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Mortimer Sellers
Stephan Kirste
Editors

Encyclopedia of the Philosophy of Law and Social Philosophy

Internationale Vereinigung für Rechts- und Sozialphilosophie
International Association for Philosophy of Law and Social Philosophy
Association internationale de philosophie du droit et de philosophie sociale

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With 43 Figures and 13 Tables

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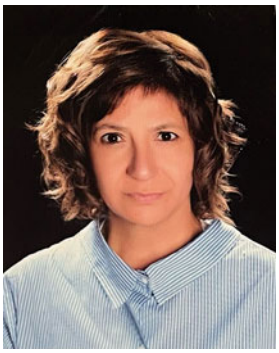

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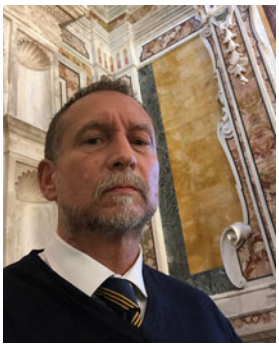

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Introduction

This *Encyclopedia of the Philosophy of Law and Social Philosophy* is the fruit of many years of planning, hard work, and cooperation among members of the International Association for the Philosophy of Law and Social Philosophy – the Internationale Vereinigung für Rechts- und Sozialphilosophie, or "IVR." The vision for this grand project begun at the 21st World Congress of the Philosophy of Law and Social Philosophy in Lund, Sweden, in 2003 under the Presidency of Aleksander Peczenik, with the notable support and encouragement of Neil MacCormick and Yasutomo Morigiwa, among others. With this first printed edition, their dream becomes a reality.

IVR President Ulfrid Neumann inaugurated a new era of the nascent encyclopedia at the 25th World Congress in Frankfurt in 2011, when he and the Executive Committee appointed Mortimer Sellers and Stephan Kirste as General Editors, with the charge of presenting the entire field of legal and social philosophy in one comprehensive work. For this task, there was already a considerable foundation developed in a Wiki format by the IVR Executive Committee, and particularly Pauline Westerman, who took advantage of then newly emergent on-line possibilities to build interest among IVR members and scholars across the world, as future authors and users of the proposed IVR Encyclopedia.

The protean task of covering the entire field of legal and social philosophy in a single compendium could never be accomplished without professional support. This led to the partnership between the IVR and Springer Verlag, which has produced such happy results. Michael Hermann, Neil Olivier, and Anja Trautmann of Springer provided the guidance and technical support without which this encyclopedia would never have become a reality. How fragile the Wiki format would have continued to be in the hands of philosophers became apparent when all the first gathered entries were nearly lost, and would have been gone forever, but for the timely intervention of a young family member. Like Aristotle's lectures in the cellar at Scepsis, great knowledge then hung upon a very slender thread.

The task of gathering so many entries was truly a collective effort. This collective in the first instance was the whole of IVR, but the leaders and moving spirits of the enterprise were the section editors. The whole field of legal and social philosophy was rendered into 15 sections, in which they became the leaders and creators. This division begun with the assumption that like every sound science the philosophy of law and social philosophy must rest on solid theoretical foundations and proceed on the basis of effective and

deliberately chosen methods. The first two sections of the Encyclopedia were thus "The Science of Law and Social Sciences" (Pierluigi Chiassoni, Genoa) and "Legal Methods" (Jorge Cerdio Herran, Mexico City). Social philosophy has its own questions and topics, which overlap with those of legal philosophy, but require their own approach and thus their own section: "Social Philosophy" (Sally Scholz, Villanova). Better understanding then requires a legal-theoretical investigation of the structure of law and in particular of the concept of law and the forms of law. The sections "Formal Structure of Law," "Legal Systems" (both: Miodrag Jovanovic, Belgrade), "Theory of Rights" (Martin Borowski, Heidelberg), and "Legal Institutions" (Marcelo Galuppo, Belo Horizonte) are devoted to this inquiry. Ultimately, however, we believe that law aims at "Justice" (John Tasioulas, Oxford; Kristin Y. Albrecht, Salzburg), especially "Liberty and Equality" (Gülriz Uygur, Ankara; Konstantinos Papageorgiou, Athens) and the "Common Good" (Tetsu Sakurai, Tokyo). Two further sections deal with these areas. At the core of these questions of legal ethics are the concepts of freedom and equality, whose central importance we examine in a separate section. In answering the concrete questions to which an answer can be expected from legal and social philosophy today, the previous sections overlap and interact. However, their importance is so great that a separate section is devoted to it, "Applied Legal Philosophy" (Norbert Paulo, Salzburg).

Despite all this, the philosophy of law and social philosophy does not simply represent an abstract system, but also the insights of generations of philosophers of law and social philosophy, who have faced these questions for 2500 years. Thus, in addition to the synchronic, systematic dimension, any proper study of legal and social philosophy must also embrace its diachronic, historical dimension. This encyclopedia does so in three sections: "History of the Philosophy of Law and Social Philosophy" (Gianfrancesco Zanetti, Modena); "Contemporary Legal Philosophy" (Sally Scholz, Villanova); and in order to capture world's vastly divergent legal cultures, scholarship, and patterns of understanding, "Schools of Thought" (Patricia Mindus, Uppsala). Taken together, these 15 sections tried and will continue to pursue legal and social philosophy into all its multifarious corners and complexities.

We are very grateful that such skillful and renowned legal and social philosophers were willing to devote themselves to this task over the past many years. Without their expertise and tireless contribution, this encyclopedia would not exist. In countless meetings, the general editors have met repeatedly with the section editors to discuss the organization and progress of the sections. Although this structure of sections is no longer visible in the alphabetically ordered encyclopedia, the factual quality, breadth, and depth of these articles rest on the competence of the section editors. In some cases, the experienced section editors have enlisted the help of younger colleagues to assist them in planning and reviewing articles. Thanks are due to all of these philosophers for their selfless and tireless contributions.

Despite this vast ambition of inclusiveness, we have always known and must still acknowledge that this encyclopedia is not now and cannot ever be entirely complete. We have determined to present as comprehensive as possible a picture of the discipline of legal and social philosophy, but the science of

law will never be captured in its full and astonishing plenitude. One beauty of this new era of electronic publication is that that the doors of scholarship will never be closed. New contributors will perpetually expand and renew the fountains of knowledge in the on-line encyclopedia. This first printed edition of which we are all so proud is also the transient record of the state of our discipline at a particular moment. We hope that our readers will notice the inevitable lacunae, errors, and oversights and propose improvements, revisions, and new entries. This process will continue forever.

One great strength of the IVR that will always enhance this encyclopedia is the global reach of its membership. The first printed edition concentrates on the best-known questions, theories, and philosophers. Going forward we shall include many less well-known figures of regional interest and importance. An example of this is the section "Argentinian School of Jurisprudence" in the present printed edition. We shall strive to overcome the parochialism of much of the traditional canon, by acknowledging the diversity of current social and legal philosophy and embracing the unfairly overlooked ideas of brilliant but subordinated cultures and traditions.

One could draw up a grand plan for a reference encyclopedia of legal and social philosophy, organize the subject areas, and assign them to renowned section editors – and yet the scholars involved would never be able to write such a comprehensive work themselves. It has been an extraordinary pleasure over the past 10 years for the general editors and the section editors to see the expertise and energy with which the many hundreds of authors from universities around the world have devoted themselves to their entries in this encyclopedia. The combination of longer (up to 5000 words) and shorter (500 words and more) articles allowed authors to differentiate the significance of different topics. This clarifies and harmonizes the relationship between these myriad entries. We thank Shobana Lenin for corresponding with each and every contributor to the encyclopedia to put their scholarship into its final publishable form.

To study legal and social philosophy is to study law and society not only as they are, but as they ought to be. No science is closer to what matters most in our lives. This encyclopedia appears in print for the first time as we emerge from a global pandemic that forcefully reminds us of our shared humanity and our common fate, even as we retreated for 2 years into our most local and parochial retreats. The global cooperation across six continents that produced these volumes was a comfort and inspiration in the midst of suffering and death. We hope that the scholars, students, philosophers, and authors who refer to the *Encyclopedia of Legal and Social Philosophy* will feel some of the optimism that inspired our work, with the expectation that knowledge and reflection will lead to understanding, and perhaps a better legal and social order.

We, the two general editors of this encyclopedia, are deeply grateful and proud that IVR has entrusted us with such an honorable task. We hope that we have proven ourselves at least to some extent worthy of this trust. The first printed edition of the encyclopedia has been a labor of love. We have deeply enjoyed and will always remember our fellowship with each other, with the encyclopedia's Managing Editor, Joshua Kassner, with the Section Editors,

and with the authors who have presented us with so many incomparable insights. The journey continues, but this milestone of a bound and shelved encyclopedia makes our happiness tangible. We welcome all those who use this encyclopedia to the global fellowship of Legal and Social Philosophy that created these volumes, and hope you will enjoy the world of scholarship it opens and explains as much as we have. We eagerly await your corrections.

Mortimer Sellers
Stephan Kirste
Editors

A

Abduction: Legal

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Introduction

Abductive inferences provide explanatory hypotheses. As such, they differ both from deductions and inductions. They start from something that calls for an explanation and provide tentative answers, which need subsequent testing and evaluation (Peirce 1998: 106ff, 205ff, 231ff).

When considered in its interplay with other inferential patterns, abduction can be taken as the first step of an "inference to the best explanation" (IBE) process (Harman 1965; Lipton 2004; Michelon 2019). This means that abduction is not equivalent to IBE. Instead, it is a component of this more complex and structured inferential process.

Abduction is a very common and natural inference, that is, an inference that our cognitive system operates every time we are puzzled by some phenomena, or we ask a why-question. For example, if we see smoke where usually there is none, we jump to the abductive conclusion that there must be a fire. Likewise, if a friend behaves differently from the way she usually does, we wonder why and look for an explanation. We perform abductions in everyday reasoning and in specific contexts like empirical science, medicine, and law. Of course, specific uses require specific background knowledge and skills that everyday abductions need not.

The present entry focuses on the legal uses of abduction (Tuzet 2003; García Amado and Bonorino 2014; Askeland 2020). Abduction plays a distinctive role in legal reasoning, and, to some extent, it can throw light on the nature of law itself. Section "Kinds of Reasoning" explains why abduction is different from deduction and induction. Section "Abduction and Legal Reasoning" explores the role of abduction in legal reasoning in the context of the syllogism model of judicial decision. Section "Uses of Abduction in Law" focuses on different uses of abduction in law, having to do with fact-finding, interpretation, and practical decision-making.

Kinds of Reasoning

Generally speaking, reasoning leads from premises to conclusions in a justified manner. According to a standard definition, an inference is *deductive* when its conclusions cannot be false if the premises are true. On the contrary, an inference is *nondeductive* when its conclusions can be false even though the premises are true. Nondeductive inferences include induction, abduction, and analogy (Brewer 1996). What is the point of performing nondeductive inferences, then? It is this: They provide plausible or probable conclusions where available information and

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background knowledge do not permit deductive certainty. We perform nondeductive inferences when the information at disposal is incomplete or when we face factual ambiguity or some form of uncertainty (Gabbay and Woods 2005). So, nondeductive conclusions can be, and usually are, assessed in terms of some understanding of what is plausible (Allen and Pardo 2019) or some account of probability (Schafer and Aitken 2018).

Both induction and abduction are nondeductive inferences. Nevertheless, they are not the same. *Induction* (in the standard form) is the inference generalizing some observations. *Abduction* (in the standard form) is the inference that provides a hypothesis explaining some puzzling or "surprising" (Peirce 1998: 231) observations.

Standard examples of induction in the above sense concern items that have been observed and found to have a given property (e.g., black ravens, white swans). Such findings are generalized via induction to the conclusion that all members of the relevant class have that property (or, in a statistical version of it, that a certain percentage of the class has that property given that the observed items have it in that percentage).

Standard examples of abduction in the above sense concern instead scientific puzzles like deviations from what an accepted theory predicts (e.g., deviations of planet orbits in the classical dispute between the Ptolemaic and Copernican conceptions of the Universe). Puzzling phenomena need an explanation and, in most cases, call for a theory revision. In medicine, doctors perform abductive inferences each time they provide a tentative explanation of given symptoms, especially when these are surprising to some extent. In law, investigators and fact-finders perform an abduction when they tentatively explain a given fact that matters for legal decision-making (e.g., why Otto possesses the stolen goods) and judges do it when they try to make sense of legal materials by suggesting a specific interpretation or construction of them (e.g., why a line of precedents were decided in a given way).

That does not mean that there are no connections between those inferences. Indeed there are, and they can be highly fruitful. For example, in legal fact-finding (more on this below, section "Abduction in Fact-finding"), abductions point at particular facts that need an explanation. At the same time, inductions provide scientific laws, regularities, or generalizations from experience that can play the role of major premises in abductive inferences.

In the last century, philosophers of science debated the distinction between the "context of discovery" and the "context of justification" (Reichenbach 1938; Nickles 1980; Anderson 1996), and one may claim that abductive inferences belong to the former. This view has a grain of truth, but the analytical distinction between the two contexts must not be overstated. It should not be taken as a *de facto* separation between inferences that merely suggest hypotheses and inferences that justify them. Most of the time, we make hypotheses with at least a *prima facie* justification, given background knowledge and the available information. In most contexts, it is crucial to provide hypotheses that are not wild guesses. Especially when what is at stake has practical significance, we need to hit on the right hypothesis, namely, the true one. Justification is important, then, because it is truth-conducive. From simple assumptions to complex theories, this is the role of the justifying premises in our reasoning process. What justifies a hypothesis makes it likely true. Consider the medical context: You will be disappointed if your doctor engages in bizarre guessing about your pain (e.g., the government implanted a pain-generating device in your brain). Constraints in terms of time and resources put pressure on the justification requirement: what Peirce called the "economy of research" (Rescher 1976; Wible 2018). Testing a hypothesis requires time and resources; it can be economically crazy to indulge in wild guessing and consequent testing of bizarre hypotheses.

That is not to say that abduction alone generates knowledge. As already pointed out, one can take abduction as the inference suggesting an explanation of given facts. But at closer scrutiny, one cannot fail to see that abduction does not generally provide, by itself, a sufficient degree of inferential security. For it generally is a weak mode of inference. Hence, abductive conclusions require testing and assessment.

From the viewpoint of formal logic, abduction is guilty of the "affirming the consequent" fallacy. In its simplest form, it is the inference of *p* (conclusion) from premises *q* (minor premise), and *if p, then q* (major premise). However, such a formal violation may be a negligible cost if we are interested in generating testable explanatory hypotheses.

We can call it our "first inference" (Tuzet 2006), for abduction is the first step of the reasoning process that provides an explanation of given facts, reconstructing what happened in a given context (e.g., how the victim was killed, when, who probably did it, and so on). The first step consists of suggesting a hypothesis based on the evidence at disposal. Then, the hypothesis must be tested against further evidence. That involves further inferential steps, like determining some of the hypothesis' consequences and testing them: If such consequences are true, they corroborate the starting hypotheses; if not, the hypothesis is falsified or at least weakened. In the former case, one has to formulate a new hypothesis explaining the initial evidence and the additional findings, and so on, until the best explanation is determined. The IBE process is complex, and abduction is its first step. To assess what the best explanation is, one has to consider the hypotheses at stake and compare them along the relevant dimensions (e.g., coherence, explanatory power, and probability values).

Abduction and Legal Reasoning

Legal reasoning includes, but does not reduce to, judicial reasoning. However, let us focus here on the latter since it is the most studied form of legal reasoning and, in a sense, its most representative one (MacCormick 1978: 7). (For some remarks on other forms of legal reasoning, such as the legislative one, see subsection "Abduction in Practical Reasoning".)

Let us take a classical model of judicial reasoning, namely, the *syllogism model*. Accordingly, decision-makers are to *deduce* the outcome of a case from the facts and the applicable norms. Beccaria advanced the model in his 1764 masterpiece *Dei delitti e delle pene* (Chap. IV). It was meant as a normative model to constrain judicial decision-making in criminal law. Note that it was not presented as a model descriptive of judicial practice. In fact, Beccaria was quite critical of the criminal justice system of his time. His main critique concentrated on the arbitrariness of criminal decision-making. As a remedy to it, he recommended that judges decide according to a syllogism model, with a general legal norm provided by legislation as the major premise, the relevant fact (or, better, an accurate description of it) as the minor premise, and the outcome as a logically deductive conclusion. In the syllogism model, the conclusion follows from logical necessity.

To make a straightforward illustration (of course, actual cases are far more complex), if legislation establishes that whoever does *A* shall be punished with *S* (major premise), and if Brutus did *A* (minor premise), then Brutus shall be punished with *S* (conclusion). The argument has a deductive logical structure: If the premises are true, the conclusion cannot be false. Differently put, the conclusion is necessarily correct, given the correctness of the premises. The model preserves legal certainty (or the rule of law) and the principle of equal treatment under the law: If Brutus did *A* and whoever does *A* shall be punished with *S*, not punishing him with *S* would be to treat him differently. Deductive application of law permits to treat like cases alike. The model can be extended from criminal to civil matters.

But, as is well known, judges need reasons to assume the premises of the syllogism. They do not find the premises as one can find shells on the beach. The premises must be determined from the relevant legal materials and available evidence. Parties present arguments whose conclusions are possible premises of the syllogism. Then decision-makers evaluate those arguments and, if needed, supplement them. So, the syllogism model is too simple in this respect. One needs arguments *for the premises*. The vast majority of legal disputes concern such arguments.

That calls for an enhancement of the model. A well-established view in the contemporary

literature has it that the justification of judicial decisions is double, internal, and external (Wróblewski 1971, 1974; Alexy 1989; Canale and Tuzet 2020). We call "internal" the justification of the conclusion provided by the deductive structure of the syllogism and "external" the justification of its premises. On the whole, one can call this the *double justification model*.

Internal justification is typically *deductive* (it is undoubtedly so in the syllogism model). In contrast, *external* justification is typically *abductive* as it is a tentative reconstruction of the facts and the applicable law.

In its turn, external justification has two aspects: normative and factual. Interpretive and integrative (analogical) arguments provide the external justification of the major premise of the syllogism, namely, the normative external justification (NEJ) of the decision. On the other hand, evidentiary arguments provide the minor premise's external justification, namely the decision's factual external justification (FEJ).

NEJ goes from provisions to norms through interpretive (or integrative) arguments (subsection "Abduction in Interpretation"). FEJ goes from evidence to factual reconstruction through empirical generalizations (Twining 2006: 334ff), scientific laws, or legal rules (such as presumptions, Mendonca 1998).

From a logical viewpoint, one can conceive of NEJ as deductive if one considers interpretive arguments as major premises with normative force, i.e., directives that ought to be applied to the interpretive problem at hand. Alternatively, suppose emphasis is put on the tentative and hypothetical nature of the reasoning. In this case, one can look at NEJ as the epistemic effort to find the best interpretation (and legal outcome) for the case at hand. The latter is possible if one considers interpretive arguments as heuristic devices that help interpreters find the correct or best interpretation of the relevant materials for the case. In this sense, logically speaking, NEJ becomes abductive or, in a broader sense, a form of inference to the best explanation, being an educated guess at what is most correct in legal terms.

FEJ is more straightforwardly epistemic, even though legal presumptions, burdens, and standards of proof respond to principles and values (Allen 2014; Nance 2016; Tuzet 2020; Ferrer 2021). So, from a logical viewpoint, FEJ is typically abductive; more technically speaking, it is the effort to find the best explanation of the evidence and check whether it satisfies the relevant standard of proof.

Uses of Abduction in Law

The above points, further specified, lead to categorizing distinct forms of abduction in legal reasoning. These uses will be briefly discussed:

1. *Abduction in fact-finding*
2. *Abduction in fact-classification*
3. *Abduction in interpretation*
4. *Abduction in principle-determination*
5. *Abduction in practical reasoning*

Abduction in Fact-Finding

Abduction in fact-finding is the subfield to which scholars interested in the legal role of abduction have mainly directed their attention. The fact-finding literature is rich and increasingly complex (e.g., Twining 2006; Haack 2014; Dahlman et al. 2021; and Schauer 2022). For what matters here, the question is this: In legal fact-finding, is reasoning deductive, inductive, or abductive? It is primarily abductive because the information is almost always incomplete, and there is some uncertainty about what happened. Can we be sure that Otto stole the goods since he was found to possess them? Our confidence in the guilt hypothesis is stronger if we collect the additional evidence that he had a motive to steal them and he was seen where the goods were when they were stolen. However, such additional information does not deductively show that Otto stole the goods. The reasoning always starts from an abduction. Why does Otto possess the goods? Some induction (thieves usually possess the stolen goods) provides the major premise of an abductive inference about the facts (Otto probably stole the goods). And this must be tested and assessed. As already pointed out, abductive conclusions are not certain but only probable or

plausible. So, hypotheses must be tested against further evidence for corroboration or falsification. In sum, an IBE process must determine the best explanation of the case and whether this meets the applicable standard of proof (Pardo and Allen 2008). Notice that legal standards of proof do not require absolute certainty: They require something like certainly beyond a reasonable doubt in criminal cases and the preponderance of the evidence in civil ones.

So, abduction starts the process but is not the end of it. For analytical purposes, it is good to distinguish the inferential components of IBE. One such component is abduction. It is the first step of the process. As to legal fact-finding, it is crucial to see who performs this first step and to what extent, given the system's rules (adversarial or inquisitorial, in the common law or the civil law tradition). Differences in burdens of proof are also important to modulate the role of abduction and of IBE in legal fact-finding. But such differences do not prevent us from elaborating a model. These are the basic operations that must be performed according to an IBE model of fact-finding:

(a) Inferring from the evidence a plausible explanatory hypothesis
(b) Testing the hypothesis against further evidence
(c) Comparing the hypothesis with rival explanations
(d) Assessing the hypothesis along the relevant dimensions

The first step is essentially abductive. Let us stress again that abduction never yields certainty. In a way, it is a *probable* inference, namely, an inference that provides conclusions which are not necessarily true given the premises. Alternatively, it is a *plausible* inference, namely, a reasoning process that provides tentative conclusions based on the evidence at disposal, the background knowledge, and the relevant assumptions on the ways the world is (e.g., how things generally work in some respect, how people behave in some kind of situation).

We must not expect from abduction more than abduction can yield, that is, probable or plausible conclusions. So the answer to whether abductive conclusions are sufficient to justify a verdict of guilt or liability is hardly a positive one. But the answer is different if abductive conclusions are tested and corroborated up to the point mandated by the relevant standard of proof (e.g., more probable than not).

Abduction in Fact-Classification

Once the decision-makers have sufficient knowledge of the relevant facts, they must ask themselves how to classify them from a legal viewpoint (Walton et al. 2020: 256ff). The classification step is crucial because different legal consequences follow from different legal categories.

As a criminal example, is a given killing an instance of murder or manslaughter? Decision-makers need to know what the legal categories of murder and manslaughter comprise. To put it differently, they need to understand under what conditions a given fact counts as murder or manslaughter. Whether medically assisted death counts as suicide or homicide is another and more controversial example.

The point here is that the classification or categorization of proven facts is abductive (conjectural) unless it is made upon (undisputed) necessary and sufficient conditions. Suppose some legal categories are (undisputedly) defined by necessary and sufficient conditions. In that case, the classification of given facts under one category should not be a matter of concern and should follow by deduction. For example, if features F_1, F_2, and F_3 define legal category C and only category C, then it is certainly true that a given fact falls under C if it displays those features. Then fact-classification is a matter of deduction. However, that hardly occurs. Legal definitions rarely provide necessary and sufficient conditions. Moreover, there can be disagreement over their reach even when they do.

In that regard, vagueness can justify disagreement over "borderline cases" (Endicott 2000). Additionally, there can be disagreement over additional tacit conditions, or tacit exceptions, and because of defeasibility more generally speaking (Rodríguez and Sucar 1998; Ferrer and Ratti 2012; Duarte d'Almeida 2015).

In all the above circumstances, we have reasons to make hypotheses, on the best classification of the case and the best legal outcome following the hypothesized classification. Interestingly, this can take different shades depending on one's views on the nature of law. There is a spectrum of possibilities. To one extreme, one can view the law as already determined in every respect; then the reasoning goal is to find out how the law is in a certain respect – as a matter of discovery, not different in principle from the findings of the natural sciences. Conversely, one can view the law as primarily undetermined – ontologically, not only epistemically; then abductive inferences turn into a form of practical reasoning concerning what to do rather than what there is (subsection "Abduction in Practical Reasoning").

Natural law theories locate on the former side of the spectrum. Versions of legal realism locate on the latter. Finally, positivist views distribute along the spectrum depending on the degrees of determinacy of positive law. Similar considerations apply to the following uses of legal abduction, notably to interpretive issues.

Abduction in Interpretation

Legal interpretation goes from provisions (texts) to norms (content) through interpretive arguments or canons of interpretation. The basic problem is that decision-makers do not find norms as such. Instead, they usually have a bunch of authoritative texts, materials, and precedents, and the norms provided by these sources can be unclear or controversial.

Interpreters are supposed to provide arguments that justify the choice of the norm applicable to a case. Parties provide such arguments in the first place; then, judges are supposed to evaluate them to make decisions on the litigated points and justify them. The contemporary theories of legal interpretation and argumentation (Alexy 1989; MacCormick and Summers 1991; Patterson 2004; Chiassoni 2019; and Walton et al. 2020) distinguish several such devices, including literal arguments, arguments from legislative intent, arguments from purpose, arguments from precedent, systemic arguments, and arguments from principle. All these arguments extract normative content from authoritative sources.

Now, insofar as interpretive arguments match inferential structures, there can be interpretive abductions, namely, hypotheses on the legal content or meaning of given provisions. As already suggested (section "Abduction and Legal Reasoning"), one can conceive of interpretive inferences as deductive if one considers interpretive canons as directives that shall be applied to interpretive problems. But one can also look at interpretive inferences as epistemic efforts to find the best interpretation of the law for the case at hand. Then interpretive arguments are heuristic devices that help interpreters find the correct or best interpretation of the relevant materials.

Surely the epistemic view fits a cognitive conception of interpretation, better than a skeptical one. In a cognitive conception of interpretation, interpreters look for the content of the law as a matter of fact, as something to be discovered, with the aid of dictionaries, linguistic evidence, and historical documents, supplemented by the ability to make rational conjectures. Of course, several difficulties accompany the cognitive conception, including incomplete information about the circumstances of enactment. In a skeptical conception of interpretation, instead, judges make discretionary choices when they attribute content to legal texts; such choices are, at best, motivated by policy reasons and, in some cases, by individual preferences. Still, there is room for abduction here because some such choices can be justified by practical abductions (subsection "Abduction in Practical Reasoning") concerning the best means to an end, individual or social.

In sum, if there are abductive inferences concerning meaning determination (Walton et al. 2020: 260ff), they can be epistemic, and one can label "inference to the best interpretation" the complex process of generating, evaluating, and selecting interpretations, or they can be practical as concerning the best interpretive means to an end.

Abduction in Principle-Determination

Everyone recalls the *Riggs v. Palmer* principle, "No one shall profit from his own wrong," and the theoretical insight drawn from it, namely, that legal principles prevail over rules (Dworkin 1967). However, there is less attention to how

the principle was inferentially extracted from a line of precedents. Compare these scenarios: First, a line of precedents establish, explicitly, that no one shall profit from his own wrong; second, there are different precedents that concern, respectively, distinct forms of fraud and crime. In the first scenario, the reasoning from precedent has first an inductive component (generalizing the principle from single decisions) and then a deductive component (applying the principle to the case). In the second scenario, there is more. One has to extract the principle as a higher-order norm that explains and justifies the decisions on fraud and crime. The higher-order norm has greater generality but is not the outcome of induction in the generalization sense considered above (section "Kinds of Reasoning"). There must be an abduction of the reasons for the past decisions. Hence, there must be an inferential ascent to the higher-order norm that explains and justifies those decisions. Next, to test the hypothesis, one can predict that similar decisions will be found in similar cases (not considered yet). If confirmed, such predictions would corroborate the principle hypothesis. At the end of the process, the principle can result as a generalization from case law. But there would be more than a simple induction by enumeration. One can characterize the process as "inference to the best legal explanation" (Michelon 2019).

Similar considerations apply to statutory law when specific rules are construed and systematized in the light of an implicit principle that explains and justifies them. One does not read the principle in the wording. One has to infer it by abduction first.

Of course, those processes are not immune from problems. What if some cases confirm the principle hypothesis and others disconfirm it? Some cases may be rightly decided, and some may not. Or perhaps there are competing principles, or implicit exceptions. Then novel hypotheses must be made, assessed, and updated against additional information.

Abduction in Practical Reasoning

By "practical abduction," we can mean the inference drawing the (best) means to achieve an end. Practical inference can be a deduction when one infers a necessary condition of the desired outcome. It is also deductive when one identifies a sufficient condition for an outcome. But it becomes abductive when hypotheses are made on what will bring about the desired outcome, what will best advance a policy, or what will be the most efficient option in a given context.

The inferential pattern is something like this: We wish to bring about E; tentatively, if we adopt M, then E will be the case; therefore, we should adopt M. Variations on this basic pattern concern the best means to the end, the most efficient, the one that interferes less with other desiderata. The process includes identifying the end, some hypotheses on the means, some tests about the efficacy or efficiency of the means, and some evaluation of the considered courses of action.

The practical abduction view accounts for the first inferential step in tasks like planning, engineering, designing technical artifacts, and creating a work of art (Anderson 1987). It also applies to law if we consider the reasoning process of legislators, judges, other officials, and counsel when the task is to select a legal means to an end. To give a sketchy illustration of this, legislators typically identify social desiderata (e.g., unemployment rate reduction). Then they hypothesize what will bring them about, discussing their merits and demerits or expected costs and benefits. Finally, they make a choice that is supposed to be informed and reasonable in that it considers the available information and the relevant context's economic and normative constraints. Similar considerations apply to judicial reasoning when judges must exercise discretion to select the best legal means to a valuable end (Posner 1985: 103ff).

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Abelard, Peter

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Introduction

Peter Abelard's (c. 1079–1142) comments on human action, on his ethical judgment and the questions of guilt and sin, can be found in his *Ethica Scito te ipsum* (E), in his *Commentary on the Epistle to the Romans* (R), as well as the *Dialogus inter Philosophum, Judaeum et*

Christianum (D), also referred to as *Collationes*. His central thesis is that the outward deed is not decisive for the ethical evaluation of an action; an outward deed is neither good nor evil in itself but indifferent, killing a human being, sleeping with someone else's wife, and misleading someone with a false statement; all these examples do not constitute sins (E I, 16, 4). Rather, what defines the ethical quality of an action, apart from the agent's *consent* to it, is mainly their *intention* which can only be judged (except by God) by the agent's *own conscience* and remains hidden from other people.

Consent

According to the *Ethica*, the precondition, on the basis of which an action can be described as sinful or culpable, is found in the agent's free consent (*consensus*) to evil and, thereby, the contempt of God (*contemptus Dei*) (E I, 3, 1–2). Although, Abelard claims, in a public sense, the word "sin," e.g., in the context of "original sin," may also denote punishment for a sin committed or sinful deeds (R 164, 354–165, 393; E I,13, 3–6), in the proper, moral sense of the term (before God), there can be no guilt without consent to evil. Neither vices (*vitia*), which incline us to evil, nor ill will (*mala voluntas*) constitute in themselves moral guilt or sin. Guilt occurs only if one consents to them, consciously and without being subject to coercion. Free decision-making (*liberum arbitrium*) – which he defines, following Boethius, as an "independent judgment regarding one's will" – lies therefore not in our capacity of directing our will toward this or that, but in the decision, that is the judgment of reason, on the basis of which we give our consent (ThSch, 536–537). Yet, neither the outward doing of evil (*opus*) nor the desire linked to specific actions contributes anything to the culpableness or scope of the guilt (E I,14,1–2). On the other hand, mere consent to an evil action may already constitute sin, namely, if one is prepared to commit it at a suitable opportunity (E I, 9, 7–8). And what is decisive is the intention of doing good. The intention alone, as opposed to the outward deed or will, will be judged by God (E I, 29, 5) and counted toward the deed and rewarded if realization is not possible ("intended action," Marenbon 1997, 256).

Intention

But whether or not an action can be described as good or bad in an ethical sense depends not only on the agent's consent but also on their intention. Abelard uses the example of Judas' betrayal to show that one and the same action can be carried out with different intentions by different agents and may hence be evaluated in different ways: God the Father, Jesus, and Judas the traitor all perform one and the same action. Given their intention, however, God's and Jesus' actions are good, whereas the traitor's action is bad. Similarly, the legal execution of a criminal can either be motivated by efforts to bring about justice, or by hatred, and can therefore be either morally good or bad (E I,17,1–5). In his *Dialogus*, Abelard provides an extensive analysis of the question as to when one acts with good or with bad intention. His starting point is the insight that the term "good" cannot only be used as a descriptive adjective (good horse, good craftsman, good thief) but also in the sense *that* a good or bad thing *exists*. One could say it is good *that* a bad thing exists and it is bad *that* a good thing exists (D II, 201–202). Thus, it may be good that God wants evil things to happen in this world (D II, 210). What is decisive about the moral evaluation of an action is not that something good or bad (*bonum/malum*) is done but rather that it is done *in a good or bad way* (*bene/male*). It is in this sense that Abelard uses the expression that something is done with a good intention: "... bene, id est bona intentione" (D II, 212).

Again, Abelard uses the example of Judas' betrayal to reveal his criterion for establishing whether something happens in a good or bad way: the Father's and Son's actions are carried out with good intention, accepting the evil of the crucifixion for the sake of human salvation and thus for *rational reasons* which may justify that evil (D II, 219; see also E I, 19, 2). The traitor, on

the contrary, acts in a bad way and with a bad intention because he does not want the crucifixion for rational reasons but for the sake of money (R 105, 303f). Good intention thus consists in not being guided by self-interest but by God's will, thus acting on the same reason and with the same intention as God wishes. By contrast, the bad intention consists in doing something not for the same reason for which God does it, although Abelard also stresses the limitations of human rational insight into the reasons behind God's actions (D II, 219). Human beings can be mistaken about whether the reason behind their action is in accordance with God's intention and thus really justifies the evil to which it contributes.

Conscience

The resulting question of how it is then, nevertheless, possible to act with good intention is answered by Abelard in his *Commentary on the Epistle to the Romans* as follows: even if an action is only mistaken to be in accordance with God's intention, it does not constitute guilt so long as one does what one's *conscience*, subjectively, identifies as the reasonable thing to do so that one lives in accordance with one's own conscience (R 180, 156–181, 163). Only those who act against their own conscience (*contra propriam conscientiam*), and do what they themselves identify as bad, act morally badly and commit a sin (R 77,18–20; 205, 617–619). Sinning means not to do what we believe we should do as well as not to omit what we believe we should omit (E I,10, 2). For Abelard, those who killed the martyrs or Christ (even though, objectively speaking, they may not have acted well or commendably) are hence not guilty in the proper sense. In this context, he points to the concept of unconquerable ignorance (*ignorantia invincibilis*) (E I, 45, 1). The scope of their guilt would have been greater, had they acted against their conscience (E I, 45, 4). In this process, the function of conscience is to assess whether or not we really do what we subjectively see as reasonable, if we are thus formally guided by our own reason and rational reasons – which could be seen as presaging Kantian philosophy (Enders 1999) – or if other, selfish motivations determine our actions. Evaluating intention in this way, Abelard claims that conscience cannot err (R 86, 343–347).

Ethics, Reason, and Law

With these considerations, Abelard determines moral guilt and sin, in the proper sense, solely in relation to inner moments of free consent, of intention, and of subjective judgment of one's own conscience. This has led to the charges of ethical subjectivism and relativism and, of a simple ethics of conviction, brought against him by his contemporaries (Bernhard von Clairvaux) and found as well in earlier scholarship. In contradistinction, it was stressed that some actions are already bad *in themselves*. More recent research has pointed out, however, that Abelard does not in any way deny the existence of an objective basis for ethics (Van den Berge 1975) but that his concern is the subjective mediation of morality (Honnefelder 1992). Abelard himself also emphasizes that an intention cannot be described as good if it only appears this way but only if it is good in reality (E I, 36, 5).

Abelard's objective basis for ethics can be found, for example, in the fact that an action is performed with good intention (*bene*) only if the reason to act can justify the concomitant evil and is therefore a *rational* reason. As a consequence, acting against one's own conscience also means, for Abelard, acting against *one's own rational insight* which commands us to do good and avoid evil (R 205, 219–223). There is no other way of gaining insight into the morally good, except through one's own reason and the *natural moral law* inherent in it. The written laws of the Old Testament – and the Ten Commandments, specifically – are also developments of the *lex naturalis*. These laws are valid because reason agrees with them from its own principles (R 208, 730–733; 207, 694f).

The significance of one's own rational insight as a measure of moral value in Abelard's work is also reflected in the fact that, in his *Dialogus*, he acknowledges, as one of the first medieval theologians, the independence of the ancient philosophical doctrine of virtue and integrates it with

Christian ethics. Categorization of the virtues – understood, with explicit reference to Aristotle, as the "best habits of the soul" (*habitus animi optimus*) (D II, 111) – is modelled after the pattern of the cardinal virtues. However, Abelard excludes prudence from the list of moral virtues as it may also be used with bad intention (D II, 115–116). Only through *justice* which is not directed toward one's own benefit but, under the guidance of reason and natural law, toward the *common good* (*communis utilitas*; see also Marenbon 1997, 304–310) can good intention be established (D II, 118–119).

Moreover, Abelard points to the fact that it is not enough to obey commandments and laws, literally, since the legislator's intention must always be taken into account as well (E I, 18). As a consequence, it may sometimes be necessary to act against the literal law or that sometimes the validity of laws will vary according to place and time (R 310, 431–436).

Orientation toward the common good also determines – as Abelard states in the *Ethica* – the outward evaluation of human action in a legal context, for instance (see E I, 24). A woman who, out of love, takes her child into bed with her in order to warm it, but smothers the child in her sleep, is not guilty in the proper sense. Nevertheless, she will be legally punished, although, as Abelard claims, not for reasons of guilt but for the sake of preventing others from acting similarly. In the same vein, a judge, who knows that a person, accused by his enemies, is in fact innocent but cannot legally dismiss the false witnesses during the trial, must convict and punish the accused. According to Abelard, in both cases the decisions are made for *rational* reasons: this is not about punishing actual guilt but about preventing public harm and damage to the common good as well as avoiding public offense. The degree of punishment also depends on such reasons. So, it may happen that, in obedience to the law, someone is punished legally but not justly and that the law is carried out but justice, indeed, is not done.

Generally speaking, Abelard's works reflect a confirmation of the validity of culture-, time-, and socio-specific conventions and, particularly, a validation of external jurisdiction. This is also evident in his respect for ecclesiastical authorities and the penance rules of his time (Luscombe 1974, 82–84).

Conclusion

So, as much as Abelard acknowledges the significance of a legal judgment of actions, he also transcends this human evaluation in his theological-ethical valuation. In his *Dialogus*, he therefore relativizes the virtues and stresses their insufficiency regarding the actual, highest good (*summum bonum*) of humankind. Only the greatest love for God, which can never be acquired but only granted by the grace of God, can be described as *summum bonum* and true human bliss (Perkams 2001).

Cross-References

- ▶ Aquinas, Thomas: On Natural Law
- ▶ Natural Law: Contemporary
- ▶ Rule of Law: Historical Perspectives
- ▶ Virtue Theory and Law

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Abū ʿAlī al-Ḥusayn ibn ʿAbd Allāh ibn Sīnā

► Avicenna (Ibn Sīnā; Abū ʿAlī al-Ḥusayn ibn ʿAbd Allāh ibn Sīnā)

Abū al-Walīd Muḥammad ibn Aḥmad ibn Muḥammad ibn Rushd

► Averroes (Ibn Rushd; Abū al-Walīd Muḥammad ibn Aḥmad ibn Muḥammad ibn Rushd)

Academic Freedom

► Freedom: Academic

Addams, Jane

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Introduction

Jane Addams (1860–1935) was an activist, social theorist, and participant in the American pragmatist movement in philosophy. In keeping with pragmatist beliefs about the need for political and moral ideals to be rooted in experience, Addams drew on her experiences as a settlement leader to advocate for political reforms such as the creation of a juvenile court system and revisions to traditional understandings of democracy, knowledge, gender roles, and ethics.

Addams founded Chicago's Hull House Settlement in 1889 with her friend Ellen Gates Starr. Like other settlement houses in the United States and England, Hull House brought middle-and-upper-class residents into industrial communities with the goal of improving the well-being of poor and working-class neighbors. Addams and other Hull House residents – including well-known social reformers Alice Hamilton, Florence Kelley, and Julia Lathrop – provided meeting spaces, support to labor organizers, childcare, and a variety of other services to Chicago's 19th Ward. They also campaigned for improvements in child welfare, public health, and industrial working conditions. Addams eventually became a national public figure, who seconded Theodore Roosevelt's nomination for president at the Progressive Party's convention in 1912. She was also a founding member of the NAACP, an officer in the National American Women's Suffrage Association, and headed the Women's Peace Party, which opposed American involvement in WWI. In 1919, she helped found the Women's International League for Peace and Freedom and served as its first president. Addams was awarded the Nobel Peace Prize in 1931.

Democracy as a Way of Life

A reoccurring theme in Addams's writings is that democracy is not simply a set of political institutions but a way of life that requires a social approach to ethics. As described by Addams, social ethics is distinct from the "individual morality" espoused by many nineteenth century Americans in at least two ways (Addams 2002, 6). First, whereas Americans have traditionally accepted responsibility for their own well-being and the well-being of their families, social ethics entails accepting responsibility for fellow members of the community. Second, Addams observes

that American culture has long celebrated self-reliant individuals who achieve greatness through their own effort and prioritize the dictates of their own consciences. Social ethics, however, means seeking to accomplish things in collaboration with others; this in turn entails openness to compromise and a willingness to learn from others.

Though Addams argues that the increased complexity of industrial and urban life makes social ethics necessary, she also views social ethics as an expression of democratic principles. The democratic creed – which insists on "the essential dignity and equality of all men" – does not merely require that citizens be given equal political rights, but rather demands that community members treat each other as equals in their daily lives (Addams 1902, 7). Treating people as equals, moreover, entails cooperating with them to achieve shared goals.

Addams also notes that the failure to practice social ethics is likely to have especially disastrous results in democratic societies. Citizens governed by representative political institutions have a stake in each other's well-being; affluent citizens are inevitably impacted by the choices that the poor and working classes make at the ballot box, and so they cannot afford to disregard the welfare of other social classes (Addams 1902, 112). Furthermore, efforts to address social and political problems that are exclusively elite driven are likely to be ineffective in a democratic society, as people who are accustomed to some measure of self-rule are likely to resent elites who attempt to impose their will on others (Addams 1902, 66). Thus, social ethics is not only a means of enacting democratic ideals but also the best way to ensure the flourishing of citizens governed by representative institutions.

Addams's understanding of democracy as a way of life is most fully articulated in her first book *Democracy and Social Ethics* (1902), in which she explains how the shift from individual to social ethics transforms everything from charitable relations to the interactions between employers and employees. She continues, however, to advocate for social ethics in subsequent books and essays, including *The Spirit of Youth and The City Streets* (1909) and *Twenty Years at Hull-House* (1910). In both *Newer Ideals of Peace* (2007) and *Peace and Bread in Time of War* (1922), Addams connects democracy and pacifism, arguing that militarism is incompatible with the cooperative spirit that democracy requires.

In her later books, Addams extends social ethics beyond the nation-state, encouraging her readers to take responsibility for the well-being of fellow human beings, regardless of whether they are fellow citizens.

Pragmatism, Pluralism, and Democracy

Addams was an eclectic thinker who read widely and drew on a wide variety of sources. The social gospel movement (Elshtain 2002), the cooperative movement (Brown 2004), and Tolstoy's writings on nonresistance (Addams 1910) all influenced her ideas about democracy, social ethics, and international cooperation. Some of the ideas that influenced Addams – such as social evolutionary theories that emerged in the nineteenth century after the publication of Darwin's *Origin of Species* – are no longer widely accepted (Fisher 2019). Addams was, however, especially influenced by the American pragmatist movement in philosophy. Renewed interest in pragmatism in recent decades has led to increased interest in Addams's political and social thought.

Pragmatism is a philosophy that developed in the United States in the late nineteenth and early twentieth centuries. A key feature of pragmatism is that it takes experience as its starting point (Seigfried 1996, 6–7). As a pragmatist, Addams believed that all knowledge claims must be tested against experience. Additionally, she regarded knowledge as developmental and potentially contingent, meaning that political and moral ideals that contribute to human flourishing in a particular time and place may need to be reevaluated as circumstances change.

One can see pragmatist ideas at work in Addams's descriptions of settlement work. In *Twenty Years at Hull House,* she emphasizes that effective settlement workers do not arrive in urban neighborhoods with preconceived notions they

are unwilling to reconsider but rather allow their cherished assumptions to be challenged by new experiences. She illustrates this point by explaining how Hull House residents once gave candy to neighborhood children as a Christmas present, only to discover that grueling labor at a candy factory made the treat unappealing; this experience led to the realization that urban children need labor regulations more than they need holiday treats (Addams 2010, 198).

Addams's understanding of democracy also reflects pragmatist insights. In *Newer Ideals of Peace*, she criticizes America's founders for assuming the existence of a fixed set of inalienable rights. Rights, she argues, are continually evolving in response to new challenges to human flourishing, and they are not automatically granted, but rather "hard-won in the tragic processes of experience" (Addams 2007, 21). Because they did not realize that future generations would need to adopt their political institutions in order to meet new needs, Addams laments, the founders created a regime that focused on protecting property rights, as opposed to one that encouraged civic participation and which would allow citizens to readily adopt their political institutions to new circumstances.

For much of the twentieth century, biographers described Addams as a social reformer who put into practice ideas developed by male friends and acquaintances. She was, in fact, close friends with pragmatist philosopher John Dewey, who served on the Hull House board and who credited Addams with shaping his own view of democracy (Seigfried 1996, 58). In recent years, however, scholars have come to see Addams as having made original contributions to pragmatist philosophy. For example, Addams was especially attentive to the ways in which experience is shaped by gender, class, and other differences (Seigfried 1996, 76). In her essays, Addams describes how her working-class, immigrant neighbors experience American society very differently from middle-class native-born citizens.

One of Addams's contributions to pragmatist theory is her emphasis on the importance of sympathetically interpreting the perspectives of people whose life experiences are different from our own (Addams 2002, 98; Hamington 2004, 100). As described by Addams, sympathetic interpretation makes it easier for citizens to cooperate with others to achieve shared goals despite disagreements about issues such as temperance. It also helps citizens understand aspects of industrial life that they may not have directly experienced.

While Addams did not place as much emphasis on assimilating recent immigrants as many of her contemporaries, there is an ongoing debate about whether Addams should be viewed as a role-model for cultural pluralism. Knight (2006, 222) detects a complicated mix of respect and condensation toward immigrants in Addams's writings that offers an imperfect model of a pluralistic democratic community. Lissak (1989), however, argues that Addams's relationship with ethnic minorities was almost entirely heavy-handed and prejudiced.

Relationship with Feminism

The changing role of women in American society is a reoccurring theme in Addams's writings. In *Democracy and Social Ethics*, she laments that middle-class women of her generation were educated to value democratic principles but given no opportunities to participate in the daily life of a democratic society. As described by Addams, a society that practices social ethics must allow women to balance familial duties with responsibilities to their fellow citizens (Addams 1902).

Some of Addams's arguments about gender are maternalist, meaning that she suggests that women's public lives are an extension of their role as mothers. Women's experience as housekeepers and caregivers, Addams argues, gives women particular insight into many of the problems faced by industrial societies. In a satirical essay entitled "If Men Were Seeking the Franchise," she suggests that a society ruled by women would not tolerate child labor or unhealthy working conditions (Addams 1913).

Maternalism was far more common in the Progressive Era than it is today, and contemporary scholars have widely different interpretations of Addams's arguments about gender. Jean Elshtain

embraces Addams's maternalism. According to Elshtain, Addams offers a vital counterpoint to a Western political tradition that has ignored the importance of motherhood to the success of democratic societies (2002). Shannon Jackson, on the other hand, suggests that while Addams's maternalistic rhetoric does reinscribe traditional gender roles, her settlement work and her understanding of social ethics present a radical challenge to models of care that focus on the nuclear family (2009). Meanwhile, Charlene Haddock Seigfried's feminist interpretation of Addams largely ignores maternalism and focuses instead on the ways in which Addams's writings point toward a pragmatism that is especially attentive to feminist concerns about the experiential and contextual nature of human knowledge (1996).

Conclusion

More than 150 years after Addams's birth, contemporary readers may struggle to relate to her maternalist arguments, and her reliance on evolution as a model for human development (Fisher 2019). At the same time, scholars in a wide variety of fields are increasingly turning to Addams for perspective on contemporary problems. While she has received particular attention from feminist philosophers and thinkers indebted to the American pragmatist tradition, Addams's ideas have been discussed in a variety of fields, including political theory, social work, public administration, and education.

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Adler, Max

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Introduction

Max Adler, born January 15, 1873, in Vienna, Austria, studied law at the University of Vienna where he received his degree in 1896. Renowned as a Neo-Kantian Marxist, he was active in the Austrian Social Democratic party as both a politician and theoretician until his death in 1937.

Among the Austrian Marxists of his generation, Adler was the most astute in the philosophical movements of his time, evidenced from the onset of his significant publications, which began with *Kausalität und Teleologie im Streite um die Wissenschaft* [*Causality and Teleology in Conflict*

Over What is Science] published in 1904 as a monograph in the first *Marx-Studien*, a monograph series he co-edited with Rudolf Hilferding. Adler's last publication *Das Rätsel der Gesellschaft* (Vienna, 1936) included in its contents, besides providing an exhaustive epistemology of Marxism that secured its meaning as a social scientific approach to society, capsule reviews of 22 contemporary philosophers, sociologists, and theoretical historians, and their relevance to Marxism. These minds included Edmund Husserl, Wilhelm Dilthey, Alois Riehl, Ferdinand Tönnies, Max Weber, Werner Sombart, and Theodor Litt.

Kant, Marx, and the "Social a Priori"

As a Neo-Kantian, Adler's life work was to bring to conceptual effectiveness in his contemporary Marxist policies the significance of what he called the "social a priori." The "social a priori" was for Adler among the transcendental synthetic concepts that shaped every judgment. While Kant touches upon this concept in his essays of the 1780s, it is not a precise concept in his Critiques of the same decade. Kant comes closes to this concept in his Fourth Thesis of the 1784 *Idea for a Universal History from a Cosmopolitan Point-of View* (2001, 15). Kant writes there that people feel more as a person as a member of society and that any individual insight is against the background of a social whole that others can comprehend. Indeed, all sentential judgments are structured to communicate to others, and while the logic of discourse in its syntax remains the same through all diverse constructs of a "social whole," the semantics of its evaluations differ from age to age. Max Adler saw Kant as a voice whose vision of the social whole was bourgeois, and this enabled him to see that every historical period has its own asymptotic universe of social organization. For Adler, the "social a priori" became a conceptual instrument to comprehend the asymptotic limits of the distribution of authority necessitated in the vision of a social whole in any era.

In his *Marxistische Probleme* (1913, 31), Adler spoke of the unperceived limits of an era's sense of the social whole. Marx's vision of a "classless society" would be one that has its own "social a priori," but one that truly included an equal distribution of authority, and thus voice, to the entire population.

While Max Adler did not coin the Kantian-based term of the "social a priori" until after World War I (Abendroth-Weigand 1959, 13), he developed its logical form for analyzing judgments as early as 1904 (1904, 180–181). In his *Kausalität und Teleologie im Streite um die Wissenschaft*, he spoke of this judgmental horizon of one's social totality as one's "form of sociation," using the German term "vergesellschaftung" (1904, 180). Adler cites there Marx's definition of the person as a "geselliges Tier" "a social animal" (Marx 1904). Adler, by linking Kant's understanding of how one is compelled to formulate judgments towards a comprehension of a social whole with Marx's understanding of the changing forms of social wholes, enables him to use of this dimension of social consciousness in all his future thought. Adler saw Marxism as a social science rather than as mere social policy. Thus, the "social a priori" as a concept that justified how a universe of discourse based upon the semantics of how the "social whole" that was comprehended as a univocal fact by an era became an instrument for analyzing the societal blindness to its own presumptions in the inevitability of how authority within a society was distributed and structured.

Beyond Kelsen: Political Democracy and Social Democracy

Adler made use of this theory for the first time in a thorough analysis of the law-based universe of the bourgeois state in a monograph that took up Hans Kelsen's legal-based theory of the democratic state (*Die Staatsauffassung des Marxismus*, 1922).

Criticizing Kelsen's formal concept of political democracy, which for Kelsen was the unchangeable law-based universe articulated through the legislation willed by the majority of the citizens of the state, Adler distinguished between political

democracy and social democracy. Political democracy was a manifestation of the hegemony of the bourgeoisie, and a social democracy was the future "social a priori" of the "classless society" (*Die Staatsauffassung des Marxismus*, 1922), where law was an expression of the will of all, not of those given more civic authority than others.

Adler came to realize in his encounter with Kelsen that Rousseau had justice in determining that a true "general will" was not a mathematical majority rather a concept that articulated the essential values shared by all within a society. Adler understood that through his concept of the neo-Kantian "social a priori" such an in-common set of values required an educational liberation of those captured by the false promise of bourgeois laws that claimed universal truth. Hans Kelsen had written the democratic constitution of the First Austrian Republic in 1919. His vision respected as the basis of the democratic autonomy of every present and future citizen the laws enacted by the majority will. The laws of the Republic could guide and enforce this democratic vision, and the legislature could accommodate changes in circumstances to this vision. Adler knew he must show the asymptotic limits to this apparent universal freedom. Indeed, this would require the pedagogical experience of a Socratic give and take so that each person could begin to understand the limits and blind areas of his or her own thought, the learned semantic of bourgeois democracy, and its misconceptions of what a true democracy would be. The democratic laws of the Austrian Republic were largely an impersonal expression of the bourgeois understanding of the "social whole," their limited articulation of the "social a priori."

Education and "Solidarity" Society

Education then became a major project for Max Adler. He began to teach in the "Schönbrunn Circle" in the early summer of 1919. He had been involved in educational efforts for the proletariat in the 1890s and the decade before World War I, along with Rudolf Hilferding, Otto Bauer, and Karl Renner. But now he had a clear sense of the social scientific methodology and discourse of Marxism. In 1920 he qualified at the University of Vienna, where he became an Extraordinary Professor of Sociology and Social Philosophy. His interest in effectively arriving through philosophical conversation at the justness of the premises of what he called the future "solidarity" society, which was classless in that all persons had equal authority within their vocational competence and civic judgments, and embraced the "solidarity" of shared values that Rousseau had spoken of as the genuine "general will." The "solidarity" society would be something more universally in-common than the outcomes of a majority interest (*Die Staatsauffassung des Marxismus*, 1922, 53–54).

Between 1930 and 1932 Adler wrote two volumes which he saw as a textbook of his vision of Marxism as a social science, whose concepts when enacted by the populace of a culture would lead to the "solidarity" society. These texts, *Lehrbuch der Materialistischen Geschichtsauffassung.* Two volumes (Berlin, 1930, 1932) were followed by notes from a third text that would offer more insight into the dynamics that could assure a "solidarity" society. This volume was not published until long after Adler's death (*Die Soldarische Gesellschaft*) (Vienna, 1964).

A student of Max Adler's at the University of Vienna between 1930 and 1932 was the later famous Marxist theoretician, Lucien Goldmann (1913–1970). Goldmann expanded on some of Adler's ideas of how within actual interactions among persons a general will could be established. Adler had written about face to face conversation as the key to surfacing mutual values in his 1922 text, *Marxistische Probleme.* There he cited the Enlightenment text of Heinrich von Kleist on conversation – "Über die allmähliche Verfertigung der Gedanken beim Reden." When someone develops an idea in a counterpoint with others, the "social whole" both share generates a more informed discussion, sharpening one's own view, bringing to light the personal blindnesses, and augmenting the thought towards a mutual comprehension (*Marxistische Probleme*, 1913, 25). Adler wrote theoretically of such a group in his final text, *Das Rätsel der Gesellschaft* (1936, 90–94). Goldmann furthered this understanding

in his address of small group discussions that sought the same end. This microsociological app roach to effective cooperation and interdep endence had been started by a German Social Democrat in the early 1930s, Kurt Lewin. Goldmann criticized the microsociological group dynamics begun by Lewin insofar as its practice did not enable its participants to focus upon societal problems, rather only helping the small group learn to listen and to cooperate in formulating mutual understandings (Goldmann 1969, 72–74). In that Goldmann shared Max Adler's disdain for personal problems that were not caused by societal imbalances.

Max Adler believed that one's only effective personality was the public one of shared values. He wrote that the "historical personality" became "dross" "Schlacke" over time, a skin that could be shed and could be renewed with true interdependent values (1936, 118–120). Nonetheless, he firmly believed in the autonomy of each individual to make these choices. One must be captain of one's own ship. Max Adler's first theoretical work, never published, but preserved in his papers (Pfabigan 1982, 14–27), was a study *Max Stirner. Ein Beitrag zur Feststellung des Verhältnisses von Socialismus und Individualismus* (1894). The title captures the radical individualism at the core of Adler's understanding of societal renewal. Stirner was anathema to socialists because of his insistence upon individual autonomy. Adler showed in his microsociological group dynamic insight of mutual conversation how this individuality could be preserved but included in a solidarity society.

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Introduction

A German philosopher, social-theorist, musicologist, and literary critic, Adorno (1903–1969) is with Max Horkheimer and Herbert Marcuse one of the most prominent representatives of the first generation of the interdisciplinary and Marxist-oriented movement of thought called *Critical Theory*, named after a programmatic text of 1937 by Max Horkheimer titled "*Traditional and Critical Theory*," and less appropriately the "Frankfurt School," as it was based in Frankfurt in the *Institut für Sozialforschung*, an affiliate of Goethe University, directed after Horkheimer by Adorno from 1958 until his untimely death.

The only child of Oscar Wiesengrund, a prosperous Jewish wine merchant, and of Maria Calvelli-Adorno, a Catholic of Corsican descent who became a well-known singer before marriage and from whom Adorno later took his name, relegating Wiesengrund to the initial W., Adorno undertakes studies at the University of Frankfurt in the 1920s on philosophy, music, psychology, and sociology, then goes on to Vienna to further his study of musical composition with Alban Berg. Even though he continues to write many articles defending modern music and also to compose, he finally opts for philosophy.

Under the direction of the neo-Kantian Cornelius, Adorno obtains in 1924 his doctorate degree with a thesis on Husserl's phenomenology. In 1927, Cornelius refuses, however, his manuscript on the Freudian concept of the unconscious in the transcendental theory of knowledge, that is, that focussed on the conditions of possibility of knowledge. He will obtain his habilitation only at the beginning of the 1930s, on the basis of *Kierkegaard: Construction of the Aesthetic*. Although he turns to existentialism at this time, Adorno still pursues the project, started since his doctorate, of moving beyond what he will call idealism or epistemology, that is, the admission of a primacy of knowledge or of the constituent subject on the object, belief that he will later integrate into a logic of false identification and of domination. This critique will lead to a study on Husserl written in Oxford in 1934–1937, *Against Epistemology, A Metacritique*; to *Negative Dialectics*, where Adorno affirms at the same time a *reciprocal mediation* of the poles of subject and object and nevertheless *the difference of the object within this mediation*, and consequently, "The Object's Preponderance" (Adorno 1973, 183). In this way, he blocks any inclination toward elaborating any system, while bringing thought back to the necessity of experience and to the task of its interpretation.

Its multiple facets, the scope of the subjects it addresses as well as the anti-systematic impulses that follow from the desiderata of a genuine, i.e., open and corporeal-based experience of reality, give Adorno's writings a paratactical, fragmental, and aphoristic form, a content that resists summarization into a sole thesis and a radically critical impulse. Nevertheless, it is possible to assemble his key ideas around a few focal points.

The Actuality of Philosophy and the Period of Exile in the United States

Although he is not yet a member of the Institute for Social Research at this time, Adorno delivered there in 1933 his inaugural lecture entitled "*The Actuality of Philosophy.*" All the while opposing himself to Hegel's thesis pertaining that reality has an overall meaning and is identical to the concept, Adorno also rejects Heidegger's and Scheler's recourse to an immediate being. In his view, this phenomenological attempt lands either in the irrational or else in the ideological, that Adorno generally assimilates to the "false conscience," a conscience that has forgotten or abstracted its own activity and finds itself thus reified. Adorno's thesis is precisely that "the idea of science is research; that of philosophy is interpretation" (Adorno 2000, 31): "For the mind is indeed not capable of producing or grasping the totality of the real, but it may be possible to penetrate the detail, to explode in miniature the mass of merely existing reality" (Adorno 2000, 38).

Since Hitler comes to power at this very moment, Adorno finds himself barred from teaching and soon forced to exile. He rejoins Horkheimer and the Institute for Social Research, which moved to New York in 1934.

This period before and after the Second World War is very fertile for Adorno, although he never manages to adapt to the American way of life. He participates in two sociological studies in which the Institute is engaged.

The first is the Princeton University Radio Research Project, where Adorno detects already the tendency towards the "marketability of art" which he thematizes in the famous chapter in the *Dialectic of Enlightenment*, entitled "The Culture Industry."

The second is the Berkeley Opinion Study Group inquiry on anti-Semitic behaviors, for which Adorno publishes the results in 1950 in

The Authoritarian Personality. This multidisciplinary research, both quantitative and qualitative, is more generally focused on prejudices that reveal a fascist or antidemocratic potential in individuals, an "authoritarian" disposition susceptible of radicalizing itself in hostile or destructive practices with regard to outgroups (minorities) when placed in contact with ideology. The study has for hypothesis "that the political, economic, and social convictions of an individual often form a broad and coherent pattern [. . .] and that this pattern is an expression for deep-lying trends in his personality" (Adorno et al. 1950, 1). As these prejudices cannot be explained entirely by sociopolitical, economical, or even rational causes, the authors considered crucial that, if one wishes to thwart them, then the accent should be placed foremost on the psychology of these individuals. Many of the ideas developed here will later be taken up in the "Elements of Anti-Semitism" in *The Dialectic of Enlightenment.*

Adorno publishes two decisive works as pertain to the development of his philosophical thought: *Minima Moralia, Reflexions from Damaged Life* in 1951 and, with Horkheimer in 1944, *The Dialectic of Enlightenment*. Starting from the presupposition that defines the *Aufklärung*, namely, that the progress of reason leads to emancipation from terror and superstition, this latter essays aims to comprehend the incomprehensible, that is, "why humanity instead of entering a truly human state, is sinking into a new kind of barbarism" (Adorno and Horkheimer 2002, XIV). The principal thesis of the book is that rationality has reversed into the myth of immanence – of existence as a blind and self-reproducing order – since it has misunderstood its own portion of alterity (its mimetic dimension, the ambiguous tendency of the living to make itself like the other) and its constitutive rapport to nature (as motor and substrate of thought and activity). This somber diagnostic draws on a reconstitution of the development of knowledge as a power which progressively substitutes itself to nature's blind one, by becoming the tool of an instrumental rationality, that is, that reduces all being to a fungible and calculable means to any given aim in the name of control and efficiency (in the first study, "The Concept of Enlightenment") and on a reconstitution of the advent of subjectivity as a fixed and closed ego, who represses his own impulsions and needs as heteronomous (in the excursus on Homer's Odyssey and on de Sade's Juliette).

The possibility of emancipation resides however in that the human being still has the capability to reflect itself and reverse its tendency for a "totalitarian" domination. Hope resides, in short, in "the remembrance of nature within the subject" (Adorno and Horkheimer 2002, 32). Adorno turns consequently towards the *non-identical*, a notion that can be approached theoretically as to what differs from the general concept or the always identical and therefore either escapes one's grasp or seems bare of meaning or value, i.e., blind spots and cast-off materials (Adorno 1987, §98), the "only" individual; and practically as to what raises fear and arouses defensive reactions, in the first place nature in or outside us, the suffering and weakness of the living body, the expression of something that is aesthetically perceived. Advocating for the nonidentical and the negation of suffering, his thinking takes a materialistic turn.

The Return to Frankfurt and the Late Works

The two major publications from the 1960s converge into this motif of the materialistic turn concerning the subject.

In *Negative Dialectics*, subjectivity's self-reflection leads to validating the non-identical as the need or the pulsion that motivates the thought of suppressing the reality that weighs down on it and gives it at the same time its objectivity. This primarily somatic need to abolish suffering transforms itself respectively into the imperative and into desire, at the heart of the Adornian "after Auschwitz" reformulation of morality and metaphysics. On the one hand, morality must henceforth be reconstituted on this imperative that is addressed to humanity: "to arrange their thoughts and actions so that Auschwitz will not repeat itself, so that nothing similar will happen. [. . .] Dealing discursively with it would be an outrage,

for the new imperative gives us a bodily sensation of the moral addendum – bodily, because it is now the practical abhorrence of the unbearable physical agony to which individuals are exposed even with individuality about to vanish as a form of mental reflection" (Adorno 1973, 365). On the other hand and in the same vein, metaphysics is reborn on contact with the despairing experience of the self as cadaver. It leads to a meditation on the intrinsically human desire, i.e., founded on a mimetic solidarity with the living, of immortality. This motif, which concludes *Negative Dialectics* and opposes Adorno to Heidegger's solemnization of death (cf. also *The Jargon of Authenticity*, 1964), merges with the impulsion that penetrates the art of saving the nonidentical in an appearance, which is in the end perhaps only an appearance.

This is treated in *Aesthetic Theory*, Adorno's second major work, published posthumously in 1970. The feat which radically modern art must realize, that is, of turning itself against its appearance of being the thing itself, is to realize again this salvage. For this to be, art must become autonomous, nonapparent, almost a simple commercial commodity. Baudelaire is already an exemplary case: "The new is akin to death" (Adorno 1997, 21).

Adorno's engagement with respect to education converges also in this emancipatory motif. He returns to Germany in 1949, a year before the Institute, at the express request of authorities in Frankfurt, in order to occupy a position in the Department of Philosophy at the University. He also gets actively involved in the ongoing revision of the education program, which he conceives as well in an "after Auschwitz" perspective, as an education opposed to the hardening of individuals and to the iciness that allowed genocide to be, as indicated by the title of his most famous essay on the subject, "*Education after Auschwitz*" (1966).

The Question of Justice

Adorno did not develop a philosophy of law to speak of and only rarely engaged on questions of jurisprudence, as in "*Sexual Taboos and Law Today*" (Adorno 1998, 79 sq.), seemingly contenting himself with denouncing injustice, in particular that of positive law for which "the formal principle of equivalence becomes the norm" (Adorno 1973, 309). Notwithstanding the negativity of his position with regard to law, his advocacy for the fundamental right of those who suffer to express themselves, for the nonidentical and more concretely, the unique and incomparable entity that is each individual, is part and parcel of a conception of justice that permeates all of his writings. Drawn from a Marxian critique of the commodity fetishism and from the Lukácsian diagnostic of the universalization of the value of exchange in our societies that are increasingly bureaucratized, this conception of justice has for cornerstone the notion of exchange. According to *The Dialectic of Enlightenment*, this notion is rooted in the mythical law of equivalence between "guilt and atonement, happiness and misfortune" (Adorno and Horkheimer 2002, 12) and finds itself materialized in multiple activities aimed at escaping from that blind fatality, but ends up reproducing it, through sacrificial rituals, replacing the victim by the criminal, barter, work and the gift of hospitality, among others.

In *Negative Dialectics*, Adorno connects more explicitly barter to identity, stressing therefore its ambiguity: "if mankind is to get rid of the coercion to which the form of identification really subjects it, it must attain identity with its concept all the same. The barter principle, the reduction of human labor to the abstract universal concept of average working hours, is fundamentally akin to the principle of identification. Barter is the social model of the principle [. . .] The spread of the principle imposes on the whole world to become identical, to become total" (Adorno 1973, 146). Accordingly, a just and unconstrained exchange would be one that is not governed by the abstract and potentially deceptive equality of equivalence, but by an equity wherein "each receives his own." In terms of knowledge, this would imply that the subject "makes up for" (Adorno 1973, 145) the "false copy" (Adorno 1973, 170) that he projects onto nature or objects, and that he gives them *more* than what he receives from them, however

without sacrificing himself, proportionally to the surplus that they possess relative to the general concept, on the one hand, and to their reified facticity, on the other. In terms of social interactions, finally, this would mean that each tries to promote the others' ends. In addition to the determination that a human being is its own end, according to a famous variation of the Kantian categorical imperative, Adorno takes up the Kantian rule of law that "everyone's freedom need be curtailed only insofar as it impairs soemone (sic) else's" (Adorno 1973, 283). In this way, a just society would ultimately correspond to a reconciled, a happy society.

The Good Life and the Advocacy for the Nonidentical

As for *Critical Theory* in general, Adornos aim lays in the emancipation from domination and in the intellectual contribution to the transformation of our society. Thus, at the very beginning of his major theoretical work, *Negative Dialectics*, Adorno says, contrary to Marx's final *Thesis on Feuerbach*, that philosophy as an interpretation of the world is still on the agenda, given the failure of the transformation of reality and the regression into blind violence of soviet praxis and western activism. "The whole is the false": this polemical thesis of *Minima Moralia* §29 means that, albeit entirely and rationally administered, our post-capitalist society is on the whole a self-destructive organization that atomizes individuals, forcing them to strategies of self-preservation, hence repressing human needs – i.e., the material and corporeal ones in the first place, as we have seen – instead of satisfying them, as promised. Adorno's thought is therefore seminal in that it is located in the perspective of the good life and in that it confronts us with the crucial and still living question of whether and how one can lead a good life in a "bad life." In short, Adorno answers this problem by way of an imminent critique and an autocritique. He believes that the exposure of the inner contradictions of one's own life and those of the society as such may allow the good to still shine through, provided that the exposure permits the expression of suffering and its awareness. As we cannot know exactly what the good is, Adorno invokes it as an identity of ideas and phenomena, of subject and object, that he sometimes calls utopia, reconciliation, or best, "communication of what was distinguished" (Adorno 2000, 140).

Conclusion: Reception

The reception of Adorno's thinking encountered numerous critiques at first, even from the second generation of *Critical Theory* (Jürgen Habermas; Axel Honneth).

He was generally criticized for his pessimism, negativity, and lack of a positive criteria for emancipation. Adorno obtains today a more favorable reception.

The *Posthumous Writings*, which include his lectures in 18 volumes, his unpublished conferences and additions to the 20 tomes of the *Gesammelte Schriften*, assist in making his thinking more comprehensible.

On another note, the recent publication of a 1967 conference, "*Aspects of Contemporary Right-Wing Radicalismus,*" is surprising by its actuality.

Finally, the primacy given to the body and the sympathy with respect to the concomitant vulnerability finds notably an echo in feminist and environmentalist thinking, animal rights studies, and even in the ethics of *care*.

Cross-References

► Hegel, Georg Wilhelm Friedrich
► Horkheimer, Max
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► Marcuse, Herbert
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Agamben, Giorgio

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Introduction

Giorgio Agamben (b. 1942, Rome) is an academic cosmopolitan. He teaches in Italy at the University of Venice and in France at the Collège international de philosophie in Paris and travels the world as a visiting professor. His oeuvre is correspondingly diverse, encompassing the fields of political philosophy and ethics and those of metaphysics, aesthetics, anthropology, and linguistics. The core of his political theory is his analysis of the ambivalence of politics and its ill-fated relationship with the law. The key figure of this relationship, the biopolitical product, is the *homo sacer*, a figure that dates back to ancient Roman law. For Agamben, the *homo sacer* is the perfect manifestation of the sovereign power since it has created the homo sacer by banning it as an outlaw who can be harmed or even killed with impunity – all in the name of the law. His political theory aims at revealing the inherent logic of the sovereign power and its effects in determining the legal subjects of law (inclusion) and in imposing the pending option of separating these very legal subjects (or parts of them) from the legal order (exclusion). This "exclusionary inclusion" illustrates the logic of biopolitics and its destructive power. In the name of sovereignty, this power accumulates the capacity to "form life" in its interest by binding politics and law together. Historically, this kind of sovereignty is of ancient origins, but politically its real power has been unleashed in modern times. For Agamben, *homo sacer* has become the cipher of modern societies, regardless of the manifold differences between democratic and autocratic political systems.

For this reason, he has dubbed his major project in the field of political theory *Homo Sacer*. Moreover, he designs his whole project as a tetralogy, which includes, among others, and besides the *Homo Sacer* study: *Remnants of Auschwitz*; *State of Exception*; *The Kingdom and the Glory*; and *The Highest Poverty*. In 2017, a collection of all studies related to this project came out, named *The Omnibus Homo Sacer* (OHS).

Agamben started his *Homo Sacer* project with his widely received study, programmatically of the same title, in 1995 (Italian version, English 1998). A great deal of Agamben's work in the following years elaborates the juridification of politics that he despises so much. Contrary to modern constitutionalist understanding, juridification is, for Agamben, not a process of

civilizing the political order. Instead, it produces ready-made legal instruments at the disposal of any sovereign anytime. Therefore, according to Agamben, it is a myth, typically told by proponents of liberal democracy, that law has the power to constrain sovereignty; instead, it enables sovereignty. His ambition is thus to expose the origin and effects of the interrelationship between politics and law. Agamben searches for "true" politics that, in his eyes, can only be achieved through the emancipation of politics from the law.

Agamben has a somewhat cynical view on juridical normativity, its sources, and logic. For him, law, first and foremost, exhausts life with the effect that law separates life from the way of life (*moda di vita*). What remains is life in the sense of sheer living, the mere or bare life (*nuda vita*), which becomes fundamentally depending on the law: "killable" or not? This question is the biopolitical key question of law (OHS, 1998, p. 70). Moreover, to raise the question is to answer it since existential dependence is the guiding principle of the *Homo Sacer* project. The law itself cannot exclude the principle of killing human life – a situation that is to be grasped by the figure of the (permanent) state of exception. It unfolds in two ways: Agamben's systematic intention is to bring to light the inherent matrix of sovereign power that transforms the rule of law into a zone of indistinction between norms and facts. In addition, he tries to demonstrate the state of exception as an effective instrument of biopolitical governance that has become the dominant paradigm of politics in modern societies.

Homo Sacer

According to Agamben, the interplay of inclusion and exclusion is the hallmark of every ruling power. It gives law the logic of sovereignty from which the (legal) figure of the *homo sacer* arises. *Homo sacer* is that "enigmatic figure" (OHS, 1998, p. 61) of archaic Roman law. According to a fragmentary treatise attributed to Sextus Pompeius Festus, the one who is accused of a crime by the people and is therefore considered "bad or impure" (OHS, 1998) is called "sacred." Here "sacer" means separated and, in this sense, special (OHS, 1998, p. 73). The exclusion separates the person from the rest of the community (including the legal community). They may not be sacrificed and are no longer part of the religious order (*ius divinum*). The separated is also excluded from the secular legal order (*ius humanum*) and becomes, therefore, an outlaw that anyone with impunity can kill. Therefore, the *sacratio* marks a double exclusion from the law (OHS, 1998, pp. 69 f.). If someone kills the *homo sacer*, he commits neither a murder nor a sacrilege, with the consequence that life is nothing more than mere life: a bare life. At first sight, it seems impossible that the concept of bare life applies to modern states under the rule of law. However, it is a central point of Agamben's argument that the modern concept of sovereignty has produced various forms of bare life – with terrorists, illegal combatants, or (high-ranking) members of criminal gangs as the most prominent examples.

In Agamben's reading, the original meaning of the term "*sacer*" or "*sacratio*" does not lie in the religious realm (OHS, 1998, pp. 64–73). According to him, the hidden meaning of *homo sacer* is revealed only in the politico-juridical context, namely, in the structural connection between *sacratio* and sovereignty. Agamben's point is that the sanctity of life, which is nowadays used as an argument to constrain sovereign power, derives its original meaning from submission to sovereign rule. Nevertheless, it is necessary to understand the core characteristic of sovereignty: According to Agamben, we do not sufficiently understand sovereignty as the power over life and death. The real power of sovereignty comes to light by the fate of human life – that it can never escape the sovereign. Paradigmatically, the figure of the *homo sacer* exemplifies this: abandoned by the law, the separated individual lives a life in which everything – in the name of the law – is possible. The omnipotence of sovereignty is therefore revealed not by strong decisions. Instead, it is the power to decide everything without having to decide: "The matchless potentiality of the *nomos*, its original *'force of law,'* is that it holds life in its ban by abandoning it" (OHS, 1998, p. 28).

The Ban and Its Logic of Inclusive Exclusion

The term "ban," introduced by Jean-Luc (Nancy, 1993), is essential for Agamben to conceptualize the relationship between *sacratio* and sovereignty. Three elements are relevant in this context: Firstly, the asymmetry between the two, which expresses that the *homo sacer* is without rights, but everyone can rightfully harm him or her. Secondly, the term "ban" expresses the peculiar "validity without meaning" (OHS, 1998, pp. 45–52) that establishes a relationship that has no other content than the relationship itself. However, the banned individual must continue to orient his or her life toward this community. Thirdly, it is a paradox of the marginal existence of the *homo sacer*, whose existence is an integral part of the legal system and at the same time excluded as bare life. One of the astonishing elements in Agamben's work is that this paradoxical structure is something that the *homo sacer* and the sovereign share (OHS, 1998, pp. 70 ff.), for the sovereign power too "is, at the same time, outside and inside the judicial order" (OHS, 1998, p. 25; OHS, 2005, p. 195). Thus the ban establishes the relationship between the two borderline figures of the legal order: the sovereign sustains the order, and the *homo sacer* is subject to it. In addition, the concept reveals that their existence is constitutive for each other: "the sovereign is the one with respect to whom all men are potentially *homines sacri*, and *homo sacer* is the one with respect to whom all men act as sovereigns" (OHS, 1998, p. 71).

Beyond this form of relationship, the ban also illustrates the mode of this relationship. The state of exception is the way of life for the *homo sacer*, as much as for the sovereign. In describing the logic of sovereignty, Agamben largely follows Carl Schmitt's conception that law derives its validity from the exception (Schmitt 2005). According to Schmitt, only the exceptional cases challenge the law, and the legal exceptions help integrate these cases into the legal system by excluding them from the general rule – a mechanism that allows the law to exist without abandoning its relationship to the case. Agamben shares Schmitt's analysis and concludes that the norm continues to be valid by withdrawing from the exception and leaving the field to it; in his opinion, this is the mechanism of "inclusive exclusion" (OHS, 1998, p. 22). It is "inclusive" in its normative claim based on an enduring legal validity, but it becomes "exclusive" by being stripped of its regulating content. This mechanism operates on the level of individual legal norms (e.g., so-called blanket clauses), but it also has a broader scope that affects (parts of the) legal systems. The prison camp at Guantánamo Bay serves as a case in point because here, a wide range of individual rights has been suspended by legally defining the prisoners of this detention camp as illegal combatants.

In contrast to Schmitt, however, Agamben does not portray the state of exception as a difference between politics and law. Schmitt believes that politics in the form of the sovereign can restore order into the normal situation. For this purpose, the legal order can be partially or entirely suspended, with the effect that order and legality become divided for some time. It is an unprecedented act for Schmitt, initiated by an extraordinary political actor (OHS, 2005, p. 216). In contrast, Agamben defines it as a basic structure "in which law refers to life and includes it in itself by suspending it" (OHS, 1998, p. 27). While Schmitt's state of exception depends on the strong decision of the sovereign, Agamben transforms it into a structure that is characterized above all by the fact that no one can decide anymore what is lawful and what is not because norm and fact coincide (OHS, 1998, p. 24).

Anthropological Machine

Agamben's statement about the exception as the original structure of sovereignty and thus the political community leads back to the Greek polis. Here we find the origin of the relationship between politics and the good life, as Aristotle states (Politics 1252 b 28–31): The strife for survival creates the polis, and it exists for the good life. Agamben points out that the Greeks use two terms to describe life: *zoe* and *bios* (OHS, 1998, p. 5). The notion of *zoe* refers to the fact that all living beings have one thing in common – being

alive – while *bios* summarize the way of life in which individuals or groups differ from one another. Hence *zoe* and *bios* are signifiers for the difference between nature and culture. Agamben deviates from this tradition in that he sees an "anthropological machine" as the primary source of the polis order separating incessantly human from natural life (OHS, 2015, p. 1267), but not with the effect of producing good life, but bare life. This distinction is an arbitrary determination of the natural dimension of humans: either by inclusion, in the form of humanization of the animal (barbarian, foreign), or by the exclusion of the already-human in the form of an animalization the human. According to Agamben, the first alternative (inclusion of an exterior) characterizes the "anthropological machine of the ancients"; the second alternative (exclusion of an interior), that of modernity. The distinction between the private and public spheres belongs to the foundation of the modern constitutional state, not least by placing the private sphere under the special protection of fundamental rights. However, this protection is a legal provision, which can change as needed, supported by a society that has long since become accustomed to the public importance of the private sphere (Agamben 2000, pp. 73–89).

The Rise of Biopolitics

Compared with the ancient machine, the interplay between inclusion and exclusion has become increasingly unstable, according to Agamben. At the same time, the anthropological machine has become increasingly productive by governing the biological side of human life. Absorbing individual risks and turning them into a general concern of politics is the driving logic of biopolitics. The welfare state's policies, which aim to reduce the risks or mitigate their consequences, explain the success of modern society governments and their biopolitical agenda. Following Agamben, however, this success comes at a high price because the political is no longer a product of the separation between *bios* and *zoe*. However, it results from a division within *zoe* (OHS, 1998, pp. 108 f.). It represents the area in which "natural" differences – for example, between healthy versus sick, productive versus unproductive, alive versus dead, and so on – become politically relevant.

Contrary to Foucault, Agamben does not see the beginning of biopolitics as a phenomenon of modernity. Whereas Foucault explicitly points to the veritable discursive explosion in the systems of order that took place in the seventeenth and eighteenth centuries (Foucault 1978), Agamben understands biopolitics instead as the result of the connection between law and politics that arises from the original structure of the state of exception, the ban, which connects the sovereign with the bare life. Nevertheless, Agamben refers to Foucault's studies when he describes the modern state as the biopolitical space par excellence, to which it developed in the twentieth century (e.g., OHS, 1998, pp. 6 ff.). Both the acceleration and radicalization of this development are ultimately due to societal needs that foster the process of making the biological dimension of human life the main subject of politics (OHS, 1998, p. 93). Two reasons are of particular importance in this context: security as the paradigm of governance since the eighteenth century and the administration's power to undermine the distinction between the public and private spheres, which connects to the process of "politicizing" *zoe* in order to make a "pleasant" life possible (OHS, 1998, p. 12).

State of Exception

As long as the law is at the service of biopolitics, it will not protect the individual from becoming the object of exclusion. This kind of abandonment is a potential fate for everyone who lives under the rule of law – then as now. It connects the *homo sacer* as a figure of archaic Roman law with challenges of the legal community of the early twenty-first century: e.g., the stateless, refugees, or ultra-comatose. For this reason, Agamben (OHS, 1998, p. 137) sees the "camp as nomos of modernity"; it "is the space that opens up when the state of exception begins to become the rule" (OHS, 1998, p. 139). The defenselessness that

makes everything possible in the name of law characterizes the state of exception.

In Hannah Arendt's view, it is precisely the stateless person who is the real subject of human rights because of the imminent danger of losing his or her "place in the world" (Arendt 1962, p. 296). However, this hope proved to be deceptive with the advent of the great streams of refugees. Agamben's criticism of the law, including human rights, derives substantial inspiration from Arendt's study of totalitarianism (OHS, 1998, pp. 105–111). He accepts Arendt's observation about the close connection between birth (natality) and nation, according to which human rights only come to the fore as civil rights. However, without this essential legal protection, the fates of the stateless, refugees, or camp inmates indicate that the "abstract nakedness of being nothing but the human was their greatest danger" (Arendt 1962, p. 300) – and still is, Agamben would add (Norris, 2005).

In his study *Remnants of Auschwitz*, he tries to assess the political and ethical significance of "the aporia of Auschwitz": At the center of Agamben's reflections on the possible and the impossible, on the expressible and the unspeakable, is the *Muselmann*, an individual who has become dull from total exhaustion, who is wandering around the camp like a stray dog, not dead yet, but in any case too weak to end his own life; a vegetative life, despised and shunned by the other inmates because they are horrified by what they see and fear to become themselves (OHS, 1999, pp. 871–875). The *Muselmann* is the "catastrophe of the subject" (OHS, 1999, p. 859) because, with him, only survival itself remains, which is, literally, without words. In an attempt to separate the possibility of witness from survival, Agamben (OHS, 1999, p. 865) recognizes the climax of biopolitical power and its "secret cipher": it shall be unspeakable what was possible. To reveal this secrecy, Agamben carefully tries to reconstruct the dual structure of testimonies: the one part that can speak but has nothing to say; and the other part that would have something relevant to say but is unable to speak his or her experience (OHS, 1999, p. 841). If it is possible to speak of the impossibility of speaking, then a testimony "refutes precisely this isolation of survival from life" (OHS, 1999, p. 866). Moreover, Agamben reveals that the secret of biopolitics is empty – a mode of exclusion that only gets its content through exclusion.

Arcanum of Government

Agamben reveals another secret in the *Homo Sacer* project: sovereignty is not the place of actual power. In his study, *The Kingdom and the Glory*, Agamben introduces the distinction between reign and government, the distinction between an active part of the power that runs the business and a passive part of the power in whose name the ruling is exercised (OHS, 2011, pp. 380, 433, 436, 438). Sovereignty is part of a hidden division of labor that Agamben tries to illustrate by a complementary reading of the Holy Trinity and its *oikonomia* (OHS, 2011, pp. 387 ff.). We can draw three insights from this reading: Firstly, just like God is omnipotent and his world plan is incomprehensible to humans, the sovereign's potestas is unbound by the law, and its functioning is not predictable by the subjects. Secondly, just like the never complete realization of the divine will is dependent on worldly deeds, the sovereign's will, regardless of the sovereign being monarchic or democratic, is only realized by an administration acting on its behalf. In the democratic version of popular sovereignty, this administration of power is boosted by the concept of power-sharing, with the effect that ultimately only the symbolic presence (and factual impotence) of popular sovereignty remains. Only the technicians of power, the organizers and coordinators within the government machine who operate de facto, can act under the rule of law but are hardly bound by it (OHS, 2011, pp. 622 f.). Thirdly, just like God would remain a *Deus absconditus* without praise by the angels, the sovereign's public acceptance can be secured by public glorification. In Agamben's view, the media takes up the function of glorification in modern mass society. Their business is the fabrication of a political consensus, above all through permanent production of acclamation.

Politics Beyond Biopolitics

Agamben's writings contain two concepts of politics that are anything but equivalent. One concept refers to the dark side of politics, contaminated with law, based on the logic of biopolitics, and driven by the destructive power of sovereignty. The other concept of politics is linked to the idea of a *coming community* (Agamben 2007) and is law-free and non-state in nature; the concept of "true" or "pure" politics. The latter version attempts to detach politics from the state's claim to make universally binding decisions, which brings Agamben close to anarchism. According to Agamben, dichotomies like a friend–foe distinction (Schmitt 1976) do not characterize the political. Instead, it is a unifying logic that drives politics.

For this reason, he argues that we should no longer understand politics in terms of purpose but rather as pure *means without end* (Agamben 2000). This idea of politics refers to life in the sense of happiness. Consequently, true politics needs to move away from any form of power connected to either lawmaking or law enforcement. What Agamben has in mind instead, he illustrates with the example of the Franciscan Order, whose guiding principle he defines as "the attempt to realize a human life and practice absolutely outside the determinations of law" (OHS, 2013, p. 976). Politics is life itself, insofar as it seeks happiness: "Human beings [. . .] are the only beings for whom happiness is always at stake in their living, the only beings whose life is irredeemably and painfully assigned to happiness. However, this immediately constitutes the form-of-life as political life" (Agamben 2000, p. 4).

However, Agamben is less concerned with a political counterproposal than the possibilities of a good life in the existing situation (Agamben 2000, pp. 138 f.). He shares with Benjamin that it is possible to find such a life in this world and, as a starting point, refers to the human being as a "being of potential" (OHS, 2015, p. 1214). The individual's singularity illustrates this subversive potential employing its ability to think and resist the sovereign power of biopolitics. Thinking prevents the realization of life through reality because it reflects life in different ways and thus constitutes political life. Thinking experiences itself in its potentiality, a self-awareness that lies in its reflexive structure. The inexhaustibility of life drives the search for happiness and makes it possible in the first place. Life becomes bare once stripped of its potential, an actual life that only lives. The logic of biopolitics contaminates politics that reduce life to bare life; politics that maintains human beings as beings of potential is true politics. It fits, however, into Agamben's view that true politics is essentially still to be invented (OHS, 1998, pp. 12, 152).

Conclusion

Agamben presents a radical critique of the history and development of the political orders from the Greek origins to modern-day democratic governance. Is there any reason for hope? In some of his studies after the *State of Exception* (2005), Agamben picks up on this topic indirectly. In *The Kingdom and the Glory*, for instance, he deals with the industry of hope by discussing the distribution of labor within the holy trinity as the blueprint for the interplay between active, influential parts of government (governing administration) and the passive, symbolic parts of it (ruling sovereigns). However, this interplay between the different parts of government (with the help of "angelic bureaucrats") produces only spectacular but empty self-glorification. If there is any, the cure can only come from a radical detachment that liberates politics from law and any meaningful purpose. Then politics can become a form of pure means: a messianic form, inspired by Benjamin's idea of divine violence, that has the power of a total rupture without being violent. Following Benjamin, Agamben envisions a "real" state of exception in which sovereignty becomes meaningless.

Agamben's *Homo Sacer* project has triggered various forms of criticism, divided roughly into two lines of argument. The first line is directed against the dark side of his theory that a seemingly never-ending state of exception captures all individuals. Critics have claimed that this perspective results mainly from Agamben's strategy of

concept stretching, starting with the concept of the state of exception itself. The second line of criticism questions Agamben's concept of politics beyond biopolitics because his argument is vague regarding the prospect of a future political process. Critics complain that his vision of politics is ultimately an apolitical concept, based on the nonpolitical myth of a fully reconciled society. Despite these kinds of criticism, Agamben has insisted that liberation from the ongoing process of biopolitics will not be brought about by revolutionary actions but by subversive thinking. Agamben notes that everything will be more or less the same in this messianic concept – "just a little different" (Agamben 2007, p. 53). Furthermore, he seems to mean that the potentiality is no longer determined by the sovereign but by the individual.

Cross-References

- ▶ Arendt, Hannah
- ▶ Postmodern Theory of Law
- ▶ Schmitt, Carl
- ▶ State of Exception

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Albert, Hans

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Introduction

Hans Albert, born in 1921, is one of the leading exponents of critical rationalism, a prominent variety of analytical philosophy that has gained influence especially in the social sciences and humanities. The philosopher of science Karl Popper (1902–1994) is regarded as the founder of this line of thought, which Popper developed as a countermodel to the logical positivism of the "Vienna Circle" of philosophers and natural scientists in the 1920s and 1930s. Hans Albert transferred critical rationalism to the social sciences and systematically elaborated it into a system of thought that can be applied in all areas of human activity.

Critical Rationalism

Critical rationalism can be seen as a form of philosophical skepticism, a line of thought that goes back all the way to antiquity. All our attempts to solve problems are in principle fallible; there is no

such thing as secure knowledge. This applies to both the natural sciences and the humanities. Albert characterized critical rationalism by three central ideas: a consistent fallibilism, which points to the fallibility of all human attempts at problem-solving, a methodical rationalism, which emphasizes the importance of critical examination, and finally a critical realism, according to which the (albeit fallible) recognizability of a world existing independently of human opinion must be maintained.

In social philosophy, Albert, continuing Popper's classic work on "The Open Society and its Enemies" (1945), pleads for a liberal system with successive, democratically legitimized reforms. He rejected the comprehensive drafts for a socialist transformation of society that were popular in the 1960s and 1970s. This attitude brought him into sharp contrast to the "Critical Theory" around Theodor Wiesengrund Adorno and Jürgen Habermas, which was oriented on Hegel and Marx. The resulting "Positivism Dispute" is one of the most influential debates in the German social sciences and humanities after World War II and has contributed significantly to making analytical philosophy, which was expelled from the German-speaking world under national socialism, once again at home in Germany.

The Positivism Dispute

The positivism dispute is understood by the critical rationalists as a continuation of the value judgment dispute that Max Weber had to fight out against national conservative and socialist scholars in Germany at the beginning of the twentieth century. According to Weber, it is not the task of science to make political assessments, but rather to present facts, analyze and systematize them. According to Albert, four problems can be distinguished in the value judgment dispute: The definitional problem is whether a system in which value judgments occur can be called "scientific." This is obviously a question of linguistic choice. The logical problem concerns the question of what meaning value judgments have. Of particular relevance here is the question of what the difference between value judgments and statements of fact is. The methodological problem is whether value judgments are necessary in science, or in other words, what goals would require the use of value judgments in science. According to Albert, value judgments are not necessary in scientific work. The vehemence with which the value judgment dispute was conducted was sparked mainly by his fourth subproblem, namely the question of whether scientists should make moral and political judgments as scientists. This question is vigorously denied by Albert as well as by Max Weber.

The "Münchhausen-Trilemma"

One of the figures of thought that Hans Albert has made famous is what he calls the "Münchhausen-Trilemma." It is directed against the possibility of a "basic" philosophical justification: If one demands a justification for everything, one must also demand a justification for the reasons one has given for the justification of the opinion to be justified. This leads to a situation with three alternatives, all three of which seem unacceptable, i.e., to a trilemma which Albert calls the "Münchhausen Trilemma," referring to one of the adventures of the well-known lie-baron Münchhausen:

> One has the choice between an infinite recourse, which forces one to go back further and further in the search for reasons, but which is practically impossible to carry out and therefore does not provide a secure basis; secondly, a logical circle in deduction, which arises from the fact that in the procedure of reasoning one falls back on statements that had previously appeared as requiring justification, and which likewise does not lead to a secure basis; and finally, an interruption of the procedure at a certain point, which appears feasible in principle, but which would involve an arbitrary suspension of the principle of adequate reasoning.

If a final justification is impossible, and a rational discussion of scientific and socio-political questions is nevertheless to take place, the only way is to hypothetically accept proposed solutions and to test their applicability in practice. If they prove their worth, they are retained for the time being; if they fail, they must be replaced by new

solutions. Albert recommends this method of "construction and criticism" not only for the natural sciences and technology, but also for law and legal policy as well.

Law

Following Rudolf von Jhering, Albert emphasizes the technological character of law: Law is not predetermined for us by a deity or by nature but arises on the basis of conflicting interests. Laws, but also decisions of the administration and the courts, aim to achieve certain goals. They can therefore be measured by their ability to achieve these goals. In this way, normative questions ("Is the law good?") are transformed into empirical ones ("Is the law effective in achieving its goal?"), an approach already proposed by Jeremy Bentham. In contrast, Albert rejects metaphysical and natural law approaches in legal philosophy as being flawed and therefore not sustainable.

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▶ Bentham, Jeremy
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A

Alchourron, Carlos Eduardo, and Eugenio Bulygin: On Norms

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Introduction

One of the most relevant contributions of Carlos Alchourrón and Eugenio Bulygin (in the following "AB" for short) to the logical analysis of norms and normative systems is their essay on "the expressive conception of norms" (Alchourrón and Bulygin 1981).

They claim there that some debates about the ontological status and logical properties of norms, such as those concerning the possibility of a logic of norms, the relation of norms to truth, and the existence of permissive norms, are due to a large extent to the fact that authors often start from two different conceptions regarding the nature of norms, which are rarely made explicit. They call them, respectively, "the hyletic conception" and "the expressive conception."

According to the first, norms are abstract entities that have an existence similar to that of propositions: Just as propositions are the meaning of descriptive sentences, norms would be the meaning of normative sentences; they are prescriptive meanings: that something ought, ought not, or may be the case (or be done). Since they are abstract, the existence of norms is independent of language, although they can only be expressed through it. For the expressive conception, instead, norms are the result of the prescriptive use of language. They are not conceptual contents

distinct from propositions. A sentence can be used on different occasions for different purposes: to inform, to interrogate, to conjecture, to order, and yet express the same proposition in all those uses. The difference between assertions, questions, orders, etc. occurs at the pragmatic level, not at the semantic one.

If "*p,*" "*q,*" and "*r*" are considered propositional variables, the normal way of representing a norm in the hyletic conception is by prefixing a deontic operator to the variable ("O*p,*" "P*p*"). The deontic operator operates on the proposition to generate a conceptual content of a normative nature. In the words of AB "[i]n this sense the normative operators are similar to the modal alethic operators and a norm is a proposition in much the same sense in which a modal proposition like N*p* is said to be a proposition" (Alchourrón and Bulygin 1981: 96).

In the expressive conception, certain special signs must be used to indicate the illocutionary force of a verbal expression. Thus, to show that a sentence has been affirmed they use the sign "⊢" before the propositional variable, whereas the sign "!" before the propositional variable is used to show that the utterance of the sentence counts as an imperative speech act. Unlike the normative operators "O" and "P," the signs "⊢" and "!" do not contribute to the meaning of the sentences uttered; they are mere indicators of the kind of linguistic act performed: descriptive in the first case and prescriptive in the second. The expression "!p" does not express a proposition, so it has no truth value, nor can it be negated or combined with other expressions by propositional operators.

AB claim that the two conceptions of norms are radically different and incompatible, but both are plausible, which explains the fact that many important philosophers, even the founders of modal and deontic logic (they refer to C. I. Lewis and G. H. von Wright), seem to adhere to both of them.

The main differences between both conceptions are the following:

a) For the hyletic conception, there is a logic of norms regarding the logical relations between prescriptive propositions, and a logic of normative propositions concerned with logical relations between descriptive propositions about normative systems. In the expressive conception, instead, there is no place for a logic of norms, since there are no logical relations between linguistic acts; there can only be a logic of normative propositions.
b) Within the hyletic conception, some authors, though not all, consider that norms have truth values. In the expressive conception, it is not possible to admit that norms have truth values.
c) The hyletic conception admits both the existence of mandatory rules and of permissive rules. On the other hand, the great majority of those who ascribe to the expressive conception do not accept permissive norms.

AB claim that the same conceptual distinctions can be made in both conceptions, though expressed in different languages, so that there does not seem to be any crucial test that justifies a decision in favor of one or the other.

In order to prove that assertion, they deal with developing an adequate conceptual apparatus for the expressive conception, defining the notions of promulgation, derogation, permission, and normative system, as well as the truth conditions for normative propositions.

Norms

In short, a norm is a meaningful sentence in its imperative use, and promulgating a norm consists of the speech act of commanding, i.e., of pronouncing certain meaningful words imperatively. Strictly speaking, norms are essentially commands whose existence is instantaneous because it coincides with the imperative act. However, in a metaphorical sense, the existence of a norm endures as long as the propositional content belongs to a set of contents ordered by one or more authorities.

Normative System

Although for the expressive conception there are no logical relations between norms, there are

logical relations between the propositional contents of the imperative acts of one or several authorities, so that at each moment we can identify the set formed by the propositions explicitly ordered by one or more authorities as well as their logical consequences. The normative system is the set made up by both the explicitly ordered propositions and their logical consequences. If S is the set of explicitly ordered contents and Cn (S) is the set of consequences of S – in which S is included – Cn(S) is the normative system and S is its axiomatic basis.

The inclusion of the logical consequences as part of the normative systems is based on the assumption that whoever orders a content also orders its consequences, even those of which she is not aware of. This idea, however, is not free from objections. Against it, Navarro and Rodríguez (2014) have argued that it can only be based on the assumption that there are logical relations among acts of prescription, which is expressly denied by AB.

Normative Propositions

Norms are distinguished from propositions stating that there is a norm to such and such effect or that *p* is obligatory or prohibited, which are normative propositions.

The generic truth condition of any normative proposition is the following: A normative proposition stating "it is obligatory that *p* in S" is true if and only if *p* belongs to Cn(S).

Derogation, Permission, Ambivalence, and Inconsistency

In addition to the acts of commanding, which incorporate propositions into the set of commanded contents, there are imperative acts of rejection by which the authority identifies the contents that she wants to be subtracted from or not be added to the normative system. To represent the linguistic imperative act of rejecting a propositional content, AB use the sign "¡," so that "¡*p*" indicates that the content *p* has been rejected. These acts determine a set of rejected contents. The permission of a propositional content can be thought of as the rejection of its negation. However, since permission does not always consist of the cancelation of a preexisting prohibition, it must be admitted that it is possible to reject a propositional content even if it does not belong to the normative system.

When the rejected content belongs to the normative system, we have a kind of normative conflict that AB call "ambivalence." It is carefully distinguished from inconsistency, which is another kind of normative conflict that arises when both a proposition and its negation belong to a normative system. While ambivalence is a conflict that arises from different attitudes toward a given proposition, inconsistency is a conflict of norm-contents. The first is a pragmatic conflict while the second is a semantic one.

In order to solve ambivalence, a rule of preference is needed. If rejection prevails, the outcome of the act of rejection is equivalent to that of derogation, since it results in certain propositional contents being removed from the normative system.

The elimination of propositional contents catches both the explicitly rejected contents and those of which the rejected contents are a logical consequence, since, otherwise, the contents rejected would continue to belong to the system.

AB show that the operation of elimination or subtraction can lead to indeterminacy. For instance, suppose that the authority has performed the acts of command !*p* and !*q*. Then the authority decides to allow the omission of the conjunction of *p* and *q*. So, it performs the act of rejection ¡(*p*&*q*). Until that moment, the conjunction *p*&*q* was obligatory since it is entailed by *p* and *q* taken together, but it is not entailed by *p* nor by *q* alone. So, in order to solve the conflict, it would be necessary to subtract at least one of them, but logic cannot determine by itself which of them should be eliminated. AB propose two conditions of adequacy for this operation of subtraction: "(i) no rejected proposition or set or propositions shall remain in the system, and (ii) the set of the subtrahend shall be minimal, i.e., only those propositions shall be eliminated that it is necessary to

remove in order to comply with (i)" (Alchourrón and Bulygin 1981: 110–111). Applying these conditions of adequacy to the example above, we have two alternative normative systems to the effect that the omission of the conjunction of p and q be allowed: one in which p is obligatory but the omission of q is allowed and another one in which q is obligatory, but the omission of p is allowed.

AB also consider the possible existence of acts of permission, with the consequent formation of a set of permitted contents, different from that of the commanded contents but interacting with it. However, they find that this is dispensable, since the result is similar to that obtained through acts of rejection, provided that it could be possible to reject even propositional contents that do not belong to the normative system.

The existence of normative systems is momentary, since each time a propositional content is introduced or eliminated, a new set is created. The successive acts of commanding or rejecting generate a sequence of normative systems. Metaphorically, a norm begins its existence when the conceptual content is incorporated into a normative system and continues to exist as long as that content belongs to the successive normative systems of the sequence.

Logic of Normative Propositions

The authors find that it is possible, within the conceptual framework of the expressive conception, to develop a logic of normative propositions similar to von Wright's classical system of deontic logic (von Wright 1951), the only difference being that the logic they develop is relative to each normative system and that it can admit of contradictions, so that the analogue of the principle of deontic subalternation ($Op \rightarrow Pp$) is only valid when the system is consistent.

However, it does not seem clear that they have succeeded in their purpose of developing a logic of normative propositions that does not presuppose a logic of norms. In this vein, Ota Weinberger (1985) has argued that the logic of norms, which for the expressive conception does not exist, seems to be hidden in the different treatment reserved for, on the one hand, the sets of ordered propositions and, on the other hand, for the sets of rejected and allowed propositions. Indeed, if it is ordered that p ($!p$) and it is also ordered that q ($!q$), AB consider that the set of commanded contents will contain not only p and q but also the conjunction of both ($p\&q$) because it is a logical consequence of them. In contrast, the sets of rejected and of allowed contents do not contain the logical consequences of the propositions explicitly rejected or allowed. For instance, if p is allowed or, which amounts to the same, $\neg p$ is rejected ($¡\neg p$), and q is also allowed, that is, $\neg q$ is rejected ($¡\neg q$), in the set of allowed contents p and q will be present, but not the conjunction of both. This different treatment of the sets of commanded and of rejected contents seems to be in contradiction with ABs' claim that the pragmatic differences in the use of the sentences do not contribute to their meaning nor, consequently, to their logical relations.

The Foundation of Judicial Decisions in the Expressive Conception

According to a widespread idea, the judges' obligation to base their judgments in law consists of showing that the solution they achieved in the case at hand is a deductive consequence of the general norms of the legal system and some factual statements that describe the relevant facts of the case.

This idea, which could be called "deductivist conception," was firmly defended by Carlos Alchourrón and Eugenio Bulygin in many publications (Alchourrón 1961, 1996; Alchourrón and Bulygin 1971, 1992; Bulygin 1966).

Now, since for the expressive conception there is no logic of norms, there can be no room for a conception of the justification of judicial decisions similar to that of the deductivist conception.

The question here addressed is whether the nonexistence of a logic of norms entails the impossibility of rationally grounding judicial decisions, as some authors have argued, or whether an alternative analysis is possible.

In Bulygin (1985), the author tried to show, in response to Weinberger (1981), that even if there

are no logical relations between norms, it is possible to give a coherent explanation of the relationship between a general norm and a judicial decision in the frame of the expressive conception, insofar as it recognizes logical relations between the propositional contents that form the legal system and it allows to develop a logic of normative propositions.

To explain his idea, he offers the following example, in which he uses the distinction between "primary system" or "subject system" (addressed to the population in general) and "secondary system" or "judge's system" (addressed to the courts) that had been introduced in Alchourrón and Bulygin (1971): Suppose that all landowners have been ordered to pay a special tax. The ordered proposition, which becomes part of the normative system, is "all landowners pay the tax." Suppose A is a landowner. From the proposition that says "A is a landowner" and the ordered propositional content "all landowners pay the tax" follows the proposition that "A pays the tax." On this basis, Bulygin argues that "A pays the tax" also belongs to the ordered set and, therefore, the normative proposition that A has the obligation to pay the tax is true. This in regard to the primary system. On the other hand, among the ordered contents of the secondary system is the proposition "all those of whom it has been proven in a court of law that they ought to pay the tax and did not pay it are sentenced." Assuming that it is proven in court that A had an obligation to pay and that he did not pay, it is true that the judge has the obligation to sentence him because the propositional content "A is sentenced" belongs to the judge's system. Therefore, if the judge issues an individual rule sentencing A, it is justified because its content is jointly logically derivable from the content of the general rule that establishes the judge's obligation to sentence those of whom it has been proven in a court of law that they ought to pay the tax and did not pay it and the proposition that states that it was proven in a court of law that A had an obligation to pay and did not pay.

Yet, Bulygin's claim that the proposition "A pays the tax" belongs to the normative system does not seem to be justified because it is a logical consequence of two propositions only one of which belongs to the system. Indeed, according to ABs' definition, the normative system is only made up of the axiomatic basis and its logical consequences, and the axiomatic basis consists of propositional contents that were explicitly commanded. Now, "A is a landowner" is a factual statement that does not belong to the commanded set. The same can be said about the proposition "A is sentenced," which logically follows from a proposition that belongs to the system and another that does not. But this objection does not imply that the judicial decree that condemns A to pay the tax could not be grounded in the way explained by Bulygin, since the proposition that A has an obligation to pay the tax is true because it validly follows from two true propositions.

Anyway, some years later Bulygin changed his mind. Thus, in Bulygin (1995, 140, author's translation) he states that the expressive conception's attempt at grounding judicial decisions no longer seemed totally satisfactory to him because "the justification of a judicial decision -which has a normative character- requires normative premises. This means that the judge must derive his decision from the rules themselves and not from mere propositions about the rules. That is why a logic of norms is essential."

The latter view is challenged in Zuleta (2022), where a distinction between the explanation and the justification of a court ruling is advanced. The author claims that while it is true that the justification of a decision has a normative character, the explanation is a description of the reasoning on which the content of the decision is based. In his view, the judge's duty to ground her decisions consists of showing that it is in accordance with what law requires. For this task, she should identify the applicable norms and the relevant facts and derive a conclusion, which is an enterprise of a cognitive nature, the result of which is expressed through normative propositions.

Conclusion

a) The distinction between a hyletic and an expressive conception of norms is a very important contribution to the general theory of law.
b) It is possible to make the same conceptual distinctions in both conceptions.

c) For the expressive conception, the normative system is made up by the propositional contents of linguistic speech acts of command and their logical consequences.
d) Derogation and permission are defined, in the expressive conception, as the result of acts of rejection. Those acts can produce ambivalences that sometimes cannot be univocally solved.
e) For the expressive conception, there are no logical relations between norms, but the authors develop a logic of normative propositions very similar to von Wright's classic system of deontic logic. However, it is not free from objections.
f) It is an open question whether logical relations between normative propositions and factual statements may be used to ground judicial decisions.

Cross-References

► Deontic Logic

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Alchourron, Carlos Eduardo, and Eugenio Bulygin: Types of Legal Statement

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Introduction

In *Normative Systems*, Carlos Alchourrón and Eugenio Bulygin (henceforth A & B) explain that normative systems — such as legal systems — contain various types of statement. With respect to legal systems, these types of statement (or sentences, in A & B's terms) are referred to as "legal statements" as opposed to "legal norms," which suggests that legal systems are not necessarily exclusively comprised of legal norms. In other words, legal norms are a type of legal statement, but legal statements are not reducible to legal norms. Similarly, A & B claim that defining a legal system as a set of legal norms, although commonplace, excludes statements that do not impose obligations, prohibitions, or permissions and that are nonetheless often found in legal codes or statutes (Alchourrón and Bulygin 1971: 58). For example, consider statements that define legal terms or concepts, or that communicate certain purposes without necessarily prescribing something as obligatory, prohibited, or permitted. The three types of statement often found in legal systems are classified by A & B as follows:

(1) statements that correlate cases with solutions (norms), (2) statements that correlate cases with cases (definitions or meaning postulates) (on meaning postulates, see Carnap 1956), and (3) statements that correlate solutions with solutions.

Statements That Correlate Cases with Solutions (Norms)

Norms, according to A & B, are statements that "correlate [*generic*] *cases* with [*normative*] *solutions*" (Alchourrón and Bulygin 1971: 15, 28). The word "statements" here merely means that norms are linguistic expressions. The two major aspects of the definition can be broken down as follows:

Cases

A & B define *cases* as circumstances or situations where an act or forbearance is permitted, obligatory, or prohibited by any given normative system (Alchourrón and Bulygin 1971: 21–22). These circumstances or situations are technically referred to as *properties*. A & B establish that the properties that make up cases must be natural properties, as opposed to deontic properties. Furthermore, cases are either generic or individual. *Generic cases* comprise natural properties or a set of natural properties (i.e., properties that preexist norms) that define circumstances or situations that are relevant for determining what actions or forbearances are permitted, prohibited, or obligatory. Such cases are generic in that they do not refer to specific individuals in a specific place and time (Alchourrón and Bulygin 1971: 27–30). *Individual cases* differ from generic cases in that they are "situations or events taking place on a certain occasion (space-time localization) [. . .]" (Alchourrón and Bulygin 1971: 27–30). Therefore, individual cases present themselves as instances of the set of natural properties that define generic cases. However, general norms consider only generic cases in correlation with normative solutions, whereas individual norms relate to individual cases.

Solutions

A & B define *normative solutions* as a generic conduct qualified by a deontic character, i.e., obligation (O), prohibition (Ph), or permission (P). In other words, a normative solution determines whether a generic conduct is obligatory, prohibited, or permitted. Normative solutions, however, must be correlated with generic cases, as the latter establish the conditions (a natural property or set of natural properties) under which a generic conduct is obligatory, prohibited, or permitted.

Notice that A & B construe a concept of norm, as opposed to a concept of *legal* norm. According to their theory, what makes a norm a *legal* norm is determined by whether any given norm belongs to a given legal *system.* Thus, the trait *legal* is not determined by the nature of norms per se, but rather depends on their membership to a system that is qualified as a *legal* system. This understanding of legal norms represents a fundamental shift in analytic jurisprudence. Hans Kelsen, for instance, holds that a legal system is a set of legal norms, where the trait *legal* is a property of norms. According to this logic, a system will be a *legal* system when it is a set of *legal* norms. As Joseph Raz says, "[. . .] Kelsen had always tacitly assumed that the distinctive characteristic of the law, in general, is also the distinctive characteristic of every legal norm" (Raz 1970/1980: 81).

A & B, however, invert this relation: *Legal* is no longer a property of norms but of systems. Therefore, norms will be *legal* norms with reference to the system they are a part of.

Despite notable differences, A & B and Kelsen share common ground in their understanding of the property of being *legal*: Both conceive it as relating to sanctions, albeit on different grounds and with varying modal force. In this sense, according to A & B, any normative system (i.e., a deductive system or a set of statements including their logical consequences that includes at least one norm, see Alchourrón and Bulygin 1971: 48–49) will be a *legal* system if it contains *at least* one norm that imposes a sanction. Kelsen, on the other hand, sustains that a norm must impose a sanction to be a *legal* norm. Hence, norms that do not impose sanctions are not "independent legal norms" (see Kelsen 1960). In this

sense, A & B offer a critique of Kelsen's theoretical reconstruction of legal norms on several fronts and put forth an alternative conception in attempt to overcome these difficulties.

First, A & B's conception of norms does not rely on sanctions as a defining trait. Second, they try to account for other types of statement often found in legal systems that do not necessarily fit their description of norms. Lastly, according to A & B's conception of norms, sanctions are not a necessary component but contingently imposed by certain norms. Therefore, sanctions play a role in guaranteeing the efficacy of the norms which contingently impose them.

The idea that legal codes, statutes, precedent, constitutions, etc., contain sentences or statements other than norms (leaving aside the question of the different conception of norms or legal norms) that are as important as prescriptions (i.e., statements that establish a given act or forbearance as obligatory, prohibited, or permitted) has been argued by H.L.A. Hart in *The Concept of Law* and Joseph Raz in *The Concept of a Legal System*. Hart holds that primary norms (i.e., norms that impose obligations) are only a part of the content that makes up a legal system (Hart 1961/1994: 32). In his view, power-conferring rules, e.g., "[l]egal rules defining the ways in which valid contracts or wills or marriages are made [that] do not require persons to act in certain ways whether they wish to or not," are as important in explaining how the law works as primary rules, i.e., rules that impose obligations (Hart 1961/1994: 27). Moreover, he claims that people use power-conferring rules every day, even more so than primary rules, in a way that the use of power-conferring rules (private or public) is central to understanding how the law functions (see Hart 1961/1994: 27–33).

A & B thus build upon Hart's idea that "a full detailed taxonomy of the varieties of law comprised in a modern legal system, free from the prejudice that all *must* be reducible to a single type, still remains to be accomplished" (Hart 1961/1994: 32) and further this taxonomy by introducing the idea of statements that correlate cases with cases and statements that correlate solutions with solutions.

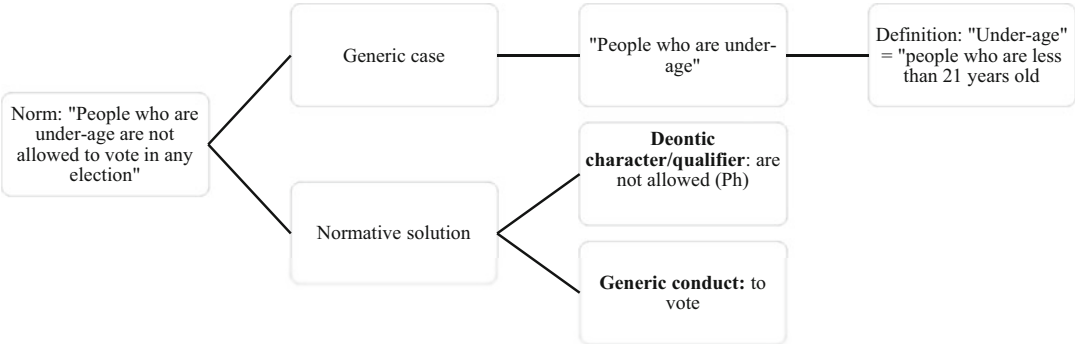
Statements That Correlate Cases with Cases (Definitions or Meaning Postulates)

Definitions or *meaning postulates* are statements that correlate generic cases with generic cases (Alchourrón and Bulygin 1971: 60). These types of statement are typically employed to define legal concepts, for example, a statement in a civil code defines the concept of being "underage." A & B draw an example of a statement contained in the Argentine Civil Code that states that "[p]ersons who are not 21 years old are underage" (Alchourrón and Bulygin 1971: 60). In their view, this definition of "under-age" (or any other statement of the sort) can be explained in terms of a correlation of "the *case* characterized by the property of being 'less than 21 years old', with the *case* characterized by the property of being 'underage'" (Alchourrón and Bulygin 1971: 60).

According to this example, being "underage" and "being less than 21" are *cases* because they are natural properties, i.e., circumstances or situations. Similarly, they are generic because they do not refer to specific individuals, nor do they specify a particular space and time. The idea is that definitions or meaning postulates do not fall within the definition of norm, for they do not determine something as obligatory, prohibited, or permitted but are nonetheless an important part of legal systems.

Although definitions are not norms, they work together with other statements that *are* norms to produce normative consequences. For instance, the statement that people younger than 21 are underage in Argentina is relevant to other statements, mainly norms. Suppose that a different statute or code in Argentina has the following statement: "people who are underage are not allowed to vote in any election." This is an example of a norm that closely relates to our previous definition of "underage."

First, it is a norm because it correlates a generic case with a normative solution. The generic case here refers to the circumstances under which people are not allowed to vote, whereas the normative solution refers to the generic conduct qualified by a deontic character. For example, the following



Alchourron, Carlos Eduardo, and Eugenio Bulygin: Types of Legal Statement, Fig. 1 Example of norm

statement can be broken down as follows and hence be described as a norm (Fig. 1):

The definition (correlation of a generic case with a generic case) of "underage" in the Argentine Civil Code is thus relevant in specifying the circumstances under which people cannot vote in elections held in Argentina. By analyzing these two statements together, a new formulation of the previous norm can be obtained, i.e., the correlation between a generic case ("people who are less than 21 years old") and a normative solution ("are not allowed to vote").

Notice that A & B's conception of norms and other types of statement like definitions differs from the two distinct explanations offered by Kelsen. Kelsen's view is that statements without sanctions are *legal* norms (although not independently so) if (a) they are related to norms that impose sanctions or because (b) they are fragments of other norms that impose a sanction. In the first case, such statements would be conceived by Kelsen as dependent norms: "[d]ependent norms are, finally, also those that further determine the meaning of other norms, by defining a concept used in a secondary norm [. . .] This article defines 'murder'; however, the article has normative character only in connection with another article that says: 'If a man commits murder, the authorized court ought to impose the death penalty'" (Kelsen 1960: 57–58). In the second case, they would be conceived as parts of larger statements that do impose sanctions and are thus *legal* norms (see Kelsen 1945). In the words of A & B, "[. . .] such sentences are not norms but fragments of norms, which must be integrated with other sentences in order to form complete norms" (Alchourrón and Bulygin 1971: 58–59).

In summary, unlike Kelsen, A & B hold that the *legal* status of definitions and other types of statement does not rely on their connection with other norms or statements that impose sanctions (in Kelsen's terminology, "independent" legal norms). Neither are they fragments of other larger statements that contain sanctions. In other words, A & B sustain that both norms and definitions are *legal* statements to the extent that they *belong* to a legal system, and in this sense, they hold the same status.

Statements That Correlate Solutions with Solutions

Recall that solutions or, more precisely, normative solutions determine whether a generic conduct is obligatory, prohibited, or permitted. A & B identify two possibilities regarding statements correlating solutions with solutions: (a) statements that "define the extent of a right" and (b) genuine norms.

Statements That Define the Extent of a Right

A & B claim that such statements can be conceived as meaning postulates "especially when they define the extent of a right" (Alchourrón and Bulygin 1971: 61). To illustrate such statements, they use the articles in the Argentine

Alchourron, Carlos Eduardo, and Eugenio Bulygin: Types of Legal Statement, Fig. 2 Example of statements that define the extent of a right

Civil Code that establish "the rights and obligations of the usufructuary" as an example (Alchourrón and Bulygin 1971: 61). They hold that these articles can be conceived as meaning postulates (or a definition of usufruct) because they "determine the extent of the real right of usufruct" (Alchourrón and Bulygin 1971: 61). In this example, the normative solutions would look as follows (Fig. 2).

The graphic to the right is clearly a normative solution, for it contains a generic conduct that is qualified by a deontic character. In the examples offered, "to perceive industrial, natural, or civil fruits" (generic conduct) is a right of the usufructuary and is therefore permitted (P). Likewise, "[t]o use the good as would the proprietor" (generic conduct) is an obligation (O). However, the graphic to the left is not as clear an example of a normative solution. Perhaps, what A & B have in mind is that "being an usufructuary" is a normative solution in the sense that such character can only be acquired or constituted through norms contained in contracts, wills, civil laws, etc. In some cases, civil laws may allow (permit) a person to become an usufructuary through, e.g., a contract or a will. In other cases, civil laws may obligate (O) a person to acquire such a condition.

However, this does not seem to be a satisfying explanation. While it is true that being an usufructuary is a property acquired on behalf of norms (generic cases correlated with normative solutions), it does not appear to be *in itself* a normative solution in A & B's terms. An example like this could be better understood as a *normative property* (as opposed to natural properties present in generic cases) correlated with a *normative solution*, where a *normative* or *deontic property* could be defined roughly as a nonnatural property conferred by virtue of a legal statement.

Genuine Norms

A & B claim that "a sentence correlating a solution with another solution can also be a genuine norm" (Alchourrón and Bulygin 1971: 61). The example they provide is "a law imposing the obligation of paying a special tax on owners of real estate" (Alchourrón and Bulygin 1971: 61). This obligation goes beyond obligations imposed on proprietors, as real estate owners are a specific type of proprietor. According to A & B, "being an owner of real estate functions here like a case, but it is a case characterized by deontic properties and not by natural ones" (Alchourrón and Bulygin 1971: 61). Nonetheless, it is once again unclear why a deontic or normative property would qualify as a normative solution in their own terms, for a normative solution requires a generic conduct to be qualified by a deontic character, and neither of these components is present in the formulation "being an owner of real estate."

Perhaps, modifying their definition of norm would be a viable solution to the difficulties noted earlier. Thus, extending the idea of generic cases to include normative properties in addition to natural properties seems like a plausible solution. According to this framing, norms would be defined as generic cases (i.e., a set of natural properties, normative properties, or a combination thereof) correlated with normative solutions, in such a way that the previous example could be adequately described as a norm. Notice that A and B use the term "genuine norm" to describe statements like the one that imposes a special tax for owners of real estate.

Conclusion

If the previous critiques are accurate, there would be only two types of legal statement: norms and

definitions or meaning postulates. While these statements would in no way be an exhaustive description of the diverse statements contained in legal systems, A & B's contribution to the problem of the typology of legal statements and the definition of "norm" and "legal system" is significant. In fact, their understanding of legal statements — their definition and structure — represents a solution to the problem of the individuation of laws, a related problem addressed by Joseph Raz in *The Concept of a Legal System* (see Raz 1970/1980: 72–72, 140–147). Moreover, how norms and other types of legal statement within a legal system are conceptualized is directly related to the problem of "what exactly are the principles underlying the jurisprudential division of the law" (Raz 1970/1980: 72).

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Alexy, Robert: On Rules and Principles

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Introduction

Notwithstanding a mere classification of norms, in its plainest and initial understanding, Alexy's distinction between rules and principles is the cornerstone of a systematic comprehension of law, encompassing multiple and diversified assertions that compound what might be qualified as a complete theory of law. As the starting point of the *principles theory*, Alexy's contraposition between rules and principles has implications in various legal fields, such as, and just naming a few, the theory of norms, the role of proportionality, the methodological operations in the application of law, or the theory of rights. If one takes into account the new framework created in legal science, its large scope, the amount of research made underneath, and its diffusion, Alexy's *principles theory* can even be seen as a paradigm shift in legal science.

The Opening Criterion of Distinction

Alexy's distinction between rules and principles is based, at a first level, on a criterion regarding the type of satisfaction each kind of norms has when applicable. This means, under this criterion, that principles are norms that can be satisfied in varying degrees, depending on the grade of satisfaction not only on what is possible as a matter of fact, empirically, but also on the limits given by other norms, no matter if other principles or rules (Alexy 2000: 295). Therefore, and since their applicability is just externally limited by the factual and legal possibilities present, principles are norms that require something to be realized to its greatest extent. They are, thus, and for this reason, *optimization requirements* (Alexy 2002: 47). Differently, rules are norms that are always satisfied or not. If a rule is validly applicable, it requires exactly what is defined in its content, without any margin of variation while governing a case. From this follows that rules, as Alexy puts it, are *fixed points* on the field of the factually and legally possible (Alexy 2002: 48).

Among the various classifications legal science uses to distinguish rules from principles (Pino 2016: 72), the distinction in Alexy has to be qualified as a strong one. It is a qualitative distinction, separating rules from principles through their substantial properties or, in other words, on the basis of a distinct categorical nature. Accordingly, it

does not express a mere quantitative difference, as it is typical in weak distinctions, frequently supported on different grades of generality purportedly recognized in rules and principles (Verhej et al. 1998: 3). In another hand, Alexy's distinction may also be qualified as "exclusive," in the sense that it exhausts all norms conceivable within a legal order; the so-called "Exclusion Theorem" (Bäcker 2011: 57). The exclusive character of the distinction in Alexy implies, consequently, that any norm is necessarily a rule or a principle (Alexy 2000: 295).

Rules and Principles in Conflicts of Norms

The first-level criterion is complemented by other criteria. One of them is the way both kinds of norms have their conflicts solved. In what regards rules, when more than one are applicable but have incompatible legal consequences, only two outcomes are admissible: (i) one exception in recognized in one of the rules; (ii) one of the norms is qualified as invalid (Alexy 2002: 49). Differently, when principles collide, a solution is obtained through balancing: principles with different legal consequences are weighted under the circumstances of the case at hand, and one principle takes priority against the other. This means that when principles collide, no issue of validity is at stake, as no exception is recognized in any norm, given the fact that principles in collision just lead to a relation of precedence (Alexy 2002: 50). Obviously, and in opposition to rules, a principle can take precedence in one case and be defeated in another.

From this follows that, for Alexy, rules and principles have distinct prima facie characters (Alexy 2002: 57). While principles, as *optimization requirements*, are not definitive commands because their applicability to a case depends on the weighting carried out with the opposite principle, rules are not definitive commands only for the reason they are subject to accommodate exceptions, whenever this follows from an opposite principle, directly or because it supports the incompatible rule (Alexy 2002: 58; Brożek 2012: 209). Taking into account this specific prima facie character of rules, Alexy frequently stated the broader and global opposition of principles as *optimization requirements* versus rules as *definitive commands* (Alexy 2014: 512).

Criticism and Refinement

The understanding of principles as *optimization requirements* faced some relevant criticism (Aarnio 1997: 27; Sieckmann 2011: 29). The main one was that optimization requirements are commands that can be realized or not, which means that they cannot be satisfied in various degrees: on this basis, the concept of *optimization requirements* would not be suitable to define the difference between rules and principles (Aarnio 1997: 27). This has led to the subsequent distinction between *commands to be optimized* and *commands to optimize*: the former describes the *ideal ought*, which is what has to be transformed in a *real ought* through optimization, while the latter just refers to something that has to be done, in the sense of a command not to be optimized but fulfilled by optimization (Alexy 2003c: 109). This distinction clarifies, thus, what is meant by *optimization requirements*. They are *commands to be optimized*, a refinement that does not justify, however, the abandonment of the initial concept, given the fact that it expresses in an altogether straightforward way the nature of principles (Alexy 2000: 300).

Within this framework, the concept of *ideal ought* became central for the distinction between rules and principles, since a correspondence between rules and *real ought*, on one hand, and principles and *ideal ought*, on another, is carried out (Alexy 2011: 16). Thus, if "Op" is a rule, then it expresses a *real ought*, where to do "p" is required without taking into account other opposite duties or rights; it is a definitive ought. However, if "Op" is a principle, then it expresses an ideal ought, which is an obligation not yet relativized to the actual and legal possibilities (Wang 2010: 47). It is a prima facie (or *pro-tanto*) ought, more appropriately represented as "O Opt

Op," where both optimization and the object of optimization are mandatory. As an ideal ought (O_i), a principle is only a reason for that definitive ought, but it implies a definitive ought when entering into a normative conflict (Alexy 2011: 24). This logical structure of principles has been also criticized, namely, on the logical function of the element "Opt" (Alonso 2016: 54).

Subsumption and Balancing

The distinction between rules and principles has a major projection on the operations performed to apply law to a case: while rules define the consequence for a case through subsumption, a deductive scheme, principles are applied by balancing, an arithmetic scheme (Alexy 2003a: 433). Despite the fact that Alexy presents these operations, subsumption and balancing, respectively, connected to the opposition between rules and principles, it is important to notice that they are not mutually exclusive: even though submitted to balancing, principles have their application also dependent on a previous subsumption (Alexy 2011: 22).

Balancing is the specific basic operation for the application of principles. Regardless, now, how principles are precisely weighted in a concrete case, structurally balancing will always confront two or more principles with incompatible legal consequences under some factual circumstances. Given that there is no absolute precedence between principles, at least at the same formal level, balancing is exactly the operation used to define the conditional prevalence of a principle against another in a strictly circumstantial basis (Alexy 2002: 52). Hence, balancing will have the outcome of a legal consequence, the one assigned to the prevalent principle, for the facts that have called the collision between the principles at hand. This is what Alexy has designated as the "Law of Competing Principles," formulated as follows: "the circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence" (Alexy 2002: 54). Thus:

1. If P_1 takes precedence over P_2 in circumstances C and if P_1 has the legal consequence Q, then the rule of the case is C→Q.

Balancing and Proportionality

Based on principles as *optimization requirements*, the theory of principles establishes a close connection between principles and proportionality. In Alexy's own terms, principle theory implies the principle of proportionality, and the principle of proportionality implies principle theory (Alexy 2000: 297). The consequential meaning of this is that principles are applied under the normative framework given by the three subprinciples of proportionality: (i) appropriateness, (ii) necessity, and (iii) proportionality in a narrow sense. The first and the second regard the factual possibilities of a principle as an *optimization requirement*, expressing a Pareto-optimality. Thus, if a measure M interferes with P_1 in order to achieve the satisfaction of P_2, but it is not suitable for that purpose, then the optimization of P_1 and P_2 imposes that M has to be abandoned: it is not appropriate. A similar scheme is valid for necessity. If measure M_1 interferes with P_1 in order to achieve the satisfaction of P_2, but there is another measure M_2, that satisfies P_2 similarly with a lower interference in P_1, then the optimization of P_1 and P_2 requires the adoption of M_2 instead of M_1. As these examples show, proportionality, in these two subprinciples, is only attending the empirical possibilities of satisfying P_2. With proportionality in a narrow sense, limitations at the level of the legal possibilities are established. Since the fulfillment of a principle is detrimental to the satisfaction of another, proportionality in a narrow sense defines the legal limits of interference. And this is done through the "Law of Balancing," more precisely the "Substantive Law of Balancing," which reads as follows: "the more the interference in one principle, the more important the realization of the other principle" (Alexy 2000: 298).

Proportionality in a narrow sense does not only encompass a command on the limits of the substantive reasons underlying the interference. It

also entails the "Epistemic Law of Balancing," known as the second law of balancing, regarding directly the conditions of empirical certainty that have to be present in a decision of precedence between principles: it reads "the more intensive an interference in a constitutional right is, the greater must be the certainty of its underlying premises" (Alexy 2002: 419). Thus, this means that proportionality in a narrow sense also covers the empirical basis of the situation that called the collision. It defines, hence, the limits of admissible uncertainty, reproaching interferences not sustained in consistent grades of empirical certainty.

The Structure of Balancing and the "Weight Formula"

Proportionality in the narrow sense, particularly the "Substantive Law of Balancing," shows that balancing can be divided in three stages: (i) establishing the degree of non-satisfaction of a principle, (ii) establishing the degree of satisfaction of the competing principle, and (iii) assessing the question of whether the importance of satisfaction the competing principle justifies the non-satisfaction of the first (Alexy 2003b: 136). Given that the first two stages imply the measurement of intensities regarding the satisfaction and the non-satisfaction of the competing principles, a scale is created to express the levels of interference: *light*, *moderate*, and *serious* (Alexy 2003a: 440). Moreover, and adopting of a geometric sequence of 2^0, 2^1, and 2^2 (1, 2, and 4) to each levels of the scale, from this follows that a formula can be conceived for the purpose of evaluating the concrete weight of a principle in a specific case: $W_{i,j} = I_i/I_j$, where I_i stands for the value of the intensity of interference with a principle P_i and I_j stands for the value of importance of the competing principle P_j, assigned with the hypothetical intensity of interference caused by omitting the interference in P_i. (Alexy 2003a: 444). Being this the most elementary version of what was called the "Weight Formula," it works as a tool to define the outcome of balancing: if the quotient is higher than 1, it means that P_i takes precedence to P_j; if the quotient is lower than 1, it means the opposite. If, however, it leads to a stalemate, then the competing principles are a scenario of structural discretion.

Despite the relevancy of intensities of interference for the definition of conditional precedence, balancing also convenes the evaluation of the abstract weight of principles (Alexy 2003a: 446). This comes from the assessment that principles can have different weights – or importance – independently from the concrete case that provokes the balancing, with, for this specific reason, possible autonomous consequences on the balancing outcome (Pulido 2006: 108). With the addition of a third pair of variables representing the "Epistemic Law of Balancing," the most common version of the "Weight Formula" is obtained: besides intensity of interference and the abstract weight of principles, the equation also includes, even though with a distinct scale of values (2^0, 2^{-1} and 2^{-2} or 1, 1/2, and 1/4), the variables representing the reliability of the empirical assumptions underlying the case (Alexy 2003a: 447). In this version, the formula is

$$W_{i,j} = \frac{W_i I_i R_i}{W_j I_j R_j}$$

This is what might be called as the "normal" version of the "Weight Formula." This version, however, was also a starting point for other versions. Particularly: (i) the "Extended Formula" and (ii) the "Refined Complete Weight Formula." The "Extended Formula" has the same structure and encompasses the same variables; however, it accommodates the cases in which there is more than one principle in one or both sides of the conflict. Thus, and just in addition, the divisor and the dividend can have other sets of the same variables assigned to other principles (Alexy 2002: 409).

The "Refined Complete Weight Formula" expresses a change of broader scope. It describes the idea that the second law of balancing is not only about empirical premises but on the underlying epistemic premises, entailing both normative and empirical assessments: the reliability of knowledge on the applicable law and on the empirical assumptions. For this reason, the reliability variable has to be divided in two: R^e for empirical reliability and R^n for normative reliability. With this extension on the epistemic side of the formula, a significant consequence occurs: the

effective impact of lower than 1 epistemic values on the substantive values. As Alexy states (Alexy 2014: 515), with the lowest epistemic values in both the empirical and the normative variables, the substantive values are decreased into a point that even the strongest substantive reasons for interference are undermined. Accordingly, this version of the formula gives a much better expression to the "Epistemic Law of Balancing." In this version, the formula is

$$W \frac{W_i I_i R_i^s R_i^n}{W_j I_j R_j^e R_j^n}$$

It is almost endless the list of criticism that has been made to the "Weight Formula," targeting different aspects such as the concept of abstract weight or importance of a principle (Sieckmann 2010: 113) or the indeterminacy regarding how are the scales of measurement to be determined (Jestaedt 2012: 164). However, a simple point regarding its "function" has to be stressed. The "Weight Formula" is not an equation purported to give a mathematical response to a conflict of norms that leads to a balancing; it is a scheme for the application of law, and, as such, it is just a rationalization of an evaluative intellectual process (Pulido 2006: 109; Klatt 2012: 9). In Alexy's own words, it is nothing other than a mathematical reconstruction of the Law of Balancing with its link to a second Law of Balancing that refers to epistemic certainty (Alexy 2016: 67).

Conclusion

Alexy's distinction between rules and principles is the first step of a complete theory of law, entailing a comprehensive understanding of its structure, regarding not only the differences between those two kinds of norms, but also what Alexy calls the two basic operations in the application of law: subsumption and balancing. If the former was already consolidated in the legal field, it is on the later that Alexy's principles theory gives a totally new insight: balancing is the basic operation to be carried out when principles have to be applied, structured as a process for the solution of a collision of two or more norms that are *optimization requirements*. As the basic operation for the application of principles, balancing convokes proportionality, and proportionality, specifically with its "substantive" and the "empirical" laws, establishes the conditions for the outcome: a deontic solution given by the prevailing principle and the relevant facts of the case. It is within and for the process of balancing that Alexy formulates the "Weight Formula," an equation that aims to rationalize balancing, where the collision is solved by assigning numerical values, in specific scales, to three variables: intensity of interference, abstract weight of the principles at hand, and reliability of the empirical assumptions. This version of the formula has been changed into a new one, designated "Refined Complete Weight Formula," in order to accommodate the idea that the second law of balancing is about the underlying epistemic premises of balancing, entailing both normative and empirical assessments.

Cross-References

- ▶ Alexy, Robert: Philosophy of Law
- ▶ Principles
- ▶ Rights: General
- ▶ Rights: Social Rights

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Alexy, Robert: Philosophy of Law

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Introduction

Robert Alexy's theory of law is considered a holistic and systematic approach, which covers most of the main areas of legal philosophy. This holistic and systematic approach can be summarized under the concept of *institutionalized reason*. This concept encompasses the idea that the nature of law has two necessary dimensions: an *institutional or real dimension* and a *rational or ideal dimension*. The *institutional or real dimension* is characterized by legal authority and social efficacy. The *rational or ideal dimension* is symbolized by the claim to correctness, necessarily raised by every participant involved in the provision of legal systems as a whole, legal norms or judicial decisions. Both, the general idea of *institutionalized reason* and its specification in terms of the *dual dimension* of law, can be founded in the extensive work of Robert Alexy. This entry will be developed in three steps, in order to expose Robert Alexy's three main theses and connect them with the very ideas mentioned above.

A Theory of Legal Argumentation

Alexy's Theory of Legal Argumentation is a theory about the concept and structure of practical and legal reasoning. Its core thesis is the *special case thesis*, which states that legal argumentation is a special case of general practical discourse. It is practical while legal discussions are concerned with practical questions – that is, what should or shouldn't be done. It is a discourse because these practical questions are deliberated within the framework of a certain process of argumentation, in which participants must necessarily claim correctness. However, it is a special case in the sense that is bound to statutes, precedents, and the system of law elaborated by jurisprudence.

There can be objections against each of these three features. Thus, it is debatable whether legal discourses are not concerned with substantiating normative statements, but rather with the establishment of facts. However, and even though it is true that sometimes a legal debate can be focused on the truthfulness of facts, this does not preclude the justification of the normative premise that allows to qualify them and support legal decisions.

Another objection states that legal argumentation cannot be considered a discourse when no claim to correctness is raised within its field. In this sense, the actual motivation of participants in the legal process is normally oriented not to correctness but rather to the desire to achieve their own advantage (Habermas 1996, p. 231). However, legal argumentation cannot be simply captured as a mere strategic undertaking, like a process of negotiation or imposition. It is assumed that participants in legal discourses will demand a claim to correctness. This claim to correctness implies a claim to justification, that is to say, that every rational person would have to agree with the reasons supporting certain viewpoint. Anyone who expressly denies the claim to correctness enters into a performative contradiction, with implicit rules carried by the assertion.

Finally, it can also be subjected to debate whether legal argumentation is not a special case of general practice discourse, but rather an autonomous normative discourse. Nonetheless, it is simple to demonstrate the inextricable connection between legal discourse and general practice discourse. First of all, legal discourse itself is a requirement of general practice discourse. Second, there is a partial correspondence in the claim to correctness. In this sense, the claim to correctness in legal discourse does not relate to whether or not the normative statement in question is absolutely rational, but rather to whether it can be rationally justified within the framework of the valid legal order. However, this does not mean abandoning general practical rationality. The claim to correctness in legal discourses comprises both a fit in relation to legal system and correctness in the sense of justice. Third, there is a structural correspondence between the rule and forms of legal discourse and those of general practical discourse. Fourth, legal arguments sometimes presuppose normative premises, which demand a justification from the point of view of general practice discourse.

A Theory of Constitutional Rights

Alexy's Theory of Constitutional Rights seeks to prove that crucial problems related to constitutional rights, such as determining the content and limits of rights, rationally justifying constitutional decisions, or delimiting the adequate distribution of competences, can be solved through the norm-theoretic distinction between rules and principles. Alexy states that the difference between rules and principles is a structural one. In this sense, each norm can be either a rule or a principle. Principles are *optimization requirements*, meaning norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. This implies that principles can be satisfied in varying degrees and that the exact degree of their satisfaction depends on what is factually and legally possible. Rules are *definitive commands*, meaning norms which require realizing something to the exact degree of fulfillment they demand, neither to a greater or lesser extent. This implies that rules are always either fulfilled or not because they contain *fixed points* in the field of what is factually and legally possible.

The structural distinction between rules and principles is especially highlighted when analyzing their behavior in situations of normative contradictions. Thus, conflicts of rules take place in the *dimension of validity*. This means that when two rules enter into a conflict, it can be solved only by declaring one rule invalid or introducing an exception clause to one rule. On the contrary, collisions of principles take place beyond the *dimension of validity*; they take place in the *dimension of weight*. When two principles enter in a collision, it cannot be solved by declaring invalidity or by introducing an exception clause. Rather, the principle with greater relative weight according to the specific circumstances of the case must receive priority. For this reason, under certain circumstances, one principle can take precedence in front of the other, but under other circumstances, the relation may be totally opposed. The way to determine which principle deserves priority is by means of balancing method. As a result of balancing, a new legal rule can be substantiated, whose *protasis* is compounded of the circumstances in which principle collide and whose *apodosis* is the consequence that demand the principle which takes

precedence. The foundation of this rule is known as the *law of colliding principles* and can be formalized in this way:

$$
\begin{array}{lll}
\text{(K)} & (1) & (P_1 \,\mathbf{P}\, P_2)\, C_1 \\
 & (2) & P_1 \rightarrow OR_1 \\
 & (3) & C_1 \rightarrow OR_1 \qquad (1) \text{ and } (2)
\end{array}
$$

The proposition (1) represents a normative premise, in which it is justified that under the circumstances "C_1" the principle "P_1" takes priority in relation to the principle "P_2". The proposition (2) symbolizes a second normative premise, which states that from "P_1" derives the consequence "OR_1". The proposition (3) is the rule resulting from balancing, whose *protasis* are the circumstances "C_1" and its *apodosis* is the consequence "OR_1".

However, how the premise (1) should be justified may be questioned. The main issue is how can it be asserted that, regarding certain circumstances, one principle deserves priority over another? This leads directly to the structure and rationality of the balancing method. According to Alexy, the structure of balancing can be derived from the very concept of a principle. Thus, principles are norms which require optimization in relation to factual and legal possibilities. Therefore, when a principle is fulfilled in a sub-optimum grade of realization, its priority can be justified. The way to demonstrate that a principle is fulfilled sub-optimally is through the well-known test of proportionality. In this way, from the command of optimization, regarding the factual possibility, it can be derived the sub-tests of suitability and necessity. In accordance with them, any adopted means, which limits the grade of realization of a principle, should be either fit or necessary to promote a legitimate goal (Clérico 2001). Meanwhile, from the command of optimization, regarding the juridical possibilities, it can be derived the sub-test of proportionality in the narrow sense. This last one examines if the relevance of the reason supporting such means is proportional to the intensity of the limitation of a right. The internal structure of this last sub-test is represented by the *law of balancing*, which states: "The more is the grade of no satisfaction or affectation of a principle, the more should be the importance of the satisfaction of the other" (Alexy 1986, p. 146). In summary, according to the proportionality test, a principle is fulfilled sub-optimally – and deserves priority – when its limitation is neither adequate nor necessary, to promote a legitimate goal or when the promotion of the goal is not important enough to justify its intervention.

Too many objections have been raised against the principle's Theory of Constitutional Rights. Unfortunately, there is no place here to consider all of them. Hence, I will only concentrate on two critiques that have been raised from the perspective of the theory of norms and the constitutional theory, respectively. The first objection states that conceiving principles as *optimization requirements* would transform them from norms to values, which play a very different role in the logic of argumentation (Habermas 1996, p. 255). But this critique is not accurate at all. There is no doubt that norms and values are conceptually different. Norms are comprised of deontological concepts such as the command, the prohibition, and the permission. On the contrary, values are comprised of axiological concepts such as the good and the bad, the best and the worst. Whenever *optimization commands* are commands, they belong to the realm of deontological concepts and therefore to the realm of norms. Besides, norms and values do not differ in reference to the role they play in practical reasoning. On the one hand, collisions of norms can be solved throughout balancing, according to the specific circumstances of the case. For instance, when we ignore the norm which forbids lying, through a white lie, in order to comply with the norm that bans hurting a friend who is starting a diet. On the other hand, there can be definitive values as a result of balancing different evaluative criteria. For example, somebody can have a definitive reason to buy a certain car after considering all relevant evaluative criteria such as its velocity, security, and price, among others. This shows that norms and values are similar in relation to their structural properties.

The second objection states that interpreting constitutional rights as *optimizing requirements*, which can be balanced with (and therefore restricted by) consequential reasons, deprives them of their greater justificatory force in comparison with policies (Dworkin 2006, p. 26). Actually, rights prescribed by principles could not be considered as "trumps", in the sense that they will always take priority over the argument of policies in legal argumentation. However, one may doubt that rights can be seriously understood as "trumps". There seem to be situations where we consider that certain restrictions to rights are justified to promote the general welfare. For example, when we tolerate a limitation of our freedom of movement, caused by the installation of traffic lights. Therefore, the issue is whether interpreting rights as objects of *optimization requirements* leads to a total loss of their special justificatory force. In this point, the debate remains open. According to Alexy, the normative force of constitutional rights is guaranteed by virtue of three reasons. Firstly, principles that prescribe rights can be only limited by legitimate goals, i.e., goals constitutionally allowed or commanded. Secondly, limitations of rights should be proportional. In line with the *law of balancing*, the more intense is the limitation of a right, the greater its capacity for resistance. This implies that very serious affectation of rights can be very difficult to justify. Finally, in some situations, rights may exhibit a prima facie presumption in their favor, which reverses the burden (and demand a greater weight) of argumentation.

The Non-positivistic Concept of Law

Alexy's concept and validity of law (translated in English under the name of *The Argument of Injustice. A Reply to Legal Positivism*) attempts to bring clarity into the debate between legal positivism and legal non-positivism. All concepts of law derive from the interpretation and weighing of three elements: (1) due enactment, (2) social efficacy, and (3) substantial correctness. Anyone solely concentrating on due enactment and social efficacy, not giving any weight to substantial correctness, advocates a positivist concept of law. Anyone who, besides due enactment and social efficacy, adds substantial correctness advocates a non-positivist concept of law. According to Alexy, from the point of view of participants of legal practice, only the latter is correct.

The core thesis of Alexy's non-positivist concept of law is the *connection thesis*, which holds that there is a necessary connection between law and morality. This necessary connection can be highlighted through the *argument of correctness*. This argument states that the participants in the provision of a legal system as a whole or particular legal norms or decisions raise a necessary claim to correctness, which is not only related to positive law but also to justice. The necessity of claiming correctness can be demonstrated by two simple examples. The first example is about the prime article of a new hypothetical constitution of state *X* which establishes:

1. "*X* is a sovereign, federal and unjust republic".

This article is absurd in a way that cannot be simply captured as conventional, political, or technically defective. The absurdity can only be explained as a conceptual defectiveness. This conceptual faulty arises from a performative contradiction: since the mere act of enacting a constitution encloses an implicit assertion of justice, which is explicitly contradicted by the content of the constitution.

The second example is about a judge who announces the following verdict:

2. "The defendant is sentenced to life imprisonment, due to a wrong interpretation of law".

Again, the absurdity of this ruling is self-explanatory as a conceptual defectiveness. This can be demonstrated through the idea of performative contradiction. The claim to a correct application of law is always raised in a judicial decision. Raising a claim to correctness means, among other things, the implicit assertion that the judgment is fair. This implicit assertion contradicts the explicit assertion that the judgment is wrong. Both examples show that claiming

correctness is conceptually necessary from the point of view of legal participants. Considering that this claim has something to do with justice, it can be concluded that a necessary connection between law and morality exists.

Nevertheless, it may be doubted that those examples are appropriate to prove that participants in legal systems necessarily make a claim to correctness. Thus, Eugenio Bulygin has objected that statement (1) cannot be interpreted as a prescription, because its content does not refer to any action or state of affairs which are the overcome of actions. By contrast, statement (1) should be understood as a political declaration and as such, it can be probably politically inconvenient, but not contradictory (Bulygin 2001, p. 48). Something similar could be said about the statement (2). The expression that qualifies the judicial decision as a result of a wrong interpretation of law should be interpreted as a description of the judge's own opinion, but not as a prescription itself. In this sense, the statement is not part of the judicial decision and it is therefore not contradictory (Bulygin 2001, p. 50).

Alexy has replied to this objection insisting that the speech acts mentioned above can be understood as instances of prescription. First of all, he states that there are real constitutional provisions whose meaning is a prescription, even though they do not refer to actions. For example, the articles of the German Basic Law state: "The German Federal Republic is a federal, democratic and social State". The meaning of this sentence is not interpreted as a mere political declaration, but also as a norm that forbids the enactment of certain norms, such as the introduction of a monarchy or the derogation of social security statutes. Likewise, the same interpretation can be applied to statement (1). Therefore, if (1) can be interpreted as a prescription, the absurdity or performative contradiction remains. Secondly, Alexy states that whether example (2) takes place or not on a judicial decision depends on what is the meaning of judicial decision. The term "judicial decision" can be interpreted either in a narrow or a broad sense. In the narrow sense, a judicial decision only comprises the prescriptions made by the judge to one of the litigants. On the contrary, the broad sense includes not only the judge's prescription but also its foundation or normative support. If one assumes the narrow conception, then the expression (2) is indeed not part of the judicial decision. But if one assumes a broad conception – as Alexy does – then the statement (2) can be part of a judicial decision. Therefore, expression (2) can also be seen as an absurdity or performative contradiction.

Notwithstanding the foregoing, and assuming that Alexy's *argument of correctness* is acceptable, there are different ways in which the *connection thesis* between law and morality can be interpreted. A first possibility is a pure classifying relation, according to which every moral defect in law leads to legal invalidity. A second possibility is a pure qualifying relation, according to which moral defects in law never affect legal validity, but allow participants to criticize it. In accordance with Alexy, both possibilities are mistaken. The first one does not take seriously enough the importance of authority and efficacy in law. The second one cannot explain those extreme cases in which legal certainty is displaced in favor of justice just as Nuremberg trials. Therefore, the only solution is a third possibility, which could be achieved by a combination of the previous two. This third possibility is represented by the *Radbruch's formula*, which states that conflict between legal certainty and justice must be solved in most cases in favor of legal certainty, but this relation cannot be absolute. The priority of due enactment and social efficacy over justice comes to a limit whenever a positive law contradicts justice to an "unbearable degree". This formula can be summarized in this way: extreme injustice is no law. The benefit of the *Radbruch's formula* is that it does not demand a complete congruence between law and morality. It leaves the enactment and efficacious law untouched even if it is unjust. It only installs an utmost limit in law. Therefore, the necessary connection between law and morality should be interpreted as a classifying or qualifying one depending on whether it has exceeded or not the threshold of injustice. Consequently, only when this threshold is breached, we can proceed to the invalidation of positive law.

Conclusion

Although Alexy's three main works are indeed different in time, they can all be captured under the concept of *institutionalized reason*, which reflects the very idea that the nature of law is compounded of both an *institutional or real dimension*, and a *rational or ideal dimension*. This can be evidenced through the analysis of the principal thesis they respectively support. First, the *special case thesis* reproduces the concept of *institutionalized reason*, while the rationality of legal argumentation depends not only on what the valid and effective legal order demands but also on the general practical discourse. Second, the norm-theoretic distinction between *rules* and *principles* reflects the idea of *institutionalized reason*, because rules represent a *real ought*, while principles represent an *ideal ought*. This means that rules are those that have authoritative determination in the field of their factual and juridical possibilities. On the contrary, principles are those which do not have authoritative determination in the field of factual and juridical possibilities and therefore demand a balancing judgment. Finally, the *non-positivistic concept of law* replicates the idea of *institutionalized reason*, while stating that, although there is a necessary connection between law and morality, this relation is not an identical one. This means that any unjust law does not necessarily lead to legal invalidity. Legal invalidity occurs only when law is extremely unjust.

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Al-Ghazali (Abū Ḥāmid al-Ghazālī)

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Introduction

Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī was born in Tus in the region of Khurasan in Persia in 1058 CE. For his education, he moved to the cities of Jurjan and Nishapur. There, he studied with one of the leading theologians of his time, Abū 'l-Maʿālī al-Juwaynī (d. 1085). Al-Juwaynī instructed al-Ghazālī in the creed of one particular theological school, the Ashʿariyya, which he would remain faithful to until his death.

In 1085, al-Ghazālī joined the court of the Seljuq vizier Niẓām al-Mulk. A few years later,

in 1091, Niẓām al-Mulk appointed al-Ghazālī teacher at one of the colleges he had founded, the Niẓāmiyya college in Baghdad, where al-Ghazālī taught law according to the Shāfiʿī school to a large number of students. During this time, he also engaged deeply in the study of Islamic philosophy.

In his autobiography, *The Deliverer from Error* (*al-Munqidh min al-ḍalāl*, composed between 1107 and 1109), al-Ghazālī recounts that, after a few years of teaching at the Niẓāmiyya college, during which his popularity grew, he fell into a spiritual and psychological crisis.

Unable to continue his teaching activity, he left Baghdad and spent the following years traveling, in search for a solution to the existential problem of how one could attain certainty about one's convictions. This was when al-Ghazālī turned to the more mystical tradition of Islam, Sufism, realizing that true knowledge of God was not attained by the intellect alone, but also by mystical experience.

In 1106, he resumed his teaching position, at the behest of the new vizier Fakhr al-Mulk, at the Niẓāmiyya college in Nishapur. After only 2 years, al-Ghazālī retired to his native Tus, where he died in the year 1111 (Campanini 1996; Griffel 2009, 19–59).

Al-Ghazālī's Significance in Islamic Intellectual History and Beyond

Al-Ghazālī was a truly prolific writer. He wrote works belonging to several branches of science as understood in his time, including theology, philosophy, Sufism, jurisprudence, and logic. This is reflective of the fact that in his life he went through different phases in the search of knowledge of God and the world.

In the academic literature, al-Ghazālī is frequently credited with having contributed to transforming the Islamic theological tradition (*kalām*) into a "philosophical theology" (Griffel 2009; Shihadeh 2005), by introducing ideas germane to the Islamic philosophical tradition (*falsafa*) into it. In the centuries before al-Ghazālī, theology and philosophy had largely existed side by side, and their encounters were more characterized by opposition. Islamic philosophers, such as al-Kindī (d. 873, known as "the first philosopher of the Arabs") and Ibn Sīnā (Avicenna, d. 1037), were fascinated by Greek philosophical ideas, which had become accessible to them thanks to the "translation movement" taking place in the eighth and ninth centuries (Gutas 1998). They believed that philosophy expressed the same truth as revealed religion (in the form of the Quran), and consequently developed whole philosophical systems, which were a synthesis of Greek philosophy and Islamic ideas. Islamic theologians, on the other hand, placed their focus on authoritative Islamic sources, such as the Quran and traditions going back to the Prophet Muḥammad (*ḥadīth*). They were suspicious of Greek philosophy, which they regarded as foreign and "un-Islamic." For centuries, Islamic theologians and philosophers were divided not only over the sources of knowledge, but also about concrete doctrines and tenets. Al-Ghazālī's significance lies in inaugurating a trend among theologians to make use of philosophical arguments, concepts, and ideas in their *kalām* works. To name but one example, al-Ghazālī incorporated aspects of the philosophical theory of secondary natural causality into his own theory of causality, and thus broke with the traditional theory of causality of his school, according to which God is the only cause in the entire universe and the appearance of causes in nature is an illusion (i.e., occasionalism) (Adamson 2007; Griffel 2009).

Al-Ghazālī in fact engaged with philosophy to such an extent that his *The Intentions of the Philosophers* (*Maqāṣid al-falāsifa*), an exposition of their main doctrines and arguments, caused Christian thinkers in the medieval ages to consider him a philosopher. Al-Ghazālī, however, did not regard himself as a philosopher, and in his autobiography he explains that he wrote *The Intentions of the Philosophers* in preparation for his aim of refuting certain philosophical doctrines in *The Incoherence of the Philosophers*. Despite al-Ghazālī's critical stance towards certain aspects of philosophy, its influence on his thought is evident.

Philosophy of Law and Social Philosophy in al-Ghazālī

Even though al-Ghazālī taught law and wrote several legal works, his relevance for Islamic jurisprudence takes second place to his relevance for theology and Sufism. This is how both classical Islamic thinkers and modern-day academics perceived him (Rudolph 2019, 67–68). Nevertheless, law did play an important role in al-Ghazālī's thought as a means of ordering society. Till the present day, jurisprudence and Islamic law as the expression of God's prescriptions for humans have enjoyed a special status in Islamic societies. In the minds of many Islamic scholars, past and present, adherence to God's prescriptions is a prerequisite to attaining happiness in the hereafter.

In his exposition of legal theory in his most famous work of jurisprudence, *The Distillation of the Science of the Legal Principles* (*al-Mustaṣfā min ʿilm al-uṣūl*), al-Ghazālī followed the traditional approach taken by the Ashʿarites, the theological school he adhered to. The Ashʿarites subscribed to the so-called divine command theory or divine voluntarism, according to which moral values and legal prescriptions are grounded in God's revelation; they did not exist before God stipulated them. The Ashʿarite position was contrary to the position espoused by another theological school, the Muʿtazilites. They upheld an objectivist position, according to which moral values are real properties of some actions, which can be discerned by human reason, independent of revelation. The same is the case with some legal prescriptions, according to the Muʿtazilites. Following his school's tradition, al-Ghazālī wrote in *The Distillation*: "If there is no statement on the part of the Lawgiver [i.e. God], then there is no judgement. Thus we say: Reason cannot declare anything good or evil . . . and there is no judgement of actions before the arrival of the [revealed] law" (al-Ghazālī 1993, I, 177; Hourani 1985; Reinhart 1995). This shows how closely legal theory was intertwined with theological positions.

Despite insisting that all moral values and legal assessments go back to God's stipulation through revelation, al-Ghazālī highlighted that humans have a natural tendency (*al-ṭabʿ*) to think in moral categories, independent of revelation. He did, however, not infer from this that humans recognize moral values intrinsic to actions (as the Muʿtazilites did). Rather, the human tendency to label actions "good" or "evil" simply points to an inclination (*gharaḍ*) to call something desirable or beneficial "good" and something undesirable or harmful "evil" (al-Ghazālī 1993, I, 179–199, 184). For the exposition of legal theory as part of the science of jurisprudence, al-Ghazālī did not regard this understanding of moral values in terms of personal inclinations as relevant, since he insisted that Islamic law rests entirely on the two authoritative, revealed sources of the Quran and Prophetic traditions.

Al-Ghazālī also affirmed, following the tradition, consensus (*ijmāʿ*) as the third authoritative source of law, and analogical reasoning (*qiyās*) as the fourth and final source. He emphasized that the two sources, while arriving at moral and legal judgment about cases not explicitly covered by the Quran and Prophetic traditions, ultimately rest on them. Al-Ghazālī employed legal and moral categories to classify human actions which were in his time well-established among jurists and theologians, that is, obligation, permission, prohibition, reprehensibleness, and desirability, as well as good and evil (al-Ghazālī 1993, I, 18–19).

In the academic literature, it is highlighted that al-Ghazālī was particularly eager to bring together logic as a branch of philosophy with jurisprudence. He insisted that Aristotelian logic was of great use for jurists, as it would allow them to reach legal judgments through syllogisms that would bring about certainty. Aristotelian logic became known to Islamic scholars in the wake of the translation movement since the ninth century but did not play as important a role in jurisprudence as it did in the rational sciences.

In his *Miḥakk al-naẓar fī al-manṭiq* (*Touchstone of Reasoning in Logic*), al-Ghazālī expressed his critique that jurists often used premises and assumptions in their legal reasoning that did not live up to the standards of Aristotelian logic, and could not bring about certainty and universal validity. In al-Ghazālī's analysis, this was the reason why the law, expounded by jurists

belonging to the different legal schools which had emerged over time, was little consistent and seemed open to all sorts of challenges.

It has been suggested in the academic literature that al-Ghazālī wished to overcome this situation and to rest the law on a more certain basis. His strategy was to show that the four sources from which the law is derived (i.e., the Quran, Prophetic traditions, consensus, and analogy) engender certainty as defined in Aristotelian logic, and that legal arguments can be expressed in syllogistic form.

While al-Ghazālī thought that a firm grasp of Aristotelian logic was the prerequisite for proper legal reasoning, he did not require jurists to always express their arguments in syllogistic form. He said this with particular reference to analogical reasoning. Jurists could continue arguing that "date wine is intoxicating, so it is prohibited, in analogy to grape wine," instead of converting it into a syllogism, "every date wine is intoxicating, and everything intoxicating is prohibited, hence every date wine is prohibited" (al-Ghazālī 1993, I, 116–117; Opwis 2019; Rudolph 2019).

Later influential jurists, such as Ibn Qudāma (d. 1223) and Sayf al-Dīn al-Āmidī (d. 1233), followed al-Ghazālī's example and made use of Aristotelian logic in jurisprudence (Hallaq 1990). Despite this, it appears that in every-day legal practice, formal logic was not used widely (Opwis 2019, 112).

Law and Ethics in Society

Ibn Rushd (Averroes, d. 1198), an important philosopher and jurist who wrote a commentary on al-Ghazālī's *al-Mustaṣfā* entitled *Mukhtaṣar al-Mustaṣfā*, expressed his view that the traditional Islamic science of jurisprudence corresponds to ethics in the Greek philosophical tradition. Both sciences share the purpose of teaching people what the good life is. In contributing to organizing proper life in society, they are both parts of the higher science of politics/governance (*siyāsa*). Al-Ghazālī held a similar view, but he thought that the role of the jurists was to instruct only the common people and the masses, while the intellectual and spiritual elite would be instructed by true scholars with special access to knowledge. Al-Ghazalī therefore followed the notion, common among Islamic philosophers but also other Islamic groups, that society is divided into the common people and the elite, who are distinguished by their intellectual capabilities (al-Ghazālī 1964, 329; Rudolph 2019, 72, 79–80).

In al-Ghazālī's view, not only jurists had an important role to play in society in that they contributed to figuring out the details of how God wanted humans to live; in his estimation, the same was true of theologians and, later on in his career, Sufis. In *The Incoherence of the Philosophers*, he charged the philosophers with disregarding Islamic law, leading others astray, and putting social order at risk (al-Ghazālī 2000, 1–3). Al-Ghazālī was equally critical of certain Sufis who thought that in perfecting their spiritual practice, adherence to the religious law had become irrelevant. Nevertheless, al-Ghazālī did agree with the Sufi principle that humans should have complete trust in God, and shun the transient, material pleasures of society (Campanini 1996, 256).

Cross-References

- ▶ Al-Kindi (Abū Yūsuf Yaʿqūb b. Isḥāq al-Kindī)
- ▶ Aristotle: On Justice
- ▶ Avicenna (Ibn Sīnā; Abū ʿAlī al-Ḥusayn ibn ʿAbd Allāh ibn Sīnā)

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Alighieri, Dante

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Life: Dante and the Legal Culture of his Times

Dante Alighieri (1265–1321) was a Florentine philosopher and poet. Although the exact date of his birth is unknown, in his writings there are plenty of autobiographical references that show him involved in political life and in the struggles of his times between Guelphs and Ghibellines. Exiled from Florence, where he was one of the city priors in 1301 affiliated to the White Guelphs, he was sentenced to death and never came back, supporting with his writings the political program of pacification of Italy led by Emperor Henry VII and traveling during 20 years through central and northern Italy until his death in Ravenna. He is the greatest Italian poet of all time, and his *Divine Comedy* is widely considered the most important poem of the Middle Ages. He is also the author of a number of learned *Epistles* and of some doctrinal works, written partly in Italian (*Convivio*) and partly in Latin (*De vulgari eloquentia*, *Monarchia*). Among these latter, *Monarchia* is the only doctrinal writing Dante completed (see Petrocchi 1983; Gorni 2008; Santagata 2011; Indizio 2013; Inglese 2015).

Although not much is known about Dante's education, his works can be said to represent a great contribution to philosophical, political, and legal doctrines between the end of the thirteenth and the beginning of the fourteenth century, and constitute a major cultural heritage in the West, destined to operate for centuries. As recently put by Justin Steinberg, "unlike his contemporary, the poet-jurist Cino da Pistoia, it is improbable that Dante had any formal training in civil and canon law, and his sporadic references to specific legal texts are concentrated in doctrinal works such as *Convivio* and *Monarchia*. On the other hand, as a convicted criminal and former public official, Dante was immersed in the legal culture of his day, and the *Commedia* is permeated with contemporary juridical rituals of everyday experience: deterrent and retributive punishment; testimony and confession; litigation and sentencing; special privileges, grants, and immunities; amnesties and pardons; and a variety of forms of oaths and pacts. These enactments of the life of law – not his explicit citations of legal doctrine – represent the poet's most profound statements about law and justice" (Steinberg 2013, 1–2). So Dante's celebrated poem, the *Comedìa* or *Divine Comedy*, has been judged a masterpiece whose "literary-theoretical framework is simultaneously and manifestly a legal one" (Steinberg 2013, 1). Therefore Dante's poem reflects the whole complexity of the legal doctrines and debates within the *ius commune*, especially from the point of view of criminal law (so much so, that the *Divine Comedy* may be considered as a criminal law treatise in form of a poem), with its characteristic use of the *contrappasso*, that "'fearful symmetry'

of the language and images" by which Dante "celebrates the transparency of the law as it is stamped on the souls' bodies" (Steinberg 2013, 45; see also Steinberg 2014). In this powerful imaginary representation in which "the two worlds," the earthly world and the otherworldly world, "resemble each other," Dante's poetry and Dante's doctrine unfold "in a suggestive parallel with contemporary legal discourse" (Steinberg 2013, 141–143).

Although this point of observation, not in contrast with the traditional idea according to which Dante "does not present a unified theory of practical doctrine of law," nor with the idea that "his general conception of law, both divine and human, reflect current analyses presented by theologians, by the written corpus of Roman law, and by glossators, lawyers, and jurists" (Armour 2000, 557), the problem of Dante's relation with his doctrinal points of reference in the legal field remains open (see Di Fonzo 2016), because if it is true that Dante "had far greater things on his mind than thinking like a lawyer" (Ross 2015, 369), it is even more true that his great visions "did not prevent him from thinking 'like a jurist'" (Quaglioni 2015, 509).

Dante as a Philosopher-Poet: The Convivio

A larger account of Dante's tendency to face great legal-philosophical themes is revealed openly in the *Convivio*, "a great work with an encyclopedic vocation with which Dante intended to consolidate and revive his mission both as a philosopher-poet" (Inglese 2015, 86) and as a mediator between the great scholars and the public of those, men and women, who did not know Latin. That is the reason why the *Convivio* (literally, "The Banquet"), has been defined as the attempt to offer "a philosophy for the laity" (Imbach 1996). Written in the same years as *De vulgari eloquentia*, probably between 1304 and 1305, the treatise with which Dante exalted the vernacular as a "natural" language, relegating Latin in the role of an "artificial" language, the *Convivio* is also unfinished: only 4 of the 14 projected treatises survive, each of which is introduced by a doctrinal composition in verse (a *canzone*). In perfect opposition to the Aristotelian tradition for which metaphysics is the queen of all sciences, Dante accorded preeminence instead to moral philosophy. As Ruedi Imbach has put it, "it seems indisputable that this transformation of the philosophical project, which culminates in the primacy of practical reason, is directly related to the function that Dante attributes to philosophy: intended for a laic public, it must primarily help men to lead a human life worthy of the name, a life in conformity with the moral and intellectual virtues so perfectly described by Aristotle" (Imbach 1996, 138). Furthermore, it can be said that the great novelty that marks the *Convivio* is Dante's full and enthusiastic adherence, in the fourth treatise, to the doctrine of the universal empire (or *monarchy*) necessary for the good of the human race and rightly belonging to Rome: "Not only that: the legal foundation of the Empire is echoed by Dante [. . .] in the will of God, which determined the entire universal history so that the story of the two holy peoples, the Hebrew and the Roman, conspired to prepare the world for the advent of Christ and for reconciliation between mankind and its creator" (Inglese 2015, 87).

Dante's Political Philosophy: The Monarchia

The same is true for Dante's political philosophy. The wisdom that Dante imagines for the laity is distinguished by a clear predominance of practical reason. This affirmation is confirmed in a third philosophical work of Dante, the *Monarchia*, written in Latin. This treatise, at once political and philosophical, deals with the political consequences of the relation between reason and faith, a problem that at the dawn of the fourteenth century "presents itself as that of the relationship between the Papacy and the Empire" (Imbach 1996, 138–139). Dante's *Monarchia*, probably written between 1312 and 1313 – just before the unlucky end of the Italian campaign of Henry VII, the emperor that Dante had welcomed for he was

bringing peace and justice (Santagata 2012, 257–261; Indizio 2013, 257; Quaglioni 2014, 828–837) – offers an original reinterpretation of the long standing imperial tradition spanning between the Middle Ages and Modernity. It is Dante that echoes and re-elaborates the concept of imperial sovereignty, writing that the empire "is the jurisdiction that includes in its scope any other secular jurisdiction" (*Monarchia*, III x 10), and defining even earlier, in the *Convivio* (IV iv 7), the imperial sovereignty in terms of a universal, supreme, and sacred political function (*officium*) that announces the emergence of a modern conception of sovereignty: "And this office par excellence is called Empire, without adding anything, because it is the commandment of all the other commandments. And so he who is placed at this office is called Emperor, because he is commander of all commanders, and what he says to everyone is law, and for all he must be obeyed, and every other commandment takes vigor and authority from that of him." For Dante, law is the salvific foundation of human society, a bond of human relations as relations of justice, and the emperor is the executor iustitie (Monarchia II x 1), i.e., the executor of the fundamental premise of every action and way of being concerning human relations.

Dante's treatise on political theory was written, just as Prue Shaw has put it, "in the moribund language" which Dante rejected "in favour of the vernacular when writing at full creative pressure," and it expresses ideas which have been descried sometimes "as backward-looking, utopian and even fanatical" (Shaw 1996, ix). Contrary to all this, Dante's *Monarchia* "is not a work of theory divorced from practical experience of politics; rather, it grows out of painful personal experience of political life, and a thwarted desire to participate effectively in the public life of his native city. In another sense, though, the treatise is purely theoretical. Dante is arguing about principles and the conclusions to be drawn from them. The arguments are abstract, concerned to elucidate fundamental truths. At no point does he consider how his conclusions might be implemented in practice" (Shaw 1996, xi).

Dante's Legal and Political Ideals

Dante's *Monarchia* is divided into three main questions, which form the three books of the treatise: first, is monarchy necessary to the good state of the world; second, have the Roman people acquired by right the universal monarchy; and third, does the authority of the universal monarch depend on God immediately or by a minister or vicar of God. The first question develops the philosophical arguments which demonstrate the logical and ontological necessity of the existence of a unique and supreme temporal power as the universal principle of order, that is as a sovereign guarantee of the highest degree of development of humanity in justice, freedom, and peace. The second general question responds to the need to prove the legitimacy of the Empire from the historical point of view, as a providential and miraculous outcome of a contest between peoples in which God's will appears clearly. The third and last *quaestio* addresses the ecclesiological-political dilemma if the Empire descends immediately from God or through the supreme ecclesiastical authority. Dante solves the problem by stating that imperial power derives immediately from God, even though a legitimate reverence to the superiority of spiritual authority over secular power is due to the Roman pontiff. Therefore *Monarchia*, "so often described by later historians as backward-looking and hopelessly unrealistic as a solution to the problems of his age – an age when the restoration of an empire was becoming as increasingly remote likelihood as perceptions of national identity and state boundaries were hardening – was nonetheless judged sufficiently dangerous by his immediate and near contemporaries to merit a detailed rebuttal by a Dominican friar (c. 1327), a ritual burning on the orders of a higher prelate in 1329, only a few years after Dante's death, and, in the fullness of time, a place in the Vatican Index of prohibited books (1554)" (Shaw 1996, xxxii–xxxiii). In spite of that, not only Dante's treatise inspired the great Florentine philosopher Marsilio Ficino to make a translation in 1468 but also many jurists of the following generation to praise its

theories and the Protestant and humanist printers at Basle to make its first print in 1559, together with its first translation into the German language by Basilius Johann Herold, just 5 years after been placed on the Index. Its influence lasted until the beginning of the twentieth century, when Hans Kelsen made it the subject of his first monograph (Kelsen 1905).

Dante's Philosophy of Law

Dante's contribution to philosophy of law can be better underlined if one pays attention to what the author says in the second book of the treatise, when he tries to demonstrate, not only on historical basis but also on a strict philosophical argument, the lawful origin of the Roman Empire. As Peter Armour has put it, "ultimately, for Dante, *ius* is identical with God's will, and *ius* in practice must be whatever reflects and is consonant with God's will; hence God's operations, revealed in the history of the Roman people, were visible signs which proved that its world jurisdiction (the *imperium*) was acquired not by force but *de* iure" (Armour 2000, 558). In *Monarchia* II ii 4–6 Dante says that it is clear that law, being a good, exists first of all in the mind of God; and since everything which is in God's mind is God, and since God most wants himself, it follows that law is wanted by God as being something which is in him. And since God's will and what God wants are the same thing, it still follows that the law itself is the divine will. And further, it follows that the law in wordly things is nothing but an image of the divine will. From this it follows that everything that does not conform to the divine will cannot be a law in itself, and whatever conforms to the divine will is precisely this law. So, Dante says, "to ask oneself if something has been done by law, no matter how different the words are, is to ask oneself if it has been done according to what God wants." This presupposes therefore, that what God wants in the society of men must be considered true and authentic law.

This full identification of the law with the divine will – a clearly voluntaristic thesis (see Fassò 2001, 222–223) – serves as a premise for the long demonstration of the legality of the Roman Empire through the miracles performed by God and witnessed by the greatest writers of poetry and history. Dante writes that the right of Rome to reign over the world will be deduced from incontrovertible signs and from the authority of the wise men ("ex manifestis signis atque sapientum auctoritatibus"), since the will of God is invisible in itself, but the invisible things of God, according to saint Paul in his Epistle to the Romans (1, 20), "are understood and perceived through the things he has done," just like the wax, that bears impressed the seal that remains hidden (Monarchia II ii 7–8). Moreover, in *Monarchia* II v 1 Dante says that anyone pursuing the good of public affairs pursues the goal of the law, and explains that this consequence is proved because "law is a real and personal proportion in the relationship between man and man, which, if conserved, preserves society, and if it is corrupt corrupts it." Dante refuses the definition of *ius* given in the Digest (D. 1, 1, pr.: *ius est ars boni et aequi*, that is "law is the art of knowing what is good and just"), because it does not say what the substance of law is, but "it only describes law through the notion of its use." Finally, Dante gives the reason for his own definition of law, writing (*Monarchia* II v 2): "If therefore our definition actually includes both the substance and the effect of law, and the purpose of any society is the common good of the affiliates, necessarily also the good of every law will be the common good; and it will be impossible for there to be a law that does not pursue the common good." The proof is supported by a quote from Cicero's *De inventione* (I, 68–69), according to which laws must always be interpreted in the direction of the utility of public affairs, because "if the laws are not directed to the usefulness of those that are subjects to the laws, they are laws only in name, in fact, they cannot be laws, since the laws bind men to each other for the common good" (*Monarchia* II v 3).

Dante finally arrives at the conclusion, confirming that anyone who pursues the good of public affairs, pursues the goal of the law, and arguing that if the Romans then pursued the good of public affairs, the affirmation that they pursued the end of the law will be true (*Monarchia*

II v 4). And it is at this point that Dante offers a long series of quotations from the ancient authors, partly from the philosophers, partly from the historians and partly from the poets (Cicero, Livy and Virgil in the first place), identified as the most authoritative testimonies to proof of the providential and salvific role of Romans in their assumption of the universal empire: "That the Roman people has pursued the aforementioned good by subduing the whole world to himself, is declared by his actions, in which all greed that is always contrary to public affairs is banished, and by loving universal peace together with freedom, that saint, pious and glorious people, shows that he has set aside his own particular interests to procure public ones, for the salvation of mankind" (*Monarchia* II v 5).

A New Definition of Law

With these arguments Dante receives and at the same time transforms a long doctrinal tradition concerning the great theme of the bonum commune, cherished by the moralizing literature of the Specula principum, that goes from Aquinas' De regno to Gilles of Rome's De regimine principum. If the idea of the identity of the bonum rei publicae (Cicero's salus rei publicae) with the very purpose of law belongs to the theological-political tradition, the novelty of an almost aphoristic formulation of this problem must be recognized to Dante. The idea that law cannot be altered (corrupted) without corrupting society is a theoretical acquisition that only partly refers to the sources of Dante, first of all to that Digest, criticized precisely the for its "description" of the law as attributed by Ulpian to Celsus. The notion of law put forth by Celsus and interpreted by Ulpian to the effect of making law the one and genuine moral philosophy (vera philosophia) does not provide for Dante – who nonetheless gave a vulgarized version of it in the Convivio (IV ix 8: "law as a written reason is the art of good and equity") – a true definition in the Aristotelian sense, because it does not capture the substance of what one would like to define. The definition in Monarchia means "to center the 'quid est' and the 'quare' of the law, which the words of the ancient jurists had only touched, as if they were concepts that escaped a precise definition or because they were universally known as presupposed or abandoned to the intuition of whoever reasoned on them" (Fiorelli 1987, 83). It is therefore necessary to note the anti-accursian character of this passage of Monarchia, because it is precisely Accursius who declares, in one of his glosses to Justinian's Digest and Institutes, his opposition to the jurists of the previous generation who, like the old Pillio of Medicina, denounced the absence of an appropriate definition of law in the Digest (Quaglioni 2011, 44–45).

Dante's opposition to Accursius' Magna Glossa – something akin to the announcement of the later humanistic attitude – can be equally found in the works of some jurists of the same generation of Accursius, as for instance Odofredus, who in his Lectura super Digesto Veteri also speaks of Celsus' definition in terms of a simple "description," or as the French jurist Jacques de Revigny, master of Cynus of Pistoia (Dante's friend par excellence): it is precisely Jacques de Revigny, as still recalled in the middle of the fourteenth century by Alberico of Rosciate, who on the basis of Placentinus' judgment rejected the hostility of the Accursian Magna Glossa and spoke of Celsus' definition as valid only quo ad effectum, an expression that Dante seems to echo directly (Quaglioni 2011, 44–45).

A Systematic Mind

It is therefore not difficult to admit that in the whole of his vast and composite work, Dante shows a strong and persistent will to offer a theoretical framework widely involved in the philosophy of his time, but also addressed towards a systematic conceptualization that reveals itself above all where his moral philosophy is expressed in a new and original vision of law and society. It has been written, by one of his most recent biographers, that "Dante has a systematic mind, aims at organicity and coherence. The ability to ascend from specific and particular experience data to ever higher levels of generalization is the trait that defines him more than any other.

A theoretical fire devours it" (Santagata 2011, 17). Dante's "sense of law" is not only close to the Roman law tradition that in his time lives vigorously in schools and in practice. In the past, as an understandable reaction to the ideological distortions of the period between the two world wars, the refusal to look at Dante's work from the point of view of legal and philosophical aspects was widespread (see for instance Vinay 1950 and 1962). A never ceased undervaluation of Dante's participation in the legal culture of his time continues to appeal even to no more reliable interpretations of some passages of *Monarchia*, such as in the second book (II ix 20), where we find the famous warning ("sileant," "let they keep silence") addressed to "presumptuous" jurists, who are unable to draw the justice placed in the eternal providence of God, and that, not being able to look at that principle from the heights of speculative reason, must therefore be contained in the enclosure provided by consulting and judging practices.

The Judge of the Dead and the Quick

As Ernest Kantorowicz has put it in his seminal work *The King's Two Bodies* (1957), "it has never been denied that Dante the political philosopher as well as Dante the poet assimilated to the full the political doctrines by which his century was moved. In fact, Dante held a key-position in the political and intellectual discussions around 1300, and if in a superficial manner he has often been labelled reactionary, it is simply the prevalence of the imperial idea in Dante's works – different though it was from that of the preceding centuries – which obscured the overwhelmingly unconventional features of his moral-political outlook. Dante, of course, cannot easily be labelled at all" (Kantorowicz 1957, 451). Underlining that Dante was not a Thomist, even if he quoted Thomas Aquinas everywhere, that he was not a canonist or a jurist, even he quoted canon and Roman law everywhere, Kantorowicz adds: "But who would care in any event to label Dante, the judge of the dead and the quick, a jurist? The difficulty with Dante is that he, who reproduced the general knowledge of his age on every page, every theorem which he reproduced a slant so new and so surprising that the evidence proving his dependency on other writings serves mainly to underscore the novelty of his own approach and his own solutions" (Kantorowicz 1957, 452–453).

Although the political work of Dante was still falsely indicated by Giovanni Gentile, at the beginning of the twentieth century, as one of the early manifestations of a modern and "secularized" vision of power, as indeed, "the first act of rebellion to the Scholastic's transcendence," free "from all supernaturalism" (Gentile 1962, 181–184), the study of Dante's major doctrinal works shows that there was a stronger and a more complex interrelation among his religious, political, and legal concepts. Dante's *Monarchia* is not a work of jurisprudence but it is hard not to recognize its nature as a work of doctrine that crosses boundaries between branches of knowledge, and that, even in the absence of the technicalities of the legal literature, is in intimate relationship with law. It is not sufficient to recognize Dante's confidence "toward Justinian and toward Roman Law in general," or to ask "whether or not Dante Studied Law," as Ernst Kantorowicz did. *Monarchia* is the major text on the medieval doctrine of sovereignty, the supreme secular jurisdiction. Dante's treatise shows a conceptual and lexical structure which is common to theology, law, and politics.

Both Laws

In the vast system of *auctoritates* of Dante's *Monarchia*, the scriptural presuppositions of theology live together with the moral examples of the Latinity and with the principles of the *ius commune*, that is both universal laws, ecclesiastical and secular. Even before *Monarchia* we can clearly see that in *Convivio*, in particular in chapter xii of the fourth treatise, where Dante, commenting the verses 56–60 of the *canzone* "Le dolci rime d'amor ch'i' solìa," displays his entire moral library quoting Aristotle's *Nicomachean Ethics*, the Holy Scripture and the principles of both universal laws ("l'una e l'altra Ragione, Canonica [. . .] e Civile") in the very beginning of their books ("li [. . .] cominciamenti

[. . .] della loro scrittura") (*Convivio* IV xii 9–10). It is easy to understand that the "beginnings of both civil and canon law" must be found in the very beginning of Gratian's *Decretum* (*dictum a*. D. 1, c. 1), where every legal order is put on the evangelical norm "all things whatsoever ye would that men should do to you, do ye even so to them" (*Mt* 7, 12), and on two parallel passages of Justinian's Institutes and Digest (Inst. 1, 1, 3 = Dig. 1, 1, 10, 1), which highlight the precepts of the law, "to live honorably, to injure no one, to give to everyone his due" (*praecepta iuris*: "honeste vivere, alterum non laedere, suum cuique tribuere").

Both laws, "l'una e l'altra Ragione," come together in an unique interaction: the same interaction by which Dante will be able to say, in the tenth *canto* of his *Paradise*, vv. 104–105, that Gratian "to either forum lent/[. . .] help," "l'uno e l'altro foro/aiutò," i.e., "helped both jurisdictions, spiritual and secular." If we read these famous verses in the light of *Convivio*, we cannot interpret them the way some legal historians of the past suggested. They were, in fact, convinced that Dante was referring "to Gratian's successful attempt to reconcile theology and canon law" (Calasso 1954, 396), thanks to the distinction between the internal forum and external forum, between the court of conscience, which judges according to the laws enshrined by God himself in men, and the court of men, which judges according to the laws of men. It has to be observed that nowhere in Gratian's *Decretum* there is any trace of such formulations. Gratian's *Concordance of discordant canons* was realized without no need to separate theology from law. Indeed, Gratian knowingly held tight the connection between theology and law, and put the natural law, contained in the Bible and in the Gospel, in relationship to the legal sources, both ecclesiastical and secular: "l'uno e l'altro foro/aiutò sì che piace in Paradiso," i.e., "to either forum lent/such help, as favour wins in Paradise." The evidence of the circularity that characterizes the works of Dante compels us to recognize that the verses of the tenth canto of *Paradise* are the purest expression of Dante's legal universalism and of Dante's political theology, which is consistently dualistic, while at the same time opposed to any disharmony between the spiritual and the secular, just as dualistic is the "harmony from dissonance" of Gratian's *Decretum* or *Concordia discordantium canonum* (Kuttner 1961; Gilson 1972).

A great medievalist and a great interpreter of Dante's spirituality, the late Raoul Manselli, has written: "Dante effectively highlights the importance of the *Decretum* for both civil and religious life, as an aid towards the achievement of a reciprocal concordance between balance and harmony; in these verses there are also evidences of the spiritual consonance of the poet, whose aspiration is precisely to achieve an autonomous, but not indifferent, convergence of civil and religious power" (Manselli 1970).

Cross-References

▶ Authority of Law
▶ Sovereignty and Human Rights

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Al-Kindi (Abū Yūsuf Yaʿqūb b. Isḥāq al-Kindī)

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Introduction

Not much is known about al-Kindi's (c. 801–c. 873) life, but some indications can be found in Arabic biographical sources. Abū Yūsuf Yaʿqūb b. Isḥāq al-Kindī was probably born in Kufa in present-day Iraq, toward the end of the eighth or beginning of the ninth century CE. His father, Isḥāq b. al-Ṣabbāh, held the position of governor there. As al-Kindī's name indicates, his family traced their ancestry back to the kings of the South Arabian tribe of Kinda, and notably to a companion of the Prophet Muḥammad.

Al-Kindī received his education in the cities of Kufa, Basra, and Baghdad, which were important cultural centers at that time. He earned a reputation as scholar and physician at the caliphal courts, and enjoyed the support and patronage of the two Abbasid caliphs al-Maʾmūn (r. 813–833) and al-Muʿtaṣim (r. 833–842). To the latter he dedicated his *On First Philosophy* (*Fī al-falsafa al-ūlā*), and to his son Aḥmad, whose education he was entrusted with, a number of other works.

Al-Kindī played an important role in the so-called "translation movement," which had begun several decades before his birth and reached its peak at his time. The translation movement was undertaken by several Abbasid caliphs, with the aim of translating Greek, Sanskrit, and other texts into Arabic. Al-Kindī headed a circle of translators, but it seems that he himself did not know the relevant languages and therefore commissioned and oversaw translations made by his circle. Other prominent persons in the movement, such as Ḥunayn b. Isḥāq (d. 873), headed other circles and are known to have produced their own translations (Gutas 1998).

Al-Kindī died around the year 870 CE in Baghdad. He had a number of students, who promoted his philosophical and scientific ideas after his death (Adamson 2007, 3–6; Ivry's introduction in al-Kindī 1974, 3–6).

Al-Kindī's Significance in Islamic Intellectual History and Beyond

Al-Kindī's influence on subsequent thinkers has been described as "significant" (Adamson 2007, 19). He stands out for his prolificacy as a writer: The *Fihrist*, a historically important list of authors and their books compiled by the tenth-century book dealer Ibn al-Nadīm, attributes some 300 titles to al-Kindī. (Compare the list in Appendix I in Atiyeh 1966.) Al-Kindī's writings were on

a variety of subject matters and belonged to several branches of science, including philosophy, arithmetic, spherics, music, astronomy, geometry, cosmology, medicine, astrology, and others. They were of varying length, but most are shorter epistles (*rasāʾil*). Most of his works are unfortunately lost, and of the ones that have survived only a finite amount has been edited.

As the list of works indicates, al-Kindī had an evident predilection for natural sciences. Today he is often best remembered as "the first philosopher of the Arabs" (Atiyeh 1966, 8–9; also Adamson 2007, 3), even though philosophy was only one of many interests he had. Knowledge of philosophical ideas inherited from the Greek tradition existed among Islamic thinkers before al-Kindī, for example, in the Muʿtazilī school of theology, but it was marginal. Al-Kindī was the first Muslim thinker to introduce Greek philosophical ideas, which had become available thanks to the translation movement, into Islam in a systematic manner. By undertaking a synthesis of different Greek philosophical strands, al-Kindī sought to give answers to problems that Islamic theologians had discussed for some time (Adamson 2003b). His main interest was in texts attributed to Plato and Aristotle – for example, he produced a translation of the *Metaphysics* and commented upon the *Categories*, *On Interpretation*, as well as the *Prior* and *Posterior Analytics* – and also to Euclid and Ptolemy.

Scholars have engaged in some debate about the precise relation of al-Kindī to the science of Islamic theology (*kalām*), especially the Muʿtazila. The debate was sparked by the observation that some tenets propounded by al-Kindī can also be found in Muʿtazilī theology, which played an important role in the intellectual milieu of his time. This is particularly the case with al-Kindī's emphasis on God's absolute oneness and uniqueness, which was a major concern of the Muʿtazila, who were known as "the people of God's unity" (*ahl al-tawḥīd*). Yet, it has also been pointed out in academic scholarship that there are significant differences, too, between al-Kindī and the Muʿtazila, which do not warrant identifying him with this theological school (Ivry's introduction in al-Kindī 1974, 22–34; Adamson 2003b).

Al-Kindī, "the first philosopher of the Arabs," was the torchbearer for later Islamic philosophers, notably Ibn Sīnā (Avicenna, d. 1037) and Ibn Rushd (Averroes, d. 1198). Despite this, only Averroes mentioned him by name, and that only while criticizing him. Yet, al-Kindī's importance in Islamic intellectual history should not be underestimated, and certain ideas, which later philosophers discussed in some detail and at length, are already present in al-Kindī's works. A noteworthy example is the idea of the world's emanation from God. (It should, however, be noted that unlike later generations of philosophers, al-Kindī understood emanation as the temporal creation of the world, and not as an eternal process.)

Generations of Islamic theologians, for their part, grappled with the philosophical ideas introduced into Islam by al-Kindī. They looked with utmost suspicion at notions such as emanation and the conception of prophethood as a human, natural phenomenon.

Al-Kindī's works also had an influence on scholars in the medieval European tradition, who learned about his ideas through their Latin translations. For example, al-Kindī's *On Optics* was used by Roger Bacon (d. after 1292) in discussions of the speed of light (Klein-Franke 1996, 173).

Social Philosophy and Philosophy of Law in al-Kindī

Readers of al-Kindī's works who are interested in social philosophy and the philosophy of law will be left somewhat disappointed. This is due to the fact that al-Kindī placed his focus mainly on natural sciences. He is not known to have written treatises on legal theory, even though the science of jurisprudence (*fiqh*) flourished in his time and was practiced as part of the traditional Islamic canon of sciences. When it comes to social philosophy, the *Fihrist* mentions treatises on politics, governance, and ethics, but with the exception of one treatise entitled "The Dissipation of Sorrows" (Griffith 2002, chapter 9) none has come down to us or has been published. Moreover, the treatises

on ethics come closer to being moral anecdotes and exhortations, rather than proper philosophical analyses.

Unlike other Islamic philosophers after him, such as al-Fārābī (d. 950), Ibn Sīnā, and Ibn Rushd, al-Kindī is not known to have put forward a detailed vision of the ideal society. Ibn Sīnā, for instance, developed his vision of the perfect society, its institutions, and the law brought by a prophet in the last of the ten books making up his metaphysical *summa* entitled *The Healing* (*al-Shifāʾ*) (Erlwein 2019). It might, however, be that al-Kindī's main philosophical treatise *On First Philosophy* also contained such an account; only the first part (containing four chapters) of it has come down to us.

Nevertheless, some relevant insights pertaining to al-Kindī's views of society can be extracted from his *On First Philosophy*. In the preface of this work, he praises the Greek philosophers (mentioning Aristotle specifically) for having gathered much knowledge, and stresses the benefits the Muslims can derive from it. He openly criticizes certain segments in society, namely, the Islamic theologians, who oppose philosophy as "un-Islamic" due to its foreign provenance, and counters that "[f]or the seeker of truth nothing takes precedence over the truth, and there is no disparagement of the truth" (al-Kindi 1974, 58).

For al-Kindī, revealed religion (in the form of the Quran) and philosophy are two sides of one coin as they are concerned with the same insights: "Indeed, the human art which is highest in degree and most noble in rank is the art of philosophy, the definition of which is knowledge of the true nature of things. . . The knowledge of the true nature of things includes knowledge of Divinity, unity and virtue. . . It is the acquisition of all this which the true messengers brought from God" (al-Kindi 1974, 55, 59). Al-Kindī found plenty of ideas in the Greek philosophical tradition that he deemed not only compatible with Islam, but expressing its central dogmas. He found the doctrine of God's absolute oneness and uniqueness expressed in the Neoplatonic idea of the One, and the doctrine of the world's utter dependence on God in Aristotle's "First Cause" and Plotinus' "First Agent" (Adamson 2003b; Klein-Franke 1996, 167).

This explains why al-Kindī openly criticized those who advocated that society should be kept purely Islamic, ridding it of all non-Islamic, foreign influences (even though this was of course also an idealistic construct, which did not correspond to reality: In the wake of the expansion of the Muslim empire, Islamic ideas were mixed with foreign ideas). Al-Kindī did affirm the crucial role of Islamic religious ideas in society, but he stressed that these ideas can be found in other traditions as well. As a consequence, he was open to the influx of foreign ideas into Islamic society, and in fact wished to promote the philosophical and scientific heritage that had become accessible to Muslims thanks to the translation movement. Religion is not the only authoritative source in the quest for truth and knowledge about the world (Adamson 2003b).

For al-Kindī, the promotion and study of philosophy had practical consequences for society. He defined philosophy in various ways, one of which was the emulation of divine excellence by humans as much as possible. This expressed the idea that philosophy enables individuals to develop virtues and overcome their vices (Atiyeh 1966, 17–18). While philosophy can then have beneficial consequences for society, al-Kindī did not make the attainment of virtues dependent on life in society or a particular organization of society, as some later philosophers did. For al-Kindī, a true virtuous life means turning away from certain transitory pleasures promoted by society (Adamson 2007, 16, 145).

Al-Kindī's view of the educational, transformative role of philosophy in society rests on his theory of the human soul. He follows Plato in his division of the soul into three faculties: the intellectual faculty (*al-quwwa al-ʿaqliyya*), the irascible faculty (*al-ghaḍabiyya*), and the appetitive faculty (*al-shahwāniyya*). The irascible faculty is the cause of humans' falling into sinful behavior. This is why the intellectual faculty should control the irascible and passionate faculties, like a charioteer controls the chariot (an image taken from Plato). The virtuous human is wise, courageous, moderate, and therefore just. Al-Kindī also

subscribed to the Aristotelian idea that the heavenly bodies influence human temperaments. Different climes cause humans to have different physiques and different qualities of character (Atiyeh 1966, 71, 93–94, 113). This indicates that for al-Kindī, theories of cosmology and psychology were linked to questions pertaining to society.

Al-Kindī's project to disseminate philosophical ideas in society must have remained somewhat limited. At his time, philosophy was not yet taught at institutions of learning (*madrasa*), which focused mainly on the traditional Islamic sciences like law, theology, and Quranic exegesis (Brentjes 2018). His main audience would have been the royal and scholarly elite present at the caliphal court.

Al-Kindī's defense of philosophy in the preface of *On First Philosophy* bears witness to struggles among different groups in early Muslim society over the right and authority to define what constitutes an "Islamic" society and the place of "foreign" sciences in it. This question remained an ongoing struggle over centuries, preoccupying various Islamic groups, arguably until the present day.

Cross-References

- ▶ Aristotle: On Justice
- ▶ Averroes (Ibn Rushd; Abū al-Walīd Muḥammad ibn Aḥmad ibn Muḥammad ibn Rushd)
- ▶ Avicenna (Ibn Sīnā; Abū ʿAlī al-Ḥusayn ibn ʿAbd Allāh ibn Sīnā)
- ▶ Plato

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Allen, Amy

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Introduction

Amy Allen (born October 14, 1970) is an American feminist philosopher and social theorist who has written on feminist theories of power, with attention to domination, resistance, and solidarity; on the theories of autonomy, subjection, and selfhood; and rearticulated the meaning of emancipation in response to postcolonial challenges to the idea of historical progress. In 2015, Allen became Liberal Arts Research Professor of Philosophy and Women's and Gender Studies at The Pennsylvania State University after teaching at Dartmouth College for almost two decades, where she was the Parents Distinguished Research Professor.

The Power of Feminist Theory

Allen's first monograph, *The Power of Feminist Theory* (1999), challenges the inadequacies of existing feminist theories of power and – underscoring the need in feminism for a satisfactory account of the term – constructs a theory of power that draws upon Michel Foucault, Judith Butler, and Hannah Arendt. Arguing that feminists have articulated power primarily as "domination," i.e., criticizing the ways in which men have power over women (MacKinnon 1987, Okin 1989, Pateman 1988), or as "empowerment," i.e., revaluing capacities that have been historically denigrated as sources of resistance (Gilligan 1982, Held 1993, Ruddick 1989), Allen writes that neither side does justice to the complexity of power through the lived experience of norms, institutions, and practices, which may at the same time dominate and empower women in various ways.

Drawing on Foucault and Butler, Allen integrates theories of domination and empowerment by redescribing them as modalities of power, and she accounts for a third modality of collective action, informed by Arendt's sense of power as acting in concert with others, which requires relations of "receptivity and reciprocity" to make possible the realization of shared ends (Allen 1998, 35). Allen names these three modalities "power-over" (forms of domination, but also teaching, parenting), "power-to" (forms of resistance, but also learning new skills and other forms of empowerment), and "power-with" (solidarity against domination, but also team sports or playing in an orchestra). Allen's first book was significant (cf. Sawicki 2002) for its careful attention to the meaning(s) of "power" for feminist theory, as well as for bringing Frankfurt School critical theory into conversation with post-structuralist critiques of power.

The Politics of Ourselves

Allen's second monograph, *The Politics of Ourselves* (2007), insists that critical theory can only be truly critical by working through the seeming paradox of being both constituted through power relations and capable of autonomous reflection. The text crosses an impasse in critical theory between Foucault and Jürgen Habermas, considering the interplay of subjugation and autonomy in the "politics of ourselves," with attention to the implications for gender and feminist theorizing in the work of Butler (1997) and Seyla Benhabib (1986; Benhabib et al. 1994).

From Foucault and Butler, Allen (2006, 2007) takes a conception of the self as constituted by power relations – at once repressive and productive – and of "the politics of ourselves" as the project of self-transformation within these terms; yet, she challenges these theories for failing to offer a theory of autonomy from which self-transformation is possible. Here, Allen turns to Habermas' more optimistic critical theory of communicative action for an account of autonomy, but she finds it lacking on the very points Foucault illuminates because relations of domination already mediate the lifeworld that structures our communicative systems; there is no position outside of power to evaluate the conditions of communication. Establishing a middle ground between Foucault and Habermas, Allen develops a "politics of ourselves" that registers the constraints of subjugation while staking out the space of autonomy.

The End of Progress (2016)

In her third book, *The End of Progress: Decolonializing the Normative Foundations of Critical Theory*, Allen aims to bridge the divide between Frankfurt School critical theory and post-colonial theory, calling for critical theory to "decolonize" itself by changing its strategy for grounding normativity. Allen argues that Frankfurt School critical theorists from Habermas onward have, both explicitly and implicitly, relied upon the idea of historical progress to justify their critiques. She characterizes this "backward-looking" idea of progress (distinguished from a "forward-looking" sense of progress, which is

understood as a political and moral imperative) as one that takes the values, institutions, and forms of rationality produced by the European Enlightenment and European modernity to be "the result of a cumulative or developmental learning process" (Allen 2016, 13). Given that this idea of progress is inextricably bound up with Eurocentric imperialism, Allen argues that critical theory, if it is to be true to its emancipatory aims, must no longer rely upon ideas of historical progress for its normative foundation.

Towards the end of decolonializing critical theory, Allen draws upon the work of Foucault and Adorno. In both thinkers, she finds recognition of the complicity of reason with power. Reexamining this complicit relation, she offers a different emancipatory vision of "an open-ended conception of the future," which includes an idea of "forward-looking" progress – distinct from the "backward-looking" model she criticizes (ibid., 188) – and a critical, genealogical approach with the tools to "get enough critical distance on that historical a priori that we can see it *as* a system of thought" (ibid., 193). Through her readings of Foucault and Adorno, Allen derives an alternative way of thinking about normativity in critical theory. This theory, which she calls "metanormative contextualism" (ibid., 215), holds that normative justification is always conducted within a particular social, historical, and cultural context, and that there are no transcendent principles for evaluating these specific and situated frameworks. Allen thus proposes metanormative contextualism as a way to think about normativity that both allows for substantive, first-order normative claims without committing to a universal, context-transcendent normative foundation. These would be the theoretical conditions, Allen argues, for an afterlife of critical theory beyond the limits of Western modernity and its colonial history.

Conclusion

Allen's work in the field of social and political theory brings together elements of critical theory, feminist philosophy, and post- and de-colonial theory. From her writings on feminist accounts of domination to her reexamination of the normative foundations of critical theory, Allen's philosophy is unified by a concern with the relationship between reason and power and a commitment to the project of emancipation.

Cross-References

- ▶ Critical Theory and International Law
- ▶ Equality and Global Justice
- ▶ Rule of Recognition and Constitution

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Allen, Anita

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Anita L. Allen (b. 1953) is the Vice Provost for Faculty and the Henry R. Silverman Professor of Law at the University of Pennsylvania Law School. She is also a senior fellow in the bioethics department of the University of Pennsylvania School of Medicine, a collaborating faculty member in African studies, and an affiliated faculty member in the women's studies program. In 2010, President Barack Obama named Allen to the Presidential Commission for the Study of Bioethical Issues. She was elected to the National Academy of Medicine in 2016.

She has published a large number of monographs, more than a hundred scholarly articles, book chapters and essays, and she has also contributed to newspapers and blogs, and has frequently appeared on nationally broadcast television and radio programs. Allen is active as a member of editorial, advisory, and charity boards, and in professional organizations relating to her expertise.

Allen was educated at New College of Florida (BA), received her M.A. and Ph.D. in philosophy from the University of Michigan and her J.D. from Harvard Law School. She is the first African-American woman to hold both a J.D. and a Ph.D. in philosophy. Her career includes positions in philosophy at Carnegie-Mellon University, at the faculty of the University of Pittsburgh School of Law, at Georgetown University Law Center, and visiting professorships at Waseda (Tokyo), Yale, Harvard, Villanova, Princeton, Arizona, Hofstra, Johns Hopkins, and Tel-Aviv.

Allen is one of the most prolific, stimulating, and productive scholars in the philosophy and legal study of privacy, but she has also published widely in bioethics, women's rights, race relations, and legal philosophy, as well as in the more general field of contemporary ethics and values.

Her contributions to privacy are particularly influential. She was among the first scholars to put the topic on the agenda, both in law and in philosophy. Her 1988 book entitled *Uneasy Access* is a bold attempt to develop a normative liberal theory of privacy that took feminist theories as well as the relevant legal approaches into account. Allen remains one of the few privacy scholars to develop a normative theory of privacy with an impressive knowledge of the relevant liberal and feminist philosophical positions as well as an equally impressive breadth of knowledge of legal decisions (see also her textbook collection 2016). She defends a theory of privacy which is conceptually linked to the protection of individual freedom and autonomy and to the possibility of developing successful identities (1988, see also 2014). Her most recent work (2008, 2011c) adds a new twist to her position: not only is privacy a fundamental liberal right that ensures individual autonomy, liberty, and dignity, but it must also be seen as a duty. It is precisely because privacy is of such fundamental value that people may sometimes have to be pushed towards appreciating the value of privacy for and in their own lives. Allen indeed defends a form of legal and ethical paternalism, while at the same time insisting on the value of liberal individual choice. These two sides of her approach, freedom and the good life, also are foregrounded in one of her most fascinating articles (2008).

More generally, the common underlying themes in Allen's work are the normative ideas of (deontological) freedom and autonomy, and the (Aristotelian) idea of a good and flourishing life; if we add to these a third fundamental idea, that of liberal equality, we have the whole normative breadth of Allen's thinking. It is with these normative principles that she approaches many different ethical problems and suggests solutions. We have already seen what this means for the value of privacy, referring to freedom and autonomy, and to more substantial ideas of a good life, including an Aristotelian virtue. And if we look at Allen's feminist and anti-racism contributions (2010a, 2012), both in the context of privacy violations, we see the same commitment to the

principle of freedom and, in these cases especially, to that of equality.

All three principles play a fundamental role in her far-reaching contributions to contemporary ethics and ethical life (2004, 2011a), tackling concrete societal and theoretical problems from various perspectives. In her work on biomedical ethics, we find strong arguments for a right to healthcare and equal access to health (2011b, 2013, 2015). Allen's arguments for the right to wear a niqab in public, even in court, demonstrate her deep commitment to the principles of individual freedom and autonomy as well as liberal equality for everyone in the American democracy (2010b, 2014).

Allen has been and still is one of the most influential privacy scholars, nationally as well as internationally; first and foremost, because of her specific conception of privacy, the "control-access definition," and her feminist approach. Here, she has not only been important for many other scholars working on privacy (see Solove 2008, DeCew 2015, van der Sloot 2017) but also more generally in political philosophy and concerning the broader question of the separation of the public from the private (see Kymlicka 2001). This approach has not been without criticism, though; Nissenbaum, for instance, although sympathizing with Allen's" ground-breaking work on privacy," is critical of her "definition that hybridizes control and access" (Nissenbaum 2010, 71), and another well-known sympathetic critic is Cohen in her 2012 (for instance 6).

A second issue which has been discussed broadly and (partly) critically is the so-called "forced privacy" or "coerced privacy" issue: the idea that the state should intervene in order to protect privacy, since "the phenomenon of public and new media exhibitionism demonstrates a shift in norms, an eroding of our taste for privacy" (Nissenbaum 2010, 107; see also 251). The suggestion that liberal governments consider taking steps to protect the value of privacy with more force, i.e., to "coerce privacy" is contested among liberal scholars who are generally critical of legislating specific ideas of the good life (Allen is joining forces with communitarians here, see, for instance, Amitai Etzioni 1999).

Let me mention just one more point: Allen's enormous influence on the conceptualization of bodily and decisional privacy, and what most recently Citron, acknowledging her extensive debts to Allen, calls "sexual privacy" (Citron 2018, see also on the dimension of decisional privacy, witnessing Allen's international influence, Sax 2018, van der Sloot 2017).

Allen's breadth of knowledge, and the normative rigour combined with a deep sense of civic commitment, make her one of the theoretically most interesting and societally most influential American scholars.

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Althusius, Johannes

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Johannes Althusius (1557–1638) is a German Calvinist jurist and political scientist. He produces a systematization of the law that anticipates the future codification of the civil law and develops a political theory preaching the division of sovereign rights to all the members of the republic, a position opposed to the sovereign absolutism which then began to predominate in Europe. Because of the political responsibilities entrusted to him, he acquires a concrete experience of power games working political institutions, and intends to mitigate their main dangers by subordinating sovereign power to the fundamental laws of the kingdom and by integrating the right of resistance to the monarch. He thus advances three of the founding ideas of modern democratic society: the necessary sharing of political responsibilities, the notion of Constitution, and the conditionality of the exercise of power.

Law Exposed According to the Ramist Method

By his philological concern, his recourse to ancient sources and his historical reinscription of the law, Althusius fits very clearly into the current of legal humanism opened by André Alciat, Ulrich Zasius, and Guillaume Budé at the beginning of the sixteenth century. He extends the project of systematic exhibition of the law led by the French humanist jurists holding *mos gallicus* (François Connan, François Baudouin, Hugues Doneau, etc.) to which he prints his own mark by applying to the law the method designed by the French logician Ramus (Pierre de la Ramée). The latter was opposed to the exposure mode of knowledge used by Scholastic, characterized by excesses argumentative, endless digressions, all leading to a verbal formalism. He had developed another, proceeding by the successive dichotomous decomposition of the object to be known, the definition and the division replacing the Scholastic use of Aristotelian syllogism. One of the specificities of Althusius as a theorist is to have sought to ensure the scientific value of his analyzes by basing his legal reasoning on a purely formal method, thereby avoiding to introduce considerations extraneous to the order of knowledge. It is then not surprising that he has exposed his thoughts following the methodology developed by Ramus.

Althusius illustrates the didactic interest of the Ramist method for the exposition of the principles of the law in his doctoral thesis on the Roman jurisprudence (*De arte jurisprudentiae Romanæ*

methodice digestæ libri), sustained in Basel in 1586 and published in the form of a treatise of law very significantly entitled *Juris Romani Libri Duo: Ad Leges Methodi Ramae Conformati* (Basel: 1586), which earned him to be recruited in 1588 at the Faculty of Law of the Reformed Academy of Herborn. Althusius undertakes to explain the principles of law in a logical way. The contribution of the methodology highlighted by Ramus is to be based on simple principles, to be didactic and easy to handle, and to allow scholars to keep in view the object of their study. After a definition of the law as the art of equitably attributing to each person what belongs to him according to right reason, Althusius proceeds to a dichotomous analysis of the three categories of Roman law: things, persons (private and public, offices, peoples), and then actions (possessions, contracts, successions, alienations, and offenses). In opening to the text, synthetic tables afford to embrace the entirety of the object that will be studied. Although the François Connan' ontological background (*Commentariorum iuris civilis tomus prior et posterior*, 1553, I, 1) is no more present, one can feel that Althusius, producing an encyclopedic synthesis of law, intends to give an exhausted report of beings and realities.

His second treatise on law, the *Dicaeologicae Libri Tres, Totum and Universum Jus, quo utimur, methodice complectentes* (Herborn: 1617), has an even more larger stake. It fits in the spirit of the work published in 1578 by Jean Bodin, the *Juris universi distributio,* which seeks to establish the universal forms of law. Contrary to Francisco Suarez (*De legibus*, II, 19), who considers that the similarity between the legal institutions of the different nations is arbitrary and simply consecutive to imitations of one another, Bodin and Althusius take up developing the Connan' thesis that all nations use the same legal categories that make up the *ius gentium*. Althusius, however, continues his analytical work in a more detailed way than Bodin. He lists all the ancient and modern legal codes known in his time, seeking to unify them, and draws out a common legal system for the institutions of all societies. According to him, this universal right is a creation of the mind determining the necessary relations of obligation and authorization that are formally established between different protagonists according to the context of their interaction.

He explains it by applying the Ramist method to law, starting from a general term and proceeding to successive dichotomies of its species (*species*) to reach its constituent elements (*partes* or *membra*). The fact anterior to law, and of which the jurist should take account, is trade, which represents the acts bringing to social life that which is useful. The general part consists of the presentation of legal relationships which are established from the fact of human interaction based upon trade. The further distinction and definition of these legal relationships is created by the separation of Things and Persons. Althusius first distinguishes the parts of trade which are things, since any trade bears on a thing. Then the element of persons is considered because any trade provided with a subsequent juridical framework has a subject that can be collective or individual.

From there, Althusius proceeds to consider law in itself –*constitution iuris*– through the identification of the first constitution of law, namely, the ground of the juridical framework, of law itself. He distinguishes the types of juridical relationship that impose obligations to men because of their living together. These are like the two sides of the same coin: the former (*obligatio*) repertories all the duties toward oneself, God and the others, while the latter (*dominium*) gives an authorization, as regards a thing or a person, that is available to man considering his needs, his use and the proper conduct of his life.

The juridical relationship established by the *dominium* – an individual power on something or someone – consists in conferring upon an individual subject the possibility to use some sort of power in relation to another subject. From this origin, Althusius analyzes the various forms of the right of authorization within society. The power over persons relates to the power over oneself – individual liberty – and the power over the other itself divided into domestic (private) and political power. But contrary to Bodin, Althusius proceeding to the analytical decomposition of the subjects of rights, he begins his exhibition of the

political power while noting that it is composed of the *iura majestatis* in which all the symbiotic groups share. They are therefore not in the hands of a particular political actor but common to all members of the republic. Analytically considered, they are then subdivided into universal right, provincial right, right of the town, and right of the private groups. The *iura majestatis* thus contain a number of particular forms of rights which allow one, according to his function, to have a specific type of power over the others.

The Thesis of a Sharing of Sovereignty to All the Members of the Republic

However, the major work of Althusius, which justifies seeing him appear among the greatest political theorists, remains the *Politica methodice digesta, and exemplis sacris and profanis illustrata* (Herborn: 1603, Arnhem: 1610, Groningen: 1610, Herborn: 1614). In a historical context favoring sovereign absolutism, defended as the only recourse to pacify the European nations torn apart by wars of religion and conflicts of allegiance, Althusius supports conversely in this book the thesis of a division of rights of sovereignty to all the organized members of the republic. In his introduction, he presents himself as the opponent of the thesis defended by Bodin in *The Six Books of the Republic* (1574) according to which the rights of sovereignty, exercised absolutely, exclusively and perpetually, belong exclusively to the prince. Althusius argues that if all powers are in the hands of one, society can only be gradually emanating, until totally withering away. To allow men to organize, it is necessary to transmit to them the part of the rights of sovereignty necessary for the development of their social life.

Althusius intends to demonstrate to his contemporaries that they remain blind to the real springs of political life because they do not grasp its real dynamic. He forges a new vocabulary to better point it. He redefined politics as "the art of establishing, cultivating and maintaining between men the necessary, essential and homogeneous conditions of social life" (I, 1). The maintenance of social life, which he calls "symbiosis," is thus described from the outset as the very object of political science, or "symbiotic." He posits at the foundation of politics the central notion of *communicatio*, which he defines as the natural capacity of men to associate to help each other with their skills, by organizing their interactions together in order to provide for their needs. Therefore, according to him, men naturally have the competence to institute the social organization necessary for their coexistence. For what it is necessary to recognize to all forms of organized life part of the rights of sovereignty necessary for the assurance of their autonomy. Althusius deduces from this that the goal of politics is to organize the cooperative sharing of services and resources within the different forms of grouping that men can create, which he calls consociations.

Unlike Bodin, who first defines in his book sovereignty as the absolute, indivisible, and perpetual power of the prince (I, 8), before studying social life, Althusius begins by analyzing the latter to determine what must be sovereignty. He analyzes in Chapters I–VIII all forms of private associations (family and guilds), then public (villages, towns, provinces), making up the republic. He confers to each a part of the rights of sovereignty adapted to its competences. Following the principle of subsidiarity, they become part of a wider consociation, without losing their status of special consociation, when they can no longer meet all their needs. Then he deduces what must be the power of command (IX). Above this multitude of consociations is the stratum possessing the *ius regni*, or the right to govern strictly speaking, charged with making them coexist. It is held by the supreme magistrate associated with the College of ephors, composed of a small number of political elites deciding by majority. The supreme power therefore does not have the function of creating society; it must bring equity and respect for rights among all those bodies possessing a parcel of sovereignty (XIX, 7). Althusius thus formulates a political theory integrating the modern concept of sovereignty but which he defines as the right of self-organization of human associations.

Althusius does not forge his political doctrine on merely theoretical bases but relies very

concretely on the historical facts of which he is the contemporary. He was indeed elected in 1604 as trustee by the inhabitants of the port city of Emden, a rich German city on the border between East and West Friesland. As a representative of the provincial dietary town and the Imperial Court, Althusius is charged with defending the freedoms and franchises of the Calvinist city against the claims of Lutheran Count Ennio III, who owns the surrounding lands, a mission that he leads with ardor and determination by following very closely the war between the United Provinces and Spain. We keep track of the numerous judgments, complaints, and reports he wrote during the serious disputes with Ennio III. He is therefore very aware of the political issues of his time, and in particular of the difficulties to conduct the coexistence of sociopolitical actors of different kinds. His practical experience in handling public affairs led him to propose in 1610 an expanded version of the *Politica*, developing in particular the chapters on the autonomy of cities and provinces and on the nature of the contract binding the supreme magistrate to the people, and adding the famous chapter 38 on tyranny and the right of resistance.

One has reproached Althusius for maintaining his political thought in the holistic medieval tradition and for failing to perceive the innovations of young modernity. Althusius does develop an organic vision of society that is not new. But he analyzes it so as to identify the essential elements of social life. According to him, the organic unity of the various consociations stems from the equitable distribution of three objects: goods, functions or activities, and law. It is a clarification of the political objects, being the focus of politics to create a just society. Althusius, on the other hand, apprehends the social fact as a sociologist, taking an interest in the conditions of practical life and dispelling theological and moral references. He devotes lengthy development to the different types of activity that men are capable of, from "noble" professions such as judges or doctors to those without whom men could not live, such as the peasant function, or to live humanly, such as artisan or baker, through the trades of pleasure.

On the other hand, he is very sensitive to the ethics required for the proper functioning of social life. In the *Politica*, he opens political functions to all citizens. It is therefore essential to understand the human nature to know how to domesticate the passions of the many magistrates, prefects, advisers, and those of the subjects, so that they do not affect their capacity to fulfill a social or political function. In 1601, he had published a treatise on morals, the *Civilis Conversations libri duo*, which already developed this theme, emphasizing the discipline of human relations necessary to make them useful for society. He analyzed what generates civility by detailing the springs of man's natural impulse towards his fellow man. He thus distinguished himself from Mélenchthon by considering that ethics was not a moral philosophy based on the divine and natural law, but the art of appropriate social interaction (*ars decorates conversanti* cum *hominibus*), which means *rite facere* (to do the appropriate thing), and no more *recte facere* (to do the right thing). The ethical question is no longer here so much apprehended according to the moral attitude of the agent as of the adequacy of the behavior to a given situation.

Another of his innovations is to have developed a contractualist theory of power. Althusius bases the duty of obedience on any form of power on a contract setting the conditions of subordination, the laws to be respected by the magistrate, prefect or director, and the purpose of the power granted to the governor. The set of consociations making up the republic obeys this rule. These multiple contracts form for Althusius the "fundamental law" or "founding constitution" of the republic, which is an other way to sustain that power must always remain in the hands and under the control of citizens. The leaders are elected by the citizens at all associative levels, and the contract of subordination is invalidated if they exceed their rights or if they do not fulfill their function well. It is this innovative contractual theory of power that allows Althusius to defend the thesis of a partial and conditioned transfer of sovereign rights to the supreme magistrate. By objecting explicitly to William Barclay, defending in his *De regno* (1600) the absoluteness of the sovereign decision, Althusius argues that the

electorate only transmit to the magistrate the powers needed to fulfill its function (XIX, 51). He associates him accordingly with another authority, the College of ephors, without which he cannot decide anything, charged with attenuating the scope of unfair decisions and ensuring that he does not overstep the rights transmitted to it.

The rejection of a unitary power is found in all the administrative institutions of the consociations. Each leader makes decisions in consultation with a panel of advisers, whose authority is necessary to validate decisions, and who provides censorship and oversight of power. These councilors play a more and more pronounced role as one gets closer to the governmental sphere, but none is as important as the ephors associated with the supreme magistrate. Althusius defends the thesis that citizens have the duty to oppose a supreme magistrate flouting the terms of his contract. It is a thesis in accordance with the political principles he defends, the supreme magistrate being elected on the basis of an explicit contract on which he has been sworn, and who commits him legally. If he violates only one of his terms, the ephors have the duty to resist him and to remove him from office, the citizens being no longer obliged to obey him. Althusius is the first analyst to show that the contractualist theorization of political society presupposes by nature the right of resistance. These theses are part of the current of monarchomacs developed in the sixteenth century, in reaction to the rise of absolutism, by Theodore Beza, Philippe Duplessis-Mornay, or François Hotman (frequently cited in the *Politica*), that Althusius completes in integrating them into a general political theory.

Althusius's work fell into oblivion for a very long time. Otto von Gierke owes it to the silence of 1880 by devoting an important monograph to it. In the 1930s, the famous German political scientist Carl Joachim Friedrich had published the *Politica* in his third version, adding to it an illuminating preface presenting Althusius as the deepest thinker between Bodin and Hobbes. His thought is now the subject of much research, where are crossed the legal and political sciences and ethical and sociological questions.

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Altman, Andrew

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Andrew Altman (b. 1950–) is a leading legal and political philosopher who has published influential work on a remarkably wide variety of important topics, including legal realism, critical legal studies, hate speech, sexual harassment, human rights, discrimination, religious liberty, genocide, international justice, civil rights, crimes against humanity, and freedom of expression. Space constraints preclude even a cursory discussion of all of these important contributions, so this entry will focus exclusively on three of Altman's books.

On the heels of his landmark article, "Legal Realism, Critical Legal Studies and Dworkin" (which appeared in *Philosophy & Public Affairs* in 1986), Altman published *Critical Legal Studies: A Liberal Critique* with Princeton University Press in 1990. Critical legal studies (CLS) emerged in the 1970s as a descendent of legal realism (a highly revisionist jurisprudential position popular in the 1930s) and leftist critics of contemporary society (who were inspired by the antiwar, civil rights, and feminists movements of the 1960s and 1970s). Many mainstream political and legal theorists summarily dismissed CLS, but Altman was at Harvard Law School when Roberto Unger (a leading critical legal theorist) was advancing this view, and Altman was enormously impressed with the force of Unger's critique of the status quo. Even so, Altman defends the traditional liberal tenets such as the rule of law and legal neutrality by distinguishing carefully between liberal commitments and the status quo and between the plausible and the implausible critical claims. Altman acknowledges that critical legal theorists are right to condemn the status quo, but liberals are not committed to defending existing institutions, as their principles also suggest the necessity of major reforms to those institutions. Altman also concedes that liberals cannot accommodate the more radical elements of the CLS critique, but he argues that these more radical claims do not stand up to careful scrutiny. The genius of this book, then, is that Altman very carefully (and charitably) examines the various claims of critical legal theorists and shows that, while some are insightful and important, others are indefensible. The objection that liberal legal doctrine is riddled with contradiction, for instance, might be understood as (1) *the patchwork thesis* (which alleges "that our legal doctrine is an unprincipled patchwork of legal norms deriving from starkly incompatible ethical viewpoints"), (2) *the duck-rabbit thesis* (which contends that "the structure of legal doctrine can be organized in radically different ways, depending upon which of the two incompatible ethical viewpoints one adopts"), or (3) *the truncation thesis* (which objects that "the principles that underlie legal rules are not consistently applied to all of the cases over which they claim moral authority but are truncated well short of the full range of cases over which they claim authority") (p. 105). Altman ultimately concludes that moderate versions of each of these interpretations contain important truths, but they are truths that liberalism (properly understood) can accommodate. These theses can also be advanced in more ambitious forms which appear clearly incompatible with liberal legal philosophy, but Altman insists that these more radical interpretations are untenable.

Building upon a series of earlier articles, Altman and his coauthor, Christopher Heath Wellman, published *A Liberal Theory of International Justice* with Oxford University Press in 2009. This book contends that the stock liberal view that only the lives of individuals ultimately matter morally is compatible with a collective right of political self-determination for those groups able and willing to perform the requisite political functions (which are defined in terms of satisfactorily protecting the basic human rights of the group's constituents and respecting the rights of all others). After defending this account of collective self-determination, Altman illustrates its important implications for a number of core issues including democracy, secession, international criminal law, humanitarian intervention, international distributive justice, and immigration. Regarding secession, for instance, Altman notes that if we explain the injustice of forcible annexation of a legitimate state in terms of the latter's right to political self-determination, then we cannot deny a separatists group's right to secede if the separatist group has the same features which ground the legitimate state's right to autonomy. So if we insist that legitimate states are entitled to self-governance precisely because they are able and willing to perform the requisite political functions, we must admit that secessionist movements have a right to political divorce when they are able and willing to perform the requisite political functions. And on the subject of immigration, Altman emphasizes that, because (1) freedom of association is an integral component of

self-determination, and (2) freedom of association includes the right to refuse to associate with others, a legitimate state's right to political self-determination provides a presumptive right to exclude outsiders from the political community. This right is vulnerable to being overridden, of course, but it is not necessarily outweighed even by the desperate circumstances of foreigners, because one can often assist outsiders in ways other than allowing them to immigrate.

Altman's most recent book project is a "for and against" style coauthored book, *Debating Pornography*, which is forthcoming with Oxford University Press. Altman's portion of this book expands upon a line of argument he initially introduced in "The Right to Get Turned On: Pornography, Autonomy, Equality" (which appeared in *Contemporary Debates in Applied Ethics*, 2005). Altman acknowledges that the case in defense of pornography grounded in free speech fails because pornography is low-grade speech which is insufficiently valuable to warrant legal protection, given the evidence that pornography harms women. Once we recognize that the right to get turned on (even if one is turned on only by violent, misogynistic material that graphically depicts the degradation of women) is a component of the fundamental right to sexual autonomy; however, Altman believes that a stronger case can be marshaled in defense of the right to produce, sell, and consume pornography. Altman acknowledges that the right to sexual autonomy is not absolute, so he concedes that the presumptive right to pornography could be overridden if compelling evidence could be offered that the availability and consumption of pornography necessarily harm women, but Altman believes that feminist opponents of pornography have yet to satisfactorily establish this causal connection between pornography and harm to women. In the end, then, Altman concludes that the evidence of pornography's harm to women is substantial enough to defeat the case in defense of pornography as free speech, but not compelling enough to outweigh the case in defense of pornography grounded in the right to sexual autonomy.

Altruism

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Introduction

Altruism, viewed empirically as a biological phenomenon, is the disposition of human beings to serve reflectively the welfare of others, as contrasted with the disposition, called "egoism," to serve reflectively their own welfare. The human capacity for reflection, for comparison and decision-making among alternatives, justifies the suffix-*ism* in these terms. Animals often behave in ways that are only intelligible as serving the survival and flourishing of others, especially the young, within their social group or species. But we do not usually credit animals with altruism, except in a metaphorical sense, because what we mean by altruism is not an instinct but a type of reflective action: doing something because, after some consideration, we have chosen to do it and to reject its possible alternatives.

Some human actions appear to be wholly altruistic, as when a person knowingly sacrifices her life to save another, and there are no side benefits to herself. Others, and these are perhaps more common, seem to be simultaneously altruistic and egoistic in motivation, as when a mother lulls her crying baby to sleep. Evolutionary scientists may account for other-serving behavior among humans and some nonhuman animals as an evolved strategy to benefit the species, social group, or other supra-individual entity, in which case the motivational distinction between egoism and altruism at the individual level is, so to speak, dissolved into self-interest at the collective or species level.

These scientific debates cannot be pursued here. We need only note that many human social institutions presuppose, and depend for their effectiveness upon, the routine superimposition of altruistic and egoistic motives. We respect turn-taking in conversation, both out of consideration for the other person and in the expectation

that our own turn will then be respected. We comply with traffic regulations to protect both ourselves and others from injury. When shopkeeper and customer perform their transaction without either attempting to cheat the other, mutual good will and mutually beneficial exchange are superimposed. We buy a lottery ticket both as a contribution to charity and as a self-interested gamble. We pay taxes to support public health services, both in order to care for others and to ensure the availability of care for ourselves when it is needed. We give and take, in a relationship of love or friendship. This system of reciprocity between the individual and others, embedded in our social practices, can readily be debunked as a mere aggregate of individual ploys to promote self-interest. But if human beings can grasp the idea of simulating consideration for another's happiness and well-being, it seems likely that they can, at least occasion, actually feel it. Even so supposedly misanthropic a philosopher as Hobbes can recognize the superimposition of self-serving and other-serving motives in a single course of action:

> The appetite which men call lust, and the fruition that appertaineth thereunto, is a sensual pleasure, but not only that; there is in it also a delight of the mind: for it consisteth of two appetites together, to please, and to be pleased; and the delight men take in delighting, is not sensual, but a pleasure or joy of the mind, consisting in the imagination of the power they have so much to please. (Hobbes 1994, pp. 55–56)

Normative Theories of Altruism

In addition to the long-standing influence of the Christian exhortation to love one's neighbor as oneself, altruism (or "benevolence"/"beneficence") as a moral ideal appears prominently in a number of eighteenth- and early nineteenth-century philosophers: examples cited below include Hutcheson (2019 [1726]), Hume (1998 [1777]), and Schopenhauer (1995 [1839]). Later philosophers who attempt a comprehensive moral theory, notably Sidgwick (1874, pp. 208–235) and Parfit (1984, 2011), give altruistic theories sympathetic, though not uncritical, attention. Thanks to the profound and lasting influences of two other eighteenth-century philosophers, Kant (1996 [1785]) and Bentham (1996 [1789]), altruism as the key normative requirement has generally lost out to impartiality, but as the following discussion will attempt to show, these two ideals are not in practical terms far apart, especially when we consider their social implications.

Some philosophers have argued that the possibility of altruism arises from our rationality, and in particular from our ability to conceive ourself, as Thomas Nagel puts it, not only as *I*, but as *someone* (Nagel 1970, p. 19). My *subjective* view, in which I experience the world as beginning, ending, and consisting in my own consciousness, coexists, in perpetual tension, with my *objective* view, in which I am forced to recognize myself as a tiny, short-lived, locus of consciousness among billions of others, in a universe unimaginably vast in space and time. Thus, in recognizing, in consequence of the objective view, that *my* pain, which I want to put an end to if I can, is also the pain of *someone*, I find myself rationally committed to the realization that the pain of any *other someone* is bad and that I have reason to put an end to that pain too, if I can. Objectivity about suffering enables altruism, the motive of helping others.

Most normative moral theories presuppose the possibility of altruism, in Nagel's cautiously limited definition: "a willingness to act in consideration of the interest of other persons" (p. 79). Utilitarianism tells us to treat every human being, including ourself, as counting = 1 in the calculus of utility. Kant tells us to treat everyone according to those principles that we could rationally will to be applied universally (i.e., to ourself and to others equally). Contractarianism commits us to respecting those social structures and institutions that would emerge from a contract freely entered into by equals, of whom we are one. None of these theories could get off the ground if human beings had no capacity for acting in consideration of the interest of others. Since, however, this capacity is unlikely to be evenly distributed, legal and social sanctions may be needed to ensure that our interactions, powered as they are by an unpredictable mixture of egoistic and altruistic motives, are orderly and peaceful. This may be

necessary even if our individual altruistic or egoistic inclinations coincide. In some situation of potential conflict, A and B cannot both vanquish the other, if they are both egoists, nor can both submit to the other, if they are both altruists. Impartial institutional rules bring consistency and stability to our interactions.

We can distinguish between this kind of contributory altruism, which relies on our ability to treat another person as of equal moral importance to ourself, provided we have some confidence that our own importance will be respected in turn, and a morality of pure altruism, which calls for the intentional prioritization of the interests of another, or of others, over our own. The distinction resembles that drawn by Hume (among many others) between "justice" and "benevolence." To treat others with justice is to recognize and obey those collectively beneficial laws, binding on all, that regulate human interaction in a world characterized by scarcity and other potential sources of conflict (Hume 1998, pp. 83–88). But benevolence has a wider scope. Hume observes that:

> no qualities are more entitled to the general goodwill and approbation of mankind than beneficence and humanity, friendship and gratitude, natural affection and public spirit, or whatever proceeds from a tender sympathy with others, and a generous concern for our kind and species. (p. 79)

Such benevolence clearly goes beyond "the observance of justice and equity" (p. 99). Hume's formulation implies that justice is merely the threshold requirement of a supreme moral motive of benevolence. Hume's contemporary, Edward Gibbon, asserts the priority of benevolence in a crisp aphorism: "benevolence is the foundation of justice, since we are forbid to injure those whom we are bound to assist." Gibbon here is paraphrasing the Qur'an, which, in line with earlier, Christian or Platonist, theories, urges us to model our actions upon the illimitable love of God. But as Gibbon immediately adds, reverting to a naturalistic explanation, "a prophet… in his moral precepts.. can only repeat the lesson of our own hearts" (Gibbon 1988 [1788], p. 238).

The most uncompromising of altruists among Western moral philosophers is Schopenhauer. For Schopenhauer, the sole basis of morality is compassion for others, arising from the intuition (which in Schopenhauer's philosophy, and in the Buddhism and Brahmanism he invokes in its support, becomes a metaphysical claim) that at root we are as one with the other person, and her suffering is therefore as much our concern as our own suffering. Compassion alone can overturn the boundless egoism in which the blind will to live expresses itself in human beings, and the intellectual correlate of that egoism, the *principium individuationis*, the delusion that we are fundamentally separate from others. Compassionate insight teaches us the fundamental principle of morality: "injure no one; on the contrary, help everyone as much as you can" (Schopenhauer 1995, p. 69 and *passim*).

In *On the Basis of Morality*, Schopenhauer makes only fleeting reference to his metaphysical theory: he relies for much of his argument on empirical evidence of the effectiveness of selfless compassion as a moral motive, and he invokes, like Hume, the testimony of our commonsense judgments, which commend a generous and warmhearted beneficence in preference to the pedantic calculations of a rationalistic morality. For Schopenhauer, moral worth lies in actions unequivocally aimed at the well-being of others and in these alone. Any accompanying taint of calculating self-interest – as in the case of a just or beneficent action performed in order to benefit from the admiration of others, or for some other kind of reciprocal advantage – negates moral worth. On Schopenhauer's view, even Kant's categorical imperative is morally tainted in this way: it is reprehensible to accept a moral principle only after rational reflection has led us to conclude that it would work well for ourselves. Such a rule is in any case a dead letter, according to Schopenhauer, when compared to such powerful natural motives as egoism, malice, and benevolence.

Schopenhauer's claim that purely altruistic motives are a necessary condition for moral worth springs logically from his larger theory, in which denial of the will within oneself is the only route to salvation. And – as he ironically remarks – there is no need to ask morality to provide reasons for self-interested action: these will always speedily occur to us (59). Actions of moral worth are

antithetical to egoism and may not collaborate with it. However, we may note Schopenhauer's concession that, in the theory he is about to expound, "only a very small part of much that is legal, permissible and praiseworthy in men's actions will appear as having sprung from pure moral motives" (p. 42). Much, then, that is in some sense praiseworthy must come from "impure" motives. Schopenhauer need not have excluded from commendation the altruistic-egoistic superimpositions that make a society workable. He discounts them because they include an egoistic element. But he could have embraced them because they include an altruistic element – or to the extent that they do so, as Francis Hutcheson does:

> [A]s all Men have Self-Love, as well as Benevolence, these two Principles may jointly excite a Man to the same Action... When he would not have produc'd so much publick Good, had it not been for Prospect of Self-Interest, then the Effect of Self-Love is to be deducted, and his Benevolence is proportion'd to the remainder of Good, which pure Benevolence would have produc'd. (Hutcheson 2019 [1726], p. 50)

A system of social norms that is made more effective by blending egoistic with altruistic motives within the population still deserves some moral endorsement, even though it lacks the purity of the wholly altruistic individual motive. The most obvious example is law, which Schopenhauer tends to see merely as a set of punitive counter-motives to human selfishness and malice. But the idea of respect for law must at least imply some degree of respect for the interests of others, unless law itself is conceived simply as an apparatus of power, obeyed merely out of fear. As Lon Fuller argues in *The Morality of Law*, law has to reflect human beings as they are and cannot impose the perfectionist aims of a "morality of aspiration." It can, however, expect compliance with those reciprocal obligations necessary for society to function peacefully (Fuller 1964, pp. 5–13). Such an expectation can draw, in part, upon contributory altruistic motives, and just occasionally it appeals to them expressly, as does the French *Code Pénal* (2022) (article 223–6) when it criminalizes a citizen's failure to take active steps to rescue a person in danger, if she can do so without serious risk to herself or to third parties.

Objections to Altruism

Is it possible to defend the claim that, as Schopenhauer suggests, altruism is the basis of morality? One reason that altruism has had limited visibility in moral and social philosophy is that it is open to several very plausible objections. These objections can in many cases be answered, but to do so effectively the theory may need considerable development. Here are some principal objections, with brief responses to them, such as a convinced altruist might make.

1. *Altruism as a moral theory is impossibly demanding. While we can reasonably expect everyone to conform to rules of impartiality, we cannot reasonably expect from any human being a continuous pursuit of the interests of others at the expense of her own.*

   The answer to this objection is that it simply draws attention to the many nonmoral motives on which people act, as well as sometimes acting on moral (altruistic) ones. We should accept that human beings do not always act morally: we knew that already. Altruism shows us what is going on when people *do* act morally.
2. *Actions by well-meaning altruists can sometimes lead to bad consequences. If the moral worth of an action depends on its altruistic intent, then many actions that are rash, ill-conceived, and counterproductive must have moral worth; but if it depends on consequences, then moral worth must sometimes be assigned to actions without altruistic intent, such as the bungled action of a would-be murderer that inadvertently saves the life of her intended victim. Both these interpretations lead to unacceptable results.*

   To answer this objection, we need to add an important refinement to the altruistic theory, as follows: to be morally right, our actions must display a sufficiently informed altruistic

intention, where "sufficiently informed" means "informed by as much relevant knowledge and understanding as we can be reasonably expected to achieve, given our own finite capabilities, the level of seriousness of the issues at stake, and what is possible in the given circumstances." Call this, for brevity, "the empirical condition." If we act with sufficiently informed altruistic intention as defined above, and the consequences turn out to be bad, we will have been unlucky in our efforts, but we will have acted rightly from a moral point of view. The empirical condition also addresses the problem of the frequent incompatibility between one altruistic aim and another (e.g., when an altruistic action to benefit person A can only be achieved at some detriment to person B). If we weigh these probable benefits and detriments to others as well as we can in the circumstances, and intend what we judge to be the best overall outcome, we are acting rightly in a moral sense.

3. *Altruism implies acts of obscene self-sacrifice, such as donating all one's organs for distribution to save the lives of several others. It offers a moral excuse for abject subservience by one person to another – for example, a bullying or exploitative marriage partner. We frequently criticize people for neglecting their own interests, such as their health and well-being, but altruism cannot explain this criticism.*

Part of the answer to this set of objections is a reminder that, according to the theory, each person is equally the subject and the object of altruism. In a society and culture that recognizes altruism as the essence of morality, the self-destructive organ donor and the over-subservient partner should have their actions corrected by the altruistic concern of others. Our criticism of others for neglecting their health is not a negative moral judgment but is itself an expression of altruistic concern. Our own altruism does not oblige us to submit to the counter-altruistic actions of others, such as physical attacks and other kinds of mistreatment: quite apart from the nonmoral reasons we have for resisting these, we can appeal on moral grounds to the need to affirm the principles of justice that have emerged to stabilize social interactions and so to benefit everyone.

Another answer appeals to the condition of informed reflection. If we want to live a moral life, that is, to act with informed and reflective altruism as often as we can, then we will see that we are normally justified in acting to preserve our own physical and mental vigor, like a doctor who protects her own life in order to continue treating others. In this way, "inferior" but widely recognized virtues such as prudence and circumspection, which Adam Smith (2009 [1759], p. 357) complains are neglected by those such as Hutcheson who place an exclusive moral focus on benevolence, can be assimilated into an altruistic theory. Only in extreme one-to-one dilemmas, where sacrificing one's own life is the only way of saving another, might altruism argue for fatal self-sacrifice, and it is in precisely such rare cases that the sacrifice strikes us not as obscene but as, in Parfit's words, "generous and fine" (Parfit 2011, vol. 1, p. 141).

4. *Altruism creates contradictions unresolvable within its own terms. A and B cannot both give up the floating plank to save the other; they cannot both take the smaller slice of cake, so one must fail in altruism.*

It is true that two altruists will need to negotiate in such cases, and that to avoid an outcome in which both drown, or the cake goes stale, one will need to consent to being the beneficiary of the other's altruism. Note that a decision to allow the other to feel content in her own altruism can itself have an altruistic element. On this point, E. M. Forster remarks, reversing the scriptural formula (*Acts* 20: 35), that it may be "more blessed to receive than to give" (1976 [1924], p. 141). Such refinements of mutual affection can display the altruistic-egoistic superimposition in particularly subtle forms. In the cake case, various rituals of courtesy have developed to ensure that the cake gets eaten.

In the plank case, some will argue that there is no morally acceptable solution or, following Fichte, that "I ought not to do

anything at all, but calmly await the outcome" since "only the fulfilment of the moral law is the final end" (Fichte 2010 [1798], p. 288). To defend altruism by comparison with these counsels of despair, it should be sufficient to point out that the negotiation of the two altruists is not likely to be more difficult than the negotiation of two egoists in the same situation and is certainly more morally edifying.

5. *Altruism, subscribed to as a moral theory for individuals, risks encouraging questionable attitudes and behavior. It can inspire in us a coercive attitude toward others – for their own good, as we suppose. Because it takes every other person as, in principle, equally an eligible target for our altruism, it ignores our special duties to those near to us. And it can foster the mentality that the troubles of our social world can be solved by acts of individual benevolence, thus distracting attention from systemic injustice.*

The answer to the first two of these criticisms is that the epistemic condition needs to be understood as including necessary reflection on one's own restricted moral and intellectual scope, as well as awareness that, in most situations, people themselves are likely to be better judges of their own good than we are. The intrusive busybody envisaged by the criticism above fails in virtue of her epistemic presumption, not because the theory fails. To justify the special responsibilities we recognize toward our family members, clients, and so forth, we can appeal, as many other theories do, to the generally beneficent effect of family loyalties, or of the rules that enforce contracts. But our special focus on altruism toward those we have most frequently in view also reflects the epistemic condition: we have finite powers of altruistic action, we know these people and their circumstances better than we know strangers, and we can have somewhat more justified confidence that we can work out what will help them. Even with these people, however, a sufficiently informed and reflective altruism may take the form of leaving them alone.

To the third criticism, we can reply that the scope of altruism as a moral theory is not limited to individual intentional actions. If morally right actions are those motivated by a sufficiently informed intention to benefit and not harm others, then collective actions such as laws and policies, in which an entire community takes the interests both of its own members and of extraterritorials into account, can be evaluated in the same way and with the same inherent requirement that they be sufficiently informed and reflective. There is no reason why a convinced altruist should attach disproportionate significance to merely individual actions. But in a world of laws and policies that are often imperfect or worse, she should not commit the converse error of leaving altruistic intentional action to the institutions alone.

These arguments, rudimentary though they are, suggest that altruism at both the individual and the collective level is at least defensible and is capable of development, as a normative moral and social theory.

Conclusion

The disposition we call "altruism" exists, and under a variety of labels, it has been incorporated into moral codes and theories of morality since at least the beginning of the Christian era. Since the eighteenth century, appeals to altruism in Western moral thought have increasingly broken free of religious foundations, and attempts have been made to find rational or naturalistic foundations to replace them. Altruism remains, nevertheless, a poor relation within moral and social theory when compared to such concepts as impartiality, justice, rights, and utility.

It has a contemporary resonance, however, thanks to the recent movement known as effective altruism. The effective altruism movement, though supported by influential philosophers such as Parfit (2015, 2017, pp. 413–437) and Peter Singer (2009, 2015) whose theoretical writings have provided it with normative impetus, has not so much argued for altruism as addressed itself to those who would already claim to be altruistic in temperament (see, e.g., the website https://www.effectivealtruism.org/).

It argues that we should act upon our altruism more diligently; it criticizes common assumptions that weaken our resolve to do so (such as the belief that the effect of any individual contribution must be imperceptible), and it presents arguments and evidence intended to help us to apply altruism in a more reflective and better informed way. Its practical success, then, will be dependent on the quality of the informed reflection it engenders and on its capacity to motivate. In these respects, at least, it falls squarely within the wider tradition of philosophical altruism.

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Ambedkar, Bhimrao Ramji

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Introduction

Dr. Bhimrao Ramji Ambedkar (1891–1956), affectionally known as Babasaheb Ambedkar, was born on 14 April 1891 in a small garrison town of Madhya Pradesh to a family of Mahar, the

largest group of the Untouchable caste from the state of Maharashtra (central India). His birth acquired status, as well as an exceptional life built to escape this fate, have profoundly impacted Ambedkar's human journey and remarkable intellectual contribution to the question of equality.

A prolific writer, he produced 22 books and monographs on an amazingly diverse range of legal, political, economic, social, and religious issues. While law and jurisprudence were central to his work, Ambedkar started his intellectual journey in writing his MA thesis on the *Administration and Finance of the East India Company*, to later engage with the issue of caste, and indeed untouchability, with his 1945 *Who Were the Shudras? How They Came to Be the Fourth Varna in the Indo-Aryan Society,* and, at the end of his life, become a scholar of Buddhism with the 1957 *Buddha and His Dhamma*. The statesman, leader, and author of the *Annihilation of Caste* is literally venerated by those he defended, the masses, the lowest castes, and the Untouchables, that is most of the Indian population. But Ambedkar is also praised – and used –, as a unifying nationalist figure by his former political enemies who, in 2018, inaugurated a Delhi-based national memorial in form of an open symbolic book, the Constitution of India of which he is known to be the father.

Education was key to Ambedkar's emancipation. His grandfather and father had served in the British army. His mother's family came from the same background and, as schooling was compulsory for all military personnel, she was literate, a very uncommon thing for women, let alone Untouchable women of that time. One of his teachers, a Brahmin (highest caste), named Ambedkar, played a central role in his upbringing. He took the bright student under his wing and provided him with a daily lunch, an exceptional intercaste gesture to which the family remained forever grateful and celebrated in taking the teacher's name, Ambedkar, instead of Ambavadekar, a surname already changed from the original family name of Sankpal, which indicated a low caste. Ambedkar was noticed again by the principal of a high school and social activist, Arjun Keluskar, who supported his applications for scholarships to finish his college education and later to study at the prestigious Colombia University in New York, an experience which profoundly changed his life. The Untouchable child to whom water and food were too often denied for he was impure reversed the course of his destiny and secured a PhD in economics from Columbia University, a DSc in Economics from the London School of Economics, and the Bar-at-Law degree from London. He could then devote his entire life to the quest for equality that was, in India, the annihilation of caste.

The Caste System

The caste system is as unique as complex. Historians and sociologists only agree to disagree on its origins and manifestations. While elements of caste are present in other societies, India's patterns are different. Simplified by western scholars who often had no contact with the Indian terrain, like the French anthropologist Louis Dumont with his influential 1966 book *Homo Hierarchicus*, the caste system is still generally understood as a four strata hierarchical society organized from the top to the bottom with the *Brahmins* (priestly people), the *Kshatriyas* (rulers and warriors), the *Vaishyas* (merchants and artisans), and the *Shudras* (laborers). To this, is implicitly associated a fifth strata of outcastes, the "*Untouchables.*"

A first school of thought tends to approach the caste system from the Vedic corpus that is a large body of Hindu religious texts composed as early as 1500–1200 BCE. In this context, the term *varna* (a unit to compare, count, classify) is used to refer to the four above divisions of society with the priest (the Brahman) at the top of the social edifice and in control of the rituals, what is pure or impure. These divisions were codified by the *Manusmriti* or *Law of Manu* variously dated to be from the second century BCE to third century CE and taking the form of a discourse on duties, rights, laws, and virtues (*dharma*). Over 50 manuscripts of the text are known today, some contradicting others, but one of these versions became part of the first Sanskrit texts to have

been translated into English, in 1776, by Sir William Jones. It was used to construct the Hindu Law Code for the East India Company's administration of Indian territories. Thus, colonialism also reinforced the idea of caste. Post-colonization, the second school of thought approached the caste system from a more sociological perspective based on occupations and functions in society. The term *jati* (derived from birth) and which could be explained as a clan, or a tribe, determining rules of marriage, property, inheritance, was then referred to. It was also used to classify people in British India. The 1891 census included 60 subgroups *each* subdivided into six other categories. Just as for botanical classification, there was a taxonomy of humans. Today, there are probably thousands of *jatis* in India. Interestingly, castes are not limited to Hindus but are also found in other Indian, and South Asian, religious group including Muslims or Sikhs. They exist, as well, in the Indian diaspora. Importantly, the concepts of *varna* and *jati* overlap. As brilliantly summarized by the historian Romila Thapar: "for a society to become a caste-based society there have to be three preconditions: the society must register social disparities; there has to be unequal access to various groups within that society to economic resources; inequalities should be legitimized through a theoretically irreversible hierarchy and the imposition of the hierarchy claim to be based on a supranatural authority. The later takes the form of a ritual demarcation dependent on degrees of assumed purity or pollution determined by those controlling the religious ideology." It is against this ideological factor derived from the idea of *varna* that Ambedkar targeted his lifelong fight.

In Maharashtra, where Ambedkar's family originated, the caste's structure was more closely aligned with that of the southern states of India. The divisions of caste groups were generally in three tiers, Brahman, non-Brahman and Untouchables, rather than in the four *varna* often found in northern India with the untouchables forming an *a-varna*, an implicit fifth category. From 1919, when he first appeared as a spokesman for the Untouchables, Ambedkar became the undisputed leader of his own caste, the Untouchables Mahar group, and transformed this fight into a national mass movement at a time India was seeking independence and modernization. The struggle became a battle for social rights using political and symbolical weapons.

On the symbolic front, Ambedkar publicly burnt a copy of the *Manusmriti,* in 1927, and fiercely opposed Gandhi's conservative vision of caste and social organization. The dissentions between the two leaders were infamous. Ambedkar saw duplicity in Gandhi's casteist approach and argued: "the dishonesty of this intellectual class, who would deny the masses the fruits of their thinking, is a most disgraceful phenomenon". For Ambedkar indeed, the caste system was nothing else than a "system of graded inequality" and had disastrous effect on the nation's moral and public spirit: "a Hindu's public is his caste. His responsibility is only to his caste. His loyalty is only to his caste. Virtue has become caste-ridden, and morality has become caste-bound." A political response was then the only option. In this matter, in December 1926, Ambedkar was nominated to the Bombay Legislative Council (BLC) as a representative of the Depressed Classes under the Government of India Act, 1919. He then became active in all important pre-independence bodies. In 1936, the year of the publication of the *Annihilation of Caste*, he founded the Independent Labour Party. He later served as the Viceroy's Executive Council Minister of labor and was invited, upon India's independence, on 15 August 1947, by the new Congress-led government to serve as the first law minister and Chairman of the Constitution Drafting Committee.

The Indian Constitution

The Indian Constitution was designed as the instrument of the social revolution Ambedkar hoped for. A unique moment in history, it has been described by the Indian Supreme court in *Virendra Singh v. State of Uttar Pradesh AIR* (1954SC 447 (28)) as a "new order (. . .) with its new allegiance springing from the same source or all, grounded on the same basis: the sovereign will of the peoples of India with no class, no caste, no race, no creed, no distinction, no reservation".

While these great aspirations have only partially been realized, the text of the Constitution was imagined as a shield against discrimination. Article 15 prohibits caste-based discriminations, and Article 17 abolishes untouchability: "'Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law".

Ambedkar also won the Assembly's support for introducing a system of reservation for jobs in the civil services, schools, and colleges for members of the scheduled castes, tribes, and other backward classes. This affirmative action *à l'indienne,* now criticized for having been abused, has played a clear part in creating a more equal society.

Ambedkar recommended, as well, the adoption of a uniform Civil Code but remained unheard even when dealing with the Hindu Code Bill in which he wanted to enshrine gender equality for marriage and inheritance. This lost battle against religious influence over social conducts pushed him to resign from the Cabinet in 1951.

While hopes to reform Hinduism from withing were long lost, Ambedkar achieved his last more intimate objective. In October 1935, he had already made a historic announcement: "Unfortunately, I was born a Hindu Untouchable – there was nothing I could prevent it. However, it is well within my power to refuse to live under ignoble and humiliating conditions. I solemnly assure you that I will not die a Hindu." And indeed, he did not. After having considered Sikhism, which encouraged opposition to oppression, Ambedkar embraced Buddhism. In 1955, he founded the *Bharatiya Bauddha Mahasabha* (Buddhist Society of India) and completed his major work *The Budhha and His Dhamma*, published posthumously.

He converted, in October 1956, and with him thousands of Untouchables decided to follow the Buddhist path.

Conclusion

At a time of a revival of caste-based violence in India, but also of global interrogations on the possibility of race and gender equality, the writings of Ambedkar testify of the of power of ideas as much as his human voyage demonstrates the power of the mind.

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Amnesty, Post-conflict

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Introduction: Character, Prevalence, and Controversy

Post-conflict amnesties (hereafter simply "amnesties") are a device of transitional justice, which encompasses the range of practices and mechanisms employed with the aim of achieving accountability, justice, peace, and/or reconciliation in the aftermath of violent political conflict. Amnesties are legal mechanisms that confer immunity from criminal, and occasionally civil, liability on groups of perpetrators of politically motivated crimes, including, not infrequently, serious human rights abuses such as murder, torture, and abduction, which have occurred during

past political conflict. The terms on which amnesties are bestowed vary. They may be granted automatically to all members of a group eligible to receive amnesty, or perpetrators may be required to apply for amnesty individually. They may be bestowed unconditionally or subject to perpetrators' satisfying certain conditions, such as revealing the details of their wrongdoing or surrendering their weapons. They may be restricted to less serious crimes or to serious human rights violations, or they may cover politically motivated crimes of all levels of seriousness. Among the more common reasons for granting amnesty are that amnesty has been agreed to as a condition of an outgoing regime and its agents relinquishing power peacefully and that amnesty is considered necessary for, or at least conducive to, achieving the goals of defusing enmity or political tensions between (former) adversaries and bringing about peace and/or social reconciliation.

Use of amnesties has a history extending back more than two millennia. Hundreds of amnesties have been employed around the globe in countries across South America, North America, Africa, Europe, and the Asia-Pacific region (Mallinder 2008; Jeffery 2014). Despite the "justice cascade," the increasing tendency in recent decades for democratizing states to hold perpetrators criminally accountable through the use of trials (Sikkink 2011), the bestowal of amnesties for crimes including serious human rights abuses remains widespread: "Since the 1970s, amnesties have steadily increased in number and cemented their place as the most popular transitional justice mechanism, ahead of trials, truth commissions, reparation and lustration policies" (Jeffery 2014: 3).

Except in cases in which amnesties have been conferred for the purpose of correcting miscarriages of justice, the use of amnesties is contentious. Amnesties are apt to excite the disapprobation of those for whom justice can be achieved only when perpetrators are suitably prosecuted and, if convicted, punished. The more serious the wrongdoing amnesties cover, the more widely and emphatically they tend to be deprecated. Judicial and quasi-judicial institutions and international and human rights groups, the United Nations included, have in recent decades been increasingly strident in their opposition to amnesties covering serious human rights violations. They typically associate trials with accountability, and amnesties for serious human rights abuses with impunity, which they deem an egregious injustice. They also commonly complain that amnesties contravene international law (though the claim is contentious in part because there is no express treaty prohibition and because laws providing for such amnesties continue to be enacted by states in transitional justice contexts).

The Rule of Law Objection

Amnesties are often said to diverge from the rule of law, a moral ideal (see, e.g., McAuliffe 2010). By exempting certain groups of people, including officials and agents of the state, from accountability under legal norms that have been made public to citizens in advance, they do not treat everyone as subject to "one and the same law" and as equally accountable for acts that exceed their lawful authority, as the rule of law demands (Dicey 1982: 114–115). And the extent of the amnesty's deviation from the rule of law is increased where amnesties extend to extinguishing civil liability, for in that case victims are denied their day in court and prevented from presenting arguments for why they should be awarded damages.

It might be countered that amnesties which are combined with a truth commission and granted contingently upon perpetrators publicly disclosing the details of their wrongdoing, as the post-apartheid South African amnesty was, are compatible with the rule of law because, like trials, they facilitate the accountability of perpetrators (see Allais 2011: 356; Greenawalt 2000: 75–79). This argument invites several replies. Accountability is widely considered to demand that offenders are legally punished. The post-apartheid amnesties ensured that their recipients *escaped legal punishment altogether*. Very infrequently amnesty is bestowed conditionally upon perpetrators not only providing an account of their offences but also performing reparative acts such as community service or compensation, the

immunity scheme implemented in Timor-Leste in 2001 serving as an example. Perhaps these acts of reparation count as legal punishment. If so, such amnesties could provide a level of accountability demanded by the rule of law. But there is another rule of law-related difficulty with accountability that results when amnesties conditional upon truth and reparations are combined with truth commissions or comparable institutions: it usually, if not inevitably, is produced through procedures that fail to observe procedural constraints built into the rule of law (see, e.g., Jeffery 1999).

Whether amnesties necessarily violate the rule of law is contentious given the diversity in conceptions of the rule of law. Amnesties' violation of the rule of law on certain conceptions of it need not render their use morally illegitimate in all circumstances. Rule of law principles are widely thought to express *pro tanto* reasons only, leaving open the possibility that those amnesties which contravene the rule of law may be justified by sufficiently weighty conflicting reasons (Raz 2019).

The Retributivist Objection

By allowing perpetrators to escape their deserved legal punishment, amnesty appears inconsistent with retributivism, on most renderings of which legal punishment of deserving miscreants is morally obligatory. Retributivists often also subscribe to the comparative principle that perpetrators of equally serious crimes should be punished with equal severity (see, e.g., Moore 1997: 90). By allowing perpetrators of political offences to escape punishment, while offenders who have committed crimes for nonpolitical reasons receive their deserved punishment, amnesty flouts this principle.

A number of replies to the retributivist objection to amnesties have been put forward. Colleen Murphy, while not expressly supporting amnesty, has argued that retributivism is for four reasons inapplicable to the circumstances of transitional justice (Murphy 2017: 84–96). First, punishment of acts that were lawful at the time they were performed is in contravention of non-retroactivity, a principle of legality. Second, the standing of the state to punish will have been eroded by its past facilitation of injustice and its perpetration of, or complicity with, human rights violations. Third, punishment in transitional settings fails to reassert the equality of victims relative to perpetrators denied by the latter through their wrongdoing, as required by retributivism, because it neglects the actions of those complicit in wrongdoing and the background injustice characteristic of pre-transitional societies. Fourth, it will not be possible to administer proportional punishment because punishment that is proportional to gross human rights abuses exceeds the limits of the severity of punishment it is morally permissible for the liberal state to exact; and, moreover, retributivism lacks the resources to arrive at accurate assessments of proportionality with respect to wrongdoing perpetrated in pre-transitional societies given its collective character.

Replies to each of these arguments have been entered (Lenta 2018). Retributivists need not accept that the principle of non-retroactivity absolutely rules out the prosecution and punishment of perpetrators for wrongdoing that was lawful at the time it was committed or whose unlawfulness was obscured by legal-governmental officials. The principles of legality state *pro tanto* reasons only; the principle of non-retroactivity could be outweighed by considerations of sufficient import, including retributive justice, such that the enactment of retroactive legislation declaring perpetrators' wrongdoing unlawful may be the lesser of two evils (Moore 1997: 187). With respect to the compromised standing of the state to punish, the state's standing to punish could be restored if it accepts its share of responsibility for past human rights and structural inequality and if it commits to eradicating structural inequality and paying reparation to victims of wrongdoing in which the state was implicated. Furthermore, even if the state's standing to punish remains compromised, it does not follow that retributivism cannot justify the punishment of perpetrators. For by failing to punish perpetrators, the state does an injustice to victims that may be serious enough to outweigh the injustice done to perpetrators by prosecuting them when the state's standing to

punish is compromised. As well, punishment can reassert the equal human dignity of victims even if the wrongdoing in question was widely endorsed when it was perpetrated and despite punishment of perpetrators being inadequate to express censure of past structural inequality. Additionally, proportionality in its cardinal sense, because of its vagueness, requires only that punishment be of a level of severity falling within a vaguely defined range; it is consistent with the stipulation of an upper limit of severity such that for any crime exceeding a certain high level of seriousness, some range of severe sanctions is deemed fitting. Finally, to the concern that retributivism offers no basis for judgments about proportionality with respect to wrongdoing perpetrated by groups, it may be replied that this is not a problem for retributivism since retributivism is a justification for punishment, not a method for determining how much, or what type of, punishment ought to be imposed in particular cases (Moore 1997: 88).

Another reply to the retributivist objection asserts that there is no injustice in granting amnesty to *low-level* perpetrators because they (or at least many of them) were non-culpably ignorant concerning the moral wrongfulness of their human rights violations at the time they performed them. These perpetrators' holding false moral beliefs from which they acted is, on this view, a result of epistemic limitations typical of pre-transitional societies (Espindola 2014). This argument has met with several replies (Lenta 2019a). Adequate intellectual and cultural resources are available in many pre-transitional societies to enable low-level perpetrators to perceive the wrongfulness of their misdeeds. Further, it is unlikely that *all* low-level perpetrators in any pre-transitional society will be morally ignorant; and if that is so, why would amnesty in favor of those who are aware of the moral wrongfulness of their actions be warranted? If it be replied that we should favor amnesty for all low-level perpetrators because there is no available standard with which to determine which perpetrators are morally blameworthy and which not, it can be countered that it is possible to assess moral culpability on the basis of testimony provided by perpetrators and witnesses, as well as other available evidence. Finally, it is doubtful whether non-culpable *moral* ignorance provides an entirely exculpatory *legal* excuse justifying amnesty in favor of low-level perpetrators of serious human rights violations.

David Gray has argued in support of amnesties that low-level perpetrators have an entirely exculpatory legal excuse because of their non-culpable ignorance of the legal prohibition of their human rights violations at the time they were performed (Gray 2006). Their ignorance is, he thinks, the result of officially sanctioned and disseminated false beliefs about what the law prohibits and permits. These false beliefs create the impression that human rights abuses against certain groups are legally permitted when in fact they are legally proscribed. The non-retroactivity principle of legality, on this argument, affords perpetrators an entirely exculpatory "defense from legality" in accordance with which legal-governmental officials are responsible for ordinary people's ignorance of certain conduct having been criminalized. Several replies to this argument have been put forward (Lenta 2020). In many pre-transitional societies, low-level perpetrators are aware of the unlawfulness of their serious human rights abuses. Furthermore, those perpetrators who are unaware may be *morally* responsible for their wrongdoing. And where they are, it may be that the *pro tanto* reason to forbear prosecution and punishment stated by the principle of non-retroactivity is outweighed by the reasons retributivists have to support prosecution and punishment.

Amnesties might also be argued to be justifiable from a retributivist perspective by analogy with plea bargains. Not all retributivists consider plea bargains to be unacceptable (e.g., Lippke 2011). However, only amnesties conditional upon perpetrators pleading guilty and making reparations, such as the 2001 Timor-Leste immunity scheme, could conceivably count as plea bargains. Amnesties conditional solely upon recipients admitting guilt and confessing, while *analogous* to plea bargains (e.g., Levinson 2000: 220), do not actually amount to plea bargains, since they allow perpetrators to escape legal punishment altogether, whereas plea bargains ensure that offenders with whom they are struck receive

some of their deserved legal punishment. It is doubtful whether any retributivists should consider that the truth produced through perpetrators' admitting guilt and confessing justifies foregoing legal punishment entirely. It is possible, however, that retributivists who consider plea bargains acceptable could look favorably upon amnesties offered to low-level perpetrators in exchange for their testifying against accomplices and associates higher up the chain of command, given that plea bargains sometimes take the form of a sentence discount in return for offenders' testifying against accomplices and associates (Mallinder 2008: 102). However, these amnesties would only be justified, if at all, from the standpoint of such retributivists, in cases where complete immunity is indispensable for securing the conviction and punishment of an appreciable number of highly culpable perpetrators. Furthermore, amnesties have never, or perhaps hardly ever, been granted with the aim of securing the conviction of third parties.

Finally, amnesties conferred conditionally upon perpetrators admitting guilt and confessing have been argued to be consistent with retributivism by reason of their facilitating more widespread condemnation than would be possible through viable prosecutions and because they allow for a more accurate assignment of responsibility for wrongdoing than prosecutions (Allais 2011). They do so, on this argument, by eliciting more truth than viable trials. It may, however, be retorted that while many retributivists consider censure to be a central purpose of punishment, they also regard the verbal censure of perpetrators of serious crimes as inadequate in the absence of materially hard treatment. The view that the loss in retributive terms of forgoing legal punishment is outweighed by the gain of censuring a greater number of perpetrators is vulnerable to the objection that retributivists do not generally advocate, in relation to ordinary criminal justice systems, that since only a small proportion of criminals are convicted and punished, immunity from prosecution and punishment should be offered to offenders in exchange for disclosure of wrongdoing to facilitate the condemnation of more offenders. Furthermore, prosecution and punishment of perpetrators need not preclude condemnation of, and allocation of responsibility to, those who are not prosecuted. Evidence is often available to allow this.

It would not follow from certain amnesties involving a sacrifice of retributive justice that they are never justified. For while most retributivists consider the punishment of offenders to be morally obligatory, that obligation, for retributivists of a non-absolutist stripe, is susceptible to being outweighed by countervailing considerations of sufficient import. Even so, considering such amnesties' sacrifice of retributive justice, retributivists are likely to demand that powerful arguments be produced in support of them before agreeing that they are justified.

Consequentialist Justifications

Consequentialist justifications hold that the benefits of amnesties outweigh their costs and that no alternative mechanism could procure the same benefits more cheaply. Among the main benefits extolled by amnesty's supporters are that it fosters, and may even be indispensable for, peace and social reconciliation. However, justifications grounded on amnesty's potential to bring about peace and reconciliation are vulnerable to a variety of objections. With respect to peace, while certain amnesties are associated with the cessation of political violence and enduring peace, others, including the amnesty bestowed in the Democratic Republic of Congo in 2009, are not. Some studies find that amnesties can facilitate durable peace, and may be necessary, where potential spoilers retain appreciable power, to avoid reversion to violent conflict (see, e.g., Snyder and Vinjamuri 2003). Amnesties' conduciveness to peace is in the view of some contingent upon their timing; it is claimed that amnesties agreed to during negotiations, once conflict has ended, decrease the probability of a recurrence of violence (Dancy 2018). Other studies, however, find that trials are efficacious in securing peace and that they may be more effective in this respect than amnesties.

An argument enlisted against amnesties' having the potential to bring about social reconciliation posits that genuine or desirable reconciliation *requires* that perpetrators be punished (Bennett 2003; Metz 2022). On this view, genuine reconciliation, as opposed to a fragile *modus vivendi*, will be precluded unless perpetrators repudiate their wrongdoing by undergoing legal punishment, which gives appropriate expression to the apology and atonement they owe. Another argument brought forward in support of trials and punishment as the preferable pathway to reconciliation is that victims and others' dissatisfaction with forbearing prosecution, which they may perceive as a failure of justice, may breed anger and resentment towards perpetrators, as well as fuel acts of vengeance and/or even civil war.

Justifications advanced for amnesties conditional upon perpetrators' disclosing their wrongdoing often claim that they are likely, because of the amnesty-for-truth inducement, to produce more truth (i.e., knowledge) than trials, which provide perpetrators with an incentive to conceal wrongdoing (McEvoy and Mallinder 2012: 436; Kiss 2000: 77). Truth is claimed to be instrumentally valuable for its facilitation of healing, peace, and/or reconciliation. These claims are controversial, however with respect to truth's engendering victims' healing or closure, there is no conclusive evidence to support the hypothesis that truth-telling benefits victims psychologically. Victims' knowing the identity of those who have perpetrated serious human rights abuses against them while also knowing that perpetrators will, thanks to amnesty, evade punishment has the potential to elicit bitterness and resentment (Elster 2012: 84). And even if amnesty does have psychologically therapeutic effects, some have hypothesized that trials do too. Truth is sometimes thought to engender peace by making denials that human rights abuses occurred prior to transition more difficult and by helping to debunk spurious rationales advanced for human rights violations (Kiss 2000: 71). However, while truth might have a pacifying effect, public disclosure of past wrongdoing may have no effect on peace; or it may, by bringing details of wrongdoing out into the open, be a spur to renewed violence by stirring up feelings of anger or resentment. The proposition that the truth facilitated by conditional amnesty is indispensable for social reconciliation may be challenged on the ground that conditions may be such that allowing past wrongdoing to recede unexamined may be conducive to reconciliation, the example of post-Franco Spain being potentially invocable in support of this counter. Furthermore, it is not obvious that the truth produced by trials and truth commissions unaccompanied by amnesty cannot foster reconciliation. Nor is it easy to show that truth is sufficient for reconciliation; some deny that genuine reconciliation has been accomplished through the amnesty-for-truth dispensation in postapartheid South Africa, for example (Metz 2022: 279).

Consequentialist justifications for amnesty generally have two serious weaknesses. One is the difficulty of demonstrating, empirically, the efficacy of amnesties in bringing about the goods its supporters claim for it. As Geoff Dancy observes, "the consequentialist argument [for amnesties] has surprisingly little support. It remains unclear whether amnesties are effective . . . Few studies conduct systematic studies of amnesty performance" (Dancy 2018: 389). Further, even if the benefits of amnesties could be shown, it has not been convincingly demonstrated that they outweigh amnesty's costs. Amnesty forgoes many of the benefits of prosecution and punishment, assuming they can be established, including their deterrent efficacy (see, e.g., Orentlicher 1991: 2542), their incapacitation of dangerous political leaders or agents of the state (Mallinder 2008: 17), and their weakening of the impulse towards vigilantism.

Amnesty as Mercy and/or Forgiveness

A number of commentators on amnesty have claimed that it qualifies as mercy (see, e.g., McEvoy and Mallinder 2012: 413). The showing of mercy is widely considered to be virtuous. And some have concluded that amnesty's amounting to mercy lends it justificatory support (see Lenta 2019b: 624–625). Amnesty could, potentially, lay claim to morally legitimate status if it counted

as mercy under the predominant definition of mercy as the mitigation or complete suspension of an offender's deserved punishment for reasons having their source in charitable or compassionate concern for wrongdoers' plight or suffering. Yet modern amnesties, at least, do not rank as mercy under this definition since they are never granted out of charitable or compassionate concern for perpetrators' predicament. And amnesty's counting as mercy under certain other, morally neutral definitions of amnesty provides no reason to consider it justified (Lenta 2019b).

Amnesties are often classified as forgiveness (see Lenta 2021a). Their qualifying as forgiveness is sometimes considered to help to justify them, forgiveness being considered by many to be morally good or virtuous. Amnesty cannot amount to forgiveness on the predominant, sentiment-based account of forgiveness, since forgiveness in this sense consists in a victim/forgiver's overcoming negative emotions or attitudes such as resentment or anger, and governments and truth commissions, in granting amnesty, cannot be supposed to undergo a change of heart. Amnesty could, however, count as forgiveness on a sentiment-independent, performative sense of forgiveness as debt remission or punishment forbearance (Lenta 2021a, 2022). Yet amnesty's qualifying as forgiveness in this sense does not assist in justifying it.

Can Amnesties Promote Restorative Justice?

Amnesties conditional upon perpetrators at least making a public admission of guilt and disclosing their wrongdoing are sometimes considered justified in virtue of their potential to foster restorative justice, at least on the predominant, *punishment-deprioritizing* conception of it (see, e.g., Kiss 2000; for animadversions on this justification for amnesties, see Lenta 2021b). The acknowledgment and shared knowledge of the facts these amnesties enable may be considered prerequisites for the dialogic encounters to which restorative justice is committed; and through such face-to-face encounters perpetrators may be publicly called, and held, to account, and victims' demands for answers may be met. The effects of this process on perpetrators may equally be beneficial insofar as admitting wrongdoing may cause them to experience feelings of guilt and shame, which are partly constitutive of repentance. And repentance, if it is consummated and results in an apology, lays the groundwork for the mending of the victim-perpetrator relationship and the latter's reintegration into the community. However, amnesties that are not conditional upon perpetrators making amends by way of restitution, compensation, service, or even verbal apology, as the postapartheid South African amnesty was not, are defective in the perspective of the *punishment-deprioritizing* conception of restorative justice. Amnesties that are conditional in this way are consistent with it, though they are extremely uncommon (and nonexistent in the case of amnesties covering serious human rights abuses).

Conclusion

Whether amnesties are justified depends on the circumstances in which they are granted, on their aims, and on the terms on which they are conferred. It is hard to see how "self-amnesties," such as that granted in Chile in 1978 by the military junta led by General Augusto Pinochet with the aim of shielding the junta and its agents from criminal liability for serious human rights abuses, could be justified. But certain other amnesties granted in favor of even flagitious perpetrators may, from the vantage point of retributivists, consequentialists, and adherents to the rule of law ideal, be justified, on balance, in some cases. For example, amnesties ought to be considered justified in transitional justice settings in which a brutal and oppressive outgoing regime retains sufficient power to require that amnesty be granted as a condition of its relinquishing power peacefully and in which refusal to forgo punishment of perpetrators by the incoming democratic regime would, given the power retained by the outgoing regime, almost certainly result in relapse into tyranny and/or violent political conflict.

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Anarchism

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Introduction

The term "anarchism" is often misunderstood. In journalism and in colloquial speech, anarchy is often mistakenly used as the equivalent of chaos, and destruction and anarchists are associated with nihilists, punks, or bomb-throwing terrorists. However, anarchism is in fact a social and political movement with a fundamentally life-affirming agenda. It attempts to build a world that fosters solidarity, cooperation, and non-dominating behaviors and that brings about collective thriving for all rather than the selected few. It questions the status quo and, at the same time, proposes a constructive alternative. The word "anarchy" comes from Ancient Greek *anarkhía* and etymologically means without (*an-*, "not") ruler or authority

(*arkhé*). More broadly, it means the absence of domination (mastery over another) and hierarchy (ranked relations of subordination) in social structures. The symbol "A in a circle" stands for a state of "order without a ruler" and represents a basic belief that people are capable of organizing themselves collectively and making decisions together about questions that directly concern them. These decisions should benefit *all* members of a community. What is more, anarchism attempts to challenge authority that is imposed from above: "to bend the knee to no authority whatsoever, however respected" (Kropotkin 2005: 8). This stance is captured in the famous slogan "No gods, no masters!" (Guérin 2005: 1–3). In brief, anarchism is a diverse and dynamic political movement – rather than a set theoretical doctrine, philosophical canon, or a political party – which means that it does not have one definition, one concept, or one key thinker that encapsulates all its various strands. We can speak of anarchism in terms of a family resemblance between its different strands rather than a clear, coherent, and unified political theory.

History and Key Figures

Anarchism emerged as a distinctive political movement with its own ideological position in mid-nineteenth century Europe (primarily in France, Germany, Italy, Spain) at a time of European state dominance. Even though one can find elements of anarchist thought beyond these historical and geographical bounds – in ancient Greece (Cynics) and ancient China (Lao-Tse), in early Christianity (Gnosticism) and Buddhism (Zen) – what is termed as the "classical" anarchist tradition refers primarily to nineteenth century European thinkers. The first thinker to call himself anarchist was Pierre-Joseph Proudhon (1809–1865) in his famous work *What is Property?* (1840). Other crucial figures include William Godwin (1756–1836) as a precursor, Michael Bakunin (1814–1876), Peter Kropotkin (1842–1921), Emma Goldman (1869–1940), Gustav Landauer (1870–1919), Louise Michel (1830–1905), Errico Malatesta (1853–1932), Voltairine de Cleyre (1866–1912), Max Stirner (1806–1856), Leo Tolstoy (1828–1910), Elisée Reclus (1830–1905), Benjamin Tucker (1854–1939), Lucy Parsons (1851–1942), Charlotte Wilson (1854–1944), and David Henry Thoreau (1817–1862), among many others. These thinkers and activists produced a rich and varied body of works without an agreed policy or philosophical canon. Instead, their writings contain an abundance of different ideas, concrete initiatives, and practical proposals. We can broadly distinguish between anarchists that championed individual will and freedom ("individualists" such as Stirner or Tucker) and anarchists that considered freedom a social virtue, which can only be achieved in a community (different designations operate for them: "collectivist," "communitarian," or "social" anarchists such as Proudhon, Bakunin, and Kropotkin). For social anarchists, one cannot emancipate oneself politically by oneself. Political and social freedom is always a collective endeavor, relying on a group of people and specific conditions. The best way to understand the history of anarchism as an organized political movement is therefore by concentrating on social (rather than individualist) anarchism.

Anarchism is a left-wing political tradition that shares its early beginnings with Marxism. Karl Marx, Proudhon, and Bakunin met during the 1840s in Paris and shared many ideas. However, their positions diverged with time, and there has been a continuous tension between the Marxist and anarchist traditions. Primarily, the conflict is of an ideological nature and concerns the question of how to bring about socialism. Whereas Marx argued for taking over the state apparatus and establishing the dictatorship of the proletariat, anarchists rejected the state and the party system and favored federations of self-governing workplaces and communes as forms of political organization. Another important distinction between the two traditions is the anarchist rejection of leaders and a revolutionary vanguard. While Marxists accept referring the decision to party leaders, anarchists prefer horizontal and collective decision-making structures through group consensus. Relatedly, while Marxism is eponymous and Marx's *Capital* (1867) is considered as one of

its key works, anarchism does not refer to a single key book or key thinker but rather focuses on practice and hence is a collection of a variety of anarchisms. Furthermore, whereas for Marxists it is possible to reach revolutionary goals by non-revolutionary means (for instance, to bring about the "withering of the state" by taking over the state apparatus and reproducing authoritarian or bureaucratic structures within the revolutionary movement), for anarchists "the means and the ends" have to be identical. Finally, the ideological conflict between Marxism and anarchism was of a personal nature as well, in that Marx engineered Bakunin's expulsion from the International Working Men's Association in 1872 in The Hague and in that way assured a Marxist agenda for the organization.

The negative stereotype of anarchists as terrorists – as people turning to violence because they are committed to freedom – originates in the nineteenth century. At the turn of the nineteenth and twentieth century, a number of individualist anarchists assassinated or attempted to assassinate a series of prominent political figures and business leaders (including Tsar Alexander II of Russia in 1881, President Sadi Carnot of France in 1894, Archduke Franz Ferdinand of Austria in 1914, industrialist Henry Clay Frick in 1892 – a failed attempt) and also a number of uninvolved people (Émile Henry's bombing of the Café Terminus in Paris in 1894). These acts were considered "propaganda by the deed," defined as a form of direct action whose aim was to serve as an example to others and give impetus to a revolution. Such acts of terror were considered by many anarchists of the time as acts of despair and were soon rejected as an ineffective political strategy. Instead of sparking a social revolution, the terrorist attacks led to a series of exceptional laws restricting freedom of the press, as well as heavy-handed repression of anarchists by the police (Shaya 2010). What is more, anarchists at the time claimed that the assassinations and bombings of the 1890s were partly instigated by state-supported *agents provocateurs* and the police themselves and further stirred up by the sensationalism of the popular press (Jensen 2013). The story line of a police spy acting as an *agent provocateur*, encouraging anarchists to perpetrate crimes that they would not commit otherwise, appears in early twentieth century novels such as Joseph Conrad's *The Secret Agent* (1907) and G. K. Chesterton's *The Man Who Was Thursday* (1908). These assassinations and bombings, and their fictional representations, fixed the image of anarchist-as-terrorist in the collective mind and still fire the popular imagination today (for instance, the James Bond film *No Time to Die* (2021) features an "anarchist-terrorist leader"). In contrast, there were also important pacifist strands of anarchism and anarchists representing non-violent civil disobedience (Tolstoy, Landauer, Thoreau). To this day, anarchists debate the question of violence in political activism, for instance, with regard to "black bloc," which is a protest tactic associated with police confrontation. There is, however, a clear and unequivocal consensus in anarchist circles that acts of terrorism targeting individuals are a thing of the past and should not form part of anarchist political strategies today.

Key Values and Concepts

The key anarchist values are solidarity, equality, and freedom. There is some discussion regarding which of these three terms is central for anarchism, but all three are considered to be mutually reinforcing, collective, and necessary. Anarchism in its classical form presents a critique of the state (Bakunin), of private property (Proudhon), and promotes the concept of solidarity (or "mutual aid") that Kropotkin proposed as a radical alternative to nineteenth century Darwinist models of "natural competition." The critique of the state is primarily based on its unjustified hierarchy, unequal distribution of power, and monopoly on violence. The critique of property and more broadly of capitalism is based on a conviction that this economic system is the source of the exploitation, inequality, and suffering of a vast majority of human beings and of the natural world. Anarchists are anti-capitalists and do not subscribe to a notion of self-regulating market

systems. Anarchists are skeptical of fixed structures and believe in community-based alternatives to the alienating structures of the state apparatus and global capital.

One of the essential features drawing together many of its different strands is anarchism's rejection of all domination (May 2009; Gordon 2008). Domination is a wide-ranging term that refers to oppressive power relations and includes, among others, ableism, ageism, capitalism, colonialism, class-based exploitation, heteronormativity, imperialism, patriarchy, racism, and speciesism. It is materialized in social and political institutions (like the traditional nuclear family, the workplace, the state) and can also be found in language, behaviors, perceptions of self, and others. Because domination is so pervasive, there can only be a variety of intersecting struggles to combat it, which are targeted to specific but systemic problems (for example, ableism, racism, sexism). This means that anarchist tactics have to be diverse because there is no single source of domination and no single sphere of human activity where all domination can be tackled (unlike "exploitation" in the economic sphere in Marxism (cf. May 2009)). In that sense, anarchism offers continuous and varied responses to domination.

Anarchist values are strongly tied to a specific vision of a human being. For anarchists, humans are inherently social beings that are capable of cooperation to realize common ends. In contrast to classical liberalism, where humans are considered asocial, egoistic, and atomistic and need to be coerced to form a community, for anarchists, community building happens organically among human beings. Ideally, the anarchist society would be based on free and voluntary associations that are self-governed and driven by cooperation, community, and self-reliance, with horizontal structures (i.e., no leaders) and collective decision-making. It would be "a fabric of closely knit voluntary relationships" that would create conditions for thriving for all members of a community, human and nonhuman alike (Woodcock 1986: 12). Anarchists propose concrete practices and small-scale initiatives to bring this vision of a society about.

Practice over Theory

Practice – rather than theory – is of highest importance to anarchists. This is also partly why some anarchist substrands, such as anarcha-feminism, are relatively undertheorized. Practice is crucial because anarchism not only criticizes the status quo (discrimination, domination, ecological destruction, exploitation, inequality, injustice, suffering) but also actively proposes concrete alternatives for a better society. In brief, anarchism is not only a revolution *against* but also a revolution *for* life, a better existence, a just society, and a habitable planet for all (von Redecker 2020). What is more, practice is crucial because "anarchists see inaction as compliance" and a silent support of the oppressive structures (Kinna 2019: 115).

Anarchists seek to fundamentally transform the society. Their crucial insight is that revolution – usually conceived as a singular and complete break with the former structures of oppression – needs to be achieved through evolutionary means (Graeber 2004, 2007; Day 2005; Davis 2012). From an anarchist perspective, it is considered naïve to assume that a single uprising or successful civil war could change the whole social apparatus and people's relations to each other. This is because not only do all social and political institutions need to change but also the way we relate to each other (Landauer 2010: 214). This necessitates also a change in our habits (Janicka 2017). In that sense, revolution for anarchists is a patient, attentive, and never-ending process, what some anarchists also call "r/evolution" (Gordon 2008). Politics for anarchists, then, does not happen through the seizure of political power, either through democratic elections or a political coup, but rather through an everyday practice focusing on cooperation and the empowerment of grassroot communities that attempt to operate without domination. Participatory and horizontal decision-making through consensus is crucial for anarchists. There is a special attention to "process" in anarchist self-government. This means that anarchists will rework a proposal in general assemblies and councils until everyone

affected by its result is willing to accept it. There is no enforcement of a decision nor majority rule in anarchism, and from that perspective, anarchism has an ambivalent relationship to democracy. Freedom and equality are not distant goals to be achieved but practices in the here and now to be exercised and integrated within one's daily life. That is why anarchists set up dedicated spaces – autonomous zones, communes, collective housing projects, cooperative farms – where they can reinvent everyday life and practice alternative, non-dominating ways of relating to each other. This is what anarchists term "prefiguration."

Prefiguration, or prefigurative politics, is one of the key terms in contemporary anarchism. It can be defined as an active construction of alternatives – institutions, infrastructures and interpersonal relationships – which build a new world "within the shell" of the existing one (Milstein 2010; Kinna 2012b). Prefiguration is about an actual implementation of anarchist social relations and thereby constructing the future, which one wishes to see realized, in the present. It signifies a consistent relationship between means and ends because the goal (the society one wishes to live in) is realized through concrete set-ups in collective spaces. In that way, anarchism reclaims utopia in a very practical sense. Utopia for anarchists is a constant exercise in imagination and experimentation in practice, in which each community needs to find their own ways to build a better common world.

In this sense, anarchism is not so much defined by a canon of theory but by a repertoire of practices that actualize anarchist values (Cohn 2006). This repertoire is a mixture of critique (activism that aims to oppose and resist) and construction (activism that builds alternatives) and includes various forms of civil disobedience and direct action such as squatting, occupations, sit-ins, strikes, hacktivism; practicing direct democracy and operating horizontally (through affinity groups, communes and federations); establishing social centers for developing non-hierarchical skills and infrastructures; creating alternative educational set-ups; engaging in artisanal forms of commerce and mutualism; developing rural and urban projects of sustainable living – for example, cooperative farms and autonomous zones based on collective ownership, community gardens; producing ideological material (manifestoes, newspapers, flyers, info sheets as well as narrative fiction, visual and performance art); and sharing knowledge (creative commons publishing and bookfairs, free software programming). Concrete examples include initiatives such as Food not Bombs, autonomous zones such as ZADs ("zones to defend") notably in Notre-Dame-des-Landes (France), and Zapatistas' territory in Chiapas (Mexico) – all of which run on egalitarian models of interaction. This is what anarchists today call "propaganda by the deed."

Contemporary Anarchism

Anarchism today is only to a limited extent a direct continuation of anarchist movements from the nineteenth and early twentieth centuries. By the end of World War II, anarchism had disappeared from the political scene. It resurfaced, though in a different form, in the radical social movements of the 1960s and its different strands fused in the late 1990s and early 2000s during the global wave of protest against the institutions and policies of global capital – for instance, the Seattle World Trade Organization protests (1999), Occupy Wall Street (2011). Contemporary anarchism is made up of various left-wing social movements with differing agendas: anti-racist, environmental, queer, and radical feminist, as well as anti-capitalist, anti-neofascist, anti-nuclear, and anti-war activism. However, not all these movements would define themselves as anarchist. The overlap between these struggles and anarchism is partial and can be broadly characterized by (1) a certain political culture (concrete forms of activism, horizontal modes of organizing, political language) and (2) an opposition to various forms of domination (Gordon 2008). Whereas classical anarchism focused on class struggle, violent revolution, and confrontation, the more recent movements advocate social diversity, creativity, and indiscipline (Kinna

2012a). Whereas the older version was organized through formal groups with elected positions, workplace organizing, and anti-militarist struggles, the contemporary anarchist movements operate in grassroot and horizontal structures, through informal affinity groups and facilitated consensus, and struggle for change across a wide diversity of issues that can be brought together under the umbrella of solidarity with the oppressed and invisibilized (Janicka 2017). In that sense, contemporary anarchism is strongly intersectional.

Conclusion

There is a wide variety of anarchisms: anarcha-feminism, anarcho-communism, anarcho-pacifism, anarcho-primitivism, anarcho-syndicalism, green anarchism, mutualism, queer anarchism, and anarchism without adjectives, to name only a few. There are also various currents within contemporary anarchism – class-struggle anarchism, insurrectionism, postanarchism, post-left anarchy, small "a" anarchism, and social anarchism – that are widely discussed. Finally, one may also encounter "anarcho-capitalism," particularly in the USA, but this position is contentious in light of the history of anarchism as a fundamentally anti-capitalist movement. Anarchism is a rich, varied, and dynamic movement that can be defined in multiple ways. A crucial take-away, however, is that anarchism is a form of horizontally organized collective practice that continually responds to various forms of systemic domination by practicing solidarity with the oppressed and by creating better alternative worlds every single day.

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Animal Rights

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The Idea of Animal Rights: Historical and Philosophical Background

Do nonhuman animals have – or should they have – certain moral and/or legal rights that entitle them to protection of their basic interests and intrinsic value or "selfhood"? Animal rights are evoked in a wide variety of contexts, generally concerning the normatively appropriate moral and/or legal status of, entitlements of and obligations toward animals. The envisaged class of animal right-holders rarely includes all biological animals, and is most commonly limited either to animals that possess human-like cognitive capacities (e.g., great apes, whales, and elephants) or to sentient animals (vertebrates and some invertebrates). The phrase "animal rights" typically refers to basic rights such as the right to life and bodily integrity, but is sometimes – especially colloquially – used to cover a more expansive range of normative protections afforded to animals.

The idea of animal rights is not novel and finds mention in the works of philosophers and social reformers such as Bentham (1789), Krause (1874), Salt (1892), and Nelson (1932). Since the advent of modern animal ethics in the late 1970s, sparked notably by Singer (1975), animal rights have become more widely theorized and popularized. Accounts of animal rights have originally and primarily been developed in moral philosophy, based on diverse theoretical frameworks such as utilitarianism, Kantianism, social contract theory, or the capabilities approach (Regan 1983; Rowlands 1998; Cavalieri 2001; Nussbaum 2007). The topic has gradually also become the subject of political philosophy, which is concerned with questions such as citizenship, political representation, and social membership of animals (Donaldson and Kymlicka 2011), as well as of legal scholarship that deals with the preconditions and possibilities of the legal institutionalization of animal rights (Francione 1995; Wise 2000).

The idea of animal rights is controversial and has attracted both "anthropocentric" critiques (objecting to the notion of *animal* rights, e.g., Carruthers 1992) as well as non-anthropocentric, for example, "welfarist" or "progressive" (feminist, Marxist) critiques (objecting to the notion of animal *rights*, e.g., Benton 1996).

Conceptual Issues and Distinctions

To begin with, a number of conceptual clarifications need to be made. First, even though they are intimately connected, moral and legal animal rights need to be distinguished. Roughly put, the moral rights of animals pertain to the treatment of animals that morality requires of moral agents. Legal rights, on the other hand, are generally conferred by legal systems and pertain to what is due to animals as a matter of law. In what follows, this entry will focus on legal animal rights.

Theories of Rights

What are the structural and/or functional features of rights? The main theories seeking to answer this question are the will (or choice) theory and the interest (or benefit) theory. Both theories come in various formulations. According to a typical will theory, *X*'s holding of a right toward *Y* consists in *X*'s being empowered to waive or enforce *Y*'s duty (e.g., Hart 1955; Wellman 1995; Steiner 1998). Interest theories typically take *X*'s right to result from a duty that protects *X*'s interests (e.g., MacCormick 1977; Raz 1984; Kramer 1998).

Will theorists are generally skeptical of animal rights, given that nonhuman animals are not mentally capable of, for example, deciding to sue in order to enforce their rights. Many will theorists might deem any putative ascription of rights to animals as merely a sloppy or incorrect use of the word "right." However, some will theorists maintain that rights can also be exercised by representatives (e.g., Hart 1982). Such "soft" will theories might accommodate animal rights. A legal

application of this view would hold that an animal must have legal standing – that is, an entitlement must be enforceable in the animal's name – in order to count as a right-holder. Interest theories typically allow for animal rights, though some interest theorists (e.g., Raz 1984) think that animals are not of ultimate moral value, rendering them ineligible to hold rights.

Both will and interest theorists typically take claim-rights – the correlatives of duties – to be the most central type of rights. However, many theorists accept that fundamental rights, enshrined in constitutions and human rights instruments, are not merely correlatives of duties. This is because a significant component of fundamental rights is the restriction of the powers of the legislator. Thus, the enactment of fundamental animal rights would not only entail the duty to respect (and protect) these rights but also disempower the legislator from enacting legislation that would infringe upon a fundamental animal right. In the terminology of the Hohfeldian analysis of rights, this aspect of fundamental rights can be analyzed as immunities (Hohfeld 1913; for an application of the Hohfeldian categories to animal rights, see Wise 1998).

Assuming that animals are conceptually capable of holding legal rights does not mean that they do in fact hold legal rights. In order to assess whether animals have legal rights, there are still a number of issues that must be addressed.

Legal Personhood and Animal Rights

Legal personhood and right-holding are often taken to be connected. Many think that legal personhood is a precondition for right-holding: only beings that have been declared legal persons can hold legal rights (e.g. Wise 1996). Adherents of this notion often equate legal personhood with "legal capacity," the capacity to have legal rights and duties. On the other hand, some think that right-holding entails legal personhood: if an entity holds at least one legal right, then it is a legal person (Bilchitz 2009). Yet others reject this connection between rights and personhood, either implicitly (Sunstein 2004) or explicitly (Kurki 2019; Pietrzykowski 2017). These authors claim that animals can – and in fact do – already hold legal rights despite not being legal persons.

The view that legal personhood is a precondition for or corollary of right-holding seems somewhat more popular in civilian jurisdictions (e.g., courts in Argentina and Colombia that have granted rights to animals have concurrently recognized animals' legal personhood) than in common-law jurisdictions, where judges have occasionally been more liberal with regard to the ascription of rights to animals, independently of the matter of legal personhood.

"Weak" and "Strong" Rights

A final question is whether any kind of legal protection that meets certain structural requirements is properly classifiable as a right. Thus, under the interest theory, does any duty imposed upon humans to refrain from the ill-treatment of animals constitute a right for the affected animals – even if the duty is merely a prohibition of some particularly grueling forms of torture? Some would say that such entitlements are too "weak" or insignificant to be classified as rights. Opinions differ on what would render an entitlement "strong" enough to be classified as a right. For instance, Gary Francione has famously argued that as long as animals retain their current status as property, their "rights" are subject to being balanced away (Francione 1995). Thus, abolishing their status as property would be a precondition for animal rights proper.

Animal Rights *de lege lata*

Apart from the aforementioned conceptual issues relating to whether animals *can* have rights, a further question is whether animals *do* already hold some legal rights under positive law.

Legal Status of Animals

In virtually all legal orders, animals are neither explicitly designated as legal persons nor endowed with legal capacity. Within the person/thing and subject/object dualism that is fundamental to Western legal thought, animals have traditionally been and continue to be classified as things,

property, and objects of rights. Nonetheless, most (at least most Western) jurisdictions have animal welfare laws that institute some special protection for animals against cruelty and inflictions of unnecessary pain or suffering – thus implicitly acknowledging that animals are not mere things. Moreover, a number of Continental European jurisdictions have enacted special civil code provisions explicitly stating that animals are not things. However, this "dereification" does not per se reassign animals to the category of legal persons or right-holders. Furthermore, some jurisdictions recognize and protect the intrinsic value or dignity of animals. Overall, considering the special legal protections afforded to animals as living or sentient beings, animals have emerged as a distinct legal category in between persons and things, or subjects and objects (see Stucki 2016, 118ff).

Statutory Animal Rights

The predominant legal opinion is that animals do not have rights as a matter of positive law. However, some commentators contend that the duties imposed on humans by existing animal welfare statutes confer corresponding rights on animals (e.g., Kurki 2017). These purportedly rights-generating statutory duties can roughly be divided into three groups. They typically include (1) a range of general negative duties not to treat animals cruelly and to not inflict unnecessary pain or suffering on them, (2) specific prescriptions or prohibitions of certain behaviors (e.g., a duty to stun animals before slaughter or to anesthetize animals before inflicting severe injuries on them), and (3) some positive duties of care (e.g., duties to provide animals with food, shelter or medical assistance). Such duties are imposed on humans for the benefit of animals, to protect their interests and aspects of their well-being, and can thus be read as correlatives of animal rights on an interest-theoretical analysis.

Several objections may be raised against such a rights-based interpretation of existing animal welfare laws. Notably, some authors assert that not all duties entail correlative rights. Moreover, following HLA Hart's redundancy critique, it may be said that animal rights, understood as flowing from animal welfare statutes, amount to nothing more than mere reflexes of beneficial duties. Furthermore, some authors insist that only legal persons can hold actual rights, and that animal welfare laws therefore do not confer any rights on animals by definition (see Wise 1998, 911). Finally, some authors maintain that the legal protection afforded to animals by statutory law is in effect too weak for them to constitute rights (e.g., Francione 1995).

A further issue is whether legal protections that can theoretically be interpreted as constituting "rights" need some form of legal recognition *as rights* in order to count as actual legal rights. To date, animal rights have not been explicitly enacted in legislation. Furthermore, while there are a few isolated instances of judicial recognition of animal rights, overall, unwritten animal rights have not been recognized by courts so far. To generalize somewhat, legal scholars and judges in common-law systems tend to speak more liberally of "animal rights" in an actual (but often vague) sense, while especially Continental European voices are less inclined to acknowledge existing legal animal rights, not least due to a lack of legislative recognition of such rights (e.g., Stucki 2016).

Regardless of whether one holds the view that animals have rights as a matter of positive law, the discussion on statutory animal rights *de lege lata* underscores the usefulness of drawing a conceptual distinction between different types of (potential or actual) animal rights, based on the content and weight of such rights. Simple "animal welfare rights" (e.g., the "right to be stunned before slaughter"), such as may be derived from existing animal welfare laws, generally provide for a narrow scope of protection and/or are weak due to their high susceptibility to being overridden by less important human interests. "Fundamental animal rights" (e.g., the right to life, including the "right not to be slaughtered"), by contrast, are strong rights along the lines of human rights that protect important interests and demand a high burden of justification for infringements (see Stucki 2020).

Constitutional Animal Rights

Even though there is a growing global trend toward constitutionalizing animal welfare matters, with an increasing number of states having enacted constitutional provisions on animal protection (see Eisen and Stilt 2016), this does not automatically translate to constitutional rights for animals. Notwithstanding the general lack of constitutional recognition of animal rights, there is some noteworthy case law that has essentially produced fundamental constitutional animal rights.

Courts in Argentina and Colombia have applied constitutional human rights – in particular the fundamental right to habeas corpus and the inalienable or "supralegal" right to freedom – to animals held captive in zoos (Stucki and Herrera 2017).

Furthermore, high courts in India have developed case law recognizing the fundamental rights of animals. Notably, the Supreme Court of India (2014), by undertaking a rights-based interpretation of statutory animal welfare law in light of the constitution, has constitutionalized statutory animal rights and elevated them to the status of fundamental rights.

Enforcement and Legal Representation

A final question having to do with the existing legal rights of animals is that of enforcement. Do animals only hold legal rights if these rights or protections are enforceable in some specific way? The most obvious example is that of legal standing: do the putative rights of animals only constitute genuine rights if they are enforceable in the name of the animal? A will-theoretical understanding of rights would likely connect rights with standing. Interest theorists, on the other hand, are often prepared to grant the status of a right to entitlements enforceable by, for example, a public prosecutor in the name of the state, or even protections that are altogether unenforceable (see Kramer 1998).

A related issue – which has more to do with the legal status of animals *de lege ferenda* – is how animal rights *should* be enforced. Given today's implementation gap, means to improve the enforcement and enforceability of animals' legal protections through private parties (rather than only public authorities) have been in the focus of legal scholarship. For instance, Christopher Stone has famously argued that environmental protection would be enhanced if natural objects were given standing, enabling human beings to sue on behalf of, for example, trees (Stone 2010). In a somewhat similar vein, Cass Sunstein has argued for an arrangement where any private party would be empowered to sue on behalf of an animal (Sunstein 2004).

Animal Rights *de lege ferenda*

As regards the rights that animals *should* potentially have, different groups of rights, designed to protect different goods and interests of animals (e.g., welfare, life, liberty, dignity), are discussed in animal rights scholarship.

On the welfarist view, animals should have rights relating to their well-being and protecting them against cruelty and unnecessary pain or suffering. These rights would however not generally preclude the use and killing of animals for human purposes, such as for food production and scientific research. Some argue in favor of a more stringent set of rights relating to the interests of animals as sentient beings (e.g., rights protecting against suffering and death), but not liberty-related rights, since (most) animals are not autonomous agents that possess an intrinsic interest in freedom and autonomy (Cochrane 2012).

According to the abolitionist view, animals should not be put to harmful use at all, and should first and foremost have the right not to be property (Regan 1983; Francione 2000). There are increasing voices advancing the view that animals should have "human rights," that is, some of the same fundamental rights as humans (e.g., Cavalieri 2001). In this vein, the traditional animal rights position suggests a range of *basic rights* along the lines of core human rights, notably:

- The right to life
- The right to bodily (and mental) integrity

- The right to liberty and freedom of movement
- The right to freedom from torture and inhumane treatment

Further possible human-rights-like fundamental animal rights include:

- The right to *legal personality*: that is, the right to recognition as a person before the law. Insofar as one holds the view that only entities deemed legal persons by the legal system can hold rights, this right creates the legal precondition for having any (other) rights at all.
- The right to *dignity*: analogous to human dignity, this right would preclude treating animals solely as means to ulterior ends, rather than as ends in themselves as well. One example would be the prohibition of extreme instrumentalization and reification.
- The right to *equal treatment and non-discrimination*: corresponding with and institutionalizing the principle of equal consideration of interests, this right would protect against discrimination based on species membership ("speciesism").
- The right to *habeas corpus*: this fundamental procedural right to the judicial review of deprivations of freedom, and a safeguard of the substantive right to liberty, would provide a legal remedy for representatives of animals to challenge the legality of their captivity and request their release.
- *Procedural guarantees* such as the right to access to justice: complementary procedural rights would be important in order to facilitate the judicial enforceability of animals' substantive rights.

In addition to such universal basic rights for all (sentient) animals, some authors propose certain complementary, differentiated *relational rights* for specific groups of animals, depending on the specific context and their relationship to humans. For example, in the *Zoopolis*, domesticated animals who are members of human society would have citizenship rights, and wild populations of animals would have sovereignty rights (Donaldson and Kymlicka 2011). Finally, some authors are discussing *labor rights* for animals as workers (Cochrane 2016; Shaw 2018).

Lastly, in legal practice, there have been legislative and litigation efforts in recent years to institute some of the animal rights discussed here. In the United States, the Nonhuman Rights Project has filed several habeas corpus lawsuits for captive chimpanzees and elephants – so far without ultimately achieving legal recognition of any animal rights. In the Swiss canton of Basel-Stadt, a popular initiative demands constitutional fundamental rights for primates (as of April 2019, the validity of the popular initiative is subject to review before the Federal Supreme Court). In Finland, the Society for Animal Rights Law has prepared a proposal that would enshrine certain fundamental animal rights in the Finnish Constitution. According to the proposal, animals would receive legal standing as well as a number of rights depending on whether they are wild animals or dependent on humans (Finnish Animal Rights Law Society 2019).

Cross-References

▶ Human Rights and Justice
▶ Proportionality: Measuring Impacts on Fundamental Rights
▶ Rights: Legal and Moral

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Anthropology of Law

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Introduction

Anthropology is the study of human societies. The focus is on what is distinctive about cultures, processes, and social groups, examined in their historical and political contexts. Rather than search for universals, anthropologists seek out cultural difference, describing the various and

distinctive methods people have developed to organize their social lives and relations.

Most anthropological work is based on ethnography, studies conducted by researchers over long periods of time, often in an unfamiliar setting. The object of the ethnographer is to get to know people, processes, events, and institutions, to observe how people act, but also to get a sense of how they, themselves, understand their societies and social relations. The aim is to understand the concepts, models, and unstated assumptions with which people make sense of the world around them. For the legal anthropologist, this means examining the structures and operation of legal institutions, the ways in which people conduct legal processes, and the rules and categories they formulate. It also means inquiring into the concepts they use to do so, including the concept of law, itself, or the related ideas they employ when speaking different languages.

What, then, can anthropological studies contribute to more theoretical reflection on the nature of law?

Anthropology and Philosophy

Anthropologists approach their subjects – law, marriage, witchcraft, ritual, money – as social facts. They are what philosopher John Searle (1995) calls "institutional," rather than "physical," facts. As Searle explains, to understand what they are is to understand what they mean and what their social roles are, as observed in people's behavior, attitudes, assumptions, beliefs, and values. But the starting point for philosophical enquiry into the nature of institutional or social facts must be the ordinary-language concepts in question. Their meaning emerges from the social contexts in which they are used to communicate. As Peter Winch (1958) has explained, the objective of this type of enquiry is to clarify those concepts that are fundamental to our conception of reality and, in this way, to make the world more intelligible. As he says, social relations are, themselves, expressions of ideas about reality. Accordingly, understanding the nature of law means examining how the concept is employed in ordinary language, during normal social interaction. In this way, we can get a sense of the rules that govern its meaningful use. Anthropological examples can be used to explore that use, to give us a sense of where the boundaries lie, of what is properly understood to be law and what is best distinguished as something else. They allow, in this way, for critical reflection on the nature of reality.

In practice, anthropologists undertaking ethnographic work start in a particular physical place or with a particular group of people, seeking to understand their view of the world. But the scholar must also consider what concepts can be used for the description and analysis of what has been observed. Sometimes English concepts – marriage, religion, money, law – are not entirely appropriate to the case at hand. The anthropologist may need to resort to qualifications, similes, or analogy to explain what has been observed. In turn, however, considering phenomena that do not fall neatly into these categories may clarify the ambit of the terms in question. Considering anthropological examples can, in this way, help to sharpen our sense of the boundaries between what is and is not properly described as "marriage," "money," or "law." This is to test and clarify the concepts through which we make sense of reality.

The concept of law, like many social categories, is "polythetic." In Wittgenstein's terms, it is a "family resemblance" concept, not amenable to a single, tight definition, such that there is always the possibility of marginal cases (Needham 1975). Equally, there are no universal, defining features. Different examples may share common features and there are overlaps between them, but none is necessary or universal. Nonetheless, the fact that we think and talk in terms of such categories indicates that they are social facts, that they are part of how we make the world intelligible. They deserve just as much philosophical attention as those concepts that can be more neatly defined. Ethnographic examples can shed light on the social contexts in which they gain their meaning and the complex, sometimes multiple or even inconsistent, ways in which a concept like "law" may be meaningfully used.

The anthropology of law, then, involves consideration of empirical examples of law and also of what is law-like. By examining unfamiliar examples, cases that hover on the margins of law, the anthropologist can both challenge common assumptions about the nature of law and shed light on the boundaries and borders of the concept. It is an approach typical of a style of philosophy, which examines cases that are not quite examples of a concept, in order to reach a better understanding of those that are. As philosopher JL Austin (1961: 130) put it, considering marginal cases sharpens our awareness of words in a way that also sharpens our perception of phenomena.

Debates in the Anthropology of Law

Exploring the nature of law is just part of the broader project of legal anthropology, which has often involved examining the institutions, processes, and ideas of other societies and cultures, which are law-like in some way. Anthropology had its roots in the interest taken by nineteenth-century scholars in the societies and cultures of different people and places. Seminal here was James Frazer's *The Golden Bough*, a study of ritual and kingship, first published in 1890. From the early twentieth century, anthropologists began to conduct field studies, spending extended periods of time in other parts of the world. Several of the earliest, notably Cornelis van Vollenhoven (1918–1933) and Bronislaw Malinowski (1926), studied the laws and legal processes of small communities (villages, families, and clans) in Indonesia and the Trobriand Islands, respectively. They concentrated on methods of maintaining order and resolving disputes. The aim was to understand those societies from the inside. This work was followed by many studies, in Africa and elsewhere, of order and disorder and forms of conflict resolution.

Which Concepts? The Gluckman-Bohannan Debate

In the 1950s, two anthropologists working in different parts of Africa conducted an influential debate over the nature of legal anthropology. This primarily concerned the use of English legal concepts to describe African ideas and practices. Max Gluckman (1955), working in what is now Zambia, analyzed the reasoning of the judges of the Lozi courts, who employed a concept of "the reasonable man," which was similar, he said, to that used by English judges. Paul Bohannan (1957) criticized this approach, arguing that it imposed an idea from English jurisprudence onto a situation in which it was not appropriate. With some justification, Bohannan pointed out that societies develop very different legal ideas and practices, which means that the anthropologist using English legal terminology risks imposing inappropriate models on his material.

It is generally accepted, however, that although great caution must be exercised when applying western concepts in culturally distinct contexts, careful use, with appropriate qualifications, can be justified. Indeed, if the anthropologists were not to use any western (e.g., English) terms, then it would become practically impossible to say anything at all. To put it more positively, language is flexible enough that it can be used to describe phenomena found in very different contexts, without misrepresentation. The use of metaphor and analogy is often key technique here. Gluckman's concept of "the reasonable man" was based on the close observation of legal cases and his own judgment that the approach taken by the Lozi was analogous to that of English lawyers and judges. Of course, some concepts are easier to transpose across cultural divides than others. Among the more problematic is the concept of "law," itself, and in the following decades, this became the subject of further debate.

Legal Pluralism: Expanding the Concept of Law

Early legal anthropologists often worked in colonial contexts. The concept of "legal pluralism" was developed to describe the fact that indigenous people have their own "laws," means of maintaining order, and forms of conflict resolution and that these often persist despite the imposition of a colonial legal system (von Benda-Beckmann 1970; Merry 1988). Studying contemporary New York, Sally Falk Moore (1973) described a similar phenomenon among workers in the garment industry. She noted that they

maintained norms and practices for regulating labor relations, quite apart from – and often in contradiction to – those of the state's legal system. These practices formed a "semi-autonomous social field." Her work inspired the seminal article by John Griffiths (1986), *What is Legal Pluralism?* Many scholars have subsequently used this concept to describe what they characterize as a plurality of laws and legal processes found in many different contexts.

One of the aims has been to expand the field of legal scholarship, beyond the "black-letter law" still dominant in law schools, to encompass legal phenomena found in very different times and places. This has sometimes been expressed as a critique of the "legal centralism" of legal scholarship. Conventional jurisprudence was characterized as being preoccupied with state law and having an ideological quality that privileged and reflected the moral and political claims of the nation state. As de Sousa-Santos (2002: 385) puts it, beyond state law, which is distinctive in being the only legal form that thinks of itself as law, lies a great variety of legal orders circulating in society. The term has proved attractive and is now used by scholars of globalization and transnational law (von Benda-Beckmann 2002; Merry 2006). Paul Berman (2012: 18) argues that legal pluralism provides a framework for understanding a hybrid world in which normative assertions of multiple entities compete for primacy. We need, he maintains, a more capacious definition of law.

It was soon recognized, however, that in this scholarship the concept of law was being expanded beyond its normal usage. In practice, anthropologists, social activists, and others seeking to describe or protect the laws of minority peoples often turn to the concepts of "indigenous" or "customary" law. If the object is to support claims to autonomy, arguments may be more powerful when phrased in terms of indigenous "law," than simply as "customs" or "traditions." Equivalence with the state's legal provisions is, thus, asserted. Chanock (1985: 238) has described how "customary law" serves indigenous people as a method of legitimation, part of "an ideology of traditionalism," which supports new demands. As he warns, however, such moves risk effacing the nature of a system that uses living principles in flexible and popular disputing processes, representing them in terms of authoritative legalism (Chanock 1985: 238–39).

Taking a more analytic perspective in an early discussion of legal pluralism, Merry (1988: 878–79) commented that if we allow the category of law to expand, it is hard to tell when we stop speaking of law and find ourselves simply describing social life. A strong critique of the extended use of the concept of law was put forward by Simon Roberts (2005). He argued that the extension of the term "law" to what are, in effect, "negotiated orders," is unwarranted. The English concept has a particular meaning, which is diluted in such cases, he maintained, leading to a loss of "analytic purchase." This may lead researchers to overlook or ignore the distinguishing features of what is properly called "law"; but it can also lead them to attribute negotiated orders with the characteristics of law-centered models. To characterize the understandings and practices of stateless societies as legal orders and to embrace all normative universes as equivalent, he said, does not help us to understand what we might want to know about them. It also does not help us to understand the nature of law.

Related debates about the concept of law have continued in two bodies of scholarship, one generated by legal theorists seeking a "nonessentialist" definition of law, the other by anthropologists and historians who use "legalism" as a means to understand nonstate law.

Nonessentialist Approaches

Legal theorists Brian Tamanaha (2001) and William Twining (2009) have each developed a form of general jurisprudence designed to encompass traditional, customary, religious, transnational, and globalized laws. Twining describes the object of jurisprudence as the creation of a "comprehensive overview of law in the world," including "other legal traditions and cultures" (2009: xi). He develops a "flexible conception of law as an organizing concept" (2009: xv), in order to pursue general enquiries about law that transcend legal traditions and cultures. This is deliberately to expand the concept of law, in the same way and

for similar reasons as the legal pluralists do, and it is susceptible to the same critiques. In Winch's terms, extending a term beyond its normal use means transcending the rules that govern its use and meaning in ordinary language. It is no longer possible to say that someone is making a mistake about their use of the concept. The concept, then, loses much of its meaning and it becomes impossible to ask about its nature. The program of expanding the field of enquiry runs counter to analysis of the nature of law.

Addressing such concerns, Brian Tamanaha (2001) has developed a "conventionalist" approach to the concept of law. This, he explains, means relying upon usage and social practice. Law is "whatever people label as 'law'" (Tamanaha 2001: 49). "Folk legal pluralism," as he has later puts it, defines law by asking what people in a given social arena collectively recognize and treat through their social practices as law (or *recht*, *droit*, *lex*, *ius*, *diritto*, *prawo,* etc.) (Tamanaha 2021: 12). This approach may work well in places like New York or in a transnational context, where an English-speaking elite coordinate their activities according to explicit rules and norms. But as a means by which scholars may identify laws, it quickly breaks down when the people in question do not use the English language. What, then, do they label as "law"? As I have pointed out elsewhere, we still need to know what counts as treating something as law (Pirie 2013: 44). As Gardner put it, "what Tamanaha wants us to search for . . . are various indigenous ideas of law." But "how can we possibly identify them as concepts of law before we know what counts as law?" (Gardner 2012: 298). Responding to such criticisms, Tamanaha recognizes the need for translation. He points out that "the cluster of ideas that the term 'law' represents has been translated from classical languages to contemporary languages across the globe." To identify law, he says, "one should look at what people in a given community consider 'law' in their own language, which a theorist can find using common translations" (2017: 75). "Shariah" is law, he says, because Muslims recognize that as law (2017: 12). It is true that *shari'ah* is often translated as "law," but really it encompasses more than law (Hallaq 2009: 163). Many scholars prefer to translate it as "God's path for the world," more often regarding the *fiqh* texts as Islamic law (Weiss 1998: 22; Vikør 2005: 1–2). There is a continuing debate among English-speaking scholars about how the phrase "Islamic law" should be used, which go far beyond anything that could be resolved by looking for common translations.

Tamanaha also suggests that in the context of hunter-gatherer societies, we can look for precursors to what are perceived as "law" and "legal systems" today. These, he says, may be counted as "law," not because they were conventionally identified as such by people in those societies but because they bear manifest similarity to phenomena that have legal status today (2017: 75–76). But what is it to have legal status? We are back to the very question the conventionalist approach was designed to avoid.

Law, Government, and Legalism

Another debate about the nature of law has centered on the link often made between law and government. Here, a brief exchange between anthropologists Paul Bohannan and Stanley Diamond in the 1960s and 1970s has been taken up again in more recent scholarship on legalism. In his studies of African societies, Bohannan (1965) started with institutions of dispute settlement in order to examine the distinctive characteristics of law. He concluded that "law may be regarded as a custom that has been restated in order to make it amenable to the activities of the legal institutions" (1965: 36). Custom, he said, must be "doubly institutionalized" in order to make it justiciable: "law is specifically recreated, by agents of society, in a narrower and recognizable context—that is, in the context of institutions that are legal in character and, to some degree at least, discrete from all others" (1965: 34). This is to understand law in terms of the distinctive form it takes.

Taking issue with this approach, Diamond (1973) made a strong case for associating law with the state. Considering a number of historical and anthropological examples, he concluded that in the early state laws arise "in opposition to the customary order . . . they represent a new set of social goals pursued by a new and unanticipated

power in society" (1973: 327). Law is formulated as states expand, he said, when they need to conscript labor, muster armies, levy taxes, maintain a bureaucracy, and monitor the population (1973: 332). The imposition of laws by a state represents a rupture with custom and practice. Adopting a similar stance in his critique of legal pluralism, Roberts (2005) argued that our "native" concept of law (the cultural assemblage we have come to call "law") is intrinsically linked to notions of government and centralized political control. "Law is a concomitant of centralizing processes, processes that, at a certain point, resulted in the formation of the nation state." It was "called into being by the attempt to govern" (2005: 12–13). Law, then, results from the aspiration to govern: An attempt to employ a particular mode of decision-making, that of command, is followed by the discursive formulation of an ideological justification for the leader's authority, the articulation of normative propositions, the attempt to achieve compliance with such rules, and the provision of adjudicative agencies (2005:14). "Law is centralist in its very nature" (2005: 17).

Dupret (2021) is even more specific about the contemporary concept and its meanings, which he traces to eighteenth and nineteenth Western Europe. Since then, he argues, the concept of law expresses the idea of "a system of norms centred on a nation state, based on a constitution, formulated through codified legislation and judicial precedents, and administered by lawmakers for its inception and judges for its implementation" (2021: 2). It has, ever since, remained attached to ideas of the state, the rule of law, and control of a population (2021: 12).

Addressing these arguments, other anthropologists and historians have used the concept of "legalism" to draw attention to nonstate forms of law from around the world. Their publications present anthropological and historical examples of codes and rules that have an intellectual life independent of any project of government (Dresch and Skoda 2012; Pirie and Scheele 2014; Dresch and Scheele 2015). The great legal systems of ancient India and the Islamic world, for example, developed largely independently of – and often in opposition to – structures of centralized government and state-like formations (Davis 2010; Weiss 1998). Examples of nonstate laws are multiplied by considering local case studies from around the world. Analyzing their "legalism," these scholars draw attention to the importance of form over function, to rule-following as opposed to rule imposition, and to the symbolic and aspirational qualities of much that is properly characterized as "law." This is to identify distinctive characteristics of law, as Bohannan did, in matters of form, rather than in projects of government.

Although it is not possible to reach a precise definition of the concept of law, these scholars argue that the focus on legalism captures much that is distinctive about it as a category of social forms. Legalism, at its simplest, is the establishment of rules, principles, and categories, which stand apart from practice, which can be used to order the messy reality of everyday life, which symbolize equivalence and ordered hierarchy, and which create possibilities for social relationships, as well as authoritative judgments. Legalism also makes possible a type of thought, a form of juristic argument that seeks relations between rules, distinctions between categories, and canons of interpretation (Pirie 2013: 156). Legal theorist Frederick Schauer (1993: xi–xii), in a similar vein, suggests that law differs from other forms of social interaction largely because of its generality; it extends over time, over persons, and over events; it has a special form of language, shorn of contextual embellishments. In the context of judicial activity, decisions made according to laws are projected onto a larger and less-known future. As Dresch (2012: 15) puts it, legalistic thought makes explicit use of generalizing concepts, addressing the world through legal categories and rules that stand apart from the flux of events and personalities. The world can then be classified in a way that allows explicit discussion of moral order. It enables a "critical reflective attitude" (Hart 2012: 57) or "organized reflection" (Dresch 2012: 15).

The focus on legalism serves to distinguish laws from general social norms, adjudication according to law from general mediation, and the commands of a ruler from his laws. It provides a sense, not a very precise one, but useful

nonetheless, of what is distinctive about law among other social forms (Pirie 2013: 223). Anthropological examples can, in this way, be used to explore the concept of "law," itself.

Conclusions

What can an anthropological approach contribute to our understanding of the nature of law? Anthropology pays close attention to the detail of empirical examples, embracing variety and inconsistency, exploring the boundaries of the concepts we routinely employ to make sense of the world, and questioning the ways in which we use them to simplify and categorize. In the case of law, this means exploring the category of forms to which we normally apply the concept of law. The inquiry can provide clarity about a concept, a category, and a set of social forms. This, in turn, tells us something about our knowledge of reality.

At its simplest, anthropology can unsettle the assumptions we may make if we confine our attention to what is familiar within our own world. Courts and other institutions, means of enforcement, and rules come to the mind of many when asked what law is, particularly those educated within a western tradition; they also feature within much legal theory. But these are aspects of state law and they do not uniformly characterize the range of examples to which we actually apply the term in ordinary language, particularly when looking beyond the modern western world. Considering examples from other times and places sheds light on the way in which the concept is used in ordinary language and draws our attention to the range of social phenomena that it encompasses. At the same time, the application of the term cannot be over-extended without losing meaning. Careful consideration of empirical examples helps to tease out boundaries and borders.

Legal anthropologists have often shied away from categorizing too closely their subject of study and avoided the term "law," preferring to focus on processes and social norms, or the phenomenon of "legal pluralism." Like some of the legal theorists who advocate a "nonessentialist" approach to the concept of law, they may let the category expand, so as to encompass the very wide range of both local and global phenomena that might be regarded as legal in some way; these are often referred to as "traditional," "customary," "religious," or "transnational" laws. The focus is, then, on what law does, rather than what it is – its role in maintaining order or resolving disputes, as a tool of government, or a means of regulating trade.

It is, however, possible to use empirical studies to ask about what law is and what, in particular, allows it to perform these very different functions. To do so, and to ask about the nature of law, the scholar needs to distinguish what is properly understood to be "law," in contrast to what are better described as "social norms," "judicial processes," or "government." It is here that marginal cases found in ethnographic studies can clarify the boundaries and borders of the concept of law. Precise definition is not possible – the range of cases to which we properly apply the term is broad, made up of examples united by little more than a "family resemblance." Asking about shared features and the connections and contrasts that emerge through comparison rarely produces straightforward answers. Nevertheless, empirical examples offer an almost limitless set of resources with which to consider the nature of law. They allow the scholar to ask about the rules that govern the concept of law, the nature of the phenomena to which it applies, and the concepts with which other people understand and make sense of those same phenomena.

Cross-References

- ▶ Legal Pluralism: History of
- ▶ Pound, Roscoe: Sociological Jurisprudence

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Antinomianism

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Introduction

Antinomianism, from the Greek αντι and νομος, meaning "against the law," is a form of individualist anarchism that puts people above the law. It was first a theological doctrine pejoratively named for its rejection of the requirement of obedience to the Law of Moses. In legal philosophy, however, it now refers to a theory for which one does not have to obey any set of rules with which one disagrees. Such a view is commonly opposed to "legalism," which overemphasizes the requirement of obedience to the letter of the law.

Antinomianism in Christian Theology

In Christian theology, legalism and antinomianism were respectively an accusation of overzealous adherence to the Mosaic Law or an accusation of lawlessness. Two famous antinomian controversies defined the latter view – one in Wittenberg, in 1538, which opposed Martin Luther to Johannes Agricola, and a second one,

exactly a century later, in the Massachusetts Bay Colony, which led to the banishment of Anne Hutchinson from Boston. Both of these incidents were prompted by Christians who believed that moral laws were not binding on anyone. For Agricola of Eisleben, for example, salvation was to be achieved through faith, not compliance with the law. As Saint Paul said, "For as many as are of the works of the law are under the curse" (*Galatians* 3:10), and "the law entered, that the offence might abound" (*Romans* 5:20; see also Waldron 2006). Luther condemned the antinomian reading of the Scriptures, although his own teachings also bolstered the ideal of self-governance, which antinomians championed. "Thus you are your own Bible, your own teacher, your own theologian, and your own preacher," Luther wrote (1958, 236f). "Just guide yourself by this, and you will be more wise and learned than all the skill and all the books of the lawyers." The Protestant doctrine of justification by faith alone, *sola fide*, has also been charged with antinomianism for its hostility toward the Law and its defiance of arbitrary moral rules.

Antinomianism as a Secular Theory

Beyond such theological controversies, antinomianism is now a secular theory as well, popularized, for example, by George Orwell or Eric Hobsbawm (1995, 16) for whom the twentieth century was epitomized by an "antinomian rebellion." Antinomianism firmly answers no to the question "should we obey the law?" One should never obey anything but one's own conscience. Antinomians believe in the justification of any conformity to the law, such that any compliance is to be motivated by individual deliberation, not by the authority of the law. "The law is no longer over us," Christian antinomians claimed, "but under us." Similarly, although they will often comply with the law, secular antinomians think that they are fundamentally free from it. No one can be made to obey any law. It is a matter of private conscience. Therefore, antinomianism challenges the Latin dictum "*omnes legum servi sumus ut liberi esse possumus*," i.e., "we are all servants of the laws in order that we may be free." Freedom precedes and supersedes the law, according to antinomianism, and for that reason it can never be defined by legalistic righteousness.

The economic analysis of law typically associated with the Chicago School of economics can also be understood in antinomian terms. For instance, Frank Easterbrook and Daniel Fischel (1982, 1177), respectively a federal judge and a former law school dean, wrote that "managers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws." In deciding whether one should comply with the law, as the argument goes, one should take into account the likelihood of apprehension and conviction, as well as the severity of punishment. Much like Christian antinomians only complied with the Law of Moses when they found valid reasons to do so, secular antinomians will comply with the law only to the extent that such compliance is acceptable, say economically, from their point of view. In this case, no deference is given to the law, and the question of obedience is reformulated in terms of acquiescence.

Conclusion

That there is no obligation to obey unjust laws may not be a controversial idea today. Antinomians, however, have gone much further. There is no obligation to obey law *tout court*. One may decide for oneself the criteria one will use in determining whether one will comply with the law – which can range from a personal commitment to justice to one's own whim. Yet we could think there will still be an obligation to preserve the legal system in itself. Such a position, for instance, is now defended by Philip Pettit (2012, 63) who says there is a conditional obligation "if you oppose the laws, to oppose them within the system." Antinomians disagree. "*Cessante ratione legis cessat ipsa lex*," i.e., "when the reason for the law ceases, the law itself ceases." Antinomianism is an extreme individualistic understanding of such a Roman maxim for which the only valid reasons for any law are those individuals come up with themselves.

Unlike most anarchists, however, antinomians may not advocate for the abolition of the state. Inasmuch as the rules are agreeable to most people, then these rules will generally be respected. The more important implication of antinomianism has to do with the right to rule, which is rejected a priori. In the end, antinomianism follows the Justinian doctrine, later crystallized by Pope Boniface VIII in his *regulæ iuris* of canon law, "*quod omnes tangit ab omnibus approbari*," namely "what touches all should be agreed to by all." The people themselves own the law, and there can only be law to the extent that it is accepted by those affected.

Cross-References

- ▶ Authority of Law
- ▶ Freedom of Conscience
- ▶ Law as Reason for Action
- ▶ Luther, Martin

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Aquinas, Thomas

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Introduction

Born in Italy in 1225, and despite a relatively short career that ended around 50 years later in 1274, Thomas Aquinas went on to become one of the most influential medieval thinkers on political and legal questions.

Aquinas was educated at both Cologne and Paris, later taking up (after some controversy) a chair as regent master in theology at the University of Paris, where he taught during two separate periods (1256–1259, 1269–1272). In the intermediate period, he helped establish a *studium* for his Order in Rome, beginning work on the *Summa Theologiae*, the masterwork for which he is still well-known. Subsequent to an experience (traditionally, a vision) Aquinas had on the feast of St. Nicholas in 1273, Aquinas intentionally refrained from further work on that text, so that it remained incomplete at the time of his death a year later in 1274.

Apart from his own contributions, the Thomistic school – including followers within and without the Dominican Order to which Aquinas belonged – has had profound and far-reaching influence upon the history of legal thought in the West.

Many of the classical developments of Thomistic thought are written as commentaries on the *Summa Theologiae* (hereafter, ST), including the works of Tommaso De Vio (Caetanus) and those of Domingo Banez, Francisco de Vitoria, Bartolomé de las Casas, and the other highly influential members of the School of Salamanca who are noteworthy for developing Aquinas' political and legal thought in the sixteenth century.

Specifically, the ways in which Aquinas synthesized classical political and legal themes around the law, morality, and the common good provided a touchstone for what has come to be called "natural law jurisprudence."

Natural law thinkers, in short, appeal to objective facts about what is good for human beings, and the social or political nature of the kind of creatures that we are, as a standard against which we measure the legal and social institutions created by human institutions. What is crucial here is that facts about human beings as social animals constitute *reasons* for individuals and groups to act or be structured in certain ways, such that "nature" is the proper source for jurisprudential and political principles.

The Common Good

For Aquinas, politics has its roots in human nature. Specifically, politics is an endeavor natural to human beings in at least two related ways. The first is that political authority itself is a natural institution. Aquinas does not think of political authority as in contradiction with the freedom of individuals, as it would be if it were merely a necessary evil or punishment for sin. Quite to the contrary, Aquinas claims that the kind of dominion exercised by masters over slaves is an effect of sinful human behavior, but that the dominion over men exercised in political communities would have been appropriate before the Fall of Adam and Eve (ST I, q. 96, a. 4). Aquinas' argument to this conclusion appeals to the fact that the social life of a community could not be well-ordered without authority to guide the acts of that community toward the communal good. And Aquinas' premises to that conclusion appeal to a more fundamental way in which political life is natural to human beings: humans are naturally social. This is what ensures that political life, and the end aimed for by society, is truly good for each individual citizen: human beings are social animals such that their individual flourishing depends in many ways on the social structures in which they live. Consequently, well-structured societies are good for everyone in that given society inasmuch as well-structured societies are good for human beings in general.

To say that political life in a well-ordered society is good for each individual that takes part in the life of that society points to a central ideal for Aquinas' legal and political theory: the "common good" of the political society. A good that is "common" is one that is not diminished by being shared, unlike private or public goods such as water or foodstuffs. Knowledge (for example) is a good that can be shared and so one and the same item of knowledge can be a good common to many people; goods that are common in this way are supposed to be good *for* each individual that participates in them. This is to say, however, that the common good of political society is quite simply the *end* or aim for which that society exists, where this end must be something that each individual citizen can see as good for them. Much of this vision from Aristotle's *Politics*, where the aim of political community is simply to promote or ensure *living well* for the human beings who are its members. Aquinas draws out the implication that the reason for living in political community, and the end of human law, is going to be intimately related to the end of life for any given individual, namely, happiness (ST I-II, q. 90, a. 2). Whereas, however, an individual operates on principles of practical reasoning in terms of what is good for them to do, the political community operates chiefly in terms of aiming at *legal justice,* legal arrangements which will produce and preserve happiness in a general way for the members of that society.

There are important ways in which legal justice in a community differs from justice considered, then, as the moral virtue of an individual person. The extent and power of human laws have intrinsic limits: on one hand, the lawmakers cannot aim at bringing about complete virtue by the laws, since the effectiveness and character of law is limited by what measures would be prudent relative to the actual state of its members, the common good considered not as an ideal but as what is able to be achieved "here and now"; and, on the other, by the fact that the law only aims at the *common* rather than the individual good, not being able to regulate the private thoughts or intentions of individual citizens except as they relate to the good public order (ST I-II, q. 96, a. 2 & 3). All that can be required of most citizens is that they obey the laws, and that is usually sufficient for the community to do well.

Nevertheless, neither the common good nor the law is morally neutral. The common good is intimately connected with morality in two respects.

The first of these respects concerns the way in which laws can be evaluated as more or less practically reasonable. Since Aquinas understands practical reasoning in jurisprudence and politics as another instance of general practical reasoning, an exercise of communal rather than individual practical reasoning, so law has an intrinsic, normative connection with whatever gives us reasons to act in general, that is, with what Aquinas calls the "natural law."

The second of these respects concerns the way in which individual persons relate to the law and to society as a whole. Aquinas' theological views bear important implications for the aims and nature of civil government, entailing that civil government is radically imperfect and that there are important human goods over which that civil government has no jurisdiction.

Ordinance of Reason

If the "common good" is to serve any normative role in informing our political or legal deliberations on anything more than a very generic, abstract level, we need to be able to determine what that common good implies as to the requirements of legal justice both in general and in particular cases. Aquinas adopts from the Roman tradition the view that justice aims at "rendering to each one his right," where the individual moral virtue is a habit of so intending to respect the rights of others (ST II-II, q. 58, a. 1). "Right" (*jus*) in this context refers to *just* or appropriate relations among people in the community. Legal justice thus concerns relating people to each other in the correct ways, and the common good as a whole can be broken down into constitutive parts or elements according to the way in which laws aim at ensuring that these rights are so respected by citizens. Aquinas understands "right" relation to mean relations between persons where an equality ought to be preserved in their dealing with each other, a normative relation where certain actions are "owed" or "deserved."

Aquinas in turn distinguishes those normative relations resulting from agreement among individuals or by public law – *positive* right – and those resulting from no such agreement, but by facts independent of any such agreement – *natural* right (ST II-II, q. 57, a. 2). Falling somewhere in between, there are those rights which are recognized not merely by some particular country, but by all men and in every country: the "right of nations" (ST II-II, q. 57, a. 3). For example, Aquinas argues that the right to private property is not, strictly speaking, a natural right, but nevertheless is such that it constitutes a specification or addition to what is right by nature (ST II-II, q. 66, a. 2, ad 1). The right to private property is a paradigm instance of these "rights of nations." Agreement or convention can therefore specify those natural rights in particular respects, as where human law outlines conditions under which individuals possess private property rights. By contrast, human agreement can neither abrogate nor change what is right by nature. Aquinas' examples are that law could not make it just to either steal or commit adultery, and if laws command acts that are evil, such commanding idolatry contrary to God's law, then one has a moral obligation to disobey such commands (ST I-II, q. 96, a. 3).

This raises a well-known aspect of natural law jurisprudence: Aquinas endorses a maxim from St. Augustine of Hippo that "a law that is not just, seems to be no law at all" (*De Lib. Arb*. i, 5), and so argues that unjust laws do not bind in conscience. Such unjust laws might be laws aiming at the private good of the ruler (not the good of society), or in being beyond the authority of the legislator, or as imposing unjust burdens on the community even if in view of the common good (contrary to natural right). Unjust laws do not morally bind citizens to obey them, although Aquinas believes it is better, in many of the cases, to obey the law so as to avoid scandal or disturbance.

Nevertheless, the claim that unjust law is *no* law could be taken in an overbroad direction, since Aquinas does not mean, e.g., that "unjust law" is a literal contradiction in terms. Rather, what Aquinas seems to mean is that unjust laws do not exemplify the essential character of *law*, and, in virtue of failing to be such, they fail to be binding. Aquinas defines "law" in terms of four constitutive aspects: [1] an ordinance of reason, [2] aimed at the common good, [3] which is promulgated [4] by legitimate authority (ST I-II, q. 90). One may notice that the ways in which laws are unjust correspond roughly to failing in one or more of these aspects. The apparent paradox in which a law is unjust and so nonbinding, and nevertheless be such that one is still bound to obey the law out of desire not to undermine public order unnecessarily, points to the deeper

foundation on which Aquinas rests his legal doctrine: practical reasonability.

The binding character of the laws arises, Aquinas thinks, from the rational need for authority to produce and promote the common good. Law-making is an exercise in communal "practical" reasoning, directing citizens to act in certain ways that conduce to the general welfare (e.g., ST I-II, q. 96, a. 1). Laws are, in short, practically reasonable when they aim for that good and are so fitted to achieve it. And, given the fact that justice involves recognizing the component rights that constitute the common good, "the force of a law depends on the extent of its justice" (ST I-II, q. 95, a. 2, resp.). But, as was already noted, justice involves recognizing and respecting those normative relations that should hold between human beings in society. Those natural rights, which are established prior to and independent of human law (i.e., what is right by nature), are such that all positive right is founded upon them as a specification or addition thereto. In this way, Aquinas holds that the normative force of all law rests on what is right by nature.

The "Natural Law"

Law is binding, in short, when (and insofar as) it is based on good reasons. Aquinas' understanding of a "natural" law relies on the view, as with his view of natural right, that there are objective facts about human beings which then constitute good reasons for human beings to act in certain ways rather than others. Francisco Suárez differed on the source of the binding character of the natural law; for Suárez, the natural law acquires force as law, rather than as merely counsel or good advice, when it is perceived as promulgated by God (see cross-reference on Suárez). Aquinas by contrast seems to hold that the natural law has its normative force merely from the apprehension that certain acts are appropriate to human nature (see Brock 2020). As he defines it, the "natural law" is "nothing else than the rational creature's participation of the eternal law" (ST I-II, q. 91, a. 2, resp.), and this refers to the rational creature's ability to judge right from wrong – knowing what they ought to do – based on their ability to rationally apprehend the order in human nature.

Controversy attaches to this point among Thomistic interpreters, as Aquinas argues that human beings are naturally such that they are able to perceive their own natural inclinations and that the fundamental precepts of the natural law are thereby both the same among and self-evident to everyone (ST I-II, q. 94, a. 2). John Finnis and Germain Grisez are known to accentuate the self-evident, in the sense of epistemically basic, character of these precepts (see cross-reference on Finnis), whereas the classical school holds that these precepts rest instead upon our natural rational ability to perceive normative facts about what is good for members of the human species. For the classical school, the first principle of practical reason, "that good is to be pursued and evil avoided," is self-evident in the sense that "good" is a primitive concept, but the precepts of the natural law are not therefore (all) epistemically basic.

Natural law encompasses both general moral precepts and the foundational principles for legal justice, but requires specification within a political community, by legitimate authority, in order to acquire force within specific legal situations. By itself, the natural law does not answer all legal questions as to whether society should be ordered in one way or another, nor do we even know all things that are morally virtuous merely by knowing our natural inclinations (ST I-II, q. 94, a. 3, resp.). When Aquinas notes that all human positive law ought to be either a conclusion or specification of the natural law (ST I-II, q. 95, a. 2), this is then simply because the "natural law" is nothing other than those general (good) reasons for which humans perform any action at all. If positive law were *not* based on the natural law, in this general way, nobody would have good reasons to obey those laws.

Nevertheless, Aquinas concedes that not all laws are *conclusions* drawn from precepts of the natural law; the force of many laws is merely that of being one possible way in which authority has decided to secure goods for the community.

Aquinas considers, for example, a law that private citizens may not kill as such a conclusion

from a general moral precept that one should harm no one, whereas laws imposing a fine or specific penalty for wrongdoing would be an addition or determination of the natural law within a community. Further, the natural law in its specifics is not intuitive or self-evident to all. The Ten Commandments, alongside the commandments to love God and one's neighbor drawn from Matt. 22: 37–39, constitute a summary of what the natural law requires (ST I-II, q. 100, a. 3, ad 1), and the revelation of these naturally knowable precepts by God to Moses was – Aquinas thinks – a practically necessary aid to human reasoning about morality, given the realities of sin and ignorance (e.g., ST I-II, q. 91, a. 4). Knowing the natural law in its specificity requires inquiry, and so our knowledge of what morality requires is often derived from other people, whether learned in human society or by revelation.

Societal Structures

Beyond those epistemic limits, however, Aquinas also holds that the law (and human political authority generally) does not suffice for either the direction of individual human action or of life in the community, precisely because both the law and political authority remain limited in being *extrinsic* to the members of the community. There is then a second respect in which the common good is connected with morality, and this is more fundamental than the claim explored above that the rationality of human law is grounded in the natural law. An important and overlooked feature of Aquinas' account of law is that, on his view, "every law aims at establishing friendship, either between man and man, or between man and God" (ST I-II, q. 99, a. 1, ad 2). Friendship clearly is not something that can be imposed by coercive force, but neither is the fulfillment of justice alone a sufficient condition for friendship among members of a given community.

Aquinas generally follows Aristotle, derived from the *Politics* and *Ethics,* as regards his account of the nature of cities, the constitutions of different regimes, the duties of rulers, etc. Like Aristotle, Aquinas accepts the inevitability of slavery, is skeptical of democratic forms of government (endorsing a "mixed" regime as ideal), and does not share modern concerns about political equality for women.

Nevertheless, Aquinas moves beyond Aristotle in key ways, developing an account on which the best regime is one in which rulers are selected by the people (ST I-II, q. 105, a. 1), or on which governmental power is illegitimate when seized contrary to the will of the people and in which resistance to tyrants, extending to regicide, can therefore be justified under appropriate conditions (e.g., *Super Sententiis* II, d. 44, q. 2, ad 5).

But Aquinas' most important developments on his predecessor's political thinking are inspired by his theology. Aristotle had already noted in the *Politics* that political justice exists between free and equal persons, where societies aim at civic friendship or concord among citizens. Aquinas is committed theologically to a fundamental equality between all human beings, where all are made in the image of God, and he therefore qualifies the Aristotelian claim that slavery is "natural," agreeing with Augustine of Hippo that slavery appeared in human affairs as a result of sin (ST I, q. 96, a. 4).

More globally, Aquinas understands the aim of political association to be "peace," a well-ordered concord among members of the community where each agree in pursuing what is good. Governments aim at securing peace by means other than legislation. War, for instance, aims at restoring peace. Aquinas therefore accepts and broadens Augustine's account of possible "just" wars, outlining three conditions for *jus ad bellum* that would later be expanded by his followers of the Salamanca School: [1] public, lawful authority declares war; [2] just cause, "namely that those who are attacked, should be attacked because they deserve it on account of some fault," which (citing Augustine again) involves a grave harm or injustice inflicted on the innocent party, and [3] that the "belligerents should have a rightful intention," that is, not aim to inflict incommensurate harm or seek revenge or revolt or dominion or money or resources, but only to redress the wrong (ST II-II, q. 40, a. 1, resp.). Peace requires, as a necessary condition, the fulfillment of justice – an "evil peace" consisting in absence of armed conflict or

other open contention, but, e.g., existing on account of injustice or oppression, would not be a desirable state of affairs (ad 3.).

Yet, unlike Aristotle, Aquinas holds that perfect peace is not (ultimately) a natural good even if human civic organization can promote some measure of peace. Civil or legal justice removes obstacles to friendship among citizens, but it is insufficient to bring about peace in society. Only the supernaturally infused theological virtue of *caritas*, love of God, can positively dispose individuals toward each other in society appropriately so that they find perfect peace with themselves, each other, and God (ST II-II, q. 29; esp. a. 3, ad 3). The common good aimed at in political association is, however, nothing other than peace, and Aquinas' position therefore implies that human authority remains radically limited or defective. How then can civil government aim at "making men good," which is what Aquinas also claims is the aim of government?

For Aquinas, there are important revealed facts about the limits to civil power. There are *two* sorts of complete political societies to which human beings can belong and to which they are subject, the civil government and the Church. These communities also have distinct ends: the hierarchy of the Church aims to promote faith and charity among its members and thus care for the *spiritual* common good. The authority of civil government is inherently limited, as a consequence, to the *temporal* common good of the community. Distinguishing what is proper to the authority of the Church versus the authority of the State allows Aquinas to delineate those more specific constitutive elements of the common good that pertain to the law of civil governments.

Thus, while Aquinas – with Christians of his time – believes that political authority exercised by unbelievers over Christians is spiritually dangerous, can see only pragmatic reasons for toleration of the religious worship of non-Christians in a Christian country, and holds that heresy poses such a danger to a Christian country as to warrant the death penalty, Aquinas does not dispute the legitimacy of government exercised by unbelievers (ST II-II, q. 10, a. 10). The author of the *De Regno* (Aquinas' authorship of this letter is disputed) outlines that Christian rulers have duties toward the Church to allow her to pursue her mission and to govern in accordance with the moral teaching of its hierarchy. Yet Aquinas' doctrine of the distinct ends of society mean that the civil government aims at fostering virtuous living among the citizens, insofar as that virtue affects justice and the common good of society; this authority does not extend to eliminating any and all private vices (ST I-II, q. 96, a. 3), nor specifically to directing consciences, especially in matters of religion, which is the proper domain of the Church.

When the directives of Church and State conflict, the conflict is resolved by appeal to these ends; when the ecclesial authority's directives conflict with those of the civil authority on matters that are properly civil, assuming that the civil directives are not immoral or contrary to divine law, then the civil directives are to be followed (*Super Sententiis* II, d. 44, ex., ad 4). Thus, these distinct ends thus do not entail a wholesale "subordination" of one authority to another, as if the Church – having a higher end – could rightly command the civil government in any matter whatsoever.

Wrongs

Political authority can clearly go wrong in many respects, and Aquinas is quite aware of the dangers posed by tyrants, unjust regimes, and laws which all overstep the boundaries of their authority. As we already have seen, Aquinas holds that tyrants and unjust regimes might be opposed under the right circumstances, as not having received power legitimately from the people or as employing it for their own ends rather than for the common good, and that unjust laws, to the degree that they are unjust, do not bind the consciences of citizens. In terms of violations of distributive justice by the government, Aquinas focuses primarily on one type of abuse of power rampant in his time: "respect of persons" in distributing offices or honors within a society on the

basis of family or other connections that are irrelevant to the common good. Even within the Church, Aquinas notes that moral character is no guarantee of administrative ability and so is not a sufficient basis for selecting officials.

Aquinas instead devotes extensive attention to moral and legal problems associated with the procedural affairs of justice. In keeping with his general approach to law as deriving its force from justice, while Aquinas notes that the sovereign to be exempt from the coercive force of the law (given the legal arrangements with which he was familiar), this is in some respects accidental, since the sovereign is still bound by the directive force of the law as much as anyone else and would be accountable for violations of the law to God, even if there is nobody would be competent to pass sentence on the sovereign if he violates the law (ST I-II, q. 96, a. 5, ad 3). Similarly, Aquinas holds that judges act as "public persons" whose task is the interpretation of justice in a particular case (e.g., ST II-II, q. 67, a. 2 & 3). Judges are thereby accountable to justice itself and to higher authority, which is why Aquinas affirms the rights of defendants to appeal sentences when those sentences are perceived to be unjust (ST II-II, q. 69, a. 3, ad 1). Judges can exceed their authority in pronouncing judgment on those not subject to their authority, in acting on private knowledge or opinion about an accused person's guilt that has not been established through proper judicial procedure, or by sentencing those not publicly accused.

But judges can also fail in two important other ways to uphold justice. One of these is that judges can fail to uphold the written law, not judging in accordance with it. As Aquinas notes, written law does not give force to law – as the force of law derives from the natural law and natural right – and so the judge is not bound to judge in accord with unjust laws. However, the judge is otherwise bound to judge in accord with the written law, as the written law determines what is just in particular instances, either by specifying the natural right or by giving force to positive rights enumerated in the law itself. The judge is, however, empowered to judge according to that equity had in mind by the legislator when the observance of the written law would lead to a conflict with natural right (ST II-II, q. 60, a. 5).

Another of these judicial failures is that remitting punishment that is deserved by a wrongdoer – when it is not in his power or appropriate to grant clemency – would be a failure of justice and constitute a harm to the common good (ST II-II, q. 67, a. 4, ad 3). Aquinas notes that the temporal common good consists in an order of justice among men, so that disruptions of that order deserve punishment that aims to correct or preserve the order in question. Since the fault committed is on account of something perverse in the will of the offender, the restoration of the social order requires inflicting on that offender what is contrary to the will, painful, and deserved on the basis of fault (ST I-II q. 46, a. 6, ad 2). The order of justice is restored in this way when the offender accepts punishment voluntarily, as a penance, and seeks to make compensation to his victims. But punishments sometimes are intended for the benefit of others besides the offender, as in the case of capital punishment, and Aquinas defends this. The societal order of justice benefits even when the punishment does not achieve or is intended to achieve any restorative effect on that criminal's moral character, as long as it is proportionate to the crime (ST I-II, q. 87, a. 3, ad 2). From Aquinas' perspective, punishment primarily aims to protect rights and restore equity in society, so advancing that common good of peace which the law, rulers, and judges all aim to preserve and promote.

Conclusion

In conclusion, it should be noted that the place of Thomism as a "school" of thought is perhaps as important as the place of the texts of Aquinas themselves in understanding the historical course and commitments of "natural law" politics or jurisprudence. Thomas' views both on the way in which nature provides reasons for human action and on what reasons there are have been taken in different – and contradictory – directions by his followers. There are also deep disagreements concerning the way in which to interpret central

principles in his theory, especially as those principles apply to specific moral or legal circumstances. Whatever the case might be, Aquinas' thought on legal matters and on political life has provided principles around which a family of views have grown, exerting significant influence on the history of legal philosophy, and his thought has proved deserving of continued attention even by contemporary scholars.

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A

Aquinas, Thomas: On Natural Law

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Introduction

In presenting the natural law theory of Thomas Aquinas (1225–1274), primary attention shall be given to its most mature formulation, which is contained in Questions 90–97 of the First of Second Part of the *Summa theologiae* (Aquinas 1947; for the evolution of this theory cf Vendemiati 2011). However, the Treatise on Law shall not be separated from the context in which is inserted. Law is only one aspect of a broader design concerned with studying human actions where man is deemed to be the principle having free-will and control of his action (I–II, *Prologue*). In this context, the structural part concerns the definition of the ultimate end and of the actions that lead to it, while the dynamic part deals with the principles of human action, which in turn are intrinsic (habits) and extrinsic (law and grace). The Treatise on Law is therefore functional to a general theory of human action. This must never be forgotten. For Aquinas, natural law is not a separate theme.

Over the centuries there have been many interpretations of Aquinas' thought on natural law, and not infrequently they are incompatible with one another. Quite often they have been influenced by the culture of the day and by the desire to defend this conception of natural law from the objections coming from later philosophical visions. Although every exposition is inevitably an interpretation, my intention is to approach the text in its bare simplicity. If the basic framework of Aquinas' approach could no longer be proposed today, any attempt to update it would be misleading or vain.

I will only dwell on these four absolutely essential themes: the definition of law, the issue of the application of this definition to natural law, the role of natural inclinations, and the precepts of natural law and their immutability.

The Definition of Law

While Cicero and St. Augustine derive the term *lex* from *eligere* (to choose) and Isidorus from *legere* (to read), for Aquinas it derives from *ligare* (to tie): the law has a binding force that compels people to act (90, 1, c). Under this aspect, it is distinguished from *habitus*, which is an internal disposition to act well (virtue) or badly (vice). The law serves to strengthen the possibility that men act well: those well-disposed through a reasonable guide to the common good (*vis directiva*) and those ill disposed also through the threat of punishments (*vis coactiva*) (cf. George 1993). Hence "the notion of law contains two things: first, that it is a rule of human acts; secondly, that it has coercive power" (96, 5, c). Nevertheless, the principal or peculiar characteristic of law is the directive one, so much so that the *vis coactiva* is not present – as we will see – in its general definition.

The first thesis, an absolutely central one, is the following: the binding force of law derives from its being a work of reason that directs action to its end, which is the first principle of action. The will necessarily aims at the ultimate end and renders normative the dictates of reason, which prescribes what leads to the end. In this sense, practical reason is normative. Its object concerns "those things that are ordained to the end" (*ea quae sunt ad finem*). But this must not be seen as if we were talking about extrinsic means or even as intermediary ends, but as that in which the end itself is respected and attained, even if not all its potentialities are fulfilled. The end in its most comprehensive meaning concerns the flourishing of the human being and in this sense is ultimate end. Practical reason orders the actions that the ultimate end demands or implies. The rules of reason are in turn prescriptive for the same will. Among these dictates of reason, there are laws. If this were not the case, the will of the prince would be arbitrary (*magis esset iniquitas quam lex:* 90, 1, ad 3m). Hence the interpretation by Francisco Suárez (1548–1617) is not a faithful one: he essentially derives obligation from the will of the legislator (*Tractatus de legibus ac Deo Legislatore*, I, c. 5).

Law seen as a rule is the work of reason *alone*, which in virtue of its normative character for the will induces or inclines people to act, that is to say is found in a participatory way "in that which is measured and ruled" (90, 1, ad 1m). In the first sense, which is the main one, law is an extrinsic principle of action, and in the second sense, the participatory one, it is intrinsic. The two senses are closely connected; otherwise law would become pure action of constraint. Indeed, an action is free only if the principle of action may be found in the agent itself. Only free actions can be compulsory.

This is the general definition of law: "an ordinance of reason for the common good, made by him who has care of the community, and promulgated" (90, 4, c). The *ordinatio rationis* is only the genus of law, but it is not enough for identifying the law, since in all human actions reason has this ordering function.

The first specification is that of the end. Law concerns a multitude of participants to a political community. Then the end to which law tends is the common good (90, 2, c), that is the good of all the political community and of each of its citizens as such. This does not mean that law deals with all human affairs or all human good but only with what is functional to the common good or oriented towards the latter as its end.

The second specification concerns the author of law. Who is competent to legislate, or whose reason can be valid as a producer of true laws? Ordering in relation to an end shall be proper of those whose end is involved (90, 3, c). This is an antipaternalistic principle that is proper to all rational beings. They would not be such if they did not have in themselves, in their reason, the resources for attainment of their end. But in the case of the common good, this end concerns not single individuals but a multitude of people united in a political community. Thus it will be this same people as a whole, or those who represent it, that can legitimately make laws. This is the justification of the role of the political authority.

The third specification logically derives from the second. Since the single citizen is not the author of law, in order to be guided by it, that is to say to follow it as his or her guide of action, he or she must first know it. Hence law has to be public, and this happens through promulgation, oral, or written (90, 4, c). In this way, exterior law becomes internal. Obedience to law becomes participation in its realization for attainment of the common good.

In this definition of law, there are all the elements for a philosophical foundation of the principle of the *rule of law:* nonarbitrariness of law, free of privileges, emanated by a legitimate authority, and made public (Viola 2011, pp. 15–75).

Once the concept of law in general has been established, the various types of law are distinguished on the basis of the author's criterion: eternal law, natural law, and positive law (human and divine). These are not separate forms of law but stages of the work of practical reason in its ordering task. With positive law (human and divine) this work finds its term and its fulfilment. This explains why the definition of law has been laid down taking as its model precisely positive law and certainly not natural law. Aquinas' intent is to show what positive law presupposes and brings to its completion. It is significant that only one question is dedicated to eternal law (q. 93) and also only one to natural law (q. 94), while three questions are dedicated to human law (qq. 95–97) and much more to positive divine law (qq. 98–105). Positive law is the arrival point, it is the general rule closest to human action, which is always particular and contingent, that is to say that it can be different from what it is. In the light of this general design the role of natural law must be framed.

Is Natural Law True Law?

One is immediately struck by an anomaly of natural law. In relation to the definition of law, it lacks a necessary element. Eternal law derives from divine reason (*summa ratio*), which directs all things, necessary and contingent, rational and irrational, to their proper end. Human law derives from the practical reason of the governors, who with the legislative artifice make up for what man lacks for his survival (95, 1, c). Natural law lacks authority of its own, and moreover, it seems to lack real promulgation. Yet Aquinas thinks that natural law has in itself the nature of law to the highest degree. The issue of promulgation is resolved as God has inserted natural law into men's minds, as something to be naturally known (90, 4 ad 1m). The author of natural law is the same as that of eternal law. This is confirmed by the well-known definition of natural law as "the participation of the eternal law in the rational creatures" (91, 2, c). Hence it should be concluded that natural law is not true law in itself, but rather the presence of eternal law in the human mind. God is the authority which enacts it; and it is God who promulgates it in the human mind (Donagan 1969, pp. 328–329).

Accordingly, it would seem that recognition of natural law as law is linked to knowledge of the existence of God and His creative work. Nevertheless, it is necessary to distinguish the order of being from the order of knowing. In the latter, the primacy belongs to the first principles of practical reason, which are nothing but natural law itself, even if it is not yet known from where they originate. These principles are "natural" in the sense that they are evident and do not imply any knowledge regarding God. In fact among these principles, there are those that direct men towards the search for truth and God (94, 2, c). If God were already known as the basis of natural law, it would make no sense to maintain that natural law itself addresses the good of knowledge and the search for God.

Hence one should wonder why these first principles of practical reason are ever considered as true law. In the case of natural law, there is already something internal, written in the heart (or in the mind), that has the character of law in that it does not find its justification in our own will and is not produced by us, so the search for its basis remains open. Human reason itself is considered in its "nature" (*ratio ut natura*).

Interpreters of Aquinas addressing the problem of whether in this context natural law can be considered true law or not are divided into two opposing groups.

The first group of interpreters follows on from the pioneering interpretation by Odo Lottin (1950). Since in q. 94, dedicated to natural law, there is no reference to eternal law, they believe that Aquinas defends an intrinsic morality founded upon right reason, which prescribes doing good and avoiding evil. Within this interpretation, there are those that only admit the analogical character of natural law, since the definition of law is only fully satisfied by positive law (Grisez 1969; Finnis 2011, p. 280; Adler 1942, pp. 226–236). There are others that defend its full character as law, arguing that participation in eternal law is to be seen in an active and not a passive way, that is as participation in the authority of God and His legislative power, which enables man to specify natural obligations and to create new ones with positive law (O'Donoghue 1955, p. 93).

The second group of interpreters believes that the obligatory force of the first principles of practical reason is not fully evident until it is linked to eternal law (Fortin 1983, pp. 605–611). Only in this way, natural law can be considered true law, although knowledge of it being "natural" does not imply knowledge of eternal law. This leads to greater emphasis being placed on promulgation of natural law, which is not to be seen as mere divulgation, but has mandatory force, a sign of the will of the supreme legislator (Lira 1979, p. 125). Authors belonging to this second group highlight that Aquinas maintains that natural law "proprie lex vocatur" (91, 2, ad 3m). A duty with a peremptory moral meaning is not intelligible outside eternal law (Anscombe 1958).

From this very brief overview, it is clear that the first group of interpreters follows the order of knowledge of natural law, while the second group follows that of justification and foundation. In this perspective, these two interpretative approaches are compatible. It is more correct to follow the order of knowledge, because it is the one that corresponds most closely to the general procedure adopted by Aquinas: since the essence of things is unknown to us, we need to start from actions and get from them to the principles behind them (*De Veritate* q. 10, a. 1). In order to know the nature of human being, we first have to know human good, and this is found first of all in the principles, known in themselves, of natural law. But it must not be forgotten that the *Summa theologiae* is a work of theology and therefore that the exposition looks forward to what must be shown, and "law" is only what will prove to be such at the conclusion of the investigation.

Hence natural law appears in the guise of the first principles of practical reason. These principles are connatural to reason itself, and they are provided with preceptive force, that is to say they are unwritten laws, whose origin – as Antigone affirms – is not yet known (Sophocles 1912, pp. 348–349). Indeed, human reason cannot justify itself all the way. Human reason is the proximate measure of human actions, but it is not their ultimate and supreme measure (I–II, q. 21, a. 1, c).

The Role of Natural Inclinations

The second interpretative problem concerns the identification of the precepts of natural law and first of all of the principles of practical reason.

The very first principle of practical reason has a structural scope, in that it is because of it that reason is "practical." If reason grasps something as good, at the same time it realizes its normativity, that is to say sees it as something that must be done (or must be avoided) or as an end of human action: *bonum est faciendum et prosequendum, et malum vitandum.* We can consider this as the principle of normativity of action, which for practical intellect has the same founding role that the principle of noncontradiction has for speculative intellect. But it is still not known what things are good for the human being.

For this purpose, Aquinas brings natural inclinations into play as an object of the judgment of reason regarding the good to be pursued and the evil to be avoided. The fundamental thesis, the object of controversial interpretations, is expressed as follows: "And since good has the nature of end, and evil the nature of the contrary, reason by nature understands to be good all the things for which human being have a natural inclination, and so to be things to be actively sought, and understands contrary things as evil and to be shunned. Therefore, the ordination of

our natural inclinations ordains the precepts of the natural law" (94, 2, c).

The main questions are the following: how are these "natural" inclinations to be seen? Do they precede or follow the apprehension of reason? What is their role in identifying the precepts of natural law?

The traditional interpretation sees in the natural inclinations the meeting point between the speculative dimension and the practical one. Nature is in some way normative (Hittinger 1987, 8; cf. also Jensen 2015). The inclination is natural because it derives from the form of the being and from its essential ontological structure. The formal cause is also a final cause of the development of the being. Nevertheless, it must immediately be specified that in human inclinations reason is already present, since "forma per quam homo est homo, est ipsa ratio et intellectus" (*In II Sent.*, d. 39, q. 2, a. 2, c) and "qui dicit hominem, dicit rationale" (94, 2, c). For this reason, "there is in every man a natural inclination to act according to reason" (94, 3, c). Hence we are not talking about a naturalistic vision since to grasp the good (*ratio boni*) the intellect has to reflect on itself and to judge whether what is proposed is good, arousing in the will the desire for the good apprehended (I, q. 16, a. 4, ad 2m). Good has a force of attraction but not every force of attraction derives from true good. There is therefore a circular movement: at first one is inclined towards or attracted by one's rational nature itself towards something that reason judges good and therefore that the will, which is the intellectual appetite, desires to reach. Moreover, these inclinations are also "natural" in another sense, that is to say in that they incline towards absolutely fundamental goods that can be ordered according to the various degrees of being (cf. Composta 1971). As we have already seen, giving order is the specific task of reason. Hence the inclination is natural in that it is judged to be such by reason. It is not the inclination as such that constitutes law but the rational order of the inclinations: "it is universally right for all men, that all their inclinations should be directed according to reason" (94, 4, ad 3m).

According to Aquinas, the human being is representative of all creation because of his or her nature at once corporeal and spiritual. Like all substances, the human being tends to keep himself or herself alive (and therefore life is a fundamental human good and everything that defends it belongs to natural law); like all animals he or she tends to perpetuate himself or herself in the species and to educate the offspring (hence another sphere of natural law concerns the relationship between the generations); there is finally the third sphere, which is specifically human, concerning the specific work of reason, that is to say living in society and seeking the truth on God (and therefore knowledge is a fundamental human good).

As can be noticed, Aquinas does not specifically formulate the precepts of natural law, but only the fundamental human good at which they are aimed. There is not a list of norms but the indication of spheres of fundamental values that must be pursued and constitute the first principles of natural law. They are common (*principia communia*) to all men in that everyone knows them and approves them (94, 4, c). From them, it logically derives that behaviors are prescribed or forbidden in so far as they are either necessary for the attainment of these values or instead an obstacle to this end. But Aquinas does not commit himself to showing the articulations of these first principles, although they fully belong to the theme of natural law (O'Connors 1967, p. 73).

The fact that Aquinas is concerned to emphasize the communication between human nature and all creation is explained by the presence of eternal law in the background (93, 6, c), of which natural law is participation. Natural law concerns human goods, but in these it is manifested and enacted the creative plan of God, with which man is called on to cooperate (Dewan 2008, pp. 199–268).

We have seen that the traditional interpretation links natural inclinations to the ontological structure of the being and that, as we are talking about inclinations of human nature, it considers them as already marked by the presence of reason, which, reflecting on itself, grasps its *ratio boni.* But another interpretative approach is also possible, the one that considers these inclinations prerational, that is as preceding and independent of

the specific work of reason (*contra* cf. Brock 2005, p. 61).

According to some interpreters of the text mentioned above, inclinations, precisely because they are "natural," in themselves are oriented towards goods suited to human nature. These goods are perceived by inclinations themselves in a way that is still preconscious, but not ungrounded. Reference is thus made to knowledge "through inclination" and a judgment "by connaturality" (Maritain 1951, p. 92, 1986, pp. 27–32). At a stage in the human conscience that is still unreflexive, certain behaviors are perceived as being in accord with human nature and others as being in sharp contrast to it. We perceive that killing a human being is something evil even before demonstrating it. This undoubtedly confers greater meaning and weight to the affirmation that natural law is written in the heart. Nevertheless, a psychological explanation of the development of the moral conscience cannot replace the philosophical foundation of natural law. In any case, attraction or repulsion in relation to a single action is not yet knowledge of a general law.

Other interpreters, precisely considering the prerational character of natural inclinations, reach opposite conclusions: they exclude them having a significant role in the foundation of natural law. These natural tendencies have a factual character but the judgment of reason on the good in itself is native and does not derive from any other judgment. Natural inclinations are only a condition of factual possibilities (Finnis 2011, p. 73). "The basic forms of good grasped by practical understanding are what is good for human beings with the nature they have" (Finnis 2011, p. 34). Nevertheless, it is to be noticed that the inclination to act according to reason cannot be considered as purely factual.

Despite the variety of these interpretations, there is a firm point that is succinctly expressed by Aquinas: "whatever is contrary to the order of reason is, properly speaking, contrary to the nature of man, as man; while whatever is in accord with reason, is in accord with the nature of man, as man" (I–II, q. 71, a. 2, c). But how can we establish what conforms or is contrary to the order of reason?

The Precepts of Natural Law and Their Immutability

Aquinas always speaks of natural law in the singular as a category that encompasses a certain number of precepts. These are united by being known by natural reason, which in turn is to be understood both in an ontological sense, that is as reason proper to human nature, and in an epistemological sense, that is as a way of knowing. The ontological issue has concerned natural inclinations, but now we have to deal with the epistemological issue. From the way of knowing such precepts we can establish their content.

Until now we have met the first principles of practical reason, which are also called *common principles* or, elsewhere, "universalia praecepta iuris" (e.g., *In II Sent*., d. 24, q. 2, a. 4, c), and are the content of *synderesis*, that is to say, of the habit of the first principles. Aquinas considers these principles of practical reason as precepts and as a unitary whole. We have seen that such principles include both what expresses the transcendental character of the good (*bonum est faciendum et prosequendum, et malum vitandum*) and has a constitutive function of normativity, and those linked to human good: all those things which practical reason understands to be human goods are, therefore, to be done (or to be avoided).

Between the very first principle and the others, there is not a relationship of logical derivation. The first principle does not say what good is, but that the *ratio* of good as such is being assumed as the end of action and being enacted. "For practical reason, to know is to prescribe" (Grisez 1969, 378). If this principle did not exist, the accusation of naturalistic fallacy would be very difficult to reject. The other principles – as we have seen – indicate fundamental goods or general ends at which human action must aim. They concern the human good (Flippen 1986), which however implies willingness to accept the good as such (*bonum universale*) (Grisez 1969).

It must at once be noticed that there is a great distance between the very general character of these first principles and the singleness and contingency of human action, aiming to realize the good here and now. The first principles establish

the fundamental criterion of practical judgment, which is founded upon the ultimate end at which action aims, but they could not guide human action without necessary mediations.

Hence further precepts will be necessary to guide people towards the actions to perform or to avoid performing in the light of the first principles. These are precepts that Aquinas calls "quasi conclusiones principiorum communium" (94, 4, c), to indicate both that they are logically connected to the first principles, and that they do not have that absolute logical stringency that is proper to the conclusions of speculative reason. That we have to act according to reason is true and correct for everybody, but the work of practical reason (*ordinatio rationis*) is not a pure deduction from the first principles, but rather a teleological evaluation of the relationship between the action to be performed and the ultimate ends indicated by the first principles. There are types of action that clearly favor or prevent attainment of the fundamental good and that, therefore, will be compulsory or forbidden. As an example – though Aquinas is very sparing with examples – we can think of the prohibition of homicide, which is a type of action that can immediately be judged contrary to the fundamental good of human life.

But the action to be performed or avoided is always particular and, therefore, the general types of action are not sufficient to guide it, because the circumstances and the particular cases will have to be taken into account. For this purpose, further evaluations and deductions will be necessary. Here *ordinatio rationis* is also at work. It is interesting to notice that the whole process, from *principia communia* to what is obligatory in particular cases, is part of the set of problems of natural law, providing that we remain on the plane of rules.

If we ask ourselves how all these precepts of natural law are known, a distinction has to be made between knowledge of the first principles of practical reason and knowledge of the further precepts connected to them. The first principles are per se *nota* both in themselves and in relation to us (*quoad nos*). The first principles are evident. But this does not mean that they are innate, because in order to know them, we always need sensible experience and memory (*In II Sent.*, d. 24, q. 2, a. 3). For the further precepts we have to take two different parameters into account in an interweaving way: that of knowledge of the precept and that of its rightness.

A precept could be evident by itself, but not such for all men. The reason of some could be impeded in its correct exercise by ignorance or passions or bad habits or bad natural dispositions. In this case, such precepts will only appear evident to those that Aquinas considers "wise" (94, 2, c). Since the appropriate use of reason is proper to the wise (*sapientis est ordinare*), in the practical field this will also imply exercise of the virtue of *prudentia*.

From the point of view of the rightness of the precept, that is of its moral objectivity, while the first universal principles are unchangeable and valid for all men and in relation to every possible action, the further ones are valid in most cases, but for particular cases, they can be subject to exceptions when their application would lead to unreasonable results in the light of the first principles. The closer we move to the particularity of the action to be carried out, the more these exceptions increase, since the measure of reason has to appraise whether particular circumstances do, or do not, induce one to reexamine her or his practical judgment. And here Aquinas gives the well-known example of the deposit, which is not to be returned if this is clearly detrimental to the common good (94, 4, c).

In conclusion, the precepts of natural law, which come after the first principles of practical reason, may not be equally known by everybody and can be subject to exceptions in particular cases. These are not to be seen as exceptions to natural law, but as what it is correct to do every time that those particular circumstances occur. The method of specification and concretization of the first principles of natural law has a deliberative character. It consists of the choice of right ways to reach the ultimate end in particular circumstances.

In the exploration of natural law Aquinas never abandons the practical point of view. He is not interested in listing norms, but in the dynamics of human action, which starts from broad horizons of good, and which to be enacted needs to be specified through the ordering work of reason. In this

pathway, impediments and particular circumstances may be encountered. The immutability of the first principles gives rise to precepts that are subject to exceptions as we draw near to practical judgment close to action. From the beginning to the end of this pathway, natural law, that is the natural use of human reason, is at work. Hence, the precepts of natural law depend on the correct way of applying the epistemology of practical reason. On this point, Aquinas' thought differs clearly from the rationalist epistemology of modern natural law theories, grounded on deductivism.

Conclusion

The work of human reason does not have a private or monological character. The search for truth and good, and therefore for natural law itself, presupposes social life, both because *ordinatio rationis* aims at common good (*iustitia est ad alterum*), and because the exercise of reason is by definition dialogic and communicative. Thus human sociality is at the same time founded upon natural law and its presupposition. But this is still not enough to fully guide human action. The political dimension is also required, that is to say a common search for the common good, which is the condition for the flourishing of people (Finnis 1998). Then natural law will need further specifications, which this time will depend on the authority in a regime in which unanimity is impossible. In this way, natural law gives rise to human law, in which the pathway is completed. Natural law continues to live as the ultimate justification of human law itself. Natural law is the right reason of positive human law.

This entry is only an outline of a theory of natural law which shall be intended as a section of Aquinas' broader general theory of law. Two relevant issues have been left aside. The first one concerns the relation among fundamental goods. The second relates to the ways of inferring the other precepts of natural law from the principles of practical reason. These last two issues have not received a systematic treatment by Aquinas. This has resulted in the great varieties of interpretations and natural law theories inspired by the thought of Thomas Aquinas.

Cross-References

- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Ethics: Legal
- ▶ Finnis, John
- ▶ Justice
- ▶ Law as Reason for Action
- ▶ Natural Law: Contemporary
- ▶ Natural Law: Middle Ages
- ▶ Positive Law and Natural Law

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Arendt, Hannah

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Introduction

Hannah Arendt (Germany 1906 – United States 1975) is one of the most important political thinkers of the twentieth century and is mostly known for her writings on political action, evil, and totalitarianism. She studied philosophy in Marburg and Heidelberg, Germany, with such renowned German philosophers as Martin Heidegger and Karl Jaspers (Young-Bruehl 1982, 44, 48). Arendt's political awakening took place when the Nazis ascended to power in Germany, and she joined the resistance movement. In 1937, she fled the Nazi regime first to France and then to the United States, where she lived the rest of her life and produced the majority of her intellectual work (Arendt 2000, 6–7; Young-Bruehl 1982, 92, 113).

Arendt never systematically developed a theory of law. However, nearly all her works deal with some aspect of law, and in recent years scholars across academic disciplines have brought to light the insights and importance of Arendt's legal thought (for instance Goldoni and McCorkindale 2012; Volk 2015). Arendt lived through the Second World War and saw how traditional, political, and legal concepts became unable to respond to the horrific events. She was concerned to find novel ways of orienting ourselves politically and legally in a post-totalitarian world. This entry introduces key aspects of Arendt's jurisprudential thinking through three themes that all shed light on the boundaries of law: law and politics, the problem of human rights, and law and evil, exemplified by the trial of Adolf Eichmann.

Law and Politics: Arendt's Constitutionalism

Arendt traces to ancient Greece the roots of the conception of law as a stabilizing and polity-constitutive force. In her reading, for the Greeks, law, *nomos*, was the ground of the political life in the *polis* that had to be erected before politics could take place (Arendt 2005, 182–183). Laws are artifacts comparable to houses, public squares, and books. They form the stable, nonpolitical foundations of the public space in which political action and freedom may continuously appear, and demarcate this space from what lies outside it, the private sphere and other polities. In *The Human Condition* (1958), Arendt distinguishes lawmaking from politics and emphasizes that for the Greeks, "the lawmaker was like the builder of the city wall, someone who had to do and finish his work before political activity could begin" (Arendt 1998, 194).

However, Arendt does not simply claim that law is prior to politics and establishes its condition of possibility (see Barbour 2012). She is also inspired by the Roman notion of law, *lex*, which, she explains, came about through the explicitly political act of peace treaties, the binding of new contracts between different, formerly hostile peoples (Arendt 2005, 179). The notion of law as a durable tie and relation between people emerging from mutual contract fascinates Arendt, for in her understanding, political action of a plurality of people forms "an in-between," and binds them

into acting in concert, and the task of law as a contract is to maintain this bind across time (Arendt 1998, 243–245).

According to Arendt, the roots of legitimate political power lie in "[t]he mutual contract by which people bind themselves together in order to form a community," and such a contract "is based on reciprocity and presupposes equality; its actual content is promise, and its result is indeed a 'society' or "cosociation" in the old Roman sense of *societas*, which means alliance" (Arendt 1990, 170). She is particularly interested in the American constitution, which she sees as a historical – and thus factual as opposed to fictional – example of John Locke's horizontal social contract. Locke criticized Thomas Hobbes' vertical social contract, which transfers all powers to the sovereign, and according to Arendt, the American constitution follows Locke as it "limits the power of each individual but leaves intact the power of society" (Arendt 1972, 86).

For Arendt, the American Revolution exemplifies political freedom in its act of founding a new polity. It shows how a polity can emerge out of political freedom to begin something new and be made a durable entity through "promises, covenants, and mutual pledges" (Arendt 1990, 181). In her famous argument, the French Revolution turned out to be a pale shadow of the American one and succumbed to terror. This was ultimately because the French were attached to the idea of the sovereign, to the idea of the One People that overrode the plurality of individuals and opinions the expression and appearance of which are, for Arendt, the quintessence of politics and political freedom and "precisely the quality that makes men human" (Canovan 1992, 27).

Societas is, as we can see from its aspect of alliance, ultimately reliant on the obligation to keep promises. Arendt emphasizes the importance of the human capacity to make and keep promises in several of her writings: promises are the foundation for continuity and the only possibility humans have – often to a very limited degree – to determine the future (Arendt 1972, 92–93; 1998, 244–254). As a basis for the continuity of *societas*, promises serve the same purpose as laws, but on a more fundamental level. Arendt emphasizes that *societas* is prior to government: it is an alliance between individuals "who contract for their government after they have mutually bound themselves" (Arendt 1972, 86). *Societas* is not only prior to, but also to a certain extent independent of government. Like Locke, Arendt holds that *societas* can remain intact, and thus ground the possibility of resistance and/or a new contract, when a government dissolves or degenerates into tyranny (Arendt 1972, 87; Locke 1967, 429).

Societas does not survive totalitarianism, though, and its destruction forms an important aspect of Arendt's analysis of how totalitarianism destroys politics. True alliances do, according to Arendt, require plurality, and as she argues in *The Origins of Totalitarianism* (1951), it is significant for the particular kind of terror exercised by totalitarian regimes that they destroy the public space – be it the free press or the freedom of associations – that makes the emergence of plurality possible (Arendt 1976, 465–466).

In her essay "Civil Disobedience" (1972), inspired by ongoing protests against the US involvement in the Vietnam War, Arendt discusses the conditions under which it is justified to break the law. She emphasizes that it is essential to distinguish consent to *societas* from consent to individual laws and specific policies: there are situations where *societas* may justify breaking the law. Arendt considers civil disobedience to be an American phenomenon, closely tied to the American legal system and its distinctions between the constitution, federal law, and state laws (Arendt 1972, 83). She criticizes the idea that representative democracy in itself creates an obligation to obey the law by giving people the right to vote. The idea is particularly flawed when representative government is in crisis, as Arendt claims it was in the USA in the early 1970s (Arendt 1972, 89). She holds that the only way to revitalize the foundation for consent to law is to revitalize institutions of actual participation, such as voluntary associations (Arendt 1972, 94–96).

Arendt reworks the Republican constitutional tradition in thinking that the authority of the Republic and its law lies in the beginning, in the Founders' act of foundation and constitution-

making, and that this "beginning" cannot simply be something in the past. Rather, the Constitution must be "augmented" by new acts in the present that express its prevailing authority by renewing it. Civil disobedience ought to be added as a fundamental right to the American Constitution, Arendt argues, because the voicing of one's opposition to a particular law is a way of both participating in the political debate concerning the form that laws as the "worldly artifice" ought to take and showing one's respect for the Republic as a whole. In that sense, civil disobedience is part of the "caring for a world that can survive us and remain a place fit to live in for those who come after us" (Arendt 1993, 95). This political care for the world is the only possibility that we have in our time to preserve its authority and stability.

The Problem of Human Rights

The Nazi regime stripped Arendt of her German nationality. She lived in exile as a stateless person for years, until she finally received new citizenship in the USA (Young-Bruehl 1982, 113). Arendt thus personally experienced what it is to live as a refugee outside the legally protected membership in a political community. In *The Origins of Totalitarianism*, Arendt presents her influential analysis of the structural "decline" that European states underwent after the First World War; a decline ultimately intertwined with what she calls the "end of the Rights of Man" (Arendt 1976, 267–302). Arendt identifies two aspects that were particularly striking in this decline: the creation of new national minorities as an effect of the Versailles Peace Treaties, such as Germans in Poland or Macedonians in Albania, and the phenomenon of mass refugee movements. The appearance of these two groups, minorities and refugees, and the state response to their appearance, constituted, for Arendt, an unprecedented legal-political situation in Europe. The plight of refugees and minorities differed from the "usual" sufferings of the unemployed or those whose civil rights had been violated, as they rather had no rights recognized by the state at all: they were rightless (Arendt 1976, 269). The displacement of the minorities and refugees "forced people to live outside the scope of all tangible law" (Arendt 1976, 293). Regardless of the recognition of minority rights as an element of the Versailles Treaties, both groups had lost the protective bond of *equal* citizenship in a nation state.

The refugee was also an anomaly in the eyes of international refugee law of the time that only knew religiously motivated persecution and political dissidence as grounds for recognizing someone as a refugee. The new refugees were, however, persecuted because of their ethnic identity, not because of their political actions. The unprecedentedness of their condition in the history of forced migration consisted of the fact that the refugees could not find a new home anywhere else, thus being forced outside the legal world completely. In Arendt's analysis, the plight of interwar refugees was an unprecedented situation of displacement: they were, Arendt writes, "depriv[ed] of a place in the human world which makes opinions significant and actions effective" (Arendt 1976, 296).

According to Arendt, such loss of one's own place left individuals in an exceptional position of "abstract nakedness of being human and nothing but human" (Arendt 1976, 297). Suddenly there were millions of people that European states did not recognize as their full-fledged members. States only protected the rights of those they selected for protection, not the human being as such. Arendt analyzes how old European democracies became incapable of reconnecting themselves to their own constitutional principle of legal equality at the moment when they faced people whose presence challenged the nationalist principle "one nation, one state." Arendt's analysis is a poignant description of state action that responds to the unwanted presence of people by, first, depriving them of equal legal statuses or refusing to recognize that they have any, and then resorting to "legally emancipated" means of police violence, or in the best of cases to humanitarian aid, to deal with the stubborn presence of these people (Arendt 1976, 287).

The "kill[ing of] the juridical person in man" (Arendt 1976, 447) was one of those elements that, according to Arendt, in time crystallized

into the totalitarian regime. Arendt observed that concentration camps were not prisons, but rather spaces of legal exception. Their inmates were precisely "merely human" and "absolutely innocent": they could not be considered criminals, guilty or not guilty of illegal actions (Arendt 1976, 447–448). Arendt observed that to be made "merely human" is a horrific form of deindividualization and dehumanization, and stripping individuals of their meaningful place in a political-legal community opens the door to the possibility of their physical destruction. The blind spot of the Enlightenment idea of inalienable natural rights was that rights in actual reality are forms of recognition and inclusion of the individual into legal, political, and social institutions. "Inalienable" human rights turned out to mean nothing the moment people lost their membership in established legal-political institutions, national or international. Arendt's radicality vis-à-vis the Western jurisprudential tradition rests on her claim that becoming recognized as a juridical person is a condition for any meaningful notion of human rights. The citizen grounds a recognizably human life, rather than the other way around (Balibar 2007, 732).

It is against this background that Arendt argues for the existence of "the right to have rights," the right to "belong to some kind of organized community" (Arendt 1976, 296). What she calls for in response to the horrors of the twentieth century is not unfettered universalism of a single global political community without borders (Arendt 1976, 302), but rather a novel understanding of the political-legal community that preserves both the humanity of the individual human being and the plurality of their communities.

An important part of recent scholarship on Arendt has focused on interpreting the meaning of the enigmatic notion of "the right to have rights." Scholarly understandings and uses of this notion can roughly be divided into three groups. The first group of scholars reads this notion against the background of Arendt's oeuvre as a whole and articulates it as a novel, moral or ethical foundation of human rights (Birmingham 2006; Michelman 1996). The second group takes from Arendt's analysis heuristic tools with which to analyze contemporary refugee and human rights law as well as the continuing plight of refugees and the persisting "rightlessness in an age of rights," as one commentator puts it (Gündoğdu 2015). The third group understands "the right to have rights" politically, as pointing to political struggles of the excluded for inclusion and recognition of their juridical personality (Barbour 2012; Beltrán 2009). The "right" to rights is about politically claiming or taking one's rights in a situation where one has been found by the state authorities as entitled to none (see Rancière 2004). Whichever approach to Arendt's fascinating but enigmatic idea we choose, however, "the right to have rights" clearly is a notion that highlights the crucial importance of independent judgment and critique of the extant limits of positive legal rights and the framework of recognizing humanity and membership they provide.

Law and Evil: Adolf Eichmann on Trial

In *The Human Condition*, Arendt connects the faculty to make and keep promises, discussed above, with the faculty of forgiving: these are the two faculties by which humans can come to terms with the unpredictability and irreversibility inherent to action (Arendt 1998, 237). She emphasizes that forgiving is "the exact opposite of vengeance," which is a mere "re-acting against an original trespassing" (Arendt 1998, 240). Forgiving is "the only reaction which does not merely re-act but acts anew and unexpectedly, unconditioned by the act which provoked it" (Arendt 1998, 241). Arendt distinguishes forgiving from punishment as well, but here we are not speaking about opposites. Forgiving and punishment are both attempts to "put an end to something that without interference could go on endlessly." They are intimately interconnected because humans are, according to Arendt, "unable to forgive what they cannot punish and [...] unable to punish what has turned out to be unforgivable" (Arendt 1998, 241).

In *The Origins of Totalitarianism* and *The Human Condition*, Arendt connects the

unforgivable and unpunishable with Immanuel Kant's concept of radical evil (Arendt 1976, 459; Arendt 1998, 241). Later, in *Eichmann in Jerusalem* (1963), these remarks on evil are developed into her controversial claim that Adolf Eichmann's deeds exemplify "the fearsome, word-and-thought-defying *banality of evil*" (Arendt 1994, 252; also Birmingham 2003; Rae 2019). Arendt argues that evil deeds do not require evil motives: except for looking out for his own advantage, Eichmann "had no motives at all" (Arendt 1994, 287). In her interpretation, the trial against Eichmann came to question the juridical assumption that the seriousness of a crime depends on the subjective factor of intent (Arendt 1994, 277). Eichmann may have lacked evil intentions, but this was certainly not an extenuating circumstance. Arendt argues that he was just as responsible for his deeds regardless of whether they were motivated by evil intentions or not.

Arendt's analysis of Eichmann's trial is above all a fierce criticism of what she calls "the cog theory," according to which the Nazi perpetrators, including Eichmann, were mere cogs in a machinery. Arendt does not deny that "the essence of totalitarian government [. . .] is to make functionaries and mere cogs [. . .] out of men, and thus dehumanize them," quite the contrary, but she emphasizes that the "cog theory is legally pointless" (Arendt 1994, 289). The trials against the Nazi perpetrators were of crucial importance exactly because "all the cogs in the machinery, no matter how insignificant, are in court forthwith transformed back into perpetrators, that is to say, into human beings" (Arendt 1994, 289).

Arendt develops her discussion of the de- and rehumanizing of the Nazi perpetrators in her posthumously published lectures on moral philosophy from the mid-1960s. Here she points out that when perpetrators on trial claimed that they had not acted on their own initiative, they "renounced voluntarily all personal qualities, as if nobody were left to be either punished or forgiven" (Arendt 2003, 111). This voluntary dehumanization is, according to Arendt, what makes limitless evil possible. She continues: "the greatest evil perpetrated is the evil committed by nobodies, that is, by human beings who refuse to be persons" (Arendt 2003, 111). In these lectures, Arendt concretizes the banality of evil by describing it as rootless evil. A person is someone who is rooted in the world by using her capacities of thinking and remembering (Arendt 2003, 100). Arendt emphasizes that though a person may be vicious as well as stupid, thinking and remembering will impose some "limits to what he can permit himself to do [. . .] limitless, extreme evil is possible only where these self-grown roots [. . .] are entirely absent" (Arendt 2003, 101).

Arendt discusses the crucial importance of memory and remembering throughout her writings (also Herzog 2002; McMullin 2011). In *The Origins of Totalitarianism*, she compares memory and law: "the boundaries of positive law are for the political existence of man what memory is for his historical existence: they guarantee the preexistence of a common world" (Arendt 1976, 465). Nobody can be forced to think and remember, but a court in its judgment declares even those renouncing the common world as well as their personhood responsible for their deeds. This is why the trials against the Nazis included an important aspect of repersonalization, not just of the victims, but also of the perpetrators.

Conclusion

In her legal thought, Arendt tries to bring together two ideas (see also Honig 1991; Lukkari 2020). First, the idea of law as a precondition and guarantee of the durability of a space within which political action may appear, and all members are recognized as equals; and second, the idea of politics, the acting together of a plurality of individuals, as the ultimate source of law. Laws guarantee equality, but a legitimate legal order also requires concerted political action between equals in order to arise. Equality, thus, is both inside and outside the law, its product and precondition.

Cross-References

► Kant, Immanuel: On Justice
► Locke, John

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Aristotle: Legal and Social Philosophy

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Introduction

In his legal and social philosophy, Aristotle speaks to us in apparently familiar terms with detailed discussions of justice, law, and constitutions. Indeed, political thinkers representing a wide variety of approaches have found value in Aristotelian ideas. In recent decades, Aristotle has been claimed by communitarians, social democrats, and even libertarians. Given this diversity in reception, it is useful to consider the foundations of Aristotle's legal and social philosophy in order to see why some of his ideas have retained their interest for modern readers.

The Human Good and Human Nature

Many classic themes in political philosophy appear in Aristotle's eight-book *Politics*, and a survey of its contents may suggest that this work is a self-contained treatment of political life. But just like Plato, who seamlessly blends ethical and political theorizing in the *Republic* and *Laws*, Aristotle does not separate politics from concerns about how we ought to live. Indeed, he announces

at its outset that the *Nicomachean Ethics*, which addresses the good life for an individual, is a political inquiry. The *Politics* completes this inquiry by taking up this same topic, the good life for human beings, from the perspective of sound legislation for a whole community. To understand Aristotle's views about law and the community, then, we must consider the outlines of his ethical theory.

For Aristotle, the best mode of life is determined by human nature. Because human activity is characteristically rational, the best life for a human being will express rational excellences, which come in two basic varieties. The first are character excellences such as courage and temperance, which are reasoned patterns of responsiveness in emotion and desire, leading to deliberately chosen actions. The second are intellectual excellences, expressed in various forms of good thinking and reasoning. Among the intellectual excellences is practical wisdom, which is exercised through good deliberation about what action to take and so operates in coordination with the character excellences, as well as excellences of pure thought.

Based on this understanding of human excellence, Aristotle goes on to argue that there are two best types of human life. One is the political life, which is devoted to action in accordance with the character excellences and practical wisdom on the widest social scale, and the other is the contemplative life, which is devoted to the exercise of the excellences of pure thought. Though the details are controversial, Aristotle regards the contemplative life as superior to the political life, even though both express rational excellences to a high degree.

Unlike the philosopher described in Plato's *Republic*, who will hide away should he find himself in an imperfect community, Aristotle's contemplator will live a communal life, even though this life is not exclusively devoted to the community. One of Aristotle's insights is that every good human life is political, since human beings are by nature social and political creatures. Even if it were possible to live without others, we would not choose to, so great is the value of shared activity and friendship. That is true no matter what kind of excellent activity is the focus of our life.

Justice as a Virtue of Individuals

Because human life is so thoroughly communal, the preeminent character excellence is justice, and Aristotle devotes an entire book of the *Nicomachean Ethics* to this topic. Aristotle distinguishes two senses of the term, a broad kind of justice that involves using all the character excellences in relation to others and a narrow kind of justice that concerns the specific domain of equality. Both kinds of justice are needed to succeed at living well with others in a political community. Strikingly to modern readers, Aristotle returns repeatedly to the idea that justice in the first instance is a virtue of individuals, though it is defined in terms of responsiveness to the possibility of unjust situations and outcomes.

Aristotle describes the broad sense of justice as equivalent to lawfulness, but this term is liable to be misleading in English translation. (Righteousness, with its etymological link to "right," is nearer the mark.) The just person does not merely comply with existing laws but finds ways of improving the laws and, more generally, acts as a capable public servant. Aristotle takes laws, the basic written and unwritten norms that regulate a political community, to always be universal in scope. In this connection, he distinguishes law from decrees passed by an assembly to handle particular situations. Therefore, he reasons that laws cannot be framed to handle every possible situation to which they apply, and both in political debates in the assembly and legal cases in court, a citizen must rely on a sense of fairness or equity that ensures just application of the law in order to bring about the outcome the lawgivers intended.

In his treatment of justice as lawfulness, Aristotle claims that every law is, in a way, just. Yet in his discussion of constitutions in the *Politics*, he acknowledges the likelihood that laws in bad constitutions will be unjust. The distinction between laws and decrees is relevant to resolving this apparent tension. Insofar as all laws aim at

goals pursued by human communities, such as the management of conflict and the distribution of shared resources, even ones that are framed poorly will at least sometimes achieve just outcomes. Moreover, an absence of laws means rule by decree, the worst version of which is the sheer lawlessness of tyranny.

Justice in the narrow sense is needed to maintain the equal status that defines citizenship. This sort of justice is implemented in a variety of contexts, from distributing wealth, social standing, and other scarce goods to regulating economic transactions, to assessing appropriate penalties for harmful acts. Ordinary citizens need a keen sense of the balance between their own worth and the worth of others in their private dealings with one another and also in positions of authority they may be expected to hold from time to time.

Friendship and the Political Community

While love for justice and anger at injustice are essential to being a genuinely just person (and not merely someone who plays by the rules) in Aristotle's framework, the challenges of living justly seem to reside primarily in finding solutions to the problems and conflicts that mark communal life. Aristotle analyzes the affective or emotional dimension of communal life more thoroughly when he turns to friendship, the only topic that receives a fuller treatment than justice in the *Nicomachean Ethics*, spanning two full books.

Much of what Aristotle says in these books concerns the kinds of friendship and friendly relations we have in our private lives, including relationships with intimates whose characters we know but also acquaintances from whom we derive pleasure or utility. He then applies his analysis of the concept to the kind of friendship that sustains a community. Our relationship with fellow members of a political community is a form of utility-friendship, but because the political community aims at our overall well-being and not any partial benefit, it is still a bond of a special sort. Communities are more likely to flourish when rulers, subjects, and, more generally, different segments of society maintain this bond. (The *Politics* features detailed discussions of the opposing force of factionalism.) Aristotle notes that tyrannies have the least friendship, a feature that is not only a mark of their deficiencies but part of what makes them intolerable to live under.

Aristotle's perfectionist ethical theory contains few resources to ground concepts that extend our regard to all human beings and that animate much modern moral and political philosophy, such as equal dignity or human rights. It is therefore striking to find him saying in this discussion of friendship and community that, as justice applies between any human being and any other, so too does friendship, even between master and slave. This remark, with its blithe acceptance of slavery, simultaneously shows the limits of Aristotle's moral imagination and indicates ways that one might build on and improve his ethics.

Legislating for Virtue

Aristotle concludes the argument of the *Nicomachean Ethics* by suggesting that implementing its conclusions about the human good would be a task for a lawgiver. Despite the association of "lawgiver" with legendary establishers of constitutions like Lycurgus and Solon, Aristotle clarifies his meaning when he argues that anyone who wants to provide systematic education in virtue – whether in a single household he runs or on the largest scale in a city – must study legislation. (In this argument, as is often the case, Aristotle relies on the connection between systematicity and universality.) The transition from ethics to politics is, as we should expect given his earlier remarks, seamless.

Aristotle evidently thinks a systematic inquiry into the best political arrangements and laws will be at once a normative inquiry and one that depends on political experience. But he also notes that very few people have a familiarity with the workings of more than one or two regimes and that most existing cities are corrupt anyway. This relatively pessimistic view about the possibility of clear thinking about politics may have led him to undertake an empirical survey

of the constitutions and political histories of 158 Greek cities, of which only the analysis of Athens survives. Even though the task of surveying and evaluating different systems of law and education is vast, Aristotle nevertheless holds that it is a real possibility given sufficient care. That is the task he sets himself in the *Politics*.

The Origins of Political Community

The argument of the *Politics* can be divided into three stages: a preliminary or foundational inquiry into the origin and nature of political community (Books I and III), a consideration of proposed and existing constitutions (Books II and IV–VI), and Aristotle's own proposal for the best community human beings could achieve under ideal circumstances (Books VII–VIII). As in many Aristotelian treatises, these distinct phases of argument can seem to operate independently of one another, with the overall plan left to the reader to discern.

In the case of the *Politics*, two relatively clear lines of argument can be seen extending from the foundational material both to Aristotle's discussion of existing constitutions and to his own ideal theorizing. The connection between the latter two topics, however, is more obscure. Whether or not Books IV–VI and Books VII–VIII were conceived independently, Aristotle may well have thought that his own proposals could not be fully understood except against the background of the details of how real constitutions operate. We may contrast Plato's approach in the *Republic*, where attention is paid to existing constitutional forms in the final books only as deviations from his vision of an ideal political community.

Superficially, Book I seems to range over a variety of topics, but the animating concern of the book is to establish that the *polis* ("city-state") is the unique form of human social organization in which free citizens share in ruling one another and where the possibility of genuine human flourishing may be realized. After establishing the natural origins of the political community in its opening chapters, Aristotle turns to the kinds of rule that humans exercise over others apart from rule in the political community. While his attention to slavery, wealth, and family is more than cursory, his aim is to show that the forms of control we see in these domains do not involve the highest human ends.

The idea that the *polis* comes into being naturally is among Aristotle's most controversial ideas. But the claim is both less and more radical than it may seem. The idea that the *polis* emerges from more primitive forms of organization but transcends them in its aspiration to furnish goods we wish for beyond survival is entirely consistent with thinking that actual political communities depend on conscious judgment for their management. For Aristotle, human life, including deliberate choice and all the variety of social customs, is a part of nature. What is more surprising about Aristotle's claim about the *polis* is that he makes it in full awareness that many human beings do not live in such communities. The features of the Greek *polis* relevant to Aristotle's argument are its political self-government and economic self-sufficiency, the latter depending on the integration of an urban center with rural hinterlands. On this definition not only nomads and others living in small subsistence communities but also those who lived in vast collectives such as the Persian Empire are excluded from genuine political life.

Women and Slaves

Aristotle's argument for the naturalness of the *polis* depends on the idea that human survival depends on two proto-communities, that of male and female who come together to procreate and that of master and slave who cooperate in economic activity. The subordination of women and slaves to free, adult men therefore lies at the heart of Aristotle's account of political community. No other aspect of his social philosophy has attracted as much opprobrium as these views. All the same, Aristotle recognizes that justice places demands on relationships within the household. Hence, by his own lights, he must argue that each of these types of subordination is justified.

Aristotle's case for slavery begins from the observation that mere force cannot provide

justification for enslavement. Since many slaves in Greek cities were captives in war, Aristotle's views on slavery differ markedly from prevailing practice. He then describes a category of people, so-called natural slaves, whose inability to plan and direct their own lives would in fact make them suitable for enslavement. Indeed, Aristotle suggests that this relationship is one of mutual benefits to slave and master, since natural slaves cannot achieve those human goods within their grasp without a master. Neither the claim that natural slaves exist nor the claim that they would benefit from this arrangement has seemed plausible to modern readers.

Aristotle's case for the subordination of women is more obscure than his case for slavery. He claims that women should not be treated simply as slaves, but does not explain why they fall short of free men except to say that their practical reason lacks authority. If this claim about authority is descriptive, then it seems to provide no justification for his view. If the claim is instead about the intrinsic nature of women's reasoning abilities, then it is hard to see what further facts ground the claim. After all, Plato has Socrates play down natural differences between women and men in the *Republic* and argue that, whatever natural differences may exist, they should not keep women from political authority. Aristotle, therefore, would seem to owe his readers an explanation for why he discounts the possibility that it is only prevailing practices that have led to any observed disparities.

The City of Dreams

In Book III, Aristotle begins to establish the framework for his inquiry into the best type of constitution. Aristotle defines citizens as those who share in the deliberative and executive work of a political community, either by performing this work as an officeholder or by electing officeholders and holding them to account. In different constitutions these functions are distributed in different ways, but Aristotle holds firm to the idea that being called a citizen while not being given any political agency is a sham. The constitution is defined in turn as the formal structure that allocates political agency in a given community. In this way, the triad of city-state (*polis*), citizen (*politēs*), and constitution (*politeia*) is bound together by conceptual links.

In good constitutions, citizens rule and are ruled in turn for the sake of the common good. In bad constitutions, the ruling body dominates for its own advantage. Virtually all cities have bad constitutions – either democratic, oligarchic, or tyrannical, depending on the size and type of ruling body. What is needed for a good constitution is sufficient character excellence among the citizens. For Aristotle, it is conceivable that just one supremely excellent citizen would be entitled to rule monarchically and also allows that a large group of relatively decent people could manage a political community well in the constitutional form he calls polity, the counterpart of democracy. But his own ideal political community, described in Book VII, is an aristocracy of excellent citizens who do not strive to dominate one another and who pursue the common good while flourishing individually. The creation of such a community requires not only an ideal system of education, sketched in Book VIII, but also material advantages. That is why Aristotle calls it a city according to prayer – or, one might say, a city of dreams.

Conclusion

Aristotle's emphasis on our mutual interdependence and the essentially communal nature of human life has endeared him to communitarian thinkers such as Alasdair MacIntyre (1999). At the same time, his seriousness about individual flourishing and the need for education to secure it makes him attractive to social democrats such as Martha Nussbaum (1990). Finally, his worries about domination within the political community and his defense of private property have led libertarians such as Douglas Rasmussen and Douglas Den Uyl (1991) to embrace Aristotelianism. Each of these inheritances represents a genuine strand in Aristotle's legal and social philosophy. Indeed, his thinking

about justice, law, and society defies easy categorization within modern social and political thought and continues to be a source of provocation and insight.

Cross-References

- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Education: Ethical
- ▶ MacIntyre, Alasdair
- ▶ Nussbaum, Martha
- ▶ Plato

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Aristotle: On Justice

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Introduction

Aristotle defines justice (*dikaiosunê*) as "the state that makes us just agents" – "the state that makes us do justice and wish what is just." It is a perfection of reason and emotion, like all practical virtues, insofar as it disposes us to make the right choices for the right reason. This requires both virtue of thought and character: We need the right comprehension of what justice demands, and we need to be emotionally inclined to act on our correct judgments, even if, and especially when, the just act requires an apparent sacrifice of self-interest. The just person (*ho dikaios*) chooses actions that are lawful and fair for the reason because of which they are lawful and fair. Whether an act is lawful and fair depends on particular facts: inter alia, who is doing what to whom with what and how, and with what result.

In book V of the *Nicomachean Ethics* (*EN*), Aristotle aims to provide a more precise definition justice as a virtue, building on the initial description of the common reference of the term, quoted above (*EN* V 1, 1129a6-9). Aristotle's analysis of law and lawfulness at the end of the *EN* represents a bridge to the empirical studies of actual Greek constitutions associated with Aristotle's school, the Lyceum, as well as a transition to the comparative analysis of types of rule in the *Politics*.[1]

Aristotle's analysis does not provide any mechanism that would allow us to determine which acts are just and which unjust by subsumption of cases under a rule. His aim is not to provide precepts of justice, but rather to define the psychological state (*hexis*) that is responsible for making us act justly. To arrive at a definition of *dikaiosunê*, he first determines what characterizes just acts (*ta dikaia*) as such – acts that hit "the mean" (*meson*) or "right mark" in matters concerning justice. He offers a general account of the *domain* of just and unjust acts, *general characteristics* of just acts, and ways in which we may *hit or fail to hit* the mean in distribution or rectification. He also offers an outline of justice in communities.

Contrary to what contemporary virtue ethicists sometimes assume, Aristotle does not define just acts as those just agents would choose. Just acts are not just *because* just agents would choose them; instead, just agents choose just acts for the reason because of which they are just. The quality of the act is not determined by the quality of the agent. Psychological justice is not a bare

[1] *EN* V may have originated as book IV of the *Eudemian Ethics* (*EE*). The discussion of the voluntary in chapter 8 of the book on justice seems to fit the Eudemian definition of the voluntary (*EE* II, 6–10) better than its *Nicomachean* parallel (*EN* III 1–5). The *EE* does not, however, situate ethics as a part of political science and lacks a transition into the *Politics*.

behavioral disposition. Doing just acts reliably is a necessary but not sufficient condition for being a just person, since behavioral conformity to the demands of justice can be secured through threats and force. Just agents value justice in and of itself, not simply on account of the consequences of doing or failing to do just acts. Just agents are also pleased by the fact that they are acting justly and do not regret making the right choice, even when it requires accepting burdens or foregoing benefits they could otherwise enjoy. Unjust agents either fail to do what justice demands or choose just acts because they happen to coincide with what they desire. Doing just acts coincidentally is better than doing unjust acts, but it is still not tantamount to acting *justly*. Only psychologically just agents can do just acts well. What distinguishes just agents from those who are unjust or lack justice is that the former, but not the latter, act justly by choosing just acts for themselves. Acting justly requires knowing that our acts are just, choosing them for themselves, and choosing them from a "firm and unchanging" psychological state (*EN* II 4). We can compare Aristotle's distinction to musical virtuosity. The amateur can play Mozart's flute concerto no 1, but not with virtuosity. Virtuosity is a measure both of the quality of the performance and its cause: the excellence of the person playing. In the case of moral virtue, excellence is a cognitive and volitional perfection of the soul. This requires excellent deliberation (*euboulia*) about matters concerning justice, and desires that fully commit us to acting on the correct conclusions of our deliberation. Psychological justice – the virtue – is a deliberative and desiderative perfection of character with respect to the choice of just acts (paraphrasing V 5, 1134a1-2; cf. Aristotle's general definition of virtue as a *hexis prohairetikê* at II 6, 1106b36-1107a2).

Because happiness by Aristotle's account consists in virtuous activity, acting justly necessarily promotes the agent's happiness. Aristotle remarks that justice is virtue in relation to another, and thereby, in a way, "another's good" (V I 1130a5). Contrary to Thrasymachus' understanding of this claim in Plato's *Republic*, Aristotle, like Plato, denies that justice is a zero-sum game. The value of just acts is not exhausted by the value or disvalue of the benefits and burdens divided up between members of a community. As a state, justice promotes the happiness of the just agent because her virtuous activity is a part of eudaimonia, and it promotes happiness for a community by promoting the goods – internal and external – that are needed to secure their welfare. Internal goods include the psychological dispositions of the citizens toward each other, for instance, well-wishing (*eunoia*) and concord (*homonoia*); external goods include prosperity and safety, which promote cooperation and common purpose, which in turn tend to make societies safer and more prosperous.

Ultimately, the demands of justice are grounded in what is good for a human being as a political animal. For Aristotle, as for Plato, we cannot establish what justice demands prior to or independently of an investigation into the nature of the good for a community and for individuals. For Aristotle, unlike for Plato, what matters is "the human good," defined relative to human nature (our defining capacities as human), rather than some hypothetical abstract property of goodness that is predicated univocally and indiscriminately across all kinds. The human good consists in the activity of the virtues, which express our rationality. Justice is thus valuable as the state that enables such activity as a perfection of human nature. It is also valuable for its consequences, since justice usually, if not invariably, secures the material and social conditions for the virtuous activity that makes up a happy life in a political community.

Aristotle divides justice into two main kinds: general and special. Of these, "general justice" is virtue as a whole, while special justice is the virtue concerned with distribution and rectification. "General justice" makes us lawful, while its opposite makes us lawless. Lawfulness makes us follow the correctly prescribed law – this "produces and maintains happiness and its parts for a political community" (V I, 1129b13-19). Whoever possesses this excellence is lawful, since he follows the correctly established law, viz., the one established by legislative science, on account of being just. Legislative science is a part of political science, which is the

science of the human good: Political science understands the ends and means of political rule.

General justice is the virtue of a citizen. It is "complete virtue" (*teleia aretê*), not without qualification, but "in relation to another" (*pros heteron*, V, 1, 1129b27). It expresses our nature as political animals. It is "complete virtue to the highest degree" because it is "the complete exercise of complete virtue." It is the complete exercise because the person who has justice is able to exercise virtue in relation to another, and *not only* in what concerns himself. That is why justice grounds community. Special justice is a part of general justice. It is concerned, primarily, with honor, or wealth or safety – divisible goods of which one person can have more or less than his fair share, or the proportionate amount. One species of special justice concerns the distribution of these goods among members of a community ("*distributive justice*"). The other species is concerned *rectification in transactions*, where transactions are either voluntary (as in selling, buying, lending, pledging, renting, depositing, or hiring out), or involuntary, either because it comes about through secrecy (as in cases of theft, adultery, poisoning, pimping, slave-deception (sic), murder by treachery, and false witness) or by force (as in imprisonment, murder, plunder, mutilation, slander, and insult). Justice of rectification seeks to restore parties to a transaction involving gains and losses to equality.

Justice in distribution is fairness, which consists in proportionate equality. This means that each party receives their fair share of the benefits or burdens to be distributed. If the parties are equal, they will receive equal shares, according to the principle "equal shares for equal people." If they are unequal, they will receive unequal shares, but each share will be proportionate to their worth. Achilles and Agamemnon receive fair shares if Achilles' share of the spoils divided by Achilles' worth equals Agamemnon's share of the spoils divided by Agamemnon's worth: "This is the sort of proportion that mathematicians call geometrical, since in geometrical proportion the relation of whole to whole is the same as the relation of part to part" (V 3, 1131b13-15). If Achilles contributes twice as much to the Achaean victory as Agamemnon, he should have twice the amount of the spoils (measured to value, say, 9 units of benefit): 6:2 = 3:1. Here, shares of equal size would be disproportionate. Aristotle observes that parties quarrel not only over the value of each person's contribution, but also over the correct measure of worth. In the polis, different measures yield different distributions of honors and political offices: "for all agree that the just in distributions must accord with some sort of worth, but what they call worth is not the same; supporters of democracy say it is free citizenship, some supporters of oligarchy say it is wealth, others good birth, while supporters of aristocracy say it is virtue" (V 3, 1131a25-29). Identifying the right measure of worth, and so the correct distribution of political power, is a task for political science.

Justice in rectification does not depend on the worth of the parties. It is not geometrical proportion, but rather numerical: "It does not matter whether a decent person has taken from a base person, or a base person from a decent person, or if a decent or base person has committed adultery."[2] What matters is how the parties can be restored to equality, which means that the harms suffered by the victim are restored from the offender's profit. Aristotle maintains that when one is wounded and the other wounds him, or one kills and the other is killed, the action and the suffering are equally divided, with profit for the offender and loss for the victim. The judge tries to restore the profit and loss to a position of equality, by subtraction from the offender's profit (V 4, 1132a7-11). Aristotle acknowledges that "profit" is not the proper word in some cases. For instance, it seems odd to suggest that I profit if I negligently and unintentionally hit you with my unsecured catapult (see *EN* III 1, 1111a10 in light of III 5, 1114a3). Even if my carelessness is not profitable, your death is a harm to you, and so I should be punished in proportion to your loss. When what was suffered is measured, the just judge restores the parties to equality by taking from the offender a benefit proportionate to the

[2] For the Greeks: theft of another man's wife.

loss suffered by their victim. A judge, says Aristotle, is a kind of "living embodiment of the just." The judge restores equality as if a line [AB] had been cut into unequal parts [AC] and [CB] and he removed from the larger part [AC] the amount [DC] by which it exceeds the half of [AD] of the line [AB] and added this amount [DC] to the smaller part [CB]. Each person now has what is properly his own. Aristotle thinks semantic considerations support this analysis of justice in rectification: "This is why the intermediate by numerical proportion is called just (*dikaion*), since it is a bisection (*dicha*), as though we said bisected (*dichaion*), and the judge (*dikastês*) is a bisector (*dichastos*)" (V 4, 1132a30-32 – the etymology is dubious). Talk of loss and profit are taken from voluntary exchanges, like selling, buying, and lending, and applied to involuntary exchanges, like theft, murder, and slander. It seems doubtful if the victim's loss can always be "equalised" with the imposition of a proportionate penalty for the offender, however, as the transactional model presupposes. This is a familiar problem for retributivists: Proportionality is not always possible, nor is it necessarily desirable from the point of view of the community. Aristotle denies that rectification is the same as reciprocity. If a ruling official exercising his office wounded someone else, he must not be wounded in retaliation, but if a person wounded the official, he should both be punished and subjected to "corrective treatment." It matters who injures whom, and so nonnormative facts about the political status of offender and offended should be taken into account in determining the nature and severity of the violation. It is not true without qualification, then, that the "worth" of the parties is inconsequential: The classification of the unjust act may depend on it. Justice in communities for exchange, however, consists in proportionate reciprocity, and this holds people together. By nature, the measure of proportionality is need, but by convention, currency. Reciprocity is secured when, e.g., the shoemaker's product is to the farmer's as the farmer's is to the shoemaker's. We measure this using money as a conventional pledge of need, as well as a guarantee of future exchange.

Having determined what is just and what unjust, Aristotle offers an account of the state that makes us hit the mean in matters of justice. Justice is an intermediate state (*mesotês*), not by being a state between two extremes, one of excess and one of deficiency, as the other virtues are (courage between rashness and cowardice, and so forth), but because it is *about* a mean (*meson*), viz., the mean between having too much and too little. Justice, he says, is "the virtue in accord with which the just person is said to do what is just in accord with his choice (*prohairesis*), distributing good things and bad, both between himself and others and between others," awarding what is proportionately equal in each case (V 5, 1134a2-4). What is unjust is disproportionate excess or deficiency in what is beneficial or harmful; hence injustice is excess and deficiency because it concerns excess and deficiency. Otherwise put: Justice has only one contrary, namely injustice, but injustice manifests itself in choices that are either deficient or excessive in their assignment of benefits and harms, deviating from proportion in either direction.

The politically just, says Aristotle, "belongs to those who share in a common life aiming at self-sufficiency who are free and either proportionally or numerically equal" (V 6, 1134a27-29). These are male citizens. The relationship between members of a household is of a different kind, and so the just for a master (i.e., an owner of slaves), and a father is not the same as political justice, though it is similar to it. Aristotle insists that "there is no unqualified justice in relation to what is one's own."[3] A natural slave, as a possession, is an instrument of the master, and a young child, until it is old enough to be separated, is as if it were a part of the father. Aristotle maintains that since no one decides to harm himself, and a young child and a slave is a part of the master/father, there is no injustice in relation to them, and so nothing politically just or unjust either. The politically just is what accords with law, and hence

[3] Since no one willingly suffers an injustice. Aristotle maintains that suicide is an injustice committed against the state and its laws.

only to those who are naturally suited for law, which are those who have equality in ruling and being ruled. Since the relation of husband and wife approximates this equality without achieving it, there is something just and unjust in the relation between spouses, but it differs from the politically just. Aristotle discusses the status of wives, children, and slaves in *Politics* I, where he launches a notorious defense of the existence of natural slaves, who can be justly enslaved for the master's benefit. Aristotle further claims that the arrangement is coincidentally beneficial for the slave since he cannot rule himself (that is why he is a "natural slave" (sic)).

The politically just is divided into the just by nature (*phusis*) and the just by law (*nomos*). The legally just is just my convention. Both the legally and naturally just are *changeable* according to Aristotle: Just as conventions vary from state to state, so does natural justice. One might think that what is natural should be invariant, and not permit of diversity. How should we understand Aristotle's claim that "justice by nature" is variable? It is natural, because in questions concerning the correctness of laws, there is a fact of the matter – some laws promote the welfare of a state, while others do not, and this is not a matter of convention. However, the same laws may not promote the happiness of cities with different characteristics or a city in different circumstances (war; plague). Which laws are natural for a city depends on particular nonnormative fact about the city – facts that vary from place to place, and time to time. If this is correct, natural law is not some inflexible, universal standard that can be used as a measure for positive law, but rather norms of nature, when correctly adapted to the politically salient facts about individual communities. This is not an objectionable relativism, but rather a recognition of the fact that good laws need to be adapted to particular facts about individual communities, just as the prescriptions of medicine need to be adapted to particular facts about individual patients. The variability of natural law is therefore fully compatible with realism and cognitivism. It also provides a starting point for robust critiques of particular laws and constitutions, as well as existing customs and practices. Aristotle acknowledges that one political system is best everywhere (kingship, as he describes it in *Politics* VII), but this means that it is best unqualifiedly, not that every city should try to achieve it. In fact, it is rare for a man superior in virtue to be found, and therefore citizens should take turns ruling and being ruled. Just as we can offer an unqualified account of what promotes health for a human body, a good doctor will order whatever benefits his patient, given his particular body. A good legislator likewise knows which constitution is best unqualifiedly, but will legislate to promote the happiness of his community.

All law is universal (*ho men nomos katholou pas*, V 10, 1137b14). It consists of general precepts and offers guidance precisely because it is general. Insofar as it is general, it cannot embody the variability and diversity displayed by the full range of particular cases that fall under its purview. Not even the best law will take account of all the circumstantial facts that matter for natural justice. Aristotle therefore maintains that law is perfected by *epieikeia*, the virtue of equity or decency. The decent is just – not the legally just, but a rectification of it. The decent is a rectification of law insofar as its universality makes it deficient: "Where a universal rule has to be made, but cannot be correct, the law chooses the universal use that is usually (*hôs epi to polu*) correct, well aware of the error being made. And the law is no less correct on this account; for the source of the error is not the law or the legislator, but the nature of the object itself, since that is what the subject matter of actions is bound to be like" (V 10, 1137b13-19). When the particular case violates the intended scope of the universal rule, and the legislator has fallen short, the judge rectifies the deficiency by considering what the legislator *would have* prescribed, had they been aware of the deficiency. The universal rule is thereby qualified in line with the aims of the law. In some matters, no legislation is possible, and so a decree (*psêphisma*) is needed. A decree is a measure that is made to fit an individual case, like the lead ruler used in masonry on Lesbos, which is bent around a stone to allow the mason to find another stone that fits next to it because of its

particular shape. This is not bending the rules, but rather finding a way to measure cases where no rule applies.

Conclusion

Like a decent judge, a decent person takes less than the rule entitles him to because he is not an inflexible stickler for justice, invoking rigid rules to advance his cause. He respects the aim of the law and settles for what is reasonable. This attitude is a perfection of justice, and not different from it.

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Artificial Intelligence

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Introduction: A Bit of History

The first scholarly inquiries into artificial intelligence ("AI") date back to 1943 and are linked to the work of Warren McCulloch and Walter Pitts in the United States (Russell and Norvig 2010, p. 16). However, the first use of the expression "artificial intelligence" occurred in 1956, when it was adopted by John McCarthy, during a lecture at the Dartmouth College in Hanover, New Hampshire (Kaplan 2016, p. 13). Many other papers about the subject were published in the following years, as described by Nilsson (2009, pp. 71–85).

It is worth discussing the "Turing test" – also known as the "imitation game" (Turing 1950, pp. 433–460). In 1950, Alan Turing designed a test to identify whether a machine evolved to the point that it would be able to produce results indistinguishable from the results produced by human actions. A machine that can pass this test could be, according to Turing, called "intelligent." Despite its historical importance, the Turing test is controversial. On one hand, some scholars argue that it is useless because of various methodological flaws (Hayes and Ford 1995). On the other hand, similar tests adapted Turing's idea to the current level of technological development and are still in use. One of them claimed that a software chatbot (called "Eugene Goostman") passed the test in 2014 (Sample and Hern 2014). The software posed as a 13-year-old boy and was allegedly able to persuade 10 out of 30 members of the London Royal Society to believe that it was human.

Although AI has existed since the 1940s, advancements in the field during the following decades were so modest that this period was called "AI winter" (Russell and Norvig 2010, p. 24). Systems from that time did not even remotely resemble the kind of applications we now

recognize as AI. However, it is interesting to mention that a feature of AI systems is that they are socially recognized as AI only when they are new, when they start performing tasks that had been restricted to humans. After a while, when a software performing these tasks becomes routine, people no longer call it AI. As an example, chess playing software was one of the first AI gaming applications. Now, however, such programs are no longer associated with AI.

It is no coincidence that the most remarkable developments in the field are happening during the twenty-first century. Indeed, the passage from an analog to a digital society, accelerated in this century, was the key factor for the fast evolution of AI systems (Calo 2017, p. 4). Dramatic increases in hardware performance and production of digital data, coupled with the reduction of data storage costs and real time network connections, helped create an environment in which AI flourishes.

Definition of Artificial Intelligence

There is no consensus about the definition of AI. In broad terms, Ryan Calo conceptualizes it as "*a set of techniques aimed at approximating some aspect of human or animal cognition using machines*" (2017, p. 4). In colloquial terms, AI applications intend to automate human tasks through the use of machines, in a faster, more accurate, and safer manner than when the tasks are performed by humans. AI applications even go as far as performing tasks that are not possible for humans to do, due to our biological limitations.

AI systems range from ordinary applications (e.g., cellphone voice assistants) to very sophisticated systems capable of driving cars, performing medical diagnostics, profiling people, or even controlling entire sectors in a given industry. In fact, the term AI encompasses a wide range of techniques in many scientific areas, especially computer sciences. There are various subfields such as robotics, machine learning, neural networks, computer vision, facial and speech recognition. Each of these subfields, due to their complexity, could be the subject of a separate entry in this encyclopedia.

There are also different ways to deliver an AI product or service in the market. It could be a software that runs "in the cloud" with no physical component (usually called a "bot"), or it could have a physical structure (as an embodied robot). Among the physical AI applications, some of them are machines like the ones used in manufacturing, while others resemble animals or human beings (androids or humanoids). The intent here is just to highlight that AI is not a unitary concept. Instead, it is an umbrella term that gathers very distinct technologies and ways of delivering it to the market.

Although far from the current state of technological development, there is a discussion about AI systems advancing towards self-development. Currently, AI systems are designed to carry out specific tasks ("weak" or "narrow" AI), instead of learning to perform any activities like humans do ("strong" or "wide" AI). In case of weak AI, regarding the specific task it was designed to perform, an AI system can heavily surpass human capabilities. However, it is extremely difficult for that system to perform completely different activities. For example, a software designed to play a game can beat the human world champion many times in a row. Yet, the same software could not do tasks as simple as washing a glass or answering a call. The more task oriented an application is, the more accurate it tends to be, at least in the current stage of technological development. Nevertheless, some scholars point out that the next evolutionary step is to have AI systems fully conscious of themselves and capable of learning totally different skills from scratch, without any human supervision (Kurzweil 2005; Bostrom 2014). If ever achieved, this evolutionary stage would be called singularity (Kaplan 2016, p. 138). Some authors point out that "*in utopian versions of digital consciousness, we humans don't fight with machines; we join with them, uploading our brains into the cloud and otherwise becoming part of a 'technological singularity'. (. . .) Once this happens, things become highly unpredictable. Machines could become self-aware, humans and computers could merge*

seamlessly, or other fundamental transitions could occur" (Brynjolfsson and McAfee 2016, p. 255).

Legal Questions Related to Artificial Intelligence

AI is definitely a revolution in the legal field. Many legal activities are being – and will continue to be – deeply affected by it. AI legal impacts will be briefly clustered into two major groups: (1) the ones affecting *how* we perform legal tasks and (2) the ones related to *who* performs these tasks.

The first group comprises AI systems designed to help legal professionals perform their jobs. Although scholars disagree about which will be the activities most affected and how each of them will suffer the impacts of a given technology, it is undisputed that these effects tend to spread and intensify in the following years (Susskind 2013, p. 3). These changes range from the automation of document drafting and legal counseling activities to new software designed to help judges at deciding cases. The first empirical studies about this transition have already been undertaken (Remus and Levy 2016). More daring proposals advocate for a deep change in the legal system itself, altering the very way law is comprehended, produced, and applied (Casey and Niblett 2017).

The second group consists of AI systems allegedly able to replace legal professionals at some tasks and raise the issue of unemployment. This group includes online platforms with software designed to provide various legal services. In the most extreme cases, some scholars have discussed the possibility of attributing legal personhood to some AI systems (Solum 1992) since they are theoretically able to act as independent agents and capable of taking unpredictable decisions – also called "emergent behavior" (Zimmerman 2016).

Regulating AI

Various instruments are available to regulate AI, ranging from market self-regulation to strict statutes. Currently there is no worldwide consensus on the optimal approach. The USA, the UK, Europe, and China, for example, decided to adopt distinct strategies, though they do overlap in some respects (Cath et al. 2017), such as the concern about unemployment and the idea that any kind of regulation should foster technological development.

Regulating AI is not as simple as coding the so-called "Asimov's laws" into the AI software (Balkin 2017, p. 3). Human values and different expectations play an important role and vary across countries, cultures, and time.

Although there is no "one size fits all" solution, some steps could help clarify what constitutes desirable regulation. First, it is important to decide *who* should regulate (the government, an autonomous agency, market self-regulation, a mix of them, etc.). Second, is the need to precisely define the *object* of regulation (just software, all embodied robots, humanoids only, etc.). Third, we need to determine the s*cope* of regulation (local, national, or international regulation). Fourth, there is a need to consider an *ex ante* or *ex post* strategy. Fifth, it must be determined whether the regulation will be *general* (encompassing all kinds of AI systems, in the most various markets – an "omnibus laws") or *sector-specific*. Sixth, there is a need to determine if there will be *registration requirements* and who is liable for a failure to register (Scherer 2016).

These steps are not a full blueprint to regulate AI and they are not intended to be. They are just a roadmap for initiating the discussion.

Conclusion

Due to its potential – and risks – AI is a matter of global concern. It is crucial for governments, companies, third sector organizations, and political communities to decide what kind of society we want to deliver to future generations, which values should guide the evolution of AI systems, and which are the limits and constraints we should impose on them (while we still can). There is no single straightforward answer to these questions. And that is excellent, because it compels us to

think, talk, and collaborate, reminding everyone of what makes us human.

Cross-References

▶ Governmentallity and Law
▶ Principles
▶ Surveillance Society

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Artificial Intelligence and Law: Case-Based Reasoning and Machine Learning

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Introduction

In this chapter, which complements the chapter on "AI & Law: Logical Models," we consider AI & law research on case-based reasoning and machine learning. The two approaches share a focus on legal data concerning individual decisions, rather than general rules and concepts. Both aim at extracting useful information from past cases. In some, but not all application, the extracted information concerns ways to address new cases. However, the two approaches, as they have been developed within AI & law, exhibit a significant difference. Case-based reasoning has relied on the human encoding of information on individual cases, to be processed according to reasoning moves meant to extend the outcome of past cases to new ones, or rather to distinguish the new case from the past ones. The machine-learning approach on the contrary, has focused on the automated construction of models, often having a non-symbolic nature. Connection between the two approaches have emerged, in particular, through the use of machine learning models to extract information to be employed in case-based reasoning.

Case-Based Reasoning

Past cases are a key component of all legal systems, including those in which precedents are not legally binding, and reasoning with and about cases is a key aspect of legal reasoning (MacCormick and Summers 1997). From the very outset in AI & law, much work has been devoted to the representation of cases and the development of methods for reasoning with them. For instance, McCarty (1982) argued that case-based reasoning relies on the deformation of prototypes extracted from precedent cases, in such a way that they may fit new cases.

The most popular AI & law accounts of case-based reasoning adopt factor-based representations, where factors are features of cases that support possible outcomes. Here are some examples from the HYPO system (Rissland and Ashley 1987; Ashley 1990), which addresses the misuse of trade secrets: some pro-misuse factors are that a non-disclosure agreement was signed, that the plaintiff had made efforts to maintain secrecy, and that the copied product was unique; some con-misuse factors are that disclosures were made by the plaintiff in negotiations and that the information was reverse- engineerable. A factor-based representation makes it possible to define various patterns of analogical reasoning. For example, the claim that a new case c_2 should have an outcome o can be supported by citing a precedent case c_1 which had outcome o and included a more (or equally) inclusive set factors supporting o and a less (or equally) inclusive set of factors supporting the opposite conclusion; on the other hand the claim that a new case c_2 should not have the some outcome o of a precedent c_1 can be supported by distinguishing c_2 from c_1, i.e., by showing that c_2 misses some factors that supported outcome o in c_1, or that c_1 includes some additional factors against that outcome. Computer systems have been developed based on factor-based models of case-based reasoning (Ashley and Aleven 1991). One problem in the successful deployment of such systems is the difficulty of manually indexing, with the relevant factors, large data set of cases, considering how labor-intensive and idiosyncratic this task is. To alleviate this problem, technologies for natural language processing have been used to automatically assign factors to cases using machine-learning methods (Ashley and Brueninghaus 2009).

The factor-based approach has been developed in various ways. Binary factors have been extended into dimensions, i.e., multivalued factors which support a certain outcome to various extents, depending on their specific value in the case at stake (Bench-Capon and Rissland 2002). For instance, the higher the number of disclosures of an item of information, the more the conclusion that there was no industrial secret is supported. Hierarchies (ontologies) of factors at different levels of abstraction have been proposed (Ashley 2009). Logical mechanisms have been defined to determine when a certain decision is consistent or inconsistent with a case base. For instance, a decision in a new case c_2 would be inconsistent with a precedent c_1, if c_2's decision is different from c_1 even though c_2 has a more (or equally) inclusive set of facts favoring c_1's conclusion and a less (or equally) inclusive set of factors against that conclusion (Horty 2004). Logical accounts of factor-based reasoning have examined how precedents give rise to rules linking factors to legal predicates and how these rules can be used to decide new cases.

One key idea here is that the rules involved in factor-based reasoning are defeasible in that new factors can motivate deviations from earlier decisions (Horty 2011). An important development for computational models of case-based reasoning has been achieved by merging models of case-based reasoning with models of defeasible reasoning and argumentation. On this approach, a case may be viewed as expressing two competing rules and a preference for one of them (Prakken and Sartor 1998): the conjunction of the factors $p_1, \ldots, p_n$ which are present in the case and support its outcome o can be viewed as a defeasible rule $p_1, \ldots, p_n \Rightarrow o$, which prevails over the opposite rule $q_1, \ldots, q_n \Rightarrow \neg o$, whose antecedent consists in the conjunction of all factors $q_1, \ldots, q_n$ in the case that support the opposite outcome $\neg o$. This idea can be applied not only to a case's final decision but also to the preliminary issues to be decided for that purpose.

When modelled through factors, cases provide a basis on which multiple, potentially conflicting arguments can be developed. Such arguments may provide abstract rules that generalize over the precedents and are thus applicable to new cases that only partly match such precedents. Such generalization may be attacked by arguments which point to allegedly relevant differences. An important aspect of the research effort linking factor-based models and argumentation has thus been to embed case-based reasoning within argumentation frameworks, and so in terms of argument-based defeasible logics (Prakken and Sartor 1998). Significant work has been done to reconstruct legal case-based reasoning in terms of theory-based defeasible reasoning, i.e., in systems where the evaluation and choice of theories is introduced to explain and systematize the available legal input information, typically a set of precedents (Bench-Capon and Sartor 2003). Finally, computational models have been developed which combine reasoning with cases and teleological reasoning. On such models, factors, and combinations of them are explained by their connection to values: factor *f* supports outcome *o*, since having outcome *o* in the presence of *f* contributes to achieving certain values. In this way precedents imply information about comparative contextual importance, which can be used in deciding new cases. These approaches (Berman and Hafner 1993; Bench-Capon et al. 2013; Sartor 2013; Maranhão et al. 2021) expand and formalize the ideas of proportionality and balancing in legal theory (Alexy 2002; Barak 2012).

Machine Learning

In recent years, a paradigm change has taken place in AI, namely, the shift from human-made representations of knowledge to machine-made models. AI has made an impressive leap forward since it began focusing on the application of machine learning to massive amounts of data. This has led to successful applications in many sectors, ranging from automated translation to industrial optimization, marketing, robotic visions, movement control, etc. Some of these applications have already had substantial economic and social impacts. On machine learning approaches, computers are provided with learning algorithms and vast sets of examples (training sets), rather than, or in addition to, formalized knowledge. On this basis, machines can by themselves construct computational models that capture the knowledge originally embedded in the training sets, namely, the correlations between examples and responses. For instance, when dealing with "predictive justice" such models may capture the complex correlations between the descriptions and outcomes of legal cases. The models are then used to hopefully provide correct responses to new cases. If the examples in the learning set that come closest to the relevant features of a new case are correlated to a certain answer (e.g., a judgement for the plaintiff in a tort case), the same answer will be suggested for new cases.

We cannot here consider in the detail the different models that may be constructed, as machine-learning technologies encompass a vast set of approaches: neural networks, decision trees and forests of them, statistical regression, support vector machines, etc. What all such models have in common is that their functions are not based on a sequence of steps each of which links meaningful premises to reasonable conclusions (as in argumentation). They rather perform complex multilayered computations that are meant to capture the statistical correlations between input features and predicted outcomes. Today the most influential approach is probably represented by neural networks, i.e., computer systems consisting of layers of nodes (called neurons) connected by weighted links (Bengio et al. 2021). Such structures, originally conceived as models of the human brain, are called sub-symbolic, since they do not consist of symbols—syntactic structures that express concepts and refer to objects in the application domain, as is the case with words in human language—but rather of vectors of numbers, The processing of such numbers determines the network's learning and its responses to new cases, which ultimately have a statistical significance. In the application of neural networks to the law, the basic model has consisted in identifying the

features which could influence a certain kind of legally relevant outcome, and then connecting those factors (as input nodes) to possible decisions (as output nodes), via multiple layers of intermediate nodes. The network is then trained on real and hypothetical cases until it provides (mostly) correct answers.

Some prototypical applications of neural networks and other machine learning approaches to the law have been taking place since the 1980s (for a review see Ashley 2019), e.g., to address open texture in legal concepts (Bench-Capon 1993) or to suggest a division of assets in divorce cases (Zeleznikow and Stranieri 1995). In recent years an explosion of such applications has taken place, with the purpose of replicating in the law the extraordinary success that machine learning has achieved in other domains (Agrawal et al. 2018). It has been argued that we need to move away from knowledge- and logic-based approaches. AI & law has rather to adopt data-driven approaches, based on machine learning, so as to exploit the wealth of legal data made available by the digitization of legal sources and of other legal data (court records, administrative data) in machine-readable format (Surden 2014). However, some caution is needed before embracing the idea that machine learning will soon bring about a revolution in legal practice, and in particular, that it will deliver the capacity to predict the outcomes of legal cases and even substitute such outcomes for human decision-making (Bex and Prakken 2021).

All machine-learning systems can indeed be viewed as prediction machines Agrawal et al. (2018), but only by using the term "prediction" to include any inference of new information on the basis of available data. Different kinds and uses of such predictions can be distinguished, in the legal domain:

1. A prediction may concern (i) the final outcome of a case (e.g., a judicial decision) or (ii) any information which may contribute to determining that outcome (e.g., whether it is likely that a party will reoffend).
2. A prediction may concern (i) a past event (e.g., the outcome of a case already decided) or (ii) a future event (e.g., the outcome of a new case).
3. A prediction may be used (i) to anticipate the behavior of others (e.g., the parties in litigation may want to forecast the decision of the judge) or (ii) to guide the decision-makers themselves (judges may look at how the system predicts their decision in the given case to determine how they should decide).
4. A prediction may be grounded (i) in normatively relevant aspects of legal cases, which decision-makers should take into consideration to adopt and justify their decision (e.g., the factors supporting an outcome according to the law) or (ii) in normatively irrelevant aspects, which decision-makers should not take into consideration (e.g., the identity of the party's lawyers or of the judge).
5. The prediction can be based (i) on the textual content of legal sources (in which case the focus is on natural language processing) or (ii) on structured data (e.g., keywords associated with the decision, features of the facts and the parties, etc.).
6. A prediction may concern (i) the activity of human decision-makers (e.g., judicial decisions) or (ii) other facts (e.g., potential recidivism of convicted offenders).
7. The system may (i) be able to provide an explanation of its predictions in terms that are legally meaningful and understandable to human beings or (ii) it may be unable to do so.

Machine-learning systems presenting various combinations of the characteristics just distinguished have been developed. It may be misleading to group them under the heading "predictive justice", since this term suggests that what such systems indicate is the outcome of future cases so as to guide or replace human decision-makers, which in most cases is not true.

Some data-driven systems make forecasts about future events which do not consist of judicial or administrative decisions. This is the case for systems used for predicting recidivism or parole violations. Such systems aim to provide information to judges and raise important legal or ethical issues concerning in particular fairness and individualized justice (Larson et al. 2016; Dieterich et al. 2016; Lagioia et al. 2022). Such issues, however, differ from those

that pertain to the prediction of judicial decisions.

Systems have been developed which "predict" the outcome of a past decision, on the basis of fragments of that very decision (e.g., the outcome is predicted based on the factual section of the opinion, i.e, its statement of facts) (Aletras et al. 2016; Medvedeva et al. 2020). What such systems do is not forecasting but rather classifying decisions already made (according to their outcome). Their predictions are grounded in normatively relevant aspects of judicial decisions (the text of sections of such decisions), but the system has no explicit computable representation of legal meanings: for the system, a decision (or part of it) is just a sequence of textual items, to be correlated with the facts of the case according to the statistics fed by the machine-learning algorithm. Thus, such systems are opaque, i.e., unable to provide justifications of their outcome (Guidotti et al. 2018).

A similar characterization would apply to systems that, based on the text of a judicial opinion, "predict" (i.e., construct) some corresponding annotations – an abstract, a list of keywords, a set of factors, etc. – after having been trained with decisions similarly annotated with human-generated metadata (Ashley and Brueninghaus 2009; Zhong et al. 2019).

Some systems offer legal assessments about contentious issues yet to be resolved, so that their indications can be used by the interested parties in forecasting of the outcome of future litigation. For instance, the CLAUDETTE system predicts whether clauses in consumer contracts might be considered unfair under consumer protection law: it does so on the basis of a training set of more than a hundred contracts (where unfair clauses have been identified and tagged by human experts, Lippi et al. 2019).

While Claudette, like other previously mentioned systems, grounds its prediction upon the relevant texts (in this case contractual clauses), other systems forecast the outcome of cases taking only or mostly into account aspects that are not normatively relevant; such aspects, while statistically correlated to the decisions, cannot provide an acceptable justification of such decisions. For instance, forecasts about the decisions of the US Supreme Court have been made on the basis of information such as the subject matter of the case, the procedure, and the background and political orientation of the judges, to the exclusion of information on the substantive merits of such cases (Katz et al. 2017). Similarly, predictions about the outcome of patent litigation have been provided based on aspects such as the features of the parties, their lawyers, and the presiding judges, regardless of the substantive merits (Surdeanu et al. 2011).

Finally, systems exist that try combine machine learning and symbolic reasoning: they use machine learning to extract concepts, factors, or rules from the text of cases, and then deploy reasoning methods to make inferences on this basis. An advantage of such systems lies in their ability to provide explanations of their predictions, according to the extracted rules and factors (Ashley and Brueninghaus 2009; Grabmair 2017, Branting et al. 2021).

Conclusion

AI & Law research has addressed legal cases from two complementary perspectives: on the one hand it has developed symbolic models which capture aspects of case-based reasoning, on the other hand it has used machine learning to extract and exploit patterns embedded in vast sets of data. Legal theory can appropriate both outcomes for the normative, empirical and critical analysis of legal content, for instance, to analyze and compare legal cases, determine the consistency of case-bases (Horty 2021), extract legal principles, capture correlations between legal decision-making and social factors, discover biases, etc. (Ruggeri et al. 2010; Ashley 2017). These methods can also contribute to better understanding both the patterns of explicit case-based reasoning (for instance, applying, analogizing, or distinguishing precedents) and the information processing unconsciously performed by human lawyers (for instance, when grasping analogies, perceiving factual situations, classifying them under rules, making value assessments etc.).

Great hopes and concerns have been recently expressed around machine learning methods in the law. Machine learning approaches have raised issues concerning the way in which they would affect legal practice and in particular judicial

decision-making: would they provide mechanical substitutes of human lawyers, or at least constrain layers' activity and modify the legal process (Pasquale and Cashwell 2018; Reichman and Sartor 2021; Hildebrandt 2018)? As noted in the Chapter on Logical Models, the initial great expectation, both positive and negative ones, concerning the deployment of logic-based systems in the legal practice had to be moderated when the limits of such systems have become apparent. We may wonder whether the same process of adjustment of expectation will take place with regard to machine learning approaches, or whether on the contrary, such approaches will deeply change legal decision-making. It is true that some limitations of logic-based approaches —such as the of relying on a human representation of knowledge, to be processed according to a fixed set of reasoning methods—do not apply to machine learning systems, due to their ability to extract knowledge from vast masses of data and deal with uncertainly. However, machine learning systems as well show some limitation that cannot be overcome, at least on the basis of today's technologies. Such systems, when used to predict new decisions, merely project the past onto the future. They apply to the new cases models drawn from past examples; they do not deliver improvements over the prevailing practice. More generally, they operate blindly: they crunch numerical models of their domain without having an awareness of the social and human issues involved, and therefore without any critical appreciation of such issues. They lack the ability of connecting linguistic expressions to the corresponding physical, psychological, or social realities (the so-called symbol-grounding problem). In particular. They cannot understand human attitudes and interests, as can be done by humans who can relate the experience of other humans to their own. Finally, as mentioned, many machine-learning systems (the most successful ones, such as neural networks) are opaque: they do not provide human-understandable rationales for their indications.

Maybe in the future scientific breakthroughs will allow artificial intelligence to reach and event overcome human intelligence (Bostrom 2014), even in the legal domain. This perspective raises serious ethical and legal issues, but such issues only pertain to possible developments in a distant future. As long as legal decision-making continues to be concerned with providing rational or at least reasonable decisions for each particular case, on the basis of the facts of the case and with an accompanying justification, the currently available AI & law methods cannot replace human decision-makers. Though neither logical nor machine-learning approaches are a substitute for human decision-makers, both can contribute significantly to legal research and decision-making, helping humans to obtain targeted information about the law, organize legal materials, evaluate factual situations, and assess or design legal solutions. In some context, machine-learning systems can provide decision-makers and parties with information about the cases they are addressing, including predictions about what the "average" solutions to such a case would be, or about what general rules can be extracted from such average solutions. Knowledge of the "average" decision can be useful for the parties to a case, who can decide on this basis what they should do, e.g., whether to settle or rather to go to trial. It may also be useful for decision-makers, who can adopt their determination in light of this reference point. It is debated whether and under what conditions, this would lead to excessive judicial conformism, hindering legal innovation and equitable assessments, or rather would favour more accurate decisions, limiting unjustified disparities in judging similar cases (Kahneman et al. 2021).

Machine-learning systems should be used in legal decision-making as enhancements of human skills rather than as substitutes for competent humans, and their users need to be fully aware of their limitations. With this proviso, research in AI & law, also in its machine learning component, can be viewed today as a constitutive component of legal theory, and its methods as an increasingly important part in the toolkit of legal researchers and practitioners.

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▶ Artificial Intelligence: Logic-Based Approaches

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Artificial Intelligence, Ethics of

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Introduction: Why Artificial Intelligence Raises Ethical Questions

The idea of artificial intelligence (AI) predates the introduction of the term "artificial intelligence." Moreover, the observation that AI raises ethical and social questions predates the current development of the field of AI ethics. Notably, the ancient Greeks already imagined animated instruments that could take over the work they thought human slaves were needed for. They even reflected on what the introduction of artificial intelligence might mean for human society – as is shown in a well-known quote from Aristotle's *Politics,* in which Aristotle says that "if each instrument could do its own work, at the word of command, or by intelligent anticipation, like the statues of Daedalus or the tripods of Hephaestus [. . .] managers would not need subordinates and masters would not need slaves" (Aristotle 1996: 15). When Alan Turing later wrote his famous essays in the early 1950s, he discussed whether machines can think and famously suggested that it is better to reflect on whether machines can imitate intelligent human behavior (Turing 1950). Notably, Turing also raised questions about what this might mean for society, as when he wrote that "it seems probable that once the machine thinking method had started, it would not take long to outstrip our feeble powers. ... At some stage therefore we should have to expect the machines to take control." (Turing 2004: 475) This is an early statement of the so-called "control problem," a topic of ongoing interest within discussions of future ethical implications of AI. The term "artificial intelligence" was eventually introduced in 1955 – in a proposal for a research workshop that took place at Dartmouth College in New Hampshire, in the summer of 1956. In that proposal, AI is premised on the idea that "every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it" (McCarthy et al. 1955: 1). In general, then, artificial intelligence is the idea of technologies that can either really be intelligent (whatever that would mean), that could imitate human intelligent behavior, or that could simulate human intelligence.

The goal of any AI application is to allow technologies to perform or take over tasks that are such that when humans perform them, they are required to use their natural intelligence. Thus understood, the creation of AI can also be defined as the creation of artificial agents (either software agents or robotic agents) that interact with their environments in the service of certain goals (Dignum 2019). Since many of the tasks humans perform with the help of our natural intelligence have ethical dimensions, any time that such tasks are handed over to machines ethical questions arise, including who will be held responsible for any bad – or indeed any good – outcomes the AI technologies might bring about? What ethical principles should govern the use of AI? Do AI technologies need to be able to be sensitive to ethical considerations when they perform tasks otherwise associated with intelligent human behavior? Will AI technologies ever become moral agents or even moral patients? What will the increased use of AI mean for human society and our opportunities to live good and meaningful lives? What if we lose control over the AI we create? Such questions arise because AI is conceived as technologies that perform tasks that

responsible human moral agents would otherwise perform, and because these technologies simulate or imitate human intelligent behavior and constitute a novel form of agents. Below, some of the main debates within the ethics of artificial intelligence are briefly introduced.

The Main Debates, Ethics Guidelines, and the Science and Science Fiction of AI

These days, there is no shortage of introductions to and encyclopedia entries on the ethics of artificial intelligence. Some focus on AI ethics more generally. Others have slightly narrower scopes, such as the ethics of robotics or "machine ethics." Notable book-length introductions and longer encyclopedia entries include those by Mark Coeckelbergh (2020), John-Stewart Gordon and Sven Nyholm (2021), Janina Loh (2019), Catrin Misselhorn (2018), and Vincent Müller (2020). These serve as good guides to what the main debates are – with Müller viewing the main debates as being about "privacy and surveillance," "manipulation of behavior," "opacity of AI systems," "bias in decision systems," "human-robot interaction," "automation and employment," "autonomous systems," "machine ethics," "artificial moral agents," and "singularity" – and Gordon and Nyholm viewing the main debates as being about "machine ethics," "autonomous systems," "machine bias," "the problem of opacity," "machine consciousness," "the moral status of artificial intelligent machines," and "singularity and value alignment." These mostly overlapping lists illustrate how wide the range of topics is that fits under the heading of AI ethics.

Another noteworthy thing is that one concrete result of the widespread recognition of the importance of AI ethics has been that several influential institutions and other entities (including governments, large companies, and other associations) have assembled panels of experts that have published policy documents and ethical guidelines for AI. These AI ethics guidelines have been both applauded and criticized – applauded because they are proactive, criticized because they have sometimes been seen as toothless or biased in favor of certain interests (e.g., business interests, such as when too many representatives from the technology industry have been on these expert panels). Already in 2019, there were so many ethics guidelines published that Jobin et al. (2019) were able to publish a comparative analysis of 84 sets of ethics guidelines. They found that within these documents, the most commonly cited ethical principles or values that should govern AI are – and the number in brackets after each principle/value refers to in how many ethics documents they were featured – "transparency" (73), "justice and fairness" (68), "non-maleficence" (60), "responsibility" (60), "privacy" (47), "beneficence" (41), "freedom and autonomy" (34), "trust" (28), "sustainability" (14), "dignity" (13), and "solidarity" (6).

Another general thing worth noting before some of the main debates are briefly explained below is that AI ethics is about all of the following: (1) ethical questions that arise in relation to actually existing AI technologies already used in human society, (2) ethical questions related, not so much to what AI technologies can actually do or how they actually work, but rather to how people imagine AI, and (3) ethical questions related to AI technologies as they might potentially be in the future, where the future time (s) referred to might be far off in the distant future. Accordingly, philosophical discussions of AI ethics – as well as discussions in other contexts, such as in other academic fields, in the mass media, or elsewhere – are sometimes about realistic questions (the actual "science of AI") and sometimes about unrealistic questions related to fantasies about AI (what might be labeled the "science fiction of AI"). Accordingly, one thing that many AI ethics researchers do is to identify and defuse myths about AI that correspond more to a science fiction conception of AI than to a scientific conception of AI. That said, some authors think that there is a value in raising philosophical questions, not only about realistic scenarios but also about more speculative scenarios involving forms of AI that do not yet exist and that might never come into existence (Bostrom 2014).

Data Collection and the Manipulation of Behavior

Many current forms of AI technologies require enormous data sets, since they involve different types of machine learning and the AI technologies need to be trained on very large amounts of data. As Müller (2020) writes, "AI increases both the possibilities of intelligent data collection and the possibilities for data analysis." This raises a whole range of widely discussed ethical issues. Some have to do with what is sometimes called the "surveillance economy" or "surveillance capitalism," that is, the way in which many online services – e.g., social media – can be offered to users for "free" because the business models behind these websites are mainly based on the commodification of personal data collected about the users of these sites (Zubuff 2019). As one commentator has put it, "Surveillance is the business model of the Internet" (Schneier 2015). This immediately gives rise to ethical worries since surveillance and the collection of personal data about people without their knowledge or expressed consent are generally considered to be ethically problematic. Among the worries that arise in relation to data collection are worries about violations of people's privacy (Véliz 2020) and the concern that big technology companies might increasingly use the information they have about people to manipulate them (Jongepier and Klenk 2022). Several commentators worry that the use of behavior-influencing techniques that utilize personal data collected about Internet users – e.g., social media users – might end up being a threat to democracy in general and to personal autonomy on an individual level. Accordingly, several commentators argue that the ethical use of algorithms that make use of personal data needs to involve transparency and "explainable AI" (Mittelstadt et al. 2016).

Biases and Opacity

A hope that some have had is that if we can outsource decision-making to artificially intelligent decision-making systems, then this might eliminate biases that are part of a lot of normal human decision-making, e.g., in contexts like hiring processes, decisions about who gets a bank loan, police work, or criminal trials. However, given that automated decision support systems, and different methods of "predictive analytics," make use of data that contains human biases, the outputs of these AI systems have been found to contain, reproduce, and sometimes even amplify regrettable human biases (Eubanks 2018). These include biases related to gender, racial identities, and sexual orientation. AI-driven decision-support systems have been shown, for example, to review job applications in ways that show gender biases and to make predictions about who is likely to reoffend in ways that show racial biases. So, while some continue to dream about creating decision-support systems that make use of AI's "increased efficiency, accuracy, scale and speed in making decisions and finding the best answers" (World Economic Forum 2018: 6), many AI researchers are increasingly starting to believe that it is impossible to create decision-support systems that are completely free of biases. Accordingly, an important ethical issue is how much bias can be tolerated for what different kinds of applications of AI and, along with that, the question of how bias can best be reduced and the detrimental effects related to machine biases be minimized.

Another problem related to AI systems that make recommendations or that automate decision-making relates to opacity. Sometimes the decision-making is opaque simply because the companies using the AI are unwilling to share information about how their technologies work. Sometimes the opacity depends on the fact that the machine-learning techniques use neural networks whose inner workings are "black boxes" even to those who create the technologies in question. It is widely thought that when important decisions are made that affect people's lives, there is a "right to an explanation" – people should know why, for example, they were denied a bank loan (Wachter et al. 2018). A key question is what kind of explanation people might have a right to. Another fascinating question is whether there is always a need for explainability – Scott Robbins

(2019), for example, argues that if certain AI technologies regularly produce good outcomes (e.g., medical diagnosing technologies that reliably make correct diagnoses), then we should perhaps tolerate opacity in these AI systems.

Machine Ethics and Automated Systems

Returning to the idea that AI systems are technologies able to take over tasks otherwise performed by human beings, it is good to point out that if those tasks involve ethically sensitive choices, many researchers argue that we need to create AI technologies that are a form of moral agents (Misselhorn 2018). For example, if we create self-driving cars that operate autonomously in traffic, then since driving involves making ethical choices, the self-driving cars need to be able to make ethical decisions (Lin 2015). Or, to use another example that AI researchers often discuss, if we create military robots that use artificial intelligence to make life-and-death decisions in warfare, then those military robots may also need to be able to make ethically informed decisions (Arkin 2009). Machine ethics is the interdisciplinary project of trying to design and build "artificial moral agents": technologies able to make moral decisions (Anderson and Anderson 2011; Wallach and Allen 2010).

This idea has given rise to a discussion of whether it is at all possible to build artificial moral agents. Some researchers think that this is not only possible, but also that artificial moral agents might become able to make ethical decisions that are superior to those that human beings make. In warfare, for example, the researcher Ronald Arkin (2009) argues that AI-driven technologies might be able to make ethically better decisions than human beings, who may be overcome with various different emotional reactions brought about by the extreme nature of the situation they are in – a problem that an emotion-less AI technology would not have. This same idea – i.e., that AI technologies lack human emotions – has also been used to argue that it is not possible to build artificial moral agents (Coeckelbergh 2010a). The idea is that making moral decisions requires moral emotions. It has also been argued that moral decision-making requires consciousness, and that because machines are like "zombies" who lack consciousness, they cannot be moral agents (Véliz 2021). Relatedly, some have argued that making moral decisions requires the ability to act for reasons, which is supposedly a problem for machines because they cannot, according to this objection, act on the basis of reasons (Purves et al. 2015). However, there is disagreement about what it means to act for reasons. There is also disagreement about whether having human-like emotions is necessary for moral agency.

Speaking of automated systems – like self-driving cars and automated weapons systems – another key issue concerns responsibility for outcomes produced by autonomous systems. A commonly discussed worry, for example, is that if AI technologies take over tasks human beings previously performed, and those human beings were responsible for those tasks, then we might be handing over what was previously a human responsibility to a technology that is not responsible for its behaviors. As a result, a gap in responsibility might be created (Matthias 2004; Sparrow 2007). Much recent discussion in AI ethics has been about how to fill responsibility gaps. If people cannot predict or directly control what automated systems do, how can they be responsible for outcomes produced by these AI technologies? Different responses have been suggested, for example, human beings can relate to AI technologies in the ways that managers, supervisors, or commanders relate to subordinates under their supervision or command (e.g., Nyholm 2018; Himmelreich 2019). Such relations can involve one party (e.g., the commander) being responsible for what the other party (e.g., a soldier under their command) is doing. Similarly, the human being might be responsible for what an AI system under their command is doing. Some AI ethics researchers and legal scholars have even argued that some AI technologies can themselves be responsible for what they do (Turner 2019; List 2021). Others argue that responsibility and control should always remain with human beings. This has led some researchers to develop theories of

how people can have "meaningful human control" over autonomous systems of a sort that is sufficient to ground human responsibility over artificial agency (Santoni de Sio and van den Hoven 2018).

Human-Robot Interaction

Another subarea of AI ethics concerns human-robot interaction (Nyholm 2020; Darling 2021). Some of this discussion focuses on social robots, viz., robots designed to engage in social interaction with human beings. Examples of such robots include everything from care robots intended for therapeutic uses to sex robots created to be sex partners or even companions for human beings. Among the topics discussed in relation to social robots is whether there might be a threat to human dignity if, rather than a human care giver, a person – e.g., an elderly person – is presented with a care robot instead (Sharkey and Sharkey 2011). Worries about deception have also been discussed in this connection: What if people are deceived about what robots are capable of doing? A robot might behave as if it is able to understand the human and even as if it likes the human; the human person – e.g. a child, an elderly person, or perhaps a lonely person seeking companionship – might be misled about what is really going on within their interaction with the robot.

In this context, philosophers have discussed whether it is possible for humans and robots to be friends or perhaps even romantic partners. While most researchers think that it is not possible to have robots as our friends or romantic partners, there are also those who argue that it is possible to have robots as genuine friends or romantic partners. John Danaher (2019), for example, has argued that if robots are able to consistently behave in the way a friend is supposed to behave, then, for this reason, the robot can be your friend. Janina Loh (2019) has argued that if a human being has the tendency to become emotionally attached to a robot, we should not view this as a "shortcoming" in the human being, but rather as a "capability" that most people do not have – and we should take up an "inclusive" stance whereby we celebrate this as part of human diversity. Others have argued that if robots lack thoughts and feelings – because they lack conscious minds – they cannot be good friends or romantic partners for human beings, since being somebody's friend or partner requires that one is able to have certain internal attitudes toward them (Hauskeller 2017; Nyholm 2020: chapter five).

Philosophical discussions of human-robot interaction have also included reflection on whether robots or other AI technologies (e.g., chatbots) could ever be moral patients – i.e., whether we should treat them with moral consideration, like we treat humans and animals with moral consideration (Darling 2021). One question is whether robots can have morally relevant properties or abilities, e.g., can they suffer or think rationally? While most researchers doubt that AI technologies can have morally relevant properties, some philosophers have argued that it is possible to build technologies with morally relevant properties or abilities (Bryson 2010; Schwitzgebel and Garza 2015). Another question is whether robots could *simulate* or *imitate* morally relevant properties or abilities in a way that might make a difference to how we should treat them. This would be a form of ethical Turing test: If a robot could reliably behave in the way that a moral patient behaves, perhaps we should say that it should, for that reason, be treated like a moral patient (Danaher 2020). Yet another question is whether robots or our interaction with them could *represent* or *symbolize* morally relevant properties or abilities. Robert Sparrow (2017), for example, argues that it is possible to act unethically in our interactions with robots since the way we treat a robot – e.g., the way somebody treats a sex robot – might symbolize something bad (e.g., it might represent negative stereotypes about sex partners).

Another perspective is that the moral status of robots should not be taken to depend on what properties robots have, or even whether they can imitate, simulate, represent, or symbolize morally relevant properties or abilities. Rather, the moral status of a robot should be taken to depend, David Gunkel (2018) and Mark Coeckelbergh (2010b) argue, on what kinds of relationships people

might have with the robots in question – viz whether the robot is welcomed into the moral circle like an animal that is given a name and is regarded as a pet might be. Similarly, C.S. Wareham (2021) has argued that we can use a Southern African "ubuntu" perspective to argue that robots can "become persons through other persons," i.e., they might be welcomed into the moral community like people can be. Others – such as Abeba Birhane and Jelle van Dijk (2020) – have argued that considering whether robots should be treated with moral consideration is a "distraction" that diverts our attention away from more important issues, such as the promotion of human welfare and the protection of human rights.

Value Alignment and the Control Problem

Another thing worth mentioning is the so-called value alignment problem, which is closely related to the AI control problem. As was mentioned in the introduction, Alan Turing already worried in 1951 about the risk that intelligently behaving machines might spiral out of control. Similarly, the concern that we need to align AI technologies with human values is also nothing new. In 1960, Norbert Wiener wrote the following, foreshadowing the language used in value alignment research today: "If we use, to achieve our purposes, a mechanical agency with whose operation we cannot interfere effectively . . . we had better be quite sure that the purpose put into the machine is the purpose which we really desire" (Wiener 1960: 1358). The contemporary AI researcher Stuart Russell (2019) – perhaps the most influential AI researcher working both on technical and social/ethical aspects of AI – has called this the "King Midas problem." In the classical myth, King Midas had the wish that everything he touched would turn to gold – something that might seem like a good idea until our food or families turn to gold as we touch them. In the same way, Russell worries that unless we specify the aims powerful AI technologies are supposed to pursue in the right ways, getting what we want might end up being dangerous – that is, if powerful self-learning AI technologies pursue the goals we assign to them in "perverse" ways that involve so-called "reward hacking."

The idea is that the more powerful AI technologies are, the harder it will be to keep them fully under our control (Bostrom 2014). So, it will be important to make sure that the goals these AI technologies pursue are goals we really want to achieve, which align properly with our human values. As Iason Gabriel (2020) notes in a useful article on this, value alignment involves both a technical aspect and a normative aspect. The former is related to creating technologies that actually pursue goals we want them to pursue, in ways that fit with our values. But then there is also the normative problem of deciding what those values should be. This involves the political problem of deciding whose values these should be and how we should settle on what values our AI technologies should align with.

Some authors worry about future "superintelligent" AI that would be part of an intelligence "singularity" (Bostrom 2014). Others think that aligning AI with human values will already be a challenge long before that – even if it will never be possible to create superintelligent AI. Moreover, authors interested in existential risks – i.e., risks related to the possibility that life on Earth will disappear after some catastrophe – have increasingly started to include worries about future AI among the factors that could create existential risks for human beings (Ord 2020; McAskill 2022).

Speaking of existential risks, AI has also been linked to climate change in recent years, for example, in the work of Kate Crawford (2021) and Aimee van Wynsberghe (2021). The idea is that training AI technologies on huge data sets uses up large amounts of energy and thereby has a very large carbon footprint. Additionally, the creation of modern hardware involves the use of natural resources and leads to pollution on a large scale (Crawford 2021). It is a pressing ethical imperative, researchers like van Wynsberghe (2021) argue, that we use AI to promote sustainability, whereas much AI technology these days poses a threat to environmental sustainability, given its

carbon footprint and the way it uses up resources and creates pollution. This – i.e., its unsustainable aspects – is another possible way in which AI technologies could clash with important human values.

Concluding Remarks

There are many more topics that are part of contemporary AI ethics than the ones briefly introduced above. These include discussions about how AI might impact the future of work, whether AI could be used as a form of moral advisor, AI and worries about "human enfeeblement," AI and political philosophy, and concerns about how to best deal with our human tendencies to anthropomorphize AI technologies (i.e., we attribute humanlike qualities to them). As noted above, the ethics of AI is a field that is growing – and growing very fast. It is a part of ethics that has caught the attention, not only of academic researchers, but also of policy makers and the general public. The idea of AI is fascinating – and perhaps also scary to some – because it is partly a reality and partly something out of science fiction. It is hard to predict what the future development of AI will be. But we can be sure that the ethics of AI is a topic that will not go away anytime soon.

Cross-References

- ▶ Artificial Intelligence
- ▶ Autonomous Vehicles
- ▶ Autonomous Vehicles: Crashes
- ▶ Computer and Information Ethics

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A

Artificial Intelligence: Logic-Based Approaches

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Though artificial intelligence (AI) & law is a relatively new research domain – the first attempts going back to the 1970s, (Buchanan and Headrick 1970) – the AI and law community has produced a vast amount of research (for an overview, see Ashley 2017), integrating AI methods with legal theories and doctrines, while also including elements of further disciplines, such as linguistics, philosophy, or economics. Here focus on logic-based approaches to AI and law, i.e., on representing legal rules and concepts and reasoning with and about them through formal inference, argumentation, and revision. This entry is complemented by the entry ▶ "Artificial Intelligence and Law: Case-Based Reasoning and Machine Learning."

The Logic of Fixed Sets of Rules

The first attempts at computational models for the law were inspired by the idea of the law as a deductive system, namely, as a set of premises from which legal conclusions could be reached through deductive inferences, a view that was inspired by previous contributions to legal logic and legal theory (Alchourrón and Bulygin 1971). According to this approach, given the union $L \cup F$ of a set L of legal premises (typically a set of if-then rules) and a set F of facts, logical deduction (including predicate logic and possibly a deontic

logic) can provide (all) relevant legal consequences, namely, any proposition φ such that $L \cup F \vdash \varphi$.

A fundamental development of rule-based systems for the law, and indeed in legal logic, has been obtained through formal models of non-monotonic reasoning. To understand the difference between monotonic and non-monotonic reasoning, we need to compare what happens when a set of premises S_0 is expanded with a further set of premises S_1 so as to obtain the enlarged set $S_0 \cup S_1$. If the reasoning is monotonic, all conclusions derivable from S_0 are also derivable from $S_0 \cup S_1$. If the reasoning is non-monotonic, this may not be the case: some conclusions derivable from S_0 may no longer be derivable from $S_0 \cup S_1$. The latter conclusions are said to be *defeated* by the additional premises, thus non-monotonic reasoning is also called defeasible reasoning. As an example of non-monotonic or defeasible reasoning in the law, consider the use of causes of justification in determining criminal (or civil) liability. If we only have the information that the material elements and the *mens rea* of a crime are present in a case, we will conclude that the corresponding punishment is to be delivered. However, we have to withdraw these conclusions if we come to know that there exists a cause of justification (e.g., self-defense). Various aspects of the law – such as the interaction between rules and exceptions, conflicts between norms, presumptions, temporal reasoning, the dynamics of legal systems, and burdens of proof – could at least partly be addressed through non-monotonic approaches.

In some early AI and law applications, non-monotonic reasoning was captured using Prolog, the leading language for logic programming, i.e., for creating computer programs which consist in logical premises, and whose execution consists in performing logical inferences (Sergot et al. 1986). In Prolog, defeasible rules can be expressed using an important component of the language, i.e., negation by failure, usually expressed as *not*. The proposition *not* φ is proved by failing all attempts to prove φ (using the information in the program). Thus, by including negated propositions in the antecedent of a Prolog rule, the rule becomes defeasible: its conclusion can be derived only so long as the negated elements cannot be inferred. For instance, a rule such as *Murder if Intentional Killing and not Justification* enables a Prolog-like system to infer *Murder* when it has established *Intentional Killing*, and there is no information about the existence of a case of justification. This conclusion will no longer hold if information on the existence of a cause of justification is added to the program.

The seminal paper by Sergot et al. (1986) stimulated numerous attempts to use logic programming to build knowledge-based systems, as well as theoretical inquiries into the use of logic programming for modelling legal reasoning and knowledge (McCarty 1988; Bench-Capon et al. 1987). Defeasible logic has provided an extension of the logic programming paradigm particularly suited to the legal domain, by making it possible to represent defeasibility though priorities over conflicting rules (Nute 1994; Antoniou et al. 2000). Modelling the law through a set of defeasible rules is thus a key idea in the AI and law community, which has attracted the interest of legal theorists as well (MacCormick 1995; Sartor 2018). In fact, it may be argued that legal reasoning is defeasible on the ground that defeasibility is an intrinsic and inevitable aspect of human cognition (Pollock 1995). Moreover, legal reasoning often takes place within dialectical settings where arguments and counterarguments interact, weaker arguments being defeated by stronger ones (see section "Statutory Interpretation").

The models of the law as a fixed set of (deductive or defeasible) rules may be criticized as wedded to the idea of "mechanical jurisprudence" (Pound 1908), i.e., to the view that legal problem-solving – and in particular adjudication – merely consists in the straightforward application of a static set of rules to new cases. Some critics have claimed that this perspective, while discredited in legal theory, would have been revived for the purpose of developing computational models of the law, which consequently would be inevitably destined to failure (Leith 1986). We agree that the use of computational

models of the law as a fixed set of rules addresses neither the interpretation of legal norms nor the assessment of facts on the basis of evidence. Systems based on such models have indeed failed to match some excessive expectations (Susskind 1996). However, systems that apply fixed sets of rules can be profitably deployed in certain contexts, such as the administrative application of regulations on social security and taxation. These contexts are governed by vast sets of connected rules, each of which has a relatively precise meaning and addresses circumstances that are usually well specified. Rule-based systems can indeed satisfactorily address the challenge of finding all rules that are relevant to the case at hand and of diligently applying the combination of such rules, keeping track of every step. By contrast, these systems have *not* been successful in supporting legal analysis in contexts where facts, concepts, and rules are controversial, as in judicial decision-making.

The idea of capturing the law through a fixed set of (strict or defeasible) rules has been implemented in many knowledge-based systems. Some of these systems have remained at the prototypical stage; others have been successfully commercialized and deployed. Among the earliest examples of legal expert systems is Waterman's product liability expert system, which was designed to advise on settlements concerning product liability (Waterman and Peterson 1980). The most successful environment for legal expert systems is probably the Softlaw system (Dayal and Johnson 2000). This system has subsequently been purchased by commercial companies, and further developed. Its latest version is owned by Oracle, a leading software company, and distributed under the name "Policy Automation." It includes a set of tools for building knowledge bases of regulations, checking their correctness and consistency, and using them interactively. To facilitate the creation of knowledge bases, it provides a formalism that is close to natural language. This idea has recently been adopted in the Logical English project (Kowalski and Datoo 2022), which provides for a natural-language-like syntax for knowledge bases, which are translated into Prolog or answer set programming.

Legal Concepts: From Deontic Logic to Legal Ontologies

Legal rules form networks where a legal effect (e.g., one's liability for violation of copyright) depends on qualifying a certain fact according to concepts provided by further rules (was there a violation of copyright? was there a damage?), which in turn may depend on further facts (was there a protected work? was there an illegal use of it?), and so on. Moreover, the application of the law requires linking legal concepts to common sense and technical terms that are used to represent the reality to which legal norms are applied.

AI and law research has provided significant contributions to modelling reasoning about, and computing legal concepts. This line of research has built upon the accounts of the most familiar deontic concepts – permission and obligation – provided by deontic logicians and legal theorists (e.g., von Wright 1951; Alchourrón and Bulygin 1971) and elaborated by AI and law scholars (see, e.g., McCarty 1986; Allen and Saxon 1991; Hage 2011; Sartor 2006; Loreggia et al. 2022; Ciabattoni et al. 2021).

Worthy of mention among the studies of basic deontic concepts is the research conducted on the idea of permission. Indeed, the concept of permission plays an important role in the law in that it is crucial in characterizing notions such as those of authorization and derogation (Boella and van der Torre 2005; Sartor 2005; Stolpe 2010). Some contributions have gone beyond the idea that permission is simply the flip side of obligation, to this end advancing the well-known distinction between *weak* (or *negative*) and *strong* (or *positive*) (von Wright 1963, see, among other, Alchourrón and Bulygin 1984; Royakkers and Dignum 1997; Makinson and van der Torre 2003; Boella and van der Torre 2003; Stolpe 2010; Governatori et al. 2013a).

Besides working on the basic deontic concepts, many scholars have elaborated formal and computational accounts of fundamental legal concepts, starting from Hohfeld (1913, 1917). This line of research has focused, on one hand, on the idea of *directed deontic modalities* and, on the other, on the concept of *power*. Directed deontic

modalities indicate the bearers (Herrestad and Krogh 1995) or beneficiaries of deontic qualifications (Gelati et al. 2004; Sartor 2005). Contributions in this field also come from the so-called Kanger-Lindahl theory of normative positions, which has developed into a rich blend of modal deontic and action logics able to formalize a complex array of deontic and legal concepts (see: Kanger and Kanger 1966, for an early exposition; Sergot 2001 for a seminal contribution; Grossi and Jones 2013, for a recent and comprehensive analysis).

Several works have focused on *potestative* norms, which concern precisely the attribution of powers. As extensively argued in Searle (1995), for instance, rules attributing powers – often called count-as conditionals – represent the basic brick of complex institutions such as legal systems, and a first logical analysis of them was developed in Jones and Sergot (1996). Others contributions (such as: Gelati et al. 2004; Sartor 2005) have expanded *Hohfeldian powers* with other types of power, such as *enabling powers* and *declarative powers*: while the first one covers any action which gives rise to a legal effect, the second one only covers cases when the law aims at enabling the agent to produce the effects in this way, and the third one covers cases where the effect is produced through an agent's declaration of it. Notions of direct and indirect responsibility have also been addressed (Smith et al. 2013; Lorini and Sartor 2015).

A different line of investigation concerns legal ontologies, i.e., formal definitions of legal concepts and their relations. They may be used to define shared and interoperable ways to represent legal knowledge, to be deployed in computer applications such as the semantic web and legal information retrieval (Sartor et al. 2011; de Oliveira Rodrigues et al. 2019). Recently, significant efforts have been made to combine the definition of deontic and other fundamental legal concepts with legal ontologies (see, first of all, Athan et al. 2015).

Ontologies can be viewed as the development of digital dictionaries and thesauri, which from the inception of legal informatics have been used for information retrieval. To define legal ontologies, researchers in AI and law have used different AI models for knowledge representation, from semantic networks, to frames, to ontologies (see Breuker et al. 1997; Benjamins et al. 2005). In general, legal ontologies can be broken down into two different groups: top ontologies which attempt to describe fundamental categories applicable to all legal domains, and domain ontologies, aimed at articulating the concepts fundamental to some domain of the law (copyright law, privacy, etc.).

Legal Argumentation

From the argumentation perspective, legal knowledge, in combination with factual knowledge, appears as a multifaceted repository (inclusive of rules, assumptions, preferences, interpretations, principles, values), from which multiple arguments can be constructed. Such arguments may attack one another, and their conflicts may be adjudicated according to further arguments. Research in AI and law has contributed to – as well as profited from – the growing research on computational argumentation, which provides formal methods for constructing arguments and for determining what conclusions are supported, or should be reasonably accepted, relative to sets of interacting arguments (Baroni et al. 2018). Computable models of legal argumentation can be related to non-monotonic or defeasible reasoning: just as in monotonic reasoning additional premises may lead to withdrawing some previously available conclusions, so, similarly, in argumentation, new arguments may defeat previously available arguments.

While relying on general approaches to formal argumentation (Pollock 1995; Dung 1995), AI and law research has developed original models. Conflicts of legal arguments have been examined, and ways have been defined to address them through meta-arguments, providing reasons why certain arguments should prevail over their counterarguments (Prakken and Sartor 1996). The interactions between rules and reasons supporting them have been logically modelled (Hage 1997). Case-based reasoning, including basic patterns of

analogical reasoning, has been captured through argumentation (Prakken and Sartor 1998; Branting 1994; Bench-Capon et al. 2013). Aspects of the law that had so far escaped logical representation, such as presumptions and burdens of proof, have been captured by combining defeasible reasoning and argumentation (Prakken and Sartor 2006; Calegari and Sartor 2021; Kampik et al. 2021).

Multiple argument schemes – different patterns for defeasible reasoning, such as witness testimony, expert testimony, practical syllogism, interpretation methods – have been deployed in modelling legal arguments (Gordon and Walton 2006; Walton et al. 2008, 2021). The issue of what argumentative moves are most advantageous in different settings of legal disputes has been addressed from a game-theoretical perspective (Riveret et al. 2007). Computable formalizations have been developed for protocols for legal argumentation, i.e., rules establishing which arguments are admissible, at any stage of the dialectical interaction, and what impact each argument may have on the course of such interactions (Gordon 1995; Governatori et al. 2014).

Statutory Interpretation

Legal interpretation has been addressed by the AI and law community through argumentation and case-based reasoning. Formal methods of statutory interpretation have been based on logical models of reasoning about legal norms, which take into account the reasons behind the application of a statutory rule and behind the interpretation of legal concepts, such as they appear in the antecedent conditions of legal norms.

An early comprehensive framework for modelling statutory interpretation was proposed within so-called reason-based logic (RBL, see Hage 1997). RBL aims at capturing how principles, goals, and rules give rise to reasons for and against a proposition and how these reasons can be weighed in interpreting legal provisions. RBL develops a model for statutory interpretation within a broad perspective of practical reasoning, a general idea that was later developed by others (such as Sartor 2005). An argumentation-based approach to legal interpretation is also offered by Atkinson et al. (2005) and Atkinson and Bench-Capon (2007), which addresses legal interpretation as a decision-making problem, i.e., "as a choice between alternative interpretations on the basis of the likely consequences of these interpretations in terms of promoting and demoting values" (Prakken and Sartor 2015, p. 230; Maranhao et al. 2021). The idea that promotion or demotion of goals is central to statutory interpretation is defended by Boella et al. (2009a), who argue that restricting and expanding the applicability of a norm amounts to revising the set of constitutive rules defining the concepts on which the application of the norms is based. Such a process is guided by checking whether such a revision promotes relevant legal values.

Some contributions have proposed to handle vagueness and open texture through quantitative methods and by resorting to fuzzy logics (Philipps and Sartor 1999). Indeed, hard cases typically include penumbral instances, whose membership in relevant concepts is disputed. This approach has recently been taken up in da Costa Pereira et al. (2017), which combines fuzziness with legal argumentation and teleological reasoning.

Finally, some recent contributions to legal interpretation fall within the tradition of the argument-scheme approach mentioned in the previous section (Walton et al. 2021). According to this view, interpretive canons for statutory law (MacCormick and Summers 1991) can be expressed through defeasible rules, according to which a legal provision has to be interpreted in a certain way on the basis of a certain canon. As different canons may apply, suggesting different interpretations, conflicts may arise which have to be addressed by comparing the underlying reasons. Along similar lines, a computational framework was devised by Rotolo et al. (2015) in defeasible logic.

Dynamic Legal Systems

Legal systems are dynamic: their content changes as time goes by and new provisions come into

force. Alchourrón and Makinson (1981, 1982) were the first to provide a logical account of changes in a *legal code*. They observed that the addition of a new norm *n* that is consistent with the preexisting code causes the code to grow larger, in such a way that it includes not only *n*, but also all other norms that can be derived owing to *n*. On the contrary, when the new norm is incoherent with the existing ones, we have an *amendment* of the code: to coherently add the new norm, we first need to reject all norms that conflict with *n*. Finally, *derogation* is the elimination of a norm *n* together with whatever part of the legal code that implies *n*.

Alchourrón et al. (1985) inspired by the work just mentioned proposed a general approach, the so-called AGM framework for belief revision. The AGM framework distinguishes three types of change operations done to theories. Contraction is an operation that removes a specified sentence ϕ from a given theory Γ (a logically closed set of sentences): Γ is set aside in favor of another theory Γ_{φ}^{-} which is a subset of Γ not containing φ. An expansion operation adds a given sentence φ to Γ: the resulting theory Γ_{φ}^{+} is the smallest logically closed set that contains both Γ and φ. Also a revision operation adds φ to Γ, but it needs to be ensured that the resulting theory Γ_{φ}^{*} is consistent (Alchourrón et al. 1985). When Γ is a code of legal norms, contraction corresponds to norm derogation (norm removal) and revision to norm amendment.

Doubts have been raised as to whether the AGM approach offers a satisfactory framework for understanding the revision of legal norms. On the one hand, some AGM axioms are controversial (Governatori and Rotolo 2010; Gabbay et al. 2003). On the other hand, it has been claimed that AGM-like frameworks are best suited for theories consisting of assertions rather than for systems of norms. While revision operators have been be used to address normative change (Maranhão 2013), they are not needed to capture the dynamics of obligations and permissions resulting from a fixed set of defeasible norms, which can be modelled through defeasible reasoning (Governatori and Rotolo 2010; Governatori et al. 2021).

It has been also argued that legal dynamics can hardly be modelled without considering temporal reasoning (Tamargo et al. 2019). Indeed, several works (Governatori et al. 2007; Governatori and Rotolo 2010; Tamargo et al. 2019) propose to combine normative and temporal reasoning to address changes in the law. Logical frameworks have been proposed which combine AGM ideas with richer rule-based logical systems, such as standard or defeasible logic (Rotolo 2010; Governatori et al. 2013b) or input/output logic (Boella et al. 2009b). Wheeler and Alberti (2011) suggested a different route, i.e., applying to the last existing formal techniques, such as iterated belief change, two-dimensional belief change, belief bases, and weakened contraction.

Conclusion

Research on AI and law has provided a rich and diverse array of contribution to the study of legal logic and argumentation. Not only has AI and law research developed and refined established logical formalisms for modelling norms, such as deontic logic. It has also advanced new methods for reasoning with and about the law – such as non-monotonic logics, computational argumentation, and belief revision – and has deployed them to addresses aspects of the law that had so far escaped logical analysis. AI and law researchers have since the 1980s played a growing role in formal legal theory\philosophy, i.e., in attempts to capture patterns of legal knowledge and reasoning through formal methods.

It is still unclear what might be in the future the relation between logical models and machine learning approaches (see the entry ▶ "Artificial Intelligence and Law: Case-Based Reasoning and Machine Learning"). It seems to us that in the legal domain, where human relations have to be regulated by human-understandable norms, to be applied in ways that appear reasonable to humans, machine-learning approaches cannot substitute logical models, and we have to aim at an integration of the two approaches. As machine learning approaches can contribute to the creation logical models, by extracting rules and concepts

from legal data, so logical models can be applied in the control and explanation of the functioning of machine learning systems being deployed in the legal domain.

Cross-References

► Artificial Intelligence and Law: Case-Based Reasoning and Machine Learning

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Astell, Mary

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Introduction

In 1986, Ruth Perry published *The Celebrated Mary Astell: An Early English Feminist*; it was the first book on Astell (1666–1731) since a slim 1916 education dissertation on her.

Fortunately, we did not have to wait another seven decades for the next publication on Astell. In rapid succession, a host of academic articles and two collections of essays on her appeared, as did complete editions of several of Astell's works and monographs devoted entirely to her. Attention to Astell has not abated: scholars in disciplines such as political theory, history, communication, theology, law, and philosophy continue to bring new frameworks to their readings of her, shedding more light on what Astell stood for and how she defended those positions; what ideas and practices inspired her and how she revised them for her own purposes; and what her rightful place is in various traditions and canons.

Biography

Perry's Astell led a vibrant life of the mind, active in a community of "learned ladies" in Chelsea, England, that included Judith Drake, Elizabeth Elstob, and Mary Wortley Montagu. Unfortunately, our knowledge of her life is limited (she is said to have loved obscurity, apparently effectively).

Astell was born in Newcastle in 1666 (one of Peter Astell and Mary Errington's two children). An uncle Ralph (a clergyman-poet) provided an early humanistic education; still, Astell would mostly have to be self-educated, like most women intellectuals throughout history.

As a young, single woman (around age 22), Astell bravely headed to London, and turned to writing to support herself, a rare feat at the time.

Her first published work was (what would become Part I of) *A Serious Proposal to the Ladies, for the Advancement of Their True and Greatest Interest* (1694), followed by release of an earlier exchange of letters with John Norris, published as *Letters Concerning the Love of God* (1695), and Part II of *A Serious Proposal* (1697). She became relatively famous, impressing people with her content and her style (her formidable wit and persuasive polemics are as unmistakable as are the rigor of her intellect and subtlety of her

arguments). *Some Reflections upon Marriage* followed (1700), as did several Tory pamphlets (more new territory for a female author), and a major work of moral philosophy, *The Christian Religion, as Profess'd by a Daughter of the Church of England* (1705).

Multiple editions of her major works were issued. In later life she helped run a charity school for girls in Chelsea (rather than a women's college, as imagined in *Proposal*), where she died from breast cancer in 1731. She was both celebrated and satirized, but was soon disappeared (representative, again, of women thinkers), until the feminist movement led more women to the academy who turned to discover their "overlooked" and underestimated predecessors.

A Defining Tension

Perry emphasized how Astell seemed to have one foot in traditional, conservative ideas (Tory politics and Anglican spirituality, specifically) and the other in decidedly less conventional promotion of women's causes, especially women's education. Variously called a "paradox," a "tension," or a "contradiction" in her thought, the co-existence of these threads continues to occupy Astell scholars (and none outnumber those interested in her feminism). They have shown that only a fairly restricted understanding of feminism inevitably links it to Enlightenment liberalism; instead, history shows women in every political and religious tradition differently grappling with the demands of voice and respect for women, from ancient Pythagoreans and medieval mystics to early modern Protestants and more.

Some resolve the tension by attributing to Astell a "conservative feminism" that, for example, recognizes women's intellectual and spiritual equality within the context of a hierarchically organized society. Others insist on her more radical challenges to the status quo: her acceptance of many forms of "resistance"; positive re-evaluation of female friendships, speech, and ways of thinking; and even fairly democratic pedagogies in her proposed academy. One can emphasize Astell's recommendation that women grow spiritually from the suffering they endure in marriage, or stress instead her suggestion that marriages be as equal as possible. One can focus on her academy benefitting a few, privileged women, or look to her imagining those few spreading the word, initiating social change. Astell was dealing with present circumstances (men have power) as well as daring to imagine a better future; some recommendations are geared more to one of these situations than the other.

Most notably, Astell modeled how to base critiques of patriarchal marriage and the dreadful state of female education on strong political and philosophical grounds, considering people's relationships to themselves (as knowers, and with a spark of divinity), to one another (as interlocutors, partners, and fellow citizens), and to God.

Later commentators have confirmed Perry's insight that Astell was "the first English writer for whom the ideas we call 'feminist' were the central focus of sustained analysis": Astell developed "a sophisticated philosophy that was designed to help the female sex attain wisdom, virtue, and happiness" (Broad v), offering "a full-scale philosophical defense of women's intellectual equality" (Springborg, 17). Astell's analysis of marriage uses (and reconsiders) such central political notions as obligation, obedience, consent, liberty, and tyranny, and her study of education is tied to general thoughts on human happiness, custom, and epistemology. She aimed to ennoble women, encouraging them to live a virtuous and good life, and her political and moral theory supported this goal, which she believed was in the interest of all.

Gender and Power

Astell's description of women's condition in marriage was dark:

> To be yok'd for Life to a disagreeable Person and temper; to have Folly and Ignorance tyrannize over Wit and Sense; to be contradicted in every thing one does or says, and bore down not by Reason but Authority; to be denied ones most innocent desires, for no other cause but the Will and Pleasure of an absolute Lord and Master, whose Follies a Woman with all her Prudence cannot hide, and whose

> Commands she cannot but despise at the same time she obeys them; is a misery none can have a just Idea of, but those who have felt it. (*Reflections,* 34-35)

Astell's woman is in a miserable condition. Hobbes may worry about "masterless men," but she considers the terrible fate of a woman subject to an absolute Master. Patriarchy satisfies all the criteria of tyrannical rule: it is a cruel, unjust, self-interested, and arbitrary system of power, exercised with impunity and against the interests of most individuals and the community. It is Astell's goal to show that women "have a greater share of sense, whatever some Men affirm, than to be content to be kept any longer under their Tyranny in Ignorance and Folly" (*Proposal,* 121).

Astell's writing on power informs this and other topics she addresses. She considers ecclesiastical, domestic, and governmental authorities; the relation of power to freedom, custom, civility, virtue, religiosity, and reason; better and worse occasions and means for resisting authority; and its reasonable, legitimate exercise for the benefit of others, as well as its destructive, arbitrary exertion for personal gain (Weiss). She looks at how unequal power affects those with more and those with less of it. She grasps that the powerful too often despise those they govern. (If one could have more power and also be virtuous and caring toward those with less, Astell imagines, greater power could be used for good.) Newly in Astell, we get to see the world – or her world, at least – through the eyes of a woman who says she loves her sex. This distinctive standpoint enables her to reveal hidden and illegitimate forms of power and to rethink basic concepts from self-knowledge to happiness, from security to freedom. She leaves us better and deeper thinkers who can and must answer such questions as this: "*If all Men are born free,* how is it that all Women are born slaves?" (*Reflections,* 18).

Locating Astell's Corpus

Exciting advances in Astell scholarship have resulted from putting her into conversation with a host of thinkers and theories, recollecting historical conversations and creating imagined ones. The earliest contemporary readings of her suggested that her empirical style and conclusions foreshadowed Hume (Duran), that she notably combined Christian faith with rationalism (Smith), generated the concept of patriarchy still popular today (Spender), and modeled how to include women in political theory (Weiss). Even more sustained analyses followed: Springborg revealed her to be among the earliest critics of early modern political theory, especially its patriarchalism and contractarianism; Kohlbrener stressed Astell's critique of the inauthenticity marking the post-revolutionary culture of William III; and Apetrei emphasized Astell's place in the "religious feminism" surprisingly popular in late seventeenth-century England. Weil's Astell divided the world between egotistical and pious people, while Broad's distinguished between women concerned with the opinions of men and women who think for themselves.

Many differences among commentators reflect the still-early stage of Astell scholarship; constructive new interpretations continually emerge. More importantly, the variety within (and outpouring of) such scholarship is evidence of Astell truly being taken seriously as a philosopher, political theorist, and religious thinker, a status accorded to very few women (perhaps Wollstonecraft, Beauvoir, and Arendt are welcoming her to their rank).

Cross-References

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Augustine of Hippo

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Augustine of Hippo (354–430) is a towering figure in the history of Western moral, social, political, and legal thought. He was arguably the most influential writer in the West for more than a thousand years after his death. His ideas have remained foundational for Western thinking about law and society.

Introduction: Biography and Intellectual Development

Augustine was born in Thagaste, in modern-day Algeria, and as a young man spent a formative period in Carthage and then in Rome and Milan, before returning to North Africa where he became the bishop of Hippo Regius (now the city of Annaba, Algeria). He is recognized as a saint by the Roman Catholic Church, Eastern Orthodox Church, and the Anglican Communion.

Augustine was a prolific writer; he converted to Christianity at the age of 31 and, although none of his writings from before his conversion survive, he lived for another 44 years, writing over 100 works, including philosophical dialogues, theological treatises, anti-heretical tracts, and biblical commentaries, as well as hundreds of letters and sermons (his works are listed in Fitzgerald et al., 1999). His two most famous works, the *Confessions* and *City of God*, defy classification, although they fall broadly within the Roman tradition of history writing. The first is a personal history of his journey to Christian faith, combined with philosophical and theological reflections, addressed directly to God; the second discusses events in Rome's history with a view to critiquing Roman religion and then turns to the history and destiny of the "city of God" with further reflections on social, political, and ethical issues.

Given his long career, it was almost inevitable that his thinking on certain questions changed. He himself wrote the *Reconsiderations* towards the end of his life, in which he offered criticisms of his early works and pointed to certain changes which had taken place in his thought. Modern scholars still debate, however, whether or not the *Reconsiderations* reliably identifies all the ways in which Augustine's thought evolved. For some, his reflections on key ideas like grace and freewill underwent major changes in the course of his career which go unmentioned in the *Reconsiderations* (Burns 1980). More recently, however, scholars have rejected the notion of any major evolution in his thought (Harrison 2006).

Closely related to the question of the development of Augustine's ideas is the question of the extent to which his thought remained in continuity with pre-Christian, Greco-Roman philosophy. Many scholars draw a sharp line between Antiquity and the Middle Ages, between "classical" and Christian culture, and locate the break as occurring with Augustine (Dyson 2006). At the same

time, much work has been done to understand the use Augustine made of Stoic, Platonic, Ciceronian, and Aristotelian ideas (Byers 2012; Colish 1985). Augustine himself clearly respected and felt indebted to these philosophies: he considered that he was writing in a continuous tradition of reflection from a theistic perspective on moral and social matters. It is possible that some of his criticisms of Greek and Roman thought need not be construed as distinctively Christian; instead, we can see him at times as taking sides in debates which occurred within ancient thought itself (Harding 2008). Nonetheless, it is also vital to do justice to his conviction that Christianity necessarily brought new ways of conceiving old ideas. On the one hand, he was concerned to show that Christian teaching did not conflict with many insights gained from Greco-Roman philosophy, and on the other hand, he also insisted that Christianity's belief in the exclusive worship of the triune God and its distinctive understanding of salvation through Christ carried implications for the meaning it gave to key notions such as "justice," "virtue," "happiness," and "wisdom."

Augustine's Ethics

The overall framework for Augustine's reflections on law and society was his acceptance and adaptation of the eudaemonist tradition in ethics. This tradition, which Augustine encountered in Roman writers like Cicero (whose lost *Hortensius* exercised an enormous influence over the young Augustine's intellectual development, *Confessions*, 3.4), took for granted the notion that everyone desired happiness, and held that happiness would only be found where human beings lived in accordance with what was fitting for human nature (*On the Happy Life*, *On the Catholic Way of Life*, 3.4–6.10, *Confessions* 10.20–23, *The Trinity* 13.4.7–5.8) (Matthews 2005). It also held that happiness, wisdom, and virtue coincided, since they all referred to the same state of living in accordance with what was fitting. At the same time, Augustine was required to adapt eudemonism to the Christian insight that happiness lay in the next life, where it was the reward for virtue in this life. Thus, he found that complete happiness, wisdom, and virtue would be found in the next life among the saved, but nonetheless a kind of happiness and wisdom could be attained in this life through faith in Christ, and these coincided with virtue defined as the love bestowed by the Holy Spirit (Tornau 2015). In the next life, our love for God would reach its fullest extent, when we lived for eternity in the divine presence, but during our earthly lives the Holy Spirit bestowed on the faithful a love of God which was sufficient for virtue. This love coincided with a kind of wisdom and happiness because it entailed holding correct beliefs about God and holding the correct attitude to everything which was not God.

Virtue referred to the love of God bestowed by the Holy Spirit: this entailed, not only loving God as we should, but also loving ourselves and others as we should. Augustine understood that other faiths, among which he included Platonism, equated virtue, wisdom, and happiness with loving and possessing God. He held, however, that these other faiths in fact failed to love God correctly because their search for God involved them finding a false joy in a mistaken evaluation of their own human powers (*Eighty-Three Varied Questions*, Question 79.1). God presided over all (*On True Religion* 31.57). Augustine compared God's authority to that of the "public laws": God gave human beings a certain autonomy, just as the public law allowed people to govern themselves to a limited degree according to private laws (*Eighty-Three Questions*, Question 79.1). Human beings must not in any way exalt in what they perceived to be their own ability to know and love God, since unaided human nature did not have the capacity to love God as it should; rather, this love was a gracious gift from God, given by the Holy Spirit to those who possessed faith in Christ (which Augustine came to view as the work of grace as well; see *To Simplicianus*, Book 1, Second Question). In other words, we must not claim a greater autonomy for ourselves than we actually possessed. To do so was to commit the sin of pride: the devil's sin was pride, as was the sin of Adam in the Garden of Eden, but pride was also the sin of all those who understood virtue as a human achievement, rather than the gift of grace

(*On The Spirit and Letter*, 11 and 17–19). Loving God meant finding all our joy in God, and none in our own powers. In this way, Augustine identified one way of relating the love of God to the correct love of self and neighbor (see Matthew 22:35–40): human beings only loved themselves and others correctly when they loved God as God should be loved, that is, when they attributed to God all the power that was God's and so avoided an inflated assessment of, and a false joy in, human abilities. In short, a search for God which assumed that human beings were able to know God through the exercise of their own powers involved an imperfect love of God, self, and neighbor. Augustine claimed that before he came to place his faith in Christ, he had held this incorrect view of human beings' natural powers (*Confessions*, 6.4). He had much praise for the Platonists (*On True Religion*, 4.7), but maintained that they had never succeeded in loving God as God should be loved precisely because they had viewed this love as a human achievement and hence attributed some of the glory owed to God to themselves. They were trapped by pride, meaning that they rejoiced in a false estimation of their own powers and so failed to rejoice appropriately in God.

The Eternal Law and the Natural Law

An example of the influence of ancient thinking on Augustine's legal and social philosophy can be seen in his notion of the eternal law, which had its origins in Platonism and Stoicism (Chroust 1973). In common with these philosophies, he held that the universe was governed by God's eternal law. The eternal law was "the divine reason (*ratio*) or will of God which requires the preservation of natural order and forbids the breach of it" (*Against Faustus*, 22.27). For Augustine, the universe was characterized by orderliness, and the eternal law stated God's will that this orderliness be preserved. This orderliness was preserved by ensuring the subordination of what was lower to what was higher. He derived from this the principle that human beings rightly exercised control over animals, parents over children, men over women, and within human beings, the reason rightly ruled over our animal nature, while the contemplative part of reason rightly ruled over the active part. In short, the human mind must be focused within itself on the "image of God," actively seeking this image through faith, while its decisions must be guided by rational principles (*Against Faustus* 22.27; *Eighty Three Varied Questions,* Question 30; *City of God* 19.15). He acknowledged that some ancient philosophers had recognized that human beings must seek God above all other things and praised them for this insight (the Platonists, see *City of God* 8.5 and 8.8), while also criticizing those whom he considered had failed to see this (the Stoics, *City of God* 19.25). He held that the Platonists, despite giving a role to divine grace, nonetheless overestimated the ability of unaided human reason to advance towards the knowledge of God (*Confessions* 7.9). For Augustine, God must be sought through Christian faith, that is, by believing the Christian Church's teachings about God and especially believing its teachings that the vision of God was the reward given by grace to those who had achieved virtue in this life, where virtue was itself the gift of grace.

The eternal law established that human beings must govern themselves according to rational precepts. Augustine held that these were set forth in the natural law which was written upon the conscience of every human being, and hence was known by everyone upon reaching the age of reason, roughly 16 years old (*Confessions*, 2.2). The natural law taught what was right and wrong in human conduct – forbidding such things as murder, theft, and adultery – and contained precepts such as the Golden Rule of "doing as you would be done by" (see Tobit 4:15). Augustine held that people could know from the Golden Rule that it was wrong to bear hatred towards one another (*Confessions*, 1.18). He also held that a little reflection upon the natural law allowed a person to understand that it was wrong to love earthly things and right to love eternal ones (*On Free Will*, 1.15.32, *Confessions*, 2.5). If a person believed in God, then she would understand that the natural law required her to make God her highest good (*On the Catholic Way of Life*, 6.10). Yet to do this was impossible without grace: either we were so

closely attached to temporal comforts that we could not abandon them as a source of happiness, or, if we were not so closely attached to them, then we fell into the trap of pride, thinking that we could love God as God should be loved by our own powers.

The ancient Israelites were the recipients of a special revelation from God in the form of the Mosaic laws. These laws contained all the teachings of the natural law, as well as a great many ritual laws (which Augustine held were replaced among Christians by the sacraments, *Against Faustus*, 19.9–10). Augustine asked why, since the moral precepts which ought to guide human life were knowable by reason, God had chosen to communicate these teachings directly to Moses. His answer was that the Mosaic laws were given at a time when God's people had chosen to ignore the natural law written on their consciences: the result was that God chose to remind them of this law by writing it on tablets of stone (*Explanations of the Psalms*, Psalm 57 (58) at 1).

The Positive Law

The natural law bore a complicated relationship to human-made, positive laws (see *Eighty-Three Varied Questions*, Question 31, where Augustine quotes at length from Cicero's discussion of natural law, customary law, and positive law in *On Invention* (*De Inventione*)). In one place, Augustine suggested that, while temporal laws ought to be based upon the eternal law, they were to be accorded a certain respect regardless of whether they were based on this law or not ("in the case of temporal laws, men have instituted them and judge by them, and when they have been instituted and confirmed no judge may judge them but must judge according to them," *On True Religion*, 31.58). Elsewhere he declared, however, that a law which violated justice "does not seem to me to be a law at all" and indicated circumstances in which an unjust law could legitimately be overturned (*On Free Will* 1.5.12 and 1.6.14–15 and Burnell 1996).

At the same time, he held that it was not the business of the state to punish all immoral conduct. Temporal laws ought to conform to the eternal standards of right and wrong laid down by the eternal law and knowable through reason, but not every action in violation of these standards rightly received a temporal punishment inflicted by the political authority. Rather, Augustine held that there were certain kinds of immoral conduct which God would secretly punish himself through providentially inflicting temporal suffering on perpetrators. Thus, he suggested that, while it was never morally permissible to kill in self-defense, nonetheless it was legitimate for a polity to refuse to punish those who did so. Here, the political authority rightly allowed the "lesser evil." Those who availed themselves of the permission given by the temporal law to kill in their own defense, however, were not blameless, but rather guilty before the eternal law and so would not escape punishment. The punishment that they received, however, would be one inflicted by divine providence itself at some unknown point in the course of their earthly lives (*On Free Will*, 1.5.12–13).

Which immoral actions fell to the state to punish, and which fell to divine providence? Augustine answered this question by reflecting upon the role of the political authority. The role of the state was to establish peaceful relations among a people: "the law of the state takes upon itself to vindicate all that conduces to peaceful relations between simple folk as far as it can be regulated by man" (*On Free Will*, 1.5.13. See also *On Free Will*, 1.15.32 and *City of God* 19.26). The aim of peace, however, did not supersede or conflict with the aim of justice: rather, the goal of establishing peaceful relations served to identify which unjust actions the state must punish and which must be left to God to punish. Augustine's notion that the state's task was to establish an "earthly peace" served to acknowledge this distinction: some unjust actions like killing in self-defense did not disrupt this earthly peace and hence fell outside the jurisdiction of the temporal law. Yet justice still prevailed in the midst of this earthly peace, since God would unfailingly inflict a temporal punishment in response to whatever unjust actions went unpunished by the civil authority.

Augustine was aware of variations in local legal systems, as well as inconsistencies between

the practices of the past and those of his present day. Again, he saw no problem with the existence of various customs provided that these did not conflict with the state's aim of achieving an earthly peace (*City of God* 19.17). At the same time, he noted that God had allowed certain practices in the past which violated the natural law. He discussed in particular those instances in the Hebrew Scriptures where God had permitted the Israelites to steal from the Egyptians (Exodus 3.22 and 12.35). Augustine argued that humankind as a whole progressed from infancy to adulthood, in the same way that a person grew from immaturity to maturity (*Eighty-Three Varied Questions*, Question 53): when humankind was in its infancy, a lesser level of virtue was required of it, and a lesser reward for virtue was promised to it. Consequently, the Israelites were permitted to deceive and steal from their enemies, but all they were promised by God was an earthly kingdom. "As befits the times, a carnal people were commanded one thing and a spiritual people something else" (*Eighty-Three Varied Questions*, Question 53.4). He offered the same explanation of the practice of polygamy as it was found among the ancient Israelites (*On Christian Teaching*, 3.12.20).

Conclusion: The Reception of Augustine's Social and Legal Philosophy

In modern scholarship, Augustine's name has become synonymous with a deeply pessimistic social philosophy (Bruno 2014). Some scholars have argued, for example, that Augustine did not think that human beings were capable of grasping completely what was just and unjust in their social lives, and that they depended upon grace to acquire a fuller knowledge of this. Here, the issue is not whether people could know precepts such as the Golden Rule, "do not unto to others what you would not have done to yourself," but whether people could grasp how to apply this principle correctly to a given situation. The bare bones of social morality might be knowable by unaided human reason, but its proper application, given the complexities of decision making, would always elude human beings until they were aided by grace (Dodaro 2004). Defenders of this interpretation point to Augustine's famous lament that judges were often compelled to seek the truth by torturing the innocent and hence rarely arrived at a just outcome in a given case (*City of God*, 19.6). Arguably, however, this interpretation overlooks the possibility that a just decision could consist, in Augustine's eyes, precisely in doing one's best in the circumstances to arrive at a just outcome. Thus, importantly, Augustine did not consider that the Jewish people's call for the execution of Christ had itself been a sin because they had honestly believed him to be a blasphemer and hence liable to the death penalty under Jewish law (*Explanations of the Psalms,* Psalms 56.10, 63. 4 and 81.4; *Tractates on the Gospel of John* 17.16, 44.17, 94.4 and 96.5).

Underlying interpretations of Augustine's social philosophy such as the above is the view that Augustine rejected the optimistic belief in human nature found in Greek and Roman social and political philosophy, and replaced it with a Christian pessimism about sinful humanity's potential for achieving social justice. Arguably, however, this pessimistic reading of Augustine is unwarranted. Scholars correctly note that Augustine regarded every human being as a citizen either of the earthly city or of the heavenly one. Those who persevered to the end of their earthly lives in faith in Christ belonged to the heavenly city; everyone else, including all infants who died before baptism, was a member of the earthly city and destined for hell. Yet on earth the citizens of both cities lived together, in the same earthly polities, abiding by the same laws and customs (*City of God* 19.17). At the same time, Augustine was emphatic that only the heavenly city attained justice through the grace of God (*City of God*, 19.21). In recent scholarship, this latter claim has been interpreted as meaning that social justice was impossible anywhere but in God's city, fully realizable in heaven and realizable to a lesser extent wherever Christians guided social and political policy on earth (Dodaro 2004). This interpretation of his social and political thought, however, is

open to question, and the case can be made that the justice that Augustine denied to the earthly city was simply theological justice, that is, justice as righteousness (Chambers 2018). Thus, as noted above with respect to his comments on the eternal law and natural law, while Augustine certainly declared that there was a sense in which justice and virtue were possible only among Christians, and to be found fully only in the next life, he identified both of these ideas with the worship and love of the true God. Hence, there are little grounds for assuming that the justice and virtue that Augustine denied to the earthly city were specifically social justice and "civic" virtue.

The Contemporary Significance of Augustine

Scholars who regard Augustine as pioneering a deeply pessimistic view of the ability of human beings to build just societies on earth see his contemporary significance as lying in his political realism (Niebuhr 1986; Hollingworth 2010). Others who share this reading of Augustine as a pessimist also draw attention to his notion of the two cities: for these scholars, his contemporary significance lies in his reflections upon the way that the citizens of these two cities can live together on earth. Some scholars have tried to build a notion of secularism on this basis (Markus 1970), while others have developed a Christian defense of liberal democracy by noting that Augustine did not identify the heavenly city with the institutional church and hence gave no political authority to the church (O'Donovan 2004; Gregory 2008). Still others explore the problems with Augustine's idea of an intrinsic moral order (Connolly 1993). At the same time, as noted above, current readings of Augustine's contemporary significance are arguably based upon the mistaken view that Augustine claimed that social justice was not possible in the absence of Christian faith. If it can be established that this view is indeed a mistaken one, then this would invite new studies of his social philosophy and a new evaluation of his contemporary significance.

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Austin, John

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Introduction

John Austin (1790–1859), an English legal theorist, is considered by many to be the creator of the school of analytical jurisprudence, as well as, more specifically, the approach to law known as "legal positivism." Austin's particular command theory of law has been subject to pervasive criticisms, but it still has its attractions, in part due to its simple model of law, and in part due to how the model's seeming emphasis on power and authority connects it with modern cynical or worldly ("realistic") perspectives.

Overview

Austin's theorizing about law was novel at four different levels of generality. First, he was arguably the first writer to approach the theory of law analytically (as contrasted with approaches to law more grounded in history or sociology, or arguments about law that were secondary to more general moral and political theories).

Second, Austin's work should be seen against a background where most English judges and commentators saw common-law reasoning (the incremental creation or modification of law through judicial resolution of particular disputes) as supreme, as declaring existing law, discovering the requirements of "Reason," or uncovering the "immemorial custom." Such (Anglo-American) theories about common law reasoning fit with a larger tradition of theorizing about law (which had strong roots in continental European thought – e.g., the historical jurisprudence of theorists like Karl Friedrich von Savigny (1975)): the idea that generally law did or should reflect community mores, "spirit" (*Geist*), or custom. In general, one might look at many of the theorists prior to Austin as exemplifying an approach that was more "community-oriented" – law as arising from societal values or needs, or expressive of societal customs or morality. By contrast, Austin's is one of the first, and one of the most distinctive, theories that views law as being "imperium-oriented" – viewing law as mostly the rules imposed from above from certain authorized (pedigreed) sources. More "top-down" theories of law, like that of Austin, better fit the more centralized governments (and the political theories about government) of modern times (Cotterrell 2003, pp. 21–77).

Third, within analytical jurisprudence, Austin was the first systematic exponent of a view of law known as "legal positivism." Most of the important theoretical work on law prior to Austin had treated jurisprudence as though it were merely a branch of moral theory or political theory: asking how should the state govern? (and when were governments legitimate?), and under what circumstances did citizens have an obligation to obey the law? Austin specifically, and legal positivism generally, offered a quite different approach to law: as an object of "scientific" study (Austin 1879, pp. 1107–1108), dominated neither by prescription nor by moral evaluation. Austin's efforts to treat law systematically gained popularity in the late nineteenth century among English lawyers who wanted to approach their profession, and their professional training, in a more serious and rigorous manner (Hart 1954,

pp. xvi–xviii; Cotterrell 2003, pp. 74–77; Stein 1988, pp. 231–244).

Legal positivism asserts (or assumes) that it is both possible and valuable to have a morally neutral theory of law. Legal positivism does not deny that moral and political criticism of legal systems is important but insists that a descriptive ("analytical" or "conceptual") approach to law is valuable, both on its own terms and as a necessary prelude to criticism. There were theorists prior to Austin who arguably foreshadowed legal positivism in some way. Among these would be Thomas Hobbes (1588–1679), with his amoral view of laws as the product of Leviathan (Hobbes 1996); David Hume (1711–1776), with his argument for separating "is" and "ought" (which worked as a sharp criticism for some forms of natural law theory, those that purported to derive moral truths from statements about human nature) (Hume 2000, Section 3.1.1). However, it is Austin's claim about the separation of is and ought in law that is now widely quoted as a general summary of legal positivism:

"The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation." (Austin 1995: Lecture V, p. 157)

Fourth, Austin's version of legal positivism, his "command theory of law," was for a long time, quite influential. This view is elaborated in the next section.

Austin's View

Austin's basic approach was to ascertain what can be said generally, but still with interest, about all laws. Austin "endeavored to resolve a law (taken with the largest signification which can be given to that term properly) into the necessary and essential elements of which it is composed" (Austin 1995: Lecture V, p. 117). In particular, Austin asserts that laws ("properly so called") are commands of a sovereign. He clarifies the concept of positive law (that is, man-made law) by analyzing the constituent concepts of his definition and by distinguishing law from other concepts that are similar. "Commands" involve an expressed wish that something be done, combined with a willingness and ability to impose "an evil" if that wish is not complied with. Rules are general commands (applying generally to a class), as contrasted with specific or individual commands. Positive law consists of those commands laid down by a sovereign (or its agents), to be contrasted to other law-givers, like God's general commands, and the general commands of an employer to an employee. The "sovereign" is defined as a person (or determinate body of persons) who receives habitual obedience from the bulk of the population but who does not habitually obey any other (earthly) person or institution. Austin thought that all independent political societies, by their nature, have a sovereign.

Austin delimits law and legal rules from religion, morality, convention, and custom. However, also excluded from the center of "the province of jurisprudence" were "laws by a close analogy" (which includes positive morality, laws of honor, international law, customary law, and constitutional law) (Austin 1995: Lecture I).

Within Austin's approach, whether something is or is not "law" depends on which people have done what: the question turns on an empirical investigation, and it is a matter mostly of power, not of morality. Of course, Austin is not arguing that law should not be moral, nor is he implying that it rarely is. Austin is not playing the nihilist or the skeptic. He is merely pointing out that there is much that is law that is not moral, and what makes something law does nothing to guarantee its moral value. "The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals" (Austin 1995: Lecture V, p. 158).

In contrast to his mentor Bentham, Austin, in his early lectures, accepted judicial lawmaking as "highly beneficial and even absolutely necessary" (Austin 1995: Lecture V, p. 163). Nor did Austin find any difficulty incorporating judicial lawmaking into his command theory: he characterized that form of lawmaking, along with the occasional legal/judicial recognition of

customs by judges, as the "tacit commands" of the sovereign, the sovereign's affirming the "orders" by its acquiescence (Austin 1995: Lecture 1, pp. 35–36). However, one of Austin's later lectures listed the many problems that can come with judicial legislation and recommended codification of the law instead (Austin 1879: vol. 2, Lecture XXXIX, pp. 669–704).

Criticisms

As many readers come to Austin's theory mostly through its criticism by other writers (prominently, that of H.L.A. Hart; see also Kelsen 1941, pp. 54–66), the weaknesses of the theory are almost better known than the theory itself.

First, in many societies, it is hard to identify a "sovereign" in Austin's sense of the word (a difficulty Austin himself experienced, when he was forced to describe the British "sovereign" awkwardly as the combination of the King, the House of Lords, and all the electors of the House of Commons). Additionally, a focus on a "sovereign" makes it difficult to explain the continuity of legal systems: a new ruler will not come in with the kind of "habit of obedience" that Austin sets as a criterion for a system's rule-maker.

A few responses are available to those who would defend Austin. First, some commentators have argued that Austin is here misunderstood, in that he always meant "by the sovereign the office or institution which embodies supreme authority; never the individuals who happen to hold that office or embody that institution at any given time" (Cotterrell 2003, p. 63, footnote omitted); there are certainly parts of Austin's lectures that support this reading (e.g., Austin 1995: Lecture V, pp. 128–29; Lecture VI, p. 218). Secondly, one could argue (see Harris 1977) that the sovereign is best understood as a constructive metaphor: that law should be viewed as if it reflected the view of a single will. Thirdly, one could argue that Austin's reference to a sovereign whom others are in the habit of obeying but who is not in the habit of obeying anyone else, captures what a "realist" or "cynic" would call a basic fact of political life. There is, the claim goes, entities or factions in society that are not effectively constrained, or that could act in an unconstrained way if they so choose.

As regards Austin's command model, it seems to fit some aspects of law poorly (e.g., rules which grant powers to officials and to private citizens – of the latter, the rules for making wills, trusts, and contracts are examples) while excluding other matters (e.g., international law) which we are not inclined to exclude from the category "law." More generally, it seems more distorting than enlightening to reduce all legal rules to one type. For example, rules that empower people to make wills and contracts perhaps can be re-characterized as part of a long chain of reasoning for eventually imposing a sanction (Austin spoke in this context of the sanction of nullity) on those who fail to comply with the relevant provisions. However, such a re-characterization misses the basic purpose of those sorts of laws – they are arguably about granting power and autonomy, not punishing wrongdoing.

One might also note that the constitutive rules that determine who the legal officials are and what procedures must be followed in creating new legal rules, "are not commands habitually obeyed, nor can they be expressed as habits of obedience to persons" (Hart 1958, p. 603). Austin was aware of some of these lines of attack and had responses ready; it is another matter whether his responses were adequate.

A different criticism of Austin's command theory is that a theory which portrays law solely in terms of power fails to distinguish rules of terror from forms of governance sufficiently just that they are accepted by a significant number of citizens as giving reasons for action.

Finally, Austin says little about methodology, though this may be understandable, given the early stage of jurisprudence at which he was writing. In particular, it is not clear whether Austin is best understood as making empirical claims about all known legal systems or conceptual claims (not a term common in his day) about what is essential to anything that would be called a legal system; elements of each sort of approach can be found in his writings (Lobban 1991, pp. 224–225; Cotterrell 2003, pp. 81–83).

Conclusion

John Austin was an important early figure in analytical legal philosophy and legal positivism. His command theory of law has few supporters today, but criticisms of its deficiencies were central to the development of later theories of law, by H.-L.A. Hart and others (Freeman and Mindus 2013).

Cross-References

- ▶ Bentham, Jeremy
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Authority of Law

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The First Thread of the Web: Grasping the Question

Law transforms our lives in the most important way: it changes how we act and because of this it gives rise to fundamental questions. One such question concerns legal authority and individual autonomy and asks: if we are autonomous agents how do legislators, judges and officials have legitimate authority to change our actions and indirectly change how we conduct our lives? We conceive ourselves as active agents who determine how and when to act, and we conceive ourselves as the planners of our own lives and the creators of change. Law asks us, however, to perform actions that range from the trivial to the complex. But how is it possible for me to do, in full awareness, as the law asks and, at the same time, be in control of my own destiny? How is my free will affected by the law?

But how is this possible when I am simply trying to conform with what the law says? This means, I am trying to follow what the law says without giving much thought or without engaging my will or intention.

Legal and political philosophers have tended to examine legal authority and autonomy and have consequently put forward the following questions: (a) Can there ever be legitimate authority? (b) What are the conditions of legitimate authority? and (c) Does the possibility of legitimate authority diminish or assuage the antagonism between authority and autonomy?

I find that posing the problem and the questions in this way is unsatisfactory because it presupposes what we need to explain, i.e., the nature of authority and whether there is a "genuine" antagonism between autonomy and legal authority. Within this framework authority is given, and the starting point of the theorist is the following

statement: If there is a legitimate authority then conditions x, y, and z need to be fulfilled, but it is not shown how there is or whether there could be something such as legitimate authority. The received view begins by recognizing the phenomenological fact that legal officials and authorities issue commands and directives. It is usually said that if authorities have the right to command and addressees the duty to obey, then the officials have legitimate authority.

Theorists usually argue in favor of a particular political theory, for example, liberalism or perfectionism, and engage with a set of key values, for instance, expert knowledge or democratic values that provide the grounds for "rights" and "duties" and that enable us to grasp the conditions of legitimate authority. The traditional strategy, therefore, begins top-down from a plausible view on political theory that leads to the framework that justifies authority. There is no doubt that the traditional strategy has provided us with a rich understanding that has advanced our grasp of the normative conditions that make possible legitimate legal authority. However, the traditional strategy fails to provide a microscopic view of the phenomenon of legal authority and falls short of explaining how legal authority truly operates on individual human beings.

By contrast, the strategy of this entry is to focus on the agent, i.e., the addressee of the legal command or directive who performs the action requested by the legal official. This strategy is bottom-up, from the level of agency and practical reason to the justificatory framework of authority. It also begins with the naive phenomenological observation that X commands Y to perform the action p (an action p-ing to Y.) Thus, it is intelligible to us that Y performs the action p as requested by X. The key question that this entry aims to investigate is how a legal command or directive, *just because* it is a legal command or directive, effectively changes the agent's course of action. A set of sub-questions arise: Does the command intervene in the practical reasoning of the agent or addressee? If this is the case, how does this intervention operate? Moreover, what are the limits of our phenomenological observations, in other words can I truly observe that you are performing an action because you are complying with a legal directive or command? What happens in the agent that enables her to comply with the legal command or directive? When we perform an action because we are complying with the legal command or directive, are we still active, self-governed, autonomous agents? In what sense are we still autonomous agents? The task is to explain what legal authority is and the premise of the study is that this question can only be answered through understanding of how legal authority operates upon the agent: if we recognize that legal commands or directives intervene upon, affect, and change the agent's practical reasoning, then we need to understand and explain how this happens.

Answering the question above raises other, difficult, questions, however. For instance, we quickly come to see that the question of legal authority is closely tied up with the issue of the normativity of law. Raz (1999a), for example, has asserted that to understand what normativity is, we need to understand what reasons for actions are.[1] But reasons for action are not "free-standing" reasons in the world where agents play no role, they do not stand independently of the agents and their practical reasoning. The philosophical literature on reasons for action is vast, and for the last 30 years philosophical studies have focused on the notion of reasons for actions, but few philosophers have concentrated on the nature and structure of practical reason.[2] Paraphrasing Raz, understanding the nature of legal normativity involves understanding the nature and structure of practical reason in the context of the law (Raz 1999a, p. 67). We have, now, two very closely related issues. The point can be summarized as this: if we are able to understand how practical reason under legal commands, directives, and rules operates and how practical reason operates by following reasons for actions, then we can fully grasp the nature of legal authority and legal normativity. There will

[1] I will use 'reasons in action' and 'reasons for action' interchangeably. At the end of the book it will become clear the reason for this interchange of terminology.

[2] For some exceptions, see Velleman (1989).

be paradigmatic cases[3] of legitimate legal authority, but it is also important to explain cases of legal authority where there is only "apparent" legitimacy.

In this entry, I examine the "anarchist" view as formulated by Wolff who aims to show that there can never be legitimate authority since this inevitably undermines our autonomy. We are then faced with two irreconcilable options: if we recognize that the State can have authority on us, then we need to give up the idea that we are autonomous agents, but we cannot give up this idea because it will involve the absurd view that we are not responsible. We, therefore, give up the idea that is least threatening to our self-understanding, i.e., that the State has authority over us. In §2 I show that the view of authoritative commands as advanced by Wolff is implausible. In §3 and §4 I demonstrate that Wolff's conception of autonomy is ambiguous and advance a more promising way of understanding the "apparent" antagonism between autonomy and authority. The entry provides a clear framework for understanding how practical reason and intentional action are intertwined and are key to better understand legal authority. A detailed explanation of the relationship between authority, the structure of practical reason, and intentional action is provided in my book *Law and Authority Under the Guise of the Good.*[4]

The Implausibility of Performing a Complex Action: Because an Authority Has Said So

Let us imagine the following two scenarios:

Scenario 1 (REGISTRATION): you are asked by a legal authority to fill in a form that will register you on the electorate roll.

Scenario 2 (ASSISTANCE AT A CAR ACCIDENT): you are asked by an official to assist the paramedics at the scene of a serious traffic incident (i.e., by helping injured parties into the ambulance and by providing reassurance and basic first aid).

The scenario in REGISTRATION involves the performance of a simple action, i.e., completing a form as clearly instructed. The scenario in ASSISTANCE AT THE CAR ACCIDENT involves performance of a more complex series of actions: it requires awareness of the situation and the possible dangers of moving the injured in one way rather than another, and it requires providing emotional and physical assistance to others. It also requires to overcome obstacles in order to succeed in the purpose of saving the lives of the victims and therefore complying with the command.

According to Wolff, the model of authority (in both scenarios) can be formulated as follows:

X performs an action p-ing because Y has said so (Wolff 1970).

In the case of REGISTRATION, we could say that the agent has filled in the form because the legal authority has said so; in the case of ASSISTANCE AT THE CAR ACCIDENT, the agent has also performed a series of action, because the legal official or authority has said so.

At first glance this seems to be a sound characterization of "authority" but closer inspection reveals discrepancies. That an agent acts in a particular way because they are directed to do so by a legal authority is, I will argue, an implausible formulation that does not grasp the depth and richness of what is truly happening in cases like ASSISTANCE AT A CAR ACCIDENT which involves the performance of a complex series of actions. It might explain simple cases such as REGISTRATION but it cannot account for complex ones. To act "because someone has said you should do so" means that you are acting because of an empirical fact that is presented to you. But we have previously noted that to perform that action requires awareness of the situation and its dangers; it involves engaging and directing the will towards the action; and it involves making judgments about how to succeed in the action. The

[3] The notion of paradigm follows the idea of core-resemblance that is defended in my article Rodriguez-Blanco (2007).

[4] Rodriguez-Blanco (2014), paperback edition 2016.

question that arises is how a mere empirical fact, i.e., the order or command to do something, can engage the will in the complex performance of the action. I believe that many different factors are entailed. My aim in this entry is simply to make the point that a mere empirical fact cannot engage our will in cases where we perform complex actions.

A first (and charitable) reading of the empirical account will suggest something like the following: the legal command or directive is an empirical fact that causes the agent to act in a certain way by virtue of the agent having certain beliefs and desires. Sanctions or threats, in particular, cause an impulse or desire in the agent to act in a certain way. This view, however, is implausible because it entails that for each movement there is a compulsive desire or impulse in the agent that causes each of the actions and series of actions. Legal commands as merely empirical and contingent cannot guarantee the continuity and direction that characterizes the performance of complex actions. The diachronic structure of future-directed intentions in action requires rational governance within discrete times, and simple empirical causation cannot guarantee such continuity. A second, more interesting, reading is that the intention of the official is grasped by the agent's mental state and the agent's mental state causes performance of the action. In this case, we also have a notion of causation between a mental state and the complex action and again the appearance of deviation in the causal connection cannot be avoided. This account is more promising because it directs our attention to the role that intention plays in practical reasoning, but it is limited because it conceives intention within the restricted model of mental states and empirical causation.

With these preliminaries clarified, we can now concentrate on Wolff's anarchist account and the antagonism between authority and autonomy.

The argument that Wolff presents us with is the following:

1. If I perform an action because someone says so, then I am not acting according to my own will.
2. If I do not act according to my own will, then I do not act autonomously.
3. Most cases involving the authority of a State involve 1).
4. I cannot act according to 1) because the authority of the State undermines my autonomy.
5. Therefore the authority of the State cannot be legitimate.

In the following section "The First Thread of the Web: Grasping the Question" concentrate on premise 2).

Autonomy Versus Heteronomy

Wolff advocates the Kantian view which presupposes that we are metaphysically free because we ascribe responsibility for actions to ourselves and others (Wolff 1970), p. 12. This view does not demonstrate that we *are* metaphysically free, merely that this is presupposed. Being "responsible" involves the task of deciding what we ought to do; it involves resisting impulses and desires, and it entails engaging ourselves with what we believe to be worth pursuing and achieving, and disengaging ourselves from our desires, moods, traditions, and practices. (This means that I am the only judge of the maxims or principles that will determine my actions.) According to Wolff, and in a Kantian vein, autonomy is the capacity that all human beings have to legislate for themselves and create maxims in the form of imperatives that guide their actions: "He may do what another tells him, but not because he has been told to do it. He is therefore, in the political sense of the word, free." (Wolff 1970), p. 14. If a man performs an action because another man has told him to do so, then the man has refused to engage in moral deliberation and therefore has refused to be autonomous. Wolff concludes that "for the autonomous man, there is no such thing, strictly speaking, as a command." (Wolff 1970), p. 15.

But what does it mean to say that human beings ought to "legislate for themselves"? Does it mean that human beings are the authors of their own moral laws and therefore that self-legislators impose on themselves the principles and maxims

that they have authored? This existentialist and romantic interpretation of Kant's notion of autonomy has been rejected by Kantian scholars (Wood 2008; O'Neill 1989) who criticize those interpretations of autonomy in which human beings behave as gods, creating their own moral world and imposing upon themselves their own principles and rules of conduct. There are, however, some passages in Kant that lend themselves to such an interpretation (Kant 2002). This kind of interpretation is, moreover, suggested in the tension that arises in Kant's formulation of autonomy and self-legislation. Kant's self-legislative thesis appears on a number of occasions in his *Groundwork for the Metaphysics of Morals*. See, for example, the two following extracts: "the supreme condition of the will's harmony with universal practical reason is the Idea of the will of every rational being as a will that legislates universal law" (Kant 2002, p. 4:43); and, "The will is therefore not merely subject to the law, but subject in such a way that it must be considered as also giving the law to itself and only for this reason as first of all subject to the law (of which it can regard itself as the author)." (Kant 2002, p. 4:431). Kant advances the view that we need to regard ourselves as having the idea of legislating universally. The emphasis is on the perspective taken: we regard ourselves as the authors of the law[5] and this does not mean that we are actually the authors of the law, merely that we consider ourselves to be such. Some authors, like Wolff, reject this interpretation and ask the following: if we have sovereignty of our actions, how can we be subject to external law and regard ourselves as legislators without truly and effectively creating our own law? For Wolff, we are the creators of the law and this explains our submission to it and our motivation to obey it. Kant's argument, however, is that because we have engaged in a deliberative process of creating the law, our created laws are intelligible to us and therefore (we have acquired the intelligibility of our "created" law and therefore) we are motivated to act according to them. In the case of moral laws we have created them independently of our interests and desires and therefore we submit to them unconditionally (are able to impose it on ourselves categorically and not conditionally). As an agent, I will follow the moral law and it is imposed on me as a practical necessity, regardless of my desires and wants. Heteronomous deliberation opposes autonomous deliberation. In the former I am driven by my desires, interests, and wants and in some sense they are external to me. The reasons and rules that guide my actions are derived from desires and wants. They might be presented as mere impulses, e.g., my desire to drink a glass of water if I am thirsty, or they might be manifested as more sophisticated desires, e.g., if I want to be rich then I need to study the stock market to learn to invest my money appropriately. In autonomous deliberation, the maxim that is part of the major premise of the practical syllogism[6] becomes a universal principle, because it is what every rational human being wills, independently of the contingencies of human nature (such as different desires, inclinations, characters, ways of life, social conventions, traditions, and so on). Subjective maxims, therefore, can become objective and universal principles and can ground our moral actions. Because the agent is the one who engages in this deliberation, he or she is motivated to act according to it.

For Wolff, however, an inescapable tension arises in Kant's thoughts on autonomy. If we are subject to objective standards, then in which sense do we legislate and in which sense are we the creators of moral laws? We are not free to decide how the law will be, and we cannot shape moral laws according to our conceptions and worldviews. On the contrary, autonomy entails that we are determined as rational beings to engage in the right process of moral deliberation whose result will be universal objective standards. There is no room for subjective worldviews or and creative conceptions of moral law. The conflict is now between legislation which involves creation and

[5] This interpretation is also advocated by Reath (2006) and Wood (2008).

[6] For a criticism of this interpretation of "practical syllogism" Rodriguez-Blanco (2014), at §4.2.1.

subjectivity, and moral law that involves universality and objectivity. Wolff believes that this tension cannot be resolved and that, therefore, one of these ideas needs to be abandoned. He advocates the view that we need to give up the idea that there are objective standards that determine moral law (Wolff 1973).

It is now apparent what motivates Wolff in his adherence to an existentialist or romantic reading of Kant's notion of autonomy. To take seriously autonomy, freedom, and responsibility, we need to abandon the idea that there are constraints in terms of absolute and objective standards. In this way we are truly sovereign and the authors of moral laws. The price of this, however, is the abandonment of an important Kantian insight, i.e., the view that there are objective standards to evaluate the moral law. Alternatively, if we take seriously that reading of sovereignty and legislation in which we merely *consider or regard* ourselves as creators of the law, then a more plausible form of diminished autonomy emerges. Let us scrutinize this interpretation. Can we say that because the source of the principle or value that will guide our actions is not created by us (i.e., it is an objective standard in either natural or non-natural elements), we are autonomous in a diminished form? Let us examine what this diminished form of autonomy might look like.

Imagine the following scenario (APPEARANCE OF AN ANGEL): you are a young adult who is trying to decide whether to go to university, travel around the world, or find a job. You are sitting on the balcony of your house at midnight trying to decide what to do with your life. A luminous figure appears and you believe it is an angel. She says to you: "Knowledge is valuable" and then adds, urgently, in an imperative voice: "you ought to go to university." Suddenly you grasp the value of knowledge and the truth in the command, and consequently you decide to go to university instead of finding a job or travelling around the world. If you are asked why you have taken the decision to go to university you will answer that it is because an angelic figure *told you to do so*. If you are asked why you should obey an angelic figure you will reply, "because the command is grounded in the idea that knowledge is valuable." The story sounds both incomplete and absurd because it does not explain how the agent grasps the value of knowledge. It might be argued, however, that this is self-evident.[7] Thus, in the same way that we grasp that the law of excluded middle in logic is true, we grasp that "knowledge" is a value. Furthermore, to assert that knowledge is not a value is self-refuting, therefore to be coherent in my assertions about the world I need to accept the value of knowledge. But this comparison between theoretical reasons, i.e., how it is self-evident that knowledge is a value that ought to be pursued and how it is self-evident that knowledge is an objective value, is misleading. The comparison mistakenly characterizes practical reason as theoretical reason plus volition. It encourages a conception of practical reason as operating along the lines of theoretical reason. It is then believed that something needs to be "added" to guarantee the performance of an action. The additional element is a volitional element. It is a mystery, however, how the volitional element can be "added" or "stuck" to the theoretical reasoning of the agent. This way of understanding practical reason is criticized in my book *Law and Authority Under the Gusie of the Good*.[8] For now it is sufficient to assert that practical reason should be understood as a diachronic process rather than as a static theoretical process plus volition. The dynamic and diachronic process of practical reason is unfolded by the exercise of the actuality of reason in action. It is an actuality which all human beings have the capacity to engage in and involves the idea that reason is manifested in action. It also entails belief, but it is the content of the belief that determines the action.[9]

For Kant, practical reason also has a structure and involves a process: that process of assent of the will.[10] The major premise of the practical syllogism is a subjective maxim that if it is universalizable, it becomes an objective principle that guides action. Our rational nature guarantees the result of the process of practical reason which

[7] A version of this argument can be found in Finnis (1980).

[8] Rodriguez-Blanco (2014), at §4.1 and §4.2.

[9] This point has been emphasised by Dancy (2002). In contemporary debates this conception was first advanced by Raz (1999b).

[10] See especially Frede (2011).

is the objective and universal principle that will guide the action. I am not the author of the principle, rather I discover,[11] construct,[12] or re-construct[13] the principle by engaging in sound practical reasoning. Because I have engaged in this process of practical reasoning, I can regard myself as the creator of the law, as a *legislator*. I can reasonably consider myself as a creator of the law and am now bound by my "as if a legislator" own creations. I am satisfied and can be proud of my task because I have followed a rational procedure engaging my full capacities as a rational human being. I can regard myself as a good or right creator of the moral law because I did not create the law through arbitrary processes according to my moods and psychological constitution. Arguably, the source of the objective principles is external to me, but because I have engaged in a process of deliberation, I can regard myself "as if I am the legislator of the law."

Conclusion

Let us now go back to our example APPEARANCE OF AN ANGEL. The creator of the objective value or principle is the angelic authority, but the agent can regard herself or himself as if he or she were the creator of the law because he or she would have engaged in the process of practical deliberation, and possibly moral deliberation.

Legal authority involves both freedom and submission. It involves freedom because we are responsible if we do not obey legal directives and rules, or if we follow them wrongly. For example, if I am asked by the local authority to recycle my rubbish and do not do so, or do so wrongly, then I can be held to be at fault and subject to penalties or other sanctions. If we assume a purely empirical perspective and assert that your actions are only determined by your mental state of fear of punishment, then our notion of responsibility is weakened. Thus, if you fail to adopt the adequate mental state that will cause the action, i.e., the belief and desire to organize your rubbish according to the instructions of the local authority, we can only say that you are responsible for not having the mental state necessary to cause the appropriate actions. The question that arises is how can we force ourselves to acquire specific (determinate) mental states? How can we control our mental states? Is it our responsibility or the responsibility of an authority to ensure the adoption of the requisite mental states? Furthermore, when we do not comply with legal rules or directives, or when we follow them wrongly, we do not consider that we have failed to acquire the requisite mental states. We say that we are free to act in certain ways and that we are responsible because we have a certain scope of freedom. But how should submission be conceived and explained if we need to leave room for freedom? The strategy is to reduce the gap between freedom and submission. The idea of self-legislation "as if" we were the creators of the law enables us to explain how something that is external to the agent, such as a legal directive or rule, can be part of the agent through his or her engagement in practical deliberation.

If we accept this reading of "as if" self-legislation in the domain of law, then we see that the antagonism between legal authority and autonomy is mitigated. We also see that Wolff's "anarchist" conclusion is not granted and that a sound understanding of the nature and structure of practical reason can illuminate both legal authority and normativity.

[11] See Wood (2008) for a critique of the constructivist reading of Kant.

[12] See Reath (2006); Korsgaard (1996) and Rawls for a constructivist reading of Kant, Rawls (1971, 1980).

[13] Wood argues that Kant's .view concerning the objectivity of principles should be understood along realist lines.

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Autonomous Vehicles

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Introduction: The Moral and Legal Promises and Challenges Related to Autonomous Vehicles (AVs)

Combining the luxury of relaxing while taking a train or plane with the flexibility of going by car is tempting and promises to be morally advantageous to boot. By removing the burden of having to constantly pay attention while driving, nothing less than another mobility revolution is about to unfold with the rise of autonomous vehicles (AVs). There is even a moral duty to allow AVs if, what is often said to be the case, they really are much safer than human-driven cars. What is more, AVs allow for more inclusion as driver's licenses and driving ability would be relics of the past, and the environment should profit as well (cf. Fagnant and Kockelman 2015 for an overview of the likely advantages of AVs).

Those benefits come at a price, however. Even AVs will be involved in accidents. The possibility of programing the outcome of such accidents involves making decisions about moral dilemmas in cold blood. This is an unprecedented situation and a great challenge for society – and the law (for details, see [the entry] Autonomous Vehicles, Crashes With). The posited advantage for the environment is not a given either; more comfortable and inclusive traveling in AVs might actually be detrimental as traffic will increase significantly if AVs function as promised. Hence, the rise of AVs is a veritable challenge for ethicists and lawyers alike: Rapid technological developments accelerate the need for a solid ethical evaluation, which then has to be transformed into law. The German Act on Autonomous Driving 2021 (BGBl. I 2021 48, p. 3108) is the first case in point worldwide; it will serve as a benchmark for the discussion here.

The question as to whether AVs really are "autonomous" in the sense commonly used in philosophical and legal debates (see, e.g., Christman 2020) is only of minor importance but it does require clarification. According to the Society of Automotive Engineers (SAE) International, a non-profit association of automotive engineers concerned with technical standards, six levels of AVs can be distinguished, with the lowest level including vehicles without any automation (level 0 – no driving automation). In the final stage, human drivers are not only obsolete but can no longer intervene at all (level 5 – full driving automation). The distinction between automated and fully self-driving, i.e. driverless, vehicles in road traffic is important not only from

a technical perspective but also from a moral and legal one, as it affects the attribution of responsibility and especially necessitates new regulatory requirements. It is worth pointing out that the SAE's current classification of level 5 no longer includes the designation – widely used and even formerly used by the SAE – of such vehicles as "autonomous." The German Act on Autonomous Driving 2021, nevertheless, – relating to cars at level 4 in the SAE's classification (see Hilgendorf 2021: p. 445) – speaks of cars with "an autonomous driving function," which, according to Section 1d, is given if the car "can independently perform the task of driving without a person driving the vehicle within a specified operating range." For the purpose of this entry, the widespread notion of autonomous vehicles will be applied along the lines of the definition provided in the German act, also when referring to level 5 AVs. Many of the points under discussion are, however, equally relevant for vehicles at lower levels, as a level 4 vehicle (high automation), for example, might also be involved in a car accident and collect sensitive private data, etc.

The Duty to Permit AVs Due to Their Promise to Significantly Reduce Traffic Accidents

If the promise of AVs to significantly reduce traffic accidents and, thus, fatalities holds, there is a moral and also a legal duty to allow AVs on the road. Despite the continuing decline in traffic fatalities to this day, the number of deaths is by no means insignificant, and the primary cause of accidents is clearly human error. This is not only relevant for drivers but for other road users as well, such as cyclists or pedestrians, who are much more vulnerable. In the light of traffic fatalities, the use of self-driving cars is promising. After all, it is quite conceivable that AVs can be designed and programmed in such a way that many (fatal) accidents will actually be avoided. A central promise that speaks in favor of the approval of functioning AVs is – despite these accidents – the resulting improvement in traffic safety. To put it bluntly, AVs do not speed, make phone calls, drive under the influence of alcohol or drugs, or fall asleep at the wheel.

Everyone's right to life enshrined in Article 2 of the European Convention on Human Rights (ECHR) covers not only the fundamental prohibition of the state to intentionally end human life (para. 1, sentence 2 ECHR), but also (according to para. 1, sentence 1 ECHR) the obligation to take precautionary measures preventing dangerous situations (see, e.g., Schabas 2015: p. 126). The state, thus, has a duty to protect individuals from threats, also from other individuals. Insofar as AVs function and fulfill their promise of significantly increasing road safety, it can be assumed that the approval of AVs is to be subsumed under the state's duty to protect life under Article 2 ECHR (see Kirchmair 2022). Hence, there is a legal duty to permit AVs on public roads. In this vein, the German Ethics Commission (2017) – which was set up to advise on the German Act on Autonomous Driving 2021 in its report on "automated and connected driving" in 2017 – postulated in Rule 6 that "[t]he introduction of more highly automated driving systems, especially with the option of automated collision prevention, may be socially and ethically mandated if it can unlock existing potential for damage limitation."

Some even argue that if or once AVs are safer than regular cars, regular cars should be forbidden. In other words, humans should be banned from driving, as they are a safety hazard which, given that AVs are functional and safer, cannot be justified anymore (Sparrow and Howard 2017). This is rather speculative, as many other considerations might also play a role, such as the availability of AVs for everybody who currently owns a car. Nevertheless, the former chancellor of Germany, Angela Merkel, predicted as early as 2017 that 20 years from then, humans would not be allowed to drive on public roads without a special permit (Vitzthum 2017). Others have argued that the transition period might be hampered by a "social dilemma": While study participants generally preferred AVs which favored the "public good," they themselves would rather not buy an AV programmed to sacrifice its passengers for the greater good (Bonnefon et al. 2016). This

dilemma might, however, be misleading as laws on AVs obviously have to envision a fairly balanced distribution of negative burdens stemming from the AVs themselves.

Even though one of the members (Luetge 2017) of the aforementioned German Ethics Commission published an article – on the main ethical topics – which referred to the report in its title as "The German Ethics *Code* for Automated and Connected Driving," the report provides, what Luetge in the text then rightly calls, important "guidelines" rather than an official code. Nevertheless, the aspiration to provide a comprehensive treatment of the ethics of AVs makes this report an important benchmark for further discussion (cf. also the Horizon 2020 Commission Expert Group to advise on specific ethical issues raised by driverless mobility 2020 installed by the European Commission).

Inclusion Effects of AVs

AVs will have inclusion effects in that many more people will be able to use cars: There will be no or fewer obstacles to using cars as no driver's license will be necessary (see, however, Luetge 2017; p. 550, who points to Rule 3 of the Ethics Commission stressing the need for an "official license"). Hence, age limits will be significantly reduced, and any other restrictions will also be much less of a hurdle to using a car (see, in relation to senior citizens and e-inclusion, Mordini et al. 2009). In this vein, AVs are to be welcomed, as mobility is an important part of freedom and, therefore, AVs will enhance the possibilities of many individuals.

Sustainability, Environmental Protection, and AVs

The positive inclusionary effects mentioned above also have negative side effects: Traffic is likely to increase significantly and there is nothing about an AV per se which makes them more sustainable or environmentally friendly than current cars.

AVs are often seen as the traffic technology of the future and are also considered to play a key role in the "traffic revolution," i.e., in the transformation of mobility systems into a sustainable approach to the environment. However, making control technology independent of human drivers does not necessarily make car traffic more ecological. AVs might save energy, for example, thanks to "intelligent" driving behavior, such as avoiding traffic jams (see Martínez-Díaz and Soriguera 2018: p. 278ff). However, if this technology is assumed to actually increase road safety and takes the inclusion effect into account (almost everybody will be able to use AVs), an increase in traffic volume can be expected (buzzword: "induced traffic"). Depending on their specific design, AVs can, therefore, have positive or negative effects in terms of their impact on the climate. Whether AVs will contribute to more sustainable mobility and, thus, to climate protection depends, above all, on appropriate legal provisions (Faisal et al. 2019; Kirchmair and Krempelmeier 2021; see Rojas-Rueda et al. 2020 in relation to public health). For instance, if car-sharing schemes are implemented, the additional kilometers driven by AVs might be canceled out (Duarte and Ratti 2018). However, such provisions are missing in the German Act on Autonomous Driving 2021, which ironically puts the burden of "environmental compatibility" in Section 1f of the act on the owner of the AV. The 2020 Commission Expert Group to advise on specific ethical issues raised by driverless mobility (2020: p. 19) is aware of the issue but deliberately chose not to include this question in the report.

Privacy Rights and AVs

"The aspect of data security takes on a new dimension as a result of autonomous driving" states the German Ethics Commission (2017: p. 24) in its report on "automated and *connected* driving" (*italics* LK). Indeed, AVs raise the question as to how the data they collect are secured and used (for an overview, see Taeihagh and Lim 2019). Important questions in the digital age on "data autonomy" and "informational self-determination" are

particularly relevant for AVs (see, e.g., Glancy 2012; Horizon 2020 Commission Expert Group to on specific ethical issues raised by driverless mobility 2020).

Rule 15 of the report by the German (Ethics Commission 2017: p. 12) states, for example, that "[i]t is the vehicle keepers and vehicle users who decide whether their vehicle data that are generated are to be forwarded and used." In doing so, the Commission highlights the "voluntary nature of such data disclosure," which "presupposes the existence of serious alternatives and practicability." To this end the Commission recommends actions which "counter a normative force of the factual" at an early stage. Well-known misuse of personal data shall be preempted in the case of AVs (see similarly recommendation 7 and 8 by the Horizon 2020 Commission Expert Group to advise on specific ethical issues raised by driverless mobility 2020).

This recommendation was also translated into the law, as Section 1g of the German Act on Autonomous Driving 2021 on data processing states in para 3 that "[t]he manufacturer must inform the owner precisely, clearly and in plain language about the setting options for privacy and for the processing of the data processed in the autonomous driving function during operation of the motor vehicle." Information, however, is not enough. The law furthermore requires that "[t]he relevant software of the motor vehicle must provide options for the way in which the data processed in the autonomous driving function is stored and transmitted and enable the owner to make the corresponding settings."

Liability/Responsibility Attributed to Public and Private Entities

It is argued that AVs might involve potential "responsibility and retribution gaps" which might require us "to reconceptualize the way that we typically understand the relation between a car user and a car" (Nyholm 2018: p. 3). In order to address such responsibility gaps, it is suggested that the debate is similar to potential responsibility gaps concerning military robots as famously argued by (Sparrow and Howard 2017) (see, to this end, Nyholm 2018: p. 2 also with reference to; Hevelke and Nida-Rümelin 2015). This comparison seems to be misleading, however (Nyholm 2018: p. 3–4). While autonomous weapons are meant to kill, sometimes even without anybody knowing exactly how they "decide" to kill when and whom, AVs are quite different (see also Purves et al. 2015). Their primary task is to drive on roads – safely. Accidents will happen – but remain accidents. Nevertheless (for a discussion, see the entry on Autonomous Vehicles, Crashes With), situations might arise – depending on the programming – where AVs also kill (in order to save more lives). This has to be regulated by law. As the German Ethics Commission (2017) stated, the possibility of being killed must only extend to those somehow involved in road traffic. Here, then, it seems, in very broad strokes, that like nowadays, mandatory car insurance (as currently exists, e.g., in Germany or Austria) will suffice – with exceptions for inappropriate use of vehicles by passengers or defects falling under the responsibility of car manufacturers. In other words, "when a human being uses an automated car, 'all agency is entirely transferred to the machine'" (Nyholm 2018: p. 4 quoting Coeckelbergh 2016: p. 754). Nevertheless, it is the AV owner's responsibility, for instance, to regularly take measures to maintain the AV, and liability issues generated by disregard of such are then the owner's too (cf. Kauppinen 2021 arguing that the very fact of using an AV might carry such liability questions (which, however, is only correct if we also take into account the potential reduction in harm otherwise induced by human-driven cars); for an overview of responsibility issues, see Horizon 2020 Commission Expert Group to advise on specific ethical issues raised by driverless mobility 2020).

Clearly there is a shift taking place because, with the exception of application errors by AV owners, humans acting as passengers (instead of drivers) are relieved of a driver's responsibilities; human drivers do not exist anymore (except, of course, when they have to take on tasks, e.g., on level 3 of the SAE's range, etc.). See, in this vein, also Rule 10 of the German (Ethics Commission 2017: p. 11) holding that "the accountability that was previously the sole preserve of the individual

shifts from the motorist to the manufacturers and operators of the technological systems and to the bodies responsible for taking infrastructure, policy and legal decisions." To this end, the responsibility aspect directly relates to one of the major promises AVs carry: much fewer accidents, because car manufacturers, who will still develop AVs due to the enormous profits, potentially, will be tasked with constructing functioning AVs. If we exonerated car manufacturers from all responsibility as Hevelke and Nida-Rümelin (2015) argue, this would cause terrible problems. How can individuals, who become passengers (as AV owners) instead of drivers, be responsible for any possible wrong the AV might do? The reason given, namely that car manufacturers might not otherwise have enough incentive to develop AVs, seems fallacious, given the current state of technological affairs.

During the transformation phase from human traffic over mixed traffic to exclusive AV traffic, however, "[i]t must be possible to clearly distinguish whether a driverless system is being used or whether a driver retains accountability with the option of overruling the system" (Rule 16 German Ethics Commission 2017: p. 13). This becomes apparent when considering some of the accidents involving AVs which has already happened. In several situations, it turned out that the AVs had, indeed, made mistakes; however, as they were still in the "test phase," the human safety driver on board mostly remained responsible for the errors. This might be different in cases like Tesla's, which calls its driving assistance "autopilot," as this might be misleading. Precisely to this end, "the human-machine interface must be designed such that at any time it is clearly regulated and apparent on which side the individual responsibilities lie, especially the responsibility for control" (Rule 16 German Ethics Commission 2017: p. 13).

Transparency and the Involvement of the Public

AVs and the accompanying novelty effect make public trust an important topic. To this end, transparency is key. Hence, for example, the programming for crash scenarios discussed above must be explained and meet with public agreement in order to enable a safe and trustworthy transportation environment. A current example is how car manufacturers are reluctant to provide sufficient data, e.g., on battery performance and endurance or environmental impact. This, however, would be vital in order to maximize the potential advantages of AVs. Rule 12 of the German (Ethics Commission 2017: p. 12), therefore, reads as follows: "The public is entitled to be informed about new technologies and their deployment in a sufficiently differentiated manner."

(Prevention of) Abuse

AVs will be particularly vulnerable to cyberattacks and further abuse due to the likelihood of their technology requiring interconnectedness. A worst-case scenario involving a hacked AV driving into a group of humans in a terrorist attack is easily imagined, especially in the light of what has already happened in recent times. Therefore, it is ethically necessary to prevent such kind of abuse by including particular safeguards. Rule 14 of the German Ethics Commission (2017: p. 12) is relevant, stating that "[a]utomated driving is justifiable only to the extent to which conceivable attacks, in particular manipulation of the IT system or innate system weaknesses, do not result in such harm as to lastingly shatter people's confidence in road transport." While Luetge (2017: p. 554) explains that this issue was "high on the committee's agenda [...] there will be much work left to the details of programming." This, unfortunately, is true as the creativity of terrorists might well be challenging.

Machine Learning and AVs

The German Ethics Commission (2017: p. 13) stresses in Rule 18 that self-learning systems shall only be allowed for ethical reasons to the extent that "they generate safety gains," meet the safety requirements concerning vehicle control,

and do not undermine any rules expressed by the Commission. This is an important aspect, as AVs very likely will have at least some self-learning components (Luetge 2017: p. 556). Nevertheless, at this stage, it might also be questionable whether too far-reaching restrictions on self-learning capacities might actually do more harm in the future, in the sense that AVs which are improved too slowly and in a non-ideal manner might be responsible for more accidents in the future (which might have been prevented if self-learning systems had been allowed to act more comprehensively).

Cross-References

- ▶ Artificial Intelligence: Logic-Based Approaches
- ▶ Autonomous Vehicles: Crashes
- ▶ Utilitarianism

Appendix

The German original of Section 1g of the German Act on Autonomous Driving 2021 reads:

> "Der Hersteller muss den Halter präzise, klar und in leichter Sprache über die Einstellungsmöglichkeiten zur Privatsphäre und zur Verarbeitung der Daten, die beim Betrieb des Kraftfahrzeugs in der autonomen Fahrfunktion verarbeitet werden, informieren. Die diesbezügliche Software des Kraftfahrzeugs muss Wahlmöglichkeiten zur Art und Weise der Speicherung und der Übermittlung der in der autonomen Fahrfunktion verarbeiteten Daten vorsehen und dem Halter entsprechende Einstellungen ermöglichen."

Note that this entry has been finalized before the Commission Implementing Regulation (EU) 2022/1426 of 5 August 2022 has been enacted (Official Journal of the European Union L 221/1).

This European Union regulation lays down rules for the application of Regulation (EU) 2019/2144 of the European Parliament and of the Council as regards uniform procedures and technical specifications for the type-approval of the automated driving system (ADS) of fully automated vehicles.

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Autonomous Vehicles: Crashes

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Introduction: The Promise and Burden of Autonomous Vehicles (AVs)

Autonomous Vehicles (AVs) are considered to be another mobility revolution, lifting the burden of constantly having to control a car (cf. [the entry] Autonomous Vehicles). A major promise of AVs is that they will be much safer than human-driven cars. Should this be true, there is a moral duty to allow AVs. These benefits put a burden on us, however, as AVs will still be involved in accidents, and the possibility of programming how accidents should happen involves decisions in cold blood about moral dilemmas. This is a situation which unprecedented in its scope and the rise of AVs is a veritable challenge for society, ethicists, and lawyers alike. The German Act on Autonomous Driving 2021 (BGBl. I 2021 48, p. 3108) is the first act worldwide which regulates moral dilemmas involving AVs. It will serve as a basis for the discussion here.

How to Program AVs for Crash Scenarios

Despite the likelihood of their reducing traffic accidents, AVs will still be involved in (deadly) accidents. The question is, then, how AVs should be programmed if all available options cause harm. Both the German Ethics Commission as well as the Expert Group on Specific Ethical Issues Raised by Driverless Mobility, advising the European Commission (Horizon 2020 Commission Expert Group), recommend that self-driving cars should be programmed in a way that minimizes risk. That is, whenever possible, they will avoid dangerous situations by slowing down, swerving, or taking a different route. Given the technical dangers and the problems of mixed-traffic, the only way to reduce the risk of accidents to zero would be to stop car traffic altogether. This will not happen. Also as of today, we do not ban road traffic because there are deadly accidents. Rather, we accept some risks in order to enjoy the benefits of riding a car. This likely will not change with the introduction of self-driving cars. There will be huge numbers of cars on the road, perhaps even more than today. It is thus to be expected that autonomous self-driving cars vehicles will also be involved in accidents, some of which will be deadly.

One of the main problems, thus, is to decide how AVs should be programmed in the case of moral dilemmas, namely in situations in which, according to all available options for action, harm is caused, e.g. a group of two people or a group of three people is seriously injured or killed because neither scenario can be prevented

(cf. for an overview on moral dilemmas Sinnott-Armstrong 2005; McConnell 2018). The legal question as to how to deal with such dilemmas in road traffic is rather new in that, to date, similar accident constellations have always had to be accepted as fate, so to speak, caused and guided mostly by subconscious human decisions. Reactions in a fraction of a second cannot be compared with conscious, reflected decisions. This new possibility is a gift and a burden at the same time. AVs include the chance of saving more lives but the prize is high as the law might have to decide that someone must die to save other people. This is a tremendously difficult question, which has so far been declined to be answered by most legal orders, at least in a state of normalcy. Yet, ignoring the technical possibility of saving as many lives as possible also means letting people die. Either way, a solid justification is necessary.

Who Decides? Law Makers, the Public, an Ethics Commission, Private (Car Manufacturing) Companies, or Individual Car Owners?

The question as to how to decide on moral dilemmas involving AVs must be answered by the law. The state has a legal duty to ensure that fatal risks are diminished (see, e.g., Article 2 of the European Convention on Human Rights (ECHR); cf. [the entry] Autonomous Vehicles. Arguably, this duty includes the state having to decide how moral dilemmas involving AVs are solved. It cannot be left to private car manufacturers or individuals to decide whether and how they program or choose the programming for an AVs' behavior in moral dilemmas since private companies or individuals are not allowed to decide on life or death (except in emergency situations when their life is at stake). (Gogoll and Müller 2017), for instance, argue for mandatory ethics settings to be in the best interests of society and individuals because allowing individual settings would lead to a prisoner's dilemma.

Others (like Millar 2014; Contissa et al. 2017), however, argue that individual ethics settings shall be possible while (Nyholm 2018: p. 3) argues for a middle ground in the sense that "certain general boundaries" should be set within which "some people should be permitted, say, to be more altruistic than others are expected to be, if that truly is what they sincerely wish." This compromise might be acceptable, but only in so far as moral dilemmas are covered by the law. Beyond such decisions, an individual might indeed be allowed to sacrifice themselves even to a degree not required by the law. However, what must not be allowed is to override a decision taken by the law. Imagine, for instance, that the law includes a prohibition, in the event of moral dilemmas, from differentiating between the personal characteristics of potential victims. Such a decision must not be overridden by individual ethics settings. Similarly, it is not up to car manufacturers to decide that their cars will always protect their passengers first, no matter what, as this would put a price tag on life-and-death decisions.

Informing Decisions About Moral Dilemmas Involving AVs Using "Trolley Cases"

It is the very definition of a moral dilemma that there is no easy solution. Hence, if we agree that AVs can cause or might be involved in situations which constitute a moral dilemma, there is no easy answer. Moral dilemmas have plagued many philosophers. A famous discussion in philosophy and psychology focuses on the so-called "trolley problem" (see below). Legal scholars, mostly criminal lawyers, have also discussed rather similar "trolley cases." Such scenarios are often adapted so as to hypothesize about how the outcome of AV accidents with unavoidable fatalities should be programmed. The trolley problem and similar scenarios, however, are no easy answer to the question as to how to regulate moral dilemmas involving AVs. The debate is huge and complex (see, e.g., Bruers and Braeckman 2014; Edmonds 2014). A major reason for being cautious is the fact that the debate around trolley problems in philosophy originally had quite different goals than what currently seems to be at center stage.

Yet, these debates are not meaningless for discussing how to decide moral dilemmas involving AVs.

"Trolley Cases" in Criminal Law

Take the criminal lawyer Josef (Kohler 1915: pp. 431–2) and his "Autolenker-Fall" ("case of the car driver"), in which he proposed to

> [c]onsider the fact that a car can no longer be brought to a standstill over a short distance but that it is still possible to steer it so that instead of going straight ahead, it goes right or left. If there are now people straight ahead, to the right and left who can no longer avoid being killed, the driver is not in a position to avoid killing people, but he can steer the car to one side or the other by moving the steering wheel. Can we punish him here for causing the death of A, whereas if the car had continued in a straight line without being steered, B or C would have perished?

This sounds terribly similar to many hypothetical scenarios circulating in the current debate on AVs. Maybe *Kohler* was a genius who predicted AVs one hundred years before their invention? He did not. His point as a criminal lawyer was to discuss whether the action chosen by the car driver is punishable under criminal law, or whether the emergency law ("Notrecht" in German) prevents the punishment of an *individual* who had no choice but to kill someone. There is another scenario, again proposed by a German criminal lawyer, which is strikingly similar to the trolley cases discussed in philosophy. In 1951, Hans Welzel (1951) described the following scenario:

> On a steep mountain track, a freight car has broken loose and is hurtling down the valley at full speed towards a small station where a passenger train is currently standing. If the freight car were to continue racing along that track, it would hit the passenger train and kill a large number of people. A railroad official, seeing the disaster coming, changes the points at the last minute, which directs the freight car onto the only siding, where some workers are unloading a freight car. The impact, as the official anticipated, kills three workers.

Welzel's argument, in broad strokes, was to demonstrate that the railroad official is not culpable for having redirected the freight car. Despite their similarity with currently suggested AV scenarios, simply adopting these examples is misguided because when we discuss the ethics of AVs and the question as to how to program moral dilemmas, we must not conflate the justification in criminal law of personal actions in terms of emergency aid or personal culpability with legally prescribed programming. While in *Kohler's* and *Welzel*'s cases alike the discussion revolves around the action of an individual and the question whether this individual – ex post – should be punished or not, regulating AVs is a societal question to be answered ex ante by the law maker or an Ethics Commission (unless we allow individual ethics settings).

Concerning the legally prescribed programming the question whether programming AVs to stay on track or steer to one side in order to save someone is pertinent. *Kohler* and *Welzel* asked whether someone in such a situation who did redirect the car (thereby killing people) is culpable and should be punished. Neither the opinion of *Kohler*, who answered his own question straightforwardly with "certainly not," or of *Welzel*, who also considered the railroad official not culpable, must lead directly to the conclusion that AVs ought to be programmed to take a different path in such scenarios. It is not criminal law which is (alone) responsible for the question as to how to decide on moral dilemmas. And still, despite the fact that this debate is at the core of something else, it does not exclude the possibility that the solution to such and similar scenarios discussed by many criminal lawyers might be informative for the debate on AVs and moral dilemmas (cf. for an overview on the German doctrinal discussion Engländer 2016, see however also Welzel 1951: pp. 51–2 who expressed the opinion that the railroad offical had to redirect the car for ethical reasons).

The Traditional "Trolley Problem" in Philosophy

After having considered "trolley cases" discussed by criminal lawyers, the internationally famous "trolley problem" in philosophy as originally

discussed by *Philippa* Foot (2002) and *Judith Jarvis* Thomson (1976, 1985, 2008) is revisited. To illustrate her point, Foot (2002: p. 23) constructed hypothetical scenarios. One scenario, which later became famous, goes like this:

> Someone is the driver of a runaway tram which he can only steer from one narrow track on to another; five men are working on one track and one man on the other; anyone on the track he enters is bound to be killed.

Her scenario, too, was designed to put the driver of the tram in a conflict, namely a conflict of two negative duties (instead of one negative and one positive duty). Taking either track, the tram driver would kill (an) innocent person(s). Because both duties were negative duties, she argued that the tram driver might steer the tram to save five persons not as the doctrine of double effect but because the distinction between positive and negative duties was decisive.

This argument was challenged by *Judith Jarvis* Thomson (1976) some 10 years later. She coined the term "trolley problem, in honor of Mrs. Foot's example." To *Thomson*, after having considered more hypothetical scenarios, it seemed that it is not (always) the case that the distinction between positive and negative duties guides us in a morally acceptable way. To her, rather, "what matters in these cases in which a threat is to be distributed is whether the agent distributes it by doing something to it, or whether he distributes it by doing something to a person" (Thomson 1976: p. 216). To make her point, she changed *Foot*'s scenario slightly. In *Thomson's* case it is not the action of the driver of the tram but the action of a bystander (who might change the points in order to redirect the trolley) which we have to evaluate (Thomson 1985: p. 1398). As *Thomson* supposes, also after having asked several colleagues for their opinions, most people also consider it morally acceptable for the bystander to change the points in order to save five persons. In this case, however, the bystander violated a negative duty (not to kill one person on the other track) in order to fulfill a positive duty (to aid five persons who would die if the bystander did not act). This, she states, "is serious trouble for Mrs. Foot's thesis" (Thomson 1985: p. 1398). *Judith Jarvis Thomson* then goes on to discuss more scenarios, defining the "trolley problem" as the difficulty to explain why the bystander may redirect the trolley, but we must not push a fat man off a bridge in order to stop a trolley killing the single person (and the fat man) in order to save five others. For her "'kill' and 'let die' are too blunt to be useful tools for the solving of this problem" (Thomson 1985: p. 1401), but an "appeal to the concept of a right" could suffice (Thomson 1985: p. 1406ff). If someone must infringe a stringent right of an individual in order to get something that threatens five to threaten this individual, then he may not proceed according to Thomson (1985: p. 1411). The problem is that in both cases we are dealing with negative and positive rights and duties in a similar way, but morally it seems that this should not be decisive as the bystander should redirect the trolley but the fat man should not be killed in order to save five other persons endangered by the trolley.

The "trolley problem" therefore, at least in the debate between *Philippa Foot* and *Judith Jarvis Thomson,* is not about how to solve such moral dilemmas (see Foot 2002: "I have only tried to show that even if we reject the doctrine of double effect we are not forced to the conclusion that the size of the evil must always be our guide."; Thomson 1976's words are similarly instructive: "[T]he thesis that killing is worse than letting die cannot be used in any simple, mechanical way in order to yield conclusions about abortion, euthanasia, and the distribution of scarce medical resources"; as well as Thomson 1985: "it is not the case that we are required to kill one in order that another person shall not kill five, or even that it is everywhere permissible for us to do this."). On the contrary, the right thing to do, morally speaking, is stipulated in all of the cases discussed so far. It is rather about the perplexity of how to explain the apparently different moral judgments in rather similar, and even almost identical, scenarios. Because this is difficult, and has proven to remain difficult until today, this has been labeled a "problem." Hence, the important point for the current debate is that conclusions from the apparent fact that the bystander should redirect the trolley in order to save five people by killing one person should not be made lightheartedly when

considering the programming of AVs in such and similar situations. This insight often seems to be neglected, however, at least in discussions in not purely academic magazines when someone makes the case for the relevance of the "trolley problem" for moral dilemmas involving AVs (cf. Nyholm 2018 with many references). For this and other reasons, most moral philosophers do not consider the "trolley problem-debate" to be particularly useful for the discussion of the ethics of AVs (see, e.g., Goodall 2016, 2017; Nyholm and Smids 2016; Himmelreich 2018).

Empirical Studies Inspired by the "Trolley Problem"

An important, but often not consciously noted, shift in the application of trolley cases has taken place over time, especially in relation to the ethics of AVs. Trolley cases these days seem to be rather an inspiration in order to find out what the right thing to do would be and, thus, how AVs should be programmed for moral dilemmas. This was impressively demonstrated in the large "Moral Machine Experiment" (Awad et al. 2018), which asked over two million people online to give their opinion on various scenarios, to find out what laypersons thought was the right thing to do in a moral dilemma situation involving AVs.

An important finding reported in the study by (Awad et al. 2018) and many similar studies is that most people think that AVs should be programmed to save five people, even if one person has to die as a result. (Despite the critique expressed by Bigman and Gray 2020, they come also to this conclusion.) Yet, this does not mean that we can decide on the programming of moral dilemmas involving AVs on the basis of empirical studies (alone). It is, for instance, a much more complex question concerning what the right programming would be than to simply consider trolley cases like experiments. However, these experiments apparently reveal significant tendencies for laypersons, which must not be ignored when regulating the programming of AVs for moral dilemmas either (Paulo et al. forthcoming). The criticism that morality cannot be established in an experiment like the Moral Machine Experiment (see, e.g., Harris 2020) hinges as much upon answering the question as to what (public) morality is as the experiment by (Awad et al. 2018) itself. Is morality only to be found in the "ivory tower" of ethical theory building or is it (also) connected to what (the majority of) laypersons consider(s) to be the right thing to do? If the latter has to play a role, the study design in order to find morally relevant preferences becomes crucial (see Hübner and White 2018 for an interesting approach taking into account trolley cases; cf. also Paulo 2022).

Normative Approaches to Moral Dilemmas Involving AVs

Another approach which also results in saving more lives at the cost of fewer in dilemma situations is presented by (Leben 2017), who draws upon (Rawls 1999). In his contractarian approach, Leben hypothesizes that a fair solution for moral dilemmas would be one which everyone would agree to when they did not know whether they were in the group with five people or the one person endangered by the AV. The result would be that – out of self-interest – everyone would prefer the larger group of threatened people to be saved (see, however, critically Keeling 2018).

Several authors as well as the Ethics Commission set up by the European Commission (Horizon 2020 Commission Expert Group to advise on specific ethical issues raised by driverless mobility 2020; Goodall 2016) have argued that instead of a black-or-white "trolley case" approach, rather the "ethics of risk" should be considered when regulating moral dilemmas involving AVs (see, e.g., Goodall 2017; Geisslinger et al. 2021; cf. also JafariNaimi 2018 suggesting a debate transcending the trolley trade-off dilemma). Adopting the ethics of risk approach, Geisslinger et al. (2021) discuss the Bayes' rule, the maximin principle, and the precautionary principle. In relation to the Bayes' rule, the greatest expected utility is envisaged. In the approach by Geisslinger et al. (2021: p. 1041), the expected utility is "composed of the probability of occurrence for different events and a real number/

rating for these consequences," the maximin principle is taken as "a strategy to avoid the greatest damage when in a situation where information on the probability of occurrence for each consequence is not available" (Geisslinger et al. 2021: p. 1041), and the precautionary principle "follows the motto 'better safe than sorry' and advocates encountering new innovations that may prove disastrous with caution and risk aversion" (Geisslinger et al. 2021: p. 1041).

Such approaches are particularly relevant for the larger picture when thinking about the general ethics settings of AVs. Furthermore, to the extent that in car accidents, very often we do not know whether someone is going to be killed or "only" (severely) injured, this obliges us to consider car accidents involving AVs not from the perspective of necessary life-and-death trade-off decisions but from the general perspective of reducing risk (and maybe also consciously considering which risks are acceptable to take). However, as AVs will also be involved in fatal accidents, it seems that there is no way to avoid deciding about specific programming for moral dilemmas.

If, thus, the question of moral dilemmas remains, the necessity to come up with an ethical evaluation and a legal regulation also remains due to the likelihood of such dilemmas in future car accidents involving AVs. While the abovementioned studies make use of trolley cases to provide important insights into what laypeople seem to think of some specific moral dilemmas, we cannot directly conclude from these studies how to program AVs. Faced with this difficulty, grand ethical theories come to mind when thinking about the regulation of moral dilemmas involving AVs (giving an overview Nyholm 2018). Deontological approaches, for instance, would probably be the closest to current traffic laws as they would also provide for rule-guided behavior. Writ large, such an approach is represented by the German Ethics Commission and the German Act on Autonomous Driving 2021 (see below). However, scholars have also taken such an approach (see, e.g., Gerdes and Thornton 2015). Most importantly, when facing moral dilemmas following a deontological approach, it will be difficult to argue as to why one person should be killed in order to save five. Adopting a consequentialist approach, in contrast, which in broad strokes aims to evaluate an action through its consequences, seeking to minimize harm and maximize happiness, it is much more likely that five people shall be saved even if this includes killing one person.

What is important to keep in mind, even though it is very likely that the difficult question as to who should decide about moral dilemmas involving AVs will have to be confronted, is that not all ethical questions around AVs involve moral dilemmas. Hence, for the overall ethics of AVs, it is probably possible to learn from all of the different approaches to morality (Nyholm 2018: p. 6). Likewise, the "trolley problem" is not particularly more relevant than before AVs, the difference being that more is at stake now (in that many would die whose deaths could have been prevented). Hence, the "trolley problem" must not be solved (any more urgently than before AVs) and it is not the case that trolley cases provide a magic formula for AV ethics. Nevertheless, the necessity remains to come to terms with decisions about moral dilemmas, at best by promulgating an appropriate law, after a societal debate. After that, the decision can be implemented in the programming of AVs. How this is to be done, and what has to be borne in mind when doing so, is briefly exemplified in the next subsection on the basis of the report of the German Ethics Commission and the German Act on Autonomous Driving 2021.

First Laws on Regulating AVs: Is the German Act on Autonomous Driving 2021 a Role Model?

Due to technological progress, it is not only hypothetically interesting to think about moral solutions to the moral dilemmas associated with AVs but it has become pertinent to implement laws which regulate the programming of AVs.

In July 2021, the German Act on Autonomous Driving was promulgated (BGBl. I 2021 48, p. 3108). Of particular interest here is the provision on collision avoidance systems (and dilemma problems). Section 1e para. 2 No. 2 of

this act states that motor vehicles with an autonomous driving function must have an accident-avoidance system that

(a) is designed to avoid and reduce harm,
(b) in the event of unavoidable alternative harm to different legal interests, takes into account the importance of the legal interests, with the protection of human life having the highest priority; and
(c) in the case of unavoidable alternative harm to human life, does not provide for further weighting on the basis of personal characteristics.

Lit a) (Rules 2) and lit b) (Rule 7) of the act were implemented directly from the suggestion in the report by the German (Ethics Commission 2017), which was set up to provide a basis for this act. However, Rule 9 of the Ethics Commission was not included fully in the act. While the prohibition of taking personal characteristics into account when solving moral dilemmas was enshrined in the law (see Rule 9 Sentence 1), there is no general legal prohibition concerning the "offsetting" of human victims against one another in the act. Neither is there an explicit obligation to protect as many people as possible even at the risk of directly harming or killing someone else. While the report of the (Ethics Commission 2017: p. 11) stated in Rule 9 that it is "prohibited to offset victims against one another," it nevertheless added that "[g]eneral programming to reduce the number of personal injuries may be justifiable," albeit with the important qualification that "[t]hose parties involved in the generation of mobility risks must not sacrifice non-involved parties." Hence, it could be concluded that those involved in traffic and mobility risks might be "sacrificed" to suffer injuries if this reduces the number of personal injuries overall. The act, however, did not include such a possibility. Despite this, the requirements of the collision avoidance system will likely meet with approval from many sides.

The question as to whether it might be possible to save more lives at the cost of fewer is very likely to be found at the center of discussions concerning the potential of this regulation as a role model beyond Germany as empirical studies have found a strong moral preference of laypeople to protect a greater number of persons in case of moral dilemmas (see, e.g., Bigman and Gray 2020; Awad et al. 2018). The German legislator – maybe due to controversies in the Ethics Commission – refrained from regulating moral dilemmas of this sort. This is understandable considering German history, the Kantian tradition, and last but not least human dignity as enshrined in Article 1(1) of the German Basic Law. However, these conditions are not given (at least not explicitly or to the same extent) beyond Germany, neither in the rest of Europe nor internationally. Internationally, thus, there might be good reasons for not refraining from a so-called "utilitarian programming" of AVs that would lead to the protection of greater numbers of people saved in the case of moral dilemmas. Nevertheless, it will be an important and, yet, great challenge to harmonize regulations at European and to some extent also at international level. This particularly applies to questions such as whether we can find European and international agreement on the ethics of AVs in terms of finding a specific programming, e.g. for crash scenarios, which applies world-wide (Pölzler 2021).

Cross-References

► Artificial Intelligence: Logic-Based Approaches
► Autonomous Vehicles
► Utilitarianism

Appendix

German original passage of the lengthy quotations above from Kohler reads as follows:

> Man denke, dass ein Auto auf eine kurze Strecke nicht mehr zum Stehen gebracht werden kann, dass es aber immerhin noch möglich ist, es so zu lenken, dass es, statt geradeaus, rechts oder links fährt. Wenn nun geradeaus, rechts und links Menschen sich befinden, die nicht mehr ausweichen können, so ist der Autoführer nicht in der Lage, die Tötung von Menschen zu vermeiden, wohl aber kann er

durch Bewegung des Steuers den Tod nach der einen oder anderen Seite hin lenken. Kann man ihn hier dafür bestrafen, weil er den Tod des A. verursacht hat, während, wenn das Auto in gerader Linie ohne Steuerbewegung weiter gefahren wäre, B. oder C. umgekommen wäre? Gewiss nicht. [translation in the text above by the author]

and Welzel as follows:

Auf einer steilen Gebirgsstrecke hat sich ein Güterwagen gelöst und saust mit voller Wucht ins Tal auf einen kleinen Bahnhof zu, auf dem gerade ein Personenzug steht. Würde der Güterwagen auf dem bisherigen Gleise weiterrasen, so würde er auf den Personenzug stoßen und eine große Anzahl von Menschen töten. Ein Bahnbeamter, der das Unheil kommen sieht, reißt in letzter Minute die Weiche um, die den Güterwagen auf das einzige Nebengleis lenkt, auf dem gerade einige Arbeiter einen Güterwagen entladen. Durch den Anprall werden, wie der Beamte voraussah, drei Arbeiter getötet. [translation in the text above by the author]

The collission avoidance regulation in the German Act on Autonomous Driving 2021 (BGBl. I 2021 48, p. 3108) reads as follows:

(a) auf Schadensvermeidung und Schadensreduzierung ausgelegt ist,
(b) bei einer unvermeidbaren alternativen Schädigung unterschiedlicher Rechtsgüter die Bedeutung der Rechtsgüter berücksichtigt, wobei der Schutz menschlichen Lebens die höchste Priorität besitzt, und
(c) für den Fall einer unvermeidbaren alternativen Gefährdung von Menschenleben keine weitere Gewichtung anhand persönlicher Merkmale vorsieht.

Note that this entry has been finalized before the Commission Implementing Regulation (EU) 2022/1426 of 5 August 2022 has been enacted (Official Journal of the European Union L 221/1).

This European Union regulation lays down rules for the application of Regulation (EU) 2019/2144 of the European Parliament and of the Council as regards uniform procedures and technical specifications for the type-approval of the automated driving system (ADS) of fully automated vehicles.

Particularly interesting of this Regulation is

ANNEX II

Performance requirements

"2. DDT under critical traffic scenarios (emergency operation).

2.1 The ADS shall be able to perform the DDT for all reasonably foreseeable critical traffic scenarios in the ODD.

2.1.1. The ADS shall be able to detect the risk of collision with other road users, or a suddenly appearing obstacle (debris, lost load) and shall be able to automatically perform appropriate emergency operation (braking, evasive steering) to avoid reasonably foreseeable collisions and minimise risks to safety of the vehicle occupants and other road users.

2.1.1.1. In the event of an unavoidable alternative risk to human life, the ADS shall not provide for any weighting on the basis of personal characteristics of humans.

2.1.1.2. The protection of other human life outside the fully automated vehicle shall not be subordinated to the protection of human life inside the fully automated vehicle.

2.1.2. The vulnerability of road users involved should be taken into account by the avoidance/mitigation strategy.

2.1.3. After the evasive manoeuvre the vehicle shall aim to resume a stable motion as soon as technically possible.

2.1.4. The signal to activate the hazard warning lights shall be generated automatically in accordance with traffic rules. If the fully automated vehicle automatically drives off again, the signal to deactivate the hazard warning lights shall be generated automatically.

2.1.5. In the event of a traffic accident involving the fully automated vehicle, the ADS shall aim to stop the fully automated vehicle and aim to perform a Minimal risk Manoeuvre to reach the Minimal risk Condition. ADS resuming normal operation shall not be possible until the safe operational state of the fully automated vehicles has been confirmed by self-checks of the ADS or/and the on- board operator (if applicable) or the remote intervention operator (if applicable)."

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Averroes (Ibn Rushd; Abū al-Walīd Muḥammad ibn Aḥmad ibn Muḥammad ibn Rushd)

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Introduction

Abū al-Walīd Muḥammad ibn Aḥmad ibn Muḥammad ibn Rushd (1126–1198) (better known in the West as Averroes) was born in Cordoba in Muslim Spain (Al-Andalus) in the year 520 AH/1126 CE. He enjoyed a traditional Islamic education, including the study of the Quran, Prophetic traditions (*Ḥadīth*), and law.

Through the philosopher Ibn Ṭufayl (d. 581/1185), Averroes came into contact with the ruling Almohad elite. The sources report that the governor of Seville, Abū Yaʿqūb Yūsuf (r. 1163–1184, later emir and caliph), noticed Averroes sharp intellect and knowledge after posing a number of philosophical problems to him. The governor consequently asked him to write commentaries on Aristotle's works to elucidate their meaning, which Averroes agreed to do.

Like his father and grandfather, Averroes assumed the position of judge (*qāḍī*), first in Seville in 575/1179 and three years later in his native Cordoba, where he even rose to the rank of chief judge. Averroes also acted as the caliph's personal physician.

Toward the end of his life, Averroes (and other scholars) fell into disgrace at court. Historical accounts are not entirely clear about the reasons but indicate that this was linked to the pressure exerted by Mālikī jurists on the court to prohibit the study of philosophy, which they perceived as un-Islamic due to its Greek provenance. After one year in exile, Averroes was pardoned but died shortly after in the year 595/1198. His remains were later buried in Cordoba (Urvoy 1996; Fakhry 2001).

Averroes's Significance in Islamic Intellectual History and Beyond

Having been a prolific writer, especially in the sciences of philosophy, jurisprudence, and medicine, Averroes plays an important role in Islamic intellectual history. However, his significance for the intellectual history of Latin Christendom cannot be overstated either. It was thanks to the Greek-Arabic translation movement in the twelfth/thirteenth centuries that many of Averroes's philosophical works, especially his commentaries on Aristotle, were rendered into Latin. This contributed to a rediscovery of Greek philosophical ideas in the West. Averroes has even been credited with having thus laid the foundations for the rise of Renaissance rationalism and humanism (Fakhry 2001, xv).

Arabic sources praise Averroes especially in his role as jurist, whereas in the West, he became better known as philosopher and commentator of Aristotle (thus his frequent epithet "the Commentator") (Adamson and Di Giovanni 2019; Erlwein 2019). He wrote commentaries of varying length on all of Aristotle's works (with the exception of the *Politics*), which form the largest part of his scholarly output. Yet Averroes also wrote commentaries on the works of other Greek thinkers, such as Porphyry and Alexander of Aphrodisias.

In the Islamic intellectual tradition, *The Incoherence of the Incoherence* (*Tahāfut al-Tahāfut*) is probably Averroes's most famous philosophical work. It is a point-by-point refutation of al-Ghazālī's (d. 505/1111) blow against philosophy in *The Incoherence of the Philosophers* (*Tahāfut al-falāsifa*). Flying the flag of theology (*kalām*), al-Ghazālī had charged the philosophers (and in particular the great Avicenna (d. 428/1037)) with having failed to present conclusive proof for their teachings. In *The Incoherence of the Incoherence*, Averroes turned the same charge against al-Ghazālī, while at the same time not sparing Avicenna from the critique of having distorted philosophy (by defiling Aristotelian ideas with Neoplatonist ideas).

Averroes also wrote works on astronomy as well as linguistics and grammar, the latter of which have unfortunately not survived. His

contribution to medicine needs to be emphasized as well, in particular his *The General Principles of Medicine* (*al-Kulliyyāt fī al-ṭibb*), which would remain a standard textbook of medicine in the West (translated into Latin in 1285 under the title *Colliget*) (Urvoy 1996; Fakhry 2001).

Social Philosophy and Philosophy of Law: Averroes's Commentary on Plato's *Republic*

Seeing Averroes's prolificity as a writer, readers interested in his social philosophy and philosophy of law will find plenty of material to consider. One insightful example is his commentary on Plato's *Republic*. There, Averroes describes how societies and states arise, how they should be organized, and what their function is (Fakhry 2001, 97–114).

Reminiscent of social contract theories later developed in European philosophy, Averroes observes that the solitary human being is unable to secure the basic necessities of life, such as food, clothing, and shelter, "unless [a number of] humans help him" (Averroes 1974, 5). Following Plato's famous dictum, Averroes concludes that the human being is "political by nature" (Averroes 1974, 5).

Having, thus, explained the origin of societies, Averroes frames his discourse about the ideal state in terms of an analogy between the state and the human soul. The human soul comprises three faculties: the rational part, responsible for rational insights; the spirited part, responsible for emotions like anger; and the appetitive part, responsible for nutrition. Corresponding to these three faculties are three virtues: For the rational faculty, it is wisdom; for the spirited faculty, courage; and for the appetitive faculty, moderation. The human soul reaches its perfection when the rational faculty rules over the other two faculties (Averroes 1974, 5, 55; Fakhry 2001, 56–73).

In analogy to the division of faculties in the human soul, Averroes advocates that society should be divided into three segments. The philosophers, who are associated with rational understanding, are the rulers in the state. (Averroes remarks that one may speak of "philosophers," "kings," "lawgivers," or "imams" (the latter two being particularly reminiscent of the Islamic tradition) as they are all equivalents (Averroes 1974, 72).) The guardians, who correspond to the spirited soul part, protect the state. The general multitude of inhabitants of the state correspond to the appetitive soul part.

With the hierarchy of faculties in the soul and of segments in society firmly established, Averroes concludes that "the equity and justice in the individual soul are identical with the equity and justice in the city" (Averroes 1974, 56). However, since the inhabitants of the ideal state are likely to differ in their qualities, Averroes defines "political justice" (Averroes 1974, 53) as the situation where "every human in the city do the work that is his by nature in the best way that he possibly can" (Averroes 1974, 5). This means that for instance, someone predisposed to protect the city (i.e., the guardians) should not aspire to rule (i.e., the philosophers). The inhabitants of such a society will be happy (Averroes 1974, 66).

The rulers of the ideal state can make recourse to two methods in order to bring about the virtues in the inhabitants so as to ensure that society is organized in the way outlined above. First, the rulers may employ rhetorical, poetical, and persuasive arguments to teach the masses, and proper demonstrative arguments for the "elect few" (Averroes 1974, 10), whose intellectual capacities are greater. (Like others before him, one might here want to rebuke Averroes for his elitism – or one might want to applaud him for his realist view of society.) And secondly, the rulers may use force and coercion in the case of opponents and enemies of the regime, who do not submit to it willingly (Averroes 1974, 10–11). It is here where Averroes once more builds a bridge between Plato's *Republic* and the Islamic tradition when he states, "This is the way in which matters are arranged in (. . .) this our divine Law (. . .) for the ways in it that lead to God are two: one of them is through speech, and the other through war" (Averroes 1974, 12).

It is noteworthy that Averroes is emphatic that men and women can essentially assume the same roles in the ideal state. Both men and women engage in waging war and may rise to the rank of philosopher-ruler. This is so because both sexes

are essentially the same, only in cases differing in degree: "And we say that women (. . .) are of one kind with men. They will differ only in less or more" (Averroes 1974, 57). Averroes then puts forward a social critique of the society he lived in: Since women are kept away from all aspects of society other than procreation and child-rearing, "they frequently resemble plants in these cities [of our time]" (Averroes 1974, 59).

Having put forward his vision of the ideal, "virtuous" state, Averroes also discusses the ways in which it can degenerate into a "non-virtuous" governance. This occurs when the segments of society no longer function the way they should. In fact, any virtuous state will perish one day as all things have to come to an end eventually (Averroes 1974, 117). Degeneration occurs, for instance, when the rulers seek honor, wealth, and pleasure instead of wisdom (Averroes 1974, 105–106). The existence of institutions like physicians and judges is a sign of degeneration, too, as it indicates a lack of virtues (i.e., bodily strength and uprightness) in the inhabitants (Averroes 1974, 31). The destruction of the virtuous state also comes about when people aspire to roles which they are not disposed to by nature (Averroes 1974, 36). Since Averroes draws an analogy between the state and the human soul, it comes as little surprise that much of his discussion of the degeneration of states is linked to a discussion of the ways in which the human soul can fall into degeneration (Averroes 1974, 145).

Once more, Averroes's discussion of degenerate, nonvirtuous states does not remain an abstract matter. Instead, he intersperses it with references to actual rulers and regimes that existed in the past and in his own time (as, for example, "as was the case with the people of Persia and as is the case in many of the cities of ours" (Averroes 1974, 112)).

Social Philosophy and Philosophy of Law: Averroes's Legal Works Proper

Readers interested in Averroes's philosophy of law and social philosophy should also take into account his legal works proper.

A starting point is *The Distinguished Jurist's Primer* (*Bidāyat al-mujtahid*), a monumental treatise that discusses all sorts of legal questions (including prayer, almsgiving, oaths, and divorce). It compares and contrasts the differing judgments which the various legal schools arrived at, by paying close attention to methodology and the sources of law (Averroes 1994).

Yet Averroes's *The Decisive Treatise* (*Faṣl al-maqāl*) is even more interesting. In this work, Averroes brings together his role as jurists and as philosopher insofar as he makes use of established legal theory in order to defend the study of philosophy, which was not generally accepted, as indicated above. The assumption underlying *The Decisive Treatise* is that Islamic law has the purpose of evaluating humans' actions. Philosophical inquiry is such an action. Therefore, the law has something to say about it. *The Decisive Treatise,* thus, takes the form of a legal ruling (*fatwā*): "The objective of this statement is to investigate, from the perspective of the law, whether philosophical inquiry and logic are permitted, prohibited or commanded – either as a recommendation or as an obligation – by the law" (Averroes 2009, 2).

Averroes's legal ruling comes to the conclusion that philosophy is obligatory according to Islamic law. His argument is that philosophy is nothing else than "rational speculation about existing things insofar as they are indications for the creator," and "the law urges to rational consideration of existing things" (Averroes 2009, 2). He then quotes several Quranic verses as proof text (e.g., Q. 59:2).

Averroes's *fatwā* adheres to established legal theory: First, by adducing Quranic verses as proof text, he emphasizes the primary position the Quran takes in the hierarchy of sources, from which Islamic jurists derived their rulings (followed by prophetic traditions, consensus among jurists, and analogy). Secondly, by asking whether philosophy is permitted, prohibited, or commanded, he operates fully within the traditional categories of legal verdicts (Kamali 2003).

In ruling that philosophical inquiry is made obligatory by the law, Averroes introduces a distinction between two social groups: the common

people and the intellectual elite. The former are obligated only to rational speculation about God's role as creator of everything (this being Islam's most fundamental dogma), while the latter are obligated to probe into the deeper meaning of the revelation. Averroes stresses that the common people must not be exposed to the details of belief discussed by the elite as they lack in understanding. The result would be the sort of political, social, and religious schisms that haunted the Muslim community since the death of the Prophet in the seventh century (Averroes 2009, 51; Schupp's introduction in Averroes 2009).

The Decisive Treatise is therefore also a socio-political reflection: In it, Averroes reflects on the division of the society he lived in into a majority group of laypeople and a minority group of religious scholars (including jurists exploring the divine law, theologians, and philosophers). His *fatwā* is a normative judgment also on the relationship of the two groups, as well as on the position of authority enjoyed by the latter group in society.

Cross-References

- ▶ Al-Ghazali (Abū Ḥāmid al-Ghazālī)
- ▶ Avicenna (Ibn Sīnā; Abū ʿAlī al-Ḥusayn ibn ʿAbd Allāh ibn Sīnā)

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Avicenna (Ibn Sīnā; Abū ʿAlī al-Ḥusayn ibn ʿAbd Allāh ibn Sīnā)

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Introduction

Abū ʿAlī al-Ḥusayn ibn ʿAbd Allāh ibn Sīnā (980–1037) (also known by the Latinized form of his name, Avicenna) was one of the most influential philosophers in the classical Islamic tradition. He was born in 370 AH/980 CE in Afshanah, a small village near Bukhara in modern-day Uzbekistan. When Avicenna was 3 years old, his family moved to Bukhara where his father assumed the post of governor.

Avicenna enjoyed a traditional Islamic education, studying the Quran and Islamic literature as well as law. He was however also educated in the curriculum of sciences inherited from the Greek tradition, such as astronomy, medicine, logic, and, of course, philosophy.

Avicenna stands out for his prolificity as a writer. (Almost 300 works have been attributed to him, many of which have unfortunately not survived.) His prolificity is all the more impressive considering that he lived under tumultuous and unstable political conditions, which forced him to often move from court to court in search of employment and patronage.

In his autobiography (Avicenna 1974), Avicenna presents himself as having been blessed with an exceptional memory and quick

comprehension, which even outshone his tutors. He recounts that he mastered several branches of science at a young age. Avicenna's philosophical system bears witness to his ability to make use of the various philosophical ideas he had at his disposal and to incorporate them in innovative ways into his own thought.

His philosophical system, thus, reflects his Islamic background, alongside Platonic, Neoplatonic, Aristotelian, Galenic, and other influences. Avicenna contributed to transforming Greek philosophical ideas (which had found their way into the Islamic world, thanks to the so-called Translation Movement in the eighth/ninth century (Gutas 1998)) by putting his own stamp on them, or put differently, he knew how to make use of Greek philosophy as a tool to give answers to questions that had long been discussed by Islamic thinkers. (In this, he did not distinguish himself from eminent Islamic philosophers who preceded him, such as al-Kindī (d. 256/873) and al-Fārābī (d. 339/950).)

Avicenna's Significance in Islamic Intellectual History

Avicenna's significance in Islamic intellectual history cannot be overstated. His philosophical system left a lasting mark on a great many thinkers who came after him.

This is particularly true for the science of theology (*kalām*), which transformed itself into a "philosophical theology" (Shihadeh 2005; Griffel 2009). Post-Avicennan theologians accepted certain ideas and incorporated them into their discussions of theological problems while criticizing other ideas vehemently. (Probably the most notorious example of such an attack against Avicennan philosophy is al-Ghazālī's (d. 505/1111) *Incoherence of the Philosophers* (*Tahāfut al-falāsifa*).)

Avicenna's significance is also illustrated in the number of commentaries post-Avicennan thinkers wrote, such as in the case of Fakhr al-Dīn al-Rāzī (d. 606/1210) and al-Ṭūsī (d. 672/1274) who both commented on Avicenna's *Pointers and Reminders* (*al-Ishārāt wa'l-tanbīhāt*).

Avicenna also left a lasting mark beyond the Islamic tradition, namely, on the philosophical and theological thought of medieval Christianity, and notably on Aquinas (d. 1274), whose proofs of God's existence were inspired by Avicennan concepts.

Avicenna's *magnum opus* is *The Healing* (*al-Shifāʾ*), which covers a huge amount of material under four categories: *Logic*, *Physics*, *Mathematics,* and *Metaphysics*. Other works, such as *The Salvation* (*al-Najāt*), the aforementioned *Pointers and Reminders*, and the Persian *Philosophy for ʿAlāʾ al-Dawla* (*Dānishnāmeh ʿAlāʾī*), are shorter versions of topics covered in detail in *The Healing* while also containing novel aspects (such as a section on Sufism in *Pointers and Reminders*).

Avicenna's *Canon of Medicine* (*al-Qānūn fī al-ṭibb*), which is inspired by Hippocratic and Galenic humoral and temperamental theories, was translated into Latin a number of times and would remain the standard textbook of medicine in the West until the seventeenth century. Avicenna also authored essays and poems, such as *Ḥayy b. Yaqẓān* on the theme of the *philosophus autodidactus* ("self-taught philosophers") and *Risālat al-ṭayr* on the soul's decent into this world and union with matter and its eventual ascent and return to its divine source.

Avicenna died in the year 428/1037 and is buried in Hamadan in Iran (Inati 1996; McGinnis 2010; Bertolacci 2017).

Philosophy of Law and Social Philosophy in Avicenna

Seeing the huge variety of topics Avicenna dealt with, it comes as no surprise that he also concerned himself with questions pertaining to the philosophy of law and social philosophy. Most relevant in this regard is the tenth and final book of the *Metaphysics of The Healing*. Yet in order to fully grasp the ideas expressed there, it is necessary to take into account other writings as well which deal with subjects such as psychology (in the sense of a theory of the soul), physics, and metaphysics. In the tenth book of the *Metaphysics*

of The Healing, Avicenna develops his vision of an ideal society and state, as well as of the function of the law.

Avicenna begins his account with an observation about human nature: "It is known that the human being differs from all other living beings in that he cannot lead a proper life if in isolation and alone, and if undertaking the management of his affairs without any associate who could help him in his needs" (Avicenna 2005, 364).

Not unlike social contract theories known from the Western philosophical tradition, Avicenna makes humans' dire situation the cause of the formation of societies and cities. In order to ensure their "existence and survival" (Avicenna 2005, 364), humans enter into partnership with each other. The success of their partnership requires the existence of laws that ensure justice. Laws, in turn, require a lawgiver – and for Avicenna, the best lawgiver is not any human but a prophet. To be sure, Avicenna does not deny that societies other than the ideal state founded by a prophet may also produce "praiseworthy laws" (Avicenna 2005, 376). But the prophetic law stands out in that it fulfills its function of organizing society in the best way possible. This is so because the prophetic law is not a possibly flawed, man-made law, but it is a "revealed law" and "all that the prophet legislates, God requires him to legislate" (Avicenna 2005, 369).

In order to gauge the role of the prophetic law in the ideal state, one has to turn to Avicenna's writings on *Psychology*. There he discusses his conception of prophethood and revelation in the context of a more general account of the human soul. Avicenna distinguishes between three types of soul: the vegetative soul, which is responsible for growth, nutrition, and reproduction; the animal soul, which is responsible for movement and sensation; and finally, the human soul, which has the two faculties of the rational intellect, responsible for forming convictions about God and the world, and the practical intellect, responsible for forming opinions about morally right conduct. Humans combine all three types of soul in themselves, while plants have only the first type and animals the first in addition to the second. Avicenna conceives of prophethood and revelation as a natural cognitive process that lies fully within human capacity – in this, he diverges from the position traditionally espoused by practitioners of theology, who regarded revelation as a divine event coming over a prophet. Yet Avicenna emphasizes that the prophet exceeds the cognitive abilities of ordinary humans, which allows him to reach the rank of prophethood. The prophet is endowed with an extraordinarily strong theoretical intellect (a "holy intellect") (Avicenna 1952, 36; Gutas 2000), enabling him to acquire knowledge intuitively and in no amount of time. He is also blessed with a perfect practical intellect. The perfection of the prophet's soul makes it possible for him, first, to grasp what Avicenna calls "the order of the good" (Avicenna 2005, 339), that is, the structure of the whole of reality which emanates from God as His creation (this being discussed in the *Metaphysics*), and second, to formulate the kind of laws that are required to organize human life in the best manner possible.

Avicenna explains that "the greatest objective of the law pertains to the practical aspect of human actions so that they should do what is good" (Avicenna 1962, 110).

The law contains prescriptions that concern three aspects of society: the individual, the household, and the state. The law seeks to instill in individuals ethical dispositions such as temperance and courage. These dispositions are meant to enable individuals to withstand their lower passions and to lead a good life. Through prescriptions regarding marriage and divorce as well as inheritance, the law aims at organizing the household and family relations. Prescriptions pertaining to warfare, good governance, and theft intend to strengthen the foundations of the state. In instilling morally good conduct in humans, the law addresses itself to humans' practical intellect; their theoretical intellect is not much of a concern for the law. Avicenna explains that "the first principle governing the prophet's legislation is to let the people know that they have a creator, one, unique, and powerful (. . .) and that obedience to His command is His right (. . .) and that He has prepared for those who obey Him a blissful afterlife and for those who disobey Him an afterlife full of misery, so that the people will hear and obey the prescriptions put into the prophet's mouth" (Avicenna 2005, 365).

The prophet has to communicate certain insights about God to the inhabitants of the ideal state (thus addressing their theoretical intellect), but these have to remain very limited and have the only purpose of making them abide by the law, out of fear of punishment and in the hope for future rewards.

Avicenna's description of the function of the law reveals something about his view of human nature. Avicenna is rather skeptical about most humans' intellectual abilities. While the prophet intellectually apprehends the way in which the whole order of the good emanates from God, most humans are able to apprehend this "only with great strain," and "the prophet would demand too much from them, introduce confusion into their religion, and cause them to fall into a state from which deliverance is only for him who is [divinely] helped" (Avicenna 2005, 365–366). Moreover, Avicenna portrays most humans as slaves to their passions. He remarks that "when most people are called to the good and justice, it is as if they are called to something that contradicts their human nature and opposes the movements of their animal soul" (Avicenna 1962, 111–112). Most humans, when left to their own devices, hold flawed and egocentric conceptions of morality. They "consider what is owed them [an expression of] justice, and what they owe [others an expression of] injustice" (Avicenna 2005, 365).

Only a small number of humans – the true philosophers – are able to reach the same insights as prophets (Al-Akiti 2004). This might be seen to hint at Avicenna's elitism – or it might be seen to reveal a very sober, realist view of humankind.

The prophetic law has the purpose of rectifying this false understanding of what constitutes the good life. It thus seeks to organize human life in the ideal state. The law, however, pursues another, even greater goal which transcends this world. The law's focus on teaching morally good behavior has the twofold goal that "their life in this world and in the world to come may be happy" (Avicenna n.d., 107). Avicenna's account of the ideal state and the function of the prophetic law is, consequently, nothing less than a soteriology (Erlwein 2019; Druart 2000).

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- ▶ Al-Ghazali (Abū Ḥāmid al-Ghazālī)
- ▶ Aquinas, Thomas

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B

Babeuf, François-Noël

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Gracchus Babeuf (1760–1797), considered by posterity as the head of the "first active communist party" (Marx 1845), never claimed to be a communist. And yet this word appeared in political vocabulary in 1795. But even in 1796, Babeuf still spoke at the most of "communitism," of real equality, and of founding a society of co-partners. The expression of "common happiness," which is found everywhere in his writing, is ambiguous in itself. To search the reason for this choice of words equals questioning the very approach of the "people's tribune": did he tactically avoid taking over a word used by other activists of his time, in order not to divide the fighters for equality? Or did he aim at something different from what the nineteenth and twentieth century called communism? What was Babeuf's philosophy?

Coming from a poor family, the young man remains a feudist until the Revolution abolished feudal right. It is therefore, according to his own words, "in the dust of the seigniorial archives" that he discovers "the awful mysteries of the usurpations of the noble caste." Before he got taken away by the revolution, he participated as an autodidact to the enlightened spirit of his time, in particular by corresponding with the secretary of the Arras Academy, Dubois.

In these letters, he shows a considerable interest in the utopias of his time. However, it is in a long draft letter, dated June 1786, that we find irrefutable proof of his early enthusiasm for the community of goods. In this letter, the author imagines, so as to solve the problem of rural misery, the creation of "collective farms" in which several associated families would work together and live together, paying a reasonable fee to the landowner, a fee limited by the needs of a comfortable life for everyone. The idea of a work community represents an important novelty compared to classical utopia. One must link it to the personal experience Babeuf got from his background. This experience is undoubtedly what allows him to infer, unlike more "theoretical" utopists," that to work individually on one's parcel of land is less efficient than coordinating efforts. This immediate link to the social reality of the countryside thus distinguishes him at once among the defenders of a collective social organization.

The spring of 1789 found Babeuf busy with a typical project of the reforming and rationalizing spirit of Political Enlightenment: the writing of the Perpetual Cadastre. Here he explains how to measure precisely and scientifically the exact area of farmland. Babeuf hopes that one will be able to rely on such a statement to establish the tax based on fair and progressive foundations. This text was

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first intended for an enlightened audience; but in the end, it was given to the newly formed National Assembly. Babeuf, taking note of the upheaval that had begun, made it start with a "Preliminary Speech" to the representatives, which revealed his intentions as to the right of ownership and more broadly as to the social relations in the new society engendered by the Revolution.

Conscious of the frame of mind of his receivers, he makes sure he presents "an acceptable plan in the existing order," and he sticks to a proposal for tax reform. A first distinctiveness lies nevertheless in the destination proposed for the new revenues. These, together with those which would be gotten out of the sale of Church property, are, in particular, supposed to finance a very ambitious national education plan, with teachers employed by public authority. He tells the rich: it is indeed "the contrast between the education of the poor and yours" that resigns the poor to an unfair social order. The inequality of education produces a naturalizing effect of social inequalities: while it persuades the poor to remain in their place, it gives the privileged, for their part, the feeling of being an elite "of a different nature." Common education must therefore lead to a unanimous awareness of natural equality and hence of a necessary "real," namely, social, equality among the citizens of the regenerated nation.

In the wake of this first analysis, on then discovers Babeuf's dream, even if it is still presented as a simple hypothesis: one could make the land public, inalienable, and divide it into exactly "6 million manors of 11 arpents." The State would have in charge the distribution of their part to the father of each family. Here the community of goods is dissociated from the community of works, which Babeuf no longer mentions. But a step has been taken in favor of the Revolution. From now on, the land community has become an option publicly evoked as a possibility for society.

From 1790 to 1792, Babeuf led an intense political and journalistic activity. He was a leader in the agrarian movement of his province, which led him to prison for the first time in the spring of 1790. He led a strong democratic and anti-feudal propaganda and battled for the agrarian law that is to say for the equal sharing of the land. In his eyes, nationalization of the land was not yet on the program.

However, in a letter dated September 10, 1791, Babeuf gives the key to understand the great means by which he thinks he can achieve the real equality he wishes for. This means is summed up in two words: agrarian law, endlessly repeated throughout this long letter. The agrarian law is presented as the single goal toward which "all the constitutions of the earth will work when they are perfected." But here, this agrarian law does not mean a simple division of the land. It refers explicitly to the "constitution of Lycurgus" in which the soil is inalienable and to a "new sharing" with each generation, which must be organized in such a way that "when one is born, one must find a sufficient portion of soil, as is the case of air and water, and in dying one must make heir not his kin in society, but the whole society" (Babeuf 1977, p. 124).

Thus, without possessing the land as a full owner, each individual would have at all times a fund, " an unassailable resource against needs" (Babeuf 1977, p.125). Babeuf is very clear on this point: the inalienability of the land is presented as a "system that completely destroys the objection of the fear of restoring inequality by mutations," that is to say by the changes which occur to individual fate from one family to another and from one generation to the next: fewer or more children, more or less developed talent from one to another, etc. Babeuf rests his hope of putting all the representants on the track to this ideal solution on the shoulders of his friend Coupé de l'Oise, the addressee of this letter, and on his action at the Constituent Assembly.

The community of goods is therefore presented for the first time as the final goal of legislative action. However, at this stage of his own development, the activist seeks to apply such a principle only to the land, inasmuch as it means to him the fundamental source of sustenance. Neither trade nor craft or industry products should be subject to such a regime. Then it is still a secret and distant plan, delivered in a private letter to a close friend. Babeuf writes about this: "You will undoubtedly find that I am traveling fast in my

reform projects, but I am convinced that small changes will be mere palliatives and that we must innovate a lot, if we want the Revolution to succeed. I can foresee how far it should go, but maybe prudence dictates that it should move ahead only by levels, without showing too much of what will be the new social edifice. Yet it is very important to seize every opportunity to keep going towards the true goal of the Revolution, equality without lies, by following one way or another" (Babeuf 1977, p.127). For the time being, this "true goal" is kept shaded.

After he was elected administrator of the Somme in September 1792, Babeuf quickly fell under a warrant for an alleged falsification of documents to the benefit of a small farmer, and he was forced to escape to Paris. There he was appointed to the administration of subsistence in the spring-summer of 1793, where he remained until he was thrown into prison in the spring of 1994 for the same case. This is a crucial moment for him, since he assumes real responsibilities within the administration, which lead him to aim at other targets. From the beginning of the Revolution, Babeuf had limited himself to publicly demanding the agrarian law, with a true political democracy. At the beginning of the Terror, he suggests in a letter to Chaumette (May 7, 1793) that he relies on Robespierre's playing the role of Lycurgus, instead of Coupé de l'Oise who has lost his trust.

But as he gets involved with the Parisian sansculotte milieu, he gradually becomes aware of urban problems of supply and distribution, as well as of the extraordinary means the State has to solve these problems. In the end, the experience of the taxation of goods under the control of the sansculotte sections during the Terror, that of requisition and control of the distribution by the Commune, or by the War Offices for the army, convince him little by little of the possibility of a distributive communism, in which each individual's production would be centralized and then distributed by public power. He gradually defines new aims, in particular as regards the necessary establishment of the "common administration" to redistribute goods with the most scrupulous equality.

The Conspiracy of the Equals catalyzes these conclusions by inserting them in a collective program, elaborated with comrades-in-arms, most of whom he met in prison. The key takeaway of these conclusions is the astonishing synthesis they operate between the economic and social legacy of the Terror and the lessons of a Utopia probably discovered by Babeuf in 1795, Morelly's Code de la Nature (see article Morelly). The "Fragment of a draft economic decree" transmitted to posterity by one of Babeuf's closest companions, Philippe Buonarroti, bears witness of this synthesis: the declaration of the community of goods and works ("A great national community will be established in the Republic", says article 1), as well as the right to be maintained "in equal and honest mediocrity," in exchange for the "work of agriculture 'or' useful arts" according to each individual's possibilities, are not an exception peculiar to Morelly's text: they are found in the great majority of classical utopias. But only he did put them at the start of his draft legislation as the basis of all other rules.

Above all, the hierarchy of the economic organization, constituted in each profession by the supervisors who occupy in turn the function of heads of the body, is most probably taken from the Code de la Nature. Citizens are thus simultaneously distributed by place of residence as regards political functions and by work class for the economic functions. In the "Fragment," this duality of powers is respected at the scale of each municipality. Articles 4 and 5 of the "Joint work" section of the decree stipulate that in each municipality, "citizens are distributed by classes"; magistrates appointed by those who compose these classes "direct the work, ensure their equal distribution, execute the orders of the municipal administration" (Buonarroti 2014, p. 401). As was the case in Morelli's work, the division of population in work units makes up therefore not a secondary factor, but the essential factor of State organization. Thus, the principle of public distribution of resources can be attributed to a legacy of the Jacobin revolutionary government, but the foundations of the organization and of the division of tasks are most probably the result of a lesson from utopia.

For the first time in history, the Revolution made the utopia of the community of goods and of work become a political program. From this viewpoint, Babeuf's path constitutes an unprecedented encounter between the optimism of the Enlightenment, the dreams of utopian tradition, and the transformative energy of 1789–1794. This combination of elements, transmitted by the testimony of untiring Buonarotti, creates a precedent and an example for activists in the next century. In this respect, the attempt of the Equals, even though it remained unsuccessful and heavily influenced by the historic circumstance of its preparation, really impregnated socialist tradition thereafter.

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Bagehot, Walter

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Introduction

Born in Langport, Somersetshire, Walter Bagehot (1826–1877) was the scion of the family that dominated the city. His father Thomas managed the local bank. Prestige and wealth infused young Bagehot with the awareness of his rank, a sense of belonging to a solid, enterprising, modern, and cultured elite. Finance was his natural environment, but it did not exhaust his interests. The marriage with the daughter of James Wilson, the founder of the "Economist," paved his way to journalism. He became director of the "Economist" in 1861: it was from the columns of that authoritative journal that Bagehot matured unmistakable skills as an opinion maker.

His fame, as well as his relevance for the history of the philosophy of law and social philosophy, however, is mainly linked to "The English Constitution," the collection of essays amalgamated between 1865 and 1867. The collection was influenced by the debate on the fate of the English political system which preluded, accompanied, and followed 1867 Reform Act (and the consequent significant broadening of the electoral suffrage). The volume expressed an ability to grasp the constant tension between social structures and the configuration of the constitutional institutions. Bagehot showed that impersonal organs were not the protagonist of the Constitution. He did not focus on the doctrine of forms, nor on the abstract theory of constitutional architecture. Rather, he offered a variegated picture of the actual actors moving in the palace.

The English Constitution

Montesquieu described a model of constitution ideally congenial to political freedom (Ch. 6, Book XI, *Esprit des Lois*). But the principle of the division of powers and their consequent balance identified a static frame, an "image from above" that did not take into account the continuous, albeit slow, modifications of the foundations on which the majestic building of the British institutions rested.

Among Bagehot's contemporaries, John Stuart Mill was certainly the most authoritative comparison. Where Mill tried to enunciate principles, Bagehot described mechanisms. The latter explicit intention was to offer a pragmatic description of how social interests make the political machine work in practice, permeating the

institutions of the kingdom. According to him, the places of power were the theatre of social dialectics, the stage that showed the prism of interests, cultures, values, traditions of British civilization, and the different subjects that embodied them. The orderly triad – the Crown, the House of Commons, and the House of Lords – reflected and projected, in a continuous game of mirrors, the relationships and balances of the society. In this sense, the "living reality" of the Constitution is not its "paper description" (Bagehot, 1995, IV, 51).

Moreover, in Bagehot's reflections, the "idea of Constitution" cannot be distinguished from the "idea of England," following a tradition founded on British exceptionalism. The conviction of the uniqueness and inimitable nature of English institutions was a *topos*, which ran through the history of Anglo-Saxon culture, from a conservative thinker à la Burke to a progressive philosopher like J.S. Mill.

In the "English Constitution" the custom is said to be "the first check to tyranny" (Bagehot, 1995, IV, 262), based on a rhetoric of reverence, constantly evoked as an atavistic forma mentis, typical of the English people, or as a guarantee of stability and preservation of the order. Bagehot also stresses the positive role of the aristocracy, made by those "*dignified*" parts that "excite and preserve the reverence of the population" (Bagehot, 1995, IV, 53), and he recognizes a fundamental function to the monarchy, considered as an institution mocked as an "isolated transcendent element" only by those who have a mechanical, rationalistic, and utilitarian conception of the Constitution itself and do not understand the fundamental importance of this "visible symbol of unity" (Bagehot, 1995, IV, 87).

An Anti-Egalitarian Anthropology and the Concept of Reverence

A real unequal anthropology animated Bagehot's view. He believed that the constitution of society, "if left to itself, is… aristocratical" (Bagehot, 1995, IV, 89). Still, the principle of the natural inequality of human beings does not refer to the holistic and traditional model according to which the order of human things corresponds to the providential order of the universe. Society is not tied by the maintenance of a sacred and inviolable chain of roles, prerogatives, and immutable privileges. In particular in the essay *Physics and Politics*, through a suggestive although approximate theory of nation-making, the characteristics of the Darwinian parable that leads from the era of strength and despotism to the era of law and freedom are described as based on the conviction that "later are the ages of freedom; first are the ages of servitude" (Bagehot, 1995, IV, 447).

Likewise John S. Mill, Bagehot is convinced that the evolutionary process does not synchronously affect all civilizations, and that every civilization follows a path that is difficult to imitate, leading towards typically national institutions, whose value can be compared but not confused to the institutions of other nations. Therefore, the English Constitution is the singular result of a historical path that has produced a specific balance of laws, customs, and beliefs suitable to guarantee freedom.

But what is England's secret? What is the peculiarity that made possible the affirmation and consolidation of a debating society, predisposed to live in respect of civil liberties and economic prosperity? It is the concept of reverence which Bagehot so frequently emphasizes – considered as a kind of *national character*. In brief, a deferential nation is a country where freedom and obedience can admirably coexist, since the acceptance of authority is not based on fear but on respect and trust, thanks to the widespread and internalized belief that the upper classes are responsible for leading the nation.

Conclusion

According to Bagehot, the evolutionary differences within English society are a pledge to the well-being of the nation. Accepting democracy means delivering the nation to the unstable moods of the "members of the public-houses" (Bagehot, 1995, IV, 170). The author of "The English Constitution" thinks, instead, that the

"bald-haeded man at the back of the omnibus" should be preserved from the prosaic nature of the power's intrigues. In his view, there is no doubt: being subject "to good government" is more instructive for common people than "helping to create a bad government" (Bagehot, 1995, IV, 340).

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Bakunin, Mikhail Aleksandrovich

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Introduction

Mikhail Bakunin's (1814–1876) contribution to anarchism is frequently presented as a matter of spirit rather than intellect. In such readings, his ferocious appetites and bold passions and his chaotic lifestyle and scattered, undisciplined writing are held up as the embodiment of anarchism's defining and unyielding fixation on freedom.

This obscures the scale of Bakunin's contributions to anarchist theory, especially his mature work written between 1866 and 1874, which helped establish core anarchist principles: a critique of domination manifest in the modern state and supported by capitalism and religion, a dissection of Marxist authoritarianism, and a theory of anarchist social revolution. While incomplete, Bakunin's ideas, and his practical example, would define the development of the anarchist tradition after his death.

Early Life and Political Development

Mikhail Aleksandrovich Bakunin, one of ten children, was born in 1814 on his family's estate of Priamukhino to the northwest of Moscow. By birth a member of Russia's nobility, the young Bakunin was initially educated at home by his father Alexander along broadly Rousseauian principles. Evidently a man of some liberal sympathies, Alexander's commitment to this educational experiment crumbled before the reaction that followed the defeat of the Decembrist revolt in 1825 and encouraged a more conservative turn in his treatment of his children. Anticipating that the young Bakunin would find a place within Russia's existing autocratic political system, his father sent him, at 14, to continue his education in St. Petersburg, where Bakunin was an unhappy pupil at the artillery school. While he successfully secured his officer's commission, Bakunin found military life unrewarding and the discipline capricious and harsh, and in 1835, he seized the opportunity to leave – by effectively deserting – much to his parents' anguish.

Resenting the time he wasted in military school studying the finer points of strategy when his real interests lay in philosophy, Bakunin moved to Moscow in 1836, throwing himself into studying the work of G.W.F. Hegel and associating with future Russian dissidents including Alexander Herzen.

In 1840, he left for Berlin, living briefly with the novelist Ivan Turgenev, and his interests began to assume a more explicitly political direction as he began associating with the Left Hegelians. This political trajectory continued as he moved to Paris in 1844, where he would meet his future

antagonist, Karl Marx, and the reputed "father of anarchism," Pierre-Joseph Proudhon.

Bakunin had not made an "anarchist turn" by this point. Drawn to a Pan-Slavism that was particularly critical of the Tsar's authoritarianism, Bakunin's speech at a dinner celebrating the anniversary of the Polish Uprising of 1830–1831 brought him to the attention of Russian authorities, leading to his expulsion from France in 1847. As revolution broke out across Europe, Bakunin threw himself into the maelstrom, burnishing his reputation as the quintessential revolutionary. Participating in insurrections in Prague in 1848, and with Richard Wagner, Dresden in 1849, he was arrested, tried, and sentenced to death in Saxony, before being handed over to the Austrian authorities, tried again, and once more sentenced to death, before being transferred to Russia where he spent the next 10 years in prison and Siberian exile.

Following an audacious escape to the United States via Japan, Bakunin settled in London before moving to Sweden in 1863 in anticipation of joining the Polish rebellion against Russia.

The next stages of Bakunin's life were preoccupied with a developing power struggle with Marx for dominance in the International Workingmens' Association, commonly referred to as the International. Settling in Italy in 1864 and then Switzerland in 1867 – and founding a number of clandestine organizations aiming to foment revolution – Bakunin's avowal of anarchism became more pronounced in this era. From 1868, he worked to promote anarchist ideas within the International and, in so doing, was drawn into an increasingly fractious conflict with the Marxist faction. The Franco-Prussian War (1870–1871) interrupted this imbroglio as he left for Lyons to participate in an ill-fated uprising. The disappointment of its failure was partly alleviated by the Paris Commune of 1871, in which Bakunin perceived elements of an anarchist uprising and a repudiation of the "authoritarian" communism preached by Marx.

The following year, Marx succeeded in having Bakunin expelled from the International, alleging various improprieties including fraud and his attempted masterminding of a subversion of the organization through clandestine operations, but the real objective was to protect the organization from anarchist influence. Bakunin seized one final opportunity for action, attempting to join a hapless uprising in Bologna in 1874 that soon failed. In poor health since his Russian imprisonment, Bakunin died in Bern, aged 62, in 1876.

Political Theory

Bakunin's life was characterized by action, but he was also an important theorist of anarchism. Indeed, his thought tends to challenge the lazy division between thought and action, given that the areas where his intellectual contribution are most obvious – his critique of the domination of statist society, his evaluation of Marxism, and his theory of social revolution – were all, at least partly, the products of the persecutions he suffered and his practical political activities.

For Bakunin, the state, in all its forms, was the enemy of true freedom. There was a biographical element to this in the sense that his life was marked by a conflict with Tsarism, but this was a critique that extended to theories of social contract that were themselves challenges to autocracy. He rejected, for example, Rousseau's theory of state formation as a fiction and argued instead that at the heart of all forms of statism were coercion, violence, and the concentration of power. He also saw little cause for optimism in mainstream democratic politics. If the state was the antonym of freedom, Bakunin argued, universal suffrage did not change this fact, and the state that could make a claim to represent the will of all could potentially be even more capable of curtailing liberties than a petty despotism. Allied to this ahistorical rejection of the state as a principle was an idea that other systems of domination interlaced themselves with the state at different historical junctures. Capitalism, Bakunin argued, was a prime beneficiary of the state's ability to centralize control, and the spiritual dominion of religion had historically been a vital force in helping maintain the statist status quo.

It was chiefly this absolute rejection of the state that informed Bakunin's hostility to Marxism.

On one level, this was tactical: where Marxists increasingly looked to participation in democratic politics as another weapon in the struggle against capitalism, Bakunin's anti-state fundamentalism saw this as inevitably corrupting the ultimate goal of a stateless society. In this formulation, we have a key axiom of anarchist political thought, the congruence of means and ends: the idea that the methods pursued to effect change must be compatible with the object desired. This was a position that informed Bakunin's conflict with Marx, in that, for Bakunin, if the International was to be an agent of revolutionary change, it must enshrine its objective in its organizational principles. Marx, in this reading, was a centralizer, looking to concentrate decision-making at the expense of the local sections of the organization, where Bakunin championed a policy of free federation that protected the autonomy of local decision-makers. Contrary to the idea that Marxists and anarchists share an essential vision of the ideal future but diverge simply over tactics, this conflict points to more fundamental differences between the two traditions, particularly concerning the degree of functional centralization that a future industrial society would demand.

Bakunin and Marx's respective positions on industrialization also informs an important divergence in revolutionary tactics. Bakunin's theory of the state demonstrated that the architects of state power would never willingly relinquish their position, but where, for Marx, the proletariat emerged through the dynamics of capitalist economics as the destroyers of this system, Bakunin was more skeptical about the capacities of industrial workers. The proletariat could be an agent of revolution, he argued, but their comparatively privileged status in the capitalist system meant that they were also often defined by their prejudice, conservatism, and comparative caution. Instead, Bakunin looked to the "lumpenproletariat" – the *déclassé* elements in society – and the peasantry as potentially far more revolutionary.

Just as his theory of the state was essentially ahistorical, there is an ahistoricism to this interpretation of revolution too. Rather than being the product of a particular moment in the historical process, the potential to rebel and confront the state in the name of freedom was eternal and latent. Bakunin's theory of revolution, therefore, privileged spontaneity and the practical invention through the revolutionary process of the kinds of organization – particularly communes – that would form the basis of a future, truly free, society.

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Barbeyrac, Jean

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Introduction

Jean Barbeyrac (1674–1744) was an influential figure in the Republic of Letters of early modern era. He is best known for his French translations of Samuel Pufendorf's and Hugo Grotius's natural

law treatises. Barbeyrac continued to emend and enrich his translations and to publish new ones with more comments and erudite footnotes throughout his career, which lasted until his death in 1744. Barbeyrac was deeply troubled by the experiences of the Huguenot diaspora and he sought to understand the origins and the solution to the religious intolerance; and this led him to study and promote natural law theory which then became his life work as a translator, an academic, and a journalist.

Jean Barbeyrac was born at Béziers in Southern France, on March 15, 1674. The eldest son of Antoine Barbeyrac (d. 1690), a Huguenot minister of Provençal origin, Jean was destined to follow in his father's footsteps. However, following the Revocation of the Edict of Nantes in 1685, Barbeyrac left France for Lausanne as a refugee. He studied Greek, Hebrew, philosophy, and theology at the academies in Lausanne and Frankfurt an der Oder and moved to Berlin, where he preached in the Walloon community in and around Berlin and taught ancient languages at the Berlin Gymnasium as a teacher (Eijnatten 2003).

Due to frustrations, he abandoned the attempt to become a priest and turned to legal studies. His 1706 translation of Samuel Pufendorf earned him a reputation as a legal scholar of intellectual standing. In 1710, Barbeyrac was invited to Lausanne to become the first professor there of natural law and history. In 1717 he took on a professorship in public and private law at Groningen, where he would spend the rest of his life. Reluctantly, he took on the duties of the rector of the university at times, but his focus was on teaching, journalistic work, and translation projects.

Family life and friends were highly important to Barbeyrac, and he had an active correspondence with many colleagues and friends throughout Europe. The otherwise so productive translator and journalist lost a great part of his energy and spirits when he his wife Hélène Chauvin passed away in 1730, and son Antoine in 1732 (Meylan 1937). Also, many important friends and colleagues passed away: especially the losses of Jean le Clerc in 1736 and Jean-Alphonse Turrettini in 1737 made an impact.

Pufendorf, Grotius, and Barbeyrac

Barbeyrac's first success as a translator and a commentator was his French translation of Samuel Pufendorf's *De jure naturae et gentium* (1672): *Le droit de la nature et des gens* (1706). Barbeyrac had aspired for an ecclesiastic career, so he had studied Greek, Hebrew, philosophy, and theology, and these linguistic capacities were a great asset for this work. Barbeyrac did a thorough study of the text and its citations and added a voluminous preface and notes to the translation. In his footnotes Barbeyrac explained cryptic passages in his authors, corrected their quotes and references to classical sources, and criticized them. Barbeyrac also introduced quotes from his contemporary thinkers, which was not customary at the time. It was his translation that got to be known to the world as also the newer editions of the English translation by Basil Kennett (*Of the Law of Nature and Nations, second edition,* 1710), who took in count both the preface and his commentaries (Tuck 2005). Pufendorf's theory was widely adopted in the law curricula of European universities and Barbeyrac also translated the textbook version *De officio hominis et civis* (1673): *Les devoirs de l'homme et du citoyen* (1707).

Hugo Grotius' *De jure belli ac pacis (On the law of war and peace)* (1625), contributed significantly to the formation of international law as a distinct discipline. In the preface to Pufendorf's *Le droit de la nature et des gens,* Barbeyrac calls for a new, better translation of the work judging the existing translation to be inadequate in quality. He finally took on the project himself having hesitated for years after the Pufendorf project. The French translation *Droit de la guerre et de la paix* (1724) was published alongside a new Latin edition with commentaries in the same style as for the Pufendorf. Barbeyrac's translation brought Grotius's work a new success with greater audience. As he had wished, the new translation was regarded as a founding text on the law of nations, or later international law, to be read together with Pufendorf's *Droit de la nature et des gens* (Päivärinne 2018).

The French translations were highly instrumental in getting natural law theory to new, wider audiences. In the same time, Barbeyrac contributed to development of the field especially through the rich annotation apparatus. He was a fierce defender of freedom and toleration – having personally lived through religious persecution this was capital for him. In alignment with Pufendorf Barbeyrac stressed that the states should only regulate matters of this world and that the consciousness is not within the reach of the earthly laws.

The success of the translations lead to numerous requests for Barbeyrac to write his own book on natural law, but he declined stating that Grotius and Pufendorf combined already formed a comprehensive basis for understanding natural law. He did publish some works of his own on specific questions; the most famous text being *le Traité de la Morale des Pères de l'Eglise (Treaty on the Morals of the Church Fathers, 1728)* where he challenged the Church Fathers' legacy for moral philosophy, and in the most famous part of the treaty discussed the distinction between civil and ecclesiastical toleration.

Diderot's *Encyclopédie* mentions both these major translations by Barbeyrac in the article entitled "Droit des Gens" [Law of Nations], singling out his very useful notes (Boucher d'Argis 1755, 128). According to the ideals of the Enlightenment, the academic world was promoting the transition from Latin to vernacular languages, and French became one of the most important languages of scientific publication throughout Europe. This meant that Barbeyrac's translations were widely read and served also as source text for other language translations.

Professional Endeavors

Barbeyrac started teaching history and jurisprudence at the university of Lausanne in 1711 and took on the duties of the rector from 1714–1717. In his inaugural speech as a rector *Discours sur l'utilité des lettres et des sciences* he stresses the importance of arts and sciences in the fight against ignorance, superstition, and persecutions and for liberty, happiness, and toleration.

Natural law was a popular academic discipline in protestant universities in the second half of the seventeenth and throughout the eighteenth century. While natural law was sometimes studied in the philosophy department, and sometimes in the law faculty, the form and content of a lecture on natural law was rather stable throughout the period. The main transformation in natural law lectures was the gradual replacement of Hugo Grotius's *De jure belli ac pacis* from 1625 with Pufendorf's *De jure naturae et gentium* or his shorter *De officio hominis et civis* as the standard manual. The task of the teacher was typically to present Pufendorf's main arguments, and to provide commentary on key issues in Pufendorf's theory. Of all the many Pufendorf's commentaries available in the early Enlightenment, Barbeyrac's was both the most read and the most respected. Barbeyrac's commentary translations of the natural law treatises of Grotius and Pufendorf thus contributed centrally to defining the areas in those theories that needed further discussion. One of these areas were questions of religious toleration, on which, Barbeyac argued, Grotius and Pufendorf had not said nearly enough. The thoughts on toleration, scattered among the commentaries of the translations, were also published separately in his main defense of the tolerationist views: *Traité de la Morale des Pères de l'Église* (Treatise on the Church Fathers' Morals) in 1728, as Korkman points out (2001: 119). Barbeyrac argued that the ecclesiastic and civil toleration should not be confused, and that civil society should adopt a tolerant view on all religious practices as long as they cause no harm to others.

In close relation to the toleration, Barbeyrac defends individuals' rights based on consciousness. He argues that "*Permission* is as real an Effect of the Law, taken in its utmost Extent, as the strongest and most indispensible *Obligation*" (Barbeyrac in Grotius 2005: 184). In this, Barbeyrac marks a significant departure from Grotius and Pufendorf, for whom permission denotes "a pure inaction" of the law, whereas Barbeyrac grants a very significant role to the liberty to act or not act as one judges appropriate (Bisset 2015: 546).

In addition to translation and teaching, Barbeyrac wrote to academic journals of his

time. His role was most influential in La bibliothéque raisonnée des savans de l'Europe (1728–1753, original publication accessible at the digital French national library collection (Gallica)). This journal was covering publications in various scientific fields everywhere in Europe. The journal published the articles protecting their writers with anonymity; therefore, for the larger public, the journalistic work remained invisible. However, among colleagues, this was a well-known way to contribute to the Republic of letters. Over 100 articles in the journal have been assigned to Barbeyrac making him one of its most productive writers (Lagarrigue 1993). He mostly wrote about publications in the fields of history, jurisprudence, and theology, but also many other matters. The very creative collaboration ended finally due to personal issues within the editorial team in 1741.

Conclusion

The example of Barbeyrac illustrates both the importance of translation in the transmission of ideas, and the variety of roles involved in such transmission (Chevrel 2014). His legacy in the development of natural law theory continues to influence the way we apprehend the notions of rights, toleration, and liberties. These notions have since shaped how the international community understands the conception of international law.

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Bartolus of Saxoferrato

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Problem

Bartolus of Sassoferrato (1313/1314–1357), the greatest medieval jurist and one of the most important of all times. He was born in a small village near Sassoferrato, in the Lands of St. Peter, and attended his first studies with the Franciscan friar Pietro da Assisi. At the age of 14, he entered the school of law in Perugia, where he met his master Cino da Pistoia, the great commentator of Justinian's Code and Dante's best friend. When Cino moved to Florence, Bartolus went to Bologna, where in 1334 he took his doctorate *in utroque* before a commission which included great masters like Iacopo Bottrigari, Raniero Arsendi, Iacopo Belvisi, and Giovanni Calderini. After a brief period in which Bartolus exercised the office of judge in cities such as Todi and Pisa, he began his courses in civil law precisely in Pisa in 1339 and then moved to Perugia in 1343. In Perugia, Bartolus, who

always called himself "civis Perusinus," taught civil law until 1357, when he died at the age of 43 (Segoloni 1962; Calasso 1964; Bellomo 1996; Treggiari 2009; Lepsius 2013).

In spite of his short life, Bartolus' scientific production was astonishing: he was the author of lengthy commentaries to Justinian's *Corpus Juris Civilis*, of a great number of *consilia* (legal opinions), of several *quaestiones* on statutes, and of a great number of important treatises on political parties, on city government, on tyranny, on trademarks and coats of arms, on river accessions, on reprisals, on witnesses and on various matters concerning legal procedure, and on bandits. Even if not all the writings attributed to Bartolus by his school and by the long-lasting scientific tradition that refers to his name (the so-called Bartolism) can be easily assigned to the jurist of Sassoferrato, his work remains one of the most representative of the cultural and scientific tendencies of the Western legal tradition at the end of the Middle Ages and at the beginning of the modern era (Calasso 1959; Fassò 2001, 229–230).

In the whole of his vast and composite work, Bartolus shows a strong tendency to offer a doctrinal framework widely involved in the philosophy and theology of his time. Large quotations of biblical sources and of Aquinas' works may be found in his treatises, especially in De Guelphis et Gebellinis concerning the right to resist and in the Tractatus testimoniorum concerning the nature and proof of miracles (Quaglioni 1991, 2014; Lepsius 2003); furthermore, the entire De regimine civitatis, written against the Augustinian philosopher Gilles of Rome, was conceived under the influence of Aquinas and his pupils, like Tolomeo da Lucca; and finally the repetitio concerning the law Si ut proponitis (Cod., 12, 1, 1), also known as De nobilitate, is a long legal commentary on Dante's canzone "Le dolci rime d'amor ch'i' solia" in the fourth treatise of the Convivio.

Discussion

Bartolus' main concern goes to the political and moral problems of his time, especially to tyranny as a corrupted form of government. The writings of Bartolus on city-state government, legitimacy of political parties, rebellion and the right to resist, reprisals and the just war, and tyranny were among the most important contributions of the legal doctrine to the development of medieval and modern political theories (Quaglioni 1983). The teachings of Bartolus had a preponderant influence on modern public law, mainly on those jurists who developed the early modern theories of the state and of the state's sovereignty. "Under his influence the study of the civil law became less purely academic and more orientated towards the legal problems of the day. He and his followers continued to expound the texts in the form in which they were transmitted but their aim was no longer to explain the meaning of those texts as they stood. Rather they sought to find in them rules which would be appropriate for late medieval society but would still carry the authority of the imperial law" (Stein 1999, 71).

Bartolus' theory of the relationship between city statutes and the general principles and rules of the *ius commune* is considerably important. "Although Bartolus had to justify the existence of a particular law (*ius proprium*) alongside the *ius commune*, he gained acceptance for the notion that local statutes must be interpreted according to the methods established by the *ius commune* and in such a way to derogate as little as possible from the *ius commune*" (Stein 1999, 72). Of course, there were no laws in Justinian's *Corpus Iuris Civilis* which referred to the conflict of different secular laws, but in fourteenth-century Europe, such problem became pressing and general rules were needed. Bartolus offered new legal paradigms to the jurists of his time that resulted from a complex re-elaboration of the Roman legal tradition while always claiming the authority of the imperial law. In his thought, as expressed in two famous doctoral sermons in praise of the legal science, juristic doctrine became the supreme form of knowledge (*civilis sapientia*), thus giving to the jurists a cultural and social supremacy in medieval society.

The great diffusion all over in Europe of the "Bartolist" methods in teaching and interpreting Roman law and in applying the maxims of *ius commune* (hence the popular motto that no one could be a good lawyer if he were not a Bartolist, *nemo bonus iurista nisi sit bartolista*) was at the origins of a radical reaction by the arising

humanist movement. In 1433, Lorenzo Valla, a professor of rhetoric at the University of Pavia, wrote one of his most provocative works. It was the *libellum* which became famous with the title *Epistola contra Bartolum*, composed by Valla against Bartolus' treatise *De insigniis et armis*, erroneously seen as the most representative example of a degeneration of the language of jurisprudence, starting from Justinian and his *Corpus Iuris Civilis*. Valla argued that a true science of law is impossible without a perfect knowledge of the Latin language, mainly in what concerns civil law (*praesertim in iure civili*), for the lack of Latin language makes every science blind and slave (*caeca est omnis doctrina et illiberalis*). "If Tribonian [i.e. Justinian's main collaborator in drafting of the Corpus Iuris Civilis] had not corrupted classic jurisprudence, the ancient law would not have been neglected and substituted by the commentaries of Bartolus and of the other interpreters" (Maffei 1972, 37–40; see also Cavallar et al. 1994).

With Valla the seed of anti-Tribonianism was thrown, which was confused with the early humanistic controversy against medieval jurisprudence. A superficial interpretation of humanistic literature has long encouraged a false and reductive view of a phenomenon that is much more complex and articulated and that cannot be reduced to the conflict between Bartolists and anti-Bartolists. In fact, Bartolus' thought remains the very basis of the modern legal culture, as evidenced by the major expressions of legal humanism of the early Renaissance, such as Andrea Alciato, and many others.

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Basic Needs

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Introduction

To prevent the spread of COVID-19, the state of Austria for some time forbad people to enter public spaces. One of the few exceptions from this

rule, stated in section "Why, by Whom and to What Extent Should Basic Needs Be Satisfied?" Z 1 of the COVID-19-Law, refers to basic needs. It says that entering public spaces is allowed if doing so is required "to meet the necessary basic needs of daily life" ("zur Deckung der notwendigen Grundbedürfnisse des täglichen Lebens").

Basic needs have been appealed to in many other social and legal contexts as well. For example, they have played a role in attempts to justify universal human rights and minimal social welfare measures (such as benefits for the very poor); they have functioned as a measure of well-being, in particular in regards to the justness of our relations to the developing world and to future generations; they have been used to define what it means for economies to develop sustainably; and they have been used as a criterion for prioritizations in health care.

This entry provides an overview of some of the main philosophical issues surrounding basic needs. In particular, it will address the following three questions: What are basic needs? Why, by whom, and to what extent should basic needs be satisfied? And what are advantages and disadvantages of appealing to them? For more detailed overviews of this topic, see Brock and Miller (2019), Dover (2016), and Pölzler (2021) (on which this entry partly draws).

What Are Basic Needs?

Outside of philosophy, basic needs are often defined extensionally. That is, those who appeal to them simply provide a list of all or some of the things that they regard as falling under the concept. The state of Austria, for instance, supplemented section "Why, by Whom and to What Extent Should Basic Needs Be Satisfied?" Z 1 of its COVID-19-Law by examples such as "provision with basic goods of daily life," "usage of health care services," and "contact with closest relatives" And the United Nations' *Research Institute for Social Development* defined basic needs in terms of nutrition, shelter, health, education, leisure, security, and environment (Drewnowski 1966).

From a philosophical point of view, such extensional definitions cannot be entirely satisfactory. The problem is that they fail to specify in virtue of what features things count as basic needs. This means that the definitions do not provide guidance in cases in which it is unclear whether something is or is not a basic need. For example, is leisure really a basic need? Should we maybe consider self-respect to be a basic need as well? Extensional definitions also do not explain why meeting basic needs is morally important. Philosophers have hence typically strived for an intensional analysis, i.e., they have attempted to provide necessary and sufficient – or at least characteristic – conditions for the application of the concept.

As with any other concept, philosophers disagree about the details of the conditions that a thing must fulfill to count as a basic need. That said, there has been at least some convergence with regard to the general outlines of the concept. The most common philosophical definition of basic needs is in terms of harm. It says that a person has a basic need for something if and only if this thing is necessary for the person to avoid being harmed (e.g., Braybrooke 1987; Doyal and Gough 1991; Thomson 2005; Wiggins 1998). Moreover, other than with nonbasic needs, this harm must be serious in the sense that it involves (the risk of) death or impairments of normal functioning (Doyal and Gough 1991; Feinberg 1986; Schuppert 2013), and the harm must be necessary in the sense that it cannot be avoided due to laws of nature or highly invariant facts about humans and their environment (Siebel and Schramme 2020; Thomson 2005; Wiggins 1998).

Food is an example of a thing that obviously qualifies as a basic need on this standard definition. If a person does not eat for a long time, then they will be harmed in a serious way. They will become apathetic, suffer from organ damage, and at some point even die. Moreover, there is not much that can be done about this. If the period of starvation is long enough, then harm along these lines will inevitably materialize. Thus,

according to the standard definition, food – or nutrition more generally (Drewnowski 1966) – is to be classified as a basic need.

However, there are also more controversial cases. To be able to determine whether things such as leisure or self-respect are basic needs, a more detailed definition is required. Most importantly, proponents of basic needs must explain what kind of harm the non-satisfaction of these needs is supposed to necessitate. Several related but competing accounts have been given. For example, it has been argued that the harm of basic needs deprivation consists in falling below some minimal level of autonomy (e.g., Copp 1995; Doyal and Gough 1991; Meyer and Pölzler 2022), in falling below some minimal level of (rational) agency (e.g., Brock 2005; Schuppert 2013), or in not being able to sufficiently participate in society any longer (e.g., Braybrooke 1987; Miller 1999).

One difficulty in evaluating these variants of the standard definition, as well as alternative definitions (e.g., Hassoun 2008; Stewart 1985; Wolf 2007), is that it is not clear which methods should be used in doing so. Social scientists have tended to stipulate the meaning of *basic needs* rather freely (e.g., Hicks and Streeten 1979; Stewart 1985; Streeten and Burki 1978). Philosophers, on the other hand, have also tried to capture how ordinary speakers use the concept (e.g., Braybrooke 1987; Brock 2005; Copp 1998; Gasper 2007). Claims about this folk usage have traditionally been justified by philosophers generalizing from their own conceptual intuitions or by their own personal observations. In recent years, however, there have also been attempts to study ordinary speakers' conceptual intuitions about basic needs in a scientific manner (Pölzler and Hannikainen forthcoming; Pölzler and Tomabechi under review).

Another complication arises from the fact that basic needs can be defined at different levels of abstraction. It is generally acknowledged that these needs (e.g., the basic need for food) must be distinguished from the resources that can satisfy them (e.g., Wiener Schnitzel, Sushi and Enchiladas) (Max-Neef 1991). But this distinction is less clear than it might seem at first. For example, while most researchers regard food and water as basic needs, Doyal and Gough (1991) only classify them as "universal satisfiers" for other fundamental basic needs, namely the needs for physical health and autonomy.

Finally, it is likely that there is no such thing as "the" definition of basic needs at all. Different contexts (such as human rights, justice, or sustainability) and different theories might allow for or even require at least somewhat different understandings of the concept.

Why, by Whom, and to What Extent Should Basic Needs be Satisfied?

According to the standard definition introduced above, a thing is a basic need if and only if its non-satisfaction causes serious harm which cannot be escaped from. This definition entails that the non-satisfaction of basic needs is independently normatively relevant. In other words, the fact that a person's basic needs are unsatisfied by itself "makes demands on us": it gives us at least defeasible reason to satisfy these needs (as the person would otherwise be seriously harmed without standing any chance of avoiding this harm) (Brock and Miller 2019).

The recognition that the concept of basic needs is inherently normative may explain some of its contestedness. It means that different individuals and social groups have self-interested reasons to understand the concept in different ways. To give but one simple example, rich people are best served by a definition that only acknowledges few things as basic needs. After all, through their taxes and other means, it is them who will have to pay for enabling some other members of their society to satisfy these needs. Poor people, on the other hand, will more naturally advocate for expansive definitions that also include items such as education, employment, self-respect, etc. (as they are more likely to be recipients of basic needs satisfiers).

The normativity of basic needs also has important philosophical consequences. First of all, it raises some intricate puzzles in metaethics, the philosophical study of moral reality, language,

and knowledge. Basic needs are typically thought of as objective parts of the natural world. It is assumed that whether a person has a basic need does not depend on what they themselves or anybody else thinks (see Section "What Are Advantages and Disadvantages of Appealing to Basic Needs?"). However, it is not clear how some entity can be both an objective part of the natural world and at the same time normative. This would mean that in some sense the world itself (not humans, God or some other beings) is making demands on us – an idea that philosophers have grappled with for a long time (e.g., Mackie 2011; Moore 1993).

Another important philosophical question about basic needs' normativity concerns the bearers of the duty to satisfy these needs. Some researchers have emphasized that attending to needs is a central part of caring personal relationships (Bubeck 1995; Reader 2007). In contrast, in social and legal contexts, it has typically been assumed that providing people with the means to satisfy their basic needs is mostly the obligation of states. This may be justified by pointing out that some of these means, such as a functioning health care system or labor market, just cannot be provided by individuals on their own (Pölzler 2021).

Suppose it is true that states have a duty to enable people to meet their basic needs. Unfortunately, in the real world, some states lack the resources or motivation to fully comply with this duty. They leave some or many basic needs unmet. This introduces the need for principles that guide potential trade-offs (Brock and Miller 2019). In particular, researchers must address two questions. First, how ought claims to basic needs satisfaction be weighed against other moral claims that people have, such as claims grounded in equality or desert? And second, how ought some people's claims to basic needs satisfaction be weighed against other people's claims to basic needs satisfaction?

Most researchers agree that meeting basic needs is more important than satisfying other moral claims; and that meeting the basic needs of those who are most deprived is more important than meeting the basic needs of better-off persons. But the strength of this priority has remained contested. While some have regarded it as absolute, others have permitted trade-offs. They have argued that it can sometimes be justified for states to meet other obligations before all basic needs are satisfied, or to meet the basic needs of the not-so-badly-off before those of the worst-off have been met (e.g., because fully meeting all basic needs or all basic needs of the worst-off can be extremely costly) (e.g., Copp 1998; Miller 1999; Rendall 2019).

Researchers who have taken this latter – non-absolutist – view have proposed a number of additional criteria for weighing the importance of basic needs satisfaction. For example, they have argued that states ought to prioritize people to the extent to which these people's basic needs can be satisfied at comparably low cost (e.g., Copp 1998), to the extent to which these people are effective in converting resources into basic needs satisfaction (e.g., Miller 2020), and to the extent to which these people are not themselves responsible for their basic needs deprivation (e.g., Segall 2010).

It is unlikely that any simple principle will emerge from these discussions. Balancing basic needs claims seems to require consideration of many different factors (Miller 2020). Moreover, one's view will again also crucially depend on general methodological decisions. Are needs-related distributions to be justified based on researchers' own normative intuitions (e.g., Wiggins 1998)? Based on personal observations about the normative intuitions of ordinary people (e.g., Braybrooke 1987; Copp 1995)? Based on scientific data about these intuitions (e.g., Hassoun 2009; Miller 2020)? It has remained contested which of these and other approaches is most suitable.

What Are Advantages and Disadvantages of Appealing to Basic Needs?

The previous sections have shown that appeals to basic needs raise a number of difficult philosophical questions. Still, many researchers have continued to use the concept. After a temporary

decline (mostly explained by the advent of the competing capabilities approach) it has, in fact, recently witnessed a revival. Why is this? What makes drawing on basic needs appealing?

I have already touched upon this question in the previous section. There I suggested that if the standard definition is correct then basic needs are independently normatively relevant. This makes them well-suited for grounding normative theories. In addition, proponents of needs-based theories have also claimed several other advantages vis-à-vis relevant alternative concepts or measures of well-being (such as preference satisfaction, impersonal resources, or capabilities). They have in particular pointed out that basic needs (1) allow for a plausible specification of a threshold of well-being, (2) are objective, (3) are universal, and (4) increase practical effectiveness.

Some normative theories distinguish between lives that are minimally decent and lives that lack this quality. It has proven difficult to specify this distinction in a plausible way. For example, why should having 30% of one's preferences satisfied, earning $2 a day, or having 20 valued capabilities be enough, while having 29% of one's preferences satisfied, earning $1.99 a day, or having 19 valued capabilities is not? Aren't these thresholds arbitrary (Casal 2007)? Aren't we overstating their moral significance (Arneson 2005)? In contrast, it has been claimed that being able to meet one's basic needs for food, water, shelter, etc., constitutes a much less arbitrary and much more morally significant threshold for the minimally decent life (e.g., Benbaji 2005; Miller 2007).

Another often-claimed advantage of basic needs is that they are objective and universal. That basic needs are objective entails that people can be mistaken about their basic needs. For example, even if I think that I do not have a basic need for education I could still in fact have such a need. The objectivity of basic needs would hence mean that these needs can be determined and measured by third-person means, such as established and readily available data about life expectancy at birth, health expenditure, or poverty rates. We would not have to engage in surveys or political decision-making (e.g., Gough 2017; Meyer and Pölzler 2022; Reader 2007).

If basic needs were universal – if all humans had the very same basic needs, regardless of where and when they live – we would not even have to study particular populations to identify their basic needs. We could simply extrapolate from our own. This is particularly advantageous in cases in which the basic needs of a population cannot be studied for practical or logical reasons. For example, under the assumption of universality, we could be sure that people in certain war-ridden or secluded areas have the same basic needs as us, and that this even holds for people who will only live in the future (e.g., Brock 2005; Reader 2007; Meyer and Pölzler 2022).

Finally, some advocates of basic needs have argued that the concept makes normative theories more practically effective. This claim has been supported in three main ways. First, ordinary people easily understand demands that are framed in terms of basic needs (compared, e.g., to capabilities) (Wiggins 1998). Second, ordinary people readily accept these demands. There is significantly more skepticism towards concepts such as human rights (which are sometimes associated with Western moral imperialism) (Miller 1999). And third, to say that someone has an unmet basic need has a greater motivational force than saying that someone has an unsatisfied preference or lacks certain capabilities (Pinzani 2013; Schuppert 2013).

It is not clear to what extent the above advantages – plausible threshold-specification, objectivity, universality, and practical effectiveness – really hold. They assume a number of controversial philosophical and empirical claims. Moreover, appealing to basic needs comes with certain disadvantages as well. The flipside of these needs' purported objectivity and universality, for example, is a risk of falling into paternalism. States that are guided by concerns about basic needs may end up providing resources to satisfy basic needs that people themselves regard as already being sufficiently satisfied or that people do not even accept as basic needs (e.g., Alkire 2002). Another common complaint is that needs-based theories are materialistic and instill a mindset of dependency and passivity in people (e.g., Sen 1984).

These problematic tendencies can be alleviated to at least some extent. For example, even though people may not be able to decide their basic needs themselves they can still be given the opportunity to decide whether and how to satisfy these needs (e.g., Meyer and Pölzler 2022). Lists of basic needs often include nonmaterial items such as "contact with closest relatives" (such as in the Austrian COVID-19-Law) and "education" (Drewnowski 1966). And it has been argued that states ought to enable people to meet their basic needs through their own efforts (e.g., through employment) rather than by providing bundles of goods (e.g., Copp 1998).

Still, further work remains to be done to show that the concept of basic needs is superior to alternatives such as preference satisfaction or capabilities. It might also turn out that different concepts are best suited for different contexts or theories, and that appeals to basic needs become more fruitful if they are somewhat assimilated to certain alternatives, in particular to the idea of capabilities (Fardell 2020; Petz under review).

Conclusion

In some social and legal contexts, people appeal to the idea of basic needs. For example, the idea has been used to specify COVID-19-laws, to guide international development, to ground theories of justice, and to define sustainable development. To be able to evaluate these appeals, we need to have some understanding of (1) what basic needs are, (2) why, by whom, and to what extent they should be satisfied, and (3) what are advantages and disadvantages of appealing to them. This entry set out to address these questions.

I first explained that researchers mostly agree on the broad outlines of the concept. They assume that a person has a basic need for something if and only if this thing is necessary for the person to avoid serious harm (e.g., in the sense of reducing their autonomy, agency, or social functioning). This connection to harm explains why meeting basic needs matters. Even though states would ideally enable all people to meet their basic needs, in reality, difficult trade-offs are inevitable. Moreover, to show that basic needs are superior to competing alternative concepts, a number of challenges must be addressed more thoroughly.

Hopefully, researchers will take up the mentioned challenges soon. The idea of basic needs certainly holds significant potential for informing decisions in many social and legal contexts.

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B

Bauer, Otto

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Introduction

Otto Bauer (Vienna 1881–Paris 1938) was an Austrian politician, a leading figure in Austrian social democracy, and finally an interpreter of the need to revise Marxist theory in light of the historical development of the new social conditions that were taking shape in the late nineteenth century.

He played a significant role in the *Wiener Marxsche Schule*, the fledgling Marxist school where he joined Max Adler, Karl Renner, and Rudolf Hilferding in an effort to enliven Marxism by engaging with the most recent currents of thought.

This lively scholarly community, described by Bauer as properly a "spiritual community" (*Geistesgemeinschaft*), would soon come to be known as *Austromarxismus*, initially a label carrying vaguely pejorative overtones. Bauer was undoubtedly among the theorists of greatest prominence in *Austromarxismus*, with a steady stream of writings in publications (*Marx-Studien*) and journals (*Der Kampf*), all prime forums for the political and intellectual debate on socialism at the time.

He was called to arms in 1914 and was made a prisoner of war on the Russian front in 1915. On his return to Vienna, he briefly served as *Unterstaatssekretär des Äußeren* (undersecretary of the state, October–November 1918) and as *Staatssekretär für Äußeres* (secretary of the state, from November 1918 to July 1919). From 1919 to 1934, he held the top leadership position in Austrian social democracy, drawing up the Linz Program for the Social Democratic Workers' Party (*Sozialdemokratische Arbeiterpartei*) in 1926.

On the international scene, Bauer was among the promoters of the Vienna International, better known as the 2½ International, so-called for its short lifespan, from 1920 to 1923, when it was merged into the Second International.

Forced to leave Austria in 1934 due to the government's crackdown on democratic uprisings, he first took refuge in Czechoslovakia, where he remained politically active, and then in Paris, in 1938, where he died on July 4 of the same year.

Among the topics that Bauer tackled, there are at least two that undoubtedly hold interest in legal philosophy: the so-called national question and the class-based nature of the state.

The Nationality Question

The "question of nationalities" came into the spotlight in Europe between the late nineteenth and early twentieth centuries, particularly in those plurinational states in which different nationalities were agitating for autonomy and for broad recognition of the principle of the self-determination of nations.

Bauer was a citizen of the Austro-Hungarian Empire, the plurinational state that more than any other staggered under the weight of nationalist calls for autonomy, and to that question in 1907 he devoted the book *Die Nationalitätenfrage und die Sozialdemokratie*.

Even if he understood his book as hewing to the canons of a materialistic conception of history updated to reflect current conditions, his theses drew harsh criticism first from Karl Kautsky and then Stalin and Lenin. A recurrent theme in this regard was the charge of "psychologism" leveled at the theoretical core of the book, in which Bauer sought to explain nationalities in light of a general theory of social forms. In order to properly understand the relation between state and nation, Bauer thought it was necessary to first define the very meaning of a nation. Here, Bauer was working in opposition to the two dominant approaches of the time – the "biological-materialistic" approach and the "Romantic-spiritual" one – ultimately to identify the national character as an outgrowth of historical forces: the national character is the precipitate of a nation's history. A nation is thus to be understood as a cultural community defined by its education, customs, and law.

The national community is a "community of common fate," meaning that the members of the community share a fate which they construct by adjusting their actions to those of others in a relation of mutual influence. As a result of this relation, the national character changes and evolves. It can therefore be said that the community and the individual are mutually entailing, and that the enjoyment of what Bauer calls "cultural goods" determines the degree to which the individual participates in the national community – a necessary condition for attaining human liberation. As Bauer sees it, this dynamic also points the way toward a liberation of the proletariat within each national context.

The Class-Based Nature of the State

The core tenet of Marxist political theory is that the state is actually the instrument through which the bourgeoisie dominates the proletariat. But historical developments in Bauer's time seemed to suggest otherwise: when the first Austrian Republic was formed in the wake of the political upheaval of 1918, it no longer seemed plausible to view the state that way, considering that a coalition government was formed (and Bauer was part of it) with the participation of parties representing both the bourgeoisie and the proletariat.

This is a problem that Bauer took on in his 1923 book *Die österreichische Revolution*, arguing that the new Austrian state could not be analyzed as a tool essentially structured to enable the bourgeoisie to advance its own class interests

against those of the proletariat. In fact, this state had been forged out of a *balance* of class power: It was not doing the specific bidding of either the bourgeoisie or the proletariat. Rather, according to Bauer, it was a "popular republic," for it was based on participation from *all the classes of the people*. It was, accordingly, a state that also took the proletariat's interests into account and would thus contribute to the formation of the *unity of the people*.

Bauer's vision clearly stands in contrast to the theory of class struggle developed by Marx and Engels. And so, Bauer set himself about the difficult task of showing that his theory of the balance of class power could also somehow be described in the works of Marx and Engels.

In 1924, in a review titled "Otto Bauers politische Theorien," Hans Kelsen found this attempt to be utterly unconvincing. Among other reasons, Kelsen argued that Austria was still a capitalist state, while Marx and Engels' theory of the state was based on a different economic structure of society, in the spirit of the materialistic concept of history. Moreover, Bauer departed from the Marxist evaluation of private property in the means of production.

Regardless of how Bauer's attempt may be judged, it speaks of his intention not to depart from the matrix of Marxist political theory, even if it meant reconciling the irreconcilable. This can be appreciated from the dual position that Bauer takes in outlining a path forward in *Die österreichische Revolution*. For on the one hand, the book urges the proletariat to forsake violence as a political tool and to instead work with the bourgeoisie in shaping the political experience of the newborn Republic of German-Austria, but on the other, the same proletariat must hold on to the revolutionary vision, only putting off its realization to a not too distant future.

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- ▶ Kelsen, Hans
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Bayle, Pierre

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Pierre Bayle (1647–1706) was born to a Huguenot family in a village, Le Carla, near Foix in the southwest of France. The circumstances of his life were primarily determined by restrictions on the Protestant faith resulting finally in the Revocation of the Edict of Nantes, in 1685. His momentary conversion to Catholicism during his studies at the Jesuit school in Toulouse and

subsequent return to the Protestant fold led him into exile, working as a tutor first in Geneva, then in Rouen, and finally in Paris, until he obtained a professorial post at the Protestant Academy of Sedan, in 1675. This academy was closed down by Catholic authorities in 1681 and Bayle took refuge in Rotterdam, where he obtained a post as a professor in philosophy and history at the Illustrious School. He was never to leave that town, where he published almost all his works, which gave him a Europe-wide reputation as an infinitely erudite journalist, a provocative Huguenot polemicist, and a very demanding philosopher, whose judgment was valued by the great thinkers of the period: Malebranche, Leibniz, Locke, in particular. His philosophical works bear mainly on the conflicting relations between superstition, faith and reason, and his doctrine of religious tolerance provoked accusations of religious indifference and atheism. His defense was based on the declaration that he was a sincere believer, but at the same time he defined faith as perfectly irrational – which gave birth to his reputation as a "skeptic" and a "fideist". His last works all aim to refute the arguments of rationalist theology and to denounce religious fanaticism: shielded by his declaration of sincere faith, he was able to demonstrate that right reason leads to atheism and to define the basic principles of materialism.

Toleration

The traditional reading of Bayle as a skeptic (Pyrrhonian or Academic) has often implied an interpretation of his conception of religious toleration as being founded on doubt: since men cannot agree on any given truth, one can do nothing but *tolerate* their errors. Skepticism and toleration appear to constitute the two sides of the same philosophical posture. However, this reading neglects Bayle's moral rationalism, which is expressed in all his works: "without exception, one must submit all moral laws to our natural conception of justice, which, like metaphysical light, enlightens all men born into this world" (*Commentaire philosophique*, 1686–1688). The self-evident certainty of human reason in its grasp of the basic tenets of ethics is the true foundation of his doctrine of toleration, which expresses "that general charity which we owe to all men by the indispensable laws of humanity" (*La France toute catholique*, 1685) and is deduced from our natural conception of "justice". These first moral principles – and hence the "laws of civility and sociability" – are "rational" and "natural" principles; their self-evidence is assimilated to that of logical axioms of which one cannot be ignorant unless it be by "negligence" or "malice". Ethics are thus completely independent of religious faith.

This "charity" (or this philosophy of sociability) and social order demand toleration in the field of religious convictions. Bayle then introduces a crucial distinction between the self-evidence of first principles and the uncertainty of "speculative" or "particular" truths, which are "matters of controversy" (*Commentaire philosophique*, II, Chap. 10). In this last field, reason cannot elaborate an "orthodox" doctrine which is preferable to any other. Men are confirmed in their beliefs by education and by habit, they adhere to them by an "inner sentiment" deeply rooted in their nature by passions and self-interest. This potentially conflictual uncertainty of their religious opinions requires toleration and a doctrine of toleration founded in reason.

Bayle's definition of faith – or of conviction – excludes violence as a means of persuasion, since persecution is here both unjust and inefficient. Bayle holds as a self-evident principle that each man should follow the light of his own reason – his own conscience – and it is from this obligation that he deduces the "rights of the erring conscience". However, these rights do not stretch to any kind of error: they are restricted to the field of "speculative" truths. To misconstrue self-evident moral principles is a fault, while errors concerning "speculative" truths are innocent. Thus are excluded all kinds of persecution in the name of any one interpretation of the articles of faith – persecution that Bayle denounces as a fanaticism which obscures natural light and destroys society.

Atheism and Rationalism

Since toleration is founded on a moral principle independent of any religious faith and since the

very existence of the Christian God – a providential God, who rewards and punishes men's actions and intervenes in the course of worldly events – is a "speculative" or "particular" truth of which men are convinced by an "inner sentiment" rather than by rational self-evidence, toleration of atheists is logically implied by the rights of conscience (whether erring or not). But in Bayle's times, a declared atheist was subject to harsh civil punishment, and since he was deemed incapable of a sincere vow in the court of justice, he was excluded from Locke's conception of toleration.

While declaring himself to hold a blind and irrational faith, Bayle constructs a solid battery of philosophical arguments in favor of "Stratonic" atheism. This position is founded on a metaphysical conception positing both the eternity of the essences of things and the eternal existence of a first (material) cause on which all worldly phenomena depend. Opposed to the Cartesian doctrine of the "creation of eternal truths", Bayle embraces the rationalism of Malebranche (or Spinoza) and maintains the existence of "a nature of things", uncreated, independent of divine will, and devoid of any anthropomorphic attributes. This metaphysical rationalism is the direct source of his moral rationalism and also explains his position as to the possibility of an atheist society. Bayle approaches the latter question in three stages: firstly, since the atheist is deemed to act without any moral principles, he is considered to be overwhelmed by forceful passions. On this point, Bayle retorts that "men do not act according to their principles" (*Pensées diverses*, §136) and he demonstrates how little the behavior of Christian believers is affected by their moral principles. Atheists thus resemble all other men: their acts are dictated by their passions which favor sociability (ambition, self-interest, affections) and by the fear of punishment (the force of law which governs social order). They can therefore be tolerated in society, since they behave just like all the other citizens. This demonstration is accompanied by a reflection on the functioning of a prosperous civil society: a perfect Christian society would soon succumb to its neighbors, who would not hesitate to wage war against it; moreover, such a society, which would practice the abstinence recommended by the Church, would soon collapse economically since money circulates in function of the citizens' passions and appetites – a reflection adopted and developed by Mandeville in his *Fable of the Bees* (1714, 1724). In this sense, atheism promotes social prosperity. In any case – and this is the third stage in Bayle's approach – the possibility of a perfectly moral conduct cannot be excluded *a priori*, but it is obvious that it cannot occur within the context of a positive religion admitting both contradictory articles of faith and self-interested mercenary motivations. A rational and disinterested conduct can be founded on atheism alone, which alone posits the existence of absolute values and denies the existence of reward or punishment after death.

Religion and Politics

In his pamphlet *La France toute catholique* and in the *Commentaire philosophique*, Bayle explicitly takes the defense of the Huguenots against the violent measures of Louis XIV, which forbad even the possibility of religious pluralism. However, Bayle does not challenge absolutism as such, but the persecution aiming to enforce conversion to Catholicism, which encroaches on the rights of conscience. The *political* act of Revocation is perfectly legal, in his view: it is not a *moral* act, but it is not in itself an act of persecution, since the Huguenots had "only" to leave the country, as they were invited by Christ: "But if you are persecuted in one town, go in flight to another" (Matthew, 10,23). The unjust persecution to which Huguenots fell victim was not exclusion, but, on the contrary, the ban on exile and the obligation to convert.

The "Glorious Revolution" of 1688–1689 and the fall of James II was quite another story, since the English people deposed a legitimate sovereign on the pretext that he was of a different religious persuasion. The English revolution was thus the occasion for Bayle to analyze more precisely the links between religion and politics and to take a more distanced view of Protestantism. As demonstrated in the *Avis aux réfugiés* (1690), Bayle was now convinced that no religion could provide a stable foundation for the State. Boldly taking

sides against his fellow Protestants, he shows that Protestantism, just like Catholicism, is incompatible with toleration and feeds constantly on persecution, violations of freedom of conscience, and discrimination against minority communities.

Bayle's attitude toward the doctrine of the political exploitation of religious beliefs is twofold. On the one hand, with the libertine tradition since Montaigne and Charron, he maintains that ecclesiastical and political imposture played an important role in the birth of religions, exploiting basic human impulses (fear of natural catastrophes, hopes of a good harvest, and desire to escape illness). On the other hand, he maintains that, in the long-term, political exploitation of religion cannot bring peace and prosperity to the State. The fact that politicians have often been happy with the religions they founded or with their implementation of existing religious convictions does not necessarily mean that such religions are really beneficial to the society: it is possible that religion is a disastrous political instrument, even if we have taken several centuries to become conscious of the disaster: "one does not always perceive the inconveniencies that an invention may entail" (*Dictionnaire historique et critique*, art. "Critias", H).

Being himself a learned expert in the history of the bloody religious wars of the sixteenth and seventeenth centuries, Bayle is convinced that religion is not the real motivation for men's actions in society: men act out of passion – mechanical passion that Bayle designates without moral judgment as part of human nature. However, while religion is incapable of inspiring human actions *ex nihilo* since actions initially depend on other motivations, nevertheless, in alliance with preexisting passions, religion leads men to override all barriers: it can induce men to trample on universal natural moral laws – and the established laws of a given society – in the name of the so-called divine inspiration; it can exacerbate the worst passions in man in the name of a "principle of conscience" which is held to be sacred and inviolable, whereas it is the source of crimes and violations (see *Pensées diverses sur la comète*, § 107–9, *Dictionnaire historique et critique*, art. "Critias", H).

Bayle's political syllogism thus reaches its conclusion: if, as Locke had declared, no intolerant or seditious doctrine may be tolerated within the State, and if religions are both intolerant and seditious, then only an atheist State, founded on purely lay principles, may guarantee social order. Thus a "Spinozist king" (i.e., an atheist) would be better than a Christian king and, for the same reason, atheists would be better citizens than Christians, who are always ready to blindly follow their priests in rebellion against the established political sovereign (*Réponse aux questions d'un provincial*, pt. IV, 1707). On this point, Bayle was to be followed by the most radical philosophers of the eighteenth century, such as the curé Meslier and the baron d'Holbach. He may, however, be distinguished from these later *philosophes* by his pre-Enlightenment or even anti-Enlightenment conviction that religion can never be eliminated: certain errors are so deeply rooted that they can never be corrected, and once a nation has embraced a religion, it can never do without it (*Pensées diverses sur la comète,* § 104). Bayle thus recognizes the fundamental validity of Spinoza's intuition: to his mind, the theological-political question determines the inescapable perspective of any reflection on the foundation of civil society among men.

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Introduction

Simone de Beauvoir (1908–1986) begins her landmark feminist treatise *The Second Sex* (1949) by observing that "enough ink has flowed over the quarrel about feminism; it is now almost over: let's not talk about it anymore" (Beauvoir 2011 [1949], 3).

Despite this cautionary note, it is apparent from Beauvoir's influence on the feminist movements of the 1960s and beyond that her feminism deserves our attention.

While Beauvoir wrote novels, essays, and memoirs, she is perhaps best known today for her feminism, which is rooted in the existentialist philosophy that she and her lifelong partner Jean-Paul Sartre (1905–1980) developed. Her views on women's oppression are the most relevant to legal studies.

Beauvoir's Feminism in *The Second Sex*

Beauvoir's feminism in *The Second Sex* can be defined as a set of ontological, normative, and descriptive claims.

The ontological claim stems from the existentialist philosophy set forth in her earlier works of nonfiction: *Pyrrhus et Cinéas* (1944) and *The Ethics of Ambiguity* (1947). According to this philosophy, we are all *transcendent* or free beings. In reality, however, we may also be treated as *immanent* beings, that is, as object-like. As she puts it, when we are objectified or objectify ourselves, we "lapse into immanence" (2011 [1949], 16).

Based on this ontological background, she makes a normative claim according to which oppression amounts to *imposed immanence* and is an "absolute evil" (2011 [1949], 16).

Beauvoir then describes women's oppression in these terms: "what singularly defines the situation of woman is that being, like all humans, an autonomous freedom, she discovers and chooses herself in a world where men force her to assume herself as Other: an attempt is made to freeze her as an object and doom her to immanence" (Beauvoir 2011 [1949], 17). This descriptive claim about women's lives provides the impetus for her project: *The Second Sex* does not only present the obstacles women face in living freely, but also the individual and societal changes that could liberate them.

Although *The Second Sex* covers a multitude of phenomena pertaining to women's subordination (e.g., the role of their biological functions, sexuality, sexual objectification, feminine narcissism, and married life), the "Independent Woman" chapter best captures Beauvoir's vision for women's future, foreshadowing her feminism in the 1950s and beyond.

She outlines the following limitations to women's freedom: (1) their lack of "economic autonomy"; (2) inequalities in domestic labor; (3) the double bind between emancipation and the capacity "to accomplish one's femininity"; (4) sexual violence; (5) unwanted pregnancies; (6) sexual freedom; and (7) the traditional burdens of motherhood (Beauvoir 2011 [1949], 721–742). For example, in discussing motherhood, Beauvoir underlines that it is "still almost impossible to undertake [it] in complete freedom" (2011 [1949], 735). For her, freely choosing motherhood would require access to birth control and the legalization of abortion. Moreover, the lack of support for mothers in the form of nurseries and

other help limited women's freedom outside of the home. In this discussion and in that of the other barriers just listed, Beauvoir makes clear that the attitudes of men and women, laws, and material conditions need to change for women to be fully independent.

Beauvoir concludes *The Second Sex* with the words: "to carry off this supreme victory [the reign of freedom], men and women must, among other things and beyond their natural differentiations, unequivocally affirm their brotherhood (*fraternité*)" (Beauvoir 2011 [1949], 766).

Her vision for women's emancipation does not imply erasing the differences between women and men, but rather for women and men to experience authentic "reciprocity." In short, their liberation does not merely amount to changes in social structures, but requires the willingness of men to recognize women as transcendent beings.

Beyond *The Second Sex*

One of the central points of continuity between *The Second Sex* and Beauvoir's later feminist writings lies in the claim that we ought to assess women's condition in terms of their concrete freedoms. For example, in a 1966 lecture in Japan titled "The Situation of Women Today," Beauvoir laments what she perceives to be a regression in the "concrete, real, and total equality that [she] wished for [women]" when she wrote *The Second Sex* (Beauvoir 2015, 133). What she has in mind are the constraining roles of the wife as "homemaker" (Beauvoir 2015, 133) and the restrictions to women's participation in "social and public life" (Beauvoir 2015, 134). Beauvoir sums up her assessment in these terms: "There is thus a double renunciation: on the plane of personal autonomy on the one hand, and on the other, accomplishment as a human being who has a social and political role to play" (Beauvoir 2015, 135). Echoing the idea of imposed immanence developed in *The Second Sex*, Beauvoir says, "Many women have told me so, in France as in Japan: there are terrific barriers which condemn women – except a few extremely rare exceptions – to mediocrity" (Beauvoir 2015, 136).

Despite significant similarities between *The Second Sex* and her later work, Beauvoir's understanding of feminist solidarity becomes more complex in the 1950s and beyond. She continues to hold that men play an important role in women's liberation. For example, in "The Situation of Women Today," she emphasizes that "feminism is a cause that is common to men and women" (Beauvoir 2015, 145). Likewise, in a 1972 interview with Alice Schwartzer, Beauvoir declares, "the battle women are fighting, although it is unique, is tied to the battle they must fight along with men," thus taking aim at separatist strands of feminist activism (Beauvoir 2015, 195). In addition to her commitment to men and women's solidarity, Beauvoir becomes more vocal about creating coalitions across women of different backgrounds in her later writings. While she has been faulted for obscuring the specificities of the oppression of women of color (Spelman 1988; Gines 2010), one of the most significant developments in Beauvoir's later feminism resides in her attention to the conditions of working-class women and the need for international solidarity among women.

Beauvoir's Feminism and the Law

In *The Second Sex*, Beauvoir affirms the importance of women's legal status for their independence. For example, in the "History" section, she draws attention to the ways in which marriage laws have traditionally hampered women's freedom, often by depriving them of the right to dispose of their wealth. By contrast, unmarried women in Europe were largely able to live economically independent lives. Furthermore, laws banning adultery or divorce shaped their freedom: whereas men's extramarital affairs were tolerated in practice, women faced harsher censure for violating the marriage contract.

Summing up the situation of nineteenth-century French women, Beauvoir asserts: "[woman] is still no less confined to the family; divorce is still forbidden for her, and it would even be preferable for her widowhood to last forever; she has no economic or political rights; she is only a wife and an educator" (2011 [1949], 129). In

addition, for Beauvoir, women's lack of political rights played a decisive role in their condition. In fact, it is worth noting that *The Second Sex* was published only 5 years after women in France were granted the right to vote. Although she insists that "one must not think that the right to vote and a job amounts to total liberation" – women's concrete situation must also evolve – it is clear that she is writing on the backdrop of decisive changes in women's legal status around the world.

In her later feminism, Beauvoir highlights the importance of women's reproductive rights. In shorter feminist texts in the 1950s and 1960s, she regularly published on access to contraceptives and abortion. For example, in the preface to *Family Planning* (1959) by Dr. Lagroua Weill-Hallé, she advocates the use of contraceptives so that women's health is not damaged by overly frequent pregnancies and so that they can pursue careers and other activities that are often hampered by unwanted pregnancies; she also believes that both parents and children can better flourish within the family when pregnancies are planned. Turning now to abortion, Beauvoir signed the "Manifesto of the 343" (1971), stating that she had had an abortion, a document whose aim was to sway public opinion in France on the issue. A year later, she made a deposition at the Bobigny Trial, a crucial event that prefigured the legalization of abortion in France in 1975.

In later texts from the 1970s, Beauvoir continues to frame improvements in women's condition in terms of legal changes. To name one text, in "The Urgency of an Anti-Sexist Law" published in *Le monde* in 1979, she underscores the sexism implicit in a verdict acquitting a man who fatally beat his wife that year. In the same article, she argues that the French legal system failed to protect women from sexist violence and that the "sexist discrimination" encouraged by "advertisements, pornography [and] literature" could be combated by the institution of an "anti-sexist law" (Beauvoir 2015, 266). Despite the strides that many countries have made since Beauvoir's times, given the persistent inequalities between women and men, such laws and reforms remain urgent today and prove the continued relevance of her analysis of women's condition.

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Introduction

Cesare Beccaria (1738–1794) was an Italian jurist and philosopher. In little over a hundred pages, in 1764, he formulated the basis of modern criminal law.

The explicit aim of his *On crimes and punishments* was that of studying and combatting "the

cruelty of punishments and the irregularities of criminal procedures" (Beccaria 2008: 10).

This double objective pushed the author toward redefining penal law: if its primary function is to protect citizens from criminals, it should also, however, protect them from unjust accusations and must protect not only the accused from iniquitous procedures (such as torture) but also the guilty from excessive punishment.

In this overall framework, the chapter "Of the punishment of death" stands out as it includes the first complete, structured argument against the death penalty, in the name of the principle of "mildness of punishments" (Beccaria 2008: 49).

Utilitarianism

Beccaria arrived at this position by means of penal utilitarianism. But how could this have enabled him to construct a theory which so carefully defended the fundamental rights of the individual from the excessive punishment of the state?

In order to understand this, we must remember that the term "utilitarianism" serves only to describe a theory of human motivation: it is thus to be understood in the strict sense sometimes used about some eighteenth-century doctrines (such as that of Helvétius) and not in the metaethical use which became standard only with Jeremy Bentham, although it is true that Bentham himself identified a source of his own thinking in the convincing motto of Beccaria according to which the only true task of the law was "the greatest happiness shared among the greatest number" (Beccaria 2008: 9).

In this way, unlike "classic" utilitarianism, the *ante litteram* version of Beccaria was perfectly in line with a concept of justice founded on consensus, and thus on the juridical model of the contract (Francioni 1990).

In the contractual models that preceded Beccaria, sentences were considered legitimate as long as they either conformed to the natural right to punish (Locke) or met the criteria of efficiency with respect to deterrence and reparation (Pufendorf). Beccaria aligns himself with the latter, with the difference that in his model of contract, punishments are not left to the discretion of the sovereign but are desired and chosen by the citizens themselves. They are thus legitimate only if they conform, first of all, to the innate human desire for liberty and security. This theoretical starting point itself brings with it a redefinition of penal law, no longer the defense of the sovereign against social disorder but that of the citizen against personal violence, indeed against all violence, including that of the state.

In order to define a legitimate penal law, then, it is necessary to start from what men and women desired when they entered into society: what they wanted was to flee from "a perpetual state of war where the enjoyment of liberty was rendered useless by the uncertainty of its preservation" (Beccaria 2008: 19). In short, they wanted to make their freedom useful. This description implies two things from which all the principles of penal law derive.

The primary objective of society is the usefulness of the individual. Men and women are indeed so interested in their present welfare that it was only the necessity of procuring it which gave rise to the institution of a civil order.

The first consequence of this is the principle of the lesser evil: men and women have been able to accept only minor sacrifices, conceding to the sovereign the least power possible. A penal order is thus just only if it has recourse to the least necessary evil: the punishment must inflict the least restriction and the least suffering possible.

A second consequence is the principle of materiality, which represents the translation, in penal terms, of the general principle of secularism. It is possible to prohibit an action only if it endangers civil life, only if it produces real and materially observable damage, and not for moral or religious reasons: only real, externalized behavior can be prohibited, not only thoughts or intentions.

A third consequence is the exclusively preventive function of punishment. A punishment is evil and a useless evil is irrational or cruel. And as only the future can be changed, any retributivist justification of punishment should be rejected. Punishment is meted out not because the perpetrator deserves it but so that he or she does not commit further crimes.

Even before Kant, Beccaria figured out the mutually exclusive nature of the two concepts of

retribution and prevention, rejecting, however, the first, and provoking fierce criticism on the part of the German philosopher. To decide upon or inflict a punishment in relation to higher ideals (whether moral or religious, retributive or for the purposes of expiation) or to lower passions (anger, revenge) is to go against human reason, entirely oriented toward the legitimate desire for happiness. Still following the utilitarian perspective, the essential principle of the proportionality of the punishment is justified independently of any reference to retribution.

This penal utilitarianism, however, is not in contradiction with the principle of the least evil possible because, following Montesquieu, Beccaria thinks that the deterring force of punishment is not proportional to the pain that it inflicts. The legislator can and must, therefore, follow a principle of parsimony in punishment, and give sentences which are milder when they can be shown to be as deterrent or even more deterrent than harsher ones.

Humanitarianism

The fundamental aim of civil society remains, however, freedom, as this is the very condition of utility. True human freedom can be defined, nonetheless, not by its physical or metaphysical source, but by its real practical application. This depends on the reasonable certainty of being able to undertake any legitimate action without fear of being prevented by the arbitrary will of others. In the permanent uncertainty of the state of nature, in fact, fear inhibits every action: in this case there is independence but not true freedom.

On the level of punishment, the first consequence is the need for the rigid application of the principle of legality, according to which there are no offences or punishments which have not previously been specified in law. If a judge could choose the punishment on the basis of a personal evaluation of its social usefulness, citizens would return to that state of uncertainty that criminal law itself had the task of eliminating.

Another consequence is the principle of the presumption of innocence, which must protect the accused from any violence before the sentence: "No man can be considered guilty before the judge has reached a verdict" (Beccaria 2008: 32).

A third consequence is the principle of the personal nature of the punishment, which must never be inflicted on any other than the guilty person, even if this injustice could be useful as an intimidatory action.

The "humanitarian" emphasis of Beccaria regarding the rights of the individual, then, derives from his "utilitarianism." This is based on a vision of man as a feeling being who desires to suffer as little as possible, to be able to seek happiness, and to use concretely his freedom, understood to mean "belief in one's own security" (Beccaria 2008: 58).

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Behavioral Economics and Law

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Introduction

An important development in legal theory at the end of the twentieth century and the beginning of the twenty-first century has been the incorporation of behavioral insights into legal analysis. In part as a reaction to economic analysis of law, legal scholars have realized that inasmuch as the law strives to influence human behavior, it must take into account scientific findings about human judgment, decision-making, and behavior. This entry briefly describes those findings, their normative and policy implications, and the challenges facing behavioral-legal analysis.

An Overview

In the past four decades or so, the most influential interdisciplinary school of thought in North America – and, increasingly, in other parts of the world – has been the economic analysis of law (Posner 2011; "Economic Analysis of Law"). This perspective uses economic methodology – particularly microeconomics and game-theory models – to explain existing legal norms and institutions. It also assesses them normatively from the perspective of efficiency, which is the yardstick used by welfare economics (the normative branch of economic analysis).

Economic models make simplifying assumptions. One of the standard assumptions is that people are *rational maximizers* of their utility (i.e., of their well-being, as measured by the extent to which their preferences are satisfied). This *economic rationality* premise consists of two elements: cognitive and motivational. Cognitively, it is assumed that the structure of people's preferences satisfies basic requirements, such as transitivity (e.g., if a person prefers A to B and B to C, then she necessarily prefers A to C) and that their strategy of decision-making complies with certain requirements – such as taking all available information into account and disregarding any irrelevant information. Motivationally, the assumption is that people seek only to maximize their own utility (and firms seek to maximize their profits) – and nothing else. This means that people do not care about the welfare of others (they are neither altruistic nor envious) and are indifferent to values of fairness and justice – unless promoting such values is instrumental to maximizing their own welfare. As a normative theory, welfare economics is basically a *consequentialist* moral theory (Hausman and McPherson 2006; Zamir

and Medina 2010). This means that, unlike *deontological* theories, it maintains that the only factor that ultimately counts in evaluating the morality of an act or a rule is its consequences. For example, it contends that there is nothing inherently wrong in killing one innocent person, if that is the only way to save the lives of two others (Kagan 1998).

While economists recognize that human cognition and motivation are not invariably rational in the senses described above, they do tend to believe that economic rationality is a reasonable approximation of reality and – even if it is not – that the costs of the added complexity due to introducing any deviations from these assumptions into economic models would usually exceed their benefits in terms of greater conformity with reality. Many economists also believe that even if people do not always behave like rational maximizers, normatively they *should* behave that way.

In part as a reaction to this *rational choice theory* (RCT), which underpins economic analysis, ever since the 1950s, psychologists have experimentally questioned the descriptive validity of that theory, in a field of research that has come to be known as *judgment and decision-making* (JDM). The two leading figures in this field – who contributed immensely not only to the study of JDM but also to the introduction of its findings into economic theory since the late 1970s, thereby establishing the subdiscipline of *behavioral economics* – were Daniel Kahneman and Amos Tversky (Kahneman 2003). Researchers in this tradition have demonstrated that people's judgments and decisions systematically deviate from the assumptions of economic rationality. Not only do people deviate from the premises of cognitive rationality, they also care about others and about fairness (so much so, that they are willing to eschew profitable but unfair courses of action), and their moral convictions are typically not consequentialist. Thousands of studies have identified a long list of *heuristics* (Baron 2008; Keren and Wu 2015), or cognitive shortcuts, that allow people to make quick, intuitive judgments and decisions without deliberation. Such heuristics are usually extremely effective, given the limits of our cognitive resources, but they also result in systematic and predictable deviations from RCT. Notable examples are:

- *Availability*: People often determine the likelihood of events and the frequency of occurrences according to the ease of recalling similar events or occurrences. For example, one might assess the frequency of divorce in society by recalling instances of divorce among one's acquaintances.
- *Hindsight bias*: People tend to overestimate the probability of an event once they are aware that the event has occurred. For example, people tend to believe that an accident that has actually occurred was foreseeable ex ante.
- *Loss aversion*: Contrary to RCT, the disutility generated by a loss, relative to some reference point, such as the status quo, tends to be greater than the utility produced by a gain of similar magnitude, relative to the same reference point. Losses, in other words, loom larger than gains. Thus, not receiving a salary raise is usually less painful than having one's salary reduced, even by a smaller amount.
- *Risk seeking in the domain of losses*: In line with expected utility theory, individuals tend to be risk-averse in the domain of gains. Thus, most individuals would rather accept a sum of $500 than take part in a gamble where they are equally likely to win $1000, or nothing at all. Conversely – and contrary to expected utility theory – individuals tend to be risk seeking in the domain of losses: most individuals would prefer to participate in a gamble where they are equally likely to lose $1000 or nothing at all than incur a certain loss of $500.
- *Framing effects*: People's choices sometimes depend on the way the outcomes are presented to them, such that their choice between *identical* outcomes can be reversed, depending on their presentation. For example, when choosing between two medical treatments with equal expected outcomes, when the outcomes are framed in terms of survival rates, most people tend to opt for the safe treatment ("200 out of 600 will be saved") rather than the risky one ("there is a 1/3 probability that all 600 will be saved"). However, when the same results are

framed in terms of mortality rates ("400 will die for sure," or "there is a 1/3 probability that nobody would die and 2/3 that everyone will die"), most people opt for the riskier treatment, because they are risk seeking in the domain of losses.

- *Omission bias*: When a choice involves both benefits and costs, prospects and risks, people often prefer to avoid making any active decision – i.e., to stick to the status quo. Relatedly, people feel greater responsibility for outcomes that they have actively brought about than for outcomes that they cause by omission. Thus, many people would refrain from vaccinating their child against a disease that has a 1:500 probability of causing death, if the vaccine itself can cause death with a probability of 1:1000.
- *Endowment effect*: Individuals tend to place a higher value on objects and entitlements that they already have than on objects and entitlements they do not. Contrary to standard economic analysis, this implies that even in a world in which entitlements are transferable and transaction costs are zero, the initial allocation of entitlements by the law may well determine their final allocation.
- *Sunk costs and escalation of commitment*: While RCT posits that in choosing between different courses of action only future costs and benefits should be taken into account, people often do not disregard *sunk costs*. Rather, the more resources, time, or efforts they have invested in a given endeavor, the more they persist in it.
- *Confirmation bias*: People are inclined to gather and process information in a manner that confirms their prior beliefs and commitments, rather than impartially and open-mindedly.
- *Over-optimism*: People are prone to overestimating the prospects of positive or desirable events and to underestimating the prospects of negative or undesirable ones.
- *Better-than-average effect*: Most people evaluate themselves more favorably than they evaluate their peers. For example, one study found that approximately 80% of the subjects believed that they were safer drivers than the median driver.
- *Naïve realism*: We tend to believe that we see the world around us objectively, while people who disagree with us must be uninformed or biased.
- *Anchoring and adjustment*: When people are presented with a salient number before they make a numerical judgment, they tend to make their judgment through adjustments from the initial number, which serves as an anchor. These adjustments, however, are often insufficient, and so the judgment is biased toward the anchor (even when people are aware that the anchor number was set arbitrarily).
- *Compromise effect*: People tend to choose intermediate rather than extreme options. For example, when choosing between a medium-quality and a low-quality product, a consumer may opt for the latter; but if a high-quality product is added to the menu, the consumer might well opt for the medium-quality one.

In addition to studying such heuristics and biases, much research has examined individual differences in reasoning, as well as how judgments and decisions are affected by expertise, group decision-making, and cultural differences – revealing a complex picture in each case. Considerable research has also been done on techniques that people, organizations, and governments might use to improve judgment and decision-making – i.e., to *debias* cognitive biases. Again, the emerging picture is mixed: while some techniques reduce (but do not necessarily eliminate) some biases, other techniques are ineffective or even counterproductive.

Over the years, JDM studies have gradually expanded in scope and methodology, blurring the boundaries with other spheres. A rapidly growing body of neuropsychological studies, using functional magnetic resonance imaging (fMRI) and similar techniques, has opened up new frontiers in understanding the neural underpinnings of cognitive processes. Beyond JDM, behavioral economics draws on *social psychology* (the study of the influence of other people's

presence, actual and imagined, on people's thoughts, feelings, and behavior), *moral psychology* (the psychological study of people's moral judgments), *experimental game theory* (experiments designed to learn about general principles of strategic behavior), and more. Thus, it has been established that people care not only about their own welfare but also about fairness, reciprocity, and cooperation – and they are even willing to incur costs to punish those who behave unfairly or noncooperatively. Recent JDM studies in the field of *behavioral ethics* have focused on the circumstances and processes that prompt ordinary people to violate ethical and social norms.

Along with the introduction of behavioral insights into economic analysis, those insights have been integrated into economic analysis of law, to produce the field of *behavioral law and economics* (BLE). An ongoing exchange has evolved between JDM research, other disciplines dealing with human behavior, and legal theory (Jolls et al. 1998; Zamir and Teichman 2014, forthcoming). This exchange has recently expanded following the growing use of experimental methodologies in legal studies (Engel 2014). Today, just as economic analysis encompasses all legal spheres – private and public, and substantive and procedural – so, too, does BLE (Zamir and Teichman 2014, forthcoming).

Before proceeding to describe the impact of behavioral studies on legal theory and policymaking, two points are in order. First, the association of behavioral studies with *economic analysis* of law – rather than with *legal analysis* in general – is largely an artifact of historical development, rather than an analytical truth. Behavioral insights pose a major challenge to standard economic analysis but are just as vital to any other interpretative or normative theory of law: since the law strives to influence human behavior, it must heed empirical findings regarding human motivation, decision-making, and moral judgments. In this regard, the title of this entry is slightly misleading. Second, and closely related to the first point, while behavioral insights have had a significant impact on legal theory and policymaking, and notwithstanding the fact that this entry is part of the section on "schools of thought," the behavioral findings hardly constitute a theory or a school of thought. Rather, the behavioral perspective seeks to enrich and possibly modify other interpretative and normative theories of law.

B

Normative and Policy Implications

General. Behavioral studies can inform moral theories, which in turn inform the law. For example, studies of human happiness and of cognitive biases can inform debates about the essence of human welfare (a factor that all moral theories deem to be important), and studies of prevailing moral convictions can inform the deontology-versus-consequentialism debate. To use one example, standard economic analysis assumes that people's welfare is enhanced to the extent that their actual preferences are fulfilled. However, "if individuals do not understand how situations affect their well-being," the analysis "may be applied to individuals' actual well-being – what they would prefer if they correctly understood how they would be affected – rather than to individuals' well-being as reflected in their mistaken preferences" (Kaplow and Shavell 2002, p. 23). A full discussion of these issues is beyond the scope of this entry (see, e.g., Kahneman 2011, pp. 377–407; Mikhail 2011; Zamir 2015, pp. 177–199; Zamir and Teichman forthcoming). Instead, the following discussion focuses on more direct ways in which behavioral insights contribute to legal theory and policy. These include:

- *Exploitation prevention and paternalism*. Inasmuch as cognitive biases prevent people from attaining their goals, the law should arguably help people overcome these biases or neutralize their effects, even if this entails curtailing people's freedom of action. Less controversially, the law should seek to minimize the exploitation of such biases by others.
- *Behaviorally informed regulation*. Whatever the causes of people's suboptimal conduct – be it market failures, cognitive limitations, or anything else – psychological insights can

inform the law when considering how to improve people's choices and behavior.

- *Legal policy and decision-making.* Legal decision-makers, including legislators, administrators, judges, juries, and lawyers, are human beings. As such, they themselves regularly use heuristics and are susceptible to cognitive biases. Numerous studies that were conducted with judges have demonstrated that anchoring, hindsight, framing, and other cognitive biases influence judges' analysis of legal vignettes; though in some contexts (such as the determination of probable cause), judges do overcome some of the pitfalls of human decision-making (Guthrie et al. 2007; Rachlinski et al. 2011; Teichman and Zamir 2014; Robbennolt 2014).
- *Explaining and justifying basic features of the law.* It has been argued that very basic features of practically all legal systems – such as the limited role of unjust enrichment compared to tort law and the lesser protection of social and economic human rights compared with civil and political ones – can be explained and justified based on the notions of reference dependence and loss aversion (Zamir 2015).

Due to space limitations, only the first two of these four major contributions will be discussed.

Exploitation prevention. When repeat players deliberately manipulate people's biases, as in dubious marketing techniques used by firms, regulation may be warranted on grounds of efficiency, fairness, or distributive justice. Marketers take advantage of customers' heuristics and biases in innumerable ways, including the use of odd pricing (e.g., $99.99); the framing of prices as involving discounts (e.g., for paying in cash or for dining at noon) rather than surcharges (for buying on credit or for dining in the evening); portraying product attributes in a positive light ("95% fat free") rather than in negative terms ("containing 5% fat"); artificially limiting the availability of products to make them seem more attractive; postponing the provision of negative information (such as one-sided contract terms) to the very end of the contracting process, to exploit consumers' escalation of commitment (after spending time and effort in selecting the good, negotiating its price, and so forth); using lenient return policies that take advantage of consumers' underestimation of the power of the endowment effect; and making long-term contracts (e.g., for gym membership) that capitalize on people's over-optimism and myopia (Bar-Gill 2012, pp. 7–23, 78–97, 156–165, 185–191, 205–229; Zamir 2015, pp. 55–66).

Drawing the lines between legitimate and illegitimate advantage takings, and between illegitimate advantage takings that merit regulation and those that do not, requires close attention to the circumstances of the particular context and the relevant considerations of liberty, efficiency, redistribution, and fairness, as well as to institutional considerations. Here are two examples of arguably sensible, behaviorally based regulation. One example comes from the European Commission's Directive on Unfair Consumer Practices, which characterizes as unfair and misleading the practice of "[f]alsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice." (Item 7 of Annex I of Directive 2005/29/EC of 11 May 2005). The other example is a 2014 amendment to the Israeli Consumer Protection Law, 1981 (Section 13A1 & Fourth Supplement), which provides customers with an inalienable right to unilaterally cancel gym memberships and contracts for time-share rights in resort units.

Legal paternalism. Paternalism is an intervention in people's freedom to further their own good. Paternalistic interventions abound in both private and public life, including the law. Examples of legal paternalism include the obligatory use of safety measures while driving or working in high-risk environments, compulsory pension arrangements and health insurance, compulsory elementary education, "sin taxes" on tobacco and other unhealthy products, and helping the poor by providing them with food stamps rather than cash. Notwithstanding its prevalence, legal paternalism is hotly debated, but delving into this debate is beyond the scope of the present

discussion (see generally Zamir and Medina 2010, pp. 313–347; Conly 2013).

The most important contribution of behavioral studies to this debate lies in the recognition that even in the absence of information problems or other external obstacles to making rational choices, people often fail to maximize their own utility due to a host of systematic and predictable cognitive biases, such as over-optimism, myopia, the confirmation bias, and problems of self-control. These findings do not give policymakers carte blanche to paternalistically curtail people's freedom. Rather, careful examination of the factual circumstances and normative considerations must be made in each and every context, before people's freedom is limited for their own good (Rachlinski 2003; Zamir 2015, pp. 220–224). The behavioral research nevertheless largely refutes the epistemological argument against paternalism – namely, the claim that individuals always know best what would make their lives better – and therefore paternalistic interventions are always likely to be counterproductive (Mill 1859/1991, pp. 14, 84–85, 92–93).

Nudges. Whatever the law's goals (be it protecting human rights, redistributing resources, encouraging people to contribute to the public good, overcoming market failures, or protecting people from their own fallibilities), it has at its disposal a huge range of means to attain these goals – from mandatory rules backed up by criminal sanctions, through default rules that people can opt out of, to disclosure duties that provide people with the necessary information to make their own decisions. Behavioral insights can contribute to all of these devices. For example, they may be used to increase the deterrence effect of the criminal law and enhance tax compliance.

One set of means that has attracted considerable attention in recent years is the use of *nudges* – "low-cost, choice-preserving, behaviorally informed approaches to regulatory problems" (Sunstein 2014, p. 719). This broad definition covers behaviorally informed disclosure duties, providing people with information about the compliance of other people with desirable social norms, forcing people to make decisions they might otherwise postpone endlessly, and setting self-benefitting and socially desirable default rules (see, generally, Thaler and Sunstein 2009). As some of these examples indicate, nudges may be used both as a mild paternalistic measure and as a means to otherwise enhance the overall good. Hence, there is only partial overlap between nudges and legal paternalism. The single most important nudging strategy appears to be default arrangements.

Standard economic analysis sees default rules as a means of enhancing efficiency by reducing transaction costs and inducing information sharing. Default rules that reflect the prevailing preferences of those to whom they apply save those people the costs of actively adopting those arrangements. Concomitantly, when people opt out of the default, they convey information to uninformed parties. For example, a default rule whereby a supplier is liable for certain product defects, unless it explicitly exempts itself from such liability, conveys valuable information to the customer, because opting out of it clarifies the scope of the supplier's liability. While this analysis is illuminating, it has long been realized that it does not fully account for the observed "stickiness" of default rules.

A primary explanation for default rules' stickiness, or the *default effect*, lies in the *omission bias* – people's tendency to avoid active choices between options that involve both advantages and disadvantages or prospects and risks. It has been shown that default rules set a reference point which people are often reluctant to deviate from – thereby directing behavior in desirable ways. For instance, due to shortsightedness and hyperbolic discounting, people often do not save enough for retirement. One study examined the rate of employee participation in a retirement savings plan at a large US corporation, before and after a change in the default. Before the change, employees were required to affirmatively choose to participate; after the change, new employees were automatically enrolled in the plan unless they opted out of it. The change of default resulted in a dramatic increase in retirement plan participation (Madrian and Shea 2001).

A powerful default effect has been demonstrated with regard to postmortem organ donations as well. In some countries of the European

Union, people are considered organ donors unless they register not to be, while in others no one is an organ donor without registering to be one. The donation rate in most presumed-consent countries is close to 100%, while in the explicit-consent countries, it ranges from 4% to 27% (Johnson and Goldstein 2003). Again, this difference is most likely a product of the omission bias. This bias is particularly strong in the context of organ donation because any decision in such matters requires one to face one's own mortality – an issue most people prefer not to think about.

Behavioral studies also show that default arrangements may have a direct distributive effect due to the endowment effect. If people who have a certain entitlement by default (say, an annual paid vacation of a given duration) value it more highly than people who must purchase it, the very allocation of the entitlement by a default legal rule benefits those people (see, e.g., Schwab 1988).

Despite their innocuous nature, nudges – particularly the use of self-benefitting default rules – have been fiercely criticized from two opposite directions. Some argue that these techniques work best in the dark and therefore effectively manipulate people's cognitive limitations. Arguably, exploiting imperfections in human judgment and decision-making – such as the omission bias – undermines people's control over their choices and is therefore more threatening to their autonomy than overt coercion (Rebonato 2012). Conversely, others point out that proponents of libertarian paternalism, especially in the US discourse, have often disregarded behavioral findings that call for much stricter limitations on people's choices, such as mandatory pension savings, for reasons of political expediency – thus failing to pursue the full implications of the behavioral findings (Bubb and Pildes 2014).

Critique

A host of critiques have been leveled against JDM research, as well as its implications for economic analysis in general and for economic analysis of law in particular. One critique is that the JDM research agenda has overemphasized the instances in which heuristics lead people astray, when in fact heuristics are an excellent, fast, and frugal way of decision-making in most cases (Gigerenzer et al. 1999). While this contention may well be true, its implications appear to be limited – akin to asking whether the glass is half empty or half full. Some commentators, especially those concerned about the possible paternalistic implications of JDM studies, have questioned the external validity of JDM laboratory findings, arguing that they may disappear with monetary incentives or that the market is expected to drive out bad judgment (see, e.g., Mitchell 2002). However, these claims run counter to the findings of thousands of empirical studies. These include studies attesting to the prevalence of cognitive biases in real-life behavior and studies demonstrating that incentives often do not eliminate biases and sometimes even exacerbate them. Moreover, while market competition may possibly drive out firms whose managers fall prey to cognitive biases, competition concomitantly *strengthens* the incentive for suppliers to exploit consumers' biases.

Finally, an important critique commonly leveled against behavioral studies is that they produce a long list of heuristics and biases, rather than a unifying, simple model of judgment and decision-making of the sort provided by RCT. In response, considerable progress has been made in recent years in systematization and theorization of JDM. However, ultimately one must concede that there is an inevitable trade-off between descriptive validity and simplicity. As Kahneman has put it, "life is more complex for behavioral economists than for true believers in human rationality" (Kahneman 2011, p. 412). Disregarding this complexity and pretending that people are rational maximizers is not a compelling strategy for legal theoreticians and policymakers, since the law has a powerful impact on the real lives of real people.

Conclusion

Human psychology is complex. People's decisions and behaviors are the product of conscious and unconscious processes that do not necessarily comport with simple models of rationality, either cognitively or motivationally. The impressive progress made in the behavioral sciences in the past decades allows legal scholars and policymakers to better

understand human behavior and more effectively influence it, while paying heed to the relevant normative considerations. At the same time, realizing that our understanding of human judgment and decision-making is still tentative and incomplete calls for caution and humility.

Cross-References

► Transnational Legal Normativity

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Bell, Derrick

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Introduction

Derrick Bell (1930–2011) was an American legal scholar whose contributions to the origins

and development of the field known as critical race theory (CRT) are unparalleled. Bell's examinations of US case law on race and racism inspired a fundamental shift in the way race was studied in the American legal academy, fueling the birth and rise of the CRT movement. Bell's work proved influential well beyond the legal domain, reverberating deeply in fields such as Africana Studies, political theory, philosophy of race, pedagogy, and literary studies, where they remain widely read and taught. Few thinkers emerging in the public eye in the post-Civil Rights era can make a stronger claim to influencing the way race in the United States is understood than Bell.

Biographical Information

Derrick Albert Bell, Jr. was born in Pittsburgh, PA, in 1930. After serving in the Air Force as a young man, Bell received his legal training at the University of Pittsburgh and began practicing as an attorney working for the civil rights division of the US Justice Department and, subsequently, the National Association for the Advancement of Colored People (NAACP).

After years of litigating school desegregation cases, Bell entered the professoriate, working first at the University of Southern California and then Harvard. Beginning with publication of the first edition of his highly influential casebook, *Race, Racism & American Law* in 1973, Bell became one of the US's most read and most influential legal scholars, and perhaps its preeminent scholar on race and the law.

His influence as a writer and theorist was echoed by the high-profile nature of his professional affairs. He left two appointments – as dean of the University of Oregon School of Law and as professor at Harvard after returning from Oregon – in protest over his institutions' failures to hire and tenure women of color. Bell continued his scholarship out of a visiting appointment at New York University from 1991 onward, publishing a number of books and articles throughout the 1990s and 2000s, before dying of cancer in 2011.

Interest-Convergence

The predominant approach to race in US legal scholarship prior to Bell was to look at particular cases as succeeding or failing in advancing American progress toward racial justice. Bell's scholarship sought to elucidate a unifying, systematic dynamic that could explain American race law as a whole, and in so doing he offered an account inflected with many of the tenets of the American Legal Realist movement, eschewing attention to the formal dimensions of jurisprudence in favor of an empirical examination of the interests undergirding legal decision-making.

Bell articulated the thesis most directly in his 1980 Harvard Law Review article, "*Brown vs. Board of Education* and the Interest-Convergence Dilemma." In Bell's words, "[T]his principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites" (Bell 1980). In short, Bell's explanation for cases that appeared to advance the cause of racial justice was that they did so in order to advance white interests, and not black interests as such; the advancement of black interests was temporary or simply illusory.

Bell maintained that *Brown* fit into a larger pattern of American legislation and litigation. For this pattern, the law's indifference to black interests serves as the norm; typical American laws and court rulings at best are unconcerned with securing benefits for black people and at worst seek out black regress and suffering. Atypical cases, in which black interests are purportedly advanced, emerge only when they serve white interests, though the white stake in such outcomes may often be subtle or concealed. This is made plain in the aftermath and enforcement of these atypical cases, which are on Bell's account universally loaded with phenomena of backlash and rollback. Grand victories for black people subsequently depreciate in value through lackadaisical or contradictory efforts at implementation, and this depreciation is coupled with the stoking of antiblack sentiments that engender corresponding losses in other dimensions of black social and political life. "Civil rights gains," Bell concluded,

"are less the result of effective pleading of injustices than they are of policymakers recognizing that responding at least in part to those pleadings will advance interests of value to them or to the country generally. Later, when conditions change and the promised remedies are no longer viewed as helpful and instead become a possible economic or political risk, they are repealed, downgraded, or simply forgotten" (Bell 2008).

Brown figured as a paradigmatic case to which Bell returned throughout his career. Bell contended that *Brown* served vital US economic and geopolitical interests, citing the importance of symbolic desegregation to winning the Cold War propaganda battle, industrializing the "sunbelt" region, and confronting the contradictions of the US military's reliance on soldiers of color. Indeed, archival research by Mary Dudziak (2000) substantiated Bell's conclusions, showing the lengths to which US officials went to influence the court to unanimously back desegregation for propaganda purposes. Despite the clear evidence of *Brown*'s benefit to white interests, though, the mainstream account regarded it as an unmitigated triumph for racial justice. Bell, however, rejected the consensus legal view that the court's desegregation order in *Brown* was legally correct and beneficial to African Americans, arguing that even if the court had acknowledged its duty to recognize black interests, it should have sought remedy through the provision of democratic access to quality education instead of presuming the intrinsic value of desegregation (Bell 2001). Hence, what *Brown* advanced was desegregation, an aim of considerable instrumental value to whites and elites at that juncture, rather than black material or pedagogical interests.

Narrating Theory

Bell's interest-convergence thesis suggested a more fundamental implication about the nature of law: that a striking portion of law's function lies in its symbolic power beyond the mere adjudication of formal doctrines and principles. Cases like *Brown* were instrumental in telling a story about the nation and about the courts: they helped create and nurture a notion of the United States as engaged in a steady, if slow, progression toward racial harmony and equality, guided by eternal principles of right that, with enough time and litigation, would cause racial inequalities to vanish.

Attention to law's narrative dimensions and skepticism about the determinacy of legal principles was not novel to Bell and the CRT movement; these notions were, inter alia, basic precepts of the legal realist movement and CRT's contemporary peer, the Critical Legal Studies (CLS) movement. But Bell led the way in seeing the implications of these insights for the *practice* of law and legal scholarship because of his concern that a business-as-usual approach to legal scholarship offered few resources to counter the dominant narrative.

Hence, Bell developed strategies to re-narrate the American understanding of race and law. The pathbreaking text in this regard was his foreword to the *Harvard Law Review*'s issue on the 1984 Supreme Court term, titled "The Civil Rights Chronicles." There, Bell began by arguing that "The myths that have... guided racial policy are manifold, operating like dreams below the level of language and conscious thought. Much of what is called the law of civil rights... has a mythological or fairy-tale quality... [T]hese myths... are not single stories or strands. Rather, they operate in a rich texture that constantly changes, concealing content while elaborating their misleading meanings" (Bell 1985). Calling for the abolition of the mythic would not overcome these tendencies, though, because the language of law and legal scholarship works within a subtly mystifying framework of presupposing and dramatically signifying objectivity in order to obscure its symbolic dimensions. Hence, Bell turned to the fantastic in order to tell stories that would utilize the reader's imagination to call attention to the realities that the commonplace, repressed myths sought to obfuscate. The article thus elaborated a series of "chronicles," fables of possible radical transformations undermined by the subtly conservative dynamics of law and American racism. The chronicles are then in turn examined through dialogue with the fictional lawyer Geneva Crenshaw,

mirroring the form of a Platonic *elenchus*, that showed the deeper truth of how race law in the United States actually operates.

Bell expanded and extended this approach in *And We Are Not Saved* (1987) and *Faces at the Bottom of the Well* (1992a), which would become two of the most widely studied texts of the CRT movement. Bell's "The Space Traders," included in *Faces at the Bottom of the Well*, came in particular to occupy a central space in debates around American racial realities. In this narrative, Bell imagines the United States being visited by space aliens who propose a deal: they will provide the United States with technologies that will cure its social and economic ails, but in exchange the United States must give the aliens its black population. The nation conducts a referendum on the proposition amidst the protest of black citizens for whom the bargain amounts to being re-sold into slavery. An elder civil rights veteran suggests that black Americans take a different tack, arguing that white Americans would only reject the referendum if black people were to state that they *wanted* to be taken by the space traders, because appeals to whites' antiblack racism are more effective than appeals to their consciences. But the black leaders and masses reject this counsel, and their civil rights protests fall on deaf ears; whites vote overwhelmingly to sell their black peers in exchange for the purported national interest.

Racism's Permanence and Ethics of Struggle

If the mythic character of American racial progress called for reorienting legal thought in a narrative direction, what were its implications for the practical project of confronting racial domination and oppression? Bell devoted much of his output in the 1990's and beyond to addressing this question. His contributions centered on the acceptance of a basic precept: the permanence of American antiblack racism.

Accepting the permanence of antiblack racism, Bell argued, could liberate black praxis from the grip of American racial illusions. On the theoretical side, Bell eventually articulated this position in terms of "Racial Realism." "Black people need reform of our civil rights strategies as badly as those in the law needed a new way to consider American jurisprudence prior to the advent of the Legal Realists," Bell wrote. "By viewing the law—and by extension, the courts—as instruments for preserving the status quo and only periodically and unpredictably serving as a refuge of oppressed people, blacks can refine the work of the Realists" (Bell 1992b). For Bell, successive waves of racial remedies in the law changed the terms of white domination but not its basic form. Failure to apprehend this reality doomed practical interventions to merely recapitulating these dynamics. "Racial Realism" was thus put forth as a fundamental reorientation of black struggle, in which the acknowledgment that black Americans' subordinate status is a *permanent* one "enables us to avoid despair, and frees us to imagine and implement racial strategies that can bring fulfillment and even triumph" (Bell 1992b).

Realism about racism's permanence – and American law's incapacity to alter this condition – did not, for Bell, grant license to proceed indifferently or justify nihilism. Rather, Bell offered passionate meditations on the value of protest and the meaning of struggle in light of the pointlessness of hoping for American racial equality (Bell 1994, 2002; Leonardo and Harris 2013). In one respect, it could be argued that Bell sought to reject a teleological conception of ethics, defending the intrinsic value of resistant protest, regardless of its inefficacy in begetting transformative change. For Bell, it was important not to lose sight of the imperative to protest in the face of injustice, despite one's knowing that such protest would not yield deliverance and the eventual attainment of justice.

By the same stroke, though, Bell's calls for protest and struggle in the face of permanent racism are not entirely divorced from a consideration of ends. Acknowledging such permanence is seen as serving at least two crucial aims. For one, it simply yields a healthier psyche: one who pursues an illusory end of thoroughgoing racial equality is likely to suffer considerable psychological damage. Moreover, the racial realist engaged in struggle will not seek racial equality as an end, but

because of the acceptance that such an end is not worth pursuing, may come to have a better understanding of how other instrumental ends may be achieved. The tension between a moral imperative to challenge unjust authority and the existential determination that one's acts cannot undo injustice is mediated by the realization that protest can be directed toward aims other than the illusory ones semi-promised by one's oppressors. In sum, for Bell, the struggle against a permanent racism is both right and good, even though it will not thereby render that racism impermanent.

Influence

Bell's contributions are, by consensus, among the most influential in the development of the field of Critical Race Theory, and Bell is widely regarded as the singularly most important figure in the development of the field (Delgado 2000). Bell's focus on narrative as an object of analysis, as well as his inventive use of fables, dialogues, and memoir throughout his corpus, would prove extremely influential for CRT. The examination of narrative came to be a central analytic focus of the movement, and the production of counternarratives on Bell's model – including Richard Delgado's highly acclaimed chronicles of Rodrigo Crenshaw, Geneva's fictional brother (Delgado 1995) – would serve as a cornerstone of its methodological approach. On the one hand, Bell's formative influence contributed to considerable criticism of Bell within the broader CRT movement: critics regarded Bell as exemplary of troublesome paradigms in the study of American race and law, such as the reduction of racism and civil rights to dynamics of black and white to the exclusion of Latinx, Native American, and Asian-American people, as well as the under-theorization of intersectional and gendered dimensions of racism (Harris 1993; Perea 1997; Vargas-Vargas 2014). On the other hand, little of this work sought to challenge Bell's basic theoretical positions on white domination and black oppression; rather, the bulk of critical race theorists sought to apply Bell's major theses to areas that lay beyond his analytical scope (Delgado 2006; Johnson 2013). Bell's theses on the permanence of American racism find contemporary resonance, as well, in ongoing debates surrounding the Afropessimism movement and the study of coloniality and global decolonization, where many find his work to be of a piece with examinations broader dynamics of white hegemony in the modern world in which black existence is subject to systematic dehumanization and abjection (Ray et al. 2017; Lynn et al. 2013). Moreover, beyond the domain of the study of race and racism, Bell's articulation of an interest-convergence schema has been utilized by legal scholars in other contexts to account for apparent advances for communities whose interests do not seem to be routine matters of concern for American jurists (Satz 2009; Setty 2014).

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- ▶ Critical Theory and International Law
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Bellarmine, Robert

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Introduction

Robert Bellarmine (1542–1621) was one of the most influential theologians and political theorists in post-Reformation Europe, especially well-known for his doctrine of the indirect power of the Pope in temporal affairs, or *potestas indirecta*. Bellarmine was also a powerful member of the Curia. Appointed to the Cardinalate in 1599, he served as a member of the Congregations of the Inquisition and Index of Prohibited Books (Godman 2000), and directly participated to several important political and theological conflicts, such as the controversy over the Oath of Allegiance in England, the controversy over the *Interdetto* in Venice, and the first phase of the trial against Galileo Galilei. He died in 1621, and was canonized in 1931.

Early Life

Born in 1542, Bellarmine entered the Society of Jesus in 1560 and studied at the Roman College, which was the center of Jesuit learning and one of the most prestigious institutions in early modern Catholic Europe. In 1569, he was sent to Louvain, where he acquired a great reputation for both his theological knowledge and his skills as a preacher. In 1576, he was called back to the Roman College, to occupy the chair of *Controversiae*, that is, to teach the course on the leading theological controversies between Protestants and Catholics. In 1592, Bellarmine became Rector of the College. The lectures soon grew into one of Bellarmine's major works, the *Disputationes de controversiis fidei,* or simply *Controversiae* (Motta 2005), in which Bellarmine laid out the theoretical groundwork for one of his better-known doctrines, the theory of the *potestas indirecta*.

The *Potestas Indirecta*

Bellarmine elaborated his theories on the nature and extent of the Pope's authority in temporal matters in the context of two important developments in the political and religious history of early modern Europe. The first was the growth of the Protestant territorial churches, and the second was the emergence and consolidation of the nation-states. Bellarmine's doctrine of the *potestas indirecta* centers on two main assumptions. First, Bellarmine argued that the political

authority of the sovereign does not depend on God's grace, but it is rather firmly grounded on natural and divine law, and thus to an extent autonomous with respect to the Catholic Church. This view of the nature of political authority was one of the main theoretical contributions of the so-called School of Salamanca or Second Scholastics, led by the Dominican theologian Francisco de Vitoria (Giacon 1944–1950; Skinner 1978). Vitoria and his pupils sought to oppose the Protestants' reading of Augustine, according to which government was both the punishment and the remedy for mankind after the fall. On the contrary, they claimed that the tendency to live in society was "natural," proceeding from the law of nature, which was both the expression of God's will and the manifestation of human rationality (See ▶ "Positive Law and Natural Law"). Consequently, for Bellarmine and the other thinkers of the Second Scholastics, the political authority of the sovereigns of the pre-Christian and non-Christian world was as legitimate as that of Christian princes. Since the Christian commonwealth is not identical with the political commonwealth, Bellarmine argued, the Pope cannot be said to have direct control over the subjects of the political sovereign, who alone is entrusted by God with the charge of governing the people.

The second key idea underpinning Bellarmine's theory of the *potestas indirecta* is that while the political authority of the sovereign does not depend on the Church, nevertheless political government is not completely separate from the Christian commonwealth. In fact, there is a point where the temporal and the spiritual spheres merge, and that point is humanity's ultimate end, the attainment of eternal life. Human beings, Bellarmine argued, are composed of body and soul, and while the temporal sovereign is entrusted by divine and natural law with the task of governing the former, the Pope is charged by God with the duty of governing the latter. Since the salvation of the soul is far more important than the well-being of the body, the Pope is allowed, and indeed required, to intervene in matters of politics whenever the political sovereigns jeopardize the spiritual life of their subjects. While the temporal sovereign is the supreme authority in purely political affairs, when it comes to spiritual matters, the sovereign is no longer in a position of primacy, but she or he, just like any other Christian woman or man, is subject to the authority of the Pope (Höpfl 2004; Tutino 2010).

Bellarmine's theory was immediately the object of intense criticism. On the one hand, it forcefully reasserted the spiritual supremacy of the Pope, which stirred the virulent opposition of the Protestant theologians. On the other hand, however, it also crucially undermined the authority of the temporal sovereign, because while it recognized that the legitimacy of the political authority did not depend on the spiritual and theological authority of the Church, nevertheless it subordinated the power of the Christian sovereigns to the spiritual primacy of the Pope. Thus, several temporal sovereigns, both Protestants and Catholics, opposed Bellarmine's theory, because they believed that it provided the theoretical justification for their subjects to resist against their authority for the sake of their souls' salvation.

Furthermore, Bellarmine's doctrine of the *potestas indirecta* was criticized even within the Roman Curia for widely different reasons. Some theologians and Catholic leaders, faithful to the Catholic Conciliarist ecclesiological tradition, believed that Bellarmine's theory was a radical new attempt to firm up the absolute authority of the Pope within the Church at the expense of the authority of the Council and of the rest of the clergy. Other Catholic leaders, by contrast, thought that Bellarmine had not defended the authority of the Pope strongly enough, having downgraded it, so to speak, from the medieval *plenitudo potestatis,* or plenitude of power, to a merely indirect form of authority (Frajese 1984, 1988). Among the latter kind of enemies, there was also Pope Sixtus V. During the course of his Papacy, Sixtus V took several actions against the leadership of the Jesuits, guilty, in his opinion, of supporting doctrines that diminished the authority of the Bishop of Rome (Mostaccio 2004). In 1589–1590, the Pope took direct aim against Bellarmine's theory and moved to put the first volume of the *Controversiae* on the Index of

Prohibited Books while Bellarmine was in France on a diplomatic mission. The Society of Jesus rallied in support of one of his most famous and well-respected members, and Bellarmine's colleagues on the Index and Inquisition also resisted what they thought was a dangerous attempt to undermine the credibility of the entire Catholic censorship apparatus. In 1590, Sixtus V died, and any attempt to officially censure Bellarmine's doctrines died with him (Le Bachelet and Marie 1907; Tutino 2010).

Political and Theological Conflicts

After the death of Sixtus V, Bellarmine's star rose higher and higher, especially during the Pontificate of Clement VIII. In 1599, Bellarmine was appointed Cardinal and soon after became one of the Pope's main advisers on the so-called controversy *de auxiliis.* One of the most delicate controversies of the early modern Catholic Church, it began in 1588 with the publication of the Spanish Jesuit Luis de Molina's *Concordia liberi arbitrii* cum *gratiae donis,* considered by many theologians, and especially Dominicans, to have a Pelagian flavor. The controversy caused a dangerous breach within the Church concerning the role of grace in human salvation, a key doctrinal division between Protestants and Catholics. The controversy ended only in 1607, when Pope Paul V avoided an official decision and commanded Jesuits and Dominicans to refrain from publicly discussing the matter. During the long debate Bellarmine demonstrated his skills of intellectual and political diplomacy: despite being a Jesuit, he did not side completely with Molina, and worked to avoid the scandal that an open authoritative condemnation of either position would have caused the Catholic Church.

At the beginning of the seventeenth century, Bellarmine defended the political and theological implications of his doctrine by intervening directly in several controversies, starting with the conflict that pitted the Roman Curia against the Republic of Venice. The conflict started in 1604–1605, when the Venetian Senate issues a series of laws attacking clerical exemption from civil jurisdiction and forbidding churches from being built and ecclesiastical properties from being alienated without the Senate's approval. Pope Paul V was enraged at what he thought was an attempt on the part of the Venetian political leaders to illegitimately claim for themselves jurisdiction on matters that should have remained within the purview of the Church. When Paul V saw that the Venetian Senate was not going to repeal those laws, in 1606 he issued an *Interdetto* against the Republic of Venice, effectively excommunicating the entire state (Bouswma 1968).

The authors who wrote in defense of Venice, and especially Paolo Sarpi, probably the most effective supporter of the cause of the Republic, often mentioned Bellarmine as an author whose doctrine would indeed support the Venetian laws, as it was Bellarmine who, after all, had written against the direct power of the Pope in temporal affairs. The Jesuit Cardinal responded in a number of pamphlets defending both the exemption of the clergy and his own doctrine from Sarpi's accusations.

In the middle of this debate, Bellarmine's position, once again, caused some problems in Rome, where some theologians thought it more effective to reply to the Venetian controversy not by stressing the indirect power of the Pope in temporal matters, but by reenforcing the plenitude of power of the Papacy tout-court, in temporal as well as in spiritual matters. Indeed, in 1607, Bellarmine decided to publish a review of his own printed works in order to clarify certain points of his doctrine, including the exemption of the clergy, which he thought had been misinterpreted by people like Sarpi and used against the Roman See.

In those years, another political controversy involved Bellarmine's doctrine of the *indirecta potestas* even more profoundly, namely the debate over the Oath of Allegiance, promulgated in England by James VI and I in 1606, after the Gunpowder Plot. The Oath was offered to the king's Catholic subjects to test their loyalty in temporal matters, but it also laid a heavy

mortgage on the profession of their faith, asking them to renounce as "impious and heretical" the Catholic doctrine that the Pope could depose a heretical sovereign and absolve his or her subjects from their duties of obedience. This mixture of a declaration of political loyalty with a theological statement rejecting the Pope's power in temporal matters was intended to extend James's temporal jurisdiction over his Catholic subjects a little beyond simple political obedience. This hit the heart of Bellarmine's doctrine, which was introduced precisely to extend the Pope's spiritual jurisdiction beyond simple spiritual authority, and indirectly into political matters. As the political conflict escalated, so did the battle of pamphlets, and in fact soon after the promulgation of the Oath Bellarmine published numerous responses against the defenders of the Oath, including King James himself (Questier 1997; Sommerville 1981, 1986, 2005).

Once again, Bellarmine's intervention caused much controversy not only in England and in the rest of the Protestant countries but also in the Catholic Europe, and in particular in France. French Catholicism had always contained a strong Gallican component, and several important French Catholic leaders firmly believed that the French Catholic Church enjoyed special privileges that made it both less dependent on the authority of the Pope at an ecclesiological level, and more committed to defending the political authority of the French sovereign at a political level. From this perspective, Bellarmine's doctrine of the *indirecta potestas* appeared as a threat to both political and ecclesiological Gallicanism, because it both undermined the authority of the French sovereign, which French Catholic theologians thought were bound to defend, and effectively submitted the French Catholic Church to the absolute authority of the Pope, thus erasing the Gallican traditional privileges with respect of the rest of the Catholic Church. For these reasons, several important French Catholic theologians and jurists attacked Bellarmine's theory, and both the Sorbonne and the Parlement of Paris attempted to formally censure some of its most radical implications (Oakley 1996, 1999).

Final Years

By the second half of the 1610s, Bellarmine's doctrine of the *potestas indirecta* was at the center of the European political and theological debate, and it had started to occupy an increasingly problematic place. On the one hand, many considered it the ultimate bulwark of papal authority in temporal matters, which provoked a strong reaction not only in Protestant countries like England but also, and more dangerously from the point of view of the Roman See, in Catholic kingdoms with a tradition of strong secular authority, such as France. On the other hand, many Roman leaders judged Bellarmine's doctrine insufficiently Papalist insofar as it diminished the plenitude of the power of the Pope in temporal affairs. Caught between these two extremes, Bellarmine started to slowly retreat from the political debate, and instead concentrated on keeping up with his impressive scholarly production and on fulfilling his role as censor of books and opinions. This decision, however, was not sufficient to keep Bellarmine out of the spotlight. For example, in 1616, Bellarmine wrote the precept exempting Galileo Galilei from the accusation of heresy but prohibiting him from publicly teaching Copernicanism, the central accusation against Galileo during the second phase of his trial in 1632–1633 (Blackwell 1991; Finocchiaro 2001, 2005; Mayer 2015). In 1621, Bellarmine participated in the conclave that elected Gregory XV, but his health was rapidly deteriorating, and in September of that year he died. Bellarmine was not canonized until 1931, although attempts at canonization started as early as 1627 and were re-proposed several times through the seventeenth, eighteenth, and nineteenth centuries.

Conclusion

Bellarmine's theological and political views were undoubtedly a product of their time and were elaborated to ensure that the Pope maintained his spiritual primacy despite the hardening of the confessional divide and the growth of the

power of the territorial sovereigns. Nevertheless, Bellarmine's doctrine touched on crucial problems concerning the relationship between law and conscience, and for this reason, it has important implications in the juridical, political, and religious development of modern Europe.

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Bentham, Jeremy

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Introduction

British philosopher Jeremy Bentham (1748–1832) is hailed as the father of utilitarianism. His life spanned from the reign of George II to that of Queen Victoria. Bentham was educated under the *Ancien Régime*, working by candlelight and traveling in horse-drawn coaches, at a time when the ideas of the Enlightenment were spreading all across Europe; he ripened into old age in the Victorian era, in a metropolis lit by gas lamps and connected by steam railways, when J.B. Say and Ricardo's economic theories had become mainstream economics.

Bentham's thought mirrors the times in which it was devised: His early influences include La Motte-Fénelon, Beccaria, Helvetius, Voltaire, and Montesquieu, and his late projects were almost exclusively focused on writing Codes. Therefore, Bentham is both the last thinker of the Enlightenment and the first Victorian.

Bentham was born in an affluent middle-class family. This allowed him to devote himself to intellectual pursuits without the need for a patron or paid employment, especially after his father's death. This financial situation coupled with his precocity – Bentham learnt Latin at the age of 3, played Handel sonatas on his violin at 5, and started Queen's College (Oxford) at 12 – explains why he enjoyed 58 years of uninterrupted career as a writer. It started in 1774 with his translation of Voltaire's French essay *The White Bull* and ended in 1832 with his unfinished *Constitutional Code.*

Training for the law, Bentham attended Blackstone's lectures on *Commentaries on the Laws of England* in 1763. This triggered Bentham's early engagement with jurisprudence in *Comment on the Commentaries*, as he found fault with Blackstone's indiscriminate praise of the English common law. Blackstone was also criticized for his lack of distinction between a *censor* (critic of a system) and an *expositor* (person who describes its functioning), thus confusing the law as it *is* and the law as it *ought* to be. Bentham was called to the Bar in 1769, and although he never formally practiced, his legal education had exposed the confusion of the common law and its need for reform. Therefore, Bentham set himself a lifetime goal to push for the rationalization of the laws according to the principle of utility and their systematic codification.

Bentham was a very prolific writer who has had a decisive influence on many reforms in Britain and overseas in his time and beyond. In the 1770s and 1780s, Bentham looked into the applications of utilitarianism to law and legislation. He worked out some of his most important theories in *Introduction to the Principles of Morals and Legislation* (*IPML*), which grew out of his wish to write a penal code, followed by *Of the Limits of the Penal Branch of Jurisprudence* (*Limits*, formerly known as *Of Laws in General*) where the search for the distinction between civil and criminal law led him to study the nature of *a* law.

From the mid-1780s to the start of the French Revolution, Bentham became immersed in practical projects such as penology, public administration, social policy, and economics. He began working out his Panopticon ideas at that time. The start of the French Revolution was a golden opportunity to draft reforms, thanks to the help of the Marquis of Lansdowne and his network of reformists in France (such as Mirabeau). While Bentham's projects had little influence on the turn of events in France, he was nonetheless awarded the title of honorary citizen in 1792. From 1795, with the beginning of the Terror, Bentham gave up his French reforms and returned to his Panopticon schemes, before definitely abandoning them in 1803. Academics have been at pains to comment upon Bentham's practical projects. Were they an unproductive interlude, which diverted him from his reformist tasks? Others argue that these years were far from barren, as he worked out most of his ideas on bureaucracy – and developed a mastery of detail – that were to be features of the *Constitutional Code*, his main exercise in substantive codification.

The period 1808–1809 was an important moment in Bentham's thought as it hearkened his transition to political radicalism and a democratic agenda. The turn of the century also marked Bentham's renewed interest in codes. As he needed a nation ready to implement them, he got involved in the Spanish and Portuguese revolutions, and he drafted a new plan of government for Greece when it was emancipating from the Ottoman rule. He was in correspondence with North-American and Spanish-American leaders to push forward his reforms. It was in South America and in Australia that his ideas would find favorable soils to grow. Bentham has truly earned the right to be called the "Legislator of the World."

Most of Bentham's writings – an estimated 75.000 folios (A3-size pages) – have never been properly published, on account of Bentham's lack of time, interest in publication, and sense of completion. When Bentham died, a first edition of his works was compiled by his secretary John Bowring. Unfortunately, the edition was far from scientific, aggregating parts of manuscripts with others, inserting versions by unapproved editors, publishing English translations from French editions, and omitting the most unpalatable writings on religion and sex. A second edition is now underway at the Bentham Project (University College London), publishing volumes directly from manuscript sources in their care. Since 1968,

34 volumes (of an anticipated 80) of the *Collected Works* have been published.

Utility

Bentham built his radical philosophical system on the concept of utility. In *IPML*, he explains as follows: "By the principle of utility is meant that principle which approves or disapproves of every action whatsoever according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words to promote or to oppose that happiness. I say of every action whatsoever, and therefore not only of every action of a private individual, but of every measure of government" (Chap. I, §2). Happiness or utility is thus the governing principle of utilitarian ethics and government. It has a long history dating back to Antiquity and was also widely used in Bentham's times, be it in the 1776 American Declaration of Independence or in Beccaria's writings. Bentham did not invent utility, and he was not the first to think that the aim of a government is to promote the happiness of its subjects, but he was the first to take it to an unprecedented pitch, systematically applying it to all realms of individual and collective action.

Happiness is measured in terms of pleasure and pain. This universal ability, which is shared by all human beings, cannot be demonstrated nor is demonstrable but results from rudimentary observation of humankind. By arranging acts according to the quantity of pleasure or pain they produce, Bentham arbitrates between conflicting policies or ethical stands and apportions a sentence exactly to any criminal offense. Critics have often pointed to Bentham's aborted attempt to measure pleasures and pains in money-terms, failing to understand how he was exploring techniques for rationalizing policy-making.

Methodology

Utility is the cornerstone of Bentham's philosophy, although some academics have challenged its place in his system. Indeed, there are other key building blocks in Bentham's philosophy, such as the importance of the theory of fictions and an approach built on the scientific method of the Swedish botanist Carl Linneaus. Following Bentham's early interest in chemistry in 1770s, he applied the Linnean binominal nomenclature of division into classes, orders, genera, and species to all his intellectual endeavors. By applying the method of bifurcation and bipartition, Bentham honed his understanding of reality and subdivided each principle into two subordinate ones. This is reflected in *Chrestomathia* with his classifying all sciences as branches of the all-comprehensive science of *Ontology.*

Bentham's theory of language, called the theory of fictions, rests on entities. These entities are divided into real and fictitious. Real entities designate real objects (like an apple) that one speaker can point out to another, while fictitious entities do not refer to any object having physical existence (like the word "obligation"). Fictitious entities are most treacherous when speakers lend them a reality they do not have for the purpose of promoting sinister interests. If fictitious entities can give rise to ambiguity in discourse, they are nonetheless essential for humans to communicate. In order to avoid ambiguity, Bentham suggested that fictitious entities be defined by means of a paraphrase referring them to a real entity, embedded in sensations of pleasure and pain.

Law as Social Control

While *Limits* was only rediscovered in 1970s, it has had a major influence on legal theory since, especially on account of H.L.A. Hart's analysis. Bentham defines a law as: "A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by *the sovereign* in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to

pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question" (Chap. III, §30). The quote presents three founding elements of Bentham's legal theory.

The first is that a law is embedded in language. It is a type of social regulation which does not have any existence other than in words. Laws, which convey the legislator's meaning (he/she being one individual in the case of a monarch or multiple in the case of a parliamentary regime), are made up of words. These words express either the primary will of the legislator when set out in a statute, or his/her delegated will in the case of a decree or any other legal instrument enforceable in court, such as a marriage or employment contract. The second point of note is that a law only applies to those to whom the power to address laws is recognized and accepted, which presupposes habits of obedience. Third, the will of the legislator relies on sanctions. Without sanction, there is no law. However, applying a sanction (fine or imprisonment) will generate pain for the noncompliant party. As utility aims to minimize pain, the rationale of laws cannot be punishment, but promoting any legal or nonlegal instrument that will make people change their behavior so that aggregate pleasure is maximized.

Bentham's legal theory extends the scope of what a law is and, in so doing, gives the tools to trace the manifold ways in which governments, corporations, and individuals exact compliance from each other, not only through legal prohibitions but also thanks to normative prescriptions.

Legacy

Bentham's influence was felt during his lifetime. He maintained a sustained correspondence with many of the prominent figures of his time in all corners of the world, advancing his ideas in the new emancipated countries of Greece and South America, as well as the young Australian colonies. Books and edited editions of his manuscripts circulated his ideas to the elite, while news media such as the *Westminster Review* helped to trickle them down to the educated masses. With disciples at all levels of government, he who was called the Hermit of Queen's Square Place was able to shape some of the major reforms of the nineteenth century: reform of the poor laws system (1834), successive extension of franchise (1832–1867–1928), or even consolidation of criminal legislation (1826–1848), among others. However, Bentham's legacy extends far beyond his lifetime. The present entry offers to investigate a few, without pretending to be exhaustive.

Animal Rights. Although Bentham did not flesh out a separate theory on animals, he did consider that the principles of utility applied to all sentient beings. Indeed, as animals can experience pleasure and pain, the guiding principle of utility – maximizing pleasure and minimizing pain – applies to animals also. According to him: "The question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?" (*IPML*, Chap. XVII, §4n). Bentham offered one of the earliest advocacy of animal rights, and many present advocates of utilitarian ethics, such as Peter Singer, recognize his legacy.

Emancipation of Women. Bentham's philosophy is not rights based but utility based – although both systems of thought seem to achieve similar outcomes – however, historiography has portrayed him as a champion of women's rights (right to vote or rights in marriage). Indeed, in the early *Rights, Representation and Reform* and in the later *Securities Against Misrule,* Bentham clearly includes women in the universal suffrage. However, his advocacy might not have been as prominent as for the male suffrage, since he might have feared a backlash if he went public. Bentham's approach to reform was always incremental, so his stance in relation to women is not unusual.

Bentham's reflection also included the reform of the law of marriage. He drafted a body of law based on the principle of utility. As it relied on the proposition that men and women were equal, he advocated radical ideas on wives and mistresses and proposed a scheme for short-term marriage.

Nonconforming Sexual Practices. When it comes to sexual practice, Bentham does not

distinguish morality from legislation. As sex is an activity which produces pleasure for people who consensually take part, the assessment of its utility relies on determining the ratio of pleasure the act produces for the person who engages in it, and the pain it may cause to the participants, and/or to the wider community. Therefore, Bentham does not think legislators have a case to intervene against such practices.

Bentham expressed his position in manuscripts he did not dare publish in his lifetime. His stance demonstrates how utility can operate as a critical principle when applied to sexual practices ranging from sodomy to zoophilia and necrophila. It is in these writings that Bentham appears so strikingly ahead of his time.

Colonies. Bentham's position toward colonialism was rooted in ambivalence. In *Bentham to the National Convention of France*, *Rid yourself of Ultramaria*, and *Institute of Political Economy*, he displayed real hostility to colonial holdings, on grounds that colonization was costly, and that, contrary to his forebears and successors, Bentham never wanted to civilize those who were then shockingly considered as barbarian or backward peoples. Indeed, he believed that every human being is capable of understanding his own interest, so that no civilizing mission should ever be promoted. Thus, his reforms – even those aimed at the East India Company – sought to define ways in which the population might be involved, even in a limited way, in the process of public decision-making.

Bentham also believed in the need to propose measures adapted to different cultures in "Place and Time." His method would thus be to define general utilitarian codes, then adapt them to local circumstances.

However, in *Colonization Company Proposal*, Bentham advanced a National Colonization Society scheme to colonize South Australia with free white settlers. His position ended being a violation of Aboriginal possession of land and a negation of his basic tenets about the value of Indigenous lives.

Panopticon, Panopticism and Surveillance Society. A circular building from which inmates in cells can be watched by the overseers positioned in a central tower – this is the basic idea of Bentham's asymmetric panoptic power gaze that can be applied to many different users: workers, convicts, paupers, students, and even civil servants.

This principle was taken up by Michel Foucault as exemplifying the era of disciplines. Foucault's engagement with the Panopticon started in 1975 with the publication of *Discipline and Punish* which publicized the Panopticon to a wider audience and coined the concept of panopticism. Panopticism exemplifies a certain number of features: first, the purpose-oriented use of space; second, the isolation and confinement of inmates under the continued gaze of a watchman; third, the maximum extraction of information and work from those who are under surveillance; fourth, a normalizing judgment; and last, the internalization of discipline by inmates, as they do not know when they are being watched. Panopticism needs to be understood as the reinterpretation of the Panopticon project to suit Foucault's strategic narrative.

Alongside Big Brother and privacy, panopticism has now become a central theoretical frame in the growing field of surveillance studies. Although David Lyon believes the Panopticon is no longer a theoretical model suited to the digital age, Bernard Harcourt still acknowledges that there are elements of the classic forms of the juridical exercise of power that can be brought into the digital age, such as a panoptic-like desire for "total awareness."

Utility and Arts. Bentham's esthetic thought has been given very little attention by scholars. The reason lies in two statements made by J.S. Mill, which have been widely circulated as the final construction of Bentham's utilitarian hedonism. In the first, Mill refers to Bentham's comment that "Prejudice apart, the game of push-pin is of equal value with . . . music and poetry". In the second, Mill accused Bentham of disparaging "all poetry (as) misrepresentation." Mill fully condemned Bentham's critique of taste, reinstating in the process a distinction between higher and lower pleasure, that the latter has eschewed, and claiming that it was better to be a human being dissatisfied than a pig satisfied.

Recent research on the relationship between utilitarianism and the arts make it possible to reconsider the way in which Bentham's utilitarianism was pitted against romanticism and literature and pave the way for exploring art in Bentham's work. Utility can be used as a motif in artistic representations (Jeni Fagan's novel *Panopticon* exemplifies the genre of panoptic fiction) or become art in its own right, as when Bentham's mummified body, the Auto-Icon, was exhibited at the "Like Life" exhibition at the Metropolitan Museum of Art in New York in 2018.

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Bentham, Jeremy: On Justice

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Jeremy Bentham (1748–1832), philosopher and reformer, is generally recognized as the founder of classical utilitarianism, the doctrine that held that the right and proper action was that which promoted "the greatest happiness of the greatest number," with happiness being understood as a balance of pleasure over pain, and conversely misery or suffering as a balance of pain over pleasure. Terms such as right and wrong, and good and evil, only made sense when they were related to pleasure and pain: the only good was pleasure and the only evil was pain. Taking into

account all its consequences, an action was right when it led to a preponderance of pleasure and wrong when it led to a preponderance of pain. In Bentham's hands, the principle of utility was a critical standard by which institutions, laws, and practices could be examined and, if found wanting, reformed.

Justice as an Aspect of Utility

Bentham rejected the notion of justice as a value independent of the principle of utility. To refer to an action as being "*contrary to the first principles of justice*" or "*contrary to every principle of justice*" was, according to Bentham, to talk "nonsense - mere nonsense." These expressions supposed that there existed a list of principles and a corresponding list of rules (Bentham noted that the term "principle" was used to bring to mind some corresponding rule, which referred in turn to the connection that existed between a cause and an effect) coming under the name of justice, "whereas, no such lists are capable of being produced by any person by whom the existence of them is thus asserted" (Bowring 1843, iii. 388). Again, Bentham complained that, in the context of penal law, it was with the words "*justice* and *humanity*" that "the warfare of tongues and pens is, in a vast proportion, carried on." Such terminological "trash" suited the interests of rulers, and it was "by nonsense in this shape that the war, made upon the *principle of utility* by *ipsedixitism* and *sentimentalism*, with or without rhyme, is carried on" (Bentham 1998, 255). Bentham's point was that the term "justice," when used independently of the principle of utility, was a cloak by which self-serving interest groups – adherents of what he had also termed the principle of sympathy and antipathy – elevated their own likes and dislikes into what purported to be a moral standard applicable to all. In short, the appeal to "justice" was a means of promoting the happiness or interest of a particular group, whatever the consequences for the happiness of the community as a whole (Bentham 1970, 21–31).

There was, however, a sense in which the term "justice" might be used with propriety. In a general discussion of motives and, in particular, of the sorts of motives that were more likely to produce benevolent acts, Bentham explained that

> justice, in the only sense in which it has a meaning, is an imaginary personage, feigned for the convenience of discourse, whose dictates are the dictates of utility, applied to certain particular cases. Justice, then, is nothing more than an imaginary instrument, employed to forward on certain occasions, and by certain means, the purposes of benevolence. The dictates of justice are nothing more than a part of the dictates of benevolence, which, on certain occasions, are applied to certain subjects; to wit, to certain actions. (Bentham 1970, 120n.)

The word "justice" was the name of what Bentham termed a fictitious entity, as opposed to a real entity, which referred to an object that had physical reality and, therefore, was capable of being perceived. The meaning of an abstract term such as justice could only be explained through the technique of paraphrasis, whereby a proposition in which the name of a fictitious entity appeared was translated into another proposition containing the names of real entities, or at least the names of other fictitious entities that stood nearer, so to speak, to real entities. (Bentham 1977, 494–496 n.) In the passage quoted above, Bentham intimated that "justice" might be translated into real entities by reference to benevolence, occasions, subjects, and actions. The dictates of benevolence consisted in the injunction to promote the greatest happiness of the community: "For the dictates of utility are neither more nor less than the dictates of the most extensive and enlightened (that is *well-advised*) benevolence" (Bentham 1970, 117). The occasions, subjects, and actions in question consisted in the enforcement by the courts, by application of the sanctions appointed by the legislator, of the rights and duties distributed among the members of the community by the law.

Justice as the Correct Application of a Utilitarian Code of Law

For Bentham, the dictates of justice were met when the law was correctly applied by the courts and when the law itself was founded on the principle of utility. The ends of justice were the ends

of judicature. Stated in a positive way, the ends of judicature were first, when some wrong had been committed, the awarding of compensation to the victim and infliction of punishment on the wrongdoer, according to the shape – that is, in according to the quantity, quality, place, and time – in which it was due, and second, when the conferral of a new right or the performance of some judicial service was demanded, the collation of the right and rendition of the service in question, again in the shape in which it was due. Opposite to these positive ends were a series of negative ends, or evils that were to be avoided, consisting of the non-application of compensation and punishment, and the non-rendition of judicial service, where they had been appointed by law. All this amounted to misdecision or non-decision, as opposed to right decision. In judicial procedure, the "collateral evils" of delay, vexation, and expense were also to be avoided as far as possible (Bentham 1843, vi. 8–10). If the law itself was contradictory and confused, or did not exist as such – criticisms that Bentham leveled at the English Common Law – then it was impossible for judges to make a right decision (Bentham 1843, v. 231–237).

Bentham explained that the law necessarily made some distribution of benefits and burdens. It might distribute burdens without conferring any benefit but could not confer any benefit on any one individual without imposing burdens either on one, some, or all of the other members of the community. In relation to the distribution of burdens, which included taxation, the legislator should be careful to ensure that they were as small as possible, and should not be imposed unless outweighed by "a corresponding and preponderant benefit." On this basis, Bentham divided the substantive law into the distributive branch, setting out the distribution of the respective benefits and burdens, and the penal and remuneratory branches which together provided inducements (punishment in the case of the former, reward in that of the latter) to individuals to act in accordance with the arrangements marked out by the distributive branch (Bentham 1998, 191–192, 206–207). A further branch of the substantive law was the constitutional branch, which concerned the appointment of rulers and their powers (Bentham 1998, 206–208). The purpose of the penal law was to give "execution and effect" to the civil and relevant portion of the constitutional law. In short, the penal law contained the enactive provisions, whereby subjects were commanded to perform or abstain from certain actions and threatened with punishment if they did not do so. The main purposes of punishment were to provide compensation for the injury caused and to prevent future misdeeds, both on the part of the offender and all the other members of the community together (Bentham 1998, 208–209). The purpose of the civil code was to promote the greatest happiness by distributing rights and duties, while the penal code was the means of effecting the distribution detailed in the civil code: "by the arrangements contained in the civil code, so many directive rules are furnished. What the penal code does, is—but to furnish sanctions by which provision is made for the observance of those directive rules." A penal code might be supplemented by a remuneratory code, but no such code had ever been drawn up, even though, noted Bentham, "a work of this kind might be of very important use" (Bentham 1998, 237). The penal code itself was made effective by the provisions of the procedure code (Bentham 1998, 223).

Security

In terms of the content of the law, Bentham identified four subordinate ends of the principle of utility, namely subsistence, abundance, security, and equality, which it was the task of the legislator to promote. Having said that, it was often best if the legislator did not interfere with the activities of individuals. The main role of the legislator was to diminish the causes of pain, in other words to prevent harm; people could be left to themselves to promote their own pleasure (Bentham 1970, 159). The starting point for legislation was "a pre-established universal law of liberty," with liberty understood in the sense of the freedom to do as one pleased within one's physical capacities. If the legislator interfered by law (as distinguished from advice or persuasion), this involved coercion

(excepting a law that repealed an existing law), and coercion was evil, since it diminished liberty (Bentham 2010, 129–130, 288–289). The imposition of this evil was only justifiable (that is consonant to the principle of utility) when it produced some greater benefit. Such a benefit was security, and it was the central task of law to provide security for person, reputation, property, and condition in life (or status), whether against interference from foreign enemies, fellow citizens, or from rulers themselves, in other words against hostility, crime, and tyranny. Acts perpetrated by domestic wrong-doers which violated security were to be designated offenses and punishment attached to them by the penal law (Bentham 1998, 197–199). In short, security consisted in the provision of legal rights. Bentham preferred the term "security" to "civil liberty" or "political liberty" since the benefit in question was produced by law, and hence consisted in either restraint or constraint. One person's freedom to walk down the street unmolested resulted from a curtailment of everyone else's liberty to interfere with them (Bentham 2010, 289).

Security was the basis for a civilized life – a state without security was equivalent to a state of savagery or of war – since it was the most important means of creating expectations and avoiding their disappointment. Unlike animals, humans were not limited to the present time, but susceptible of pleasure and pain by anticipation. The distinctive feature of human life was the capacity to project one's existence into the future and form plans of conduct. This process generated expectations, which were of the greatest importance in that they united the individual's present and future life, and linked the present to future generations. Security consisted not only in the avoidance of present loss, but also in a guarantee against future loss, and existed when the course of events followed the expectations raised by the law. If events took some other course, the result was the pain of disappointed expectation. The law, for instance, gave a person security for his property, which was itself the creation of law and consisted in the expectation of deriving advantage from the thing possessed. The evils resulting from violations of property were first, the evil of non-possession; second, the pain of loss; third, the fear of loss, which undermined the enjoyment of what was possessed; and fourth, the destruction of industry, since if one despaired of enjoying the fruits of one's labor, one would only provide for survival from day to day (Bentham 1843, i. 307–310). When Bentham stated that the foundation of justice was the "non-disappointment principle," which stated that, when some benefit was in dispute, the matter should be decided in such a way as to produce the least disappointment among all the interested parties, he was implicitly referring to security as the basis for the most important expectations, namely the continuance of life, property, reputation, and status (Bentham 1843, iii. 388).

Subsistence and Abundance

In relation to subsistence, consisting of the resources necessary to stay alive, Bentham argued that individuals should be left to provide for themselves by their labor, with the main task of government being to provide security for the produce of labor. If individuals were, however, unable to provide for themselves, whether due to infancy, old age, or illness, the legislator should supply whatever was needed, drawing on the "abundance fund" to do so. In relation to the promotion of abundance, or wealth, which consisted in "the surplus of the means of subsistence, deduction made of the quantity destroyed by consumption in all its shapes," the main task of government was again to provide security for the produce of labor (Bentham 1998, 194–197). This was, of course, the field of political economy, where interference by government was usually, though not always, not only an imposition of coercion and hence an evil in itself, but likely to be counter-productive.

Equality

The fourth of the benefits distributed by the civil law was equality. Bentham pointed out that each individual should have equal security for their person, reputation, and condition in life. Each

individual should also be guaranteed their subsistence. The title of the indigent, Bentham explained, was stronger than the title of the proprietor of superfluity, since the pain of death was always greater than the pain of disappointed expectation (Bentham 1843, i. 315–316). Otherwise, in relation to property, each person should have security for whatever portion was, according to law, rightfully theirs. Nevertheless, one had to take account of diminishing marginal utility. Bentham noted that, "The quantity of *happiness* possessed by a man is not as the quantity of *property* possessed by a man." The more property that a man already possessed, the less the quantity of happiness he received by each addition of the same quantity made to it. Bentham speculated that the individual with the greatest amount of wealth might not enjoy as much as double the amount of happiness of an individual who had sufficient for subsistence, and even if the ratio was 3 to 1 or 4 to 1, or even greater, "still the truth of the practical conclusion will not be affected," namely:

> so far as is consistent with security, the nearer to equality the distribution is which the Law makes of the matter of property among the members of the community, the greater is the happiness of the greatest number; and accordingly this is the proportion which, so far as can be done without preponderant prejudice to security, ought at all times and in all places to be established and maintained.

The problem, however, was how to promote equality of property without undermining security. If an attempt were made to institute an "absolute equality of property" at the beginning of the day, the transactions of that single day would produce inequality. Moreover, the mere prospect of such an equalization would itself destroy the value of all property, for no one would have any incentive to labor beyond what they needed for their immediate survival.

There were, however, policies that could be pursued to "advance ... towards absolute equality" and thus increase the greatest happiness "without prejudice to security." The point at which an individual would not feel a pain of loss, because they felt nothing, was upon their death. There might, however, be living persons, such as a spouse and children who had been in a "habit of co-enjoyment," who had an expectation of succeeding to the property of the dead individual. Hence, Bentham suggested that, on the death of a married person, the whole of the property should go to the spouse, but upon the death of the surviving parent, it should either be divided equally among the children or a portion of it so divided, with the remaining portion (Bentham suggested a third or a half) disposable by will. However, if a person died without any close relations, the whole of the property should be taken by the state and the proceeds used to reduce taxation (Bentham 1998, 202–204; Bentham 2002, 208).

The Sacrifice of Interests

For Bentham, the principle of utility was a universal principle in that, as he expressed it, "every individual in the country tells for one; no individual for more than one" (Bentham 1843, vii. 334). The equal pleasure of one person was of equal value to the same quantity of pleasure of any other person. The legislator, argued Bentham, should aim to promote the greatest happiness of all, and central to this undertaking was the provision of security for person, reputation, and condition in life. However, there would inevitably be clashes of interest, and in such cases the legislator would need to promote the greatest happiness of the community as a whole. In his later writings, Bentham recognized that his formula of the greatest happiness of the greatest number might imply a straightforward majoritarianism. While it would usually be right to promote the interests of the majority, in certain circumstances the interest of a minority, where it was an important interest, would outweigh the less important interest of a majority. He stated, for instance, that 2,000 people should not be placed in abject slavery so that 2,001 other people might enjoy some benefit (Bentham 1983, 309–310). The problem that Bentham eventually came to confront, however, was not the oppression of the minority, but the oppression of the majority, exemplified in the concentration of enormous masses of wealth, power, and prestige in the hands of monarchs and aristocrats.

It was in order to solve this problem that Bentham, following his advocacy of political radicalism from 1809, came to advocate the worldwide establishment of democratic republics, where each person's interest would be given equal consideration by means of the franchise (Bentham 1989, 123–147).

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Berlin, Isaiah

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Introduction

Isaiah Berlin (1909–1997) was a Russian-born, British-educated philosopher in the twentieth century. Undoubtedly, Berlin most influential work is "Two Concepts of Liberty." Berlin's methodology in "Two Concepts" is to approach the study of liberty with the analytical precision of a surgeon. He adopts this approach because he believes that the different ways in which we use the concept of liberty are often conflated and that we can learn a great deal about our philosophical and political commitments if we uncouple our different conceptions of liberty. The result was nothing short of a philosophical masterpiece. Berlin's contributions to contemporary discussions of liberty are so influential that nearly all philosophers, political scientists, lawyers, and politicians in the Western world rely on his distinction between negative and positive liberty in one way or another. Berlin's other influential work is *The Critics of the Enlightenment*. In *The Critics of the Enlightenment*, Berlin examines the views of Giambattista Vico, Johann Gottfried Herder, and J. G. Hamann as a way of challenging Enlightenment philosophical assumptions about the objectively of human reason. He continued to explore challenges to Enlightenment philosophical ideas for the remainder of his professional life, particularly in the realm of moral philosophy. Berlin's ideas about moral pluralism still figure prominently in contemporary debates about moral relativism and moral absolutism.

Positive and Negative Liberty

For centuries, philosophers have engaged in protracted debates about the ontological status of liberty. Some have argued that liberty is a natural human capacity. Others have argued that liberty is a legal relation between humans in civil society. Similarly, political scientists have engaged in intense debates about the state's sometimes conflicting obligations to respect the negative and positive liberties of its citizens, on the one hand, and to ensure the safety and security of the general public, on the other. As time passes and the esoteric political ideas of academics are used by enterprising lawyers and politicians to influence courts or congresses to increase or, as is sometimes the case, decrease the amount of liberty citizens have, dialogues about liberty permeate society and the obscure ideas of academics slowly become commonplace. In "Two Concepts of Liberty," Berlin argues that the twists and turns that esoteric ideas take on the long road to becoming commonplace often result in confusion and that to understand our political commitments, we must clear-up our confusions. So, in order to gain a clear understanding of Berlin's concepts of negative and positive liberties and how they have played out in the discussions of philosophers, political scientists, lawyers, politicians, and the general public, we must turn our attention to the political theories of seventeenth to nineteenth century Enlightenment philosophers.

Most enlightenment philosophers ground theiridea of liberty in the concept of natural freedom. To be sure, in the *Leviathan*, Thomas Hobbes tells us that humans naturally exist under conditions in which there are limited resources and no governing body to keep the peace through a monopoly on the coercive use of force, or to direct the wills of each to the common good of all. These conditions are compounded by the fact that humans are self-interested beings who continually seek to achieve their ends. Thus, in the absence of a governing body to keep the peace, whenever two or more humans desire something that they cannot both have, they become enemies, each wanting to destroy the other in order to obtain the object of his/her desire.

Moreover, Hobbes tells us that such conflicts inevitably lead humans into a war of each against all in which nothing is off limits and everything is useful for the purpose of self-preservation. Under these conditions, human life is utterly without art, agriculture, culture, comedy, commerce, construction, education, navigation, negotiation, science, society, or, in short, things that are necessary for commodious living. In fact, since there are no governing institutions in the state of nature, and since all humans have the "*liberty* to use their power according to their wills for the purpose of self-preservation and of doing anything they judge to be the aptest means thereunto" (Hobbes 1962), Hobbes concludes that humans will fight unceasingly in a disparate attempt to procure the objects of their desires.

By contrast, John Locke objects to Thomas Hobbes's description of the state of nature on the grounds that it is hyperbolic. In *The Second Treatise of Civil Government*, Locke offers a more measured description of the state of nature, one in which life outside of civil society is merely inconvenient as opposed to perilous. According to Locke, most humans are not strict observers of the laws of nature, and, even when they do observe the laws of nature, their biases and passions cause them to act unjustly in their own cases and apathetic in the cases of others. For these reasons, Locke concludes that those living in the state of nature desire to have known and settled laws that are applicable to everyone equally; an independent judiciary to settle their disputes according to those laws; and an executive who will enforce the laws and back the decisions of the judiciary with force, if necessary. Hence, whether life in the state of nature is as Hobbes describes it, "solitary, poor, nasty, brutish, and short" (Ibid.), or as Locke describes it, merely inconvenient, both Hobbes and Locke agree that reason will inevitably led humans to leave the state of nature for the safety and security of civil society.

Moreover, both Hobbes and Locke agree that the proper way to establish a social contract is for each person to transfer some of his/her natural rights to a sovereign or body politic so that it can establish a legislative branch of government that will be responsible for writing laws and thereby

creating civil liberties and obligations. For example, inevitably the legislative branch of government will establish laws prohibiting murder, physical assault, sexual assault, fraud, theft, the destruction of private and public property, and everything that undermines the safety and security of the citizenry and the state. Otherwise, rational beings would not leave the state of nature in which they face occasional danger from a small number of people who they come across randomly for a civil society in which they would face constant danger from a larger number of people living in a small area. Thus, when the legislature establishes prohibitions on murder, physical assault, sexual assault, fraud, and so on.., each citizen *ipso facto* incurs political obligations to refrain from committing murder, physical assault, sexual assault, fraud, theft, the destruction of private and public property, and everything else that the legislature prohibits. Isaiah Berlin identifies these kinds of political obligations as negative liberties because they consist in the freedom from the interference of others. Thus, whenever one unjustly infringes upon the property, body, or prevents another from doing what he/she would do otherwise, one violates the negative liberty of the other (Ibid., 161).

Conversely, Hobbes and Locke agree that the government will not bother to legislate against things that do not threaten the safety and security of the citizens or state. Thus, where the legislature permits the citizens to do whatever they please: read books in an effort to develop their intellectual faculties, or eat, drink, and make merry at the local bordello as a way of fulfilling one's appetitive desires. Either way, Isaiah Berlin identifies these kinds of political privileges as positive liberties because they consist in the ability to act as one pleases. Hence, whenever one is forced, coerced, or manipulated into acting in a way that one would not have acted otherwise, one's positive liberty is violated.

Of course, many enlightenment philosophers argue that humans are autonomous insofar as they have the ability to determine how they will act, where they will go, what they will think, and so on. What makes such actions autonomous is that they arise from the rational will of the person who is acting. In turn, the actor's rational will must be grounded in his/her own deliberations. When each of these conditions are met, the person acts freely. Indeed, we find this conception of freedom throughout Immanuel Kant's *Critique of Pure Reason*, and it is at the heart of Isaiah Berlin's concept of positive liberty. For, only autonomous beings have the abilities to deliberate and will actions based on their own deliberations. Hence, only autonomous beings are free. Isaiah Berlin explains:

> The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. . .. This is at least part of what I mean when I say that that I am rational, and that it is my reason that distinguishes me as a human being from the rest of the world. I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not. (Berlin 1969)

What's equally importantly to notice is that Berlin goes to great lengths to highlight the fact that negative and positive liberty might conflict with one another, particularly in cases where one believes that another lacks the ability to reason and is therefore not worthy of having liberty.

For example, in the quote above, Berlin tells us that rationality distinguishes humans from animals, inanimate objections, and the rest of the world. Thus, those who exercise their positive liberty *ipso facto* achieve that which is most fundamentally human, namely, autonomy, which entails that they also exercise reason. By contrast, those who can only exercise negative liberty achieve that which is fundamentally animalistic, namely, heteronomy, which entails that they cannot exercise reason. Even more, many philosophers have argued that those who act heteronomously must be led by those who act autonomously. For example, in *On Liberty*, John Stuart Mill tells us that "despotism is a legitimate mode of government when dealing with" those "backward states of society in which the race itself may be considered as in its nonage," provided, of course, that the goal of the despotic government

is to improve the "backward" race (Mill 1978). Undoubtedly, many have used similar sentiments to justify all kinds of oppression: genocide against aboriginal peoples in the Americas, the trans-Atlantic slave trade, the suppression of the rights of women, the colonization of Africa, the colonization of India, the extermination of Jewish people in Nazi death camps, and so on.

It is worth noting that Mill would do well to be skeptical of all despots, even those who he thinks will act to achieve "benevolent" ends. For, if John E. E. Dalberg-Acton was correct, and absolute power corrupts absolutely, then Mill's benevolent dictator will soon turn to tyranny. Indeed, as history teaches us, tyrants always find ways to place greater and greater restrictions on the liberties of their subjects, especially those who are able to achieve rational self-direction. For, tyrants have much more to fear from rational citizens because they understand that despotism jeopardizes the liberties of all citizens, and therefore, they are much more likely to fight for regime change. By contrast, those who are led by their appetites are less likely to understand that despotism harms the liberties of all citizens, particularly when they are not subject to the restrictions. In these cases, they are less likely to call for regime change, which makes them easier to control. Thus, in order to keep the rational citizens from calling for regime, Mill's despot will have to find some pretense for placing restrictions on their liberties. And, given that there is no objective way to demonstrate that one's actions result from rational self-direction, Mill might find himself in the position of those who he called a "backward" race. This ought to be enough to give him pause when it comes to embracing despotism.

Enlightenment Philosophy

Needless to say that Isaiah Berlin was a student of Enlightenment political philosophy. When he was not studying Enlightenment philosophy, he was studying the works of those who criticized Enlightenment philosophy. In fact, *Three Critics of the Enlightenment* is arguably Berlin's second most influential work. It represents a collection of essays in which he offers a charitable reading and careful analysis of the writings of Giambattista Vico, Johann Gottfried Herder, and J. G. Hamann in an effort to illuminate some of the problems of Enlightenment philosophy. Berlin took this approach because he believed that one could better understand Enlightenment philosophy by considering the views of its critics. In short, Vico, J. G. Herder, and J. G. Hamann found Enlightenment philosophy to be unsympathetic, presumptuously universalistic, overly rationalistic, and unattentive to the importance of human culture. As a response, Vico, J. G. Herder, and J. G. Hamann tended to focus on the influences of human culture. For these reasons, Berlin categorizes their works as nationalistic and relativistic. Although he believes that the critics are worthy of consideration, he nevertheless concludes that such positions are unacceptable because they lead to morally objectionable consequences.

As Berlin saw it, nationalism and relativism were responsible for much of the human suffering of the twentieth century, particularly the suffering that followed from World War II. By contrast, like his predecessors, Berlin argues in favor of science, rationalism, and a plurality of universal human values. Simply put, he believes that since humans are similar beings with similar capacities, the desirability and acceptability of certain values, such as liberty and freedom, will be similar across all human cultures. In which case, certain human values are transcultural. This, of course, allows him to conclude that the Nazis were morally reprehensible and blameworthy for the suffering of WWII.

Conclusion

In the end, Berlin might be correct about at least one feature of human nature, namely, humans seem to have short memories. Just 70 years after the defeat of the Nazis in Germany and Imperialists in Japan, we are drifting slowly towards nationalism, populism, isolationism, and anti-globalism, all of which are fueling the growth

of racism, anti-Semitism, anti-intellectualism, homophobia, xenophobia, and Islamophobia that is growing in the Western world. Unfortunately, however, the rise of nationalistic, right wing politicians in England, France, Germany, Greece, Italy, and the United States suggests that these isms are not going away anytime soon.

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► Coercion and Law
► Constitutionalism: Political

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Three Critics of the Enlightenment

Bernstein, Eduard

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Introduction

Eduard Bernstein (1850–1932) was born in Schöneberg, the second child of a Jewish locomotive driver from Danzig (Gdańsk). A gifted student from an early age, he attended *Gymnasium* until forced to leave at 16 due to his family's poor financial circumstances. From 1866 to 1878, Bernstein worked as a bank clerk in Berlin, during which time he became increasingly active in the German workers' movement. He joined the "Eisenacher" *Sozialdemokratische Arbeiterpartei* (SDAP, Social-Democratic Workers' Party) led by August Bebel and Wilhelm Liebknecht in 1872. Soon after, Bernstein had his first opportunity to shape the ideological direction of German socialism when he assisted Bebel and Liebknecht in the preparation of the 1875 Gotha Programme, which united the "Eisenacher" faction with the "Lassallean" *Allgemeiner Deutscher Arbeiterverein* (ADAV, General German Workers' Association) to form the *Sozialistische Arbeiterpartei Deutschlands* (SAP, Socialist Workers' Party of Germany).

With the introduction of the Bismarckian Anti-Socialist Laws in 1878, which banned any socialist activism besides the parliamentary activities of the SAP's Reichstag and other regional deputies, many German socialists were forced to go into exile. Bernstein moved first to Zurich as the private secretary of the social-democratic donor Karl Höchberg. When the Swiss authorities expelled him under German pressure in 1888, he moved to London, where he integrated himself into the circle of socialist exiles around Friedrich Engels. From 1881 to 1890, he edited the SAP's leading organ *Der Sozialdemokrat*; in 1890, after the Anti-Socialist Laws were lifted and the SAP relaunched itself as the *Sozialdemokratische Partei Deutschlands* (SPD, Social-Democratic Party of Germany), he played a leading role together with Karl Kautsky in the drafting of its 1891 Erfurt Programme. Still under a personal ban that prevented him from returning to Germany, Bernstein remained in London as a correspondent of the SPD's new organ *Vorwärts* and the theoretical periodical *Neue Zeit*. He maintained close contact to socialist campaigners in both Britain and Germany, and in 1897 he married fellow activist Regina Schattner (*née* Zadek).

After his personal ban was lifted in 1901, Bernstein returned to Germany and soon became active in parliamentary politics, winning the Reichstag constituency of Breslau-West for the SPD in 1902–1907 and 1912–1918. He also resumed his journalistic activity, editing the historical periodical *Dokumente des Sozialismus* (1901–1905) and the weekly *Das Neue Montagsblatt* (1904). The growing tensions between the European great powers that

ultimately culminated in the eruption of WW1 in 1914 provoked increasing tensions between pro- and antiwar German socialists. As a member of the antiwar faction, Bernstein felt himself increasingly isolated within the SPD; after the whole faction was summarily expelled from the party in 1916, he reluctantly joined the *Unabhängige Sozialdemokratische Partei Deutschlands* (USPD, Independent Social-Democratic Party of Germany) in 1917.

In the wake of the 1918–1919 German Revolution that catalyzed the end of WW1, Bernstein was appointed Assistant Secretary to the Reich Treasury in the transitional SPD–USPD coalition government of the *Rat der Volksbeauftragten* (Council of People's Deputies). With the war over, he swiftly rejoined the SPD and was briefly a member of both parties until the USPD expelled him in 1919. Bernstein again became a SPD Reichstag deputy in 1920–1928, this time for Potsdam (Teltow–Beeskow), and led the drafting committee for the SPD's 1921 Görlitz Programme.

He spent his final years as an elder statesman of German socialism during the Weimar Republic, concentrating his efforts on resisting the influence of Soviet-sponsored Bolshevism, and died in 1932, mere weeks before the Nazi takeover of power.

Revisionism and Reformism

Bernstein's initial forays into socialist theory cleaved strongly to the ideas and methods of Karl Marx, whose adherents during the 1870s–1880s were on the way to establishing a position of considerable dominance over the other factions in the socialist movement – Blanquists, Fourierists, Lassalleans, Owenites, and Proudhonians. His earliest writings confirm his unimpeachably "orthodox" beginnings: a forensic critique of Ferdinand Lassalle's "iron law of wages" (1890), a spirited exegesis of the thoroughly Marxist Erfurt Programme (1891), and a sophisticated polemic against Stirnerist, Proudhonian, and Bakuninist strands of anarchist thought (1891–1892). Indeed, it was the eloquence and creativity with which Bernstein articulated his orthodox commitments that first opened the door to his friendship with Engels and to his co-designation alongside Kautsky as the leading interpreter of Marxist theory after Engels' death in 1895.

Yet during the 1890s, Bernstein's theoretical position began to evolve as a result of his intellectual encounters with several non-Marxist influences. These included his reappraisal of Lassalle's arguments in defense of parliamentarism, the ethical reformism of the neo-Kantian philosophers Hermann Cohen and Friedrich Albert Lange, the state-interventionism of the economist Karl Rodbertus, the espousal of reformism by British progressives such as the Fabians and the New Liberal "Rainbow Circle," and the cooperative theory espoused by the liberal sociologist Franz Oppenheimer.

At the same time, Bernstein became increasingly sensitive to rising demands from socialist parliamentarians to use their positions in local and national legislatures to secure immediate improvements in the conditions of the working class: wage increases, shorter working hours, fairer employment legislation, and mass enfranchisement. These demands were staunchly opposed by most socialist theorists, who stuck to the orthodox Marxist view that such improvements were merely temporary solutions that delayed – but ultimately did not obviate the need for – the revolution that would permanently remove capitalism and its deleterious effects.

Bernstein distilled his concerns into a series of articles in *Neue Zeit* in 1896–1898 under the heading "Problems of Socialism," which dealt with a range of issues including utopian tendencies in Marxist theory, class struggle and class compromise, and differences in agricultural and industrial development. Kautsky and other leading SPD figures, aghast at what they saw as a direct assault on Marxist theory, called on Bernstein to urgently clarify his arguments, so they could be addressed systematically in the traditional manner of all party-theoretical disputes: through detailed consideration and debate at national conferences and international congresses. Bernstein obliged by elaborating his position in

Die Voraussetzungen des Sozialismus (*The Preconditions of Socialism*) in 1899. He queried the scientificity and theoretical importance of key Marxist tenets: the labor theory of value as the objective proof of exploitation, the reliance on dialectics to describe societal progress, and the inevitability of capitalist collapse. Further, he used his close analysis of recent business, employment, credit, and income statistics to observe that several key Marxist predictions had failed to come about – pointing, in particular, to the unexpected persistence of smaller enterprises, the continued presence of middle-income strata in the class structure, and the greater-than-forecast resilience of the capitalist economy to major crises such as the 1873–1896 Long Depression.

Above all, *Preconditions* outlined Bernstein's argument in favor of a new path for the socialist tradition: using opportunities for transformation within capitalist society, especially the institutions of "bourgeois" law and parliamentary politics, to achieve a transition to socialism through gradual reforms, not sudden revolution. The immediate response from within the German and wider European socialist movement was as swift as it was extreme. At the SPD's 1899, 1901, and 1903 conferences, and at the 1900 International Socialist Congress, Bernstein's position – disparagingly dubbed "revisionism" – was subject to vicious attacks, with repeated resolutions overwhelmingly affirming the socialist movement's commitment to orthodox Marxism and revolutionary social transformation.

Bernstein's erstwhile close colleague Kautsky waged a relentless campaign to discredit revisionist Marxism in the pages of *Neue Zeit*, to the point that Bernstein terminated his association with the journal in 1900; meanwhile, a rising star on the left of the SPD, Rosa Luxemburg, vehemently defended revolutionary socialism against the reformist conclusions of *Preconditions* in *Social Reform or Revolution* (1900).

Only a small group of *Praktiker* ("practitioners") on the SPD's right wing, such as Eduard David and Wolfgang Heine, along with Joseph Bloch, editor of the journal *Sozialistische Monatshefte*, endorsed Bernstein's modifications of Marxist analysis.

The Foundation of Social Democracy

The turn of the twentieth century thus marked a significant caesura in Bernstein's theoretical trajectory. He initially withdrew into historical work, publishing among other writings a retrospective on Lassalle's importance for the working class (1904), a voluminous history of the Berlin workers' movement (1907–1910), and an account of proto-socialist movements in the English Commonwealth (1908). Yet soon, the growing climate of chauvinism, militarism, and imperialism in Germany and across Europe compelled Bernstein to resume his theoretical activity and expand his position to respond to new thematic concerns that had featured only distantly in the 1890s debates – namely, articulating a distinctive socialist view on nationalism versus internationalism, and foreign and colonial policy. As socialist parties started to consider how best to prevent autocratic rulers and democratic governments alike from going to war, Bernstein wrote two critical reflections on the role of mass strikes as a strategic tool to supplement parliamentary activity (1905–1906). Further, as the battlelines were drawn between the rival alliances that would wage the next war – the Austro-Hungarian–German-led *Mittelmächte* (Central Powers) and the British–French–Russian *Entente* – Bernstein drew on his well-known experience of Britain (and his equally well-known Anglophilia) to dispel German-nationalist warnings of a British "conspiracy" against the Wilhelmine Reich (1911).

The outbreak of WW1 came as a great blow to Bernstein, and he soon became convinced that a protracted conflict, marked by ever more wanton brutality and technologically advanced destruction, would cause lasting damage to international workers' solidarity. Paradoxically, his increasingly pacifist position alienated him from his (mostly pro-war) revisionist allies, such as David and Heine, and instead brought him back into alignment with his (largely antiwar) orthodox former opponents. Bernstein was one of very few revisionists to join the USPD, which was dominated by the orthodox extreme left around Luxemburg, Karl Liebknecht, and the *Spartakus* group, as well as more "centrist" Marxists like Kautsky and Hugo Haase. Starting in 1915,

Bernstein launched blistering attacks on the German government's war conduct in the radical periodicals that remained sympathetic to the anti-war cause. As the conflict dragged on, he increasingly set his sights on the peace settlement that would be needed to restore positive international relations, and articulated the first detailed socialist account of a "league of peoples" and a complex system of international law (1917–1918).

The advent of the Weimar Republic presented Bernstein with a golden opportunity to observe an attempt to put his reformist theories into practice – to carry out a peaceful democratization and legislate the transition to socialism by taking over the legal–political institutions of a capitalist society. On this score, he concluded that an excess of caution and indecision on the part of the Republic's governments in 1918–1920 squandered much of the Revolution's promise and potential, arguing in particular that greater steps could have been taken to embed the socialization of the economy in the Republic's constitution. But he laid far greater blame for this at the door of the Allied victors of WW1, whose punitive economic impositions on Germany crippled its ability to absorb the temporary disruption of greater socialization, as well as the *Spartakus* left, which constituted itself as the *Kommunistische Partei Deutschlands* (KPD, Communist Party of Germany) in late 1918 and launched an uprising in early 1919 that, he argued, allowed the forces of reaction to re-establish a foothold in the new society. Accordingly, Bernstein's final theoretical works saw him exploring the options for introducing "a piece of socialism" through creative policy proposals in Germany's straitened postwar circumstances (1918–1921) and revising his position from the 1890s to confront the new partisan and geographic institutionalizations of a rival, revolutionary account of socialism in the KPD and its allies in the USSR (1921–1922).

Conclusion

Bernstein remains an idiosyncratic and neglected figure in socialist thought. As a practice-oriented revisionist, he is often dismissed as insufficiently orthodox to still be counted among the traditionally celebrated members of the Marxist tradition. Yet thanks to his Marxist origins, his theoretical position is also regarded as insufficiently different from Marx and Engels to be granted its own separate socialist identity. At the same time, thanks to his extensive parliamentary, journalistic, and activist engagements, Bernstein's ideological contribution tends to be seen as not of quite the same caliber as that of the canonical socialist thinkers. But his style and priorities were still too intellectual for him to be viewed instead as a major party-organizational figure in social-democratic institutional history.

While Bernstein's reputation has undergone some periods of rehabilitation and renaissance – especially in the historical scholarship of the 1970s – his comparative obscurity stands entirely at odds with his foundational importance for modern social democracy. Few figures in social thought have enjoyed as wide-ranging and singular an influence on the course of human society.

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Besson, Samantha

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Besson, Samantha (b. 1973), is a legal academic in public international law and European law. Born in Beirut and a national of Switzerland and the United Kingdom, Besson has been a Professor of Law at the University of Fribourg in Switzerland since 2005.

Education

Besson received her initial degree in law summa cum laude in 1996 from the University of Fribourg. In 1998, she earned a Magister Juris with first class honors in European and Comparative Law from Balliol College at the University of Oxford, completing a thesis on the economic and legal impact of anti-discrimination laws. In 1999, she completed a Doctorate in Constitutional Law summa cum laude from the University of Fribourg and in 2004 a postdoctoral Habilitation at the University of Bern. Her 1999 PhD on the legal theory and Swiss application of horizontal equality was awarded prizes for being the best PhD dissertation submitted at the University of Fribourg and among the best dissertations submitted in Switzerland.

Teaching

Besson began her academic and teaching career in 2001 as a tutorial lecturer in jurisprudence and political theory at colleges of the University of Oxford. In the same year, she also became a lecturer in comparative constitutional law at the University of Geneva, and she continued at Geneva until 2005. In 2004, she joined the Law Faculty at the University of Fribourg, where she became a full professor in 2005. Besson has been a visiting professor at a variety of institutions, including Harvard Law School, the Hague Academy of International Law, the University of Lausanne, and Duke Law School.

Research and Publications

Besson's research has centered on legal theory in European, public international, and human rights law. Her ambitious 2005 monograph *The Morality of Conflict: Reasonable Disagreement and Law* is a continuation of the development of Besson's proposed "General Jurisprudence of Conflict" that she first explored in her Habilitation dissertation. Along with José Luis Martí, Besson was the co-editor of *Deliberative Democracy and its Discontents* and *Legal Republicanism: National and International Perspectives*. Besson and John Tasioulas co-edited 2010's *The Philosophy of International Law*, a much-needed overview of the philosophical underpinnings of public international law and its various appendages. In 2011, Besson delivered a plenary lecture at the 25th IVR World Congress of Philosophy of Law and Social Philosophy in Frankfurt am Main, since published in ARSP-Beiheft no. 136. Besson is the author of a number of French- and German-language legal textbooks on international and European law, all of which have gone through multiple editions. Besson has published works in English, French, and German.

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Beza, Theodore

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Introduction

Theodor Beza was born on 24 June 1519 in Vézelay into a noble family. He was first a pupil of the German Protestant lawyer and scholar of Greek Melchior Volmar, who greatly influenced him, studying under him at Orléans and Bourges, where he met the young John Calvin. From 1535 to 1539 Beza studied law at Orléans, and after graduating went to Paris where, well-funded by two benefices, devoted himself to literature, mainly poetry. After surviving the plague, he became more interested in the spiritual aspects of life and turned to the Reformation. In 1548, he went to Lausanne, where he worked as a Greek teacher, and from there to Geneva, where he became rector of the newly founded academy in 1559 and an important collaborator of Calvin. At the beginning he tried unsuccessfully to unite the Protestant churches. For his conversion, he was sentenced to death in absentia in France and had part of his property confiscated. Between 1560 and 1563 he made many diplomatic trips to France and became the theological spokesman for the French Huguenots. As a field preacher in Prince Condé's army, he took part in the French Wars of Religion. After 1563 he returned to Geneva and took over Calvin's post after his death. He died in Geneva on 13 October 1605.

Beza was a versatile literary figure, publishing poetry, plays, translations, and especially theological and polemical writings. His 1565 edition of the New Testament is significant. In the field of law, Beza was particularly concerned with the theory of the state.

Polemics over the Death Penalty for Heretics

When Michael Servetus was burned as a heretic in Geneva at Calvin's instigation in 1553, it caused great controversy even among Calvinists themselves as to the appropriateness of such a punishment. The most prominent critic was the Basel theologian Sebastian Castellio, author of a treatise on whether heretics should be persecuted (*De haereticis, an sint persequendi*, 1554). Beza agreed with Servetus' condemnation, as is known from his correspondence (Geisendorf 1967, 64). Like Calvin, he rejected Servetus' views on the the Holy Trinity. Beza responded to Castellio's criticism with his polemical work on the punishment of heretics by the civil magistrate (*De haereticis a civili magistratu puniendis*, 1554). Here he expressed for the first time his ideas on the right of resistance, postulating that a Christian official has a duty to defend the Church

and therefore must punish heretics in order to preserve the purity of the Church (Dufour 2006, 47–49). He cites the defense of the city of Magdeburg against imperial troops in 1550–1551 as an example of a legitimate right of resistance. At that time, the Lutherans of Magdeburg wrote a series of defenses in which they argued that the lower authorities could defend themselves against the ruler if he acted unjustly. In particular, the Magdeburg Confession (*Magdeburger Bekenntnis*, 1550) became a model in argumentation for later Calvinist theologians, including Beza (Witte 2010). The latter asked three questions in his writings, to which he answered in the affirmative: whether heretics should be punished, whether this punishment is a matter for the authorities, and whether the death penalty is an option. Examining the positions of Luther, Erasmus, and Calvin and using quotations from the Bible, he finally proved that it is God's will for officials and rulers to punish contempt for religion even by death. According to Geisendorf (1967, 68), Beza regretted his attacks against Castellio in his later years.

St. Bartholomew's Day Massacre and Monarchomach Theories

After 1573, in the wake of the massacre of the night of Bartholomew, when Huguenots were slaughtered in large numbers in Paris, the positions of Calvinist theologians and jurists on the question of the right of resistance were radicalized.

Three basic monarchomachic works emerge, seeking to address the exacerbated situation in France and dealing with the right of armed resistance against the tyrant: François Hotman's *Franco-Gallia* (1573), Theodore Beza's *Droit des magistrats / De iure magistratuum* (1574), and the Beza-inspired *Vindiciae contra tyrannos* (1579), attributed by Alain Dufour (2006, 150) probably to Philippe Duplessis-Mornay. Political theorists see in them the first signs for a democratic revolution in the early modern world (Witte 2010).

Beza's *De iure magistratuum* (Right of Magistrates) was so radical that the Geneva city council would not allow it to be published, lest it offend the French king and was first published in French with a fake place of printing in Magdeburg to make it appear to be a new edition of a 1550s printing (Bildheim 2001, 49). In this work, Beza develops the ideas he had already partly expressed in *De haereticis*, namely, that the lower authorities and officials (*magistratus*, in Beza's conception mainly city councils and lower and higher state or court officials; under the influence of Hotman's *Franco-Gallia*, he also adds nobles and estates-general) are to protect the Church from its adversaries and, for the general benefit of society, to ensure the regular practice of religious life.

The treatise *De iure magistratuum* is based on the connection of the right of recall of the lesser superiors and with the medieval doctrine of the inalienable sovereign right of the people. Both ruler and people are accountable to God and to each other. According to Luther and Calvin, if the ruler abdicates his responsibility and issues ungodly and unjust commands, only passive resistance is possible. Beza disagrees that unjust commands are only to be passively resisted. To reject evil requires an active commitment to the pursuit of good and justice. According to Beza, when the interests of the people are violated by the ruler, the magistrates are obliged to oppose the ruler, even with arms in the extreme case. By violating natural rights, exemplified especially by the Ten Commandments, and departing from true religion, the ruler becomes a tyrant, the people are no longer obliged to obey him, and because the ruler has broken his covenant with the people, the people's resistance is legitimate. Thus, Beza surpasses the ideas of his predecessor Calvin, and also Hotman, who proclaimed peaceful solutions, and sets a new landmark in monarchomach theory.

Beza, however, considers armed resistance a last resort and tries to limit it as much as possible with his arguments. First, he grants the right of resistance only to magistrates or officials, not to private individuals. Individuals can intervene only if they are called to do so by God. Otherwise, their lot is to endure injustice patiently or go into exile. Further, Beza defines in detail the characteristics of a ruler-tyrant to prevent the possibility of rebellion at the slightest act of injustice on the part of

the ruler. He refuses to allow the struggle against false authority to be confused with the struggle against all authority and does not support illegitimate rebellions and uprisings. He does not regard the conduct of the majority of the people as determining, because they, like a bad ruler, can drive the state into danger, either by criminal tolerance or by weakness or malice. In many cases, then, the bad majority will eliminate the good and reasonable minority.

Armed resistance can be allowed only under three conditions: (1) when tyranny is manifest, (2) when all other means have been tried, (3) when resistance will not cause more evil than good. These three conditions are variations of the traditional "just war" principles. Beza sees an important role for the magistrates in their control function. For every type of government, even monarchical ones, needs democratic control to prevent abuses of power. In his own words, Beza bases his theory of the state on the Old Testament. In his view, there were nations before rulers. To prevent chaos, they created authorities to ensure order and law. The ruler is elected by the people and is also removable by them if he fails in his mission. The monarch cannot claim to stand outside the laws of men; such an attitude would lead to the absolutism that Beza predicts in France.

In the conclusion of his work *De iure magistratuum*, Beza discusses the relationship between the state and the church. Luther held the theory of two kingdoms, secular and spiritual, each with slightly different laws, while Beza, like Calvin, distinguishes between secular and spiritual administration, but does not separate church and state. He conceives of them as two concentric circles, the outer of which is the state and the inner the church. Since God also willed the state, founded it, and placed it at the service of his future empire, the state and the church have the same master. The state has to provide for the education of the people and enable them to be educated in the true faith that produces good citizens. A good state only grows with good citizens and must protect the religious life from external excitement. It can deploy law and arms to defend the Church.

Beza sees a connection between democratic freedoms in a country and the legal guarantee of religious freedom. When one is lost, the other is usually lost as well. His model was the Genevan ecclesiastical and city state (Kickel 1967, 264). For his work, Beza drew on classical, patristic, Catholic, and Protestant sources. His main argument, that there is a covenant that binds the people, the ruler, and God to each other, was based on ancient Hebrew and classical-stoic ideas that had already been referred to by medieval authors (Witte 2010).

Conclusion

Beza is notable for his emphasis on the active role of man in society. He considered it his duty to serve God and love his neighbor. Unlike his predecessors, he did not insist on passive resistance against the supreme government but thought of legal ways to take active action through the magistrates against unjust interference by the authorities, especially if it extended to the field of religious freedom. For law is supposed to protect the weaker, and the people are not there for the ruler, but the ruler for the people. When all avenues of redress against the tyrant fail, armed resistance is possible.

Beza's monarchomach theories gained great resonance in his time and their influence can be seen, for example, in the religious conflicts preceding the outbreak of the 30 Years' War. Dependence on the writings of *De iure magistratuum* can be found in the Declaration of Independence of the United Provinces as well as in the Covenant of the People presented to the English Parliament in 1649, in the Declaration of Independence of the United States in 1776, and, in Europe, in the Rights of Man (Droits de l'homme) in 1789.

Beza established the dogma of inalienable and unalienable sovereignty, and in this he became a greater reformer than Calvin (Geisendorf 1967, 315).

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Binding, Karl Lorenz

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Introduction

Born on June 4th 1841, in Frankfurt on the Main as the son of well-known jurist and liberal politician Georg Christoph Binding (1807–1877) and his wife Maria Dorothea, Karl Lorenz Binding went on to study history and law at the University of Göttingen in 1860, finishing 1863 with a legal doctorate for a work on civil procedural law (Binding 1863a). Having received a *venia legendi* (postdoctoral qualification required to teach at university level) to teach criminal law and criminal procedural law from the law faculty in Heidelberg in 1864 for a work on the inquisitory character of criminal proceedings in Roman law (Binding 1863b), Binding began teaching in Heidelberg in the summer semester 1864. In 1866, he became a professor at the University of Basel, Switzerland. After further tenures in Freiburg im Breisgau (1870–1872) and Straßburg (1872–1873), Binding in 1873 became professor at the Leipzig University law faculty, at the time arguably the most prestigious law faculty in Germany. In 1892 and 1909, he served as the university's rector. Starting in 1913, Binding spent his retirement back in Freiburg im Breisgau, where he died on April 7, 1920.

Binding today is regarded to be one of the most influential German criminal law scholars (for a list of Binding's extensive publications see Westphalen 1989, pp. XXIII–XLVII).

Basic Legal Views

For the most part, Binding shared the classical positivist approach to legal theory in late nineteenth-century Germany, refusing any concepts of natural or rational law while at the same time perceiving law to be intrinsically logically coherent. In line with the methodical ideal of the German Historical School of Law (e.g. Georg Friedrich Puchta, early Rudolf von Jhering), Binding saw the development of positive law into its logical consequences as the main focus of jurisprudence. Any law found in such a way was seen by him as further, previously unknown ("latent") positive law (Binding 1885, p. 10).

While most of his contemporary jurists in Germany followed some form of legal positivism, Binding was uniquely radical in his refusal of

any "external" influence on law, accusing a range of other well-known positivists of – sometimes unknowingly – relying on concepts of natural or rational law. He insisted that no rule, value, term or form based on anything other than the *will of a (any) community organized as a state* (cf. Binding 1885, pp. 198–199) may be regarded as law. Consequently, Binding thought of law as a mostly closed system, freely determining its own form and content. He specifically refused popular theories stipulating a certain form of law (e.g. August Thon's so-called Imperatives Theory), arguing that any such stipulation of form cannot be inferred from the lawmaking will itself, but is rather illegitimately imposed upon the law by the jurist proclaiming such a theory (Binding 1922, pp. 101 et seq.).

Notwithstanding the logical focus of judicial work, Binding's voluntarist view on law as the will of any community organized as a state allowed him to acknowledge the aim of such a will as a key aspect in a law's interpretation, consequently introducing a modern *teleological element* into his approach to jurisprudence (see Binding 1885, p. 13; cf. Hilliger 2018, pp. 60–63). In this way, Binding presents a synthesis of the classic, logic-centered nineteenth-century approach and early twentieth-century concepts focusing on legal purpose.

Binding did not identify the lawmaking will with that of the legislative body or its representatives. Instead, he saw law as its own *virtual will*, separated from the respective legislative body in the moment of enactment. Drawing from ideas of earlier jurists, Binding mainly argued that any subjective theory of legal interpretation would not allow for a development of the law in all of its logical consequences, thereby stripping jurisprudence of its foremost and, in Binding's view, most noble purpose as a science (cf. Hilliger 2018, pp. 138 et seq.). Binding further explained his approach, which at the time was in opposition to the common method of legal interpretation, in his "Handbuch des Strafrechts" ("Handbook of criminal law") in 1885, developing the first consequent theory of objective interpretation within German legal tradition (Binding 1885, pp. 450 et seq.).

Norm Theory

Today, Binding is mostly known for his so-called *Normentheorie* (Norm Theory), which he developed over the course of his entire academic career, starting in 1872 with the first volume of his main and most important work "Die Normen und ihre Übertretung" ("Norms and Their Interpretation").

Binding's Norm Theory is based on the idea that a delinquent does not violate criminal law, but rather fulfills its terms, as it merely grants a right to punish a person found to have committed the behavior deemed punishable by said law (Binding 1922, pp. 4, 20). As punishment without delinquency was unfathomable to Binding, another legal rule had to be the object of the perpetrator's violation. Binding named such unwritten legal rules "norms." These norms, in Binding's view, are *logical prerequisites of the corresponding criminal laws*. For example, a criminal law granting the state a right to punish a person who committed homicide would, according to Binding, logically require a norm declaring the killing of another person illegal.

The idea of such norms as logical prerequisites had been held by earlier scholars (see, e.g., Thomas Hobbes, De cive, 1657, Chap. 14 § 1; Jeremy Bentham, Of Laws in General, 1782, Chap. I.1; for an overview see Renzikowski 2002).

Uniquely at least within German legal tradition, however, Binding understood these norms to be actual laws, arguing that they derive from the same lawmaking will as the criminal laws whose logical prerequisites they are. In line with his general legal views proclaiming an intrinsic logical coherence of the legal system, any legal rule logically required by a law must itself also be a law.

In strict opposition to most of his contemporaries, Binding saw norms as, in principle, independent from the criminal laws corresponding with them. They can, in his view, be created independently from laws sanctioning their violation (as *leges imperfectae*). Even if they, as may be the case, only came into existence as a criminal law's logical prerequisite, they can principally outlive the criminal law logically requiring it. Whether a norm created via a criminal law will expire with said criminal law is, according

to Binding's Norm Theory, in each case subject to an interpretation of the legal act repealing the criminal law.

Although the dichotomy of criminal law and norm – today mostly referred to as primary and secondary norm – has found widespread acceptance at least in German jurisprudence, the details of Binding's Norm Theory remain disputed. Still, Binding's Norm Theory has undeniably influenced various fields of German jurisprudence (e.g. the dogmatic handling of so-called blanket criminal laws).

Retributive Justice

During the so-called Schulenstreit, a dispute among criminal law scholars in late nineteenth and early twentieth-century Germany over the purpose of punishment, Binding was one of the key proponents of retributive justice (Westphalen 1989, pp. 221 et seq.), speaking out against the so-called modern school represented by his lifelong academic rival Franz von Liszt (1851–1919), which favored various theories of punishment as a deterrence. In his reasoning, Binding relied on the Norm Theory, claiming that *norms had a deterring purpose while criminal laws merely allowed for the punishment a person who violated the corresponding norm* (Binding 1922, pp. 51 et seq.). Perceiving law as an own virtual will, Binding concluded that since the law itself did not contain sufficient evidence for a deterring purpose of punishment, any such purpose would have to be illegitimately imposed upon the law by the interpreting jurist (Binding 1915, pp. 61–94). Binding, therefore, accused the proponents of punishment as a deterrence of utilizing concepts of natural law (Binding 1885, p. 7).

"Allowing the Destruction of Life Unworthy of Life"

Binding's last work, co-authored by well-known German Psychiatrist Alfred Hoche, was "Die Freigabe der Vernichtung lebensunwerten Lebens" ("Allowing the Destruction of Life Unworthy of Life"), published in 1920 shortly after his death. In it, Binding unambiguously called for the establishment of a legal process to allow the termination of severely mentally disabled persons upon request by the person's caretaker, at a later stage even upon the state's request (Binding and Hoche 1920, p. 32). Binding argued that whenever a person has permanently lost the capacity to form any kind of will to live and at the same time is a burden to the people sustaining him, the possibility of legal proceedings to end such a person's life ought to be introduced into the law (Binding and Hoche 1920, pp. 25 et seq.).

While an academic debate over the possibility of terminating physically and/or mentally disabled persons had been going on in Germany since the late 1800s, connecting such controversial demands to the names of well-known scholars such as Binding and Hoche served as a catalyst, visibly reinvigorated the debate and firmly established the (already existing) phrase "lebensunwertes Leben" ("life unworthy of life") as a key term in the discussion. Responses to Binding and Hoche from various academic fields were mostly critical (cf. Grübler 2007).

In the years following its publication, Binding's and Hoche's co-work certainly encouraged even more radical views on the matter. In this way, it is also connected to the later National Socialist program to terminate disabled persons ("Aktion T4"), starting in 1939. Nonetheless, the program cannot be seen as an implementation of Binding/Hoche (Hilliger 2018, pp. 387 et seq.) as it was kept a state secret at all times, did not involve legal proceedings, and was not restricted to persons unable to form (or even openly express) a will to live.

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Bioethics: Experimental Approaches

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Introduction

This entry summarizes an emerging subdiscipline of both empirical bioethics and experimental philosophy ("x-phi") which has variously been referred to as experimental philosophical bioethics, experimental bioethics, or simply "bioxphi" (Earp et al. 2020a, b; Lewis 2020; Mihailov et al. 2021a). Like empirical bioethics, bioxphi uses data-driven research methods to capture *what* various stakeholders think (feel, judge, etc.) about moral issues of relevance to bioethics. However, like its other parent discipline of x-phi, bioxphi tends to favor experiment-based designs drawn from the cognitive sciences (Knobe 2016) – including psychology, neuroscience, and behavioral economics – to tease out *why* and *how* stakeholders think as they do.

Using insights gleaned from these experiments, bioxphi aims to bridge the descriptive and normative programs of bioethical inquiry. Thus, it seeks not only to draw on, or respond to, ethical questions raised by bioethicists (e.g., for purposes of formulating empirical research questions), but also to advance substantive normative debates within the field. To this end, rather than relying on unrealistic, abstract thought experiments to identify the contours of what is morally at stake in some issue (e.g., Thomson's "violinist" analogy in arguments about abortion; for discussions, see Walsh 2011; McMillan 2018), bioxphi tends to deal with cases that are more directly inspired by real-world dilemmas and decisions. These might pertain, for example, to specific healthcare policy options or standards of clinical practice (Kingsbury and Hegarty 2022), to medical research and rules proposed to protect participants' rights (Dranseika et al. unpublished), to the understanding, use, or application of relevant legal concepts (Sommers 2020; Demaree-Cotton and Sommers 2022), to evaluation and regulation of cognitive enhancement or other emerging biotechnologies (Faber et al. 2016; Mihailov et al. 2021b), or (more generally) to human-technology and human-biosphere relations (for overviews, see Earp 2019; Earp et al. 2020a, 2021, 2022).

We begin by articulating some of the conceptual and methodological issues that have motivated a general interest in experimental approaches to bioethics with a view to detailing the ways in which research in bioxphi has responded to those issues. We also further situate this emerging subdiscipline in relation to both empirical bioethics and x-phi. In the second section, we outline some of the strategies that have been employed within bioxphi studies to enlist empirical findings (i.e., descriptive findings or models showing how and why people make certain ethical judgments and/or interpret or apply

relevant concepts) in the service of bioethical arguments. Finally, we conclude with a brief reflection on the state of this burgeoning subdiscipline.

The Value and Methods of Bioxphi

McMillan (2018) and Machery (2017) have argued, in different contexts, that when it comes to people's ethical judgments or applications of relevant concepts (e.g., deciding whether someone is competent to refuse a doctor-recommended treatment), the basis for their decision is not always readily apparent. In the case of professional bioethicists, we do, typically, have some idea of how they have reached their normative conclusions regarding an issue, for example, when they explain their premises and reasoning in the context of an explicit argument in the academic literature. Similarly, we can learn how bioethicists apply certain concepts such as informed consent, competence, coercion, futility, equipoise, or medical necessity: Ideally, they will provide precise definitions of the concepts and explain how the concepts are being applied. Why, then, might we be motivated to go beyond the armchair and employ empirical methods to probe more deeply how individuals – both bioethicists and nonbioethicists – think about ethical issues and why they think as they do? Several answers suggest themselves.

First, even if we assume that professional bioethicists' explicit argumentation tells us all we need to know about their moral judgments and associated thought processes, professional bioethicists make up only a tiny fraction of those engaged in ethical reflection on healthcare, biomedical research, health policy, and related matters. Their intuitive moral responses to particular cases, on the basis of which they are likely to formulate their normative arguments (at least in part), may not be representative of those of a wider population. And yet, these responses are likely to be shaped, to some extent, by a bioethicist's own (relatively narrow or circumscribed) experiences, life circumstances, or even psychological dispositions. Thus, professional bioethicists may, in some cases, fail to "detect" morally relevant features of certain cases. This, in turn, may unduly restrict the scope or applicability of the arguments they develop (for a discussion, see Leget et al. 2009). Indeed, there is a vast array of different stakeholders making important moral judgments and applying ethical concepts on a routine basis, often in situations that have substantial real-life stakes and consequences. These diverse stakeholders may include medical practitioners and other healthcare providers, hospital managers, biomedical researchers, biobank personnel, policymakers, lawmakers, judges, patients, and their families. Such "on the ground" participants in practical ethical decision-making, faced with complex, morally charged situations, may have developed certain intuitive or morally relevant insights not available to the average armchair bioethicist. And although these insights may not always be easily articulated, they may nevertheless be revealed through the patterns of judgment these stakeholders generate in response to (experimentally controlled variations on) realistic cases.

Importantly, just like these other healthcare stakeholders, professional bioethicists may not always understand the underlying sources of their own intuitive responses to morally charged situations or the contextual factors that influence those responses. Depending on such background variables, including the cognitive processes that give rise to specific intuitions or shape them into concrete judgments (e.g., of right or wrong), there may be reasons to assign more or less weight to an intuition as a basis for moral judgment. This could be the case, for instance, if an intuitive moral reaction to a given scenario, or set of scenarios, is shown to emerge from a psychological process that is widely *normatively unreliable*, for example, a process distorted by racist or sexist assumptions or biases. Such biases are the result of psychological processes that are normatively unreliable in the sense that they are unlikely to "track the truth" of the situation or help us arrive at a morally defensible conclusion (for discussions, see Wedgwood 2007; Sinnott-Armstrong 2008; Machery 2017).

Another reason to understand *why* or *how* a bioethical judgment applies to a given scenario is so that action-guiding considerations,

principles, or protocols can be developed for relevantly similar cases. A crucial part of understanding whether the perceived moral (un) acceptability of a particular action generalizes to other situations involves identifying the factors that shape such perceptions in the first place and systematically exploring their scope (i.e., dimensions of variance across situations that elicit similar reactions or judgments). For these and other reasons, there is both theoretical and practical value in analyzing how and why people think about bioethical matters, and not just what they think (Lewis 2020).

However, such analysis cannot be conducted from the armchair. Reflection solely from the armchair rather than from the bedside, bench, or committee room, especially on abstract or idealized cases, may limit the real-world relevance of the intuitions, inferences, and judgments that make up such reflection. For instance, James Rachels (1975) appeals to intuitions about fictional cases unrelated to healthcare to attempt to call into question the moral difference between active and passive euthanasia. However, as McMillan (2018) notes, physicians have often objected that the distinction between active and passive euthanasia is morally relevant in real clinical cases, and that Rachels' fictional cases fail to generalize to actual end-of-life decisions. Relatedly, Rodríguez-Arias et al. (2020) have shown that, under realistic conditions, ordinary people draw the "killing" and "letting die" distinction very differently to the way endorsed by some bioethicists. For their research participants:

> the distinction between "ending" a patient's life and "allowing" it to end arises from morally motivated causal selection. That is, when a patient wishes to die, her illness is treated as the cause of death and the doctor is seen as merely allowing her life to end. In contrast, when a patient does not wish to die, the doctor's behaviour is treated as the cause of death and, consequently, the doctor is described as ending the patient's life. This effect emerged regardless of whether the doctor's behaviour was omissive (as in withholding treatment) or commissive (as in applying a lethal injection). (p. 509)

More generally, if the goal is to develop a normative position regarding a concrete bioethical issue, such as in the context of clinical care, it may be that the judgments of doctors or their patients, rather than (only) those of armchair bioethicists, will in some cases constitute more relevant data (Earp et al. 2021).

Empirical bioethicists will no doubt agree that the judgments of healthcare practitioners, policymakers, patients, their families, and so on should be considered when developing guidance and recommendations for dealing with complex ethical issues in the real world. What distinguishes bioxphi in terms of its relation to empirical bioethics is that, when it comes to either investigating the normative reliability of different stakeholder judgments or clarifying relevant bioethical concepts, such efforts involve *experimentally* testing the effects of different variables on those judgments and building explanatory models of how the latter come about (Earp et al. 2021). This feature is what bioxphi inherits from x-phi, which likewise draws on the methods of cognitive science and experimental moral psychology.

In principle, bioxphi studies could employ the full range of experimental methods used in the cognitive and psychosocial sciences, including the use of transcranial magnetic or direct-current brain stimulation devices to influence the cognitive processes involved in making moral judgments (e.g., Kuehne et al. 2015), or the administration of psychoactive substances to influence moral motivations (see Earp 2018). Indeed, as some have argued (O'Neill and Machery 2014; Mihailov et al. 2021a; Nado 2021; Alfano et al. 2022), experimental methods could also usefully be employed in combination with other empirical methods, such as interviews, qualitative surveys, linguistic corpus data analyses, anthropological work, and virtual reality simulations.

Nevertheless, the main method in x-phi from its inception, and hence of bioxphi more recently, has been the "contrastive vignette technique" (CVT) (for an overview, see Reiner 2019). Broadly speaking, the CVT involves designing a pair of vignettes describing the exact same situation, but which differ from one another in a single, key respect. This difference constitutes the experimental manipulation, which is expected, on theoretical grounds, to influence participant responses, such as their normative judgments about the (im)permissibility of a given action or

their application of a given bioethical concept. By systematically varying what is manipulated between conditions and measuring the outcome, a model can be built of the various factors that make a difference to participant responses. These models can then be used to infer the underlying cognitive processes involved. As a final step, bioxphi researchers can appeal to these empirical models, in combination with background theoretical commitments, including normative considerations, to advance a substantive argument about whether, when, or to what extent participants' moral judgments should be given *prescriptive* weight in reaching bioethical conclusions.

Bioxphi as a Normative Enterprise: Some Common Strategies

What are some of the most common strategies in bioxphi studies for reaching normative conclusions from premises that include empirical information about *how* and *why* people think as they do when making moral judgments, that is, empirical information about the underlying cognitive processes ("how") and eliciting factors ("why") that shape such judgments? Four broad approaches have recently been identified: *parsimony*, *debunking*, *triangulation*, and *pluralism* (Earp et al. 2021). Some of these approaches overlap with strategies adopted by empirical bioethicists (e.g., giving prima facie normative weight to the most consistent, common, and robust judgments within the studied population or adopting a method of reflective equilibrium) (see Leget et al. 2009; Davies et al. 2015). Of course, these are not the only strategies that could feasibly be employed in bioxphi studies. Rather, being among the most salient examples in the recent literature, they are used for illustration.

According to the *parsimony* strategy, widely shared, consistent, and robust moral judgments among a relevant group of stakeholders should carry *some* normative weight in bioethical argumentation (Earp et al. 2021, in press; see Beverley and Beebe 2018). Of course, simply identifying common and consistent moral responses and taking these for granted without additional normative consideration will typically not be sufficient for a convincing argument. These responses might, after all, reflect some misunderstanding, contradictory beliefs, inferential mistakes, bias, or prejudice. Thus, as DeGrazia and Millum (2021) have recently noted, by investigating the consistency of stakeholder judgments across different presentations of a case or providing evidence of the factors that bear on the normative reliability of judgment-forming processes, psychological experiments might be considered a new way of identifying Rawlsian "considered judgments" for the purposes of engaging in reflective equilibrium (see the "triangulation" strategy below).

The parsimony strategy, however, does not (and, indeed, should not) reduce bioethical conclusions and recommendations to a popularity contest (for a discussion, see Leget et al. 2009). The fact that a given moral judgment has been identified as being consistently held within a certain population – and has even survived experimental tests for normative reliability – does not mean that it is the "all-things-considered" most reasonable or most justifiable normative basis for action. For instance, the judgment may conflict with the equally or more reliable judgments of other stakeholders, such as experienced moral philosophers or bioethicists, or it may come into tension with other widely accepted normative factors (including moral and legal norms, principles, and theories). In such cases, a reasonable process of deliberation could well entail that the judgment should, despite its popularity, be overruled, discounted, or outweighed in arriving at some conclusion. All that the parsimony strategy entails is that the consistent, experimentally robust moral judgments of relevant stakeholders should be accorded some (defeasible) normative weight. Effectively, it "puts the burden of proof on those who would argue that *no* normative weight should be assigned to the consistent judgments of relevant stakeholders about a given moral issue" (Earp et al. 2022, pp. 190–191).

As alluded to above, bioethical judgments sometimes rely on false information, prejudiced attitudes, epistemological distortions, morally irrelevant factors (e.g., framing effects), or faulty inferences (Greene et al. 2001; Singer 2005;

Wedgwood 2007; Sinnott-Armstrong 2008; Berker 2009; Greene et al. 2009; Gino et al. 2010; Andow 2016; Machery 2017; May 2018; Sauer 2018; DeGrazia and Millum 2021; however, see Demaree-Cotton 2016; Demaree-Cotton and Kahane 2018, regarding framing effects). All else being equal, such factors should typically *weaken* the normative weight assigned to such judgments when reaching a bioethical conclusion (Wedgwood 2007; Machery 2017; Demaree-Cotton 2019). At the extreme, a given judgment might be entirely "debunked" – that is, shown to be entirely unreliable for ethical guidance. A key motivation of bioxphi studies is to provide evidence of factors that influence the normative reliability of stakeholders' moral responses (judgments, decisions, attitudes, intuitions, inferences, and so on).

The *debunking* strategy combines evidence against the normative reliability of a moral response with a type of argument inspired by work in x-phi (Mukerji 2019):

> (P1) Judgment *p* is the output of a psychological process that possesses the empirical property of being substantially influenced by factor F. (Empirical premise)
>
> (P2) If a judgment is the output of a psychological process that possesses the empirical property of being substantially influenced by factor F, then it is pro tanto unreliable. (Bridging normative premise)
>
> (C) Judgment *p* is pro tanto unreliable.

However, the scope of the debunking is necessarily conditional. After all, factor F in the argument schema above may itself be contested: Perhaps the bioxphi researcher views it as a morally irrelevant factor whereas someone else sees it as a legitimate moral consideration (see Königs 2020; DeGrazia and Millum 2021). Take the following judgment adapted from the findings of a bioxphi study conducted by Smith and Hegarty (2021): "Clitorectomies violate human rights more when performed on nonintersex female infants than on infants with intersex traits." Although Smith and Hegarty do not explicitly attempt to debunk this judgment, other work suggests that permissive attitudes toward intersex genital cutting are driven by such factors as participant endorsement of heteronormativity and the gender binary, and participants' own heterosexual identification (Kingsbury and Hegarty 2021). A politically progressive theorist who sees heteronormativity or belief in the gender binary as ethically misguided would thus likely regard such findings as supporting a debunking argument about the aforementioned judgment regarding intersex vs. non-intersex female human rights. A politically conservative theorist, by contrast, who sees both heteronormativity and the gender binary as being scientifically and ethically justified, would not regard such findings as debunking the judgment.

The issue of normative disagreement crops up in other ways. What happens, for example, when there is a divergence in two or more sets of pro tanto reliable judgments among a given population of relevant stakeholders (or between populations)? Indeed, how do ethical theories and principles, the judgments of professional bioethicists, and those of, say, patients, physicians, or the public relate to one another, and how can this information be integrated by bioxphi researchers to draw well-founded normative conclusions? In bioxphi research, one way of answering these questions involves adopting a *triangulation* strategy, one that is similar to reflective equilibrium (Earp et al. 2021). According to this strategy:

> Divergence among the judgments of various groups of experts and/or between expert and lay judgments requires the following: adjusting, pruning, or supplementing the normative conclusions derived from [one group's] judgments in order to accommodate: (1) the normative implications of the opposing views; and (2) normative considerations derived from, for example, ethical or legal principles, background theories, morally relevant facts, and/or the best arguments for a normative position in the relevant expert literature. (Earp et al. 2022, p. 189)

Of course, the mere fact that conflicting normative judgments exist does not immediately necessitate a triangulation strategy. As we have seen, one of the benefits of bioxphi is that it can employ experimental methodologies and argumentation strategies to investigate the pro tanto reliability of these conflicting judgments. Thus, if the psychological processes outputting one judgment are convincingly shown to be influenced by,

for example, a morally irrelevant or normatively distorting factor, while the psychological processes outputting another judgment cannot be shown to be subject to such influence (despite comparable efforts), then one of the conflicting judgments might appropriately be discounted or discarded on that basis (i.e., debunking). Once conflicting moral judgments have survived various attempts at being shown to be pro tanto unreliable, they can be employed as initially credible (i.e., "considered") judgments for purposes of triangulation (or) in pursuit of reflective equilibrium. This will involve the execution of trade-offs among the respective considered judgments, or adjustment of weights, toward revising normative conclusions (or ethical theories, concepts, or principles) as coherence and mutual support seem to require (Earp et al. 2021; DeGrazia and Millum 2021).

Alternatively, faced with a divergence, bioxphi studies may indicate that a given bioethical concept or moral judgment is – even at the expert level – unclear, vague, or tends to generate confusion regarding one's obligations. The purpose of the triangulation strategy would then be to clarify a moral judgment or the concepts and inferences underlying that judgment. For example, the concepts of consent and autonomy have tended to be conflated at law, with statutory and common law applications of these concepts often running together the conditions for consent and the conditions for autonomy (Lewis 2021; Lewis and Holm 2022; for a series of bioxphi studies that provide evidence for this conceptual conflation, see Demaree-Cotton and Sommers 2022). One of the aims of the triangulation strategy could then be to resolve this confusion by making explicit the respective functions, uses, and/or values of these two concepts and thereby provide patients, physicians, legal professionals, and the public with some form of contextual reeducation.

In any case, it must be remembered that merely appealing to a divergence between sets of moral judgments will be inadequate to deliver an "all-things-considered" normative conclusion or recommendation. Although the triangulation approach is a useful starting point, adjusting, pruning, or supplementing opposing judgments will, in many cases, also require engagement with broader normative considerations, such as background theories, legal and moral principles, morally relevant facts, and the like (i.e., "wide reflective equilibrium") (DeGrazia and Millum 2021; Earp et al. 2021).

Finally, *pluralism* is an approach that that does not seek to find one single normative answer to an ethical question. Rather, it holds that in cases where various stakeholders have "conflicting, yet pro tanto reliable, judgments or where multiple and independent communities each reveal persistent disagreement between two or more conflicting, yet pro tanto reliable, judgments, these judgments may all have comparable normative weight" (Earp et al. 2021, pp. 106–107).

Conclusion

Relative to its parent disciplines – empirical bioethics and x-phi – bioxphi is an emerging field, one whose scope in terms of its methods, functions, and applications for practice and policy ends is yet to be established. This situation should be viewed positively. It affords those interested in adopting experimental approaches to bioethics a level of creativity and freedom to explore, test, and get to grips with what works and what does not. At the same time, there are challenges and unanswered questions facing this burgeoning subdiscipline: How and to what extent can the methods and strategies of bioxphi be integrated with others in empirical bioethics, philosophical bioethics, x-phi, cognitive science, and moral psychology? How do we, in practice, draw upon experimental models of *how* and *why* people think about realistic bioethical issues in order to develop concrete recommendations for clinical practice and health policy? How do we, in practice, deal with the defeasible normative weight of seemingly reliable judgments in order to deliver "all-things-considered" judgments? Does bioxphi have a specific role to play in generating "all-things-considered" normative solutions and recommendations? Of course, the field of bioethics in general is still attempting to grapple with some, if not all, of these questions.

In this entry, our characterization of bioxphi has been deliberately modest. Situating the field in relation to empirical bioethics and x-phi, we have illustrated some of the ways in which bioxphi has brought empirical data into the service of reaching normative conclusions that are of significance to healthcare practice and policy, medical research, and emerging biotechnologies. We have also explained some ways in which bioxphi, at least at this stage of its development, differs in important ways from empirical bioethics and x-phi.

We have argued that there is value in understanding not only what people think about bioethical issues but also how and why they think as they do. In particular, the "hows" and "whys" will often have practical normative significance for a range of bioethical situations and problems. Bioxphi seeks to generate evidence and provide strategies for assessing such normative significance, allowing us to better navigate the views of different stakeholders across the relevant domains of medicine and healthcare.

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Blackstone, William

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Introduction

Sir William Blackstone (1723–1780) wrote what is probably the most famous English language law book ever published. *Blackstone's Commentaries on the Laws of England* envisions English common law as a humanist cultural achievement at once connected to conservative traditions and open to social change. Published between 1765 and 1769, the four-volume *Commentaries* became an influential authority in the nascent US legal system. Though his work is rarely studied today, Blackstone continues to be cited by American courts. More broadly, in countries throughout the world, Blackstone's vision continues to shape how lawyers and the public at large understand what it means to have a government constituted and limited by law.

Blackstone was an opponent of democracy and a traditionalist supporter of hierarchical society. As a member of English Parliament, he voted to reenact the notorious Stamp Act, which exacted revenue from the American colonists whose demand for independence from British rule Blackstone regarded as treasonous rebellion. It is therefore an irony of history that Blackstone's sympathetic portrait of English law retains only marginal historical interest in England today, while it continues to be cited as an authoritative

source in the United States. This odd situation is partly accidental – when the *Commentaries* was published, the US legal system was just taking shape, and few other legal sources were available there. But it is also due to the substance of Blackstone's work. Blackstone believed that history tends to advance rational social progress, characterized by expanding individual liberty and correspondingly limited government. Although Blackstone was a supporter of the British Crown, his view that sovereignty is limited by core natural rights resonated with colonists who wished to escape British rule and found an independent nation. Indeed, arguably some of Blackstone's distaste for the project of American independence stemmed from what he regarded as the colonists' hypocritical coupling of a rhetoric of unalienable equal rights with the practice of slavery and the violent appropriation of Native American land.

Blackstone played many roles in his lifetime. He served as a university administrator, a practicing (and rather unsuccessful) attorney, a judge, and a member of British Parliament – in addition to being a husband and the father of eight children. Besides lecturing at Oxford and producing scholarly legal writings, he was a poet and the author of interpretive works on Shakespeare (Prest 2008).

Blackstone's Commentaries on the Laws of England

By far the most enduringly influential of Blackstone's works is his *Commentaries on the Laws of England*. The *Commentaries* begins by identifying core rights and constitutional structures and then proceeds to what Blackstone calls "a general map of the law," describing a sprawling network of legal doctrines, procedures, and institutions, tracing their historical development, and rationalizing this multifarious mix of legal structures developed over centuries with modern liberal rights. He combines historical explanations with policy justifications, assessments of the social effects of various doctrines and statutes, and sometimes approving, sometimes rueful, commentary on the politics and morality of the law being described. Above all Blackstone aims to show that law developed through thousands of independent judicial opinions can and does produce a coherent legal system with a focus on individual liberty.

The *Commentaries* is unabashedly eclectic and synthetic. The referential backbone of the text is English judicial opinions and statutes. But Blackstone draws from a wide array of other sources, including previous surveys of English law – e.g., the medieval treatise known as Bracton, Matthew Hale's analysis, and Coke on Littleton – as well as earlier work by continental jurists like Puffendorf and Grotius (Cairns 1984). His treatment of natural rights and governmental structures that limit arbitrary sovereignty in England relies extensively on Montesquieu's *L'Esprit des Lois*. There are comparisons between English legal structures and those of cannon law, ancient Roman law (with references to *Justinian's Institutes*) and ancient Hebrew law (with references to the Bible), as well as comparisons with contemporary laws of France, Germany, Denmark, and the Ottoman Empire, among other countries. Blackstone offers both historical and conceptual explanations for the development of English law, and law in general, sometimes presenting conflicting theories and declining to endorse one over another. So, for instance, he observes that Grotius and Puffendorf rely on a concept of implied collective consent to justify the doctrine that first possession grounds a right of ownership, whereas Barbeyrac and Locke see the first possessor as having *earned* a property right in the thing possessed through the labor it took to occupy it (II:8).

Blackstone's contribution to legal and social philosophy is due as much to his approach to studying law as to any theoretical argument he made about the nature of law (Posner 1976). This is not just a matter of literary style, though Blackstone is often praised for his readability. Today his work would be called "multidisciplinary." He combines an outline of core rights, legal reasoning, and legal-political structures, with a detailed explication of the specific legal doctrines, procedures, statutes, and institutions of eighteenth-century English law. Drawing on historical sources and arguments from social

policy, Blackstone aims to show how this network of legal structures works to construct, and sometimes to undermine, a society in which rights limit sovereign power, and positive law embodies and limits rights.

Blackstone on Rights

Although for Blackstone rights are somehow conceptually, probably transcendentally, prior to positive laws, in his scheme natural rights are both constrained and constituted by legislation and judicial reasoning. The *Commentaries* begins by identifying three "absolute" rights – security, liberty, and property – that are "inherent by nature in every individual" (I, 125). But Blackstone does not view these natural rights as unlimited. Indeed, he immediately introduces the idea that positive law shapes natural rights. So, for instance, he describes the right of personal liberty as allowing every individual to travel without restraint, "unless by due course of law" (I:130). In Blackstone's account, the limitation of individual rights is not only allowed but required by the nature of government: "it follows from the very end and constitution of society" that natural rights that "belong to man as an individual may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community"(II:141). For Blackstone, the crucial factor legitimating such limitations is that they occur *by law*, that is, as general rules enacted by the previously determined conventions required for valid legislative enactments or through judicial reasoning in valid common law decisions.

When Blackstone discusses the English "constitution," he is not referring to a singular founding text, like written constitutions today, but rather to a set of legal-political concepts, rules, duties, powers, and institutions that emerged over centuries, which he views as forming the unique, liberty-oriented structure of English law and government. These are sometimes embodied textually, for instance, in Magna Carta and parliamentary statutes, but they also comprise unwritten customs, principles, and institutional practices that, according to Blackstone, may be divined from an analysis of British legal culture.

Blackstone articulates five "auxiliary subordinate rights" constitutionally established to facilitate English subjects' enjoyment of "the three great and primary rights" of security, liberty, and property (I:136). These secondary rights all relate to the structure of government, the balance of power between English government and English citizens, and law's mediation of that power relation. They are (1) the "constitution, powers, and privileges of parliament," (2) the "limitation of the king's prerogative," (3) citizens' right of access to the courts of justice, (4) citizens' "right of petitioning the king and parliament for redress of grievances," and (5) "the right of having and using arms for self-preservation and defense" (I:140).

Blackstone's account of rights differs from most twenty-first-century understandings of human rights or constitutional rights. First, in Blackstone's view, even absolute natural rights can and must be shaped by contingent, positive law. Indeed, the preservation of those rights is the primary purpose of any civil society. Second, while Blackstone's rights scheme focuses on liberty, it is not a typical libertarian structure comprising only the so-called "negative" individual rights to avoid state coercion. Blackstone's core rights sometimes guarantee what we today refer to as "positive" entitlements to protection by the state. For instance, according to Blackstone, the right of personal security includes a right of indigent persons to "demand a supply sufficient for all the necessities of life" (I:126).

Blackstone's lengthy exegesis of property law exemplifies the complicated relationship of natural rights and positive law he weaves throughout his work and demonstrates that he feels no need to root all important legal structures in natural law (Allen 2014). Although Blackstone classifies property as one of the three "absolute natural rights" of individuals, he insists that any natural right to ownership ends with a person's death, which he regards as paradigmatic abandonment (Rose 1999). According to Blackstone, any right a dying person has to determine the future disposition of his property, or any right of

acquisition belonging to designated heirs, is "no natural, but merely a civil right" and this despite the fact that Blackstone saw familial inheritance as "the principal object of the laws of real property in England" (II:201). Thus while Blackstone avowedly believes in natural rights, he views many, if not most, important legal rights as a matter of social and political development (Finnis 1967). Indeed, long before the twentieth-century critique of false naturalism, Blackstone pointed out that attributing natural inevitability to contingent social structures is a common misconception, observing that "we often mistake for nature what we find established by long and inveterate custom" (II:11).

Blackstone on Legality and Sovereignty

Blackstone was a supporter of the English monarchy, but he did not view the English king as ruling by divine or natural right but rather as holding an office created and defined by positive law. Indeed, Blackstone agrees with advocates of democracy that rule by a monarch imagined to have a "divine indefeasible hereditary right" is "the most thoroughly slavish and dreadful" of all constitutions (I:211). He insists that a hereditary right to govern is necessary to avoid conflict and bloodshed. But no sooner does he declare the king's hereditary right than he qualifies it. In Blackstone's vision of the parliamentary English monarchy, "[i]t is unquestionably in the breast of the supreme legislative authority" to vest the royal succession in someone other than the immediate heir (I:188). Short of revolution, sovereign hereditary succession can only be changed with the agreement of the reigning monarch (who is considered part of parliament). Such a change, however, would have to be established legally, through "particular entails, limitations, and provisions," as opposed to by arbitrary fiat (I:188). A change in the order of succession is possible, because the source of the king's title is not any sort of natural law or natural right. It is rather "clearly a human institution," a purely positive legal right (I:202).

So, according to Blackstone, the king in parliament makes law, but law makes the king and contingent human law at that. For while the three core rights of the king's subjects – personal security, liberty, and property – originate in transcendent natural law, the king's sovereign power comes entirely from contingent human action. This vision of law originating, justifying, and limiting governmental power is one aspect of Blackstone's work that appealed to the founders of the American republic. It is striking how closely Blackstone's vision of a legally constituted sovereign comes to Thomas Paine's avowal in, *Common Sense*, the tract that urged rebellion against the very king Blackstone revered, that "so far as we approve of monarchy, . . . in America the law is king."

Blackstone on Judicial Reasoning

Blackstone identifies an independent judiciary as an important check on government power. While the king may establish new courts, according to Blackstone, neither the king nor parliament can change court procedure, which "must proceed according to the old established forms of the common law" (I:138). Blackstone is sometimes criticized as a believer in a "declaratory" theory of judicial decision in which judges simply read off legal outcomes from preexisting legal rules. His account of judicial reasoning asserts the basic rule of law requirement that a judge makes decisions "not according to his own private sentiments. . . but according to the known laws and customs of the land" (I:69). In a common law system, that requirement focuses on the doctrine of precedent, that is, the rule that judges' decisions in new cases must be consistent with their resolution of previous similar controversies. But Blackstone's articulation of precedential adherence is hardly mechanical. Instead he explains that previous rulings must be followed only "unless flatly absurd or unjust" (I: 70).

If anything, then the problem with Blackstone's account is that it seems to give judges an easy excuse for diverging from precedent. That, anyway, was the reaction of

Blackstone's fiercest contemporary critic, Jeremy Bentham. Bentham thought it nonsense to treat precedent as settled law but allow judges to deviate from previous rulings that are "contrary to reason" (I:69–70). As far as Bentham was concerned, if judges could reject precedent they regarded as unreasonable, the idea that judicial rulings created stable law was a joke. The absurdity was only heightened by Blackstone's observation that when judges diverge from precedent, "they do not pretend to make a new law, but to vindicate the old one from misrepresentation" (I:70), which Bentham viewed as instructing judges to willfully deviate from settled law and then lie about it (Bentham 2010 [1776]).

It is worth noting that Blackstone does not assert as a matter of fact that judges only discover and never make law but rather that judges conventionally describe their work that way. To the extent Blackstone endorses that convention, he can be read critically, a la Bentham, as contributing to a kind of judicial fraud, or sympathetically, as presenting a pragmatic judicial method that values consistency but allows for innovation smoothed over with a performance of discovery. In the second view, *acting as if* judges never make new law but only discover new aspects of preexisting legal rules is not fraud but an agreed upon fiction. Judges ritually perform their disciplined subordination to legal authority, inside an institutional practice with the flexibility needed to produce justice in a changing social context (Page and Prest 2018).

For an enlightenment author wishing to present a coherent legal system based on core rights and reason, eighteenth-century English law posed significant challenges. There was the multiplicity of courts and the separate, sometimes opposing, doctrines of law and equity, the fact that many contemporary legal doctrines were traceable to a reviled feudal system imposed by foreign invaders, and a rigid, categorical procedural system. Most obviously, there was the institution of common law, which develops legal rules and standards not by crafting a set of generally applicable statutes but instead by adjudicating particularized controversies and attempting to generate consistent outcomes across a span of centuries. Blackstone's response to this problem was to present the multiplicity, variability, and sometimes inconsistency of this mixed system of common law, legislation, and fundamental constitutional rights as a vital source of a legal system uniquely balanced between individual rights and government sovereignty. Blackstone not only rationalizes common law. He positively celebrates English law's purported ability to balance conflicting values – government control versus individual liberty, tradition versus innovation.

Blackstone's attempted resolution of historical authority and forward-thinking adaptability is captured and rationalized in what is probably the most famous metaphor in the *Commentaries*, the image of English law as "an old Gothic castle, erected in days of chivalry, but fitted up for a modern inhabitant," a castle whose structure is forbidding, with "moated ramparts… embattled towers, and … triumphal halls" that "are magnificent and venerable but useless," but whose interior spaces have been "converted into rooms of convenience," and "are cheerful and commodious, though their approaches are winding and difficult" (III:269).

In keeping with the metaphor of reshaping existing structures to suit new needs, Blackstone celebrates the ingenuity of lawyers and judges in reforming legal doctrine. Common law may originate in "immemorial" custom, but Blackstone is clear that its development over time is not accomplished through natural evolution. It is the deliberate work of canny individual practitioners, often in response to challenges from opposing interests, as, for example, when certain future interests in property were created to preserve family real estate for as yet unborn children (II:172).

Periodically in the midst of detailed exposition, Blackstone stops to regard the relationship between particular legal rules and basic natural and constitutional rights. So, for instance, he discusses the apparent conflict between statutes that forbid hunting and what he takes to be the natural property right of every man to capture and kill wild animals that belong to no one (II:411). Suggesting several possible legitimate policy reasons for banning hunting by the general

population, Blackstone rationalizes the hunting bans according to the principle that the natural rights of individuals "may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community" (II:411). Blackstone views these laws as a pretext for outlawing the possession of arms, a right necessary to guarantee the people's ability to protect themselves "when the sanctions of society and laws are found insufficient to restrain violence of oppression" (I:139). Nevertheless, according to Blackstone, hypothetical policy reasons for outlawing hunting are enough to legally validate the bans, even though they are politically noxious (Allen 2019).

Blackstone's Influence

Blackstone's work was widely read and appreciated upon publication. The *Commentaries* went through eight English editions and was translated into French and German before Blackstone died in 1780. But Blackstone's greatest impact may have been across the Atlantic. Partly because of the paucity of other legal sources available in the American colonies and partly because Blackstone's message of sovereignty limited by natural rights resonated with the American rebels, the *Commentaries* became an authoritative source for law in the American colonies and the early United States. The first American edition appeared in 1772, and its readers were not only lawyers but people from all walks of life, including quite a few of the men who later signed the American Declaration of Independence.

To be sure, the founders of the American republic did not need Blackstone to introduce them to the concept of natural rights or the doctrines of English common law. Their knowledge of common law and rights theory came from earlier authors – Coke, Montesquieu, and Locke – whose work was formative. Moreover, they distrusted Blackstone's veneration of an English legal system and government that they rejected as oppressive – to say nothing of his explicit opposition to their political cause. Unsurprisingly, then, the US founders were sometimes critical of Blackstone. Thomas Jefferson objected to Blackstone's conservative defense of monarchy and thought his doctrinal analysis superficial, and James Wilson described Blackstone's treatment of common law as a legal basis for "systematic despotism" (Alschuler 1996). Nevertheless, Blackstone's vision of a society whose familiar positive legal structures served universal rights, and limited sovereignty appealed to the American rebels. It provided both a legitimate basis for rejecting British authority and a template for a government constituted and limited by positive law.

As an elementary legal textbook and a reference for legal authority, Blackstone's work was most significant in Britain and North America. But as an account, and to some extent a model, of a social-political system based on the rule of law, the *Commentaries* contributed more widely to the international development of modern ideas of human rights and limited sovereignty (Prest 2016). In none of these contexts is Blackstone's influence confined to legal professionals or academics. Blackstone's work crops up in popular legend and fiction, generally as a sign of law's potential for producing enlightened justice. Thus Abraham Lincoln was said to have learned law, and Calpurnia, the African American maid in Harper Lee's novel *To Kill a Mockingbird*, to have learned to read, by studying the *Commentaries* (Temple 2019).

Few law students or lawyers read much of the *Commentaries* these days. But Blackstone's work continues to be cited as an authoritative source on the historical and philosophical development of common law (Prest 2014). US advocates and judges mine Blackstone selectively to support arguments about common law doctrines and legal methods in the early United States. More problematically, Blackstone is sometimes credited with a kind of oracular status, channeling law in the minds of the US Constitution's framers (Minot 2018). In the early twentieth century, references to Blackstone all but disappeared from the US Supreme Court's opinions. But he has enjoyed a recent renaissance, in part related to the rise of the Court's emphasis on the original meaning of constitutional text. Remarkably, in the twenty-first

century, references to Blackstone's work appear in the US Supreme Court's cases nearly as frequently as they did in the Court's early days (Nolan 1976).

Conclusion

Blackstone's most lasting substantive contribution to legal philosophy is the idea that a complex traditional common-law system can foster modern conceptions of human rights. As Duncan Kennedy observed in his critique of the *Commentaries*, that message has two faces – apologetic and utopian (Kennedy 1979). No doubt, Blackstone's rationalization of arcane English legal doctrines and procedures with values of liberty and justice tends to obscure the inconsistencies and unfairness of the legal system he praised. Consider, for example, his acceptance (described above) of pretextual hunting bans on social policy grounds, despite the politically noxious purpose of those laws. But Blackstone's insistence that a nation's entire system of mundane legal rules could and should embody and elaborate a set of basic human rights helped to inaugurate the modern project of shaping traditional legal structures to generate social justice.

Finally, Blackstone's work offers a remarkable incarnation of a legal system both observed and imagined. The fundamental experience of reading Blackstone is not of digesting a theoretical argument about legal rights or a historical explanation of how particular legal structures developed, although Blackstone weaves both history and theory throughout his work. Instead, Blackstone invites a kind of immersion into a way of thinking about law that is profoundly humanist (Allen 2019). The *Commentaries* is a sweeping narrative that aims to capture the aesthetic and moral power of law as a cultural achievement and to generate feeling as well as intellectual responses. Blackstone draws heavily from a diverse, sometimes analytically inconsistent, group of theoretical sources. What is original – and in some ways remains unmatched – is the way Blackstone spins out of these diverse sources a story of legality that is at once a recognizable description of a complex real-life system and an aspirational account of an ideal (some say ridiculously idealized) legal culture.

Cross-References

- ▶ Bentham, Jeremy
- ▶ Claim Rights (Subjective Rights)
- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Constitutionalism
- ▶ Destituent Power
- ▶ Human Rights and Justice
- ▶ Positive Law and Natural Law
- ▶ Precedent: In the Common Law World
- ▶ Property: Philosophy of
- ▶ Rights: General
- ▶ Rule of Law: Theoretical Perspectives
- ▶ Supreme Courts

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Blame

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Introduction

Blame is a central concept in moral philosophy. Most generally, blame is some kind of negative reaction or response to perceived wrongdoing. For example, suppose Billy steals something from Jennifer's store. Jennifer may feel resentment towards Billy in light of what he did. This is an instance of blame. Blame is an important part of our interpersonal relationships and social practices. Note that Jennifer may blame Billy for what he did in addition to wanting the person to be arrested and convicted for their crime. In that sense, the moral component of one's response to a person's behavior is independent from legal considerations. While blame may coincide with legal responsibility, this need not necessarily be the case. Occasionally, we blame people for instances of behavior that is not illegal but nonetheless morally wrong. For example, if someone promises you to help you move, but fails to show up, then you may blame the person even though the person did not break the law. Thus, blame is an important moral concept that is distinct from concepts such as legal liability or legal guilt.

We may understand blaming as something that we do that involves a four-place relation: The blamer blames the target for X to a certain degree. In order for there to be an instance of blame, we need someone who blames and someone towards the blame is directed, that is, the target. The scope of blame, X, designates what the target is being blamed for. This can be someone's action or behavior, an outcome, their beliefs, or their other attitudes, which the blamer believes are wrong (or perhaps merely bad). The degree of blame is how much the blamer blames the target for X. Occasionally, we may blame two people for the same thing, yet we blame one more than the other. For example, suppose Eve and John forgot the birthday of their friend Markus. Markus knows that Eve has been under a lot of stress lately at her job, whereas John has not had a care in the world. This may mitigate the appropriate degree of blame towards Eve. Markus may be angrier with John than Eve, though he is still somewhat angry with Eve and thinks that she should have remembered his birthday despite her hectic job. In construing blame as something the blamer does, it is important to note that blame does not necessarily require the blamer to perform any *overt* actions (which express that blame). For example, Markus may not say anything to Eve and yet still blame her. We can blame others privately. With this in mind, this four-place relation will be helpful for understanding the conditions of the appropriateness of blame.

Most moral philosophers think that blame plays an important role in understanding what the right theory of moral responsibility is, though they do not always agree on the exact role blame plays. This disagreement can (in part) be traced back to the influential paper "Freedom and Resentment" by Peter F. Strawson (1962). Strawson aims to show that the "pessimist" is wrong to think that if determinism is true, then our practice of holding others morally responsible is unjustified because we lack free will, but that we need not follow the "optimist" or utilitarian route, where moral responsibility is justified purely via forward-looking considerations (e.g., blaming someone will lower their propensity to commit wrongdoing again). In effect, Strawson

reorients the debate towards the reactive attitudes that are essential to our interpersonal relationships. The conditions that make certain interpersonal reactive attitudes appropriate do not need this external (metaphysical or utilitarian) justification. Even if we wanted to, we could not give up our reactive attitudes such as resentment, indignation, and guilt. These attitudes themselves express the great importance of the attitudes and intentions of others towards us (Russell 2021, 755). We expect and demand some degree of good will from others (Russell 2021, 755). When someone fails to show the appropriate degree of concern towards us, we may respond with resentment, indignation or other forms of blame (Russell 2021, 755). We respond from the "participant view," which is something that is simply given with "the fact of human society." What it means to be morally responsible in general is simply that you are a member of our moral community: you are someone towards whom others (appropriately) feel reactive attitudes (Coates and Tognazzini 2013, 6).

Importantly, an agent's moral capacities are not left out of the picture, but they are only relevant for moral responsibility in light of our practices. We must gain a better understanding of the factors that either serve to modify our reactive attitudes or that require us to withdraw them altogether (Russel 2021, 756). However, Strawson does not think this requires any strong metaphysical claims. Excuses indicate that the agent's quality of the will was unobjectionable, it did not display any malice or an uncaring attitude (Russell 2021, 756). Exemptions show that the agent in question is an inappropriate target of our reactive attitudes more generally. When an agent is exempted from responsibility, we must adopt the "objective view" towards the agent. We see agents not as ones to be esteemed or resented, but as ones to be controlled, managed, manipulated, or trained, that is, as an object of "social policy." If we pay close attention to the way excuses and exemptions work, we see that determinism does not generalize in the sense that everyone is always exempted from moral responsibility. None of the standard excusing and exempting conditions hold universally. Strawson (1962, 9) argues that it cannot be a consequence of any thesis which is not itself self-contradictory that *abnormality* is the universal condition.

However, as Paul Russell (2021, 757) points out, this capacity argument is not a knockdown argument against the pessimist, as it does not seem self-contradictory to hold that *incapacity* is the universal condition. Though Strawson does not discuss the relevant moral capacities in any detail beyond the "capacity to participate in ordinary adult human relationships," we would need to know more about the conditions under which an agent is exempted from responsibility. Thus, the conditions under which it is appropriate to blame someone are of central importance. For more discussion of Strawson's influential paper, see Hieronymi (2021), McKenna and Russel (2008), Shoemaker (2011), Todd (2016), Tognazzini (2013), Wallace (1994), and Watson (2004).

As Patrick Todd (2016) helpfully points out, what most philosophers will agree on is that blaming a given agent is appropriate if and only if that agent is blameworthy. However, there are two ways of understanding the explanatory order underlying this biconditional:

(A) Blaming a given agent is appropriate *because* that agent is blameworthy.
(B) A given agent is blameworthy *because* blaming that agent is appropriate.

This is somewhat oversimplified, as not all types of moral responsibility necessarily involve moral blameworthiness (Shoemaker 2011), but the difference is essentially that those who defend (A) take being morally responsible as the foundation, which in turn explains the appropriateness of one's being held morally responsible. Those who defend (B) reverse the explanatory order and hold that what makes it appropriate to hold someone morally responsible determines what it means to be morally responsible. Setting aside what this means for interpreting Strawson's claims (as libertarians could possibly still accept (B), see Todd 2016, cf. Watson 2004), what is clear is that when theorizing about moral responsibility, we should pay careful attention to our responsibility practices and the role blame plays in these

practices. For those defending (A), this is still extremely important. In order to explain when an agent is blameworthy, that is, worthy of blame, we still need to understand what exactly constitutes blame, even if the conditions for blameworthiness are what determines when such blame is appropriate. And if they offer too much of a revisionary view of our current responsibility practices, this will raise some serious questions about their view.

The point is that one cannot develop a comprehensive theory of moral responsibility without a detailed understanding of what blame is and when it is appropriate. However, perhaps non-surprisingly, philosophers further disagree on what kind of adverse reactions exactly constitute blame and when such blame is appropriate.

Theories of Blame

What sort of negative reactions or responses exactly constitute moral blame? Justin Coates and Neal Tognazzini (2013) helpfully distinguish between four different theories of blame.[1]

Cognitive theories of blame view blame as a judgment about the quality of the other's moral self as exemplified in action and attitude (Watson 2004). This judgment is *evaluative* (Coates and Tognazzini 2013, 9). According to Gary Watson, blame involves a negative *aretaic* judgment, and the target of blame has displayed some kind of vice or fault. We see the action or attitude as something that tells us about the quality of the other's self. Others understand blame as a kind of moral accounting (Haji 1998; Zimmerman 1988). To blame someone is to judge that there is a 'discredit' or 'debit' in the person's ledger (Coates and Tognazzini 2013, 8). It is as if the person has a record sheet, and we judge that there is a stain on their moral record, diminishing the moral standing of the person (Coates and Tognazzini 2013, 8; Zimmerman 1988).

However, cognitive theories of blame have difficulty to account for the difference between judging someone blameworthy versus actually blaming someone (Coates and Tognazzini 2013, 10). Plausibly, Markus could judge that technically Eve is blameworthy for forgetting his birthday, he judges that it would be appropriate to blame her, but he does not actually blame her.

Conative theories of blame add the importance of responses such as intentions, desires, expectations, or dispositions to the evaluative aspect of blame (Scanlon 2008; Sher 2006). The judgment further involves some intention, desire, expectation, or wish. The most influential account is by T.M. Scanlon. According to Scanlon (2008, 128–9), to claim that a person is blameworthy for an action is to claim that the action shows something about the agent's attitude towards others that impairs the relation that others can have with him or her. To blame a person is to judge her to be blameworthy and to take your relationship with her to be modified in a way that this judgment of impaired relations holds to be appropriate.

The main criticism of conative theories of blame is that this still allows for responses that are too detached in order to be called blame. As R. Jay Wallace (2011) puts it, Scanlon's account leaves "the blame out of blame." For example, does Markus really *blame* John if he does not resent him for forgetting his birthday but is merely disappointed that John did something blameworthy? Markus might take their relationship to be impaired, he no longer counts on John being the kind of friend who remembers his birthday. And yet it seems something is missing in order to call this reaction blame. Another worry is that we routinely blame strangers, but strangers are people with whom we do not really have any kind of relationship (Sher 2013). For example, shop-owner Jennifer may have no relationship whatsoever with Billy, and yet, plausibly, she can blame Billy for stealing from her.

Emotional theories of blame hold that certain reactive emotions are essential to blame (Tognazzini 2013; Wallace 1994; Wolf 2011). To blame someone is to be subject to a reactive emotion that is directed toward the wrongdoer (Wallace 2019). According to Wallace (1994), blame includes an attitudinal aspect that has a

[1] I am indebted to Coates and Tognazzini (2013, 2021) for setting out the debate this way.

distinctive content. This content is given by the reactive emotions, which are responses to particular violations of moral obligation, and this captures the attitude characteristic of blame. When we blame someone, we feel an attitude of resentment or indignation, or when we blame ourselves, we feel guilt (Coates and Tognazzini 2013, 14; Wallace 1994, 75).

Some object that blame is not always this emotional (Coates and Tognazzini 2013; Sher 2006). Another problem is that if blame essentially involves emotions, then blame is not (fully) under our control, and this makes it (more) difficult to make sense of the idea that sometimes someone could be morally criticized for certain blaming responses (Hieronymi 2004).

Functional theories of blame hold that blame should be identified via the function that it plays. This allows for subsuming various of the features discussed above under blame. Smith (2013) holds that blame is to be identified with *protest* (see also Hieronymi 2004; McGeer 2013). To blame someone is to judge that she is blameworthy, and to modify one's own attitudes, intentions and expectations toward that person as a way of protesting the moral claim implicit in the target's conduct, and this protest seeks some kind of moral acknowledgment from the target or others in the moral community (Smith 2013, 43). Likewise, Miranda Fricker (2016) argues that blame is essentially communicative (see also McKenna 2012). The illocutionary point of blame is 'to inspire remorse in the wrongdoer, where remorse is understood as a pained moral perception of the wrong one has done. This remorse effects an increased alignment of the wrongdoer's moral understanding with that of the blamer' (Fricker 2016, 167).

The main worry for functionalist theories of blame is that there may be instances of blame that do not serve the particular function identified. For example, private blame seems to involve no form of protest whatsoever, yet this is still an important part of our blaming practices. Of course, functionalists could respond that the paradigmatic case of blame does involve this particular function (see Fricker 2016), but this strategy is open to all accounts of blame in response to objections.

The Appropriateness of Blame

Regardless of how one exactly conceives of the explanatory relation between morally blameworthiness and the appropriateness of blame, it is important to understand the conditions under which blame is appropriate. Remember the four-place relation: The blamer blames the target for X to a certain degree. When is blaming someone appropriate? We can distinguish between two sets of relevant facts: (i) facts about the target of blame and what they are blamed for and (ii) facts about the blamer. Keep in mind that the conditions are likely to vary depending on one's theory of blame above. And, importantly, some theories may reject some of these conditions as necessary for blame to be appropriate.

The *Moral Agency Condition* requires that the target of blame must be someone who satisfies the conditions for moral agency. Exemptions block responsibility for a particular act by showing that an (otherwise) impermissible act has been done by someone who is not, in general, a morally responsible agent (see Wallace 1994, 156). Plausibly, to be morally competent the target must at least have reflective self-control: the agent must be able to understand and process moral reasons and act according to those reasons (Wallace 1994).

The *Control Condition* requires that in order for blame to be appropriate, the target must have had the relevant sort of control over what the target is blamed for. Some will spell this out in more metaphysically demanding requirements such as the opportunity to have done otherwise, whereas others may invoke weaker notions of control.

The *Epistemic Condition* holds that, reasonably speaking, the target must have known, could have known, or perhaps should have known that the behavior or attitude would be wrong, for example, because the behavior is (potentially) harmful or has harmful consequences (see Robichaud and Wieland 2017). For example, suppose a doctor administers what they believe is the right drug to treat a disease, but they could not have known that this drug would cause a fatal allergic reaction in the patient. The doctor is non-culpably ignorant of some relevant fact about the patient, and therefore, it would be inappropriate to blame the doctor for the act done out of ignorance.

The *Wrongdoing Condition* holds that the target can only be blamed for the instance of behavior if this constitutes moral wrongdoing. Some think that reactive attitudes express moral demands (Darwall 2006; Wallace 1994). Thus, if someone is appropriately blamed, this expresses that they have committed moral wrongdoing by violating a moral obligation. In this way, our blaming practices are connected to the larger ethical theory in the background.

Plausibly, when these necessary conditions are jointly met, this is sufficient to make it appropriate to blame an agent. Note that some additional facts about the target may make it inappropriate to express blame, though. For example, suppose someone already shows remorse for what they did, it may be inappropriate to strongly express one's resentment towards them (Smith 2007).

Likewise, some facts about the blamer may make it inappropriate for the blamer to blame the target or perhaps to *express* blame, even though the target is blameworthy.

Some think that the blamer must have the right sort of *standing*. To illustrate its importance, consider an example by Angela M. Smith (2007, 478). Suppose a stranger at a party shows demeaning and dismissive attitudes towards his wife by repeatedly interrupting her and ignoring her contributions to the conversation. A friend might have the standing to express blame towards the husband, whereas for a complete stranger it would be presumptuous and meddling to express blame. However, the question is whether this holds for all forms of blame. Would it be inappropriate for the stranger to privately blame the husband?

To show that one's standing to blame can be lacking in some instances, some focus on hypocritical blame. For example, suppose the friend himself is guilty of the same offense, it seems objectionable for him to blame the husband. Scanlon (2008) argues that hypocritical blame is unfitting because the hypocritical blamer has already impaired the relationship by doing so. Wallace (2010) argues that hypocritical blame undermines one's standing because the blamer attaches different significance to the interests of the target of blame versus oneself. This violates the standard of equal consideration of persons, which is essential to our moral community.

Conclusion

There are many further questions concerning the appropriateness of blame. For example, what sort of expressions of blame are appropriate given the specific scope and degree of blame? Does this vary per the specific standing of the blamer? Could a blamer have a reduced standing to blame, but where this only affects the exact manner in which it would be appropriate for the blamer to blame the target? Safe to say, blame is a central topic in moral philosophy that raises a host of important questions concerning our moral responsibility practices.

Cross-References

▶ Moral Luck
▶ Responsibility: Collective
▶ Responsibility: Global

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Bloch, Ernst

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Introduction

When philosopher Ernst Bloch, who was born on July 8, 1885, in the German industrial city of Ludwigshafen, recalled his childhood and youth, he was interested in the relationship between the perceived working-class world and his earliest reflections. Thus, the motif of something being created from its origins became a philosophical theme very early on.

In 1905, Bloch began his studies of philosophy and German in Munich and added physics and music in Würzburg, the following year. In 1908, he then earned his doctorate with a dissertation on Heinrich Rickert. In 1917, he and his wife Karola Piotrkowska emigrated to Switzerland, where he published political articles opposing the war. In 1918, the first edition of *The Spirit of Utopia* appeared. In *Heritage of Our Times* (1935) he exposed the roots of Nazi doctrine as anchored in the unresolved past. Thus, in his work Bloch came to an analysis of conditions which have encouraged the growth of National Socialist ideas. He was forced to flee with his wife and his son Jan Robert from one country of exile to another. They eventually came to the United States, where he began work on his magnum opus "*Dreams of a Better Life*," ultimately published as *The Principle of Hope*. In 1949, the family moved to Leipzig, where Bloch was offered a chair at the Institute of Philosophy. More and more, he stood openly against the politics of the Socialist Unity Party of East-Germany. This forced him to emigrate yet again. After the building of the Berlin Wall, Bloch decided to remain in Tübingen, where he died in 1977.

Freedom and Order

Statements on legal policy can be found in all of Bloch's writings, chronologically ranging from the Imperial Era to the Prague Spring. With the first edition of *The Spirit of Utopia*, it becomes apparent that Bloch considers democracy and socialism as related and starts to speak of human rights and social emancipation as one. Repeatedly he underlines the significance of the ideals of the French Revolution and sees their justification in the doctrine of natural law (see Schiller 1991, 174). Natural law is the right which derives from anthropological characteristics of human beings and is superordinate to the positive law. Bloch

emphasizes the implications of the "*inalienable rights*" (Bloch 1996, Author's Preface xxvii) and argues that the establishment of the "upright gait" is "*a postulate of natural law*" (ibid., Author's Preface xxviii). He underlines: "*There can be no installation of human rights without the end of exploitation, no true end of exploitation without the installation of human rights*" (ibid., Author's Preface xxix).

While natural law aims at human dignity, social utopias aim at a better, happier life. An abstract of the latter can be found in "*Freedom and Order, Survey of Social Utopias*," chapter 36 of Bloch's main work "*The Principle of Hope*."

Previously, the same chapter had been published as a monograph in 1946 by New York Aurora and then again as two separate editions in 1947 and 1969. They differ from each other due to their epigraphs. In 1946 Bloch quotes from Georg Büchner's "*Danton's Death*" (1835) and from Ernst Moritz Arndt's "*Spirit of the Time*" (1806/07) to highlight the guiding principles of his text. In the subsequent editions and in "*The Principle of Hope*," he replaces these quotations with three new mottos: starting with a "Peasants' War" quotation from John Ball to a quotation from Johann Gottlieb Fichte and ending with a statement from the Communist Manifesto by Marx and Engels.

The unambiguous perspective on the relevance of Marx's theory is due to personal and contemporary changes. Bloch considered himself a contributor to the laboratory "socialism" at the beginning of his time in Leipzig, when he started to prepare the text of "*The Principle of Hope*" for publication. In this process, he wished his own "Philosophy of the New" to be understood as initiated by Marx but keeps underlining the importance of the legacy of civic ideals, too.

What remains is the title "Freedom and Order" with two seemingly contradicting terms, intentionally dismissing the title "Freedom versus Order." He always chose his words very consciously; his titles were meant to emphasize the motifs of his works. For Bloch, it is incomprehensible why human beings do not revolt against coercion and despotism. However, he understands that this state reflects reality and that an uprising sounds like a fairytale, which is why social utopias often appear like travel narratives, aiming at a nation or time of dreams. "*For a thousand wars there are not even ten revolutions; so difficult is walking upright. And even where they succeeded, as a rule the oppressors turned out to be exchanged rather than abolished. An end to deprivation: this did not sound at all normal for an incredibly long time, but was a fairytale; only as a waking dream did it enter the field of vision*" (Bloch 1995a, 475).

An Itinerary of Concrete Utopia

This way, Bloch's outline becomes a journey through history, often narratively describing the content of utopias but always striving to add critical comments. The goal, it seems, is to work out the meaning of hope over time, to interpret diversity even within its contradictions, and thus to sketch an outlook for a potential future. This sketch thus becomes an itinerary of concrete utopia. And although Bloch adduces Marx in order to explain his ideas of the objectives of a world process, he repeatedly emphasizes the necessity to incorporate all dreams of a better life, starting with the "primordial intention of the golden age." For him, utopia is a precedent-setting program, and history opens the view of the invariant of direction. Thus, his main concern is the inheritance of utopian content, which has not become a reality yet but remains virulent.

Insisting on the significance of all dreams of mankind of a better future, Bloch highlights the subjective factors. Even though he wants to retain an objective perspective on the world process, he cannot abandon the impetus of the dreamer, particularly due to the indication that "utopian types" are needed to articulate those dreams. He explains the terminological dichotomy of "Freedom and Order" employing the early modern utopias of Thomas More and Tommaso Campanella. According to Wilfried Korngiebel, they confirm a federal and democratic feature of utopias of freedom and a unitary and authoritarian feature of utopias of order (Korngiebel 2017, 177). Thus, Bloch keeps on pursuing these terms narratively, starting with the dream of the golden age, which coins his idea of natural law and its significance

for human dignity decisively, until today. A summary of all social utopias is given, but only to highlight the relevance of their legacy for constructing a better world. This way, the utopias of More and Campanella become two defining lead differences of "Freedom and Order."

The quintessence of all utopias is that freedom must never be the sole goal. Rather, utopia requires a world of order that has become home. Quoting Volker Caysa: "*Freedom and Order are possible for Bloch, only if one does not dismiss all forms of power, rulership, and government, but decides confidently in favour of particular forms of power and government, which one chooses as alternatives to the established forms of rulership*" (Caysa 2003, 705). Even though the history of social utopias can be illustrated through the lead differences "Freedom versus Order," the goal remains "Freedom and Order" as an appropriate world concept for humans. For Bloch, true freedom and order could only be obtained in communism. However, he does not mistake communism for socialist societies and evaluates it critically, despite his many misjudgments.

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Bobbio, Norberto

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Introduction. An Immeasurable Oeuvre

It is probably impossible to give an exhaustive description of the thought of Norberto Bobbio (1909–2004), even if this was only a rigid summary of his works. Certainly, it could not be contained within the space of an encyclopedia entry. The two most important monographs on the subject are both by Spanish scholars, and each focuses on one of the two spheres of knowledge most associated with Bobbio: taken together, the two volumes – that of Alfonso Ruiz Miguel, dedicated to his legal reflections (*Filosofia y derecho en Norberto Bobbio*, Madrid 1983), and that of Andrea Greppi, dealing with his political theory (*Teoria e ideologie en el pensamiento politico de Norberto Bobbio*, Madrid-Barcelona 1998) – reach a 1000 pages.

Even so, many aspects of Bobbio's work are left out of both books, or at most are given

marginal, indirect references. The reason for this is simple: Bobbio's output is immeasurable, either quantitatively or qualitatively. The electronic bibliography of his writings, available on the website set up by the Piero Gobetti Study Centre in Turin (www.erasmo.it/bobbio), contains almost 5000 titles. The number of pages he has written is incalculable. Many of them belong to the unpublished works now collected and kept by the Gobetti Centre, in particular his largely unknown correspondence, the extent of which inspires wonder.

No less important is the qualitative aspect: the extraordinary variety of specific fields of knowledge to which Bobbio made contributions. His work, he once said, is like a maze in which one could easily get lost, and thus before thinking about what path to take, it is fitting to consider the general nature of the author's complex intellectual personality.

Law and Politics. Philosophy or Theory?

Norberto Bobbio was one of the most eminent philosophers of law and political science of the twentieth century, but does that profile mean that he worked on two distinct levels? Not at all. As Luigi Ferrajoli has argued convincingly, one of Bobbio's chief merits was his ability to connect the theory of law and political theory, or more precisely to make the two interact at a time when most jurists and political scientists had little to do with each another. Bobbio himself stated in 1999 that:

> I have always considered the fields of law and politics, to use a metaphor that is familiar to me, to be two sides of the same coin. The world of rules and the world of power. Power creates the rules, and the rules transform *de facto* power into legal power.

That comment is highly reductive, yet it evokes the idea of two apparently contiguous worlds that are in reality intersected, or better still overlapping, while remaining distinct and analytically distinguishable: like the two sides of a coin. These worlds were the object of the two main disciplines – the philosophy of law and political philosophy – taught by Bobbio for almost 50 years. And academic teaching was the almost exclusive breeding ground for his ideas.

But what philosophical orientation can be ascribed to Bobbio's legal and political thought? In an essay aimed at identifying Bobbio's complex cultural identity by means of a number of paradoxical formulas, Alfonso Ruiz Miguel defined him as a "positive philosopher." But this is almost an oxymoron. Bobbio always used the word "philosophy" cautiously, at least after the late 1940s. His undisguised distrust of the word arose from his open hostility to "the ultimate metaphysical intoxication" that had permeated Italian culture, namely, the idealism of Giovanni Gentile that had come close to identifying itself, and to being identified, as "the" philosophy, and which Bobbio deemed the emblematic expression of a stubborn "Italian ideology."

These attitudes and opinions of Bobbio were reflected in the way he devised the methodology and basic direction of his studies, and even the naming of the courses he taught. The distinction he made between "the philosophers' philosophy of law and the jurists' philosophy of law" – the latter provocatively set against the former – gained renown. Perhaps less well-known, however, was his clear distancing from the interpretation of the political philosophy that dominated the 1970s, namely, the normative philosophy of justice inspired by John Rawls. When defining his teaching Bobbio preferred the word "theory" to "philosophy," and since he considered law and political science as two sides of the same coin, he conceived the philosophy of law and political philosophy – or rather, the *theory* of law and political *theory* – in the same way: as congeneric and contiguous disciplines.

In 1998 Bobbio reviewed his thinking, summing it up in this way:

> In my writings what the two theories [of law and politics] have in common is not only the aim, to learn (and not to propose), but also the way of proceeding towards it. This is the method of "reconstruction" by means of linguistic analysis never separated from historical references to classical authors or from fundamental concepts that make it possible to establish its external limits and order within it the two areas, the juridical and political, and establish their reciprocal relationships.

It goes without saying that this brief summary is again reductive. Yet from it we glean further important elements that characterized Bobbio's intellectual identity, in particular an understanding of the typically Bobbian way of interpreting the task of "theory" and the work of the "theorist."

Theory and History - Concepts and Facts

Bobbio was essentially an analytical theorist, but one who believed that conceptual analysis – the analysis of the "fundamental concepts" of law and politics – must never be "separated from historical references to classical authors." It is therefore difficult to divide his oeuvre between writings on "theory" and on the "history" of legal-political thought and institutions. On the one hand, the foremost declared purpose of his historical works was that of developing and systematizing conceptual models. In the preface to his first volume of essays dedicated to the classics we read:

> In studying the authors of the past I have never been particularly attracted by the mirage of the so-called historical background [. . .] I have dedicated myself with particular interest to enucleating key themes, to clarifying concepts, to analysing arguments, to reconstructing the system.

On the other hand, Bobbio produced no theoretical work on fundamental concepts that did not refer repeatedly to the history of ideas, or was not even built upon it. Suffice it to think of *L'analogia nella logica del diritto* (The Use of Analogy in Legal Logic, 1938, reprinted 2006), or *Il positivismo giuridico* (Legal Positivism, 1961, second edition 1979), the essay collection *L'analogia nella logica del diritto* (Analogy in Legal Logic, 1990), or the volume *La teoria delle forme di governo* (Theory of Forms of Government, 1976). Two other paradoxical aspects of Bobbio's identity are thereby highlighted, as identified by Ruiz Miguel, namely, those of the "conceptualist historian" and the "analytical historicist." However, it should be noted that when analyzing Bobbian writings expressly devoted to the classics, it is pointless trying to draw a clear distinction between legal works and historical ones. In them the two-sided world of the "practical life," as Bobbio liked to say, is viewed from the standpoint of power and also that of norms.

Furthermore, Bobbio's approach cannot simply be designated analytical, since it was intended to be, in his own words, "empirical-analytical":

> Contrary to a restrictive interpretation of analytical philosophy, conceptual analysis cannot be reduced to pure and simple linguistic analysis, because it is constantly intertwined with the analysis of the facts, that is to say with the analysis, which must be conducted using the established methodology of the empirical sciences, of politically significant situations.

This theme can be developed by turning to another of the oxymoronic formulas of Ruiz Miguel, who described Bobbio as a "formalist empiricist." Briefly put: while the *object* of Bobbio's theory is *twofold* – the world of law and the world of politics, both observed and studied primarily by adopting an empirical approach – it is also *unitary*, since according to Bobbio's perspective law and politics are in fact the two hemispheres of the same world, which he referred to as "the world of the practical". But Bobbio's *method*, his preferred way of reasoning and of proceeding in the analysis of any subject, is *unique*, also in the sense of *original*. It can be described with a few key words: distinction, comparison, combination, canonical questions, and dichotomous answers. The reader can easily grasp the unity and originality of Bobbio's method by exploring the different examples of his work.

Suggested Readings in the Legal Writings

As an aid to navigating the maze of Bobbio's work, I here recommend a number of exploratory paths to follow, once having separated the legal side from the political. The first path, then, principally concerns the studies of "meta-theory and theory of legal science." The starting point is found in the essay *Scienza del diritto e analisi del linguaggio* (The Science of Law and the Analysis of Language, 1950), which many consider the founding act of the analytical theory of law in

Italy. We then immediately arrive at *Teoria della scienza giuridica* (Theory of Legal Science, 1950), and then to a number of other contributions on the same topic, not least the essay *Essere e dover essere nella scienza giuridica* (*Is* and *Ought* in Legal Science, 1967). The writings collected in the volume *Giusnaturalismo e positivismo giuridico* (Natural Law and Legal Positivism, 1965) are meta-theoretical, as well as historical.

Taking us in the same direction, albeit along a different, well-defined track, are the studies of deontic logic. These include the essay *La logica giuridica di Eduardo Garcia Maynez* (The Legal Logic of Eduardo Garcia Maynez, 1954) – in which Bobbio, anticipating Kelsen, Alchourron, and von Wright, elaborates the distinction between norms and propositions about norms, and between the logic of law and the logic of jurisprudence – as well as the essay *Diritto e logica* (Law and Logic, 1962). A neighboring branch of the first-path network passes through Bobbio's studies on legal reasoning and the arguments of jurists, beginning with the previously mentioned 1938 book on analogy. Finally, not to be bypassed is the track of his preparatory writings, including his lecture notes, *Lezioni di filosofia del diritto* (Lectures on the Philosophy of Law, 1941 and 1945) and *Introduzione alla filosofia del diritto* (Introduction to the Philosophy of Law, 1948).

Another track explores the "general theory of law" in the strict sense, or the "formal theory" as Bobbio sometimes preferred to call it. Here we encounter innumerable essays, articles, and encyclopedia entries mostly collected in such volumes as: *Studi sulla teoria generale del diritto* (Studies on the General Theory of Law, 1955); *Studi per una teoria generale del diritto* (Studies for a General Theory of Law, 1970); *Dalla struttura alla funzione. Nuovi studi di teoria del diritto* (From Structure to Function: New Studies on the Theory of Law, 1977); and *Contributi ad un dizionario giuridico* (Contributions to a Dictionary of Law, 1995, edited by Riccardo Guastini). These studies cover almost all the themes and issues of contemporary legal thought, beginning with the determination of the concept of law: the notion and the typology of norms, the general principles of law, custom, validity, omissions, antinomies, sanctions, and of course the concept of the legal system. The volume entitled *Teoria generale del diritto* (General Theory of Law, 1993) brings together two of Bobbio's university courses, *Teoria della norma giuridica* (Theory of Legal Norms, 1958) and *Teoria dell'ordinamento giuridico* (A Theory of Legal Order, 1960).

Yet another track leads us through Bobbio's (more strictly) legal works concerning the "theory of justice," which the writer always considered from the perspective of conceptual analysis. Of particular note are the article *Sulla nozione di giustizia* (On the Notion of Justice, 1952); the lecture series *Teoria della giustizia* (Theory of Justice, 1953, new edition 2012); the preface to the Italian edition of Chaïm Perelman's *De la justice* (On Justice, 1945, translated into Italian as *La giustizia* in 1959) (translated as *La giustizia* in 1959); and another essay entitled *Sulla nozione di giustizia* (On the Notion of Justice) and published in the inaugural issue of the journal *Teoria politica* (Political Theory, 1985). It should be borne in mind, however, that all Bobbio's writings on the political problem of equality, especially the entry "equality" in the *Enciclopedia del Novecento* (Encyclopedia of the Twentieth Century, 1977), contain in-depth analyses of the specifically legal aspects of the concept of justice.

Suggested Readings in the Political Writings

The area of more strictly political works is very complex and difficult to penetrate, but it can be investigated via a series of thematic tracks corresponding to the sections in *General Theory of Politics Teoria generale della politica* (General Theory of Politics, edited by Michelangelo Bovero, 1999), a systematic collection of Bobbio's political essays. The first one, signposted "political philosophy and the lesson of the classics," does not relate to "politics" as such but rather looks at the several possible ways to reflect on politics and also at the way in which Bobbio typically analyzed the subject by a comparison with classical works. On the one hand, a

number of meta-theoretical writings must be mentioned and, on the other, so must the many studies on the history of political thought – that is, legal-political thought, since the two are inseparable – in which a special place belongs to the collection entitled *Thomas Hobbes* (1989) about the political author Bobbio most admired. But the works considered classics by Bobbio were many, encompassing almost all the greatest and many minor political theorists of Western culture.

The second path that I wish to recommend is dedicated to "Politics, ethics, law" and addresses directly the problem of determining the concept of politics on the one hand, and the relationship between politics and other aspects of the practical world on the other. The first part includes the long entry "State," written for the *Encyclopedia Einaudi* and which Bobbio conceived as a draft of a general theory of politics. It was later republished with other entries from the encyclopedia in the volume *Stato, governo, società* (State, Government, Society, Einaudi, Turin, 1980). On the same section of this path we meet the essays on the "natural law model," notably the longer one included (together with an essay by M. Bovero) in the volume *Società e stato nella filosofia politica moderna* (Society and State in Modern Political Philosophy, Il Saggiatore, Milano, 1979). And of the works that comprise *Teoria generale della politica* (General Theory of Politics, 1999), an essay of 1987 entitled *La politica* (Politics), a sort of general theory *in nuce*, deserves special attention.

Along the second path, we once again come to a fork: one branch leads to Bobbio's studies on the relationship between ethics and politics, among which emerges the eponymous essay that is included, together with other writings on parallel themes, in the excellent *Elogio della mitezza* (In Praise of Meekness, 1994, reprinted several times). The other branch takes us to studies on the relationship between politics and law. Prominent among these is *Dal potere al diritto e viceversa* (From Power to Law and Back Again), the first version of which was written by Bobbio in 1981 in occasion of the awarding of the *Prix Européen de l'Essai* of the *Fondation Charles Veillon*. The metaphor of the two-sided coin appears for the first time in this work.

The subject matter of the third path is "values and ideologies." In other words it tackles the three key principles of liberty, equality and justice, with their ambiguities and different interpretations, and also the movements and trends of ideals that have refined and sustained them. Apropos of the first of the three values, the book *Eguaglianza e libertà* (Equality and Freedom, Einaudi, Turin 1995) is worthy of special mention. This unites two long encyclopedia entries written several years earlier, as well as the famous essay *La libertà dei moderni comparata a quella dei posteri* (The Freedom of the Moderns Compared to that of their Followers) written in 1954 as a part of Bobbio's debate with communist intellectuals and later included in the famous volume *Politica e cultura* (Politics and Culture, 1955). As regards equality, the successful booklet *Quale socialismo?* (Which Socialism? 1976) is recommended, as is the essay *Liberalismo e democrazia* (Liberalism and democracy, 1985), intended as a contribution to a collected work but published independently. Not to be overlooked are Bobbio's many writings on liberal socialism, which include his theoretical (not just historical) essays on fascism and resistance ideology, most of which are included in the volume *Dal fascismo alla democrazia* (From Fascism to Democracy, 1997).

The fourth path pertains to the "theory of forms of government," the title of a university course that Bobbio later adopted for a volume of the same name, published in 1976. Together with this we find the theory of "Democracy," a subject to which, more than any other, the reputation of Bobbio's vast opus is linked. This particular theme is studied from two viewpoints: that of "principles" and that of "techniques." Relevant here is the above-mentioned collection *Dal fascismo alla democrazia*, but one should not forget that Bobbio penned more than 200 writings on democracy, its principles and techniques. The volume *Teoria generale della politica* includes two previously unpublished essays from 1986 and 1987 concerning respectively the specifically Bobbian definition of democracy as "public government in public" and the connection between

democratic ideology and the "procedural universals," in other words the rules of the game.

The fifth path permits an examination of the problems of "human rights and peace," which Bobbio regarded as interconnected and which together with democracy form the triad of "his" ideals. With respect to the first issue, the best-known contributions are collected in the volume *L'età dei diritti* (The Age of Rights, 1990, extended edition 1997). As for the second, the most important work is *Il problema della guerra e le vie della pace* (The Problem of War and the Roads to Peace, 1979), republished several times in different editions. The collection of essays entitled *Il terzo assente* (The Absent Third, 1988) is, however, no less important.

The sixth path brings the overall exploration of Bobbio's maze to an end with his reflections on "political change and philosophy of history," examining the theme of the antithesis between reform and revolution. We finally arrive at Bobbio's reflections on the meaning of human affairs, the problem of evil, the tragedy of communism, historical revisionism, and the discrepancy between scientific and moral progress: all these considerations are strewn in a vast mass of writings, some of which are preserved in *Teoria generale della politica*.

We could perhaps create a seventh path dedicated to works on history and cultural criticism and on the question of how culture and politics correlate. This path would also split into two branches. The first would include the theoretical essays on the problem of the intellectuals and the relationship between them and power. Most of these make up the volume *Il dubbio e la scelta* (Doubt and Choice, 1993), but many also appear also in *Politica e cultura* (Politics and Culture, 1955). With regard to the second branch, apart from *Profilo ideologico del Novecento* (Ideological Profile of the Twentieth Century), reprinted several times with variations and additions (final edition 1990), the collections of Bobbio's portraits and recollections must be highlighted for their exceptional political, and historical, significance. There are four of these: *L'Italia civile* (Civil Italy, 1964, new edition 1986), *Maestri e compagni* (Teachers and Companions, 1984), *Italia fedele, il mondo di Gobetti* (Faithful Italy: The World of Gobetti, 1986), and *La mia Italia* (My Italy, 2000). Also noteworthy are the autobiographical writings that make up the short volume *De senectute* (Of Old Age, 1996), and, naturally, even if by supreme paradox not strictly speaking a work by Bobbio, *Autobiografia* (Autobiography, 1999).

Legal Positivism and Political Realism

If we now try to outline the two sides of Bobbio's work – the legal and the political – including identifying where we should place his theories within the mainstream of thought, it seems fair to say, at least as an initial, sweeping description, that Bobbio is one of the greatest theoreticians of legal positivism as well as of political realism. Nevertheless, both these labels immediately appear far too simplified. We ought rather to say, turning once more to the oxymoronic formulas of Ruiz Miguel, that Bobbio was a "restless positivist" and a "dissatisfied realist."

Reconstructing the specific connotations of Bobbio's positivism would require an accurate comparison – here obviously impossible – between his legal theory and that of Kelsen. Although Bobbio several times declared his debt to Hans Kelsen, it would be incorrect to say that his legal theory is a mere development or simple variant of Kelsen's work. It is true that Bobbio can be defined as a positivist, in a pro-Kelsian sense, as regards the fundamental theory of a rigorous separation between law and morality, or rather between the law as it is and the law as it should be. But it is equally true that a perceptible "disquiet" towards positivism is often found in his work, and this concerns the problem of the *justification* of law, which cannot fail to appeal to meta-legal values.

Nevertheless, Bobbio was a rigorous and consistent noncognitivist: for him (ultimate) values were the subject of choice and effort, not of knowledge; they could not be compared to natural facts nor be "discovered" like facts. And this precludes any slide towards the theoretical territory of natural law. For Bobbio, one cannot say either

that unjust law is not law, nor that (positive) law is in itself just. Law does not need to be based on moral values to be what it is, but the law must not be obeyed simply because it is law. Unjust law *is* law, and *must* be disobeyed (by anyone who deems it unjust). Bobbio's "disquiet" is reflected in his rejection of "ideological positivism," meaning the argument that (valid) laws must be obeyed regardless of their content, by reason of moral obligation towards the state. But this disquiet does not translate at all into some form of revival of natural law as a theory of law, that is of the dual thesis that there are knowable and binding norms which are not human products and which are superior to positive norms.

Furthermore, if it is true that Bobbio held firm to the Kelsian "purity" of law (and of the study of law) with respect to morality, the same cannot be said with regard to the other side, namely, the relationship of law with politics. Bobbio's well-known critique of fundamental norms (in the essays collected in *Diritto e potere*, Law and Power, 1992) equates to a rejection of the notional self-founding of law. Bobbio invites us to recognize the circularity between law and power, that is to say between law and politics: at the top of every normative system *lex et potestas convetuntur*.

The problem of power is at the center of any realistic theory of politics. And there is no doubt that Bobbio is essentially a realist, a disenchanted observer of political events, even of the history of the world, which for him resembled, as Hegel said, a "butcher's block." Realists of every age are those who do not allow themselves to be captivated by utopian dreams, nor deceived by false justifications of ideologies (in the negative meaning of this ambiguous term). Instead they argue that the world of politics is a theatre of violence and fraud, of shrewd moves, of reciprocal attempts at abuse of power and imposition among human individuals and groups. But Bobbio's realism is "dissatisfied," as Ruiz Miguel says, because it is never accompanied by the sort of cynical complacency which marks much of the realistic theories of politics. He did not stop with providing pessimistic diagnoses and gloomy prognoses of human destinies, but constantly fed reflection on possible therapies to cure, or at least counter, the perennial ills of political life. And the therapies he preferred, those that he believed most effective, were institutional: those that turned to the law.

Theory and Ideology

As already seen, Bobbio stated that his theory – legal and political – had an "exclusively cognitive, not proactive" purpose. He was a firm advocate of value-freedom, that is of the theoretical duty to refrain from value judgments, of impartiality as an ethic of science and scholarship. A 1000 times he repeated to his students the celebrated words of Max Weber: "The prophet and the demagogue do not belong on the academic platform."

But everyone knows that there was *another* Bobbio: the "civil writer." Neither prophet nor, less still, demagogue, of course, but nonetheless immersed in public life and an active participant in the political and, more broadly, the civil destinies of his country and the world. This was the Bobbio who supported the ideology (this time in the noblest sense of the term) of liberal socialism – another oxymoron noted by Ruiz Miguel – of the values of freedom and equality, of the ideals of democracy, of human rights and peace.

What relationship was there between Bobbio the theorist and Bobbio the ideologue? Was it one of distinction, or rather separation, in keeping with the idea of "unrepentant dualist," with which time and again he identified himself? It can be argued that the separation of theory from ideology always remained clear and rigorous: Bobbio the theorist did not let himself be influenced by his ideological beliefs. Still, it could be said that he crossed that line in the opposite direction: the typically Bobbian way of practicing "militant philosophy" was that of the analytical professor, who applied the conceptual analysis method also to the notions used in value judgment in order to recreate their descriptive dimensions. It is fitting therefore to emphasize the part played, in the defense of the values and ideals upheld by Bobbio, by his many years of intellectual battles. These formed the undertaking, not in itself ideological but stringently theoretical,

of reestablishing clear and distinct concepts, of overcoming misunderstanding by expunging ambiguity from the language of politics, of formulating precise, not persuasive definitions of basic categories.

The influence of Bobbio as a civil writer was profound. It is no exaggeration to say that the whole political-cultural history of the second half of the twentieth century, in Italy and sometimes beyond, was shaped by debates enlivened and mostly provoked by Bobbio through his contributions to magazines and the press. I mention only the most important: after the famous 1950s discussion with communists on the politics of culture, freedom, and democracy, there ensued that of the 1970s on the inconsistency of the Marxist doctrine of the state. Afterwards there took place debates on pluralism and the "third way"; on the unfulfilled promises of democracy and "invisible power"; on international democracy and human rights; on the end of communism and the "overturned utopia," and the need for a new international (indeed, global) left; the tense, exacerbated controversy on "just war"; the wide-ranging, rampant discussion on the right and left; and, in his final years, came interventions on the miserable end of the (so-called) first Italian republic, on the terrible start to the (self-styled) second, and the "ghost party" founded Silvio Berlusconi, who he described as "a person without many principles, but with many interests, who I consider nefarious for the moral and civil education of Italians." Most of Bobbio's interventions in these debates have been collected in volumes – *Destra e sinistra* (Right and Left, 1994) deserves a special mention – which give voice to the hugely stimulating range of positions he held on the key events of the twentieth century.

Tolerance and Intransigence

But the last word of Bobbio the ideologue – or, if one prefers, his meta-ideology – was his defense of pluralism: his validation of the irreducibility of ultimate values and his extolment of tolerance. There is a passage in his work which many scholars believe encapsulates his intellectual and moral personality. It is found in the preface to *Italia civile,* one of the four books in which Bobbio collected portraits of cultural and political personages who, directly or indirectly, influenced his evolution. Bobbio said:

> The scholars I have studied the most are extremely different from each other in terms of their professions of faith, philosophical conception, political attitude. From the observation of the irreducibility of ultimate beliefs I have taken the most important lesson of my life. I have learnt to respect the ideas of others, to stop to consider the secret of every piece of knowledge, to understand before discussing, to discuss before condemning. And since I am in the mood for confessions, I will add another, perhaps superfluous one: I hate fanatics with all my heart.

I wish to highlight two aspects of this oft-quoted passage that are frequently overlooked. First, the final declaration is not merely an ironic or self-deprecating quip prompted by a taste for paradox: hatred for fanatics is in point of fact a radical expression of the intransigence that must accompany toleration. It is the precondition of toleration which ensures that it does not degenerate into a sort of accommodating and complicit compromise. The image of the "tolerant intransigent" is not at all paradoxical. Second, even this concise depiction of the tolerant attitude, which precedes the final affirmation of intransigence, leaves no space for indulgent submissiveness: toleration does not involve eschewing discussion and disapproval. Rather, toleration demands respect for the ideas of others, but such respect hinges on the defense of the right of all to express their own views, and it converts into the duty to understand them and discuss them without prejudice. This certainly does not rule out criticism, even the most radical kind, and, when appropriate, condemnation.

Conclusion. A Pessimist of Enlightenment?

History is ambiguous, Bobbio repeated countless times: it sends ambivalent signals, nobody knows where it leads, in which direction and in which way it moves. Indeed, it may be that they are right who say that it has no meaning. Bobbio did not believe in the Enlightenment conception of

progress: he was – supreme paradox! – a "pessimistic *illuministe*." Nonetheless, he also encouraged his readers not to give credence to the notion that history has an opposite destiny, or a predetermined negative course. On the contrary, he said, one can and should endeavor to *attribute* meaning to history: if we look towards the past, we can attribute meaning to it by dint of the attempt to reconstruct it with intellectual honesty, taking and comparing different criteria and points of view. And if we look towards the future, perhaps we can make some sense of history by reaffirming our faith in the supreme ideals of democracy, human rights, and peace.

Cross-References

- ▶ Alchourron, Carlos Eduardo, and Eugenio Bulygin: Types of Legal Statement
- ▶ Claim Rights (Subjective Rights)
- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Destituent Power
- ▶ Equality and Global Justice
- ▶ Freedom
- ▶ Governmentallity and Law
- ▶ Hirsch, Andreas (Andrew) von
- ▶ Hobbes, Thomas
- ▶ Human Right to Democracy
- ▶ Jurisprudence of Interests
- ▶ Kelsen, Hans
- ▶ Law and Efficacy
- ▶ Legal Positivism: Inclusive
- ▶ Legal Science
- ▶ Legal System and Legal Order
- ▶ Legal Systems
- ▶ Legal Theory: Types of
- ▶ Liberty and Justice
- ▶ Natural Law: Protestant
- ▶ Normative Conflicts
- ▶ Peace
- ▶ Perelman, Chaïm
- ▶ Poverty in Ethics and Political Philosophy
- ▶ Rawls, John
- ▶ Rights: Social Rights
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- ▶ Validity

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Bobbio, Norberto: Functionalist Theory of Law

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An analyst of **Kelsen**, and himself a Kelsenian, **Norberto Bobbio** invested the first half of his scholarly production (leaving aside his initial adhesion to phenomenology) in constructing a **general theory of law** of a normativistic leaning, delving especially into the great Austrian scholar's thought through a rigorous, yet often unconventional, interpretation of his writings. He stressed that the core of Kelsen's Pure Theory of Law is concerned not so much with norms – though they are the primary element of law's structure – but with the **legal order** (*Rechtsordnung*). This Kelsen portrayed as a system, consisting of intertwined norms, coercive in nature and therefore addressable, as a kind of "social technique," to achieving a variety of goals sought by the holders of legal and political power. Focusing on the legal system as a whole and on its suitability for inspiring and affecting human actions, Bobbio thus rejected the idea that an insoluble contradiction would exist between Kelsenian Normativism and **Legal Institutionalism**, as expounded, among others, by **Santi Romano**, a distinguished Italian constitutionalist. The two volumes devoted by Bobbio to the "Theory of Legal Norms" and the "Theory of Legal Ordering" between the 1950s and 1960s, originally in the simple form of lecture notes and, much later, converging into a "General Theory of Law" published in 1993, reveal convincingly the potential of both Kelsen's constructions and Bobbio's own constructive critique.

The author's "functionalist" turn in legal theory, which occurred between the 1960s and the 1970s, stands on much the same grounds, at least in its essence. Indeed, Bobbio himself brought about an important change in his scholarly life in that period, at the same time as he moved from the Chair in Philosophy of Law at the Department of Law to the Chair in Political Theory at the Department of Political Studies at the University of Turin. His insights into current political reality no doubt affected his fresh conception of the general theory of law. Yet what he did in this field was more a *mise à jour*, albeit steady, rather than a radical turn.

Bobbio observed that the use made of law by governments in developed societies, which displayed both an advanced industrial structure and an advanced welfare system, had undergone a substantive change. Law had come to rely not only on the machinery of "negative sanctions" (the Kelsenian scheme "prohibition-affliction"), as it had in the "liberal" nineteenth century, but also, and increasingly, on "positive sanctions," i.e., rewards and incentives, closely connected with prospective policies, especially in the economic sphere. In this new format, a country's law also played a "promotional function," together with its traditional "protective-repressive" function: no longer did it confine itself to "rendering an undesired action [. . .] impossible, difficult or disadvantageous"; it also sought to render "a desired action necessary, easy, advantageous" (Bobbio [1977] 1984[2], p. 27). An updated legal theory therefore had to take this turn into due account and fill a visible gap in the vision of law that had been a fruit of the enlightenment and had developed alongside the modernity. While it was true – Bobbio conceded – that "positive sanctions," albeit under different labels, had attracted the attention of some prominent authors, such as **Rudolf von Jhering** and, first and foremost, **Jeremy Bentham**, there was nevertheless no doubt that they had never played a critical role in the most influential theories expounded during the nineteenth and the first half of the twentieth centuries.

Bobbio insisted on this contention in a series of essays, written between 1969 and 1975. Significantly, the last of these was published in *Sociologia del diritto*, the journal that Renato Treves had founded 1 year earlier and to which

Bobbio himself had contributed since the first issue, devoted in part to a preliminary discussion about how sociology of law had to be conceived of and practiced. In these essays, he saw and acknowledged that, while speaking of functions and of a connection between functions and structures, it would be impossible not to venture beyond the boundary that separates law from other social sciences – a frontier that, if it exists, is anyway porous. Reading Bobbio's words, it becomes quite clear that, in the process of extending his vision from the structures to the functions of law, he sought to update his general legal theory, rather than merely adding his voice to those, already quite numerous, then circulating in the field of sociology, especially in the milieus of the ever-influential structural-functionalist schools.

His purpose is implicit in the title and subtitle of the volume, *Dalla struttura alla funzione. Nuovi studi di teoria del diritto*, in which he published a collection of these essays in 1977. In his presentation, the author warned that the functional analysis of law is indispensable "to adapt the general theory of law to the transformations in contemporary societies." He stressed that the theme of law's promotional function was crucial in this respect and openly acknowledged his debt to Kelsen, though conceding that a new conception might "even" bring about "a passage from a formal (or pure!) theory, to a sociological (impure?) theory," since – he said – "sociology of law knocks at the door" in the essays collected in the book (Bobbio 1977–1984^2, p. 9).

What comes across in these essays is actually the author's intention not to leave Kelsen aside but to update his theory and maybe grasp some hitherto unexpressed potential of his thought. In the only one of these articles that was translated into English in 1969 under the title "The Promotion of Action in the Modern State," Bobbio had already taken a decisive step forward in this direction: he laid emphasis on the fact that the notion of positive sanction is compatible with Kelsen's scheme of the **norm** as a "hypothetical" connection between an unlawful action and a corresponding sanction. In fact, as he then observed, such formulae as "if you do *a*, you may do *b*," or "if you wish *a*, you ought to do *b,*" typical of "promotional" action, might well go hand in hand with the traditional formula "if you do *a*, you ought to do *b,*" typical of "repressive" action, with no logical contradiction. In another essay, entitled "Hans Kelsen" that appeared in 1973 on the *Rivista internazionale di filosofia del diritto*, the author noted that, if one considers the legal order as a whole, rather than looking at individual norms, Kelsen's **Pure Theory of Law** contains at least a hint of a functional vision. Indeed, Kelsen portrays law as a social technique addressed "to achieve those social ends that cannot be achieved through other and milder tools" (Bobbio 1973, now in Bobbio 1977–1984^2). Kelsen – Bobbio said – did not go beyond this and raised serious doubts about the most recurrent functional tasks usually attributed to law, e.g., peace. Only in this respect, and in view of this gap, did Bobbio describe Kelsen's general theory of law as "inadequate" *vis-à-vis* the changes occurring in contemporary societies.

Bobbio's position about the nature – legal or sociological – of his own perspective is less neat, yet of considerable methodological interest. He kept his distance not so much from sociology proper, as from structural functionalism, i.e., the most influential current of sociological thought. Not all his readers grasped this point, even though it is crucial in that it makes a sharp separation between "functionalism" and "functional analysis." Functionalism, Bobbio claimed, is "a global theory of society I am not concerned with." Functional analysis, in its turn, is a method: "The functional analysis of an institution, which may well leave aside functionalism, [which is] a kind of social philosophy [. . .], is by no means incompatible with a critical analysis of that same institution, based on the more or less effective social utility of the function it actually performs" (Bobbio 1975, pp. 8–9). Sociological functionalism – Bobbio added – takes the concept of function in an "exclusively positive sense." It does not go beyond the analysis of dysfunctions, "which can be corrected within a system," whereas a functional analysis may also take "negative functions" into account, that "postulate the change of a system" (ibidem). This critical

insight is particularly significant. In one of the essays mentioned above, dated 1971, he had emphasized that "law no longer occupies that privileged position that had been assigned to it traditionally" (Bobbio 1971, p. 259; then in Bobbio 1977–1984[2], p. 42), and that other tools of social control, especially "psychological" and connected with the media system, were gradually taking over its role. Studies devoted to the role of law and its limits as a tool of social change had become urgent.

This kind of studies, critical in essence, is a matter of both theory and field research, to be conducted also by means of empirical methods. This – Bobbio admitted – is a typical task for the sociology of law. Yet he did not really venture into this field, except for marginal observations devoted to some current definitions of the social functions of law (Legaz-Lacambra 1974). These seemed to him to be too generic and insufficiently developed. He also warned that in their search for *the* "function" of law, social scientists ran the risk of undue simplicity. This – he said – had occurred "with the most refined (and complicated) theorist of the function of law, Niklas Luhmann, according to whom the function of law is that of *congruente Generalisierung* of normative expectations" (Luhmann 1972) – "Uselessly complicated," he added in a footnote (Bobbio 1975, p. 24).

Bobbio therefore sought to outline a general scheme of a functional theory of law more as a jurist than as a law-and-society-scholar, although on the borderline between jurisprudence and sociology of law. He thought that other scholars, on both sides of this disciplinary divide, should fill in this schematic outline with adequate contents. In the same period, a high-ranking Norwegian sociologist of law, Vilhelm Aubert (1983), even though he seemed to ignore Bobbio's contributions, actually devoted a thoughtful analysis of the connection between functional analysis, positive sanctions in law, and the welfare state.

As far as Bobbio's essays are concerned, they soon became – and to a certain degree still are – a matter of scholarly discussion. In 1984, the author offered a reappraisal of the same topic. In an article published, again, in *Sociologia del diritto*, he reflected upon his own theory self-critically, bridged some bibliographical gaps, and reacted to some of the objections advanced by other and younger scholars, both legal theorists and legal sociologists. This essay is interesting from different perspectives. Firstly, it includes a comment on **Peter Blau** (1964) and **Niklas Luhmann** (1975), whose opinion on law and power seemed to him to relaunch the idea that law's social function is predominantly repressive, rather than promotional. Secondly, with a hint of irritation, Bobbio counters some criticisms of a linguistic and terminological nature that had been advanced by analytic philosophers ("that hyper-empiricism, obsessive and paralysing, that, once accepted, prevents anything being said about anything", Bobbio 1984, p. 21). Thirdly, specifically discussing a proposal advanced by the legal philosopher **Letizia Gianformaggio** (1980), he examines the relationship between the concept of "functions" of law and that of "techniques" of legal machineries. Actually, he says, the latter notion amounts to the former. Fourthly, and more significantly, he sees a close connection between functional analysis and teleological action. "Man," he stresses, "is a teleological animal: there is no chance of understanding his conduct (in the sense of *verstehen*) if one has no clear idea, at all times, of the purpose for which he does what he does" (Bobbio 1984, p. 24). This, incidentally, marks his distance from Luhmann's systemic structural functionalism, which belittles the teleological explanation of human action.

Bobbio's recognition that functional analysis and teleological explanations are closely connected deserves some clarification. While he rejected sociological functionalism as a global theory of society, he nevertheless kept faith with the notion of "function" classically adopted by functionalist sociologists, from Malinowski to Parsons, and borrowed from biology: i.e., "the continuous contribution of an organ to the preservation and the development of a whole organism [. . .] according to its rhythm of birth, growth and death" (Bobbio 1984, p. 20). In fact, in sciences in general (Nagel 1961) and in the social sciences in particular, the notion of "function" is also found to have other meanings, including in teleological explanations (see Achinstein 1977,

pp. 341 ff.; Ferrari 2007). In this case, as far as social action is concerned, it may be used to denote the contribution offered by a social institution to defined projects of action, i.e., as a means to ends. This is how Jhering, Kelsen, and **Weber** (1922) conceived of law and, incidentally, when Bobbio himself spoke of the "promotional function of law," he maybe unwillingly implied this nonbiological use of the word "function." Indeed, Kelsen's own perspective, according to which law is "a social technique," is "no such little thing," as Bobbio said, but could pave the way to a myriad of research projects investigating how social actors achieve or fail to achieve their goals by making use of law.

Cross-References

► Bobbio, Norberto: In Torino
► Normative Individualism

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Bobbio, Norberto: In Brazil

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Introduction

Norberto Bobbio (1909–2004) has a significant intellectual presence in Brazil with emphasis in the spheres of legal and political theory. These are linked to the trajectory of his academic pursuits as a highly distinguished Italian professor in these areas, and also to his exemplarity as a public figure, committed to democracy in the political landscape of his country. One cannot say, to be rigorous, that there is a School of Thought of Bobbio in Brazil, such as one that can be identified in Italy where he has followers that have developed and continue to discuss and elaborate his methods, ideas, and visions on law and politics as well as on their interdependence. Yet, there is a considerably important and lasting reception of his thought and intellectual presence in Brazil.

This reception has been endowed with authority. Authority, to adapt Karl Deutsch's formulation (Deutsch 1966: 178–181), may be understood as preferential treatment in terms of attention and

Marcelo de Azevedo Granato contributed to the writing of this entry

transmission of Bobbio's work, not only because of the merits associated with the contents of his thoughts but also as a result of an entitlement to the legitimacy of his intellectual message that came about with the ongoing process of the publication of his books in Brazil. *Auctoritas* derives from the Latin verb, *augere*, to augment. In this sense, the steady increase in the availability of Bobbio's books in Brazil, adequately translated into Portuguese, and the interest they engender, is a first indicator of his authority.

Between 1980 and 2020, the most significant items of Bobbio's bibliography were published in Brazil. They comprise around 43 titles, including those he coauthored, most of them in print and many of them continuously reprinted. Seminars devoted to his thought are frequent, including international ones of significant scope, such as those held in 2009 at the Federal University of Paraíba, and in 2016 and 2018 at the Catholic University of São Paulo. Academic interest in his thought resulted, up to 2020, in approximately 25 doctoral theses in several Brazilian universities. Moreover, around 15 books have discussed his work, not to mention articles published in newspapers and journals. In the reading list of Brazilian Law Schools, Bobbio's books on legal theory are usually present.

There is a Norberto Bobbio Institute in São Paulo that began its activities in 2005, was restructured in 2009, and is devoted to the study, research, and dissemination of his thought. The Bobbio Institute has a good library, which is open to the public, and provides access to Bobbio's books, his classics, as well as writings by authors with whom he maintained an intellectual and political dialogue, and his less known articles and offprints, including unpublished academic and personal materials donated by Bobbio's family. The Bobbio Institute has a cooperative partnership and links with the Centro Studi Piero Gobetti in Turin, which is the depository of Bobbio's archives and personal academic library.

Authority according to Theodore Mommsen, as quoted by Hannah Arendt in her well-known essay on this concept, is "more than advice and less than command, an advice which one cannot safely ignore" (Arendt 1969: 123). One should not ignore this aspect, to recall Bobbio's original and remarkable distinction between *comandi e consigli*, because an advice that is not a hierarchical command of power is given for the benefit of the addressee and draws its prescriptive force from the *vis directiva* of the quality of its reasoning (Bobbio 1970:49–78, Brazilian edition, 2015).

Bobbio's visit to Brazil, in 1982, drew broad attention to the *vis directiva* of his thought: His interventions and dialogue with the academic public in the University of Brasilia, his conferences at the Law School of the University of São Paulo on *Government by Laws or Government by Men* and *Law and Power,* and his many interviews to the media enhanced interest in his thought that went beyond the legal and political scholars who were already aware of his work. They favored, with the added vigor of his intellectual presence in the country, the path of the redemocratization process in Brazil in a similar manner to what happened in Spain and other Latin American countries in the transition from authoritarian rule to democracy. In the case of Brazil, in this process, Bobbio, as a public intellectual of a "liberal socialist" persuasion, provided with his thought common ground for the intellectual approximation of the democratic left and the liberal center.

This is the origin of a spillover effect that led to the preferential treatment in terms of attention and transmission of his intellectual endeavors, conferring authority to the *vis directiva* of his thought in the spheres of legal and political theory, for the manifold of substantive reasons that I shall explore in this entry.

Method

One of the reasons that explain the impact of Bobbio's presence in Brazil is the clarity of his expression that the affinity of the Italian and Portuguese languages helps to convey in translation. That was also aided by the traditional awareness of Italian legal theory in the academic milieu of the country. This favored the intellectual appreciation of the analytical style of his method in which the preciseness of language and the inquiry into

the meanings of words and expressions, their use, and ambiguities are at the service of a continuous effort aimed at a broader understanding of concepts. He was helped in this effort by the use of dichotomies in order to distinguish and thus increase the intelligence of what the concepts aim to explain. Bobbio's originality is grounded in the skill of an *ars combinatoria* in which the elaboration of dichotomies allows for a precision of concepts that enhances the grasp of contexts and situations. This *ars combinatoria* takes on board the lessons of his preferred political, philosophical, and legal classical authors of the Western canon (among them Hobbes, Kant, Weber, and Kelsen) with an in-depth knowledge of someone who was schooled by the best in both law and philosophy.

This *ars combinatoria,* however, is not an exercise in erudition. It is linked to an awareness of what is relevant in the contemporary agenda. His analytical methodology is not detached but attentive to the issues and problems that emerged in the interdependent world of the twentieth century and has as an organizing perspective the traits of his intellect. He is, at the same time, a realist in his evaluation of things but an unsatisfied realist, unhappy with things as they are, and as such concerned with promoting change.

In short, access to the understanding of the complexity of things and clarity in their distinction and exposition with no improper simplifications are one of the greatest strengths of Bobbio's analytical style and method. This is one of the explanations of the overall presence of the *vis directiva* of his thought in Brazil and, specifically so, in the areas of knowledge upon which this Encyclopedia focuses.

Legal Theory

In the field of law *stricto sensu*, Bobbio draws a dichotomy between philosophy of law as practiced by and for jurists and philosophy of law as abstractly theorized by philosophers. In his view, it is the former that is more relevant for understanding what law is all about (Bobbio 1972: 43–46). His is a philosophy of law *sub specie juris* that has as its subject matter the structure of law and the functions of law in contemporary societies. His aim is a legal theory that has as a source of inspiration the challenges and problems of legal experience that cannot be sorted out by only reverting to positive law and to which the traditional natural law doctrine is totally inapplicable. The purpose of Bobbio's legal theory as a work in progress is to offer conceptual instruments that are useful to understand and deal with positive law as it is and as it evolves.

Bobbio's philosophy of law figures prominently in the trends of legal thought of the twentieth century with which he was very conversant. He shares jurisprudential ground with both Kelsen and Hart, especially with regard to the latter's distinction between primary and secondary rules. Yet his elaboration has a much greater practical dimension and use that are missing from Kelsen and Hart's more abstract framework of inquiry. It is rigorous in the clarification of concepts that are at the same time in sync with the agenda of the living law of continental legal systems such as those of Italy and Brazil.

That is why lawyers, judges, prosecutors, and professors in Brazil have found in their activities great help in Bobbio's view of the structure of law, and this fact is one of the reasons for his aforementioned presence in the reading list of Brazilian Law Faculties. He offers a very clear road map to the world of law with his analysis of how legal norms are normatively typified (e.g., Bobbio 1958, Brazilian edition 2001) and how their validity results from their connection with the nomodynamics of the legal order and the problems they bring about. Among them figure those regarding the sources of law, the hierarchy of norms, antinomies, gaps in the law, and also the interaction between different legal orders (e.g., Bobbio 1960, Brazilian edition 1988). This roadmap assists in the understanding of positive law as entrenched in continental legal systems, such as Brazil (e.g., Bobbio 1979, Brazilian edition, 1995).

Bobbio subsequently added to his analysis of the structure of law his concern with the functions of law in contemporary society. Always attentive to the issues present in the agenda, he enlarged the

scope of legal theory by taking on board and focusing on the functions of law envisaged by contemporary welfare states. He examined the characteristics of law that go beyond the traditional functions of protection and repression and aim at promoting and stimulating social behaviors governed by different types of norms and sanctions (Bobbio 1977, Brazilian edition 2007). In Brazil, the promotional dimension of law became the object of constitutional interest and concern and Bobbio's rigorous analysis of this dimension helped in dealing with this aspect of Brazilian legal experience.

In short and to sum up, Bobbio's philosophy of law, conceived and elaborated *sub specie iuris*, is a remarkable expression and articulation of legal reason aimed at the understanding of the intellectual and practical activities related to the creation of law and its application. It is a road map to the world of law that has rightfully earned pride of place in the Brazilian legal milieu.

The Interplay Between Legal Theory and Political Theory

Bobbio's philosophy of law is very much concerned with the precision of language, but it is not self-contained and does not focus exclusively on this field of knowledge. It is interdisciplinary in its relationship with political theory as a result of his views on how law and power are linked: "Law and Power are the two faces of the same coin" and "Power without Law is blind and Law without power is void" are two well-known assertions of his view. Power is a concept and a challenge that both legal scholars and political scientists share, yet, as he observed, they tend to treat in isolation from each other's inquiry, as he pointed out in his analysis of the matter in his collected essays on Kelsen (Bobbio, 1992:141–114,143 Brazilian edition, 2008). His case begs to differ in a commendable way: He devoted his academic career to both legal theory and political theory. That is why, he was capable of shedding light on the remarkable affinities between the cycle of the norm and the cycle of power: Justice, validity, and efficacy are the flip sides of legitimacy, legality, and effectiveness, respectively (Bobbio, 1970:79–93).

Bobbio's contribution to political theory is as outstanding as his contribution to legal theory, and the presence of the *vis directiva* of his political thought in Brazil is extremely significant. Bobbio's *Theory of the forms of government in the History of Political Thought* (Bobbio 1976, Brazilian edition 1980) was the first of his books published in Brazil in 1980 and has remained successfully in print. *The Future of Democracy* (Bobbio 1984) was first published in Brazil in 1986, followed by an enlarged edition in 2000, and remains in print with great success as it continues to be unabatedly topical to the Brazilian political agenda. The *Dictionary of Politics* (Bobbio & Matteucci 1976) that he coauthored with Nicola Matteucci and Gianfranco Pasquino is a reference book for scholars and public figures alike. The first Brazilian edition was published in 1986, and the fifth in 2004. The latter has a significant preface by former President Fernando Henrique Cardoso, who is also a well-known sociologist and political scientist. Bobbio's *General Theory of Politics* (Bobbio 1999), organized and edited by Michelangelo Bovero, was published in 2000, 1 year after the first Italian edition. It is a standard reference for scholars and easily available to informed public opinion as a result of the continuous reprints of the book. *General Theory of Politics* has a section devoted to politics, morals, and the law in which the interconnectedness of law and politics is duly analyzed. *State, Government, Society: Fragments of a political dictionary* (Bobbio 1995) has more than twenty editions in Brazil and contains a clear overview of central political concepts, discussed by means of dichotomies such as public/private, civil society/state, and democracy/dictatorship. This is not the place for further elaboration of his political thought, but I would like to conclude this entry with some comments on *L'età dei Diritti* (Bobbio 1990, Brazilian edition 2004) because this remarkable book is a very instructive token of how legal and political theory are interwoven in Bobbio's thought.

In his late years, while reflecting on what he had or had not accomplished in his intellectual endeavors, Bobbio observed that the ideal aim of a general theory of law and politics that he would

have liked to have fully elaborated would have been to deal with an in-depth discussion on the links between democracy, human rights, and peace (Bobbio, 1996:165). He deals with these links in many of his texts but certainly in a more complete manner in his *L'età dei Diritti*. In the Introduction to the aforementioned book, he states that human rights, democracy, and peace are the three essential components of the same historical movement: Without recognized and protected human rights, there is no democracy; without democracy, the minimum conditions for the peaceful settlement of disputes do not exist (Bobbio, 1990: VII).

This book has been received with continuous interest in Brazil not only for its great intellectual merits but also for the intellectual alignment of its content with the spirit and letter of the Brazilian 1988 Constitution. The 1988 Constitution is the Constitution that normatively embedded the values of Brazilian redemocratization, and as such it is very receptive and detailed regarding human rights. The historical assertion of human rights for Bobbio, as modern amalgamations of the legacy of the French Declaration of 1789, is an expression of a turning point regarding the way the political system is organized. It is the departure from the perspective of the sovereignty of the rulers, and thus from the duties of subjects to the rights of citizens. This is a process that leads to the empowerment of citizenship and, hence, to the strengthening of the "rules of democracy." Needless to say that this is a perspective that helped to refute and question the way the previous authoritarian regime operated, and is of permanent interest to avoid the backsliding of democracy.

Likewise, the remarkable chapter in *The Future of Democracy* (Bobbio 1984, Brazilian edition 2000) in which he stresses that, in a democracy, power should be exercised in a transparent and visible way, stands as a critique of the use of *arcana imperii* by the previous authoritarian rule. It also provides a rule of thumb to avoid the backsliding of democracy, and a link to human rights since his thought provides legitimation to citizens' right to information regarding issues of public concern and hence to the principle of transparency of public administration as contemplated in the 1988 Brazilian Constitution.

Bobbio's analysis of the historical steps in the assertion of human rights – positivization, generalization, specification, and internationalization – has been a very precise roadmap for Brazilian jurists in their comprehensive elaboration of the relevant articles on human rights in the 1988 Constitution, hence another explanation of the authoritative reception of the *vis directiva* of his thought, in which legal theory and political theory come together.

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Bobbio, Norberto: In Mexico

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Mexico was the first country that Norberto Bobbio visited in Latin America. On that occasion, Eduardo García Máynez invited him to participate in a seminar on the philosophy of law. This information is important because the first contact between Mexican and Bobbian thought was established when the professor from Turin taught law and took on legal issues. However, his main influence in Mexico was not in the area of law but in the realm of his political thought. The translation of an important part of his political work – when he was a professor of political philosophy – had a significant impact on the intellectual work as well as the institutional life of contemporary Mexico. In fact, when one speaks of the "Bobbio School" in Mexico, one refers to the influence of his political ideas on a group of people who have learned his method of thought, have spread the ideas of his commitment to liberal democracy, and have had or maintain interaction with them.

In 1986, the Fondo de Cultura Económica de México, the most important publishing house in the country, published the books *El Futuro de La Democracia* by Norberto Bobbio and *Sociedad y Estado en la Filosofía Moderna,* by the same author in co-authorship with Michelangelo Bovero (Bobbio 1986; Bobbio and Bovero 1986). The first set of essays, published 2 years before in Italy, was translated into Spanish by José Fernández Santillán, who had completed his doctoral studies at the University of Turin in 1983. Fernández Santillán himself would translate *La Teoría de las Formas de Gobierno* in 1987 (Bobbio 1987) and two other volumes also published by the Fondo de Cultura Económica in 1989: *Liberalismo y democracia* (Bobbio 1989b) and *Estado, gobierno y sociedad* (Bobbio 1989a). In 1996 the anthology *Norberto Bobbio: El Filósofo y la Política,* originally published in Spanish by Fondo de Cultura Económica, was published (Fernández 1996). Thus, for over a decade, in Mexico and from that country, the political thinking of the Turin professor would have a presence throughout Latin America.

During those same years, we can say that together with the translation of the political work of Bobbio, one by one all the countries in the region – with the exception of Cuba – were transitioning to democracy. It is important to note the above because, as Dieter Nohlen would say, "context matters" (Nohlen 1994). The political situation in Latin America where Bobbian thought landed was particularly fertile where it put down roots. The concept of democracy proposed by Bobbio, with its close link to political liberalism and its translation in institutions or rules of the game, was present in the political discussions of those times. This can be ascertained in the speeches of some important political figures, in parliamentary debates, in newspaper articles and debates, etc., but it can be seen particularly in the institutional models that were adopted.

In fact, if we take into account the institutional models that emerged from those transitions that transformed the political regimes from autocracy to political democracy, we can maintain that Bobbio's concept of democracy prevailed over other alternatives such as those that promoted models of democracy – called substantive – or those that continued defending autocratic

alternatives. In fact, although a presidential regime, rather than a parliamentary one (as Bobbio himself would have suggested), was preserved in Latin American countries, the "universal procedurals" were adopted that characterize the formal concept of democracy advocated by the philosopher from Turin. So, although it would be wrong to assume a direct and unequivocal connection between the work of Bobbio and Latin American political change, it is not wrong to say that Bobbian thought was present and contributed to the cultural environment of that time in which the transitions were taking place.

In Mexico, it is possible to trace the influence of Bobbio's ideas, especially in a particular sector of the politicized intelligentsia. I am referring to the group of intellectuals at the Instituto de Estudios para la Transición Democrática – IETD (Research Institute for Democratic Transition) that emerged in 1989 as a civic/political project, aimed precisely to promote political change in Mexico in a democratic code and with an ideological orientation toward the left. This group is made up of teachers, journalists, intellectuals, activists, and even politicians that had an influence on the Mexican transition toward democracy and has continued to have an impact on the country's political life in the first decades of the twenty-first century. The institute itself (IEDT) defines its identity and purpose in the following way:

> The Institute of Studies for Democratic Transition is a nonprofit, nonpartisan civil association, constituted in 1989, in the heat of the social movements and electoral disputes that accelerated political change in Mexico.
>
> Its founding purpose is to encourage reflection and rigorous analysis of the problems of democratic development and the social life of Mexico. Democracy and social equality are the core issues of our association, the essence that forms the backbone of all our activities, the publications, discussions, our collective belonging and our public initiatives.

Members of this Institute include Bobbian scholars and students of his school in Turin. Among them are José Woldenberg (who was its first president from 1989 to 1995), Luis Salazar Carrión (who led it from 1997 to 2001), Lorenzo Córdova Vianello, and the author of this text. In close connection with the group, although they do not belong to the institute, it is important to mention professor Corina Yturbe as well as some young students who have attended the monthly meetings of the institute since their university years and who have subsequently carried out their doctoral studies in Italy. Such is the case of Pamela Rodríguez Padilla and Guadalupe Salmorán. It is worth making a brief reference to the trajectory of each one of these persons to envision the traces of Bobbian thought in their biographies and, through them, in some circles of Mexican public life.

José Woldenberg is a leading intellectual and university professor of political science. He is also one of the most respected personalities in Mexican political life. His thoughts had a decisive influence on the process of Mexican transition toward democracy, and, in fact, he was the first president of the electoral authority – the Federal Electoral Institute – responsible for organizing the first truly free elections in modern Mexico. His work is a mandatory reference for understanding the last third of the twentieth century and the first decades of the twenty-first in the country's political life, and his biography is part of the history of the democratic transition in Mexico. All of this is relevant because the theory of democracy proposed by Norberto Bobbio had a great influence in this thinking. Suffice it to say that reading the many essays and books written by Woldenberg on the Mexican transition to democracy, one notes the weight of Bobbian thought on his own thinking. In this case, one can argue that the intellectual and political work of one of the protagonists of Mexican democratization was guided by Bobbian theories.

Luis Salazar Carrión is a political philosopher and a professor at the Autonomous Metropolitan University who read, understood, and taught Bobbio's thoughts ever since his early works were translated into Spanish. It has already been said that, like Woldenberg, he was president of the IETD. Since then, in very influential publications like the magazine *Nexos* – he was a member of its editorial board since its foundation – or *Configuraciones*, the periodic publication of the IETD itself, Salazar was devoted to promoting the Bobbian theses in the areas of

democracy, but also in its liberal and egalitarian orientation, as an ideal model to guide the political change in the country. In addition, the influence of Bobbian thought in the work of Luis Salazar had an impact not only in the scope of his political convictions but, perhaps above all, in the methodological dimension of his work. The rigorous study of the thinking of "classic" authors is a feature of the work of Luis Salazar who learned from the intellectual endeavors of the Turin professor. As a university professor, Salazar has taught these ideas and that method to multiple generations of young Mexicans.

In 2001, Corina Yturbe published a book entitled *Norberto Bobbio: Pensar la Democracia* (Yturbe 2007) which was the result of her doctoral thesis, directed by Michelangelo Bovero, Bobbio's discipline and heir to his chair in the political philosophy department at the University of Turin. This work is a systematization of Bobbian thought in democratic matters and is a confirmation of the presence of the so-called School of Turin in the area of Mexican academia. In fact, Yturbe teaches political philosophy at the National Autonomous University of Mexico and is part of the academic group that is close to Luis Salazar Carrión. Both, in turn, interacted with José Fernández Santillán and over time established and maintain academic ties with the direct and indirect students of Bobbio in Italy.

Lorenzo Córdova's academic and public career path has been clearly influenced by the thinking of Bobbio. Córdova also studied his doctorate under the guidance of Michelangelo Bovero – between 1996 and 1999 – and he wrote a thesis that was published as a book by the Fondo de Cultura Económica, with a methodological and thematic imprint that is typical of the School of Turin: *Derecho y Poder. Kelsen y Schmitt frente a frente* (Córdova 2009). But the influence of Bobbio in Córdova's intellectual and political convictions transcends the scope of his university life as an author and researcher at the National Autonomous University of Mexico and explains his public career. Just like Woldenberg, he was a council member and is currently president of the Mexican electoral authority (today called National Electoral Institute). While Woldenberg's job was to direct this important and complex authority in times of transition, Córdova has had the task of heading it at no less complex moments during the consolidation of this form of government in Mexico's twenty-first century. The work of Córdova, to use Bobbian terminology, is to act as the guardian of the "rules of the game" of democracy in Mexico.

The author of these lines also studied under the guidance and direction of Michelangelo Bovero. The result was the thesis published by the Fondo de Cultura Económica in 2006 under the title *La Democracia Constitucional. Una radiografía teórica* (Salazar 2006). Bobbio's ideas are present in much of the book as well as in the curricula of the courses he taught, in lectures, and in the texts published since 2003 at the National Autonomous University of Mexico. In 2014, the Board of Governors of the university decided that he should serve as director of the Instituto de Investigaciones Jurídicas (IIJ) (Institute for Legal Research) from which several academic initiatives committed to the historic triad identified by Bobbio between peace, human rights, and democracy have been promoted. In fact, in close connection with Woldenberg, Salazar, Yturbe, Córdova, and other intellectuals, various academic events have been organized at the IIJ in relation to Bobbian thought.

Pamela Rodríguez and Guadalupe Salmorán were students of that school during their undergraduate years and conducted doctoral studies in Italy in the second decade of the twenty-first century. One of them was under the tutorship of Ermanno Vitale, who was also an eminent Bobbian disciple, and the other was once again with Michelangelo Bovero. In October 2016, Paulina Barrera Rosales, who was also a student of that group since she joined the University of Turin, undertook the same intellectual journey. Metaphorically we can say that they are the intellectual great granddaughters of Bobbio in Mexico and of the continuation of the School of Turin in the country. All of them were brilliant undergraduate students who have kept alive a vocation oriented toward teaching and research. With them, the continuity of Bobbian thought in Mexico is guaranteed.

I have already mentioned the magazines *Nexos* and *Configuraciones*. Along with *Letras Libres,* the first one of these is the most influential monthly publication of Mexican intellectuals. For its part, *Configuraciones* is the publication of the Instituto de Estudios para la Transición Democrática – IETD (Research Institute for Democratic Transition) and is directed by one of the most renowned economists and intellectuals in the country, Rolando Cordera Campos. To write this text, I dedicated myself to the task of searching for traces of Bobbio among its pages over the years because they constitute visible imprints of Bobbio's influence and of his school in Mexico.

The first thing we found is a review of "Norberto Bobbio y la democracia moderna" by Perry Anderson in the February 1988 issue of *Nexos* (Anderson 1988) and a "Defensa de Bobbio" written in October that same year by José Guilherme Merquior (1988). The two essays, which are dense, complex, and intelligent, have Bobbio featured in the pages of that Mexican magazine a year before the fall of the Berlin Wall. We also found a text by Bobbio himself on "Democracia realista de Giovanni Sartori," presented in Italy in 1987 and published in *Nexos* in February 1990 (Bobbio 1990). This work, translated into Spanish by Fernández Santillán, was published in the Italian magazine *Teoria Politica* in 1988 (Bobbio 1988). This is evidence of the presence of Bobbio and his ideas in Mexican intellectual debate since the late 1980s, precisely when his works began to be translated into Spanish.

Bobbio's presence in the pages of *Nexos* continued and continues to be present through his own texts, such as the essay "Los intelectuales y el Poder" (Bobbio 1994), translated by Laura Baca Olamendi (who published a book with the same title in 1998 (Baca 1998)); works by Michelangelo Bovero, translated by Lorenzo Córdova or by this writer, such as the delightful essay "Norberto Bobbio profesor," published in October 2004 (Bovero 2004); or through the essays by the authors who have already been referred to in this text.

It is worth mentioning a few examples. In May 2003, Ermanno Vitale published an interesting essay on the "El Pacifismo y Bobbio" (Vitale 2003) that reflects on the challenges to peace that emanate from criminal threats, terrorism, and state violence; in February 2004, Luis Salazar Carrión bid farewell to the teacher with an endearing text entitled "Hasta siempre, profesor" (Salazar Carrión 2004); and in July 2016, three decades after the first texts on Bobbio appeared in *Nexos*, José Woldenberg published an eloquent essay entitled "Volver a Bobbio," in which he recaptures the theses of the professor to promote their study (Woldenberg 2016). So, we have had traces of Bobbian thought during 30 years of Mexican intellectual and political life. Obviously, these are not the only texts dedicated to or inspired by Bobbio's work, which have been published in Mexico, but they are some of those that prove the existence of a "Bobbio School" in the country.

In *Configuraciones* – the magazine of the IETD – it is possible to find sensible essays that are concerned about the direction of the country's policies in which Bobbio is a constant reference. This applies to authors like Luis Salazar himself, Rolando Cordera, José Woldenberg, Fernando J. Cardim de Carvalho, Arnaldo Córdova, and Adolfo Sánchez Rebolledo. In the political memoirs of the latter, published under the auspices of IETD and entitled "La izquierda que viví, El instante y la palabra" (Sánchez Rebolledo 2014), Bobbian thought is a constant reference, cause for both intelligent agreement and disagreement. The data is interesting because Sánchez Rebolledo was an indisputable intellectual reference for the IETD community and a man of proven left convictions, closer to Marxism than social liberalism. One cannot say that Sánchez Rebolledo belonged to the "Bobbio School," but members of that school were also his students. Finally, in the pages of *Configuraciones*, it is possible to find a text by Bobbio himself, "La persona y el Estado," translated by Luis Salazar and published in 2002. Therefore, a review of the magazine's issues made it possible to confirm the specific weight of Bobbian thought on this group of intellectuals actively committed to Mexican democracy.

It would be wrong to assume that the references and the influence of Bobbian thought in Mexico are only found in the publications that

I mentioned and have only gravitated toward the intellectual biography of the people to whom I have referred – for example, until now I had left out the intellectual portrait of Bobbio by Jesús Silva Herzog, in his book *La idiotez de lo perfecto* (Herzog 2008); the works of Antonella Attili; or the essays collected in the book *Política y Derecho: (re)pensar a Bobbio*, coordinated by Lorenzo Córdova and this writer (Córdova and Salazar 2004) – but I have tried to give an account of Bobbio's influence on what could be considered his school in Mexico. The people who studied near or directly with his disciples of Turin and who remain actively thinking about and explaining politics with the categories learned in this intellectual experience were part of and continue to be part of the school.

Also, the impact of the legal thoughts of Norberto Bobbio in Mexico has been left out. This does not mean that Bobbio's work as a lawyer has not been studied by philosophers of law such as Eduardo García Maynez, Rolando Tamayo Salmorán, or Rodolfo Vázquez – to cite some notable professors. But, for various reasons, including generational ones, they never formed anything equivalent to a school of thought among them.

Bobbian thought, which brought together a small but powerful academic community in Mexico, was what developed as political philosophy in those years, and that is what this work has wanted to acknowledge.

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Bobbio, Norberto: In Torino

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Introduction

Norberto Bobbio (1909–2004) was one of the most important and influential Italian intellectuals of the late twentieth century. A philosopher of law and politics, political scientist, interpreter of the classics of legal and political thought, and militant intellectual, he produced fundamental studies on an extensive range of subjects, following an "empirical-analytical" method that combined the analysis of concepts and the construction of theoretical models with a clear regard for their applicability to empirical reality.

The first to refer to a "northwestern analytical school" that was "born in Turin out of the research and teaching of Norberto Bobbio" was Uberto Scarpelli (1982a). The designation "Bobbio school," adopted by Anna Pintore (1985), then found its definitive sanctification with the publication of the book *La escuela de Bobbio* (1990), by the Spanish scholar M.A. Barrère Unzueta. However, the same title, or others like it, such as "school of Turin," has more recently also been used with reference to the group of philosophers and political scientists that gathered around Bobbio in the years following his appointment to the chair of political philosophy of the University of Turin (Fernandez Santillán 1996).

Hence the question: should one talk of two distinct "Bobbio schools," corresponding to the two main disciplines of the Turinese scholar's research and university courses? In tracing a comprehensive profile of his *maestro*, Michelangelo Bovero has insisted on the unison of Bobbio's approach to the theory of law and that of politics, which he always treated as complementary and congeneric, in accordance with his conviction that the "world of rules" and the "world of power" are interconnected. Could one say the same about those who were inspired by Bobbio's theoretical and methodological teachings? In the following entry, we will attempt to describe separately the events surrounding the two "schools" of legal and political theory engendered by Bobbio, before then reconsidering, in the conclusion, the question of their relationship.

The Theory of Law

The year 1950, in which Bobbio's *Scienza del diritto e analisi del linguaggio* (The Science of Law and Linguistic Analysis) was published, is generally considered the birthdate of the Italian school of analytical philosophy of law, which, while not completely identical to the Bobbio school, largely overlaps with the latter (Pintore 1997). In the context of Italian philosophical culture still profoundly imbued with idealism, this essay became a veritable programmatic manifesto of a new way of conceiving philosophy of law and legal science, inspired by logical positivism and contemporary philosophy of language (Pattaro 1972). Thus it can be said that philosophy of law first met linguistic analysis in Italy, predating even the same encounter in Great Britain, since the famous inaugural lecture delivered by Hart in Oxford took place in 1952 (Ferrajoli 1999).

Reflecting, many years later, on the identifying attributes of "our school," Scarpelli spoke of a "commonality of attitudes and methods" inspired by the traditions of general theory of law, analytical positivism, and analytical jurisprudence, as well as that of linguistic analysis. He nevertheless observed that, while the tendency to look inside the "machine of law," disassembling and reassembling its parts, was a common trait of the school as a whole, a second way of construing analytical philosophy – that is, as an analysis of language in the technical sense – has been well theorized albeit practiced to a different extent by its various components (Scarpelli 1982a). Apart from the methodological aspect, the group of scholars that from the 1960s gathered around Bobbio – Uberto Scarpelli, Giacomo Gavazzi, Amedeo G. Conte, Luigi Ferrajoli, Mario G. Losano, Giorgio Lazzaro, Giovanni Tarello, and Letizia Gianformaggio – was distinguished by its adherence to the thesis of the "great divide" between descriptive and prescriptive discourse, which gives rise to the criticism of natural law theories and the option of noncognitivist metaethics, by their neo-empiricist conception of science and by their Enlightenment and secular approach to the "world of practice."

Among the most significant results of the early years of activity of these scholars, united by frequent contact and regular intellectual exchange, were the studies of the general theory of law by Lazzaro and Gavazzi (1993); the theory of language and morality by Scarpelli (1982b); the work on deontic logic by Conte, which developed a line of research begun in Italy by Bobbio himself (Conte 1989); the equally innovative studies of Losano on legal informatics; and the first draft, by Ferrajoli, of an axiomatic theory of law that was completed 30 years later (Ferrajoli 2007).

In legal theory, the common point of reference was legal positivism, in the version offered by Hans Kelsen. Losano edited several Italian editions of Hans Kelsen's work and made some notable contributions (Losano 1981) to the interpretation hereof. For this reason the Bobbio school has sometimes been identified, somewhat reductively, with Kelsenian normativism. In reality, Bobbio and his followers' adherence to Kelsen's theory was neither total nor acritical. Indeed, it was the discussion on certain internal tensions in the Kelsenian model that triggered a productive debate within the school. On the occasion of a round table on the crisis of legal positivism held in Pavia in 1966 to discuss the theses presented in two recent papers by Bobbio and Scarpelli, progress was made on the idea of a fundamental incompatibility between normative legal positivism and the value freedom required by neo-empiricism (Pattaro 1972). Bobbio concluded this discussion recognizing that legal doctrine (or jurisprudence) (See entry ▶ "Jurisprudence of Interests") did not have an exact scientific nature, but he still upheld the possibility of descriptive meta-jurisprudence; Scarpelli posited the need to spell out the "political choice" in favor of a particular positive law that would underpin any form of legal positivism (Barberis 1993).

In the following years, the debate continued on the theoretical status of legal science (See entry ▶ "Legal Science") and other disciplines that reflected on law. In Tarello's work especially, the outcome of the criticism of legal positivism reached its highest point: Tarello formulated a radically skeptical theory of interpretation which, building on the ideas of Alf Ross, refuted the existence of norms as objects pre-existing the activities of the interpreter (Tarello 1980). Tarello also provided important historical studies on the role of jurisprudence and doctrine also in the production and not only the interpretation of law.

In subsequent years, the confrontation between normativists and realists within the school of analytical philosophy inspired by Bobbio was at times lively and enriched by contributions of new participants. Whereas Scarpelli, Ferrajoli, and Mario Jori, a pupil of Scarpelli and Herbert Hart, remained faithful to the normativist approach and employed a "reconstructivist" form of linguistic analysis in order to elaborate a formal theory of law, the scholars who adhered to the realist paradigm, like Tarello and his pupil Riccardo Guastini, interpreted the philosophy of language in a mainly "therapeutic" way, associating it with the task of eliminating all ideological metaphysical terminology from the lexicon of jurists (Barrère Unzueta 1990).

During the 1970s and 1980s, the application of linguistic analysis to the phenomenon of law enriched research ranging from the formal theory of law to deontic logic and to the interpretation of and the analysis of legal reasoning, to which Letizia Gianformaggio (2008) in particular dedicated herself (as well as contributing with innovative studies on gender and the principle of equality). Nevertheless, the "initial Bobbian plan for an empirical-analytical overhaul of all legal science and of the same theory of law" (Ferrajoli 1999) appeared to have fallen into neglect. This project was resumed by Ferrajoli, who reinterpreted it and "corrected" it in the light of changes generated by the emergence of rigid constitutionalism in postwar Europe. The new constitutional paradigm, according to Ferrajoli, required giving up the "Kelsenian and Bobbian illusion of a pure or formal theory of law in a 'value-free,' or 'merely descriptive' sense" (Ferrajoli 1999). This would not, however, entail a rejection of the scientific character of the theory of law, which had been called into question by the more radical forms of realism. Rather it would involve recognizing the prescriptive dimension of the theory of law, which avails itself of conventional theoretical concepts and hypotheses, and would to some degree result from an ethical and political choice. But the prescriptive dimension at the same time preserves the cognitive dimension, holding fast the empirical anchoring of the legislator's language and the stringency of the theoretical construction ensured by the axiomatic method. The most mature result of this approach was the axiomatic theory of law and democracy presented in *Principia juris* (Ferrajoli 2007).

Closer to Bobbio's ideal of a value-free legal science aimed at understanding rather than

modifying the existing law was the Genoese branch of the Bobbio school, pioneered by Tarello; developed by Riccardo Guastini (1996), Paolo Comanducci, Mauro Barberis, and Pierluigi Chiassoni; and later sustained by a new generation of scholars, many of whom are not Italian (See entry ▶ "Legal Realism: Genovese").

Political Theory

In 1972 Bobbio gave up his chair at the University of Turin in philosophy of law, a chair he had held since 1948, in order to take up the chair of political philosophy. From 1962, the year of his first appointment as professor of political science, at the same University in Turin, he had begun to apply the tools of conceptual analysis to the world of politics, in which he had become involved from the early days of his anti-fascist militancy and his adherence to the *Partito d'Azione* (Action Party). His work contains many references to a plan for the construction of a general theory of politics that – along the lines of the general theory of law – would have the task to clarify the fundamental categories of political language that all too often were contaminated by ideology.

This project resulted, in 1999, in the publication of a collection of essays, edited by Michelangelo Bovero, entitled *Teoria generale della politica* (A general theory of politics). This collection brings together in a systematic way essays written by Bobbio over many decades. Bobbio first intensified his work on the classics of political theory in the 1960s. He paid particular attention to "recurring themes" and to the identification of categories and theoretical models that were trans-epochal in scope.

Among the fruits of that research was the book that can be considered the first pillar of the nascent Bobbian school of political philosophy, namely, *Società e Stato nella filosofia politica moderna* (Society and state in modern political philosophy, 1979), which comprises a first part, by Bobbio, dedicated to the "natural law model" and a second part, by his pupil and collaborator Bovero, on the "Hegelian-Marxian model." The first model, dating back to Hobbes, was based on the great dichotomy of natural state/civil society; the second, initiated by Hegel, hinged on the contraposition between civil society and the state. Another of Bobbio's pupils, Paolo Farneti, who had graduated with him in philosophy of law on a dissertation that Bobbio had supervised, but who soon turned to studying political science and political sociology, had a few years earlier enhanced the model by introducing the notion of "political society" to indicate an intermediate sphere between the state and civil society, in which political parties took shape and operated (Farneti 1971). Farneti, who died prematurely in 1981, was also responsible for empirical research on the Italian political class and studies of history and political sociology. Another of the early fruits of the Bobbian school of political science that must be mentioned is the *Dizionario di politica* (Dictionary of politics), which appeared in a first edition in 1976 and on which worked, first, as "editor in chief" and then as "co-director" (alongside Bobbio and Matteucci), one of Bobbio's first graduates in political science, Gianfranco Pasquino.

If the analytical style, the attempt to clarify concepts, the propensity for typification, and the construction of models were characteristic of scholars who referred to Bobbio's teachings, so too was the way in which they moved between political science, sociology, history, and political philosophy, addressing many different themes. Luigi Bonanate, a pupil of Bobbio's, dedicated himself to the study of war and peace, focusing on the link between international order, democracy, and ethics, taking a critical approach toward the realist paradigm then prevalent among scholars of international relations (Bonanate 1992). Marco Revelli, who graduated in jurisprudence under the supervision of Bobbio and Alessandro Passerin d'Entreves, but who then dedicated himself to political science, sociology, and the history of ideas, investigated the left/right dichotomy – a central theme in Bobbio's work – from a historical and analytical perspective, providing deep insight into several major ideologies of the twentieth century, from Fascism to right-wing liberalism and to communism while also

tackling the phenomenon of globalization and the crisis of the "labor society" (Revelli 2009). Pietro Polito also interpreted certain critical moments in the history of twentieth-century political thought. He coordinated, together with Revelli, the "Ethics and Politics" seminar held between 1979 and 1998 at the Piero Gobetti Study Centre in Turin under the direction of Bobbio. In addition to working with Bobbio and editing some of his works, Polito has written essays on anti-fascist intellectual as Aldo Capitini and Piero Gobetti (Polito 2001). The "realist" side of the Bobbian school of political philosophy is well represented by Pier Paolo Portinaro, an expert on Schmitt and Anders and author of numerous books on the theories and political institutions of modern and contemporary Europe (Portinaro 1986).

But the main topic of the Bobbian school of political theory was democracy. This has been the main object of research carried out over the past 20 years by Michelangelo Bovero who, by elaborating and enriching Kelsen and Bobbio's procedural theory of democracy, has developed a set of criteria for assessing the degree of democracy within political systems. Bovero observed how the majority of regimes commonly classified as democratic had a tendency to reduce the role of parliament in favor of the executive branch of government, not least by introducing electoral systems distorting popular will. This trend led to the establishment of a post-democratic model which he called "elective autocracy" for which the purpose of elections was contracted to the investiture of a monocratic power in itself incapable of representing the plurality of interests and opinions of citizens (Bovero 2000). The issue of inequality between citizens in our contemporary democracies is revisited in the reflection of Piero Meaglia, who looked in particular at the role of oligarchies and stakeholder groups before and after elections (Meaglia 2006). The concept of democracy and the analysis of its foundations in the context of post-secular societies is one line of enquiry pursued by Raffaella Sau and Virgilio Mura. Mura is a scholar who more than any other has sought to resume the Bobbian project of a general theory of politics, aiming to investigate systematically the fundamental categories of political language (Mura 2004). Ermanno Vitale, after studying Hobbes, investigated how theories of multiculturalism and, more recently, how the ideology of the "common good" pose challenges to democracy and fundamental rights, which has led him to a secular and rationalist defense of the constitutional rule of law (Vitale 2000). More recently, a new generation of scholars in Turin has continued to work in the wake of Bobbio's methodological and ideal lesson. Among these are Valentina Pazé (2011) and Massimo Cuono (2013).

During the 1980s and 1990s, Bobbio's work, not only his legal writings, became internationally known. Numerous translations were made, spreading particularly in Spain, where Bobbio's association with certain important political and intellectual opponents to the Franco regime, such as Elias Diaz and Gregorio Peces-Barba, had a long history. Several "Bobbiologists" who moved to Turin to study and converse with Bobbio – and later with Bovero, who succeeded him on the chair of political philosophy – eventually became "Bobbians" and published works identifiable as products of the Turin school. Noteworthy among these "Bobbians" are Alfonso Ruiz Miguel, author of two important monographs on Bobbio and also author of several studies on democracy, secularism, cosmopolitanism, war and peace, and international justice (Ruiz Miguel 2009); Andrea Greppi, author of the most comprehensive work on Bobbio's political thought, who has inquired into the concepts of democracy and representation in contemporary political thought (Greppi 2006); and Patricia Mindus, one of the most recent pupils of the "Turin school," who wrote an intellectual biography of Axel Hägerström and a systematic study of the notion of citizenship (Mindus 2014). Beyond Europe, the work of Celso Lafer in Brazil, Alberto Filippi in Argentina, and Agustin Squella in Chile has contributed to the spread of Bobbio's legal and political thought and should not be overlooked. The *Instituto Norberto Bobbio: Cultura, Democracia e Direitos Humanos* in Brazil has been active since 2005 (see entry on ▶ "Bobbio, Norberto: In Brazil"). Mexico might also be considered a veritable "second Turin school" (Fernandez Santillán 1996), where scholars who

have valued Bobbio's methodology now belong to more than one generation.

Conclusion

So what relationship is there between "Bobbian" theorists of law and "Bobbian" theorists of political science? There is no doubt that, because of the ever-increasing degree of specialization that the disciplines have assumed in the academic world, it is possible to identify two distinct "Bobbio schools" that do not overlap in time and that are composed by a variety of scholars who work on distinct themes and problems. Even so, it is not difficult to discern a certain "family likeness" deriving from common methodological and meta-theoretical assumptions, as well as from the constant contact and exchange of ideas between them.

Emblematic of this "family resemblance" was the dialogue that progressed over several years between Bovero and Ferrajoli: the former was engaged in the construction of a rigorously formal and procedural theory of *constitutional* democracy, and the latter was engaged in the elaboration of an axiomatic theory of the *democratic* state of law. No less intense were the intellectual relationship between Bovero and Guastini and the collaboration between the Turin school and the Genoese school in the vast area where political and legal theory largely overlap. If the sense of this commonality was also generated through the practice of comparison and direct discussion, one cannot overlook the participation of Genoese philosophers of law in the historic seminar on political philosophy founded in 1981 by Michelangelo Bovero, Salvatore Veca, and Remo Bodei in response to a call for such a forum that Norberto Bobbio had made.

Political philosophers of the Turin school are also continuously present in the research activities and seminars of the so-called Italo-Spanish seminars, organized by analytical legal theorists inspired by Bobbio (these seminars later grew to include also French and Portuguese scholars who identify with the method). Two of the journals of reference of the Bobbio school, namely, "Teoria politica" and "Ragion pratica," bear witness to this uninterrupted dialogue and exchange that is typically of the school's multidisciplinary approach. The former, founded by Bonanate in 1985 and directed by Bovero since 2011, hosts contributions on political philosophy, chiefly analytical political science, and political sociology oriented toward the elaboration of conceptual models, but also papers by legal scholars aimed at furthering general theory of law and falling within the field of constitutional law. The other journal, directed by Mauro Barberis, Riccardo Guastini, and Paolo Comanducci, is edited by a group of philosophers of law and is open to contributions from moral and political philosophers, historians, sociologists, economists, and black-letter lawyers who are interested in the great topics in the debate on ethics.

Cross-References

- ▶ Bobbio, Norberto: In Brazil
- ▶ Jurisprudence of Interests
- ▶ Kelsen, Hans
- ▶ Legal Positivism: Inclusive
- ▶ Legal Realism: Genovese
- ▶ Legal Science

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Bodin, Jean

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B

Introduction

Jean Bodin (c. 1530–1596) belongs to a group of authors that are located in the "turn" toward modernity. His legal education led him to put forward arguments on all subjects, with the intention of convincing his readers with his practical and realist vision. His writings covered history, geography, and languages such as Latin, Greek, Hebrew, Italian, Spanish, and German. His work was not only delimited to political science and law but also covered topics in math, astronomy, astrology, and to what was known about physics at that time. His erudition was very solid, as can be seen throughout his writings.

Bodin made a major contribution in the field of law, introducing universal legal and political concepts that did not exist before. *Les six livres de la république* (*The Six Books of the Republic*) is not only a work of political philosophy but principally a legal treatise that can be read through the categories of modern law and notions of the general theory of the state.

Life

As regards his life, it is known that he was born in 1529 in a French city called Angers, which was a very important trading place and favorable for a legal profession practice; he was a son of a respectable trading family, educated in the local cathedral school. Historical and political circumstances were not an adequate condition but necessary enough for the professional and intellectual progress of the future jurist. Under the protection of the Bishop Jean Boveri, he entered a Carmelite convent located in his city. Later, in 1545, without having taken vows yet, he moved to Paris where he remained until 1547.

One of the centers of humanism of his time was found in that place. This environment was an occasion to penetrate into the catholic theology and to make incursions into translation and edition of classical writings. The study of John Baconthorpe, an English theologian and philosopher, gave Bodin independence and questioning mind while leading him into great philosophy debates of the school, topics of which would later appear throughout his work, as well as the growing Augustinianism arising at that time. A noticeable point in Baconthorpe's doctrine was to relate theology with philosophy and law, considering canonical issues in relationship with the Pope's and King's ministry. This author's particular doctrine related to the sovereign independence of the pontiff could be a remote antecedent of Bodin's later conclusions in his political writings (Lloyd, 2017, 10).

University was both an important Theological and Humanities Center. Change was not only about content but also about method: from the Aristotelian demonstration to the dialectic *invention* that could adequate to a great variety of arguments and facts in a factual and hypothetic way. In this context, Petrus Ramus's influence arose (1515–1572).

The Angevin got registered in the number of lawyers of the Court, but he focused on the pedagogy of law writing, in the first place, the *Juris Universi Distributio*; This work is an instrument made from the study of the Roman law institutions and consisted of a kind of large diagram that divided the science of law into multiple schemes in a synoptic way (*in tabula*). It is a text whose bases are found not only in Ramus's methodology but also in systematic works of German jurists such as Sebastian Derrer and Johan Apel, among others.

All of them were devoted to the task of exposing deductively, from the law first principles, all legal institutions, mainly Roman law, but also Canon law and other legal systems. According to Goyard-Fabre, the way in which Bodin, based on the "Radical Reasoning" was able to adjust a complex judicial system as the Roman in a surprisingly simple and worldwide applicable logic system is noticeable.

At that moment, Bodin started studying Law at Toulouse University where he became a Roman Law Professor. His intellectual relevance is joined by his increasingly intense commitment to problems and law methods related to the contingent policy, which moved from "eclecticism" that grew as a society way of thinking in a context that could now be called "international." This term determined not only the relationship among the rising national states but also among kingdoms, and even cities.

His works show the large author's education, his humanist style, and Latin as the core language. However, in time, for instance in his work *Consilium* – another work about education – he would make changes of emphasis: religious considerations now occupy a more highlighted place, at the beginning and at the end of education.

Bodin left Toulouse and went to Paris to practice law with great success. In November 1576, Estates General was officially summoned to the observance of the Beaulieu edict. The cause was principally the financial crisis of the monarchy and the disarray thrown by the internal factions that threatened as a result of possible foreign interventions. After a year of its culmination, a royal committee worked on the cahiers and set the basis of the *Blois* Ordinances, which was considered the largest legislative undertaking in the -sixteenth-century France. In its 360 articles, the *cahiers* collected the doctrine exposed by the Angevin in *The Republic,* especially about justice administration, legal protections, and punishment for usury, among others. However, all these issues were not only in *The Republic* but also extended as a general citizens' concern. Thus, Bodin's work was a mirror of the contemporary opinion. That is to say, it shows the importance of legal and political hermeneutics of his thought over the philosophical-legal one. Bodin seems to act more like a law specialist who makes a Renaissance "law report" than a scholastic treatise writer who deduces the legal principles of the politicians and these last ones of the philosophical-metaphysical ones. This thesis of interpretation could be especially productive when understanding the reference to the fundamental concepts of Angevin's political theory.

The first element to note at the time when Bodin writes is the Edict of Beaulieu (1576) achieving by pressure from the Huguenots, who succeeded in imposing an equality of religious treatment between Protestants and Catholics that has been regarded as genuine religious pluralism. However, tolerance was far from being the aim of the disputing parties. Catholic reaction from the Picardy came very soon threatening again the unity of the kingdom and the Monarch authority.

Intellectuals of that time, called *politiques*, who belonged to different areas of knowledge, especially of the science of spirit, were very influential in a period of time when Protestantism had settled in. Because of that, it was intended not to add to a religious schism one of a political nature, thus the King's authority could prevent any other attempt in that sense.

For this purpose, the royal power had to be strong and stop disputes between Catholics and Huguenots. To found their theories on legal basis, they praised the monarchic power and, in some cases, upheld the divine rights of kings. It is arguable, in this sense, that Bodin was found enrolled in this last theory, many commentators favor the opposite. Consequently, the author admitted as legitimate those States where the people are sovereigns. The prince could be called "representative" and God's image without, therefore, reign under divine right (Baudrillart 1853, 269). Jean Bodin died in Laon in 1596.

Bodin's Method

Bodin was an author who covered issues concerning sovereignty, trying to juggle power with the legality of the State, which is still one of the main current problems and the core issue of constitutional State. Sovereignty is an interpretation scheme about a reality that historically would start to mutate. The Angevin would give birth to what theorists had already glimpsed in the late Middle Ages: the appearance of a new type of power and political organization, that is, the affirmation of the State.

The bodinian method is principally dialectic; it has been widely written during the last years about the Ramus's *Dialectic* (Couzinet, 2012, 331) influence and the defining system settled by him on Bodin, which was mainly platonic and based on the dichotomous division, proceeding from the general to the particular. This does not mean that Ramism was always his main and dominant way of thinking but an additional component in his training. The fact that the Angevin was too eclectic made it difficult for him to be classified as a loyal disciple of a thinker, and in any case, he was much less interested in logical subtleties than in real facts. Under the influence Ramus's logic, Bodin presents law as an organized system and as a hierarchical classification. This rational systematization was destined to reorganize, Roman Law was based on a new mathematical method. Angevin's fascination for numbers was outstanding, but it also showed the will of humanist jurists to scientifically reorganize law, history, and politics from a "harmonious" conception of the universe and being (Bodin 1986, 260).

The Concept of Sovereignty

The birth of State is identified with the birth and affirmation of the concept of sovereignty. In the introduction of the classical book *Elements de Droit constitutionnel francais et comparé,* Esmein considers that State should be understood as "the Nation legal personification, considering that its constituent is found in the existence of a superior authority over the individual will" (Esmein 1921, 1). This authority that, naturally, does not recognize a superior or concurrent power regarding the relationships that regulate is called sovereignty.

When dealing with the crucial question of political law, the notion of sovereignty as an essential mark of the State is found in the monumental work *The Six books of the Republic*. Bodin states that "sovereignty is the absolute and perpetual power of a Republic" (Bodin 1986, 179). This concept is so important for the Angevin that three families can constitute a State on the condition that the sovereign power exists. Instead, a crow of individuals or corporations that are not under a supreme authority cannot be considered a state organization.

The acknowledgment of the sovereign power is in the Republic origin, which is previous to the establishment of any institution. It is not, then, commerce, law, regulations, religion of the different confederated cities that allow it to be considered as such, but the union under the same authority (Cfr. Bodin 1986, 117). In turn, the sovereign power, which is identified as the principle that determines the existence of the Republic, comes to be the reference point in the redefinition of the rest of the political categories. Thus, for example, citizens are not based on privileges, rights and duties, but on the mutual submission acceptance of the same authority.

Bodin settled the legal aspects of the supreme political power, specifying the decisive concept of sovereignty: making this the main legal and political concept of monarchy was his essential commitment. The sovereign power practice has a very specific scope: positive law. Within it, the King is an absolute sovereign, since he creates and nullifies civil laws according to his will only. Inside this area, he is totally free but outside; he is suppressed by regulations that are beyond his competence. Thus, it is possible to understand how the sovereign power is defined as absolute, in the sense of being independent and superior and, at the same time, having clearly delimited restrictions –divine and natural laws, the fundamental ones of the Republic – among which it should be practiced.

The Discussion About the "Methodus" and Its Connection with the "Republique"

Sovereignty as it is developed first in the Methodus and after in the Republique has different characteristics; the transition is located reflecting the slide from "institutionally limited" sovereignty in the Methodus to a "functionally limited" one in the République.

In the Methodus, the author intends to study human history, specifically, through the institutions that depend on will. The method is the definition obtained through analysis and synthesis. To Bodin, the interpretation of Laws depends on the knowledge of the history of the Republics. The fundamental question is the distribution and levels of power and authority within the Republic.

Bodin defines a Republic as a "union under the same authority." The indispensable agent of this union is the magistrate who, at his highest level, possesses the power of sword.

The high power of the *Imperio Principis* is intended as "sovereignty," whose main elements are: first, the creation of magistrates and the definition of their function; second, the creation and the annulment of laws; third: the declaration and the end of war; forth be the last appeal instance, and fifth: be the final arbiter of leniency in capital cases.

Among them, he does not essentially highlight the legislative character of sovereignty as he will make in the Republic. Despite the sovereign owns all these characteristics, the only privative is to declare and end war. The rest are distributed and participated in the other magistracies.

This leads us to the idea that in the *Methodus* sovereignty is conceived mainly as a legal concept, which will be the basis of the one of politics: the royal power is presented as linked to the constitutional law, finding its limitations within certain competencies. The power of making and annulling laws is among the exclusive competences of the sovereign, but it does not make its essence; Bodin still does not think about the need for power to be disassociated so that it can face any eventual need for changes in law: "the absence of brakes does not yet belong to the concept of sovereignty."

To a systematic theory of sovereignty, it is needed to wait for the publication of *The Republic.* The sovereignty is conceived in this work based on the traditional notion of an intrinsically limited power exercised in a predetermined normative system.

As we will see next, in *the Republic* the breaks vanish and the sovereign's will is presented as free of duty, superior over the rest and from which the legal order comes exclusively. This happens because of an ideological reaction to the radicalism of some Huguenot writings that preached armed revolt against the royal power.

The Sovereignty in the Republic

The French jurist improves his conception of sovereignty in *Les six livres de la République,* defining it as we have already mentioned: "the absolute and perpetual power of a Republic." Sovereignty has the potential to unite and give the political community coherence, being the power of command, which is something natural because of its existence. It is necessary to define it because "no law specialist or political philosopher has defined it yet": being this the main and the most necessary point to be understood in the treaty of the Republic (*Rep*. I, 8, 179).

For its part, in the Latin version, written 10 years after, Bodin redefines the concept: "*Majestasest summa in cives ac subditos legisbusque solute potestas"* (*De Republica,* I, 8), as we can observe, the description of perpetual is excluded. I consider that this is because the adjective "absolute" means permanent and temporally continuous. It is always about a public power, which includes the faculty to govern, legislate, and judge. We are in the face of a supreme power over the citizens and subjects who is not being subjugated by law.

Since, apart from God, – says Bodin – there is nothing superior on earth than the sovereign prince, established by himself as his deputies to govern over man, he warns that "it is necessary to pay attention to his conditions, since who despises his sovereign prince, despises God, image of whom is the image on earth." Just as God cannot create another similar God, in the same way cannot the prince make a subject similar to him making his power disappear. If the Prince is a reflection of God on earth, he can only be "one" as it is a mathematical unit. He cannot share his authority with anybody, not even with his people: "because the word supreme (. . .) will never be able agree with the one who has made his subject his equal. The indivisibility and unity of sovereignty therefore arise from theology and from logic in itself.

The scheme is shaped by the existence of a free citizen who obeys whoever possesses sovereignty, but this adaptation is not based on an objective norm that obliges but rather on an unconditional act of will which it determines they must obey and in fact they do. If, above the sovereign, there were someone with the power to enact laws, he would have to obey them and consequently lose the status as such. It is for this reason that Law is the quintessential hallmark of sovereignty.

As a result, I consider that the French lawyer approached legal positivism but without letting law be disassociated with the idea of justice. While reaffirming sovereignty, there are laws in the Republic that must be complied with. In spite of the battle against Monarchomachs, he saw, however, in the technification of law (reflected for instance in Machiavelli's writings) something pernicious and perverse. Bodin could never admit that the sovereign will could enact as law any arbitrary proposition. To him, this could not be a State, but tyranny.

The Author's Influence in Europe

The spread of *The Republic* in Spain was very important as a result of his "catholicly amended" publication by Gaspar de Añastro (1590), within which, considering the Inquisition, corrected some aspects of the history of the monarchy in Spain; however, in spite of his determination, this piece of work was subject of expurgations and was even included in the "Index" (Bodino 1992, 91 y ss.).

Bodin's influence spread among Spanish places regarding legal and political discussion in the context of historical affirmation of new modern States. Such was the case of Althusius, who wrote his principles in *Politicamethodice digesta* first edition of which was published in 1603 and the second one in 1614. Here, he disagreed with Bodin placing the basis of the entire political regime over the citizens and not over the prince.

In Germany, according to Pierre Mesnard, a defamation campaign carried out by the emigrating Protestant Antonie Tessier in 1684 had very effective results because, as a result, the name of our author disappeared in the law specialist lists that were constantly published by universities (Menard 1959, 535–559).

In England, the first translation of *The Republic* was held by Richard Knolles in 1606. There was a great Bodin's influence over William Barclay (1546–1608) who wrote *De Regno et regalipotestate* in 1600. On this subject, there exist two writings belonging to Mose and Salomon that develop Bodin's influence over the English thinking (Mose 1948, 5).

A great number of his writings show the importance of his thinking: *The Methodus* (12 editions); *The Republic* in French (14), in Latin (8), having Italian, Spanish and German translations even during the author's life and an English one after his death. The most successful one was the *Démonomanie* (22 editions between 1580 y 1616). However, none of them was widely welcomed like *The Republic* nor did exemplify better his thinking. By that time, at least in France, the Empire and Papacy subordination were already overcome (Beaud 1994, 59); that is why Bodin's doctrine did not need to approach to this topic that, however, was in the core of the first development of the legal authority theory of the late middle age.

In Spain, toward the end of sixteenth and beginning of the seventeenth century, *The Republic* was instrumental in all the parties involved in the constitutional controversy about the secularization and jurisdification of the Spanish government.

Conclusion

The interest that he evokes is reinforced to a great point because of that, since, as a result, it has maintained all of his vitality. The contradictions in his thought are the result of a mixture of medieval tradition – profoundly alive – with Renaissance humanism, combined with his legal training and the situation in France. All this gives meaning to his attempt at systematization.

Sovereignty is the pivot (foundation) on which the Bodinian Republic is based. Law is the sovereign's work, who is the image of God, which makes positive law similar to divine law. Bodin's theory of sovereignty has laid the foundation of the modern State, being the cornerstone of the State and affirms its political autonomy, producing the organization from the legal level.

The Angevin aimed, with this vast work, at a main objective that consisted of raising sovereignty as a first and major, almost exclusively, basis of law as a normative order. This is what should be highlighted: his attempt to emphasize the legal role of sovereignty and its importance in the modern State of public law. This raises important questions, for example the autonomy of this filed regarding the national normativism, the defense of self-determination, the legal equality of the States which, consequently, shows Jean Bodin's relevance over political and international law.

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Bonald, Louis-Gabriel-Ambroise de

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Introduction

Louis-Gabriel-Ambroise de Bonald was born in Millau on 2 October 1754. He studied at the collège de Juilly then became a royal musketeer before being appointed mayor of his home town in 1785. He enthusiastically supported the Revolution in the early days, but his attitude changed sharply following the Civil Constitution of the Clergy and he emigrated to Germany in 1791. There, he discovered his calling as an author, writing his *Théorie du Pouvoir* [*Theory of Power*], which he sent to a number of eminent figures, including Napoleon. He returned to France shortly before the 18 brumaire and published his following works clandestinely, eventually earning recognition in the world of letters. During the Restoration, he sat in parliament, representing the département de l'Aveyron in the Lower Chamber from 1815 and in the Upper Chamber from 1824. He was also a minister of state and member of the king's privy council and was seen as a mentor for the Ultras. In 1816 he was the rapporteur for the law abolishing divorce that still bears his name. When Louis-Philippe came to the throne in 1830, he stepped down and returned to his family lands, remaining there until his death on 23 November 1840. He is best remembered for his theory of counterrevolutionary doctrine, like his friend Joseph de Maistre, to whom he is often compared. He also developed a theory of social metaphysics.

Constitution and Natural Law

Bonald's stance was clear from the preface of his first work: "In all ages, man has sought to assume the role of the *legislator* of political society and *reformer* of religious society, and give a *constitution* to both; I believe it is possible to demonstrate that man can no more give a constitution to religious or political society than he can give weight to a body, or extent to matter, and that, far from being able to *constitute* society, man's intervention can only prevent society from *constituting* itself, or to be more precise, can only delay the success of society's efforts to achieve its own natural *constitution*" (1796, p. 121).

Denying all possibility of constructivism, Bonald defines the *constitution* both as a natural state of perfection and the movement that tends to perpetuate it or return to it if it is disturbed. This allows him to consider the Revolution as one such sidestep from the course of history, which simply calls for a prompt restoration, or to be precise, the condition for a new stage of the conditions of possibility for a more advanced state. The Bonaldian *constitution*, therefore, has an organic meaning, a *constituted* state being the equivalent of a healthy body. The sole definition of the historical process is this permanent effort, such that, conversely, "the constitution of a people is its history put into action" (1817, p. 1275).

As an autonomous continuum, the dynamic is partly immanent; as a reflection of the universal order and the continuation of divine intention, it is also transcendent. Bonald draws on an

arithmetical analogy to argue that the same laws govern the universe, nations, the moral world, and the physical world. These laws, generated by the act of Creation, revealed to man with the Word, form the *primitive*, definitive body of *legislation* handed down once and for all in the Ten Commandments. They apply to all peoples in all ages, acknowledging the oneness of the human race in its organization, not just its shared biological features; the *positive laws* derived from it can, however, diverge from it, as they stem from the same source but translate the necessary diversity arising from its adaptation in secondary regulations. This subaltern, contingent embodiment falls to the *administration*, leading to the practical reinterpretation of natural reason by human reason. A balanced match between the two is again a sign of a healthy *constitution*.

More broadly, this single order is summed up in the triadic structure *Power*/*Minister*/*Subject*. It takes shape equally in the nested *societies* formed by *religious society* (God/Christ/humanity, or in the ecclesiological version, the Holy Trinity/the Church/the flock), *political society* (the king/the nobility/subjects), *domestic society* (father/mother/child), all part of *civil society.* Logic, viewed as a cause/means/effect framework, and even syntax (subject/verb/complement) mirror its morphology. As a result, Bonald only judges each such *society* to be *constituted* when the three *social persons* are clearly defined in nature and function, with the unity, independence, and perpetuity of Power underpinned by a Minister transmitting its will as a form of *authority*, with the delegated twofold role of judgment and combat, and thirdly, the obedience of a Subject restricted to passivity but enjoying the benevolent protection of the former two. For Bonald, law was, as it were, a game of mirrors between *power* and *duties*. The harmony was that of an *absolute power*, which he considered the polar opposite of *arbitrary power*: "absolute power is power independent of its subjects; arbitrary power is power independent of laws; and when you raise a people to power, you do not grant them absolute power, since it is at the whim of the ambitious and the plaything of plotters: you necessarily grant the people arbitrary power, in other words, power independent of all laws, even those the people gives itself" (1818, p. 627).

The absolute monarch is responsible before God, bound by the fundamental laws of the kingdom and by the weal of his subjects, which he cannot contravene with decisions; he is merely a conduit for the dissemination and actualization of natural law and cannot act as a particular will. On the contrary, he simply expresses the *general will*, since he *represents* his people. The notions of popular sovereignty and representativeness are therefore not so much stripped out as turned upside-down in this crystallization induced by Power. All will being singular and indivisible, the *general will* cannot be the result of the sum of *particular wills*; rather, the latter logically conform to the former. Bonald returns to Rousseau's arguments on contractualism with an almost Kantian tone to arrive at the opposite conclusion. A limitless monarchy, or tyranny, means the reign of a particular, despotic, often short-lived will, incapable of following this imperative, just as an elective monarchy, aristocracy, or democracy implies the dilution of the political in a more or less broad pool of particular wills.

In sum, Power is the voice of the *constitution*, the Minister that of the *administration*. With the monarchy that he considered only partially restored in 1814–15, since it was restricted by a written, and therefore useless, constitutional text in the form of the Charte and elective institutions, the question arose of an incomplete *re-constitution*; in this case, the *administration* became stricter by an inevitable countermovement that was the sole means of maintaining social stability.

Power and Legitimacy

This question leads to the further issue of the origin of Power. While Bonald keenly refuted the mere possibility of Jean-Jacques Rousseau's *social contract*, he did posit the existence of a *social pact* that he defined as timeless and transgenerational, tacitly concluded at the foundational moment of society and equally tacitly renewed over the centuries. He wrote that the pact was not chosen or imposed; rather it imposed itself of its own *necessity.* As the sole means of forming and stabilizing human communities, it established

the aforementioned tripartite structure of functions once and for all. The first king was not mysteriously designated by God in an invisible past, as was the case in Maistre's theory; he was only the first historically speaking, the solidity of the edifice being guaranteed subsequently by the hereditary transmission of the throne, which was the sole means of avoiding usurpations, interregnums, and civil war. Divine right therefore took on a rather different meaning from its customary providentialist understanding: "Is power, generally considered, of divine right? The answer is doubtless yes, since domestic power is of *natural* right, and public power is of *necessary* right, and the Author of *nature* is the Author of all *necessities* of beings, and he could not destroy the *necessities* that make beings endure without destroying the very beings that comprise nature" (1817, p. 1341). God is, as it were, circumscribed in the laws governing his Creation, which are resumed in a logical causality that in turn defines the principle of legitimacy.

In sum "everything that is legitimate is divine, since legitimacy is but conformity with the laws authored by God. [. . .] There is a *legal* state of society that is the work of man, and a *legitimate* state that is the will of God as the expression of the eternal order, and the consequence of the primitive, fundamental laws of human society" (1818, p. 627). Bonald does not consider "legitimate" and "legal" to be ontological opposites; they arise from the *constitution* and *administration*, respectively, and in an ideal world would overlap fully: "The progress of society and its perfection consist in rendering legal that which is legitimate, and legitimate that which is legal, in other words, in having only laws that are good and natural and none other" (1817, p. 1315). Beyond the simple movement by which society tends to be maintained or reconstituted, he sketches out the broader telos of a perfect harmony to be (re)discovered, a sociopolitical Parousia yet to come that is to be *civilization*'s final state.

Order and Liberty

The rigor of the sociopolitical architecture described by Bonald as the only one possible seems to deny man his faculty of action in civil society and his capacity for theorizing that which is posited as immutable, and consequently deprives man of his liberty. This is indeed the case if man is considered as an *individual*; seeing the individualism introduced by the Reformation and developed by the Enlightenment as a ferment dissolving the social bond, leading to the Revolution, his aim was to replace the "philosophy of the *individual* man, of the *I*" with a "philosophy of *social* man [. . .] of the *we*" (1830, p. 29). The isolated being is no longer an intellectual unit of measurement, giving way to the *person*: the social microcosm stops with the family, whose components are solely defined by the web of interdependencies determining their function. *Similar* but not *equal*, Bonald's *persons* are characterized by the strict determination of their attributions as much as by their homogeneity; the Minister is a third term that holds the two others, such as the nobility, originating in the people but participating in Power, or the mother, half-way between the father and the child. Just as the child is destined to become an adult and a father or mother in turn, a natural process of ascension drives the Subject, restricted to the *private state*, to enter the *public state*, in other terms to rise to the nobility. Change is gradual, and only takes place collectively, as when an individual reaches the point where he is capable of taking on the duties of nobility, the effects and posterity are shared by his entire family. Freedom, Bonald argued, by no means consisted in all being admitted to all places, as he summed up the revolutionary, and later liberal, stance, but rather in their potential for admission. Within a normative and admittedly static framework, an individual, who was indivisible from his family, which was in turn indivisible from society, was, like society, destined to strive for and achieve perfection. In this principle of *perfectibility*, which he sees as the defining property of the human race, Bonald once again paradoxically borrows from categories of authors whose theories he seeks to refute, including Condorcet and Rousseau.

Was the Ancien Régime, which he well remembered, the only place that had once fostered such fluidity? This is where Bonald's argument can no longer be read as unambiguous, as it both

harks back nostalgically to that lost golden age while remaining clear-eyed about the dysfunction that led to its downfall and which he sought to call on for his program of postrevolutionary regeneration.

Conclusion

Bonald's thought has been described as both theocratic and sociocratic; it is complex and his influence difficult to define (Barberis (2007); Bertran de Balanda (2016), De la Royauté en France (1814); Gengembre (1983); Moulinié (1916); Spaemann (1959). While authoritarian traditionalism undeniably drew on the counterrevolutionary legacy, Viscount Bonald's own heirs are perhaps to be found rather in Comte and Durkheim, while the dichotomy of legitimacy and legality was to be taken up by Max Weber and Carl Schmitt.

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Bossuet, Jacques-Bénigne

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Introduction

An eminent figure of the century of Louis XIV, Jacques-Bénigne Bossuet was born in Dijon on September, 1627, into a family of magistrates and parliamentarians. Trained at the Jesuit college in his city, he was "tonsured" at the age of 8 (in other words he assumed clerical status) before being appointed canon of Metz at the age of 13. He then studied philosophy and theology in the *Collège de Navarre*, one of the schools of the University of Paris.

He began his ecclesiastical career in Metz in 1649, where he was appointed deacon and ordained in 1652, before obtaining his doctorate in theology in the same year. This stay in Metz (1652–1659) gave him the opportunity for a first heated exchange in the field of controversy, in

opposition to the views of Pastor Paul Ferry. It was also in Metz that Bossuet began his career as a preacher, which continued in Paris, where he was appointed adviser and extraordinary preacher to the king (1659–1669). Consecrated as a bishop of Condom (a small city in southern France) in 1670, he almost immediately gave up his seat, being called to the court by Louis XIV to instruct the Dauphin (1670–1680). Elected to the French Academy on June 8, 1671, he henceforth played an important role as counselor and spiritual director at court. Becoming bishop of Meaux in 1681, he was immediately called upon by the *Affaire de la régale* that pitted Louis XIV against Pope Innocent XI.

Spokesman for the Extraordinary Assembly of the Clergy of France, which the King summoned to settle this dispute, he delivered the inaugural speech, the *Sermon sur l'unité de l'Église* (*Sermon on the Unity of the Church*) (November 2, 1681), then wrote the *Déclaration des quatre articles* (*Declaration of Four Articles*) (1682), which would define the freedom of the Gallican Church for several centuries. This period, when Bossuet carried out all his duties as a bishop in an exemplary way, was marked by the many controversies; he would also deliver his most famous funeral orations – notably those for Queen Marie-Thérèse (1683), Michel Le Tellier (1686), and Condé (1687) – masterpieces of oratory.

As a counterpoint to his works of controversy, which occupied the last 10 years of his life, Bossuet devoted himself to composing spiritual writings. Appointed State Councillor in 1697 and first chaplain to the Duchess of Burgundy in 1698, he died in Paris on April 12, 1704.

The Preacher

In 1643 as a student in Paris, Bossuet improvised, a sermon and fascinated the guests of the salon of the *Hotel de Rambouillet*, including the poet Vincent Voiture who would have confessed to having "never heard preach neither so early nor so late." However, his official career as a preacher began in Metz, where he gave many sermons (now lost), and passionate panegyrics dedicated to Saint Bernard, Saint Francis of Assisi, or Saint Therese; it continued in Paris, after the Queen Mother, passing through Lorraine, heard him preach in 1657. His membership in the ecclesiastical community, which brought together the Queen Mother, the old court, the *Compagnie du Saint-Sacrement* (The Company of the Blessed Sacrement), but also Saint Vincent de Paul, whose "Tuesday conferences" he had attended, opened the doors to a brilliant career for him: first in Saint-Lazare, where he preached a sermon on the retreats of the ordinands, then to the Minimes, to the Carmelites, finally at the Court, where he famously pronounced the *Carême du Louvre* (1662), and where, behind the parables, he did not hesitate to criticize important figures, including the King himself, sometimes tackling delicate political questions head-on. His frankness, however, deprived him for 3 years of the honor of preaching on great occasions at court. At the same time, he delivered several sermons at religious investitures – including that of Lady de La Vallière (1675), former mistress of the King – as well as the funeral orations of Father Bourgoing (1662), Nicolas Cornet (1663), Anne of Austria (1667, lost), Henrietta of France (1669), Henrietta of England (1670), other masterpieces of sacred eloquence.

Being a follower of Saint Vincent, and heir to Saint Augustine, both recommending the simplicity and systematic reference to Holy Scripture, he renounced two tendencies then dominant in the pulpit: the complexity of divisions, an inheritance of the scholasticism, and the excess of preciousness through the search for refined and profane tropes. The attention paid to the rhythm of the sentences, to the images, striking without being arbitrary, as well as their sound effects made Bossuet a preacher of rarely equaled talent.

The Dauphin's Tutor

Appointed by Louis XIV from a list of a hundred names to become the Dauphin's tutor, Bossuet renounced his seat of bishop of Condom in September 1670 to devote himself fully to this mission. In addition to works on grammar and

philosophy – the *Traité de la connaissance de Dieu et de soi-même* (*Treatise on the Knowledge of God and One's Self*) (1722), the *Logique* (1828) and the *Traité du libre arbitre* (*Treatise on Free Will*) (1731), marked by the scholastic tradition but also by Cartesianism – he would compose for his pupil an ambitious fresco, the *Discours sur l'Histoire universelle* (*Speech on Universal History*) (1681) where, in the tradition of Saint Augustine, he developed a providentialist vision in order to show, against the libertines, that chance plays no part in history and against fatalism, that human actions, "secondary causes," contribute to the development of this vast edifice, whose foundations and ultimate ends belong to God, the first cause.

To instruct his student in the duty of justice, he drew up from the *Politique tirée des propres paroles de l'Écriture Sainte* (*Politics drawn from the Very Words of Holy Scripture*) (1709), also dependent on providentialism which takes into account the succession of governments. Often considered as the theorist of the absolute monarchy, Bossuet rather established a dividing line between "arbitrary" and "civilized" sovereign powers, although the authority of both comes from God, which is why it is not appropriate to want to overthrow the former – which God will undertake to do – because anarchy is at the same time the worst state for man and the least natural. If he seems to have defended the monarchy by preferring it to other principles of government, it is "that one must abide by the form of government that one finds established in his country (*Politics*, II, art, I, 12th proposition)," and that the monarchy seems to him the most natural regime embodying a form of paternal authority, from which flows political authority, the foundation of social order.

The Controversialist

Even though Bossuet composed his first controversial work in Metz, *Réfutation du catéchisme de Paul Ferry* (*Refutation of the catechism of Paul Ferry*) (1655), it was around the 1680s that he became more resolutely involved in the field of the controversy. Skilled in dealing with the parties in conflict during the crisis of the *Régale* (1673–1693), showing himself to be a follower of moderate Gallicanism, he proved pugnacious against the protestants – *Histoire des variations des églises protestantes* (*History of the Variations of the Protestant Churches* (1686); *Six avertissements aux protestants* (*Six warnings to Protestants)* (1689–1691); *Défense de l'Histoire des Variations*. . . (*Defense of the History of Variations*) (1691) – against casuists such as Father Caffaro who had dared to defend the theater; against Richard Simon, who intended to submit sacred history to the principles of a critical historiography; and against the alleged Quietists or the Jansenists (in the affaire of the "case of conscience," in 1703). All of those were perceived as innovators, likely as such to introduce divisions, even schisms in the universal Catholic Church, Bossuet opposed to them, with stubborn determination, the bulwark of a "fixist" theology (faithful to the doctrine of the first Fathers), guardian of the traditions of the Church. History will mainly remember his fight against Fénelon and in particular his "lightning" *Relation sur le quiétisme* (*Relation on Quietism*) (1698), by which he obtained from Pope Innocent XII the condemnation of the latter, who was dismissed from his duties as tutor of the *Enfants de France* in 1699.

Theology and Spirituality

Mainly composed after the quarrel with quietism, Bossuet's works on spirituality, the *Discours sur la vie cachée en Dieu* (*Discourse on the Hidden Life in God*), the *Méditations sur l'Évangile* (*Meditations on the Gospel*), the *Élévations sur les mystères* (*Elevations on the Mysteries*), and then the *Traité de la concupiscence* (*Treatise on Concupiscence*) – some intended for nuns of his diocese of Meaux, and all published posthumously – are characterized by a refusal of subjective experience, considered erratic, and even more by refusing to represent it, which is why there is no reference to the great mystics. Bossuet draws the themes or the subjects of his meditations from the sources of Scripture, from the writings of the

Fathers of the Church and of some Doctors like Saint Bernard.

Voluntarist spirituality, like the voluntary act, leads to knowledge, then, and from there to the love of God, and he is also wary of the illusions of a feeling left to itself. As for God's love, it is discovered in the mourning of the world, which explains the recurrence of the themes of poverty, ascetic stripping, tears or silence, sought not in themselves but because they open themselves to a higher and purer joy in God.

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► Augustine of Hippo

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B

Bracton, Henry de

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Henry of Bracton (Henricus de Brattona or Bractona), born before 1225, was an English Catholic clergyman who ruled in ecclesiastical courts, and in the years 1247–1250 and 1253–1257 in the royal court *coram rege*. At the end of his life, he became chancellor of Exeter Cathedral where he was buried in 1268. Bracton is known as the author or a co-author of *Tractatus seu Summa de legibus et consuetudinibus Angliae libri quinque* (finished no later than in 1259), being the second work on the English mediaeval law after Ranulf de Glanville's *De legibus et consuetudinibus Regni Angliae*. Just like John of Salisbury and a French lawyer Philippe de Beaumanoir, Bracton negated the king's moral right to legislate arbitrarily. However, as John Lackland's 1215 *Magna Carta Liberatum* had already been established at that time, he also addressed juridical limits of the king's will to conclude that the monarch is both above and within law: as a God-like figure he may transcend the legal system, but needs to respect it as a human being. As such, Bracton refused to expose the quasi-sacral qualities of the ruler and remained critical of the ideas backing up the claims of Frederick II, king of Sicily and Jerusalem, who called himself in the Constitutions of Melfi "the father of justice." Using the works of glossators (Azo of Bologna) and canonists (Johannes Teutonicus Zemeke), Bracton followed both John of Salisbury in thinking of the king as the head of the organic community, and Richard de Morins (Ricardus Anglicus) in arguing that his legitimacy is independent of the emperor and pope. With reference to Glanville, he also took

into account the importance of agreements between subjects and their superiors, particularly exposing the role of customs. Unlike Sicilian lawyers, who deemed law to be constituted by the king's will, Bracton defined it as a living belief of the community, shaped by the demands for justice revealed in commonly respected, and therefore rational, customs. Consequently, although the monarch as an *auctor iuris* stood above law, he could only do what he was entitled to by the law; just like God, he was not allowed to do evil, and his will was to be restrained not only by natural law, but also by the customary law of a community. As much as having need of an army, the king was in need of just laws to rule his subjects, laws which are not established arbitrarily, but which respect customary norms and correspond to the sense of justice guiding the subjects "from the inside."

Bracton made the justice of human law dependent on three things: God's justice, human virtue allowing the acts of justice, and the application of the virtue to the process of legislation. The king, albeit named by Bracton "God's vicar on earth," was not supposed to determine himself what justice was; instead, his duty was to learn it by recognizing God's rationality expressed in the laws and rights shaped in the long run (Bracton spoke of public law, private law, and the law of nations; civil and natural laws were thought to be motivated by God himself or were associated with a rational act of will). The jurisprudence to be used by the king revealed that England was governed by unwritten laws and customs, unlike the countries where law is written in the acts (*leges*) introduced by the will of the monarch. Although there are the acts of law in England too, argued Bracton, the legal force is not given to them arbitrarily by the king, but only through the consent of lords and the whole community.

There was no contradiction in denying any earthly superiors to the king and arguing that his will needed external consent to become law. Bracton followed Anonymous of York and John of Salisbury in pointing that Jesus Christ honored Caesarian laws, and this analogy reinforced the thesis of king's subordination to law: if God submitted Himself to it, the monarch has to imitate Him in order to "redeem" those who are subjected to it. Only he who is *servus legis* may also be *dominus legis*; only he who respects law like Christ did might be called "God's vicar." Bracton abandoned the analogies of God the Father with the king and God the Son with the clergy to be found, for example, in Anonymous of York and Hugh of Fleury, and replaced the doctrine of *rex imago Dei et sacerdos Christi* with a new one: *rex imago Dei et judex Christi*. Along with the king as a servant of justice, the formula justified the presence of secular jurists and made royal judges *sacerdotes justitiae*, thus shifting emphasis from the theological to the juridical. While Bracton rejected the thesis of the people as the primary source of power, the interpretation of the Roman *lex regia* widespread in continental Europe, and the formula of *quod principi placuit*, he scrutinized the relation of *jurisdictio* to the Crown as its center embodied by kingship, with jurisdiction delegated to judges who realized it in the name of the monarch, incapable of himself examining and judging all cases.

The problem of the monarch's simultaneous supremacy and subjection to law is the element of the doctrine most closely associated with the then juridical model of royal power. Although Bracton's theory tends to be classified as "constitutional" for this reason, it is not about the separation of powers or about the monarch's accountability to any other authorities. It addresses his duty to respect the normative order, and be subject only to God and law; as there is no king (*rex*) without law (*lex*), it is the law which makes him the king. However, the appendix to his *Tractatus* titled *Addicio de cartis* mentions, among others, the earls as royal companions and members of the council who – if there were no legal restrictions to the king's power – shall act to introduce them. The main body of the treaty talks about the king bound by law who follows jurisprudence and the rules applied in his Westminster, not feudal, courts; about the king whose disposition is shaped by customs to restrain his will. Bracton is thereby critical of the "absolutist" tendencies sometimes derived from the Roman law, and this criticism is important for the development of the *common law*. *Addicio*, for a change, seems to advocate institutional restrictions to the king's will, which makes some scholars either

question Bracton's authorship of the appendix or classify him as a proto-parliamentarian thinker who even lays the foundations for the right of community members to resist, thus complementing its limits set by God and the law.

De legibus offers reflections on prescription and the Crown which were going to influence the understanding of what monarchy and state are. The maxim *nullum tempus currit contra regem* had never been considered before; even Glanville failed to analyze the problem of a long-standing state which operated differently from the original legal situation, though it had been known in continental Europe at least since Ivo of Chartres and Gratian whose compilations contrasted the notion of prescription against the "inalienability" of rights. Bracton addressed prescription and inalienability of rights because the royal courts were increasingly examining actions against the Crown based on the "allegation of prescription" which was meant to repeal the dormant rights of the Crown (not inalienable ones) and justify their acquisition by the plaintiffs. The change which gave rise to the reflections on prescription and inalienability also raised a problem that over time – thanks to Bracton, earlier in England than in continental Europe – was to be resolved by the conception of the depersonalized Crown. The reforms of Edward II which consolidated the royal domain were reinforced by the arguments taken from both the Roman and canon law whose norms justified the king's and Church's inalienable property rights. Even more important was the introduction of the set of rights and properties by Henry II; this set belonged to the domain which legists called *bona publica*, unrelated to the king and his feudal domain. Bracton strongly advocated the principle of *nullum tempus* and argued that with reference to the royal domain, the factual situation could not work against a legal situation because the properties of the Crown, which served the peace and justice, became *quasi sacrae* and were as inalienable as the rights to "sacred things" belonging to the Church and therefore to God himself. The king, who exercised jurisdiction and defended the realm (*defensio regni*), as *rex regnans* was an administrator rather than owner of the things *quasi sacrae* and "things of treasury" (*res fisci*); because they served the common good through keeping peace and justice, he was not allowed to give back, sell or transfer them to anyone. By ascribing immutability, inalienability and permanence both to the holy things belonging to the Church (God) and to the things *quasi sacrae* which belonged to the royal domain, Bracton resolved a crucial problem of late mediaeval political thought and drew a parallel (following canonists and legists) of Christ and treasury (*fisc*) as the figures of durability of the Church and kingdom, the figures which symbolized their superpersonal firmness, thereby making their properties independent of particular state and Church superiors, and immunizing them against the argument of prescription. The use of "fiscal theology" was characteristic of Bracton's reasoning which distinguished between the king as senior and the king as treasury administrator who "never ceases to exist" and resists the passage of time. Not only did he build the analogy of the king and God, but also made the king into the "vicar" of a depersonalized and stable "public sphere," thus revealing the juridical pattern essential for building public institutions that would hire secular officials. The dichotomy of *regnum* and *sacerdotium* was replaced by the dichotomy of the king and law, and monarchy obtained the status of corporation in the likeness of worship communities.

What makes Bracton distinctive as a lawyer is the conception of the monarch who enforces the universal law strictly connected with the feudal idea of kingdom; this conception blends the Roman legal tradition with local customary law important for the German heritage. Such a combination – already known to Gratian who had demonstrated mankind as governed by the natural law and customs – aroused a lot of controversies back in the twelfth and early thirteenth century. On the one hand, there was Irnerius who argued that customs should be honored if they are legal and rational, but could not abrogate norms established by the prince; on the other hand, Azo – as if anticipating Bracton – pointed that while customs abrogated by written law no longer have legal power, they can repeal a norm written

down before they were established as customs. Consequently, whereas Irnerius held that written norms should be the essence of law, Azo objected by arguing that custom was not only complementary to written norms, but had to be treated as a measure of these norms (*vide* the German doctrine of the ruler subjected to law). Following Azo, Bracton criticized the continental canonists who tended to reflect on norms and the lawmaker's will separately. Unlike John of Salisbury and the canonists of the twelfth century who had related law to "abstract rationality," Laurentius Hispanus and others maintained that the rationality of divine order was not the sole factor determining the essence of law and consistency of the whole normative system. Once the ruling on the content of norms got separated from rationality and placed in the king's will, the rules established in a legal legislative process started to be recognized as legal norms. However, having excluded rationality from the domain of law, Laurentius kept the other property of law required by traditionalists: the ruler's will which is not arbitrary but directed by the demands of common good (albeit this good was understood as utility and measured by the ruler himself). With the criteria of righteousness of the lawmaker's will reduced so much, there was no protection of the legal system against its revisions; quite the opposite, the monarch who ruled on utility ("common good") could introduce new norms at any time, complying with procedures but ignoring customs, and thus following Irnerius rather than Azo. Bracton defended the custom and integrity of evolutionary legal systems by arguing that the king stands above law while being legitimized by it; that he can revise and respect it at the same time. His objection to the "proceduralization of law" and its separation from rationality proved more effective than a return to tradition postulated by St Thomas Aquinas. When the sense of universal normativity was weakened by decomposition of both Christian and political communities, the appeal to the rational order of creation, also important for Bracton, had to yield to the appeal to long-term customs. John Fortescue's efforts to combine them both in the fifteenth century were successful insofar as they referred to the "firmness of custom" founded on rationality.

Cross-References

- ▶ Anthropology of Law
- ▶ Aquinas, Thomas: On Natural Law
- ▶ Authority of Law
- ▶ Coercion and Law
- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Constitutionalism
- ▶ Ethics: Legal
- ▶ Jurisprudence of Interests
- ▶ Legal Statements: Internal, External, Detached
- ▶ Legal System and Legal Order
- ▶ Metaphysics of Law
- ▶ Natural Law: Protestant
- ▶ Ontology of Law
- ▶ Rights: Legal and Moral
- ▶ Rule of Law: Historical Perspectives
- ▶ Virtue Theory and Law

Bruno, Giordano

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Introduction

Giordano Bruno (Nola 1548–Rome 1600) was a major philosopher of the late Renaissance, known especially for his interest in Copernicus and for his many works on cosmology, natural philosophy, the art of memory, and magic. Bruno spent his formative years studying in Naples at the Dominican convent of San Domenico Maggiore but was eventually forced to leave Italy in 1578 having been accused of Anti-trinitarianism and of reading prohibited books (Firpo 1993, p. 191). All of his works were thus composed in his years of exile, during which he moved among many courts and universities in Switzerland, France, England, and Germany. In 1591, he returned to Italy, only to be promptly arrested by the Inquisition in Venice and, after

a lengthy trial, burned at the stake in Rome in 1600. Despite the censorship that fell on his name and his entire body of work (Canone and De Bujanda 2000), Bruno enjoyed a significant circulation and was read and translated by many different philosophers and writers, including John Toland, Pierre Bayle, Friedrich Schelling, Giovanni Gentile, and James Joyce (Blumenberg 1987; Ricci 1990, 2009; Verene 2016).

Bruno never developed a systematic social or legal philosophy, but his works are full of observations on the political and religious turmoil of sixteenth-century Europe (Ciliberto 2005, p. 287). Moreover, though he was not a political thinker in the vein of Jean Bodin or Thomas Hobbes, Bruno conceived his philosophy as the tool for "a general reform," aimed at putting an end to a long period of decline and to promoting the advancement of knowledge and civil life (Firpo 1993, p. 248). This article presents Bruno's social and juridical thought by focusing on four main themes: (1) Irenicism, (2) Civil Religion, (3) The Rights of the American Indians, (4) Politics and Magic.

Irenicism

Bruno's most political work is undoubtedly the *Spaccio de la bestia trionfante* [The Expulsion of the Triumphant Beast], published in London in 1584 and dedicated to the Elizabethan poet Philip Sidney. According to Frances Yates, the *Spaccio* contained an ambitious political plan, intended to oppose Spanish hegemony over Europe by promoting an alliance between Elizabeth I of England and Henry III of France, who was praised in the conclusion of the work as "the most Christian, holy, religious and pure king" (Yates 1940; Bruno 1964, p. 270, original text in Bruno 2000a, p. 667). While Yates's reading and her general interpretation of Bruno as hermetic magus (Yates 1964) was later put into question, scholars have continued to examine the many political allusions of the *Spaccio*. In fact, when read historically, the work clearly reveals Bruno's dialogue with Renaissance Irenicism and with the various thinkers who intended to reunite Christianity and bring religious strife to an end. Bruno outlines a portrait of the ideal prince as a peaceful ruler, whose duty is to safeguard the stability of his kingdom rather than to wage war to expand his dominion. The ideal prince "loves peace and, as much as it is possible, maintains in tranquility and devotion his beloved people. He does not like the noises, the boisterousness, and the clashing of martial instruments that administer the blind acquisition of unstable tyrannies and principalities of the earth, but loves all acts of justice and blessedness that point out the direct path to the eternal truth" (Bruno 1964, pp. 270–271, original text in Bruno 2000a, p. 667.).

In these passages Bruno is appropriating the irenic ideals of Erasmus of Rotterdam, as expressed in works such as *The Education of a Christian Prince*, *The Complaint of Peace* and the *Adages*. In fact, Erasmus is an author Bruno read beginning in his youth in Naples, and who never ceased to influence his religious and political thought. Bruno's dialogue with Erasmus is clear not only from the *Spaccio*'s emphasis on peace as the main goal of the ideal prince but also from Bruno's understanding of the relationship and hierarchy between sovereignty and the law. As in *The Education of a Christian Prince* Erasmus notes that the prince was not the creator but only the guardian of the law, so too Bruno is convinced that the only legitimate power is one limited by the law. For Bruno the prince is a *princeps-iudex*, who cannot create but only enforce the law and who is legitimate only when he aligns his actions with a superior and preexistent juridical sphere, which is the condition under which "princes reign, and kingdoms and republic are maintained" (Bruno 1964, p. 144; Bruno 2000a, p. 538). In order to guide the sovereign and to prevent the rise of tyranny, Bruno suggests that the prince should be advised by a group of wise counsellors, strictly selected by merit and not by birth (Bruno 2000a, p. 628). However, when the authority of the sovereign is not bound by the law Bruno admits the possibility of resistance to an unjust power, considering tyrannicide legitimate and in agreement with "the eternal law," the juridical tool created so "that tyrants be deposed, just rulers and realms be constituted and strengthened" (Bruno 1964, p. 145; Bruno 2000a, p. 539; Pirillo 2010).

Civil Religion

As it has been observed, the *Spaccio* brings to light Bruno's close dialogue with Erasmus, both on the issue of peace and on the relationship between law and sovereignty. There is, however, one point that separates Bruno firmly from the humanist of Rotterdam. While for Erasmus the goal of humanist learning is to recover the original sources of Christianity and the nonviolent ethics of the Gospel, Bruno is convinced that Christianity is unable to function as a civil religion and that politics must be reconceived on the basis of a new religious foundation. For this reason Bruno proposes the hermetic religion of the Egyptians as a model, a form of faith he knew through the *Asclepius*, a text ascribed by Renaissance scholars to the fictitious ancient Egyptian theologian Hermes Trismegistus that in the early modern period enjoyed a wide circulation after its inclusion in the *Hermetic Corpus* translated by Marsilio Ficino (Copenhaver 1992). In a central passage of the *Spaccio*, Bruno samples the *Asclepius* and appropriates it to interpret the religious and political crisis created by the Protestant Reformation (Ciliberto 1986). In Bruno's view, only once Christianity had been replaced by a new Hermetic religion could the human commonwealth be refounded and the age of religious strife brought to an end (Bruno 2000a, pp. 631–638).

Along with Hermeticism, Bruno's civil religion has another point of reference, constituted by ancient Rome, which he praises in the second dialogue of the *Spaccio*: "For this reason they [the gods] exalted the Roman people above others; because with their magnificent deeds they, more than the other nations, knew to conform and resemble them, by pardoning the subdued, overthrowing the proud" (Bruno 1964, p. 149; original text in Bruno 2000a, p. 544). With these words Bruno discloses another fundamental source of his political thought: Niccolò Machiavelli. To be precise, Bruno is citing not the *Prince* but the *Discourses on Livy*, and specifically the famous chapters of the first book of the work in which Machiavelli discusses Numa Pompilius and his role in the foundation of the Roman state.

The Rights of the American Indians

While the *Spaccio* is undoubtedly Bruno's most political work, other dialogues also contain important legal and political observations. This is the case of the *Cena de le ceneri*, also published in London in 1584 and dedicated to the French ambassador Michel de Castelnau, who hosted Bruno while he was in London. While the focus of the *Cena* is cosmology, and more specifically Bruno's effort to reformulate Copernicanism within his doctrine of the infinite universe, it also includes a remarkable defense of the rights of the American Indians. According to Bruno, the Spanish *conquistadores* have "discovered how to disturb the peace of others [. . .] how to add new vices to old and propagate new follies by means of violence [. . .] Finally they demonstrated that wisdom lay in strength, and introduced the arts of tyranny and murder" (Bruno 2018, pp. 32–33). In contrast to Cristopher Columbus and the discovery of the New World, Bruno proposes his own cosmological discovery, destined to produce opposite effects, liberating the human mind from the Aristotelian belief in a closed world and declaring the existence of an infinite universe (Bruno 2018, pp 34–39).

On the one hand, Bruno's harsh criticism of the Spanish conquest of the New World points to Bruno's relationship with the Dominican order in which he was educated, and especially to figures such as Francisco de Vitoria and Bartolomé de Las Casas, who had both denounced the Spanish enslavement of the American Indians. On the other hand, Bruno does not simply echo the sixteenth-century Spanish debate over the conquest and the rights of the Indians. In fact, he uses the discovery of the New World as a way to challenge the chronology of the Bible and to embrace the pre-Adamite theory. In the *Spaccio* and later also in his Latin philosophical poems, Bruno regards the American Indians as a pre-adamitic population, more ancient than Adam, with a history predating the events recounted in *Genesis*. In this respect, Bruno situates himself at the beginning of a debate on the origins of the American Indians and biblical chronology – one that would become central in the early modern

period, especially after the publication of the *Preadamites* by Isaac La Peyrere in 1655 (Gliozzi 1977; Popkin 1987).

Magic and Politics

To be sure, Bruno's interest in politics was not limited to the *Spaccio* and to his Italian dialogues. This is evident especially in his magical works, composed just before his return to Italy in 1591 and marked by a systematic dialogue with Renaissance literature on magic, from Marsilio Ficino to Heinrich Cornelius Agrippa. In the *De magia* [On Magic], for example, Bruno considers the relationship between magic and politics by making reference to "the royal touch," the widespread belief that French kings had a miraculous power and were able to heal their subjects affected by scrofula: "It cannot be denied that, in some people, there are dominating spirits who have the power to dispel certain types of illnesses [. . .] the same is true of the Kings of France, who cured disorders of the lymph glands with the touch of a thumb." (Bruno 1998, p. 128; Bruno 2000b, pp. 236–238; Bloch 1973). It is, however, the *De vinculis in genere* [A General Account of Bonding], in which the relationship between magic and politics is discussed more systematically, to the point that modern scholars have read it as a "Machiavellian text" (Biondi 1986, p. XV) or even as a theory "of the manipulation of masses" (Couliano 1987, p. 89). In the *De vinculis*, Bruno explains how the philosopher magus can apply his knowledge of nature to politics. Unlike the charlatan, the authentic magus can bend nature to his will, creating bonds suited to each specific person and situation (Bruno 2000b, pp. 414–416). To be effective, bonds do not have to be founded exclusively on truth but also on the imagination of the persons to be bound. In fact, even ideas that are simply illusions and exist only in men's imagination can still condition the minds of those who believe in them. As Bruno explains, echoing Ficino and Erasmus, this is the case of Hell: "even if there is no hell, the thought and imagination of hell without a basis in truth would still produce a true hell. . .and thus the torments of hell are as eternal as the eternity of thought and faith" (Bruno 1998, pp. 164–165, original text in Bruno 2000b, p. 488). Bruno's ideas on Hell would figure prominently in the documents of his trial, when he was accused of believing in Origen's heresy for which "there was no Hell. . .and that infernal punishments were not eternal but only temporal and everyone would be saved" (Firpo 1993, p. 266).

Conclusion

Though his main interests lay in cosmology and natural philosophy, Bruno presented his thought as the instrument to effect a general reform of knowledge and society, and his works often dealt with key concepts of early modern political thought including peace, sovereignty, law, civil religion, natural rights, occultism, and belief.

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Brutus, Stephanus Junius

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Introduction

The name of the author is a pseudonym (it reads exactly "Stephanus Junius Brutus Celta") of one or more persons who wrote the treatise *Vindiciae contra tyrannos* (Verdict against Tyrants). The pseudonym was probably inspired by the name of Marcus Junius Brutus, the assassin of Julius Caesar.

Theodore Beza, Hubert Languet, and Philippe Du Plessis Mornay have been considered the actual authors in the past (Garnett 1994, lv–lxxvi), and there are also conjectures about the authorship of some other persons, such as the not very conclusive theory concerning Johan Junius de Jonghe (Visser 1971). The thesis of Languet's authorship or co-authorship was refuted by Béatrice Nicollier-De Weck in 1995, and so Philippe Du Plessis Mornay, whose authorship is convinced Daussy 2002, remains the most likely author.

Basic Source of Argumentation for the Right of Resistance

Vindiciae contra tyrannos is one of the most important Calvinist monarchomachical writings, written after the St. Bartholomew's Day Massacre, when thousands of Huguenots were slaughtered in Paris. The book was published by the printer Thomas Guérin in Basel in 1579, but the fictitious place of printing is Edinburgh. It is based largely on Theodore Beza's De iure magistratuum (1574), with further inspiration from François Hotman's Francogallia and Innocent Gentillet's Anti-Machiavel (1576). Gentillet is sometimes credited with the preface and accompanying poems to Vindiciae, published under the pseudonyms Cono Superantius Vasco and Lucius Scribonius Spinter Belga (Murtha and Pathericke 2018, xxxi). In these poems Machiavelli is denounced as a sophist and "Tuscan buffoon" and his cynical political principles are rejected. It is no coincidence that the Vindiciae, along with Beza's *De iure magistratuum*, was published from the 1580s of the sixteenth century as a counterweight to Machiavelli in the same volume as his *Il principe* (Garnett 1994, lxxxiv).

The book is divided into four sections, each of them answers one question: (1) Should people obey a ruler who gives them commands contrary to the Law of God? (2) Is it possible to resist such

rulers, and if so, to what extent? (3) Is it possible to resist rulers who oppress their subjects and destroy their own state? (4) Do neighboring rulers have the right or duty to help the people oppressed by their ruler?

In the first three questions, the author repeats Beza's thesis about the conditions under which it is possible to resist a ruler who issues orders contrary to the Ten Commandments. Like Hotman and Beza, the author of *Vindiciae* delegates the right of resistance to officials who represent the people. Individual private persons can also disobey, but they are neither obliged nor authorized to do so. A legitimate ruler who has become a tyrant must be tolerated by private persons, but no one is obliged to obey an illegitimate tyrant. Officials can raise armed resistance against him only when peaceful solutions have failed.

The *Vindiciae* were not written immediately after the St. Bartholomew's Day, but with a longer time interval. Thus, the fourth question, concerning the possibility of intervening against a tyrant in a neighboring state, reflects the political situation at the time when the Queen of England was supporting the Protestants in France and the Netherlands. The answer to the fourth question provides arguments from the Bible, from mythology, and from ancient and contemporary history for interfering in the affairs of a neighboring state. Such help is presented as evidence of Christian love of neighbor, but it is necessary to avoid the savior himself becoming a tyrant later. An English translation of the fourth question was published as part of anti-Spanish propaganda 1588 under the title *A Short Apologia for Christian Souldiours*. A French translation of the entire work was published already 1581.

In contrast to the Monarchomach works of Beza and Hotman, *Vindiciae* does not explicitly side with the Huguenots and is not primarily anti-papal; it addresses the Christian reader, whether Catholic or Reformed. Therefore, they try to present neutral arguments (Hüttenhof 2019, 109), supported most often by quotations from the Bible, more rarely by examples from European history or ancient authors, and they also reach out to Catholic authorities. Although the *Vindiciae* are based on older Calvinist Monarchomach writings, they do not quote them, but instead quote extensively from the medieval jurist Bartolus of Sassoferrato and his treatise *De tyranno*, whose geometrical way of thinking is the counterpart of the criticized Renaissance scholar Machiavelli. The *Vindiciae* are thus a Calvinist relevance of late medieval political theories (Leppin 2016).

Conclusion

Vindiciae had a great resonance in its time, providing arguments for the theory of resistance that were adopted long after its first publication.

Compared to earlier Monarchomach writings, they also dealt in a new way with the right of neighboring states to intervene against a tyrant. We find traces of the influence of *Vindiciae* in the French Revolution and in the events surrounding the founding of the United States.

Relatively soon, before the Thirty Years' War, they were also reflected in Bohemia when, under their influence, the rector of Wittenberg and later Prague University, Jan Jessenius, wrote an analogous oration *De vindiciis contra tyrannos oratio* (Prague 1614). Its second edition was published at the time of the Bohemian War and served in the argumentation of the Bohemian Protestant Estates when they refused to recognize Ferdinand II of Habsburg as their king and chose Frederick V of the Palatinate.

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Burke, Edmund

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Introduction

Edmund Burke (1729/1730–1797) was an Irish intellectual and politician originally from Dublin. His mother, Mary, was a Catholic; his father, Richard, was a Protestant and a Dublin lawyer. In 1741, Edmund began attending a school for Quakers run by Abraham Shackleton. In 1744, he entered Trinity College, Dublin, and studied there until 1748. In 1750, he left for England to study law at the Middle Temple in London. Few records of him as a student survive, but at Trinity, he edited and contributed to the *Reformer*, with his fellow students. In this periodical, his interest in contemporary Irish society and politics can be traced.

Burke was not content with reading law and turned to more philosophical and political subjects. In 1756, he published his first major work, *A Vindication of Natural Society*, anonymously for its first edition, yet in its content and writing style in the guise of Lord Bolingbroke, who had died recently. Burke intended to criticize and make readers appreciate the pernicious implications of the religious thought of the ex-leader of the Tory party. In his view, Bolingbroke's deistic attitudes towards Christianity could easily be adopted in politics, and end up with the subversion of the constitution and social order of Britain.

In 1757, Burke published another major work *Philosophical Enquiry into the Origin of our Ideas of the Sublime and Beautiful*. Since his time as a student, he had been interested in aesthetics and had long been producing this work. The primary theme of this work was to identify the distinction between "the sublime" and "the beautiful" in terms of their effects on human psychology, in which both his philosophical and religious dispositions can be found.

The *Vindication* and the *Enquiry* helped establish Burke as a philosophical writer, and towards the early 1760s, he continued to be a prolific author. In addition to his somewhat penurious livelihood, his active personality, and his ambition to establish himself as a man of letters encouraged him towards the production of works. In the same year as the first publication of the *Enquiry*, Burke and his close friend ("cousin" in Burke's expression) William Burke published *An Account of the European Settlements in America*, a historical account of the European progress to the American continents since the age of Columbus. For some years from 1758, Burke was also the editor of and contributor to the *Annual Register*, a yearly magazine for an introduction to contemporary politics and the literature on various subjects. First published during the Seven Years' War, the opening articles of the periodical were devoted to sketching the outline of the war, but it also reported on the circumstances of domestic politics and included the information on newly published books in Britain. The process of writing and editing the *Annual Register* trained Burke in political, as well as historical and philosophical, subjects. The knowledge and experience in the early phase of his career were utilized later in his political life starting from the mid-1760s.

Spokesman for Rockingham Whigs

On 12 March 1757, Burke married Jane Mary Nugent (1734–1812), the daughter of a Catholic

physician. His elder son, Richard, was born the following February. In 1759, Burke became a private secretary of William Gerard Hamilton. This hope for a future career, however, was soon dashed around the end of 1764 after discord with Hamilton. In July 1765, Burke became a private secretary to the second Marquis of Rockingham (1730–1782), one of the wealthiest aristocrats, and the prime minister of the time (until July 1766). In late December of the same year, Burke was elected a member of the House of Commons for Wendover. In parliament, Burke soon proved himself a gifted orator and, as a spokesman of the Rockingham Whigs, most earnestly engaged in the political affairs of the age.

In 1770, Burke produced and published an important political pamphlet, *Thoughts on the Cause of the Present Discontents*, in which he advanced the "creed" of the Rockingham Whigs and advocated the role of political parties in general in struggling against the various political corruptions of the age. The specific target of the *Thoughts* was the politics of third Earl of Bute (1713–1792) and his associates who were politically close to George III. Burke believed that Bute and his followers planned to subvert the constitution which had been established by the Revolution of 1688–1689.

In parliament, Burke also engaged actively in the affairs of the American colonies. As a spokesman of the Rockingham Whigs, he strongly argued for the repeal of the Stamp Act and the enactment of the Declaration Act, both of which had been implemented by the Rockingham administration in 1766. In his view, these measures enabled the relationship between Britain and the colonies to return to the harmonious state which had existed before 1764. The repressive policies of government after Rockingham, however, tended to arouse fierce opposition among the colonists and threatened to lead the empire to total disintegration.

Burke frequently spoke in parliament on the subject, and the "Speech on Conciliation with the Colonies" (22 March 1775) was informative and eloquent, if not clearly new in content and arguments (Langford et al. 1981–2015, III, 104, editor's preface). In this speech, he emphasized that the colonists were characterized by their spirit of liberty, which they had inherited as the offspring of Englishmen and the instinctively unruly Protestants. In the southern colonies, the spirit of liberty was even stronger since the colonies there were vividly conscious of their privileges as freemen being distinct from their owned slaves.

In American affairs, Burke consistently opposed the administration's coercive policy and repeatedly insisted that the restoration of the state before 1764 would bring harmony and prosperity back to the empire, although such a proposal was far from realistic in the period of the late 1760s onwards. It has often been said that Burke "supported" the American Revolution, but it should be made clear what this means precisely. He strongly wished to prevent the colonies from ceding from the mother country. Their independence would, he believed, be fatal not only for the social and political stability of the colonies, but it also meant the disintegration of the British Empire. Only in December 1778 did he reluctantly acknowledge that Britain would have to accept the colonists' declaration of their independence. This was, according to him, a matter of "necessity" rather than agreement or choice.

Despite its failure, his efforts to rescue the empire from the crisis were well remembered by later generations. Burke has been regarded as a "friend of America" and a liberal thinker. Such a portrait was often compared to his later, more "illiberal" and "confused" opposition to the French Revolution, which seemed to many to show his inconsistency and decline in both thought and action.

As a native Irishman, Burke also long contemplated the social and political situation of his native country. In his view, Ireland had been harassed by her neighboring country, England, since the Middle Ages to his time. In religion, Roman Catholicism, embraced by the great majority of the inhabitants, had been harshly persecuted, and the development of her commercial trade was also hampered by the policies intended to favor England's interests. Almost throughout his life, Burke aimed to liberate Ireland from both of these, which he believed was not only equitable but also would bring prosperity to both England

and Ireland. Since the early phase of his career, he had been consistently critical of the penal laws on Catholics, and supported the efforts to repeal these laws. As a parliamentarian, he also argued strongly for the policies of relaxing the constraints on Irish trade.

These efforts, however, sometimes backfired on him. In November 1774, he was elected as Member of Parliament for Bristol, a great commercial city of the age in Britain, but was defeated there at the next general election of September 1780 (alternatively elected for Malton through the good offices of Rockingham). Behind this was his "liberal" stance towards Irish trade, which many of the electorate considered threatening to their interests and was hence, he was not supported by them.

From the late 1770s towards the early 1780s, Burke was also actively engaged with so-called "economical reform," an attempt to restrain government expenditure chiefly to reduce the political influence of the Crown, but also to improve its finances which increasingly grew tight due to the nation's prolonged engagement in the war against the American colonies. At the same time, he was in strong opposition to the movement of parliamentary reform which continued to influence English politics. Subversive of the constitution were, in his view, frequent elections for parliament and extended suffrage proposed by the reformers and the radicals.

"Crusader" for Liberty and Justice

India had been an object of Burke's interest at least since the late 1750s, but his particular focus on it emerged much later in his life, which he believed to be the highlight of his political career. Burke was never dismissive of the advance and presence of the Britons in the Indian subcontinent and thought that India could contribute to furthering the prosperity of the British Empire, yet this had to be done without undermining the interests of the original inhabitants there. According to his theory of justice and prosperity, once justice was fundamentally defied, both Indian civilization and the British Empire would plunge into decline.

Before the early 1780s, Burke was supportive of the East India Company partly because he was anxious about the Crown's possible intention to control the Company. His attitude towards it, however, was forced to change after he took part in the parliamentary investigation and realized the injustice and corruption endemic in the workings of the Company. The select committee of parliament was organized in February 1781, and as one of the core members of the committee, he took the lead in writing some substantial reports on the investigation.

In November 1783, the Fox-North coalition government proposed two bills on the reforms of the Company, which Burke fully engaged with and supported. On 1 December of the same year, he made a speech in parliament, which was soon to be published in the press as "Speech on Mr. Fox's India Bills." By the late 1780s, Burke's target for criticism increasingly shifted onto Warren Hastings (1732–1818), the first Governor General of India. The trial of Hastings began in February 1788 and continued until April 1795 when Hastings was, after all, acquitted.

In October 1788, George III was mentally ill and the introduction of regent was debated in parliament, in which Burke frequently intervened. This political crisis (the "Regency Crisis") ended with the king's unpredicted recovery in February 1789. On 14 July of the same year, the Bastille, a state prison in Paris, was stormed, initiating the French Revolution. Burke's critical analysis of the Revolution of 1789 is today the most famous part of his political thought, and prompted later generations from the nineteenth century onwards to call him the founder or the father of "modern conservatism."

Among the surviving records, the earliest evidence of his comments on the French Revolution was his letter to the Earl of Charlemont on 9 August 1789, in which Burke took a somewhat skeptical attitude towards the events in France. In November 1789, Burke wrote to a friend of his in France, Charles Dupont, who had asked in a letter about his views on the French Revolution. Burke's reply was a long letter, in which the origins of his *Reflections on the Revolution in France* lay. According to modern scholarship,

Burke began to write the *Reflections* in mid-February 1790 and had nearly completed it around early September before it was published on 1 November of the same year (Copeland et al. 1958–1978, VI, 85–92, 137, editor's notes). Four weeks later, Mary Wollstonecraft replied to him with *A Vindication of the Rights of Men*. In January 1790, Thomas Paine, too, sent him a letter to exchange opinions on the Revolution of 1789. In writing that the "Revolution in France is certainly a Forerunner to other Revolutions in Europe," he expected Burke, like himself, to sympathize with what was going on in the neighboring country (Copeland et al. 1958–1978, VI, 71).

Burke was highly alarmed by the movements of the radicals and reformers who advanced the interpretation of 1688–1689 such as Richard Price's and welcomed the French Revolution to promote similar political reformations in Britain. In the *Reflections*, he targeted Price's recent pamphlet, *Discourse of Love of our Country*, which not only praised the revolution in France but presented an interpretation of the Revolution of 1688–1689 in England that Burke disagreed with. In 1688–1689, in Price's view (as quoted by Burke), the people in England "acquired three fundamental rights" to "choose" their "own governors," to "cashier them for misconduct" and to "frame a government for ourselves" (Langford et al. 1981–2015, VIII, 66).

Burke repudiated this interpretation of England's Revolution and argued that the "principles" of 1688–1689 can be found in such documents as the "Declaration of Right," in which nowhere was expressed the people's right to choose their governors, but rather, the hereditary principle of the royal succession. In 1688–1689, William of Orange was allowed by parliament to be crowned after James II's exclusion. This by no means meant a "choice" of the governor, but a "necessity," that is to say, the English people had to do so to protect their ancient constitution which was then being subverted.

In Burke's view, European civilization substantially improved over time and produced, by the late eighteenth century, enlightened societies, whose foundations rested on the Christian tradition and the spirit of chivalry which had emerged as "a revolution in manners" in feudal societies. In France, national debt had been cumulative in recent years, and the "monied interests" increased their power and collaborated with the *philosophes* by 1789. The "monied interests" confronted the landed interests and, in particular, confiscated the property of churches, which was, in Burke's view, part of the project, supported by those enlightened intellectuals, attacking the Christian religion itself. The narrative of such a "conspiracy" against the old regime constitutes a fundamental theme of the *Reflections*.

Burke was so convinced of the threat of the French Revolution to Britain and European civilization as a whole that he soon believed that Britain should collaborate with other European nations to defeat by arms revolutionary France. He seemed to be very determined for this around 1792, even though Britain did not begin the war against France until February 1793, very soon after the execution of Louis XVI. At the same time, he continued to keep a wary eye on radicalism in Britain, including that of the Foxite Whigs and Unitarians, both of which, he believed, awaited a chance to subvert the constitution.

Around this time Hastings's trial still continued, to which Burke still devoted considerable energies. In May and June 1794, he spent several days for the closing speeches on the trial, whose contents were not novel, but consistent with his previous speeches in the trial in denouncing the infringements of the rights of the Indian people and arguing for justice in the affairs. After these closing speeches, Burke resigned from parliament on 21 June 1794. His son, Richard, was elected to the House of Commons on 17 July, but died suddenly on 2 August due to illness, by which Burke plunged into total despair.

Even in such sheer despair and after retirement from parliament, Burke remained committed to politics with all his might until the end of his life. The final publication during his lifetime was *Two Letters* [. . .] *on the Proposals for Peace with the Regicide Directory of France*, in which he severely censured the British government embarking on peace negotiations with revolutionary France and argued for the continuation of the war against it. In his view, this was not the same as

the other wars in modern times, in which Britain was frequently engaged over territory and commerce. It was a war over civilization, in which suffering defeat would mean the disintegration of the enlightened world in Europe and a retreat to sheer barbarism.

On 9 July 1797, Burke died in Beaconsfield, Buckinghamshire, without finding much hope for future Britain and Europe. Although his superior intellect and his talent for delivering an oration were well recognized, he was not the most popular or politically influential figure among his contemporaries. Other politicians such as Charles James Fox were more successful and influential. Nevertheless, especially from the late nineteenth century onward, his thought has been a source of inspiration for various political and philosophical minds, such as those referred to the German Historical School of Jurisprudence (from Friedrich Carl von Savigny to Friedrich Christoph Dahlmann and Friedrich Julus Stahl), according to which the state depends on a gradual, slow "historical" development and whose idea of freedom derives from the "immemorial" historical sources.

He has been remembered for his aesthetics, idea of a political party, liberal attitude towards the American colonists, and his "conservatism," or vitriolic criticism of the French Revolution. A variety of examples from the reception history certainly convinces us of the force and impact of his thought, although they do not necessarily convey a proper understanding of it. A careful reading of his texts and their historical contexts leads us to find rather its subtle complexities than mere inconsistency or a conglomerate of ideas.

Burke's Theory of Law

Burke's ideas on law can be analyzed from several different perspectives. For example, he was undoubtedly an adherent of the natural law tradition. Like many of his contemporaries, Burke was taught natural law at university. Both rhetorically and content wise, he relied on the concept to advance his arguments at crucial junctures of his career. A key aspect of his study of the natural law tradition was his perspective for a universal morality, which he applied to political issues. The earliest example is his criticism of the penal laws affecting Roman Catholics in Ireland. Burke regarded these laws as iniquitous and contrary to the moral standards of a civilized society. As he wrote in "Tracts relating to Popery Laws," the penal laws were "prejudicial to the whole community" and "against the principle of a superior Law," or "the will of Him who gave us our nature" (Langford et al. 1981–2015, IX, 455). He took a similar tack in his criticism of the East India Company, arguing that the Company's oppressive policy towards the native inhabitants of the Indian subcontinent fell far below the universal standard of morality imposed by natural law, or Divine Providence. Burke's opening speech at the Hastings' trial closed with the remark, "I impeach him in the name and by virtue of those eternal laws of justice which he has violated" (Langford et al. 1981–2015, VI, 459).

Burke also claimed that "the doctrine of prescription [. . .] is a part of the law of nature," an argument that the French revolutionaries totally despised (Langford et al. 1981–2015, VIII, 200). Scholars have long debated which intellectual tradition Burke's idea of prescription was most indebted to. While some commentators argue for the natural law tradition (Stanlis 1958; Canavan 1960), others point to England's common-law principles (Pocock 1960. cf. Lucas 1968). As recent scholarship suggests, he drew on the idea of prescription from at least a few intellectual sources, rather than exclusively relying on a single legal tradition (Clark 2001, p. 95).

Although well aware of common law concepts in England, Burke did not insist that English laws had remained essentially the unchanged since the distant past, as some writers had previously claimed. In an early work on English history, *Abridgment of English History*, he strongly criticized ancient constitutionalism, which he considered incompatible with historical truth. Although placing more emphasis after 1789 on the continuity of the English constitution over time, especially in *Reflections*, Burke still rejected the invariable and insular nature of English law. Instead, his views on the formation of law

encompassed international and dynamic perspectives throughout his career. He agreed with Lord Mansfield that English law was improved "by making its Liberality keep Pace with the Demands of Justice, and the actual Concerns of the World" and by "conforming our Jurisprudence to the Growth of our Commerce and of our Empire" (Langford et al. 1981–2015, VII, 168).

Burke's theory of law was quite closely linked to his idea of manners and opinions. Like Montesquieu, he often asserted that politicians should pay attention to people's manners, and the constitution should be well fitted to them. A failure to do so, he argued, would lead to despotism and underdevelopment. As an oft-quoted passage of the *First Letter on a Regicide Peace* says, "Manners are of more importance than laws," and "in a great measure the laws depend" on manners (Langford et al. 1981–2015, IX, 242). This does not mean that the government can impose any rule that matches with people's habits and mindsets. Rather, despotism must be excluded by drawing precepts from the general standard of justice and morality. Burke considered the "old regime" of France and that of India to be far from being entirely despotic although, like many of his contemporaries in Britain, he was still critical of the illiberal character of the French government. The rule of law was, in his view, an essential condition for a civilized society, and he regarded eighteenth-century France (and, presumably, India) as possessing this criterion. One goal of Burke's politics was the achievement of "*social* freedom" (Copeland et al. 1958–1978, VI, 42), in which people can enjoy freedom and their own culture without departing from justice. His idea of law was a significant part of this theory, which aimed at harmony between manners and universal morality.

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Burlamaqui, Jean-Jacques

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Introduction

Jean-Jacques Burlamaqui (1694–1748) was one of the leading figures in Swiss natural law of the early modern era. His work built on the

foundation laid by Hugo Grotius (1583–1645), Samuel Pufendorf (1632–1694), and their prominent translator and commentator Jean Barbeyrac (1674–1744). Natural law theories laid foundation to modern international law as well as helped conceptualize individuals' inalienable rights, where our current understanding of human rights has grown from.

Teaching Natural Law

Jean-Jacques Burlamaqui was born on the 13 July 1694 in Geneva, Switzerland, and died on the 3 April 1748 in the same city. His parents were Jean-Louis Burlamaqui, châtelain of the Peney region and member of the Council of two hundred, and Suzanne Favre de la Croix. His spouse was Renée de Chapeaurouge, daughter of Jacob de Chapeaurouge (Dufour 2003).

After brilliantly completing studies of philosophy and jurisprudence at the Geneva Academy, he graduated as a lawyer in 1716. Burlamaqui soon showed preference for developing the theoretical framework of legal thinking and teaching it. He gave private lessons on natural law to the sons of local notable families, as well as to the young noble foreigners. The success of his private lessons leads Burlamaqui to move towards the university career. In 1720 he sought and obtained the function and title of honorary professor at the University of Geneva.

In 1720 and 1721, Burlamaqui traveled in Europe, visiting London, Oxford, Amsterdam, and Groningen, where he met Jean Barbeyrac. In 1723, Burlamaqui is appointed professor in Natural and Civil Law together with Jean Cramer. In this function he alternates teaching natural law according to *De officio hominis and civis* of Samuel Pufendorf, translated in French by Barbeyrac under the title *Les devoirs de l'homme et du citoyen*, and Roman Law according to the Institutes. Appointed member of the Council of Two Hundred during his stay in England and then the Council of Sixty in 1730, he also participates in the political life of the city and is involved with the unrest of 1734. Interrupted by a brief stay in 1735 at the court of the Landgrave of Hesse-Cassel for the education of the young Prince Frederick, Burlamaqui continued teaching at the university up until 1739, when he asked for discharge for reasons related to his health. The lawyer Pierre Lullin took on the teaching duties and officially succeeded him in 1740. After having withdrawn from the academic life, Burlamaqui was finally accepted in 1742 after several refusals, an election at the Petit Conseil, where he held a seat until his death. Burlamaqui had a fondness for the fine arts, sculpture, architecture, music, and painting, and he possessed a fine collection of paintings and prints. He was actively promoting the creation of the public school of drawing (1751).

Natural Law to New Audiences

Burlamaqui's lectures drew foreign students to Geneva, and his natural law treatise was translated into English, Latin, Dutch, Danish, Italian, and Spanish and republished in more than 60 different editions. The English translation became a standard textbook both at Cambridge and at the foremost American colleges. An American historian Ray Forrest Harvey wrote the first scholarly work on Burlamaqui (Harvey 1937). He argued that the Founding Fathers knew well his writings and that these works had considerable influence on the American constitutional system. Moreover, Burlamaqui's work was important to philosophers such as Jean-Jacques Rousseau and Denis Diderot. However, it has been a topic of debate, whether the ideas thus disseminated were Burlamaqui's own.

It can be shown that Burlamaqui's published work borrows extensively from Jean Barbeyrac's French translations of the main natural law treatises of his time, especially Pufendorf's *Les devoirs de l'homme et du citoyen* (1707) and *Le droit de la nature et des gens* (1706) (*De jure naturæ et gentium*) and from Grotius's *Le droit de la guerre et de la paix* (1724) (*De jure belli ac pacis*). Barbeyrac had provided extensive commentaries for these translations, and for him it was important to give precise sources of referenced works, both ancient and modern, in a way that the reader could trace the origins of ideas

and also follow the theoretical dialogue between scholars.

Burlamaqui follows a different method and often omits mention of his modern sources, as most of his commentators have noted. The heavy reliance of Burlamaqui's main work, the *Principles of Natural and Politic Law (Principes du droit naturel* 1747 and *Principes du droit politique,* 1751*)*, especially its second part, on Barbeyrac's editions requires an explanation. At the time the practices varied greatly on how especially modern sources were presented even in print and even more so in a lecture situation, so it is not as surprising to see Burlamaqui's work omitting many of them.

Burlamaqui published only the first part in his lifetime. He himself thought of these books as an introduction to a complete system of the *law of nature and nations* for students and beginners, not the learned audience. He never published the whole system himself, but he laid out the main lines of one in lectures, which were preserved in students' notes. His main reason for publishing the work was, as he states in his introduction, that he "began to apprehend, lest this work should be published against my will, in a very imperfect and mangled condition."

Burlamaqui's teaching drew on the most up-to-date political science available in his day and provided a summary of it. The lectures took the usual form of a commentary on the abovementioned works by Pufendorf and Grotius, all in Barbeyrac's French translations. However, as Bernard Gagnebin notes in his monograph on Burlamaqui, "the editors of the *Principes du droit politique* published all these quotations, without indicating the sources," (1944: 86) so it is difficult to discern which claims of the lecture notes come from other scholars and which are his own.

The first half of *Principles of Natural and Politic Law* presents Burlamaqui's understanding of Pufendorf, Grotius, and Barbeyrac, followed by either taking sides on controversial points or arguing that all three are in need of rectification. Despite the standard view of Burlamaqui, his standpoints are sometimes surprising. The second half of the same work is less original since, as explained, Burlamaqui had not prepared it for publication, except for a few chapters. It clearly and systematically presents the main issues of contemporary natural law theory.

Burlamaqui and Other Natural Law Theorists

Burlamaqui is often disagreeing with his predecessors. One possible explanation for some of the differences could lie in his background that was wealthy and aristocratic. For instance, on the best form of governance, he, as a council member and as an expert on natural law, participated in formulating the ruling elite's intellectual response to the bourgeoisie's claim that the small council was usurping power that constitutionally and traditionally belonged to the general council. Burlamaqui's chapter on forms of government is very critical of democratic regimes and argues against Pufendorf for the advantages of a mixed government like the Genevan "aristo-democracy." According to Burlamaqui, the best political regime is the one that most safely helps men achieve the happiness they naturally aspire to, and such a regime is government by the ablest, meaning the elite.

In addition to these kinds of differences in interpretation of the natural law, Burlamaqui also adopts some different foundational principles than Pufendorf, who had developed a systematic and organized approach of natural law in much more detail than Grotius before him. Times had changed, and Burlamaqui's context was the more optimistic Genevan Calvinism. For Burlamaqui, man is first and foremost a being that strives for happiness or felicity; this is what guides all human action; and reason is the only way to achieve happiness.

When Burlamaqui insists that self-love is not "the fruit of human depravation" (Burlamaqui 2006: 66), he is quite in line with many theologians of his day. But these views are contrary to those defended by Pufendorf who had underlined people's inclinations to evil and who saw natural laws not as rules to make them happy but as rules needed to survive other people's company. Burlamaqui by contrast claims that the natural

laws do not exist merely to hinder us from harming each other but to guide the *natural striving for happiness*, a concept that Burlamaqui offers in the first paragraph of his book.

Burlamaqui applies the same approach to civil laws. The most central task of the civil state is to help people become happier than what would be within their reach as individuals. Civil laws can thus be used as a means to make the citizens happier. This also implies that those involved in legislation should have a solid understanding of what makes the citizens virtuous and happy, and according to Burlamaqui, the uneducated people generally did not.

In his political theory, Burlamaqui stands out, together with Barbeyrac, as one of the early modern natural law theorists with something resembling a theory of *human rights*. Burlamaqui in fact holds that everyone has a "right of endeavoring to provide for their safety and happiness, and of employing force and arms against those who declare themselves their enemies" (Burlamaqui 2006: 446).

For Burlamaqui, the science of natural law is in effect a science of happiness. In all of these views, Burlamaqui defends a different understanding of politics and law than most supporters of the earlier theorists of natural law, such as Grotius, Pufendorf, or Barbeyrac.

Conclusion

Burlamaqui developed further the natural law theory building on the works of Grotius, Pufendorf, and Barbeyrac, sometimes without much trace of these important references. He also promotes a different interpretation than his predecessors of natural law, both for its application and for its foundation. Burlamaqui's works have been highly influential and read widely. The English translator describes Burlamaqui's works as follows: "But his singular beauty consists in the alliance he so carefully points out between ethics and jurisprudence, religion and politics, after the example of Plato and Tully, and the other illustrious masters of antiquity" (Burlamaqui 2006: 6).

Cross-References

- ▶ Jurisprudence as Normative Science
- ▶ Legal System and Legal Order
- ▶ Natural Law: Contemporary
- ▶ Positive Law and Natural Law
- ▶ Rights: General
- ▶ Toleration
- ▶ Virtue Theory and Law

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Introduction

Born near Abbeville, South Carolina, Calhoun's (1782–1850) educational opportunities were limited, albeit advanced by the occasional tutelage offered by his brother-in-law, Reverend Moses Waddel. After his parents' death and a period of self-education, Calhoun entered Yale College, studying under the arch-Federalist Dr. Timothy Dwight. He proceeded to study law for two years under Judge Tapping Reeve at the Litchfield Law School, the most prominent institution devoted to legal training during this period. Returning to his native South Carolina to practice law, a pursuit he considered "both dry and laborious," Calhoun was married and served two terms in the South Carolina Legislature until elected to the US House of Representatives in 1811.

As a congressman, Calhoun continued to embody republican principles and acquired the reputation as a moral statesman who regarded republicanism and patriotism as synonymous: he supported the War of 1812; he revised Madison's original national bank proposal and backed limited internal improvements; and he continued to praise a free economy and a regime founded upon "reason and equity" that was surrounded by a world of "fraud, violence or accident."

Calhoun supported "national" legislation during his early career, encouraging scholars to inappropriately divide his life into stages based upon his perceived degree of attachment to a centralized political order. The rising protectionist spirit in America would also affirm Calhoun's wisdom in supporting the 1816 tariff measure, even though he held subsequent tariffs in disdain. President Monroe asked Calhoun to assume the helm at the War Department in 1817, where served until 1825.

Statesmanship and Executive Power

Calhoun was generally considered too philosophical for such a practical post as Secretary of War, but he accepted the appointment out of a republican sense of duty. In the course of two terms in office, Calhoun completely reorganized and revitalized the War Department and its general staff, resolved its financial problems resulting from the war, and demonstrated a new, more compassionate approach to Native American affairs. Calhoun also began reforming West Point through a new spirit of openness in terms of admissions and administrative procedures. Calhoun has been described as the ablest war secretary the Government had before Jefferson Davis in 1853.

A broad spectrum of supporters encouraged Calhoun's candidacy for President in 1824 against his fellow cabinet members William H. Crawford

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and John Quincy Adams, Speaker of the House Henry Clay, and war hero and newly elected senator, Andrew Jackson. Initially entering the presidential field, Calhoun realized he lacked adequate support and withdrew after Pennsylvania nominated Andrew Jackson. Accepting the vice-presidential nomination, Calhoun was elected by a large majority. The results in the presidential contest between Jackson and Adams were inconclusive in terms of the electoral and popular vote, and the election was "thrown" into the House of Representatives where Jackson's nemesis Clay served as speaker. In an unusual series of events, Clay came to Adams's aid, with the House vote securing the election for Adams. The president-elect proceeded to appoint Clay as Secretary of State. Many Americans considered the supposed arrangement between Clay and Adams a "corrupt bargain." Calhoun believed the "corrupt bargain" had disrupted the balance between preserving liberty and assuming power explicitly reserved to the people; "improperly acquired" power would doubtless be "improperly used," he opined.

Calhoun and either Adams or his representative engaged in a pseudonymous debate about the sources of political power. Calhoun began to separate himself from what he considered to be Adams's abuses of office, and supported General Andrew Jackson in 1828. It was as part of this ticket, later known as the Democratic Party, that Calhoun was elected Vice President in 1828.

The falling apart of the political union between Calhoun and Jackson is one of the most remarkable events in American politics. Calhoun had hoped Jackson would assume the republican political mantel, but his expectations were not fulfilled. When Jackson decided to seek a second term and selected Martin Van Buren as his vice presidential candidate, several controversies were ignited that raised questions about the corruptibility of the administration. The most important concerned Mrs. Peggy Eaton, wife of Jackson's dear friend and Secretary of War John H. Eaton. Out of a sense of propriety, Mrs. Calhoun and most ladies in Washington refused to receive her into their homes. After John Eaton made the controversy public, Calhoun was forced to respond and defend his wife's actions, which amounted to a moral stance and not an act of snobbery as often noted.

Senator and Secretary of State

As a result of the dispute with Jackson, Calhoun resigned as Vice President and was elected to the Senate. In an attempt to moderate the crisis posed by tariff-related concerns and the "Force Bill" in 1832, Calhoun questioned the prospect of preserving the union by force, and not relying on the "harmonious aggregate of the States." To this point in his career as a statesman, Calhoun had made few statements regarding slavery. Troubled by the increasing influence of abolitionism and the rise of sectional conflict, Calhoun would devote the remainder of his life to defending the South and attempting to avoid conflict. Retiring from the Senate in 1843, he unsuccessfully pursued the presidency for the last time. In 1844, Calhoun was appointed as Secretary of State.

Returning to the Senate in 1845, Calhoun served as a thoughtful critic of the war with Mexico, and suggested the conflict would encourage disharmony between the North and South. In 1844, Calhoun had helped contain a truly revolutionary "Bluffton Movement" composed of his fellow South Carolinians. Many leading South Carolina politicians threatened drastic responses to a troublesome new tariff and the questionable status of Texas. Calhoun's success at moderating the conflict demonstrated both his restraint in a crisis situation and his lack of control over the politicians often described as "Calhounites" due to their intimate ties to the statesman.

Calhoun's Political Theory

For Calhoun, the recovery of a proper mode of popular rule was dependent upon a return to the ideas of the Founding; such a project could not be accomplished without revisiting and expounding the "primitive principles" and experiences of the Founding generation for a new day. Calhoun devoted his life to this task and his writings are the most profound examples of this attempt at

recovery and self-understanding, reframed for a nineteenth-century America that was consumed by new challenges.

In Calhoun's interpretation, America's political inheritance was established upon an appreciation of the necessary limitations of social and political life. Primary among the means of limitation was the need for societal and personal restraint when faced with the possibility of radical transformation. While change and social mobility were not the most commonly acknowledged aspects of Southern society, neither were such considerations beyond the pale of possibility. As an articulate representative of agrarian republicanism during the early and mid-nineteenth century, Calhoun could present an Aristotelian mean as the basis for installing an element of restraint in the operation of government. If government could not be restricted, the regime would necessarily lose a sense of liberty and the populace's role in governing would be greatly diminished. Government, with its use and abuse of power, must become more moderate, or suffer its eventual demise.

The quality of restraint was instilled and encouraged by a vast number of sources including the works of antiquity, the treatises of Christian authors, and the genius of the Founding generation. Living within a society aware of its constraints, Calhoun also appreciated the limits of human experience. The necessary balance between the need for popular participation in the government and the need to avoid the potential excesses of popular rule guided Calhoun's philosophical mission. In this regard, Calhoun's political theory should be understood as a reflective journey toward recovering genuine popular rule amid the national crises during his career as a statesman and political philosopher.

Calhoun, Slavery, and the American Regime

Due to the complexity of Calhoun's inherited worldview and experiences, discernible policy formulations were not always the result of his theoretical labors. Consequently, Calhoun was often criticized for his "metaphysical" approach to politics. Instead of dismissing Calhoun on the grounds that he at some junctures did not conform to the mold of a "practical" political thinker, his principled disavowal of efforts to diminish the Western tradition's attachment to individual and social responsibility in an effort to seek the deeper truths regarding political life as a means of preserving the republic should be acknowledged.

While Calhoun offered a moderate defense of slavery, viewing the slavery situation as part of a larger discussion of the evolving nature of Southern society, it was neither the most important nor most consuming aspect of his political thought. In most of the great debates of his lifetime, including a myriad of concerns from nullification to slavery, Calhoun should be understood as a source of moderation amid seas of extremism. Because of Calhoun's own complex views and long-standing regional tensions, some of his critics attempt to use slavery as a means of distracting students of Calhoun's political thought from a more complete examination of his work and its continuing importance to American politics. Defending slavery was not the touchstone of Calhoun's political thought, but it is also accurate to acknowledge his support of the institution. Calhoun believed that the slavery problem would resolve itself over time, but the need to preserve the republic and to improve the citizenry's understanding of the regime's foundational elements were of greater importance.

Conclusion

Calhoun presents a political theory girded by a doctrine of restraint that would develop into a collective self-understanding that was grounded in a moral obligation to restore the regime to its original principles. Published after his death, Calhoun's two treatises on political theory and American constitutionalism, the *Disquisition* and *Discourse*, demonstrate his hope that America could avoid the pending conflict. Calhoun's persistent concern about the unequal treatment of the South would, he feared, lead to increased regional tensions and to civil war. His last years were spent

attempting to unify the South and avoid strife. On 31 March 1850, Calhoun died in Washington, D.C. In death, Calhoun became a source of inspiration for the Confederate government, its leaders, and the South. Calhoun's understanding of restraint within political order, albeit imperfect, remains one of the most important characteristics of his political thought and his achievement as a statesman. In Calhoun's interpretation, the interposing and amending power of the states implicit in the Constitution could only augment authentic popular rule by allowing for a greater diffusion of authority.

Calhoun's purpose was the preservation of the original balance of authority and the fortification of the American political system against the obstacles it faced.

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Introduction

John Calvin (1509–1564) was the central force of the Genevan Reformation in the sixteenth century. Through the Reformation's radiance, he shaped the religious cultures of France, Scotland, the Netherlands, Switzerland, parts of Germany, and eventually the New World.

Accordingly, a decisive role in the genesis of modernity and especially in social and political history has been attributed to him in very different ways: be it negatively as a proponent of a theocratic model of the state, be it positively as a pioneer of constitutionalism and democracy, or be it as a forerunner of modern capitalism. Such retrospective appropriations, however, should be viewed with caution.

Not only was Calvin first and foremost a child of his time who dealt primarily with the specific ecclesiastical and theological issues of his immediate Genevan context, but the theological perspective was also the only one of relevance for him, so that he had merely an indirect interest in political, legal, or economic issues: Calvin was not a political or social theorist. It is true that as a humanistically trained jurist, he knew how to use the terms and concepts of both the medieval legal tradition and contemporary jurisprudence, which made his thinking compatible with later political theories, but in view of his lack of interest in genuinely philosophical questions, later developments that could relate to Calvin or that may have found fertile ground in Calvinist milieus can hardly be regarded as consequences that Calvin had preconceived or intended.

Born on July 10, 1509, in Noyon in Picardy (France), Calvin first pursued a traditional degree in philosophy at the Collège de Montaigu in Paris before studying law in Orléans and Bourges. He was trained there in the humanist tradition of Guillaume Budé, but also came into contact with ecclesiastical sources.

After completing his studies and publishing a humanist commentary on Seneca's moral philosophical treatise *De clementia* (1532), however, he became increasingly interested in the religious issues of his day. In 1536, he published the first edition of his *Institutio Christianae religionis*, through whose various editions he would establish himself as a mastermind of the French reform movement.

Stopping on a journey to France in Geneva, which had adopted the Reformation only a few months earlier, he was persuaded to stay and help

the city organize the new church structures. Calvin attempted to establish a church model that not only accorded the pastorate the administration of the sacraments and the office of preaching (as Luther had done in analogy to the medieval priesthood), but also attributed to it a juridical competence and, in particular, the right to excommunicate church members. For many Genevans, who had only just broken away from the bishop and transferred his legal powers to the city council, this went too far, as it did for the neighboring state of Bern, on whose military protection Geneva was dependent and under whose political pressure Calvin had to leave the city again in 1538.

He went to Strasbourg, where he became pastor for the congregation of French refugees and used his time above all to sharpen his theological profile (second edition of the *Institutes*; commentary on the Epistle to the Romans 1540). After successful mediation between Bern and Geneva, however, he returned to the latter city in 1541 to further establish the Reformation, but not without having negotiated that an ecclesiastical board be created whose task was to supervise discipline. This *consistory*, composed of the Genevan pastors and 12 elders, and subordinated to one of the four *syndics* (city majors, which meant that it was not a purely ecclesiastical authority), did not remain unquestioned in the following years; only in the late 1550s was it definitely granted the right to pronounce excommunications as an ultimate measure.

In addition to such organizational issues, Calvin dealt with a multitude of theological problems, wrote tracts and commentaries, corresponded with a wide range of scholars of his time, preached regularly and revised his main work, the *Institutes*, up to its last, four-volume edition of 1559. Calvin died on May 27, 1564, in Geneva.

Theological Presuppositions

At the center of Calvin's theology stands the essentially political concept of God as absolute sovereign. As the creator of all things, God is also their rightful ruler and owner, to whom all creation is bound to honor and obedience. Since the Fall, however, human beings disregard the divine majesty and put themselves in God's place: considering the good that happens to be their own doing (even though, for Calvin, humans are so corrupted by sin that they are not capable at all of achieving or even willing something truly good), they perpetually commit the crime of lèse-majesty. If humanity does not sink into chaos, this is due, first and foremost, to God's gracious providence: notwithstanding their fault, he wants to restore humanity and helps human societies to achieve, among others, political organization and legislation. On the other hand, despite the depravity of their thinking, human beings retain a fundamental awareness – Calvin also speaks of natural law (*Institutes* 1559, II.2.13, see Backus 2003) – of the difference between good and evil, which allows them recognizing the fundamental benefit of laws and political order.

This political salvation will of God is most clearly expressed in the Mosaic law, but Calvin considers every body of law and every form of political organization to be in its essence a good thing, since it is given by God and corresponds to his will for order. As a consequence, even secular bodies of law remain inscribed in the divine plan of salvation, so that they too ultimately serve the spiritual goal of restoring mankind.

Calvin adheres thus to the traditional notion of an intertwining of public order and religion, and because theologians know better about the goal of this order, he can insist – as was evident in the creation of the consistory – on the attribution of juridical powers to the clergy. Nevertheless, more than many of his contemporaries, he understands church and state as two distinct entities that – apart from questions of public morality – should function independently of each other: Pastors, according to Calvin, are not allowed to hold political office (*Institutes* 1559, IV.11.8), and above all, the church is to be organized in an independent code of laws (*Ordonnances ecclésiastiques* 1541). Calvin's understanding of society is therefore theocratic at most in the sense that he understands both the church and the state as governed by and directed toward God as the actual sovereign (Höpfl 1985).

Political Consequences

Because Calvin knows that God is at work behind secular hierarchies, he understands not only laws but also all political structures as something positive. Of course, he makes the fundamental claim that authorities must ensure "that a public manifestation of religion may exist among Christians, and that humanity be maintained among men" (*Institutes* 1559, IV.20.3). But even authorities who do not fulfill this task, who openly violate Christian principles and "rule unjustly and incompetently" he considers God-given, following Romans 13, for they have been "raised up by Him to punish the wickedness of the people" (Ibid., IV.20.25). It follows, first, that Calvin has no theoretical preference for any particular form of government: "For if it has seemed good to Him to set kings over kingdoms, senates or municipal officers over free cities, it is our duty to show ourselves compliant and obedient to whomever He sets over the places where we live" (Ibid., IV.20.8). In practice, however, he believes that "it is very rare for kings so to control themselves that their will never disagrees with what is just and right. Therefore, men's fault or failing causes it to be safer and more bearable for a number to exercise government, so that they may help one another, teach and admonish one another; and, if one asserts himself unfairly, there may be a number of censors and masters to restrain his willfulness" (ibid.).

Calvin may thus indeed have encouraged corporalist models of government, but he cannot therefore be understood as a pioneer of modern democracies: for one thing, Calvin is not thinking of democratic bodies, but of the aristocratic city councils of his time; for another, for Calvin the actual power does not lie at all with these councils (let alone with the people), but solely with God (Kingdon/Linder 1970; Hancock 1989; García-Alonso 2020).

Second, it follows from the divine givenness of all political structures that for Calvin there is no fundamental right to resistance. Since all power comes from God, resistance even to an unjust authority would also be resistance to God (*Institutes* 1559, IV.20.23).

In view of the political oppression of Protestants in France, however, Calvin is prepared to make at least one decisive concession since the very first edition of his *Institutes*, namely, that the duty of obedience applies only to "private individuals." Things are different "if there are any magistrates of the people, appointed to restrain the willfulness of kings" (Ibid., IV.20.31). Calvin cites as historical examples the ephors in Sparta, the tribunes of the people in Rome, the demarchs in Athens, and also the three estates of the medieval monarchies: since they also received their power from God, these inferior magistrates even had the duty, by virtue of their office, to oppose an unjust ruler. In the generation after Calvin, Calvinist theologians such as Theodor Beza or Francis Hotman would expand these approaches into a doctrine of monarchomachy, which also provides for the right of deposition or, if necessary, even tyrannicide (Strohm 1996, 346–380; Larson 2009; Witte 2008).

Social Consequences

As regards individuals, Calvin's interconnection of absolute divine sovereignty and providence reveals yet another consequence whose social relevance has been emphasized.

In view of God's omnipotence and prescience, Calvin adopts, along with many of his contemporaries, the Augustinian belief that God has since ever determined who among human beings is elected and who is condemned, without humans being able to contribute anything to this election by means of their works (doctrine of "double predestination"). Calvin concedes, however, if individual human beings are able to perform good works in spite of the fallen status of mankind, to take this as a sign of divine providence turned toward these individuals (*Institutes* 1559, III.14.18).

Max Weber based his famous capitalism thesis on this connection: because these signs of election would have incited Calvinists and later, even more so, Puritans to assure themselves of their salvation through inner-worldly success, they had encouraged the spread of a capitalist market economy. In

addition, the fact that Calvin allowed the taking of interest was also said to have had a reinforcing effect (Weber 1904). Both assumptions, however, are no longer tenable today. In the sixteenth century, the taking of interest had long since been legalized not only in later Calvinist areas, but also in numerous other regions of Europe, and Calvin took a comparably critical and restrictive stance toward it. Calvin himself also remained extremely cautious about good works as a sign of election since they "have no place in laying a foundation to strengthen the conscience but are of value only when taken *a posteriori*" (*Institutes* 1559, III.14.19). While later theologians in Calvin's tradition may have formulated this reassurance more offensively and even in terms of a practical syllogism, Calvin himself cannot be considered, thus, the father of modern capitalism (Bieler 2006, 423–454; Hall/Padgett 2010, 69–94).

Cross-References

- ▶ Luther, Martin
- ▶ Seneca, Lucius Annaeus
- ▶ Weber, Max

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Introduction

Tommaso Campanella (Stilo, Calabria, 1568–Paris, 1639) was one of the major philosophers of the late Renaissance. Known today mostly for his utopia, *The City of the Sun* (*Città del Sole*), he authored works covering many fields of inquiry, including natural philosophy, metaphysics, theology, ethics, politics, magic, and astrology. Campanella intended his encyclopedic project to serve as a basis for an overall reform of knowledge in the light of new discoveries, and a social reform based on the proper understanding of nature and its principles.

Not long after joining the Order of Preachers (Dominicans), Campanella became disenchanted with the strict adherence to Aristotelian philosophy in the houses of study and turned to the works of Plato, the Neoplatonists, and natural philosophers.

His first published work, *Philosophia sensibus demonstrata* (Naples, 1591), was a defense of Bernardino Telesio's anti-Aristotelian natural philosophy. Campanella's philosophical project is marked by the attempt to reconcile Telesio's philosophy with Thomism, which he sought to purge from exclusively Aristotelian commitments. Such a stance drew the suspicion

of his superiors and the Inquisition. As he travelled across Italy during the 1590s, he had his works confiscated several times and his writings were placed on the Index of Prohibited Books. He spent a time under arrest after being found guilty of suspicion of heresy and was forced to abjure his espousal of Telesio's ideas. After being ordered to return to his native Calabria, he became involved in jurisdictional quarrels between local bishops and officials of the Viceroy of Naples, to the annoyance of the latter. When a revolt by local noblemen and clerics in Stilo was foiled, Campanella was accused of being its main inspiration and instigator through his prophetic and millenarian teachings. In his sermons, he denounced the Spanish Crown's mistreatment of fellow citizens and foretold social and political reforms that would be brought about by the advent of a new era.

In 1601, after a tortuous trial during which he successfully feigned insanity as a way of avoiding capital punishment, he was found guilty of high treason and heresy and sentenced to life imprisonment. During his captivity, which spanned nearly three decades first in Naples and later in Rome, Campanella wrote copiously and even managed to have many of his works published in Germany through the good offices of his friends. Among the works published in Frankfurt were his defense of Galileo (*Apologia pro Galileo*; 1622) and *The City of the Sun* as an appendix to his treatise on politics contained in *Philosophia realis* (1623, later published again in Paris, 1637). The friar-philosopher was freed from imprisonment in 1629, and thereafter enjoyed the favor of Pope Urban VIII and became acquainted with the French intellectual circle in Rome. With his opponents (mostly within the Dominican Order) persisting in discrediting him, in 1634 he was forced to flee to Paris. Here, he lived the last years of his life under the protection of Cardinal Richelieu and King Louis XIII, tending to the revision and publication of his works as part of a projected opera omnia which remained incomplete at the time of his death on 21 May 1639 (Badaloni 1965; Ernst 2010; Firpo 1947; Ricci 2018).

Society, Justice, and Law

Campanella's philosophical system is founded on the three metaphysical principles, or *primalitates*, of Power, Wisdom, and Love, which constitute the essence of Being (and the essence of God in his theology). These principles guide human virtues, as the private laws of individuals that are natural to them, as well as the proper ordering of societies through government and laws, which are the common virtues of the community (Campanella 1637: 114; Campanella 1976–1984).

Campanella affirmed the view that human beings can only fulfill their natural need for self-preservation in society, insofar as every individual pursues a reciprocal natural good together with others at various levels of socialization, such as the family, the local community, the city, the state, and the universal human community (Cesaro 2003: 60–61). Social order and governance are directly related to virtue and wisdom because an ideal society follows the correspondence between the natural inclinations of individuals and the social role they fulfill. In Campanella's organic view of society as a body politic, each member's role corresponds to one's natural abilities and individual virtue. This view draws inspiration from the natural philosophy of Telesio which Campanella sought to develop and extend into other domains, including in his political philosophy.

Justice is the essential characteristic of God (*iustitia originalis*) which is infused in the whole of creation as its universal moral characteristic (*iustitia naturalis*). As such, it constitutes the general virtue on which political communities ought to be founded (political and social justice or *aequitas*), the acts of which are commutative and distributive justice. Justice is specified or determined by means of specific laws and procedures (*iustitia legalis*) (De Lucca 2010, 2017; Iacone 2008: 62 ff).

A just society must be organized in a manner that embodies and promotes, rather than transgresses, the metaphysical principles that are natural to human beings (Campanella 1637: 113). The "three great evils" Campanella writes about in relation to his contemporary society are the

deficiency of each of the three primalities, namely tyranny, sophistry, and hypocrisy. They represent a perversion of the natural justice on which a political community ought to be based. Campanella's views sit squarely in the natural law tradition of Aquinas which affirms the dependence of politics, as the external manifestation of human action through government and laws, on ethics. This is made clear in his sustained critique of Machiavelli and his followers, whom he accuses of inverting the natural order especially when confusing the true meaning of the political virtue of *aequitas* (justice) with the reason of state (Campanella 1637: 120; Ernst 2006). In his ethical and political works, Campanella insists on contrasting justice as right (*iustum*) with the conventional, "Machiavellian" view of justice as power (*iussum*), and on explicating the difference between *ius* and *dominium*. Right (*ius*) is the rule of reason that justifies (i.e., makes just) both the relations among equals in that in which they are equal, and the exercise of power and the application of laws. The rule of dominion (d*ominium*), on the other hand, is the extension of the act of power of a superior over a subordinate, which act may be either just or unjust (Campanella 1637: 115; De Lucca 2017: 276).

The central idea of self-preservation as the ultimate purpose of all things proceeds from Campanella's metaphysics to his ethics and politics. The inherent purpose of a political community is its self-preservation as a body politic. Good government and good laws are the means that enable and function for the attainment of this end. Legal justice (*iustitia legalis*), then, is the measure in which a legal system (*lex*), specific laws (*leges*), and judicial practices and procedures are held to be just or unjust.

Campanella largely follows Aquinas' general definition of law and the structure of his distinction between its different kinds (*Summa theologiae*, I–II, q. 90, art. 4; q. 91), albeit with some significant modifications and elaborations. Whereas the natural law is known to human beings in a self-evident manner through their moral-rational nature, and independent of any social structure, human positive laws (*iura, leges*) are the determination or specification of natural law in the form of rules that bind political communities. Innovative aspects of his theory of natural law feature the inclusion of concepts developed from Telesio's natural philosophy, such as the theory of *spiritus* that allows Campanella to expound upon his view of law as the spirit of the body politic (Campanella 1637: 123; De Lucca 2015a).

Like many other Thomists of various ilks, including those belonging to the School of Salamanca, Campanella thought it necessary to develop the idea of the *ius gentium* (the law of peoples, or the law of nations) in a manner that could reflect and serve the profoundly transformed geopolitical reality of the sixteenth and seventeenth centuries. Aquinas had at times placed the *ius gentium* under natural law and at times under positive law. Campanella resolves this ambiguity by considering the *ius gentium* as a distinct kind of law and placing it in an intermediary position between natural law and positive law (De Lucca 2010). For Campanella, the *ius gentium* is natural in its roots on account of its universality and positive in its various formulations by means of various laws, treatises, and conventions. This concept marked an important theoretical and practical underpinning for Campanella's ideal of universal governance, or the universal monarchy. It also places Campanella among a group of early modern theorists of the law of nations that included Hugo Grotius, who read and commented on Campanella's political treatise (De Lucca 2015b).

Law and Utopia

The City of the Sun, Campanella's best known work today, is a "poetical dialogue" between a Genoese sea captain and a Grand Master of the Hospitaller Order of Malta. It describes an ideal political organization based on natural precepts. Rather than a society living in a pre-civilized state of natural innocence, Campanella's utopia depicts a "philosophic community" set up by settlers who were forced to flee tyranny (Campanella 1981: 37–39). The inhabitants choose to return to natural principles as an alternative to tyranny, one of

the three "great evils" that corrupt human beings and their societies through the misuse and abuse of power. In Campanella's works, tyrants and tyrannical laws are always contrasted with good rulers and good laws that allow humans to live their natural condition as free agents (De Lucca 2020: 249 ff). The absence of slavery in the City of the Sun attests to Campanella's view of it as a moral vice on account of its negation of natural freedom and as a political vice insofar as it constitutes an illicit form of dominion (Blum 2017; Garcia 2020).

The community is founded on the major precepts of natural law: to love God and fellow human beings. The City is ruled by the Sun (also called Hoh or the Metaphysician), who is assisted by three chief officials called Pon, Sin, and Mor, representing the three metaphysical primalities of power (*potentia*), wisdom (*sapientia*), and love (*amore*). They are in turn assisted by a lower hierarchy of officials who oversee specific tasks. While supreme legislative authority lies with the Metaphysician, subordinate officials establish rules and laws – and serve as judges – within their respective spheres of responsibility (Campanella 1981: 41, 97).

Although punishment is the inevitable consequence of breaking the law, Campanella echoes Aquinas and the Church Fathers in insisting on its medicinal or restorative function, to the extent that no prisons are to be found in the City of the Sun. Those who commit offences out of weakness or ignorance are censured (Campanella 1981: 99), while minor punishments typically consist of some form of temporary deprivation "until the judge thinks they have been sufficiently punished" (Campanella 1981: 41). The City has no executioners, and capital punishment by stoning or burning requires the participation of all the inhabitants, who may however collectively pardon the condemned person. Death sentences are often commuted to banishment, thus showing that the true loss of freedom results not from incarceration or death, but rather from being expelled from a place of natural freedom and social relationships. This highlights Campanella's view of justice as the virtue of the community, whereby instructive justice is preferred over punitive justice, which in any case should never be vindictive, but always aimed at preserving the community's good. Punishment in the City seeks "to make the guilty party aware of his relationship to his fellows," and instructive judgments are seen as being more effective than punitive ones (Campanella 1981: 99, 101; Panichi 2015: 110 ff).

The laws in the City are very few, and they are inscribed on a copper tablet placed on a column at the temple door, where officials sit in judgment. In the political treatise to which *The City of the Sun* was appended, Campanella adds to the desirability of few laws the consideration that laws are best when they are brief, easy to understand, and adequate to the customs and the public good. Frequent changes to the laws damage the political community, and the presence of more punitive laws than instructive ones is a sign of bad government (Campanella 1637: 121).

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Capability

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Introduction

Capability means what a person can do and be, i.e., that person's substantial freedom. To live a flourishing life, we need not only formal freedoms declared and stipulated on paper but also substantial ones that we can enjoy only through decent social arrangements. Although people's ways of life vary across boundaries, everyone lives a life in need of this freedom to act as an agent. According to Amartya Sen, the pioneer of the concept capability, an agent is "someone who acts and brings about change, and whose achievements can be judged in terms of her own values and objectives, whether or not we assess them in terms of some external criteria as well" (Sen 1999: 19). In this sense, capability is a universally applicable concept.

Equality of What?

The term capability first drew the attention of legal and social philosophers in 1979 when Sen gave the Tanner Lecture on Human Values, titled "Equality of What?" at Stanford University; this was subsequently published as an article in 1980. Sen focused on the question of "equality of what?" instead of "why equality?" and examined the utilitarian ideas of equality ("utilitarian equality" and "total utility equality") and John Rawls's idea of equality ("Rawlsian equality"), concluding that both the utilitarian ideas of equality and Rawls's idea of equality were inappropriate. Instead, Sen suggested the idea of capability equality ("basic capability equality"), indicating that "The focus on basic capabilities can be seen as a natural extension of Rawls's concern with primary goods, shifting attention from goods to what goods do to human beings" (Sen 1980: 218–219). Since then, capability has become one of the metrics of egalitarian considerations.

Measuring Quality of Life

Since mid 1980s, Sen and Martha Nussbaum have forged what they call "a philosophical and conceptual framework within which to discuss some urgent problems that arise in the course of 'development,' especially economic development" (Nussbaum and Sen 1989: 299). Sen had been engaged in the study of economic development, and had noticed that his idea of capability had an Aristotelian strand, while Nussbaum, who was then a well-known Aristotelian philosopher, had focused on beings' *dunamis* (capability) instead of *energeia* (functioning) in her study of Aristotle and also devised her own idea of capability

(Nussbaum 1988). Sen and Nussbaum joined in collaborative development projects in the World Institute for Development Economics Research (WIDER), a part of the United Nations University in Helsinki, Finland. Their projects continued till 1993, generating what is known today as the "capability approach" (Nussbaum and Sen 1993).

The capability approach (also known as the "capabilities approach" or the "capability theory") thus started as a new approach to investigating people's "quality of life" (QOL) (also known as "well-being"), particularly in the field of development studies. In general, this capability *approach* aims to see what individuals can do and can be. It attaches more importance to a person's substantial freedoms (capabilities) than to her possessions (resources) or her actual achievements (functionings). For example, although human beings require food to live (resources), merely having food does not guarantee a person's well-being (for example, she may be starved to death due to some psychological issue). In this case, it is necessary to look at what she can actually do with that food (capabilities) in order to understand her state of affairs better. On the other hand, while she could be dead from starvation (functioning), we do not know whether she has really died from starvation until we look at what she could actually do (capabilities), as she could have died from hunger strike (individual choice).

Sensitivity to Differences

The capability approach also aims to respect differences among individuals, based upon considerations of equality. It is crucial for the capability approach to note that people having the same amount of the same resource does not guarantee that they have the same measure of capabilities. For example, even if in a given society everyone is given the same bottle of soya milk daily (supposing that soya milk makes humans healthy), some may need two bottles a day for the soya milk to have the same effect as on others, due to their body size, metabolism, or pregnancy and breastfeeding. Or some may simply not be able to drink soya milk due to an allergy or dislike, and so require alternative measures in order to be healthy as others. As Sen (1992) stated, people are different, not only in external characteristics such as inherited assets, natural and social environments but also in individual characteristics such as age, sex, tolerance to diseases, and physical and psychological capacities. This diversity affects the way in which resources are converted to capabilities (individual differences).

Human-Centered Approach

Hence, out of the three dimensions of a person's life, namely, capabilities, resources, and functionings, the capability approach focuses on a person's capability space, i.e., the expanse of her substantial freedom. In this sense, it is opposed to a stance that adheres to the metric of resources ("resourcism") (Dworkin 1981; Pogge 2002), to perfectionism, which emphasizes the importance of certain functionings for human flourishing, and to what Sen calls "welfarism," which uses people's satisfaction as the metric of well-being (Sen and Williams 1982). As is explained below, although Nussbaum's version of the capability approach has some element of perfectionism, it tries to fend off criticism by appealing to the fact that it is indeed liberal in respecting individual choices about whether or not to use capabilities to achieve functionings.

The capability approach indeed refers to resources. Nevertheless, it is not as narrow as previous development approaches, such as the GNP (GDP, GNI) approach. Since the 1990s, the United Nations Development Programme (UNDP) has applied the capability approach to its development policy, and generated a new development index, the Human Development Index (HDI), by adding life expectancy and education level to GDP per capita so that the concept of development has become more human-centered. The capability approach as an approach to human development has gained some popularity among theorists and practitioners in the area of development. The activities of the Human Development & Capability Association (HDCA), an international study group for the capability

approach launched in 2004, show that the initial object of the capability approach was the mitigation of poverty, understood as a lack of capabilities, and that the current extent of the capability approach is well beyond this initial object (Nussbaum 2011).

Philosophical Debates

As the capability approach has reached a broader audience, and begun to be applied to wider issues so that it would cover all human activities (Crocker 2008; Brooks 2012), its philosophical sides have received more attention and become subjected to philosophical debates. One such debate involves Nussbaum's listing of "the central human capabilities" (Nussbaum 2000, 2006).

Based on her neo-Aristotelianism, together with her affiliation with Kant, J. S. Mill, and Marx, Nussbaum lists ten capabilities and asks all governments on earth to guarantee those capabilities to their citizens as "a bare minimum of what respect for human dignity requires" (Nussbaum 2000: 5). Her list includes: life (to be able to live normal length of longevity with dignity); bodily health (to be able to be healthy); bodily integrity (to be able to have one's body as sovereign and mobile); senses, imagination, and thought (to be able to feel and think humanly); emotions (to be able to choose loving and caring relationships); practical reasoning (to be able to form a conception of the good through critical reflection); affiliation (to be able to share a life with others in a respectful manner); other species (to be able to coexist with nature); play (to be able to have leisure); and control over one's environment (to be able to participate in political as well as economic activities as an agent) (Nussbaum 2000: 78–80).

Nussbaum claims that this list is open-ended and not exclusive, for it is supposed to be a product of a "thick vague theory of the good" (Nussbaum 1990). This theory is not only *thick* (Aristotelian) in the sense that it asks what it means to be a human being and derives a certain set of human characteristics from the answers but also ethical in the sense that it picks up particular human characteristics as deserving protection and cultivation. However, it is at the same time *vague* (liberal), in the sense that it leaves individuals the choice as to how they actually live, and which capabilities to functionalize. In this way, Nussbaum claims that it is based on "internalist essentialism" (Nussbaum 1992), a viewpoint that is internal to human experiences.

There have been various reactions to Nussbaum's list. Roughly speaking, among theorists of social justice, in particular of global justice, it is the *content* of the list, not the idea of listing itself, that is at stake (Doyal and Gough 1991; Gasper 2004; Miller 2007; Brock 2009). In fact, the idea of listing certain social values is not new in political philosophy; we can find it in John Rawls's theory of justice (social primary goods) as well as in certain theories of human rights, such as Rawls's theory of international justice (Rawls 1971, 1999). Moreover, Sen himself, who used to be negative about listing basic capabilities (Sen 1993), proposed at one point the idea of "human rights as entitlements to capabilities" and suggested that some of the basic capabilities he mentioned in his Tanner Lecture are cross-culturally basic (Sen 2005). This implies the inevitable universality not only in human rights talk but also in human capabilities talk that should come before. The real issue here is not whether we *can* make a list; it is whether we *want* to treat others as morally equal human agents who are in need of substantial freedoms.

Conclusion

This debate will be further deepened as more capability theorists engage in the construction of the theory of (global) justice, as we can see in Nussbaum's partial theory of global justice, where she suggests to converge the capability approach with the contract theory and to represent the list of central human capabilities as a product of "reflective equilibrium" (Nussbaum 2006), and as more criticisms against such endeavors are developed.

Meanwhile, as the capability approach is increasingly applied to new fields of study such

as animal welfare (Nussbaum 2006) and robotics designs (Oosterlaken and Hoven 2012), we will be seeing and examining the capacity and potential of the capability approach itself.

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Capital Punishment

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Indroduction

Capital punishment – the legally authorized killing of a criminal offender by an agent of the state for the commission of a crime – stands in special need of moral justification. This is because execution is a particularly severe punishment. Execution is different in kind from monetary and custodial penalties in an obvious way: execution causes the death of an offender. While fines and incarceration set back some of one's interests, death eliminates the possibility of setting and pursuing ends. While fines and incarceration narrow one's routes to happiness, death eliminates its

possibility. Given the severity of execution, it is not surprising to find much philosophical controversy about the moral permissibility of capital punishment. This entry maps the terrain of the debate. The first section discusses justifications of the death penalty as they appear in major theories of punishment. The second section surveys moral objections to execution that apply to most justifications. The third addresses procedural criticisms, which do not target the morality of execution so much as the justice of its implementation.

Justifications of the Death Penalty in Major Theories of Punishment

The shape of the death penalty debate depends on the different conceptual resources found in major theories of punishment. More specifically, the terms on which the debate proceeds depend on specific theories of *sentencing*. (Both Rawls (1955) and Hart (1968) famously argue that justifications of penal institutions and justifications of individual punishments can operate on distinct, even conflicting, moral grounds.) Because we are focused on the permissibility of sentencing someone to death, we need not discuss the strengths and weaknesses of general justifications of punishment. This section thus surveys how different approaches to sentencing address the morality of execution.

Retributivism

Retributivist theories of sentencing hold that legal penalties should be proportionate to legal offenses. Roughly put, a penalty is proportionate to an offense when the severity of the penalty fits, or is appropriate to, the moral gravity of the crime. The moral gravity of a crime is a function of the amount of harm caused and the culpability of the offender. Culpability comes in degrees: intentional harm is worse than reckless harm, which is worse than negligent harm. Someone who intentionally kills is more culpable than someone who kills through negligence, though they inflict the same amount of harm. A penalty is disproportionate when it fails to fit the crime – when it is too harsh (life in prison for petty theft) or too lenient (parole for attempted murder).

Proportionality comes in two flavors, ordinal and cardinal. A punishment p for crime c is *ordinally* proportionate when p is less severe than those punishments imposed on crimes graver than c and when p is more severe than those punishments for crimes less grave than c. A punishment is *cardinally* proportionate when the severity of p matches the seriousness of c in a quantitative sense. A few philosophers defend capital punishment in light of ordinal proportionality. Edward Feser contends that execution is permissible in some cases just because it is the most severe punishment in the state's arsenal (2011). He believes that ordinal proportionality would be violated if the most serious crimes were not punished with the most severe punishments. But as Benjamin Yost (forthcoming) points out, an ordinal proportionality vindication of execution ultimately relies on assertions of cardinal proportionality. Perhaps for this reason, most of the debate has centered on cardinal proportionality. Retributivist proponents of execution contend that it the penalty is permissible because it is cardinally proportionate to murder. Opponents argue that execution is excessively severe. (Interestingly, philosophers make almost no attempt to explain why execution is so bad for the offender; Michael Cholbi (forthcoming) is an exception.)

Cardinal Proportionality and the *Lex Talionis*

The best-known retributivist justification of the death penalty employs the *lex talionis*, or the principle of "like for like." Immanuel Kant's *Metaphysics of Morals* is the *locus classicus* of this strategy. Kant asserts that "whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself" (6: 332). Accordingly, "if [an offender] has committed murder, he must die" (6: 333). Because the murderer takes a life, he must be punished with death.

This literalist interpretation of cardinal proportionality, while accepted by some philosophers, especially Van den Haag (1986), and alive and well in the popular imagination, faces decisive

objections. It would require the state to punish the rapist with rape and the torturer with torture. These are clearly morally impermissible acts – if not for the state, then for the official charged with implementing them. (Benjamin Yost (2019) argues that Kant has a more plausible argument than is commonly understood.)

Inspired by Kant, Tom Sorell develops a more flexible version of the *lex talionis*. For Sorell, the *lex talionis* stands for the proposition that "the punishment imposed on the criminal should reflect the costs of the crime to the victim," where costs are deprivations of goods (1993). This approach does not require that punishments mimic crimes, but it still attaches execution to murder. Sorell argues that the good of life differs in kind from all others (the goods of a rewarding job, friendship, etc.). Life, we might say, is a fundamental good, as it is the condition of the achievement and enjoyment of every other good. Murder thus differs in kind from all other crimes, which attack non-fundamental goods. Because the murderer wrongs his victim by robbing her of the fundamental good, proportionality demands that he suffer this hardship in turn (see also Waldron 1992).

Sorell's improvements might not be sufficient. Because the rapist robs his victim of the good of sexual autonomy, it seems like the rapist must be punished with rape after all. This illuminates a general problem with the *lex talionis*. Retributivists accept the existence of moral constraints on types of punishment – sexual violence is clearly impermissible. Accordingly, death penalty proponents must show that there is no prohibition on execution. But as both Claire Finkelstein and Sarah Roberts-Cady have argued, even sophisticated versions of the *lex talionis* have no principled way of rejecting types of punishments as immoral or inhumane (Finkelstein 2002; Roberts-Cady 2010). This means that retributivist justifications of the death penalty hinge on the success of arguments external to the *lex talionis* itself. (For example, retributivist Mike Davis argues that capital punishment is permissible when it does not "shock" the moral sensibility of a community (1981). But this is clearly not a test of proportionality.) And so *lex talionis* seems theoretically incapable of justifying execution.

Fair Play Retributivism

Fair play theories hold that a lawbreaker deserves punishment because she helps herself to an unfair advantage over her fellows. That is, she benefits from others' compliance with the law, while refusing the burdens of obedience herself. Criminal desert is here associated not with culpable harm, but with what one wrongfully gains from free-riding.

While many philosophers find fair play theory an attractive general justification of punishment, whether it can provide meaningful sentencing guidance is an open question (see, e.g., Dagger 1993). George Sher suggests that criminals take freedoms that law-abiding citizens don't and should be punished in proportion to the amount of freedom illicitly taken (1987). He thinks that more serious criminal acts embody more objectionable thefts of freedom. And so the most serious criminal act, whatever it is, should be punished with the most severe punishment, namely, execution. But this defense of capital punishment exhibits major problems (in addition to those mentioned in the previous section). First, it misdescribes what is wrong with murder. Murder is not wrong just because the murderer helps himself to an excess of freedom. Murder is wrong because it takes a life. And so fair play theories conflict with basic moral intuitions. Second, the vast majority of citizens have no inclination to murder. The legal prohibition of murder does not restrict their freedom because they have no interest in killing! So it doesn't look like the murderer acts unfairly: he does not take a liberty others are denied. Fair play thus offers little reason to punish murderers (and rapists, child molesters, etc.), much less execute them.

The fair play theorist can respond that everyone is tempted to disobey *some* law or other, yet most people successfully combat that temptation. What the murderer takes advantage of, then, is his fellow citizens' general compliance with the law. He enjoys the benefits of general compliance while refusing to comply himself (Dagger 1993). But now the problem is that every crime is wrong for the same reason and to the same degree, and so

there is no reason to punish murder more harshly than theft. Put differently, this version of fair play sentencing fails to respect ordinal proportionality.

Communicative and Expressive Retributivism

Expressivists believe that publicly condemning criminals is part of the point of punishment. Communication theorists add that punishment should communicate this condemnation to the wrongdoer as well; in so doing, punishment can help offenders repent and reform. For both theories, the harshness of penal expression is intrinsic to its important message, and in this way, punitive hard treatment is justified. Expressivism has little to say about the kind or amount of punishment to be imposed, so it need not detain us. Communication theorists like Antony Duff (2001) and Dan Markel (2005) reject the death penalty as incompatible with the rehabilitative ambitions of punishment. But Jimmy Hsu (2015) replies that in cases of extraordinarily evil crime, execution may be needed to counteract the wrongdoer's message to society.

Consequentialism

Consequentialist theories of sentencing choose punishments the severity of which achieves good outcomes. The best-known consequentialist theory is utilitarianism, according to which punishment is justified in terms of its contribution to aggregate social welfare. Utilitarian theories of sentencing direct officials to choose the kind and amount of hard treatment that has the greatest net benefit to society. Here the question is not whether execution is morally permissible in the abstract, but whether capital punishment secures social benefits that outweigh the costs.

General Deterrence

One of the most popular justifications of the death penalty is that it deters potential murderers from killing their victims. Deterrence promotes important social goods, most notably the lives saved, but also the feelings of safety that accompany lower incidences of murder. (The issues surrounding specific deterrence, which aims at deterring actual offenders from repeating their crime, are virtually the same, so I will set that view aside.)

Utilitarian justifications of capital punishment will succeed if they can show that (a) execution has a marginal deterrent effect and (b) this effect outweighs the costs of the practice. The viability of utilitarian justifications thus hinges on empirical claims. However, these claims are not supported by evidence. The conclusion of a meta-study conducted by the National Research Council's Committee on Deterrence and the Death Penalty is that existing research "is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates" (Nagin and Pepper 2012). Some of the studies analyzed by the Committee show that the death penalty decreases murder rates, others that it has no effect on murder rates, and still others that it increases homicides (the phenomenon captured here is often labeled the "brutalization effect"). There is an even more serious problem with the literature. To assess the marginal deterrent effect of execution in a jurisdiction – the amount of deterrence in excess of imprisonment – one needs to measure the baseline deterrent effect of noncapital penalties for murder. But none of studies even tries to do this, and so the deterrent effect of custodial penalties "contaminates" their estimation of the deterrent effect of capital punishment, rendering them useless.

Because there is no conclusive evidence supporting the existence of a marginal deterrent effect, deterrent justifications are in hot water. For utilitarians, severely harmful state actions are prohibited unless there are plausible cost-benefit analyses favoring them. The proponent of capital punishment thus shoulders the burden of proof. And without evidence for a marginal deterrent effect, cost-benefit analyses cannot recommend the death penalty, because (at least in the USA) it is much more expensive to pursue a death sentence than a lengthy custodial sanction.

Deterrence theorists might acknowledge these epistemic hurdles but insist that the death penalty *must* deter because it is so much more fearsome than incarceration (e.g., Pojman in Pojman and Reiman 1998). Given the utilitarian commitment to empirically sound policy-making, this commonsense vindication is suspect. And there are additional reasons to reject it. Jeremy Bentham,

the godfather of deterrence theory, observes that a potential offender is more likely to be deterred by a modest but certain penalty than a more severe penalty she believes she is likely to elude. Contemporary research suggests that most offenders judge the likelihood of being caught to be so low that the threat of prison is meaningless (Anderson 2002). The fact that very few murderers are executed makes it even less likely that potential murderers will be deterred by capital punishment.

Utilitarian proponents of capital punishment make one more attempt to cope with these empirical hurdles: the Best Bet argument, first formulated by Ernst van den Haag and developed by Louis Pojman (Pojman and Reiman 1998). Best Bet has two key premises. First, it says that failing to employ the death penalty is just as much a utilitarian gamble as using it, on account of the possibility that execution does marginally deter. Second, it stipulates that innocent lives are more valuable than the lives of murderers. Best Bet concludes that it is better to gamble with less valuable lives – executing murderers hoping that deterrence will follow – than with more valuable lives, incarcerating murderers hoping that murder rates will not rise. The claim that murderer's lives are less valuable (at least half as valuable according to Best Bet) is contentious. Even if we set this controversy aside, it remains the case that Best Bet presumes the existence of a marginal deterrent effect, and as we have seen, no evidence supports that assumption (for further analysis, see Yost (2019)).

Incapacitation

The incapacitation rationale for capital punishment characterizes some criminals as so dangerous they cannot be trusted to walk the earth. (Incapacitation resembles specific deterrence. But incapacitation via execution is incompatible with specific deterrence, insofar as executed murderers have no capacity to be deterred.) On this view, execution is warranted because it prevents especially threatening offenders from committing further heinous crimes. A commitment to incapacitation is evident in the "future dangerousness" aggravators present in many US states' capital sentencing schemes. But proponents must wrestle with empirical findings that cast doubt on courts' ability to predict dangerousness (Golash 2005). They also face a significant moral objection: incapacitation approaches ignore culpability and moral responsibility. When someone is executed for something they *might* do, they are not being executed for a wrong they have actually committed. It is doubtful that legal authorities have the moral right to execute the innocent.

Purgation

The most recent innovation in the death penalty literature does not appear within the context of a general theory of punishment, although it has clear deontological affinities. Matthew Kramer's "purgative rationale" (2011) is noteworthy due to its focus on extreme cases of wrongdoing and its correspondingly narrow scope. Kramer argues that moral communities have a duty to purge defilingly evil offenders. Defilingly evil offenses are those that are of the most extreme gravity, marked by the most serious harm and the most thoroughgoing contempt for humankind. The state must execute such offenders to avoid complicity with the offender's disparagement of humanity. According to Kramer, when states expend resources on a defilingly evil offender, e.g., by feeding him in prison, they incur responsibility for prolonging his repudiation of dignity. To avoid this objectionable complicity, they must execute him.

Kramer endorses the widely shared view that only morally responsible offenders may be executed. Accordingly, putting his argument into practice depends on distinguishing between defiling evil and psychopathology. Psychopathic offenders are not culpable for their misdeeds and therefore not liable to execution (Levy 2007). But this is a hard line to draw. Psychopaths exhibit an absence of empathy during the criminal act, a subsequent lack of guilt, and extreme egocentrism. Because these are also properties of defilingly evil offenders, Kramer's emphasis on defiling evil seems to undercut his view (Steiker 2015). Critics have also claimed that there are noncapital punishments that appear to satisfy the purgative rationale (Danaher 2015; Yost 2019); if they are correct, there is no affirmative reason to employ capital punishment.

Substantive Objections to Capital Punishment

We have so far considered debates about whether leading theories of punishment justify capital punishment. The present section will examine criticisms of the death penalty that issue from moral considerations external to those views. These criticisms are meant to get traction with the various theoretical justifications either by reflecting values shared by the theories or by establishing side-constraints that apply to them.

The Right to Life

Some death penalty abolitionist arguments appeal to an inviolable right to life. Few philosophers endorse this strategy, preferring the dignity arguments canvassed below (but see Bedau 1986). Right to life abolitionism is nevertheless worth considering due to its international visibility and prevalence within human rights discourse; see, for example, the Second Optional Protocol of the International Covenant on Civil and Political Rights. The associated view is rooted in Enlightenment doctrines of pre-political natural rights. Roughly speaking, to say that P has an inviolable right to life is to say that everyone else has a strict duty not to kill P. P enjoys this right in virtue of P's status as a human being and thus cannot forfeit it. Accordingly, even murderers possess it, and because execution offends this right, the death penalty must be abolished.

This argument works only if the right to life is absolute. If the right to life is merely a prima facie right, it may be overridden by considerations favoring execution. But asserting the inviolability of the right requires one to endorse other rights that are far more controversial than the right not to be executed. If the right to life were exceptionless, military officials would be barred from sending citizens into combat, even in the face of an existential threat to the nation. The killing of enemy combatants by volunteer soldiers in the prosecution of a just war would also be immoral. An absolute right to life would also rule out killing in self-defense. (For other worries about pacifist approaches to capital punishment, see Corlett (2013)). These unpalatable consequences are likely why most philosophers shy away from the view, Hugo Bedau (1986) being a notable exception. Even the Enlightenment philosophers who emphasize the existence of pre-political natural rights believe that rights can be forfeited; they are untroubled by execution because they believe that murderers forfeit their right to life (Bedau 1986).

Dignity

Human dignity and right to life objections to execution both reject the notion of treating human lives as means to an end. However, dignity objections appeal to the fundamental moral status that grounds our specific rights. Dignity names the property possessed by all human beings that grants them the same rights and the same claim to others' respect. Dignity expresses the notion that the status undergirding our equality is an elevated one; in Jeremy Waldron's words, it is the status of a person who is "sui juris," who can "demand to be heard and taken into account" by others and by the legal and political systems (2012).

While most philosophers agree that punishments that violate human dignity are morally prohibited, there is less consensus on whether the death penalty numbers among these. A common strategy for determining whether a sanction violates dignity is to identify the human capacities definitive of dignity and then ask whether the penalty destroys or corrupts those capacities. Philosophers like Ronald Dworkin (2011) and Jeremy Waldron (2010) conclude that torture violates dignity because it shatters the victim's will or subjects it to the whims of her torturer. Dan Markel argues that the death penalty violates human dignity because it destroys the rational and volitional capacities that constitute our dignified status (2005). He concludes that the penalty should be abolished (see also Bedau 1987). But Dworkin, Waldron, and others reply that torture offends dignity because it is degrading – the torture victim is aware of being reduced to an animal or a tool of her oppressor. Modes of execution like lethal injection do not share this characteristic, and so might not count as a violation of dignity.

Proponents of dignity arguments have at least one response. They can point out that because life

is a condition of whatever else is a condition of dignity, taking a life deprives someone of whatever it is that grounds their dignity. Execution is thus prohibited because it eliminates the possibility of having dignity. For this argument to go through, however, it must be shown that disposing of the condition of some valuable thing *v* is an offense against *v*. And there are reasons to be skeptical here: killing someone eliminates his capacity to express himself, yet killing someone is not understood to violate his free speech rights. Ultimately, even if it is true that killing abrogates dignity, the abolitionist will be saddled with the dialectical burdens of right to life arguments. An absolute requirement to respect dignity would prohibit some acts, like killing in self-defense, that are clearly permissible. And if the requirement is a prima facie one, the abolitionist owes an explanation of why execution violates dignity and other types of killing do not.

Procedural Objections to Capital Punishment

Proceduralist objections to capital punishment make no substantive claims about the morality of execution. Rather, proceduralists argue that the implementation of the death penalty is irredeemably unjust and that execution is therefore impermissible. This view is meant to show that capital punishment should be abolished even if some murderers deserve death.

Arbitrariness

Stephen Nathanson contends that legal punishments are legitimate only when they are imposed on the basis of good reasons, or reasons relevant to the moral assessment of an offender's act. Bad reasons include morally irrelevant reasons and repugnant reasons, like those based in the race or class of the accused. When sentences are imposed for repugnant or irrelevant reasons, the associated punishments are inflicted arbitrarily and therefore unjustly (Nathanson 1985, 2001). Nathanson's abolitionism flows from this normative premise and the idea that it is difficult, if not impossible, for capital punishment to be imposed on the basis of good reasons. (Legal scholars also develop arbitrariness arguments against the death penalty; see Charles Black (1981), Austin Sarat (2002), and Justice Harry Blackmun's famous *Callins v. Collins* dissent (1994)).

To substantiate his descriptive claim, Nathanson adverts to statistical patterns showing that the distribution of executions varies with the race, class, and jurisdiction of the victim and offender. He takes particular note of the geographical disparities in the application of statutory aggravators (factors which are used to establish death eligibility at trial). The capital sentencing schemes of both Georgia and Florida, and many other states, feature the following aggravator: "the murder was especially heinous, atrocious, cruel, or depraved." Nathanson cites a study showing that in Georgia, 46 percent of murders were deemed especially heinous, while juries in Florida found that 89 percent of murders met this description (2001). Because there is nothing in Florida's water that causes its murderers to be significantly more depraved than Georgia's, the sentencing differences are utterly arbitrary. These and other disparities lead Nathanson to conclude that executions are imposed on the basis of irrelevant considerations.

However, if arbitrariness precludes the death penalty, it will rule out most other punishments as well. The wide amounts of discretion enjoyed by police, prosecutors, and judges to arrest, charge, and sentence means that arbitrariness permeates every aspect of the criminal justice system. Nathanson responds to worries about wholesale penal abolition by distinguishing capital from noncapital punishment. He argues both that capital sentencing is subject to a higher standard of rationality and that the death penalty is not as necessary for crime control as punishment *simpliciter*. While the second response is somewhat plausible, the first seems to fall flat, insofar as *any* unjust type of punishment should be prohibited, even if it is not as severe as execution.

The arbitrariness argument meets with other criticisms. Van den Haag insists that when a murderer gets what she deserves, her treatment is just even if the legal system applies the penalty unfairly. In short, he believes that noncomparative justice in sentencing always trumps comparative justice (1985). While Van den Haag's position is short on argument, Patrick Lenta and Douglas

Farland (2008) make a stronger case. They turn Nathanson's argument on its head, arguing that the difference in severity between custodial and capital sentences leads to the conclusion that non-comparative considerations of desert may trump comparative considerations of fairness.

Discrimination

Some critics of the death penalty focus on the ways in which capital sentencing disproportionately targets racial minorities and the poor. In this context, the principles that motivate arbitrariness arguments apply with even more force, because the improprieties in question emerge from morally objectionable structures or attitudes. Jeffrey Reiman asserts that the death penalty discriminates against the economically disadvantaged (2010), but there is an unfortunate dearth of research in this area. By contrast, the racially discriminatory nature of capital punishment is fairly well-established, though it is discriminatory in some complicated ways. While black murderers are more likely to be sentenced to death than white ones, racial disparities are most pronounced at the victim level: those who murder whites are much more likely to receive death sentences than those who murder black people (Baldus et al. 1983). Daniel McDermott takes this evidence of racial discrimination to ground a decisive objection to capital punishment (2001). He argues that a discriminatory criminal justice system lacks the authority to punish. Unlike Nathanson, McDermott bites the bullet and concedes that discriminatory legal systems forfeit the right to punish as such. For many, however, this implication will serve as a reductio of the abolitionist program.

Michael Cholbi argues for a moratorium on the death penalty in light of a principle of equality: everyone ought to face the same legal costs for committing the same offense (2006). For Cholbi, the fact that the criminal justice system imposes higher costs on black murderers and on those who murder whites means that the criminal justice system treats the class of black Americans unjustly. Because the practice of the death penalty violates equality, he concludes, it ought to be suspended, if not abolished. (For a response to Cholbi, see Lenta and Farland (2008)). Cholbi and Alex Madva develop this argument by analyzing implicit racial bias research (Cholbi and Madva 2018, 2021). They agree with Nathanson that states may continue to employ discriminatory noncapital punishments while implementing procedural reforms, owing to the lesser severity of those punishments.

Irrevocability

Because the dead cannot be brought to life, execution is irrevocable. Accordingly, erroneous executions cannot be remedied or put to right. Some philosophers hold that this feature of execution renders it morally impermissible. Mike Davis argues that the death penalty is *not* irrevocable or that it is no less revocable than everyday custodial sanctions (1996). If Davis is correct, the irrevocability argument either fails on its own terms or commits its proponents to the wholesale abolition of punishment. But Benjamin Yost rejects Davis' claims, insisting that they rely on an overly narrow conception of revocation (Yost 2011). A greater challenge to irrevocability arguments is posed by cases where the defendant's guilt appears to be incontrovertible. As Matthew Kramer (2011) observes, we seem to have little reason to worry about irrevocability in such contexts. Yost develops a view that attempts to meet this challenge (2019). Yost contends that what he calls "higher-order uncertainty" permeates the criminal justice system and that all capital cases thus fall prey to the irrevocability argument.

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Card, Claudia

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Introduction

Claudia Card (1940–2015) was one of the foremost scholars of ethics in recent times. Card wrote about a variety of issues in ethical theory and applied ethics. She is most well-known for her work on an ethical theory of evil, on gay and

lesbian rights, and on feminist philosophy. She wrote about many other issues in philosophy including the history of women philosophers, the history of lesbian culture, environmental philosophy, and the roles of punishment, mercy, forgiveness, and moral luck. She was fundamental in developing lesbian philosophy. Card consistently contextualizes her own work among the work of other scholars, especially noting the work of other feminists.

Evil

Card's work on evil is significant to legal philosophy for considering how to classify wrong actions and for determining punishment. Where historical authors have considered the problem of evil to be about why evil exists (especially if we assume a benevolent god) or the more contemporary question of what evil is (as in Arendt's definition that evil is banality or the absence of engaged thinking), Card's aim was delineating evil from other kinds of wrong doing. It is clear that many wrongs occur and that the lack of thoughtful consideration is often a cause of wrongdoing and of evil. However, according to Card, evil is more specific. Her definition changed throughout her work as she developed a more precise description of how to understand moral accountability (See Card 2002; 2011). Her definition evolved to "reasonably foreseeable intolerable harms produced by inexcusable wrongdoing" (Card 2010). Card distinguishes acts that are unfair, unjust, morally wrong, or harmful from acts that are evil. Clearly, some acts are all of these things, but some acts are unjust without being evil. The definition of evil helps us to see what kinds of legal responses are appropriate. It is important to emphasize that Card's definition is about actions, not persons. Card specifically sought to distinguish acts that were evil from "lesser wrongs" while not demonizing perpetrators.

Card develops her definition of evil in historical context. She gives a fascinating description of other ethicists' views, including the big three ethical thinkers: Aristotle, Kant, and Mill, in *The Atrocity Paradigm*. However, Card also analyzes historical events, atrocities, and survivors' accounts of them to develop her theory. She wrote, "For me, the greatest challenge posed by atrocities is how to respond to them without doing evil in the process" (Card 2004b). She restates this concern (especially in *Confronting Evils* [2010]) as a motivating factor of her work. Societies must respond to atrocities, to evils, without themselves committing evil acts.

In considering what her own definition of evil means (reasonably foreseeable intolerable harms produced by inexcusable wrongdoing), Card refers to legal scholarship. For example, in developing her own explanation of "inexcusable wrongdoing," Card considers and distinguishes her view of what it means for an act to be excusable from those of Austin, Horder, and *Black's Law Dictionary* (Card 2010). Card was in conversation with legal definitions, using them as a basis for developing her view. Card's own definition concerns whether an act is morally excusable (as distinct from legally excusable).

Card's work pushes us to consider what it means to survive evils, and thus, what part of the self, or what definition of self, we have when we say that someone "survived." This very basic question central to all philosophy, what does it mean to be human, also is (or should be) central to theories of punishment. Card keeps the question of what defines humanity in focus while thinking about evils. For example, when evaluating laws meant to protect us from terrorism, Card asks: What are we protecting? Is it enough to keep people alive, regardless of what rights and liberties we surrender? Card implies that it is not. What needs to survive is a certain sensibility about one's own humanity. Governmental or societal responses to or punishment for evils cannot themselves be inhumane. Taking away the humanity of the perpetrator would itself be evil and would defeat the goal of protection.

Rawls

Card was deeply influenced by her teacher John Rawls and she refers to Rawls in most of her major works. For example, her book *Lesbian Choices* (1995) discusses lesbian lives and the way in which social choices influence our

experiences as well as the ways in which social institutions shape the choices we are able to make. Rawls' ideas about the roles social institutions play, his notion of "reflective equilibrium" and the ways in which it helps us to find the most just choices, are touchstones for Card's theories. Card sets up discussions about a variety of social, political, and legal problems by using Rawls and his theories and insights as a starting point.

When writing on a social issue or when using an historical event as an example, Card often begins her own analysis by thinking through how Rawls did respond or might respond. Her influential articles on topics as diverse as gay marriage and torture include discussions of Rawls and how he might analyze historical events. Card found Rawls' theory of distributive equality to be more compelling, and more just, than utilitarianism or any other theory. However, she generally moves beyond Rawls to her own questions and analysis.

Social Issues

Card wrote broadly on social philosophy and has articles on environmental ethics, many issues in gay and lesbian ethics and rights, and a wide variety of issues concerning feminism as well as those issues I discuss below. She may, in fact, be better known for her positions on marriage, hate crimes, and torture than for the theory of evil explored above. She was particularly concerned with the variety of evils practiced against women, including rape, sati, foot binding, and domestic violence, along with what she called "horizontal violence," such as violence within lesbian relationships.

Punishment

Card has a series of worries about punishment and was especially concerned that we do not think about the consequences of punishment to the perpetrator, the punisher, or the society. As noted above, she insisted that just punishment does not take away the humanity of the perpetrator. Thus, her view does not fit neatly into established categories of retribution or rehabilitation.

Genocide and Mass Atrocities

Card's theory of evil develops out of her analyses of genocide and mass atrocities. Her idea is that what is taken away is not only particular lives but the group identity and the sense of humanity of the group. The crime is genuinely a crime against humanity, namely, the humanity of the groups in question. Card surmises that physically surviving such evils may not be enough. One's sense of humanity may be forever damaged. Violence against women can be said to do the same, to make women experience ourselves as less human.

Marriage

Card wrote about same sex marriage by contextualizing the debate in terms of marriage generally as a social institution. She recognizes the significance of marriage, identifying it, in concurrence with Rawls and others, as one of the "basic structures of society." Her arguments, however, point to the ways in which marriage supports power hierarchies, especially sexist hierarchies that disadvantage women and children (Card 1996a; 1999b). The institution of marriage is, in Card's view, irrevocably tied to men's social power over women and children in ways that increase the likelihood of violence and oppression. Card argues that marriage law and the understanding of marriage as a social institution make violence against women and children not only harder to prosecute, but harder to identify. Thus, the institution of marriage allows for the perpetuation of evils. Card recognizes that her arguments are in direct opposition to the common understanding that marriage is meant to protect women and children. Her argument is that the realities of violence against women and children refute that common understanding.

While Card is not against long-term monogamous relationships, she is skeptical that the institution of marriage is necessary to them or that it adds to happiness or overall well-being even for adults who have relatively equal social power. Consequently, she argued that same-sex couples ought to have the same rights as opposite sex couples, but the battle for same-sex marriage should not be a priority. Joining the institution of marriage may change the institution, but it also

might make same sex relationships more like opposite sex relationships in ways that increase the differences in power between the two people involved. Her view is that marriage is not an institution worth joining.

Card holds the view that "the law should no more declare which durable intimate sexual unions between freely consenting adults are legitimate and which are not than it should declare which newborns are legitimate and which not" (Card 2007). While this view coincides with libertarian views about marriage, Card is not so much against state intervention as she is against "the vague, open-ended, state-enforced legal marriage contract, rarely entered into voluntarily by any who are adequately informed of its consequences" (Card 2007). In short, marriage laws are bad laws. They are simultaneously expansive and vague.

Card's ideal then is that long-term, durable, intimate unions would no longer be stamped as legitimate or illegitimate by the state. Ridding ourselves of marriage as a state-recognized institution would free us from an erroneous mindset about marriage protecting women and children from harms and providing a safe haven for the vulnerable. It would free us from false beliefs about patriarchy. Her work on this issue is an interesting study on how social beliefs, especially erroneous beliefs, can be furthered by vague, expansive laws. Laws can only solve problems when the laws in question make injustice evident. Laws also can hide injustice and oppression.

Hate Crimes and Penalty Enhancement

Card's work on hate crimes (2001) carefully examines what hate crimes are, who the perpetrators are likely to be, and what the meaning of penalty enhancement is. Card looks not only at the psychology behind hate crimes, but also at statistical evidence regarding who commits such crimes: their race and economic status, for example. Card also consider who benefits from hate crimes (usually not the perpetrator) and who is harmed in what ways. Card meticulously examines theories of punishment, the connections and disconnections between penalties and moral culpability, statistical evidence about such crimes, and more. She uses empirical evidence to counter common sense notions on which theories are based. Her assessment then combines empirical evidence (of the kinds of crimes that judges see fit for penalty enhancement and the racial and social backgrounds of the perpetrators of those crimes) with ethical theory to conclude that penalty enhancement for hate crimes is not sound. Penalty enhancements are more often used against people from socially disadvantaged groups. Statistically, most crimes identified as hate crimes involve property damage. The crime is not worse, in this case, because of the motive.

Card also points out, along with other feminist scholars, that rape (with the possible exception of war rape) is not generally considered a hate crime. The identification of certain crimes as hate crimes and others as not is worth considering. Also worth considering is whether hatred of a group (the usual definition of a hate crime) is worse than hatred of an individual as a motivation for violence. Card argues that we ought to punish the teachers of hate in addition to the perpetrators of hate crimes.

Torture

In "Ticking Bombs and Interrogations," (Card 2008) Card argues that while it is imaginable that torture might be ethically acceptable in a particular situation, there is no real-life situation that matches that theoretical possibility. Many of the justifications given for torture turn out to be impractical. In other words, torture is never ethically acceptable because it is never possible to know that it will result in finding true information that will help avoid greater harm or to know whether torture will be an expedient way to get such information, and it is never possible to contain the torture to a limited event. It is never possible to know who can judge when torture will be effective. This summary may seem simple, but Card considers in meticulous detail arguments in favor of the regulated use of torture and actual cases in which torture was used in order to show that the knowledge gained is unreliable and the long-term effects of torture perpetuate evil rather than curbing it. Card addresses the claim that torture may be the only expedient way to get information in a desperate situation by countering

that torture is not, in practice, usually quick. Card concludes that most arguments for torture in desperate situations ignore or contradict empirical, historical evidence about torture. And ethically, torture is not supportable.

Unpublished Work and Influence

Card was working on the third volume of her trilogy, *Surviving Atrocity*, when she died. Many of her articles, and "Ticking Bombs and Interrogations" is a case in point, are exemplary pieces of philosophical analysis of political issues. Her two collections, *Feminist Ethics* (1991) and *On Feminist Ethics and Politics* (1999a), were instrumental in defining the field of feminist ethical theory. *The Cambridge Companion to Simone de Beauvoir* (2003), which she edited, brought the revolution in Beauvoir studies to the forefront of discussions about feminist philosophy in the USA. A 2009 collection in her honor, edited by Veltman and Norlock (2009), shows the tremendous influence Card had on her contemporaries as well as on the generation of feminist philosophers she taught, both formally at the University of Wisconsin and informally. Through conversations and her editorial work, Card mentored a generation of philosophers. Her generosity of spirit and tremendous intellect had great impact, evidenced in her published work but also experienced by those of us lucky enough to know her. Her influence will be with us for decades, both in terms of what we write about and how we engage others.

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Cardozo, Benjamin

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Introduction

Benjamin Nathan Cardozo (1870–1938) is, together with Oliver Wendell Holmes (whom he succeeded as Associate Justice of the United States Supreme Court) and Roscoe Pound, one of the maximum representatives of the anti-formalist school of thought described as "sociological jurisprudence" which was highly influential in North America in the early decades of the twentieth century. Cardozo's protagonism in the

juridical culture of his time is twofold: as a judge and as a legal theorist. The two are, in any event, facets that are intertwined. On the one hand, his rulings (recognized for being thoroughly adapted to the new needs of a society in a continual process of transformation) represent a genuine expression of his theoretical thinking. On the other hand, his extrajudicial writings were mediatized by the final aim of providing the reader with an analysis of the correct legal decision. Cardozo already advances the nucleus of his ideas in *The Nature of the Judicial Process* (1921), where he expresses his intention of revealing the methods that a judge follows in preparing his rulings, proposing a definite criterion for determining their content. He looks more deeply, however, into some of those questions in *The Growth of the Law* (1924) and in *The Paradoxes of Legal Science* (1928), offering precise and articulated replies to problems that remained unanswered in that initial expression of his conception.

Legal Wisdom

Cardozo believes that legal decisions are conditioned by law and the interpretation that scientific doctrine makes of it. The theory of legislation and the science of law represent in this respect ancillary legal wisdom that places the judge in the best position to give his ruling: the former permits laws to be well formulated, adapting them to the objectives that the legal system pursues; the latter transmits the necessary information about current legal provisions, reformulating in some cases their significance. But when it comes down to it, in resolving the conflict elucidated in each specific case, the judge has to reach for legal philosophy, unless the matters dealt with are so simple as to permit the automatic application of the law or of legal precedent. Legal philosophy thus emerges as the fundamental legal wisdom, i.e., the legal wisdom that determines in each case the ultimate meaning of the judge's ruling.

For the rest, legal judgments operate on the basis of facts. This makes it necessary for the judge to have sufficient knowledge to evaluate their presence and meaning, which is ever more difficult in a world that is changing at a dizzying speed. He proposes in this regard the model of a generalist judge who has the maximum level of knowledge of the realities of life that have to be taken into consideration when giving each ruling. The concept of continuity of knowledge that Cardozo (1939, 232) takes from Lawrence Lowell would refer to the importance that he himself attributes to the conjunction of legal knowledge and extralegal knowledge in the judicial process.

The fundamental role that Cardozo attributes to legal philosophy contrasts with the absence of even the most superficial treatment of its subject areas, considering it unnecessary for his purpose of defining the correct judgment. He limits himself in this to declaring that the genesis, growth, and ends of law are the subjects in legal philosophy that claim his attention and for an overall consideration of the subject matter of legal philosophy referring to the analyses presented by Roscoe Pound (1922).

The Concept of Law and the Value of Legal Certainty

Cardozo recognizes the existence of a body of law prior to the judicial ruling and in this matter is critical of the extremist positions of the legal realism that were beginning to form in America. In the idea of prediction, he detects the key to determining the very existence of the law: only those elements that permit us to predict the sense of the future action of the courts will constitute law. Those elements that in *The Growth of the Law* had not been defined sufficiently (on incorporating therein, superimposed, the contradictory ideas that only the principles of order are law and law is both these and the rules that reflect them provided they pass the test of predictability) would then be clarified in his Address in 1932 to the New York State Bar Association as encompassing therein "a vast conglomeration of principles and rules and customs and usages and moralities" (Cardozo 1932, 18). In this he definitively embraces as law those principles that inspire the traditional legal sources but also directly the latter. The only requirement for giving

legal character to both is that both the principles and the rules of official law fulfil the demands imposed by the principle of predictability.

Furthermore, Cardozo identifies in the adapting of the legal ruling to the legal objective the element that in the final reckoning determines its correct sense. He incorporates in this point legal safety or certainty that permits individuals to know in advance the consequences to them of acting against the law as part of the wider objective that he recognizes as social interests in *The Growth of the Law*. But legal certainty is not an absolute value but one which in certain cases may yield before the realization of other legal values with greater specific weight.

Cardozo is very graphic in indicating the difficulties involved in the task of detecting in legal precedents the principle that has to guide at all times the determination of the content of the legal ruling. Applying legal precedents mechanically in a society which is constantly changing where the situations presented for the decision of the judge bear little relation to those that were presented in the past will in the end convert legal precedents in centers of infection that, as such, may finally affect the whole of society, perverting conclusively the sense of the very function of law. In these cases, the most we can achieve with legal precedent is a false sense of security whose appearance limits us in our efforts to reach true legal certainty. In this respect in *The Growth of the Law*, the distinction between what is the sound certainty and the sham certainty, between gold and tinsel, is emphasized (Cardozo 1924, 16–17). Cardozo assumes here a surprising material or finalistic conception of legal certainty bringing into it the idea of movement, i.e., of adaptation to social change. He would later (Cardozo 1932) take up once more the formal traditional conception of legal certainty, stressing in this sense that legal certainty as the governing aim of the content of the legal ruling can be defeated when it is in conflict with another higher aim.

That oscillation between contradictory conceptions of legal certainty is explicable if we examine the specific characteristics that define the style used by Cardozo in his arguments. The assumption of the finalistic conception makes sense in the quest to discredit the function of legal precedent as the foundation of the ruling: in saying that precedent gives false legal certainty, he saves himself the work of convincing his audience of the limited weight of legal certainty as the governing aim of a ruling. The rehabilitation of the formal conception of legal certainty shown in his mature writings illustrates his assumption of the idea that the best that can be done so that law can be perceived as it really is is to show the opposition that presents itself in a legal ruling between differing values without searching for a formula that artificially encompasses all of them.

The Workings of the Legal Process

In *The Nature of the Judicial Process*, Cardozo identifies four methods that the judge employs in the discharge of his duties: the rule of analogy or the method of philosophy, the method of evolution, the method of tradition, and the method of sociology (Cardozo 1921, 30).

The logical method represents the first tool for the work of the judge. As a method it is relevant, but not necessarily decisive because the ruling ought in any case to be adjusted to the social ends of law. The defense of the historical method, or the method of evolution, does not necessarily shackle a legal institution to the form that it had in the past. On the contrary, Cardozo considers it an invigorating and dynamizing function, one that enables the evolutive sense of law to be captured in relation to the different institutions. Cardozo admits the subordinate role of custom in respect of law, but that does not prevent him from appreciating the force that it can acquire in the absence of an applicable juridical regulation and, indeed, as a criterion operating on the very regulation that the existing legal norms establish, and he distinguishes two different scenarios: the reform of legal regulation through custom and the integration of the undefined legal concepts that may crop up in the existing legal norms.

The method of sociology acquires sovereign significance over the rest in the view of Cardozo; it is the arbiter between all the other methods, the method that tells us in what proportion each of the

others have to be taken into account in the various instances. At this point Cardozo turns to the concept of the social welfare underscoring with this the conventionalist sense of law, because the legal principle that determines the meaning of the ruling is given by consideration of the consequences that the application of one rule or another would bring about in each case. The social welfare is a hypothetical situation in which the consequences deriving from the legal ruling are appropriate more or less directly to the individuals and, by extension, to the whole of society. In this sense he proposes the substitution of the traditional structural analyses of law by other functional analyses that permit an evaluation of the adaptation of law to the ends which are intended.

The problem is to determine which are the particular guidelines that the judge has to follow in order to carry out the aims of the law. Cardozo excludes the possibility of issuing correct legal responses on the basis of mere subjective sentiment or personal intuition. However, in *The Nature of the Judicial Process*, he gives no general rule for solving the problem of the content of the principle that has to guide the sense of the ruling. What prevails, he says, is the need to resort to reasons of a superior nature that have to be sought in life itself, but which have at the same time to connect with the demands imposed by moral considerations.

Cardozo offers a much more elaborate analysis of the object of law in *The Paradoxes of Legal Science*. There, he expressly recognizes liberty as the underlying principle of his political philosophy, as a genuine element directing the sense of law and the legal ruling itself. But the principle of liberty is not a static and frozen concept. If the judge wishes to attend to the achievement of liberty, he will also have to provide the corresponding satisfaction to the personal circumstances of the individual whose exercise of liberty he is endeavoring to guarantee. The principle of liberty is thus endorsed in the formula of free development of personality which implies recognition of the right of each individual to form his own opinion furnishing him with knowledge of the opinions of others and permitting him to participate actively in public discussion. The free development of the personality evidently ought not to constitute a privilege of any individual or social class but should be open to all, guaranteeing equality of opportunity to every individual. The right to knowledge that is a result of the exercise of the liberty to participate effectively in social debate and the equality of opportunities are, therefore, the basic pillars on which his view of the free development of personality can rest.

The application of these elements will not be automatic, however, as demands of time and place need to be met. Their application must in this regard be contextualized. The demands implied in the free development of personality cannot be of an absolute nature because frequently the claims of one individual to guarantee his liberty clash with those that another invokes to guarantee his own liberty. Hence the solution to be adopted by the judge when faced by a conflict of interests has necessarily to be adapted to the circumstances of the social group and the time and place in which he has to make his ruling. The ruling does not lose its moral nature with this. But it is not the morality of the judge himself that the ruling should reflect but the morality of the social group. That apparent relativism of the legal ruling is, nevertheless, nuanced when he states that the moral model that should be enshrined in the ruling is not that which the general membership of the group share, but that of those men and women of that same social group whose mentality may be considered as "intelligent and virtuous" (Cardozo 1928, 37). The law does not have as its aim the achieving of a society of virtuous people, but that of an ordered social life in accordance with criteria often imposed by convenience and prudence. In this point the social circumstances and peculiarities of the group it is intended to regulate and its environment have to be taken into account when solving social conflicts. But in trying to strike a balance between the various elements to be given value in the ruling, the judge will have to keep in mind the model of moral behavior that corresponds to intelligent and virtuous men. The legal ruling acquires in this sense a dimension that is unequivocally perfectionist. That remission to the perfectionist moral model of the social group does to some extent permit a solution to the problem

that Cardozo had marked out in *The Nature of the Judicial Process* with remission to the idea of the superior principles that would have to guide in any case the sense of the legal ruling.

The Theory of Legal Decision-Making as Legal Philosophy

Cardozo never intended to produce a complete, articulated philosophy of law. This already provoked in his own time some discussion about whether or not Cardozo could be considered a true legal philosopher. His view is explicit in this regard. Each legal ruling has an underlying specific philosophy. And the model of the correct legal ruling is, in any case, illuminated by the legal principle enshrined in legal philosophy. The legal ruling is thus presented as legal philosophy applied to the solution of legal problems and Cardozo as a judge who in exercising the administration of justice does no more than project his own theoretical conceptions as a legal philosopher.

Cardozo draws up his theoretical conception in a cultural environment in which the influence of legal realism was becoming progressively more notable. His conception is far from being identified with the fundamental theses of what was then a thriving doctrinal tendency. In fact, the famous Address of the 22nd January 1932 to the New York State Bar Association is in a way a settling of scores. His differences with American realism are not limited to the moderate tone of his conception vis-à-vis what he considers to be the radical excesses of the neorealists. They are differences above all based in the concept of law. And Cardozo is very clear that there is law before the legal ruling, precisely because the ruling has to be in accordance with the law, even though this may be difficult to identify.

The influence of Holmes on Cardozo in some aspects of his theory cannot be denied, in particular regarding his demarcation of law as a prophecy of what the courts will do. Cardozo himself confirms this influence in a laudatory work dedicated to Holmes (Cardozo 1930–1931). Cardozo is similarly explicit in regard to the influence that Pound had on him. The pragmatic basis of their conception is highlighted not only in their quotations from William James and John Dewey but in that Cardozo himself who already considered in *The Nature of the Judicial Process* that the philosophy of common law was the "philosophy of pragmatism" made an explicit profession of pragmatic faith in *The Growth of the Law*. The instrumental consideration of law and deeming it a reality in a constant state of flux determined largely by the needs and changes that take place in the life of a society are testimony to the unequivocal pragmatism of his legal philosophy.

Cardozo also takes very much into account the theoretical contributions of François Gény (1889) in the sense of trying to identify an objective criterion on which to base the ultimate sense of judicial rulings. In fact, his conception has many points in common with the latter. In the search for that criterion, they equally appeal to the idea of natural law. But the expression acquires a very different meaning in the conception of these two authors. The natural law to which Gény appeals has a concrete material content; in contrast, Cardozo's conception in appealing to natural law has as its priority a formal significance, referring above all to the remission to the ideal element of the judicial decision. The expression perfectionist seems in this sense preferable to describe the philosophy of law. Only in a very broad and improper sense could this be described as natural justice. Pragmatism and perfectionism are, in this regard, the philosophical conceptions that to the greatest degree underpin the legal thinking of Cardozo.

Conclusion

Cardozo's view of the law represents above all a response to the problem of identifying the overriding principle that is to direct the sense of the correct legal ruling. For this he proclaims that the philosophy of law is the fundamental legal wisdom that would operate on the groundbase provided by the ancillary bodies of legal wisdom (the theory of legislation and the

science of law) and nonlegal wisdom. The law is presented as a reality in a process of continual transformation where the elements of its configuration have to pass the test of prediction as to the probable way in which the courts will act. It is in any case a reality oriented toward the realization of an aim. Legal rulings ought to combine attention to that end with consideration as to the peculiarities of the reference social group and the time and place in which they have to be given. The view of Cardozo acquires an unequivocally perfectionist dimension in assuming that the moral model to be taken into account by the judge is the model of moral behavior such that would correspond to intelligent and virtuous men of that social group. Pragmatism and perfectionism constitute in this respect the foundations on which the legal conception of Cardozo is built.

Cross-References

- ▶ Corporal Punishment: Judicial
- ▶ Legal Realism, Russian
- ▶ Pound, Roscoe: Sociological Jurisprudence

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C

Introduction

Born in Seville – the European terminal of the conquest – Las Casas (1484–1566) was from childhood connected to Spain's involvement with America. When he was 18 years old, he arrived at Hispaniola, where he managed the family farm and joined the expedition to put down the Indian uprising in Higüey. After returning to Europe, where he was ordained in Rome and, although this is not certain, may have graduated in church law, he went back to Hispaniola where he started his own business. Appointed as Chaplain of the militarily enforced "pacification" of Cuba, Las Casas witnessed the awful violence by the *conquistadores* and the extreme exploitation of the natives. He gained the appreciation of the indigenous people by attempting to save lives and peacefully convert souls. Despite this, the Spanish colonial government rewarded him by allowing indigenous people (*repartimiento*) to work as servants in his *encomienda*, which was the typical form of forced labor. But in 1514, at the time of his "first conversion," he redirected his energy to the cause of the Indians, deciding to denounce the illegitimacy and the sinfulness of the detention of natives and to give back his servants to the governor. As his claims were ineffective, he went back to Castile in order to denounce the conquest and to defend the claims of the Indians at court. There he was strongly opposed by Bishop Juan Rodríguez de Fonseca who was delegated to manage the Indian affairs but gradually gained support from Cardinal Cisneros. Then, after the death of King Ferdinand in 1516, his proposals were favorably received by Adrian of Utrecht, the future pope, who started to reform the colonial system, designating three Hieronymite friars to implement proposals. Las Casas was deeply involved in this work and

was appointed "Protector of the Indians," but the project got no further. Back in Spain, he gradually succeeded in gaining the trust of the Flemish entourage in the court of Charles V. He was then authorized to attempt an experiment of peaceful colonization in 260 leagues of the continental coast. Confronting the establishment opposition in Hispaniola, in 1521, he agreed to include prominent colonists in the enterprise. This "deal with the devil" ended in a catastrophe: when Las Casas was absent, the natives attacked his entourage, killing four of them.

This was probably the worst moment in Las Casas's life. He began to distrust the very idea of his mission and decided to join the Dominican order (his "second conversion"). During more than a decade of retirement and meditation, he deepened his theological studies and started to write theoretical and historical works. In 1534, he convinced the cacique Enriquillo to end his rebellion. Then Las Casas moved to central America, where, either by fighting against the governors or earning their support, he contributed to the peaceful evangelization of Tuzutlán and to the drafting of statements in favor of the Indians by the local ecclesiastical hierarchy. Back in Spain in 1540, his treatises and pamphlets (including the *Brevísima Relación de la Destrucción de las Indias*, which was to get international acclaim in the following decades) gave impetus to the proclamation in 1542 by Charles V of the *Leyes Nuevas*: a radical reform which remained ineffective and was later substantially revoked. From 1543 to 1547, Las Casas was back in America, as bishop of Chiapas. There the colonists' opposition to his intransigent attempts to enforce the *Lejes Nuevas* escalated to the level of physical threats. Back in Spain, in 1551–1552, he contested the legitimacy of the conquest in the Valladolid *congregación* convened by the king, confronting the humanist Juan Ginés de Sepúlveda. The last two decades of the friar's life were spent writing works which expressed progressively more radical thought, recruiting missionaries, fighting the charges of heresy on the part of Bishop Bartolomé Carranza, and against the attempt by the Peruvian colonists to transform the *encomiendas* into hereditary feuds.

Las Casas' position on the legitimacy of the conquest changed over decades. His 1516 *Memorial de remedios* proposed a sort of refurbishment of the *encomienda* system, in which the displacement of natives, their work together with Spanish virtuous farmers, and even the limits to the time and the hardness of their labor, were integral to a disciplinary model whose objective was the "civilization" of the Indians and the rational exploitation of their work and natural resources. After his second conversion, Las Casas stated that *the only way* to convert the infidels was through peace (OC 2). Nonetheless, in the early writing of the *Historia de las Indias*, Columbus is depicted as a providential hero who opened the gates of the Ocean to Christianity and consequently the possibility of salvation for millions of souls (OC 3, pp. 353–65, 494–95). In the following years, his criticism of the two causes of the destruction of the Indies – the cruel and unjust wars of conquest and extreme exploitation – became more and more radical. During his episcopacy in Chiapas, Las Casas stressed the superiority of ecclesiastical over secular power in order to bring back the Indians as "poor people" under the protection of the bishops. In any case, when accused of jeopardizing the Spanish Empire in the Indies, he theorized that its legitimacy depended on the vicar of Christ's mandate to Christianize (OC 10, pp. 197–214, 391–543): he maximized the role and the power of the crown in order to contrast the claims of the settlers and to grant the political autonomy of native communities. In the following years, however, a further radicalization can be seen: the pope's investiture conferred to the kings of Castile a mere *ius* ad rem, i.e., a jurisdiction *in habitu*. In *De Thesauris* (OC 11.1), only the explicit consensus of the people and their natural rulers, stated in a formal treatise, could transform it into an *ius in re*, an actual (*in actu*) jurisdiction. Only at this point could the Spanish king assume a "sort" of imperial role which would not revoke the free enjoyment of rights and powers by native kings and peoples. Moreover, in the *Doce Dudas* (OC 11.2), Las Casas argued in favor of the restitution of his kingdom to the descendant of the Inca. The diagnosis of the illegitimacy of the conquest is

ruthless: "Todos los reynos de las Indias tenemos usurpados" (OC 11.2, p. 217).

Las Casas's thought was framed by the Aristotelian-Thomistic paradigm and was in line with the *auctoritates* of medieval thinking. He was inclined to trust the assumptions of ancient natural philosophy and even traditional superstitions, e.g., on celestial influences and witchcraft, but nevertheless showed some openness to empiricism. Belonging fully to the "revival of Thomism" (Skinner 1978), his debt to Aquinas' approach to the relationship between faith and rational knowledge is evident (e.g., OC2, pp. 24–70). Though some elements of novelty in his theological thought have been emphasized (Gutiérrez 1992), the chief originality in Las Casas's thought is to be found mainly in legal and political theory.

Legal Theory

According to some interpreters, Las Casas obtained his degree in Canon Law from the University of Salamanca (Rand Parish, Weidman 1992, pp. 133–34). His competence in the field of law, in any case, would appear to be sound and his works are filled of references to *ius civile*, *ius gentium*, Castillan law end especially Canon law. José Alejandro Cárdenas Bunsen argues that all of Las Casas's thought was framed by the demonstrative models elaborated by the Medieval jurists on the basis of Aristotelian dialectics (Cárdenas Bunsen 2011) and shows the typical junction of reason and authority typical of Canon law. In his writings, he used and developed the legal *glossa* (pp. 72, 89–107), when, in his textual interpretation, he adopted the hermeneutical method elaborated by canonists (pp. 107–20). Even his historical and proto-anthropological works contain a juridical dimension. Finally, the *Apologética historia sumaria* frames Indian ways of life and institutions in the *ius gentium*.

It would be anachronistic to look for the modern distinction between law and ethics, legal and religious rules in Las Casas's writings. He used seamless terms such as "crime" and "sin" and often ecclesiastical and legal sanctions were considered together: "facere iniustum peccatum mortale est" (OC 2, p. 502). Some differences do emerge, however. For example, in Mexican criminal law, some evil actions such as prostitution and some forms of concubinage were not subjected to legal sanction, and this was approved by Las Casas: one ought to leave some behavior, such as simple fornication between unmarried people, bad thoughts, and all that does not cause scandal or prejudice to the commonwealth "to the freedom of the subjects" (OC 8, p. 1356), whereas laws ought to regulate only interpersonal relations (p. 1357). Human law cannot exercise any obligation or prohibition concerning inner passions that do not cause harm to others: this would be an interference in divine law and mean to asking the impossible (p. 1272). Other legal-theoretical theses deserve to be mentioned, such as a democratically oriented vision of the custom, according to which popular consent is privileged on approval by jurists or sovereign power (OC 10, p. 456; OC 12, p. 124).

Las Casas's talent in re-elaborating the heritage of the legal tradition is apparent in his conception of rights. Some scholars have maintained that this theory was derived from Aquinas's rationalist approach to natural law. Others have contested Las Casas' supposed interest in the rights of humans as such (Villey 1976) and even the presence in his works of the very concept of subjective right, which is actually absent in Aquinas's thought (André-Vincent 1976). But Brian Tierney highlighted explicit references to rights as faculties and powers in Las Casas's texts (e.g., OC 11.1, pp. 76, 80, 112, 116, 316, 322, 380), quoting expressions such as "ius [...] regiae potestatis" (p. 222), "potestats et auctoritas vel ius eligendi" (p. 236). "His essential achievement, on a theoretical level, was to graft, quite consciously, a juridical doctrine of natural rights onto Aquinas's teaching on natural law" whereas "the appeal to legal sources was more overt and persistent in Las Casas than in Vitoria" (Tierney 1997, p. 276). It was typical of Las Casas' method to recall concepts elaborated by decretists and glossatores with reference to technicalities in order to apply them to themes of general relevance and topical interest in

contemporary life. The concepts of Canon law were transposed at the level of natural law, thus obtaining natural and universal rights which ended by assuming a radical content. "By appealing to specific well-established principles of the law he was able to add flesh and bone and muscle to the theoretical concept of natural rights that have been developed in the schools." The statement that "a papal rescript favoring one individual should not prejudice the rights of a third party" (p. 281), recurring in the *Decretales* for example granting a Bishop's rights with respect to a papal legate, became a principle of natural law; as such, it was employed to affirm that the pope's concession to the kings of Spain did not revoke the power and jurisdictions of Indian princes or the properties and rights of their subjects (OC 11.1, p. 118). The distinction between *ius ad rem* and *ius in re*, originally employed to differentiate the status of a prelate elected to office from the status acquired after his confirmation, was applied to imperial jurisdiction in the Indies: it remained a mere *ius* ad rem until it was confirmed by the free and unanimous consent of Indians. The private law principle "quod omnes tangit, ab omnes approbari debet" was likewise alleged to assert that the legitimacy of Spanish King's rule depends on the unanimous consent of natives.

Unjust Wars and Forced Labor

Las Casas adopted the "just war" theory in the version elaborated by Vitoria: the only just cause for war is an *iniuria*, i.e., the violation of a *ius*, a basic right. But according to Las Casas, the just cause belonged only and always to the Indians: "they had, from the very beginning, every right to wage war on the Christians, while the Christians never had just cause" (OC 10, p. 40). In his historical work, Las Casas offers a horrifying phenomenology of the terrorist violence perpetrated during the conquest in the different areas of the Americas. He contested the supposed just causes on the side of the Spaniards (such as the natural slavery of the "barbarians," evangelization, anthropophagy, human sacrifices) and turned Vitoria's theory upside down. Vitoria proclaimed a series of universal natural rights to communication, commerce, the appropriation of common goods, and the freedom to announce the Gospel, suggesting that their violation by the "barbarians" constituted an *iniuria* and consequently a just cause. On the contrary, Las Casas emphasized the right by the legitimate political communities to defend their borders, protect their jurisdictions, and even to resist the preaching of Christianity (OC 9, p. 350).

In some texts, the very theory of the just war appears to be nearly abandoned. War is defined as "multorum homicidium commune et latrocinium" (OC 2, p. 380), and it is shown to be difficult to save the innocent. Moreover, the similarity between war and legal trial is contested. In his last works, however, Las Casas came back to this theory and took it to its radical and extreme conclusion. To be entitled by the just cause gave the Indians the right to resistance, vengeance, and punishment of the Spaniards, who could be reduced to slavery according to the *ius gentium*. If the just war theory was born in Late Antiquity in order to legitimize the recourse to war by the Christians, its imperialist function was jeopardized by Las Casas' arguments.

In the sixteenth century, the *ius gentium* justification of slavery – based on an exchange between life and freedom on the part of a defeated enemy in a just war – was generally accepted, but Las Casas, negating the legitimacy of *all* conquests, declared invalid *every* reduction of prisoners to slavery. The Aristotelian theory of natural slavery – based on the idea of the lesser rationality, and consequently *humanitas*, of the "barbarians" – was deconstructed by distinguishing between different meanings of "barbarian" and arguing that "barbarian" in a proper sense refers only to wild and idiotic individuals who live in isolation, and that this category could not be applied to the Indians (OC 9, pp. 76–124). Some years later, in *De Regia Potestate*, Las Casas entirely revoked, de facto, the Aristotelian theory, stating that the natural freedom of human beings is a function of their rationality (OC 12, pp. 34–36).

During his "reformist" period, Las Casas proposed on several occasions the use of African

slaves in order to replace the Indians, and his detractors have accused him of being the first theoretician of the slave trade. Actually, in the 1550s, he wrote a bitter self-criticism on this point (OC 5, p. 2324) in which he considered the slavery of the Africans to be as bad as the forced labor of the Indians (Pérez Fernández 1995).

Las Casas showed the consequences of a system of exploitation which consumed its servants and induced a state of profound depression: "they forget to be humans" (OC 4, p. 1287). The *encomienda* was a devilish institution, "intrinsically evil," which destroyed the policies of the Indians (OC 13, p. 290), and inhibited the exercise of rational faculties and even the Christian faith (p. 288). The overturning of the Aristotelian theory is clear: it is not insufficient rationality that makes the barbarians natural slaves; it is rather slavery that blocks the development of rationality.

The Recognition of the "Other"

Las Casas is considered a forerunner of Cultural Anthropology (Hanke 1951; Pagden 1982). In the *Apologetica Historia Sumaria*, the ways of life, religions, political institutions, and legal systems of American peoples were compared to ancient ones in order to show that the former matched the Aristotelian test of human rationality and political virtue, and also obtained equal or even better scores than ancient Jewish, Greek, and Roman systems. Las Casas's goal was evidently to refute the charges of barbarity, lesser rationality, or even ferality that were adduced in the first reports on the Indians, and their alleged incapacity to govern themselves. In doing so, he assumed a specific model of humanity and rationality. On this basis, Las Casas has been accused of being co-responsible for the "spiritual conquest" of America, the imposition of the "Christian" way of life by the "ecclesiastical imperialism" if not of "cultural ethnocide" (Subirats 1994; Castro 2007).

Nonetheless, Las Casas evaluated the beliefs, rituals, and sacrifices in the Indies as being more rational and virtuous than several of those of the classical world, and emphasized the natives' devotion, acknowledging the dignity of the indigenous faiths. The *experimentum crucis* of the Las Casas' strategy is the issue of human sacrifices. Las Casas attributed to them a literally devilish origin (OC 7, p. 686), but he stated that the Christian princes, and even the pope, lacked the jurisdiction to prohibit them. Moreover, on the one hand, he argued that human sacrifices were an immemorial custom and were recommended by their leaders and the men whom they consider the wisest: it was impossible to extirpate them by war. On the other hand, to sacrifice to God is mandatory by natural law, but it is positive law that establishes what and how to sacrifice. In the absence of divine revelation, it is rational to sacrifice what has the higher value, i.e., human life.

Liberty, Power, and Consensus

In Las Casas' political theory, every human being is entitled to *dominium* and consequently the infidels have property rights just as the Christians do. Beyond the field of private law, also the power and the jurisdictions of the infidels are justified by natural law (OC 10, pp. 550–54). Indeed, somebody who rules is needed, exercising the *vis regitiva* (OC 10, p. 556) directed to the common good. Actually the diverse parts of the society are characterized by different "causes" and "aliquid quod moveat ad bonum commune multorum" (p. 556) is necessary. Hence, nature created some human beings apt to rule, who "naturaliter sunt domini et rectores aliorum" whereas the *deficientes ingenio* "naturaliter sunt servi," are apt to obey and to be governed by the former (OC 10, p. 556; cp. p. 454, OC 6, p. 390). Here, social cohesion seems to be viewed in a way partially different from Aristotle: diverse subjects express different interests and this would lead to the disaggregation of the society in absence of a *vis regitiva*. The Aristotelian political theory, by which the submission of the Indians was largely justified, was reversed by Las Casas to affirm the universality of political power and indeed the legitimacy of their "natural rulers." Roman law

and Thomist philosophy in any case offer arguments for defining the natural liberty of individuals and peoples as inherent, universal, and original natural rights (OC 13, p. 127). Human beings "ab origine naturae rationalis liberi nascebantur." The rationale of this was stated by Aquinas: human beings are rational by nature and "rationalis, quantum est de se, non ordinatur ut ad finem ad alium, ut homo ad hominem" (OC 12, p. 34). As a corollary, slavery is an accidental phenomenon and every human being is free until proven otherwise.

According to Las Casas, in the *ius gentium primevum*, all things and every human being were free. Then the *ius gentium secundarium* introduced servitude and subjection both of things and of human beings. So in the best form of government, subjects remain free and do not give up their natural rights (OC 10, p. 327). Here Las Casas hinted at a dichotomous model which had been used to legitimize the Roman emperors and would be used to establish the absolute power of the Leviathan. But individual liberty was connected to common liberty. The people as a collective entity preexist the sovereign and "they are free and not *recognoscentes superiorem*" (OC 13, p. 127). Rights are an entitlement of the people and one cannot impose "nulla subiectio, nulla servitus, nullum onus" on them without their voluntary consensus. That would imply a violence that inhibited their exercise "sua libertate, quae de iure naturali competebat" (OC 12, p. 60). Consequently, the consensus of individuals and peoples is necessary to institute political power (OC 12, pp. 34–60), but according to Las Casas, there is no consensus that this should remain the case once and for all. If "imperium immediate processit a populo [. . .] per liberam electionem," then "populus eligendo principem seu regem libertatem suam non amisit" (p. 62). The people maintain their freedom, which cannot transferred to the sovereign with the institution of its power: the dialectic prince/people ought to work in order that the *regia potestas* does not became violence and tyranny. "Ergo nulla subiectio imposita fuit sine consensu populi" (p. 64). Citizens are in any case not subjected to the ruler's power, but to the just law: consensus and rule of law refer to each other. Nobody can rule "secundum libitum suae voluntatis, sed solum secundum leges politicas." But laws have to be addressed to "*communem omnium utilitatem*][. . .] et sic cives manent liberi, nec oboediunt homini, sed legi" (p. 84). Since Aristotle, in mainstream political theory the idea of rule of law implied an anti-democratic issue: democracy was seen as the government by the poor and not by the law (Pol 1293 a); instead Las Casas proposed the rule of law as a safeguard of people from absolute power.

Moreover, an articulation of the different political communities is apparent on three levels: *civitas, regnum, imperium,* with decreasing intensity of obligation. "Civis namque ad civitaem maiori vinculo astringitur, quam civitas ad regnum" and "regnum non est patria civitatis, sicut civitas est patria civis" (p. 74). There are indeed different levels of jurisdiction: the "quasi-imperial" one of the kings of Castile was compatible with the actual power of the native leaders and the autonomous government by the communities (OC 11.1, p. 112).

No transfer, assignment, and gift of jurisdiction has legal force in absence of the consensus by the ruled (OC 12, pp. 146–48). Here the reference to the projected institution of the perpetual *encomienda* is clear. Moreover, Las Casas qualified the actual Spanish rule in America as tyranny and reminded the reader that against the tyrant, "plague of the republic" (OC 9, p. 412), rebellion, and even killing are a right and even a duty (OC 8, p. 1452, OC 10, p. 560 11.2, pp. 130–32). In general, "wherever justice is missing, the oppressed and the humiliated can take it into their own hands" (OC 5, p. 2307).

Conclusion

Las Casas outlined a political theory which kept together original liberty and equality, legitimation based on consensus, limits to the sovereign power, rule of law, civic self-government, and excluded the legitimacy of absolute power. The materials of Aristotelian practical philosophy, the Bible, Scholastic theology, Canon, and civil law were conveniently selected and employed to construct a

building projected far beyond the tradition of medieval natural law theory.

In almost five centuries, Las Casas has been evaluated in radically different ways, from being demonized to being uncritically defended. His contemporary adversaries accused him of betraying the civilizing mission entrusted to the Spanish nation, a charge that was exhumed during the Franco dictatorship. Las Casas' influence on policymakers was significant, and in the following epoch his thought was used within the Protestant milieu to supply arguments for the so-called *Leyenda negra*, to whom the "White Legend" would later respond in constructing an Hispanophile counter-narrative. Las Casas has been analyzed both as a dual personality psychopath (Menéndez Pidal 1963) and exalted as the apostle and prophet of the Americas (André-Vincent 1980). Recently, he has been considered, on the one hand, as the founder of humanitarian anticolonialism, and, on the other, as a supporter of imperialism (Young 2001; Todorov 1982; Castro 2007; Mora Rodríguez 2012). Leaving aside direct political influence, his interpreters have emphasized the theoretical relevance of Las Casas' work: its seminal insights on issues such as human rights discourse, the foundation of International Law, and popular sovereignty (Baccelli 2016).

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- ▶ Aristotle: On Justice
- ▶ Hobbes, Thomas
- ▶ Vitoria, Francisco de

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Ernst Cassirer (1874–1945) was one of the leading philosophers of the twentieth century, and his thought has been in the focus of a broad interdisciplinary reception (Endres et al. 2016: 9–22), which includes political theory (Lüddecke 2003) as well as social and legal sciences (Coskun 2007; Kirste 2007; Saurer 2009). At the core of his intellectual endeavor is the investigation of the forms of human culture, with the aim of understanding their constitutive principles as well as the functions at the basis of their interconnection. Myth, language, law, technology, religion, art, or science: his philosophy of symbolic forms addresses the problem of a unitary foundation of human activity, giving an account of the diversity and plurality of its expressions. In this perspective, Cassirer developed his philosophy of law and social philosophy throughout his entire work as a part of his philosophy of culture.

Born in Breslau (today Wrocław, Poland), Cassirer began his academic education in law, German literature, and psychology at the universities of Berlin, Leipzig, Heidelberg, and Munich. From 1896–1900, he studied philosophy and natural sciences in Marburg, the center of the neo-Kantian school led by Hermann Cohen and Paul Natorp. Both thinkers had a crucial influence on Cassirer, in particular considering the use of a revised transcendental method, which moves from a concrete scientific fact back to its conditions of possibility, or the integration of historical and systematic point of view, which assumes the historical-processual character of the concepts regulating each field of human knowledge and activity. This alignment is visible in *Leibniz' System in seinen wissenschaftlichen Grundlagen* (1902, ECW 1) and *Kants Leben und Lehre* (1918, ECW 8) as well as in the edition of selected writings of Leibniz (1904–1906, 1915) and Kant (1912–1922).

Cassirer's early examination of law and society in his *Leibniz' System* is also oriented by the Marburg neo-Kantian approach. Issues of legal and social philosophy, hence, are part of the foundation of the ethics as a pure rational discipline and basis for all the "moral sciences." As a result, Cassirer argues for an identity between morality and legality, according to which rational legal norms have an intrinsic binding force based on their conformity to the moral reason (ECW 1: 381–386). The "being" of a positive legislation is to be adjusted referring to the "ought" of the rational law (*Vernunftrecht*) (ECW 1: 404), i.e., the vision of an "ethical community ruled by objective and universally valid norms" (ECW 1: 395), which embodies the regulative ideal of justice as a limitation to political power, as Cassirer stated taking into consideration Cohen's, Natorp's, and Rudolf Stammler's understanding of a neo-Kantian ethical socialism.

As a Jewish philosopher with a Marburg neo-Kantian background, Cassirer obtained his habilitation not without impediments in 1906 at the University of Berlin, where he taught as a *Privatdozent* until 1919. In this period, he worked on a historic and systematic foundation of the natural sciences, according to which mathematics, physics, or chemistry have been gradually overcoming a metaphysical or realistic understanding of the concepts used to describe the natural phenomena, such as atoms, matter, or force, by developing a purely symbolic and relational determination of them. Cassirer's *Das Erkenntnisproblem in der Philosophie und Wissenschaft der neueren Zeit* (1906–1907, ECW 2–3) and *Substanzbegriff und Funktionsbegriff* (1910, ECW 6) are the most influential contributions in this regard and had a relevant reception within the legal science of the time, as shown by Hans Kelsen's appreciating references in *Der juristische und soziologische Staatsbegriff* (1922) or by Siegfried Marck's *Substanz- und Funktionsbegriff in der Rechtsphilosophie* (1925).

During the First World War, Cassirer widened the scope of his investigation, focusing on: cultural sciences, key figures of the German classicism such as Lessing and Herder, Goethe and Wilhelm von Humboldt, and issues in philosophy of law and politics. The studies of *Freiheit und Form* (1916, ECW 7) and *Ideen und Gestalt* (1921, ECW 9: 243–435) represent this phase at best, and in particular, the former includes Cassirer's first treatise of a functional concept of state (ECW 7: 319–387) as a plea for a liberal-cosmopolitan conception of the German state (*Volkstaat*) within the discourse on the "Ideas of 1914" (Möckel 2018: 184–204). In this view, authors such as Nicholas of Cusa, Leibniz, Kant, and Fichte conceived the state as a purely rational system of norms capable to regulate a priori the social phenomena. Accordingly, they criticized theories based on the logic of the abstraction, including natural law and contractualism, as long as they atomistically deduce the political body without having a concept of its systematic unity (ECW 7: 329). Significantly, Cassirer insisted that the idea of human rights was at the core of the normativity developed within the idealistic tradition, which contributed to the intellectual framework of the revolutions in North America and in France thanks to Christian Wolff's dissemination of Leibniz' ideas and their reception in William Blackstone's and Lafayette's work (ECW 7: 331; ECN 9: 12–13).

In the same period, Cassirer continued his research on the natural sciences with the third volume of the *Erkenntnisproblem* (1920, ECW 4) and *Zur Einsteinschen Relativitätstheorie* (1921, ECW 10). Interestingly, in the latter work as well as in the essay on *Goethe und die mathematische Physik* (ECW 9: 268–315), he introduced the notion of symbolic form as the keystone of his philosophy of culture. The transcendental method was supposed to demonstrate its validity and effectiveness wherever a certain mode of construction of human experience is recognized (ECW 9: 302); therefore, a theory of culture shall not only distinguish the features of each cultural form but also identify a least common denominator underlying a unitary concept of culture (ECW 10: 113–117). The program of such a *Philosophie der symbolischen Formen* (1923, 1925, 1929, ECW 11–13) was realized in the following decade in Hamburg, where Cassirer had been appointed in 1919 as a professor at the newly established university. The contact with personalities such as William Stern, Jakob von Uexküll, or Erwin Panofsky, as well as with Aby Warburg and his Library for Cultural Studies played a crucial role in this regard. In the same period, as an integration of his systematic research, Cassirer published *Individuum und Kosmos in der Philosophie der Renaissance* (1927), *Die Platonische Renaissance in England und die Schule von Cambridge* (1932), and *Philosophie der Aufklärung* (1932), illustrating the development of the human reason and the emergence of philosophical idealism in modern European culture.

In the *Philosophie der symbolischen Formen*, Cassirer transforms the Kantian "critique of reason" into a "critique of culture" (ECW 11: 9), in order to show "the unity of the human mind (*Geist*) toward the variety of its manifestations" (ECW 11: 49). The goal is achieved by recognizing each cultural form as an application of a general symbolizing activity, which operates by relating a certain "content of meaning" to a "sensory sign," since the latter is the concrete representation of the former (ECW 9: 79). In this way, the human experience is understood as a well-organized system of symbols, and these represent reality from a meaningful perspective, being the medium of knowledge and interaction between a subject, an object, and other subjects. Whereas the first two volumes deal specifically with language and myth, the third inquires the connection between myth, language, and science, since they epitomize the three main functions of expression (*Ausdrucksfunktion*), representation (*Darstellungsfunktion*), and pure signification (*Bedeutungsfunktion*) that affect each symbolic form, according to the grade of autonomy achieved, in different proportions. In a fourth, never completed volume, Cassirer envisioned a critical assessment of the contemporary philosophy, including Georg Simmel, Martin Heidegger, Henri Bergson, Max Scheler, Ludwig Klages, and Oswald Spengler, as an exploration of the "metaphysics of the symbolic forms" and in particular the

problem of the metamorphosis of life to form (ECN 1).

Although Cassirer did not discuss the topic extensively, the law (*Recht*) is to be recognized as a symbolic form (Krois 1987; Coskun 2007), as much as it can be understood as the principle of conceptualization of the human interaction in society, i.e., as the way of symbolization that makes the formation of a social experience as a system of norms possible. This notion can be recognized in works elaborated between the end of the 1920s and the early 1930s, such as *Die Idee der republikanischen Verfassung* (1928, ECW 17: 291–307), *Wandlungen der Staatsgesinnung und der Staatstheorie in der deutschen Geistesgeschichte* (1930, ECN 9: 85–112), *Die Idee des Rechts und ihre Entwicklung in der modernen Philosophie* (1931–1932, ECN 9: 113–128), *Das Problem Jean-Jacques Rousseau* (1932, ECW 18: 2–82), and *Vom Wesen und Werden des Naturrechts* (1932, ECW 18: 203–228) – the period of Cassirer's highest intellectual and political exposure, as shown by his commitment to the Weimar Republic and an humanistic philosophy, respectively, in his office as rector of the University of Hamburg (1929–1930), and in the debate with Heidegger in Davos (1929).

Cassirer maintained that the intellectual and historical development of law is driven by opposing forces competing to hegemonize the understanding of social reality: the paradigms of metaphysics and realism, which, in spite of their radical differences of content, share a same substantialistic logic, and legitimize the legal norms through the reference to a self-subsisting external authority – be it divine, natural, or political, and the idealistic approach, which aims on the contrary at a purely relational determination of the validity of law according to the functionalist logic (ECN 9: 114–115). As long as in any form of human experience "each facticity" has "to refer to a pure ideality," then, in order to conceptualize and produce a social reality, the "particular legal rules" have to find "their legitimacy in universal principles of law" (ECN 9: 89–90; ECN 5: 21–23). In this precise sense of "*ordo ordinans*," the law is a basic norm determining the conditions of possibility for the regulation of human actions in a social order (ECW 18: 209), and, as a symbolic form, one of the functions making a meaningful communication in society possible.

The establishment of the Nazi Regime represented a dramatic turning point in Cassirer's life. After the anti-Semitic boycott and legislation in April 1933, he decided to leave Germany without return, and spent the last years of his personal odyssey in Oxford (1933–1935), in Goteborg (1935–1940), and in the USA. Cassirer's last appointments were at Yale University (1940–1943) and at Columbia University in New York, where he died in 1945 at the age of 70. This phase is characterized by a further exploration of the modern history of ideas, such as in the monograph on Descartes (1939, ECW 20), as well as by a dialogue with contemporary science, as shown by *Determinismus und Indeterminismus in der modernen Physik* (1937, ECW 19), *Zur Logik der Kulturwissenschaften* (1942, ECW 24: 357–486), or the posthumously published *Ziele und Wege der Wirklichkeitserkenntnis* (1937, ECN 2) and fourth volume of the *Erkenntnisproblem* (1940, ECW 5). Moreover, Cassirer intensified his study of philosophy of culture (1936, ECN 5: 29–104) and philosophical anthropology (1939–1943, ECN 6), paving the ground to the novel exposition of his thought given in *An Essay on Man. An Introduction to a Philosophy of Human Culture* (1944, ECW 24). In this work, he suggested a definition of the human being as a "symbolic animal" instead of the traditional "rational animal" (ECW 24: 31), translating the suggested turn to a "critique of culture" in the perspective of an "anthropological philosophy" (ECW 24: 13).

Cassirer also further developed his philosophy of law and society. In addition to the lectures on Hegel's moral and political philosophy (1934, ECN 16), a notable work is *Axel Hägerström* (1939, ECW 21: 3–116), which includes a critique of the Swedish philosopher's legal doctrine. Cassirer empathized the origin of law in both myth and language, but at the same time underscored the function of the linguistic representation for the development of legal concepts beyond their rooting in the mythical culture, in order to give a durable form to human actions (ECW 21: 99–101). Furthermore, Cassirer argued

for the irreplaceability of a concept of will that is purely rational and functional; this concept is neither reducible to an external coercion nor can be explained through a psychology of emotions, but rather requires an autonomous act of recognition in the present, as well as of commitment in the future, of the validity of law (ECW 21: 104).

During the Second World War, in the posthumously published *The Myth of the State* (1946, ECW 25), Cassirer addressed the problem of the origin of contemporary totalitarian regimes, whose key feature is the hegemony of mythical thought over rational thought (ECW 25: 7). These societies are shaped by political myths, which certainly refer to forms of language, perception, and action characteristic of the mythical stage of human culture and exploit narratives emerged in the history of the political ideas, but actually are an unprecedented phenomenon: the methodical reactivation and reproduction of mythical ways of communication and interaction through a social technology, which is applied by political movements to achieve absolute power (ECW 25: 277); the resulting community is based on radically emotional rhetoric, mass rituality, direct identification with the leader, fatalistic vision of history, and stigmatization of a mortal enemy (ECW 25: 278–288). In light of these developments, philosophy is asked to call for a political order based on the rule of law, that is, to take a stance for the paradigm of rational law at the heart of the European idealistic tradition starting with Plato and culminating in the modern Enlightenment (ECW 25: 61–77, 163–186). Furthermore, a philosophy of culture is able to reveal weaknesses and strengths of political myths, fostering a successful strategy of intellectual fight (ECW 25: 290–291): Referring to Spinoza, Cassirer ultimately suggested that political myths are techniques to manipulate instincts and to convey passions, so the "antidote" is to educate and to reinforce active moral emotions such as "fortitude" and "generosity." On this basis, "the wild chase of our passive emotions" is contained, the "freedom of the individual mind and of human society" is secured, and a "truly human" order is built up through the power of reason (ECW 24: 264–265; ECN 9: 221–224).

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Causality and Imputation: Hans Kelsen's Perspective

► Kelsen, Hans: Causality and Imputation

Certainty: Legal

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Introduction

The principle of legal certainty is such a multidimensional principle that it is difficult to define.

Attempts to define the principle have been controversial. For example, *Xavier Groussot* provides a typical, yet a bit obscure, definition stating that legal certainty reflects the ultimate need for clarity, stability, and intelligibility of the law (Groussot, General Principles of Community, 2006, p. 189). In general, legal certainty is taken to express a fundamental principle according to which the addressees of laws must know the law in order to be able to plan their actions in accordance with it. Legal certainty and the rule of law are closely connected, but they have a different meaning. The rule of law essentially aims at limiting the abuse of power. Perhaps the most relevant definition is the twofold division between formal and substantive legal certainty, between predictability and acceptability. The attempts to define legal certainty have been studied from a comparative perspective in the European context. These studies confirm that the formal elements of legal certainty are relatively often balanced with its more substantive elements (e.g., Raitio, The Principle of Legal Certainty in EC Law, 2003; Paunio, Legal Certainty in Multilingual EU Law, 2013; Fenwick-Siems-Wrbka, The Shifting Meaning of Legal Certainty in Comparative and Transnational Law, 2017) In the following presentation this conception of legal certainty is illuminated more thoroughly.

Juristic Problem: How to Define Legal Certainty?

The twofold definition of legal certainty is based on Aulis Aarnio's and Aleksander Peczenik's definition of legal certainty (Aarnio, The Rational as Reasonable, 1987; Peczenik, On Law and Reason, 1989). The formal aspect of legal certainty refers to the requirement of eliminating randomness from legal decision-making activity. According to Aarnio this intertwines with the concept of predictability. For example, a judicial decision cannot be based on coin-flipping. The outcome of the case is not predictable merely because the probability of a decision is known to be 1:2. The substantive aspect of legal certainty requires in turn that the solutions adopted in judicial decision-making must also be substantially right. This can be called the demand of acceptability. Peczenik's "Hitler argument" illuminates the demand of acceptability. Accordingly, the laws and decisions against the Jews were predictable and did not breach the formal legal certainty, but they were not acceptable in the light of generally accepted moral norms. One could refer to various human rights instruments in this context. However, the principle of legal certainty has often been used and understood in a formal sense implying the idea that legal decisions should be predictable (Peczenik 1989, p. 31).

As an underlying principle of law, legal certainty cannot be formulated in a specific way, because the circumstances to which it is supposed to be applied are difficult to determine. For example, legal certainty can be related to various circumstances, whereas the more specific principle of equal pay applies to the relationship between an employer and employees. Principles are often intertwined and suitable for "weighing up and balancing," which in turn implies that principles do not necessarily have any predetermined scope of application. However, one can describe the typical situations in which the principle of legal certainty has been applied in practice.

In the context of European law, the principle of legal certainty refers to the non-retroactivity and the protection of legitimate expectations in particular. As regards non-retroactivity, a distinction can be made between true retroactivity of the law, i.e., its entry into force on a date prior to its adoption, and the immediate application of the law to existing situations. True retroactivity is normally forbidden, since it would mean the application of a legislative measure to a situation which is fully completed. However, new procedural rules may be immediately applied to previously initiated cases. New substantive rules may also be applied to the future consequences of facts which predate the introduction of the new rules (Schermers – Waelbroeck, Judicial Protection in the European Union, 2001). The protection of legitimate expectations should usually be based on legislation. While this is not always necessary, legitimate expectations require that an individual must be able to point to a course of conduct or a "specific assurance" on the part of the authorities as a basis for legitimate expectations. The

principle of legal certainty can also be relevant in the context of the revocation of unlawful legislation as well.

Peczenik has listed the following requirements for decision-making to which legal certainty (*rättssäkerhet*) can be related especially in the Nordic context (Peczenik, Vad är rätt?, 1995, p. 89):

- The principle of legality, (the legal decisions must be based on law)
- The legal texts must be clear and precise-The prohibition of retroactive penal or criminal law
- The prohibition to use analogy in applying sanctions in penal law
- Prosecutors must give proper reasons for their charges
- The principle of objectivity, (similar cases must be treated and decided in a similar way)
- The prohibition of arbitrariness in judicial decision-making
- A requirement that the facts of the case be properly described
- An obligation to justify judicial decisions
- The right to be heard
- The prohibition of misuse of powers
- Judicial review of administrative decisions as well as the judgments of the courts
- The right to have access to a competent court
- The right to get an instruction as to how to appeal to a higher court or tribunal
- The possibility of a public control of the decisions by official publications
- Decisions must be given in reasonable time
- The principle of openness in decision-making
- Oral proceedings
- The limited number of the courts with a special jurisdiction, e.g. ad hoc – courts
- The independence of the courts and administrative tribunals in relation to other state organs

Discussion: The Expectation of Legal Certainty

The expectation of legal certainty sensu stricto means that every citizen has the right to expect legal protection (Aarnio 1987, p. 3). Furthermore, the courts' obligation to give legal protection is such that the citizen's legal problem is dealt with in accordance with the law and in an objective way. *Marc Van Hoecke* elaborates objectivity in legal decision-making from an important viewpoint (Van Hoecke – Husa (eds.), Objectivity in Law and Legal Reasoning, 2013). The judge must be completely neutral to the case at hand. Here "objectivity" means having no subjective feelings in favor of one of the parties. He has illuminated the concept of "the appearance of neutrality" by describing the Belgian "Spaghetti case." In this case the impartiality of the judge impaired because he had participated in a "spaghetti evening" organized by the parents of the victims during the investigation of the crime at hand.

The courts must also make a justified legal decision in the case at hand. It is not acceptable for a court to refuse to make a decision (*denegatio iustitiae*) because people expect access to justice. There might be exceptional reasons based, for example, on procedural law, when the court decides not to give a judgment. Courts nevertheless have in principle a legal obligation to reach a decision irrespective of the difficulties related to its decision-making. Uncertainty in judicial decision-making should not be evaded merely by referring to the authority of the court. Peczenik lists three conditions for legal decisions (Peczenik 1989, pp. 29–31):

1. The decision is supported by a statute and/or another source of law
2. In hard cases the decision is also supported by moral value statements and
3. One can reconstruct legal decision-making as a logically correct process of reasoning

According to Aarnio, the expectation of legal certainty sensu *largo* contains two substantial elements: the demands that arbitrariness must be avoided (formal legal certainty) and that the decision must be proper and thus acceptable (substantive legal certainty) (Aarnio 1987, p. 3). Formal legal certainty can be defended by stating that courts have to behave so that citizens are able to plan their activities on a rational basis, which in turn is a necessary condition for the continuity of society. The need to eliminate randomness from

judicial decision-making requires rational legal reasoning. The minimum precondition for such reasoning is that the courts support their decisions with legal norms. This precondition is connected with the principle of legality, which has significance especially in criminal and penal law. On the other hand, those who are inclined to stress substantive legal certainty tend to demand that courts must ensure that legal norms cohere with arguments based on human rights (or moral considerations) as well as teleological arguments, which pursue the objectives of the legislation (Peczenik 1989, p. 34). The expectation of legal certainty also requires that the decision is reasonable as an outcome of the rational legal reasoning. Thus the substantive aspect of legal certainty means that the judicial interpretation must be in accordance with the law and it has to meet certain minimum distinctive criteria of equity and justice.

Peczenik's Hitler argument illustrates why the requirements of legal certainty are not fulfilled without the substantive legal certainty. The core of Peczenik's Hitler argument is shared by Aarnio, who has in turn referred to the Cambodia of Pol Pot as an example (Aarnio 1987, p. 38). The Hitler argument has been criticized by various commentators including *Nils Jareborg*, who has pointed out that the content of certain Nazi laws was absurd, but not the concept of legal certainty as such (Jareborg, Straffrättsideologiska fragment, 1992, p. 90). In general there seems to be a tendency to criticize the Hitler argument, especially among the legal positivists, who would like to keep issues of law and morality separate. For example, one might conclude that it would be like "[taking] a step out of the sphere of law" to include the aspect of acceptability within the framework of legal certainty and valid law. *Petter Asp*, for one, maintains that law can never give a final answer to what we as human beings should do in a situation described by Peczenic's Hitler argument, but it eventually gives an answer to a judge what he/she is obliged to do (Asp, EG's Sanktionsrätt, 1998, p. 33). In general, predictability can be related to the inner logic of judicial decision-making, to the subsumption of the fact and norm premises, whereas acceptability relates to the content of the decision.

The requirement of substantive legal certainty can also be linked to views of democracy. Peczenik has argued that democracy requires legal certainty. Legal certainty in turn presupposes a certain degree of respect for democratic values (Peczenik 1989, p. 40). Legal decision-making ought to be loyal to the democratically elected legislature. On the other hand, when the law is vague or unclear, interpretations other than those based on linguistic arguments prevail. Aarnio in turn points out that one of the most important properties of a mature democracy is openness, which facilitates the external control of decision-making. He adds that the courts do not fall completely outside the scope of democratic control, although they are independent of other power centers in society. The requirement of openness in turn leads one to conclude that decisions must be justified in such a way that considerations relating to moral or social values are revealed (Aarnio, Reason and Authority, 1997).

Alternative Philosophical Answers: The Threefold Conception of Legal Certainty

The question of acceptability and the Hitler argument can be linked with the issue of the validity of law. Law is not valid unless it is acceptable. *Jerzy Wróblewski's* three conceptions of validity – systemic validity, factual validity, and axiological validity – are important for defining the concept of legal certainty (Wróblewski, The Judicial Application of Law, 1992). Aarnio makes similar distinctions in terms of systemic validity, the efficacy, and acceptability of legal norms. Systemic validity can be defined with reference to a norm's formal source of origin, factual validity with reference to the operative "law in action," and axiological validity with reference to a norm's acceptability in light of social and moral values. *Raimo Siltala* prefers the terms positivist, sociological, and axiological (naturalist) validity, with reference to the basic postulates of Legal Positivism, Legal Realism, and Natural Law Theory, respectively (Siltala, A Theory of Precedent, 2000). Aarnio concludes that the legal order established by Hitler's regime was valid in the

systemic sense, but not in a material sense (Aarnio 1987, p. 38). Therefore he requirements of legal certainty were not fulfilled either.

The point of departure is based on Aarnio's and Peczenik's definition on legal certainty. In judicial decision-making, the formal aspect and substantive aspect of legal certainty are not necessarily equal in importance. The conceptions of validity, i.e., systemic, factual and axiological, are not equally significant either. The weighing of different validity concepts or aspects of legal certainty depends on the view-point of law in general. In Wróblewski's conceptions of validity the systemic validity is the basic model of legal validity for the statutory systems of law and the notions of factual and axiological validity are applicable only exceptionally (Wróblewski 1992, pp. 75–83).

If the Wróblewskian conceptions of validity were employed in defining the conception of legal certainty, the factual validity of law might be perceived as the demand of efficiency and stability in law. The term "operative law" refers to the law constituted by final judicial decisions. The most radical version of the concept of factual validity emphasizes the idea that "law in action" is the real law, and is opposed to "law in books": real law is that law which is applied as "law" (Wróblewski 1992, p. 84). Such a radical view might be understandable in the context of the communistic regimes such as Poland during Wróblewski's lifetime, so one may conclude that factual validity in its radical form is an extreme, yet illustrative, example. Thus one would have three elements in legal certainty:

1. Formal legal certainty (predictability)
2. Factual legal certainty
3. Substantive legal certainty, (acceptability)

Factual legal certainty can be perceived as intertwining with formal and substantive legal certainty. One may pose a question, whether case law or administrative practice can differ from the norm formulations and literal interpretation so that one could refer to factual legal certainty. Wróblewski's answer relates to obsolete laws. In the case of *desuetudo* obsolete laws are not considered to be in force anymore because they have not been applied by the judiciary for a long time even though the laws are formally in force. If a court unexpectedly applied such an obsolete law, it would be against factual legal certainty. One could point out that the court's behavior was unpredictable and thus against formal legal certainty. This idea is not tenable, however, because by definition formal legal certainty as a requirement of predictability is fulfilled if the formally valid legal rules are applied in the judicial decision-making. On the other hand, one might also point out that legal certainty was breached because of the material reasons related to the concept of substantive legal certainty. This latter counter-argument to factual legal certainty is much more convincing because one might not consider the application of obsolete laws acceptable in the light of the social and moral norms of that society. The conception of factual legal certainty remains a mixture of formal and substantive legal certainty and thus it is situated between the two extremes.

Factual legal certainty might be considered as a logical derivation of Wróblewski's threefold conception of validity. Since administrative practice is easy to alter and not as public as legislation, one might argue that it is not predictable and clear enough to be employed in support of the argument of factual legal certainty. The case law concerning the English *estoppel* doctrine and the protection of legitimate expectation in EU law prove that there is reason to employ such a term with respect to legal certainty. To be more precise, factual legal certainty relates to the certain conduct of an administrative authority on which the protection of legitimate expectations can be based rather than the vague and general concept of administrative practice.

In the Nordic jurisprudence these kinds of more nuanced or elaborated conceptions of legal certainty have been presented. For example, *Håkan Gustafsson* has presented an idea of social acceptability and moral acceptability in the context of substantive legal certainty (Gustafsson, Rättens polyvalens, 2002). This resembles the idea of the threefold conception of legal certainty, namely the formal, factual, and substantive legal certainty. The three elements of the conception of

legal certainty may, respectively, illustrate theories of legal positivism, legal realism, and natural law. Factual legal certainty is a logical derivation of *Wróblewskian* conception of factual validity. *Elina Paunio* has also noted that substantive legal certainty includes the factual aspect of legal certainty (Paunio 2013, p. 54). However, the idea of stability in (factual) legal certainty is actually not a novelty at all, since already in the 1980s *Franz Bydlinski* listed the following elements for the legal certainty:

> "*Rechtsklarheit, Sicherung, der Rechtsdurchsetzung, Stabilität des Rechts, Zugänglichkeit des Rechts*" (Bydlinski, Juristische Methodenlehre und Rechtsbegriff, 1982).

Conclusions and Links to Other Entries

The principle of legal certainty cannot be expressed by definitions alone, because it is an underlying general principle of law. However, one might conclude that the principle of legal certainty relates to the principle of non-retroactivity and the protection of legitimate expectations in particular, but more profoundly it can be related to the conceptual scale for weighing up and balancing between predictability and acceptability, between formal justice and material fairness, in legal decision-making. The idea of legal certainty as a scale from predictability to acceptability is not merely a question of legal theory, but it is also a question of legal politics.

Many entries in this encyclopedia can be related to legal certainty, such as:

Alexy, Robert: Statutory Interpretation
Atienza, Manuel: Argumentation in the Law
Manero, Juan Ruiz: Principles and Rules
Morawski, Lech: Methods of Statutory Interpretation
Peczenik, Aleksander: Coherence and Justice
Viola, Francesco: Positive Law and Natural Law

Perhaps the most obvious and important link is between the principle of legal certainty and rule of law/*Rechtsstaat*. The German conception of Rechtsstaat contain both formal and substantive elements. German understanding of Rechtsstaat underlines the importance of Fundamental rights, which can be illustrated by referring to the strong status of the German Constitutional Court (*Bundesverfassungsgericht*). The rule of law sets conditions for the proper exercise of legislative power, for example, banning or restricting retrospection, and stipulating reasonable generality, clarity, and constancy in the law. It requires that a legal system must exhibit a relatively high degree of coherence as a normative system. The rule of law can also be perceived as containing both formal and substantive elements. One tends to refer to the "thick" conception of rule of law, which includes at least the following elements: legal order and stability, equality of application of the law, protection of human rights, and the settlement of disputes before an independent legal body. To this extent, there is reason to refer to the so-called Venice Commission's report concerning the Rule of Law (European Commission for Democracy Through Law, Report on the Rule of Law, Venice 2011, Study No. 512/2009), wherein the Rule of Law is strongly connected to democracy and the requirement of the implementation of human rights.

Charron, Pierre

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Other philosophers linked to Charron (1541–1603): Michel de Montaigne, Erasmus of Rotterdam, Justus Lipsius, Thomas Hobbes, René Descartes, Blaise Pascal, and Jean-Jacques Rousseau.

Introduction

Pierre Charron (Paris, 1541–1603) was a French theologian, legal scholar, and philosopher who lived between the Renaissance and Baroque periods (Schneider 1970, 196). He is usually

associated with Skepticism, a philosophical school established by Pyrrho of Elis at the end of the fourteenth century B.C. and later spread by Sextus Empiricus at the end of the second century B.C. Skepticism experienced a later comeback in the Renaissance, thanks to the works of Erasmus of Rotterdam, following his controversy with Luther, and Spanish-Portuguese philosopher Francisco Sánchez. Michel de Montaigne, friend and somehow also mentor of Charron, also played a role in this revival due to the strong influence of humanist ideas contained in his French Humanism masterpiece: *Les Essais* (1580) (Popkin 1960, xii). Nevertheless, despite Montaigne's seniority over his disciple, it would be misleading to assume that Charron was a sheer epigone of Montaigne (Guichot 1899, 363): a minor figure within Humanism lacking original contributions or ideas worthy of consideration and without a legacy to pass on to both European Rationalism and the secularization process experienced by French philosophy during the seventeenth and eighteenth centuries (Stabile 1985, 28).

Fideism, Libertinism, and Skepticism in Pierre Charron's Works

As indicated by Richard Popkin, Pierre Charron's influence both in his time and up to the mid-eighteenth century was at least comparable to that of his master, despite being an almost forgotten figure in the history of modern philosophy. Indeed, Charron goes further than Montaigne in his particular commitment to breaking with Scholasticism for the sake of contributing to the ideology of *libertinage érudite* and the separation of morality and religion. This made him a pioneer of the defense of freedom of thought and religious tolerance, but it also made him worthy of ferocious criticism from Catholic theologians of his time. For example, Jesuit François Garasse accused Charron of supporting atheism and religious indifference in his essay *De la sagesse* (1601), a work subsequently considered to be the founding manifesto of libertinism.

Paradoxically, 8 years earlier in 1593, Charron published a theological treatise titled *Les trois vérités contre les athées, idolâtres, juifs, mahométans, hérétiques et schismatiques*, which was conceived as a counter-reformist piece opposing Calvinism. On the one hand, it defended that the only certainty for men came from the authority of the Church; on the other hand, it employed skeptic and Fideist arguments to openly contest both atheist and theist dogmatism situating the Divinity beyond the scope of human reason and knowledge (Charron 1970a, 11–34). Charron's open advocacy of Catholicism is shown in this book as well as in his *Discours chrestiens* (1600), a theological essay divided into 16 discourses addressing central aspects of the Christian life. Despite that, his Fideist epistemology (according to which only faith allows humans to reach God, who is beyond the scope of human reason) and his Neo-Pyrrhonist skepticism that separated morality from religion (summarized in his Montaigne-inspired motto *Je ne sais*) caused controversy among the French Catholic theologians of his time. They were divided between Charron's supporters (lead by Claude Dormy, bishop of Boulogne) and Charron's detractors (lead by the already mentioned François Garasse, who was convinced that underneath Charron's thin Fideist and proto-libertine coating lay a potential atheist) (Gregory 2000, 24; Popkin 2003, 61).

On the Treatise *La Sagesse*

That said, where Charron unequivocally shows his opposition to the religious fanaticism and philosophical dogmatism that tainted his time with violence, warfare, and religious persecution, is in his treatise on *La Sagesse*. This book, a literary reference work for seventeenth-century libertinism, introduces a notion of natural morality that will later influence Rousseau's *Émile* (Kaye 1982, 15; Pire 1962, 481–494). Certainly, it could be argued that this work is not original since the naturalist rationalism inspiring Charron's essay draws from other earlier Renaissance treatises, such as Justus Lipsius's *Les Politiques* (1598), certain parts of Jean Bodin's *Les six livres de la République* (1576) and *Le Théâtre de la nature universelle* (1596), Juan Huarte de San Juan's

Examen de ingenios para las ciencias (1575), and, obviously, Montaigne's *Essais.* Nevertheless, the novelty and originality of Charron's treatise *La Sagesse* lies in his consideration of the relationship between Nature and Reason not from the universalist-rationalist perspective employed by the aforementioned Renaissance classics, but belonging to the sphere of the private, aristocratic, and individual knowledge of the wise-man (*preud'homme*).

According to such an ethical-naturalistic approach, Charron regards the wise-man as some sort of *imago Dei* who faithfully observes the law of nature and remains undisturbed before the changes and vicissitudes of the world (Charron 1970b, 51–94). The author of *La Sagesse* considers that the wise-man always fulfills his duty and abides by the law, not because positive law is inherently compulsory but because of the superiority of his moral status. This is due to the fact that wise-men, unlike common people, do not need legal coercion to act according to reason (*At iusto et sapienti non est lex posita*); moreover, the wise-man would always behave properly even if there were no legal rules granting a peaceful coexistence in society (Stabile 1985, 94).

Charron distinguishes three levels of wisdom: firstly, a divine wisdom (transmitted from God directly to theologians and restricted to the religious sphere); secondly, a human wisdom (cultivated by philosopher and seeking *preud'hommie*, justice and moral conduct); and thirdly, a mundane wisdom (which corresponds to the popular wisdom or common people) (Gregory 1992, 106).

Conclusion

In line with his Skeptical mindset, Charron thinks that human fragility is an empirically demonstrated fact (Erskine 1997, 49–59). Thus, he thinks that law and the state are necessary to grant the survival of life in society. Precisely because of that, some specialists have stressed the importance of *La Sagesse* for the opening up of the process of secularization of the scholarship on law and the modern state, the function of which is deprived of any moral grounding and is instead aimed at instrumentally guaranteeing peace, order, and security for all individuals (Charron 1961; Kogel 1972; Gregory 2000, 27). It is precisely in this quest for a modern and secular state that could stabilize such a turbulent society as France in the end of the sixteenth century and beginning of the seventeenth century, that some scholars identify relevant similarities between Charron's model (which combines rationalist and Neo-Stoic principles, humanist ideas, and Christian theological postulates) and Thomas Hobbes's English Civil War-influenced *Leviathan* (Grendler 1963, 212–224).

As a conclusion, it could be said that specialists in Charron point to three reasons to consider the author of *La Sagesse* as one of the most influential scholars of his time: his contribution to the secularization of the Modern State, his separation of morality and Religion, and his Skepticism-based anti-dogmatic tolerance. Such philosophical stands would also explain why Charron is one of the most widely read authors among the major eighteenth-century French philosophers like René Descartes and Blaise Pascal (Kaye 1982, 23; Gregory 1992, 26–27; Adam 1991, 217).

Cross-References

► Legal Realism, French
► Virtue Theory and Law

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Children

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Introduction

Children are treated differently in society and have different rights and responsibilities than adults. Most people have certain moral intuitions toward children, such as that violence against children is worse than violence against adults (Lenta 2012) or that it is permissible to patronize children and tell them what to do. This also shows the first problem outline of the philosophical reflection on children and the phase of childhood. It is concerned with what makes children special and different from adults in morally relevant respects. This text is divided into three sections, each of which addresses important questions: What is a child, and so how can children and adults be distinguished? What rights and responsibilities do children have, and how can these be substantiated? What is the relationship between parents, children, and the state?

What Is a Child?

Childhood is both a biological phase of life and a social construct that is historically as well as culturally variable (Giesinger 2017). The most important characteristic that makes children children is obviously age. When childhood begins and when it ends is the subject of controversy and holds ethical relevance. The question of the beginning of childhood coincides with the question of the beginning of human life and (moral) personhood. At the end of childhood is the transition to adulthood and the rights and responsibilities (and many other social expectations) that come with it (Franklin-Hall 2013). It is useful, however, not to view childhood as a uniform phase but to differentiate it further. In particular, the distinction between childhood and adolescence is relevant because adolescents are not only different from children in their characteristics, but they are also ascribed more rights and duties (Betzler 2021). Nevertheless, children will be referred to here and the phase of adolescence will be included herein.

When it comes to the attribution of different (moral) rights and duties or to preferential treatment (e.g., in medical care or rescue in a life-threatening situation), then reasons have to be put forward for this. It is obvious that the starting point of such considerations is the assumed moral equality and equal value of all human beings. Not any quality may justify unequal moral treatment. For example, it is obviously wrong to treat women paternalistically and not men and to justify this on the basis of the trait of being a woman. Likewise, it is inadmissible to discriminate against people who are 50 years old by giving them different rights than people who are 30 years old. Normally, neither gender nor age is such quality that

constitutes a special moral status. So what is it that makes children special? The answer will not be related to age but to other qualities that typically correlate with age. Two of these characteristics will be identified here: vulnerability and autonomy.

Children are considered more vulnerable than adults (Andresen 2014). The concept of vulnerability can usefully be divided into at least natural and social vulnerability (Mackenzie et al. 2014). Children's natural vulnerability stems from their inherent characteristics and abilities. Young children have weaker bodies, they are outmatched by adults, and they do not yet have the skills to care for themselves. This makes children more vulnerable and in need. Children need the protection and support of adults and only learn to take care of themselves during childhood. On the other hand, social vulnerability means that people are at risk of being hurt because they are in a particular social situation. Road traffic carries high risks, but so does the power that others have over people. In this respect, children are more vulnerable than adults because they depend on others who can hurt, exploit, or endanger them. The family is a central place for children where they are both protected from being hurt and where they are also particularly vulnerable. Parents have power over their children (Lotz 2014). In addition, the social world is adult-centered, and children receive little attention in it. Children are affected by economic poverty; they are exploited and forced to work (Drerup and Schweiger 2019).

Applying the concept of vulnerability to children faces two challenges. The first has to do with the fact that not all children are equally vulnerable and that vulnerability changes throughout childhood. There are adults who are similarly vulnerable and needy as children due to illness or disability. There are also adults whose social vulnerability is much higher than that of many children. For example, most children in the Global North grow up in much better conditions than adults in many areas of the Global South have to live. Vulnerability between children varies according to their age, maturity, and also social characteristics such as class, citizenship, or gender (Schweiger and Graf 2017). Girls are more vulnerable than boys in patriarchal societies, and black children are more vulnerable than white children in the United States because of structural racism there. The second challenge is to move from describing vulnerability to its moral relevance. The question, then, is: What moral rights and responsibilities flow from children's particular vulnerability? The protection of the best interests of the child is at the heart of much ethical reasoning, and it most often refers to the fact that in order to grow up and live well, children must be protected from harm to which they are particularly vulnerable. The argument then goes, for example, that children have a moral claim to care because they could not survive or live well without it.

The second trait that can be used to justify a morally relevant difference between children and adults is autonomy. Autonomy describes both the ability to decide and act autonomously and the moral value that these decisions and actions are to be respected by others unless there are good reasons not to. A woman cannot be a little pregnant; she can only be pregnant or not, but people can be more or less autonomous. People can be autonomous with respect to certain issues or aspects of their lives and less autonomous or not autonomous at all in other respects. This is because autonomy has as its prerequisite not only cognitive abilities but also requires knowledge and education (and experience), and the realization of autonomy often involves resources, skills, and relationships with other people. Children are less autonomous than adults (Giesinger 2019; Mullin 2014). They are so in terms of first developing the cognitive skills, knowledge, and education to make autonomous decisions. But children are also less autonomous in that they have fewer resources of their own and are deprived of the opportunity to make their own decisions. It is certainly the case that very young children cannot understand the decisions they would have to make. They lack autonomy in this regard as a skill (almost) completely. Older children who can articulate their will may be able to make autonomous decisions with regard to some areas of life but not yet with regard to other more complex issues – they have local but no global autonomy, as Andrew Franklin-Halls has called it

(Franklin-Hall 2013). Trade-offs must be made in each case. Age limits correlate only imprecisely with the capacity for autonomy; some children are more mature than others, and some have earlier experiences that help them make better and more rational decisions. The protective space of childhood, as defended by Joel Anderson and Rutger Claassen, for example (Anderson and Claassen 2012), should allow all children to be relieved of the weight and burden of having to make impactful decisions. The protective space of childhood is meant to allow them to live more carefree lives than adults can and to be allowed to make mistakes. However, the protective space of childhood also has the potential to become too narrow a prison of children's autonomy if it deprives children of too many choices and opportunities for experience. The balance between protection and autonomy must therefore be reflected upon and redefined for each area of children's lives.

Autonomy for children, however, should not only be seen as an ability they lack but also has many positive aspects. First, childhood is supposed to be a phase in which autonomy is formed and experimented with. To this end, Monika Betzler has argued that parents have a moral duty to enable their children to practice and learn autonomy (Betzler 2015). Second, children and adolescents want to be autonomous, and autonomy has a moral value for them. From a certain stage of development, children are autonomous at least with regard to some areas of life and decisions (perhaps not fully autonomous but to a certain degree) in the sense of being able to reflect on their own preferences as well as adults. This must be taken into account in education and weighted accordingly against other considerations of protecting children's well-being.

Children's Rights

Children's rights can be seen as a central point of reference in philosophical discussion (Archard 2004; Brighouse 2002). It should always be noted that children's rights, as formulated at the level of human rights in the UN Convention, can mean both moral and legal rights. Two questions can be distinguished here. Why do children have rights at all? What rights do children have?

Unless one adheres to a legal positivism that relegates the question of the justification of children's rights to the level of legislation and political compromise, then there needs to be a justification of why children have these or those, why they have rights at all. While the will theory of rights is mostly put aside as useless for children, because children are not yet autonomous human beings but are only developing into such, the interest theory of rights has the most traction. Children, it can be briefly said, have objective interests and needs, and the rights they have are protecting them. In these respects, children and adults are no different, but because their interests and needs differ, they each have different rights. Contrary to the Declaration of Human Rights' assurance that they apply to all people, children are deprived of many of the rights enshrined therein. Children are not allowed to marry or work, they are not allowed to vote, and they are not allowed to determine their place of residence. The Convention on the Rights of the Child justifies this with reference to the best interests of the child, which must be protected, and also refers to the maturity of the child as a yardstick (Zermatten 2010). This more or less directly names the two characteristics of vulnerability and autonomy mentioned earlier.

The best interests of the child as the central reference point of children's rights can be filled with content in different ways. On the one hand, it would be possible to assume subjective well-being here, but this is mostly rejected as insufficient. Children's rights do not seek to protect children's happiness (although this may well play a role in some dimensions, such as the discussion of play and leisure) but rather refer to objective dimensions of children's well-being (Bagattini and Macleod 2014). Determining these objective dimensions is similarly difficult as determining which goods of justice are relevant to children. There have been attempts to define child well-being in terms of children's basic needs as well as in terms of those tangible and intangible goods that children need for a good life, or from

the capabilities approach as a set of capabilities and functioning (Bagattini 2014). All these attempts characterize similar problems: child well-being is multidimensional, the individual dimensions have to be selected according to certain criteria, and then it has to be determined how much of them is necessary to guarantee a sufficient level of child well-being. Obviously, philosophy is here dependent on discourse with many other disciplines such as medicine, psychology, pedagogy, or childhood studies. When a child's development is healthy or when it is endangered cannot be determined by ethics alone. Some dimensions of the child's well-being, which can also be found as legal entitlements in children's rights, seem at first glance to be less controversial: material provision (food, clothing, housing), health, or education. However, when it comes to determining the level of material provision, health, and education to which each child is entitled, a number of controversies arise. Children's rights are often understood as minimum conditions that aim to ensure that every child is sufficiently well provided for. More significant claims are then shifted to the discussion of global and social justice or the requirements of a good childhood. But even the minimal claims of children's rights are controversial, insofar as they also refer in each case to the context in which a child lives. Other key rights that can be derived from the best interests of the child are less obvious. These include, for example, the right to political participation or to privacy. In virtually all states, children are excluded from participation in elections at least until adolescence (Wiland 2018), and the right to privacy seems to be directly at odds with the fact that children should not grow up alone and that they should be protected by their parents (Mathiesen 2013). This always requires some form of monitoring and control of children. The simultaneous granting and restriction of rights is justified with reference to the best interests of the child. Children have such rights because they have objective interests (e.g., in participation), but at the same time they are not yet mature enough to realize them, which is why this right is granted to them only in rudimentary form or only as adolescents.

Parents, Children, and the State

Finally, the relationship between parents, children, and the state should be discussed here. In political liberalism, which is the dominant doctrine in political and legal philosophy, this triangle of relationships is dominated by questions of justification of intervention in the family. At the beginning, then, there is also the decision whether children disappear into family autonomy or whether they are equally important citizens of the state. Indeed, if children are also citizens of equal importance, then the state has an obligation to them as well, which it cannot simply abdicate to parents (Archard 2003). At the center of many discussions is the question of who may decide what for children and what rights parents have over their children. In principle, the UNO children's rights also emphasize that children have rights, i.e., they have their own subject status, but that the parents are the authoritative actors in educating and protecting their children and that this always also legitimizes a far-reaching power over the children that is aligned with their own values. This power and domination of parents over their children can be justified in different ways. One can understand children as the property of their parents or, more weakly, argue for the fact that the upbringing and shaping of one's own children according to one's own ideas and values is part of a life plan of the parents that is to be respected. The child is part of their good life, so to speak, that they exercise power over their children. A child-centered argument, on the other hand, places children and their rights at the center and argues that parents have their rights only because and only as long as they take good care of their children and raise them to be free and equal human beings (Archard 2010). In this perspective, parents have a responsibility to their children, and this responsibility is granted to them by the state. The question of the permissibility of state intervention arises less in the case of obvious threats to children's well-being, such as abuse or neglect, than in the case of conflicts of values and conflicts between the wishes of children and those of their parents. Conflicts of values include issues of religious upbringing such as

wearing a headscarf or performing circumcision or teaching anti-liberal values such as homophobia or xenophobia (Macleod 2017; Brennan and Macleod 2017). On the other hand, issues of children's capacity to consent have been discussed extensively, particularly in medical ethics (Alderson 2007; Tucker 2016). In law, there are different proposed compromises as to when a child may make decisions about medical treatment alone or jointly with parents. The focus here is mostly on the capacity for autonomy, which must be sufficiently present. Similar challenges arise with custody issues and other aspects where courts have to make decisions relevant to the best interests of the child. One suggestion was that children have the right to be heard but that their understanding is not decisive (Archard and Skivenes 2009).

Finally, when considering what global and social justice means for children, similar questions arise as those regarding differential rights and morally relevant differences between children and adults. At the outset, it should be acknowledged that because children are not yet fully autonomous and rational, they are to be included in the foundation of social justice differently than adults (Schweiger and Graf 2015). Children cannot create justice for themselves but depend on adults and the institutions they create to do so. Similarly, children are not involved in the social production of the goods that are to be distributed justly. Thus, children are not active as agents either in the constitution of power relations or in the economic sphere. Nevertheless, children are addressees of justice who have a just claim to certain goods or capabilities. Depending on the focus of the theory of justice, this may require that all children have equal amounts of the same goods (egalitarianism) or that children have sufficient amounts of the goods or capabilities relevant to justice. Which currency of justice is relevant to children or better suited to meet their interests and needs as children is a matter of debate (Macleod 2010). Certainly, however, some goods are only indirectly relevant to children because they need them but cannot do anything with them on their own. Thus, there is a need for mediators of justice, a position mostly attributed to parents, and only when they are unable or unwilling to do so does the state intercede as a substitute. Controversy also arises in the philosophical literature over whether children need certain goods of justice that adults do not, such as play and leisure (Gheaus 2015). Finally, at the global level, issues that address such injustices as poverty, exploitation, or underage refugees come to the fore.

Conclusion

Philosophical reflection on childhood is still in its infancy, which is why many issues remain unaddressed. While there has been increased attention to some issues such as justice for children, their rights, or their status in medical ethics, other aspects are still underexposed. These include, among others, the differentiation of the phase of childhood into different stages and what moral significance these have.

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Children and Justice

► Justice: And Children

Chinese Legal Thought: Mohist School

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Introduction

Confucianism has been widely known in China and around the world, but a rival philosophical school of thought to Confucianism in pre-imperial China and much less well-known both in China and beyond is Mojia or Mohism (墨家). This entry outlines and highlights the main philosophical ideas relevant to law of Mohism, one of the most important philosophical schools of thought in early China. Mohism evolved around the same time as Confucianism, Daoism, and Legalism as

one of the four main philosophic schools during the Spring and Autumn and Warring States period (770 BC–221 BC), fundamental to Chinese philosophy and thought and Chinese culture as a whole. It then declined and parts of the thought of Mohism were absorbed by Confucianism and Legalism and some later merged into the Taoism, disappearing as an independent school of thought. Its main contributions were in the areas of philosophy of logic, rational thought, and science to Chinese ancient thought and civilization.

Background

Mohism originates in the teachings of Mo Zi, from whom it takes its name. Mo Zi or Master Mo (墨子 Mo Tzu, or Mo Di, circa 479 BC–381 BC) was the founder of the Mohism.[1] There has been a lack of information surrounding Mo Zi's background who remains a shadowy and mysterious figure (Johnston 2010, pp. xviii–xix). It is believed that he came from the artisan class, the only well-known ancient Chinese philosopher who came from a low social economic background. He must have lived after Confucius (551 BC–479 BC) and prior to Mencius (372 BC–289 BC). It is possible that Mo Zi's life may have overlapped to some extent with either Confucius or Mencius (Chang 2016). Mo Zi is "one of the most important figures in Chinese history, a man whose name was constantly linked with that of Confucius from the Warring States period down to the beginning of the Han Dynasty" (Fung 1952, p. 76). (For more details about Mo Zi, see Johnston (2010), Wong (2012), Chang (2016).)

The book *Mozi* that carries the main philosophical thought of Mo Zi is one of the most important books in the history of Chinese philosophy (Johnston 2010, p. xvii). It embodied the most serious challenge to Confucianism by presenting a coherent body of doctrine articulated in a strikingly systematic way (Johnston 2010, p. xvii). Mo Zi and his followers were credited for initiating philosophical argumentation and debate in early China. They were the first in the tradition to engage, like Socrates in ancient Greece, in an explicit, reflective search for objective moral standards and to give step-by-step, tightly reasoned arguments for their views, though their reasoning is sometimes simplistic or rests on doubtful assumptions (Fraser 2015). They formulated China's first explicit ethical and political theories and advanced the world's earliest form of consequentialism, a remarkably sophisticated version based on a plurality of intrinsic goods taken as constitutive of human welfare (Fraser 2015). The Mohists applied a pragmatic, nonrepresentational theory of language and knowledge, developed a rudimentary theory of analogical argumentation and played a key role in articulating and shaping many of the central concepts, assumptions, and issues of classical Chinese philosophical discourse (Fraser 2015).[2]

Core Mohist Doctrines

Mohism is known for its ten central doctrines which provide a consistent portrait of Mo Zi's philosophy. The ten doctrines form the core of Mohism (For detailed explanation of the ten doctrines, see Johnston (2010), Chang (2016)). The core doctrines of Mohism are:

1. Exalting worthiness (*shang xian* 尚贤)
2. Exalting unity (*shang tong* 尚同)
3. Universal love (*jian ai* 兼爱)
4. Condemning offensive warfare (*fei gong* 非攻)

[1] For a complete English translation of Mozi, see Johnston (2010); for English translation of selected passages of Mozi and commentaries, see Chang (2016), Watson (1963). For discussions of Mo Zi and the Mohist school of thought, see Fung (1952, pp. 76–105, 246–278); see also Schwartz (1985), Waley (1939), Wright (1953/1967), Creel (1953), Graham (1978), and Chang (2016).

[2] A later branch of the Mohist school formulated a sophisticated semantic theory, epistemology, utilitarian ethics, theory of analogical reasoning, and mereological ontology and undertook inquiries in such diverse fields as geometry, mechanics, optics, and economics, and they addressed technical problems raised by their semantics and utilitarian ethics: see Hansen (2012).

5. Moderation in use (*jie yong* 节用)
6. Moderation in funerals (*jie zang* 节葬)
7. Heaven's intention (*tian zhi* 天志)
8. Percipient ghosts (*ming gui* 明鬼)
9. Condemnation of music (*fei yue* 非乐)
10. Against fate (*fei ming* 非命)

Of these, Mohism is best known for its advocacy for the doctrine of *jian ai* which is translated as "universal love," "inclusive care," or "impartial concern or care." *Jian ai* is the cornerstone of Mohism. The basic idea is that to achieve social order, people must inclusively care for each other, having as much concern for others' lives, families, and communities as for their own (for further discussion, see Johnston (2010), Chang (2016)). It is comparable and related to the concept of *ren* (benevolence) in Confucianism.

Without going into details regarding these ideas (see Johnston 2010, for detailed discussion), the core doctrines need to be considered in line with the overall objectives of Mohist philosophy: a wealthy, populous, and well-ordered society, or put it alternatively, a stable, peaceful, and well-administered society. In terms of some of the core doctrines, as pointed out, the divergence of Mohism from Confucianism and Legalism can be seen as where they believe the ultimate moral authority lies: for Confucianism, it lies with the family; for Legalism, it lies with the despotic ruler; and in Mohism, it is with Heaven and ghosts and spirits (Johnston 2010, p. xliii).

Mohism and Law

There is not a great deal of discussion on law or legal order in Mohism as expressed in the book Mozi. Nevertheless, interestingly, one of the prominent passages in Mozi is the discussion of *fa* meaning standards and models which happens to be the same character for the Chinese term for "law." *Fa* is polysemic, in both classical Chinese and modern Chinese. *Fa* means "model," "pattern," "standard," and "law" (for discussion of the keywords of Chinese law including *fa*, see Cao (2004, 2017)).

In Mozi textual discussion of *fa*, it refers to "model" or "standard", not "law". *Fa* is considered not as ethical principles, but virtuous agents, role models. This observation provides a key to understanding both the concept of *fa* and, more broadly, the orientation of Mohist views about language, knowledge, cognition, and reasoning (Fraser 2015).

For the concept of *fa*, Mozi has this to say:

> On Standards and Rules
>
> Master Mo Zi said: "Those who work in the world cannot do so without standards and rules. No-one has ever been able to accomplish anything without standards and rules. Even those officers who are generals and ministers all have standards. Even the hundred craftsmen in doing the work all have standards too. The hundred craftsmen make what is square with a square, make what is round with compasses, use a straight edge to establish what is straight, determine the horizontal with a water level, and the vertical with a plumb line. Whether skilled or unskilled, craftsmen all take these five things as standards. Skilled craftsmen are able to comply with these standards whilst unskilled craftsmen, even if they are unable to comply with them, will still surpass themselves if they follow them in their work. Thus the hundred craftsmen all have standards as a basis for their work. Nowadays, the greatest [achievement] is to bring order to the world and the next greatest is to bring order to a large country, but to attempt the things without reliance on standards is to compare unfavourably in wisdom with the hundred craftsmen." (Johnston 2010, p. 25, footnotes omitted)

Governance and social order was an important aspect of Mohist philosophy. The Mohists refer to the objective ethical standard they seek as a *fa* (model, standard), a concept that plays a central part in their ethics and their views on language, knowledge, and argumentation or reasoning (Fraser 2015). Here, *fa* denotes any guide, aid, or tool for following a norm or making a judgment; and explicit rules, laws, and definitions are all fa. But *fa* may also be role models, such as a virtuous parent, teacher, or ruler (Fraser 2015). As explained, they may be prototypes, exemplars, analogies, or pictures of some kind of thing, or they may be tools or measuring devices, such as a yardstick or a carpenter's compass and square; in short, any criterion or paradigm that helps us to make correct judgments or to act correctly can be a *fa* (Fraser 2015). *Fa* is among the key notions

through which Mohism has an important influence on the late Warring States Confucian thinker Xun Zi and his student Han Fei, leading representative of a style of realpolitik thought that later became known as the *Fa Jia* (School of *Fa*, or Legalism).

More directly in relation to law, Mozi has a few commentaries on *xing* (punishments or criminal punishment, see Cao (2004, 2017)). This is how *xing* is described in Mozi:

> In former times, the sage kings formulated the "five punishments" for the purpose of bringing order to the world. When it came to the You Miao's formulation of the "five punishments", this brought disorder to the world. Does this mean, then, that the punishments [themselves] were not good? No, it means that the use of punishments [themselves] was not good. This is why, in the words of the book of the former kings, the *Lü Xing (Punishments of Lü*), it is said: "The Miao people were not selective in their use of punishments. They just established the five violent punishments and call them laws." This is to say, then, that those who were skilled in the use of punishments use them to bring order to the people [whereas] those who are not skilled in the use of punishments conceived of the five violent punishments. Does this mean, then, that punishment itself was not good? No, it was that use of punishments that was not good. Therefore, they subsequently became the five violent punishments. This is why, in the words of the writings of the former kings, the *Shu Ling*, it is said: "The mouth may emit what is good or it may promote warfare." This is to say, then, that those who are skilled in the use of the mouth emit what is good [whereas] those who are not skilled in the use of the mouth use it to slander and incite enmity. Does this mean that the mouth itself is not good? No, it is the use of the mouth that is not good. Therefore, it is subsequently used to slander and incite enmity. (Johnston 2010, pp. 108–109, footnotes omitted)

Here, again, the Chinese word *xing* is polysemic and ambiguous, or it is ambiguous to modern readers of Chinese as we try to interpret ancient texts today. *Xing* originally means "corporal punishment," "torture," and later also means "criminal punishment" and "criminal law" (For discussion of *xing*, see Cao (2017)). *Xing* in the above quote refers to "criminal punishment" by the state. Here Mo Zi seems to approve of it as a general concept to bring order, but disprove of the violent use or abuse of it as that would bring disorder. Elsewhere in the text of Mozi, *xing* appears also but the meaning is ambiguous. For instance:

> Master Mo Zi spoke, saying: "Kings, dukes and great officers of the world all desire their states to be wealthy, their people to be many, and their administration to be well ordered . . ." (Johnston 2010, p. 81)

Here in the original Chinese, *xing fa* (刑法) was used which literally means "criminal law." Here it is translated as "administration" or elsewhere as "government" (Chang 2016, p. 113), but in other interpretations, *xing fa* in this text is understood as "criminal punishment and laws" (Mozi 2001). In Mozi, *xing zheng* (刑政) was also used, literally meaning "criminal law" and "government" or "judicial and administrative governance," or to use today's terminology, it refers to "rule by law."

On the whole, Mo Zi seems to be advocating the use of law, and in early China, law means criminal punishment, in bringing order to society. To Mohism, in order to maintain a system of collectivism headed by an absolute ruler, law is necessary, but Mo Zi did not talk much about it because law was the ruler's orders accepted by all under the ruler (Chang 2016, p. 139).

It is also believed that one notable contribution that Mohism made to Chinese law is the use of analogy in legal reasoning, not during his time, but much later in Chinese imperial time and later. As we can see from the Mohist texts cited above, analogy is used extensively in the explication of their philosophical ideas.

A related legal concept and practice often attributed to Mohism since ancient time in China including today is the belief and law as embodied in the expression *sharenzhe si* (杀人者死 one who kills must die). Although this is not explicitly discussed in Mohist classics, *The Annals of Lü Buwei,* another ancient text, described this way attributing the idea to Mohism:

> The Mohist superior man Fu Tun resided in the state of Qin. His son killed a man. King Hui of Qin said: "You, Sir, are old and do not have any other sons, so I have ordered the officials not to execute him. You, Sir, should listen to me in this matter." Fu Tun replied, "The law of Mohism says: 'He who kills another shall die; he who injuries another shall be

> punished (*sha ren zhe si, shang ren zhe xing*).' The purpose of this is to prevent the killing and injuring of other people. To prevent the killing and injuring of other people is the most important idea of justice in the world. Though your Majesty has ordered the officials not to execute my son, I cannot but follow the Mohist law." Fu Tun did not assent to King Hui's request and proceeded to have his son killed. A son is what a man is partial to. Fu Tun endured the loss of what he was partial to in order to uphold justice. He can indeed be called impartial.[3]

Sha ren zhe si, shang ren zhe xing (杀人者死伤人者刑 – He who kills another shall die; he who injuries another shall be punished) – this saying has been widely cited in popular Chinese culture, with a colloquial variation of the idea being *sharen changming* (杀人偿命 – for killing a person, one must compensate with one's own life). This has served as a popular justification for the death penalty for murder in Chinese criminal law. It was incorporated in successive Chinese imperial codes since ancient times and is still often referred to and widely held by the Chinese people today.

Conclusion

Mohism largely disappeared as an independent school of thought in ancient Chinese philosophy, but some of its core doctrines and ideas have endured in Chinese culture including legal culture and legal thought.

Cross-References

► Chinese Legal Thought: Overview
► Chinese Legal Thought: The Confucian School
► Chinese Legal Thought: The Legalist School

[3] The translation here from *Lüshi chunqiu* is my own. *The Annals of Lü Buwei* (*Lüshi chunqiu*) was believed to be compiled under the direction of Lü Buwei (?BC–235 BC), who was a statesman in the State of Qin during the Warring Period. The book contains compilations of various schools of thought in pre-imperial China. Twenty-six chapters of this collection are still in existence. Each chapter has a theme illustrated with stories from earlier sources. A modern Chinese translation is found in Guan et al. (1997). For an English translation of *Lüshi chunqiu*, see Knoblock and Riegel (2000).

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Chinese Legal Thought: Overview

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For most of the last century, Chinese Legal thought was not a topic of interest. If Chinese thought there was, it was "Confucian," and

therefore opposed to any kind of legal normativity. "Ni Dieu, Ni Loi" (No God, No Law) was the double negation concluding Marcel Granet's *La pensée chinoise*, likely the most elaborate and influential work on Chinese thought for the Francophone readership (Granet 1934). In a civilization entirely deprived of *transcendence*, that is submission to a superior and abstract norm, Granet contended, social life was a matter of congruence and of suitability to rules of propriety *immanent* in a static social order. When Escarra, an admirer of Granet and first rank Civil Law expert, attempted the first general description of Chinese Law, he considered it to be "not different from morals, and merely consisting in the enforcement of this morals" – in other words, deprived of any specifically *legal* (or juridical) quality (Escarra 1936). Meanwhile, the general consensus in the Anglophone scholarship was that Chinese law mainly aimed at repairing breaches to the cosmic order caused by evildoers (Bodde and Morris 1967; Van der Valk 1949; Needham 1951), a mainstream opinion that few scholars dared contest (Hsu 1970). In such a conception, law was but an instrument to infuse heavenly harmony into the social order, which implied suppressing or at least reducing litigation, preventing all possible conflict by displaying ritualistic rules, and proscribing all authors or practitioners who may have developed a disputatious spirit. As a result, law was "typically treated, if at all, as an afterthought, with little, if any, effort to integrate observations about it into the general picture being offered of Chinese intellectual, social, political, or economic life" (Alford 1997, p. 400).

The three last decades have seen deep revisions leading to a growing reintegration of law in the general picture of Chinese life, in all aspects but the intellectual. The influence of law has been restored in a variety of fields, including literature, theater, or medicine, resulting in the catch-all notion of "legal culture," which allows to remain at a very empirical and descriptive level, without enquiring about what exactly can be deemed *legal* (or juridical), in Chinese law. A focus on practice and practitioners has produced interesting insights on "legal knowledge" conveyed by specialized handbooks under the Ming and the Qing (Wu 2015), but the ways of reasoning and theoretical assumptions on which these practices were founded are scarcely evoked, if at all. The very notion of "Chinese thought" may even become out of age if were to prevail a recent trend opposing Qing magistrates' "legal practices," allegedly open to peoples' civil customs, to their "representations," allegedly imbued of the Confucian bar on litigation (Huang 2001). As a consequence, the intended rehabilitation of Chinese law amounts to interpreting Chinese practices and cases at the light of Western concepts, instead of trying to reconstitute the inherent rationality of the underlying Chinese concepts.

Paradoxically, this trend develops when many new elements for reconstituting Chinese legal thought on its own premises have surfaced. To proceed chronologically, the antique oppositions between Confucianism and Legalism, or in other terms between Rite and Law, can be reexamined at the light of recent archeological findings. Secondly, the long appraised codification pursued between the late Han and the Tang (third to seventh Century AD) can be connected to its underlying conceptual foundations. Then, a "science of the code" emerged, which left an abundant juridical literature that has recently become more easily accessible. Finally, the modern developments of legal skills can be relocated in a larger movement called "statecraft" (jingshi 經世) from the fifteenth century on, whose grounding in a new relationship between classical canons and current practices have been highlighted by recent scholarship. The conclusion will examine lineaments of the classical legal thought identifiable in the current legal developments of China.

Rites Versus Law: New Issues on an Old Sinological Cliché

That since antiquity China was governed by the means of rites (li 禮) rather than by law (fa 法) is a stereotype conveyed by the reading of Confucius and Mencius, or more exactly their interpretation by later scholars. Approximate translations also played their role. "Rites" is an acceptable

equivalent for *li*, once it is specified that these "rites" were intended to mold the individual subjectivity through wholehearted participation in ceremonies evincing the conformity of the social order to heavenly harmony. This order hinged on the three "natural bonds of subordination": from subject to Emperor, from child to Father, and from wife to Husband. By contrast, "law" is a very misleading rendering for *fa*. Indeed, the term originally had a much wider array of meanings, ranging from method, technique, or device to religious canon, or even to all kinds of governmental tools, in particular corporal punishments, until the term was belatedly given this restrictive sense by Meiji Japanese reformers of the late nineteenth century (Brown and Sanft 2011). The appearance in official histories of *fajia* (法家 the so-called "school of Law," or "Legalists") rendered the issue more obscure yet. Fajia was the name given to ministers and theoreticians reputed to have grounded the power of the First Emperor through a skilled use of reward and punishments, which they called the two "handles" needed to steer people into submission. Legalists' cynical and brutal use of such "laws" would have been the main cause of the general revolt that toppled the Qin dynasty, as the succeeding Han official historians maintained to justify putting an end to the terrifying Qin legislation, and starting a long process called the "Confucianisation of the Law." This process consisted of using law to promote Confucian values, infusing law with the spirit of the rites (Ch'ü 1965). On that account, legal thought was a misnomer for ritual thought with legal outcomes, and notable scholars conveyed the idea that only the introduction of Western Law in the first decade of the twentieth century awakened Chinese legal thought from a two millennia-long sleep (Meijer 1950).

This narrative is invalidated by recent research and attested by the archeological discoveries of the last 30 years. Pieces of legal texts discovered in the tombs of Qin and Han officials have given evidence of the continuity between the legislations of the two dynasties, thus confirming that the dark vision of Qin Legalism was a belated justification for their overthrow. Still, some of the characteristics wrongly attributed to "Legalism" apply well to ancient Chinese law as a whole. First, law was assumed to uniformly apply to all, except the emperor and heir apparent, who were the living source of law. Certainly, this basic principle was marred by a lot of exceptions, immunities, and special cases throughout history, but still, Chinese legal tradition remained consistently reluctant to legally sanction *privileges*. Second, Law was a tool for regulating the State apparatus, with its layered functions and accountabilities, which extended to society the same grid of merits and demerits. This is where the "legalist handles" of reward and punishment met with the Confucian "correction of the appellations" (zhengming 正名), stating that government starts with giving the right names to statuses, deeds, functions, and sanctions (Barbieri-Lowe and Yates 2015). Indeed, the most impressive feature of ancient laws was the minute classification of all activities, the effort to sort them into categories, and fix society in a scale of layered statuses, which can be ascended or descended according to a chart of merits and demerits. The underlying structuring principle was proportion: sanctions should match the demerit, punishment fit the crime, status correspond to the function, etc. From this vantage point, the master concept was *lü* 律, which, before gaining its meaning of "statute law," had originally been a rule of related proportions between the musical tubes constituting the pentatonic scale, which becomes a six-note scale – just as our seven note scale resolves at the superior eighth note or octave. This scale of six Yang (major) tubes, combined with a scale of six Yin (minor) tubes, as an earthly echo of the Celestial harmony, became a model of harmonious order. By extension, the *term lü* applied to standards of weights and measures and finally to the legal skill of "weighing" misdeeds to provide proportioned penal sentences. A second basic notion was "category/categorizing" (*lei* 類), which gave birth to massive collections of laws or ordinances, all neatly indexed. Legal *lü* were grouped by subject matters that constituted a proto-codification for penal issues.

On the other end of the normative order were decisions taken by the emperor (or in his name) to respond a particular situation, or endorse all kinds

of measures taken by the bureaus. The generic term for these ad hoc regulations was *ling*, which in the strictest sense meant an ordinance of the sovereign, but tended to designate all administrative regulations. *Lüling* came to designate legislation as a set of penal laws and administrative regulations completing each other. Penal *lü* were restricted in number, well ordered, and long standing, for they stated general principles in order to provide clear and firm guidance to officials when they mete out punishments in the name of the emperor. By contrast, administrative *ling* were by nature proliferative, ever-changing, and inconsistent. Although the polarity of these two genres was certainly in the mindset of the ancient lawgivers, the practice was messier, *lü* tending to proliferate and cover all kinds of matters, while *ling* frequently intruded into the penal realm. Moreover, other sources of law interfered, the most ubiquitous being precedents resulting from "parallelisms" between a new and older judicial decision (*jueshi bi* 決事比). This sort of analogy emphasizing formal similarities in the circumstances remained a cornerstone of the Chinese casuistic. There were also "judgments according to the Classics," which allowed the judge to override written law for the sake of superior values conserved in Confucian canons. Indeed, late antiquity scholars would comment on pieces of legislation or judicial decisions in the light of ritual Classics, and vice versa, thus showing that rites were not the opposite, but an integral part of law. It was clear already that "ritual books" assumed a prescriptive function by giving a set of models and warnings against misconducts, while penal laws provided a set of sanctions to punish misdeeds already committed, thence fulfilling a proscriptive function. However, too many other norms interfered, so that the ancient legislation sank into an incoherent and unmanageable hotchpotch.

Another durable foundation was the rational and detailed set of procedural rules as revealed by excavated documents. Since the second century BC, specialized scribes were trained to elucidate doubtful cases with evidential reasoning based on material proofs (such as forensic examination of the corpses). Until modern times, rationality, materiality, and secularity were to remain the characteristics of a Chinese justice immune from any supernatural beliefs, whatever the latter's prevalence in the surrounding society (MacCormack 1996).

C

The Chinese Way of Codification and Its Intellectual Foundations

The fruit of five centuries of innovations, the Tang codification appears as a systematization of basic elements sparsely present in the Qin-Han legislation. Most of the competing norms were suppressed, and the polarity of penal *lü* and the administrative *ling* was made more systematic, with the former endowed with a true monopoly over legal punishments. The latter was distributed into subcategories ranging from sovereign orders (*ling, chi* 敕) to prescribed formats of paperwork (*ge, shi* 式). It is therefore misleading to say that China only had a penal law, or to superimpose a civil/penal law dichotomy, when the system was built on a penal/administrative polarity. If the code of statutes was penal in its basic logic, it covered a much broader field than penal matters and used punishments as yardsticks to evaluate misdeeds, then allowing redemption according to fixed tariffs, and thus turning them into fines, damages, and other indemnities, etc. In the broad field they covered, punishments were connected to a body of shifting regulations, which they anchored in a firm legal ground. Statute laws were the core of the legal system, the subject of legal expertise, and they are therefore the focus of this presentation.

Indeed, only the *lü* were organized into a formal code. Deliberately restricted in number (560 under the Tang, 436 in the late Qing), the *lü* generally followed a standard form that strikingly fits with what the legal theorist H.L.A. Hart named the "if clause": "If anything of a kind X is done or omitted or happens, then apply sanction of a kind Y." (Hart 1994). They were regrouped in 12 sections, a number that evoked the aforementioned Yin and Yang musical scales, and the cosmic order it replicated. Within this general plan, laws were divided into 30 sections devoted to legal or administrative functions:

(Marriage, households, and taxes; violence and robbery; fraud and counterfeit, etc.) These specialized sections were preceded by one general part, which concentrated all the novelty of the new codification. Entitled "Laws of Names and Rules" (*mingli lü* 名例律), it consisted of basic definitions and standard ways for applying them; or to keep in line with Hart's views, these were a set of "secondary rules" specifying what the law was, how it could be changed, and how the judge must apply it (Hart 1994). Thus, the first articles provided the list of the regular five punishments and their subdivisions, the whole constituting a penal scale of 21 degrees. Subsequent articles specified in which conditions and along what rules punishments should be aggravated or lightened, redeemed or pardoned. Article 50 specified how a judge may reach a decision in cases that were not precisely provided for by law, thus regulating analogical sentences and their revision by higher courts. Complicity, recidivism, collective incriminations in cases of public crimes were also minutely defined and their effects on the sentence set forth. Just as important as the law itself, an official "commentary" (*shuyi*), just as important as the law itself, an official "commentary" (shuyi) was intertwined intertwined with each statute and skillfully highlighted the meaning of the law with cross-references to other articles, or questions-and-answers and definitions.

To sum it up, between the third and the sixth century AD, the heterogeneous and untidy statutes of the Han had been turned into an impressive ensemble providing fixed and unambiguous definitions of crimes as well as rules to interpret the law in a dynamic way. This took place in order to adapt to variable circumstances, and with a view to cover all possible misdeeds under a same set of provisions.

This legal tour de force had conceptual foundations, deeply rooted in a philosophical school called "Study of the Mysterious" (*Xuanxue*), attached to Daoism. Wang Bi (226–249), its most brilliant proponent, based his reflection on the *Book of Changes* (*Yijing* 易經), an old manual of divination that had been consecrated as one of the Five Classics (*wujing*) under the Han. This uncanny book was structured by the succession of 64 figures, called hexagrams because they were formed of six lines, themselves a combination of two trigrams, composed of three lines. These lines were either plain or broken, that is, odd or even, depending on whether they represented the Yang agent (hard, strong, male), or the Yin agent (soft, weak, female). The grouping of three even or odd lines in trigrams inserted in the system an initial disequilibrium, bringing dynamism to the system. Thus, hexagrams followed each other according to combinatory logic, each representing a situation to be interpreted by the diviner. Over time, ten commentaries were appended to the figures, all attributed to authoritative figures like the Duke of Zhou or Confucius.

Wang Bi authored the first philosophical commentary of the *Changes* and founded the reinterpretation that became the orthodoxy up to the Song Neo-Confucians and their followers during the Ming and Qing dynasty. This in-depth reinterpretation was tightly connected with a new reading of law, so much so that Wang Bi was later perceived as more Legalist or Taoist than Confucian. Among innovations that cannot be detailed here, a highly significant one was his proposition to regard hexagrams as vehicles of abstract meaning instead of symbolic representations charged with cosmological speculation, as had been the case for centuries. Thus, he allowed the *Changes* to become "a literary text rich in metaphysical, political, and personal significance" (Lynn 1994). Moreover, Wang Bi asserted that each hexagram was a unified entity whose meaning may be read as a "controlling principle" which could be developed by referring to *Judgments* (*tuan*), one of the earliest commentaries of the book that associated to each hexagram a statement assuming the form of a judicial decision, ending with a divinatory "verdict." Each hexagram had an inner structure made of the particular disposition of its lines, which placed it in opposition to the next and in resonance with others, thus composing a comprehensive web that helped identify particular moments.

Two decades later or so, Zhang Fei (third Century, dates unknown) composed his preface to the code of the Jin dynasty (265–419) that deeply resonates with Wang Bi's comments on the

Changes. Zhang Fei's preface was a blueprint for what would be called a "science of the Code" (*lüxue* 律學), which became the name for jurisprudence in imperial China. For Zhang Fei, the Code was not a mere set of statute laws, but the central part of an interconnected system, the structure of which should be understood and used with rational skill to allow the law to reach out to reality (Wallacker 1986). He carved the sentence that conceptualized the inchoate polarity of the ancient legislation: "Statutes (*lü*) and ordinances (*ling*) are the warp (*jing)* of state affairs, and the weft (*wei*) of the myriad of occurrences." Hence, this twofold legislation was able to regulate state bureaucracy, and to handle all kinds of events occurring in the empire, through the intercrossing of a "warp," *jing* 緯 – a term that also means "Classic," "Canon," – and a "weft": *wei* 緯 – a term also used for the esoteric reading of the Classics, which are supposed to deliver a hidden message allowing the reader to fathom the general trend of events.

Zhang Fei openly professed a divinatory reading of the Statutes by scrutinizing its "mysterious" inner structure. The complexity of the code required interpretation, just as did the interconnected hexagrams of the *Book of Changes* (Bourgon 1999). Like any hexagram, the Code of statute laws was to be regarded as a unified entity, reproducing a cosmological tripartition between Heaven, Men, and Earth, where law was at the place of Heaven. But like the *Changes*, the Code could not be read or applied naively as a collection of univocal precepts: there was an underlying pattern that the initiated user could activate if he wished to fathom out the "just punishment." For this, the preface provided him with a set of 20 legal categories, which would allow this user to assign any affair its "essential name" (*benming*), that is to say, its legal characterization.

The most important of these categories was certainly the classification of crimes according to the degree of evil intention. The notion that a crime essentially consisted not in the objective deed, but in the mens rea that had driven the offender to commit it, had been clearly stated in the antiquity. A Classic like the *Book of Documents* (*Shujing*) called to "pardon the gravest fault if nonintentional, punish the lightest fault if intentional." Another Classic attributed to Confucius, the *Annals* of his native State of Lu, inspired Dong Zhongshu (179–104 BC), the famous founder of the Confucian orthodoxy under the Former Han, to compile a selection of his own judgments, most of which exemplified the idea that intentionality must prevail over objective facts and circumstances (Queen 1996). But these were philosophical stances or rare literary pieces whose exact influence on the legislation and on judicial decisions is conjectural. Zhang Fei's preface can therefore be considered as the first systematic application of this notion, inserted in an official piece of legislation. Its most significant outcome was certainly the distinction of the "five kinds of homicides" according to the degree of intention, from "murder with premeditation" (*mousha* 謀殺) down to the homicide caused by negligence or mistake (*guoshisha* 過失殺), and passing by the more peculiar "homicide during horseplay" (*xisha* 戲殺). Though all homicide in principle invoked the death penalty, the law offered a variety of mitigations, according to circumstances. The same kind of categorization was made for other kinds of crimes, such as stealing with or without violence, with fraud, fakes, etc., many of these being grouped into antithetic or complementary pairs, just like the hexagrams were in the *Changes.* Zhang Fei also took advantage of the arithmetic aspect of hexagrams to use calculations in the handling of the code, either for estimating the price for redeeming punishments, or settling the "maxima" of sentences. Thus, penal servitude, for instance, could not be prolonged beyond 11 years, and a death penalty could not result from the mechanical accumulation of aggravating circumstances. To sum it up, the divinatory rationality inherent to the *Book of Changes* was turned into an amazingly advanced and complete systematization of law.

A more questionable influence of the *Yijing* was the alteration of the fixed legal definition according to aggravating situations. For instance, the distinction between intentional or accidental misdeeds was affected by "mutations" according to the matter it was applied to. Thus, liability could be modulated in line with statuses and hierarchy. Crimes

against the figures of authorities, rebellion, high treason, and parricide, not only deserved the harshest penalties, but also implied a drastic "mutation" of the common rule amounting to a systematic presumption of culpability. Thus, a great rebel's kin that did not denounce him, or a child causing a parent's death unintentionally, were held to be guilty and punishable.

A last influence of the *Yijing* reintroduced a human factor in the mechanism. A "just punishment" (*zhengxing*) could not result from a mere application of the written text, but asked for a complex process of interpretation. "He who pronounces a sentence must know the bottom of his mind, enquire about the objective and subjective situation, and grasp the essentials of the affair: 'nearby, he takes from his own self, afar, he takes from the myriad of beings,' and only then can he pronounce the right punishment." The quotation included in the precept comes from one of the *Yijing* commentaries, describing how the legendary Fuxi invented the hexagrams, by embracing his own subjective self as well as the objective world around him. Indeed, this stance implies some differences with our conception of objectivity and subjectivity, as shown in the basic notion of *qing* 情. *Qing* are what the investigating judge has to highlight to close a case and pronounce a sentence; it can be translated by "the facts," "the circumstances," but these include as well the relations of an evildoer with his victim(s), and the feelings that are supposed to have guided their behaviors (Wallacker 1986).

Meanwhile, *qing* also involved the investigator's mind, as a part of the "human relationships" on trial. A good judge therefore had to elucidate his inner motivations and prejudices, as well as his feelings about the individual he was adjudicating. The investigation of one's mind with techniques derived from the *Book of Changes* would remain a pillar of the "science of the code" that was conveyed in magistrates handbooks.

The Development of the "Science of the Code"

The "science of the Code" first found its most common expressions in the commentaries that ranged along the main texts of the statutes, in imitation of the Tang code *shuyi*. However, in post-Tang dynasties, and particularly under the Song (960–1279), the statutes and their commentaries were added other materials to help their application or palliate their inadequacies. These were, first, imperial edicts, which tended to supplant the statutes as "living law" stemming from the emperor's will, even in penal matters. Such edicts were concurrently published in massive compilations, with only a selection of them included in the Song code. Second, the most ubiquitous and long-lasting sort of law, however, was called *li* 例, a new term that should not be confused with the aforementioned character meaning "rite." These new *li* were "patterns of practices in use in a given organization or applied in a given incident" (McKnight 1987), which consolidated into rules once endorsed by explicit or tacit approval by the emperor. From their origin as practical examples, these "precedents" always had an uncertain binding force and should therefore not be assimilated with the precedents of the Common Law system. They compensated for this weakness by the strength of number, since they tended to proliferate in proportion with the complexity of state bureaucracy and the reinforced imperial control over it. While imperial edicts were a direct expression of the imperial will, *li* were produced by the daily activity of the most subaltern layers of the state apparatus. That *li* were insidious tools used by self-interested petty bureaucrats or clerks to subvert the law became a common critique during the eleventh century, only to grow in intensity in later times. Beyond self-interest, all stemmed from a structural weakness of the legal system: the necessities of administrative and judicial practice tended to infuse a flow of short term expediencies into codified laws, which were supposed to remain clear, fix, and restrained. In other words, growing technicalities in the judicial system threatened the polarity between *lü* and *ling* that structured the legal system.

The "science of the code" that developed between the early Song and the late Qing can be regarded as a collection of remedies to this deficiency. Under the Song and Yuan (late eleventh to early fourteenth century, roughly) appeared

treatises attempting to give cohesion to the Song code (Song *Xingtong* 刑統), by developing interpretative techniques along the lines Zhang Fei had already hinted at. Most authors took for starting point the following conundrum: the code being necessarily limited in the number of its provisions, how could one expect to cover the boundless circumstances of human misdeeds? This conundrum became hallmark for legal experts, who found ways to tackle the varying circumstances of crimes by making the most of the general organization of the code into categories. In a common metaphor, this was called holding the main rope holding the network of the law, so that the meshes are kept tidy and catch fishes or the right size. The general idea was to keep a right balance between constancy and flexibility, by allowing for skilled analogical quotations of the statutes when they did not apply exactly to a particular misdeed.

The method was inspired by the *Book of Changes* in Zhang Fei's style, but as much by the exegesis of another Classic, the *Annals* (*Chunqiu* 春秋) of the antique State of Lu, the motherland of Confucius, to whom the writing of this chronicle was liberally attributed. For a certain school of commentators in line with the aforementioned Dong Zhongshu, the sparse chronicle of 12 Dukes reign in the State of Lu concealed judgments of the Sage on major events such as parricides, regicides, and other violations of the most sacred principles (Cheng 1997). The glossators made a rule to read the chronicle as an intertwinement of constancy *jing* and expediency *quan* 權 (Langlois 1981). The character *jing* has been mentioned in its meaning of "Classics," or the "warp" of legislation, but it more broadly may designate the meridians and "veins" of the human body, the texture of a cloth, regular standards of behaviors, or constant rules, – in other words, *structure* and the way to put it into effect. As for *quan*, its basic meaning is "weight," "to weigh," and by extension "power" (or "rights" in modern Chinese), and in particular the ability to evaluate how the circumstances might alter the application of a rule – typically the leeway left to a general to adapt his scheduled mission to unexpected circumstances. The constancy/expediency dialectic guided debates about whether and how the principles proclaimed by the Classics may be applied to a different time, and some commentators used to treat it by raising *exempla* called *li* 例– – that is, the very character that came to designate the "precedents" introduced into the code to complement the *lü*. Thus, the exegesis of the canonical corpus provided for a consistent theoretical background to legal innovation and their handling by learned experts. This was particularly the case in the analogical reasoning. In spite of a common presumption, analogy as used by Chinese jurists was not an unrefined or vicious manipulation of the law, but a skilled technique, consisting of evaluating the seriousness of an unprecedented misdeed by referring to principles and using the penal scale provided by law for a similar misdeed. In practice, refined procedural checks ensured that the magistrate had not abused of his *quan* in adapting the law to circumstances.

Managing Penal Law with Benevolence in Statecraft

The constancy-expediency dialectic with its scriptural backing in the *Changes* and *Annals* remained at the foundation of the "Science of the Code" till the end of the empire, but from the mid fifteenth century on, a new doctrinal current took advantage of ancient premises to cultivate the magistrate's conscience and benevolence.

As a matter of fact, burdened as it was with a growing flow of new "precedents," routinely handled by unskilled magistrates, the code risked becoming an overpowering mechanism used by soulless servants. The surge of autocracy under the Ming dynasty, and the correlative downgrading of the bureaucracy, was marked in particular by the disappearing of all reference to legal skill in a magistrate's career. The new code proclaimed by the Ming founder, and continued by the Qing, was conceived so that any ingenuous magistrate be able to find the appropriate sentence and transmit the decision for oversight to the central Board of Punishments. Legal qualification was therefore concentrated at the very top of the judiciary and diluted in various levels of the bureaucratic communication. This does not mean that no magistrate was aware of law, but just that

this qualification was left to personal initiative. Indeed, the authors of many skilled legal handbooks of the Ming and Qing dynasties published them by themselves, with no or very few official acknowledgment (Will 2013). The "science of the Code" thus developed as a liberal art, thanks to authors who were often not members of the bureaucratic apparatus, but private counselors hired by posted magistrates (Chen 2015). Still, illegal pettifoggers, who were accused of making profits on litigations they prompted naïve commoners to engage in, published a special genre of "secret" legal handbooks (Macauley 1998). In sum, Ming and Qing autocracy kept legal knowledge and competences at the margins of the bureaucracy, where they throve and found of a new public of literate commoners. Another drastic expression of the autocratic concentration of power was the reordering of the penal review process around the emperor, through the institution of the Assizes. This system gained its full maturity and fame under the Qing appellation of Autumn Assizes, because they started on the first day of autumn, when executions would not contradict the seasonal cycle of regeneration. Assizes meant a thorough revision of all serious sentences by the emperor in person, prepared by a systematic scrutiny by the Board of Punishments, the Censorate, and the Court of Revision. This highly centralized system tended to make of each magistrate a mere provider of drafted sentences, leaving the responsibility of the final decision to the emperor and his ministers.

This legal evolution is likely at the origin of the new trend in legal thought that developed as an art of "moderating the punishments" (*shengxing* 省刑) or applying them "cautiously" (*shenxing* 慎刑). These two expressions can be found in handbooks of a new kind, which started with the "Essential Readings for Making Punishments Auspicious" (*Xiangxing yaolan* 祥刑要覽) by Wu Ne (1372–1457). A Censor known as a promoter of the Neo Confucian School, Wu Ne developed what may be called the legal doctrine of benevolence. Certainly, the concern for including benevolence in the application of legal punishments had a long tradition, well grounded in the Classics. However, what characterizes the "Essential Readings" and the many handbooks that continued it is the systematization of this trend to practical effects. As a preface said: "Dynastic legislations are to the sacred Classics like the lining to the clothing. One who does not understand the Classics cannot apply punishments in an enlightened and cautious way, one who ignores legislation cannot balance leniency and severity properly, both fail the same." (Bourgon 2016). The book elaborated skilled cross-references between classical extracts – mostly from the *Book of Changes* or the *Book of Documents* (Shujing 書經) – and tasks or problems frequently met in judicial practice. The oddest though most revealing was the selection of "Five judicial hexagrams," which allegedly allowed to balance leniency and severity properly. The method culminated in the quintessential hexagram *Zhongfu* (inner veracity) urging the Confucian Gentleman to "find a way to postpone death penalty." Appended to the book was Wu Ne's version of the *Parallel Judgments from under the Pear Tree*, an old casebook portraying a witty judge-detective elucidating tricky cases. In Wu Ne's deeply modified version, Neo-Confucian judges were mainly concerned with showing their benevolence so as to avoid that the ghosts of wrongly executed people seek revenge and damage their karmic fate.

The new legal doctrine found a consecration in the "Supplement to the Amplified Meaning of the Great Study" (*Daxue yanyi bu*) by Qiu Jun (1421–1495). This was a vast plan of reform presented to the emperor by a Censor and promoter of Neo-Confucianism. Indeed, Qiu Jun extended the tight connection between classical quotes and field practice to the whole administrative apparatus, thus founding the "Statecraft" (jingshi) current, which would exercise a decisive influence on generations of officials and scholars till the early twentieth century. Statecraft, or "reordering of the world" to translate the Chinese term more literally, has become famous for its promotion of "practical studies," but this is just one side of the coin. Indeed, all along the 160 chapters of his magnum opus, Qiu Jun had each new item start with a quote from a Classic, followed by exegetical comments by Neo-Confucian luminaries, and concluded by

the author's "remarks" teaching the emperor about how these canons applied to a particular aspect of statecraft. This method amounted to providing each specialized field of the administration with a sound doctrinal setting, thus turning the multiple state functions into a coherent program of permanent reform. In this sense, each of the 12 specialized sections contributes to a legal, or at least normative, revamping of the Chinese State. For instance, an important part of the 11th section devoted to "Control over Barbarian peoples" dealt with the legal requirements of war or peace. Still, to remain focused on the core legal expertise, the most significant part of the book was section 9, entitled "Circumspection in the administration of punishments." This section started with basic principles of the penal system that strikingly resembled those exposed by Wu Ne and his followers. Each had the same characteristic extracts from the *Changes* and *Documents* applied to judicial practice. The section continued with chapters devoted to questions of the day, like the tricky issue of introducing the "precedents" into the Ming code, as complements or amendments to statutes, thus codifying them as "substatutes". Judicial procedure, imprisonment, amnesties, pardons were similarly examined under the scope of their doctrinal legitimacy and signification at the light of the Classics. Two final chapters called to cultivate a commiserating spirit and clear-sightedness in the use of punishments. Thus, the Statecraft doctrine included the most advanced trends among legal practitioners and generalized its spirit and method to the whole administration. Legal practice, reciprocally, found legitimacy in its inclusion in an agenda founded on the highest canonical authorities. At the core of the doctrine was the judge's cultivation of his "inner veracity" and benevolence, which remained in the line of the "science of the code" initiated by Zhang Fei, but with considerable doctrinal developments.

This call to balance punishments with benevolence may sound bland and casual, but it should not be overlooked. First, it responded to a functional need in a system where the only safeguards were hierarchical checking and review of a case investigated by a magistrate at the local level. If the preliminary investigation was flawed or biased, it was difficult to restart it from scratch, even though that might happen, hence, the pertinence to develop moderation and clear-sightedness among magistrates. Still, the new trend was potentially disruptive to the autocratic monopolization of justice. While the Assizes system had been organized to stage-manage the image of an emperor pouring pardons onto his subjects like a fountain of benevolence, which implied that inferior judges would behave like automats of the law, the "spare punishments" ethics encouraged the lowly magistrate to deliver benevolent sentences of his own, with only perfunctory reference to the code. This had tremendous effects, if we believe the growing concern expressed by emperors and high officials from the mid-Ming to the late Qing. In 1801, for instance, an imperial edict sternly reminded magistrates that "If the living [criminals] must be treated with compassion, the dead [victims] should not suffer injustice." As high a legal authority as Shen Jiaben (1840–1913), the last traditional jurist at the Board of Punishments, complained about many murders deliberately turned into unintentional homicides by complacent magistrates, for the sake of "Caring for the living, not for the dead" (Bourgon 2000). This tacit rivalry between emperor and bureaucracy about the power of pardon was certainly a cause for the general trend toward commination, which meant that many penalties were more nominal than real.

Conclusion: A Lost Tradition?

In introduction of the best book on Chinese law of the time the former British consul in China could write that, despite obvious shortcomings and shocking methods such as judicial torture or some monstrous penalties, what he called the "Criminal law of the Chinese" was "infinitely more exact and satisfactory than our own system," an advantage he deemed mainly due to its "inherent consistency" (Alabaster 1899). At the time he was writing, however, this consistency built on century of original legal thought would soon be a thing of the past. The late Qing had to transplant

pieces of Western legislations, and the Republic followed suit after 1912. Elements of French and German Civil law, of Common law, with loans inspired from Swiss, Russian, or Turkish legal novelties were combined along models crafted by Meiji Japan jurists and under the scrutiny of Japanese professors of law. After 1949, the compendium of Republican laws would be abolished and superseded by Soviet laws, if any. The post-Deng Xiaoping era has seen piecemeal restoration of the Republican legislation, with ad hoc transplants of legal expedients to tackle hectic economic and social changes. For an entire century, legal thought has yielded to emergency and opportunity.

Meanwhile, the millennial legal tradition has left its enormous imprint. The *lü/ling* polarized legislation had been borrowed by Japan, Korea, Vietnam from the eighth century onward, and best works of the "science of the code" were periodically imported till the late nineteenth century. What is currently construed as "Confucian East-Asia" indeed relies on a common legal culture with local variations (Bourgon et al. 2021). Admittedly, the Nation-State building under Western guidance and law has dislocated the former *jus commune*, but not to the point of its complete disappearance. Basic legal terms and concepts still in use in these countries have been crafted by the Japanese legal reformers from Chinese characters. The "science of the code" thus retains a subliminal influence over East Asian legal culture (Bourgon and Roux 2015).

May the broken threads be tied again? The last scholars of the "Science of the Code" in the Board of Punishments, such as Xue Yunsheng (1813–1901), had busied themselves in the Sisyphean task to reducing the growing inconsistencies between ancient statutes and the substatutes appended to them. The general plan of revisions they drafted was finally employed by Xue's main disciple, Shen Jiaben to combine sections of the Qing legislation with the Western transplants. Qing jurists remained prevalent in the Supreme Court (Dali yuan) till the 1930s and infused Republican law with as much as they could of the "Science of the code" spirit. Beyond written law, the practice was in line with the bygone Board of Punishments: in reply to questions put by inferior courts, the Supreme Court rendered "interpretative judgments" that acquired legal force on the matter. This authoritative and centralized case-law was revived in 2011, when the People's Supreme Court was endowed with the prerogative to edict "guiding cases" (https://cgc.law.stanford.edu; Ahl 2014). Concurrently, the ongoing rediscovery of an abundant and diverse legal literature by a vibrant new generation of legal historians, the revival of Confucianism in its popular as well as scholarly dimensions (Thoraval and Billioud 2015), are elements in the reconstitution of the "science of the code." Certainly, an original legal thought worthy of China's brilliant past has not yet emerged, but it is on its way, as far as the *Book of Changes* allows conjecturing, of course.

Cross-References

- ▶ Chinese Legal Thought: Mohist School
- ▶ Chinese Legal Thought: The Confucian School
- ▶ Chinese Legal Thought: The Legalist School

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Chinese Legal Thought: The Confucian School

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Introduction

Confucianism may refer to a cluster of concepts closely related to the school of thought built up around the name of a great Chinese thinker, Confucius (*Kong Zi* or *Kong Fuzi*), who, it is believed, was born in 551 BC and died in 479 BC. Additionally, the term Confucianism may mean *Rujia* (School of Scholars), *Rujiao* (Religion of Scholars), *Ruxue* (Study of Scholars), and *Kongjiao* (Religion of Confucius). The term *Ru* existed long before Confucius lived, referring to those who acted as wizards and practiced fortune-telling. It gradually developed other meanings, such as "scholarly," "educated," and "civil."

Confucianism has a long history in China. Over the course of time, it has taken on many forms and connotations. One could talk about Confucianism before Confucius, Confucianism of Confucius, Confucianism after Confucius, authentic Confucianism, neo-Confucianism, liberalized Confucianism, defensive Confucianism, or vulgar Confucianism. However, a coherent theme links together all these different types of Confucianism – the preoccupation with the

elevation of human morality and its role in individual refinement and social construction.

None of these Confucianisms has a coherent or systematic theory of law, let alone a legal philosophy. So when we talk about Confucian legal philosophy, we are talking about legal ideas developed over the centuries and articulated in the writings by, or attributed to, subsequent Confucian scholars. Despite the fact that these legal ideas are expressed by different thinkers, a general trend can be detected, which can be described as normative dualism, which advocates using two, rather than one, systems of norms to regulate social relations and activities. Using one system of norms to positively maintain order but another system of norms to negatively punish disorder is a defining, if not unique, characteristic of Chinese experience. Perhaps the single important difference between Western (common law and continental legal traditions) and Chinese legal traditions can be characterized as the following: in the West both order and disorder are dealt with by one coercive external system of norms, be it religious in the Middle Ages or legal in modern times. Law in the West both protects and punishes, whereas, in China, law was designed as a negative force to punish disorder, while the glorious task of order maintenance was given to *De* (virtue) and *Li* (rules of propriety). The Tang Code made this quite clear by saying that "virtue and rules of propriety are the roots for governance, while penal law and punishments are instruments for governance." Many legal scholars have not been ready to accept this difference. For them, China's unique experience simply does not make sense because of its redundant nature.

The emergence of normative dualism in China was predicated upon an ancient schism between law, which originated from punishment as an institution of war, and the rules of propriety, which originated from sacrificial rites and ceremonies propitiating Heaven and the ancestors and which gradually transformed into behavioral guides for aristocrats and commoners alike. After coalescing from these sources, normative dualism endured as a component of Confucian thinking for more than 2000 years of Chinese history, probably due to the theoretical support from practical dialectical reasoning, which advocates recognition of both positive and negative sides of a thing or an issue and which is central to Chinese culture, as in the doctrine of *Yin* and *Yang* espoused by both Confucians and Daoists. In addition, as traditional Chinese judges were mainly trained in Confucian classics, their training guaranteed the implementation of normative dualism.

This entry will mainly focus on normative dualism in Confucian legal thought. It will, however, begin by providing a brief general survey of the legal ideas of three major Confucian thinkers as the background for understanding the concept of normative dualism.

Legal Ideas of Confucius, Mencius, and Xun Zi

Confucius: Rule of *De* (Virtue)

Confucius was born in the state of Lu and lived during the turmoil of political intrigue, social unrest, and pitched warfare which characterized the last part of the Spring and Autumn period (approximately 771–476 BC). Confucius studied music, archery, and angling. It is not clear with whom he studied, but he made it clear that his model was the ancient Duke of Zhou, who had helped to establish the Zhou dynasty (1046–256 BC). Confucius said he had met the Duke of Zhou many times in his dreams.

Confucius was a teacher, traveling from state to state to provide advice to the kings and aristocrats as well as to common people. In addition to teaching, Confucius is credited with editing the *Book of Odes* and the *Spring and Autumn Annals*, revising the music and ceremonies used at court, and writing commentaries on the *Book of Changes*. He himself didn't write any book. The main source of his thought is a book called the *Analects* (*Lun Yu*), which is a collection of his teachings composed by his students.

The *Analects* records the words and deeds of Confucius and his disciples in the form of quotations and dialogues. It contains Confucius's moral and ethical teachings, political convictions, thoughts on the art of rulership, and education

principles. For more than 2000 years, the Chinese have esteemed the *Analects* as the must-read book of their civilization. It has such significant influence on Chinese culture and Chinese people's mentality that it is regarded as the *Bible* of China.

Confucius inherited the idea of rule of virtue from previous thinkers but made it more illustrious by saying, "he who exercises government by means of his virtue may be compared to the north polar star, which keeps its place and all the stars turn towards it" (Analects, 2:1). Confucius served as the Minister of Justice for the state of Lu, responsible for hearing lawsuits. However, he famously said, "in litigation, I am as the others are, but the point is to eliminate litigation" (Analects, 12:13).

Confucius's view of justice might be said to be ethical. For him, maintaining family relationships seemed to be more important than pursuing justice. The Duke of She remonstrated with Confucius, saying, "Among us here there are those who may be styled upright in their conduct. If their father has stolen a sheep, they will bear witness to the fact." Confucius said, "Among us, in our part of the country, those who are upright are different from this. The father conceals the misconduct of the son, and the son conceals the misconduct of the father. Uprightness is to be found in this."

Confucius laid great importance on language and justification. He taught people that every link of human endeavor must be correctly carried out in order to realize the desired outcome, especially with regard to the use of language to conceptualize reality. Therefore, rectification of names is considered to be the right start of imposing punishments. "If names be not correct, language is not in accordance with the truth of things. If language were not in accordance with the truth of things, affairs cannot be carried on to success. When affairs cannot be carried on to success, rules of proprieties and music do not flourish. When rules of proprieties and music do not flourish, punishments will not be properly awarded. When punishments are not properly awarded, the people do not know how to move hand or foot" (Analects 13:3).

Mencius: Toward Rule of Virtue, Philosophy of Heart, and the "Right to Revolution"

Mengzi (Mencius) is thought to have lived from 371 to 289 BC. He is the second most important thinker in the Confucian tradition and was fondly esteemed as the Sage Minor. Like Confucius, Mencius spent most of his time traveling from state to state to find some ruler who would follow his teachings. However, he didn't accomplish much. His teachings are recorded in the book *Mencius*, which was not actually written by him. It was probably composed by his disciples, or disciples of disciples, in his name. The text was subsequently edited and shortened by an anonymous scholar in the second century AD, who also wrote a commentary on the text. This version of the text was used by subsequent scholars and is the version most widely available today.

Mencius argued for the innate moral good of human beings. He embraced the values developed by Confucius, such as benevolence and rules of propriety, and added concepts like righteousness and wisdom. Building on the Confucian idea of "benevolence," Mencius was of the view that the "humaneness" or "benevolence" that one shows to individuals should correspond to the type of relationship one has with those persons.

Following the teachings of Confucius, Mencius believed that people only submit to force unwillingly, because they are not strong enough to resist; but when they submit to the transforming influence of virtue, they do so sincerely with admiration in their hearts. Goodness brings honor but cruelty disgrace. When the good and wise rule, the able are employed; in times of peace, the laws can be explained to the people but the ruler indulging in pleasures and indolence courts disaster. If the good and wise are honored and the able are employed, gentlemen will come to the court.

Regarding law and governance, Mencius was fascinated with ancient culture, traditional codes, and the legendary ways of ancient kings. Like Guan Zi, an earlier thinker, Mencius took *guiju* (compass and squares/standards/norms) very seriously, saying that "[t]he powers of vision of Li Lou, and skill of hand of Gong Shu, without the compass and square, could not form squares and

circles. The acute ear of the music-master Kuang, without the pitch-tubes, could not determine correctly the five notes." Mencius advocated the development of some type of law to regulate private and social life. But he also advocated keeping to the traditions. He said that the principles of Yao and Shun, without a benevolent government, could not secure the tranquil order of the kingdom.

He famously said that virtue alone is not sufficient for the exercise of government and that laws alone cannot carry themselves into practice. This is typically a statement reemphasizing the Confucian normative dualism discussed below. Mencius was an ardent advocate of human goodness. But as this statement makes clear, to Mencius goodness alone is not sufficient. Law too is needed. While Confucius compared both ways and argued that probably the latter way is better, i.e., that ruling by virtue and ritual is much better than ruling by government maneuver and punishment, Mencius said that the two are interdependent so that both are indispensable. This is very different from what Confucius argued.

To say that he promoted the right to revolution would be somewhat exaggerated. However, he did argue that the Mandate of Heaven (Tianming) was conditioned on virtuous rule. He argued that a ruler's authority is derived from the Mandate of Heaven, that such mandate is not perpetual or automatic, and that it depends on good governance worthy of a virtuous sovereign. If the ruler did not rule virtuously, then the Mandate of Heaven would be rescinded, and somebody else would replace the present ruler. So his admonition to the rulers is that the people are to be valued most, the altars of grain and the land (traditional symbols of the vitality of the state) next, and the ruler least.

Mencius is better known for his philosophy of heart. He believes that in everyone's natural endowment of *xin* (heart/mind), there are four inborn senses (*duan*) for moral behavior: the sense of compassion, the sense of shame and disgust, the sense of humility and respect, and the sense of right and wrong. The sense of compassion is the starting point of humaneness. The sense of shame and disgust is the starting point of righteousness. The sense of humility and respect is the starting point of propriety, and the sense of right and wrong is the starting point of wisdom. People have these four basic senses just as they have four limbs. Since all people have these four basic senses within themselves, everyone should understand how to enhance and develop them. It is like when a fire first kindles, or a spring first bubbles out of the ground: If you are able to develop these four basic senses, you will be able to take care of everybody within the four seas. If you do not develop them, you won't even be able to take care of your own parents.

For Mencius good government was not as important as good education, because the people fear good government, while they love good education. Good government wins their wealth, but good education wins their hearts. Mencius believed it contrary to goodness to kill even one person and contrary to justice to take what one is not entitled to. The wise person knows everything but only considers urgent what demands attention. The good person loves everyone but only devotes himself in close association with the good and wise.

Xun Zi: Li-Fa Jurisprudence

Xun Zi ("Master Xun"), whose full name was Xun Kuang, is also known as Xun Qing, "Minister Xun," after an office he held. He was born in the state of Zhao in north-central China around 310 BC. Throughout Chinese history, Xun Zi probably has been much more influential than Confucius and Mencius. According to some scholars, Chinese philosophy, or Chinese legal thought, in the last 2000 years, is primarily the scholarship of Xun Zi. Because he valued both rites and law and coined the term *lifa* (rites-law), his philosophy of law has been called Li-Fa jurisprudence, which is the main substance of the normative dualism this entry will discuss in the next section.

Xun Zi, the book, is different from the *Analects* and *Mencius* in that Xun Zi himself actually wrote most of it. There are 32 chapters in the whole book, 25 of which are believed to have been written by him. The remaining chapters were actually add-ons by later scholars.

It is Xun Zi's view that human nature is evil and human beings are nasty and aggressive and need to be constrained. In governing, Xun Zi recommended promoting the worthy, dismissing the incompetent, punishing the incorrigibly evil, and teaching the average. He argued that proposals ought to be weighed in terms of justice and harmoniousness. To show favoritism and partisan feeling is the worst thing one can do. Xun Zi believed that if everyone were treated equally, conflict would result from insufficient resources. Distinctions were set up so that those above could watch over those below, so hierarchy is necessary for society to flourish.

Xun Zi placed great importance on li (propriety, ceremony, ritual). He explained that desires would lead to conflict and disorder if they were not regulated by principles of propriety and justice. He believed that social distinctions need to be made between the eminent and humble, elder and younger, rich and poor, and important and unimportant. The wise know how to think and be steadfast, but they also love ritual. A gentleman would be ashamed to treat even a slave in a way that offends the heart. He wrote, "Rites trim what is too long and stretch out what is too short, eliminate surplus and repair deficiency, extend the forms of love and reverence, and step by step bring to fulfillment the beauties of proper conduct."

Xun Zi analogized the relationship between government and people to the relationship between boat and water: The water can carry the boat, but it can also capsize the boat. Like Confucius and Mencius, he believed that capable governors should treat the common people with kindness, encouraging filial piety and brotherly affection by looking after orphans and widows and assisting the poor. A king works to acquire people, a dictator to acquire allies, and a despot to acquire territory.

Good governance needs to use both carrot and stick. Xun Zi advocated using both rules of propriety and laws to govern. That is because Xun Zi was a student of both legalism and Confucianism. He was also very well versed in Daoism and other philosophies. So he tried to combine both. He used the term *li* and *fa* together. He said human nature being what it is: man is born first with the desire to hoard selfish gains. If that desire is followed, exploitation will result and courtesy will disappear. Second, man is born with anger and hate in his heart. If these impulses are followed, injury and cruelty will abound, and loyalty and honesty will disappear. According to Xun Zi, human nature is wicked and wanton so it must be constrained.

Normative Dualism

In Chapter 2 of the *Analects*, Confucius remarks, "Lead them by political maneuvers, restrain them with punishments: the people will become cunning and shameless. Lead them by virtue, restrain them with ritual: they will develop a sense of shame and a sense of participation." This dichotomy lucidly summarizes the basic features of normative dualism that takes as its building blocks the concepts of virtue (德), rules of propriety (礼), government (administrative) maneuvers (政), and punishments (刑). It expresses, in very concise terms, the basic attitudes toward governance held by Confucius and his disciples. At the same time, this normative dualism is the key to understanding China's ancient legal tradition. Legal historians in China as well as overseas have done extensive and in-depth research on this topic. They generally maintain that this is a theory of governance characterized by "the combination of the rules of propriety and law" (礼法结合) or "morality supplemented by punishment" (德主刑辅). However, such denotations bear a very strong cultural orientation, which makes them inappropriate for universal acceptance as analytical models to be used by the international community of scholars.

This section will examine the basic meanings of the four conceptual building blocks of normative dualism identified by Confucius in the passage excerpted above.

De (Virtue)

The Chinese word *De* is not the same as the concept of arete in Greek culture or virtue in Roman culture, yet "virtue" may be the best

available English translation. *De* originally meant showing kindness to the prisoners of war, but in Zhou Gong's hands, it was transformed into more general concerns of humanity. Zhou Gong's theory of virtue contained three related aspects: paying respect to heaven, which was the source for the Mandate of Heaven; being filial to the ancestors, who were the models of virtue; and protecting the people, who were the foundation of the ruling house.

The idea of rule of virtue legitimized the succession of Shang by Zhou and helped the Zhou people to consolidate their domination. But more significantly for the Chinese tradition, later scholars like Confucius interpreted rule of virtue as the authoritative ideal of the moral civil order. This broad conception of the rule of virtue would endure for more than 2000 years. Despite its abstract and indivisible nature, the myth of the rule of virtue, as the late Professor John King Fairbank so termed it, remained the only predominant authoritative ideal throughout Chinese imperial history.

The predominance of this ideal created the expectation that good governance requires power holders to be virtuous. However, what happened in reality is that whoever was in power would be described as being virtuous, a common practice in the history of Chinese dynasties, as epitomized by the famous saying "The victor becomes a king and the loser a bandit."

Li (Rules of Propriety)

During the formative years of the Chinese moral civil order, two things were considered important for state stability: sacrificial ceremonies and military endeavors. It is from these two important activities that *Li* and *Fa* were respectively originated.

There is no doubt that the first group of *Li* developed and observed was rules of propriety for sacrificial rites. As propitiatory activities were often conducted by aristocrats, *Li* gradually evolved into norms for aristocratic interactions. By the Zhou dynasty, *Li* had become fairly detailed rules governing not only behaviors of aristocrats but also commoners. Because of this some scholars call the Zhou dynasty a period ruled by *Li*.

The Chinese character for *Li* signifies a sacrificial ceremony, and much of *Zhou Li* (the *Rites of Zhou*), an ancient work of political philosophy, concerns rules of propriety. Thus, Radcliffe-Brown firmly believed that *Li* was some kind of religion. Max Weber talked very little about *Li*. The term *Li* usually refers to three things: *Zhou Li*, *Yi Li*, and *Li Ji*. *Zhou Li*, also known as *Zhou Guan*, is actually a collection of institutes of the Zhou dynasty, which functioned as an equivalent to a modern administrative code. It recorded the responsibilities and powers of the offices of six major governmental departments, the head of which were called ministers of Heaven, Earth, Spring, Summer, Autumn, and Winter. The Autumn minister was charged with responsibilities of adjudication. *Yi Li* mainly describes norms for interactions among princes and ministers and other aristocrats, containing 17 chapters with specific rules concerning greetings, capping ceremonies, marriage, hunting, funeral rites, drinking, and imperial tribute. *Li Ji*, sometimes called the philosophy of *Li*, discusses ideas, principles, and standards of *Li* and the ways through which a gentleman attains internal refinement.

The separation of *Xing* ("punishment") from war and its application to civilian society as *Fa* is believed to have derived from prisoner of war policy. Large numbers of enemy soldiers (often ethnic minority residents around the fringes of Han China's traditional heartland) were captured and pressed into slavery by the winner of the war, who inflicted *Xing* upon these slaves to punish recalcitrance and compel obedience.

This difference of the origin of *Li* and *Fa* is of great significance for understanding why there were two systems of behavioral norms in China. It also makes the so-called transformation era in the Warring States period meaningless in terms of the normative order. Essentially, *Li* was used by aristocrats to maintain order within Han society, while *Fa* was mainly used to punish disorder, the causes of which were either tribes or slaves.

Zheng (Government Maneuvers, Policy, and Strategy)

In the chapter of *The Family Sayings of Confucius* on "Punishment and Government Maneuvers," Zhong Gong says to Confucius, "I heard that when there is extreme punishment, then there is

no need to have government maneuvers, and if you have excellent government maneuvers, and if there is excellent governance, there is no need to use punishment. Is that true?" Confucius answers, "The sages ruled by harmonizing both punishment and government maneuvers. Ancient sages cultivated people by virtue and unified them by rules of propriety. They also used government maneuvers to guide the populace and finally used punishment to prohibit some unwanted behaviors." If moral cultivation cannot change people and if the people do not obey the guidance but behave in a way that damages righteousness and degrades conventions, punishment will then be employed.

The concept of *Zheng*, which has not yet been seriously studied by China law scholars, holds the key to understanding the Chinese attitude toward normativity. It might also have the explanatory power to explain China's impressive economic growth under an incomplete legal framework. One of the meanings of the term *Zheng* is obviously governance related, be it policy or strategy or edict. It could also mean the affairs of the state or a community or a family. Whatever it refers to, it is not law. It may be rules formed to deal with emergent situations, but certainly not premade law. It is what really works in actual disputes and conflicts. It deals with various problems as they arise.

In the chapter "Explicating *Zheng*" of *The Family Sayings of Confucius*, Zi Gong asked Confucius why he gave different answers to a same question asked by the kings of three different states. Confucius replied saying that even though the question is the same, things are different for different states:

> Governance should be attuned to different circumstances. The King of the State Qi has constructed many pavilions and mansions and built parks and palaces for their lustful pleasure, and enjoyed entertainment provided by courtesans any time they wanted. Sometimes in one day he gave away one thousand battle chariots to each of the three families as rewards. That is why I reply to him that governance means to be thrift. There are three ministers serving the King of the State Lu. Internally, they colluded to cheat on the King and externally, they discriminated against guests from other states to blind the King's vision for forming good judgments. That is why I reply to him that governance means to get to the ministers. The State of Chu has a vast territory but a small capital. People do not want to stay in the capital and long for leaving. That is why I reply to him that governance means making those who are near feel happy and those who are far away feel connected. The circumstances of these three states are different, therefore different governance strategies should be adopted.

It is obvious that *Zheng* as used in *The Family Sayings of Confucius* is very flexible and varies with different governance needs. It is more like strategies or policies that respond to specific and concrete problems than law which is premade for general application to a class of issues that are more or less settled and stable.

Xing (Punishments)

Good governance is achieved by relying on both government maneuvers and punishment. The relationship between the two is that of order and disorder. It was recorded in *The Story of Zuo* that when the Xia dynasty was facing disorder, the *Punishments of Yu* were enacted; when the Shang dynasty was facing disorder, the *Punishments of Tang* were enacted; when the Zhou dynasty was facing disorder, the *Nine Punishments* were enacted. It is clear that "punishments" were meant to address disorder. There was no need to have punishment/law when order was established by virtue, rules of propriety, and government maneuvers.

In fact, as recorded in many historical sources, *Fa*, or rather its earliest form *Xing*, was originated from war. Three facts reflect this origin. First, the word *Xing* was used to denote both war and punishments. According to *Zuo Zhuan*, *Shang Shu*, and other sources, the word *Xing* was used, in various contexts, to refer to wars among the tribes, to stand as a byword for prisoners of war, or to denote the punishment of rebels. Even earlier, *Xing* was used to describe violence inflicted by the ancestors of the Han people to deter minority tribes from encroaching on Han lands. "Virtue is for cultivating the middle kingdom and punishment is for deterring the barbarians around" (*de yi rou zhongguo, xing yi wei si yi*). One contemporary historian, Lu Simian has underscored this latter point. He said, "*Xing* was created to cope with foreign tribes." Second, the official who was

responsible for legal affairs was also responsible for military affairs. The legendary Chi You, who was blamed for devising the infamous "five punishments," and Gao Yao, the superjudge, both held this imperial post. Third, the early instruments for punishing criminals were weapons used in war.

One chapter, entitled "Five Punishments Explained," of *The Family Sayings of Confucius* discussed the relationship between the rules of propriety and punishments. It is said that ancient sage kings made rules of propriety and punishments to address the moral defects of human beings. If people followed the rules of propriety, there would be no need to use punishments. Normally, the world order could be maintained by emphasizing the rules of propriety. In order to guarantee the effective implementation of the rules of propriety, punishments were then made, not in order to punish people but rather to educate them. Therefore punishments are rarely used. Punishments are used only as the last resort. "Ran You asked Confucius, 'It is said that in ancient times the Three Sage Kings and the Five Emperors had never used the five punishments. Is that credible?' Confucius answered, 'The Sages instituted the preventative measures for the purpose of keeping people away from violating them. That the five punishments were made but not applied was to achieve the supreme status of governance.'"

Conclusion

Normative dualism may have its direct theoretical roots in the doctrine of *Yin* and *Yang*. The ancient Chinese developed a concept called *Yin/Yang* which is a belief that there exist two complementary forces in the universe. One is *Yang* which represents everything positive or masculine, and the other is *Yin* which is characterized as negative or feminine. One is not better than the other. Instead they are both necessary and a balance of both is highly desirable. This thinking is different from the duality of most religions where one force overcomes the other, e.g., good overcomes evil. In the concept of *Yin/Yang*, too much of either one is bad. The ideal is a balance of both.

It was believed that the Yellow Emperor once said "Heaven was created by the concentration of *Yang*, the force of light; earth was created by the concentration of *Yin*, the forces of darkness. *Yang* stands for peace and serenity; *Yin* stands for confusion and turmoil. *Yang* stands for destruction; *Yin* stands for conservation. *Yang* brings about disintegration; *Yin* gives shape to things. . ." The Yellow Emperor said "The principle of *Yin* and *Yang* is the foundation of the entire universe. It underlies everything in creation. It brings about the development of parenthood; it is the root and source of life and death; it is found with the temples of the gods. In order to treat and cure diseases one must search for their origins."

The *Yin/Yang* doctrine served as the philosophical foundation of many branches of learning and institutions, including normative institutions. In the Han dynasty, Dong Zhongshu (179–104 BC), the main architect of Confucianism after Confucius and of ideological orthodoxy in imperial China, incorporated the *Yin/Yang* doctrine into his Confucian theory and legitimized the place of *Yin/Yang* in Chinese official doctrine and ideology.

When discussing the roles of *De* and *Xing*, he specifically said, "The Law of the heaven and the earth resides in *Yin* and *Yang*; *Yang* is the virtue (*De*) of heaven while *Yin* is the punishment (*Xing*) of heaven." "Spring and summer belong to *Yang* and it is the time to practice governance by virtue; autumn and winter belong to *Yin* and it is the time to carry out punishments." It is well known that based on this understanding, death penalties in ancient China were carried out only in the autumn of a given year.

Dialectical ways of thinking and the doctrine of *Yin/Yang* were widely accepted by Chinese literati and the population at large in contemplating their affairs, public and private. When this doctrine was applied to the relationship between freedom (*Yang*) and dominance (*Yin*), it likewise fostered a distinction between order and disorder. Consequently, it became possible to use different systems of norms to address the needs of order and disorder. Virtue, rules of propriety, and government maneuvers are positive *Yang* means, which are used to maintain order, while punishments are negative *Yin* means, which are used to address problems associated with disorder.

Cross-References

- ▶ Chinese Legal Thought: Mohist School
- ▶ Chinese Legal Thought: Overview
- ▶ Chinese Legal Thought: The Confucian School
- ▶ Chinese Legal Thought: The Legalist School

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Chinese Legal Thought: The Legalist School

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C

Introduction

While apparently largely accepted in Chinese philosophy and international scholarship, the term "Legalist" remains controversial if not misleading. The "Legalist school" (*fa jia* 法家) is indeed part of the many schools of thought that have flourished at the end of the Springs and Autumns period (770–453 BCE) and the beginning of the infamous Warring States (453–221 BCE) when a major political crisis was threatening the integrity of the State. The Legalist school of thought does not relate to one particular individual as in the case of Confucius 孔子 (551–479 BCE) or Mozi 墨子 (ca. 460–390 BCE), but to a variety of intellectual productions which were later gathered and coined as "Legalist" during the Han 漢 dynasty (206 BCE–220 CE). The Legalists departure from the past and previous intellectual traditions as well as their unique approach to the law in the construction of a strong, centralized, and rather repressive State has often been analyzed as one of the first Chinese contributions to the theorization and practice of authoritarianism.

Definition and Philosophical Foundations

First of all, it is important to distinguish the Legalist school from a pure reference to the law (fa法) as the Chinese signification of "fa" is manifold and can cover as much as standards, regulations, norms, and other more personal rules. According to the Han imperial Catalog, two texts are of major influence in the development of the legalist though: the *Book of Lord Shang* (*Shang jun shu* 商君書), attributed to Shang Yang (aka Gongsun Yang 公孫鞅 or Lord Shang 商君) and the *Han*

Feizi 韓非子 attributed to Han Fei whether or not the entire book had been penned by him. In addition, two other texts have been largely studied while only partially readable as not well kept over the years: the *Shēnzi* 申子 attributed to Shen Buhai (a chancellor of the state of Hán 韓) in the middle fourth century BCE, and another text, the *Shènzi* (慎) written by Shen Dao (慎到 300 BCE) and of whom very little is known.

In response to a conflicting context, the Legalists proposed to reach peace and stability by achieving unity of "All-under-Heaven" (*tianxia* 天下) through measures of stabilization devoid of moral considerations and so departing from tradition and previous thinkers such as Confucius, Mozi, or Laozi 老子 (fourth century BCE).

The Legalists and the Building of the Chinese State

Pragmatic, grounded, and oriented toward the elaboration of concrete measures to radically reform the State, the Legalists appreciation of the human nature revealed severe and certainly pessimistic. They dismissed the possibility of an ethical elite able to overcome its natural selfishness and truly support the ruler's political tasks. Hence the law was seen as coercion and a mean to protect social order through primarily punitive rules and a fierce control by the State of its subjects, including the bureaucracy on whose it relies to achieve its goals. From rewards to punishments, the righteous Legalists thinking on the construction of the imperial bureaucracy proved influential and participated to the consolidation of a monarchistic regime in which the omnipotence of the ruler could not be challenged. For Han Fei, in particular, the monarch was the sole guarantor of a political stability envisaged as the unique and so necessary basis of socioeconomic prosperity.

Conclusion

In this perspective, it is interesting to recall that the rich and complex Legalist thought was rediscovered in the twentieth century in a context of growing nationalist pride and State building. Whether controversial as referred to by Lin Biao in the 1970s to oppose Confucianism, or more balance as in today's Chinese scholarship, the Legalist school of thought deserve to be reinvested for it is a major contribution to Chinese intellectual history, which influence is still visible today.

Cross-References

► Chinese Legal Thought: Mohist School
► Chinese Legal Thought: Overview
► Chinese Legal Thought: The Confucian School

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Cicero, Marcus Tullius

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Introduction

Marcus Tullius Cicero (106 BCE- 43 BCE) was the first legal philosopher in history. In Cicero's

thought, we can find the Stoic conception of Natural Law, i.e., that Law is derived from God, Nature (Universe), and Human Reason. Indeed, Cicero inherits from Stoicism the Pantheistic view of Natural Law as right Reason in agreement with Nature and God (who is its author, its promulgator, and its enforcing judge as well). It is a true Law of universal application, unchanging and everlasting, valid for all nations and all times. While Cicero derived many ideas on Natural Law from the Greeks, he also contributed some key ideas of his own, for instance, that whoever seeks to disobey the Natural Law flees from himself and rejects man's nature. In other words, when man obeys the Natural Law he is obeying not only a natural and divine rule but also a rule that he gives himself as a fully rational and autonomous legislator. Here I will focus on the key aspects of Cicero's Natural Law Theory through three masterpieces of his legal and political thought: *De Re Publica, De Legibus,* and *De Officiis*, which had great influence over the medieval Christian conception of Natural Law through Lactantius (one of the Church Fathers) and Thomas Aquinas (the father of Thomism and considered the greatest theologian and philosopher of the Church).

Marcus Tullius Cicero: The First Legal Philosopher in History

Marcus Tullius Cicero was one of the great names of the Roman Republic's final days. Despite being a *homo novus* and having been born outside the aristocracy, he received as a young man an impressive education at the hands of some of the greatest philosophers, orators, jurists, and public figures of the day (of Cicero's teachers, it will suffice to mention such rhetoricians and orators as Apolonius Molon; philosophers as the Skeptic Philo of Larissa, the Epicurean Phaedrus, and the Stoics Diodotus and Posidonius; and jurists of such renown as the two Q. Mucius Scaevola – the Augur and the Pontifex). As an intellectual polymath, Cicero perfectly embodied the classical scholar who cultivated all the "humanist" disciplines (*omnium doctrinarum studiosus*). According to this republican intellectual model, the orator could be at the same time a jurist and the philosopher could end up a government man capable of averting any attempt to subvert or threaten Rome's institutions and traditions.

Of the painstaking study of and dedication of his life to these three intricately linked disciplines – law, oratory, and politics – Cicero gave elaborate testimony in some of his most influential works. Thus is it that, from a strictly legal perspective, for example, apart from his treatise on laws (*De Legibus,* 51 BC), there are descriptions of a treaty (*De Iure Civile in Artem Redigendo*, c. 55 BC) that did not survive to the present day, in which Cicero proposed the systematization of a veritable heap of jurisprudence, which was, until then and to his eye, disordered. According to Alfonso Castro, this treatise of Cicero's served as inspiration to the youngest, most progressive jurists of the day, as, for example, in the case of his friend Servius Sulpicius Rufus.

As for oratory, although Cicero distinguished among diverse forms, he preferred to consider himself above all a legal orator, as he declared in the first book of his treatise *De Oratore* (46 BC). The profession demanded a mastery of public and private law, in addition to eloquence and persuasiveness (Cicero's participation in the tribunals owed itself in part to his belief that it was a moral duty as *patronus* to defend his friends and *clientes*, as well as the opportunity that legal oratory presented for social and political mobility). In this regard, according to Jill Harries, although Cicero claimed that he knew only as much law as he needed to get by as an orator, "knowledge of law in its most technical and occasionally even pedantic sense was part of his culture" (Harries 2006).

With respect to politics, the works that best reflect his commitment to republican ideals and his calling to serve his country are, without a doubt, *De Re Publica* (51 BC) and *De Officiis* (44 BC). According to the patriotic and republican principles that inform Ciceronian political thought, the scholar who fails to involve himself in public affairs is wasting his wisdom. For this reason, in the first book of his treatise on the commonwealth he claimed that whosoever

wished to serve Rome must acquire power and influence, for only from a position of civic responsibility can one aid his country (*De Re Publica*, I, 10).

Finally, as a philosopher Cicero was not an original thinker, but rather an eclectic. Diverse sources of Hellenic philosophy converge in his doctrine, most importantly Platonism, Aristotelianism, and Stoicism. Yet, for many historians of Greco-Roman legal thought, this lack of philosophical originality in no way precludes recognizing in Cicero a sincere and impassioned interest in philosophy (among others, see Fassò 1966 and Shackleton Bailey 1971). More important still, due to his flair for systematization and talent as a writer, Cicero notably advanced the study of philosophy in Rome by first planting questions, opening them up to debate, and then expounding and disseminating the answers of the Greek philosophical greats. This explains why, even though Cicero did not ascend to that lofty category which Karl Jaspers referred to as "*die grossen Philosophen*" (the Great Philosophers) and even though, for that reason, the importance of his philosophical thought is limited (above all if one compares it with that of Aristotle or Plato), his work has nevertheless enjoyed such extraordinary renown in the history of philosophy. On this note, one might highlight from among his philosophical treaties *De Finibus Bonorum et Malorum* for its ethical ideas and *Tusculanae Disputationes* (both from 45 BC) for its dialogues on happiness.

The multidisciplinary nature of Cicero's doctrine allows different readings of the same material (specialized or comparative), depending on the approach one uses to analyze his work. The present study aims to examine but one of these multiple dimensions – perhaps one of the least familiar of his extensive bibliography, yet also one of the most suggestive and original from a thematic point of view due to its combining the two disciplines to which Cicero most dedicate himself: philosophy and law. Though Cicero was less an original philosopher than a compiler and disseminator of Greek philosophy, and though he was not a lawyer as his teachers the Scaevola or his friends Servius Sulpicius Rufus and Gaius Trebatius Testa (to whom Cicero dedicated a dense legal treatise by the name of *Topica*) were, but rather a consultant (as a young man) and an expert witness or authority on law as an adult (not without reason does the Anglo-Saxon tradition simply consider him a legal advocate), it is clear that, as Guido Fassò suggests, the vast legal experience our author acquired over the course of his career as a forensic orator and professional politician forced him to frequently treat problems of legal philosophy. Hence that, for those historians of legal thought, Cicero should be considered the first true philosopher of Law (Fassò 1966).

Although jurisprudential questions arise frequently in Cicero's writings, above all those questions surrounding situations which arise in everyday life and which have to do with justice and the law, the works that most interest us from a legal-philosophical point of view are essentially the three treatises *De Officiis*, *De Legibus*, and *De Re Publica*. The essay *De Inventione* (86 BC) from Cicero's youth and the aforementioned *De Finibus Bonorum et Malorum* and *Tusculanae Disputationes* are also of interest despite their indirect connection with legal argument. The following section focuses on one of the more subtle aspects of Ciceronian legal philosophy: his conception of the natural law (*lex naturalis*) as a law born from right reason (*recta ratio*) and not from the edicts of the praetors or the laws of the Twelve Tables. As such, it entails an unwritten and universal law, distinct from positive law (*ius positum*) and whose understanding requires us to probe the very heart of philosophy (*ex intima philosophia*), wherein we learn that the reason all of humanity holds in common is the source of the natural law. Thus, Cicero concludes that the nature of law is derived from human nature (*De Legibus*, I, 5, 17).

Natural Law as *Ratio Summa, Insita in Natura*

One clearly sees in Cicero's philosophy of natural law the influence of the Stoic belief in a divine *recta ratio* woven into nature that acts as the foundation of Law. Even though Cicero does not explicitly defend his idea of natural law until the third book of his treatise *De Re Publica* and even

more so in *De Legibus* (considered by many to be the first work of legal philosophy in the history of human thought), it is clear that 30 years before he had already referred to the idea, situating it in the forensic context of the practice of law. Strictly speaking, he treats it as a rhetorical *topos* under the heading of *inventio*. According to Cicero's view, the theory of Natural Law provides the orator with arguments that permit him to amplify the Civil Law and to compare it with nonjuridical principles. Therefore, a strategy of argument based on Natural Law is particularly helpful when the speaker wants to persuade his hearers that a given act, although illegal, is nonetheless right (*De Inventione*, II, 22, 65–68; *Topica*, 23.89).

As a legal orator, Cicero was fully aware that in Republican Rome the *ius civile* was the only law that obligated. The Roman civil law did not depend on any standard other than itself for its legitimation. In the same way, he knew that Roman jurisprudence did not differentiate between the two meanings (objective and subjective) that the term *ius* could possess. That is to say, on the one hand, understood as law and, on the other, as right. For the Roman legal experts, whose vision of the *ius* was formalist, something was deemed right in virtue of the fact that it was what the law enjoined. Although the rights derived from Natural Law had no normative bearing on Civil Law, Cicero believed that the orator could invoke Natural Law as an ethical principle, in connection with which he used the terms *aequum* and *ius*, as a means of appealing to the moral sentiments of the court in cases where the Civil Law, applied literally, would disadvantage his cause.

It is clear Cicero was convinced from the start of his career as a forensic orator that the same limitations constraining Positive Law, embodied in the *ius civile*, did not bind Natural Law. Although Positive Law and Natural Law both govern human behavior, they are distinct in that while Positive Law is a human product and thus its written norms transient and particular (the force of the *ius civile* was limited to Rome and her citizens), Natural Law is an unwritten code of laws whose origin is divine and human (given that it proceeds from the *naturae ratio* which is the law of gods and men), of a universal, eternal, and immutable nature (*De Officiis*, III, 5, 23). For Cicero, Natural Law required no positive formulation or recognition, for it is a reality unto itself, "a supreme law which has its origin ages before any written law existed or any State had been established" (*De Legibus*, I, 6, 19).

Cicero's theory of Natural Law achieved its fullest explanation in two essays representative of his last intellectual phase: *De Re Publica* and *De Legibus*. With respect to the first of these, there is an extremely relevant text transmitted by Lactantius (*De Divinis Institutionibus*, VI, 8, 6–9) in which Cicero refers to a "true law" that is "right reason" in agreement with nature: ("*est quidem vera lex recta ratio naturae congruens*"). He then characterizes Natural Law in the following way:

> "It (Natural Law) summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment." (*De Re Publica*, III, 22, 33)

Many commentators on this fragment, found in Book III of *De Re Publica*, agreed that Cicero's ideology here appears confusing (Fassò 1966; Bretone 1987). In effect, the three possible versions of Natural Law (divine, physical or naturalistic, and rationalist) coincide in the same text. This is because Cicero adheres to the pantheistic tenet of Stoicism according to which God, Nature, and Reason are the same. Nonetheless, in the final

chapter of the text lies a clue that greatly aids any attempt to better understand Cicero's conception of Natural Law. The Natural Law flows from the *mens divina*, since God is its supreme legislator and judge, and it is inherent in human nature itself. For this reason, asserts Cicero, the man who fails to respect it renounces his own nature ("cui qui non parebit, ipse se fugiet ac naturam hominis aspernatus"). It follows that the *natura* from which this law is derived is not some objective reality outside of man, but rather inherent to him, forming part of his essential rationality. Upon closer examination, this idea is simply the Greco-Roman conception of Natural Law understood as *recta ratio*. Conversely, when Cicero speaks of "Nature" it is a different nature than his Greek philosophical predecessors (such as Pythagoras or Empedocles) imagined, and different too from that meant by jurists from Imperial Rome (such as Ulpian) (*De Re Publica*, III, 11, 19; *De Finibus Bonorum et Malorum*, III, 20, 67). In contrast to Cicero, these authors understood Nature as a preexisting entity, an objective physical order prior to Man whose norms applied equally to him as to the rest of Creation: "*Ius naturale est, quod natura Omnia animalia docuit*" (*Digesta*, 1, 1, 1, 3).

Thus, when Cicero asserts in *De Officiis* that the reason which is in nature (*naturalis ratio*) is the law of gods and men: ("*ipsa naturae ratio, quae est lex divina et humana*"; *De Officiis*, III, 5, 23), what he really means is that in obeying the Natural Law, Man obeys a law which is both human and divine, but which ultimately he gives to himself as an autonomous legislator. Not without reason does Man encounter within himself, that is, in his own nature, the principle of law; for reason forms part of his nature, of his human nature, and as such is not some external metaphysical entity. Only in this semantic context does the definition Cicero gives of natural law in *De Legibus* as The Law of Reason achieve its full meaning:

> "Law as the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed and fully developed in the human mind, is Law" (*De Legibus*, I, 6, 18).

Cosmopolitanism and Natural Law: Toward an *Omnium Gentium Consensus*

As we have seen in the preceding section, for Cicero, all law emanates from a primordial natural law, universal, eternal, and prior to the creation of any written (positive) law as well as to any city-state. Law was neither founded in nor born from human laws. For this reason, justice and the legitimacy of the *ius* do not depend on their agreement with positive law, but rather on agreement with that *recta ratio divina* which is the Natural Law (*De Legibus* I, 15, 42; II, 4, 10). The logic of Cicero's Natural Law argument seems unimpeachable. In response to the thesis (to Cicero unacceptable) that justice be identified with the *lex positiva*, Cicero replies:

> "But if the principles of Justice were founded on the decrees of peoples, the edicts of princes, or the decisions of judges, then Justice would sanction robbery and adultery and forgery of wills, in case these acts were approved by the votes or decrees of the populace." (*De Legibus*, I, 16, 43)

For Cicero, justice is one (in contrast to Carneades' position: in accordance with Lactantius' comment in Book III of *De Re Publica*, Carneades differentiates between two classes of justice: Natural and Civil (the first has more to do with prudence than justice, and the second more to do with justice than prudence); see Lactantius, *De Divinis Institutionibus*, V, 16, 5–13). Justice binds all human society and is based on one Law, which is right reason applied to command and prohibition. Whoever knows not this Law, whether it has been recorded in writing anywhere or not, is without Justice. At the same time, justice must not be understood as conformity to written laws and national customs, for were it so, obedience to the law would depend on a simple calculation of utility on the part of those it governs. Basing himself on this observation, our thinker from Arpinum concluded that for there to be true justice, it must be founded in Nature. Said another way, he who wishes to be in harmony with the general principles of justice must observe the following two postulates of natural reason: first, that no harm be done to anyone; and second, that the common interests be

conserved (*De Officiis*, I, 10, 31). As such, natural law is neither an external law alien to Man, nor constituted by laws foreign to one's autonomy (as is positive law), but rather its commands are firmly imprinted in the human mind (*De Legibus*, I, 6, 19).

On account of Cicero's faith in human fellowship, owing to the power that the *recta ratio* of nature exercises over it as much in practice as in theory, he is often grouped with Greco-Roman Cosmopolitanism, which originated with Diogenes the Cynic and included such illustrious philosophers as Crates of Thebes, Zeno of Citium (the founder of the Stoic school), Chrysippus (who developed Stoicism into a full philosophical system), Panaetius and Posidonius (masters of the Middle Stoa), and then Cicero, Seneca, Epictetus, and the Emperor Marcus Aurelius, with whose death, in 180, the Late Stoa effectively ended.

Cicero's thought had the unique gift of perfectly combining natural law theory with cosmopolitan humanism. The firm humanist conviction that inspired his legal philosophy appears time and again throughout his work in texts as eloquent as the following:

> "There is only one principle by which men may live with one another, and that this is the same for all, and possessed equally by all; and finally, that all men are bound together by a certain natural feeling of kindliness and good-will, and also by a partnership in Justice." (*De Legibus*, I, 13, 35)

The *recta ratio* that this underlying law embodies is common to all of humanity (*ratio summa, insita in natura*), though it is neither a product of human ingenuity nor of the will of the people. It is the very spirit of God, His sovereign reason. In this sense, departing from the idea that right reason is the closest to divinity existing between heaven and Earth, some authors have concluded that Cicero shared with his Stoic teachers the belief in a tie that binds gods and men at least insofar as laws and rights are concerned. From this universalist perspective, one might consider the world one great city in which gods and men coexist with one another. Precisely in this cosmopolitan context must one understand Cicero's appeal to a consensus between all people ("*omnium gentium consensus lex naturae putanda est"*) as well as his desire that said accord be elevated to the order of natural law (*Tusculanae Disputationes*, I, 13, 30).

At this point, one would do well to note that between the *ius naturae*, whose universal, eternal, and immutable principles are as seeds we possess innately, having been sown by God in the minds of men, and the *ius civile*, whose written norms are only in force within the particular boundaries of the *civitas* where they were created (*ius propium civitatis*) – that is to say, whose norms apply not to the whole of humanity but rather to the *cives* of a specific state, Cicero interposes the *ius gentium*, understood as that positive law which all nations observe on account of its having been introduced to them through the *naturalis ratio*.

Still, even though the classification of objective Law into these three categories was widely accepted by jurists both at the time of and well after Cicero, and though Cicero appears to have been the first to employ the phrase *ius gentium*, it is clear that on occasion Cicero contrasts the *ius civile* with the moral order formed jointly by the *ius commune gentium* and the *ius naturale* so strongly that it is extremely difficult to distinguish these latter two. Worse still, there are times when Cicero goes so far as to identify the *ius gentium* with the *ius naturale* (or simply confuse the two), as occurs, for instance, in one well-known passage of *De Officiis*: "*Neque vero hoc solum natura. Id est iure gentium*": ("But this principle is established not by Nature's laws alone (that is, by the common rules of equity)" *De Officiis*, III, 5, 23).

One should add, for the sake of clarity, that the *ius gentium* is, just like the *ius civile,* a form of positive law. All that differentiates them are their corresponding areas of influence: The Roman *ius civile* did not take into consideration the other nations of the world while the *ius gentium* did. Nevertheless, as we have seen in the preceding passage of *De Officiis*, when Cicero distinguishes the *ius gentium* from the *ius civile* in the same terms he uses to differentiate *ius naturale* from the the *ius civile*, in practice he is establishing an equivalence between *ius gentium* and *ius naturale* (*De Haruspicum Responso*, XIV, 32). This fusion (or confusion) of the two concepts seems a fruitful

one for two reasons: in the first place, because it opens the way to a conception of Natural Law less abstract-intellectual than that of the Stoics and thus closer to people's actual experience of the Law, as Guido Fassò suggested; in the second place, the interaction between the Natural Law and the Law of Nations gives greater internal consistency to the humanist-cosmopolitan project, both ethically and legally. This project, Cicero tells us, consists fundamentally in spreading solidarity and transforming the global political alliance of all with all into a truly universal society (*De Legibus*, I, 5, 16. *Tusculanae Disputationes*, V, 36, 108: "Patria est ubicumque est bene").

Notes on the Influence of Cicero's Philosophy of Law in the History of Philosophy

This entry began by highlighting the crucial role Cicero played in transmitting the ideas of the great masters of general philosophy (above all Plato and Aristotle) as well as his considerable work regarding the Stoic theory of Natural Law. Had he not first undertaken the compilation, adaptation, and transmission of the classics of Greek thought to Roman culture, their presence in Christian ethics would be inconceivable. As seen in the previous section, it was one of the Fathers of the Church, Lactantius (commonly known as the "Christian Cicero"), who transcribed the text of Book III of *De Re Publica* in which Cicero refers to "one eternal and unchangeable law," valid "for all nations and all times" and whose author is God that survived to the present day (Lactantius, *De divinis institutionibus*, VI, 8, 6–9). This same Book III received also the commentary of other Fathers of the Church, such as Augustine of Hippo with respect to Law's empire (*De Civitate Dei*, XIV, 23, 2; XIX, 21, 2) and Isidore of Seville on the question of just and unjust war (which in the Medieval Ages would be taken up by Thomas Aquinas and which in the Modern Age would be reformulated yet again by such Spanish classics of the philosophy of law as Juan de Mariana and Bartolomé de Las Casas).

The term *humanitas*, so deeply rooted in the core of the Ciceronian-Stoic philosophy of Natural Law, conjured up throughout the Renaissance the image and work of the illustrious orator, thinker, and politician of Arpinum. Indeed, one of the most important essays on rhetoric and esthetics of the period, written by as quintessential a humanist as Erasmus, bore for a title, *Ciceronianus, sive, De optimo dicendi genere* (1528) and entailed, in reality, a critique of those humanists unjustly calling themselves Ciceronian. One encounters yet another test of the relevance of Cicero's doctrine to this age in the writings most representative of French humanism, specifically, the 107 *Essais* of Montaigne, in which quotations of Cicero's dialogues as well as of his major works abound.

The intellectual footprint left for posterity by Cicero is best embodied in the foundational work of the Law of Nations, *De Iure Belli ac Pacis* (1625), written by Hugo Grotius. Here, Cicero's defense of respectful treatment and hospitality toward strangers on account of their being members of the human race had a definite influence on the Just War Theory of the Dutch jurist. Unmistakable elements of Stoic and Ciceronian philosophy appear also in his theory of a rational natural law. Finally, as far as the combination of Cosmopolitanism and Natural Law theory that characterized Cicero's final intellectual phase is concerned, one need but mention that it was perhaps Immanuel Kant who best knew how to take advantage of the Stoic belief in a global citizenship and develop it into his cosmopolitan and humanist project in which – as Nussbaum remarks – he mapped out an ambitious program for the containment of global aggression and the promotion of universal respect for human dignity (Nussbaum 1997). This humanist project, cosmopolitan and enlightened, whose foundations were laid out in Kant's most important political work, *Zum ewigen Frieden* (1795), is defended to this day by those champions of the Enlightenment's legacy as well as of

the universality of human rights, among whom one might count John Rawls (1921–2002), Martha C. Nussbaum, Jürgen Habermas, and Ulrich Beck, a clear sign that, at least within the humanities, Cicero's philosophy still "enjoys good health."

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Cinema and Law

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C

Introduction

Law-and-cinema (or law-and-film) can be defined as a field-in-making belonging to the interdisciplinary scholarly genres "law-and-society" and "law-and-literature." It can be considered as the predictable consequence of a deep focus on the social dimension of the law which is increasingly studied and analyzed in its relationship with other subjects such as "law and. . ."

Apparently, law-and-cinema could regard the regulation of audiovisual content according to intellectual property and entertainment law. Instead, law-and-cinema aims to analyze, on the one hand, the impact of legal films on social culture and, on the other hand, the representation of law in films addressing legal matters or judicial proceedings such as courtroom dramas.

Since the second half of the twentieth century, American cinema has started to represent legal topics and justice leading viewers in the world of courtroom movies. In particular, their worldwide diffusion is also justified by the structure of the common law trials which is more adaptable to movie representation based essentially on the prosecutor's thesis, defense antithesis, and synthesis with the verdict.

The dissemination of legal films has strongly influenced the common perception of law and justice not only in the United States but also in the rest of the world. This is the reason why scholars have decided to put together legal subjects with those of film, cinematic storytelling, and popular visual imagery. Since the beginning of the twenty-first century, the law-and-film scholarship has drowned the attention both of the Anglo-American and Continental legal academia. Indeed, law-and-cinema has been increasingly

included together in law school courses and legal reviews.

There are at least two elements which is worth examining to understand the reason why a law-and-film scholarship has been developed. First of all, the role of popular culture, and in particular mass culture, is increasingly predominant for social sciences studies. Second, the combined approach of the law-and-film scholarship constitutes a new path to understand how the law is perceived by society and vice versa.

The Relationship Between "Law" and "Cinema"

At first glance, law and cinema appear as two different fields without any common ground. While the law is a system of power and rules, cinema represents the economics of entertainment. The former is characterized by an authoritative and coercive system; instead, the other is one of the expressions of art.

However, examining law and cinema more closely, both can be considered as two vehicles which favor the dissemination of social values shaping the contemporary society's dominant culture. In other words, both law and cinema are the results of the cultural framework of a specific society. In particular, films play a key role in reaching a huge audience. The cinematic medium influences the general and legal culture. But, even regulation and norms play a role in the formation of popular culture. Indeed, it cannot be excluded that even society is influenced by the development of its norms or artistic values. The law is more than organized rules, orders, or statutes which are enshrined in black letter law or courts' decisions. It also expresses the expressions of the values of a society which decide to be bound by those set of rules which represent them contributing. In other words, the social perception of the law is also the consequence of its cinematic representation, and, in particular, the law strongly influences the cinematic world not only by creating various sub-genres but also impacting on the structure of the plots and techniques of representation.

Another similarity between law and cinema consists of the presence of reasoning activities based on social values. On the one hand, judicial decisions and norms are deeply biased by social values shared by judges and lawmakers; on the other hand, films usually encourage viewers to be engaged in cases related, for example, to ethical issues such as the protection of the environment or legal matters such as in a courtroom drama. Moreover, differently from literature, cinematic elements make more complicated understanding how a specific scene affects viewers' judgment. For example, the choice of a specific gender or the same personality of the actors could contribute in influencing the perceptions of viewers. Indeed, the film structure could evoke viewers' familiarity with legal concepts and social conventions. The result of this intuitive process would be the deep engagement of the viewers in legal films which manipulate social and legal concepts through the viewers' implicit judging activity.

For these reasons, law and cinema are two fields which, only apparently, do not communicate with each other. Indeed, they contribute to shaping popular culture by influencing the fundamental values of society such as gender roles, justice, and truth.

For example, beyond the courtroom drama, it is possible to explore the concept of law and justice as represented by the cinematic medium. Focusing on films which fall into other genres such as cop movies, some issues about the system of law enforcement could be highlighted. Moreover, law films deal also with moral and social problems such as discrimination based on gender and environmental issues.

In other words, studying law-and-cinema offers not only alternative explanations to cinematic features of subjects or topic such as justice and judgment but also the social dimension hidden in its fictional elements, allowing legal and cinematic mechanisms to influence each other shaping popular culture.

Based on this framework of mutual influence, in the last years, the social relation between law and cinema has led to looking at cinema, or more in general at audiovisual content, not only as a form of expression of thoughts or artistic values

but also as an instrument through which it is possible to deeply study other areas expressing social values such as, the law.

Methodology and Scholarship

Law-and-cinema constitutes a new theoretical framework aimed to deeply examine and conceptualize the relationship between movies and legal culture.

Legal education has traditionally been influenced by the black letter tradition. Indeed, one of the early critics was related to the lack of any kind of theoretical perspectives which could make such field comparable with the traditional ones.

In the past, the first studies of the law-and-cinema scholarship focused on the accuracy of the representation of law in films (screen law vs. real law). However, such an approach did not lead to important result due to its narrow point of view. A second approach, which is currently the most diffused, is based on analyzing the influence of films on the social perception of the law.

Currently, it is possible to identify two main general approaches of the scholarships in the field of law-and-cinema. The first, born in the United States thanks to the cinematic popular culture related to the Hollywood production, is more practice-oriented. While the second, which is European based, poses at the core of the studies the legal aspects and the cinematic techniques.

There is not a unique approach of the scholarship in this field. Some scholars base their studies on a wide range of film. Others, instead, have focused only on a particular area or topic. There is also the contamination of different field: the law-and-cinema studies are influenced by legal, social, and literal theories. Even in those cases, when some films are analyzed by different authors, it could be difficult to identify similarities.

Indeed, the law-and-cinema scholarship has not found a unique definition, and it is also difficult to identify a sharing methodology among scholars worldwide. Initially, considering that much of the studies have been carried out in the United States, a clear influence of the common law tradition to such field is predominant. As a result, considerations related to a particular legal procedure represented in a film could be not extended in other countries where other rules are applicable. Looking at the differences between common law and civil law countries, this appears particularly evident. For example, some researchers show how film can supplement legal studies, while others prefer to focus on the relationship between law and cinematic representations.

From a methodological perspective, any law-and-film study could be (a) analyzed of one or more topics, such as the role of judges and lawyers in society; (b) based on one or more methodologies, such as focusing on the cinematic techniques or the evolution of the plot; and (c) aimed to explore the interactions between law and film.

Differently from law-and-literature, law-and-film focuses on different elements. Texts are common elements in disciplines like literature, film, and law. The first law-and-film focused on supporting legal education. Later, such studies analyze films' plots and characters from a textual point of view without considering other elements which are peculiar of audiovisual contents such as cinematic editing and casting. A law-and-film analysis that focuses only on the literal elements would be not more different in respect of the law-and-literature scholarship becoming only one of its offshoots. Indeed, some elements are peculiar of the cinematic representation whose is mainly focused on images involving other elements such as camera angles and moves, casting choices, sound, and other cinematic features.

The examination of a film through cinematic elements may reveal interesting insights regarding its underlying values. A film can represent different social perceptions of justice, citizenship, gender roles, and discrimination, highlighting social and normative concerns which are deeply rooted in the current society.

Taxonomy of Legal Films

In order to classify legal movies, it is necessary to understand which of them can be considered "legal films." While courtroom dramas are clearly

included in this framework, the law-and-cinema scholarship has extended the scope of analysis to other movies. In particular, the studies in the law and cinema field have enlarged the scope of the researches by also focusing on the cinematic portrayal of law or the role which the law plays in films.

Concerning legal films in broad terms, it is possible to identify a potential model of classification which, however, should not be considered as exhaustive. In particular, such a model focuses on the difference in the role of the law in films. Together with courtroom dramas which are the traditional example of legal films, there are also other cases where the law is part of a movie such as in films where, although the law apparently remains in the background, it influences the entire plot.

According to this classification, it would be possible to divide law films into:

1. Courtroom drama (e.g., "Twelve Angry Men"). These movies focus on the representation of the courtroom and the role of attorneys and judges in the plot. Some films are entirely developed inside the Court, thus, providing a representation of the reality which is totally centered on the law. These films are particularly effective to show viewers the reasoning and the procedure according to which legal matters are concretely treated in the halls of justice. In other films, the courtroom plays a role less important but relevant for the entire plot as, for example, in those films where the decision of the jury at the end of the trial is the crucial moment of the entire film.
2. Legal drama (e.g., "The Firm"). This kind of films differs from courtroom drama because the plot is usually structured outside the Court. In particular, the law is represented from a different perspective which is not that of the inside but from an ex ante or ex post perspective. In other words, in such drama, the law still plays a fundamental part in the plot, but its representation tries to be focused on an external perspective looking at how society deals with legal matters before or after the judicial decisions. Examples of such films can be found in police or business drama.
3. Ethical drama (e.g., "Man Who Shot Liberty Valance"). Apparently, in these films, the role of the law seems to be less relevant. This is the cluster, instead, which shows better how the law is relevant in the daily life and how it impacts on society and social behaviors. Indeed, such films are not merely focused on the law, but it constitutes the social background around which the plot is developed. In this category, there are films which deal with drugs or environmental issues.

However, this model is not the only one which is able to represent the relationship between law and cinema. For instance, another model might focus on the topics which legal films deal with. In some cases, some studies focus on the figure of the lawyers, while, in other cases, for example, gender discrimination and the protection of minors have been the main topics of different movies.

Law, Films, and Education

The use of films in education is not a novelty promoted by the law-and-cinema scholarship. In the past, films have been used to highlight and emphasizes specific subjects studied in traditional courses such as in economics. Indeed, the law is only one of the subject where films may be used for teaching and learning purposes.

It is worth mentioning that, nowadays, law professors have more learning instruments rather in the past when blackboards and book were the only teaching tools at disposal. The shift from analogue to digital learning instruments and the development of the web has fostered access to a much wider range of materials which can be used in the education of lawyers.

However, according to the law-and-cinema scholarship, legal films should not be considered as a mere support for lectures and learning activities. Clearly, one of the more common uses of movies in legal education consists of traditional teaching where images are used to focus on identifying relevant legal issues. Indeed, for example, films usually replace legal texts that could be difficult to understand for students at the

beginning of their academic experience. But, legal films can provide perspectives which could be particularly useful not only for law students but also for those which are not familiar to situations like judicial decision-making, investigations, and social issues. In general, such a broad approach could be extended even to non-lawyers who may have different perspectives about legal issues and, consequently, could provide different viewpoints stimulating further analysis.

Moreover, legal films can also be displayed to show skills and techniques such as oratorical performances or police law enforcement. Such examples could be useful to students to analyze and assess specific situations such as the respect of human rights during a police inspection or the respect of the rules of procedure during a judicial hearing. Indeed, films encourage viewers to be active parts of the plot making lessons more interactive. As a result, students could be lead to a deep assessment of the legal values embedded in a film, also showing different contests in which lawyers could operate. Furthermore, the social and ethical dimensions of some issues can be used to highlight the relationship between law and society.

Conclusions and Further Perspectives

Currently, it is possible to consider law-and-cinema as an autonomous subject. Cinema and more in general audiovisual content are increasingly considered not only an expression of the entertainment industry but also a new tool to study and analyze other practices. In particular, focusing on the legal education, law schools are starting to include in their academic curriculum a law-and-cinema course. Moreover, always more seminars are organized and law reviews promoted, in order to gather the thoughts and ideas of scholars in this field.

However, notwithstanding this rising framework, it is necessary to take into consideration some issues for the future. In particular, the main challenge for the development of the law-and-cinema field is related to the skepticism coming from the black letter law tradition. Indeed, as long as film and audiovisual content will be merely considered only as a source of entertainment and not as a legal field which deserves more academic attention, such legal field risks to remain marginal.

Another relevant issue is related to the lack of a shared methodology. Some of them ask for a more critique and systematic study of this subject in order to better define the research boundaries of the law-and-cinema field.

There are different areas for the enlargement of the research in this field. For instance, more attention might be drawn on those films on the small screen, considering, in particular, that television reaches a number of viewers more significant than cinema. More in general, this field could be expanded even to online audiovisual content to better understand how the law is perceived and shared through new digital channels.

Cross-References

- ► Anthropology of Law
- ► Language and Law
- ► Law as Discourse
- ► Legal Argumentation

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Citizenship

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Keywords

Civic and social integration · Denizenship · Membership · Migration · Nation state · Social rights

Introduction

Citizenship is not only a legal concept, but also a subject of social, political, and legal philosophy. It refers to a legal status of **membership** within a community and encompasses various **rights**. In recent years, the concept of citizenship has been used in many contexts in order to promote the civil, social, or political rights of those individuals, who have traditionally not been perceived as citizens.

Definitions

The legal and philosophical debate on "citizenship" encompasses various dimensions. Citizenship can be perceived as a legal status, the membership in a political community, a bundle of rights and obligations or social and civil virtues, as a mean for identity and belonging or a way to conceptualize social equality (see Shahchar/Bauböck/Bloemraad/Vink, Introduction, in: ibd. 2017, 5). Accordingly, the ways to conceptualize citizenship and citizenship laws depend from country to country (see for an overview over various citizenship models on the different continents: Isin and Nyers 2014, 159 ff.)

First and foremost, the term "citizenship" denotes the **membership of an individual** – the citizen – **to a political or social community**. In its daily use citizenship is perceived as the membership of an individual to a nation-state. Yet citizenship is not be confused with **nationality**, even though both terms are often used synonymously. Nationality, like citizenship, describes the **"formal" membership** of an individual to a state. But while nationality refers to the membership to a nation-state and thus to a **nation** (as a specific ethnic group), the term citizenship is more open as to the community to which it refers. Moreover, citizenship does not only possess this "formal" meaning (Hammar, 3). It is not only a **formal status**, it also provides the individual a **bundle of civil, social** – that is usually a privilege of a citizen compared to an "alien" – **and political rights and duties** (Bosniak, 19). In this **"substantial"** meaning (Hammar, 3), citizenship is – in the formulation of *Hannah Arendt* – "a right to have rights." Since both its "formal" and its "substantial" meaning refer to law, **citizenship** is first and foremost a **legal concept**. In general, each state is

sovereign in regulating its own citizenship law, which determines how citizenship is acquired (by birth or by **civic integration**), whether an individual may have multiple citizenships and to which extent citizenship may be withdrawn by denaturalization. However, in cases of **civic integration** or renunciation of citizenship, the interests of the concerned individual and of other states have to be taken into account (Hammar 1990, 28).

At the same time, citizenship is – for many reasons – a subject of **social, political, and legal philosophy**. Expressions like "social citizenship" (*T.H. Marshall*), "multicultural citizenship" (*Kymlicka*), "digital citizenship" (*Mossberger* et al.), "transnational citizenship" (*Bauböck*), or "global citizenship" (*Dower & Williams*) show that citizenship theories attempt to decontextualize citizenship from its "formal" meaning and reconfigure it in new social contexts. In order to do that, the conception of citizenship has to be analyzed and differentiated. Here, *Linda Bosniak* offers of very clear approach: ". . . questions about citizenship can be divided into three (inevitably overlapping) categories: those that concern the substance of citizenship (**what** citizenship is), those that concern its domain or location (**where** citizenship takes place), and those that concern the class of citizenship's subjects (**who** is a citizen)" (Bosniak 2006, 17).

Referring to the question of "**what**" citizenship means, citizenship theorists have developed multiple understandings. One approach reserves the term for the **membership** to a *state*, while others would also describe a membership to a *societal subsystem* such as the economy, the labor market, the culture, the politics, or simply the resident population as citizenship (Hammar 1990, 35). This second approach emphasizes the **rights** it encompasses and which shall enable the citizen to fully participate and self-govern the community concerned (Bosniak, 19). The idea of citizenship can still be supplemented with a third dimension, which accents the aspect of **"identity"** of the social or political community, e.g., the necessity of identification of the citizens with the community (Bosniak, 20). This approach is well known in debates about **civic and social integration**.

The question, **"where"** citizenship is located, is often answered: Within the nation-state (Bosniak, 23). The idea of the nation-state, which arose in the eighteenth century, assumed that individuals have individual rights just because of their belonging to a nation (state). Even though the ideas of citizenship and the nation-state are hence historically linked (Hammar 41–53), recent theorists have attempted to develop conceptions of "transnational", "post-national", or "global citizenship." These models can lean on the fact that many political issues are nowadays being discussed and regulated on a supra- or international level. This would require an international or supranational citizenship – which is already realized in the form of EU citizenship. Nonetheless, today citizenship "keeps . . . firmly within a national framework" (Bosniak, 25).

This leads to the question **"who"** is a subject of citizenship. The strong linkage between the concepts of citizenship and the nation-state must mistakenly lead to the conclusion that only members of the "nation" could be members of a state. Citizenship in most countries cannot only be acquired by birth (either in forms of *jus sanguinis* or *jus soli*), but also by **civic integration**. Accordingly, citizenship law provides a solution for "non-nationals" to gain citizenship. Moreover, many countries accept double or multiple citizenship. However, citizenship laws of most states require aliens in order to get naturalized serious efforts of social, economic and cultural integration. Citizenship thus has at the same time an inclusive and an exclusive effect. It helps citizens to socially integrate in the receiving state and society, while it at same time excludes those people who do not enjoy citizenship rights and thereby hinders their integration. According to Seyla Benhabib (2004, 134) ". . . every new polity only reproduced the dilemma between insiders and outsiders, those who were full citizens and those who were not."

Contemporary Theories of Citizenship

The importance of citizenship becomes most noticeable when comparing the legal status of citizens and noncitizens (or "aliens"). The

unequal treatment of citizens and aliens is one of the key drivers of contemporary citizenship theories, as Klaver and Odé detect: "Increasingly, however, the notion of citizenship is being applied to comprehend the position of non-citizens or aliens in a society as well" (Klaver/Odé, 13). Moreover, the application of the citizenship category is no longer restricted to membership of a political community, but also to other fields of society, such as the membership in the social welfare system ("social citizenship") or the culture of the host country ("multicultural citizenship"). Finally, recent citizenship theories rather stress the importance of rights than the importance of a common identity.

In his famous essay "Citizenship and social class," the British sociologist ***T.H. Marshall*** dealt with the rights of workers in a modern capitalist state and the **evolution of citizenship rights from civil to political, and finally social rights** (Marshall 1950, 10). Civil rights were those "necessary for individual freedom" (such as the liberty for the person, freedom of speech, thought, and faith, etc.), while political rights encompassed "the right to participate in the exercise of political power" (Marshall 1950, 10, 11). Social rights, in contrast, contained "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in social heritage and to live the life of a civilised being according to the standards prevailing in the society" (Marshall 1950, 11). According to Marshall, "the modern drive towards social equality is . . . the latest phase of an evolution of citizenship which has been in continuous progress for some 250 years" (Marshall 1950, 10). Marshall understands citizenship as "a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed. There is no universal principle that determines what those rights and duties shall be, but societies in which citizenship is a developing institution create an image of an ideal citizenship against which achievement can be measured and towards which aspiration can be directed" (Marshall 1950, 28–29). Whereas citizenship for Marshall was a "principle of equality" (Marshall 1950, 33), social class, in contrast, was a "system . . . of inequality" (Marshall 1950, 29). Accordingly, Marshall describes citizenship as an instrument to overcome the barriers of social class. It required "a direct sense of community membership based on loyalty to a civilization which is a common possession" (Marshall 1950, 41).

In her book "Limits of citizenship" (1994), **Yasemin Soysal** focused on the **extension of "citizenship rights" to immigrants**. Soysal observes this development by comparing the legal systems of various European states. She sees the reason for this development in the evolution of universal human rights and their implementation in domestic law. According to Soysal, this development blurred the line between citizens and noncitizens. She thus proposes a model of **"postnational membership"** based on the idea of universal personhood rather than national belonging. The starting point of her work is the contrast of "two institutionalized principles of the global system: national sovereignty and universal human rights" (Soysal 1994, 7). Soysal then describes a social process which she calls **"incorporation,"** which denotes how "a guest worker population becomes part of the polity of the host country" (Soysal 1994, 30). Whereas Soysal perceives **social integration** as a process whereby migrants adapt to the "receiving society," incorporation is a "wider process that takes place independently of the integration of individuals or perceptions of such integration," since incorporation examines the politics of the "receiving state" regarding the question if and how they grant migrants access to social institutions (Soysal 1994, 30, 31). By identifying four models of incorporation – (1) corporatized, (2) liberal, (3) statist, and (4) fragmental (Soysal 1994, 37–39) – Soysal finds that incorporation can either occur by means of the state or the market. Accordingly, migrants are granted more or less civil, social, and political rights on the domestic, the supranational, and the universal level. The redistribution of these rights constitute a "reconfiguration of the institution of citizenship" and a "multiplicity of membership" (Soysal 1994, 163).

Similarly, **Seyla Benhabib** in her book on **"The Rights of Others" (2004)** seeks to

"formulate a **discourse-theoretic grounding**" of a universal rights discourse (Benhabib, 93). Benhabib initiates her argument with an analysis of Immanuel Kant's understanding of the cosmopolitan right to hospitality. Benhabib then puts Hannah Arendt's concept of the "right to have rights" in the context of citizenship rights. Like Soysal, Benhabib uses the evolution of international human rights to evolve her argument. According to Benhabib, the "practice and institution of citizenship can be disaggregated into three components: collective identity, privileges of political membership, and social rights and claims" (145). Benhabib argues for "**non-territorially based models of representation**" (218) and a "contentious dialogue . . . between the demos and other representative bodies about the limits of their jurisdiction and their authority" (219).

Will Kymlicka's book on **"Multicultural citizenship"** (1995) choses a different approach. It distinguishes human rights and **minority rights**, while the latter are the main subject of the book. Kymlickas' main interest is the question of how minority rights are limited by principles of individual liberty, democracy, and social justice. In order to solve this conflict, Kymlicka proposes group-differentiated rights for ethnic groups and national minorities. He distinguishes between three forms of "collective rights" of minority groups, namely, self-government rights (the delegation of powers to national minorities), polyethnic rights (financial support and legal protection for certain practices associated with particular ethnic or religious groups), and special representation rights (such as guaranteed seats for ethnic or national groups within the central institutions of the larger state). Kymlicka then dedicates to the relationship of these collective and individual rights. Against the view of many liberals, Kymlicka argues that collective and individual rights are not necessarily in conflict with each other. Moreover, both types of rights can provide the minority groups with a protection against economic or political power exercised by the society's majority. In order to promote his claim for collective rights, Kymlicka then differentiates between (1) *equality-based* arguments, (2) *history-based* arguments, and (3) arguments which appeal to the intrinsic value of *cultural diversity*. While the first group of arguments aims to show that the minority is facing an unfair disadvantage, which can be rectified by group-differentiated rights, the second group of arguments aims to show that the minority group has some historical claim of group rights (e.g., based on prior sovereignty). Finally, for Kymlicka the value of cultural diversity lies mainly in the "enrichment" of the host society's culture.

The Future of Citizenship in a Globalized World

Since it is linked strongly with the idea of the nation-state, the concept of citizenship is challenged by the **impacts of globalization**, especially by **transnational migration**. This challenge has been described by John Rawls (1993, 41) as follows: ". . . a democratic society, like any political society, is to be viewed as a *complete and closed social system*. It is complete in that it is self-sufficient and has a place for all the main purposes of human life. It is also closed. . . in that entry into it is only by birth and by exit from it is only by death . . . Thus, we are not seen as joining society at the age of reason, as we might join an association, but as being born into a society where we will lead a complete life." Benhabib (2004, 82–92) has criticized Rawls' assumption of the nation state as a "complete and closed social system" for different reasons. Firstly, Benhabib criticizes Rawls for treating the idea of a nation as a "fact," rather than an aspiration. Secondly, Rawls' assumption would – according to Benhabib – lead to the creation and exclusion of "others," which would – thirdly – jeopardize Rawls' goal to protect and promote liberalism. Moreover, it must be emphasized that migrants due to their presence and the exercise of their culture in the "receiving state" have often altered its cultural and social values.

Nonetheless, noncitizens have gained more and more civil and social rights (Soysal 1994). They are not only protected to a certain extent in their residence status and their freedom to work. Noncitizens also enjoy protection in the exercise

of their culture and may – under certain conditions – receive social welfare in the "receiving state." This development – which is mainly based on the emergence of universal human rights in recent decades – leads to a "**defragmentation" of citizenship as a cluster of rights** to make **hybrid forms of membership** between citizenship and alienage, such as "**denizenship.**" Denizens are migrants who have lived for a long period in receiving states and accordingly gained a secure residence status and "equal treatment in all spheres of life, with full access to the labor market, business, education, social welfare, even to employment in branches of the public service" (Hammar, 12, 13). Accordingly, citizenship today is often "marginal to the great debates on immigration" (Spiro 2008, 160). **Citizenship rights** at one point will possibly be **replaced through universal human rights**. But as long as the world is divided into nation-states, citizenship – at least in its "formal" meaning – will be determined by domestic (citizenship) laws.

Conclusion

Citizenship was originally a mere legal category denoting a person's membership in a nation state.

However, toward the end of the twentieth century, political and legal philosophy shifted to using the term citizenship to refer to other forms of an individual's membership in a community. As a result, the question of membership and belonging in a polity has been fundamentally reconsidered.

Cross-References

► Integration: Civic and Social
► National Identity

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Civil Disobedience

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Civil disobedience refers to politically motivated law breaking that exhibits *civility*, *conscientiousness*, *nonviolence*, and *publicity* and expresses *respect for – or fidelity to – law*, typically through the acceptance of legal sanctions. The term aims to capture a significant subset of political protests that fall under the broader category of *civil resistance,* a category usually used to capture a more extensive range of both legal (e.g., boycotts, demonstrations) and illegal acts (Chenoweth 2021). Those engaging in illegal protest will often describe their acts as civil disobedience to benefit

from its relative moral and political prestige. By doing so, protestors can distinguish their endeavors from ordinary criminal lawbreaking and thus potentially face reduced legal penalties. Even when they fail to do so, they still benefit politically by claiming the mantle of iconic historical figures (e.g., Mohandas Gandhi, Martin Luther King, Jr.) widely viewed as having pioneered civil disobedience. This often proves advantageous to activists as they seek public support.

Introduction

As an irrepressibly contested and politically controversial concept, civil disobedience, notwithstanding broad agreement about its overall contours, has taken on a variety of rival meanings. We can distinguish between and among competing *religious-spiritual*, *liberal,* and *radical democratic or republican* renditions (Scheuerman 2018, 2021). Fundamental philosophical differences undergird correspondingly diverging assessments of its normative contours and political purposes. Though standard accounts usually envision civil disobedience as resting on civility, conscientiousness, nonviolence, publicity, and respect for law, different political-philosophical traditions interpret such elements in dissimilar ways. Civility, for example, has been viewed by Gandhi, King, and others of a similarly spiritually orientation as requiring that lawbreakers exhibit "proper" moral decorum and politeness. In contrast, secular-minded liberals have usually rejected such ideas. Instead, they often interpret civility as tasking lawbreakers with acting as partners in a shared political project, as equal citizens participating in some cooperative or "civic" effort to realize justice with their peers (Laden 2019; Milligan 2013).

Nonetheless, rival analyses of civil disobedience make use of a joint conceptual language. Even when surprisingly elastic, this shared language remains an ideational mainstay that places constraints on what can or cannot be meaningfully characterized as civil disobedience. Anyone who seeks to view *nonviolence*, for example, as allowing for extreme physical abuse, will seem confused and probably incoherent to those employing civil disobedience's common, yet unavoidably contested, conceptual terminology.

This entry describes civil disobedience's three most influential political-philosophical versions. Special attention is paid to the idea that civil disobedience entails respect for or fidelity to the law, "although. . .at the outer edge thereof" (Rawls 1971: 366). This commonplace claim about the nexus between civil disobedience and the law contains a surprising variety of connotations. Our discussion concludes by acknowledging recent theoretical and practical challenges religious-spiritual, liberal, and radical democratic interpretations of civil disobedience jointly face.

Divine Witness

For Gandhi, King, and many other religious believers, civil disobedience primarily offers a way to resist evil in a world plagued by sin, as manifest most egregiously in unjust laws against which the spiritually inclined are morally obliged to wage battle. Civil disobedience constitutes divine witness, or spiritual "truth-seeking." On this account, every feature of civil disobedience possesses directly religious contours. As religiously based *conscientious* lawbreaking, civility demands decorum and maintenance of a polite composure. Acting publicly provides evidence of the protestor's appropriate spiritual orientation; deception is irreligious. Disobedients aim to *convert* their opponents. Accordingly, for King protestors should always aspire to achieve divinely inspired *Agape,* a "disinterested love" that powerfully resists the sinful tendency to demonize political opponents (King 1986a [1958]: 104–105). Strict nonviolence follows directly from the necessity of respecting all of God's creatures. Disciplined souls in search of divine truth must be willing to sacrifice and suffer for their convictions. Consequently, they readily accept even unjust, draconian legal penalties that sometimes will be meted out to the spiritually inclined in a sinful universe.

As King commented in "Letter from Birmingham City Jail,"

> I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for the law (1991 [1963]: 74)

Law here – and in closely related accounts – refers to religious (and, for King, Christian) ideas of natural law that provide a yardstick for delineating just from unjust positive law. The gap between natural and positive law provides justificatory grounds for civil disobedience. However, even for the devout King civil disobedience is also grounded on a view of the existing constitutional order as containing hitherto untapped possibilities for far-reaching and potentially radical reform. The *Declaration of Independence* and US Constitution represent legally dynamic "promissory notes" that have always pointed toward the prospect of a just future order in which "all men, yes, black men as well as white men, would be guaranteed" basic rights (King 1986b [1963]: 217). Civil disobedience offers a device by which the oppressed can cash in on such legal and constitutional promissory notes and the resulting debts owed them. Lawbreakers show respect for law and accept possible penalties as a way of anticipating and *prefiguring* a prospective constitutional order free of racism and oppression. They break the law "lovingly," nonviolently, and respectfully so as already to embody – and thus help create – a superior instantiation of ideals implicit within existing legal commitments. Crucially, fidelity to law on this religious-spiritual entails no principled respect for – or an obligation to obey – many existing laws, which King, like Gandhi before him, viewed as deeply unjust.

Liberal Reformism

When John Rawls famously described civil disobedience as a "public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in law or politics of law," he relied on innovative prior work by Hugo Bedau to codify not only the standard and hugely influential liberal view but also its reformist aspirations (Rawls 1971: 364; also, Bedau 1961). For Rawls, civil disobedience constitutes a political practice best suited to "nearly just" liberal societies in which "serious violations of justice" nonetheless still sometimes surface and should be opposed (1971: 363). Outside basically liberal societies, more militant, potentially violent protests are permissible and may be politically appropriate. But within liberal societies built on ideals of free consent, equal respect, deliberation, publicity, and the rule of law, civil disobedience "to law within the limits of fidelity to law" is a legitimate and potentially effective way to address political majorities that have violated a political minority's basic rights (1971: 366–367). Since threats to liberty are usually generated by overreaching majorities, civil disobedience represents a necessary corrective, countermajoritarian device, where minorities whose rights have been violated make an appeal on the basis of shared principles of political justice.

On the liberal view, civil disobedience is no longer a matter of divine witness. Accordingly, Rawls and other liberals generally delineate conscientious objection or refusal, by which the religiously inspired seek private exemptions from law, from civil disobedience as an identifiably political practice (Rawls 1971: 377–382). In contrast to the former, the latter is an expressly political act akin to exercises of free speech, available to both believer and nonbeliever, aimed at changing the law.

To be sure, civil disobedience still requires some evidence of conscientiousnesss. Yet appeals to conscience are no longer necessarily religious or spiritual. Nor does it suffice: Civil disobedients will need, more importantly, to make additional, far broader, identifiably political appeals to their fellow citizens. For liberals, civil disobedience remains nonviolent, but now chiefly because violence countermands the equal respect we owe each other in a liberal polity. Civility demands

not politeness or respectability, but instead a properly public-minded or civic orientation. Not derived from religiously conceived moral duty, civil disobedience constitutes a political right, though one not inscribed in the law or constitution, employable under certain conditions. Its effective use requires acting – and then typically defending one's actions – openly and publicly, not because secrecy is ungodly, but because its rationale is to change public opinion and generate reform.

The liberal reinterpretation of civil disobedience trades in its original religious-spiritual foundations for a more secular gloss. Civil disobedience becomes a mode of political participation, justified under exceptional circumstances (i.e., extreme injustice), among free and equal citizens. It no longer appeals to controversial religious "knowledge claims that are practically impossible to defend" because of their "supernatural" contours (Cohen 1971: 115–116).

The liberal attempt to reconstruct civil disobedience on nonspiritual grounds has far-reaching implications for its view of legal fidelity. As in its religious-spiritual incarnation, respect for law is still most clearly evidenced by a disobedient's readiness to accept penalties. Only by showing that she is willing "to pay a price" can the disobedient realistically demonstrate moral seriousness and basic respect for law (Rawls 1971: 367). Accepting legal sanctions, *pace,* the religious-spiritual view, has nothing to do with religious ideas of suffering or sacrifice. Nor does the liberal view depend on juxtaposing natural to positive law. For Rawls and other liberals, every just liberal order rests on an idea of the rule of law that has no necessary basis in religious ideas of natural law. When civil disobedients express fidelity to law, they merely acknowledge the demand that "laws be known and expressly promulgated, that their meaning be clearly defined, that statutes be general both in statement and intent and not be used as a way of harming particular individuals" (Rawls 1971: 238). Otherwise, liberty's boundaries are likely too vague and uncertain, and government may act arbitrarily. The rule of law offers no perfect guarantees against injustice, yet it still provides an indispensable modicum of legal security. Civil disobedients may sometimes justifiably violate laws they view as unjust, but when doing so they are obliged to provide evidence of their general commitment to the rule of law – typically, by accepting legal penalties.

The liberal view's demotion of natural law tends to go hand in hand with a degree of political deradicalization. Whereas for Gandhi and King civil disobedience constitutes a device for radical and perhaps far-reaching political and social transformation, for Rawls and other liberals it becomes a decidedly more modest, reformist instrument for correcting supposedly "nearly just" (i.e., already basically liberal democratic) polities. While the spiritual-religious model conceives of legal fidelity in dynamic, prefigurative terms, for many liberals it tends to mean respecting the overall, existing "frame of established authority and the general legitimacy of the system of law" (Cohen 1966: 3). As such, it diverges sharply from more radical, potentially revolutionary protests.

Democratization

Radical democratic and republican theorists reject the standard liberal view of civil disobedience as a limited, basically countermajoritarian check on political majorities. Instead, they interpret it as a potentially legitimate means to deepen and extend opportunities for meaningful popular deliberation and participation. On this view, existing liberal states suffer from serious institutional and especially democratic deficits; they may require far-reaching, even radical reform. Civil disobedience can help get the job done. Like its religious-spiritual exponents (but minus their appeals to natural law), radical democrats view civil disobedience as a potentially radical, albeit nonviolent, path to far-reaching political change. Because democracy should be viewed as an unfinished project, civil disobedience is by no means

necessarily exceptional or extraordinary in character. Since even well-designed laws and institutions are susceptible to injustice and ossification, civil disobedience performs the more-or-less ongoing task of struggling to keep the blocked arteries of democratic politics unclogged (Markovits 2005).

Jürgen Habermas offers a sophisticated version of this position. For Habermas, civil disobedience operates in a legal gray zone between positive law and the normative foundations of democratic legitimacy. The democratic law-based or constitutional state draws normatively on universal principles (e.g., basic rights, self-government, and separation of powers) it has never completely or perhaps even satisfactorily realized. As history suggests, tensions between existing political and legal practices and their normative bases regularly surface. Democracy and constitutional government represent a "constantly interrupted" (nonlinear) "learning process [that] is by no means at an end today" (Habermas 1985b: 135). Constitutional democracy's own implicit normative energies can be tapped for an immanent critique of existing practices and serve as a springboard for reform. Unfortunately, even well-conceived institutional mechanisms for peaceful legal change often falter: History is replete with examples of unjust laws and corrupted institutions that stand in the way of the requisite change. Democracy therefore requires *extralegal* mechanisms to check the "systemic inertia of institutional politics" (1996: 383). Civil disobedience offers an answer. When citizens break the law because in their considered view it fails adequately to live up to constitutional democracy's normative standards, they act not as a revolutionary avant-garde, but as free and equal citizens seeking a richer, more developed democratic polity. While acting illegally, they nonetheless seek to adapt and improve law-based democracy.

Not surprisingly, civil disobedience's standard traits (civility, conscientiousness, nonviolence, publicity, and respect for law) undergo subtle but significant shifts. Like many other writers, Habermas argues that disobedients should expect to face possible legal repercussions. But they do so now to demonstrate their seriousness as participants in the ongoing – and still unfinished – project of constitutional democracy. Fidelity to law is reconfigured in accordance with an interpretation of constitutional democracy as a more-or-less permanent experiment in republican self-government. Civil disobedience potentially serves as a "pace-setter for long overdue corrections and innovations" (Habermas 1985a: 104). By resisting injustice and initiating reform, civil disobedients can prove to "be the true patriotic champions of a constitution that is dynamically understood as an ongoing *project*" (Habermas 2004: 9; original emphasis). Though acting illegally, civil disobedients potentially advance the unfinished project of constitutional democracy.

Contemporary Challenges

Civil disobedience's core religious-spiritual, liberal, and radical democratic or republican versions have faced major intellectual as well as real-life political challenges in recent years. For example, both philosophical and political anarchists defend antistatist and antilegal intuitions that directly challenge some of its main features. To anarchists, the idea of civil disobedience as linked to what King famously dubbed "the very highest respect for law" necessarily seems naïve and probably misconceived. Similarly, the familiar claim that civil disobedience should target political officials within a legitimate state apparatus obfuscates the harsh and – for many anarchists – unacceptable realities of a "Leviathan" we should view in a decidedly more skeptical light. Unsurprisingly, philosophical anarchists who hold onto the idea of civil disobedience tend to abandon some of its standard features (Simmons 2010).

Other challenges derive from real-world social and political processes. The ongoing post-nationalization and privatization of public authority, a fundamental shift in state/society relations in our increasingly post-Westphalian political universe, tends to undermine the implicitly *nation-*

state orientation of a great deal of conventional thinking about civil disobedience. When liberals and others demanded of disobedients that they address broader publics, for example, the "publics" they implicitly had in mind were the national publics of existing liberal democracies. Another major development, digitalization, has opened the door to the proliferation of relatively novel forms of politically motivated online or digital lawbreaking (e.g., so-called "hacktivism"). Yet it remains unclear whether concepts of civil disobedience implicitly designed with "on-the-street" or "in-person" protests in mind can be extended to digital disobedience. Since key traits of present-day social and political reality look quite different from the worlds Gandhi, Rawls, or even Habermas inhabited, it often proves difficult to adapt theirs and related ideas to contemporary conditions. Not surprisingly, many illegal political protests no longer mesh neatly with conventional ideas of civil disobedience (Scheuerman 2019).

In part as a response to such trends, many writers are pushing for broader, more inclusive definitions and justifications for civil disobedience (Brownlee 2013; Celikates 2016). They seek to extend the idea of civil disobedience to include, for example, violent as well as nonviolent action. The possible danger here is that civil disobedience risks losing its discrete conceptual and political contours. Some present-day theorists go even further by developing philosophical defenses of *uncivil* disobedience, defined as principled lawbreaking that is covert, legally evasive, morally offensive, and potentially violent (Delmas 2018). These efforts remain controversial in part because they potentially cover a vast range of diverse illegal protests (e.g., property damage as well as violence against persons) so as to obscure the necessity of differentiating normatively and politically between and among them (Scheuerman 2019).

Cross-References

- ▶ Gandhi, Mohandas Karamchand
- ▶ Habermas, Jürgen: Faith and Reason
- ▶ Positive Law and Natural Law
- ▶ Rawls, John
- ▶ Thoreau, Henry David

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Civil Disobedience: Legal, Moral, and Political Dimensions

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Introduction

Is it possible for a law to recognize a right to disobey the law? If the State establishes institutional mechanisms of revision and exercise of citizenship, is the recognition of such a right possible? These questions reveal to us that civil disobedience presents itself as a paradox.

We must start by setting a difference between a contradiction and a paradox. If two things are contradictory, the confirmation of one turns the other null. Therefore, two contradictory terms cannot co-exist. The paradox works differently. It also sets a contradiction between terms or things. However, a paradox works in a way that the contradiction sets interdependence between them so that they do not turn each other null. Thus, confirming one term affirms the contradictory structure sustained, ensuring the other term. How does this fascinating perspective borrowed from quantic physics relate to law?

When we affirm the formula of civil disobedience, that is, the right to disobey the law, we are setting a paradox, which becomes comprehensible if we look at the modern formulation of the principle of the rule of law. We will show how this paradox is not an exception, but it is what constitutes and structures modern law. The paradox of civil disobedience is the paradox of law.

Before getting to this point, we must clarify a second definition. When referring to civil disobedience, we must distinguish it from the right to resistance to oppressive regimes and revolution. In these cases, the legitimacy of government and State are in check as a whole, and actions aim to overthrow law and order. Differently, civil disobedience refers to a sphere in which a specific rule, governmental policy, or order is questioned and is open and deliberately violated, as a form of protest before the constitutional legal framework, recognized as legitimate by the civil disobedient herself. Civil disobedience works within the legal system and intents to correct specific unjust decisions or provoke change within this framework for vital social purposes. However, beyond a mere protest, it uses illegal acts as a method to call attention to injustice.

Modernity introduces the rule of law as a technological, social novelty, which sets that rulers and governed are equally subject to the law. So the rule of law is based on the duty of obedience, common to rulers and governed. Wouldn't the recognition of a right to disobey be a contradiction? Well, it does not set a contradiction but a paradox because only legal systems that incorporate the capability of adapting to social change can survive. So modern legal systems function through the operative tensions that permeate law: coercion and social acceptance; stability and change; legality and legitimacy. From this perspective, the paradox is not to be solved. Instead, it enunciates the way law is and the way it functions. Civil disobedience is one way to pronounce these paradoxes that operate within the law.

Farther from the tension within it, we must also consider the tensions between law and morality and law and politics. Law must be permeable to moral discourses to seek legitimacy, for example, by its self-referential basis in fundamental rights. A post-conventional morality commonly uses the law to gain binding force and practical implementation in post-industrial societies, where plural values co-exist. As to the tension between law and politics, the former uses implicitly legitimated procedures to justify decisions and programs. Law uses the bureaucratic apparatus and highly efficient policy decision-making centers to ensure effectiveness.

These tensions are explicit in civil disobedience. Disobedient citizens raise their moral arguments against laws and policies which they consider unjust, setting tension between law and morality. Such moral justification of an illegal act, the act of disobedience, is legitimated in the legal order as these arguments can also find justification before the legal system of rights. Hence, the

Constitution, where we concentrate this rights system, is the guiding principle that justifies civil disobedience.

Civil disobedience is also a political act. It questions the legitimation deficit of decision-making centers in the political system produced by the disconnection of these centers from the channels and networks of political opinion that ferment in the periphery of the political system. Such disengagement also creates the inefficiency of the political system, as the decisions eventually will not be followed through because they do not show their link to political opinion and will. Civil disobedience is a way to relink the political and legal systems to avoid these legitimation and efficiency deficits.

In the following pages, we will argue that there is a fundamental right to civil disobedience within the framework of the rule of law and that such a right emerges from understanding the different tensions that permeate law. Finally, we will end by discussing the limits of civil disobedience from the perspective of the "*coloniality*" produced by modernity.

Law, Morality, and Civil Disobedience

Theory of Law has traditionally explained the legitimation crisis of modern law as a gap. It has questioned its ability to regulate, influence, and accompany social change based on the difference between the production of positive law and effective social normativity, between the content of its norms and effectively verified conduct. Civil disobedience helps us understand that such an interpretation can no longer explain how the law works in modern societies and that one must treat the ideal and the real as a tension rather than as a gap.

Modern positive law reveals a paradox that arises from the process of differentiating it from morality, politics, and ethics: the fact that legitimacy emerges from legality, from which the German philosopher Jürgen Habermas launches a hypothesis. It reads something like this: the genesis of modern law is based on the assumption that if citizens, in concrete legal orders, want to regulate their coexistence through positive law legitimately, they will have to attribute certain rights to each other.

This hypothesis presupposes that it is no longer possible for modern law to seek a foundation in tradition, religion, or even morality. Therefore, it explores the tension between facticity and validity, human rights and popular sovereignty, to serve as a basis for justification of a system of rights.

The institutionalization of a system of rights through the legislative process is another remainder of the correlation between human rights and popular sovereignty since the principle of democracy, and not a moral principle, is its basis. The principle of democracy serves as a regulatory criterion for the process of legal institutionalization through the legislative process. It reveals the tension between facticity and validity within the legal validity itself.

From an empirical perspective, it is through legal processes of recognition that the law acquires its legal character, and only by legal processes can it be derogated. However, this tautological sense of the validity of the law can only find its explanation if referenced to social validity and validity in the sense of legitimacy.

Social validity concerns factual acceptance, that is, the ability to impose norms among recipients. Validity as legitimacy is measured by the discursive retrieval of normative pretensions of validity, which means that norms enter the legal order through a rational legislative process and that we can present, at any time, moral, ethical, and pragmatic reasons to justify them.

In summary, we can understand a norm as empirically valid since we recognize it has gone through a legal process. Moreover, we can also understand a norm as valid in a social sense because, if demanded, it would be possible to justify, by reasons, the consensus that leads to the decision to make a specific norm.

This double-faced validity elucidates why positive law cannot guarantee its legitimacy only through legality. Thus, we cannot base the validity of a rule on the obligation not to modify it. As we clarify the complexity of legal validity in its different aspects, we begin to understand civil disobedience as a legal mechanism for the production of law.

Hypothetically, if the interests that led to making a norm were modified, the norm could change arbitrarily. Hence, if empirical reasons are enough to justify the norm, any motive would serve and be as good as another. On this basis, there would be no way of explaining what it means to raise validity claims or how the difference between them is an imposed demand.

To solve this problem, we would need to introduce a way to distinguish the "good" motive, or the best motive, to validate standards and the reasons for accepting it. Beyond the empirical perspective, we would need a normative point of view from which it would be possible to judge and decide rationally and impartially (Habermas 1996).

We often think of the normative point of view as a moral standard. Civil disobedient citizens commonly use justifications for their actions linked to moral, ethical, and even religious views. Nonetheless, in a pluralistic and complex society with different ideas of what is "good," "correct," or "good life," these justifications are insufficient to serve as standards for a legal decision.

Civil disobedient citizens can translate their moral, ethical or religious views into a general form in a way that the normative point of view by which we examine these norms is that of a member of "humanity." This translation is close to the abstract moral principle enunciated by Immanuel Kant: "can we justify interest X as universal?". In the context of post-conventional societies, the universalization principle seems adequate to justify interests embodied in the norms as reasons that decide in moral discourse. In perspective, we are looking at the justification of actions, considering all claims symmetrically in different time and space contexts.

This normative perspective can pose several obstacles to the justification of legal action in post-conventional, pluralistic, and complex societies. For instance, it is impossible to ignore criticism from feminist theory directed at universality as a biased idea used to reinforce patriarchalism (Gilligan 1982; Haraway 2006). In a weaker sense, the universal principle that stands as a foundation for a legal order is the idea that such an order must keep its norms open to pluralism and complexity.

We can then shift our normative standpoint from moral to legal and political. The principle of democracy changes the perspective from "humanity" and "universalism" to that of participants who, as subjects of law, self-determine and construct an "association" of free and equal members. Therefore, this principle opens a way for discussion permeable to various reasons - moral, ethical, pragmatic, or through negotiations, which model legal norms. The principle of democracy not only establishes procedures for producing legitimate norms but also directs the production of law itself.

As legal philosophers would put it, the principle of democracy contains a "*telos,*" an aim implied in the norm production process and procedures. The production of procedures themselves assumes the possibility that they contribute to creating a legal community that institutionalizes the participation rights of its members in producing standards.

Thus, the legal system does not only set the form by which rational political will becomes a norm. It also provides the *medium* by which that will can express itself as a will common to free and equal associated members of the legal system.

Ultimately, civil disobedience is not merely justified from a moral, religious, or ethical standpoint, where we put some extra-legal order above and beyond the legal order. We do not mean that these ways to justify civil disobedience do not exist or could not be enough for a disobedient citizen to act. The point is that beyond an individual's self-conviction to take action, it is possible to find legal justification for civil disobedience to be considered a right within the fundamental (or civil) rights system. This way, modern law removes the burden of legal validity from concrete subjects and puts it in the formal legal procedures by which universal claims are institutionalized.

In this sense, civil disobedience reinforces the rights system; it does not deny it. From Thoreau through Gandhi and Martin Luther King Jr., the history of civil disobedience has shown us that those who once were considered rebels who undermined the foundations of the State are seen

today as those who were striving to sustain the very principles of the democratic rule of law.

Law, Politics, and Civil Disobedience

As we move from a moral to a legal and political normative perspective, it is essential to clarify the connection between law and political power. We should look at the exercise of political autonomy and the development and implementation of the democratic rule of law.

We construct modern law from the basis of the democratic principle, which presupposes the form of law to consolidate. Thus, law and politics are co-original in form and content. It is through the formal procedures regulated by law that democratic politics works. These procedures are also content-based since each spatial and temporally located legal community achieves a system of fundamental rights through particular historical and theoretical processes.

The system of fundamental rights includes political participation in forming opinions and will, through which citizens can exercise political autonomy. These rights have a reflexive application. They enable citizens to change their position concerning the law and collectively interpret and configure public and private autonomy. They are rights to reconfigure rights through political action.

In this perspective, civil disobedience is a touchstone to the democratic rule of law. It is a participatory political right that enables citizens to change the course of the interpretation of the law. Furthermore, citizens use it when governments make rules or policies inconsistent with the basis of the system of rights and the rule of law itself, in a way that these decisions violate the political and legal system that sustains its legitimacy. Indeed, this is why Henry David Thoreau called civil disobedience not a right but a civil duty (Thoreau 1993).

Civil disobedience is a political tactic to show that law or administrative acts, even when produced according to the official political power and procedures, cannot be imposed solely based on them. This power must maintain the connection with the communicative power generated by non-official sources to be legitimate.

The disobedient citizens will rightly draw attention to a double crisis generated by the lack of connection between the decisions of the official power circle and communicative power. In a democracy, which lies on the grounds of the reversibility of decisions, the connection between the political system and public sphere is to be constant, or it generates a crisis of legitimacy. When the political system closes this relationship, it also produces a crisis of effectiveness because it will make decisions that decide nothing.

Thus, civil disobedience reinforces the principle of popular sovereignty. It denounces the threats against the structural connection between civil and political society when, under certain circumstances, the first fails to influence the latter, having exhausted all ordinary means.

Civil disobedience teaches us an important lesson about the dynamics of politics and law through their structural coupling, the Constitution (Luhmann 1996). Civil disobedience clarifies that the democratic rule of law institutionalized in the Constitution is an unfinished work in progress. Understanding the Constitution as a risky, delicate, and fallible enterprise is core to understanding its democratic and pluralistic foundation. It shows that its meanings need to be updated every day and that this is a condition for the system of rights to reach all, or, as modern Constitutions enunciate, "we, the people." (Rosenfeld, 1994) (Ackerman 1991).

From this perspective, the actions taken by disobedient citizens are not illegal because they act under the Constitution. Instead, illegality rests in the government's decision, at least until the judgment of its constitutionality. Moreover, under the democratic rule of law, who says what is constitutional or not? All members of a concrete legal community who hold participatory political power to interpret the law.

No law or governmental act is constitutional per se. Thus, these legal norms gain validity in the interpretation processes which legitimate them through constitutional principles. Furthermore, such interpretation is not limited to the one made by judges and administrators at the center of the political public sphere. Instead, the exercise of

sovereignty where citizens discuss, rethink, restructure, update, and perfect these interpretations is diffused in public arenas.

Civil disobedience is a firm reminder of how a democratic and legitimate political sphere works and of the importance of having diverse self-correction mechanisms for the system to keep its principles alive through generations.

Modernity/Coloniality and the Limits of Civil Disobedience

After the assassination of President John F. Kennedy in November 1963, Martin Luther King Jr. wrote *Death of Illusions*. He commented on this murder and those that happened in the same period, four black girls in church, other black children by police violence, a black postman, and black civil rights leaders. He urged to ask: "not merely about who murdered them, but about the system, the way of life, and the philosophy which produced the murderers." (King Jr 1963: 1) In this last part, we will propose understanding the system and the philosophy that produces the murders from a different voice.

In applying the rule of law, we usually take the idea that the rights system is successful and designed to serve all for granted. Oppositionist voices use the argument of apparent success to justify their fear that acts of civil disobedience could lead to a general breakdown of the system and violence. These voices do not consider that civil disobedience is a reaction to the violence and the breakdown that already exists in the system, commonly provoked by political and economic powers. On the contrary, it might be the last remedy for the system to create a situation where negotiation leads to necessary changes. Civil disobedience sets a constructive crisis within the system.

Disobedient citizens challenge the general idea that the system works for all. Moreover, this challenge is not made outside the system since the possibility is part of how the system works. Instead, civil disobedience makes visible that which is commonly disguised in the dynamics of the legal system: *"coloniality"* (Mignolo and Tlostanova 2006; Mignolo 2008) generated by modern devices, such as the written Constitution.

The narratives around the written Constitution usually show it as a solution to different problems. Nevertheless, the Constitution produces as much violence as liberty and equality when seen by those constantly put aside by modern devices. Failure to understand the violent foundation of the system and its deployments results in a narrow conceptual framework within which one understands democracy. As a result, we tend to narrow down the legitimacy of rights and techniques available to defend them to their formal existence and institutional operation. In that case, we will fail to see how these exact mechanisms often exclude those whose voices are less or not heard.

The idea that liberty, equality, and a principle of democracy are the bases of the legal system, which proposes a horizontal power among its members while hierarchical institutional authorities exercise it, ignores the question of how each virtual member access these powers. A theoretical reaction to the paradox is to propose a radical horizontality (Sitrin 2006; Matos 2016; Hardt and Negri 2005). It is through the horizontality lense that many authors interpret recent protests around different parts of the world, such as Tahrir Square and Arab Spring; Occupy Wall Street; Indignados and 15-M in Spain; Gezi Park in Turkey; Umbrella Movement in Hong Kong; Women's Marches; Protests against IMF in Greece and Argentina; June 2013 in Brazil.

As Walter Mignolo puts it: "the path to the future cannot be built from the ruins and memories of Western civilization and its internal allies" (Mignolo 2008: 295). Civil disobedience is a vital tool to experiment with other possible worlds and to denounce the market and state violence covered by the system. However, we do not solve the paradox by tilting the pendulum to the opposite tip. Radical horizontality is a necessary political action of denunciation used by disobedient citizens, but it is also capable of disguising structural hierarchies that operate in society, even within social movements.

Another crucial task beyond defining civil disobedience is recognizing its limits as a legal, political and social strategy to promote and

provoke social change. Furthermore, this task requires one to stay in the borderline, the location of the paradox (Mignolo and Tlostanova 2006). Of course, the base violence of the rule of law system has to be recognized and denounced, but this does not exempt one from building new mediations and dealing with the problem of legitimation and legitimacy (Habermas 1988, 1992, 1996). Otherwise, we will continue to reproduce structural violence through the narrative of a universal common.

`It is vital to consider Mignolo's warning that civil disobedience must keep company with epistemic disobedience. We must work on our ability to learn to unlearn and unveil the geopolitics of knowledge and its racial, patriarchal, and imperial constructions. Furthermore, this includes not changing one universality, one hegemonic thought, for another. The commonality is a starting point for negotiation and a politics of alliances, not an aim. New subjectivities, political, and social forms emerge from fracture and ambivalence of "being," not from totality. Who participates, how each participates, whose voices we hear, and who is silenced by hegemonic identities erected to a place of category, history, and experience are questions that must keep open.

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Civil Law: Roman

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Introduction

"Civil law" is an English language label for groups of law that trace their origins to the law

of ancient Rome (Rheinstein 1968; Watson 1981, 1–11). Most of the world lives in "civil law" systems. This includes the countries of continental Europe (e.g., France, Germany), most countries settled or colonized by the countries of continental Europe (e.g., Angola, Columbia), and other countries that without foreign settlement or colonization adopted civil law or were colonized by those that did (e.g., Japan, Korea). The title of this entry is "civil law (Roman system)" to distinguish civil law legal systems from the civil laws that govern civil matters in individual legal systems.

Noticeably absent from this list are the laws of England. In the English language, the term "civil law" ironically is less a positive definition of foreign laws and a foreign legal system than it is a definition by contrast of laws and legal systems different from the "common law" of England. The term "civil law" is mostly used with reference to "common law." For some time, the two major legal groupings in the world were civil law and common law. In countries of civil law, however, civil law is not a term much used. Instead, preferred terms are "continental law" or "Roman-Germanic law" (Husa 2015, 25; Kontinentales Recht 2011). These better reflect that there is no one civil law or civil law system, but many.

Moving beyond legal systems, it is usual to use civil law as an adjective describing aspects of a civil law legal system, e.g., civil law codes, civil law statutes, civil law legal methods, civil law courts, and civil law judges.

This necessarily brief entry addresses: (1) introduction, (2) reception/non-reception of Roman law, and (3) civil law in comparative law and comparative legal systems. Notwithstanding centuries of use, this entry concludes that civil law as a term has fallen out of favor with jurists and is likely to find only limited and selective use in future.

Reception/non-reception of Roman Law

One of the most momentous developments of European history was the discovery and reception of laws of the ancient Roman empire. Roman laws were literally re-discovered in Bologna in the eleventh century. In the centuries that followed, Roman law was taught, learned, and adopted across Europe. The "reception" took different forms with different effects at different times and places; it has been a centerpiece of legal scholarship of continental Europe (Stein 1999; Tuori and Björklund 2019).

England avoided a wholesale reception of Roman law but was not spared Roman law influences in its laws and legal system. The influence of Roman law on English law is itself a centerpiece of English legal history. "Roman law" was found in canon law, law merchant, admiralty law and elsewhere. Courts that applied Roman law were dubbed civil law courts (e.g., Admiralty, Equity, Star Chamber) as contrasted to common law courts (e.g., King's Bench, Common Pleas, Exchequer). Civil law courts applied different laws using different procedures than did common law courts. Oftentimes they filled needs that common law courts could not. In England, one use of civil law described laws in England deemed Roman in origin. Roman law was itself of interest in comparison to common law (St. German (1517) Doctor and Student: Or Dialogues between a Doctor of Divinity and a Student in the Laws of England, Wood (1704) New Institute of the Imperial or Civil Law). The University at Oxford famously had a chair of civil law before it had a chair of common law.

In America too, Roman and civil law found interest, perhaps even more than in England, for contrary to popular perception, the settlers of modern America did not bring English common law over in their ships and did not adopt British laws wholesale (Maxeiner 2015, 2018). Looking toward a new legal system, the founders studied Roman law (Sellers 1994). Their successors encouraged the study of civil law (e.g., Cushing 1820, On the study of the civil law). American Supreme Court Justice Story in the 1820s and 1830s promoted its study enthusiastically. He wrote the first Commentaries on the Conflict of Laws Foreign and Domestic, included civil law in the titles of three other of his famous commentaries, agency, bailments, and partnership, subtitling them "With illustrations From the Civil and

Foreign Law," and chaired a Massachusetts committee that endorsed codifying common law. Throughout the nineteenth century in both the United States and England benefits and drawbacks of the marque card of civil law, the code, against the marque card of the common law, the binding judicial precedent, were vigorously debated over the issue of adopting codes (Clark 2022; Maxeiner 2015, 2018). Americans looked to civil law both for solutions to specific substantive issues of law and for methods of making law in codes. They did not much distinguish among civil law jurisdictions.

The codification debates of the nineteenth century were not concerned with devising an academic structure of laws: they were concerned with better laws and better ways to make them. It was a century of law reform and law codification not just in the United States. The century began with France adopting the five Napoleonic Codes including the Code Civil (CC), which for the nineteenth century was the modern model of civil law. The century ended with Japan adopting German codes, with united Germany enacting its Civil Code (Bürgerliches Gesetzbuch—BGB), and with the United States and the United Kingdom largely, but not completely, giving up on codes. In the debates in legislatures and bar associations, the different sides stressed advantages and disadvantages of civil and common law substantive laws and methods of lawmaking and law applying. Civil law, as distinguished from common law, was as good or as bad as one felt about the individual components that one identified as central to the respective approaches. Codification since then has lagged even in continental law countries (Parise and Vliet 2019).

Civil Law in Comparative Law and Comparative Legal Systems

As codification was leaving the scene at the turn of the twentieth century, academic comparative law came into being. Commonly it is dated from the Paris International Congress of Comparative Law of 1900. More than a century later there is no generally accepted understanding of comparative law as an academic discipline. That means much is allowed as acceptable and much is debated. The 100th anniversary of the Congress marked a perceived need for rethinking of comparative law (Glanert et al. 2021; Husa 2015; Legrand and Munday 2003). In both the twentieth century and now in the early years of the twenty-first century, the concept civil law has not fared well. It was not at the center of the academic ordering of legal systems in the twentieth century. It appears that a role in the twenty-first century is likely to preempted by other, more relevant, or more practical organizing measures.

Three things about comparative law today still relatively non-controversial are: (i) it is about more than study of foreign law; (ii) it properly addresses both comparisons of different legal systems (a/k/a "macro") and comparisons of individual legal rules and institutions (a/k/a "micro"); and (iii) it properly is conducted for both practical (lawmaking or legislative) and theoretical (understanding and explaining, philosophical) purposes (Husa 2015). A repeated criticism, however, is that much of comparative law is too rule bound. Practically of course, that comes with practical comparison.

Civil Law: Version Twentieth-Century Comparative Law

One of the tasks comparativists set to work on in the twentieth century was classifying legal systems. Over the course of the century, reaching a high point roughly mid-century, scholars developed different classifications first into legal families, for *legal systems* and then, more broadly, for *legal traditions*. The latter addressed some issues of the former and has helped to maintain vitality of "civil law tradition" and perhaps "civil law methods." The explication of families of law was a major focus of the study of comparative law in the twentieth century (Pargendler 2012).

One might have thought that civil law would dominate classification of legal systems. It did not and could not. No one could miss that; the first day of 1900 the new German civil code went into effect. It was quite different than the Code Civil of Napoleon of 1804. Classification systems could not deny that. Differences between the two could

be greater than the difference between one and English law (Zimmermann 2001, 2019). Although classification was made that melded the two into one under a different name, Roman-Germanic, more widely adopted approaches made the two into separate families, although related, of French and German legal systems.

That did not solve the classification issue. How should other European countries be fit into the classification? Were the Nordic systems even civil law at all? Where did the Benelux countries belong, not to speak of Italy, Spain, most of the countries of Latin America, and Portugal? In the era of the Cold War there was a socialist family, now deemed largely extinct. Decolonization required categorizing the newly independent states of Africa and Asia.

Similar problems plagued the civil law's counterpart, the common law. If one could close one's eyes to the independent United States in 1900 (e.g., Dicey AV 1900), one could not in 2000 (Posner 1996). Differences between England and the United States can be more profound than between either one of them and civil law legal systems.

If one desires a scientific classification of laws, one should look for objective factors that distinguish legal systems. Which factors should one choose? No matter which you choose, legal solutions and legal methods often cross territorial borders and change over time. Within one legal system different parts of one system may reflect different choices. One cannot reasonably say statutory law, even systematized and codified statutory law, is exclusively characteristic of civil law systems and not of common law systems. Similarly, one cannot reasonably say binding precedents exclusively make up the law of common law systems and have no similar role in civil law systems. Similar observations are easily made in the respective systems of procedures.

Can one explain a system's classification only on historical grounds? Pretty much that seems the case. For at least much of the world, the language in which the legal system is conducted sets the classification. English language means common law and just about any other European language means civil law.

To a substantial extent this issue was addressed by classifying legal traditions instead of legal systems. Yes, "there is no such thing as the civil law system or the common law system [however] . . . the fact that different legal systems are grouped together under such a rubric as 'civil law' indicates that they have something in common, something that distinguishes them from legal systems as 'common law' . . . that makes it possible to speak of the French and German (and many other) legal systems as civil law systems (Merryman 1969, 2)." That flexibility, however, limits the utility of the classification. It is, as the author's first words of his preface proclaim, "This book is written for amateurs, not professionals" (Merryman 1969, viii). There is nothing wrong with that. Classification serves pedagogic purposes: it operates as an "epistemological preliminary analysis and results in a *hermeneutical preliminary comprehension* of the foreign law" (Husa 2015, 238). Classification is most useful at the beginning of learning about foreign law. Further along when study becomes more detailed, generalizations are less useful (Husa 2015, 241–242).

This also explains why civil law has not been little used as a concept in recent years. The more one focuses on individual rules and institutions, the less helpful is the classification. This is particularly so when the one is looking for legislative solutions abroad to problems at home (Husa 2015, 237). One cannot say, this is a "civil law" jurisdiction and therefore it will have the following characteristics. As knowledgeable as a comparativist may be about one civil law or common law system, the comparativist will not likely make anything but a tentative assessment about another civil law or common law system. The demands of knowing multiple legal systems are so high that it is unusual for one person to know well more than two or three (Legrand 1999, 52–53).

Civil Law: Version Twenty-First-Century Comparative Law

The future of the label civil law in the twenty-first century looks bleak. Professional comparativists question it as a concept. Some are critical, and others are just doubtful of its future usefulness

(Husa 2004; Walker and Chase 2010). The real challenge may be less criticism and more non-use. Once you have two major systematizations "on the shelf, there seems to be less reason to keep doing it" (Langbein 1995, 547). Comparative law in much of the world is thriving both as an academic pursuit and as a practical legislative vehicle but it is not relying on a civil law (or for that matter, common law) classification. "Some things seem obvious. Macro constructs, such as legal family are not necessary: the comparativist can do without macro-constructs" (Husa 2015, 237).

In micro-comparisons of laws or legal institutions, classifications into families of law, or characterizations as civil or common, have little utility. Legislators are interested in solutions wherever they can find them. They should take into account the legal methods by which other systems implement them, but classification as civil or common should not make a difference (Husa 2015).

Comparativists are publishing comparative works that rely on ordering mechanisms other than civil law or common law. Several publishers (e.g., Cambridge, Elgar, Oxford, Routledge) have extensive series of comparative law handbooks and encyclopedias; these publishers and others, e.g. (Eleven, Hart, Intersentia, Palgrave, Springer), have series of individual studies focused on comparative law. Topics and subtopics, e.g., federalism, constitutional review, and aspects of the same, are more important to ordering in most of them than civil law/common law classifications. Some of these works find the label civil law or common law useful in addressing specific substantive areas, e.g., civil law civil procedure or common law civil procedure, but the use is usually incidental and not central. Many of these works have no use for the civil law/common law distinction beyond in the choice of systems to compare; editors choose countries that are more or less alike, depending upon whether they are looking for similarities or differences.

In Europe practical reasons of harmonization of the laws of the European Union have loomed large ever since the Single European Act of 1986. Proposals for Union and harmonized laws have been numerous. Some have stumbled because of differences among legal systems generally and others because of differences between English and continental systems. It will be interesting to see if the departure of the United Kingdom and its common law makes harmonization easier. No matter how it turns out, it seems the focus of discussion in Europe, as well as comparisons with Europe, will not be on some generic civil law, but on the laws of the European Union and its Member States.

There are a few areas both practical and theoretical where the civil law/common law distinction survives, although even there, it hardly thrives. Mixed jurisdictions, that is jurisdictions where both legal traditions compete, e.g., Louisiana, Québec, and South Africa, find use for it where proponents of civil law use it in defense (Farran et al. 2014). Elsewhere proponents of learning from foreign legal systems use the distinction to mark the "convergence" of legal systems (Markesinis 2000). Economists, not lawyers, use it in the so-called *legal origin theory.* They assert that common law countries do better economically than do civil law countries largely, their argument seems to be because common law systems interfere in an economy less (World Bank 2022). Comparativists have little use for what they see as an argument based on inadequate understanding of law (Garoupa and Moriss 2012; Garoupa and Pargendler 2014).

In the extremely nationalist legal system of the United States (Husa 2015, 87), the distinction survives as a protective wall against civil law intrusion. When civil law is mentioned other than by the small circle of comparativists, the connotation is usually negative. Even comparativists who do not see it as negative fear that American jurists generally see a "great divide" between civil law and common law (Bersier et al. 2022; Lundmark 2014). Ironically, American Supreme Court Justice Scalia, the strongest proponent of renewing American legal methods, was a vigorous opponent of references to foreign law, even though the methods he proposed were more "civil" than "common" (Maxeiner 2013; Scalia 1989, 1997; Scalia and Breyer 2005; Scalia and Garner 2011). Most American jurists have little use for learning about foreign legal systems,

let alone for finding solutions in them (Langbein 1995; Maxeiner 2018, Appendix). American legal scholars are not expected to study abroad to learn civil law legal systems. United States publishers have not participated in the twenty-first century's outpouring of comparative law books; few of the authors and editors of these books are Americans who first studied law in the United States.

Cross-References

- ▶ Comparative Law: Methods of
- ▶ Legal Methods: Statutory Interpretation – The Argument from Intention
- ▶ Legisprudence
- ▶ Precedent: In Legal Positivism
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Civil Procedure: Philosophy of

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Introduction

In very general terms, civil procedure is a means for solving civil disputes, but first of all such a definition requires to determine which disputes are "civil." In a sense they deal with the application, in concrete cases, of the "civil law," including various areas such as property, contracts, torts, family, labor law, and so on and including also individual and collective disputes. Then criminal and administrative disputes (and in some systems also constitutional disputes), as well as supranational and international disputes, do not belong to the area of civil procedure. However, the distinction between what is and what is not a civil dispute may vary to some extent in the several legal systems.

Procedure

Referring to a civil matter, a relevant problem is to understand what is properly a "procedure." Once again in very general terms, a procedure is an organized sequence of acts, usually performed by different subjects: private parties, lawyers, prosecutors, experts, judges, and sometimes also juries. Such a sequence is usually determined and specifically regulated by the law with the definition of what is a *starting* act and what is the *final* act that concludes the sequence and also with the definition of all the *internal* acts that are included in the sequence. However, it may be interpreted also as a series of situations in which the various subjects participating in the procedure have the possibility of doing (or of not doing) an act regulated by the law. Usually they have a discretionary power to determine their behavior, although sometimes they have duties and other times they have burdens. It is the procedural law that usually defines the order in which the various acts may or should be performed, the timing of them, their contents, and the consequences of not performing them in the due form and in the due time.

Procedural Models

The structure of the procedural sequence is very different in the various legal systems and cannot be analyzed here in details. However, the most important models may be considered.

One of these models is defined as *adversarial* because it is essentially party-centered, and the (usually two) parties are supposed to behave as *adversaries*. Actually, the procedure begins only by initiative of a party and has only the subject matter that this party defines in her claim. The adverse party is in a corresponding position while opposing to the plaintiff's claim. Moreover, the development of the whole following procedure depends essentially on the parties' own decisions. Then the proceeding is actually a sort of fight, or of competition (see Pound's idea of a "sporting theory of justice"), and it is aimed at determining which of the two parties deserves to win. In such a context, the role of the judge is

basically that of a "passive umpire" who should only ensure that the "rules of the game" are properly applied, eventually sanctioning their violations, but nothing more. The most important example of this model is the American adversarial procedure. It is true, in this case, that the judges developed a rather active attitude of "case management" in the last decades, but this did not change or limit the fundamental and monopolistic role of the parties in determining the subject matter, the beginning, and the development of the proceeding. A very important aspect of this kind of proceeding deals with the presentation of evidence, i.e., with the way how the information needed for the final decision about the facts in issue is acquired. In the adversarial system this depends only on the activities of the parties: they have the exclusive burden of presenting the items of evidence that they consider useful to advance their case and hopefully to win in the end. It is interesting to note that even when the judge has the power to order ex officio some item of evidence, as it happens in the American *Federal Rules of Evidence*, usually such a power is not used because also the judges share the "adversarial ideology" and avoid to interfere with the parties' strategies.

A radically *nonadversarial*, i.e., *inquisitorial*, procedural system never existed in the administration of civil justice and was only typical of the Holy Inquisition; then it may not be considered here.

The alternative to a pure adversarial system is very frequent, however, in a number of procedural systems: these are *mixed* systems, in which the protection of the parties' procedural guarantees combines with an active role of the judge. Then there are two important dimensions of the procedure. On the one hand, the *private* nature of the proceeding implies that it is up to the parties to determine in each case the specific subject matter of their claims and defenses. Usually the judge cannot start a case ex officio, and only in rare and exceptional case he can determine on his own motion, for instance, that a contract is void. Therefore, it is also up to the parties to establish which kind of final decision they ask to the judge. On the other hand, however, the judge has several *active* powers: he can *manage* the case according to his own discretion (as it is permitted by the law), that is, establishing delays, governing the parties in their procedural activities, and admitting or excluding the items of evidence that are presented by the parties. But he may also ordinarily order on his own motion the presentation of some items of evidence that the parties did not offer, when he considers that these items of evidence may be relevant for the final decision on the facts in issue. Such an evidentiary power may be regulated in different ways in the several procedural systems: for instance, Art. 10 of the French code of civil procedure provides the judge with the *general power* to order the production of any kind of evidence on his own motion, while in other system he has only *some* powers to order specific items of evidence. However, a general trend that may be seen emerging in many procedural systems is in the sense of providing the judge with several *active* powers of collecting ex officio all the relevant evidence.

Dialectical Structure

A very important feature of a civil litigation is the structure according to which the activities of the parties, and of the judge, are organized. This structure has a basically *dialectical* nature, since usually a party has the right and the possibility of reacting to everything that is done or said by the other party or by the judge, in order to support her own position. A double justification may be found for this basic rule, notwithstanding the problems – and the waste of time and money – that its application may provoke. A first justification is that the right of each party to react to what the other party or the judge says is granted on the basis of the constitutional guarantee of due process, that is, that each party has the right to defend herself in any moment of the proceeding. A second justification is that a method based on *contradiction* between the parties is a good and effective way to perform a fair, complete, and deep analysis of all the factual and legal aspects of the case, in view of a just and correct final decision.

Functions of Procedure

A very relevant aspect of how the *function* of a civil proceeding is determined deals with the kind of outcome that the proceeding should achieve. As said above, the main goal of such a proceeding is to solve the dispute that arose between two individual – and usually private – parties. However, there are several theories about the nature of such a solution.

A first distinction is whether the solution is intended as a *decision* made by a judge or as an *agreement* reached by the parties by means of a *settlement*. A decision issued by a judge is usually considered as the ordinary means by which a dispute is solved, and this decision is the final step of the whole proceeding. However, a trend that is becoming more and more important in the last decades is in the sense of trying to avoid the development of the whole procedure – therefore sparing time and money – and of inducing the parties to bargain with the goal of reaching a fair agreement that puts the dispute to an end. This trend emerges in almost all the procedural systems, but there are extremely interesting examples of that: for instance, in the United States civil disputes are solved by settlement in roughly the 98% of the cases.

When a dispute is decided by a judgment, a further distinction has to be taken into account. When the proceeding is intended – as it has been said – as a sort of individual competition, the outcome is, as in any kind of competition, just that a party is the winner, and the other is the looser. In this way the conflict is put to an end, and therefore the main goal of the proceeding is obtained. Nothing more is required: the winner deserved to win (because he was stronger, because he invested more money in the case, because of cultural, social, strategic, or cultural advantages), and this is the only reason for his victory. The contents and the quality of the judgment have no special importance, although it is usually claimed that the rule of law has to be followed. Then a judgment that is clearly against the law may actually produce the outcome of finally solving the dispute, mainly when the looser does not have the money or the possibility to file an appeal and to try to achieve a favorable decision in a further proceeding. Nothing strange in this: in any kind of competition the winner is not the party that has the right to win, he is just the one who deserved to win according to the rules of the game.

Applying the Law

The situation is different when it is said – as it happens in many cases – that the goal of the procedure is not just to find out who wins but to decide the case by means of a correct interpretation and application of the substantive legal rule that governs the case. Here the quality and the contents of the final judgment are really important, but then the problem is to establish when, and under which conditions, this rule is validly and correctly interpreted and applied. Here a useful suggestion comes from the standard doctrine of legal philosophy according to which any legal rule has basically a *conditional* structure. It is composed by two sentences: the first one defines a *condition*, and the second one states the *consequence* that should be applied under that condition. The first sentence defines – usually in general terms – a *type of facts* (e.g., "if somebody, acting without due care, destroys the property of somebody else"), while the second statement establishes the *legal effect* that is produced by those facts ("he shall have to pay for the damages"). Correspondingly, such a legal effect may be applied in any specific case *when and only when* a fact corresponding to the type defined by the rule actually occurred in the empirical reality. If such a fact did not exist, or if a different fact occurred, this legal effect cannot be established, basically because that rule simply cannot be applied in the specific case. If it is applied although that particular fact did not happen, then the decision is not legally valid and is basically unjust. As Jerome Frank once said, no just decision can be based on wrong facts.

This theory concerning the function of procedure has several important consequences.

On the one hand, it implies that the rule governing the case has to be chosen among the

system of rules and then has to be interpreted in order to be applied in the specific case. All this may be a complex and difficult task, in which a guiding role is performed by the facts of the case, since it is to these facts that the rule has to be applied. It means that the judge has to consider first which rules could be hypothetically referred to those facts and has to select the one which is more properly corresponding to the facts. Then the further problem is that no normative formulation has just one meaning: rules generally may have several (valid) meanings, and it is up to the interpreter – that is, to the judge – to find out (or to establish) a meaning that may well correspond to those facts. This may be a specially complex reasoning (some people speak of a *hermeneutic circle*) in a kind of *trial and error* sequence considering several and different possibilities until a final solution is identified, in which the facts of the case may be *subsumed* (as the Germans would say) in the factual statement that is the condition of the rule.

On the other hand, speaking simply of "facts" is a common but extreme simplification. Actually the facts do not enter into the proceeding: they already occurred before and out of the proceeding. In any procedural context, we have nothing but *statements* or *narratives* saying the given fact happened in a given way, at a given time, and so forth. Then the problem for the judge is to determine a narrative of the facts that could be taken as realizing the condition established by the rule. This happens when there are valid reasons to conclude that there is a *truthful narrative* of the facts and then that there is a justified reason to apply that rule in that case. In a sense, therefore, it can be said that the "truth of the facts" is a *necessary condition* for a valid and correct application of the rule, i.e., for the *justice* of the final decision.

Epistemic Procedure

All this shows that a judicial proceeding has an important *epistemic* function, since it has to be oriented toward a decision establishing the truth of factual narratives. Of course this function has several implications. On the one hand, as Jeremy Bentham wrote a couple of centuries ago, an ideal procedural system should include a basic rule according to which "all the relevant evidence should be admitted," since a basic epistemic principle is that of the *comprehensiveness* of the information that is used in order to achieve a rationally justified decision. Correspondingly, the various rules that in many systems exclude the possible presentation of several items of relevant evidence – usually in order to protect interests conflicting with the search of truth – should be set aside.

On the other hand, it is necessary to determine properly the meaning of the "judicial truth" that the final decision should find out. Many theories of "narrative" truth or of "coherence truth" do not provide with useful insights into the judicial context. Since the epistemic function of the process is to determine the truth of factual statements in order to apply the law in concrete cases, a modern version of the s.c. *correspondence theory* of truth may be used to interpret what should be the factual basis of any judicial decision.

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Claim Rights (Subjective Rights)

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Introduction

The phrase "subjective right" is a literal translation from the German expression "*subjektives Recht*." This expression refers to a legal position the holders of which are empowered to enforce it by means of a court decision. For example, a definitive right of person A to attend a certain church service, implied by religious freedom, is a subjective right if the holder of the legal position "right to attend church service X," namely, person A, can take legal action.

The Classic Controversy: Rights Protecting "Interests" or "Will"

According to the classic controversy, the crucial question is whether subjective rights protect "interests" or "will." In Germany, the theory of subjective rights as protected will was supported by Friedrich Carl von Savigny (von Savigny 1840, 7) and Bernhard Windscheid (Windscheid 1906, 156), while for not least of all Rudolf von Jhering interests were key (von Jhering 1905, 339). Since no decision could be reached, both aspects were compounded in different versions of the "combination theory" (Jellinek 1905, 44; Ennecerus and Nipperdey 1959, 428–429). In the Anglo-Saxon world, John Austin defended the will theory (Austin 1873, 410) and Jeremy Bentham the interest theory (Bentham 1970, 206). Unlike in Germany, the controversy has basically persisted (for the will theory see Hart 1982, 183–184; Wellman 1997, 70; for the interest theory see Raz 1986, 180–183; MacCormick 1976, 305; → interest and will theory).

Distinguishing Justifications for Legal Positions, Legal Positions, and the Legal Enforcement of Subjective Rights

In his analysis of constitutional rights, Robert Alexy proposed a three-stage model of subjective rights, distinguishing between and among (i) justifications of legal positions, (ii) legal positions, and (iii) the legal enforcement of subjective rights (Alexy 2002a, 115–118). He claims: "Failure to distinguish these three matters is a major cause of the unending controversy about the concept of subjective rights, and above all of the dispute between various versions of the interest and the will theories of rights" (Alexy 2002a, 115). Alexy's model provides crucial insights; it needs, however, to be developed further.

Distinguishing "Justifications of Legal Positions" and "Legal Positions"

What is classically regarded to be the characterization of a subjective right – that the subjective right "is" a legally protected interest or legally protected will – refers to *reasons* or *justifications* for subjective rights. In Alexy's words: "The reason for a right is one thing, the right which is based upon this reason is another" (Alexy 2002a, 116 [emphasis omitted]). Thus, the justification for the legal position is located at the first stage, the legal position itself at the second stage. This provides for a reconstruction of the German idea of a "combination theory" with an eye to "interests" and "will." There is no exclusionary "either-or," both "interests" and "will" can be understood as mutually supporting justifications for a legal position. While "interests" refer to the substantive aspect of subjective rights, "will" refers to the autonomous decision of the holder of the legal position to legally enforce the subjective right or not and, thus, to the formal aspect of subjective rights (on the general distinction of formal and

substantive aspects in this context, see already von Jhering 1905, 339).

Intrinsic and Extrinsic Justifications for Legal Positions

In addition to Alexy's model, the distinction between intrinsic and extrinsic justifications for legal positions adds explanatory power with an eye to contemporary legal systems. For the interest theory, the *interests of the holder of the legal position* are key – in the example mentioned above, A has the interest in exercising his or her own religious liberty. Justifications that are specifically linked to the interests of the holder of the subjective right can be termed "intrinsic reasons." Joseph Raz generally characterizes rights by such intrinsic interests: "[R]ights are based on the interests of the right-holders" (Raz 1986, 180). There is, however, hardly any need for such narrow characterization. A legal position may be justified by interests that are not specifically linked to the holder of the subjective right. Such interests or justifications may be termed extrinsic interests (interests of other persons or of the general public) or extrinsic justifications (Borowski 2006, 223–225; Borowski 2018, 377–378). For example, the market freedoms in European law, giving rise to "negative integration," serve the purpose of realizing the "internal market" of the European Union according to Article 26, paragraph 2, Treaty on the Functioning of the European Union (TFEU). This economic structure is a collective good of the Union, the realization of which is furthered by awarding a certain subjective right to individuals and/or private associations (on the market freedoms as judicially enforceable individual rights, see, for example, Streinz 2019, 157, 342). These holders of the subjective right pursue their intrinsic interests and by making their claim stemming from their right they further, in turn, the extrinsic interest that runs parallel. The subjective right represents a means to the end of furthering the collective good (Borowski 2018, 60–64). Note that the intrinsic aspect of the protected "will" of the holder of such subjective right remains intact – it is still the autonomous decision of the right-holder whether she takes legal action, thereby also enforcing the realization of the collective good. To sum up, at the level of justifications for the subjective right, there can be both intrinsic and extrinsic justifications and they can mutually support each other.

Distinguishing the Substantive Legal Position and the Procedural Legal Position

Alexy's "legal position" in his three-stage model is what I shall term the *substantive legal position* and his "legal enforcement of subjective rights" implies a second kind of legal position, namely, a *procedural legal position*. The justifications for both legal positions need to be distinguished, which is not reflected in Alexy's characterization of the first stage of his model, for he speaks in a rather undifferentiated fashion of "justifications of subjective rights" (Alexy 2002a, 115).

The Substantive Legal Position

The legal position, to which Alexy refers at the second stage of his model, will be typically a "right to something" or a liberty (see generally Alexy 2002a, 120–149). The example of A's religious freedom can be reconstructed as a liberty – to be precise, as a "negative liberty," according to which a certain action is permitted – neither proscribed not prescribed, so that "opportunity for action" emerges (see Berlin 1969, xlii). Then the issue of the subjective right is whether this liberty benefits from "subjective protection" (Alexy 2002a, 148). It can also be understood as an instance of a "right to something" in the form of a "right to the non-obstruction of acts" – Alexy mentions "professing a faith" in this context explicitly (Alexy 2002a, 122).

It is less obvious whether the substantive legal position of the subjective right can be a competence or legal power. A competence empowers the holder to change the legal situation (Jellinek 1905, 47; Merkl 1931, 281; Hart 2012, 81) – for example, by enacting legislation (public powers) or concluding a legally valid contract (private powers). The immediate legal change as such needs no enforcement. Legal changes have, however, implications in the real world. It is these implications in the real world that need enforcement. To be sure, insofar as the protection of a private power is concerned, this protection is generally

brought about by means of "rights to something." "Freedom of contract" is constitutionally protected – apart from certain limitations, there is a definitive positive right of the individual that the state enacts and upholds legislation giving effect to "freedom of contract" and implements this freedom by means of administrative and judicial decisions (Borowski 2018, 462–468).

The Procedural Legal Position

The legal enforcement of subjective rights, located at the third stage of Alexy's model, implies the procedural legal position: "Statements about enforcement also express legal positions, namely the legal capacity (power or competence) to enforce a right" (Alexy 2002a, 117, footnote omitted). Alexy's suggestion to call this legal position also a "right" (ibid.) is less convincing, for this procedural "right" would be part and parcel of the whole "subjective right." It is true, however, that while the substantive legal positions are typically "rights to something" or "liberties," the procedural legal position is a competence or legal power.

The Legal Enforcement of the Subjective Right

The action or complaint of the holder of the subjective right to the relevant court is the "institutional act" by which the competence is exercised. The legal change brought about by this competence consists in the creation of the legal obligation of the relevant court to assess the claim and, if all conditions are met, to hand down an adequate judgment as a basis for, if needs be, compulsory execution. This competence is part and parcel of the legal enforcement of subjective rights indeed; it does not, however, exhaust this stage. There are other necessary elements for the effective legal enforcement of substantive legal positions.

The Legal Permission to Perform the Institutional Act

To begin with the legal dimension, the "institutional act" by which the competence is exercised must be legally permitted. Even though it has a contradictory flavor that an institutional act may count as an exercise of a valid competence but attracts a punishment because the "act" that legally counts as the "institutional act" is forbidden by another legal norm (in Hart's parlance: a primary rule), this is not analytically impossible. Thus, the "institutional act" must *not* be *proscribed* in the greater legal system. What is more, "will" as a justification of the subjective right demands at the level of the legal enforcement of the subjective right that the institutional act is *not prescribed*, so that it is left to the autonomous decision of the holder of the subjective right whether to enforce it or not – in this sense, the right-holder can be described as a "small-scale sovereign" (Hart 1982, 183). Thus, the institutional act needs to be *merely legally permitted*.

The Factual Dimension of Enforcement

The enforcement stage also boasts of a factual dimension. For example, if it is a requirement that the action be filed through a barrister, but the holder of the subjective right lacks the financial means for such obligatory representation, it becomes apparent that legal power and legal permission alone are not sufficient conditions of effective enforcement. Other factual conditions of effective legal enforcement of subjective rights are other aspects of access to courts, for example, lengthy court proceedings or ineffective compulsory enforcement of judgments.

Enforceability as an Analytical Necessity or Typical Property of Subjective Rights

It has been contentious throughout the debate on subjective rights whether the legal enforcement represents an analytical necessity (Kelsen 1960, 140–141; Röhl 2001, 356) or (merely) a contingent property of subjective rights (von Gerber 1880, 40–41; Alexy 2002a, 117–118). This is not to be confounded with the question as to whether "rights" are necessarily enforceable (which Alexy does to a certain extent, Alexy 2002a, 116–118). Neil MacCormick has correctly emphasized that the existence of a legal position of an individual counts as an argument in favor of the enforceability of this legal position (MacCormick 1977, 204; see also Alexy 2002a, 117–118; Borowski 2018, 374). This thesis certainly depends on the purpose of the law generally and on the purpose of awarding legal positions to

individuals. With this caveat, it might be said, however, that it does suggest itself. Seen from this standpoint, the existence of a substantive legal substantive position of an individual forms a justification of its enforceability. Or to phrase it slightly differently: Since in the case of the existence of a legal position of an individual, the reasons for its existence outweigh the reasons for its non-existence, one might say that the justification for the existence of a legal position of an individual typically extends to its enforceability.

This justification relation is less than analytical necessity but more than mere contingency. If the existence of a legal position is regarded as a weighty justification for its enforceability, then this weighty justification for enforceability will frequently not be outweighed by justifications of competing rights and goods. This explains why subjective rights are often definitively enforceable. Only under exceptional circumstances this weighty justification for the enforcerability can be outweighed by justifications of competing rights and goods, so that there might be a definitive substantive legal position that is definitively not legally enforceable.

Prima Facie Positions and Definitive Positions

These considerations suggest that a distinction be made between *prima facie* positions and definitive positions at both (i) the stage of substantive legal positions and (ii) the stage of procedural legal positions. At both levels, a balancing of the pros and cons takes place. The result is that the justification of the respective legal position either outweighs the justification of competing rights or goods or not – in the first case, the *prima facie* position turns into a definitive position and in the second case, it turns into a definitive non-position (leaving aside the possibility of a stalemate, which leads to a form of structural discretion, see Alexy 2002b, 408–414; Borowski 2021, 152–153, 157). Thus, the realm of possibility allows for four combinations:

(1) Definitive substantive legal position that is definitively enforceable
(2) Definitive substantive legal position that is definitively not enforceable
(3) Definitive substantive legal non-position that is definitively enforceable
(4) Definitive substantive legal non-position that is definitively not enforceable

The distinction between (3) and (4) is practically insignificant, since the definitive enforceability of a substantive non-position is irrelevant – there is nothing to be enforced. By contrast, the distinction between (3) and (4) on one hand and (2) on the other is of crucial import – in the first case, there is no definitive substantive legal position, in the second case there is, but this definitive substantive legal position is definitively not enforceable. Although there is an overarching argument – the argument mentioned above that the existence of a (definitive) substantive legal position of the individual counts also as an argument on behalf of the (definitive) enforceability of this legal position – the arguments in favor or against definitive substantive legal positions and their definitive enforceability are not identical (on arguments *specifically against the enforceability* of a definitive legal position, see Borowski 2018, 379–380). In this sense, "limitations of a right" and "limitations of the enforcement of a right" can and should be distinguished (Borowski 2018, 375–376).

If a constitutional right is comprehensively understood, the "subjectification thesis" (*Subjektivierungsthese*) holds true: There is a presumption that a constitutional right exhibits the characteristics of a subjective right (Alexy 1990, 61). This can be extended to substantive legal positions that are justified by both extrinsic and intrinsic justifications (see section "Intrinsic and Extrinsic Justifications for Legal Positions" above).

It is clear, then, that combination (1) – "Definitive substantive legal position that is definitively enforceable" – characterizes a subjective right. It is less clear, however, what is meant if someone says "there is no subjective right" under the circumstances of the case at hand; it may mean (i) that there is a definitive substantive legal non-position – combinations (3) and (4) – or (ii) that there is a definitive substantive legal position that is definitively not enforceable, combination (2). Since a subjective right in a concrete case is the

conjunction of (i) a definitive substantive legal position and (ii) the definitive enforceability of this substantive legal position, combination (1) characterizes a subjective right and (2) to (4) cases in which there is no subjective right. The category of cases in which there is no subjective right, combinations (2) to (4), comprises different cases – cases in which there is no substantive legal position and cases in which there is, but this position is not legally enforceable for its holder.

The distinction of these two different cases of the non-existence of a subjective right is important from the practical point of view, for if there is a definitive substantive legal position that is definitively not enforceable from the point of view of the right-holder, it may be enforced other means – for example, by action of officials of the legal system – "objective enforcement" (Borowski 2018, 375–376). This is impossible if there no definitive substantive legal position in the first place.

To be sure, if one characterizes a certain right – such as religious freedom – at the general and abstract level, one would classify it as a "*prima facie* subjective right" (*notabene*: *not* "subjective *prima facie*-right"), since it provides for *prima facie* substantive legal positions that are *prima facie* legally enforceable by means of an action of the right-holder. For example, in assessing claims stemming from religious liberty, it needs to be determined whether the arguments on behalf of substantive legal positions and on behalf of their enforceability by means of an action of the right-holder, respectively, outweigh arguments in favor of competing rights and goods at the relevant level.

Conclusion

The distinction between on the one hand two legal positions at different levels – the "content level" with the substantive legal position and the "enforcement level," at which the procedural legal position is key – and the justifications for these legal positions at different levels on the other, taken together with the *prima facie* character of both legal positions, provides a sound reconstruction of the characteristics which are traditionally ascribed to subjective rights. "Interest" and "will" can be combined as justifications for the elements of this model and the often assumed but contested analytical necessity of enforceability can be explained by assuming a strong presumption in favor of enforceability of the individual's substantive legal positions by means of an action of the right-holder – a presumption which can, however, be rebutted in exceptional circumstances.

This model has been largely developed in the context of constitutional rights, international human rights, and market freedoms. To be sure, all this is based on important jurisprudential insights that predate the modern debate on constitutional rights and human rights. The model can be applied *mutatis mutandis* to subjective rights provided for in legislation. Here the *prima facie* character at the content level will be less prominent or even lacking, if the existence of the substantive legal position is determined by means of subsumption rather than balancing. It may well be, too, that some measure of legal enforcement is provided for by statutory law and case law. Statutory law and case law must, however, be interpreted against a jurisprudential background. It is this jurisprudential background that the model of subjective rights outlined above aims to provide.

Cross-References

► Rights: Interest and Will Theories

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Clemency

► Mercy and Clemency

Climate Justice

► Justice: Climate Justice

Codification

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Introduction

Codification is a standard means for making the law public and available through recording it in written texts. It is a tool known since the law's early development. Albeit both its naming and conceptual definition may vary from age to age and culture to culture – for, as widely accepted, "no *a priori* codification concept exists [...], therefore the exploration of this concept involves empirical work" (Ermacora 1964, 225) – in a generalizing manner it can be summarized in that it is (1) a law-consolidating (2) compilation in (3) a systemic and (4) written form (5) enacted with formal validity (Varga 2011, 262–272); or, simply stated, it is "a systematic and exhaustive regulation of a comprehensive area of the law" (Basedow 2009, 997).

Historical Developments

The fundamental task of codification in antiquity was the exclusion of any doubts in the presentation of the law, for example, the restoration by the *Laws of Hammurabi* of the validity of ancient traditions in accordance with the prevailing interests of the ruler, or the declaration of law as the common body of rules for the all-inclusive social game by the *Laws of Twelve Tables* (at least according to Titus Livius' legend of its origin),

or again, a halt of the law's previous development by its drastically abbreviated restatement in the *Codex Justinianus*. Already the promulgation of this last epoch-marking opus clearly shows the program characteristic of its antecedents as well, close to the sempiternal Utopian thought (Varga 1979). For instance, the eloquence of the *Constitutio tanta* introducing Justinian's *Digest* (533) holds, in addition to claims for complete comprehensiveness and exclusivity, that

> the Supreme Deity [. . .] vouchsafed us successful [. . .] the giving of the best laws, not only for our own age, but for all time, both present and future. Therefore we saw it necessary that we should make manifest the same system of law to all men, to the end that they should recognize the endless confusion in which the law was, and the judicial and lawful exactitude to which it had been brought, and that they might in future have laws which were both direct and compendious within every one's reach, and of such a nature as to make it easy to possess the books which contained them. Our object was that people should not simply be able by spending a whole mass of wealth to procure books containing a superfluous quantity of legal rules, but the means of purchasing at a trifling price should be offered to both rich and poor. (Justinian 1904, *Constitutio tanta*, §12, xxxi)

In the medieval era – under conditions when the European *ius commune* was hardly more than an assemblage given at the moment open to "favor exchange of experience, ideas, customs and legal rules throughout the European continent" (Vuletić and Kićanović 2013) – codification made possible the registration, recording, and uniform editing of the consolidated customs, adapted and brought up to date, prevailing in particular areas of customary law. In the modern era, the continued recording of recognized customs, the declaration of newly established national laws, the collection of an unambiguous body of law designated to be applicable by the sovereign power, as well as the activation of legal reform, often hidden and sometimes executed under the guise of restoring old-time conditions only ideologically postulated, have all fallen within the domain of the tasks for codification.

Earlier, the mere collection and textual embodiment of portions of the law into a *quantitatively conceived summation* proved to be enough for completing the task, without any structural renewal. However, on the European continent in the modern era, ending in fact feudal particularism (disunity and division) became the sine qua non for survival among competing empires and dynasties. In order to achieve this, the monarch had to organize the state army and its state financing separate from his personal own, as well as a bureaucratic institutional machinery to run them, which could function in an impersonal way through a far-reaching regulatory, implanted system. But for the lucid arrangement and up-to-date handling of such a quantity of regulations, having grown into huge mass of law in the meantime, the old method of mere accumulation could not prove adequate. In other words, in the codification of continental Europe, by that era quantitative collections of legal material had to be replaced by its *qualitative restructuring*. Following the cardinal idea of the Enlightenment, ideals such as rationality, logicality, and universality imbued in fact the law's systemic reshaping according to the logical ideal of a system, which were all to serve accessibility, cognoscibility, and manageability of regulation by law in practice.

The genuine breakthrough was based on the idea of legality through re-conceptualizing laws in a sequence of legal rights and duties. The classical codification movement translated the bourgeois constitution of society in the law's language with a complete structural reform, re-establishing and re-positing the whole body of law. This was accomplished by the Enlightenment's bold demand for change, by the ethos of rationalists' planning, by re-founding natural law (for overcoming feudalism) and, as to methods, by redrafting law *more geometrico* as a system, borrowed from the axiomatic idea of exact sciences (especially geometry and mathematics) (Varga 1987). This meant the accomplishment – after many initiatives taken from the republican and imperial periods of Roman legal development up to the French Revolution and further on – of the conceptualization of law, and thereby the beginnings of applying logical criteria as well, in how to build up, name, and group legal institutions. Hoping that with the change-over of the chaotic mass of disordered, sometimes contradictory rules,

which had just been superimposed one upon another by mere chance, law too would then be applied deductively with the rigor of sheer axiomatism. For the new systemic construction was a well-ordered assembly of *general principles* serving as foundation stones, then *general rules*, *specific rules*, *exceptions from these rules*, and, finally, *exceptions from the exceptions*. And in order to divide the total structure from the aggregate of specific structures, the code itself usually was to consist of two parts, the *general part* providing the directives for the entire field of regulation and the *special part* offering regulation calibrated for typical (standard) situations (as, e.g., individual contracts defined in civil law or those legal facts that may constitute a specific case in criminal law).

Princely absolutism attempted to operate with casuistic precision (General State Laws of the Prussian Territories, 1791) but did not succeed in the long run. The *Code civil,* which the French revolutionary renewal concluded with (1804) as well as the Austrian (1811), the German (1897), and the Swiss (1907) codes of civil law, resulted in framing a foundational body of the law on the European continent, still in force today. As to their historical functions, they accomplished the law's national unification and reform at the same time. Simultaneously they had to be – and were indeed – the symbolic expression of (as driven by) their finished stage of nationhood in parallel with the perfection of state building [*Etatisierung*] (Brauneder 1993, 225–229). In the same symbolical sense, for instance, the General Civil Code (Austria, 1811) played a constitution-substitute role as well, providing, by its official translations into the empire's local languages, the consciousness of the state's unity in a multicultural society (Brauneder 2013).

In their germs, all of them were to achieve a dream, cultivated from the age of the Enlightenment, postulating that society and law had to be established in one consciously planned and executed act around which real life could and would revolve as planets in the solar system. The extent to which perfectionism with the hope for a kind of "end of history" ideal fulfillment was to ground these codes neighboring sheer Utopianism (Varga 1979), already present in early American attempts at codification, had been punctiliously declared by the Enlightened king as programming expectations to what later became the Prussian code (*Allgemeines Landrecht*, 1791):

> A body of perfect laws would be the human spirit's masterpiece in matters of government: one would observe in it a unity of design as well as rules so precise and well proportioned that a state that was run according to those laws would be like a watch, all of whose springs are fashioned to the same end; one would find in it a profound awareness of the human heart and of the nation's genius [. . .] everything would be foreseen, all would interlock, and nothing would be left at risk: but perfect things cannot spring from human nature. (Frédérick le Grand 1750, 27, quote by Stewart 2012, 23)

All in all, codification has meant new possibilities in the presentation of the law, as well as in its internal organization and structure. The germ of claim for *legal positivism* was first formulated in the imperial codification by Justinian and, later on, by Frederick the Great. Its early instances were the embodiments of laws in a series of institutions, the development of requiring their fundamental classification and coherence, with emphasis upon prohibiting interpretation except before an extraordinary imperial committee, and, eventually, the reduction of law [*ius*] to the body of enacted laws [*lex*], that is, the exclusive identification of law with the statutory outcome – that is, texture – of its formal enactment. However, the classical formative era's foundation of rules upon general principles, within a consistently established system derived from principles as demanded by the qualitative idea of codification, was soon lost when the initial phase of the rigid – exegetical – application of the great civil codes came to an end. For, as the consequence of socioeconomic transformation of liberal capitalism by the end of the nineteenth century, legal positivism – simplified to rule (or statutory) positivism by then – became challenged by the so-called free-law movement, in order that legal regulation could be adapted to timely needs through judicially developing the law in a jurisprudence changed.

Present-Day Variations and Considerations

Looking back to this classical past by assessing its achievements from today's standing perspectives, those various codes are now usually blamed as statist, authoritarian, and atavistic. True, the use of them since the free-law movement period has not been any longer reminding of a purely and exclusively deductive pattern but one offering more as systemic or taxonomic loci wherefrom to elaborate an own judicial solution instead. Accordingly, the same code in post-classical times cannot but function as a "residual law" (Irti 1989, 27). Skepticism on and disappointment from codification have permeated the very chance of future undertakings, emphasizing, for instance, that it is no longer the code-form that is superior but the idea of its "(suit)ability to offer a good solution for all possible future cases." (Sacco 1983, 125) From such a perspective, even the vision of the past is turned down: Napoleon with his invaluable *Code civil* is getting considered a historically incidental exception; moreover, in the light of Europe unified and further unifying, it is seen now not as a living example of how to embed in tradition and symbolize the triumph of capitalism but as a detour, due to "national fragmentation of the European legal tradition" (Zimmermann 2001, 1). Even background motives for codification like the law's certainty, stability, and availability are questioned through heralding, as needed achievements, the new codes' partialness and fragmentation of results, alongside with their necessary localism, transitionalism, and pragmatism, as well as the desideratum for "democratic openness," taken as the day's foundational principle (Kübler 1969, 651). For "the future is no longer to be found in the past" (Lasserre-Kiesow 1998, 223), consequently "mummification of the law" cannot be a service goal any longer (Timsit 1997, 159).

Critics notwithstanding, today's codes are invariably characterized by old marks like (1) forming an exclusive body of law while (2) implementing unity in a given regulatory field (3) with logical coherence and consequentiality; or featuring (1) completeness, (2) freedom from contradictions, and (3) regulatory economy; or again to be a (1) comprehensive and (2) systematic (3) enactment by the legislature, (4) promulgated as a code. At the same time, other classical ideals that once used to constitute a strict and coherent system, with such basic functions as to guarantee the supremacy of statutory law by exhaustively embodying the law of the field, as well as the internal consistency of the regulation and the ability to determine exactly what the law is, are gradually showing signs of waning.

As to the present state of codification, more than 50 codes have been promulgated since the end of the World War II, such as the complete re-drafting of classical civil codes in Portugal (1967), the Netherlands (1992), Quebec (1994) in the West; as well as in Poland (1964), Russia (1996), and Hungary (2013) in the East; in Guatemala (1963), Bolivia (1975), Venezuela (1982), Peru (1984), and Paraguay (1987) in Latin America; of penal codes in a number of countries as well as civil law re-codified in Louisiana. Some of them comes with new statehood, when preservation, summation, and systematization are intermingled with the wish of reformation (Narits 2005), a process during which (in Macedonia, for instance) the initial job may be overwritten by a complete refurbishment of the law (Zivkovska and Przeska 2014). Almost the same holds for situations when countries with varying pasts come to the self-confident, standing balance for showing up their built-up stage with a "symbol of modernization and national independence" superseding earlier transit stages. Such is the Bill of the Civil Code of Israel (2004) finalizing the law's continentalization (Kedar 2007, 194; Zamir 2012) or the amended Civil Code of Taiwan (2008), which "localized" the transplants the country had had as mixed with local customary law components (Wang 2016). The most general common treat of them is just recodification – after decodification with new regulations (and new micro-systems) introduced into the code's territory was made (Murillo 2001). As a pioneer, it was the *Code civil de Québec* (1994) that broke

the beaten path by launching that "both the ambivalences and the diversified interests cohabiting in society" had to get translated into the code's language (Ministère de la Justice du Gouvernement du Québec 2003, vii), searching for a balance in that albeit it decidedly disfavored judicial law-making, on the one hand, but initiated judicial developments that could further concretize the code's provisions, on the other (Chamberland 2003, 31).

In the era characterized by today's speeded up globalization, national states' domestic law is superimposed by international law and in Europe itself, placed under the European Union law as well. The complexity arising therefrom can be even further aggravated, and the centrality of codification relativized by dealings in law like constitutionalization or de-codification. For they all produce their own microsystems with the by-effect that the code stops being placed at the center of "a solar system where everything not found in the civil code, which is the sun or central star, gravitates around it, and is inspired and interpreted on the basis of the light it sheds on the planets that revolve around it." Instead, they are now detaching parts that will go on "revolving loosely like shapeless meteors" somewhere in it (Parise 2016, 384, quoting Moréteau and Parise 2009, 1110).

By the end of the twentieth century, the very term "codification" comes to have become relativized in both France and elsewhere. From now on, its reduced meaning will stand for the rationalization of one aspect of the mass-scale, all-inclusive management implied by today's public administration: of the periodical consolidation of the normative stuff serving as its foundation. Albeit, no need to add, this job gets increasingly relegated to the new potential what present day information technology has established and is going to produce.

Common Law Queries

In *England*, efforts at codification in the beginnings advanced parallel to those in continental Europe. However, since legal unity was no longer in question and the judicial route to legal adaptation had already been institutionalized at an earlier period, the idea of codification stemming from rational considerations did not take hold. Even in the *United States*, codification proved to be successful primarily as the medium for legal transplant to, while also reconsidering, the new states' institutions. Thanks to the Common Law judicial argumentation through precedents, also general principles could serve as sources for the judges' considerations without any mediation by a code.

Later on, codification taken in the strict sense of the word was mostly replaced by various *substitutes*. Such were the doctrinal codification (*textbook writing* as medium for nineteenth-century English legal export to the colonies; *restatement of the law* by private bodies with professional support as the best toolkit rationalizing American law in the twentieth century); as well as rearranging statutory law (*consolidation*), and the *uniformization* and *unification of the law.*

Retrospectively, from the great strive for law-codification in the United States of America, past emphases on the benefit of a consistent, coherent, and systematically arranged law are not accentuated any longer, for new properties like fragmentation, particularization, and departmentalization have won the day (Morriss 1999).

Perhaps a sober approach makes it to state that there is no inherent incompatibility between the spirit and institutional network of English/American legal regimes, on the one hand, and codification, on the other (Skinner 2009). Overviewing the half a millennium old parallel history of Civil Law and Common Law arrangements, today's conclusion repeats exactly what was ascertained four decades ago:

> Both systems represent efforts to solve "the basic problem of retaining the flexibility of a legal system while securing a reasonable amount of certainty with regard to the solution of legal problems and of predictability for the event of litigation." (Garoupa and Morriss 2012, 1498 quoting Piero 1956, 69)

A special aspect of the issue of codification in England is represented by the dilemma of whether or not to codify European Union law, for this

"legal paradise aspired to create" (Steiner 2004, 215 quoting Sir Leon Radzinowicz in Helden Society) makes a chance for the historical convergence of Common Law and Civil Law. Literature siding with longing for codification is by and large optimistic on elusive grounds, the fact notwithstanding that comparatists with historical outlook are used to emphasize the near impossibility of effecting radical changes, or turnover, in peoples' mentality. Specific *legal mentalities* are at stake here, "culturally embedded" traditions on how to build law and think in law, that is, a culture-dependent stand with the whole legal development and professional culture involved in the background (Legrand 1997, 56–59). Not rarely this forced move for codification is portrayed as a fully-fledged paradox with constituents contradicting everything that comes from the European Union (Bercea 2008). No need to add that even when codes are present, it is principled approach that shall be generated in Civil Law and pragmatic one that will be followed in Common Law (North 1982, 503). Simply stating the divergence in manners and expectations, "American courts tend to read the codes to facilitate case law evolution rather than as the definitive resolution of the issue involved." (Hyland 1994, 61) As a telling example, it suffice to remember the early failure of the reformist effort by the British Law Commission (considering codification as late as in 1964), indicative of an utter confusion on what to do with a law thoroughly generalized, broken into and embodied by legions of concepts, arranged in order in accordance with abstract logical schemes, and also with implied possibility for that facts shall be subordinated (subsumed) to rules – in an environment in which, as a sensitive characterization holds, "the alphabet is virtually the only instrument of intellectual order of which the common law makes use" (Rudden 1991–1992, 105).

Debates are periodically renewed on whether or not, and in which parts of the law, codification will be put on the agenda again. For instance, functionalist approach is preached for relieving codification from historical stereotypes, notably, "[t]he almost myopic perception of codification by a number of common lawyers as an ideological enterprise rooted in Napoleonic Europe" (Steiner 2004, 12). However, independently of contemporary intentions, old hesitations on similar structural dilemmas – for instance, on the presumably destructive danger as the outcome, when codifying classical Talmudic law or the jurisprudence of Roman–Dutch law was contemplated (Varga 2011) – may convey the unchanged teaching that "once the common law is codified it will, of necessity, cease to be the common law, not only rather obviously in form, but also in substance" (Hahlo 1967, 258). Arguably, non-committed and no-partisan weighing of the issue "whether common-law institutions and attitudes make it impossible to operate under codification" can only lead to a most hesitating conclusion, letting to know that "History and experience do not answer this question in the affirmative. Active consideration of European codification should continue." (Weiss 2000, 532).

Summations

Summing up, the code is a thoroughly organized body of rules covering a branch of legal regulation. From the ancient collections of law in Mesopotamia and China up to the general codes of the Nordic countries born in the seventeenth and eighteenth centuries, the codes committed to one written body almost the entire system of law. Under specific conditions, the same function could be served by recording customs or compilating them in forms of collections or proposals as a private work (for example, Stephan Werbőczy's *Tripartitum opus iuris* presented but not passed in 1514, successfully preserved Hungarian legal unity even after the country had been divided in three for one and a half centuries). From the time of later efforts at legal consolidation, namely, from French absolutism until the present, codification has had somewhat limited ambition to collecting all the rules of a relatively independent area of regulation from within individual branches of the law. Private projects have continued, for instance, in the recommended Model codes or the Restatements of the law, which were meant for internal legal

uniformization as well as for codifying precedent law in the United States.

Today's codes are, in general, the products of legislative initiatives. In its modern forms, codification strives for a structure built from the top general to the parts with the specific components, often introduced by a preamble stating the goals, and always having a statement of general principles taken as the foundation. Accordingly, a General Part grounds the Special Part, going to details of individual legal institutions. Among the provisions, there are often one or more clauses from which legal practice can generate new regulations, sometimes even erecting new legal institutions.

As its name implies, *compilation* is a way of stating and arranging applicable rules in chronological order as a written or printed collection or as a mass of information stored in electronic data bases. This information is mostly classified in accordance with the sources from which the legal provisions have been taken, and secondarily by topics. Until the formation of modern codes, most law books of the ancient, medieval, and modern era were only collections of the prevailing normative material – in some cases with textual corrections, which were meant mainly to exclude possible contradictions, or to leave out parts that had lost their validity due to desuetude, or to remedy textual deteriorations arisen while earlier copying, or sometimes also to expressedly "correct" it, in order for it to be able to satisfy current pressing interest (this is *revision*). Modern compilations mostly do not revise but preserve the original structure of the legal sources processed in them. Sometimes the rationale of the minister who originally presented the bill is included, too, and in the states of Nordic Europe, the preparatory material [*travaux préparatoires*] once conceived and framed by scholarly and judicial committees are also, in order to guide interpretation, included in or attached to it.

Through the succession of ages and of various ideals of order nurtured as the ends to attain by the means of law, codification has always served as the highest form of objectifying law. Considering the fact that "[l]egal systems of varying types and family backgrounds can attempt to use codification for solving socio-legal problems equally successfully" (Varga 2011, 258), one may conclude that, in a generalized sense, it is universal a phenomenon in the life of law.

Conclusion

From the point of view of an American-type economic approach to law and in light of a cost/benefit analysis, it may seem that codification at large is an instrumental choice that increases both the probability of formal changes, statutory amendments and drafts of bills, and the probability of legislative borrowing and of interest groups intermingling, all to the detriment of – as a deficit to – democratic involvement, while its action may be a practice

> "prompting [the courts] to focus more on the meaning of individual words than on the overall policy goals of enactment and to rely more on external sources, such as legislative history." Ultimately—as the assessment ends, sounding like an oracle from Dodona more than the slightest sign of encouragement—, "codification has accelerated the very problems in the legal system it was supposed to resolve." (Stevenson 2014, 1129 resp. 1173.

Some years ago, the Supreme Commission for Codification as the leading engine of the movement in France concluded that "the age of drawing up new codes is probably reaching its end." (Commission 2011, para 2.7, 13) By generalizing from the perspectives of the result, developments of information technology may now offer the key. The eventual replacement of the center of gravity in the future is certainly not a criticism on what codification has achieved under various conditions for millennia but sober acknowledgment of the fact that by times and availabilities changing, "What had been the good aims of codification are being pursued in very different ways" (Stewart 2012, 47).

Cross-References

- ▶ Certainty: Legal
- ▶ Civil Law: Roman
- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Legisprudence
- ▶ Normative Individualism

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Coercion and Law

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Introduction

The use of coercive enforcement mechanisms in law is one of law's most conspicuous features. The norms of the criminal law, for example, are typically backed by the threat of state punishment. Likewise, the norms of civil law are typically backed by the threat of sanctions as a means to induce compliance with court orders to abide by findings of liability. As an empirical matter, coercion seems always to accompany valid rules of law.

Some of the most important problems in legal and political philosophy concern the state's use of coercive mechanisms to enforce the law. The normative problem of justifying state authority, for example, is an important *moral* problem precisely because the state characteristically employs enforcement mechanisms that coercively restrict the freedom of law subjects – coercion being presumptively problematic. Without such mechanisms, authority does no more than "tell people what to do" – a practice that seems presumptuous and rude but not one that would give rise to any serious moral problem that warrants a great deal of philosophical attention.

Likewise, there are important empirical problems that arise in connection with law and coercion. For example, insofar as a legal system deploys coercive enforcement mechanism to induce compliance with the law, the issue arises as to which mechanisms are most effective in inducing compliance to law. While one can surely speculate about this issue from the safety of the philosopher's armchair, it is more helpful in resolving this issue to examine the various coercive mechanisms that have been most effective in inducing compliance to the law. Such information, together with normative considerations of the legitimacy of coercion, can aid officials in determining how best to deploy such mechanisms.

For purposes of this essay, however, the most relevant issue is whether the authorization of coercive enforcement mechanisms is a conceptually necessary feature of law. That is to say, the issue is whether an institutional normative system must authorize coercive enforcement mechanisms to be accurately characterized as a legal system. This involves determining whether there can be law without coercion. If, for example, one can produce an uncontroversial example of something that counts as a legal system without such authorized mechanisms, then the authorization of coercive mechanisms is not a conceptually necessary feature of law.

Law's Coerciveness and the Problem of Legal Normativity

At the outset, it should be noted that the issue of whether it is a conceptual truth that law is coercive is related to, but distinct from, the issue of legal normativity. The threat of coercive enforcement mechanisms is the kind of thing that beings like us find normatively relevant – and should find normatively relevant – from the standpoint of objective practical rationality. The coercive mechanisms of law are typically regarded by law subjects, other things being equal, as providing a disincentive to violate norms that are backed with them. Further, it would seem irrational from the standpoint of practical rationality not to assign them some weight in deliberating about what to do. Accordingly, the issue of whether it is a conceptual truth that law is coercive implicates the normativity of law.

Nevertheless, the problem of legal normativity is broader than the problem of whether law is, as a conceptual matter, coercive. Theories of legal normativity are concerned to identify the distinctive normative force that law *as such* has (or should have). Some theorists have argued that law has a normative force that cannot be explained in terms of coercive enforcement mechanisms or prudential rationality. On this view, law is normative in virtue of having authority over law subjects, and the relevant kind of authority simply cannot be explained in terms of authorized

coercive enforcement mechanisms (Raz 1996). Further, insofar as the authorization of such mechanisms is not conceptually necessary to law, the normativity of law as such cannot be explained in terms of those mechanisms because law is necessarily normative in the relevant sense and thus cannot be explained in terms of some contingent features of a law.

Historical Survey on Law and Coercion

Up until comparatively recently, it was taken for granted that authorized coercive enforcement mechanisms are a conceptually necessary feature of law. Early positivists almost universally held the view. For example, Jeremy Bentham stated that it is an essential feature of an obligation that it include "liab[ility] to be punished" (Bentham 1988, 109). Following Bentham, John Austin argued that "[b]eing liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it" (Austin 1995, 22). As both theorists held that mandatory legal norms necessarily give rise to legal obligations, both were committed to the position that it is a conceptually necessary feature of law that it authorizes coercive enforcement mechanisms for some violations of norms that give rise to legal obligations.

More recent positivists have also taken that view. Hans Kelsen, for example, writes:

> If we confine our investigation to positive law, and if we compare all those social orders, past and present, that are generally called 'law', we shall find that they have one characteristic in common which no social orders of another kind present. This characteristic constitutes a fact of supreme importance for social life and its scientific study. And this characteristic is the only criterion by which we may clearly distinguish law from other social phenomena such as morals and religion. This criterion is coercion. (Kelsen 1949, 15)

Elsewhere, he puts the point more forcefully: "The purpose of the legal system is to induce human beings – by means of the notion of this evil threatening them if they behave in a certain way, opposite what is desired – to behave in the desired way" (Kelsen 1992, 29).

Historically, strong natural law theorists (i.e., those who hold that there are conceptually necessary moral constraints on the content of law) have also taken that position. William Blackstone, for example, expressed the view 11 years before Bentham adopted a similar position and nearly 60 years before Austin did:

> Legislators and their laws are said to *compel* and *oblige*; not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation: but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty: for rewards in their nature, can only *persuade* and *allure*; nothing is *compulsory* but punishment. (Blackstone 1979, 57)

What difference there is, if any, between Blackstone's conceptual views here and those of Austin and Bentham seems to consist in Blackstone's view that the true sense of obligation consists in the "compulsion" of "natural violence," by which he might mean violence imposed by a deity for disobedience of divine law. If this is what Blackstone means, then his view differs from Austin's and Bentham's on this particular.

Some contemporary strong natural law theorists seem to hold a similar view on the conceptual link between coercion and law. In a section entitled "The Main Features of Legal Order" in his landmark Natural Law and Natural Rights, John Finnis can be construed as taking a similar position. As he puts it, "law needs to be coercive (primarily by way of punitive sanctions, secondarily by way of preventive interventions and restraints)" (Finnis 2011, 266). Although Finnis believes that certain features of a legal order would be necessary in a society of beings where coercion is not necessary to deter noncompliance, he seems to view this as something that closely *resembles* a "legal order," rather than *constituting* a legal order, strictly speaking.

For his part, Ronald Dworkin is unequivocal about holding that law is necessarily coercive in the relevant sense. As is well known, Dworkin

holds that the conceptual function of law is to provide a justification for state coercion:

> I suggest the following as an abstract account that organizes further argument about law's character. Governments have goals. . .. They use the collective force they monopolize to these and other ends. Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified. (Dworkin 1986, 93)

He puts the matter more pointedly as follows: "The law of a community on this account is the scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from the past decisions of the right sort" (Dworkin 1986, 93). Although Dworkin here is discussing what he takes to be the conceptual function of law, it should be clear that he presupposes that the authorization of coercive enforcement mechanisms is a conceptually necessary feature of law. Law is not capable, in principle, of "licensing" coercion unless coercive enforcement mechanisms are authorized for the relevant cases of noncompliance.

Though quite intuitive, this common view began to be questioned in the early 1960s by legal theorists working in conceptual jurisprudence. While observing the *empirical* ubiquity of coercion in legal systems of nation-states, Hart questioned its conceptual necessity. Hart argues that there is an international system of norms with nation-states as its law subjects that counts as a system of law despite lacking authorized coercive enforcement mechanisms. As Hart puts the point, "[t]here are no settled principles forbidding the use of the word 'law' of systems where there are no centrally organized sanctions, and there is good reason (*though no compulsion*) for using the expression 'international law' of a system, which has none" (Hart 1994, 199).

Similarly, Raz has challenged the idea that authorized coercion is a conceptually necessary element of a legal system. On Raz's view, a society of beings who are willing to do what law requires without prudential motives in the form of authorized sanctions would still require a system of law to perform three functions: (1) provide official solutions to coordination problems, (2) resolve disputes about the interpretation of the legal effects of certain acts, and (3) resolve disputes about partially unregulated acts (Raz 1990, 159–160). A system of law without authorized coercive mechanism is, thus, conceptually possible.

More recently, Frederick Schauer has also rejected the view that law is necessarily coercive on different grounds. Schauer denies this idea on the ground that the existence of legal norms that empower, rather than constrain, law subjects shows that law as such cannot be characterized as coercive: "if the nature of law is the collection of law's essential properties in all possible legal systems in all possible worlds, and if there are things that are plainly law – like the law of wills and the obedient behavior of Finns when confronting a pointless command not to cross at a deserted intersection – but that appear not to be coercive, then coercion can no longer be considered essential to law" (Schauer 2015, 2).

What is noteworthy about Schauer's discussion of the issue is that he takes this result, together with the centrality of coercion in existing legal practice, to ground a criticism of the very project of conceptual jurisprudence. As he puts the matter:

> That a feature of law that is so important and salient to almost everyone . . . is so marginal to the jurisprudential enterprise says something about the enterprise of philosophy of law – jurisprudence – itself. And thus a running subtext of this book is a challenge to a prevalent mode of jurisprudential inquiry. (Schauer 2015, Preface)

Schauer regards it as a defect of the project of conceptual jurisprudence – and not so much as a defect of particular conceptual theories of law – that it does not include the authorization of coercive enforcement mechanisms as a theoretically significant feature of law, given its clear importance to existing legal practice. One important task of legal theory, on his view, is to explain the central role of coercion to legal practice.

Like Schauer, Leslie Green attempts to find a theoretically significant role for coercion in theorizing about law but, unlike Schauer, finds one in the conceptual theory of law. Green rejects the claim that law is necessarily coercive, claiming instead that it is conceptually necessary that law *can* impose sanctions *if needed*:

> [T]here are conceptually possible legal systems that do not deploy any coercion. That leaves open other possibilities, several of which I mention below. But here is an important one: because the authority of law is comprehensive, there are no legal systems that lack norms capable of imposing sanctions if necessary. (Green 2016)

Green believes there can be systems of law that do not impose sanctions, as a conceptual matter, but none that lack norms capable of imposing sanctions.

Recently, Kenneth Einar Himma has taken a contrary position, defending the view that the authorization of coercive enforcement mechanisms is a conceptually necessary feature of a *legal system*. While Himma concedes that not every legal norm is backed by such mechanisms, he argues that some norms in a legal system must be backed by them. Indeed, as Hart observes:

> It is surely not arguable (without some desperate extension of the word 'sanction' or artificial narrowing of the word 'law') that every law in a municipal legal system must have a sanction, yet it is at least plausible to argue that a legal system must, to be a legal system, provide sanctions for certain of its rules. So too, a rule of law may be said to exist though enforced or obeyed in only a minority of cases, but this could not be said of a legal system as a whole. (Hart 1984, 78)

According to this weaker claim, then, it is a conceptually necessary feature of legal systems that (1) coercive enforcement mechanisms (2) are *authorized* (3) for violations (4) of *some* mandatory legal norms that (5) regulate the acts of citizens. Himma grounds this claim in what he takes to be the ubiquity and paradigmatic quality of legal practices incorporating authorized coercive enforcement mechanisms (Himma 2016).

As this brief summary of views on the issue makes clear, the issue of whether law, as a conceptual matter, makes use of authorized coercive enforcement mechanisms has been of abiding interest throughout the history of jurisprudence. The prominence of such mechanisms in our experience with paradigmatic legal practice has required conceptual jurisprudes to address the issue, albeit with varying results.

Schauer considers this more plausible possibility but rejects it on the strength of the well-known "society-of-angels" argument. The idea is that a society of angels would need a system of social norms to solve certain disputes and coordination problems but would not need coercive enforcement mechanisms to enforce these norms. This system is, on this line of reasoning, a system of *law*.

Conclusion

One of the most prominent features of all existing legal systems of which we know is that coercive enforcement mechanisms are authorized to respond to violations of mandatory legal norms. Such mechanisms figure most prominently in the criminal law, but they also play a central role in civil litigation, as the point of pursuing civil litigation is to secure an enforceable court order. This raises the issue of whether authorized coercive enforcement mechanisms are a conceptually necessary feature of a legal system. This issue is related to, but is distinct from, the problem of legal normativity, as some theorists hold that law has a distinctive normativity that is not related to the authorization and application of coercive enforcement mechanisms. While early legal theorists held such mechanisms to be conceptually necessary conditions for the existence of a legal system, contemporary legal theorists have split on the issue. Dworkin holds the view that such mechanisms are conceptually necessary conditions for the existence of a legal system, but contemporary positivists, such as Raz, deny this claim. On Raz's view, a society of rationally self-interested angels who always obey the law

would need a legal system to resolve disputes but would not need the law to authorize sanctions for violations. Similarly, Hart argued that international law is a system of law despite lacking centrally organized sanctions. To some, this result seems problematic; Schauer regards it as a defect of the very project of conceptual jurisprudence that it has no place for sanctions in the theory of law.

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- ▶ Dworkin, Ronald: Legal Philosophy
- ▶ Hart, Herbert Lionel Adolphus: Influential Ideas
- ▶ Jurisprudence of Interests
- ▶ Law as Reason for Action
- ▶ Ontology of Law
- ▶ Raz, Joseph

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Cohen, Gerald Allen

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Introduction

G. A. Cohen (1941–2009) was a Canadian political philosopher. He taught at University College London and the University of Oxford, where he was Chichele Professor of Social and Political Theory at All Souls College for 23 years. Cohen is well known as a central figure in the analytical Marxism school and for his seminal critiques of the libertarian philosopher Robert Nozick and the liberal philosopher John Rawls. This entry summarizes these debates and sketches the connections between them. It borrows heavily from Vrousalis (2015).

Historical Materialism

Historical materialism is a substantive thesis, originally elaborated in Marx (1977 [1859]), about what explains what in history. Cohen's (1978) seminal exegesis of Marx consists in an extensive defense of two claims: the first primacy thesis, according to which the *productive forces*, roughly human technology, have explanatory primacy over the *economic structure*, roughly relations of economic power, and the second primacy thesis, according to which the economic structure has explanatory primacy over the *superstructure* – roughly laws and the state.

The argument for the first primacy thesis can be roughly summarized as follows: the productive forces have an autonomous tendency to develop on the basis of facts about human nature, such as rationality and self-interest. These forces are only compatible with certain economic structures. As the productive forces grow, there will be a tendency for the whole set of production relations to change in a direction facilitating that growth.

Concomitant with growth in the productive forces, and the consequent change in economic structure, different classes will shrink and others grow, depending on the extent to which they are capable of presiding over the development of the productive forces. Ruling classes will therefore rise and fall depending on whether they can carry productive power to its optimal levels. It is, therefore, the productive forces that explain economic structures and not vice versa.

Cohen's historical materialism is materialist in that it provides a framework for understanding epochal transitions – from, say, antiquity to feudalism or from feudalism to capitalism – through an explanatory hierarchy attaching priority to how societies reproduce themselves, as opposed to their ideas or conceptions of themselves as such.

Cohen's defense of historical materialism was heavily criticized on a number of counts. Joshua Cohen (1982) criticized the asocial characterization of rationality in the specification of the first primacy thesis. Elster (1980, 1982) criticized Cohen's methodology, and Levine and Wright (1980) the failure to locate the class struggle more prominently in the discussion of both primacy theses. Cohen (1988, 1995) himself criticized his early views in a series of essays. He raised two fundamental objections to these views. The first objection, call it the *agency problem*, arises due to the fragmentation of the working class, which deprives history of the agent with the will and capacity to carry revolution forward. According to Cohen (1995), the optimism of classical Marxism flowed from its joint ascription of certain properties to one class. That class would encompass the majority, produce the wealth, represent the exploited, and comprise the needy. The concomitance of these four properties in one class was deemed a necessary condition for socialist revolution. But these four properties have come apart. It follows that there is "no group with both (because of its exploitation, and its neediness) a compelling interest in, and (because of its productiveness and its numbers) a ready capacity to achieve, a socialist transformation" (Cohen 1995, p. 8). Cohen's second challenge to his own early Marxist self-confidence may be called the *scarcity problem*, which consists in pointing out that the planet Earth rebels: strong ecological and natural constraints on the growth of the productive forces make the envisaged material overabundance unlikely.

Increasing pessimism about the explanatory credentials of historical materialism thus led to an "intellectual need to philosophize" (Cohen 1995, p. 8). Cohen's early forays into normative political philosophy – that branch of political philosophy dealing with *principles* – are about freedom. On the one hand, Cohen wants to criticize the liberal appropriation of the negative idea of freedom. On the other hand, he wants to criticize the work of Robert Nozick, that ideal type of neoliberalism.

Freedom

On a widely held liberal account, freedom consists in the absence of interference with what an agent might want to do (the locus classicus is Berlin 2002). The Right uses this account of *negative freedom* to argue that private property protects freedom. But that claim is, rather obviously, false. The enforcement of private property does imply that owners are guaranteed certain negative freedoms. These freedoms are, however, *thereby* denied to nonowners. I cannot, for example, pitch my tent in your backyard without (being liable to) interference from you, or your bodyguards, or the police, in a system where private property is universally enforced. Indeed, according to Cohen, private property is simply a distribution of freedom and unfreedom or of rights to interference (Cohen 1988, pp. 293–294). In a celebrated essay entitled "Freedom and Money," Cohen makes a similar argument about money (Cohen 2011).

It follows from Cohen's argument that capitalism requires vast amounts of (threats of) interference in the service of private property: next to the invisible hand of the market, the visible fist of the capitalist state. Hence "[t]o think of capitalism as a realm of freedom is to overlook half of its nature" (Cohen 2011, p. 152). Cohen goes on to illustrate some ways in which total negative freedom might increase, relative to private property, through socialist common property or distribution

according to need. Consider street sidewalks. Privatizing sidewalks is likely to be disastrous for freedom of movement: under a system of private sidewalks, I am liable to interference at every possible juncture of my walking life: when I walk to work, to the university, or to the pub. And all that on a common-stock *liberal* definition of freedom.

Negative freedom, then, cannot do the work the Right assigns to it and may, indeed, serve to justify anti-Right political goals. Cohen concludes from all this that we need a theory of the *just distribution* of freedom. In constructing one, socialists must try to make good on the old but ambiguous socialist slogan that capitalist private property is theft, that is, a species of *unjust* taking.

Rights

According to Robert Nozick, liberty is not about negative freedom but rather about rights. His famous Wilt Chamberlain example defends the justice of market transactions, focusing on the putative fortunes of the 1960s basketball player. Suppose, says Nozick, we start from a "patterned" distribution D1, in which everyone's holdings abide by some just and/or socially desirable pattern. Chamberlain signs a contract with his team, or with the basketball association, which will allow him to collect 10% of all revenue per game. After a year, a million people have watched him play, paying $100 each. Chamberlain makes $10,000,000. Call the new distribution D2. The movement from D1 to D2 is fully justified, according to Nozick, because it flows from the voluntary choices of all parties. And, assuming the original distribution D1 is just, D2 must also be just. This is how equality and markets are incompatible, or how "liberty upsets patterns" (Nozick 1974, p. 160).

Cohen points to a number of problems with Nozick's account. One is that it equivocates between different objects of voluntary choice. Consider the following set of possibilities:

(i) I choose to pay $100 to watch Wilt play.
(ii) I choose to pay *Wilt* $100 to watch Wilt play.
(iii) I, and another 999,999 people, choose to pay *Wilt* a total of $10,000,000 to watch him play.

Unconcern for the move from (i) to (ii) and for the move from (ii) to (iii) are both irrational, because they fail to consider the "effect on Wilt's power" (Cohen 1995, p. 26). The move from (ii) to (iii) embodies, in addition, a collective action problem: even if it were *individually* rational to accede to (ii), acceding to (iii) is individually and *collectively* irrational.

One of the functions of coercive state redistribution is precisely to coordinate all of these rational desires: Wilt should not "rake in" an extra $25 from *me* (over and above what I and everyone else gets), and Wilt should not "rake in a cool quarter million" from *us*. "Democratically authorized taxation" just is the upshot of the generalized institutionalization of a "Pattern Maintenance Association" (Cohen 1995, p. 30) designed to correct the mooted set of collective action problems. This is, Cohen says, how "patterns *preserve* liberty."

Justice

One of Cohen's most celebrated contributions to egalitarian political philosophy deals with the *site* of justice and takes its cue from a critique of the liberal philosopher John Rawls. The bottom line of that critique is that an egalitarian *ethos* in citizens is a necessary condition for the just society *on the liberal's own terms*. Cohen develops his critique by first appropriating the feminist slogan "the personal is political" and then generalizing it. This section elaborates on this criticism.

Rawlsian liberalism offers a famous interpretation of the public/private distinction. Rawls argues that the "primary subject" of justice has to be restricted to the "basic structure" of society, construed as its fundamental, publicly observable, institutional features. Illustrations: legal institutions protecting liberty of thought and conscience, "competitive markets, private property in the means of production and the monogamous family" (Rawls 1971, p. 7). In general, Rawls also

includes the institution of the family under the basic structure, but some feminists, such as Okin (1991), criticize his ambivalence on the matter. For them, Rawls is too lenient on the inequalities that inevitably result from an unfair division of labor within the household.

Does inclusion of the family in the basic structure render Rawlsian liberalism coherent? According to Cohen, those feminists who respond in the affirmative "fail to grasp the form of the feminist critique of Rawls". For if noncoercive institutions, such as the family, come under the purview of justice, then – largely for the same reasons – so does systematically unjust personal behavior. Rawls therefore finds himself on a slippery slope, for he cannot exclude from the basic structure what he ostensibly wants to exclude, namely, personal behavior. Cohen here subjects the Rawlsian conceptual apparatus to immanent critique: if Rawls chooses to opt, in all consistency, for inclusion of personal behavior under the purview of justice, then his theory aligns itself with Cohen's own putative view that "social justice requires a social ethos which inspires uncoerced equality-supporting choice" (Cohen 2000, p. 131).

Thus Cohen objects both to the practice of the talented self-maximizers, i.e., those who, by dint of superior talent, can reap great rewards for themselves in the marketplace, and to the *motivations* for such practice, namely, to enrich oneself at the expense of others (see below).

Cohen's conclusion, if true, has important implications for how we should conceive of our moral ecology and thus for the strategies required to transform it in an egalitarian direction. It is, moreover, significant for the long-term sustainability of egalitarian institutions, such as the system of highly progressive taxation that Cohen favors, which "ensures that top incomes are no more than three times as high as bottom ones" (Cohen 1989b, p. 11). In effect, Cohen has recast Gramsci's notion of *hegemony* in terms more congenial to the liberal vocabulary. Its most significant corollary pertains to education and social pedagogy: a truly egalitarian society will educate its citizens in mutual respect and reciprocal giving, such that its least well-off members are as well-off as possible.

Community

Cohen's critique of liberalism has two strong communitarian strands. The first Cohen (2009) calls *communal reciprocity*. This is the "planned mutual giving" that takes place in a well-ordered camping trip with friends and family. The idea is that, as long as human beings need to produce together through some division of labor, they had better organize their working lives on the principled basis of a camping trip, rather than the principles of a capitalist workhouse. Cohen's camping trip argument is part of an attempt to buttress his view that "every market, even a socialist market, is a system of predation" (Cohen 2009, p. 82). Unlike market reciprocity, communal reciprocity envisages arrangements under which people constitute each other's *need*, such that the emphasis is not just on how they *fare* but also on how they approach and *treat* one another. *Fear* and *greed* thus cease to be the dominant motives in their everyday lives, as they are in market society, and are replaced by dialogically acceptable mutual concern.

The second communitarian strand in Cohen's thought takes its cue explicitly from his critique of Rawls. Rawls (1971) defends what he calls the *difference principle*, the view that economic inequalities are justified if and only if they are necessary to improve the position of the least well-off. One Rawlsian justification for this principle is that inequality provides *incentives* for material contribution. The idea is that unequalizing incentives might be deemed necessary by those higher up the economic hierarchy in order to contribute to the livelihood of those lower down (Rawls 1971, p. 78). Cohen (2008) argues that this proposed justification of incentives is morally equivalent to the putative justification offered by a kidnapper to the kidnapped child's parents. The kidnapper says: "Children should be with their parents. Unless you pay me, I shall not return your child. So you should pay me" (Cohen 2008, p. 39). By the same token, Cohen's Rawls says: "Economic inequalities are justified when they make the worst off people materially better off (major premise). When the top marginal rate is 40 percent, the talented produce more than when it

is 60 percent, and the worst-off are, as a result, materially better off (minor premise). Therefore the top tax rate should not be raised above 40 percent to 60 percent (Cohen 2008, p. 34).

Suppose the latter argument is articulated by the talented rich and addressed directly to the nontalented poor. Note that both the kidnapper and the talented egoist make the minor premise true. That is, the kidnapper makes it true that if she does not get the money, she will not return the child. By the same token, the talented who insist on high salaries or profits make it true that if they do not get the high reward, they will work less hard, to the detriment of the poor. Thus even a society, where all have equal access to *alienable* resources, such as means of production, and *inalienable* resources, such as talents, will appear as yet another source of inequality. In market societies, the talented can press a kind of resource advantage that jeopardizes both justice and community.

Conclusion

According to Cohen, a fully emancipated humanity would do away with material inequalities that do not exclusively reflect individual choice, fault, or effort (Cohen 1989a). Cohen's major intellectual preoccupations, namely, the Marxian image of history as a material relay race toward freedom (Cohen 1978, 1988), the centrality of material deprivation to liberty (Cohen 1995, 2011), the hindrances of private property to human flourishing (Cohen 1995, 2000), and the communitarian lacunae in liberal thought (Cohen 2008, 2009), are all united by a resolute socialist commitment to the self-emancipation of humanity.

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► Liberty and Justice
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Coke, Edward

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Introduction

Sir Edward Coke (1 February 1552–3 September 1634) was one of the greatest legal thinkers of seventeenth-century England who served under

the rule of Queen Elizabeth I, Kings James I, and Charles I. He was a barrister and then became member of Parliament, Solicitor General, Speaker of the House of Commons, and Attorney General of Queen Elizabeth I. After that, under the reign of James I, he was made Chief Justice of the Court of Common Pleas and subsequently the King's Bench, before returning to play an important role in the English Parliament during the rule of James I and Charles I. Although in his early years Coke was even obsequious to the crown, ever since the start of his judicial career, he challenged it and went on to become one of the most prominent champions of the common law and the rights of the English people as a way to limit royal power.

Coke's defense of the jurisdiction of the common law courts over the ecclesiastic courts in ruling about the tithes; his criticism of the king's use of orders to establish crimes, fines, and punishments instead of applying the law of the land, as ruled by clause 39 of the Magna Carta; his firm refusal of royal intervention in the course of justice and the defense of judicial independence which was without a doubt one of the main reasons for his dismissal from the courts by James I; and his criticism on monopolies and the necessity of limiting the possibilities of the crown to grant patents – later captured in the Statute of Monopolies, passed by English Parliament in 1624 and coined by him – are only some of the aspects of his thought and activity (Bowen 1957). Although a great part of his fame has been attributed to his influential role in the framing and passage of one of the most important constitutional documents of England – the Petition of Right of 1628 – the truth is that all his work, including his famous *Reports* and *Institutes*, is a testament to the cornerstones of constitutionalism, limitation of powers, and the rule of law.

Bonham's Case

However, if only one key aspect of Coke's life and work had to be chosen, it would have to be his judgment in what is commonly known as *Bonham's Case* (1610) when he was the Chief Justice of the Court of Common Pleas. No other of Coke's statements have caused so many rivers of ink to flow. Thomas Bonham was a physician who had been fined and committed to prison by the Censors of the College of Physicians. Bonham brought an action of false imprisonment against them, and the pleadings of the defendants alleged that letters patent of King Henry VIII, later confirmed by statute, granted these powers – to fine and to imprison – to the College.

Coke's opinion on the case was based on different legal arguments. In the most prominent, Coke pointed out that the College was to receive one half of all the fines. Thus, the College was acting as not only judge but also as a party in all the cases that came before it, which went against the common law maxim that no man can be judge in his own case. Hence Coke uttered what is considered to be the most controversial statement of his life: "The censors cannot be judges, ministers and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture (. . .) [T]he common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant or impossible to be performed, the common law will controul it, and adjudge such act to be void" (Coke 1826, 375, vol. 4).

The central debate surrounding *Bonham's Case* is with regard to Coke's influence on the establishment of the modern institution of judicial review of legislation. This question has been tackled by a lot of scholars not only English or American but also from other countries (Cappelletti 1970, 1028). The different positions have ranged from the claim that he was just outlining a maxim of strict statutory interpretation (Kramer 2001, 25; MacKay 1924, 223; Thorne 1938, 548) to the assertion that Coke was indeed formulating a constitutional theory of the judicial review based on the idea of a fundamental law (Berger 1969, 527; Boyer 1997, 45; Plucknett 1926, 68).

Coke and the Revitalization of the Ancient Constitution

In any case, to truly comprehend Coke's statement in *Bonham's Case* in relation to his whole thought, it is necessary to consider the broader perspective

and the historical context. Accordingly, the most important fact that should be borne in mind is that in Coke's era there was no modern division of powers but instead a monarchical government. Coke was part of a theory originating in the middle ages with representatives as Bracton or Fortescue, the English theory of limited government: the Ancient Constitution (Burgess 1992; McIlwain 1947; Pocock 1987).

According to this theory, the English monarchy was a kind of government where two fields must be differentiated: firstly, the *gubernaculum* – in Bracton's words – where the power of the monarch was, although not absolute (Burgess 1996, 129), at least not controlled by law, or under her discretion (McIlwain 1947, 77, 84), and, secondly, the *iurisdictio*, in Bracton's words, where the common law operated as some sort of fundamental law whose main pillars were represented in the Magna Carta. Here, the monarch was bounded by the common law, and whatever royal act beyond this law was *ultra vires*. Despite judges at courts being appointed by the monarch and acting in her name alone, they were bounded to determine the rights of the subjects according to the law and not to the monarch's will (McIlwain 1947, 85–86).

The fundamental character of the common law is that it was based on two different grounds. Firstly, its antiquity. The common law was a customary law rooted, as fiction, even before the Norman conquest (1066) (Pocock 1987, 30). However, this was not enough, and common law became fundamental law secondly – and most importantly – because it was a manifestation of reason, thus establishing a connection between this law and natural law. Its antiquity was not then a value itself, but a proof that the common laws of England were the best exemplification of the law of nature. Although due to a natural aversion to the continental ideas and the influences of Roman and ecclesiastical law, the English practice of common law lawyers was the use of the term *reason* (Haines 1930, 28; Pollock 1922, 5). However, this reason was not the natural one, an individual reason, but a collective and *artificial reason*, the reason of those instructed in law – the courts. This allowed both the interpretation of the law to be taken out of the hands of the monarch and to manage its connection with the law of nature and its customary but necessary changing character to adapt it to social conditions (Burgess 1992, 48).

Coke was inheriting all this practice at the time when the Stuarts were trying to blur the line between the abovementioned fields to reinforce their royal power in the fashion of absolutist monarchies of continental Europe. Coke was against this trend. He revitalized the medieval theory of the Ancient Constitution and the Magna Carta in the fight against royal arbitrariness, to the point that the modern significance of this document may be considered in a great part a creation of his own (McKechnie 1917, 12).

Coke and the Interpreters of the Ancient Constitution

Coke's position in *Bonham's Case* can be explained by the previously mentioned context. Coke's final preoccupation was not with parliament, but with the Stuarts' attempts to set up an English absolute monarchy. For that reason, one of Hobbes' main works – *A Dialogue Between a Philosopher and a Student of the Common Laws of England* – was directed against the common law lawyers and their theory of the Ancient Constitution, and Coke especially.

It is also in this context that Coke's opinion in *Bonham's Case* – considered a possible precedent of the idea of judicial review – may be properly understood when considering another of his famous statements: Coke's definition of the power of the English Parliament as "transcendent and absolute" in the fourth part of his *Institutes* (Coke 1797). This last statement is considered as one of the first authoritative statements of parliamentary sovereignty (Stone de Montpensier 1966). But how could Coke be defending that English Parliament has a transcendent and absolute power and, at the same time, claiming that it was limited by the common law as stated in *Bonham's Case*? Perhaps, the solution lies in that in Coke's mind, the answer to the question about who should be the interpreter of the Ancient

Constitution couldn't be other than the courts, those in possession of the *artificial reason*. This was the only way to contain the monarchy within its limits. However, among the courts, the *High Court of Parliament* (McIlwain 1910) was the best suited to interpret the Ancient Constitution. It shouldn't be forgotten that Coke's words on the powers of parliament in the fourth part of his *Institutes* have the subtitle "Concerning the Jurisdiction of Courts" and, there, Coke referred to the parliament as the *High Court of Judicature*. But still, nothing seems to impede the test of strict statutory interpretation – likely to have been applied in *Bonham's Case* – when required by equity, as a way to get justice in particular cases.

Conclusion

After Coke's death, his ideas – especially those that have been considered pivotal in this article – evolved very differently in England and the United States. In England, Parliament pleaded its position as the highest interpreter of the Ancient Constitution in the fight against monarchy that resulted in the civil war. And finally, after the *Glorious Revolution*, the theory of parliamentary sovereignty – reflected in William Blackstone's *Commentaries*, quoting Coke – was established. In the United States, *Bonham's Case* – understood as a tool of judicial review of legislation – was used in the struggle against the writs of assistance and the Stamp Act (1765) in British America, and some scholars are convinced that they have seen its wording in the US Supreme Court's decision in *Marbury* vs. *Madison* (1802). However, he probably would have denied both. He was just a lawyer defending the supremacy of the law against the supremacy of the crown.

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Collective Responsibility

► Responsibility: Collective

Common Law and Civil Law Systems: A Comparison

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Introduction

The world contains a vast number of various national legal systems.[1] Differences between the diverse systems are not always of the same order. The diversity of laws, languages, and forms in which they are expressed, as well as differences in social organizations and cultures, makes it difficult to compare various legal cultures and systems. The most convenient way to analyze those differences is to group all the laws in legal systems by using specific criteria and categories.

This text discusses similarities, differences, and tendencies of convergence between two main legal systems, common law and civil law. It attempts to provide a broader picture based on the general features of these two legal systems without addressing specific differences in substantive and procedural law.[2]

The text aims to (i) identify the main conceptual differences between common law and civil law and (ii) explore the possibilities of convergence between these two legal systems. To emphasize the distinctive features of the common law and civil law systems, this text does not cover the differences between the members within the same family (e.g., differences between American and English law, or differences between French and German law). It will be assumed that all common law or civil law systems are alike in essential respects.

Classifications of legal systems are predominantly based on private law and largely ignore public law. Such an approach will also be used in this text. A comparative study of public law would need a different classification leading to a different story.

Main Features of Common Law and Civil Law

Historically, laws used to be similar, at least in Europe, and there was no division between civil law and common law. There were some differences, especially in customary law, but the laws were similar in different parts of Europe. After England established its legal system, common law and civil law took different paths, developing into two divergent legal systems.

Notion of Civil Law

Civil law has its origin in Roman law[3] and, in the Middle Ages, was impacted by canon law forming the basis of a common legal system called *ius commune*. Civil law was developed in Continental Europe and in many other parts of the world during the ensuing period.[4]

The main feature of civil law is that it is codified in civil codes. Civil code is described as a "systematic, authoritative, and guiding statute of broad coverage, breathing the spirit of reform and marking a new start in the legal life of an entire nation" (Schlesinger et al. 1998, 271). Civil law jurisdictions are not homogenous. Despite some important differences (e.g., between Romanic and Germanic families), there are certain features that bind them together and "set them apart from those who practice under different systems" (Schlesinger et al. 1998, 282).

Civil law contains general rules and principles, often lacking details. One of its essential

[1] According to Zimmermann there are "as many legal systems as there are national states" (Zimmermann 1996, 580).

[2] As a reference, several texts address those differences (Zweigert and Kotz 1998; Schlesinger et al. 1998; Gordley et al. 2012; Pejovic 2001).

[3] The term "civil law" is derived from the Latin expression *ius civile*, and it has two meanings: in its narrow meaning, it designates the law related to the areas covered by the civil codes. The broader meaning relates to the legal systems based on codes as contrasted to the common law system. In this paper, the broader meaning of civil law shall be used.

[4] The term "continental law" is also used, especially in civil law countries.

characteristics is that the courts are required to apply and interpret the law contained in a code. The assumption is that the code regulates all cases that could occur in practice. When the code does not regulate certain cases, the courts should apply the most relevant general principles to fill the gaps.

Modern civil law systems, originally developed in Western European countries, have spread worldwide, including the colonies of European imperial powers.

Notion of Common Law

Initially, common law and civil law traditions shared sources of law such as Roman law, canon law, and customary rules. However, these influences were neither systematic nor did the legal concepts remain the same once imported; "once the continental ideas were imported into England, the umbilical cord was cut" (Lewis 1995, 50).

The present division between the civil and common law systems resulted from a different path England took after the Norman conquest departing from the rest of Europe. Common law evolved in England around the eleventh century from the decisions of local courts, which applied customary rules. It developed in time to resist the impact of the Roman law's revival that has shaped the continent's legal system.

Common law was created as a part of the struggle for authority, first at the regional level; then it was influenced by the competition for power between the courts and the Parliament. Common law was initially created as a tool for establishing a central power in medieval England, as the king was trying to overcome resistance from the local authorities that opposed the attempts for centralization. The king established his own courts throughout the country by relying on judicial decisions. They indeed constituted a "common law" that applied to the whole country's territory based on customary uniform rules, which brought forth the origin of the term "common law."

The court system was established before the Parliament. After the Parliament acquired the law-making function, its legislative power created tension with the courts since every legislation represented an encroachment on the domain of the common law developed by the courts. The courts were obliged to render their decisions in accordance with legislation, but this was often done by giving it a narrow interpretation to limit its impact and preserve the courts' authority. These conflicts through which common law was created and implemented are reflected in the nature of common law.

The law of England is the common source of today's common law systems. In fact, until the seventeenth century, common law was exclusively English law applied within British colonies across continents. Hence, there is a high degree of continuity in the history of common law.

Comparison Between Civil Law and Common Law: Generally

The common law and civil law systems are the products of two fundamentally different approaches to the legal process (Pejovic 2001, 820). They might have more similarities than differences, but a comparison tends to focus on differences. The differences between common law and civil law lie in, inter alia, their approaches to certain concepts, legal structure, classification, terminology, style, methods, and way of interpretation, rather than in differences in the fundamental or philosophical concepts. The core differences that determine different characters of these legal systems relate to the roles of legislation and courts deriving from different origins of the two legal systems. Civil law is based on the theory of separation of powers, whereby the role of the legislator is to legislate, while the courts should apply the law. On the other hand, in common law, the courts are given the main task of creating the law.

For the purpose of this text, the following part focuses on major differences concerning the sources of law, the role of judges, and some differences in approach.

Different Sources of Law

The most obvious difference between civil law and common law systems is that the civil law

system is codified, whereas the common law is based mainly on case law.

Civil Law

Codes

Civil law is based on comprehensive codes designed to regulate every area of human life and society. Civil law has formulated a large number of substantive legal rules serving as the basis of legal claims and court decisions. Individual rules are connected in a coherent and logical way to provide a systematic set of rules. For example, contract law is formulated in terms of formation, parties' obligations, breaches, and remedies.

The starting point for addressing a legal issue is the code. Civil law is considered a complete system with a developed mechanism for dealing with possible gaps. Even if a code does not expressly address a particular problem, it provides relevant guiding principles and legal tools for resolving the problem. The coherent system of civil law plays a key role in addressing many similar situations that may arise. This has promoted the academic character of civil law and the scholars' role in drafting and interpreting legislation. Court cases or scholarly writing may provide a new basis for the interpretation of legal provisions, but they always remain a secondary legal source.

Case Law

In civil law, the courts are not bound by their previous decisions. Court decisions cannot have a binding character because that would violate the doctrine of separation of powers, which requires that legislative power be exercised by the Parliament.

The judge should base a decision on the applicable legislation; the task of the court is first to identify the applicable legislation based on the facts presented by the parties. The principle is expressed in the Latin maxim: *da mihi factum, dabo tibi ius* ("give me the facts, and I will give you the law"). The court's task is to identify and apply the relevant provisions from the applicable legislation. The court must state the grounds for a decision based on the relevant legal provisions; previous judicial decisions may or may not be quoted. The decision should not be general – it should be rendered only for a particular case without aiming to create a general rule for future similar cases.

In some civil law jurisdictions, the courts follow the line of previous court decisions when a particular issue is decided repeatedly in a consistent way over a number of cases. Such practice is known as *jurisprudence constant* which is considered binding for future cases.[5] The continuity of line among different court decisions shows that the same legislation applies to the same or similar facts and that the same reasons lead to the same decisions.

Common Law

Case Law

The common law is based on decided cases by reference to previous judicial decisions. While common law relies on some scattered statutes, it is largely based on precedents,[6] the judicial decisions that have already been made in similar cases.

The principle is that earlier judicial decisions, usually of the higher courts, made in a similar case, should be followed in subsequent cases – that is, precedents should be respected. This principle is known in Latin as *stare decisis* ("to stand by things decided"). This principle has never been legislated but is regarded as binding by the courts.[7] The precedents are maintained over time through the courts' records and historically documented in collections of case law known as yearbooks and reports.

[5] *Jurisprudence constante* is a legal doctrine according to which a long series of previous decisions applying a particular rule of law carries great weight and may be determinative in subsequent cases. *Jurisprudence constante* is recognized in most civil law jurisdictions.

[6] Precedent (Lat. *praecedens* – "before in time") is the principle in the law of using the past to assist in current interpretation and decision-making.

[7] Only in 1898 was the binding force of precedents accepted in case *London Tramways Co v London County Council* [1898] *AC* 375.

Precedent is not necessarily the final decision in a specific case. It is rather the opinion of a particular court on an issue that serves as an orientation for similar cases to be decided in the same or similar manner. The doctrine of precedents aims to prevent inconsistent verdicts on the same point of law while serving the need for legal certainty and predictability.

Precedents incorporate a certain degree of flexibility. Where a new similar issue is subject to court review but that is not covered by relevant precedents, the judge can either apply a relevant precedent or create a new precedent for the new case being distinguished from existing precedents.

In a more radical scenario, the court may overrule the prior precedent that it finds erroneous by providing a new precedent for the same issue. This gives the common law system a certain level of flexibility to adjust its law to changed circumstances.[8] When different facts or new considerations arise, common law judges are free to depart from precedent and establish a new law.[9]

Statutes

The claim that the case law constitutes common law is only partly true, as the common law is also largely based on statutes. Since the nineteenth century, much of private law has been codified into statutes, but the codification was rather limited.

The statutes often represent codifications of case law, but there are no codes in the civil law system sense. Even if there is a statute, it is usually adopted in an area already developed and regulated by common law. The main function of a statute in common law is consolidating and clarifying the common law, not replacing it.

The statutes are not aimed at providing general principles. They are rather based on specific rules that apply in particular factual situations resembling the character of precedents that apply to such specific situations. This derives from the attempt to ensure legislation implementation by limiting the courts' power to avoid giving effect to legislation by its narrow interpretation, which is a relic of the previous conflict between the common law courts and the Parliament.

The statutes in common law are also comprehensive but in a different sense than in civil law. While civil law statutes aim to regulate any situation that may arise in practice, common law statutes are considered comprehensive for their detailed regulation of a specific area of law.

From the perspective of civil law, the common law statutes may be regarded as incomplete due to a lack of general standards and principles; at the same time, they may be detailed in considering how they regulate a specific issue. Yet, the common law statutes are not incomplete if they are brought into a larger picture and if the way how they function is understood.

Role of Judges

One of the key differences between civil law and common law is the role of judges. In civil law, the role of judges is limited mainly to the application and interpretation of the law. On the other hand, the judges in common law play a key role in making law.

Civil Law

The civil law tradition views judges as government officials who perform essential but uncreative functions. The judges act as civil servants who administer the laws enacted by legislators. The origin of such status of the judges lies in the French Revolution, 1789, as one of the intentions of the revolutionaries was to terminate the -law-making role of the courts (*parlements*) of the ancient regime. The classic view was that the judge is "no more than the mouth that pronounces

[8] Lord Woolf in *R v Simpson*, [2004] *QB* 118, 128:

> *rules as to precedent reflect the practice of the courts and are of considerable importance because of their role in achieving the appropriate degree of certainty as to the law, but they should not be regarded as so rigid that they cannot develop in order to meet contemporary needs.*

[9] "What is needed today is a dynamic, or at least an activist, judiciary, ready and willing to develop the law to fit the changing times" (Devlin 1979, 1).

the words of the law" (Montesquieu 2010, Book XI, 6). The French Civil Code contains an explicit provision forbidding the judges from laying down general rules.[10]

> In civil law a judge is a kind of expert clerk. He is presented with a fact process in the sense that response will be readily found in all except the extraordinary case. His function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. (Merryman 1985, 36)

It is often stated that the judges in civil law merely apply the law. This is a simplification. In civil law, the judges also produce court sentences, but those sentences are merely an interpretation and application of relevant codified provisions to the specific situation. However, through the interpretation, the judge can expand the meaning of law beyond the original text and even beyond what was originally envisaged. In this way, the judges can contribute to making law. Just this way of making law is different from the way law is made by the common law judges.

Civil law judges normally refrain from attempting to change the law, even if they consider it wrong or unjust: *dura lex sed lex* ("the law is harsh, but it is the law"). When the circumstances change and new legal rules are required, a change of law is achieved by the revision or amendment of the existing legislation.

Common Law

The common law judges do not just interpret the law. Rather than theoreticians, they are problem solvers who create law (Merryman 1985, 71). The judge's task is not only to resolve a particular case in front of him/her but also to formulate a general rule that will apply to future similar cases.

> [J]udge legislates only between the gaps. He fills the open spaces in law. . .. Nonetheless, within the confines of those open spaces and those of precedent and traditions, choice moves with a freedom which stamps its actions as creative. The law which is the resulting product is not found but made. (Cardozo 1921, 113)

The judge determines the precedents to be applied in the decision of each new case. Precedents contain the arguments of a judge, who balances the parties' competing arguments in a specific case while trying to find out what the law should be in the present case. The courts are supposed not only to decide disputes between particular parties but also to provide guidance on how similar disputes should be settled in the future.

Differences in Approach

Here will be discussed several differences in approach deriving from different origins of civil law and common law. These differences may be helpful for a better understanding of the characters of these two legal systems.

Entrepreneurship Versus Paternalism

Common law has an element of entrepreneurship by granting a wide range of freedom to the parties. On the other hand, civil law adopts a more paternalistic attitude that imposes constraints on what can be done. The distinction is noticeable in various areas of these two legal systems, like the role of a judge in a trial or the role of the State in the economy.

Common law takes a *laissez faire* approach in the court proceedings, with the judge's role being limited to overseeing proceedings, leaving to the parties the main role in the trial. The judge rules on the validity of questions asked by attorneys during cross-examination, but the judge usually does not ask questions. The court process is dictated by the parties, who lead the process to the final trial at which they decide what evidence the judge will hear. In common law, the pretrial search for evidence is dominated by the process of discovery. The parties are obliged to produce for inspection by the other party all documents or information which are relevant to the matters in dispute and which are in their possession without the intervention of the court. In the end, the judgment is rendered based on a more convincing presentation.

[10] Article 5 of the French Civil Code: "Judges are forbidden to decide cases submitted to them by way of general and regulatory provisions."

In civil law, the judge plays an active role in trials and is in charge of the whole process during proceedings; he/she interviews the parties, makes the selection of witnesses, and interrogates them. The judge does not have to wait for the counsels to present evidence, but he/she can actively initiate the submission of relevant evidence and may order the parties to disclose evidence in their possession. While the common law process of discovery is a private matter, performed by lawyers in accordance with the prescribed procedure, the civil law process of collecting evidence is a public function conducted by the court (Pejovic 2001, 832). The role of a judge is not merely to decide the case according to the stronger of the competing presentations, but to ascertain the definite truth and then make a just decision serving the public interest (Pejovic 2001, 831).

In a similar way, in common law, the role of the State in economic affairs is less intrusive. The legal origin theory asserts that the differences between legal origins are expressed in different strategies of social control of the economy and are thus central to understanding the varieties of capitalism (La Porta et al. 2007, 4). The economy in common law jurisdictions presupposes the use of private law methods as protection against the State's interference. On the other hand, in civil law, the State uses public law instruments for intervention in the market. As an illustration, this difference is prominent in the enforcement of antitrust law. Private enforcement by the parties is prevalent in common law jurisdictions, while civil law countries rely more on enforcement by the state agencies acting in the public interest (Segal and Whinston 2006, 1).

Abstract Versus Practical Approach

Civil law takes a more dogmatic approach to the rules since it relies on abstract legal norms and their well-developed systems. It has developed a logical and systematic approach to the law, which is more rule-based than fact guided. Civil law codes are based on the comprehensive systematization of issues governed by the code and on general standards and principles which are removed from actual cases.

> Just as the mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact. (Grotius 1964, 23)

The code incorporates various legal concepts that are rationally ordered and serve a judge as a fundamental tool in deciding cases. Codes and statutes contain legal rules created for abstract and anticipated situations that may appear in the future. Those rules are based on rational ideas to create a rational-legal order in a society where the codes and statutes are to be implemented by the court's application and interpretation.

On the other hand, common law has been gradually developed by case law instead of abstract legal norms. The legal technique is focused on setting precedents and comparing them to concrete situations. Common law was originally developed through practitioners, judges, and courts to enable the courts to apply the law which was "common" to the whole country. This is reflected in the nature of the modern common law that is aimed at finding solutions to specific issues.

Common law is the system that is always in the process of gradual development, without feeling the need to create rules for situations that have never happened but may happen. The attitude is in line with the English proverb: "we will cross the bridge when we come to it." In civil law, the approach is different: before coming to the bridge, there should already be rules defining what to do and when we come to the bridge; the bridge not being a specific one, but any bridge in abstract terms.

While civil law judges think about institutions in abstract terms, common law judges focus on a particular case. Precedents have a clear practical character, as they relate to issues that have arisen in life, rather than hypothetical speculations regarding situations that might occur in the future. Common law has a pragmatic approach, based on experience and equity. "The life of the law has not been logic; it has been experience" (Holmes 2009, 1).

The lawyers from civil law countries are said to be more conceptual, while judges from common law are said to be more pragmatic. A common law judge creates rules for specific cases to do justice in a specific dispute that has occurred in real life, rather than striving to establish the rules of justice

for all, which was the proclaimed goal of the law in the civil law system.

Deduction Versus Induction

The civil law system is said to be deductive, going from general principle to specific case. By contrast, the common law is inductive, extracting the general principle from specific cases. While common law is shaped by practice, civil law is governed by principles.

The lawyers in civil law focus on legal principles and rules contained in the codes or statutes, which are applied to specific situations. Civil law is based on codes and statutes that contain logically connected concepts and rules, starting with general principles and moving on to specific rules. A civil lawyer usually begins from a legal norm contained in legislation and uses deduction to make conclusions regarding the actual case.

On the other hand, a lawyer in common law begins with the actual case and compares it with the same or similar legal issues that courts have dealt with in previously decided cases. Lawyers in common law analyze cases by comparing them with previous cases involving similar but not necessarily identical facts, in order to extract specific rules that can be invoked or to eventually establish new rules applicable to similar situations. In this way, a binding legal rule is established via induction from relevant precedents (Pejovic 2001, 820).

While civil law is based on rationalism and deduction, common law has a reverse starting position being based on empiricism and induction. When a problem arises, the civilian lawyer asks himself/herself, "What should we do this time", while in the same situation the common lawyer would ask, "What did we do last time?" (Cooper 1950, 471).

Future Directions: Tendency of Convergence

Modern civil law and common law systems show several signs of convergence. Many of the differences that used to exist are now less visible due to changes in both systems.

Traditionally, civil law's reliance on codes has been contrasted with common law's use of judicial precedents. On a closer examination, this distinction is gradually disappearing or at least becoming less visible. Large portions of common law are now contained in statutes and codes; regulatory law has achieved greater importance leaving less room for the courts. On the other hand, the rigidity of the *stare decisis* doctrine has been softened by several changes, including the famous Practice Statement by the House of Lords, which declared its intention "to depart from a previous decision when it appears right to do so."[11]

In civil law, the role of courts in creating law has gradually increased. Under the influence of "*jurisprudence constant*" doctrine, the decisions of higher courts are likely to be followed by lower courts. The binding force of precedents, as one of the main distinctive features of common law, is not so unique to the common law as it may seem because the case law has an influence on the courts in all legal systems (MacCormick and Summers 2016, 2).

The outcome of disputes is often the same or similar in both civil law and common law courts. In both systems, the courts may use both legislation and case law – just their place and the way of application may be different. As a result of these processes, many of the differences look now more like nuances rather than major differences; the difference is more in degree than in essence. With the convergence process, it is becoming increasingly difficult to identify the differences between civil and common laws. Notwithstanding very different legal cultures, processes, and institutions, civil law and common law have remarkably converged in their treatment of most legal issues (Pejovic 2001, 837).

Despite the tendency toward convergence between civil law and common law systems, the fundamental differences between these two legal systems continue to exist. The tendencies of rapprochement cannot change the different natures of

[11] Lord Gardiner's statement in the House of Lords, July 26, 1966 [1966] 1 WLR 1234.

the common law and civil law systems stemming from their different attitude towards the role of courts and legislation.

Conclusion

By definition, a comparison tends to focus on differences. Comparing common law and civil law reveals that these two legal systems have more similarities than differences. Despite different legal cultures, processes, and institutions, common law and civil law have remarkably similar treatment of most legal issues.

The differences between civil law and common law systems are more in styles of argumentation and methodology rather than in the content of legal norms. Using different approaches, both civil and common law aim at the same goal, and similar outcomes are often reached.

While many legal issues are dealt with in the same way, there also remain significant differences between these two legal systems related to legal structure, classification, fundamental concepts, and terminology. The differences deriving from differences in historical development and a different attitude toward the role of courts and legislation will not disappear in the foreseeable future.

Cross-References

- ▶ Codification
- ▶ Comparative Law: Methods of
- ▶ Civil Law: Roman
- ▶ Legal Transplants
- ▶ Precedent: In Legal Positivism
- ▶ Precedent: In the Common Law World

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Comparative Law: Methods of

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History

Comparative law was born as a discipline, its borders demarcated by theories, methods, and a subject matter, in Paris in the year of 1900. Whoever invokes the venerable tradition of the discipline may enlist Aristotle as one of its founders,

distinguish Montesquieu's *Spirit of the Laws* as one of its still fascinating and important documents, and praise Henry Sumner Maine and Max Weber as comparative law's heroes of the nineteenth century. And there were others who excelled in comparative legal studies. Yet, it took the *Congrès International de Droit Comparé* in Paris to raise comparative law above the level of singular, albeit remarkable, investigations to a collective, concerted venture. Without belittling the genius of the comparatists just mentioned, there is little evidence of systematic, methodologically guided legal comparison before 1900.

The *Congress* privileged a scientific approach to foreign laws and jurisprudence that included an intense occupation with the foundations of comparison. It was dominated by the motivation of the French organizers, Raymond Saleilles and Édouard Lambert, to overcome the sterile "school of interpretation" (*École de l'Exégèse*) and to direct the epistemic community toward new horizons – the "common law of civilized humanity" and comparative legislation. By contrast, the German faction led by Josef Kohler tended to be more inspired by Herder's and Hegel's philosophy of history and, assuming that different legal cultures follow the same pattern of development, therefore reached out to a "world law." After the Paris Congress, these traditions disembogued into the delta of attempts to recapture the pre-modern and early modern concepts of universal jurisprudence and to re-imagine them as updated scientific frameworks for a universal jurisprudence of comparative law and have been overshadowed since the 1920s by the triumph of the functional method, accompanied, not challenged, by other methodological approaches, such as taxonomy, structuralism, and factualism.

Throughout the twentieth century, comparative law was marked, in the Western comparative community, by a significant inferiority complex marked by a lack of recognition in academia and marginalization in the law school curriculum. Over the years, this Cinderella complex has become more knotty and, after the discipline's further development, was replaced by a spirit of naïve enthusiasm that claims for comparative law the position of queen of the legal sciences. This spirit leads some comparatists to overlook the intricacies of comparative research and embrace, albeit tentatively, Montesquieu's method featuring the highest possible standard for the widest scope and most complex complexity of their task and committing them to an endless search for phenomena related to law. Leading textbooks command in the name of science that comparative law does not limit its studies to phenomena arising within national boundaries but becomes international or contextual. Aside from its scope and reach, comparative law today commands a respectable body of knowledge. It is supported by the typical genres of literature covering fields of research and their genealogy and tools, encyclopedias, handbooks, and monographic studies, which provide comparative law with the generally recognized credentials of science.

Method Without Matter?

This disciplinary development comes with a peculiar feature, though. There are quite a few comparatists who argue that method and subject matter are co-extensive in comparative law. In other words: there is *only method*. While it is true that comparative law is not defined by a discrete ensemble of norms and doctrines, like international private law or conflict of laws, it still encompasses a body of knowledge of foreign laws, structured by intensive, critical debates about theory, method, and projects. Therefore, "comparative law is nothing but a method" appears to serve as a mantra – a magic formula to purge the practice of comparison from messy aspects of comparing, such as bias and ethnocentrism, as well as neutralize extra-legal, notably political implications and keep at bay ethical demands. Thus, "comparative law as a method" functions as a veil of innocence for some of the standard comparative practices. The veil is supported by the corresponding claim that comparative law, by necessity, qualifies as an objective, ethically and politically neutral science. Whoever propagates this mantra obviously refrains from the famous dictum that "there is only one method in social anthropology, the

comparative method - and that is impossible" and avoids the notion of comparing as a moral act and the invariably ethical-political significance of dealing with foreign laws and cultures. Nonetheless, this position tries in vain to escape from the intense and controversial debates in the other human and social sciences about objectivity and positivism. Moreover, this pose of innocuousness may foster a ubiquitous angst about the disciplinary identity and the image of a merely collateral science.

Methods of Legal Comparison

Universalism. The prominent figures before and in the aftermath of the 1900 Congress distinguished their comparative practice by embracing a variety of universalistic approaches and projects. They earn respect and also admiration for introducing and applying methods and, more importantly, for translating their reformist ideas into treatises of comparative law. However, their agenda came with claims to ethical neutrality, not always sufficiently explicit, provided by philosophies of history and scientism. One may doubt whether they would have described their mindset and cosmopolitan vision as politically agnostic. Yet, innocence was also transmitted by the disciplinary program supported by not only French and German but also other European protagonists of what was referred to as the "school of truth" (*école de vérité*) or, simply, history. The search for inspiration in other countries, whether driven by humanism or the mission to civilize, was invariably guided by the ambition to promote comparative law as a science, thus linking comparative law with the overall nineteenth-century project of legal scientism.

The intellectual leaders of the Congress shared a profound legal-historical background and a mastery of the tools of other human and social sciences. Josef Kohler studied non-European laws from a historical and ethnological perspective, which he combined with a theory of culture. He interpreted law and legal orders in the framework of a science of culture as a natural law of the respective cultural period. In his doctrinal treatises, Saleilles constructed law systematically and in opposition to the still influential school of conceptual jurisprudence. As regards the comparative practice, Saleilles and Lambert also embraced the idea that each country and people have their own law shaped by the developmental stage of the national culture. According to the philosophy of history informed by Johann Gottfried von Herder and G.W.F. Hegel, the founding fathers of the discipline who regarded national laws as forerunners of a universal law, in its service, they applied their comparative methods. Despite their belief in rationality and progress, their interest in ethnology and sociology, and their interdisciplinary mindset, one might say, the founders of the discipline held that only legal orders of the same or similar developmental stage could be compared. Regrettably, their rhetoric of humanity and civilization as well as their universalism did not advise them to comment on and criticize colonialist and imperialist legal orders.

Taxonomy. Comparatists have always tried to order the world of laws by constructing, according to certain criteria, models of reference that would facilitate comparison. They reduced complexity and diversity on the global scale by pre-ordering legal regimes and fitting them into clusters they defined as "traditions," "major systems," "families," "circles," or "spheres." The taxonomic method echoes, if only in its formalist categories, the spirit of universalism, at least when pursued to develop a universal jurisprudence and to investigate the potential of comparison for a better understanding among nations. Classifying foreign legal regimes means, however, looking at the world of laws from Archimedes' imaginary outpost, unmarked and never called into question. Its scope brings to mind Montesquieu's "Spirit of the Laws" and the universalistic perspective.

Classification exercises a temptation few comparatists find easy to resist. It reaches a high point in the 1950s with René David's treatise on "grands systèmes," followed by a turn to legal traditions and, later, to context. The turn ended, for the time being, with H. Patrick Glenn's attempt at classifying and yet sustaining diversity in his much praised and also harshly

criticized *Legal Traditions of the World* and recent fusions of family-like clusters with the contextual method.

René David reduces universalism to the legal geographer's mindset and tropes. He privileges quite evidently "Western," that is, civil and common, law and devotes much less attention (and pages) to present what he calls the total view of other, clearly not so grand legal systems, such as Socialist, Muslim, Hindu, Chinese, Japanese, and African legal orders. By contrast, Patrick Glenn places national laws in the broader context of major legal strands, those of chthonic (indigenous – oral and written) law, Talmudic law, civil law, Islamic law, common law, Hindu law, and Confucian law. He examines each tradition primarily in view of its institutions, substantive laws, founding concepts, and methods. His difference-oriented approach distinguishes the category of tradition from the somewhat hermetic concept of legal families by the openness of traditions to innovation and inclusive forms of logic.

Glenn's commendable effort at sustaining diversity does not prevent the project from being entrapped by the regular problems of taxonomy though. First: The arbitrariness of the criteria of taxonomic ordering invokes the famous "Borges' list." Second: Taxonomists have to take note that they operate in the comparative space as well as their role as both observers (of the foreign) and participants (in their own legal culture). However, their treatises read as if written by Archimedean observers who at a glance survey the totality of laws. Third: No taxonomist can seriously be expected to encompass the laws of the whole world, past and present, giving each equal attention and treating it with equal methodological care. However, the focus of comparative attention, the selection of materials, and in particular epistemological privileges granted to "basic" or "parent" legal orders need to be disclosed, discussed, and possibly justified. And fourth: Taxonomists, like all other brands of comparatists, have to deal with the interpretive dilemma posed by comparing the own with foreign laws. Opting beforehand for similarity may facilitate the job of transnational ordering; however, its result is almost as a rule deeply flawed by the impact of settled knowledges gained through legal education and training and academic experience.

Therefore, taxonomic approaches, fascinating as they may be, are liable to – and often do – reiterate the endless similarity-versus-difference debate and uphold the methodological hegemony of civil/common law ("the West") from whose vantage point they generally classify the varieties of the Other as minor, marginal, secondary, and derivative – "the rest." Hence, taxonomies are far from innocuous and have to be carefully searched for traces of Anglo-Eurocentrism and cultural imperialism, for the combination of power/knowledge in their "order of things" comparative.

The functional method. After the First and again the Second World Wars, the comparative mainstream followed the objectivist and positivist trend in the social sciences. Their dualist mantra of comparative law as "nothing but a method" and "method as science" reflected the turn to the logic and techniques of the natural sciences and the corresponding decline of the philosophical-speculative spirit. After a phase of tranquility during which comparatists remained stoically indifferent to the intense debates on methodology in the neighboring sciences, they woke up, in the 1920s and again after the Second World War, with a functionalist frame of mind. They invoked the Weberian realm of value freedom, where also the comparative science of law was (and still is) believed to operate in the domain of (purposive) rationality as well as ethical and political neutrality. There they hoped to exorcise political influence and socioeconomic interests and then be able to work – detached from social passions and political ideologies, economic imperatives, and cultural particularities – in the service of purely scientific comparison.

The turn to practical knowledge superseded the former enthusiasm about theoretical ideas and generated what was called applied comparative law. It basically privileged a functionalist design, which focused comparative research on systems rather than sources. It was geared toward problem-solving rather than the origins and foundations of law. Thus, the varieties of the functionalist method came to triumph throughout the twentieth century and into the next. After each of

the two World Wars, the *Zeitgeist* favored a pragmatic mindset: Hence, comparative law was expected to help chart the facts of law rather than pursue the vision of universal legal orders, which fostered a branch of the functionalist school called factualism. Moreover, comparative law seemed as good a practice as any other, if not a better one to look across the borders for better legal solutions to social problems, which led to the very logic of functionalism. Together the preoccupation with (social) problems, legal solutions, and legal facts fostered a new realism without a critical edge.

The triumph of this method may also be due to the simple elegance of functionality, its basic principle. While there are quite a few varieties of the functional method, at the end of the day, it rests on the assumption that all societies have to cope with similar social problems. Therefore, law is expected to devise solutions to these problems. In consequence, functionalists presume the similarity of legal solutions, some being better than others, and allow only for differences in detail. They oscillate between a status quo-oriented instrumentalism and (moderate) reformism. They tend not to question what entitles a comparatist to define something as a "problem" and then decide what might be a "better solution," as the functional approach claims to be so commonsensical that it stands without alternative.

The success of the functional method is also illustrated by the wide range of its uses: Functionalists support theories of legal transplants, and the functionalist method infiltrates structural analyses and is combined, for the sake of the unification of (private) law, notably in the European Union, with *factualism*. The latter method claims to be strictly tailored to the collection of legal facts so as to obtain at least the main lines of a reliable geographical map of the law of Europe. Quite successfully, the "Common Core Group" combined Rudolf Schlesinger's factualism with Rodolfo Sacco's structural investigation of legal formants by gathering and reconstructing those facts that, say, relate to the principle of contract or tort law (without questioning their social construction) and then exploring the "legal formants" that shape the principles of contract law or torts in the different legal regimes of the European member states. Producing reliable information, gaining more knowledge, "whatever its policy use may be," claiming objectivity and neutrality characterizes factualism as yet another method that reiterates the pure aspiration of comparatists, in particular functionalists, who seek to establish their work as scientific, ethically neutral, and politically agnostic – a combination that usually invites ideology.

Structuralism. The structuralist method could have been inspired by neighboring ethnography and anthropology. Instead, comparative law has been dominated for quite some time by a special brand of structuralism – Rodolfo Sacco's reconstruction and comparison of "legal formants." Formants are texts and documents, which are generated by the members of the legal profession (courts, legislators, legal scholars, etc.) in their strategically oriented practices. Formants resemble deep structures that are invariably interlocked. Thus, law has to be conceptualized and studied as a set of interlaced documents used and further developed by professionals rather than a set of (unconnected) texts. The critical implications of the formant approach are, first, that legal processes come to be seen as arenas where different types of elite or professional groups compete. Second, unitary theories of law are rejected as metaphysics or, one might say, ideology. For the model of interlocking formants and competing strategies challenges the idea of law as a coherent system or set of consistent practices.

The formant theory is designed to cope with the different fabrics and layers of legal orders, and more realistically than other legal theories, the formant method conceives of law as a battleground of competing sources and professional elites. It is geared toward comparing both the historical evolution and the features of coexisting legal regimes. Very much like functionalism, however, it accepts the view of a purely technical, maybe even a-political, merely professional evolution of many legal rules. Unlike functionalism, it allows for understanding the choice of an adopted rule as being socially irrelevant. Comparable to sociological jurisprudence, the formant method loosens the connection between legal

sources, legal solutions, and social problems. Instead, it introduces a concept of social change that is brought about by the strategies of legal professionals rather than regulated by (a hierarchy of) sources as legal positivism would have it.

Elements of Critical Methods

It is one of the puzzling traits (which is paradoxically related to the widespread mantra of comparative law as method) that prominent authors favor a rather dismissive treatment of an adequately rigorous debate on method. While method certainly need not become an obsession, for a discipline with a methodological focus and practice, it looks rather foolish to cut off an intense (and controversial) exploration of how to "do" legal comparison and why to be concerned about the pitfalls this practice might have in store. The point is not to present a cooking recipe or a complete and closed methodology, but in closing, it seems apposite to register a few steps toward a (self-)critical comparative practice and note some fallacies to be avoided:

Positionality marks the aspect that addresses any comparatist's position in the comparative space as both an *observer* (of the foreign) and a *participant* (in the own legal culture/setting). To be aware of positionality means treating comparative law as a *practice* geared toward the study of foreign laws and self-consciously relating them to more familiar legal concepts, norms, experiences, institutions, and cultures. Hence, it is crucial to recognize oneself as detached from or committed to one or the other context, as a comparatist from the global north or the global south, and as a specialist of Nordic law or Asian constitutions – at any rate as operating *not* from nowhere in particular. Self-awareness is a precondition for coping with bias and clarifying research interests, averting disparities in the representation of the "relevant" materials, and recognizing the ethical challenge posed by the co-presence of the other – foreign legal cultures and laws – in the comparative space. By contrast, the presumption of neutrality is anything but a promising way to meet the foreign at eye level, study it as a phenomenon in its own right, and give it, in Ronald Dworkin's terms, equal concern and respect.

Perspectivity shifts the attention to the cognitive orientation and hermeneutic a comparatist brings into the field to study, evaluate, and relate foreign legal phenomena to each other and to the familiar. Focusing on perspective also brings to the fore the comparatist's interpretative dilemma. If all goes well in comparative practice, that is, if comparatists manage to reflect upon not only who they are, where they are from (see positionality above), what kind of work they do, which methods they use and to what end, and how they can disengage themselves from settled knowledges, they may succeed in sidestepping the hermeneutic – and political – perils of transnational comparison. Instead, the scholarly discourse has more often than not resisted introspection and re-enacted with never-tiring energy the similarity-versus-difference and universalism-versus-particularism (or cultural relativism) debates. Until recently, critical scrutiny of perspective succumbed to the more or less hushed preference for similarity. Thus, functionalists, for example, managed to present their work as politically agnostic, taxonomists overlooked the dangers of chauvinism and legal-cultural imperialism, and factualists were naively out to search for "common cores." The functional method could be improved if comparatists were inclined to adopt a maxim from anthropology (Clifford Geertz) and to bring foreign laws and legal cultures very close while at the same time keeping them far away.

Contextualism. The contextual method quite obviously has to define the "contexts" under comparative review and the commonality of legal orders conjoined in one context cluster. From what was said above, it seems evident that a "continental European context" (consisting more or less of France and Germany) compromises the contextual method, especially when defined as a *basic* context.

By the same token, African law with its immense plurality and diversity of legal orders hardly qualifies as a single context even if one agrees that African laws and orders clash and need to tolerate each other. Arbitrarily and artificially constructed commonality raises more problems than comparative analysis can solve. Moreover, the conundrum of bogus contexts fails to cover the author's similarity orientation and devalues the potential richness of her comparative work.

The contextualist method contravenes the (formalist) assumption that perfect comparison and, by the same token, the easy transfer of norms are possible. In consequence, contextualists are wary of, if not even estranged from, taxonomies and functionalist schemes, where similarities are constructed with a light hand from a Western point of view. In contrast also to universalism, the contextual method does not choke the foreign in its embrace but espouses radical versions of difference. Contextual implies thick comparison of the culture and constellations, strategies, and institutions that shape foreign laws. To achieve this, comparatists need to be skilled cultural navigators who avoid the fallacies of orientalizing, i.e., patronizing, or demonizing the foreign Other as well of cognitive control.

Cognitive control. Whatever their methodological orientation, comparatists practice legal comparison and define the utility of comparative law preferably in cognitive terms and practice comparison as cognitive control. Cognitive control is characterized by the selective gathering, formalist ordering, and labeling of legal information, often randomly gleaned from limited data. It features the combination of a professed scientific attitude of objectivism/detachment with a presumption of similarity in interpretation. Thus, cognitive control lends itself to strategic comparison. The armchair comparatist, rather than going native or exposing her settled knowledge to new ideas and insights, travels lightly and briefly to the Other and always returns to her point of departure failing to take the foreign as an irritant of the Own.

In this way, cognitive control lends itself to establishing and sustaining the "Western" hegemony by relegating laws that are different to the margin. William Twining aptly characterized these approaches (practicing cognitive control) as being over-concerned with the domestic law of [European] "parent" nation states. Cognitive control shows quite strongly the moral deficit that comes with the routine and arm-chair management of similarities. Due to the non-reflected positionality, comparatists become accomplices of their own legal system, education, and practice. Some have indeed argued that all other (non-Western, Romano-Germanic, Common Law) systems are no more than survivors from the past or will ultimately disappear with the passing of time and the progress of civilization.

Comparing may be difficult but does not set up unsurmountable obstacles, as long as the comparatist considers: She will never see the whole picture. She is part of the picture and the comparative practice she performs. Good comparison is transformative work because it transforms the knowledge of laws that are familiar and those that are unfamiliar – work that has to be done jointly by dialogue, criticism, and self-criticism as well as thick (or productive) comparison, which favors context and narrative, and also addresses the normative and political aspects of comparative practice. A good start could be to stop the production and the recursive validation of inferior Others.

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Competence Norms

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Introduction

The concept of a norm of competence is central to the contemporary legal theory conceptual apparatus. It is also of paramount importance in day-to-day legal practice as a presupposition for the assessment of the legal validity of legislative, judicial, or administrative norms and decisions, as well as of contracts and promises. Norms of competence (hereinafter "NC") have, however, been immersed amidst controversy for several years. Although there is an overlapping consensus on NC serving the purpose of conferring upon a given subject the ability, or aptitude, to change the legal positions of certain subjects (Hohfeld 1917; Lindahl 1977), theoretical disagreements persist on the nature of such norms.

Preliminary Precisions

To *Hold* and to *Exercise* Competence

It is common knowledge that "*p holding* competence over *q*" and "*p exercising* competence over *q*" are two different states of affairs. To hold competence is a relatively stable *legal position*; to exercise it is an occasional *activity* which only comes about with intent (Spaak 2003, 91). This division recalls the separation between categorical and dispositional properties (see Choi and Fara 2016).

Unlike categorical properties, dispositional properties (dispositions) denote the capacity of a certain object to react in a certain manner under certain conditions (on the relation between dispositions and NC, Guibourg 1997, 458, Beltrán 2000, 129ff.; on dispositions in general, Ryle 1949, 100ff.; Popper 1963, 154; Putnam 1987, 11ff.). This means that certain properties may be predicated to an object though they are not directly observable at any given moment. Furthermore, it is said that dispositional properties denote the capacity of an object to actively affect or passively be affected by others. For instance, sugar is *soluble*, but the solution of sugar will only occur under given circumstances (Beltrán 2000, 130). Likewise, one can suppose that subject *p* is *competent*, but she has not yet and may never exercise competence. Legal competence therefore seems to be an *active disposition*.

Note that for subject *p* to be competent (i.e., for her to hold competence), a norm of competence must preexist, but no action from *p* is required; the norm specifically concerns the subject and the disposition of being competent. Differently, for *p* to exercise competence, a hypothetical action is required from *p*; therefore, the norm(s) governing the exercise mainly concerns the hypothetical action of *p*.

Making subject *p* competent over *q* can only be achieved through the use of performatives such as "*p is* competent over *q*" (Searle 1969, 68; Beltrán 2000, 134). Being competent is therefore connected with norms that make it so. Under Conte's categorization (1985, 345ff.), NC may be dubbed anankastic-constitutive norms as they establish the necessary conditions for their own object that of legal competence (see Beltrán 2000, 153; von Wright 1963, 10; Atienza and Manero 1994, 72). Quite differently, exercising competence presupposes NC but also instantiates other

norms, those which prescribe if, when, or how a given exercise of competence is permitted, prohibited, or obligatory.

The Individuation of Norms of Competence

Guastini (1996, 375) discusses NC through the enumeration of norms that *(i)* confer *powers* to a given subject, *(ii)* regulate the *procedure* for the exercise thereof, *(iii)* circumscribe the *subject matter* of such powers, *(iv)* limit the valid exercise to a category of *formal legal acts*, and *(v)* regulate the *content* of the exercise of these powers. Though functionally connected, the majority of these norms are analytically distinct.

Norms indicated in *(ii)* establish procedural steps for the valid exercise of competence. Norms indicated in *(iv)* prescribe that competence over subject matter *q* be validly exercised by means of legislative acts, administrative regulations, etc. Lastly, norms indicated in *(v)* model to a certain extent the valid content of the product of exercised competence (i.e., the norms and decisions thereby created). These three types of norms presuppose – and are not to be confused with – previous NC which, in turn, entail the conjunction of the artificially divided norms indicated in *(i)* and *(iii)* (on individuation of NC, differently, Spaak 2003, 97ff.).

Legal competence necessarily connects a certain subject with a certain subject matter. This is stressed under several well-known continental public law references to the subjective and objective dimensions of competence. The distinction, albeit useful, is artificial. It makes no sense to say that "*p* is competent" (an elliptical statement) or that "competence is held over *q*." NC necessarily entails reference to both. All modalities of NC are derived therefrom by conceiving *(i)* the competence holder, *(ii)* the domain of competence, and *(iii)* the exercise thereof as criteria within a combination of all logical possibilities (e.g., legal competence as exclusive, plural, alternative, specific, residual, primary, subsidiary, etc.).

Legal Competence and Performance of Valid $Acts_{law}$

A final precision should be made on the type of acts performed by the competence holders: enacting legislative statutes, creating judicial decisions or administrative acts and regulations, entering into agreements, etc. Much like moves in chess, those acts are not human actions that anyone can perform as an exercise of natural abilities (albeit the former presuppose the latter) (Hart 1961, 41 ff). There is indeed a difference between $action_1$ "moving one's hand and changing the position of a wooden piece on a table" and $action_2$ "making a move for *checkmate*." As discussed below, the latter is an *institutional action* which simply does not exist without a prior normative set that make the rules of the institution.

The types of acts performed pursuant to NC are usually labeled *acts-in-the-law*, *actes juridiques* (Ross 1968, 130), or *C-acts* (Spaak 2003, 91). Let us call them $acts_{law}$. One should note that $acts_{law}$ are enunciations, the majority of which have an illocutionary *directive* force, though sometimes a *declarative* one (Searle 1975; Searle and Vanderveken 1985, 13–15). Therefore, legal competence is not required, for instance, in case of statements with illocutionary assertive or expressive force since the latter are not $acts_{law}$ (sustaining that promises are $acts_{law}$; Ross 1968, 56). $Acts_{law}$ are entangled with the realm of normativity or *potentially* intertwined therewith if one thinks about competence to create NC through performatives (on this potential aspect of NC, see also Alexy 1987, 155).

It was mentioned above that NC are conditions for validly bringing about changes in legal positions. On the other hand, validity is a systemic relational concept covering the membership of a given act_{law} within a given legal system (Guastini 2011, 253ff.; Spaak 2003, 91–92). Therefore, an act_{law} is valid if its creation was carried out in accordance with all applicable norms of the legal system (and its content conforms to, or is consistent with, such norms). Among those norms are NC, thought not as requirements to be met *in* the law-creating activity, rather conceived as conditions *for* the creation of $acts_{law}$ (see "To Hold and To Exercise Competence").

Reducible and Irreducible Theories on Norms of Competence

Several theories concerning the nature of NC exist. NC may be conceived as:

(i) Permissory norms addressed to the competence holder
(ii) Fragments of indirect obligations addressed to legal officials
(iii) Definitional norms
(iv) Constitutive norms of the institutional dispositional property of "being competent"

The first two theories are dubbed *reducible* as they reduce NC to norms arising out of ought statements (e.g., norms of conduct); on the necessary relation between norms and ought statements, see Austin 1832, 21; differently, Hart 1958, 604 ff; 1994, 40). The latter two are deemed *irreducible* as they conceive NC as a wholly different type of norms. This labeling has governed the legal parlance since Bulygin (1992, 203ff; 207ff.) definitively imported into the discussion over NC the distinction between regulative and constitutive norms (originally, Searle 1964; see also Ross 1968).

Reducible Permissory Norms

von Wright (1963, 191ff.) is the main proponent of the account of NC qua permissory norms (see also Lindahl 1977; Alchourrón and Bulygin 1971). His conclusion is drawn from the distinction between norms of the first order, the content of which are acts other than $acts_{law}$ and norms of the second or higher (n^{th}) order, the content of which are $acts_{law}$ issuing or canceling the former. Under this account, the addressees of norms of higher order are themselves authorities of lower-order norms, and NC are necessarily higher-order permissory norms (von Wright 1963, 192).

Several remarks have been directed to this theory. In brief, it does not accurately account for the distinction stressed above between holding and exercising competence. von Wright is ambivalent when stating that "a higher-order permission is to the effect that a certain authority may issue norms of a certain content (. . .) a norm concerning the competence of a certain authority (. . .)." Now, it may be argued that if no status for the exercise of a legal competence (*Øing*) is defined by norms of a legal system, such exercise is by default permitted. This, however, is a proposition wholly uncorrelated with the proposition sustaining that NC are permissory norms. "*p* is permitted to *Ø*" is a norm that regulates an action from subject *p* (whether or not it be performing $acts_{law}$), not one that confers upon her the ability to perform it. This subtlety marks the difference between *authorization* (*Dürfen, licere*) and what is roughly called *authority* (*Können*, *posse*). On the ambivalent meaning of «power» in legal parlance (particularly in latin languages), see Caracciolo 1995, 200–204.

Being permitted to *Øing* equals having authorization to *Øing*. This is not equivalent to saying (roughly) that one has authority to *Øing*. Negation of competence is incompetence or disability, whereas negation of permission is prohibition (Hohfeld 1917, 710; Spaak 2003, 90). It may well be that *p* has authority to *Øing* but is not permitted under a given state of affairs to do so (Bulygin 1992, 215–216; Beltrán 2000, 69). On the other hand, if subject *p* is permitted to *Øing*, then two permissions would oddly arise, both at the level of holding and exercising competence. This theory seems unsustainable.

Fragments of Reducible Indirect Obligations Addressed to Legal Officials

A different reducible theory envisages NC as *fragments* of "complete" indirect sanction-imposing or duty-imposing norms addressed to legal officials. The first theory conceives "complete norms" as those that impose sanctions to be applied by legal officials in case of disobedience of $acts_{law}$ created by the competence holder (Kelsen 1949, 58–64; differently, Kelsen 1979, 133ff.). It seems however to entail that competence only arises at the moment of the sanction-applying act, thus affecting the independent existence of NC (see further remarks in Raz 1970, 147ff.). The second theory does without the sanctioning aspect of the "complete norms" and focuses on conceiving NC as "directives to the courts" (Ross 1958, 32ff.). This last account has been further developed by Spaak (2003, 89ff; 1994) through the distinction of "competence norms" and norms that confer competence (NC).

"Competence norms," within the latter conceptual apparatus, are addressed at the competence holders and enable them to bring about a certain

change of legal positions by performing a certain kind of act in a certain situation. However, since according to Spaak only duty-imposing norms are genuine norms in the sense of "complete" reasons for action, "competence norms" are fragments of complete duty-imposing norms directed at legal officials (on norm individuation, see Raz `1970). For Spaak, NC are the norms that impose duties upon the latter to recognize as legally valid those changes of legal positions brought about by the competence holder (Spaak 2003, 97ff.).

This theory has also been subjected to several remarks. It seems odd to explain the aptitude of one subject to perform $acts_{law}$ through the command directed at others to recognize its validity. This bypasses the absolute competence-conferring aspect of NC (and of the competence holders *holding* it) by focusing on the relational aspect of the impact of the exercise in duty-bound legal officials. NC are not *looked at* from the point of view of the ones exercising competence (Hart 1994, 41). The theory also does little to explain the state of affairs "being competent" prior to the exercise of competence, which may never come to be.

Irreducible Definitional Norms

Hart (1961, 38 ff.) sharply criticized the kelsenian account of NC. Ross also shifted his position toward the constitutive aspect of NC (Ross attempts at reconciling both accounts in Ross 1968). Both Hart and Ross draw an interesting parallel between NC and the rules of a game (Hart 1961, 41 ff.; Ross 1968, 54 ff.). Hart calls attention to the resemblance between rules of a game and, on the one hand, rules of criminal law punishing theft or murder (something which, absent such norms, would not exist) and, on the other hand, NC (power-conferring rules). The latter type of norms strikes Hart and Ross as being unable to be obeyed or disobeyed, therefore being irreducible to norms of conduct or Hartian primary rules (Ross 1968, 54). NC are structurally deprived of deontic operators (*P*, *Ph*, or *O*), thus rendering them immune to violation. Rather NC appear to *define* the ways in which contracts, wills, or marriages are made (or by which a crime is committed), as well as the conditions and limits of the validity of $acts_{law}$.

The *constitutive* and *definitional* aspect of norms was made famous by Searle (first in 1964 and then in 1969). It is of paramount importance for a game to exist that rules define what it is to be understood by it (see Bulygin 1992, 208). Under this account, regulative norms regulate a pre-existing activity, the existence of which is logically independent from the rules governing it (e.g., rules of etiquette governing interpersonal behavior). Differently constitutive norms "do not merely regulate, they create or define new forms of behavior (. . .) the rules of football or chess (. . .) create the very possibility of playing such games" (Searle 1969, 33; see also Carcaterra 2014). This means that chess of football (like law) would not exist without the norms that define them as institutions (Searle 1969, 34). Conversely, if these rules are not complied with – much like if a goal is scored in offside – there is no offense or violation of the rule, but a *nullity* (Hart 1994, 35), i.e., there is *no goal* in football and there is *no* act_{law} in law. It is thus tautological to state that if an attempt is made to exercise competence ultra vires, no act_{law} has been performed (Ross 1968, 54).

It must be noted that this last assertion should be understood within the conceptual purity of legal competence and (in)validity [which, in turn, is not equivalent to legal (in)existence; Guastini 2011, 253ff.]. Naturally, it is for a given legal system to define the specific conditions of validity of $acts_{law}$, i.e., whether and to what extent invalid norms and decisions performed in non-compliance with NC are null and void or voidable yet efficacious.

The definitional theory thus purports that NC are constitutive norms providing for the logically necessary conditions for the making of moves of the "game" (Ross 1968, 53). They *make it so*, for instance, that the natural activity "inserting the ball within the perimeter of the other team's goal" creates the institutional fact "scoring a goal" and the institutional result "score of one-nil" and, likewise, that the natural activity "raising one's hand in the parliament" together with the majority of the people therein creates the institutional fact "passed legislation" and the

institutional result "act_{law}" (on institutional facts, Searle 1995, 27–29; 113–114).

Now, norms are either constitutive or regulative (Bulygin 1992, 213–214; differently, Searle 1969). However, nothing prevents the existence of regulative norms governing the exercise of legal competence which, in turn, logically presupposes a prior set of constitutive norms. A distinction may therefore be drawn between *(i)* regulative norms of natural behavior as norms that *govern* antecedent and logically independent behavior (natural activities), *(ii)* constitutive norms as norms that *constitute* institutional facts and behavior, and *(iii)* regulative norms of institutional behavior that *regulate* institutional behavior logically independent from these norms but presupposing previous constitutive norms (see Brinz 1873, 65).

The definitional theory also does not go without remarks. On the basis of the kelsenian distinction (Kelsen 1960, 150ff.) between Deliktsfähigkeit (the *capacity* to commit crimes) and Zuständigkeit (the *power* to create legal norms), one can note the differences between norms that create and define (i.e., constitute) the crime "murder" and norms that confer upon subject *p* the aptitude to perform $acts_{law}$ over subject matter *q*. There is a difference to these situations that makes it odd to sustain – as Bulygin (1992, 215) does – that NC are simply norms that define "what is to be understood by a contract, a will, or a promise, and therefore make it possible to engage in the corresponding activities." Moreover, by sustaining that NC also define the subject to which competence is conferred, then one should sustain that when subject *p* is acting ultra vires, *p* is not acting qua a legal authority. This is arguable and, to say the least, counterintuitive (see Beltrán 2000, 101ff.)

Irreducible Constitutive Norms of the Institutional Disposition of Being Competent; Conclusion

In the metaphor concerning the rules of the game of football, a difference should be highlighted between the constitutive norm that *creates* a goal and the constitutive norm that *empowers* the referee to decide for it. This distinction is parallel to the one dividing purely constitutive (definitional) norms, which provide for the logical conditions of institutional facts (e.g., a theft) and norms that constitute a subject on the property of being competent, thus empowering her with the normative aptitude to produce institutional results.

NC are constitutive norms uttered through the performative use of language. The sole utterance of "*p* is competent over *q*" changes the world (Searle 1975). Legally speaking, such utterance – if valid under the criteria of a given legal system – changes the institutional world of law. What precisely is this change? NC have expansive effects upon their addressees. Upon their entry into force, NC expand the *abilities* of the competence holder, not quantitatively but from a qualitative point of view (see Searle 1969, 34). NC confer competence to *p* over *q* by expanding *p's* antecedent *natural abilities* to thereby constitute *institutional abilities* which would otherwise not exist (i.e., to affect legal positions through the performance of $acts_{law}$).

It follows that NC should be conceived as norms addressed at the competence holder herself. This account allows for NC to be *looked at* from the perspective of the empowered subject, in order to avoid distorting the social function of NC (Hart 1994, 41). It should be stressed, however, that this proposition is valid for pure NC of the like "*p* is competent over subject matter *q*" and not for norms providing for the exclusive competence of *p*. The latter are biconditionals stating the logically equivalent *universal incompetence* of all subjects [non *p*], to which they are also addressed.

It was stressed above that capacities, abilities, and aptitudes are dispositional properties. Dispositions, in turn, may differ depending upon whether they are *empirical* (e.g., the solution of sugar) or *normative* (on conventional dispositions, see Choi and Fara 2016). The latter presuppose a set of norms, while the former do not. Holding competence requires a set of valid constitutive norms to that effect. For *p* to be competent over *q*, a dispositional statement that asserts the dispositional property of "being competent" must have been uttered by a legitimate authority in a given legal system. Therefore, *p* is competent in legal system *LS* to perform a certain act_{law} on subject matter *q* if and only if a dispositional statement including a

constitutive norm of the type *NC* conferring such competence to *p* belongs to legal system *LS* (with slight differences, Spaak 2003, 91). Insofar NC make it possible for subject *p* to produce institutional results; legal competence is a normative and institutional dispositional property (Beltrán 2000, 135ff.; 137ff.).

The final structure of NC may now be addressed. It is said that by virtue of NC, if subject *p* performs naturalistic actions *a* regarding state of affairs *x*, then institutional result *r* occurs. By replacing "institutional result *r*" with "changing legal positions through the act_{law} therewith," "state of affairs *x*" with "subject matter *q*" as well as "naturalistic actions *a*" with "naturalistic actions *a* underlying the performance of $acts_{law}$," one obtains: if subject *p* performs naturalistic actions *a* underlying the performance of act_{law} regarding subject matter *q*, then legal positions are changed through the act_{law} therewith.

This final account allows for the conception of NC qua necessary – yet insufficient – conditions for the validity of $acts_{law}$ performed through the exercise of competence. It is something that the reducible theory of duty-imposing norms does not seem to accommodate. Additionally, it allows for the segregation of NC from within the several types of competence-connected norms referred to in Guastini (1996, 375; see 2.2.), each one a necessary condition of validity of the act_{law} performed through the exercise of competence (differently, sustaining that competence is a sufficient condition for the validity of $acts_{law}$, Alchourrón and Bulygin 1971, 120ff.). As Beltrán (2000, 165) rightly puts it, "for subjects to possess the dispositional institutional property of being competent the existence of a norm of competence attributing such property is a necessary and sufficient condition. In turn, being competent is a necessary yet insufficient condition for the validity of the acts or norms created by subjects."

Cross-References

- ▶ Hart, Herbert Lionel Adolphus: Influential Ideas
- ▶ Institutional Facts
- ▶ Legal System and Legal Order
- ▶ Ross, Alf: Biographical Perspectives
- ▶ Ross, Alf: Influential Ideas

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Computer and Information Ethics

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Introduction

Computer and information ethics are related fields of practical philosophy which address the proper use of computing and information technology. This entry provides an overview of their history and major topics of interest, including those germane to emerging technological and social developments.

History

World War II and Cybernetics

The roots of computer ethics can be traced to the 1940s. It is a direct descendant of cybernetics, an interdisciplinary field of study which emerged during the Second World War. Throughout the 1940s and 1950s, several notable scholars pursued cybernetics research, including engineer Vannevar Bush (1890–1974), mathematician John von Neumann (1903–1957), physiologist Arturo Rosenblueth (1900–1970), mathematician Claude E. Shannon (1916–2001), and mathematician Norbert Wiener (1894–1964), who is credited as the field's founder (Bynum 2008; Hamilton 2017). Wiener's cybernetic theory originated with his work on the design of a new kind of antiaircraft cannon. Per military specifications, the cannon was meant to gather information and make decisions without direct instructional input from a human being. In order to function autonomously, it would have to integrate data from external sources while its internal components shared data or "talked" with one another. Wiener and his colleagues saw this project as requiring a novel approach to engineering. To assist in this effort, he established a new area of scholarship dedicated to the science of self-regulating information systems. He called it "cybernetics," which comes from the Greek *kubernētēs* ("steersman") and is the root of the English word "governor" (Bynum 2008).

In its earliest phase, cybernetics was primarily concerned with information feedback systems that used statistical logic to oversee their own executive functioning (Wiener 1969). It also addressed ethical and social questions pursuant to the rise of computers in society, a phenomenon bolstered by wartime industrial development. Although the term "computer ethics" would not be coined until the mid-1970s, postwar cybernetics scholarship explored many of the topics that came to define computer ethics as it is studied and applied

today (Schriffert 2018). In 1948, Wiener published the book *Cybernetics: Or Control and Communication in the Animal and the Machine*, which marked the first documented use of the word "cybernetics." *Cybernetics* explored the scientific and mathematical basis of cybernetic theory and commented on its implications for social organization and our understanding of the human psyche (Wiener 1969). Two years later, Wiener published his most well-known book, *The Human Use of Human Beings*. Building on insights from *Cybernetics*, *The Human Use of Human Beings* investigates the potential effects of automation technology on human life. It also presents Wiener's theory of the nature of information and considers this theory's ethical significance. Blending principles from metaphysics, mathematics, and thermodynamics, Wiener states that information is a material distinct from matter and energy; as such, he argues that it must be treated with a distinct kind of ethical regard by technologists and laypersons alike (Wiener 1950). Citing the second law of thermodynamics, which indicates that all substances in the universe are subject to entropy, he makes an ethical argument for the defense of information against forces of decay. Wiener believed that entropy was a kind of "natural evil," and that the ethical treatment of information entails the prevention of its loss and dispersion. Wiener's work on cybernetics and information theory influenced the early development of computer ethics and informs research in multiple scholarly fields to this day.

The Postwar Era

The postwar era not only saw the advent of cybernetics, but significant advances in digital computing machinery. The world's first programmable digital computer, known as the Electronic Numerical Integrator and Computer (ENIAC), began operations in 1946 at the University of Pennsylvania (Barger 2008). The first major programming language, Formula Translation (FORTRAN), was published in 1954, and by the 1960s, research in natural language processing (the computational interpretation of human language) was underway (IBM [no date available]; Barger 2008). Eliza, one of the first pieces of software that could simulate dialogue with a human being, was developed by computer scientist Joseph Weizenbaum in 1964 and 1965 (Markoff 2008). To Weizenbaum's surprise, many who "spoke" with the program attributed sentience to it, and Eliza is now considered a precursor to modern artificial intelligence (Bynum 2000). With this wave of innovation came increased awareness of computers' capacity to aid unethical and unlawful activities. In 1966, security researcher Donn B. Parker argued that The Association of Computing Machinery (ACM) should adopt a formal code of ethics. His paper "Rules of Ethics in Information Processing" identifies multiple problems that might be preempted or mitigated by such guidelines (Parker 1966). These include computer-assisted privacy breaches; negative consequences of copyrighting computer code; and the spread of what he called "fraudulent programming trade schools." From that point forward, the ACM followed the stipulations proposed in "Rules of Ethics," and in 1972, they adopted an official code of conduct (Association for Computing Machinery 2018).

1970s–1980s

The move toward computer ethics as a formally recognized scholarly field gained momentum in the 1970s. In 1976, Weizenbaum published *Computer Power and Human Reason: From Judgment to Calculation*, a foundational study in the difference between human and computational decision-making (Weizenbaum 1991). Weizenbaum was already renowned for his work at the Massachusetts University of Technology, where in addition to Eliza, he had helped to program the world's first computer-assisted banking system. In the wake of Eliza's public reception, he grew increasingly troubled by what he perceived as an uncritical embrace of the power of computers (Bynum 2000). He was especially perturbed by the public's willingness to accept A.I. as a substitute for a human conversation partner. Weizenbaum maintained that computers lacked a certain "human quality" necessary for meaningful interaction, casting doubt on the idea that A.I. might one day gain consciousness (Weizenbaum 1972). In *Computer Power and Human Reason*, he argues that humans should always oversee

activities which demand the exercise of ethical judgment. Among his peers, Weizenbaum became known as a heretic for advocating a skeptical attitude toward contemporary technology (Markoff 2008). Today, he is equally famous for his contributions to computer science and computer ethics.

The year 1976 also marked the commencement of higher educational pursuits conducted under the name "computer ethics." While teaching courses in medical ethics at Old Dominion University, philosopher Walter Maner noticed that the use of computers in medical practice led to ethical quagmires not addressed by the extant literature (Bynum and Floridi 2012). Unfamiliar with Wiener's work on cybernetics, Maner proposed a new domain for research and teaching: What he called "computer ethics" would investigate moral problems where computers played an essential role. Maner created an experimental computer ethics course and, upon its resounding success with students, promoted his ideas in presentations delivered across the United States. In 1978, he published *A Starter Kit for Teaching Computer Ethics*, a resource for aspiring computer ethics educators. By the early 1980s, the term "computer ethics" had gained traction among academics (Bynum and Floridi 2012).

Inspired by one of Maner's lectures, philosopher Terrell Ward Bynum initiated his own course in computer ethics in 1979 (Bynum 2000). Like Maner, Bynum was committed to legitimating computer ethics as an academic field. Bynum was founder and editor of *Metaphilosophy*, which published research on the nature of philosophy as a discipline (Bynum 2011). In an attempt to spark interest in computer ethics, *Metaphilosophy* ran an essay contest on the topic; per contest rules, the top submission would be featured in a forthcoming volume. The winning submission, "What Is Computer Ethics?" was written by philosopher James Moor. Throughout the essay, Moor makes multiple arguments for the field's necessity as a distinct site of inquiry and practice (Moor 1985). "What Is Computer Ethics?" appeared in *Metaphilosophy* in 1985 and has been cited widely ever since. Its publication established Moor as a leading scholar in the field (Bynum 2008).

1980s–1990s

In the same year that "What Is Computer Ethics?" was featured in *Metaphilosophy*, philosopher Deborah Johnson published the world's first computer ethics textbook, simply titled *Computer Ethics* (Johnson 1994). Johnson had worked alongside Maner in the Philosophy Department at Old Dominion University, but unlike Maner, she maintained that computers do not create wholly novel ethical concerns. From her perspective, computers led to new variations on well-established problems, which could be resolved through the application of already-existing ethical theories. *Computer Ethics* takes this approach by articulating specific sites of concern and analyzing problems through traditional frameworks. Its first chapter introduces readers to such concepts as ethical relativism; utilitarianism; deontology; and legal, natural, moral, and human rights. From there, it examines topics germane to computing, including professional ethics; intellectual property rights; and privacy. Despite prevailing arguments against Johnson's traditionalist approach, *Computer Ethics* set the field's research agenda for over a decade (Bynum and Floridi 2012). Multiple editions were published after the first, with updates to include chapters on hacking; the impact of computers on politics; and the use of computers by disabled people, among other subjects. The latest edition was published in 2008; Johnson's more recent work has focused on engineering ethics and A.I. ethics (Johnson 2020).

The year 1989 marked the invention of the World Wide Web by Tim Berners-Lee, a computer scientist affiliated with the European Council for Nuclear Research or CERN (from the French *Conseil Européen pour la Recherche Nucléaire*). The World Wide Web was preceded by ARPANET, a computer networking project initiated by the United States' Defense Advanced Research Projects Agency (DARPA) in 1962 (Leiner et al. 1997). Although personal computers had been available since 1975, the general public did not have access to the Internet until the age of the World Wide Web. With its advent, computer

ethicists began to pay greater attention to information-related problems. The year 1988 had seen the publication of ethicist Robert Hauptman's *Ethical Challenges in Librarianship*, which considered several topics pertinent to digital information access (Hauptmann 1988). In 1992, Hauptman founded *The Journal of Information Ethics*, which published research on the ethics of access; fair use; computer crime; and other topics often examined within the purview of computer ethics (Froehlich 2004). Although the field of information ethics explores problems that may be unrelated to computers (e.g., those connected to citation practices; management of library and archival resources; and the selection of materials for course syllabi), it has always been closely linked with computer ethics. University courses in computer ethics often include material on information-related problems, such as censorship, and information ethics cannot avoid questions germane to information and communication technology.

Information ethics was further developed in the 1990s by philosopher Luciano Floridi. In his 1999 paper "Information Ethics: on The Philosophical Foundation of Computer Ethics," Floridi argues that ethical regard for information should constitute the field's major point of theoretical orientation (Floridi 1999). As he explains, computer ethics is viewed by many philosophers as a form of applied professional ethics which lacks a robust conceptual ground. For that reason, it is often seen as undeserving of serious philosophical attention. "Information Ethics" rebuffs this view and presents a nuanced philosophical argument for the inherent value of information-based entities. Nevertheless, Floridi maintains that information and computer ethics should not be developed and practiced solely within the remit of philosophy. Indeed, the relationship between computer ethics and the discipline of philosophy has never been straightforward (Floridi 1999). Their points of overlap and divergence have multiplied as computing technology has grown more complex and ubiquitous in society. In 1991, philosopher Donald Gotterbarn argued that computer ethics should serve as an adjunct to the computing profession; accordingly, its practitioners should attend to case studies and concrete problems rather than theoretical matters (Gotterbarn 1991). But other 1990s-era inquiries into the moral value of emerging technologies emphasized theory over application. In particular, studies on the morality of autonomous agents, including A.I. and robots, explored hypothetical scenarios in which computers were endowed with agency beyond the capacities of currently existing technologies (Shiego 1996). By the turn of the century, substantial growth in computer ethics had sparked numerous debates over its purpose, methods, and sites of application.

2000s and Beyond

By the 2000s, the World Wide Web had gained a strong foothold across the developed world. The "digital divide," a term referring to the unequal distribution of computing resources across the globe, had already been identified as morally problematic in the 1990s (van Deursen and van Dijk 2020). Questions of access continued to fuel scholarship in the 2000s, and as personal computer ownership was normalized, many researchers took interest in the effects of everyday computer use on individual well-being and social cohesion (Cocking and Matthews 2001). With the 2007 release of Apple's iPhone – the world's first smartphone – came a shift toward app-based computing, and a growing number of individuals were starting to rely on the web to facilitate their personal and professional pursuits (Hartmans 2022). Thus Internet ethics rose to prominence as a subfield of computer ethics, and ethical issues related to Internet technology were taken up by scholars in a growing number of research areas. These include but are not limited to communication and media studies; engineering; STS (Science, Technology, and Society); sociology; and psychology.

Amid the rapid and exponential rise of computing in society, computer ethics has retained its status as both categorically discrete and imbricated within multiple disciplines. The number of researchers contributing to its agenda has grown likewise, and it is no longer possible to individually identify those shaping present and future developments. What began as a byproduct of the

United States' participation in World War Two has transformed into a global intellectual and professional pursuit. As time moves forward, the issues and voices that constitute computer ethics will likely grow more diverse, consistent with the trajectory of computing technology itself.

Areas of Interest

Metaphilosophy

As an interdisciplinary field, there is little consensus on best approaches to theory, methodology, and application. Debates on these topics date to the field's earliest years, as Wiener's cybernetic framework takes a normative position on the ethical implications of information and communications technology. His view on the intrinsic value of information and the "natural evil" of information loss has been defended and developed by Floridi and others, but it is not without controversy (Floridi 1999). Wiener and Floridi accord special status to information-based entities, suggesting that ethical questions raised by information technology are unique to technology as such. By contrast, Johnson argues that such questions have meaningful precedents in ethics scholarship that predates the rise of modern computing, and that today's ethicists need not develop new means for resolving them (Johnson 1994). Both sides of this debate have contemporary advocates: philosopher Shannon Vallor's 2017 book *Technology and the Virtues* pursues a more traditional path, as it applies an Aristotelian virtue ethics lens to moral questions raised by computers (Vallor 2018). Philosophers Wendell Wallach and Colin Allen, on the other hand, propose novel frameworks for thinking about the exercise of moral judgment by autonomous machines (Wallach and Allen 2010). Other scholars have taken a blended approach: Maner, for example, argues that certain problems should be thought of as unique to computing technology and others not (Maner 1996).

Considering its origins in research and development, it is unsurprising that many scholars see the field of computer ethics as adjacent to the profession of computer science. In "What Is Computer Ethics?" Moor suggests that the practical applicability of computer ethics scholarship should take precedence over its nuance and theoretical ingenuity (Moor 1985). While Moor does not frame computer ethics as solely applied and practice-oriented, the essay is most influential for introducing the notion of "policy vacuums," which pertains to the tangible effects of computers. Per Moor's definition, a "policy vacuum" entails a breach between innovative technologies and policies that could effectively resolve problems caused by their use. The first responsibility of computer ethicists, he writes, is to close such gaps whenever possible. The essay also states that computers will be responsible for social revolution on a scale comparable to that of the Industrial Revolution. As Moor admits, the claim may have been seen as audacious at the time. Today, it is indisputable, and scholarship has kept apace. Empirical inquiry in computer ethics is generally interested in the manifest effects of computing technologies on human beings and nonhuman entities, including natural and constructed environments. Computer ethics continues to be advanced by philosophers and computer scientists, but is likely to become more interdisciplinary and methodologically heterodox as time moves forward.

Privacy and Surveillance

The earliest instance of computer networking dates to 1965 (ISOC History of the Internet). Computers have henceforth borne the capacity to infringe on individual and collective privacy, as data shared through computer networks may be accessed by those other than the intended recipient. Privacy became a major focus for computer ethics scholarship in the 1990s, with the growing population of web users. But as a greater number of computer ethicists surveyed the problems associated with privacy loss, the conceptual meaning of "privacy" remained murky and indefinite. Recent scholarship has emphasized the fact that conceptions of privacy are contingent on social and cultural norms, and historical research suggests that the widespread moral valuation of privacy in the West only dates to the Industrial era (Igo 2020). Nevertheless, the fraught relationship

between privacy and computing has been the subject of innumerable books and articles, where the moral value of privacy is, for the most part, taken for granted.

Concerns for privacy are generally treated as context-dependent and applied. Scholars often investigate specific sites of privacy breaches, e.g., those which take place in educational settings (Nemorin 2017), public spaces (Nissenbaum 1998), and workplaces (Miller and Weckert 2000). They may also look at particular effects: decline in psychological autonomy and quality of life, for example, has been portrayed as an outcome of reduced privacy (Zuboff 2020), and surveillance has been scrutinized as a means of exerting disproportionate power over marginalized groups, including those who receive government assistance, immigrants, and people of color (Eubanks 2019). As it is usually approached from a normative vantage point, research on privacy and surveillance often has clear-cut implications for policy. In the twenty-first century, governments and corporations have called on ethicists to contribute to the development of privacy policies designed to mitigate surveillance overreach. Today, the European Union's General Data Protection Regulation (GDPR) is considered the gold standard for such policies (Schünemann and Windwehr 2021). Scholars have also considered the responsibility of individuals in protecting the collective privacy of Internet users, while others claim that the rapid spread of data collection technologies demands a wholesale reconsideration of the moral value of privacy (Lyon 2017; Bratton 2022). Privacy is implicated wherever computers are linked together, and it will likely serve as a framing category for computer ethics research well into the future.

Computer Crime

Computer crime encompasses various types of unlawful and unethical behavior made possible or assisted by computing technology. These include but are not limited to instances of unauthorized information access; distributed denial of service (DDoS) attacks; the harboring and dissemination of illegal materials; intellectual property infringement; online fraud and scams; the development and release of viruses and worms; the use of digital resources to facilitate offline crime; and Internet-based stalking and harassment. Given the rapid pace at which technological applications are released to the public, new forms of harmful digital behavior may precede the creation of applicable laws and regulatory measures. Such activities may occupy a legal gray area, for example, laws against the collection of certain kinds of user data may not have policies regarding metadata (contextual information about data). In other instances, harmful pursuits may rely on the use of highly innovative tools, and no law may exist as a deterrent. Cryptocurrencies such as Bitcoin and Ethereum have long been censured as means to launder money, promote scams, and abet the provision of illegal goods and services both online and offline (Lee 2012). Efforts to prosecute such crimes, however, have been problematized by their reliance on highly specialized and esoteric tools. These efforts are further complicated by differences between local, federal, and international protocols for governing Internet use.

In the aforementioned cases, research in computer ethics may be consulted to assist the creation and interpretation of laws and policies. Computer ethics might also be invoked to highlight the nuances of legally or morally ambiguous cases. The many activities that fall under the category of "hacking," for example, are not all unlawful. Indeed, many scholars define hacking activities as those which indicate a creative attitude toward computing rather than those which break the law or effect harm (Coleman 2014). Meanwhile, the ethics of copyright law in the United States and worldwide is often called into question. According to copyright law expert Lawrence Lessig, copyright law imposes needless barriers to informational access and endows undue financial and creative power to those with ownership rights ([No author given] 2000). On an individual basis, ethicists may not see their work as having direct implications for the mitigation of crime, and those that do may disagree on various principles. As a cohesive field, however, computer ethics provides necessary theoretical grounding for to the elaboration and enforcement of computer law.

A.I. and Machine Learning

The related fields of artificial intelligence and machine learning date to the postwar era, with many identifying Turing's 1950 paper "Computing Machinery and Intelligence" as a key informant to contemporary artificial intelligence (Turing 1950). "Computing Machinery and Intelligence" begins by asking if machines are capable of thought. The question remains unresolved, in part because the nature of thinking defies a rote and universally satisfactory description. Turing argued that we may reframe the question "can machines think?" as "can a machine successfully convince a human being that it is also human?" Toward this end, he devised a simple procedure – known as both "the imitation game" and "the Turing Test" – which might be used to test the computers' ability to disguise themselves as human. While the Turing Test is a famous relic of computer science history, "Computing Machinery and Intelligence" is also notable for proposing that computers may only "think" if they can "learn," that is, if they can update their own internal programming to reflect new information. Today, most artificial intelligence programs follow a machine-learning model: In lieu of human input, they optimize accuracy and efficiency by rewriting their own code without human intervention.

The ethical problems associated with artificial intelligence and machine learning – which often go by the acronyms A.I./M.L. – are often but not always connected with these programs' autonomous functionality. Many ethicists have commented on the implications of A.I./M.L. for accountability, as it is not always possible to attribute the effects of autonomous agents to human actors. This problem is compounded by the tendency for machine-learning tools to yield "black boxes," or opaque systems where the causal link between inputs and outputs cannot be determined (Holm 2019). When machine-learning programs produce unintended and/or harmful effects, black boxes problematize troubleshooting and mitigation efforts. For example, recent scholarship has indicated that A.I. may propagate unethical forms of bias and discrimination; in such cases, black boxes make it difficult to resolve the issue without discarding needlessly large portions of the source code (Buolamwini and Gebru 2018).

On the more speculative end, some ethicists are concerned by the possibility that A.I. might "wake up," or gain self-awareness and agency. This scenario remains in the realm of science fiction: to date, no evidence supports the notion that A.I. has or is likely to acquire these properties in the near future. Current technology remains squarely in the domain of "narrow A.I.," or artificial intelligence designed to execute a finite and well-defined range of functions (Baum and Chodosh 2017). Nevertheless, autonomous programs may be capable of simulating moral discernment, and scholars have considered how something akin to a moral consciousness might be rendered in software (Wallach and Allen 2010). Still others have pondered hypothetical scenarios in which conscious and/or sentient A.I. has been developed (Metzinger 2013). These cases raise theoretical questions about the treatment of humans and other natural entities by machines, and vice versa. Whether they remain purely conjectural or not, they are useful catalysts for philosophical inquiry within and beyond the domain of computer ethics.

Conclusion

As the pace of technological innovation accelerates, scholarship in computer and information ethics gains in complexity and applicability. This article provides historical context for contemporary developments in these fields and outlines today's major areas of interest. Scholars and practitioners in these fields are encouraged to remember that the subject matter tends to change rapidly. As such, today's emerging ethical problems may soon be outmoded. The topics addressed herein have been identified as perennial concerns for computer ethicists. They will, however, demand supplementary research as new technologies raise new questions for theory and practice.

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Comte, Auguste

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Introduction

Auguste Comte (1798–1857) is the founder of sociology, positivism, the history of science, and the secular Religion of Humanity. Growing up in the aftermath of the French Revolution and living through not only uprisings but various monarchies, republics, and empires, he saw the fruitlessness of political solutions to the chaotic period in which he lived. He argued that an intellectual revolution was necessary as it would lead to moral renewal and then a social and political restructuring – a restructuring that would temper class conflict, prevent war, and increase social justice.

To Comte, social stability depended on a consensus that was both intellectual and emotional in nature. Both ideas and feelings had to be reorganized before a stable secular republic could be constructed. Individuals would be brought together if they had a common set of beliefs rooted in the sciences and if they loved and acted in behalf of Humanity. Positivism, which embraced all the sciences, including the science of society, would create the belief system, and the Religion of Humanity, which was based on love, would direct people to serve society. Limiting knowledge to the factual and the observable and relying on science to help solve social problems, Comte's philosophy of positivism had a significant impact on the rise of the social sciences and modern consciousness in general.

Early Life

Comte was born on January 19, 1798, at the end of the French Revolution (1789–99). This upheaval, which eliminated the monarchy and abolished Catholicism, created discord in his hometown of Montpellier, a center of resistance, and in his conservative family. Later, as a teenager, Comte disavowed God and supported republicanism, rebelling against his father, a minor bureaucrat, and his mother, both of whom were Catholic royalists.

His questioning attitude came partly from his republican teachers at his lycée (high school), where he excelled in mathematics. Thanks to his brilliance, he left home at age 16 to study at the Ecole Polytechnique in Paris. However, his rebellious attitude got him into trouble, and he was expelled in 1816. But he was forever marked by his education at this prominent engineering school, whose famous professors revealed to him the role the sciences could play in improving social conditions. Comte grew up after the Enlightenment, when science had a lot of cachet;

many of his contemporaries pinned their hopes on science, assuming it would provide a better basis for social justice than religion had done. Indeed, after being expelled, Comte studied the works of Condorcet and Montesquieu, who argued in favor of applying the scientific method to the study of history and society.

In 1817, around the same time as he was reading these two Enlightenment philosophers, Comte started working for Henri de Saint-Simon. A social reformer, Saint-Simon sought to launch a new stage of history, dominated by competent industrialists and scientists, who would replace obsolete military leaders and priests. A new era would begin with the creation of a new unified system of scientific knowledge – a "positive philosophy" – based on the study of society. While Saint-Simon was increasingly distracted by practical projects having to do with industry, Comte, a more disciplined thinker, devoted himself to realizing his original idea of forming a positive philosophy, including its key element, the science of society. Comte now had a blueprint for social renovation. In 1824, he laid out his ideas in the *Plan des travaux scientifiques nécessaires pour réorganiser la société*. After suspecting Saint-Simon of trying to take credit for this seminal essay Comte split with his mentor.

To make ends meet, Comte tutored students in mathematics and in 1825 and 1826 wrote articles for *Le Producteur*, a publication of Saint-Simon's followers. Here he emphasized his notion of the spiritual power, which he explained should no longer be composed of priests but men with knowledge of all the sciences, including the science of society. They should take over the educational system and counter the bureaucratic despotism and materialism of the temporal power. His endorsement of the power of a priesthood in establishing a new intellectual and moral basis for society comes partly from the influence of the Catholic theocrats, especially Joseph de Maistre, who also helped shape Saint-Simon's thought. Another influence was the Ideologues, such as Cabanis and Destutt de Tracy, who embraced the notion of an educated elite leading a republic based not on religious principles but on a new science of man. From this point on, Comte sought to create this new secular priesthood devoted to the common good.

In 1826, Comte started giving a lecture course on the new philosophy based on the sciences. It was attended by leading scientists, including Alexander von Humboldt. Yet after a few lectures, Comte had a breakdown, one that sent him to an asylum for eight months. Suffering from manic depression and paranoia, he was deemed incurable. Caroline Massin, whom he had married in 1824, helped him recover. He found a job at the Ecole Polytechnique, where he worked from 1832 to 1851 as a low-level teaching assistant in mathematics and admissions officer. Fired in 1851, chiefly because of his prickly temperament, he relied on the financial support of his disciples until his death from stomach cancer on September 5, 1857.

Major Works

Comte's most important work, the *Cours de philosophie positive*, came out in six volumes from 1830 to 1842. He presented his new philosophy of positivism as a synthesis of all scientific knowledge, that is, knowledge based on the observation of concrete, real phenomena. Five sciences were established: mathematics, astronomy, physics, chemistry, and biology. To grasp the nature of each science he reviewed the historical process by which it adopted the "positive," that is scientific, method. He created the new field of history of science because he looked at the history of each science in relation to the history of the other sciences and the history of society in general. Sciences were social products, not the creations of brilliant individuals. Now that five sciences had become positive, it was time to extend the scientific method to the last important field of study, society, which was still mired in metaphysical, if not, theological ways of thinking, as the other sciences had once been.

In 1839, Comte invented the term "sociology" to refer to the scientific study of society. Sociology examined how social phenomena were interrelated in both space and time. Reflecting his motto "order and progress," sociology was

divided into two parts. Social statics studied spatial relations, investigating the basis of social order (especially the family) and promoting social solidarity. Social dynamics specialized in temporal relations and focused on the progress of society (history), generational connections, and continuity.

As sociology was now becoming a science, thanks largely to his efforts, Comte maintained that all of knowledge was positive and positivism as a synthesis was complete. In particular, sociology's scientific theories could be used to help reconstruct the post-revolutionary society. It would focus all the sciences on improving society, or humanity, and its conditions of existence. The positive era could now begin. The *Cours* attracted the attention of many scholars of the time, including John Stuart Mill and Emile Littré.

Between 1851 and 1854, Comte published his second major work, the four-volume *Système de politique positive*. It promoted his Religion of Humanity; emphasized the importance of the emotions in creating social harmony; introduced a new term that he invented, "altruism," to designate love for others; made morality the seventh science; and outlined his ideas for the political reconstruction of society and a new educational system to inculcate positivism. The Religion of Humanity would spread throughout the world thanks to the proliferation of positivist schools, a new commemorative calendar based on secular saints (such as Aristotle and Dante), new sacraments (reflecting his Catholic background), public festivals devoted to Humanity, and continual socialization by positivist priests. Reflecting his own "aesthetic revolution," of 1838, Comte emphasized the role of artists in inspiring social solidarity and progress. Influenced by Franz Gall's phrenology, Lamarck's theory of use and disuse, and the Scottish Enlightenment philosophers (David Hume, Adam Smith, and Adam Ferguson), who highlighted humans' natural sympathies, he believed that through exercise the two unique characteristics of the human species – intelligence and sociability – would become more dominant within both the individual and society. If people contributed to Humanity, that is, to social solidarity and progress, they would live on in the memories and social rituals of posterity. This was positivism's version of immortality.

Comte asserted that the *Système* was inspired by Clotilde de Vaux. Three years after separating from his wife, Comte fell in love with this young writer, who died of tuberculosis in 1846. Afterwards, many contemporaries and scholars claimed the besotted Comte turned his back on his scientific project and became a sentimental religious prophet. Yet his so-called second career did not represent a sudden break; in his early letters and essays and in the *Cours*, he had discussed the importance of creating a new belief system to replace traditional religion, referred to the need to establish a "Positivist Church" and a new spiritual power, showed wariness about the dominance of science and necessarily narrow-minded, egoistic scientists, and emphasized the importance of the emotions in securing human happiness and shaping our ideas and actions. Though he promoted a system based on the sciences, Comte paradoxically sought to limit the desiccating effect they could have on people's emotions by means of a secular religion and the arts. In many respects, his stress on sentiments reflected the Romantic era in which he lived.

Search for Support

Claiming that his philosophy was a synthesis, Comte tweaked it to appeal to various groups. He always yearned for the approbation of other thinkers and scientists, but they never gave him a prestigious position at the Académie des Sciences, the Collège de France, or the Ecole Polytechnique, despite his numerous applications. From the start, he also sought the support of the working class, to whom he gave a free course on astronomy every year from 1831 to 1848. In 1848, he addressed to them a manifesto, *Discours sur l'ensemble du positivisme*, which argued that workers and women, who were free from the corrupting effects of wealth, should help the positive philosophers rein in abusive, selfish industrialists and make sure they cared about the common people. Yet he was disappointed that most

workers preferred to attend socialist clubs than his Positivist club, which he established in 1848, the year of the revolutions. Henceforth, he became more conservative. He supported Napoleon III's takeover in late 1851, hoping to convert him to positivism. But Comte soon grew disillusioned with his empire building. To entice women away from Catholicism, he wrote the *Catéchisme positiviste* (1852), a dialogue between a positivist priest of Humanity and a female acolyte. Having read Mary Wollstonecraft's *Vindication of the Rights of Woman*, he wished to reassure women that in the positive era, they would be respected. Their task would be to develop sociability and a compassionate society. Yet Comte forbade women from exercising economic or political power, insisted on their domestic duties, and made them the object of worship in his Cult of Woman, a prelude to the Cult of Humanity. Not many reform-oriented women or Catholic women were tempted to join him. One of Comte's last books was *Appel aux conservateurs* (1855), which targeted people on the right. However, his attacks on Catholicism did not endear him to this group any more than they did to women. Comte, who by the end of his life signed his letters "The Great Priest of Humanity," never achieved the renown he sought either in the eyes of academics or the public.

Positivism

Positivism, or the "positive philosophy" stems from the word "positive," which derives from the Latin word *positus. Positus* is the past participle of *ponere*, which means to place or put. In early modern Europe, "positive" referred to something laid down by human authority, especially in the courts and in legislation. "Positive law" was often used in contrast to "natural law," though many pointed out their congruence. Because it was designed by humans, positive law was thought to be certain. As a result, by the seventeenth century, the adjective "positive" meant factual, certain, and capable of verification. At that time, Bacon and Descartes developed the scientific method, which insisted that knowledge was certain if it derived from sense experiences and observations and related to our understanding of nature. Enlightenment philosophers such as J.-A. Naigeon and Condorcet used the term "positive" to refer to verifiable knowledge, which they maintained was superior to theology. In the early nineteenth century, Madame de Stael and Saint-Simon argued that it was time that the studies of society, politics, and morality become factual and join the "positive sciences." Only then could a new social order be established, one that would combat the illusions of religious thinking, embrace progress, and prioritize the common good.

In his *Discours sur l'esprit positif* (1844), which summarized the *Cours*, Comte succinctly explained what he meant by "positive," creating a definition that owed much to this earlier tradition. To him, the positive referred to the real (instead of the chimerical), the useful, the certain, the precise, the constructive (as opposed to the negative and the destructive), and the relative (as opposed to the absolute). A positive philosophy opposed theological and metaphysical thinking and embraced all legitimate knowledge, that is, all the sciences. Comte envisioned it would be the basis a new society. Working in an age where "isms," such as socialism and communism, were proliferating, Comte created the term "positivism" to encapsulate his activist program.

According to positivism, all we know is what we observe. Indirect observations are acceptable, but one cannot refer to God or other first causes which are beyond all possibility of observation. Facts based on direct or indirect observations should be used to create scientific laws (e.g. the law of gravitation) that explain how, not why, phenomena operate. These descriptive laws must express the spatial and temporal relationships of phenomena in certain, precise terms. These laws should be considered provisional, because knowledge is relative. There is no absolute truth.

Comte was deeply influenced by both Bacon and Descartes and tried to synthesize their approaches. He seemed to be an empiricist in the mold of Bacon and the Enlightenment thinkers, but he maintained that collecting facts alone could not fully depict reality, which lay beyond our

grasp. (Comte's skepticism owed much to Immanuel Kant and David Hume.) He went so far as to state that facts themselves could not be grasped without the help of provisional a priori theories. Without these theories to guide observation, a researcher would not know what to look for. Then his or her theories had to be verified by induction and deduction. Here Comte's debt to Descartes is obvious. (Comte was, after all, a mathematician). Because not all sciences could be reduced to the purely experimental, he asserted that rationalism and abstraction were crucial in the process of creating scientific laws by generalizing from factual observations. But no matter how abstract, every positive theory ultimately had to refer to concrete phenomena. Excessive rationalism was as misguided as excessive empiricism. But Comte resisted explaining in detail his epistemology and refused to issue universal rules of scientific procedure in order to give researchers as much latitude as possible.

He did insist, however, that scientific laws be useful; they had to relate to individual or social needs and make predictions that could be employed to direct action and design policies. One of Comte's aphorisms was "From science comes prediction; from prediction comes action." Positivism was not "value-free," as is commonly asserted. Its goal was to facilitate constructive activity that would improve the human condition.

Law of Three Stages and the Classification of the Sciences

Comte's main law in sociology was the law of three stages. It showed that naturally seeking homogeneity, the mind proceeded from one mode of thinking to another, and as it did so, it created a different theoretical system, which in turn shaped the political and social system. According to Comte, every branch of knowledge and every social and political structure went through theological, metaphysical, and positive stages of history. In the theological stage, people tried to explain how the world worked by tracing every occurrence to the action of one or more gods. (There were three substages: fetishism, polytheism, and monotheism). Military men, such as monarchs, took charge of the temporal (secular) realm, while priests ruled the spiritual realm. The theory of divine rights dominated the political realm, while conquest was the key goal of society. In the transitional metaphysical stage, which started in the fourteenth century, God was replaced as the prime mover by abstract entities like Nature or Reason. Metaphysicians (especially liberal thinkers) and lawyers (especially members of parliament) were the temporal and spiritual leaders. The political world was dominated by the theories of popular sovereignty and natural rights. Manufacturing was beginning to be an important social goal. The positive stage of history started developing with the scientific revolution of the seventeenth century and was about to take off. People would explain how things worked by using descriptive scientific laws. Once all fields of thought were subject to scientific rigor, people would no longer bring up gods and metaphysical abstractions, which could not be observed. Positive philosophers, that is, men who were familiar with all the sciences, would be the new priests of the spiritual realm. They would ensure morality and oversee the cultivation of ideas and feelings, which should be directed at Humanity. Comte assumed that people who had the most general knowledge had the widest views and sympathies. The temporal realm would be ruled by industrialists, including manufacturers, merchants, and bankers, who would be in charge of practical, material activities, which should improve society. The government would be a republic. Industrial production would replace conquest as the goal of society.

The law of three stages illuminated Comte's classification of the sciences. Each of the six sciences proceeded through these three stages according to their distance from the interests of humans and the simplicity and generality of the phenomena that they studied. Mathematics developed as a positive science first, followed by astronomy, physics, chemistry, and biology in that order. Comte maintained that the study of

society was now becoming became a positive science. Sociology developed last because it dealt with the most complex and specific phenomena, those closest to humans. Once it became a science, positivism would be complete. Knowledge would be synthesized not on the basis of a Newtonian-like law, which had been the hope of Saint-Simon and other thinkers, but on the grounds of having a common method, the scientific method, and a common object of study, that is, society. In the *Système*, Comte added morality as the seventh science. It dealt with individuals and their relations to society.

Legacy

Comte was a visionary, who offered a wide-ranging, complex doctrine to resolve the tensions stemming from the French Revolution. After his death, positivism gained in prestige as a scientific manifesto for the new age, and the Religion of Humanity acquired some appeal, though far less than the philosophy. Followers proliferated in France, England, Italy, Spain, Germany, Austria, Russia, Czechoslovakia, Poland, Turkey, India, Japan, the United States, and Latin America. Comte offered his religious and political followers beliefs based on certainty – beliefs that gave them programs for action and/or satisfied their spiritual longings in an increasingly secular age. He understood the appeal of a strong belief system. In "Considerations sur le pouvoir spirituel" (1826), he famously stated, "Dogmatism is the normal state of human intelligence, the one toward which it tends by nature continually and in all genres, even when it seems to move away from it the most."

Comte's doctrine was easily cherry picked. In terms of politics, Comte's emphasis on dogmas, duties, elitism, hierarchy, and order and his authoritarianism were much appreciated by right-wing movements, such as the Action française, and dictatorships, such as that of Porfirio Diáz in Mexico. The French novelist on the right, Michel Houellebecq, acknowledged the impact of positivism on his thought.

Comte had a large impact on left-wing politics too. Critiquing nationalism, imperialism, and racism, he condemned England's treatment of India; insisted that Gibraltar and Algeria be given back to the Spaniards and Arabs, respectively; opposed slavery; spoke favorably of mixed raced marriages; and praised Africans for their fetishist religion. His scientific, anticlerical, republican philosophy with its stress on progress was used by critics of the status quo in France's Third Republic, such as Emile Zola, Emile Littré, Jules Ferry, and Léon Gambetta. Many Latin American countries embraced positivism as a way to challenge legacies of colonialism, such as the influence of the Catholic Church and of the old elites who continued to hold onto power. Brazil's flag displays the positivist motto "Order and Progress." Positivism also appealed to leftists in the United States, such as Edward Bellamy, Herbert Croly, and Elizabeth Cady Stanton, and English reformers and writers, including John Stuart Mill, George Henry Lewes, Harriet Martineau, and George Eliot. In 1853, Martineau freely translated Comte's *Cours* and reduced it to two volumes, which even Comte found preferable to his own original.

As for the academic world, positivism influenced the history and philosophy of science (e.g., Claude Bernard, Pierre Duhem, Henri Poincaré, Ernst Mach, and logical positivists), philosophy (e.g., Ernst Renan, Charles Peirce, and Ian Hacking), historiography (e.g., Hippolyte Taine and Henry Thomas Buckle), sociology (e.g., Emile Durkheim), and anthropology (e.g., Lucien Lévy Bruhl).

There is an ongoing debate on whether legal positivism developed independently of or in close association with Comte's positivism. One of the founders of legal positivism, John Austin, was a friend of Comte's, but his major work, *The Province of Jurisprudence Determined*, was published in 1832, 12 years before they met. As suggested previously, there was a tradition of "positive law" long before Comte, and the latter never claimed to have coined the term "positivism."

Many of Comte's concerns still resonate today: his fears of social fragmentation, especially due to

excessive specialization; his worries about the effects of negative thinking and skepticism; his denunciation of capitalism for encouraging egoism and materialism; his critique of scientism; and his desire to make people more committed to humanity as a whole.

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Condorcet, Jean-Antoine-Nicolas Caritat de

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Introduction

Jean-Antoine-Nicolas Caritat de Condorcet (1743–1794), mathematician and philosopher, Permanent Secretary of the Académie des Sciences, and member of the Académie Française, was the last of the French Encyclopedists. During the French Revolution, he added concrete political action to his intellectual endeavors, focusing his efforts on a few fundamental areas: the removal of the privileges and prejudices (the stupidity of the people, the innate inferiority of women and blacks) of the Old Regime; the acknowledgment and defense of natural, civil, and political rights; the law as guarantor of political liberty and democratic citizenship as necessary condition of the sovereignty of the finally emancipated people, rendered rational by a universal public education system independent of the constituted authority, open to men and women, and free; and the promotion of a written Constitution as "a system of [supreme] laws tutelary of the rights of the people" (*Opinion sur les mesures générales propres à sauver la patrie..*, in Condorcet 1847–1849, X, p. 480), but one which must continually be subject to modification at the will of those same people in recognition of changing circumstances over time or the passage from one generation to another.

A committed democrat, therefore, in belief and action, Condorcet was none the less a voice ignored in the constitutional debates in the spring of 1793 and on the losing side as a political opponent of Maximilien de Robespierre and Louis Antoine de Saint-Just within and outside of the National Convention. Accused of conspiracy against the integrity of the state, of undermining, that is to say, the Jacobin principle of the indivisible unity of the newly proclaimed Republic

(September 25, 1792), he was condemned to death in absentia. Absconding, he hid for some months in the Paris house of Mme Vernet in the Rue Servandoni, but in March 1794 quit that refuge, feeling himself no longer safe. On the 27th of that month, he was recognized and arrested in Clamart. Incarcerated in the prison of Bourg-la-Reine, he was found dead the following day in circumstances that remain unclear: the tragic destiny of many revolutionaries, and of Socrates before them, another philosopher who fell foul of the polis and Condorcet's ideal alter ego, as recounted in the IVth epoch of the *Esquisse* – one of his last writings, and in many ways his spiritual testament.

Democratic Citizenship: Equality and Difference

Condorcet takes his place, as of right, alongside Thomas Jefferson and Thomas Paine, in the great democratic family of the late eighteenth century, committed to pursuing, both in the Old World and the New, the struggle for "a republican constitution, with equality as its foundation" (*Ce que les citoyens ont droit d'attendre de leurs représentants*, in Condorcet 1847–1849, XII, p. 567), within a constraining framework of generational revision.

Viewing the principle of equality as an antidote to the spread of despotism, Condorcet emphasized that "the only remedy against despotism is to ensure that no distinction be allowed to subsist between citizens, either in the civil or criminal law, or in contributions to the public purse, or in the distribution of offices and employment; so that there exist only the inequalities of reputation and fortune, which are in reality neither less natural nor more unjust nor more dangerous (if the laws are reasonable) than the inequalities of talent and strength" (*Idées sur le despotisme, à l'usage de ceux qui prononcent ce mot sans l'entendre*, in Condorcet 1847–1849, IX, p. 153). An achieved democracy is the political space devoted to equality within universal human rights, in which the only legitimate distinctions – in so far as they could only be eliminated at the price of sliding back into despotism – are those without trace of social privilege passed down from father to son, but which are part and parcel of wholly innocuous forms of inequality, being awarded by nature. These are divergencies in the capacity for political judgment which derive from the ineradicable inequality of talents and abilities, which is to say those natural (and therefore legitimate) differences in knowledge and faculties that separate individuals one from another but do not on that account eliminate the possibility of formal and substantial equality within a Republic. Furthermore:

> [all] men have the same rights, and in that respect, equality must be absolute and rigorous; but it is impossible that they have an equal share in society's advantages. Nature herself has not wished it so; they are not born with the same organs; the soil on which they live is not equally favored; all cannot receive the same education; all cannot make the same use of their strengths; all cannot have an equal share in property, without depriving the whole human race of the pleasures that arise out of the happy fusion of intelligence, strength and industry [. . .] their labors, their interests, their social relations are distributed among them with an inequality which is meritous, if it be the free convergence of individual wills, and that alone. (*Sur le préjugé qui suppose une contrariété d'intérêts*. . ., in Condorcet 1847–1849, X, pp. 146–147)

Here is the point of interconnection between democracy and republicanism, where a juridical/political equality – which is not the same thing as the abstract egalitarianism of the hardline Jacobins – is guaranteed by the law acting as an instrument of political liberty, but a simple "weak liberty," opposed to the heroic virtues and civic religion of Graeco-Roman antiquity and their revolutionary renaissance. This political liberty is that "free convergence of individual wills" to which the people indirectly contribute through the political behavior of their representatives, and directly with their control over the latter's actions through public opinion, which gradually becomes the opinion of the whole people as expressed through local assemblies and national conventions convened by popular demand. The sovereignty of the people and political representation combine to create a model of republican citizenship which makes the law its cornerstone,

because good laws (just in so far as they ensure the only feasible kind of equality, that of natural rights) render equal under the law individuals necessarily unequal in practice, without claiming to bring about complete social uniformity. "[If] bad laws increase the effects of natural inequalities, good laws ameliorate them, without eliminating them" (*Sur le préjugé qui suppose une contrariété d'intérêts*..., in Condorcet 1847–1849, X, pp. 146–147). One is born subject to natural laws; one becomes a citizen. And the paths of apprenticeship in political citizenry under a democracy are open to all, regardless of sex, but always within the framework of a social order that is continually improved but never entirely overthrown. Like any other aspect of humankind, the condition of citizenship is perfectible, and not an all-or-nothing status defined by a right held once and for all. The resulting vision of citizenship is "gradualist," depending on a gradual accumulation of socially acquired expertise, in line with a rationale of establishing a rational foundation for future political and constitutional choices on the part of free and self-sufficient individuals. This should supersede the classic republican paradigm of the virtuous citizen as well as that of the property-owning citizen, dear to the physiocrats, and indeed to Condorcet himself at an earlier stage of his thinking. In this mature phase of his democratic radicalization, citizenship is defined in the light of the intersection between representative democracy and a "republicanism of the moderns," as the "competence in progress" of a possessor of rights poised between the progress made by the human spirit and the necessity for emancipation from bad laws and bad institutions – bad institutions such as black slavery, female subordination, and the despotism or demagogic tyranny that ensues every time a people is deceived, manipulated, and stirred up, to the detriment of its independence of opinion and rationality of judgment. Because, no more than blacks and women, the people are not naturally stupid or incapable of self-determination, but can become so (usually do become so) due to the social conditions they are condemned to, and in which certain forces might wish to re-imprison them on the pretext of seeking to liberate them. It is a question, then, of fighting on more than one front for political emancipation, easing the grip of the social exclusion of the common people which prevents them from forming integral part of society – since "attending to their basic needs leaves them no time to educate themselves" (*Dissertation philosophique et politique... s'il est utile aux hommes d'être trompés*, in Condorcet 1847–1849, V, p. 359) and forces them into manual labor – and putting a permanent end to the subordination of women and the enslavement of blacks. Since "[...] either no member of the human race has genuine rights, or all have the same ones, and anyone who votes against the right of another, whatever his religion, color or sex, from that moment abjures his own" (*Sur l'admission des femmes au droit de cité,* in Condorcet 1847–1849, X, p. 122). Nonetheless, no sooner has he affirmed the right to emancipation of every class, sex, and race, Condorcet raises the problem of individuals long excluded from the full enjoyment and exercise of political liberty who might from inexperience make bad use of it. How can this be avoided, except by rigorously applying the principle of the *graduality* of political citizenship? The emancipation of the people, like that of women and blacks, cannot be *immediate* (here and now), or *unmediated*, that is, other than by the agency of those called on to effect it (those more wise and educated, and more free, than the common people, women and blacks, who must direct and regulate it). Condorcet's favored channels toward universal emancipation were public education and the wider access to knowledge made possible during his years of reflection and political commitment by the development of a free press.

However, although there is only one final end of knowledge, access to this single political and moral truth is not a unique one, being hierarchically graduated in accordance with the social position of the individual, who, benefitting from it, is able to achieve full emancipation. What is being proposed, it would appear, is a cognitive pluralism expressed through the classes of individual male citizens that destine some to manual labor, others to the liberal and scientific professions, and more broadly to the higher level of education that is an integral part of Condorcet's rational republican

ideal. In addition to this pluralism, we find two further dualities, both again cognitive, that divide men and women in one case and blacks and whites in the other. With regard to the first division, it is perplexing to find Condorcet – despite his proclamation of the natural equality of men and women, of their innate rights and their no less innate capacity to exercise them – positing different existential roles for the two sexes that, notwithstanding his open criticism of any *natural* subordination of women, he traces to nature and not to society. Evidently concerned by the potential effects of sexual, on top of social, subversion which full democratic citizenship might produce, he reaffirms – and in some way (re)essentializes and naturalizes – feminine social roles connected with maternity and the domestic sphere. Here is his reasoning:

> [. . .] this change [the participation of women in the full rights of citizenship] would be contrary to the public good, because it would divert women from the responsibilities that *nature* seems to have reserved for them. [. . .] The principle foundation for this fear is the notion that every man exercising the rights of citizenship comes to think of nothing but government, and there may be some truth in this up to the point where a constitution has been properly established, but it would not be an enduring tendency. So we need not think that were women to participate in national assemblies, they would forthwith abandon their children, their households, their needles [. . .]. It is *natural* for a woman to breastfeed her children, care for them in their first years, be tied to her home by household tasks [. . .] it is *natural* too that she lead a more secluded, domestic life. (*Sur l'admission des femmes au droit de cité,* in Condorcet 1847–1849, X, pp. 127–128. Italics mine)

He is expanding here on an argument already put forward in his *Essai sur la Constitution et les fonctions des Assemblées provinciales* on the possibility of making an exception to the public joint education of men and women, in the form of a putative home education for women again "naturally" tied to the care of their smallest children. It confirms the ideal of generalized education while at the same time anchoring it in a "natural" (read: social but naturalized) feminine "destination." This is underpinned by the fact that "[. . .] whatever constitution is established, it is certain that in the existing state of civilization among the European nations there will always be a very small number of citizens who can be actively engaged in public affairs. Women would no more be torn from their homes than farmworkers from their plows, or artisans from their workshops."

And blacks with their legitimate demand for emancipation from slavery? Here again the answer involves a duality, with an argument developed within an understanding of liberty that is entirely inalienable but not always subject to the same parameters of meaning. We start from an appeal to a sense of humanity that would have us all party to a single humankind and an explicit condemnation of any form of enslavement of one to another. There are no justifications for slavery, least of all commercial ones advanced by the plantation owners who defend the institution on the basis of the financial losses that would attend its abolition. Even so, the emancipation of blacks, with the abolition of the slave trade and slave labor, is the first stage of full access to political citizenship which by token of its necessary gradualism brings back to the fore the issue of dualism. The blacks are neither more stupid nor inferior by nature to whites, but they have been rendered stupid by their prolonged existential state of subjection. What they desire is therefore personal liberty in small things rather than the freedom for greater things like politics. The latter they do not feel because "the love of this kind of liberty is not to be found in the hearts of all men [. . .]. But there is another kind of freedom, that of a free control over one's own person, of not depending for food, or for the exercise of feelings or preferences, on the whim of another. No man exists who would not resent being deprived of this liberty, or feel horror at such a form of servitude" (*Réflexions sur l'esclavage des nègres*, in Condorcet 1847–1849, VII, p. 122). This is why:

> [. . .] a negro will never kill himself, like Cato, rather than be obliged to obey Caesar, but he will kill himself if his master, despite his best efforts, separates him from the woman he loves, or forces her to surrender herself to him; [. . .] or he prostitutes her for money. Negroes mourn for their revels, their dances, their idleness, the freedom to indulge in the tastes and the customs of their countries. (*Réflexions sur l'esclavage des nègres*, in Condorcet 1847–1849, VII, pp. 121–122)

According to this order of priorities, blacks would seem strikingly similar to women, a propos of whom:

> [. . .] it is said that women [. . .] have never been ruled by what we call reason. This observation is false: they are not, it is true, ruled by *men's reason*, but they are by their own. Their interests are not the same; constrained by the laws, the same things cannot have the same importance for them that they have for us; they can, without forfeiting reason, be guided by other principles and aim at different ends. It is no less reasonable for a woman to concern herself with enhancing her looks that it was for Demosthenes to study his voice and his gestures. (*Sur l'admission des femmes au droit de cité,* in Condorcet 1847–1849, X, pp. 124–125. Italics mine)

These two dualisms, of sex and race, to some extent support one another and, together with pluralism of classes cutting through the sovereign people, complicate the vision of political democracy which, while founded on the absolute equality of rights and a tolerance of only innocuous distinctions owed to nature, treads a sometimes uncertain line between what is natural and what is not, and allows certain distinctions, artificially engendered by society, a sufficient consistency to transform them into distinctions that if not quite natural are least nearly so, and that will require the extended span of one or more generational changeovers to be expunged. So much goes to confirm the essential role of time, alternately an element favoring preservation and historical sedimentation, and one bringing rupture and innovation, but always an inescapable factor in human affairs whose political and institutional importance Condorcet never tires of emphasizing. Because it is within time, and thanks to time, that democratic citizenship confirms its hold, with no suggestion of permanent immutability but free too of excessively brusque or insufficiently considered changes. Condorcet "well understands that the desire to found without perpetuating leads to virtuous and enthusiastic abstraction (which he was ready to denounce), but he also sees that an emphasis on permanence alone impedes the formulation of a methodology of historical change and the reform of political regimes. [. . .]. The issue, then, is nothing less than the *continual foundation* of citizenship, within the Republic" (Coutel 1999, p. 41). And this he addresses punctually with another theme dear to his heart: the constitution and the test of time.

Conclusions: From the Emancipation of the People to that of the Human Race

In the winter of 1793, in a speech accompanying his proposed text for a constitution, delivered in the name of the Constitutional Committee, Condorcet argued that:

> [we must] protect the people from that profound indifference that often follows a revolution, from the effect of those slow and secret abuses that in the long run corrupt human institutions, and lastly from the vices that perforce undermine the best made constitution, when, while it remains the same, the men for whom it was designed have themselves been changed by none other than the progress of enlightenment and civilisation. (*Discours. . .au nom du Comité de constitution*, in *Plan de constitution, présenté à la Convention Nationale*, in "Moniteur", VIII, *Séance du 15 février 1793*, p. 227)

His wager was specifically on constitutional revision as an ordinary mechanism of democratic life, based on an assumption he had already put forward a few years earlier, by which:

> [. . .] a constitution is not truly free and legitimate if it is not submitted, periodically, to revision by an assembly charged by the people with that task; if the will of the citizens, expressed in some form established by law, does not require the convocation of such a constituent body! This convocation should not be delayed beyond twenty years without offending the rights of the citizens, more than half of whom will by then be compelled to obey a constitution they had not been able to consent to! [. . .] Thus, at least every twenty years, and perhaps every ten, whether or not this eternal power should continue to be preserved will be put to the question! (*Sur l'institution d'un Conseil électif*, in Condorcet 1847–1849, XII, pp. 243–244)

Envisaging a legal mechanism which would allow the people of today and tomorrow to change their ideas on things, to reshape them and reshape themselves, modifying the existing structures and anticipating future ones, but only and always in harmony with, and respectful of, the enlarged

knowledge of themselves and the world which subscription to a doctrine of infinite human perfectibility tends to entail, might be thought to have a clear "conservative" propensity, aiming to normalize constitutional innovation and mitigating any consequent social instability. However, it would be a mistake to think we are dealing with a revision intended to absorb everything in order to instead change nothing. The real intention of the "philosopher in Revolution" was another: everything can be revisited, rethought, and renegotiated, as long as this takes place within an assured framework of rules and principles which, if not entirely immutable, can only be updated a step at a time and with prudence. The rule, in normal conditions, was that a constitution could remain unchanged for no more than a generation, and at the end of its 20-year term, a standard revision process "from above" must be set in motion. But the completely novel element, with respect to previous elaborations of the idea, in what would pass into history erroneously as the "Girondin Constitution" but is more justly to be attributed to Condorcet alone, was that the mechanism could also be triggered "from below," at the initiative of any individual citizen in conformity with a procedure outlined in Title VIII concerning the popular censure of the ordinary activity of the legislative power and the right of popular petition. We are witnessing here a passage from the emancipation of the people to the progress of the humanity as a whole, with an analysis projected entirely into the future, involving a new order of knowledge and power capable of ferrying every people, and all peoples together, toward an ultimate goal, which is no longer one of an improved politics but of an improved humanity, not the emancipation of this or that people but the betterment of man as such.

In the *Tableau Général de la Science*, written in 1793 and posthumously published 2 years later in the "Journal d'Instruction Sociale," and again in the much better known historical, as against scientific, *Tableau*, which completes the so-called tabular thinking of the late Condorcet (*Esquisse d'un tableau historique*), moral and political perfection was a necessary goal but always a tendency, never to be achieved once and for all. As he put it: "there exists in the order of possible things an endpoint that nature wants us constantly to work towards, but which we are not allowed ever to reach" (*Rapport et Projet de décret sur l'organisation générale de l'instruction publique*, in Condorcet 1847–1849, VII, p. 478). Full achievement is in any case always threatened by the reversibility of the progress of the human spirit, despite its destined accumulation, from one generation to the next, of an ever-increasing body of knowledge, whose best employment is so often belied by the errors and resolutely irrational behavior of the human race – if perfectible, never perfected. In order to reduce as far as possible the gap between what the human intellect can grasp and what human individuals and societies can freely achieve, it is necessary that progress in the field of political and moral action follows a similar, if not quite identical, logic to that of progress in the exact sciences, where of course it is the laws of nature that are being constantly revised, rather than the laws governing the relations between the individual and his essential self and his fellows. Knowledge of these latter can be gleaned from probability calculations applied to collective opinions, judgments, and decisions, where the priority is to entrench the ground gained by the Enlightenment and the Revolution of popular sovereignty.

What would be the reception, in the nineteenth century, of this ambition to insert political and social action, with all their messiness and unpredictability, into a firm legal framework – the *tableau* so dear to Condorcet? The answer can readily be gleaned from looking at the social sciences which, without and beyond Condorcet, will draw from politics in general, and democratic politics in particular, their laws of human development, following in the wake of his vision of human and political emancipation over a long perspective of universal history punctuated by generational change.

Cross-References

► Constitutionalism
► Freedom

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Confucian School

► Chinese Legal Thought: The Confucian School

Confucianism

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Introduction

There is no word corresponding to Confucianism in Chinese. Confucianism can mean the "School of Ru" (Ru Jia)[1] or the "thoughts of Confucius." In both cases, it encompasses ethical, political, and philosophical ideas and standards that are both derived and developed from the teachings of Confucius (551 BCE–479 BCE). As such, and as highlighted below, Confucianism has had a profound and lasting impact on the attitudes to government, law, family, and relationships not only in China but also in other parts of Southeast Asia (e.g., Korea, Japan, Singapore, and Vietnam) that have been influenced by Chinese culture and philosophy. It is no exaggeration to say that it is

[1] "Ru" means "art/technique" (shu) that consists of six abilities that aristocrats should master: rites (Li), music (Yue), archery (She), charioteering (Yu), calligraphy (Shu), mathematics (Shu).

impossible to understand China and the Chinese without understanding Confucianism.

Confucius and Confucianism: Historical and Political Context

With the family name Kong, given name Qiu, and courtesy name Zhongni, Confucius was born in the state of Lu (in today's Shandong province) into an impoverished lower aristocratic family. The times in which he lived, and subsequently in which his followers developed his ideas, were ones of great political and social instability and violence: the Spring and Autumn period (770 BCE–476 BCE) and the Warring States period (475 BCE–221 BCE). It is, therefore, unsurprising that in his teachings he sought practical ways to promote political and social stability.

According to the *Records of the Historian* (Sima Qian 2008), Confucius had firsthand experience of government and held various positions in the state of Lu, where he stayed until his mid-50s. He finally returned to Lu in his 70s having spent time in other states with varying degrees of success[2] in part because of his refusal to pander to the personal interests of the rulers.

His (and Confucianism's) lasting influence is based on his teaching that eventually was recorded in various written works. He took inspiration from the past and in particular the earlier Zhou dynasty as the pinnacle of culture and *Li* (rituals). During the period when he withdrew from political affairs in Lu, he compiled the old songs and rituals of Zhou and the dynasties before. He verified the rituals of three dynasties and edited the *Book of Songs* (Shi), *Book of Documents* (Shu), *Book of Rituals* (Li Ji), *Book of Music* (Yue), *Book of Change* (Yi), and *The Spring and Autumn Annals* (Chun Qiu). These six works were later called the *Six Classics.*

Apart from his political activities and compilations, the *Records of the Historian* tell us that Confucius recruited around 3,000 pupils on the basis of ability and regardless of their social background. He taught them the old songs, records, rituals, and music and was the first to disseminate knowledge that had only been available for aristocrats to a wider public. This also led to the production of *The Analects* (*Lun Yu*), which contains dialogues held by Confucius with statesmen and his pupils.

There were three main factors ensuring that Confucianism became the dominant political, social, and family ideology for the next 2000 years in China and until the imperial system was discontinued in 1912 with the fall of the Qing dynasty. First, after an attempt to violently suppress Confucianism by the first emperor of the Qin dynasty (221 BCE–207 BCE), the subsequent Han dynasty (202 BCE–220 CE) readopted the "School of Ru" as the state ideology. Although the Han dynasty inherited the Qin dynasty's laws, they were interpreted from a Confucian viewpoint and this interpretation was largely followed by later dynasties. Second, Confucianism became institutionalized through the imperial examination system. The *Six Classics* were compulsory subjects[3] for these examinations for almost 1300 years in China.[4] This is a major reason for Confucianism's enduring influence. Dynasties and emperors may come and go but from the seventh century to the start of the twentieth century anyone who wished a position in the government had to show proficiency in Confucianism so that the empire at all levels was run by a body of meritocratically selected scholar officials. Finally, the Song Dynasty (960–1279 CE) saw an important rejuvenation of Confucianism. "The Song dynasty was the golden age of Chinese philosophy. The Confucian value system of the ancients, revitalized and brought to its highest expression by twelfth-century scholars,[5] became the preeminent ideology dominating the behavior of the Chinese elite and regulating the state's domestic and

[2] For example, he was dismissed from the state of Qi and forced from Song and Wei states.

[3] In the twelfth century CE, four more books reflecting Confucian thought, including *The Analects*, were added.

[4] From the Sui and Tang period (early seventh century CE) until abolished near the end of the Qing dynasty (1905).

[5] The greatest was Zhu Xi (1130–1200 CE).

foreign policy until the end of the imperial period." (Dieter Kuhn 2009, p. 99)

Li, *Ren*, *Yi*, and Harmony: Confucianism's Key Concepts

Once the King of Qi state asked Confucius how to govern a country well. He answered "There is government, when the prince is prince, and the minister is minister; when the father is father, and the son is son."[6] This encompasses a key element of Confucian theory. The roles of, and relationships between, individuals in both the family and country, are defined by their hierarchical position. The guideline for both is respect/filial duty (to the senior in a family) and loyalty (toward the superior in the government). The relationships are given stability and substance by the idea of the *Li*, which means the rules of behavior varying in accordance with one's status within the various forms of social relationships. "When the person's title and position are different, the *Li* used are also different" (T'ung-Tsu 2011, p. 311). The *Li* are basically the formalities for the right behavior of different social groups. According to the *Book of Rituals* (*Li Ji*), "*Li differentiates*."[7] *Li* is for the purpose of distinguishing the superior from the inferior, and of discriminating the noble and the humble. Xunzi, Confucius's pupil, said the ability of humankind to draw boundaries was of fundamental importance and of these boundaries "none is more important than that between social classes. Of the instruments for distinguishing social classes, none is more important than ritual principles" (i.e., *Li*)".[8]

Li has the following characteristics:

1. *Every one lives in relationships*: Confucianism contains no abstract idea of the individual, nor equality, nor any concept of inviolable and fundamental human rights. Family is the basic unit of the nation and the relationships within it are hierarchical. Everyone belongs to a family where the most important relationship is between father and son. The ethics concerning a political regime is just an enlarged version of the hierarchical order within the family. Therefore, the relationship between the father and son echoes the dominant ethics of the relationship between the ruler (superior) and the ministers (inferior). From the ethics in the family and the country, come *the three guidelines* (San Gang): the ruler is the guide for his ministers; the father is the guide for his sons, the husband is the guide for the wife.

   In addition, Confucius divides society into 4 pairs of relationships: "honorable and humble" (Gui Jian), "superior and inferior" (Zun Bei), "senior and junior" (Zhang You), "close and remote" (Qin Shu). The last two pairs concern the ordering within a kindred group (family); the first two pairs concern the ordering in the society at large (the country). A society lacking these distinctions is repugnant to Confucianism. The greatest calamity for society is "to be young and yet unwilling to serve one's elders; to be of humble origins and yet unwilling to serve the noble; and to be lacking in worth yet be unwilling to serve the wealthy."[9]
2. *Li imposes a duty on the lower toward the higher in each relationship*, i.e., to respect and obey the superior, the noble, the senior, the elder. Some Chinese legal scholars regard the *Li* as a duty-based ethic.
3. *Li* not only stressed the privileges provided to the higher group from the lower, but also emphasized the value of benevolence shown by the former to the latter. "*Li* were formulated to regulate the expected, reciprocal attitudes and behavior between persons occupying different social status" (T'ung-Tsu 2011, p. 315). *Li is reciprocal*. What triggers the *Li* is Benevolence (*Ren*) and Righteousness (*Yi*). So, in

[6] Legge (1893, p. 256) (Confucian Analects – Book XII Chapter XI).

[7] Ibid.,p.312.

[8] Xun ZI (1999) (*Fei Xiang Pian*. p. 107).

[9] Ibid., p. 103.

basic terms, the object of respect and loyalty must be worthy of it.

What are *Ren* and *Yi*?

According to *The Doctrine of Mean* (*Zhong Yong*) written by Zisi, Confucius' grandson, benevolence (*Ren*) is the chief element of humanity, and the greatest excise of it consists in the love of relatives. Righteousness (*Yi*) is the agreement of actions with what is right, and the greatest exercise of it consists in the honor paid to the sage (the worthy).

Ren is to cultivate oneself according to *Li* and concentrates on the centrality of the self. Benevolence comes from within a person. Confucius said, "What you do not want done to yourself, do not do to others"[10] and "To subdue one's self and return to propriety (Li), all under heaven will ascribe perfect virtue to him."[11] By exercising self-restraint, one cultivates moral character. Once self-discipline is realized, one can extend oneself out into other circles of human relationships. The root of benevolent behavior is filial piety and fraternal submission.[12] From loving and respecting the close, one learns to love the remote; from loving and respecting family members, one learns to be loyal toward the authorities. Confucius said, "There are few, who being filial and fraternal, are fond of offending against their superiors. There have been none, who, not liking to offend against their superiors, have been fond of stirring up confusion."[13]

Yi is righteousness. The Chinese character *Yi* means "to get something (good/right) by killing." Confucius said, "To see what is right and not to do it is want of courage."[14]

Therefore, *Yi* is to sacrifice oneself (for what is right), *Ren* is to generate love.

Ren, *Yi*, and *Li* are the building blocks to perhaps the most important Confucian value: harmony. *Ren* and *Yi* emphasize the affection, the mutually shared feelings of all human beings. Harmony is like music: "music aims at homogeneity" (T'ung-Tsu (2011, p. 312). While the function of *Li* is to differentiate, the function of music is to maintain social solidarity. To maintain social solidarity does not mean to cancel the actual differences between different people but to harmonize father and son, ruler and ministers.

Love and affection can absorb complaint, pacify hatred, and bring softness to the feelings that everyone is capable to bear. *The Book of Rituals* said, "Let music attain its full results, and there would be no dissatisfaction (in the mind); let ceremony (*Li)* do so, and there would be no quarrels" (Max Müller 1885, p. 98). The best way to pacify disputes is to extinguish the blame, the hatred, and the complaint. *Li* can only set up the boundaries for each social group, while *Ren* and *Yi* are to promote the acceptance of these boundaries, namely, to make people not only abide by these boundaries, but to act voluntarily and wholeheartedly in accordance with them.

In Confucian theory, *Ren, Yi* and *Li*, seek to create an ideal (harmonious) social and political order.

The Influence of Confucianism on Chinese Legal Culture

Over the centuries, Confucianism has helped to shape Chinese society's attitude to the role of law, rules, and justice. Examples that are still influential in today's China include

1. *Rule of virtue is superior to the rule of law*: The Confucian concept of ideal behavior originates from within a person and is not imposed by external means. A virtuous man is one who behaves according to *Ren, Yi*, and *Li.* People automatically follow him as a result. Confucius, therefore, believed that governing by relying on the rule by law (involving external

[10] Legge (1893, p. 301) (Confucian Analects – Book XV Chapter XXIII).

[11] Ibid.,p. 250. (Confucian Analects – Book XII Chapter I).

[12] *See* Fei Xiaotong, "Chaxu Geju: The Differential Mode of Association", in Fei Xiaotong (2012, p. 48). Also see Legge (1893, p. 138) (Confucian Analects – Book I Chapter II).

[13] Legge (Legge 1893, p. 138) *(Confucian Analects – Book I Chapter II).*

[14] Ibid.,p. 154. *(Confucian Analects – Book II Chapter XXIV).*

force) is inferior to rule by virtue: "If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good."[15]

2. *Hierarchical punishment system dependent upon kindred relationship*: Traditional Chinese law takes filial piety toward parents and grandparents as the supreme moral and legal duty. Therefore, offenses against a parent or a grandparent were punished more severely than similar ones against others. Related to this, recent legislation in China emphasizes the importance of the duties of family members to care for the old. Article 13 of the *Law on Protection of The Rights and Interests of The Elderly of PRC (Amended in 2015)* provides that "The home is the foundation of care for the elderly, and family members shall respect, care for and attend to the elderly." While Article 18 imposes a duty on family members who live away from their relatives to "frequently visit or send greetings to the elderly persons."
3. *Concealment among relatives*:[16] The law of all dynasties recognized this principle. This is another side of the guiding principle of filial piety. Not only should a father conceal a son's wrongdoing and a son conceal the father's, but also a son who accused his parent acted not only contrary to the principle of concealment but in an unfilial manner. Such behavior was severely punished under the all dynasties' law. All seniors who might be legally concealed were also protected from accusation. If the accusation proved true, the guilty elder was nevertheless treated generously. The punishment of the unfilial accuser was increased if the accusation was proven false.[17]
4. *An ideal society dominated by Confucius theory is a harmonious society:* The function of *Li* is to stop the crime beforehand, while the function of law is to punish afterwards. Litigation is an adversarial process with the court declaring a winner and a loser and so promotes discord. Confucius said, "In hearing litigation, I am like any other body. What is necessary, however, is to cause the people to have no litigation." [18] This helps to explain the popularity of mediation in modern China (and other Confucian-influenced societies) as a means of resolving disputes. Mediation seeks compromise rather than adjudication of the parties' rights and so promotes harmony.[19] An important function of judges (and arbitrators) in China is to promote the harmonious resolution of disputes and in so doing they can resolve cases before them by acting as mediators. For example, in 2015, the PRC Courts resolved 6.228 million civil cases and also dealt with just under five million mediations.[20] This statistic does not include the substantial number of cases resolved by People's Mediation in accordance with the *People's Mediation Law* introduced in January 2011.

Confucianism in Today's China

In the nineteenth and twentieth centuries, attempts were made to destroy Confucianism's influence in China. It was attacked on three broad fronts. First, reformers and intellectuals in the nineteenth and early twentieth centuries blamed Confucianism

[15] Legge (1893, p. 146) *(Confucian Analects – Book II Chapter III).*

[16] The Duke of She told Confucius about a man whose son reported him for stealing a sheep. Confucius replied "The father conceals the misconduct of the son. and the son conceals the misconduct of the father. Uprightness is to be found in this." Ibid., p. 270. (Confucian Analects – Book XIII Chapter XVIII).

[17] *See* T'ung-Tsu Ch'u (2011, Chapter I).

[18] Legge (1893, p. 257) (Confucian Analects - Book XII Chapter XIII).

[19] *See* Albert H Y Chen (2003), Mediation, Litigation and Justice: Confucian Reflections in a Modern Liberal Society, in Bell and Chaibong (Ed.), *Confucianism for the Modern World*. Cambridge.

[20] See *Work report of the People's Supreme Court of PRC (2015)*, http://www.court.gov.cn/zixun-xiangqing-17712.html. Accessed 31 March 2019.

for weakening China as the world around modernized. In a powerful indictment, Lu Xun's[21] short story "Diary of a Madman" (1918) starkly equated Confucianism with cannibalism. Second, the imperial examination system was abolished in 1905, closely followed by the end of the imperial system itself in 1912. Both were deeply linked to Confucianism and their failure was seen as a failure of Confucianism. Finally, the dominant political force in China from the early twentieth century onwards is the Communist Party of China (CPC). In "On New Democracy (1940)," Mao Zedong advocated "sweeping away" "the worship of Confucius, the study of the Confucian canon, the old ethical code and the old ideas" (Mao Tse-Yung 1965, p. 369). During the Cultural Revolution, anti-Confucianism intensified with a campaign in 1973/4 to "Criticize Lin (Biao), Criticize Confucius." Articles from the *Peking Review* during this period give some idea of the strength of feelings. Examples include "Both reactionaries at home and abroad and the ringleaders of the opportunist lines worship Confucius"[22] and "... no ruling class ever showed benevolence or righteousness. Their benevolence, righteousness and morality meant consuming people. The doctrine of Confucianism is one of exploitation and oppression." [23]

However, many Confucian ideas were too deeply rooted in Chinese society as they provided a practical approach on how to behave and live. Following the reform and opening policy since 1978, the official attitude of the CPC to Confucianism has mellowed and, gradually, there has been a move to align CPC policies with Confucian ideals. For example, in 2005, President Hu Jintao stated that "the CPC and the central government have made it an important task to build a harmonious society" [24] and consistent with this, one of the twelve officially promulgated Socialist Core Values is "Harmony." Furthermore, the 4th Plenum Session of the 18th CPC Central Committee issued an important *Decision of the CPC Central Committee on Major Issues Concerning Comprehensively Implementing the Rule of Law* (Oct. 2014). This states that "benevolent laws are the precondition for good governance" and the country should be ruled according to both law and virtue: "We must persist in grasping the rule of law on one hand, and the rule of virtue with the other hand, forcefully carry forward the Socialist core value system, carry forward China's traditional virtue, foster social morals, professional ethics and household virtues."

Conclusion

Confucianism has played a significant role in the development of China and continues to help shape modern Chinese society, government, and law in the twenty-first century. Above all else, Confucianism has shown, over the centuries, a resilience and adaptability that has enabled it to continue to be relevant, and have influence, even after periods of, sometimes violent, disapproval and suppression. And this is because it is capable of providing guidance not only at the level of personal and familial relationships but also at a wider political and governmental level. It is, therefore, not surprising that, in recent years, the CPC has made increasing use of Confucian ideas as a means of harnessing traditional indigenous Chinese thought to underpin its rule.

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[21] Lu Xun (1881–1936), a well-known author, literary critic, and thinker in China. He was the key figure in the New Culture Movement of China in the early twentieth century.

[22] *Peking Review*, 4 Jan. 1974 (New Year's Message).

[23] *Peking Review*, 1 Feb. 1974.

[24] Reported in *Xinhua*, 20 Feb. 2005.

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Confucius (Kong Qiu)

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Introduction

Confucius (trad. 551–479 BCE) is the Latinized romanization of "Kongfuzi," that is, a combination of the surname Kong (孔) with the honorific suffix "Master" (*fuzi* 夫子). A teacher, political advisor, editor, philosopher, and reformer, Confucius was born in the state of Lu on the Shandong peninsula on the northeastern coast of China. Confucius seems to have been a member of the scholar-official (*shi* 士) class, a class of civil servants who filled the middle and lower ranks of state governments. As a young man, Confucius was known for his expertise in rites and rituals. In adulthood, Confucius began a career as an official in the employ of aristocratic families.

Little is known about the life of Confucius as he did not leave any of his own writings. Different sources indicate that Confucius held various government roles in the state of Lu. Later in life, Confucius left government service and became a teacher.

The *Analects* or literally, "ordered sayings" (*lunyu,* 論語), is the best extant record for the teachings of Confucius and was compiled by his students.

The Historical Background

In Chinese historiography, the Xia dynasty (ca. 2070–1600 BCE) is recorded as the first hereditary dynasty. This is followed by the Shang dynasty (ca. 1600–1046 BCE) and then the Zhou Dynasty (ca. 1046–256 BCE).

Under the Zhou system, hereditary fiefdoms were given to feudal lords (usually relatives of the royal family or favored retainers) by the Zhou king. These feudal lords, in turn, were obliged to recognize the sovereignty of the Zhou king. The decline of the Zhou dynasty can be traced to the sack of the Zhou capital in 770 BCE and the forced exile of the Zhou capital to the east of China. This change of capital marks what is named the "Eastern Zhou" period (770–221 BCE), the latter period of which is also subdivided into the "Spring and Autumn" (722–481 BCE) and "Warring States" (475–221 BCE) periods.

During this period, the Zhou royal authority over the various feudal states eroded as the latter increasingly and openly ruled their fiefdoms as independent states and fought wars against themselves for regional hegemony. The partition of the state of Jin, one of the most powerful states, marked the end of the "Spring and Autumn" period and the beginning of the "Warring States" period. Confucius was born during the "Spring and Autumn" period and by the time of his birth, the Zhou kings had been reduced to figureheads and even many of the feudal lords had seen their power usurped by ministers. Against the background of chaos in which Confucius saw his own age as mired, he looked back to a supposed golden age of the Zhou in which socio-political order prevailed.

For Confucius, one major cause of the social chaos of his own time was the degeneration of the traditional social practices of the Zhou dynasty, which involved elaborate systems of ritual practice, music, and correct language usage that promoted harmonious social conduct. Confucius believed that the restoration of order in society rested upon the restoration of this classical Zhou culture, and he saw his life's mission as the restoration of social order.

The Key Concepts of Confucius's Philosophy

Confucius saw himself as a transmitter of the correct way that governed his idealized vision of

the Zhou during its heyday. His vision is one of reforming society such that this order can once again prevail. Although much of Confucius's teachings are rooted in the cultural assumptions of his time, many aspects of his teachings are progressive and creative advancements of existing ideas and social practices.

Confucius's philosophy presents a coherent and systematic worldview ranging from the metaphysical-naturalistic to the moral, social, political, and cultural-aesthetic.

Pervading all schools of Chinese philosophical thought is the concept of the "way" (*dao*, 道). Literally meaning "path," it designates the whole of nature, the cosmos, or the process in which it comes into being and has an implicit normative dimension. Although the way transcends time and place, it is embodied as a concrete presence in all things. In Confucius's teachings, the way has a more specifically humanistic focus. The Confucian way is the way of the human being and society. For Confucius, the way refers to the humanist ideal of virtue and the well-being of society. The way *is* the proper way of the human person.

What expresses the ideal cosmological and, by extension, human order of the world is "harmony" (*he,* 和). This Confucian understanding of harmony is that of a creative ordering of particulars through which particulars achieve maximum complementarity. This harmony is neither an extraneous imposition of order onto particulars nor the chaos of mere particularity. Best embodied by the harmonious cooperation of individual organisms within an ecosystem, underlying Confucius's ideal of harmony is the cooperative order of nature itself. On the human-social level, this conception of harmony is a normative ideal. Those "exemplary persons" (*junzi*, 君子) that have cultivated an ethical sensitivity and insight are able to bring harmony to any nonoptimal human situation. The opposite of this ideal and its foil is sameness. Those of little cultivation can only resolve situations through recourse to demanding unity from the actors in any given situation. Confucius's ideal of a human agent is thus one with a social efficacy accrued to him or her through the consistent display of social competence or elegance.

The person who manifests all the qualities that allow them to bring the most harmony to social situations is understood as having a kind of "(social) efficacy" (*de*, 德). This kind of (social) efficacy is manifested as a social authority and agential power that non-coercively influences others. The actors with the most social efficacy and authority are known as "exemplary persons" (*junzi*, 君子). For Confucius, the political leaders of a given society should be exemplary persons who demonstrate this social efficacy. This social efficacy or virtuosity can generally be understood as the capacity to achieve harmony in a particular situation and the position of rulership is earned and deserved through the ruler's virtuous display of social efficacy.

There are many dimensions to how this authority is cultivated, but the most overarching concept or consummate virtue is arguably "ren" or "humaneness" (*ren*, 仁), which can be understood as the highest ideal of Confucius's moral philosophy. For Confucius, humaneness is a moral quality that is distinctively characteristic of humanity. Humaneness is central to the Confucian understanding of human flourishing. For Confucius, such flourishing is inevitably social and relational. In its ideal socio-political form, humaneness is a compassionate concern between people. Humaneness is central to Confucianism, and is even considered Confucius's golden rule, because the Confucian understanding of the human subject is irreducibly social in the sense that there is no self that is isolatable apart from and prior to its relationships. This (Confucian) self can only become realized through the cultivation of intersubjective regard: "humaneness" as such.

For Confucius, the starting place for the moral psychology of this social virtue is to be found in the family. It is within the family that the agent first learns about the force of human attachments and obligations that obtain between people. In the *Analects*, we find Confucius saying that "filial piety" (*xiao*, 孝), that is, the love, reverence, and attitude of care one has towards one's parents, along with brotherly respect, are the root of humaneness.

Humaneness can also be understood from a practical perspective and is associated with five virtues: respectfulness, tolerance, trustworthiness,

diligence, and generosity. Attendant upon this intersubjective understanding of personhood is the Confucian stress on education or "acculturation" (*wen*, 文).

For Confucius, the self is not born complete. He or she needs to be formed through the culture of a given society before he or she can become fully realized as an agent. Relatedly, for Confucius, the inner attitude of humaneness cannot be realized without an external form. Like the relationship between meaning and linguistic expression, humaneness is dependent upon an external manifestation. For Confucius, this is "li" (禮), which is traditionally translated as "ritual propriety." "Ritual propriety" denotes the codes that govern how the agent conducts himself or herself in public or in relation to different social figures. For example, there are particular etiquettes that a minister is expected to enact in front of his lord or, in a more contemporary example, particular ways that a doctor is expected to greet a patient. Although the particular norms of etiquette constantly change, the fact that societies have norms governing our body languages in public spaces does not. The idea of phenomenological social norms or etiquettes underlying the concept of "li" is thus also captured by the term "behavioral propriety" (*li*, 禮). Humaneness and ritual/behavioral propriety are thus inextricable from each other. For Confucius, ritual/behavioral propriety is the means by which one establishes oneself and conducts affairs. The charismatic power of the exemplary person is expressed and cultivated through the norms of ritual/behavioral propriety.

Social-Political Aspects of Confucius's Philosophy

The era Confucius lived in was marked by the fall of the Zhou order and with it the system of rites (the codes that govern ritual propriety) that upheld Zhou rule. Trespassing rites was a common phenomenon and this was of great distress to Confucius.

He believed that the causes of these trespasses were twofold; human nature itself and the perversion of social rites/mores. One solution that Confucius proposed for redressing the social chaos around him was through "the rectification of names" (*zhengming*, 正名). For Confucius, one must earn the name that is accorded one in a given role or situation. A father, for example, must fulfill the obligations that are associated with the name "father."

The rectification of names serves as the basis of Confucius social-political philosophy. Under this vision, if everyone performed the actions commensurate with their roles or the name of their roles, then society will spontaneously be ordered in a "non-coerced way" (*wuwei,* 無為). The philosophy of the rectification of names is especially pertinent to political leaders. The qualities appropriate to a ruler is a social efficacy cultivated through submission to the norms of "ritual/behavioral propriety" (*li*, 禮), involving attitudes such as "filial piety" (*xiao*, 孝), and ultimately embodying the arch-virtue of "humaneness" (*ren*, 仁). If a ruler cannot properly manifest these qualities, then he or she does not deserve to be called a ruler and does not merit the position of rulership.

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Conscience

▶ Freedom of Conscience

Consent

▶ Informed Consent

Consequentialist Argument

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Introduction: Scope of the Argument

The consequentialist argument, or argument from consequence, is used in different domains of legal decision-making (MacCormick 1978: 115ff; Feteris 2005; Atienza 2013: 243ff, 602ff). Sometimes, it is used in constitutional law for the justification of constitutional principles or of decisions based on them. Frequently, it is used in legislative discussion and argumentation in order to justify legislative decisions. Very often, it is used in judicial practice for the justification of a judicial decision or, more specifically, for the justification of a statutory interpretation or the interpretation of a precedent; in the judicial context, both parties and judges often make appeal to the consequences of an interpretation, and support or criticize the latter in view of the former. The focus of this contribution is on the uses of the argument in judicial adjudication.

Assumptions and Varieties

Assumptions

Some general assumptions on legal interpretation and argumentation must be pointed out before examining the consequentialist argument. First, there is a theoretical difference between *provisions* and *norms*, i.e., texts and meanings: legal provisions are the object of interpretation and norms are the outcome of it. Second, *interpretive arguments* justify the attribution of meaning to provisions (Tarello 1980; Alexy 1989; MacCormick and Summers 1991; Chiassoni 2019). Arguments such as the argument from literal meaning, the argument from intention, the argument from systemic coherence, etc., provide reasons in favor of an interpretive outcome. Third, interpretation "in abstracto" determines the abstract meaning of a normative text (Guastini 2011: 15–18). And fourth, interpretation "in concreto" determines the meaning of the text in view of application to the case in hand. According to the syllogism model (Wróblewski 1974; Canale and Tuzet 2020), the latter provides the external justification of the major premise of the judicial syllogism.

Core and Varieties of the Argument

As noted above, the consequentialist argument is one of the interpretive arguments used in judicial adjudication. Generally speaking it is the idea that an interpretation is justified by its consequences. (Likewise, in other contexts, it is the idea that a decision is justified by its consequences).

That should not be taken in a narrow sense which considers consequences of one type only and excludes all the rest of the potentially relevant considerations. As Neil MacCormick put it, "consequentialist argument is indeed concerned to establish that a preferred ruling is the best all things considered; but that conclusion as to the

'best' is not determined by reference to a single scale of evaluation (e.g. the pleasure-pain scale as in the hedonistic utilitarianism of a Bentham); it is a final judgment passed in summation of the cumulating competing results of evaluation by reference to a number of criteria of value, including 'justice' and 'common sense' as well as 'public benefit' and 'convenience'" (MacCormick 1978: 115). Common sense, justice, consistency with legal principles, and public policy are criteria for the evaluation of consequences and decisions (MacCormick 1978: 151) both in legislation and adjudication.

The argument has some varieties (MacCormick 1983). Most of them turn on how "consequences" are understood. The most important distinction concerns the intentionality of such consequences. Of course, interpreting and applying the law can have intentional and unintentional consequences.

When intentional consequences are concerned and referred to legislation, the argument is frequently called "argument from purpose" (purposes are taken as intentional and desired consequences of an act or decision). It so ranges over both normative and factual consequences, that is, over the intentional allocation of legal rights and duties and the desired factual consequences that a decision is expected to have.

When unintentional consequences are concerned, the argument is used in a critical way. Typically, economists claim that lawmakers or judges do not see the (bad) consequences that their decisions are likely to produce (when the argument is *ex ante*) or have already produced (when it is *ex post*).

To a certain extent, that distinction overlaps with the one between expected and unexpected consequences. Normally, the expected consequences are the ones that a decision-maker wants to produce. But, in a critical perspective, one can predict some expected consequences that go against the purposes of the decision-maker. Theoretically speaking, the distinction between expected and unexpected consequences is related to the epistemic perspective of what can be predicted given a certain decision, while the distinction between intentional and unintentional consequences concerns the practical perspective of the decision-maker. In other words (Hart 1994), the former belongs to the external point of view and the latter to the internal one.

Additionally, one can point out that some interpretive decisions have consequences that are not only legal (or normative in the narrow legal sense specified above) but also social, economic, moral, or religious. As is well known, the critics of legal positivism (e.g., Dworkin 1986) claim that that is not just a contingent fact. If the criteria of legality are grounded on moral facts, and the determination of legal content requires a moral understanding of it, then it does not come as a surprise that the argument from consequence ranges over moral consequences as well. Similarly, in the field of law and economics, scholars claim that legal decision-making is and should be shaped by an understanding of its economic consequences (Cserne 2020).

To sum up, the consequences the argument is about can be intentional or unintentional, expected or unexpected, normative or factual, legal or extralegal. These are different ways of taking the argument, which can overlap.

In the following, given its legal importance, we focus on the intentional understanding of the argument, namely the argument from purpose.

The Argument from Purpose

Maxim, Features, Varieties

The maxim of the argument, when taken as an interpretive one, is the following: in case of interpretation, judges should attribute to legal provisions the meaning that best realizes the purpose of the law, or the one that at least contributes to it. So the consequences of the interpretive decision consist in the realization or promotion of a given purpose.

As an interpretive argument, it is also called "purposive interpretation" (Barak 2005) or, in civil law countries, interpretation according to the *ratio legis* or "teleological" interpretation (Ekelöf 1958; Sartor 2002). By *ratio legis,* civil lawyers mean a legislative purpose that interpreters must take into account when determining the content of the law and its application.

This way of understanding the interpretation and application of the law suggest a view of law as a means to an end (political, social, economic, or other). This is a disputed view. While instrumentalists and pragmatists generally endorse it, others claim that law is not *just* a means to an end (Tamanaha 2006). For instance, according to Atienza (2006: 55–56), legal reasons are not only instrumental, for they concern not only means but also ends; in addition, for Atienza and others, legal practice embodies a claim to correctness (Alexy 2015, 2021), and law itself incorporates rational moral values (it is not just an instrument).

As a matter of fact, nothing requires an interpreter to endorse such an instrumental view, especially when one realizes that the argument from purpose is just one of the various interpretive arguments that judges can use in resolving interpretive disputes (Llewellyn 1950; MacCormick and Summers 1991).

However, the argument is claimed to have some features that count as advantages over other interpretive arguments in that it enables courts to obtain valuable results that are precluded by other interpretive techniques. First, if law is a means to an end, we should interpret and apply it in view of the relevant end, so as to achieve practical rationality (even if only at the instrumental level). Second, the argument from purpose overcomes the limits of literal interpretation and the difficulties of the reconstruction of legislative intent. Once the purpose of the law is clearly determined, the best means to achieve it can be more easily identified. Third, the identification of the purpose of the law allows the analogical extension of a legal rule or principle, so as to fill gaps in the legal system (Canale and Tuzet 2017). Fourth, it justifies the use of "a fortiori" arguments (Duarte d'Almeida 2017; Skoczeń 2019: 76–77) when these are based on some legal purpose. Fifth, the purposive interpretation of legal provisions matches the *desiderata* of some specific legal systems – e.g., EU law where directives are characterized by an explicit indication of their general purposes.

That does not mean that the argument is unproblematic. In the first place, there are some varieties of it. In the *subjective* variety, the interpreter invokes the purpose of the historical lawmakers. In this sense, it frequently overlaps with the argument from legislative intent, when this is referred to the intentions of the actual lawmakers who proposed, discussed, and enacted the law. In the *intersubjective* variety, the interpreter makes reference to the purpose that the law has (acquired) in the relevant social context. This need not coincide with the purpose of the historical lawmakers. In the *objective* variety, the interpreter invokes the purpose intrinsic to the law or, in a weaker version of the idea, the purpose of a "reasonable author" (Barak 2005: 88, 148).

Positivists are skeptical about the existence of such objective purposes, which natural law theorists on the contrary admit. In any case, there is a significant risk: that "objective purposes" are nothing but a fiction that interpreters use to distance themselves from subjective purposes, that is, nothing but a projection of the interpreters' *desiderata* (Canale 2022: 61–64).

In the second place, there are some problems affecting, to different extents, the varieties of the argument. From the epistemic point of view, how are we to identify the relevant purposes and consequences? When the purpose of a statute or a regulation is not clearly stated by the lawmaker, it can be reconstructed in different ways, depending on the interpreter's conception of the general purposes of law. In addition, the consequences of a judicial decision may be hard to predict. What consequences should be taken into consideration by the interpreter? The actual consequences of a given regulation, the intended consequences, the foreseeable ones, or those that are more likely or probable? Depending on the type of consequence considered by the interpreter, the consequentialist argument can justify different decisions. Furthermore, is any purpose acceptable as such? What are the acceptability conditions of normative purposes? The achievement or promotion of a purpose can be in conflict with the achievement or promotion of a different purpose (e.g., efficiency vs. fairness). How are judges to solve such conflicts? Do legal systems have a hierarchy of purposes? The problems just mentioned show that the argument from consequence

is far from identifying an unambiguous and determined technique of legal justification.

Exemplifications

In order to see how this interpretive technique is actually used, let us give some exemplifications of it. Three examples of the argument from intentional consequence (or argument from purpose) are given in the following. They belong, respectively, to US law, EU law, and the humanitarian law of the ECtHR. Of course, we will make abstractions from many aspects of the cases and of the relevant legal systems. We wish to give an idea of some ways the argument is used in legal practice.

In *Holy Trinity* (143 U.S. 457, 1892), the interpretive problem was whether a religious service counted as "labor or service" to the purpose of restricting immigration (Feteris 2005; Marmor 2008: 427ff). More precisely: Did the provision prohibiting the migration of foreigners "to perform labor or service of any kind in the US" apply to a New York religious society that made a contract with an Englishman who was expected to enter into its service as rector and pastor? The prima facie solution, according to the plain meaning of the text, was that such service was within the meaning of "labor or service of any kind." But the final decision of the case was different and was mainly based on an argument from purpose or argument from intentional consequence (in the subjective variety). These were the steps of the final decision: (1) the contract was within the letter of the statute; however, (2) Congress could not intend "to denounce with penalties a transaction like that. . . . It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit not within the intention of its makers"; (3) the title of the act refereed to "labor" only; (4) another guide to the meaning of the text was found "in the evil which it is designed to remedy," for the purpose of the act was the protection of the internal labor market; (5) that was confirmed by the historical circumstances of the appeal to Congress and by the reports of the committee of each house; (6) the American people, said the Supreme Court, "is a religious people," as shown by history and by the fundamental documents of the American legal order; therefore, (7) Congress could not have wanted "to make it a misdemeanor for a church . . . to contract for the services of a Christian minister residing in another nation."

The outcome of the case was a restrictive interpretation of the provision prohibiting such contracts to perform "labor or service of any kind," and the justification of this reading against the letter of the law was found in the purpose of the lawmakers, namely the protection of the internal labor market. This concern did not apply to the Holy Trinity case, since it was never suggested, said the Court, "that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition."

In EU law, the argument has a special role. There is no doubt over the importance of purposive interpretation and application of EU law. Treaties ought to be interpreted according to their purposes. Directives indicate their general purposes, or the general results to achieve (Art. 288.3 TFEU). Especially, there is a general favor for the interpretation leading to better integration and harmonization of the EU, and, in the caselaw of the European Court of Justice, it is said that "where a provision of Community law is open to several interpretations, only one of which can ensure that the provision retains its effectiveness, preference must be given to that interpretation" (C-223/98, § 24, *Adidas*). Domestic law, in its turn, should be interpreted in conformity with directives and EU law. "When national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive" (C-212/04, § 108, *Adeneler*).

So, to come to our example, what is meant by "State aid" in EU law? The legal issue in Case C-241/94 was the following: Was the financial participation of the State in the implementation of a social plan by a company a "State aid" within the meaning of (at the time) Art. 92.1 of the EC Treaty? Yes, according to the Commission. France's counterargument was that the purpose of the State was "purely social" ("for the benefit of employees"). In the Court's decision (§ 20), EU law "does not distinguish between measures of

State intervention by reference to their causes or aims but defines them in relation to their effects." The general purpose supporting this view was taken to be the promotion of economic competition and the efficiency of the "common market" (now "internal market"). This decision is theoretically interesting because it excludes the relevance of the alleged purposes of one party (the French State), and focuses only on the (expected or actual) "effects" of certain measures of State intervention. Of course, that is not just an empirical matter. Such factual consequences (the "effects" of the measures) are relevant to the legal purpose of promoting the efficiency of the internal market.

In *Hirsi v. Italy* (ECtHR [GC], judgment of 23.02.2012), the legal issue was whether "expulsion" covers interception on the high seas and return (push-back action). The applicants were part of a group of about 200 individuals who left Libya aboard three vessels with the aim of reaching the Italian coast. On 6 May 2009, when the vessels were 35 nautical miles south of Lampedusa, they were intercepted by three ships from the Italian Revenue Police (*Guardia di finanza*) and the Coastguard. The occupants were transferred onto Italian military ships and returned to Tripoli. At a press conference held on 7 May 2009, the Italian Minister of the Interior stated that the operation to intercept the vessels on the high seas and to push the migrants back to Libya was the consequence of the entry into force on 4 February 2009 of bilateral agreements concluded with Libya and represented an important turning point in the fight against clandestine immigration. The alleged purposes of the governmental action were discouraging smugglers and saving lives.

From a legal viewpoint the case was quite complex, given the various legal sources and materials that applied to it (Italian Navigation Code, Bilateral agreements between Italy and Libya, Geneva Convention on the Status of Refugees, UN Convention on the Law of the Sea, International SAR – "Search and Rescue" – Convention, EU law, Convention for the Protection of Human Rights).

The applicants alleged, in particular, that their transfer to Libya by the Italian authorities had violated Art. 3 of the Convention on Human Rights (prohibiting inhuman or degrading treatment) and Art. 4 of Protocol No. 4 (prohibiting collective expulsion). On the latter point, Italy claimed that the case was different: the measure did not concern the "expulsion" of migrants but their access to state territory.

The Decision of the Court was against Italy. The Court claimed that the persons who were pushed back to Libya were denied the right to obtain an individual assessment of their case and an effective access to the refugee-protection system (*non-refoulement* principle); that the applicants were exposed to the real risk of torture or inhuman or degrading treatment in Libya and in their respective countries of origin; and, for what matters here, that Art. 4 of Protocol No. 4 was in need of a "functional and teleological interpretation." In this way the Court rejected the alleged "territorial requirement" and argued as follows: "account must be taken of the purpose and meaning of the provision in issue, which must themselves be analysed in the light of the principle, firmly rooted in the Court's case-law, that the Convention is a living instrument which must be interpreted in the light of present-day conditions" (§ 175). It added that "it is essential that the Convention is interpreted and applied in a manner which renders the guarantees practical and effective and not theoretical and illusory" (§ 175) and stated that "the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority" (§ 177). This purposive dimension prevailed over the literal interpretation according to which "expulsion" requires that someone already be within the national territory. To put it differently, a literal interpretation of the relevant text would have produced legal and factual consequences that would run counter to the purposes of the Convention.

Conclusion

The examples proposed above show that the argument from consequence plays a relevant role in

judicial interpretation and argumentation. The consideration of the intended consequences of a statute or regulation is, in particular, one of the leading criteria of legal adjudication in most contemporary legal systems. This argument justifies the departure from literal meaning in favor of an outcome that satisfies the expectations of the lawmaker, the society, or the legal system considered as a whole. At the same time, the use of this argument opens the door to a large degree of discretion on the part of judges, who are called upon to determine what the purpose of the law actually is and what relevant consequences their decisions are likely to bring about. As a matter of fact, the search for legal purposes and consequences may be highly controversial and convey forms of interstitial legislation by courts.

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Constant, Benjamin

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A founding father of modern liberalism, Benjamin Constant (1767–1830) was one of France's leading politicians, political theorists, and publicists. An indefatigable campaigner for parliamentary government and individual rights, he wrote a constitution for France in 1815 and published newspaper articles, pamphlets, and several books, whose influence reached across Europe and the Americas. The author of a pathbreaking five-volume book on the history of religion, he also wrote a novel that became a classic in its genre.

Throughout his life, he fought for the legal and moral principles he thought necessary to establish and safeguard a liberal society.

Biography

Henri-Benjamin Constant de Rebecque, commonly known as Benjamin Constant, was born in Lausanne, Switzerland, to Protestant parents. His father, Juste Constant de Rebecque, was an army officer in the service of Holland. His mother, Henriette Chandieu, died only 16 days after his birth. Benjamin's early years were poorly supervised by his frequently absent father, who entrusted him to a series of incompetent tutors. A brilliant and precocious child, Constant nevertheless managed to learn Latin and Greek, followed by German and English. In 1782, he was enrolled by his father in the University of Erlangen in Southern Germany, before moving on to the University of Edinburgh very shortly thereafter. At Edinburgh, he was introduced to the philosophy of the Scottish Enlightenment, which would have a major impact on his intellectual formation. He learned political economy and initiated his research into the history of religion.

In 1788, his father obtained for him a position as Gentleman of the Chamber at the court of Brunswick. From there, he witnessed the French Revolution from afar. A failed marriage prompted him to return to Switzerland in 1794, where he met and fell in love with the woman who would become the most important influence on his political thought and career. Anne Louise Germaine de Staël-Holstein (commonly known as Madame de Staël) was the only child of Louis XVI's director-general of finances, the immensely wealthy Genevan banker, Jacques Necker. She ran an influential salon in the capital and was already a published author when Constant met her.

Two months after the fall of Robespierre, in May 1795, Constant accompanied Madame de Staël to Paris, where he began publishing newspaper articles and pamphlets in support of the Directory. The couple's hope was that this new government would be strong enough to quash the forces of extremism and bring the Revolution to a close while safeguarding its principal achievements. When it proved unsuccessful, they threw their support behind Napoleon Bonaparte's seizure of power in the coup d'état of Brumaire (9 November 1799). Granted a position on the Tribunate, Constant soon joined others in attempting to impose some legal limits on Bonaparte's powers. For this, Constant was summarily dismissed in 1802. Having also irritated Napoleon by her political opposition and machinations, Madame de Staël was ordered into exile and Constant accompanied her abroad.

Constant spent the following 12 years dividing his time between Madame de Staël's salon at Coppet, near Geneva, which became a center of opposition to the emperor, and Germany, where he met leading intellectuals like Goethe, Friedrich Schiller, and the von Schlegel brothers and conducted research into the history of religion. It was during this period that Constant produced some of his most important work: an outline for a republican constitution and a first draft of what would become his *Principles of Politics Applicable to All Representative Governments*, today recognized as a founding text of modern liberalism. He also wrote the novel *Adolphe* and an adaptation of Schiller's play, *Wallenstein*.

Constant's romantic relationship with Madame de Staël ended in 1806, but their intellectual partnership remained firm. In 1813, when Napoleon's power seemed on the brink of collapse, she pushed Constant to write what would become one of his most brilliant and important works, *The Spirit of Conquest and Usurpation*, published at the end of January 1814. Soon thereafter came Napoleon's defeat and banishment to the island of Elba. In April 1814, Louis XVIII was proclaimed king of France.

Only a year later, Napoleon stunned the world by escaping from captivity and returning to France. Despite his many years of fierce opposition, Constant now shocked his erstwhile allies by agreeing to work with the former emperor on the drafting of a new constitution, thereby appearing to legitimize his reassumption of power. Constant's purpose, however, was to design a liberal constitutional monarchy strong enough to withstand a return to dictatorship. The outcome, called the "Acte additionnel" and sometimes the "Benjamine" in

Constant's honor, was, in fact, the most liberal constitution France had ever known. Constant also published his *Principles of Politics* to explain his legal and constitutional theories in full.

The Acte additionnel was never implemented, since Napoleon remained in power for only "100 days" before being defeated at Waterloo, after which he was sent into final exile on the island of St. Helena. Louis XVIII returned to the throne, and, fearing retaliation, Constant hastily departed for Brussels and London. While in London, he published his novel, *Adolphe*.

Fortunate to avoid being exiled by the restored king, Constant soon returned to France and politics. In 1819, he was elected to the Chamber of Deputies. He remained involved in parliamentary politics until his death in 1830. It was during this period that he earned his reputation as the intrepid leader of the "liberal party" as its principal theorist in France. He defended his principles in the Chamber and in newspaper articles and other publications, among which his *Cours de politique constitutionnel* which was translated into several languages.

In 1822, Constant lost his seat in a reactionary landslide. Until his reelection in 1827, he devoted himself to several other publications, among which was a commentary on the work of the Italian theorist, Gaetano Filangieri, and his work on religion, *De la religion considérée dans sa source, ses formes et ses développements*, the first volume of which appeared in 1824. Despite declining health, Constant continued his political campaigning until his death in 1830.

For his services to France, Constant was given a state funeral on December 12, 1830, just 6 months after the July Revolution. According to one major newspaper, France owed Constant eternal gratitude because "no other writer has contributed as much to her political education; no other writer has been better at popularizing constitutional questions and rendering them familiar to all classes of citizens."[1]

Sovereignty and Individual Rights

Like others of his time, Constant struggled to understand one of the Revolution's essential paradoxes: Despite its promising beginnings, it had derailed into terror and culminated in a regime more oppressive than the one it had replaced. Such facts prodded Constant to come up with the legal and constitutional principles that he believed should secure any legitimate government.

One of his central innovations concerned the idea of sovereignty. The revolutionaries had been inspired by Rousseau's notion that all sovereignty comes from the people. In his *Principles of Politics*, Constant expressed agreement with this general idea, only to add the crucial point that sovereignty should always be limited. Political power, he insisted, was dangerous no matter in whose hands it was placed: "Entrust it to one man, to several, to all, you will still find that it is an evil."[2] The fatal mistake made by the revolutionaries had been to simply transfer absolute sovereignty from the king to the people. This had made power arbitrary and left individuals without any protection against the state. All sovereignty should be strictly bounded, and individual rights protected. "There is a part of human existence," Constant wrote, "which necessarily remains individual and independent, and by right beyond all political jurisdiction." The individual rights Constant stressed throughout his life were freedom of religion, press, and private property. He also advocated trial by jury and the separation of church and state.

While Constant defended the notion of popular sovereignty, he never supported universal suffrage. To him the Revolution was proof that the majority of Frenchmen, not to mention women, were unprepared for political rights. The most democratic periods of the Revolution had also been the most bloody and despotic. Napoleon's regime was repeatedly legitimized by plebiscites.

[1] *Courrier français*, December 9, 1830, 569. Translation my own

[2] Benjamin Constant, "Principles of Politics Applicable to All Representative Governments," in *Political Writings*, p 176

Constant defended property requirements for both voting and office holding.

Commerce, Modern Liberty, and the March of History

In "The Liberty of the Ancients Compared to that of the Moderns," a speech delivered in 1819 and soon thereafter published, Constant pinpointed a crucial distinction that underpinned his political theories. Freedom, he declared, cannot be the same among the moderns as it was among the ancients. Ancient liberty required citizens constantly to be devoted to politics and willing to sacrifice their personal interests for the public good. But modern men were no longer interested in, or even capable of exercising, this hyper-politicized form of liberty. Modern men desired not so much to participate *in* the state as to hold negative rights *against* it. They wanted mostly to be left alone; they cherished their independence from the government above all.

Following Scottish political economists, like David Hume and Adam Smith, Constant believed in the forward "march" of history. Human history had passed through four successive revolutions, theocracy, slavery, feudalism, and nobility, each period marking a stage above the one before in terms of freedom, equality, and general well-being. Men had now entered a fifth stage, namely, the "Age of Commerce." It would bring greater prosperity to all, more fairness and equality, and the promise of peace between nations.

The providential "march" of history had political ramifications. Calamities such as the French Revolution happened when the rich and powerful tried to oppose necessary political reforms. Napoleon's error had been to try to take Europe backward. Despotism and wars of conquest were anachronisms doomed to failure. The future belonged to liberal forms of government and peaceful commerce between nations.

The arrival of the age of commerce also explained why government should play only a limited role in the economy. In his two-volume book *Commentary on Filangieri's Work* of (1822–1824), Constant strongly championed laissez-faire. The functions of government should be "purely negative," he wrote. Government should "repress disorder, eliminate obstacles [and] prevent evil from arising," while the rest should be left to individuals. Limited government did not mean weak government, however. Freedom could only exist with the aid of a government that was powerful in its own sphere. And government naturally required taxation, which, for Constant, was a necessary evil. He favored an element of progressive taxation and consumption taxes.

Though generally optimistic about commerce and the future, Constant was not naïve. He was troubled by what he saw as modern man's growing materialism and selfishness. He worried that future generations would become overly focused on their private comforts and interests. A lack of vigilance and political participation only played into the hands of counterrevolutionaries and would-be dictators, like Napoleon. A liberal political and economic system required true citizens, alert, active, and devoted to the public good. At the end of his speech on ancient and modern liberty, Constant therefore warned his fellow liberals not to economize liberty and downplay the importance of political engagement. While modern liberty required constitutional guarantees, like divided powers and other institutional safeguards, it also required an alert citizenry to ensure its survival.

Neutral Power and Freedom of the Press

Connected to his battle for constitutional government in France was Constant's deep admiration for England's form of government. He particularly admired how England's political institutions allowed for free thought, discussion, and debate. He thought the clash of opinions he observed in parliament during his visit to London necessary for the healthy functioning of a liberal regime. Battles over principles and policies in parliament, fed by a free press, would make representatives more enlightened and decisions more just.

While he admired the English political system, Constant also tried to modify it in innovative ways. The particular strength of a constitutional

monarchy, he argued, was not that it was separated into three branches, as Montesquieu had claimed, but that it was separated into five: the "royal power," the "executive power," the hereditary assembly, the elected assembly, and the "judicial power." The key distinction here was between the "royal" power, which referred to the king, and the "executive power," which was led by ministers who sat in the legislature, were entirely dependent on it for their positions, and did not have the capacity to block legislation. The king, Constant wrote, should be "neutral" and not actively involved in legislation. Instead, he should serve as a kind of referee and protector of the constitution. He should have the authority to dismiss the executive power and dissolve the legislature, thereby ensuring that a clash between them was followed by a general election to test who was acting in accord with public opinion. If it was the ministry who was at odds with a majority of the legislature, the king's response should be to appoint new ministers acceptable to the majority.

Moral Regeneration and Religion

Constant did not believe that constitutional arrangements would be enough to heal France after the turmoil of the Revolution. Social bonds had been dissolved and harmful passions unleashed. Fanaticism, selfishness, and pride were on the rise. In *Adolphe*, Constant denounced the moral impoverishment of the modern age. A new morality was needed to regenerate France and sustain any liberal order.

Like most liberals of his time, Constant believed it impossible to count on the Catholic Church for this regeneration. Himself a liberal Protestant by upbringing and predilection, he thought the Catholicism propagated by the Church an obsolete religion out of sync with the age. Its stress on human sinfulness and superstitious dogmas would never foster the moral values France needed. Moreover, its centuries-long support for the absolute monarchy and a system based on inherited privilege disqualified it. The Pope and his allies had unambiguously denounced the Revolution, taking aim especially at freedom of conscience and freedom of the press, two of the most essential liberal principles.

And yet Constant believed that a religion of some kind was necessary for the moral health of any free society. A merely utilitarian morality would never prevent a society's descent into despotism. In his copious writings on religion, and in his magisterial five-volume book, *De la religion*, he explored the relations between the sociopolitical conditions of human populations and their religions. Over the course of human history, he argued, religions had reformed themselves, thereby keeping up with the gradual evolution of their societies and remaining forever relevant. Catholicism had been good for a time, but was now obsolete. Instead, the future belonged to a liberal and Protestant variety of religion, a religion akin to Unitarianism, which was more focused on encouraging good morals than on fostering a slavish adherence to dogmas. For religion to remain relevant, Constant also argued, it was crucial to leave it independent and free from state or clerical control. If such freedom led to a proliferation of sects, it was only a good thing, because a competition between religions would lead to their progressive purification.

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Constitution

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Introduction

In the broadest sense used in political and legal theory, the word "constitution" refers to the rules creating institutions, typically of governance; the rules, sometimes described as "secondary rules," specifying how those institutions can make rules regulating the primary conduct of those within the institutions' jurisdiction; and amendment rules specifying how the secondary rules can be changed. Typically though not universally these rules are written, ordinarily in a single document but sometimes scattered through several documents. Amendment rules in particular are not infrequently a combination of written documents and unwritten or informal practices. So, for example, many constitutional systems use a combination of formal amendment rules and judicial interpretation to update old constitutional provisions.

In addition, some constitutions, most notably the British constitution, consist largely of unwritten norms, known as "conventions," that are typically regarded as politically constraining but not legally binding. Even systems with written constitutions often supplement them with conventions. The distinction between written constitutions and unwritten ones thus has less significance than is often suggested, and some concepts used to describe and analyze constitutions have to be developed in ways that make them useful in dealing with written constitutions, the unwritten supplements to them, and unwritten constitutions.

Making a Constitution Work

How does a constitution get off the ground? In general, when a group of people get together and decide that their purposes would be advanced by

creating governance institutions for the activities they care about. A group of football enthusiasts, for example, might decide that they would better achieve their goals – sociability, organized games, and the like – by creating the Hammersmith Football Club instead of relying upon informal modes of communication like telephone trees to alert people to upcoming events.

The case of ordinary governments is more complicated. It is relatively easy to identify the creators of the Football Club's constitution. It is more difficult to identify the group that "creates" ordinary governments. It is insufficient to point to some group – the "framers," for example – who promulgate a written constitution, in part because not all constitutions are written, and in more important part because we need an account of why *that* group of people has the authority to create a constitution that binds other people. Further, on many views the process of constitutional creation is an on-going one, as people alter their institutions to ensure that they continue to do as well as possible in promoting the goals for which the institutions were initially created.

The Idea of the Constitutional *Demos*

An important controversy is the theory of constitutions deals with the question, Must the group preexist the governing institutions that its constitution creates? Classical constitutional theory answered, Yes. For a constitution to come into being the group must be a *demos*, meaning a group of people who understand themselves to be engaged in a common enterprise that would go better with a constitution. Sometimes the *demos* was even more narrowly defined as an *ethnos*, meaning a group of people who had a common genetic and cultural heritage. The twentieth century showed how risky it was to treat constitutions as flowing from a genetically defined *ethnos* but the idea that a constitution requires not merely a common enterprise but a shared culture remains important in some versions of the theory of constitutions (For an important discussion in connection with the European Union, see Weiler 1995).

In other versions, though, the *demos* and the constitution can be co-constitutive. The usual example is the United States, where the creation of the Constitution brought into being the new nation and helped shape its political and constitutional culture. The idea of co-constitutiveness is captured in a celebrated statement by Hector St. John Crèvecoeur:

> What then is the American. . .? He is an American, who, leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. He becomes an American by being received in the broad lap of our great *Alma Mater* (de Crèvecouer (1782)).

More recently Jürgen Habermas, reflecting on developments within the European Union, has similarly defended the idea that in at least some circumstances a *demos* and a constitution can be co-constitutive (Habermas 1996; see also Michelman 1996). (Habermas and Michelman use the term "co-originary" and focus specifically upon democracy and constitutionalism but in my view their arguments can be used to address the questions raised here about the relation between a constitution and a people.) To the extent that we see constitutional creation as an on-going process of adaptation and adjustment, we must see the *demos* as itself fluid rather than fixed – constituted, as Habermas suggests, by the very process of governance.

The Idea of the Constituent Power

Can a constitution's content be limited? That seems unlikely given the generality of the initial definition. The presence of amendment rules in a constitution, though, has sometimes been thought to pose a problem. Consider an amendment rule that in practice makes it difficult to alter the initial constitution – one requiring in effect a strong supermajority such as 75% support, for example. Such a rule purports to place a limit on one component of the constitution. What can the group do if it wants to change the constitution but cannot satisfy the amendment rule because, for example, "only" 65% of the group want to make the change?

Constitutional theory has addressed this problem by describing the constitution-making group as the "constituent power." That term was introduced initially by Abbe Sieyès in the late eighteenth century and reintroduced into constitutional theory by Carl Schmitt in the twentieth. According to Sièyes and Schmitt the constituent power lay at the foundation of constitution-making and could not be limited by law. On this view amendment rules can be understood in two ways: first, as recommendations from a group of people who have thought seriously about constitutional design, recommendations that the constituent power should take seriously when considering whether and how to alter the constitution, and second, as prescriptions that legally bind the institutions created by the initial constitution but not the constituent power itself. According to this second understanding the institutions charged with changing the constitution pursuant to the amendment rule are legally bound to comply with that rule because they are exercising a power delegated to them by the constituent power. As agents of the constituent power they are bound to respect the limits of the power they have been given.

Under contemporary understandings the constituent power is bound by international human rights norms but, for most jurists who have grappled with the issues, by nothing else. The constituent power can amend or replace the constitution without complying with its amendment rule. So, for example, if the constitution's amendment rule requires approval by the legislature, the constituent power can bypass the legislature and amend the constitution by referendum or replace the constitution through the action of a constitutionally innovative (or unlawful) constituent assembly. Doing so should be seen as an exercise of revolutionary power, even if nonviolent, and comes at some cost to legality.

Obviously any arguments that invoke the constituent power in constitution-making require identification of that power (and so are closely related to discussions of the *demos* and *ethnos*). Some scholars treat the constituent power as a purely conceptual requirement, necessary to provide the foundation for a constitution. This appears to have been Hans Kelsen's view, though he did not engage in a sustained discussion of the concept. Treating the constituent power as a sociological phenomenon seems more satisfactory because the concept is brought into play in the context of real political actions such as holding a referendum.

The sociological account has its own difficulties, though. By definition the constituent power is not an institution created by the constitution. How then can we know that a referendum is an exercise of the constituent power rather than, for example, a fancy opinion poll conducted by a segment of the society? A reasonably common phenomenon involves a claim by a charismatic leader that he or she speaks for the people, that is, that his or her proposed constitutional revisions would be exercises of the constituent power. Sometimes the claim might be true, sometimes false – and there appear to be no criteria for identifying when it is one or the other. Rather, doing so appears to require the exercise of something like political judgment.

Carl Schmitt can be read as attempting to give some informal institutional content to the process of identifying when the constituent power has been exercise, but his argument is especially troubling. For Schmitt a political leader's program would be endorsed by what he called acclamation, a non-institutional method of identifying when the constituent power has been exercised. Schmitt's approach led rather naturally to his support for the Nazi Führerprinzip. In Schmitt's case this was coupled with the *ethnos* account of the group for whom the constitution is made, to produce an anti-Semitic constitutional theory. The *ethnos* account probably can be detached from Schmitt's reliance on acclamation to identify at least some of the occasions on which the constituent power has been exercised, leaving us with one phenomenon – acclamation – that might be a helpful component of the political judgments we must make.

Who Does the Constitution Regulate Through the Primary Rules It Authorizes?

Once we have a constitution up and running, we have to consider the question, for whom is it a

constitution? The obvious answer – it is a constitution for the group that created it – requires some modification. Nothing in the bare definition of a constitution limits its institutions to creating primary rules that purport to regulate the conduct of people outside the group. Ordinarily, of course, an attempt by the Hammersmith Football Club to prescribe rules defining property relations among non-members would be futile: The non-members would simply ignore those rules. Such rules, they say, have to emanate from the British Parliament or other institutions created by the British constitution.

Yet, one can imagine post-apocalyptic science fiction scenarios in which the Hammersmith Football Club would succeed in prescribing property rules that non-members honor (although one might then want to consider whether the non-members should as a normative matter be treated as members and whether they will as a positive matter be so treated). That success would reflect acknowledgment by the people subject to regulation that the Football Club's rules advance their interests better than the rules promulgated by the now-defunct Parliament: By their lights they are better off obeying the Deputy Secretary of the Football Club than obeying the Mayor of London. This basically sociological account resonates with H.L.A. Hart's treatment of the rule of recognition as supported by the habitual action of officials charged with implementing primary rules, with one important modification. In the scenario under consideration the question of *who* the relevant officials are is up for grabs – again, the Deputy Secretary or the Mayor. The sociological account thus must move away from dealing with the habitual behavior of officials to the habitual behavior of ordinary people with respect to their identification of the people – the "officials" – with whose regulations they will comply.

The Formal and Material Constitutions, and the Dignified and Efficient Constitutions

The German political theorist and socialist activist Ferdinand Lassalle criticized the liberal constitutionalism of the 1860s for asserting that it promoted people's well-being while actually failing to do so or even worse making it more difficult for people to do so through political action. The liberal constitution, he said, was merely formal whereas what mattered was what he called the material constitution. During the outpouring of constitutional theory in Weimar Germany other theorists, most notably Herman Heller, revived the distinction between the formal and the material constitution.

As a first approximation the formal constitution is what written constitutional documents set out, supplemented by what academic lawyers would describe as unwritten but legally binding norms. Constitutional theorists offer accounts of the material constitution that are either input- or output-oriented.

Input-oriented accounts start with the observations, first, that the formal constitution might seem to describe the processes by which policy outcomes are generated and, second, that such a description might be misleading. Consider for example a state with an authoritarian leader and a parliament of the usual sort. The formal constitution describes the processes by which policy is generated – introduction of proposals by the executive government or individual members of parliament, consideration by parliamentary committees, deliberation in the parliament, and more. Actually, though, policy is generated by the authoritarian leader, who simply instructs parliament to go through the motions of complying with the formal constitution.

Other examples involve political parties and interest groups. Many contemporary constitutions say little about political parties even though they are important institutions for enacting policies into law. The formal constitution might set electoral rules that affect how many parties are likely to be significant – whether executive governments will typically be coalitions of numerous parties or instead consist of a majority party (or a coalition of two parties) facing an opposition. The formal constitution will ordinarily say little about how coalition governments develop and enact policies (except perhaps to describe when a coalition government must be replaced), nor about how a

majority party does so. The inputs to policy-making, that is, come from the parties and are not described in the formal constitution.

Similarly, today's formal constitutions typically say that legislators are chosen in elections by the people and imply that legislators are responsible to them subject to questions about whether a legislator should or must exercise her independent judgment about whether a policy proposal serves the nation's interests. Often, though, legislators' decisions are strongly influenced not by their constituents or by their judgments about the national interest but by the desires of those who finance their campaigns or by interest groups that lobby effectively for policies that advance their specific interests without regard to the public interest as a whole.

One might question input-oriented accounts of the material constitution on the ground that – to continue the examples – the authoritarian leader, political parties, and interest groups are actually built into the formal constitution even though they are not mentioned (in enough detail) in the written constitution. The formal constitution might be defined to include unwritten practices and norms (conventions) that, though not legally binding, are in fact effective forces in policy-making. Doing so incorporates the inputs identified by a material analysis into the formal constitution. This illustrates the way in which concepts initially associated with written constitutions – here, the idea that there is a formal constitution – can be adapted to deal with a constitution's unwritten components.

Lassalle and Heller to a somewhat lesser degree had an output-oriented account of the material constitution. On such an account one describes the constitution as its outputs without paying attention to the institutions and processes that produce them. So, for example, a material constitution might authorize the summary arrest, detention, and trial of political dissidents; whether that system emanates from legislation or from emergency decrees by the chief executive is a matter of indifference. Lassalle, a socialist activist, focused on the distribution of material goods in his description of the material constitution. Liberal constitutions produced distributions of goods (and political power) that systematically disadvantaged the poor and the working class. For Lassalle those distributions *were* the material constitution. (Lassalle did not entirely disregard inputs into the policy-making process. Influenced by his contemporary Karl Marx, Lassalle described the inputs as "the real effective relations among social forces." We can use the output-oriented account of the material constitution without having any commitments to that or any other account of inputs, though.)

Roughly contemporaneously with Lassalle, in 1867 the British scholar Walter Bagehot distinguished between the "dignified" and the "efficient" constitution. The former, in his words, "excite[d] and preserve[d] the reverence of the population" for the constitutional system as a whole. His primary example was the British monarch; contemporary examples might include preambles and similar openly aspirational statements, and the designation of the national capital, national symbols, the design of the national flag, and – often quite important, particularly in what scholars describe as divided societies – the official language or languages. The dignified constitution generates affective ties that lead the nation's people to identify themselves with the constitution.

The efficient constitution, in contrast, details the way in which the constitution's institutions work to generate public policy. Though ordinarily used in connection with national constitutions, Bagehot's distinction probably applies to constitutions generally under the broad definition offered here. The Hammersmith Football Club might have rituals associated with its regular meetings, for example, and create offices with titles (the "Grand Poobah") that generate affective ties – the Club's dignified constitution. It also has methods of scheduling football matches and organizing transportation to them – its efficient constitution.

One might think that the outputs of the governance system – the output-related sense of the material constitution – would play an important role in generating affective ties. That is, to an important extent people take an instrumental attitude toward the constitution, asking whether they are receiving what they want or need from the way

the governance system operates. Lassalle's material constitution might be understood as a way of capturing this instrumental attitude. Seen in this way Bagehot's distinction may be most useful in explaining why people support the (formal) constitution even when the (material) constitution is failing them. So, for example, Bagehot's distinction might be used to explain why the British working class in the nineteenth century supported the British constitution.

The efficient constitution might be inadequate in material terms. Roberto Gargarella, surveying Latin American constitutionalism, argues that the efficient constitution, which he usefully refers to as the constitution's "engine room," can actually undermine the dignified constitution (Gargarella (2013)). For Gargarella, an important component of the dignified constitution today is the identification of rights – traditional civil and political rights, more recent social and economic rights, and emerging rights to culture and the environment. People support the constitution because it promises to ensure those rights, sometimes immediately, sometimes through "progressive realization." Gargarella argues, though, that some constitutional designs build into the efficient constitution processes that systematically thwart the protection and promotion of those rights.

Bagehot's distinction, then, brings into view the possible incongruence between the affective and the instrumental functions of a constitution. Jürgen Habermas's notion of "constitutional patriotism" can be seen as an effort to reduce that incongruity. For Habermas, constitutional patriots have affective ties to the constitution *because of* its instrumental effects, especially in protecting and promoting the people's rights. Note that this is consistent with the view, attributed earlier to Habermas, of the co-constitutive nature of a constitution and the people for whom it is a constitution. While undoubtedly attractive, the idea of constitutional patriotism faces a difficulty at its foundation: It lacks an account of the institutional mechanisms that generate constitutional patriotism – and perhaps necessarily so because it seeks to dissolve the distinction between the dignified and the efficient constitution.

Constitutions and Constitutionalism

Political scientist Giovanni Sartori describes "façade" constitutions, with two characteristics: they do not provide "reliable information about the real governmental process" and they do not meaningfully limit the exercise of government power (Sartori (1962). See also Law and Versteeg (2013)). The input-oriented version of the material constitution gives us the desired reliable information. What remains is the idea that façade or sham constitutions do not limit government power. Examples frequently offered are the Soviet Constitution of 1936 and the contemporary constitution of the People's Republic of Korea (North Korea).

It is not that such constitutions are a simulacrum of a "real" constitution. Rather, they fail to satisfy a normative requirement that government power should be limited. That normative requirement can be relatively thin, precluding only truly arbitrary exercises of power, or thicker, with governments bound to protect and promote a list – short or long – of human rights.

Failing to distinguish between the term "constitution" and the term "constitutionalism" is frequently harmless, although the thicker the normative demands of constitutionalism are said to be the more often will real-world constitutions fall short of satisfying constitutionalism's requirements, which in some settings might cast doubt on the value of constitutionalism itself.

Around the turn of the twenty-first century, with some resonances continuing to echo today, political leaders in Malaysia and Singapore suggested that Western constitutionalism's focus on individual rights was inconsistent with "Asian values," which led them to question the value of constitutionalism as they presented it. The "Asian values" discussion faded away as observers began to see the purported inconsistency between Western constitutionalism and Asian values as mostly a political ploy to shore up rulers who, though willing to avoid completely arbitrary rule, were reluctant to place themselves under the constraints imposed by thicker notions of constitutionalism.

In general maintaining the distinction between "constitution" and "constitutionalism" is helpful not only to aid the positive analysis of

constitutions but also for normative purposes. As a matter of positive analysis it is useful to have a term available to describe the constitution of the Hammersmith Football Club, and "constitutionalism" seems too heavy a weapon to deploy in that and similar settings.

Normatively, focusing as the term "constitutionalism" does on limits on the exercise of power might lead us to overlook or downplay the importance of *creating* power in the first place. People create constitutions because they believe that their lives will be improved by having institutions in place that generate primary rules of conduct, that tell them who has the right to do what to improve the public good. Take the Football Club example. That the Club is constitutionalist is important when we think about why limiting the power its officials have to discipline members for breaching rules of decent conduct during football matches is desirable. Such limits, though, should not distract us from the evidently more important power the officials have to schedule matches with other football clubs, to sign contracts to purchase equipment and rent vehicles to transport club members to matches, and the like.

Constitutionalism understood as requiring constraints on the exercise of power thus should not be confused with constitutions understood as institutional arrangements for the exercise of power. Constitutions are power-enabling. Constitutions can fail because they are not constitutionalist in the sense that government officials exercise arbitrary power. They can fail as well when the power they create is not exercised to promote the public good even when the failures do not lead to systematic or widespread violations of human rights. We might say that constitutions promise people a right to effective governance – but we might well think twice about saying that ineffective governments fail to satisfy the requirements of constitutionalism (For discussion of the right to effective governance, see Jackson and Dawood (2023)).

Conclusion

Constitutions describe and prescribe the institutions used to create policies and primary rules governing the conduct of those for whom they are constitutions. For that reason we can refer to the constitution of a nation or of a football club. All constitutions have to deal with determining the *demos* for which they are the constitution, the possible gaps between what a formal written constitution says and how the institutions actually operate, and the degree to which their policies are normatively valuable. Perhaps the most important lesson to be drawn from studying the idea of the constitution "as such" is that we be careful not to identify that concept with the normatively more significant "constitutionalism."

Cross-References

- ▶ Constitutionalism
- ▶ Habermas, Jürgen: Faith and Reason
- ▶ Heller, Hermann
- ▶ Kelsen, Hans
- ▶ Lassalle, Ferdinand
- ▶ Patriotism: Constitutional
- ▶ Schmitt, Carl
- ▶ Sieyès, Emmanuel-Joseph

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Constitutional Patriotism

▶ Patriotism: Constitutional

Constitutionalism

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What Are Constitutions?

Constitutionalism refers to the practice of establishing the society's basic laws. Those laws usually form the framework for organizing the government, set forth the procedures and powers attached to the various governmental institutions, and establish various rights of the citizenry. The basic laws that are a society's constitution are not, however, distinguished from nonconstitutional laws by performance of these functions. Nonconstitutional laws can and often do organize the government, set forth government powers, and establish rights, and constitutions often deal with matters outside these categories. Rather, the line between constitutions and nonconstitutional law is best drawn by reference either to where the laws stand in the chain of legal validity or to how entrenched the laws are against change.

Constitutions are the highest laws in the chain of legal validity in the sense that no law inconsistent with a constitutional law is legally valid, whereas the constitution's legal validity rests on its acceptance as fundamental law. (For this reason, because the validity of all laws turns on consistency with the constitution, all laws' status as laws rests ultimately on acceptance.)

Constitutions are also usually more entrenched against change than are nonconstitutional laws. The reason for this should be obvious. For were laws lower in the chain of legal validity more entrenched than higher level laws, their entrenchment could be circumvented by first repealing the less entrenched higher level laws that authorize the entrenchment and then repealing the now unentrenched lower level laws. (Note that for constitutions that are amendable – not totally entrenched – the amendment process might be regarded as higher in the chain of legal validity than the other parts of the constitution.)

If constitutions – and thus all laws – ultimately trace their authority to their acceptance, how is it possible for people to accept the authority of constitutions promulgated perhaps generations ago and that contain, as all constitutions inevitably will, provisions that people will perceive as unfortunate or even perverse? No constitution will be anyone's ideal constitution, except perhaps its author's.

Yet, as fragile as the necessity of acceptance would appear to render constitutions and the laws they validate, the appearance is misleading. For if the order the constitution establishes – its authoritative settlement of the inevitable controversies over what must be done – is preferable to anarchy from everyone's perspective and is the best settlement obtainable from everyone's perspective, then it may prove quite durable despite its many flaws.

Do constitutions need to be written? Do they need to be promulgated and adopted at some specific point in time? The United States Constitution is, of course, both a written document and one that was promulgated and adopted at specific times. But constitutions can be unwritten, and unwritten constitutions can come to be constitutions by virtue of official practices developed over time, making the date on which such practice-based norms attained constitutional status uncertain. Unwritten constitutions, the status of which depends completely on official practices, are not entrenched by reference to specific amendment procedures, but solely by reference to the degree of resistance of the constituting official practices to change over time.

Constitutional Rules, Standards, and Principles

Constitutional provisions, like all legal norms, can be either rules or standards, and many

constitutional provisions (and many nonconstitutional laws) are partly rule and partly standard. Rules are determinate norms that are understandable by those whose behavior the rules seek to control without regard to the values they hold or how they believe those values apply. Rules settle matters that otherwise might be controversial due to disagreements about facts and values.

Standards, on the other hand, are norms that leave matters unsettled. They require those to whom they are directed to engage in first-order practical reasoning to determine what is best to do under the circumstances. Those circumstances include the existence of rules and the matters those rules have settled. In other words, standards require first-order practical reasoning within the interstices of the rules.

Many believe that there is a third type of constitutional (and nonconstitutional) norm: the legal principle. Unlike rules, legal principles are not determinate and have no algorithmic formulation. They require controversial "weighings" to ascertain when and how they apply. And unlike standards, which require consulting a nonposited, preexisting moral order for their application, principles owe their existence and weights entirely to their promulgation.

Although many prominent constitutional theorists are proponents of legal principles, and although many jurists and lawyers claim to find such principles in various constitutional texts, some – including this author – are skeptical that principles as described above can actually exist. The controversy over principles turns on whether "weight" can be posited. Complex algorithms can be posited, but these are rules. And there may be moral principles that have "weight," but these do not owe their existence to human promulgation. So if it is asserted that a constitution contains the "principle" of federalism, or of separation of powers, or of freedom of expression – and if one doubts that such principles are preexisting moral principles – there is reason to be skeptical. For arguments about how such principles apply – about their "weights" – would seem to require an ontological truthmaker that is nonexistent.

The Authority to Settle Disputes over the Constitution's Meaning

As previously stated, one important function of constitutions is "constituting" the government – creating its institutions and offices, its procedures and powers. For obvious reasons, it is best to do so through rules rather than standards, as rules authoritatively settle controversies while standards leave them unsettled. And to the extent the constituting parts of the constitution contains standards, it will be important for whatever institution has the authority to do so to translate those standards into determinate rules – to "rulify" the standards. A society can abide lack of settlement of controversial matters and thus standards in many domains, but not in the domain of its basic rules of the game. If, in the United States, we could not by reference to determinate rules ascertain who was President, who was elected to Congress, who was on the Supreme Court, or when a bill had become law, we would be threatened with anarchy.

Even if a constitution consists primarily of rules, controversies over its application will still arise. The meaning of the rules may be less than completely clear in some of their applications. Or there may be disputes over the facts on which the rules' applications turn. Or they may be lacuna not covered by rules and left to be resolved through inherently controversial standards. In such cases of constitutional controversy, there will be a need for some institution's having the ability to settle the matter authoritatively. The ability to effect authoritative settlement does not, of course, suggest infallibility. The institution with such supreme settlement authority may misinterpret the constitutional rule in dispute, apply the rule incorrectly to the facts, or engage in flawed first-order practical reasoning under a standard. In such a case, there will be a conflict between what the constitution really requires and what the institution with supreme settlement authority has declared the constitution requires. If, however, that institution really does possess supreme settlement authority, then its ruling will trump the constitution, correctly interpreted and applied.

In the United States, the Supreme Court is regarded as possessing supreme settlement authority. It is debated whether that authority comes from the written constitution itself or is instead an unwritten constitutional norm that was asserted in practice and accepted. It is also debated whether the Court's settlement authority extends beyond the particular cases that the Court resolves and governs all future cases (until the Court changes its mind). The Court itself takes the latter view. And if the people accept the Court's view of the authority of the Court's precedents, then the people will have accepted a method for constitutional amendment other than the method prescribed in the constitution itself, namely, amendment through a mistaken constitutional decision that is then deemed to be supremely authoritative until overruled by the Court itself (or by a constitutional amendment of the constitutionally prescribed type).

What is clear, however, is the desirability of settlement of constitutional controversies, at least in the domain of basic institutions, procedures, and powers. If the constitution contains standards, unclear rules, or rules whose applications turn on debatable facts – and all constitutions of any consequence will – then an institution with the authority to settle constitutional controversies will be necessary. If the constitution itself fails to designate that institution, practice under the constitution will probably do so.

Constitutional Rights: The Possibilities

Constitutions also set forth various rights. There are two ways they may do this.

First, a constitution may create a right through a determinate constitutional rule. If it does so, it does not matter whether there is a moral right corresponding to the constitutional right. For the latter is solely the product of a posited constitutional rule. In the United States Constitution, it is likely that the right against self-incrimination – at least as it was originally intended – and the right to a jury trial have no counterparts in morality. And even if there is a moral right of freedom of expression, it is quite likely that the First Amendment's "freedom of speech" was intended to be a narrow rule proscribing requiring licenses prior to speaking rather than invocation of the more general moral right.

Second, a constitution may incorporate by reference real moral rights. Many believe that various provisions of the United States Constitution were just such incorporations by reference of rights that exist independently of their constitutional mention. Freedom of speech, free exercise of religion, and equal protection are a few of the usual candidates.

There are three aspects of constitutionalizing by reference real moral rights that deserve mention. First, if real moral rights are incorporated into a constitution so that they determine the legal and not just the moral validity of other laws, they must be "domesticated." What I mean is that as constitutional rights, they must be deemed consistent with the other parts of the constitution – its various rules regarding structures and specific rights – even if as real moral rights, they are quite possibly inconsistent with those other parts of the constitution. And similarly, as constitutional rights, moral rights must be deemed consistent with the pronouncements of their content by whatever institution has supreme legal authority – in the United States, the US Supreme Court. If real moral rights were not domesticated in these ways, then neither the supreme legal authority's decisions nor the specific rules in the constitution would be thought to have supreme legal authority in the eyes of those who thought such rules and decisions to be inconsistent with real moral rights. Put differently, unless in incorporating real moral rights into the constitution they are domesticated by subordinating them to the other parts of the constitution and to the supreme legal authority's decisions, the inevitable controversies over what real moral rights require would undermine the settlement function of the constitution.

The second point about a constitution's incorporation of real moral rights is related to the first: A decision is required regarding which institution's view of real moral rights should be treated as supremely authoritative for purposes of constitutional law. To narrow the focus to the usual

suspects, should the legislature's view of real moral rights be authoritative, or should the authoritative view be that of the courts?

Keep in mind that everyone – the legislature, the courts, and the people themselves – is subject to the requirements imposed by real moral rights. So the question is never whether the legislature is free to disregard real moral rights, or whether the courts are free to do so. The question is whose view of what those rights require should be the authoritative view within the legal system.

Some democrats believe that the legislature's view should be authoritative. However, because the legislature is always subject to the constraints of real moral rights, whether or not they are incorporated into the constitution, it is pointless to incorporate them unless one plans to make them judicially enforceable against the legislature (whether or not the legislature is able thereafter to override that determination). The point bears repeating. Constitutionalizing real moral rights only makes sense alongside judicial authority to determine their content and enforce them against the legislature, not because courts are superior to legislatures when it comes to determining the content of moral rights, but because legislatures are already supposed to make their legislation consistent with real moral rights, whether or not constitutionalized. If courts are not superior to legislatures in determining the content of real moral rights, either epistemically or motivationally, it makes no sense to constitutionalize those rights.

So if real moral rights are to be incorporated into a constitution, they must be subordinated to the constitutional structures and to some institution's determination of their content. And therefore an institution must be chosen that will have the authoritative say regarding that content, though incorporation of real moral rights strongly implies that the chosen authoritative institution will be the courts. The third thing to note about incorporating real moral rights is that there is no guarantee that moral reality will contain the moral rights referred to in the constitutional text. There may be no moral right of equality, or of freedom of expression, or of freedom of religion. Or those rights may just be aspects of some moral right that is not named in the constitution. Or the correct moral theory might be a consequentialist one, like utilitarianism or egalitarianism, in which the only moral "right" is that all actions conform to the consequentialist norm. If constitutional authors wish to constitutionalize real moral rights, they had better be certain that the rights they name are real moral rights. But, of course, they cannot be certain. They would be better off just telling the courts to enforce against the legislature whatever moral rights there actually are without attempting to name them.

I have now discussed two of the three possibilities constitutional authors might have in mind in constitutionalizing rights. They might be creating specific rights in the form of determinate rules that define the rights, such as a rule forbidding judicially compelled incriminating testimony or a rule forbidding requiring a license to speak. Or they might be attempting to incorporate by reference real moral rights. The third and final possibility is that in constitutionalizing a right, the constitutional authors are inventing or creating the right, but without giving it any determinate form – that is, without embodying it in a rule or set of rules. Rather, the right is supposed to function as a principle or value, with weight, not as a specific rule such as the rule against requiring a license to speak.

I have already mentioned the problem with this third possibility. It may not be possible, however hard one tries, to invent a right that is not coterminous with a determinate rule. If there is nothing in the world preexisting the constitution to which this right refers – if this right comes into being only by virtue of its being mentioned in the constitution – then its contours and weight cannot be assessed nonarbitrarily, as there is nothing in the world that would make any such assessment true. The courts would be making it up were they to declare that such a constitutional right applied or did not apply, outweighed the government's interest in its legislation or did not outweigh it.

What distinguishes these legal principles or values from legal standards – legal norms that are not determinate rules? Do not standards require judges to fill in their requirements? Standards do require judges to fill in their requirements, but fill

them in by consulting reasons that preexist the legal system, most notably, moral reasons. A standard essentially instructs the judges to do what is morally best within the space left open by legal rules. Standards do not create the reasons on which judges are to rely in fleshing them out.

Implications for Constitutional Interpretation

I have argued that constitutional provisions creating governmental structures are like assembly instructions for toys and gadgets. They are assembly instructions for creating a government. Constitutional rights provisions, I have argued, can be of two types: determinate rules creating the rights, or incorporation by reference of real moral rights. Finally, I have argued that creating rights other than through determinate rules may be an impossibility.

So what do these points suggest is the proper way to interpret constitutions? Although this is an extremely contentious matter, and there are a multitude of views on offer, this author believes that reflection on the foregoing description of the constitutional project suggests constitutional interpretation should be an inquiry into the authorially intended meaning of the constitution's provisions. If that inquiry reveals that a provision is a rule, its meaning will be what its authors intended it to mean. If it is a standard, or the incorporation by reference of principles of morality or prudence, interpretation is at an end, and the task of implementation switches from interpretation to first-order practical reasoning.

Constitutional Change, Organic and Revolutionary

Of course, it is always possible for there to be some sort of bloodless constitutional revolution. Constitutions are fundamental law only if they are accepted by the people as fundamental law. And the people may wake up tomorrow and begin accepting as fundamental law some new instrument. The US Constitution was not an organic continuation of the Articles of Confederation. It was just run up a flagpole, and the people saluted. If they had not, the US Constitution would have no more authority today than the Articles of Confederation or the Constitution of the Confederate States of America.

Therefore, if judges routinely depart from the authorially intended meanings, and the people accept these new judicial amendments as fundamental law, then we will have had several constitutional revolutions. Several new constitutions, superficially resembling but actually different from one another, will have come into being through successive judicial amendments and popular acceptance of those amendments. But the real question would then be whether the people were actually aware of what is going on. Was their acceptance itself dependent on their belief that the courts are not amending the constitution from the bench but are interpreting it?

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Constitutionalism: Cosmopolitanism

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Introduction: Constitutional Language in the International Legal Debate

In recent decades, constitutional language has been used equally to face challenges of globalization and fragmentation of International Law, to explain the phenomena of supranational integration as well as to evaluate the characteristics of human rights protection organizations. The versatility of constitutional language makes it more difficult to clearly define the limits of the different debates arising when the word "constitutionalism" is applied in the international debate, and therefore, there are often conceptual confusions.

Indeed, the conceptual vocabulary of constitutionalism is often used in several ways in academic debates related to the global setting (Diggelmann and Altwicker 2008; Lang and Wiener 2017; Schwöbel-Patel 2011). A variety of different expressions are used, such as "Global Constitutionalism" (Peters 2009), "Transnational Constitutionalism" (Neves 2013), "World Constitutionalism" (Macdonald and Johnston 2005), "Meta Constitutionalism" (Walker 2002), "Multilevel Constitutionalism" (Pernice 2015), and "Cosmopolitan Constitutionalism," which is under revision here. These expressions are sometimes used synonymously, but at other times they represent different approaches to whether it is possible to use the constitutional language beyond state boundaries.

A helpful way of categorizing such approaches is to distinguish between descriptive and normative approaches (Klabbers 2009) based on the analysis of the main purpose of each perspective when they use the constitutional language beyond the state. Before understanding Cosmopolitan Constitutionalism in this great conceptual range, we must consider that the term "constitutionalism" is sometimes used for descriptive purposes, that is, to argue that the global society has a constitution as evidenced by the actual or doctrinal use of the word "constitution" to designate the constituent documents of international organizations, such as the World Trade Organization (WTO), the World Health Organization (WHO), or the United Nations (UN) (Fassbender 1998; De Wet 2006), or to showcase the analogical affinity between the ordinary or historically entrenched meaning of constitutionalist and corresponding phenomena in the domain of International Law (Diggelman and Altwicker (2008): 637–39). The same term is also used for normative purposes in the context of using theoretical tools of constitutionalism to advocate the introduction of new concepts and institutions that can better address the challenges of globalization. Cosmopolitan constitutionalism falls within this second group of approaches.

Concept

In this context, cosmopolitan constitutionalism may be defined as an ambitious normative project aimed at setting conditions for the enjoyment and effective exercise of human rights, and to establish limits to power and conditions for its exercise, considering the particularities of the post-national setting. In short, it seeks to redefine the conditions for exercising legitimate authority within the context of neoliberal globalization, considering humanity as the standard of constitutional legitimacy. Described in this way, cosmopolitan constitutionalism is part of the "normativist" schools of thought that are highlighted in the editorial N° 1 of the journal "Global Constitutionalism" (Wiener et al. 2012).

The use of the term "cosmopolitan" (instead of "global") to describe the project is justified on conceptual and strategic grounds. The former highlights that, under the current conditions, it is

important to use the "cosmopolitan" adjective because the use of "global" as a concept carries the risk of missing out on the prescriptive content of cosmopolitanism. Indeed, the "global" denomination has also been used to describe globalization within the law or to discuss neoliberal policies. Globalism has hidden under an apparent neutrality a certain ideology that implies deregulation and liberalization, and it is not necessarily linked with cosmopolitan principles.

Also, there is a conceptual (Brown 2017; Corradetti 2017), historical, and empirical (Kumm 2009) connection between these two ideas. Corradetti highlights the core of the question: "If you agree that state legitimacy depends on both an internal and an external legal standard, then you are likely to be a global constitutionalist. But if you also think that these are juridical expressions of a principle of universal equal freedom, then you are a cosmopolitan constitutionalist" (Corradetti 2016: 3).

Cosmopolitan constitutionalism asserts that the legitimacy of "traditional" constitutionalism (understood as state constitutionalism) has taken a cosmopolitan turn, since national constitutional legitimacy now depends, in part, on how state constitutionalism is integrated and relates to the larger global legal–political sphere (Kumm 2013: 612). This integration is part of the constitutional legitimacy as a way of embodying the promise of constitutionalism in a post-national setting—in a contemporary setting, the promises of constitutionalism cannot be realized because individuals are embedded in anonymous networks with no control, where domination has become the rule. Accordingly, the standards of constitutional legitimacy arise from an integrative conception of public law which transcends the national–international divide and acquires a cosmopolitan character. Humanity becomes a standard of justification for constitutional decisions. In practice, this transforms constitutional democracy into a community that "includes humanity when acting as a political community open to reinterpretation and revision of its principles in order to do justice to humanity" (Bohman 2007: 116/117).

From a legal perspective, the crystallization of this duty arises from Article 28 of the Universal Declaration of Human Rights, which, if vested with legal effect, would bind states to move towards cosmopolitan constitutionalism: "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

Characteristics, Approaches, and Critics

It is essential to highlight the connection between cosmopolitan constitutionalism and legal pacificism, developed by scholars such as Kant, Bobbio, and Kelsen (García Sáez 2019). Despite the differences regarding the objective of the project (it is more ambitious than peace through law), the philosophical foundations of cosmopolitan constitutionalism lead us back to Kant and his reflections on cosmopolitan law (Kant, 1917 [1795]) and through the path developed by Kelsen (2007 [1944]) and Bobbio (1982, 1997) in their institutional proposals. This is an important characteristic because it allows us to situate this project in the field of legal theory, not merely in a sociological or moral perspective. Cosmopolitan constitutionalism is, above all, a legal project.

This aspect allows us to refer to another, related concept, cosmopolitan or global democracy (Archibugi 2008; Held 1995). While cosmopolitan democracy is concerned with extending democracy beyond the state, cosmopolitan constitutionalism incorporates this concern in constitutional terms, i.e., under the values constituted by the trinity of human rights, democracy, and the rule of law (Kumm et al. 2014). Following Kleingeld's taxonomy (Kleingeld 1999), cosmopolitan constitutionalism is linked to political and legal cosmopolitanism.

Within cosmopolitan constitutionalism, there are two main approaches. Some scholars have arrived at this concept by reflecting on law and democracy in the context of a general reflection on the political philosophy and legal philosophy, and other scholars have developed this concept through specific reflections on the constitutional character of the international arena. In the first group, we find scholars like Habermas (2001, 2008, 2013), Ferrajoli (2018, 2022), and Bohman

(2007). They develop a normative proposal as part of a broader theory of law and democracy that culminates in a cosmopolitan aspiration. In the second group, we find scholars such as Kumm (2004, 2013, 2016), Brown (2012, 2013), Stone Sweet and Ryan (2018, 2020), and Benhabib (2006, 2011), among others, whose work emphasizes the reconstruction of a specific hermeneutic frame to comprehend the relation between international and national relationships in constitutional and cosmopolitan terms. There is a common core in all the proposals, which allows us to speak of cosmopolitan constitutionalism as a specific way of understanding constitutionalism. This common core shares the following aspects: (1) it makes a pessimistic diagnosis of the state of constitutionalism in the post-national context, highlighting the incapacity of contemporary constitutionalism to achieve the goals of protecting democracy, human rights, and the rule of law; (2) it is proposed as a transformative and critical project to confront this scenario; (3) it provides a cosmopolitan twist to the concept of constitutional legitimacy; and (4) it is an heir of legal pacifism, as we have explained.

The main differences between the approaches to cosmopolitan constitutionalism are related to the conception of democracy that underlies the legitimacy model espoused in the work of different scholars. Also, it bears directly on the legal and political proposals related to the architecture of this model. We can talk about three models: (1) a republican-deliberative model of legitimacy (Habermas, Bohman), (2) a guarantee-based model of legitimacy (which is inspired by the "garantismo" of e.g., Ferrajoli), and (3) a supranational reason-based model of legitimacy (Kumm, Stone-Sweet, and Ryan). Inspired by deliberative democracy, Habermas proposes a disaggregated democracy, a multilevel constitutional system with a differentiation of competencies and various chains of legitimacy. Bohman's republicanism proposes a decentralized *demo*cracy, with a particular emphasis on mechanisms of democratic experimentalism. Ferrajoli highlights the necessity of strengthening international human rights guarantees and puts forward a specific proposal for a "Constitution of the Earth" (Ferrajoli 2022). Finally, Stone-Sweet, Ryan, and Kumm, for example, focus on the development of principles and standards of supranational public reason of a procedural and substantive nature to assess the legitimacy of authoritative public decisions beyond the state, emphasizing existing models, such as the European Union, and focusing on phenomena such as judicial dialogue.

To adequately characterize this project, it is also helpful to review who resist these ideas (Kumm 2018: 183). In general, it is possible to argue that cosmopolitan constitutionalism stands as a response to normative indifference about the principle of international legality (Peters 2009) and to "methodological nationalism" (Beck 2006) as a framework for political–legal debate. In this sense, specifically, criticisms come from the following strands of thought: state-focused understandings of constitutionalism (Grimm 2012; Loughlin 2022), radical pluralism and agonist positions (Krisch 2010; Schwöbel-Patel 2011), new sovereigntism (Benhabib 2016; Goodhart and Taninchev 2011), and political realism (Zolo 2000).

Conclusion

Behind these positions, it is possible to see that cosmopolitan constitutionalism allows us to return to classic debates in legal-political philosophy, such as the relationship between law and power and law and morality as well as the shaping of the demos. All these familiar issues can receive novel interpretations in light of the aspirational cosmopolitan postulate that all human beings, regardless of their political affiliation, cultural heritage, or civic ideology, can and should be members of a single universal community. Constitutional institutions, conventions, and practices are one such avenue for turning this aspiration into reality. This avenue is anything but exclusive of other avenues of universal belonging including universally accessible economic markets, universal distributive justice, universal civic education, a global roll-out of a universal basic income, and cosmopolitan democracy.

Cross-References

▶ Constitutionalism
▶ Constitutionalism: World
▶ Cosmopolitanism
▶ Transconstitutionalism

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Constitutionalism: Political

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Introduction

Political constitutionalism can refer both to a theory of what a constitution is or should be and to a doctrine of Commonwealth constitutionalism. These two dimensions are not disconnected and often overlap (for examples, in recent scholarship see Gordon 2015; Mac Amhlaigh 2016). In this entry, both dimensions will be taken into account. The structure of the entry is simple: in the last decades, political constitutionalism – a discourse on the political dimensions of modern constitutions – has been articulated in three waves, each one marked by a specific methodological angle and its own legal theory. These are functionalist (what political constitutions *do*), normative (what political constitutions *ought* to do), and reflexive (what is it that is *political* about political constitutions). Let us explain each in turn.

The Functionalist Wave of Political Constitutionalism

The first – what we call *functionalist* – wave of political constitutionalism was most famously articulated by the late JAG Griffith in his 1978 Chorley Lecture, "The Political Constitution." Although he did not repeat, let alone define (at least not explicitly so), that titular phrase in the lecture, Griffith's methodological approach, here and elsewhere, was to defend the political constitution against those who agitated for its reform. In 1978, this meant tackling head on the proposed reforms of a Bill of Rights, an elected second chamber, legal limits to Parliament's legislative competence, devolution to the nations of the UK and to the regions of England, a more sophisticated system of administrative law, the creation of a Supreme Court, and an entrenched written constitution (Griffith 1979, 8–9). Later, it was the advance of the common law, as advocated by Sir John Laws and Sir Stephen Sedley, and the enhanced judicial powers created by the Human Rights Act that drew his ire (Griffith 2000, 2001). It was Griffith's view that, taken together, the object of this "new constitution" would be to institutionalize a theory of government limited by law (Griffith 1979, 8). By way of contrast, the function of the "old" constitution – uncodified, not entrenched, with legislative power centralized at Westminster and executive power at Whitehall, and underpinned by the unlimited legislative supremacy of the Crown-in-Parliament – was, he said, precisely the opposite: to *enable* government. The very heart of the political constitution was, as he saw it, that the government of the day may take whatever action it deems to be necessary for the proper government of the UK, subject only to two limitations: (1) that they would require express legal authority (from statute or from prerogative) in order to infringe the legal rights of

others, and (2) that in order to change the law, including where it sought to expand the reach of executive power, they would require the assent of Parliament (Griffith 1979, 15). Put another way, Griffith's fundamental *political* objection to the shift from a political or parliamentary constitution towards a legal or judicial constitutionalism was that it would deprive the government from exercising its power as best it sees fit to govern in the interests of the UK (Griffith 1979, 16).

Whilst Griffith wrote with a particular jurisdiction firmly in mind, it is possible to extrapolate from a second, philosophical, objection a more general view about the nature of constitutions and of politics more broadly. This is so because his defense of the political constitution begins neither from indigenous constitutional principles nor from a moment of revolution unique to the UK's constitutional history, but from the human condition itself. The reality of politics, Griffith said, is one of conflict: ubiquitous, inevitable, and intractable conflict. The ubiquity of conflict was self-evident to him: "All I can see in the community in which I live," Griffith said, "is a considerable disagreement about the controversial issues of the day and this is not surprising as those issues would not be controversial if there were agreement" (Griffith 1979, 12). That these conflicts, such as they exist, are *inevitable*, in Griffith's view, is because they spring from our very nature, and this is in two ways. First, because we are – all of us – *both* individual and social animals, and the rights, principles, and interests that we hold dear in each capacity are neither (necessarily) comparable, co-equal, nor, and this is the point, compatible. We are born and we are conflicted, indeed, *inherently* so. Secondly, because we seek a life lived with others. Be it in the company of the family and friends with whom we are surrounded in our private lives or the communities in which we live, work, and act socially, economically, and politically, our interactions with others serve only to multiply the differences and disagreements, conflicts and compromises that characterize our living together. Indeed it was the recognition of these tensions which led Griffith to the view that conflict is not only inevitable but intractable. "We find this [condition] difficult to accept," he said, "and so we continuously seek the reconciliation of opposites and become frustrated and aggressive when this fails" (Griffith 1979, 3). For Griffith, neither politics, "what happens in the *continuance* or resolution of those conflicts," nor law, which is but "one means, one process, by which those conflicts are continued or *temporarily* resolved" (Griffith 1979, 20), are capable of delivering us from conflict. Here Griffith's account closely aligns with that of a contemporary whose own defense of politics neatly dovetails with this first wave. For Bernard Crick, a truly political form of government is one which accepts "the fact of [the] simultaneous existence of different groups, hence different interests and different traditions, within a territorial unit under common rule" and whose method is to conciliate those interests "as far as possible" (Crick 1962, 17–18).

By taking such an approach, Griffith and Crick each attack what they see to be the lie at the heart of the project of legal (or liberal) constitutionalism: the fiction that these conflicts ought to be contained – and can be contained – by law. For Crick, the liberal "wishes to enjoy all the fruits of politics without paying the price or noticing the pain," in other words without engaging in the conflicts, disagreements, and conciliations that define political life (Crick 1962, 123). The liberal, he says, sees politics as being the stuff of political parties and politicians who may act in their distinct sphere in any way they please so long as they do not infringe upon the rights of the private citizen. In this way, Crick holds that the liberal is guilty of "narrowing the scope of politics drastically and unrealistically" (Crick 1962, 123). For Griffith, the liberal's approach to the constitution "looks first to the individual and seeks to protect him and his 'rights'" from the tumult of politics (Griffith 2000, 176). Yet because conflict is inevitable – because disagreement *about* rights (which rights are to be protected, to what extent, in what circumstances, with what exceptions, trumping which others in the event of a clash) is itself a political disagreement; because statements of rights are so abstract as to restate political conflict while posing as its resolution (Griffith 1979, 14); because so-called rights are but political claims to be considered alongside the claims of others (Griffith 1979, 17) – any project which seeks to

contain political conflict by the means of entrenched, and therefore supposedly apolitical, legal rights will succeed only in displacing political decision-making from representative and democratically accountable politicians (accountable in the sense that they are removable (Griffith 1979, 16)) into the hands of unrepresentative and unaccountable judges. Political institutions might need to be strengthened (Griffith 1979, 16) to meet the task but for Griffith, as for Crick, they are to be preferred for their capacity to channel conflict productively in a way that functions to enable government (left or right, if it so dares) to initiate radical societal change (Griffith 1979, 12).

With its outright rejection of natural law and natural rights thinking, and a focus on the function of constitutional law in securing the stability of the public realm, the underlying legal theory of the first wave recalls the utilitarian positivism of Bentham. The functionalism of the first wave is therefore to be seen in the stripping away of (what its proponents see to be) legal fictions – that this or that right is so fundamental as to be beyond disagreement; that judges are neutral arbiters of disputes and not themselves political actors; that in the Rule of Law is to be found (as one judge has subsequently put it) the "ultimate controlling factor" of our constitution – in order to present the realities of political power. For Griffith a substantive conception of the rule of law was "an invaluable concept for those who wish not to change the present set-up": a liberal "fantasy" thrown up to protect certain legal and political institutions from themselves becoming the subject of disagreement (Griffith 1979, 15). By contrast, to rule politically was, rather, to embrace and to harness the power generated by political conflict (Griffith 1979, 12): the function of law to achieve the objectives decided by the political process in the face of reasonable disagreement (Griffith 1979, 15).

The Normative Wave of Political Constitutionalism

The second wave of political constitutionalism emerged in the late 1990s and early 2000s as a response to the hegemonic position attained by legal constitutionalism. During a period which saw an aggressive expansion of administrative law and judicial review, the carving out by the judiciary of common law rights, and enhanced powers of the judiciary to protect human rights under both the Human Rights Act 1998 and the devolution legislation into which the ECHR has been hard wired, not to mention the creation of a Supreme Court, it was argued by a new generation of political constitutionalists that their predecessors had too easily let their opponents off the hook. In particular, by failing to articulate a convincing *normative* case for the political constitution, it was said that "the legal constitutionalists have never had to show that the loss of the political model entails risking anything of value" (Tomkins 2005, 39).

In the second wave can be included, among others, Jeremy Waldron, Richard Bellamy, Adam Tomkins, and Keith Ewing. What gathers this literature is the authors' shared view that parliamentary government is not just *what happens* but that parliamentary government happens for good normative reasons. However, where they differ is in the identification of what precisely they believe the value of parliamentary government to be.

For Waldron, the political constitution is normatively attractive because of what he calls "the dignity of legislation" (Waldron 1999). His argument relies on an Arendtian assumption that he defines as the two "circumstances of politics": (1) the need to agree upon a common course of action (2) in the face of reasonable disagreement about what that course of action should be. This condition of plurality calls for a fair decision-making process for managing disagreements (Waldron 2016). Parliamentary government provides the best normative solution because it ensures that the plurality of opinions is respected through the legislative process. The emphasis here is put on the virtues of parliamentary lawmaking vis à vis judicial lawmaking. According to Waldron, only the former process recognizes the plurality of the human condition and provides for a procedure for settling normative disagreements. Under certain conditions, parliamentary politics delivers important goods: epistemic accuracy in deciding upon rights, deliberative legitimacy, and representativity. Therefore, rights are better

protected through legislative means. On the contrary, judicial law-making cannot deliver most of these goods and violates plurality in a fundamental way. As a consequence, it should be admitted only in weak forms, as advocated also by Mark Tushnet (2013).

Bellamy, like Waldron, takes as his starting point the proposition that the circumstances of politics are those of reasonable disagreement. However, whereas for Waldron the circumstances of politics are redeemed by the dignity of legislation, in Bellamy's account (Bellamy 2007), it is political equality that allows us to live together notwithstanding our disagreements about the outcomes of the political process. Here we are not talking about substantive political equality – it is not that the political process produces outcomes that we can all (equally) agree *with*.

Rather, it is an equality of input: that the contest between two dominant parties for the votes of citizens required in order to win the opportunity to govern – a contest in which each vote counts equally and which demands of those parties that they "hear the other side" on the controversial issues of the day – creates the conditions for decisions to be made that we can agree to even if they are decisions that, on their merits, we might reasonably disagree with (Bellamy 2011). In this way, Bellamy says, the political constitution is best placed to secure our freedom from arbitrary domination: be that domination by a powerful political elite (whose power is protected by e.g., a requirement for constitutional amendment only a super-majority) or by a constitutional court with a "privileged evaluative viewpoint" to determine proper balance between individual rights and the public interest.

In common with Bellamy, Adam Tomkins offers a republican defense of the political constitution. Parliamentary government does not *just* happen, according to Tomkins, but *ought* to happen as the surest way to protect the freedom of citizens from domination. However, for Tomkins the source of domination – that against which the political constitution is set – is the ever expanding scope and reach of executive power. The "reality of government", in Tomkins' analysis, is that "the government of the day will try to do whatever it thinks it can politically get away with" (Tomkins 2005, 10), and so he reassesses the historical and contemporary accounts of the Common Law constitution (in which government was held primarily to account by the judicial branch) in order to demonstrate the failures of such a constitution and the underrated strength of parliament as an institution capable of democratically and effectively holding government to account. Tomkins' is a critique of liberal-legalism (according to which political activity ought to be constrained by law (Allan 2001)) and the prominence which it gives to a conception of freedom – freedom from interference – that undermines the public realm. Where the liberal/legal constitutionalist portrays the relationship between the government and its citizen as having a contractual nature capable of being adjudicated in the dualist and zero-sum environment offered by the courts, for Tomkins the political constitutionalist believes the government to hold power in trust on behalf of the citizens. Thus, freedom from domination is not the infrequently exercised "liberty of the moderns" engaged only when the interests of private actors are directly interfered with but is an altogether more demanding freedom: a plural conception of freedom that requires "an active and engaged citizenry and a deep participation in political affairs" (Tomkins 2002, 175). Thus he re-visits the constitutional tumults of seventeenth-century England in order to demonstrate that – once upon a time – Parliament itself was the vehicle by which such a pluralistic form of freedom could be exercised against a tyrannical monarch (Tomkins 2005, Chap. 3) before making the case that Parliament can and ought to again exert itself to such ends (Tomkins 2005). The place of public law is then, for Tomkins, not to repel government but to open it, be it by the creation of institutional channels by which citizens might *contest* government or by empowering citizens meaningfully to exploit those channels through, for example, the passage of broad freedom of information laws (Tomkins 2002, 175).

The political constitutionalism of Keith Ewing shares with those above the view that parliamentary government does not just happen. Expressing his frustration that Griffith himself did not directly engage with the underlying *normative* case, for

Ewing "the legal principle of parliamentary sovereignty," what he calls the "core legal principle of the political constitution," amounts to "no more and no less than the legal principle underpinning the political principle that in a democracy there should be no legal limit to the wishes of the people" (Ewing 2013, 2118). Thus for Ewing, political constitutionalism is not only about responsible and accountable government – about removing "them" (the government, though this is undoubtedly an important aspect) – but more than this it is about empowering "us" (Ewing 2013, 2117). It was this capacity for radical change, the "transformative potential" of the political constitution which he attributes to its very openness that was once so attractive to progressive lawyers such as Griffith, and it is this which has warranted its revival by the lawyers of the second wave. Law, in this account, is still seen in positivist terms, but for the second wave, it is a normative positivism (Bellamy 2011, 90). The sources of law cannot be in contradiction with forms of democratic politics.

The Reflexive Wave of Political Constitutionalism

While initially refreshing, the view put forward by the second wave has soon appeared as too narrow (Minkkinen 2013). During the last decade, a third wave of political constitutionalism has emerged, with the intention of retrieving and vindicating some precious insights from the first while, at the same time, overcoming the normative constraints of the second. Contrary to the first and second waves, the third is not reactive but reflexive. Rather than define the political constitution *against* its agitators – liberal, or legal, or judicial constitutionalism – this new turn is characterized by an internal reflection which addresses the political constitution on its own terms. Not quite a constellation, the third wave resembles a *nebula* which can be identified, despite its uncertain and blurred boundaries, by observing certain traits common to different works. The first of these traits concerns the operative context: the third wave appears to be much less concerned by the rise of judicial power and more focused on the analysis of the conditions which make possible the emergence, the development, and the preservation of a political constitution. As a consequence, rights review is not their main or exclusive focus. Content-wise, the works of the third wave are more prone to look beyond formal institutional arrangements and to inquire into political practices, governing arrangements and customs. Methodologically, the works which belong to the third wave are not functionally driven nor do they aim primarily at a normative outcome. At their core, these works constitute an exercise in understanding, which contain a twofold reflexive quality. First, methodologically, this is an approach based on the analysis of the contexts and conditions which enable or stifle the political constitution; secondly, and substantively, this is a way to keep the question of political action open within the discourse and practices of political constitutionalism. Thus the third wave embraces explicitly a question hitherto (and surprisingly) taken for granted in each of the first and second waves: what, precisely, is *political* about the political constitution. Answering this question requires those who we call reflexive political constitutionalists to look beyond legislation and accountability as the *means* of political constitutionalism in order to account for the rise of modern constitutions themselves as political objects.

The most coherent and developed effort in the direction of a reflexive take on political constitutionalism is visible in Martin Loughlin's "political jurisprudence" (Loughlin 2003; Loughlin 2010; Loughlin 2016). Loughlin's reflection aims at retrieving the conditions which made possible the rise and development of modern public law in the first place. This entails a shift from rights review to the generation of political power as the main focus for constitutional understanding, as well as the conceptualization of the space within which political constitutions can emerge. According to Loughlin, the place of political constitutions, in modern times, has been the European State. Contrary to Griffith, Loughlin takes the modern state as the main *juridical* unit and the separation between sovereign and government as the enabling factor for generating political power.

Therefore, even the development of the British model of constitutionalism is rightly placed within the wider context of modern European constitutionalism. Furthermore, the history and the explanation of parliamentary sovereignty are located in a framework that allows seeing the continuity and the differences with other European models of constitutionalism. In so doing, Loughlin suggests that parliamentary supremacy is not reducible to a normative doctrine nor is it fully understandable if not studied against the background of the institutionalization of the political unity of England (extended later to other nations by treaties or colonization). The reason for the success of the model of parliamentary government rests on its state-building capacity, which is the precondition for the generation of political power. The task of political jurisprudence is not to provide a normative justification but to reconstruct the grammar of public law. It is not by chance that Loughlin writes of a grammar (as an analogy) of public law, which provides a scheme of intelligibility. From the prism offered by this grammar, power and freedom are observed as political creation par excellence: "Just as the rules of grammar are not restrictions on speech but are possibility-conferring rules that enable us to speak with greater precision, so too should the rules and practices of public law be seen not as restrictions on power or liberty but as rules that are constitutive of the meaning of these terms" (Loughlin 2010, 178).

Note that this grammar is local and not universal knowledge, as it is more the product of prudential reasoning than morality (hence, the autonomy of public law). Through the study of the grammar of public law, "we acquire knowledge of the words and symbols of the language in conjunction with an understanding of the appropriate circumstances in which to use them" (Loughlin 2010, 179). Here, Loughlin implies that knowledge of the practices of public law can be acquired only by paying attention to their implicit assumptions and background conditions. The pay off, again, is hermeneutic and not normative: that lawyers can understand better the nature of their own constitutional orders. Loughlin's reflexive approach shows that law and politics are actually intertwined because they form the backbone of the constitutional order. Law is part of a wider order whose function, in modern times, is to create political power. Knowledge of the basic tenets of a constitutional order is therefore political and legal at the same time. It is *juristic* knowledge. The political stake of modern public law is therefore that of being a productive force, in particular of power and freedom. To achieve this, Loughlin reminds us that two enabling factors are necessary: a juridico-political unity (a *nomos*) immanent to sovereignty and an effective exercise of the art of governing society. For Loughlin, political jurisprudence exists in the interplay between these factors which both constitute and limit the art of public law.

In a series of articles, Graham Gee and Grègoire Webber (2010, 2013a, b) have also urged political constitutionalists to drift their attention toward the grammar(s) of public law. Their starting point is epistemic: that knowledge of a constitutional order and the possibility of making sense of it heavily depend on the understanding of its language. The target is the dominant form of abstract rationalism in constitutional studies. This is the case because public lawyers tend to adopt a sloppy and vague language, which does not reflect the underlying constitutional realities which they encounter. According to Gee and Webber, a "rationalist" view of public law promotes a language of principles, developing in this way "an understanding of the constitution that focuses only on, and in turn exaggerates, certain features of our political and legal arrangements and [. . .] provides a false and misleading education in public law" (Gee and Webber 2013b, 712). Theirs is a call to revive certain aspects of Griffith's scholarship: the attention to the political culture of the institution and its working arrangements were already placed by Griffith himself against the metaphysics of principles. Gee and Webber also urge constitutional scholars to think politically about public law. This begins "with an awareness of [. . .] the underlying relationships within legal and political practice" (Gee and Webber 2013a, 2151). This is an invitation to look beyond the formal proceedings in courts and in parliamentary assemblies in order to grasp the tenets and the functioning of the political constitution. The core knowledge for the political

constitutionalist ought to be the varied and daily practices which animate constitutional and political life. The political constitution is at work during parliamentary proceedings, but by far not only there. What is not publicly visible is equally relevant: A nexus of micro- and macro- political and legal processes shape the political constitution and, crucially, this forms the quintessential object of knowledge for public lawyers. Such an approach implies a careful and accurate reconstruction of the complexities of these institutional practices, which should not be limited to parliament but extended to the judiciary and the executive. Otherwise, the unreflective use of principles culminates in a serious pathology: constitutional discourse is trivialized by taking up a "placeholder constitution." The grammar of public law should never lose touch with the realities of power and conflict populating the constitution. Interestingly, the principle of parliamentary sovereignty is among the examples they point to in order to illustrate the tendency toward the "placeholder constitution." A reflexive understanding might resort to a model of the political constitution, as a necessarily incomplete explanatory framework, but always by bearing in mind the relevance of the concrete dynamics behind it (Gee and Webber 2010).

Finally, another strand of the third wave has to be mentioned because a fast-growing scholarship on the relation between national and supranational orders has sparked new interest in the political constitutions beyond the level of the state (e.g., Glencross 2014). Michael Wilkinson has applied a reflexive approach to the European Union in order to understand whether there is a European constitution at all, and what is its nature. The perspective adopted is indeed a reflexive one, which entails an analysis of political constitutionalists with a view on European integration which does not include normative underpinnings; to the contrary, "it is a distinct type of approach, seeking instead to get behind the 'positive constitution'" and "it bears more affinity [than normative political constitutionalism] with the way Griffith originally used the term 'political constitution' [. . .] to capture the sense of the constitution of the polity as a whole" (Wilkinson 2013, 193). A political constitution emerges and develops out of a concrete ordering of society. In other words, it has a formal and a material consistency. In terms of constitutional knowledge, this entails to move away from the individual to the polity itself as the main unit of analysis. According to this approach, the polity does not represent a monolith nor a pre-given entity (e.g., the nation), but, by being conceived as in constant formation and reformation, it is conceived as the space and the context where the reflexive exercise takes place. Every constitution "has a political form (and social substance). It is a task of constitutional discourse to identify and reconstruct this form (and substance) as it emerges and develops in distinctive ways" (Wilkinson 2013, 209). In line with other works belonging to the same nebula, it is the relation among political and legal institutions, on one hand, and social practices on the other, to be the focal point of constitutional analysis. But Wilkinson, following Griffith's seminal insight, also adds to this picture a description of the relational aspect of constitutional authority based on political conflict and history.

It is difficult to pinpoint the legal theory behind the nebula of the third wave. However, in negative terms, it can certainly be characterized as non-formalist. Moreover, the attention paid to the concrete ordering of polity formation points toward a revival of legal institutionalism (Croce 2017; Giudice 2017; La Torre 2017), which is especially evident in Loughlin's work.

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Constitutionalism: Popular

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Introduction

The term "popular constitutionalism" has been used with considerable frequency in legal academic journals since the late 1980s and to the present. However, it is still not absolutely clear what the phrase came to designate. One interesting way to approach to the concept is through the book *The People Themselves*, published by Larry Kramer in 2004. Kramer, who is one of the key names within this movement, defined "popular constitutionalism" as a system in which the people assume an "active and ongoing control over the interpretation and enforcement of constitutional law" (Kramer 2004b, 959). The notion of "popular constitutionalism" brings together a remarkable set of legal scholars. Among them, we find authors like Larry Kramer, Akhil Amar, Jack Balkin, Sanford Levinson, Richard Parker, or Mark Tushnet. Starting from the basic premise that the government belongs to the people, "popular constitutionalists" can be recognized in the defense of criteria such as the following:

Judicial review without judicial supremacy: Taking the Constitution away from the courts. Larry Kramer advanced an important distinction between the ideas of judicial review and "judicial supremacy." In fact, Kramer presents "popular constitutionalism" as a view that challenges judicial supremacy, by which he means "the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone" (Kramer 2004a, 125). The idea is that courts should not have "normative priority in the conversation" about the meaning of the US Constitution. In his book, Kramer seeks to demonstrate at least two things: first, that the distinction between judicial review and judicial supremacy has profound roots in early American history and, second, that the latter was consistently rejected during the founding period (and even beyond that stage).

We should remember that the notions of judicial review and judicial supremacy tend to be confused or read as implying the same thing, particularly since the famous case *Marbury vs. Madison*. In that occasion, the US Supreme Court ruled for the first time the unconstitutionality of a legislative decision (thus reaffirming the court's capacity to review the validity of a statute). Also, at that time, Chief Justice Marshall's opinion about the law prevailed over the one of the

then President Thomas Jefferson on the matter (thus consecrating "judicial supremacy"). Contrary to Marshall's viewpoint, then President Jefferson advocated for an alternative approach that reserved a more prominent role for the political branches in the interpretation of the Constitution. This latter understanding, known as a "departmentalist" or "concurrent" approach, argued that none of the branches of government could claim superiority over the others, in interpreting the Constitution.

In the last few years, judicial supremacy has been the object of frequent criticisms within the legal academia. For Jeremy Waldron, for instance, in a society marked by the existence of deep disagreements, and founded on the principle of equality, the idea that the Supreme Court has the "last institutional word" seems unintelligible – particularly when we recognize that Supreme Courts are also divided by the existence of deep disagreements among its members and also decide by majority rule (Waldron 1999). Mark Tushnet has been another prominent author in objecting "judicial supremacy," which explains the main line of one of his latest books, which suggests "taking the Constitution away from the courts" (Tushnet 1999).

Extrajudicial interpretation. "Popular constitutionalism" is particularly interested in advancing a normative view (which is accompanied by a redescription of the actual legal practice), related to the role of people in constitutional interpretation. It actually proposes "extrajudicial constitutional interpretation," which assumes that non-judicial officials need not treat Supreme Court opinions as authoritative and also that the people at large play – and fundamentally should play – a significant role in defining the meaning of the Constitution.[1] Larry Kramer, for example, considers that courts – and particularly the Supreme Court – should start recognizing the people as the "higher (interpretative) authority." In his words, Supreme Court Justices should "see themselves in relation to the public somewhat as lower court judges now see themselves in relation to the Court: responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with power to overturn their decisions – an actual authority, too, not some abstract 'people' who spoke once, 200 years ago, and then disappeared" (Kramer 2004a, 253).

In the last years, and in diverse ways, different legal scholars have been defending and developing similar ideas (again, with both normative and descriptive implications). For example, in the early 1990s, Bruce Ackerman published an influential book where he examined the role of "We the People" in the creation, development, and interpretation of the Constitution (Ackerman 1991). In his book, Ackerman described the phenomenon of "constitutional moments," this is to say moments where "We the People" stands up in defense of a renewed understanding of the "Constitution," finally changing its meaning. Similarly, Akhil Amar has stressed the importance of the principle of popular sovereignty in America's legal history and has also defended (both descriptively and normatively) the leading role played by citizens and the political branches in the interpretation and application of constitutional rights (Amar 1987, 1988).

Taking into account a similar view about American history, Professor Stanford Levinson has contrasted two opposite approaches to the Constitution, which he aptly labeled the "Catholic" and "Protestant" conceptions of the Constitution. According to the first one, the interpretative task is seen as the "exclusive province" of the Judiciary. Meanwhile, and according to the second one, legal interpretation is seen as a task that is equally shared by all citizens (Levinson 1988, 1999). "Popular constitutionalism" advances a view that is obviously related to the latter alternative.

Social movements against the "juricentric Constitution." "Popular constitutionalism" has not only challenged the description according to which constitutional interpretation is the exclusive province of the judicial branch (the "juricentric Constitution"). It has also stressed the unique (and frequently neglected) importance of social movements in shaping the law. By calling our

[1] Alexander and Schauer (1997) have argued that judicial supremacy in constitutional interpretation is necessary to avoid interpretive anarchy, which would make people uncertain concerning what the prevalent legal rules are.

attention to the strong connection that exist between social movement activism and constitutional development, "popular constitutionalism" has put into question the so-called "juricentric Constitution" in a distinctively significant way.

One of the earliest and more interesting approaches in this regard was the one advanced by Robert Cover in his noted work *Nomos and Narrative*. In that piece, Cover explored the "undisciplined jurisgenerative impulses," coming from alternative social movements and he also tried to demonstrate that the most characteristic judicial task was not to "create, but to remove [certain visions of the] law" (Cover 1983, 51).[2] Cover concluded his study by stating: "Legal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence. We ought to stop circumscribing the *nomos*; we ought to invite new worlds" (ibid.).

Reva Siegel and Robert Post have advanced a similar approach to constitutionalism, focusing their attention on the impact of social movements in creating, modeling, and reshaping the law (Post and Siegel 2003, 2004). For Siegel, for instance, "(s)ocial movements change the ways Americans understand the Constitution. Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding – a dynamic that guides officials interpreting the open-textured language of the Constitution's rights guarantees" (Siegel 2006, 1323). Similarly, Wayne Moore has explored ways in which the people at large "play roles in creating and sustaining constitutional norms – including 'legal' norms that do not fit readily within professional narratives" (Moore 1996, 11).

Scholars such as Michael McCann also analyzed "the fact that many citizens routinely reconstruct legal norms into resources for purposes quite unintended by judicial officials" (McCann 1992, 773), while others have strived to understand the ways and reasons in which the public makes use of the law (Erick and Silbey 1998; Graber 2000).

Reinterpreting the effects of judicial review: "noise around zero." In previous sections we have examined "popular constitutionalism's" normative view, concerning the role of the people in constitutional interpretation. In this section we are going to examine a different, more sociological claim, related to the actual practical relevance and implications of judicial review. In fact, and contrary to the standard view, "popular constitutionalism" has frequently underlined the limited ability of courts to stop or reverse the policies adopted by the executive and legislative. In the American context (where the fascination exerted by the role of courts is particularly salient), this critical view found an early and significant support in the work of political scientist Robert Dahl. Dahl demonstrated that judicial decisions tended to be in line with political decisions – in other words that courts are rarely in deep disagreement with the political majority, implying that the exercise of judicial review should not really be seen as a threat to democracy (Dahl 1957).

More contemporarily, Gerald Rosenberg has helped recognize that even in resonant cases such as *Brown v. Board of Education* – a decision against racial discrimination, which appears at the top of the preferences among those who glorify the judicial task – the judicial decision did not have the extraordinary importance and effectiveness usually attributed to it. In Rosenberg's opinion, Brown "had virtually no effect on ending discrimination in the key fields of education, voting, transportation, accommodation and public places, and housing" (Rosenberg 1991, 70–71). By contrast – he claimed – such change became possible only when the legislative and executive branches acted jointly, together with the courts. Similarly, other studies, like those of Stephen Griffin, tried to demonstrate that "the meaning of most of the Constitution is determined through ordinary politics," i.e., through "the interactions between the executive and legislative branches,"

[2] In his view, judges – disregarding the value of hundreds of alternative legal traditions – tend to say "that *this [tradition]* is law, and destroy or try to destroy the rest" (Cover 1983, 51) Also, and against that approach, Cover argued that "[t]he stories that resisters tell, the lives they live, the law they make in such a movement may force the judges, too, to face the commitments entailed in their judicial office and their law" should come to play a more prominent role at the time of defining the content and meaning of the law (ibid., 66).

rather than by the intervention of courts (Griffin 1996, 45). More significantly, Mark Tushnet maintained that judicial review represents little more than "noise around zero": "it offers essentially random changes, sometimes good and sometimes bad, to what the political system produces. On balance, judicial review may have some effect in offsetting legislators' inattention to constitutional values. The effect is not obviously good, which makes us lucky that it is probably small anyway" (Tushnet 1999, 153). In line with that view, he maintains that there is no reason to fear "a world without judicial review."

Anti-elitism. According to advocates of "popular constitutionalism," ordinary political discourse is dominated by what Richard Parker has named an "anti-populist sensibility," namely, the view that "ordinary political energy. . .is problematic because of attributes that set it apart from, and identify it as qualitatively inferior to, more 'refined' sources of political participation" (Parker 1994, 56). Robert Unger has identified a similar attitude within contemporary jurisprudence. In fact, he has famously claimed that the "dirty little secret of contemporary jurisprudence" is its "discomfort with democracy." For Unger, this discomfort is expressed in "the ceaseless identification of restraints upon majority rule as the overriding responsibility of judges and jurists; in the consequent hypertrophy of counter-majoritarian practices and arrangements; and in the single-minded focus upon the higher judges and their selection as the most important part of democratic politics" (Unger 1996, 72). Jack Balkin has also explored this peculiar "anti-popular feeling" which he considers constituted by "elitism, paternalism, authoritarianism, naiveté, excessive and misplaced respect for the 'best and brightest', isolation from the concerns of ordinary people, an inflated sense of superiority over ordinary people, disdain for popular values, fear of popular rule, confusion of factual and moral expertise, and meritocratic hubris" (Balkin 1995, 1951). In the face of this elitism – he claims – popular constitutionalism seeks to recognize and highlight the importance of popular understandings about the law.

Democracy and participation. All the above features speak of a common concern among "populists": they are all interested in promoting a greater degree of popular participation in administering the political affairs of the community. This concern distinguishes their work from that of "progressives," who have traditionally focused on the *risks* generated by such participation as risky. Indeed, and according to "populists," the "progressives" struggle against parochialism, lack of impartiality, and ignorance should be mainly be read as a struggle directed against popular majorities, and the biases they could bring into the political process.

"Popular constitutionalism," or at least part of them, favors an understanding of democracy that is based on the ideal of the "sovereignty of the people." In agreement with this particular approach to democracy, they have been inclined to take "popular culture" seriously: they want to recognize the importance of the people's views about the common affairs, even though their expressions may sometimes be of an "undisciplined," "vulgar," or "unrefined" character (Balkin 1995, 1948). Institutionally speaking, and as a result of their confidence toward the citizenry (and their consequent distrust of elites), they have backed proposals that come to ensure a closer relationship between representatives and the people (i.e., mandatory rotation, short mandates, decentralization, etc.). In *The People Themselves*, Kramer has also advanced different reformist proposals, which are also aimed at the "politization" of the institutional system. In particular, he has suggested the introduction of changes directed at bringing the US judicial system closer to the European model in that matter (Kramer 2004a, 250). For instance, he proposed limiting the tenure of judges, restricting the Court's jurisdiction, and reducing its members and even recommended impeaching those judges that were more resistant to the popular views. He has also suggested the adoption a more flexible Constitution (ibid., 249). For him, "the combined effect of these innovations is to relieve the pressure a doctrine of supremacy creates by reducing the likelihood of serious breaches between the constitutional court and the other branches of

government, and by making political correctives easier to implement when breaches occur" (ibid., 250).

Conclusion

Although "popular constitutionalism" has lost part of its initial force, it still represents a significant movement within contemporary legal academia. Its distinction between "judicial review" and "judicial supremacy"; its emphasis on the role of ordinary citizens and social movements in constitutional interpretation and its idea that constitutional law is defined outside of the courts by the people themselves represent some of "popular constitutionalism's" main contributions to our understanding of contemporary law.

Cross-References

- ▶ Constitutionalism
- ▶ Legal Positivism: Inclusive
- ▶ Legal Reasoning: Virtues
- ▶ Neoconstitutionalism

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Constitutionalism: Sociology of

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Main Themes

Sociological research on constitutionalism, often now known as "sociological constitutionalism," contains a number of very varied lines of analysis and is not strictly characterized by a common or unifying set of features. As a result, such research is best identified *ex negativo*, by discussion of the characteristics that differentiate it from more classical normative lines of constitutional doctrine.

More classical analysis of constitutionalism is exemplified, first, by inquiries in a broadly liberal, Kantian tradition (Kant 1976, 169). Such approaches tend to see the constitution as a textual instrument, imposed on organs of state, which obliges government to act in accordance with principles that are perceived as rationally necessary for a society in which human beings can flourish and realize their most essential freedoms, both publicly and privately. From a Kantian perspective, the significance of a constitution resides in the fact that it creates a state which is bound by rational laws, integrating citizens under norms enabling the exercise of collective human freedoms, and which does not encroach upon essential spheres of private human integrity. Underlying the Kantian theory of the state, in fact, is the view that a constitutional state acquires legitimacy as the realized form of human autonomy, so that the state appears as a collective likeness of the autonomous human being. More classical analysis of constitutionalism is exemplified, second, in practical republican constructions of constitutional rule, which examine the constitution as a project for institutionalizing collective ideas of, and agreements about, the common good, framing the interests of a national community at any historical moment.

Of course, many theories of constitutionalism move between liberal, Kantian and practical, republican lines of analysis, combining elements of both. Uniting different perspectives in classical constitutional analysis, however, is the idea that a constitution acquires legitimacy as it forms a reflection of a general human interest in collective freedom. This interest is consolidated around either the normative demands or the basic practices of social agents in their role as citizens, and a constitution brings legitimacy to a political system because it represents a widely imputed interest in freedom. Underlying both classical lines of theory is the claim that the constitutional state guarantees freedoms for all society, and norms codified by a constitution underpin experiences of liberty in all social spheres. For both lines of classical constitution theory, the order of public law is a vital focus for societal cohesion, with a certain legitimational distinction and primacy vis-à-vis other legal domains.

The use of sociological methods for interpreting constitutions assumes many different variations. But, in general terms, it can be defined through its opposition to more classical theories of constitutional law.

First, the sociological approach to constitutions argues that constitutions are not constructed, or not solely constructed, by rational choices or deliberations of particular persons or collective actors in society, and they cannot be seen as institutions that translate into objective form collective notions about the organization or direction of society and its political system. Instead, the sociological approach proceeds from the claim that constitutions are the products of deeper-lying social processes, and they need to be explained as expression of macro-sociological conjunctures. Indeed, to a sociological perspective, the claim

that members of a society can simply translate arrangements regarding the common good into rationally acceded legal norms is always rather reductive and simplistic.

Second, the sociological approach to constitutions claims that, although constitutions assume a core role in stabilizing principles of legitimacy for society as a whole, they do not express notions of legitimacy that gain validity at a simply justifiable level or which can be tested against standards of consensus, collective interest, or rational choice. Unlike Marxist theories of constitutionalism (Marx 1958), sociological constitutionalism generally assumes that legitimacy is a real phenomenon, and it accepts the claim in more normative theory that societies rely on the existence of a political system that is able to demonstrate legitimacy in legal form, in order to secure their own formative processes. In particular, it proceeds from the assumption that societies rely on legal constructions of legitimacy in the political system in order to stabilize social motivations, to perform processes of inclusion, and to uphold patterns of differentiation, on all of which the wider cohesion of society depends. To this degree, sociological constitutionalism assumes that the legal norms in which the political system orders its functions form a distinct and vital social domain, and legal norms cannot simply be derided as elements of superstructure. However, sociological constitutionalism also presumes that the legitimacy of a political system is not a resource that is easily contested on categorical grounds or whose presence or absence is absolutely quantifiable.

Third, the sociological approach to constitutions claims that the functions of constitutions are historically variable and correlated with material societal pressures and exigencies, and different historical conjunctures condense demands for legitimacy in very different constitutional forms. In this respect, sociological analysis of constitutions often moves close to classical historicist analysis, which observed constitutions as reflections of localized or socially embedded cultural orientations. In this respect, much sociological inquiry into the role of constitutions adopts an evolutionary approach, which links the articulation of constitutional norms to deep-lying evolutionary trajectories in society.

For this reason, fourth, the sociological approach to constitutions is usually prepared to admit a certain degree of latitude in the definition of what constitutes a constitution. On the one hand, sociological analysis which adopts a historical approach to constitutions is often prepared to see aspects of constitutionality in different legal orders, including those existing *before* the age of classical constitutionalism in the eighteenth century, that is, in medieval and early-modern history. At the same time, however, the sociological approach to constitutions is usually also prepared to acknowledge the emergence of constitutional forms *after* the age of classical constitutionalism, that is, outside the classical domain of nation-state politics. In fact, different perspectives in this field claim that global society as a whole possesses its own constitutional order, either in its entirety or in different social domains. In both respects, the sociological approach to constitutions is widely inclined to separate constitutions from the classical canon of public law, which, from the French Revolution to the present, typically defined a constitution as a strictly hierarchical legal order, relating to the exercise of power by national state institutions. Instead, sociological constitutionalism examines the constitutionality of a legal norm as defined, more generally, by its role in stabilizing societal expectations, in generating and underpinning subsidiary legislation, and in providing points of normative regress for different societal exchanges. Such functions, however, do not necessarily presuppose a correlation between legal norms and national state institutions. The strict linkage between a constitution and a nation state, posited as central to any definition of a constitution by many theorists, is thus often relativized in sociological-constitutional analysis. Overall, the sociological approach to constitutions tends to converge around the principle that a constitution is a set of legal norms that acquire a higher-order, organizational primary for a national society, for global society, or for a particular domain in society (national or global), providing authoritative foundations on which secondary norms can be established, and facilitating the

stabilization of interactions in the domain of its application (national or global).

Most importantly, fifth, sociological theories of constitutionalism generally opt for a multi-perspectival account of human freedom, and they reject the idea in classical constitutionalism that human freedom is a simply measurable commodity that can be easily reflected and guaranteed through normatively enshrined principles. Indeed, the claim connects most sociological theories of constitutionalism that constitutions cannot be expected to organize all society around shared experiences of freedom, and freedom itself is not a simple reality that can be immediately translated into, and preserved in, a body of constitutional norms. The claim that human freedom cannot be equated with collective acts of rational self-legislation may easily be understood as a claim that first consolidated sociology itself, in its entirety, as a distinct discipline, separate from the moral philosophy of the Enlightenment. This insight is carried over into and rearticulated by sociological analyses of the constitution.

Historical Background

The sociological approach to constitutions is not new. To some degree, this approach can be traced to theorists of the high Enlightenment, such as Adam Smith (1978/1762) and David Hume (1978/1739), who observed the rise of constitutional law and legally framed constructions of legitimacy as reflecting evolutionary processes in society. Montesquieu's (1748) relativizing, contextual account of constitutional formation also possesses a very evident sociological dimension. However, the most important historical point of reference for sociological thinking about constitutionalism appears in the legal-political works of Hegel. Hegel (1969/1821) understood constitutions as legal documents that are integrally shaped by historically subliminal social processes – in particular, by the differentiation of state institutions as a formal political order, following the dissolution of the late-feudal estate-based society in eighteenth-century Europe. In this context, he argued that constitutions develop and assume prominence as sets of legal norms that secure and structure state institutions, as they are separated from the private patterns of order that define feudalism. He thus perceived constitutions as products of trans-personal, trans-sectoral patterns of functional differentiation, which cannot be seen as originating in strategically conceived rational acts. Yet, at the same time, Hegel also saw constitutions as instruments whose social position cannot be explained in an exclusively contingent perspective. He viewed constitutions as essential elements of modern societal grammar, concentrating generalized normative ideas about the organization of state and society and the rational form of human freedom. In establishing such ideas in legal form, constitutions detached the material form of government from private interests or private prerogatives and helped to preserve a functional balance between contesting ideas of liberty. In other words, Hegel set the foundations for later sociological analysis of constitutions by defining constitutions (a) as evolutionary outcomes of the formative trajectories of modern social construction and (b) as essential prerequisites of legitimate social order, meeting an invariable, yet fluctuating, demand for legitimacy. After Hegel, Émile Durkheim and Max Weber made important observations on the role of constitutions in society. Durkheim (1950) saw the rise of constitutional law as a reflection of the transposition of society onto foundations defined by functional differentiation and organic solidarity. Weber (1921–1922) saw constitutions as formal legal documents that underpin processes of inclusion, motivation, and cohesion for all social groups and which integrate individual social agents in conditions of mass society.

After 1945, elements of a sociological analysis of constitutions appeared in the works of Talcott Parsons (1965) and Jürgen Habermas (1990/1962). However, the most important sociological commentary on constitutionalism in the postwar decades was provided by Niklas Luhmann (1965, 1990). In fact, Luhmann addressed the possibility of designing a sociological model of the constitution repeatedly throughout his career, and he

arrived at slightly different conclusions on each occasion. Broadly, Luhmann argued that constitutions need to be seen as institutions that are generated by the process of functional differentiation in modern society. Above all, in the fact that they institutionalize sets of basic rights, constitutions bring the great benefit to modern society that they obviate the de-differentiation of society, they allow different function systems objectively to mark out the lines of demarcation between different spheres of interaction, and they prevent the excessive or uncontrolled convergence of society around the institutions of the state. As for Hegel, therefore, constitutions appear to Luhmann as the results of unreflected, deeply embedded processes of societal evolution, and there is no categorical normative necessity at the center of constitutional law. Yet, constitutions also appear to Luhmann as institutions that are structurally vital to society; they reflect exigencies that shape society as a whole, and they help to stabilize society in face of these exigencies.

Although not new, however, sociological analysis of constitutions has not been widespread since 1945, and it is not fully established either in pure constitutional analysis or in sociology. Since 1945, constitutional theory has tended to focus on normative explanations of constitutional validity and authority. In sociology itself, approaches to constitutions were not strongly represented after 1945, owing to the general importance of sociological methods based in conflict theory. Such methods were unsympathetic to the idea that a constitution could assume a legitimating role in society in abstraction from deep-lying patterns of contestation.

Renewed Relevance of Constitutional Sociology

Over recent decades, there has been a broad renaissance in sociological analysis of constitutions, and the sociology of constitutions has evolved and gained importance of a distinct line of legal-sociological inquiry. Broadly speaking, this can be attributed to the following factors.

Constitutions and Democratic Transitions

The re-emergence of sociological constitutionalism can be linked to the fact that the years since 1989 have seen a decline in the prominence of theoretical Marxism as a mode of social interpretation, so that pure conflict theory has lost its dominant position in social analysis. Indeed, the decline of conflict theory ultimately led to a normative turn in sociology, in which sociological theorists began to engage more seriously with the role of norms, including legal norms and legal institutions, in the overall stabilization of society. This was of course linked to the fact that the revolutions in Eastern Europe after 1989 were revolutions not for, but against Marxism (or some variant on it), such that a new paradigm was required to explain them. Moreover, in the wake of 1989, constitutionalism experienced a rapid renewal in significance, and, through the wave of democratic transition in Eastern Europe, Latin America, and Sub-Saharan Africa, constitutionalism, arguably for the first time, became a global form of political organization. These two phenomena combined to generate a widening sociological interest in the role of constitutions in processes of democratic transition, placing emphasis in particular on the ways in which social actors participating in transitional politics might reflect their interests and prerogatives in constitutional norms. Notable in this respect is the fact that, after 1989, constitutions captured the interest of many social theorists who had previously, in broad terms, aligned themselves to theoretical Marxism. This turn found its apotheosis in the later legal thought of Habermas, in the 1990s (Habermas 1992). Many sociologists began to identify specific criteria of legitimacy for governance structures and to comprehend analysis of constitutions as a lens for examining social transformation and its legitimational preconditions, which avoided the reductive approach to law and legal norms in theoretical Marxism. In many cases, this was linked to theories of civil society, which observed the correlation between civil-society actors and constitution making as a key source of governmental legitimacy. This was exemplified in the works of Andrew Arato (2000). In many cases, this approach was also

linked to a growing awareness of the formative role of international human rights law in domestic legal contexts.

Constitutions and New Constitutional Actors

The recent renewal of interest in constitutional sociology has been caused by the fact that, in some new democracies, new constitutional models have emerged, in which constitution-making processes have been moved outside the classical parameters of public-legal authority. Recent years have thus widely seen a widening of the constitution-making situation, in which constitutional laws have been created by a broad range of personalities, organizations, and actors, often using international law to authorize their constitutional engagement.

This is evident, for example, in societies with complex ethnic structures, containing multiple indigenous communities. In such settings, constitutions have been created in pluralistic fashion, reflecting the inputs of different population groups and embedding constitutions more deeply and variably in societal structure. In such settings, constitution making has itself at times appeared as a sociological initiative, attempting to capture the form of society in legal order. This can be seen, for instance, in the constitutions of Colombia (1991) and Bolivia (2009), which were created through procedures that integrated multiple actors and collectives in the exercise of constituent power. This is also evident in societies marked by histories of deep conflict, in which constitutions have been created that integrate previously envenomed adversaries, so that constitutions and constitution-making processes obtain a visible role in stabilizing precariously balanced societies. This can be seen above all in South Africa. This is also evident in the stalled transitions in North Africa beginning in 2011, in which NGOs, public-interest litigators, and human rights agencies played a key role in the early process of systemic upheaval (see, for example, El-Ghobashy 2008). In each instance, the growing tendency toward experimentalism in drafting new constitutions has necessitated a move away from pure formalism among observers of constitution-making processes, and sociological methods have become essential for analysis of constitutions, their origins, and their impact.

Constitutions and Global Norm Production

The renewed sociological interest in constitutionalism can be ascribed, in part, to the fact that the bundle of processes usually known as "globalization" have led to the construction of new spheres of normative practice, such that classical state institutions are, arguably, not the sole objects of constitutional norms.

On the one hand, for example, the period since the 1980s has witnessed a global growth in the power of international human rights law, as new transnational jurisdictions have gained in importance and new democratic states have accorded increased authority to international norms. Generally, in fact, the global growth of constitutional democracy since the 1980s is not easily separable from a global growth in the force of human rights instruments, and most constitutions of new democratic states create in this period accord great prominence to international human rights law. Against this background, some sociological accounts of constitutional law have developed as part of an endeavor to explain the prominence of global norms and to illuminate the role of international norms in domestic processes of social integration. Some such accounts, discussed below, imply that contemporary society as a whole possesses, or is close to possessing, a legal order with features close to those of a *global constitution*.

On the other hand, some observers have addressed the impact of globalization on constitutional law by rejecting the idea of a global constitution (see Krisch 2010). As an alternative, some theorists have identified a process in which different sectors of society, focused on distinct sets of functional exchanges, have begun to acquire a more pluralistic, yet still constitutionally ordered, normative structure, reaching across the boundaries traditionally separating national states (Teubner 2012). Such perspectives often ascribe de facto constitutional functions to legal principles usually associated with private law, and they identify the spontaneous fusion (or hybridization) of public and private law as a factor that leads to the constitutionalization of different functional

sectors in transnational society. On this account, different spheres of transnational exchange, for example, medicine, sport, and the economy, all acquire distinct, pluralistic models of constitutionality.

On both counts, the growth of a global legal system, albeit perceived differently in different approaches, has elicited a range of sociological responses, which seek to explain the emergence of new patterns of norm production as correlated with shifts in societal structure. One line in such analysis is closer to classical constitutionalism, stressing the universal authority of constitutional norms, albeit examining the transfer of constitutional norms to the global domain. One line in such analysis moves radically outside the conventional constitutional terrain, although it retains the claim that social cohesion depends upon the construction of primary legal norms.

Main Positions in Contemporary Sociological Constitutionalism

The positions in current research on the sociology of constitutions are loosely correlated with the three areas of concern outlined above. Notable in each of the above areas is the fact that the formation of constitutional law is partly driven by the interaction between national law and international. At the core of current directions in constitutional-sociological research, therefore, is an inquiry into post-traditional modes of constitution making, in which the classical process of constitutional formation by a national constituent power is replaced by more complex interactions and legally formative articulations.

First, current sociological research on the role of constitutions in democratic transitions or in general processes of democratization is represented primarily by Heinz Klug (2000), Kim Lane Scheppele (2003, 2004), Paul Blokker (2013; Blokker and Thornhill 2017), and Marcelo Neves (1992, 2017). Klug's major works deal with the social preconditions for the democratic transitions in South Africa. Scheppele's work is mainly concerned with the social/constitutional preconditions for democratic stabilization (or otherwise) in Eastern Europe, most notably Hungary. In her earlier work, Scheppele developed an ethnographic method to explain the stabilizing position of constitutions. More recently, she has devised a phenomenological method to account for the reasons why some constitutions do and some constitutions do not generate integrative motivations in society. Blokker's work is also focused on accounting for the societal motivations that are aggregated around constitutional norms. However, he uses a conflict-theoretical method to explain the societal foundations of constitutions, arguing that constitutions need to be approached as objects of eminently political contestation, in which rival concepts of legitimacy are projected and tested. The work of Neves is focused on explaining constitutional realities in Latin America, showing regard for the (alleged) weak consolidation of the legal system and the reduced efficacy of constitutional norms. Central to the later work of Neves is an attempt to incorporate multiple sources of legal normativity, ingrained in different societal domains and practices, within the concept of constitutional law. Highly important in this context is the less well-known work of Mona El-Ghobashy (2008), addressing the constitutionally formative role of in pre-2011 Egypt.

Sociological approaches to the emergence of constitutional norms of a global character have been promoted, diversely, by Hauke Brunkhorst (2002, 2014) and Chris Thornhill (2016, 2011). Brunkhorst places the essential interconnectedness of global normativity and national constitutional formation at the center of his theory, claiming that the years after 1945 witnessed the revolutionary construction of a system of international norms, especially relating to human rights law, which both grew out of, and then directly reinforced, principles of self-legislation that were embedded in underlying processes of national constitutional formation. He thus explains global norms as the results of deeply embedded learning processes in national societies, and he traces their formation to cognitive/evolutionary developments that underscore the earliest processes of human socialization. Thornhill argues that

modern society has acquired a globally effective system of constitutional norms because, over long periods of time, national political institutions, and especially national constitutions, were historically unable to absorb the social pressures which they encountered through the evolution of class-based nationalized societies. As a result, national societies were forced by deep-lying functional imperatives to lock themselves into international normative systems, largely based in human rights law. On this account, national states locked themselves into a global constitution as a precondition of their own stability. Basic constitutional functions of inclusion, integration, motivation, and emancipation depend, thus, on the deep structural interplay between national and international constitutional norms.

Also concerned with the emergence of constitutional norms with purchase outside national societies is the work of Gunther Teubner (2007, 2011, 2012). Teubner has proposed the argument that our comprehension of constitutional law needs to be directed away from more classical ideas of formal legal certainty, and constitutional law should be observed as the result of the highly contingent, inner-sectoral legal interactions, which define global society as it spreads beyond the jurisdictional force of the institutions of national states. On the one hand, Teubner argues that the globalization of society has led to the emergence of a legal order in which each functional domain of society is capable of generating norms with constitutional standing, and so with establishing basic legal freedoms, for a given aggregate of social practices: these norms are termed *societal constitutions*. On the other hand, he claims that the sectoral constitutions of contemporary global society are created through a spontaneous hybridization of elements of public law and elements of private law. The main implication of this is that constitutional norms are not created through identifiably public or conventionally political acts, and transnational accretions of private law are able to assume quasi-public, quasi-political status, as they produce regulatory norms for different societal domains. Teubner's work on these questions is influenced in part by the proceduralist theories of David Sciulli, who, in the 1980s (Sciulli 1986) and early 1990s (Sciulli 1991), identified constitutional dimensions in informal domains in society, especially in professional organizations. Some elements of Teubner's work have been extended further by Peer Zumbansen (2010), who has claimed that transnational private law might be viewed as possessing constitutional dimensions. Some elements of his work also feed into the writings of Poul Kjaer (2013), who argues that global society requires multiple constitutions, both to regulate particular social sectors and to organize coordination of these sectors with other functional arenas.

Conclusions

Sociological reflection on constitutions is as old as constitutions themselves. Indeed, the first normative claims of constitutional law, set out in the later eighteenth century, elicited a sociological critique from many observers, who derided as simplistic the assumption that one legal text could create rational measures of political legitimacy for all society. Early critical observers of constitutionalism tended to accentuate the complex, contingent, and differentiated nature of modern society. On this basis, they claimed that constitutions could only meaningfully generate legitimacy if they were separated from simple understandings of human freedom as the result of rational or practical agreements. These perspectives, in variably revised form, have begun to reappear in some contemporary constitutional analysis, which fuses the reconstruction of public-legal norms with the analysis of social formation. One thread that connects early and late constitutional sociology is the claim that normative analysis of constitutions misconstrues constitutional law by attaching it to simply acceded ideas of personal freedom and political legitimacy. On the sociological view, generally, constitutions may evolve for many reasons, which may only be incompletely understood if they are associated with rational agreements or shared constructions of liberty. However, a further thread that connects early

and late constitutional sociology is the claim that constitutional norms, although deeply contingent, always retain a certain structural necessity. That is, even if there is no final justification for their existence, modern societies rely on constitutionally articulated norms to conduct, and to retain integrated cohesion in face of, their defining processes, such as differentiation and individualization. In such conditions, constitutions may secure experiences of freedom and legitimacy in ways that are not simply evident to rationally engaged observers.

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Constitutionalism: World

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Introduction: National Constitutions and Global Constitutionalism

A *constitution* can be defined as the legal document in which the fundamental principles and rules of the social and political interactions within a community are laid down. On this basis, *constitutionalism* is the theoretical approach and political praxis that maintains that every human community, to be well ordered and to avoid tyranny, has to be grounded on a foundational legal document. Only this kind of document, in fact, guarantees that the rule of the powerful can be substituted by the rule of law. More concretely, a constitution contains, in general, the following elements:

(a) A definition of public power and of the institutions rightfully entrusted with its exercise.
(b) A list of fundamental rights which are proclaimed to belong to every member of the community.
(c) The criteria for public power and its exercise to be regarded as legitimate.
(d) A proclamation of the specific identity of the community.
(e) The specification of the procedures for issuing statutory laws and administrative acts.
(f) The self-definition of the constitution as the highest law within the hierarchy of norms that govern the community.

The contents of the constitutions have taken quite different forms in the highly various polities from which they emerged. Yet, they are realized, on the whole, in those legal documents that have been established – starting with the revolutions of the late eighteenth century and then spreading over almost the entire globe – as the basic laws of the nation-states. Given these premises, the very idea of *world constitutionalism* seems to verge on an oxymoron since it aims at expanding a notion which was conceived – and not by chance – for the limited range of specific communities to the global scale. Indeed, the application of the concept of constitution beyond the borders of the nation-state was triggered in the last couple of decades by the process of globalization. Nevertheless, it needed a much longer preliminary work in the history of ideas, without which no proposal of world constitutionalism could even be conceivable. Two steps, in particular, were necessary to understand constitutional order as something not just suitable for the individual polity but applicable to the worldwide interactions between human beings and states. The first idea that had to be developed was that order is possible also beyond the borders of the single polities; in other words, that the well-ordered society can be cosmopolitan. The second step was to conceive of this order in legal terms, i.e., as an order based on legal documents and practices.

Once the essential concepts on whose basis order can be assumed to take on a cosmopolitan range were established, different variants of world constitutionalism have been developed, depending on what kind of worldwide integration was envisaged. None of these variants, however, contains all six elements of national constitutionalism or accomplishes all traditional tasks of a national basic law. As a result, the question arises whether we should regard the application of the concept of constitution to the project of a worldwide order as simply improper and therefore give up the very idea of world constitutionalism. As an alternative, we can revise the concept of constitution itself, maintaining its essential normative tenets but making it, at the same time, more flexible and suitable for contexts beyond the national borders.

The Idea of a Cosmopolitan Legal Order

Even just the idea of a global community including all human beings is anything but obvious. Rather, it took quite a long time for human

thinking to overcome the long-lasting predominant conviction that only limited societies can be well-ordered, while between them only a restriction of disorder is possible, and to develop the perspective of some kind of worldwide order. The first glimmer of a universal idea of order can be found in Buddhism. In Buddhist tradition, indeed, the *dharma* can be interpreted – among other possible understandings – as the "natural order of the universe" (French and Nathan 2014, at 4). However, the universal range of the *dharma* goes, first, far beyond the boundaries of the human community, including at least all sentient beings and, possibly, even the non-sentient world. Secondly, to be recognized, the *dharma* requires to complete a path of spiritual enlightenment which, in principle, is open to all members of the human community but – like all religious experiences – can hardly be expected from everyone of them. Therefore, to develop a perspective of cosmopolitan order in the sense of the word which is most common to us, two further steps had to be undertaken: order had to be centered on the human community, and had to be based on a faculty arguably inherent to all humans, regardless of which spiritual experiences they may have gone through. Both elements were introduced into the history of ideas by the Stoic philosophy. In Stoicism the foundation of universal order is the *logos*, i.e., the reason which is shared by all human beings, and, as a result, the *cosmopolis* is explicitly tailored to include all of them – and only them (von Arnim 1905).

Stoicism was, in general, rather alien to the world and so was also its cosmopolitan proposal. But many elements of its conception were passed on to the nascent Christian philosophy: significantly, both the cosmopolitan idea of order and the concept of a universal natural reason – as well as of a natural law which is assumed to be based on it – were among them. Although the Christian message was addressed, in principle, to all humans, in fact the Christian conception of universality ended up struggling with the limits that inevitably affect all cosmopolitan perspectives based on religious assumptions: religious beliefs can hardly be universalized, not even by force. As a result, on the one hand, the would-be universalism of the Christian community never came to include more than a minority of humankind, and on the other hand, it was generally biased against non-Christians (Vitoria 1964). Nevertheless, the link that Christian thinking maintained between the *lex aeterna*, as the God-given universal order, and the natural reason shared by all human beings provided an alternative path beyond particularistic biases. In fact, if the sense of God-given order contained in the divine law could be recognized only by those who embraced the Christian faith, natural reason was regarded as an endowment of all humans, with the consequence that an order grounded on pure natural reason was actually able to include the whole humankind. Here lies the basis of the modern jus gentium as the expression of an all-embracing humanity (Suarez 1944, 348). When Protestant thinkers, then, cut the Thomist connection between rationality and revelation, the way was eventually clear for a universalistic jus gentium grounded only on pure natural reason (Gentili 1933, 10; Grotius 2005, 150).

Medieval and early modern Christendom was characterized by the rather unrealistic vision of a concretization of God's universalistic order in the form either of the worldwide authority of the emperor (Dante 1986) or of the unrestricted supremacy of the pope (Henricus Hostiensis 1556). As both conceptions collapsed due to the lack of feasible perspectives and were definitively abandoned, the only foundation for a worldwide order was located, then, in the assumption of a universal validity of human reason (Pufendorf 1995). This passage was positive, on the one hand, because the idea of cosmopolitan order was made independent of the intrinsically discriminatory pretension of a worldwide authority under Christian rule. On the other hand, it marked also a step backward insofar as it gave up the perspective of a political and legal formulation of the *cosmopolis*. Being conceived only in terms of general principles of natural law, the idea of world order remained a matter for "comforters" (Kant 1977a, 210), while world constitutionalism, if properly understood, necessarily needs a clearly identifiable legal framework.

The transition from the conception of world order as the result of an unwritten jus gentium based on natural law to an explicitly *legal* understanding of cosmopolitanism was Immanuel Kant's outstanding contribution. In particular, Kant introduced for the first time a tripartition of public law, in which the third part – going from the most specific to the most general and inclusive – is what he unequivocally defined as "cosmopolitan law" (*jus cosmopoliticum*) (Kant 1977a, 203, 1977b, 475). Beside the law *of the state,* as the first part of his system of public law, and the law *between states* – or *international law* as the second part of it – cosmopolitan law included principles and rules that govern the interaction between human beings as such, regardless of their national belongings and citizenships. Despite its exceptionally innovative character, Kant's proposal was affected, nevertheless, by at least two significant deficiencies. The first problem is the surprising thinness of the rights which are guaranteed by the *jus cosmopoliticum*: in fact, this is restricted to nothing more than pure "hospitality," i.e., to the entitlement not to be treated as an enemy while being – by choice or necessity – in a foreign country (Kant 1977a, 213, 1977b, 475). Surely, Kant's time was not ripe for an exhaustive catalogue of human rights, which were generally included, at the end of the eighteenth century, under citizens' rights – and he cannot be made responsible for this. Nevertheless, other authors before him, like Vitoria (1964, Section III, 1), went further in the recognition of what is due to every human being. This can be partially explained by the fact that Catholic authors were more prone to limit the authority of the state in front of the rights of the members of the *communitas christiana*, while Kant tried to find a more equilibrate balance between the identity of the individual state and cosmopolitan order. Yet, precisely the thinness of Kant's *jus cosmopoliticum* is a proof of how difficult it is to find an equilibrium between state law and cosmopolitan law – a problem which haunts political and legal theory until today.

The second shortcoming of Kant's conception concerns his institutional proposal for world order. On this point, he fluctuated rather inconsistently between the idea of a "world republic" (*Weltrepublik*) and that of a "federation of peoples" (*Völkerbund*) (Kant 1977a, 208, 1977b, 474). In fact, while Kant regarded the first concept as the more suitable for the safeguard of peace, yet hardly feasible and, to some extent, even undesirable, the second was considered easier to realize, although rather unable to implement its task – i.e., world peace – because of its incapacity to curb steadily the selfishness of individual states. As for the narrow content of the *jus cosmopoliticum*, so is Kant's difficulty in proposing a clear-cut solution for the institutional shape of world constitutionalism just another example of the complexity of holding together the achievements of national constitutionalism and the project of a supra-state order. Little more than a century after Kant, Hans Kelsen suggested resolving the conflict by cutting the Gordian knot. More specifically, he developed the uncompromising idea of a radically monist legal system, in which international law – in the sense of a supra-state law – was put, for the first time in the history of legal theory, at the apex of the hierarchy of norms. As a result, state law – even constitutional law – was authorized to govern social interaction only within the framework established by international law (Kelsen 1934, 149). In doing so, Kelsen prevented any kind of conflict between national and international norms since supremacy was always recognized to the latter. In this sense, his legal philosophy can be regarded as the apotheosis of world constitutionalism. Nonetheless, his ambitious goal was achieved at high cost. First, Kelsen's monism firmly rejected any kind of legal pluralism as it was based on the assumption that conflicting norms grounded in different legal systems can never justifiably claim validity if contemporarily applied to the same matter. In his view, only the establishment and acknowledgement of hierarchy – and not dialogue or "inter-legality" (Fischer-Lescano and Teubner 2007, 42) – can put an end to the conflict. Secondly, Kelsen's world order has explicitly and exclusively a *legal* dimension, without any significant involvement of political institutions (Kelsen 1944). Thus, the interpretation of norms by the international courts seems to be more important, to guarantee

global order and peace, than democratic legitimacy and political dialogue.

At the point of its most courageous affirmation, world constitutionalism was therefore affected by a twofold problem: the incapacity to cope with pluralism, on the one hand, and the one-sided concentration on the legal dimension of order on the other. Starting with a growing awareness of these shortcomings, the more recent theories of world constitutionalism have concentrated their efforts largely on the attempt to conciliate the idea of world order with pluralism and legitimacy (Dellavalle 2015).

Variants of World Constitutionalism

Different variants of world constitutionalism have been developed in the last decades. They generally deal with the difficult application of the concept of constitution to a domain for which it has not been originally conceived either by reducing or by reformulating its content. Thus, if the goal has been quite homogeneous, the ways in which the goal has been achieved differ significantly.

The Global Economic Constitution

A first strand of world constitutionalism limits the application of the concept of constitution to the legal framework that gives rules to the worldwide transactions carried out by economic agents. The reason for this limitation is that – according to the view of the supporters of this theory – no other field of interaction would have developed a global range as well as shared rules at a comparable level. Two distinct approaches emerge from the general theory of the global economic constitution (GEC). The first identifies the constitutional quality mainly in the legal system and in the praxis of the World Trade Organization (WTO) (Dunoff and Trachtmann 2009, 206); the second is the lex mercatoria as the system of rules created by private economic agents in order to guarantee the validity of their transactions (Teubner 1997). Thus, while in the first case GEC is based on agreements between states, in the second it grows, almost spontaneously, as a private law regime from the self-organization of private economic agents.

Despite this difference, both approaches of GEC share some fundamental assumptions. In particular, they rely on an understanding of contemporary law as a deeply fragmented system in which single legal regimes – here, the regime that governs economic transactions – have become increasingly independent and self-referent. Furthermore, they restrict the use of the concept of world constitutionalism with regard not only to the kind of interactions that are regarded as constitutionalized but also to the contents of what is assumed to be the global constitution. In fact, only one of the contents of the concept of constitution outlined before (see *supra*) is considered essential for the application of the concept to the global scale, namely, the idea that the constitution must contain the rules for the production of secondary norms. As a result, the constitution is understood exclusively in its *functional* dimension or, more concretely, as the legal document that (a) enables the production of norms by specifying the procedures which govern the issuing of valid rules, (b) restrains this production by clarifying in which fields no rule-making should take place, and (c) fills the gaps, in the contexts where rule-making is allowed, which may arise from disparate norm-issuing actions at the transnational level, thus guaranteeing sufficient homogeneity to the legal regime (Dunoff and Trachtmann 2009, 9).

Besides the conceptual problems which originate from the reduction of the notion of constitution to just one element (see *infra*), even if we assume the point of view of the supporters of GEC, some questions remain unresolved. Starting with the allegedly constitutional regime of the WTO, even its most fundamental assumption – namely, that the legal documents that lie at the basis of the WTO regime take on the role of a functional constitution insofar as they govern the making of secondary rules – is highly contestable. Indeed, it is not by chance that in many circumstances, due to the lack of norms regulating rule-making in the WTO agreements, the tasks of a functional constitutionalization – i.e., enabling, constraining, and homogenizing rule-making –

have been assumed by the Appellate Body (AB) (Dunoff and Trachtmann 2009, 189, 216). However, while on the one hand the intervention of the AB covered only singular cases, missing therefore the inherently general scope of constitutional rule-making, on the other hand it is questionable whether this kind of intervention does not prove rather the absence of a truly constitutional framework.

Even more deepgoing are the problems associated with the GEC as a spontaneous private law regime. Indeed, the authors who make the case for this interpretation of world constitutionalism face an old and almost inescapable dilemma, namely, the necessity that private law, in order to be an effective legal regime, must be validated by public law. In other words, without a public power which guarantees that private contracts are respected, these depend necessarily on the arbitrary will of the contractors and are doomed, thus, to be little more than words. The question has been addressed by claiming that the legal system of the lex mercatoria guarantees for the self-validation of private law through the establishment of a hierarchy of norms, i.e., of primary norms which regulate the creation of secondary norms, of iteration processes in formulating and concluding private contracts, as well as of arbitration courts to settle the disputes (Teubner 1997, 16). Nonetheless, it remains controversial whether these mechanisms are really suitable for the task. Furthermore, insofar as the lex mercatoria is undergoing a process of codification, elements are necessarily introduced into its *corpus* which are derived from national codes of private law and through these, due to the usual interconnection of private and public law at national level, also from the national systems of *public* law (von Bogdandy and Dellavalle 2013).

The Global Constitution of Governance

Just like GEC, also the second variant of world constitutionalism is built on the assumption of the fragmentation of global law. Yet, unlike GEC, it does not concentrate – at least not only – on the private dimension of global constitutionalization but (also) on its "publicness." The starting point of the idea of a global constitution of governance (GCG) is the acknowledgement of the necessity to meet the growing request for governance of global processes like labor and financial markets, migration, ecological crises, terrorism, organized crime, technological and scientific innovation, exploitation of natural resources, etc., by establishing executive networks composed of members of national governments and of international organizations. Although most authors who can be led back to GCG are explicitly reluctant to apply the concept of "constitution" to their understanding of global order, their interpretation of postnational governance recalls, on a broader scale, what has been labeled as "material constitution" in the theory of national constitutionalism. Beyond the legal framework of a formal basic law, the notion of "material constitution" includes also the nonformal rules and practices of interaction that characterize the social and political life of a community (Goldoni and Wilkinson 2016). Therefore, even if GCG lacks a fundamental legal document – or set of legal documents – on which to be based, the assemblage of sometimes disparate rules and practices of rule-making constitutes, nonetheless, a clearly identifiable idea of global order.

Some authors see the GCG as a mixture of regulations issued by public agents – such as representatives of national governments – acting within the context of international organizations, and rules emerging from agreements taken by private actors, like those at the basis of the lex mercatoria, whereas the line that should separate the two dimensions is not always clear-cut (Slaughter 2004). Other exponents of GCG, instead, focus unequivocally on the *public* dimension of global governance, which is expressed, in particular, by international public authorities (IPA). In this second case, the "publicness" of the policies that lie at the basis of GCG is assumed to be guaranteed by the fact that IPAs are expected to pursue shared interests and the common good (von Bogdandy et al. 2016). Here, however, the question arises about the definition of the common good and the ways of its realization. Although the theorists of IPA also refer to substantial criteria like freedom or the rule of law, the most relevant feature to ensure the "publicness" of the IPA

policies is lastly just formal, namely, the very fact that IPAs are endowed with a public mandate, derived from public power, to act for the common good. Insofar as they do so, the acceptance of their policies by at least the majority of individuals and populations involved leads to a sort of output legitimacy. Hardly any attention is paid, instead, to deliberative and democratic procedures of legitimation of international organizations.

The Constitution of Humankind

The word "constitution" was applied for the first time to the organization of the international community in the 1920s (Verdross 1926). The conceptual foundation of this historical turning point was twofold. First, their proposers claimed that a part of international law, regardless whether it was treaty law or customary law, was expected to be valid not only for the parties involved vis-à-vis but for the whole humankind. Secondly, they assumed – according to the old tradition of natural law – that the ontological basis for the worldwide constitution is a humanity which shares common fundamental values and interests. This conception of world constitutionalism, unlike the former variants, maintains a largely unitary conception of the legal system – now extended to make the whole community of humankind well ordered – while being still skeptic toward the emerging legal pluralism.

After World War II, the legal dimension of the constitution of humankind (CHK) was established in particular through the discipline of the obligations *erga omnes*, on the basis either of the UN Charter or of the theory of *jus cogens*. More concretely, supra-state international law is considered to be "constitutional," in accordance with this interpretation, insofar as it takes on three main features of historical constitutionalism (Tomuschat 1999). The first aspect is the centrality of the individuals and of their rights; although states are still the most significant actors in the international arena, their actions are to be regarded as justified and legitimate only insofar as they aim at the best possible realization of individual rights, both at home and abroad. The second feature is the increasing inclusion into international law treaties of references to values, like democracy and the rule of law, which should serve as a foundation for a well-ordered international community. The third element is the establishment of a germinal division of powers within the system of international organization, whereas the focus is concentrated in particular on the creation of an ever more powerful international judicial power. A more formal approach to CHK underlines rather the function of the UN Charter at the top of the hierarchy of the legal instruments of international law – which would correspond to the sixth and last content of the concept of constitution among those outlined in the introduction (Fassbender 2009).

Serious criticism has been raised against CHK. In fact, the alleged division of powers within the system of international organization is at best incomplete since the UN Security Council holds both the legislative and the executive competences. Moreover, the UN Charter is far from having the same hierarchical position generally recognized to constitutions in national systems, and the authority of supra-state international law is often contested. Lastly, the rule of law is constantly threatened by the display of power (Paulus 2009). Beside these critiques, a further consideration should be added. In an epistemological perspective, CHK relies heavily on the assumption that a worldwide community of humankind exists which shares fundamental values and interests. However, this assertion is neither self-evident nor can it be empirically proved since no less evidence speaks for the contrary. Therefore, it is understood rather as an ontological axiom to be recognized and accepted – than as a political project to be built. Given these premises, it is not surprising that the paramount role in guaranteeing the realization of CHK is given to the international courts – as the interpreters of the already existing ontological truth and of its legal expression – and not to democratic processes of deliberation within the international organization.

The Democratic and Eco-social Cosmopolitan Constitution

World constitutionalism has been accused of covering up normatively – and thus of improperly dignifying – worldwide hegemonic ambitions

carried out by transnational elites. By marginalizing or even annihilating the principle of popular sovereignty rooted in national traditions of constitutionalism, transnational economic agents, as in the case of GEC, technocratic experts in respect of GCG, or legal professionals and judges at international courts are allowed to act in a sphere which is less politically controlled by the involved individuals and populations than in national contexts. Thus, under the cover of a noble and progressive idea, social and economic exploitation would flourish on an unprecedented scale. In fact, constitutionalism – before going global – has never been an elitist undertaking but a bottom-up project supported by broad coalitions of stakeholders.

Taking this criticism seriously, a fourth variant of world constitutionalism has been conceived which keeps the contents of the concept of constitution as broad as possible by recognizing, at the same time, the value of pluralism and diversity, as well as by putting the stakeholders at the basis of the entire proposal. The epistemological fundament, here, is the communicative understanding of society, according to which this is constituted by different contexts of interaction. The most general and inclusive among these is the one in which human beings are involved transnationally and irrespective of their citizenships and belongings (Dellavalle 2015). In accordance with this understanding, world – or, to be precise, "cosmopolitan" – constitutionalism is the political project that aims at regulating this kind of transnational interactions with principles and rules in order to make them predictable, inclusive, and just.

Cosmopolitan constitutionalism is based on four pillars. The first is a rather thin layer of international organizations – largely comprised of institutions under the aegis of a reformed UN – with the limited task to protect peace and fundamental human rights (Habermas 2004; Kadelbach and Kleinlein 2006). However, in contrast with the present situation, these institutions should be endowed with adequate democratic legitimation – which is what the second and third pillars have to deliver. In particular, the second pillar envisages to deepen and broaden the parliamentarization of the institutions of the international community (Archibugi 2008; Peters 2009), while the third explores bottom-up forms of nonrepresentative – i.e., direct – and inclusive empowerment of stakeholders, aiming at the safeguard of the social and ecological conditions of life (Tully et al. 2016). The fourth pillar is constituted by the politicians, the scholars, the legal professionals, etc., who are committed – everyone in and with her/his activities – to an inclusive, just, and democratic world order. Under these conditions, world constitutionalism is explicitly something to be developed, rather than a matter of fact to be simply analyzed.

Conclusion: Toward a New Concept of Constitution?

None of the variants of world constitutionalism matches perfectly the full range of contents of the national concept of constitution. As a result, we are confronted with two possible outcomes: the first is to give up the use of "constitution" for the kind of legal order that is established beyond the borders of the nation-state; the second is to question which ones of the contents of the *national* concept of constitution are really essential for the notion to make its use generally justifiable and its application to the *postnational* context reasonable. Some considerations may help to find a way out of the dilemma.

First, within the national context, the constitutional identity is sometimes defined by references to religious beliefs, national traditions and history, or substantive political goals. Yet, in a postmetaphysical society, characterized by ideological, social, political, and religious pluralism, the normative elements of the constitutions cannot but be only formal, in the sense that they are limited to the specification of the rules of interaction. This assumption represents the core tenet of constitutionalism in the liberal and democratic nation-states, but is a downright inescapable necessity for the definition of world constitutionalism, where we are confronted with a much higher level of cultural and religious diversity.

Secondly, national constitutional identity always implies an element of exclusion: in fact, we are what we are also because we are not what others are. Obviously, this element cannot be part of a constitutionalism which aspires to include all human beings. Nevertheless, it is also possible to understand constitutional identity not by focusing primarily on the contrast to others but on the tasks of our community. Given this premise, even a cosmopolitan constitutional identity becomes conceivable if we address the protection of peace and fundamental rights, as well as of the social and ecological conditions of life, as the paramount missions of the cosmopolitan society.

Thirdly, if the constitution has to guarantee that social interactions are peaceful and cooperative, as well as that they aim at benefits shared by all involved, then it cannot be value-free. In national liberal and democratic constitutions, these values are expressed through the safeguard of fundamental rights and democratic procedures of legitimation. Albeit with the inevitable differences and nuances, these values should be enshrined also in world constitutionalism. This consideration leads us to conclude that the use of "constitution" is inappropriate if applied to conceptions in which little or no attention is given to the most value-related contents of the basic law of the transnational community – like CGE and GCG.

Fourthly, the only content that cannot but be excluded from the postnational definition of constitution is the presumption of the hierarchical supremacy of the constitution within the legal system. This pretension may be reasonable for the constitution as the apex of the domestic system of norms but is largely inapplicable to any kind of normative integration beyond the nation-state. Indeed, the *jus cosmopoliticum* cannot – and should not – be hierarchical but is characterized by the dialogical interaction and cooperation of supra-state principles and norms, as well as of political institutions and courts, with their national counterparts. Nonetheless, provided that the constitution is the legal document which organizes the life of a community, and a human community of cosmopolitan scope exists whose interactions should be regulated, the only logical conclusion, then, is that the legal documents which are endowed with the task of shaping the *cosmopolis* have a constitutional quality as well – and a quality which leads us to the most advanced frontier of constitutionalism.

Cross-References

- ▶ Constitutionalism: Cosmopolitanism
- ▶ Constitutionalism: Political
- ▶ Cosmopolitanism
- ▶ International Law: Legitimacy of
- ▶ Kelsen, Hans
- ▶ Language and Law
- ▶ Law as Discourse
- ▶ Legal Pluralism: History of
- ▶ Natural Law: Contemporary
- ▶ Natural Law: Protestant
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Conventionalism

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C

Introduction

Conventionalism may be characterized as a position according to which a certain fact is (or is determined by) a convention. In other words, a conventionality thesis contains two main elements: a concept of convention and a particular, purportedly conventional, fact. Hence, in order to work out a particular conventionalist proposal it is necessary to offer an account of conventions and an account of the fact under analysis.

In the legal domain, even if it can be traced back to the conventionalist political philosophies of Hobbes and Hume, conventionalism has been framed following Herbert Hart's insights about the concept of law. As we know, Hart argued that a necessary condition for there to be a legal system is the existence of a social practice between judges regarding the identification of law – famously known as "rule of recognition" (Hart 1961). Legal conventionalism purports to strengthen Hart's original proposal by replacing the concept of social practice with the concept of convention. This task seemed necessary mainly after Ronald Dworkin's attack against Hart's theory (Dworkin 1978, 1986) and obtained some legitimacy as a Hartian legacy since Hart's purportedly conventionalist turn in his notes published as "Postscript" in the second edition of *The Concept of Law* (Hart 1994/1961). However, there is no agreement whether Hart's original proposal was already conventionalist. For instance, Coleman argued in favour of this reading (Coleman 1982) but Green and Dickson disagree (Green 1999; Dickson 2007); moreover, Dickson even doubts that the conventionalist turn has actually taken place (Dickson 2007).

Dworkin's attack has as departing point the claim that the law does not simply advice judges what to do, it imposes them a duty to enforce certain

norms. Indeed, judges themselves claim to have legal duties. According to Dworkin explaining these claims requires showing that judges have legal duties. Dworkin's criticism points to the further fact that judges sometimes disagree about the content of those duties. In cases of disagreement there is no convergence and, therefore, there is no social practice. However, even in those cases judges claim that they have legal duties. Dworkin claims that Hart's original proposal, according to which legal duties are determined by a convergent social practice, cannot show how legal duties arise in cases of disagreement where there is no convergence. Moreover, this would also show that Hart's theory is not even a good explanation of convergence cases. Legal conventionalism is an attempt to overcome this criticism by claiming that legal duties are conventional.

Conventions

The first step in order to strengthen Hart's theory is to advance a concept of convention in substitution of the concept of social practice. There is a general sense in which "conventional" is a synonym of "social": what depends on human actions and attitudes. However, conventionalists attempted to offer a more precise and interesting definition of "conventional." From this perspective, a convention exists only when human actions and attitudes acquire a precise configuration. There are two kinds of conventions in this sense, one that is agreement-based and one that is convergence-based. The condition for the existence of the first one is, according to the so-called standard version of agreement, an exchange of conditional promises (Lewis 1969; Gilbert 1993; Raz 1984). The conditions for the existence of the second one are convergence of behaviour, the dependence condition, and arbitrariness.

A concept of a nonagreement-based convention becomes indispensable to give an account of the conventionality of some, purportedly conventional, facts even if they do not result from an agreement. This is the case of some rules of natural languages, the practice of waving hands to greet someone, the rules that establish the way in which some artistic practices should be carried out, and so on. It is also the case of law. Let's then elaborate on the conditions for the existence of a convergence-based convention. The first condition consists in a regularity or convergence of behaviour: "doing the action A in the occasion O." However, conventions are not habits and, following Hart's classical observation, the mere convergence of behaviour is not enough to make this distinction. The following and second condition are about the particular attitude of the agents involved, which has been called "condition of dependence." The condition of dependence refers to the reasons people have for conforming to the convention once it is in place. There is a crucial sense in which each individual conforms to the regularity because other people do the same thing. In particular, the reason for conformity is constituted (at least in part) by the fact that there is a common practice.

Now, the existence of a common practice becomes relevant because it points to a course of action between several alternatives. This takes us to the third and final condition: arbitrariness (see (Miller 1992) for an argument against building arbitrariness into the concept of convention). Even if it has been proved difficult to specify this condition, it will be sufficient here to frame it as the possibility of choosing an alternative regularity. Thus, the convention according to which the parents of the bride have to pay for the wedding expenses could have been different. That is to say, it could have been the case that the parents of the groom were the ones having to pay for the expenses. The existence of a different way of framing a convention can be easily noticed in those cases where both alternatives are actually followed by two different groups, as in the case of the circulation sense. It seems that some practices have acquired their actual form in virtue of a particular circumstance (the decision of a person or a group, an historical accident, coincidence, etc.), but they could have been different and nevertheless be able to perform the same function.

I exclude here a further property that has been considered a condition of conventionality, namely, common knowledge. See Burge (1975) for an

argument in favour of the exclusion and see Lewis (1969) and Celano (2014) for an argument in favour of the inclusion.

Legal conventionalism claims that in order to explain how conventions can give rise to legal duties it would be necessary to specify further what a convention is. Two sets of additional conditions have been proposed in order to specify the concept of convention: those that define a coordination convention and those that define a constitutive convention. We may distinguish between different versions of legal conventionalism depending on which one of these conventions is considered to give rise to legal duties.

Kinds of Legal Conventionalism

Legal conventionalists have endeavored to answer Dworkin's criticism. Thus, all of them have sought to explain, first, how conventions give rise to duties and, second, how that explanation can be extended to, or accommodated in, cases of disagreement. They diverge regarding the specification of the concept of convention and the explanation they give for cases of disagreement. First, some philosophers have purported to defend conventionalism by claiming that there is a constitutive relationship between convention and duty. We will call this position Constitutive conventionalism. This kind of conventionalism had historically two versions. On the one hand, Jules Coleman has introduced a version based on coordination conventions (Coleman 2001b/1998), but then he abandoned it (Coleman 2001a). On the other hand, Andrei Marmor has introduced a version based on constitutive conventions (Marmor 2009).

Second, some philosophers have defended a version of conventionalism according to which legal duties stem from the fact that conventions are, under certain conditions, suitably related to moral or political values. This is Gerald Postema's position and following him we will call it Constructive conventionalism (Postema 1982; Postema 1987).

These two alternatives may be also classified in internalist and externalist versions of legal conventionalism. An internalist version is held by those philosophers that consider the practical capacity of conventions as stemming autonomously from their constitutive elements. This is the case of Constitutive conventionalism even if Marmor is not completely clear on this point. On the one hand, he claims that one condition for the existence of a convention is that there are normative reasons to follow the regularity of behaviour and that constitutive conventions define some values. This seems to imply that the existence of a convention necessarily implies that there are normative reasons to follow it. On the other hand, he claims that constitutive conventional duties are conditional (Marmor 2009). Instead, according to externalism, legal duties arise only if conventions relate in the right way to non-conventional norms. This is the case of Constructive conventionalism.

There are further differences between these two strategies. Constitutive conventionalism is a global theory, whereas Constructive conventionalism is local. Global theories seek to explain legal duties by explaining the normativity of conventions in general. On the contrary, local theories purport to show how duties stem from *legal* conventions.

Constitutive Conventionalism

According to this version of conventionalism, legal duties arise from some elements of conventions themselves. After Coleman retreat, coordination conventions are no longer proposed as a constitutive version of conventionalism, so I will not deal with them here. Yet, coordination conventions will be relevant in the next section, regarding Postema's proposal. Here we will discuss the version based on constitutive conventions.

Marmor has introduced the concept of constitutive convention. According to Marmor constitutive conventions are a system of rules that have basically the following functions: (i) they define the practice, (ii) they regulate conduct within it, and (iii) they define some of the values that are inherent to the practice and the kind of evaluative discourse that applies to it (Marmor 2009). In other words, constitutive conventions define the practice and how to be part of it. Clearly enough, this characterization relies on John Searle's distinction between regulative rules and constitutive rules ((Searle 1969); the distinction appears also

in Rawls (1955) and in Ross (1968)). Regulative rules are rules that regulate forms of behavior that exist prior to, and independently of, the creation of the rule (e.g., "it is forbidden to smoke in enclosed places"). Constitutive rules are rules that create and define new forms of behavior. Marmor proposes to conceive constitutive rules, not as rules that constitute particular actions or "new forms of behavior" but as rules that constitute a social practice, that is to say, as rules that constitute activities (Marmor 2009).

Constitutive conventions, as a kind of social rules, may give rise to duties. For instance, once we are engaged in a chess game, rules of chess determine our duties within the game. In the same way, if judges were to identify certain norms as law, they would engage in a practice that defines and constitutes their duties.

Marmor accepts that in some cases, the conventional nature of a practice may be opaque for the participants and that people may disagree about the content of conventions. Some authors have tried to explain these traits of conventions by introducing the concept of deep conventions, for instance, Juan Carlos Bayón (2002), Andrei Marmor (2009), and John Kekes (1993). From this perspective, constitutive conventions come in different layers. That is to say, there are different levels of conventional shallowness. For instance, the conventions on how to show respect in a wedding may have this structure. We can imagine a group where there is a convention according to which men should wear a tie. We can also imagine another group where there is a convention according to which men should wear white pants. Both conventions are shallower in relation with the convention according to which there is a dress code for weddings. But this last convention is, in turn, on the same level with a further convention according to which men should paint their faces with a particular color. Both conventions are shallower in relation with a convention according to which men should show respect through their personal appearance.

In the case of law, Marmor argues that the rule of recognition is a superficial convention that may instantiate different deep conventions. For instance, the reasons for having a legal system (such as having conflict-solving mechanisms, solving problems of collective action, producing public goods, etc.) may be instantiated by different kinds of legal systems, such as those instantiated by the common law and the continental law traditions. These traditions are, according to Marmor, deep conventions instantiated by different rules of recognitions (Marmor 2009).

Given that conventions may be structured in different levels, constitutive conventionalism is now able to make room for disagreements. If conventions were all superficial, then any discrepancy on the content of the duty would preclude its conventionality. But disagreement on a level does not imply disagreement on a deeper level. Thus, even if people might disagree on the content of a superficial convention they might still agree or converge regarding the content of the deeper one. Sure, the compatibility between disagreement on one level and convention on the other has limits, i.e., the disagreement cannot be pervasive. Conventions are finite, and it is possible that some disagreement would imply that there is no convention on any level. However, the point is that now there may be some level of disagreement and, nevertheless, a convention may be in place.

This form of conventionalism has received several objections. First, the attempt to extend the notion of constitutive conventions to the activity of judges has been contested. Even if constitutive conventions are useful as an account of game-like activities, it seems difficult to claim that a constitutive convention of that sort exists in the legal domain. It is so because judges' activity is characterized by conflicts of interest and by an interaction with an open structure. For instance, Dworkin claims that from a historical perspective it can be seen that legal practice often changed in response to arguments made in the context of adjudication. These arguments were carried out not as part of a special miniconstitutional convention to change the rules of the game, as in game-like activities. Instead, lawyers often require changes to be made within judicial practice. They are not the result of special agreements about having a new set of rules (Dworkin 1986). In the context of constitutive conventions such arguments would have been powerless, even silly, if everyone had thought that

rules constitute the practice in the same way as the rules of football constitute that game. Constitutive conventions can also change, but once people are engaged in the practice, a sharp distinction is made between arguments about and arguments within the practice. This distinction does not take place in the activity of the identification of law. Second, it has been claimed that constitutive conventions are just conceptual rules and, as such, they do not impose duties. For instance, Eugenio Bulygin has argued that the rule of recognition defines what counts as law, and even if in that sense it may be conceived of as a constitutive convention, it has not the normative force of norms of conduct. We may say that a conceptual rule is being used or not, but it makes no sense to say that it is obeyed or not. So, according to Bulygin, either the rule of recognition is a constitutive convention or it is a duty-imposing norm of conduct (Bulygin 1976).

Constructive Conventionalism

This kind of conventionalism trusts to have found in the value of coordination the key to explain how conventions can justify legal duties.

According to Postema judges identify and apply the law on the basis of coordination conventions and, given certain conditions, those conventions impose duties. The argument is that once the coordination convention is stabilized it will generate in the addressees of the norms the expectation that judges will continue to identify norms that way. Under certain conditions the fact that these expectations are created gives raise to the duty of following the convention.

A coordination convention is a regularity of behavior that solves a recurrent coordination problem. This is the type of convention introduced by David Lewis in his book *Convention* (Lewis 1969). Actually, the label "coordination convention" is not Lewis'. Originally, Lewis purported to provide an explanation of the general concept of convention, hoping to capture "our common, established concept of convention" (Lewis 1969). After some criticism by Jamieson (1975) and Gilbert (2008) he assumed a less ambitious position. According to Lewis, a coordination convention exists, even without an agreement, in certain situations of social interaction that have specific properties. These are situations in which two or more individuals, with similar interests, face two or more possible courses of action. Each option satisfies their interests in a similar way provided that both of them take the same course of action. For instance, we can imagine two friends facing a situation of this kind when they have decided to meet without specifying the place. In their situation, many solutions are available (several places for their meeting), and to each friend it is not too important which particular solution is chosen, each of them only cares for the place to be the same as the one chosen by the other. The situation becomes problematic because even if each individual knows that their interests are the same, there are many options (at least more than one) that satisfy them. Lewis called "a coordination problem" the kind of situation that I have described.

When a situation of this kind is recurrent, i.e., it occurs with certain regularity, the solution attained once can generate, between the agents, mutual expectations about the behavior of others and that can drive them to converge in that same solution the next time. When an alternative emerges as a solution it is said to be *salient* (Lewis 1969). Once the group of friends has met in one bar, they would tend to go back to that place. The relevant thing about this regularity is not so much the way in which it emerged, but the fact that it started to be repeated. In that case a coordination convention emerges.

Judges purport to guide the behavior of citizens and in order to do that they need to give citizens the possibility of identifying the law. That identification would be impossible if judges were to decide cases in disparate ways (Postema 1982). In this situation, according to legal conventionalism, judges face a coordination problem. For that problem to be solved, and for judges to effectively comply with their professional task (i.e., guiding citizens behavior), they must converge in the identification of law. In particular, judges should maintain the unity and integrity of their activity. A coordination convention emerges when the convergence on identification becomes settled. The existence of that convention will create in the citizens the

expectation that judges will keep identifying law in such and such way.

However, not all expectations, even if reasonable, impose the duty to meet them. As, in the example mentioned by Postema, the fact that during his diary promenades Kant would pass at five o'clock at a lady's window and the fact that on that basis the lady would form the expectation that he would pass every day at that hour does not impose to Kant the duty to satisfy that expectation. (Postema 1982). According to Postema, the duty emerges only "when the context in which expectations arise and are sustained is closely analogous to a cooperative enterprise for mutual benefit in which considerations of fair play require conformity" (Postema 1982). The conformity is required when the frustration of the expectation would be unfair. The frustration of expectations is unfair when those who encouraged it frustrate the expectation.

These considerations make it mandatory for judges to comply with the conventions on which basis they identify the law. Indeed, the relationship between judges and citizens, while interdependent, is asymmetrical. Judges conceive of, and they demand others to conceive of, their activity as authoritative, and this is clearly a way to induce expectations. This type of activity requires, according to the doctrine of political responsibility, that judges act on the basis of a "general public theory" and therefore each judge should (i) secure consistency regarding the activity of other judges and (ii) respect the legitimate and reasonable expectations of citizens regarding his activity.

In this way, given that induced expectations should be respected, and given that citizens are entitled to expect that judges will conform to the convention, judges have a duty to respect the coordination conventions on which basis they identify the law.

Based on this reconstruction Postema attempts to answer Dworkin's objection according to which Hart's theory cannot explain judicial disagreements. Postema admits that the content of the coordination convention may be uncertain or controversial in some cases, but he claims that this only means that a new coordination problem has emerged. Therefore, in order to solve it judges will have to deal with the same kind of task: to try to find a salient solution. Thus disagreements are just coordination problems of a different level that may be solved through a coordination convention (Postema 1982). Of course, conventions have limits and the case may arrive where coordination is not possible, and hence there will not be a duty to decide the case one way or another (Postema 1982).

The objections against this form of conventionalism highlight the fact that, contrary to Postema's claims, judges do not seem to face a coordination problem when they are in the business of identifying the law. A coordination problem is a situation in which participants have ex-ante preferences that are structured in a certain way, i.e., their interests coincide. On the contrary, it seems more realistic to affirm that interaction problems in the legal domain, where charges and benefits must be distributed, are of several different kinds and complexities that involve conflict of interest. To conceive the activity of judges as solving a coordination problem would be to distort the kind of situation in which they act (Celano 2010/1997).

In short, according to critics, judges do not face a coordination problem and if coordination conventions are regularities of behaviour that solve recurrent coordination problems, then it is not possible to claim that legal duties arise from a coordination convention. See, however, Lagerspetz (1995) and Postema (2011) for an argument attempting to extend coordination conventions to cases in which interests are in conflict.

Further Varieties of Legal Conventionalism

The search in conventions for a successful alternative to Hart's notion of social practice was also motivated by the aim of keeping the theory within the realm of legal positivism. That is to say, legal conventionalism purports to remain inside the set of legal theories that defends the social facts thesis. According to this thesis, the existence and the content of law is a matter of social facts (see Bulygin (2006) and Caracciolo (2009) for a

characterization of legal positivism). Legal conventionalism purports to show that legal duties may be explained by making reference to a special kind of social facts: conventions.

However, there are some varieties of conventionalism that depart from this project. On the one hand there is what we might call Moral legal conventionalism, according to which legal conventionalism is intrinsically antipositivist and therefore it is a version of Natural law theory. For instance, Dimitrios Kyritsis claims that there are second order considerations in virtue of which participants in legal practice have moral reasons to defer to the decisions of other participants (Kyritsis 2008). Govert den Hartogh defends the thesis that the potential of conventions, including legal ones, to give place to duties must be explained by reference to higher-order expectations about the cooperative virtues of each participant, i.e., the fact that they will act on the basis of moral principles such as fairness and fidelity (den Hartogh 1998, 2002).

On the other hand, we find what we might call Sceptical legal conventionalism that rejects the thesis according to which there are legal duties. Federico Arena has claimed that judges' statements about legal duties can be explained without having to show how those duties exist. In order to overcome this difficulty we should sharpen the comprehension of those statements. Adopting a slow-track expressivist view (Blackburn 1998), Arena claims that judges' statements of duty are propositional reflections of judges' evaluative attitudes and that their assertion according to which, on the basis of some interpretative conventions, there are legal duties is nothing other than expressing their attitude towards the accomplishment of the action (Arena 2014).

Conclusion

Conventionalism in the legal domain has been mainly devoted to answering Dworkin's objection against Hart's original proposal by specifying the social fact thesis. Indeed, according to the conventionality thesis the existence and content of legal duties are determined by conventions. I have referred to what I consider the two most representative versions of legal conventionalism. Marmor's proposal based on constitutive conventions and Postema's proposal based on coordination conventions. Both versions seek to explain, first, how conventions give rise to duties and, second, how that explanation can be extended to, or accommodated in, cases of disagreement. First, according to Marmor, legal duties arise when judges engage in a practice constituted by a set of rules defining how to identify legal norms and regulating their conduct within it. Moreover, given that constitutive conventions may be structured in different levels, they make room for disagreements. For disagreement regarding a superficial convention does not preclude convergence (or agreement) regarding the content of a deeper one. Second, according to Postema, legal duties arise because, given that citizens are entitled to expect that judges will maintain the unity and integrity of the legal system, judges have the duty to comply with the coordination convention on which basis they identify legal norms. Besides, disagreements are just coordination problems of a different level that may be solved by finding a salient solution.

Finally, I have briefly introduced the objections raised against both versions, but I have left open the question whether conventionalism is able to overcome them.

Cross-References

- ► Institutionalist Theories of Law
- ► Legal Positivism: Exclusive
- ► Legal Positivism: Inclusive
- ► Natural Law: Contemporary
- ► Neoconstitutionalism

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Corporal Punishment of Children

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Character, Prevalence, and Controversy

Corporal punishment of children may be defined as the intentional exercise by parents, teachers, or other authorized caregivers of physical force on children's bodies, in a way calculated to inflict physical pain, for the purpose of discipline or correction. It is administered through techniques such as spanking, slapping, and beating, not infrequently using instruments such as canes, belts, and paddles. Corporal punishment could be defined more broadly to encompass in addition punishments inflicted on the body that consist in the visiting of physical pain without the exercise of physical force, as when a child is required to perform backbreaking labor as a direct consequence of their wrongdoing. This entry is confined to corporal punishment in the narrow sense, however. It is corporal punishment in this narrower sense that is the most prevalent form of corporal punishment. And it is corporal punishment in this sense that is at issue in the debate raging in the social, legal, and political arenas about the moral acceptability of corporal punishment of children and about whether it ought to be legally prohibited.

Corporal punishment has been practiced for as far back as history has been recorded and is nowadays, as it has been for some time, widespread. Around 63 percent of children worldwide between the ages of 2 and 4 – some 250 million children – are regularly subjected to corporal punishment (Heilmann et al. 2021: 355). Parents encounter a legal prohibition on all corporal punishment in only a minority of countries, most legally permitting them to administer "reasonable" and/or "moderate" corporal punishment. Corporal punishment in schools has been legally proscribed in most countries, but continues to be lawful in many, including in the United States, where it is legally authorized in nineteen states.

Corporal punishment has historically garnered some support from philosophers. John Locke and Immanuel Kant, for instance, both consider it to be morally permissible as long as it is used infrequently and as a last resort (Locke 1996; Kant 1900). It has more recently been defended by David Benatar, who considers mild and infrequently inflicted corporal punishment administered by parents and teachers to be morally permissible on the ground that its benefits outweigh its costs (Benatar 1998). A number of philosophers have opposed corporal punishment, however, including Henry Salt, who deems it unacceptably degrading and tyrannical, and Bertrand Russell, who considers it to teach children the wrong lesson about violence and to destroy the relationship of trust that ought to exist between children and their parents and teachers (Salt 1905; Russell 1926: 176).

The Retributivist Justification

Corporal punishment's supporters sometimes argue that retributivism, in its primary formulation a deontological rationale for punishment according to which punishment of culpable offenders is justified on the ground of their desert, justifies corporal punishment (see Hsiao 2020). This is implausible, however. A necessary condition for adjudging individuals to deserve punishment is that they are morally responsible for their wrongdoing. Yet it would be unreasonable to hold young children (the vast majority of corporal punishment's recipients) morally responsible for their misdeeds as they lack a sufficiently developed ability to reason and maintain self-control. And even if retributivism can be invoked in partial justification of the punishment of some older children, it cannot vindicate the use of corporal punishment because, although its tenets do not rule out corporal punishment, retributivism does not single out any particular type of punishment as a uniquely appropriate response to any misdeed. Retributivism does not require corporal punishment and could be fully satisfied by the imposition of alternative types of punishment such as writing lines, time-outs, detention, grounding, suspension of privileges, and extra chores. Corporal punishment, therefore, will only be permissible if its advantages compared to alternative sanctions outweigh its disadvantages and if it does not set back children's basic interests overall.

Advantages and Disadvantages

A number of advantages are claimed for corporal punishment by its defenders.

One benefit reaped by corporal punishment, they claim, is that it is an effective technique of moral education. It may be considered an especially edifying response to children's acts of violence insofar as it forces them to experience the suffering they have inflicted on others as a precursor to moral awakening or transformation. But even setting aside Kant's holding, in relation to corporal punishment, that "no good character is formed in this way" (Kant 1900: §84), there is no credible evidence to suggest that corporal punishment is more effective than disciplinary alternatives at promoting children's moral education. It is probably less effective: There is strong evidence associating even moderate forms of corporal punishment, including spanking, with low moral internalization, as well as with a range of delinquent, violent, antisocial, and otherwise undesirable behaviors in children (Gershoff and Grogan-Kaylor 2016).

Another benefit extolled by corporal punishment's supporters is that it is efficacious in

bringing about stubbornly disobedient children's compliance with caregivers' commands and instructions when used as a sanction of last resort (Locke 1996: §78). The findings of psychological studies indicate that corporal punishment is effective at eliciting immediate, short-term compliance with the commands of parents and teachers. Yet the empirical data do not support the claim that it is indispensable to the achievement of this aim (Gershoff 2010: 37).

A further benefit sometimes claimed for corporal punishment is that it deters children from misconduct, either by providing those who have undergone it with an incentive to not engage in wrongdoing in the future (specific deterrence) or by instilling in other children a fear of undergoing it (general deterrence). Indeed, it is claimed by some to be a more effective deterrent than other types of punishment (see Peters 1966: 273, 278). But evidence adduced in support of the claim that corporal punishment is an effective marginal deterrent is meagre and weak.

Benatar identifies three additional benefits of corporal punishment. He contends, first, that it is more convenient than alternative sanctions for parents and teachers owing to the ease and swiftness of its administration. It may, however, be countered that the greater convenience of corporal punishment relative to many of its alternatives does not lend it much justificatory support, both because convenience is not a weighty consideration in determining an act's moral status – inconvenience does not go far toward justifying reneging on promises or resiling from obligations – and because convenience is outweighed by the importance of investing intensively in children's discipline, a point Locke's description of corporal punishment as a "lazy and short" mode of discipline may be intended to convey (Locke 1996: §47).

Benatar argues, second, that the inclusion of corporal punishment in the roster of punishments enhances parents' ability to express condemnation of wrongdoing. To this, it can be replied that since the abjuring of corporal punishment does not preclude there existing a scale of punishments varying in severity and character, and because it would be possible to combine qualitatively distinct punishments (detention and writing lines, for instance), forbearing corporal punishment would not seriously impede the communication of condemnation. A defender of corporal punishment might rejoin that corporal punishment is uniquely capable of expressing censure of children's wrongdoing involving physical violence in virtue of partaking in the wrong-making feature of the offense for which it is imposed. But against this must be weighed the disadvantage that use of corporal punishment to convey to children disapproval of violence models the very behavior caregivers are attempting to condemn, conveying the message that violent behavior is acceptable to maintain authority or correct undesirable behavior. Benatar argues that other types of punishment might equally teach children the wrong lesson, yet we do not consider this a strong objection to their use. Detention and time-outs, for example, have the potential to teach children that restricting the liberty of individuals of whose conduct one disapproves is acceptable, yet we do not consider these punishments unacceptable for this reason (Benatar 1998: 246). A counter is, however, available, namely that we ought to be more concerned about children learning the lesson that physical violence is an acceptable response to a conflictual situation than about their extracting the message that restrictions of liberty are, since resort to violence in situations of conflict or confrontation is a more prevalent and serious social problem than individuals incarcerating or detaining others in response to conflict (Lenta 2018: 50).

Benatar argues, third, that corporal punishment, unlike alternatives such as extra chores or work, or service to the school or home (picking up garbage or weeding flowerbeds, for instance), does not result in children coming to associate activities that are "good in themselves" with punishment, reinforcing any existing disinclination to engage in these activities. But this argument is speculative and overlooks an important consideration: Assigning extra chores or activities that promote the good of the home or school could afford children the opportunity to make apologetic reparation, thereby restoring their relationship with those they have wronged and other members of their school or family (Duff

2001: 105). Such punishments could also have the effect of "strengthening the child's sense of self as good and constructive rather than bad and antisocial" (Nussbaum 2004: 246).

Against corporal punishment's advantages – the most clearly established and significant of which is that it is more convenient than (most) alternative disciplinary techniques – must be weighed its costs and disadvantages. Studies of parental spanking falling short of severe corporal punishment or abusive treatment have found it to be associated with these psychological harms and undesirable behaviors:

> In childhood, parental use of spanking was associated with low moral internalization, aggression, antisocial behaviour, externalizing behaviour problems, internalizing behaviour problems, mental health problems, negative parent-child relationships, impaired cognitive ability, low self-esteem, and risk of physical abuse from parents. In adulthood, prior experiences of parental use of spanking were significantly associated with adult antisocial behaviour, adult mental health problems, and with positive attitudes about spanking. (Gershoff and Grogan-Kaylor 2016: 457)

The evidence that spanking is associated with these adverse outcomes is sufficiently strong to warrant, in the view of several psychologists, the causal inference that corporal punishment increases the risk that children, and the adults into which they will develop, will experience detrimental outcomes (Gershoff et al. 2018). Some psychologists, it is true, deny that this causal inference is justified on the ground that the studies on which it is based are mostly correlational in design (Larzelere et al. 2019). That most studies relied upon are correlational, these psychologists observe, means that their findings could suffer from reverse causation, that is, children's behavioral problems could induce parents to mete out corporal punishment. Furthermore, correlational studies may leave open the possibility of selection bias (leaving unobserved characteristics underlying parents' use of corporal punishment and children's development unaccounted for). A retort available to corporal punishment's opponents is to observe that causal conclusions have in the past been drawn in the public health arena based on well-designed correlational research. For instance, the United States Surgeon General has concluded on the basis of correlational research that it is safe to infer a causal relationship between smoking and a variety of cancers (Gershoff 2010: 51). What is more, recent research on the effects of corporal punishment on children employing MRI analysis has found that it may affect their brain structure and functioning. The findings of a recent study reveal an association between spanking and atypical brain architecture (Cuartas et al. 2021).

Another disadvantage of corporal punishment relative to its alternatives is that it is associated, empirically, with a risk of escalating into abuse (Gershoff 2010: 51–52). Parents and teachers, that is, may inadvertently cross the indistinct line between mild corporal punishment and unacceptably severe forms, or the equally blurred line between corporal punishment and physical abuse. Because of the potential for a spank and an exercise of greater force to elicit qualitatively indistinct reactions from children, corporal punishers will not be in a position to know at what point corporal punishment crosses over into the realm of the unacceptably severe or shades into abuse (see Bartlett 2010).

A further disadvantage of corporal punishment is the psychological distress, in the forms of anxiety and fear, that it elicits in children. Anxiety is often occasioned by the anticipation of corporal punishment. Corporal punishment's potential for anxiety can be eliminated by carrying it out immediately after the child's transgression. But this allows no time between the child's transgression and the administration of corporal punishment for the child to reflect on her wrongdoing in a way conducive to moral awakening or reform and runs the risk of it being administered while the parent or teacher is angry, which, apart from this making it more likely that the punishment administered will be disproportionately severe, conveys to the child the message that violent expressions of anger are acceptable. Furthermore, there is evidence to suggest that anxiety can trigger hyperalgesia, whose effect is to amplify the perceived intensity of the physical pain visited on the child, increasing the difficulty of gauging the severity of the corporal punishment inflicted. Corporal

punishment may also elicit fear while it is being inflicted that may be intensely distressing, heightening the child's psychological suffering in a way undesirable given children's psychological vulnerability. Nonphysical punishments such as time-outs are less likely to engender intense anxiety and fear in children.

Children's Rights

It is at least plausible to conclude that corporal punishment ought to be eschewed because its advantages over its alternatives are outweighed by its disadvantages. But even if the opposite conclusion is reached, its defenders must still confront a powerful objection to its use, namely that it violates children's rights (see Lenta 2018: chapters 3 and 4). Not everyone agrees that children possess moral rights. Jeremy Bentham famously regarded talk of moral rights as nonsensical, while others, though accepting that normal adults have moral rights, deny that young children can be rights-holders. Adherents to the Will (or Choice) theory of rights, which conditions the ascription of rights on a degree of self-determination, the exercise of choice among options, denies that infants possess rights because infants lack the capacity to exercise meaningful choices between enforcing or waiving their claims against others. But preeminent psychologist defenders of corporal punishment join its opponents in condemning the corporal punishment of infants, who lack the cognitive wherewithal for punishment of any kind to succeed in achieving legitimate disciplinary aims. Moreover, Will theorists can accept that children who have progressed beyond infancy such that they possess a measure of agency could possess basic rights, including a right to protection against physical violence (Wellman 1995: 113; Wellman 1997: 132–135; Griffin 2008: 94–95).

Among the rights that corporal punishment's opponents contend corporal punishment violates are the right to security of the person, which affords protection against deliberate, nonconsensual exercise of physical force on their bodies. Corporal punishment is also often viewed as violating children's right to protection against degrading punishment. The principal argument for its being unacceptably degrading is that it treats children as though they occupied a lower rank than they do in virtue of communicating to them the insulting message, whether or not the insult is intended, that they lack sufficient worth to be treated with the respect accorded to others. The message that corporal punishment is said to convey to children is that they possess a low social status, corporal punishment having been reserved, historically, for those assigned a low social status such as slaves, wives, and employees. Many who think that the advantages of corporal punishment are outweighed by its disadvantages (including risks), and that available alternative punishments can achieve legitimate disciplinary aims at a lower cost, conclude that corporal punishment violates children's rights to personal security and to protection against unacceptable degradation.

The Case for Legal Prohibition

Those who conclude that corporal punishment is seriously wrongful, in virtue of its posing a risk of psychological harm to children and its violating children's rights, often also believe that it ought to be criminalized (see Lenta 2018: chap. 5). A number of arguments may be enlisted in support of criminalization. It has been contended that the failure to criminalize corporal punishment when the nonconsensual exercise of physical assault on the bodies of adults is criminalized as assault amounts to unfair discrimination on the ground of age. As well, it has been contended that evidence coming in from many countries that have legally banned all corporal punishment suggests that legal prohibition has efficacy in abating its use by playing a role in changing people's attitudes toward it such that over time increasing numbers of them come to view it as morally wrongful and to forswear it.

A further consideration may support the criminalization of all corporal punishment: the vagueness of legal authorizations, which typically condition corporal punishment's permissibility on its being "reasonable" and/or "moderate."

These vague standards are argued not to provide parents with sufficiently clear and determinate guidance about the severity of the physical force that may permissibly be inflicted on children's bodies, preventing caregivers from gauging accurately the point at which their infliction of corporal punishment exposes them to criminal liability. The vagueness of these standards also disables police officers and legal officials from knowing with certainty whether a given instance of corporal punishment exceeds the limits of what is legally permissible, potentially resulting in arbitrary or even discriminatory enforcement. To this argument, it may be replied that it is possible to eliminate the vagueness in legal authorizations by replacing references to reasonableness and moderation with an operationalizable rule, as former Canadian Supreme Court Chief Justice MacLachlin attempted to in her majority judgment in the 2006 case, *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*. But Justice MacLachlin resorts once again to vagueness in restricting reasonable force to "minor corrective force of a transitory of trifling nature," phraseology which does not greatly ease the difficulty of knowing precisely what severity of force may be employed before corporal punishment becomes unlawful.

The case for criminalization of corporal punishment may be challenged from several perspectives. It is often argued that the presumption in favor of freedom from state coercion is sufficiently strong to protect certain "behaviours that are seriously wrong from being criminalized" including certain examples of bad parenting, and that in this context "it is more important that one choose freely than that one choose rightly" (Moore 2014–5). To this, however, supporters of criminalization may reply that the latitude accorded to parents to raise their children as they deem fit is circumscribed by the requirement that they promote their children's interests overall, and that they do not set back those interests, as corporal punishment (in their view) does.

Opponents of criminalization may also object that what occurs in the privacy of domestic sphere should be safeguarded from state intrusion into the home. But supporters of criminalization can counter that no one whose opinion matters considers that the state, out of respect for privacy, should refrain from intruding into the family home if necessary to prevent child abuse or spousal violence. They are likely to insist that considerations of privacy are outweighed by the importance of protecting children's rights and interests with respect to corporal punishment too.

It may also be objected to criminalization that the state's interference in the family is likely to erode valuable intimacy in the relationship between parents and children. But supporters of criminalization may reply that there is little reason to fear that frequent state interference in family affairs will result from criminalization. The main aims of criminalizing corporal punishment, they may say, are to remind parents of their children's rights and the need to protect them and to alter their convictions about its acceptability with the objective of reducing its use. These aims, it may be urged, can be achieved without children continually standing on their rights and without the state frequently intruding into family life.

There may be a residual concern that the criminal law is a "blunt instrument" whose intrusion into the family risks destroying the integrity of families and undermining the well-being of family members. But few nowadays are inclined to take seriously this sort of concern as an argument against state intervention to prevent husbands from physically chastising their wives for corrective purposes, for example. Furthermore, the dire consequences of criminalization envisaged by its opponents have not materialized in many cases. The criminalization of corporal punishment in New Zealand, for instance, has not resulted in the destruction of families, for in that country (as in a number of others) a policy of prosecutorial restraint has been operative which reduces unwarranted intrusion by the courts into family life and obviates appreciable strain being placed on the criminal justice system.

Finally, members of religious groups, including Evangelical Christians, may claim to possess a right to be exempted from compliance with the legal ban on corporal punishment. They may invoke their right to religious liberty, insisting

that the uniform application of a legal prohibition will treat them unfairly by imposing a burden on them that is not imposed on others in virtue of their being forced to forgo this practice inconsistently with their perceived religious obligations. But this claim for a religious exemption confronts two powerful objections. First, most philosophers who have considered claims for religious exemptions to facially neutral laws of general application have concluded that there is no principled argument that singles out religious commitments as meriting special moral or constitutional solicitude. And second, there is no room for granting exemptions in circumstances in which the legally prohibited practice risks serious harm to children and violates their basic rights.

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Corporal Punishment: Judicial

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Introduction

Judicial corporal punishment (JCP) consists in the deliberate exercise of physical force on the bodies of criminal offenders using techniques such as fustigation, flagellation, and electric shocks in a way calculated to inflict physical pain. JCP is administered pursuant to offenders' having been sentenced to it by a court following a determination that they are guilty of an offence. Historically widely employed around the globe, including throughout the British empire, the use of JCP is nowadays confined to fewer than 30 countries, including Singapore.

JCP is widely deplored as brutal and inhumane. One of the dominant narratives of modern penal history is of a transition from the use of physically violent sanctions emblematic of premodern repression to the more humane

deprivation of offenders' liberty. Yet this narrative is disputed by some, including Michel Foucault, who denies that the transition from JCP to imprisonment brought about by Enlightenment reformism can be explained by a heightening of moral concern for the well-being or dignity of prisoners. The shift is instead accounted for, in Foucault's view, by a determination to punish more effectively and to exercise greater control over society through new regulatory and normative techniques of disciplinary power. Foucault conceives of this transition as the replacement of one system of domination with another (Foucault 1977).

There has in recent decades been a resurgence of interest in a moral reconsideration of forms of JCP that cause no lasting physical injury (see, e.g., Scarre 2003; Newman 2010; Moskos 2011; Murtagh 2012; Brennan 2017; Moen 2020). Those pressing for a reassessment of JCP are typically motivated, in part, by the thought that it may be more humane than subjecting criminals to the conditions of imprisonment existing in many countries, especially the United States, whose prisons are widely depicted as a nightmare of overcrowding, predation, rape, violence, degradation, poor diet, and inadequate ventilation (see, e.g., Ferguson 2014). Opponents of JCP can retort that the awfulness of the conditions of incarceration in the United States and certain other countries supplies an argument not for JCP but for the reform of existing prison conditions to allow inmates to live in safer, less crowded, and less humiliating circumstances. But to this, supporters of JCP typically rejoin that it is morally preferable to imprisonment even under humane conditions. They claim a number of advantages for it over imprisonment. Before considering the benefits and advantages extolled by JCP's supporters, the retributivist justification for JCP stands in need of assessment.

The Retributivist Justification

Assuming what some philosophers deny (Boonin 2008; Zimmerman 2011), namely that the legal punishment of criminal offenders is justified, can resort to JCP ever be morally legitimate? Retributivism, according to which punishment of criminal offenders is justified by their desert, does not rule out the use of JCP. Yet retributivism cannot be invoked in support of JCP either. Because retributivism is only limitedly determinate, it does not single out any type of punishment as a uniquely fitting response to any particular crime and can therefore be completely satisfied by other types of punishment.

The doctrine of *lex talionis*, adhered to by some retributivists, appears to provide the most promising basis for claiming that retributivism calls exclusively for the imposition of JCP for certain crimes such as assault. On its most plausible construction, the *lex talionis* requires that like be returned for like. In other words, it demands that a punishment should qualitatively match the crime for which it is imposed. However, as Jeffrey Reiman and Jeremy Waldron demonstrate, the *lex talionis*, plausibly interpreted, is itself only limitedly determinate and does not ever render JCP a morally obligatory response to any crime including assault (Reiman 1985; Waldron 1992).

It could be argued that retributivists ought (all else equal) to prefer types of punishments, such as JCP, that can be completed quickly. On this argument, the more protracted the punishment, the greater the chance of an offender on whom it has been imposed not receiving the entirety of his or her deserved punishment as a result of the offender's death, escape, or something else (Tomlin 2014). But against this time-related advantage of JCP over more prolonged types of punishment must be weighed the drawback that JCP is more likely to punish in full people whose innocence is discovered only after the administration of punishment has begun. While an innocent person who has been subjected to JCP can be compensated for undeservedly exacted punishment, JCP is less likely to be remissible because when the innocence of an offender whose JCP has commenced is discovered, there is "little chance of their being any [punishment] yet to come" (Bentham 1830: 52).

Advantages and Disadvantages

The case for JCP must therefore depend, for retributivists as for others, on whether its

advantages compared to available alternative punishments outweigh its disadvantages and on whether there are powerful objections to its use, such as its violating offenders' rights. JCP's defenders claim for it several advantages over imprisonment (see, e.g., Scarre 2003; Newman 2010; Moskos 2011; Murtagh 2012; Moen 2020): that it is financially much less expensive than imprisonment; that because it is administered swiftly, it does not cause harm to offenders' family members and dependents by depriving them of a source of financial and emotional support to nearly the same extent as imprisonment; that it avoids prolonged restrictions on offenders' liberty and privacy that are prerequisites for work, relationships, and family life and, in so far, for the furtherance of many of their ulterior interests; that it avoids the interaction of offenders, a feature of imprisonment that may serve to reinforce their criminal propensities and therefore to increase the probability of their criminally offending in the future; that it reduces the risk, ever-present in many present-day prisons, that offenders will be predated upon, assaulted, raped, or mistreated by guards and other offenders; and that JCP is likely to have greater deterrent efficacy than incarceration. Other advantages over imprisonment that JCP is said by its defenders to possess are that it is inherently less invasive, that it has greater denunciatory efficacy, and that it is more "equable" inasmuch as the pain it inflicts can be precisely measured to eliminate variation in the suffering experienced by different offenders in response to the same amount of punishment.

Some of the advantages claimed for JCP over imprisonment by its supporters are plainly significant, including its depriving offenders' dependents of a source of emotional and financial support to a lesser degree, its being much less financially costly, and its not restricting offenders' liberty and privacy to the same extent. Others are harder to demonstrate or less substantial. The claim that JCP will have greater effectiveness as a deterrent than imprisonment is questionable. JCP could have appreciable deterrent efficacy if its administration was publicly exhibited (Bentham 1830: 184). But most modern supporters of JCP think it should be carried out in private to avoid unacceptably humiliating the offender. It is possible that JCP's deterrent efficacy could outstrip that of other punishments in virtue of its exerting a greater influence over the imagination of the offender (Scarre 2003: 302). But against this speculation can be set the conjecture that the use of JCP could have a brutalizing effect on members of the public, coarsening their moral sentiments and weakening their aversion to violence with the effect of increasing the crime rate. There is insufficient empirical evidence to show that JCP has greater efficacy as either a specific or a general deterrent than other types of punishment. And it is far from clear that the reintroduction of JCP on an experimental basis to ascertain its deterrent efficacy would be justified (Lenta 2018: 197).

Graeme Newman argues that JCP has an advantage over imprisonment insofar as, because it involves the infliction of physical pain and has no reformative ambitions, it is more likely than imprisonment to reassure the public that punishment has been credibly administered (Newman 2010: 50, 93–94). This is questionable, however. Although imprisonment need not visit physical pain upon offenders, the deprivation of liberty over a (relatively) prolonged period is widely understood to be a credible punishment. Manifestly, even prison conditions at their mildest will set back offenders' basic interests in liberty and privacy significantly, reducing the quality of their lives to a level significantly below those not behind bars.

Also open to question is the contention that JCP is more "equable" than imprisonment in virtue of the amount of pain it inflicts being amenable to precise calculation, eliminating variation that exists in the case of imprisonment in the subjective experience of suffering by different offenders – the suffering of incarcerates in response to the same term of imprisonment varying depending on their psychological sensitivity, adaptability to prison conditions, and whether they have relationships with friends and family that will be disrupted. One way to reply to this argument is to insist that what ought to be proportional to the seriousness of the crime is the

severity of the punishment, understood objectively as the setting back of offenders' interests, not the severity of the suffering subjectively experienced by them as a consequence of its infliction. But even if it be conceded that variation in offenders' suffering ought to be eliminated or at least minimized, it is doubtful whether JCP achieves this. For one thing, the psychological suffering induced by corporal punishment may vary depending on the differing characteristics of offenders (Bentham 1830: 83). As well, it may be that different people experience painful physical stimuli differently. Pain responses have been found to be influenced by psychosocial context and cultural background, as well as by anxiety and depression.

Finally, the claim that imprisonment is more invasive than JCP is open to question. Kevin Murtagh argues that imprisonment, because it inflicts psychological suffering relating to the disruption of valued relations and activities, is more invasive than JCP, which causes only physical suffering. Psychological suffering is more invasive than physical suffering, he contends, because the "beliefs, desires and attachments" with which psychological suffering is bound up are more central to and "constitutive of our identity as persons" than our bodies are (Murtagh 2012: 51–53). Murtagh appeals to Hugo Adam Bedau's Minimal Invasion Principle, according to which a punishment will be justified only if it is the least invasive means of achieving a worthy public purpose (Bedau 2002). A number of replies are available. Imprisonment need not involve a deep invasion of an offender's psyche in the way that brainwashing and certain forms of coercive therapy would. Additionally, JCP that inflicts severe physical pain, as JCP typically does, is deeply psychologically invasive because the intense pain it inflicts (temporarily) undermines offenders' rational self-governance, preventing them from rationally reflecting for the duration of the punishment. And by undermining offenders' self-governance and self-possession, JCP attacks offenders' dignity, which is plausibly viewed as being at the core of their identity. Furthermore, JCP often elicits feelings of humiliation and loss of self-esteem as a result of offenders' inability to retain their self-control under the importunity of severe physical pain, and this too must count as psychological suffering.

Against JCP's advantages compared to imprisonment must be weighed certain disadvantages. Because JCP is swiftly administered compared to imprisonment, it is much less incapacitative. As well, JCP offers offenders less encouragement to repent and reform. Because its infliction is swiftly over, and because the intense physical pain it inflicts undermines offenders' ability rationally to reflect, it does not afford offenders an extended opportunity to reflect on the censure communicated to them through its infliction, undistracted by the demands and diversions of daily life, while the punishment is being administered (Bentham 1830: 115). Furthermore, it is harder, if not impossible, to communicate a condemnatory message about the denial of victims' dignity by offenders through their wrongdoing, when the punishment that is the medium through which that message is conveyed is itself unacceptably degrading.

Additionally, to the extent that JCP has advantages over imprisonment, those advantages may be less significant when it is contrasted with other types of punishment. Community service and community custody curtail offenders' liberty and privacy to a lesser degree, result in offenders' dependents suffering less collateral harm, and are far less expensive than imprisonment. And types of punishment other than imprisonment may have certain advantages over JCP that imprisonment does not have, such as, in the case of community service, being highly amenable to being tailored to reflect qualitatively the crime for which it is imposed, enabling it to communicate censure more effectively.

Offenders' Rights Against Degrading, Cruel, and Torturous Punishment

Even if the balance of JCP's advantages and disadvantages compared to alternative punishments, including imprisonment, is such as to favor its use, a powerful rights-based objection can be raised against JCP. On this objection, JCP is unacceptably degrading, cruel, and torturous, and

offenders have a right not to be subjected to unacceptably degrading, cruel, or torturous punishment. One reason to consider JCP unacceptably degrading is that by overwhelming the reflective, deliberative agency of offenders through the visiting of severe pain upon their bodies, and reducing them to terrified, screaming animals, it undermines their "autonomous human personhood" (Murphy 1979: 233). Another reason is that JCP frequently humiliates offenders, causing them to experience "a painful sense of loss of dignity," as a result of the loss of self-possession and self-control that JCP occasions (Margalit 1996: 115–116, 147). Shame may be occasioned by the inability of offenders to refrain from publicizing, and thereby exposing to the view of others, their responses to the intense pain JCP inflicts (see Velleman 2001).

Some of JCP's defenders deny that it is unacceptably degrading or that it is more degrading than imprisonment. Murtagh contends that "temporarily shutting down rational functioning" need not be unacceptably degrading. A punishment that involves cryogenically freezing offenders so that they exist for a time in suspended animation, after which they are thawed out and restored to normal functioning without any adverse effects, would not, he asserts, be unacceptably degrading despite these offenders' rationality having been temporarily shut down. He argues as well that it is not perforce unacceptably degrading to "animalize" people by causing their sensuous animal nature to overwhelm their capacity for rational self-governance. We see this, he says, when we consider that a person who brings his sexual partner to orgasm does not ipso facto unacceptably degrade the latter. As well, he contends, the psychological suffering experienced by prison inmates will equally have the effect of undermining offenders' capacity for autonomous reflection and functioning, yet we do not consider this an objection to imprisonment. He contends further that imprisonment curtails offenders' autonomy to a greater extent than JCP by subjecting them to the dominion and control of prison guards and by forcing them to comply with restrictive prison rules (Murtagh 2012: 150–159). Additionally, Newman denies that JCP is degrading on the basis of a study which found that offenders viewed JCP as an opportunity to demonstrate their manliness (Newman 2010: 120).

The force of these objections to considering JCP to be unacceptably degrading has been challenged (Lenta 2018: 199–205). It is not only the shutting down of offenders' capacities for reflection, deliberation, and speech that makes JCP unacceptably degrading, it has been argued, but also that JCP results in their autonomous personhood being overwhelmed by their heteronymous, sentient nature such that they are reduced to the level of terrified animals. Cryogenic freezing, because it renders its recipients unconscious, does not have this effect. Nor does it have the effect of shaming offenders by publicizing responses to intense physical pain that they would prefer to keep private. Furthermore, the analogy with bringing someone to orgasm does not show that JCP is not unacceptably degrading since, while it could temporarily undermine a person's rational self-governance, and so degrade the person experiencing it in a descriptive sense, it will not be unacceptably degrading because, being consensual, it does not amount to mistreatment. A person who is brought to orgasm without their consent will be unacceptably degraded; and the JCP discussed to this point is imposed non-consensually. Murtagh's claim that prisons too will induce psychological suffering severe enough to undermine their rational functioning has been countered on the ground that while conditions of confinement, if sufficiently dire, may induce severe psychological suffering, prison conditions need not be nearly that bad. And if they are not, inmates can obtain psychological relief by diverting their thoughts to happier objects of contemplation, something that is impossible for offenders experiencing the intense pain of JCP, which dominates their consciousness to the exclusion of all else while it lasts. As for the claim that imprisonment is more degrading than JCP because it subjects offenders to the dominion and restrictions of prison officials and prison rules, it can be replied that the prison regime is not necessarily inconsistent with being treated respectfully, as Margalit's example of military conscripts who are subject to the dominion of

their superiors, and the rules of the military, without being degraded, shows (Margalit 1996: 266–270). Finally, Newman's evidence that (some) prisoners take pride in demonstrating their manliness in being able to brazen out the infliction of JCP does not entail that it is not degrading. Determining whether a punishment is unacceptably degrading involves an objective assessment, and not a subjective one, and depends on the character of the punishment and its effects on those subjected to it and not on whether offenders feel degraded by it (Duff 2005).

Whether JCP is inherently cruel depends on the definition of cruelty that is operative. A cruel punishment can be defined as one that inflicts pain or suffering that is both severe and unjustified (Lenta 2018: 112). JCP, in the forms its defenders support, causes severe physical pain. It often elicits intense anxiety prior to its administration, which may function to magnify the experienced intensity of that pain. And if JCP is deemed unjustified, either on the ground that its advantages compared to other types of punishment are outweighed by its disadvantages, or on the basis that it is unacceptably degrading, the conclusion that it is cruel seems inescapable. Certain of JCP's defenders deny that it is inherently cruel on the ground that the severity of the physical pain that it inflicts need not be disproportionate to the seriousness of the offences for which it is imposed, and if it is not, JCP will not be unjust (Scarre 2003: 307–308; Murtagh 2012: 86–91). But to this it may be retorted that being disproportionately severe is not the only way in which punishments may be unjust. If JCP is unacceptably degrading, or if its advantages are outweighed by its disadvantages, there may be reason enough to consider it unjustified.

There may also be reasons to consider JCP that involves the infliction of severe physical pain to be torturous. Torture almost always involves the intentional infliction of severe pain or suffering. And punishment is one of the purposes for which torture is imposed (Lenta 2018: 120–121). Predictably, however, defenders of JCP have objected to its classification as torture on a number of grounds: that torture, unlike JCP, is "a highly utilitarian process" (Newman 2010: 154–155); that torture has the aim of using pain to "break the victim's will," whereas JCP does not have this aim (Davis 2007: 33; Waldron 2010: 206); and that recipients of JCP, unlike torture victims, are informed in advance of the amount of punishment they will receive and the manner of its infliction, so that an offender anticipating JCP "knows that he will not be put at the mercy of a seemingly omnipotent individual" (Murtagh 2012: 32) and will therefore not experience anxiety or terror that is a concomitant of torture. Efforts to distinguish between JCP torture on these and related grounds are contentious, however (for a rebuttal, see Lenta 2017, 2018: 120–128).

Conclusion

It might appear that if offenders have a right not to be subjected to cruel, degrading, or torturous punishment, and if JCP is either cruel, unacceptably degrading, or torturous, then JCP is morally illegitimate and ought to be foresworn. There may be circumstances in which the administration of JCP is necessary to avert a catastrophe, in which case its use could be morally optimal or even obligatory. Yet such circumstances are fanciful and unlikely to arise; and unless they do, offenders' right not to be subjected to cruel, degrading, or torturous punishment must be considered to protect them against JCP.

Perhaps, though, JCP that is inflicted on a consensual basis could be morally legitimate. Offenders could waive their rights by consenting to the imposition to a fixed course of JCP in preference to another type of punishment, such as a term of imprisonment, of equal severity (Moskos 2011: 111; Scarre 2003: 314). This is indeed a possibility, assuming that safeguards are in place to ensure the genuineness of offenders' consent and that the right not to be unacceptably degraded by the state is not inalienable. But even if certain offenders validly waive these rights, their doing so will only mean that JCP does not wrong them. For the use of JCP on a consensual basis to be justified, it may still have to be demonstrated that on a weighing

up of its advantages and disadvantages, JCP is preferable to other types of sanction, including imprisonment.

Cross-References

► Corporal Punishment of Children

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Corrective Justice Theory

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Introduction

Many of the twenty-first century's legal theorists occupied themselves with the task of explaining away the deontic language of judicial decisions – the "rights" and "duties" that fill court opinions. While beginning law students and lay persons might take at face value judicial invocations of justice, duties, and rights, generations of lawyers and law professors in the United States have long taken the opposite approach. That language, they claim, is mere window-dressing for the more down-to-earth tasks actually performed by courts and the legal system: resolving disputes, discouraging antisocial conduct, and maintaining or altering existing distributions of wealth. In this spirit, the idea that breach of contract suits or tort suits are about doing justice was seen to be on a par with the idea that Hallmark greeting cards are about love.

In significant part, because of a scholarly approach to tort law that travels under the banner "corrective justice theory," it is no longer the case that talk of justice, rights, and duties is treated merely as a mark of naivete. While, corrective justice scholars have developed and applied their theories to a range of subjects, including contract law, fiduciary law, and the law of unjust enrichment, many of the leading works from this school concern tort law, which will be the focus of this entry.

Broad and Narrow Conceptions of Corrective Justice Theory

Four works of legal theory in the early 1970s jolted legal thinkers in America and beyond to reconsider the place of moral concepts in the law of torts. The first two, ironically, were so powerful not because they opposed reductionistic theorizing but because they embraced it with great confidence and élan. Guido Calabresi's *The Costs of Accidents* proposed that tort law could be understood as a means of reducing accident costs through market pricing of activities, rather than through top-down government command and sanction (Calabresi 1970). Richard Posner's "A Theory of Negligence" proposed that when the law purported to hold someone responsible for carelessly injuring someone, this really had nothing to do with whether there was some duty of care the person had breached (Posner 1972). It was a capitalist society's way of incentivizing firms and individuals to take cost-efficient precautions when they undertake productive activities. Negligence law was an invisible hand guiding cost-efficient precaution taking without requiring heavy, top-down government regulation.

Two contemporaries of Calabresi and Posner bridled at their reductionism and offered provocative responses. Drawing from Rawls' recently published *A Theory of Justice* (Rawls 1971), George Fletcher argued that tort law was actually about the fair and reciprocal allocation of the burden of accidents (Fletcher 1972). Like Rawls, he suggested that reasonableness was tied up with reciprocity. He then found a way to depict negligence law as a domain in which those who take excessive and nonreciprocal risks must in fairness bear the costs of those risks when they are realized in harmful accidents. Tort law, Fletcher insisted, is fundamentally about fairness and rights; it is not a device for the maximization of utility or wealth.

Richard Epstein challenged economic accounts of tort law from within a framework that was both rights-based (in a Lockean sense) and resonant with Aristotelean themes of corrective justice (although Epstein did not use that phrase in his earliest writings on the topic) (Epstein 1973). Part of what it is to have rights in one's body or one's house or one's car is that if any of these are interfered with or damaged by the act of another, one has a right to be compensated for that invasion or damage. The courts are available to parties as a means of ensuring that those rights are protected and vindicated. The wrongdoer or rights-invader is required to compensate the victim for the invasion. The enforcement of the right is the doing of a kind of justice.

At a broad level, the phrase "corrective justice theory" used in connection with tort law refers to theories that interpret tort law in a nonutilitarian, noneconomic, and non-instrumentalist manner – very roughly put, in a manner that is deontic rather than welfarist. On this broad usage, Fletcher and Epstein's important articles both count as instantiations of corrective justice theory. From the 1980s until today, philosophically oriented theorists –including not only myself (Benjamin Zipursky), but also John Goldberg, Tony Honoré, Gregory Keating, Nicholas McBride, and others – have continued to develop non-welfarist, rights-based, conceptions of tort law. Legal scholars from more welfarist or doctrinalist backgrounds sometimes use the phrase "corrective justice theory" to denote any of these sorts of views, with resulting confusion. Fortunately, a second and narrower sense of the phrase now predominates in philosophical usage: "corrective justice theory" refers to a cluster of ideas first developed more or less simultaneously by Jules Coleman (Coleman 1992) and Ernest Weinrib (Weinrib 1995) in the 1980s and 1990s.

Like Fletcher, Coleman and Weinrib were persuaded that the rights-based language of tort law mattered, and each was skeptical about Calabresi's and Posner's efforts to reduce away the content of legal concepts such as duty, fault, cause, and injury. Like Epstein, each took seriously the idea that courts applying tort law aspire to make tort victims whole and in so doing to rectify the defendant's invasion of the plaintiff's right. But, in contrast, to Fletcher, Coleman and Weinrib insisted, following Aristotle, on distinguishing sharply between corrective and distributive justice. And, in contrast to Epstein, neither associated corrective justice with

libertarianism and Lockean notions of ownership. For both Coleman and Weinrib, the law's "correcting" or "rectifying" the rights invasion was the doing of justice – hence the name "corrective justice theory." Numerous scholars have developed nuanced versions of corrective justice theory in this narrower sense, including Peter Benson, John Gardner, James Gordley, Scott Hershovitz, Stephen Perry, Arthur Ripstein, Robert Stevens, and Richard Wright.

For both practical and thematic reasons, this entry predominantly provides an overview of corrective justice theories in the narrower sense.

The Development of Corrective Justice Theory

Vaughan v. Menlove (1837) is a classic tort case. Vaughan suffered substantial property damage because of a fire that started on his neighbor Menlove's property and spread to his, burning down his house and barn. It turns out that Menlove had placed bales of hay in a way that was well-known among farmers to generate a high risk of spontaneous combustion and, with it, a fire that might burn out of control. Several people had informed Menlove of this risk but he chose to ignore it. The law of negligence – a centrally important part of the law of torts – says that if Vaughan can prove that his fire-related property damage resulted from a failure by Menlove to exercise ordinary care (i.e., the care of a reasonable person under the circumstances) in how he stacked his hay, then Vaughan has established a negligence claim and Menlove must pay Vaughan for the damage caused.

Tort theory asks what the point or principle underlying a rule like this is, and why liability to pay damages is connected to someone's proof of negligent conduct or breach of a duty of care. Posner answered that it is our way of sending the Menloves of the world a message: You will need to pay for the damages that flow from your careless conduct, so don't think you will save money by being careless; indeed, if you figure out what you will pay if there is an accident, you can then ascertain the value of avoiding the accident by taking precautions. It is a case-by-case system that shifts losses when one of the party's conduct is sanctionable; this in turn motivates rational actors. And indeed the degree of care is somehow keyed to what the liability will be.

Richard Epstein, Jules Coleman, and Ernest Weinrib all observed a serious shortcoming in economic analysis: it focuses largely on the legal system's reasons for imposing financial liability on the injurer, and it has relatively little to say about why liability runs *to* the person injured by the injurer. In particular, it leaves out the fact that tort law (and private law more generally) is at least in significant part about the alleged e*ntitlement* of a person to be compensated for having suffered a rights-violation at the hands of another, i.e., the injured person's *right* to recover damages. To be sure, Posner crafted a clever explanation of why victims are permitted to keep the money that the injurer must pay. The legal system, he argued, chooses to deputize victims to collect these "fines" because their injuries give them a special incentive to go after the defendant, to recover the costs of injury, and to provide evidence of the circumstances. Coleman and Weinrib have argued with great force that *whatever* normative value this "deputizing" explanation might have, it is a catastrophic failure as an interpretive matter. It is undeniable that courts open their doors to plaintiffs in part because of a conviction that plaintiffs are *entitled* to be compensated by those who have wrongfully injured them. Several concrete features of the law provide powerful evidence for this interpretive claim: the keying of damage awards to the injury incurred; the radically asymmetrical treatment of equally culpable actors when one has actually caused injury and the other (through sheer luck) has not; the irrelevance of damage awards of the ease or difficulty of bringing and winning a suit, and so on.

As against a heavily welfarist approach to tort law at Yale Law School, the political philosopher Coleman — studying at Yale – saw immediately that, at least on the surface, contract and tort law are *rights-oriented and justice-oriented* rather than welfare-oriented. While Guido Calabresi, like Fleming James before him, was right to take seriously the costs incurred by hapless victims, the

law does not assign liability on the basis of whether loss-spreading reduces the sum of accident costs. As Coleman observed, tort liability is in significant part about the *injustice* of leaving someone who was wrongfully injured by another person to bear those injury costs on her or his own. Perhaps they should be borne by the state or by an insurance fund or by the wrongdoer, but it would certainly be unfair for the blameless victim to bear the costs. And, indeed, when courts order defendants to compensate the victims they have injured, they appear to be saying that justice requires such victims to be compensated and that they must be compensated because they have a *right* to be compensated. Coleman also acknowledged that much of tort law is committed to the idea that those who wrongfully injure others should be required to provide compensation to those whom they have injured. Even (perhaps especially) from a descriptive and positivistic point of view, Coleman contended, while tort law's imposition of liability on a wrongdoer may indeed be a socially valuable form of deterrence, the law itself appears to be imposing liability in part out of a recognition that wrongdoers should be held *responsible* for the harm their wrongdoing has caused. During the early phases of his writing, he urged the importance of separating – at least in theory – justice-based reasons for a legal system *to ensure that victims of wrongful injuries are compensated* from justice-based reasons for a system *to ensure that wrongdoers face some accountability for their wrongdoing*. Justice demanded both the nullification of wrongful losses and the imposition of accountability for wrongdoings.

The 1980s saw quite distinctive, nonutilitarian theorizing in Oxford's Tony Honoré, who had famously coauthored *Causation in the Law* with H.L.A. Hart. From deep within a world of philosophical figures including not only Hart, but Strawson, Williams, and Austin, yet entrenched in private law, Honoré focused above all on the concept of *responsibility.* Tort law is a system of allocating responsibility for the losses one has brought about through one's conduct (even, sometimes, when the conduct was not, in and of itself, wrongful). Far from criticizing tort law for twists and turns that might seem to defy common sense moral thinking, Honoré saw in it the possibility of grasping the nature of responsibility and its connections or lack of connections to notions of fault (Honoré 1999).

In a remarkable turn, the American and British strands of philosophical tort theory in the 1980s generated an unparalleled surge of interest in corrective justice theory among Canadian legal theorists, including Ernest Weinrib and Stephen Perry. Ernest Weinrib's 1995 book, *The Idea of Private Law*, quickly became and remains today the classic statement of corrective justice theory (in its narrow, rather than broad, sense).

Weinrib's corrective justice theory has four basic aspects. In the first place, it is a theory of a particular kind of object, namely, private law, understood as a domain that, by its nature, exists in institutional form, with courts, in an entrenched legal system, and addresses disputes between private parties. Second, it depicts this particular domain of legal relations as an instantiation of rights and corresponding relational duties that hold among private actors in a bipolar relationship. Third, the law addresses wrongful transactions between the private parties, in which there is a normative loss by the plaintiff and a normative gain by the defendant, and it applies to rectify, simultaneously, both the gain and the loss. Finally, this rectification through the law instantiates a dynamic, Aristotelean conception of "corrective justice" that stands apart from and operates on a different principle than, "distributive justice." As Aristotle said in Book 4 of the Nicomachean Ethics, distributive justice is geometric, pertaining to the just and proportional division of a good or goods. Corrective justice, by contrast, is arithmetic: an unjust reduction of what one part has and enlargement of what another party has is "corrected" by undoing the wrongful loss and wrong gain; the first party's loss is restored by means of an appropriate change in what the second party has. Weinrib contends that in private law, courts see to it that a rights invasion suffered by one party as the result of another's breach of duty is corrected by ensuring that the duty-breacher/rights-invader undoes her or his wrongful gain and thereby rectifies the wrongful loss. For both Weinrib and Coleman, in their most

important versions of corrective justice theory, tort law is fundamentally about rectifying the disturbance of the bipolar relationship between the plaintiff and the defendant, and this "bipolarity" is something which instrumentalist accounts are incapable of capturing.

Because a core philosophical claim of corrective justice theorists is that the defendant's having injured a plaintiff through breach of a primary duty gives rise to a duty of compensation of the defendant that runs toward the plaintiff, a critical philosophical challenge of such theorists is to explain how and why the defendant's breach of a primary duty generates a secondary duty. Weinrib contends that the initial duty not to injure the plaintiff wrongfully and the subsequent duty of repair are actually aspects of the very same duty. Ripstein relatedly contends that the nature of the right that is violated when the defendant wrongs the plaintiff is such as to include within it a right to be compensated in the event of such wrongful injury. Were one (mistakenly) to treat Ripstein as holding an interest theory of rights, one would depict him as saying the interest in not being so injured and the interest in being compensated if one is so injured are fused together into a single right. In fact, Ripstein – who rejects an interest theory of rights – understands the right to be an aspect of self-ownership that becomes possible only with the institutionalization of normative relations among parties. Gardner's view is in one respect more guarded: Under the banner of "the continuity thesis," he asserts that the primary duty and the secondary duty are not the same, but that the reason giving rise to the primary duty (e.g., the importance of one's fellow motorists' intact automobile, such that attentiveness to not smashing it is obligatory) also gives rise to the secondary duty (ensuring that the automobile's intactness can be restored).

Benjamin Zipursky's and John Goldberg's sustained (if friendly) critique of corrective justice theory rejects all of the above accounts of a primary-secondary duty connection, but proposes that such a connection plays no essential role in explaining the nature of tort liability (Zipursky 2003). Goldberg and Zipursky's civil recourse theory claims that a plaintiff's right to hold accountable one who wrongs her or him does not stem from a duty of repair in the wrongdoer, but from a political principle entrenched in Anglo-American legal systems: the state owes it to one who is legally wronged to provide her with an avenue of civil recourse through which to redress a wrong done to her (Goldberg Zipursky 2020). Weinrib has rejected the criticism, but more generally contended that civil recourse theory is a form of corrective justice theory, rather than a competitor to it.

Substance and Structure

Richard Posner famously responded to corrective justice theorists in the 1980s by suggesting that the account they offer is purely formal or structural, and thus did not pose any sort of threat to economic reconstructions of tort law (Posner 1981). Indeed for good measure, he suggested that economically oriented accounts like his own *are* corrective justice theories. Of course, tort law is about an injurer and a victim, and a plaintiff and a defendant. The important questions about tort law are not about its form or structure, but its substance: what legal rights and duties should the courts recognize or impose? For the latter, normative question, a theory must identify the goals that tort law aims to achieve and explain why some specifications of rights and duties better achieve those goals than others. Since it is plausible, according to Posner, to suppose that tort law aims at fostering wealth-enhancing activity levels, and that a cost-benefit version of negligence best satisfies that aim, the best version of a corrective justice theory is the law-and-economics inspired account of tort law advocated by Posner.

Beyond providing increasingly powerful iterations of their "bipolarity critique," corrective justice theorists generated several different responses. Coleman acknowledged that a variety of different substantive accounts of primary rights and duties could complement corrective justice theory's account of tort law, but warned that the concepts of duty, wrong, right, and responsibility may themselves have features that limit which accounts of substantive content of the law can

claim plausibility. More specifically, Coleman and others persuasively argued that the law and economics scholars' conception of tort law as a matter of liability rules misses key features of the conceptual structure of the common law of torts as it actually exists. His most detailed articulation of corrective justice theory contends that social and legal conventions about what counts as a wrong, rather than cost-benefit analysis, provide tort law's content.

Weinrib himself took another tack, suggesting that the principle of corrective justice links directly to a Kantian conception of agency, rights and morality. In *The Idea of Private Law*, he explains important landmark cases of English, American, and Canadian tort law through a finely tuned analysis of the relational duties that are actually found in the law. Arthur Ripstein – Weinrib's colleague and a preeminent scholar of Kantian legal and political philosophy – has taken up this suggestion and developed a carefully wrought account of torts as "private wrongs." The substantive rules of tort law, on Ripstein's view, reflect a commitment to a principle of independence, requiring each of us to forbear from taking or using that which belongs to others and to constrain our actions in light of the risks they pose to others so that each person retains security in their person and possessions.

Many who take themselves to be corrective justice theorists adopt what might be called a moral incorporationist response to the Posnerian critique. Insofar as corrective justice theory aims to provide an interpretive account of the law of torts as it actually is, it must capture the concepts of wrongs, rights, and duties that are found in the law. And while what is found may not be exactly the set of wrongs, rights, and duties that moral theory as such would prescribe, it is undeniably rather close to some version of that. In particular, many corrective justice theorists have argued that the recognition and utilization of a connection to straightforwardly moral conceptions of duty is key to understanding and faithfully capturing what the legal concepts actually are, and that the effort to jury-rig an economic and instrumentally rooted account simply misdescribes the reality (Perry 1992).

Corrective justice theorists tend to converge in their views of how certain important issues in tort law should be resolved, and this is part of the reason for the significance of the theoretical approach. On the issue of whether the law of torts, properly understood, condones strict liability as opposed to wrongs-based liability – they commonly answer that it does not and should not. Given that rights always have correlative duties, imposing liability without breach of a duty involves abandoning the idea that the right of recovery stems from a rights violation. Similarly, the damages recoverable by a plaintiff in a tort suit should be limited to what will *compensate* the plaintiff; punitive damages should not be available because tort law is about rectifying the relationship between the parties, not about punishing or deterring wrongdoers (Weinrib 1995). Perhaps more fundamentally, a tort plaintiff has no right to recover damages from a defendant unless the plaintiff can prove not only that the plaintiff acted wrongfully toward him or her, but also that the defendant's actions actually *caused* her injury. In each of these areas – fault, punitive damages, and causation – judges and scholars endorsing other approaches have often supported quite different doctrinal rules.

It would be a mistake, however, to suppose that the corrective justice theorists perspective typically pushes in a pro-defendant perspective relative to that of its theoretical antagonists. That is not just because its proponents often taken a nuanced view of what counts as a "wrong," what breadth "compensatory damages" admits, and what counts as proving "causation." It is also because it has taken more seriously than any other view the normative basis of the duty of care in negligence law and the rights protected by tort law more generally. In that vein, corrective justice theorists have strongly resisted efforts to diminish or eliminate tort law on grounds of its inefficiency and alleged market disruptions.

Corrective Justice and Distributive Justice

As mentioned above, it is not a coincidence that corrective justice theory came onto the academic

scene with a couple of years of John Rawls' landmark *A Theory of Justice* and Robert Nozick's *Anarchy, State, and Utopia*. After decades of skepticism in twentieth century philosophical thought about the viability of justice-based theories, Rawls and Nozick's accomplishments appear to have emboldened theorists to talk about justice as a normative ideal in areas of private law. While corrective justice theorists were able to draw attention by expressly distinguishing the form of justice in tort law from distributive justice, the coin had two sides: many have been troubled by thinking about potential conflicts between distributive justice and corrective justice.

The prototypical problem case involves a hypothetical car accident in which a low-income person without liability insurance crashes her bicycle into the side of an expensive Rolls Royce owned by a billionaire. So long as the billionaire can prove that the cyclist was negligent and that the negligent conduct caused his injury, tort law allows him to have a judgment against the cyclist for thousands of dollars. Corrective justice theory, say its critics, seems to imply that justice is being done when the state forces the cyclist to pay the billionaire all the money she has. Yet the reproduction of a prior distributive injustice hardly seems to be the doing of justice.

The hypothetical example simply renders vivid what critics describe as a systemic challenge: is not the capacity of tort law to do some form of justice contingent on whether the distribution of assets and wealth it is preserving is itself just? Isn't corrective justice fundamentally dependent on underlying distributive justice? If so, isn't that rather a preposterous contention in current systems like the United States, Canada, or the United Kingdom? The most straightforward (albeit quite concessionary) response to this challenge is to concede that tort law's purpose of doing corrective justice is actually only fulfilled on the assumption that the system is roughly distributively just (Coleman 1992). Corrective justice theory still has the attribute of accurately describing the design of the law of torts and its built-in aspirations, even where that assumption is untrue.

A less defensive response is offered by Weinrib, Perry, and a range of corrective justice theorists. On this view, corrective justice is a distinctive kind of justice that pertains to maintenance of just relations between parties (Perry 2000). It does not purport to be doing distributive justice, and it does not contend that corrective and distributive justices are two aspects of one whole. A wrong by a defendant upon a plaintiff disturbs proper relations between them, and corrective justice undoes this disturbance. Corrective justice is justice between the parties, as relates to transactions between them.

Arthur Ripstein and John Gardner, among others, have advanced powerful arguments that the institutions of tort law are intimately connected with the *distribution* and not simply with *rectification or correction*. Both recognize – as have Goldberg and I – that the legal system's provision of legal rights to individuals against being injured or having one's assets damaged (and related rights to hold such injurers accountable) is itself a part of treating persons equally (Ripstein 2016). Gardner contends that the provision of such legal protection to each is, in effect, the allocation across society of the good of *security* in what one has (Gardner 2018).

Conclusion

While the law of torts has clearly been the central focus of corrective justice theory, legal scholars over the past 30 years have successfully utilized this theoretical approach in the law of contracts, restitution, equity, and fiduciary duty. In all of these areas, the law is depicted as enforcing rights and doing justice, and in all, it is critical that the law is understood to be recognizing and enforcing the relations between private parties. These rights, moreover, are correlative to duties, and the duties are duties of conduct that do not reduce to what economic analysts of the law depict as "liability rules." They are not mere prices for activity or risks of sanction; they are in an important respect actual obligations.

To what many may find a surprising degree, corrective justice theorists get their hands dirty with the messy world of legal doctrine and real cases. Indeed, Weinrib, Coleman, and their

followers have often highlighted the capacity of corrective justice theory to generate illuminating interpretations of the leading cases of the law, and persuasive justifications for pushing tort decisions in one direction rather than another. While American courts seem thus far to have limited interest in the work of such theorists, Canadian and English courts have commonly found such scholarship valuable at both a practical and theoretical level.

The larger importance of corrective justice theory can be seen in legal theory, where its significance is five-fold. First and foremost, private law legal theory of both sophisticated and unsophisticated forms overwhelmingly depicted the content of the common law in a reductive instrumentalist form before the advent of corrective justice theory. Second, and relatedly, the common law (body of judicially enforced law without legislative anchor) itself was thought to provide only quite minimal constraint on what judges do and should do. Third, the distinction scholars and courts have made between private law and public law was ridiculed as naïve and intrinsically regressive. Fourth, while the costs and the benefits of the law were not understood in purely economic terms, the value of the law was indeed conceptualized in purely consequentialist terms of deterrence and compensation. Finally, those who discussed justice in law could only be understood as referring to the distributive justice, which concerns tax, property, and law governing goods such as education or healthcare, or to the retributive justice of the criminal law.

Corrective justice theorists reversed all five. In what Weinrib provocatively labeled "formalism" but others have called (courting oxymoron) "pragmatic conceptualism" (Zipursky 2000), they explained how legal concepts and principles could have conceptual depth and integrity, rather than simply being cogs in social welfare machine. For that very reason, it means something for judges applying the law to hew closely to its content. And because the law's content relates to relations, obligations, and responsibilities among private parties, private law is after all quite different from public law, and capable of progressive and regressive development in its own way. The range of values realized, secured, and protected by the law includes many that engage social welfare concerns, but justice and responsibility are not reducible to such concerns. Corrective justice is distinct from both distributive justice and retributive justice, and it is alive and well in the private law of obligations.

C

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Corruption: Institutional

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Introduction

Common pictures of the corruption of public institutions describe it by reference to its opposite, the integer, healthy, or unspoiled. In his eloquent study of political corruption, Robert Sparling notes how corruption has become in political discourse "the reverse of integrity and legitimacy. It is the dark shadow behind the conception of how the society ought to be ordered and what norms ought to govern public and private life" (Sparling 2019, xii). Along these lines, other prominent characterizations of corruption picture it as a form of institutional decay (Lessig 2013), or an internal enemy of public institutions (Ceva and Ferretti 2021).

The tradition that contrasts corruption to its unspoiled opposite dates back to Aristotle, who saw corruption as a form of deviation (*parekbaseis*) from integrity (*orthos*). Plato observed in all political institutions a tendency toward corruption (*pthora*) in the form of a degeneration from an ideal form of government toward more worldly forms, such as timocracy, oligarchy, democracy, and, finally, tyranny (Plato 1993, 490). In this tradition, corruption originates when public rulers lose sight of the common good and pursue private interests instead (Aristotle 1988, 28–32).

This tradition has propagated until recently, with some notable variations concerning the conception of what an "uncorrupt" state of affairs is. In modern times, political philosophers have searched for such a state of affairs through the lenses of a teleological account of a fully realized political life (Sparling 2019, 18). Throughout these efforts, corruption has gradually come to indicate two different forms of deviation from the good and the unspoiled. One form is individual; it sees corruption as a vice of character or conduct of those who occupy a role in a public institution, the officeholders. The other form is institutional; it concentrates on corruption as a dysfunction of institutional rules, mechanisms, and practices.

Examples of individual corruption include bribery, embezzlement, and misappropriation. Individual corruption standardly indicates the misuse of public power for private ends. Such ends typically involve some monetary gain, but they may also include sexual favors, or political influence. On most interpretations, a core feature of individual corruption is the public officeholders' corrupt character, or their being moved by a corrupt motive (Lessig 2018; Thompson 1995). When public officeholders use their power of office to pursue an illegitimate personal gain, their conduct may be symptomatic of a breach of personal morality or professional ethics. These are personal vices; yet, clearly, not all of them are also significant at an institutional level.

Institutional corruption is arguably the most problematic form of corruption that may affect the public order (Ceva and Ferretti 2017). This idea lies at the core of many recent conceptualizations of corruption in political philosophy (see, e.g., Ceva and Ferretti 2021; Lessig 2018; Miller 2017; Philp 1997; Thompson 2018). However, theorists also widely disagree about the understanding of public institutions, how corruption may affect them, and why exactly that is problematic. Such disagreements concern both the descriptive criteria and the normative standards for the identification and assessment of the justifying conditions for the exercise of public power and what deviations from those conditions are instances of corruption.

In what follows, we offer an essential critical survey of philosophical theories of institutional corruption as developing teleological (§1), substrate (§2), discontinuity (§3), continuity (§4), impartiality (§5), and democratic (§6) explanations of this dysfunction of public institutions.

The Teleological Explanation of Institutional Corruption

One explanation of institutional corruption sees it as a dysfunction of institutional processes that

prevents a public institution from achieving its defining ends. This approach thus offers a teleological explanation of the corruption of public institutions. Public institutions are defined by their purpose, which is to implement processes to deliver certain intrinsic or instrumental goods. A public institution is corrupt when it fails its purpose. A public institution may fail its purpose when the officeholders' individual or joint corrupt behavior undermines institutional processes by distracting them from their purposes (Miller 2017, 81). On this teleological explanation, institutional corruption always occurs as a consequence of the actions of some occupant(s) of an institutional role. Human (individual or joint) behavior *causes* institutional corruption when a certain action has the effect of undermining institutional purposes by subverting institutional processes. In this sense, this teleological explanation of institutional corruption recognizes a causal nexus between the corruption of human behaviors and the corruption of institutional processes. So, for example, if one or some finance officers regularly or frequently accept bribes to turn a blind eye on fiscal frauds, their action can cause the corruption of fiscal authorities by undermining the achievement of their purposes of financial oversight.

There is a second approach to institutional corruption which revolves around a teleological explanation. This second approach sees institutional corruption as nested in institutional rules. In this view, a public institution is corrupt when the rules and mechanisms that compose it make it unable to serve its essential purpose. Larry Lessig (2013, 2014, 2018) and Dennis Thompson (in his early writings, see, e.g., Thompson 1995) have pioneered this explanation. To wit, their work has moved the focus of the philosophical study of corruption from the actions of some "bad apples" to the features of "bad barrels." This move allows containing the stigmatization of individual bad traits of character and unlawful or otherwise questionable behavior in favor of a wider and deeper understanding of the institutional environment in which corruption may flourish.

This variety of teleological explanation is helpful to see how some public institutions may fail their purpose structurally, because of the mechanisms that compose them. While some commentators have referred to this form of institutional dysfunction as a matter of "institutional corrosion" (Miller 2017, 73), Thompson and Lessig insist that this dysfunction makes "institutional corruption" a useful category of its own. The category indicates those cases where public institutions fall prey to economic or partisan interests, thus diverting from their purpose of serving the "will of the people" (Lessig 2013).

The paradigmatic illustration of a corrupt institutional practice in this interpretation is the private financing of electoral campaigns. In the United States, for example, candidates who run for public office may receive financial support from diverse private sources. The practice of attracting campaign funding is not only legal but also considered a vital element of democratic competition. What is problematic about this practice is that a large portion of donations often comes from a small group of wealthy elites, who make sizable contributions with the goal of influencing electoral outcomes and policy-making. It is often observed that candidates who receive financial support tend to be responsive to their sponsors' interests. For example, a member of Congress sponsored by a private company may push some regulation that aims for reducing the fiscal pressure in the area in which that company operates. What motivates the congressperson may be the legitimate commitment to ensuring future financing for their campaign and, possibly, reelection. According to Lessig and Thompson, focusing on the congressperson's action and its alleged corrupt motive cannot be a fruitful strategy if we want to make sense of what (and whether something) is wrong in this scenario. Attention should, rather, go to the rules of campaign financing. These rules make the institution of electoral representation respondent to the interests of large donors instead of those of the "people." The institution of electoral representation is, in this sense, corrupt as it is unable to fulfill its pristine purpose.

Whether public institutions are the kind of entities that can be defined in function of their having a *purpose* is an open question for the teleological explanation of institutional

corruption. In order for any entity to have a purpose, this entity should be capable of intentional action so that its quality could be normatively evaluated on the basis of its actual capacity to achieve such a telos (Ceva and Ferretti 2021, 89–90). Referring to "originalist" interpretations of institutional purposes or rather appealing to some kind of "natural" telos is controversial (Lessig 2014). Surely enough, in ordinary language, one may refer to certain public institutions by their general purpose. For example, one may refer to a public hospital in terms of its pursuing the provision of decent healthcare. However, to be generally recognizable, such a reference is too vague for characterizing and assessing public hospitals from an analytically accurate and normatively solid point of view. What a "decent healthcare" is may vary across time and space, in view of various conceptions of what human wellbeing is (biologically and biographically) and, possibly, of the availability of material resources. Against this complex and mutable background, an essentialist teleological account of institutional action would risk to be too rigid to give practical guidance. On the other hand, any departure from such a rigidity would come at the cost of some vagueness, which would make the identification of a telos too blurred to guide institutional action at all.

A possible rejoinder consists in revisiting institutional action by reducing institutional purposes to the individual intentions of those who occupy institutional roles (see, e.g., Miller 2017). But even so, a degree of open-endedness should be recognized and embraced. Different officeholders may have different interpretations of the purposes of their joint action. This predicament is quite evident when considering such political institutions as parliamentary assemblies. The diversity of views of what purposes should be pursued as a matter of political priority is, arguably, the very stuff of politics, at least in a democratic setting. The function of such public institutions is, therefore, inevitably open-ended, so as to include such a variety of normative commitments as those to promoting the public good, social equality, citizens' basic freedoms, or just responding to the electorate's preferences. The question remains open whether the teleological explanation of institutional corruption may accommodate such concerns of open-endedness by revisiting its current essentialist and reductivist varieties.

A further open question concerns whether the teleological explanation of institutional corruption only offers a description of this dysfunction of public institutions or, also, a moral assessment thereof. At a first glance, and in line with everyday usages of "corruption," the two aspects – descriptive and normative – look intertwined. "Corruption" is rarely used in a neutral connotation; it is commonly associated with something going wrong. However, some scholars have pointed out that there is a sense in which also morally and legally illegitimate institutions (such as the Mafia) may be called "corrupt" when they deviate from their criminal purposes (Lessig 2013). In these cases, the corruption of the institution may in fact be morally desirable. After all, on a teleological interpretation, institutional corruption analytically and normatively depends on the identification and the evaluation of the institutional purpose whose achievement is impaired. However, as discussed above, the identification and evaluation of institutional purposes is far from being straightforward and uncontroversial. Therefore, the answer to the question of the descriptive or normative function of the teleological explanation of institutional corruption remains likewise uncertain and debatable.

The Substrate Explanation of Institutional Corruption

There is a further variety of institutional corruption which insists on the primacy of corrupt institutional mechanisms (the bad barrel) over individual corrupt behavior (the bad apples). Reconsider the institutional practice of the private funding of electoral campaigns we saw in the previous section. Lessig (2014, 2018) notes how people generally regard the very practice of campaign financing as corrupt, rather than the candidates who seek sponsors. This generalized perception is understandable, for Lessig, because it is the very institutional practice of electoral campaign financing that demands that candidates

seek large donations to be successful in electoral competition. Candidates do not act by their own optional choice when they ask for or accept private donations, nor do they seek a personal benefit (as in cases of bribery). They just abide by the rule of the electoral game.

One may even go as far as arguing that democracies are structurally vulnerable to this variety of institutional corruption (see, e.g., Weinstock 2019). Electoral institutions in democratic systems are organized in an adversarial manner and, as such, are more likely to attract competitive characters than other regimes. Moreover, the same competitive spirit extends beyond the electoral moment throughout the legislative phase. In that phase, partisanship risks to prevail over the pursuit of public interests. In this sense, the very institutional mechanisms that compose a democracy seem to create the circumstances for corruption. In this view, public institutions do not become corrupt as a result of the behavior of corruptly motivated individuals. The relation is inverse. Certain institutional mechanisms may be corrupt, and they provide favorable circumstances for corrupt individual behavior. Ceva and Ferretti (2021) have called this the "substrate explanation" of political corruption as an institutional practice.

The substrate explanation of institutional corruption is useful to bring into focus how some institutional mechanisms may provide the terrain for individual corrupt behavior to flourish, either by creating incentives for corruption or by making corruption the price to pay to be part of the system. In the earlier example, given the terms of the democratic electoral competition, candidates are motivated to seek private funds for their campaigns on pain of not being elected. The relationship so established between private donors and political representatives spreads from the electoral to the legislative phase, thus making this latter vulnerable to private interests.

Following the substrate explanation, the causal nexus between a corrupt institution and the corrupt behavior of some officeholders within it is reversed compared to the teleological explanation: Institutional practices may cause individual officeholders to act corruptly. However, this causal nexus does not necessarily entail that individual corruption implies the corrupt officeholders' corrupt character. Lessig (2013), for instance, insists that the members of the American congress may not be said to act necessarily on a corrupt motive when they promote the interests of a lobby that supported their campaign. They may not gain any private benefit in so acting. They would simply act coherently with the mechanisms that put them into power. From this point of view, the fight against institutional corruption is not a matter of upholding the officeholders' ethical behavior. Combating corruption requires a revision of the institutional mechanisms that incentivize corrupt behavior, an "institutional big bang" (Rothstein 2011) rather than some corrections. The question remains open whether the two aspects of cultivating personal dispositions and amending institutional rules can be kept separate and to what extent.

The Discontinuity Explanation of Institutional Corruption

The teleological and the substrate explanations conceptualize individual and institutional corruption as two distinct forms of dysfunction of the public order. However, they recognize that such dysfunctions may be causally linked.

In his most recent work, Thompson (2018) proposes that, to seize the specialty of institutional corruption, this latter must be conceptualized separately from individual corruption. On his "discontinuity view" (Ceva and Ferretti 2021, 53–54), to understand *institutional* corruption, it is necessary to abandon the idea that corruption is somehow related to some particular agent's commitment to promoting interests exogenous to the purposes of an institution. In paradigmatic cases of institutional corruption, such as the earlier mentioned case of private financing of electoral campaigns, the agents are in fact motivated to benefit the institution (e.g., by contributing to the democratic process). Corruption is nested in institutional mechanisms as a matter of institutional *design*; it is totally independent of what individual agents end up doing or not doing. Democratic

elections in the United States are designed in a corrupt manner because they are designed to make public power subservient to the interests of private donors, instead of those "of the people." From this discontinuity interpretation, institutional corruption does not only claim a particular scholarly and practical attention. Central to this discontinuity explanation is the emphasis on the separateness of the very notions of individual and institutional corruption; neither notion is conceptually reducible nor (causally) amenable to the other.

The discontinuity explanation of institutional corruption is helpful to invite the critical consideration of how public institutions are designed. However, the neat separation it advocates between individual and institutional corruption seems quite extreme and, to a certain extent, counterintuitive (qua totally divorced from human action). There is a risk that "institutional corruption" becomes a metaphor to indicate a heterogeneous set of problems of decay, corrosion (Miller 2017, 73), or simple misconception of the architecture of public institutions with respect to their purpose. In so doing, by searching for the specialty of what makes corruption *institutional*, there is a risk of losing sight of what makes certain institutional failures a matter of *corruption* in the first place.

The Continuity Interpretation of Institutional Corruption

A fourth explanation sees institutional corruption as a specific form of institutional dysfunction that comes about through the officeholders' interrelated action (Ceva and Ferretti 2021). The central claim of this continuity explanation is that the corruption of institutional action can only and always be explained starting from a diagnosis of the uses officeholders make of the power associated with their office (Ferretti 2018). This approach builds on a conceptualization of public institutions as systems of *interrelated embodied* roles (the offices) to which power is entrusted with a mandate. Institutional action consists in the officeholders' interrelated action. The interrelatedness of institutional roles is such that the performance of an institutional role depends on the performances of the other roles and the relative uses of the power entrusted to those roles. This key feature explains why public institutions are not merely a set of procedural mechanisms but a group of agents, whose interrelated work is definitive of institutional action.

In Ceva and Ferretti's interpretation, each public institution is grounded in a raison d'être which comprises the normative ideals that motivate its establishment, its internal structure, and functioning (Ceva and Ferretti 2021, 23). An institution's raison d'être is irreducible to a fixed (list of) institutional purpose(s). Rather, it is the officeholders' normative self-understanding of their action in their institutional capacity: what they are doing as a group of agents when they exercise the powers entrusted to their roles with what mandate. In this framework, public institutional action is not a matter of mechanic rule-following. Officeholders partake in the process of definition and enactment of the raison d'être of their institution. The interrelatedness of institutional roles makes in this process officeholders accountable to one another for the way they use their power of office with respect to the raison d'être of their institution. This is the idea of "office accountability" (Ceva 2019).

In this continuity interpretation, the corruption of institutional action consists in a deficit of office accountability. It comes about when there is at least one officeholder who (1) acts in their institutional capacity (office condition) (2) for the pursuit of an agenda whose rationale may not be vindicated as coherent with the terms of the power mandate assigned to their role (mandate condition; Ceva and Ferretti 2021, 22). Because of the interrelatedness of institutional roles, it may be enough that one officeholder fails office accountability for the raison d'être of an entire institution to falter. Consider favoritism in public procurement. Take a municipal office assessing the feasibility of an urban development plan. Should the officeholder charged with the task of selecting an independent expert to deliver an opinion nominate a specific expert, either upon accepting a bribe or because they seek to promote a personal political

agenda, they would make a corrupt use of their power of office. This use is corrupt because it may not be vindicated as coherent with the terms of that power mandate. Moreover, because of the interrelatedness of institutional roles, the officeholder's corrupt conduct may initiate a corrupt institutional dynamic. The officeholders' colleagues entrusted with the role of making a decision on the implementation of the urban development plan will base their decision on that tainted report, and so will the engineers having the role of developing the plan and the contractors that will implement it. In this way, the single action of an officeholder may spread to the entire institutional action, making it dysfunctional qua corrupt. Because institutional action consists in the officeholders' interrelated action, such a dysfunction *constitutes* (does not merely cause) the corruption of an institution.

When this dysfunction affects legitimate or nearly just public institutions, the analytical ascription of corruption to institutional action acquires also normative value. In this context, it signposts a wrongful web of interactions between officeholders in violation of the rights and the duties associated with their offices (Ceva and Ferretti 2021, 81–82). Because corruption, in this continuity interpretation, works as an "internal enemy of public institutions," the resources to counteract it must importantly (but not exclusively) come from within an institution too. Anticorruption requires, in this view, the officeholders' mobilization and direct engagement in practices of answerability (e.g., whistleblowing – see Ceva and Bocchiola 2018) to uphold the raison d'être of their institution. This is the sense in which the adoption of a continuity explanation of institutional corruption makes it an instance of public ethics of office.

The Impartiality Explanation of Institutional Corruption

Some explanations of institutional corruption characterize this form of institutional dysfunction by direct reference to its positive opposite. One instance of this approach comes from the scholarship on "good governance" and the quality of government in political science. One prominent explanation within this framework (Teorell and Rothstein 2008) sees the quality of governmental institutions as their impartiality in the exercise of public authority. Impartiality requires that, when implementing laws and policies, government officials straightforwardly abide by what the relevant laws and policies stipulate. Most importantly, they are not allowed to consider any information or make any evaluation about the specific case at hand which goes beyond what the relevant law or policy prescribes (Teorell and Rothstein 2008, 174).

Within this framework, corruption consists in a breach of the norm of impartiality (Kurer 2005, 230; Kolstad 2012). The norm that corruption violates is the impartiality principle governing the exercise of public power, which ensures that government does not discriminate between citizens. The norm of impartiality tracks individual corruption as a misuse of power for private ends, but it also disqualifies such institutional practices as clientelism, patronage, or nepotism (Mungiu-Pippidi 2006).

A distinguishing feature of the impartiality explanation of corruption is its ambition to generality and universality. Many approaches based on the idea of public good tend to relativize the wrong of corruption to the cultural milieu (and the various understandings of office) where the dysfunction occurs. On the contrary, pointing at a general violation of the rule of impartiality, this approach offers a universal standard for assessing public institutions. This universalization, however, comes at some costs. Some theorists (Philp 1997; Sparling 2019) have criticized the tendency of such an approach to offer a uniformed abstract standard insensitive to the political importance of recognizing the many disagreements concerning the nature and qualities of what makes governance "good." Moreover, the approach tends to render too mechanic a view of government as an exercise of rule-following that demonizes all manifestations of officeholders' discretion. This tendency is risky because it reinforces a bureaucratization of institutional functions that is untrue to the actual conditions of uncertainty of public

institutional action (Zacka 2017, 9–10) and, ultimately, inimical to officeholders' taking responsibility for the working of their institution (Ceva and Ferretti 2021, 3).

The Democratic Explanation of Institutional Corruption

A more specific, institutionally circumscribed explanation of institutional corruption sees it as a dysfunction of the democratic form of government and characterizes it in opposition to fundamental democratic values (Warren 2006a, b). One such value is political inclusion.

As a violation of democratic inclusion, corruption involves three elements: (1) an unjustifiable exclusion; (2) duplicity with regard to the norm of inclusion, i.e., the excluders avowedly recognize and support the democratic norms of inclusion, despite actively engaging in exclusion; and (3) that the exclusion normally benefits those included within a relationship – say of clientelism – and harms at least some of those excluded (Warren 2006a, 804). This democratic explanation of institutional corruption is clearly moralized as it presents up front this dysfunction of the democratic order as distinctively harmful. The harm of corruption consists in a form of "duplicitous exclusion" (Warren 2006b) which violates a special political relation of second-order trust. In a democracy, citizens can have a first-order trust that their representatives will convey the citizens' interests; such trustful relation is grounded in a second-order trust in the good faith and veracity of their representatives' first-order commitments. This kind of trust derives from "a confidence in the fidelity of the representative to the norms of publicity and public accountability" (Warren 2006b, 167). When corruption occurs, people are misguidedly reassured that that they are included because their representatives formally abide by the democratic rule. However, de facto, they are excluded because of the actual corrupt conduct of their representatives. This duplicity weakens citizens' second-order trust, both in the particular elected representative and – most importantly – in the integrity of the democratic project as a whole.

The democratic explanation of institutional corruption pinpoints the level of alert that democratic institutions should have with respect to this dysfunction of public institutional action. Such an alert concerns primarily systemic cases of corruption, which involve the legislative function and have the potential to undermine the credibility of the entire democratic institutional system.

Conclusion

The sketch of some prominent philosophical explanations of corruption in public institutions has emphasized how the different philosophical theories of institutional corruption move from different underlying understandings of the nature, functioning, and normative standards of public institutional action. Several questions remain on the plate for further discussion. They include the partition between the descriptive and normative dimension of institutional corruption, the problem of attributing individual or collective responsibility for institutional corruption and – relatedly – to explain institutional agency, and the regulatory or ethical strategies that may be employed to oppose and curb corruption as a dysfunction of the public order.

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Cosmopolitan Constitutionalism

► Constitutionalism: Cosmopolitanism

Cosmopolitanism

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C

Introduction

In the ancient Greek world, a cosmopolitan (*kosmopolitês*) meant a citizen (*politês*) of the universe (*kosmou*). It was a human being who had internalized or at least aspired to internalize the law of the universe so as to embrace a small universe within himself/herself. Hence, although the answer to the question "what does it mean to be a cosmopolitan?" has changed over the course of time, in particular due to scientific evolution and philosophical developments, cosmopolitanism in general has been the stance of a person who has an identity as a citizen of the world. More recently, however, cosmopolitanism is often associated with the conception of responsibility and justice beyond national boundaries.

Pre-Contemporary Cosmopolitanism

In the literature of cosmopolitanism, the ancient Greek philosopher Diogenes of Cynic is usually introduced as the first cosmopolitan. When he was asked his home country, he was said to have claimed that he was a *kosmopolitês*, a "citizen of the world" (Diogenes Laertius 1925: 65). Coming from Sinope and being a foreign resident (*metoikoi*) in Athens, he was not a member of *demos* in the Athenian city-state (*polis*), just as women and slaves were not. Instead, he searched for the meaning of life within, not outside of, himself. In the ancient Greek world, where the conception of the good life was deeply associated with one's *polis*, Diogenes' conception of the good life was positively detached or was forced to be positively detached, from it. Although he saw himself as "[a] homeless exile, to his country dead. A wanderer who begs his daily bread," he contended that "to fortune he could oppose courage, to convention nature, to passion reason"

(Diogenes Laertius 1925: 40–41). Through an eccentric way of life, he expressed "a deliberate proclamation of his world citizenship—challenging by shock tactics the narrow conventions of the *polis*" (Heater 2002: 27).

Through Stoicism founded by Zeno of Citium, a second-generation pupil of Diogenes, the idea of "cosmic city," which "attempts to retain community and citizenship while removing all contingency—such as physical proximity or mutual acquaintance—from the notion of citizenship," was generated (Schofield 1999: 103). A more inclusive political sphere was generated at an ideal level, and the source of law was thus considered reason, not the state. In *On Duties*, Cicero discussed the law of nature that covers the common fellowship of human race. And he claimed that "we must preserve the communal sharing of all the things that nature brings forth for the common use of mankind" in the human fellowship (Cicero 1991: 22). However, Cicero, following Ennius, a Roman writer, also claimed that assistance be provided to a stranger in ways not detrimental to oneself. "Since…the resources of individuals are small, but the mass of those who are in need is infinitely great, general liberality must be measured according to the limit laid down by Ennius, that his own light shine no less; then we shall still be capable of being liberal to those close to us" (Cicero 1991: 22). Thus Cicero's doctrine is said to have left a "problematic legacy" among posterior philosophers and policy-makers, by giving them a sense of universal duty but not of positive duty, i.e., duty to provide material goods (Nussbaum 2001).

Cosmopolitanism can also be found in Christianity. As the Parable of the Good Samaritan suggests, the scope of the duty of benevolence was not confined to ethnic or religious boundaries. Justice was conceived beyond political boundaries, as can also be found in the theory of just war worked out by theologians in the Middle Ages.

More recently, in his 1795 work *Perpetual Peace*, written in response to the Peace of Basel, Kant argued for a cosmopolitan law to make eternal peace between free states (Kant 1999). This law was imagined to be based on the duty of hospitality, i.e., to show no hostility to incoming strangers and to eventually form a cosmopolitan regime through its practice. Nonetheless, Kant never envisaged a world state, setting an example for many of his followers.

Contemporary Cosmopolitanism

In contemporary political philosophy, cosmopolitanism in general has been on the rise since the 1990s. This is partly because of the end of the Cold War, the rapid globalization, the pervasive world poverty, the extreme inequality between the world rich and the world poor, and possibly a turn in political philosophy. The 1980s saw the passing of debate between liberalism and communitarianism (or libertarianism), which was usually staged within the national boundaries and which therefore produced little help to solving global issues.

The default of theoretical discussions is usually "moral cosmopolitanism." This is probably because theorists are either realistic or more or less content with the current nation-state system. Following Gillian Brock, once we define the idea of moral cosmopolitanism as "that every person has global stature as the ultimate unit of moral concern and is therefore entitled to equal consideration, no matter what her citizenship or nationality" (Brock 2009: 11), we have "weak (moral) cosmopolitanism" and "strong (moral) cosmopolitanism." Weak (moral) cosmopolitanism demands conditions that are, as requirements of justice, "universally necessary for human beings to lead minimally decent lives," while strong (moral) cosmopolitanism demands conditions that are, as requirements of justice, necessary to "eliminate inequalities between persons beyond some account of what is sufficient to live a minimally decent life" (Brock 2009: 13). In short, moral cosmopolitans today are disagreeing with each other regarding the level of cosmopolitan equality (minimum or higher) as a matter of justice.

The opposing camp to moral cosmopolitanism is usually introduced often as "institutional cosmopolitanism" (sometimes referred to as "political" or "legal" cosmopolitanism), which is

associated with claims of those theorists who demand radical institutional changes such as the establishment of a global supranational system to realize the idea of moral cosmopolitanism and the justice it entails (Cabrera 2004). However the distinction between moral cosmopolitanism and institutional cosmopolitanism can be blurred, for moral cosmopolitans do ask for institutional changes, at least to some extent. For example, according to Onora O'Neill, who expects the coming of "just but porous boundaries" so as to realize a world of states in which humans beings could discharge their moral obligations to distant strangers, moral cosmopolitanism in fact points to "forms of institutional cosmopolitanism in which further boundaries become porous in further ways" (O'Neill 2000: 202). The taxonomy of cosmopolitanism can thus be sometimes confusing.

Utilitarian Cosmopolitanism

The most prominent example of moral cosmopolitanism is utilitarian cosmopolitanism. Utilitarianism by its nature can extend its moral thinking beyond national or state boundaries without much difficulty. Hence, as early as in 1972, in his monumental essay *Famine, Affluence, and Morality*, Peter Singer could bring up the issue of global inequality and apply the so-called "the greatest happiness of the greatest number" principle to the globe. Based on the assumption that "suffering and death from lack of food, shelter, medical care are bad," Singer argued that "if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it" (Singer 1972: 231). Famines in Africa and Asia were apparently of greater importance to the Concorde project in Europe.

Singer has been an enthusiastic advocator of the idea of moral cosmopolitanism to reduce bad consequences such as death from hunger on a global scale, and it is charity that he has advocated as a way of discharging the universal positive duty. For example, in *One World* (2002), Singer proposed "1 percent donation of annual income to overcome world poverty as the minimum that one must do to lead a morally decent life" (Singer 2002: 194). More recently, in *The Life You Can Save* (2010) and *The Most Good You Can Do* (2015), Singer proposes efficient and ethical ways to save lives as well as to help others maintain decent lives through charity, in particular through donations using cost-effective analysis. A set of ideas behind is called "effective altruism," and it is becoming a popular movement among morally conscious people.

Contractarian Cosmopolitanism

The other strand of cosmopolitanism is contractarian. Since the publication of John Rawls's *A Theory of Justice* in 1971, several philosophers, most famously Charles Beitz (1999) and Thomas Pogge (1989, 1994) have worked to extend Rawls's theory to a society beyond national or state borders. Instead of Rawls, who was determined to discuss justice within a closed society, namely, a state (1971), and who later rejected the cosmopolitan view in one's own conception of international justice known as "the law of peoples"(1993, 1999), Beitz and Pogge used a Rawlsian contractarian framework to show that a thought experiment that starts with an international or global "original position," where delegates discuss and agree to principles of justice without knowing which country they represent, would lead to principles of international or global distributive justice. While Beitz discussed the global distribution of the advantages of natural resources (Beitz 1999), Pogge proposed a scheme for a global resource tax (which was later called the global resources dividend, GRD) (Pogge 1994). As Pogge stated, a Rawlsian would admit that "nationality is just one further deep contingency, like genetic endowment, race, gender, and social class, one more potential basis of institutional inequalities that are inescapable and present from birth" (Pogge 1989: 247).

A Rawlsian contractarian framework is still and will be an excellent thought experiment that seeks impartial and fair principles of justice, and it is also employed by other cosmopolitan theorists to derive global justice principles (Hayden 2002; Brock 2009). However, Rawls's own contractarianism, which insists particularly on "the mutual advantage" condition among others

known as "circumstances of justice" set by David Hume, is criticized by Martha Nussbaum as an inappropriate account for global justice as well as for domestic justice, since such a condition would naturally exclude children, the elderly, the disabled, refugees, immigrants, and so forth from the subject of justice (Nussbaum 2006).

Human Rights Approach

In more recent years, Beitz and Pogge have justified their conceptions of global justice by putting a greater emphasis on human rights (Pogge 2008; Beitz 2009). For example, Pogge proposed the idea of "the negative duty not to harm the poor" (2008). According to this novel idea, global poverty is the result of the harm done by the global elites (not only the governments of rich countries and corrupt dictators in LDCs but also the citizens of rich countries). It goes on to say that, by taking part in flawed institutions, the global elites are harming the poor, so they are obliged to make reparations to restitute the baseline of the harmed. GRD is now represented as one way of making these reparations. Pogge's thesis of "the negative duty not to harm the poor" originates with the fact that people actually do not, or at least did not, donate as much as Singer expects.

It is not only self-claimed cosmopolitans such as Beitz, Pogge, and Charles Jones (1999), among others, who appeal to human rights to justify their conceptions of global justice. David Miller, a well-known liberal nationalist, also refers to human rights upon justifying his principle of global justice that gives rise to "the general responsibilities that we have to humanity at large" (Miller 2007: 44). According to Miller, those general responsibilities to fellow human beings override our special duties to compatriots. When basic human rights go unprotected in some nation, "any agent, individual or collective, who is able to help protect them may in principle bear remedial responsibilities" (Miller 2007: 164), although such responsibilities are supposed to be lightened when the poor nation supposedly has outcome responsibilities for its destitution. Thus, in Miller's theory, weak cosmopolitanism (which in his account "requires us to show equal *moral concern* for human being everywhere" as opposed to strong cosmopolitanism that "goes beyond this to demand that we should afford them equal *treatment*, in a substantive sense") is compatible with nationalism (Miller 2007: 43–44). Yet, this marriage of nationalism and weak cosmopolitanism seems so susceptible to nationalist sentiments that such a joint may easily come apart when things become pressing.

Human Capabilities Approach

In *For Love of Country?*, Nussbaum developed an argument against the prevalence of nationalism (or patriotism, to use the word in the book) in the United States from a cosmopolitan viewpoint (Nussbaum 1996). Her cosmopolitanism is Stoic in the sense that she, following Roman Stoics, sees the source of our moral obligations not in the local community but in the human community and inherits the idea that "we should give our first allegiance to no mere form of government, no temporal power, but to the moral community made up by the humanity of all human beings" (Nussbaum 1996: 7). Nevertheless, while proposing cosmopolitan education to her fellow citizens, Nussbaum does not deny their love for their country. In this sense, her stance is close to that of Richard Price (1992). For Nussbaum and Price, a person could love her country and at the same time be cosmopolitan, as long as she prioritizes her regard for the world over herself, family, friends, and her own country. Nussbaum's cosmopolitanism also has a Kantian flavor, just as many other contemporary cosmopolitanisms, by being sympathetic to the idea that "[o]ne should always behave so as to treat with equal respect the dignity of reason and moral choice in every human being" (Nussbaum 1996: 8).

Most importantly, it is the capability approach that Nussbaum brings in upon applying her cosmopolitanism to a theory of global justice. Like the need approach generally (Doyal and Gough 1991; Brock 2009), the capability approach sees human beings as creatures with rich needs to be fulfilled, materially and psychologically. Thus, unlike Cicero and his followers, the capability approach to cosmopolitan justice indeed respects the universal positive duty.

With this sort of cosmopolitanism, Nussbaum argues for global principles, including such as "national sovereignty should be respected, within the constraints of promoting human capabilities," "prosperous nations have a responsibility to give a substantial portion of their GDP to poorer nations," "multinational corporations have responsibilities for promoting human capabilities in the regions in which they operate," "all institutions and individuals have a responsibility to support education, as key to the empowerment of currently disadvantaged people," and so forth (Nussbaum 2006: 315–323).

Some Further Considerations

As stated above, the trend in contemporary cosmopolitanism is moral and weak cosmopolitanism. And although, in a "weak cosmopolitan plateau," cosmopolitans and their critics are said to be debating "not over whether we owe outsiders anything but how much, and what it is" (Vernon 2010: 2), cosmopolitans themselves are still debating over "how much and what it is" that we owe outsiders. For example, in his *Cosmopolitan Justice*, Darrel Moellendorf famously wrote that the idea of fair equality of opportunity would require that "a child born in rural Mozambique would be statistically as likely to become an investment banker as the child of a Swiss banker" (Moellendorf, 2002: 79). Although this claim is an extension of domestic idea of equality of opportunity and has some appeals, it is criticized for being "too strong" (Miller 2007: 63) or "much too culturally specific" (Brock 2009: 59). However, in this radically globalizing world, it may not be unreasonable to imagine situations where a child in rural Mozambique meets investment bankers or rich tourists from abroad or children of the UN personnel and aspires to become like them. How should cosmopolitans address this child's hypothetical interests? "How much and what it is" that we owe her? Would a more weak and more transcultural idea of global equality of opportunity suffice?

Another question is the standing of multinational corporations (MNCs) as agents of cosmopolitan justice. It is true that many cosmopolitans have already recognized their considerable presence and affirmed their possibilities in realizing the idea of cosmopolitanism and the justice it entails, as, for instance, we can see in the reform plan in the domain of pharmaceuticals proposed by Pogge (2008). It is also true that MNCs today are expected to act at least as *economic* agents of justice, as the UN Global Compact suggests. However, cosmopolitanism might be able to ask more from MNCs. According to Florian Wettstein, MNCs, as well as international nongovernmental organizations (NGOs), "have reached a level of capability and power that in many situations put them in de fact governing positions" (Wettstein 2009: 162). Wettstein's idea is to regard MNCs as primary agents of justice who bear *political* responsibilities. In this world of globalization where many states are increasingly failing to secure minimally decent lives to its citizens and newcomers, MNCs might be demanded to take responsibilities for the improvement of the situation. This would certainly cause many discussions, including serious questions regarding the meaning and extension of "the political."

Conclusion

Coming a long way from the time of Diogenes of Cynic, we live in a world where nations or states are no longer the sole source of identity or the good life nor the sole primary agent of justice. With the advancement of globalization, human lives will be increasingly connected with distant strangers as well as strangers nearby. Cosmopolitanism seems to be in need of finding further ways to realize its idea and the justice it entails, not only by making states and international organizations more accountable but also by examining and extending possibilities of newly emerging agents of cosmopolitan justice.

Cross-References

▶ Constitutionalism: Cosmopolitanism
▶ Immigration
▶ Nussbaum, Martha

▶ Rawls, John
▶ Rawls, John: The Argument for the Two Principles of Justice
▶ Rawls, John: The Law of Peoples
▶ Refugee

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Covenant Membership as a Community of Equals

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Introduction

At the beginning of the seventeenth century, Johannes Althusius, offered a distinctive and fertile conception of political community. The polity, he wrote, is a consociation in which partners in a common life are mutually committed to communicate to one another whatever is useful and necessary for harmonious social life (Althusius 1964, 17–19). Consociates not only live side-by-side, they inhabit a common world together; they are not merely gathered into the same community, subsumed by the collectivity, they are *symbiotes*, interdependent partners, members of one another. Members

communicate – entrust to each other – goods and services, common rights and responsibilities. These things are not *allocated to* them, nor exchanged between them, by negotiated bargain, but *shared among* them. Something more than exchange is involved, for both the reciprocal giving and the things given convey something of meaning; the movement brings the parties together, creating, reproducing, and enhancing unity. Through this communication they pledge themselves to each other.

Invoking the biblical concept, Althusius called this polity a *covenantal* community or membership (Althusius 1964, 27). Implicated in this notion is a richly relational notion of equality. If we participate in a covenant membership, equality would not be about what I get or you get, not about how well I do compared with how well you do; rather, it is about what we are to each other. A covenant membership is a community of equals. This entry offers a sketch of some key features of the notion of a covenant membership and explores the notion of equality implicated in it.[1]

Covenant Membership and Equality

"Covenant" used here refers not to a kind of transaction or a mode of agreement, but to a measure or ideal for human communities that share certain empirical properties. In them, human beings live together in an environment of interactions of hosts of people most of whom are unknown to them but whose efforts provide the infrastructure for their quotidian activities. In a vast number of ways involvement in such communities is inevitably dependent life. It is also nonvoluntary. The community's life extends backwards and forwards beyond the lives of its current members and incorporates their lives into it. For most purposes, including forming convictions regarding members' communal obligations, the decisive fact is not the origin of the association, or the date of their voluntary initiation, but their on-going, community-reproducing activities. Further, polity-sized covenant memberships are communities of communities. While some constituent communities may be relatively intimate, in political communities that comprise numbers of subcommunities, interpersonal relations are likely to be more distant, mediated by participation in common institutions and in the relations between subcommunities and the larger polity that embraces them.

For human associations that meet these empirical conditions, the idea of covenant offers a measure and an ideal. This ideal takes its shape from its core concept: *mutuality.* Covenant membership is characterized by relationships articulated in a structure of mutual responsibilities and the commitments evident in the faithful execution of them. In larger covenant communities, bonds of affection, shared values, or identity-shaping experience are uncommon. If they obtain, they are likely to be consequent upon, rather than constitutive of, healthy communities which nurture the smaller communities in which these bonds more typically are formed. The mutual responsibilities are communicated among members, shared and entrusted to each other. They are embedded in and flow from the practices of members. The content, scope, and limits of the responsibilities are set by these practices, and the normative meaning that they have acquired over time.

Mutuality is key to understanding how the ideal of covenant seeks to deal with otherwise morally troubling aspects of community life. First, the covenant idea accepts the fact that communities, and the participation of members in them, are rarely rooted in consent. For individual members, community relationships and attendant responsibilities are found, not made, the product of an on-going concern, which makes its demands upon them without asking them to sign up. Willing participation is a mark of a healthy covenant community, but it is not a necessary condition of its moral force for individual members. Rather, it is the desired consequence of genuine mutuality, and such mutuality is a condition

[1] An extended version of this essay was presented at the University of Athens, October 2016. I am enormously grateful to Konstantinos Papageorgiou and my other friends and colleagues in the Faculty of Law of the University of Athens for the opportunity to outline these ideas.

of its moral force. Of course, nonvoluntary associations can morph into monsters of oppression. The bulwark against such oppression, according to the covenant idea, lies in genuine mutuality. Mutuality is an indispensable condition of willing participation in a nonvoluntary association. Conditions that perpetuate dominance, arbitrary power, or oppression constitute deformations of the covenantal relationship. Covenant engenders relationships that invite and encourage wholehearted embrace. Conditions that undermine this willing affirmation of the relationship compromise the covenant relationship.

Similarly, the idea of a covenant communities implicates a robust form of equality. A scheme of mutual responsibilities is not proof against domination due to arrogant exercise of rank or the exploitation of relative weakness. Covenant communities, in their construction of mutual responsibilities and the enactment and enforcement of them, must be especially vigilant about the potential for oppression that is thereby created. They must also be aware of the ways in which characteristic activities of members, and typical structures of their responsibilities, can push some members to the margins and effectively exclude others, making them especially vulnerable to domination or exploitation by others. Thus, the normative ideal of covenant community is morally compelling only if covenant communities confer equal standing on members and enable them to participate *as equals* in community life. Covenant mutuality entitles each member to a recognized and respected place in the community, a place from which each can participate on an equal basis with others.

Equality Requires Community

Covenant memberships are morally compelling only if they are communities of equals, but, in turn, equality that is essentially comparative and intrinsically valuable depends on its realization in concrete communities like those meeting the covenantal ideal.

The social ideal of a community of equals rests on, or instantiates, a more fundamental, universal moral ideal, the *basic moral equality* of all human beings, that lies at the foundations of morality (Scheffler 2003, 21–2). This principle combines universality with an essential relational dimension. Hence, Jay Wallace formulates the basic equality principle as follows: all persons are members of a maximally inclusive community of agents whose interests count equally for moral reflection (Wallace 2019, 37, 46, 53). The problem, of course, is that all real communities are concrete, historical, and bounded. The universal human community is merely notional, fragmented into a variety of real communities. Consequently, the social ideal rests on a fiction.

This problem can be solved if we distinguish two components of the basic equality principle, the *operative principle* and its *ground*, and then identify conditions necessary for the realization of the operative principle. The operative principle holds that every human being is entitled to be treated, and required to treat others, as an equal (TAE). This is an essentially comparative principle and must be realized in some kind of community. Its ground lies in the notion all human beings occupy one basic moral status (BMS). TAE prescribes the most appropriate way to respect the moral status of each person. To show why this is so, we must identify morally significant features of human persons that make them eligible for basic moral status, and, then, show that TAE indicates the most appropriate way that people living in some proximity to each other respond to these features.

We can identify at least five relevant and morally significant features of human persons. (1) They are embodied, biological creatures. They depend on the natural world for their own psychological and agential infrastructure. They also depend on the cooperation of the natural world for survival and the resources with which to live out their lives. (2) They are self-conscious. They feel pain and they experience suffering and joy; they feel affection for others and experience the love of others; they appreciate, engage with, and create that which is good, and understand, seek to avoid, or mitigate that which is evil and seek to repair its damage. These things not only matter *for them*, but crucially they matter *to them*.

(3) They are practical agents. That which matters to them is shaped into plans, aims, and a self that executes them. They yield reasons for acting in the world. (4) They are temporal. They think of themselves as existing over time as continuing subjects. They compose their experiences and actions into meaningful patterns, narratives of significance. They live out these narratives in time and in the natural world; hence they are in many respects fragile and dependent on the cooperation of nature and other human beings. (5) They are social. Their cognitive and meaning-making capacities are in fundamental ways developed only in a social world. Their unique subjectivity is nevertheless accessible to others. While the life of each is lived only "from the inside," its shape, character, and value is intelligible to others and, given the social nature of human beings, they must be so. Likewise, the world of moral value, like the physical world, is a common world for human beings, so their point of view on it must be to a significant degree a common point of view. The sufferings and joys that matter to each person can also matter to others, and they matter *because* they matter *to each* person who experiences them. Such mattering calls for an appropriate response from others.

To respond appropriately, each person must be accorded respect, recognition. Recognition must be communicated, given expression in the actions, practices, and arrangements in and through which persons relate to each other. It must publicly structure interactions, such that persons see themselves and others through these modes of communication of recognition. Further, such recognition, like greeting or embracing, cannot without distortion be unilateral. To greet is to *exchange greetings*; to embrace is also to be embraced. A greeting that is not returned misfires; an embrace that is coldly endured is incomplete, deformed. Likewise, interpersonal recognition misfires unless reciprocation is readily available.

Thus, recognition respect is available only in public circumstances in which it is communicated, given and received reciprocally, and modes of social interaction that weaken, distort, or deny such recognition are challenged. Communities in which each person is treated as an equal promise recognition of this appropriate kind, but the idea of treatment as an equal is abstract. It has content only when the principle is realized in social practices of historical communities. Recognition for human beings is expressed, communicated, received, and potentially reciprocated only in a shared public environment of practices carrying social meaning for persons interacting in that environment. Recognition in a merely notional community is like a disembodied embrace.

Thus, the basic moral status of each person is respected properly in communities in which persons treat each other, and are treated by each other, as equals, and this principle must be realized in concrete communities. Of course, not just any concrete historical community can fill the bill, but only communities that enable communication of mutual recognition. Covenant memberships provide the necessary practical environment for such communication.

A Community of Equals

In covenant communities, members stand in concrete social relationships that embody and manifest the equal standing of each member. What is it to be regarded and to regard others as members of a community of equals?

The focal egalitarian concern is not, in the first instance, about the psychological well-being of members, but rather about the nature of their presence and place in the community. This presence is not merely a matter of subjective sentiments – of the actual feelings about, attitudes toward, or intentions regarding, others. The relations are necessarily *public*, embodied in social meaning of modes of behavior, practices, and institutions and their effects on the lives of members. Those practices are able to constitute relationships of equality or inequality without all members experiencing the attendant subjective elements.

The specific forms of behavior that manifest recognition of members as equals are determined by concrete covenant communities and their

characteristic practices and institutions. But these practices and institutions must meet certain conditions. Recognition as an equal entails recognition of each as a distinct person, due to an effort at identification (Williams 1973, 236). This calls for recognition of who they are, not merely for how they are like others. Differences among members do not in themselves threaten their standing as equals. A community of equals is not a community of identicals. Full membership in a community of equals does not require or expect assimilation to one of a set of approved identities. Inclusion does not entail absorption; indeed, because covenant communities recognize and respect singularity, equality practiced in them protects and nurtures these differences.

Nevertheless, these potentially differential relationships must not be such that they can be interpreted by any reasonable person to communicate, whether by design or inadvertence, inferiority of some and superiority of others. No member may be given to understand, as a condition of participating in the practices or benefitting from the institutions, that they must regard themselves as inferior to other participants, or subordinated to those members, or required to submit to the dominance or arbitrary control of others. Thus, any kind of relationship or institution that calls for submission to the authority of another must be reciprocal. Members relate to each other within a framework defined by a common set of norms that articulate their mutual responsibilities. They submit not to *the law* or to *the community*, but rather to *each other*. All exercises of authority must be subject, manifestly, to public accountability in which each has the opportunity to participate on an equal basis with all other members.

The idea of having standing in a community as an equal has implications for the distribution of goods, positions, and opportunities. These implications are determined by asking what conditions must be met, to what goods must access be guaranteed, and what opportunities must be secured, in order for each member to participate fully in the community as an equal (Anderson 1999, 2012, 40–42). Equality in its distributive dimension is not a matter of each member getting the same amount of something, but a matter of what each is to each other, and thus about what is needed for each to function in the community as an equal. Sufficiency may be the measure, but equality – standing as an equal – is the aim and touchstone.

Model Egalitarian Arguments

The institutions and the decisions and actions officials of a covenant membership inevitably have differential impacts on their members. Treatment as an equal does not entail treatment that is equal in every respect. However, differential effects may violate the entitlement of members to treatment as equals. One major way to determine whether they violate this entitlement is to look to at the reasons and arguments that underlie and might be offered publicly in justification of the institutions or decisions. Equality thus understood takes political shape in certain forms of argument, among them *equality extension arguments*.

Such arguments seek to demonstrate that, with respect to a specific community, access to certain benefits, goods, or conditions are marks of membership in the community, signals of equal status in it, and thus must be made available to all on an equal basis. Or they seek to show that access to certain benefits, conditions, or goods is necessary for full participation in that community, and thus they must be extended to all. Equality extension arguments draw out often unacknowledged implications of a community's understanding of membership.

They take two different forms. Arguments *from* membership make the case for full participation of an excluded member in aspects of community life understood to be available alike to all members. By virtue of that membership, excluded persons are entitled to benefits provided to other members. Of course, membership may be disputed. Thus, sometimes arguments *for* or *to* membership must be made. While arguments from membership draw out implications of commitments a community has already made to its members; arguments *for membership* seek to extend those commitments to parties currently regarded as beyond the boundaries of the community.

The landmark case in American constitutional law, *Brown* vs. *Board of Education* illustrates arguments *from* membership. The Supreme Court argued, "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be available to all on equal terms" (*Brown* 1954, 493). The Court argued that, since the state provides education, and since it is essential if any child-member of American society is to succeed in life and, thus, be able to participate fully in life of the community, the state is committed to providing the opportunity for education to all members on an equal basis. The Court drew its egalitarian conclusion from an understanding of key aspects of membership in American life and conditions of participation in that life.

In *Plyler v Doe* (1981), the U.S. Supreme Court used a similar argument to declare unconstitutional a Texas statute that withheld state funds for education of illegal aliens and authorized local school districts in Texas to deny them enrollment. Justice Brennan argued that while public education is not a constitutional right, it plays a central role in the American view of civic life, and in virtue of that fact must be extended on an equal basis to all school-age children residing in Texas. However, implicit in this argument, and not directly addressed by it, was the premise that the illegal aliens fall in the same category as regular citizens for the purposes of deciding the issue of access to educational opportunity. Justice Brenan's argument *from* membership must be supplemented with an argument *for according* membership to the children of illegal aliens residing in Texas.

There are two fundamentally different kinds of arguments for according membership to persons in actual, on-going communities. (i) Arguments for *recognizing* membership, which focus on the community's understanding of the conditions of membership in it. They challenge a community to follow its professed principles. (ii) Arguments for *conferring* membership, which concede that the parties on whom membership might conferred are not members, according to existing criteria, but they seek to show that the community's fundamental values compel it to include them in the membership. Such arguments advocate an expansion of the criteria of membership.

A typical argument for *recognizing* membership draws on conditions of life shared in the covenant community and the ethos of the covenant community. It points out that those for whom membership is claimed participate actively in networks of material interdependence with them, that they and recognized members live from each other. Moreover, it observes that they are subject to a common system of authority, structured and acting through a common set of public norms, all of which has a substantial and pervasive impact on the daily lives of members and nonmembers alike. To refuse to recognize the membership of people already substantially integrated into the life of the community and deny resident aliens important social benefits, it is argued, makes social pariahs of aliens and creates a caste system within the community. Aliens are forced to live at the margins of society, always at risk of domination, exploitation, and subordination. A covenant membership, committed to being a society of equals, it concludes, cannot consistently tolerate systematic subordination of people within its borders.

In contrast, typical arguments for *conferring* membership, for welcoming persons into a community, appeal to considerations of a universal sort that may not be a part of the community's creed, for example, compassion in response to manifest and often urgent human need. Such moral considerations stand alongside, and possibly conflict and even perhaps outweigh pro tanto membership-oriented and more particular considerations. However, an egalitarian extension argument is also possible.

Covenant communities seek to realize the principle that every person is entitled to be treated as an equal. This principle gives expression to the ideal of a "maximally inclusive" moral community; yet, every community is bounded, exclusive. This tension is unavoidable, but it must not be ignored. The moral force of the universal normative demand, when realized in a particular community, remains by policing the kinds of reasons

that can legitimately ground refusals to welcome nonmembers into the membership.

In view of its commitment to pluralism and diversity, a covenant membership could not base its refusal to extend membership to persons outside the community on grounds that presuppose the superiority or purity of the membership's culture. Indeed, to the extent that a kind of overvaluation of its culture is a characteristic deformation of concrete communities entitled systematically to exclude people different from it, covenant memberships must be willing to welcome and work to integrate people from cultures different from its own. Of course, given its commitment to equality it may be necessary to maintain borders in order to protect the viability of the covenant membership, and perhaps more specifically its ability to protect institutions and practices that make possible treatment of its members as equals. Nevertheless, this commitment to equality rules out other reasons for exclusion that nonmembers could not recognize without thinking of themselves as inferior in some fundamental way to members. This appeal to the integrity of covenant communities illustrates how arguments for extending membership might go.

Conclusion

The idea of covenant community offers a demanding measure and compelling ideal for our own political communities. It urges us to secure within them robust conditions of mutuality in many dimensions, and in particular to secure standing for all members as equals. At the same time, it demands that we be especially vigilant that the borders we define and defend do not lead us to compromise the commitments at the core of the ideal. Communities have significant moral value, but they command our respect and allegiance only when they meet conditions that serve the good of human beings all of whom are entitled to a place to stand alongside others, face to face with them, in a community of equals.

Cross-References

► Claim Rights (Subjective Rights)
► Dworkin, Ronald: Theory of Equality
► Equality and Global Justice
► Immigration

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Crenshaw, Kimberlé Williams

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One of the founders of critical race theory in the US legal academy, a black feminist scholar-activist whose groundbreaking work was an impetus behind the interdisciplinary field known today as "intersectionality studies," Kimberlé Williams Crenshaw (B.A. Cornell, 1981; J.D., Harvard, 1984; L.L.M., Wisconsin, 1985; currently Professor at UCLA and Columbia Law Schools and founder-director of the latter's Center for Intersectionality and Social Policy Studies) was born in 1959 in Ohio. Her influence extends beyond legal theory and practice to women's, gender, and sexuality studies, critical ethnic studies, the empirical social sciences, and the humanities, but also to the advancement of human and civil rights internationally. As co-founder of the African American Policy Forum (in 1996) and an intervener in the United Nations World Conference on Racism (in 2001) who drafted a background paper on "Race and Gender Discrimination" that facilitated the integration of

gender in the WCAR Declaration, Crenshaw's legal and social activism has informed social movements transnationally, urging us to attend simultaneously to multiple forms of oppression and discrimination in people's lives: particularly those of women of color, who form the global majority and are situated at the bottom of social hierarchies, facing endemic institutional and interpersonal violence, but are systematically denied representational and political power, even in the context of emancipatory or reformist social movements. This entry will focus primarily on Crenshaw's theoretical contributions (section "The Concept of Intersectionality") but will also discuss how, through her activism, intersectionality – as a framework or an analytic sensibility for making visible the sociolegal invisibility of women of color (and multiply oppressed social groups more generally) – has become praxis, revealing how black women and other women of color fall "through the cracks" of mutually exclusive antiracist and feminist discourses or, rather, are pushed into the chasm produced by their respective uninterrogated sexisms and racisms (section "Intersectional Activism").

The Concept of Intersectionality

Crenshaw introduced the metaphor and concept of "intersectionality" in two articles, published in close succession in 1989 and 1991 in the *University of Chicago Legal Forum* and the *Stanford Law Review*, respectively. The first article, entitled "Demarginalising the Intersection of Race and Sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics," used a "traditional" case-study approach to examine three antidiscrimination employment suits brought by black female plaintiffs (*DeGraffenreid v. General Motors*, 1976; *Moore v. Hughes Helicopter*, 1983; and *Payne v. Travenol*, 1982) in order to demonstrate that black women are systematically excluded redress by precisely those legal instruments we might imagine were designed to eliminate racialized and gendered inequities (Crenshaw 1989). Crenshaw used the metaphor of the street "intersection" (and a companion metaphor of the "basement," which has garnered relatively little attention) to elucidate how prevailing definitions of discrimination (based on "race" or "gender") render black women's concrete experiences of discrimination (based on multiple grounds) noncognizable under US law and exclude their claims – whether these combine admissible grounds or categories of discrimination, or claim discrimination on a singular ground, or refuse the categorial fragmentation of their experience to claim discrimination as black women (Crenshaw 1989). A claim of discrimination requires, prima facie, that a plaintiff demonstrates her membership in a protected class, such as one based on "race" or "sex." At the very outset, then, women of color – who simultaneously experience racism and sexism – are positioned in a dilemmatic relationship to the analytical structure of law, which posits that, as categories of discrimination, "race" and "gender" are discrete (Crenshaw 1989, 140). Moreover, to demonstrate disparate treatment or impact, a plaintiff must show that other members of the class were similarly affected. Since, however, categories of "race" and "gender" crosscut each other, experiences of discrimination are often heterogeneous within a protected class. Yet, black women are denied representational power over the racialized category "black people" or the gendered category "women," precisely because of their simultaneous membership in both. In other words, these categories are defined with the experiences of relatively privileged individuals – for instance, black men and white women – as their "historical base" (Crenshaw 1989, 148) and are constituted prototypically with respect to those experiences, which are routinely falsely universalized to all members of these groups. Consequently, "black women are protected [by the law] only to the extent that their experiences coincide with those of either [white women or black men]" (Crenshaw 1989, 143). When intersected, what becomes apparent is that categories of "racial" and "gender" discrimination have been constructed through mutual exclusion: not to make visible black women's experiences but rather to distort and fragment them (Crenshaw 1989, 139–140; Harris 1990).

The problem that Crenshaw's analysis reveals is not contingent on poor jurisprudential

reasoning, a function of the lack of doctrinal precedent, or the result of judges' personal "bias"; rather it is a cognitively perceptually engrained problem that extends beyond an admittedly conservative institution – the law – to emancipatory movements, the discourses of which reveal precisely the same kinds of categorial exclusions and dynamics of subordination. Thus, intersectionality, as an analytic sensibility, enables us to critically examine how both the legitimating discourses of state and capital (such as anti-discrimination and employment law) but also the contestatory ("liberal" and "radical") discourses of antiracism and feminism reproduce cognitive-perceptual habits and dynamics of privilege and oppression which, even as they contest some aspects of racism and misogyny, advance white male hegemonic power. It is not a coincidence that, contrary to what we might perhaps expect or imagine, the most successful group in discrimination cases is white men (Selmi 2001; Oppenheimer 2003; Best et al. 2011); plaintiffs belonging to one or more oppressed social groups fare better when they can demonstrate their hold on whiteness or masculinity, since, paradoxically it is these forms of privilege that invisibly constitute the categories of discrimination to which plaintiffs must take recourse when bringing their claims (Crenshaw 1989, 145; Carbado 2013).

In her early work, Crenshaw sought to theorize the complicity of symbolic and material dimensions in constituting racial oppression, noting how easy it is to mistake a symbolic transformation for a material one (Crenshaw 1988, 2011, 1313n192). Nearly three decades later, in the "Age of Obama" but also of mass incarceration, the acuity of this insight is ever more striking. Crenshaw's recent work focuses on the prison-industrial complex, its continuity with slavery, and the naturalized and invisibilized institutionalized violence that black women face as prime targets of the criminal legal system (Crenshaw 2012) and on theorizing post-racialism, a powerful ideology combining a form of "aversive racism" – the racism of a racist who wishes not to appear racist (Son Hing et al. 2004) – with naturalized denial of the endurance of white supremacy (Crenshaw 2011, 1314). Post-racialism locates white supremacy in the past, delegitimizing antiracist discourse by denying the ongoing relevance of "race" as a struggle concept; yet, post-racialism cynically appropriates the category "race" to stigmatize racialized groups, at once erasing their systemic subordination and constructing them as responsible for their own victimization.

Intersectional Activism

If "intersectionality" represents the invisibility of women of color and other multiple oppressed groups at the junction of categories constructed through their conceptual and political exclusion, Crenshaw's activism has focused on making visible and audible racialized-gendered violence targeting women of color, including the epistemic violence effected by self-described emancipatory discourses that reproduce their sociolegal invisibility. A co-founder of the African American Policy Forum, and founder-director of Columbia University's Center for Intersectionality and Social Policy Studies, together with her collaborators, Crenshaw has initiated a number of research and advocacy projects to combat the still widespread erasure of women of color in antiracist and feminist politics.

Crenshaw has explicitly situated the concept of intersectionality and the analytic and political sensibilities that it crystallizes in a social movement context – not only in that it inherits and builds upon a trajectory of black feminist and womanist critical thought that extends back to the nineteenth century but also in that her own personal trajectory embodies an effort, both in academic spaces and in anti-violence organizing, of contesting the multiple marginalizations of black women and other women of color face. Crenshaw conducted field research in Los Angeles women's shelters serving black, Asian, and Latina women in preparation for writing "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," her second article on intersectionality, which advances a positive definition of the concept, elaborating its structural, political, and representational dimensions (1991, 1245n11). Crenshaw situated her scholarship in

two then-emerging legal academic discourses: critical race theory and works that investigate the "connections between race and gender" (1991, 1242–1243n3). Arguing in a retrospective article published in 2011 that the "apparent intimacy" of the law "with the prevailing racial order presented a unique site for an intellectual sit-in," it is significant that it was her "activist engagement" in anti-violence organizing "that brought [her] to this work" (Crenshaw 2011, 1310; Crenshaw qtd. in Berger and Guidroz 2009, 65). Indeed, Crenshaw's praxis of the past three decades spans the fields of law and advocacy, legal theory, feminist and antiracist activism, showing their actual interconnectedness and the productivity of transformative struggles waged on multiple levels at once. From protesting masculinist campaigns, such as the Nation of Islam's Million Man March/Day of Absence[1] in 1995 and the Obama administration's My Brother's Keeper[2] in 2014, to producing empirical studies tracking interpersonal and institutional violence against black women, such as Say Her Name and Why We Can't Wait, and to organizing spaces of intellectual and political exchange, such as the "Overpoliced and Underprotected: Women, Race and Criminalization" conference at the UCLA School of Law, in 2012, Crenshaw is part of a resurgent black feminist intellectual and political movement that militates against "dominant frames" that render black women invisible as both the actual targets of gendered racism and the normative subjects of antiracist and feminist struggles (Ransby 2000, 1217; Crenshaw 2015, 2012). For instance, introducing a symposium in the *UCLA Law Review* on mass incarceration, she argues that "some of the dominant frames pertaining to mass incarceration reveal little about how women are situated as objects of social control and are not analytically attentive to the dynamics that contribute to this particular population's vulnerability to incarceration" (Crenshaw 2012, 1422). Indeed, despite the fact that black girls are "the fastest growing population in the [juvenile legal] system" and "receive more severe sentences" than other girls, little research focuses on how they are criminalized as children, "overdisciplined" and "pushed-out" from schools, or traces the effects of the state's constant surveillance and violent discipline on their lives (Crenshaw 2015, 4–6). Yet, not only the disciplinary and punitive apparatuses of the state but also antiracist and feminist discourses, perhaps inadvertently, reproduce epistemically oppressive dynamics of what the black feminist philosopher Kristie Dotson has named "testimonial quieting" and "testimonial smothering" of black women (Dotson 2011, 242–251; May 2014). Intersectionality helps transform such dynamics, which render black women and girls "conspicuously absent" in frames focused on men and boys as the exclusive or paradigmatic targets of racism, specifically police brutality (Crenshaw and Ritchie 2015, 1). If "intersectionality articulates a politics of survival for black women," as political scientist Julia Jordan-Zachery has written, it functions powerfully as an immanent critique of movements such as black Lives Matter (Crenshaw and Ritchie 2015, 5). As exemplified by the campaign Say Her Name: Resisting Police Brutality Against black Women, "the erasure of black women is not purely a matter of missing facts"; what are needed are "reframings" that make visible the multiple marginalizations that violently intersect in black transgender and non-transgender women's lives – but not in antiracist analyses (Jordan-Zachery 2007, 256; Crenshaw and Ritchie 2015, 4).

The brutal paradox that Crenshaw's oeuvre reveals, then, is that those who are violently located in the basements of social hierarchies, where others make their ascents on their backs, are also those whom emancipatory discourses consistently fail, rendering them marginal in their representations and mobilizations while

[1] Nation of Islam. 2016. About the Million Man March: A Glimpse of Heaven. Website. Last accessed 15 September 2016. http://www.noi.org/about-million-man-march/

[2] The white House. 2016. My Brother's Keeper. Website. Last Accessed 15 September 2016. https://www.whitehouse.gov/my-brothers-keeper. Why We Can't Wait: Women of Color Urge Inclusion in "My Brother's Keeper." Open Letter to President Barack Obama. 17 June 2014. Last accessed 15 September 2016. https://issuu.com/jusharpelevine/docs/whywecantwait_mbkletter.pdf__1_?e=0/15261424

relying on their creative energies, redirecting them from serving their own immediate interests to advancing those of others with which their experiences only partly coincide. Yet, this representational and epistemic violence undermines transformative movements from within, since it is only by addressing all systems of oppression simultaneously, and by disarticulating their interconnections, that they can ever be dismantled.

Cross-References

► Critical Theory and International Law

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Crime

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In late modern societies, crime and its accompanying procession of fears have gained enormous prominence as a cultural theme. Crime and its embodiment, the criminal, have always had, of course, a significant impact on collective representations – especially when produced in violent and aggressive guises. Rupture of the social contract, irruption of a premodern savage atavism, destabilizing element of a functional society, nefarious product of a predatory capitalism, inevitable result of the hyper individualism of a cosmopolitan contemporaneity, or still an inevitable dimension of a risk society (Beck 1992), crime appears as the sometimes dark and intriguing side of human evil not only in popular literature, but also in more sophisticated literature, in classical and contemporary philosophies, in essays, treatises, and sociology textbooks, in the pages

written by jurists, in analyses, and in press reports. And it strongly impacts, in many ways, the social and collective representations. The final years of the last century and the beginning of the twenty-first century have brought us face to face with a scenario of redramatization of crime (Garland 2002), moving away from the more comprehensive and condescending image of the criminal as someone more vulnerable to social vicissitudes and injustices – in need of shelter and support from a social State – and replacing it by that of a predator unadapted to social coexistence and deserving of exemplary and incarceration punishment.

The so-called Classical School – actually a movement that embraced the most varied currents – may be pointed out as the main precursor of a more elaborate approach to crime. This intellectual movement began in the mid-eighteenth century, in the context of the transition from the absolutist to the liberal State, along the lines of the new capitalist order, projecting itself until the middle of the following century, when the new bourgeois liberal order was consolidated.

This long period led to significant transformations in the conceptions of this school, which was impregnated with a strong philosophical content directly related to the fundamental currents of European Enlightenment – in which the concern of a certain contractualist strand focused on the search for principles capable of forging a political-philosophical model of a liberal state that incorporated proposals for liberalizing penal reform – later developing toward the knowledge that gave rise to a fruitful dogmatic-penal construction. The new rules of the capitalist economy presented different realities from the old feudal order, and the central question became to ensure consensus, order, and peace around the development of the economic activities of the bourgeoisie and the conquest of new civil liberties that would be accompanied by legal rules that would guarantee them. Beccaria, the main name of this first phase, uses the old theories of the social contract as an instrument to build this consensus. Through this contract, the ownership of punitive power is exclusively transferred to the sovereign, making criminal law the expression of this agreement between "rulers and ruled," capable of conjuring the constant threat of war of all against all. If, at least since Hobbes, the predatory and selfish nature of the human being was already known, only under this utilitarian social contract could passions be contained. This political postulate will have important consequences in the criminal sphere. Only the law, as clearly as possible and only in relation to present and future facts, could determine what is or is not a crime; this law, as well pointed out by Pavarini (1983), would be applied by an impartial judge who, if necessary, would punish observing proportional criteria of retribution. What would be defined as a crime would result from a freely agreed contract (a political-philosophical postulate), and its practice would be understood as an act of personal responsibility, misuse of freedom, or incorrect exercise of free will, legitimating the imputation of penal culpability.

Emphasizing the rational nature of man, capable of elaborating rules of coexistence and punishing those who deviate from them by committing crimes, the Classical School embraces the "isms" of the nineteenth-century Enlightenment (rationalism, liberalism, contractualism, and jusnaturalism).

If the penal illuminism – the Classical School – transits on a conceptual and philosophical level, permeated by a critical and normative rationalism not completely devoid of a utopian dimension, concerned with scrutinizing the limits of state-punitive intervention in the sphere of bourgeois individual freedoms, criminological positivism would follow the methodological path of empiricism that, moving away from the logical-abstract methodology of the classics, would shift the focus of analysis from crime abstractly considered to the one who personifies its reality: the criminal. However, both wagered on a rationalism and utilitarianism that led them to share the same faith in science and progress. The former sought to use them primarily to combat the iniquity and irrationality of the punishments of the "*old regime,*" while the latter primarily sought to combat criminality. The experimentalism typical of the natural sciences allowed them to look for certain physical, or physical-environmental-moral characteristics,

which would condition, to a greater or lesser extent, the practice of crimes. Anthropology, medicine, criminal sociology (mainly Ferri 1907), psychology, and statistics, all these knowledge would help the criminologist to delve into the roots of human evil and atavistic criminality, represented mainly by the born criminal (Lombroso 1924).The belief in the possibility of establishing a scientific explanation of criminality based on general laws found, in the first place, in aspects of the individual's biological conformation led its defenders to become entangled in the trap of a determinism that would leave very little room for normative or critical approaches. Therefore, criminal diversity will end up having an ontological-natural foundation. It is not surprising that it received the approval of a bourgeoisie that needed a "scientific discourse" that legitimized a wide range of legal measures aimed at fighting the "dangerous classes," the socialist and anarchist movements. Completely uninterested in questioning the processes of definition, criminological positivism will project itself as a "science" that legitimizes the constituted order.

The processes of definition will be more strongly emphasized by the so-called "labeling perspective," in the mid-1960s, and it was an important methodological turn within criminology, focusing less on the possible definitions of crime than on the reactions to it externalized by agencies and instances of social control. Thus, crime, as deviant behavior, appears rather as the result of a process of definition than of any objective reality, which would represent a qualitative leap, in the Kuhnean sense, toward a new phase of development of criminological thought. In this perspective, crime can only be understood by leaving the intrinsic quality of the conduct in the background and illuminating the process of attribution resulting from the complexity of social relations themselves. Frank Tannenbaum had already, long before, announced his well-known formula – *The Young delinquent becomes bad because he is defined as bad* – and symbolic interactionism explored the provocative hypothesis that what determines individual behavior is not the norm, but the interpretation that the actor makes of concrete situations and the actions of others, extracting from them meanings and senses and, based on this, also constructing his own self. The reciprocal process of construction of meanings goes through the attribution of a certain meaning given to the action of the other, and they are manipulated and modified through this interpretative process (Blumer 1971). Therefore, the expression "the label creates the deviation" (Becker 1963; Lemert 1967) proves to be one of the adaptations tending to be possible in face of the process of social reaction to criminal deviation (secondary deviation), not without the mediation of an intense process of "negotiation" of this criminal identity, in which the results are not a priori placed and within which the position of the agent in the social structure cannot be excluded. The important thing is that the selectivity of social control (formal and informal) will become a fundamental chapter in any study of criminality and crime will be seen within a process of social construction.

Conflict theories will highlight a society characterized by the constant dispute for power among groups, factions, or segments and its reflections in the criminalization process. If the interactionists put excessive emphasis on a microsociology that is careless of the structural dimensions of the phenomenon of deviance, the Marxist conflict theorists will seek to go beyond the disputes between groups, introducing a macro dimension in the debate, henceforth illuminated by a "material referent" of class dimension more attentive to a structural analysis. In its most radical version – and recognizing a drastic simplification in this statement – capitalism is criminogenic, which is almost a truism.

In Latin America, some authors (Anyar de Castro 1983; Zaffaroni 1991) suggest that a critical theory of crime, of an eminently social nature, should take as critical references historical materialism – the understanding of history within a structural vision and the capacity to insert the particular within the totality of this historical process – and elements of Frankfurtian critical theory. Thus, the importance of dialectics, substituting causalist explanation, knowledge directed to the commitment of social transformation, and the questioning of power would be the "structural" elements of this Latin American criminology.

In the so-called reflexive modernity (some use the expressions late modern or postmodern societies with similar meanings), less than constituting a unified and indivisible object of study, crime is now scrutinized through several "criminologies." This relative process of fragmentation will illuminate the phenomenon of crime through different spotlights, and the way it is produced and constituted will depend on complex and multifaceted interactions. Henry and Milovanovic (1996), for example, call for a "constitutive criminology," emphasizing the mutual influence between the individual and society in the process of constructing discursively organized social categories of order and reality. The question is how we constitute order and crime while, in this process of construction, we are also constructing ourselves. The criminological field widens and opens space for the study of crime within the most varied contexts and how its definition process is transformed along with these contexts from a complex relationship between agency and structure. But it is possible to discern proficuous and encouraging lines and paths in the criminological field. Let us stay with just three.

It suggests a Global Criminology (Morrison 2006) capable of facing and understanding the emergence of new forms of criminality from the confrontation between the "civilized spaces," represented by the northern hemisphere of the Western world – an imaginary territory that excludes the conflictive and uncivilized zones – in contrast with the territories dominated by barbarism and the discourse of war. The lands of peace and the lands of bombs. The new global order of modernity – modernity created, to a large extent, by imperial projects – imposes a discourse that excludes the "uncivilized," leaving them at the mercy of genocides and war crimes in a geographic space distant and alien to those spaces of civilization (the current war in Ukraine demonstrates this impossibility of separation). A global criminology is presented as an attempt to capture the interdependence between these two worlds and to work with these categories of crime from this point of view – and not only from the colonizer's point of view. Morrison, following this line, questions whether this field of study would be able to address issues such as genocide while avoiding legitimizing explanations.

It also suggests new forms of approaching organized crime, less in need of static definitions than of an approach capable of capturing its operational dynamics. Along this line, in a first phase, the organizations or groups will use violence among themselves or against third parties, as a form of territorial affirmation, conquest, and consolidation of influence and recognition. This "predatory phase" can assume extreme forms of violence and can involve law enforcement agents, who are also involved in these schemes to conquer territory and respect. Then, an established economic and political influence is consolidated and combined with greater corrupting capacity ("parasitic phase"). Finally, already at the "symbiotic level," the political and economic system and the "parasite" develop close relations of mutual dependence (Tokatlian 2009).

Another line draws attention to the politicization of legislative initiatives, loaded with strong symbolism in the creation of criminal offenses, more interested in listening to "the voices of the streets," "of the people who effectively suffer the harshness of criminality," than the specialists, seen now as elitist and insensitive. "Public opinion" replaces experts, considered incapable of placing themselves as intermediaries between popular demands and political-legislators. The communication channel is now immediate, from the popular outcry, vocalized by the media and social networks, to the parliament, which legislates under pressure and in a populist manner. The affliction component of the penalties is noted, and now as a passionate reaction of revenge (Durkheim 1999), motivated by outraged moral feelings (or the collective conscience). All this leads to the revalorization of prison, so often identified as a "factory of criminals" and a "school of crime." Against this view, dominant for much of the last century, it is understood that "prison works." Less, of course, as an instrument of resocialization or reform, and more as incapacitation, punishment, and exclusion (Garland 2002; Ripollés 2007).

In conclusion, the acceptance of the postulate of the normality of crime can provide greater expansion of the margins of tolerance to "deviant"

behavior, from an open and plural society, able to assimilate the difference as something natural and beneficial and channel some conflicts – already inevitable, if we talk about plurality – toward less stigmatizing paths, which means a more parsimonious use of excessively intrusive instruments of social control, such as criminal law. Therefore, it is still important to highlight the selectivity of the criminalization processes within the criminal system.

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Crime: Philosophy of

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Philosophical treatises on the nature of crime in the mainstream analytic tradition typically focus on criminalization and the criminal law. The result of this disciplinary focus has been that philosophical discussions about the nature of crime often occur outside of philosophy departments. This entry draws together a number of these philosophical debates from philosophy, sociology, criminology, law, and criminal justice concerning what crime is, how we recognize and measure crime, and how we ought to address it.

The Nature of Crime

Analytic philosophers often presume what we can call the legalization view of crime. They typically define a crime as an intentional (or negligent or reckless) action that violates a specific kind of legal norm. If there is a duty not to perform an action, and an agent performs it with the necessary criminal intent, then a crime has occurred, unless there are any justifying or excusing conditions. According to this definition, crime is a form of logical determination; if a prohibitive rule is valid and an action falls under that rule, then a crime exists, whether or not anyone notices or prosecutes it.

The legalization view of crime begins its analysis from the internal perspective of agents reasoning about what ought to be done. Such an analysis might involve an examination of the reasons the criminal law gives agents to act one way or the other or an articulation of the reasons that legislators have to proscribe certain forms of conduct. From this perspective, the important questions raised by the issue of crime and criminalization concern whether or not we can make the rational and normative structure of the criminal law more coherent. Is there, for instance, a rational basis for

the International Criminal Court's Joint Criminal Enterprise doctrine (Ohlin 2011)? Must an action seek to cause harm to be criminalized (Dworkin 1999)? How can the state rightfully punish criminal attempts if a harm never materializes (Alexander 2012)?

One prominent debate among philosophers and legal theorists who hold the legalization view is whether a crime necessarily calls for punishment as a response. Some argue that liability to punishment is an essential characteristic of criminalization (Moore 2010), while others contend that the primary function of criminalization is to compel wrongdoers to publicly answer for their misdeeds (Duff 2007).

The legalization view has several advantages. For one, it is consistent with dictionary definitions of crime, which typically describe a crime as an action or omission that violates the criminal law. It also integrates nicely with how lawyers and judges talk about crime, thereby lending greater logical and normative rigor to the deliberations of the courts. Most importantly, the legalization view provides a normative framework for how the law can be made more rational and equitable. The more the law integrates our logical and normative commitments into a rational unity, the fairer people will judge it to be and the easier it should be for people to plan their lives around its requirements.

But the legalization view's tendency to push the question of crime into the space of logic and reasons is also one of its shortcomings. In many common law jurisdictions, felony convictions are often resolved by plea bargains, which may have only a tangential relationship to what the defendant actually did (Kipnis 1976). In a number of countries, sexual assault is so underreported by victims and under-recorded by the police that criminologists do not consider their official police reports reliable (Currie 2009, 10). In most criminal justice systems, police officers and prosecutors may use their discretion to simply disregard laws on the books. The legalization view may be helpful in designing a coherent system of criminal law, but it often brackets important issues that lie outside the spheres of legislation and criminalization.

More common in sociology departments and critical theory circles is a cluster of what we can call social meaning theories of crime. Social meaning theories treat crime not as a logical determination that follows from the validity of a formal system of rules, but as a label that members of a community or society apply to certain actions. The content of that meaning, how it changes the way people understand and interact with the criminal, is not fixed in logical space, but fluid and subject to change. Crime is "socially constructed," to use an oft-misunderstood phrase; it gets its meaning and application from the social interactions and practices of human beings, much like the rules in a game of basketball.

Unlike proponents of the legalization view, social meaning theorists typically take a third-person, demoralized view of what crime is and how it works. Crime is not necessarily intrinsically good or bad, but an object in need of sociological inquiry like any other social phenomenon. This relegates questions concerning the coherence of the criminal law into the background and foregrounds questions about how societies produce and apply the label of crime as a social designation and what function it plays in regulating social reproduction.

Social meaning theories exist on a spectrum from individualistic to heavily social or structural. More individualistic social meaning theories view crime as a label or designation created and applied by powerful individuals (Becker 1963). Slightly less individualistic, conflict theory suggests that crime as a label arises from class conflict between the working class and ruling class or bourgeoisie (Chambliss and Seidman 1971). Slightly less cynical, consensus theory holds that the designation of crime emerges as a form of social consensus about what behavior society ought to prohibit (Durkheim 1933).

On the more social or structural end of the spectrum, social meaning theories model crime as a phenomenon that results not only from individual choices but from the interaction of individuals, institutions, and social networks (e.g., see Gilmore 2007). On this view, crime as a social designation is the product of an intricate web of interacting systems: ideology, political economy,

familial practices, educational institutions, and the criminal justice system, just to name a few systemic nodes. While this more structural approach may elide the contingent decisions of powerful agents, it highlights the way that even powerful actors are constrained by structural factors and institutional pressures.

The obvious advantage of social meaning theories is that they give us a more accurate model of how crime and criminalization function outside the halls of courtrooms and legislatures. The legalization model of crime has a tendency to exclude contextual factors irrelevant to excuses or justifications. Conversely, the social meaning model typically foregrounds those contextual factors, especially in its more social or structural iterations. This can help to shed light on trends largely ignored by the legalization model: why the character of crime differs from neighborhood to neighborhood, how and why courts and the police selectively enforce laws, and how the process of criminalization interacts with and supports the functioning of other social systems, such as the political economy or education system.

However, it is also the case that social meaning theories may strike some as overly cynical, an attempt to wave off the harms visited upon individuals by criminal acts as an unpleasant contingency. It is also hard to mine any sort of normative commitments out of the hard-nosed realism of naturalized social scientific analysis. A social meaning theory may give us insight into the deep scientific story of what is going on, but it has less to say about how we should make things better.

It is likely not productive to think of the legalization view and social meaning view as competing definitions of crime. Rather, they are two different models we can employ to better understand various aspects of the phenomena of crime and criminalization. It may be possible to successfully integrate both perspectives into a unified model of crime that captures both its internal logical-normative dimension and its external social-dynamic one, but attempts to do so thus far are still in their early stages (Henry and Mark 2001; Polizzi 2016; Wikström 2004).

Crime and Knowledge

Reasoning about the nature of crime inevitably leads to questions about how humans recognize and understand it. The salient epistemological issues with crime differ depending on whether one begins more from the legalization view or the social meaning view. Beginning from the legalization view, the important questions about crime and knowledge tend to be those of legal epistemology: how finite, cognitively limited agents can accurately determine whether or not an agent broke the law in the past, what sorts of evidence ought to be admissible or utilizable in a court of law, and how evidence relates to the acquisition of truth or to other important legal goals.

One of the broadest debates in legal epistemology concerns the extent to which the trial process aims at finding the truth, whether in its adversarial or inquisitorial form. The common law tradition favors the adversarial model, which pits opposing counsels against each other as competitors. Because each side's counsel aims for victory at trial, some worry that the adversarial system incentivizes winning at all costs and disincentivizes bringing the truth of what happened to light (Frankel 1980). Susan Haack (2004) acknowledges that lawyers in the common law tradition are often disincentivized from making the truth known at trial; however, she argues that finding the truth is only one of the aims of an adversarial legal system. It is also important that people receive a speedy trial, so lawyers cannot spend years gathering evidence, but must be pressured to present as much evidence as possible in a relatively short amount of time. In addition, because a common law criminal trial typically pits a powerful and well-resourced state against defendants who are often indigent, it is also important that criminal defendants receive zealous advocacy from someone who understands how the legal system works.

In the inquisitorial system favored by civil law jurisdictions, opposing counsels are not so much competitors as assistants to the judges, who take on the primary role of directing the fact-finding process. The inquisitorial system improves upon the partisan element of the adversarial system by

having a neutral arbiter lead the investigation. It also typically does a better job centralizing information and making it available to all parties. But the inquisitorial system is not without its own epistemic shortcomings. Individual judges may become anchored on hypotheses and seek only to confirm their biases (Damaška 2003, 121). It is also unclear whether confirming or disconfirming a narrative of events presented by the prosecutor is a more reliable way to determine the truth than choosing between two competing interpretations of the facts, the method favored by the adversarial system (Brants 2013, 1079).

One epistemological oddity of both the adversarial and inquisitorial trial systems is that although witnesses are typically prohibited from speculating, scientific experts are called upon to do just that. Judges or opposing counsels may retain experts to draw inferences from the existing physical and testimonial evidence based on their knowledge of criminalistics or other relevant disciplines. For instance, a fingerprint expert might take the stand to testify that a partial print found on the victim's body almost certainly belongs to the defendant. This process would be straightforward were criminalistics experts generally reliable and capable of communicating their findings clearly and accurately, but sadly this is often not the case. Many criminalistic disciplines enjoy weak empirical support at the moment, as research into forensic science is underfunded (Morgan and Levin 2019), and police officers often refuse to participate in studies that may cast their actions in a negative light (Maver 2013). Experts also sometimes misrepresent their confidence in their findings, and people are often overly credulous towards scientific experts (Garrett 2021).

The United States has gone the farthest in formalizing the rules for the admissibility of expert forensic testimony, typically requiring that testimony be based on sufficient facts or data, that the forensic methods be reliable, and that the expert reliably and faithfully apply those principles in drawing conclusions. In *Daubert v. Merrell Dow Pharmaceuticals Inc*, the United States Supreme Court also determined that federal courts were competent to decide which experts are trustworthy. A Law Commission in England and Wales (2011) has recently suggested that the UK adopt similar requirements for admissibility. Continental European states typically allow judges a great deal more discretion in choosing which expert testimony to accept and which to reject (Champod and Vuille 2011).

One worry with allowing courts or judges to play the role of gatekeeper for forensic testimony is that courts are simply not equipped to evaluate the methodology of criminalistics (Champod and Vuille 2011, 45–46). In the United States, courts rarely ever invalidate expert testimony in criminal trials (Neufeld 2005), even though across the world high-profile failures of forensic science are relatively common (Brants 2013; Champod and Vuille 2011). Some have also questioned the equivalence of reliability and truth. For one, the reliability of most forensic methods has not been rigorously tested (National Research Council 2009). In addition, just because an inquiry is scientific, that does not make it reliable (Haack 2014). An experiment that fails most of the time may still produce correct results if repeated enough times. Also, reliable methods may sometimes produce incorrect results, whether due to chance or expert error.

Turning our attention to the social meaning theory, it becomes less important to learn the truth about any one crime that happened and more important to understand trends in crime and how those trends interact with individual and social factors. But crimes are often unpredictable, and they may occur in relative seclusion with few witnesses. This raises some questions about how we can best measure and record crime accurately. The dominant methods of measuring crime in the social sciences are government agency crime surveys, victim surveys, and self-report offender surveys, all of which come with significant challenges.

Official crime data from government agencies may take the form of arrest reports, reports of charges filed by prosecutors, or reports of prison admittances or releases. Occasionally, organizations outside the criminal justice system contribute as well. Medical organizations report statistics on death certificates, which can be used to cross reference murder counts from criminal justice

agencies. Justice ministries and organizations often publish official crime statistics on websites and in publications, and cross-national organizations such as the UN and the European Commission's Eurostat send crime surveys to national governments to centralize and standardize international measures of crime.

For a number of reasons, official government reports of crime may be misleading. Police officers typically only record a crime if a citizen first lodges a complaint, but across the world, most crimes are never reported to the police (Heiskanen 2010). Also, police records are subject to all the biases of the police officers who perform the arrests and fill out the reports. Often, different jurisdictions record crime using wildly different methodologies. Many countries have different thresholds for intentional homicide, and some do not include infanticide and police killings in officially reported murder statistics (Malby 2010). In some cases, police departments have simply fabricated data (Mosher et al. 2011, 100–101).

Unlike official government data, victimization surveys bypass the criminal justice system to ask citizens directly about their experiences as the victim of a crime. Victimization surveys typically ask respondents not only whether or not they have been victimized but also questions about the nature of their victimization, such as whether the crime was reported to the police, what the demographics of the offender were, whether there was any injury or property loss, and so on. National governments often administer their own victimization surveys, while the International Crime Victimization Survey Working Group has in a number of waves sent out standardized victimization surveys to different countries.

The obvious advantage of victimization surveys is that they are not subject to the reporting problems and biases of the criminal justice system. However, they are not without their own issues. One limitation of victimization surveys is that they do not include consensual crimes, such as drug trafficking (Mosher et al. 2011, 176). For obvious reasons, victimization surveys cannot record murders. Another issue is that while victimization surveys bypass the prejudices of the criminal justice system, they do not bypass the assumptions and prejudices of victims. Different people may have different ideas of what counts as an assault (Mosher et al. 2011, 177). In addition, there are most certainly sampling issues with victimization surveys. Homeless people are the most likely to be victimized, but they are also the least likely to take a phone or internet survey.

Social scientists also use offender surveys to measure criminal offending. Self-report offender studies ask respondents directly whether or not they have committed an offense, and if so, to provide some specifics about the nature of the offense. For example, in 2003, England began administering the Offending, Crime and Justice Survey (OCJS), primarily to monitor offending trends among British adolescents. One obvious advantage of offender surveys is that like victimization surveys, they are not subject to the biases and idiosyncrasies of the criminal justice system. In addition, self-report surveys can capture some crimes that fall outside of victimization surveys, such as murder or drug use. But self-report surveys have shortcomings as well. First, people often report criminal offending inconsistently; some groups exaggerate their involvement while other groups tend to underreport (Mosher et al. 2011, 142). And like victimization surveys, offender surveys may systematically miss offenders from certain demographics who are less likely to respond to traditional survey requests.

One general statistical issue that arises from all criminal justice surveys is the problem of extrapolating from small sample sizes. Many crimes are relatively rare, so even surveys with a large sample size may end up with few victims or offenders. One victimization study performed in the United States extrapolated from the fact that none of the 13 black women they found who had been sexually assaulted were assaulted by a white man to the conclusion that white-on-black sexual assault did not occur that year (U.S. Department of Justice 2010). Conversely, from the 11 white women they found who had been sexually assaulted by a black man, they extrapolated to the prediction that around 19,000 black-on-white sexual assaults occurred that year. This supposed disparity was

converted into a "meme" image online and circulated by white supremacists. But had the survey found even two black women who had been assaulted by white men, it would have predicted close to 3500 white-on-black sexual assaults per year, and after adjusting for population size, the disparity would have disappeared (Cohen 2016).

Criminal Justice Ethics

Because methods of responding to crime are often coercive or even harmful, a number of debates have emerged about the justification of state sanctions, the permissibility of methods of crime control, and the rights and responsibilities held by members of the public and members of the criminal justice system.

The broadest debates in criminal justice ethics concern the function of the criminal justice system and whether it is justified as an institution. Utilitarians view the function of the criminal justice system as making society safer, either by deterring would-be criminals, incapacitating the dangerous, or rehabilitating wrongdoers for re-integration into society. Retributivists view the function of the criminal justice system as meting out the sanctions that people deserve for their offenses against society.

A number of writers have suggested that perhaps criminal justice systems serve a more insidious function: to oppress the poor (Reiman 2007), to deal with surplus labor supply (Gilmore 2007), to oppress minorities (Alexander 2010), or to norm deviants into modern industrial society (Foucault 1977). These sorts of hard-nosed realist analyses often lead to more radical conclusions: perhaps one or even all of the segments of the criminal justice system need to be abolished or at minimum radically transformed. This may involve abolishing the police and replacing them with a number of other public services or emptying prisons and diverting wrongdoers to systems of restitution or restorative justice instead.

A number of more specific debates have also emerged on how to reform criminal justice systems to make them more just. For one, as video recording devices proliferate, instances of excessive force by the police have received increasing scrutiny, leading many to wonder whether police officers ought to exercise greater restraint in the use of force. The United Nations' Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) stipulates that officers ought to exhaust all non-violent methods of de-escalation before resorting to force, utilize only a proportional magnitude of force, minimize the harm caused by the use of force, provide medical aid to injured suspects, and notify friends and family of the injury as soon as possible. Many countries presently fall short of these standards. Some have argued that stringent principles such as these are rational or moral (Kleinig 2014), while others contend that police officers need a certain amount of discretion to use deadly force to uphold the law or to deter criminals in a state of emergency (Miller 2016, Chap. 4).

Another major debate involves the function and character of the police. Some argue that police officers ought to think of themselves as crime fighters who view criminals as enemies in a war on crime. Others believe that police officers ought to understand themselves as guardians of society who relate to lawbreakers as fellow citizens and community members. There is a general preference among academics for the guardian model of policing, but as Pollock (2019, Chap. 5) notes, there may be tradeoffs with having police officers more closely embedded in the community; while they may be less likely to use excessive force, they may also be more liable to corruption and partiality.

The contemporary field of legal ethics emerged primarily in response to philosophers and legal theorists puzzling over the seeming amorality of lawyers working in the common law tradition in the 1970s. In an adversarial trial system, lawyers are incentivized to engage in zealous advocacy for their clients, even performing actions that would otherwise be considered immoral, such as intense, critical questioning of victims of sexual assault. Richard Wasserstrom argues that such zealous advocacy makes perfect sense for the criminal law, where the defense attorney's efforts protect the defendant from getting her rights trampled by the state, but he remains ambivalent about

whether it makes sense for civil wrongs (Wasserstrom 1975). Perhaps, there are some means lawyers ought not take when defending a corporation from injury lawsuits brought by genuinely wronged parties. While civil law jurisdictions often avoid this problem, some worry that the inquisitorial system often leaves criminal defendants without sufficient recourse to challenge biased or mistaken proceedings (Brants 2013, 1089).

More recently, a number of legal theorists, philosophers, and political scientists have begun to examine the enormous discretionary power held by public prosecutors. In most legal systems, prosecutors are afforded a great deal of choice in who to prosecute and who to release. In England and the United States, prosecutors share this discretion with police officers, who can also decide to drop charges based on insufficient evidence. In Korea and Japan, the public prosecutor has close to complete control of who gets charged and who gets released (Choe 2014). This tremendous power raises a number of ethical concerns. Some have argued that common law prosecutors have too much power to coerce defendants into taking plea bargains (Kipnis 1976), while others contend that forms of prosecutorial immunity allow prosecutors to bring bogus charges in bad faith with relative impunity (Levine and Schwartz 2020). Still others worry that giving prosecutors monopolistic control over the decision to charge or release allows far too much opportunity for prosecutorial misconduct (Choe 2014).

Worries about the physical and psychological effects of incarceration have led some to wonder whether prisons ought to be the primary avenue for punitive correction. It is not at all obvious that confining someone to a prison cell is the most appropriate or dignified form of punishment, but to many, it seems like the only sensible option (Davis 2003, Chap. 1; Foucault 1977). The consensus in criminology is that prison sentences generally do not deter criminals from committing crime in any straightforward way (Petrich et al. 2021). Incapacitation effects are notoriously difficult to measure because they require counterfactual assumptions about the volume of crime a prisoner would commit were they not confined (Piquero and Blumstein 2007). While some studies have found that incapacitating wrongdoers may prevent crime, incapacitation likely prevents high-volume crimes like theft and simple assault much more than serious low-volume crimes like murder (Currie 2013, 24–25).

Some recommend substantially reducing prison populations or even eliminating them by building other institutions that can address social conflict (Davis 2003). For example, Germany already diverts most of its lawbreakers to non-carceral alternatives (Subramanian and Shames 2013). But even if eliminating prisons is not an option, some contend that prison conditions in many countries could be significantly improved without any danger to public safety. Abdel-Salam and Sunde (2018) argue in favor of a Norwegian prison model, with more accommodating facilities and highly trained prison guards who take an interest in the rehabilitation of prisoners. Others argue for alternative forms of punishment to incarceration, whether forms of corporal punishment (Murtaugh 2012) or a system of restitution where wrongdoers may pay or work off the injuries they caused to others (Barnett 1977).

Emerging criminal justice technologies have also raised new worries. The falling price of digital storage and camera technology has facilitated the rise of mass surveillance, which raises concerns about privacy and the limits of government intrusion into our lives. The use of algorithms and machine learning to analyze or even predict crime is hotly contested by those who feel that algorithms tend to import and reproduce all the biases and inequalities of the status quo.

Conclusion

While the criminal law has received quite a bit of attention from philosophers in recent years, the phenomenon of crime itself has received far less, especially in the mainstream analytic tradition. Philosophical debates about the relationship of crime to human agency, ideology, or political economy still occur, but often in criminology or sociology departments, largely isolated from the philosophers who work on those topics. There is

presently a great opportunity for philosophers to work with academics outside of philosophy departments to establish the philosophy of crime as an autonomous field as well-developed as the philosophy of law.

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Criminal Justice

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Introduction

Criminal justice can be conceptualized as an ideology, a system, and a process that aims to reduce crime by achieving certain objectives, such as deterrence, incapacitation, rehabilitation, restitution, and retribution. Criminal justice can have different meanings to different people, under different circumstances, within different cultures and societies globally. Generally speaking, criminal justice refers to the broad range of theories, laws, practices, and institutions that together seek to address the problem of crime in society. It is the delivery of an outcome, most frequently in the form of punishment, for those who have violated the law. But what exactly one believes that outcome should entail is entirely dependent on individual perspective and ideology, both of which are conditioned by historical, geographical, and experiential context as well as the circumstances of any given crime. Crime can be generally defined as an act that violates an established law. And while most of these actions must be intentional to be considered criminal, illegal acts of omission and negligence can also be considered crimes. Criminal justice, therefore, is what occurs in response to those violations of the law.

Objectives of Criminal Justice

It is the responsibility of criminal justice practitioners and lawmakers aim to reduce crime, but there are differing views about how this is best facilitated. Most seek to accomplish this through at least one of five objectives, although they are not mutually exclusive.

One objective of criminal justice is to deter individuals from committing crime. The belief is that for those who have already broken the law, being processed by the criminal justice system will persuade one to not commit crime. Criminal justice actions that could facilitate deterrence include being questioned by a police officer, going to trial, and being punished, such as by a fine, probation, or incarceration, within the criminal justice system. The idea behind deterrence is that these experiences will impose social control on the mind (Foucault 1977), essentially controlling how a person thinks about crime, and make the offender choose to not commit future crime because of the desire to increase pleasure and avoid pain in the form of punishment (Beccaria 1764; Bentham 1823). This process wherein a particular individual who has been punished and then chooses to refrain from recidivism (i.e., reoffending) has been called special, or specific, deterrence. Deterrence is also favored as a criminal justice objective by those who believe punishing offenders will convince *other* would-be offenders not to break the law because they want to avoid experiencing the sanctions imposed on those who do break the law; this is referred to as general deterrence (National Institute of Justice 2016).

Incapacitation is another objective of criminal justice. Some believe that the best way to reduce

crime is to incapacitate those who are likely to break the law. Typically this pertains to people who have a history of breaking the law, but this is not always the case. When incapacitation is the goal of criminal justice, police are deployed with the intent to arrest offenders and process them through the criminal justice system such that their punishment physically prevents them from committing future crimes. Incarceration in jail or prison is the most frequently used punishment aimed at incapacitation, wherein incarcerated individuals are unable to commit crimes, at least those outside of the institution in which they are sentenced. It is well documented that crimes continue to be perpetrated within jails and prisons by inmates and others. There are additional punishments that aim to achieve physical incapacitation. Such examples include "chemical castration" of sexual offenders and house arrest for non-violent offenders. However, research indicates that while these may achieve certain objectives, they are not the most effective at achieving incapacitation. Of course, the most effective punishment for physically preventing an offender from committing future crimes is the death penalty, a sanction at the center of intense ethical debate (Ellsworth and Ross 1983).

Rehabilitation, yet another objective of criminal justice, aims to "fix" or "cure" the problem that led the individual to commit, or want to commit, crime in the first place. Often referred to as "treatment," rehabilitation may take the form of addiction therapy through medical or psychological intervention, psychiatric counseling, or more practical assistance, such as helping individuals get an education, employment, housing, and healthcare – all basic needs that might prevent one from breaking the law; if basic needs cannot be met through legal means, they are more likely to resort to criminality. Yet despite the research showing the promise and efficacy of rehabilitation for long-term desistance from crime, many resist this objective of criminal justice because it may be perceived as too lenient for certain offenders and its promise may not be realized for many years (Latessa et al. 2020). And while some also argue that it can be expensive, the more punitive punishments of incarceration and the death penalty far exceed rehabilitative treatment costs (Death Penalty Information Center n.d.).

Restitution is the objective of criminal justice that endeavors to repair the harm that was caused by the crime, and return any aggrieved parties to their state prior to being victimized. The most typical form of restitution is the requirement that people who have committed crime repay the victim. This could include returning or replacing property that was stolen or damaged, paying victims' legal fees, compensating victims for healthcare expenses or time spent not working due to their victimization, and so on. Restitution is separate from compensation that victims may wish to pursue within the civil legal system, which is when victims file a lawsuit against an assailant. In addition to restitution being an objective of criminal justice that seeks to repair the harm done to an individual or group of individuals, restitution may be sought for those who violate public goods or society at large. When single individuals cannot be identified as harmed parties, judges may sentence offenders to punishments like community service.

The final objective of criminal justice is retribution, which is the desire for a criminal to have justice system consequences regardless of any objective other than that they deserve pain. Retributivists, such as the philosopher Immanuel Kant and the theologian C. S. Lewis, argued that the criminal justice system must impose punishment for punishment's sake. The presumption is that offenders are rational beings who chose to violate the law and should therefore be punished with no concern for deterrence, incapacitation, rehabilitation, or retribution. This objective of criminal justice is often paired with the saying, "an eye for an eye," implying that punishment is sanctioned as a type of revenge – that an offender deserves it. Of course, most punishments applied around the globe do not perfectly correspond to the offense that was committed. For instance, while the incarceration of a kidnapper might closely connect the punishment with the offense and capital punishment might correspond to a murderer, sex criminals are not raped, robbers are not robbed, and political criminals are not subjected to political victimization.

Criminal Justice as an Ideology

Competing ideologies of criminal justice exist. As an ideology, criminal justice is relatively abstract, and with a meaning that varies according to individual value structures. Abstract terms are often used to describe criminal justice as an ideology, including fairness, truth, and, interestingly, justice. Criminal justice ideology can often seem tautological, and cannot be easily explained or justified: criminal justice is just. However, there are several ideological models of criminal justice that aim to explicate more concretely how justice could be achieved. Among these perspectives are crime control, due process, rehabilitation, nonintervention, justice, and restorative justice.

The crime control perspective operates under the assumption that controlling crime is the principle objective of criminal justice. Therefore, the proper role of criminal justice would be to prevent crime through the liberal use of punitive sanctions for offenders. The belief is that if criminal justice systems were effective, individuals would be deterred from committing crime. In essence, the system would punish in such a way to convey to would-be offenders that "crime doesn't pay." The primary focus of justice in this ideological framework is on the rights of the victim. Crime control consequences would therefore be certain and swift, and include prison and jail terms. Preventive detention would be promoted and parole would be abolished. Under a crime control model of criminal justice, law enforcement, courts, and corrections would expand.

The due process model of criminal justice operates under the assumption that providing due process to those accused of having committed a crime is the most important element of criminal justice. The due process perspective combines elements of civil liberties advocacy and concern for the individual rights, such as those that might be guaranteed by government constitutions. This model aims to safeguard against arbitrary or unfair judicial or administrative proceedings and prioritizes fair and equitable treatment of those accused of criminality. It also advocates for strict monitoring of discretion by justice officials in order to prevent discrimination. Due process oriented policies include ensuring that police have probable cause to make an arrest or conduct a search, hearings are impartial, competent legal council is available to defendants at all stages of the process, that trials are fair to defendants, that juveniles are granted legal protections, and that illegally collected evidence is excluded from judicial proceedings. Unlike the crime control model, the due process perspective believes it is preferable to let a guilty person go free than to wrongly convict and punish an innocent person. Thus, the main issue that differentiates the two models is how to balance public safety with individual rights.

Advocates of the rehabilitative perspective of criminal justice believe that the criminal justice system should be more of a treatment agency, focusing on helping offenders be rehabilitated and become law-abiding individuals. Under this model, the justice system should be a means of caring for and treating people who cannot manage themselves. Crime could be seen as an expression of frustration and anger created by social inequality, or it could be seen as the result of drug or alcohol addiction. Either way, the goal is to help offenders resolve whatever led them to commit crime so that they will desist from crime. This view is often criticized, however, for neglecting certain kinds of crime, such as greed-motivated crimes of the wealthy and extremist violence, and focusing too exclusively on traditional "street crimes" or those that are largely committed by poor and disadvantaged groups. Nonetheless, rehabilitation may be an effective criminal justice strategy for certain offenders.

The central tenet of the nonintervention model of criminal justice is that justice agencies should limit their interaction with offenders because criminal justice system contact does more harm than good. It recognizes the stigmatizing effect of acquiring a criminal record and being institutionalized with other offenders. It believes criminal justice measures encourage recidivism, due to the way an arrest and conviction can impede future conventional successes in education, employment, housing, and in other realms of life. Thus, this model of criminal justice favors the least intrusive treatment or sanctions possible. Examples of nonintervention policies include recent calls to "defund the police," end mass

incarceration, increase community diversion programs, and decriminalize victimless crimes.

There are elements of both liberal and conservative philosophies inherent to the justice model of criminal justice. The core of the justice model is that people should receive the same treatment under the law and that any effort to distinguish between those who commit the same crimes will create a sense of unfairness that can be detrimental to future law-abiding. Frustration and anger over differential justice system treatment could result in a sense of unfairness that will increase the likelihood of recidivism. Therefore, advocates of this model tend to support determinate sentencing and abolishing parole and eliminating plea bargaining. While the goal of reducing disparities in criminal treatment are admirable, one criticism of this perspective is that it fails to recognize that not all individuals are on equal footing, and that that there may be elements inherent to each criminal event or criminal's background that should be considered, such as whether the offender was intoxicated or the crime was motivated by hate.

The restorative justice perspective views the criminal justice system as an institution that should promote peace and facilitate justice for victims, the community, and even the offender rather than punish offenders. This perspective focuses on restoring the victim, the community, and the offender to a state of well-being through peaceful, humanitarian means. According to restorative justice, resolution of the conflict between a criminal and victim should take place in the community in which it originated, as opposed to some far-off prison. This framework enables the victim an opportunity to voice his/her/their story, and the offender can directly communicate his or her need for social reintegration and treatment as well as remorse. The goal is to enable offenders to appreciate the damage they have caused, to make amends, and to be reintegrated back into society.

Criminal Justice as a System

Criminal justice can also be conceptualized as a system of institutions and personnel that function to reduce crime and assign consequences for those who commit it. The criminal justice system is a vast network of agencies and individuals that are charged with protecting the public, maintaining order, enforcing laws, identifying transgressors, bringing the guilty to justice, and treating criminal behavior. Forms of criminal justice have likely existed for as long as humanity. In human history, prior to the advent of agriculture, nomadic cultures had established systems of punishment for undesirable behaviors. With the development of agriculture and then industry, cities developed and became more populated. To varying extents, different cultures formalized consequences for persons who took advantage of or caused harm to others. Some of these systems developed independently around the world, while some were based upon the practices within other cultures, including those developed in the early Babylonian laws of Hammurabi. The ancient Babylonian Code of Hammurabi, from 1750 BCE, was among the first written sets of laws establishing proportionate punishments for crime. It adhered to the principle of lex talionis, or an "eye for an eye," which is translated as the "law of retaliation." Since the time of this Code, countless others have followed.

Early criminal justice systems have evolved from primitive and frequently superstitious approaches to decreasing crime and deviance into comprehensive and often complex instruments of law and justice that Western countries have in place today. These modern justice frameworks purportedly placed a premium on the rights of the individual, with due process protections enumerated in order to protect the innocent from being wrongly punished – an admirable goal that too often fails, to devastating consequence for the innocent. Modern criminal justice tends to include three sub-systems: law enforcement, courts, and corrections.

Law Enforcement

Policing is the dominant sub-system in the beginning of criminal justice processes, with officers being charged with maintaining order, enforcing the law, investigating crimes, apprehending suspects, creating a sense of community safety, and providing emergency and traffic services.

Policing as we understand it to exist today is a relatively modern institution – it is only about 200 years old. It appears to have emerged as an alternative to the ineffectiveness of various night watches and to military. However, they are also at the center of controversy for myriad instances of misconduct, such as violating individual rights, racially profiling suspects, and brutality that have prompted some to call to "defund the police."

One of the ways to address police misconduct is through policy reform. One of the earliest police reformers was August Vollmer (1876–1955), who aimed to professionalize policing (Oliver 2017). Vollmer was the first police chief to require that officers have a college degree, and he helped implement training programs and ranks within law enforcement in order to remove politics from policing. While Vollmer, O. W. Wilson (1900–1972), and other police reformers helped to professionalize the police, they failed to see that the police were losing touch with the community. In the United States, the Commission on Law Enforcement and the Administration of Justice (1967) endeavored to conduct a modern study of the state of American policing and determine specific measures to reduce crime and promote the rule of law. A result is that law enforcement agencies began to focus on recruiting more females and minorities and developed more community-oriented police programs so that police and the communities they serve could work together to fight crime. More recently, in the aftermath of several high-profile terrorist attacks globally, initiatives to enhance intelligence-led policing proliferated. It was followed by a recent call for more community policing, after the occurrence of multiple incidents of police brutality that were graphically captured on video.

Criminal Courts

Criminal courts, distinct from civil courts, are responsible for making many important decisions affecting those who have been accused of committing crimes. It is in criminal courts where a determination is made whether a criminal suspect is guilty as charged. But other important decisions include what the specific criminal charges will be, whether charges will be dropped, whether plea bargains will be offered, what the sentences will be for those convicted of their charges, and whether appeals warrant a new decision. The ultimate goals of the judicial system are to seek truth, obtain justice, and maintain integrity of the rule of law, but how these are achieved is subject to much debate.

Court systems vary widely in different countries. For example, in America, there is a dual court system – with sovereign judiciaries both at the national and state level, while England's court system operates under a common law framework. Tribal courts have their own structures. In more recent years, courts in many countries have created specialized courts for specific types of offenders and problems, including juvenile courts, DWI courts, and drug courts. Because of the vast number of criminal cases in the United States, most that are funneled to the court system by law enforcement do not go to trial. The court system could not accommodate a trial for every lawsuit or prosecution, therefore many less serious charges are either dropped or plea bargained, wherein a prosecutor offers reduced charges, fewer charges, or a reduced sentence in exchange for a guilty plea, avoiding a trial altogether.

The "courtroom workgroup," which is prosecutors, defense attorneys, and judges, is responsible for the majority of work that occurs within the judiciary. As opposed to being adversarial given each parties' differing interests, the reality is that courtroom workgroups maintain collegial, trusting, and cooperative relationships. These relationships are crucial for generating pretrial solutions to cases through plea bargaining and negotiating. Without them, the judicial system would collapse. Other key participants in the judicial process are jurors, witnesses—including victim witnesses if the prosecutor chooses to include them, and defendants.

Punishment and Corrections

Corrections is the part of criminal justice system that deals with offenders who have been formally convicted of a crime, and typically involves some form of punishment. The realm of corrections includes not only jails and prisons, but also

correctional programming, such as probation, parole, and treatment programs. Community corrections, such as house arrest, are included, as are fines for ordinance violations that result from getting parking and traffic tickets. Some governments use capital and/or corporal punishment, while others have abolished these more extreme punishments. Juvenile treatment or institutionalization for those adjudicated delinquent also falls under this area of the criminal justice system. Each of these sanctions may be associated with one or more criminal justice objective and fall within various ideological models of justice.

The first modern jail was established in the United States, and was created with the intention of facilitating criminal reform; the Walnut Street Jail in Philadelphia, was established in 1775 before the signing of the U.S. Constitution. It was intended to be a workhouse and to correct criminal behavior. Advocating for humane prisoner treatment, the Philadelphia Society for Alleviating the Miseries of Public Prisons helped to establish the first penitentiary, Eastern State Penitentiary, in 1829. Modeled by Jeremy Bentham (1823), a classical theorist from England, the architecture of this penitentiary was intended to facilitate deep reflection and remorse among inmates who were isolated in solitary confinement and constantly observable by guards in a central tower. This form of punishment was thought to be progressive because it did not use corporal punishment. Instead the penitentiary was designed so that prisoners could be penitent and be deterred from committing future crime through social control of the "soul" or mind (Foucault 1977). And, many thought the visibility of Eastern State Penitentiary in the center of growing Philadelphia would be a highly visible symbol and source of social control that would deter others from committing crime. Many now view solitary confinement as cruel and unusual punishment, although these techniques continue to be used worldwide. Yet today's use of prisons often prioritize incapacitation and retribution over deterrence as a desired objective of incarceration. Thus, it is not surprising how few rehabilitative or educational programs are available in these facilities.

Criminal Justice as a Process

Criminal justice can also be thought of as a process that involves the various sequential stages through which offenders pass, from initial contact with law enforcement to final disposition and punishment. And it includes the agencies charged with enforcing the law at each of these stages. Although there are always exceptions, cases generally flow only in one direction through the criminal justice system. For example, arrests generally come after a crime is detected, a trial is held before sentencing occurs, and appeals occur after a conviction. In reality, however, sometimes these steps in the process are reversed in order or happen concurrently, as when in the course of an arrest for one crime, a suspect commits a new crime or when someone who is innocent, and has not committed a crime, is wrongfully arrested or convicted. It is important to remember that the specifics of criminal procedure and the criminal justice process differ from country to country and jurisdiction to jurisdiction.

Conclusion

The criminal justice system is a complex network of laws, government agencies, criminal justice personnel and practices, nonprofit organizations, and public policies that aims to promote the goals of fairness, equality, and safety. As with every realm of social life, many viewpoints, perspectives, and assumptions guide the design and application of criminal justice. As a result, disagreements about best practices for preventing crime and reducing recidivism are ubiquitous. The pursuit of reducing victimization and improving lives is a worthwhile one that should merit improved criminal justice.

Cross-References

▶ Crime: Philosophy of
▶ International (Criminal) Justice: Punishment
▶ Liberty and Equality in Criminal Law

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Critical Posthumanism

► Posthumanism: Critical

Critical Theory and International Law

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Introduction: The Field of Inquiry

It is impossible to define the limits within which critical theory and international law move through identifying a common approach, an academic standard, or a methodology. In a letter to the organizers of a symposium on the methods of international law in the late 1990s, one of the leading figures of the new approaches to the discipline, Martti Koskenniemi, used a sharply critical tone in relation to academic analysis of method, comparing it with the logic of consumer capitalism in a shopping mall:

> The liberal-pluralist approach to method suggested by the image of the shopping mall or the electoral campaign is a reifying matrix that makes apparent from the plethora of styles through which we approach and construct "international law" only those qualities that appear commensurate so as to allow comparison (Koskenniemi 1999: 52).

A potential alternative way to restrict the field of enquiry might be to indicate the common target of criticism in the twentieth century traditions of doctrinal formalism and pragmatism, even if these two approaches might appear distant from and even opposed to each other. This alternative strategy certainly allows us to grasp a certain feature shared by the New Approaches to International Law (NAIL) which took center stage for the discipline in the 1980s and 1990s, but it would perhaps fail to address the richness of discussions and themes that developed later on.

Unsurprisingly, the eclecticism that characterizes critical international legal scholarship has exposed it to accusations of postmodern inconsistency, parochialism, a shaky grasp on reality, and a weakness in political engagement. On the contrary, the current contribution will map out critical theory and international law according to criteria that aims to show the radical commitment to change across a variety of different approaches, ranging from the disclosure of the ideological function of international law in serving the modern imperialistic enterprise, to the relevance of Marxism for the study and understanding of international law, through to non-Western views, feminist theory, and the activism of lawyers and legal practitioners who view international law as a field of struggle rather than a mean of emancipation as such. This choice broadens out the spectrum of critical theory and international law beyond the usual boundaries assigned to it by British and North American debates around Critical Legal Studies, and acknowledges the legacy of further traditions including Marxism, legal feminism and postcolonial theory.

Beyond Formalism and Pragmatism

In a 1988 essay dedicated to *A New Stream of International Law Scholarship*, David Kennedy described the field of international law discipline in the late 1970s as characterized by a "defensive enthusiasm and a corrosive skepticism" (Kennedy 1988: 5):

> The origins and goals of international law's optimistic façade seemed to have been taken out of discussion – displaced by an endless intellectual and bureaucratic process. Neither the elite confidence of the pre-war establishment nor the enthusiastic optimism of the post-war reformers had survived. The vision associated with the large-scale post-war reordering projects had disappeared – transformed into the details of bureaucratic pragmatism and policy formulation familiar from American public law (Kennedy 1998: 6).

The conceptual pragmatism criticized by Kennedy had shown its modesty during the Vietnam War, when various scholars attempted to rearrange the social and political anguish of the war into an image of lawfulness, and has continued to demonstrate its weakness through its manner of addressing substantive issues such as international racism, inequality and violence.

As emerges from Nigel Purvis account of Critical Legal Studies in Public International Law (Purvis 1991: 89), the polemical hostility towards conceptual pragmatism at the turn of the 1980s and the 1990s derived from different starting points in the United States and in Europe. The two leading figures of this debate were undoubtedly David Kennedy, Director of the Institute for Global Law and Policy at Harvard Law School, and Martti Koskeniemmi, Professor of International law at the University of Helsinki, who also served as a diplomat and international lawyer. As well as acknowledging their mutual influence on each other, both scholars shared the intent to "dislodge the discipline of international law from its stagnation in post-war realism [. . .] and rejuvenate the field as an arena of meaningful intellectual enquiry" (Kennedy 1988: 6).

Writing about his work since the publication of *International Legal Structures* (1987), David Kennedy has explicitly recognized the inspiration of the Critical Legal Studies movement, especially that of Duncan Kennedy and his attempt to rethink private law doctrine and history. David Kennedy's criticism demonstrates the pragmatism's misleading attitude to leave theory aside in favor of a functionalist doctrine that has characterized policy-oriented approaches, such as that of the influential "New Heaven school" led by Myres McDougal. Discussing the traditional tripartition of the discourse of international law into sources, processes, and substance, Kennedy demonstrates that while this discourse puts a sovereign-centered pragmatism in opposition with the utopia of an integrated international system, at the same time both of these ideas depend on and reinforce each other (Trimble 1990). These mutual reference points lead the two sides to a "strange comprehensivity" (Kennedy 1988: 35) and substantiate the claims of public international law "by generating a sense of progress or momentum" (Kennedy 1988: 38). Among these claims, the divorce of substantive law from the historical-political contexts in which it developed has played an essential role in advocating a place for international law within legal modernism. In order to break the sovereign monopoly over power, Kennedy suggests a disciplinary revisiting of the state as a linguistic relationship between law and politics and as a site for their reciprocal awareness. The argument focuses on the regenerative process of discourse itself, which allows for the political engagement of international law and the spreading of struggles throughout institutions and society.

The philosophy that lies behind modern pragmatism is liberalism. According to Koskenniemi, it is the liberal doctrine of politics that provides the philosophical structure upon which the sovereign-centered international order is built. In the 1989 groundbreaking book *From Apology to Utopia The Structure of International Legal Argument*, Koskenniemi discusses the liberal assumptions that have affected international law, from the essential separateness of individuals from each other to the arbitrariness of subjective values. The consequences of these assumptions have been that:

> The ensuing uncertainty could only be disposed of by establishing a knowledge-producing process in a meaning-generative (name-giving) consensus in the State. This enabled understanding political power as creative, not merely declaratory. Instead of an objective, pre-existing order, liberal consciousness created a projected order, constantly relative to its place of projection, the State. (2006: 74)

It is difficult to attribute Koskenniemi with a definitive label. While it is certainly true that his work has been deeply influenced by post-structuralist European philosophy, he himself rejected the category of anti-formalism. In the new epilogue to *From Apology to Utopia* written in 2006, Koskenniemi stresses that formalism and anti-formalism can serve both cosmopolitan liberalism and conservative nationalism and that even formalism may sometimes be used as a "counter-hegemonic strategy" (Koskenniemi 2006: 602). By describing the practice of international law "as politics," the "indeterminacy critique" in the book undermines any feeling of naturalness that might be associated with institutions and appeals for a new imagination of institutional practices (2006: 605).

Another important aspect of the NAIL movement's reflections on the discipline is the critique of the use of history as an "anticipation" (Kennedy 1988: 14) of the progressive evolution of international law and the world order. Koskenniemi's 2002 book *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* represents a broad inquiry into the legal culture of the period under study, as well as a historical account of international legal developments. Central to the book is the discussion of imperialism and colonialism, which is not limited to the role of international law in justifying the modern enterprise but extends to its relevance for understanding contemporary humanitarian discourse and human rights imperialism.

Marxism and International Law

Marxism has revealed itself to be a productive theory for studying and understanding international law. As Susan Marks has observed, in our era of "unrivalled capitalism" (Marks 2008: 1), this is only a paradox on the surface, once one considers that Marxian thought and its interpreters have produced the most penetrating analysis of capitalism and its globalizing tendencies. While this consideration could perhaps be extended to a number of disciplines, the specific relevance of Marxism for international law chimes with the idea that history should be understood in materialist terms, that is, that the material conditions of life need to be comprehended in reference to a historically specific mode of production. Given that capitalism frames social and institutional relations, it represent more than merely an economic system: it also produces a "reification" of the world that ceases to recognize the social environment as an outcome of human endeavor, treating it as an object of contemplation rather than a domain of action. This is a central point for the development of critique, inasmuch as the fetish character produced by reification not only affects commodities but also the category of international law itself which tends to be seen "as a set of rules, a thing, rather than a social (and especially interpretative) process" (Marks 2008: 6).

Among the international scholars who have engaged with Marxism, Bhupinder Chimni – author of *International Law and World Order: A Critique of Contemporary Approaches* (1993) – can be singled out for his focus on the category of class. It should be noted that criticisms which consider the concept of class to be out of date are generally associated with orthodox Marxism more than with direct reading and interpretation of Marx's own writings. Conversely, Chimni rejects the "death of class" thesis by discussing the opposition between productive and unproductive labor, arguing against an understanding of classes as determined by economic terms alone, and through re-evaluating the relation of class to the categories of race and gender (Chimni 2010). The question driving his analysis is the possibility of speaking about class on a global level, thus shifting the focus of international law from a state-centered vision to that of social formations. A social formation constitutes a complex unity in which different modes of production (capitalist, feudal, patriarchal) combine even while, at the same time, one dominates the others. In our

current context, "accelerated globalization has led to the emergence of a *global social formation* in which different modes of production (*in a double sense* as they exist both inside nation states as well as in the international system) co-exist but which is dominated by the Capitalist Mode of Production (CMP)" (Chimni 2010: 66).

Capitalism's inherent tendency toward spatial expansion – today driven by international finance capital – has led to the emergence of a "global imperialism" that simultaneously generates both development and underdevelopment. This explains why supporters of global financial oligarchies can be found both in the First and Third Worlds. International law does not merely reflect this global social formation but plays an essential role in constituting it and sustaining the interests of the Transnational Capitalist Class (TCC). The analysis of the TCC is particularly interesting for reflecting on international law discipline, as today the ownership of the means of production is no longer the only criterion that identifies the capitalist class, which is composed instead of different fractions including corporates, state bureaucrats, and globalizing professionals as well as a consumerist fraction. If, on the one hand, global financial firms have played a central role in working with governments in order to develop rules and ideas that sustain global neoliberal policies, on the other hand, an "invisible college" made up of international layers has also made its own contribution to this process (Chimni 2010: 68). Indeed, the development of uniform global standards, the protection of global property regimes and intellectual property rights have claimed credit and legitimation through the growth of the discourse around human rights and their expansion across the world. In Chimni's words, current international law "may be viewed as a system of principles and norms arrived at primarily between states, and secondarily through a network of non-state entities, embodying particular class interests which are enforced by a range of means, including increasingly international institutions, which are the building blocks of a nascent global state" (Chimni 2010: 74).

At the same time, Chimni rejects a nihilistic view of international law, inasmuch as this would not serve the interests of a Transnational Oppressed Class (TOC) upon which the constructivist side of his analysis is built. As he underscores, today we face an increasing coordination between social movements and protest movements, giving rise to "a new complex internationalism":

> [T]he growing struggle against 'accumulation by dispossession' is 'class struggle', even when it is not always rooted in production relations. In other words, the changing structure of global relations of exploitation necessitates an enlarged and more inclusive conception of capital–labour relations. (Chimni 2010: 80)

A class approach to international law thus enables the role of social forces and the struggles of subaltern groups to enter into the history of international law and its institutions.

Among critical scholars that draw on the tools of Marxism, China Mieville has acquired great visibility over recent years. An author of urban fantasy novels, a political activist and comic book writer, Mieville holds a PhD in international relations. His book *Between Equal Rights: A Marxist Theory of International Law* (2005) has quickly become an influential volume. Deeply inspired by Koskenniemi, Mieville's approach to Marxism responds to the contradictions held within the liberal theoretical edifice. Differing from Chimni's content-based approach to class, Mieville shifts the focus from the content to the form of the law through reevaluating the analysis of the 1920s legal theorist Evgenij Pashukanis. As is well known, Pashukanis was the most important lawyer of the Soviet Union (at least until his conflict with the Stalin's regime) who argued in *The General Theory of Law and Marxism* (1924) that the logic of the commodity form is also the logic of the legal form (Mieville 2008: 106). Transferred into the arena of international law, the correspondence between commodity exchange and the form of the law implies that "the 'real historical content of international law' is an ongoing and remorseless struggle for control over the resources of capitalism, that will often as part of that capitalist ('economic') competitive process spill into 'political' violence" (Mieville 2008: 119). Seen from this perspective, imperialism is not so much a historical

accident in a system of equal states but rather is inherent to capitalism and, consequently, to international law – which, in turn, provides the constituent form of global capitalism. By referring to Marx's famous sentence that "between equal rights force decide," Mieville argues that violence and coercion are immanent to the commodity relations reflected within international law (Mieville 2008: 116). On the same grounds, this eclectic British writer has taken a position against the possibility that human emancipation resides within the rule of law.

Any choice to discuss Marxism in critical international law by suggesting a selection of authors who have influenced the discipline inevitably excludes other equally important scholars. Marks' edited collection *International Law on the Left* (2008) provides a good overview of the relevant issues and themes at stake. However, other fields of research should also be worth a mention, such as those approaches that have recently turned their criticisms toward the divide between the economic and the political spheres. This, in turn, is reflected in the separation of institutional bodies and the regulation of international economic law on the one side, and international law on the other (Macmillan 2019; Perrone and Schneiderman 2019). The fact that literature reviews on critical international law rarely include such discussions of international economic law merely confirms this divide and, at the same time, accounts for the necessity of calling it into question.

Despite the plurality of approaches, a common feature shared by all perspectives that draw on Marxism as a lens for studying international law is its relevance for a transformative critical project. Even if he would not categorize himself as a Marxist, it is through engaging with Marxism that Koskenniemi clarifies the extent to which deconstructivism does not necessarily lead to nihilism. When confronted in Marxian terms, the unresolved tensions and seemingly paradoxical dichotomies that run through international law are not in fact problems to be resolved but represent instead an "horizon of political possibility" (Koskenniemi 2008: 47), revealing the transformative commitment of critique.

Situated Views

International legal scholars are passionate about acronyms. TWAIL – Third World Approaches to International Law – has become the common way to indicate a wide range of scholarship that denounces inequality and injustice in international relations and shares a strategic engagement in "trying to attune the operations of international law to those sites and subjects that have traditionally been positioned as 'the others of international law'" (Eslava and Pahuja 2011: 104). Alongside feminist approaches to international law, TWAIL embodies the perspective of a historically situated view, rooted in a legacy of subordination. The secondary literature indicates different generations of TWAIL scholars (Bianchi 2016). The first, mainly focused on the criticism of colonialism, was characterized by the acceptance of the - state-centered system of international law and the endorsement of the dogma of sovereignty. The second, influenced by both postcolonial theory and critical approaches to law, appeared in the 1990s and has been more prone to provide a critical analysis of the premises framing international law.

A key issue of TWAIL's research is the deconstruction of the paternalistic narrative toward non-Western countries that has accompanied the official history of international law. Anthony Anghie's *Imperialism, Sovereignty and the Making of International Law* (2005) and Sundhya Pahuja's *Decolonising International Law: Development, Economic* Growth *and the Politics of Universality* (2011) are both particularly relevant for questioning the idea of Third World as the "the Other" of International Law. Furthermore, the very concept of "Third World countries" is itself contested among TWAIL scholars. If, on the one hand, conditions of subalternity and subjugation are not contained by national boundaries (Otto 1996), on the other hand, the use of this concept may likewise be strategically reclaimed. It is in this second sense that Chimni defends it in a *Manifesto* for the TWAIL agenda, claiming that "the category of third world reflects a level of unity imagined and constituted in ways which would enable

resistance to a range of practices which systematically disadvantages a subordinate an otherwise diverse groups of people" (Chimni 2006: 6)

A situated view does not imply a compartmentalized approach neither does it necessarily delimit the object of analysis. Instead, it indicates an epistemological posture concerned with the specificity of the experience through which we acknowledge the world. This epistemological concern is shared by both postcolonial and feminist theories. It is thus no coincidence that Hilary Charlesworth, Christine Chinkin and Shelley Wright, in writing the first article on feminism and international law in 1991, have also posed the question of the relations between Third World's and women's voice. In the authors' words:

> Both groups are said to encounter the paternalist attitude that they must be properly trained to fit into the world of developed countries and men, respectively. Both feminists and developing nations have also resisted assimilation to prevailing standards and have argued for radical change, emphasizing cooperation rather than individual self advancement. Both groups have identified unilinear structures that allow their systematic domination and the development of apparently generally applicable theories from very narrow perspectives (Charlesworth et al. 1991: 618)

Of course, the criticism of the false neutrality of legal norms is a feature common to feminist legal theory. Nonetheless, the main point of encounter between Third World voices and feminism seems to be the condition of oppression that, in the case of feminist approaches to international law, brings the domination of the colonial legacy and the domination of men over women to an intersection with each other. Further, this same intersection "require[s] a reorientation of feminism to deal with the problems of the most oppressed women, rather than those of the most privileged" (Charlesworth et al. 1991: 622).

Another key issue for the feminist critique of international law is the gendered construction and naturalization of the public/private distinction in which man is assigned to the realm of work, law, economics, politics, and culture, while woman is confined to home, heart, and children. This, in turn, has strong normative implications that Charlesworth, Chinkin, and Wright have indicated as such:

> The distinction drawn between the public and the private thus vindicates and makes natural the division of labor and allocation of rewards between the sexes. Its reproduction and acceptance in all areas of knowledge have conferred primacy on the male world and supported the dominance of men (Charlesworth et al. 1991: 626).

Outside the field of international law, the private/public dichotomy has long been at the center of a body of feminist literature that has developed an important tool of critique around the Marxian category of social reproduction. Distinct from production, social reproduction relates to the activities and processes necessary to reproduce the workforce, including material resources such as food, clothes, housing, and transport, as well as immaterial resources such as education, health, and the care of children and elders. Following the 2008 financial crash, we have seen a renewed interest by legal scholar in social reproduction. For instance, feminist approaches to critical international economic law have underlined the importance of this category for reading the separation of international bodies and rules of economic relations, on the one hand, from those that regulate political relations and regimes of human rights, on the other. The "hard law" that regulates the economic sphere contributes to depoliticizing and naturalizing productive relations of dominance and subordination, while failing to address social reproduction as the very condition upon which relation of production are built and perpetuated (Alessandrini 2016).

Since the 1995 TWAIL conference on postcolonialism, critical race theory, law and development, a number of female scholars have produced important analysis at the intersection between feminism, postcolonial theory, and Black feminism. As noted by Adrien Wing (2019), who herself has taken part in the debate, these scholars' work has fostered both theoretical categories as well as new themes and fields of research. Critical Race Feminism (CRF) has challenged conventional approaches by bringing race discourse into class analysis. Categories such as "anti-essentialism" and "multiple

consciousness" have questioned white feminism and the standpoint of an essential and univocal women's voice. The intersection with Latin American critical legal scholarship has brought the structural character of violence in neoliberal societies into the debate, thus re-contextualizing gender and sexual violence in broader critical terms. Finally, thanks to the encounter between postcolonialism and feminism, fields of research such as refugee law and labor law have been brought from the margin to the center of international law debates.

Situated views may likewise be considered approaches to international law that prioritize legal practice over academic diatribes. Bill Bowring's account of critical legal theory and international law provides several examples of radical legal practice, both in Britain and in the United States (Bowring 2019). Among these, the Haldane Society of Socialist Lawyers – founded in the 1930s and included members active in the Communist Party of Great Britain – supported national liberation movements against colonialism and struggles against apartheid, and later provided services to the National Union of Mineworkers as well as campaigning against unlawful internment in Northern Ireland. In the United States, the National Lawyers Guild, founded in 1937 by progressive jurists and practitioners, has played an important role in promoting human rights over property rights. A 1989 court case won by the Guild uncovered the FBI's illegal surveillance of legal activist organizations. Feminist movements also share a strong tradition of legal activism. If domestic and sexual violence cases have been a central focus both in national and international jurisdictions, providing legal support to women in asylum cases has been particularly relevant for developing a gender sensitive interpretation of refugee law (Anker 2014). The legacy of these traditions can be seen today in support provided to the migrants' struggles against border regimes. Formal and informal networks of collaboration have been established among activist lawyers in Europe against national and European border policies and in support of rescue operations conducted by NGOs in the Mediterranean Sea (Rigo 2020). Growing criminalization of solidarity with migrants has fueled a counter-reaction of activism and scholarship and fostered a renewed perception of international law as a field of action and contestation.

Conclusion: An Open Field for Research and Debate

None of the critical approaches discussed so far should be considered as self-contained but rather in dialogue with each other, providing mutual influence. Highlighting the inconsistency of liberal constructions is a common trait of critical scholarship in international law. Just as with legal scholarship, Marxism has been renewed through its encounters with feminism and postcolonial theory. Lastly, New approaches to international law cannot develop a credible critical project without taking into consideration the views of subaltern groups and the historical marginalization of women, on the one hand, and, on the other, the analysis and body of critique already produced by feminist and postcolonial theory.

This does not mean that critical theory and international law is a reconciled arena in which a patchwork of approaches stand side by side, composing a pluralistic symphony. Non-Western and feminist views still struggle for their claims to be recognized, and even for their voice to be heard within the discipline. The relations between international economic law and international law remain a field of investigation that calls for greater self-reflection within the two disciplines. NAIL scholars have contributed to the emergence of international law out from its marginal position in the legal disciplines. Nonetheless, beyond the academy, the conflicts at the center of international law impact upon the material conditions and competing interests of real subjects struggling for liberation, emancipation, freedom from violence and justice. If nihilism was a trait of earlier critical legal scholarship, any updated conceptual map of critical theory and international law must now acknowledge a lively and open debate that includes a radical commitment to change.

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Croce, Benedetto

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Introduction

Benedetto Croce (Pescasseroli 1866–Naples 1952) was a philosopher, historian, and literary critic and a prominent figure in Italian cultural and political life in the first half of the twentieth century whose thought had a significant international echo.

Born in Pescasseroli to Pasquale and Luisa Sipari, Croce spent the early years of his education in Naples. In the summer of 1883, while on holiday with his family on the island of Ischia, he lost

his parents and his sister, Maria, in the tragic earthquake of Casamicciola. Now orphaned, he was entrusted, along with his younger brother, Alfonso, to the care of his father's cousin, Silvio Spaventa (1822–1893), a jurist and leading figure in the Italian Conservative Party (Destra storica).

After moving to Rome, Croce complied with his uncle's wishes, enrolling in the faculty of law, where he began to attend university courses, without, however, developing a real interest in legal studies. Already in this early period he began to formulate his first critical thoughts regarding both the conceptual abstractions elaborated by legal science and the nature of law, which he saw as clearly distinguished from morality and as bearing a close affinity to politics (*Intorno alla mia teoria del diritto*, p. 82ff.). In these difficult years, he found stimulus in the acquaintance he made with Antonio Labriola (1843–1904), whose lectures in moral philosophy he began to attend regularly, dedicating most of his intellectual energies to them.

Upon leaving university, Croce returned to Naples, in 1886, and decided to devote his life to his studies – but did so always remaining a stranger to academia. He was diverted from his early erudite and literary investigations, first by philosophical meditations on the nature of history and science, which in 1893 culminated with the publication of his essay *La storia ridotta sotto il concetto generale dell'arte*, and then by the study of economics and the materialistic conception of history, from which derived the essays collected in 1900 in the book *Materialismo storico ed economia marxistica*. Reprising his own reflections on art, in dialogue with the ideas of Francesco De Sanctis (1817–1883), he began to design a vast theoretical and historical work dedicated to aesthetics. A turning point in his thought came with the publication, in the spring of 1902, of *Estetica come scienza dell'espressione e linguistica generale*: it was with this book that he began to develop his own philosophical system. These were also the years that mark the beginning of his intellectual partnership with Giovanni Gentile (1875–1944). With support from Gentile, in the summer of 1902, Croce drew up the program for *La Critica*, the journal of history, literature, and philosophy he would go on to edit (and mostly contribute to) for over 40 years starting in 1903. His "Philosophy of the spirit" would develop into a system made up of four parts: the first resulting in the third edition of *Estetica* (1908), the second in the second edition of *Logica come scienza del concetto puro* (1909), the third in *Filosofia della pratica: Economica ed etica* (1909), and the fourth in *Teoria e storia della storiografia* (1917). Decisive in shaping this work was Croce's relationship to Hegel and Vico, the two philosophers who most influenced his thought: this led to his 1906 essay *Ciò che è vivo e ciò che è morto della filosofia di Hegel* and to the 1911 book *La filosofia di Giambattista Vico*.

In January 1910, when he joined the senate of the Kingdom of Italy, Croce began an important period of political commitment which culminated in his appointment, in June of 1920, as minister of education, in the fifth and last cabinet of Giovanni Giolitti (1842–1928). In the heated political controversy that erupted during the First World War, he took part in the public debate by siding initially against the most fervent supporters of Italy's intervention in the conflict and then against those scholars who, under the pretext of war, had succumbed to idleness or, worse still, had taken to manipulating the truth to make it a slave to the interests of their country.

Politics never distracted Croce from his studies, which he constantly pursued with firm commitment, even in the difficult years of Fascism, which, after some early hesitation, he opposed with moral and intellectual rectitude. After the break with Gentile, when an irreducible political rift compounded the philosophical disagreement between the two scholars, during the period of isolation in which the regime tried to sideline him, Croce wrote his main historical works: *Storia del Regno di Napoli* (1925), *Storia d'Italia dal 1871 al 1915* (1928), and *Storia d'Europa nel secolo decimonono* (1932) – three works united by the aim of reawakening the idea and value of freedom in the spirit of his countrymen. These books were received with great interest by readers and were thus a publishing success. These were followed, in close succession, by the two fundamental works *La poesia*

(1936) and *La storia come pensiero e come azione* (1938), testifying to the deep rethinking of the essential cores of the "Philosophy of the spirit," which, while departing from the original form of a treatise, nonetheless preserved its unitary and systematic character.

After the Second World War, Croce came back to the center of the public stage, and beginning in the summer of 1943 his commitment to politics took up a large part of his life. He collaborated in rebuilding the Italian Liberal Party, of which he became president in 1944, and took part in the reconstruction of the democratic state, with an active involvement in its institutions: as minister without portfolio, in 1944, in the cabinet led by Ivanoe Bonomi (1873–1951); as member of the National Council (Consulta Nazionale), from September 1945; as elected member of the Constituent Assembly (Assemblea Costituente), in June 1946; and as senator in the first legislature of the republic, a post to which he was appointed in May 1948. Even during this period, Croce managed to be active in both politics and his studies. The radical crisis of European civilization, a consequence of the tragic war and of the unsolved postwar restlessness, prompted him to meditate on the dialectical relationship between "vitality" and "civilization" – a dramatic opposition, which, threatening to break up the spiritual unity of reality, forced him to return to Hegel, resuming with the German philosopher a dialogue that in truth had never been interrupted. This culminated in his book *Indagini su Hegel*, published in 1952, shortly before his death.

The Object and History of the Philosophy of Law

Juridical activity does not constitute an autonomous category in the structure of Croce's philosophical system; it rather represents a practical experience to be resolved in the wider sphere of economics, and as such distinct from, but related to, ethics. Nevertheless, his ideas on law and the philosophy of law grew to maturity in the process of developing the "Philosophy of the spirit," in the early 1900s, and reached its climax with two works – *Riduzione della filosofia del diritto alla filosofia dell'economia* (1907) and *Filosofia della pratica* (1909) – written within a few years of each other.

It is in the first pages of *Riduzione* that Croce treats the question of the object and history of the philosophy of law. According to him, scholars had been overly committed to defending the epistemological autonomy of the philosophy of law relative to universal history, to general theory, or to ancient natural law. For this reason, they generally paid little attention to the particular problem, proper to the discipline, of the nature of law. This real nature of law remained obscure, according to Croce, given the inability to distinguish juridical activity from ethics. Borrowing a significant metaphor from Rudolf von Jhering (1818–1892), Croce characterized this unsolved problem as the "Cape Horn" of the philosophy of law, which marked its entire history: certainly, according to him, this was a very recent history, its origins going back no earlier than the end of the seventeenth century. Until that time, there was no philosophy of law proper to speak of – whether in relation to the noble tradition of theories of justice, within which the law would have been entirely absorbed by ethics, or in relation to the opposite doctrines of force or utility, within which ethics itself was denied in its own consistency.

The problem of distinction between juridical activity and ethics had to wait until Christianus Thomasius (1655–1728), who in his *Fundamenta iuris naturae et gentium* (1705) developed the first systematic account of the relationship between *honestum*, *decorum*, and *justum*. From this moment on, the idea of a peculiar trait by which to distinguish law from morality – the idea of a purely juridical form irreducible to the ethical one – would be rooted in modern philosophical consciousness. This was an important development, to be sure, but one that Croce still considered unsatisfactory, given that philosophical thought is fundamentally inimical to empirical concepts such as "exteriority" and "coaction," through which this distinctive trait has been identified over time. The inability to solve this problem and, at the same time, the impossibility of setting it aside engendered the basic contradiction of legal philosophy: "law does not seem identical to ethics, but neither does it seem simply different

from it; it seems to be both identical and different, yet the element of diversity cannot be fixed in the concepts of exterior, coactive, and the like" (*Riduzione*, p. 32).

According to Croce, this "morbid condition," which was to plague legal philosophy for about two centuries, is a consequence of the failure to elaborate the category of the "economic" as the first form of practical activity and to recognize "utility" as an autonomous principle in the life of the spirit. From this there emerged the guidepost showing the path to be followed: assuming the unity of spiritual forms, distinct but not separate from each other, the problem is framed starting from the determination of the concept of law.

The Concept of Law

As early as 1902, in *Estetica*, in the eighth chapter, dedicated to the system's conceptual structure, Croce excludes that next to the aesthetic, logical, economic, and ethical forms, there may be a fifth, autonomous form of human activity – an argument he makes reasoning by specific reference to the example of "juridical activity." However, the question of the nature of law isn't dealt with in its proper meaning until his 1907 *Riduzione*.

"Is the law a pure economic activity," Croce asks, "or is it a moral activity?" (*Riduzione*, p. 38). The very formulation of the question excludes the possibility that law belongs, not to the domain of the practical spirit, but to that of the theoretical spirit, to the sphere of human cognitive activity. It therefore excludes the possibility that the juridical can be said to be a particular and further determination of practical activity, as different from economics as it is from ethics, since this division, coinciding with that of the individual and the universal, leaves no room for any third form. Otherwise, the elaboration of an answer begins from the recognition of the "amoral" character of law, from the awareness that juridical action, considered in itself, is a practical activity that is neither moral nor immoral; it finally verifies the perfect identity of juridical activity with economic activity, the "action of the individual among the actions of other individuals," the "first condition of any moral or immoral activity" (*Riduzione*, p. 41, 45).

Having verified this identity, law and morality would therefore be both distinct and united. Juridical (or economic) activity, the activity of the individual, can also be separated from ethics, without thereby becoming unlawful (or uneconomic). Ethics, on the other hand, the activity of the universal, is inclined to make every individual action its own means and thus to conform the whole of human life to itself, since the moral intention always turns into practical action, by necessity expressing itself in a juridical (or economic) form (*Riduzione*, p. 53). To those who are startled by the affirmation of the unethical nature of juridical activity, and who refuse to admit the existence of immoral juridical facts and to recognize that immorality does not deprive them of their own consistency, Croce replies, in the most eloquent way, in a page in the note on international law published in the summer of 1916, in the middle of the First World War, and incorporated in 1919 in the volume *Pagine sulla guerra*: "if morality is powerless to make the law not be law (as it cannot make art not be art), it is, however, very powerful in forming conscience and the will, and in proposing moral needs that continuously operate in the history of law, although in it such needs must of necessity always take the form of law, strength, utility: which is precisely what is called the moral progress of humankind" (*A proposito del diritto internazionale*, p. 120).

Juridical Actions and Laws

Croce holds that once we set aside arbitrary representations, which would prevent the identification of law with the economy and produce spurious distinctions between juridical and economic facts, it must be recognized that there exists a genuine trait marking out juridical actions and laws as different.

In *Riduzione*, he hastens to point out that this difference does not concern the essence of the juridical fact (*Riduzione*, p. 49). Then, in the 1908 *Obiezioni intorno alla mia teoria del diritto*, he confirms that in order to distinguish between

law and morality, it is necessary to refer to two irreducible forms of spiritual activity. It is therefore appropriate to consider law in the primary and simple form of individual acts, not in the secondary and complex form of the laws; in fact, contributing to the production of laws are both a theoretical work of abstraction and the practical act by which it is ordered that individuals must henceforth, in the acts they do, conform to the abstract models thus set out (*Obiezioni*, p. 71ff.). Even so, in Croce's assessment, the problem of the laws remains unsolved: having briefly but accurately examined it in *Riduzione*, he dedicates to it the entire third part of *Filosofia della pratica*.

The first aspect of the problem concerns the ambiguity of the law, described as "a *volitional* act which as its content has a *series* or *class* of actions": as an abstract volition of the abstract, the law is therefore taken to be an "unreal" volitional act. The second aspect of the problem, then, concerns the relationship between this "pretended volition," contradictory and imperfect, and the determined volition of the single act, the real volition in view of which the law – by its nature impossible to be carried out, impossible to be applied to the concrete case – performs a "preparatory" and "aiding" function (*Filosofia della pratica*, p. 317, 337f., 343ff.).

Behind these pages, open to objection but nevertheless fascinating, it is possible to observe the problem of the freedom of individual action, which must come to terms with the need for social order in the dialectic between practical activity and the laws that govern it. It is also possible to descry, in the background, the disturbing hypothesis according to which the concept of "design" proposed for action and carried out by its means – a concept which has no place in the fields of the economy and ethics, but which has its legitimate meaning in the field of the laws – sheds a ray of light on a specific and distinctive character of law, beyond its determination as pure economy.

The Double Aspect of the Practical Problem

According to Croce, although Thomasius had correctly framed the problem of the philosophy of law – concerning the nature of law and its relation to morality – this was not a problem that could properly be solved until the economy was elevated to a philosophical science and situated close to ethics. From this perspective, the entire history of the philosophy of law had therefore been a history of failures, of inevitable shipwrecks at "Cape Horn."

On the other hand, as he observes, the stubborn search for a solution would have contributed importantly to the recognition of the double aspect of the practical problem, considering that over the course of this investigation, the need for a philosophy of the not-yet-ethical (*aetica*), or premoral (*premorale*), form of the practical spirit would be affirmed and progressively consolidated in the modern philosophical conscience (*Riduzione*, p. 37). The history of the distinction of law from morality, then, would have had an importance even greater than the experience of the emancipation of legal philosophy, since it concerned the whole domain of the practical spirit (*Filosofia della pratica*, p. 366). This would ultimately be the historical merit of the philosopher of law, his precious contribution to the philosophical thought of modernity.

Cross-References

- ▶ Gentile, Giovanni
- ▶ Hegel, Georg Wilhelm Friedrich
- ▶ Thomasius, Christian
- ▶ Vico, Giambattista

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Cultural Rights

► Rights: Cultural

Cusa, Nicholas of

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Introduction

Nicholas of Cusa (1401–1464), also known as Nicolaus Cusanus, was not an abstract thinker whose work was detached from the real world, rather he was an influential politico-religious figure, who not only thought through and interpreted the social and normative world of Christian life but also played a decisive role in shaping it. He lived and worked in a time defined by a fragile ecclesiastical order marked by crises of schism, conciliarism, and Hussitism, which influenced his work as much as the struggle for the survival of spiritual power against secular sovereignty. From 1432 to 1437 he worked on the Council of Basel as a brilliant young lawyer and then in the 1440s worked on the German Diets. He then ascended to Cardinal and Bishop of Brixen, and in 1458, under Pius II, he became one of the most influential Curia Cardinals. At that same time, Cusa was involved in a conflict with the powerful Duke Sigismund of Austria-Tyrol, causing disruption both politically and mediaistically throughout Europe.

Works of Legal Philosophical Relevance

The *Concordantia catholica*, one of the most famous and influential scholarly works related to the debates over church and imperial reform, conciliarism, and church constitution, was written in 1433/34 at the Basel Council. Profound erudition and knowledge of even the most remote sources catapulted "the Cusanus," as he was soon called in humanist circles, to become one of the most popular – and most hated – church politicians of his time. Much in the *Concordantia catholica* was still incomplete, some theses and arguments remained, as a conceptual matter, weakly connected with each other. But this made

the treatise a welcome resource for those engaged in all kinds of legal and socio-philosophical debates, at the time and for succeeding generations.

During the Basel period, there were other contributions that Cusanus made to the aforementioned debates. In some he argued in a decidedly canonistic manner, but he never limited himself to the tight restraints of the *Decretum Gratiani* and the Decretal Collections. To be specific, Cusanus contributed to the debate over calendar reform, he made contributions to the ongoing ecclesiological discussion about the office of Council President and the question of superiority, as well as contributing to the debate with the Hussites over the necessity and legitimacy of lay communion under both forms. The Hussite writings were considerably amplified by the Bohemian Letters of 1452.

His transition to the papal faction in 1437 was perceived as a major break in his career and work. His contributions to the ecclesiological debate on the true church constitution became manifestos of papal authority, perhaps none more so than his *Dialogus* on the errors of the followers of the Council (1441), his speech *Summa dictorum* held on the Diet of Frankfurt (1442), and his letter to Rodrigo Sanchez de Arevalo (1442). After being promoted to Cardinal as recognition for his ecclesiastical services to the Pope, Nicholas V sent him on a great legation journey which took him all over Germany in 1451/52. During that time, he published reform decrees which were widely distributed and laid the groundwork for future synodal legislation in Germany.

While Bishop of Brixen (1452–1458/60), Cusanus engaged in intensive preaching, focused on reconnecting all aspects of human existence to the model of Christ. At the same time, he composed numerous legal-historical treatises that presented the secular claims of the Brixen Church, especially those claims in competition with the County of Tyrol. Within a few weeks of the conquest of Constantinople Cusanus provided a well-known framework for the intellectual management of religious conflicts (*De pace fidei*), which he further developed in 1460/61 in the treatise *Cribratio Alkorani*. Visitation forms and synodal statutes that recorded the decisions made extensive use of ecclesiastical censures, painting a vivid picture of the Christian life that Cusanus demanded in practice.

During his time in Rome, Cusanus wrote the *Reformatio generalis* (1459), an unfinished draft of a visitation of the entire Church at all levels, from the Pope to the Curia to the parishes; a document which achieved great fame. The basic idea had already been conceived christologically in various reform sermons: Every human being must find the essence of oneself, which is contained in one's name or position within the Church.

Numerous other philosophical works by Cusanus, above all the treatises *De docta ignorantia, De coniecturis, De visione dei,* and *De ludo globi,* as well as various mathematical, astronomical, and scientific writings, are not directly relevant to the history of ideas in legal and social philosophy, but are worth considering as reference points to understand how his ideas fit into his complete oeuvre. Of particular significance is the idea of the concordance of unity and diversity, which is decisive for his legal and socio-philosophical writings. He developed this idea in his writings about knowledge of God based on the neoplatonic idea of the coincidence of opposites as well as the model of *explicatio* and *implicatio*.

Ideas and Methods

The focus of Cusanus's work was to reform the Church, which in his case was shaped not only by the pastoral theological and soteriological dimensions of the Church but also by the legal ones. For Cusanus, reform was often the practical consequence of simply sharpening the rules of the *Ius commune*, which had lost relevance due to carelessness, excessive privileges, and different customs. In the lifelong struggle for unity against the reality of Christian life drifting away into singularities, lines of conflict in his reform initiatives often ran along the tension between *Ius commune* and *Consuetudo*. Many initiatives for monastic reform, whether as papal legate, bishop of Brixen or visitator in Italy, were based on a consistent

demand for positive norms – the *Regula Benedicti*, the great reform bills of the thirteenth and fourteenth centuries, the decretals of the *Liber Extra*. The conflict with Duke Sigismund of Austria-Tyrol involved a similar tension. After an extensive enquiry into the relevant documents, Cusanus explained that the Duke's paternal inheritance should, in fact, belong to the Bishop of Brixen.

Antiquarian passion and the search for old documents was a characteristic feature of this period. While the Italian humanists took advantage of their time on the councils of Constance and Basel to hunt through southern Germany's monastery libraries to satisfy their curiosity, Cusanus pursued this antiquarian method with rigor. Hardly anyone achieved such a profound knowledge of the old texts and operated on the basis of the authority of rules that – from Carolingian documents and chronicles, Council acts of the ancient Church to the records of the Brixen Church – had been long forgotten. Innovation for Cusanus was above all rediscovery and reevaluation of the old.

The strength of his arguments based on such texts, however, lay not only in his antiquarian knowledge, but in his almost historical-critical approach to it. His capacity for textual criticism went far beyond the analysis of authenticity. For example, in the *Concordantia catholica* he succeeded in proving that the Constantinian Donation was fake. Furthermore, he consistently interpreted norms from their historical context and thus extended the field of interpretation by a whole dimension. The strength of this historical method proved itself in the Bohemian scriptures, where he was able to diplomatically and opportunely demonstrate that the main demand of the Hussites for the granting of lay communion was acceptable, and did so without having to oppose theological-dogmatic positions of the Church.

In addition, his integration of vague legal concepts was ingenious, especially his use of the *pia interpretatio*, which, on the basis of the Aristotelian concept of *equitas/epikeia*, made possible the flexible and politically opportune interpretation of norms without having to depart from the system of canons.

Typical of Cusanus was a double legitimation of the social order, hierarchical on the one hand (mainly based on the pseudo-isidoric model), and on the other, collegial-corporative (through the consensus of the subjects in norming and reception). This thoroughly dynamic legitimization of the social order beyond a rigid systematic positivism even included biblical norms, which Cusanus did not understand as absolute and timeless, but always wanted their normative essence to be bound back to the authority of the Roman Church.

Cross-References

► Plato

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De Maistre, Joseph

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Joseph de Maistre (1753–1821) was a conservative political philosopher, critic of the French Revolution (1789–1815). He was born in Sabaudia, although his family descended from France. He did not speak Italian; he wrote only in French, identifying himself as a Savoyard. The family was *ennobled* in 1780, when he was 27 years old, which made him a member of the *nobility of officials* (*noblesse de robe*). He obtained his law degree in Turin. He worked as a lawyer and an official. In 1788 he became a senator. Before the Revolution he was an Enlightenment liberal, an advocate of the social contract and constitutionalism, which he expressed in speeches and small publications. In 1775, he supported the American Revolution, and in 1789 the French Revolution, seeing in it the chance to abolish the relicts of Feudalism.

De Maistre changed his political views in 1792, when the armies of revolutionary France occupied Sabaudia. As a nobleman and official, he had to flee to Switzerland and later as a Savoy diplomat remained in Russia until 1817. In Switzerland he wrote *Lettres d'un royaliste savoisien à ses compatriotes* (1793) and also his first major work *Considérations sur la France* (1796). He wrote his subsequent works in St. Petersburg. At the time of the Revolution, he published only one famous work: *Essai sur le principe générateur des constitutions politiques et d'autres institutions humaines* (1814). Most of his books were published posthumously, although they were already known to political elites thanks to circulating manuscripts. The most important works published after the Revolution include *Du pape* (1819); *Les soirées de Saint-Petersbourg* (1821); *De l'Eglise gallicane* (1821); *Lettres à un gentilhomme russe: sur l'inquisition espagnole* (1822); *Examen de la philosophie de Bacon* (1836); *Quatre chapitres inédits sur la Russie* (1859); and *Etude sur la souveraineté* (1884). His political correspondence is noteworthy: *Lettres et opuscules inédits*, two volumes (1851); *Correspondance diplomatique*, two volumes (1860); and *Correspondance*, six volumes (1884–1887). The most important dissertations were collected as *Oeuvres complètes*, 14 volumes (Lyon, Vitte et Perrussel, 1884–87).

He returned to Sabaudia in 1817 as a political philosopher of the European format, a theoretician of ultramontanism, which was aimed against the liberal rule of Louis XVIII and the Constitutional Charter of 1814. He died in 1821.

The political philosophy of de Maistre is a response to the ideas of the French revolutionaries. He regards them as opposed to the theocentric vision of the world embodied by the pre-revolutionary order. Political order is based on natural laws that a person can grasp by studying

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various societies. The widespread existence of the family, property, authority, and religion prove that these institutions are not incidental, but necessary, resulting from the nature of man created by God. The Creator also controls nations by way of providentialism, that is, supernatural interventions, when natural laws are not respected, and order is based on injunctions of reason emancipated from tradition, religion, and authority. This leads him to interpret Jacobin terror as a punishment for the rejection of natural law.

De Maistre sees the origins of the Revolution in the Reformation, which, while negating the ecclesiastical authority, led to the emancipation of reason. The Enlightenment transferred this principle to political philosophy, emancipating individual reason from tradition and authority, giving it the power to pronounce on legal and political relations. In the eighteenth century, reason constructed the alternative to the existing world. De Maistre argues that in order for man to be able to project a new reality, he would have to cover the whole of sociology, history, law, economics, management, psychology, etc. Since human reason is not so capacious, the projected reality is a utopia. The revolution is a confrontation of utopia with social reality, as a result of which the emancipators gained power by building despotism, thus anticipating totalitarianism (Jacobins).

Man faces a dilemma: tradition or utopia. An example of utopian thinking was the idea of giving France a written constitution: "Who would not say the best political constitution is that which has been debated and drafted by statesmen perfectly acquainted with the national character, and who have foreseen every circumstance? Nevertheless nothing is more false. The best constituted people is the one that has the fewest written constitutional laws, and every written constitution is worthless" (*Les soirées de Saint-Petersbourg*, Paris 1960, La Colombe, pp. 267–268).

Since emancipation led to a revolutionary catastrophe, de Maistre defends the traditional world. He considered pre-revolutionary France, Sabaudia, and the Church to be a perfectly constituted community. On this basis, he created a vision of a just monarchical and Catholic State, founded on customs and tradition: "The plant is a living image of legitimate power. Look at the tree: its growth time always corresponds to strength and durability" (*Du pape*, II, 10). He opposes rationalism and emancipation with (1) Authority that emphasizes truth, especially the sovereign and the Church, led by the dogmatically infallible Pope. (2) Superstitions expressing folk wisdom. Superstition is not a shibboleth because it conveys the experience of generations. (3) Tradition, which is not an accidental collection of institutions and customs: if an institution has existed since time immemorial, it must be in accordance with natural rights; otherwise it would not survive. All institutions and traditional laws bear the Divine sanction, and their violation (reform, revolution) is a transgression against the principles constituting society. Tradition is plural in nature: every nation has its own and it is unique. In France, it is Catholic absolutism; in Poland it is republicanism. De Maistre expresses his opposition to the reception of rights from one country to another in the famous formula: "Now, there is no such thing as 'man' in this world. In my life I have seen Frenchmen, Italians, Russians, and so on. Thanks to Montesquieu, I even know that one can be Persian. But as for man, I declare that I have never in my life met him; if he exists, he is unknown to me (. . .) [A] constitution that is made for all nations is made for none; it is a pure abstraction." (*Considérations sur la France*, Paris 1936, Vrin, s. 81–82). (4) Skepticism toward discursive cognition. Reason confuses man; scientists are alienated from tradition. Rationalism is contrasted with practical common sense. (5) Congenital ideas, because each species received from the Creator a range of knowledge and skills. People were bequeathed with knowledge about everyday matters, but not about building a society, creating alternative visions, and writing a constitution. Man is destined to existence in a circle marked by tradition, religion, and authority.

The experience of the French Revolution showed the inability of man to create an alternative world to the *Ancien Régime*, pointing to the necessity of a restoration of natural rights, which were identical with the traditional ones. At the same time, de Maistre knew that there was no

integral return to pre-revolutionary relations. The revolution has been defeated militarily; however, it has many followers. In the struggle with them, he proposed new solutions. First of all, the ultramontanism presented in *Du pape*, based on the idea of recreating pan-European Christendom, led by the Pope. The theocracy was to break the confessional divisions created by the Reformation and to bring about counterrevolutionary ideological unity in the fight against revolutionaries. At the same time, de Maistre favored an authoritarian model of government, seeing in it a remedy for revolutionary conspiracies. For the purpose of suppressing future revolutions, he foresaw the possibility of introducing dictatorships that would overcome them with military means.

Discussion

De Maistre's influence on conservative political philosophy in the nineteenth century was enormous. Although he avoided direct criticism of the liberal rule of Louis XVIII, his writings formed the foundation of ultraroyalist thought in France in the years 1814–1830, followed by a legitimist reflection directed against liberalism and republicanism which lasted well into the 1870s. References to his idea can be found before the outbreak of the Second World War in the political thought of Charles Maurras and Action Française. In Spain, his idea of a right-wing dictatorship had a major impact on Juan Donoso Cortés, on his political and legal doctrine of decisionism, developed further by Carl Schmitt in the Weimar Republic. His ultramontanism had a huge impact on the Catholicism of the Vatican I era (1869–1870) because of the extremely evocative argument in favor of papal docility and primacy in the Church.

De Maistre's writings were studied by the founders of French sociology, Auguste Comte and Emile Durkheim, who drew from him ideas of the indispensable laws on which every society must rest. De Maistre derived them from the will of God, while sociology took up their reconstruction, unwilling to address the question of their naturalistic or supernatural origin.

Today, we can observe unflagging interest in his views among the European Right, but also among supporters of postmodernism, for whom de Maistre has become a source of numerous arguments against the rationalism of the Enlightenment and the philosophy of law coming originating from it.

The expressiveness of de Maistre's political views drew a wave of criticism against him. For liberals, he remains an archetypal enemy of natural human freedom, emancipation, and political rationalism, and they accused him of defending clerical despotism (Emile Faguet) or being a precursor to Fascism (Isaiah Berlin) – which, however, seems to be a glaring exaggeration. Liberal critics rightly note that his political philosophy is a transition from traditional monarchy to a right-wing dictatorship in the twentieth century. For Marxists, his thought is a classic example of the reflection of a failing aristocracy trying to salvage its political domination through authoritarian rule. There is also a long tradition of a Catholic critique of de Maistre's thought: during his time, Rome cut itself off from his political ultramontanism, seeing in it ideas that were too radical, embarrassing for ecclesiastical policy. Later, his political Catholicism was criticized by the Christian Democrats who wanted to reconcile the Church with the republic and democracy.

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Death Penalty

► Capital Punishment

Deconstructionism

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Introduction

Deconstruction is a mode of philosophical thinking with which the French philosopher Jacques Derrida broke away from the traditional and dominant ways in which texts have been read and understood in the history or Western civilisation. Instead of focusing on the "ideal content" of meaning that texts evidently aim to convey and instead of engaging with in a debate with the author regarding this "ideal content" of the text, Derrida focused on the way in which the "material" organization of texts complicates, relatives, destabilizes, and even renders contradictory their ideal content or meaning.

What was Derrida's aim with this new approach to reading and understanding texts? The brief description of Derridean deconstruction and its reception in legal theory that follows responds to this question in four steps. The first section, "Key Themes of Derridean Deconstruction," briefly explains a number of the key concepts that Derrida developed in his early work. The second section, "The Reception of Deconstruction in Legal Theory," looks at the way in which these themes or concepts found their way into legal theory and explains how some of the legal scholars who played a prominent role in this reception of deconstruction in legal theory assessed the aim or purpose of deconstruction. The third section, "The Return of the Outside of the Text: Justice, Hospitality, Friendship, and Forgiveness," then shows that Derrida's later writings made it increasingly clear that the understanding

of deconstruction that informed its reception in legal theory was quite at odds with his own understanding of deconstruction. The fourth section, "Deconstruction and Legal Theory," concludes the piece with an alternative assessment of the relation between deconstruction and legal theory that is more in line with the understanding of deconstruction that came to the fore in Derrida's later work but which he claimed to have been there all along.

Key Themes of Derridean Deconstruction

When Derridean deconstruction burst onto the scene of the twentieth-century philosophical thought, a number of key themes captured the imaginations of those who joined the "deconstruction movement." These key themes pivoted on, among others, the notions of "différance", "trace," and "supplement" that Derrida developed in his early work. All these themes inspired the members or followers of the movement to also acclaim Derrida's provocative assertion that "there is nothing outside the text" – *il n'y a pas de hors-texte* (Derrida 1967: 227, 1974: 158). Let us begin to take a closer look at deconstruction and the broad theoretical movement that it precipitated by unpacking these notions of "différance," "trace," and "supplement" together with the contention "there is nothing outside the text."

Différance denoted for Derrida two fundamental features of language. The first concerns the way in which all linguistic signs derived their ability to signify "something" from their difference with other signs. The second concerns the way in which the ability of signs to signify also derived from their *deferral* of the signs from which they differed. The signifying sign – the sign that signifies at a particular moment in time – signifies something because of the way it precludes other signs from signifying something else at the very same time while nevertheless depending on their ability to signify something else later. To give a simple example: The letters c, a, and t, when spelled in this sequence, signify a particular kind of animal because of the way the signification "c-a-t" differs from other significations such as "d-o-g" or "c-o-w" that may come to signify other animals later. The same can be said of the individual alphabetic letters themselves and their phonetic or sonic equivalents. We receive and register the signification "a" because we do not receive at the very same time the signification "b" or "c" (and so forth) while constantly knowing and expecting that we might receive them again later (see Derrida 1972: 1–29, 1982: 1–28).

This simple explication of *différance* already allows one an elementary grasp on the two other key terms in the early work of Derrida mentioned above, namely, "trace" and "supplement." The explication of *différance* already shows how potential but currently absent significations *leave a trace* on actual significations, notwithstanding their "absence." "C-a-t" comes to the fore as an effective signification because of the way in which *the absence* of the "deferred" significations "d-o-g" or "c-o-w" is constitutive of the signification "c-a-t." "C-a-t" thus carries with it a trace or traces of "d-o-g" and "c-o-w." The deferral of "d-o-g" or "c-o-w" (that takes place whenever we are not talking about dogs or cows) by the actual signification "c-a-t" does not make "d-o-g" or "c-o-w" disappear *without a trace*. "C-a-t" thus remains conditioned by the traces that "d-o-g" and/or "c-o-w" and countless other significations leave lingering in the play of différance. A sign always figures as a trace of other signs not currently or immediately "present."

Consider, for instance, the way in which someone who sees a cat scrambling up a tree invariably begins to expect seeing a dog before actually seeing it or, vice versa, the way in which someone seeing an excitedly barking dog charging off already expects to see a cat scrambling up a tree, well before actually seeing one. These examples show how the observation of a cat behaving in a certain way already carries with it a reference to the quite possible behavior of an as yet unobserved dog or vice versa. This cross-referencing, however, is not restricted to behavioral incidents with predictable consequences. They also pertain to classificatory observations of species of animals under relatively stationary and isolated conditions, say at a cat show where

there are no dogs present and where the behavior of the cats signal no imminent presence of dogs. Even under these conditions, it would not be all too surprising if someone would observe: "These cats are so at ease; one can see there are no dogs present." Part of our understanding of what a dog or a cat "essentially" is, even in isolation from one another, depends on bringing into play a whole set or series of references regarding the differences between them. A cat that would suddenly start barking at a cat show would have everyone in utter amazement because of the way this barking cat would disrupt the set of cross-references that are always latently in play whenever we observe a cat or a dog.

The upshot of all this is that effective signification is as such always the effect of interlaced traces; traces that are themselves the effects of other traces and never of something beyond or outside the trace. At no point in time does linguistic signification arrive at or capture some kind of unitary substance or presence. It never constitutes a substantive unit of present meaning. All there is are traces, not traces of things other than traces but traces of traces. Language is nothing but this interlacing play of traces of traces (see Derrida 1972: 25, 1982: 24).

Derrida discovered the play of interlacing traces also to be at work in all acts of textual *supplementation*. The need to supplement a text with an appendix or addendum suggests an author's sense that the true or accurate meaning of the main text only comes to the fore once the appendix or supplement is added. At the same time, however, the supplementation on its own only attains meaning as a supplement, that is, not on its own but always in connection with a main text. In this way, the main text ends up being the supplement of the supplement. There is therefore no such thing as *the main text* in the end. The meaning of any text is affected and effected by its *margins*, to bring into play here another key term that Derrida would develop in his early work. The meaning or significance of any text is ultimately fundamentally conditioned by that which is either deliberately written into its margins as a supplement (or a footnote) or that which is silently relegated to the margins for purposes of centring the main purport of the text. In the final analysis, no text is closed or enclosed. Textual meaning is never neatly enclosed within "its own" boundaries. A text can for this reason not be presented like a finished book. On the contrary, Derridean deconstruction invites readers to also look at "finished books" as inscribed in an endless textuality or intertextuality that exposes all claims to semiotic and semantic closure to margins that re-include what they pretend to exclude (see Derrida 1967: 203–234, 1974: 141–164).

This more or less "standard" understanding of key themes from Derrida's early works gave rise to a new wave of literary studies that challenged well-established interpretations of literary texts by exposing these interpretations to elements of the text that have hitherto always been ignored or considered less important. This new wave of literary studies soon also spread to other fields of textual studies, and legal theory was no exception. Critical legal theorists began to employ the deconstructive reading strategies of literary theorists to dig up marginalized, ignored, or suppressed elements of important legal texts in order to challenge the dominant interpretations of these texts so as to allow for alternative readings that might bring about legal reform, as we shall see presently. However, before we turn to this reception of deconstruction in legal theory, let us now bring into play one more key theme of Derrida's early work, namely, his claim that "there is nothing outside the text" – "il n'y a pas de hors-texte."

The key insight that Derrida sought to communicate with the claim "there is nothing outside the text" was a further implication of the way in which combinations of *difference* and *deferral* and the interlacing of *traces* produce meaning. The notions of *différance* and *tracing* effectively put paid to the idea that a linguistic sign actually referred to something beyond language, that is, beyond the differing and deferring interplay of linguistic signs. The linguistic perspective that informed Derrida's understanding of language broke away from all "realistic" conceptions of the relation between signs or *signifiers*, on the one hand, and that which they *signified*, on the

other. From the perspective of the structural linguistics of Ferdinand de Saussure on which Derrida relied, the sign or signifier never relates to something beyond language. Whatever a particular *signifier* may come to signify is an effect of the relation of signifiers with other signifiers. Signification, and all communication of meaning that may result from it, accordingly remains a contingent intra-textual and intertextual process. There is for this reason ultimately nothing – no instance of stable meaning and no stable referential relation between a sign and some signified "semantic content" – that exists outside and independently from the contingent interplay of signifiers and the compilations and combinations of such signifiers that ultimately come to constitute a text. Outside the text there is just more text. The one text supplements and displaces another in an endless play of textuality.

What, then, is the point of it all? What was Derrida's point when he pointed out all of this? Was his point simply that there no longer is a point or that there never was a point as one may understand Friedrich Nietzsche already to have argued a hundred years earlier? Was his point that one should simply stop considering oneself burdened with this question so that one can begin to take part freely in the exhilarating charges and discharges – or disseminations – of an ultimately inexhaustible textuality? Let us engage with this question by taking a closer look now at the reception of deconstruction in legal theory.

The Reception of Deconstruction in Legal Theory

The problem with many strands of deconstruction in legal theory, wrote Christopher Norris in 1988, concerns the way in which it reduces deconstructive techniques of reading to a general method that can be applied more or less to any text for purposes of pursuing an already envisaged result or outcome (Norris 1988: 179). At the time of Norris' observation, James Balkin's seminal article "Deconstructive Practice and Legal Theory" (Balkin 1987) could be considered exemplary in this regard. "Deconstruction," argued Balkin, "by its very nature is an analytical tool" (ibid: 786). Balkin's article surely made its mark in legal theory, "mainstream legal theory" included. It even convinced Neil MacCormick that deconstruction was a useful "heuristic device" (MacCormick 1990: 554). The risk of reducing Derrida's reading techniques to a method, tool, or "device" was perhaps always on the cards, but the materialization of the risk could only take place at the cost of ignoring Derrida's caveat that deconstructive reading consists in a certain exposure of the reader to a text in a way that deprives him or her of the subjective control of that text. As Derrida put it, deconstruction consists in "the general movement of the field and it is never exhausted by the conscious calculation of a [reading] subject" (Derrida 1981: 82).

For Derrida, deconstruction involves the reader in a movement or *event* of reading to which he or she is exposed. It is not a method that the reading subject controls for purposes of arriving at anticipated or desired outcomes. At the time of deconstruction's early reception in legal theory, Pierre Schlag was the one legal theorist who understood this aspect of Derrida's thought well. He pointed out how Balkin's understanding of deconstruction reserved for the reading self or subject a place outside the process of reading and outside the text for that matter. For Balkin, claimed Schlag, the outside of the text is still "me" – "le hors de texte, c'est moi" (Schlag 1990). Balkin surely did not shy away from this location of the reading subject outside the process of deconstructive reading. He unflinchingly affirmed the fact that the deconstructivist legal theorist has a premeditated politics. He or she has "an ax to grind"; she is "picking her targets" (Balkin 1990: 1627–1629).

What Schlag pointed out well and what Balkin was happy to confirm was the fact that the reception of Derridean deconstruction in legal theory in the 1980s and 1990s went hand in hand with a conception of it as a tool that could be used by progressive or liberal legal theorists to pursue predetermined political goals. No one seemed to be bothered at the time by the possibility that,

once reduced to a tool or method, deconstruction could also come to be used for conservative or reactionary political goals. This possibility need not detain one's attention for long, for it did not materialize. Conservative and reactionary legal theorists most likely simply sensed that "deconstruction" was something that happened to belong to left-wing or liberal legal theoretical circles and therefore stayed away from it. Besides, established paradigms of legal formalism and originalism surely served them well enough. They were certainly not out looking for new theoretical approaches.

Two considerations nevertheless make it necessary to take a closer look at the "leftness" or "progressiveness" of deconstructive legal theory. The first is the one just mentioned above: If deconstruction were simply a tool that could be utilized to upset or undermine dominant readings of texts, that tool could be used by anyone, political conservatives and right wingers included. Secondly, Derridean deconstruction surely did not invent or inaugurate left-wing politics and is surely also not a prerequisite for such politics. Progressive politicians and lawyers have been fighting great battles and winning a good number of them (almost invariably relying on notions of "justice" and "fairness" that avid deconstructivists consider highly deconstructible) before Jacques Derrida started capturing the imagination of a new generation of largely left, liberal, or progressive legal theorists. And, in as much as these progressive lawyers also lost many battles, deconstructive legal theory could hardly be expected or seen to offer the promise of fewer failures and more successes in the future. On the contrary, faced with the question of deconstruction, progressive politicians and lawyers – to the extent that they are effective and efficient *politicians* and *lawyers* – are most likely to sense that deconstruction brings something unique to the scene of political or legal deliberation that is likely to slow down one's progressive politics, instead of advancing or accelerating it. And this something unique, Derrida's later work would increasingly reveal, was exactly the "outside of the text" that his early work claimed not to exist. Let us take a look now at this return of the outside of the text in Derrida's later work.

The Return of the Outside of the Text: Justice, Hospitality, Friendship, and Forgiveness

Were progressive politicians and lawyers indeed to put forward the misgivings regarding deconstruction as a political tool or strategy to which we have alluded above, they would be quite right. The more the so-called "ethical" turn in Derrida's work became manifest during the 1990s and 2000s, the more it became evident that deconstruction is not a tool that could be employed but much rather a unique endeavor to precipitate the disruption of any calculated and calculable employment of tools. It would become the recurring theme of Derrida's late work that key ethical and political concepts of Western civilisation such as justice, hospitality, forgiveness, and friendship should ultimately not be considered political goals that can be achieved through the effective launching of methods and programs. They are, on the contrary, denotations of encounters with an otherness or strangeness that arrives uninvited at our doorstep, so to speak (for some of the key texts, see Derrida 1994a, 1997, 2000, 2003a, b). These encounters demand a response, but they evidently preclude any calculation of the response demanded, any rational determination of what should be done, any resort to available methods of operation, and any recourse to existing political or moral norms and codes. These encounters are, in fact, encounters with the "outside" of all these political or moral texts.

However much Derrida may have stressed in his early work that there is "no outside of the text," he evidently became nothing less than obsessed with this "nothing" outside the text as the "ethical" and "political" turn in his work took shape. We shall presently take a closer look at the status or characteristics of this "ethical" and "political" turn. Let us first just note that Derrida did not consider this turn to introduce a new element into his work that was not there in the beginning.

He always remained adamant that the concern with "différance" was from the beginning already a contemplation of the arrival of otherness and strangeness that he would later come to articulate with recourse to notions of the event, justice, hospitality, forgiveness, and friendship. If his claims in this regard are to be taken seriously, it would evidently mean that deconstruction never was the interpretivist celebration of the infinite possibilities of intra- and intertextual meaning that it was widely understood to be in the early years of its reception. It was an endeavor to precipitate an encounter – and to solicit an experience – with an uninterpretable outside of texts that ultimately disrupts all interpretive claims.

An early description of the "method" of deconstruction indeed suggests exactly this. The inversion of semantic hierarchies that deconstruction seeks to solicit, wrote Derrida in 1972, is less concerned with the end result of this inversion (the new hierarchy) than it is with *the interval of otherness* that becomes evident in the process of inversion, an interval of otherness that exceeds the textual or binary terms of both the initial and the inversed hierarchy (see Derrida 1981: 42). This description of deconstruction indicates that Derrida was always decidedly less interested in the new textual possibilities that could result from deconstructive practices than he was in the disruption of textuality that occurred in the moment of deconstruction.

In other words, Derrida did not *value* deconstructive disruptions of texts for reasons of their beneficial effects. He did not value them because he had no doubt that they could not be valued or evaluated. He considered them critical moments that render all existing frameworks and dispensations of evaluation fundamentally questionable. In the same text that he pointed out the "interval" that occurs in the inversion (the phase of overturning) of binary hierarchies, Derrida (1981: 12) also observed that there is "no beyond of metaphysics" and no "transgression" (in the same way that he claimed there "is no outside of the text"). This awareness of a limitless and inescapable metaphysics and textuality again reflected Derrida's insight into an interpretive condition – a condition that marks each and every instance of textual or situational interpretation – that allows no escape from the grasp of readily available normative evaluations. And yet, the concern with demands of justice, hospitality, forgiveness, and friendship that disrupts all existing frameworks of normative evaluation in his later work would suggest that his early awareness of the ubiquitous and endless condition of textual or metaphysical or normative interpretation could hardly have constituted an act of resignation or surrender in the face of an inescapable field of normative interpretation and evaluation, let alone a celebration of this field.

As we saw above, this is surely not how Derrida understood his early work. Notwithstanding his insight into the ubiquitous textuality from which no act of reading or interpretation escapes, his concern with différance, trace, and supplementation was along a paradoxical or *aporetic* concern with moments that offered fleeting encounters with the limits of a seemingly limitless text and limitless metaphysics. Already in the essay "Différance" did he invoke the phrase "radical alterity" (*alterité radical*) in connection with deferrals or delays of signification that never attain presence (see Derrida 1972: 21, 1982: 21).

It is important to underline again that Derrida did not consider these *aporetic* encounters with the limits of limitless systems of normative evaluation new sources of value, or new grounds of evaluation. He had no illusions about their potential destructiveness as far as existing values and systems of value are concerned. Hospitality to the event, he wrote in *Spectres of Marx*, entails the willingness to risk the materialization of harm or evil (Derrida 1993: 57, 111–112, 1994c: 28–29, 65–66). The relentlessness with which he pursued the possibility of these impossible encounters with an outside (the *possibility of the impossible* would become another recurrent theme in his late work – see, e.g., Derrida 2002) should nevertheless caution legal theoretical engagement with his work to pay due attention to the irreducible difference between law (the ultimate instantiation of normative evaluation) and justice (the most incisive encounter with the disruption of available

normativity) that he would emphasize in *Force of Law* (see Derrida 1990, 1994a). Let us now take a closer look at what a due regard for the difference between law and justice might mean for the relation between law and deconstruction, considering that Derrida expressly equated deconstruction with the justice that the law is *not*.

Deconstruction and Legal Theory

Legal theoretical engagements with Derrida's work have made little effort thus far to make sense of the hospitality to the potentially hugely destructive eventfulness of existence that Derrida evidently considered the heart of his concern with deconstruction. Engagements with the demands of justice can easily be understood as normative engagements with the amelioration of law. In the case of Derrida, such an understanding of justice would be a misunderstanding. For him, justice concerns a disruptive event that renders existing law inapplicable. The same applies to any future law that may come to replace existing law after disruptive encounters. In other words, justice should also not be confused with any instance of improved law – or any improvements of law – that may be introduced after forceful experiences with the unsuitability and inapplicability of earlier law. Justice concerns, for Derrida, the very experience of an irreducible incongruity between the demands of justice and all positive instantiations of past, present, or future law. The experience of justice as an experience of irreducible incongruity is such that no law reform can ever hope to overcome or erase this experience of incongruity. This should caution one against the kind of link between deconstruction and purposeful law reform that Balkin and many other early proponents of legal theoretical deconstruction seemed to contemplate.

The same applies to the relation between deconstruction and revolutionary interventions that may bring about far-reaching legal change. Again, one can imagine Derrida or any other deconstructive legal theorist to be highly in favor of and even elated about some or other instance of far-reaching legal change that progressive legal theorists could consider a victory. Deconstruction surely does not proscribe or preclude solidarity with the left. It just should not be equated with it, given its insistent concern with an incongruity between law and justice that hard-nosed politicians – however progressive or left – are likely to consider curious or quaint, if not downright obstructive and debilitating. Deconstructive legal theory will and should of course not consider itself quaint or curious, but it may want to pay due attention to its potential to indeed turn out obstructive and debilitating, or in any case not very helpful, when it comes to positive pursuits of programmatic political goals. For only if it does so, will it attain an incisive understanding of its unique relation to such positive pursuits of programmatic political goals.

The Derridean or deconstructive concern with the incongruity between law and justice – the incongruity that allows for no pragmatic reformist or revolutionary closure of the gap between them – is perhaps nowhere more expressly and strikingly articulated than in the passage in *Force of law* where Derrida describes the sheer madness of the justice he contemplates (see Derrida 1994a: 56: [L]a deconstruction est folle de cette justice-là. Folle de ce désir de justice). The conception of justice that he puts forward here would seem to suggest, as forcefully as Foucault suggested, that the way from man to the true man somehow passes through the mad man" (*de l'homme à l'homme vrai le chemin passe par l'homme fou* – Foucault 1972: 544). Derrida's fascination with an insane suspension of law surely resonates well with Foucault's anti-institutional and anti-juridical concern with freedom. From the perspective of any legal theory that stresses the need for juridical, institutional, and regulatory stabilizations or formalizations of liberty, this anti-institutional and anti-juridical concern with a pristine freedom and a pristine justice must come across as sheer madness. This is how lawyers and legal theorists can invariably be expected to see the matter, left-wing or progressive lawyers and theorists included. Alain Supiot's assessment of Derrida's mad desire for justice as nothing less than lunacy (*folle en effet*) is a case in point (see Supiot 2010: 48).

Neil MacCormick once offered a surprising olive branch to the "deconstruction wave" in legal theory by recognizing its transformative and innovative potential. Had he discerned the extremity of Derrida's "insane" concern with the radical incongruity between justice and the law as clearly as Supiot does, he may well have been less convinced of the transformative and innovative potential of deconstructive legal theory. But he took his cue from theorists like Balkin who had tamed and domesticated deconstruction in order to extract from it an innovative and transformative potential. Legal theorists who continue to deem it important to engage seriously with Derridean *deconstruction* for purposes of distilling from it *constructive* insights for the normative concerns of legal theory would either have to admit that they are still relying on a highly tamed and domesticated understanding of Derrida's work that ignores essential aspects of it, or they would need to break new ground to show what the radically disruptive potential of his work might mean for legal theory after all.

Despite his generous accommodation of the deconstruction movement in legal theory, MacCormick retained a clear enough sense of its sheer and ultimately rather "unconstructive" disruptiveness to nevertheless impart the message that the really important work of jurisprudence and legal theory comes "after deconstruction." However, from the perspective of the more incisive regard for Derrida's radical concern with the abyssal divide between law and the deconstructive experience with justice, one may want to consider "Reconstruction *and* Deconstruction" as an even better title than "Reconstruction after Deconstruction" for the insights MacCormick sought to communicate. The phrase "Reconstruction *and* Deconstruction" communicates – or can be read to communicate – a more incisive regard for the disjunction between the deconstructive concern with an impossible justice, on the one hand, and the legal theoretical concern with possible law and plausible law reform, on the other. Not only would this simple juxtaposition of deconstruction and legal theory resonate better with the categorical divide between law and justice (between law and deconstruction) that Derrida articulated in *Force of Law*, it would also recognize better the equally legitimate or at least equally inevitable demands that both concerns – the concern with good and coherent law and the concern with abyssal encounters with the irreducible inadequacy and inapplicability of all law – make on the human imagination.

This understanding of the irreparable disjunction between law and legal theory, on the one hand, and the deconstructive concern with an abyssal experience with justice, on the other, invites one to recognize and take seriously the completely opposite trajectories of legal theory and deconstruction. Deconstruction seeks to move – doomed to fail, no doubt – directly toward the cataclysmic event that catapults it into existence. It seeks to return to the event from which it derives. This much is clear from the seemingly reckless hospitality to the event that Derrida describes in *Spectres of Marx*, already pointed out above. Law and legal theory seek to move – ultimately equally doomed to fail – away from the cataclysms (social conflict, revolution, crime, delict, etc.) that call them into existence. This decisive retreat from the event is most evident in Hans Kelsen's endeavor to construct a pure theory of law, a theory that extracts and distils the law from the historical reality from which it emerges (see Van der Walt 2014). This radically opposite trajectory of Kelsen's pure theory of law may well be – perhaps surprisingly, but deeply plausibly – the legal theory that tells one more about deconstruction than any legal theory that seeks to integrate deconstruction into legal theory. Kelsen's normative constructivism and Derrida's non-normative deconstruction may well be closer companions than one would think if one would only concentrate on the opposite directions in which their respective endeavors move. A new generation of scholarship concerned with the relation between deconstruction and legal theory should perhaps commence with a recognition of the parallel status and paradoxical proximity between their opposite trajectories (see Van der Walt 2014).

The human condition appears to be fatefully suspended between – and sustained by – both these Kelsenian and Derridean trajectories. It is

unthinkable that a future humanity might one day desist from normative constructions that shield it from the chaos and uncertainties to which its irreducible historicity (its existence in the openness of time and history) exposes it. But it is also unthinkable that a future humanity might one day be fully reconciled with these normative constructions that shield it from the vicissitudes of its historical existence. This is so because humanity also invariably experiences and perceives normative constructions – established moral, legal, and even esthetic codes – as hardened shells that frustrate "life" as much as they protect it. As long as this deep duality between the need to be shielded from the reality of existence, on the one hand, and the desire to be exposed to it, on the other, continues to condition the human imagination, the impulses that incline legal theorists to enthusiasm for Derridean notions of deconstruction are likely to continue their tug of war with Kelsenian concerns with adequate normative construction. A simple choice in favor of the one or the other side is not an option for those jurists and legal theorists with a realistic and holistic regard for both these sides of the human psyche. And the idea that some kind of reconciliation between these two sides will become possible one day also does not strike them as seriously plausible.

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Defeasibility in Law

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Introduction

The assertion that legal rules are defeasible means that, according to our legal practices, it may be justified for judges to set aside applicable rules in the resolution of disputes and to take into account other considerations in their place. Defeasibility of legal standards has been dealt with using several approaches (Ferrer and Ratti 2012). For instance, the conceptual apparatus of Alchourrón and Bulygin have generated some suggestive attempts to approximate to the problem of defeasibility (Alchourrón and Bulygin 1971; Alchourrón 2010, pp. 77–127, 141–153 and 155–177). Nevertheless, the approach proposed here does not correspond to these attempts. As an alternative, the analysis offered here takes its starting point in Joseph Raz´ theory of reasons for

action (Raz 1990). The aim that underlies this election is putting the focus on the way in which defeasibility operates in judges´ practical reasoning.

In accordance with this aim, we will start – in section "Rules as Protected Reasons for Action"– from the role which our legal practices attribute to rules in legal reasoning: here we will look at the role of rules as protected reasons for action. We will then seek to clarify – in section "Three Senses of Defeasibility" – the cases and the conditions in which, according to our legal practices, it is acceptable for judges to deviate from what is established in legal rules. This clarification will lead us to differentiate between three different senses of defeasibility: defeasibility concerning the prescriptions contained in the formulation of rules (D1); defeasibility concerning the underlying justifications of rules (D2); and, finally, radical defeasibility (D3). To conclude, we will address – in section "Conclusions" – the question of whether we can regard as *legal* the set of alternative considerations to which judges must appeal when they consider that they should set aside prima facie applicable rules.

Rules as Protected Reasons for Action

According to Joseph Raz´ analysis, law claims that legal norms are protected reasons for judges. This means two interrelated aspects: (1) that rules constitute *first-order reasons* for judges in order to take the required action – that is to say, to dictate a resolution whose content corresponds to that of the rule – and (2), in turn, that rules are also *exclusionary reasons* for the judge to disregard the result that would lead to an independent deliberation on the arguments for and against the adoption of that resolution, that is, a reason that excludes the content of the resolution being based on the judge's assessment of what would be the best resolution, according to the merits of the case (Raz 1990).

How can rules, characterized in the terms we have just seen, be defeasible? Apparently their characterization as protected reasons excludes the property of defeasibility. There is a problem that Raz' theory does not seem to contemplate: his theory seems to consider some kind of "external" defeasibility, based on moral external standards. However, defeasibility can also depend on reasons internal to the legal system, so that we can also speak of an "internal" or "systemic" defeasibility. Although judges usually adopt preexisting legal standards as peremptory reasons to issue their resolution, there are also exceptional occasions in which they understand that there are important *legal reasons* to set aside a prima facie applicable rule. We speak of *defeasibility* precisely when we understand that, according to our legal practices, the rules should not be taken as exclusionary reasons in the judicial deliberation.

Then, under what circumstances should judges according to law set aside applicable rules? Why would it be rational in such cases to stop applying the rules?

Three Senses of Defeasibility

Trying to answer the previous questions is not easy, since there is not just one single notion of defeasibility at stake, but several. To be precise, it may be interesting to differentiate between three kinds of defeasibility: defeasibility concerning prescriptions contained in the formulation of rules (D1), defeasibility concerning underlying justifications of rules (D2), and radical defeasibility (D3) (Ródenas 2001, pp. 72–82).

Defeasibility Concerning Prescriptions Contained in the Formulation of Rules (D1)

In order to account for the first of the proposed meanings of the term defeasibility, it is essential to distinguish between two different levels of analysis within a legal rule: the level of prescriptions contained in the formulations of the rule and the level of its underlying justifications.

Let us start with a fairly simple example. Imagine a rule that prohibits smoking in workplaces. This rule could have been approved for certain reasons that operate together as its underlying justification. We are usually able to understand the rule that prohibits smoking in workplaces without clarifying what the underlying reasons

for it are. According to Frederick Schauer, many normative formulations have *semantic autonomy*, that is, we can determine their meaning – what they prescribe – without taking into account their underlying justification (Schauer 1991).

Generally speaking, following rules without asking for their underlying reasons is a good strategy, but in some cases there may be mismatches between what the normative formulation demands and what the underlying justification requires. Returning to the example of no smoking in workplaces, let us assume that we can clearly determine that the underlying justification of this rule is the protection of the right to the health of nonsmokers. Well then, it is easy to imagine cases that are instances of application of the rule, but to which the underlying justification would not be applicable.

Let us consider, first of all, the case of a company employee whose job is to attend the telephone enquiries of the company's clients, outside office hours, when the other employees have gone. The prohibition seems to affect him, although there are no nonsmokers rights at stake. We could say that in this case the prescription contained in the formulation of the rule – smoking is prohibited in workplaces – exceeds what its underlying justification allows to be forbidden, the protection of the right to the health of nonsmokers. Actually the rule was designed for other types of situations. Reasons underlying this rule are not applicable at all in this case.

Something similar would happen in the case of a clinical trial carried out in a hospital, in order to show the amount of smoke that a nonsmoker who shares a closed space with smokers inhales. Since the hospital is a workplace, the prohibition also seems to be applicable to this case. Also in this case, we could say that the prescription contained in the formulation of the rule exceeds what its underlying justification allows. However, in this second example, there is a significant difference to the previous one: clearly the clinical trial endangers the health of the nonsmokers who participate in it, but it is estimated that the advantages obtained from the experiment, in terms of its contribution to public health policies, are greater than the disadvantages derived from the harm to the participants' health.

These two examples – the isolated smoker in his office and the clinical trial – help us to illustrate the first definition of defeasibility, D1. In both cases the rule appears to be overinclusive (Schauer 1991, pp. 31 ss.), and it might seem reasonable for judges to decide not to take the rule that prohibits smoking in workplaces as a basis for their decision, precisely because, if they did so, they would go beyond the balance of reasons underlying this rule. When judges deliberate in this way, they are considering that a rule is defeated in one of the possible meanings of the term defeasibility: they consider that the rule is defeated at the level of the prescriptions contained in the formulation of rules (D1); judges understand that the result of applying a rule endowed with semantic autonomy is at odds with what is required by the underlying reasons.

To be more precise, defeasibility at the level of prescriptions may be due either to the fact that the main reasons that support the rule are not applicable to the case – as in the example of the employee who smokes alone – or to the fact that, although some of the main reasons for the rule are applicable, there are other available reasons that have not been considered in the balance of reasons that the rule contemplates, as in the clinical trial example. The first type of situations can be considered as *cases beyond the scope of the rule*, while the second as *exceptions to the rule* (Raz 1990, p.79, Ródenas 1998, pp. 113–115).

Therefore, in relation to defeasibility at the level of prescriptions (D.1), we can differentiate, with regard to its cause, between two subtypes of defeasibility: (D.1.1) defeasibility because *prescription exceeds its justified scope* and prescription defeasibility due to an *exception* (D.1.2). To sum up, in D.1.1 the rule is defeasible because the underlying reasons contemplated in the rule are not applicable to the case, while in D.1.2 the main reasons underlying the rule are still applicable to the case, but the rule is also defeasible because a new decisive reason for the solution, not taken into account in this underlying balance, has arisen.

Defeasibility Concerning Underlying Justifications of Rules (D2)

As we can see in the two previous examples, D1 defeasibility concerns the prescription derived from the normative formulation (resulting from the attribution of its meaning) by which the rule is expressed, but it does not question the balance of reasons underlying to it: we can perceive the excesses of the prescription contained in the formulation of the rule just by looking at the balance of reasons underlying the rule, without having to reopen the underlying balance. However, does it make sense to also speak of defeasibility on this second level? Can we talk about defeasibility at the level of reasons underlying rules?

In order to answer this question, we must stop for a moment and consider a second deeper level of law: the level of reasons underlying rules. The origin of every regulatory rule is a conflict between reasons protected by law. Regulatory rules resolve this conflict by balancing the conflicting reasons. Of course, it is not always easy to determine exactly what the balance between reasons which underlie a rule is (and very often it could be a matter not of knowledge, but of decision). However, when this is possible, situations could appear in which these balance of reasons must be considered to be a misjudgment.

This possibility allows us also to speak of defeasibility at the level of reasons underlying rules (D2). We speak of defeasibility at this level when, in accordance with another balance between reasons, which (i) is implicit or explicit in other norms of the legal system which are either hierarchically or axiologically superior and which (ii) is applicable to the case, we perceive a miscalculation in the balance between reasons that operates as the underlying justification of the rule itself and, as a result, the balancing should be the opposite. In short, it is possible that what is defeated is not the prescription contained in the normative formulation – as in the previous examples (D.1.1) and (D.1.2) – but the commitment (or prevalence judgment) between reasons underlying the rules.

For example, let us consider a legal system which establishes the principle of secularism as a constitutional legal principle, but, despite this, approves a rule regarding the compulsory character of catholic religious education for all students. Obviously this rule is not valid, since (besides being at odds with the principle) there is a miscalculating in the very balance of reasons underlying it: the Catholics' right to receive a religious education prevails over the principle of secularism, in spite of the fact that this second principle is recognized as a fundamental constitutional principle. In short, the balance between reasons that underlies the rule establishing obligatory Catholic religious education is clearly misjudged according to the fundamental constitutional principles of this legal system. It is not just that the prescription contained in the formulation of the rule prohibits more than its underlying justification allows; this is what happens when the rule is overinclusive (as in D1). The situation now is much more problematic: the balance underlying the rule must be revisited and abandoned for all future cases. The balance is defeated because the result of the weighting should be exactly the opposite.

In addition, normative consequences that follow from defeasibility at the level of reasons underlying rules (D2) are characteristically different from those which follow from defeasibility at the level of prescriptions contained in normative formulations (D1): when defeasibility takes place at the level of justifications underlying rules, the rule has failed, both in this case and in successive cases, as a reason for guiding decisions; the balance between reasons itself, operating as the underlying justification of the rule, is what is considered a misjudgment, so it is assumed that the rule should not play any role in making future decisions. Therefore, the consequences following defeasibility in the D2 sense are those characteristic of nullity. In contrast, normative consequences that follow from defeasibility in D1 do not imply any loss of validity of the rule. In cases in which the rule becomes overinclusive, judges are simply entitled to set aside the prima facie applicable rule, but this rule is still valid: it will remain applicable to the majority of the cases to which the justification underlying the rule is relevant.

Radical Defeasibility (D3)

Although the first two meanings of defeasibility – D1 and D2 – are the ones that best reconstruct the way in which defeasibility is understood in our legal practices, there is still a third meaning of defeasibility to be explored: radical defeasibility (D3).

Radical defeasibility is by no means a usual experience in law, that is, it is rare to find examples that illustrate this situation, but it is a theoretical possibility which is not impossible, by hypothesis, to exclude in any real legal system. We speak of defeasibility in this third sense when, according to law, there are reasons for basing the response to a problem of indeterminacy on extra-legal standards, that is, standards which have nothing to do with what the law establishes[1] (Bayón 2000, pp. 87–117).

The presence in the law of defeasible rules in this third meaning will occur if one of these two situations arises (Bayón 2000, p. 119):

I. The first situation occurs "if in Law does not exist any interpretative convention[2] which obliges judges to follow conventionally determined criteria in order to select the relevant features for the normative qualification of a conduct." If such a convention does not exist, rules should be understood as mere "rules of thumb," which means that they alone cannot lead to any concrete decision regarding any particular case, since a legal official's choice between open alternatives is always necessary in order to reach a decision, i.e., a decision whose foundation does not stem from the system (Bayón 2000, pp. 104–105). We can refer to this first situation as *a situation of rules without authority.*
II. The second situation occurs if in the law, there are rules whose order of preference in relation to some of the other rules of the system is not pre-established according to the existing interpretative conventions (Bayón 2000: 109). If the system does not contain a complete set of orders of preference between norms, it will be necessary that it contains some defeasible rules (Bayón 2000, pp. 107–108) in the D3 sense.[3] We can refer to this second situation as *a stalemate situation between rules.*

To sum up, we can speak of radical defeasibility of rules (D.3) in two hypotheses: *a situation of rules without authority* (D.3.1) or *a stalemate situation between rules* (D.3.2) (Ródenas 2001, pp. 72–82). Although radical defeasibility is an exceptional experience in law, it is a theoretical possibility which is not possible to exclude in any real legal system.

Conclusions

To conclude, a paramount question must be addressed: to what extent can we consider *legal* the set of alternative considerations to which legal operators must resort, when they consider that they should set aside applicable rules?

I. Clearly our answer must be negative regarding the marginal third notion of defeasibility (D3) that we have just considered. Courts are not obliged to submit themselves to the law in cases of radical defeasibility, i.e., *a situation of rules without authority* (D.3.1) or *a stalemate situation between rules* (D.3.2). Let us remember that, by definition, in D3 we cannot have recourse to any meta-interpretative standard – based on the legal community's shared implicit or tacit beliefs – concerning semantic or interpretative conventions to settle legal disputes.

[1] Namely, standards which are based on the legal community's shared beliefs concerning either semantic conventions, or interpretative ones.

[2] Applicable to one, several, or all norms.

[3] The doctrine of the margin of appreciation of the ECHR could provide us an example of this second type of situations: in the absence of an interpretative convention in the European Law which allows the European Court to resolve a conflict between two or more rights recognized in the Convention, the Court renounces to establish its own criterion of resolution and refers the resolution (within certain limits) to the criteria selected by each state, even when this implies a lack of homogeneity in the response to substantially identical cases.

Therefore we cannot resort to any implicit legal standard regarding interpretation or hierarchies.

In contrast, defeasibility in the D1 and the D2 sense does not imply denying that law positively determines judges' decisions:

II. As we have just seen, defeasibility in the D1 sense assumes that judges can set aside a rule when a case is beyond the justified scope of the prescription (D.1.1) or when the case constitutes an exception to that prescription (D.1.2). But judges are not free to formulate as many exceptions or exclusions of the scope of the rules as they wish and when they wish; legal officials must clearly show that, in accordance with the system of principles that gives meaning to the institution or to the branch of law concerned (for instance, in criminal law, the principle of legality has a decisive weight, as does the principle of parties autonomy in civil contract law), the controversial case must be considered either an exception to the prescription or excluded from the scope of the prescription.
III. Neither in defeasibility in the D2 sense do judges have free discretion to establish a new balance between first-order reasons which underlie rules. Judges can only set aside a rule when they can show the prevalence of other explicit or tacit preexisting balances in the system among the first-order reasons applicable to controversial cases.

In short, only defeasibility in the D3 sense involves the exercise of a free discretionary power to make law. But this sense of defeasibility is an unusual and marginal phenomenon. In the D1 and D2 senses – those that best reconstruct the way in which our legal practices understand defeasibility – judges must base themselves on the system of principles that gives coherence to the institution or to the branch of law concerned in order to legitimately set aside a prima facie applicable rule. Therefore, they must allude to reasons that are closely related to the ideas of normative coherence or congruence.

Cross-References

- ▶ Law as Reason for Action
- ▶ Legal Norms as Hypothetical Imperatives
- ▶ Legal System and Legal Order
- ▶ Normative Conflicts
- ▶ Raz, Joseph
- ▶ "Semantic Sting" Controversy

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Delgado, Richard

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Introduction

Richard Delgado (b. 1939–) is among the most read, cited, and influential American legal scholars of the past half century. Delgado is a prolific author who has contributed to wide-ranging areas of legal scholarship and social and

political thought. He is most well-known for his crucial role in the critical race theory (CRT) movement. His writings came to define and epitomize CRT for a great number of readers both within and beyond the movement, and – along with frequent co-editor and co-author Jean Stefancic – he has assembled a number of anthologies and casebooks that have shaped the study of race in law, the social sciences, and the humanities (Delgado and Stefancic 2013; Delgado and Stefancic 2017). Beyond being a central contributor to the major topics and debates at the heart of CRT scholarship in its burgeoning period in the late 1980s and early 1990s – the illusory character of apparent civil rights gains, the limitations of hegemonic models of scholarship, the call for counternarratives – Delgado was an influential voice in the development of CRT's later outgrowths, particularly Latino/a Critical Theory (LatCrit) and Critical Whiteness Studies. Delgado's attention to multiple, interrelated dynamics of oppression, combined with his inventive and compellingly readable authorial style have made him a unique and highly valued contributor to the project of rigorously studying race and racism in the United States and beyond.

Scholarship

As Delgado recounts in 1984's "The Imperial Scholar," he had begun his career as a law professor by following the counsel of elder scholars who implored him to do his work in the traditional fashion and to avoid being too attentive to "civil rights or other 'ethnic' subjects" (Delgado 2016: 167–174). In his early career, his publications covered a wide variety of issues, with recurring areas including the law of science and medicine, religion and the First Amendment, and questions of expertise and testimony. His forays at this point into "ethnic" terrains were limited, but nonetheless quite influential; these included a 1975 article on Mexican-Americans as a legally congnizable class and a 1982 article, "Words that Wound," that would prove central to debates on hate speech in American law. Having established himself as a rigorous scholar in a breadth of areas, he set out to tackle racism and civil rights more directly a decade into his professorial career, and at that point tried to get up to speed in current scholarship in that area. What he discovered, though, was a field dominated by "white scholars' systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship" wherein "[t]he mainstream writers tend to acknowledge only each other's work." Practices of reading and citation were dictated by status and implicit or even explicit forms of epistemic racism, yielding scholarship where scholars of color in the legal domain and beyond simply went unread and uncited in a version of what Reiland Rabaka would later term "epistemic apartheid" (Rabaka 2010). The consequence of these perspectives, Delgado shows, is a presumed white normativity in the perspective of legal scholarship on race, functioning not only to crowd out theorists of color but to tailor legal views to the interests of the white and well-off, to breed ignorance of the horrors of past and present regimes of racial subordination, and to propose ameliorative endeavors that place undue burdens on communities of color.

Delgado's solution to the problem of imperial scholarship could have been, simply, a plea for greater representation of thinkers of color in civil rights scholarship. However, this would be to treat the matter as merely a quantitative one without tackling the qualitative issues the problem posed. In reviewing Derrick Bell's *And We Are Not Saved* – a work composed of parables ("Chronicles") interspersed with dialogues between the text's unnamed narrator and its protagonist, fictional civil rights litigator, and law professor Geneva Crenshaw – Delgado departed from the standard approach and wrote a narrative of his own, envisioning a dialogue between Crenshaw and a psychiatrist in order to explain the hopeful turn Bell's ending suggested in spite of his (and Geneva's) uncompromisingly bleak view of the prospects for Black people in the United States. Delgado then concluded, in praising Bell's text and assisting the reader in understanding the approach of his review, that narratives have an anti-imperial and counter-hegemonic function: "Cases and case analysis purport to be objective,

impartial, rigorous, rational, quasi- scientific. They proceed to a pre-determined conclusion, leaving the reader little opportunity to reach a different one, or the same one in a different way. Stories, by contrast, are noncoercive. They invite readers to pick and choose elements that ring true and thus construct their own story."

After coauthoring a similar dialogue – this time between an imagined father and daughter – for an article on parental leave with Helen Leskovac, Delgado wrote one the most widely read legal essays of the era, "Storytelling for Oppositionists and Others: A Plea for Narrative." In that rich work, elegantly bridging legal theory and social philosophy, Delgado offers a deft and nuanced view of how stories and what he termed "counter-stories" function, respectively, to reinforce and unsettle the ideological background of the status quo (Delgado 2016: 3–19). In the several years following, Delgado's contributions across a series of articles shaped the heated debate on the status and function of narrative in law and critical race theory. He frequently wrote critical reflections on the reception of the new, critically oriented scholarship, including an article revisiting "The Imperial Scholar" and charting the responses of the original clique of imperial scholars to the prolific and field-changing contributions of an emerging generation of critical race theorists and radical feminists. Delgado discerned a typology of how those occupying hegemonic intellectual positions responded to transformative work in such a way as to retain, if less dominantly, the perches to which they had grown accustomed. He contributed to a number of debates, including ones initiated by his colleague Pierre Schlag's critique of normativity in legal writing, on why preceding paradigms and "dominant narratives" proved so durable in light of efforts to overcome them. A central concern of Delgado throughout this period was the question of the cultural functioning of power. In seeking to work through power from a vantage informed by sociology of knowledge, Delgado sought to demonstrate how questions of individual interpretation – in law, in scholarship, and beyond – were shaped by naturalized power dynamics in such a way as to dismiss counter-hegemonic protest and thought. If racism it not merely *commonplace*, Delgado argued, but *normal*, then the standard means of identifying and correcting for racial inequalities in law and racist presumptions in legal scholarship would not only prove inadequate but may well exacerbate the underlying condition. Calls for dialogue, listening, cross-racial "contact," empathy, and the like are not antidotes but function within the framework of a dominant narrative that structures their meaning.

In 1992, Delgado composed a dialogic text, "Rodrigo's Chronicle," offering a conversation between an elder civil rights law professor and an emerging scholar, Rodrigo Crenshaw, the half-brother of Bell's Geneva Crenshaw. In 1993, Delgado published in rapid succession a series of articles continuing the dialogue with Rodrigo, and over the three decades since Delgado has produced dozens of law review articles and four books centering on the narrator's conversations with Rodrigo (and, occasionally, Rodrigo's partner, Giannina, and colleague, Laz). With this authorial framework, Delgado put into practice many of the arguments he had been making in his essays on narrative and counter-stories. Using the dialectical interplay between Rodrigo's imaginative and radical approach to questions about social and political reality and the elder professor's sympathetic but grounded responses, Delgado was able to use his characters to work through theoretical questions that transcended the normative conventions and narrow dictates of typical legal scholarship. The conversations had the philosophical character of a Platonic *elenchus*, but were geared less toward delivering a knock-down argument in favor of a single conclusion but rather toward fulfilling a pedagogical function in helping the reader imagine what alternatives to what might otherwise be presupposed. Delgado used Rodrigo to articulate counter-stories, ways of narrating reality that challenged the dominant narrative and facilitated transformation (Delgado 1999, 2010, 2016). These dialogues were not mere flights of fancy: carefully footnoted with numerous academic references, Delgado fused the imaginative power of the counter-story with a rigorous scholarly erudition, transcending the formal limitations of the law review article but

retaining the power of its citational practices to embolden further research. Indeed, Delgado used these dialogues not to replace but to supplement more conventional legal scholarship: the major ideas explored are, nearly across the board, also the subjects of Delgado's more didactic and straightforward prose elsewhere; the dialogue format, though, enables a different way of presenting and thinking through these ideas, geared toward the enrichment of thought as opposed to merely the communication of a narrow thesis. The range of topics covered in the Rodrigo chronicles is vast, but topics include the rise and decline of hegemonic cultures, intersectionality, the compatibility of liberal democracy and racism, the relationship between forms of racial subordination experienced by different groups, race and racism in a "post-9/11 world," the relevance of postcolonial thought and neocolonialism to racial minorities in the United States, the limitations of empathy, and, of course, further reflections on the prospects for narratives to change legal practice and social reality.

Conclusion

Delgado's work has inspired a wide variety of scholarship and critical engagements (Feldman 1992; Gould 1999; Solorzano and Yosso 2001; Heinze 2007; Johnson 2015; Michelman 2015; Parea 2015; Ramirez 2015; Taylor et al. 2015; Barnes 2016; Rudolph Cole 2017). Considering in isolation just the Rodrigo series, or considering just Delgado's scholarship within any of several discrete areas alone – for example, hate speech, narratives, LatCrit, whiteness studies, the elaboration of Bell's interest-convergence thesis, the relation between right wing politics and prospects for communities of color – is sufficient to yield the judgment that he's one of the more distinguished and significant scholars to have emerged through the CRT movement. Taking all of these multifarious contributions together, Delgado is simply one of the most consequential theorists of race and law that the United States has produced. Those seeking to understand the historical development of critical race theory – not only in legal studies but far beyond – will find Delgado's an essential voice for study, and his philosophical nuance and convention-defying approach ensure that his contributions will continue to edify, stimulate, and challenge readers for generations to come.

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- ▶ Critical Theory and International Law
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D

Deontic Logic

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Introduction

Deontic logic is the branch of symbolic logic that studies the formal properties of normative concepts.

It contributes to the general theory of law with a formal analysis of such concepts as obligation, permission, prohibition, commitment, rule, authority, power, rights, and responsibility. It analyzes the formal properties of normative systems, helping to clarify notions such as legal gaps and legal contradictions.

The first viable system of deontic logic was presented by G.H. von Wright in his classic essay "Deontic Logic" (1951). There was a previous attempt to build a formal theory by Ernst Mally, in 1926, but it was unsuccessful. As a matter of historic curiosity, it can be added that it is possible to find suggestions of a logic treatment of normative concepts as far as Aristotle, the Stoics, a modern philosopher like Leibniz, and also in Bentham.

After von Wright's seminal paper, many systems of deontic logic were developed, even by von Wright himself. Many of them were designed to avoid certain paradoxical results that were seen to arise in his original system.

Many problems remain open. From a philosophical point of view, the main one concerns the interpretation and validity of its basic principles.

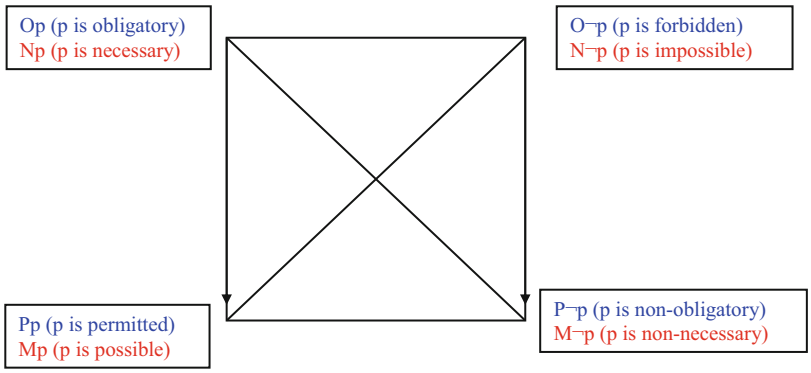
There is also a great deal of controversy about the proper way to represent some basic deontic notions such as those of commitment and conditional obligation.

Many contemporary studies in the field are oriented to the formal representation of legal knowledge, the analysis of legal argumentation, and the links between deontic logic and computer science, artificial intelligence, and organization theory. In this line of research, important efforts are focused on applications, such as the formal specification of systems for the management of bureaucratic processes in public or private administration, database integrity constraints, computer security protocols, electronic institutions, and norm-regulated multi-agent systems.

Most systems of deontic logic are built upon propositional logic, and lack the expressive resources of quantification. As a consequence, their applicability to real-life normative discourse in moral or legal contexts is rather imperfect. In order to represent legal knowledge, it seems that deontic logic languages must be enriched not only with quantification but also with notions for agency and temporal devices. In recent years, many lines of research were headed in those directions.

The Classic and the Standard Systems

Von Wright's approach (1951) is generally known as "the Classic System". It is based upon the observation that there is an analogy between the deontic notions "obligation" and "permission" and the alethic modal notions "necessity" and "possibility". The deontic concepts are interdefinable: If "permission" is taken as primitive, as in von Wright's essay, "Op" (it is obligatory to p) can be defined as "¬P¬p" (it is not the case that not to do p is permitted), where p stands for the name of a generic act, like swimming or smoking. Conversely, if obligation is taken as primitive, "Pp" can be defined as "¬O¬p". The concepts of "necessity" and "possibility" are related in the same way. If we substitute



"possible" for "permitted" and "necessary" for "obligatory" in the aforementioned definitions, we obtain parallel interdefinitions for the alethic modal concepts.[1]

Other similarities between alethic modal notions and deontic notions are represented in the graphic.

The vertical arrows express subalternation (entailment from the upper to the lower sentence), the diagonals indicate contradictions, the upper horizontal line means contrariness (both cannot be true), and the bottom horizontal line expresses subcontrariness (both cannot be false). The deontic expressions (in blue) maintain subalternation, contradiction, contrariness, and subcontrariness in the same way as the alethic modal expressions (in red).

Moreover, the notions of "permission" and "possibility" behave in the same way with respect to conjunction and disjunction, and the same happens between "obligation" and "necessity". Permission can be distributed into the disjunction and obligation can be distributed into the conjunction. On the other hand, "it is permitted to p and q" entails "it is permitted to p and it is permitted to q," but the converse is not valid; and "it is obligatory to p or it is obligatory to q" entails "it is obligatory to p or to q," but, again, the converse is not valid.

The most significant difference between deontic and alethic modal concepts lies in the fact that whereas alethic modal logic accepts as valid the implication from "p" to "it is possible that p," and from "it is necessary that p" to "p," any sound deontic logic must reject their analogues: that p is the case does not imply that it is permitted, and that p is obligatory does not imply that it is the case. Obligations can be violated and impermissible things do hold.

Von Wright's system is included in many other systems of deontic logic. Among them, the best known and most discussed, and one of the first axiomatically specified, is the so-called Standard System.

There are two important differences between standard deontic logic (SDL) and the classic system: First, in SDL the deontic operators are understood as operating on propositions, not on names of generic acts. So, "Op" is to be understood as stating the obligation that some state of affairs – the one described by p – be the case, not as expressing the obligation to perform a certain type of action. It must be read as "it is obligatory *that* p," not as "it is obligatory *to* p". SDL may be conceived as a logic about what ought to be the case, as opposed to a logic about what ought to be done. This feature seems to obscure the agent relativity of legal obligations, permissions, and prohibitions. Second, there is a rule of inference to the effect that every logically true proposition (e.g., every tautology), is obligatory, and, as a consequence, every contradiction is forbidden (this rule resembles the *rule of necessitation* of

[1] The analogies of interdefinability were first noticed by Leibniz in *Elementa Iuris Naturalis*, 1672.

alethic modal logic). Both modifications strengthen the analogy with modal logic.

The Paradoxes of Deontic Logic

There is a large number of problems and limitations attributed to standard deontic logic. They are usually called "paradoxes," but that word is used here in a loose sense. Some of them are not real paradoxes but results that could be found counter-intuitive. At any rate, they show that the formal language does not reflect faithfully the way in which some normative statements are generally understood in ordinary language.

Ross's Paradox[2]

In SDL, O(pvq) (it ought to be the case that p or q) can be derived from Op. So, if it ought to be the case that a letter is mailed, then it ought to be the case that the letter is mailed or burnt.

It seems rather odd to say that an obligation to mail a letter entails an obligation that can be fulfilled by burning it. However, this is a misunderstanding. The implication does not mean that the original obligation can be fulfilled by burning the letter. By propositional logic, whenever "p" is true, it is also true any disjunction of which "p" is part. So, if it is obligatory to see to it that p is the case, it is obligatory to see to it that the disjunction of "p" with any proposition is the case.

The air of paradox derives from the fact that, in ordinary language, a disjunctive obligation is generally understood as one in which the agent is free to choose any of the alternatives; but this is not the meaning of O(pvq) in SDL.

The Paradox of Derived Obligation[3]

In the Classic System, as well as in SDL, the idea of conditional obligation (or commitment) is represented by "O(p ⊃ q)", where "p ⊃ q" is understood as a material conditional. It can be proved that, if some state of affairs, say p, is forbidden, then it is obligatory any conditional in which p is the antecedent. So, if it is forbidden that I steal a gun, then it ought to be that if I steal a gun I kill someone.

Now, if we substitute "¬pvq" for "p ⊃ q," which is logically equivalent, it is easy to see that this paradox is but a variation of Ross's.

Contrary-to-Duty Paradox[4]

Consider the following:

1. It ought to be that John visits his mother.
2. It ought to be that if John visits his mother then he tells her he is coming.
3. If John doesn't visit his mother, then he ought not to tell her he is coming.
4. John doesn't visit his mother.

Proposition (3) expresses what Chisholm named "a contrary-to-duty imperative," it says what a person ought to do if she has violated her duties.

It is reasonable to expect that (1)–(4) constitute a mutually consistent and logically independent set of sentences. Yet, it can be shown that, if we represent the logical form of (2) as O(p ⊃ q), and represent (3) as ¬p ⊃ O¬q, a contradiction can be derived in SDL, as can be easily shown: From (1) and (2) we obtain, by deontic detachment (or deontic Modus Ponens), "it ought to be the case that John tells his mother he is coming," and from (3) and (4) we get, by factual detachment (or factual Modus Ponens), "John ought not to tell his mother he is coming". So, if norms (1)–(3) hold, it is logically impossible that John doesn't visit his mother, which is absurd.

The cause of the paradox seems to be that SDL allows both factual and deontic detachments. This led to attempts to block or modify one or both of those detachment principles, to introduce temporal restrictions to the deontic operators, and also to a reconsideration of the formalization of conditional obligations.

This last idea was explored, among others, by von Wright. In von Wright (1956), he presented a new system of deontic logic in which the deontic

[2] Ross (1941).

[3] Prior (1954).

[4] Chisholm (1963).

operators are intrinsically associated with conditionality. The atomic expressions have the form "O(p/q)" and "P(p/q)," which can be read "it is obligatory that p given q" and "it is permitted that p given q" respectively. The systems that use this kind of deontic operators are named "dyadic deontic logics".

Nowadays it seems to be generally admitted that material implication does not express the notion of conditional obligation faithfully, and the dyadic approach tends to be the one most commonly followed.

The Problem of Interpretation

In standard logic, to say that a sentence derives from a set of sentences means asserting that, in every possible interpretation in which all the sentences appearing as premises are true, so it is the sentence appearing as conclusion. The meaning of the logical connectives is also characterized by the truth-value given to the propositional compounds taking into account the truth value of the component propositions. Now, if norms do not have any truth-values, it is not clear what could possibly mean to say that a norm logically follows from other norms or that two norms are contradictory; nor is it clearer what the conjunction of two norms means. However, it seems intuitively true that there are logical relations between norms, that some norms are incompatible, and that the conjunction of two norms makes sense.

The problem is usually framed as a dilemma –called "Jørgensen's dilemma"–: either there are no logical relations between norms and logical connectives cannot be applied to norms or else the logical relations and the logical connectives can be characterized in a way that does not involve the notions of truth and falsity.

The dilemma is based on the philosophical assumption that norms cannot have truth-values. So, an obvious way out would be to deny this claim. As a matter of fact, most presentations of deontic logic treat norms as if they could bear truth-values. This is usually explained by a semantic theory of possible worlds.

In von Wright (1963), a distinction is made between norms, norm-formulations, and norm-propositions. Norm-formulations have a characteristic ambiguity: the same sentence may be used both prescriptively to rule other people's behavior and descriptively for stating that some norm exists. In the descriptive use norm-formulations do have truth-value; then their logical relations can be accounted for in the standard way. Accordingly, the author distinguishes between a prescriptive and a descriptive interpretation of the deontic formulas. He considers deontic logic as a logic of descriptively interpreted expressions. "But –he adds– the laws (principles, rules) which are peculiar to this logic, concern logical properties of the *norms* themselves, which are then reflected in logical properties of norm-propositions. Thus, in a sense, the 'basis' of Deontic Logic is a logical theory of prescriptively interpreted *O*- and *P*-expressions" [p.134].

Von Wright seems to have thought that deontic operators have the same logical properties under a descriptive as under a prescriptive interpretation. However, Alchourrón (1969) showed that the logic of normative propositions differs from that of norms in some important aspects. In that paper, a logical system of normative propositions is presented for the first time. Yet, it is explicitly based on the logic of norms.

Alchourrón and Bulygin (1981) explore the consequences of characterizing norms as the result of the prescriptive use of language. In this view, named "the expressive conception," norms only differ from assertions or questions on the pragmatic level; there is no difference on a semantic level. The possibility of a logic of norms is then precluded, but they develop a logic of the descriptive norm-contents, i.e., of normative propositions. The system obtained looks very much like the classic system. However, it is dubious that a system of normative propositions could replace a real deontic logic because, in order to justify or criticize a decision, it seems necessary to use norms. This is not the same as using descriptive sentences about the existence of norms in some normative system.

In von Wright (1983), the possibility of deontic logic is rejected. However, an analogous system is

derived from a set of minimal criteria for rational legislation.

Alchourrón and Martino (1990) grasp the second horn of Jørgensen's dilemma. They contend that the notion of deductive consequence can be characterized by some formal properties, without any reference to truth values. Then, taking that notion as primitive, the deontic operators, as well as the logical connectives, can be defined by sintactic rules that indicate how to introduce and how to eliminate them within a deductive context.

Concluding Remarks

Since deontic logic was launched by von Wright as an academic specialization, the proliferation of competing formal systems is impressive. They can be classified by different criteria. They can be divided into monadic or dyadic deontic logics according to the deontic operator they use. According to their treatment of conditional norms, they can be characterized as deontic logics with material implication, with necessary implication, with defeasible conditionals, with counterfactual conditionals, etc. They can also be divided into different groups according to the kind of detachment they admit (factual, deontic, or both).

It is an area in which there is still a good deal of disagreement about fundamental matters.

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D

Deontic Logic and Legal Rules

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Introduction: The Concept of Deontic Logic

Deontic logic is a branch of logic that studies normative concepts such as obligation ("ought"), permission ("may"), prohibition ("may not"), and other related notions ("optional," "good," "bad," "claim," "power," "liberty," "immunity," "supererogatory," "blameworthy," "praiseworthy," etc.). It investigates the logical features of these concepts, as well as the logical relations among propositions that contain them as their essential constituents. Deontic logic is also concerned with the study of norms, normative systems, and different forms of normative reasoning. That is why it is considered to be particularly relevant for investigating the logical aspects of law, ethics, and other fields in which this kind of reasoning plays a prominent role (see Hilpinnen 1981, 2002; McNamara 2006; Von Wright 1951, 1999).

The origin of the term "deontic" can be traced back to the Greek word "δέον" (gen. δέοντος), which may be translated as "duly," "as it should

be," and "that which is binding." Deontic logic is often treated as a branch of modal logic. This is due to the fact that the logical behavior of deontic concepts ("deontic modalities" – obligatory, permitted, forbidden) is found to be similar to the behavior of the so-called alethic modalities (necessary, possible, impossible), which are explored in the framework of basic modal logic (see Von Wright 1951). However, the laws that govern alethic modalities are not identical to those of deontic modalities. For example, while if something is necessary, it must also be (true), the fact that something is obligatory does not imply that it will, indeed, be brought about. In fact, people often fail to comply with the normative requirements, and that introduces a need for a concept of sanction for breaking the deontic obligations. Thus, although it is closely connected with modal logic, deontic logic is a field with its own theoretical and practical interest.

Historical Development of Deontic Logic

The analogy between alethic and deontic modalities has been investigated since medieval times, especially by the logicians of the fourteenth century (see Knuuttila 1981). In the seventeenth century, the young Leibniz, in his essay on natural law, also utilized this analogy to define what he called "legal modalities" (*iuris modalia*). He observed that the legal concepts of permitted (*licitum*) and obligatory (*debitum*) can be defined through corresponding alethic concepts of possibility and necessity. Thus, according to him, the permitted is that which is possible for a good person to do, and the obligatory is that which is necessary for a good person to do (see Hilpinen 2001, 159–160).

From the nineteenth century onward, different aspects of the study of normative phenomena have been treated in the work of prominent philosophers and jurists. Jeremy Bentham developed his "science of morality" under the name "deontology." Alexius Meinong explored the possibility of defining normative concepts from the perspective of actions of agents and their praiseworthiness or blameworthiness. Wesley Newcomb Hohfeld attempted disambiguation of the term "rights" by exploring the opposition and correlation of the concepts of right, duty, privilege, power, immunity, liability, etc. A more formal approach to deontic concepts was developed by Ernst Mally in his work *Grundgesetze des Sollens*: *Elemente der Logik des Willens* (1926). In fact, Mally constructed the first formal system of deontic logic, conceived of as a basis for the exact system of pure ethics that he intended to build.

However, in the 1930s and 1940s, critical objections started to be raised concerning the very possibility of logical treatment of norms and related deontic entities. Thus, for example, Mally's system of deontic logic was subjected to harsh criticism by Karl Menger. Additionally, Jørgen Jørgensen (1937) convincingly problematized the applicability of the standard conception of logical truth and validity to imperatives and other normative sentences (for the detailed history of the development of deontic logic, see Hilpinen and McNamara 2013).

The decisive impetus, however, for the constitution of deontic logic as "a full-fledged branch of *symbolic* logic" (McNamara 2006, 199) came around the middle of the twentieth century. In 1951, Georg Henrik von Wright published his seminal paper "Deontic Logic," which marked the beginning of a new era in the study of deontic logic. Von Wright stayed preoccupied with the field of deontic logic through all his intellectual life, greatly contributing to its development with several important publications: *Norm and Action*: *A Logical Enquiry* (1963), *An Essay in Deontic Logic and the General Theory of Action* (1968), *Deontic Logic*: *A Personal View* (1999), etc. Apart from von Wright, the problems of deontic logic have also inspired the work of many other logicians, philosophers, and legal theorists of the twentieth and twenty-first centuries, like Georges (Jerzy) Kalinowski, Stig Kanger, Alan Ross Anderson, Nicholas Rescher, Héctor-Neri Castañeda, Lennart Åqvist, Carlos Eduardo Alchourrón, Eugenio Bulygin, Jan Woleński, Kazimierz Opałek, Zygmunt Ziembiński, Jerzy Wróblewski, Jaakko Hintikka, Dagfinn Føllesdal, Risto Hilpinen, Paul McNamara, Simo Knuuttila,

Patrice Bailhache, Arend Soeteman, Henry Prakken, Giovanni Sartor, Marek Sergot, Guido Governatori, Pablo E. Navarro, Jorge L. Rodríguez, and many others.

In recent decades, research in deontic logic has been closely connected with the field of Artificial Intelligence and Law, especially in relation to the formalization of fundamental legal concepts, the building of formal models of legal reasoning and argumentation, and expert systems in law. These new trends make deontic logic a particularly diversified and vibrant field of contemporary logical investigations.

The Formal Structure of Deontic Logic: Syntax and Semantics

Von Wright's system of 1951 represents a basis for what is nowadays known as Standard Deontic Logic (SDL). It is built in an axiomatic manner: starting from a number of primitive, undefined notions and a number of axioms, the theorems of deontic logic are derived by a set of transformation rules. These axioms and theorems are supposed to reflect the laws that govern our intuitive notions of obligation and permission, although not all of these laws are intuitively obvious.

SDL is a monadic system, which means that the deontic concepts (called "deontic operators") apply to single, elementary propositions in order to build compound, molecular propositions (the presentation of the fundamentals of SDL below is based, in its main lines, on McNamara 2006). It uses the language of classical propositional logic in which there is an infinite set of propositional variables (symbolized by small Latin letters p, q, r, etc.). The basic logical operators (connectives) of SDL are negation (~) and implication (→), interpreted as a material conditional (other logical operators – conjunction ("and," &) disjunction ("or," ∨), equivalence ("if and only if," ≡) can be defined through the basic operators of the system – negation and implication).

A new element, added to the language of propositional logic, is the deontic operator O, obligatory. Thus, Op reads "p is obligatory." Other deontic operators can be defined with the help of the operator O and negation. Thus, for P (permitted), we have the equivalence $\mathrm{P}p \equiv \sim O \sim p$ (informally: if p is permitted, then its negation is not obligatory and vice versa), and for F (forbidden), the equivalence $\mathrm{F}p \equiv O \sim p$ (informally: if p is forbidden, then its negation is obligatory and vice versa).

Besides the logical truths of propositional logic, the new, deontic axioms of the system are the following:

(a) $\mathrm{O}(p \rightarrow q) \rightarrow (\mathrm{O}p \rightarrow \mathrm{O}q)$, which means that if it is obligatory that p implies q, then obligatory p implies obligatory q (in other words: "if a material conditional is obligatory, and its antecedent is obligatory, then so is its consequent").
(b) $\mathrm{O}p \rightarrow \sim O \sim p$ – if p is obligatory, then its negation is not obligatory.

From the transformation rules, the system uses the *modus ponens* rule:

If $\vdash p$ and $\vdash p \rightarrow q$, then $\vdash q$, meaning that if a material conditional and its antecedent are theorems, then the consequent is also a theorem, and the rule
If $\vdash p$, then $\vdash \mathrm{O}p$, meaning that if p is a theorem of the system, then the claim that p is obligatory is also a theorem.

For the formal system SDL, it is possible to construct a standard, Kripke-style semantics, based on three fundamental elements:

- A set of possible worlds, W
- A function of interpretation, I, which assigns a truth value to each proposition in each possible world
- A relation R that connects the possible worlds (Rij means that the world i is related to the world j by the relation R).

The relation Rij holds if and only if j is a world where everything that is obligatory in i holds (i.e., in j there are no violations of the obligations that hold in i). The worlds which are so related to i are called "i-acceptable

worlds." The relation R is "serial," which means that for every world *i*, there is at least one *i*-acceptable world. In a given world, propositions are either true or false. The basic idea of this semantics is that "the normative status of a proposition from the standpoint of a world *i* can be assessed by looking at how that proposition fairs at the *i*-acceptable worlds" (McNamara 2006, 211). Thus, iff p holds in all the *i*-acceptable worlds, it is obligatory; iff p holds in some such worlds, it is permissible; iff p holds in no such world, it is impermissible; etc. A formula is considered to be valid when it must be true at any world in any such model of worlds related in a serial way (McNamara 2006, 212).

The formal construction of deontic logic in its basic form makes it possible to formulate important and interesting deontic theorems, some of which express the basic "deontic truths" that we intuitively capture. In his 1951 essay, von Wright mentions some of them; for example, if something is obligatory, then it is also permitted; doing the permitted can never commit us to do the forbidden; if something commits us to the forbidden, then that thing is also forbidden; it is logically impossible to be obliged to choose between forbidden alternatives; etc.

However, the first attempts to construct deontic logic as a formal system revealed some fundamental dilemmas in its foundations, including the question of the types of entities to which deontic operators are supposed to apply – names of act types (smoking, murder, adultery, etc.) or names of sentences, like in classical propositional logic. Other posed dilemmas are: Can deontic operators be iterated, i.e., should the expressions of the type OOp ("it is obligatory that it is obligatory that p") be part of the formal deontic system? How to formally express the phenomenon of the violation of an obligation? Although the system of SDL successfully resolved some of these questions by interpreting the variables and operators as applying to propositions (and thus enhanced the original von Wright's system, in which they applied to names of acts), it still generates a considerable number of theoretical puzzles and paradoxes.

Controversies and Challenges of Deontic Logic: Ambiguities of Normative Discourse

The puzzles and paradoxes related to the system of SDL are numerous and heterogeneous (see, e.g., Hansen 2006; Hilpinen and McNamara 2013; Navarro and Rodríguez 2014). Some of the most widely known include:

- "Ross' paradox" (named after Alf Ross, who first discovered it), related to the formula $\mathrm{O}p \rightarrow O(p \vee q)$; informally, if some state of affairs p is obligatory, then that state of affairs or any other state of affairs is also obligatory; for example, if somebody is obliged to mail a letter, then he/she is obliged to mail the letter or to burn it, which sounds counterintuitive.
- "Prior's paradox" (named after A.N. Prior), related to the formula $O \sim p \rightarrow O(p \rightarrow q)$; informally, the doing of what is forbidden commits us to the doing of anything whatsoever, e.g., the forbidden act of stealing commits us to committing adultery, which sounds counterintuitive.
- "Good Samaritan paradox" related to the formula $O(p \ \& \ q) \rightarrow \mathrm{O}q$; for example, if helping the robbed man is obligatory, it follows that his being robbed is likewise obligatory, which sounds counterintuitive.
- "Free choice permission paradox," related to the formula $\mathrm{P}(p \vee q) \rightarrow \mathrm{P}p \vee \mathrm{P}q$; informally, if a disjunction of two states of affairs is permitted, then each of them is permitted. Although this formula sounds plausible, it cannot be derived in the system of SDL.

The abovementioned paradoxes are but a small part of a long list of paradoxes and other conceptual challenges related to the system of SDL. However, it seems that the most general objection not only to this system, but to the very perspective of deontic logic, is contained in the so-called Jørgensen's dilemma (Jørgensen 1937), which in von Wright's formulation reads as: "Since norms are usually thought to lack truth value, how can logical relations such as contradiction and

entailment (logical consequence) obtain between norms?" (Von Wright 1991, 266).

This problem contributed to the revealing of the fundamental ambiguity that lies in the conceptual basis of deontic logic: the ambiguity between the *prescriptive* and the *descriptive* aspect of deontic sentences. Interpreted in a prescriptive way, deontic sentences express norms. In a descriptive interpretation, however, "they express (true of false) propositions to the effects that certain norms exist" (Von Wright 1991, 265). The formulation of this ambiguity inspired the proposal to devise, besides a logic of norms, a separate "logic of norm propositions," as a means of overcoming the problems generated by the ambiguity (see Alchourrón and Bulygin 1989).

Apart from this ambiguity, other conceptual confusions in our deontic intuitions that were identified by the formal-logical approach concern the notions of permission and obligation. It turned out that they are not homogeneous, but inherently heterogeneous. Consequently, it is important to distinguish between different kinds of permissions/obligations (e.g., between the so-called "strong" and "weak" permissions/obligations) in order to avoid conceptual confusions in normative discourse (see Von Wright 1968, Hansson 2013; Hansen et al. 2007; Soeteman 1989; for a criticism of the concept of "permissive norm", see Opałek and Woleński 1991).

Other, more generalized ways to overcome paradoxes and challenges of standard deontic logic include (but are not reduced to):

1. Strengthening the SDL with new axioms
2. Reducing deontic logic to alethic modal by introducing a specific deontic constant stating that all relevant normative demands are met
3. Building a so-called dyadic calculus of deontic logic in which the deontic operators apply not to propositions, but to corresponding pairs of propositions, built by the symbol "/" (p/q is interpreted as "p is permitted, given that q")
4. Building a stronger connection of deontic logic with logic of action and temporal logic as its theoretical prerequisites (see McNamara 2006; Von Wright 1963, 1968).

However, although these approaches contributed to the resolving some of the puzzles of deontic logic, many of them are "still alive and kicking" (Hansen 2006).

Deontic Logic, Legal Systems, and Legal Rules

Law is one the most important normative phenomena of human society, both by its internal complexity and its deep influence on the life of communities and individuals. As a logic of norms and normative systems, deontic logic is arguably highly relevant for the analysis, representation, and better understanding of conceptual, logical, and inferential structure of law and legal reasoning (see Alchourrón and Bulygin 1971; Soeteman 1989). Indeed, the theoretical analyses related to deontic logic treated many important questions that concern some of the fundamental concepts of law: What is a norm? What types of norm are there? Which factors determine the existence and the validity of a certain norm? Are permissive norms genuine norms or only imperative norms deserve that name? What is the relation between norms and rules that express them? What types of legal rules are there? What is the logical structure of legal rules, which allow exceptions and which can be changed or overridden in the course of time? Which are the factors that, in some situations, can block the actual application of applicable legal rule(s) to a particular case? What are the most important features of legal systems as corpora of norms? Which are the peculiarities of consistency and completeness as features of legal systems compared to the same features of axiomatic systems in logic? How to deal with normative gaps and normative conflicts in legal systems? How to establish prioritization and hierarchies of principles in legal reasoning?

In an attempt to answer these and other related questions, research on deontic logic contributed to the clarification of the specific ontological status and ontological effects of legal rules as vital parts of the "institutional reality"

of human society. As Hage (2005) emphasizes, they have the capacity to impose specific structures on the (legal) world, be it in a form of legal meaning conventions (definitions), competence-conferring rules, or deontic legal rules in a narrower sense. The rules of the last group characteristically attach deontic facts to the facts that satisfy their conditions, or in cases where they lack conditions, they directly create deontic facts (Hage 2005, 194–195).

Another important contribution of contemporary application of the perspective of (deontic) logic to the study of law is the distinction of two kinds of study related to legal rules: reasoning *with* legal rules and reasoning *about* legal rules (see Prakken and Sartor 2015). The first kind includes phenomena related to the representation of legal rules and corpora of legal regulations. Here, the emphasis is put on legal conclusions that deductively follow from these corpora. The second kind includes phenomena related to the reasoning about legal rules and their application in novel circumstances, in situations that need interpretation or order to establish the facts of the case (Prakken and Sartor 2015, 1). These analyses show that there are significant logical specificities in reasoning that includes legal rules compared to the reasoning with ordinary sentences. To wit, legal rules should be applied in order to generate deontic consequences, and a great deal of legal reasoning is concerned precisely with the conditions of applicability of certain rules and the factors that determine their actual application.

However, despite its important results, there are still different opinions concerning the real capacity "of conceiving deontic logic as a suitable account of the logical behavior of (sentences expressing legal norms)," because of "the ontologic, semantic, and epistemic features of legal norms" and rules that express them (Mazzarese 1991, 374). Also, in the field of AI and Law, there is some "uncertainty concerning the potential role of deontic logic in legal knowledge representation," based on the belief that "a good deal can be achieved [. . .] in the absence of explicit representation of the deontic notions" (Jones 1990, 237).

Conclusion

The question of assessing the real degree to which deontic logic contributes to the study of legal rules and other legal phenomena is still open to discussion. However, as the history of deontic logic has shown, the fundamentals of deontic systems often allow for the possibility of their further sophistication and upgrading of their expressive power. Some of the contemporary research is taking precisely that direction of extending deontic logic with new concepts (like groups of actors, authorities/enactment, authority hierarchy/applicability, etc.) in order to accommodate the peculiarity of legal rules and reasoning with them (Royakkers 1998). Their eventual success may soften the explicit or implicit skepticism concerning the theoretical merit of deontic logic, by reaffirming its role as "a study of conditions that must be satisfied in a rational norm-giving activity" (Von Wright 1991, 266) and a tool for enhancing the criteria of normative rationality.

Cross-References

► Is and Ought Distinction in Legal Philosophy
► Law and Efficacy
► Rights: Legal and Moral

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Descartes, René

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Introduction

Renatus Cartesius, in Latin (1596–1650), whom his English contemporary Hobbes referred to as Mieurs Des Cartes and "the best geometer in the world," since he had made possible analytical geometry and the rectilinear coordinate system of algebraic geometry. He was by vocation a mathematical physicist, but also a respected philosopher in the history of the Western world; for promoting the programmatic agenda of modern philosophy and for influencing the development of science in general.

He was born in the city of Haye in Touraine, central France, which was renamed in 1967 as Descartes, in his honor. His father Joachim, a lawyer by profession like most of the men in the family, served as chancellor to the Parliament of Brittany in Rennes and owned a moderate amount of landed property. At his father's death, Descartes sold his states and invested the money, obtaining an income of six or seven thousand francs a year.

The first 9 years of his pedagogical training, young Descartes received from the Jesuit ground plan of the *Ratio Studiorum* at the College of *La Flèche*. This Jesuit philosophy curriculum followed Aristotle regular topics of logic, physics, metaphysics, morals, adding mathematics in the final 3 years of study, and Thomas Aquinas's theological vision, as well. Until 1644 he continued to write frequently to French Jesuits such

as Bourdin, Denis, Petau, and Mesland, with whom he discussed philosophy while, on the other hand, he denounced that Fr. Fournet had corrected and adapted his *Metaphysical Meditations* before being sent to publication. To follow his family calling, Descartes went to study law at the University of Poitiers where he obtained his degree of lawyer, in civil and canon law, at his 20 years in 1616. Instead of following the path of judicial forum, he attempted a new method, first in the *Compendio musicae* (1618) dedicated to his physicist-mathematician friend Beeckman, thus beginning a path of liberation from his preceptors. The same year he decided to set out by riding horse to Breda, wearing toga and uniform, as a gentleman soldier; following the path of his tutor Michel Ferrand, who belonged to the world of military officers in the period of the Thirty Years religious war, considered the first modern war that convulsed all over of Europe until 1648. At that time, Descartes adopted the name of Lord of Perron as his title. After he had inherited a small farm in Poitou from his mother's family, he began to travel, to gain experience in what he liked to call "the great book of the world."

Descartes moved to Netherlands in 1628, resided there for 20 years while developed most of his influential works on mathematics and philosophy, and deepened his medical knowledge, as well. In the meantime, to the accumulation of written investigation and moving experiences of his life, in 1640, is added the early death of his daughter Francine, born of his relationship with Hélèna Jans van der Strom. To this bitter painful experience was added the last misfortune of the traveling philosopher, related to his departure to Stockholm, at the end of September 1649, in order to illustrate his philosophy of the *highest good* to Queen Cristina of Sweden (AT V 81, 82; AT V 295) and to organize a new scientific academy. However, while he planned to stay in Sweden only until the summer of that same year, as he confesses in a letter to Princess Elisabeth (AT V 430), his death surprisingly came on February 11, 1650, at the age of 53.

Evolution of the Cartesian Philosophical Work

Descartes stands out in intellectual history for his natural scientific curiosity and the presence of a practical spirit (AT I 458–460), traits reflected in his new and extensive philosophical production, and revealed in the lexicon of his novel method of scientific analysis, in expressions such as *mathesis universalis*; eternal truths; simple natures; intuition and deduction; *bon sens*; *ego cogito*; *sum res cogitans*, hyperbolic doubt; criterion of truth in clear and distinct ideas; infinite power that God is; Deceiving God and evil genius; dualism of mind and body; human body as machine; rules of morality; moral certainty and certainty more than moral; provisional morality; passions and admiration, morality of generosity; sovereign good that virtue is; virtues as weapons of the will; resolution theory; free will as the noblest thing we have and makes us *like* God; three laws of nature that govern the physical world; mechanical laws of the impact of bodies; laws of geometry; and also laws of nature established by God, lastly, common laws of society, a focus of interest where is possible to reveal Descartes's political thought.

Thereupon, if the evolution of the philosophy and the thought of Descartes are analyzed, it is possible to notice a convergence between method, moral, and even political vision.

Starting from *The Rules for the direction of the spirit* (1628) and *the Discourse of the method* (1637), where Descartes developed his first scientific research project, which consisted of: the re-foundation of philosophy from the union of physics and mathematics, while advancing in developing a humanistic ideal of modern science. However, in his maturity, a metaphysical turn is observed in the *Meditations of First Philosophy* (1641), to rediscover the truth as divine power. Finally, in his treatise on the *Passions of the Soul* (1649) and in a considerable selection of *The Correspondence*, the last generation interpreters have come to recognize that the practical-moral project of Descartes will come to be revealed, for some masked and for others explicitly, as a

politician, in the sense of a *political ontology* and in *politicity* or statecraft in his epistolary language.

Political Virtue in Descartes

Until some time ago, interpreters of Cartesianism maintained the conviction that the philosopher from The Hague and the Dutch circle did not concern himself with formulating theories of value, so that aesthetics, ethics, and politics would not have deserved their greater attention.

Regarding ethics, it was accepted for a time that Descartes was not a philosopher of morals; particularly by his own explicit statements in *The Principles of Philosophy*, namely, that the construction of a perfect moral system – *the most perfect moral* – would have to be the crown of his philosophy. This is the reason why Descartes is seen facing the field of prudential behavior in a general way, and therefore, managing to articulate only a "provisional moral code," by which he personally conducts himself, while raising the firm and secure edifice of universal knowledge. Descartes had also expressed that he normally refused to write about morality, for fear of being misinterpreted as malicious and because he believed that only sovereigns, or those who are authorized by them, have the right to regulate the morality of other people (AT V 86, 87). However, scholars have shown that their statements in *The Principles* and some epistolary expressions are not absolute indicators of that he maintained disinterest in formulating a moral theory as a whole, since in his writings he includes a conception of virtue along with affections, happiness, values and norms, being that Cartesian morality is inseparable for the understanding of his political thought.

But, be that as it may, the state of the current discussion remains in development, showing that the political question in Descartes is ambiguous and murk.

On the one hand, Descartes did not intend to publish anything like a *Politeia*, *De republica*, *The Principe*, *De iure*, *De la servitude volontaire, De legibus ac Deus legislatore* or a *Leviathan*, or others, in the style of the most prominent classical or modern jurists and political philosophers. Indeed, he did not write a treatise dedicated to asking questions about *the nature* of the state, the moral foundation of political power, or offering a concept of the state that relates to the status of the political and distinguishes itself from society, nor is he interested in answering: Whose is the government of men or of the laws? May nevertheless, the Cartesian bibliographic *corpus* be analyzed to distinguish a conception of political virtue? At first sight, Descartes did not base political authority on theories of tacit or hypothetical consent, as did his predecessors or contemporaries, but he did pronounce on the universal extension of reason, and the power that some individuals have over other individuals (who have free will), and not only on the power of self-control.

Now, in matters of politics, the set of countless interpreters of Descartes are divided, holding opposing judgments. Thus, a generation of scholars, identified rather with the textualist school, as a subjective interpretation of classical texts, seems to them that Descartes is carefree, ignorant, and abstains on history and political theory. However, the main reason why Descartes does not *write* about theories of value, moral or political, was stated by himself when he wrote in an intimate tone to Chanut, on November 1, 1646: "[. . .] What would you not say if I began to examine the correct value of all the things that we can desire or fear, the state of the soul after death, how much we should love life, and How should we live so as not to have reasons to fear losing our life? It would be useless for me to keep only those opinions that agree as closely as possible with religion and those that are as beneficial as possible to the state: since my critics would still try to convince people that I had opinions that are opposed to both of them. So, the best thing I can do, therefore, is to *refrain from writing books*, having as my motto: "Death only weighs heavy on him, whom everyone knows far too well, but who dies unknown to himself" (AT IV 537), which indicates that Descartes had preferred to

follow Seneca's safe lines of *Thyestes* and the political virtue of prudence (AT IV 306). But also in *Cogitationes Privatae* from a very young age, Descartes had already subtly pointed out the way in which he had gone out into the theater of the world: *larvatus prodeo*, "hiding I advance" (AT X 213), so he was nicknamed "the masked philosopher," for his cautious way of behaving with respect to his life and his political ideas, which he decided to discreetly wrap and mask, given the religious persecutions of the time, the critical harsh opponents of his philosophy (AT V 16–19), and the turbulent global historical situation of the greatest period of baroque irony.

The study of language, in the key of *speech acts*, that Descartes enunciated in writing in his letters addressed to friends – in particular to well-known figures of European political power of the seventeenth century – began to shed light so that another number of interpreters understood it under the category of "politicity," which he connotes in his political speeches and even served to define him as a "political man," who thought in terms of "reasonable ideology" with bourgeois class identity that manifests the consciousness of its own revolutionary impotence, or "ontologized form of the internal crisis of absolutism" (Negri 2008), including the notion of an ideal type of "society of wise men" (AT III 19), and a "so close a community" (AT IV 316).

Furthermore, from this interpretative current a possible political ontology is derived in Descartes, which has been explored by feminist authors who work on gender theories and recover the perspective of corporeality. This is the case of Irigaray (1974), Heinamaa (1999), and Alanen (2003). According to Negri's analysis, Descartes would have defended the type of feminism of difference, in the sense that: "difference follows from admiration for the thing loved; the difference of the singular point of view in order to build the corporeal relation of desire and of the desired thing. The difference is diluted and at the same time confirmed in the always unresolved, but always resolvable nexus between soul and body" (Negri 2008). In truth, the individual body, but also the set of corporeal relationships that mark sexed crosses, reveals a difference. However, the body and difference are not only the center of the philosophical scene in general, but of the contemporary feminist philosophical debate, since also from the side of enlightened feminism, Descartes appears as an author who did not defend equality in the first place, among men and women; however, he would have done so against his own principles. In any case, feminist philosophers of both difference and equality recognize the feminist capacity of Cartesian ontology. Meantime, the internal coherence or incoherence of their approaches will be tested when determining whether the ontological difference in individuals would base a moral and social difference, or if the attribution of material ontological differences would justify inferiorizing functions within the diverse "natural" hierarchy of social subjects.

In another trend of analysis that search inside "the restriction of the domain of philosophy in private space" (Del Noce 1965; Canziani 1998), an interpreter who, for his part, notes how Descartes's political language was made visible in numerous letters (such as those of September 15, 1645, October 6, 1645, January 12, 1646, April 25, 1646, et al.), addressed mainly to Princess Elisabeth of Bohemia, where Descartes makes explicit: the relationship of the individual and society, the sense of obligation towards others, the relationship of natural and moral interdependence that exists between the Universe, the State, society, and the family (AT IV 293); a close community (AT IV 316); the role of the common laws of society (AT IV 356–7), the problems of absolute power and free will, civil obedience; goodness and prudence as rules of action (AT IV 353–4), or on the "Popular states" (Canziani 1998) that at that time he is being forced to leave (AT V 16–17). Thus, then he dares to express unfavorable political opinions against "A troop" of enemies, scholastic theologians from Utrecht and Leyden, who attack and insult him (AT V 18).

In addition, in these letters, Descartes would have interpreted and advanced certain selective insights on Machiavellianism to illustrate the princess of Bohemia, highlighting the idea that the prince must always try to keep the people on his side (AT IV 486–492). But at the same time, in the same epistolary context, he omitted, apparently in a Machiavellian way, to call his attention to the central idea in *The Prince*, regarding the

conception of *the legitimacy* of the prince's political power, based on the people or the crowd. To this is added the political speech that Descartes expressed from Amsterdam, on April 15, 1630, in a letter addressed to Mersenne, where he writes extensively on the political sphere, using a transitive metaphor between the eternal truths of mathematics, the established natural laws by God, to derive or to transfer the power in a descending scale: "The terms of [monarchical] absolutism: a full sovereign will, little known in His Majesty, which simply owes to its own will the ability to legislate ('*Si veut le Roi, si veut la loi*') (AT I 145) and this will the fullness of social obedience has been established, without being able to avoid subordinating it" (Negri 2008).

Conclusions

So far, the following have been recorded.

Some Descartes's biographical data, which attempt to show decisive aspects of his itinerant life, whose strength, intellectual restlessness, and willful spirit, made him go through the saddest and extreme experiences. Meanwhile, his nomadic lifestyle arranged him to necessarily adapt to the circumstances of different cultural and linguistic environments throughout Europe, always in search of suitable spaces for his peace of mind, with ideals of religious and political tolerance.

An intellectual evolution, interconnected to the development of his scientific work, with a strong pragmatic sense, from which the opportunity will also arise to express in the figure of a provisional morality the most objective part of his laconic political intuitions.

An outline of the discourse on political virtue is represented in Descartes, a question that continues to be discussed by his interpreters, since this kind of masked attitude is revealed *a fortiori* in a family of ethical-political concepts mainly in his abundant private Correspondence (which amount to five volumes out of the ten that make up the Adam & Tannery *Œuvres de Descartes,* 1996 edition), where he expressed more freely notions such as: "free will," "absolute power," "King, Law," "The only prudent legislator who gives laws to the people," "sovereign will," "natural law," "freedom," "laws of society," "obligations," "Common good," "close community," "political passions and virtues," "supreme good," "the good of men," "provisional morality," and even a plausible conception of gender "difference" within a context of social justice. It would be necessary, though, to give an account as a whole of the actions and political motives of Descartes's friends and enemies, of Descartes's woman friends and woman enemies, whose categories would sociologically determine what is political and *a*political, in his trip through the European baroque iron century, time, and territory where Descartes appears as a traveler without end.

Finally, it would seem convenient to dissolve this gloomy tension on the political in Descartes, adopting a contextualist or genealogical method, such as that of the Cambridge School. In an approach that focuses its research on the history of the political languages of the authors, and that is shared with the French tradition, considering thinkers as social agents, capable of generating social change and reacting to historically significant political stimuli. This long-term methodological tool would allow us to discover all the performative potential of Cartesian political discourse and Descartes himself, as a relevant social actor, with friends and also enemies so powerful that they lead to the hypothesis of his murder being presented as more than plausible.

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- ► Aquinas, Thomas
- ► Hobbes, Thomas
- ► Machiavelli, Niccolò

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Descriptive Legal Theory

► Legal Theory: Descriptive

Destituent Power

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Introduction

The debate on the destituent power – or destituent potency – has emerged in the twenty-first century, especially because of the work of the Italian philosopher Giorgio Agamben, and based on the limitations of the traditional theories concerning constituent power and constituted power, developed in an uncritical manner in the realm of Constitutional Law. Schematically, the constituent power shall be understood as representing the origin of a certain legal order and, as such, it is not subject to normative limitations, being usually identified with the sovereign will of the people (Dyzenhaus 2007; Lindahl 2007). The traditional constitutional theory that had its roots in the French Revolution reserves a rather limited role for the constituent power. After its manifestation and the consequent foundation of a constituted legal order, whose apex is the Constitution, the constituent power would survive as a power of constitutional revision, to be exercised only in well-established cases, according to Sieyès' proposal (Sieyès 1985). From these, arise the figures of the original constituent power and the derived constituent power. While the original constituent power is more than a right, being a fact of power, the derived constituent power shall be understood as a legal structure based in the Constitution. Its mission is to define the procedures for its own modification, either through amendments or constitutional revision (Dyzenhaus 2012).

Carl Schmitt and the Limitlessness of the Constituent Power

The German jurist Carl Schmitt states that the constituent power expresses the political-existential decision of a certain people and, therefore, is not exhausted in the foundation of the constituted order. The holder of the sovereign power may resume the constituent power and exercise it at any time, provided that specific conditions (such as the state of exception) are present (Schmitt 1928). Contrary to liberal and legal positivist proposals, Schmitt perceives the constituent power as a political and meta-legal dimension that can be constantly activated for the transformation of the basic structures of the State. Even though he wrote about this topic already in his *Theory of the Constitution*, that is,

before the rise of Nazism in Germany, Schmitt will use this reasoning to legitimize the new National Socialist State that he joined from 1933 on. For Schmitt, the constituent power cannot be limited by established legal forms and procedures, because this would mean constitutionalizing the constituent power, which is logically inadmissible. Limiting the constituent power would imply the assumption that there is some higher authority, a presupposition that is senseless in a plebiscitary State such as the one thought by Schmitt, in which the source of normativity resides in the popular will embodied in the political leader acclaimed by the people. Furthermore, Schmitt understands that the constituent power remains active even after a new constitution comes into force, which consequently creates the ever-present possibility of radical questioning of the constituted political system. Among the factual situations that require the constituent appeal to the people, Schmitt mentions the case of constitutional gaps and that of constitutional conflicts, which affect the basis of the political decision on which the Constitution is founded.

Antonio Negri and His Critique of Constitutionalism

Even though he belongs to a tradition of thought totally different from the authoritarian one represented by Schmitt, the Italian philosopher Antonio Negri shares with him the understanding that the constituent power has been gradually emptied by the constituted power. According to Negri, the opposition between constituent and constituted power historically illustrates the desire of the ruling classes to control the creative power of the multitude. So, it is necessary to resume the thought of authors such as Machiavelli, Spinoza, and Marx to free the constituent power from the institutional chains and activate its revolutionary and democratic potentialities (Negri 1992). The constituent power is not a temporal mark that appears in the system only as a sign of a supposedly popular origin. On the contrary, the constituent power should be understood as a continuous process, constantly producing norms, subjectivities, and conflicts that find their always precarious solutions in the very movement of its constant affirmation. According to Negri, legal science intends to tame and control the constituent power. The strategies for this are many and range from the invention of the dualism original constituent power/derived constituent power to the association between constituent power and political representation. These strategies always indicate the submission of the constituent power to the constituted power, denying, then, the absolute, indeterminate, and potential character of the constituent power. Therefore, Negri does not perceive the constitutionalism as a democratic movement, but rather as an attempt to subject political power to certain limits dictated by political liberalism. Since it is a radical expression of the democratic will, Negri's constituent power opposes political representation and the system of check and balances. It points to the future, never to the past, unlike the constitutional liberalism.

Giorgio Agamben's Political-Philosophical Project

It is in the context of this conflict between Schmitt's and Negri's perspectives that arises Giorgio Agamben's proposal on the destituent potency. Nevertheless, to understand it, it is necessary to briefly resume the meaning of his political-philosophical project presented in the *homo sacer* series. According to Agamben, sovereignty remains alive and active, and today it might only be properly understood as an exception, so that the sovereign is the one who makes the final decision. In the first volume of the *homo sacer* series, the exception appears as an inclusive-exclusive figure which demonstrates that order can only be founded on violence. This creates a paradox whereby law and politics are based on what is outside them, just as the life they protect is based on its sheer exposure to a power of life and death, to the possibility of being killed (Agamben 1995). In the last book of the series, Agamben realizes that the exception is only a specific case of a much more general apparatus that he calls, inspired by Furio Jesi, the

anthropological machine, founded on the Western metaphysical and dualistic conception of Being. It works in such a way that a practice, idea, or phenomenon may only come to light to the extent that it bears its opposite as a secret foundation, turning blindly and revealing either one or the other of its poles (Agamben 2014; Jesi 1973). Not only does the rule need the exception to be founded, but the constituted power also needs the constituent power, the norm needs the anomie, the human being needs the animal, the Being needs the Nonbeing, and, of course, politically qualified life needs a killable life. Therefore, in order to protect, law ends up threatening.

Destituent Potency and Violence

According to Agamben, conceiving (as the Western tradition has done since the French Revolution) a constituent power capable of transforming the constituted juridical-political reality means nothing more than exchanging masters and lords, because a power that has been put down by constituent violence will fatally reemerge in other forms. In such a hypothesis, the dialectic of violence that establishes (constituent power) and maintains (constituted power) the law has not been deactivated. Agamben inherits this conception from Walter Benjamin, who distinguishes between law-making violence ("arbitrary violence," *schaltende Gewalt*) and law-preserving violence ("administered violence," *verwaltete Gewalt*) (Agamben 2003; Benjamin 1991). Hence, for Agamben, constituent power and constituted power build a system, so that the constituted is rhetorically grounded in the constituent, and the constituent ends up being captured by the constituted. To avoid this paradoxical redundancy, Agamben's solution involves abandoning the dyad constituent/constituted power and assuming a radical inoperability capable of deactivating existing institutions of power, preparing them for a new use through what Benjamin calls destitution (*Entsetzung*) (Agamben 2014). Then, the idea of destituent potency (*potenza destituente*) arises and it is not a new kind of power. Agamben does not understand inoperability as inertia, but rather as an activity that deactivates the apparatuses of law and politics marked by the exceptional violence that institutes them. Thus, it opens new possibilities of use. Destitution in Agamben is conceived as a reality that at no point is related to the institutions, that is, to the paradigm of production. Inoperability means not operating, that is, ceasing to constitute works, as if every constituent power embodied the original sins of violence and of the separation between an ordered dimension and another that is disordered. In all the dyads that structure thought and praxis in the West, like constituent and constituted, there is an exceptional structure. The latter, acting incessantly between the poles of the anthropological machine, makes them indiscernible, separating the factual experience through a movement of inclusive exclusion by which a certain dimension (fundamental rights, for example) only becomes thinkable or politically relevant to the extent that it is differentially included in the system by the *ex-capere* (the "taken outside") which is characteristic of the exception. In the given example, this translates into the perception that rights are only guaranteed through actions that legitimize the institutional violence of the State which affirms them (Agamben 2014).

Criticisms and Dis-instituting Power

Although philosophically riveting, there are some problems with Agamben's proposal of destituent potency that need to be considered. Firstly, the necessary connection that he perceives between constituent and constituted power is a historical fact, not an ontological one. A constituent power that, as its name indicates, is not subjected to or limited by the constituted power is perfectly well thinkable and realizable. There is no reason to affirm, as Agamben does, that every institution will keep alive the original violence of the *arkhé* that establishes and maintains the law, if we conceive a permanent constituent power that is not hierarchically related to the constituted power and that even opposes it, in the sense that, being permanent, it will never give rise to fixed institutions

that might legitimize themselves under the label of the constituted power. This idea translates into the proposal of a dis-instituting power capable of deactivating the real political-legal institutions marked by the constitutive violence of the capital and the State (Matos 2019). Differently from Agamben's destituent potency, the dis-instituting power is related to the constituent dimension, not as a logical moment, but as an empirical structure necessary to overthrow the constituted power and replace it with a continuous and permanent constituent process. While in Agamben the dialectic between constituent and constituted power should be totally abandoned in order to deny the relationship between them, which occurs through destituent potency, the dis-instituting power aims to rupture the historical and rhetorical link between constituted and constituent power, freeing the latter from the hijacking made by the former. To realize such a project, a dis-instituting force that advances against institutional and concrete aspects of capitalism and State is indispensable. It opens room to produce new subjectivities, new uses and new normativities that will emerge from the permanent constituent power, which should not always be understood, as Agamben states, as a mere expression of the violence of the *nómos*. On the contrary, constituent power, as an originally rebellious figure, involves a productive excess that is not limited by the institutional mechanisms of constituted power. Furthermore, the dis-instituting power might be understood as an exodus from the institutional forms through which contemporary political-economic violence is expressed, translated into institutions such as the State, banks, and global markets. There is no doubt that the historical process of the affirmation of Western law was founded on appropriating and hierarchizing violence. However, there is no reason to assume that this will always be so, and that every constituent productivity bears the mark of this original *arkhé*. Affirming this thesis of the inseparability between violence, production, and constitution, means to confuse history and ontology and, thus, hinder the real possibilities of social transformation. On the other hand, it is indeed dangerous to conceive the constituent power in a formal and empty way according to the constitutionalist paradigm of sovereignty. Since it is open and indeterminate, the constituent power might originate any type of society. However, this does not occur with the dis-instituting power, which is neither open nor indeterminate, but configured by the reality it denies. Therefore, dis-instituting power does not represent a blind bet, since it defines itself negatively through existing institutions questioned by dis-instituting resistances and singularities (Matos 2019).

Conclusion

Despite the philosophical and practical problems that Agamben's idea of destituent potency/power involves, it has proven to be an important instrument for critical thought that aims to reimagine basic categories of human socialities such as work, rights, obligation, property, and use, as stated by Gian Giacomo Fusco. In this regard, Agamben's idea of destitution might be helpful in developing political and legal tactics that leave behind a world dominated by pervasive sovereign violence (Fusco 2022). Among many other proposals, we might mention the one of Rafaelle Laudani who, attempting to distance himself from the tradition of civil disobedience, works with the notion of destituent power to problematize the liberal effort to limit and tame disobedient practices. Nevertheless, unlike Agamben, Laudani admits that his destituent power is not hostile to the existing institutions, classifying it not as an anti-institutional idea, but rather as an extra-institutional one (Laudani 2011). Markus Patberg, analyzing recent European revolt movements, perceives in the destituent power a neglected dimension of the constituent power, which is the right to dismantle public authorities without the intention to create new ones. However, the author states that there is a problem of authorization in the destituent power, so that it can only complement, not replace, the constructive side of constituent power (Patberg, 2020).

Cross-References

- ▶ Agamben, Giorgio
- ▶ Civil Disobedience
- ▶ Constitutionalism
- ▶ Resistance
- ▶ Schmitt, Carl
- ▶ State of Exception

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Devlin, Patrick

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Introduction

Lord Patrick Devlin (1905–1992), a British High Court judge, left an enduring mark on legal philosophy with *The Enforcement of Morals*, a response to the 1957 *Wolfenden Report* of the Committee on Homosexual Offences and Prostitution. The *Report* holds that the purpose of criminal law is "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young" (Committee on Homosexual Offenses and Prostitution 1963, Para. 13). Private homosexual acts between consenting adults neither threaten public order nor cause unavoidable public offense. The *Report* concludes that criminalizing them is an unnecessary infringement of civil liberty, an enforcement of standards of "private morality and immorality which is, in brief and crude terms, not the law's business" (ibid., Para. 61). Criminal law should not "concern itself with immorality *as such*" (ibid., Para. 257, emphasis added).

Main Text

Reference to "private" and "public" morality misleadingly suggests that the *location* of an offense is crucial. (See Dworkin 1999, p. 929 n. 11.) But murder is not mere immorality "as such" if committed in private. Though indecency is often associated with public acts, the *Report* is most concerned to distinguish conduct that is harmful to others from conduct that, though perhaps immoral, does not harm others.

Devlin argues that there is no plausible "theoretical limit" to the state's authority to punish

immoral conduct. "Immorality" here refers to violations of "positive morality," the *conventional* morality "actually accepted and shared by a given social group," not to violations of "critical morality," which is independent of positive morality and consists of "general moral principles used in the criticism of actual social institutions including positive morality" (Hart 1963, p. 20). Though considerations of privacy and freedom recommend that much immoral conduct not be prohibited, the question of whether to forbid a given type of immorality belongs on the political agenda of a democracy. No credible principle distinguishes crime from sin such that the latter should not be considered for proscription.

That (conventional) immorality is always a reason, if not a decisive one, for criminalization has earned Devlin's position the title *legal moralism*. The debate between Devlin's moralism and the liberalism of the *Wolfenden Report* seems to echo the debate between John Stuart Mill and James Fitzjames Stephen a century earlier. Mill's harm principle holds that, given the value of personal autonomy, "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others" (Mill 1978, p. 9). Stephen replies that immoral conduct is rightly punishable apart from whether it harms unwilling others: "there are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented at any cost to the offender, and punished, if they occur, with exemplary severity" (Stephen 1967, p. 162). The distinction between legal moralism and liberalism is usually thought to turn on the issue of forbidding such conduct, which is often characterized as *harmless immorality* and equated with what the *Report* calls morality "as such."

It is far from clear that this is an accurate characterization of the distinction, because of doubts about whether there is such thing as harmless immorality and about whether *Devlin* assumes that there is. (Whether Stephen assumes it is a vexed question.) Gerald Dworkin defends Devlin's no-theoretical-limits thesis, yet seems ultimately skeptical of the category of harmless immorality. A harmless wrong would either harm no one or harm someone without *wronging* her. A supposed example of the former is "a wrongly broken promise that redounds by a fluke to the promisee's advantage" (Feinberg 1988, p. xviii). Dworkin (1999) thinks the legal moralist can plausibly characterize this as an act that, though harmless in *this* case, is nonetheless wrong *and harmful* because "it is of a *type*, the general performance of which is harmful" (p. 938). A supposed example of harming without wronging is breaking someone's leg at his request so that he can avoid the draft. The moralist can rebut this case either by invoking "nonwaivable rights in a strong sense" (ibid.) or denying that wronging someone entails violating her right. Either way, *wronging someone* is different from simply *doing wrong* in (perhaps) Stephen's sense and suggests that harm has been done to that person.

Devlin too is skeptical of the category of harmless immorality: "Immorality then, for the purpose of law, is what every right-minded person is presumed to consider to be immoral. Any immorality is capable of affecting society injuriously and in effect to a greater or lesser extent it usually does; this is what gives law its *locus standi*" (Devlin 1965, p. 15). This suggests that *every* type of conduct considered immoral by the right minded is harmful "for the purpose of law."

If this is so, then the issue of proscribing *harmless* immorality is not what divides Devlin's moralism from liberalism. Is the issue instead whether the immorality of conduct provides a reason, if not the sole reason, for proscribing it? "You can't [i.e., shouldn't] legislate morality" is a popular characterization of liberalism. But it is misleading: liberalism holds that only conduct that is *wrongful* as well as harmful should be punished. Murder and theft should be proscribed; morally permissible conduct that harms another, such as besting a business competitor or causing nonnegligent injury, should not. Criminal punishment does not simply deter; it communicates moral indignation as well. Liberals too are legal moralists.

Devlin and his liberal opponents apparently agree that conduct rightly subject to criminalization is both immoral and harmful. They disagree on the sense of "immorality." Liberals such as Mill and H.L.A. Hart deny that *conventional* immorality is in principle eligible for

criminalization and think that conduct that damages the capacity for autonomy *is* eligible, even if it is consistent with conventional morality.

They also disagree about what the *subject* of proscribable harm is. It is useful in this context to sketch what Hart calls Devlin's "moderate" thesis (Hart 1963, p. 48). Devlin says that "law exists for the protection of society. It does not discharge its function by protecting the individual . . . the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies" (Devlin 1965, p. 22). Outside society we are, as Aristotle says, either beasts or gods; and we are incapable of being gods. There is no human life without society and no society without a common morality. A central purpose of criminal law is to prevent the disintegration of society by enforcing its moral standards. Some of these standards, such as those forbidding murder and theft, protect *individuals* from harm. The burden of the moderate interpretation, and what is said to distinguish it from liberalism, is that the criminal law rightly protects certain *institutions* as well: a society's constitutive traditions of moral behavior and belief. If homosexuality violates the morality of a society, that society is within its rights to criminalize it, even if no *particular* act undermines the standard in question, just as environmental laws forbid a certain type of act even if no one act of that type damages the natural environment.

Though, as noted earlier, Devlin says that immorality, "for the purpose of law, is what every *right-minded* person is presumed to consider to be immoral" (emphasis added), it is important to reiterate that *conventional*, not critical, morality is relevant to determining what conduct should be criminalized. Devlin's right-minded person is not necessarily attuned to critical morality. He is rather "the man on the Clapham omnibus" (ibid., p. 15), someone who exemplifies the moral beliefs of his society. His moral standards are the relevant ones because positive morality constitutes "the invisible bonds of common thought"; this "bondage is part of the price of society; and mankind, which needs society, must pay its price" (ibid., p. 10). Conventional morality does its society-constituting work independently of whether it conforms to critical or objective morality. Devlin supports the laws against private homosexual acts because society has the right to "use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence" (ibid. p. 11). It is reasonable to see his case for enforcing conventional morality as ultimately prudential: we want human life to go on, so we want society to survive, so we have reason to enforce moral convention.

That Devlin's position is prudential is suggested by considering what distinguishes conventional morality in Devlin's sense from other social standards, such as manners and etiquette. Morality sets the limits of tolerance without which there is no society. Thus, while breaches of manners and etiquette meet with adverse judgment, "intolerance, indignation and disgust . . . are the forces behind the *moral* law" (ibid., p 17, emphasis added). For Devlin the intensity of moral emotion is not an index of moral truth. What matters is the intensity; its importance is its adhesive force, which makes possible a society as opposed to a collection of atomistic individuals. "What is important is not the quality of the creed but the strength of the belief in it" (ibid., 114). If the belief is strong, it is prima facie enforceable. Murder, not bad etiquette, arouses outrage in the typical member of the community and so violates the creed. If private homosexual conduct inspires disgust, it too is immoral for the purpose of law, that purpose being the prudential one of keeping society going, not enforcing objectively correct standards of conduct.

If these sentiments "or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice" (ibid., p. 17). As Ronald Dworkin (1978) says, for Devlin "any uneasiness or half-heartedness or latent toleration in society's condemnation" (p. 243) of conduct falls below the threshold of intolerance and disgust necessary to override the presumption of freedom.

According to the moderate thesis, the difference between Devlin and his liberal opponents is

that he focuses more on society as the subject of harm and sees conduct that undermines positive morality as harmful to society regardless of the moral soundness of those conventions. The thesis has serious problems. The first is the lack of evidence for the claim that conduct that generates sustained intolerance and indignation is a threat to the survival of a society, in any ordinary sense of "survival" or "society." Would England really have faced disintegration if mid-twentieth-century moral conventions against homosexuality had been regularly violated? Devlin responds by denying "that *any* deviation from a society's shared morality threatens its existence any more than I assert that *any* subversive activity threatens its existence. I assert that they are both activities which are capable in their nature of threatening the existence of society so that neither can be put beyond the law" (Devlin 1965, p. 13 n. 1). Does this mean that society has a right to enforce a given standard of conventional morality *only* when its violation *actually threatens* – in some ordinary sense of the term – the social order, e.g., in case "a quarter or a half of the population got drunk every night" (ibid., p. 14)? This squares with the social-environmentalist case for some criminal laws noted earlier. But how do we know when the threat is real? What evidence do we have that a given type of conduct, if sufficiently common, would threaten social disintegration and that it might reach that level if not forbidden by law? For Devlin, the settled indignation of the man on the Clapham omnibus is the deeply flawed measure of what constitutes a threat rightly subject to criminalization.

To avoid this problem, Devlin could adopt an eccentric conception of society that equates society with a set of specific moral conventions at a given time, such that any change in conventional moral belief results in the destruction of the society. This is an untenable idea of social identity and disintegration and reactionary too: the most evil society would have the right to use the criminal law to defend its worst moral conventions, for if they were truly moral conventions by Devlin's lights – if they were backed by sustained indignation – the limits of tolerance would be surpassed and the presumption of liberty defeated.

In addition to Devlin's moderate thesis, Hart espies a rather diffusely stated "extreme" thesis that advocates the enforcement of positive or conventional morality, not because of its instrumental value in averting social disintegration, but because of its *intrinsic* value. (See Hart 1963, p. 49.) Our moral standards express our deepest values, and such values are worth protecting even at the cost of individual liberty, regardless of whether their violation threatens social disintegration.

Devlin's use of intolerance, indignation, and disgust as the criteria for identifying such values weakens the extreme thesis. No doubt these emotions constitute, or at least accompany, many moral judgments. But to figure in genuine *moral* judgments, they must point beyond themselves to the content of those judgments and the reasons for them. Raw, indiscriminate sentiment is not moral emotion, nor does it justify criminalization. Disgust at a certain type of conduct might spring from mere prejudice and rely on a "justification" that falls so far below minimal standards of logic and evidence as to be mere rationalization. On this basis Ronald Dworkin (1978) concludes that Devlin "misunderstands what it is to disapprove on moral principle," (p. 247), even a faulty one.

Conclusion

Devlin might respond implausibly by insisting that *every* conventional "creed," regardless of its quality, has enough intrinsic value to warrant enforcement. Or he could argue that the enforcement of moral standards is justified only if at minimum those standards are justified or true. That is, he could refine his conception of what it is to be a community of ideas. Such a view could agree with liberalism that proscribed conduct must be harmful, yet part ways on the question of whether harm must be construed in *liberal* terms, i.e., as threatening personal autonomy. Criminalizing pornography because it undermines an environment in which an enriching sexual life is likely is quite different from criminalizing homosexuality on the grounds that it disgusts the omnibus passenger. The liberal would object to

criminalizing pornography on such grounds, but that is quite different from objecting to the enforcement of blind prejudice and intolerance. Devlin does not explore this conservative option, but has inspired others to do so.

Cross-References

- ▶ Dworkin, Ronald: Legal Philosophy
- ▶ Hart, Herbert Lionel Adolphus: Influential Ideas
- ▶ Illiberalism
- ▶ Liberty and Equality in Criminal Law

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Introduction

John Dewey (1859–1952) wrote a handful of essays on various legal topics, and he made sprinkled references to law in his voluminous body of work (for informative analyses of Dewey's perspective on law see Patterson (1950); Donoso (1959)). He did not elaborate a special theory of law, but rather analyzed legal matters from a pragmatic standpoint, treating law like other social institutions. This entry therefore begins with a summary of pragmatism. Then it addresses, in order, three topics Dewey covered with enduring significance: his critique of natural law, his account of judicial decision-making, and his social theory of law.

Pragmatism

Developing their ideas at the turn of the twentieth century, the classical pragmatists – Charles Sanders Peirce, William James, John Dewey, and George Herbert Mead – were influenced by Darwinian evolutionary explanation, probabilistic explanation, and experimental scientific inquiry (the strain of pragmatism broadly described here, setting aside differences among them, was developed by James, Dewey, and Mead. Peirce distanced his version from that espoused by James). They applied a naturalistic view of human social animals striving to survive, procreate, and improve the conditions of their existence. Reflective thought "has its origin in biological adaptive behavior and the ultimate function of its cognitive aspect is a prospective control of the conditions of the environment," Dewey explained. (Dewey 1982, 37). There is a plurality of perspectives and interests among humans in social groups and their goal-oriented activities bring about continuous changes, intended and unintended, in natural and social circumstances. The collective striving of individuals to better their circumstances has in the aggregate resulted in "the inclusion progressively of social factors in human environment over and above natural factors; so that the needs which are fulfilled, the ends which are attained are no longer of a merely biological or particular character, but include also the ends and activities of other members of society." (38).

Knowledge is obtained by humans while engaging in purposive activities within natural and social environments, acting on the basis of

their beliefs, ideas, and theories, paying attention to failures and successes, doing what works and discarding or revising what does not. The pragmatists modeled this problem solving (instrumental) view of knowledge on scientific inquiry, which they saw as continuous with all human inquiry. Dewey elaborated: "If ideas, meanings, conceptions, notions, theories, systems are instrumental to an active reorganization of the given environment, to a removal of some specific trouble and perplexity, then the test of their validity and value lies in accomplishing this work. If they succeed in their office, they are reliable, sound, valid, good, true." (Dewey 1948, 156) The key to acquiring knowledge lies in attention to consequences that follow from action.

Theories, ideas, concepts, under this view, are tools or instruments that facilitate the achievement of purposes. Truths are not absolute, but relative to the theoretical framework and the purposes advanced. As William James put it, scientists "have become accustomed to the notion that no theory is absolutely a transcript of reality, but that any one of them may from some point of view be useful. Their great use is to summarize old facts and to lead to new ones." (James 1975, 33) The pragmatists absorbed this lesson from the development of non-Euclidean geometry and Einstein's theory of relativity, which undermined previous beliefs that Euclidean geometry and Newtonian physics were absolute truths. (Dewey 1960, 108–39).

Reflective thinking mainly occurs when people are confronted with problems, uncertainty, or new situations, which forces them to engage in inquiry and contemplation of alternative possibilities and potential solutions. Ideas and actions that work over time become ensconced in habits, customs, routines, rules, practices, institutions, and other forms of patterned behavior. Irrational beliefs are also incorporated in social institutions and perpetuated as tradition. Humans are naturally conservative and tend to hold on to existing beliefs and courses of action, even when poor results follow. (244) "Reliance on precedent, upon institutions created in the past, especially in law, upon rules of morals that have come to us through unexamined customs, upon uncriticized tradition, are. . .forms of dependence," Dewey noted. (272).

Consistent with their commitment to humanism, the pragmatists advocated "meliorism" – belief in the capacity of humans to improve their circumstances through reform efforts. (Dewey 1982, 34) This is a forward-looking orientation that subjects existing institutions to critical scrutiny. "What is needed," Dewey stated, "is intelligent examination of the consequences that are actually effected by inherited institutions and customs, in order that there may be intelligent consideration of the ways in which they are to be intentionally modified in behalf of generation of different consequences." (Dewey 1960, 273).

The pragmatists set forth their position as a critique of and contrast to prevailing philosophical approaches, characterized by Dewey:

> They have seen themselves, and have represented themselves to the public, as dealing with something which has variously been termed Being, Nature or the Universe, the Cosmos at large, Reality, the Truth. Whatever names were used, they had one thing in common: they were used to designate something taken to be fixed, immutable, and therefore out of time; that is, eternal. In being also something conceived to be universal or all-inclusive, this eternal being was taken to be above and beyond all variations in space. (Dewey 1948, xii)

The pragmatists raised multiple objections: truths are tied to our theories, purposes, and actions, and cannot be found through pure reason, claims of self-evidence, and abstractions untethered to human experience; all existence is temporal so there is no standpoint outside of history; there is wide disagreement over what is self-evident; philosophical disputes are so detached from reality that they offer no useful guidance for social problems; the notion of fixed universals ignores the pervasiveness of pluralism, variation, and evolving developments, and is antithetical to the human capacity to effect fundamental changes in ourselves and the world. (Dewey 1948, 1960).

Furthermore, Dewey asserted, philosophical claims of universality are false, since all philosophies reflect the circumstances in which they are constructed. "When it is acknowledged that under disguise of dealing with ultimate reality, philosophy has been occupied with the precious values

embedded in social traditions, that it has sprung from a clash of social ends and from a conflict of inherited institutions with incompatible contemporary tendencies, it will be seen that the task of future philosophy is to clarify men's ideas as to the social and moral strifes of their own day." (Dewey 1948, 26) The pragmatist, James observed, "turns away from abstractions and insufficiency, from verbal solutions, from bad *a priori* reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action, and towards power." (James 1975, 31).

Dewey applied this cluster of pragmatic views to his analyses of law (early in his career, prior to his adoption of pragmatism) Dewey wrote an essay on Austin's theory of sovereignty (Dewey 1894)). He wrote essays on corporate legal personality, judicial decision-making, law's coercive force, natural law and reasonableness, and on law in general. Nearly all are brief, a dozen pages or less. Two threads flow through the essays, one critical and the other prescriptive. His criticisms are directed at breaking down traditional barriers to legal change, questioning legal essentialism, fixity, excessive conceptualism, and rigid adherence to precedent. His prescriptions advocate an instrumental view of law as a means to social ends, attention to consequences, and efforts at reform. Linking the two threads is the pragmatists' counsel to "not insist upon antecedent phenomena but upon consequent phenomena; not upon the precedents but upon the possibilities of action." (Dewey 1982, 32–33).

Critique of Natural Law

Dewey repeatedly criticized natural law, which was variously grounded in God's will, reason, human nature, self-evidence, or the nature of things. (Dewey 1914b, 25) Proponents utilized claims of natural law to justify law, or to serve as an objective standard against which to evaluate the legitimacy and validity of law. Dewey granted that natural law arguments have sometimes served as sources of legal improvement. "But we also find that in practice one of the chief offices of the idea of nature in political and judicial practice has been to consecrate the existent state of affairs, whatever its distribution of advantages and disadvantages, of benefits and losses; and to idealize, rationalize, moralize, the philosophically given." (31) Natural law in this usage entrenches the status quo, functioning as a bulwark against reform.

Dewey points to the evident diversity of positions to challenge natural law arguments. "For upon an exclusively intellectual basis, the various legal philosophies are in such conflict with one another as to indicate that all alike are attempting the impossible." (Dewey 1987, 75) The profusion of contrasting views of natural law principles at different times and places "is sufficient evidence that they were not derived from any *a priori* absolute standard." (84) The claim of self-evidence, he wrote, is "*ipse dixitism*. What is it but arbitrary dogmatism?" (Dewey 1960, 183).

Assertions of universal timelessness made on behalf of natural law are guises. "As a matter of fact, legal philosophies have reflected and are sure to continue to reflect movements of the period in which they are produced, and hence cannot be separated from what these movements stand for." (Dewey 1987, 75) Since they are tied to past systems, legal philosophies "have to be viewed in connection with actual cultural and social movements of the periods in which they appeared." (75; Dewey 1926) Moreover, because societies are continuously changing, natural law arguments that once served as sources of positive reform when first introduced can later become regressive and reactionary owing to transformations in surrounding circumstances.

Liberal principles of freedom of contract and property rights underwent this very shift from liberating to reactionary, according to Dewey. When these principles were introduced into law in the eighteenth century they served to "emancipate" industry, trade, and people from a "multitude of restrictions" held over from feudal times. (1914a, 27) The dawn of the twentieth century, however, witnessed pressing social challenges with the emergence of large urban societies, including huge monopolistic corporations with numerous employees, dangerous working conditions in factories and plants, transportation and

electrification needs, extensive poverty and unsanitary conditions, corrupt municipal governments, and a host other problematic circumstances that called for solutions. Social welfare legislation was being enacted at the time to ameliorate problems, but judges were impeding these efforts by invoking traditional notions of liberty of contract and property rights entrenched in law. "Thus these principles became in turn so rigid as to be almost as socially obstructive as 'immutable' feudal laws had been in their day." (27)

Dewey was especially critical of Herbert Spencer's *laissez faire* argument that the natural law of the survival of the fittest governs human behavior and efforts contrary to this are futile and socially detrimental. (Dewey 1960, 211–12; 1914b, 27) Natural law understood in these terms has a paralyzing effect, Dewey objected. "These natural laws were supposed to be inherently fixed. . .. Once discovered, nothing remained for man but to conform to them; they were to rule his conduct as physical laws govern physical phenomena." (Dewey 1960, 212) Under this view, efforts to regulate economic affairs are "harmful interference" doomed to fail. (212)

Powerlessness in the face of social challenges is contrary to pragmatism's meliorism. Humans are active participants in nature with the natural capacity to purposively shape and change the conditions of their existence to try to meet their needs, Dewey argued. Legal rules and principles must remain flexible to deal with new circumstances and allow experimentation with reforms; otherwise they obstruct progress. "But if they are conceived as tools to be adapted to the conditions in which they are employed rather than as absolute and intrinsic 'principles,' attention will go to the facts of social life, and the rules will not be allowed to engross attention and become absolute truths to be maintained intact at all costs." (Dewey 1914a, 27).

Judicial Decision-Making

In "Logical Method and Law," Dewey situates legal reasoning as an instance of inquiry generally, understood in the instrumental terms set out by pragmatism. At the outset, he distinguishes two types of human conduct. (17) The first type involves human action without deliberation, following routines, hunches, trained intuition, not consciously considering likely consequences. The second type engages in a process of inquiry in which facts are weighed, alternatives are evaluated, and probable consequences are anticipated, when deciding what course of action to undertake. Dewey limits his account of legal reasoning to the latter type (without denying that the first type might also come into play).

Legal reasoning, he tells us, is similar in mode to reasoning by people engaged in other domains of purposive activities, like scientists, engineers, doctors, merchants, bankers, etc., working with their own material and objectives. (18) All areas of inquiry generalize principles and develop logical consistency among the propositions they utilize, though Dewey emphasizes that these systematizing efforts are not ends in themselves but rather instruments to achieve desired purposes. This applies to legal knowledge as well. "It is most important that rules of law should form as coherent generalized logical systems as possible," he asserts. "But these logical systematizations of law in any fields. . .is clearly in last resort subservient to the economical and effective reaching of decisions in particular cases." (19)

The systematization of knowledge, in law as well as other fields, often involves concepts. Concepts are indispensable and beneficial in several ways, including organizing ideas and experiences, serving efficiency, and producing stability. "It is practically economical to use a concept ready at hand rather than to take time and trouble and effort to change it or to devise a new one." (20) But concepts contain an "intrinsic inertia on their own account" and, combined with the human tendency to habitual behavior, they change slowly and can fall out of sync with evolving circumstances and needs.

Following these general discussions of systematic knowledge and concepts, Dewey turns to judicial decisions, first addressing syllogisms in general – the logical progression from premises to conclusions. He makes a crucial threshold clarification: "the syllogism sets forth the *results* of

thinking, it has nothing to do with the *operation* of thinking." (22) Likewise, a written judicial opinion laid out in syllogistic form does not purport to represent the actual process by which judges arrive at the decision. "The logic of exposition is different from that of search and inquiry." (24) As exercises in the logic of exposition, written judicial opinions have several important purposes: to provide reasons that justify the decision (showing it was not arbitrary or ad hoc), to articulate a rule that guides the determination of future cases and facilitates legal uniformity, and to provide notice, stability, and predictability for people who need to know the legal consequences of their actions. (24) Judicial decisions are written in logical form, Dewey adds, because judges want to give the appearance that it is "impersonal, objective," determined by law, although "the personal element cannot be wholly excluded." (24)

When describing how judicial decisions are made, he refers to the process of inquiry in general. People deciding on a course of action begin with a complicated and confused case, often with some vague anticipation of possible conclusions; they consider all relevant factors of which they are aware, and they consider and evaluate the likely consequences of different treatments and solutions. (23) "Premises only gradually emerge from analysis of the total situation." (23) Lawyers and judges engage in the same back-and-forth process, considering applicable law and relevant facts, searching for law applied in similar cases, anticipating possible outcomes, altering the selection of relevant facts, modifying the selection of relevant law or its interpretation, and so forth, until arriving at a tentative resolution. (23) This is not syllogistic reasoning from premises to conclusion since both emerge in this process. "Thinking may be defined either as a development of premises or development of a conclusion; as far as it is one operation it is the other." (23)

Dewey closes the essay by drawing out the implications of his analysis for the dilemma confronting judges of the day: finding the right balance between maintaining legal stability while responding to the social demand for legal changes to meet new circumstances. "There is of course every reason why rules of law should be as regular and as definite as possible," he emphasizes. (25) The reality, however, is that rules have ambiguities, are sometimes vague and indeterminate, and cannot be written to foresee or address all circumstances (25–26; Dewey 1926, 669); "situations do not literally repeat one another in all details, and questions of degree of this factor or that have the chief weight in determining which general rule will be employed to judge the situation in question." (Dewey 1914a, 25) Difficulties are heightened during periods of rapid and sweeping social changes, like the present, for which longstanding doctrines are ill-suited. When judges doggedly hold to past interpretations "the gap between current social conditions and the principles used by the courts" constantly widens, breeding public "irritation" and "disrespect for the law." (26)

Judges, Dewey argues, should apply "a logic *relative to consequences rather than to antecedents*, a logic of prediction of probabilities rather than one of deduction of certainties." (26) Logical systematization, legal concepts, and legal principles, are tools, not ends in themselves. "They are means of intellectual survey, analysis, and insight into the situation to be dealt with. Like other tools they must be modified when they are applied to new conditions and new realities." (26)

Social Theory of Law

Dewey sets forth his consummately pragmatic perspective on law in "My Philosophy of Law:" "The standpoint taken is that law is through and through a social phenomenon; social in origin, in purpose or end, and in application." (Dewey 1987, 76) Law is an "ongoing" aspect of social activities, he emphasizes, and "must be viewed as both intervening in the complex of other activities, and as itself a social process." (77) Because it is interconnected within society, "'law' cannot be set up as if it were a separate entity, but can be discussed only in terms of the social conditions in which it arises and out of what it concretely does there." (77)

He identifies "customs," which are tied to the human tendency to habitual behavior, as the

primary origin and source of law. (78) Dewey holds an atypically broad view of this term – "Social customs, including traditions, institutions, etc.," – to encompass all sorts of "stable and enduring" social processes. (79) While ongoing patterns of behavior are "relatively fixed," change also occurs, usually slowly, but sometimes rapidly, depending on the circumstances. (79) He describes the emergence of law and government in evolutionary terms as a "crystallization" of social forces into organized institutions that efficiently govern through law. (Dewey 1894, 41–43) Legal rules are "precipitated formulations" of longstanding social customs, while the enactment of customs into law in turn reinforces and extends the stability of said customs. (Dewey 1987, 79–80) Judicial decisions are the main mechanism through which customs are incorporated into law. Legislation enforces custom as well, although the recent "immense outburst of legislative activity" is tied to "social interests," particularly those related to economic factors. (82) All law, including constitutional law, the common law, and legislation, involve the crystallization of "the moral (or social) forces" within society, (Dewey 1894, 43) as products of "the whole complex of social activities." (51)

The most effective form of regulation of everyday life and activities is not state law, Dewey reminds us, but customs and moral forces within "institutions like the family, the school, the business partnership, the trade-union or fraternal organization;" "a factory and a church." (48) Legal doctrines and rules provide supportive frameworks for these social institutions, which have an "infinitely" greater role than state law in maintaining the order of society. (48)

Law and government, in Dewey's depiction, are instrumentalities for carrying out social purposes, including maintaining social order and advancing the public good. The application of coercive force makes law a more effective instrument, he argued. Hence "law is essentially a formulation of the use of force" for instrumental purposes. (Dewey 1916, 367) He asserts that one must evaluate whether law's use of force in given instances is "intelligent" and justified by the "comparative efficiency and economy in use." (367, 364)

Dewey applies this analysis to ongoing battles between employers and striking laborers, who were subject to court issued injunctions against strikes and harsh enforcement by police. He uses the instrumental test not only to evaluate use of force by police, but also use of force by strikers. Police use of force that is excessive, brutal, or provokes a backlash does not advance social ends – "An immoral use of force is a stupid use." (365) With respect to laborers, he wrote, if existing legal and economic mechanisms are the most effective means to the social ends at stake, then laborers should resort to these processes rather than engage in illegal strikes. If not, however, "then resort to extra-legal means may be indicated; provided it really serves the ends in question – a very large qualification it must be noted." (362) He recognized that this assertion might be seen as an encouragement to violence, but emphasizes that in general there should be a presumption in favor of resorting to courts over violence. (363).

Two pivotal points emerge from his analysis of the battle between employers and labor, which run through his other legal writings as well. The first is his insistence that law is not "sacrosanct" and must be subject to critical evaluation (364), and the second is that the standard of evaluation is whether law advances social ends. This prompts an inevitable question: How do we identify the correct social ends in instances of fundamental disagreement? Dewey eschews natural law principles as standards for the evaluation of law. (Dewey 1987, 82–83) He recognizes there are conflicting values and interests. He emphasizes that "the fact that such and such customs and laws have grown up is no sign that they should exist; it furnishes no test for their value." (83) So on what basis is law to be evaluated?

Dewey's answer is that "the standard is found in consequences, in the function of what goes on socially." (84) Observing the consequences of law requires that "intelligence, employing the best scientific methods and materials available, be used to investigate, in terms of the context of actual situations, the consequences of legal rules

and of proposed legal decisions and acts of legislation." (84) Empirical studies must be conducted to discern what legal officials actually do with respect to law in the books, and the social efficacy of these actions, as well as how people act in relation to matters covered by the law.

This response, however, does not fully answer how law is to be evaluated. Attention to the consequences of law can reveal whether or not the law is working as intended. If the intended social ends *are not* achieved, or if unanticipated consequences result, then the law can be changed or its application be made more effective in the pursuit of those ends. But if the intended social ends *are* achieved by the law, by what standard are we to evaluate whether these desired results are good or just or serve social purposes? As Dewey states, "The fact that something is desired only raises the *question* of its desirability; it does not settle it." (Dewey 1960, 260)

He affirms that "it is true that social arrangements, laws, institutions are made for man, rather than that man is made for them; that they are means and agencies of human welfare and progress." (Dewey 1948, 194) But "human welfare," "progress," and "social good" are value questions, which appear to require resort to a substantive standard – a content filled principle or notion – to determine whether something in fact advances welfare, progress, and the social good, particularly given competing accounts. Dewey rejects universal, immutable principles of the good and right, as too abstract, too fixed, and incapable of accounting for pluralism, vast differences in social circumstances, and historical change. He has no substantive standards and no hierarchy of values to offer – though he does state one proposition to be mentioned shortly.

What Dewey propounds and advocates is a *method*[1]: intelligent inquiry into the sources of and possible solutions to concrete social problems, utilizing legal mechanisms to resolve these problems (if law can help), and observing whether the results of legal initiatives are desirable, learning from failures and building on successes. He contrasts this method with natural law: "the chief working difference between moral philosophies in their application to law is that some of them seek for an antecedent principle by which to decide; while others recommend the consideration of specific consequences that flow from treating a specific situation in this way or that, using the antecedent material and rules as guides of intellectual analysis but not as norms of decision." (Dewey 1914b, 31).

Dewey proposes intelligent, experimental, and piecemeal reformism with the conviction that when the consequences of actions are critically scrutinized, humans have the capacity to evaluate whether the results are socially desirable – are welfare enhancing and good – even though people inevitably disagree on such matters. Thoughtfully deciding upon and doing the reforms, and then observing their consequences, provides additional concrete information that helps evaluate their desirability: Was there a decrease (or an increase) in the extent of human suffering? Are people better off, and if so, in what specific ways? Are people worse off? Do we like the results all things considered? And so forth. A robust, informed exchange of views on these matters – which democracy facilitates – leads to the next reform effort, a continuous process of intelligent inquiry and instrumental action. "Ends grow, standards of judgment are improved," Dewey wrote. "Man is under just as much obligation to develop his most advanced standards and ideals as to use conscientiously those which he already possesses." (Dewey 1948, 175) This approach is superior to rigid adherence to fixed principles (frequently disputed anyway), which can become dysfunctional and socially detrimental as circumstances change.

The substantive end Dewey articulates is this: "It is socially desirable to give as much incentive as possible to the full development of everyone's powers." (Dewey 1978, 490) The "meaning" and "purpose" for *all* social institutions, including law, "is to set free and to develop the capacities of human individuals without respect to race, sex, class or economic status." (Dewey 1948, 186).

[1] For an elaboration of Dewey's focus on method rather than substantive propositions, see Manicas (1981).

Conclusion

Edwin Patterson, who co-taught a seminar on legal philosophy with Dewey from 1924–1929 at Columbia Law School, claims Dewey had a "great influence" on the American legal realists, a number of whom cited his work (Patterson 1950, 619–620). The extent of his influence is unclear because aspects of his analysis of judicial decision-making echo positions previously expressed by Oliver Wendell Holmes, which Dewey acknowledges. The instrumental view of law as a means to social ends he articulates is similar to Roscoe Pound's earlier advocacy of sociological jurisprudence (Pound 1907); and Holmes and Pound were exposed to the pragmatism of William James early on. What can be said with confidence is that pragmatism generally had an influence on American jurists and Dewey enhanced this by insightfully applying pragmatism to various contested legal issues of the day.

Beyond the specific insights conveyed in his legal writings, the enduring significance of Dewey's work lies in his overall mindset – his belief in empirically informed intelligent inquiry and in the human capacity to engage in actions that bring improvements to the lives of individuals and society, through the courage to act and make empirical and value judgments in the face of disagreement, uncertainties, and the absence of absolute truths or universal standards. Bringing this mindset to law is the best way to grapple with and surmount our ever-present challenges.

Cross-References

- ▶ Holmes, Oliver Wendell Jr.
- ▶ Pound, Roscoe
- ▶ Spencer, Herbert

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Dicey, Alfred Venn

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Albert Venn Dicey (4 February 1835–7 April 1922) was Vinerian Professor of English Law at Oxford from 1882 to 1909 and then one of the first Professors of Law at the new London School of Economics. He was defined as a British Whig Jurist. He was a Liberal Unionist and published four books against the Ireland Home Rule Movement. His major books include *A Digest of the Law of England with Reference to the Conflict of Laws* (1896) and *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century (*1917). However, he is most widely known for his first book

Introduction to the Study of the Law of the Constitution (1885).

This work is regarded by British constitutionalists as the cornerstone of their discipline. Already in the 1930s, Sir Ivor Jennings (1967, X) referred to Dicey as "the first to apply the juridical method to English public law." At the commemoration of the centenary of *The Law of the Constitution*, the phrase "whether we agree with him or not, Dicey has helped many of us to earn our living over the years" echoed (Phillips 1985, 588).

For a century since *The Law of the Constitution* was published, virtually every British public law work that aspired to be both historical and analytical has begun with a discussion of Dicey's theses. Almost every important constitutional judicial decision of the last century contains references to *The Law of the Constitution*. This, together with the linearity and systematic clarity of the work, led to reading Dicey's book as if it offered binding interpretations or even as if it were a constitutional law.

After Dicey's death in 1922, E.C.S. Wade published two new editions of the book, in 1939 and 1959. Following the path traced by Dicey in his last edition, that of 1915, Wade left the text unchanged and wrote both times a new introduction, replacing that of Dicey in 1915, in which he compares the constitutional law of 1885, discussed in the volume, with the current one. To illustrate the legislative innovations that have taken place, Wade has used, just as Dicey did in the eight editions he edited, notes to the text and the "Appendix." This choice certainly contributed to propagate the feeling that Dicey's text is a sort of constitutional code to be reproduced with side notes. The last edition of *The Law of the Constitution*, the tenth, was reprinted for the eleventh time in 1985.

The main reason for the success of Dicey's constitutional theory is that it combines Austin's view that a state must by definition have a sovereign body, a body whose competence is not predefined and whose power is not subject to any limits, and the Whig tradition, born of the Glorious Revolution: in perfect harmony with both, Dicey argues that the two fundamental principles of the English constitution are the sovereignty of Parliament and the rule of law. The dogma of parliamentary sovereignty was in that period metabolized by the English jurists to the point of making any theory not premised on it appear to have no connection with reality (Allan 1993, 16). It is therefore not surprising that *The Law of the Constitution* was immediately acknowledged as an Austinian work, that the pillar of Dicey's proposed constitutional system was considered the principle of parliamentary sovereignty, not that of the rule of law.

But it was precisely this reading, after World War II, with the development of constitutionalism in continental Europe, that brought Dicey's construction to a crisis. The view of the British Parliament as "an absolutely sovereign legislature" with the "right to make or unmake any law" pushed both Neil MacCormick (1986, 183) and Joseph Raz (1979, 218 no. 3), the two authors who in the last decades of the twentieth century brought the notion of the rule of law back at the heart of the English-speaking legal-political debate, to proclaim that Dicey's theory does not represent a useful elaboration of this notion.

English constitutionalists most attentive to the protection of fundamental rights have blamed Dicey for failing to understand that, as Friedrich August von Hayek (1973-9, vol. II, 61) pointed out, "the whole history of constitutionalism, at least since John Locke, which is the same as the history of liberalism, is that of a struggle against the positivist conception of sovereignty and the allied conception of the omnipotent state." Dicey's fault would be that he did not realize that without the imposition of precise limits on legislative power, the rights and freedoms traditionally guaranteed in Great Britain by common law can be abolished at any time by Parliament.

This reading is at odds with Dicey's polemic against continental constitutionalism, which is primarily a polemic against the systems where there is a power that can change the list of constitutional rights overnight "with a stroke of the pen."

In order to remedy this contradiction and to recover the important ideas for our time that in my opinion, contrary to what Raz and MacCormick maintain, his construction contains, we should

reread Dicey's work looking at the debate on the common law that took place for two centuries before the drafting of *The Law of the Constitution*. When placed within this framework, this work appears an attempt to outline, following the myth of the ancient constitution, a common law constitution. By merging constitutional theory and the contingent evolution of British legal institutions (Allan, 46), Dicey built a theory that gives the rule of law the function of conferring a constitutional status on the traditional common law rights of the British subjects, identifying them as "the general principles of the constitution."

The English system is superior, in Dicey's eyes, because it entrusts the protection of rights, before Parliament, to a judicial body trained in the light of the common law tradition. For this reason, criticizing the administrative jurisdictions that had spread over the continent, he insisted on the "constitutional" importance of a unified judiciary in the common law.

Dicey was clearly proud of the common law tradition that had made it possible to protect fundamental rights in Great Britain long before in other countries. It is in the light of this proud claim that the notion of Parliament's sovereignty should be interpreted. As great as Austin's influence on his views was, Dicey was far from accepting Austin's thesis that common law is valid in that it is tacitly accepted by the sovereign. On the contrary, he argued that common law courts are the "masters" of the law.

An incompatibility between parliamentary sovereignty and the rule of law is literally inconceivable for Dicey. In his view, parliamentary sovereignty and the rule of law are complementary. Parliament's sovereignty is only expressed through the Acts of Parliament. This is the basis for judges' authority. By definition, each law gives the ordinary courts the power to apply it and to review its application by any administrative authority. As Jennings (1967, 152–3) states, the fundamental principle of the "English Constitution" is not the sovereignty of parliament, but the rule that the courts enforce as a law what has been approved according to the prescribed legal forms.

Dicey (269) also points out that it is essential for the rule of law to be in force that the courts, as the English courts have traditionally done, refer only to its literal wording in order to interpret the law. This means that they must not take lawmakers' intention into account at all: "an English judge will take no notice [. . .] of the changes which a Bill may have undergone between the moment of its first introduction to Parliament and of its receiving the Royal assent" (Dicey, 269).

The idea that the legislator disappears and only the legislative text remains is the essential premise of Dicey's constitutional system: it is the precondition for the courts to exercise their own autonomous normative activity. Judicial activity is configured not as the continuation of legislators' work, but as an activity with a purpose of its own: the courts must not execute the legislators' will, but guarantee the constitutional principles, that is, the rights of the common law tradition. Behind the hermeneutical rule that prohibits judges from reading laws in the light of Parliament's will is a thesis on the basis of the British constitutional system: judges who are called upon to interpret the law, as common law judges, will be faithful to the tradition in which they were trained.

The thesis that judges should interpret laws in accordance with "the rules and spirit of common law" goes back to Sir Edward Coke. As Postema (1989, 17) recently pointed out, this tradition and its surrounding myth based the courts' activity on the conviction that formally enacted law can only be accepted into the body of the English law to the extent that it can be integrated into the common law. The classical theory of the common law rests on the idea that "through interpretation," judges exercise constant "review" over legislation. As Allen (1964, 456) points out, the dominant principle, always present in judges' minds, is the idea that common law is broader and more fundamental than legislation and that therefore "wherever possible – and that means every time that the judges deem it to be opportune – legislative enactment should be construed in harmony with established Common Law principles rather than in antagonism to them." As Jennings wrote (1967, 309), when Dicey argues that "Englishmen are ruled by the law, and by the law alone," he

means that "Englishmen are ruled by the judges, and by the judges alone."

This approach was developed by Sir Matthew Hale who, in his *The History of the Common Law*, argued (Hale 1924, 46) that the task of the judge is to interpret parliamentary legislation as an integration and clarification of the common law and the customs of the Kingdom. When inserted in the scheme outlined by Hale, Dicey's constitutional theory appears coherent and significant. The sovereignty of Parliament is reduced to the sovereignty of the Acts of Parliament. It is traditional common law rights, and not the will of the Parliament or the constituencies, that guide the specific determination of the laws' contents. Dicey works in a tradition in which for a provision to be law, it is not enough that the text containing it has been approved by Parliament in certain ways – that is, through an Act of Parliament – but also that its meaning, the rule derived from it, has been reviewed in the light of the standards, values, and principles of the common law. It is this theoretical framework that allows the coexistence, within his system, of two apparently contradictory principles such as the sovereignty of the Parliament and the rule of law, the latter understood in a substantial meaning as protecting individuals' fundamental rights.

The debate on granting exceptional powers to the government in emergency situations makes the pivot of Dicey's constitutional theory very clear. It is the idea that the courts cannot fail to apply the laws of Parliament, because this would mean denying its sovereignty, but must interpret them in a restrictive way, to the point of reducing them, if necessary, to practical impotence, when this is required to defend the traditional common law rights of individuals or the "freedoms of the English."

When faced with an exceptional situation, by virtue of the principle of the sovereignty of Parliament, only this sovereign body can, through special legislation, free the government from the constraints that ordinarily limit its action (Dicey, 271). On these occasions, Parliament approved the Habeas Corpus Suspension Acts and the Acts of Indemnity. In particular, the Acts of Indemnity made violations of the law legal retroactively, thus representing the highest expression of Parliament's sovereignty. Dicey highlights the importance of the arbitrary act being a legislative act, stressing that "this fact of itself maintains in no small degree the real no less than the apparent supremacy of law" (Dicey, 145) and with it the review by the ordinary courts. Even when Parliament gives it the greatest possible authority, the executive knows that it will be held responsible for its actions: "powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, *what is more, by the interpretation put upon the statute by the judges*" (Dicey, 273, my emphasis).

Even when the government is granted exceptional powers, the judiciary is not a subordinate power that abides by the will of Parliament. It is instead an autonomous power that, through its interpretative activity, guarantees the protection of citizens' rights. If the courts, by culture hostile to the granting of extraordinary powers to the government, should not deem the attribution of such powers compliant with the principles of common law, they will hold the government and public officials responsible for their acts as if the special law did not exist: "Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, *who are influenced by the feelings of magistrates no less than by the general spirit of the common law*, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments" (273, my emphasis).

Parliament acts through laws, and laws unlike administrative acts are applied, and therefore screened, solely by ordinary courts. Only if the rules are produced by Parliament can the courts guarantee the effectiveness of the rule of law or, better, they can guarantee the values and rights of the common law constitution. According to Dicey,

the screening of the courts between a law's promulgation and its application, that is, the fact that only the courts can translate the law into individual rules, has allowed legislation in Britain to be subjected, besides the constraints of form and method, to effective limitations of content and scope. The protection of individual rights by the courts, configured as an effective constitutionality test, is the element that allows Dicey to maintain that the rule of law, understood as the judicial protection of individual rights, and the sovereignty of Parliament are compatible or even complementary.

In developing his theory of the rule of law, Dicey re-proposes the principles, values, and standards of the common law, identifying them with those of liberal philosophy. In other words, the legitimizing foundation of the common law changes. The latter must be taken as the context of legislation not only, and not so much, because it expresses the law of the land but also because it guarantees the rights considered fundamental by the liberal tradition and does so better than any other legal system. By showing that the common law recognizes the rights usually provided for by continental constitutions and upholding that it offers a superior protection, Dicey ascribes the centuries-old English legal tradition to the liberal tradition. Both *The Law of the Constitution*'s success in the field of English constitutional law and its theoretical-legal and theoretical-political interest rest on this attempt to merge the common law tradition and the liberal tradition. Liberal values find, from a legal positivist point of view, their own translation in a positive law such as the common law and, on a sociological level, their own bulwark in a centuries-old legal tradition (paradoxically previous to liberal theories themselves). It is by virtue of this operation that Dicey can claim that a violation of constitutional rights in England implies a revolution that radically changes the legal system.

Dicey's constitutional theory is in stark contrast to the "phonographic" conception of judicial power, i.e., the idea that the judge is merely a repeater of lawmakers' will and his normative autonomy, his producing norms, is a usurpation of political power. Instead, the cornerstone of Dicey's notion of the rule of law is the idea that rights arise from judicial protection and the constitution is nothing more than the recognition of this protection as "entrenched" on the basis of the judiciary's loyalty to a deep-rooted legal tradition that makes the law almost impermeable to the excesses of legislative voluntarism.

In this way, Dicey reconfigures the theory that "the British Constitution has not been made but has grown," taking away all Savignyan coloring. It is translated into the thesis that "the liberties of the English" "far from being the result of legislation, in the ordinary sense of that term, are the fruit of contests carried on in the Courts on behalf of the rights of individuals" (116). This operation and its importance deserve to be reassessed at a time when, in the twenty-first century Europe, the European Court of Human Rights, in order to defend individuals' rights, maintains that its task is to consider the text of the Convention, on the basis of which it is called to judge, as a "living instrument." Today, the principal liberties of the European "have not been made but have grown"; they are the fruit of the contests carried on in the ECtHR.

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Diderot, Denis

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Introduction

Denis Diderot was born in Langres in 1713 and died in Paris in 1784. He co-edited, with Jean Le Rond d'Alembert (1717–1783), the famous *Encyclopédie* (1751–1772) and was one of the foremost exponents of the philosophy of the Enlightenment. However, since he was not well known at the time of his death, it was not until the nineteenth and twentieth centuries that his works, many of which had not been published until then, were extensively studied. In this respect, a 1948 discovery by Romanist Herbert Dieckmann (1906–1986) was of particular importance: a substantive collection of manuscripts by Diderot, thereafter known as "Fonds Vandeul," which had been preserved by the heirs of Angélique de Vandeul (1753–1824), his daughter.

As for his ideas in the social and political arenas, it was long thought that he had made little, if any, contribution to the field (Mornet 1933: 105). However, a series of texts published from the mid-twentieth century on, particularly after Dieckmann's discovery, and Gianluigi Goggi's work on the philosopher's contribution to *Histoire philosophique et politique des deux Indes* (1770–1780) by the Abbé Raynal (Diderot 1976, 1977), have since rendered this interpretation obsolete (Benot 1970; Duchet 1971; Goggi 2013; Leca-Tsiomis and Thomson 2019; Proust 1962). Below is a summary of his fundamental social theories and their evolution, that, given the size and richness of his work, can only be schematically outlined.

Natural, Statutory, and Divine Law

Diderot was not a systematic author, which is why his ideas on ethics, politics, and the legal system must be traced through various texts. In the legal field, faced with the excesses of the clergy and statutory law, he advocated for the existence of natural rights separate from religion and the established powers. He thus joined the modern school of natural law, following in the footsteps of men such as Hugo Grotius (1583–1645) and Samuel von Pufendorf (1632–1694). In his entry Droit naturel, written for *Encyclopédie* volume 5, published in 1755, he identifies natural rights and explains that they are within reach of everyone through understanding, being based on the "general will" of the "human genus" (Diderot 1755: 116). While "individual will" can fail, "general will," he explains, "is never wrong" (116). It is the latter, he adds, which "must define all our duties" (116). With this, he introduces the concept of "general will" which would be resumed, albeit differently, by his then friend Jean–Jacques Rousseau in the famous *Contrat social* (1762) and explicitly mentioned in Article 6 of the *Déclaration des droits de l'homme et du citoyen*, drafted in 1789 (Ratto 2015).

In addition to natural laws, Diderot identifies two other types of rules: statutory and divine. He does not merely propose to reduce written statutes to natural rights, or to simply overturn religious norms, but to achieve harmony between the three codes, as is the case in the fictional community he presents in *Supplément au voyage de Bougainville* (1772). He maintains that when these codes "sacrifice for each other reciprocatively [. . .] there are no longer men, nor citizens, nor religious persons" (Diderot 1995a: 350). This allows him to consider some customs as reasonable within certain societies but to reject them in others. In his maturity, moreover, he considered it necessary, as societies are constantly transforming, to "timely reform" laws, in order to adapt them to contemporary circumstances and allow for their continued effectiveness (282). From this, stems part of his criticism towards *Dei delitti e delle pene* (1764) and its author, Beccaria (1738–1794), who advocated for a fixed system of penal legislation, although he does acknowledge the humanity that courses through the work: "An offense requires different punishments depending on place, circumstance, custom, government [. . .]" (Diderot 1995b: 539).

Political Authority and Social Order

Concerning the nature of political authority, Diderot was opposed to both the theories of divine rights being awarded to royalty, and the attribution of an absolute power to a sovereign, as presented in, for example, the theory of Thomas Hobbes (1588–1679). Such is explained in the entry AUTORITÉ POLITIQUE, which he wrote for *Encyclopédie* volume 1, published in 1751, where he maintains that legitimate power arises from a nation's people; the prince receives it from his subjects. This is through the execution of a "contract" that can be express or implicit and has "necessary limitations," since "power that stems from the acceptance of the people necessarily involves terms and conditions to legitimize its exercise [. . .], as one man should not and cannot fully and without reservation surrender to another" (Diderot 1751: 898). The authority awarded to the prince is limited by the "laws of nature and state" (898). The sovereign, who receives his power from the people, is subject to law, both natural and that which arises from the contract that substantiates his authority.

However, Diderot does not substantiate the right to resist against poor princes at the time. He maintains that power would return to the French nation only if "the royal family were extinguished to the last heir" (900). Otherwise, subjects would always owe obedience to the prince by virtue of their sworn pact of subservience. Nonetheless, his position would evolve towards more radical stances over time, particularly after his stay in Russia in 1773–1774 and his disillusionment towards rulers such as Catherine the Great in Russia and Frederick the Great in Prussia, who he passionately bashes in *Pages contre un tyran* (1771), and towards the monarchical system in general (Strugnell 1973: 229; Israel 2011: 810). In *Essai sur la vie de Sénèque* (1778) and his contribution to the work of the Abbé Raynal, *Histoire de deux Indes* (1770–1780), which examine European colonization and criticize its excesses, he justifies insurgency against conquerors and unfair regimes: "Run, unfortunate Hottentots, run! Drive yourselves deep into your forests. The ferocious beasts which inhabit them are less frightening than the monsters of the empire you are going to fall under" (Raynal 1780: 205).

Even though in texts like this one, or the previously mentioned *Supplément au voyage de Bougainville*, Diderot condemns certain issues of civilized nations, like those of eighteenth-century France, he expressly rejected primitivist stances – in the eighteenth century, generally attributed to Rousseau – in various sections of his work: "I will never be persuaded that barbarism is the most desirable state for a nation, nor that a people heads towards decadence through enlightening or civilization" (Diderot 1995c: 486). Diderot pronounces himself for civilization. As can be observed, for example, in the reform agenda he proposed to Catherine the Great for the Russian nation in the '70s, he seeks to promote the development of science and the arts, the instruction and civilization of nations, and the progress of the human spirit (Diderot 1995a, c). That said, and far from naïve optimism, this does not prevent him from cautioning that, at the same time, love for the superfluous, tyranny, and imbalance with nature can ruin the achievements of civilized nations; in other words, that decadence is always a danger.

Conclusion

Diderot lived for a time, the eighteenth century, crossed by lights and shadows, by the development of new knowledge and reform projects that collided with fanaticism, censorship, and oppression. Those shadows, against which he fought until his last days, were those that hindered the publication of the *Encyclopédie* on more than one occasion, those that led him to prison in 1749 and those responsible for the fact that much of his writings was not published during his life or that some of them circulated through very small circles, through *La Correspondance littéraire, philosophique et critique*, edited by Friedrich Melchior Grimm. It was only after his death that many of his works were known, particularly after the aforementioned discovery of the "Fonds Vandeul" – these has served as the basis for a

scientific edition of his writings, which is currently the reference work (Diderot 1975) – which has led prominent specialists to affirm that Diderot's work is the product of the readings that happened after his death: he has been presented as the man who anticipates the revolution, a humanist, an atheistic materialist or a critic of colonialism, among other interpretations (Proust 1974: 5; Stenger 2013: 7).

This entry investigates the main social and political ideas of a thinker who is hard to define, both because of the length of his work and because of his unique style. Moreover, presenting these main ideas has not allowed for the mentioning of the vast number of brief writings by Diderot dedicated to the latest social and political circumstances of his time, such as the assassination attempt on Louis XV by François Damiens, the Seven Years' War, the Calas case, the suppression of the *Compagnie de Jésus* in France, discussions around the wheat trade issue, etc. (Ouertani-Khadhar 1995: 93–103). In any case, this entry provides a glimpse of Diderot's attempt to secularize and reform politics and law, his rejection of despotism, his defense of the sciences and the arts, as well as the progress of the human spirit, characteristic values of what is known as the Enlightenment, of which his philosophy was a faithful representative.

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Dignity, Human

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Introduction

Human dignity has come to occupy a central place in legal and constitutional discourse. Dignity is not only entrenched as a right in national constitutions and international human rights instruments but is also invoked as the basis of all human rights and a guide to their interpretation. Moreover, it is often claimed that dignity commands a transnational consensus and that it can offer a principled guide to the resolution of incommensurable values (Ackermann 2012). And yet the meaning of dignity is contested, and it is sometimes argued that dignity's vagueness and indeterminacy can result in arbitrary decision-making. The problem, it seems, is not that dignity has no meaning, but rather that its meaning is overdetermined, in that it draws on different traditions and has a variety of meanings and connotations which overlap and sometimes conflict with each other. Against this background, dignity's historical and philosophical roots will be considered first, before examining its role as a legal right and value. This will be followed by a discussion of its meaning(s) in legal discourse, before turning to contemporary threats and challenges.

Historical and Philosophical Roots

The term "human dignity" is said to have originated in Stoic thought. Cicero used the term in a passage in *De Officiis*, in which he grounded the dignity and preeminence of man in the human mind and moral freedom, which separate humans from animals. However, the reference to a dignity which inheres in all human beings is difficult to reconcile with the way in which the term "dignity" was commonly used at the time. For the Romans, a man's dignity was closely linked to his social rank, status, and prestige. The state was also endowed with dignity, as were the Roman people and particular state offices and institutions. Dignity was thus conceived in hierarchical, non-egalitarian terms. Despite its radical potential, the idea of the dignity of human nature was not seen as incompatible with the existence of different levels of honor, status, and esteem in Stoic thought (Cancik 2002).

Medieval thinkers situated human dignity within a different anthropology, as they derived the dignity of human beings from their creation in the image of God. Humans' resemblance to God was linked to their capacity for freedom and reason; however, these attributes were thought of in very different terms from modern conceptions of the autonomous and rational self. In the medieval conception, freedom does not mean that humans are free to do whatever they choose, but remains tied to the true and the good and thus to God himself. Similarly, reason does not exist separately from the person's relationship to and knowledge of God (Hanvey 2013: 221).

Renaissance authors drew both upon the idea of the *Imago Dei* and upon the link made by Cicero between the dignity and preeminence of human beings. One of the most influential texts of the period dealing with human dignity was authored by Pico della Mirandola. In an oration that was posthumously titled *De Dignitate Hominis*, Pico stated that man's dignity derives from his God-given ability to choose his own destiny. Because this text severs dignity from a particular position or rank, vests it in all human beings, and links it to choice, it is tempting to read it through the lens of modern conceptions of the relationship between universal human dignity and individual autonomy. However, that would be to overlook the extent to which its treatment of dignity and choice is inscribed into orthodox Catholic notions of divine grace and the dignity of social roles (Milbank 2013: 200–201). In Catholic thought, dignity is often thought of as "the value something has in virtue of occupying its proper place within a divine order" (Rosen 2012: 47–48). On this understanding, dignity inheres in membership of a particular group (e.g., laborers) and in

conforming one's conduct to the role reserved for that group within the hierarchical social order. This is of course neither an individualistic nor an egalitarian vision of dignity, and it has been invoked to justify the inequality of men and women in marriage (Rosen 2012: 49).

In the twentieth century, a shift occurred in Catholic thought from a group-based (or corporatist) conception of dignity to one in which dignity vests in the individual person. This reinterpretation was meant to offer an alternative to both the atomic individualism of liberal theory and the totalitarianism of communist and fascist regimes (Moyn 2013). This enabled Catholic thought – and Christian thought more generally – to play an important role in the emergence of human dignity as a value that is foundational to international human rights and postwar constitutionalism. The Catholic understanding of dignity was instrumental in the framing of the Irish Constitution of 1937, with its reference in the preamble to the dignity and freedom of the individual. It was also influential in the drafting of Article 1 of the German Basic Law of 1949 and informed the vision of Jacques Maritain, who played a leading role in the drafting of the Universal Declaration of Human Rights.

Human dignity found its most rigorous and influential conceptualization in the moral theory of Immanuel Kant. In the *Groundwork to the Metaphysics of Morals* (1785), Kant (1996: 4:434) famously stated:

> In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.

He thus distinguished between those things that have a relative value (price) and are replaceable and those with an inner worth (dignity) that is absolute and unconditional. For him, it is only "morality, and humanity insofar as it is capable of morality," which has dignity (4:435). What confers dignity on humanity is the capacity to act autonomously in terms of a universal moral law. Dignity is therefore closely linked to autonomy. However, Kant's moral philosophy should not be read through the lens of contemporary notions of individual autonomy. In his moral thought, autonomy does not refer to the individual's freedom to determine the course of her own life in line with her private wishes and inclinations. It consists, rather, in living in accordance with a moral law that a person has given herself. Such moral law must be universal, in the sense that the self-legislating individual must act on the basis of a "maxim through which [she] can at the same time will that it become a universal law" (4:421). The universality of this moral law presupposes treating human beings as ends in themselves. As the second formulation of the categorical imperative states: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means" (4:429).

Kant's moral philosophy proved attractive in the aftermath of the horrors of the Second World War and in the context of twentieth-century societies that sought to come to terms with a racist, authoritarian, and/or totalitarian past. His conception of human dignity is universal and non-hierarchical: dignity is inherent in every human person and does not admit of differentiations in a person's worth on the basis of status, role, or intellectual capacity. Moreover, it prohibits the instrumentalization of any person as it insists that human beings must always be treated as ends in themselves. Despite the attractiveness of this vision, it is not easy to translate into legal norms within the context of concrete legal disputes. For Kant, the universality of the moral law can only be conceived through a metaphysics of morals which is completely independent from any empirical influences (4:426). To bring the transcendental quality of his moral philosophy, and its emphasis on the inner moral law, to bear on the concrete, external world of legal relations seems tricky. What further complicates the issue is that, as Fletcher (1984: 175–177) points out, Kant's own legal philosophy differs in fundamental respects from his moral philosophy, as it focuses on external rather than internal compliance, is rights-based rather than duties-based, and leans toward liberalism rather than communitarianism.

In both the Catholic and Kantian traditions, then, human dignity is conceived as a higher or natural law norm whose validity precedes its entrenchment in positive law and whose content derives from fundamental truths about human nature. This understanding of dignity is not uncontroversial. First, its theological and metaphysical foundations may be considered problematic in an age characterized by the fragmentation and pluralization of belief systems. Second, it could be said to be based on assumptions about individual autonomy and free will that are out of touch with developments in neuroscience, cognitive psychology, and social theory (see Woolman 2013). And third, its appeal to natural law could be criticized for masking fundamental disagreement over the meaning of dignity within the context of disputes about hate speech, abortion, and other controversial social issues (McCrudden 2008: 697–712).

Some constitutional theorists proposed an alternative understanding of human dignity, which grounds it not in religious beliefs or moral conceptions of the qualities or capacities of the individual person but in social recognition. According to Hofmann (1993: 363–364), dignity is best viewed as a relational and communicative concept which can only be realized through the positive valuation, within a concrete community, of claims for recognition. Its basis can be found in a mutual promise made by members of a political community and in human solidarity. Möllers (2009) similarly views dignity as a legal and political, rather than an abstract, moral concept. On this view, dignity's recognition is based not on its universality but on a commitment made by a particular political community which is constitutive of its democratic self-understanding. It could be argued that this theory is better able to account for the boundaries against which claims for the recognition of dignity inevitably come up: since it grounds dignity in the self-understanding of a bounded democratic community, it can explain why such a community is obliged to respect and protect the dignity of everyone within its borders but does not have a similar obligation in respect to foreign nationals (other than asylum seekers) outside of the country's borders.

Others, like Carozza (2008: 939), insist that dignity's emancipatory potential, and its capacity to mediate between conflicting constitutional rights and values and between universal norms and local context, depends precisely on its claim "to be the bearer of some extra-legal and supra-positive value." Habermas (2010: 469) similarly argues that it is dignity's quality as a moral and universalistic idea that enables it to ground a democratic legal order founded on human rights. He states that "human dignity forms the 'portal' through which the egalitarian and universalistic substance of morality is imported into law."

Human Dignity as a Legal Right and Value

Human dignity is firmly entrenched in international human rights instruments. The preamble to the Charter of the United Nations (1945) declares the determination of the international community "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person [and] in the equal rights of men and women." The Universal Declaration of Human Rights (1948) states in its preamble that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and declares in Article 1 that "[all] human beings are born free and equal in dignity and rights." While dignity is sometimes formulated as an individual right (as in Article 5 of the African Charter on Human and People's Rights (1981)), it also features as a founding value which underlies and legitimates the international protection of human rights. Examples of the latter include the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), which proclaim in their preambles that human rights "derive from the inherent dignity of the human person." References to dignity are also common in treaties proscribing discrimination and/or seeking to protect vulnerable groups. For instance, Article 1 of the United Nations Declaration on

the Elimination of All Forms of Racial Discrimination (1963) and the preface to the Convention on the Elimination of All Forms of Discrimination Against Women (1979) state that respect for human dignity is violated by racial discrimination and discrimination against women, respectively.

Dignity is similarly recognized as a fundamental right and a founding value in many national constitutions, particularly in countries that emerged from authoritarian, oppressive, colonial, or racist pasts during the last 70 years. In these constitutions, dignity plays a variety of roles and is invoked in different contexts. It is enshrined as a founding value or principle, a self-standing fundamental right, a guide to the interpretation of other rights, and/or a consideration to be taken into account in determining the justifiability of rights limitations. Dignity also features in provisions relating to specific interests, such as the family, or seeking to protect vulnerable sectors of the population, such as children, women, elderly people, or the disabled (see the examples cited by Daly 2013: 21 and articles 227 and 230 of Brazil's Constitution (1988)).

Many of these constitutions seem to have been influenced by Article 1(1) of the German Basic Law (GBL), which provides: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." Three basic distinctions, which are central to German literature and case law, have been particularly influential. The first is the distinction between the negative duty imposed on the state to refrain from performing any action that infringes human dignity and the positive duty to protect individuals from infringements by third parties and ensure the conditions of a dignified existence. The latter has been linked to the protection of socioeconomic rights, as in Article 23(2) and (3) of the Belgian Constitution (1994). Even though the duty to protect can be relied on to require the state to take positive steps to protect individuals' lives and safety, there are indications in German law that, in cases of direct conflicts, the state's (negative) duty to respect human dignity would trump its (positive) duty to protect it. (See in this regard the Aviation Security judgment, referred to below.)

The second distinction is between dignity as a subjective right and an objective legal norm. The latter entails that dignity is at the center of an objective value order which must guide the enactment, interpretation, and enforcement of all law, as recognized by the Federal Constitutional Court in the Lüth judgment (BVerfGE 7, 198, 205 (1958)). Accordingly, dignity is regarded as a foundational value which must guide the interpretation of the GBL and the fundamental rights enshrined in it. In addition, dignity, and the fundamental rights associated with it, has a radiating effect on private law relations as it influences the interpretation and development of all spheres of law, including private law. In Germany, dignity is seldom if ever invoked directly as a right. It is, rather, relied on as a value to help flesh out the meaning of more specific rights which give effect to it, such as the right to life or the right to the free development of the personality. In South Africa, by contrast, the courts sometimes find that the right to dignity has been infringed. Despite this, however, dignity is said to assume the role of a residual right which is used to interpret and give shape to more specific rights and which is relied upon directly only in cases in which no more specific right is available (*Dawood; Shalabi; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 36).

The third distinction relates to the question whether dignity is an absolute or relative right. A number of constitutions follow Article 1(1) of the GBL by declaring that human dignity is "inviolable" (e.g., Art 15(1) of the Constitution of Ghana (1992), Art 30 of the Constitution of Poland (1997)). Dignity's absolute character is further underlined by Article 79(3) of the GBL, which shields Article 1 from constitutional amendment and thus treats it as eternal. The view that human dignity is absolute and inviolable, and may not be weighed up against conflicting rights or state interests, is exemplified by the judgment of the German Federal Constitutional Court in the Aviation Security Case. This case dealt with the constitutionality of legislation, adopted in the wake of 9/11, which authorized the security forces to shoot down an aircraft which was to be used to destroy human life. The Federal

Constitutional Court found that the legislation infringed the dignity of cabin crew and passengers, who were reduced to helpless objects of the state's attempts to protect others. The Court refused to balance their dignity against the lives of others who may be saved in the process and, accordingly, found that the legislation was unconstitutional (BVerfGE 115, 118 (2006)).

Not everyone agrees with the idea that dignity is absolute. Some German commentators have pointed out that, because dignity is seen as the basis of human rights and is often used in conjunction with more specific rights, it sometimes features on both sides of a constitutional dispute. In cases where dignity conflicts with dignity, a court may have no choice but to engage in balancing – such as in the abortion cases, where the life and dignity of the unborn fetus conflicted with the self-determination and dignity of the mother (BVerfGE 39, 1 (1975); BVerfGE 88, 203 (1993)). This has led some authors to argue that a distinction must be made between a core of dignity that is absolute and a periphery that is open to balancing (Herdegen 2009: 30–38), or between dignity as a rule, which is absolute, and dignity as a principle, which is weighed up against conflicting principles (Alexy 2002: 62–64). However, the majority view in the German literature remains that human dignity cannot be limited. As a result, much turns on the definition of dignity and on interpretive strategies designed to preserve its absolute character. These strategies include avoiding direct reliance on dignity as a right, and giving dignity a restrictive interpretation, which must prevent it from overuse and trivialization (Dreier 2004: 207–209, 226).

In some other countries, like Israel (Barak 2015: 281–283), dignity is viewed as a relative right which can be limited. This is also the position in South Africa, where dignity plays an important role in proportionality analysis, as a limitation which limits the core aspects of a person's dignity requires a compelling justification (Botha 2009: 215–216). It has nevertheless been argued that, even in those jurisdictions where dignity is not entrenched as inviolable, there may be a core of inherent human dignity that cannot be limited (see Steinmann (2016: 6, 13).

Scope and Meaning

Günter Dürig, the German constitutional scholar, wrote that the dignity guarantee in the GBL is rooted in the idea that man is distinct from impersonal nature by virtue of his mind, which enables him to become conscious of himself, to determine himself and to shape his own environment (Dürig 1956: 125). To treat human beings as objects is to deny their capacity to shape themselves and their environment. In Dürig's formulation:

> Human dignity as such is affected when a concrete human being is reduced to an object, to a mere means, to a dispensable quantity. [Violations of dignity involve] the degradation of the person to a thing, which can, in its entirety, be grasped, disposed of, registered, brainwashed, replaced, used and expelled. (Dürig 1956: 127, my translation)

This definition, which rests on the Kantian idea that a human being is an end in itself and not simply a means to an end, has come to be known as the "object formula" and has, more than any other academic contribution, helped shape Germany's dignity jurisprudence. For instance, in the *Life Imprisonment* case, the Court held that the state may not "turn the offender into an object of crime prevention to the detriment of his or her constitutionally protected right to social worth and respect" (BVerfGE 45, 187, 288 (1977), translation by Kommers and Miller 2012: 365). This formula has also been influential in other jurisdictions (see Daly 2013: 46–48 for references to comparative case law).

Despite its intuitive appeal, doubts have been expressed over the capacity of the object formula to constrain judicial decision-making. In the view of some commentators, the object formula is over-inclusive, as there are many instances of objectifying treatment which do not constitute a violation of the constitutional dignity guarantee (Dreier 2004: 167–168). Critics have also pointed to a judgment of the Federal Administrative Court in which it held that "peep shows" resulted in the objectification of the women who were being watched, despite the fact that they willingly participated (BVerwGE 64, 274 (1981)). This judgment brings to the fore the complex relationship between dignity and individual autonomy.

Although dignity often supports individual freedom and self-actualization, it can also be used to limit it. Admittedly, dignity requires the protection of the poor and vulnerable against exploitation, but there may come a point where such attempts tip over into the illegitimate imposition of a middle-class morality onto those who do not share it (see Dreier 2004: 218–220).

Dignity's articulation with related values, such as equality, also points to the limits of the object formula. In countries in which dignity has infused the interpretation of the right to equality, emphasis has been placed on the ways in which laws or conduct may result in the stereotyping, stigmatization, and degradation of individuals from vulnerable groups or their exclusion from full moral citizenship (Ackermann 2012). These themes resonate with a Kantian understanding of the inherent worth and dignity of every human being. However, they also introduce a different dimension, which is not fully captured by the object formula, namely, that our personhood is grounded in mutual recognition and that laws which effectively brand some social groups as inferior or as second-class citizens are inconsistent with a basic respect for human dignity.

Challenges

The historical development of human dignity as a legal concept and value is often presented in terms of a narrative which foregrounds the progressive expansion of human dignity and human rights to every member of the human family. (For a somewhat unusual take on this narrative, see Waldron 2012.) This narrative stresses the shift from the particularity of the dignity of rank and status to the universality of the dignity which is inherent in every human being and typically includes an account of the legal instruments, concepts, and doctrines that have enabled this shift and facilitated a transnational dialogue on human dignity. However, it could be asked whether this account does not underestimate the breaks and discontinuities between different historical eras and traditions. A second criticism is that this narrative underplays the disjuncture between legal norms and social reality. For to present the history of postwar constitutionalism as the gradual unfolding of a transnational consensus on the meaning and implications of human dignity is arguably to ignore the enormity of contemporary threats to the dignity of the human person.

The precarious position in which refugees and some classes of economic migrants find themselves represents one such threat. More than six decades after Hannah Arendt noted that the loss of a political community willing and able to guarantee their rights had resulted in a state of utter rightlessness for refugees and stateless persons (Arendt 1968: 290–302), millions of people who have forfeited the protection of a national community are still consigned to an existence without rights. Admittedly, international law has developed important tools for the protection of the human rights of refugees, and in many cases, borders have been relaxed to facilitate the movement of goods, capital, and people. Despite this, refugees and migrants (particularly those coming from developing and Muslim countries) are today faced with an unprecedented array of bureaucratic mechanisms that prevent them from entering and staying in their countries of destination, deprive them of the most basic rights, and subject them to draconian police-state apparatuses.

Another threat consists in the conceptualization of all spheres of life in market terms. Social and political theorists like Wendy Brown (2015: 17–45) and Margaret Somers (2008: 61–143) point out that the governing rationality of neoliberalism reduces individuals to disposable forms of human capital who are constantly at risk of becoming redundant and whose primary goal is to increase their net worth. This is a far cry from the idea of the human person as an end in herself, whose highest goal consists in self-actualization. Moreover, neoliberalism shifts the blame for poverty and destitution onto individuals themselves who, in the absence of a safety net provided by the state, must take responsibility for having made the wrong "investment choices." It also prevents citizens from seeking redress through political contestation, as it transforms social issues into the subject of managerialist techniques. Citizenship itself becomes marketized and is shed of its

egalitarian, inclusive, and universalistic dimensions. As a result, whole populations are effectively stripped of their membership in the community and are reduced to a condition of "bare life."

These threats raise fundamental questions over the relationship between universal human dignity and membership in a particular political community. Is it true, as Arendt claims, that the abstract dignity of being human means little in the absence of membership in a particular community? Would that not imply that dignity is still linked to a particular status, namely, citizenship or, at the very least, residence? How is human dignity related to Arendt's notion of the right to have rights? (See Kesby 2012.) Can the value of dignity be used, in conjunction with political rights, to challenge the disenfranchisement of poor and marginalized populations? Can it be used, in conjunction with civil and social rights, to contest the legal boundaries that consign refugees and migrants to a life of misery and exclusion?

Human dignity has been articulated with political rights and citizenship in some judicial decisions. For instance, the South African Constitutional Court described the right to vote as "a badge of dignity and of personhood" in a case concerning the disenfranchisement of prisoners (*August v Electoral Commission* 1999 3 SA 1 (CC) para 17). And some authors view dignity as a foundation of democracy (Häberle 2004: 350–352; Möllers 2009). Attempts have also been made to ground the rights of noncitizens in mediations between universal human rights and particular ethical and political self-understandings (Benhabib 2004). Whether these attempts attest to human dignity's resilience in the face of adversity, or highlight serious difficulties inherent in attempting to rethink the political in moral terms, remains the subject of contention (see Botha 2013, 2015).

Conclusion

The history of human dignity as a legal right and value bears testimony to the plasticity of this concept and its ability to respond to a range of legal and social problems. The fact that dignity has roots in different historical and philosophical traditions helps to explain both its basic appeal and its contested nature. The slippages between its meaning as a moral and a legal term also contribute to the difficulties surrounding its interpretation. Whether dignity should be grounded in an abstract and universal morality, or in social recognition within a concrete community, remains contentious. The same goes for the question whether and to what extent it should be conceived as an absolute or relative right and value. Despite the appearance of a growing transnational consensus on the importance of human dignity, dignity today faces grave threats, such as the inhumane treatment of refugees and migrants and the economic dispossession and political disempowerment of poor and marginalized populations. Since these dangers are embedded in the international system of states (Arendt 1968) and the logic of contemporary capitalism (Brown 2015), they will not be averted easily.

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- ▶ Citizenship
- ▶ Legal System and Legal Order
- ▶ Natural Law: Contemporary
- ▶ Refugee
- ▶ Rule of Recognition and Constitution

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Dilthey, Wilhelm

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Introduction

Wilhelm Dilthey's (1833–1911) lifelong attempt was to lay the foundations of what he called "Geisteswissenschaften" (human sciences), those sciences dealing with the individual and social worlds of meaning as distinct from the natural world. He developed a very influential distinction between *explanation*, the epistemic goal of the natural sciences, and *understanding*, the method appropriate for the psychological, historical, and social reality of the human life world. Despite his skepticism pertaining to the methodological unity of all sciences, he rejected body-mind dualism and emphasized the embeddedness of culture into the biological life process.

The Introduction to the Human Sciences

Dilthey's book with that title, which appeared in 1883, was intended as the first part of a six-volume project of which several drafts exist and have now been published within the 26 volumes of his *Gesammelte Schriften*. The basic idea was to supplement or even overcome Kant's *Critique of Pure Reason* by developing a *Critique of Historical Reason*. Dilthey argued that social, cultural, and psychological reality, the categories of

reason and the systems of law included, is always shaped by comprehensive human experience, which comprises volitional and emotional as well as cognitive aspects, and develops in time. His key terms were "inner experience" and the "facts of consciousness." "Inner," however, isn't meant to exclude the "outer" physical reality; it rather emphasizes the fact that in the human world, reality is always apprehended in its meaningfulness for life. Both biographically and culturally, meanings grow and alter within a diachronic nexus of meaning. Dilthey therefore rejected all attempts to found the human sciences on ahistorical metaphysical considerations and substituted them with the methodological program of historical-empirical inquiry into the nexus of life and meaning based upon the facts of consciousness. His concept of law in the *Introduction* manifests this stance with special clarity. According to Dilthey, the nature of law cannot be found in abstract reasoning about right and wrong; it must rather be understood according to its function within the nexus of meaning, namely, to provide a teleological nexus in which the systems of culture and the modes of societal organization hold together in an integrated unity.

Human Action in the Context of Life's Evolution

From early on, Dilthey had regarded mental, social, and cultural phenomena as integral parts of the life process going on between subjects and their environment. But his emphasis on inner experience and individual consciousness in the *Introduction* seemed to favor a merely psychological foundation of the human sciences and accordingly an individualistic explanation of intersubjectivity and social structures. Furthermore, it had a dualistic ring to it and seemed to neglect the active character of the human mind. In the years around 1890, Dilthey became occupied with evolutionary theory and biology in general and realized that his groundwork had to be enlarged by including organic interaction and an action-theoretical understanding of subjectivity. In his *System of Ethics* from 1890, he wrote: "Within the structural nexus of psychic life, thought is but an intermediate link between excitement and reaction: it has to be transformed into action. Thereupon is based the play of children as well as the entire culture" (Dilthey 1981, p. 13; my translation). The human tendency to reflect, distinguish, and make explicit is but a part of some larger property of life in general: "life articulates itself" (Dilthey 1982, p. 345; my translation).

According to Dilthey, we are immediately connected with the world via action and the resistance it encounters, but at the same time, this immediacy is always already mediated by biological, cultural, and social structures which have emerged historically and biographically within the overarching nexus of life. He saw the necessity to act in a both social and physical environment as crucial for understanding not only the individual mind but also society in general – a line of thought directly connected with American pragmatism emerging about the same time. It is no coincidence that George Herbert Mead, the pragmatist philosopher and founder of social psychology, studied with Dilthey and attended his lecture on ethics.

The Hermeneutics of Objective Spirit

Due mainly to reasons of science policy, the late Dilthey refrained from elaborating his anti-dualist understanding of the human sciences further and instead focused upon their autonomy over against the natural sciences. In parallel, he developed his mature concept of the structural nexuses shaping the meaningful realm of society and culture. It would be a mistake, though, to exaggerate his contraposition of nature and the human world. Biological drives and evolutionary processes in general continue to shape the subject matter of the human sciences, and for an in-depth understanding of cultural phenomena, we need both causal explanation and interpretive understanding. The latter term, *understanding*, for Dilthey signifies the method of the human sciences: understanding means to grasp a given particular meaning as a part of a greater whole to which it belongs,

namely, the nexus of life and vice versa. But only those articulations of life which are fixed permanently in writing can, according to him, be objects of scientific understanding. In an influential text from 1900, *Die Entstehung der Hermeneutik* (1957), Dilthey developed the idea of universal *interpretation* as crucial for the foundation of the human sciences. The mutual dependency of part and whole (e.g., particular sentences and an entire novel) can be understood better and better by repeated interpretive feedback loops and thus universal validity approached. Yet, there remains an individual element in all social meanings that limits understanding.

In its most comprehensive form, the constitutive nexus between larger totalities and particular articulations can be described as "objective spirit." Whereas according to G. W. F. Hegel, from which the term was taken, the objective spirit must finally be integrated into the "absolute spirit"; Dilthey rejects the latter term. There is no final, metaphysical, timeless structure in which the contingent and continuously iterated historical process of lived experience, expression, and understanding is anchored. We have to accept the contingency of historical developments but are free to better understand and appropriate them if we refrain from metaphysical judgments. This hermeneutical stance is accompanied and fortified by Dilthey's philosophy of life: the prereflective unity of life, which comprises emotional, volitional, and cognitive aspects, is prior to any attempt at scientific understanding and any theory. It cannot be judged by reason. This could be seen as Dilthey's irrationalism but is better understood as the rational acknowledgment of reason's limits.

Another point is of crucial importance for the late Dilthey: his theory of the objective spirit implies that the meaningful structures with which hermeneutics deals emerge within the social life process, but are not accessible from the standpoint of methodological individualism. Cultural and social meanings form *systems* shaped by the nexus of effects which characterizes the human world. This nexus is qualitatively different from the causal nexus between two physical events insofar as it is based on the coherence between some part and some greater whole. In Dilthey's mature hermeneutics, the mental states of individuals obtain no privileged status. They are necessary, but not sufficient elements in the ongoing hermeneutic process of meaning-constitution and meaning-understanding. The social systems of morals, law, economy, etc., are brought about by interacting individuals over time, but they nevertheless achieve the status of belonging to the "objective spirit," that is, of meaningful configurations prior to individual action and experience. According to Dilthey, the crucial importance of political bodies and the accompanying legal frameworks for the achievement of a teleological nexus between the individual beings has paradigmatically been realized by the leading officials of the Prussian state and by Hegel, yet any rational and normative reconstruction of actual political bodies à la Hegel is inevitably destroyed by a fully developed historical sense of contingency.

Conclusion

Dilthey argued against two opposed adversaries: those who wanted to see the historical development of social meanings, values, and norms as being grounded in atemporal, metaphysical truths and those who aspired after a unified concept of all scientific inquiries under the lead of the natural sciences. His concept of objective spirit as the emerging nexus between parts and wholes avoids both pitfalls. In the course of the history of his reception, however, his approach has often been misunderstood as establishing a mutually exclusive dichotomy between explanation and understanding and thus as a license to practice the humanities without any regard to evolutionary and other natural influences. This is partly due to the fact that many of his most important writings remained unpublished during his lifetime and began to appear not until the 1970th.

Dilthey's triadic structure of lived experience, articulation, and understanding universalizes the hermeneutic tradition, provides it with a biological and anthropological basis, and overcomes the methodological individualism his early work was

inclined to. In its mature form, it opens up the possibility to understand and study all objectivations of social life as meaningful structures shaped by the hermeneutic circle established between parts and wholes. Dilthey's understanding of hermeneutics has deeply influenced hermeneutical legal theory, most prominently in the work of Emilio Betti (1967). Hans-Georg Gadamer's *Wahrheit und Methode* (1960) is unimaginable without Dilthey's influence and especially his insights into historic consciousness, but Gadamer remains highly skeptical pertaining to Dilthey's anti-dualistic philosophy of life and his radical historicism.

Cross-References

► Hermeneutical Legal Theory

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Disability

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Introduction

Disability has not been a recognized category in philosophical discussion until the emergence of Disability Studies in the 1980s (Wasserman 2016). Today, the philosophy of disability includes consideration of physical and mental variations and their impact on well-being, personal identity, relationships, justice, knowledge, and morality. The philosophy of disability is significant for law and policy, education, medicine, justice, theories of well-being, and moral status because of how disability challenges standards of ability, autonomy, independence, and cognitive status that are assumed in these fields (Wasserman 2016; Cureton and Wasserman 2020). While an introduction to all these areas proves too lengthy for the present entry, there are key areas to consider in the discussions and debates within the philosophy of disability.

First, sustained philosophical discourse on disability has not resulted in a shared definition of the term. A discussion of the different definitions of disability available is therefore important, not only to highlight some key considerations about disability but also to reveal central issues that merit attention in the field.

Second, discussion of well-being is a critical area to address because it factors into decisions regarding medical care, education, social status, law, and justice. Well-being discourse emphasizes the disconnect between standard views about the quality of life for someone with a disability and testimonies of those with disabilities.

Third, ethical theories ought to be examined, particularly the way ethical theories have elevated and privileged autonomy and intellectual ability, two concepts that many people with disabilities lack or have to a lesser degree than their able-bodied peers.

Models and Definitions

Models of Disability

The two prevailing models of disability are referred to as the medical model and the social model. These models pick out a set of phenomena intended to capture the reality of disability and locate the source of disadvantage, whether actual or perceived, that accompanies disability (Wasserman and Aas 2022).

According to the medical model of disability, the limitation experienced by people with disabilities is explained in terms of their bodily difference. It is the physical or mental impairment that disables someone. These "pathological" states are the primary cause of disadvantage (Wasserman and Aas 2022, quotations mine). The medical model is the default position implicitly adopted by most bioethicists, philosophers, and the general public. It is accompanied by the view that disability is a "bad-difference" maker and should be fixed, resisted, feared, or cured. The development of technology aimed at eliminating disability through genetic editing, genetic testing, and selective termination is supported, often implicitly and unreflectively, by the medical model of disability.

In contrast, the social model of disability places the source of the disadvantage in the relationship between the individual and their environment. It is the society that disables an individual by excluding them from central facets of social life because of their impairments. This exclusion includes the day-to-day architectural environment that is designed for the able-bodied as well as the social settings where activities often restrict participation of individuals with disabilities. Thus, the social model distinguishes between the physical impairment and the disability. It is not the impairment per se that disables someone but the society that disables someone; where society to be fully accepting, universally designed, and inclusive of all abilities, impaired individuals would not be disabled. Disability is therefore the disadvantage that is imposed on someone who has an impairment (see UPIAS 1976).

While firm commitment to either the social or medical model of disability is possible, one may consider a hybrid model to best capture the reality of disability for those who experience it (see also Swain and French 2000 for an alternative model). By reducing the disability to either the physical/mental impairment or society, one risks overly simplifying the lived experience of disabled people. For instance, if one claims that it is solely the lack of ramps that disables the paraplegic in a wheelchair, then one trivializes the physical and mental challenges that come from paralysis. When one focuses exclusively on the impairment as the cause of disablement, one may fail to change social and environmental conditions that also disable individuals. Attention to the complexity and multifaceted nature of those conditions called "disabilities" is required to ensure a just and inclusive society is achieved. For a thorough discussion of the different models of disability, see Wasserman and Aas (2022).

Definitions of Disability

If models of disability offer a theoretical perspective highlighting the set of phenomena one hopes to explain when discussing disability, then definitions of disability ask about the nature of disability – *what is disability*? Is disability a positive entity or is it an absence of something else; is it a natural phenomenon or a social construction; is it an impairment or a limitation caused by an impairment? These questions generate divergent definitional strategies. Four definitions include the Normal-Function view (e.g., Boorse 2010), the Welfarist view (e.g., Kahane and Savulescu 2009, 2011), the Social Constructionist view (e.g., Barnes 2016; Lim 2018), and the Inability view (e.g., Buchanan et al. 2000; Gregory 2020).

The Normal-Function view of disability, namely that disability consists of an abnormal functioning of a bodily feature, flows from the assumptions of the medical model. This position characterizes disability as a *pathology,* that is, a departure from the species typical function, that is deserving of unique treatment (Boorse 2010, emphasis mine). For example, if the normal blood pressure reading for the average adult is less than 120/80, then a blood pressure reading of 140/90 is considered a departure from the species-typical function and is deemed as hypertension – a pathological condition treatable by diet, medication, and lifestyle changes. This view takes seriously the departure from typical functioning as essential to disability and assumes an identifiable "normal" function of the species. It does not indicate the extent to which the pathology itself versus the social acceptance or rejection of the pathology is the disabling factor (Wasserman and Aas 2022).

The Welfarist view takes well-being as the standard by which to define disability. Disability is a physical or psychological property of an individual that impacts well-being in a negative way, thus making its bearer "worse off" with respect to well-being (Savulescu and Kahane 2011). For a property to be a disability, it must reduce well-being independently from the social prejudice that might result from the condition. Take, for example, achondroplasia, the most common cause of short stature or dwarfism (https://www.achondroplasia.com/what-is-achondroplasia/), which is categorized as a disability according to the Americans with Disabilities Act (ADA 1990). According to the Welfarist view, achondroplasia is not necessarily a disability if it does not reduce one's well-being even if the individual receives significant prejudice from society.

The Social Constructionist view holds that disability is a social construct. Uniquely, advocates of this view argue that disability ought to be defined by members of the Disability Rights Movement – the self-identified group of disabled and non-disabled members (Wasserman and Aas 2022). Thus, disability depends on the disabled person's judgements and attitudes about which physical conditions lead to unjust treatment in society. This view shifts the focus of disability from a physical or psychological property to a social one. For further discussion of this view, see Barnes (2016), Lim (2018), and Howard and Aas (2018).

Finally, the Inability view defines disability as an "unusual inability." One version of this view suggests that to be disabled is to be less able to do something than is typical for an individual of the same species (Gregory 2020, 26; 33). Proponents of this view are resistant to the stigma of the term disability that flows from the medicalized normal function view. For example, one would categorize blindness as an unusual inability to see for the typical adult rather than a pathological state.

Some thinkers resist defining disability at all, or at least as a trait, function, or condition (see Tremain 2017). Still others emphasize the need for multiplicity rather than unity that comes from a set definition (see Beaudry 2016, 2020). For a detailed discussion of these four definitions along with others, see Wasserman and Aas (2022).

Ultimately, there is no standard definition of disability within philosophical discussions, and those working within the field must take seriously the implications of adopting one definition of disability over another. Definitions such as the Welfarist view require additional discussion of the notion of well-being. The Social Constructionist view opens itself up for criticism by not including impairment as part of the definition. For example, Howard and Aas (2018) suggest that disability is distinguished from other social categories like race, gender, and sexual orientation by being an impairment – a dysfunctional bodily state that limits a major life activity. The Normal-Function view involves embracing a naturalistic explanation of how one's species typically functions and raises questions about the normativity of claims regarding suboptimal functioning – e.g., that it is bad to have low vision. These challenges notwithstanding the distinctions raised by these definitional attempts point to other areas of philosophical interest. One such area is well-being studies to which we now turn.

Theories of Well-Being

Well-being is that which is good for an individual, what benefits her, what is in her interests, and what makes her life go well for her (Haybron 2007). Theories of well-being offer different accounts of what is good for individuals and why, what constitutes the nature of well-being, and the different truth conditions for the claim that something *S* is good for someone *P*.

Disability challenges many popular theories of well-being. For example, subjective theories and objective theories offer two different explanations of the nature of well-being. Subjective theories of well-being consider pleasure or desire, which are a function of an individual's mental states, to constitute well-being. Hedonism and desire-satisfaction are two types of subjective theories. Objective theories of well-being distinguish the achievement of objective goods from an individual's mental states and consider them to have

independent effect on well-being. Objective list, eudaimonism, and nature-fulfillment are examples of objective theories of well-being (Goodnight 2018, 39–40). Depending on how one unpacks the notions of pleasure, desire-fulfillment, objective goods, virtuous activity, and nature-fulfillment, the possibility for achieving well-being as a disabled individual varies. This entry will outline two responses to the question of how disability impacts well-being: the "bad-difference" view and the "mere-difference" view.

The bad-difference view claims that disability makes you worse-off with respect to well-being and that "in social contexts where people are fully accepting of disabled people and there is no ableism, having a disability either has or is likely to have a negative impact on the well-being of anyone who is disabled" (Campbell and Stramondo 2017, 151). Disability is a bad-difference because it prevents you from achieving basic goods, causes you pain, limits the satisfaction of desires, or hinders the attainment of virtue. The bad-difference view is sometimes referred to as the "Standard View" and is adopted by many philosophers, bioethicists, and public intellectuals (2017, 151). The disability community resists such views and offers the alternative view that disability is not bad but rather neutral with respect to well-being.

The view that argues for disability as neutral in its impact on well-being is known as the mere-difference view and is defended by Elizabeth Barnes (2009, 2016). Having a disability herself, she claims that living with a physical disability is "simply a way of living with a minority body" and is a mere-difference maker. In other words, the mere having of a physical disability does not automatically make someone worse off with respect to well-being; disability per se is neutral for well-being (Goodnight 2018, 66; Barnes 2014). Barnes clarifies that the mere-difference view does not prevent disability from being bad for an individual; but this badness tends to be local rather than global in kind. In other words, a heart condition that prevents someone from playing soccer might be bad by hindering that particular desire from being realized, but it does not mean that individual will consider her life *on the whole* to have lower well-being. There are ways such an individual can still get enjoyment from the activity, such as watching or coaching the sport.

One primary limitation to Barnes' view is her singular focus on physical impairments. She does not say whether cognitive or social impairments are also neutral with respect to well-being. Another limitation to the mere-difference view is that it risks minimizing or trivializing the severity of some impairments. There are some disabilities that are bad for an individual – infantile Tay-Sachs, for example, is a rare and usually fatal disease that stops the nerves from working properly (https://www.mayoclinic.org/diseases-conditions/tay-sachs-disease/symptoms-causes/syc-20378190). As Campbell and Stramondo (2017) suggest, it is difficult to argue that this genetic disease is a mere difference maker for the individual and a more nuanced look at what it means for something to be neutral for or bad for an individual is needed. One must be careful not to over generalize about the impact of disability on well-being because of the wide variation across disabilities.

When determining the relationship between disability and well-being, it is important to consider the testimony of persons with disabilities as well. Without including the testimony of the disabled, one risks committing testimonial injustice towards these individuals (see Barnes 2016). Testimony may be fallible, but it is nonetheless an important source of information regarding the experience of those living with disabilities.

Ethical Theories

Prominent ethical theories privilege the role of reason, individualism, and autonomy for morality. However, for those with disabilities, these goods often are limited, unrealizable, or absent. According to Immanuel Kant's deontological theory, human beings have worth because they are rational beings who can act autonomously. For John Stuart Mill's Utilitarian theory, happiness is a matter of maximizing pleasure and minimizing pain, both in terms of intellectual pleasures and

physical pleasures. For Aristotle's Virtue theory, the exercise of virtue requires rationality because we are, after all, rational animals. Using each of these well-known ethical theories as examples, it is not clear where people with disabilities fit – either as moral agents or as beings capable of living a good life.

One ethical theory that embraces people with disabilities into the theoretical structure is an Ethic of Care. Philosopher Eva Kittay, for example, argues that human beings are dependent beings who need other people to help them become rational, autonomous, or independent. It is through relationships of care and love that we discover our moral responsibilities to others and receive the support needed to live full and thriving lives (Kittay 2001, 2011). Embodiment is embraced within the ethics of care too; care theorist, Ruth Groenhout says, "physical existence is the source and ground of their [human] reasoning and acting" (2004, 40). The body is a source of communication where reason might be absent. Communicative gestures, eye contact, and sound are all examples of how someone with an intellectual or physical disability might communicate their thoughts and needs to another who can respond to them (Goodnight 2018).

Disability therefore challenges standard ethical goods by re-prioritizing relational goods over individual achievements (Kittay 2013). Kittay explains,

> An ethics of care sees the affective connection between people as prior to a calculative reason that binds self-interested persons... An ethics of care understands responsibility to be bound by the connection to and an understanding of the needs and wants of the other. Asymmetrical and partial relations are as morally relevant as symmetrical and impartial ones and the mode of deliberation at once respects both emotional responses as well as rational considerations (2013).

While Kittay, for example, does not exclude rationality from a robust and complete ethical theory, she includes the embodied and emotional aspect of the human being as ethically significant. When dignity is equated with reason and autonomy, human beings without such capacities are deemed less worthy of justice. Thus, Kittay pleads for an "ethics that will both articulate the harms faced by people with disabilities—discrimination that threatens dignity as well as well-being—and offer moral resources for redress" (2013).

In addition to the ethics of care, the "Capabilities Approach" defended by Martha Nussbaum maintains that rationality is only one determination of human functioning and that our sociability is critical for an accurate account of human dignity. Nussbaum says, "More generally, the capabilities approach sees the world as containing many different types of animal dignity, all of which deserve respect and even wonder...the kind of sociability that is fully human includes symmetrical relations, but also relations of more or less extreme asymmetry" (2002, 158). On this view, people with disabilities have the same capabilities (e.g., life, liberty, bodily integrity, play) of those without disabilities even if there are more barriers present to the realization of these capabilities. See also Nussbaum (2006, 2011) and Amartya Sen (1979, 1985) for more about the capabilities approach.

Philosophical work in disability requires a serious look at what it means to be a moral agent and to work for theories of justice that uphold and protect all individuals, not just those with reason and autonomy.

Conclusion

Philosophy of Disability is a burgeoning field, and the areas outlined in this entry are only a small sample of relevant issues. Philosophical inquiries into the relationship between disability and aesthetics, disability and bioethics, intersectionality, and justice are additional areas to explore. What remain central to these discussions are the following: human beings are embodied creatures and the relationship between physical, mental, social, and emotional aspects of human beings must not be minimized; living with a disability is not easily generalized and must be considered on an individual basis to avoid over or under generalizing about what it is like to live with a disability; the testimonies of people with disabilities offer insights that should be considered seriously to avoid committing testimonial injustice toward

them; and finally, it is helpful to scrutinize one's starting assumptions that the *normal* or *typical* body is the *able-body* and should be the standard for discussion. Such assumptions are referred to by Kittay and others as the "tyranny of the normal" and must be resisted (Kittay 2019; Silvers 1994). The reality is that each one of us is only temporarily able-bodied and all of us will 1 day become disabled to some extent. Embracing such frailty, one is empowered to look honestly beyond mere *ability* to that which makes life valuable, gives meaning, and provides fulfillment.

Cross-References

- ▶ Capability
- ▶ Equality and Global Justice
- ▶ Francis, Leslie
- ▶ Relational Autonomy: A Feminist Perspective on the Concept of Autonomy
- ▶ Sen, Amartya
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Discrimination

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Introduction

Originally, the quotidian use of the word "discrimination" was morally neutral, as the word was taken from a late Latin word *discriminatio* to mean "distinguishing." For example, according to the 1978 Shorter Oxford English Dictionary, "discrimination" is "the power of observing differences accurately, or of making exact distinctions" (564). Today, however, the word "discrimination" is generally used to express a "morally wrong act" (Wasserman 1998, 805). On a theoretical level, there is no consensus on how to understand the concept of "discrimination." However, the concept is generally described by reference to concepts related to it such as equality, freedom, autonomy, and honor (Khaitan 2015, 6–7). These theoretical discussions are relevant to the meaning of the word and to legal norms that deal with discrimination related issues.

There are approximately six basic international human rights law documents containing norms that prohibit discrimination. For instance, the Universal Declaration of Human Rights (UDHR) states in Article 2 that "Everyone is entitled to all the rights and freedoms [. . .] without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [. . .]". The nondiscriminatory philosophy of the UDHR is reflected in several other general human rights covenants: such as the "International Covenant on Economic, Social and Cultural Rights"; the "International Covenant on Civil and Political Rights"; the "International Convention on the Elimination of Racial Discrimination"; and the "Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)." The last two international legal contexts specifically focus on discrimination and provide for specific definitions. For example, the definition of "discrimination" provided in CEDAW states in -Article 1 that "[. . .] the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

After the Second World War, liberal democratic states started to impose domestic legal obligations on states and non-state actors not to discriminate, and around this same time discussions started in the legal literature on the concept of "discrimination" (Doyle 2007, 537–553). When these discussions are examined, it is seen that they are related to the legal practice and theory of how the legal norm dealing with discrimination was implemented in the past and how it should be implemented going forward (Hellman and Moreau 2013, 2). Further, many legal concepts related to discrimination have been developed: "direct discrimination," "indirect discrimination," "affirmative action,"

"harassment," "reasonable accommodation," "victimization," etc.

Discrimination is conceptually linked mostly to "inequality" (Lippert-Rasmussen 2012, 569). The concepts of "discrimination" and "inequality" are often used interchangeably in international legal instruments (Charlesworth 2002, 137–147). Generally speaking, the concept of "discrimination" involves unequal treatment. The concept of "justice" is also related to "discrimination": if an act is unjust, it is discriminatory (Wolgast 1980, 54). Therefore in the following two sections two types of equality: formal equality (*de jure* equality, equality as consistency, procedural equality), and substantive equality (de facto equality, material equality) (Pojman, Westmoreland 1997, 2–3) will be explained in parallel with two different concepts of "discrimination," direct and indirect (Doyle 2007, 537–553). Roughly, efforts to combat direct discrimination seek to achieve formal, legal equality, while efforts to combat indirect discrimination aim to ensure equality in practice or in actual fact. They are mutually exclusive in the sense that it is not possible to detect both kinds of discrimination at once (Fredman 2011, 190).

Direct Discrimination-Formal Equality

In Western thought, accounts of normative equality are generally derived from Aristotle's understanding of equality (Westen 1990, 185). In reference to Plato, the Aristotelian understanding of equality is based on this normative statement: "things that are alike should be treated alike" (Aristoteles, V.3. 1131a10-b15). According to this formula, the party that is expected to act in accordance with formal equality needs to treat those under similar circumstances similarly. It focuses on the rule that forms the basis of equal treatment in formal equality but not on the differences between peoples or groups. Similar individuals or groups expect the same treatment. In this context, the party that is expected to act equally should treat the others similarly or the same.

The concept of "direct discrimination" is based on formal equality (Fredman 2011, 166). For example, in the United Kingdom's (UK) Equality Act (EA), direct discrimination is defined as follows: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others" (EA 2010, s13). UK law restricts legal protection to a defined number of characteristics; age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation (EA 2010, s 4). However, this list is neither exhaustive nor universally accepted. It can change in accordance with social movements or recognition claims for new characteristics (Taylor 2003, 36; Felski 1997, 16).

Treating people less favorably or differently because of their differences is the main element of the problem of direct discrimination. Unless there is direct discrimination, similar treatment of similar people in similar circumstances ensures formal equality. Therefore, discrimination according to formal equality is an exceptional case. Once the exceptional situation has been eliminated, formal equality is attained. Elimination of the structural problems of society that causes discrimination is not a requirement of formal equality. For this reason, approaches on equality that look at formal equality alone have been criticized and different accounts of equality have been developed.

Detecting direct discrimination is easier than identifying other types of discrimination. When a different treatment is applied to individuals or groups who are in the same or a similar position, there is direct discrimination if such treatment cannot be justified. Hence, first of all, it is necessary to determine whether the individual or groups who are the receivers of the treatment are in the same or in a similar position. Secondly, it is necessary to evaluate whether different treatment can be justified.

This raises a troubling question about direct discrimination. Can direct discrimination ever be justified? English law forbids direct discrimination and provides no defense based on a justification. Under European Union (EU) law, there is no general defense of justification for direct discrimination either. However, the European Court of Human Rights (ECtHR) not only accepts the defense of justification for both direct and indirect discrimination but also holds that either type of

discrimination would be justified if it constituted a proportionate response to a legitimate aim.

The president of the Supreme Court of Justice of the UK, Lady Hale, has been "arguing for a long time now that the ECtHR approach is preferable to the EU approach. The lack of a general defense of justification for direct discrimination is a problem" (Hale 2014, 5). However, some legal scholars show strong resistance to allowing justification for direct discrimination, especially direct sex discrimination. For example, Bob Hepple attacks the notion of allowing justification for direct discrimination, calling it "[. . .] a dangerous heresy [that] is threatening to subvert the developing principle of equality" (Hepple 2014, 48). In addition, some scholars believe that allowing justification for discrimination would damage the distinction between direct and indirect discrimination (Barnard 1996).

In direct discrimination, one person or a group is treated less favorably than another. This requires a comparison between how the discriminatee – a person unlawfully discriminated against (Lippert-Rasmussen 2012, 569) – was treated and how a person or group without the protected characteristic, such as sex, age, race, ethnic origin, etc., would have been treated in the same circumstances. The comparison might be to a hypothetical person (Connolly 2011, 82). The fact that the direct discrimination approach requires a comparison opens it up to criticism. The comparative approach requires the discriminatee to prove she is treated differently from the "normal" others and so does not respect the natural differences between people. As Sandra Fredman put it, "the abstract comparator is clothed with the attributes of the dominant gender, culture, religion ethnicity and sexuality" (Fredman 2011, 11). This makes the comparison approach assimilationist.

While criticizing formal equality, feminist legal theorists also help to reveal the assimilationist side of direct discrimination. According to Catharine MacKinnon, under the sameness standard of formal equality women are measured according to their correspondence with men (MacKinnon 1987, 34), the dominant gender in the patriarchal world. Radical feminists, including MacKinnon, think that the differences between men and women are not considered by male constructed standards. For instance, as regards the dilemma over pregnancy in the workplace, formal equality approaches choose to make analogies between pregnancy and disability, i.e., the "sick man" notion, which is criticized by feminists for not respecting the unique sex differences of women. In the case of *Dekker*, a woman was not hired for a job for the reason that she was pregnant. The European Court of Justice (ECJ) held that detrimental treatment because of pregnancy, which is a unique sex difference, should be considered direct discrimination (Dekker, no: 6, para 17). The ECR also rejected the sick man comparison thus siding with feminist critics.

Indirect Discrimination-Substantive Equality

Indirect discrimination (de facto discrimination, disparate impact discrimination, adverse impact discrimination) involves the notion of "substantive equality." The concept of substantive equality was developed due to critiques of formal equality (Barnard and Hepple 2000, 564; Connolly 2011, 10). Unlike formal equality, substantive equality is "full equality in practice" as expressed in European Union law (Hepple 2014, 12–13). In order to ensure de facto equality, people who are in a disadvantaged position because of their differences need to be treated differently. Same or similar treatment towards disadvantaged and non-disadvantaged people may lead to formal equality but not substantive equality. While formal equality approaches focus on a norm requiring the same treatment of everyone, substantive equality looks to a norm's results and effects after application. If the norm has been applied properly but the result leads to inequality anyway, then indirect discrimination has occurred.

Substantive equality can be ensured by different treatment in accordance with the differences of individuals or groups. However, one version of substantive equality focuses on remedying past discriminations. Some remedial measures such as affirmative action, comparable worth schemes or reverse discrimination aim to reverse the detrimental effects of past direct discriminations (McCrudden 1985, 85; Fredman 2011, 260). As

an example of such past direct discrimination, women have been legally excluded from public domains, such as politics, education, work, etc. These remedial tools strive to eliminate the detrimental effects of gender-based discriminations (Bartlett 1994, 4).

As opposed to direct discrimination where individuals or groups are disadvantaged due to their differences, in indirect discrimination inequality arises due to disregard for the differences between people or groups. Hence, the meaning of "difference" is important for the determination of indirect discrimination. What kind of differences should be recognized, and how should they be taken into account? For instance, in the UK, the answer to this question is given in the EA, which provides a definition of indirect discrimination as follows: "A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's .... The relevant protected characteristics are; age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, sexual orientation." (EA 2010, 19). That said, there are various explanations about differences in relation to the concept of "indirect discrimination under different legal systems. However, similar to the concept of 'discrimination', for 40 years there has been no consensus on the concept of 'indirect discrimination" (Smith 2011, 144). The most referenced case for the first appearance of the concept is *Griggs v. Duke Power* by the Supreme Court of the United States (1971). A large energy company in North Carolina instituted new qualification standards to determine promotions at the company: possessing a high school degree and a passing score on two written tests. Even though the tests were not designed with discriminatory intent, almost all the African American employees were unable to pass them. A lawsuit was filed against the company for alleged racial discrimination. The court decided that the policy of using two written examinations was discriminatory for two reasons: (1) the tests disproportionately, negatively effected African American employees, and (2) the tests were not necessary to determine who was qualified for promotion (Selmi 2013, 252–255). Thus, the Supreme Court set out one way of understanding indirect discrimination without explicitly using the concept of "indirect discrimination."

This Supreme Court decision has helped to form the concept of "indirect discrimination" in EU law and in other democratic legal systems (McCrudden 1985, 84; Fredman 2011, 178). According to the Council of the Europe Union directive (15 December 1997) regarding to the burden of proof in cases of discrimination based on sex, indirect discrimination is defined thus: "[I]ndirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex." (Art. 2(2). OJ [1998] L14/6. amended by Directive 98/52/EC (OJ [1998] L205)).

Based on these two examples, Supreme Court and Council of the Europe Union, it can be stated that there are three basic factors relevant to whether indirect discrimination occurs (Fredman 2011, 178): (1) whether the treatment is neutral; (2) whether the treatment has disparate results on disadvantaged people; and, (3) whether the disparate impact can be justified.

In indirect discrimination, a provision, criterion, or action, which is seemingly neutral, disproportionately affects certain groups. If this provision, standard, or action is an appropriate and necessary means to carry out a legitimate aim, the criterion or practice is not considered indirect discrimination. The seminal decision of the ECJ involving Bilka-Kaufhaus exemplifies this idea well. The Bilka-Kaufhaus Joint Stock Company, in which women were concentrated in part-time status, decided to remove part-time workers from the workplace pension insurance system to encourage full-time work. The company held that the goal of this decision was economic: to encourage full-time work and to increase the efficiency of the company.

The defendant company argued that it had no intention to engage in gender discrimination. However, the ECJ underlined the need for the local court to investigate the coherence between the economic justification and Bilka-Kaufhaus' pension changes according to the proportionality

standard: a requirement for harmony between the means and a legitimate aim. As can be seen in this model decision, to avoid indirect discrimination it is important to justify the legitimate aim of acting and to justify the implementation of appropriate means for this end.

There is a relevant subdistinction surrounding the concept of "discrimination" that deals with the role of motive and intention. Direct discrimination focuses on the reasons for the perpetrator's action, whereas indirect discrimination focuses on the impact of the action (Fredman 2011, 203). The main reason of the wrongness of the indirect discrimination is that a neutral provision, action, or standard, has a detrimental effect on disadvantaged people regardless of discriminatory intention, motive, or ground. In that sense, present objective measures of discrimination do not eliminate discrimination. The lack of discriminatory intention does not make the action acceptable. Regardless of the intention, if the impact of an action negatively affects certain groups, it would be considered indirect discrimination.

Relatedly, Jeremy Waldron explains the difference between the concept of "covert discrimination" and the concept of "indirect discrimination" using the notion of "intention." In covert discrimination, the intention of the perpetrator is discriminatory and concealed by a neutral action, whereas in indirect discrimination, the intention of the perpetrator need not be to discriminate. Some people think that from a moral point of view covert discrimination is worse than indirect discrimination because of its hypocritical nature (Waldron 1985, 95). However, in a practical sense, intentional indirect discrimination is the same as direct discrimination (Smith 2011, 145).

Conclusion

As Kasper Lippert-Rasmussen put it, "discrimination is bad because it makes the discriminatee worse off than she would have been had she not been subjected to it" (Lippert-Rasmussen 2006, 174–175). Discrimination reduces the self-esteem of the disadvantaged person or groups and creates an inferiority complex, which violates the freedom of these people to make their own choices, such as what school to choose, what job to apply to, or where to live (McCrudden 1985, 85; Altman 2016). A loss of self-esteem causes discriminatees to determine their lives according to the prejudices of society instead of their own ends. Discriminatory behavior causes disadvantaged people to struggle. Legal norms seeking to combat discrimination are clearly important. Despite the uncertainty surrounding the concept of "discrimination," the concept is nevertheless useful in the struggle against inequality. Indeed, the discussions surrounding this concept contribute to the recognition and understanding of the differences in society.

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Dissent and Law

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Introduction

Societies require consensus as well as dissent (Bobbio 1987), but little has been written on the concept and the dynamics of dissent. Many classic theorists have focused on problems of social integration and different forms of consensus as well as on the notions of unity, harmony, peace, or order. Manifestations of dissent can provoke reflection and debate on the contours of fundamental rights and freedoms, which are needed to reach a balance between unity and diversity, conformity, and dissent. "Democracy is diversity, and diversity of views is often born out of dissent. One measure of a thriving democracy is the extent to which it fosters vibrant dissent" (Collins & Skover: xii). Dissenters are often seen as menaces, selfish, irrational, or unpatriotic. Unlike conformists, who ride commonsensical postures, dissenters often pay high prices for being in disaccord with others' ways, for contesting official policies and rules, or for questioning existing narratives.

This entry contains two core sections: (1) dissent as a foundational, rather than a disputed, concept; (2) the conceptualization of dissent. They advance two arguments. First, dissent is a widely used but very ambivalent term. Its opacity does not contribute to discussions about its importance and its legal regulation (both to protect and to restrict manifestations of dissent). Second, a concept of dissent can help to solve practical controversies about its limits and highlights the role of dissenters as potential catalysts of societal changes.

A Foundational Rather Than a Disputed Concept

The word dissent has been turned into a general label encompassing many different activities, terms, and notions. One hears about a multitude of types and forms of dissent (e.g., lawful or unlawful; violent or peaceful). Further, the English language admits it to be a verb and a noun. "To dissent" is commonly perceived as the opposite of "to consent" (to agree). As a noun, it refers to the opposite of consensus (e.g., in a deliberative meeting in which no consensus is reached).

The Latin verb *dissero* means: "To examine, discuss a matter, which turns into the noun dissensus, which means another sense. The suffix

'dis' (. . .) means opposition, confrontation, contrary, something else. Thus, we have, for example, the words dispute, which originally means to think differently, or displeasure that is equivalent to dislike, or disjunctive that is not to be together, to be separated" [this and other citations of this author have been translated] (Buela 2004: 76). Authors also invoke other Latin words, such as *dissentio* (Daube 1971: 784) or the verb *dissentere (or dissentire),* which literally means to differ in sentiment (Falk 2016: 24; Collins and Skover 2013: xv). Some cite the Oxford Dictionary, which according to Falk, "suggests a large tent of meanings, including difference of opinion or disagreement, withholding assent, as well as the action of thinking differently. (. . .) Dissent implies both the possibility and the opportunity to engage with and criticize the status quo – literally, to 'speak truth to power'" (2016: 24). Collins and Skover contend that the Oxford's definition does little to solve philosophical, linguistic, cultural, and jurisprudential problems as it is both overinclusive and underinclusive (2013: xv–xvi). The word disagreement, for one, is not a synonym of dissent, as in the example of friends who disagree over who is the best opera singer. Conversely, it fails to embrace notions linked to several aspects of dissent (ibid.).

Dissent seems to be a disputed concept due to the variety of ways and contexts in which the term is used. Even authors discussing its concept adopt notions that are distinct to each other: "*Dissent means, first of all, another sense, divergence, contrary opinion, disagreement"* (Buela 2004: 76). The literature uses dissent as a "catch all-term" to describe contentious politics and acts of disagreement (Szulecki 2019: 29). Several works use it as a synonym of concepts that are only occasionally coincidental, including transgression, disobedience, disagreement, dissidence, protest, deviance, conflict, resistance, noncompliance, subversion, social movement, opposition, and political rights such as the freedoms of speech, association, press, and demonstration (Denis de Castro Halis 2020).

A judge's dissenting opinion within a jurisdiction that allows judicial dissent represents neither an act of transgression and subversion, nor disobedience and dissidence. The latter term (dissidence) has a clear political character – though at its origin, is connected to religion (Szulecki 2019: 22), while that of dissent can be of other types (e.g., judicial, scientific, environmental, gender-related). Even in political parties, dissenters regarding a decision are not dissidents if they remain within the party's cadres and comply with that decision and other party lines. Further, judicial dissent cannot be seen as a form of social deviance in contexts where the expression of a judge's dissenting views is a matter of moral duty and, thus, expected. Justice Oliver Holmes, the "Great Dissenter," illustrates that when affirming his duty to express his dissenting opinions (1943). Corso sustains that "dissents allow for what Max Weber called the ethics of conviction and, in extreme situations, give the judge the opportunity to even save his soul" (2017: 1).

As for transgression, one can invoke the well-known biblical narrative of Adam and Eve, a couple in the Garden of Eden who could eat the fruits from any tree, except one. By eating the apple from the forbidden tree, they disrespected God's command and were expelled from paradise. Theirs was an act of transgression or disobedience but not a dissent, as they did not offer any alternative meaning or proposal to that divine command. Likewise, smokers who litter the ground, despite a prohibiting rule and a fine, are also transgressors but not dissenters.

Rather than controversy over the term's meaning though, there is little effort to define it. The term remains widely, but vaguely, used. It is ambivalent but also a foundational notion, meaning that it is at the foundation of other notions. It is central to fundamental ideas constantly examined in scholarly works intersecting different fields of inquiry and several aspects of social life. In judiciary studies, scholars underscore the relevance of dissenting opinions in shaping prospective regulation (Tushnet 2008; Vitale 2014; Cotrell and Ghai 2013; Kirby 2001). Sociologists underscore various ways to control dissent in societies, including selection processes to place conformist individuals in desirable positions while excluding dissenters and welfare programs that diffuse

social unrest. They write on deviant behavior and on methods enforcing conformity. Historians connect dissent with protest, civil disobedience, and social movements. Young (2015) argues that dissent has shaped the history of the USA and is one of that nation's defining characteristics (2015: 2). In law and politics, dissent is *the core* of fundamental political rights and freedoms, including those of speech, press, demonstration, and association, which are necessary for all and specifically for those who choose to question accepted views or official policies. Rather than being a right (Larsen 2009), dissent is the notion linking, unifying, and strengthening those rights. Without this notion, those rights can become irrelevant or a mere formality under authoritarian governments or majoritarian groups.

In authoritarian settings and beyond, loyalists and conformists are likely to enjoy those fundamental rights without obstacles if they praise that order or associate to defend it. Such initiatives will likely receive official support rather than repression. Conversely, those perceived as dissenters will likely encounter suppressive reactions and official repression. Dissenters continue to suffer and be silenced around the world both under protective legal frameworks as well as under repressive legal frameworks. Many societies restrict political debate and manifestations of dissent often characterizing dissenters as troublemakers, harmful, or dangerous (Bleiker 2000; Nemeth 2018). Political rights and freedoms' protection dwindles due to controversies about dissent's limits, the term's ambivalence, and its lack of conceptualization. The need to conceptualize dissent is linked to several questions. What constitutes manifestations of dissent? When should democracies not endure dissent? What is about dissent that makes it valuable or harmful? Who are dissenters (e.g., Nobel laureates, but not religious terrorists?) and what to do with them? If dissent is part of the texture of democracy, enables civic participation, and promotes diversity and tolerance (Collins and Skover 2013; Falk 2016: 24–5), its conceptualization contributes for the regulation of rights related to dissent, which remain without clear limits and highly controversial.

Conceptualizing Dissent

Dissent's ambivalence, its foundational character, and its different types justify its usage in various fields. Buela contends that there is a relational aspect of opposition between consensus and dissent, but "in everyday practice, consensus is presented as an agreement of the parties to achieve a common purpose and dissent, not so much as the denial of the agreement, but rather as the pretense of granting another meaning, a different meaning, distinct, alternative, not conforming to what is given or present" (2004: 81). He distinguishes dissent from transgression and rebellion: "Dissent proposes another meaning, a different meaning from what things and men's actions currently bear on them. Dissent requires a different project from the one in force so as not to be a mere transgression or rebellion. (. . .) It allows the creation of critical theory about men, the world and the problems that surround it. Neither transgression nor rebellion possess that quality" (Buela 2004, 78).

The term is often used interchangeably with freedoms of expression and of demonstration. They are not identical, however, because these freedoms can be exercised to express dissenting as well as conformist views. People praising a government will use those freedoms as much as those criticizing it, even though they likely provoke distinct reactions.

A classificatory framework for analyzing manifestations of dissent in different settings, times, and places can reveal many facets of the concept. Halis' categorization encompasses various types and forms of dissent (2020). It starts from broad ideal types according to the predominant nature of a manifestation of dissent, including religious, political, ethical, legal, judicial, economic, epistemological, scientific, philosophical, academic, artistic, gender-related, and environmental. These usually appear combined. The Protestant Reformation exemplifies a religious dissenting movement within the Roman Catholic Church that laid the basis for the Protestant branches of Christianity. Scientists such as Galileo Galilei, Charles Darwin, and Marie S. Curie exemplify scientific dissent. Their insights challenged

existing consensus in their fields and times, revolutionizing them. There are, however, examples of overlaps between those types. Artists have manifested political dissent through their art. Academic scholarship is rich in overlaps between various types of dissent. Fukurai and Krooth (2021) developed original nation approaches to international law that go beyond traditional views that remain paralyzed on the state as a canonical unit of geopolitical analysis. Their dissent accentuates largely unheard voices and favors changes of mindset and behavior to treat the ecology and environment, rather than Nation-States, as indispensable elements to challenge anthropocentric, Anglo-American, and European historical narratives. Their work intertwines academic, environmental, political, and cognitive dissent.

Halis' categorization (2020) contains other factors including motivation of the dissenter (e.g., altruistic or egoistic); orienting values (e.g., religious or lay motives; politically left or right wing); goals (e.g., disruptive and destructive or cooperative and constructive); form of expression (e.g., peaceful or violent; concealed or overt; by action or by omission); broad method to solve issues (e.g., reforms, reaction, or revolution); promoter (e.g., individual, collective, institutional; by a minority or a majority; by those with power or by those lacking it); outcome (e.g., successful or non-successful); and reactions provoked (e.g., suppressive or supportive).

Whenever and wherever the legal protection of dissent exists, it is not unlimited and comprehensive. The legal regulation either to protect or to repress dissent exists in different legal branches, from Constitutional to Company Law. Not all manifestations of dissent are legally sanctioned or desired by most, and all societies impose limits to them, irrespective of their declarations of freedom of expression, of press, and others (Bobbio 1987). Questions remain, however, on how to balance rights and freedoms protecting dissent as an engine of innovation and error correction (Nemeth 2018: 163ff; Sunstein 2003) with other legally protected values that are best protected by social conformity. To a large extent, legal protection depends on the details concerning the conduct of dissenters and on issues within and beyond a legal system. Assessments about the behavior of dissenters depend on a range of factors and are conditioned by specific settings, time, and places, which also influence the interpretation of legal norms.

Contemporary scholarship adopts dualistic labels such as right or wrong, and positive or negative dissent. Tushnet and Sunstein exemplify that scholarship. Tushnet (2012) seeks to counterargue his depiction of Sunstein's "Why societies need dissent" (2003) by contending that societies need dissent of the right kind, rather than dissent as such. Sunstein, however, had made the same point and had been cautious not to be seen as a supporter of dissent for all cases and at all costs: "What we want to encourage is not dissent as such but reasonable dissent, or dissent of the right kind" (2003: 91). A problem with moral and dualistic labels is the inherent difficulties to define what is positive or right dissent. Who is to define that? How is that to be practically defined? Governments adopt such labeling to encourage or, conversely, suppress dissent.

That dualistic labeling is filled with moral content, but dissent is a relational and contextual concept. Opinions and behaviors might be considered peculiar and accepted or not depending on their position within an expected order of things (i.e., political, social, cultural, legal, etc.), within existing power struggles, and within time and space dimensions. Religious or radical environmental activists deploying force to advance their goals are considered terrorists in some contexts, while considered freedom fighters or defenders of the planet in others. Same dissenters might be regarded both as heroes and criminals, depending on the context, laws in force, and the angles from which their behaviors are evaluated. Such a role can be perceived both during their lives, as well as after their deaths. Joan of Arc, for one, was burnt alive as a heretic in 1431 and in 1920, almost 500 years later, was turned into a Saint by the same Church (Petersen 2021).

Manifestations of dissent have catalyzed changes in various places, settings, and epochs. In important cases, what started as dissent became the new norm. Several dissenters have gained notoriety and entered history, refusing to accept

societies in contrast to their values and convictions. Some became worldwide inspirations or, conversely, hateful references. Nobel Peace Prize laureates fostered innovation and advanced human rights, as Nelson Mandela. Contrariwise, several have adopted unrestricted violence to advance extremist positions in their societies and beyond. The assessment of their dissent largely depends on the result obtained, as early hateful criminals can become prestigious leaders, while early prestigious leaders can become hateful criminals.

Regime changes can also produce political dissenters, who can be either tagged as reactionaries, progressive, or even revolutionaries. Dissent occurs across all the political spectrums, from extreme left to extreme right-wing. Dissent is represented by manifestations against a given reality while favoring another. Hence, it is both negative (denies something) and positive (proposes something else) (Buela 2004: 77–8). The aspiration to be right is not a necessary attribute of dissent. Dissenters are not necessarily martyrs nor always moved by altruistic and principled motives – doing what they believe to be right or fair and sacrificing for that. There are egoistic dissenters, motivated by self-interest or some combination of altruistic and egoistic motives.

To dissent implies not only to have a possibility but also to make a choice to speak out or behave differently when facing other people's opinions or conducts. Those voices or behavior need to be manifested (externally expressed or articulated) as a person who "dissents" in silence, without anyone knowing about it or without any behavior at all, is not to be considered a dissenter. The manifestation of dissent, either by action or by omission (when an action was the expected behavior), brings it to life and produces reactions. Falk argues that "dissent usually implies externality – action apart from the centers of power; although one great form of institutionalized dissent is the judicial dissent in the Anglo-American tradition. Dissent should be intentional, not accidental; critical rather than laudatory; public rather than private" (2016: 24). Her latter point has been emphasized by others sustaining that an initiative needs to be articulated to be considered dissent (Leppänen 2016: 17), or that dissent has a public nature (Brier 2013: 17; Szulecki 2019: 30). There are, however, known acts of dissent and resistance such as those of judges during the Nazi regime described by Graver (2018), whose work demonstrates that dissent can be externalized through concealed and disguised resistance.

Often, manifestations of dissent are triggered by a first dissenter capable of catalyzing whatever divergence others have. Even one dissenter can make a difference by disclosing data unknown to others, by changing hearts and minds, and by fostering important changes locally and globally (Sunstein 2003; Nemeth 2018: 39ff). Today's mass and social media can transform local acts of dissent almost immediately into events of global importance, provoking new acts in other places and spaces (Bleiker 2000: 1).

There is a relation between dissent and innovation. Epistemological rupture is Bachelard's argument that the main force driving scientific knowledge is rupture with existing knowledge rather than its accumulation (2002). Prior knowledge is an epistemological obstacle that can be overcome "by moving on beyond what, in our own intellect, is an obstacle to intellectualization" (2002: 24). Dissent questions existing knowledge and behavior, while offering alternatives. It becomes a mean to overcome that obstacle, potentially triggering theoretical, technical, social, political, and innovation. A dissenting voice might lead to a different proposal and collective decision, which would not exist had not been that dissent. By challenging social conformity, dissent has the potential to correct errors and break up wrongful informational cascades (e.g., fake news) and extremism (Sunstein 2003, 2009).

A widespread misconception is that only individuals, a minority in a group, or outsiders can be dissenters. However, majoritarian groups and insiders can also be dissenters. Example of the first comes from South Africa, during the apartheid regime. The white minority in power imposed segregation and discrimination against most of the nonwhite population. Dissent arose from the majority. Insiders can also choose to dissent and an example of this are members of

political parties or governments who externalize their dissent in favor of policies other than those approved by their party or government.

Another misconception concerning dissent is its supposed connection with criticism. Dissent, however, is not merely represented by a rejection or non-acceptance as these neither propose something new, nor disclose new information. It has a propositional character that reflects non-conformist thought and action. It is not equal to criticism, or it does not even imply divergence, but rather, a view from elsewhere (Daube 1971: 784ff), which offers another sense, another meaning, another feeling, or another reason that is different from existing ones, but not necessarily divergent. It can be an alternative view to usual or majoritarian beliefs, for instance, which can be merely different, rather than contrary to them.

Conclusion

Dissent involves the choice to manifest ideas (i.e., needs to be externalized rather than merely thought) or behavior (i.e., through actions or omissions) that are alternative (i.e., different but not necessarily opposite) to existing or proposed ones. Manifestations of dissent can be categorized in ideal types, based on its predominant nature, and other factors such as its forms of expression, motivation, goal, promoter, outcome, and reactions it provokes. Dissent might be violent or peaceful, and it does not need to be overt, as it can be concealed or anonymous. It may be motivated by egoistic or altruistic (i.e., principled) interests and values. Altruistic and principled dissenters aspire to be right and are willing to self-sacrifice for the benefit of others, while egoistic dissenters do not have such aspiration and willingness. Dissent can favor innovations (i.e., being innovative or progressive) or, conversely, favor the maintenance or the return to a previous status quo (i.e., being either conservative, or reactionary). It may have disruptive (e.g., destructive) or collaborative (e.g., constructive) goals. It does not need to be promoted by single individuals or minorities, by outsiders, or by disadvantaged people. There is collective and institutional dissent, as well as dissent by majorities, by insiders, and by those with or in power. Dissent is a relational and contextual concept, and its manifestations are potential catalyst of changes that can be evaluated both as positive and negative depending, for instance, on the results they achieve and the reactions they produce.

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Divine Justice

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Introduction

In Western debates about the nature of justice, practical reasoning, and human flourishing, the concept of divine justice has often played a central role. "Divine justice" has been understood variously as a juridical norm, a personal virtue, or a regulating feature of the cosmos, although the concept takes on diverse meanings in different theoretical and practical contexts. Because disagreements about it are often illuminated by attending to the ways later thinkers received and reworked biblical and classical conceptions, this entry begins by mapping conceptions of justice in the Hebrew Bible and in ancient Greek and Roman philosophy. Then it identifies distinctly Christian claims about divine justice, focusing on discrete doctrinal loci in which divine justice is central, namely, political justice, the atonement, and natural law theory. Its structure is chronological, beginning with the Hebrew Bible, Plato, Aristotle, and the Stoics, before turning to the Apostle Paul, Augustine, Anselm, and Aquinas. It concludes with a discussion of the practical demands of divine justice in Christian life. Since conceptual maps do not come with map scales, suffice it to say that the ground covered here is vast and, like many rich territories, subject to centuries of dispute.

Divine Justice in Jewish Scripture

For the writers of the Hebrew Bible, the concept of justice could not be understood without reference to their understanding of God and of human beings as God's creatures. Justice is loved by God, and human beings are commanded by God to be just, to follow justice, and to act justly. The operative conception of justice is similar to almost all other definitions of justice: Justice is rendering to each their due. But the Hebrew *tzedek* (justice) and its cognates *tzedakah* (charity) and *tzaddik* (righteous person) express law that is not only a matter of rules and concepts, but also – perhaps even primarily – a relationship of appropriate alignment between human beings with God, others, and themselves.

Justice is predicated first of God, the divine judge who upholds the Law by vindicating the innocent and punishing offenders. (Although the story of Job may be read otherwise.) For human beings, justice is a matter of obedience to God's will, and fulfillment of God's Law. Unlike the work of contemporary philosophers and theologians, the biblical texts were written in diverse genre including poetry, proverbs, narratives, letters, and codes. Some claim on this basis that they do not offer a theory of divine justice, but are

nevertheless significant since they have served to inspire theories of justice in the work of Jewish and Christian philosophers. These later theories are usually premised on the Jewish scriptures assuming a conception of theological legal positivism or natural law. The content of the *Ten Commandments*, for example, has widely been taken to be contained in natural law, but qua commandments they are not examples of natural law, but rather divine positive law. In Jewish tradition, some approach the question of divine justice according to a theological version of legal positivism, where divine justice is simply to be identified with divine commands. Others claim that theological positivism makes divine commands arbitrary and argue instead for a theological natural law according to which divine justice is the rationale underlying specific divine commands. David Novak argues that the only explanation of the punishment of Cain or the Flood, for example, is that the people in question have natural knowledge of good and evil. On his natural law interpretation of the Hebrew Bible, divine justice is "a criterion of judgement that prevents irrational interpretations and unjust applications of the specific divine commands" (Novak 2010).

Between the writing of the texts of the Hebrew Bible and the Christian New Testament, however, divine justice was the subject of considerable reflection and analysis in the works of ancient Greek and Roman philosophers whose works shaped later Christian thinking. Sophocles, for example, appealed to the justice of Zeus as a standard of justice that could not be provided by humans themselves or even by "the gods," plural. This cosmic sense of divine justice, *diké* in ancient Greek, is the order that sustains the universe, the source of human justice, and its justification.

Human and Divine Justice in Plato, Aristotle, and the Stoics

Although Aristotle and the Stoics feature most centrally in later Christian accounts of divine justice qua natural law, Plato's *Republic* also played a significant role in political conceptions of justice such as Augustine's.

Plato

The philosophical accounts of natural goodness given in Plato's *Republic* and Aristotle's *Politics* imagine societies in which virtue and happiness are achieved by all by living in accordance with their natural gifts. In the *Republic,* Socrates discusses Simonides' definition of justice [*dikaiosunē*] as "to give each what is owed to him" (*Republic* 331e) and offers both a juridical conception of justice and a moral one. Juridical justice concerns a standard for social relations, namely the distribution of all of a community's goods according to the capacities or fitness of individuals. Moral justice is a personal quality, an excellence or *areté*, of the upright individual. In books II-IV of the *Republic,* Socrates refutes the conception of justice defended by Glaucon and Adeimantus by appealing to the well-ordered *polis* [city state] and the well-ordered *psuchē* [soul]. A *polis* in good order is one where each citizen can perfect themselves in the form of activity for which their soul is particularly well suited. The *psuchē* in good order is able through her activity to perfect herself, because reason provides her with knowledge of what is good for her. She is motivated to act by reason, on Plato's conception; no passion or appetite is required to supplement it. Central to Plato's conception of goodness is the idea of perfected excellence in specific activities which are particular to specific types of person. Virtues are the qualities of character required to achieve this perfection. Justice is an ordering virtue of both the *polis* and the *psuchē*, which enables the other virtues to do their work. In book IV, Plato ascribes the characteristics of a *polis* to the characteristics of its members (IV 435e2) and that justice can exist in the individual *psuchē* whether or not that individual is treated justly by the polis. On one plausible reading, therefore, Plato held that justice as a personal virtue is independent of and antecedent to the justice that orders the polis.

Aristotle

Aristotle's taxonomy of justice as *suum cuique* (to each what is due) in Book V of the *Nichomachean Ethics* distinguishes between a broad and a narrow sense of *dikaiosunē*: general

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justice and particular justice. The former is a virtue that is conducive to a community sharing an account of the good (human flourishing) and organizing itself in ways that will facilitate the attainment of that good. It is a general requirement of each citizen to exercise virtues in relationships with other citizens. The latter, particular justice, focuses on the good that is due to each individual in the community, and to the ways that individuals engage in relationships and exchanges with each other. This second category is further subdivided into distributive justice (concerning the distribution of goods and services between individuals) and corrective justice (concerning responses to injustices, whether restitutive, retributive, or restorative). Corrective justice functions to restore the order which was destroyed by unjust action(s). Distributive justice consists in following the principle of distribution that defines the order upheld by corrective justice.

Stoicism

Stoic ethics also concerns living a life that is "fitting" or "appropriate" to the kind of entity you are. But with the Stoics, the scope of citizenship expanded from being citizens of a particular polis to being citizens of the cosmopolis. The scope of moral duties also expanded to obedience of universal norms of conduct, which were given by nature rather than by local laws or customs. Moving from Greek philosophy to Roman, in Cicero's account of Stoic theology, we find the universe imagined as a community of the human and divine: "For the universe is, as it were, the shared household of gods and men, or a city belonging to both. For they alone [i.e., not animals etc.] live according to justice and law" (*On the Nature of the Gods* 2.154). By the first century CE, the Stoic conception of an ideal society is a cosmic "community of virtue," in which the virtues of its participants structure the community of human beings and gods. This conception of the cosmic city emerged alongside the development of the concept of natural law in Greek and Roman thought. Seneca (a first-century CE Roman Stoic) understood the ideal human city to be a cosmic one including human beings and gods – arguing that belonging to such a community was not only good, but natural. Marcus Aurelius went so far as to claim that "The good of a rational being is community" [. . .] "because we are born with a view to community" (*Meditations* 5.16).

Plato, Aristotle, and the Stoics shared the view that societies were structured by ethics: Ideal societies function well because each of their members practices their virtues. But Stoicism departed from the pluralist perfectionism of Plato and Aristotle, according to which the same virtues were not required of all members. Before the Aristotelian conception of justice was synthesized with Christian thought in the middle ages in the works of Aquinas, some of the most significant interventions in Christian thinking about divine justice were made by the Apostle Paul, Augustine of Hippo, and Anselm of Canterbury. After the epistles of Paul, we will examine the place of divine justice in their theories of political justice in Augustine, atonement in Anselm, and natural law in Aquinas. These thinkers wrote influentially about other matters, and their theories represent a small sample of Christian thinking. The aim here is not to provide an exhaustive account, but rather to identify significant landmarks in the development of thought about divine justice.

Divine Justice in Christian Thought

The Apostle Paul

The Apostle Paul writes of justice and the just person using the same Greek words as Plato and Aristotle, *dikaiosunē* and *dikaios*. However, these terms are often rendered "righteousness" and "righteous" in English translations, which can obscure the centrality of justice in the epistle to the Romans, the most sustained account of justice and justification in the Christian biblical canon. (*Dikaiosunē*, and *dikaios,* had already been used to translate what were taken to be their Hebrew equivalents in the Septuagint in the second century BCE, and Paul regularly cites Jewish scriptures in Greek.)

According to the Pauline epistles, to live in a community of the human and divine is natural, since it is what God calls human beings to do through Christ. It is also good, since members of

this community practice qualities that are practiced or commanded by God. Some of these qualities are practiced by each member (*pistis* [faith], *agape* [love], and *dikaiosynē* [justice]); others are practiced by some for the benefit of all ("the common good," 1 Corinthians 12:7).

St Paul does not offer an argument for natural law but rather seems to, like the Jewish scriptures, take its existence for granted and identify it with the commands of God. In Romans 1:18–32, for example, he claims that despite lacking the law Gentiles should know God and God's commands by looking at the natural world. In Romans 2, Paul claims that Gentiles can *by nature* do what the law requires, because the law communicates the commands of God (see Romans 2:14, 27). This sounds like an allusion to the Stoic doctrine of natural law, and many later Christian philosophers accepted it as such. Later in Romans 13, Paul tells Christians to obey the authorities, which are instituted by God (13:1–7). This passage has been interpreted to support an "Augustinian" view of government, where the civil order exists to maintain justice – and justice is defined as a matter of external, legally correct relations between citizens, and doing justice primarily a retributive concern. However, given that Romans as a whole is concerned with a much broader sense of justice, it is unlikely that Paul intended the term to denote merely the functions of the state. In the next verse, Paul claims that Christians are to owe only one thing to other human beings: "Owe no one anything, except to love one another" (Romans 13:8).

Whether or not Pauline natural law is derived from Jewish scriptures or Greek philosophy, it is unlikely that it would have surprised his audience. What was more likely to surprise in the context of first-century Roman popular morality and philosophy was that the Christian scriptures do not contain a developed idea of personal virtue as self-achieved excellence that is central to Greek ethics. Christianity rejected the claim that virtue is the ethical end or ultimate good of human beings and that it could be reached by human effort alone: Instead, a right relation to God is our ultimate end, and God's grace is a necessary condition of attaining it.

The classical conception of justice as *suum cuique* is redefined in the Christian tradition because of the incarnation of God in Jesus Christ – an event of God's action in and for the world. Paul claimed that human beings are incapable of attaining or deserving justice through the fulfillment of the Law, and that Christ's sacrifice was necessary to atone for the debt of sin and restore human beings to an appropriate alignment to God, others, and themselves. For Christians, therefore, divine and human justice are intricately interlinked: Justice is part of God's character, and it is part of the perfected nature for which humans were created. Instead of appealing to justice as a social norm or personal virtue, early Christians argued that moral, political, and philosophical concepts are revealed in full by the person of Jesus Christ, and that his incarnation, life, death, resurrection, and ascension are literally God's revelation of God's will, love, and justice, to the created order.

Since Paul believed that human beings are justified through the salvific work of Christ, human justice should not be conceived as a personal excellence but rather an occasion for humility and gratitude (Romans 3:27). Biblical justice makes what *God is due* central, although it is not possible to disassociate what God is due from what Christians owe others. Christians owe God their gratitude, and the form this gratitude is to take is to do God's justice in the world through acts of mercy, and care for the impoverished, the imprisoned, and the marginalized. The *ecclesia*, the community of the faithful, inaugurates Christ's justice in the world and represents the kingdom of God. In the eschatological context of first-century Judaism, this raised questions about this life and the afterlife. According to Paul, both Christian and non-Christian alike will face the justice of God on the day of judgment, when God "will render to every man according to his works" (Romans 2:6).

Later Christian thinkers would identify Stoic and especially Ciceronian accounts of natural law as evidence of the natural knowledge of God that Paul discusses in Romans 1 and 2. Discussions of justice in Deuteronomy and the Hebrew prophets, and certain philosophical accounts of justice in

Greek and Roman philosophy, came to be understood by Christians as a form of the revelation of divine law and divine justice. Consequently, one of the tasks of theology was to make sense of these different sources of thinking about justice within a single framework. Many patristic thinkers applied themselves to this task, but it was St Augustine that brought it to its early Christian apex.

Augustine on Political Justice and Love

Augustine's account of divine justice drew on the works of Marius Victorinus, a fourth-century Greek-to-Latin translator of Aristotle and various Neoplatonists, who also wrote commentaries on Cicero and Aristotle. After Augustine's conversion to Christianity, he retained the philosophical idiom of Platonism, and his reading of Victorinus enabled an integration of Ciceronian and Platonic thinking about justice with his own Christian theology. On Augustine's account, to know what justice is is to be acquainted with the form of justice. This is a truth about justice that is present in the mind and cannot be derived from the senses (*De Trinitate* VIII, vi). Augustine formulates this Platonic claim in a way very similar to Cicero's definition (*De Finibus* V, 63; *De Inventione* II. 160), according to which justice consists in giving to each their due.

Cicero's conception of justice presupposed that justice is exercised within a hierarchically ordered community. Augustine's definition of divine justice presupposes an alternate form of community that orders the deserts of each member: the City of God, a divinely ordered community into which every human being is called to find the place that is their due, and within which, by the grace of God, each human being may receive not only their just deserts, but also better.

Like the Stoics', the scope of Augustinian justice is universal, but what is required of this universality – as "giving each their due" – is very differently conceived. Drawing on St Paul, Augustine claims that we are to be just "so as to owe no one anything, but to love one another" (*De Trinitate* VIII, vi; Romans 13:8). He thought that the account of justice offered by Plato and the Neoplatonists failed to provide an adequate solution to the problem of moral motivation. Intellectually, everyone can discover the form or standard of justice. But not everyone who exercises their intellect and becomes aware of that standard is motivated to act justly. Plato and the Neoplatonists had a satisfactory explanation for the phenomenon of failing to exercise the intellect in order to discover the form of justice. But, on Augustine's view, their psychology did not take into account the possibility that one could know what was just and, even so, fail to act justly.

Augustine argued that to generate right action more was needed than intellectual recognition of what justice is. He claimed that directing our love toward the form of justice is only possible when our love is directed toward a particular life that perfectly embodied that form: Jesus Christ. The just actions of Christ's life evoke a response of love – which is love of both the person of Christ and the form of justice (*De Trinitate* IX, 13).

On this reading of Augustine, his conception of love is distinct from the Platonic *eros*. Augustinian love consists in the sum of our natural desires and our desire to achieve happiness through their satisfaction. But it involves learning that the satisfaction of *all* our desires will not result in happiness: Happiness is achieved only by the satisfaction of desires that it is right to desire (*De Beata Vita* 2, 10). On Augustine's psychology, human desires are in need of reordering and redirection if there is to be justice. But the work of direction and ordering belongs to the will [*voluntas*] (*De Libero Arbitrio* III, 1, 2). And fallen human beings have disordered wills [*mala volunatas*] which only the grace of God can order. We are, therefore, at the mercy of God even to desire justice.

Anselm on Atonement and Mercy

In the medieval period, Saint Anselm of Canterbury developed the Christian conception of divine justice as the liberation of humanity from sin, a liberation which was achieved by Christ's work of atonement. On Anselm's view in *Cur Deus Homo*, sin puts humans at a distance from God which no human action can bridge. For God, however, this distance is not unbridgeable: Since God is infinitely just, he can forgive the offenses of human sin. Nevertheless, Anselm conceived of sin as

incurring a debt that required satisfaction. Through God's grace, the debt was repaid through the death of Jesus Christ, which is a corrective substitute for all human failure.

Anselm's satisfaction view of atonement presented him with some difficulty when it came to reconciling the claims of Scripture and tradition that God is both supremely just and supremely merciful. Chapters 8–11 of Anselm's *Proslogion* address the so-called "paradox of mercy": the apparent incoherence of ascribing both justice and mercy to God. If the salvific work of Christ brings eternal life, Anselm asks: "what kind of justice is it to give everlasting life to him who merits eternal death?" He opens his discussion with an inconsistent quartet:

1. God is completely and supremely just.
2. A completely and supremely just being never does anything unjust.
3. God saves the wicked.
4. It is not just to save the wicked.

If a negative judgment is just, then the person judged deserves to suffer the consequences of that judgment. And if mercy involves reducing or forgoing just punishment, then it seems to be unjust. Unlike human law, which can involve procedures that accommodate both justice and mercy, divine justice poses a particular problem. Aristotle observed that human legislators use imprecise language, making universal prescriptions although cognizant that there will be exceptional or unforeseen cases where the law fails to deliver justice. *Epieikeia* (usually translated "equity") aims to correct the injustices that arise from the application of imperfect laws (*Rhetoric* I.13, 15). In the case of divine justice, by contrast, the lawmaker is not susceptible to the imperfections of ignorance or imprecision: So how could there be any ethical reason to deviate from its standards?

Recent scholarship has appealed to Anselm's perspectivalism and to the doctrine of divine simplicity to resolve this paradox. Anselm claims that God is "merciful according to our way of perceiving and not according to God's way" but does little to defend his perspectivalism in this section of the *Proslogion*. However, his metaphysical and epistemological commitments as elucidated elsewhere have been brought to his defense (Mann 2019). First, Anselm's God is eternal in the Boethian sense: His life is "an illimitable life existing in its perfect entirety all at once" (*Monologion* 24). In human experience, mercy follows a determination of guilt. It is part of a temporal sequence which involves action, judgment, and searching for extenuating circumstances. In such a context, appeals to the value of mercy seem to permit or require unjust outcomes. But in addition to being eternal, Anselm's God is simple; God's mercy is not distinct from God's justice, nor is his justice distinct from his goodness. Anselm's Latin – "*misericordia tua non absit a tua iustitia"* – includes the variously translated "*non absit a*": according to which God's mercy is either *not apart from* or *compatible with* or *coexists with* God's justice. But if Anselm intended by *non absit a* a relation of strict identity, then God's mercy just is God's justice, and God's justice is just God's goodness. On this construal, there is no incommensurability between divine justice and divine mercy, and the appearance that there is is a feature of human temporality and epistemic limitation.

Aquinas on Divine Justice Qua Natural Law

Thomas Aquinas' *Summa Theologiae* (hereafter ST) offers the paradigmatic articulation of the Christian natural law position. Aquinas holds that the goal of the concept of justice is union between God and humanity – a union which enables human beings to participate in the will, love, and justice, of God. Although Aquinas does discuss justice as an attribute of God (ST Ia 21), this is a much less central concern for him than the possibility of human flourishing and the reconciliation of human beings to God. He resolves the question of whether God can rightly be said to be just and merciful by invoking Aristotle's distinction between commutative justice (which cannot be ascribed to God) and distributive justice (which can), and by claiming that divine justice always presupposes the work of mercy (ST Ia 21, 4).

Put simply, Aquinas' natural law theory holds that natural law is given to human beings by God, and that it is authoritative over all human beings,

and knowable by them, *by nature*. According to this theory, human beings are required to fulfill the good, as God defines it, by right action, and doing so will result in their happiness. Aquinas saw truth in Aristotle's account of practical reasoning and in Augustine's articulation of the Pauline doctrine of the defective human will and was faced with a task of integration.

For Aquinas, natural law functions in more than one way in the moral life. The precepts of natural law express the eternal law as apprehended by human reason, and God as their source is both a legislator and teacher. Aquinas claims that if we focus on God as the divine lawgiver, then the natural law is an aspect of divine providence. If we focus on the human reception of natural law, then natural law should be understood as constituting the principles of practical rationality – that is, the standards by which human action can be judged reasonable or not. The theory of natural law is therefore to be understood as a part of the theory of divine providence or the theory of practical rationality (IaIIae 94).

The natural law is part of divine providence, on Aquinas' view, because it is a participation in the eternal law, the rational plan that orders all creation (ST IaIIae 91, 2, 1). As such, natural law is the way human beings "participate" in the eternal law. Aquinas distinguishes between nonrational and rational forms of participation in eternal law by claiming that nonrational beings participate in the eternal law via determinism – their actions are determined by their natures, which were willed by God in accordance with his providence. Rational creatures, by contrast, are capable of discerning the eternal law and free to act on it (ST IaIIae 91, 2). This is why Aquinas thinks the natural law can aptly be called "law." As Aquinas defines it, a law is a rule of action: "an ordinance of reason for the common good, made by him who has care of the community, and promulgated" (ST IaIIae 90, 4). Since God has care for the universe, and chose to bring into existence rational beings who are free to act in accordance with the principles of reason, Aquinas claims, we are justified in thinking of those principles as law.

Aquinas holds that human beings are recipients of natural law through the principles of practical rationality and that its precepts are both universally binding and universally knowable by nature (ST IaIIae 94, 4; 94, 6). These precepts direct us to the good and to various particular goods (ST IaIIae 94, 2). These goods provide reasons for action in pursuit of them because they are perfective of us given the natures that we have (ST Ia 5, 1). Owing to "the various conditions of men," he claims that certain acts are virtuous for some and vicious for others, depending on the appropriateness of the act to their nature. Aquinas followed Aristotle in allowing that rules are inadequate to the multiplicity of particular situations, and that virtue is needed in order to act well (*Commentary on NE* II, 2, 259). But he denies that it follows from this that there are no universal principles of right conduct.

On Aquinas' view, what is good is fundamental. Whether or not an action is right depends on whether or not it realizes a good. And whether or not it realizes the good depends on whether or not the human being responds to it appropriately. For while the scope of the natural law is universal, some human beings fail to know it, since their reason is perverted by passion, habit, or disposition.

Aquinas offers an account of eternal, natural, and human laws in order to demonstrate that these distinct forms of law do not come into conflict. He affirms that there is an eternal, unchanging law and recognizes the historical fact that human laws are mutable. He reconciles the two by dividing the natural law into primary and secondary principles: the former changeless and the latter changeable. The first principle of practical reason is that "good is that which all things seek after," and the first precept of law that "good is to be done and pursued, and evil is to be avoided." In avoiding one problem, however, Aquinas left himself open to another. A persistent problem natural law theories face is how natural law can generate solutions to the questions of human governance, or specific rules for the guidance of human conduct.

The substantive commitments and entailments of Aquinas' natural law position are matters of continued dispute. Controversy divides those

(e.g., John Finnis) who read Aquinas' natural law as not ontologically grounded in human nature and those (e.g., John Bowlin) who claim the reverse. Nevertheless, it remains the *locus classicus* of divine justice qua natural law, bringing together Stoic, Aristotelian, Augustinian, and biblical conceptions of divine justice.

Conclusion: The Demands of Divine Justice

Discussions of divine justice often focus on metaphysical, metaethical, or scriptural puzzles such as those outlined above. In these debates and their successors in the Reformation, Counter-Reformation, and beyond, a distinguishing feature of Christian conceptions of divine justice is that justice is not merely a matter of following rules, but of right relatedness to God, others, and ourselves. For practicing Christians, this is not primarily a theoretical concern: The appropriate reaction to the merciful love of God is action in opposition to injustice. To give a few recent examples: Before the campaigns for women's rights in the nineteenth and twentieth centuries, many Christians invoked divine justice to argue against women's exclusion from the goods of political and social life. In the United States in the 1950s and 1960s, theological conceptions of justice and liberation played an important role in the genesis and sustenance of the civil rights movement and black liberation theology. In South America in the 1960s, 1970s, and 1980s, theologians opposed oppressive regimes, refusing to accept the extreme poverty and suffering they imposed. In South Africa, Christian conceptions of justice informed and motivated responses to Apartheid. If to be Christian is to love the God who is justice, the conceptual question "what is divine justice?" is inseparable from its practical counterpart: "what is my part in it?"

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► Natural Law: Protestant

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Doctrine of Double Effect

► Double Effect

Domat, Jean

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Introduction

Jean Domat (1625–1696), a magistrate and practitioner, was considered by many the greatest lawyer of the seventeenth century, like Dumoulin for the sixteenth century and Pothier for the eighteenth century.

His *Les Loix civiles dans leur ordre naturel* [*Civil laws in their natural order*] is a restatement of Roman law considered as a system derived from natural theology. Because of he is Jansenist and Gallican, close friend of Blaise Pascal as well, Domat's originality lies in the reconciliation of the seeming paradox of building a legal corpus between Christian thought and modern rationalism.

In both public and private law, Domat's thinking is rich in contradictions and ambiguities. In his lecture on Public Law, he constantly moves between tradition - sometimes archaism - and subtle inflections that announce fruitful developments. The original combination that he builds - between the weight of the divine foundation of his legal system, on the one hand, and the will to establish a purified, jusnaturalist, rational, and geometric law, on the other hand - characterizes his work.

Born in 1625, trained at the Collège de Clermont by the Jesuits, Domat studied law in Bourges and started in the late 1670s to draft what would become *The Civil Law*. The "Jurisconsult of Port-Royal," (Nourisson 1939) pensioned by Louis XIV, continued this work from 1682 until his death on 16 March 1696. *The Civil Law in Its Natural Order*, with a preface titled *A Treatise of Laws*, was first published from 1689 to 1694; the work was posthumously completed by *The Public Law, Following the Civil Law in Its Natural Order*, first published in 1697.

For him, each part of his work was as important as the other, even if he could not finish the *Droit Public*. This ambition seems natural to him, as a man of the Great Century nourished both by scriptures, Cartesian *cogito,* and by the enforcement of the French monarchy and the establishment of a strong State of Law in the hands of an absolute monarch. It is the search for a foundation that guides Domat.

Aims of the Civil Laws in Their Natural Order

Domat intends to force humanity, by law, to respect the divine order. If the soul and reason of human beings are partly obscured, then human law is also plunged into the darkness of incoherence. He places himself more in the legal tradition of the sixteenth century than in the modernity of the emerging Enlightenment. On him rests the burden of abandoning the plan of the Justinian compilations. But he does not intend to follow only a modern way of uncovering foundations; based on *mos geometricus* (Renoux-Zagamé 1989) and Descartes' philosophy to bring out natural and Christian principles in a law of pagan origin, he wanted to build a complete legal system, from the private law to the public law, from the basis of the contract to the rules of public enforcement, fiscal powers, and magistrate function. In *Public Law*, we do not find in his writings an innovative plan to reorganize public law, as his *summa divisio* between engagements and successions intended to do for civil law. Domat divides *Public Law* into four books: The first deals with the government and the general policing of a state, the second with the officers and other persons who take part in public functions, the third with crimes and offenses, and the fourth with the judicial order. Only the first two books were completed by the jurisconsult before his death. For the last two, he leaves only the preambles that allow for, however, a fairly precise vision of the principles he intended to highlight on these issues (Sarzotti 1995; Gilles 2004).

Foundation of the Legal System

Very classically, Domat posits the ends of divine law as limits of the civil law guaranteeing the social order. The ultimate foundation of natural law is God, while its next foundation is the nature of humankind. The juridical system, which recalls in its rigor and its binary classification the geometric classic French gardens, is built around a mathematical method, clear structure, and succinct articles. Starting from the two laws of love, the system is structured by a *summa divisio* between immutable natural laws, on the one hand, and arbitrary human laws, on the other. Legally, he is at the hinge of classical and modern jusnaturalism without taking a decisive step. Politically, he rejects the neo-Thomist tradition, a source of protest, in favor of a vision of the state and society close to that of Bossuet, supporting a solid state. Domat's jusnaturalism is more conservative than the school of modern natural law. His entire work therefore tends to express the consciousness of spirituality that must animate the positive legal apparatus of humanity.

The order of nature and religion is confronted with the darkness of fallen humanity. The only true foundation of the law, therefore, can only be religious and Christian. For Domat, in frontal opposition to Hobbes, there is no state of nature where all would be at war against all others. There is no social contract between individuals; humanity has remained in the hands of God despite the Fall, and if human beings are led to bind themselves to others, it is by virtue of the law of love for one another. Wishing to create a system that conforms to the divine law, Domat acts, reasons, and builds

as a jurist and not as a theologian. He must convert the moral aspirations that animate him into a natural legal system (Ventimiglia 1983).

Defender of a natural law that is more classic than modern, Domat is outside the school of ius naturale and ius gentium, even if, like Grotius or Suarez, he bases natural law on human reason and the clear and obvious principles it illustrates. He refuses, however, to remove God while laying down a rational systematization of the law. There is therefore a natural law that finds its expression in Roman law, in which, however, the great principles underlying the rules of natural law are lost. This is why Domat is building a new, exhaustive legal system with the help of a refined Roman law, cleansed of its ancient remnants and enlightened by the Christian religion. The legal science of the civil law is for Domat primordial because it proceeds from the analysis of human behavior in society and of humanity's divine destination.

He wants the double law of love of the sovereign good – love of God – and love of neighbor to reign over these matters. He deduces from this divine order a plan of exposition that breaks with the legal tradition. He sets the tone for his work in introductory observations under *A Treatise of Laws*. He moves to the main portion of his treatise and discusses the various rules and principles under *The Civil Law*. He is therefore carrying out a refounding and restructuring, in order to establish the links among the natural rules. This must be done according to a very strict program:"The design therefore proposed in this book, is to set the Roman laws in their true order: to distinguish the matters of the law, and to place them according to the rank which they have in the body which they naturally compose: to divide each matter according to its parts" (Domat 1697). He can see the power of self-esteem over the souls of men and women, so it is essential to build a body of law that abides by the first two laws, because the realization of the finality of human beings and their salvation is conditioned by the conjunction of these two laws. He refers largely to biblical texts, thus extending the phenomenon of sacralization of the law.

Domat thus appears as a conservative author of a certain legal tradition. His *Treatise of Laws* is organized almost entirely on maxims derived from scriptures. He therefore seeks to verify the conformity of positive laws with divine law and thus enlighten the jurist and the Christian in the quest for justice.

The Public Law Project

The *Public law* book as a whole then takes its place in a "universal police," an instrument of public power. For him, the state's essential mission is the rule of justice. If private law governed natural laws in the strict sense, in public law they are more divine precepts from the Scriptures than true natural laws. Public power and the state have a role to play in the return of the fallen man to God. The action of the public power will be organized, then, around the traditional idea of the exercise of the jurisdiction of the magistrate, declined between contentious jurisdiction and voluntary jurisdiction. This becomes the expression of his vision of the order. The qualification of voluntary jurisdiction ultimately embraces any activity of the public official, apart from any judicial debate or preexisting dispute. However, it does not really cross the threshold of a clear autonomy of the administrative action independent of the jurisdictional action, but its vision of the public action determines the bases of an organized public action, structured around principles proper to a public right conceived as autonomous.

Quotations of the scriptures in *Public Law* are found primarily in the first titles – "Government," "Power," "Prince's Counsel," and "Use of Forces Necessary to Maintain a State" – strengthening the divine foundation of power. When it comes to more technical issues, such as state funding, he comes back to the "royal ordinances." As a Jansenist, he recalls the natural truths that must reign over the heart of each of us. This leads him to use the scriptures to establish the foundation of the great principles of civil law found in *A Treatise of Laws* and then in the *The Civil Law*. It is no longer natural laws in the strict sense that found public law, but divine commandments, sometimes referred to as divine rules of positive law. The parallel with the thought of Bossuet is constant

throughout the work, even if the questions properly legal, such as domaniality or the police, are more out of comparison with the Eagle of Meaux.

The action of the prince takes place only in the classic setting of the Prince Justice (Domat 1697). Its legislative power derives from its power of justice. He thereby exercises a voluntary jurisdiction. The prince is above all a prince vigilante. The assertion of the specificity of the law governing public action then finds its premises in Domat's thought. The spirit of *Public Law* can be seen first of all through the idea that the State, through a broad definition of public law and a strict distinction between jus publicum and jus privatum, is in charge of all the fields of the community while having a field of action that is specific and legally distinct. It is the notion of "universal police of society" (Domat 1697) that is transposed to a "general police of things that are for the public use." He states that he intends in this work to treat "matters relating to the general order of a State" and "rules and duties of all kinds of professions in relation to this order." Classically, he analyzes the realization of the public good on the idea of collective order specific to particular development (Napoli 1994). The police envisaged by him can then be concretized in more precise missions: to prevent the crimes like the control of the foreigners, to avoid the fires and the disasters (fire, maintenance of the streets, hygiene of the dwellings, food, and water), and to ensure the beneficence for guarantee social peace or ensure political police. The jurisconsult's lengthy elaborations in the area of liability, the status of foreigners, the police of the highways, the regulation of hospitals, and communities and provisions affecting arts and crafts show the influence of the police on society such as Domat envisaged. For him, taking the Paulian formula, all power comes from God, the prince having to "make God reign." The action of the Prince therefore finds a judge only in God. His vision of the judiciary is no more new for his time.

Public Legal Thought Innovations

Despite the traditional aspects that dot Domat's work, he bases his vision on public law, which stems in part from the structure chosen to deal with the issue. In book II of the *Public Law*, he dedicates an independent development to the status of the public staff. This is one of the first interest of Domat's analysis of public law: to consider the "public service" as an independent entity from the rights it has to put into action. Criticizing the venality of the offices, he nevertheless finds, disillusioned, that ultimately, venality is a lesser evil if we consider the other abuses that prevails, according to the magistrate, in some companies of justice. Domat belongs to the little provincial "robe" which may explain a notable disappearance, the absence of the States General and parliaments in Public Law.

This part of the work is remarkable in its ability to view society as entirely focused on the public interest, a capacity that derives from an organicist yet classical view of society. The new social order, according to Domat, then revolves around the idea of service to the community, emerging from the tripartite division of society between Third Estate, clergy, and nobility. Using the modern term taxpayer, he bases a tax duty on the entire population in the name of community interest. It affirms a tax duty of all, a direct link with the expenses of the State, and a goal which is the common good even if the practical implementation is largely ignored by the jurisconsult. In the area of criminal law, while Domat's expositions are still in the draft stage, they are interesting for more than one reason (Gilles 2004; Pierrard 2020). If the exemplarity of the sentence that is developed at length does not constitute an originality, the idea that it is necessary, in order to prevent a certain number of offenses, to adopt an upstream social policy is a singularity.

Web of Natural and Human Laws

In *The Civil Law*, Domat defines natural laws as "those which God himself has established, and which he teaches to men by the light of reason"; these "are natural and so just always and everywhere, that no authority can change them or abolish them" (Domat, CL 1689). These are the direct consequences of the first two principles from which the set of norms in a society must flow. Among these immutable laws are not only the

great principles of contractualism, which derive directly from the two laws of love, but also certain operating principles of the public authority, the rejection of all unjust enrichment, avarice, usury, and so on. But natural laws are not limited to these great principles and are found in certain rules that Domat wishes to make universal, such as the law that a possessor should not be disturbed in the enjoyment of his property, or that the state should not take advantage of a taxpayer's doubt in the case of an unfounded tax claim. He then sets up a web of norms, both natural and arbitrary, that limit each other to the point of creating a complete body of law, filling the entire legal sphere. By basing his work on a very moralistic view of the law, Domat does not intend to devalue positive law. Not all people have pure enough reason to recognize the justice of the laws or have a right enough heart to obey them. Obvious legal principles, they nevertheless need to be extended by positive norms. Close to the thought of Saint Augustine, in a society perverted by both original sin and self-esteem, civil law must be constructed while "God himself made men" for God himself. Domat wishes to use reason to raise humanity toward God. The arbitrary law of Domat is a resumption of the *lex humana* of Aquinas, as human reason elaborates the practical rules of individual and social life. It establishes the idea of a relationship between three legal strata: the two first principles, natural laws, and finally arbitrary laws. It is a legal structure leading to an ante-Kelsenian relationship, necessary and decreasing between the norms. According to the scholastic tradition, human and arbitrary law must be to the natural law what the natural law is to the divine law and the first principles. Arbitrary laws, by their prescriptions, then mediate for humanity the order of divine creation. There is in these wilful laws a part – director – belonging to natural law and another part – mediator – which is arbitrary.

Legal Thought Heritage

The construction of a streamlined, structured civil law will be Domat's major legacy in the eighteenth century, and later in the great codifications of the early nineteenth century. The perspective offered by Domat's *Public Law* leaves the reader puzzled. It evokes a curious mixture of archaism and modernity. Unfortunately for him, it is the legal structure and solutions that will know a widespread use in the French civil code, in the Louisianan codes, and in the civil code of Lower Canada in particular.

The Christian foundations and the desire to bring humanity back to God through law will be abandoned by the codifiers, depriving Domat's work of his Christian soul for the benefit of his legal thought.

Still today, in many works throughout the world, marked by the codification evolution, the evocation of Domat's thought is made when we talk about the civil law of obligations, usufruct, arbitration, interpretation of law, or prescription, for example.

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Donoso-Cortés, Juan Francesco Maria de la Salud

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Introduction

Juan Francisco Manuel María de la Salud Donoso-Cortés (1809–1853) was born to a family of prosperous land-owners from the Spanish region of Extremadura. Following the early education in Extremadura – in Don Benito and Trujillo – Donoso spent the years of the Liberal Triennium (1820–1823) at the University of Salamanca (1820–1821) and the Colegio de San Pedro in Cáceres (1821–1823). From 1823 to 1828, while studying Law at the University of Seville, he formed close friendships with Juan Francisco Pacheco and Juan Bravo Murillo, who would become prominent figures of the Liberal Party's moderate wing, whose ideology Donoso Cortés shared until his conversion to anti-liberalism. A close connection to the romantic poet and liberal intellectual, Manuel José Quintana, gave Donoso an entry ticket to Madridian intellectual circles on his 1828 trip to the capital and served as an endorsement for his first teaching post at the Colegio de Cáceres (1829–1830).

The battle over Ferdinand VII's succession was the watershed moment in the history of nineteenth-century Spain and a turning point in Donoso's political biography. The so-called Salic law, introduced in Spain in 1713, and unofficially derogated in 1789, limited access to the throne to the male members of the royal family. Ferdinand VII, whose first child, Isabel, was born only 3 years before the King's death in 1833, officially abolished the Salic law in 1830 in order to secure his daughter's rights of succession. The king's decision paved the way for the dispute between traditionalists who sided with the King's brother and aspirant to the throne, Carlos María Isidro, and the liberals, who endorsed his daughter, the future Isabel II. In the aftermath of Fernando VII death, the dynastic dispute evolved into a civil war between liberal and traditionalist camps, the so-called Carlist Wars that lasted intermittently from 1833 to 1876 and posed a constant threat to the stability of the Spanish political system and the institution of representative monarchy. Loyal to the liberal ideals he espoused at the time, Donoso advocated in favor of Isabel and her mother, the Queen regent María Cristina, labeling the Carlists a "fanatic and anti-national party… that inundated the nation with all sorts of evils" (Garrido Muro 2015, 32).

His defense of the interests of Isabel II and his close bond with María Cristina, whom he accompanied during her exile in France, solidified Donoso's standing as an advisor to the crown and an influential voice of moderate liberalism in the doctrinaire tradition.

From 1833 until his death in 1853, Donoso held a number of political posts, as an official in

the Ministry of Justice, member of Parliament, and finally as an ambassador in Paris (1849) and Berlin (1851). In the 1830s and until mid-1840s, he was a prominent voice in the debates surrounding the nation's political and legal system and the establishment of a liberal regime in Spain. In 1836–1837, while holding the Chair of Political Law at Madrid's Ateneo, he presented a course titled "Lessons in Political Law," which expounded the main tenets of his brand of liberalism. These "lessons" and Donoso's participation in the crafting of the 1845 Spanish Constitution illustrate his attempts to protect the interests of the monarchy while securing the foundations of the liberal system destabilized by civil war, frequent government crises and conflicts between conservatives and progressives.

His most influential works were produced in the aftermath of two momentous events: the 1848 revolutionary wave and his religious "conversion," motivated by the death of his brother in 1847, together with the influence of a friend by the name of Santiago de Masarnau in whom Donoso saw an example of authentic religiosity. Horrified by the spectacle of the revolution, Donoso rejected liberalism and turned, in Carlos Dardé's words, into "a prophet of catastrophes and the European apostle of the re-Catholicization of society." (3) The reputation Donoso garnered in Spain and Europe owed much to the intellectual brilliance with which he captured the pulse of his time, the tremors of the revolution, and the difficulty or – or, as he eventually concluded – the impossibility of establishing stable political institutions without an appeal to transcendental authority.

From Liberalism to Catholic Reaction

An exposition of the main tenets of Donoso's liberalism can be found in the *Lessons in Political Law* (1836–1837). He delivered these lectures in the aftermath of the 1836 rebellion of progressive liberals who demanded the reestablishment of the 1812 Constitution of Cádiz that proclaimed popular sovereignty and was suspended by Ferdinand VII. Within the climate of conflict that involved the Crown and different liberal factions, Donoso offered a reflection on the "general theory of governments and the specific mission of representative government" (1854, 116). The lectures are informed by Donoso's conception of the human subject as a bearer of intelligence and freedom, two properties that act in opposing directions. While the former is a quality that leads the individual to associate with other intelligent beings, freedom leads to privileging individual aspirations over the interests of the society. If intelligence is the origin of society, argues Donoso, freedom is what makes government necessary (idem, 120). Throughout history, those societies that privileged intelligence – Donoso's example is Plato's republic – emphasized social unity at the expense of freedom, and those that championed freedom faced the danger of disorder and anarchy. Only representative government can and, indeed, must "devise a law that will transform in harmonious unity the incoherent duality of the law of individuality and the law of association" (idem, 125).

For Donoso in the late 1830s, the future of European society hinged on the capacity to formulate a theory that would pave the way for the fulfillment of the representative government's mission of reconciling social cohesion and freedom. However, as he argued in his commentary on the 1837 Spanish constitution, the theory of representative government consecrated in that foundational legal document reveals a dangerous misunderstanding of the nature of power and the relationship between the Crown, Congress, and society. The root of the problem for Donoso lies in the very notion of the division of powers and the idea that rights confer power.

Rather than appealing to legal categories such as sovereignty and rights, Donoso defines the nature of power based on its origin (the fact that the ruler and the subjects are different "social persons"), the way in which it is exercised, and the goal it pursues (happiness of the subjects). Power rests on the single fundamental right of the ruler, which is to rule (*mandar*), and the irrevocable duty of the subject to obey. The fact that members of society hold determinate rights does not alter the nature of power, which is unified,

inalienable and indivisible. "All the possible rights cannot confer power to those who have the obligation to obey" (idem, 313).

The notion that rights confer power culminates in the doctrine of popular sovereignty, which does away with subjects' obligation to obey and legitimizes insurrection. Similarly, the doctrine of absolutism, or the divine rights of kings, demands passive obedience and transforms people into an inert entity without agency. While the demagogues – Donoso's code word for the advocates of popular sovereignty – call for active resistance, and the absolutists count on the passive obedience of subjects, a third way is needed, that of active obedience and passive resistance (320). Both popular sovereignty and the divine rights of kings are, in Donoso's view, theories of reaction, which rather than consolidating society pave the way for disorder. In 1837, he still believed that, in Spain and Europe, it was possible to restore the relationship between power and society in order to "prevent catastrophes and close the abyss [between the rulers and the subjects]" (idem, 319).

A constellation of political upheavals and personal turmoil in the late 1840s cemented Donoso's conviction that the horizon of social reform was closed off and that only an extraordinary and overwhelming intervention – a dictatorship from above – could halt the unfolding political catastrophe.

In his best-known works from this period – "Discourse on dictatorship" (1849), *Essay about Catholicism, Liberalism and Socialism* (1851), "Letter to the Cardinal Fornari" (1852) – Donoso adopts the voice of a prophet who announces the birth of the most inhuman form of power that grows out of the belief in human sovereignty and omnipotence. These writings express the conviction that all nefarious political ideas – such as popular sovereignty or the belief in the human being's intrinsic goodness – have their origin in some form of religious heresy. While the tendency of human reason to debate and contest divine teachings was certainly not new, in the revolutionary era, the reason's contestation of religion does not remain at the level of speculation, but "descends into the political and social sphere," turning "every error into a conflict, every heresy into a revolution." (1970, 745)

The terrifying message of his post-1848 texts is that with the dismantling of the notion of divine transcendence, the very possibility of human freedom and social organization disappears as well. The parallelism between the religious and political realms informs Donoso's political theology conceived as a defense of the Catholic reaction. The analogy between the religious and the political spheres acquires its clearest and boldest formulation in the "Discourse on dictatorship," where Donoso establishes a link between two repressions, the religious and the political, which are inversely proportionate. As the thermometer of human faith in God drops, the need for political repression grows; the lesser the power of religion in human affairs, the more need there is for an omnipotent government.

The process of secularization and human emancipation from religious authority inevitably leads to the most tyrannical form of government whose features, announced by Donoso in 1849, foreshadow twentieth-century totalitarianisms.

Anticipating the biopolitical paradigm, he argues that the expansion of governmental functions and the development of new technologies of communication (the telegraph) transform politics into a mechanism of total domination of life. For Donoso, dictatorship from above, an intervention in human affairs by a god-like extraordinary power, is the only way to interrupt the trend of mounting political disorder that calls for ever more formidable forms of governmental repression. To proclaim Catholic reaction as the only solution to the danger of political disorder means that the very meaning of politics as it was conceived in Donoso's liberal phase – the creation of a social order grounded in human faculties and not transcendental authority – was forever lost.

Carl Schmitt, Reader of Donoso

Donoso owes his present day reputation to Carl Schmitt's recuperation of his works, particularly those from the post-1848 period. Schmitt argues that the contrast between the success of Donoso's works among mid-nineteenth-century European intellectuals, including Schelling, Ranke, and Metternich, and their subsequent oblivion speaks to the

prophetic nature of his ideas. Donoso's insights arise in circumstances of extreme danger, only to be forgotten in moments of relative stability.

Schmitt posits continuity between Donoso's analysis of the 1848 revolutionary era, the context of 1918 Europe and the mid-twentieth century "civil war that spans the entire globe" (Schmitt 1963, 32). The lessons Schmitt draws from Donoso come from the latter's devastating diagnosis of liberal politics: his critique of the bourgeoisie as the "chattering class" (*clase discutidora*), his defense of the sovereign decision, and his notion of the enemy as a foundation of all grand politics.

Donoso's thought completes the arc of the European philosophy of counterrevolution that runs from De Maistre's focus on legitimacy to the Spaniard's defense of dictatorship. In Schmitt's view, dictatorship is not diametrically opposed to democracy, but to the discussion (idem, 87). In that sense, Donoso's ideas run counter to the dominant tendency of modern politics that generalizes infinite discussion, turning the "entire society into a club" (idem, 86).

Ultimately, Donoso's rejection of the philosophy of progress and his deep-seated anthropological pessimism contributed to his vision of politics as a locus where the battle for the destiny of modern humanity is fought. But, laments Schmitt, his lesson is entirely lost on those – here, he enumerates North-American capitalists, industry experts, Marxist socialists and anarcho-syndicalists – for whom politics will remain subordinated the laws of economy or life.

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► Schmitt, Carl

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Double Effect

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Introduction

According to the doctrine of double effect (also known as the principle of double effect), the

difference between intended effects and foreseen side effects is relevant for evaluating actions. For example, some people appeal to this difference to explain why militaries may not target civilians even though they may cause civilian casualties as a side effect of attacking military targets (e.g., Anscombe 1957. pp. 64–66). Consider the actions of two generals who cause similar effects:

> *Targeting an innocent person*
> A general orders a drone attack on a child whose parents are scientists in a weapons lab so that the scientists will be frightened and quit their jobs, leaving the lab inoperable. The general foresees but does not intend that the explosion also will destroy the lab's power generator because the targeted child happens to be standing next to it.
> *Killing an innocent person*
> A general orders a drone attack on the power generator for a weapons lab so that the lab will lose power, leaving the lab inoperable. The general foresees but does not intend that the explosion also will kill a child who happens to be standing near the targeted generator.

Why do many people believe that the first general acts wrongly and that the second general acts rightly, or at least that the second general could act rightly depending on other factors (e.g., whether the war is just and whether the general has other ways to shut down the lab)? According to the doctrine of double effect, the relevant difference is that the first general intends the child's death as a means of shutting down the lab, but the second general knowingly causes the child's death without intending it. (Questions about how to define intended effects are discussed below.)

Another well-known illustration of the doctrine contrasts two physicians who save five people at the expense of one (Foot 1985, p. 25):

> Withholding a drug
> A physician withholds a drug from a patient so that the patient's death makes organs available for five lifesaving organ transplants.
> Rationing a drug
> A physician rations a scarce drug by giving one dose to several people who each need one dose instead of giving all five doses to one person who needs all the remaining doses.

Many people, including some critics of the doctrine of double effect, believe that the first physician acts wrongly and that the second physician acts rightly (Scanlon 2008, p. 1–2). According to the doctrine of double effect, the relevant difference is that the first physician intends the patient's death as a means of making organs available, but the second physician knowingly causes the patient's death without intending it.

Not all illustrations of the doctrine involve matters of life and death. Consider two basketball coaches who call a play that each coach foresees will result in a more one-sided score and an embarrassed opponent:

> Running up the score
> A basketball coach calls a play in the final minute to embarrass an opponent. The coach foresees but does not intend that the play will give the backup guard experience.
> Giving a backup experience
> A coach calls a play in the final minute of a blowout win to give the backup guard experience. The coach foresees but does not intend that the play will cause a more one-sided score, which will embarrass the opponent.

By itself, the doctrine says nothing about sportsmanship, but it does explain why a question such as, "Was the coach trying to embarrass the opponent or give a backup some experience?" seems relevant for evaluating the coach's action. The first coach intends the opponent's embarrassment, but the second coach causes the embarrassment as a foreseen side effect.

The distinction between intended effects and foreseen side effects also is relevant in some legal contexts. In international law, the Geneva Conventions prohibit intending civilian casualties but do not prohibit all acts that result in the civilian casualties (75 *United Nations Treaty Series* 287). In American law, the United States Supreme Court ruled that the crime of treason requires the intention to betray the country, so someone could organize a labor strike in a weapons factory while *foreseeing* that the strike will aid an enemy without *intending* to aid the enemy (*Cramer v. United States* 325 U.S. 1, 29 (1945)). In another case, the Supreme Court ruled that a state may prohibit physician-assisted suicide even if the state permits other actions that foreseeably result in a patient's death. Consider two physicians who relieve a patient's pain by injecting a drug:

Using potassium chloride

A physician treats a patient's pain by injecting the patient with potassium chloride to stop the patient's heart so that the patient will die.

Using morphine

A physician treats a patient's pain by injecting the patient with morphine to prevent pain signals from reaching the patient's brain. The physician and the patient foresee that the morphine also will slow down the patient's heart and cause the patient's death.

According to the Supreme Court, a state may treat these cases differently, because the first physician intends the patient's death as a means of ending pain while the second physician knowingly causes the patient's death as a foreseen side effect of relieving pain (*Vacco v. Quill*, 521 U.S. 793, 807–808 (1997)).

Clarifications

Some proponents of the doctrine present it as a complete set of conditions that a person must satisfy when causing a bad effect. One common version of the doctrine has four conditions (e.g., Mangan 1949, p. 43 and Černý 2020, pp. 7–8):

(1) The action is not wrong in itself.
(2) The agent intends only the good effect.
(3) The bad effect is not a means to the good effect.
(4) There is a proportionate reason for causing the bad effect.

Some proponents of the doctrine combine conditions (2) and (3) into a single condition about the agent's intention (Cavanaugh 2006, p. 36). Other proponents believe that no list can include every way that a person can act wrongly, so they treat the doctrine as a single principle about the relevance of the person's intention (Masek 2018, pp. 117–126). Proponents of the doctrine agree, however, that a person can act wrongly without intending a bad effect (e.g., by playing loud music that keeps neighbors awake at night).

To understand any version of the doctrine, one should distinguish intended effects from effects that a person is morally or legally responsible for causing. Suppose that an arsonist burns down a building for insurance money and knows that the fire will kill one person inside the building. The person's death is a foreseen side effect, not an intended effect, but the arsonist still is morally responsible for the person's death. The arsonist also could be legally guilty of murder, because the law can define murder to include both intending death and knowingly causing death without a legal justification (Finnis 1991, p. 49).

To understand the doctrine, one also should distinguish the strictness of a rule from the seriousness of violating the rule. Proponents of the doctrine claim that the rule against intending death is stricter than the rule against knowingly causing death, but they do not claim that intending death is always more seriously wrong than knowingly causing death. They could agree, for example, that the arsonist who causes death as a foreseen side effect does something more seriously wrong than a physician who intends death as a means of relieving pain.

A final point of clarification is that few, if any, proponents of the doctrine present it as a way of explaining intuitions about the trolley cases that are widely discussed in contemporary philosophy and moral psychology. In these cases, someone can save five people from a runaway trolley only by doing something that results in the death of one person, such as pushing a man off a footbridge and into the trolley's path (Thomson 1976, 207–208). Discussing these cases in detail is unnecessary for summarizing the doctrine of double effect. The doctrine was presented centuries before the first trolley case, and contemporary proponents of the doctrine do not defend it by appealing to intuitions about trolley cases (Masek 2018, 109–110).

Definitions of Intended Effects

In American jurisprudence, one well-known treatise asserts that a person intends an effect if the person acts with the desire to cause the effect or believes that the effect is "substantially certain" to

result from the person's action (*Restatement (Second) of Torts* § 8A 1965). By defining intended effects to include all certainly foreseen effects, the authors of the treatise might seek to present a useful legal fiction in tort cases (see Lyons 2005, p. 513), but some philosophers have made similar assertions in non-legal contexts (e.g., Chisholm 1976, p. 75 and Beauchamp and Childress 2001, p. 131). The principle that people intend all the certainly foreseeable effects of their actions faces some obvious counterexamples. For example, this principle entails the conclusion that competitive cyclists intend increased wind resistance when they accelerate, even if they use a crouched stance to reduce wind resistance (Masek 2021, 663). The principle also entails the conclusion that Eisenhower intended to kill his own troops when he ordered the Normandy invasion. The US Supreme Court cited this example about Eisenhower (which came from a dissenting judge on a lower court) in its ruling about physician-assisted suicide (*Vacco v. Quill*, 521 U.S. 793, 803 (1997) and *Compassion in Dying v. Washington*, 79 F. 3d 790, 858 (CA9 1996)).

Proponents of the doctrine of double effect agree that a person does not intend every foreseen effect, but they disagree about how to define intended effects. According to "strict" definitions of intended effects, a person intends all the effects, and only the effects, that are necessary steps in the agent's plan (e.g., Masek 2021). For example, these definitions support the conclusion that a physician can prescribe a lethal dose of morphine without intending death, because the patient's death is not a necessary step in the physician's plan to relieve pain. One way to test whether an effect is a necessary step in a person's plan is to ask the counterfactual question, "Holding everything else constant, if the effect did not occur, would the person be less likely to achieve the person's end in the way that the person expects?" Answering yes is evidence that the effect is a necessary step in the person's plan and therefore is intended; Answering yes is evidence that the effect is a necessary step in the person's and therefore is intended. When a physician uses potassium chloride to treat pain, the patient's survival would prevent the physician from relieving pain in the way that the physician expects, because potassium chloride would not relieve pain without causing death. When a physician uses morphine to treat pain, the patient's survival would not prevent the physician from relieving pain in the way that the physician expects, because morphine still would relieve the patient's pain.

Proponents of the doctrine of double effect agree that a person intends *all* the effects that are necessary steps in the agent's plan. The disputed point is whether a person intends *only* these effects. According to "broad" definitions of intended effects, a person also intends effects that have a certain physical, metaphysical, or logical relation to the action. Some broad definitions refer to closeness (e.g., Delaney 2008, p. 342), others refer to the essence of actions (e.g., Gormally 2013, p. 102), and others refer to logical relations (e.g., FitzPatrick 2006, p. 603). The disagreement between proponents of strict definitions and proponents of broad definitions has generated an extensive literature. Much of this literature discusses the case of an obstetric craniotomy, in which a surgeon collapses a living fetus's skull to save the mother from impacted labor. According to strict definitions, the surgeon can perform the craniotomy without intending death or harm, because neither death nor harm is a necessary step in the surgeon's plan. If the fetus could survive the craniotomy unharmed, the surgeon's plan to save the mother would not be impeded in any way. Proponents of the strict definition also argue that intended effects explain actions and that someone who wants to explain why the surgeon performs the craniotomy gets no closer to an answer by knowing that the surgeon causes death or harm (Masek 2021, 670–72). Some critics of strict definitions, however, insist that any plausible definition of intended effects must include death or harm in the craniotomy case (e.g., Di Nucci 2014, 127–129). Proponents of strict definitions respond by arguing that their analysis of the craniotomy is no less plausible than the claim that a cyclist can accelerate without intending increased wind resistance (Masek 2021, 671).

Other critics of the strict definition argue that the strict definition makes it impossible to explain some moral judgments, such as the judgment that physicians act wrongly by withholding treatment from patients to study a disease (see Quinn 1989, 336 and Nelkin and Rickless 2015, 388). Proponents of strict definitions respond that the physicians act wrongly even if they do not intend harm, because they expose patients to harm and fail to act in their patients' best interests (Masek 2018, 193).

One basic disagreement in debates about defining intended effects is methodological. Critics of strict definitions rely on counterexamples in which strict definitions entail conclusions that seem implausible to critics, such as the conclusion that a surgeon can perform an obstetric craniotomy on a living fetus without intending death. Proponents of strict definitions argue that one should begin with a definition of intended effects that has a plausible basis in psychology and apply it to specific cases, instead of beginning with moral intuitions about specific cases and then extending the definition of intended effects to include effects that do not explain a person's action (ibid, 656).

The Basis of the Doctrine

Even if proponents of the doctrine successfully define intended effects, they still face the challenge of explaining why intentions are relevant for evaluating actions. Some critics argue that a person's intention is relevant for evaluating the person's character or decision-making process, not for evaluating the person's action (see Thomson 1999, 517–518 and Scanlon 2008, 8–36). If these critics are correct, then the general who orders a drone attack on an innocent child and destroys a generator as a foreseen side effect does the right thing for the wrong reason. One basic disagreement between proponents and critics is whether the two generals who order a drone attack perform the same action with different intentions, as critics of the doctrine claim, or different actions that have similar effects, as proponents of the doctrine claim (see Masek 2018, 86–89).

Proponents of the doctrine agree that the agent's intention is relevant for both types of evaluations, but they present justifications of the doctrine. Some proponents appeal to moral absolutism, arguing that one must recognize a relevant difference between intended effects and foreseen side effects to make sense of absolute or exceptionless moral principles, such as the rule against murder (e.g., Boyle 1991). In some situations, people cannot avoid knowingly causing death, but they can avoid intending death. Other proponents appeal to a phenomenological account of the difference between intending a bad effect and knowingly causing a bad effect, arguing that the difference seems irrelevant from a purely objective perspective from not from the perspective of the person who acts (Nagel 1979). Other proponents appeal to different ways that intended effects and foreseen side effects are related to an agent or to the agent's character (e.g., Wedgwood 2011 and Masek 2018). Other proponents appeal to an account of human solidarity (Stuchlik 2022).

Conclusion

Proponents of the doctrine deny two common views in contemporary ethics: the consequentialist view that all moral principles are directions for maximizing general happiness and the rights-based view that all moral principles are directions for respecting other people's rights. Consider the pair of cases about generals who order a drone attack and the pair of cases about physicians who use a lethal drug to treat pain. The cases are designed so that the two agents in both cases cause the same effects, so their acts will seem similar to anyone who accepts a purely consequentialist or rights-based theory of ethics. Debates about the doctrine often begin with specific cases, but these debates raise some fundamental issues in moral philosophy.

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► Autonomous Vehicles: Crashes
► Euthanasia

▶ Finnis, John
▶ Killing: Ethics of

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Douglass, Frederick

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Introduction

Frederick Douglass (1818–1895) was born into slavery in Tuckahoe, Maryland. While still a slave, Douglass learned to read and educated himself. In 1838, he escaped from slavery and worked as a laborer until he was "discovered" by the antislavery leader William Lloyd Garrison, who invited Douglass to join him on the abolitionist lecture circuit. Over the course of the next several decades, Douglass would establish himself as one of the leading political orators in the world. In addition to public speaking, Douglass was a prolific writer who authored three autobiographies, a novella, and hundreds of essays. In 1848, Douglass began a decades-long career as a newspaper editor, and after the Civil War, he was appointed to several posts by Republican administrations.

Garrisonian Period

During his first few years in public life, Douglass was a devotee of William Lloyd Garrison's legal and social philosophy. The Garrisonians believed that the only legitimate government was the "government of God" and, therefore, rejected the legitimacy of the American government. Garrison

famously declared that the Constitution of the United States was a "pact with the devil" and a "covenant with hell" due to its protection of the institution of slavery (among other things). Since Garrison rejected the legitimacy of the Constitution, he also rejected the moral acceptability of voting. For his first several years as an abolitionist orator, Douglass accepted these Garrisonian doctrines.

Transition to Political Abolitionism

In 1845, Douglass published his first autobiography, *Narrative of Life of Frederick Douglass, An American Slave*, and embarked on an extensive speaking tour of the United Kingdom. In 1846, a group of British abolitionists purchased Douglass's freedom from his former master, Thomas Auld. Upon his return to the United States, Douglass moved from Massachusetts – which was dominated by the Garrisonian abolitionists – to Rochester, New York, which was a hotbed of political abolitionism. In 1848, Douglass would begin publishing his own antislavery newspaper, *The North Star*. Upon assuming the editorship of his own newspaper, Douglass felt obliged to rethink his fundamental views of the law, politics, and morality of abolitionism. As part of this rethinking, Douglass studied the ideas of several abolitionists – most notably Lysander Spooner, William Goodell, and Gerrit Smith – who argued that the Constitution ought to be interpreted as antislavery. In 1851, Douglass announced a "change of opinion" on the proper reading of the Constitution. The Constitution, he now declared, "construed in light of well-established rules of interpretation, might be made consistent in its details with the noble purposes avowed in its preamble; and that hereafter we should insist upon the application of such rules of that instrument, and demand that it be wielded in behalf of emancipation" (Buccola 2016, 43). Douglass argued that slavery cannot ever, properly speaking, be made "lawful" because it is "a system of lawless violence." All legitimate law, Douglass argued following Spooner, must be consistent with natural law, and slavery is at odds with natural law. Although the original Constitution contained many clauses that protected the institution of slavery in one way or another, Douglass and the other political abolitionists thought it was significant that the document did not refer to slavery by name and that the preamble contained aspirational language in the Preamble.

Soon after Douglass announced his "change of opinion" on the Constitution, he explained his underlying political philosophy in an essay called "Is Civil Government Right?" (Buccola 2016, 45–49). In response to the Garrisonian anarchist position, Douglass defended the political abolitionist idea that "righteous government" was a possibility. The "office of government," he argued, is "to protect the rights of man." Government is necessary, he insisted, because "hardened villains" refuse to respect the natural rights of others. In response to the Garrisonian position that the use of force can never be justified, Douglass said "when every avenue to the understanding and heart of the oppressor is closed, when he is deaf to every moral appeal, and rushes upon his fellow-man to gratify his own selfish propensities at the expense of the rights and liberties of his brother-man, the exercise of physical force. . .is alike the right and the duty of society" (Buccola 2016, 49).

Douglass's antislavery reading of the Constitution and his natural rights political philosophy were on display in his famous "What to the Slave is the Fourth of July?" oration, which he delivered in Rochester in 1852. In the speech, Douglass defended the natural rights philosophy of the Declaration of Independence as "saving principles" and argued that the Constitution, when read in light of these principles, could be deemed a "glorious liberty document" (Buccola 2016, 53, 69).

"There Is No Freedom from Responsibility for Slavery but in the Abolition of Slavery"

Douglass's political philosophy and constitutionalism invite us to consider what duties are implied in the theory of natural rights. At the heart of natural rights philosophy is the idea that each

human being has the duty to respect the rights of other people, but Douglass and other abolitionists thought this basic duty was insufficient to achieve justice. In addition to this negative injunction to refrain from violating the rights of others, Douglass argued that we have an imperfect duty to intervene if the rights of others are being violated by a third party. This duty was at the core of the abolitionist project. Against the Garrisonian abolitionists who had begun calling for Northern secession from the South in order to free themselves from complicity with the sin of slavery, Douglass insisted "there is no freedom from responsibility for slavery but in the abolition of slavery" (Buccola 2016, 127).

Douglass's belief that the use of force was justified in defense of natural rights and his commitment to the idea that there was an obligation to vindicate the rights of others led him to conclude that abolitionist violence (e.g., the activities of radical abolitionist John Brown) was morally justified and it led him to rejoice at the outbreak of the Civil War, which he insisted must be an "abolition war."

A Capacious Legal and Social Philosophy

Douglass's antebellum and postbellum writings and speaking were by no means limited to abolitionism (pre-war) and the security of civil rights for former slaves (post-war). During his nearly six decades in public life, Douglass extended his natural rights political and legal philosophy to the rights of all people, and he was actively engaged in battles for the rights of women and immigrants. He attended the famous Seneca Falls Women's Rights convention in 1848 and continued to agitate for the rights of women until (quite literally) the day he died. On questions of cultural and religious diversity, Douglass embraced a liberal pluralist position. "Religious liberty," Douglass said in 1869, "always flourishes best amid the clash and competition of rival religious creeds."

Douglass supplemented the political and legal philosophy described above with a personal philosophy of self-reliance and a social philosophy that emphasized the idea of fairness. Douglass preached a doctrine of self-reliance in his most oft-delivered speech, "Self Made Men," in which he argued that individuals could make and remake themselves if they behaved virtuously and devoted their souls to meaningful work. While Douglass's rhetoric of self-reliance has been championed by many contemporary individualists, it is important to note that he always paired this rhetoric with a social philosophy of fairness. For Douglass, fairness required not only that we ensure the legal and social rules do not rig "the race of life" in favor of some players or against others but also that we rectify past injustice. "Should the American people," he said in 1894, "put a school house in every valley of the South and a church on every hill side and supply the one with teachers and the other with preachers, for a hundred years to come, they would not then have given fair play to the Negro. The nearest approach to justice to the Negro for the past is to do him justice in the present" (Buccola 2016, 341).

Conclusion

On February 20, 1895, Douglass died. Douglass was the leading African American orator, author, and statesman of the nineteenth century. While he will always be best known as the "slave who became an abolitionist," this is but one part of his enduring legacy as a philosophical reformer and civil rights leader.

Cross-References

► Claim Rights (Subjective Rights)
► Natural Law: Protestant

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Duff, Antony

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Introduction

Antony Duff (b. 1945–) is a leading scholar in the philosophy of criminal law and punishment. He is professor emeritus in the Department of Philosophy at the University of Stirling, where he taught from 1970–2009, and a Fellow of the Royal Society of Edinburgh as well as the British Academy for the Humanities and Social Sciences.

Duff's impressive body of work consists of rational reconstructions and normative theorizing about nearly every significant aspect of criminal law and punishment, including the criminal process, the substance of criminal law, the structure of criminal law, and the scope of criminal law. Much of his work aims at developing idealized, aspirational accounts of criminal justice. Yet his normative theorizing is characterized by its attentiveness to the divergence between the ideal and the real and its attempt to remain well-anchored in the practical. Duff pays careful attention to existing legal doctrine and caselaw and avoids endorsing any normative account that is blind to the realities on the ground. In other words, his work aims to explain and justify idealized versions of our *current* legal practices (1986: 97), which can then be used as bases for criticism and to guide progress.

Consistent with this attention to the practical, Duff's views are often complex and nuanced. He explicitly rejects what he terms "grand theorizing" – the attempt to explain the whole of the criminal law in terms of one "major principle," though he proceeds to try and shed light on major characteristics of criminal law's institutions (2007: Ch. 6, 2011: 125–126).

The following summarizes some of the major contributions he has made to the field.

Communicative Theory

Duff is perhaps most famous for his *communicative theory* of punishment and the criminal process. Going beyond traditional expressive accounts, which take the primary function of criminal punishment to lie in its expression of certain statements or values (Feinberg, 1970), Duff conceives of the trial and punishment as communicative endeavors (2013) intended to engage in a *dialogue* with the accused (1986: 260, 2007). The trial calls the accused to account for his or her wrong (1986; Duff et al. 2007), while punishment seeks to communicate deserved censure and induce repentant understanding and moral reform (2001: 97, 1986).

Duff addresses both the significance of a guilty verdict, which *condemns* the criminal's action and constitutes a symbolic punishment (1986: 261), as well as that of penal sanctions. Per Duff's view, the material burdens of punishment can be justified as compulsory *secular penance* (1986). Such burdens are imposed upon the guilty as a forceful way of inducing one who has wronged to confront the wrong he or she has committed and make appropriate moral reparations to those wronged (1986: 260–261, 2001: 302, 2013: 17). While forceful, such punishment is not, Duff claims, inappropriately coercive, as it presents the offender with the rational reasons one already has to repent past wrongs (1986). This Duff opposes to the objectionable coercion involved in purely consequentialist punishment, which manipulates and bullies, offering the wrong kind of reason for obeying the law (1986: 179–188). This opposition to purely consequentialist accounts of criminal law, grounded in an objection to their failure to accord the respect due to autonomous rational agents, is pervasive throughout Duff's work.

Within communicative punishment, on the other hand, punishment serves as a vehicle through which the offender may express remorseful understanding and undertake a form of penance (1986: 257). Punishment can thus serve to restore the offender's relationship with the victim as well as with his or her community, contributing to what Duff terms "three Rs" of punishment: *repentance, reform, and reconciliation* (2001: 107–109).

Communication thus requires reciprocal and rational engagement with the offender (2001: 79). This marks a major contribution of Duff's work to the philosophy of punishment: the significance of the participation of the offender as a rational moral agent in the process and imposition of punishment. In later work, together with Sandra Marshall, Duff elaborates further upon the roles of other actors, including the role of witnesses as well as that of the victim (2004).

Overall, the communicative theory proposed by Duff is a "mixed theory" which, he claims, "does justice to the central retributivist concern that punishment must focus on and be justified by its relationship to the crime for which it is imposed," "does justice to the consequentialist concern that punishment must be justified by some good that it aims to achieve," and furthermore, does justice "to the abolitionist concern that we should not aim to 'deliver pain' to offenders" (2001: 129). Yet even this nuanced view, he takes not to be the singular function or justification of criminal punishment but rather a central function, as predicted by his objections to grand theorizing.

The Trial: A Communicative Account

Duff's work is transformative in placing the trial and the criminal process at the center of criminal law and theory, most recently in a collaborative research project led by Duff together with Lindsay Farmer, Sandra Marshall, and Victor Tadros: *The Trial on Trial*. Per Duff, the criminal process is itself a communicative endeavor that calls the accused to account (1986; Duff et al. 2007). This calling to account consists in calling upon the accused to answer a charge of public wrongdoing, which, if proved, requires the wrongdoer to answer for the wrong either by offering a defense or by accepting the condemnation that a conviction expresses (2007, 2011: 130, 2013: 12, 2014a: 215).

This normative account of the criminal trial defends the independent significance of the trial as an intrinsically valuable, formal process that achieves important social goals, which need not rely on the significance of punishment for its justification. The trial is conceived as a vehicle through which the polity responds seriously to the wrongdoing engaged in by its members, holding them publicly accountable for flouting the values by which all such members are bound (2001: 302), while also doing justice to victims (2013: 12). It further does justice to offenders, recognizing them as fellow members of the normative community – rather than addressing them as outlaws or "others" – offering them the opportunity to explain or deny the charge made against them, thus respecting offenders as rational, autonomous, moral agents (Duff et al. 2007; Duff 2013). This account is a much-needed alternative to the classic, instrumentalist account of the criminal trial as merely a truth-seeking process for the identification of those to be punished (Duff 2007, 2013; Duff et al. 2007). Duff's promotion of the significance of the procedural has further implications for substantive criminal law doctrine and its justification, which he explores throughout his work.

Responsibility as Answerability and the Significance of Community

On Duff's view, the trial holds the agent responsible for his or her wrongdoing. Duff develops an account of *responsibility as answerability* whereby to be responsible is to be answerable to others for one's actions (2007). Duff thus introduces his triadic conception of responsibility whereby to understand the nature of one's responsibility we must ask (1) who is responsible, (2) for what, and (3) to whom (2007, 2013: 17). Duff offers distinctive answers to the first two of these questions, yet the very introduction of the third question as central to the notion of responsibility marks a further important contribution of his work.

His answer to this third question is that in criminal law one is answerable as a *citizen* to one's polity, that is, to one's *political community* (2001, 2007). Duff conceives of the polity as a normative community engaged in an enterprise of living together, structured by a set of shared values (2007, 2011: 136–13). The enterprise of criminal law, on this account, is the calling to account of citizens by the members of the political community to which they belong and whose values are reflected in the law.

Duff has in mind a specific type of community within which communication and answerability are central justifying aspects of criminal law. He proposes that the relevant civic community is liberal-communitarian, structured by classic liberal values (such as autonomy, freedom, privacy, and pluralism), while at the same time retaining a nonderivative, moral identity that allows it to be an independent participant in the communicative dialogue (2001). Within the liberal-communitarian polity, the law, as the expression of the shared values of the community, is "our" law – i.e., a law belonging to the members of the community rather than to a sovereign who imposes "its" laws from above. Thus, when a member of such community flouts these values, that member is answerable *to the members of the community* as a *citizen* of such community for his wrongdoing. Citizens, however, are not answerable for all moral wrongdoing but only for "public wrongs" that properly concern the public – i.e., those that violate the polity's defining values (1986, 1998, 2007: 100, 2011: 139, 2014b). If offenders fail to provide an exculpatory answer for their public wrongdoing, they become *criminally liable* to censure and penal sanctions (2007) aimed at engendering moral reform and reconciliation.

Perhaps one of the most potent critiques of Duff's account argues that Duff's communicative justifications presuppose moral homogeneity of a kind not found in typical liberal democracies, wherein the effort to mount criminal law on a system of shared values seems doomed to failure. Duff's hope is that the liberal community presupposed requires only a "thin" level of shared values rather than thicker moral homogeneity. It is not clear that Duff's attempt to meet the above-mentioned criticism is successful.

Another line of critique questions whether the responsibilities that lie at the heart of criminal law are really those which one owes *as a citizen*, rather than under some other (perhaps non-relational) description. For these and other critiques, see *Crime, Punishment, and Responsibility: The Jurisprudence of Antony* (Duff 2011).

D

Law, Morality, and Criminalization: Modest Legal Moralism

Duff's conception of the relationship between law and morality thus offers a middle position between those views that divorce the notion of criminal wrongdoing from pre-legal, moral wrongdoing and those that consider all moral wrongs potentially relevant to criminal law (Moore 1997). Duff is indeed a legal moralist, espousing a view that moral wrongdoing is both a necessary condition for criminalization and punishment, as well as potentially a reason in favor of such criminalization and punishment (2014b: 2). Yet consistent with his conception of "public wrongdoing," Duff's legal moralism is *modest*: only some moral wrongs are appropriately criminalized and punished by the state – those that are the proper concern of one's political community (2014b). These will include pre-legal moral wrongs that are of concern to the public such as murder and rape (*mala in se*), as well as legal wrongs that are morally wrongful in virtue of the power of the shared political enterprise to make violations of its legitimate rules and regulations morally wrongful (*mala prohibita*) (2007, 2013: 11). In both cases, on Duff's view, the criminal law is declaratory rather than prohibitive, pointing to the pre-criminal reasons persons already have to refrain from engaging in such violations. The role of substantive criminal law is then to mark out and condemn those pre-criminal wrongs that are in the interest of the public through its processes of criminalization and to provide legal mechanisms through which the community can respond in the morally appropriate way to such moral wrongdoing (through trial and punishment) (2007).

Criminalization is the focus of a further collaborative project led by Duff together with Lindsay Farmer, Sandra Marshall, Massimo Renzo, and Victor Tadros, which has produced a number of monographs focusing on different aspects of criminalization (2010, 2012, 2013, 2014).

Criminal Attempts

A summary of Duff's contributions to criminal theory would be incomplete without reference to his work on criminal attempts, to which he has dedicated a full-length monograph (1996a). In his work on substantive criminal law, Duff develops an account of the relation between the significance of subjective facts – about the offender and his or her mental states – and objective facts relevant to a crime (1990). On Duff's view, one is accountable for what one "has done," offering an *objectivist* account of action generally, as well as of attempts more specifically. "Objectivists argue," explains Duff, "that in the context of the criminal law, as in other contexts, the actions which we are to ascribe to an agent must be described in partly objective terms – in terms, that is, of their actual impact on... the public social world in which they are done" (1996a, 1996b: 39). This is as opposed to subjectivist views, which insist on the moral equivalence of identical acts performed with identical mental states, while rejecting the (objectivist) contention that consequences are an integral part of the act that is to be ascribed to the agent.

In line with his communicative theory, Duff argues that the correct moral understanding of wrongdoing to be conveyed to the offender, and that wrong for which the offender is to be called to account, incorporates the impact of the wrong on those affected by it (1996a). Thus, because "the unsuccessful agent has done less than the successful agent" (1996a, 2007: 202) and because of the various ways in which the difference between failed and successful attempts matter (e.g., in our relief in response to failed attempts), conviction and punishment should reflect these differences, and liability for failed attempts should be tempered (1993: 40).

Notwithstanding, the subjective aspect remains significant to the assessment of what the agent "has done," and Duff proposes a reclassification of crimes into "attacks" – in which the agent intends to do harm – and "endangerments" (1996a: 222, 2007).

Duff further proposes a detailed attempts doctrine, which not only operationalizes his theoretical views but further makes progress with respect to legal puzzles that have long proved enigmatic such as impossibility and putative defenses. Duff proposes that a person commits a criminal attempt only if they try to do something that, if they succeed in doing it, would constitute a crime (1996a: 88). Thus, whether one is liable for an attempt depends not only on one's mental state but also on what is actually the case (1991: 98, 1996a: 42).

While this subsection has only elaborated upon Duff's contribution to the attempts doctrine, his work has contributed to many important doctrines including: the act requirement, omissions, the circumstance/consequence distinction, the offense/defense distinction, the classification of defenses, endangerment crimes, exclusionary rules, the harm principle and its alternatives, the wrong principle, and countless other topics that cannot be elaborated upon here.

Conclusion

Antony Duff is a leading figure in the philosophy of criminal law and punishment. He is the author of over one hundred and sixty papers and six full length manuscripts on topics related to criminal law and criminal theory and has led numerous collaborative projects in the field. His work has contributed to our understanding of the structural, theoretical and doctrinal dimensions of criminal law and punishment, and is committed to both comprehensive and grounded thinking about these fields. His impressive body of work has greatly influenced contemporary philosophy of criminal law and punishment and will no doubt continue do so for many years to come.

Cross-References

- ▶ Coercion and Law
- ▶ Consequentialist Argument
- ▶ Feinberg, Joel
- ▶ Hampton, Jean
- ▶ Hirsch, Andreas (Andrew) von
- ▶ Murphy, Jeffrie
- ▶ Responsibility: Collective

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D

Duguit, Leon

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Léon Duguit (1859–1928) made his mark on the legal thinking of his day and is considered among the forefathers of legal sociology. Duguit was born into a family of jurists and wine negotiators, in Libourne, Gironde. After excelling in his studies, he briefly taught in Caen, before becoming professor of constitutional law, at the Faculty of Law in Bordeaux, in 1892, and was appointed Dean of the Faculty in 1919. From 1901, his work began to be influenced by the work of Emile Durkheim and the sociological positivism of Auguste Comte (*L'Etat, le droit objectif et la loi positive*); both of whom, he openly supported.

Much like Durkheim, he shared the belief in multidimensionality of law, based on social deeds, from which it derives its value, thereby producing a legal standard. The importance given to the social deed, in Duguit's works, earned him the recognition of being a foreseer of legal sociology, while remaining a realist and positivist author. Refusing deductive reasoning, which he considered to be the basis of classical theories, in French and German law, and concurring in this way with the epistemological model of Auguste Comte, Léon Duguit had the ambition to apply a

reasoning method, based on strict observation of social life to his legal thinking. However, this social deed is mainly represented under the guise of solidarity, which he places at the heart of his analytical system, and which created the profound originality of his thinking as much as contributed to the multiplicity of possible interpretations of his work in France, as well as in Anglo-Saxon, Spanish, and Latin American worlds. Therefore, Duguit's original works or a translation were read in England and the United States, as representing a positivism that indeed was not formalist but materialist, while in Spanish and Latin American countries he was more rightly recognized as an author whose views were imbued with a realism that was attentive to the value of the "thing," and axiology. Miguel Reale, in Brazil, counted Léon Duguit among the proponents of a "three-dimensional theory of law" *à la Française*. Following his death, in France, Duguit's interpreters were divided on the scope of his work and the correctness of his methods. The debate continues to this day.

However, all agree on the importance of the criticisms that Duguit made, concerning the contemporaneous legal systems. Part of his work addressed an alternative conception to the German state, imbibed with the idea of power and state sovereignty that had been spread, among both sociologists and jurists, such as Max Weber and Georg Jellinek. Equally, it served as a counterweight to the definitions of "things," and more precisely "goods" (*les biens*), that are used in the Romanist system of law (Jhering) or by phenomenology. Léon Duguit stands out because of his criticism of subjective rights and their absolute character. Legal systems, proposed by Duguit, have never been directly transposed, in practice, but they still encourage not only critical thinking but also reflections on the duties of rulers, vis-à-vis the governed, for public services, solidarity, a sense of justice, and, more generally, the meaning of law's exercise within society, as well as considering the law's origins and foundations. Through his writings, both in France and abroad, Duguit was successful in his lifetime and his legal theses continue to be frequently called into use.

Leon Duguit's thinking was entirely driven by the concept of "solidarity," which he developed in a singular meaning, despite it being based on an assimilation of Durkheim's mechanical and organic solidarities. This idea which, through its content, is homogeneous, since it is inevitably articulated by solidarity, is sometimes debated on its philosophical filiations as Duguit did not have a philosophical foundation to his education and may not have mastered some of its methodological implications. He belonged to a movement proposing a nonmaterialistic realism and, as his writings show, he is identified as an anti-subjectivist.

Solidarity According to Duguit

The concept of solidarity was an original formulation of Léon Duguit, not only within his own discipline, legal thinking, but it still stands out within the whole of social science. Solidarity is a necessary social interdependence, which is the criterion and the goal of any given society.

Tönnies' influence, whose work on mechanical or organic will shaped the development of Durkheimian theories, as well as Durkheim himself, is revelatory for the sociological heritage of Duguit's work, as well as demonstrating Duguit's own contribution to sociology. While he initially worked on the hypothesis of the existence of a collective social consciousness, he changed direction, toward solidarity as being the fundamental social reality. Collective consciousness seemed as though it belonged in metaphysics, something that he flatly refused to investigate. In Duguit's thinking, solidarity is essentially organic, as opposed to mechanical. Moreover, it is first among social interactions, insofar as it appeared necessarily concomitant to the existence of society; and further served as a justification for the rule of law, which has to be put into action. Duguit's solidarity is, therefore, a social interdependence that predates the rule of law, and which the latter must seek to establish, or develop.

From this societal conception, characterized by solidarity and its maximization, there followed a certain number of purely legal consequences that

Duguit developed throughout his writings. Thus, the state, and more specifically their rulers, governs only because they have a function: that of ensuring social solidarity. It is for this reason that the state is neither sovereign nor does it possess a legal personality (*L'Etat, les gouvernants et les agents*, but also, more generally, *Traité de droit constitutionnel*). It is also for this reason that Duguit was driven to develop the thesis of "functionality," during a speech given in Buenos Aires, and a theory of public service, which he defined as "any activity which must be fulfilled, regulated and controlled by governments, because the accomplishment of this activity is crucial to the realisation and development of social interdependence, and is of such a nature that it cannot be completely achieved, if it is without the intervention of a governmental force." While this definition may be quite imprecise (Gaston Jèze), it is very explicit as to the central role of solidarity.

The fundamental notions of private law, namely legal acts, contract, property, and liberty, were also reviewed by Duguit, who disputed the distinction drawn between public and private law, in light of his concept of solidarity. Duguit, in the critical wake of Gierke and Jellinek, and contrary to classical doctrine, considered that the contract consists of two acts of will that are distinct in their aims and objectives. Following on from this contract, which is not the best place for the meeting of wills, in Duguit's thinking, situations of collaboration and association would exist, where on this occasion wills would be organized, according to common objectives (*Traité de droit constitutionnel*, p. 294). Property is affected by solidarity, when Duguit contested its absolute character and submitted it to the requirements of the common good (*L'Etat, le droit objectif et la loi positive*, p. 282). As far as freedom is concerned, it became the consequence of everyone's duty to develop, rather than a subjective law whose limits are incomprehensible, and thus, better serves social solidarity (*Les transformations générales du droit privé depuis le code Napoléon*).

Solidarity permeates all law and allowed Léon Duguit to make legal sociology a means of understanding and critiquing the contemporaneous legal system. Equally, it is also thanks to this valorization of solidarity that Leon Duguit's theses could be disputed, on the grounds that they lacked "positivity." Indeed, if solidarity is a value, it means that the system is axiological; something that Duguit declined to contest. He would even found classical, realist, natural law, based on the nature of things, as opposed to human nature, according to Jean-Marc Trigeaud. However, the Bordelais professor refuted this, refusing to recognize, or maybe honestly ignorant, that his method owed much to a certain tradition of, what is effectively, a "thing." Indeed, one of the main confusions over Duguit's work stems from this misunderstanding. Duguit did not lack coherence by admitting that a value can be "directly" observed, since the solidarity, upon which it relies, is a "good," and possibly, even, a common good. It is precisely at this point that the revisions and additions, made by Miguel Reale, to a reading of Léon Duguit, are fundamental. To this solidarity, which the rule of law expresses, a "feeling of justice" is added, which could, in itself, be a source of misunderstanding. If the law were only recorded by a legislator, whose function is to formalize a law that already exists in society due to solidarity, the "feeling of justice" is mobilized, at a time of determining the sanction of the law. The mobilization of such a "feeling," which Duguit presents as being objectively observable, may have been wrongly denounced as proof of a sensualism and a nominalism within Duguit's thought (Gurvitch, *L'idée de droit social*, p. 495).

To understand the true tenets of solidarity, and the sense of justice attached to it, one must place Léon Duguit within a deeply anti-subjectivist movement.

The Anti-subjectivism of Léon Duguit and Its Relationship to Freedom

Léon Duguit declared himself a positivist. In order to clarify this trend, to which he faithfully ascribed, and which has been a legitimate source of some criticism and confusion toward him, he must be described as being a "Realist" and, more exactly, as an "Anti-Subjectivist" (Jean-Marc Trigeaud). Indeed, in his writings Duguit asked the

fundamental question of the source of values, and more specifically he questioned whether this source is in the subject, or the object. If Duguit is more Anti-Subjectivist than Objectivist, it is not only that he built his work in opposition to the predominant idea of the origin of law being within the subject itself, and within the manifestations of will, which were taken as being those of freedom. Equally, he had a conception of the object which was neither that of Jhering nor of phenomenology. For the Dean of the Faculty of Law, in Bordeaux, things "present themselves as objective data possessing an axiological criterion of their own or as authentic goods" (Trigeaud, p. 311). This characterization of Duguit's thinking allows for a better understanding of some of the major aspects. From this anti-subjectivism, follows logically a refusal of the principle of subjective rights, as well as the possibility of a legal personality of the state. Subjective laws would belong to the subjects of the law, more-or-less absolutely. Essentially, it is a question relating to the exercise of freedom. In the concept against which Duguit stood, subjective rights are only restricted by the exercise of freedom of others to use also their subjective rights. According to Duguit, there would be here a hiatus in the logical coexistence plan of individual rights. However, there would have been a lack of knowledge of social reality of solidarity. Far from being against freedom, Duguit refuted the idea of a freedom which would be in fact an unlimited power for all. He considered that freedom was linked to the consideration of a common good, that it was the duty of everyone who was subject to this common good. The state itself, far from being a superior entity and endowed with its own moral personality, is made up of a set of governors, whose duties are enhanced. Refuting the theory of an abstract and powerful state, Duguit saw the function of governing as requiring greater responsibility. This very clear position is one that earned Duguit the right be regarded as a thinker on the state of law. It is necessary to reconsider the validity of the criticisms that were directed toward Duguit, about the absence of a clear definition of the civil service (Jèze), at such a time when the civil service is a force to be reckoned with, in fact, freedom of the state is limited.

Conclusion

Perhaps less logically, from this anti-subjectivism emerges an openness to the value, which has, too often, been seen as an incoherence in the thinking of the positivist Duguit, who remained so attached to a scientific observation of facts. Nonetheless, this is far from the case. Even if the nonlegal philosopher, Duguit, could not explain it in such terms, his learned readers have been able to show how axiology was precisely what made Duguit's thinking profoundly original and still to this day the foundation of our understanding of the most precious of our goods: freedom.

Cross-References

► Constitutionalism: Sociology of
► Solidarity

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Duns Scotus, John

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Introduction

Born in Duns, Scotland, in 1266, Duns Scotus was a Franciscan friar who taught in Oxford and died in 1308. Known as the "Subtle Doctor," he was influential for Franciscan school of late Medieval philosophy and theology. The Franciscan voluntarist tradition focuses on the will as central to any discussion of human rational freedom. Informed by the Augustinian tradition, this focus on the will maintains that love is superior to knowledge in terms of human excellence and perfection.

Throughout his teaching career, Scotus lectured on Peter Lombard's *Sentences* at three different times, producing three distinct versions: *Lectura* (earliest teachings), *Ordinatio* (over several years, this version was reviewed and edited by Scotus for eventual publication), and *Reportatio Parisiensis* (comprised of student notes from his lectures). In addition, he authored philosophical commentaries *on Aristotle's logic, Questions on the Metaphysics, Secundum et Tertium De Anima, Theoremata,* and *De Primo Principio* (treatise demonstrating the existence of a First Prinicple). Scotus also disputed a set of *Quodlibetal Questions*. With the exception of the *Reportatio* and *Quodlibet*, his writings now appear in critical edition.

Foundations of a Rational Will

Systematic theological reflection on freedom in the will developed throughout the thirteenth century, and specifically during the decades following the Condemnation of 1277. Duns Scotus's position on the will's freedom evolved throughout his own teaching, as can be seen from his early *Lectura* teaching to his later *Reportatio* lectures on Distinction 25 of Book II of the *Sentences*. Scotus's voluntarism is moderate, based centrally upon the emerging notion of a rational will which the Franciscan explains by means of a recursive reading of the two affections of the will (Anselm's *De Casu Diaboli)* and a distinction found in Scotus's *Questions on the Metaphysics of Aristotle* Book IX, Q. 15. Close reading of these texts reveals that, in his earliest teaching, Scotus identified the intellect with the rational potency and did not identify the will's freedom with rationality. In the later Parisian teaching he presents the will as the sole rational potency, thereby diminishing the role of the intellect, but not the centrality of rationality. Scotus's final teaching on the will integrates rationality into the functioning of freedom as moral self-mastery, offering a contrast to the position of Henry of Ghent (1217–1293), a late-century voluntarist.

Duns Scotus follows the Anselmian approach and identifies within the natural constitution of the will both a desire for perfection and well-being (*affectio commodi*) and a natural orientation for moral objectivity, that is, to love according to the value of the object (*affectio justitiae*). Unlike Anselm, Scotus holds that both metaphysical affections are native to the will *post lapsum.* Wolter (1972) demonstrates the centrality of these affections within the will at the heart of Scotist ethical thinking.

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Affectio justitiae is the key moral desire within the will. It is for Wolter the basis for the Scotist contention that moral truth is accessible to natural reason. As the will's higher tendency for justice or objective goodness, it represents the ultimate specific difference of the will. Thus, for Scotus, the will is not simply desire but rational desire. Selfless or other-centered loving is an activity for which the will is naturally constituted, although perhaps not naturally capable of achieving alone, due to the consequences of original sin. Its realization can only be completed with the aid of divine grace.

Beneath this double orientation toward the good is found the will's capacity for self-determination. Scotus identifies two manifestations of this capacity: the external act of choice and the internal act of self-control. The will looks out toward objects for choice and is in constant control of its own act of willing. It can, in the presence of an object, suspend judgment and choose not to choose. "In regard to any object, then, the will is able not to will or nill it and can suspend itself from eliciting any act in particular with regard to this or that" (*Ordinatio* IV, d. 49).

The will's innate rational freedom for self-determination always exists in relationship to the Good (as object of desire), and this in two ways. The will can either love the Good as good in and for itself alone (*affectio justitiae*) or the will can love the Good as possession to be used (*affectio commodi*).

The exemplar for human freedom is the divine will. The background provided by God's action as the supreme paradigm for Scotus' discussion of human freedom is no small element in his overall theory. It heightens the importance and value of moral objectivity and the essential perfection of freedom (and thus, the will) as an imitation of and participation in divine activity. Correct understanding of the will and freedom within Scotist thought is impossible in abstraction from consideration of divine perfections.

Nature of Law

Duns Scotus does not present a systemic political theory. Nevertheless, important political and social innovations originated within the theological context within which Scotus writes. The interfacing between theological and political discussion appears within the way the Franciscan describes divine activity within a legal model, and legal models over against the divine will. The law's purpose is the common good. The legislator does not act for himself nor for his own good, but rather for the good of all, public harmony, and peace. (*Ordinatio* IV, d 14, q. 2).

Natural law can be understood in a twofold manner: *stricte loquendo* and *large loquendo*. In its narrow sense, natural law applies to love for God alone, as the highest good. In this way, the first command of the Decalogue (*Deus diligendus est*) is an analytic proposition and *per se nota* first principle of praxis. This principle is the exceptionless basis upon which all law relies. In its broader sense, natural law can be applied to the last seven commands of the Decalogue, which relate to the neighbor and can admit, in certain circumstances, of exceptions (*Ordinatio* III, d. 37). It is clear, explains Scotus, that the second table of the Decalogue reveals the intent of the lawgiver and its commands are deemed in harmony (*consona*) with the first principle. These commands are contingent upon the first, as can be seen from the exceptions found in Scripture. Private property, belonging to the second table, is therefore not an absolute natural right (*Ordinatio* III, d. 37). By establishing the first principle as a *per se nota*, Scotus avoids the charge of being a Divine Command Theorist.

Law and the Divine Will: Social and Political Authority: The will constitutes the law. Duns Scotus uses the distinction of Peter Damien (+1072) highlighting two powers in the divine will: *potentia absoluta* and *potentia ordinata* (*Lectura* I, d. 44). The first refers to any action within the power of the legislator that is bounded by the principle of noncontradiction. The second refers to those commands or laws which the legislator enacts. Using the example of a king, Scotus explains the divine power to grant exceptional behavior by means of this distinction. However, if indeed God acts in a way different from the ordained power, that action still lies within the rational power of the divine agent to act. In this

way, all law depends upon the divine will, whose actions are not limited by the present state of affairs. In the later *Ordinatio* treatment Scotus extends this legal/moral distinction to every agent who acts rationally, that is by virtue of intellect and will.

The polis is not the natural/necessary expression of human nature. In addition, private property is not a natural right, since it did not exist *prelapsum* (*Ordinatio* IV, d. 15, a. 1); it is useful only insofar as it promotes peace and harmony in the community.

Because of the foundation of the law in will, political authority is derived from those who are governed. Duns Scotus deals with the origin of the state and social ethics within a question devoted to the sacrament of penance, and whether a penitent is obliged to restitution of ill-gotten gains. Against the historical backdrop of the crisis in Paris, between King Philip and Pope Boniface (1302), Duns Scotus holds that whatever authority is held, it is the subjects who give the form of government its authority. In contrast to Giles of Rome who maintained that the State is a natural institution, and that the monarch is above the law, Scotus held that the family is the only natural institution, and only paternal authority is natural authority (*Ordinatio* IV, 15, a. 1).

Conclusion

Theological questions frame the context within which Duns Scotus elaborates his position on questions that touch both legal and political realms. Because of this, his influence within the Franciscan scholastic tradition is significant. William of Ockham's (1288–1347) political thought used Scotus as background. Scotus's own students such as William of Alnwick (1275–1333) and Francis Mayronis (1285–1328) continued to develop his positions well beyond the fourteenth century. Other members of the Franciscan tradition, belonging to the Long Scotist tradition, such as Bartolomeo Mastri (1602–1673) influenced generations of moral and political thought.

The popularity of Franciscan Christian humanism influenced the Renaissance and Second Scholastic thinkers, such as Jesuits Luis de Molina (1535–1600) and Francisco Suarez (1548–1617). In addition, his overall voluntarist approach to moral law, political, and social relationships can be seen in later social contract theorists, and in philosophers such as René Descartes, Christian Wolff, Immanuel Kant, and Charles S. Pierce.

Much historical twentieth-century debates centered on inauthentic texts of Scotus, which the publication of the Vatican critical edition (begun in 1950) has worked to clarify.

The most significant current debate surrounds the role of the will in Scotist thought, with Thomas Williams maintaining a stronger, more radical interpretation of his voluntarism and Allan B. Wolter offering the more nuanced reading of Scotist thought, contextualized by the Franciscan tradition.

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- ▶ Kant, Immanuel
- ▶ Molina, Luis de
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Durkheim, Emile

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Introduction

The legal philosophy of French sociologist Émile Durkheim (1858–1917) focuses on three general areas: (1) the relationship between law and morality, (2) the correspondence between social solidarity and legal sanctions, and (3) the social functions of contract.

Throughout his sociological writings, Durkheim analyzes several issues with some constancy: morality, religion, solidarity, and law. Of these, morality was for him the most important and law the least important. Durkheim regarded legal phenomena as nothing more than expressions of moral phenomena. It was his abiding interest in the moral elements of social life that strongly informed his views on law and society. Indeed, for Durkheim, society's well-being depends on people's commitment to moral beliefs and sentiments, of which law is simply a reflection. Due largely to his prevailing focus on religion and morality, Durkheim did not articulate a systematic sociology of law. He did, however, produce a comprehensive explanation of legal evolution.

Intellectual Sketch

Émile Durkheim was born in Épinal, France. At the age of 19, he was admitted to the prestigious *Ecole Normale Supérieure* in Paris where he studied philosophy, specializing in Montesquieu. However, by the time of his graduation from the *Ecole* in 1882, Durkheim had shifted his intellectual interest to sociology – a discipline that, though it had previously been founded by the French philosopher, Auguste Comte, was not yet part of that country's curriculum. In 1887, a course on social science was created for Durkheim to teach at the University of Bordeaux. He completed his doctoral dissertation, *The Division of Labor in Society*, at the University of Paris and published it in 1893. It is here that Durkheim proposes his earliest ideas on law. His subsequent commentaries on legal sociology are scattered in various writings but can be principally found in two additional sources. The first is his article, "Deux lois de l'évolution pénale," which appeared in *L'Année Sociologique* in 1900. The second consists of a series of lectures he delivered intermittently between 1898 and 1915 and posthumously published in English as *Professional Ethics and Civic Morals*.

Durkheim was much influenced by the French *philosophes*, Montesquieu and Rousseau, and their ideas on the holistic view of society and the general will, respectively. Also of significance to Durkheim was Kant's understanding of morality as a principle of social duty. From Comte, Durkheim derived his positivistic approach and his notion of "collective consciousness." From Herbert Spencer, he obtained much of his organismic and evolutionary views of society. Ferdinand Tonnies's concepts of *Gemeinschaft and Gesellschaft* shaped Durkheim's ideas about the different types of social solidarity.

Law as Social Fact

In his primer, *The Rules of Sociological Method* (1895), Durkheim's main concern is with promoting the new science of sociology. For him, sociology must implement a methodology rooted in the principles of *positivism*. As such, he urges the sociologist to abide by the basic tenets of the scientific method, which include empirical investigation through observation and measurement. Additionally, sociologists must undertake a *functionalist* analysis of social phenomena and consider them in systematic relation to society as a whole.

Durkheim identifies sociology's fundamental subject matter as the study of *social facts*, which he defines as those "ways of acting, thinking and feeling, external to the individual, and endowed with the power of coercion" (1966:3). Social facts are "real" due to their regulatory influence on people's actions. In this sense social facts are to be treated as part of an "objective," external, and demonstrable social reality. But given that most social facts are nonmaterial, they are not easily observable. Finally, because social facts have a distinct existence independent of the will of individuals, they can only be explained by other social facts.

For Durkheim, law is the preeminent social fact. It is coercive because it constrains people's actions by prohibiting certain behaviors like murder, theft, and prostitution. It is real because its violation will usually evoke decisive sanctions such as a fine, incarceration, or execution. Law is also experienced as an objective aspect of social reality, as being "out there." Law is a material social fact in that legal rules – as written down in codes, constitutions, and law books – can be observed, classified, and measured (counted).

The nonmaterial social fact with which Durkheim is principally concerned in *The Division of Labor* is *social solidarity*, of which there are two types. *Mechanical solidarity* is the cohesiveness that exists when members of a small, traditional, preindustrial community are attracted to one another because of mutual resemblances. In this case, homogeneity creates a strong bond that unites this group. Moreover, there exists a well-defined *collective consciousness* – "the totality of beliefs and sentiments common to the average members of a society" (1984: 38–39) – that acts as a regulating moral force. Challenges to the collective consciousness evoke moral outrage and harsh retaliation. Thus, explains Durkheim, "we should not say that an act offends the common consciousness because it is criminal, but that it is criminal because it offends that consciousness" (1984:40).

By contrast, an *organic solidarity*, typically characteristic of large, modern, industrial societies, involves an extensive and highly differentiated division of labor. Here, it is the members' heterogeneity, the fact that they exchange different skills, that contributes to social integration. This relational engagement is one of mutual dependence between autonomous individuals with distinct specialties. Durkheim describes it as a "system of rights and duties joining [people] in a lasting way to one another" (1984:338). Thus, an organic society is held together by functional interdependence based on the division of labor. According to Durkheim, historically, there has been a general evolutionary movement from mechanical to organic solidarity and their associated forms of law.

Legal Evolution and Societal Complexity

Given that mechanical and organic solidarities are nonmaterial in nature, they are difficult to observe

and measure empirically. Nevertheless, because Durkheim regards social solidarity as a moral phenomenon and sees law as reflecting moral beliefs, he identifies codified law as the visible index by which to gauge social solidarity. Thus, according to Durkheim, the type and amount of law vary concomitantly with the type and amount of solidarity. "Since law reproduces the main forms of social solidarity," states Durkheim in *The Division of Labor*, "we have only to classify [and count] the different types of law in order to investigate which types of social solidarity correspond to them" (1984:28).

Durkheim classifies all legal rules as either repressive or restitutive. *Repressive law* encompasses criminal law, whereas *restitutive law* includes civil law, commercial law, procedural law, administrative law, and constitutional law. Durkheim correlates repressive law with punitive sanctions but sees restitutive law as providing for reconciliation. Moreover, he posits that the greater in a society the amount of repressive law, which is an expression of the collective consciousness, the greater the indication of mechanical solidarity. Likewise, the greater the amount of restitutive law, which is an expression of relationship reparation, the greater the indication of organic solidarity.

In "Deux lois de l'évolution pénale," Durkheim departs from his social solidarity thesis on penal sanctions and offers two propositions explaining the quantitative and qualitative transformations in the character of punishment. In the quantitative proposition, Durkheim contends that *the greater a society's governmental absolutism, the more likely it is to inflict severe punishments*. Governmental authority is most absolute when it is concentrated in a single sovereign power. For example, because the ancient Hebrews, the city-state of Athens, and the Roman Republic were relatively democratic, they typically did not employ cruel and aggravated forms of execution. By contrast, in Imperial Rome, when the emperors exercised autocratic rule, penal law carried brutal physical punishments, and torture and capital crimes increased. Similarly, with the prevalence of monarchic absolutism in Europe during the fourteenth and seventeenth centuries, executions became common. However, by the eighteenth century, as the power of the monarchies declined and gave way to more democratic governments, punishment became more lenient.

In the qualitative proposition, Durkheim explains the historical shift *from corporal punishment to incarceration*. According to him, the social practice of incarceration passed through several stages of historical development. The earliest prisons were intended only for the purpose of temporary detention. This was the case, for example, in Athens where Socrates was held in confinement only while awaiting trial. Prisons gradually became institutions for the administration of penal sanctions where prisoners were systematically subjected to various torments. The dungeons and torture chambers of the absolutist monarchs of seventeenth-century Europe exemplify this type of prison. Then, in the eighteenth century, following the collapse of these authoritarian regimes, physical punishment was superseded by depravation of liberty as the preferred penalty.

Durkheim's ideas on legal evolution and societal complexity, which he proposed in *The Division of Labor*, have been tested empirically by, among others, Richard D. Schwartz and James C. Miller (1964). In their study, based on a cross-cultural analysis of 51 preindustrial societies, Schwartz and Miller show that, in general, legal institutions follow a path of development that is the opposite of what Durkheim had postulated. Thus, in contradiction to Durkheim, Schwartz and Miller's ethnographic data indicate that restitutive, not repressive legal structures, occur in mechanical solidarities.

Steven Spitzer (1975) tests the propositions of quantitative and qualitative change that Durkheim advances in "Deux lois de l'évolution pénale." Here again, contrary to Durkheim, Spitzer found, among other things, that advanced societies are generally characterized by more severe punishments. Notwithstanding Durkheim's failings, Spitzer nonetheless credits him for making explicit the fact that punishment is deeply rooted in the structure of society.

Contract: Evolution and Social Functions

Though Durkheim's ideas about contract's social role were introduced in *The Division of Labor*, his most developed insights on the topic are found in a set of lectures he gave at Bordeaux and later at the Sorbonne (*Professional Ethics and Civic Morals*). Here Durkheim contends that the contract's moral bond – considered in terms of duty owed – arises from two social arrangements. The first, predominant in premodern societies, involves the unilateral relationship between the *status* of persons or things, as in, for example, the case of masters and slaves. The second, common in societies with a highly differentiated division of labor, involves the *willful agreement* between individuals with rights and duties relative to each other. The true, juridical, contact has its basis in the second type of arrangement.

Durkheim traces the historical progression of moral bonds – from unilateral coercion based on status to bilateral agreement based on reciprocal rights and duties – through five types of contractual relations. In the first, the *blood covenant*, members of a certain group are duty-bound to each other because they share a sacred quality: they see themselves as being "of the same blood." In the *"real" contract*, the bond is forged with the actual transfer and delivery of a thing, thus giving rise to a duty of debt. The *contract by solemn ritual* involves the formal utterance of a specific phrase in accordance with a sacred formula. Here, the parties are bound, first, by the duty to fulfill their promises because they have sworn an oath to the highest moral authority, the deity, and, second, because they have "given their word." The *consensual contract*, which emerges as economic transactions become more frequent, creates a bilateral bond of mutual rights and duties where each party – playing the dual role of creditor and debtor and promisor and promise – freely consents to the terms of the agreement. Finally, the *contract of equity* ensures a fair and just transaction.

However, for Durkheim, contract's social function is not so much to foster fair and just transactions between parties, but to ensure the parties' regular *cooperation* in order to maintain social and economic coordination. To be sure, because it gives rise to corresponding pairs of rights and duties, the contract becomes the main legal expression of cooperative relationships.

Moreover, the division of labor depends on the form of voluntary collaboration expressed by the juridical contract.

As symbols of exchange, contracts harmonize the social relationships between persons performing differentiated roles like those displayed in the commercial negotiations between agent and principle, carrier and consignor, and insurer and insured. But even in interdependent collaborations as these, parties will nonetheless endeavor to advance their interests by maximizing their rights and minimizing their duties. If solidarity is to be preserved, however, every contract must result in a *compromise* that balances competing interests. In this way the contract ensures solidarity by encouraging social relations of cooperation and compromise between parties engaging in specialized and distinct tasks. In other words, the division of labor in organic society functions in accordance with *contractual solidarity.*

Crime and Ritual Punishment

For Durkheim, not only does the legally binding agreement of contract have its basis in morality and religion, so too does the legally violating action of crime. Indeed, in "Deux lois de l'évolution pénale," he distinguishes between two types of crime: religious and human.

Religious crimes, predominant in less-developed societies, are acts against beings or things with a transcendent or mystical character. Because an absolute sovereign possesses the attributes of a deity, offenses committed against him are considered sacrilege and blasphemy. Moreover, crimes against society are seen as crimes against the sovereign who makes the laws that express his will. In this case the collective consciousness is assaulted severely; the offenses are regarded as reprehensible; and, as a consequence of the community's moral condemnation, punishment becomes an emotional act of vengeance. Thus, the function of ritual punishment – trials, excommunications, banishments, public executions – is to

reaffirm group solidarity and restore the moral order violated by the criminal.

In his study of seventeenth-century Massachusetts Bay Colony, Kai T. Erikson (1966) employs Durkheim's functionalist ideas about ritual punishment and solidarity. He illustrates empirically that deviants provide a contrast that gives community members a sense of their cultural identity. In imposing severe sanctions in the form of ritualized expression, the community members' cultural identity is renewed and reaffirmed, and they subsequently experience a greater sense of social cohesiveness.

Human crimes, which include murder, theft, rape, and fraud, are prevalent in more advanced, differentiated societies where the collective consciousness has lost its sacred character. Here there is a shift from a collective, sacred morality and toward a secular morality that attaches supreme value to the dignity of the individual. This gives the offender and victim, qua individuals, the same moral standing. In addition, increased public sympathy and respect for all individuals prohibit cruel and degrading treatment.

Conclusion

The Durkheimian perspective, which relies on an examination of the moral elements of social life, has yielded sociological theories to explain the evolution of law, punishment, and contract. Taken together, these statements constitute Durkheim's evolutionary thesis on law. He sees morality as the basis of law because law usually represents the moral beliefs and sentiments of a community. His interest in law, in general, holds only to the extent that he uses it to measure the degree of social solidarity. Durkheim's interest in contact law, specifically, is to show how it regulates cooperative relationships that engender contractual solidarity.

Cross-References

► Comte, Auguste
► Crime
► Solidarity

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Durkheim, Emile: His Philosophy of Social Science

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Emile Durkheim (1858–1917) is often described as one of the founding fathers of sociology. While many reject this terminology, it indicates that he entered the canon taught in many universities. He achieved this posthumously, mainly through the efforts of the American sociologist, Talcott Parsons. In his *The Structure of Social Action,* which was published in 1937, Parsons conducted an intellectual survey of European social thinkers who had addressed the "Hobbesian problem of order". Against those who posited a social contract theory, he elevated Durkheim to the status of a key thinker because of his emphasis on a social solidarity based on a shared morality (Parsons 1968).

Durkheim grew up in a France that was traumatized by its defeat in the Franco-Prussian war of 1870. The country was polarized between a clericalist, monarchist Right and a class struggle left. Durkheim was a supporter of the republican regime who sought to find a mid-way position between

these competing forces and his sociology reflected an engagement with that regime. After graduating from the Ecole Normale *Supérieure*, Durkheim was urged by the republican Director of Higher Education, Louis Liard, to visit Germany to report on how social science had contributed to its national regeneration. He was also appointed to his first academic position in the University of Bordeaux, where he lectured in both social science and education, by ministerial decree in 1887.One of the key concerns of the French republican regime was to create a social order that was underpinned by a shared morality. Against, the Right the regime suggested that such a morality did not necessarily derive from religion but could be generated and spread in secular society. Against the Left, it emphasized a consensus on values that undercut competing class interests.

Durkheim's sociology focused on how morality emerged from social interaction rather than from an external deity. He followed in the footsteps of Charles Renouvier, one of the main influences on the French Republican tradition. Renouvier wanted to develop a "science of ethics" that was not dependent on metaphysical concepts rooted ultimately in a God (Stock-Morton 1988: 58). Durkheim claimed that to understand morality, we needed to examine the empirical data of the past and present. He suggested that morality arose as soon as humans formed a social group. There was no need for God to hand down morality because "once a group is formed nothing can hinder an appropriate moral life from evolving, a life that will carry the mark of the special conditions that brought it into being" (Durkheim 2003: 23–24). Morality, therefore, consisted of rules which promoted the common good over individual interests.

This moral vision is evident in the four major books that Durkheim authored. His first book, *The Division of Labour in Society*, was published in 1893 as part of his PhD thesis. In contrast to Adam Smith and the subsequent Benthamite utilitarian school, Durkheim did not conceptualize the division of labor in terms of individual interest and productivity. Instead, he focused on how it created a functional interdependence between human beings that generated social solidarity. However, the form of that solidarity differed between "primitive" and "modern" societies. This simple binary reflected Durkheim's position in a France society that was becoming the second major colonial power. In every society, primitive or modern, there is a *collective conscience* which is "the set of beliefs and sentiments common to the average members of a single society which forms a determinate system that has its own life" (Lukes 1973: 4). "Primitive" society, however, was characterized by a mechanical solidarity where the collective conscience is exceptionally strong and smothers individuality. Common sentiments, belief systems, and behavior predominate and the individual is "literally a thing at the disposal of society" (Durkheim 1997: 85). This form of solidarity emerges because individuals closely resemble each other in their participation in tribal groups and by the virtual absence of economic specialization. Each member is interchangeable and the lack of a division of labor means that they are subject to deeply embedded social rules. In this society, the law is repressive and visibly punitive as it seeks to protect shared communal value from transgression.

Modern society, by contrast, is characterized by organic solidarity. Here there is an extensive division of labor and a higher concentration of the population. Collective belief systems lose their intensity and become more abstract. Each peer group has its own beliefs and society loosens its grip on individuals. As a result, a culture emerges which respects the dignity of each human being and so individuality flourishes. But it does so in a society that has a greater inter-dependence than that shown in mechanical solidarity. This shift is characterized by a new form of morality that is more general and secular than the specific injunctions that come with one based on a collective conscience. Durkheim thus exudes a certain optimism in his discussion of solidarity in modern society. In contrast to Karl Marx's damming critique of capitalism or Max Weber's bleak defense of that economic system which described it as bureaucratic and disenchanted, he thought that social solidarity was growing rather than diminishing.

However, a somewhat darker note is struck in Durkheim's most popular book, *Suicide*, was

published in 1897. He focusses on some of the pathological abnormalities that can arise in modern society. In an earlier paper, he had described suicide as a sign of social malaise. His book was an attempt at a diagnostic social science capable of examining symptoms of an underlying social disease and helping society to heal itself. He was determined to ground explanations of suicide rates in exclusively social causes. He therefore rejected explanations based on climate or race and showed the limitations of focusing on individual psychology. His key categories were the *integration* of the individual into social groups and the *regulation* of the individual by social norms.

Suicide, he claimed, varies inversely with the degree of integration. Where an individual is detached from social bonds and focuses exclusively on his own goals rather than those of society, he or she is vulnerable to *egoistic* suicide. By contrast, when society is strongly integrated, it holds individuals under its control, considers them at its service, and effectively forbids them to take their own lives. Empirical evidence for this proposition is provided by examining the different rates of suicide in terms of marriage, family size and religious communities. Whereas modern society suffers from an excess of individualism, traditional society places little value on the individual personality. In traditional societies, therefore, *altruistic suicide* is the main form caused by the weight of society bearing down on individuals. There is thus an over-integration of the individual into social groups.

Suicide rates also vary with the degree of regulation in society. Where the norms of social regulation are weakened due to rapid changes in the business cycle, a form of *anomic* suicide emerges. Durkheim's focus is on how an economic instability can produce unrealistic aspirations. To avoid this, he claims there needs to be an "upper limit to which a workman may aspire in his efforts to improve his existence" (Durkheim 1951: 249). If this limit is too low, little effort would be made for improvement, but if the aspirations are too high, class conflict and social problems emerge. Society therefore needs "a regime which fixes with relative precision the maximum degree of ease to which each class may legitimately aspire". If such exists and if each person "respects regulations and is docile to collective authority and a wholesome moral constitution" they will not ask for more (Durkheim 1951: 250).

Durkheim make a brief reference to fatalistic suicide, which is caused by over regulation by society of the individual, but, significantly, this point is not developed in any detail. While, *Suicide* offers important insights, it has two significant weakness. It adopts a sexist tone in discussing one of Durkheim's findings that women were more likely to benefit from divorce than men. Moreover, while he may have been correct to assert that there are low rates of suicide when people live in poor, tightly knit communities; this is not the case in modern, richer societies (Baudelot and Establet 2008). In the former, the individuals are not excluded from social activities whereas in the latter they are. The key issue is not poverty in general but *relative poverty* or sudden *impoverishment.*

Another major book, *The Elementary Forms of Religious Life*, was published in 1912 and was a study of Aboriginal tribes (Durkheim 1995). The choice of subject matter was dictated by the need to find an empirical object that represented religion in its elementary form, uncontaminated by any involvement in the French political divide. While Durkheim's own personal outlook might be defined as atheistic, he regarded religion as a source for social order and cohesion. Religion, he claimed, was originally responsible for our shared identities, our sense of community, and even the categories through which we came to understand the world. The reason is that religions classify the world according to two fundamental categories – the sacred and the profane. Religious beliefs and rituals are those that express and are articulated toward the sacred. They are separated absolutely from the profane or mundane and protected by prohibitions, sanctions, and interdictions.

Durkheim's research agenda sought to examine the origin of religion which gave rise to this binary system of categorization. He rejected an animist explanation of religion which asserted that it arose from an anthropomorphized concept of nature, animated by spirits and souls with human-like qualities. He also rejected the naturalist explanation which asserted that people were over awed by the immensity and mystery of nature. He

claimed that his own explanation of its origins came from an examination of aboriginal religious practices, which involved totemic beliefs. He noted that instead of aboriginal tribes forming their closest bonds on the basis of blood-ties or close proximity, tribal members feel themselves part of wider communities based on their links to a given plant or animal species. In other words, they become related to each other because they each share the same totem. He suggests that if the object of religious worship is not an illusion and if people genuinely feel they are under its influence, it must be because there is a power hanging over each individual. This sacred power could only be society itself. What is being adored in religious ceremonies is not the totem itself but the social forces that turn these profane objects into sacred symbols of identity. This was a daring conclusion that pointed to the role of ritual and symbolism is binding society together.

While emphasizing the power of the social bond, Durkheim was concerned to break from a speculative approach. Hence his claim to root an understanding of the origin of religion in the actual practices of tribal groups. More generally, he argued that sociology should adopt a scientific method and he therefore produced his key text, *The Rules of Sociological Method*, in 1895, which helped to establish sociology as an academic discipline. Every new discipline needs an object of study and Durkheim asserted that for sociology it was social facts which are independent of individual thought or behavior. To support this claim, he pointed to the pre-existing nature of society for newly born individuals; the fact that institutions of society are external to him or her; and that they impose external constraints on behavior. The social world, he suggests, is just as objective as the world of physics. Observing social facts is the starting point of any sociological investigation, but the crucial task is explanation and that means searching out the *causal roots* of visible phenomena. Here his primary concern was to challenge any form of reductionism. Social processes could not be explained by individual psychology or still less by biological explanations. He suggests that "there is between psychology and sociology the same break in continuity as there is between biology and the physical and chemical sciences. Consequently, every time a social phenomenon is directly explained by a psychological phenomenon, we may rest assured that that explanation is false" (Durkheim 1982: 129).

Durkheim's demand, therefore, is that social facts must be explained in terms of their causal roots in other social facts. However, sociology faces a difficulty because of the exceedingly complex nature of social interaction. Durkheim claims that it is wrong to suggest that sociology is inferior to the natural sciences because social life is bursting full of variations. What must be done is to examine series of *concomitant variations* residing in the statistical records of crime, suicide, births, deaths, marriages, and savings, and so on. When dealing with general facts such as these, it is permissible to study them in any one society. However, it is always preferable to compare and contrast series of statistics across different societies at the same stage of their social development. In this way, the investigator can ascertain whether or not the same phenomenon evolved in the same way overtime in the same conditions. Indeed, the best strategy is to follow a particular social institution through all of the variety it has hitherto exhibited, with Durkheim insisting that to "explain a social fact of any complexity one must follow its entire development through all social species" (Durkheim 1982: 157).

Durkheim's aim was to assert that sociology must be independent of all philosophical and practical ideologies. This was buttressed by a claim that it was a science. Durkheim faced a number of major difficulties in his claim that its subject matter was objective social facts. First, unlike physics there can be reactive effects when a sociologists with particular identities seeks to conduct research. The force of gravity does not vary between one physicist and the other, but human beings can respond in different ways to different identities. Second, by portraying society as a functional totality where, in normal times, it operates independently on individuals, Durkheim's sociology added to a form of fatalism. It failed to pick up on genuine conflicts of interest in society and the ability of people, through political contestation, to alter the social environment around them. Durkheim tended to regard openly expressed conflicts of interest as pathological rather than normal. For

these reasons Durkheim's sociology is often regarded as belonging to a conservative tradition. The American sociologist, Robert Nisbet, grasped this when he suggested that Durkheim's greatest sociological achievement was to "take the conservative view of society out of what was essentially a speculative framework. . .before translating it into certain hypotheses which he sought to verify" (Nisbet 1952: 175).

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Dworkin, Ronald: Constructive Interpretation *aka* Interpretivism

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Introduction

Advancing a distinctive integrated legal, moral, and political theory and its corresponding methodology are some of Ronald Dworkin's major contributions to the field (Flores 2010, 2015; Guest 1991, 2013; Shapiro 2011, 292–306). It is worth mentioning that Dworkin was adamant in his critique of both legal positivism and utilitarianism. At first, following the distinction between rules and principles (1967), he seemed to assume a two-systems view; but as he acknowledged (2011, 402) early on he began to approach the issue from a different perspective, i.e., a one-system view (1972), focusing on the interaction between them. At some point, he reluctantly characterized his theory as a version of "natural law revisited" (1982a). Moreover, he recharacterized it: first, "law as interpretation" (1982b, 1983); later on, "law as integrity" (1986); then, as implying "a moral reading" (1996); and, finally, "law as interpretivism" (2004a, 2006, 2011). According to Dworkin "Interpretivism. . . denies that law and morals are wholly independent systems. It argues that law includes not only the specific rules enacted in accordance with the community's accepted practices but also the principles that provide the best moral justification for those enacted rules. The law then also includes the rules that follow from those justifying principles, even though those further rules were never enacted" (2011, 402). It is worth noting that Dworkin did change the labels, but his core position remained intact as we will see in this entry.

From Constructive Interpretation to Interpretivism

Ever since the publication of his book review on John Rawls' *A Theory of Justice* (1971), Dworkin (1973) distanced himself from a "natural" model and endorsed a "constructive" one. The "natural" model presupposes a philosophical position that describes an objective moral reality, which is not created by human beings, but rather discovered by them, as the laws of physics. In contrast, the "constructive" model "treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulated features of a general theory to be constructed, as if the sculptor set himself to carve the animal that best fits a pile of bones he happened to find together" (1977/1978,

160). Afterward, he reaffirmed: "moral judgments are constructed, not discovered: they issue from an intellectual device adopted to confront practical, not theoretical, problems" (2011, 63).

In his exchange with Stanley Fish (1982, 1983) on legal *vis-à-vis* literary interpretation (Dworkin 1982b, 1983, 1985) and throughout his works, but especially in *Law's Empire,* Dworkin not only reinforced that his model is constructive and, to some extent, creative but also clarified that it is not inventive but interpretive of the practice (1986, 1; 66, 67, 366; and 2006, 15). In other words, since law is an "interpretive concept," the proper method requires a "constructive interpretation" of the practice. Dworkin is not only confident in his criticism of "semantic theories of law," which he labels as "the semantic sting," because they appear to consider the concept of law as a "criterial concept" and even a "natural kind concept" (1986, 31–44; 2006, 9–12; and 2011, 158–159) with necessary and sufficient conditions, whereas it is an "interpretive concept" (1985, 146–8; 1986, 45–96; 2006, 10–12; 2011, 160–163 and 403–405), but he also defines: "constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it, the best possible example of the form or genre to which it is taken to belong" (1986, 52). Furthermore, "constructive interpretations... try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice" (1986, 90). In that sense, Dworkin's interpretive model is argumentative as well (1986, 13; and Flores 2016).

As it is well known, Dworkin delineates three stages of constructive interpretation: (1) "Preinterpretive" in which the interpreter identifies the rules and standards taken to provide the tentative content of the practice; (2) "Interpretive" in which the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage; and (3) "Postinterpretive" in which the interpreter adjusts the sense of what the practice "really" requires so as to better serve the justification accepted at the interpretive stage (1986, 65–68; and Flores 2012).

Although, Dworkin seemed to deemphasize both the evaluative and the descriptive, it was in the process of emphasizing the interpretive (1982b). At the end, he has been endorsing a moral reading of the practice, which requires references to value and even value judgments that are certainly done by subjects but not necessarily subjective but objective (1983; and 1996, 1–38). On the one hand, propositions of law are neither merely descriptive, nor are they simply evaluative, but interpretive of legal history, which combines elements of both, description and evaluation, but is different from both (1985, 147). On the other hand, it is clarified (with the "rules of courtesy" as an example) that the "interpretive attitude" has two components, i.e., an assumption that it has an objective value (or point) and a further assumption that it is sensitive to it. In his words: "People now try to impose *meaning* on the institution – to see its best light – and then to restructure it in the light of that meaning" (1986, 47).

In *Law's Empire,* Dworkin advanced his conception of "law as integrity," which includes both coherence and fit (1986, 94–96). In his words "[Law as integrity] argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification" (1986, 96). What is more, "Law as integrity... insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements... So law as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither" (1986, 225; Flores 2013, 115–123).

H.L.A. Hart conceded "It is true that when particular statutes or precedents prove indeterminate, or when the explicit law is silent, judges do not just push away their law books and start to legislate without further guidance from the law. Very often, in deciding such cases, they cite some general principle or some general aim or purpose... This indeed is the very nucleus of the 'constructive interpretation' which is so prominent a feature of Dworkin's theory of

adjudication." "But" insisted "though this procedure certainly defers, it does not eliminate the moment for judicial law-making" (1961/1994, 274–275; Flores 2011).

Dworkin (2004b) responded by developing an argument against a detached conception of values and for an integrated conception. In a few words, "political values are integrated rather than detached" (2006, 159), and we "must try to understand them holistically and interpretively, each in the light of the others, organized not in a hierarchy but in a fashion of a geodesic dome" (2006, 160).

Similarly, Dworkin acknowledged that theories of law have been divided roughly into two groups: "positivist theories of law, which insist that what the law of any jurisdiction requires or permits is only a matter of social fact, and anti-positivist theories, which claim that what the law requires sometimes depends not on social facts alone but also on controversial normative issues including moral issues." Regarding "hard cases" in which what lawyers regard as settled law does not decide the immediate issue according to a positivist theory judges "must exercise discretion to make new law," whereas in an antipositivist theory, judges "must aim at integrity in their decisions." However, "what integrity requires will often, perhaps usually, be controversial, so that a fresh judgement is needed" (2006, 242). Therefore, Dworkin restates Rawls' "reflective equilibrium" (1971, 48–51; Waluchow 2006; Flores 2009) as a method for legal philosophy: "We try to generate principles of some general scope and to match those general principles to the concrete judgements about what is just and unjust with which we begin, shifting our views about either principles or concrete judgments, or both, as becomes necessary to achieve an interpretive fit" (2006, 46).

Conclusion

Let me emphasize that in an "Epilogue: What is Law?" to *Law's Empire*, Dworkin reiterated (1986, 413):

> Law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theater of behavior. Nor by any roster of officials and their powers each over part of our lives. Law's empire is defined by attitude, not territory or power or process... It is an interpretive, self-reflective attitude addressed to politics in the broadest sense. It is a protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances... Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past.

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Dworkin, Ronald: Legal Philosophy

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Introduction

Ronald Dworkin's general theory of law[1] centers on the issue of what determines the doctrine of a legal system. Take the following proposition: "In the state of Montana, it is against the law to discriminate in employment on the basis of a person's political views." This is a proposition about the doctrine or content of a particular legal system (hereafter, "legal proposition"). What, fundamentally, makes propositions of this sort true? Slightly differently, what facts, in general, determine the norms that a legal system has? Legal positivists have traditionally said[2] that what fundamentally makes a legal proposition true is some social fact(s). For example, H.L.A. Hart has it that the social acceptance among officials of a common set of criteria for identifying law (what he famously calls a "rule of recognition") is at the foundation of a legal system in that all other of its legal rules are law in virtue of satisfying these accepted criteria.[3] Put roughly, what the law is around here depends on what is conventionally recognized as settling what the law is around here. Since the content of law is determined by what is, in fact, socially recognized, neither the tests of legal validity nor the norms they recognize as valid need have any morally respectable character to qualify as law. Rather, there simply need be a significant degree of factual social *consensus* on the criteria of legal validity. "[T]he rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria."[4] Dworkin rejects this kind of picture of legal content. On his view, the answers to doctrinal questions do partly depend on existing legal practice. However, that practice need not have consensus at its base, and morality is a fundamental determinant of which norms are law.

Intuitively, we might express the underlying idea as follows. Imagine we are disputing whether I have an obligation to aid an old, long out-of-contact friend who has requested financial assistance. You argue that our friendship gives me strong reason to assist, pointing to ideas of mutual support and longevity typical of friendship and to aspects of my particular friendship (e.g., the friend offered intensive emotional support at a crucial juncture). I deny that I am obligated, contending that friendship normally does not involve financial solidarity and that the moral ties of this friendship were undermined by the long, voluntary absenteeism. However this facially sensible argument ultimately goes, the dispute is seemingly about what friendship (here and now) really requires. Moreover, relevant considerations include not only social facts about how friendships typically work, or the history of this particular friendship, but the moral point of friendships and how that point applies to the relationship in question. If the point of friendship is to foster personal virtue, then this will likely say something

[1] Dworkin developed his philosophical views on law over the course of 50 years, during which they evolved in important respects. Here I will attempt to distill general aspects of his legal philosophy that remained stable in his later work (essentially, *Law's Empire* forward).

[2] The proper characterization of legal positivism's foundational commitments is currently in question. See, for instance, Kevin Toh, "An Argument against the Social Fact Thesis (and Some Additional Preliminary Steps Towards a New Conception of Legal Positivism)," *Law and Philosophy* 27 (2008).

[3] H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 100–123.

[4] Ibid., 110. A quick note on a division in legal positivism. Both inclusive and exclusive legal positivism hold that legal systems have a social convention about the criteria of validity. They differ on whether these further criteria are necessarily nonmoral social facts. Exclusive positivists say that they are and that legal content is always purely a matter of social fact. Inclusive positivists deny this, and say that a legal system can have moral criteria settling further content, *as long as the criteria are conventionally recognized*. Dworkin's challenge is to both versions.

about the significance of the long absence and the propriety of financial assistance. If the point concerns committed and affectionate companionship, then that will say something else. Finally, we can have a cogent moral dispute about this point, i.e., the value and significance of friendship. On Dworkin's view, law is in much the same way a contestable social practice, and what the law really requires in any specific system depends on the moral point of law as it applies to the system's particular characteristics.

Legal Disagreement

Part of what motivates Dworkin's account is a sense that a certain kind of legal disagreement occurs in law. On Hart's view, recall, the social fact that determines which norms are law is the rule of recognition, which is partly constituted by concord among officials in identifying law. The problem, Dworkin argues, is that there is no such basic concord, and hence no such social fact. In *Riggs v. Palmer*, for instance, judges disagreed about the pertinent considerations in deciding whether a grandson named in his grandfather's will was legally entitled to inherit after he had murdered his grandfather for the inheritance. The statutes of wills contained no explicit exception for such a circumstance. Some judges reasoned that the statute should be read literally, in strict accordance with its explicit language, to identify the applicable legal rule. Hence, they concluded, the grandson ought to inherit. Other judges, however, contended that the correct legal standard depends on the intentions of the legislators (who would not have intended to permit murdering heirs to inherit) and more general principles of law (which normally disallow profiting from one's own wrong). On that view, the grandson has no legal title to inherit. The important point for Dworkin is that highly competent legal officials disagreed on the basic criteria for identifying the law in their jurisdiction. If there is disagreement about these criteria among practitioners, then they do not share a convention concerning how to identify law. The positivist view that asserts conventional agreement as the social fact that determines legal content is, Dworkin concludes, mistaken.[5]

Constructive Interpretation

Dworkin believes that what motivates theories of law that posit consensus at a legal system's foundation is the idea that disagreement in legal practice would be senseless if practitioners did not share the same criteria for identifying law. If the judges in *Riggs v. Palmer* really disagree about this basic matter, in what sense could they be having a meaningful dispute about what the law requires, rather than merely talking past each other? The challenge, as Dworkin sees it, is to offer an account of how meaningful legal disagreement is possible in the midst of a lack of consensus about the elementary terms by which to evaluate the truth of legal propositions. "Constructive interpretation" is his answer to the challenge.[6] Stated in general terms, constructive interpretation is "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[7] One begins by looking to the evident characteristics of an object to get a sense of an object's general kind (call this "pre-interpretive understanding"), and then construes that object as the best possible instance of that kind, consistent with its evident characteristics. Put otherwise, the properties we properly attribute to the object depend on the interpretation of the object that fits its evident characteristics sufficiently, while making the object into the best example of the kind per the kind's proper standards.[8] If novels, for instance, are properly

[5] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 1–44. *Justice in Robes* (Cambridge, MA: Harvard University Press, 2006), 223–226; *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011), 402–405. For useful framing and discussion, see Andrei Marmor, *Interpretation and Legal Theory*, 2nd ed. (Portland: Hart Publishing, 2005), 1–8.

[6] Dworkin, *Law's Empire*, 43–46.

[7] Ibid., 52.

[8] Though, as we will see, fit with pre-interpretive understanding is not a threshold requirement for Dworkin.

assessed in terms of the integrity and intrigue of their plots, the revelation offered by the engagement with their themes, and the richness of their characters, then we have aesthetic standards appropriate to the genre of novels. For a particular novel, to determine which narrative to construct from the text, I should treat it as the best *novel* it can be by, for instance, imputing character motivations or thematic commitments that best serve the literary values consistent with text's constraints. When we disagree about the meaning of the novel, much of this disagreement can be sensibly understood as reflecting different understandings of what would make the novel best (and, this could further reflect different assumptions about how to prioritize certain aesthetic judgments in the literary form, e.g., cogent plot vs. significant thematic exploration).[9]

Similarly, Dworkin argues, we ought to treat social practices like friendship and law constructively to determine their content. "A participant interpreting a social practice. . .proposes value for the practice by describing some scheme of interests or goals or principles the can be taken to serve or express or exemplify."[10] When the practice concerns our practical interactions, the values relevant to the social object are likely to be moral rather than, for example, aesthetic in character. Nonetheless, in determining what friendship requires, I impute some moral significance to that sort of relationship, though one constrained and informed by standard social understandings of how friendships operate and what they require. I cannot reasonably conclude that friendship demands that a person wholly abandon their personal aims – it fits neither tradition nor the values likely to endorse other accepted elements of the relation. However, I can arrive at surprising conclusions about friendship's demands if a powerful interpretation justifies other elements of the practice but implies that we must set aside some traditional understanding. It could turn out that friendship requires financial solidarity to a higher degree than is typically assumed if other aspects of friendship are best accounted on principles that commend that solidarity. In any case, the specific normative content of any friendship, and the practical requirements and attitudes it properly involves, is largely determined by morality.

In law, then, basic disagreement can be accommodated since we do not need foundational agreement on the criteria of validity. What we need, rather, is a moderate degree of agreement on the discrete elements that constitute the practice (again, though, not on *why* these elements constitute legal practice), for instance, that statutes, a constitution, prior judicial decisions, and certain customs are part of local law and that there are certain standard ways of approaching these materials in normal cases. From there we can offer interpretations or justifications of these elements to determine the precise content of law. These justifications will be moral in character, about what is valuable about the rule of law and about what makes legal practice morally best. Since there is no great mystery to having sensible moral disagreements about a common matter, we need no longer be mystified by the idea that we could have meaningful disagreement about law in the absence of a convention about the criteria of legal validity. In *Riggs v. Palmer*, no judge doubted that the statutes of wills were relevant. Rather, the issue, on Dworkin's account, is what legal norms to construct from the text consistent with the value of the rule of law. We can see literal, textually constrained statutory interpretation recommended by a concern with predictability in governance and avoidance of ex post facto penalization and a focus on legislative intent recommended by a moral concern with democratic legitimacy and (when relevant) legislative expertise. That the judges are having a conversation about a common matter is secured by a sufficient degree of shared pre-interpretive understanding. That the judges are having sensible disagreement is secured by the intelligibility of a moral dispute about the value of the rule of law.[11]

The doctrinal upshot of constructive interpretation is that whether, for instance, the grandson is

[9] Dworkin, *Law's Empire*, 49–73.

[10] Ibid., 52.

[11] Ibid., 87–101; *Justice in Robes*, 1–35, 140–186, 223–240.

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legally entitled to inherit depends on best moral account of the rule of law as that account applies to the jurisdiction's legal practice. Since morality fundamentally determines legal content in this way, the truth of legal propositions cannot be conclusively established without engaging in moral reasoning. Even if the rule of law is best achieved if practitioners prescind from moral judgment in deciding everyday legal questions (for reasons of predictability, for instance), this is conclusion of constructive interpretation, established by some moral argument to that effect.[12] Judges would be legally bound to use nonmoral heuristics in adjudication because of a moral requirement concerning the rule of law. Legal reasoning, then, is a practical engagement with the requirements of morality as they concern institutionalized, coercive legal practices, i.e., a kind of moral reasoning for a special subject matter. Rather than seeing law and morality as autonomous domains:

> [W]e might treat law not as separate from but as a department of morality. We understand political theory that way: as part of morality more generally understood but distinguished, with its own distinct substance, because applicable to distinct institutional structures. We might treat legal theory as a special part of political morality distinguished by a further refinement of institutional structures.[13]

Further, legal rights, of the sort at issue in *Riggs v. Palmer*, are a special kind of moral rights – one has such a right in virtue of some moral justification of the legal materials.[14]

Why think the theory of constructive interpretation offers a correct account of legal content? Dworkin offers a number of arguments,[15] but the most important and influential is the one implicit above, that constructive interpretation offers a way of understanding fundamental legal disagreement as intelligible and meaningful. If there is serious, non-irrational disagreement about the criteria for settling legal content among officials, that is something for which a theory of the nature of law should account. Even many of Dworkin's positivist critics have been impressed by the challenge.[16] Additionally, insofar as there are nonlegal matters to which constructive interpretation intuitively applies (e.g., other social practices or creative enterprises) that are relevantly analogous to law, we have a reason to believe that constructive interpretation applies in the legal context. Dworkin also argues that the model captures a quite general method of inquiry.[17]

Law as Integrity

All this still leaves unsettled which moral standards are appropriate to the legal domain. Law, Dworkin contends, is in the business of regulating the use of collective power in accordance with past political decisions about the use of force. Hence, the relevant standards will concern why this governance practice is valuable.[18] One view (call it "conventionalism") says that the rule of law provides predictability and procedural fairness to subjects. On a constructive interpretation of local law, conventionalism indicates legal norms only when explicitly designated in the legal materials.[19] Another view (call it "pragmatism") says that the rule of law secures future valuables for the community and indicates legal norms whenever this will best promote the collective good.[20]

"Law as integrity" is Dworkin's own alternative substantive theory of the rule of law. Dworkin argues that every political community owes equal concern to each member's well-being on some plausible theory of what that concern involves. A community cannot legitimately mark arbitrary distinctions between members – distinctions in treatment must be justified in terms of some

[12] *Law's Empire*, 87–101; *Justice in Robes*, 1–35.

[13] *Justice in Robes*, 34–35.

[14] *Justice for Hedgehogs*, 400–409.

[15] See *Law's Empire*, 49–65.

[16] See, for example, Wil Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994); Jules L. Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001).

[17] Dworkin, *Justice for Hedgehogs*, 123–188.

[18] *Law's Empire*, 90–96.

[19] Ibid., 114–150.

[20] Ibid., 151–175.

principled understanding of what equal concern involves. A community that embodies principled equal concern, even if the principles are somewhat mistaken from view of justice or proper democratic control, achieves an independent political ideal of integrity. This ideal, Dworkin contends, is significant enough to legitimate coercive political power.[21] Since what is valuable about the rule of law is being governed by a coherent body of principle expressing a theory of equal concern, legal norms are indicated when they follow from the best principled moral justification of a jurisdiction's legal materials. The task of the judge is to try to construct a coherent, morally cogent justification of those materials to determine legal content. "The adjudicative principle of integrity instructs judges to identify legal rights and duties. . .on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness."[22] We are equal under the law when the law governs us on a single, integrated vision of principle. On this view, legal reasoning is not only moral at its base (as per constructive interpretation). Rather, moral judgment plays a role in uncovering the most pedestrian legal matters of local law (though, normally the underlying principles need not be articulate). Relatedly, judges are more likely to get legally satisfactory answers insofar as they have good moral judgment.[23]

Conclusion

There are, then, several separable elements to Dworkin's legal theory. Constructive interpretation could hold even if Dworkin is wrong about law as integrity (as he himself regularly emphasizes). The best theory of the rule of law depends on substantive considerations of political morality. Also, Dworkin could be wrong about constructive interpretation and legal content but succeed on other fronts. Legal positivists, for instance, may offer the best general descriptive account of law, but Dworkin may still be right that integrity is a virtue of politics and (separately) may even still be right that judges and other officials should adjudicate constructively. In the latter case, he would simply be deprived of the claim that judges are reliably tracking legal content when so deciding.

[21] Ibid., 176–224.

[22] Ibid., 225.

[23] Ibid., 225–275.

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Cross-References

- ▶ Dworkin, Ronald: Constructive Interpretation *aka* Interpretivism
- ▶ Legal System and Legal Order
- ▶ Positive Law and Natural Law
- ▶ Rule of Law: Historical Perspectives
- ▶ "Semantic Sting" Controversy

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Dworkin, Ronald: On Justice

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Introduction

When philosophers talk about justice, they are sometimes concerned with *distributive* justice – i.e., with what would amount to a morally defensible allocation of resources, welfare, or some other good among members of a group. Ronald Dworkin offers an influential account of distributive justice, which he calls "equality of resources" (Dworkin 2000, 2011, ch 16).

On other occasions, philosophers use the word "justice" to refer to a broader set of moral concerns. It is in this broader sense that Dworkin typically uses the word "justice," and his understanding of justice in this broader sense is the focus of the present entry.

Dworkin consistently maintained that justice is an "interpretive" concept. This claim is examined in the section "Justice As an Interpretive Concept". In other respects, his views about justice changed over time. Of his many important writings on this topic, this entry focuses on two. The section "Conflicts Between Justice and Other Values in *Law's Empire*" considers Dworkin's claims in *Law's Empire* about how justice relates to other political values. The section "The Components of Justice in *Justice for Hedgehogs*" explores the very different account of justice offered in *Justice for Hedgehogs*.

Justice As an Interpretive Concept

While Dworkin typically uses "justice" in a broad sense, he queries whether there can be a general statement of what justice (in this broad sense) is, of a sort that is "sufficiently abstract to be uncontroversial among us and sufficiently concrete to be useful" (Dworkin 1998, 74). Justice is not a "criterial" concept, such that competent

users of the concept share criteria for its application. Disputes about justice are often about the right tests for determining whether something is just, not about whether an agreed test is satisfied in particular cases.

Rather, justice is an "interpretive" concept, which we share despite disagreeing about what justice requires. In *Law's Empire* and *Justice in Robes*, Dworkin suggests that justice "is an institution we interpret" (Dworkin 1998, 73) or that we share the concept of justice because (inter alia) we "participate in a social practice of judging acts and institutions just and unjust" (Dworkin 2006, 224). Theories of justice represent attempts to identify what is valuable about this institution or social practice, or to identify its purpose.

In addition to participating in a certain social practice, we share the concept of justice because we share a sense of the "rough boundaries" of that practice, even if we disagree about its purpose or value, and because we generally regard the requirements of justice as sensitive to that purpose or value (Dworkin 1998, 73–75; Dworkin 2006, 224–225). It is also important that there are paradigms of (in)justice we largely agree on, even if we disagree about what *makes* them instances of (in)justice.

Taken at face value, these claims are puzzling. Firstly, it is unclear whether it is an institution or a social practice that lies at the heart of Dworkin's account. Secondly, we usually distinguish both institutions and social practices from values. We might think that justice is a value that certain institutions should promote or protect, but Dworkin seems to suggest that there is a relationship of identity between justice and a particular institution (or, alternatively, that an account of justice is generated by interpreting a specific social practice). Thirdly, while the practice of judging acts and institutions to be just or unjust could have many different purposes, the purpose that seems most apt (in the context of developing an interpretive theory of justice) is that of promoting *justice*. Similarly, if justice is an institution, it appears that what is valuable about that institution is that it instantiates *justice*. Thus, the prospects of developing an illuminating interpretation of the institution or social practice of justice appear bleak.

Similar claims can be found in *Justice for Hedgehogs*. However, here, Dworkin emphasizes that, when interpreting the concept of justice, we must show how the different components of justice fit together, and how our account of justice fits with accounts of personal morality and ethics. This is discussed further in the section "The Components of Justice in *Justice for Hedgehogs*", but the shift in emphasis may ameliorate some of the concerns expressed in the previous paragraph. For example, Dworkin draws on this aspect of his account in *Justice for Hedgehogs* to respond to the objection that any interpretive theory of justice is viciously circular, because we cannot explain what is valuable about the social practice of justice without appealing to *justice*: "We defend a conception of justice by placing the practices and paradigms of that concept in a larger network of *other* values that sustains our conception" (Dworkin 2011, 162). There is still a circle, since those other values are understood partly in terms of their fit with the account of justice. However, by expanding the radius of the circle, Dworkin hopes to avoid the accusation of *vicious* circularity.

There may be a more fundamental concern with Dworkin's claim that justice is an interpretive concept. Why should we accept his taxonomic framework, such that the fact that justice is not a criterial concept is, at least, strong evidence it is an interpretive one? However, perhaps the key point Dworkin wants to make by insisting that justice – and its various components, such as liberty and democracy – are interpretive concepts is that they must be understood by identifying what value they pick out, or what is valuable about their paradigm instances, rather than ascribing descriptive content to each concept and then asking how that content is valuable (Dworkin 2011, 344–348; his targets include Berlin (1969), Mill (1982) and Rawls (1971)). We understand liberty, for example, by considering what freedoms it is valuable to possess, rather than understanding it as the freedom to do what one wants and then asking whether there is anything valuable in possessing that freedom. This means that interpretations of

the concept of justice must take sides in substantive political disputes (Dworkin 2006, 148–149). Conceptual analysis, in this domain at least, is not value-neutral.

This claim may be compatible with various views about the nature of moral concepts. However, it is not uncontroversial. Some critics deny that justice – or liberty or democracy – are to be understood by identifying the values these concepts pick out, or by finding the best justification of paradigm cases (e.g., Murphy 2014, 84). Whether or not these critics are correct, this disagreement calls into question Dworkin's claim that we share the concept of justice (or liberty, etc.) because, inter alia, we agree that the concept is to be understood in light of the value it picks out, despite disagreeing about the best account of that value.

Conflicts Between Justice and Other Values in *Law's Empire*

In *Law's Empire*, justice is an important political value, but not the only political value. Dworkin also refers to values such as fairness ("a matter of finding political procedures . . . that distribute political power in the right way" (Dworkin 1998, 164)) and integrity (the value displayed when the state exercises its coercive power by reference to a coherent set of principles of justice and fairness, even if those are not the correct principles of justice and fairness).

An important feature of Dworkin's position in *Law's Empire* is that justice may conflict with other political values. The resolution of hard cases in the law "will sometimes set one department of [the judge's] political morality against another: his [or her] decision will reflect not only his [or her] opinions about justice and fairness but his [or her] higher-order convictions about how these ideals should be compromised when they compete" (Dworkin 1998, 256). Justice and fairness conflict where fair institutions produce unjust decisions, or unfair institutions produce just outcomes. And the possibility of conflict between justice and integrity is built into Dworkin's understanding of integrity, as requiring that the state act on a coherent set of principles of justice and fairness, even if those are not the *correct* principles. This is not a merely theoretical possibility – to the extent that political actors have not always acted justly in the past, actual conflicts between integrity and justice arise.

Dworkin claims that, when justice and integrity conflict, justice may sometimes, but should not characteristically, prevail (Dworkin 1998, 218). Rather, we must prioritize integrity in order for political obligations to arise. In a society marked by moral disagreement, we cannot expect political actors always to adhere to the correct principles of justice and fairness, but we can expect them to treat everyone according to the *same* principles. They thereby display equal concern for all, satisfying an important precondition for the existence of political obligations.

Dworkin's claim that, when they conflict, integrity should typically prevail over justice, is controversial. Joseph Raz argues that, in the context of adjudication, if courts cannot arrive at a just outcome, they should generally strive to come as close as possible, even if this means that different people are treated according to different standards (Raz 1995, 312–314; for Dworkin's response, see Dworkin 2004, 383–384). Jeremy Waldron flags the possibility that it is more expressive of genuine integrity for a community to acknowledge it is torn between competing views of justice, rather than trying to conceal this tension by acting in accordance with a single view of justice (Waldron 1997, 4).

The Components of Justice in *Justice for Hedgehogs*

In *Law's Empire*, justice is one of several political values, and potentially conflicts with other political values. This position is adjusted in at least three ways in *Justice for Hedgehogs*. (Many of these changes were foreshadowed in Dworkin 2000, 2006, ch 6.) Firstly, in *Justice for Hedgehogs*, justice is typically equated with all of political morality, including that branch of political morality (which Dworkin equates with law) that addresses the implications of our political

community's past actions for what we, collectively, ought to do now. (I say more below about Dworkin's conception of law in *Justice for Hedgehogs*.) Secondly, more specific content is given to the concept of justice, by setting out its main components – equality, liberty, democracy, and law. The accounts offered in *Justice for Hedgehogs* of these more specific values constitute the book's "theory of justice" (Dworkin 2011, 15). Thirdly, *Justice for Hedgehogs* offers a very different account of the relationship between political values. Perhaps its central thesis (henceforth, the "unity of value" thesis) is that values – not just political values, but also those of personal morality and ethics – do not conflict, but rather are integrated and mutually supporting. This means that what one value requires must be consistent with what other values require, so we need not resolve apparent conflicts by prioritizing one value over the other. But it involves more than consistency. It also means that our convictions about one value must derive support from our convictions about other values (Dworkin 2011, 120–121).

According to Dworkin, political morality differs from personal morality or ethics because it addresses what we, collectively, owe to individuals when we act as a political community (Dworkin 2011, 327–328). However, each domain – political morality, personal morality, and ethics – can be understood as concerned with the implications, for that domain, of two fundamental principles of dignity: that it is important that each person's life be lived well, and that each person bears particular responsibility for directing the course of their own life.

In the domain of political morality, the two principles of dignity generate two further principles: the state must display equal concern for the fate of all its subjects, and must respect each individual's responsibility for directing the course of their own life. Accounts of the components of justice – equality, liberty, democracy, and law – represent more precise statements of what these two principles require (Dworkin 2011, 330–331). Much of Dworkin's discussion of these concepts in *Justice for Hedgehogs* involves rejecting accounts according to which they would conflict (e.g., that liberty is the freedom to do what one wants), in favor of accounts that integrate these concepts and so eliminate the risk of conflict (e.g., that liberty is concerned with that part of one's freedom the government would be wrong to constrain, where what freedoms the government would be wrong to constrain is fixed, in part, by the values of equality and democracy). (The integration works in both directions. A proper understanding of equality must preserve room for people to exercise their liberties, including the liberty to acquire and use property: Dworkin 2011, 374–375.)

Dworkin anticipates the objection that he renders values compatible by gerrymandering his account of each value so it fits with the others. He responds that it is necessary, but not sufficient, that an account of one value fit with accounts of other values. The account must also be independently attractive (Dworkin 2011, 5–6). For example, a proper understanding of liberty must not only eliminate conflict with equality, but must also represent an attractive account of liberty, by better capturing what is valuable about liberty than alternative accounts.

This account of justice avoids certain issues that troubled Dworkin's earlier position. For example, we need no longer worry about how to resolve conflicts between justice and fairness or integrity. (Dworkin says little about integrity in *Justice for Hedgehogs*; this omission is explored in Waldron (ms).) This is partly because justice now incorporates all of political morality, rather than being one of several political values. But it is also because there is no room to debate which value has priority over other values when they conflict, because there is no longer any scope for conflict.

However, the account of justice in *Justice for Hedgehogs* gives rise to new challenges, including explaining how its various components fit together, so they do not conflict, but rather are integrated and mutually supporting. There is also a question as to whether Dworkin's accounts of equality, liberty, democracy, and law are attractive in their own right. The rest of this section focuses on how Dworkin's accounts of those values fit together to produce his theory of justice.

Consider law. One might think of law as potentially conflicting with justice. However, Dworkin suggests, this would be a mistake. Law is not a separate system of rules that may conflict with the requirements of political morality. Rather, law is a branch of political morality (Dworkin 2011, 405). It is the branch of political morality that is concerned with the moral implications of the past decisions of our political community – i.e., with what the political community ought to do now, given how it has acted in the past.

(Dworkin focuses on what rights the political community's adjudicative institutions should enforce on demand. Those rights are *legal* rights (Dworkin 2011, 404–405). Whether he is correct to restrict his focus in this way is contested. We might think that the political community's past actions also have implications for what its *legislative* institutions ought to do (Sager 2016, 120–121; see also Dworkin 1998, 167). However, in *Justice for Hedgehogs*, Dworkin treats "legislative rights" as part of the subject matter of "general political philosophy," which appears *not* to be concerned with the moral implications of the political community's past actions (Dworkin 2011, 406). In the rest of this section, I refer to "political institutions," bracketing the question of whether our focus should be restricted to adjudicative institutions.)

Dworkin draws an analogy with what he calls "family morality," according to which the opportunities, privileges, etc., that parents should accord one of their children depend, in part, on what opportunities, privileges, etc., they previously accorded their other children (Dworkin 2011, 407–409). What the family morality requires of the parents is a moral question. So, Dworkin claims, is the question of what the law requires, given the past decisions of our political community. Considerations of fair play, fair notice, and a fair distribution of authority may require that political institutions attach moral significance to those decisions.

The claim that law is a branch of political morality raises several concerns, including whether it leaves room for the possibility that the law is unjust. (For discussion, see Dworkin 2011, 410–412; Dyzenhaus 2016.) However, if we accept that law is a branch of political morality, then the unity of value thesis requires Dworkin to show that law is integrated with the rest of political morality. To show that, he must show that there is no conflict between law and other political values. This is a tall order, since it is a fundamental feature of his account that – given the past decisions of our political community – the law may require political institutions to depart from what would otherwise be the right thing to do. (As Dworkin puts it, what law is may differ from what it should be (Dworkin 2011, 407).)

In seeking to show that liberty is integrated with equality, Dworkin aims to show that what each value requires is compatible. By contrast, what law requires often differs from what other political values require. Our political community's history is such that political institutions often cannot act on the correct account of equality, liberty, or democracy without disregarding that history – and the principles of fair play, fair notice, and a fair distribution of authority that require it to be paid heed. Conversely, political institutions often cannot act on those principles without departing from what equality, liberty, or democracy require. (Concerning the scope for conflicts between law and the rest of Dworkin's account of justice, see Delmas (2016). For further discussion of the difficulties Dworkin faces in integrating law with other political values, see Smith (2012).)

This worry is not about whether an unjust statute is really law, or whether a statute can be so unjust that it makes no difference to what one ought to do. Rather, the worry arises where a morally suboptimal statute does make a difference to what political institutions ought to do, and for that very reason requires that they depart from what other political values require.

Would this problem evaporate if Dworkin did not treat law as a branch of political morality? In that case, conflicts between law and equality, liberty or democracy would not be conflicts within the domain of political morality. However, a version of the problem would remain. There would still be questions about the moral significance of the past decisions of our political community. These would be questions of political morality, even if we did not regard them as questions about the content of the law. And there would

still be potential for the answers to those questions to conflict with the requirements of equality, liberty, or democracy. (The unity of value thesis is not limited to values, narrowly understood, but rather seeks to establish that all of morality, and ethics, is integrated and mutually supporting. See Raz (2016) 3 regarding the broad sense in which Dworkin uses the term "value.")

Conclusion

Dworkin offers an intriguing account of justice as an interpretive concept, and of the relationship between the values at the heart of political morality. While he does not entirely succeed in his attempt, in *Justice for Hedgehogs*, to show that those values are integrated and mutually supporting, he may not entirely fail, either. Perhaps Dworkin succeeds in showing that equality, liberty, and democracy are integrated and mutually supporting, even if the unity of value thesis breaks down with regard to law. Or, if we think that there are also conflicts between equality, liberty, and democracy, Dworkin may nevertheless have shown that there is less conflict than we thought.

Whether this is so requires further investigation. While commentators have criticized Dworkin's accounts of equality, liberty, and democracy, there has been relatively little discussion of his claim that the correct account of these values will reveal them to be integrated and mutually supporting. One notable exception is Raz (2016), who also calls for further assessment of the scope of the unity of value thesis (of which values is the thesis true, and to what extent is it true of those values?), and of its implications (does the thesis, properly understood, allow for conflict between values and indeterminacy of value?). Raz's discussion raises the possibility that there is both conflict and unity among the values that constitute Dworkin's account of justice.

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Dworkin, Ronald: Partnership Conception of Democracy

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Introduction

Constructing – and even reconstructing – a redeeming conception of democracy as "self-government" is one of the main contributions of Ronald Dworkin's integrated legal, moral, and political philosophy, namely, the "partnership conception of democracy" (Flores 2010, 2015). It is worth to mention that Dworkin originally

characterized it as the "constitutional conception of democracy" in the "Introduction" to *Freedom's Law* (1996, 1–38), but later on in a comment to Frank I. Michelman (1998), re-characterized it as the "partnership conception of democracy." According to Dworkin, "Its central hypothesis is that the citizens of a political community govern themselves, in a special but valuable sense of self-government, when political action is appropriately seen as collective action by a partnership in which all citizens participate as free and equal partners, rather than as a contest for political power between groups of citizens" (1998, 453). It is worth mentioning that Michelman was confronting the competing conceptions of democracy supported by Dworkin's substantive ideal (1996) and Robert C. Post's procedural ideal (1995).

Democracy: Substantive v. Adjective

Although "democracy means self-government" and "is valuable because in a democracy the people govern themselves" as Dworkin acknowledged (1998, 453), the concept of democracy is an interpretive and a very contested one: people disagree about what democracy is (2011, 379 and 382). In short, "Democracy. . . means government by the people," but there are at least two competing and conflicting rival conceptions of democracy, that is, the *majoritarian* and the *partnership*, which attempt to answer in two radically different ways the question: "Who are the people?" On one side, for the "majoritarian conception," it "means government by the largest number of the people. On this majoritarian view, the democratic ideal lies in a match between political decision and the will of the majority or plurality of opinion." On the other, for the "partnership conception," it "means government by *all* the people, acting together as full and equal partners in a collective enterprise of self-government" (2000, 357–358).

As far as I know this distinction can be traced all the way back to John Stuart Mill, who in his *Considerations on Representative Government*, under the epigraph "Of True and False Democracy: Representation of All, and Representation of the Majority Only," acknowledged (1861/1958, 102–103): "Two very different ideas are usually confounded under the name democracy." For some, "[D]emocracy. . . is the government of the whole people by the whole people, equally represented." Moreover, for others "Democracy. . . is the government of the whole people by a mere majority of the people, exclusively represented." "The former is synonymous with the equality of all citizens; the latter, strangely confounded with it, is a government of privilege, in favor of the numerical majority, who alone possess practically any voice in the State." In Dworkin's version (2006b, 131):

> According to the *majoritarian* view, democracy is government by majority will, that is, in accordance with the will of the greatest number of people, expressed in elections with universal or near universal suffrage. There is no guarantee that a majority will decide fairly; its decisions may be unfair to minorities whose interests the majority systematically ignores. If so, then the democracy is unjust but no less democratic for that reason. According to the rival *partnership* view of democracy, however, democracy means that the people govern themselves each as a full partner in a collective political enterprise so that a majority's decisions are democratic only when certain further conditions are met that protect the status and interests of each citizen as a full partner in that enterprise. On the partnership view, a community that steadily ignores the interests of some minority or other group is just for that reason not democratic even though it elects officials by impeccably majoritarian means.

In what follows, we will revisit the developments of Dworkin's "partnership conception."

Firstly, searching for a candidate for democracy, Dworkin distinguished not only two conceptions of collective action, that is, "statistical" and "communal," but also two types of "communal collective action", that is, "integrated" and "monolithic" (1990, 328–330; Guest 1991, 98–100; 2013, 114–117). On the one hand, the "statistical" conception simply "counts heads" and accepts the "majority rule," whereas the "communal" rejects it. On the other hand, the "integrated" type affirms the importance of each individual, whereas the "monolithic" denies it. In short, Dworkin advocates for an "integrated communal collective action" and for "background institutions and assumptions that elicit and

nourish the needed pair of democratic attitudes: collective responsibility and individual judgment" (1990, 337; 1989, 491–499). Furthermore, he identifies three principles of democracy: (1) *participation*, (2) *stake*, and (3) *independence* (Dworkin 1990, 337–342; Guest 1991, 100–102; 2013, 117–120).

Secondly, Dworkin introduced a crucial distinction between two very different approaches to answer to the question about the best form of democracy: a *dependent* and a *detached* conception or interpretation. The first approach "supposes that the best form of democracy is whatever form that is most likely to produce the substantive decisions and results that treat all members of the community with equal concern." The second approach "insists that we judge the fairness or democratic character of a political process by looking to features of that process alone, asking only whether it distributes political power in an equal way, not what results it promises to produce." In other words (2000, 186): "A detached conception of democracy… supplies an input test: democracy is essentially a matter of the equal distribution of power over political decisions. A dependent conception supplies an outcome test: democracy is essentially a set of devices for producing results of the right sort."

Finally, in *Is Democracy Possible Here?* (2006b, 134) he insisted that democracy couldn't be reduced to a *procedural* ideal as the majoritarian conception purports but to a *substantive* one as the partnership conception proclaims:

> The majoritarian conception purports to be purely procedural and therefore independent of other dimensions of political morality; it allows us to say, as I indicated, that a decision is democratic even if it is very unjust. But the partnership conception does not make democracy independent of the rest of political morality; on that conception we need a theory of equal partnership to decide what is or is not a democratic decision, and we need to consult ideas about justice, equality, and liberty in order to construct such a theory. So on the partnership conception, democracy is a substantive, not a merely procedural, ideal.

Hence, Dworkin emphasizes one fundamental and relevant difference between the *majoritarian* and *partnership* conceptions of democracy (2000, 358):

> Citizens play two main roles in a mature democracy. They are, first, the judges of political contests whose verdicts, expressed in formal elections or in referenda or other forms of direct legislation, are normally decisive… Citizens are also, however, participants in the political contests they judge: they are candidates and supporters whose actions help, in different ways, to shape public opinion and to fix how the rest of the citizens vote. The majoritarian conception of democracy pays exclusive attention to the first of these roles… The partnership conception recognizes both roles, because it supposes that in a true democracy citizens must play a part, as equal partners in a collective enterprise, in shaping as well as constituting the public's opinion.

First and foremost, Dworkin was adamant in his critique of "a supposedly neutral account of democracy: democracy is government according to the will of the majority expressed in reasonably frequent elections with nearly full suffrage after political debate with free speech and a free press." Furthermore, he challenged whether: "Is democracy, understood as majority rule, something valuable in itself?" And even questioned: "Why should the fact that numerically more people favor one course of action over another signal that the more favored policy is either fairer or better?" To prove his point, that is, majority rule is not intrinsically fair in all circumstances, he recognized "We might say: when people locked in a joint enterprise disagree about what should be done, the only fair solution is to count heads. But that must be rejected as a universal default principle of fair play: it is not automatically true." Actually, he reinforced his point not only by asking a rhetorical question: "But if democracy means majority rule… then why should we care so much to protect our democracy [from majority rule]?" (2011, 347–348). But also, by answering: "According to the alternative view of democracy… majority rule isn't even legitimate, let alone democratic, unless [certain] conditions are at least substantially met" (2006a, 134).

In fact, as Rickard Parker emphasized "the animating *mission* of modern constitutional law is conventionally described as the correction of failures allegedly endemic to majority rule" (1994, 69). Clearly the mission is to safeguard the individual, minorities and even governmental bodies supposedly threatened by the force of

majoritarian politics. Since such task has been conferred upon Courts via judicial review, some considered it as the "counter-majoritarian difficulty" (Bickel 1962/1986, 16) and are against it (Waldron 2006). Nevertheless, Dworkin and some authors, such as Ely (1980), have argued that allowing the country to be governed in part by judges is not necessarily antidemocratic, once it is accepted that the objective for democracy is to get the different decisions resolved in accord with the best or right conception of a democratic regime, which assures equal concern and respect to every citizen and their rights (1977/1978, 1985, 1986, 2000). Certainly, allowing to be governed by the judiciary alone is a grave threat to democracy (Berger 1977), but that is exactly the point to guarantee that neither many nor few, but all are part of the partnership.

Conclusion

Dworkin summarizes: "First, democracy is not simple majority rule, but a partnership in self-government. Second, that partnership is structured and made possible by a moral constitution guaranteeing to individuals one by one the prerequisites of full membership. Third, we are committed by our history to an institutional strategy of asking judges. . . to enforce those guarantees of equal citizenship" (2006a, 139). Although someone might think that "our" refers to a particular country, such as the United States of America, nothing precludes its extension to other countries – and even entities – committed to a similar institutional strategy.

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Dworkin, Ronald: Theory of Equality

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Introduction

Any legitimate government must, on Ronald Dworkin's account, attempt to show equal

concern for the fate of all persons it governs. A government can go wrong in what it properly means to show equal concern and still remain legitimate, so long as it is making a good faith effort to get it right and is acting on some plausible view of what the idea requires. Nonetheless, Dworkin has it that "equal concern" is a determinate and objective political ideal, and his theory of equality is an attempt to give an account of it. The foundation of his account of political equality is his theory of distributive justice, which holds that people ought to be equal in resources to pursue a life worthwhile by their own lights, where the value of any entitlement for the equality comparison is determined by the opportunity costs that entitlement imposes on others. Dworkin views political liberty as derivative of this basic idea, and hence, he thinks equality of resources is the fundamental political virtue. I focus here on the core elements of the idea.[1]

Distributive Equality

Dworkin orients his discussion of equality around the issue of what distributive justice is properly concerned with distributing, i.e., whether politics should be interested in the distribution of welfare, resources, capabilities, or some other good. Methodologically, Dworkin's thought is that the best argument for equality as a general political demand will come in the proper formulation of the ideal.[2] Dworkin's argument proceeds by first detailing his rejection of equality of welfare, an ideal he takes to be a powerful alternative to his own equality of resources.

Equality of Welfare

Equality of welfare "holds that a distributional scheme treats people as equals when it distributes or transfers resources among them until no further transfer would leave them more equal in welfare."[3] The ideal, Dworkin notes, has clear attractions: it centers on something of obvious intrinsic value (i.e., welfare) and speaks to the sense that those with disabilities fairly deserve greater resources.[4] However, Dworkin argues that there is no way of construing "welfare" that, when we try to equalize it, does not have unacceptable results. For instance, if we try to make equal persons' subjective assessment of the overall success of their own lives, those with very demanding visions of what counts as a successful life will typically be allocated greater resources than those with less demanding understandings. Yet, it seems unfair to provide an aspiring artist more simply because she measures her life by more severe standards than one who thinks that a life is successful when it is actively engaged in ordinary pursuits. It *is* sensible to compare the success of their lives if we ask how much they should reasonably regret of their lives given fair distribution of resources to make something of themselves. However, this requires an independent specification of what counts as a fair distribution of resources, and equality of success would no longer play a role in determining the distributive standard. The general point is that, in the absence of a resource baseline defining entitlement, any welfare measure that we make the subject of equality will involve giving objectionably preferential treatment to certain subjective evaluations of what makes a life go best. Furthermore, even if we adopt an objective standard of welfare (which Dworkin thinks would be unacceptably sectarian in a free society, anyhow),[5] we will need some independent measure of when regret about how a life goes is reasonable – a measure that will have

[1] Dworkin does provide a good deal of illustration of how he thinks the theory applies institutionally. See especially Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000), 307–473; *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton: Princeton University Press, 2006).

[2] *Sovereign Virtue: The Theory and Practice of Equality*, 13.

[3] Ibid., 12.

[4] Ibid., 14–16.

[5] Ibid., 209–303.

to be spelled out in terms of what resources people are properly entitled to.[6]

Dworkin also presses the objection of expensive tastes: that equality of welfare would require us to provide disproportionate resources to those with costly to satisfy preferences (e.g., strong preferences for rare wine or enjoyment of skiing in remote mountains). Welfare egalitarianism cannot avoid the objection, Dworkin contends, without surrendering its core commitments or introducing heterogeneous considerations that play the fundamental role of settling entitlements. Crucially, people should not be able to unfairly impose the costs of their deliberately cultivated preferences and commitments on others.[7]

Equality of Resources

"[E]quality of resources is a matter of equality in whatever resources are owned privately by individuals."[8] Basic to Dworkin's specification of this idea is the device of an ideal market. Imagine a group of shipwreck survivors arrives on an unpopulated island with various, quite diverse resources (arable land, forests, wild animals, rivers, fruit trees, fishing spots, etc.). What would it mean to divide the island equally among the survivors? Given the plurality of resources, an identical division is not viable, and some resources' value may depend on not being divided. Instead, the island can be auctioned off in bundles with each survivor receiving an equal allotment of currency. Dworkin summarizes:

> Each distinct item on the island. . .is listed as a lot to be sold, unless someone notifies the auctioneer. . .of his or her desire to bid for some part of an item. . .in which case that part becomes itself a distinct lot. The auctioneer then proposes a set of prices for each lot and discovers whether that set of prices clears all markets, that is, whether there is only one purchaser at that price and all lots are sold. If not, then the auctioneer adjusts his prices until he reaches a set that does clear the markets.[9]

Once the bundles have been successfully auctioned, the survivors will have achieved an envy-free distribution of resources, as no one will envy anyone else's bundle since every bundle and its parts was available on the open market for purchase. Relatedly, the *prices* of items on the ideal market perform the vital functioning of registering the costs of one's control over resources on others. If I want control over a fruit tree that is also valued by other survivors, then I will have to spend the amount required to outbid them in order to secure it. In doing so, I reduce my ability to buy in other parts of the market, and this adequately compensates others for my control – their loss of the ability to use the tree (i.e., the opportunity cost) is compensated by their continued purchasing power with respect to other items over which I have reduced bidding power. They could have continued bidding on the tree, but judged that loss of purchasing power in other respects not worth it; I judged the loss in purchasing power with respect to other parts of the market worth it, and so should not envy what others attain in virtue of my purchase (I could have refrained and bid on those items instead). Hence, when we arrive at a schedule of prices where the market clears, we have achieved an attractive form of equality where "the true measure of the social resources devoted to the life of one person is fixed by asking how important, in fact, that resource is for others."[10]

In general, we show *concern* for each individual by giving each the freedom and responsibility to determine her ambitions in view of the cost of those ambitions (in light of available resources) on the aims of others. We show *equal* concern by giving each person equal purchasing power on the market. People's fate, then, is largely a feature of their choices, given fair claim over the world. Also, we can extend equal concern over the whole lives of persons by permitting them to retain the results of labor performed and risks taken. If I work my land tirelessly to trade for fine wine that you also value, and you regard such leisure-free labor as cultish dedication to a soul-deadening work ethic, you may envy my

[6] Ibid., 11–47.
[7] Ibid., 48–59.
[8] Ibid., 65.
[9] Ibid., 68.
[10] Ibid., 70.

wine, which you could not afford. But you should not envy the package of labor and wine over the course of a life as you opted for a package of leisure and meaner pleasures.

What, though, of outcomes that are not a consequence of ambition? Natural disasters, handicaps, and differential talents affect people's effective control over the world (and, hence, ability to realize their ambitions) in basic ways. Dworkin here relies on the idea of social insurance, understood as a public provision of resources to compensate misfortune that falls outside of one's control (and, hence, responsibility). Distinguish option luck from brute luck. An outcome is a feature of option luck if it is a consequence of deliberate risk-taking. If I gamble or make a risky market venture, then I opt for the risk, and I have no complaint if it turns out poorly from view of the idea that I ought to control the contours of my life in light of my ambitions. I could have opted for a safer route (without the potential gains). An outcome is a feature of brute luck if it is a consequence of a danger outside of my control. If lightning strikes my fruit tree, I have bad brute luck. We can, though, partly convert brute to option luck through insurance. If I have the option of insuring against a possible misfortune, then the misfortune is no longer a matter of uncontrollable luck but a matter I can address through a decision to purchase insurance or not. If I choose not to buy insurance for a danger, I opt for the risk. Return now to handicaps and talents. Frequently, whether I have a talent, or suffer a handicap, is a matter of brute luck, and those conditions (Dworkin reasons) are part of the resources I have for making something of my life. However, we can compensate those handicapped (or born with less in the way of marketable talent) by asking how much insurance for general kinds of handicaps (or general degree of inability to market talent) the average person would buy unaware of their own specific circumstance (but aware of the generic features of their society). When a handicap, for instance, is covered by the solution to this question, we ought to afford the person resources according to the policy that would have been purchased. The resources would be financed through taxation, again in accordance with the structure of policies that would be chosen. In other words, we partially convert the brute luck of talent and ability into option luck, from the point of view of the decision of the average person. Although Dworkin acknowledges that the result will not always then be envy-free (e.g., I may still regret my lack of marketable skills), we can, nonetheless, mitigate the effects of brute luck on equality of resources. We have a principled basis for tax-financed social insurance consistent, to the degree reasonably possible, with the aspiration to make people's lives ambition sensitive in a fair way. Moreover, the idea of equality of resources can handle the problem of handicaps for egalitarian political theory in a principled manner.[11]

Equality and Liberty

Dworkin argues that to approximate the true opportunity costs of an entitlement, we have to treat it as sensitive to people's ambitions as possible. If during the auction we treat a tract of land as indivisible, and C would purchase that tract for $100, whereas A and B would each buy separate sections of the tract for $60 (perhaps they only want to plant small gardens), but neither would spend the amount necessary to outbid C for the whole tract, then C will succeed in acquiring the title. However, C will do so without internalizing all the costs to others' ambitions, and so a refusal to treat the land as divisible (and, hence, more sensitive to people's ambitions) is unfair to A and B. "[T]he true opportunity cost of any transferable resource is the price others would pay for it in an auction whose resources were offered. . .in the form that permits the greatest possible flexibility in fine-tuning bids to plans and preferences."[12] This thought, Dworkin contends, underlies a general presumption favoring liberty. If we are at liberty to use resources we control in any way we like, consistent with the security of others' person and property, then this

[11] Ibid., 73–109.

[12] Ibid., 151.

will accommodate the highest reasonable level of flexibility in resource use as possible (e.g., I can do a great number of things with my land without legal restriction), and we can fine-tune our bids to the highest reasonable degree. The resulting distribution will then reflect (again, as far as reasonably possible) the true opportunity costs of persons' control over the world. Failure to guarantee the liberty against legal restriction unnecessary for mutual security would arbitrarily omit opportunity costs from the resource market, thereby treating the aims of some unfairly.[13] Equality of resources, Dworkin contends, supports the basic liberties in another way as well. Since the basic measure of a resource's value is its significance to people's ambitions, it is important that people have authentic preferences, convictions, etc., relevant to those ambitions. Hence, liberties like freedom of expression, association, and religious commitment ought to be protected so that I can form ambitions free from duress, with full information, etc.[14] The overall result is, as Dworkin emphasizes, a view that treats liberty and equality as fully compatible ideals – though, with equality doing the heavy theoretical lifting in determining the scheme of liberties.

Cross-References

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[14] Ibid., 159–161.

Dworkin, Ronald: Theory of Rights

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Introduction

Dworkin famously characterizes political rights as trumps, and his explication of this idea is his central contribution to general theorizing about

rights. The claim that rights are trumps primarily concerns one question we might ask about the nature of moral rights: what is the practical force of a moral right? Or, slightly differently: what do moral rights accomplish in terms of our reasons for action? Dworkin's view is that political rights, i.e., the moral rights asserted by individuals against their government in liberal societies, generate distinctive practical requirements that effectively disable otherwise operative justifications for acting. The theory is somewhat narrow, then, in offering an account of the role of rights in a liberal political theory, rather than an analysis of moral and legal rights assertions generally.

Intuitively, the basic idea can be expressed as follows. Suppose we think that utility promotion is typically sufficient grounds to justify structuring public rules in one way or another. For instance, if a system of traffic regulations increases efficiency overall, the fact that the system is inconvenient for me (because, for instance, it increases my commute time compared to another system) does not render the system illegitimate. On the other hand, if I assert a right to free expression, for example, Dworkin has it that I am claiming that a policy restricting my protected expression *is illegitimate* (and wrongs me) if *all* that can be said in its favor is that it promotes utility overall. A policy restricting unpopular political speech, for instance, is illegitimate even if it produces a marginal gain in utility. The right trumps a utilitarian justification. The nature of rights' trumping, though, requires explication.

Main Text

Dworkin provides a formal and a substantive characterization of rights. The formal account states the general features of both a successful justification of a right and a right as a component of any liberal political morality. The substantive picture displays how rights operate on one particular normative political theory. Formally, an individual right grounds a requirement whose force is the justificatory power of a political theory's goals the right outcompetes. A goal is a state of affairs the basic commitments of a theory seek to preserve or attain, so that action promoting that goal is recommended or required by the theory. For instance, a theory might demand maximum satisfaction of preferences, the cultivation of human excellence, or the pursuit of a certain type of national character. If goals compete within a theory, we can assess their value and the extent to which they would be served by various policies and aim for optimal expected value. A right modifies this logic by generating an obligation to an individual that can undermine maximal goal promotion. A right-holder's claim on obligation-bearers withstands or "trumps" a certain level of goal promotion, the degree of a right's resistance to goals being its force. "The strength of a particular right, within a particular theory, is a function of the degree of disservice to the goals of the theory, beyond a mere disservice on the whole, that is necessary to justify refusing an act called for under the right."[1] When rights compete, we ought to prefer the stronger to the weaker.[2] Dworkin's label of rights as "trumps," then, is modestly misleading. In cards, any trump card defeats any nontrump card, no matter the value of the nontrump card. Although it is possible that a political theory could have rights that defeat all goal-based reasons, frequently rights will only outcompete some of those reasons (or will be especially undermining with respect to some types of goals, and less so against others – see below). Given a strong enough "goal card," rights-based obligations will not prevail.

Why would a political theory include rights among its normative components? It appears that Dworkin's most general, considered answer is this: in order to protect individuals' sphere of self-determination from communal goals in a way that enhances fidelity to the political theory's foundational commitments (the commitments that would also explain why and how any particular goal generates reasons). Dworkin is clear that what is distinctive about theories that give rights pride of place is their concern with protecting

[1] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 169–170.

[2] Ibid., 193–194.

individual thought and choice by creating duties in others. The reasons of such duties are sourced, so to speak, in individuals, i.e., in the significance of individual independence for them. If a theory merely needed to constrain goal promotion to retain fidelity to its central commitments, it could simply introduce self-standing duties, duties that do not treat individuals as the ground of duties.[3] It is when and where pursuit of a theory's goals threatens the proper recognition of the significance of individual independence (on the theory's own terms) that rights will properly be recognized.[4] Consequently, for Dworkin, rights will only have a role in a political theory that takes individual independence seriously.

Dworkin's explication of rights in terms of a substantive political theory raises some interpretive difficulties about how far his views evolved over the years, especially since he apparently gives (at least) two different accounts of the trumping phenomenon as part of an egalitarian, liberal political theory.[5] I think the theory can be stated in a unified way, and it appears to have been his intention that it be so treated, so I will suggest how to do so here, while acknowledging the complexity. First, though, I discuss the background political theory in terms of which he articulates the substantive view. Dworkin frequently discusses rights in the context of a utilitarianism requiring optimal preference satisfaction and sees utilitarianism's goal as a plausible basis for much legitimate government policy.[6] However, preference utilitarianism is attractive as a political theory, Dworkin contends, because of its facially egalitarian nature: "Utilitarianism owes whatever appeal it has to what we might call its egalitarian cast. . .Utilitarianism claims that people are treated as equals when the preferences of each, weighted only for intensity, are balanced in the same scales, with no distinctions for persons or merit."[7] Utilitarianism is plausible as part of a political theory because it is plausibly supported by an egalitarian norm: people deserve to be treated by their government with equal concern and respect, in accordance with their dignity as persons. This is a crucial idea for Dworkin, generating a place for rights in a political theory that otherwise seeks impartial preference satisfaction and explaining the structure of rights' interaction with utilitarian justifications. The core of "equal concern and respect" is that political entitlements ought to be arranged so as to give equal regard to each person's ability to determine for herself how to live a worthwhile life. Politically established opportunities, goods, and protections from interference ought to enable each person to independently endeavor to live well by her own judgment and do so without distinction based in a view of a person's worth or a life's merit.

> Government must treat those who it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods and opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's.[8]

I should emphasize two separate items here, as they inform the logic of Dworkin's approach in distinct ways. First, a government *has reason to* treat people with respect, i.e., to create conditions for an independent, self-determining life. This is a basic reason of political morality to secure for individuals control over their lives, not a response to a preference or desire for such control.[9] Second, the structure of entitlements *cannot be a response*

[3] Ibid., 170–177.

[4] *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 369–371.

[5] Yowell's careful textual analysis of the evolution of Dworkin's views shows this clearly. See Paul Yowell, "A Critical Examination of Dworkin's Theory of Rights," *American Journal of Jurisprudence* 52, no. 1 (2007).

[6] See, for example, Dworkin, *Taking Rights Seriously*, 191.

[7] *A Matter of Principle*, 361. See also *Taking Rights Seriously*, 233–234.

[8] *Taking Rights Seriously*, 272–273. Dworkin offers a similar statement of the idea in *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011), 330.

[9] See *Taking Rights Seriously*, 176.

to differential evaluations of persons or the lives they pursue. This would be to fail to give equal respect to people's capacity and responsibility to discern a valuable form of life.[10]

Now returning to Dworkin's substantive characterization of rights, Dworkin first says that a right works to counteract utilitarian justifications, as such (i.e., whatever the character of the utility or preferences at issue). If I have a right to free expression, the government has a duty to avoid intruding upon expression within the scope of the right, and this duty cannot be overridden merely on grounds of a marginal gain in utility. Normally (on the theory in question), such a justification would be adequate to legitimate government policy, but not when a right is at issue – the force of the particular right setting the bar for how much utility gain would render invasion permissible.[11] The right to free expression would be justified by showing that the freedom has value from the perspective of treating persons as independent, dignified beings. The force of a right depends on its significance from this point of view, whatever people's preferences.[12]

On the second substantive picture of rights, Dworkin describes them as categorically disabling certain preferences from counting as political justifications.[13] Again, on the theory being considered, preferences count as reasons for structuring entitlements in a way that would satisfy them because this gives effective recognition to people's self-determination. Normally, when preferences are counted equally, people are shown equal concern and respect. However, some of our preferences concern not our own lives (call self-regarding preferences "personal preferences"), but the lives of others (call other-regarding preferences "external preferences"). One might prefer that some or all of certain others' preferences are satisfied or dissatisfied because one regards their mode of life as noble or ignoble, or certain of their preferences as base or worthy, or those persons' as having greater or lesser inherent worth, or simply because one likes or dislikes them. For instance, one might prefer that another's preferences be discounted in weight because of her race, gender, or ethnicity, or prefer that another's preferences be given greater weight in politics because of her devotion to certain kind of spiritual excellence. If external preferences were permitted to count (on par with personal preferences) in political justification, it would violate the more basic commitment to equal concern and respect since some people's self-determination would effectively be privileged. If external preferences favor the preferences of group A, and we count those preferences as reasons in settling entitlements, then A members will have greater scope for realizing their ends than nonmembers. Similarly, if external preferences that disfavor group B are counted, the resulting structure of the social world will disadvantage their self-determined aims. Slightly differently, to treat external preferences as political reasons is to make the structure of entitlements responsive to evaluations of people's lives and choices, or views that understand the worth of persons discriminately. This is a core part of what the fundamental value of equal concern and respect forbids, and hence, rights properly limit the goal of maximal preference satisfaction by disabling external preferences in political justification.

In practice, the second account views rights as counteracting preference-sensitive decision-making procedures that are unable to reliably ignore external preferences. In the context of constitutional democracy, we can see rights as claims against democratic legislatures. Dworkin contends that such legislatures are largely sensitive to the preferences of constituents, but cannot reliably constrain external preferences from affecting decisions. In matters where external preferences have tendency to intrude into democratic decision, political rights prohibit results that are likely a feature of those preferences specifically.

> It should be plain how this theory of rights might be used to support the idea. . .that we have distinct rights to certain liberties like the liberty of free expression and of free choice in personal and sexual

[10] For further discussion, see *Justice for Hedgehogs*, 191–218, 327–378.

[11] See, for instance, *Taking Rights Seriously*, 190–191.

[12] Ibid., 198–200.

[13] Ibid., 223–239, 66–78; *A Matter of Principle*, 335–372.

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> relations. It might be shown that any utilitarian constraint on these liberties must be based on overall preferences in the community that we know, from our general knowledge of society, are likely to contain large components of external preferences, in the shape of political and moral theories, which the political process cannot discriminate and eliminate.[14]

Rights have a proper role in state institutional practice, then, of eliminating certain decisions from democratic purview, and this role is a function of democratic procedure's relationship to illicit (from view of equal concern and respect) relationship to external preferences.

Apparently, then, Dworkin offers two different accounts of rights as trumps. On one version, a political right trumps some degree of preference satisfaction-based justification by supplying a preference-insensitive mandatory reason to act consistent with the right's corollary prescriptions or proscriptions. A right thereby affects the total array of reasons to be legitimately relied upon for political action, essentially by adding nontrivial reasons that operate independent of people's preferences (and hence, are only contingently consistent with maximal preference satisfaction). When we claim that the right to free expression trumps "collective welfare" on some issue, we are simply saying that the rights-based reasons of equal concern and respect outweigh reasons of preference satisfaction in a practically important way. The balance of reasons does not, in this case, favor maximal preference satisfaction, and to pursue a maximizing policy would violate at least someone's right by not according it adequate weight. On the second picture, rights trump by categorically disabling certain types of preferences as sources of legitimate reasons for political action, preferences that tend to threaten equal concern and respect in prevailing social conditions. A right to sexual autonomy, for instance, articulates a constraint on the types of decisions that the otherwise fair political process can reach, forbidding decisions that could only be grounded in external preferences. These two accounts, moreover, can deliver different verdicts on the same case. Taking Yowell's example of a statute that prohibits newspapers in order to reduce paper consumption, the preference excluding model has no objection to the law, so long as the justification for the law appeals only to personal preferences (e.g., personal preferences concerning the price of paper goods). On the other hand, supposing the prohibition overburdens expression relevant to individual independence and free self-determination, a justified claim of a rights violation appears available on the model of rights as reasons. On that model, rights can count against any utilitarian justification, not simply justifications based on external preferences.[15]

What should we make of this? My suggestion is that we see Dworkin's analysis as complex, rather than conflicting and dis-unified. Although he develops the different approaches on different occasions, he appears to affirm versions of both at various points in his later work[16] and acknowledge that his discussions differ in emphasis.[17] Perhaps more importantly, there is nothing incoherent about including both accounts as part of the analysis of political rights. In the context of preference utilitarianism, a political right can perform as a significant reason to structure entitlements in a certain way (independent of anyone's preferences), as a claim against a legislative outcome likely generated by external preferences, or both. A right to free expression, for instance, might insulate a sphere of liberty from a certain degree *personal* preference satisfaction by being a weighty reason and prohibit categorically intrusive legislative initiatives grounded in prejudice.[18] Moreover, both models fit at least the

[14] *Taking Rights Seriously*, 277.

[15] Yowell, "A Critical Examination of Dworkin's Theory of Rights," 105–106. Yowell concludes that the accounts are, in fact, in tension.

[16] For instance, the "rights as reasons" model is affirmed at Dworkin, *Justice for Hedgehogs*, 329. The "preference excluding model" is affirmed at *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996), 101–104.

[17] *Taking Rights Seriously*, xi–xv.

[18] Some of Dworkin's discussion of preference exclusion seems to suppose complex rights by treating certain spheres of activity as prima facie protected from legislative intrusion. See, for example, ibid., 277.

thrust of the formal role of rights in a political theory: rights serve to disable otherwise successful justifications for political action (justifications that are facially recommended by the goals of the theory), and that disability improves conformity with the underlying values of the theory.

Conclusion

I will offer a final word concerning Dworkin's understanding of "human rights." As we have seen, Dworkin treats political rights as theory relative. In contrast, human rights – such as those appealed to in the Universal Declaration of Human Rights – are to be seen as both distinct from political rights and less tied to a particular theory of justice. A human right, for Dworkin, is fundamentally a claim to an attitude on the part of governors: that they treat those they govern as dignified human beings, i.e., as creatures deserving equal concern and respect *on some plausible interpretation of that idea*. Whereas the contours of a political right would be tied to a particular understanding of equal concern and respect, the perspective of human rights is more abstract in that permits an array of possible interpretations. To violate a human right is to treat someone in a way that no intelligible interpretation of equality could allow – by, for instance, treating some prejudicially in law, or imprisoning someone without due process, or punishing heresy.[19] Although human rights require an attitude of seeking to treat people with dignity in good faith, the conditions for the satisfaction of human rights are public and objective.

> The distinction between human rights and other political rights is of great practical importance and theoretical significance. It is the distinction between mistake and contempt. The test, I emphasize, is interpretive; it cannot be satisfied simply by a nation's pronouncement of good faith. It is satisfied only when a government's overall behavior is defensible under an intelligible, even if unconvincing, conception of what our two principles of dignity require.[20]

Are human rights in any sense trumps? This is unclear and closely related to another interpretive difficulty facing Dworkin's theory of rights. Throughout much of his work, Dworkin asserts that it is a *right* to equal concern and respect that sits at the basis of political justice. Given that, on Dworkin's analysis, the force of a right is its trump of other justifications within the theory, it is uncertain what it means to say that the normative basis of a theory is a right. What is it trumping? As Waldron notes, "The force of this underlying right, and of other rights which are derived from it directly, is not captured either by the trumping image nor explained by the external preferences argument."[21] Nonetheless, however we are to understand the practical force of fundamental and human rights, Dworkin's theory of rights offers a sophisticated and plausible account of the nature of many political rights assertions.

Cross-References

- ▶ Rights: And Collective Goods
- ▶ Rights: General
- ▶ Rights: Legal and Moral

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[19] *Justice for Hedgehogs*, 332–339.

[20] Ibid., 335–336.

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École de l'Exégèse

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Introduction

The French wording *École de l'Exégèse* ("School of Exegesis") is used, since the beginning of the twentieth century, to point out the method of legal interpretation and the style of the Napoleonic Code commentators during the nineteenth century. In a 1904 discourse celebrating 100 years of the Civil Code, the dean of the Paris Law School, Ernest Glasson, was the first to use this complete phrase to identify the deference shown to the Napoleonic Code by the professors teaching civil law (Halpérin 2003). The choice of the word Exegesis made an analogy between the respect of the Holy Scriptures and the sacred character recognized in France to the Napoleonic codification since 1804. Exalted as the genial product of the emperor-lawgiver during the First Empire (in 1807 the *Code civil des Français* was officially rebaptized *Code Napoléon*), maintained by all the political regimes after the 1814–1815 collapse of Napoleon, the Code was considered as the true social constitution of France. This masterpiece was the core subject of the teaching of the State Law Schools reestablished in 1804 and endowed with the monopoly of legal education (that was mandatory to become advocate or judge). Dozens of commentaries of the Civil Code were printed during the nineteenth century, and many of their writers were influent professors in the nine Law Schools located in Paris (the main academic institution in that time, gathering more than 3000 students in the years 1820s) and in other French cities. In order to evaluate this legal literature, that Bonnecase depreciated in his classical work devoted to the School of Exegesis (Bonnecase 1924), the main features of these commentaries of the Civil Code have to be discussed, before analyzing the question of the so-called exegetic method in a more general frame.

Featuring the Literature of Commentaries Devoted to the Napoleonic Code

The 1804 Civil Code achieved the unification of French private law: in matters dealt with the Code, the law of 13 March 1804 suppressed all the royal ordinances, as well as all the customary and Roman law inspired rules. The new State law made a complete *tabula rasa* of the sources of the ancient law, even if the content of many articles of the Civil Code was inspired by the tradition of French law (*droit français* as it was qualified since the end of the sixteenth century and taught in the Law Schools by royal professors since 1679). The respect of the Civil Code was based on the revolutionary cult of the statutory law, which considered that legal rules were determined by the

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will and authority of the Legislator. During the debates preceding the adoption of the Civil Code by the assemblies (the Tribunat and the Corps Législatif that were pressed by Bonaparte as Premier Consul to approve the Government project), the Code was seen as a set of commands ordered by a sovereign power. At the same time, this positive law was described, through an analogy with the Roman law of contracts, as a written reason (*ratio scripta*) embedding eternal "truths" of natural law. Both the legalistic ideology and the reference to natural law were employed to inspire the greatest respect to the codification. However, the drafters of the Code hesitated between two ideas: would the strictly interpreted text of the Code constitute the whole private law or would it be necessary to understand the Code through a larger use of other sources (Audren and Halpérin 2013)?

The organization of the Law Schools (recreated in 1804, qualified as Law Faculties since 1808 and depending completely from the State regulations) decided in favor of the first solution. Not only the Civil Code was taught, as a core matter (letting a small room for the other codes and no place for public law), during the 3 years of the curriculum, but it had to be explained (through courses dictated to the students and notebooks that professors had to send to the superior administration) according to the order of its articles. Without any pedagogic autonomy, professors were constrained until 1895 to follow this method and to spend much of their time in oral examinations during which the students were compelled to recite the articles of the Civil Code. Every lesson began with the reading of these articles that was followed by their literal explanation: such an exegetic method was not favorable to an open discussion of the legal dispositions.

In fact, many of the commentaries of the Civil Code that were published during the nineteenth century by professors, but also by advocates (like Marcadé) or judges (like Troplong), were much more developed than the oral courses given in the Law Schools. After the first analyses of the Napoleonic Code written down by the jurists that were close to the codification process (Locré's *Esprit du Code Napoléon* and Maleville's *Analyse raisonnée de la discussion du Code civil*), the edited "courses" of professors Delvincourt, Toullier, Proudhon, and Duranton (from the years 1810s to the 1830s) were extended commentaries of the Civil Code, beginning with an introduction about laws in general and then following the order of the articles. For Duranton, who was the first to achieve a complete commentary of the Civil Code, it needed 22 volumes! The most famous works of the middle of the nineteenth century with multiple editions – Aubry and Rau's *Cours de droit civil français* beginning in 1839 with 6 volumes and Demolombe's *Cours de Code civil* with 31 volumes from 1845 to 1888 that was never achieved – were voluminous treaties, contrasting with the more modest "repetitions" used by the students (as did Mourlon in 3 volumes since 1846).

The writers of all this commentaries agreed to consider the Civil Code with a great respect: Aubry and Rau protest against any innovation tending to substitute an alien will to the one of the legislator, whereas Demolombe affirmed to consider the text of the Code before any other consideration. But, at the same time, they claimed to have their own method. Toullier quoted Grotius, Pufendorf, Wolff, and Heineccius, did not hesitate to refer to natural law and to Roman texts, and made a long introduction combining the Civil Code with the 1814 Constitutional Charter. Duranton looked for the clearer and easier explanations for the students. Aubry and Rau began their book by the translation of the German *Handbuch* that Zachariae has devoted to the French Code in Heidelberg: despite the fact that they introduced (more and more with the successive editions) their own commentaries, they followed the dogmatic plan of Zacharia, which was not one of the articles of the Napoleonic Code. Demolombe wrote that the old quarrel between the exegetic method and the dogmatic method had to be overruled. His style was close to the rhetorical pleadings of advocates, discussing different "systems" of interpretation.

If all these commentators of the Civil Code wanted to look for the intent of the Legislator, they made different uses of the preparatory works of the Code (known only after 1827 by the publishing of Fenet's and Locré's collections),

of the case law of the court of cassation (influent very early in the nineteenth century) or of the doctrine of their colleagues and competitors. Without any theoretical basis except a naive respect of the positive law (which must not be confused with "legal positivism"), these authors defended their own opinions on the behalf (or under the mask) of the statutory law. Sharing the same love toward the Code, they disagreed when there were gaps in the Code (e.g., about the possibility to adopt illegitimate children) or ambiguous articles. In all these cases, the frequent use of a grammatical (and purely textual) interpretation and the invocation of the Code's spirit were powerless; finally the rulings of the court of cassation prevailed to fix the law.

If one reconsiders the five features of the so-called School of Exegesis proposed by Bonnecase, it is ascertained that these commentators rendered a cult to the codified law (1), claimed to look for the intent of the Lawgiver (2), defended a statist vision of law (3), invoked (in a paradoxical way) a general (and rather jusnaturalist) idea of law (4), and used the authoritarian argument through the quotations of legislative works, of case law, and of other authors (5). On another hand, it is doubtful that these features are well qualified through the wording "École de l'Exégèse": first, these commentators of the Civil Code were not linked by a relationship between master and disciples, the French law schools of this time ignoring any kind of seminar or of collective action (e.g., through a legal review); second, a great part of these common features was the result of the constraints imposed (until the years 1890s) to the teaching of civil law (it was more an Exegesis imposed by the School that is a chosen program inside the Law Faculties); and third, these authors can be differentiated according to the successive generations (what Bonnecase himself admitted), to specific styles, and to divergent opinions about many debates concerning the interpretation of the Napoleonic Code. The rehabilitation of the Exegesis, proposed in a provocative way (Rémy 1985), gives no serious arguments to praise the nineteenth-century commentators of the Civil Code as legal theorists, but it leads to question the relationship between the methods of legal interpretation and the codification.

Questioning the Notion of Exegetic Method

Whereas the French writers of the nineteenth century did not use very frequently the wording "exegesis," it was referred very earlier in Germany in the debates about hermeneutics in the years 1800s. Under the influence of Schleiermacher and Schlegel, it was proposed to look for a better understanding of all the authoritative texts, either in theology or in law. This better understanding (*Besserverstehen* in German) concerned all the texts, and not only the ambiguous or unclear ones, and searched to reconstruct (in an objective manner) the thought inside the text itself and not only in the purported intention of the author(s). In the first stage of his courses about methodology, between the years 1800s and 1820s, Savigny qualified as Exegesis this philological approach of the Roman texts (Schröder 2012). Other German jurists pleaded for this strictly exegetic interpretation in the first decades of the nineteenth century. Then, in his 1840 *System*, Savigny reintroduced the systematic element besides the grammatical and the historical ones in the interpretative process, thus mixing traditional hermeneutics (with the use of analogy and logics, as in the previous works of Thibaut and Zachariae) and new conceptions inherited from Schleiermacher and Schlegel. Savigny's final theory of the four elements of legal interpretation (grammatical, logical, historical, and systematic) became classic and was adopted by Pandectists like Windscheid: the wording "exegetical method" was reduced to a narrowly tailored (mainly grammatical) interpretation, as the one of the Gloss of the medieval Romanists.

Several questions can be asked about this parallel history of the word "Exegesis" in the nineteenth century in France and Germany. First, it seems that the two currents developed independently and without reciprocal influence. The notion itself of legal hermeneutics was very

badly known in France. Contrary to the situation in Germany, the debates about legal interpretation gave birth to only two modest books: the 1822 *Traité de l'interprétation des lois* by the advocate Mailher de Chassat and the even more reduced 1832 *Logique judiciaire* of the judge Hortensius de Saint-Alban. Aubry et Rau knew only the rather traditional conceptions of Zachariae, and Demolombe ignored the works of Savigny before his 1840 *System* he used scarcely.

Second, German authors and French writers agreed about the principle that the process of legal interpretation had for goal to discover the true and exact meaning of the law. Very far from the linguistic turn of the twentieth century, the nineteenth-century jurists were convinced of one unique meaning for every legal text that was necessary to elucidate. It was the reason why they defended strongly their own opinion, as the only right one, in the case of controversial debates about the meaning of the articles of the Civil Code. In the case of French law, they admitted finally that this legal truth was ascertained by the case law of the court of cassation.

Third, this invocation of the exegetic method served two antithetic purposes in Germany and in France. It was used by the Historical School of Law in Germany – but also by French admirers of Savigny, like Klimrath, talking about history as a scientific exegesis – to deal with Roman texts of the Antiquity, for which the research of the intent of the legislator was rather vein. In such a situation (without authoritative codification of the positive law), the research of the best understanding of the text was an argument for a productive science of law. On the contrary, the exegetical method was applied in France to a recent Code imposed by a lawgiver, the intents of which could be easily known by the contemporaries, then by the publishing of the preparatory works. The use of this method was a means to separate (and to depoliticize) the legal text from its Napoleonic source, especially in the regimes that considered Napoleon as a usurper. The French doctrine was rather a work of legitimation of the State law than an innovative means to create legal concepts.

Fourth, the link between this success of an exegetical method and the codification of private law associated with a reform of legal studies can be found also in Austria after the 1811 Civil Code (ABGB). Beginning with the work of Zeiller, one of the drafters of the Code, then with the books of Nippel or Winiwarter, commentators of the ABGB developed a literal and rather narrow interpretation of the legal text. After 1848, and the introduction of historical matters in the university curriculum, Joseph Unger criticized this approach as an exegetical one. This phenomenon can be compared with the use of this wording as a polemic argument against the traditional method of law teaching among the French writers at the turning point between nineteenth and twentieth century, from Gény to Bonnecase.

Conclusion

If the concept of Exegesis can appear today as relatively hollow (Bürge 2004), the study of the different uses of this word, especially for commentaries of civil codes, remains useful for the understanding of the legal literature of the nineteenth century.

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Education: Ethical

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Introduction

As other contributions to this Encyclopedia demonstrate, lawyers' ethics are intimately connected to the public good. As representatives of their clients, lawyers have considerable power to cause harm to the law, the administration of justice, opponents, other affected third parties, the general public and the environment. Conversely, to the extent that the law itself promotes the public good through the legal rights and powers it confers on individuals and groups, lawyers who help clients vindicate those rights and powers serve the public good. Accordingly, it is arguable that an – if not *the* most – important ethical duty on lawyers is to help ensure that no one is denied justice because of access to legal representation. Furthermore, if access to a lawyer is important to clients, the lawyer must be capable of providing an effective service. This in turn requires, not simply technical skills, but also that lawyers are trustworthy both to clients and those with whom lawyers interact on their clients' behalf. Lawyers must also be able to pursue their client's best interests without unethically impinging on client autonomy, and with commitment, care, and consideration.

It is clear, then, that ethical behavior on the part of lawyers will enhance, and unethical behavior may well detract from, the public good. This contribution looks at the role ethical education can play in ensuring that lawyers act in the public good by first looking at why ethical education is necessary and then how it may be best delivered as regards its content, place in the curriculum and teaching methods.

Why Teach Legal Ethics?

The starting point for an understanding of the value – if not necessity – of ethical education is the psychology of moral behavior and the received wisdom that moral behavior requires the activation of four different psychological components (e.g., Rest and Narvaez 1994 esp. ch1). First, moral actors need moral sensitivity in order to recognize moral problems in the first place. Secondly, they need the moral judgment to work out the correct response. Thirdly, moral commitment is required to ensure that they regard morality as important enough to take precedence over competing considerations like self-interest. Finally, moral actors need moral courage in order to sustain this commitment in the face of competing pressures such as the demands of senior colleagues in law firms.

However, without effective ethical education prior to entering legal practice, there seems far less likelihood that lawyers will act in an ethically optimum way. This is because the other two main means of seeking to ensure ethical behavior by lawyers are of limited efficacy. Historically, the first approach involves socialization on the job in fairly lengthy apprenticeships with lawyers being guided and mentored by existing members of the profession and learning from the general ethical mores prevalent in the profession. This, however, begs the question as to whether such socialization would in fact lead to high ethical standards given the historical record of many legal professions in relation to ensuring access to justice, refraining from harming opponents and the public interest without good cause, as well as treating clients ethically such as by respecting their autonomy and caring about them as more than just a means to a good living.

But even if one could trust the profession to espouse high ethical standards, law graduates usually enter legal practice with already formed attitudes to ethics and justice which are contained in what is usually called the hidden curriculum of legal education (see, e.g., Nicolson 2008). These unarticulated value assumptions are communicated to students by example, by teaching methods, by curriculum choice as to what courses are or are not taught, at what level and for what credit points, and whether they are compulsory, and by student culture and contacts with the legal profession. By concentrating primarily on the

teaching of legal rules and thinking like a lawyer, by separating issues of law from those of justice and ethics – and largely disregarding the latter, by failing to challenge images of the lawyer as a legal technician whose function is confined to manipulating law and facts in the interests of paying clients, traditional legal education can be said to convey the implicit message that issues of ethics and justice are of little relevance to the real business of law, that rules are either there to be formalistically followed or manipulated in the interests of clients, and that a legal career is a means to success and financial rewards. And according to research, albeit largely in the USA (summarized in Chapman 2002, 73–79). This tends to undermine student idealism about using law to promote justice, and to engender moral and political cynicism, and a propensity toward ethically dubious behavior.

The hidden curriculum also has implications for the alternative to the "professional socialization" means of ensuring ethical behavior. This alternative involves the profession promulgating ethical rules reinforced by sanctions for breach. There are numerous problems with this standard "command and control" method both generally and in relation to the legal profession. Thus, in general, philosophers and psychologists note that trying to inculcate ethics from "outside in" is less likely to succeed than in encouraging moral actors to develop intrinsic motivations to act ethically, and that this "inside out" approach is better accomplished by positive encouragement than punishment (see, e.g., Lapsley and Power 2005 passim, but esp. Ch. 10). More specifically, very often many professional codes of conduct are highly general and vague and hence can only be enforced through sanctions by breaching the principle of legality to which lawyers profess to adhere. But, even when the code rules are clear, problems remain. Thus, detecting breaches of such rules is notoriously difficult (Granfield and Koenig 2002, 515–57) and even when breaches are detected many professions are far from vigorous in imposing sanctions (e.g., Abel 2003, Ch. 9). Moreover, detailed rules will always contain gaps, suffer from the inherent ambiguity and vagueness of language, and struggle to deal with the contextual nuances of actual moral dilemmas (Nicolson 2005). Finally, all codes – whether detailed or not – may reflect the views of some professionals rather than others, and/or may be premised on contentious views of the professional role regarding the treatment of clients, third parties, and the public interest (e.g., Nicolson and Webb 1999). Codes thus always need to be supplemented by the capacity to exercise judgment, as regards both their application and critical evaluation.

What Should Be the Goals of Ethical Education?

This suggests that a primary goal of legal ethics education should be the development of, not just the ability to recognize ethical problems once in practice, but the moral judgment to be able to effectively resolve them when the rules run out, are unclear, or are morally questionable. However, empirical research repeatedly confirms that knowing what is morally right by no means guarantees moral behavior (see Rest 1988, 21–22). Moral actors still need to care about doing the right thing and in the case of lawyers this may involve countering the effects of the hidden curriculum which will encourage them to see ethical rules like legal rules – as obstacles to be avoided in the interests of clients and themselves through the instrumental use of reasoning skills. And then even if they do care about doing the right thing, once in practice they need to resist the many pressures to act unethically which stem from various aspects of contemporary legal practice, such as its increasing specialization, fragmentation, bureaucratization, commercialization and globalization (see, e.g., Granfield and Koenig 2002; Boon 2014, Ch. 4).

Thus another central goal of legal education must be to encourage the development of moral courage. In fact, many argue that most moral behavior is a more or less automatic, rather than a conscious response to moral issues in which people consciously seek to overcome temptations to act immorally (Lapsley and Power 2005, *passim*). According to Aristotle and other virtue

ethicists), if ethical education is to strive to inculcate such more or less automatic ethical behavior, it should seek to foster students' moral character so that they gradually develop relatively stable character dispositions, or habits of perception, thinking, feeling and behaving through actual engagement with moral issues in a way similar to how expertise is developed in other walks of life (Narvaez and Lapsley 2005). By emulating others, by trial and error, by instruction from authoritative others, by experiencing and reflecting on the appropriate pride or regret at the outcome of one's actions, moral habits or dispositions are said to gradually develop to the point that appropriate moral behavior and feelings become embedded in the individual's character. In other words, character formation results not so much from direct teaching but from the experience of frequent immersion in moral dilemmas, frequent exercise of one's moral muscles, and learning from one's mistakes and successes in moral behavior.

If properly developed, moral character can be said to equip individuals, not just with moral sensitivity and judgment, but also with moral motivation and courage (Nicolson 2008). Where all four moral components are developed to the extent that virtue becomes a way of life, moral behavior is far more likely to ensue. Thus, "moral saints," such as Gandhi, Nelson Mandela, and Oskar Schindler, seem to act out of deep-seated and spontaneous feelings of compassion, empathy, etc., rather than conscious deliberation. According to contemporary psychologists, this automaticity derives from the fact that frequent activation renders moral considerations and categories easily accessible and readily utilized (Narvaez and Lapsley 2005, 31) and from the fact that moral considerations are central to the virtuous person's sense of self (see Lapsley and Power 2005, *passim*, but esp. Chs. 1, 2–4, 9 and 13). Indeed, where the motivation to be moral is central to the individual's self-identity, moral action is argued to flow from a kind of "spontaneous necessity" without the need for willpower or moral courage to overcome temptations or pressures to act unethically. Arguably, then, the goal of ethical education must be to make a commitment to act ethically a central part of the student's professional identity.

Admittedly, it is not possible to positively affect the moral character of all incoming law students. Radical changes to a person's essential character are likely to be rare, so there is probably little that universities can do in relation to those who enter university with, or quickly develop, a deep-seated cynical attitude to legal practice and hence are likely to be impervious to attempts to encourage an ethical professional identity. However, universities can reinforce the existing moral character of those more inclined to act ethically and adapt it to the ethical demands of legal practice and perhaps even influence those without predispositions toward either cynicism or ethical professionalism to choose the latter path. The extent to which they can achieve these goals will, however, depend on how much time is devoted to ethics in the curriculum, what is taught, how and when?

What Should Be Taught in Legal Ethics?

Ideally, as most jurisdictions now recognize, all law students should have some compulsory exposure to legal ethics. Even if there is no hope of affecting the moral character of some students, they at least need to be made more aware than most currently are of what might constitute unethical conduct so that they can make informed choices about risking formal sanctions and peer condemnation, as well as about acting in ways that are currently condoned by the codes, such as paternalistically deciding for clients what is in their best interests or violating the public interest or dignity or autonomy of others who stand in the way of such interests. However, while the formal rules obviously have to be taught at some stage, it is arguable that this should occur *after* students have been exposed to legal ethics literature. This might help prevent students seeing the rules either in formalistic or instrumental terms. Exposure to legal ethics literature should help them develop the ability to critically evaluate the rules and their underlying role morality, and the justifications for both, and to learn to apply them in ways which are

sensitive to the contexts of legal practice, and to fill in the gaps where they are silent, vague and conflicting. Such an understanding will, in turn, be enhanced by introducing students to various ethical theories which both underlie and may challenge dominant approaches in legal ethics and to the realities of modern legal practice so that students understand problems of access to justice and the ways in which the contemporary nature of legal practice affect lawyers' ability to act ethically.

When Should Legal Ethics Be Taught?

While it is possible to teach such an extensive ethics curriculum in one class, doing so is likely to be counterproductive. For one thing, confining all ethics teaching to one class sends a message that legal ethics is a subject like any other involving the learning of discrete areas of knowledge, rather than an approach to ethical issues which can unexpectedly arise at any time in legal practice. Moreover, teaching ethics in the final year as many jurisdictions do means that students are likely to already have learnt from the rest of their university experience that ethics and justice are unimportant optional extras for legal practice. Equally, if the class comes early on or even in the middle of the degree, ethics is likely to be forgotten when the "real business" resumes and moreover cannot be effectively taught unless it builds on relevant areas of knowledge and thinking like access to justice and legal theory.

Consequently, many recommend teaching ethics throughout the curriculum as and when ethical issue arise in other classes (see, e.g., Rhode 1992), Such pervasive teaching redresses the current marginalization of legal ethics and demonstrates to students that ethical considerations are integral to legal practice and vary according to contextual factors, such as the practice setting, the type of case and the client's status. However, there are well-recognized problems with pervasive teaching (see, e.g., Boon 2014 Ch. 6). By giving ethics a home everywhere, it effectively deprives its core concepts of a home anywhere (Bundy 2004, 33). There is therefore a need for a dedicated class to provide an in-depth analysis of overarching theoretical and institutional issues, and an introduction to the sort of ethical issues which arise in different contexts such as client confidentiality and conflicts of interest. Moreover, all academics are currently unlikely to give ethics the attention it deserves if required to deal with ethical issues relevant to their classes. Instead, they are likely to cut corners to ensure adequate coverage of their specialist topics and may even make clear their disdain for having to waste precious time, hence actually making the current situation even worse.

Consequently, it seems best to leave ethics teaching to those who are committed to taking it seriously and this is more likely to occur within dedicated ethics classes. However, where law schools and most of their staff are committed to taking ethics seriously, the ideal solution would be to introduce students to legal ethics in their first year – perhaps in some general introduction to law or law and society class – so that they understand its importance and ubiquity, and are introduced to the main issues. Subsequently, legal ethics can be linked to other relevant classes such as those teaching access to justice and legal theory, and raised pervasively as and when relevant in substantive law subjects. Finally, student understanding can be developed to a higher and more critical level in a final year "capstone" class which draws far more extensively on the legal ethics literature than the introductory class and where the professional rules, lawyers' role morality, notions of professionalism, and professional regulation are subjected to detailed critical analysis.

How Should Legal Ethics Be Taught?

Students can be sensitized to the sort of ethical dilemmas which arise in practice and to the ethical rules and role morality which currently resolve such dilemmas in traditional lecture format. However, interactive teaching methods are more likely to inspire and help students develop their own moral stance and the moral judgment necessary to supplement the rules and to evaluate lawyers' role morality. Set reading and dialogue in smaller

classes will produce deeper understanding of issues through exposure to different views of both published legal ethicists, and staff and students engaged in class discussion. In addition, ethical debates can be brought to life and students ethically inspired by exposure to legal biographies; fictional accounts of legal practice in literature, films, and television or even short dramas filmed by academics; and the personal accounts of local lawyers, clients and those affected by lawyer behavior.

When it comes to developing moral sensitivity and judgment, role plays and simulations are more likely to engage student interest and emotions and hence potentially develop moral commitment than the discussion of hypothetical scenarios. This is because, according to adult learning theory, learning is more profound where student experiences are more personal, immediate and realistic, and relate to the fulfilment of their future social roles (Bloch 1982). This is particularly so if such experience is accompanied by the critical evaluation of performance by others in class, and by the student herself and her ethical teacher via reflective journals (Newman and Nicolson 2017). Learning is also more profound when prior assumptions and settled values jar with experienced reality causing "disorienting moments" involving moral crises and cognitive conflict (Quigley 1995). By encouraging participants to see issues from the "other side," role-playing may encourage the development, not only of moral judgment, but also of empathy and other emotional sentiments, which virtue ethicists and others see as so important to morality (Nicolson and Webb 1999, Ch. 2 *passim*). This is particularly likely in ongoing and realistic simulations. When the results seem to "count" in contexts which accurately reflect practice, students are more likely to emotionally invest in and learn from their experiences.

However, it is generally accepted that ethical learning is best achieved in student law clinics, (see, e.g., Nicolson 2008, 2016). By engaging with actual clients, students are far more likely to develop the empathy and emotional maturity which is so important to ethical behavior. Lessons learnt are likely to go deeper when students bear responsibility for decisions which have consequences in the "real" world and where the presence of flesh and blood clients with actual problems make learning seem more useful than traditional legal education. Moreover, because of their perceived practical knowledge and skills, clinic supervisors may function as influential moral exemplars, modelling good client relations, concern for how their actions affect others, and an altruistic commitment to the community. And, crucially for character development, any feelings of satisfaction or regret caused by their actions in representing actual clients and resolving real dilemmas may affect character development, whereas clinics reveal the extent of unmet legal need, and social and legal injustice, that legal practice can involve helping others, and that this can be rewarding as well as intellectually challenging. According to anecdotal evidence from clinicians and a growing body of empirical work (cited in Newman and Nicolson 2017, 1–4) clinical experience may inspire, or at least reinforce, students' aspirations to be an ethical and altruistic professional, especially if combined with a theoretical basis and supervisory guidance to help them make sense of their experiences.

Such a theoretical basis and guidance is necessary because, without being alerted to the sort of ethical dilemmas which arise in practice, students might overlook those staring them in the face, whereas without exposure to a wide variety of ethical theories or positions on issues of legal ethics, they will not have the opportunity to explore alternative approaches to resolving dilemmas and to develop their own sense of professional values in order to supplement or even supplant existing professional roles and rules. Moreover, according to clinical educational theorists "[l]earning occurs not in the doing but in the reflection and conceptualization that takes place during and after the event" (Brayne et al. 1998, 47). Such reflection, aided by the critical evaluation of others, may help students develop the life-long learning skills of the reflective practitioner (see, e.g., Schön 1983). According to Kolb's well-known learning circle, (Kolb 1984), reflection may lead to the adoption of new, or the adaptation of existing, theories about how to

handle issues which can then be put into practice when similar situations arise. This new experience provides the material for further reflection, theory adaption and theory testing, and so on.

Conclusion

Admittedly, teaching ethics clinically is highly resource-intensive, though not nearly as resource intensive if oriented more toward social justice and/or ethical education rather than teaching legal knowledge and skills (see Nicolson 2016). But even if resources are made to stretch as far as possible, only a relatively small number of students can receive the intensive moral apprenticeship that is required in order to ensure character development. Consequently, one cannot ignore other forms of ethical education. Indeed, legal education is currently so far from taking ethics seriously that any means of illuminating and illustrating professional legal ethics and inspiring student interest is worth pursuing even if it does not necessarily inculcate the sort of habits of moral conscience that has the greatest potential to ensure that lawyers act ethically in furtherance of the public good.

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Education: Legal

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The Concept of Legal Education

Legal education is traditionally understood as the preparation or instruction for the practice of law. Nowadays the basic institutional locus for this

education is the Faculty of Law, commonly a Department of a University. Legal education has been part of the University's tasks since the Middle Ages when the University of Bologna, the first European university, was founded as a Law School in the twelfth century.

Since the advent of the modern university-based law schools in the eighteenth and nineteenth centuries that legal education adopted a new educational profile. Ever since legal education has faced the challenge of reconciling its aim of teaching law as one of the academic disciplines with its goal of preparing persons to become members of a profession. Most of the contemporary legal education still deals with a tension between offering more academic and theoretical and offering practical training for practicing lawyers. Critics of legal education often criticize it either for being excessively theoretical and incapable of training lawyers to solve day-to-day legal problems or for being deficient in building solid academic background that would enable lawyers to deal with the most complex problems that legal profession posed to them.

History

In ancient Athens, there has been no development of a true legal profession. The sovereign and democratic people of Athens (especially during the second half of the fifth and the first half of the fourth century BC) displayed some aversion to the professional lawyer.

In contrast with ancient Greeks' experience, the grandeur of the Roman law was, in fact, the concerted achievement of the Roman legal profession. In ancient Rome, the legal profession was honored and favored its members to achieve technical proficiency and pride of professional accomplishment throughout the empire. As a consequence, there was more incentive to legal education which was basically offered in schools of rhetoric which provided useful advocate training but no systematic study of the law.

During the third century BCE, Tiberius Coruncanius gave public legal instruction, and a class of jurisprudents (nonpriestly legal consultants) emerged. In this new setting, a student could read some (few) law books and attach himself to a particular jurisprudent and learn the law by attending consultations and by discussing points with his master. Over the ensuing centuries, some jurisprudents established themselves as regular law teachers. Besides a body of legal literature developed.

In the medieval universities of Europe, including those in England, it was possible to study canon law and Roman law. However, the local or customary legal system was not taught, since it was understood as parochial and so unworthy of university treatment. The study of national law came later in many parts of Europe and only started in the seventeenth and eighteenth centuries.

On the continent of Europe, the transition to the study of national law was facilitated by the fact that modern legal systems grew mostly from Roman law. In England, the national law, known as the common law, was provided for legal practitioners by the Inns of Court through reading and practical exercises.

During the sixteenth and seventeenth century, most of the legal education moved toward the study of printed books. Although some jurists such as William Blackstone lectured on English law at Oxford in the 1750s, the university teaching of the common law did not develop significantly until the nineteenth century.

In England, as on the Continent and throughout most of the rest of the world (the exception is the United States), university-based legal education became an undergraduate program and remained so until quite recently. Since the late twentieth and early twenty-first century, influenced by globalization and the prominent role of the US economy, many countries have adopted the so-called US model of legal education. According to it, university-based instruction in law should focus on the profession rather than only as an academic discipline.

In the early years of the United States, following the English tradition, persons hoping to enter the law sought apprenticeships in the offices of leading lawyers. Later university-based law

schools (such as Harvard University founded in 1817) played a paradigmatic role in American legal education. By the late nineteenth century, Harvard had put in place a number of practices that eventually came to define American legal education, including the use of the "case method" of instruction (developed by Christopher Columbus Langdell). Besides, it adopted the requirement that students complete 3 years of training. Later the university hired full-time faculty of scholars, instead of a part-time faculty of practicing lawyers as had previously been the dominant pattern.

The Objectives of Legal Education

The history of legal education has also shaped the objectives, goals, and social function of legal education. In theory of the basic aims of law schools is to make the students familiar with legal concepts and theories and legal reasoning. For this purpose, legal education usually focuses intensively on the study of legal dogmatics (a body of decision-making theories useful for lawyers). It is also a central feature to show and explain how legal institutions (courts, political powers, administration, etc.) work. These skills are essential to be a legal professional such as a judge, a legal adviser, a lawyer, or a prosecutor.

Usually, law schools also aim to offer the students some knowledge about social, economic, and political contexts that are related to the practice of law. The globalization has produced some pressure in most law schools for adopting more interdisciplinary approaches to law. Following this trend, disciplines such as sociology of law, philosophy of law, and many "law and" disciplines (such as law and economics, political science and law, etc.) are becoming more popular in law schools' curriculum. Among them, law and economics is probably the most pervasive influence, especially in new areas of law related to economy and technology. In the United States, Canada, and some European countries, law schools sometimes appoint economists, historians, political scientists, or sociologists to their staffs. Besides, most law schools that belong to a university allow their students to take courses outside the law school as part of their work toward a degree.

Nevertheless, it is important to notice that most traditional law schools, especially in the civil law tradition, still base the dominant legal education on statutes and codified law analysis and commentaries. In common law tradition countries, the study of the legal precedents is usually more frequent and combined with statutes analysis. In general, European continental and Latin American legal education tend to be more abstract and doctrinal than the American counterpart.

Study and Teaching

Some disciplines constitute the core body of basic subjects a law student should study. They are constitutional law, contract law, torts, property, criminal law, corporate law, civil procedure, and legal theory. In civil law countries that usually offer a long list of mandatory courses, other areas of private law are also included such as family law. Besides, disciplines such as Introduction to the Study of Law are also frequent in the curriculum.

Both civil law and common law models of legal education also include a varied class of nonmandatory courses such as regulation, law and economics, securities regulation, bankruptcy law, environmental law, banking law, legal history, philosophy of law, etc., depending on the emphasis given by the specific law school.

The basic purpose of the basic courses is to make the students acquainted with the basic concepts and methods of legal dominion. However, it is a commonplace to say that legal education is usually not in harmony with both legal practice and the legal profession and the labor market in general. On one hand, many law schools still insist on traditional legal methods and legal materials that are at odds with the legal practice. In this case, the law in books is not updated with the law in action. This kind of problem is commonly associated with the challenge of offering a broad view of legal doctrine together with a grip with what is happening with the fast-evolving legal practice.

On the other hand, it is important to notice that law schools do not deal with students who are going to pursue a legal career. In many traditional law schools, it is noticeable that many former students go to other areas of professional practice, such as the private sector, civil service, and business. For this reason, it is important for legal education to train the professionals with skills that can be useful in other nonlegal areas of the professional market, such as analytic thinking, reading, verbal expression, and a clear understanding of how the institutions work.

This phenomenon is even more evident in many non-elite law schools in Latin America. In Mexico, Brazil, Colombia, Argentina, and even in other continents such as Africa, Asia, and North America, the huge expansion of law schools in recent years was driven by economic interests of education entrepreneurs (opening new schools at lower costs) and the students coming from lower economic classes looking for better opportunities in the labor market. In this sense many of the hundreds of law schools in Mexico, Brazil, India, etc., social function is not to form jurists but rather to serve as a tool for upward social mobility. Most of the students in these law schools do not find a job as lawyers, judges, or legal advisers. They usually get better opportunities in civil service, in education, and in the private sector, commerce, or industry.

Some critics see a disease in this situation since legal education should be focusing on offering education for those really interested in following a legal profession. Even though this could be labeled as an anomaly, it is one that is making a big impact in legal education in many countries and somehow expanding its social function beyond its traditional scopes. It is clear that the curriculum of the law school also must allow for the great diversity of careers followed by those who have been trained in the law.

Methodology

The methodology of legal education can vary considerably in different law schools and legal traditions. Most modern law schools tend to mix different methods of legal training such as Socratic method (today understood in a less orthodox way than if used to be in the last century), case method (in which the student reads reported cases and other materials collected in a casebook), and lecturing and tutorials (or seminars) based on previously read materials. The balance of these methods usually varies from school to school, and lecturing is still the dominant pedagogy in most civil law countries. It is important to notice that formal lectures permit very large compared with those recommended for seminars and tutorials. This reality impacts the costs of legal education. For this reason, usually, low-cost law schools are usually heavily dependent on formal lectures.

The cost also affects legal scholarship. Generally speaking, it has undergone an important change in the last 50 years. Still today, with the exception of the better-ranked law schools in the United States, the United Kingdom, Germany, and other European countries, most legal scholars combine one foot in the academy and one in the world of affairs. Since the late twentieth century, there has been a growing trend toward a more scholarly approach. In the United States, Canada, and the United Kingdom, top-ranked law schools' evaluations for tenure became closer to other academic fields. This process is following a similar but slower pace in Latin America where the majority of the faculty is still composed of part-time professors who also have a job as legal professionals.

This move toward a more scholarly approach also impacts legal education since students in contact with more academic faculty tend to adopt a stronger focus on research and pay more attention to scientific methods for legal thought and writing.

Cross-References

- ▶ Civil Law: Roman
- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Ethics: Legal
- ▶ Jurisprudence of Interests

▶ Law
▶ Language and Law
▶ Legal Argumentation
▶ Legal Knowledge: The Hermeneutical Point of View
▶ Legal Science
▶ Positive Law and Natural Law
▶ Rights in Recent Anglo-American Philosophy

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Introduction

Eugen Ehrlich (1862–1922) is considered one of the founders of the sociology of law. His understanding that law is a living force in society, which cannot be trapped in a statute or code, has brought about a profound change in the way jurists have come to understand law. This change is seen in various fields, but especially in philosophy and constitutional hermeneutics, the debates on the justice of judicial decisions have brought to the investigation the sociological aspect pointed out by Ehrlich.

Biography

Eugen Ehrlich was born on September 14, 1862, in Czernowitz, capital of the then Duchy of Bukovina, part of the Austrian Empire. Ehrlich was registered with the name Elias in the birth book of the Czernowitz Synagogue, a city that at that time had 40% of its population formed by Jews. He changed his name in honor of Prince Eugen and changed his religion to declare himself a Catholic, a fact that helped him in the development of his academic career. Ehrlich studied law at the Universities of Czernowitz, Lemberg, and Vienna. After receiving the title of Doctor of Law and having written his habilitation, Ehrlich was named Privatdozent at the University of Vienna. In 1896 he was appointed Extraordinary Professor at the University of Czernowitz and in 1900 was appointed Ordinary Professor. Eugen Ehrlich was Rector of the University of Czernowitz between 1906 and 1907. Ehrlich developed much of his prolific academic production in Czernowitz, having lived in the city until August 1914, when the University was closed because of the advance of the Russian troops. Ehrlich went to Vienna leaving behind much of his belongings. Between August 1914 and August 1918, Ehrlich lived in Vienna, spending the summer months in pensions in Küb, in the region of Semmering and Bad Ischl. Until his return to Czernowitz in November 1920, Ehrlich lived in Switzerland. During his time in Switzerland, Ehrlich sent unsuccessfully to Vienna his request for retirement. He also pursued unsuccessfully his qualification as Professor of Sociology in Berne. Faced with these refusals, Ehrlich decided to return to the University of Czernowitz and present his request for return to the activities of Professor in the Romanian public service. Eugen Ehrlich, however, did not get to resume his activities as a Professor in Czernowitz. With the worsening of his health problems due to diabetes, he died on May 2, 1922, in Vienna (Rehbinder 2008).

The Controversy with Hans Kelsen on the Nature of the Legal Science

The 1913 publication of Ehrlich's main work *Fundamental Principles of the Sociology of Law* was followed by a critical comment by Hans Kelsen (1881–1973), published in 1915. In that commentary, which was answered by Ehrlich and initiated the famous controversy between the two authors, Kelsen argues that Ehrlich produced a methodological syncretism, a confusion between normative jurisprudence and explanatory sociology of law. Ehrlich responds to Kelsen's criticism by saying that in his book law is always treated as "ought" and never as "is." According to Ehrlich, it makes no sense Kelsen's definition that the legal precept is a general legal norm and that it is logically impossible to think of legal relations without the presupposition of such precepts (Kelsen and Ehrlich 2003). The controversy between the two authors is marked by mutual incomprehension. Both Kelsen and Ehrlich depart from distinct methodological and terminological assumptions that preclude an approximation, a conclusive and approximate synthesis of the two understandings of law.

Ehrlich's Influence on the Free Law Movement

Ehrlich also played a prominent role in the so-called Free Law Movement, a movement that gained identity with Hermann Kantorowicz's manifesto "The Battle for Legal Science" (1906) but strongly influenced by Ehrlich's ideas. Ehrlich's lecture on the free investigation of Law and free legal science, given at the Vienna Law Society, is considered an important milestone of the movement. According to Ehrlich, the free investigation of Law brings the following tasks to juridical science: (i) overcoming traditional civil law; (ii) the understanding of law as a living force and not as a rigid dogma; (iii) evidence of jurisprudence trends, their origins, effects, characteristics, and values, from which a picture of what is given in the jurisprudence and what its fundamentals can be derived; (iv) the preparation of specific studies on legal documents as they are drawn up; (v) the elaboration of specific research on relations in real life, the so-called living law; and (vi) the need of legal science to approach the practical jurist, as both develop activities that are very close (Ehrlich 1903).

Ehrlich's Political Thought

Ehrlich develops reflections on politics when dealing with the legal method. Thus, it is possible to identify his criticism both to absolutist and liberal thinking regarding the results of their conceptions of law. For both political forms, the statute is the only law, and the Judge has the task of applying it. According to Ehrlich, Montesquieu's famous theory of the separation of powers knows only the law contained in the statute. One possible difference between them would be the fact that the absolutist conception of the law seeks only to imprison the judge, to subject him to the manifestation of the will of the state unity, whereas the liberal divides the state power into three and submits the executive and the judiciary to the manifestation of the legislator (Ehrlich 1925). Ehrlich's writings on subjects related to politics generally correspond to a quarter of all his academic production. These writings can be classified into three categories: (i) questions about the First World War, (ii) questions about social policy, and (iii) questions about the pacifist movement (Rehbinder 2008). Ehrlich's political thinking changed over time. In the student period in Vienna, he was strongly influenced by Marxist ideas. At that time as a professor in Czernowitz, he devoted himself to the study of social and political issues in the region and distanced himself from a more orthodox Marxist/socialist political position, as he had in Vienna, to take a more conciliatory position into a pragmatic perspective (Maliska 2015).

The Distinction Between State and Law According to Ehrlich

An important aspect of Ehrlich's work lies in the distinction between State and Law. The state

emerged as a military association formed in the warrior aristocratic alliance between tribes with nearby languages, followed by free men who chose a permanent war chief. Alongside this purely military function, the State incorporated two others, the tax function and the police function. The law, in turn, has its origin in the clan or in the domestic community. Law is a social phenomenon, since most of the legal life is developed far from the state, state organs, and state law. According to Ehrlich, there are four aspects that contribute to highlighting the State as a source of law: (i) its participation in the formation of law through the act of legislating; (ii) its participation in the administration of justice through state courts and partly also through other governmental bodies; (iii) its power of command over state organs, which serve as an instrument to enforce its laws; and finally, (iv) the conception that maintaining a situation that corresponds to the law is only possible, whether in the first or last instance, through the coercive force of the State (Ehrlich 1989).

According to Ehrlich, the enormous importance of the State for law lies in the fact that the Society uses the State to give a consistent endorsement of the law emanating from it, to impose its order on the associations that belong to it. The State is a social association, because the forces that act in the State are social forces and everything that emanates from the State, like the action of the governmental organs and, above all, the state legislation, is the work of the society executed through the state association (Ehrlich 1989).

Ehrlich draws attention to the distinction between statute (*Gesetz*) and state law (*staatliches Recht*). State law is not linked to the state from the form, but from the content. It is a law that arises from the state and does not exist without it. It is indifferent to know in what form it arises, whether through statutes, regulations, administrative acts, or judges' law. Legal prescription (*gesetzliche Vorschrift*) contains both state and non-state law. The difference lies in the content of the normative act (Ehrlich 1989).

State law consists of first-order norms and second-order norms. The first-order norms express the condition of the state of organ of the society. The Constitution of the State, the law of state organs, the purely state decision norms, and the State's prescriptions for the different fields of economic and social life, such as education, the productive sector, and the financial sector, are first-order norms. The second-order norms, in turn, criminal law, procedural law, and police law, protect society's law and state law, do not directly regulate life, but exist to support a more comprehensive regulation. State law provides for state peace through state bodies specially created for this purpose. In this way, police law and criminal law, for example, are second-order norms whose purpose is to protect existing social and state institutions (Ehrlich 1989).

State law produces its effects through decision norms (*Entscheidungsnormen*) or norms of intervention (*Eingriffsnormen*). The State prescribes to its courts and state organs how the issues that are brought to it must be decided. Most decision norms, however, are the law of jurists (*Juristenrecht*), but when they arise independent of the law of jurists and seek to achieve a state purpose, they are part of state law. The norms of intervention, in turn, instruct state organs when they will act regardless of being called. If the legal precept allows for direct intervention or if it works only as a norm of decision, the solution is independent of the legislator or the statute, since what matters, in fact, is the habit actually existing. Administrative law, says Ehrlich, is an example in which norms of decision and norms of intervention are presented (Ehrlich 1989).

The conception of law as a coactive order rests on the misinterpretation that the law comes from the State. It is known that only a small part of the law, the state law, comes from the State. The idea that all law derives from the State, that is, that a norm, regardless of how it emerged, only becomes a legal norm when it is recognized as such by the State, which involves it with second-order norms, with threats of punishment, procedure, and administrative rules, does not hold. If these aspects were indeed an integral part of the concept of law, says Ehrlich, much of the formations accompanying universal history and the history of law (the order of the Roman house, the medieval landlord, communal organizations, to the

extent that they themselves are not considered as a State) would not be part of the law (Ehrlich 1989).

The fear of punishment is not the only way to obtain obedience to norms. Ehrlich refers to the existence of internal obedience to the observance of norms. Obedience to law results, says Ehrlich, from an educational process. The impetus to comply with the norm alone is not enough. The balance between them is that it promotes the effectiveness of norms. All normative coercion, be it juridical, moral, religious, customary, fashion, and good manners, rests on the fact that the individual is not an "individual being," since the same individual is bound to several associations. Homeland, place of origin, religious community, family, circle of friends, and political militancy are not empty words to anyone. It is in your circle that the person seeks support in case of need, comfort in disgrace, recognition, honor, and prestige, in short, everything that gives value in life. Associations are also important for professional success, and because of the profession, the person is linked to them as well. In this way, man/woman acts according to law, because social relations compel him/her to do so (Ehrlich 1989).

Most of the legal life is developed far from the state, state organs, and state law. As in the remote past, in our era, new communities, new ownership relations, new contracts, new hereditary orders appear that for the statutes are still unknown. Notwithstanding this analysis, Ehrlich writes that social associations do not represent autonomous nuclei before the state reality, because they are understood as an expression of a law that is in harmony with the law of the State. According to Ehrlich, the experience of millennia shows that the formation of a locally dispersed law can only serve strictly local needs. The development of law has a great impulse only when, in large territorial extensions, it emanates from a single center that only the state can create. However, the existence of a single center does not presuppose the existence of general legislation. This, it is known, failed in the case of the two most important legal systems. Roman law and English law did not become what they are through statutes. In Rome the work was done by jurists, with the sources of intellectual aid provided by the immense empire. In England it was the judges who in London, for centuries, found the law proper to a large, economically developed and politically evolved country. The common law is fundamentally a work of the London courts. Only the third universal legal system, the French, owes its success above all to legislation. Thus, a highly developed law may arise without state legislation, but it certainly will not come without a state (Ehrlich 1989).

E

Society as a Grouping of Associations and the Role of Legal Norms

According to Ehrlich, society is formed not as a grouping of isolated individuals, but as a grouping of associations. Every individual belongs to a social association and these associations are the State, the family, the cooperative, the communities, etc. Associations have an internal order that is determined by legal norms. The basic difference between a legal precept and a legal norm is that the first one is the writing of a legal determination in a statute, and the second one is the legal determination transformed into action. While the legal precept emanates from the State through the formal mechanisms of state legal creation, the legal norm is empirical law practiced in associations, which is independent of the legal determination (Ehrlich 1989).

The legal norms, in turn, are not to be confused with other social norms. The question of the opposition between legal norms and extralegal norms is not a question of social science but of social psychology. The various types of norms arouse various feelings, and one reacts to transgressions in different ways, with different feelings. The legal norm is particularly for Ehrlich, the sentiment for which the jurists of the common law had already found the significant concept *opinio necessitates* (Ehrlich 1989).

The Concept of Living Law

Ehrlich's work can be summed up in the concept of living law. In short, all of its academic effort is

aimed at demonstrating that law is constituted by the binding norms that people voluntarily observe in social coexistence. Living law, as opposed to the only law-in-force before the courts and state bodies, lies in the dynamics of life, in the challenges brought by technological development, and in the new practices that open new fields of work to the jurist. To understand that the living law of people may consist of a code would be like damming a stream of water in a tank, one would no longer have a living stream, only dead water (Ehrlich 1986).

According to Ehrlich, living law is found in modern documents, in the direct observation of the day to day of commerce, of customs, and also of associations. The modern legal document, especially the judicial sentence, presents itself as the most important source of knowledge of living law, in the sense that it presents itself as a witness of living law. It is not a matter of studying judicial sentence as a correct interpretation of statutes, but of investigating the legal relations inherent in it, the living law contained within it (Ehrlich 1989).

However, Ehrlich observes that the investigation of living law cannot be restricted to the study of judicial decisions, since they do not in fact provide a complete picture of the legal life. Only a minimal part of what actually occurs is brought to court. Thus, the sociological method requires that the results obtained from the decisions of state organs may be supplemented by direct observation of reality (Ehrlich 1989).

According to Ehrlich, the sociological analysis of the law will have to distinguish between law-in-force (*geltendes Recht*) and living law (*lebendes Recht*), in order to compare reality with both legal prescriptions and documents. The law-in-force (decision norm) is all ruling content of the document that will be brought to the process, but it is only living law if the parties observe it, even if they do not think about the process. Living law can also be observed by empirical analysis, even when there is no document that registers it. In these cases, jurist should be alert to day-to-day, inquiring people and register their manifestations (Ehrlich 1989).

Eugen Ehrlich was an author who opposed the positivist thought of his time and the dogma that every law comes from the statute. Its pioneering role in investigating law as a social fact, in demonstrating that the law governing human life does not necessarily stem from state law, is highly relevant, both from the point of view of studies on legal pluralism (Bauwens 2016; Benda-Beckmann 2002; Bönte 2008; Chiba 1989; Correas 2007; Fournier 2016; Gailhofer 2016; Hertogh 2009; Meder 2009; Meder 2015; Otis 2014; Robles Morchón 2002; Röhl and Machura 2013; Schneider 2016; Seinecke 2015; Tamanaha 2008; Tarrega et al. 2016; Teubner 1996; Vogl 2003; Wolkmer 2015) and from studies on fundamental rights and the role of constitutional jurisdiction.

Ehrlich, Constitution and Pluralism

Living law and association are two concepts of Ehrlich that can aid the constitutional law in the investigation of the relation between Constitution and pluralism (Maliska 2015, 2018). In portraying the forces of society expressed in the production of a living law in the context of the various associations of the community life, Ehrlich shows to constitutional law the existence of a law outside state law. In this context, the concept of a political community is presented as a more comprehensive idea than that of society, since it does not seek to oppose public or private order, but to understand, under the aegis of the Constitution, both State and society. The political community brings together the various social associations and the living law that is produced in them. The plurality of associations and constitutional unity, as a source of validity of law, points to the relevance of the work of Eugen Ehrlich in the twenty-first century (Maliska 2019).

Conclusion

A final word on the importance of Eugen Ehrlich's work can be addressed to the meaning of law for a world civil society. The subject was investigated by Teubner (1996) with reference to a classic passage in the preface to *Fundamental Principles*

of the Sociology of Law: "The center of gravity of legal development therefore from time immemorial has not lain in the activity of the state, but in society itself, and must be sought there at the present time." The idea of law as a living force in society has enormous significance for the twenty-first-century world. The development of a law that is beyond the state (international, supranational, and transnational law) and also below it (extra-state local legal orders), based on a pluralistic legal paradigm, finds Eugen Ehrlich's work an indispensable source.

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Emerson, Ralph Waldo

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Introduction

Ralph Waldo Emerson (1803–1882) was perhaps the most important intellectual in American history. Not only by his writings and lectures did he shape much of nineteenth-century thinking, but he inspired schools of philosophers, poets, essayists, artists, and even landscape architects. His lifelong watchword of self-reliance has been called America's one true religion.

Descendent of six generations of Congregationalist ministers, Emerson was raised in Boston and attended Harvard. He was a desultory student, more popular and intellectually wandering than academically accomplished. After briefly working as a teacher, he became a minister in the more liberal faith of Unitarianism. But in religious crisis, he resigned his pulpit and, taking advantage of the newly established lyceum movement, became a much sought-after public speaker. After given a series of lectures until they became well-known, he converted them into books, riding the emerging print culture to increased income and notoriety. Also notable is his remarkably candid Journals, some 2.5 million words that he called his "savings bank," as he would construct his talks and essays from those spontaneous private entries. They remain one of the great monuments of American writing.

The young Emerson and some of his contemporary Harvard friends reacted against what they perceived of as the decorous and self-satisfied world of Boston mercantilism. Tapping into a Puritanical vein of instinct and enthusiasm earlier expressed by Jonathan Edwards and later invigorated by European Romanticism and Neoplatonism, they contested the Lockean empirical tradition with their own interpretation of Kantian idealism. In his foreword to Coleridge's *Aids to Reflection* (1825), John Marsh had made available to Americans a reductive Kantian dichotomy of Reason – the inherent moral sensibilities – and Understanding – the external world which humans perceive approximately and which feeds and stimulates Reason. As Reason *transcends* Understanding, this group of young thinkers embraced what they called Transcendentalism. This loosely organized cluster of thought evolved in the 1880s into American Pragmatism – both absorbing and reacting against Emersonianism.

Philosophically, Emerson was a committed non-formalist, believing in the spontaneity of thought. "A foolish consistency is the hobgoblin of little minds" from his 1841 essay "Self-Reliance" is one of the most often-quoted American maxims (Spiller et al. 1971, 2:33). "I unsettle all things. No facts are to me sacred; none are profane; I simply experiment, an endless seeker, with no Past at my back." He wrote in "Circles" the same year (Spiller et al. 1971, 2:188). Because of his eclectic skepticism and insistence on drawing on his own thoughts, contemporaries often compared him to Montaigne, a comparison he embraced. He questioned all conventions, challenging a Boston obsessed with social reform: "[D]o not tell me. . .of my obligation to put all poor men in good situations. Are they *my* poor?" (Spiller et al. 1971, 2:31).

Social Philosophy

Emerson's social philosophy begins with his belief in self-reliance. "In all my lectures, I have taught one doctrine, namely, the infinitude of the private man," he wrote in the Journals (Gillman et al. 1960, 7:342). His essay "Self-Reliance" sets out the qualities of that individual. They include: self-trust ("Trust thyself: every heart vibrates to that iron string" Spiller et al. 1971, 2:28) and nonconformity ("Whoso would be a man must be a nonconformist" Spiller et al. 1971, 2:29). But Emerson was a highly sociable being and self-reliance must take account of living among others: "It is easy in the world to live after the world's opinion; it is easy in solitude to live after our own; but the great man is he who in the midst of the crowd keeps with perfect sweetness the independence of solitude" (Spiller et al. 1971, 2:31). That individual might gain enormous power: "if the single man plant himself indomitably on his instincts, and there abide, the huge world will come round to him" (Spiller et al. 1971, 1:69 "The American Scholar"). Individual power, the ability to live within and perhaps even alter Fate, was a lifelong theme. Little wonder that Nietzsche found so much to like in Emerson's writings.

But the self-reliant individual, the person who has what Emerson calls "*plus* power," must acknowledge social responsibility. *Representative Men* (1850), a direct response to friend Thomas Carlyle's more autocratic *On Heroes, Hero-Worship, and The Heroic in History* (1841), was a tour-de-force in arguing for the symbiotic relationship between individual greatness and democratic principles. It also helped Emerson work out his own struggle in converting genius into practical power.

Emerson's broader political sentiments were always liberal and sometimes radical. Initially refusing to belong to any political or social movement for fear of compromising his self-reliance, Emerson eventually became a leader in the abolitionist movement and a champion of women's rights.

Reductively, we might divide Emerson's thinking into an earlier period of greater self-reliance and a later period of political activism. Generally speaking, philosophers appreciate the earlier period as a purer expression of his philosophy, while historians and political scientists applaud the later period as a practical application brought on by the need to take a political stand.

Emerson's views on race were deeply complicated and are greatly debated. With increasing consistency Emerson spoke out on the equality of races, and, certainly by the time of the Civil War, was a strong champion that freed slaves would supply new energy to the American experiment. Privately, however, his record is more ambiguous. His Journals – which reflect his spontaneous insights – do contain despairing observations of African American inferiority. Most, but not all, of those expressions, however, are found in his earlier journal entries.

As he became an abolitionist, Emerson also joined the women's movement. Although unable to attend the National Woman's Rights Convention in 1850, Emerson signed "The Declaration of Principles" and consistently supported the women's movement. His signature talk, "Woman," was an address to the annual woman's right convention in 1855. Although worried that exercising the right to vote might be the "unsexing" of women, he nevertheless observed that "it is they and not we that are to determine it." Emerson's views were "essentialist," that differences between sexes occur in nature, a position also argued by other contemporary feminists, including his friend and great feminist Margaret Fuller.

Law

Emerson gave little thought to law until he became a public abolitionist. The Compromise of 1850, designed to organize the vast lands won in the Mexican-American War, included the Fugitive Slave Law. Requiring northern citizens to surrender southern fugitive slaves, the law shattered Emerson's confidence in a peaceful resolution to slavery. Incredulous that "this filthy enactment" could be "made in the 19th Century, by people who read and write" (Gillman et al.

1960, 11:412), the moral agony of involving himself in slavery caused him to abandon his rigid self-reliance and fully commit to participation in the abolitionist cause. He began an abolitionist talk: "The last year has forced us all into politics, and made it a paramount duty to seek what it is often a duty to shun. . ..I wake in the morning with a painful sensation. . .which robs the landscape of beauty, and takes the sunshine out of every hour" (Bosco and Myerson 2010, 1:258–276). Emerson made a classically Stoic response: to resolve stress, he must surrender his *apatheia* in order to reclaim it later. Emerson encouraged resistance to the law "in every manner, singly or socially, in private and in public, by voice and by pen – and, first of all, by substantial help and hospitality to the slave, and defending him against his hunters. . .." He added: "[T]his result has become certain, that the Union is no longer desirable" (Myerson and Gougeon 1995, 68).

John Brown's failed attempt to instigate a slave rebellion in 1859 at Harpers Ferry and his subsequent hanging provoked Emerson (and Thoreau) to echo the important Stoic argument (already made by other abolitionists) that natural law must prevail over human law: that the Declaration of Independence, which "hold[s] these truths to be self-evident, that all men are created equal" is a greater truth than is found in the Constitution which indirectly recognized slavery. Emerson's public support for Brown's actions are considered by some modern historians as helping to spark the Civil War, in such high esteem was Emerson held in the North and with so much fear in the South.

Conclusion

Because of his fierce belief in self-reliance, Emerson was a reluctant believer in social improvement and was skeptical about law as an instrument of change: "The end of all political struggle, is, to establish morality as the basis of all legislation. 'T s not free institutions, 'tis not a republic, 'tis not a democracy. . . We want a. . .state of things which allows every man the largest liberty compatible with the liberty of every other man" ("Fortune of the Republic": Myerson and Gougeon 1995, 153). Despite his eventual involvement in social causes, Emerson's prevailing message was that genuine progress can only be measured individually. To defend him from attacks by formalists, his successor, John Dewey, called him America's "Philosopher for democracy." That judgment still stands.

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Eminent Domain

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Eminent domain means the governmental power to expropriate private property for public use. Such expropriation is also called taking, appropriation, condemnation, or compulsory acquisition.

The phrase "eminent domain" comes from the early modern Latin expression "dominium eminens" (supreme ownership) (Waelkens 2015: 297). Since this power is an apparent restriction on property rights, Grotius in *On the Law of War and Peace*, II. 14. 7. required that "in order that this

[taking] may be done by the power of eminent domain, the first requisite is public advantage; then, that compensation from the public funds be made, if possible, to the one who has lost his right" (Neff 2012: 226). Those dual requirements of (1) public advantage and (2) compensation are reflected in many liberal constitutional codes today. Thus, the Fifth Amendment to the US Constitution provides, "nor shall private property be taken for public use, without just compensation," and the third paragraph of Article 29 of the Japanese Constitution provides, "private property may be taken for public use upon just compensation thereof." (For similar restrictions, see, e.g., Article 14, paragraph 3 of the German Constitution; Article 26, paragraph 2 of the Swiss Constitution; and Article 23, paragraph 3 of the Korean Constitution.) Those requirements are regarded as strong bulwarks against governmental infringements of private citizens' rights.

There are several interpretative problems regarding the takings clause, however. First, when is private property taken for public use? If it is taken for the interest of other citizen(s), can that redistributive taking be for public use? And if so, when and why is the taking for public use? Or, put another way, can a forced transfer of private property to another private party satisfy the requirements? The recent US Supreme Court's controversial decision in *Kelo v. City of New London* (2005) is an example of this problem, where a 5–4 majority held that the Connecticut City's appropriation of residential neighborhoods to a private nonprofit entity for the stated purpose of economic development did not violate the requirement of public use.

Second, when a government does not physically take private property but regulates its use and enjoyment by its owner by, for example, environmental and zoning regulations, does this "regulatory taking" require compensation? In addition, is the eminent domain clause applicable not only to real and personal property but also to contractual rights, choses in action, and intellectual property? If the concept of eminent domain is interpreted in such a wide sense, taking and taxation are hardly distinguishable in theory (Epstein 1985).

Third, how should "just compensation" be decided? Does it mean market value, or should the valuation take into account the owner's subjective use value and attachment? If the former approach is adopted, then the owners might be forced to sell their property at much lower price than they would accept without eminent domain.

Different normative legal theories attempt to answer those questions in different ways (Munzer 1990: chapters 14 and 15; Alexander and Penalver 2012: chapter 8). Utilitarian theory of property and its cousin, economic analysis of property law, tend to permit takings when they are expected to increase the aggregate utility on the whole by overcoming such problems as holdout and transaction costs. To use Calabresi and Melamed's terminology, private property is protected by the liability rule here, rather than the property rule. Rawlsian liberal egalitarian theory may allow takings for purely distributive purposes, possibly even without compensation for affluent owners, unless taxation is a more appropriate way of distribution. Hegelian personhood theory of property would distinguish personal property, which is considered indispensable to personal development, and fungible property, which is interchangeable and impersonal. Only the latter kind of property is liable to taking. While those approaches to property law are often quite permissive of the governmental power of taking, Lockean (and other types of) libertarian theory of property is skeptical of eminent domain in both its theory and practice and requires that the concepts of public use and just compensation be strictly interpreted. In fact, the most forceful opposition to the *Kelo* decision comes from this side (e.g., Epstein 2008; Benson 2010). The reasons libertarians criticize the decision include, among others, the governmental or legislative abuse of eminent domain to confer benefits on politically powerful interest groups at the expense of the politically weak, imprudent expenditure of public money on unproductive projects, the impossibility to correctly estimate owners' essentially subjective valuations of their property, and the general loss or diminution of citizens' economic and personal freedom and security.

In these ways, eminent domain is a touchstone and battleground of diverse approaches to property law today.

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Enforcement of Morality and Law

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Introduction

Some legal norms are enforceable: Using force to prevent and respond to their violation is authorized by law. There may be conceivable legal systems that contain no such authorization (Raz 1975: 158–160). But enforceable legal norms form part of every legal system we know to have existed. And in every such system, those norms impose duties that form part of morality, including duties not to kill, maim, cheat, or steal from others (Hart 1961: 192ff). Though these remarks establish a connection between law and morality, that connection should not be overstated. Legal duties not to kill, maim, cheat, and steal may extend to only some of those to whom morality would have them extend. As HLA Hart reminds us,

> even the homicide of a slave may be regarded only as a waste of public resources or as an offence against the master whose property he is. Even where slavery is not officially recognized, discriminations on grounds of race, colour, or creed may produce a legal system. . .which does not recognize that all. . .are entitled to a minimum of protection from others. (Hart 1961: 200–201)

Hart's examples show that not all enforceable legal norms are morally justified. What does it take to provide such a justification? The answer depends, it is plausible to think, on the uses to which those norms permit force to be put. This entry focuses on the enforceable legal norms that make up the criminal law. To make φing a criminal wrong is to authorize the use of reasonable force against P to achieve a variety of objectives. These include (i) preventing P from φing, (ii) obtaining evidence of past, present, or future φing, (iii) ensuring P appears in court to be tried for having φed, and (iv) giving effect to criminal sentences imposed by the courts on convicted φers. Our question is what role moral wrongdoing plays in the justification of such legal norms.

Two Principles

One school of thought that offers an answer to our question is known as legal moralism. As the disagreements between legal moralists are many, an uncontentious characterization is hard to find. But all legal moralists claim that moral wrongdoing figures in the justification of criminalization *in its own right*. Legal antimoralists deny this claim. This need not be to deny that lawmakers who are considering whether to criminalize φing should often take an interest in whether φing is morally wrong. One remains an antimoralist if one claims that, where law-makers should take such an interest, it is an interest they should take for some further reason – because, say, criminalizing moral wrongs will help to improve economic productivity (Posner 1985), or support public institutions (Chiao 2016), or preserve social stability. If

the moral wrongfulness of φing matters because – and only because – it indicates that criminalization will serve these further ends, we have rejected not accepted legal moralism.

If moral wrongdoing does figure in the justification of criminalization – and does so in its own right – how does it so figure? Consider first what we might call the instrumental principle:

> *Instrumental principle:* φing ought to be criminalised only if criminalizing φing helps to prevent or ameliorate moral wrongs, and there is no less costly way to do so.

The instrumental principle can usefully be contrasted with what we might call the mirror principle:

> *Mirror principle:* φing ought to be criminalised if and only if φing is a moral wrong.

These principles have very different implications. If φing is a moral wrong, the mirror principle implies that φing ought to be a criminal wrong (Moore 1997: 645; Husak 2016: 34ff). The instrumental principle has no such implication. For one thing, that principle only identifies a necessary condition of justified criminalization. For another, there is no guarantee that criminalizing a moral wrong will prevent or ameliorate moral wrongdoing. It may only succeed, despite itself, in encouraging would-be wrongdoers to commit more and graver moral wrongs. If this would be the effect of criminalizing φing, the instrumental principle implies that φing should not be criminalized.

Conversely, if φing is not a moral wrong, the mirror principle implies that φing should not be a criminal wrong (Moore 1997: 72; Husak 2007: 66; Duff 2018: 55ff). Again, the instrumental principle has no such implication (Edwards 2018a). Criminalizing conduct ancillary to wrongdoing may be the most effective way to prevent moral wrongs. We may prevent more gun deaths by making it a crime to possess unlicensed firearms than we would by criminalizing shooting others alone. We may prevent more deaths on the roads by making it a crime to drive with a specific blood alcohol level than we would by only criminalizing dangerous driving. True, these ancillary acts may be sufficiently dangerous to be morally wrongful in their own right. But this need not be so. People without licenses may be safer possessors than those who have them. Drivers above a specific blood alcohol level may be safer behind the wheel than those below it. Why not just criminalize ancillary acts that are dangerous? Because this does little good if dangerous possessors and dangerous drivers tend to mistakenly think their conduct safe. If they do, preventing wrongs may require that we criminalize the safe along with the dangerous. Doing so then satisfies the instrumental principle. It does not satisfy the mirror principle.

Two general points are worth making about these principles before we consider some particulars. First, both principles are concerned with critical not conventional morality. Conventional immoralities are violations of norms that members of a social group accept and practice. Critical immoralities are violations of norms that those members ought to accept and practice (Hart 1963: 17ff). No one seriously argues that the fact that φ is conventionally immoral itself suffices to justify criminalizing φing. Nor is it plausible to claim that this fact – or the fact that criminalizing φing would prevent conventional immoralities – is a necessary condition of justified criminalization. Norms of conventional morality can, after all, be repugnant, absurd, or downright confused. True, such norms may also be amply justified. True, we may wish to lend justified norms of conventional morality the protection of the criminal law. But justified norms of conventional morality are norms of critical morality. So there is nothing here to suggest that norms of the former kind figure in the justification of criminalization in their own right.

Patrick Devlin is often thought to be a legal moralist who dissents from these claims. On closer inspection, however, Devlin's claims are consistent with them. Devlin claims that we ought to criminalize violations of conventional morality when, and because, failing to do so would threaten social cohesion. Since any such violation might turn out to pose such a threat, no principled line can be drawn between those immoralities that we may and may not criminalize

(Devlin 1959). Notice first that, since conduct that is *not* conventionally immoral may also threaten social cohesion, this argument does nothing to support the claim that conventional immorality – or its prevention – is a necessary condition of justified criminalization. Notice second that, for Devlin, it is not conventional morality *itself* that justifies criminalization. What justifies criminalization is preserving social cohesion. The fact that φing is conventionally immoral may indicate that its criminalization will contribute to this further end. But that fact is not normatively significant in its own right. It follows that – contrary to popular opinion – Devlin is no legal moralist.

A second general point about the aforementioned principles concerns the strength of the conditions they set. According to the mirror principle, the fact that φ is morally wrong is a sufficient condition of justified criminalization. Since nobody believes that all moral wrongs should be criminalized, sufficiency must be understood here to be defeasible: The claim must be that while the immorality of φing sometimes gives us undefeated reason to criminalize, that reason can also be defeated by reasons that countervail. The possible defeaters are many and varied. Criminalizing immoralities can diminish privacy, invade autonomy, exacerbate inequality, foster intolerance, and do much else that is evil besides (Moore 1997: 739–795). Only a fundamentalist would claim that these (and other) moral costs of criminalization never defeat our reasons to criminalize moral wrongs.

Both the instrumental principle and the mirror principle identify necessary conditions of justified criminalization. There is some debate about how these conditions are best understood. One interpretation has it that the conditions hold *presumptively*: While there are always strong reasons against criminalizing the morally permitted – or against criminalization that fails to prevent or ameliorate moral wrongs – those reasons can be defeated by reasons that countervail (Cornford 2017; Edwards 2018b). A rival interpretation has it that the conditions hold *categorically* – the countervailing reasons are defeated reasons come what may (Simester 2014; Duff 2018: 249ff).

The Instrumental Principle

Let us now turn to some aspects of the instrumental principle. It might be thought that criminal law satisfies this principle by deterring those disposed to commit wrongs – by threatening to punish, and actually punishing, those who would otherwise act wrongly. No doubt this is a significant part of the truth. But there are other means by which criminal law can prevent and ameliorate wrongs, including by helping instill dispositions to avoid moral wrongdoing (Gardner 2007: 201–211). As many have claimed, criminal law – at least paradigmatically – speaks with a moral voice: It communicates that violations of its norms are acts worthy of censure (Simester 2014: 493; Duff 2018: 18ff). Those who take the criminal law at its word – who endorse its moral message – will be disposed to refrain from offending acts even if they know they will not be punished. Nor need the criminal law's preventive contribution be so direct. Given time, changes in the criminal law can contribute to changes in conventional morality. As Les Green puts the point,

> the most important changes in our morality in the last century or two—the repudiation of chattel slavery, the rise of the view that individuals have rights even against their lawful sovereigns, and the idea men and women are moral equals—were not mere "changes" in our morality, on a par with the evolution in spoken English or shifts in fashions of dress. They were changes brought about intentionally if indirectly by people who protested, boycotted, wrote pamphlets, preached sermons, and organized unions—but also by people who voted, legislated, and litigated. In doing so they changed the law, and in changing the law they helped change our morality. (Green 2013: 494)

Changes in conventional morality of the kind Green describes have helped prevent many critical moral wrongs. Criminal laws that contribute to such changes thereby satisfy the instrumental principle. This is so even if those laws largely disappear from our practical reasoning – even if many of us come to refrain from φing because it violates norms we accept and practice, and not because we are required to refrain by law. That criminal law's preventive contribution can end up being largely self-effacing does not make it any less a contribution.

None of this is to say that criminal laws which satisfy the instrumental principle typically do so without resorting to criminal punishment. Criminal laws that go unenforced are hardly likely to instill dispositions to avoid moral wrongdoing, let alone deter those who remain disposed to commit wrongs. This reliance on enforcement leads to a first worry about the instrumental principle: that it licenses deliberately harming some as a means of preventing wrongdoing by others. How serious a worry this is depends in part on the scope and force of the means principle: on whether and when we wrong others by using them as a means to an end. One reply has it that the means principle only rules out using others as *mere* means. The criminal law can avoid violating this injunction by conforming to additional constraints on its pursuit of prevention. Which constraints these are is a matter of debate. On one view, what is required is that offenders have a fair opportunity to avoid criminal liability (Hart 1968). On another, offenders must themselves be duty bound to protect others against the wrongs criminalization serves to prevent. This last idea is at the heart of what Victor Tadros calls the duty view (Tadros 2011, 2016). On that view, criminalizing φing is compatible with the means principle just as long as the harm imposed on φers as a means of preventing and ameliorating moral wrongs is harm that φers have a duty to suffer in pursuit of this objective.

The duty view purports to show that offenders who are harmed in order to prevent or ameliorate wrongs need not be wronged in the process. Such offenders are, as it is now often put, morally liable to be harmed. Be that as it may, we know that all systems of criminal law do much more harm than this. Some are tried and punished despite having committed no offense. Others suffer punishment disproportionate to the offense they committed. And harm is done to those not themselves tried or punished – to families, friends, employers, etc., of those caught up the criminal justice system. That criminalization results in such harms leads to a second worry about the instrumental principle: that preventing moral wrongs is insufficient to justify harming those who are not liable to be harmed. One response to this worry is to claim that criminal laws ought not to be enacted unless failing to enact those laws would itself be harmful. Those who make this claim endorse one version of the harm principle (Feinberg 1984; Raz 1987; Edwards 2014). According to that version, what the harm principle demands is not that all criminal conduct be harmful. What it demands is rather that conduct not be criminalized, unless criminalizing that conduct is necessary to prevent harm. All else being equal, criminalizing unsuccessful (and harmless) attempts satisfies (this version of) the harm principle if, were unsuccessful (and harmless) attempts not criminalized, there would be more successful (and harmful) attempts.

The instrumental principle and the harm principle are not rivals. Since each identifies a necessary condition for permissible criminalization, one can consistently endorse both. Some, nonetheless, think that the latter subsumes the former: Since people are harmed only if they are wronged, laws that satisfy the harm principle automatically satisfy the instrumental principle (Feinberg 1984: 31–36). One might also claim that the opposite is true: Since people are wronged only if they are harmed, laws that satisfy the instrumental principle automatically satisfy the harm principle. Both views should be rejected. We can wrong others without harming them, and harm others without wronging them. If a side effect of my opening a cake shop on the high street is that your shop goes bankrupt, my actions harm you without wronging you. If I set out to bankrupt you but your cakes sell just as well, I wrong you without harming you.

The above remarks suggest that criminal laws which satisfy the instrumental principle need not be morally objectionable. A further worry about that principle stems from the fact that – at least in domestic legal systems – criminal laws are exercises of the power of the state. It follows that instances of criminalization must satisfy conditions of political legitimacy. The precise content of these conditions lies beyond the scope of this entry, but it is worth noting two possible positions here. One is what we might call *welfarism*: The state's only legitimate objective is improving the lives of its people. A second possibility we can call *neutralism*: The state's only legitimate objective is protecting its people's moral rights. One

way to render the instrumental principle compatible with welfarism is to combine it with the harm principle. Another is to endorse moral paternalism. On this view, "wrongdoing makes the lives of wrongdoers go worse" (Tadros 2016, 2). It does so not because our acting wrongly has bad consequences for us – though of course it may do – but because our acting wrongly itself constitutes a blemish on our lives (Gardner 2005, 54–61). On this view, any criminal law that satisfies the instrumental principle thereby makes a positive contribution to people's welfare. True, that contribution may be decisively outweighed by the damage criminalization does. It remains the case that welfarism provides no principled reason to exclude any moral wrong from the purview of the criminal law.

Can the same be said of neutralism? It cannot. As not all moral duties are owed to others, not every moral wrong violates moral rights. Feinberg spells out the implications for criminalization as follows:

> The only legitimate ground [for criminalization] is a thoroughly moral one, namely the protection of moral rights; but not every conceivable moral ground would be a legitimate one for criminalization. That is what is meant by saying that, for the liberal, the criminal law is not concerned with enforcing "morality as such," but only with protecting the rights of others. (Feinberg 1988, 153–154)

As Feinberg recognizes, this view must contend with counterexamples. Perhaps the most widely discussed examples concern future people. Consider:

> *Depletion.* As a community, we must choose whether to deplete or conserve certain kinds of resources. If we choose *Depletion*, the quality of life over the next two centuries would be slightly higher than it would have been if we had chosen *Conservation*. But it would later, for many centuries, be much lower than it would have been if we had chosen *Conservation.* (Parfit 1984: 361ff)

We can add three further stipulations. First, the people whose quality of life will be lower if we choose *Depletion* will have lives that are worth living. Second, these people would not have existed had we chosen *Conservation*. Given the effects of the two policies on the details of people's lives, our choice of policy will increasingly result in different children being born. After two centuries, we can assume, no one living would have been born whichever policy we chose. Third, whether we end up depleting or conserving depends on whether certain activities persist. The persistence of these activities suffices for *Depletion*. Their cessation is necessary and sufficient for *Conservation*. Unless we criminalize, the activities will persist.

These stipulations in hand, we can now ask and answer two questions.

1. Would criminalization be justified under these conditions? Yes. Given that billions of people would for many centuries be much worse off under *Depletion*, it would be wrong not to criminalize for *Conservation*.
2. Would criminalization prevent anyone's moral rights being violated? No. It is true that if we deplete, by continuing with the aforementioned activities, billions of people will come to live much worse lives. But, we are assuming, the people in question would not otherwise have existed. And, we are also assuming, their lives are worth living. To claim that these people have a right to cessation is to claim that we owe it to them to act in ways that would preclude their existence. Given that their lives are worth living, it is hard to believe that such a duty exists. So it is hard to believe that criminalizing for *Conservation* prevents the violation of anyone's moral rights.

Whatever we make of Feinberg's rights-based view, it helps show that the instrumental principle admits of wider and narrower interpretations:

> *Wide instrumental principle:* φing ought to be criminalized only if criminalizing φing helps prevent or ameliorate moral wrongs.

> *Narrow instrumental principle:* φing ought to be criminalized only if criminalizing φing helps prevent or ameliorate moral wrongs of a particular kind.

Some worry that even the wide instrumental principle is not wide enough. Are not there cases in which criminalizing a wrong will fail to prevent

or ameliorate its commission, but in which we remain justified in criminalizing the wrong? Grant that there are. The instrumental principle does not contraindicate. That principle does not require that we only criminalize moral wrongs – or acts ancillary to them – if this will result in fewer instances *of those very wrongs.* It allows for criminalization that will prevent or ameliorate *other* moral wrongs – other, that is, than the moral wrongs thereby criminalized. What might these wrongs be? Some are *secondary* wrongs – those committed in the wake of (actual or alleged) wrongdoing. Of these secondary wrongs, some are wrongs of *commission*: wrongs committed by victims and their supporters in retaliation for (actual or alleged) wrongdoing. As John Gardner observes:

> It is a central plank of the argument for having any law. . .that it cools heated reactions to actual and alleged wrongdoing, that it substitutes its laborious rituals and distractions for the horrors of the blood-feud, the vendetta, the duel, the lynching, and so forth. (Gardner 2018, 1–2)

Criminal laws that prevent these horrors thereby prevent moral wrongs. Other secondary wrongs are wrongs of *omission* – wrongs we commit by failing to discharge duties we incur by acting wrongly. These include duties to answer for wrongs (Duff 2011, 2018), and to suffer harm necessary to protect others against further wrongdoing (Tadros 2011, 2016). Criminal trials can help prevent breaches of the former duty by putting wrongdoers under pressure to answer for themselves in court (Gardner 2007, 190). Criminal punishments can help prevent breaches of the latter duty by harming wrongdoers in ways that reduce the likelihood of future wrongs. Criminal laws that prevent these secondary wrongs thereby satisfy the wide instrumental principle.

So far, we have focused on the idea that failing to exercise legal powers – to criminalize, try, and punish – can make it more likely that moral duties will be breached. A different idea is that failing to exercise such powers can *itself* breach moral duties. Michael Moore claims that societies have a duty to do retributive justice in a manner that provides would-be wrongdoers with fair warning (Moore 1997, 91). Antony Duff argues that polities have a duty to call wrongdoers to answer for the commission of public wrongs (Duff 2011, 140). If Moore and Duff are right, failing to try and punish (at least some) wrongdoers is itself a moral wrong: The failure constitutes a breach of the aforementioned moral duties. When criminalization helps prevent these failures – when it helps ensure that wrongdoers are called to account and given their just deserts – it helps prevent moral wrongs we would otherwise have committed collectively. This is yet another way in which criminalization can satisfy the wide instrumental principle.

So construed, the wide instrumental principle is capacious enough to deal with some apparent counterexamples. Consider:

> *Happy Pill* – The government of Country A relies on subsidies provided by Country B to provide essential medicines to its population. Absent the subsidies, a large number of Country A's citizens will suffer severely. The government of Country B announces that it will only continue to provide subsidies on one condition: Country A must criminalise possession of Happy Pill, a harmless recreational drug. (Tadros 2016, 98)

Tadros claims that (i) criminalization is justified in Happy Pill, and (ii) the instrumental principle cannot account for this fact. It cannot do so because it is not wrong to possess Happy Pill, and because Country B need not act wrongly in failing to provide essential medicines to Country A. Grant that this is so. The government of Country A nonetheless has a duty to provide essential medicines to its population. In *Happy Pill*, that duty will be breached unless the government exercises its power to criminalize. By exercising that power, the government prevents this moral wrong. One worry about this version of the instrumental principle is that we cannot apply it until we know what duties governments have. A second is that the principle threatens to collapse into its rivals. If governments have moral duties to promote economic productivity, or support public institutions, criminal laws that are necessary to further these ends prevent breaches of these duties. Thereby, they conform to the wide instrumental principle.

The Mirror Principle

Let us now turn to the mirror principle. Like the instrumental principle, this principle can be read in two ways:

> *Wide mirror principle:* φing ought to be criminalised if and only if φing is a moral wrong.

> *Narrow mirror principle:* φing ought to be criminalised if and only if φing is a moral wrong of a specific kind.

Michael Moore defends the wide mirror principle. To defend the claim that we have defeasibly sufficient reason to criminalize all moral wrongs, Moore argues as follows: (i) that all moral wrongdoers deserve to be punished for culpably committing wrongs; (ii) that society has a duty to do retributive justice by imposing deserved punishments; and (iii) that it is unfair to punish those whose acts were not prohibited at the time they acted. To defend the claim that we only have sufficient reason to criminalize moral wrongs, Moore claims (i) that criminalizing what is not morally wrong authorizes the imposition of retributively unjust punishment, and (ii) that society has a duty to avoid authorizing such injustice.

One reply to Moore's argument denies that there are any sound principles of retributive justice (Tadros 2011, 60–87). A second reply denies that our reasons to do justice via the criminal law extend to all moral wrongs. Perhaps the most influential version of this last reply relies on a distinction between public and private: While we have reason to criminalize public wrongs, we have no reason at all to criminalize private wrongs. The former generate duties to hold wrongdoers responsible publicly, duties which criminal proceedings can help discharge. The latter are no business of the political community, or by extension of the criminal law (Duff 2018; Duff and Marshall 2019).

What we should make of this version of the narrow mirror principle depends on what makes wrongs public. The most influential answer is developed by Antony Duff (both individually and jointly with Sandra Marshall). For Duff (and Marshall), whether an act is *wrong* is a question of critical morality. Whether a wrong is *public* is a conventional matter – it depends on the political practices of each community. Such practices may, of course, be messy. Constructive interpretation, however, may identify values that are definitive of the community at hand. Acts made wrong by those values – and only those acts – are public wrongs.

Should we accept that these are the only wrongs we have reason to criminalize? One reason for doubt derives from the role Duff and Marshall give to existing practices. We already observed that conventional morality can be repugnant, absurd, or downright confused. Much the same goes, of course, for political practice. Duff and Marshall are not committed to the idea that such practices cannot be morally deficient. But they appear to be committed to the conclusion that, when those deficiencies run deep, they deprive us of reason to criminalize wrongs that would not have been committed absent the deficiency. To see the point, imagine a patriarchy that fails to value the sexual autonomy of women on even the most constructive interpretation of its political practices. This failure encourages more violations of women's sexual autonomy. Given the patriarchy's values, these violations are not public wrongs. Yet, it is hard to believe that forestalling further such violations provides no reason at all for criminalization (Dempsey 2011).

There are other versions of the mirror principle, and other defenses of the versions just discussed. At least as species of legal moralism, however, all versions of that principle face a more general challenge. We can see it by noting that the fact referred to by the mirror principle – that φing is morally wrongful – does not itself identify anything valuable about criminalization. Since that fact that does not tell us what commends criminalization to us, it can at most be an *auxiliary* reason to criminalize: a fact that transmits the force of some other consideration to the conclusion that we ought to do so. It is this other consideration that is our *operative* reason for criminalizing: the fact that reveals the value served by criminalization. Since its soundness depends on whether such a reason exists, the mirror principle leaves us hanging in midair.

One possibility is that the operative reason that principle presupposes is a reason that itself makes no reference to moral wrongdoing. We have reason to criminalize moral wrongs because, say, this preserves social stability. If this is so, the mirror principle turns out to be an antimoralist principle in disguise. A second possibility, as we have seen, is that the operative reason we are looking for is the fact that criminalization will prevent moral wrongs. As the goodness of preventing moral wrongs is analytic, this fact is no mere auxiliary reason. It is an operative reason to criminalize that itself makes reference to moral wrongdoing. This reason, then, gives us an authentically legal moralist position. But what gives us this position is not the truth of the mirror principle. It is the truth of the instrumental principle.

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Introduction

Friedrich Engels was born on November 28, 1820, as the eldest son of a textile manufacturer by the same name, Friedrich, and his wife Elisabeth. His home town, Barmen, was strongly geared toward textile production and had a population of around 20,000 in 1820. In Barmen and Elberfeld, an "aggressive form of pietism" was culturally predominant, which also shaped, as described by Max Weber's theses in *The Protestant Ethic and the Spirit of Capitalism*, the very atmosphere of his paternal home (Hunt 2009, p. 16ff.). In 1838, Engels started a commercial apprenticeship in Bremen which introduced him to more liberal environments (p. 25). Between 1841 and 1842, he served as a member of the army in Berlin. Here, although without taking any qualification, he furthered his cultural education and took part in political associations where he began to develop his political ideas.

However, it was the continuation of his practical education in 1842 at his father's factory in Manchester, an industrial center that even then

already had more than 300,000 inhabitants, which had a profound influence on his life. It is no wonder that hardly any other city in the nineteenth century was the scene of such a violent class struggle between the bourgeois and the working class as Manchester (pp. 75–78). While Marx, whom he only met briefly before forging closer ties from 1844 onward, first in Paris and then in Brussels, was becoming one of the most brilliant radical intellectuals of the time, Engels started to make a direct experience with the wretchedness of the working class in Manchester. Furthermore, on a more political level, he began to engage with the political agenda of British Chartists and their aspirations for broader democratization of electoral law.

Rather than Paris, which with its more than 300,000 workers was the largest city after London, it was the uprising of the Silesian weavers in 1844 that had a profound influence on Engels. The revolution of 1848–1849 led him to take part in German political events both in his hometown and in one of the last bulwarks of democratic resistance against the reactionary forces: "Near Rastatt, south of Karlsruhe and on the western edge of Germany, Engels took part in the biggest battle of the campaign in the Palatinate and Baden" (p. 175). The disastrous failure of the revolution in Germany and France forced Marx and Engels, who became widely known through the publication of *The Communist Manifesto* in 1847–1848, into exile in England. There, the new home became so familiar that they addressed each other in a mixture of English and German in their private letters.

While in the Library of the British Museum Marx devoted himself to writing his masterpiece, *Capital* (1867), Engels concentrated his efforts on providing a living for himself and the Marx family, managing his father's factory in Manchester. In 1869, he separated from his business partner, obtaining a compensation of £12,500 (about 1.5 million euros today). At Jenny Marx's suggestion, Engels moved with his family into a large building in what is now the prestigious Primrose Hill district, not far from the Marx family. This became the center of Engels' activities during the last 25 years of his life. After Marx's death, his home was even more than before the international reference point for the socialist movement.

In addition to the two further volumes of *Capital* (1884–1894) that Marx never completed, Engels also bequeathed a sum of money (equity capital), which was further increased after the cessation of his activity by about £22,600 (p. 349). The old revolutionary of 1848 finally passed away on August 5, 1895. He found his final resting place during a burial ceremony at sea, attended as executors by Eduard Bernstein and three other witnesses.

Engels' Philosophy of Law and Social Philosophy

While Marx was still alive, Engels outlined the main thesis of "historical materialism" as formulated in *Socialism: Utopian and Scientific* (1880). According to it, "the economic structure of society always constitutes the real basis from which it is ultimately possible to explain the entire superstructure of legal and political institutions, as well as the religious and philosophical conceptions of each historical period" (MECW 24, p. 304). It is mainly in Engels' early writings that one finds the first critical hints of the social and legal philosophy of the time. Indeed, although the work *Critique of Hegel's Philosophy of Right* (1843) is attributed to Marx, Engels had written in the same year, therefore prior to the beginning of their collaboration in 1844, his text *Progress of Social Reform On the Continent*. In this work, Engels applied a pure dialectical perspective. As he stated: "Since man has been able to think, there has never been a more complete philosophical system than the Hegelian one. Logic, metaphysics, natural philosophy, philosophy of the spirit, philosophy of law, philosophy of religion and philosophy of history are all reduced to a single system and one fundamental principle. This system appeared from the outside to be unassailable, and indeed it was; it could only be overthrown from within, by the Hegelians themselves" (MECW 3, p. 404).

In the same work, writing about the French proto-socialist Charles Fourier, Engels stated that

there would have remained "something not present in the Sansimonists: scientific investigation, systematic thinking, cold and unprejudiced, in short, social philosophy, whereas in Sansimonism there is nothing but social poetry. It was no coincidence that Fourier was the first to set out the great axiom of social philosophy: given that each individual has an inclination or predilection for a specific type of work, the sum of all the individuals' inclinations must, on the whole, constitute a force sufficient to satisfy the needs of all" (MECW 3, p. 394).

Compared to Lassalle's masterpiece *The System of Acquired Rights* (1861), Engels emphasized his methodological differences: "His objections to the Hegelian philosophy of law are mostly correct, but with his new philosophy of spirit he is only at the beginning; from the same philosophical point of view, he would have to the point of conceiving as absolute only the process and not its mere temporary result, so that no other idea of law can derive from it than the one that coincides with the historical process itself" (Engels' letter to Marx of 2 December 1852, MECW 30, p. 203. The quotation was taken from the work in the original language).

Within the work *Karl Marx* (1869), Engels sought to make the *Verflüssigung der Rechtsformen*, introduced by Lassalle in his theory of the revolutionary genesis of law, to be continued in the materialist conception of history: "Referring to Hegel's philosophy of law, Marx came to the conviction that it was not in the state, conceived by Hegel as 'the crowning part of the building', but in the 'civil society', so much maligned by Hegel, the key to understand the historical process of evolution" (MECW 21, pp. 60–61).

After the critique of German legal philosophy and the critique of French social philosophy, what Marx and Engels' doctrinal framework lacked was a critique of English economics. Here again, thanks to the *Foundations of a Critique of Political Economy* (MECW 3, pp. 418–443) published in 1844 – hence before the studies carried out in the 1845 work *The Condition of the Working Class in England* (MECW 4, pp. 295–583) – Engels' impulse would prove decisive for the political-economic reorientation of Marx.

In his later work, *The Origin of the Family, Private Property and the State* (1884), Engels came back to the fundamental questions of social and legal theory. Here, next to the class issue, the question of the gender relations arose, particularly in relation to the transition to patriarchy in ancient Greek civilization. As he stated: "The overthrow of matriarchy marked the historical defeat of the female gender" (MECW 26, p. 165). Concerning the subject "of legal marriage equality between men and women," which emerged in modern times, Engels reiterated the primacy of the economic factor: "The juridical inequality between the two sexes, which we have inherited from previous social conditions, is not the cause, but the effect of the economic oppression of women." Thus, Engels used an analogy between class and gender relations by pointing out how class contrasts, with the exploitation and subjugation of workers, could manifest themselves "in all their acuteness." As he later stated: "only after all legal privileges of the capitalist class had been abolished and the full legal equality of both classes had been established, the peculiarity of man's dominance over woman within the modern family and the need to establish genuine social equality between the two will appear in clear light. It will then become clear that the emancipation of women has as its first condition the reintroduction of the entire female gender in public industry. This, in turn, requires the abolition of the family as the economic unit of society" (ivi, pp. 181–182 and following).

In a contribution to the "socialism of the jurists," published in 1887 in *Die Neue Zeit*, edited, among others, by Karl Kautsky, the "legal conception" was defined as a conception "typical of the bourgeoisie," since "equality under the law is the main battle cry of the bourgeoisie" (MECW 26, p. 598). However, it was Engels himself who explicitly admitted an inadequate consideration of legal relations within his doctrine: "In Marx's theoretical inquiries, the law, which always and only reflects the economic conditions of a given society, has been examined only marginally; on the contrary, it was mainly the

historical legitimisation of certain conditions, modes of appropriation and social classes in certain epochs that were examined" (ivi, pp. 607–608). This did not mean, however, that the formalization of law was not essential in the transformation process of society or that it could be formulated through preconceived framework conditions regardless of the specificities of the context. As Engels stated: "The claims arising from the common interests of a class can only be satisfied if that class gains political power and gives its claims general validity in the form of law. Therefore, during this struggle, each class must formulate its demands in the form of legal claims within a programme. But the demands of each class change in the course of social and political transformations, varying not only from one country to another but also according to its peculiarities and its degree of social evolution" (ivi, p. 615).

The Historical-Theoretical Work of Engels After Marx's Death

Shortly after the foundation of the Second International in 1889 and 1890, when anti-socialist legislation was suspended and the so-called Bismarck era came to an end, Engels made some important statements on fundamental questions relating to the theory of history. As he claimed: "The term 'materialist' is generally used in Germany by younger writers as a simple slogan with which to label anything without further specification: in other words, by attaching this label one believes to have closed the question. Our conception of history is, however, above all an instruction manual, not a construction lever as in Hegelianism. In fact, it is necessary to re-examine the whole of history from the beginning and to carefully investigate the conditions of existence of the various social formations before attempting to deduce from them the conceptions of politics, private law, aesthetics, philosophy, religion, etc. that correspond to it" [letter from Engels to Conrad Schmidt, 5th August 1890, in MECW 49, p. 8].

It is worth pointing out another classic formulation by Engels, in which he contrasted every form of simplification and theoretical reductionism with the complexity of history. As he wrote: "According to the materialist conception of history, the decisive moment in history coincides, in the last instance, with the production and reproduction of real life. Neither Marx nor I said more. If someone now twists the meaning, stating that the economic moment is the only decisive one, then they are turning that sentence into a meaningless, abstract and absurd statement. The economic situation is the basis, but also the different moments of the superstructure – the political forms of the class struggle and its results, such as constitutions established after a battle won by the ruling class, etc.; legal forms, as well as the effects of all these concrete struggles in the brains of those who took part in them, the political, legal and philosophical theories, the religious opinions and their further development into dogmatic systems – influence the course of historical struggles and often decisively shape them. It is therefore a reciprocal interaction of all these moments that finally, through an infinite series of contingencies (i.e. of facts and events whose connection is so remote or indemonstrable that it can be disregarded), the economic movement imposes itself as necessary" [letter from Engels to Joseph Bloch, 21st September 1890, in MECW 49, pp. 34–35].

In the following year, in a letter to one of the leaders of German social democracy, August Bebel (May 1, 1891), Engels again urged people to "reflect": "You – the party – need socialist science and this cannot exist without freedom of movement" (MECW 49, p. 176). Two years earlier than the abovementioned "political testament," Engels came close to the "revisionist" formulation of the theory of history as developed by Bernstein, without however giving up the prospect of a revolution: "We do not have an ultimate goal. We are evolutionists, we are not going to dictate to mankind definite laws. Preconceived opinions about the organisation of the future society in detail? You won't find any here" (interview to *Le Figaro*, 8 May 1893, MECW 22, p. 542. The quotation was taken from the work in the original language).

Engels was therefore not a dogmatic guardian of Marxian orthodoxy. On the contrary, he criticized himself by drawing attention to "a point, which is never sufficiently emphasised in my and Marx's works and for which we are all equally responsible. That is, we have all first placed and emphasised the derivation of political, legal, etc. concepts and the actions they mediate from basic economic facts. We have thus neglected the formal side as opposed to the material side: that is, how these conceptions are formed" (letter from Engels to Franz Mehring, 14 July 1893, in MECW 50, p. 164). This, however, was the task that was left to the second generation after the "invention of Marxism" (Morina 2022) and in the context of which Austro-Marxism also took on to explore new paths; a good case in point is a text published by Karl Renner (under the pseudonym Josef Karner) in 1904 in the *Marx-Studien*, in which Renner closely related legal and social theory.

Recent Studies on the Work of Friedrich Engels

Samuel Hollander has the merit of having carefully re-examined, from an economic and historical perspective, Engels' original contribution to Marx's political economy and, in particular, having highlighted the influence of his early studies in the 1940s (Hollander 2011). A controversial quote from Engels, according to which the state as an instrument of domination finally deserved to be placed in a "museum of antiquity" (MECW 26, p. 272), is mentioned in the title of a 2012 volume edited by Samuel Salzborn. However, it is rarely specified that it refers to the "state machine" and that a "society that reorganises production based on free and equal association of producers" should instead remain – as stipulated in the early writings of Marx and Engels – a positive idea of state negation. In fact, another well-known quote from the late Engels reads: "Instead of government over people takes over the administration of things and the management of production processes. The state is not 'abolished', but rather disappears" (MECW 24, p. 321).

The importance of the volume published by Elmar Altvater (2015) lies in the effort to integrate the Marxian critique of capitalism with ecological perspectives: "Engels developed an interest, unusual at the time, in the dense web of relations between economics and ecology in the context of the capitalist way of production" (Altvater 2015, p. 14). He analyzed the "general context of the system" and, therefore, set the problem of its limits (p. 17).

In 2018, with the 200th anniversary of Marx's birth, Engels came back to the center of academic and social attention. According to Jürgen Herres (2018), they are to be considered "participants in a discussion about some very serious issues and problems, i.e. as 19th-century radicals who tried to understand globalisation and industrialisation as premises for human self-emancipation." For all their affinities and differences, one could not have existed without the other and neither would be remembered today "except by a few 19th-century historians" (Herres 2018, p. 272).

In the year of the 200th anniversary of his birth, Engels himself became the subject of considerable attention (Frambach et al. 2020; Lucas et al. 2020). Georg Fülberth applied the Engelsian description of himself as Marx's "second violin" to the "ensemble" of the social-democratic movement at the time. Through this formulation, Engels referred to a "leading moment in the revolutionary process," which he "would certainly not hesitate" to call a "party" in the sense of a movement (Fülberth 2018, p. 8). He conceived "Marxism" as a "political praxis toward the abolition of capitalist society," as well as a "collective effort of several generations of the socialist movement, to whom the first condition of success is that each of its members finds the place to which aspires to and which best corresponds to his abilities" (p. 11). As a "Marxist" political scientist, Fülberth honored the most lasting contribution of Engels and Marx – the "recognition of the priority of the material conditions of life over the so-called superstructure" (p. 15). Moreover, he emphasized the "centrality" of the idea of revolution in Engels' work. To this idea in particular, in the archetypal guise of a "militant

intellectual" (p. 11), he was able to give a masterly expression.

Following on from more recent work (Lehnert and Morina 2020), an important "element of continuity" in what some call Engels' "political testament" is also worth mentioning: the *Introduction* (MECW 27, pp. 506–524) to Marx's book *The Class Struggles in France, 1848–1850*, written by Engels shortly before his death (1895). Starting with the changes made to the original text at the request of the social-democratic leadership at the time of its publication up to the most recent interpretative controversies, there have been continuous attempts to claim its meaning for their own political views (Lehnert and Morina 2020). Those carried out by the executor of the estate, Eduard Bernstein, who, to some extent, proposed the English way for Germany as well, are, for instance, particularly clear, especially when analyzed from a comparative perspective (among others, see Morina 2017). Of no less importance is the historical context of this last text by Engels and its influence on the Austro-Marxism of Austrian social democracy up to the Linz program of 1926 (see Lehnert and Morina 2020).

Cross-References

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- ▶ Hegel, Georg Wilhelm Friedrich
- ▶ Lassalle, Ferdinand
- ▶ Marx, Karl
- ▶ Renner, Karl

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Equality

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Introduction

On the term: Equality – Greek *isotes,* Latin *aequitas, aequalitas*, French *égalite,* German *Gleicheit.*

Equality can be used with two meanings: first in the sense of qualitative agreement, second in the sense of numerical identity. In the first meaning, one refers to "equal" as to several different objects which have the same properties in at least one respect but not in all. The second meaning refers to one and the same object which corresponds to itself in all characteristics.

The second meaning concerns formal logic. In the second meaning, equality is the central concept of ethics and political philosophy that evolves from the basic concept of moral equality under specific concepts of legal, political, social, and economic equality (Gosepath 2010, p. 919).

In this entry, we deal with the first meaning, specifically, equal in the historical context of legal philosophy.

Antiquity

The origins of the idea of equality go back to antiquity (Dann 1980, p. 31; Koller 2010, p. 439) when the sophist Antiphon was the first to advocate the concept of the equality of all human beings. But not all sophists were egalitarian. For example, Thrasymachus and Gorgias were not egalitarian. For example, Thrasymachus and Gorgias were not egalitarian (for Thrasymachus Waechter 2002, p.114–116; Aichele 2017, p.108,109; For Gorgias, Plato, Gorgias, 2014 483 c). Antiphon made recourse to the biological nature, i.e., equality of people. He does this in a historical-political context with particular brazenness, because he does not choose the Greeks among themselves, but Greeks and barbarians as a pair, for comparisons (Schirren and Zinzmaier 2003. p. 195). Of course, the appeal to the law of nature could also be used in arguments about equality. Examples are Hippias and Antiphon. They refer to equality in the individual nature of humans. Hippias assumes that we are "relatives and friends and fellow citizens of nature, not by the law, but who is a tyrant of men, forces much against nature" (Plato 2009 Protagoras, 337 d; Böckenförde 2006, p.60).

The idea of equality became a postulate of political theory in Plato and Aristotle (Dann 1975, p. 1001). Plato justifies the idea of equality with existence. According to Plato, the equality of birth is based on natural equivalence and the need to seek legal equality and to tolerate subordination only because of the reputation of virtue and insight. For him, the correct form of state is the rule of the best. The natural equality gives more to the superior, less to the weak, and thus gives to each of the things adequate in relation to their nature. In particular, it raises to higher honors those distinguished by virtue and thus assigns to them what is due to them in proportion (Plato 1991 Nomoi, 757 c, d). Equality based on measure, weight, and number, on the other hand, would give certain equality to equal and unequal persons, thus establishing a "constitution without government" (Plato 2012 Politeia, 558 c).

Plato sees his proposal of having a council of the state elected according to the wealth of the classes as a middle course between an autocratic and popular constitution. He accepts this procedure, which involves the brave and the incompetent, only to prevent revolts (Plato 1991 Nomoi, 757 a, b, c, d.).

According to Plato, if two persons are considered equal in at least one relevant respect, these persons must be treated equally in that respect. Otherwise, one will be treated unfairly. This is called the generally accepted formal principle of equality.

Aristotle also develops the idea of the inviolable equality of the free man and his subordination to the law. "Thus also the same seems to be just and it is even, but not among all, but only among equals" (Aristotle 2010 Politik, 1280 a).

He distinguishes between an equivalence "according to the number" and an equivalence "according to worthiness." The first basic form ensures that the contractual relations from person to person are mostly right. The path to justice leads through the judge. Its task is that of a "mediator." "Thus the just as a regulation is nothing other than the middle between loss and gain." The second basic form becomes effective in the distribution of public recognition, money, and other values to which the citizens of an ordered community are entitled. For Aristotle, it is beyond doubt that the question of rule in the state is a question of dignity. If in political reality, however, the two constitutional forms of democracy and oligarchy are most likely to develop, then this can be explained by the observation that there is nobility of birth and virtue only in a few, quantity and wealth in several (Aristotle 2010 Politik, 1301 b, 1302 a). The distinction of people in their social and political functions is natural. "He who by nature does not belong to himself, but as a man to another, is by nature a slave." Just as the soul dominates the body, the man stands above the wild animal – and in this situation are all those whose work consists in dealing with the body, and this is also the work best done by them. All these are by nature slaves. Furthermore, "the relationship of the male to the female is by nature such that the former is the better, and the latter the worse, the one the dominant and the other the dominated" (Aristotle 2010 Politik, 1254 b).

Against Plato and Aristotle, the Ulpian formula has, throughout history, taken on the egalitarian meaning that everyone deserves the same dignity and respect. This is now a widely shared concept of substantial universal equality (Gosepath 2010, p. 920). The term "*ius aequum*" in Roman law means above all the equal treatment of Roman citizens before the law, but not their equal political participation. Cicero writes "*Privatum autem opportet aequo et pari cum civibus iure vivere"* ("But the private man must live in the same and equal right with his fellow citizens") (Cicero 1964 1, 124) but rejects equal participation according to the pattern of Attic democracy.

Scholastic Discussion

The fundamental notion of equality of the inalienable dignity and personality that is equally characteristic of every human being and is found in law has its origin in Christianity. Christian ethics derives its principles of order from the idea of the original equality of all who wear human countenance. Every human being is in the "image of God" (*imago dei*).

In its origins, Christianity recognizes neither social classes nor relations of power or authority of the state for the world created by God; man and woman are equal; and the difference between masters and slaves is already regarded as unacceptable (Dann 1980, p. 51).

In the Middle Ages, dominated by ancient and especially by Cherish traditions, "*aequitas*" and "*aequalitas*" were the relevant terms. The tendency, which became apparent in late antiquity, continued to increase in the expression of the conceptual content: "*aequitas*" became almost exclusively a special terminology of the case law. It was used synonymously with "*iustitia*" and "*ius*" and understood as the epitome of "*iustitia distributiva"* (Dann 1975, p.1100). In contrast, "*Aequalitas*" became the dominant term in the Middle Ages for all comparisons. The basic meaning maintains the same measurable quantitative commitment. Thomas Aquinas, whose influence is still unmistakable on Catholic legal and social philosophy, defines *Aequalitas* as follows: *Aequalita est relatio quadam fundata supra unitatem quantitatis* (Equality is a relationship based on certain quantitative unit [Schütz 1895, 24]).

In the late scholasticism, three thinkers were decisive, namely Francisco de Vitoria (1483–1546), Bartolomé of Las Casas (1484–1566), and Francisco Suarez (1548–1617).

According to Vitoria, the causa materiale, the material sponsorship of political power, is now assigned to the political community itself. This has far-reaching consequences. Not a single or a few are by nature the bearer of the power, but all the citizens are the holders of and material reason for this power.

His argument for this thesis ties in with the original equality of the people. Before they formed a political community, no one was above the other. Therefore, there is no reason why in such a merger an individual should claim for themselves a potency of power over others, especially since everybody has equal rights and the right of self-defense on the basis of natural law (Böckenförde 2006, p. 360, 361).

Vitoria was very courageous for his time as he had dedicated himself to human rights in South America.

It was discussed whether Las Casas, of late scholasticism, was a human rights activist. From 1547, he campaigned for the rights of Native Americans. Against the background of his time, however, in which the universality of the Catholic understanding and the Aristotelian conception was undermined, he is considered one of the earliest human rights activists of the early modern period (Gajek 2010, p.163).

Francisco Suarez was known to have been a natural rights activist for the Native Americans.

Seventeenth Century

Modern egalitarianism had its beginnings in the seventeenth century. It is related in part to Calvinist doctrine, which, although it admittedly drew a sharp distinction between the saved and damned, insisted at the same time on the equality of the elect, whether clerical or lay. This view of equality

came to be associated with a theory of church government and indirectly of secular government – that derived legitimate authority from the voluntary agreement of natural equals to submit to such of their number as they choose.

According to Thomas Hobbes, people are by nature the same in both their physical and mental abilities. But the equality of abilities gives rise to the same hopes; when two people try to attain the same thing, they become enemies, seeking to destroy the other or subjugate him. So, equality results in war. Self-preservation requires that each person tries to seize the other's power by force or underhand to forestall his attack. The three main causes of the dispute are rooted in human nature: competition for profit, suspicion for safety, and craving for fame for prestige. As long as people live together without a supreme order-preserving force, war reigns. And it is a war that each individual wages against each other. Justice exists only in a state that enforces the observance of valid rules. State-guaranteed law overcomes the equality of all human beings and, in particular, secures the distinction between mine and yours (Hobbes 1651 [1970], pp. 112 ff.).

In Samuel Pufendorf, the equality of men, in contrast to Hobbes, is not natural equality of powers and talents but consists in the freedom that the wiser man does not claim the control of the unwise man in his own right unless the latter agrees. This equality of law contains no doctrine of the overall order of human coexistence (Denzer 1972, pp. 148–149).

Eighteenth Century (The Emergence of the Bourgeois Concept of Equality in the Enlightenment)

With John Locke, nothing is more obvious than living beings of the same kind and rank, born to enjoy the same benefits of nature and use the same abilities, should also live on equal terms, without subordination or submission. In the state of nature, there is a natural law that is binding for all human beings. Reason, which justifies this law, teaches all men that no one should harm another's health, freedom, or property since all are equal and independent. All men are, after all, the work of a single powerful and infinitely wise Creator, the servants of a single sovereign Lord, by whose command and order they were sent into the world. They are his property, his work, and shall exist as long as he likes it, but not as they like it among themselves (Locke 1689 [1960], p. 287).

Montesquieu formulated the principle of equality before the law and its relationship to natural equality in France. In his famous book "*De l'esprit des lois*" ("The Spirit of Laws"), he formulated "*Dans l'etat de nature, le nature, le hommes naissent bien dans l'egalité: mais ils n'y sauraient rester. La société la leur fait perdre, et ils ne redeviennent égaux que par les lois*" (In the state of nature, men are born well in equality: but they cannot remain there. Society makes them lose it, and they only become equal again by law) (Montesquieu 1748 [2017], pp. 8, 3).

However, Jean-Jacques Rousseau gave natural law a decisive turn during the revolutionary movement in France. Rousseau observed two types of inequality in the human species: Natural inequality consists in the difference of age, health, physical strength, and qualities of mind and soul while moral or political inequality depends on a kind of agreement. As long as men pursue objectives that one can do alone, and cultivate arts that do not require the cooperation of several hands, they live free, healthy, and happy, as they can be by their nature, and they continue to enjoy among themselves the advantages of independent intercourse. But when they begin to pursue projects through a division of labor, one is dependent on the help of the other; even supplies are recognized as useful for several, and equality thus disappears. Property is introduced, the organization of work creates slavery and misery, and the natural differences in strength, skill, and ingenuity become more tangible and lasting in their effects. The poor are forced to receive or steal the means to support them from the hands of the rich. Thus the silence of society gives way to the terrible state of war, and the humiliated and tormented human society works through the abuse of its abilities on its own disgrace and thus brings itself to the brink of ruin. This loss finds its restoration in the social contract (Rousseau 1775 [1978], pp.191

ff.). In summary, Rousseau attributes inequality to the development of culture, which is mainly due to differences between inherited and acquired property.

The ideal of equality can be found in the American Declaration of Independence of 1776. This represents an important milestone in the history of ideas.

In the French Declaration of Human Rights of 1789, which was influenced not only by the ideas of Rousseau but also by liberal ideas, the first sentence of Art.1 reads as follows "Men are born and remain free and equal in law" (*Les Hommes naisssent et demeurent libres et égaux en droit*). In addition to freedom and brotherhood, equality became the basis of the Declaration of Human and Civil Rights in the French Revolution. With the abolition of the state order (social rank) in the French Revolution and its internal dynamics, a turning point was reached in the history of the concept of equality.

Immanuel Kant distinguishes between natural law and the law of practical reason and bases this solely on the transcendental-philosophical idea of autonomy, in which the recognition of the same freedom of all rational beings is already included (Kant 1797 [1997], p. 6, 230). The concept of freedom thus determined, which Kant elevates to a transcendental principle of law, formally enables the unopposed thinking of freedom and equality as together in the legal state. Kant does not derive the same participation in the process of concretizing and realizing this legal concept, which is characterized as a "regulative idea." Kant sees man as a being whose reason makes him understand that he is the actual purpose of nature. In the claim to be an end in itself, man enters into equality with all rational beings; every man also has used the other for other purposes. Here, and not in reason, which serves merely as a tool for the satisfaction of various inclinations, lies the reason for man's unlimited equality (Kant 1786 [1946], p. 82).

The demand for equality is directed against the differences in the legal status of people according to their social status that had been handed down from medieval feudal society. To the extent that the bourgeoisie succeeds economically with the development of trade and commerce, it demands ever more vehemently legal equality and equal freedom (Dann 1980, 85 ff.). The spiritual foundation for this is provided by the philosophers whose views were presented above, Hobbes, Locke, Montesquieu, Rousseau, and Kant. The theories of rational natural law and classical liberalism have formed the basis of legal equality and freedom. These include philosophers such as Smith and Hume.

The rational doctrine of natural law derives from the natural freedom and equality of all human beings' inalienable rights to which every human being is naturally entitled. In addition, classical liberalism promises that the freedom of all will automatically lead to a state of general well-being. Inspired by this, a bourgeois emancipation movement is generated, which in the course of time succeeds in enforcing constitutional orders that guarantee equality of rights and certain fundamental freedoms, reins in state power through the separation of powers and binding laws, and involves the wealthy in legislation.

Nineteenth Century

These achievements, while satisfying the bourgeoisie, cannot satisfy the petty bourgeoisie and the ever-growing working class, which remain excluded from political participation and restricted in the exercise of liberties. Since the nineteenth century, the philosophical and political rights of participation have increasingly been based on the question of economic and social inequality. The social question and the labor movement have arisen as a result of the widening gap between the growing wealth of the owners and the extreme misery of the working masses. The workers' movement demands the elimination of class differences and more equal redistribution of wealth.

The labor movement has developed in different directions. On the one hand, Marx and Engels called for the restructuring of capitalist production relations and the equalization of social living conditions (Fenske 1981, p. 442); on the other hand, they called for the theories of liberal socialism (social democracy), for which Ferdinand Lassalle and Eduard Bernstein advocated taming and

slowing down capitalism through reforms and limiting it through the redistribution of wealth (Fenske 447, p. 450).

Marx has criticized the equality of rights on the basis of the abstractness of the law. According to Marx, the idea of equality of rights has an unequal effect. This is because the equality of rights draws on only a limited number of morally relevant points of view while neglecting others, and theories of justice concentrate too much on distribution rather than on the fundamental questions of production (Gosepath 2007, 3.1). The equality of rights does not only consider the economic differences, but also the natural differences that develop under the protection of the economic. According to Marx, even the principle of equal pay for equal work is, therefore, an unequal right, namely for unequal work and therefore, "a right of inequality according to its contents, like all right" (Marx and Engels 1875, MEW, volume 19 p. 21). According to Marx, the real intent of the demand for equality is the demand for the abolition of classes. Every demand for equality that goes beyond this, necessarily, runs into the absurd (Marx and Engels, MEW, volume 20, p. 99, quoted Klaus and Buhr 1975, p.505).

Twentieth Century

Radical Inequality in the Nazi Era

Undoubtedly, without the Nazi barbarism, the discussion on equality would not be as well-established as it is now, and legal regulations at the international and national level would not have come about as they have now. The motto "You are nothing. Your people are everything" led millions to be annihilated because of their race, ethnic group, beliefs, and political and ideological views in the Nazi era. One must learn the lessons from the Nazi period, so that the Nazi barbarism shall not be repeated.

John Rawls

In the twentieth century, John Rawls formulated principles of social distributive justice. What cannot be justified should not be a criterion of distribution. Differences due to natural gifts and social circumstances should be compensated according to Rawls. According to Rawls, an unequal distribution of social goods is unfair if it results from the actions and decisions of the person concerned. Everyone shall have an equal right to the greatest possible freedom in dealing with institutions, compatible with the same freedom for all. Social inequalities caused by institutions are arbitrary unless they are to the benefit of all.

According to Rawls, social and economic inequalities must meet two conditions: "(a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle)" (Rawls 2001, p.42 ff.).

Ronald Dworkin

Like John Rawls, the American legal philosopher Ronald Dworkin has strongly influenced the current debate on equality. For Dworkin, the central term of this debate is not freedom but equality. He says "I presume that we all accept the following postulates of political morality. Government must treat those whom it governs with concerns, that is, as human beings who are capable of suffering and frustration. and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with 'equal' concern and respect. It must not distribute goods and opportunities unequally on the grounds that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of good life of the one group is nobler or superior to another's. These postulates, taken together, state what might be called the liberal conception of equality; but it is a conception of equality, not of liberty as license, that they state" (Dworkin 1997, p. 272–273).

Current Discussions

Three cardinal questions are being discussed in the current philosophical debates; the first question concerns itself with the subject of, who should be equal ("Equality Among Whom" – Debate, Gosepath 2007, 4). This question deals with the fact that equality should prevail among people, persons, or members of a given society. The second question is on "Equality of What" (Dworkin 2000. Chapter 1–4; Young 2013, p. 1688; Lippert-Rasmussen and Eyal 2012 p. 142). The second question raises concerns about what should be equally distributed between individuals (natural rights, democratic rights, civil liberties, opportunities, money, skill, resources, and well-being). The third question is "Why Equality?" (Gosepath 2007, 5). It is about why equality should be of crucial importance for justice. In this context, the question is why or whether equality is valuable at all? (Wündisch 2017, 387).

Through social development and the struggle for social and political equality, equality – with the exception of gender equality – in the wealthy Western countries is not a central topic in public discussion today (Koller 2010, 441). Antiracism has also benefited from the fight for equality.

The postulate of the equality of all human beings before the law is currently being used in several human rights conventions, constitutions, and national laws of the modern states. On the one hand, this postulate prohibits unequal treatment without special justification; on the other, it binds the legislature to enact laws with unequal content.

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Equality and Global Justice

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Introduction

Some people indeed think that gulfs in income and living standards across borders are regrettable, yet this does not commit us to thinking they are also *unjust*. Thus, citizens of developed countries do not have obligations of justice, but could have obligations stemming from charity or humanitarianism. By contrast, the entry aims to describe and evaluate current discussions about global distributive justice, and to that extent, prospects about global equality, that is, whether the latter is demanded from a normative point of view, plus what should be its content. Along these lines, we will also deal with the further question of whether our duties of global egalitarianism are compatible with our special responsibilities toward compatriots. We will conclude with further considerations on some future challenges for global justice and equality, as the relevant discussion becomes all the more expansive.

Some important clarifications are in order. First of all, the terms *cosmopolitanism* and *statism* have to a great extend dominated current discussions on equality and global justice, sometimes creating more confusion. Our use of these terms in this entry does not take them as necessarily opposed or mutually exclusive. This is because, all relevant

positions – except racist ones – share the fundamental view about the moral equality of persons, a view often connected to moral cosmopolitanism. Yet, surprisingly enough, there seems to be no necessary connection between moral cosmopolitanism and principles of global egalitarianism. For it is possible to believe that all persons are owed equal respect, but belonging to a self-determining community also establishes some special duties toward them. Therefore, we will mainly use the terms *global egalitarianism* and *minimalism*, instead of cosmopolitanism and statism (Armstrong 2012).

Second, we should distinguish egalitarian approaches from the other two most prominent approaches to (global) distributive justice, that is, prioritarianism and sufficientarianism. On the one hand, prioritarians claim that whatever distribution justice entails, this should improve the position of the worst-off, rather than try to equalize the position of all. On the other hand, sufficientarians claim that justice requires that each has enough (e.g., resources) in some absolute sense. Both approaches do not place any intrinsic value upon equality. By contrast, egalitarians argue that (global) inequality is unjust for non-instrumental reasons (Beitz 2001). What needs to be found are firm grounds for a theory of global egalitarianism.

Grounds of Global Equality

One of the most significant challenges to the possibility of global equality voiced so far has been eloquently put forward by Thomas Nagel, who echoes John Rawls's reluctance to allow for such a possibility (Nagel 2005; Rawls 1999). The basic thesis is the following: requirements concerning duties of distributive justice apply exclusively within a single state and do not extent to duties of this nature between rich and poor countries; in short, *extra rem publicam nulla justitia*.

Nagel claims that egalitarian justice is the internal morality of the association of equals that is formed by a legal order in which the subjects of the law are represented as its *authors*, that is, as co-citizens. We have egalitarian obligations to our fellow citizens, because inequality undermines our common liberty within a state that has also a *coercive* structure. A variety of this argument stresses the fact that we inhabit a system of *cooperation* and *reciprocity* within a state (Sangiovanni 2007). This is clearly a *relational* conception of justice, which denies the existence of such a relation between members of different states. Equality, in this sense, is the special virtue of sovereigns. Yet, even if we accept that coercion, cooperation, or reciprocity trigger equality, the same may also inhere beyond that level, albeit with ambivalent normative outcomes. It is argued, for example, that the existence of global coercion triggers global distributive duties more demanding than mere humanitarianism, but not necessarily as demanding as egalitarian duties (Valentini 2011).

One prominent effort to avoid such a challenge comes from a cluster of theories that try to base duties of global egalitarian justice on a *non-relational* ground. According to this approach humans have entitlements simply as humans and not because they happen to share certain institutions. It is our humanity or, indeed, dignity that ought to be respected and doing so has distributive implications. This approach is familiar to human rights versions of global justice. Indeed, it is said that people deserve equal opportunities, because they should not suffer due to morally arbitrary factors, such as race, class, or gender into which they are born. By analogy then, neither should they suffer due to arbitrary factors, such as nationality or citizenship, which comes along with birth. The approach is a luck egalitarian argument extended to global distributive justice (Schahar 2009; Caney 2005), even though not all luck egalitarians are also global egalitarians. Despite its great emotional appeal, this approach is criticized for three main reasons. First, merely focusing on an extension of luck egalitarianism globally seems insensitive to existing interactions between countries and between individuals across countries, which may *cause* inequalities. Second, whatever principles of justice this approach entails, they are excessively vague, and over-demanding, mainly because it moves directly from moral to political equality. Third, it cannot

offer an account of the special difference a state should make on articulating its own preferences for redistribution among its citizens.

Relational responses to Nagel's challenge come from a number of directions. One cluster of relational theories contains those that make an effort to extend Rawls' difference principle at the global level, which means that we should accept inequalities only when they benefit the worst-off. Charles Beitz and Thomas Pogge, for example, have argued that there is currently a "shared institutional order" (a "basic structure") at a global level, which might embody ideals of cooperation and reciprocity (Tan 2004; Pogge 2008; Beitz 1979). This institutional order creates the conditions that do not allow poor countries develop and many people inhabiting them do not have access to nutritious food, clean water, education, and shelter. Pogge refers to our negative duties towards the global poor, that is, "one ought not to co-operate in the imposition of a coercive institutional order that avoidably leaves human rights unfulfilled without making reasonable efforts to aid its victims and to promote institutional reform." Critics argue we cannot legitimately claim that we should abolish any boundaries regarding our duties, based on de facto cooperation. If so, mere de facto cooperation might give a reason to the rich and powerful states to withdraw from cooperative schemes or deny any strong cooperation, just to escape egalitarian duties (Van Parjis 2007). In relation to the "difference principle" applied globally, it has been objected that, first, there is no "international basic structure," because whatever interaction exists is much weaker and less direct in impact, and second, that, in any case, there is no global agent to apply it. Yet, whatever definition of an "international basic structure" one adopts, the global institutions that *already* exist might still create inequalities that lead to injustices. Finally, a global egalitarian theory should be seen as having the task to propose what institutions *should* exist, despite the fact that they cannot be put into practice right now (Beitz 1979: 156).

A second cluster of relational theories aims to ground global egalitarian justice on a particular conception of freedom, conceived as non-domination – a feature of modern republican theory recently connected to global justice (Bohman 2007). According to such an approach one is free if no one else has the arbitrary power to interfere with her affairs. Domination can be exercised not by actual interference, but even by the possibility of interference. Thus, mere possession of power, rather than the exercise of it, matters here. Accordingly, under a complex and hierarchical interdependence, powerful states, multinational corporations, and organizations like the WTO create institutions from which the global poor cannot exit, that is, there is a system of nonvoluntary inclusion in indefinite cooperative schemes, which creates domination. Rich states exercise arbitrary power to foreigners through border controls (through their unchecked "right to exclude") and developing countries are dominated when offers are made to them on terms which cannot refuse (Ip 2016; Laborde 2010; Koukouzelis 2009). Inequalities of power, especially large ones, are responsible for creating relations of domination. Therefore, equality matters because of its effects on power – we need reasons why others ought to provide what is significant – and duties of justice pertain to *relative* rather than exclusively *absolute* economic status.

None of the abovementioned approaches, including the statist approach, deny the moral equality of persons. Their difference lies in whether the relevant notion of moral equality leads to principles of global egalitarianism. Non-relational approaches think that moral equality leads directly to distributive equality and the denial of this commits allegedly the "fallacy of restricted universalism" (Caney 2005). Relational approaches think there should be an existing relation that triggers egalitarian duties. A "third wave" group of theories of global justice includes theories that claim there is no deep conflict between relational and nonrelational approaches, arguing instead for a pluralist internationalism, that recognizes multiple grounds and principles of justice that apply either within states (relational) or across borders (nonrelational) (Risse 2012). But how should the various principles of justice be combined in cases of conflict, unless there is a unified theory of justice?

The Content of Equality

Apart from the pertinent role of the above discussion on the grounds of global distributive justice, there is also the question of the content of our possible global egalitarian duties. Those who reject an egalitarian conception of global justice recognize only humanitarian duties to come to the rescue of other human beings wherever they are. However, there are also *minimalist* approaches to global distributive justice. Rawls famously holds such an approach through defending a duty of assistance from liberal and decent peoples to burdened societies, presumably having the content of meeting basic needs (Rawls 1999, also Miller 1999). The *egalitarian* theories of global justice defend variously equality of (natural) resources, opportunity, capabilities, and power.

Equality of resources, for example, is defended together with an extension of Rawls' "difference principle" at a global level. The argument follows the same logic as in the domestic level and accepts inequalities only on the assumption that they exist for the benefit of the worst-off. Redesigning our global institutions in this way would mean that the countries of the developed world should work to open their borders to goods and services from the developing world and stop providing subsidies for their own goods, or work toward more just rules for international trade. Beitz, in particular, defends a global redistribution of natural resources, while others want to equalize the value of natural resources between nations (Steiner 2005), something that could entail a "global resource dividend" that would share among peoples the value of the natural resources each of them happens to be endowed with, by taxing their extraction (Pogge 2001). The main problem here refers to how we can make the required comparisons. In order to know what our fair share of resources is we need to know first the total value of all resources, and second, the total number of people who are entitled to a share of those resources, including the people who are going to exist in the future – something impossible.

Furthermore, versions of luck egalitarianism at the global level defend a global equality of opportunity. Darrel Moellendorf, for example, claims that "a child born in rural Mozambique should be statistically as likely to become an investment banker as the child of a Swiss banker" (Moellendorf 2002). This approach might be problematic, because it favors the positions of high status in one society over the positions of high status in others, thus it cannot avoid favoring one culture over another. Simon Caney has tried to modify what should be demanded by such a principle. Now equal opportunities mean that one attains "an equal number of positions of a commensurate standard of living." The challenge here becomes one of how to construct a somehow culture-neutral account of a standard of living. Caney says this can be assessed in terms of their contribution to well-being. But this is again problematic. Equalizing standards of living might not be enough to counter forms of domination created, for example, by poor political participation and power.

The "capabilities-based" approach to equality represents a significant challenge to the extension of the Rawlsian theory to global justice. Moving away from equal access to resources, the "capabilities-based" approach is a rather outcome-oriented approach, indicating that everyone should be able to achieve important functionings. These functionings include living a life of normal length, enjoy human dignity, etc. and are connected to a list of basic capabilities, such as education of human faculties, protection of bodily integrity, and freedom of speech. The focus on capabilities, although closely related to human rights, adds something important. It informs us that our goal is not only "negative liberty" or absence of interfering state action, but instead the full ability of people to achieve these functionings (Nussbaum 2005). Gillian Brock – although invokes a relational theory of equality – draws on Nussbaum's capability approach and ends up with a set of needs-based minimal floor principles of global justice (Brock 2009). Therefore, it is not clear whether this approach endorses capability equality or whether it favors a rather sufficientarian approach to global distributive justice. Moreover, it is also controversial *which* capabilities individuals need to enjoy equal access to.

Modern republicanism occupies an intermediate position between the minimalist approach,

which aims to respect the conditions that are universally necessary for human beings to lead minimally adequate lives, and global egalitarianism, which takes inequalities as such between persons across borders to be a concern of justice. At the individual level absolute deprivation (food, basic health care, shelter, and education) is of considerable concern as it undermines rational agency and autonomy, therefore makes people extremely vulnerable to domination. Furthermore, relative large inequalities also undermine the sense of dignity and self-respect of the poor. Both create the material preconditions for the fundamental capacity all individuals must enjoy to counter domination. At the state level, the enormous disparities in resources and powers among states create differences in bargaining power in international negotiations. Developing countries do not have political voice most of the times in decision-making across boundaries, for example, in organizations like WTO, or the World Bank. To curb domination there should be a scheme of wealth redistribution from rich to poor countries using tools proposed so far, such as the Tobin Tax. At the same time there should be a reform in international organizations that allows developing countries to contest decisions made.

Are Duties of Global Egalitarianism Compatible with Special Responsibilities?

However, there is also one additional question to be addressed here. Are obligations of global egalitarian justice, if true, prior or do they follow obligations of egalitarian justice towards compatriots? There two extreme positions here. The first one claims that a commitment to the equal worth of persons is incompatible with a recognition of underived special responsibilities to the members of one's own community, thus global egalitarianism takes priority. The second one claims that special responsibilities are owed not to all persons qua persons, but to some persons with whom we have particular attachments. However, the incompatibility of the two extremes has been criticized. Scheffler, on the one hand, acknowledges a genuine tension, but tries to sketch a reasonable accommodation between them, without reducing the one to the other (Scheffler 2001). Others argue that special responsibilities arise within the framework of global egalitarianism, and the tension is not between global egalitarianism and special responsibilities, but between the various general duties and special responsibilities to which global egalitarianism gives rise (Abizadeh and Gilabert 2008).

Future Challenges

Nevertheless, the ambit of discussions around global justice and equality has grown somewhat larger than it used to be some years ago. We saw that both grounds and content of global egalitarianism remain essentially contested. However, the relation between global justice and equality is constantly being renewed nowadays, within projects that are connected with the emergence of new issues, such as gender, international trade, and migration (see Armstrong 2012; Risse 2012). We shall only mention two here: global health and environment. While those coming from a broadly defined Rawlsian tradition are concerned with inequalities regarding access to healthcare (Daniels 2008), others coming from the capability-based approach are concerned with wide disparities in life expectations and susceptibility to diseases (Venkatapuram 2011). Lately, environmental issues have been importantly focused on climate justice. There has been significant work to defend a framework for an equal per capita distribution of greenhouse gas emissions, globally speaking (Caney 2012). From a more integrative point of view, from which all issues of resource use ought to be addressed through an egalitarian theory, some have argued for an equal entitlement to "ecological space" across the globe (Hayward 2007).

Conclusion

There are, admittedly, intense ongoing debates around the possible extension of equality to the

global sphere, as the literature develops in complexity and sophistication. We have dealt with grounds and content and have briefly referred to some important future challenges. However, there are still a number of important questions we have left unaddressed in this entry. For example, how principles of global equality be balanced with national self-determination? What should be the appropriate institutional framework for global equality? The discussion has only begun and promises to be fascinating.

Cross-References

► Cosmopolitanism

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Erasmus, Desiderius (of Rotterdam)

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Humanism

Desiderius Erasmus of Rotterdam (c. 1467–1536), the greatest Renaissance scholar north of the Alps, known as the "Prince of the Humanists," was a prolific writer who left behind more than a hundred original compositions written in elegant Latin. He also translated from

Greek into Latin and published some of the finest works of Greek and Roman classicism. To this sphere belong 4151 proverbs of Greek and Roman origin which he collected and added to each of them an annotated summary (*Adagium*), thus producing "thousands of adages" (*Chiliades adagiorum*), e.g., the proverb "War is Sweet to Those Who Never Experienced it" (*Dulce bellum inexpertis*), which served Erasmus to write a polished adage denouncing war and praising peace.

He attached great importance to the written heritage of the Church Fathers and published full editions of the writings of Augustine, Ambrose, and Jerome, as well as Latin editions of Church Fathers from the east, e.g., John Chrysostom and Origen, who were hardly known in the West. Erasmus especially admired Jerome (342–420 AD), who translated the Scriptures into Latin and thus created the Vulgate (*Vulgata*), which became the authorized and sacred Bible text of the Church. Erasmus edited and published Jerome's writings and as an introduction wrote "The Life of Jerome" (*Vita Hieronymi*), a biography that set for future publications of this type new standards of accuracy and reliability. Erasmus constructed Jerome with the aim of inspiring his readers to appreciate and admire a life of scholarship and Christian piety. This contributed to a revival of interest in Jerome, and not less so in Erasmus.

The rapid development of the printing industry in his time served Erasmus well. By the end of the fifteenth century, there were already dozens of printing houses throughout Europe. Erasmus knew how to use it in order to promote his scholarly image – a sort of Jerome of his time – and to disseminate his books and ideas.

"Praise of Folly" (*Moriae encomium* id est *Stultitiae laus*, 1509) is Erasmus' most famous and popular work. It is a piercing satire about the driving force in human life, i.e., stupidity. The satirical spirit of Lucian, the Roman satirist, and Aristophanes, the author of the Athenian comedies, dwells on it, and Erasmus' erudite use of Greek and Roman classicism is strongly felt. A goddess speaks. She is Folly, the daughter of the Plutus, who is the god of money and wealth, the most important of the gods, as Erasmus puts it. Criticism of government and Church is striking. "What do I say about the courtiers? For the most part they are the most obsequious, servile, stupid and worthless of creatures, and yet they are bent on appearing foremost in everything."[1] Popes are reproached for spending resources on the purchase of their position, which once bought has to be protected by the sword, by poison, by violence of every kind.

The Franciscans, Erasmus' chief haters, accused him of laying the egg which Luther hatched. Unsurprisingly, "Praise of Folly" was on the "Index of Prohibited Books" published by Pope Paul IV in 1559, as part of measures taken against the Reformation.

Many of Erasmus' works deal with education, such as "On Education for Children" (*De pueris instituendis*, 1529). Thus, "A teacher can expect success in the classroom if he displays the qualities of gentleness and kindness and also possesses the skill and ingenuity to devise various means of making the studies pleasant and keeping the child from feeling any strain. Nothing is more harmful than an instructor whose conduct causes his students to take an intense dislike to their studies. . ."[2] This educational thinking influenced the shaping of modern teaching. Erasmus' educational influence has also disseminated through his "Colloquies" (*Colloquia Familiaria*), which Erasmus began writing during his studies in Paris (1495–1499) as simple exercises designed to teach correct conversational and written Latin for pupils he taught. These witty dialogues on a diversion of issues which Erasmus considered superstitious: pilgrimage, fasting, worship of saints, etc. Despite the condemnation and the ban imposed by the Church, the demand for his "Colloquies" as textbooks in schools has considerably grown up over time, and within a century since their appearance, they became text studies all over Europe, as well as Erasmus' most popular piece of writing, second only to "Praise of Folly."

[1] *Praise of Folly* in *Collected Works of Erasmus* (=CWE), vol. 27, 136.

[2] CWE, vol. 26, 324.

Religious Mind

The core of Erasmus' religious mind was "The Philosophy of Christ" (*Philosophia Christi*), as he named it. It meant the acceptance of the Gospels as the basis for a Christian way of life. Moral values were prominent in "The Philosophy of Christ." Piety (*Pietas*) in general, and "Learned Piety" (*docta pietas*) combining faith with reason, were pivotal. This last term indicated a desirable combination of Christian-moral commitment, and scholarly contemplation was first and foremost embodied in Jerome, the admirable Church Father. Predominant were also the pursuit of peace, opposition to futile rituals and ceremonies (*adiaphora*), and a firm preference of the spiritual and internal essence of the sacraments.

The Latin text of the Vulgate was corrupt over centuries of repeated copying and reproductions by monks who were often insufficiently learned or scholarly incompetent. Erasmus, an innovative theologian and a resolute opponent of the orthodox-scholastic theology, who was endowed with a critical attitude and a degree of distinctive skepticism, took upon himself to produce an improved text of the New Testament. He compiled old Greek manuscripts of the NT on the basis of which he produced a bilingual revised edition with a parallel Greek and Latin text, the first of its kind to be published in print (1516). In doing so, Erasmus corrected the Vulgate, broke sacred conventions, and challenged the authority of former theologians who related to the text. The first edition appeared in 1516, and four more followed in 1519, 1522, 1527, and 1535. Erasmus added a volume of annotations which supplied extensive commentary and often disputed the adequacy of the Vulgate vis-à-vis the Greek source, calling attention to errors as well as to mistaken inferences made by theologians over the centuries.

Erasmus' NT of the 1519 edition was in front of Luther when he prepared his German edition of the NT. Luther's remarks, in his own handwriting, on Erasmus' annotations to the NT prove that Luther was more critical than appreciative toward Erasmus' work. William Tyndale, in his translation of the NT into English, utilized the 1522 edition of Erasmus's Greek New Testament (as well as the Vulgate and Luther's German translation of the NT). Tyndale's translation was used by many subsequent English translations and was standardized in the King James Version in 1611.

Mutual appreciation and a degree of conceptual closeness marked Erasmus' and Luther's early connections. Both went against corrupt Church practices, though Luther went much further and Erasmus refused to join his Reformation movement. The theological issue which marked the rupture between the two (1524–1525) is known as the debate on the free will and salvation: whether the attainment of salvation requires faith alone (*sola fide*), as Luther ruled, or whether good works are also required, as Erasmus argued. Luther was convinced, following a study of Paul's epistles, that faith was the only prerequisite for salvation: "For by grace are ye saved through faith; and that not of yourselves: it is the gift of God: Not of works, lest any man should boast" (Ephesians 2, 8–9). Erasmus argued that God renders humans according to their deeds, and humans, out of free will, may choose to perform good works in order to obtain redemption of their souls. Luther harshly rejected that: such a presumption was unbearable, for it would mean that man is capable of influencing God's decision, which would be a violation of God's absoluteness.

Pacifism and Cosmopolitanism

Erasmus is often referred to as a pacifist, based on lines such as he phrased in his "Complaint of Peace" (*Querela pacis*, 1517). "Are you longing for war? First look at what peace and war are, the gains brought by one and the losses by the other... If it is something for admiration when a kingdom is prosperous throughout, with its cities soundly established, lands well cultivated. . .if you have ever seen towns in ruins, villages destroyed, churches burnt, and farmlands abandoned and have found it a pitiable spectacle, as indeed it is, reflect that all this is the consequence of war."[3]

[3] CWE, vol. 27, 316.

However, Erasmus approved war against the Turks. He opposed waging a crusade against them, such as Pope Leo X planed, but he did not essentially reject waging war against the Turks, as he discloses in his "The Education of a Christian Prince" (*Institutio Principis Christiani*, 1516). The waging of such a war must be conditioned: "Let us first make sure that we are truly Christian ourselves and then, if it seems appropriate, let us attack the Turks."[4]

Erasmus was often viewed as preaching for the unity of human kind and as an intellectual who recognized and cherished different peoples and cultures. Expressions such as "...this world, which we share, is the homeland of all human beings,"[5] won him the reputation of a universalist. Stephan Zweig, in his *Erasmus of Rotterdam*, valued Erasmus as a precursor of transnationalism who contributed considerably to the vision of a united Europe by one language, one religion, and one culture, in which conflicts and wars will end.[6]

However, the appreciations of Erasmus as a visionary of the European Union and as pacifistic cosmopolitan were the outcome of an idealized perception and a tendency, shared by many, to ignore Erasmus' attitude toward the "other." Erasmus despised the Turks, their achievements, and their religion, at a time when the Ottoman Empire was at its peak under Sultan Suleiman I (the Magnificent.) As for Jews, the anti-Judaic spirit of the time did not skip Erasmus. He was impatient with the modern ideal of tolerance, but because most people feel respect and esteem for him, it is difficult to ascribe to him failings such as intolerance, whether religious or ethnic. In a letter to João III, king of Portugal, of March 1527, Erasmus expressed his hope that Europe will be free of Judaism and paganism, and Jesus will reign over all. Nevertheless, there is no doubt that Erasmus' hostility toward Judaism and Jews was much less incendiary or inciting than that of Martin Luther.

[4] CWE, vol. 27, 287.

[5] *A Complaint of Peace* in CWE, vol. 27, 315.

[6] Originally written in German: *Triumph und Tragik des Erasmus von Rotterdam*.

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Erotics of Law

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Introduction

> Com'è povero il diritto se non parla d'amore. (Rodotà 2014)

Erotics of Law – an allusion to Eros, the Greek god of love and passion – is the name given to combining emotional and sensory elements with Law, and is especially based on Susan Sontag's and Colette R. Brunschwig's theories (Sontag 2001; Brunschwig 2010). It is a methodological-epistemological approach to face Law through an

understanding of its empirical elements, with an elevated sensory awareness and open-mindedness to experience Law in a new way.

The traditional and morally driven understanding of the word "erotics" must be avoided, since the concept of Erotics of Law is not limited to the lustful feelings associated with erotic love, as common sense has it. This concept is meant to add to the juridical universe new capacities and experiences of desires, frustrations, expectations, feelings, senses, and passions (Luna 2019).

Erotics of Law suggests a perspective of juridicity impregnated with subjectivity, pleasure, and sensitivity. Law takes up an erotic dimension when it surpasses abstraction, excessive formality, and coldness, and becomes an "experience" to the human being, bridging the gap between theory and practice. The juridical perspective refrains from being only the reason and sprouts from the interaction between the individual and Nature as a form of sensitive experience. The Erotics of Law values orality and hearing/listening to the legal discourse, as well as the other human senses: touch, taste, sight, and smell, which the juridical tradition voluntarily atrophied over its history (Brunschwig 2021).

Erotic Law is ambivalent; it refuses totalitarian certainties and simple dualisms, such as reason-emotion, mind-body, soul-matter, and spirit-flesh, because these extremes are not actually opposite but, rather, an empirical continuum. Continuity is the common thread to the history of humankind; therefore, it takes a unified view to comprehend reality, to perceive the whole that associates immediate facts and fundamental data. Through erotics, law makes our presence in the world more significant and keeps alive the power of feeling it to the fullest. The essence and the value of law do not lie in its theoretical instruments and procedures per se but, rather, in the dynamic human activity, in an experimental development through which such tools are created and perceived.

Origins of the Concept of Erotics

Although Greek mythology makes no mention of the relationship between Eros and Dike, they will find a favorable place for their union in the field of law – Dike representing the juridical dogmas, the realm of legality and normativity of law, while Eros as a symbol of affection, enthusiasm, and untimed tenderness.

Themis, daughter of Uranus and Gaia (Sky and Earth), is a Titaness. Goddess of order and Justice, she personifies the order in the world, the balance of all things, the divine and moral law (in Greek, *thémis* means "that which has been set as a rule" – Collognat 2012). She created the oracles, the rites, and the laws. Themis is Zeus' second wife, after Metis. Of her union with the master of gods Dike was born, the goddess of justice, sister of Aletheia, goddess of truth. Especially interested in the quarrels between men, Dike has become the symbol of justice; she incarnates the word of the judge.

As to the birth of Eros, Ancient times have given us three different versions. In the first version, in Hesiod's Theogony, Eros is a force that lies in Chaos, puts the elements in order, and guaranteed it's unfolding into Cosmos. That is, although confused with disorder and anarchy, Eros restores and organizes the shapeless and open-ended mass, which grants him an orderly force of attraction as he causes to approximate the loosely scattered bodies. The power of Eros joins, unites, mixes, multiplies, and varies the species of animals, plants, liquids, and fluids, that is, all creation (Commelin and Maréchaux 1995). In another version, Eros is said to be the son of Ares, god of war, and Aphrodite, goddess of love. Due to his parents, Eros has the destructive energy of Ares, the scourge of men, but also the need to get together with another one. This union brings forth the idea of lustful love: desire (by Aphrodite) and death (by Ares), symbol of a reality that both destroys and fecundates. Lastly, in Plato's Symposium, Eros is said to be the son of Poros and Penia, abundance and need, both contradicting realities that manifest themselves in the figure of the god, which was conceived on the day of Aphrodite's birth (a very pertinent coincidence). All these versions show that Eros' genesis is the more-than-possible dialogue between fate and the experience of passion.

Eros is one of the primary divinities, he who leads gods and goddesses into copulating and getting together indefinitely. It is him who connects, gathers, and brings others together. However, this coupling has no end or boundary and, therefore, leads to incest, cannibalism, and parthenogenesis. It is only by distance, which goes through emotions such as anger, wrath, and pain, can the order be reinstated. This distance, which lies on discord, is symbolized by Eris, daughter of Night. The acts of Eris, whose name resembles that of the Erinyes (deities of vengeance), are meant to differentiate, separate, and distance, which are necessary conditions for the birth of individuals in society. With no rupture or separation, everything would be undifferentiated, fusion, and chaos. As the original chaos and undifferentiation exit, it is then possible to establish the political-juridical order.

Therefore, the union of Dike and Eros, of law and passions, is characterized by ambivalence and allows keeping opposite elements in a state of dynamic tension; not that of unity, but of coexistence of opposites that gives way to the transformation in each pole. Between opposite poles, identified by Eros and Dike, there exists an interesting movement of dialectical transformation that warrants an ever-renewed balance (Larrieu 2017). These opposites are far from being indifferent and confused; rather, they coexist.

The Coupling of Law and Emotion

In recent years, the positivistic-juridical paradigm has been hit by harsh criticism. The debate developed at the core of epistemological tradition, on the one hand, and the growing success of hermeneutic reflection, on the other hand, have stimulated the search for relevant nexus between the two worlds that positivism meant to separate: the world of the individual, of passions, of value-judging schemes, of environmental rooting, and the world of rigid logic, of subsumption and rhetoric demonstrations (Simpson 2015).

As the issue of hermeneutics was taken into the field of art, the American philosopher Susan Sontag invites readers to abandon all the cold rationality of contemporary hermeneutics to substitute it with an artistic "erotics," in which the arrogance of interpretation should give in for men to get back their sensory dimension and learn to see more, listen more, and feel more. According to Sontag, "Ours is a culture based on excess, on overproduction; the result is a steady loss of sharpness in our sensory experience. All the conditions of modern life – its material plenitude, its sheer crowdedness – conjoin to dull our sensory faculties. [. . .] What is important now is to recover our senses. We must learn to see more, to hear more, to feel more. [. . .] In place of a hermeneutics we need an erotics of art" (Sontag 2001).

The scenario drawn by Sontag is very similar to the current juridical panorama, marked by the excess of normativity, by the abundance of litigiousness, by technicity, and by formalism (Franca Filho and Carneiro 2014). Therefore, it is necessary to get back on the provocative path to emotions, senses and feeling in law, using parts of our body and brain that have not been used or challenged in a traditional juridical approach.

Conclusion

The erotics of law is not an abstract product of the pure solipsist subjectivity of an author. Law takes up an erotic dimension when it stops being an abstraction and becomes an "experience" for the human being, funneling to the fullest the relation between theory and practice. Law refrains from being only reason and sprouts from the interaction between the individual and Nature as a form of sensitive experience (Brunschwig 2011). It is necessary to distance itself from lonesome reason and go back to the experience and the senses: touch, taste, sight, and smell (and sniffing, mark of intuition, and of the search for "*fumus boni iuris*") which the juridical tradition voluntarily atrophied over its history (Pavoni et al 2018). Law barely touches things right now; it started to mentally idealize them, proclaim them, but it only touches them with gloves, as in a forensic medical examination. Unlike the juridical current that kills the senses, the Erotics of law is in sync with Multisensory Law, a concept developed between 2010

and 2011 by Colette R. Brunschwig, of the School of Law at the University of Zurich, who coined this expression based on the findings that verbal–vocal–palatal–olfactory–tactile–visual juridical manifestations were not only possible but also necessary in the more-and-more plural society we live in (Brunschwig 2021).

Cross-References

▶ Anthropology of Law
▶ Nussbaum, Martha
▶ Psychoanalysis and Law

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Ethical Education

▶ Education: Ethical

Ethics of Law

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Introduction

The ethics of law deals with the question of whether and, if so, how law can be morally justified and criticized.

As a subdiscipline of law and philosophy, an explicit presentation of the ethics of law is rare. This may be due to the fact that the expositions of the philosophy of law tend to focus rather on legal theory or particular ethical problems – for example, whether there is a right to resistance or how criminal punishment can be justified. This orientation toward concrete questions, however, has the disadvantage of overlooking the particularities common to all these ethical problems regarding the law.

Ethics of Law as a Discipline

Ethics of law is part of the philosophy of law which is in turn part of two disciplines: law and philosophy. Within the studies of law, ethics of law stands alongside subdisciplines such as the study of the valid regulations of law (e.g., criminal law or administrative law), the sociology of law, and the history of law. For a better understanding of the ethics of law, comparing it to these subdisciplines may be helpful. In contrast to the study of the valid law, the ethics of law reflects upon the law from an *external*, namely ethical, point of view. While sociology and history are mainly descriptive, the central question of ethics of law

is normative: Which law is morally justified? The relationship between the ethics of law and legal methodology depends on the understanding of legal methodology, which itself is controversial. If one understands the methodology of law as (at least partially) determined by questions of ethics, one might consider legal methodology as a part of the ethics of law. Ethical argumentation could in this sense support a positivistic interpretation of law (Radbruch 1932; MacCormick 1985; Campbell 1996) as well as a non-positivistic interpretation of law (Dworkin 1977).

Within the philosophy of law, the ethics of law must be distinguished from legal theory, which attempts to answer non-normative questions of theoretical philosophy in relation to law, for instance, regarding the concept of law, normative logic, and the use of language in law.

In contrast, ethics of law is a normative discipline. Its central concern is the question of the justice and morality of law (Fig. 1).

The ethics of law is also a branch of ethics as a subdiscipline of philosophy. Ethics (or moral philosophy) is characterized by reflecting, criticizing, or justifying norms, rules, evaluations, and convictions, e.g., in morals and law.

The discipline of ethics can schematically be subdivided into metaethics, normative ethics, and applied ethics. Metaethics is concerned with rather abstract questions that are supposed to precede the theories of normative ethics, e.g., what ethical normativity actually means or whether ethical norms and evaluations can be objective and true. The field of normative ethics, on the other hand, includes all general theories aimed at answering the question of when action is to be qualified as just or ethically good, respectively unjust or ethically wrong.

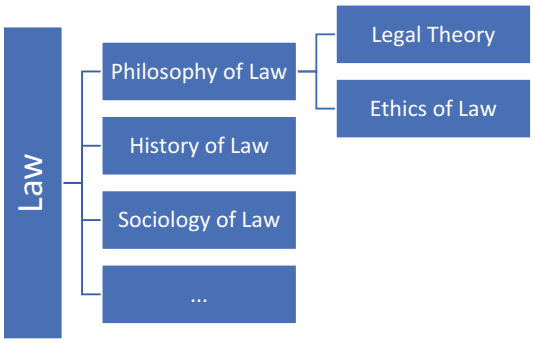
Normative ethics can be further subdivided into theories that apply to the evaluation of the decisions of individuals (individual ethics) and theories that apply to social and political communities (social or political ethics/philosophy). The ethics of law is a part of this political and social ethics.

The ethics of law is at the same time a form of applied ethics, i.e., part of the discipline which examines characteristics of the application of normative ethics to particular subject areas. Just like medical ethics applies general normative ethics to medicine, ethics of law applies general normative ethics to law (for a detailed study, see Pfordten 2011, 2005) (Fig. 2).

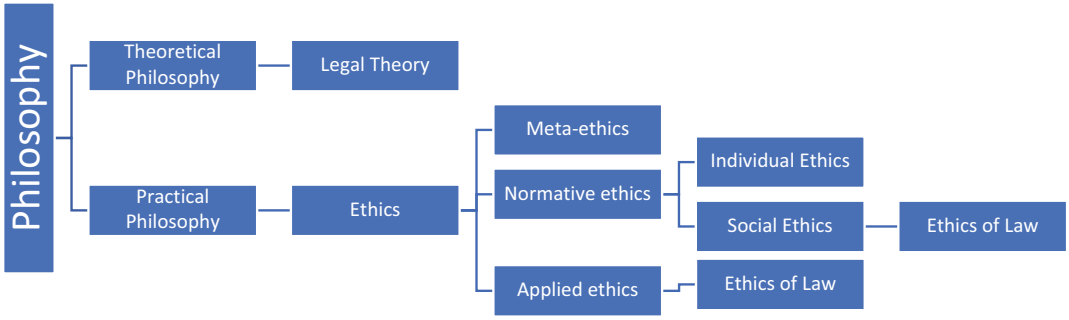
Ethics of law in this sense must not be confused with the issue of the professional ethics of lawyers, i.e., the moral norms of conduct that members of the legal profession are expected to observe in their practice. Questions of professional ethics, however, could of course be a subject of the ethics of law.

General and Specific Ethics of Law

Ethics of law can be further differentiated according to how specifically it addresses the law as its object. On the one hand, there are ethical theories that deal primarily with action in general and apply ethical principles without any further differentiation, as ethical principles for law, e.g., Jeremy Bentham's classical utilitarianism, which does not differentiate between ethical imperatives



Ethics of Law, Fig. 1 Ethics of Law as Subdiscipline of Law



Ethics of Law, Fig. 2 Ethics of Law as Subdiscipline of Philosophy

for individuals and ethical imperatives for political action in the form of law (Bentham 1780/89: 170). On the other hand, there are theories that do make specific modifications to their more general ethical theory in relation to political action in the form of law. For the latter, Kant stands paradigmatically with his distinction between Doctrine of Virtue (*Tugendlehre*) and Doctrine of Right (*Rechtslehre*) (Kant 1797).

The (Im)possibility of an Ethical Critique of Law

Before asking the normative questions of ethics of law, above all the question of the justice of law, it is important to address the fundamental justification of this question. It is conceivable in many respects to reject the normative questions of ethics of law already on a meta-level. Quite fundamentally, such skepticism toward a normative ethics of law applies if true normative moral judgments are considered impossible in general metaethics. So-called non-cognitivists generally consider moral statements to be incapable of being either true or false. Rather, moral statements express subjective attitudes such as pro or contra attitudes toward the object of judgment (expressivism) or mere emotions (emotivism) (e.g., Ayer 1936, Chap. 6; Schroeder 2008). Similarly, error theorists claim that moral judgments are always false due to the impossibility of objective moral truth (e.g., Mackie 1977).

In metaethics, these skeptic theories are often subsumed under the term anti-realism. In respect specifically to law, a comparable thesis can be found in some forms of the so-called legal realism, especially Scandinavian legal realism. Its best-known representative Axel Hägerström (1911), for example, argues emotivistically.

Similarly, but not generally opposed to the aptitude of moral judgments for truth, metaethical relativism argues that moral judgments can only be true or false relative to specific truth conditions, such as the social or cultural environment (e.g., Harman 2000: 77–99). Relativism therefore does not claim the impossibility or senselessness of ethics of law, but only its local, temporal, and social conditionality. It thus calls into question the objective and universal claim of ethics of law. Many communitarian theories argue for such a form of political or ethical relativism (e.g., Walzer 1983).

If one of the positions mentioned above were true (perhaps with the exception of metaethical relativism), the project of a normative ethics of law would be doomed to failure. In fact, in this case the ethics of law could claim nothing more than the metaethical statement that objective, true statements about the justice of law are not possible. The ethical theories presented in the following, in contrast, do assume some form of objectivity of ethical judgments.

Beyond these fundamental metaethical skepticisms which are directed at normative ethics in general, there are also other forms of more specific criticism directed at law and the ethics of law. This specifically legal skepticism becomes particularly clear in various legal critiques by, for example, Marx and Foucault, from feminist or postcolonial

perspectives, and in Critical Legal Studies (see the respective entries). Despite their many differences, what all these positions have in common is that they understand the law mainly as an instrument of domination. Also in Nietzsche (1887) and in the speech of Callicles in Plato's Dialogue Gorgias (2008: 483b-c), conventional morality and law are seen as instruments of domination – in these cases, however, as instruments of the weak against the strong.

Reduction to an Internal Critique

A rejection of the external ethics of law is occasionally accompanied by arguments in favor of a reduction to an internal critique of the law (Kirste 2011: 242). This aims at the elaboration of evaluations from existing law or from the concept or general idea of law. Its critical potential consists in pointing out the corresponding tension or even contradictions of legal evaluations. This internal criticism of law is sometimes referred to as descriptive ethics of law. Alternatively, it can be considered a part of the study of valid law (Pfordten 2011: 1, 8). Similarly, if moral norms are analyzed merely as an incorporated part of positive law, this method is best understood as the study of applicable law because of the internal perspective on positive law. Therefore, at least in this article, an accordingly postulated "internal ethics of law" will not be considered an ethical theory of law.

Ethical References in the Concept of Law

As already described, the task of legal theory is to analyze the concept of law. Many contemporary, especially positivist, legal theorists emphasize their striving for a purely conceptual, descriptive analysis of the concept of law and that the resulting concept of a legal obligation has no moral implications (cf. Himma 2019: 35–40; Raz 1979: 150–53). However, numerous other attempts to define the concept of law do rely on normative-ethical elements. Radbruch (1932), for example, defines the concept of law with reference to its pursuit of justice. Radbruch emphasizes that norms that do not even strive for justice are conceptually not law, but mere power or force. For Dworkin (1977) and Alexy (1992), too, the concept of law has moral implications. These references must also be taken up by the ethics of law, especially when it comes to the question of the moral duty to follow the law.

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Ethical Theories of Law

There are a number of individual questions of ethics of law that are intensively discussed. However, the answers to these specific questions are largely determined by the answers to more abstract ethical questions. Only if we understand what general ethical guidelines we *ought to* apply to our actions and in particular to the law, we can give meaningful answers to more concrete questions. This question about the abstract requirements of ethics is answered in many different ways. Some groups of (sometimes rather loosely connected) theories can be distinguished: consequentialism, deontology (especially contract theories), virtue ethics, and deliberative theories.

Consequentialism

Classical consequentialism assumes that an action, just like law, is morally correct if it pursues or achieves the best possible consequences. Thus, it is first determined which consequences are desirable and which are undesirable. In a second step, actions are evaluated according to whether they cause as many good consequences as possible and avoid as many bad consequences as possible – or, in a rule consequentialist fashion, whether they obey the rules that maximize good consequences. The best-known consequentialist theory is utilitarianism which sets as a good consequence the utility, traditionally understood as the increase of pleasure and avoidance of pain. Classical representatives are Jeremy Bentham (1780/89), John Stuart Mill (1861/63), and Henry Sidgwick (1874). In the last 200 years, numerous variants of utilitarianism have refined this idea focusing on rules instead of acts, well-being, desires, or preferences instead of pleasure, etc.

Deontology and Theories of Rights

Unlike consequentialism, deontological theories do not (directly) address the consequences of an action. Instead, they ask what rights and corresponding duties should guide actions. Thus, if an action violates an ethical norm, i.e., it is in breach of a duty to a rights holder, it cannot be justified by good consequences. Deontology aims at clarifying the conditions under which rights, duties, and obligations exist and seize to exist. The best-known deontological theory is Kant's ethics (1785). In Kant's view, our duties are completely independent of the consequences of our actions. Crucial is whether the principle guiding our action can be generalized without contradiction. There are also many deontological theories that do not completely ignore consequences. However, their primal focus remains the individual rights and corresponding duties.

Deontology and Contract Theories

In the ethics of law and in political ethics, many deontological theories are based on a thought experiment: which rights and duties should the members of a community agree upon in a suitable original position? They thus do not deviate from deontology per se but offer a specific (hypothetical) procedure by which it is possible to recognize and argue which rights and duties apply within a community. This idea finds its roots primarily in Hobbes (1651), Pufendorf (1672), Locke (1689/90), Rousseau (1762), and Kant (1797). More recently, Rawls (1971) and Scanlon (1998), for example, have used this starting point for their theories of justice.

This represents a very decisive step from individual to social ethics, of which the ethics of law is a part. While there are clearly rights and duties that apply only on the individual ethical level, such as a general prohibition to lie, the idea of the social contract focuses on political and legal rights and duties. This step is necessary to establish a deontological ethics of law. The question cannot be what duties we have in individual, private interaction with one another, but rather what rights and duties should be recognized and protected by law.

Deliberative Theories of Justice

One reason for a contractarian argumentation is that this method allows to avoid strong moral assumptions because it derives them from a description of a rather uncontroversial starting situation. Deliberative theories go one step further and try to replace material ethical guidelines even more by an explanation of the correct procedural intersubjective conditions under which it is possible to determine what is ethically and politically correct. Thus, while most contract theories continue to make strong substantial moral claims, for example, in the form of the pre-contractual human rights in Locke or the principles of justice in Rawls, deliberative theories try to avoid them (Habermas 1995: 126–131). For example, Habermas' discourse ethics analyzes the conditions of a discourse free of domination, which could claim moral validity for its results. Applied to law, this means for Habermas that content-related specifications may only be made for the purpose of establishing democratic discourse conditions (cf. 1992).

Virtue Ethics

Finally, in general ethics, one distinguishes, in addition to consequentialism, deontology, and deliberative theories, the virtue ethics. It does not ask how we should act, but how we should be as persons. The classical virtue theory is Aristotle's ethics (2009b). In modern ethics of law, especially civic republican and communitarian theories have emphasized the importance of civic virtues (cf. Machiavelli 1517/31; Rousseau 1762; Macintyre 1981; Sandel 1995).

Further Classification of Ethical Theories

The differentiation of the groups as presented is primarily a methodological one. Just as types of theories can be distinguished with regard to this abstract methodological level, so they can be distinguished with regard to the substantial demands that arise from them. The best-known classification of theories according to the various substantive demands is the classification into liberal and non-liberal theories, whereby the classification represents a spectrum between more or less liberal theories. Liberal theories can once more be differentiated into more or less egalitarian theories.

Less egalitarian liberal theories are especially theories of libertarianism (e.g., Nozick 1974). More egalitarian theories are, for example, those of Rawls (1971) and Dworkin (2011), the capabilities approach of Sen (2009) and Nussbaum (2011), and the socialist liberalism of Norberto Bobbio (1985). Of course, there are positions in between egalitarian and libertarian theories, e.g., the political philosophy of Otfried Höffe (2015).

Specific Problems in the Ethics of Law

A traditionally highly controversial area of ethics of law is that of the justification and determination of the limits of the duties and obligations to obey the law. This debate is to a large extent linked to the debate on competing concepts of law. However, caution is required in regard to the question of whether one could infer the limits of the duty to obey the law from a specific concept of law. If, for example, one accepts a strongly positivist understanding of law such as Kelsen's, this does not prevent the (all things considered) moral duty to comply with the law from ultimately being determined by ethical considerations (which, according to Kelsen 1971: 21–2, of course, cannot change the question of legal validity). There is also a close link from the question about the duty to obey the law to the debate about the understanding of the moral legitimacy of civil disobedience and resistance. Liberal theories generally assume that the duty to follow the law ends at a certain point, since the law serves to secure freedom and therefore loses legitimacy when failing to do so. An argumentation for such a right to resistance can be found, e.g., in Locke 1689/90: Chap. 3, and Rawls 1971: §§ 55–59. If one assumes, however, that there is a greater threat to freedom through non-compliance and other forms of resistance, one can assume a much more extensive duty to comply with the law. Such an argument against the right to resistance can be found, e.g., in Kant 1797: 318–9 and Hobbes 1651: Chap. XXI.

A main topic of the ethics of law is the justification and criticism of human rights. In general, two approaches can be distinguished: moral and political conceptions of human rights. Moral conceptions like those of Gewirth (1982, 1996), Griffin (2008), or Tasioulas (2015) hold that human rights are fundamentally moral rights, while political conceptions like those of Rawls (1999) or Beitz (2009) ask for the political function of human rights and discuss which rights should have this function from an ethical point of view. A specific question in the philosophy of human rights concerns human dignity and especially the question of whether it is a specific human right or the moral foundation of all human rights.

The question of whether state punishment is justified, and if so, under what conditions, is also crucial to the ethics of law, because in a democratic state under the rule of law, state punishment often represents the greatest restriction on freedom by the state. Classical purposes with which punishment is justified are (especially in consequentialist theories) future-oriented prevention via deterring, reforming, or incapacitating potential future offenders on the one hand (cf. Beccaria 1872; Bentham 1780/89, Chap. XIII–XV; Feuerbach 1801: §§ 19–22; Liszt 1882) and (often from a deontological standpoint) retribution resulting from the concrete committed crime on the other (cf. Kant 1797: 331–37; Hegel 1820, §§ 99–101).

Another controversial question in connection with the theories of morally legitimate punishment is whether punishment can be justified by reference to moral opinions of the members of society (cf. the so-called Hart-Devlin Debate: Hart 1963, 1965 and Devlin 1965).

Yet another important topic of ethics of law is the role of gender and sexual orientation and especially the role of women in law. A central question is to what extent law is shaped by gender conceptions and to what extent law itself consolidates and shapes these gender conceptions (cf. Jaggar 1983; Okin 1989; Benhabib 1996). This examination becomes ethical when it asks whether the interaction of law and gender conceptions is just with respect to people affected by law.

The question of whether and, if so, how property can be justified also poses fundamental questions for the ethics of law. There are huge differences between political philosophies, depending on the importance they attach to the

establishment of property in their theories and how they imagine the attribution of rights over the use of goods. A central role is played by the justification of private property, which is positively connotated, for example, by Aristotle (2009a, 1263a), in the classical liberal theory of John Locke and later libertarian theories, such as that of Robert Nozick (1974). More critical positions on the establishment of private property can be found in Plato (2000, 462b-c), Jean-Jacques Rousseau (1755: 44), and, most prominently, Karl Marx (1867–94).

One final example of an issue of the ethics of law is whose interests actually should be considered by the law. Animal rights theories argue for a consideration of non-human animals (cf. for a consequentialist position Singer 1975 and for a deontological position Regan 1983), and famously Christopher Stone (1972) even argued for juridic rights of other natural entities.

Obviously, these are just some examples of an almost endless list of moral considerations regarding the law. Undoubtedly for all these considerations, it is of paramount importance to take into account the ethics of law, starting from the transfer of metaethical and conceptual considerations to questions of general ethics applied to law and not least its concrete applications.

Cross-References

- ▶ Animal Rights
- ▶ Consequentialist Argument
- ▶ Human Rights and Justice
- ▶ Illiberalism
- ▶ Legal Realism, American: Theoretical Aspects
- ▶ Legal Realism, French
- ▶ Legal Realism, Scandanavian
- ▶ Legal Realism: Bologna
- ▶ Legal Realism: Contemporary
- ▶ Legal Realism: Genovese
- ▶ Utilitarianism

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E

Ethics: Legal

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Introduction

The legal profession is an institution that promotes the cluster of values identified by Anglo-American philosophers with the ideal of the rule of law. This in any event is one perspective on the morality of the lawyer's role. It challenges the long-standing assumption by philosophers that

actions within a professional role must be given the kind of justification that could be offered by moral agents not occupying a professional role (Dare 2009). The qualities that make a legal system worth having, and which distinguish legality from other modes of governance, are worth promoting (Waldron 2008). To the extent lawyers contribute to the realization of the ends promoted by the rule of law, their actions have prima facie moral value. The rule of law thus provides the basis for a role-differentiated morality for lawyers.

Role-Differentiated Morality and the Value of Legality

Lawyers do things in the course of representing clients that appear to violate principles of ordinary morality, such as honesty and respect for human dignity. Criminal defense advocates may represent clients they reasonably believe to be guilty of the charged offense, corporate counsel may keep secrets that, if disclosed, could prevent harm, and lawyers may lend their assistance to client projects that promote social injustice, such as providing advice on how to minimize taxes lawfully. Lawyers remain moral agents even when acting within a professional role and are therefore subject to the demands that morality makes on all persons. The role also makes normative demands, however, and lawyers must somehow reconcile these competing sources of obligation (Applbaum 1999). The usual approach to this reconciliation is to rely on a common moral value supposedly promoted by the professional role, such as trust, loyalty, or autonomy (Fried 1976). Even when the justification is successful, however, the argument from common moral values overlooks the distinctive political role of law and the legal profession. A signal characteristic of many modern societies is ethical pluralism, that is, the existence of a diverse range of comprehensive doctrines about human goods, values, ideals, and virtues. As a result, reasonable disagreement is a fact of life in many political communities (Rawls 1993). The task of governing a pluralistic society characterized by reasonable disagreement and conflict presents distinctive problems, and the various political and institutional arrangements for governing societies have moral features of their own (Luban 1997, pp. 117–120). It follows that the moral permissions and demands associated with the lawyer's role should have something to do with the moral properties of the legal system upon which the role depends.

The rule of law, or the value of legality, is a contested concept. It is sometimes used loosely to refer a good government under law, such as one characterized by the existence of strong property rights and investor protections, which may correlate with the size of a country's capital markets (La Porta et al. 1997), or protection for human dignity and human rights (Bingham 2007). The rule of law may also refer to formal features that a legal system ought to have, such as laws that are publicly promulgated, clear and understandable, consistent, openly and impartially administered, or at the very least capable of being obeyed (Fuller 1964; Raz 1979). In the British Commonwealth, it is often associated with Dicey's critique of official discretion. All of these conceptions of the rule of law share an underlying feature which is relevant to the moral value of legality. Governing a society by law is arguably different from ruling by unconstrained fiat. Vindicating this argument, however, requires articulating an underlying theory of law (Marmor 2004, p. 4). On a crude, Austinian command-sanction theory of law, any command issued by the sovereign is a law, regardless of its form, consistency with other commands, whether the command is binding on the sovereign, and the like. Modern theories of law, such as Kelsen's and Hart's, which emphasize the systematicity, generality, and publicity of law, suggest a conception of the rule of law as responsive to the needs of autonomous, self-governing citizens (Waldron 2008). Governance through a system of reasoned articulations of general norms manifests an attitude of respect toward the subjects of law as agents and bearers of dignity (Woolley 2014, p. 767). The positivity of law – that is, its deliberate creation and openness to change by a human community – enables the use of law as a means of governance in a society in which citizens disagree about what morality requires. (Even classical natural law theorists such as Aquinas emphasize the need for human

governors to specify, or "determine," the general demands of natural law as they apply to the problems faced by particular communities (Aquinas 2002))

Lawyers are not formally legal officials, at least in common law countries which emphasize the independence of the bar from the government. But lawyers may be said to "mediate" between citizens and the state by interpreting and applying the general requirements of the law to the specific situations encountered by clients. For example, a law stated in general terms may require corporate directors to exercise duties of care and loyalty when evaluating an offer to acquire the corporation. Do these duties require directors to attempt to negotiate with third parties in an effort to obtain a better sale price for the corporation? The corporation and its directors need expert assistance to determine what they are required by law to do, and this is precisely what lawyers provide. On the so-called standard conception of legal ethics, lawyers must provide competent advice about the requirements of law, untainted by the lawyer's own beliefs about the morality of the client's objectives and the means used to accomplish them. Because laws are established in the name of the whole society (Waldron 2008, p. 20), lawyers are professionally obligated to ascertain the content of the community's laws, not to base their advice on moral principles that may be controversial in a pluralistic society (Wendel 2010).

Just and Unjust Laws

Of course, the mere fact that something is a law does not guarantee that it is consistent with the requirements of morality. Some natural law theorists would maintain that an unjust law is not a law at all (*lex injusta non est lex*), but others would criticize it as a law, albeit a defective one (Finnis 1980; Murphy 2006). Legal positivists, on the other hand, are united in insisting on a conceptual distinction between the existence of a law and the evaluation of its content as just or unjust (Hart 1958). On the assumption that a law may be unjust but still be a law, lawyers may encounter an ethical dilemma when faced with a client seeking to obtain an advantage under an unjust law, or a client using an otherwise just law to accomplish an unjust end. Consider a much-discussed example of a client who wishes to write a will disinheriting his son for his antiwar activities (Wasserstrom 1975, p. 7). The man's lawyer may believe, with justification, that the man's intended action would be unjust – petty, mean-spirited, and likely to be detrimental to one of the most important relationships in his life. The lawyer is free to counsel his client to change his mind, but if the client insists on a provision in his will disinheriting his son, it is clear that that law permits him to include it. If the lawyer does not resign from the representation (and some lawyers would at this point), the ethical issue is joined. Is the lawyer subject to well-founded moral criticism for assisting the client in an action that is legally permitted but unjust?

Philosophers who emphasize the connection between the rule of law and legal ethics observe that the law creates rights and duties to permit citizens of a political community to live together and cooperate on common projects even though they may have many disagreements about empirical or normative matters. Whether something is just or unjust is likely to be a matter of contention in a pluralist society. The rights and duties established by law may be used for good or for ill, but they go a long way toward securing community among people who otherwise would be divided by reasonable but conflicting moral beliefs. Clients need lawyers to understand what is required of them and permitted by law. If lawyers refused to provide assistance to a client on the ground of the lawyer's belief that the client's end was unjust, the efficacy of the law as a strategy for building a relatively stable political community would be undermined (Dare 2009, p. 74). While one might understand a lawyer's reluctance to assist a client in doing something that is lawful but morally distasteful, the moral blame should fall on the client. The lawyer's action is best described not as providing assistance to the commission of an unjust act, but in helping to administer a political institution whose goal is to provide a framework for co-existence and interaction among people who disagree about the requirements of morality.

An account of the ethics of the lawyer's role centered on the value of legality supports normative criticism of lawyers who abuse or manipulate the law in the service of their clients' ends. Lawyers should not interfere with their clients' access to the rights secured to them by the law, but neither should they use their training and expertise to thwart a legal prohibition on a client's actions. Much of the criticism of lawyers who represent corporations and wealthy individuals centers on their use of the law to evade taxation, shelter assets from creditors, or otherwise get around the limitations that apply to ordinary citizens who cannot afford expensive lawyers. Some of the means employed by lawyers are entirely lawful, in which case the proper target of criticism is the law that permits the conduct in question. In some instances, however, lawyers are able to manipulate legal forms and take advantage of complexity and the high cost of enforcement by the state or private parties to establish a de facto power on the part of their clients to evade the requirements of law. This type of abuse should be criticized in the strongest terms.

A Duty to Obey the Law?

This approach to the ethics of the lawyer's professional role takes no position on whether there is a moral obligation to obey the law, whether conclusive or merely prima facie (Simmons 1979). The conception of the rule of law that focuses on governing through general, public norms as a way of respecting the dignity of the law's subjects is a substantive moral thesis about the good secured by a legal system (Waldron 2008, p. 41). Thinking about the law in this way may support associative theories of obligation for citizens, grounded in jointly manifested attitudes of commitment to a common project (Gilbert 1993). But it need not, and issues related to legal obligation and obedience for citizens can be set aside when thinking about the role-based ethical obligations of lawyers. Some roles create obligations that are more demanding than those that exist as a matter of background morality, but these heightened obligations may have limited scope. Parents, for example, are required to provide care and support for their children far beyond that which is owed to persons generally, and judges have duties of impartiality that require them to set aside presuppositions and biases that might affect their views of the parties. These role-specific obligations follow from the end that a natural or social role serves. If it is the case that the role of lawyer serves the end of providing access to information and expertise about the law, so that clients can plan and act with reference to a socially established scheme of rights and duties, then lawyers have an obligation to promote the good working order of the legal system. They do so by advising their clients competently and candidly about the content of applicable laws, not interfering with their clients' rights under the law based on a moral objection to the client's ends, and refraining from manipulating or evading the law.

Conclusion

Philosophical legal ethics has generally sought to derive principles of right action for lawyers directly from ordinary moral values such as trust, loyalty, and dignity. This derivation either ignores or underemphasizes the institutional context in which lawyers act for clients. The rights and duties that form the basis for their advice to clients are established by political processes which themselves aim to promote social goods such as stability and solidarity. People remain moral agents even when acting in social roles. However, the moral evaluation of official and quasi-official actors like lawyers should take into account the purpose for which a role is constituted. Even legal positivists concede that the law has as a moral aim the end of enabling cooperation among people who otherwise would disagree about matters such as rights and justice (Shapiro 2010). If the law realizes this moral aim, then the professional activities of lawyers partake of this moral value. Just as Rawls aimed to defend a freestanding political conception of justice that did not depend on any particular religion, tradition, or any other comprehensive moral doctrine (Rawls 1993), it may be possible to construct a

freestanding political system of ethical principles for lawyers that is grounded in considerations related to the value of legality.

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► Rule of Law: Theoretical Perspectives

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European Court of Human Rights: Autonomous Legal Concepts

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Introduction

As products of a judge-made law, autonomous concepts emerged through application of the provisions of the European Convention on Human Rights (hereinafter, ECHR) before the European Court of Human Rights (hereinafter, ECtHR or the Court).

Even though there is no commonly accepted definition of autonomous concepts in the legal doctrine, they can be elucidated as terms applied by the Court, which exist in national legal systems of Member States, but they are given a special meaning in the Court's case law (Popović 2010, 114). At least two basic approaches toward explication of the notion evolved in the scholarship. On the one side of the spectrum are scholars who accepted a simple denomination of the concept. For instance, according to Leach, autonomous concepts are "terms used in the Convention," for which "the classification under national law will be a factor in the Court's determination as to whether the Convention is applicable, but it will not be decisive" (2005, 165). Mahoney stated that autonomous concepts ensure "the universality of the international standard" and that legislations of Member States provide "sources for deducing the common core of the concept" (2004, 145–146). Oppositely are those who adopted a more complex approach to defining the notion but actually came to similar

results. Letsas explained that the adjective "autonomous" stands for the fact that these concepts enjoy a status of semantic independence, since their meaning is not to be equated with the meaning that these very same concepts possess in domestic law (2007, 42). He concludes that they are "technical terms that are employed in national legal sources and are invested with a special, non-ordinary meaning, that is often gained as a result of an authoritative stipulation" (2007, 48).

When it comes to the perspective of the ECtHR, it qualified autonomous concepts as those whose "definition in national law has only relative value and constitutes no more than a starting point" (*Chassagnou and Others v France*, para. 100), while emphasizing that they must be interpreted independently, as having an autonomous meaning in the context of the Convention and not merely based on their meaning in domestic law. In the words of judges Tulkens, Fischbach, and Casadevall, "the purpose of an autonomous interpretation is to secure procedural guarantees to those subject to the jurisdiction of the courts where the classification under the domestic law might restrict the scope of the Convention" (*Escoubet v Belgium*, Joint Dissenting Opinion, para. 1).

A Few Examples of Autonomous Concepts in the Jurisprudence of ECtHR

The judgment that introduced the doctrine of autonomous concepts into the jurisprudence of the Court was *Engel and Others v The Netherlands*. The applicants have argued, inter alia, that the proceedings in which they were sentenced for offenses against military discipline did not satisfy the requirements of Article 6 of the Convention. However, the Government took a stand that there had been no violation of the right to a fair trial, since under their domestic law such proceedings and penalties were of strictly disciplinary and not criminal nature. Hence, given that Article 6 refers only to *civil rights and obligations* and *criminal charge*, the respondent Government claimed that it was not applicable to the case at hand. Therefore, the initial question that the Court had to resolve was whether these penalties could be considered to fall under *criminal charge* within the meaning of the ECHR. The Court conveyed its concern that "if the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will." Therefore, "a latitude extending thus far might lead to results incompatible with the purpose and object of the Convention" (para. 81). For the purpose of keeping States from evading the provisions of the ECHR in the described manner, the Court qualified the concept of *criminal* as autonomous one and went further to define specific indicators for assessing the applicability of the criminal aspect of Article 6. These indicators, which will eventually become known as *Engel criteria*, include classification in domestic law, nature of the offense, and severity of the penalty that the person concerned risks incurring. As already explained, the first criterion serves only as a starting point. Namely, if domestic law classifies an offense as criminal, then this will be decisive, but if not, the Court will look behind the national classification and examine the substantive reality of the procedure in question (Guide on Article 6, 2021, para. 23). In order to assess the nature of the offense, various factors must be considered, such as whether the proceedings are instituted by a public body with statutory powers of enforcement (*Benham v the UK*, para. 56), whether the legal rule has a punitive or deterrent purpose (*Bendenoun v France*, para. 47), the classification of similar procedures in other Member States (*Öztürk v Germany*, para. 53), etc. Finally, the determination of the last criterion is based on the maximum potential penalty for which the relevant law provides (*Campbell and Fell v the UK*, para. 72). Hence, *Engel* was a clear example of the newly emerged theory revolving around concepts appearing in the domestic law that are not necessarily identical to their counterparts in the ECHR, albeit their domestically envisaged content is not completely irrelevant (Letsas 2004, 284).

Staying within the realm of Article 6, autonomous nature was also attributed to *civil rights and*

obligations. In its earliest case law, the ECtHR took a more traditional approach that was consistent with the views of legal theory, by ruling that civil rights and obligations "cover all proceedings the result of which is decisive for private rights and obligations" (*Ringeisen v Austria*, para. 94). However, over the time it departed from this line of interpretation and significantly expanded the scope of the phrase. This wider approach even led the Court to acknowledging that the *civil* limb has covered cases which might not initially appear to concern a civil right, but which may have direct and significant repercussions on a private pecuniary or non-pecuniary right belonging to an individual (*Bilgen v Turkey*, para. 65) and which may even have been classified in domestic law as public law disputes (*Denisov v Ukraine*, para. 51). Some of the examples are disciplinary proceedings concerning the right to practice a profession (*La Compte, Van Leuven and De Meyere v Belgium*, paras. 47–48), disputes involving the right to a healthy environment (*Taskin and Others v Turkey*, para. 133), prisoners' detention arrangements (*Ganci v Italy*, para. 25), or the right to access to investigation documents (*Savitskyy v Ukraine*, paras. 143–145). Therefore, the Court is persistent in extending the protection guaranteed under Article 6 by continuingly redressing the concept of *civil rights and obligations*.

Another example of autonomous concept in the ECHR is the notion of *possessions*, protected under Article 1 Protocol No. 1 to the ECHR within the protection of property. Its autonomous nature implies that in respect to the ECHR, the term has much broader meaning and scope compared to its traditional connotation inspired by Roman law (Popović 2010, 115). The Court is determined in stating that the concept of possessions has an autonomous meaning which is not limited to the ownership of material goods and is independent from the formal classification in domestic law; hence certain other rights and interests can also be regarded as possessions for the purposes of this provision (*Broniowksi v Poland*, para. 129). Accordingly, the ECtHR found that many different interests can be regarded as possessions, such as intellectual property, including trademarks, copyrights, and patents (*Tokel v Turkey*, para. 56), shares in companies (*Bramelid and Malström v Sweden*, para. 82), a claim before the domestic court of law (*Pressos Compania Naviera S.A. and Others v Belgium*, para. 31), the exclusive right to use the Internet domains registered in the name of a company (*Paeffgen GmbH v Germany, dec.*), or even legitimate expectations of obtaining an asset (*Pine Valley Developments Ltd v Ireland*, para. 51). Recognition of a proprietary interest by a domestic court is highly relevant in the assessment of the ECtHR, although not decisive (*Broniowksi v Poland*, paras. 130–131). The bottom line is that the issue that must be examined is whether the circumstances of the particular case, considered as a whole, granted the applicant the right to a substantive interest protected by Article 1 of Protocol No. 1 (*Beyeler v Italy*, para. 100). Interestingly enough, the Court also highlighted the economic and pecuniary scope of Article 1 of Protocol No. 1, when it concluded that human embryos cannot be reduced to *possessions*, within the meaning of that provision (*Parrillo v Italy*, para. 215).

Paradigmatic for autonomous concepts is also the Court's understanding of the notion of *law*. Contrary to the standpoints adopted in legal theory on the European continent, the ECtHR proclaimed that it understands the concept of *law* (*la loi*) in its "substantive," rather than its "formal" sense; hence it covers not only statutes and enactments of lower rank than statutes (written law), but also unwritten law (*Kruslin v France*, para. 29). By way of explanation, the ECtHR clarified that any exclusion would deprive common law Member States of the relevant protection and strike at very roots of their domestic legal systems (*The Sunday Times v the UK*, para. 47). Moreover, given that English and French versions of the treaty are not identical in respect of their meaning and translation, the Court emphasized that they must be interpreted in a way that reconciles them as far as possible and is most appropriate in order to realize the aim and achieve the object of the treaty (*The Sunday Times v the UK*, para. 48). In regard to the lawfulness requirement set forth in, for instance, Articles 8, 9, 10, and 11 of the ECHR, the law must satisfy certain qualitative features, so as to be adequately accessible, formulated with sufficient precision and

foreseeable as to its effects and consequences (*Lebois v Bulgaria*, para. 66–67). Finally, in *Kruslin v France* the Court even went so far as to almost deny the differences between the two great legal systems, by stating that written and unwritten law were highly relevant parts of both of them (para. 29) (Popović 2010, 118).

The autonomous interpretation has even been described as allowing the Court to assign a meaning to the provisions of the ECHR that is opposite to what the drafters had in mind according to *travaux préparatoires* (*Young, James and Webster v the UK*, Dissenting Opinion of Judge Sørensen, joined by Judges Thór Vilhjálmsson and Lagergren, para. 2) (Marochini 2014, 76). In *Young, James and Webster v the UK*, the ECtHR was confronted with the question whether Article 11 of the ECHR, apart from protecting freedom of association in the positive sense, implicitly guarantees a right not to be compelled to join an association or a union (negative aspect of the freedom). The Government referred to preparatory works and insisted that this right had been deliberately excluded, hence that its sudden introduction would run counter the drafters' intention (para. 51). Although the Court did not consider it necessary to explicitly answer the question raised by the Government, it did find a violation of Article 11, thereby implicitly guaranteeing the negative freedom of association (Marochini 2014, 76). In subsequent judgments, the Court confirmed this kind of reasoning by stating that "protection of personal opinions is one of the purposes of the freedom of association, which implies a negative freedom of association" (*Sigurður A. Sigurjónsson v Iceland*, para. 37) (*Chassagnou and Others v France*, para. 103).

Conclusion

As evident from provided examples, autonomous concepts enable the ECtHR to extend the scope of certain Convention rights (Marochini 2014, 65). This is greatly facilitated by the fact that the provisions of the ECHR were drafted in a brief and concise manner, which allows for their broad interpretation.

Several features of autonomous concepts can be identified. To begin with, they defy a precise definition, given that they are a typical product of a judge-made law. This is apparent, for instance, from the example of *possessions*, since it is inconceivable to develop a comprehensive approach which includes all categories belonging to the class at hand, as it now exists in the case law of the ECtHR (Popović 2010, 114–115). Secondly, the Court's understanding of the term *law* indicates that some autonomous concepts even contradict the mainstreams of legal theory. Then, notwithstanding that some of these concepts have connections to comparative law, others may lack its support, because they do not represent either a common core of similar terms existing in the legal systems of Member States or fit such terms in any of the Member States (Popović 2010, 118). Last but not least, the example of *civil rights and obligations* clearly illustrates that autonomous concepts are susceptible to evolution.

In view of all the above, it comes as no surprise that autonomous concepts are often subject to criticism, not only from the scholars, but also the judges of the Court. For example, after admitting that autonomous interpretation is the method best suited to multilateral conventions, Judge Matscher forewarns that it raises complex problems of legal hermeneutics (*Öztürk v Germany*, Dissenting Opinion, para. 3). The main concern is focused on the danger that by autonomous qualification of a concept, one may depart from the formal classification of an institution in the national legislation of a Member State and arrive at an abstract qualification that might be philosophically valid, but without any basis in law (*Öztürk v Germany*, Dissenting Opinion, para. 2). Scholars also emphasized that autonomous concepts carry a risk of allowing judges to create law instead of just interpreting it, but they at the same time admitted that it would be impossible to avoid the formulation of such concepts, considering that the Member States do not share the same criteria for identifying the meaning of the terms included in the ECHR (Milčiuvienė and Gruodytė 2019, 101).

In a word, the greatest skepticism about autonomous concepts comes down to their possible ramifications regarding certainty and predictability. This was directly addressed by Letsas, who is convinced that only a government that does not respect the

freedom of its citizens might have its expectations defeated by an unpredicted finding of a violation (2004, 305). Relying on the previous practice of the ECtHR, too much activism on the Court's side will not dismay the Member States or impel them to stop enforcing its decisions (Letsas 2004, 305). After all, autonomous concepts are important and often used as means of interpreting the ECHR that are rooted in judicial activism, which seems only to be an apt response to the challenges of contemporary world (Popović 2010, 126).

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Euthanasia

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Definition

The word "Euthanasia" is derived from Greek; it means "good death." Although there is no contemporary consensus about the meaning of the word, it is widely understood to refer to the

intentional hastening of a patient's death by a physician in order to end the patient's suffering.

A distinction is often drawn between "active" euthanasia when the hastening of death is brought about by an act, typically the injection of a lethal drug, and "passive" euthanasia when death is intentionally hastened by an omission, typically the withholding or withdrawal of life-prolonging treatment or tube-feeding. A further distinction is often drawn between "voluntary" euthanasia, when death is brought about at the request of the patient; "non-voluntary" euthanasia, when there is no request because the patient is incompetent; and "involuntary" euthanasia, when a competent patient does not want a hastened death (or perhaps when they have expressed no view either way). Euthanasia is to be distinguished from "physician-assisted suicide" (PAS), when a physician intentionally assists a patient to commit suicide, typically by prescribing a lethal drug that the patient later ingests.

Over the past quarter of a century, the phrase "physician-assisted dying" has gained widespread currency, though it is ambiguous. Some use it to mean PAS, others to mean both PAS and voluntary euthanasia, and still others to include palliative treatment. To confuse matters further, some bioethicists see no moral difference between the intentional and the foreseen hastening of death and regard palliative treatment, or the withholding or withdrawal of treatment, which foreseeably hastens death, as a form of euthanasia.

The Law

PAS and voluntary euthanasia are crimes in the vast majority of jurisdictions. Since the mid-1980s, however, the number of jurisdictions that permit either or both has been increasing, particularly in North America, Western Europe, and Australasia. Explanatory factors include the growth of secularism at the expense of religion, an increasing emphasis on individual autonomy and unwillingness to endure suffering or incapacity, and judicial activism.

Legalization has resulted from court decisions in Colombia, the Netherlands, Canada, Italy, Germany, and Austria. Legalization has been effected by statute in around a dozen US jurisdictions beginning with Oregon and in countries including Belgium, Luxembourg, Spain, Australia, and New Zealand.

The European Court of Human Rights has held that the right to private and family life in the European Convention on Human Rights includes a right to determine the time and manner of one's death but that states may interfere with that right to promote certain interests including the rights and freedoms of others. The court has granted states a wide "margin of appreciation," particularly in light of the range of different laws in Europe, allowing them either to permit or to prohibit PAS and voluntary euthanasia. The UK retains its blanket ban on both, though bills to permit PAS have been regularly debated in Parliament. The UK Supreme Court, like the US Supreme Court, has hitherto declined to uphold a right to PAS or voluntary euthanasia.

Legalization tends to follow one of two models. The first, as in states like Oregon, permits PAS for the "terminally ill." The second, as in the Benelux countries, permits PAS and voluntary euthanasia for those experiencing "unbearable" or "intolerable" suffering. By a historical quirk of Swiss law, assisting suicide is not a crime if the motive of the person providing assistance is not selfish. The Swiss organization "Dignitas" provides assistance in suicide, including to foreigners who travel to the country for the purpose.

The Ethical Debate Over Legalization

At the forefront of the ethical case for legalization stand autonomy and beneficence: It is claimed that at least in some circumstances patients have a right to decide when and how to die and that doctors have a duty to put an end to their patients' suffering. It is sometimes also contended that there is no significant moral difference between palliative treatment that foreseeably hastens death and the administration of a lethal drug with intent to shorten life. Against legalization, it is argued that the wrongness of intentional killing or assisting suicide sets a limit to autonomy and

beneficence; that suffering can be alleviated by palliative treatment; and that any relaxation of the law will result in a "slippery slope" to further relaxation that will endanger the vulnerable, including the frail elderly, people with disabilities and the incompetent. It is also argued that there is a significant moral difference, captured by the idea of "double effect," between intentionally and merely foreseeably hastening death.

The central question in the modern political debate over legalization concerns the feasibility of effectively maintaining and policing the limits demarcated by any permissive law. Take, for example, the current debate in the USA and the UK, whose focus is whether to permit PAS for the "terminally ill." Those in favor argue that the experience from states like Oregon shows that the law can safely be relaxed; that relatively few people avail themselves of PAS; and that there is no evidence of abuse or a slippery slope. Those against argue that the evidence about the operation of such laws is sketchy and that their safeguards are largely illusory. They also argue that the ethical principles underlying permissive laws – respect for autonomy and the duty to alleviate suffering – would equally justify voluntary euthanasia, and whether or not a patient were "terminally ill." They observe that the laws in the Benelux countries and in Canada allow not only PAS but also voluntary euthanasia, and for patients who are not "terminally ill." They also point to the condonation of nonvoluntary euthanasia by the Dutch courts in 1996, in the case of disabled infants, as a further illustration of the conceptual or logical slippery slope: If autonomy and beneficence justify PAS and voluntary euthanasia, then beneficence alone justifies nonvoluntary euthanasia.

A development tending to promote legalization has been the move by some national medical and nursing associations to drop their historic opposition and to adopt a neutral stance. A development tending the other way has been the growing influence of groups representing those with disabilities. Although individuals with disabilities can be found on both sides of the debate, disability groups have been at the forefront of opposition to legalization. They highlight one of the key moral questions in the debate: Are PAS and voluntary euthanasia a reflection of an individual's autonomous judgment that death would be a benefit, or of a judgment by others that some people would be "better off dead," or both?

Whether PAS and/or voluntary euthanasia should be legalized and, if so, in what circumstances and subject to which safeguards, is one of the most important and controversial moral debates in the modern age, at least in developed countries. It is likely to remain so for the foreseeable future.

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Evidence

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Introduction

Evidence occurs when something presents itself to intelligence through intuition, senses, or proven facts. It leads to a conviction that something is true in so far as they sustain hypotheses and propositions. In the ordinary life, things may reveal themselves (i) as direct indicative facts of other facts known by experience; (ii) when a trustworthy source says something that is believable due to the knowledge that they have; and (iii) through mere sympathy, as mentioned by Bentham (1825, p. 17). However, in law, evidence has a special connotation because it is restricted to the limits imposed by the Rule of Law – especially the procedural rules.[1] One resorts to a judge to ask for a decision about a fact that corresponds to a legal rule. Nevertheless, the truth about the alleged facts must be proven, and the applicable rule must be identified. Facts are true if proven, and the proof is the available means to clarify the truth about the facts.

[1]In the common law tradition, the word evidence is used instead of the word proof when referring specifically to the legal system and its procedural rules.

Evidence in Law: The Fact-Finder

According to Bentham, people have a disposition to believe in things based on experience (p. 16). Law, however, is a special case because it entails the legitimate use of force by the State. The facts presented in court need to be proven; they need to show themselves in a way that convinces the fact-finder (jury or judge) that they are true to justify the applicability of a legal sanction. And truth is part of the real world and not a fabricated world, even if there are different interpretations of the facts. The fact-finder will decide on what happened based on the information provided by the parties because she/he was not present in the event itself. The parties will present the necessary elements that will make the court get closer to the truth. The closer the fact-finder is from the truth, the better they can decide upon the case. Rules of evidence are the regulatory framework that will determine what evidence will be heard by the fact-finder. The rules exist to balance the type of evidence that will be presented to the fact-finder with the guarantees of due process.

Nonetheless, evidence is not only important to the adjudication of the law in the specific case, but also for the creation of precedents, notably in constitutional law. Evidence helps shaping the legal factual premises by judicial law-making. Drawing on the distinction coined by Kenneth Culp Davis, facts are divided into legislative facts and adjudicative facts. The latter corresponds to the determination of who did what, where, when, and why, so that the law may be adjudicated in the specific case. The legislative facts, on the other hand, correspond to the generality that is peculiar to the legal rules (Davis 1942).

Evidence on adjudicative facts is focused on declarations, documents, and expert testimony, whereas legislative facts are proven through expert testimony.

Evidence and Adjudicative Facts

When in court, plaintiffs present their side of the story and the defendants rebut it on a different

narrative. The burden is on the plaintiff to show that the alleged facts fit into a rule that justifies the enforcement of the sanction by the State.

It is under the adjudication process that judges face the biggest challenge because they have to decide based on relevance and on fairness of due process.[2] Evidence is relevant if it makes a fact more or less probable than without it. Common law countries trust the judge and the jury to make this analysis more than they trust statutory law.

The proposition that affirms a fact and serves to justify the application of a legal sanction (*factum probandum*) results from a chain of inferences that is based on the facts that are proven throughout the claim (*factum probans*). Consequently, the evidence will normally be introduced to support not just one proposition but a series of propositions, linked together in a chain of inference. Evidence of a statement thus may tend to prove A, which in turn makes B more likely, which in turn suggests C.[3]

Based on the available evidence and on the system of belief, the fact-finder will test if the facts of the case fit the hypotheses established by the legal rule. The proven facts, available through evidence, will serve as the justification to the legal conclusion and applicability of the sanction.

According to Wigmore (1983, pp. 7–9), the proof taken to court should persuade the fact-finder about the truth of the matter asserted. Proof must not be confused with fact because proof is a statement about a fact and not the fact itself. "The judge, based on proofs, ascribes acceptability to the statements about the facts" (TARUFFO, prologue *in* Beltrán, 2005, p. 14). To Jordi Ferrer (2005, pp. 25–26), assuming that *p* is a description of a fact, the assertion "it is proven that *p*" means that there are sufficient elements to render a judgment for *p*.

Evidence and Legislative Facts

Facts that are proven in a case can also be used as a general factual premise in future similar cases. In other words, legislative facts will determine the factual premise of the legal rule from the judicial law-making. This can happen on a case-by-case basis or in the judicial review. One example is when courts, based on expert testimonies, allow the use of cannabis-derived products. Expert testimonies can be presented by the parties directly involved in a case, by amicus curiae, or when a court calls for a public hearing – a common practice in Brazil.[4] In any situation, the court, as a legislative fact-finder, will be persuaded by the evidence presented by the experts, who help them understand facts at issue.

Knowledge is limited to the available theories under scientists' domain. Scientists follow methodological rules of verifiability and fallibility, so judges must be deferential toward scientific conclusions. The *Daubert Case*,[5] in the United States, was a turning point for the admissibility of scientific evidence in courts. Accordingly, experts must be well qualified and make proper use of the scientific method.

In both science and law, rationalities infer from general principles to specific premises of fact, deriving a logical conclusion (Faigman et al.

[2] In the common law system, the rules of evidence establish criteria for admissibility and relevance of evidence. Because this is not an exact science and each case has its own peculiarities, the common law judge has the discretion to apply the rules of evidence as long as they are within the limits of the case. For the common law, admissible evidence is one told by a witness that is (i) physically present in court, (ii) under oath, and (iii) subjected to cross-examination (Sir Raleigh's case). If someone is subjected to the three requirements, they will be more likely than not to tell the truth. Evidence that is not submitted under these standards will be considered hearsay and, consequently, inadmissible.

[3] A chain of inferences is supported by underlying generalizations based on background knowledge and experience. "One concludes that something is true in light of something else's being true or seeming to be true." Such as the declarant said it; therefore, the declarant probably believed it. Consequently, what the declarant said was probably true.

[4] In Brazil, besides the presence of *amici curiae* who appeal spontaneously to court, experts may be summoned to clarify factual matters.

[5] *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993)

2016). However, even though the law pertains to justice while science pertains to the truth, "science and the law share, at the deepest possible level, the same aspirations and many of the same methods. Both disciplines seek, in structured debate, using empirical evidence, to arrive at rational conclusions that transcend the prejudices and self-interest of individuals" (FJC 2011, p. 52). In both areas, the deductive method guarantees predictability and verifiability for a certain outcome. A scientific assurance that cannabis is beneficial, as in the example, will ensure that the law will support its use in any future case.

Conclusion

The challenge to the Philosophy of Law is to study evidence beyond the specific case because the issues around evidence also reach legislative facts, which are equally important to the Rule of Law. Traditional doctrine is focused only on adjudicative facts. Discussions were prompted in 1993 after the ruling of the Supreme Court of the United States in the *Daubert* Case, which sparked the creation of criteria to ensure the accuracy of the evidence presented in court by experts. And with the strengthening of the contemporary democracies, based on the protection of fundamental rights, the debate over constitutional facts started by Biklé has been reawakened. Robert Alexy's theoretical effort, for instance, emerges with the purpose of delimiting the power of constitutional courts as legislative fact-finders.[6] However, the biggest difficulty is when judges give decisions based on publicly available scientific theories that are not specifically presented by the parties in the case. Off-record evidence do not have the same legal protection necessary to ensure quality and relevance for guaranteeing the adversarial principle and due process.

[6] Robert Alexy (2014) relates the levels of reliability of the empirical premises available to the limits of epistemic discretion (legislative fact-finding) of the ordinary legislator.

Cross-References

▶ Evidence: Philosophy of
▶ Legal Argumentation

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Evidence: Philosophy of

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Introduction

In the English legal language, there is an important distinction between *evidence* and *proof.* The first term refers to any possible source of information (witnesses, documents, tests, photos, videos, records, events, circumstances, and so forth) that may be used in order to draw conclusions about the truth or falsehood of a statement concerning a fact in issue. The second term refers to the outcome of such a reasoning, that is: a positive conclusion saying that such a statement has been confirmed as true, on the basis of the available evidence. A necessary remark is that in the other legal languages, such a distinction does not exist: only one word (*prova, preuve, prueba,* and *Beweis*) is used to indicate both aspects, and other expressions are used in various contexts in order to specify the different aspects of evidence and proof.

Function of Evidence

One of the main purposes of any judicial proceeding is to search and establish the truth about the facts in issue (see section "Truth and Probabilit"). Since such facts already happened before and out of the proceeding, the real problem is to find out if any *narrative* concerning such facts may be taken as true on the basis of the evidence that is presented to the trier of fact (judge or jury). Then it may be said that the *function* of the evidence is basically *epistemic*, since the evidence is the means by which a "knowledge" may be achieved about such a narrative. However, this definition is based upon the premise that a judicial proceeding is aimed at achieving a legally valid final decision, and that in order to decide by applying correctly the law, the judge should reach a truthful conclusion about the facts in issue. But there are other theories saying that the purpose of a judicial proceeding does not include the truth of the facts in issue but has only the need to put to an end the competition between the parties, no matter how the final decision is made. Then the function of the evidence is defined in a different way, i.e., by saying that the evidence performs only a *persuasive* function, being aimed only *at convincing* the trier of fact, but not at achieving any true conclusion about the facts in issue. Such a definition is strongly reductive but it is not completely false: actually it corresponds to how many lawyers (maybe all of them) use the evidence trying in any way to obtain a decision in favor of their clients.

Relevance and Admissibility

In order to be considered by the trier of fact, any item of evidence has to be *relevant* and *admissible.* According, for instance, with Rule 401 of the American *Federal Rules of Evidence*, "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." It seems clear that such a definition corresponds with the epistemic function of the evidence in a judicial context in which the existence of a fact (i.e., the truth of its narrative) should be demonstrated. As a general principle, then, any relevant evidence should be admitted: Jeremy Bentham wrote, a couple of centuries ago, that in an ideal system of justice, *this* should be the only rule concerning evidence. Today, the ideal of the search of truth requires the *maximization* of the collection of any relevant evidence (i.e., the so-called *weight of evidence*), since every useful information should be considered as a basis for a truthful decision.

However, the real situation of the existing judicial systems does not follow Bentham's suggestion. Actually, in fact, a relevant evidence is required to be also *admissible*, that is: not to be excluded by any rule concerning evidence. The problem is that all the procedural systems include several rules preventing the admission of relevant evidence because of the attempt to promote various interests (as, for instance, in the case of

various professional, industrial, or State privileges). Most of these rules may be considered as *antiepistemic* just because they exclude relevant evidence from the proceeding, and therefore they prevent or at least make more difficult the search of truth.

Presentation of Evidence

Any item of relevant and admissible evidence shall be submitted to the trier of fact. This is not a difficult problem when the trier of fact is just a professional judge and the evidence is *real* (consisting in a thing), *demonstrative* (consisting of maps, documents, photos, and so forth), or *circumstantial*. In such cases, in fact, the item of evidence is *presented* to the judge and/or *perceived* by him, and he will take it into consideration.

A different situation occurs when a *scientific evidence* is needed because the decision on the facts in issue requires to refer to any kind of scientific knowledge. Such a knowledge is usually provided by *experts* in several ways that are regulated by procedural rules.

Moreover, things are different and perhaps more complex in the case of *oral* evidence (as it is the general rule in trials with a jury). Actually oral evidence is created inside the proceeding, during one or more hearings just devoted to the presentation of this kind of evidence. Two different methods are used in order to carry it out. One of these methods is typical of most civil law systems and is based upon the judge. It is up to him, actually, to question the witness about the facts in issue, trying also to check the witness's credibility and to clarify his answers. Usually, the parties cannot question directly the witness; they may just ask the judge to put further questions to him.

The other method, typical of common law judicial systems, is based on interrogations made by the parties' lawyers: there is a *direct* examination performed by the lawyer who called *his* witness and a *cross-examination* performed by the adverse lawyer (and then a redirect and a recross examination may follow). Here the role of the judge is just to ensure that these examinations are performed in correct ways. The direct examination is aimed at obtaining from the witness statements in favor of the party's position, while the cross-examination is aimed mainly at attacking the credibility of the witness. In the USA, the same method is used to examine expert witnesses.

It is difficult, and probably impossible, to say which of these two methods is more effective for the search of truth by means of oral evidence, since both of them have limits and defects, and their concrete implementation depends essentially on the role performed by the judge and by the lawyers. Probably a *mixed* system could combine the positive aspects of the two methods.

Evidence and Inference

Every item of relevant evidence provides the trier of fact with an information concerning a fact in issue, but a complex reasoning is required in order to establish whether the evidence is a reliable basis to say that there is a proof of that fact.

Some theories claim that this connection between evidence and proof is the outcome of an irrational act of intuition. From time to time in the history of some legal systems, but also in the current literature, the temptation emerges of dissolving the problem of the decision on the facts into something irrational and mysterious. However, it is a way to assert that the decision is the outcome of an act of arbitrary subjectivity, and mainly for this reason it should be rejected.

On the contrary, a proper way of dealing with the evidence is to think that the trier of fact performs a *rational evaluation* of it, with the aim of drawing *justified conclusions* about the truth or falsehood of the narratives concerning the facts in issue. Then some remarks are necessary about the main aspects of such an evaluation.

On the one hand, there is a theory according to which the evaluation is *holistic*. It means that the trier of fact takes into consideration all the items of evidence in a single act, drawing by intuition some consequences about the facts in issue. Once again, however, this approach (that was proposed in order to explain how the jury decides) does not say anything interesting about the way

how the various item of evidence are evaluated. A different and *analytical* explanation is worth considering: it means that the trier of fact has to examine *one by one* all the specific items of evidence, in order to establish whether and how each of them offers a useful information. In other terms, the trier of fact should determine the *probative value* of every item of evidence. Then, in a further step of his reasoning, he may consider all the evidence available in order to establish whether or not the statements concerning the facts in issue have been proved.

On the other hand, the logical structure of the judge's reasoning deserves to be considered. The most important aspect is that it is composed by a more or less complex *set of inferences* connecting some statements taken as premises and a statement being a conclusion about a fact in issue. The premises are the information given by the evidence (a statement made by a witness; the content of a document; the description of a thing or of a fact, the outcome of a scientific test), and the inference is the logical link that connects a premise with a conclusion, so that – so to say – the conclusion is the rational consequence of the premise. However, such a connection is never given a priori: it has to be *construed* on the basis of a logical support. Such a support is given by a *warrant* (according to Toulmin's analysis), that is by a *rule* saying that when there is a premise P, the conclusion C is justified. Such a warrant may be a general principle, and in this (infrequent) case, the conclusion is deductively certain, but usually it is just a *generalization*, and then, provided the generalization is not a spurious one, the outcome is that the conclusion has a degree of justification. Such a degree may vary, being higher or lower, depending on the kind of warrant that is used in each specific inference. Obviously, if no reliable warrant is available, the inference cannot be made, and then the evidence does not say anything about the fact in issue.

Truth and Probability

A different analysis of the reasoning about the evidence is proposed by referring to the calculus of quantitative probability and specifically to the "Bayes' theorem." Such a calculus should end up with a number that would represent the *degree* of the probabilistic confirmation that any item of evidence gives to a factual statement. This theory is very sophisticated and has very interesting aspects, but unfortunately, it cannot be applied in the great majority of real judicial cases, not only because of the difficulty of performing the mathematical calculi that are required but also because, in most cases, the data that are necessary in order to apply the theorem are not actually available.

Not considering, therefore, this possibility to use mathematical probabilities, it seems that the correct way to interpret the reasoning of the trier of fact is provided by *logical* probability, that is by the analysis of the logical inferential structure of the evaluation of evidence.

Thinking in terms of logical probability is a useful way of interpreting the inferences based upon evidentiary premises. Actually when the current language speaks of "judicial truth," this expression has to be intended in a proper way. In fact, in the judicial context (as well as in any other context), no "absolute" truth can be achieved; therefore, any "judicial truth" can only be *relative* to the set of relevant evidence available and to the complexity of the inferences based upon such evidence. Since such a set may be more or less wide and reliable, the conclusion concerning the fact in issue may have a different *degree of confirmation* (that is: degree of probability) in the different situations. Such a degree may be very high, when the inferences based upon a number of items of evidence are well supported and are converging toward the same conclusion, and it may be very low, when there are only a few items of evidence and the inferences are not well supported.

Conclusion

Of course the final proof of the facts in issue is not achieved in every case. Beyond the situation in which there is no relevant and admissible evidence about such facts, there is a wide variety of situations in which there is some evidence available, but the inferences lead to very different outcomes. Then the problem arises of deciding when

the facts are proved and when they are not proved, although some evidence has been acquired. In several judicial systems, this problem is not solved according to clearly established standards, and the final judgment is actually based upon a sort of reasonable discretion of the trier of fact. Sometimes it is said that such a discretion should take into account the probability of the conclusion supported by the evidence, but rather often there are uncertainties about the meaning of this probability. In fact the difficult question is how to establish a degree of probability, or of logical confirmation, that could be referred to as a *threshold*, that is as a limit under which a proof is not achieved, and over which the facts can be considered as proved.

An important example of standard in criminal cases is that of the so-called BARD, according to which a defendant may be condemned only if his guilt is proved *beyond any reasonable doubt.* The traditional justification of this very high standard is commonly said to be the need to reduce to a bare minimum the risk of condemning an innocent, although at the cost of acquitting a relevant number of guilty people. However, the problem is to find out a reliable definition of when a doubt is reasonable, not considering the attempts to express it in terms of numerical probability.

In civil cases, the situation is different, and sometimes, mainly in the American courts, the standard of the so-called *preponderance of evidence* or of the *more probable than not* is applied, but once again, the proper meaning of these expressions is far from being clear.

Cross-References

► Civil Procedure: Philosophy of
► Legal Argumentation: And Truth

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Evil

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Introduction

Given the complexity and duration of the historical traditions which inform the philosophical conception of evil, this entry is a conspectus of the critical development of the so-called problem of evil, what Leibniz will eventually call "theodicy" in the seventeenth century. Echoing the ancient Epicurean formulation of these difficulties in the early twentieth century, the sociologist Max Weber succinctly posed the problem as such:

> How could a power which is said to be both omnipotent and good create such an irrational world of unmerited suffering, unpunished injustice, and incorrigible stupidity? Either that power is not omnipotent or it is not good, or else—a third possibility—life is governed by completely different

principles of compensation and retribution, principles that we can interpret metaphysically or that are destined always to elude our attempts at interpretation (Weber 2004).

What follows is a selective account of rational attempts to come to terms with the manifest irrationality of the world. Historically, the conception of evil has proven to be most problematic for monistic systems of thought, be they philosophical or religious. Though not always the case, the concept of evil would often prove to be less of a problem for rival schools of thought, and they would in turn seek to press this point to the monistic tradition's disadvantage, resulting in increasingly sophisticated forms of theodicy.

The Prehistory of the Problem of Evil

While the concept of evil (*kakon*) has a long prehistory in ancient Greece, it is with Socrates that the notion is given an increasingly philosophical determination. Prior to this point, discourses on evil were primarily *sacred* in orientation, with evil often understood in terms of some form of transgression of divine laws. This mythic transgression was expressed in a number of ways, some of which would have a long philosophical afterlife, informing even the most *secular* formulations of the concept of evil.

Preeminent among such religious expressions of evil is the mythical account of an original crime or sin committed by an otherwise pure soul. Inevitably, this transgression of divine law required justice (*dike*), and the soul experienced some sort of descent (*káthodos*) from its pure state as its form of punishment. Although this fallen, impure state was put in terms of the *pollution* of the individual soul, the ramifications of this pollution were rarely limited to the individual. Rather, such pollution frequently had negative ramifications for larger social groups, be they the family, the *polis*, or even humanity as a whole (as in the parallel Abrahamic tradition). Accordingly, ritual forms of *purification* were essential for removing even minor forms of pollution and were a fundamental part of religious social practice in Greek antiquity.

Elements of this mythical prehistory would inform and undergird Socrates' subsequent more philosophical determination of the concept of evil. Broadly, this turn may be seen as an attempt to respond to what he saw as a pernicious social trend, namely, the Sophistic dissolution of ethical standards within the city-state. Such dissolution, at the individual and the social level, served to relativize that which had formerly been deemed either "good" or "evil." In such cases, Sophistic practice was to make salient the most ephemeral aspects of any specific law (*nomos*) and to exploit the "customary" nature of ethical and moral norms for equally capricious individual ends, the latter being the primary target of Socrates' animadversions.

As a response to this general context of ethical-social unmooring, Socrates' rejoinder to the Sophists is primarily *epistemological* in orientation; the object of knowledge being that which is good, the question of evil being a subordinate concern. Unlike the Sophists, the end or aim of the philosopher is *not* to utilize skepticism to manipulate presupposed normative claims to serve arbitrary individual interests. On the contrary, the end or aim of the philosopher is to use interrogation (*élenchos*) to arrive at knowledge of what is actually good beyond the interests of the individual. Failure to achieve this end (or even seek it), according to Socrates, is how we must understand that which appears to be evil. From which follows his notorious claim that no one knowingly commits evil; for every action is aimed at achieving what appears to be good, and if we fail to achieve this end, it is a result of our own ignorance or confusion. It is for this reason that evil does not present itself as an intractable problem for Socrates but rather as a mere *error* which will be dispelled with the acquisition of greater knowledge of that which is good.

The Concept of Evil as a Problem for Systematic Monism

The relatively unproblematic nature of Socrates' conception of evil would prove to be short lived. Plato's subsequent development of Socratic

thought would, at times, move in a far more *monistic* direction, and with this shift, the notion of evil would become more and more *aporetic*. It is this shift which marks the moment when the concept of evil proper develops into the so-called problem of evil; the designation of which will serve as a rough shorthand for the difficulties attendant upon any attempt to conceptualize evil within a more monistic framework. Why this is the case is the result of Plato's continued concentration upon that which is good, with evil remaining a subordinate concern. In itself this is no real divergence from Socratic practice. Where Plato departs from Socrates concerns the range and scope of these queries. No longer are such considerations of good and evil limited to the ethical and social domain. Such circumscriptions are now lifted, with good and evil increasingly taking on more cosmic and ontological dimensions.

It is this expansive notion of good and evil which will be so aporetic, with Plato's treatment oscillating between more monistic and more dualistic ontological accounts of good and evil. At times, the more dualistic account will hold sway with both good and evil being given some kind of self-subsistent status. At other times, the Good (*agathon*) will be given absolute ontological privilege, with evil approximating something like absolute non-being. Concurrently, Plato's language will become equally ambiguous, appropriating more and more of the mythological tropes which preceded Socrates' more ethically focused approach to good and evil. Religious overtones of this sort are readily seen in a dialogue like the *Sophist* where the use of a term such as *elenchus* (interrogation) will now subtly shift its epistemological import into the mythical domain, being now described as a form of *katharsis* (purification) involving the removal of evil from the soul (230d).

Such equivocal formulations (coupled with the monistic tendencies in Plato's thought) would be extremely influential, with this strand of Platonic thought reaching its apex with Plotinus in the third century A.D. The great Neoplatonist would ultimately radicalize the monistic interpretation of Plato, thus profoundly influencing the productive and contentious cross-fertilization of Platonism and the traditions of Abrahamic monotheism. The latter, as presented in various forms of Judaism, Christianity, and Islam, would all martial arguments drawn from Plotinus' monistic account of Plato, and use them against the dualistic accounts of good and evil, especially those of the Gnostics.

Criticisms of the Monistic Account of Evil

If the claim is made that any monistic system faces serious difficulties when called upon to give an explanation for the existence of evil (Kalligas 2014), it usually follows (as a corollary) that they are compelled to do so by a rival school of thought or belief. A special kind of *justification* is thereby required, what Leibniz in the seventeenth century will name *theodicy*. Bringing together the Greek *theos* (God) and *dike* (justice), Leibniz' term may be used to conveniently designate some form of justification of the goodness of God and God's creation in the face of the evil present in the world. And it is in this specific sense (as an attempt to ward off rival points of view) that a number of the great *proto-theodicies* of antiquity will be produced.

For example, according to the openly hedonistic ethos of the Epicureans, a very straightforward *dualistic* account is offered of good and evil. The good is that which is *pleasurable*. In turn, evil is summarily conceptualized as anything that causes *pain*. And given their basic conviction that the gods have no real concern for this world, the Epicureans would consider questions of divine benevolence or malevolence to be simply misplaced. But above all else, the Epicureans are often credited with having made salient the complications that attend the monistic account of evil. Their formulation of these difficulties is as follows: "Is he [God] willing to prevent evil, but not able? then he is impotent, Is he able but not willing? then he is malevolent, Is he both able and willing? whence then evil? (Hume 1980)." While no ancient textual source is extant (the quotation comes from Hume in the eighteenth century), this possibly apocryphal formulation

has become an almost unavoidable *locus classicus* of sorts, serving as a model for stating the problems of evil which any theodicy must come to terms with.

Just as influential is the Gnostic account of evil. There is not, for the Gnostics, one divinity which is good, but rather *two* fundamental divinities: the one being good and the other evil. The Gnostics could thereby present an explanation for the presence of evil in the world that many found both uncomplicated and persuasive. In response to the question of why there is evil in the world, the Gnostic will simply gesture to the evil deity as the cause (Rudolph 1987). By way of contrast, the monistic account of evil appears both overly complicated and incoherent. It was thus that the explanatory force of the Gnostic response would have such historical longevity and influence. Plotinus felt it to be so great a threat that he composed the Ennead referred to as "Against the Gnostics," and the young Augustine would consider Gnosticism so compelling that he remained a Manichean Gnostic for almost 10 years prior to converting to Christianity and polemicizing against Gnosticism for the rest of his life.

Pronoia: The Great Proto-Theodicies of Late Antiquity and the Middle Ages

Although the Epicureans and Gnostics were critical rivals to the monistic systems, the latter found a powerful ally in Stoicism. Like the monistic philosophies and religions already considered, the Stoics were firmly convinced of the absolute power and benevolence of God. When confronted with what they would consider *natural* forms of evil (natural calamities such as plagues, famines, floods, and earthquakes), the Stoic would offer a broad *teleological* response: that the cosmos is purposively structured in such a way that that which appears to be evil is, in reality, merely a *means* for achieving an all-encompassing divine *end* or *plan*, the latter being what the Stoics will otherwise refer to as *pronoia* (providence). Hence, evil is always something *partial* or *ephemeral* for the Stoic; partial, in that it only appears evil if not considered in relation to a larger whole which is good; ephemeral, in that it only appears evil if it is not considered as a moment in a larger *process* that terminates in a good.

Often placed in combination with other schools of thought, the stoic notion of *pronoia* would figure prominently in later Platonic accounts of evil. Most significantly, it will be a central element of what may be considered the preeminent Greek contribution to the tradition of theodicy, namely, Plotinus' two Enneads "On Providence." Along with Ennead I.8, these works would fully incorporate not only the Stoic conception of *pronoia* but also Aristotle's innovative conceptualization of both *hyle* (matter) and *steresis* (absence, negation). While the manner of assimilation of these latter two concepts would have been completely foreign to the Stagirite, this heterodox combination of Platonic, Stoic and Aristotelian elements would nevertheless have great historical influence despite the precariousness of Plotinus' synthesis. For on the one hand, he would posit the identity of matter and evil; and on the other hand, he would simultaneously refuse to reify this identification. Hence, the seminal formulation of evil as being an *absence of the Good*.

Plotinus' expansive notion of providence taken together with his speculative accounts of evil would cast a long shadow throughout late antiquity and the Middle Ages, the most decisive transmission being Augustine's enthusiastic appropriation of the Platonist's formulation of evil and its resultant Latin formulation as *privatio boni* (privation of good). As mentioned in the foregoing, like Plotinus, Augustine felt compelled to argue against the explanatory force of Gnostic dualism. While a committed Manichean Gnostic, Augustine's readings of "the books of the Platonists," above all Plotinus, provided him with a powerful critique of such a dualism, especially as concerns the question of evil. These Platonic arguments would serve to liberate Augustine from Gnosticism and thereby set the stage for his eventual conversion to Christianity. As a result, much of the thought of Plotinus was taken up and given a Christianized and Latinized form, including Plotinus' harmonic absorption of evil: the notion that evil is a necessary part of the *beauty* of creation. However, at the end of the day, Augustine's reflections upon human freedom are perhaps his most

novel contribution to the problem of evil; all of which result from his abiding reverence for the Mosaic Legend of the Fall (in Genesis) and his resultant view that individual evil acts are a necessary consequence of humans having been bequeathed freedom of the will by God.

It is with Plotinus' account and Augustine's Christianized recapitulation that the conception of evil reaches a teleological peak of sorts. This is insofar as the most advanced attempts to comprehend the existence of evil had increasingly been formulated in purposive terms wherein the existence of evil and its problematic status are understood with reference to their place within a teleological framework. Either directly through Platonism or as mediated through Augustine, this approach would have an enormous influence upon succeeding centuries of the Middle Ages, with thinkers as diverse as Pseudo-Dionysius, Eriugena, Avicenna, Maimonides, and Aquinas (to name but a few), working out the logical and theological implications of the teleological notion of evil in a manner (and depth) that had only been anticipated in late antiquity.

Theodicy and the Principle of Sufficient Reason

While such teleological speculations upon evil could proceed and develop in a relatively unencumbered fashion throughout late antiquity and the Middle Ages, this was no longer the case with the onset of modernity. It was not so much that the conception of evil proper was directly challenged in the modern era, but rather, with the rise of mechanical systems of thought (in both science and philosophy), the explanatory force of teleological explanations *in general* was undercut, rendering their use with regard to the problem of evil far less convincing.

This general tenor of thought, guided by modern science and set in opposition to the centuries of natural philosophy dominated by the telological categories of Aristotle, would produce a rejoinder that stands as one of the most famous of all theodicies. Just as Augustine sought to defend Christian monotheism against the threat of Gnostic dualism, so did Leibniz seek to stand as such a bulwark in relation to modernity's anti-teleological thrust. Formulated as an immediate response to Pierre Bayles's famous dictionary article on the "Manicheans," Leibniz' *Theodicy* sought to counter Bayle's claim that it is impossible to rationally reconcile belief in a wholly good God with the existence of evil in creation. Unwilling to rationally genuflect in this fashion, Leibniz' response is a novel reflection upon theodicy *from the vantage point of modernity*. For Leibniz refuses to relent in the face of evil but continues forward armed with his axiomatic belief in the principle of sufficient reason; "*that there is nothing without a reason*; or, to explain the matter more distinctly, that there is no truth for which a reason does not subsist (Leibniz 1973)." As such, Leibniz would synthesize, in the grand fashion, rigorous post-Cartesian categories of thought with the ancient providential tradition, providing him with a set of rational arguments by which he will famously claim that we live in *the best of all possible worlds* and that whatever evil we may encounter must be measured against that fact.

Theodicy and the Critical Philosophy

Following upon the devastation of the Lisbon earthquake of 1755, Leibniz' optimistic claims about the world would be most famously lambasted in Voltaire's *Candide*. But an even greater threat to theodicy was to come from a one-time follower of the Leibnizian philosophy, the great Enlightenment thinker Immanuel Kant. As presented in the *Critique of Pure Reason*, Kant's transcendental dialectic offered an extraordinarily trenchant attack on all theoretical considerations of the nature of God, thereby cutting off the possibility of making any claims that would allow for the construction of theodicies.

However, while Kant may have ruled out theoretical reflections in the form of theodicy, he did not rule out philosophical reflections upon evil. Figuring prominently in his practical philosophy, Kant's sustained account in *Religion within the Boundaries of Mere Reason* would specify that the comprehension of evil should not be rendered

in relation to God. On the contrary, the question of evil should be limited solely to the human, ethical domain. In accord with his Enlightenment focus upon autonomy and freedom, Kant's account does not look for an external objective source of evil that determines the will and actions of the individual. Biological impulses or instincts are thus ruled out. Rather, Kant posits his notion of *radical evil*, so-called because the source is ineradicably related to the subjective ground of human freedom. It is a crucial aspect of what makes human freedom possible. As such, evil must always remain an open option for us as free individuals. In fact, according to Kant, the eradication of it would make us no longer free, moral beings.

Far from being limited to the individual, this account of evil has broad historical implications for the development of humanity as a whole, with *progress* being specifically understood as the development of the ability to subordinate evil to good. Hence, Kant's view is anti-*utopic*, for no final moment will be reached when evil will be eradicated from humanity at the individual or social level. In this regard, at least, Kant's thought does not eschew teleological modes of thought entirely. It is only that he is unwilling to grant them any constitutive or ontological significance.

The Dialectical Conception of Evil

As with Plato's departure from Socrates' ethical myopia, Hegel would be equally unwilling to accept Kant's restrictions to the practical domain, with many of the traditional themes of theodicy returning with unprecedented force (albeit in a post-Kantian framework). And like the monistic systems of antiquity, Hegel will frequently draw upon mythical resources to articulate his conception of evil. Such an approach is readily seen in his speculative treatment of the Mosaic Legend of the Fall (as presented in the *Encyclopaedia Logic*) where Hegel most clearly indicates that evil should not be considered a peripheral concept for logic and metaphysics. On the contrary, evil's absolute centrality is asserted by way of an extremely heterodox account of *original sin* which synthesizes the third chapter of Genesis with Platonic and Aristotelian categories of thought.

According to Hegel's interpretation, Adam and Eve's transgression of God's command (to not eat from the tree of knowledge) and their subsequent punishment should be understood as an indispensable moment in fulfilling our vocation as humans as it is expressed in Genesis. That is, insofar as we are said to be made in the image of God, our transgression facilitates our gradual acquisition of universal knowledge. We are thereby *elevated* above our initial instinctual harmony with nature and become more like the divine. When interpreted thus, original sin is entirely misunderstood if it is treated *solely* in terms of a *descent* from an initially pure state. A dialectical reading of the Fall must equally see it as the first step in an *ascent* (*pace* Plato) to universal, divine knowledge and, with it, the freedom to choose between good and evil.

As a result, when considered from the vantage point of the Enlightenment, Hegel's speculative reading of original sin has immediate social and political ramifications; for this mythical curse is now seen as a necessary moment of evil which is to be incorporated into a larger form of human cognitional progress and development. To be sure, every human universally experiences this moment of discord as painful. However, for Hegel, the real evil would be to stay in this alienated state which he equates with the social and political results of Enlightenment thought and its exhortation to "think for yourself!" Like the exile of Adam and Eve, this exhortation is to be seen as an unavoidable step in the awakening of human cognition. And yet, Hegel's central claim is that to stay in such a state is to fragment society, with each human being declaring their own thoughts to be absolute, thereby confusing the particular with the universal. Echoing Socrates condemnation of the Sophists, Hegel will then argue that this state of discord, where the individual wills only his or her own subjective ends without reference to the larger social order, is an evil state if we do not progress beyond it to achieve (through the highest labors of spirit) a harmonic, social self-knowledge through *art*, *religion,* and *philosophy.*

It is at these highest levels of knowledge and reality that Hegel will explicitly reflect upon the existence of evil in terms of the teleology of human history. Infamously, in his *Philosophy of History*, this is stated in the mythological terms of sacrificial ritual: "But even as we look upon history as an altar on which the happiness of nations, the wisdom of states, and the virtue of individuals are slaughtered, our thoughts inevitably impel us to ask: to whom or to what ultimate end have these sacrifices been made?" To this teleological question, Hegel will respond in a manner that is, at once, both extremely ancient and extremely modern. Invoking *pronoia*, he will vary the question: "We are compelled to ask whether, beneath the superficial din and clamor of history, there is perhaps not a silent and mysterious inner process at work." As such, he will then insist that the examination of this mysterious process must not remain so. We are to proceed rationally, by way of a, "*theodicy*, a justification of God, something Leibniz attempted metaphysically in abstract and indeterminate categories. It should enable us to comprehend all the evils of the world, including moral evil." For Hegel, dialectical theodicy must not rest content, like Leibniz, with the conceptualization of evil via *abstract* categories of thought. If theodicy is to succeed–if it is to facilitate an end to our discordant and alienated existence, then it must think evil concretely; for only then will humanity be "reconciled with the negative (Hegel 1975)."

It is with such a dialectical *reconciliation* that the tradition of conceptualizing evil reaches its historical apogee, especially as far as its social and political ramifications are concerned. As stated in terms of the quotation imbedded in the introduction of this encyclopedia entry, Hegel offers the most systematic attempt to rationally comprehend what Weber refers to as this, "irrational world of unmerited suffering, unpunished injustice and incorrigible stupidity." As the last great rationalist successor to Leibniz, Hegel will accordingly deny that the apparent irrationality of the world will always escape our metaphysical interpretations. On the contrary, this very irrationality is to be assimilated into a speculative form of the principle of sufficient reason. The apparent irrationality of the world is *itself* to be seen as a manifestation of reason, resulting from what Hegel calls the *cunning of reason*. It is that which "sets the passions to work in its service, so that the agents by which it gives itself existence must pay the penalty and suffer the loss (Hegel 1975)." Taken together, the suffering of individuals, as well as their apparent freedom to pursue their own individual interests; both are to serve the purposive end of humanity as a whole; a final form of reconciliation and accord in which humanity achieves full self-knowledge and freedom.

Conclusion

By the middle of the twentieth century, in the wake of the horrors of Dachau, of Auschwitz, of Buchenwald, and the other mass atrocities which would soon follow, the philosophical tradition recoiled from such grand teleological theodicies, especially that of Hegel. Such attempts to rationalize evil were scornfully rejected, even by those philosophers who would otherwise be sympathetic to Hegel. To give but one characteristic example, for someone like Adorno, all such attempts to rationalize evil are a shining example of the specific brand of stupidity of which only philosophy seems capable of:

> [t]he idea that we can say of the world as a whole in all seriousness that it has a meaning now that we have experienced Auschwitz, and witnessed a world in which that was possible and that threatens to repeat itself in another guise or a similar one. . . to assert such an idea would seem to me to be a piece of cynical frivolity that is simply indefensible to what we might call the pre-philosophical mind. A philosophy that blinds itself to this fact and that in in its overweening arrogance fails to absorb this reality and continues to insist that there *is* a [positive] meaning despite everything—this seems to me more than we can reasonably expect anyone who has not been made stupid by philosophy to tolerate. (Adorno 2008)

For Adorno and many others, the notion that the atrocities of the holocaust could somehow be cognized as a means for achieving some greater rational good – that such a sacrifice is made in the name of the Good (be it secular or divine) – such a view redounds upon philosophy itself, to the latter's systematic detriment.

As a critique of this systematic tradition and an attempt to circumvent its failures, one of the most influential of the twentieth century responses to the problem of evil is that of Hannah Arendt. While Arendt would initially offer an analysis of evil imbedded within a broader context of the genesis of totalitarian modes of thought, she would eventually provide a startling critique of teleological explanations of evil, especially those couched in mythological language. Such accounts of evil only served to mythologize evil and, in a sense, romanticize and reify its significance. Set over against such approaches, Arendt's controversial *Eichmann in Jerusalem* offers a sustained study of the trial of Adolf Eichmann, an unreflective bureaucratic functionary of the Nazis who was a mindless instrument for efficiently carrying out the inhuman orders of an authoritarian regime. According to Arendt, the evil of Eichmann is not marked by exceptionality of any sort. There is no need to have recourse to mythology or religion to comprehend such an existence. In fact, such an approach would only serve to obscure his utterly prosaic nature, marked by placid conformity, devoid of all moral reflection, what Arendt most famously refers to as the "banality of evil."

Other accounts are equally critical of the history of theodicies. For Levinas, the failure of such systems is inevitable for there is a *quiddity* to evil that always exceeds any attempt to rationally grasp and systematize it. Or, as Ricoeur puts it, "the reader of Hegel's *Philosophy of History* cannot help but be struck by the fact that, the more the system prospers, the more the victims are marginalized. The success of the system brings about its failure (Ricoeur 2007)." And given that in such systems there is always "a *disproportion* between evil as suffered or done and evil as said to illustrate the structure of rational necessity," Desmond raises the very natural question which must follow upon such failures: "Does the matter [of evil] so stun and paralyze philosophy that no further thought is possible? (Desmond 1992)."

It is perhaps this question of despair, which best characterizes the present moment in the history of philosophical attempts to come to terms with evil. Shall the problem of evil thus be set to one side as an historical curiosity? Is it a pseudo-philosophical problem that has transmigrated from the domains of religion and theology? These questions remain. Nevertheless, for thinkers as starkly different as the foregoing, their response to this kind of question is uniformly negative. To be sure, there is systematic despair. And yet, it is (for them) simply unacceptable for thought to remain stupefied, to be, as in the *Meno*, stunned into submission by philosophical *aporia* and thereby complacent, conforming to the irrationality of the world. Thought (wary of being blind to its past failures) should continue. It should continue, not by ignoring the Hegelian demand that "the total mass of concrete evils" be "set before our eyes (Hegel 1975)," but by acknowledging his failure to move beyond an abstract and indeterminate theodicy. For such thinkers, to conceptualize evil *concretely*, thought – when faced with the intractable reality of suffering – should resist the systematic urge to avert its eyes.

E

Cross-References

- ▶ Adorno, Theodor Wiesengrund
- ▶ Arendt, Hannah
- ▶ Augustine of Hippo
- ▶ Freedom of Will: Philosophical Genealogy of Legal Person
- ▶ Hegel, Georg Wilhelm Friedrich
- ▶ Kant, Immanuel
- ▶ Plato
- ▶ Weber, Max

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Evolutionary Theories of Law

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Introduction

When considering the evolutionary approach to the legal phenomenon, it is fairly easy to see how this theory (or better, group of theories) is characterized as infused by a general attitude of skepticism by legal actors, both practitioners and scholars (Hovenkamp 1985). Such a feeling is mainly based on the misperception that having an evolutionary approach to the law means having a deterministic underpinning ideology as to what the law is and what the law will be, i.e., an idea that the law necessarily has come into existence in order to fulfill certain goals and, despite all contrary efforts, the law in the end will accomplish them (Beckstrom 1989; Duxbury 1997, 41–46). This erroneous perception is mostly due to some fundamental terminological confusion by the legal audience (Luhmann 2004, 230). This chapter aims at explaining what evolutionary is from a legal perspective, in particular in terms of a contribution for a better understanding of how and why legal changes take place.

Evolution, Evolutionary, and Evolutionist Theories of Law

First, it is necessary to distinguish between a general theory of legal evolution and a more specific evolutionary theory of the law (Sinclair 1993; Elliott 1985). From the perspective of legal actors, a theory of legal evolution is a general label attached to all legal thinking aimed at discovering and explaining general patterns of continuity and change in the law. The works of Henry James Sumner Maine (2005 [1861]), Oliver Wendell Holmes (1963 [1881]), or more recently of the economic approach (Clark 1981; Rubin 1977), Friedrich A. Hayek (1973), and Alan Watson (1985) can be considered, for example, as presenting a theory of legal evolution. Among the different theories of legal evolution, one can find a specific subgroup that can be defined as an evolutionary theory of law.

The evolutionary theory of the law is a specific way of perceiving the law-making, characterized for offering more than a theory about the evolution of law, i.e., more than simply attention to points of change and stability in the law through the centuries and among various legal systems (Strahlendorf 1993, 23–25; Hutchinson and Archer 2001; Hovenkamp 1985). The evolutionary theory of the law distinguishes itself because it evaluates these aspects of change and stability in the legal phenomenon from a point of view that can be defined, in Hartian terminology, as typical of theories external to the law and its system (Hart 1961, 90): Luhmann's sociological theory on law (in Europe) and biological evolutionary theory as a metaphor for explaining the evolution of the law (in the United States) (Sinclair 1987; Teubner 2006).

The second misperception generally shared by legal actors is the confusion between "evolutionary" and "evolutionistic" theories of law-making and, in particular, the fact that when talking about an evolutionary theory of the law, one aims at a theory explaining changes in the law and legal system, but not necessarily in an evolutionist way (Fried 1999; Ruhl 1996; Blankenburg 1984). From an *evolutionist perspective*, as can be attributed to Marxist legal theory or certain Law and economics scholars, the central point of investigating changes in law is both in the mechanisms of legal evolution and the directions to which the law or some of its parts are unavoidably bound (Marx 2000 [1848]; Priest 1977;

Stein 1980, 46–50). For instance, some Law and economics scholars put under scrutiny not only the process of changes in tort law in modern times, but also attempt to identify the types of goals this branch of the law is (more or less) necessarily going to fulfill (Posner 1992, 534–536; Priest 2002).

At least explicitly, the *evolutionary theory of the law* instead proclaims to focus its attention exclusively on the explanation of the mechanisms underlying the changes and continuities of a certain legal system (or part of it). As recognized by one critique, evolutionary theories typically involve nothing more than "a set of developmental stages and a mechanism for moving from one to another" (Galanter 2006). In other words, while the focus is on the "how" and "why" the law evolves, this approach does not also explicitly designate the points of arrival to which such a system (or its parts) is somehow obliged to aim. As repeatedly stressed by Gunther Teubner, (his) evolutionary theory focuses on the "mechanisms of development" rather than the "direction" of such developments, the latter being more the focus of attention for evolutionist functionalist theories (Teubner 1993).

Evolutionary Theories of Law: Variation, Selection, and Retention

Once the sky has been cleared of all possible terminological confusions, attention can now be given to identifying that which characterizes an evolutionary theory of law-making: the very possibility of organizing the creation of legal concepts or categories around three fundamental moments, the processes of variation, selection, and stabilization or retention (Elliott 1997; Calliess et al. 2008; Luhmann 2004, 230–231).

The *process of variation* is the moment in the life of a legal system when new and alternative legal categories are created. The reasons for this variation can be several. Niklas Luhmann, for instance, stresses the importance (though not monopoly) of the "ambivalence of a norm" as an endogenous factor allowing legal actors to produce different (and often opposite) meanings (Luhmann 2004, 243, 252). The American versions of the evolutionary theory of the law underscore instead the importance of exogenous pressures coming directly from the surrounding environments and forcing the body of law to offer alternatives to "out-dated" existing regulations (Elliott 1985, 38). Regardless of which position is taken (endogenous or exogenous), the results are similar for both the European and American evolutionary theories: due to an interaction of external (social) conditions and internal (legal) structures, the legal system has now produced several possible available legal concepts (Luhmann 2004, 244–245; Deakin and Wilkinson 2005, 32).

However, all these legal concepts tend by and large to be mutually exclusive due to the very nature of the legal phenomenon: since the latter reasons in terms of "either-or," the coexistence in the same legal system of a legal concept stating A and, simultaneously and for the same situation, a legal concept stating non-A is often impossible (Luhmann 2004, 244; Holmes 1899). For example, due to the increasing importance of multinational corporations in host countries, a group of NGOs develops the legal concept of corporate social responsibility as a legal duty (i.e., a possible base for future liability actions) "embedded" in each form of economic organization falling under the definition of "public corporation." At the same time, in-house attorneys of large corporations produce standard contracts to be used in host countries where corporate social responsibility is excluded unless in cases explicitly accepted by both parties.

A *process of selection* is therefore required, either mainly according to criteria determined by the very legal system (as for Luhmann and Teubner) or by the actors using the legal system (as for the American versions of evolutionary theory) (Luhmann 2004, 248; Deakin and Wilkinson 2005, 277; Sinclair 1993). In both cases, legal and nonlegal actors propose, mostly under the pressures coming from the surrounding environments (e.g., the business world), which legal concept is to prevail and, implicitly, which one is to disappear (Skeel 1998; Teubner 1997). For example, there is a formation within the international community (also due to UN documents)

of a "shared-by-all" basic value, that corporations have to exercise their economic activities in the spirit of promoting the general welfare of the community of the host country, and not only of their shareholders. Therefore, major corporations adopt a series of standard codes of conduct manifesting the concept of social responsibility as an essential part of corporate activities. For instance, nonlegal actors also play a fundamental role by using a certain concept such as "corporate interest" regardless of whether it is formally sanctioned as legal; this law-like use of a certain concept is simply done because it helps to protect "the public interest in having profitable enterprises."

After this selection, a *process of stabilization or retention* takes place: the surviving legal concepts are then imbedded in the legal system as fully operative, or, in legal theoretical terms, they become the valid law and in force as the addressees perceive them as binding and (in the vast majority of cases) operate accordingly (Deakin and Wilkinson 2005, 32; Sinclair 1987; Luhmann 2004, 232–237). This process of embodiment into the legal system can, for instance, take place through a hypothetical convention drafted by the World Trade Organization and ratified by the required number of its members in order to become binding. As a consequence of such a ratified convention, a series of constant and uniform practices takes place, both by state-based authorities (e.g., courts) and non-state based organizations (e.g., international professional associations). All these practices are directed in considering as the beneficiary of the legal status of "corporation" only those forms of organizations promoting their economic activities in the full respect and fulfillment of the stakeholders' rights.

One can immediately notice how this very process of stabilization is that which can be defined as the proper law-making process, at least from a Hartian legal actors' perspective, as this phase coincides with either the legislative measures or judicial activism imposing the "surviving" legal concept upon the entire (international) legal system (Eckardt 2008). In order to stress this coincidence between the process of retention and the proper "law-making," one should consider the fact that in the evolutionary literature, the retention phase sometimes goes under the name of "selective retention." This terminology is used in order to stress the very fact that legal concepts are retained not spontaneously by the legal system, but through an explicit and planned act such as law-making (by a legislator or a judge) (Sinclair 1987; Fisch 1997).

Moreover, this identification of the selection phase with the first step of a "real" law-making, at least from a legal perspective, is also confirmed by the fact that the new legal concept to be stabilized is often constructed by actors (e.g., in-house attorneys) located outside the traditional institutional channels enjoying the law-making authority (Shapiro and Stone Sweet 2002, 294). The effect of this process of stabilization ultimately is that a new category, such as a new type of corporation "inclusive *per default* of social responsibilities," becomes fully binding for an entire community. This authoritative character is given to the concept by those legal actors traditionally attributed the legal power and legitimization of imprinting certain models of behavior as legal (e.g., national and international assemblies) (Sinclair 1987; Luhmann 2004, 256–257).

Evolutionary Theories of Law: The Real Deal

As it can be seen from this brief and necessarily rough sketch of the main claims by the evolutionary theory, the skepticism that this approach encounters in large sectors of legal theory and legal world is largely unfounded, or at least, is grounded on the wrong ideas. To immediately connect evolutionary theory to a sort of social Darwinism explanation of the law and its making, i.e., an explanation justifying the dominant legal cultures and their paradigms (or principles) as being per se the best in a sort of deterministic way, paradoxically neglects the very evolution that the evolutionary theories have gone through. As pointed out by Fried, "the enormous change in sophistication over time suggests that the literature on evolution and the law may itself be as susceptible to an evolutionary analysis as its subject" (Fried 1999, 303–304).

If one considers the basic ideas behind the modern evolutionary approaches to the legal

phenomenon, there are only two things they still have in common with Charles Darwin's original evolution theory and its subsequent distortions as a social theory. Both aim at finding some general explanatory model to clarify how complex phenomena, such as an animal species or a legal system, change. Moreover, both Darwin and contemporary evolutionary approaches to law aim at pointing out that such changes always occur in multiple phases. The law and its parts, like the animal species and its parts, have continuous relations both with the surrounding environments and with their internal structures, and these interplays between environment and structures in the end are as determinative for the shape of the law as for the animal species (Sinclair 1987; Smits 2003; Deakin 2002).

The basic feature characterizing the evolutionary approach to the law as "Darwinian" eventually is the same as that characterizing many legal theoretical approaches to the law-making process: the attempt to explain the processes of law-making by taking into consideration not only the internal structures and different parts of a legal system, but also how these internal aspects relate and somehow "survive" the confrontation with the external realities in which the results of the evolution (e.g., a new statute) are to exist (Deakin and Wilkinson 2005, 30). As pointed out by Herbert J. Hovenkamp:

> Jurisprudence was also 'evolutionary' long before Darwin, and it continues to be evolutionary. Like most other intellectual disciplines, jurisprudence needs a theory of change.... Today every theory of jurisprudence worth contemplating incorporates a theory of change. (Hovenkamp 1985, 645–646)

These being the major features of the evolutionary theory and its idea of legal evolution, the relevance and potential this approach can have in becoming a theory of law-making turns out to be quite evident. One should in particular pay attention to Hart's idea of legal theory as that part of the legal discipline aimed at generally seeking "to give an explanatory and clarifying account of law as a complex of social and political institutions" from the perspective of legal actors or, as expressed by the English legal philosopher, the "internal point of view of a legal system" (Hart 1994, 239). Reducing changes in the law into the three major ideal-typical phases of variation, selection, and retention can help the legal scholar in the typical task of legal theory: the clarification and explanation of how and why the law-making has taken place, i.e., how and why a certain concept has become the prevailing one (i.e., the "only and true" legal) within a certain legal system (Raz 2001).

The evolutionary approach can help legal scholars clarify the evolution of a certain legal concept by not dismissing, based on *ex ante* theoretical assumptions, the complexity of law-making. The evolutionary theory offers instead a way to approach legal changes, taking into consideration, all with the same level of attention at least ab initio, possible factors (both legal and nonlegal) contributing to the creation, selection, and retention through time of a certain legal concept (Smits 2002; Skeel 1998; Roe 1996). In other words, the evolutionary theory helps legal scholars avoid falling into offering overly plain and general, and therefore useless, clarifying stances, where legal changes are reduced to either purely nonlegal factors (such as "it is all politics") or merely mechanisms internal to the legal system under consideration (Alexy 2002, 43).

For example, the establishment at the international level of a form of corporation that legally embedded certain responsibilities towards the community can be ascribed neither to a "pure" technical construction by some law professors nor exclusively to the lobbying work by some powerful NGOs. Instead, an evolutionary approach can help legal scholars find a solution in the complex interaction between the dominant idea of what a corporation is among legal actors and the living and working of the latter in an environment affected by also the political, economic, and social discourses.

Conclusion

The evolutionary approach and its focus on processes (rather than results or actors) allow simplification, to a certain extent from an explanatory perspective, as to the entire picture of the course of creation of a new legal category (Zumbansen and Calliess 2011; Clark 1977). The legal scholar using an evolutionary approach can articulate the explanation of the process of change and

stabilization around three main phases, in each of which legal and nonlegal factors can simultaneously play a more (or less) important role. In this way, and fulfilling the fundamental postulate for a middle-range theory in order to be useful, the explanation can simplify (in three phases) the process of creation of legal concepts taking place in reality, but without losing the capacity of showing its articulate nature (the mixed role of legal and nonlegal factors) (Allen and Rosenberg 2002). For example, the evolutionary approach can show how the creation of the legal concept of "corporation with social responsibilities" binding multinational corporations is neither the product of an unique planning master mind (e.g., a sort of multinational NGO) nor the unexpected fruit of a chaotic series of independent and separate microcreative processes, both of legal and nonlegal nature. Instead, the legal scholar using the evolutionary approach can explain the birth of the legal concept as the result of a process where different actors have interacted in a more or less rational way and have followed, more or less, certain patterns in creating alternative possible solutions and in "selling" these solutions as the best fitting for improving the relations between the multinational corporations and the environments in which the corporations operate.

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Evolutionist Jurisprudence: Legal Epistemology

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Introduction

"Evolutionist jurisprudence" (from now on EJ) still sounds like a strange label – as strange as, say, "psycho-analytical" or "dadaistic jurisprudence." Yet in legal studies there is an ancient research tradition, older than Charles Darwin and his juristic followers, that could be dubbed *legal evolutionism* (from now on LE) by opposing it to *legal constructivism* (Hayek 1982) or, better, *legal creationism* (Barberis 2015). EJ applies directly or indirectly, how we will see, evolutionary theories or concepts to legal issues (Barberis 1998; Zaluski 2009).

The present entry is structured as follows. Section "Direct and Indirect Evolutionism" draws a distinction between two forms of legal evolutionism. At section "Prehistory and History of EJ" the prehistory and history of EJ are sketched, the latter consisting of four well-established jurisprudential traditions. Section "Five Current Research Programs" lists the five research programs of EJ, while at section "Three Basic Ideas," three basic ideas common to them are hypotized. Conclusion "A Jurisprudence for the Twenty-First Century" sketches one of these research programs – Friedrich Hayek's indirect LE – as the most serious candidate to answer the legal questions of twenty-first century jurisprudence.

Direct and Indirect Evolutionism

«After the Critical Legal Studies and the Law and Economics movement, "Law and Evolutionary Biology" seems well on its way to become the new rage in American Law Schools and the wave could well spill over to European Law Faculties» (Dyevre 2014). One could share such an auspice but still have three methodological qualifications to make preliminarily.

First, academic fads come and go, while EJ is a research tradition much more rooted in legal history, at least in English-speaking world, than a mere academic label. *Second*, and accordingly, we will see EJ is not only another item in the huge list of "law and" US academic labels. *Third*, EJ cannot be reduced to a mere toolbox in order to improve policy-making as Dyevre 2014 tell us later. EJ is, virtually, a full jurisprudence, both cognitive and normative, that could answer all the main questions of postmodern legal philosophy.

Here, however, an important distinction is in order (see also Zamboni 2008). The *first* type of EJ, here called *direct* evolutionism, is just represented by the various "Law and evolution" approaches, seeking to apply Darwinist theories to legal and/or political issues directly – possibly through middle-level evolutionary theories like Trivers 1985 or Axelrod 1984. The idea underlying direct evolutionism is law and politics are nothing more than tools for survival and reproduction of humans – a truism producing rather puzzling consequences, although.

If human reproduction by dissemination of genes could be the main target of legal or political institutions, indeed, then the best legal and political regime would be the Tamerlane, Attila, and Gengis Khan's horde, spreading its genes across Europe through devastation and rape. The problem with direct evolutionism, in fact, is twofold. On the one hand, if one cannot draw normative consequences from evolutionary premises without falling in the well-known naturalist fallacy, then a truly cognitive evolutionary approach, for itself, is compatible with any normative consequence whatsoever (Hovenkamp 1985).

On the other hand, direct evolutionism seems alien, trivial, or both, to legal and political issues. Consider the very trivial questions raised by direct evolutionists. Do "female judges sentence men who assault women more severely than their male colleagues"? Are rapists "favored by the evolution," considering "the rapist genes were naturally selected for"? Finally, is "the civil rights activism of certain judges (particularly certain male judges) [. . .] ultimately about carnal knowledge"? (Dyevre 2014, 26–28).

The *second* type of EJ, here called *indirect* evolutionism, provides a more promising approach. From its *cognitive*, holistic, standpoint, not humans but normative systems as a whole ensure survival and self-reproduction both of themselves and the individuals or groups adopting them (Hayek 1967; Amstutz 2009, esp. 472 ss.). Survival and self-reproduction are legal and/or political goals, not merely biological ones. Methodological individualism, here, is opposing not to holism but to two equally untenable postures, atomism and organicism.

From the indirect evolutionism's *normative* standpoint, in turn, the mere survival-and-reproduction goal may not to be commendable at all – even Nazi and Stalinist normative systems, after all, do pursue such an end. The bare fact a legal or political system pass the test of the survival of the fittest – an expression notoriously coined by the social Darwinist Herbert Spencer, not by Darwin himself – satisfies only a necessary condition, if any, for its goodness, justice, legitimacy, and so on, whereas it do not satisfies a sufficient one.

In the Western culture, today, two main types of legal systems exist: a common law, precedent-based one, in Anglo-American sub-culture, and a civil law, legislation-based one, in European and Latin-American subcultures. The *common law* type, precedent-based, yet proved it capable of thousand-year survival and self-reproduction, whereas its imitation and exportation seems doubtful, if not impossible. Institutions like customs and precedents, indeed, do emerge on its own, but they cannot be intentionally planned nor mechanically exported.

The *civil law* type of legal system, the legislation-based one, from an evolutionary standpoint is affected by constructivism or creationism – the fallacy of presupposing a single, central mind organizing society as a whole according to a preconceived recipe. Yet, just because of such an attractive idea, mixed with democratic ideology, in the last three centuries civil law normative systems proved them more apt than common law ones to an extrinsic imitation and large exportation – an aptness to autonomous survival and reproduction, however, not yet tested in the *longue durée*.

From a truly realistic and evolutionary standpoint, in fact, legislation proves always parasitic of jurisdiction – the judicial function of do justice to humans' fundamental normative expectations. Jurisdiction is the core of any effective legal order – an order of actions underlying any order of norms. In fact, legal systems without legislation are found, whereas without jurisdiction are not (Raz 1979, 105; Barberis 2016). And this remark is not about any alleged nature of law, as in Raz's jargon, but on the very concept or definition of the word "law."

Prehistory and History of EJ

LE is much more dating than Darwin – in fact, is not jurisprudence that learned from them, rather the reverse is true (see at least Hovenkamp 1985, 645–647). Darwinian ideas of random mutation and selective retention are implicit in the ancient conception of Roman mixed government, common law, and English constitution – all the three human institution emerged and tested over time, by trial and error. A recognition of this emergent character of English constitution is found even in John Austin – the pupil of arch-creationists theorists such as Thomas Hobbes and Jeremy Bentham.

> The constitution of the supreme government has not be determined at once, or agreeably to a scheme or plan: the positive moral rules of successive generations of community (and, perhaps, positive laws made by its successive sovereigns) have determined the constitution with more or less of exactness, slowly and unsystematically (Austin 1954, 337).

The ancestors, say the prehistory of both LE and EJ, is found in authors like Edward Coke, William Blackstone, and Edmund Burke, adopting a form of evolutionism implicit or *ante litteram*, pre-Darwinian. The LE and EJ explicit, post-Darwinian history, in turn, is detectable in founding fathers of other perspectives such as Oliver Wendell Holmes Jr., Roscoe Pound, or Hayek himself. The main source of EJ, however, can be found in an idea underlying David Hume and Adam Smith's natural jurisprudence.

In Smith (1776) makes its appearance the idea – a present-day sociological and anthropological commonplace – of unintended effects of human action (see at least Boudon 1977; Hirschman 1977). Unintended effects, in fact, are ignored or misunderstood by standard creationist jurisprudence – say, analytical legal positivism and Continental legal realism – as matter of mistery, or ideology, or both. According to LE, instead, properly human phenomena in general, and law in particular, are neither natural, like alleged "natural" law, nor artificial, like legislation is, this being, according to Hayek, a false dichotomy.

Instead, properly human phenomena, like language, market, morals, money, religion, State, etc., are the result of human action but not of human design – an idea spreading from Scottish Enlightenment authors as Adam Ferguson to Karl Menger's Austrian Economics until American libertarianism and/or Law and Economics (see Ferguson 1985; Menger 1883; Friedman 2000, at least). EJ in general and LE especially, however, are not a mere neoliberal, conservative, and/or traditionalist political philosophy.

EJ and LE, instead, are full-fledged realistic approaches refusing the constructivist and creationist fallacy of the alleged creation from nothing (*ex nihilo*) of human institutions – the true Achille's heel of such modern mythologies as social contract and constituent power. In fact, always there is a lot of law and political power both before and after such alleged creations. A good example, here, is Hayek's favorite example, law of contract. The law of contract enforced by common law judges is abstract in the sense it has no purpose at all:

> All persons use that law for all kinds of private purposes, from buying a bus ticket to going cinema, getting medical treatment, going on vacation, effecting a corporate takeover, and satisfying innumerable individual needs and wants [...] A common law judge, contrary to positivist theory, is not a deputy legislator with delegated legislative power to bring about particular social outcomes as wealth redistribution. Instead, common law judge should seek to uphold legitimate individual expectations (so Ratnapala 2010, 54).

In LE, jurisdiction, that is to do justice to human expectations (Hayek 1982), becomes the core of law as well. Unlike the standard, creationist misrepresentation moulded on legislation and democratic parliaments, law's main function is just to do justice to individual's main normative expectations. From a truly realistic and evolutionary perspective, indeed, legislation is parasitic of jurisdiction. It is just a check in order to prevent judicial and administrative arbitrariness – and an often very ineffective check, as remember us rulings such as *Lochner v. New York* (1905).

Anyway, modern history of EJ is told by listing authors belonging to it into four main currents (see f. e. Elliot 1985). First, *historical* jurisprudences, like Friedrich Savigny's and Henry Sumner Maine's ones. Then, *sociological, realistic,*

pragmatist, or critical legal theories, from Holmes to Roscoe Pound until American realists and their pragmatist or Crit's legacy. Still, *economic* jurisprudence, like Richard Posner's and Law and Economics' scholarship (Zywicki and Sanders 2008).

Finally, there are strictly *biological* (biologically directly or indirectly inspired) jurisprudences, that is the five current evolutionary research programs listed in section "Five Current Research Programs" – EJ properly or so-called *stricto sensu*, the only subject of the present entry. *Lato sensu*, in fact, the label "EJ" covers all authors and movements yet listed – each of them, nevertheless, also otherwise labelled. *Stricto sensu*, instead, such a label covers only direct or indirect evolutionary jurisprudences classified in the next section.

Five Current Research Programs

EJ *stricto sensu* presents at least five research programs (see Zaluski 2009, 26–28). The *first*, best-known line of inquiry is Sociobiology: a form of direct evolutionism praising "the extension of population biology and evolution theory to human organization" (so Wilson 1978, x; see also Bekstrom 1985). The debate, here, still revolves around the old natural law's dilemma: could we draw prescriptive consequences – both altruistic or left-wing, and egoistic or right-wing – from alleged descriptive premises on human nature? (see Cronin 1992; Segerstråle 2001; Alcock 2001).

The *second* research program, somehow reacting to the first, is Evolutionary Psychology: a more promising approach, perhaps, but still a form of direct evolutionism, widely unrelated to legal issues. Human behavior, according to the evolutionary psychologists, is the output of specifically psychological adaptations to recurrent environmental problems. Here, human mind – an only word for human brain and reason – is no longer conceived as a blank slate, passively receiving external influences without selecting and processing them (see at least Pinker 2002; Buss 2004, 2005; Barkow 2006).

The *third* line of inquiry is Behavioral Ecology: the study of ways organisms, including humans, adjust their behavior adapting it to environmental changes (see Alcock 2009; Danchin et al. 2008). The focus of this research program is not psychology, like the second one, but human behavior, in a way which is still closer to Sociobiology than Evolutionary Psychology. All these approaches, indeed, including the next, can be conceived of as a form of direct evolutionism precisely because they apply directly to the law evolutionary theories, whether behaviorist, psychological, or both, elaborated without any reference to legal and political issues.

The *fourth* research program is Gene-culture-coevolution, or Dual inheritance theory, assuming a strict analogy, and/or a mutual interaction, of natural and cultural evolution (see Dawkins 1976; Lumsden and Wilson 1981; Durham 1991; Shennan 2002; Boyd and Richerson 2005). Here, mere analogies like genes/memes or natural/cultural evolution give way to an integrated approach – still a form of direct evolutionism, although.

The *fifth* and more promising line of research, *qua* form of indirect evolutionism nearer to legal and political issues, is LE *stricto sensu*: the research tradition emerging in the late Hayek's works, inspired especially by Bruno Leoni (see Leoni 1961; Hayek 1982, 1988). LE's followers tend to reduce it to a libertarian political philosophy – a neoliberal ideology justifying policies such as the dismantlement of Welfare State. Contrariwise, LE is above all a legal epistemology, allowing to criticize both welfarism and neoliberalism.

Both policies, in fact, share the same constructivist or creationist fallacy of a central, planning mind – a fallacy adopted by welfarists in a positive way, by praising the rebuilding of entire society, by neoliberals in a negative way, by delegating the same task to the market. The same fallacy affects both positivist jurisprudence, assuming legislation as the only true source of law, and realist one, misunderstanding judicial decisions of individual case as judicial legislation – the Austinian oxymoron.

From a cognitive standpoint, on the one hand, creationistic view is not general enough for

accounting also of common law and non-Western legal cultures. From a normative standpoint, on the other hand, courts are really the capital of law's empire. Only politically independent judges, in other terms, proved them apt to check-and-balancing administrative, economic, financial powers, including alleged democratical parliaments. In times of globalization, courts and independent authorities are the only grain of sand able to hamper the machinery of powers today governing the Earth.

Three Basic Ideas

The five research programs yet listed share, if any, at least three basic, defining ideas. *First* of them is the very evolutionary paradigm of *blind-variation-and-selective-retention*: a true commonplace, in a sociology of law such as the one provided by Luhmann (1972, 1982). In a full-fledged evolutionary jurisprudence, variation emerges in citizens' environment and behavior, whereas selective retention is operated first by such decentralized sensors as the courts, and only after by such centralized receptors as legislation, code, constitution.

The *second* defining idea, coming from Evolutionary Psychology, is *modularity of human mind*. Human mind can no longer be conceived on the artificialist model of a central supercomputer which knows all the information and manages it for the best. Evolutionists oppose to this creationist model, originally assumed by socialist planners, and today still shared by utilitarian moral philosophers, rational choice theorists, and economists, a model of human mind as a modular, multitasking tool, like a Swiss-army knife or a smartphone.

According to this model, the main quality both of human mind and institutions is *pluralism*, in a twofold sense. In a *first* sense, cognitive, "pluralism" means *fragmentation of information*, this being infinitely divided both within individual mind and among individuals, groups, and institutions. In his seminal essay on the impossibility of socialist planning, Hayek (1937) famously added to the Smithian division of labor's a division of information: no human mind could check on and manage all the information's data – a truth that applies to human legislator too.

In a *second* sense, normative, "pluralism" means *fragmentation of value*. In order to manage lot of such fragmented and decentralized information, each individual, and the society at large, must resort to a range of different and conflicting epistemic, ethical, aesthetical, and religious values. Fragmentation of value, in turn, requires pluralist institutions, capable of reasonings irreducible to consequentialist cost-benefit analysis – there is space, here, for human experience, wisdom, and sensibility.

The *third* defining idea of EJ – a qualification of second one even more debated than it in neurosciences and artificial intelligence studies – is the *autonomy of mind*. Far from being a blank slate on which culture and experience can imprint any idea, human mind is an autonomous system, shaped by evolution in order to meeting the environment's challenges. This idea is not relevant only for a Kantian epistemology, refusing the old model of mind as the mirror of nature, but also for a liberal politics, rejecting any monopoly of power.

Accordingly, there is a human nature: far from being indefinitely determined by their environment, humans are free, self-determining beings, able to pursue their own ends within the environmental constraints. Contrary to the common anti-evolutionary prejudice, therefore, EJ is compatible with the preservation and grown of – so to speak – an *anthropomorfic* image of man, in accordance with the ancient ideal of a truly human flourishing.

Conclusion: a Jurisprudence for the Twenty-First Century

The three-century old academic tradition called (general) jurisprudence is divided from the very start until today, into two approaches: natural law, focusing on normative and evaluative issues, and legal positivism, pursuing cognitive and conceptual concerns. In the second half of the twentieth century, both the post-Auschwitz

constitutionalization of European and Latin-American legal systems, and the discussion opened by Herbert Hart about law-and-morals question, produced many attempts to find a middle way and/or a third legal philosophy.

EJ seems a more appealing approach than legal positivism's common conceptual analysis but shares with natural law the same difficulty with normative consequences drawn by cognitive information. By chance, the adoption of a realist definition of law as legal process, from jurisdiction to legislation and not the other way round, makes EJ particularly suited to study processes like constitutionalization, judicialization, and globalization of power, and such issues as international justice, bioethics, ecology, and evolution of rights.

Cross-References

- ▶ Civil Law: Roman
- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Legal Positivism: Inclusive
- ▶ Legal System and Legal Order
- ▶ Natural Law: Protestant

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E

Exclusive Legal Positivism

► Legal Positivism: Exclusive

F

Failed States

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Introduction

"Failed States" (sometimes also: "collapsed States") is a term used in Public International Law (PIL). The term designates a State within the meaning of PIL whose governmental powers have deteriorated or (and then often the term "failing State" is used; see Thürer 2009, § 1) are deteriorating and who thus has lost overall effective control over the people living in its territory (critical of the concept, i.a., von Engelhardt 2012). The relevance of such deterioration of the governmental powers of a State can only be seen within the larger context of PIL.

The Public International Law Context

In the construction of the PIL system States are the basic, "original" legal persons. They are non-derivative legal persons, their existence coming about where a community of human beings lives in a territory belonging to no other PIL legal person under the rule of an effective government independent of any other PIL legal person. These three elements, a people on an independent territory under effective independent government, are constitutive of a State (Epping 2014, p. 49 et seq., §§ 1 et seq., following Jellinek 1922, 396 et seq.). Where such an entity *de facto* comes into existence and proves to possess the potential to persist and endure stable over time, there exists a State. Irrespective of recognition by other States, this entity is – at least according to most scholars – a legal person of PIL. The system of government which a State may choose is not as such prescribed by PIL (ICJ Nicaragua 1986, § 258, although international norms do address internal uses of governmental powers and, if one only considers human rights guarantees, do make provisions with implications for administrative or judicial procedures and institutions (e.g., Article 9 ICCPR).

States as the core international legal persons are the basic holders of rights and bearers of duties and obligations under PIL, endowed with "sovereign equality," the two components of which (sovereignty and equality) connect with the States' fundamental duties to respect one another as legal persons, not to interfere in the exclusive matters and affairs of other States (principle of non-intervention), to settle their controversies peacefully, and to refrain from the threat or use of force against the territorial integrity or political independence of any other State (see Article 2 of the Charter of the United Nations).

States are actors under international law who, by behavior attributable to them, can make and modify legal norms: They can conclude treaties, thereby creating obligations under the legal

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principle *pacta sunt servanda* or perhaps setting up international organizations and vesting them with legal personality as derivative PIL legal persons. They can make unilateral legal declarations, e.g., forfeiting a right or terminating a treaty where such a possibility is foreseen by a specific treaty provision or by general rules of international treaty law. By common practice consistently adhered to over time in conviction of being required so to perform under international law (*longa consuetudo et opinio iuris vel necessitatis*), they create international customary law. The general principles of law recognized by civilized nations within their domestic legal orders supplement the State-made law of treaties and custom. The cogwheels of the PIL system's machinery to create and modify the law are thus hinged to States.

States are not only the main actors in this sense of law-making. They are also persons to whom responsibility is attributed for acts or omissions violating the law (ILC Draft Articles on State Responsibility 2001, p. 38 et seq.). Such responsibility requires a State to stop any continuing breach of PIL, to refrain from repeating such a breach, to restore the situation before the wrong (*restitutio in integrum*), and to compensate for damages (see Crawford 2002).

Finally, it is still essentially the States on whom the PIL system relies for the enforcement of international law. The PIL system up to date lacks centralized institutions vested with the power to oversee compliance with the norms of international law and to enforce these effectively. Even the Security Council of the United Nations, acting under Chapter VII, lastly depends upon the Member States to implement and enforce its binding resolutions (see Article 41 and 42). Although the Charter of the United Nations envisions the Security Council to have at its avail, "on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security" (Article 43), no such agreement has ever been concluded. Even where States submit to the jurisdiction of an international court or tribunal, enforcement of the judgment is a matter for States, even if in the context of an international organization (cf. the role of the Security Council under Article 94(2) of the Charter of the United Nations or of the Committee of Ministers of the Council of Europe under Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the supervision of judgments).

Consequently, the PIL system very much rests upon States. This is the result any observer immersed in the system will reach when trying to understand its structures and code from within. Where the observer steps back and takes a look from the outside, she or he recognizes that certain overall objectives can be attributed to this system.

Any legal system essentially concerns human beings and their behavior. In this, it will essentially serve not simply somehow to influence the behavior of human beings. Rather, and primarily, it will define, and stabilize over time, norms which make human behavior predictable. Furthermore, and more importantly, it will prevent human acts and omissions from conflicting and, where conflicts nevertheless arise, solve these in a way which the members of the legal community ought to be able to perceive as "just" (cf. Höffe 1999, p. 63).

This also holds true for PIL. Its "purpose" can be considered to be the coordination of human behavior as well. In its basic structures, PIL is concerned with States, which are considered as "one," as single actors, as which they qualify for the very reason of there existing effective independent governmental control over the people on a distinct and independent territory. In a world of seven billion people, this reduces complexity. Nevertheless, it is not to be overlooked that, of course, States are themselves communities of people, of human beings. Historically, PIL has only fairly recently developed norms attaching themselves to the behavior of individual human beings directly, whether duties, e.g., of combatants under *jus in bello*, or rights, especially individual human rights. When PIL sets up rules for States to comply with, this means regulating the behavior of institutionally organized communities which international law perceives of as entities and single actors. Nevertheless, in the end, compliance

with international law by a State requires interaction of human beings within the community, even if only in a formalized function – with groups understood to be collegiate institutions (or organs) such as a legislative body (e.g., a parliament adapting a State's internal law to the requirements of a non-self-executing treaty of establishment or free trade) or individuals singly acting on behalf of the community as State officials (e.g., a border control officer whose task it is to decide whether a foreign national is allowed to enter the country without a visa as required by an international treaty on free movement of persons). Ultimately, the coordination of the behavior of States extends to what individual human beings do or do not do.

It simultaneously becomes clear that what PIL requires of a State as such (as an entity), in most cases, needs to be implemented internally – whether by domestic legislation, substatutory norms, or orders given to a soldier, a border officer, or a civil servant. Refraining from double-taxation, agreed to in a bilateral treaty with another State, for example, regularly will require both an act of legislation and compliance with this act by the tax authorities. The principle of *non-refoulement* forbids any State's immigration authorities or border control officers to expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion (for details see: Kugelmann 2010, §§ 29–34). The human right to a fair trial (guaranteed, e.g., in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) demands respect by domestic courts of law. The prohibition of torture is a *jus cogens* rule which is to be respected by every soldier, policeman, prison ward, or guard.

In all this, it is more than coordination and avoidance of conflicts which PIL conveys. It enables States – and thus whole communities – to cooperate, especially by concluding treaties, upon whose ratification the State institutions and authorities, from the perspective of PIL, are bound to perform the resulting obligations. States thus can avail themselves of PIL law and shape and tailor it to their needs: In case of treaties, as the paradigmatic instrument of PIL, States accept obligations, the onus of which they are prepared to carry in prospect of the advantage they will draw from the other States parties' compliance with their obligations. The resulting norms bind the States; this binding effect leads to foreseeability and predictability of State behavior (which, as shown above, in the end is human behavior), which enable and promote cooperation – especially, where treaties go beyond mere short-term "deals" or "trade-offs" and establish longer-lasting relations. Where international organizations have been established, these form a framework for inter-State cooperation as well; States can, although this is not necessarily the case, even bestow upon international organizations the power to adopt acts which then bind the Member States (a most prominent example of which is the European Union).

Consequences of a State's "Failing"

When a State loses its governmental powers to such a degree that it is completely, or at least largely, unable to control what is happening in its territory, it seems that one necessary (factual) requirement for statehood, one of the aforementioned three elements constitutive of a State under PIL, has disappeared. This seems all the more dramatic as it is the *effectiveness* of governmental powers which is decisive in the constitution of a State under PIL (Crawford 2011, §§ 13 et seq.; Krieger 2000, 88 et seq., 115). Having realized the central role of States in the system of PIL, one easily sees the negative consequences of a State's loss of governmental control.

One deplorable effect is that the State loses its capacity to act in contexts of cooperation; one community in the world is cut off from interacting with all others (Ghani 2008, p. 66). This, e.g., concerns the performance of treaty obligations requiring the enactment of domestic laws (as far as the domestic legal order does not provide for self-executing treaty norms as such to be applied internally) and the continuous enforcement of

these by municipal authorities and courts of law. Also, cooperation within an international organization is only possible through representatives of a member State, who are appointed and vested with authority to commit this member State (i.e., to act on this State's behalf with ensuing obligations that require fulfillment "back home") (Putnam 1998, p. 434); where a State's governmental organization breaks down, there will be a gap.

Dramatically dangerous can be the decay of a State's internal control: Effective powers to rule over the people in the State territory are needed in order to guide and direct this community's behavior so that it abides by and complies with the norms of PIL. Neighboring States might fear the negative effects of anarchy which could spill over into their territories (Kasfir 2004, pp. 53, 55–56). The failure of States is often caused by internal armed conflicts. In such cases, the official forces of the failing State may have been overwhelmed by armed groups of insurgents, who could attempt to cross borders into neighboring territories. PIL would – in contrast to a situation in which an effective State government were actively to arm and train irregular fighters intending to attack a foreign State – not attribute these armed groups to the failing State so that their military activities would not qualify as an armed attack triggering the neighboring States' right of self-defense against the failing State (see Article 51 of the Charter of the United Nations). It is a matter of debate and thus insecurity whether neighboring States have a right unilaterally (i.e., without authorization by the Security Council of the United Nations under Article 42 of the Charter of the United Nations) to invade the failing State's territory or airspace for the purpose of conducting military operations against the armed groups. The failing State might well be considered to fail at fulfilling the positive obligation to prevent the "private" use of force across borders to neighboring States (Bothe 2013, p. 585, § 13). But it is clear: Such situations are dangerous. Loss of governmental control can also lead to the disregard of PIL rules of humanitarian law which bind the parties to noninternational military conflicts, whether States or non-State actors, where a non-State party has gained control over a considerable part of a State's territory (see Article III of the four Geneva Conventions of 1949 and Protocol No. 2 to these Conventions).

Where a State's organized power is intact, its institutions hold the *Gewaltmonopol*, the monopoly to exercise force internally. Since the flipside of this coin is that the State prohibits its citizens and inhabitants to use force in their private relations *inter se*, the shattering of the *Gewaltmonopol* puts life, liberty, and property of private persons at great risk. The State is also no longer able to afford foreign nationals residing within its territory the protection required by long-established customary law. What is more, the State can no longer fulfill the guarantee of human rights protection which international law demands in relation to all human beings within the State's jurisdiction, irrespective of their nationality. Under PIL human rights standards have developed originally as norms privileging private individuals (and private corporate persons) in relation to the exercise of the State's governmental powers. The State is thus bound by human rights, in the first place, in the sense of being prohibited to intervene into rights and freedoms of private persons; i.e., human rights establish negative obligations. However, some human rights norms clearly demand the State to become active. For example, according to Article 2(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms "[e]veryone's right to life shall be protected by law" (see, e.g., ECtHR, Osman v. United Kingdom, no. 23452/94, judgment of 28 October 1998, § 115; Keenan v. United Kingdom no. 27229/95, judgment of 3 April 2001, § 89). And Article 13 of the Convention guarantees that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." In the course of judicial practice, international courts such as the European Court of Human Rights have gone beyond such clear cases by acknowledging other guarantees of individual rights and freedoms to contain *positive obligations*, calling for the State

to protect human rights actively, especially against interferences by other private entities (ECtHR, X and Y v. the Netherlands, no. 8978/80, judgment of 26 March 1985, Series A no. 91, § 23 as to the right to respect for one's private life, Article 8 of the ECHR). In consequence, the concept of human rights carries with it the idea that the State is a guarantor of liberty and freedom in its internal legal order. Deterioration of State institutions and powers destroys the domestic-law framework of human rights protection as a vital prerequisite for the civilization of the society (cf. Buergenthal and Thürer 2009, pp. 416–417). When State institutions break down, the State can no longer act as the guarantor of human rights. Individuals may no longer feel obliged to refrain from violence. Anarchy and chaos unleash human aggression. The victims suffer terribly. This contributes to the destabilization of the community. When people flee and seek refuge elsewhere, neighboring States are affected as well.

The failing of the State thus has negative effects both internally and externally.

Public International Law's Answer to the Failing of a State

Nevertheless, PIL does not immediately attach to the acute complete or overall deterioration of governmental control the consequence of a loss of statehood, the legal "death" of a State so to speak. Rather, the law reacts more slowly. The system seems intentionally inert. Just as, in the formation or creation of States, the establishment of a government over people in a territory needs to prove both effective and enduring *over time* in order to bring about the existence of a new State within the meaning of PIL, so does a temporary, even if complete, inability to exercise effective control over the people and the territory *not* dissolve this State as a legal person under PIL. Even if such a situation were to last for a long period of time, States, as the main actors under PIL, seem reluctant to conclude that such a State has vanished. The extinction of a State, discussed among scholars of PIL as a final consequence of a State's "failing" (Ziemele 2007, § 2), has not occurred in any one single case (Crawford 2006, p. 722).

The "failed State" is rather, in the practice of PIL, continued to be treated as an existing legal person (Epping 2014, p. 113, § 142). What is clear, however: This State is, if the metaphor be allowed, legally "paralyzed": Together with the ability to exercise governmental power effectively, this State as a legal person has *lost its capacity to act* in international law contexts. Nevertheless, its rights and duties under PIL persist (although, of course, neither can rights be exercised, nor duties fulfilled or obligations performed). Especially, treaties do not lose their binding force, and membership in international organizations does not dissolve, as the legal person to which the respective rights and obligations attach is still there (Thürer 1999, p. 298). Most importantly from the perspective of international peace and security, the persistence of the State as a legal person requires all other States to continue respecting its basic rights, especially its sovereign equality, the integrity of its territory, and the freedom from interventions into its exclusive affairs.

In case of a failed or failing State, there is no legal vacuum, which other States might move into. Unilateral intervention by third States (or regional organizations) on the grounds of customary law is unlawful, though certain cases of "humanitarian intervention" are theoretically discussed (pro: Greenwood 1993, p. 40; Herdegen 1996, pp. 60–61; Levitt 1998, pp. 336–337, 351) but are considered by most authors to lack a basis in customary international law and thus to be excluded (von Arnauld 2016, p. 34, § 87, p. 145, § 336; Epping 2014, pp. 114–115, § 143; Liebach 2004; Nolte 1999, p. 14; Rodley 1992, 14 (24)). There is even great skepticism among scholars as to the legality of military interventions by third States to rescue their own nationals (Epping 2014, p. 115, § 144). Annexation of a failed State's territory is banned.

It is only the United Nations which are considered to have the legitimacy and right to intervene into a failed State with the Security Council acting under Chapter VII of the Charter of the United Nations, especially in order to stop gross violations of human rights (cf. von Arnauld 2016,

p. 34, § 87; Epping 2014, p. 114, § 142). The precedent is the case of Somalia and the Security Council's resolution 794 (S/RES/794 (1992)), adopted on 3 December 1992, in which the Council determined that "the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security" (see especially nos. 7, 8, 10, 16 of the operative part referring to Chapter VII of the Charter of the United Nations).

In this context, the concept of "responsibility to protect" ("r2p") needs to be mentioned. The General Assembly of the United Nations, in its Resolution on "World Summit Outcomes" (Res A/60/1 of 16 September 2005), declared that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity" (at para. 138). According to para. 139 of the Resolution, "[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity." It continues "In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and *national authorities manifestly fail to protect* their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. . . ." (emphasis added). Note that the Resolution does not expressly speak of failed States. In contrast, a "failed state situation" was addressed by the International Commission on Intervention and State Sovereignty (ICISS), established by the Canadian Government in the course of international deliberation of external military intervention for human protection purposes, in its 2001 Report "The Responsibility to Protect" (see 4.19). The ICISS Report, however, mentions a failed state only as one of several cases, in which it considered "large scale loss of life, actual or apprehended, with genocidal intent or not" to justify intervention by military action (see 4.10–17), the other cases being "deliberate state action, state neglect or inability to act" (4.19). Interestingly, the General Assembly's Resolution does not reflect the ICISS Report's (see 6.28–40) realistic, though critical consideration of interventions by States or groups of States should the United Nations fail to act. Obviously, ICISS's recharacterization of sovereignty as responsibility (2.14) was, if at all endorsed, not accepted as allowing such unilateral action, not even against failed States (but see Bannon 2006, pp. 1161–1162).

All in all, PIL can be understood as tuned to preserving the existence of a State as a legal person despite its governmental powers decaying or even having disintegrated. A vacuum is to be avoided. The situation is to remain open in order to allow the State to recover, meaning to permit the people – in making use of their right of self-determination (cf. *Heintze* 2014, pp. 335–336, 338, 360–369, §§. 25–6, 29–30, 56–70) – in the territory of the State to reorganize as a community, and reestablish, or build anew, institutions which can take over effective government internally and thereby allow the State also to regain its capacity to act at the international level (Werther-Pietsch 2012, p. 29) (and, of course, to fulfill PIL obligations as far as domestic implementation and application are required).

Contact Points for Legal Theory and Political and Legal Philosophy

The concept and treatment of failed States offers various points from which a philosophical reflection can depart.

Legal Theory

A theoretical perspective might detect that by upholding the legal personality of a State despite its "failure," *the PIL system stabilizes itself*. The State's position in international law, as a member

of the legal community, is retained despite the loss of its capacity to act. A vacuum, which other actors might invade, is avoided. Other States are kept at bay. They need to respect the failing State's borders, its territory, the nationality of its citizens, its status in international organizations, and its rights under international custom and treaties. This serves one fundamental *telos* of PIL: *coordination and preservation of peace and international security*. Furthermore, PIL concedes the failed State what may be termed "the right to recover," as part of its basic PIL status, its sovereignty: the possibility to restore effective government, reinstall functioning institutions, and thus regain control over its people and territory and, consequently, also the legal capacity to act at the international level (for the people which it originally controlled). Behind this "inertia," PIL's second *telos* can be discovered: enabling and promoting *cooperation between States*.

The phenomenon of failed States points back to the creation of States and thereby to the *interplay of facts and norms*: PIL is receptive of the fact that in a given (independent) territory effective governmental control over a people is established. This fact has normative consequences, which the PIL system does not abandon easily. Both the inclusion of a newly formed entity as a State and its extinction as a legal person are matters defined by the law but dependent on factual circumstances.

The attempt made above to describe PIL with a view to the concept of a "failed State" has changed perspectives several times, staying "outside" of States and then again "stepping in": From the border between "in" and "out," we have looked at what PIL requires in acknowledging the existence of a new original legal person to be addressed as a "State." We hinted at the effectiveness of internal control and domestic procedures of institutional deliberation and authorization as an implied condition for the State's ability to act in contexts of PIL and, especially, to participate in international law-making. We showed PIL norms to attach themselves to States regarded as single entities, but unmasked this as a necessary technicality to reduce complexity in the face of seven billion human beings on earth. We presented internal processes and procedures, although defined by domestic laws, as relevant and often decisive for compliance with PIL norms. This interdependence of PIL and domestic law is coped with by every State's domestic legal order (Cassese 2005, p. 220). It inspires reconstructions of PIL in forms of monism and dualism (cf. Cassese 2005, p. 213) – especially by those seeking the source of the binding force and validity of PIL.

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Political and Legal Philosophy

Source of PIL's Validity

Where does such a source of the law's validity lie? If States can "fail" without losing their existence, can this be reconciled with the positivistic position, popular among scholars of PIL (see, e.g., Ipsen 2014, pp. 13–15, §§ 41–50), that PIL is founded on the consent of States? The failed State can no longer form a "will." Does this reveal that there needs to be some other foundation on which the PIL system rests than consent, which, in the end, points to the common will of States, from which single States could break away as they arbitrarily choose (such volatility being the reason why, e.g., in the eyes of Radbruch 1950, pp. 138, 244, the binding force of law cannot be founded on will; but see Koskenniemi 2001, p. 200 on Jellinek 1922, pp. 333–334; Jellinek 1882, p. 2).

Is PIL's Concept of a State Underlying the Treatment of "Failed States" Correct?

The PIL concept of "failed States" concerns the (temporary) loss of a constitutive element of statehood. Thus, it is connected with the fundamental question: What is a State? And this again unravels into more specific questions, such as:

Is a State more than a (positivistic) legal construction to which rights and duties are attributable within a specific legal system like PIL? Is it "natural" for human beings to build (regional) communities (cf. Aristotle, Politics, 1252b10 et seq.) as States? Is a State a moral person (Kant 1795/96, p. 197) or a fictive person (Hobbes 1651, Chaps. XVI and XVII, pp. 101–110; Skinner

2012, 88 et seq.). Does the existence of a State depend on a domestic legal order (cf. Cicero, de re publica, § 39: "coetus multitudinis iuris consensu et utilitatis communione sociatus")? Does it depend on an international legal order? How do the domestic and the international order relate, how ought they to? Might the State even exist as a social entity beyond PIL (a discussion Skinner 2012, pp. 87–88 points to)? If so, does PIL deal with States adequately? How do States interact? How ought they to interact? Which rules of international law ought they respect, create, apply?

In this, the longevity of States seems to play a role. Our tendency to think of communities as existing over time despite their continual renewal by fluctuation of members points to the aspect of time and the temporal stability of institutions, processes, and procedures of deliberation and decision. This institutional backbone is in the focus of reflections on legal relations within and between States, which, however, hardly give us the whole picture.

In light of this, we might ask anew: Which are – or ought to be considered as – the necessary and constitutive elements of a State. Do these elements extend beyond the PIL formula, "people plus territory plus independent effective governmental powers"? Is the PIL system defective especially in emphasizing the *effectiveness* of governmental control when judging whether a State exists, giving principally no regard to the quality of a State's political system? Or should other requirements, such as democracy or effective guarantees of human rights, be regarded as so fundamental that in their absence a "community" ought not to be acknowledged as a State?

Consequences of the Deterioration of a State's Governmental Powers

If we look at States as an existing real-world phenomenon, which we are called upon to comment from the standpoint of moral philosophy, PIL's handling of "failed States" might be questioned:

First, should not the deterioration or disintegration of elements which are constitutive of statehood lead to the extinction of a State? This consideration demands reflection of the consequences of such a conclusion for the whole of international society as well as for the people living in the territory of such a State and for its neighbors.

Second, ought not, if law in the end always concerns human beings and their living conditions and behavior, at least a power structure which violates fundamental human rights simply not be respected by the law?

PIL's development of human rights law was slow, taking up momentum after World War II and the foundation of the United Nations. As it was States which created international obligations to respect human rights, it was a top-down approach. This contrasts with *Immanuel Kant*'s construction of *öffentliches Recht* (public law). Starting his *Rechtslehre* from every human being's innate right to freedom as the axiom of right, Kant goes beyond laying down ("republican") principles for constitution-building (*Staatsrecht*) and discusses both *Völkerrecht* and *das Weltbürgerrecht*. Just as he never loses sight of individual human beings and their fate, he takes account of States as human communities, which need to enter into an *allgemeiner Staatenverein* (a general association of States) in order to make peremptory what is right in relations between *Völker* (peoples) (Kant 1797/98 § 61). If all legal relations, whether at the domestic or the international level, met the conditions of what is morally right, there would necessarily be full respect for everyone's innate right to freedom.

At this point, PIL's inertia in concluding that a failed State has become extinct is remarkable. That PIL prefers to sustain a State despite its failing, *prima facie* appears as precarious in terms of human rights: While foreign States are kept out, internal chaos and anarchy might lead to the death and suffering of thousands, perhaps millions. However, PIL acknowledges the international community's (to be exact: the United Nation's) power to intervene for the protection of human rights (Kahler 2011, 32 et seq.). And together with the failed State, *PIL conserves essential legal structures*: The PIL status and

obligations of the failed State persist. This is especially important for obligations stemming from treaties since these only bind the *contracting parties*, and, where they concern human rights, will not only specify human rights standards (usually going beyond the obligations of general customary human rights law) but can also install judicial institutions to which individuals may have access (see the ECtHR). Preservation of the failed State's legal personality also retains its former submission to such jurisdiction. The resulting continuity stabilizes the substance of PIL. As soon as the State "recovers," it needs to start performing its obligations (including respect for an international human rights court), domestic implementation, as shown above, reaching down to individual human beings. For a State which committed itself to human rights protection under PIL before it "failed," there is no change in its human rights obligations.

Contrast this, admittedly idealistic-sounding, description of the PIL rules on failed States with any call for a world public order beyond the UN in the form of a world state. Kant discusses the possibility of a *Völkerstaat*, a State composed of nations, but dismisses this as incompatible with the continuous existence of States (under the roof of such a *Völkerstaat*) in each of which a people owes obedience to the (domestic) legislator (Kant 1795/96, pp. 209, 211), a State being a society of humans over whom no one else, but the State itself, as a moral person, has the power to rule (Kant 1795/96, p. 197). Also, a global *Völkerstaat* would not be able to exercise effective overall control and thus to guarantee every member's protection, whereas several regional *Völkerstaaten* would necessarily exist in their external relations in a state of nature and thus of war (Kant 1797/98 §§ 54, 61). Merging all States and all nations into one State (hinted at in Kant 1795/96, p. 209) is also prone to the argument of ineffective rule and lack of secured protection of rights. Kant only speaks in favor of a *foedus pacificum*, a federation of free States banning all wars and gradually – of the idea of *Völkerrecht* understood as a regulative idea – extending to include all States (Kant 1795/96, pp. 211–212).

Conclusion

For Kant, all of *Recht* (right), whether for the construction of States or international relations, is spun with a human-rights thread. Though we might be tempted to regard a State, viewed in isolation, as delegitimized by the loss of effective governmental rule and thus of the power to protect the human rights of its inhabitants, might there not be some wisdom in the way PIL upholds the legal existence of a failed State and gives it a chance to recover in an international environment and to reestablish itself as a guarantor of human rights?

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Family

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Families are socially constructed, especially considering the structure of family paradigm: the heterosexual couple and their children. Disciplines like Psychology, Sociology, Anthropology, and other sciences in Humanities assert that there is no kind of natural or divine guarantee for basic human groups like that image.

Reading about history and private life of the Roman Empire (Veyne 2009/1985) or social history of children and their families (Ariès 2014/1981) and perceiving that the sentimental family idealized by bourgeois morality is a very recent invention. In the Roman Empire, for example, a baby would only be accepted as part of the family if the father lifted him up in the air after birth; otherwise, he could be left on a dunghill without being hurt. Likewise, elite breastfeeding was an unthinkable task for a mother, being attributed to a "nursing mother." The very idea of the difference between children and

miniature adults only began to be more clearly delineated in the seventeenth century. From the Roman Empire context, parricide was not part of a Freudian plot but, however, was free from imperative law, which was often carried out by men seeking for paternal autonomy.

Family and power are articulated in different ways throughout history. Engels (1942/1884) demonstrated the importance of thinking about class struggle in that society between men and women, adults, and children. It is naive to think that family history can be reduced to a history of affections. Lévi-Strauss (1969/1949) raised a very important hypotheses about the kinship dynamics and how it is related to political economy of wars, in addition, making it an objectified place for women, a valuable exchange object, very evident insofar as their alliance child guarantee.

Okin (1982) clearly shows how philosophers such as Kant, Hegel, and, before them, Rousseau and Lock built the image of a sensitive woman who is closer to nature. These theories were certainly part of the power games that built the family as one of the fundamental devices of the misogynist patriarchy that runs through the entire history of the bourgeoisie.

Without losing sight, therefore, of this long genealogy, let us focus our gaze on psychoanalysis that will condense, in our view, these images of the family were invented four centuries before Freud. In psychoanalytic theory, we see the innateness that tries to justify the existence of the family beyond its historical contingencies, but we also see the strong winds of deconstruction of the idealized family's image, possible after the clinical experience inaugurated by Freud.

Talking about family basis, psychoanalysis necessarily forces us to comment on what the Oedipus Complex is, one of the most popular psychoanalytic concepts. On one hand, the legend of Oedipus helped Freud to assemble the image of the family as a scenario of complex affections and vital battles around personal identity. On the other hand, it will be very evident in Ferenczi: the Oedipus complex helps us to perceive the family as a first power device that, through the gears of recognition and hospitality, it can give life or cause infant mortality.

The legend of Oedipus has been explored extensively by psychoanalysts throughout the twentieth and twenty-first centuries since Freud took it as the ineluctable destiny for all of us. Oedipus is condemned to love his mother and kill his father. Freud called this classic version "the positive." The "negative version" is the one in which the child resolves his first love ties by loving the parent of the same sex and hating the opposite sex.

The important feminist critique, directed at Freud's set of texts on Oedipus, makes it clear that man and heterosexuality are taken as human models, innate, and natural. We will see how Freud presupposes, in Totem and Taboo, the origin of the family as a horde dominated by a violent male – the primeval father – who imposes castration on all men and possesses all women exclusively. This background of heterosexuality is present in practically all of Freud's texts on Oedipus and the configurations of our desire.

What is interesting, however, is to note that the very idea of Oedipus, when associated with the idea of family romances, paves the way for us to understand the identity constitution – and this includes our sexual orientations and gender identities – as absolutely contingent and dependent on our early historical libidinal relationships. Gradually, it becomes clear to psychoanalysis that the word complex is more important than Oedipus in the expression that articulates the two.

In Freud, therefore, there is a very powerful theoretical movement that will always force the hypothesis of an innate Oedipus that forces the child to resolve his love conflicts towards heterosexuality. The image of the traditional family is a presupposition of Oedipus in Freud: the mother who breastfeeds, takes care of, and protects; the father who institutes the law and who will inevitably claim the mother for himself, interrupting the loving dyad between her and the baby.

The initial love for the mother is evident. The love of the child, boy or girl, is based on the initial exchange marked by the need. Desiring the mother for oneself and fearing losing her love are the initial forces of Oedipus, in both girls and boys. Gradually, the child comes to realize that his incestuous desire cannot come true. The mother

has other interests, especially the father. And that is why he becomes our first rival and enemy, our original object of hatred.

What can you do against these affective forces of love and hate? Freud presupposes two great narcissistic sources that will oppose the incestuous and parricide scenario: the threat of castration and the threat of loss of love. In the case of boys, castration represents the ultimate punishment, losing the very instrument of crime. In the case of girls, where castration has already occurred imaginarily, losing their parents' love is the threat that will make them give up their mother's exclusive possession and seek the love of their father and other substitutes for these loves outside the family field.

Freud assumes that the collapse of Oedipus leaves an heir, an internal guard, and the superego, which will, forever, guarantee the maintenance of the circuits of our desires, at the same time marked by family romances and distant from them; marked because it will be impossible to have an identity that does not have identifying traits with the parents, our first objects of love and hate; and distant because the effects produced throughout the Oedipus complex are too intense and deadly to be repeated.

Throughout life, an encounter with the object of desire will always be a re-encounter with the Oedipal objects. The repetition of family romances is inevitable. The question is not whether we are going to repeat them, but how and at what psychic cost. From the Freudian perspective, families are the matrix of who we are and how we love.

The Oedipus myth is also a potential metaphor on how the unconscious works in family novels. Polybus and Merope are the adoptive parents of Oedipus. Not knowing its history, Oedipus takes the oracle literally. Oedipus' hubris is wanting to know too much, to be above divine plans. Laius' murder and his marriage to Jocasta happened in such a way that Oedipus was unaware that he was committing his crimes. Similarly, many of the children's Oedipus complex will take place and remain in the unconscious.

Throughout the history of psychoanalysis, especially from feminist critiques, we will further complicate what happens under the aegis of family love. First, we will not take heterosexuality as an innate force or the masculine as a paradigm of what is human. Just as homosexuality is constituted from the contingent and deeply unconscious events of family romances, heterosexuality and any other form of sexual orientation are formed in the same molds, never without conflicts, never without a complex game of forces that involve identification, desire, and hospitality.

Secondly, the family image is changing. Gradually, we will realize that the heterosexual couple, biological father and mother, is just a possibility of family construction. The idea of the Oedipus complex, paradoxically, helped us to understand that any family configuration is constitutive of the subject. Therefore, homosexual couples, single mothers, or orphanage children will each have their own Oedipus complex.

Thirdly, the emphasis given to the genital character of Oedipus in Freud will also be criticized. Incest can be understood as a power relationship, for example, and not just a sexual relationship between parents and children. Dominating, remaining omnipotent for the child, not letting him walk with his legs, imposing his values in a sadistic and brutal way: all this is sexual – because it is in the service of the parents' pleasures – and can be considered an incestuous modality of love. Likewise, the father's murder will increasingly be understood metaphorically. It is not about killing the father, but seeking to be independent of the power of the parents, from the constitutive identifications, from the intrusive repetitions demanding that we are originally a determined family injunction.

The deconstruction of machismo present in the first reflections of Oedipus in Freud, therefore, does not serve to diminish the importance of family relationships in our psychic constitution. On the contrary, it reinforces and helps to perceive the strength and multiplicity of these relationships. It is not necessary that we are linked to the father by law. The law that distinguishes the generations or that prohibits crimes such as murder and incest is conveyed by adults, men, and women, in the Oedipal scene. Likewise, that incestuous desire comes from all caregivers (men and women, bi, hetero, or homosexual).

We can read the notions of paternal/maternal function, in Jacques Lacan's work, as a movement of metaphorizing what Freud perceived in a more concrete, even phylogenetic, way. The paternal role would be something associated with, for example, introducing a child into a world full of laws and symbolic rules. The maternal role, of course, would be associated to caring and reception (incestuous or not). Talking about function, that is, as a symbolic operation capable of being performed by anyone, regardless of their sex or sexual orientation, paves the way for an even deeper deconstruction, which we will not see in the Lacanian work, of the association between paternal and the law or maternal and caring, a still sexist remainder that associates men with culture and women with nature.

Deleuze and Guattari's (1983) critique was fundamental for us to realize that much of what Freud presupposed as an innate force was a code imposed on children. Freud, in the conception of Foucault, Deleuze, and Guattari, would have described how the child is oedipalized by the family. From these authors, it is easy to perceive the heteronormative and patriarchal forces of family romances.

The different interpretations that Butler (2008) makes of Freud help us to realize that where Freud described phylogenetic forces at work, we should see the family vector being imposed on children. For example, instead of the thrust towards incestuous heterosexuality – natural, innate, and incoercible – we must see (1) the imposition of a model of desire and (2) the violent repression of other ways of desiring, loving, and existence.

Jean Laplanche (1992) formalizes this inversion of the vectors in family novels. Of course, there is a vector that goes from the baby to the parents, but Laplanche emphasizes the vector that goes in the opposite direction, from the parents to the baby. Oedipus and castration are codes and narratives that constitute the desire, presented, more or less violently, by parents to their children.

As we can see, the story of the Oedipus complex is far from the end, with this metaphor, Freud described how the family is a normalizing device that tries to organize the subject from the primacy of sexual difference. It is easy but naive to read this description of Freud as an attempt to save the patriarchal family. His description opens the way, radically, to the perception of the historical-libidinal contingency that constitutes our family ties. The family is not limited to our first relationships, but it expands and projects to other social devices:

> Psychoanalysis has made known the intimate connection between the father complex and belief in God. It made us see that a personal God is, psychologically, nothing more than an exaltation of the father, and daily we can observe young people who abandon their religious beliefs as soon as parental authority collapses. We verify, therefore, that the roots of the need for religion are found in the parental complex. The almighty and just God and the kind Nature appear to us as magnificent sublimations of the father and mother, or rather, as reminiscences and restorations of infantile ideas about them. Biologically speaking, religious feeling stems from the child's long-term dependence and need for help; and, later, when she realizes how fragile and unprotected she is in the face of the great forces of life, she returns to feeling as in childhood and then tries to deny her dependence, through a regressive renewal of the forces that protected her in childhood. The protection against neurotic illnesses, which religion grants to its believers, is easily explained: it removes the paternal complex, on which the feeling of guilt depends, both in the individual and in the whole human race, resolving it for him, while the unbeliever has to solve his problem alone. (Freud 1976/1910, p. 124).

This and many other passages from Freud show how the family scene relates to religion. The second is a projective extension of the first. The children's helplessness and dependence on their parents are rediscovered and, to some extent, resolved in their relationship with God the Father or Mother Nature. There is always an attempt to refuse the contingency of family ties: sometimes religious or biological. We can read Freud's work and, later, that of other psychoanalysts such as Ferenczi and Winnicott, deeply marked by this tension. On one hand, they seem to support this almost metaphysical essence of the heterosexual family as a paradigm of primary human love. On the other hand, in all these authors, there is an evident recognition that the human bonds that constitute a subject do not depend, at all, on this

type of scene crystallized around the legalistic father and the caring mother. Nearly a century of clinical research shows that notions such as hospitality, helplessness, dependency, autonomy, care, and ambivalence are not dependent on gender or sexual orientation. Gender and orientation are just more elements that make up the affective family complex that constitutes us.

The quote above is an example of the relationship that Freud establishes between family and religion. Parental love is so potent that it survives beyond the concrete family structure. A few years later, in *Future of an Illusion*, Freud develops one of his theses on the survival of the family beyond the constitutive experiences of the subject. God, for Freud, is the representative of omnipotent parents in early childhood, whether in its negative or positive aspects. A God in whom we can trust and feel fully loved or a God who persecutes us and condemns us for what he considers a crime: such things are only the continuity, on a symbolic level, of actual experiences that the child has had with his or her family. The gods are our metaphorized parents, their permanence, symbolically, determining our lives: how we see ourselves, how we should view others, and what we should be or desire.

In his other book devoted to a sociological theme, *Totem and Taboo*, Freud also points out the symbolic survival of the father. Freud follows the hypotheses of anthropologists and biologists of his time and proposes that the origin of the human family took place in the form of a horde. The primeval horde was guided by a powerful male who retained all the females in the group and castrated all the males. The sons then gathered and killed the father, devouring him in a totemic feast to acquire his strength. Still following the footsteps of the biology of his time, Freud proposed that this scene would be repeated countless times and that, gradually, it was phylogenetically internalized. The feeling of guilt for having killed the father would be present in all of us and would be revived in each one's family experiences and also in collective religious rituals. Communion among Christians, who symbolically eat the body of Christ, would be an evident metaphor for the continuity of this original and constitutive scene of human culture.

Even though today we know that phylogenetic hypotheses do not hold up and that it is much more likely that the origin of human culture is multiple and does not follow only one type of grouping or social order, the Freudian myth can be read metaphorically today: the family origin is sexist, patriarchal, and violent. Furthermore, it is evident, in a more solidary reading of Freud's texts, that the family is maintained not by an instinct, but by gestures of force and, later, by political choices that maintain the effects of those inaugural gestures perennially. Today it is easier to read Freud's theses as if he were describing the mythical origin of European civilization, androcentric, misogynist, and sexist. The family, in this description, is the core that maintains this civilizing pact (Roudinesco 2003). It is in this pact that we will see the ontogenetic repetition of what was phylogenetically experienced. When we abandon the biological hypothesis, the central thesis can be maintained: the family is the disciplinary device through which social codes are introduced and reinforced in the new members it constitutes. What changes here is that the power to maintain the status quo of men and the father does not come from innate biology, but from historical, social, and political relationships. The central word of this intertwined historical game is affect. And this is what Freud brings to the center of his analysis:

> (...) a father had been awake at the bedside of his sick son for days and nights on end. After the boy's death, he went into the adjoining room to rest, but he left the door open so that he could see from his room the room in which his son's body lay, with tall candles around it. An old man had been charged with watching over him, and he sat beside the body, muttering prayers. After a few hours of sleep, the father dreamed that his son was standing by his bed, and he took him by the arm and whispered reproachfully: "Father, can't you see that I'm burning?" He woke up, noticed a bright flash in the adjoining room, ran there, and found that the old watchman had fallen asleep and that the shroud and one of the arms of the corpse of his beloved son had been burned by a lighted candle that had fallen on them. (Freud 1976/1900, p. 524).

The loving, caring father, devastated by grief over the loss of his child, is a far cry from the primeval father or father as a cold, harsh representation of the law. Clinical knowledge, little by little, showed the perverse and tyrannical mother, as well as the loving father. Social roles assigned to gender do not seem to survive long when we examine people more deeply in their unique histories. Wishing the child was alive for one more second, the time of a dream is the kind of evidence that the psychoanalytic clinic produces to understand the power of family romances.

This is also Oedipus: the ambivalence towards the death of the child, the interminable mourning that this can provoke, and/or the act of getting rid of the child – as Laius had done. There is no guarantee – instinctual, religious, or of any kind – that parents and children will love each other without conflict. The daily routine of the clinic is the opposite: the family relationship is inevitably full of ambivalence. Wanting the child to die and blaming yourself eternally for it; to dedicate oneself in a brutally masochistic way to the care of children, and impose an unpayable symbolic debt on them: family romances are virtually endless.

> Growing up, the individual frees himself from parental authority, which is one of the most necessary, if most painful, results of the course of his development. Such liberation is essential and it is assumed that all those who have reached normality have achieved it at least in part. The entire progress of society rests on the opposition between successive generations. There is, however, a class of neurotics whose condition is visibly determined by their having failed in this task. (Freud 1976/1909, p. 243).

Freud (1976/1909) establishes independence (or moving towards independence, as Winnicott will prefer) as one of the clear signs of psychic health. Autonomy here is, first of all and paradigmatically, to the parents or the group of people who constituted us as subjects. A type of psychic illness – which can range from common neurosis to psychosis – can always be referred to as the failure of parents and children to produce this separation in a careful and not too traumatic way.

The various fantasies that Freud (1976/1909) groups under the name of family romances are unique responses to separation (and resistance to it) from our parents. Imagining being the son of aristocrats and having been adopted is just one example of a fantasy that Freud will interpret as a kind of homage we pay to our original parents, omnipotent and infallible as the kings to whom we imagine ourselves to be heirs.

It is essential to establish connections between children's fantasies about their origins and what happens to them in their affective day-to-day with their parents. This work will be radically initiated by Sandor Ferenczi. From some of his texts, it is evident that children's fantasies do not come out of nowhere, but are always responses to their concrete affective experiences.

Let us think of the story of Schreber, a judge of the law, whose autobiography Freud analyzed. Today we know that Daniel Schreber lived through a family nightmare. He was the target of unspeakable violence in the name of severe pedagogical orthopedics imposed by his father. Instruments that kept the body erect, permanent violence in the reprimand, and absolute intolerance of disobedience: all this added up to Schreber's psychosis. Note that this can be described as a type of symbolic incest, once again, reiterating that it does not depend on gender or sexual orientation to happen.

On the other hand, let us recall Freud's reading of the relationship between Leonardo Da Vinci and his mother or even that of little Hans and his family. The artistic creation or famous fantasy of the vulture in the case of Da Vinci and the phobic fantasies of Hans are neurotic responses to the affection and care received amid unconscious fantasies of his parents less violently addressed than those lived by Schreber.

Sandor Ferenczi (1992/1913) will largely follow in Freud's footsteps in his conception of the family. In the case of Arpad, the "rooster boy," for example, we have the same interpretive logic used by Freud to understand Hans: the boy identifies with his father (the village rooster) and wants to replace him and that is why he fears to be pecked by the rooster. Just like Hans who fears being

bitten by the horse, little Arpad fears having his penis destroyed by the rooster-father. An important detail that escapes both Freud and Ferenczi is the desire to be castrated in boys, insofar as the identification with the mother plays a fundamental role in the sexual constitution of boys within the family scenario. In the name of the innate Oedipus, identification with the mother is left in the background by these authors, and the idea of primary identification with the father is reinforced.

Three texts by Ferenczi, written from 1928 onwards, will produce an important turning point in this vector that goes from the child to the family. The first of these articles, "The adaptation of the family to the child" (Ferenczi 1992/1928), as the title indicates, aims to raise hypotheses about how the family welcomes the child and what its consequences are, especially poor reception. Ferenczi talks about the traumas of weaning, the training in personal cleanliness, the suppression of "bad habits," and, most important of all, the transition to adulthood. In all of those traumatic situations, parents must play a supporting and containing role: not so strong as to make the child passive, nor so fragile as to leave him helpless. The family's main task is precisely to find this in-between place: neither subjection nor neglect, imposition of the regulatory codes of life, and protection of the child's personal and free gestures. Ferenczi ends this text with a curious anecdote. He narrates a joke with his nephew in which the latter began to beat him. Ferenczi then holds him and says that he can even imagine and fantasize that he hits, but he cannot hit. The child recognizes his right to attack in imagination. Recognize the hate, but control it, and find a more suitable place for it. This is, of course, valid for all other child's affections and their articulation with the adult social world.

The second text is from 1929 and is entitled "The unwelcome child and his death drive." Its central thesis concerns children who have been "unwelcome guests in the family" (Ferenczi 1992/1929, p. 48), that is, children who have been treated with impatience, indifference, or violence by the family. Ferenczi observed that patients who survive this will have their will to live diminished; they will tend to pessimism and lack of appetite for work. The title of the work indicates the hypothesis that the death drive must be fought by a "prodigious expenditure of love, tenderness, and care" (Ferenczi 1992/1929, p. 50). The absence of this specific hospitality would leave the way open for the death drive. Despite the criticism of the innate notion of the death drive (Laplanche 1992), Ferenczi's thesis is brilliant in explaining the work of love and reception as one of the fundamental tasks of the family. Once again, it is clear that biology does not play a central role, but rather the ethical choice to perform careful hospitality towards the baby. It does not matter if it is a heterosexual or homosexual couple, or if one or two women or any arrangement of sex, gender, and sexual orientation: what is decisive for psychic health and subjective constitution are tasks related to care and tenderness. In Ferenczi, it can be said, every human must be, so to speak, adopted by his family so that he can come to have a place in the world. Oedipus, remember, is an adopted son. The tragedy happens not because of this fact itself, but because of the denial surrounding the adoption. Merupe and Polybius never told Oedipus his story. These denial and omission, of course, take its toll. It is for details like this that Ferenczi wants to draw attention to when he talks about welcoming.

This brings us to the third text in this series, "Confusion of tongues between adults and children" (Ferenczi 1992/1933) which is subtitled "the language of tenderness and passion." In this text, it can be said, Ferenczi resurrects Freud's theory of seduction, in which he pointed to adult seduction as a traumatic factor par excellence. The language of tenderness, of the child, can be confused, by some adults, with the language of passion, that is, more sexual. Faced with this confusion, children feel physically and morally defenseless, automatically submitting to the will of the aggressor and identifying with him.

Ferenczi helps us to perceive the family as a place of violence as well. Hospitality is contingent, not natural. In the text "Dream of the Wise

Baby" (Ferenczi 1993/1923), Ferenczi reports a typical dream in which newborns or very young children can speak or write with ease, deliver speeches, or give scientific explanations. In 1923, Ferenczi interprets this dream as part of the child's desire to supplant adults in wisdom and knowledge. In the 1933 text, however, the interpretation follows the direction of identification with the aggressor: "Fear in the face of enraged adults, in a way mad, transforms the child, so to speak, into a psychiatrist; to protect himself from the danger posed by the adults without control, she must, first of all, know how to completely identify with them" (Ferenczi 1992/1933, p. 105). Ferenczi is speaking about children, therefore, who mature too soon, like the hasty maturity of a fruit provoked by a bird's peck. The metaphor of the fruit and the bird brought by Ferenczi, once again, brings up the importance of inverting the vector and valuing the action of the adult in front of the child. As there is no natural guarantee for caring hospitality, it is of fundamental importance to recognize that violence can occur within the family itself.

Conclusion

In conclusion, this brief tour of the history of psychoanalysis shows that the family is a cultural and political arrangement. Its strength lies in being the first and most important device of subjectivation. Throughout history, there has been immense idealization of the heterosexual format of this arrangement. However, it is becoming increasingly clear that sexual orientation, race, sex, and the parents' economic class are factors that will articulate, in infinitely complex ways, the spectrum that goes from welcoming hospitality to abusive neglect. There are certainly forces and social codes that impose functioning for the family device. However, it is of fundamental importance to listen to each family, in particular, from the logic of unconscious fantasy. Each member of this device will make, from his family romance, his first model of how to organize his pleasures and his ways of being with others.

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Family Justice

► Justice: And the Family

Fanon, Frantz

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Introduction

Frantz Fanon (1925–1961) is, in a double sense, an unlikely candidate for entry in an encyclopedia of law. The Martiniquean-born psychiatrist and revolutionary in his chosen country of Algeria spent much of his life dedicated to the refusal and radical dismantling of the colonial-racial juridical form at the level of subject and system. In the end, he died 6 months before Algerian independence, just too early to see the debates in international law and neocolonial economy that he helped birth in his late work explode into global prominence. If this distinctive revolutionary position between questions of colonialism and neocolonialism highlights his relentlessly negative critique of patterns of existing and emerging rule, it is also from this vantage in history that Fanon's deeply creative, positive, unfinished commitments to worldmaking to the elaboration of new forms of legal thought can be grasped.

Fanon was born in French Martinique on July 20, 1925. The son of a black bourgeois family, he received an education in French history and ideas. He writes in *Black Skin, White Masks,* the text that he intended to submit as his dissertation in 1952, that his upbringing led him to embrace assimilation, to disdain working-class Black culture, and to imagine himself relatively immunized from the worst of racial repression. Two factors radically upended this view: first, the teaching of Aimé Césaire, philosopher of *Négritude,* who taught Fanon to question the desire for assimilation and encouraged his early theoretical writings, and second, his experience as a soldier in the French Army.

Fanon served in the Free French Army in World War II. He left service cadre disillusioned not only by the traumas of the battlefield but also by the virulent racism of his fellow soldiers and the insulting treatment of Black soldiers, who were expected to quietly reintegrate into the post-War racial order after risking their lives as members of the French military. While the collective quality of the former trauma underwrote the entire post-War boom in psychotherapy, the experience of the latter made Fanon an outlier when he took up residency in psychiatry. His choice of mentor was fortuitous, however. Francois Tosquelles, the founder of institutional psychotherapy, encouraged his students to read texts in phenomenology, psychoanalysis, surrealism, psychiatry, anthropology, and political economy and to seek in all of these discourses a radical political perspective on psychiatry (Robcis 2021) Tosquelles had a long history in anti-fascist work as a battlefield doctor and partisan, and he carried on this legacy at his clinic in Saint-Alban-sur-Limagnole, where Fanon joined with a community of visitors and students that would include Félix Guattari and Michel Foucault in "observ[ing] there for the first time patients playing a part in their own recovery" (Adam Shatz 2017). Institutional psychotherapists innovatively argued that the therapeutic transference that might help the shattered psyche to stabilize should be enacted socially, with and against the built environment. This idiosyncratic worldmaking commitment served Fanon well as he strove to confront the specific reaction formation of colonial racism. On the other hand, the direct racism of fellow students in Lyon appalled Fanon. This experience shaped his proposed dissertation, which emerged from his early text "An Essay for the Disalienation of Blacks" and would eventually become *Black Skin, White Masks* (1952).

Black Skin, White Masks

Fanon's first book, *Black Skin, White Masks,* offers an existential perspective on the racial construction of the subject and their imbrication in the social world with others. According to Fanon, the white subject requires a Black Other against which to construct itself. The production of this racial Othering is theorized as a form of political

domination, of course, but the priority of the book is to explain not only domination but also alienation, how the agency and subjectivity of the Black subject in their most intimate self-experience is shaped by mechanisms of being posited as the Other of the white subject. Most damningly, the text reconstructs the movements by which even forms of refusal and rebellion are captured in the same basic dialectic. For example, Césaire's *Négritude*, which proposes the recovery of a native spirit and form of culture capable of contesting colonial whiteness, is re-explained as the staging of the Black subject and community as backward and prior, a place that Whiteness goes to extract authenticity and pre-history to bolster its own claims to superiority. Language itself (perhaps most of all) consolidates these forms of alienation. The text, while drawing on existentialism (especially the dialectical thinking of Jean Paul Sartre) and psychoanalysis, offers a criticism of Hegel's philosophy of history, rejecting the emancipatory dimensions of the master-slave dialectic as rooted always already in racialization. In this, Fanon also criticizes the universalism and humanistic pretensions of French philosophy and points the way towards a more political understanding of anti-racism, rooted in the leap into action of Black peoples. On the other hand, this text also suggests that the profound psychic dimensions of racial alienation are not so easily undone, and the tension between and inextricability of these two conclusions – psychic repair and revolution – form the horizon of Fanon's thinking for the remainder of his life.

Black Skin, White Masks has had an enduring influence on (especially) the poststructural reception of Fanon's thinking, and it has also been the subject of some of the most generative criticism of Fanon's thinking, especially regarding questions of gender. In his staging of the racial dimensions of sexual desire, feminist critics have argued that he unfairly charges Black women with complicity in anti-Blackness more harshly than he does Black men, and that this is underwritten by a pathologization of and lack of clinical curiosity about female desire more generally. More generally, feminists have criticized the absolute priority of race as a founding category as insufficiently intersectional and have drawn connections between this and his later heroization of female revolutionary martyrs in "Algeria Unveiled" from *A Dying Colonialism,* (1959; hooks 2000; Bergner 1995). Feminist scholars of law, therefore, will find in this text important material exploring the prospects and failures of an intersectional perspective on subject formation under racial capitalism.

Some of these tensions remain internal to the text, but many are concretely taken up and expanded in Fanon's later work, which bolsters his exposure to the life of these questions in colonial conditions. Fanon's Anglophone reception has, until recently, underemphasized the thoroughly practical quality of Fanon's vocational commitment to psychic liberation. It is along this vector, however, that Fanon's most concrete encounters with colonial legal repression emerge. Having received his qualifications to practice as a psychiatrist, Fanon accepted a position as c*hef de service* at Blida-Joineville in Algeria. His disgusted exit from France would, rather unexpectedly, focus his gaze on a new object, the Algiers School of colonial psychiatry.

Jurisprudence of Social Health

The Algiers School, under the leadership of Antoine Porot who had also been the previous director at Blida, offered a racist account of the origins of neuropatholgy. Porot saw depression and other mental illness in his North-African patients as indication of lower capacity, brain development, and cultural primitivism. Fanon contested this explanation while taking the social symptoms it identified seriously. His 1952 essay "The North African Syndrome," written as a doctoral researcher in Lyon, offers a powerful indictment of how the racial legal clinic ignores the chronic pain of "undisciplined" patients in a way that doubled their subjection to policing, violence, economic insecurity, and forced labor. Fanon's years at Blida were prolific and his writings from his time on the racially-divided Wards, recently gathered in the anthology *Alienation and Freedom,* offer some of his most concrete experiments

in the critique and practice of law that he called the medical jurisprudence of social health. Fanon was also a heterodox Marxist who understood social pathology to be rooted in exploitative colonial-capitalist relations. Fanon's experiences contesting the Algier's school of colonial psychiatry would radicalize him further as the Algerian Revolution grew in power and popular support, leading him to eventually take up Algeria's revolutionary cause as his own.

In response to their purported lack of treatability, patients of color were more likely to be treated as incurable and subjected to extreme medical interventions, carceral forms of containment, and violent neglect. Instead, Fanon and his doctors built institutions such as a clinic journal and a "Moorish Café" that were intended to create a "microsociety" compatible with and fostering of the agency of patients. His institution-making was deeply engaged with questions of law in itself, but also because of the intrusions of the colonial legal order. For example, Fanon was occasionally called to a police station to evaluate victims of torture for insanity. In "Conduits of Confession," Fanon first poses the Kantian imputative dilemma in clinical terms: "was the accused in a state of insanity?" or can he be held responsible for his actions?, but decisively rethinks it as a different question. His refusal to diagnose refusal as madness on a terrain where madness and criminality were inextricable reflects a historical judgment about the racial social contract and the desirability and meaning of the cure in relation to legal violence and racialized policing.

Revolution, Nationalism, African Solidarity, and Third-Worldism

When it became unsustainable to treat victims of torture and the police doing the torturing alike, and when the contradictions crystalized to pose a direct threat to Fanon's life, he resigned from his post in 1956 in a highly circulated letter and joined the revolution-in-exile directly in Tunisia, serving as organizer, doctor, writer, and propagandist for the FLN's newspaper *El Moudjahid*. Studies from this period on questions of violence, organization, gender, the market, and the family will be of particular interest to students of law and social theory. Although the most well-known text of this period is the book *The Wretched of the Earth* (1961), Fanon largely wrote independent essays, which have been anthologized in *A Dying Colonialism* (1959), *Toward the African Revolution* (1964), and *Alienation and Freedom* (2018).

Most often remembered as an enthusiastic nationalist, Fanon was also a proponent of what he called African Solidarity, which called for political struggle beyond the bounds of the state as well as a vision of international, "Third World" law and political economy capable of contesting not only national colonial powers but the forms of Western, capitalist internationalism that would constitute the post-colonial period. Suspicious of these forms, Fanon's Algeria would play a key role, beyond his death, in shaping jurisprudence such as the New International Economy Order (NIEO), which was intended to demand space within institutions of international law for the interests and political self-determination of Global South actors, and to build an anti-capitalist set of institutions to deal with concrete problems of post-colonial economy (Getachew 2020). In his late writings, Fanon foresaw problems of land use, property, and customary tenure, agrarian vs. urban society in the production of food security, extractivism and resources curses, and the possibility of Federalism. Of course, Fanon sometimes anticipated and sometimes failed to anticipate the failures of post-revolutionary and postcolonial nationalism and statehood, around questions of violence, economy, corruption, and democratization, and there are substantial resources in his writings for conceptualizing, but also for historicizing, such tensions in legal, social, and political terms.

Violence and Organization

It is an irony of historical reception that Fanon's best-known work, *The Wretched of the Earth* was actually written via transcription in the condensed

period in 1960 when it was clear that leukemia would end his life before the revolution could be concluded. It is of critical importance for legal scholars interested in the genealogy of contemporary international law with and against the revolutionary politics of the post-colonial order. It is also an indispensible source for the global South critique of emergent neoliberalism in real time, and for attempts to re-mobilize Marxism for a specifically decolonial critique of what Adom Getachew has called "unequal integration and racial hierarchy" in international law (Getachew 2020).

The Wretched of the Earth is probably best known, however, for its claims about the uses of violence. Jean Paul Sartre's admiring "Preface" is partly responsible for the proliferation of the questionable interpretive claim that violence itself ought to be endorsed for its existential, cathartic, cleansing function. Certainly, Fanon thought violence was inevitable in revolutionary situations, situated as they were on a terrain of colonial violence, and he imagined that violence might awaken actors to their own agency. The endorsement of violence is well-attested to, if controversial, but it ought to be thought alongside and in tension with those texts in which Fanon explains his clinical understanding of the psychic costs of war, his understanding of the persistence of legal and extra-legal violence in institutions of the family, the clinic, and the police, and his profound desire for a form of peace that would not simply recreate deeply entrenched forms of structural violence within a new legal order, neocolonialism (Marriott 2018). This contradictory legacy, its successes and failures, most of all its warnings for militants involved in struggle against neocolonialism, is borne forward in the political movements that have taken up his thinking in the wake of his death, on the cusp of the forging of the postcolonial legal order.

Fanon died of leukemia in a hospital in Maryland in 1961. His trip was arranged by the CIA. His body was brought to Tunisia and later moved across the border in secret so that he could be buried in his chosen country of Algeria. He left behind his wife, Josie Fanon, and two children, Oliver and Mireille.

Legacy

In his own moment, Fanon influenced and was influenced by pan-Africanism and Third Worldism. This term, which has today fallen out of critical favor because of its derogatory imbrication in developmentalism, in Fanon's time was more obviously linked to Third-Bloc politics, i.e., the insistence that Global South revolutionary communities ought to affiliate neither with the capitalist West or the USSR. All over the Third World, Fanon's writings spread alongside the central role of Algeria as a revolutionary example, intertwining with decolonial Marxism, including Maoism. He has also been taken up by indigenous scholars such as Glenn Coulthard (*Red Skin, White Masks*) and Maori scholar Linda Tuhiwai Smith.

Fanon, largely via *Wretched* also had a profound influence on the American Black Power movement – he was enthusiastically read by Stokely Carmichael and others from the Student Nonviolence Coordinating Committee and the Black Panthers and was taken up by American writers in response, including Hannah Arendt in *On Revolution*. He influenced many major revolutionary leaders, including Steve Biko (South Africa) and Che Guavara (Cuba). He was taken up in Brazil by Paulo Freire in his *Pedagogy of the Oppressed.* He has also deeply influenced contemporary African literature. On the other hand, until recently he was comparatively forgotten in France and the former French empire, where the Algerian Revolution is still known as "The War Without a Name."

Fanon's profound influence in Black Studies continues to grow and change. His work is of foundational influence for "Afro-pessimist" thinkers like Sylvia Wynter, David Marriott, Frank B. Wilderson III, Jared Sexton, and Zakkiyah Iman Jackson, and has further been taken up in Black Studies by bell hooks, Fred Moten and many others. More often known as a writer of Black Nationalism, a recent and growing wave of Black internationalist thought has taken up Fanon as an internationalist, using his writings to rethink the relation between decolonization and the formation of international law. For scholars of law today, this new wave of Fanon studies

generated by reclaiming his internationalism, on the one hand, and taking up his career as a psychiatrist as new materials have been translated and published, on the other, constitute an intellectual event that intersects in productive ways with the call to think law intersectionally, beyond humanism, and in relation to racial capitalism.

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- ▶ Political Economy and Law
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Faulty Norms (*Fehlerkalkül*)

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Introduction

The idea of the hierarchical structure of the legal order is widely known among legal philosophers, and even students, at least in some countries. However, the theoretical achievements of the Vienna School founded by Hans Kelsen are often presented in a diminished and caricatured way (Pfersmann 2003). The concept of the *Fehlerkalkül*, developed by Kelsen's pupil Adolf Julius Merkl, is an essential complement of the theory of the hierarchy of norms.

The Hierarchical Structure of the Law

Since "the pure theory of law is a theory of the positive law," (Kelsen 1960, p. 1) one of its first tasks is to identify its object. It has to distinguish *legal* norms from other norms. To do this, it can refer neither to facts nor to morality, since Kelsen intends to unify a positivist approach (under which the law is separate from morality) and a normativist approach (under which the law, as normative, is separate from the factual – the *Sollen* is separate from the *Sein*) (Dreier 1990, p. 27 sqq.). Therefore, the legal character of a norm can stem only from another legal norm. A legal norm N1 can be identified as such because it was enacted on the ground of a legal norm N2, that is, because it was enacted in conformity with the process, and limitations on content, provided by N2. The legal norm N2, in turn, can be identified as such because it was enacted on the ground of a legal norm N3, and so on. (This recursion leads obviously to a norm, say a constitution, whose legal character cannot originate from another norm. One has therefore to presuppose the legal character of this norm. Kelsen calls this presupposition the "fundamental norm" or *Grundnorm*.) The law can thus be conceived as an order and a system, and "validity" is the quality of belonging to this system. Furthermore, when a norm N2 establishes the conditions of creation of a norm N1, N2 can be said to be "superior" to N1. In this sense, the legal order, which is created step by step (through a *Stufenbau*), can be said to be "hierarchical."

According to this first aspect of the theory, a legal norm can be created only in full compliance with the conditions provided by the superior norm. An act pretending to create "statute law" succeeds only if it perfectly conforms to the constitution. The slightest deviation prevents the production of a legal norm; it leads to a nullity. Starting from Kelsen's 1914 essay (Kelsen 1914b), Merkl insists on the principal equivalency of all the conditions set on the production of law. There is a difference of degree only, and not of nature, between, on one hand, the alleged normative act that ignores only one condition, and, on the other hand, the orders of the captain of Köpenick (the shoemaker dressed as a military officer who, in 1906, walked into a city hall and ordered that money be given to him as a military requisition) (Merkl 1918, p. 239). An "unconstitutional law" is not a law at all. There is nothing between the domains of perfectly conforming law and non-law (Merkl 1921, p. 394 and 416.)

The Possible Validity of Faulty Norms

This theoretical conclusion, however, can be contradicted by the positive law. A system in which every minor illegality in the production of law would lead to a nullity would not be optimal: when an alleged "law" is actually a nullity, nobody has to obey it – everyone can dismiss it. Such a system would quickly lead to anarchy. It is therefore not surprising that most – if not all – legal systems decide that some "faults," some violations of the conditions of production of law, will not prevent the production of a valid norm (Kelsen 1914b, p. 509). Merkl soon elaborated

upon Kelsen's insight: the positive law can decide to attach different consequences to different faults. The law is a tool created by humans for humans, and it is therefore not surprising that it takes account of their fallibility. Being certain that a norm, although faultily created, is nevertheless legal is better than suffering eternal doubt concerning the validity of an apparent legal act (Merkl 1925, p. 375). Therefore, legal norms are enacted to take account of the possibility of mistakes committed in the process of law creation. Merkl calls these norms the *Fehlerkalkül* ("error-calculus"). The *Fehlerkalkül* is a provision of positive law that recognizes as legal those norms that were not enacted in perfect conformity with all the conditions that the law had set for their creation (Merkl 1923, p. 295).

How can such a provision be formulated in a legal order? The most frequent formulations of the *Fehlerkalkül*, Merkl explains, refer to the possibility of taking legal action against a norm. For instance, when the constitution allows a constitutional court to nullify a law, it clearly anticipates the possibility of a fault during the legislative process and tolerates it: the faulty law will remain valid until the court nullifies or repeals it. In the same vein, the existence of recourses against judicial or administrative acts shows that such acts can be considered valid despite their lack of perfect conformity with the superior norms that apply to them. But the *Fehlerkalkül* can also result from an opposite provision. Sometimes, when an act meets some conditions, it is expressly forbidden to any organ to review it. This shows that the legal order accepts the non-satisfaction of other conditions (Merkl 1923, p. 294). For instance, a constitutional provision that forbids courts from reviewing statutes that are legally published implies that all apparent statutes that are published in compliance with the law are indeed valid, despite their possible violation of other constitutional provisions dealing with the legislative process (Kelsen 1914a, p. 412 and 414).

When a *Fehlerkalkül* is introduced in a legal order, a certain number of conditions for the enactment of a valid norm are thus suppressed. It becomes possible to create a valid norm without respecting all the conditions that the law seems to set for such creation. The law lowers its requirements and leaves the organ some "latitude": it does not have to perform a perfect normative act that conforms to all superior norms; it can produce a valid law despite some faults (Merkl 1923, p. 296). Some requirements that seemed a priori to constitute necessary conditions for the enactment of a valid norm appear not to be necessary after one takes the *Fehlerkalkül* into consideration (Merkl 1921, p. 395). This creates a distinction among the conditions set for the production of law: not all the "maximal conditions," but only the "minimal conditions" need to be satisfied (Merkl 1923, p. 296; Kletzer 2005, p. 47). In other words, only some requirements are conditions of validity, the others being mere conditions of conformity, whose violation does not prevent the enactment of a valid norm (Pfersmann 2012, p. 498 sqq.)

The importance of the concept of *Fehlerkalkül* should now be obvious. Without it, the theory of the hierarchy of norms requires that every norm conforms perfectly to a superior norm. Such a theory would have difficulty explaining the multiple cases where a norm appears plainly to be in tension with the superior norm it claims to implement. A theory that would have as its consequence the nullity of every faulty "norm" would have little appeal.

Merkl took pains to defend his theory against an idea that is still widely held. The law, the argument goes, is what the judge says it is, and therefore it makes no sense to search for whether a norm conforms to the norm it implements (on this argument, see also Hart 2012, p. 141 sqq.). It is correct that a norm always leaves a margin of choice to the organs applying it, answers Merkl. It is also correct that legal norms are formulated linguistically and are therefore vague or ambiguous. But this should not lead to any "skeptical resignation": many interpretations are often – or even always – permitted by the text, but many other are also excluded (Merkl 1918, p. 249). It is therefore possible to investigate whether a norm conforms perfectly to a superior norm or whether it is valid only through the *Fehlerkalkül*. Hence, the differentiation between the validity and the conformity of a norm is a conceptual

framework that enables legal scholarship to be critical without losing its status as legal analysis. It can recognize the validity of a norm – for instance, a judgment – and go on to examine its conformity. If it lacks conformity, the judgment can be criticized for legal, not political, reasons. The theory of the *Fehlerkalkül*, however, also has its problems.

Problem One: The Decisions of Final Organs

The mechanism of the *Fehlerkalkül*, explains Merkl, is not widely known to legislators. It is much more an inadvertent consequence of the introduction of the possibility of lodging a legal action against certain legal acts. Therefore, the legislator often forgets to provide a *Fehlerkalkül* for the acts of final organs. This has dramatic consequences: the slightest fault perpetrated by those organs entails the nullity of their apparent decisions. In 1921, Merkl could not identify any *Fehlerkalkül* for the decisions of the newly created Austrian Constitutional Court (Merkl 1921). This would appear to mean that every individual can check whether an apparent decision of the court is in perfect conformity with the norms that frame its normative activity. Should it not be in conformity, the apparent decision would be a nullity that no one has to obey. Such a system where no organ possesses the ability to speak the "last word" can hardly operate.

It is sometimes argued that Kelsen elaborated the theory of the "alternative character" of legal norms to solve the problem of the faulty decision of a final organ (Kletzer 2005, p. 51). Such an interpretation seems inaccurate. Compared to Merkl's *Fehlerkalkül* theory, Kelsen's theory of the alternative character of norms represents more of a regression than a "development." Kelsen works on the assumption that the decision is valid and concludes therefore that the superior norm authorized the organ to take the decision it chose. In other words, the superior norm has an alternative character: it provides that the organ can issue a norm while acting in compliance with the conditions set up by the superior norms or while disregarding some of them (Kelsen 1960, e.g. p. 277; see also Paulson 1980). But this reasoning begs the question: the validity of the discussed norm is taken as the starting point (Lippold 1990, p. 196). Hence Kelsen does not resolve the problem of the faulty act of a final organ: he takes as granted its validity and strives to ground it in the law.

Merkl, by contrast, accepts the possibility that all faulty decisions of a final organ might be legal nullities. However, that does not mean that such decisions are unsolvable problems for the *Fehlerkalkül* theory. First, one must emphasize that such decisions can perfectly well be the object of an enacted *Fehlerkalkül*. The possibility of appeal is not the only way to incorporate a *Fehlerkalkül* into positive law. Merkl himself suggested that a provision could safeguard the validity of the decisions of a final organ, including its faulty decisions, by providing that those decisions are not appealable, even when they are legally flawed (Merkl 1921, p. 435). Such provisions seem quite common. Article 62 of the French Constitution can be quoted to illustrate this point: "No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts."

Legal theory must nevertheless be ready to confront a legal order where no similar provision exists concerning the acts of a final organ. It must accept the possibility that, in such a case, the slightest fault affecting an apparent "decision" of this organ deprives it of validity. It must not "retreat in front of seemingly ludicrous consequences" (Merkl 1921, p. 437). It is however highly likely that all the actors of the legal order will treat all those decisions as if they were valid, regardless of their potential faults. The pure theory of law provides a tool for the legal scholar that enables him to deal with such a situation.

Such a legal order works as if it contained a *Fehlerkalkül* for the decisions of this final organ. Therefore, the scholar can presuppose the validity of a *Fehlerkalkül*, in the same way that he presupposes the validity of the first norm of the system (the historically first constitution). The *Fehlerkalkül* is introduced into the *Grundnorm*. Read charitably, Kelsen can be understood this way. He writes, for instance, that "If a statute enacted by the legislative organ is *considered to*

be valid [. . .], *we must assume* that the prescriptions of the constitution concerning legislation have an alternative character" (Kelsen 1945, p. 156). In other words, the scholar who wants to describe a system similar to the one perceived by its participants must presuppose the existence of a *Fehlerkalkül* covering the decisions of a final organ.

Problem Two: The Limits of the *Fehlerkalkül*

When a *Fehlerkalkül* is in force, a number of conditions set to the production of law can be disregarded by the competent organs. The problem is that the norm providing the *Fehlerkalkül* rarely specifies which requirements need not be observed. It often does not distinguish explicitly between the conditions of validity and the conditions of mere conformity. How is one to interpret the positive law in such a situation? For instance, what are the minimum conditions that are to be met for an act to count as a "decision of the Constitutional Council" under Article 62 of the French Constitution?

The *Fehlerkalkül* cannot be absolute. There must remain some conditions that must be satisfied to create law. Otherwise, it would become impossible to differentiate between law and non-law: every act pretending to enact a legal norm would succeed. Such a system cannot work (Kelsen 1914b, p. 486 and 512; Kelsen 1960, p. 276). Consensus on this point is usually illustrated by an alleged legal norm enacted by an individual who obviously lacks jurisdiction. The "judgment" with which I sentence my neighbor to a fine is not a legal norm (Lippold 1990, p. 196; Kletzer 2005, p. 48). Kelsen used the example of a "statute" enacted by a lunatic committed in an asylum (Kelsen 1960, p. 281). The "decision" of the same lunatic nullifying a French law is plainly not a decision of the Constitutional Council. It does however remain difficult to define precisely the conditions on the production of law whose violation prevents validity. Maybe it is not possible to go further than Merkl, who observed that the *Fehlerkalkül* cannot cover an act that does not have the *appearance* of a legal act (see Merkl 1921, p. 416). This criterion is admittedly quite vague. But it is also easy to apply.

Conclusion

The *Fehlerkalkül* is an indispensable complement to the theory of the hierarchy of norms. Without it, one cannot understand what happens when a norm does not perfectly conform to the superior norms that it claims to implement. The distinction between validity and conformity enables one to understand "a phenomenon that other theories regard as inconceivable or pathological: the existence of 'faulty norms'" (Pfersmann 2002, p. 815).

Cross-References

▶ Kelsen, Hans
▶ Merkl, Adolf Julius
▶ Validity

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Feinberg, Joel

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Introduction

Joel Feinberg (1926–2004) was a prominent American philosopher who made important contributions in social, political, and legal philosophy. He wrote on topics such as punishment, rights, and the moral limits of the criminal law. Most of his articles are collected in four volumes: *Doing and Deserving* (1970), *Rights, Justice, and the Bounds of Liberty* (1980), *Freedom and Fulfillment* (1992), and *Problems at the Root of Law* (2003). His only book-length scholarly monograph was *The Moral Limits of the Criminal Law*, which appeared in four volumes: *Harm to Others* (1984), *Offense to Others* (1985), *Harm to Self* (1986), and *Harmless Wrongdoing* (1988). He wrote *Social Philosophy* (1973), an introduction to the field that remains influential. He edited a widely used reader for introductory philosophy courses, *Reason and Responsibility* (2016), and a popular reader for philosophy of law courses, *Philosophy of Law* (2013).

Punishment

Of Feinberg's early articles, perhaps the most influential has been "The Expressive Function of Punishment" (*Doing and Deserving*, pp. 95–118). Authors such as HLA Hart define punishment as the imposition of harsh treatment by an authority in response to a person's failure. Feinberg thinks that this definition accounts for cases in which people are put in prison or forced to pay large fines. However, he does not think that this account applies to "parking tickets, offside penalties, sackings, flunkings, and disqualifications" (96). He sees these as mere penalties and not as punishments. He thinks that mere penalties are a heterogeneous group without much in common and therefore turns to see if there is something distinctive about punishments. He holds that a punishment, but not a mere penalty, "is a conventional device for the expression of attitudes of resentment and indignation, and of judgements of disapproval and reprobation" (98). A judge who, with regret, suspends the driver's license of a well-meaning person who, due to age or infirmity, is too accident-prone to drive is not punishing. A judge who suspends a person's license for a year for drunk driving is expressing resentment, indignation, disapproval, and reprobation. This is true even if the mere penalty is more of a deprivation than the punishment. The suspension of the license of the infirm person might be permanent while the suspension of the drunk driver's license might be for only a year. In cases of punishment, harsh treatment is a means to express disapproval. In the case of mere penalties, it is not.

Feinberg believes that recognition of the expressive function of punishment illuminates several issues. For one, it explains why taxes are not punishments. Suppose that a person is convicted of perjury and, perhaps because of a plea bargain, avoids jail time but must pay a

fine. Suppose further that, because the person has a large income, this fine is less than the person pays in income tax. Nevertheless, the deprivation of funds from the income tax is not a punishment and the fine is. On Feinberg's account, the difference between the two cases is that there is a convention in our culture that the fine expresses resentment and disapproval while the tax bill does not.

Feinberg also thinks that the expressive function of punishments shows how the state's regulatory apparatus can be used to punish. He cites the example of a law, passed in New York in 1961, that said that those who advocated for the overthrow of the federal government could not hold driver's licenses. The law passed as part of a red-scare movement against Communists and applied to only a few dozen people. While framed as merely a change to the list of qualifications to be able to hold a driver's license, Feinberg sees this law as an example of punishment.

On the other hand, Feinberg also thinks that the expressive function of punishments explains why many of the deprivations carried out by the state are not punishments. He thinks that taxes, fines for parking and minor traffic violations, violations of health codes, and the civil commitment of those dangerous to themselves or others fall into this category.

Rights

Beginning in the middle years of his career, Feinberg wrote a series of seminal articles on rights. These are collected in Chapters Six through Eleven of *Rights, Justice, and the Bounds of Liberty*, Chapters Eight through Eleven of *Freedom and Fulfillment*, and Chapter Two of *Problems at the Root of Law.*

In "Duties, Rights, & Claims," Chapter Six in *Rights, Justice, and the Bounds of Liberty*, Feinberg distinguishes at least nine different sorts of duties and argues that some of them are not correlated with rights. In other words, he argues that the existence of a duty does not imply the existence of a right. For example, he holds that there are duties of status that are not correlated with rights. Thus, a rich person has a duty to give to charity, but this duty does not generate any right.

In perhaps his most well-known discussion of rights, "The Nature and Value of Rights" (Chapter Seven in *Rights, Justice, and the Bounds of Liberty*), Feinberg asks us to imagine a place, Nowheresville, that is much like our work except that it has no rights. He asks: what is missing in Nowheresville? He answers what is missing is the activity of claiming. Nowheresvillians do not righteously made demands on those who discriminate against them or leave them without essential needs. Feinberg goes on to distinguish between (a) claiming that, (b) making claim to, and (c) having a claim. To claim that is simply to assert something. I can claim that the earth is flat or that pigs have wings. This use of "claim" is not linked to rights. Making a claim to is to seek something that one has a right to. For example, one presents one's ticket and makes a claim to a particular coat in the coat-check room. To have a claim is to be in a position to make a claim. Before one presents one's ticket at the coat check (before one makes a claim), one has a claim to a particular coat. Feinberg holds that to have a right is to have a valid claim. One might have a claim, but it might not be valid and, in that case, would not be a right. Feinberg goes on to argue that having valid claims, having rights, and knowing that one has rights are necessary for self-respect.

Chapters Eight through Eleven of *Rights, Justice, and the Bounds of Liberty* apply this analysis of rights to hard cases: animal rights, the rights of unborn generations, the right to be born, and the right to kill oneself.

Chapters Eight through Eleven of *Freedom and Fulfillment* develop a defense of moral rights. In Chapter Eight, "In Defense of Moral Rights: Their Bare Existence," Feinberg notes that two assertions seem to make perfect sense. (a) Women currently have a right to vote in the United States, but that there was a time (prior to 1920) when they did not have the right to vote. (b) Prior to 1920, women had the right to vote, but this right was wrongfully withheld from them. Similarly, it seems to make sense to say that, (c) prior to the 1967 legalization of interracial marriage, the USA violated the rights of interracial couples to marry, and it seems to make sense that

(d) the Gestapo violated the rights of Jews when they rounded them up and sent them to be tortured and killed in concentration camps. Feinberg holds that assertions like (b), (c), and (d) are assertions of moral rights. He defines moral rights as rights that exist prior to and independent of any social practice (e.g., legislation). Feinberg defends the view that there are moral rights against a series of objections.

Feinberg considers and rejects the view that the assertion that a particular moral right exists should be understood as an assertion that the corresponding legal right should exist. He holds that this analysis cannot account for the moral right to rebel against a profoundly unjust government. Feinberg holds that a genuine moral right is a right that is validated by correct moral principles. Feinberg then confronts the problem of the origin of these correct moral principles. There is a worry that these principles exist only in some ghostly realm. Feinberg argues that this view comes from the mistaken conviction that there can be no right without some social/institutional basis. On Feinberg's view, the correct moral principles that validate rights are no more (and no less) ghostly than the moral principles that underly the theory of utilitarianism or any other view that some actions are in accordance with the correct moral principles and some are not.

In Chapter Nine, "In Defense of Moral Rights: Their Social Importance," Feinberg discusses the view that moral rights are individualistic in a pejorative sense, that they separate people, encourage selfishness, and/or are a hindrance to the forming of tight communities. Feinberg responds that there is nothing in the concept of moral rights that implies, suggests, or encourages the view that people will not assert rights to help others, to be with other people, and to form tight communities. He goes on to argue that moral rights are, in fact, key building blocks for the formation of healthy and equal relationships with others.

Chapters Ten and Eleven of *Freedom and Fulfillment* consider two specific issues regarding moral rights: how they are used in constitutional interpretation and whether there is a moral right to die.

The Moral Limits of the Criminal Law

Almost all of Feinberg's work, going back to *Doing and Deserving* and *Social Philosophy*, revolves around the question he attempts to answer in the four-volume set *The Moral Limits of Criminal Law*: What conduct may a state sanction with criminal punishment? Each volume of this work focuses on a liberty-limiting principle, a principle that states that a particular sort of consideration is a relevant reason for making conduct criminal (although other considerations may outweigh this reason).

Volume One, *Harm to Others* (1984), considers the harm principle, the view that preventing one person from harming another is a relevant reason for criminal legislation. Because this principle is widely held, Feinberg does not present an argument to support it. Instead, this volume is devoted to clarifying the harm principle. Feinberg begins by defining harms as setbacks to a person's interests that are wrongful, i.e., that are violations of that person's rights. For example, a setback to a person's interests that a person consents to is not a harm covered by the harm principle because the person's consent to the setback means that it is not a violation of their rights. The volume turns to consideration of puzzling cases, such as vicarious harms and posthumous harms. Feinberg then argues that failures to prevent setbacks to interests (e.g., in easy rescue cases) are violations of rights and therefore are harms covered by the harm principle. This move is more important than it may seem at first glance because it is essential for Feinberg to be able to hold that the state may use criminal penalties to enforce rules that force people to do things to prevent others from being harmed by events they did not cause (e.g., require them to wear masks during a pandemic).

Volume Two, *Offense to Others* (1985), considers the offense principle, the view that preventing one person from offending another is a relevant reason for criminal legislation. Feinberg begins by defining offenses in parallel with his definition of harms. Offenses are disliked mental states but the offense principle only covers those offenses that are wrongful, i.e., that violate the offended person's rights. Feinberg holds that the offense principle is a valid liberty-limiting principle. In support of this view, he provides his

famous example of a bus ride on which 30 offensive activities take place. These include relatively mild activities such as a loud portable speaker blaring strange noises and more unusual activities such as sex acts with animals and coprophagia. The point of this story is to lead the reader to the conclusion that many of these offensive actions (which are currently subject to criminal sanctions in many jurisdictions) are appropriate subjects of criminal sanction. The rest of the book considers the nature of obscene conduct (including obscene pornographic conduct) and when obscene conduct may be criminalized.

Volume Three, *Harm to Self* (1986), considers the principle of legal paternalism, the view that preventing a person from harming themself is a relevant reason for criminal legislation. Feinberg defends soft paternalism, the view that criminalization to prevent a person from harming themself is only permissible when the actions of the person are insufficiently voluntary or temporary intervention is needed to determine whether the actions are sufficiently voluntary. Feinberg thinks that soft paternalism is not paternalism at all. Feinberg's case against paternalism rests on the view that it is inconsistent with personal autonomy, and he offers a subtle analysis of autonomy and its importance. He then proposes an analysis of voluntariness as a decision-relative threshold concept. Voluntariness is decision-relative in that the level of cognitive abilities required for an action to be voluntary varies according to the importance of the action. To be sufficiently voluntary, a decision about the investment of a large sum of money requires a higher level of cognitive abilities than a decision about where to go for dinner. Voluntariness is a threshold concept in that once an individual has the cognitive abilities necessary to make an action voluntary, any additional cognitive abilities are an unused surplus. Both myself and a 12 year-old have the cognitive abilities necessary for a decision about where to go for dinner to be voluntary. With respect to this choice, but not with respect to a decision about the investment of a large sum of money, my greater cognitive abilities are irrelevant. The second half of Volume Three is devoted to consent and failures of consent, covering issues such as coercive force, coercive offers, and defective beliefs.

Volume Four, *Harmless Wrongdoing* (1988), considers the principle of legal moralism, the view that preventing immoral conduct that neither harms nor offends is a relevant reason for criminal legislation. Feinberg discusses a list of proposed examples of justified legal moralism that includes preserving a way of life, supporting community, enforcing the true morality, and preventing non-harmful exploitation. He argues that each case is either covered by the harm principle, covered by the offense principle, or is not an example of appropriately criminalized conduct.

Conclusion

Joel Feinberg did not offer grand theories or detailed policy papers. He focused on mid-level questions about our relationship with the law. He had a nontechnical writing style that avoided acronyms, quick references to great thinkers, and debates about different isms. His writing style and way of doing mid-level philosophy has been widely imitated and thus Feinberg has had an important influence on philosophy well beyond the topics he explicitly considered in his writings.

Cross-References

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- ▶ Coercion and Law
- ▶ Devlin, Patrick
- ▶ Dworkin, Ronald: Theory of Rights
- ▶ Enforcement of Morality and Law
- ▶ Freedom of Expression
- ▶ Human Rights and Justice
- ▶ Liberty and Equality in Criminal Law
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Feminist Philosophy of Technology

► Technology: Feminist Philosophy of

Ferguson, Adam

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Introduction

Adam Ferguson (1723–1816) was a leading light of the Scottish Enlightenment and a contemporary of Adam Smith and David Hume, with whom he was also friends. He was a highly respected and widely read figure in his day and was influential in Britain and America as well as Europe where his publications were translated into all the principal languages. His two most important works were *An Essay on the History of Civil Society* (1767) and *Principles of Moral and Political Science* (1792).

Ferguson is a significant early social scientist; his most important contribution was his anti-rationalist, anti-contractarian account of the origins, maintenance and progress of social, moral, cultural, legal, and political institutions. This accounts both signposts and makes possible the transition to modern social science. Yet, Ferguson was also committed to the idea of a creative demiurge which, paradoxically, enabled his pioneering thought to reach a wider and more receptive audience.

The First Sociologist?

So original were Ferguson's theories that he is sometimes rated the "first sociologist." Both Ludwig Gumplowicz and Werner Sombart traced the origins of sociology back to him (Strasser 1976, 52) while Harry Barnes once opined that "[i]f anyone before Saint-Simon and Comte has the right to be designated as the 'father of sociology' it is…Ferguson" (Barnes 1917, 234). According to Ronald Meek "Ferguson's *Essay*…..is undoubtedly one of the most notable works of the epoch…[and]… rightly regarded as one of the first important exercises in the field which modern sociologists have marked out as their own" (Meek 1976, 150).

Having said that, one should not allow Ferguson's genuine prescience to obscure the theological underpinnings of his thought. As far as Ferguson himself is concerned, his writings are equally an exercise in moral philosophy and natural theology as they are in history, philosophy, political theory, and "sociology." Even as he is forging modern social science he is also making a sincere attempt to reaffirm the centrality of God in accounting for the workings of society, a role that had been questioned by the secularist social theories of thinkers like Bernard Mandeville, David Hume, and many French eighteenth-century

philosophers. And yet, Ferguson's project is not really hindered or narrowed by this attempt, because the God of his system acts through secondary laws of nature and hence through invariable social laws that can be comprehended within an authentically modern social science.

Ferguson is therefore properly understood as a transitional thinker in the emergence of the human sciences; a bridge between an intellectual universe still dominated by the design principle, on the one hand, and the social scientific realm of empirically observable, morally neutral facts and patterns, on the other. Ferguson promulgated a social science based on the detection of such facts and patterns but within the overall framework of Providential design and a theology based on the deistic natural religion of his beloved Stoicism. He averred that the "sublime religion" of the Stoics is "justly considered the highest attainment of created intelligence" (Ferguson 1792, I: 7–8, 312. See also Hill 2006). Accordingly, the God he invokes is a General rather than Special Providence.

This distinction between General and Special Providence is crucial for understanding Ferguson's transitional status in the conceptual history of social science.

Two Kinds of Providence

General Providence denotes God's action in the original creation of a world that "He" has little to do with on its completion. On this view, God is the "Great Clockmaker" who brings the world into existence and invests it with natural laws that keep it in perpetual motion. This was an idea influentially promulgated by Isaac Newton and which became a commonplace trope for eighteenth-century Deists. However, Newton differed from Ferguson in one important respect: Newton's Deity occasionally had to intervene and rewind the clock to keep it ticking over whereas Ferguson's did not, since, on his account, the world was created already complete and perfect.

Because the world, and all its components is perfect, it is also self-governing, self-perpetuating, and self-equilibrating, thereby permitting God to retire once the task of Creation is done, never to be seen or heard from again. This is the Deistic conception of God favored by the Stoics and adopted by Ferguson. Contrasting with General Providence is Special Providence, a conception of God accepted by Christianity and many other theistic religions to denote a creator who does not retire upon bringing the world into existence but stays behind, remaining a perpetual witness to – and presence in – human affairs. "He" continues to observe and intervene in human affairs: punishing the bad, rewarding the good, hearing and sometimes answering prayers, and periodically communicating his message through miracles, visions, and even positive documents like the Bible and the Ten Commandments. Unlike General Providence, who operates at a distance via impersonal, immutable, and universal general laws, the interventions of Special Providence often override or contravene the normal course of natural operations (Force 1984, 519).

Ferguson was sincerely pious. But in addition to that tendency, just like almost everyone else in his time, he had trouble explaining the seemingly miraculous calibration and harmony of the social world without the assumption of Design. Since an evolutionistic or atheistic path to social science was not possible for him, either personally or intellectually, he found a way to unite the opposing universes of religion and science through his belief that God's will is expressed in the workings of efficient or secondary causes rather than through direct divine interference: "[t]he author of nature," he wrote, "though himself omnipotent, acts in every department by the intervention of secondary causes" (Ferguson 1996a, 124). Although the universe is designed, everything that takes place within it is due to the operations of invariable, self-regulating and observable laws of nature, not because of any special interventions on the Creator's part.

Like the Stoics – whose religion was devised as a calming antidote to the terrifying and unpredictable pantheon of gods who ruled from the heights of Mount Olympus – Ferguson disliked religious enthusiasm, superstition, and any supernatural belief that was based on or incited fear. "True religion," said Ferguson, consists in the "study of nature, by which we are led

to substitute a wise providence operating by physical causes" for "phantoms that terrify, or amuse the ignorant" (Ferguson 1996b, 89–90). Comprehending God's intentions for the world is a matter of calm and dispassionate natural science, not theological speculation or faith. As he wrote:

> The more we examine the universe, the more we find everything to be governed by general laws. . .In the case of man, and all the animals, the good of every individual is not separately consulted, but the good of the species of every kind is at the same time provided for; and if it were otherwise, there could be no general laws by which men or beasts could regulate their actions. (Ferguson 1792, II: 338)

Ferguson's self-appointed task is to direct our attention away from faith, superstition, and revealed religion to a morally neutral study of the natural workings of human society within a framework that would not be rejected out of hand by his still predominantly Christian culture; in so doing, he brings us a step closer to modern social science. The presence of God is still palpable but this god neither wishes, nor is able, to monitor, punish, or censor. Indeed, "He" not only tolerates but encourages us to engage in the study of nature and the systematic observation of regular, adaptive laws so as to discern "His" benign plan and especially his purposes for us (1792, II: 37; ibid., I:133; 1996a, 84; 1996b, 205). This errand, says Ferguson, should be our "true religion": to trust in, study and comprehend a world that is perfectly regulated for the best outcomes. Everyone may participate in this project because everything we need to know about the world is set right in front of us in the great "volume of nature" which is "open for the information of mankind" (Ferguson 1792, I.: 218). We all share in and encourage each other in this journey of scientific discovery: "The world's a system and the best we can do is to assist one another in perceiving and communicating its parts and their connection" (Ferguson 1996a, 204).

An Early Spontaneous Order Model

Ferguson is properly rated one of the first spontaneous order theorists, others of whom include David Hume, Adam Smith, Thomas Reid, Gilbert Stuart, William Robertson, and John Millar. Yet, it is no exaggeration to say that Ferguson's was the most exhaustive, systematic, and explicit statement to date of the manner in which social patterns, order, and progress emerge spontaneously from the seemingly random, private actions of individuals over time. Social order, rather than being the result of conscious planning, emerges from sub-rational, internal processes, a theory that is known to have influenced directly the later thinking of such important sociological figures as Emile Durkheim and F.A. Hayek.

Spontaneous order theories account for the manner in which social order emerges and persists from the unintended consequences of individual actions performed over time (Hamowy 1987, 3–4). The term was first coined by Michael Polanyi in 1950 (Polanyi 1951, 112) and later popularized by F.A. Hayek when he defined spontaneous order analysis as any "systematic social theory" that accounts "for the manner in which an order or regularity could form itself among those actions which none of the acting persons had intended" (Hayek 1967). Others have employed such terms as the "unanticipated consequences of purposive social action" (Merton 1938), and "invisible-hand explanations" (Nozick 1974, 18–19), a phrase that comes from Adam Smith's comment that the individual pursuing private egoistic goals is "led as if by an invisible hand to promote an end which was no part of his intention" (Smith 1979, IV.ii.9: 456).

All the major social institutions, whether political, linguistic, moral, social, economic, or legal, were not invented at once but emerged slowly and by degrees, embodying the collective intelligence of our species over many generations. Technically speaking, invisible-hand explanations are restricted to explanations of social phenomena and should hinge on human agency but not on human design. Further, they normally refer to unintended consequences of individual actions that give rise to adaptive rather than maladaptive social patterns and order.

There are four essential features of spontaneous order explanations: their undirected character, their "gradualism," their inevitability, and, their

universality throughout seemingly diverse and distant cultures all of which are present in Ferguson's scheme and all of which he posits as a function of a universal "human nature" (e.g., 1996b, 96–97). Of course, Ferguson did not use the term "spontaneous order" but referred instead to "the results of human action, but not the execution of any human design," a phrase that Frederick Hayek later took up with enthusiasm (Petsoulas 2001). Ferguson dilates on the dynamics of this emergent order:

> Mankind, in following the present sense of their minds, in striving to remove inconveniences, or to gain apparent and contiguous advantages, arrive at ends which even their imagination could not anticipate; and pass on, like other animals, in the track of their nature, without perceiving its end. . .Every step and every movement of the multitude, even in what are termed the enlightened ages, are made with equal blindness to the future; and nations stumble upon establishments, which are indeed *the result of human action, but not the execution of any human design*. (1996b, 119, emphasis added)

A New Historiography

In order to help forge modern social science Ferguson first had to challenge the rationalistic historiographical assumptions that dominated his age, namely, the idea of an original contract, great legislator myths, and the diffusionist theory of civilization, whereby civilization was thought to have been transmitted from nation to nation from its original source in Egypt. In their place, he proposed an irrationalist theory of the history of social organization that prefigured structural functionalist explanations of the development and perpetuation of social institutions, patterns, and norms. History, says Ferguson, is hardly ever effected by a single visionaries but is a spontaneous process generated socially, sub-rationally, gradually, and from the ground up, not from the top down.

The natural progression of the species is more or less uniform and this should not be attributed to cultural contact or the imitation of the ideas of one or a few ingenious individuals: "[W]hy seek from abroad the origin of arts, of which every society, having the principles in itself, only requires a favourable occasion to bring them to light?" (1996b, 162). After all, "[m]atters have proceeded so far, without the aid of foreign examples, or the direction of schools" (1996b, 168). The "wisdom" of exceptional legislators, normally given as the source of rules and the legal order, is also displaced by the "hidden wisdom immanent in a dispersed and evolutionary system" (Barry 1982, 9). Folkways, mores, formal institutions, and culture all emerge from a process of natural selection of practical "know-how" and tacit knowledge refined over very long periods of time.

All our drives – including the progressive drives of "ambition"and "self-preservation" – are instinctive and, since human nature is uniform, it is reasonable to hypothesize that cultures will progress in roughly the same manner. Every nation, "however aided by lights from abroad," possesses "the fabrics of science and art to erect for [itself]" (1792, I: 283). Primordial creative imperatives, as well as basic species needs, are constant, therefore we should expect to find many cross-cultural uniformities, all things being equal, that is, provided the cultures being compared are at the same stage in their natural development and enjoy relative domestic "political felicity." Even in those cases where "nations actually borrow from their neighbours, they probably borrow only what they are nearly in a condition to have invented themselves" (1996b, 162).

The Heterogeneity of Ends

Throughout his work, and especially in the *Essay*, Ferguson explains how the perpetuation of the species, the origin and maintenance of the family, the division of labor, language, technological, and artistic advances, social norms, and the organized state are all unintended consequences of individual actions played out on the micro-level via what is now referred to as "the law of the heterogeneity of ends." All these social phenomena are shaped unwittingly by human actions and motives completely unrelated to their eventual results. For example, in the case of reproduction, it is an efficient or secondary cause – sexual desire (the "mutual inclination of the sexes") – that ensures

the preservation of the species, not any long-term goal to do so (1792, I: 28, 201). Sexual desire is an instinct, whereas reproduction is the final cause and therefore the exclusive business of the Creator. Every one of our self-regarding, short-term goals yields adaptive yet entirely unforeseen results: the herding instinct develops, over time, into nationalistic sentiments and thereafter the sovereign state, the instinctive drive for subsistence results in the accumulation of wealth and inadvertently leads to technical improvements in production; class resentment and envy lead to formal government as well as political faction fighting and (therefore, in turn) the preservation of rights and liberties; invidious comparison generates the quest for excellence and the pursuit of wealth and progress; parental affection leads to the formation and maintenance of the family and later the nation-state; shame operates as a powerful means of social control; material and moral progress spring from "ambition" which is a combination of restlessness, activism, and a compulsive desire for improvement; competition, conflict, belligerence, and hostility unintentionally preserve social cohesion and give rise to such beneficial institutions as an organized state, positive law and advances in defense technology and statecraft; while social norms and moral judgments are generated and reinforced subrationally by mutual affective responses (see Hill 2006 for a fuller discussion).

We are rarely aware of our role in securing order because "[t]hings the most remote, are made to concur to the same salutary purposes" (1978, 126). Notably, in order for humans to operate in this subrational fashion they require a minimum level of freedom or negative liberty. This domain of freedom is comparable to the idea of "natural liberty" found in Adam Smith's equilibrium model (see Hill 2019). For human agents, there is no synoptic perspective on affairs in progress; nor should there be. Events taking place at the social systems level are the exclusive concern of God, while the less demanding responsibilities associated with efficient causes are delegated to human agents. Yet, "Providence" has so arranged things that, however apparently random our actions on the efficient level, survival, order, happiness, and progress are secured on the Final Causes or social systems level. We might think of this as a form of "Providentialist functionalism" whereby underlying mental structures produce a universal pattern of social, moral, cultural, technological, legal, and political structures.

I now consider more closely the manner in which Ferguson's idea of spontaneous order plays out in his discussion of the origins of political and legal society.

The Challenge to Contractarianism

Ferguson's theory of unintended consequences persuasively challenges the type of contractarianism found in early modern political philosophy; it also shifts attention away from political elites and "great legislators" toward "civil society" as the key arena of political activity. Civil society, for Ferguson, encompasses both the realm of uncoerced collective action and the sometimes coercive realm of the organized state, the latter of which he conceives, not as antagonistic to the liberties and preferences of the people, but as a product of their own activities, motivations, and needs. Civil society is a state of social order; a condition in which a people are both organized and especially *self*-organizing; where both informal norms and positive laws regulate orderly conduct and the use of violence is constrained and regular. Therefore the market, voluntary social and religious organizations as well as the state and its legal, military, and political institutions are all embraced within civil society. Further, civil society has normative connotations because it is a condition that exists only where a peoples' life-ways and institutions are generated spontaneously, freely and naturally, where a citizenry is civically engaged, community-minded, and therefore virtuous. Civil society is the adaptive, "good" society and it "is in conducting the affairs of civil society, that mankind find the exercise of their best talents" (1996b, 149).

Ferguson's analysis of the origins of the state abandons all rationalistic notions of a state of nature and of any social or political contract.

Whereas Rousseau posited pre-social "man" living independent, "[s]olitary, indolent" and "dispersed among other animals" (1973, 58, 54) Ferguson insists that humans have always lived in groups (1996b, 21). As he not unreasonably points out, Rousseau could not be correct because, by the latter's own lights "men must have been already together in society, in order to form any compact, and must have been in the practice to move in a body, before they have concerted together for any purpose whatever" (Ferguson 1792, II: 244). Rousseau's attempt to "discover the natural man" and his assumption that the state of society is an impediment to such knowledge is wrongheaded (Rousseau 1973, 43–5; Ferguson 1996, 11). Political society, with its inevitable structures and hierarchies, has a much more informal, happy and spontaneous origin.

> In these happy, though informal proceedings, where age alone gives a place in the council; where youth, ardour, and valour in the field, give a title to the station of leader; where the whole community is assembled on any alarming occasion, we may venture to say, that we have found the origin of the senate, the executive power, and the assembly of the people; institutions for which ancient legislators have been so much renowned. (Ferguson 1996b, 84)

Ferguson muses that humans are apt to flatter themselves in ascribing their own achievements to "a capacity superior to that of rude minds" (1996b, 173–174) while those of other species are a consequence of mere instinct ("the wisdom of nature"). Yet, political institutions are coeval with our species because we instinctively develop them (1996b, 120; 1792, I: 256; ibid., II: 244–245).

It should be noted, however, that Ferguson nowhere denies that we have a rational faculty or that it was a faculty worth possessing. It is, after all, the faculty we are supposed to be using when we interrogate nature for the divine architect's plan. He simply wishes to impress that there is much more to understanding the human condition than our conscious intentions. Better to accept that humans are just another species of animal, albeit with exceptional powers of consciousness, imagination, and artifice. Our "animal" and "intellectual nature" is "joined" therefore their workings and effects should be studied with this in mind (Ferguson 1766, 7) and with the understanding that artifice is natural to the species (1996b, 12–14).

Conclusion

Ferguson is a much underrated figure in the history of social and political thought, particularly where the idea of emergent and self-equilibrating phenomena are concerned.

Although he worked within a Providential framework, the Deistic character of that framework meant that his ideas could gain a foothold within his conservative milieu but at the same time enable him to prosecute an effectively secular social science method.

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- ▶ Hayek, Friedrich August von
- ▶ Mandeville, Bernard
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Fichte, Johann Gottlieb

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Introduction

Johann Gottlieb Fichte (1762–1814) was a German philosopher who was made famous early by his first writing, *Attempt at a Critique of All Revelation* (1792), which was published anonymously and wrongly attributed to Kant, before Kant published *The Religion within the Boundaries of Mere Reason* (1793). Fichte was hired as a professor at the University of Jena in 1794, and dismissed in 1799 due to accusations of atheism against him (cf. Wood 2016b, ch 1–2). He moved to Berlin and became influential in governmental spheres. After Prussia's defeat against Napoleon he become a major figure of the early German nationalism. He was appointed as a dean (1810) and later (1811) as the rector of the newly established Humboldt University in Berlin.

Fichte makes a sharp distinction between his scientific writings and his popular ones with respect to the method, although the latter are strongly influenced by the former.

The latter – e.g., his *Contribution to the Rectification of the Public's Judgment of the French Revolution* (1793) and his *Addresses to the German Nation* (1808) – profoundly influenced the political debates of his time. First in favor of the French Revolution, then – after Napoléon took over power in France – in favor of a republican, autarchic, German national state ideal. The former initiated in philosophy the "German idealism" movement through his search to overcome Kant's dualism between the noumenal world and the phenomenal world, as well as the dualism of the natural law tradition between natural law or natural right and positive right.

A Deduction of Law from the Conditions of Consciousness

The Deduction of the Concept of Law

Fichte's scientific writings are a multilevel deduction from the unity of his philosophical system, the foundation of which is the result of the exploration of the conditions of consciousness in *Foundations of the Entire Science of Knowledge* (Fichte 1965).

These primarily consist of self-consciousness, practical subjectivity, and finally intersubjectivity (cf. Kahlo et al. 1992; Merle 2016a, ch. 1). On the basis of this first level of deduction, that is, explicitly "according to the Principles of the Wissenschaftslehre [Science of Knowledge]," (cf. Rockmore & Breazeale, ch. 9) the first part of *Foundations of Natural Right* (Fichte 1977) and *The System of Ethics* (Fichte 1966–1970) inquire into the conditions of intersubjectivity.

These conditions include the existence of a system of law and a system of morals.

At the second level of deduction, the "concept" of the former is: "I must in all cases recognize the free being outside me as a free being, i.e. I must limit my freedom through the concept of the possibility of his freedom" (Fichte 2000, 49). Whereas the concept or "principle" of the latter is: "The principle of morality is the necessary thought of the intellect that it ought to determine its freedom in accordance with the concept of self-sufficiency, absolutely and without exception" (Fichte 2005, 60). (On the distinction between law and morals see Gottlieb 2016, Wood 2016a; on morals see Merle & Schmidt 2015).

Applying the Concept of Law

At a third level of deduction Fichte enquires into the respective "applicability" – i.e., the conditions of realization – of these concepts, which pertains, on the one hand, to the sphere of free action located in one's own body and colliding with others, so that a common will must care for their legal reciprocal limitation, and, on the other hand, to elements that would belong today to the theory of action and to free will, that is, to the possibility for freedom to motivate or to the relationship between "natural drive" and "pure drive."

At the level of applicability, Fichte locates only an "original right," which is not human rights proper, but rather the necessary and fundamental requirement of any free being in the world, i.e., a body and a sphere of activity. Since the original right of each individual potentially collides with that of any other individual, valid rights must be established through a reciprocal and equal limitation or coercion of the individual's claims resulting from their original claim.

This occurs in the "systematic application" at the fourth level of deduction. In *Foundations of Natural Right*, this application is comprised of Fichte's theory of the constitution, ownership (cf. James 2011), punishment, marriage and family law, and international and cosmopolitan law. In *The System of Ethics*, the "systematic application" consists of a system of duties according to the double division of unconditional and conditional and of universal and particular duties. It emphasizes familial and social duties, e.g., the particular duties of scholars, teachers, artists, and politicians. On all these applied issues, Fichte formulates positions opposed to those of Kant's contemporary *Doctrine of Right* (1797) and *Doctrine of Virtue* (1798). For instance, Fichte advocates for a control of the sovereign by the people, punishment as deterrence, a foundation of ownership in labor and needs, rejecting a world republic, and, in his later *The Closed Commercial State* (Fichte 1988) he advocates, as a deduced application or "Appendix to the Doctrine of Right" a strictly egalitarian state economic planification and autarky, which inspired later socialist theorists like Lassalle and Jaurès (cf. Merle 2016b). Yet, like Kant, Fichte also opposes the so-called early Kantian natural law theorists like Hufeland, Heydenreich, and Schmalz, who identify the domain of law with what, according to Kant's categorical imperative, is either a commanded or a nonprohibited action.

Cross-References

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► Lassalle, Ferdinand

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Filangieri, Gaetano

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When addressing the figure of Gaetano Filangieri (1752–1788), one is struck by the brilliance that characterizes both the man and his work. It was the brilliance of a destiny cut short during his time, as Filangieri died prematurely in 1788 at the age of 36. But also, and above all, it was the brilliance of a work centered around a main text, the *Scienza della legislazione*, translated almost immediately into most European languages, which was admired by the greatest philosophers and politicians of the world, including Benjamin Franklin, but which proved too ample and ambitious for the conservative politics of the Kingdom of Naples under Ferdinand IV.

Born in 1752 in Cercola, at the foot of Mount Vesuvius, Gaetano Filangieri displayed early aptitude for study, and soon embraced a military career. His formative years coincided in Naples with the reformist policy of Charles of Bourbon and Bernardo Tanucci, in the midst of Giambattista Vico's philosophical legacy and the teachings of Antonio Genovesi. It was during this fertile period that the very young Filangieri wrote his first text in 1772, *Morale de' legislatori*, mixing reflections on the status of sovereignty, the role of education and the question of punishment, especially in argument with Beccaria concerning the death penalty. Following a trip to Palermo where he met Isidoro Bianchi, with whom he established a continued correspondence, Filangieri returned to Naples and in 1774 published his *Riflessioni politiche sull'ultima legge del Sovrano*, which are dedicated to Tanucci, and which highlight the sovereign role of the law as the sole guarantee of civil life and the need for public and reasonable sentences.

But it is certainly the *Scienza della legislazione*, the first two books of which appear in 1780, which must be considered Filangieri's great political and legal work. According to Filangieri's own plan, this work had to include seven volumes of which only the first four were to be published during the author's lifetime. The first book was intended to establish the general principles of all forms of legislation ("Delle regole generali della scienza legislativa"). The second dealt with political laws and economics ("Delle leggi politiche ed economiche"), the third with criminal law ("Delle leggi criminali"), the fourth with the question of education ("Delle leggi che riguardano l'educazione, i costumi e l'istruzione pubblica"), the fifth with religion ("Delle leggi che riguardano la religione"), the sixth with property, and, finally, the seventh with family. It is, as we can see, a complex work that sediments all the legal and political issues of the Enlightenment, and which is in dialogue with the great philosophers of the time, be they Neapolitan (Mario Pagano), Milanese (Pietro Verri and Cesare Beccaria), or foreigners like Montesquieu and Goethe, who visited Filangieri, and Benjamin Franklin, with whom Filangieri had a correspondence.

It is difficult to summarize such a theoretical mechanism that operates as much diachronically, by masterfully tracing the history of law, as it does synchronically by fixing on the conditions of possibility and legitimacy of all forms of legislation. To summarize, it could be said that Filangieri is at the intersection of a dual influence, of both Vico and Leibniz. In both cases, it is for the Neapolitan philosopher to demonstrate to what extent the substratum of laws is not limited to a historical legacy that varies according to places and climates – which is precisely what differentiates him from Montesquieu and the *Spirit of the Laws* – but to what extent laws are based on a rational and universal structure that does not vary from one nation to another. The rational requirement of laws, like the idea of a single juridical and legislative schema particular to all nations (for example, Vico's "corso" scheme), clearly expresses this dual influence. From this requirement of a rational foundation of laws, Filangieri draws a frontal criticism of all forms of privilege and exception, particularly manifest from a historical point of view in the Kingdom of Naples. It is sufficient, for example, to reflect on the role of the "baronage" ("baronaggio") and the difficult process of defeudalizing the Kingdom, as well as an excessive clergy that is also attached to its privileges. From this point of view, Filangieri forms part of a long tradition dating back to the seventeenth century and the spread of the "ceto civile," whose predecessors were Francesco D'Andrea, Pietro Giannone, and Antonio Genovesi.

The political and civil consequences of Filangieri's positioning led to the critical reception of his text in the Kingdom of Naples (the book was even blacklisted in 1784), even though reception abroad and in the rest of Italy was very important. The *Scienza della legislazione* was rapidly republished and translated into many foreign languages, including German in 1784 and French in 1786. The end of Filangieri's short life was marked by strong disillusionment following the ousting of Tanucci in 1776, the catastrophic policy of Ferdinand IV and the impossibility of reforming the Kingdom in a sustainable manner. Isolated in Naples, but known throughout the Republic of Letters, Filangieri died suddenly on July 11, 1788.

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Filial Justice

► Justice: And the Family

Filmer, Robert

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Introduction

Robert Filmer (c. 1588–1653), a patriarchal absolutist, best known through John Locke's *Two Treatises of Government*, was born the eldest son of a Kentish gentry family in 1588.

Filmer attended Trinity College, Cambridge, in 1604 and enrolled at Lincoln's Inn the next year, without having obtained his bachelor's degree. In both London and Kent, he enjoyed the company of friends in intellectual circles, such as William Camden and Roger Twysden. However, the English Civil War brought painful years for him. Although there remains no clear evidence of his active support for the Royalist cause, he was arrested in 1643 and imprisoned in Leeds Castle for a period. After being released at some point between 1645 and 1647, there was relatively little time left for Filmer to enjoy freedom, as he died in 1653. Nevertheless, most of his political writings were written or published during this period (Laslett 1948; Sommerville 1991; Cuttica 2012, Chap. 1).

Filmer's talent as a political writer was best displayed in his persistent attacks on other theorists. Indeed, his writings often consisted of close examinations of his opponents' ideas and accusations of their alleged contradictions. Among his opponents were Aristotle, Philip Hunton, John Milton, Hugo Grotius, and Thomas Hobbes.

His rebuttal of Hobbes, published within a year after *Leviathan* appeared, is one of the earliest polemics against this masterpiece. Filmer's first, and perhaps best-known, political writing was *Patriarcha*, a version of which was completed in 1632; at this point, he tried in vain to obtain official permission for its publication (Cuttica 2012, 65–6). It was finally published posthumously in 1680.

However, politics was not the only theme that interested Filmer, who wrote several short treatises on various issues, including usury, witchcraft, and women's virtue. These writings shed light upon the intriguing aspects of Filmer often overshadowed by his political reputation. When examining the legality of usury, Filmer took a rather "progressive" stance on the Bible (Sommerville 2014).

In his last book, *An Advertisement to the Jurymen of England, Touching Witches*, he indirectly cast doubt on the validity of witch trials (Laslett 1948, 543). Furthermore, he denied the fundamental difference between male and female virtues, referring to Queen Elizabeth, who showed that even "warre and goverment of kingdomes" were "well handled by weomen" (Filmer 1987, 183). This suggests that, unlike a common assumption, Filmer's patriarchalism did not outlaw female rulers.

Refutation of Consent Theory

Filmer was an absolutist, as unanimously acknowledged by historians who have otherwise suggested almost incompatible readings of political writings in the early Stuart age (Burgess 1996; Sommerville 1991). Filmer's intention to insist on absolute power was not always the same: *Patriarcha* was probably written to vindicate the king's right to impose tax (including the forced loan) at his pleasure, while *Anarchy*, published in 1648, was intended to demonstrate that the idea of limited monarchy was merely a recipe for anarchy, or English civil war. Nevertheless, he consistently endeavored to sweep away the restrictions on sovereigns and to construct his own theory of absolute sovereignty: his refutation of consent theory and his patriarchal absolutism.

The keystone of Filmer's whole argument was the denial of natural liberty. His political doctrine was built upon the assumption that the idea of people's natural liberty invariably resulted in limiting sovereign power or even justified the right of resistance. Indeed, Filmer complained that Hobbes's *jus naturae*, which permitted self-defense against sovereigns, was destructive "even to the *Leviathan* itself" (Filmer 1991, 195).

Proponents of natural liberty predicated governments upon the consent of people. Catholic writers such as Francisco Suárez and Robert Bellarmine, Filmer's main opponents in *Patriarcha*, advocated a "corporate" consent theory. According to this theory, the people as a corporate body were originally "free" in the sense that they were not under any ruler and so held a God-given right of self-rule. However, due to the practical difficulty of self-rule, the people often chose to vest their right in the sovereigns through unanimous or majority consent. Filmer saw this consent theory as inimical to all existing political authorities because it easily authorized

the people's right to resist or even to alter the form of government by popular decision (Sommerville 1982).

Filmer attempted to show the theoretical inadequacy of consent theory and its potentially dangerous consequences (Daly 1979, Chap. 4; Schochet 1975, Chap. VII). His most important strategy was to delegitimize the "corporate" people as a consenting agent. Even supposing that people did enjoy natural liberty, the consent of past people would be insufficient to legitimize political authorities. The idea of natural liberty, Filmer argued, required any government to be consented to by every single person living under it, including women and children. The majority consent cannot be a substitute for unanimous consent, since majority rule was a human invention, inapplicable to decisions in the so-called state of nature (Filmer 1991, 140–2). However, proposing the individual person as the consenting agent is not the solution to the problem: if the consenting agent is the individual, the same individual could resist the sovereign at their will, the result of which was "utter confusion and anarchy" (Filmer 1991, 154).

Thus, government and natural liberty were incompatible. If "the people were ever but once free from subjection by nature," it would become impossible "lawfully to introduce any kind of government whatsoever" (Filmer 1991, 142). It follows that all political theories should be founded upon the alternative assumption: the natural subjection of the people. This leads us to Filmer's notorious patriarchalism, an indispensable theoretical device for negating people's natural liberty and instead establishing absolute sovereign power.

Patriarchal Absolutism

According to Filmer's patriarchalism, the nature of sovereign power is identical to paternal power in terms of their purpose or *telos*. A sovereign of a commonwealth and a father of a family are both tasked with taking care of a community – the only difference is its size. Kings were obliged to take a "universal fatherly care of his people" (Filmer 1991, 12). Fathers, as small sovereigns, were natural rulers over their children. Hence no natural liberty for children. Political authorities had a larger dominion since their right was based on the power of the supreme father, Adam. He was the only person who had ever enjoyed unconditional natural freedom; all of his children and grandchildren were born under his rule. This paternal right descended from Adam to Filmer's contemporary sovereigns. Accordingly, they had complete freedom (i.e., absolute power) and no superior human authority. It led Filmer to see the international relations in "realistic" terms: "Where there is no supreme power (. . .), there can be no laws made to bind nations," except for divine moral laws (Filmer 1991, 216).

The inheritance of this right, however, was not necessarily regulated by the principle of primogeniture or any other hereditary succession, as is commonly supposed; Filmer never asserted that the kings of England had inherited Adam's rights by primogeniture. In *Patriarcha*, he readily admitted that Adam's sovereign power existed in aristocracy and democracy as well as in all types of monarchy, including hereditary, elective, and even usurped (Filmer 1991, 11, 44). This seemingly "un-Filmerian" argument in fact constituted an indispensable part of his theory. If he denied, say, a usurper the rights of the supreme father, it would inevitably create a vacuum where people could enjoy natural liberty. His de facto recognition of the rights of Adam in all governments was therefore an essential aspect of his uncompromising absolutism.

With his absolutist doctrine, Filmer intervened in contemporary debates about English legal history and "patriotism," which ultimately pertained to the issue of sovereignty. Common lawyers tended to avoid asking by whom the ancient constitution came into being, thus rejecting the Bodinian theory of sovereign legislator. Filmer, in contrast, maintained that English kingship preceded the Parliament, and therefore kings legitimately wielded absolute power (Pocock 1987, Chap. XII). Furthermore, in *Patriarcha*, he responded to "patriots," who upheld a kind of republican view that placed the love of country above the love of king, rejecting absolutist discourses on kingship. Filmer significantly undermined the patriot idea by identifying the

love of country with that of king, for the king was the *pater patriae* (Cuttica 2012).

Although patriarchal absolutism played the central role in his political theory, it forced Filmer to confront a difficult problem in the post-Civil War context, when the variety of the de facto arguments were employed to justify the newly established government. After the Civil War, he attempted to control the unintended consequence of his de facto theory by modifying some of his previous contentions (Daly 1979, Chap. 5; Schochet 1975, Chap. VIII). Filmer, who had argued for unconditional absolutism, came reluctantly to admit conditional obedience to the republican government while implying that Charles II was the sole legitimate ruler (Filmer 1991, 285). Before the execution of Charles I, he had urged his opponents not to eschew the fundamental question: "who shall be the judge" or who holds unconditional, absolute power (Filmer 1991, 151). When this question was most urgently asked, however, he became incapable of offering the forthright, unreserved answer as he had done before.

Conclusion

Filmer's political idea functioned as a medium through which very different political theories emerged. The best-known example is John Locke's theory. Locke ruthlessly ridiculed Filmer's patriarchal absolutism as a theory for de facto rule or even for "anarchy," which could "suppose *paternal power* (i.e.) a right to government in the hands of a *Cade*, or a *Cromwell*" (Locke 1988, II-121, 198). After demolishing absolutism, Locke set out to build his own consent theory. However, in this process, he partly accepted Filmer's refutation of "corporate" consent theory, insisting on the necessity of each person's consent for the legitimacy of governments (Schochet 1975, Chap. XIII). Therefore, Filmer's attack helps us understand why Locke constituted his political idea as he did.

However, it does not follow that Locke exhausted Filmer's "legacy." Filmer leads us to face, perhaps more effectively than any other theorist, the double-edged nature of political values such as the prevention of anarchy or the achievement of peace. Certainly, as Filmer feared, "utter confusion and anarchy" are the worst possible political outcome. It is nevertheless clear from his counterproposal that the possibility of anarchy can be rooted out if, and only if, the idea of natural freedom disappears: even *Leviathan* was half-baked for Filmer. From Locke's perspective, Filmer's idea is nothing but the outright, despotic oppression of natural or human rights. Hence the need for the right of resistance. Yet, for Filmer, the very Lockean right of resistance is, as it were, nothing but terrorists' pretext for anarchy. Neither of these two arguments can be easily dismissed. Thus, Filmer, together with Locke, raised fundamental political issues that are still worthy of serious consideration.

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Finnis, John

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Introduction

John Mitchell Finnis (b. 1940–) is a Catholic legal philosopher specialized in philosophy of law and ethics. He has notably contributed to New Natural Law theory, which is grounded on the thought of St. Thomas Aquinas. Finnis has written extensively on jurisprudence, philosophy, law, theology, and history.

Finnis is a Professor of Law at the University of Notre Dame (South Bend, IN), and in 2010 he became an Emeritus Professor of law at University College, Oxford. He married Marie C. McNally in 1964, has 6 children, and is a dual citizen of Australia (from birth) and the United Kingdom (2004).

Education and Career

Finnis attended St. Peter's College, Adelaide (1947–1957) and Adelaide University (1958–1961). In 1962, he won the Rhodes scholarship at University College, Oxford (1962–1965) where he completed his D. Phil with a doctoral thesis on the concept of judicial power, titled "The Idea of Judicial Power, with special reference to Australian federal constitutional law," supervised by H.L.A. Hart.

Finnis' professional appointments include service as a fellow and praelector in jurisprudence at University College, Oxford (1966–2010), Rhodes Reader in the Laws of the British Commonwealth and the United States (1972–1989), Professor of Law and Legal Philosophy at University College of Oxford (1989–2010), and Biolchini Family Professor of Law at the University of Notre Dame (1995-present). Finnis has additionally taught law at UC-Berkeley (1965–1966), Adelaide University (1971), Boston College (1993–1994), and the University of Malawi where he served as department chair (1976–1978).

Outside of academia, Finnis has contributed to numerous projects. He became a member of the British Academy in 1990. He was the Barrister of Gray's Inn (1979–2010), a governor of Plater College, Oxford (1972–1992), advisor to the Foreign Affairs Committee of the House of Commons, Westmister (1980–1982), member of the Catholic Bishops' Joint Committee on Bio-ethics (1981–1989), governor of the Linacre Center for Healthcare Ethics, London (1981–present), and governor of the Anscombe Bioethics Center (2010–present).

Finnis has also served the Roman Catholic Church in many capacities, as member of the Pontifical Council *Iustitia et Pax* (1990–1995), member of The International Theolotical Commission (1986–1991), and member of the Pontifical *Academia Pro Vita* (2001–present). On November 21, 2016, Finnis and Germain Grisez wrote an open letter addressed "to the Supreme Pontiff Francis, to all bishops in communion with him, and to the rest of the Christian faithful," addressing the misuse of the papal encyclical *Amoris Laetitia*.

New Natural Law and the seven Basic Goods

New Natural Law Theory is a twentieth-century revision of St. Thomas Aquinas' (1225–1274) natural law theory. French-American philosopher Germain Grisez (1929–present) was the first to give voice to New Natural Law in 1965. Finnis was among the initial scholars to join Grisez in articulating and defending the theory, along with

Joseph Boyle and Olaf Tollefsen. In 1980, Finnis published his own seminal defense of the New Natural Law, titled *Natural Law and Natural Rights*. In 2011, Oxford University Press released a second edition of the book which includes Finnis' substantial postscript that replies to 30 years' worth of discussion and criticism of his claims. Finnis has also collaborated with Grisez and Boyle to author numerous articles elaborating and defending the New Natural Law.

Grisez's initial articulation of New Natural Law was intended to be an exegetical and faithful interpretation of Aquinas' conception of the foundation of practical reason. Grisez argued that Aquinas' conception of practical reason and the discovery of ethical norms does not rest on a prior conception of human nature. New Natural Law therefore rejects the claim that moral norms are derived from nature on the grounds that it is neither necessary nor even possible to derive rational guidance from nature. Instead, New Natural Law argues that practical reason is itself *foundational* in the sense that it can recognize seven choiceworthy goods. These goods are *basic*: there is no further causal reason that explains why they are good, and there is no need to offer arguments that justify why they are good because their goodness is self-evident. In this sense, the basic goods operate as first principles of right practical reason.

These seven unique, basic goods together comprise facets of authentic human flourishing for every person. They include life and health, knowledge and aesthetic experience, play, friendship, marriage, religion, and practical reasonableness (including internal psychic harmony, external harmony with others, and ability to determine and act on achieving these goods).

These goods do not exist in a hierarchy to each other. Rather, they are incommensurable: no one good is intrinsically better or more comprehensive than another. Because the goods are all equally basic, it is never morally permissible intentionally to damage or to destroy one good in order to achieve another. New Natural Law therefore holds that actions which violate any basic good are never morally acceptable. The view thereby argues in favor of the existence of moral absolutes (Finnis 1991; Boyle 1999; Tollefsen 2007). Because morality is grounded on recognizing and actively pursuing the basic goods, no external factor could morally justify violating those goods. Any action that *directly* and *intentionally* violates a basic good is always wrong (for the importance of "direct" and "intentional" violation, see "Action Theory" below), and there is no extreme circumstance that could reverse that determination.

Nevertheless, the priority a virtuous agent gives to a basic good in her life may differ in both order and type from that of another virtuous agent. New Natural Law allows for a difference in prioritization of the basic goods among different people due to a distinction between the foundation of practical reasoning as opposed to the foundation of virtuous action. New Natural Law argues that the foundation of practical reasoning is the recognition of the seven basic goods; however, the foundation of virtuous action lies in the agent's ability to prioritize and pursue those goods well.

This makes it possible for different agents both to be practically rational and virtuous, even though they may prioritize and pursue different kinds of goods. Individual agents can determine what goods to pursue by carefully weeding out arbitrary preferences for one good over another due to undue inclination within one's own preferences, or elevation of one's own interests over the good of other agents. All that virtuous action requires is that agents be open to how the different goods may be realized in their lives in a way that does not violate the integrity of the basic goods or damage other agents' pursuits of them.

Criticism of New Natural Law

New Natural Law's position that the seven basic goods are self-evidently true and basic is a controversial feature of the theory. The basic status of the goods means that no inference from an account of human nature is necessary or possible. It is not necessary because the goods are foundationally basic. It is not possible because one cannot infer moral norms (an "ought") from the way human beings are (an "is").

Many natural law theorists reject these claims which form the bedrock of the seven basic goods. Critics of New Natural Law argue that a naturally normative account of ethics can derive "ought" from "is." In fact, it must do so. Theoretical knowledge of human nature is necessary if one is to develop a natural law ethics. On this view, nature determines what ends and means humans ought to pursue if they are to actuate their natures and flourish (See, for example, McInerney 1980; Veach 1990; and Murphy 2001). Other critics hold that there is a hierarchy of goods, and that they are not incommensurable as Finnis suggests (Hittinger 1987).

Political Theory

Finnis' seminal work, *Natural Law and Natural Rights*, also contained a robust political theory detailing the source and nature of political power as well as the ends of the political community. In this area, Finnis intellectually departs from the line of thinking that Grisez and Boyle pursue. These other New Natural Law thinkers argue for a Rawlsian-inspired account of political theory, holding that state power should not legislate morality in its pursuit of instantiating the common good. For Grisez and Boyle, this "anti-perfectionist" account of political pursuit of the common good was driven by the concern to protect the seven basic goods from government coercion and control.

However, Finnis pursues a different tack, arguing for a "perfectionist" account of political rule. Finnis holds that political rule is a necessary instrument for actualizing the common good. Without state organization, individuals would not be able to organize effectively to achieve goods that come only through functional communal interaction. While it is true that the basic goods can exist without the state, it is also true that the state can prevent obstacles from inhibiting the full pursuit of these goods. The state acts as a fence of protection to ensure that citizens can (1) organize effectively; (2) remain free from the aggression of hostile outsiders; (3) avoid and punish the behavior of threatening insiders; and (4) protect those that need a social safety net. The state therefore acts as a measure to prevent the impossibility of effectively realizing the basic goods, rather than as a necessary feature of the basic goods themselves. Optimally, the basic goods are pursued by private individuals and associations, and the political common good ensures that the social conditions make it possible for them to do so. The state and political authority, then, act in service to the basic goods that legitimate them. As such, the state should be open to adopting and promoting the basic goods, even if there should be strong limits to state control over the individual's freedom to determine life choices. Thus, Finnis settles on a view of political authority that considers and promotes the common good without coercing citizens to adopt those goods in their own lives.

This means that Finnis, Grisez, and Boyle end up promoting the same concept of the common good and reasons for political authority, even if they do so for meaningfully different reasons. For Finnis, the common good and the political authority needed to promote it entail that the state is a "community co-operating in the service of a common good which is instrumental, not itself basic" (Finnis 1995, p. 5). By this, Finnis means that political authority is a necessary instrument for human beings to achieve their full flourishing. In this regard, Finnis, Grisez, and Boyle agree. On the other hand, since Finnis holds that the state is a necessary instrument to achieve the common good, it is not untoward for a state to recognize and promote substantive moral goods. In this regard, Finnis parts ways with Grisez and Boyle.

By holding this view of political authority, Finnis sees himself as defending a Thomistic theory of political rule that is more robust than non-normative Rawlsianism and less robust than Aristotelianism. The basic goods drive the purpose of political authority, and so the common good and political authority are defined in terms of their service to these goods. In this sense, it is more robust than Rawls' political theory. On the other hand, the state is not responsible for making citizens virtuous. The end of the citizen does not lie in the state, and so Finnis' political theory is less robust than Aristotle's political theory. Finnis

argues that his view is the accurate reading of St. Thomas' own political theory.

Other Thomists have argued that St. Thomas should be read as more in line with Aristotle than Finnis suggests. As a result, Finnis has drawn criticism from both ends, for some New Natural Lawyers that are more sympathetic with Rawls have criticized his view of the common good as overly intrusive (Grisez and Boyle 1998), while others more sympathetic with Aristotle have criticized his view as not substantive enough and overly procedural (George 2001).

Action Theory

New Natural Law holds that moral absolutes exist and are grounded on the incontrovertible goodness of the seven basic goods. Agents must never intentionally destroy or damage a basic good. This absolutist position led Finnis and his collaborators to develop a full theory of when agents are morally blameworthy for limiting a basic good. This development in the field of "action theory" was necessary, because without it opponents to New Natural Law could reduce its claims to absurdity by plausibly claiming that *any* action is morally wrong. This is possible because whenever agents choose to instantiate any basic good – say, the good of health by going for a run – it seems they are implicitly choosing *not* to instantiate another basic good – say, the good of increasing one's knowledge. As a result, opponents of New Natural Law could argue that practical realization of any basic good hinders another basic good. Pursuit of any basic good therefore seems to be immoral because it hinders another basic good. If true, this violates New Natural Law's absolute ban against hindering or destroying any basic good, making every human action immoral. This result would be absurd, thus showing a comprehensive weakness in New Natural Law theory.

In light of this potential criticism, Finnis, Grisez, and Boyle wrote a number of articles explaining the contours of intentional actions that supplement New Natural Law theory (For example, see Finnis et al. 2001; Finnis 1998; and Grisez 1997). A main goal of this body of work is to delineate when a result of an action directly contravenes a basic good, and when it indirectly hinders a basic good. With this distinction, Finnis argues that only actions that *directly* violate a basic good are morally forbidden.

The distinction between direct and indirect violation of a basic good hinges on the agent's intention. When agents intentionally seek to harm basic goods, they violate moral absolutes. Since the pursuit of one basic good – health, by going for a run – does not directly or intentionally damage the basic good of increasing one's knowledge, there is nothing morally problematic as such with pursuing one basic good instead of another. The distinction between direct and indirect harm therefore hinges on a coherent explanation of intentional action as well as a rigorous way of explaining when and why it is acceptable to permit indirect harms to basic goods, even when those indirect harms are foreseen by the agent doing the intending.

Finnis holds that intentional actions are determined by what end the agent aims to achieve and how he/she aims to achieve it. Thus both the end and the instrumental means to the end are intended in human actions. To determine what ends and means an agent intends, one must look in each case to what the agent aims to do. This can only be done if one looks at any given situation through the eyes of the agent herself, what is called the first-person perspective. This perspective enables one to see that there are many ends and means that an agent aims to achieve, but there are also many that she does not aim to achieve. For example, by baking a cake a given agent may intend to have dessert for a dinner party, but she does not aim to deplete her supply of flour. While dessert and diminished flour supply are both the result of our agent's actions, she intended only the former. The latter effect turns out to be an unintended, indirect consequence of her actions. If our agent was considering the wider effects of baking the cake, he/she may have foreseen before beginning the baking that her actions would deplete her stock of flour. Nevertheless, foreseeing this effect does not entail that she meant to bring about that end, since it was never a goal or even a direct means to her actual, intended goal.

The first-person perspective therefore enables Finnis to distinguish between direct, intentional ends and foreseen, unintentional ends. Without this approach to determining what makes an action intentional, Finnis argues that a person's action theory will quickly fall into error. If one adopts a "third-person perspective" and tries to explain the objects of an agent's intention according to *whatever* effects follow from an agent's action as can be seen from general observation of the action (regardless of her first-person aims), then one will be incapable of explaining why our baker does not intend to reduce her supply of flour. From the third-person perspective, any result that follows from an agent's doing will be an object of her intention. Not only would this make New Natural Law theory untenable, but it would also lead to a host of other problems. From the third-person perspective, agents would be held morally responsible not only for all the effects of their own actions, but also the effects of others' bad actions, if those actions could have been prevented by the agent in any way. These difficulties do not attend the first-person perspective.

New Natural Lawyers have used this distinction not only to defend how agents can coherently pursue the basic goods, but also to explain their positions on disputed cases in applied ethics. In end-of-life situations, they argue that it is always wrong to intend directly or use means to bring about the end of a suffering person's life (since this would violate the basic good of life). However, it is morally permissible to cease life-saving treatment if that treatment is believed to cause the patient more discomfort than benefit. Here, the goal is not to kill the patient, but to provide the highest quality of life available to the patient given her circumstances. While care providers may foresee that ceasing life-saving treatment will hasten the patient's death, the intention is not to terminate the patient's life. Since there is no intentional, direct violation of the basic good of life, this latter action does not violate the ban against directly hindering or destroying basic goods.

In other more controversial cases, Finnis, Grisez, and Boyle argue that the distinction between direct and indirect action can sometimes legitimate the use of death-hastening drugs, performance of fetal craniotomy, and use of lethal force in self-defense (both privately and in wartime). Their account of the goods upheld in marriage and the goods inhered by homosexuality has been particularly controversial, from intellectual friends and foes alike (For both sides, see Grisez and Boyle 1998; Smith 1991; Finnis 1995; Lee 2005; Lee and George 2007; Macedo 1995; and George and Bradley 1995).

This careful account of intention enables New Natural Law theory to settle many theoretical questions and difficult cases in applied ethics. Nevertheless, it also raises questions. Given that no end or means to an end can directly violate a basic good, some explanations of what is happening in applied cases raise questions as to whether such violations of basic goods occur. For example, in the case of fetal craniotomy, it would seem that crushing a fetus' skull directly and intentionally contravenes the basic good of life. However, Finnis, Grisez, and Boyle argue that this is not necessarily true. In some cases, the intention may be "to change the dimensions of the child's skull to facilitate removal" from the mother. In these cases, critics of New Natural Law argue that such a description is merely a verbal rather than a substantive difference for a means to an end that directly contravenes a basic good. The question, then, of how practically to identify intrinsically prohibited actions is a matter of dispute, with some claiming that it is sometimes permissible intentionally to act against basic goods (McCormick 1984).

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Fish, Stanley

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Introduction

Stanley Fish (b. 1938–) is a scholar of sixteenth- and seventeenth-century English Literature whose work expanded into the areas of legal and political philosophy. This was not a new direction so much as an extension of philosophical commitments that he had developed in his earlier work. One of these commitments was a conception of the self that could be described as falling within the communitarian tradition. Fish argues that the attributes that people acquire by being socialized into different institutions, and by being embedded in particular local contexts, are not secondary attributes of a deeper, more enduring self. Rather the self is completely constituted by its local commitments. Take them away, and you would not have an essential, stripped-down self, rather you would have no self at all. A second important philosophical commitment is to an anti-foundationalist epistemology. Simply put, anti-foundationalism holds that there is no unmediated perception of the world and hence no direct perception, in a positivist sense, of any extra-human "foundations" for truth and knowledge. Any human thinking, perceiving, and acting is enabled and structured by the background commitments already in place as a result of the socialization and local embeddedness that constituted the human perceiver. Experience of the world which was not mediated in this way might be available to God, Fish claims, but not to human beings. Fish asserts that it is the human condition always to live in a world which is given

shape, order, and significance by humanly generated categories, beliefs, and values which we hold (or which hold us) because we are embedded in particular communities.

Political Philosophy

Fish's conception of the self and his anti-foundationalist epistemology lead him to describe liberalism as an incoherent political philosophy (Fish 1994, Chap. 10). According to Fish, the distinctive mark of liberalism is the search for neutral and universal principles that stand outside the contest between substantive political and moral positions. The liberal hope is that these principles can regulate disagreement between partisans of different conceptions of the good without unfairness to any of the participants. But Fish denies that any such principles can be found. Because humans are necessarily embedded beings, they can never transcend (or rise above, or stand to the side of) their deep and constituting local commitments. All of liberalism's putative neutral principles will either be so abstract that they cannot tell us what to do in a particular context or they will be able to direct us precisely because the partisan content that they purport to have risen above will have been smuggled in. On Fish's analysis, liberal principles are not independent and neutral constraints on politics, because it is politics that fills them with the content they need in order to do any work. In *The Trouble with Principle*, he demonstrates his point with detailed analyses of two important liberal principles: freedom of speech and freedom of religion (Fish 1999).

Fish is not saying that neutrality is impossible. Fish's anti-foundationalist position is that the abstract notion of "neutrality" can always be given a content, but only from *within* some locally embedded position; it cannot be identified by stepping *outside* all forms of local embeddedness. But since the ways of being locally embedded differ, there is no assurance that humans will agree on what is neutral. This is why the liberal project of using reason to discover neutral principles and procedures for ordering political life that all can accept is constantly being frustrated by people who refuse to accept that what liberalism delivers is indeed neutral.

The rejection of liberalism as a coherent philosophical project does not mean the rejection of liberalism as politics, Fish insists. Someone who accepts that liberalism can never achieve the strong neutral principles it seeks and is always advancing some contestable, substantive position can nevertheless endorse that substantive position and join with liberals in seeking to advance it.

Fish sees liberalism as a foundationalist project because its search for universal and neutral principles is a search for foundations of political order that would be the same for any group, no matter what its deep local commitments. But there are also *anti*-foundationalist projects in political philosophy. Some anti-foundationalists argue that if disadvantaged groups become aware of the socially constructed nature of the values and beliefs that allow others to oppress them, then they will be able to free themselves from these ideological shackles. Other anti-foundationalists argue that if reality is always socially constructed, then we have to accept that our group's perception of reality cannot claim a higher standing than those of other groups, and so we have to be more tolerant of these groups and less insistent about them conforming to our beliefs and standards. Still other anti-foundationalists argue that if everything is socially constructed, then we need to engage in open democratic discussions as to the kind of reality we should be constructing. These political positions are associated with critical theory, postmodernism, and pragmatism, respectively.

Although Fish is an anti-foundationalist himself, he emphatically rejects any such attempts to derive a political program from this epistemology. This is because he sees such a move as contradictory: If an anti-foundationalist holds that everything is "socially constructed," then realizing this truth cannot enable him to cease being socially constructed. Accepting the truth of anti-foundationalism could only allow him to be more tolerant, or open-minded, or critically self-conscious, or free from ideological distortion, or democratically inclined, if it allowed him to

escape the constraints imposed by his local embeddedness, but this contradicts the anti-foundationalist's basic premise.

The failure to understand properly the non-implications of the necessarily embedded or socially constructed self is a surprising point of commonality between most foundationalists and anti-foundationalists, Fish argues. They both tend to make the mistake of believing that anti-foundationalism does something and that it has consequences outside the precincts of philosophy. The difference between them is that one group thinks that those consequences are desirable, while the other group thinks that they are undesirable. For one group (typically but not always foundationalists), anti-foundationalism has the consequence of leaving us in a relativistic and chaotic world without the possibility of standards and procedures that are common and authoritative. Fish calls this "anti-foundationalist theory fear," and he calls those afflicted by this fear "the intellectual right." For the other group, anti-foundationalism has positive consequences – it can free us from the constraints of our partisan local context and make us freer, or more open and tolerant, or critically self-conscious. Fish calls this "anti-foundationalist theory hope," and he calls those buoyed by this hope "the intellectual left." Both the hope and the fear are illusory, Fish insists, because each group fails to appreciate that the grip of local contexts cannot be transcended (Fish 1989, 322–323, 345–348).

Legal Philosophy

For the disciplines influenced by positivism, accurate perceptions of empirical facts are the foundation of all genuine knowledge, while metaphysics and other supposed routes to knowledge that do not rely on empirical facts are rejected. Legal positivism follows this pattern when it stresses law's character as a matter of empirical fact only and when it rejects the position that valid laws are essentially connected to some nonempirical source such as God or Nature. That is, valid law is created solely by the observable acts of particular identifiable human beings, such as sovereigns or legislatures or judges or other types of officials. It is also characteristic of positivism to draw a sharp distinction between facts and values: Facts are objective, while values are subjective; fact claims can be shown to be true or false, while value claims cannot be; no value claim follows from a fact claim. Legal positivism also follows this pattern by claiming that because valid law is completely a matter of empirical fact, it is essentially separate from the kinds of value judgments found in morality and politics. While moral considerations might sometimes prompt the lawmakers to create a law, this is a purely contingent matter and has no relevance to the law's status as a law.

Fish's anti-foundationalism entails a rejection of positivism as an epistemology: Any human apprehension of facts is both enabled and structured by an already-in-place socially constructed background. Consequently our apprehensions of empirical reality are never direct and unmediated; facts are never "brute" and available to all in the same shape. Fish therefore rejects any analysis of law that both makes facts central and conceives of facts in a positivistic way. He directs this criticism at legal realism as well as legal positivism (Robertson 2014, Chap. 12). Fish also rejects the legal positivist claim that a hard separation can be maintained between law and morality. Since the background which is a precondition for any human experience is acquired as a result of humans being embedded in local contexts, it follows that any such background will reflect partisan and contestable viewpoints. This will include moral and political commitments, Fish argues. Therefore, the background which enables and structures the practice of law will contain moral and political commitments too and, indeed, competing moral and political commitments. But this means that legal positivism must be wrong about law and morality being essentially separate. Law can never be essentially separate from morality and politics, Fish concludes, because moral and political commitments are present in the background that structures the surface (or foreground) of law and enables the perception of legal texts and legally relevant facts.

The hope of legal formalism is that subjectivity in law can be reduced and objectivity enhanced by limiting the materials an interpreter may consider in understanding and applying the law. Today legal formalism is typically advanced under the banner of textualism. Textualism asserts that if you understand the grammar of the language the text is written in, and the conventionally accepted meanings in that language of the words making up the text, that is all that you need in order to understand the objective meaning of the text itself. It is not necessary, nor is it desirable, for a law applier to go outside the limited domain of syntax and semantics to consider external matters such as the author's intention, or the context surrounding the text's production, or more generally the spirit rather than the letter of the law.

Fish's broadest argument against formalism flows from his anti-foundationalist position that whatever we apprehend in the foreground of consciousness is both enabled and structured by an unnoticed and already-in-place background. This applies to the apprehension of textual meaning too. But the legal formalist fails to appreciate the crucial role of this background, for in effect he commands us to attend only to the foreground – the legal rule or text – and exclude everything in the background that makes the existence of that rule or text possible. Fish's critique is that the legal formalist distinction between a limited domain of material that can deliver legal objectivity, and a body of material outside that domain which threatens legal objectivity, cannot be maintained because the outside materials the formalist wants to exclude are preconditions for the existence of the very things that he wants to defend. Attempting to exclude this material is thus like someone in a tree who is attempting to saw off the branch he is sitting on.

Fish is not denying the existence of legal texts with meanings that are clear and compelling and understood by all in the same way – i.e., objective legal meanings. What Fish does reject is the textualist account of how these objective or literal meanings come to exist, and he seeks to provide a more adequate explanation of them. His anti-foundationalist explanation is that a shared background can produce a shared foreground. That is, a group of people similarly trained and engaged in similar practices will share background beliefs, values, and organizing categories, and this shared background explains why the members of the group (which he calls an "interpretive community") will often see the same clear and compelling meaning in a text.

Fish claims that law is given two incompatible jobs in Western societies: achieving the rule of law and achieving substantive justice (Robertson 2014, Chap. 10). These jobs pull in opposing directions because while the rule of law job stresses the goals of certainty, consistency, predictability, and continuity with the past, the justice job stresses the goals of flexibility, context-sensitivity, an ability to adapt to new realities, and the importance of achieving fair and sensible results. One jurisprudential response to this tension is to reject one of the jobs as improper or impossible, thus leaving the other job in occupation of the entire territory of the law. Another response is to assign a separate territory to each job to avoid clashes between them, as Hart did in Chap. 7 of *The Concept of Law*. But Fish rejects both of these responses. On Fish's analysis, each of the law jobs is capable of making territorial claims over any part of the legal field. That is, whenever a legal dispute arises, it will be possible to argue that its resolution requires performing either the rule of law job or the substantive justice job.

The contest between law's two basic jobs is therefore not resolved logically but rhetorically, according to Fish. Two stories about what the law should do will compete to be the most plausible and persuasive. But the rule of law job has a built-in advantage in any rhetorical contest because it is the dominant story in our liberal culture. The values and goals it advances are more closely tied to the liberal social vision than those of the substantive justice job. Consequently, the substantive justice job is typically advanced indirectly. One important way to do this is to take an existing rule or precedent, reshape it with an eye to the present, efface the evidence of that reshaping, and then declare the law to be compelled in the present case by the past it has just transformed. Fish call this the law's "amazing

trick," the "the art of constructing the (verbal) ground upon which you then confidently walk." He describes how this rhetorical move is performed in contract law, where the substantive justice job is done but the result is presented as the rule of law job at work (Fish 1994, Chap. 11).

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Formalism

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Introduction

Formalism is a theory of legal reasoning and legal interpretation committed to the claim that judges discover and apply the law without ever creating it. The elaborations and criticisms of this claim are subject to at least three equivocations.[1] (1) The first equivocation consists of the confusion between traditional formalist theories and the views of contemporary formalists. (2) The second equivocation confounds the formal character of law with the descriptive or normative accounts of legal reasoning and legal interpretation. (3) The third equivocation regards the fact that formalism is thought of as a description of judicial interpretation and a normative (a doctrine) theory of judicial interpretation.

Equivocations have consequences. Theoretical discussions about adjudication often result in seemingly endless misunderstandings, ranging from debates about whether there is or ever was such a thing as formalism portrayed by its critics (Tamanaha 2010), attempting to reinvigorate formalism against the legal realist critiques (Weinrib 1988), and formulating neo-formalist positions that have very little to do with formalism (Nachbar 2020). This entry aims to disambiguate some of these equivocations.

Formalism: Old and New

The common denominators of classical formalism are understanding law as coherent and classifiable into general conceptual categories and elaborating legal reasoning in terms of formal deductive logic. The task of jurists and legal science is to identify settled rules, connect them into a unified whole without gaps or contradictions, and ensure the curbing of judicial discretion and consistent decision-making (Lobban 2018, p. 436).

In the common law tradition, this basic idea in the work of its proponents took the form of rationalizing law by identifying the basic principles on which it is based. Oliver Wendell Holmes, a fierce critic of what he saw as the extreme emphasis on the logical connection between legal concepts, marked Christopher Columbus Langdell as the foremost exponent of nineteenth-century formalism in the USA. Langdell advocated for a mechanically understood legal science, tasking it with formulating doctrines and principles to be applied with certainty to human affairs. The same vision of a coherent system of precise rules of a scientific law is to be found in the works of James Barr Ames, Joseph Beale, and Samuel Williston (Grey 2014, p. 47). A movement in civil law tradition called jurisprudence of concepts favored a complementary idea of

[1] References to legal formalism in its various meanings can be found in history of law, sociology of law, and comparative law (Kennedy 2001).

approaching legal problems by systematization and conceptual construction. Pioneered by Friedrich Carl von Savigny and championed by Georg Friedrich Puchta, Bernhard Windscheid, and Rudolf von Jhering, it came under critical scrutiny in the work of the same Jhering. He denounced the idea that the law is a system of logically related concepts without gaps, in which all the subordinate concepts can be deduced from superordinate ones (Anderheiden et al. 2011). And while the formalist methodology and theory of law were never fully formulated in common law formalism (Lobban 2018, p. 423), the formalist attitude in civil law resulted in a thrall application of formal logic to law.[2]

A coherent and complete system of legal rules entails a specific kind of reasoning for those tasked with applying the rules in concrete instances. At the height of the enlightenment tradition (1764), Cesare Beccaria writes that the legal solution to the case entails the judge engaging in deductive reasoning, with the general rule as the major premise and the facts of the case as the minor premise. The result – a practical conclusion, a judgment – follows as a matter of necessity (Beccaria 1973, p. 12). The most poignant formulation of Beccaria's account of judicial reasoning is to be found in Montesquieu's (1748) elaboration of the idea of separation of powers, according to which judges are "only the mouth that pronounces the words of the law, inanimate beings that are not able to modify either its force or its rigor" (Montesquieu 1989, p. 163). In this formulation, we find the most apparent basis for the finding that a jurisprudence of rules, in the quest for legal certainty and predictability, degenerates in a mechanical application of fixed and final rules to cases. Equipped with a "thinking machine" and a desk (Kantorowicz 1906, p. 7), the jurist conducts the "mechanical" task of applying the existing rules to real-life situations with absolute precision (Pound 1908, p. 607).

Doctrinal and adjudicative formalism advanced in these classical writings amount to a descriptive or normative theory about law as a gapless system of general rules and adjudication as the deduction of normative conclusions from these definite normative premises (Unger 1983, p. 564). While it might be that both civil law and common law formalism never existed in the exact form its critics portrayed them,[3] it is undoubtedly the case that the positions identified by critics had significant weight in the second half of the nineteenth century. From this time, criticisms of classical legal formalism have, in the thought of legal realists, interest jurisprudence, school of free law, and critical legal theory, become commonplace both in civil law and common law tradition. As a result, in contemporary legal parlance, formalism is often used in a pejorative sense, sometimes even as an umbrella term for everything disliked in legal thinking and legal adjudication (Schauer 1988, p. 510).

Conceptual formalism succumbed to the waves of criticism and is for the most part gone from recent debates (Nachbar 2020, p. 148).[4]

[2] The parallelisms between formalism and the ensuing critical backlash in Germany and the USA were already noticed by H. L. A. Hart (Hart 1983a, pp. 266–267). But not only are there significant similarities between, for example, Holmes' and Pound's criticism of mechanical jurisprudence and Jhering's and Kantorowicz's criticism of the jurisprudence of concepts, but also between reassessments of German and US nineteenth-century formalism in the writing of contemporary authors like Tamanaha, Lobban, and Haferkamp, Rückert, and Heidermann (Heidemann 2015; Rückert 2017).

[3] Some contemporary literature identifies both strands of formalist thought in the nineteenth century as straw-man construed by the critics (Tamanaha 2010; Lobban 2018; Anderheiden et al. 2011, para. 6–10). The accurate portrayal of the theoretical positions is historically important but of limited philosophical interest. In most cases, critical assessments were not aimed (only) at authors labeled as formalists but were rather theoretical reconstructions of tendencies, modes of thinking, and full-blown doctrines present explicitly or tacitly both in the legal profession and in scholarly writings.

[4] A notable exception is Weinrib, who advances the contemporary version of formalism as the claim that the legal system is coherent and intelligible from within, without recourse to political considerations. In this interpretation, however, formalism amounts to the regulative idea that the "elaboration of law can be a coherent enterprise in justification" (Weinrib 1988, p. 1012). Some contemporary writing favors doctrinal formalism as a theory of law focused on the idea that elaborate legal doctrine is the basis for adjudication (Troop 2018, p. 439).

Modified versions of adjudicative formalism are alive and well to this day. Recent authors reject the idea that adjudication and interpretation are purely mechanical or logical exercises of deduction of decisions from a fixed or fixable set of premises. Contemporary formalists subscribe to a much more nuanced picture of adjudication, entailing the identification of legal sources, interpretation, and qualification of facts. Its exponents in legal academia reject the ideas that black letter law decides cases that there is no interpretation when the plain meaning of the formulation of the rule is clear (Manning 1999, pp. 685–686), embracing the notion of judicial discretion and multiple legally correct answers (Solum 2006, pp. 171–176).[5]

Still, formalist authors are indeed committed to a set of determinable propositions regarding rules, the relation between rules and facts, the preferred attitude of judges regarding rule formulations, interpretation, and the application of rules (Solum 2006, pp. 169–170). With a lack of a canonical exposition (Pildes 2017, p. 619), incorporating a variety of nuanced views, the common philosophically significant denominators of contemporary formalist positions are (a) the belief that law is rationally determined, leading the judge to one right solution either in every case or in the vast majority of cases, and (b) the idea that the solution to cases can be found without stepping out of the law, i.e., without the aid of political, moral, and other pertinent considerations (Leiter 2010, p. 111).

Formality and Formalism

Legal reasoning results in decisions that are justified by their premises and the inference rules that allow the judge to reach a normative conclusion for the case at hand. In making a valid conclusion, the judge deduces a final decision from the normative meaning of the source of law and the facts of the case (Wroblewski 1971, p. 412). Insofar as the premises also need to be established, the justification of the decision regarding their content is predicated on the existence of valid legal reasons. To establish the major normative premise of the inference, the judge departs from a source of law, a definite form in which the normative meaning is expressed. The standard form in which contemporary law is expressed is linguistic; law – legal norms that the judge is supposed to apply without creating them – are recovered from legal texts, constitutions, statutes, executive acts, and judicial decisions, in which the legislator expresses its intention regarding the regulation of social relations.

A common trend in contemporary jurisprudential writing related to formalism and its rescue from the clutches of antiformalist critics, especially those with a pronounced tendency to mislabel disparate modes of legal thinking as formalism, was to emphasize the importance of legal form.[6] As a set of properties making a content determinate or definite (Weinrib 1988, p. 958), form is undoubtedly important in identifying and understanding legal rules, legal institutions, and the legal system (Summers 1997, p. 1166). Legal rules are thought to be formal in virtue of their generality, completeness, and definitiveness (Summers 1997, p. 1177), but also in virtue of the fact that they are expressed explicitly in a written form (Summers 1997, p. 1179), entrenched by their linguistic formulation (Schauer 1993, pp. 62–63). Dominant strands of adjudicative formalism are thus focused on the linguistic formulation of legal norms in modern legal systems (Schauer 1988, p. 510; Schauer 1993, pp. 62–63).

The fact that normative content is communicable and identifiable via a definite form might be understudied in legal philosophy. Still, it hardly constitutes a theoretical position regarding adjudication – admitting to the platitude that the content of the law is expressed in a definite and

[5] For a discussion on contemporary formalist authors, see (Tamanaha 2010, pp. 177–180).

[6] Nuanced accounts of form, either within a theory labeled as formalism or not can be found in (Weinrib 1988; Summers 1997).

identifiable form doesn't amount to formalism.[7] The most detailed studies of the formality of law take significant care to exclude implications of formalism, rejecting the "collapse of formal into formalistic" (Summers 1997, p. 1168). Being an essential or at least important property of legal rules, formality doesn't entail any definite formalist position, being limited to the simple finding that rules are, in fact, rules – prescriptive generalizations that can play a role in guiding behavior and decision-making (Schauer 1988, p. 537).

The formalist character of a theory of adjudication lies in the unique position it ascribes to legal form in describing and guiding judicial reasoning and interpretation. Contemporary formalism is hence a reductionist view regarding legitimate premises in determining the content of the law (Tushnet 1984; Matczak 2018), the "overstressing" of "the form as opposed to the content" (Pihlajamäki et al. 2018, p. 929), an "interpretative method that relies on the text. . .and that excludes or minimizes extratextual sources of law" (Sunstein 1999, p. 639). Somewhat more precisely, most contemporary formalism revolves around the issue of the importance of the linguistic form of the authoritative legal materials in the determination of the normative meaning of the legal text (Solum 2014, p. 2490; Solum 2006, pp. 181–182). It is the belief that legal interpretation is the rational activity of recovering the objective normative meaning of the sources of law (Chiassoni 2019, p. 80).

Starting from the importance of linguistic form for the determination of legal content, no less than three positions can be identified as formalist: (1) The linguistic expression of the legal norm determines and should determine the content of the norm in *all* instances of its interpretation. On the adjudicative level, the thesis claims that the judges never ascribe a normative meaning to legal texts but only discover the normative meaning. The canonic formulation of the norm, therefore, precludes judicial choice. (2) The linguistic expression of the norm determines or should determine the content of the norm in *most* instances of its interpretation. When the linguistic form is indeterminate, judges use other interpretative methods or defer to legislators. Finally, (3) the linguistic form doesn't determine the content of the law, but legal content is still determined univocally – by ascribing one right normative meaning to the legal text (Dworkin 1977; Dworkin 1986, p. 313).[8]

For the first two positions, the language in which law is formulated is capable of eliminating or significantly reducing interpretative choice in some instances but not in others, which are anchored by the fact that the words used in the sources of law can be interpreted and applied as understood by the majority of speakers of a given language (Schauer 1988, pp. 520–529). Both claims hinge on the idea that linguistic meaning is determinate and can be objectively ascertained. In this sense, formalism is dependent on the underlying theory of linguistic meaning (Bix 2003, p. 281). And indeed, the claims mentioned above are sometimes considered to be based on semantic internalism, semantic minimalism, or literalism – a view that language meaning consists of a set of criteria that the speaker applies to reality and checks whether they obtain or not (Matczak 2018, p. 65; Chiassoni 2006, pp. 120–121). In most formalist accounts, the main criteria for accessing the truth value of interpretative sentences are the semantic and syntactic rules of language, the literal, plain, ordinary meaning of the legal texts within a community (Guastini 2011, p. 154).[9] Approached from the perspective of legal form, as a descriptive account of adjudication and interpretation, contemporary

[7] Pildes notes that if formalism amounted to the idea that law sometimes depends on rules and rule following, a claim advanced by Schauer and Alexander (Alexander 1999, p. 531), we would all be formalists (Pildes 2017, p. 608).

[8] The qualification of the theory of interpretation of Ronald Dworkin as formalist is controversial, given that legal reasoning in his account includes moral considerations (Leiter 1999). Cass Sunstein labels Dworkin as an anti-formalist, since his account of constructive interpretation instructs judges to reach (far) beyond the text of the legal source (Sunstein 1999, p. 640).

[9] For an overview of the debate around determinacy and indeterminacy of law, see (Bix 2012).

formalism is committed to the idea of linguistic determinacy of law.

Normative and Descriptive

Nineteenth-century formalism has been shaped by the writing of its critics. These critical depictions of formalist positions were often used as a theoretical punching bag, a laughable theory brought forward only to show its apparent shortcomings. The long-standing impression arising from these criticisms is that formalism is largely rejected as a theory of legal interpretation and adjudication and a theory of legal content. In this sense, formalism was often considered bunk and derided as a valueless and even baseless theory of adjudication and interpretation.

Still, as a memorable quote goes: "Like the treatment of neurosis or the death of God, the critique of formalism seems somehow interminable" (Stone 2002, p. 166). Some prominent contemporary positions that are explicitly or implicitly formalist have gained significant traction in philosophy of law. The idea that there is a single right answer to every interpretative and adjudicative issue was defended by Ronald Dworkin, remaining largely unaffected by the tendency to conflate formalism with an overemphasizing of the form of law. The end of the twentieth and the beginning of the twenty-first century have brought to fore originalism in constitutional interpretation, textualism in statutory, and constitutional interpretation (Solum 2014, p. 2496). A theory that was considered defunct was not only revived but elevated to the status of the dominant position in legal interpretation and legal reasoning.[10]

The critical dismantlement of classical, nineteenth-century formalism and the fact that some contemporary formalists often do nothing more than affirming the truism that law is in various ways formal go a long way in eliminating confusion. However, contemporary formalists, when identifying their central positions, succumb to equivocations of another sort. According to neoformalist authors, formalism is committed to a variety of claims, like the one that judges apply the law and not make it, that judges should decide cases following the applicable constitutional or statutory provision (Solum 2006, p. 169).[11] Adequate explanation of the simultaneous death of formalism and its dominance requires noticing that the claims of contemporary formalism, like the ones mentioned, are largely independent of each other in virtue of their descriptive or normative nature. This dual character of formalist claims is regularly mentioned by its exponents and critics (Leiter 2010; Guastini 2011, p. 155; Solum 2008, p. 30).

As a theory, formalism is committed to the idea that adjudication is the rational activity of applying legal norms to cases and that interpretation is the activity of determining the objective normative meaning of sources of law. A formalist descriptive account of adjudication purports to explain how judges reason by appealing to sources of law and rules of logic. And while rules have a role to play in explanatory accounts of legal reasoning (Solum 2014, pp. 2487–2488), an adequate description of adjudication and interpretation necessarily entails a wider set of considerations (Barry 2020, pp. 1–8; Rachlinski and Wistrich 2017; Segal 2011). The dismissals of formalism as a naive ideology stem both from the realist intuitions and empirical research insights that rules and logic are not the only determinants of legal reasoning and interpretation.

As an account of the nature of legal interpretation, formalism is often reconstructed either as the

[10] The remark: "We are all textualists now" was made in 2015 by justice Elena Kagan of the US Supreme Court as an acknowledgement to the success of ordinary meaning textualism – a formalist approach to legal interpretation (Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes, YOUTUBE, Nov. 25, 2015, https://www.youtube.com/watch?v=dpEtszFT0Tg)

[11] Solum advances a thin conception of formalism simply entailing the possibility of adjudicators being constrained by rules (Solum 2006, p. 170) and then moves to explain why judges should be constrained by rules without and with resort to moral and political arguments (Solum 2006).

idea that judicial interpretation is a cognitive activity of discovering the meaning of legal text (Guastini 2011, p. 150), or as the idea that sources of law and interpretative principles determine one outcome in most cases (Leiter 1999, p. 1145). The position is best encapsulated in the "unexciting truth" that judicial interpretation amounts to the discovery of normative meaning when legal texts are linguistically determinate. When sources of law are not linguistically determinate, there is space for a decision on the normative meaning and discretion. It is only in these cases that judges engage in creating law (Hart 1983b, p. 144). Given that the legal texts have a determinate pre-interpretative meaning, law is rationally determined in some (easy) cases and not in others (hard cases). If the texts are determinate in some or most cases, the nature of judicial interpretation cannot be understood but as the determination of the correct meaning of the text. Interpretative statements are thus descriptive, suitable to be accessed as true or false and correct or incorrect (Posner 1986, p. 181). The consequence of interpretative cognitivism is that legal interpretation doesn't entail any choice on the part of the judge.

As a doctrine, formalism is committed to the idea that judicial interpretation is legitimate insofar as it uses determinate interpretative methods to ascertain the meaning of the legal texts.[12] Normative precepts are more often than not a result of theoretical commitments of formalists regarding the nature of language and meaning (Wróblewski 1992, pp. 109–110; Spaić 2018). However, descriptive accounts of legal interpretation don't necessarily lead to normative commitments regarding judicial reasoning. Contemporary formalists are well aware of judicial choice resulting from indeterminacy of underdeterminacy language, interpretative approaches, and legal doctrine, describing their theoretical accounts of adjudication as "a commitment" and "an approach" (Nachbar 2020, p. 122) and defending it based on its positive consequences. The application of textualist or intentionalist interpretative rules should lead to predictability and legal certainty, values inherent in the rule of law (Gluck 2017, p. 2060), and positive institutional consequences (Sunstein 1999, p. 641).

Contemporary Criticisms of Formalism

In a sense, critical scrutiny of real and imagined formalist positions has been largely successful. Contemporary formalist theories of adjudication have explicitly rejected most of the ideas of classical formalism both in the civil law and in the common law tradition. Reinterpretations of formalism have narrowed down the space for disagreement, but they haven't eliminated it.[13] As a theory and doctrine, contemporary formalism is still attacked and defended as a position in legal interpretation and adjudication. Most of the debates don't rage on the philosophical level, but on the level of various doctrinal instantiations of formalism, like textualism and originalism, and multiple instantiations of antiformalism, like purposivism in statutory, evolutionary interpretation in international law, or living tree constitutionalism in constitutional law. Even though doctrinal positions often incorporate theories of meaning and accounts of adjudication and interpretation, the central points of the debates regard the justification of determinate interpretative and adjudicative methods. In some jurisdictions, doctrinal writings and opinions that carry the formalist banner have gained significant prominence in recent decades, despite a considerable body of literature criticizing textualist and originalist approaches. Overall, formalist authors have done well to accommodate new developments in the philosophy of language, revising fresh challenges

[12] In most contemporary writing, formalism is understood normatively: "The real debate between formalists and realists is normative" (Solum 2006, p. 2492).

[13] Recent authors claim that the essential feature binding various contemporary strands of formalism is merely the "commitment to interpreting law through its form instead of deriving its meaning in some other way" (Nachbar 2020, p. 160). Consequently, formalism is a component of methodologies of interpretation and not a group of methodologies (Nachbar 2020, pp. 163–164).

to the claim that linguistic meaning significantly determines legal interpretation (Solum 2021, p. 2041).

As a theoretical position, formalism hasn't been faring so well. The dominant critiques of formalism stem from contemporary American or European legal realism. Recent critics have been astute in identifying the plausible core commitments of formalism, at times even more so than the self-professed formalists. Brian Leiter has insisted that the central disagreement between formalists and realists regards the determinacy of law and the autonomy of legal reasoning. Formalists mistakenly assume that legal reasons, including sources of law, interpretative methods used on sources to extract rules, and modes of reasoning, lead to determinate solutions to legal disputes, precluding judicial discretion (Leiter 1999, p. 639). Given that legal reasoning is indeterminate in those cases that reach appellate review, the formalist position is sustainable up to a point, but not as a sound description of the entirety of judicial reasoning (Leiter 2010, p. 112). A more radical position, arising from the criticism of the formalist commitment to identifying the legal form and its normative content, has been forcefully defended by Riccardo Guastini. According to him, the indeterminacy of legal texts doesn't concern only the denotation of legal terms but, more importantly, the ambiguity of every legal proposition. If a legal proposition expresses different norms, judicial interpretation – the ascription of one definite normative meaning to a legal text – is necessarily a choice between multiple possible normative meanings (Guastini 2011; Guastini 2005, p. 141).

Eventually, both the normative and descriptive debates have some bearing on judicial practice and empirical inquiries into adjudication. Attempts to chart judicial behavior along formalist or antiformalist lines have been abundant in US political science (Segal 2011) and have recently gained some nuance in the growing field of experimental jurisprudence (Bystranowski et al. 2021; Barry 2020; Tobia 2020, pp. 798–804; Czarnezki and Ford 2006). And while new insights about judicial reasoning and interpretation are expected given the unsettled descriptive, conceptual, and normative debates surrounding formalism, so are some new equivocations regarding its truth, usefulness, and scope.

Cross-References

- ▶ Institutional Control of Interpretation
- ▶ Interpretation: The Realist View
- ▶ Legal Realism, Russian
- ▶ Legal Relations: Theories of
- ▶ Legal Reasoning: Virtues

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Fortescue, John

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Introduction

Probably the most prominent jurist and political theorist in fifteenth-century England, Sir John Fortescue (c. 1395–c. 1477) was active in the service of Henry VI, both as a propagandist and as Chief Justice of the King's Bench. His most important works are *Opusculum de natura legis naturae* (1461–1463), *De laudibus legum Angliae*

(1468–1470), and *The Governance of England* (1471), the first treatise on the constitution of England written in English.

Natural Law's Primacy

Only recently have historians of legal and political thought begun to offer a reconstruction of Fortescue's doctrine that does justice to the complex and, in some respects, ambiguous nature of his theory of law. Previously, there was a tendency to focus almost exclusively on the one element that most commands the attention of those who approach his reflections on this theme, namely, the presence in his writings of a philosophy of law (of clear Thomist inspiration) whose keystone is the natural law (hereafter NL). Exemplary in this regard is the "little treatise on the law of nature" contained in the first part of the *De natura legis naturae* (1.47), aimed at proving the undisputed superiority enjoyed by this law: a primacy that derives from it having governed the human race from Eden until the delivery of the tables of the Law to Moses and from the fact that it remained in force even after the introduction of Mosaic Law, first, and then of the Gospel Law.

Fortescue first of all highlights how, far from sanctioning its abrogation, Christ confirmed NL and explicitly ordered its observance by summarizing its commands in the words "whatever you want men to do to you, do to them" (Matthew, 7.12). Fortescue then takes a further step and adopts the thesis expressed at the beginning of the *Decretum Gratiani*, according to which the "ius naturale" is nothing other than that "contained in the Holy Scriptures and in the Gospel" and which coincides in particular with the commandment just cited. Like the canonists of the twelfth and thirteenth centuries, Fortescue fully equates the law of nature and the one contained in the New Testament and sees in NL a system of moral principles of divine origin: an origin from which he draws a further argument in support of the absolute primacy of that law.

The idea that NL "is not only human" but has a divine dimension too returns in the second half of *De natura*, together with the conviction that, although the *lex divina* shines sufficient light to resolve all questions concerning the spiritual life, there is also a need for a second source of clarity, by which God's law dispels the darkness of ignorance in human beings and "puts an end to their conflicts through human laws" (1.42). Starting from these assumptions, Fortescue develops a conception of law according to which every human law is necessarily grounded in NL, from which it draws its moral value, as well as its vigor, "almost in the form of a loan." In line with mainstream medieval legal thought, he states that "all other existing human laws have validity only by virtue of the authority of that law, which they are obliged to integrate" (1.5). The NL excels over all other normative systems and provides their foundation, by virtue of the fact that it derives from the divine will – being nothing other than participation in the eternal divine plan by every rational creature – and that it has remained immutable since the appearance of the first beings endowed with reason. Indeed, God created at the same time humanity and the set of rules of justice on the basis of which man could exercise full dominion over the rest of the world. Fortescue went so far as to compare the relationship between man and NL to that between substance and accident. Difficulties arise when, despite this indissoluble union, men with the power to legislate promulgate norms in contrast with the NL: rules that Fortescue considers to be devoid of any force, in accordance with an established view in the tradition of English legal philosophy that goes from John of Salisbury's *Policraticus* (1159) to Christopher St. German's dialogue *Doctor and Student* (1528). These thinkers share the idea that divinely created law of nature is the standard against which every norm or human decision is to be tested. In their view – as in that of Thomas Aquinas – the function of civil laws is merely to apply the precepts of the superior juridical body, i.e., of NL, to life in a specific political community through norms that, in order to be valid, must conform to the universal moral rules contained in that law.

A Positivist View of Law

There are, however, pages where Fortescue stresses the entirely human character of the NL, as well as others in which he emphasizes the coercive nature of laws, consisting essentially in commands and prohibitions. Indeed, he goes so far as to trace the etymology of the word law back to the verb *ligare:* "whence law may be said to be the bond of right by which someone is forced to do or suffer what is right" (1.30). Now, a similar definition can be interpreted in widely different ways, depending on whether the term *justum* is taken to mean "what is considered right for (and by) the community" or understood in an objective sense. While there are many statements by Fortescue corroborating this second interpretation, in his well-known analysis of the model of English government, any reference to the divine plan disappears in favor of the idea that the authority of laws derives from the will of the community.

On a more general level, at the origin of every civil law Fortescue establishes the human will, which gives its form and vigor: the arbitrariness of an individual, in the first of the forms of government distinguished by the author, the "dominium tantum regale," an absolute monarchy whose ruler governs according to laws he himself has made but from which he is exempted; the decisions of citizens, when there is a purely "political" constitutional model; and a joint act of the king and the people, in those countries having the good fortune of having a government, "both royal and political," that is a mixed lordship that combines the benefits of kingship with wide political participation and the supremacy of law. From the conception of laws as the product of men's choices, there stems the idea that, far from always being the same, laws vary from place to place and change over time. This idea – at the same time, an acknowledgement based on the experience of how things actually are – in turn further reinforces Fortescue's convictions about the purely earthly origin of civil laws, which are inevitably destined to change through man's laborious search for a regulatory system that is as "appropriate" (*De Legibus*, 30) as possible to the needs and expectations of the particular civil community it regulates.

Another consequence of Fortescue's voluntarist and earthly view of human law is the idea that humanly created rules are to be treated as laws irrespective of their actual moral quality. Provided that secular laws are duly enacted, they are fully valid regardless of their content; therefore, even bad laws are still laws. This separation between law and morality is the result of the idea that a rule acquires the status of law only because men who live in a certain area see it as an instrument temporarily useful to the common good and, therefore, agree to accept it as part of the legislative body of their country.

Ambiguities in Fortescue's General Theory of Law

Fortescue's legal thought shows an intrinsic tension, and at least potential contradiction, between two different sets of ideas: on the one hand, statements wholly in accordance with the line of thought of NL theorists, which had long been dominant during the Middle Ages, and, on the other hand, certain concepts that were instead typical of an emerging positivist outlook in English legal theory, which was destined to assert itself with ever greater force in the sixteenth-century England and to make a decisive contribution to the modern notion of legislative sovereignty. This tension also inevitably affects the way Fortescue conceives NL, to which he attributes sometimes a human and temporal character and sometimes a divine and eternal one. Similarly, in certain pages he envisages coercive power as the discriminating element of civil law and proposes a thoroughly earthbound conception of law, but then there are other pages in which Fortescue argues in no uncertain terms that every true law "must be fair and good," on the basis of the principle according to which "law is a sacred sanction commanding what is honest and forbidding the contrary" (DL, 3). Now, without having the presumption of resolving this basic tension and of artificially harmonizing theses that reflect the profound transformation of English

legal thought typical of Fortescue's years, it is possible to at least partly trace this tension back to the impact that the author's constitutional reflection had on his way of conceiving the law. According to Fortescue, in every "political and royal dominium" – the ideal system of government – law is the result of the combined action of the king and of the representatives of the community; as such, it has its roots in the "intentio populi," the will of the people. It seems, therefore, that a desire to praise the English political model is what brought about a change in Fortescue's theory of law, by attenuating its theocratic character and sometimes leading him to assign justice an eminently human matrix.

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Foucault, Michel

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> "You see, what I want to do is not the history of solutions, and that´s the reason why I don´t accept the word 'alternative.' I would like to do genealogy of problems, of *problématiques*. My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads not to apathy but to a hyper- and pessimistic activism." "On the Genealogy of Ethics: An Overview of Work in Progress," *Michel Foucault: Beyond Structuralism and Hermeneutics* (1982).

Introduction

What Michel Foucault (1926–1984) did was to think over the political power. His analysis of the political forms is not limited to the state realm . This power embraces hospitals, workplaces, residencies, prisons, and schools. Finally, this "biocracy," or living management, substituted the administrative character of the State.

Michel Foucault was born in 1926 in Poitiers. He was raised in a traditional bourgeois Catholic environment. He was influenced by having descended from a family with a tradition in surgery. His ancestors were prone to drastic medical activity without any intellectual reflection (Michel Foucault, *Le beau danger. Entretien avec Claude Bonnefoy*, 2011). He did not find his comfort zone in Rue d'Ulm in Paris during his sojourn as a *normalien*. That is why his intellectual path was so far flung. He travelled to Uppsala, Warsaw, Hamburg, Tunis, Rio de Janeiro, Clermont-Ferrand, San Francisco, Stanford, and Tokyo, among other places. He was influenced by thinkers such as Nietzsche, Heidegger, Merleau-Ponty, Canguilhem, Blanchot, and Bataille. He was never engaged either at the Sorbonne Université, whose roots are Catholic nor at the École des Hautes Études in Social Sciences, where he was rejected, but he held a lectureship for life at the Collège of France, whose roots were Protestant. He died in 1984 of from to AIDS (Didier Eribon, *Michel Foucault*, 1984).

The Juridical Model as a Contrast/Opposition

The juridical model for explaining political power is rejected by Michel Foucault, but it acts as a very important countermodel. Norms, law, and

regulations are products of the state. For Foucault, the state mechanisms for exerting power are very important, but this normative procedure of regulation has a very limited scope. Normativity has simple and minor effects by comparison with the huge and wide-ranging realm of standardized control.

Normalization is much more closely linked to crime prevention; it covers much more ground than punishment. The codification of behavior is much more useful than the punishment of crimes and torts.

Normalizing is effected through two different procedures: firstly by regulating daily corporal movement and custom as if it were law, thereby imposing on work and pleasure a constant structured discipline; and secondly by way of a biopolitics of populations. The normalization through discipline of human behavior is effected by medical institutions (hospitals), pedagogical institutions (school, university), custodial institutions (detention centers, prisons, penal facilities), and health and rehabilitation organizations (psychiatric and asylum institutions).

The biopolitics of populations is a strategy of power aimed, among others, at two different goals: to increase the birth rate, while at the same time fostering its work efficiency; this is an intensive and decentralized control over population. Birth rate and work efficiency are two of biopolitics´ possible targets, which include any large-scale biosocial feature in a given population (morbidity, mortality, agricultural production, sexual customs…). This is called *gouvernementalité* – or governmentality, the tendency towards extending of the scope of power – and it does not belong to the realm of the State. Discipline is a power that controls gestures, normal practices and body activity, human life time, continuously and completely. Discipline provides omnivisibility, registration, and written behavior.

It matches with the necessity of capitalism to improve the quality of work as input. This result is achieved through a constant and meticulous intervention on citizenship (implying control over birth, procreation, longevity, sickness, and death). The study of the mechanism of normalization does not underestimate the role of the law and the state in regulating conduct in these areas. Foucault argues there is a dialectic relationship between the juridical explanation of power and the concept of state sovereignty.

On one occasion he declared, "I have no phobia of the state." This engagement with the law is a key to Foucault's thinking.

In 1983, shortly before his death, he made a proposal to create an Institute of Legal Philosophy in Paris.

The Dissonance Between Confession and the Enforcement of Penal Law

Foucault laid out the fundamentals of his research, strongly focused on criminal sciences, in his work *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice* (1981). In these writings, he analyzes the study of the unequal justice which originated from the judicial trials of Christian confession, the alternatives opened by medicine, the criminal sciences, and public security, in a world deeply marked by a concern with law and order. He also drew up a meticulous record of the proliferation of work in the aspects of society relating to madness, illness, and crime. When his detailed analysis reached the nineteenth century, he realized that one of the masterful devices of the legal system – the judicial confession – introduced a great deal of imbalance into penal law. In his courses he tried to analyze "the duty of telling the truth about oneself," and its consequences as shapers of the subject, which has been transformed by psychiatric science into the intersection point between the Christian tradition and the new contemporary psychiatric therapy, which provided the judicial process with a much more accurate body of research.

These lectures reflect some political and historic arguments, previously delivered in the Collège de France courses, taught between the academic years 1970 and 1973, and which led him to the writing of his masterpiece, *Surveillance and Punishment*.

In this research, he examined the distortion as a consequence of what happened to the confession, a key point of the inquisitorial process during the

eighteenth and nineteenth centuries. Up until then, self-incrimination of the defendant under suspicion was the main piece of evidence used in the criminal process. But the early transformation into the traditional version of confession was, as a result, unavoidable and imperative, and upset the well-established workings of the judicial machinery. The supposed defendant does not confess his/her crime and only leaves unfathomable conjectures as to his/her motives.

The Judicial Apathy of Penal Institutions

Foucault dismantled the whole "religion of judicial confession" on which modern penal procedural law was based. A huge "economy of the truth" started from the very first police interrogation to the last public hearing, seeking crime recognition, which must be done by the defendant him/herself.

Foucault highlighted the judicial laziness of the penal system, which was typical of the past century. As an example, he mentioned the execution of Mr. Ranucci, who was guillotined on July 28, 1976. In an ordeal in which judicial instruction was carried out for 5 days in a stressful environment, the final objective was for him to plead guilty to the horrific crime he had committed. What that process really reflects, he wrote, is that it is an indolent justice system.

Judicial testimony makes the functioning of penal law difficult due to the huge disagreement between the parties.

The more truthful the claim is for the jury, the more likely is the delinquent's confession to result in a judicial anomaly. The problem is framed around judicial practice, but despite that, it goes beyond penal law, since the modern day search for the truth incorporates government technology which produces many different kinds of subjectivity. The present obligation to tell the truth can be found in many places, and often in religious and medical practices.

The fundamental mutation in judicial testimony in court, according to Foucault's argument, happens through the transition from its deficient form, always via the declaration "acknowledge your guilt, ratify your responsibility," to the hermeneutical manifestation: "tell us who you are."

He highlighted the dramatic role of the judicial confession in some specific and violent cases which took place between 1805 and 1835 without any specific purpose, and which had already been examined in his course *The Abnormal* (Collège de France, 1974–1975). By that time, the judicial confession was so weak that it failed to produce a satisfactory explanation instead of performing its enlightening task: to serve as irrefutable evidence of criminal liability.

The judicial inquiry into the case of Pierre Rivier, accused of murdering his father, achieved two goals: on the one hand, it illustrated a controversial mode of truth, grounded in Nietzsche´s philosophy (this controversial model reflects the confrontation between that of the medical, psychiatric and media establishment and at the same time, that of the murderer´s memories); on the other hand, it leaves open the black hole that judicial reasonability does not solve after the sentence has been delivered.

Judicial truth was the consequence of social and judicial practices. His writings in *Acting Wrongfully, Telling the Truth* developed a research field previously drafted in "*A verdade e as formas jurídicas*" *Universidade Católica de Rio de Janeiro*, in 1973. When he mentioned the "juridical-political matrix" (*mesure-enquête-examen)*, it was in order to stress the rise of some natural and human sciences.

An Exhaustive Knowledge of the Delinquent and the Citizen

The eighteenth century judicial questioning for guilt "do you admit your guilt, of the crimes you are charged with?" – which implied the defendant's unquestionable culpability – was changed for the mandatory injunction with the deep and exhaustive question: "who are you?".

Fabien Brien and Bernard E. Harcourt pointed out that judicial confession and the hermeneutic of the criminal subject configured both a soft and a hard power. Both views of truth are framed in Western democracy.

"The fact that only madness can trigger a crime opens an endless crime/madness feed-back mechanism, in a society already faced with the threats of delinquency"

The alliance between criminology and psychiatry expanded the social control webs much more deeply than when it was focused on those stealthy criminals. *The subnormal* (Collège de France, 1974–1975) had already drawn attention to the expansion of control over the new and emerging diseases, such as necrophilia (1840), kleptomania (1860), exhibitionism (1870), pederasty (named homosexuality in 1869), and sadism. This entire panoply of felonies is expanded, and psychiatric intervention is extended in dealing with such crimes. Psychiatry examines not only the monstrosity of crime but all other felonies as well, since in all of them lies the shadow of madness.

Monomania is exempted from responsibility; individual and familiar degeneration qualified any crime or misdemeanor as a possible source of madness. In Foucault's criminal history, social degeneration is fostered by police surveillance of the territory.

What is at stake is not the treatment of the unknown, but police watch over the whole population. Confession is utterly inadequate as a medical forensic investigative tool, which has as its main target combating crimes. Currently, the goal is not to inquire into the defendant's conscience but to prioritize social defense and crime prevention. Political crimes – the revolutionary crimes of 1848, the establishment of the Paris Commune in the wake of the Siege of Paris in 1870, and anarchical uprisings at the end of the nineteenth century – and common crimes are viewed in the same urban light which criminalizes the social body. Society must defend itself from the imminent danger, that which supposes widespread delinquency.

Foucault detects the failure of the penitentiary system from the nineteenth century onwards. This crisis was present in the meetings of social reformers of the time. In Foucault's mind, penitentiary facilities reproduce and feed back into the sealed system of delinquency, police, social surveillance, cycling back to delinquency and surveillance over the population. In this way, the penitentiary system has become a generalized surveillance device rather than a resocializing institution for delinquency. The whole construction of penal imputation, juridical principles, and notions dates back to the late eighteenth and early nineteenth centuries; it was surpassed by the rise of the idea of public safety, something which was the original target of the school of criminology.

Foucault realizes that devices such as confession and cross-examination, already present in the Age of Enlightenment codes, were eclipsed by the forces of psychiatry, criminology, and psychology, since all of these sciences promised public safety in a society which was actually scared of imminent offences.

Surveillance Takes the Place of Punishment

Theories and penal institutions (1971–1972), *The Punitive Society* (1972–1973), "The Power of Psychiatry" (1973–1974), and "The Abnormals" (1974–1975): all these writings make up the *travaux prepartoires* that lay the groundwork for the modern analysis of panopticon society that culminated in Foucault's *Surveillance and Punishment* (1975). The main goal of his analysis was to unlink the juridical conception of power. This is one of many other tools that the theory of sovereignty accomplished in its role of legitimizing political power. Foucault stresses its functionality in modern society.

In some way, now that we are in a very different time, law has a fundamental task in Foucault's thought: the production of those "fictions" that political powers require in order to act in a very effective way.

All through the eighteenth and nineteenth centuries, the theory of sovereignty and its durability has played a twofold role: on the one hand, it has served as an ideology challenging the Ancien Régime; on the other, in Foucault's opinion, the codification of law, based on the notion of natural sovereignty, was used to promote the advancement of modern disciplines, concealed under the guise of constitutional rights with due process guarantees, in an environment of domination and

inequality maintained by enforcement mechanisms.

In this way, in our current society, a mechanism of power, grounded on social pact and people´s sovereignty shelters the subtle exercise of power over every person, which is carried out by means of work, spare time and the framing of the social space, and last but not the least an endless surveillance.

In this way, Foucault reframes the purpose of law as an organizer of the entire social system. In *Surveiller et Punir*, he dismantles the reductionist conception of power which prioritizes the repressive effect of power, but this turns out to be a useless tool, and the analysis makes it possible to observe the much more complex effects of power.

Surveiller et Punir restates the relationship between power and law. The juridical consideration of power highlights the enforcement of law, but in Foucault's opinion, such enforcement does not regulate social organization. Legal obligation only happens in the very confined political realm of government.

The strategy of power is much more insidious than the bare juridical strategy: it penetrates, and at the same time creates, the social body, not only through law but also through other disciplines; and not so much by means of prohibition but rather by incitement, seduction, and the creation of knowledge.

In this sense, *Surveiller et Punir* analyzes the historical materialization of the power-knowledge relationship from the beginning of the nineteenth century. *Surveillance and Punishment i*s not confined to a search for the *repressive* effects of punitive law but also investigates the *positive* effects, which are different from punishment. Foucault realized that punishment plays a much more socially complex role: punitive methods are not the result of legal and social structures but rather result from the techniques of power, which are much more complex. The abovementioned writing analyzes the punishment of offences as if it were a political tactic.

The eighteenth century question relating to the accused: "do you recognize your responsibility for the crimes you are accused of?", which means the absolute recognition of indictment's culpability, was substituted by a general demand of deep and exhaustive knowledge of the defendant: "who are you?". Fabien Brien and Bernard Harcourt highlight that the confession of the crime motive, and the hermeneutic on the defendant's behavior represents two kinds of control: one soft, which has become generalized, and another hard, akin to the defendant. Both versions of subject's veridiction are located in the realm of liberalism.

After all, social madness of the delinquent has a very short range. Psychiatry and criminology wide social web control, much more extensively. Both sciences do not bring into focus the stealthy criminal monster.

In both *A History of Madness* and *Surveillance and Punishment,* Foucault agrees that objectivation of social space becomes affected by social institutions, due to some kind of social normativity which differs from juridical normativity.

The much more persistent control mechanism does not operate through law but uses gaps in the same law. This mechanism does not follow the rule-of-law principle, but uses regularity and order as parameters of functionality.

A system of social control is much more persistent than a juridical one, since social control puts the whole population under vigilant tutelage as if they were minors. On one side, the task of protection and security, and on the other side, its theoretical and juridical justifications operate on the state of minority.

In such a way, normalizing power established at the very beginning of the nineteenth century does not operate by law enforcement, but by using social norms and disciplinary control. It is an extra-juridical control that arises out of the loopholes in the penal law, the social contract, and the "separation of powers."

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Fourier, Charles

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Introduction

Charles Fourier (1772–1837) was a French Social Theorist born in Besançon France in a family of the commercial petty bourgeoise. He advocated for a form of socialism based on a communal association of producers (*phalanges*) that would foster human passions and self-fulfillment. Fourier was among the postrevolutionary socialists that most influenced Marx and Engels (Bruhat 1972; Engels 1975).

Growing up in the milieu of the cloth merchants and the provincial petty bourgeoise, Fourier developed very early a hatred of capitalism because of the corruption of social and human relations it produced. He inherited his father's business as an entrepreneur and moved to Lyon

in 1793, in the middle of the revolution, where he started a business of imports of colonial goods. Lyon's uprising against the new Republic and the subsequent economic crisis that followed completely ruined him. Having lost all his capital, Fourier became a commercial employee for the rest of his life (Beecher 1986).

When he was working as a commercial clerk in Lyon, Fourier experienced first-hand the sharp social contrast between an increasingly impoverished proletariat and a small wealthy class of speculators which contributed to his further radicalization. In 1808, he wrote his first major work, *The Theory of Four Movements*, although it is believed his project to invent an alternative society can be backdated to as early as 1799 (Fourier 1996).

In 1812 Fourier inherited his mother estate which gave him a greater financial independence and allowed him to devote himself more fully to writing although he continued working on and off as a commercial clerk for different companies. In 1822–1923, he began his most ambitious systematization of this projected socialist project which was left incomplete of which he published an abridged version in 1822, the *Traité de l'association domestique-agricole* and later in a longer form (*Universal Unitary Theory,* 1832) (Fourier 2001b). His model of the phalanstery was popularized by the *Nouveau monde industriel et sociétaire* issued in 1829 and intended to proselytize and fundraise for his project (Fourier 1971, 2001a).

As early as 1814, Fourier began to gather around him, a small group of followers. The most prominent among them, Victor Considérant, a young Polytechnician who joined the "Fourierists" in 1825, became the main continuator of the movement after Fourier's death into the 1848 Revolution. In 1832, the Fourierist group was strengthened by a split of the most talented Saint-Simonians under the leadership of Enfantin, which had become a hard cult (Bruhat 1972).

In the last period of his life, Fourier contributed often to the two journals of his movement issued by his disciplines (*Le Phalanstère, ou la Réforme industrielle* issued between 1832 and 1834 and followed by *La Phalange* between 1835 and 1836) and gave numerous public lectures. Fourier was never able to implement his ideas because of lack of funds. He however began fundraising as early as the 1820s looking for "benefactors." He personally wrote and sent his publications to Napoleon, government officials, deputies, bankers, diplomats, or wealthy or well-known writers (such as Germaine de Stael, Chateaubriand or George Sand). He also held regular dinners on Thursday nights between 1828 and 1835 to attract potential investors, but most of the time nobody showed up or responded to his pleas. Despite this, his work inspired many experimental communes modeled in the phalanstery project (Beecher 1986; Bruhat 1972). The most known are: the *colonie sociétaire* in Condé-sur-Vesgre in France, which began in 1832 and was abandoned two years later because of lack of funds and was repudiated by Fourier because of its deviations from his writings: *L'Union industrielle du Sahy* (Brazil, 1841–1845), Arthur Young's *Colonie sociétaire de Cîteaux* (France, 1841–1844), the *Union Agricole de Saint-Denis-en-Sig* (Algérie, 1846); Considerant's *Societé de colonization au Texas* (1855), and the *familistère* de Guise (France, 1859–1884) which was preserved and classified in 1991 as an historical monument and harbors today a museum.

The Laws of Attraction

In the *Theory of the Four Movements*, Fourier exposed for the first time his social system called "Harmony." Although this first book functioned like a "teaser" or a prospectus before the complete unveiling of his full project, in it our author proposes a new form of organization of labor established according to the needs of human passions, which are analyzed and systematized. In his cosmogony, the world is divided in four realms (material, organic, instinctual, and social), each of them in "perpetual movement" and following "laws of attraction" which ought to be discovered. Yet so far only Newton had only discovered the laws of motion of the realm of matter. Fourier's project was thus to elucidate the "laws of attraction" that explains social movements and the internal dynamics of social arrangements (Tacussel 2007). The engine of social exchanges was to be located in human passions and desires,

which Fourier understood in an analogous way as Spinoza' *conatus*. Fourier identified a total of 12 different social passions at play in our social relations and productive and creative activities. By calculating all possible combinations, he concluded that there were 810 types of characters and that the ideal phalanx should house 1620 persons, one of each type for each gender.

The French socialist openly broke with the philosophical and the French moralist classic traditions which severely condemned all passions and desire. Fourier blamed his predecessors for their failure to understand the true nature of humankind, that is, its passionate nature, and reducing human beings to their reason and analytical capacities. Despite his condemnation of all philosophy, Fourier's own philosophical underpinnings are very akin those of the French neo-spinozists materialists: his pantheism and regular conflation of God and Nature, his insistence that all passions have a divine origin, his rejection of dualism and pursue of parallel ontologies to understand the different dimensions of the natural world, and of course his centering of passion and desire as the center of human life.

Having repudiated theology, philosophy, and moral discourse, Fourier turned to science to ground his system and discover or calculate the perfect social arrangement. He borrowed liberally some concepts such as mathematical series and calculus from his uncle Joseph Fourier, a renowned physicist. Fourier's writings are full of neologisms and permanent classifications and organizations of social possibilities (Debout 1999). His work is a combination of scientific aspirations and literary imagination and can be read as part of the precursors of modern science fiction in that regard.

The Critique of "Civilization" and the Identity of Labor and Enjoyment

Both Marx and Engels were greatly influenced by Fourier despite the label of all preceding forms of socialism as "utopian" because of their failure to develop a political strategy to achieve socialism. They recognized in Fourier's work the most radical and uncompromising critique of the modern industrial society and free-competition capitalism (Abensour 1992). They also borrowed the core of the Fourierist materialist project of emancipation which was to combat human alienation at all levels (from economic to passional and spiritual) and to restore the identity between labor and enjoyment. This is apparent since Marx's 1844 *Manuscripts* (Marx 1992).

Fourier was indeed a declared mortal enemy of the new "civilization" (i.e., capitalism) because it was nothing but "organized anarchy" producing vast poverty and repression of passions everywhere it developed. Of the capitalist system, he criticized its new forms of property, specifically the failure of private property which he labeled "simple property" to which he opposed "composed property" which will be, in the new societary world, individual possession put at the service of the collective. Fourier also developed a critique of "commercial parasitism," that is to say the system of "free competition" and commercial exchange. As a whole, "civilization" or capitalism created a "fragmented" industrial system, where the system of production, consumption, and distribution were working at odds with each other, producing both waste and poverty (Fourier 1971).

The premise of the phalanstery, the relatively small units of living and production which composed "Harmony," was to reestablish a non-alienated link between work and personal fulfillment by connecting work tasks to one's passions and develop them. Fourier envisioned a division of labor based on short sessions where each one will be assigned to tasks one has an inclination for, building both on natural passions and social ones (such as group work, emulation, public recognition for the hardest chores). The phalanstery was to be the place where through a careful mathematical arrangement which will assemble humans according to their natural and social inclinations, work will be a passionate affair. He applied the same logic to human relations. In such a new socialist society, passions do not need to be repressed and they could be instead fully deployed and developed (Debout 1998; Schérer 1970). Such a society would not need any form of state or government institution, which for Fourier where inherently repressive and created to enforce coercion into forms of activity and relationality that did

not suit people. Therefore, Fourier did not develop any theory of government.

A Feminist and Ecological Thinker

Fourier was a staunch critic of the bourgeois family and the degradation of women under "civilization." He strongly criticized the marriage institution which he qualified as a form of slavery for woman and was a strong advocate of equal rights for women and of full divorce rights for partners. In the phalanstery, there childcare and maternity services are provided for, women have equal rights than men and equally participate in social production, and gender is not invoked to decide the social division of labor (Goldstein 1982).

More interestingly, his most radical work on gender and sexual liberation, *The New Amourous World*, was censored by his disciples and only published in 1967 (Fourier 2013). In it, Fourier applies his view of mathematical arrangement according to laws of attraction to love and sexual relations, departing from the radical understanding that all forms of relationship and sexuality are to be accepted and organized in Harmony (Beecher 1985).

Conclusion

Finally, Fourier's rejection of "civilization" is also based on a critique of the depending human alienation with nature brought by industrial production and the environmental destruction produce by the new system of production. Fourier's dream of a harmonious society seeks to restore nonrepressive and destructive relations among humans, but also between social formations and nature.

His political economy is one that minimized industrial manufacturing and recenters agricultural production, and craft making for labor is also to be a process of fluid exchange with the surrounding natural world.

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Fragmentation

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Introduction

Present-day scholars in international law and related fields generally agree that international law is characterized by "fragmentation." Certainly, the diagnosis is apt, given the proliferation of specialized fields of law, normative sources,

and corresponding institutions: for instance, matters of international trade, immigration, property, and seafaring as well as environmental issues and human rights are nowadays discussed with respect to distinct fields of law. A plethora of internationally active (quasi-)legal forums and organizations have emerged particularly after 1989, including the World Trade Organization and the International Criminal Court, alongside older organizations, such as the European Court of Human Rights and various United Nations institutions.

What, exactly, the fragmentation diagnosis means and entails, however, is a more complex issue – and one that raises fundamental conceptual and philosophical questions. These questions relate to the nature of law in general and international law in particular, its relation to conventional municipal law, and the supposed unity of international legal regimes. At stake are also our expectations regarding such unity, the relation of fragmentation to more positive processes like diversification and functional differentiation, or to contrary processes like constitutionalization and convergence, as well as the phenomena of globalization and modernization in general which are often perceived as fragmentation's root causes.

How much unity and uniformity must be assumed for an international body of regulation to be labelled as "law" in the first place – a question asked by Bentham, Kelsen, Hart, and their contemporary followers, oftentimes very critically (see Jovanović 2019, 16 ff.) – and what are the implications of international law's fragmented nature to its validity, bindingness, and normativity? Although unity must not be "fetishized," certainly we wish international law to amount to a relatively coherent legal order rather than a mere collage of unrelated pieces – at stake is thus the "unity, harmony, cohesion, order – and concomitantly, the quality of international law as a truly normative order," as formulated by Peters (2017, 680).

Jovanović (2019) argues that international law mostly qualifies as actual law with respect to all typical criteria, and in this argument, fragmentation emerges as a crucial test case. For Jovanović, international law remains proper law even given the fragmentation tendency, particularly if legal interpreters use international law with what he, building on Hans Vaihinger, calls the "as if" perspective – *as if* a coherent system of international law existed, and thereby strive toward congruence amid de facto diversity (Jovanović 2019, 222–6).

Besson and Tasioulas (2010, 9–13) similarly posit that international law amounts to proper law with respect to the most common criteria of how international law is created, recognized, enforced, and complied with as well as the abstract and general nature of its norms. Correspondingly, Besson (2010, 184) perceives fragmentation as "a constitutive feature of international law" and a guarantee of its democratic nature in a pluralistic world, not a threat to its coherence.

Far from being a mere judicial technicality, the diagnosed fragmentation of (international) law thus serves as a lens to broader questions of legal philosophy. We can perceive similar trends in other fields of law, too, but fragmentation has been considered especially typical of international law. The fragmentation question also arises most pronouncedly in international law scholarship and sparks the theoretical question related to the very nature of its object of study.

The Fragmentation Diagnosis

Most scholars would agree that the phenomenon that the term fragmentation typically denotes genuinely does exist, and most of them employ that term to discuss it. Several causes for fragmentation have been identified, starting with the very nature of international law as a decentralized field without a single legislator and states being organized "horizontally" rather than hierarchically with relation to it. Substance areas are also divided and delegated to different authorities already domestically so that each institution's global interaction creates differentiated structures.

More politically, fragmentation also emerges as result of states' inability to agree upon unambiguous framings in bilateral agreements, which provides law-appliers with significant interpretative leeway. Fragmentation may also directly serve the interests of powerful states in

accordance with a divide and rule logic, thus being partly the result of intentional political activity. (For these arguments, see Peters 2017, 674–5.)

Even when taking place primarily within law and for intralegal reasons, fragmentation proceeds amid concrete political challenges and social developments. Particularly globalization pushes toward increased cultural unification and convergence in governance but at the same time makes national and regional differences increasingly salient, giving rise to the unifying aspirations that highlight the problematic aspects of fragmentedness in the first place.

Further, rather than being hermetically sealed in international law alone, the legal fragmentation diagnosis reflects insights from the analysis of similar developments on adjacent fields like international relations (IR), sociology, political economy, or the environmental sciences. Therefore, viewpoints and terminology from broader sociological discussions on globalization, modernization, and multiculturalism, as well as IR debates on emerging multipolarity and pluralism, leak into the legal fragmentation debate. Scholars have, for instance, reinterpreted legal fragmentation in terms of functional differentiation and systems theory á la Talcott Parsons and Niklas Luhmann (Zürn and Faude 2013) and read it as reflecting the deeper fragmentation of the "world society" brought about by "modernization" (Fischer-Lescano and Teubner 2007, 40–41).

Legal scholars have offered a plethora of partly overlapping classifications to analyze the *kinds* of fragmentation at play. These include, first, "substantial," "regulatory," or "sectoral" fragmentation, which all roughly mean that a single phenomenon is covered by several, possibly contradicting legal regimes. The second form, that of "institutional," "structural," "jurisdictional," or "interpretative" fragmentation, stems from the existence of several players of different types within a single field of law, such as judicial bodies and non-legal international organizations, that may interpret rules differently and thus cause international law's internal inconsistency. Third, we may also identify a specific form of "normative fragmentation," referring to the loss of binding norms accepted as valid by all participating judicial communities. (See Andenas and Bjorge 2015, 4–6; Ambrus 2016, 203; Cohen 2019, 320–322.)

While fragmentation in some sense doubtless prevails, the tone of the diagnosis, however, varies. Depending on one's anterior premises and reasoning, the trend can be seen as positive or negative – as the loss of unity or as liberation from constraining forces and the first step toward functional differentiation. The term may thus connote melancholy, nostalgia, and perception of immediate danger but also pluralism, democratic empowerment, decentralized expediency, or simply modern effectiveness.

In Cohen's (2019, 327) formulation, the concept can be seen as "a mirror reflecting international lawyers' perceptions of themselves, their field, [and] its prospects for the future." Historically, the debate has proceeded in waves from post-Cold War optimism, to fear of incoherence in the first decade of the millennium, to a factual acceptance of the phenomenon, and to eventual calls for saying farewell "to the f-word" (Andenas and Bjorge 2015; Peters 2017; Agon 2022) and rather turning to the perspective of constitutionalization (Jakubowski and Wierczyńska 2016).

The concerns have not disappeared, however. Some scholars lament, for instance, the diversification of international criminal law and even see its unity as being at risk, although one might argue that plurality and internal tensions are particularly typical of this field (Stahn and van den Herik 2012). Such was perhaps the dominant tone in the 2006 report by the International Law Commission, chaired by Martti Koskenniemi, which mourned the loss of coherence and warned of increasing norm conflicts, although the Commission was open toward positive developments, too (International Law Commission 2006).

Certainly, fragmentation may create problems of insufficient coherence, give rise to conflicts between norms emerging from different frameworks, or fail to treat all legal subjects equally, for instance. The proliferation of substantial or regional forums may also enable countries' strategic forum-shopping, i.e., attempt to maximize utility by choosing an optimal framework to

discuss their legal concerns in. Most fundamentally, specific fields of law may lose their guiding principles. The term "fragmentation" is well suited to express such concerns, as it carries a predominantly negative tone; and, vice versa, anxieties are unlikely to dispel as long as we speak about the phenomenon in this terminology.

The Concept of Fragmentation

Although understandable, this terminological choice is also problematic. This largely follows from the very concept of "fragmentation," which carries a rich metaphorical implicature. The concept strongly connotes an anterior whole, such as a vase, manuscript, or computer hard drive, which has been fragmented in either a sudden shock or in a piecemeal fashion; in both cases, this is also an unfortunate change of status and mostly irrevocable (with the possible exception of computer hard drives which can be de-fragmented by employing a specific software). (For the full argument, see Pankakoski and Vihma 2017.)

Correspondingly, the metaphorical use of the term "fragmentation" in legal analysis presumes; first, "a decline from a past golden age in which international law was a single, entirely coherent system," second, that the transformation is detrimental; and, third, that unity and diversity are in conflict (Greenwood 2015, 38–9).

The first, past-oriented perspective is clearly false in historical terms: the earlier, largely bilateral arrangements between states hardly amounted to a pinnacle of international law in terms of coverage, effectiveness, or normative bindingness, and much of global legal regulation is only gradually emerging, as we come aware of problems related to climate change, artificial intelligence, targeted killings, and similar novelties. By erroneously assuming an anterior unity, the fragmentation diagnosis itself, somewhat paradoxically, summons the unity it denies.

The second and third aspects might be true but are not necessarily so. One may well argue that the proliferation of institutions for processing human rights violations, for instance, promotes, rather than undermines, the status of international human rights law. Neither does the increased number of regional forums for negotiations in, say, environmental questions per se dispel unity or coherence insofar as the actors operate under shared principles.

In fact, Peters (2017, 682–698) discusses several procedures already utilized by legal practitioners to create coherence between principles stemming from different areas of international law, including explicit obligations not to apply sectorial legislation in isolation from other existing international law. Rather than conceptual necessities, the relative proportions of differentiating and integrating tendencies appear to be contingent matters of judicial reality. The term "fragmentation," however, strongly hints that they would be inevitable.

Fourth, fragmentation is a paradigmatic example of a process concept: the same term denotes not only the condition of being fragmented or an end state of a fragmentation process but also that very process (cf. Peters 2017, 672). While we typically differentiate modernity from modernization, secularity from secularization, and liberty from liberalization, the term "fragmentation," by contrast, squeezes both the condition and the process into a single suggestive concept.

Further, as we typically assume processes to continue, the process concept of fragmentation comes with an ancillary prognosis that there will be even more fragmentation (as condition) in the future – another contingent matter and by no means empirically self-evident, particularly given how legal actors may intentionally strive toward more unity. These aspects together give the term prognostic, rather than merely analytical, power, ultimately derived from the term's internal conceptual properties (Pankakoski and Vihma 2017, 27–29 and *passim*).

This reflects the often-observed capability of social scientists' concepts not only to describe but also co-constitute social reality. Zajadło and Widłak (2016, 28) note the constructive power of language and point out how "the concept of the constitutionalisation of international law both reflects and at the same time shapes reality." This is no less the case for fragmentation, the concept that "constitutionalization" responds to. Already

the ILC report noted that "'fragmentation' and 'coherence' are not aspects of the world but lie in the eye of the beholder" (International Law Commission 2006, 12).

Fragmentation certainly challenges the unity and coherence of international law – but to conceptually codify these problems into the description of the phenomenon in the first place comes dangerously close to short-circuiting analytical terminology, empirical reality, and the observer's normatively loaded future expectations.

Alternative Concepts and Philosophies

International law is fragmented if we perceive it as such and in relation to an ideal unity either only emerging or located in the past. If we by contrast underscore the unifying potential in available international legislation, we may also wish to use alternative descriptions. Correspondingly, the fragmentation debate is flooded with several related concepts that either serve similar functions as "fragmentation" or construct the background against which the fragmentation diagnosis gains its strength.

As noted, fragmentation as prevailing condition is analytically distinct from fragmentation as a process. Fragmentation as a *condition* is primarily assessed in relation to such antonyms as unity, coherence, or convergence. The most central parallel concepts for fragmentation as a prevailing condition are diversity and plurality.

The fragmentation *process*, by contrast, oftentimes occurs together with the pluralization, differentiation, diversification, or sometimes "refinement" of international law (Peters 2017, 703), whereas its dominant counter-concepts include constitutionalization, integration, and sometimes de-fragmentation.

Some of these terms (such as diversity and plurality) carry significantly more positive inherent connotations than fragmentation. Particularly differentiation and refinement imply effectiveness and rational expediency, and they emerge as conscious attempts at dispelling the dominantly negative tone of "fragmentation" by creative reinterpretation. Such effects notwithstanding, the debate is still mostly conducted in terms of "fragmentation," though.

Since the mid-2010s, particularly "constitutionalism" has arisen as the dominant counter-concept of "fragmentation." So forceful is this trend that Zajadło and Widłak (2016) in fact propose constitutionalization as "a new philosophy of international law." Increased constitutionalization of the disconnected legislation and soft law could respond to the observed lack of norm hierarchy in international law and the complex problems of coordination and perpetual risk of politicization that stem from states being both the legislators and objects of international regulation.

The relationship between the fragmentation and constitutionalization of international law is complex and still evolving. They are "two competing models of reasoning," also related to normative concerns, and both are "arguably founded on the concept of unity in public international law," as Jakubowski and Wierczyńska (2016, 1) note with reference to Prost. The difference is primarily that of differing temporalities: whereas fragmentation conceptually implies a more united past and easily turns nostalgic in its dominant tone, constitutionalization conversely anticipates a relatively advanced future unity regulated by a coherent and hierarchical system of norms.

Constitutionalization and fragmentation are perhaps best conceptualized as "two inseparable poles around which the legal pluralism of international legal order gravitates" (Arcari 2016, 86). In fact, the two are intrinsically linked so that constitutionalization may proceed through fragmentation. The rise of regional constitutionalized regimes, such as European human rights law, can be read as a step toward greater overall constitutionalization, rather than the fragmentation of international law (Finck 2016). Yet in the short term such a development *eo ipso* creates multiple structures corresponding to the fragmentation diagnosis, and fragmentation is thus "inherent to the very process of constitutionalization in various sites" (Finck 2016, 95). Andenas and Bjorge (2015, 1) aptly describe convergence and fragmentation as being involved in a "Hegelian dialectic process."

In contradistinction to the dominantly negative normative connotations of fragmentation, constitutionalization has significantly positive undertones (cf. Peters 2015, 1 and *passim.*). This positive ring has a long historical pedigree: it emerged with the crucial function of written constitutions in securing human rights since Enlightenment philosophy and the French revolution which enabled also later projects of cosmopolitanism and a worldwide republic, and continued with nationalistic perspectives of a constitution presumably codifying the essence of national unity and a unified will of the state conceived as a person. Furthermore, the very term "constitution" and its various equivalents in related languages carry a connotation of physical or bodily constitution and is easily combinable with organic analogies of the state as a unified formation, whereas fragmentation shatters such unity and is easily associated with mechanization, modernization, and excessive rationalization.

Positions in the fragmentation/constitutionalization question may be quite independent of normative philosophies. Nevertheless, at least elective affinities can be perceived between them. Efforts at constitutionalizing international law are typically linked with legal thinking in the natural law tradition, Catholicism, cosmopolitan universalism, or republican endeavors, such as those in Habermas's "Neo-Kantianism" (see Zajadło and Widłak 2016, 24–5; Jovanović 2019, 117). From those perspectives, fragmentation appears as a temporary challenge to be overcome by the public use of reason on a global public sphere, which would also give rise to overarching constitutional principles and, via increased civic participation, provide the required democratic legitimacy for global legal regulation.

While fragmentation diagnoses are haunted by nostalgic and melancholy undertones, the pathological form of constitutionalization is utopia, critics would argue. Those with skepticism toward universalism and the purportedly concomitant unipolarity of the global order tend to agree with the fragmentation diagnosis, but only interpret it differently – as a sign of the eventual impossibility of uniformity and normative hegemony. Political philosophers like Chantal Mouffe (2005) find inspiration for these arguments in the international thought of Carl Schmitt, who identified universalism with imperialism and rebutted anything resembling international law as Anglo-American liberal attempts at world domination (see, e.g., Koskenniemi 2013).

Also followers of Jacques Derrida and other poststructuralist equally reject ideas of overarching totalities and rather embrace the fragmentedness of meaning in general; a parallel affirmatively reading of fragmentation of international law as welcome liberation from traditionalist shackles and the antidote of any possible totalitarianism follows effortlessly. From these perspectives, fragmentation is an index of lacking foundations and a welcome interim stage on the way to the full disclosure of universalism's impossibility.

Conclusions and Future Developments

While the fragmentation debate arose in post-Cold War conditions of relative multipolarity, the contemporary world order shows tendencies – and states' intentional aspirations – toward a reintroduced bipolarity, particularly in the defense and security regime. The historical setting that sparked the fragmentation process and discussion now appears in a somewhat different light.

Countries like Russia or China, together with their allies, promote multipolarity on the first level of direct political goal setting to challenge the alleged Western hegemony. On the second level, their attainment of long-term objectives may necessitate intentionally undermining the purported unity of "the West," and introducing alternative negotiation forums, regional organizations, and bilateral treaties rather than globally binding norms might appear instrumental here.

Whereas these two levels point toward increased fragmentation, the equally purposeful political response on the part of the EU and its Western allies may entail increased coordination and unification of responses and their legal support. Politically driven regional unification may thus undermine genuine globality. Also here fragmentation and convergence interact in complex ways, and multidisciplinary scholarship in international law, international relations, and adjacent

fields will be needed to comprehend the intricacies of this possible development.

On the broadest level, however, the inextricably global nature of the most pressing current challenges pushes toward increased unification or constitutionalization of international law and intentional attempts at overcoming the prevailing fragmentedness. Tackling climate change is the main driver of global environmental law and one that pushes toward unified international law in general.

Lately also the COVID-19 crisis, however, has been read as a potential catalyst for a unified global health scheme relying on transnational governance structures and on the authority of international law to target further zoonotic pandemics (Peters 2022). The pandemic has also been perceived to necessitate wider perspectives in the academic fragmentation debate, such as increased consideration for soft law measures and non-judicial actors, like the World Health Organization or the United Nations Security Council, who despite their non-judicial status crucially contribute to the practice of international law and whose activities may induce norm conflicts comparable to those resulting from overlapping branches of formal law (Agon 2022).

Alternative ideas like constitutionalization, converge, or functional differentiation may be useful in future scholarly endeavors. All its conceptual limitations notwithstanding, saying farewell to the analytical concept of fragmentation altogether, might be difficult, given how deep the term sits in available scholarship since the turn of the millennium. More refined and differentiated uses of this flexible category might, however, be useful to further support scholarly analysis of international law and practical aspirations in this field.

Cross-References

- ▶ Constitutionalism: World
- ▶ Cosmopolitanism
- ▶ Critical Theory and International Law
- ▶ Evolutionist Jurisprudence: Legal Epistemology
- ▶ International Law: Legitimacy of
- ▶ Responsibility: Global
- ▶ Transnational Legal Normativity

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Francis, Leslie

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Leslie P. Francis, is a distinguished professor of philosophy and law at the University of Utah. She holds concurrent appointments in the departments of Family and Preventative Medicine, Internal Medicine, and Political Science. She received her B.A. in Philosophy from Wellesley College, her Ph.D. in Philosophy from the University of Michigan, and her J.D. from the University of Utah. Francis specializes in the fields of privacy law and ethics, disability, and bioethics. She was the president-elect (2014–2015) and then the president of the Pacific Division of the American Philosophical Association (2015–2016). She is a widely known expert in her fields and has been recognized as such by the International Society for Philosophy of Law and Social Philosophy, the Ethics Committee of the American Society for Reproductive Medicine, and the Privacy, Confidentiality, and Security Subcommittee of the National Committee on Vital and Health Statistics, among others such as the Medicare Coverage Advisory Committee and the American Bar Association's Commission on Law and Aging. Her research has been funded by the National Science Foundation and the National Endowment for the Humanities.

Francis is the coauthor of several books including *Privacy: What Everyone Needs to Know* (Oxford University Press, forthcoming in June 2017 with JG Francis) and *The Patient as Victim and Vector: Bioethics and Infectious Disease* (Oxford, 2009 with Margaret P. Battin, Jay A Jacobson, and Charles Smith). She is also the editor or coeditor of numerous volumes including *Handbook of Reproductive Ethics* (Oxford, 2017); *Death, Dying, and the Ending of Life* (Ashgate, 2007); *Blackwell Guide to Medical Ethics* (Oxford, 2006); and *Americans with Disabilities: Implications for Individuals and Institutions* (Routledge, 2000). She is also the author or coauthor of well over 100 book chapters and peer-reviewed articles as well as a regular blogger for Health Law Prof, Bill of Health, and Philosophy Talk.

There are five areas of specialization in which Francis is most accomplished as a scholar. First, she has produced work concerning the conceptual, ethical, and legal domains of privacy and health information. Her interests in this domain revolve around the responsible and just use of health information and the role of anti-discrimination law. In her 2010 article *You're born with your genes?: justice and protection against discrimination in*

the use of genetic information, Francis argues that in navigating the benefits and dangers of tracking genetic information in the context of personalized medical care, we must install serious protections. She identifies three sites in which these protections are currently lacking: confidentiality risks in genetic testing, potential employer possession of employee genetic information, and interoperable health records which fail to allow for the sequestration of genetic information.

Second, Francis has worked extensively on questions surrounding ethics and infectious disease. Her coauthored book, *The Patient as Victim and Vector: Ethics and Infectious Disease*, argues for a dual approach to articulating an ethics of treating infectious diseases. She and her coauthors show how the patient-centered approach bioethics grounds in autonomy needs to move toward also accommodating public health concerns. Along the way, they also explore issues surrounding the ethics of quarantine and isolation, research, disease screening, rapid testing, antibiotic use, and immunization. Francis' other published work in this area delves deeply into issues surrounding HIV prevention as well as the criminalization of health-related behaviors.

Third, Francis specializes in theorizing decision-making and disability, especially intellectual disability. She has worked toward developing theoretical and practical accounts of supported decision-making which are applicable in the arena of informed consent by those who cannot function entirely independently such as children, adolescents, and those with intellectual disabilities. In her "Thinking about the good: reconfiguring metaphysics (or not) for people with cognitive disabilities," reprinted in Eva Feder Kittay and Licia Carlson's *Cognitive Disability and its Challenge to Moral Philosophy*, Francis and Silvers argue that liberalism, specifically the standard that each person must form their own independent idea of the good, excludes those whose capacity to conceptualize is labeled as limited or disabled. They show how their notion of "prosthetic" thinking can meet liberalism's standard and allow cognitively disabled people to fully participate as subjects of justice.

Fourth, concerning the law and ethics of disability discrimination, Francis has worked to understand and define what precisely constitutes disability discrimination and how we ought to respond to such discriminatory practices. She has worked especially in the confrontation of this issue for infants, young children, and families. Her coauthored published work extends from topics such as how to avoid disability discrimination in the administration of health benefits, the moral status of infanticide, acceptable standards at the start of life, and what constitutes "meaningful access" to health care for those with disabilities.

Lastly, feminist insights and investigative methodologies have deeply informed Francis' work in the philosophy of law, in particular. She is the coauthor of the Stanford Encyclopedia of Philosophy article "Feminist Philosophy of Law." In this encyclopedia entry, she explores how "legal institutions enforce dominant masculinist norms" by applying "insights from feminist epistemology, relational metaphysics, feminist political theory, and other developments in feminist philosophy." She utilizes feminist epistemologies as well in her other published work in this area. For example, drawing upon the core feminist insight that autonomy is inherently relationally grounded, Francis engages standpoint theory to address issues surrounding law school education and disability.

Cross-References

► Disability

Frank, Jerome New

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Introduction

Jerome N. Frank (1889–1957) was one of the founders of American legal realism. A non-academic scholar, Frank concentrated his enquiry on the nature of the judge's decision-making process, underlining its authoritative character.

At the same time, he was committed to reforming the teaching model adopted in American Law Schools. His vision led to the "clinical" method of law study, of which he was the first theorist. Frank's jurisprudence, a product of the climate of philosophical pragmatism and legal anti-formalism of the early twentieth century, proposed a radical interpretation of these perspectives, shifting the accent from the *rules* to the *judge*. This characteristic developed as a combination of the philosophical, anthropological, and psychological influences that marked his investigations in the field of law. However, it also drew on Frank's profound knowledge of the American judicial and administrative system. He narrowed his field of specialization to a number of topics in this area, showing a marked interest in aspects connected with the reconstruction of the facts in court, namely, the nature of prejudice and beliefs, the provision and reconstruction of evidence in the Trial Courts, and the role of the jury.

Through arguments developed from Freudian psychoanalysis and Piaget's educational theories, these aspects are the basis of the thesis of the unpredictability of judicial decisions and, ultimately, the falsification of the principle of legal certainty. In the more mature phase of his output, a further field of research emerges, concerning the relationship between "government of laws" and "government of men" in the context of a reflection on the American democratic model.

Frank and American Legal Realism

American legal realism established itself during the 1930s in the wake of the antiformalistic trend that had taken root in jurisprudence under the influence of Holmes (1841–1935) and Pound (1870–1964).

The movement's ambition to reform this tradition is certainly one aspect to be considered, although it is not the most important. Of greater interest are the positions acknowledged by legal realists on a matter raised by Holmes: that of applying the scientific model to knowledge of the law.

The above point outline the deep identity of the movement, which goes far beyond the unrealistic portrayal presented in the *manifesto* published by Llewellyn (K.N. Llewellyn 1931) and offered in the writings that mark the theoretical and academic controversy between Llewellyn and Pound (K.N. Llewellyn 1930, 1931; R. Pound 1931).

Despite Llewellyn's political aim to consolidate the movement around nine fundamental theses (K.N. Llewellyn 1931: 1236–1238), realism is a *label* that draws together distinct personalities from different schools of thought.

This aspect led to a reading of American realism as an expression of a *mood*, part of the intellectual trends of its time. This view was already credited in the first interpretations, which underlined how the movement concentrated on a "dogmatic rejection of dogmas (. . .) as dogmatic as dogmatic acceptance of them" (R. Pound 1930: 705) and, at times, an amateurish exercise (H. Kantorowicz 1934: 1252 ff.). Despite this, in those same years some scholars saw the search for a reformulation of legal certainty (redefined as "congruency") as the main topic of interest of the movement (L. Fuller 1934).

At its core, this last was a question that could be traced back to Holmes (O.W. Holmes Jr. 1897: 994), who had posited a conception of law as "experience," whose development can be grasped through the evolution of social and historical factors. On the other hand, it was also an issue already addressed by Dewey (1859–1952).

In later developments, within the framework of these influences, legal realism would adopt two different attitudes on the principle of legal certainty. Llewellyn's standpoint was to see law as a "going institution" (K.N. Llewellyn 1941: 189), but Frank would adopt a different perspective: he was radically skeptical about the possibility of binding the decision-making process of the judge, practical as it may be, to logic.

The Certainty of Law. Frank on Judicial Decision Making

Frank and Llewellyn: The Science of Law and the Social Sciences

In the American reformist view developing between the nineteenth and twentieth centuries, the question of the method of legal science was

very different from the discussion arising in Europe at around the same time. Due to the nature of the common law legal system and the philosophical influence of pragmatism, reflection on the scientific model of jurisprudence focused on analyzing judicial reasoning and its logic.

In addition to the works of Holmes, Dewey's instrumentalist pragmatism constitutes an essential point of reference on these matters. In his *Logical Method and the Law* (1924), Dewey addresses the problems of legal reasoning and judicial decision making, subjecting the judicial syllogism to intense criticism.

For Dewey the courts are not isolated from social reality: there is "a certain way of looking at and interpreting the facts" in the construction of the major premise of which the current practices and the very experience of the judging subject are part. His attack on the conception of law as a *formal rule*, with its role in the logic of judicial reasoning, does not go so far, however, as to deny the symbolic value of motivation in law. In his opinion, case law acts as a *mediation* between the aims pursued in court, in the form of general rules for the interpretation of cases, and the needs emerging at the level of the political, social, and economic institutions (J. Dewey 1924: 24).

Dewey's pragmatism, applied to the law and its logic, is the philosophical premise required by legal realism in order to carry out its task of self-renewal.

For one branch of the movement, these philosophical premises lead to an understanding of the process of *formalization of a rule* as a component of the institutionalization of *social regulation* (L. Fuller 1934). For Llewellyn, this implies a move away from "paper rules" to "real rules" or "working rules," which have a fundamental role in solving the dispute because they are the *rules of action* internalized by judges and officials (K.N. Llewellyn 1930: 442–443).

Frank's contribution offers an interesting perspective precisely on this point. It contrasts with the scientific model (from the social and legal sciences) adopted by the branch of the movement that looks with interest at behavioral psychology and functionalist anthropology.

Frank questions the cognitive model of the human sciences, which claims some degree of affinity with that of the natural sciences: "Their attempted generalizations (...) are not readily predictable, because of the numerous elusive and accidental factors, including the fortuitous effects of forceful ('earth-quake') personalities" (J. Frank 1949a: 210). This led Frank to a radical skepticism about *law as a science* (J. Frank 1955: 8–9). Following in the footsteps of Dewey and Holmes, he does not share their conclusions on legal certainty (J. Frank 1931a).

In some areas of realism, Frank sees a tendency to transplant onto the American legal system the method cultivated by Malinowskian (1884–1942) anthropological functionalism, to which the position of Cardozo (1870–1938) is linked, and Llewellyn's (K.N. Llewellyn and E.A. Hoebel 1941) research is also susceptible.

This model claims to inductively derive legal generalizations from the regularities enshrined in the beliefs shared by a social group. But for Frank, these simply cannot boast any substance, either in themselves or by virtue of the ways in which the fact is represented in court.

Facts are not subject to any form of generalization, because of the canons of irrationality that Frank sees in the cognitive process that takes place in the decision-making process, which, more broadly, reflects the intuitive nature of human knowledge. Frank was able to represent its traits through one of his most famous metaphors, which associates *law* with *music*: intuition emerges as "wordless rationality," whose translation into arguments is a form of betrayal (J. Frank 1948a: 921–933).

Certainty as a Legal *Myth* and Uncertainty as a *Value*

In 1930 Jerome N. Frank, a lawyer in New York, published *Law and the Modern Mind*, a work that aroused great interest among contemporaries from the start. Aligning himself with the same field of criticism of the formalistic logic of judicial reasoning, the ideas he expressed in this volume developed material taken from Freudian psychoanalysis, from theories of education and, in some cases, anthropology.

Law and the Modern Mind led to a split in the realist movement between "rule skeptics" and "fact skeptics" (J. Frank 1949a: 74): identifying with this last group, Frank deems the "rule skepticism" stance held by most of the movement to be inadequate. He thus ascribed to the "temporary divorce of Is and Ought" as a position enabling the isolation of facts in their objectivity, but went beyond the conclusion to which this led, affirming a "Distrust of traditional legal rules and concepts insofar as they purport to describe what either courts or people are actually doing" (K. Llewellyn 1931: 1236). In the analysis of the judicial decision-making process, this distrust implied having to reformulate the concept of the formal legal rule, incapable of explaining what the "operative factor in producing court decisions" was (K. Llewellyn 1931: 1237). Realism was underpinned by a language of causality and a variously marked familiarity with the naturalistic outlook, expressed through the behaviorist psychology of the time (B. Leiter 1997).

Frank took a very critical stance vis-à-vis the psychological approach ascribed to by a number of scholars: like the research carried out on monkeys and rats, this *pseudoscience* claimed to adopt the same action/reaction perspective with regard to human behavior by applying the principles of *veterinary* psychology (J. Frank 1949b: 21).

Influenced by Freud (1856–1939), but also addressing topics from Piaget's (1896–1980) developmental theories, Frank is skeptical about the possibility of understanding psychology as a science at all, and right from *Law and the Modern Mind*, the psychological approach is seen as "a weapon of attack" (Th.W. Arnold 1931: 644) rather than a cognitive model.

To this end, Freudian psychoanalysis offers a crucial system of symbols in combination with arguments from anthropology in *Law and the Modern Mind*, (A. Chase 1979), with the aim of revealing the artificial nature of legal certainty, which is the myth through which Western legal culture has safeguarded a reality (the authoritative basis of the legal phenomenon) by entrusting it to a fiction (its legal rationality) (J. Frank 1930).

From this perspective, the authority of law (expressed through the stability of precedents) assumes the function of a "Father Substitute" (J. Frank 1930): it is necessary to be free of it, allowing ourselves to abandon a psychological state (childhood) and civilization in its primordial condition (belief in myths) in pursuit of the goal of professing an adult legal science, following Holmes's example (J. Frank 1930: 279 f.).

These premises led Frank to come to a definition of what the role of certainty is, namely, to conceal the authentic element from which the law draws its authority, the power of *decision*.

The Judge as a *Cadi*. The "Court-House Government" and Intuitive "Fact-Finding"

In one of the Pound's writings, the image of the *machine* and that of the eastern *cadi* appear as the representation of two opposing models of understanding the judicial decision: the formalism of the rule and the arbitrariness of the will of the individual (R. Pound 1905).

The same reference to "Cadi-Justice" is found again in the early thirties, marking the peak in the controversy that pitted Frank against sociological jurisprudence. *Law and the Modern Mind* was at the center of Dickinson's (1894–1952) attack on Frank: in his opinion, Frank considers the individual judge's obedience to the law to be a form of *mystical superstition*, concentrating the decision-making process on the personality of the judge alone, as happens with the "purely discretionary authority of an oriental *cadi*" (J. Dickinson 1931: 844–845).

Frank's position on the point leaves little room for doubt. In the construction of a judge's reasoning, a precedent expresses nothing more than the meaning that the judge, in the case before him, says it expresses: "any case is an 'authoritative' precedent only for a judge who (. . .) decides that it is authoritative" (J. Frank 1930: 160).

For Frank, it is not (only) a question of recognizing that the law is affected by semantic vagueness, but of affirming that its authority is rooted exclusively in the decision of the judge. The one who judges, also because of the presence of a jury, works "as a fallible and variable witness of witnesses," so much so that "as a 'fact-finder' [he] is a 'Cadi'" (J. Frank 1931: 28).

On these aspects, which Frank examined further in *Courts on Trial* (1949), the discussion proceeds even affirming the *totally ideological* nature of the relationship between the logic of judgment and the certainty of law.

Unlike other exponents of realism, Frank focuses on the judicial activity of the Trial Courts, which illustrates the importance of emotional and personal factors in the perception of the fact of the case and how it is reconstructed in the mind of the judge: "The court has to guess what actually happened, basing its own fallible guess on fallible inferences made while listening to and watching fallible witnesses" (J. Frank 1931b: 650). Within such dynamics, the role played by an individual's emotions is at least as crucial as what emerges from the procedural aspects of a trial.

Cases before the lower courts are such that "our present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation" (J. Frank 1949a: 85), and Pound is wrong in believing that the jury, in being "lawless," is "the great corrective of law in its actual administration" (R. Pound 1910: 18). On the contrary, for Frank "The jury makes the orderly administration of justice virtually impossible" (J. Frank 1930: 194).

For Frank the only possible reconstruction of judicial reasoning relies on the nature of the hidden factors at play in the depths of the "private mind" of each of those involved: the judge and the jury. Considering the relationship between the fact (F) and the decision (D), "The F which leads to the D is not something which existed before the lawsuit began. The 'facts' of a 'contested' case, for judicial purposes, are not what actually happened between the parties but what the court thinks happened" (J. Frank 1931b: 649).

Recalling the theory of intuitive judgment (J.C. Hutcheson 1929), the decision-making process is a reaction to the stimulation from the facts, as realism states, but cannot be reconstructed on the basis of any law of causality (J. Frank 1932: 595).

Intuition is the first element to orient the judge towards the decision, the person who manipulates both the rules (R) and the facts (F): "The trial judge (. . .) can begin with the decision he considers desirable, and then, working backwards, figure out and publish an F and an R which will make his decision appear to be logically sound" (J. Frank 1949a: 168).

For Frank, this process is also supported by the role of the jury. The jury system highlights issues in the administration of justice in the lower court, radicalizing elements of subjectivity in decision making, and removing them from criteria of controllability by the judge. With his attack on the system of "Court-House Government" in the Trial Courts, Frank affirms that jury makes the cognitive process of decision obscure, negating the principle of the "government of laws" (J. Frank 1930: 177–178, 1949: 131–132) whose meaning must be sought in the need to subject the action of judges and officials to criteria of rational verifiability.

Skeptical about the "government of laws" model, Frank thus sets out his own interpretation of the "government of men," distinguishing its deleterious representation – the jury's "Court-House Government" – from its *ideal model*, anchored in the profile of a democracy based on the accountability of its stakeholders: "The jury system, praised because it was apparently a bulwark against an arbitrary tyrannical executive, is today the quintessence of governmental arbitrariness" (J. Frank 1949a: 132).

"The Upper Court Myth"

Frank's analysis of the Trial Courts is a point of attack against the realist movement. In the thrall of an "Upper-Court Myth," American legal theorists are rooted in "the false belief about the unimportance of the trial judge's activities" (J. Frank 1949a: 222). They continue in the error that had indicated the main field of observation of jurists between the nineteenth and twentieth centuries (J. Frank 1948b).

On this point, Frank goes back to the identity of the American legal realism. Although there is a certain meeting of views, perspectives diverge when it comes to stating what happens to supposed legal certainty in the Trial Courts' decision-making process: "this uncertainty – a trial court (not an upper court) uncertainty – is present not only (. . .) when a case is to be tried by

a jury, but also when it is to be tried by a trial judge sitting without a jury" (J. Frank 1950: 216).

Scholars such as Cook, Patterson, and Llewellyn look down on the justice system, assuming a position that prevents them from seeing that it is at the level of the trial courts that the establishment of the fact on which the Court of Appeals decision depends. Legal realists, who had succeeded in shifting their focus from the rules to the fact, do not grasp the condition of legal uncertainty, not being willing to reflect on the reforms that, in Frank's view, could modify the procedural fact-finding system in court. These are aspects on which Frank makes a number of proposals, including the introduction of the burden of setting out reasons on the judge of first instance in relation to the reasons that underpinned his own assessment of the testimony (J. Frank 1949a: 202 ff., 132 ff.).

In this analysis, the uncertainty and unpredictability of decisions as structural data but also as a *value* remains firmly in place (J. Frank 1930: 7). Thinking of the position adopted by the movement and explicitly referring to Karl Llewellyn, Frank is sarcastic: "By spending a few nickels on subway-fares for short trips from Columbia Law School, where he teaches, to lower New York City, Llewellyn could have studied in detail the trial courts of that metropolis. He could then have written a book on the anthropology of Tammany-Hall Indians, many of whom are first-rate trial judges" (J. Frank 1949a: 77).

"Government of Law" and "Government of Men"

Frank's perspective attacks the programmatic role of case law that appears to hold strong in American antiformalism. By attacking predictability, Frank questions legal certainty and, with it, the ideal privilege granted to a "government of laws" over the "government of men." Pound had entrusted the former with containing the discretionary power of the judging, set up against the "government of men" personified by "the oriental Cadi administering justice at the city gate by the light of nature tempered by the state of his digestion" (R. Pound 1905: 21).

It is in this context, marked by the institutional transformations of America in the 1930s, that *Law and the Modern Mind*, more than any other testimony of the realist movement, "cleared the way for a new set of conceptions and ideals with respect to the relationship of the citizen to his government" (Th. Arnold 1956: 635).

As Llewellyn put it, a clear perspective on these aspects could be discerned from the movement's very beginnings: "All that has become clear is that our government is not a government of laws, but one of laws through men" (K.N. Llewellyn 1931: 1243). Influenced by functionalist anthropology, this view of the system as fact-centered had led to a conception of *law* and *government* as being part of a single and dynamic institution: "the view of law-and-government as in essence a single institution opens up at one stroke an answer to two problems which have for centuries been eluding effective answer-in-words: that of the relation of rule and discretion, and of the relation of rules and the official" (K.N. Llewellyn 1949: 1296).

Despite the nonsubversive message of legal realism, in the late 1930s the movement began to undergo a process of "Frankification" (B. Leiter 2007: 57 ff.). Frank's views on the decision-making process became the emblem of a school that does not actually exist, endowing it with the responsibility of having given credit to a concept of judicial activity reduced to the mere product of power.

Despite this reaction against the movement, Frank's scientific output proceeded in directions deserving of further study today: Law School education (J. Frank 1933, 1949: 225 ff.), the mechanisms of government administration (J. Frank 1942), and in the mid-forties, philosophical-political themes (J. Frank 1945).

Frank's Legacy. A Doubting Thinking on Democracy

In 1933 Morris C. Cohen (1880–1947) drew attention to the need for awareness of the dangers in emphasizing personalistic elements in the legal realist theory of judicial decision making (M.C. Cohen 1933: 359).

In Frank's view, however, the discovery of the personalistic and emotional factor in the decision-making process was raising a *profoundly democratic* question: given that government activity concerns the citizens, also when it is the Courts that are acting, it must be accepted that it expresses the actions of fallible men (J. Frank 1945: 45, 112). Mature acknowledgment of this reality is the only condition that can safeguard the *controlling* role of the law in a democratic society (J. Frank 1930: 10).

Thanks in part to his personal involvement in agencies and administrative bodies with roles delegated by the government (R. Pound 1940), from the late 1930s the "government of men" model assumed for Frank a broader meaning than the relationship between discretion and arbitrariness in the exercise of the jurisdictional role.

At the core of Frank's legacy, there is a "constructive skepticism," which implies "hostility to dogmatism" (J. Frank 1945: 332). It denotes a philosophical attitude towards the institutions in which the relationships between a plurality of visions of the good undergo a process of (political mediation) and (interpretative) balancing, involving all the protagonists in the system (B.A. Ackerman 1974):

> I repeat that, in a democracy, it can ever be unwise to acquaint the public with the truth about the workings of any branch of government (. . .). It is the essence of democracy that the citizens are entitled to know what all their public servants, judges included, are doing, and how well they are doing it. (J. Frank 1949a: 2)

Cross-References

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Freedom

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Introduction

The concept of freedom is strongly ambiguous: it has many different meanings which come into complex relationships. It seems that a good point of departure for disentangling these meanings is making a distinction between *freedom as a fact* and *freedom as a value*. The former type of freedom has a purely descriptive sense: it describes, so to speak, a "metaphysical condition" of man. The basic controversy in this context is whether human beings have free will (which is the capacity to make choices undetermined by past events) or whether the only type of freedom inscribed in their "metaphysical condition" is freedom from compulsion (which consists in acting in accordance with one's desires and beliefs and is compromised either when an agent is coerced into doing an act by some other agent or if she suffers from some mental disease, deficiency, or disturbance that makes her incapable of recognizing the significance of her act and/or controlling her conduct). This controversy, essential for the philosophy of criminal law (and more specifically, for the question about the conditions of moral and legal responsibility), will not be a focus of this article. Its focus will be freedom as a value, i.e., the type of freedom which is or can be an object of human aspirations and, consequently, is or can be pursued by means of law (by contrast, freedom as a fact cannot be aspired to; either human beings are endowed with free will or can be free only in the sense of freedom from compulsion). One can distinguish four types of freedom as value, viz., negative freedom (i.e., freedom as noninterference), freedom as non-domination, political freedom, and positive freedom. The article will aim at presenting them and analyzing their mutual relationships.

Freedom as Noninterference (Negative Freedom) and Freedom as Non-domination

The basis for the distinction between freedom as noninterference (negative freedom) and freedom as non-domination – two types of freedom which are usually opposed to each other – is the question about the conditions under which one can plausibly say that freedom is violated. The adherents of freedom as noninterference claim that freedom is undermined in the case of the *actual* interference into a subject's sphere of choices, whereas the adherents of freedom as non-domination claim that the very possibility of interference, i.e., *potential* interference with an agent's sphere of choices, constitutes a diminution of her freedom (Pettit 1996, 1997).

The famous formulation of freedom as noninterference (negative freedom) comes from Isaiah Berlin who claimed that being free is equivalent to enjoying a state of lack of coercion, i.e., "the deliberate interference of other human beings within the area in which I could otherwise act" (Berlin 2000: 194). Interference, if thus understood, is a deliberate encroachment aimed at worsening a subject's situation of choice. This manner of thinking about freedom can be, in general, attributed to the representatives of the liberal tradition (e.g., Hobbes, Locke, Mill, or von Hayek). For instance, in Thomas Hobbes's formulation, a free man is the one who can act in accordance with his wit or strength without impediments (Hobbes 1996: 146). In a likewise manner, Friedrich August von Hayek defines freedom as the absence of coercion, where coercion is understood as a state "when one man's actions are made to serve another man's will, not for his own but for other's purpose" (Hayek 2011: 199). Needless to say, the acceptance of the conception of freedom as noninterference does not entail the

support for the unlimited sphere of this freedom. *Maximal* negative freedom, i.e., unrestrained by any external (e.g., legal) regulations, would turn into its opposite – a state of *minimal* negative freedom in which all could interfere with one another's choices without impediment. Thus, although the supporters of negative freedom consider legal and political institutions as a limitation of liberty, they acknowledge its necessity.

The supporters of freedom as non-domination draw attention to the insufficiency of freedom as noninterference. Although the idea of non-domination has been thoroughly examined and developed in Philip Pettit's works, it is not a contemporary conception (Pettit 1997). According to Pettit, equating freedom with non-domination is a trademark of republican political thinkers, such as Machiavelli, Harrington, or Montesquieu. The republicans oppose freedom to domination, i.e., a state of *arbitrary* interference of one party into the affairs of another undertaken *at will* and *with impunity*, where arbitrariness is understood as the lack of "reference to the interests, or the opinions, of those affected" (Pettit 1997: 55). Pettit illustrates the distinction with a master-slave scenario: the slave may have a benignant master who does not interfere with his activities. For the proponents of freedom as noninterference, this alone would be sufficient to claim that slave's freedom is not compromised. However, the master could alter his conduct and interfere with slave's affairs on an arbitrary basis and with impunity. This state of being at the mercy of the other person is tantamount to unfreedom according to the adherents of freedom as non-domination (Pettit 1997: 22–23). In this point, freedom as non-domination proves to be a wider or stronger ideal than freedom as noninterference, as it implies that liberty is compromised not only by actual but also by potential interference. However, saying that freedom as non-domination is an extension or strengthening of freedom as noninterference would not be fully apt, since, as is emphasized by Pettit, acts of interference are not regarded by the adherents of freedom of non-domination as infringements thereof *unless they have a dominating character*. It should be noted that if, as the republicans claim, unfreedom of an agent is correlated with the other agent's (who may be an individual but also institutions) capacity to exercise arbitrary power over her sphere of choices, the question arises as to the means by which freedom as non-domination can be secured. The republicans assert that freedom as non-domination can be most effectively secured by properly designed legal and political institutions, i.e., based on such measures as the separation of powers, checks and balances, or the rule of law. These measures minimize political domination, i.e., domination in the sphere of relations between the citizens and the state. However, as is emphasized in the more contemporary works in the republican tradition, for freedom as non-domination to be fully realized, also social domination, i.e., domination in the social relations, must be diminished. Social domination results from the glaring inequalities in social and economic status. Thus, contemporary supporters of non-domination acknowledge that fulfilling this ideal requires certain means of promoting personal independence and economic prosperity (Pettit 1997: 158–165). For instance, according to Frank Lovett, non-domination demands some form of distributive justice, e.g., guaranteeing for each citizen unconditional basic income (Lovett 2009).

It is worth noting at the end of this section that, at the general level, there exists no fundamental disparity between the approaches to law by the supporters of freedom as noninterference and the supporters of freedom of non-domination. Both would agree in the crucial point, namely, that law is effective in realizing the type of freedom they adhere to. However, some subtle differences exist between them. Firstly, while the former claim that law, although effective in securing a possibly large amount of negative freedom, constitutes nonetheless its infringement, the latter do not *definitionally* oppose law and freedom and thereby do not depict being under the protective legal and political institutions as a form of a limitation of freedom as non-domination. Secondly, while the former assume that law is an effective but not necessary way of generating a possibly large sphere of negative freedom, the latter (given their claim about the definitional connection between law and freedom) assert that law is a necessary means for realizing freedom as non-domination.

Political Freedom

The notion of freedom as non-domination draws attention to the connection between freedom and politics (viz., that liberty requires protective legal and political institutions), but it does not exhaust all of the possibilities of achieving liberty *through* politics. Political freedom in a stricter sense is associated with political action, i.e., a possibility to participate in governance. The conception of political freedom thus understood can be broader or narrower depending on the scope of participation in the political life of community. The broad conception of political freedom is characteristic for the ancient Athenian model of politics. The ancient liberty "consisted in exercising collectively, but directly, several parts of the complete sovereignty; in deliberating, in the public square, over war and peace; in forming alliances with the foreign governments; in voting laws; in pronouncing judgments; in examining the accounts, the acts, the stewardship of the magistrates; in calling them to appear in front of the assembled people, in accusing, condemning or absolving them" (Constant 1988: 311). Thus, ancient political freedom encompassed an extensive bundle of political rights. However, such conception could not be sustained in the modern and contemporary era due to the transformations in the sociopolitical conditions, e.g., to the emergence of mass societies. For this reason, the idea of direct participation of all citizens in governance has been replaced by the support for representation (among contemporary philosophers, it was Hannah Arendt (1958) who – despite certain reservations – supported the ideal of wide political participation in the public realm). Moreover, the support for the ideal of representation stemmed from disbelief that the majority could make reasonable decisions and from the fear of what Alexis de Tocqueville labeled as "the tyranny of the majority," taking place when the majority of citizens forces its demands upon minority without taking into consideration (or even at the expense of) its needs and interests (Tocqueville 2000: 239–241). For this reason, in the contemporary times, political freedom is mainly associated with the participation in electing political representatives and participating in other direct forms of political decision-making (such as referendums). Participation in certain forms of expressing political convictions, such as manifestations, is also a form of political freedom (although it is at the same time an individual right). Political freedom thus understood is one of the chief democratic values, partly due to its close relationship with the abovementioned conceptions of freedom, viz., noninterference and non-domination. Expressing political attitudes and participating in public governance can be one of the means of securing both kinds of freedom, as in public participation and deliberation citizens manifest their consent and dissent toward legal authorities and express their opinions as to legal regulations, thereby setting the boundaries for the legal intervention in social life. However, the supporters of the theory of non-domination attach greater value to the institutional safeguards to freedom than the supporters of freedom as non-interference, although, as it should be emphasized, both the former and the latter are skeptical toward a broad (Athenian) model of political freedom (their skepticism stems mainly from their fear of the tyranny of the majority). It should not be thought, however, that there exists some fundamental disparity between political freedom, on one hand, and negative freedom and freedom as non-domination on the other. They cannot be reconciled only if political freedom is understood in a radical way – as enabling the citizens to make *any* political decisions, i.e., if political freedom is unrestrained by individual, inviolable rights.

Positive Freedom

Positive freedom is one of two concepts of freedom (the other being negative freedom, i.e., freedom as noninterference) analyzed by Isaiah Berlin in his famous essay *Two Concepts of Liberty*. The intuition that stands behind the distinction between negative and positive freedom (the distinction deeply embedded in the history of Western philosophy and thereby not invented by Berlin) is that we can use the term "freedom" to describe two markedly different phenomena: either a situation which is *external* to an agent or

an *internal* state of an agent. In the former case, by saying that an agent is free, we mean that she would not encounter external (i.e., imposed by other persons) constraints if she wanted to act on various desires (those desires which she actually has and which she could have as a human being). In the latter case, by saying that an agent is free, we mean that she "governs herself" or is a "true master of herself." There are two interesting differences between these two concepts. The first one concerns the degree of their clarity: the concept of negative freedom is clear and thereby needs no explication, whereas the concept of positive freedom is notoriously unclear and thereby needs an explication (and, consequently, one can formulate various *conceptions* of positive freedom). The second one concerns their cogency as a legal-political value: whereas negative freedom is commonly accepted as an uncontroversial legal-political value, many thinkers question the importance of positive freedom in legal-political sphere. These two differences deserve a closer analysis.

The concept of positive freedom is notoriously unclear: its definition – "being a true master of oneself" or "governing oneself" – says very little besides indicating that it refers to an internal state of an agent. Accordingly, it needs to be developed by stating what "governing itself" exactly consists in. It is worth presenting (in very broad outline) the main accounts (conceptions) of positive freedom proposed in the philosophical literature. The first account, which can be dubbed "Socratic," says that an agent is positively free only if her beliefs – regarding herself as well as the external world – are *true* beliefs. It follows from this account (among other things) that a positively free agent will not be prone to self-deception. The second account, which comes from Plato, says that an agent is positively free only if her reason controls her passions. This account does not require that our passions – the spirited (*thumoeides*) and the appetitive (*épithumêtikon*) part of our soul – should be extinguished but only that they should be controlled by reason – the rational (*logistikon*) part of our soul. The third account, formulated by Stoics, says that an agent is positively free only if she has reached the state of *apátheia*, i.e., if she has extinguished her passions and, thereby, as was emphasized especially by Epictetus, is not attached to things which are not dependent "on us." A Stoic sage who has reached this state manifests *amor fati*: she does not want to change the course of events that happen to her but accepts it as good. The fourth account – Epicurean – implies that an agent is positively free only if her desires are limited to those which are natural and necessary; according to this account, the widening of the scope of one's desires must lead to an inner enslavement. The fifth account – developed by St. Augustine and other thinkers from the Christian tradition – assumes an agent is free only if she makes morally proper choices (an evil man is therefore by definition positively unfree). The sixth account – Nietzschean – says that an agent is positively free only if she is not a "reactive person," i.e., if she is free from *ressentiment*. The seventh account (which can be called "procedural") asserts that an agent is positively free only if her goals – values to be realized by her – have been formed in the process not based on manipulation, pressure, ignorance, deceit, etc. The eighth account, which can be called "axiological," says that an agent is positively free only if her goals – values to be realized by her – are of special kind: they are *high* values. Three additional remarks seem to be in order here. Firstly, none of these accounts, when considered in isolation, seems to reflect the whole richness of the phenomenon of positive freedom; in order to build a concept of positive freedom which would fully reflect this phenomenon, one must arguably combine at least some of the above – partial – accounts (which, with perhaps some exceptions, are not mutually exclusive). Secondly, as was mentioned in section "Political Freedom," Benjamin Constant called political freedom "the freedom of the ancients." It seems, however, that this view should be qualified: given that the most influential and, perhaps, also most mature conceptions of positive freedom were formulated by the ancient philosophers and that this concept of freedom was the main object of their theoretical reflection, one could just as well argue that it is positive freedom that can be most aptly called "the freedom of the ancients" (or that there are two "freedoms of the ancients"

that can be justifiably opposed to the "freedom of the modern"). Thirdly, the concept of negative freedom is clear, though, as was mentioned in section "Freedom as Noninterference (Negative Freedom) and Freedom as Non-domination," it is not quite certain what exactly is its relations with the concept of freedom as non-domination. One can supplement the analysis of these relations conducted in section "Freedom as Non-interference (Negative Freedom) and Freedom as Non-domination" by noting that while negative freedom *unambiguously* refers to an external situation of agent (describes, to put it metaphorically, her "breathing space") and positive freedom *unambiguously* refers to an internal state of an agent, freedom as non-domination transcends or rather cuts across the distinction "external situation-internal state": since it is *a legally guaranteed status* of an individual which *safeguards her negative freedom*, it refers at the same time to an external situation of an agent and, in a sense, to his internal state (i.e., to the feeling of security – which arises from awarding her a legally guaranteed status – that the sphere of her negative freedom will not be arbitrarily curtailed).

Regarding the second difference between negative freedom and positive freedom, negative freedom, as was already mentioned, is commonly accepted as an uncontroversial legal-political value, though it is widely discussed how broad the sphere of negative freedom ought to be. The views proposed in this controversy (which is in fact a controversy about the limits of legal intervention in social life) range from the strongly liberal (which assume John Stuart Mill's "harm principle") to the strongly moralistic and paternalistic (which assume that the law, apart from preventing harm to others, may enforce also those moral norms which do not concern interpersonal relations and interfere with the freedom of an autonomous agent without her consent if the agent's welfare is thereby increased or protected from decreasing). It is worth mentioning in this context that the strongly liberal views, i.e., those which imply that limitations of negative freedom can be justified only if they in fact lead to the increase of the amount of negative freedom in society, can be of two different types. Within one type, negative freedom is considered to be an instrumental value, subservient to some intrinsic value; within the other, negative freedom is assumed to be an intrinsic value, that is, worthy of pursing for itself. The most famous representative of the former view was John Stuart Mill who assumed that negative freedom derives its value from the fact that it contributes to the maximization of utility, which he believed to be an intrinsic value. The latter view was most fully developed by Immanuel Kant who rejected any other ground for the state coercion than the protection of negative freedom, which he called "the only inner right" and defined as "independence from being constrained by another's choice, insofar as it can coexist with the freedom of every other in accordance with a universal law" (Kant 1996: 30). He emphatically opposed those who believed that the state is justified in imposing any particular conception of happiness on citizens; he stressed that any attempt at such an imposition would amount to treating them as children, infringe upon their negative freedom, and constitute an offense to their "transcendental freedom," i.e., free will (in which the value of negative freedom is ultimately embedded). Positive freedom, in contradistinction to negative freedom, is controversial as a legal-political value. According to Isaiah Berlin's famous claim, it can be used by the authorities to justify the imposition of considerable limitations on citizens' negative freedom. The justification might proceed in the following way: since the citizens cannot achieve by their own efforts the level of their "true or *noumenal* selves" and thereby cannot be "true masters of themselves," they must be deprived of those options which are likely to be selected by their "empirical selves." However, Berlin's argument that the concept positive freedom could be easily used to justify encroachments into the sphere of citizens' negative freedom seems to be valid only with reference to *some* accounts of positive freedom, namely, those that imply some form of the distinction between the "true or *noumenal* self" and "the empirical self," not with reference to all accounts of positive freedom. For instance, the account of positive freedom which requires that agents select their goals – values to be realized by them – as a result of their autonomous deliberations, i.e., deliberations pursued in the absence of

any external coercion, can hardly be invoked by the authorities to justify the curtailment of the sphere of negative freedom. But it must be admitted that even if positive freedom was to be regarded as a non-dangerous political ideal, it is hard to imagine how it could be effectively realized or promoted by the state. Moreover, and more importantly, one may argue that it is not possible to reconcile liberalism (which assumes that the state should not support any conception of good life but, rather, should create conditions for developing various conceptions of good life) with the suggestion that the state should pursue the ideal of positive freedom – one of many (even if, for some people, especially attractive) conceptions of good life.

Conclusions

At the end, it is worth pointing at the conceptual relations between law and various kinds of freedom distinguished in this article. Negative freedom and positive freedom, unlike freedom as non-domination and political freedom, are *conceptually independent* on law, i.e., in their definitions, no reference is made to law. This implies, of course, that they need not be *necessarily* realized by means of law. It remains the fact, though, that law is arguably the most effective means of realizing negative freedom even if at the same time it constitutes, according to the adherents of negative freedom, infringement thereof (they admit, however, that, on balance, however, law may cause and usually causes a "net gain" of negative freedom). Thus, realized (i.e., legally guaranteed) negative freedom is equivalent to freedom as non-domination, though, as was mentioned in section "Freedom as Noninterference (Negative Freedom) and Freedom as Non-domination," the phrase "legally guaranteed negative freedom" is not a fully adequate definition of freedom as non-domination. The problem of the *factual relations* between positive freedom and law is much more complex: it is neither clear whether positive freedom can at all be realized or favored by law nor whether, if it could, such a realization would be desirable (given Berlin's misgivings about the threat that positive freedom, when appealed to by politicians, may constitute a threat to negative liberty).

Cross-References

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Freedom of Conscience

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Introduction

Freedom of conscience is a cornerstone of international human rights law, as established in Article 18 of the Universal Declaration of Human

Rights of 1948 ("Everyone has the right to freedom of thought, conscience and religion"), in Article 18 of the International Covenant on Civil and Political Rights of 1966 ("Everyone shall have the right to freedom of thought, conscience and religion"), Article 9 of the European Convention on Human Rights (ECHR) of 1950 ("Everyone has the right to freedom of thought, conscience and religion"), Article 12 of the American Convention on Human Rights of 1969 ("Everyone has the right to freedom of conscience and of religion"), and Article 8 of the African Charter on Human and Peoples' Rights of 1981 ("Freedom of conscience, the profession and free practice of religion shall be guaranteed").

Freedom of conscience is also a crucial element of many state Constitutions, often conceived of as a general right to conscience that represents a paramount principle of liberal democracies. One of the most emphatic passages about liberty of conscience is written by Justice Jackson in the US Supreme Court's decision *West Virginia Board of Education v. Barnette* in 1943. The Court relied on a general right to freedom of conscience as an element of the First Amendment to the US Constitution to invalidate a compulsory flag salute law in public schools and held: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" (319 U.S. 624 [1943]; see Greenawalt 2006).

Demarcations and Controversies: Theory and Practice

Even when the recognition of freedom of conscience as a category distinct from freedom of religion is "more perfunctory than substantive" in some Constitutions (Leiter 2013), there are moves toward either interpreting the term "conscience" in a distinct way involving secular claims of conscience or expanding the meaning of "religion" to encompass broader commitments of conscience in current human rights and constitutional law adjudication, legal doctrine, and theory (Leiter 2013; Eisgruber and Sager 1994, 2007; Greenawalt 2006; Nussbaum 2008).

With regard to the demarcation between freedom of religion and freedom of conscience, it must be acknowledged that it is not possible to draw a precise line. In the history of ideas, justifications of freedom of conscience often referred to religious conscience and religious freedom. A famous example is Mendelssohn's arguments for freedom of conscience (Mendelssohn 1983; see the entry on freedom of religion). There is an overlap between the two freedoms, but each of them has its core concern and its own content. Brian Leiter succinctly defines a claim of conscience as "a claim about what one must do, not matter what – not as a matter of crass self-interest but because it is a kind of moral imperative central to one's integrity as a person, to the meaning of one's life" (Leiter 2013). Even though freedom of conscience embraces claims of religious conscience as well, the two liberties are not identical, and in some instances, freedom of conscience is closer to freedom of thought, for example, when the European Commission on Human Rights held in 1978 that "pacificism as philosophy . . . falls within the ambit of the right to freedom of thought and conscience" as provided for in Article 9 ECHR (European Commission of Human Rights, Arrowsmith v. the United Kingdom, Application No. 7050/75 [1978]). Litigated cases revolving around "secular" claims of conscience are mostly found in the context of conscientious objectors to military service, traditionally the most prominent problem connected with rights of conscience.

Paradoxically, although freedom of conscience is regarded as a fundamental human or constitutional right, when it is not conceived to be a synonym for freedom of religion, its practical relevance is comparatively small. While there is abundant case law on freedom of religion, freedom of conscience has remained in the background. This has to do mainly with the fact that many cases concerning freedom of conscience involve claims of religious conscience, so that they are within the ambit of freedom of religion and are therefore considered by courts and human rights bodies within the legal framework

of religious freedom. A further reason for the comparatively small practical relevance of freedom of conscience is the fact that this right is often invoked when exemptions from generally applicable laws are requested, as in the case of conscientious objection to military service. The aspect of opposition to state (or the law's) authority that is often contained in claims of conscience renders the legal acknowledgment of freedom of conscience a difficult, highly controversial, and markedly political issue. Most state courts, and also the European Court of Human Rights (ECtHR), have been very reluctant, if not opposed to the idea of granting a legal right to exemption from military service on the grounds of conscience (i.e., a legal right to conscientious objection), qua freedom of conscience as a human or constitutional right. Instead, if granted at all, exemptions from military service are often granted as a matter of statutory law in many states.

Freedom of Conscience and Conscientious Objection

Conscientious Objection to Military Service as the Paradigm Case

The ECtHR has long regarded the issue of conscientious objection to military service not as an aspect of the provision of Article 9 ECHR. However, in 2011 for the first time, the ECtHR held in a Grand Chamber Judgment, in what could be called a – however cautious – paradigm shift, that "opposition to military service, where it is motivated by a serious and unsurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 . . ." (European Court of Human Rights, Bayatyan v. Armenia, Application No. 23459/03, para 110). The ECtHR thereby accepted that conscientious objection to military service may fall within the ambit of the provision of Article 9, depending on the particular circumstances of the case.

But conscientious objection to military service is only one example of structurally similar cases in which the individual conscience collides with legal duties (Greenawalt 1987). It can be argued that with a view to increasing religious diversity and widespread moral disagreement experienced in pluralistic democracies on the one hand (Gowans 2000) and the process of juridification on the other hand, cases of conflict between legal duties and the individual conscience become more important or at least more numerous. This is because the law covers more and more areas that can have moral implications for the individual, for example, in the context of medical procedures such as medically assisted suicide, abortion, or the problem of refusals of life-saving measures such as blood transfusions by members of Jehovah's Witnesses. In such cases, the freedom of conscience of the patient may collide with the freedom of conscience of the medical staff, who have – to a certain extent – the right to refuse on conscientious grounds to assist in specific therapies or medical measures desired by the patient.

Conscientious Objection in Political and Legal Philosophy

In light of the conflict-prone and contingent political potential of claims of individual conscience, political and legal philosophers were traditionally reluctant to accommodate such claims if they collided with legal duties. This is shown by the way they treat the problem of conscientious objection. Hence, in order to grasp the difficulties of acknowledging a legal right to freedom of conscience, it is instructive to highlight some prominent theories that deal with the problem of conscientious objection. Because of the structural similarities of cases in which the individual conscience collides with legal duties, those theories offer important insights, even when they don't treat this problem as an aspect of *freedom of conscience*.

In the *history* of the philosophy of law, there have been both radical and differentiated proposals for solving the problem of conscientious objection. Radical approaches grant a priori primacy either to valid law or to the individual conscience in case of conflict. According to

differentiated approaches, neither the individual conscience nor valid law deserves absolute priority, without exception.

A prominent example for an approach that grants priority to positive law can be found in the philosophy of Thomas Hobbes. Hobbes argues for a strict duty to obey the law, regardless of conflicting duties of conscience. In the political theory of Hobbes, the subjectivity of individual conscience constitutes a threat to the sovereignty of the state (Hobbes 2017). While accepting a core of freedom of thought and personal convictions, Hobbes categorically rejects a general right of the individual to decide which acts are good or bad. Such a right of the individual would undermine the authority of the supreme power and endanger security and peace. Civil law, not individual judgment, must be the guideline for actions and the exclusive ground for knowledge of what constitutes good or bad acts. Only the supreme power can make a judgment about good and evil. Under civil government, a private judgment of "good and evil actions" is permitted only in cases that are not covered by the law. Otherwise, men would "call in question the commands of the commonwealth, trying to decide which of them to obey, and then to proceed either to obey or to disobey on the basis of what in their private judgments they think fit." According to Hobbes, the state order therefore does not leave space for individual claims of conscience to act contrary to civil law.

With regard to the significance of the individual conscience, the effects of Jean-Jacques Rousseau's theory of democracy seem to be not too different from Hobbes's theory. Rousseau advocates for the unlimited sovereignty of the people. In the social contract, the individual submits to the general will (*volonté générale*) which represents the sovereign power resulting from the association of individual interests and to which the citizens owe obedience (Rousseau 2012). The laws are manifestations of the collective will, and according to Rousseau, there can be no contradiction between the individual sense of justice and the law. The law cannot be unjust because nobody can be unjust toward himself. Rousseau does not discuss the case of conscientious objection explicitly, but as a consequence of his explanations of the *volonté générale*, the possibility of a conflict between the law and individual claims of conscience is arguably excluded from the outset or must at least be viewed as very unlikely.

Immanuel Kant also did not regard individual claims of conscience colliding with legal norms as a sufficient reason not to be bound by these legal norms. Kant's concept of autonomy does not imply that the autonomous person is not bound to objective norms (Kant 1977; Ludwig 2005). According to Kant, law entails the moral duty to comply with its norms. Legitimate law that is in accordance with the categorical imperative and the moral law cannot collide with the law of reason ("*Vernunftgesetz*") that is realized in human conscience. But the categorical duty to obey the law has its limits when it contradicts the inner morality. Should the legislator enact laws containing elements that are inherently evil (i.e., that contradict the moral law), the addressees would not have to obey these laws. But the individuals would then have to carry the burdens of their resistance – according to Kant, they would not be privileged on grounds of their conscience (Kant 1977).

In current philosophy of law, individual claims of conscience are given more weight. Doesn't the individual's moral autonomy require that, in a case of incompatibility between law and individual moral beliefs, the latter deserve priority? This problem was discussed under the heading "dilemma of autonomy" by Robert P. Wolff: "If the individual retains his autonomy by reserving to himself in each instance the final decision whether to cooperate, he thereby denies the authority of the state; if, on the other hand, he submits to the state and accepts its claim to authority then (...) he loses his autonomy" (Wolff 1976). But to argue for a radical priority of the claims of individual conscience based on this consideration would be as unconvincing as the radical approach which grants absolute priority to positive law. In light of this, it comes as no surprise that differentiated approaches prevail in current theories. According to these approaches, neither individual conscience nor state law deserves absolute priority; instead, they either explicitly grant the individual a moral and/or

legal right to conscientious objection or offer at least a posteriori justifications for such an objection (Kühler 2010).

A famous example for such a differentiated approach is John Rawls' account of conscientious objection as developed in *A Theory of Justice*, revolving mainly around conscientious objection to military service and the possibility of just wars. Rawls acknowledges that conscientious objection can be morally justified, but only if the objection is based on the so-called political principles that correspond to the principles of justice laid down in the constitution, i.e., to the two principles of justice agreed on from the impartial "original position" (namely, the principle of equal liberty and the difference principle). But Rawls' account of morally justifiable conscientious objection in *A Theory of Justice* is narrowly tailored and more restrictive than current constitutional law practice in many countries because he accepts only reasonable claims of conscience. Furthermore, he doesn't connect the problem of conscientious objection to his famous and powerful argument for *freedom of conscience*, i.e., the argument that persons in the original position do not know "how their religious or moral view fares in their society, whether, for example, it is in the majority or the minority." Therefore, according to Rawls, "equal liberty of conscience is the only principle that the persons in the original position can acknowledge. They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes" (Rawls 1971).

Freedom of Conscience and Exemptions from Generally Applicable Laws

In contrast, as indicated, current human rights and constitutional law adjudication treats the problem of conscientious objection as an aspect of freedom of conscience. This leads current discussions on freedom of conscience to focus on the question whether individuals should be exempted from generally applicable laws when they put forth claims of conscience and who should be accommodated. Should religious claims of conscience be privileged vis-à-vis nonreligious claims of conscience? (Koppelman 2006) Martha Nussbaum argues for an accommodationist approach that allows for exceptions to generally applicable laws on grounds of conscience if the respective individuals are severely burdened by a particular law and where there is no compelling state interest like peace or public safety that can override the individual interest (Nussbaum 2008). She advocates a broad reading of the concept of conscience that includes both religious and nonreligious believers, agnostics, and atheists. Brian Leiter, in taking up these questions, denies that there is a good moral reason to single out matters of religious conscience for special legal consideration. In his view, there is no good moral reason to think that religious claims of conscience deserve special protection and exemptions from generally applicable law (Leiter 2013). But the option to extend the exemptions to all claims of conscience, religious or not, is not a convincing solution to him either. Rather, there should be no exemptions to general laws with neutral purposes at all, except for exemptions which do not shift burdens or risks onto others. In other words, "exemptions from generally applicable laws for claims of conscience that do not impose burdens on others – such as the right to wear certain religious garb, or to use certain otherwise illegal narcotics in religious rituals" are morally justifiable (Leiter 2013). On this account, conscientious objection to military service would not qualify for an exemption, because military service heavily burdens those who are not exempted from it.

While it is convincing not to categorically reject the legal acknowledgment of a right to conscientious objection qua freedom of conscience, because this would seem to be too rigid and not necessary with regard to the doctrine and existing case law, the aspect of the *burden* that *others* in the community must bear is not the only important aspect of the problem. A further – but related – important aspect is the *purpose* of the law in question, i.e., the grounds for imposing a particular legal duty, when assessing the claim to recognize a right to conscientious objection. In this vein, it seems convincing to argue for a

generous treatment of conscientious objectors to paternalistic laws that essentially serve the interest of the individuals bound by the laws, as in the case of a duty for members of the Sikh community to wear crash helmets when riding motorcycles. As Joseph Raz holds, it is "hard to imagine a situation in which coercing the conscience of a normal adult by law in its own interest could be justified. If the ideals of autonomy and pluralism are not enough to enable a person to pursue his moral interests at his own expense, they count for very little indeed" (Raz 2009). Therefore, it is also important to take into account the perspective of the individuals who are burdened by a particular legal duty. In this respect, another crucial aspect is the *seriousness* of the violation of the conscience for the individual who desires an exemption. Kent Greenawalt argues that exemptions should depend on how serious such a violation would be for the claimant (Greenawalt 2006). Being forced to kill in military service in wartime against one's conscience seems more serious than not using an illegal drug in a religious ritual, for example.

Concluding Remarks

Notwithstanding problems of evidence and proof (the "epistemic problem"), which are admittedly complex – courts must decide whether a claim of conscience is really sincere and serious – there are compelling reasons to include such instances of conscientious objection in the ambit of the legal right to freedom of conscience. This is all the more conclusive as freedom of conscience is not an absolute, unlimited right, but, given the dogmatic structure of human or constitutional rights adjudication, a right that has reasonable limits (Taylor and Maclure 2011). Freedom of conscience, like other freedom rights, can be limited in order to protect public interests and the freedom of others and must be balanced against these interests under the circumstances of the specific case. The ECHR holds in Article 9 that such limitations must be prescribed by law and must be "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Cross-References

- ▶ Claim Rights (Subjective Rights)
- ▶ Freedom of Conscience
- ▶ Freedom of Religion
- ▶ Freedom of Thought
- ▶ Hobbes, Thomas
- ▶ Human Rights and Justice
- ▶ Kant, Immanuel
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Freedom of Expression

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Introduction

Freedom of expression involves a vast range of topics, spanning areas as diverse as national security, personal privacy, courtroom perjury, or commercial fraud. Those areas command wide agreement that limits are justified to counter clear harms, with any disagreements largely arising as exactly where the line between freedom and harm ought to be drawn. The challenges which arguably best illuminate questions about the foundations and justifications for free speech are those posed by the problem of so-called "hate" (or "extreme") speech, where controversy focusses on whether provocative speech as such can be said to cause any harm at all.

The Basic Structure of the Right to Freedom of Expression

The right to express one's opinions is enshrined in many modern constitutions and in international and regional human rights documents, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and the ASEAN Human Rights Declaration.

Notwithstanding its broad recognition, nowhere is the right to free expression absolute. Constitutions, human rights treaties, and courts generally recognize important limits. For example, article 10 (2) ECHR lists a number of "legitimate aims" for the restriction of the freedom of expression. The First Amendment to the Constitution of the United States, while setting forth no such "black letter" restrictions, has nevertheless been judicially construed as subject to limits to safeguard national security, personal safety, protection of reputation, and numerous other "compelling" government interests.

As a procedural matter, restrictions are typically of two types. A system of "prior restraint" proscribes distribution of materials ab initio. Alternatively, and more commonly in democratic societies, sanctions are imposed upon otherwise freely circulating materials where specific grounds for censorship are alleged. Prior restraint is considered exceptionally intrusive, as it preempts assessment of the merits of the material in question. Liberal democracies ordinarily subject prior restraints to close government and judicial scrutiny (cf. Barendt 2005: 117–153).

A Common Restriction: Hate Speech

One type of expression currently prohibited in most countries is "hate speech." This category of expression has no fixed definition (cf. Heinze 2016: 22–23; Strossen 2018: xxiii). Hare and Weinstein describe it as "expression which articulates hatred for another individual or group, usually based on a characteristic (such as race) which is perceived to be shared by members of the target group" (Hare and Weinstein 2009: 4). Waldron defines it as "publications which express profound disrespect, hatred, and vilification for the members of minority groups" (Waldron 2012: 27). Many scholars specify various types of hateful expression in different contexts (cf. Delgado and

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Stefancic 2004: 11–18; Parekh 2012: 38–42; Brown 2015: 19–41).

On the international and regional level, there is broad consensus favoring hate speech bans. The International Covenant on Civil and Political Rights provides in article 20 (2) that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law." Article 4 (a) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) obliges all state parties to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred. . .." Some regional human rights documents contain similar provisions. The ASEAN Human Rights Declaration requires that "All forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated." The European Convention on Human Rights has been interpreted to recognize lawful restrictions on hate speech in articles 10 (2) and 17. Protection from the expression of racial, ethnic, or religious hatred is central to most hate speech legislation (cf. Schauer 2005: 33), although some countries have extended the list of categories. For example, the Dutch law against "incitement to hatred or discrimination" prohibits incitement on the basis of race, religion, philosophy of life, sex, hetero- or homosexual orientation, or physical, psychological, or mental disability.

The United States is currently the major dissenter in regulating hate speech in public discourse. Since the 1960s, the US Supreme Court has steadily interpreted the First Amendment of the Constitution to bar government from prohibiting expression within public discourse solely on the grounds of its offensive or provocative point of view. Upon ratifying the ICCPR and CERD, the United States submitted treaty reservations to that effect.

Free Expression and Democracy

Free expression is widely regarded as essential for self-government. While voting is a necessary condition for a state to be democratic, it is an insufficient one. "Governments," Post points out, "do not become democratic merely because they hold elections in which majorities govern" (Post 2014: 328). The distinctive feature of democracy lies in "the authorship of decisions," not in the "making of decisions" (Post 2014: 329; cf. Heinze 2016: 5). This is where freedom of expression and democracy intertwine. "Authorship of decisions" is realized through a sphere, typically called "public debate" or "public discourse," for the exchange of opinions free from government interference. For the Austrian political philosopher Friedrich Hayek, "democracy is, above all, a process of forming opinion. . . The conception that government should be guided by majority opinion makes sense only if that opinion is independent of government. The ideal of democracy rests on the belief that the view which will direct government emerges from an independent and spontaneous process. It requires, therefore, the existence of a large sphere independent of majority control in which the opinions of the individuals are formed" (Hayek 2011 (orig. 1960): 174–175).

Public discourse provides for a "running discussion between majority and minority" (Kelsen 1949: 287) during which citizens may persuade each other or their political representatives of a particular viewpoint. Participation in public discourse enables people to "self-govern" and to identify – albeit not necessarily to agree – with the laws by which they must live. According to Post, "a major reason why modern democracies protect freedom of speech is to endow persons with the sense that their government might be responsive to them. The sense of responsiveness produced by freedom of speech is more ubiquitous and more continuous than that produced by voting" (Post 2017: 654). In contrast, "censorship of public discourse must be understood as excluding those affected from access to the medium of collective self-determination" (Post 1993: 660). While it could appear as if "public discourse" is limited only to expression that is strictly political in nature (e.g., expression about the pros and cons of government policy X, but not art or music), the term is generally understood as something broader – entailing cultural components other than solely political ones (cf. Barendt 2005: 189;

Heinze 2016: 26–30, providing insightful nuances and examples).

Since "democracy is, above all, a process of forming opinion," a state that aspires to be a democracy cannot punish opinions too broadly. A clear example would be a state that punishes all criticism of immigration as "racist propaganda" under a hate speech ban. If it did, then any immigration policy would lack legitimacy. The "process of forming opinion" would be hindered, and any immigration policy would be *imposed on* citizens rather than one the people *had a part in making*.

Matter and Manner in Public Discourse

Although it is clear that freedom of expression is indispensable for a democracy, there is no obvious standard as to the extent to which it must remain free from government interference in order to maintain democratic legitimacy. The United States' formally inclusive and egalitarian commitment to freedom of expression is, comparatively speaking, exceptional. "Constitutional democracy in the United States . . . [guarantees] to all the possibility of influencing public opinion," according to Post (Post 2012: 17). Pious, blasphemous, gentle, and hateful opinions are granted equal access to public discourse in the United States insofar as government may not favor one view over the other through censorship (cf. Greenawalt 1995: 16; Schauer 2005: 35; Weinstein 2009: 81–88).

Other advanced democracies commonly do make use of the law to punish "hate speech" (cf. Schauer 2005: 33, also 42–56). Germany, for example, prohibits inciting hatred against a national, racial, religious group . . . in a manner capable of disturbing the public peace (section 130 (1) of the German *Strafgesetzbuch*). Canada penalizes the willful promotion of hatred against any identifiable group (article 319 of the Canadian criminal code).

Some types of "hate speech" – such as Holocaust denial or certain racist expression – may be sanctioned no matter how decorously it is articulated. Other expression may be suppressed depending on the manner of presentation. In such cases, "sober" or "clinical" critique is allowed, but expression of dislike uttered in a "gratuitously offensive," "indecent," or "inflammatory" manner is punished (cf. Post 2009: 128). As Waldron observes with regard to hate speech bans in Western democracies: "[hate speech laws] generally permit [racists or Islamophobes] to restate their racism or their contempt for Islam in more moderate terms, less calculated to stir up hatred" (Waldron 2012: 149–150). Obviously, deciding whether speech is "merely" offensive or "gratuitously" offensive is not always an easy task and may give rise to problems of interpretation, especially in borderline cases (cf. Post 2009: 125).

Truth and Self-Fulfillment

Apart from its crucial link to democracy, theorists have defended free expression on other grounds, such as truth-seeking and self-fulfillment. On the truth-seeking argument, exchanges in the "marketplace of ideas" will lead to truth and an increase in knowledge (cf. Schauer 1982: 15, 47). The discovery of truth is frustrated in case the free marketplace is disrupted by restrictions on expression. The theory suggests that a "competition of opinions" takes place, with the "best" or "true" opinions "winning" (cf. Justice Holmes' famous passage in *Abrams v. United States* 1919: ". . .the best test of truth is the power of the thought to get itself accepted in the competition of the market. . .").

While there are contexts in which an open exchange of ideas may arguably lead to knowledge or truth, for example, in a scientific context or in other strictly regulated settings such as an adversarial proceeding (cf. Goldman and Cox 1996: 29–30), there is considerable skepticism that the theory applies to other areas, such as politics (cf. Heinze 2016: 99, 101; Barendt 2005: 11).

Criticisms have been levelled against both the structure of the marketplace and its customers. It is argued that the structure of the marketplace does not provide for a very fair competition. Barendt, for example, notes that "the marketplace is not in practice open to everyone who wants to

communicate his ideas. Some views are widely disseminated by the media, others hardly figure in public discussion. Differences in the availability of ideas have little to do with their truth" (Barendt 2005: 12; cf. Ingber 1984: 38–40; Greenawalt 1989: 134–135).

Another flaw concerns the "customer." The theory assumes that arguments exchanged in the marketplace are *rationally* evaluated on their *merits*. Yet, this assumption has met with skepticism. Goldman and Cox argue that "in the marketplace, nothing guarantees, or even makes it likely, that hearers will pay attention to messages on all sides of the issue. To the contrary, people are commonly disposed to attend rallies, listen to broadcasts, and read articles that support only the side of an issue they antecedently favor" (Goldman and Cox 1996: 31; cf. Schauer 1982: 26–27, also 33; Ingber 1984: 7; Greenawalt 1989: 135–138). Similarly, evolutionary psychologists Mercier and Sperber find that "human reason is both biased and lazy. Biased because it overwhelmingly finds justifications and arguments that support the reasoner's point of view, lazy because reason makes little effort to assess the quality of the justifications and arguments it produces" (Mercier and Sperber 2017: 9). Notwithstanding these considerations, Greenawalt explains that "the question is not whether free individuals are paradigms of rationality while sifting claims of truth; the question is whether truth will prosper better in freedom than under government dictation. Individuals may be untrustworthy in their evaluations; but governments deciding what people may hear and see may be even more suspect" (Greenawalt 1995: 4).

On the self-fulfillment theory, free expression is considered essential for personal development. In short, the argument holds that "the development and exercise of a range of distinctively human capacities, such as thinking, feeling, communicating, imagining, culture building, and so on, would be practically impossible, if not inconceivable, without freedom of expression given the expressive nature of the human capacities in question" (Brown 2015: 122; cf. Greenawalt 1989: 143–145). Censorship, on this view, "negates what is distinctly human about the speaker" (Heinze 2016: 105; cf. Barendt 2005: 13). While the notion of "self-fulfillment" is concerned with individual personal growth, it undoubtedly has collective components, as people develop intellectually through interaction with others – they learn from the products of others: their music, their art, and their political and religious opinions (cf. Brown 2015: 122). "Self-fulfillment" as an argument for free expression also has its caveats. Barendt, for example, states that "it is far from clear that unlimited free speech is necessarily conducive to personal happiness or that it satisfies more basic human needs and wants than, say, adequate housing and education" (Barendt 2005: 13). Moreover, it may be argued that certain utterances, while considered important for the speaker's personal development, may limit the development of others affected by the utterance. Matsuda, for example, points to restrictions in the personal freedom of victims of hate speech as they have to modify their behavior – including quitting jobs and avoiding certain public places – in order to avoid receiving hateful messages (Matsuda et al. 1993: 24; cf. Barendt 2005: 15). If one regards free expression as a "zero-sum game" – one's gains in personal development are balanced out by another's loss of development as a result of the utterance – it is not clear why the speaker's right to free expression should prevail.

Hate Speech and Harm

Laws against hate speech are justified by their aim to prevent certain harms. Typically, however, they are not concerned with two types of harm, the first of which is *mere offense* – a subjective sense of discomfort, unease, or perhaps even shock as a result of public expression. Mere offense is generally regarded as a cost of living in a heterogeneous society, in which different groups of people hold different, often conflicting, points of view (cf. Waldron 2012: 105–106). Secondly, *physical violence as a direct and intended result* of an utterance is a harm that is typically addressed by laws against "incitement to violence," not by hate speech bans. Laws against this type of incitement are broadly seen as legitimate and uncontroversial, although they do raise complex issues, for example, as to how close the causal connection between

expression and violence must be in order to violate the rule.

Hate speech bans are concerned with other harms it has, or is said to have, on individuals and the social fabric (cf., generally, Heinze 2016: 125–162; Strossen 2018: 121–132). The argument of "militant democracy" arguably addresses the most severe harm of hate speech, as it links hate speech to the collapse of the democratic order. "Militant democracy" is the idea that in order to protect itself, a democracy needs to withhold certain democratic freedoms – for example, the freedom of expression – from the "enemies of democracy." By curtailing their hateful rhetoric, the argument goes, hate speech bans obstruct fascists in achieving their anti-democratic aims. Heinze argues that we have to be careful in accepting this argument for hate speech legislation in *democracies as such*. Hateful expression may indeed contribute or lead to the decay of civil society in weak democracies or non-democracies. Yet, to infer from this the necessity of hate speech bans in democracies *in general* is an inductive fallacy (Heinze 2016: 131, 134, also 209).

Another argument links hate speech to the undermining of democratic legitimacy. Here, hate speech "silences" the targets of such expression and thereby in fact damages democratic legitimacy, as hate speech discourages people from participating in public discourse for fear they themselves become a target of hate speech. On this view, hate speech bans strengthen rather than undermine democracy (cf. Gelber 2017: 622; Post 2017: 657; critically, Weinstein 2017: 579–580 (". . .even if it could be definitively shown that bigoted speech prevented others from participating in public discourse, it is not clear what principle would justify shutting up A (or a group of As) so that B (or a group of Bs) can speak").

Furthermore, Delgado and Stefancic point at physical, psychological, economic, and societal harms caused by hate speech, including a damaged self-image, a sense of fear, and diminished career options for the targets of hate speech (Delgado and Stefancic 2004: 13–17), while Matsuda mentions "physiological symptoms and emotional distress ranging from fear in the gut to rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide" (Matsuda et al. 1993: 24).

Arguments of cause and effect, at least in their general form, are called into question by Heinze, who rejects hate speech bans within what he calls "longstanding, stable, and prosperous democracies" – or "LSPDs," a type of democracy "tracing back no further than the 1960s" (Heinze 2016: 69–78, also 207). His opposition to these bans rests in part on "a lack of causal evidence reliably linking hate speech within LSPDs to further harms" (Heinze 2016: 76). Despite the fact that "LSPDs are the most empirically surveyed societies in history" and despite "decades of pro-ban law and policy," Heinze writes, "no empirical evidence has, in any statistically standard way, traced hatred expressed within general public discourse to specifically harmful effects" (Heinze 2016: 126–127). It is important to note that Heinze has only *one* type of society in mind, namely, his model of LSPDs – and not, for example, Weimar Germany or 1994 Rwanda, where "hateful expression is by no means the same thing . . . that it is in early twenty-first-century Western Europe" (Heinze 2016: 8, also 207).

Conclusion

This contribution has discussed the right to freedom of expression. While virtually all countries – at least formally – endorse free expression, the extent to which expression is legally protected varies significantly. A common restriction is "hate speech." Most countries curtail this type of expression in public discourse, the United States being a notable exception. Notwithstanding its – many – restrictions, freedom of expression is regarded by many legislatures and courts as important for the democratic order, for the search for truth, and for the personal development of citizens. These arguments are not mutually exclusive: legal systems typically encompass a plurality of theoretical foundations. For example, the European Court of Human Rights holds that "freedom of expression . . . constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment" (*Lingens v. Austria*

1986), while the US Supreme Court has stated not only that "speech concerning public affairs . . . is the essence of self-government" (*Garrison v. Louisiana* 1964) but also that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail" (*Red Lion Broadcasting Co., Inc. v. FCC* 1969).

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► Freedom

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Garrison v. Louisiana, 379 U.S. 64 (1964)
Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969)

Europe

Lingens v Austria (1986) 8 EHRR 407

Freedom of Religion

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Introduction

Freedom of religion (often called "freedom of religion or belief") is guaranteed in numerous legal documents at national, supranational, regional, and international levels. It is a widely

recognized constitutional and human right all over the world. In a historical perspective, a major impact for the legal development of freedom of religion in the Western world had the provisions in the *Virginia Declaration of Rights* of 1776, in the *Bill of Rights* of 1791, and in the *French Declaration of the Rights of the Man and of the Citizen* of 1789 (although in the latter only as a subcategory of freedom of opinion). This long tradition has helped to establish the reputation of freedom of religion as a primordial fundamental right ("Ur-Grundrecht", Jellinek 2013) – a much disputed thesis that has to be integrated into the persistent broader controversy on the origins of human rights. In this context, it is important to highlight that freedom of religion is not a purely Western construct. Its origins can be found in the traditions, cultures, and religions of different parts of the world. Therefore, non-western perspectives on human rights must be considered as well for an exploration of the origins of freedom of religion.

Since the 1990s, freedom of religion has attracted more widespread attention in law and philosophy, not least due to the fact that in the context of global migration, many countries experience increasing religious diversity (McCrudden 2018; Nussbaum 2012; Habermas 2005; Benhabib 2004). When the discussion about freedom of religion is surrounded by tension, this has to do, among other things, with the fact that in many national constitutions and in international or regional human rights instruments, such as the Universal Declaration of Human Rights (UDHR) of 1948, the International Covenant on Civil and Political Rights (CCPR) of 1966, or the European Convention on Human Rights (ECHR) of 1950, freedom of religion is seen as a wide-ranging right, covering a large number of distinct yet interrelated issues. It encompasses both the right to have (and to change or renounce) a religion (*forum internum*) and to manifest or practice it alone or with others (*forum externum*). According to judicial and human rights bodies all over the world, freedom of religion contains both an individual and a collective dimension, and religiously motivated behavior corresponding to clothing and dietary rules, religious holidays, etc. falls within the ambit of the protection afforded by freedom of religion. It is mostly the manifestation of religion or belief that triggers legal dispute, especially when religion requires special treatment and in some circumstances even exemption from generally applicable law (Leiter 2013; Greenawalt 2006; Benhabib 2002). Since the manifestation of religion may be subject to reasonable limits, there is a diversity of opinions about the proper understanding of the scope of protection and the limits of freedom of religion. Specifically, there is ongoing controversy about whether its scope should be interpreted broadly or narrowly and whether the distinction between an internal and an external dimension of freedom of religion (belief-action dichotomy) is an adequate categorization at all. In particular, the definition of the "religion" that is protected by this right is very much debated: should it encompass a wide range of beliefs, or should it be restricted to traditional understandings of "religion"? Not to forget, the content and boundaries of constitutionally enshrined freedom of religion also depend on the relations between church and state and on the organization of religion in the respective state (Rapporteur's Digest on Freedom of Religion or Belief 2011).

Justifying Freedom of Religion

Arguments for freedom of religion – not in a technical but in a general sense – have been put forth in theology and philosophy long before it was guaranteed as a constitutional or human right. Early arguments for a general freedom of religion were religious in nature and referred to the virtues of religious values like charity and love and to the *search for religious truth*.

Search for Truth and Epistemology

Among religious justifications of freedom of religion, the argument of Augustine (354–430) features prominently, in which he contended that only a freely chosen belief could exist in a permanent, firm, and stable manner. It is impossible to influence belief by force: Human beings must autonomously find the true belief by way of insight and conviction, whereas "truth" is bound to the divine and conveyed to mankind by God (Augustine 1845). However, Augustine later

changed his position, when Christianity had become the state religion of the Roman Empire and was faced with the challenge of schisms. The search for truth nevertheless remained an influential argument for a legal right to freedom of opinion and conscience in the work of John Milton (1608–1674) and John Stuart Mill (1806–1873). They both argued from a specific religious viewpoint that there are good reasons to grant equal liberty of opinion even in religious issues – which is also an element of freedom of religion in current human rights case law – including to non-believers and heretics, because the constant debate between all the different opinions serves the search for truth (Milton 1888; Mill 1978). The argument that belief cannot and should not be compelled by violence or force remained important as well and figured prominently in the writings of Spinoza (1632–1677). In his *Tractatus Theologico-Politicus* of 1670, he contends that "total failure will attend any attempt in a commonwealth to compel men to speak only as prescribed by the sovereign despite their various and contrasting opinions" (Spinoza 1991). Furthermore, John Locke (1632–1704) prominently argued in his Epistola de Tolerantia (A Letter Concerning Toleration) of 1689 that only freely adhered conviction could be pleasing to God (Locke 1968), and in the eighteenth century, Moses Mendelssohn (1729–1786) prominently supported this argument (Mendelssohn 1983).

Social Peace

Another strand of justifying freedom of religion builds on arguments for religious tolerance and considers freedom of religion as a means to secure *social stability and peace* in religiously pluralistic societies. Freedom of religion – even if not yet interpreted as an individual right to full freedom of religion – appeared to become an urgent political and societal problem in Europe, when confessional conflicts after the Protestant Reformation were among the factors for religious wars and bloodshed starting in the sixteenth century. This raised awareness of the benefits of freedom of religion as a principle for accommodating competing religious communities in a religiously nonhomogeneous society (Forst 2013). The argument that disentangling state power from religious truth permits societal and political peace remained an influential rationale for freedom of religion, tolerance, and state neutrality. Even today, it is still closely connected with a specific understanding of liberalism. The overcoming of the religious wars in the early modern period can be seen as the historical starting point of an influential branch of liberalism claiming the priority of the right over the good (Rawls 1971). In Western history of ideas, the argument from social peace, coupled with the call for a separation of state and religion, can also be traced back to the writings of John Locke (1632–1704) in the seventeenth century. John Locke famously argued in *A Letter Concerning Toleration* in 1689 that "it is not the diversity of Opinions (which cannot be avoided) but the refusal of Toleration to those that are of different Opinions (which might have been granted) that has produced all the Bustles and Wars, that have been in the Christian World, upon account of Religion." Locke built on the notion of two separate realms – the realm of the state and the religious realm – each having their own functions and tasks. Since they serve separate functions, they must be considered to be separate institutions. Government is instituted to promote external interests, relating to life, liberty, and the general welfare, while the church should promote internal interests, i.e., salvation. Earthly judges cannot evaluate religious standpoints and cannot determine disputes about religious doctrines.

Democracy

Furthermore, freedom of religion is being justified with an argument from *democracy*, challenging the at times widespread assumption that deeply held religious convictions are not compatible with democracy. The argument was not explicitly but rather implicitly put forth by Alexis de Tocqueville (1805–1859), who held that religion creates benefits for liberal democracy. He thought that a vibrant religious life was essential to the preservation and prosperity of a free democratic society because organized, communal religion could counterbalance some of the main threats democracy faced, especially individualism, materialism,

and religious fanaticism. To de Tocqueville, a strict separation of religion and the state was necessary for democracy (de Tocqueville 2004). Today, a link between democracy and freedom of religion as guaranteed in Article 9 ECHR is famously made by the ECtHR: "As enshrined in Article 9, freedom of thought, conscience and religions is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimensions, one of the most vital elements which go to make up the identity of believers and their conception of life, but it is also a precious asset to atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it" (European Court of Human Rights, Case of Kokkinakis v. Greece, 1993, Application no. 14307/88, para 31). Hence, freedom of religion serves as a foundation for religious and ethical pluralism because it facilitates a diversity of views and opinions.

Individual Integrity and Autonomy

The ECtHR's decisions point to another influential strand of justification of freedom of religion, one that is oriented toward the *individual human being* and aims at the protection of personal identity, integrity, dignity, and autonomy. In this sense, the European Court of Human Rights regards freedom of religion to be crucial for "the identity of believers and their conception of life." Since religion is a central aspect of human existence and thus forms an existential human concern, it is necessary to highlight the importance of freedom of religion for personal identity and integrity. In current debates on the foundations of this right, freedom of religion is also tied to human dignity. In a Kantian tradition, freedom of religion demands "to take every individual and her pursuit of happiness as a categorically protected value and good. This perception of the individual as a supreme value is embodied in the concept of human dignity. Human dignity means that every human being is an end in itself, that no other collective or cultural value surpasses the value of the individual human being irrespective of her concrete properties like (...) skin color, sex, (...) level of education, income or scientific merit. In consequence, no human being can be used as a mere means to reach the purposes of others" (Mahlmann 2009). Since Immanuel Kant (1724–1804), human dignity is closely connected with autonomy that Kant attributed to human beings in a novel way (Kant 1968). Human dignity is an important postulate and field of research in the context of freedom of religion. It is important for the current debate, because it emphasizes the crucial insight that the value of freedom of religion should not be inferred from the value of religion but from the respect for the person who believes and who has an intrinsic value as an individual human being. In short, it is argued that freedom of religion is not about the protection of religion or beliefs but about the protection of the freedom of the person (Bielefeldt et al. 2016).

Protection of Minorities

A further important argument for freedom of religion is its significance for the *protection of minorities*. In the context of the situation within states, this argument focusses on the fact that democratic majority decisions can have unfair impacts on the members of minorities. Freedom of religion – indeed mostly invoked by members of minority religions – helps to alleviate such effects on religious minorities (Nussbaum 2008). It comes as no surprise in this context that freedom of religion plays a major role in the debate on multiculturalism, a prominent debate in political and legal philosophy and law dealing with the rich cultural, linguistic, and religious spectrum in Western democracies. Multiculturalism revolves around the question of the just treatment of minority groups. To achieve justice for minority groups, Will Kymlicka suggested, among other things, that members of minorities should be awarded special "group-differentiated rights" such as "self-government rights," "polyethnic rights," and "special representation rights" that transcend and complement the traditional framework of human rights which are awarded to individuals regardless of their membership in a specific group (Kymlicka 1995). He argued that such rights are consistent

with liberalism and that minority cultures should be given a special status.

Freedom of Religion and Gender Equality

One of the salient problems in current discussions on freedom of religion appeared clearly in the debate on multiculturalism: the relation between (freedom of) religion and gender equality (Mendus 1989; Mahlmann 2014). The topic has gained prominence in the context of the debate about legal prohibitions of headscarves and burqa or religiously motivated requests for exemptions from school (especially swimming) lessons. Many different questions arise in this context such as which gender roles are envisaged in the diverse religions or whether promoting freedom of religion serves to harm gender equality, as well as how to achieve gender equality while respecting freedom of religion. The argument that freedom of religion should be restricted because it is not compatible with gender equality, which was proposed in the context of a ban on the headscarf in various court rulings in Europe, has been revised or at least differentiated by some courts in recent times. The European Court of Human Rights, while proclaiming that the advancement of gender equality is today a major goal in the member States of the Council of Europe, took the view, "that a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms" (case of S.A.S. v. France, 2014, Application no. 4835/11, para 119).

Conclusion

In our times, when constitutional or human rights serve as reference points for the newly prominent political, legal, and philosophical debates about religion in liberal democracies, freedom of religion has developed into one of the most controversial civil liberties. Examples are the debates around the ban of the headscarf or burqa, religious symbols in classrooms, and religiously motivated exemptions from school lessons in many Western countries, debates that legally fall within the framework of freedom of religion. However, the current uproar about freedom of religion in some countries should not obscure the fact that the content and meaning of this right were contested from the beginning of its legal acknowledgment, especially where the rights of minorities were concerned. The difficulty to grant (equal) freedom of religion to religious minorities is a recurrent problem all over the world even today, and the persecution of people because of their faith caused some of the greatest tragedies in human history. In the light of this, a justification of freedom of religion that is oriented toward the individual human being and aims at the protection of personal identity, integrity, dignity, and autonomy is of particular significance. It should also be noted that – notwithstanding an ongoing controversy about how to interpret freedom of religion and recurrent attempts or tendencies to downplay its importance as a human right – its value as a principle and fundamental cornerstone of a liberal democracy is nowadays generally not questioned in most states, if not always in practice, at least in theory.

Cross-References

- ▶ Augustine of Hippo
- ▶ Freedom of Conscience
- ▶ Kant, Immanuel
- ▶ Mill, John Stuart
- ▶ Nussbaum, Martha

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Freedom of Speech

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Introduction

In this entry, freedom of speech will be treated solely as the subject of a political right, that is, a right of private persons against the state, leaving other topics, e.g., government speech, outside its purview. It will also be understood to encompass any instance of expression, whether or not it has propositional content, as speech, narrowly defined, does.

The Good of Free Speech

According to one family of views, the right to free speech is grounded in the good that is being produced by the guarantee of such a right. For some, the good consists in that free speech promotes the speaker's interest in autonomy. For example, Mill (1859, 31) writes that restricting speech compromises "the entire moral courage of the human mind." (See also Brison 1998; Richards 1974; Riley 2005.) Others contend that in a society where speech is free and viewpoints compete in a "marketplace of ideas," the truth is more likely to emerge and become ascendant than in a society where viewpoints cannot be freely disseminated unless they are deemed worthy by state officials. On this rationale, free speech has value not only for the speaker but also for the listeners. For example, listeners also benefit from having true beliefs on important matters. The marketplace of ideas is a method for collectively arriving at true beliefs.

It is argued that this type of instrumentalist grounding of a right to free speech is "more fragile and more limited" (Dworkin 1996, 201; see also Schauer 1982). It is more fragile because it makes the existence of the right contingent on the consequences of recognizing it, which may well vary depending on social conditions, and more limited

because it is implausible to suggest that all forms of speech have the beneficial consequences that are taken by this kind of view to ground the right to free speech. On the other hand, it does have the resources to delimit the scope of the right in a more fine-grained way so as to track features of speech that we tend to think should make a moral difference, e.g., by taking into account the relative value of speech in different settings and weigh it up against its costs (Scanlon 2003a). Hence, it offers an explanation why, for instance, we seem to want to accord certain forms of expression a privileged position. Take, for example, political and journalistic speeches. Here, it is widely thought that the common good is served by allowing all views to be expressed and heard, especially because an alternative regime which authorizes the drawing of distinctions between instances of speech that have beneficial consequences and those that do not would be extremely vulnerable to abuse. Rulers have a very strong interest in using the power of drawing such distinctions so as to shield themselves from criticism and exposure of their failings by their political opponents and journalists.

The Right to Free Speech

On some theories of rights, we have seen, the good of free speech is a necessary ingredient of the case for the existence of a right to free speech. We can call such theories good-based. A contrasting view – call it deontological – decouples the right to free speech and the good of free speech, and instead grounds the former in a deontological principle whose force is independent of the contribution the recognition of the right makes to the good, either of the speaker or broader society.

Notably, such a principle is drawn from the theory of political legitimacy. Now, clearly, on any view, the right to free speech will be relevant to political legitimacy. What differs is the order of explanation. For good-based views, a state's legitimacy depends on respect for certain fundamental moral rights of individuals, and the right to free speech is one of them. But the theory of legitimacy does not determine what is the content of that right. For deontological views, legitimacy requires that individuals be treated in certain ways. The existence and content of the right to free speech – and perhaps other rights – is derivative from that requirement.

There are two versions of the deontological view that have been prominent in recent years. On the first version, a legitimate state accords individuals a certain status, from which flow a set of more specific constraints. Thus, Dworkin (1996, 200) contends that it is a condition of a government's legitimacy that it treat persons as responsible moral agents who "insist on making up their own minds about what is good or bad in life or in politics, or what is true and false in matters of justice or faith." Elsewhere, he refers to a related "right to moral independence" (Dworkin 1985, 353–372). Relatedly, on Scanlon's early view, it is not legitimate for the state to restrict acts of expression in order to prevent "(a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression, (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing." (Scanlon 2003a, 14). Scanlon maintains that, insofar as the state adheres to this so-called Millian principle, citizens can "[regard] themselves as equal, autonomous, rational agents" (*ibid*., 15). He writes: "An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do" (*ibid*., 16). A similar conception of autonomy may be thought to underpin a deontological conception of freedom of expression that relies on a putative moral right that individuals have independently of the state rather than a principle of state legitimacy (Nagel 1995).

Common to both Dworkin's and Scanlon's early account is that they do not start their theory from circumscribing a privileged class of acts of expression, whose restriction triggers their respective principles of legitimacy. The emphasis is, rather, on the reasons for government

intervention, whether it targets artistic or political expression or expression without propositional content. By contrast, according to Kramer (2021, Chap. 2), who also advocates a deontological view, we must first identify what is a "communicative activity," because the principle of legitimacy only imposes a constraint on government measures aiming to curb the "communication-dependent" effects of expression, and we need to know what makes an activity communicative in order to distinguish communication-dependent and communication-independent effects. Specifically, it is legitimate for government to impose restrictions on expression to avert effects that can be caused either by communicative or non-communicative means. In this category, Kramer includes incitement to imminent lawless violent action. Though such incitement may be committed by communicative means, it is "sufficiently proximate to [the ensuing criminality]" (*ibid*., 37) to be subsumed to it "as some of the initial stages thereof" (*ibid*., 36).

Proponents of this version of the deontological view insist that it should not be confused with the view according to which free speech promotes the autonomy of either speakers or listeners, understood as an aspect of their good. However, it has been suggested (notably by Scanlon himself in later work modifying his earlier account) that built into the Millian principle are, in fact, certain assumptions about the moral weight of certain key interests in speech that we have qua listeners. That is, the Millian principle seems to be intended to leave it entirely to individuals to evaluate the merit of the information they receive and decide on the basis of this evaluation whether something is good or bad, true or false. But it is controversial that we would be willing to protect this capacity of ours against the government at all costs. In fact, says Scanlon (2003b, 98), there may be circumstances under which we would be better off if "we could shield ourselves from some influences," possibly with the help of government restrictions, as in the case of deceptive advertising. If we think that the Millian principle implausibly condemns this type of government restriction as illegitimate, then surely we do so because we take a different view about the relative weight of interests in speech, which suggests that the Millian principle is not entirely independent of the good. Note, though, that this does not entail that this view collapses into consequentialism.

According to a second version of the deontological view, it is illegitimate coercively to enforce a policy against those who object to it, unless they had been given an opportunity to present their viewpoint (Dworkin 2009, vii). A right to free speech guarantees such an opportunity. Again, this position should be distinguished from the instrumentalist view that free speech promotes democracy by facilitating the free exchange of political ideas and government accountability. Here, the relationship between free speech and democracy is constitutive, underpinned by an idea of fairness. According to the latter, legitimate policies must be decided by fair contests, and there is no level playing field when dissenting viewpoints are silenced.

It could be objected that, although the argument from fairness, if sound, can justify, say, opposition to bans on hate speech and other political speech, it is doubtful that it can provide a general account of the right to free speech, including in nonpolitical matters (Waldron 2012, 281ff). According to this objection, nonpolitical speech like pornography may of course also be the subject of a ban or restriction, but the argument from fairness extends, at best, to advocacy for freedom of pornographic expression rather than pornographic expression itself. In response to this objection, it is argued that many people voice their preference for a certain type of speech not by making the case for its protection in the design of public policy but simply by engaging in it and thereby seeking to shape their cultural environment (Dworkin 2009, vii). However, the further we shift from political advocacy, the more the boundaries between the two versions of the deontological view are blurred.

Freedom of Speech and Content Neutrality

It is commonly thought that the right to free speech on the deontological view issues in a demand for a degree of "content neutrality." At a minimum, content neutrality in this context is

understood to mean that government should not ban or otherwise restrict speech on the basis of a judgment that the content of the speech in question is worthless, bad or false, because this would amount to a failure to treat persons as responsible moral agents in the sense specified by the deontological view. However, as theorists like Kramer warn, it should not be taken to imply that the justification of a restriction on expression cannot refer to the content of the expression at all. Surely, the wrongness of shouting "Fire" in a crowded theatre has to do with the content of the utterance. So, what is a characteristic affront to freedom of speech is "viewpoint neutrality." According to Kramer (2021, 38–40), freedom of speech also condemns restrictions that violate "subject neutrality" inasmuch as they treat differently not a certain viewpoint but a certain category of speech, say, political as opposed to artistic speech, and "speaker-neutrality," which single out certain individuals for favorable or unfavorable treatment.

The Harm of Free Speech

On any view of the right to free speech, it is a separate issue under what circumstances some speech may be restricted. In some cases, this may be because the speech in question does not instantiate the value or promote the good that the view identifies as the moral basis of the right. For example, a good-based account of the right to free speech might exclude pornographic expression from the right's protective scope on the grounds that it is highly unlikely to contribute to the search for truth. In other cases, it will be because, though the speech in question falls within the protective scope of the right, there are countervailing reasons in favor of removing the protection. For example, that could be said of various restrictions on free speech to protect national security during an emergency situation like a war or of the prohibition of speech that incites violent action. Rather than offer a comprehensive account of justifiable restrictions on free speech, this section will examine a number of controversial proposals about the kind of reason that can furnish a basis for such restrictions. What makes them controversial is that they stand in tension with the aforementioned demand for viewpoint neutrality.

An especially problematic option, as far as viewpoint neutrality is concerned, says that a permissible reason for restricting a certain type of speech is that it causes offence to some people. In this vein, Feinberg (1985, 1; see also Waldron 1987) writes: "it is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense. . .to persons other than the actor, and that it is probably a necessary means to that end." However, he clarifies that the case for prohibition should take into account other considerations such as, crucially, whether the offence is easily avoidable.

More plausible is the idea that some viewpoint-based restrictions can be morally justified if they target speech that causes harm to the dignity of those it is directed against. In this vein, Waldron (2012, Chaps. 3 and 4) argues that, even if hate speech does not lead to, say, imminent violent and lawless action, it has – by virtue of the viewpoint it expresses – a deleterious effect on the status of some individuals as equal members of society. He contends that hate speech has this effect, because it undermines an important public good that sustains equal status, namely, the existence of public assurances that one's position in society is respected and secure. We all have a responsibility to uphold such assurances towards one another. It is this responsibility that bans on hate speech enforce. They, thus, provide another layer of assurance of equal status.

A different view rests, instead, on the idea that some speech may be restricted because it is subordinating. This view has been developed primarily with reference to pornographic speech and its effects on women's social position (See Langton 2009; Langton 1993; MacKinnon 1993, 31), though it has also been applied to hate speech (Langton 2018). It has affinities with but should be distinguished from the view that pornographic speech is harmful, because it is causally linked with, say, rape committed by consumers of such speech by conditioning their beliefs and sexual desires. The latter theory has

been criticized by, among others, Dworkin (1996, 230ff) on the grounds that there is a lack of evidence correlating consumption of pornographic speech and an increase in sexual violence against women. By contrast, the view under consideration here does not depend on this kind of correlation. Drawing on speech act theory, it claims that pornography is an exercise of authority that changes the normative standing of women (or, analogously, victims of hate speech) in society by assigning inferior worth to them, licensing their discriminatory treatment and taking away some of their rights, for instance, their right to withhold consent to intercourse.

A key premise of this view is that pornographic speech is indeed authoritative. As Langton (2009, 37) puts it, "[s]ubordinating speech acts are authoritative speech acts, so if we are ever to count some class of speech acts as subordinating speech, the speakers in question must have authority." Of course, neither epistemic nor practical authority is expressly claimed by pornographers, much less formally bestowed upon them. Rather, Langton argues, pornographers acquire this status informally through a process of presupposition accommodation, whereby their assertions (about women's inferior worth, the permissibility of treating them in a discriminatory fashion and denying them their rights) presuppose the pornographers' authority on sexual matters, and that presupposition is accommodated by their audience, thereby becoming part of the context of the interaction between them and the pornographers. However, it is doubtful that pornographers presuppose that they have epistemic and even less practical authority or that consumers of their speech typically accommodate any such presupposition (Kramer 2021, Chap. 4).

Conclusion

This entry distinguishes two ways of grounding a moral right to free speech, one based on the good of not restricting speech and the other that does not rely on the good of unrestricted speech but rather on the principle of the state's legitimacy. It then goes on to explain the connection between free speech and the concept of viewpoint neutrality. Finally, it discusses a number of controversial proposals for restricting speech in the name of averting offence, protecting the dignity of others and averting their subordination.

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Freedom of Thought

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Introduction

Freedom of thought is one of the great ideas in the Western political and philosophical tradition (to which this entry is restricted) as well as a core human right. The broad and abstract idea has found various manifestations which elude a unified definition. The common core might be stated as the rejection of unfounded authority over thoughts and beliefs, thinking and reasoning.

Conceptions of Freedom of Thought

Particular practices may serve as a first approximation: Freedom of thought opposes dogmatic teachings, indoctrination, propaganda, coercive pressures, or manipulative influences on reasoning; it is the antidote to blind belief. It favors Socratic dialogue, Cartesian skepticism, habits of critical thinking, and, in the words of Bertrand Russell, the will to doubt (Russell 1921). The having and exercising of these and many other cognitive capacities for reflection, creativity, and outside-the-box thinking might be called *free thinking*.

"Thought is free" has further meanings. It is usually not a claim about freedom in a metaphysical sense (as in the free will debate) or about freedom in the mind-brain relationship (as in substance dualism), but about an empirical inaccessibility of thought that is twofold: Undisclosed thoughts are free because they cannot be known by others, except perhaps by God; thoughts are free because they are factually invincible as they cannot be changed or prevented by others against the thinkers' will. This twofold understanding of freedom is expressed in the comforting lines of an eighteenth-century German folk song, popularized in the English-speaking world by the singer Pete Seegers: *no scholar can map them, no hunter can trap them, no man can deny – die Gedanken sind frei* (thought is free). The belief in the factual inaccessibility of thought corresponds with its phenomenological freedom. Thoughts are usually experienced as coming and going freely, not as forced upon the thinker. Only in exceptional cases such as intrusive or compulsive thoughts, they might be experienced as unfree, uncontrollable, or externally imposed. However, this phenomenological freedom might be primarily due to lacking introspective access to the non-conscious cognitive machinery which underlies and generates thought and thinking. Even more, thought might not be as inaccessible as the comforting view suggests. For more than a century, psychology has tested means and methods to assess and alter how and what people think, often on ways bypassing their control or awareness. In general, the degree of freedom people possess over their mental lives might be smaller than it may seem (Metzinger 2015).

In a different perspective found throughout the ages, free thinking is understood as *rationalist* thinking, primarily as rational belief formation in the search for truth (Collins 1713; Kant 1786; Pettit and Smith 1996). Thoughts, or better: beliefs, are free then if (and only if) they follow the commands of reason. Freedom of belief in this sense is not the ability to believe anything one wants but to believe in accordance with available evidence and epistemic standards. In this view, beliefs are free because not even the greatest tyrant can compel a person (or her cognitive faculties) to accept as true a proposition that is not supported by evidence and argument. Even more, beliefs largely evade direct control by thinkers themselves; people cannot get themselves to form beliefs by acts of will (doxastic voluntariness). At best, people have indirect control over forming beliefs by strategies such as attending to specific pieces of evidence. These considerations give ground to the assumption that beliefs cannot be compelled or coerced. Similar arguments in the Christian debate about the impossibility of coercing faith of unbelievers paved the way for toleration. As Locke wrote in A Letter of Toleratio: "And such is the nature of the understanding,

that it cannot be compelled to the belief of any thing by outward force" (Locke 2003, p. 219). This freedom from compulsion applies to all beliefs. However, one should not rely too strongly on the supposed natural resilience of the understanding or rational capacities more generally. The history of coercive indoctrination, "thought reform," and not least the Inquisition shows that the use of coercive force may successfully change people's beliefs. There are many weaknesses in the mental processes forming and revising beliefs that can be exploited by others (Lifton 1953; McMyler 2011).

Rulers and governments seeking to preserve power have a vested interest in shaping, influencing, or controlling beliefs and opinions of citizens. The *political* idea of freedom of thought encapsulates the view that such measures are overbearing because thoughts and beliefs are, in principle, off-limits for intervention by the State or other actors. Structurally, freedom of thought protects the nonconformists and dissidents which challenge dominant views (Swaine 2021). The idea that there must be a place of inner refuge in which people are left to themselves is the foundation of a rough distinction between thought and action which is still relevant today: people may reason freely, as long as they obey. In other words, the purview of legitimate powers of the State is limited to controlling external behavior and does not include thoughts. Even Hobbes grants a residual form of this freedom against the absolutist Leviathan. Although it has the power to well-govern opinions and public speech, people in private have the liberty to disbelief (Hobbes 1996). From Hobbes onwards, this inner freedom has increased in scope and depth. A significant step was Spinoza's (Spinoza 2007) argument in his Theological-Political Treatise for a natural right to think freely and make one's own judgments. In contemporary political theory, freedom of thought can be seen as a precondition of democratic legitimacy (Paulo and Bublitz 2016). The negative freedom barring governmental interventions ensures the free formation of the will of the people, the ultimate source of governmental legitimacy. A manipulated or coerced will cannot confer legitimacy.

Historically, seeds of the idea of freedom of thought can be found in Greek and Roman writings (Swaine 2021). The Digest of Justinian decreed one of the most enduring legal maxims, *cogitationes poenam nemo partitur,* no punishment for mere thought (48.19.18; Watson 1998). It sets a lower limit to what States may rightfully penalize and is still a pillar of contemporary criminal law which in principle rejects "thought crimes" (Mendlow 2018). However, despite such seeds, freedom of thought in Europe emerged only slowly, through centuries of bitter struggles, often against religious authorities, with a long trail of persecutions which left many tortured or executed. A free-thinking people was too great a danger for public order and the sovereigns' power. The rise of freedom of thought was aligned with the successes of the natural sciences, and it is most closely associated with the Age of Enlightenment, the triumph of reason. Echoing Voltaire (1765), Kant proclaimed the courage to use one's own understanding, without guidance by others, as the motto of the Enlightenment (Kant 1784). Calls for freedom of thought by these and many other protagonists were not only directed at political and religious authorities, but at the people, as an encouragement and sometimes a command to embark on the effortful and exhausting path to think for themselves in order to overcome their self-incurred immaturity. These developments culminated in the French *Déclaration des droits de l'homme et du citoyen* from 1789 which guaranteed, as one of the first documents, that "no one shall be disquieted for his opinions" (Article 10) as well as freedom of communication (Article 11).

In many writings, freedom of thought is used more or less synonymously with freedom of speech, expression, or the press. Mill's (2003) famous chapter "Of the Liberty of Thought and Discussion" in his On Liberty deals primarily with freedom of expression (although he makes a separate argument for freedom of thought based on the harm principle elsewhere in the book). Both freedoms are indeed closely interwoven (Shiffrin 2017; Wacławczyk 2019). Free thinking is not a solitary exercise. It requires inputs and ideas from others as well as scrutiny of one's ideas by critical

interlocutors; biases and the constraints of one's own perspective are hard to overcome without external. Freedom of thought thus requires the public use of reason and freedom of expression, but they are not the same; the latter concerns primarily interpersonal communication, the former intrapersonal psychological, neurobiological, and other processes of thinking or reasoning. In conjunction, both freedoms call for social conditions conducive to critical exchanges, tolerance of differences, viewpoint diversity, and a general atmosphere of free inquiry that shields thinkers not only from State censure, but also from being disquieted through social exclusion or economic repercussions for thought (Russell 1921).

The Human Right to Freedom of Thought

Freedom of thought first appeared as an international human right in Article 18 of the Universal Declaration of Human Rights in 1948, alongside the freedoms of conscience and religion. It was codified in many subsequent instruments (e.g., Art. 18 ICCPR, Art. 9.1 ECHR, Art. 13.1 ACHR). Its adoption in the Declaration was championed by two influential drafters, Charles Malik and René Cassin, who praised it as "the basis and the origin of all other rights" (UN Doc. E/CN.4/SR.60, 7). During the final negotiations, it found wide support among delegates, even among the often-diverging United States and the Soviet Union. The latter underscored the importance of free thought by recalling the persecution of scientists and free thinkers in history (UN Doc. E/CN.4/SR.60, 10). The precise meaning and scope of the right was not settled; it is an incompletely theorized agreement (Sunstein 2007). But some points are clear. Reflecting the importance drafters accorded to it, freedom of thought was conceived as an absolute right that allows no interference. This view was shared during subsequent negotiations of the Covenant on Civil and Political Rights (UN Secretary General 1955, UN Doc A/2929 at 136). Moreover, freedom of thought was seen as a distinct freedom, over and above the freedoms of conscience and religion. While protecting the seemingly adversarial freedoms of thought and religion in one article might seem ironic from a historical perspective, they converge in the idea of an inviolable internal sphere. With respect to religion, this is called the *forum internum*, the metaphorical place of the personal interaction with God. The secular freedom of thought expands this sphere outside the reach of others to thinking and reasoning, and perhaps the mind more generally. Furthermore, it is settled that it protects against severe interventions with thoughts such as brainwashing, "thought reform" camps or ideological conversion systems (Nowak 2005). Apart from that, however, its scope is underdetermined and underexplored; not even the object of protection, "thought" is settled (Bublitz 2021). This is one of the reasons for why the right never played a role in international or domestic legal practice (Loucaides 2012; O'Callaghan and Shiner 2021). One of the rare international decisions in which it was implicated is *Kang v. Korea*. The UN Human Rights Committee (2003, CCPR/C/78/D/878/1999) found that the coercive offer to a political prisoner to renounce his beliefs in exchange for release from longtime confinement violated both freedom of thought and opinion. No additional guidance about the right seems to be available at the international level. The proclaimed importance of the right stands in a striking contrast to its practical insignificance.

Legal scholarship has not given much attention to the right either. Only in recent years, provoked by new methods to detect and intervene into minds afforded by neuroscience, a scholarly debate about the right has set in (Blitz 2010; Farahany 2012; Bublitz 2014; Alegre 2017; Ligthart 2020). Whereas some scholars have troubles finding a scope for the right apart from some neuroscientific interventions (Schauer 2020), others suggest a broad construction covering a wide range of issues from advertisement to freedom of memory or coercive psychiatric treatment (Kolber 2006; Stenlund 2017). Still others propose a novel right that actualizes freedom of thought for contemporary times, *cognitive liberty*,

which may encompass issues such as the use of psychoactive substances (Boire 2001; Farahany 2019). In these ongoing debates, scope and limits of the rights have not yet crystallized. Different philosophical conceptions of freedom of thought suggest different constructions of the legal right, e.g., with respect to the protection of non-rational or delusional thought. One of the pressing open questions is whether the right should indeed be absolute. By their nature, absolute rights are construed narrowly as they do not allow for balanced decisions or wise precedents, surely one of the reasons for the lacking practical relevance of the right.

The UN Special Rapporteur on Freedom of Religion or Belief (2021) has recently issued a thematic report on freedom of thought which summarizes the state of the legal debate. The report identifies four attributes of the right: (i) freedom to not reveal one's thoughts; (ii) no punishment for thought; (iii) protection from impermissible alteration of thought; (iv) fostering an enabling environment for free thought (cf. Bublitz 2014; Ligthart et al. 2022). The first three attributes serve as guidance for the negative dimension of the right, the last imposes positive obligations on States. How these attributes can be operationalized remains to be worked out in detail. The report also draws attention to several practices supposedly threatening freedom of thought such as laws penalizing proselytism, setbacks to intellectual freedoms, coercive deradicalization or criminal rehabilitation programs, microtargeting, or neurotechnologies.

Critical Perspectives

Although the principled value of freedom of thought is rarely disputed, one may ponder about the significance, and presuppositions of the concept and the right, because they will likely affect future construction. To social epistemologists, the individualistic ideal of independence of thought from others might appear neither attainable nor desirable since knowledge production is a highly social endeavor (Levy and Alfano 2020). By their own devices, most people would fail to acquire the cognitive capacities necessary for free thinking, attain a somewhat adequate level of knowledge or critically test even a small portion of their beliefs. People learn from others until they stand on the shoulder of giants. Thinking and believing is social through and through. If that is the case, the ideal of independence of thought may sometimes lead astray. Rather than freeing people from the influence of others, it might be preferable to expose them to epistemically beneficial influences. The societal vision would be flourishing epistemic communities that advance thinking and reasoning and that are inclusive and self-reflective about power relations in knowledge production.

Furthermore, the invincibility of thought tacitly underlying the received legal understanding of freedom of thought must be viewed with suspicion insofar as it assumes that relevant interferences require overwhelming force such as coercion, violence, brainwashing or similar interventions. Time and time again, psychology shows that thoughts and beliefs are amenable in many more subtle ways (Taylor 2017). Many subtle, but non-rational influences are omnipresent in ordinary social life; people change each other's minds all the time and so do governments through education, rehabilitation, cultural production. The very idea that thought is outside of governmental reach might appear overstated (Tussman 1977), and with respect to the advancement of important societal goals, even undesirable (Persson and Savulescu 2012; Douglas 2014). That the absolute right to freedom of thought is adequate to find reasonable and nuanced regulation for such a vast and diverse domain is not evident. This may tie in with a perspective from Critical Theory which considers thought as shaped by socio-economic and cultural forces which have largely "deformed reasoning" (Honneth 2009). Outlawing some exceptional interventions into thought without addressing and alleviating these much larger, comprehensive forces might seem futile and misguided. These criticisms have some purchase. However, they may not pose fatal challenges to the idea of freedom of thought, but only underscore the contemporary challenge for the concept and right to freedom of thought.

Conclusion

In the 21st century, philosophers, legal scholars, psychologists and neuroscientists must come together and reconsider the meaning and value of freedom of thought in light of contemporary views about the human mind, and open the way for conceptions of freedom of thought which are neither insensitive to the ubiquity of influence nor to the frailties of thought, without abandoning the spirit of this once revolutionary idea.

Cross-References

- ▶ Descartes, René
- ▶ Freedom of Conscience
- ▶ Freedom of Expression
- ▶ Freedom of Religion
- ▶ Freedom of Speech
- ▶ Freedom: Academic
- ▶ Locke, John
- ▶ Spinoza, Baruch
- ▶ Toleration

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Freedom of Will: Philosophical Genealogy of Legal Person

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Introduction

Freedom of will is the central question of the philosophy of ethics that denotes volitional consistency to deliberate free and virtuous action. Apart from the virtue of someone is grounded on his idiosyncrasy or involved in adhering to the dominant morality, the freedom of will is a key concept of ethical deliberation which ubiquitously enunciates the very roots of ethical duty and responsibility. Ethics encompasses utmost width of all human deeds wherewith it may or may not contradict with socially or legally approved duties, to the extent to which its outright approval resides in the conscience of individual and his manifest respect to human dignity.

We may set ethics apart, positive law concerns the problem of triadic relationships between legal order, individual legal subjects, and collectivities under the objectivity of law that all parties are presumed as free and volitional actors who willfully carry on their own commitments. Legal power is the basement of objectivity that carries on its power upon obliged individuals and entitles them right holders as legal persons. The freedom of will question must be problematized to understand intellectual basement of a legal person, as a crucial problem of philosophy of law. Ethics relies on self-imposed duty, whereas the law attunes both duties and rights of legal persons under objectivity of law. The present chapter will be confined to shed light on what is an intellectual preliminary of legal person in three successive phases of formation.

The First Phase: Freedom Is Rationality

The Platonist tradition was the most crucial starting point to examine the freedom of will question that was initiated by Socrates and thereafter culminated by Augustine, as may be an inaugural theme of the philosophy of ethics. It must be noticed that, regarding Socratic dialogues of Plato, ideas of the two philosophers cannot be diversified from each other, whatever; Socrates would be considered as both philosopher and the principal of *dramatis personae* in the Socratic dialogues that therefore we may occasionally suffice to refer only Plato via assuming them unanimous. Those ideas can be grouped within three focal points.

First point is Socrates' consideration on virtue: In the dialogues, Socrates denoted that a wise man deserved happiness and reputation in private life and politics by way of virtue, the general aim of ethical action. For him, virtue depends on knowledge through intellection about ideas. In *Meno* (86–88), Socrates and Meno are discussing if virtue may be a teachable knowledge or a natural gift. Socrates replies that it may probably be a hypothesis in order to obtain knowledge of forms like happened in geometry, therefrom it is knowledge wittingly grounded on rationality and wisdom. Socrates ascertains value of education,

but also considers it as clustered with natural endowment (*Republic* III 401–405, IV 431c; *Laws* I 643–644; *Timaeus* 87b). He reckons that knowledge is the recollection of ideas inherent in human soul, thereby education evokes their reminiscences (*Phaedo* 75e–76a). He explicates that human soul has several qualities which might be enumerated as moderation, justice, courage, intelligence, memory, and munificence, but wisdom promotes them to the virtue. Therefore, Socrates considers that acquisition of any good is not virtue alone, but the virtue is to fulfill it rationally with justice and honesty, contrariwise its absence is the state of wickedness (*Meno* 78d–79a; *Republic* I 350d). Socrates sets an ethical dilemma between bodily pleasure and wisdom that, respectively, represents slavery to bodily desires and achievement for virtuous life. He portrays rational faculty of individual, where individual can apprehend the being by wisdom, and that such apprehension denotes what is virtuous in itself.

Second is Platonist metaphysics that carries on the Eleatic doctrine about unity of being, as already had been set forth by Parmenides. The doctrine is based on a main truism about diversity between being and existence, whereby existence had no epistemic value, because of its encompassed contingent characters, apprehensible by sensation, but could not reveal being. Socrates says that the being has no contradiction and is not appropriate to any diversity, even also encompasses all contradicted characters as resemblances, therefore the being is non-contradictory and constructive of things, as an idea of unity, not multitude (*Parmenides* 132b–133a; *Phaedo* 104a–e). Ethical principle of Socrates relies on rationality that is at the apex of human soul where spirited and desiring parts are, respectively, its inferiors (*Timaeus* 37a–d). Likewise, Socrates lets Timaeus to utter a more elaborate expression about unity of being: Timaeus construes three forms: (1) intelligible and changeless pattern, (2) visible copy of pattern, and (3) receptacle of all sensibilities that are made use of as metaphors in discourse to reveal obscure and dim nature of two others (*Timaeous* 48e.ff). Since Socrates presumes rational forms behind the sensible properties as constellation of being that such forms are perceivable only by reason by completely denying value of empirical observation (*Timaeous* 51b–e). He has ultimately recourse to the idea of god, the creator of universe in rational design; therefore, every idea is good if it fits to the godly design (*Timaeus* 29e.ff.).

Third is the Socratic idea about the immortality of human soul that it is held as the firmest basement of the Platonist freedom of will theory via reliance on assumed divine rationality. Socrates presumes the human soul as a metaphysical category that its substance is apprehensible through knowledge of rational forms. For him, the soul was created by god, but can live longer than mortal body by virtue of ethical perfection. Socrates thinks that human soul would poise mortal body to accord rationality, wherefore it is imperishable if he can be wise, rational, and philosophy studied in his mortal life. It means that the philosopher's soul is able to desert mortal body after death and transmigrate into a new body that is divine grace to the philosopher's excellence (*Timaeus* 35a–37c; *Phaedo* 83d–84b). He presumes, when an individual is used to succumb pleasure, and lust in his mortal life, whose soul is absolutely destined to be nailed into dissolving body by rivets and unable to desert and transmigrate, therefore this soul would disperse with post-mortem decomposition together with mortal body. The concept of immortality of soul denotes that the most perfect reason belongs to the omniscient god, is likely to the monotheist god conception, Additionally other Socratic ideas on divine justice and penalty demonstrated that they would permeate to the Christian theology formation in progress of time. Platonist tradition matched the god and soul where rationality was their common nexus.

The Platonist lore was really very influential on early idealist circles and Christianity, but its exponents slightly withdrew from the immortality of soul presumption. Plotinus, the Neo-Platonist philosopher of the third century who respected the Parmenidean idea on the unity of being, but he held human nature in duality of both incorporeal being and corporeal existence (Plotinus 1930: 342ff.). For him, incorporeal being cannot easily be reduced to any form, but the *reason principle*, because he conceives human reason is inseparable

from human existence. Since, virtue belonged to complete unity of both essentials, eternal and unchanging part is contemplation or reason principle by which the body should be poised through divinity. For Seneca, reason principle had been caused from without, thereon god and intellected soul are its derivations, besides there is no room for intellect when actual existence of human individual is absent (Plotinus 1930: 26, 351). Consequently, divine being is moral balance of all virtues, therefore virtuous life necessarily relies on a measurement of reason principle in soul through pursuing absolute good and abstaining from evils by incessant discipline (Plotinus 1930: 32–34). Anyway, Plotinus denied transmigration of the soul but he alleged human potential's ability to deserve divine blessing.

Stoicism was deeply influenced by Platonism that was having a remote history since initiated by Zeno of Cyprus in the Hellenistic age and thereafter became a noteworthy philosophical circle in the early imperial period of the Rome. Stoics entirely reified the Eleatic conception of being as the cosmological principle would prolong influence of the Platonist lore. Besides, virtue became an appropriate action to the being (*καθῆκον*) in the Stoic ethics since Chrysippus (Cicero 1914, *De Finibus* III.vi.10, IV.ii.4; cf. Seneca, *Epist* 61, 73), therefrom Stoics' deified cosmological order was likely treated as the major premise of ethical reasoning. Stoicism puts forward not only a rational form of ethical action but also the law of nature (Cicero, *The Commonwealth* III.xxii), that legal and moral precepts are integrated as derived from the same source. Cicero hypostatizes the universe that he named *cosmopolis* how it is governed by divine reason, whereof gods and men both are its members (Cicero 1914, *De Finibus* III.xix.64). The Stoic interlocution sets forth the concept of freedom of will in order to deduce right choice through faculty of *ratio recta*. Actually, Cicero's point of view is reiteration of Plato's wisdom (cf. *De Finibus* I.xix.62) that he acclaims entelechy of a wise man who chooses virtue against vices through forbearance from pleasure, lust, and other vicious drives.

At first glance, Stoic ethics seems as an outright conformism, but Cicero was a republican who traced a subtle liaison between the wise man and citizen, therefore he indiscriminately claimed citizenship status for all men (*De Finibus* IV.xxvii.72). Furthermore, Cicero depicted free people that they were enjoying equal rights before the law, for which they should educate themselves for affability by what he called *mental poise*. He frankly said that citizens might be irritated or intruded by someone through unseasonable manners or requests whatsoever; meanwhile, they would develop an expedient response against the offensive or prejudicial man (*De Officiis* I. xxv.88). In this context, he connotes that nuisance of an unjust ruler on citizens might envisage their legitimate resistance. Notwithstanding that Stoics were disciples of Platonist philosophy, Cicero (1877: 114, 313–318) expressed that the debate on the immortality of the soul seemed groundless and that immortality would be attributed only to the gods. For him, a human individual is meaningful by only his intellect, as divine gift. Besides, Seneca's assumption was transcendence of the god, whom he called Jupiter, but portrayed him similar to the god of Christianity and also considered that he resided in the human individual (*Epist.* 61, 72, 74, 91). Seneca concluded that virtue was obedience to universal will what emanated from the god (*Epist.* 107).

Lastly, we point out the most consistent explanation of freedom of will, notion was rooted in Christianity that believers should obey divine precept about faithful supererogation, directed by divine precepts. The zenith of the Platonist tradition flourished in Augustinian interpretation of the postlapsarian doctrine of Christianity, thenceforth Augustine inculcated individuals' rational fidelity to divine precepts and responsibility in order to deserve divine grace (*The Free Choice* 1.1.1.3ff.). In this context, Augustine believes the omniscient, omnipotent, and transcendental god who can foresee all deeds of individuals and predestined them to ignorance, mortality, and trouble as consequences of the original sin (*The Free Choice* 3.18.52.177ff.), but they would severally deserve divine grace if they were absolved by the God through their virtuous acts. The good will is human power to exculpate himself by way of virtuous life instead of might be convicted before

divine judgment, despite the God had preordained all human destiny (*The Free Choice* 1.10.20.71ff., 3.3.7.27ff.).

The Second Phase: Virtue as Reasonableness

Aristotle pioneered a great alteration in ethics that he persuasively replaced existence and human experience instead of purgation by reason. Aristotle's virtue ethics was furnished with a secular concept of freedom through virtuous conduct of an individual relying on practical reason and habit. Aristotle is a very consistent philosopher when he distinguishes living organisms according to the certain potencies of their souls with regard to nutritive, perceptive, and desiring elements, mobility with respect to place, and power of thought: Plants have only nutritive elements, and that animate bodies have perceptive element how evokes desiring power via stirring pleasures, but character of mobility belongs only to some species. For Aristotle, human soul is quite distinctive by reason that grasps universality, activation, and harmony through logos, and capable of virtue and choice, in spite of stationary character of other animate souls (*De Anima* II.i–iii.412a–413a). The power of thought (intellect) is prerogative of human individual as indispensable basement of the free will what has borne with him, but cannot be destroyed, even springs from mortal soul (*De Anima* I.iii–v.406b, 408ff.).

Aristotle puts forward the powers or potencies of the human soul, as being resided in both sense perceptions and reason, thereby the former is indivisible like reason, but necessitates reason's guidance. Aristotle describes that every pleasure cannot be obviated by contrary motions of pleasure and reason, but individual can subjugate pleasures to reason's determining power for virtue, because persuasion needs logos through intellection (*De Anima* III.ii.426b–426a; *NE* I. xiii.1102a.ff.). Aristotle refers duly to role of desires and pleasures to bring about virtue of character, besides he believes that desire and crave without logos can only manifest appetite, so it hinders self-command. In Aristotle, desiderative faculty is related to desires which generates from perception and imagination of some animals and human being. Desiderative faculty starts motion, that's simply good and has value in virtue of character, but cannot be correct when deliberative faculty is nonexistent. Deliberative faculty is intellective power that relies on rationality, by which virtuous conduct, introduce its tenor by logos (*De Anima* III.viii–xi.431b–434a). Aristotle bifurcates intellect into contemplative and practical sub-parts that the former provides theoretical knowledge, whereas the latter embodies ethical conduct, whch is not the direct outcome of theoretical knowledge, but acting through perception and imagination proper to logos (*De Anima* III.x.433a–b). The aforesaid contemplative sub-part can also be said the scientific part of mind what concerns first principles in order to establish theoretical knowledge. Furthermore, the practical sub-part is related to calculative and evaluative faculties which strictly create intellectual virtue on what deliberated actions (*NE* VI.i.1139a).

Aristotle divides virtue under two headings: The first is intellectual virtue that owes its origin and development to be taught by reason what dictates a meaning between extremes and urges to abstain from unreasonable manners. The second is virtue of character (ἦθος) or moral virtue that is the result of habituation by nature and custom through already poised manners in sociality (*EE* II.i.1220a.ff.; *NE* II.i.1103a, 1109a). Both virtues set individual up a salient and practicable mean between pernicious emotions and instinctual extremes. Yet, the intellectual virtue has utmost importance that its steadfast outcome is volition, the decisive power to govern all desires and pleasures, whereas virtue of character relies on habituation whatever having been learned through experience of individual. Power is a crucial concept in Aristotle that he primarily sets forth intellectual virtue, albeit particular virtues are also powers severally. He enunciates voluntary power, as guided by intellect, but also mentions involuntary powers of passions which must be subordinated to guidance of reason (cf. *EE* II. i.1219b.ff., VII.iii.1248b; *NE* III.v.1113b). Subsequently, human conception of Aristotle is

traceable as a network of powers, therein volition is praised power due to virtue, nonetheless that vices may be perpetrated voluntarily or involuntarily (cf. *NE* III.i.1109b–1111a).

Aristotle's adjectival word of "voluntary" squarely indicates "free will" in terms of secular locution of virtue ethics, instead of theologized presumptions of Plato. Aristotle is conscious of the concept of "good," what designates a quality like being, but he says that virtues are quantities to mention existential relations in a given milieu to the degree that intellective act of an individual may correspond circumstances in different levels (*NE* I.vi.1096a–b). Aristotelian ethics is aiming happiness amongst virtuous individuals, which culminates in accomplishment of justice, friendship, and *politeia* (cf., *EE* IV, VII.; *NE* V, VIII, IX). Owing to Ancient Greek city states, we easily presume that the Aristotelian concept of justice and friendship were main tenets of citizenship, whereby justice denoted varied forms of equality, and that entitlement of political and legal rights embodied by citizenship in *polis* in virtue of his merits and domination on his *oikos*.

Contrary to mainstream development from Socrates to Aristotle, we must glance at the heterodoxy of Epicurus (1926: 18ff., 56ff.) who unequivocally challenged the philosophical concept of being in his tracts. Instead, he alleged that the universe was an infinity as composed of infinite number of celestial bodies and space how involuntarily formed through contingent combinations of indivisible atoms. Besides, he also alleged that there was neither a being beneath observable facts, conceivable only by theoretical inference, nor any creator god anyway. Accordingly, Epicurus rejects immortal soul where he thinks soul as combination of fine atoms until death as ultimate dissolution via decomposition of such atoms. He frankly says that there is not any eternal punishment after death, anyway such punishment idea is only result of a groundless fear. The concise idea of Epicurean ethics relies on eudemonism that set forth as pursuance of pleasure which is revealed through observation and analysis about human relations. Despite his adversaries condemned him what is to the contrary, he expressed that his consideration about pleasure did not connote any hedonism, lust, indulgence, sensual enjoyment or other immoderate satisfaction, but meant health in body and to exercise mind on philosophy (Epicurus 1926: 87ff.). He assumes that every pleasure is natural kin of the good and vice versa, therefore he portrays pleasure as being free from pain and to accomplish prudence, by virtue of them individual can learn prudent and honorable living.

Apart from differences and peculiarities in their philosophical outlooks, Aristotle and Epicurus converged on secular ethics through upholding virtuous life, but they completely differed on politics. In effect, Aristotle traces politics as the ultimate aim of ethics, contrariwise Epicurus recommends to his disciples to refrain themselves from politics (Epicurus 1926: 115–119), where he also says that politics is a prison, from which individual has to free himself. Even Epicurus exhorts a refrained life from political matters, he suggests honorable living in friendship as blessed and complete life through abiding reciprocity and abstaining from harming others.

The Third Phase: Legal Person

A legal system is not an embodiment of certain metaphysical idea or philosophy of ethics, but legal theorists usually borrow some ideas from contemporaneous or mainstream philosophies. On the one hand, jurisprudence cannot be squarely reducible to any intellectual movement, because it is a manifestation of a societal power system totally outcome of all economic and other societal forms of relations. On the other hand, representation of sum total of legal relations can only be suitably delineated in a consistent body of legal utterance which is articulated legal philosophers or theorists through matching some adopted ideas from intellectual sources, especially from philosophy, religion, science, and anterior legal doctrines.

Regarding to the aforesaid forms of ethical articulation, except the Augustinian theory, they ultimately aimed to establish a reasonable government and balanced society through virtuous citizens. It rather seems that the aforesaid theories contributed to institutionalization of legal person.

It seems that such theories incrementally established rational individual presumption which might be speculated firstly, substance of sociality and secondly reassessed as a reasonable actor of public sphere. This was a juncture where paths of religion and law would be diversified. Historically, duty and right concepts hovered between political and legal domains, where citizen and legal person designated by the two identities of same individual. Owing to a complete legal system, *persona* is legal designation of individual which is free and rational actor of rights and duties. As having been pointed in *Digest* I.v–vi, Roman law recognized legal person *sui juris* individual, other than miscellaneous *alieni juris* individuals. *Sui juris* denotes *persona* (legal person) had full capacity in himself, as assigned in *status libertis*, whereas other individuals are alien to legal capacity who under custody or sheer domination, as wife, *filius familiae*, manumissed freedmen or entirely incapacitated slaves either.

Erstwhile, Clement C. Webb, Oxford scholar on classics, theology, and law, pointed generation of legal person that he persuasively demonstrated the legal person concept as ripened in the philosophy of ethics and religion (Webb 1920: 35ff.). The Latin *persona* initially meant mask of artist in tragedy or as Hobbes said, "outward appearance of a man" (Hobbes 1998: 106ff.) that had been translated from Greek word ὑπόστασις that meant substratum, essence, hypostasis, or *substantia*. As Webb (1920: 43–48) pointed that Plotinus and Origen used ὑπόστασις synonymous with οὐσία (being) that signified an idea other than a real individuality. Thereafter, the concept was enunciated as the divine οὐσία by means of three ὑπόστασις in the doctrine of Trinity. It seems that *persona* was subsequently translated back to Greek language as πρόσώπον (face) and used for same purpose in the Eastern Church. Apart from debated questions on nature of the Trinity, Boethius made a conspicuous definition that would affix meaning of the *persona*: *Persona est natura rationalibis individua substantia* (Webb 1920: 109ff.). In this context, *persona* meant rational nature of indivisible being, not a concrete human individual, but aftermath used for legal person.

Legal person is not a biological individual, but a *persona* that is a nominal human individual in universality and objectivity of law. It seems that, as an entitlement, *persona* has some affinities with other Greek and Latin words in metaphorical and metonymical constellations. Apart from denomination of concrete individual, the concept was already transposed other legal categories as public personality of state or corporate personalities of collectivities and capital assets that they were being presumed free and rational actors in legal domain. Lastly, we may refer to Immanuel Kant who demonstrates division of powers in the state by means of personality concepts:

> Every state contains three authorities within it, that is, the general united will consists of three persons (*trias politica*): the sovereign authority [*Herrschergewalt*] (sovereignty) in the person of legislator; the *executive authority* in the person of ruler (in conformity to law) and *judicial authority* (to award to each what is his in accordance with the law) in the person of the judge (*potestas legislatoria, rectoria et iudicaria*). (Kant 1991: 125)

Conclusion

Freedom of will is an achievement that emanates from the ethical virtue of individual and human condition, but posteriorly in law, denotes legal responsibility and capacity for duties and rights of legal person. The will may be boundlessly free in ethical conviction of a certain individual if its owner has sufficient prowess to raise absolute or purely political claims, but they may not be backed by law. Freedom in law has become determinate through recognition and attunement of legal person by objectivity of law, to the extent to which rights are available and legally protected.

Cross-References

► Citizenship
► Ethics of Law
► Legal Person
► Virtue Theory and Law

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Freedom: Academic

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Introduction

Academic freedom can plausibly be described as the freedom of university teachers and researchers to produce and make public through scholarly publications, teaching, and other means (extramural speech) any type of material (views, theories, inventions, results, syllabi, etc.) related to their scientific expertise without running the risk of being punished, purged, or silenced for doing so. From this, it follows that the personal beliefs expressed by academics, when they speak in other capacities, that is, as followers of political parties or football clubs, do not fall within the domain of academic freedom but of freedom of speech in general, although it has to be admitted that, on certain occasions, it is impossible to draw a clear line between what an academic says when she speaks in her official capacity and what she says when she speaks as an ordinary citizen. Moreover, an interesting question about whether academic freedom should be extended to those teaching in primary and secondary schools arises from this description. This matter is open to debate, but any relevant inquiry should aim at striking a balance between a teacher's understandable need to express her own views in the classroom and her contractual obligation to follow a preexisting curriculum which mandates the content of her teaching to a greater or lesser extent.

Is it an absolute freedom? As with most freedoms, the answer is negative. There is an overwhelming consensus that academics should not be allowed to teach subjects beyond their expertise or totally irrelevant to the educational aims of the department of which they are members. As far as their ignorance is concerned, professors and the general public are on a par, and all faculty members with teaching duties are, in principle, committed to the success of a coherent and comprehensive educational program that leads into a degree or another academic qualification. Any discussion about further justifiable limitations apart from the most trivial ones cannot, however, be conducted without any reference to the values and aims served by academic freedom.

Historical Background

In the past, western universities were, to varying degrees, regarded as places where disagreement, debate, contestation, and innovation were tolerated and occasionally even encouraged, provided that the official doctrines of the church were not overtly rejected or disputed and the political

authorities were not criticized. Thus, it is reasonable to assume that, throughout a long period of time, academic freedom was roughly conceived as the ability of university professors to do their job without coercive interference either from the clergy or the government. However, the emergence of academic freedom as a distinct and entrenched freedom which can be studied and protected in its own right can be traced back to the ideological apparatus of the nineteenth-century German Humboldtian university. For faculty and students alike, *Academische Freiheit* meant *Lehrfreiheit*, the teacher's freedom to determine the content and the methods of his teaching, and *Lernfreiheit*, the student's freedom to attend the classes of his choice (Rockwell 1950). By the end of the century, first *Lernfreiheit* and then *Lehrfreiheit* had found fertile soil in certain American universities, which, after many years of control by clergymen, were in a steady process of secularization and modernization (Stone 2015). This new spirit, which placed emphasis on innovation, empirical confirmation, and the questioning of established authority, was expressed by John Dewey, who, in a seminal and moderately optimistic article (Dewey 1902: 3), argued that since the function of the university is to "investigate and transmit truth," "any attack, or even any restriction, upon academic freedom," which is necessary for the proper exercise of this function, "is directed against the university itself." He also took great pains to show that, in the long run, the freedom in question would bestow the more "backward" scientific subjects, namely, the humanities and the social sciences, the highly valued status of mathematics and engineering. In addition, he stressed the dangers stemming from the ambition of certain rich and powerful donors and benefactors to be involved in academic affairs and warned university leaders that the unconditional search for money can easily become an end in itself. A few years later, at a time when the outbreak of World War I had divided faculty members, academic freedom was formalized and publicly acknowledged through the 1915 *Declaration of Principles on Academic Freedom and Academic Tenure* issued by the American Association of University Professors. Those who drafted it reaffirmed its significance in rather dramatic terms, made clear that it concerned not only research and teaching but "extramural utterance and action," and maintained that the university and its people should be protected from the tyranny of public opinion.

However, at an international level, as totalitarian regimes in Europe and other parts of the world came into power, academic freedom was dealt a serious blow. The new authorities actually took control of the universities and imposed strict rules regarding what should be taught and who was qualified to teach. Anyone not complying with their educational, political, or racial standards was in serious trouble. As a result, many academics were put to death, imprisoned, fired, forced to live in exile, or simply silenced. The situation changed in the aftermath of World War II as continuous waves of democratization created a milieu that was conducive to the establishment of various liberties. In this context, academic freedom began to be recognized as an enforceable public principle as is attested by its inclusion in official documents such as the German Basic Law of 1949 (art. 5 §3), the 1997 UNESCO *Recommendation Concerning the Status of Higher-Education Teaching Personnel*, and the UK Education Reform Act of 1988. Nevertheless, as will be argued below, these welcome developments do not imply that the dangers threatening academic freedom have been eliminated, even in advanced liberal democracies.

Academic Freedom and Freedom of Speech

The close affinity and partial overlapping between freedom of speech and academic freedom might give the impression that the latter refers only to the freedom of speech enjoyed by academics envisaged as a distinct professional group. There is, however, a wide consensus among scholars that freedom of speech and academic freedom are different notions that must be distinguished. First, academic freedom includes freedom of research, and it is evident that certain forms of scientific research, such as the excavation of an

Egyptian tomb or the assemblage of a satellite prototype, can hardly be described as "speech" (Barendt 2010: 21). Second, it enjoys a special protection that is withheld from ordinary free speech (Dworkin 1996; Pettit 2018). Traditionally, the right to free speech implies a duty on the part of the government not to interfere with people's speech by penalizing utterances with which it disagrees. On the contrary, those who run a modern university have a duty not only to tolerate the research and teaching projects of the scientific personnel (unless of course there are blatant violations of the codes of ethics in force) but also to provide faculty members and their associates with all the available resources for the successful completion of their endeavors. In addition, they are expected to offer moral and, if necessary, legal support to academics who are persecuted and intimidated by third parties for promulgating expert views the latter consider provocative, offensive, or abhorrent. Thirdly, its bearers have certain responsibilities that far exceed those of the ordinary bearers of the right to free speech. Outside academia, people can freely express whatever crosses their minds, subject only to a minimal set of restrictions (time, place and manner, defamation, incitement to crime, and a few more depending on the laws of the land). This is not the case with academics. When they publish, teach, or speak in public, they have to be sincere, honest, well-informed, argumentative, and original (especially when they are engaged in cutting-edge research) and to abide by a wide variety of complex methodological and deontological rules including those of civility. "Academic speech . . . is subject to *quality* controls, for which there are no equivalent constraints in public discourse" (Barendt 2010: 20; see also Stoner 2018). Finally, apart from these responsibilities, academic freedom implies for its bearers certain powers pertaining to the content of the speech of their students and colleagues, which are denied to those who have only the right to speak freely. For instance, in contrast to the general public, a history professor has the right to fail a student who writes in the final exam that the allied forces landed in Normandy in 1942, thus badly affecting her academic progress. As Simpson and Srinivasan (2018: 197) point out, "the standards of expertise that govern teaching and research are compatible with all sorts of content-based restrictions on communication." From these examples, we can conclude that academic freedom is not identical to freedom of speech, although, when issues of justification arise, the family resemblance of the two notions allows us to use similar lines of reasoning.

Threats Past and Present

Equally important as the theoretical parameters of academic freedom are the practical ones among which the various factors that can prove threatening or detrimental to its exercise stand out. Scholars more or less agree that its most fearful enemies, who can operate separately or in concert, are:

(a) *The government*. Political authorities (and the courts which implement their legislative decisions) have a long and well-documented history of interfering with academic freedom. It only has to be noted that there are more subtle ways a government can use to inveigh academic freedom than reducing state subsidies, targeting specific individuals, or banning the teaching of particular books, theories, or subjects. For instance, by forbidding certain non-American categories of scientists to handle lethal pathogens, the US Bioterrorism Defense Act thwarted the efforts of the remaining experts at Cornell University to find cures for diseases that plague a great number of people (Cole 2015). This does not mean that democratic or quasi-democratic governments have stopped resorting to more overt and familiar forms of interference. The messages recently received from various parts of the world are rather disheartening for the empowerment of academic freedom (Ross 2017; Ignatieff and Roch 2018).

(b) *University administration*. In democratic societies, those who run the universities can act as the gatekeepers of academic freedom or as its undertakers. Usually, they do not take an

interest in the content of the views of particular faculty members on their own initiative. When they do so, it is because they are the final recipients of claims and exhortations to take action against academics who are targeted by third parties. This happens because state educational authorities cannot fire or initiate disciplinary procedures against academics who are not civil servants. Moreover, the "offenses" academics are often accused of by individuals or groups, such as being unfair to Israel in a course about politics in the Middle East (Cole 2015), are not legal offenses punishable by law. University leaders can succumb to these pressures or make clear that the academic community is independent, self-governed, and committed to certain core values that shape its unique identity. In this context, the tendency of certain high-ranking administrators to place a high premium on public relations, to regard students as "customers" and the public as "potential customers," and to treat academics as temporary employees who can be easily "dehired" and replaced is quite ominous for the prospects of academic freedom.

(c) *The general public*. A few decades ago, academics were addressing a very limited and interested public, which was not only familiar with controversial and diverging positions but also knew that there were certain rules of civility concerning the expression of criticism and disagreement. The new information technologies made the works of academics accessible to a wider public either directly or through not always accurate press reports. These developments have often made academics who express disturbing and unpopular views the target of a public backlash of unprecedented proportions. The case of Francesca Minerva, a postdoctoral bioethicist from the University of Ghent, is quite telling (Minerva 2016). In 2013, Minerva co-authored an article with Alberto Giubilini which appeared in the *Journal of Medical Ethics*, one of the leading journals in the field. They argued that if abortion is morally permissible on the grounds that the fetus does not meet all the conditions of personhood, then infanticide should be made permissible for the same reasons. This is not a new position in moral philosophy, but when their views became publicized, they started receiving thousands of aggressive, offensive, and even threatening e-mails and messages. As a result of the public outcry, Minerva was denied a permanent position in a philosophy department, and a job offer made to Giubilini was rescinded. Irrespective of whether they were right or wrong, the above scholars suffered unjustly for expressing views that did fall within the ambit of their expertise, something that would not have happened without the aggressive intervention of members of the general public.

(d) *Academics*. It cannot be denied that ordinary academics can also restrain academic freedom through their acts or omissions. One could think of a professor who tells doctoral students that she will not tolerate her own views being challenged by them or of a reviewer who rejects an article before reading it on the ground that nothing should be published on this topic. Attitudes like these usually remain within the walls of academia or are never revealed, but academics cannot blame only third parties for any onslaught on academic freedom.

Moreover, there is a series of ongoing controversies, particularly in the USA, about the potential involvement of students in the suppression of academic freedom. One of them centers on the idea that classrooms should be "safe spaces," namely, spaces where students can work "without fear of being made to feel uncomfortable, unwelcome, or unsafe on account of biological sex, race/ethnicity, sexual orientation, gender identity or expression, cultural background, age, or physical or mental ability" (quoted by Weida 2018: 5–6). The question is how statements like this should be interpreted. Nobody would condone any sort of harassment or verbal abuse in class, the silencing of those who do not fit the prevailing positive stereotypes or pedagogical indiscretion, but there is disagreement as to whether teachers should abstain from presenting important educational material which certain students might find offensive (Moody-Adams 2015).

If we also take into account the chilling effect, all these menacing factors can have on academics, who, as an act of self-protection, might opt to avoid controversial topics or going against the current, thus stifling pluralism, diversity of perspective, and finally the advancement of knowledge, it becomes evident that, notwithstanding all the progress that has been made, academic freedom remains fragile and vulnerable.

Justifications

At this point, someone might wonder why one should invest in academic freedom, given the fact that there are more important ideals worth fighting for, such as equal respect or social justice. This legitimate concern leads unavoidably to the question of its justification. Some authors dismiss any relevant discussion because they regard academic freedom either as a "social practice" that is devoid of philosophical presuppositions (Rorty 1996) or just a "guild desire" or "privilege" (Fish 2014). However, even if this is the case, it does not follow that there should be no discussion about the ends served by social practices and collective desires, especially when the previous equivocal acknowledgment of them has started to be called into question. Thus, antitheoretical attitudes aside, the most promising justifications of academic freedom in the current literature are those which underlie its significance in the functioning of democratic government and the pursuit of truth and knowledge.

Justifications of the first type treat academic freedom as a political freedom. Robert Post (2012), for instance, argues that ordinary citizens need "democratic competence," by which he means the ability to distinguish good from bad ideas. This competence cannot be achieved without the knowledge produced by academic disciplinary practices. Therefore, the freedom of those involved in the production of this knowledge needs constitutional protection. From this, it would follow that this freedom should not protect a professor who endorses and preaches white supremacy, even if she presents her views covered in a pseudoscientific veneer, since she would systematically inculcate ideas harmful to democratic governance in the citizenry.

Justifications of the second type draw upon its contribution to the pursuit of truth and knowledge, which are regarded as values of paramount importance. In an earlier version of this approach (Jones 1972), academic freedom is conceived as the moral right of academics to do what is expected or demanded from them that is the much cherished and socially invaluable pursuit of truth and knowledge. A theory of this type can become more appealing, if it does not exclude the social sciences and the humanities by envisaging truth as the simple correspondence between our statements and the physical world (Lynch 2018). In this context, the search for truth could better be seen as an effort to continuously improve our understanding of nature as well as human civilization in its multifarious aspects through a plurality of rigorous and widely acclaimed methods. Moreover, it should be stressed that the latter type of truth can be pursued *par excellence* in academia, despite its increasing dependence on extramural factors (Ryan 1999). Finally, such a theory cannot but endorse the view that the road to truth is paved with conflict, unhindered debate, tolerance, and disagreement without, however, embracing the slogan that "anything goes" in matters of academic research and teaching. The Millian arguments of *On Liberty* (Mill 1978) are useful to this effect, but we have to bear in mind that the philosopher was arguing about freedom of thought and discussion and not academic freedom. There may be good reasons not to ban the publishing of a book that maintains that all vaccines are harmful, but a medical school should not offer a professorship to its author. This would be a violation of its educational commitments and responsibilities to the wider public.

Conclusion

Academic freedom will continue to be debated and challenged. The greatest danger always comes from governmental interference, but, as we have seen, it can be vehemently attacked from various standpoints. Its defenders should

not dismiss every type of criticism voiced against it as politically motivated, hypocritical, bigoted, or self-righteous. Objections even from non-sympathetic critics can, under certain conditions, contribute to a better understanding of it and to a more precise demarcation of its limitations. One thing is, however, certain: A university that does not honor academic freedom runs the danger of becoming alienated and of ending up as the mouthpiece of political and economic elites, a profit-seeking ordinary business or a puppet in the hands of an aggressive and tyrannical public opinion, and those who manipulate it.

Cross-References

► Freedom of Speech
► Liberty and Justice

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French Legal Realism

► Legal Realism, French

Fuller, Lon Luvois

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Introduction

Lon Luvois Fuller (1902–1978) was an important figure in American Contract Law, particularly due to his work on contract damages (Fuller and

Perdue 1936, 1937) and his innovative casebook (Gerber 2003), as well as being an influential early writer on alternative dispute resolution (Fuller 1981). Within legal philosophy, he was an insightful critic of some aspects of American legal realism (Fuller 1934), but his greatest influence came from his procedural natural law theory and his criticisms of legal positivism, both exemplified in a famous debate with H. L. A. Hart in the *Harvard Law Review* (Fuller 1958; Hart 1958).

Main Text

Fuller criticized legal positivism (perhaps unfairly) as treating law merely as an object for quasi-scientific study rather than as a process or a function; and as portraying law as a "one-way projection of authority" (Fuller 1969: 192), when it is better understood, he argued, in terms of reciprocity between officials and citizens. His most important work, *The Morality of Law* (Fuller 1969), puts forward an alternative vision, which has been characterized as "secular natural law."

For Fuller, law is not merely an object or entity to be studied dispassionately under a microscope; law is a human project, with the implied moral goal of allowing people to coexist and cooperate within society. It is not merely that law has an ideal, but that the law cannot truly be understood without understanding the (moral) ideal towards which it is striving. Law, Fuller stated, is the "enterprise of subjecting human conduct to the governance of rules" (Fuller 1969: 106). Law thus is a process, to be contrasted with the slightly different process of managerial direction.

Fuller's phrase, the "enterprise of subjecting human conduct to the governance of rules," and a close examination of his eight criteria for the "internal morality of law," both indicate that his focus, in these discussions, was on legislation. Fuller's approach to law can be seen as rejecting the notion that "law" is best understood as an object that can be analyzed down to its component parts. Instead, he would argue, law is better understood as being the official response to particular kinds of problems – in particular the guidance and coordination of citizens' actions in society.

Fuller argues that legal positivism sees laws mostly as one party giving orders, and other parties complying. This characterization fits well with John Austin's work, with its reduction of law to the commands of a sovereign, but later legal positivists are arguably not that different. This view of law, Fuller states, is a basic misunderstanding: for so much of law, so much of a fully functioning legal system, depends on there being a reciprocity of duties between citizens and lawgivers: "the existence of a relatively stable reciprocity of expectations between lawgiver and subject is part of the very idea of a functioning legal order" (Fuller 1969: 209). Only when citizens and officials cooperate, each fulfilling his or her own functions, can law work. For example, officials promise, expressly or implicitly, to enforce the rules as promulgated and to make the demands on citizens reasonable and consistent; to the extent that officials violate these duties, the smooth running of society will begin to break down.

Additionally, Fuller claimed that legal positivists missed the centrality of the ideal of law (which he alternatively described as "order," "good order," and "justice") to any understanding of law. To exclude the ideal from a theory of law on the basis of a "separation of description and evaluation" is to miss the point entirely: the social practice and social institution of law is by its nature a striving towards such ideals.

Fuller's affirmative analysis thus derives from what he takes to be the shortcomings of legal positivism. Fuller's analysis focuses on law as a process, one that emphasizes the importance of the interaction between officials and citizens, and that makes more transparent the way in which a legal order can be instrumental to the attainment of other goods. His work can be seen as emphasizing the way that the right approach to the making and application of law treats citizens as agents deserving respect (Summers 1984; Rundle 2012). However, critics have raised objections to this purported connection between the Fuller's "internal morality of law" and the value of human agency (e.g., Kramer 1998).

Principles of Legality (Internal Morality of Law)

Fuller offers a list of eight "principles of legality":

- Legal rules must be general.
- Legal rules must be promulgated.
- Retroactive rulemaking and application must be minimized.
- Legal rules must be understandable.
- Legal rules should not be contradictory.
- Legal rules should not be impossible to obey.
- Legal rules should remain relatively constant through time.
- There should be congruence between the rules as announced and as applied.

Some of Fuller's eight principles are best seen as minimum requirements – for example, in the case of laws that require the impossible or contradict one another. Others, such as the minimizing of retroactive legislation, the full promulgation of laws, and the understandability of the laws, are best seen as ideals to which legal systems should always strive but which may not always be achieved.

Rule systems that substantially comply with the eight requirements are "legal systems," in the sense that they are likely to succeed in guiding the behavior of their citizens; rule systems that do not substantially comply with the eight requirements are not legal systems, or at least not "law" in the fullest sense, as they are unlikely to be able to guide citizen behavior.

Criticisms

A number of critics, most prominently H. L. A. Hart (1983: 343–364), objected to calling Fuller's eight criteria "morality" – arguing that they are, at best, merely efficacy or efficiency, a morally neutral value as important to evil officials and governments as to virtuous ones (one could easily, Hart famously notes, have an "[internal] morality of poisoning"). If a legal system has evil ends, then following Fuller's guidelines will allow the government to be more efficient in achieving those evil ends.

However, one might respond that "playing by the rules of the game" – or playing the game fairly – is itself an integral part of justice, even if by no means all of it (by analogy, many people believe that it is of some moral value to keep one's promise, even if it was a promise to do something bad). For example, if retroactive lawmaking is to be criticized, it is not at the level of efficacy, but at the level of justice and morality. Second, certain kinds of evil are arguably less likely when proper procedures are followed: for example, courts may be more likely to come up with just decisions when judges know that they must give public reasons for their decisions (certain forms of corruption may be hard to rationalize).

Critics argued that a regime could follow Fuller's principles and still enact wicked laws. One response is that a government that is just and good will likely be good on formal and procedural matters as well, and that governments which are evil will be likely to ignore the formal and procedural requirements. There certainly have been regimes so evil that they have not even bothered with any of the legal niceties, with establishing even the pretense of legality, and certainly shirking all rules that might constrain what the government did. To some extent, Nazi Germany is an example, as Fuller himself pointed out (Fuller 1958). However, there have also been regimes, generally condemned as evil, which have at least at times been quite meticulous about legal procedures (South Africa before the fall of Apartheid or East Germany before the fall of Communism may be examples). Since the principles of legality can be understood as guidelines for making the legal system more effective in guiding citizen behavior, wicked regimes might also have reasons to follow them.

Natural Law

One can connect Fuller's description of law as "the enterprise of subjecting human conduct to the governance of rules" – law is a way of governing people, to be contrasted with other forms of governance or control – with his general view of law as a particular means to an end, a particular kind of tool, if you will. With that in mind, one can better understand the claim that rules must meet certain criteria relating to that means, to that function, if they are to warrant the title "law." If we defined "knife" as something that cuts, an object which failed to cut would not warrant the label, however much it might superficially resemble true knives. Similarly, if we define law as a particular way of guiding and coordinating human behavior, if a system's rules are so

badly constructed that they cannot succeed in effectively guiding behavior, then we are justified in withholding the label "law" from them.

Fuller offered, in place of legal positivism's analyses of law based on power, orders, and obedience, an analysis based on the "internal morality" of law. Like many traditional natural law theorists, he wrote of there being a threshold that must be met (or, to change the metaphor, a test that must be passed) before something could be properly (or in the fullest sense) called "law." Unlike traditional natural law theorists, however, the test Fuller applied is one of function, form, and procedure rather than one primarily of moral content.

Fuller's approach is often contrasted with that of traditional natural law positions. Fuller at one point tried to show a connection, writing that "Aquinas in some measure recognized and dealt with all eight of the principles of legality" (Fuller 1969: 242). On the other hand, Fuller also realized that there were significant differences: he once referred to his theory as a "procedural," as distinguished from a substantive natural law (Fuller 1969: 96–97).

Legal Process

Lon Fuller was a significant influence on the "legal process" approach to law, an approach that was important in American legal thought in the 1950s and 1960s (Hart Jr and Sacks 1994). The legal process school emphasized the relative institutional competences of different approaches to resolving disputes and policy problems. Both Fuller's theory and legal process can be seen as responses to American legal realism. Fuller's internal morality of law could be seen as an indirect reaction to the realists' cynicism and focus on power. By contrast, legal process was a more direct response to the challenge of the realists, arguing that law can offer expertise regarding methods of decision-making, constraining and channeling official discretion, even when the substantive law could not offer determinate answers to social disputes.

Conclusion

Lon Fuller offered a critique of legal positivism connected to a procedural (process-based) natural law theory.

Cross-References

▶ Hart, Herbert Lionel Adolphus: Influential Ideas
▶ Legal Realism, American: Theoretical Aspects
▶ Positive Law and Natural Law

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Fuller, Lon Luvois: Influential Ideas

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The most renowned American legal theorist in the middle decades of the twentieth century, Lon Fuller taught contract law and jurisprudence at Harvard Law School from 1939 until his retirement in 1972. He secured his place in American

law in the early 1930s with three articles on legal fictions and probing critiques of legal realism. His work on "the reliance interest," the doctrine of consideration, and other aspects of contract law established him as one of the most innovative and influential theorists in the field by mid-century. His hypothetical "Case of the Speluncean Explorers" (1949), an elegant portrayal of rival judicial philosophies, is a classic of the legal literature. And his published exchanges with the Oxford philosopher H. L. A. Hart, in the 1950s and 1960s, set the terms of debate in jurisprudence for several generations of students.

In assessing these exchanges, many philosophers at the time thought that, while Hart displayed greater clarity and rigor in argument, Fuller had the more compelling view of law. This assessment is evident, for example, in John Rawls's reliance on Fuller for his remarks on law in *A Theory of Justice* (1971) and in Ronald Dworkin's lifelong effort to formulate a more sophisticated version of Fuller's views. Hart's work stimulated the growth of a branch of Anglo-American analytic philosophy that continues to flourish today, but many legal scholars believe that the consequent division of labor among academic specialists has led to an impoverishment of the field, especially in the neglect by philosophers of the sociological foundations of legal institutions necessary for an adequate grasp of law as a social phenomenon.

One reason for Hart's dominance in philosophy is that Fuller was thought to conflate descriptive and evaluative elements (the *is* and the *ought*) in his account of law. Yet Fuller's views on this issue are widely misunderstood, because they are judged in terms of conventional semantic theories and not placed in the Pragmatist frame that guided his analysis. Of central importance is the practical nature of intellect. The human mind does not simply mirror an external reality, any more than human observation simply passively registers fixed properties of independently existing objects. Knowers are participants in the world, interacting with things in accordance with definite purposes. Thus, the human knower is active – selective, goal-directed, valuing, and objects of knowledge connect in distinctive ways to human inclinations, sentiments, and capacities.

Given the practical nature of intellect, definitions of phenomena are not compelled by the way the world is. Indeed the very idea of a true or correct definition is wrongheaded. No definition gives the essential nature of an object such as law; rather, there are diverse definitions, adopted by different writers concerned about different aspects of the phenomenon. This is especially so for social categories like law, since their manifestation is historically contingent and variable. Law as custom and law as legislation are (or have been) realities, and any definition which excluded one or the other would be arbitrary.

How then do we choose? What role does a definition play in inquiry? Like the Pragmatists, Fuller regarded ideas as anticipatory and action guiding; they always mean something that does not yet exist, an ideal presence absent in fact (in William James's phrase). To develop a thought's meaning is to determine what direction it gives to the application of human energies. So, what is at stake in a particular definition of law is that it leads us to act one way rather than another. Accordingly, disagreements about the meaning of law are not verbal or semantic disputes; they are about what kind of legal professional one ought to be. Definitions of law (and conceptions of legal philosophy) encourage us to ask: "How would the adoption of one view or the other affect the way a lawyer, judge, or law teacher spent the working day?" The preferred thought is one that awakens our active impulses and leads us to conduct ourselves better than we otherwise would have done. In this way, Fuller attempted to capture the interaction and mutual dependence of law and morality in the work of lawyers and other collaborative participants in the creation of legal order.

This analysis makes clear that a Pragmatic definition embodies a teleological factor combining the real and the ideal. To have assurance that an ideal is practical, it must be based on the experience of actual societies. At the same time, it cannot simply recapitulate what already exists. Rather, it extrapolates from an existing pattern or tendency and envisions it as perfected in some

crucial way. The model then offers a critical standpoint from which to assess the ongoing activity and suggest improvement. Of course, one must not be so overly impressed by the ideal as to neglect the fact that the actual only partly embodies it, and one must not be so overly impressed by the real that one neglects the active striving toward an ideal. On the one side, law is not simply reason or justice; on the other, law is not simply the will of the sovereign or the interest of the dominant class. Reason and fiat are intertwined, and it is a question for inquiry what the exact mix is at a given historical moment.

In Fuller's account, there is no illusion that the law of any particular time and place is anything other than what it is. In fact, Fuller was inclined to dwell on the way things can go wrong in the law – the pathological cases – including most famously the parable of the hapless king Rex who nobly attempts to make laws for his subjects and fails in eight ways that illuminate "the morality that makes law possible." The tenets of this morality may be stated briefly as follows: (1) *generality*, there must be rules; (2) *publicity*, the rules must be made available to those expected to comply with them; (3) *prospectivity*, the rules must typically be enacted and promulgated prior to the time when compliance is expected, hence not retroactive; (4) *clarity*, the rules must be understandable or intelligible to legal subjects; (5) *non-contradictoriness*, the rules must not require conflicting actions; (6) *conformability*, the rules must not require actions that are impossible to perform; (7) *stability*, the rules must remain relatively constant over time; (8) *congruence*, the rules promulgated by the lawmaker must be the rules actually administered and enforced.

Why does violation of these principles constitute failure? Given Fuller's Pragmatist orientation, the critical issue for lawmaking is how it directs the application of human energies. Building on Locke's proposition that the good legislator provides intelligent guidance to rational beings, Fuller describes Rex's aim – the aim he failed to achieve – as subjecting human conduct to the governance of rules. This formulation is not chosen at random. The use of rules is not instrumental to some other aim but part of the aim itself. Why? The brief answer is that governing by rules involves recognition of citizens as responsible moral agents. The idea has both a descriptive and a normative component. Descriptively, it refers to the capacity of citizens to engage in practical deliberation and accept responsibility for their actions. Normatively, it involves acknowledgement by the lawgiver of the rightfulness of citizens exercising such agency. As John Rawls would note, respect for the moral competence of persons is intimately connected to certain prima facie duties. The principles of the internal morality capture the conditions of respect between lawmaker and citizen by giving expression to eight prima facie duties of the lawmaker. For a lawmaker to acknowledge these duties, and thus to govern by rules, is to stand in moral relation to legal subjects.

The further point is that the morality of lawmaking (the ideal element in legislation) is derived from the character of the enterprise itself, not an external source. The lawmaker who labors to make statutes intelligible and consistent and prospective is fulfilling a moral responsibility to citizens drawn from an understanding of why modern states have statutes at all. Thus, the "internal morality of law" consists of just those standards that must be honored if the right relationship between lawmaker and citizen is to be maintained, as essential components of the institution's distinctive mission.

Of course, not all states are modern states, and not all lawmaking is done by legislators. A second respect in which Fuller departs from ordinary definitions is in his commitment to legal pluralism. Law is not a unitary phenomenon that takes the same form wherever it appears. It consists, rather, of a diverse set of formal processes that yield authoritative rules or decisions – only a subset of which is likely to be found, at least in a dominant role, in any legal community. By suggesting that law can appear in different forms in different places, pluralism helps us set aside the parochial view that law is peculiarly Western or peculiarly modern. The main processes that Fuller discussed at length are adjudication, mediation, legislation, contract, and managerial direction. Each process has two principal components.

First, it has a characteristic design that makes it suitable for reaching certain kinds of outcomes (a decision, an agreement, a rule) and not others. This design or pattern serves to guide the functioning of any actual institution in which the model is operative. It is thus a limiting conception, a principle of order for the arrangement of human affairs. Second, it has constitutive elements characteristic moral principles – for example, impartiality (for adjudication), equality (for contract), and legality (for legislation) – which specify the distinctive moral duties of officials and perhaps others, who act within the institutional structure. These principles constitute the internal morality of the process in question. Like principles of due process, their moral importance is largely, even if not entirely, independent of whatever connection they may have to desired outcomes.

Although Fuller never gave a comprehensive account of the forms of legal order, he coined a term for the theoretical effort he envisioned: "eunomics," which he defined as the science or study of good order and workable arrangements. His various essays on particular forms of order were his "exercises in eunomics." Fuller viewed the diverse forms of legal order dynamically, that is, not just as determinate structures of norms or rules but reasoned responses to problematic situations common to human societies. This brings out their moral as well as their purposive aspects. Since people reflect on what they are doing, they construct models of possible structures, which then guide the emergence of specific practices and provide patterns for evaluating their success. Thus, the models are focal points of human striving; they embody moral aspirations and define moral relationships. The central task of eunomics is to describe these models in detail and assess the possibilities for their realization. The contextual factors that enhance or impair the effectiveness of particular structures determine whether or not an existing social problem can be collectively managed, and how. We want to know where a mechanism works and where it does not and cannot be made to. Thus, eunomics is a branch of moral sociology, involving evaluative judgments about the interplay of means and ends. It deals with the conditions for the effective pursuit of collective aims and ideals, as well as criteria for assessing the appropriateness of those aims and ideals – and for reconstructing them – in light of available means.

Here, too, Fuller is concerned with what it means to be a professional. He rejected the legal realist conception to the extent that it turns lawyers into masters of technique without regard to the ends they serve. For realists, law becomes a means to ends that originate outside itself. It thereby excludes from the scope of professional responsibilities the lawyers' duty to think about what the law ought to be. The separation of means and ends is contrary to what Fuller believed lawyers actually do, which is to devise formal structures into which citizens' various interests can be accommodated in ways that are fair, decent, and workable. Whether arbitrating a dispute, drawing up a contract, or writing a statute, the common thread is problems of human organization, and lawyers are architects of social structure. Such a responsibility cannot be carried out without a simultaneous focus on means and ends. Thus, the lawyer's job is not simply to think about what legally can be done but about what ought to be done, all things considered.

This is a very demanding view of the legal professional. Was Fuller similarly demanding of citizens? Did he expect institutional forms to realize moral outcomes without presupposing certain qualities of citizens – civic-minded, well-informed, self-restrained? Are institutional arrangements meant to compensate for a lack of virtue and intelligence? Fuller's stress was on the limits of what law can do. With his special emphasis on fostering decency and fairness in human relationships, Fuller was sufficiently confident in the good nature of men and women to be optimistic about their ability to achieve a program of living together. This meliorism infused his idea of democracy, which presupposes that conflicts can be resolved through discussion and public accountability. The role of law in these efforts is more facilitative than directive. Instead of imposing prescriptive rules backed by threats or micromanaging administrative agencies, legislators should ensure the availability of mechanisms by

which citizens can exercise effective and responsible choice. The good legislator aims to release human energies, not just harness them, by setting baselines for self-directed actions. Thus, Fuller was a theorist of private more than of public law, emphasizing voluntary forms of cooperation that enable citizens to develop the moral dispositions necessary to becoming productive members of society, including the capacity to make effective and responsible decisions and to practice a democratic way of life.

In this view, the affinities between legal rules and social expectations must be close. In some places, Fuller pictured law as emergent out of social practices, the articulate or formalized expression of pervasive and settled conventions. Law then consists not only of discrete and readily identified official declarations but is continuous with norms and understandings that are partly inchoate and evolving. What lies beyond official notice at any moment is broader and deeper than, and gives shape and force to, what is evident. This is not to say that legal rules always do or should reflect existing social norms. But background social practices provide a critical resource for judges and other interpreters of legal rules – a context of expectations, social purposes, and principles for deciding cases where the articulate law is indeterminate or pulls in contrary directions. Conversely, the more legal decision-making departs from everyday understandings of fair and impartial treatment of legitimate claims, the more it must rely on coercive threats and hence the less authority it has. In that state of affairs, positive law undermines sociality.

Today, some philosophers are discovering that Fuller was right all along to reject the dichotomy of the *is* and the *ought*, and they have come to embrace the "conflation," at least in certain contexts. They realize that, when the analytic distinction between fact and value was turned into a metaphysical dualism, it was based on false premises. Hilary Putnam, for example, has observed that empiricism and logical positivism led philosophers astray, and he for one has returned for enlightenment to the writings of John Dewey, who was one of Fuller's principal intellectual guides. Ironically, the new Deweyans fail to note that some philosophers resisted empiricism and logical positivism all along. Fuller was in that camp. It is also heartening to see the revival of interest in Fuller's work evident in the writings of contemporary American legal scholars who call themselves democratic experimentalists, and in symposia, doctoral dissertations, and journal articles in countries around the world, especially the Netherlands, Canada, and China.

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Functionalist Theory of Law in Norberto Bobbio

► Bobbio, Norberto: Functionalist Theory of Law

G

Gandhi, Mohandas Karamchand

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Introduction

Mohandas Karamchand Ghandi (1869–1948) is popularly seen as a man of action. However, Gandhi's actions were rooted in his thought. He lived his ideas, making his philosophy a living philosophy. When asked about his message to the world, Gandhi responded, "My Life is my message." An idea that could not be acted upon for the well-being of humanity had no place in Gandhi's life. The integrity of his thought and actions is evident from his writings and his life.

Gandhi authored several books, including an autobiography, many pamphlets, and thousands of articles on wide-ranging topics, delivered numerous speeches, and corresponded with hundreds of people around the world. His writings are compiled in 98 volumes as *Collected Works of Mahatma Gandhi* (Gandhi 1999). A selection of these is compiled in a six-volume set, *Selected Works of Mahatma Gandhi* (Gandhi 1968). Of his voluminous writings, *Hind Swaraj* (*HS*) is widely regarded as Gandhi's seminal work containing his essential concepts and ideas. In addition, he was the editor of several newspapers including the *Indian Opinion* (South Africa), *Young India*, and *Harijan* (India).

Gandhi's life spanned from October 2, 1869, to January 30, 1948. He was born in Porbandar, Gujarat, in Western India to Karamchand Gandhi and his wife Putlibai. At 13, he was married to Kastur of the same age. After his initial education in India, Gandhi went to England where he studied law at the Inner Temple in London. He was called to Bar in 1891. His life after that took many momentous turns. On his return to India, he failed to practice law. He had "no connections, no touts, no income" (DiSalvo 2012: 27–29). Moreover, the persistent political intrigue offered no hope for a worthwhile legal practice anchored in ethics. Gandhi yearned for an opportunity to escape from such an environment.

In 1893, he sailed to South Africa as a legal counsel to Dada Abdullah and Company entangled in a major lawsuit with Sheth Tyeb. Gandhi regarded his experience with this lawsuit as "most valuable" in his practice of law. He learned that facts mean truth, and "once we adhere to truth, law comes to our aid naturally." Gandhi's initiatives in resolving the case shaped him as a lawyer. He realized that "the true function of a lawyer was to unite parties riven asunder" (Gandhi 1993: 133–134). This became his guiding philosophy throughout his legal career of nearly two decades in South Africa. Gandhi was opposed to the prevailing practice among lawyers who were simply concerned with winning the case

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at any cost even at the cost of truth. Moreover, the legal profession in South Africa and India was an accessory to colonial rule as he repeatedly saw law courts benefitting colonial authorities instead of the people. In the process, lawyers continued to make money while prolonging conflict. This to Gandhi was sheer immorality (Gandhi 2009: 57–59).

Gandhi's practice of law and his many experiments in pursuit of social justice for the Indian community in South Africa informed his ensuing thought and actions. Gandhi was very widely read and had an innate gift of learning life lessons. While Gandhi acknowledged the many influences – both Indian and Western – had on him, he named three individuals who left an enduring impact on his life: Leo Tolstoy and John Ruskin through their books and Raychandbhai – a guide and mentor – through his "living conduct" and correspondence (Gandhi 1993: 90). Gandhi returned to India in 1915 where he led numerous nonviolent movements for India's freedom and unity until his assassination on January 30, 1948, during a prayer meeting.

Gandhi's Philosophical Framework

The key components of Gandhi's philosophy are *swaraj, swadeshi, satyagraha, and Sarvodaya*. The fundamental principles underpinning these are *satya* (truth) and *ahimsa* (nonviolence). Together, they provide us a framework to understand Gandhi's philosophy.

Gandhi's thought evolved in the context of modern industrial civilization which regarded "bodily welfare" as the purpose of life, measured human progress in terms of material advancement, and promoted a worldview in which humans had control over nature to satisfy their greed. Gandhi argued that such a civilization was driven by the desire of profit and self-interest, unconcerned with ethics guiding humans to their duty toward fellow humans, thus leading to the exploitation of humans by humans under the global phenomenon of colonialism (Sethia 2012: 58–59). True civilization, according to Gandhi, is characterized by good conduct leading humans to their ethical responsibility anchored in self-control enabling them to master their passions (Gandhi 2009: 65), a precondition for developing the practice of nonviolence.

Satya and Ahimsa: Individual and Social Values

Truth and nonviolence are two fundamental principles underpinning Gandhi's thought. His emphasis on the significance and interdependence of these principles is exceptional in the history of modern philosophy.

He expounded on their meanings beyond their common connotations. Gandhi's thought is deeply aligned with truth. However, truth for Gandhi is not a cognitive idea. It is experiential. It is both absolute and relative. Gandhi also regarded truth as the ultimate end of life and nonviolence as an essential means to realize it. Gandhi regarded ahimsa as "the Law of our Species as violence is the Law of the Brute" (Gandhi 1968: 6:156). In a positive sense, ahimsa means "greatest love." In its negative aspect, ahimsa means refraining from violence. In Gandhi's own lived experience, ahimsa is an evolving process. It takes practice and training. Gandhi was cognizant of the fact that it is impossible to practice ahimsa in the absolute sense. Violence may be necessary for legitimate self-defense. Gandhi's insistence on ahimsa was aimed at reducing the violence both at individual and social levels. Gandhi's idea of ahimsa is "in a class by itself." Gandhi could discuss its "absolute efficacy" and at the same time "tolerate violence" in certain situations (Parekh 1988: 214).

Ahimsa begins with the individual, in one's heart and thoughts. Its practice requires courage and fearlessness, humility, and kindness. Once it is embodied in individual behavior, it can be extended to social, national, and international levels. Gandhi was convinced "if nonviolence is established in one place, its influence will spread everywhere. . ." (Gandhi 1968; 6: 173). Its efficacy and power can be tested only in the face of violence.

Gandhi regarded "*ahimsa* and *satya* are so intertwined that it is practically impossible to disentangle and separate them" (Iyer 2000: 227). Ahimsa is the foundation for the pursuit of truth, the basis of soul-force or truth-force. At the same

time, Gandhi was convinced that truth would lead him to nonviolence. Although truth and nonviolence are individual ethics, they can evolve into social ethics. Gandhi saw a "moral link between the order of the soul and the order of society" (Gandhi 2009, Introduction by Parel: xxxv).

Swaraj: Individual and National Freedom

Gandhi envisioned swaraj at two interrelated levels: individual and national. He explained "...if we become free, India is free. It is in this thought you have a definition of swaraj. It is swaraj when we learn to rule ourselves" (Gandhi 2009: 73). At the individual level, swaraj means self-rule as in self-discipline or self-restraint. As such, swaraj assumes the agency of the spirit which Gandhi also called the spiritual freedom, the basis for self-realization. This freedom is not given by any external power but acquired through one's spiritual strength. In this sense, it may also be referred to as the spiritual swaraj.

Gandhi regarded individual freedom as the foundation for national freedom. This essential link between individual swaraj and national swaraj makes Gandhi's vision of freedom not only distinctive and original but also exceptionally powerful. Gandhi demonstrated its originality and potency through his many movements in India, which were aimed at making India free from British rule but relied on individual swaraj of the participants in his campaigns.

Means and Ends

Gandhi rejected the political philosophy of ends justifying the means. Instead, he underscored the purity of means. For Gandhi, there is an "inviolable connection between means and the ends as there is *between* the seed and the tree... We reap exactly as we sow" (Gandhi 2009: 79). He explained that foul means cannot lead to a positive end just as one cannot harvest a rose by planting a weed. For Gandhi, constitutional means were not sufficient to realize swaraj from the British. And conventional revolutionary means for him were far from fair and ethical. He recognized the need of force to attain swaraj. However, the force had to be just and worthy of swaraj. Gandhi devised his signature strategy of *satyagraha* – a moral force to question, reform, and transform the unjust establishments of authority.

Satyagraha

Rooted in truth and nonviolence, satyagraha for Gandhi is the only moral means of combating oppression and injustice and for securing rights. As such, satyagraha entails sacrifice of the self, which is "infinitely superior to the sacrifice of others." A satyagrahi is not bound by man-made laws when in conflict with the just law of truth. A satyagrahi does not compromise truth and nonviolence even at the cost of self-sacrifice. In disobeying an unjust law, a satyagrahi takes the risk of penalty, including death (Gandhi 1960: 30–31). Gandhi's *ashrams* (spiritual community) were the training grounds for truth and nonviolence. Training required reliance on self-discipline anchored in ashram vows – code of conduct.

Satyagraha is effective only when it is aimed at achieving justice through nonviolence. Satyagraha relies on persuasion, dialogue, and negotiations if possible and noncooperation and civil disobedience when necessary. A satyagrahi aims at conversion of heart through love and self-sacrifice rather than coercion through violence. Satyagraha needs no jiujitsu (or jujitsu, a Japanese martial art of fighting). Satyagraha is the art of living and dying (Gandhi 1960: 237). It simply requires self-control. As a nonviolent revolutionary tenet and tactic, satyagraha is regarded as the "weapon of the strong." When one embraces satyagraha, one sets an example. Gandhi's concept of exemplar is innovative and is intended to "provide an alternative to the concept of principle in moral philosophy" (Bilgrami 2003: 4162).

Swaraj Through Swadeshi

For Gandhi, satyagraha can be effective for attaining swaraj only if it is accompanied by *swadeshi.* Swadeshi literally means pertaining to one's own country. It symbolizes self-reliance. Swadeshi movement originated in 1905 following the partition of Bengal by the British and led to boycott of British imports, British education, and the political resignation of Indians from the British-dominated legislative councils.

Recognizing its revolutionary import, Gandhi expanded the scope of swadeshi to include replacement of everything foreign with the indigenous. Gandhi gave swadeshi a profound meaning – reliance on one's own strength – physical, mental, and spiritual. Swadeshi accompanied satyagraha and became an integral part of Gandhi's pursuit of swaraj.

Khadi, the hand-spun fabric, became one of the most effective examples of swadeshi. Its production included cotton growing, picking, spinning, dyeing, preparing the warp and the woof of weaving, and washing. All these activities had to be carried out to achieve self-reliance in the production of *khadi*. Gandhi himself spun khadi daily and relied on his own spun cloth. *Charkha* (spinning wheel) became a symbol of swaraj and economic self-reliance. Later, khadi became a model for developing other local industries in India's 700 villages.

Swadeshi also inspired a need-based culture in contrast to modern industrial civilization rooted in greed. This was consistent with his principle of ahimsa. His adoption of loincloth exemplified his commitment to have no more than what the poor Indians could afford. This was at its very core both a political act challenging imperialism with its roots in greed and an empathetic act inspiring Indians to a culture based on needs.

Sarvodaya: From Swaraj to Poorna Swaraj

Sarvodaya or the well-being of all encapsulates Gandhi's vision of poorna swaraj (complete freedom). After realizing individual and national swaraj, it was necessary to focus on freedom not just for the majority but for *all*. Gandhi had relied on satyagraha to resist unjust laws, oppressive policies, and/or an established authority. However, poorna swaraj could only be achieved through *Constructive Program* – the vast range of reforms that Gandhi initiated in India for the well-being of all. These included addressing problems of communal discord, social injustice, illiteracy, and the lack of education. To foster a sense of harmony, Gandhi recommended the cultivation of national unity among all communities, especially among Hindus and Muslims. Similarly, he pursued removal of untouchability as imperative for social harmony. National integration was necessary to make India an inclusive and participatory democracy in which the minorities, the disabled, and the "worst off" population could be empowered. To achieve this, Gandhi proposed a paradigm of oceanic circles, ever widening and never ascending, as opposed to the paradigm of pyramid in which the few people on the top are sustained by the majority on the bottom (Gandhi 2009: 181–183). Under this model, no one is the first or the last. He strove to make women "equal partners" in the fight for swaraj. Concerned with the growing gap between the rich and the poor, Gandhi advocated *trusteeship* – a voluntary program for sharing by the rich of their excessive wealth for the common good (Mehta: 119–120). To ensure local and self-sustaining economies, decentralization of production and distribution, Gandhi endorsed small-scale industries which would provide local people with employment and empower them (Terchek 1998: 159–160).

To promote practical education, Gandhi recommended *nai taleem,* basic education aimed at the holistic development of mind, body, and spirit in the context of the child's immediate environment. Similarly, he suggested programs for adult education to promote a greater sense of political awareness.

To reform and improve the quality of life in the 700,000 villages of India, which were home to more than 70% of India's population, Gandhi suggested the revitalization of village *panchayats* as local self-governing bodies and the development of indigenous institutions to provide basic education. Program for village sanitation, he suggested, must be part of the national agenda to make villages models of cleanliness. This was needed to build awareness not only of health and hygiene but also about the need for clean air, water, and healthy food. Gandhi regarded such constructive programs essential to the process of nation building from the bottom up and empowering all people to realize the vision of poorna swaraj. His quest of complete freedom was also his quest for a harmonious society and for the welfare of all (Parel 2006).

Gandhi's Vision of a Nonviolent State

Gandhi's view of nonviolence was not monolithic. He knew nonviolence works differently in different contexts. According to Gandhi, a nonviolent state is possible if the "vast majority" of its people are nonviolent. This calls for a shared responsibility among its leaders and the citizens. They have the responsibility to abide by the ethics of nonviolence. This also means a conscious self-introspection on their part to examine the violence and the injustice they might be tacitly condoning or indirectly supporting in their daily life. The state must fulfill its obligation to encourage and support nonviolence in the life of its citizens.

Gandhi was aware that the state's commitment to nonviolence may not be absolute, and there may be coercion in discharging the "duties" of the state. He was aware of the need for the state to defend its citizens from foreign aggression and protect the rights of minorities to ensure social justice for the benefit of all citizens. Citizens too have the responsibility of defending the state and serving on its armed forces when necessary (Parel 2006: 58). A nonviolent state must not encourage the use of arms. It has the duty to operate in ways that build bridges among its diverse population fostering a sense of national unity by building a climate of mutual trust and cooperation.

Conclusion

Gandhi was a practical philosopher. "Philosophy to be worth anything" Gandhi wrote "has got to be applied to one's life" (Gandhi 1968, 45: 226).

His legacy of living philosophy, making his ideas practical, is singularly relevant for our times (Sethia & Narayan 2013: x). In times marked by "alternate reality" and "fake news," Gandhi's example prompts us for seeking truth. In the world where violence is raging in every sphere of our lives as individuals, society, and nations, Gandhi's thoughts and actions demonstrate the significance of ahimsa for conflict resolution and harmonious living.

In the realm of modern politics, where ends become the sole focus and means are not a concern, Gandhi shows us why means matter. In the middle of a pandemic where wearing mask, for example, is seen as an infringement on individual freedom, Gandhi reminds us that freedom is not an absolute right. It comes with social responsibility.

Gandhi's signature strategy of satyagraha has been a source of power to powerless and of hope to the hopeless as Gandhi continues to inspire nonviolent movements dedicated to political and social change around the world. Gandhi's vision of Sarvodaya offers a guidepost to the world's largest democracies where minorities in the twenty-first century continue to struggle for their rights. Gandhi's simple lifestyle rooted in the idea of need vs. greed has deep resonance in the wake of challenges associated with climate change, economic meltdown, and rising inequality.

Cross-References

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Gaps: Legal

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Introduction

Civil law jurisprudents speak sometimes of "the problem of gaps" (Donati 1910; Romano 1925, 173–174; Kelsen 1934, § 40). Gaps, however, pose to law professionals and legal philosophers not one, but a variety of problems. Among these, the conceptual, ontological, identification, and repair problems are foremost.

The *conceptual* problem concerns the meaning of phrases like "legal gap," "gaps in the law," "gaps of the law," etc. Its solution requires devising a terminological-conceptual apparatus capable of capturing all (or most of) the different situations legal professionals and legal philosophers refer to when they speak of "gaps."

The *ontological* problem is about establishing whether gaps are a *necessary*, *contingent*, or rather an *impossible* feature of positive legal orders. All the three positions had supporters in Civil-Law jurisprudence since the beginning of the twentieth century. Some philosophers claimed gaps to be a *necessary* feature of legal orders (Kantorowicz 1906, 13–39). Others held the presence of ("genuine") gaps to be altogether *impossible* (Zitelmann 1902, 287–322; Donati 1910; Romano 1925; Kelsen 1934). Others still maintained gaps to be altogether *contingent*: a possibility that may, as well as may not, materialize (Bobbio 1963, 89–109; Alchourrón and Bulygin 1971). The three positions are not necessarily at odds. For that being the case, they must refer to the same type of gaps. This is not always so. When Kantorowicz claims gaps to be a necessary feature in any positive legal order, he is talking of gaps as *situations of semantic indeterminacy* of existing legal norms (roughly, what Alchourrón and Bulygin call "gaps of recognition," as we will see). Therefore, he is not advancing a thesis contradictory to the one endorsed by Donati or Alchourrón and Bulygin, who, instead, are talking of *normative gaps* (the absence of a norm for a case at hand). Contrariwise, Zitelmann, Donati, and Kelsen, while upholding the impossibility of (genuine) normative gaps in extant legal orders, claim something at odds with the contingency claim by Bobbio and Alchourrón and Bulygin, since all of them are referring roughly to the *same* sort of (normative) gaps.

The *identification* problem concerns the "ascertainment" of gaps: the activity by which legal professionals come to affirm the existence of a gap in a certain sector of a legal order. The identification problem comes in a descriptive and a prescriptive variety. In its *descriptive* variety, it asks for true accounts about *how* (by which tools, through which sorts of operations), in a legal experience at a certain time, legal professionals (judges, jurists, attorneys, etc.) *do in fact* proceed when they identify some gap in their law. In its *prescriptive* variety, it asks for providing legal professionals with the legally "correct" instructions about *how* they *ought to* proceed at identifying gaps in a legal order.

Finally, the *repair* problem concerns the filling of gaps once identified. It comes too in a descriptive and a prescriptive variety. As a *descriptive* problem, it asks for true accounts about how (by which tools, through which sorts of operations), in a legal experience at a certain time, legal professionals *do in fact* proceed when they remedy to ("fill") some gap in their law. As a *prescriptive* problem, it asks for the legally "correct" instructions about how legal professionals *ought to* perform gaps-filling in a legal order.

In the following, leaving the ontological problem aside, I will address the three remaining ones, from the standpoint of Civilian jurisprudence.

Non-normative Gaps

Different concepts of legal gap are afoot. They compose a set where *normative* gaps are to be told from *non-normative* ones. Both sub-sets are varied bunches.

Broadly (and tentatively) speaking, a *normative gap* occurs whenever, from the standpoint of some legal professional, a legal order contains no norm concerning a certain issue at hand. Contrariwise, a *non-normative gap* is any situation where "the missing something" is *not* a norm.

Four different notions of non-normative gaps exist in contemporary jurisprudence: institutional gaps, personality gaps, gaps of knowledge, and gaps of recognition.

Institutional gaps are situations of crisis in the working of a legal order, consisting in the impairment or malfunctioning of an organ playing a key constitutional role. No voter shows up at polling stations, and so no new representative is elected to parliament. The royal family perishes at once in a combination of accidents. Legal orders may (and do usually) contain norms coping with such events. Nonetheless, the orderly working of the law is impaired, until new elections bring about a new legislature, or a new royal family is finally called to the throne (Romano 1925, 181–185; Romano 1946, 99).

Personality gaps are situations of crisis in the working of a legal order, resulting from the disappearance of a charismatic leader. The "Mather of Freedonians" suddenly passes away. Freedonian law regulates such event. Nonetheless, the working of the Freedonian order is impaired until a new charismatic leader gets popular recognition (Romano 1925, 181–185).

Gaps of knowledge occur where the information available about the relevant facts of a trial is so poor or uncertain, that it is not possible establishing the truth or falsity of evidentiary statements (Alchourrón and Bulygin 1971, 31–34).

Gaps of recognition, finally, are situations where there is a norm for the issue at hand, but it proves semantically indeterminate in relation to the facts on trial. The existing norm contains an expression ("sacrilegious contract"), the current meaning of which, as determined by linguistic conventions, is such that the individual fact (Tim and Tom made a deal on Sunday) *neither* is clearly included in the reference of the expression, *nor* is clearly excluded from it, dwelling in the so-called area of penumbra (Alchourrón and Bulygin 1971, 31–34). By the way, gaps of recognition can be considered as resulting from a second-order methodological *normative* gap: that is, from the absence of a *methodological default rule* establishing which, between the inclusive or exclusive interpretation of a vague expression ("sacrilegious contract," "vehicle," "wood," "edifice," "due care," etc.), should be preferred (Chiassoni 2011, ch. 3, § 3.5.1.2).

Non-normative gaps cast light on momentous blind spots in the working of legal orders. Nevertheless, but for gaps of knowledge and gaps of recognition, the focus of Civilian jurisprudence has been on normative gaps. These proved in fact a quite difficult bullet to bite.

Normative Gaps

Three main notions of normative gap circulate in contemporary jurisprudence: normative gaps "proper" ("properly so-called"); "technical" gaps; and "ideological," "political," or "axiological" gaps ("normative gaps improper" or "improperly so-called").

Normative Gaps Proper

There is not one single notion of normative gap proper. A fair account requires considering different concepts. Three look prominent: the juristic commonsense notion, the B-notion, and the AB-notion.

The *juristic commonsense notion* is what every Civilian seems having in mind whenever s/he refers to normative "gaps": gaps are situations where the law provides *no norm* for coping with an issue at hand (Section "Non-normative Gaps" above; Kelsen 1934, § 40; Bobbio 1963, 89).

The *B-notion* results from a rational reconstruction by Bobbio of the commonsense notion (Bobbio 1963, 95–96). A normative gap proper is *not* just the absence of a *norm whatsoever* for

coping with an issue at hand, as jurists use believing. It is rather the absence of a *hard-and-fast norm*. This is so, Bobbio claims, because whenever a normative gap is at stake, two alternative ways of filling the gap are usually available. Suppose there is a gap concerning the right of *fathers* to get welfare-paid parental leave, the only relevant norm at hand being that *mothers* have that right. From a methodological standpoint, the gap can be filled in two opposite ways: *either* by an analogical reasoning, and in such event, fathers *too* end having the right; *or* by an *a contrario* reasoning, and in such event, fathers end having *no right*. The uncertainty about the gap-filling norm, the embarrassment of riches of alternative (implicit) norms for filling one and the same gap, is what, in Bobbio's view, should be regarded as making part of a theoretically adequate concept of a normative gap proper. Notice: the B-notion refers to a *complex situation* where three conditions obtain. *There is* a gap, roughly in the juristic commonsense meaning of the term. *Alternative*, and opposite, *ways* of filling that gap are available, which are amenable, respectively, to an "inclusive general norm" (unregulated cases should be regulated like regulated ones), or to an "exclusive general norm" (unregulated cases should be regulated in the opposite way of regulated ones: Bobbio 1960, 155). The law does not provide any methodological meta-rule of preference establishing *which* way of filling the gap, among the ones available, should be adopted all-things considered, leaving the choice to the discretion of law-applying organs. A gap as the absence of a hard-and-fast rule occurs, therefore, whenever a legal order proves gappy on *two* counts. It presents a *first-order* gap concerning an issue to be decided. It also presents a *second-order* methodological gap, concerning the way the first-order gap should be filled (Chiassoni 2011, ch. 3, § 3.10.2).

The *AB-notion* is, again, the output of a rational reconstruction of the juristic commonsense notion, by Alchourrón and Bulygin. The AB-notion purports emphasizing the *relational character* of normative gaps proper. According to it (in a very simplified rehearsing), a normative gap is – *in relation* to *a set of* previously identified legal *norms* ("normative set"), *a set of* (generic) *cases* ("universe of cases"), and *a set of* normative *solutions* ("universe of solutions") – the *absence* of a norm connecting a normative solution to a case of the set of cases. Consider the normative set NS_j (N1, N2):

N1. Citizens ought to pay tax T (C/OT)
N2. Farmers ought not to pay tax T (F/O¬T).

On its basis, a set ("universe") of cases UC_j can be identified, which encompasses four (generic) cases, resulting from the not-contradictory and not-redundant combination of the properties "C" (Citizen) and "F" (Farmer) with their complementary properties "¬C" (Not-Citizen) and "¬F" (Not-Farmer):

C1. Citizens and Farmers (C&F)
C2. Citizens and Not-Farmers (C&¬F)
C3. Not-Citizens and Farmers (¬C&F)
C4. Not-Citizens and Not-Farmers (¬C&¬F).

NS_j (N1, N2) also identifies a set ("universe") of solutions US_j:

S1. Obligatory paying tax T (OT)
S2. Obligatory not paying tax T (O¬T).

Armed with the previous distinctions, a (systematizing) matrix can be drawn, calculating which normative solution of US_j (S1, S2), if any, the normative set NS_j (N1, N2) connects to each of the four (generic) cases composing the universe of cases UC_j (C1–C4):

	Cases	N1 [S1]: C/OT	N2 [S2]: F/O¬T
C1	C & F	OT	O¬T
C2	C & ¬F	OT	–
C3	¬C & F	–	O¬T
C4	¬C & ¬F	–	–

The matrix brings to the fore two flaws of the systematized normative set. First, it proves antinomic (inconsistent) in relation to C1 (people being at the same time Citizens *and* Farmers, ought to pay T *and* ought not to pay T). Second, it proves gappy in relation to C4 (people being, at the same time, *neither* Citizens, *nor* Farmers).

The AB-notion, notice, embodies a determinate *criterion of identification* of the *normatively relevant* properties (the properties of cases from the standpoint of which the (in)consistency, (in) completeness, and (not)redundancy of a normative set is (to be) assessed). The criterion ascribes normative relevance *not only* to properties that are *expressly* considered in the norms of the normative set at stake (in our example, "C" and "F"), but *also* to properties that are *complementary* to the former (in our example, "¬C" and "¬F"). It is indeed in relation to C4 – identified by the conjunction of the complementary properties (¬C&¬F) – that NS_j (N1, N2) proves *incomplete*.

Suppose, however, we adopt a different criterion. For instance, one ascribing normative relevance only to *properties expressly considered* by the norms of the normative set at stake. If we apply this criterion to NS_j (N1, N2), we get a universe of cases UC_j*, encompassing C1 (C&F), C2* (C), and C3* (F), but *not* C4 (¬C&¬F). C4 would lie *outside of the reach* of NS_j, dwelling in the "no-law space" (*Rechtsleerraum*) (Chiassoni 2011, ch. 3, § 3.9.2; Caracciolo 1994, 33 ff.). Consequently, the normative set NS_j would *not* be *gappy*. It would be *antinomic* in relation to C1; and *complete* as to C2* and C3*.

The content of criteria about the normative relevance of properties depends on *stipulations*: either by normative authorities (when *real* sets are at stake), or by jurists or philosophers (when *experimental* or *interpretive* sets are at stake).

In dynamic normative orders like positive legal orders, the criteria concerning the normative relevance of the properties of cases *contribute to the content* of *competence norms*. Very roughly speaking, these are secondary norms establishing the questions, matters, or cases on which the organs of a legal order (legislators, judges, etc.) are, or are not, permitted ("empowered," "authorized") to pass law-creating decisions. A legally relevant case is one upon which, due to some property it happens to possess, some legal organ is permitted to decide.

Technical Gaps

Technical gaps occur when a legal order does not contain norms the existence of which is a necessary condition of efficacy of another, not-self-sufficient, norm. A constitutional principle entitles citizens to Medicare. The legal order proves technically gappy, if the legislature has not enacted any statutory norm establishing a national health service and providing citizens with free access to it (Guastini 2011, 413–414; Ferrajoli 2017, 59–65).

Not-self-sufficient norms can be open to *degrees* of efficacy. *Technical gaps in a strong (proper) sense* are to be told from *technical gaps in a weak (improper) sense*. The first occur whenever a legal order contains no norm promoting the efficacy of a certain not-self-sufficient norm. The latter occur whenever a legal order *does* contain some norms promoting the efficacy of a certain not-self-sufficient norm, but these norms guarantee to it a (very) poor level of efficacy.

Technical gaps in a weak sense are a variety – so far overlooked – of axiological gaps. From the standpoint of the not-self-sufficient norm whose efficacy is at stake, they show up whenever *sub-optimal* norms are present. *There are* norms, but they *do not* promote the (assumed) right level of efficacy of the not-self-sufficient norm. In a properly working legal order, these should be replaced by *optimal* norms promoting the right level.

Ideological, Political or Axiological Gaps

"Ideological" (Kelsen, Bobbio), "political" (Bobbio), or "axiological" (Alchourrón and Bulygin) gaps are complex situations, occurring by the *conjunction* of *two conditions*. The legal order *does contain* a norm that it *should not contain*, the content thereof being *axiologically inadequate* ("inconvenient," "unsatisfactory," "unjust"). The legal order *does not contain* a norm that it *should contain* instead of the former, the content thereof being *axiologically adequate* ("convenient," "satisfactory," "just") (Bobbio 1963, 96–97; Alchourrón and Bulygin 1971, 106–110; Guastini 2011, 414–417).

By the *positive* condition, a certain case *is* regulated by the law. There is *no* normative gap proper. By the *negative* condition, the norm regulating that case is *axiologically sub-optimal*; it is *not* the one that there should be, an axiologically

better norm being available, which has not been enacted, but should be to replace it.

The axiological (ideological, political) (in)adequacy of a norm can be appreciated from different standpoints. These include: the not-self-sufficient norm whose efficacy the norm at stake is supposed to promote (Section "Technical Gaps" above); what the legislator actually intended to realize by the norm proving sub-optimal (supposed actual legislative intent); what the legislator would have intended to realize by the norm proving sub-optimal, had it considered certain data it did not consider (supposed counterfactual legislative intent); the state-of-affairs the norm is assumed to promote (its assumedly "objective purpose"); the constitutional principles or superior norms of the legal order to which the norm proving sub-optimal belongs; the norms of a social or critical morality a legal professional considers relevant to the "life" of the legal order (e.g., some natural law norms).

Eminent Civilians adopt different postures about this kind of gaps.

Kelsen uses the idea of "ideological gap" to demystification purpose. Positive legal orders, he claims, are structurally *gapless* (Section "Introduction" above; Chiassoni 2011, ch. 3, § 3.10.1; Bulygin 2013, 337–353). Whenever judges or jurists hold "there are gaps in the law," they cannot really be talking of normative gaps proper, since they do not exist. Rather, by a (legislator's inspired) "fiction," they are *presenting as* genuine normative gaps proper, what are in fact ideological gaps: situations where existing legal norms *do* regulate the behaviors at stake, but they do so in ways judges or jurists find unacceptable for ideological reasons (Kelsen 1934, §§ 40–41; Kelsen 1945, 146–149; Kelsen 1960, § 4, d), and 35, g)).

Bobbio locates the difference between normative gaps proper and "ideological" or "political" gaps in the proper ways of filling them. Normative gaps proper are «insufficiencies» of *the law as it is*; they are "*de lege lata*"; their filling is therefore generally up to the judge. Ideological gaps are «imperfections» of *the law as it is* from the perspective of *the law as it ought to be*; they are "*de lege ferenda*"; their filling is therefore up to the legislator (Bobbio 1963, 96–97; Chiassoni 2011, ch. 3, § 3.10.2).

Alchourrón and Bulygin, finally, *neither* consider the idea of axiological gaps as a demystification tool, the presence of gaps being a *contingent* feature of legal orders (see Section "Introduction" above); *nor* do they conceive the filling of axiological gaps as something necessarily (or properly) up to the legislator. In their view, axiological gaps pose serious problems that can be (and usually are) coped with by judges. Norm N1 is in force in a legal order:

N1: Assisted suicide shall be punished with ten years imprisonment.

N1 can be regarded as a sub-optimal, axiologically defective norm, reasoning as follows:

1. N1 establishes a sanction for *any case* of assisted suicide *whatsoever*.
2. Consequently, N1 also makes *therapeutic* assisted suicide punishable.
3. *Therapeutic* assisted suicide, however, should be treated differently by criminal law, since it promotes the protection of human dignity, a paramount constitutional value.
4. It is likely that the legislator that enacted (the legal provision from which) N1 (has been derived by interpretation) did not consider the property *therapeutic* in assisted suicides, and that, had it considered it, it would have enacted norm N1* instead:

N1*: *Not-therapeutic* assisted suicide shall be punished with ten years imprisonment.

A few comments.

1. Axiological gaps, as conceived by Alchourrón and Bulygin, are situations where the sub-optimal norm *does not draw a distinction* that ought to be drawn. It regulates *in the same way* cases that should be regulated differently, treating *unlike* cases *alike*. Whenever an axiological gap is afoot, a *discriminatory norm* is missing: one introducing a certain distinction inside of a broadly defined class of cases.

2. *Filling* an axiological gap requires *replacing* the non-discriminatory, sub-optimal, existing norm with the optimal and so far missing discriminatory one. This norm takes the originally neglected, and axiologically relevant, property into account (as it happens with N1*). Once N1* replaces N1, *therapeutic* assisted suicide becomes an *unregulated* case. Replacement of N1* to N1 *creates* a *normative gap proper*. This gap is to be filled by introducing a further norm; say, N2: Therapeutic assisted suicide *shall not* be punished with any criminal sanction whatsoever (justified, for instance, as the output of an *a contrario* reasoning from N1*). The "filling" of an axiological gap, therefore, is a complex, two-stages operation. First, the original sub-optimal norm (in our example: N1) is replaced, by way of restrictive re-interpretation, by an optimal discriminatory norm (in our example: N1*). Secondly, the normative gap so created is filled. Obviating to sub-optimal norm N1 requires *replacing* it with the conjunction of *two* optimal norms: N1* *and* N2. Axiological gaps are *replacement* or *switch-over* gaps (Chiassoni 2019, ch. 8).
3. Alchourrón and Bulygin claim the filling of axiological gaps to be generally up to *judges*. Now it is clear why. Remedying to a sub-optimal norm involves: *first*, performing a suitable *restrictive re-interpretation* of the sub-optimal norm (or of the corresponding legal provision), turning it into an optimal, axiologically adequate, one; *second*, *filling* the normative gap proper that the replacement of the sub-optimal norm with the optimal norm has created. Both operations, in contemporary legal orders, are usually within the reach of ordinary judicial "powers of interpretation" (broadly conceived).
4. Alchourrón and Bulygin equate axiological gaps with the absence of a *discriminatory norm*. Another variety of axiological gap is worthwhile considering (Chiassoni 2011, ch. 3, § 3.8.), which is useful for capturing situations where the existing norm is axiologically sub-optimal, not because treating *unlike cases alike*, but because treating *like cases unlike*. An *equalizing norm* is missing. The law contains provision D2: "Mothers are entitled to welfare-paid parental leave." Are *fathers* too so entitled? Judges are constantly interpreting D2 as expressing the *biconditional norm* N2: "If, and only if, somebody is a mother, somebody is entitled to welfare-paid parental leave" (corresponding to the conjunction of two norms: (N2*) "If somebody is a mother, somebody is entitled to welfare-paid parental leave" *and* (N2**) "If somebody is a not-mother, somebody is *not* entitled to welfare-paid parental leave"). N2 proves axiologically sub-optimal, treating mothers and fathers differently in relation to a benefit which they should be equally entitled to. The missing axiologically optimal norm is therefore a norm ascribing the right (also) to fathers. How can such a gap be "filled"? A *deflationary re-interpretation* of legal provision D2 is to be performed, replacing the *biconditional* (complex) norm N2 with the *conditional* (simple) norm N2*. Once N2* is established – say, in a judicial opinion where it is presented as the "only legally correct meaning of D2" – the case of fathers becomes *unregulated*; and the normative gap proper can be filled by a norm N3: "If somebody is a father, somebody has the right to welfare-paid parental leave," justified, for instance, by an appeal to overriding constitutional principles (equality as no-discrimination, parenthood protection, children's best interest, etc.).
5. I have followed so far extant jurisprudential terminology. This refers to the troublesome situations just mentioned in terms of "ideological," "political," or "axiological" *gaps*. However, if we consider which sort of trouble is afoot, whenever some legal professional claims there being an ideological, political, or axiological "gap," and if we take into account that the sub-optimality of a norm derives from its being *incompatible* with some superior norm of the same or another normative order, and the remedy always involves the partial or total *removal* of the sub-optimal norm, it seems reasonable concluding that ideological, political, or axiological "gaps" are as many situations of *normative conflict* or *antinomy*

(Chiassoni 2011, ch. 3, § 3.8.1, ch. 4.). We can continue using the extant "gap" terminology. In doing so, however, we must be conscious of their antinomic character.

Normative Gaps Revisited

The preceding typology of normative gaps is theoretically valuable. It is a *strictly normativist* typology, though. A gap is always defined as the situation where some needed norm is missing. Be it a norm whatsoever, a hard-and-fast norm, a norm in relation to a normative set (a universe of cases, and a universe of solutions), a norm conditioning the efficacy of another, not-self-sufficient, norm, or an axiologically adequate norm. The typology is *opaque* in relation to the *methodological dimension* of law, containing no hint at the interpretive operations legal professionals perform when they claim that "there is a gap in the law."

It seems useful complementing the extant typology with a couple of *methodologically transparent* notions of normative gap proper: *textual gaps* and *meta-textual gaps*. The *gaps-identification* problem will be also considered.

Textual Gaps

A *textual gap* is, *in relation to* a set of *legal provisions* $\mathbf{D}_j$, an *interpretive code* $\mathbf{IC}_j$, and a set of *interpretive resources* $\mathbf{IA}_j$, *the absence* of an *explicit general norm* answering to a *judicially decidable question of law* $\mathbf{Q}_j$ by connecting to a generic case $\mathbf{C}_j$, according to the tenor of the question, *either* the normative solution Sp (e.g., Obligatory p), or the contradictory solution ¬Sp (e.g., Permitted not-p), or the contrary or subcontrary solution S¬p(e.g., Prohibited *p*).

A *set of legal provisions* ($\mathbf{D}_j$) is a discrete number of authoritative norm-formulations (e.g., constitutional or statutory clauses).

An *explicit general norm* is a norm presented and defended as *the legally correct meaning* of a legal provision. I will only consider *prescriptive norms*: norms that permit, enjoin, or prohibit behaviors.

A *judicially decidable question of law* ($\mathbf{Q}_j$) is a legal problem (e.g., Is therapeutic assisted suicide a constitutionally legitimate felony?) that judges, from the standpoint of the competence norms of the legal order, (are assumed to) have the permission ("power") and/or the duty to decide.

The notion of *textual* ("explicit") *gap* aims at capturing the situations legal professionals regard as the paradigmatic cases of "gaps in the law." There is a gap, they ordinarily assume, whenever *no* ("properly" or "correctly" interpreted) *legal provision* expresses an *explicit* norm adequate for settling a judicially decidable question of law at stake.

The notion of textual gap is *interpretation transparent*. It emphasizes that any absence-of-an-explicit-norm situation is *relative to* a set of legal provisions ($\mathbf{D}_j$), an *interpretive code* ($\mathbf{IC}_j$), and a set of *interpretive resources* ($\mathbf{IA}_j$).

Any interpreting of legal provisions (textual interpretation) by a legal professional *necessarily* depends on a previously selected interpretive code and set of interpretive resources. Legal provisions are not self-interpreting entities. Legal professionals cannot avoid selecting interpretive codes, though their selection can be a piece of interpretive conformism. Consciously or unconsciously, any interpreter stands for *a certain* code and *a certain* set of interpretive resources as the *legally correct* ones, at least as to a question of law and an individual case at hand. The same interpreter (the same judge) may use different interpretive codes in different decisions. Shifting interpretive codes is a widespread feature in our legal world. It may also happen, however, that an interpreter (a judge) sticks to (roughly) the same interpretive code whatever the issue at hand.

An *interpretive code* is made of a discrete number of interpretation rules. A *well-built interpretive code* contains rules of two sorts: translation rules and methodological rules. *Translation rules* provide instructions about how (by which sort of *interpretive resources*) a legal provision should be *translated into* an explicit norm. The translation is *intra-linguistic*. A legal provision (a sentence in a natural language L_i) is transformed into (and substituted by) another sentence (or conjunction of sentences) in the same

language L_i, presented as semantically equivalent to the former. Translation rules point to different kinds of interpretive resources (data, pieces of information, etc.): linguistic conventions (*linguistic interpretation*); legislative intent (*intentional interpretation*); the objective purpose of the legal provision-self, or of the branch or sector it belongs to (*teleological interpretation*); previous interpretations by prominent judges or jurists (*authoritative interpretation*); suggestions from other norms of the legal system (*systematic interpretation*); suggestions from external items like the nature of things or the norms of a social or critical morality (*heteronomous interpretation*). *Methodological rules* are meta-rules. They set the normative frame for translations. A well-built interpretive code contains methodological rules of different sorts. A *purpose rule* establishes the aim interpreters should pursue (e.g., respecting the democratic nature of the constitution). A *selection rule* establishes *which* translation rules should be used (e.g., rules of linguistic and intentional interpretation). A *procedure rule* establishes *how* selected translation rules should be used (e.g., rules of linguistic interpretation *first*, and . . .). A *preference rule* establishes which meaning should be preferred, when alternative meanings for the same provision result from using the selected translation rules. A *default rule*, finally, establishes which meaning should be preferred all things-considered, if the previous rules prove ineffective (Chiassoni 2011, ch. 3; Chiassoni 2019, ch. 2).

The identification of a textual gap is not the ascertainment of an empirical fact, but the output of an interpretive-argumentative activity. Suppose the set of legal provisions $\mathbf{D}_j$ includes D1: "Mothers are entitled to welfare-paid parental leave." Suppose judge J should settle the question of law $\mathbf{Q}_j$ (Are *fathers* likely entitled?).

To begin with, J may adopt a literalist interpretive code, containing a *preferential procedure rule* by which the *translation rule* of linguistic interpretation is to be applied *first*, and interpretation should stop *there*, if the linguistic meaning proves determinate. In this event, J may argue as follows: (i) D1, once correctly interpreted, expresses the norm N1: "*Mothers* are entitled to welfare-paid parental leave"; (ii) N1 does not say anything about *fathers*; (iii) therefore, there is a (textual) gap in the law, calling to be filled.

J, however, might also adopt an intentionalist interpretive code, according to which legal provisions are *always* to be interpreted by applying *both* the translation rule of linguistic interpretation, *and* the translation rule of intentional interpretation (as an appeal to the actual semantic intent of the historical legislator) (*not-preferential procedure rule*); whenever the linguistic meaning and the intentional meaning of a provision are at odds, the meaning more in tune with constitutional principles should prevail (*criterial preference rule*). In such case, J may argue as follows: (i) D1 expresses the norm N1 (*Mothers* are entitled to welfare-paid parental leave), *if* read according to the rule of linguistic interpretation, and the norm N2 (*Mothers and fathers* are entitled to welfare-paid parental leave), *if* read according to the rule of intentional interpretation; (ii) following the criterial preference rule, N2 should be preferred to N1; (iii) therefore, there is *no* (textual) gap in the law concerning the right of fathers to welfare paid parental leave.

Interpretation can make gaps to exist ("gaps creation"), as well as it can prevent gaps from coming into existence ("gaps prevention") (Guastini 2011, 409–413; Chiassoni 2011, ch. 3, § 3.7). From a *methodological standpoint*, there is no limit to taking one course or the other. Limits about the identification of textual gaps come from different sources. Ultimately, from *ideological factors* (e.g., what a legal culture considers axiologically viable or unviable), together with *prudential considerations* by individual interpreters.

Meta-textual Gaps

A *meta-textual gap* is, *in relation to* a previously identified set of explicit and/or implicit norms $\mathbf{NS}_j$, an *integration code* $\mathbf{IGC}_j$, and a set of *integration resources* $\mathbf{IGA}_j$, *the absence* of an *implicit general norm* answering to a *judicially decidable question of law* $\mathbf{Q}_j$ by connecting to a generic case $\mathbf{C}_j$, according to the tenor of the question, *either* the normative solution Sp, or the contradictory

solution ¬Sp, or the contrary or subcontrary solution S¬p.

Implicit norms are not the meanings of legal provisions. Rather, they are "derived" from other previously identified norms, jurist-defined legal concepts, and/or juristic theories of law, legal institutes, legal bodies, etc.

The notion of *meta-textual* ("implicit") *gap* purports emphasizing that a "gap in the law" could also consist in the missing of an *implicit norm*. The existence of a meta-textual gap would depend on an *integration code* to the effect that there is *no* implicit general norm for a judicially decidable question of law (for which no *explicit* norm is available either). Integration codes, however, are usually employed *to fill* (textual) gaps. How can it happen, then, that a meta-textual gap ever "show up"? Consider again the situation where "there is" a textual gap concerning fathers' right to parental leave (Section "Textual Gaps", above). How can a meta-textual gap relating to that legal question (be said to) exist? By which integration code can such a negative result be justified? How can it be, to recall Bobbio (Section "Non-normative Gaps", above), that neither integration by analogy, nor integration by *a contrario* reasoning, are viable? There seems to be only one way out of this riddle. Only an integration code *prohibiting* judges to create any implicit norm whatsoever will do. In such event, however, judges will have to declare that the law is irreparably incomplete and dismiss the claim. This is not something judges in contemporary (Civilian) systems are allowed to do, though. Furthermore, precisely on that footing Civilian jurists use to conceive of gaps as *textual gaps*, tacitly assuming that, in the boundless sea of implicit ("invisible") law, it is always possible for a (skilled) professional to "find" an implicit norm filling a gap of explicit ("visible") law. In sum: the notion of meta-textual gap is a borderline-notion. It points to (here and now) very unlikely, if not altogether impossible, situations.

Conclusion

The "filling" of axiological gaps was already considered (Section "Ideological, Political or Axiological Gaps", above). To conclude, let me briefly cope with the descriptive variety of the repair problem (Section "A Troublesome Matter", above) in relation to textual gaps.

Law professionals fill textual gaps by a discrete set of integration rules composing an *integration code* (Section "Meta-textual Gaps", above). A *well-built integration code* contains rules of two sorts: addition rules and methodological rules.

Addition rules provide instructions about *how* (by which sort of *integration resource*) a textual gap is to be filled by adding an implicit norm to an extant normative set. In Civilian methodology, addition rules point to integration resources usually including: the *relevant similarity* between the expressly regulated case and the unregulated case (*analogical integration*); the *silence of explicit law* as an index of the will to connect the unregulated case with a solution that is the negation of the one expressly provided for the regulated case (*a contrario integration*); the *stronger reason* that justifies an implicit norm connecting to the unregulated case the same solution expressly provided for the regulated case (*a fortiori integration*); the *counterfactual intention* of the historical or present legislator (*intentional integration*); *superior norms* of the legal order (e.g., constitutional principles, general legal principles, etc.) (*systematic integration*); the *"essential" properties* of the case to be regulated (*integration by the nature of things*); *additions previously proposed* by prominent judicial bodies or juristic personalities (*authoritative integration*); the *external norms* of a social or critical morality (*heteronomous integration*).

Methodological rules are meta-rules. They set the normative frame for textual gapfilling. A well-built integration code contains methodological rules of different sorts. A *purpose rule* establishes the aim gapfilling should realize (e.g., advancing the liberty values of the constitution). A *selection rule* establishes *which* addition rules should be used (e.g., the rules of intentional and systematic integration). A *procedure rule* establishes *how* selected addition rules should be used (e.g., rules of intentional integration *first*, and . . .). A *preference rule* establishes which implicit norm should be preferred, if alternative implicit

norms for the same gap result from using the selected addition rules. A *default rule*, finally, establishes which implicit norm should be preferred all things-considered, if the previous rules prove ineffective.

Cross-References

- ▶ Interpretation: Systemic
- ▶ Legal Argumentation
- ▶ Legal Argumentation: Principialism
- ▶ Legal Systems
- ▶ Logic and Law
- ▶ Normative Conflicts
- ▶ Principles

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Garantism

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Introduction

Garantism is a legal and political doctrine which, in a nutshell, conceives of the legal system as a system of protections (or "guarantees") for the fundamental rights of individuals, against the encroachment by public and private powers. This doctrine is still virtually unknown to English-speaking readers. This is because, barring a few exceptions (Baccelli 2011, Chiassoni 2011, Costa 2011, Ferrara 2011, Sandro 2011, 2022, Ferrajoli 2011, Moreso 2021), the work of its most prominent theorist, Luigi Ferrajoli, has not been translated or discussed in English. The situation is very different in those countries where Italian, Spanish, or Portuguese are spoken: for there garantism, since its first complete appearance – as a normative theory of criminal law – in the late 1980s, has sparked not just an incredibly rich academic debate but has inspired legislative reforms and has been cited, with approval, by lower and superior courts (particularly in South American jurisdictions).

While only wholesale translation in English of Ferrajoli's work can bridge this unfortunate gap, in this entry we will endeavor to introduce to the

reader unfamiliar with garantism the main features of this legal and political theory. We will start with a brief but necessary etymological excursus, which will illustrate the fragmented origins of the term in its French and Italian versions. After showing the path through which the term has become of current usage in political and legal thinking, we will use the rest of this entry to disambiguate between its three most common uses nowadays. These are:

- Garantism as a theory of criminal law.
- Garantism as a dimension of constitutionalism.
- Garantism as a specific normative theory of constitutionalism.

We will then conclude by offering some necessarily brief remarks on the expansion of the garantist paradigm beyond the nation-state.

The Word and Its History

In civil law jurisdictions, the term guarantee (or warranty) has a long history. It can be understood in two senses, a narrow and a wide one. The narrow sense is the original meaning of the term: it refers to a class of legal institutions, dating back to Roman law, which were directed to guarantee the satisfaction of certain obligations and the protection of the corresponding property rights – what we generically refer to in English as collaterals. With time, though, the term has come to mean any type of normative technique (or device) which is geared toward the protection (or satisfaction) of an individual right (Ferrajoli 2014).

The word "garantismo", by now common in Romance languages, is instead a neologism of the nineteenth century, coined in French political discourse. This original meaning is quite different from its current one. A "Garantisme" entry can be found in the Dictionary of French Language by Émile Littré (edited by Hachette between 1873 and 1874), although its definition as "system of industrial feudalism" arguably confuses more than clarifies. This is because it is a term of art within the school of thought that originates in the works of French philosopher Charles Fourier (1772–1837). By "garantisme," Fourier meant a stage in the "evolution" of society toward the realization of the perfect (utopian) socialist community. As illustrated in his 1829 work *Le nouveau monde industriel et sociétaire*, "garantisme" delineates a system of welfare aimed at guaranteeing the satisfaction of basic needs (subsistence) for the weakest members of society, which is subsequently articulated into sub-types (agricultural, industrial, and domestic) by other members of Fourier's intellectual group. This is the meaning that progressively acquires currency in French political discourse and is received by Pierre Larousse in his *Grand Dictionnaire universel du XIX siècle* (1872).

It is not clear, to be fair, how the current (and different) meaning of "garantismo" has come to appear in Italian. What we know is that already in 1925, Italian historian of philosophy Guido De Ruggiero discusses "so-called garantismo," describing it as the conception of political liberty as liberty *before* and *against* the state. This conception, says De Ruggiero, arguably originates in Montesquieu's analysis of the English (uncodified) constitution, and it is in this latter – specifically, in its combination of normative and institutional strategies to preserve the liberties of individuals vis-à-vis the sovereign – that we can identify the paradigmatic case of instantiation of the principles of garantism (De Ruggiero 1984). But not everyone agrees in tracing the doctrine back to Montesquieu: according to Italian political scientist Nicola Matteucci, the main theorist of garantism is Benjamin Constant. For it is only in this latter's work that the need to protect the fundamental liberties of the individual – personal freedom, freedom of speech, religious freedom, and private property – from the powers of the state is *specifically* conceived of through constitutional devices (Matteucci 1983).

Be that as it may, this brief genealogy is relevant for two reasons. First, as the given name of those political doctrines centered around the constitutional guarantees of the fundamental liberties of the individuals vis-à-vis the power of the state, the term "garantismo" takes root in the Italian jurisprudential discussion in the aftermath of World War Two. Within this intellectual tradition,

modern constitutionalism and garantism appear indissolubly tied, as two faces of the same coin (Ferrajoli 2007: vol I, 823). This is not of secondary importance. For instance, it allows Giovanni Sartori, already in the 1960s, to illustrate the apparent paradox of British constitutionalism (Sandro 2021): in that while the British might not have a [codified] constitution, they certainly have – and had long before the Americans and the French – a normative-institutional set of arrangements aimed at protecting (some of) the basic liberties of the subjects of the Crown. In other words, and even if they did not call it in the same way, they share the *telos* of modern constitutionalism. As Sartori puts it (Sartori 1962: 855):

> all over the Western area people requested, or cherished, "the constitution," because this term meant to them a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a "limited government."

Second, from what it has been said so far it emerges that garantism is used in two different senses already within constitutional scholarship. On the one hand, it is used to refer to a specific dimension of modern (entrenched) constitutionalism: that is, its rejection of the Rousseauian general will of "the people" as the lodestar of the constitutional project and the affirmation of the need to guarantee – against the interference by public and private powers – some of the fundamental rights of the individual. On the other hand, garantism has also come to be used, progressively more and more, as the name for a specific normative theory of modern constitutionalism. How so?

In order to understand how this shift in usage occurred, we must turn to the third and, at least in Romance languages jurisdictions, more common meaning of the term: garantism as the normative theory toward a minimalist criminal law. This theory is born in Italy during the 1970s, where in response to terrorism, rise of organized crime, and social and political turbulence, the Italian State enters a phase of overcriminalization. It is as a reaction to this crucial historical moment that a former judge and legal philosopher, Luigi Ferrajoli, advances the new theory of criminal law garantism.

Garantism as Criminal Law Theory

Ferrajoli puts forward his comprehensive theory toward a minimalist criminal law with his monumental (>1000 pages) *Diritto e ragione. Teoria del garantismo penale* (Law and reason. Theory of criminal law garantism) in 1989. His experience as a judge until the mid-1970s is crucial to understand the fundamental tenets of his garantism: Ferrajoli has wielded what amounts to the most far-reaching power of the state, the power to punish, and is acutely aware of its fallibility and potential risks for individuals. Hence the need to reduce it to a (necessary) minimum. The book has since become, without exaggeration, a classic of modern legal and political theory, and sparked a vast and long-lasting debate in Continental Europe and South America.

To be sure, criminal law garantism is premised on the protection from both arbitrary punishment as well as crimes. In this regard, its main pragmatic objective is the minimization of violence in society both in its institutional and private form. The relationship between the two is very complex, and it effectively provides a threshold below which no theory demanding a minimalist criminal law should go (because it would then run counter its other objective of also minimizing violent conflict in society).

Ferrajoli's theoretical project, at its core, explicitly draws on the Enlightenment's debate about the justifications, the aims, and the limits of the state's power to punish (Ippolito 2021). Typical of Enlightenment thinkers is also the union between contractualism and utilitarianism. It is not a misnomer, therefore, to describe Ferrajoli's work – in following Norberto Bobbio's footsteps – as a form of Neo-Enlightenment (Chiassoni 2011: 331).

As already mentioned earlier, at the basis of the Enlightenment thinking, there is the rejection of the status quo of political theory at the time, centered around the sovereign's right to rule and the corresponding duties of obedience by subjects. The shift is grounded in the acknowledgement of the inviolable character of life, of basic freedoms, and of private property which demand respect *especially* by the sovereign. This way of

conceiving of the most basic political relation between rulers and ruled effectively overturns the traditional understanding of the relation and prompts the rejection of the absolutistic paradigm of *potestas legibus soluta*, as expressed, for instance, by Jean Bodin. It is within this paradigmatic shift that we must also understand the development of the principles of the rule of law, of the separation (and/or division) of powers, and of political representation. In a nutshell, it is here that the modern idea of state begins to take form.

It should not come as a surprise, then, that the problem of criminal law – of why and how to punish – is a center of the reflection by Enlightenment thinkers. For Montesquieu, it is a terrible but necessary power (Montesquieu 1989). Why so? It is necessary because, without primary norms that regulate social interactions and which are backed by public sanctions, the liberties of individuals – and their lives even before – would be constantly threatened by private violence; that is, they would be left to the dynamics of the Hobbesian state of nature. But the power of the state to punish is also "terrible" because, while justified by the necessity to protect individuals' rights and the liberties thus guaranteed, it can always potentially encroach upon those rights and liberties, taking them away from their holders.

This acknowledgment of the dual nature of state punishment puts the criminal justice system in the spotlight as the primary site where the relationship between authority and individuals is characterized by the conflict between violence and law. As such, the ideal of the rule of law, where the exercise of political power is not merely channeled, but limited by law, finds its test bed in the legal classification of the offenses, in the formulation of the punishments, and in the organization of the criminal justice trials.

Against the system of punishment of the Ancient Regime – characterized by the almost complete lack of procedural and substantive guarantees for the accused and by the brutality of both procedures and punishments – Beccaria, Voltaire, and Filangieri (to name but a few) fight to completely overhaul the criminal justice system. Their objectives were the codification of criminal laws, the containment of judicial arbitrariness, the humanization and rationalization of sentences, the secularization and liberalization of the configuration of crimes, and, going beyond the inquisitorial trial model, the introduction of key procedural guarantees for the accused.

In Diritto e Ragione, Ferrajoli does not just rediscover the garantist lesson of the Enlightenment, but extensively builds on it. A quick glance at the book's chapters on the criminal trial should suffice: in stark opposition to the ancient regime procedures (characterized by preventive detention, secrecy in the pre-trial phase, the weightier status of prosecution vis-à-vis defense, and the fluidity in the demarcation of the offices of prosecutor and judge during the trial), the Enlightenment model of trial is structured around the presumption of innocence and the personal freedom of the accused, the publicity (and oral character) of the trial, the equality and cross-examination between parties, the independence and impartiality of the judges, and the collegiality of the court.

One of Ferrajoli's intuitions is to highlight the link between the quality of criminal law legislation – its clarity, precision, and systematicity – and the (ideally) cognitive nature of the criminal justice process. For Ferrajoli, in fact, judicial decisions have an altogether different character vis-à-vis other legal ones (legislative, administrative, and contractual decisions). This difference lies in the fact that judicial decisions have a double dimension: theoretical as well as normative. More precisely, their normative effects (including sanctions) are grounded in the ascertainment by courts of empirical facts and legal norms which are then connected through the traditional model of the legal syllogism. This implies that, unlike many other powers of the state, judicial decisions should be justified exclusively on the basis of "judicial truth," which can only in turn be pursued if the powers of judges are fully regulated by legislation and a sufficiently cognitive decision-making mechanism is devised.

The two aims that we have thus far illustrated, the conception of criminal justice as a tendentially cognitive decision-making power and the protection of fundamental liberties, are a function of a set of substantive and procedural guarantees

which criminal law garantism establishes as justificatory parameters for the state's power to punish. The substantive criminal law guarantees must direct and limit the legislative creation of offenses: the principle of strict legality, the materiality and harm principles, and the principle of culpability. The procedural guarantees govern the state's intervention during the delicate phase of the judicial assessment of the crime and tie in with the former to create a cohesive system oriented toward the protection of liberties and the minimization of the state's punitive power.

Garantism as Legal and Political Theory

The criminal law garantism envisioned in Diritto e Ragione is part of a wider project. For Ferrajoli, in fact, garantism constitutes more broadly a whole general theory of law, which shares much of its DNA with legal positivism but goes beyond classical versions of this latter (Hans Kelsen's and H.L.A. Hart's in particular) in significant respects. Ferrajoli himself defines it as "critical legal positivism," in opposition to what he calls "dogmatic" one, to be identified in those positivist theories of law where the existence, validity, and efficacy of law are not clearly separated (Ferrajoli 1989: 921). But the scope of garantism does not end here, for it is also a distinctive political theory that puts forward a comprehensive model of (constitutional) democracy. It is precisely in this indissoluble connection drawn between the legal and the political that we must identify its perhaps most distinctive feature (Sandro 2022: 44).

Ferrajoli's theoretical elaboration of garantism has spanned more than four decades, and during this time – Ferrajoli is still very much active at the time of writing this encyclopedia entry, as his recent *Per una Costituzione della Terra* (2022) demonstrates – his position on a number of topics has necessarily evolved. But the foundations of his legal and political thinking, which see in his theory of constitutional democracy their highest expression, have remained firm since his first publications. First, liberalism, egalitarianism, and secularism in law and morality strengthen one another and are starkly opposed to any political theory that bolsters political organicism (the conception of the political community as an organic entity) and ethical statism (the fascist conception according to which the state is the only source of morality). Second, the demystification of any attempt to legitimize the institutions of the state, and any type of non-natural power more generally, through naturalistic or religious arguments. Third, the repulsion vis-à-vis those political doctrines which personify the body politic and celebrate the state as an end in itself, as a superior being to which the legal system is merely instrumental and individuals' rights and interests are subordinated. In a nutshell, Ferrajoli's political axiology is the antithesis of fascism.

It is from within these coordinates that Ferrajoli's garantism recovers and modernizes the tradition of social contract in political theory, releasing it from the metaphysical baggage of natural law theory and presenting it from a utilitarian perspective. This happens, it should be noted, independently of Rawls' neo-contractualism or R.F. Harrod's and Richard Brandt's utilitarianism. It is in fact, as we have already seen, the great theorists of the rationalist tradition in politics and of the Legal Enlightenment that Ferrajoli confronts himself with: Hobbes, Locke, Montesquieu, Beccaria, and Bentham. But it would be erroneous to think of these, reductively, as the mere "sources" of garantism: for Ferrajoli enlivens the thinking of these classical theorists by merging it with his own thinking.

In this sense, the doctrine of the social contract is reinterpreted as a metaphor for democracy and as the paradigm of modern constitutionalism (Ferrajoli 2007). But Ferrajoli sees its principal value in that it represents the archetype of all the political theories that conceive of the state in instrumental terms, so that the legitimacy of public institutions and their laws becomes a function of the satisfaction of individuals' needs and interests. That is to say: if the state is an artifact, being the product of human reason and will, then it is necessarily the case that society (understood as the set of individuals), and not the state itself, must be the center of gravity of political engineering. We must therefore ascribe axiological primacy to the human being vis-à-vis naturalistic

conceptions of the polity. Bobbio called this the Copernican revolution of modernity (Bobbio 1990: 56), and we can safely say that garantism represents its fullest expression to date.

It should be clear, then, that garantism squarely belongs to the political tradition of the stato di diritto (or rechsstaat, or estado de derecho, or – albeit not precisely – rule of law), with its emphasis on the need to recognize the value of people as ends (and not as means) and the corresponding need to recognize the state as an instrument that serves them. At least three more fundamental shared traits confirm the relationship between *stato di diritto* and garantism: first, the acknowledgment that political power, although necessary for peaceful coexistence, is intrinsically and always prone to lapsing into authoritarianism; second, the emphasis on positive law as the device to organize, regulate, and limit public powers; and third, the recognition that the primacy of the individual in law within society requires the protection of its needs and interests via fundamental rights whose content cannot be disposed of by public powers, at least at their core. Starting from these premises, Ferrajoli polishes the notion of *stato di diritto* – clarifying semantic ambiguities and historical premises – and expands it into a comprehensive legal and political model, where all public powers are made instrumental to the guarantee of the fundamental rights of individuals by means of the incorporation in the constitution of the public duties corresponding to those rights (Ferrajoli 1989: 897).

In this respect, garantism captures the paradigm shift in the legal system brought about by the transition from the "legislative" *stato di diritto* to the "constitutional" one. These two political doctrines, albeit sharing the basic idea of the rule of law (and not of men), are quite different in how they configure the protection of individuals, as well as the arrangements of public powers of the state.

In Ferrajoli's view, the first one, the legislative stato di diritto, comes into being when the principle of legality becomes the rule of recognition (to use Hart's terminology) of all existing law. By principle of legality, he means the meta-norm which recognizes as law only those norms which are produced by institutions so authorized and only through established procedures. Put another way, this is the moment when the state gains the monopoly of law production, thus ending the era in which case law and legal dogmatics were central sources of law and the ultimate rule of recognition was of a substantive character, as captured by the Latin maxim *veritas non auctoritas facit legem*. Ferrajoli contrasts this latter with the legal positivist principle, first put forward by Thomas Hobbes, according to which it is instead authority, and not truth, that makes the law (*auctoritas non veritas facit legem*). For while the former might intuitively appear sounder than the latter, it is only the second and positivist one that is able to ensure the attainability of the rule of law and legal certainty, understood as necessary prerequisites of freedom and equality. The criterion of the intrinsic justice of the law, in fact, tends to lapse into normative disorder (because it might never be clear what the law is on any given issue) and widespread arbitrary exercise of public power, as shown by pre-modern juridical experience. Ferrajoli's skepticism toward judge-made law and rejection of natural law theories underpinning it could not be more explicit.

The legislative state, however, does not represent the complete institutionalization of the *stato di diritto*'s normative paradigm according to which the legal system imposes on the powers of the state the ultimate aim of guaranteeing the fundamental rights of the individual. This incompleteness lies in the purely formal dimension of the principle of legality in this model of the state: that is, in the fact that anything can be done through legislation, provided the correct procedures are followed, and thus there are no predetermined objectives or limits to it. Any other legally recognized power (judicial, administrative, executive, and contractual) is subordinate to and limited by legislation, but nothing limits this latter. Whoever can produce legislation has still an absolute power, and this means that the existence of fundamental rights is dependent on it (rather than constituting it). It is government *by* law, but not *under* the law.

It is only with the passage to the constitutional *stato di diritto* – that is, to that form of government

where a rigid or entrenched constitution is normatively superior to ordinary legislation – that all public powers become *subject* to the law. The consistency of legislative acts with the contents of constitutional norms is guaranteed by a form of strong constitutional review. As such, this introduces an additional, substantive dimension of the principle of legality, thus integrating the formal or procedural dimension which already governed the competences and procedures of legislative powers. As Ferrajoli observes, this twofold dimension of the principle of legality results in the potential divergence between the existence and the (full) validity of legislative norms, given that the latter must abide by substantive as well as formal/procedural norms concerning their creation, as established in the entrenched constitution. This divergence could simply not occur in the legislative *stato di diritto*. For in this latter, compliance with procedural norms made legislative acts spring into existence and gain validity simultaneously. To be precise, existence and validity of norms denoted the same thing in the legislative state model (Sandro 2018). Instead, in the constitutional *stato di diritto* the existence of substantive legal norms in the constitution – that are normatively superior to legislation – brings even the acts through which the ultimate law-making power in the legal system is exercised *under* the law, thus making their validity conditional on their compliance with the fundamental rights established in the constitution.

This paradigm shift in the form of the state was produced by the subordination of what was once considered to be the unlimited power par excellence to legality, and the simultaneous constitutionalization of a set of individual fundamental rights. These two processes bear significantly on democratic government itself. According to Ferrajoli, due to this novel paradigm of legality, democracy ceases to be characterized only by its political dimension – the universal franchise, free elections, and majority rule – and instead acquires a substantive one, which pertains not just to the forms of political decisions, but to what can (or cannot) be decided through the latter. We are now, in a nutshell, in the era of *constitutional* democracy.

One could think, from this brief reconstruction, that the democratic question is effectively an afterthought in Ferrajoli's elaboration of garantism, as often it is the case – or so it is said – with those political and legal theories which defend strong forms of constitutional review. Nothing could be farther from the truth. Besides the acknowledgment that Ferrajoli, unlike other strong constitutional review defenders like Alexy, Dworkin, or Nino, does not legitimize or encourage judicial activism (Chiassoni 2011: 339), a bird's-eye view of Ferrajoli's scientific production will readily show that the problem of democracy is at the front and center of his research trajectory: starting from the 1970s, when Ferrajoli was engaging with Norberto Bobbio and Danilo Zolo on the reality of representative democracy and on the economic structure of authoritarian democracy (respectively), to the present day, as the recent publication (2021) of *La Costruzione della Democrazia: Teoria del Garantismo Costituzionale* ('The Construction of Democracy: A Theory of Constitutional Garantism') clearly demonstrates. In this latter work, Ferrajoli summarizes, refines, and broadens his theory of constitutional democracy as developed, over the years, in his *Diritto e Ragione* (1989) and *Principia Iuris* (2007). For the reader who wants to study the theory of constitutional garantism, *La Costruzione della Democrazia* is where to start.

Conclusion

This short entry cannot possibly do justice to the theoretical edifice built by Luigi Ferrajoli over five decades. His garantism, as a comprehensive theory of constitutional democracy, now even stretches beyond the nation-state. Global challenges (climate change first and foremost) require global solutions, and for Ferrajoli these presuppose some form of supra-national constitutionalism which can ground what he calls a "cosmopolitan democracy" (Ferrajoli 2021). To this end, he published in 2022 a full draft of a World Constitution (Ferrajoli 2022), avowedly inspired by Kant.

Is Ferrajoli's theory desperately utopian (Chiassoni 2020: 58–61)? Of all the criticisms, this is arguably the most insufferable for Ferrajoli, because it betrays what for him constitutes a fundamentally flawed perspective that humanity cannot afford, especially at this point in history. Ferrajoli rejects political realism, as it always ends up legitimizing the *political and economic* status quo and warns that what is actually utopian is for governments and citizens of developed countries to think that they will be able to keep enjoying the same type of lifestyle and levels of wealth if global inequalities and climate change (to name but two) are not urgently addressed globally (Ferrajoli 2021: 449). Ferrajoli, instead, subscribes to a type of "methodological optimism" which is inspired by two of the classical thinkers he has been in dialogue with for his entire career, Kant and Kelsen. He urges us, in a nutshell, not to mistake theoretical problems for political ones and reminds us that the hope of progress is a prerequisite of civic engagement (ibid). The hope of progress is based not on a generalized optimism, but on reason: on the acknowledgment that only some form of supranational constitutionalism – in other words, universal expansion of the garantist model – can guarantee humanity a future on this planet (ibid: 449–450).

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Gardner, John

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Introduction

John Gardner (1965–2019) succeeded H.L.A. Hart and Ronald Dworkin as Professor of Jurisprudence at Oxford. He was one of the world's leading philosophers of law. Gardner's work takes up puzzles about law in general and about particular areas of law, from crime to tort to contract to discrimination. For him, solving these puzzles requires facing up to others—to deeper questions about responsibility and reasons, wrongs and faults, and justice and morality. Gardner's work is both a study of these deeper questions, and—through them—of the place law occupies in a life well lived.

A Glaswegian, born in 1965, Gardner studied law as an undergraduate at New College, Oxford, where his academic interest was piqued by tutorials with Nicola Lacey and Jonathan Glover. In 1986, Gardner won a Prize Fellowship at All Souls College, bringing him into the orbit of G.A. Cohen, Derek Parfit, and other philosophical luminaries of that era. Gardner would go on to teach in Oxford with one of them—his friend and mentor Tony Honoré—for three decades. Gardner completed his doctorate in 1995, under the supervision first of Honoré, and then of Joseph Raz, perhaps the greatest influence on his academic work (Gardner 2007a). Gardner was Professor of Jurisprudence at Oxford from 2000 to 2016, and senior research fellow at All Souls until his death in 2019.

An entry like this one might be expected to do two things: assign Gardner to one or more schools of thought, and assign one or more big ideas to Gardner. Work of this kind, however, is not work Gardner would commend to others. "Philosophy," he writes, "is not the art of compiling as many little thoughts as possible into as few big thoughts as possible, but the art of wearing every thought down to its rightful little size and then keeping it in its rightful little place" (Gardner 2013a, v). This process is not aided—indeed, it is positively hindered—by parceling thoughts together to form rival schools, turning philosophical reflection into a series of pitched battles between broad camps. These battles, Gardner claims, are a "blight on our subject"—"enemies of open-minded reflection" which serve mainly to produce red herrings and straw men (Gardner 2013a, vi; 2020, 353). To break free of them is to seek our little truths regardless of tradition. It is to become the "intellectual squirrel" who hoards away good sense wherever she can find it—for whom an idea is never valid on its sources but only on its merits (Gardner 2013a, vi).

As a squirrel who ranges widely, Gardner is not easily summarized. It is possible, however, to identify some recurring themes. One is the relationship between our rational capacities and the philosophical foundations of particular areas of law. A second is the relationship between law's positive character and its moral character. The remainder of this entry begins with the first theme, then turns to the second.

Reasons and Philosophical Foundations

Areas of law are collections of norms each calling for justification. While some try to justify whole collections at once, others plod away one norm at a time. Whatever one's speed, Gardner observes, there is no escaping a prior question: Before we can work out which, if any, legal norms are justified, we need to work out which considerations bear on the justification. Gardner's own answer to this prior question is monist in the following sense. First, reasons that bear on what should be done with the law also bear on what should be done in ordinary life: "ultimately the only considerations that are relevant to defending the law are considerations that are also relevant to defending what people do quite apart from the law" (Gardner 2018, 8). Second, all reasons that bear on what should be done in ordinary life also bear on what should be done with the law: "all reasons are ultimately the same reasons for everyone," such that "everyone's conformity to every reason is everyone's business" (Gardner 2011, 89; 2007b, 62–63). To accept the first thesis is to deny that any area of law is fundamentally *autonomous*—a domain regulated by considerations that apply only within its bounds. To accept the second is to deny that any area of life is fundamentally *private*—a domain which gives rise to reasons having no force for those outside it.

Monism—understood as the combination of Gardner's two theses—is easily misunderstood. If all reasons are the same for everyone, does this entail that the moral position of public officials is the same as the moral position of everyone else? It does not. Monists need not deny that, while it "is no bad reflection on me as a friend that I do not announce or clarify the rules of our friendship," it "*is* a bad reflection on me as a lawmaker that the legal norms I make are announced or clarified to those whose actions they purport to regulate" (Gardner 2013a, 192–193). Nor need they deny that, while we all have duties not to harm others, "police officers have an additional moral duty to protect people against a wide range of misfortunes" (Gardner 2013b, 104). As Gardner explains, monism is compatible with legal officials gaining moral rights, duties, powers, and permissions when they step into their official roles. It only tells us that these gains are to be explained by the different circumstances in which officials find themselves, circumstances made morally salient by considerations that bear on both official and ordinary life (Gardner 2013b, 116–118).

To endorse this last claim, Gardner writes, is to sign up to "the unity of morality" (Gardner 2013b, 118). This should not be confused with Ronald Dworkin's unity of value thesis, according to which conflict between moral considerations is always merely apparent (Dworkin 2013). For Gardner, this could scarcely be further from the truth. What is just often conflicts with what is humane (Gardner 2013a, 244–246). What is charitable often conflicts with what is just (Gardner 2000). That we are justified in pursuing one course of action does not entail that we breach no duty in doing so. That pursuing a course of action is the only way to do one's duty does not entail that no duty is thereby breached (Gardner 2005, 55; Gardner 2013b, 107–108). Conflicting considerations, in short, are an inescapable part of moral life. Monism entails that the defensibility of any legal norm depends on each and every one of them. So the fact (if it is one) that retribution sometimes conflicts with deterrence does nothing to show that only one forms part of the justification of punishment (Gardner 2007b, 214–215). And the fact (if it is one) that tort law is in the business of doing corrective justice does nothing to show that distributive justice is irrelevant to the justification of its norms (Gardner 2019, 79–83).

For the monist, recall, everyone's conformity to reasons is everyone's business. This is to say that "any reason for P to φ is equally a reason for any action by anyone, familiar or stranger, that contributes to P's φing." It may seem to follow that we are propelled towards a life "overwhelmed to the point of madness with endless efforts to help everyone to do whatever it is they have reason to do" (Gardner 2018, 109). Not so. Whether we should be trying to help others, and what we should be trying to do to help depends on what would make for the most "efficient use of rational energy" (Gardner 2007b, 64–65). It depends on how well-placed we each are to bring about

conformity with the reasons we all have. Perhaps Q knows so little about P that her efforts to help would only hinder. Perhaps Q's efforts would prevent others from helping P more, or come at the cost of Q failing to conform to other, more stringent reasons. Where her efforts would be rationally inefficient in any of these ways, Q should leave P well alone. This "efficiency principle," as Gardner calls it, applies as much within law as without (Gardner 2007b, 277–279). It helps determine when legal regulation is appropriate, and what type of regulation should be preferred. If legal regulation of any kind would be self-defeating or counterproductive, the efficiency principle implies that the law should butt out. Where legal regulation of some kind will help us do better—and there is no superior alternative—the principle implies that we ought to so regulate.

To which reasons can law help us better conform? How can law help us better conform to them? Much of Gardner's work, in addressing both questions, is concerned with the rational significance of the past—with the contribution law makes to our conformity with reasons generated by wrongdoing. Part of that contribution consists in putting wrongdoers under pressure to respond appropriately to their own wrongs. Part of it consists in reducing the temptation for victims and their supporters to respond *in*appropriately to the wrongs of others. As to the latter, a "central pillar of the criminal law's justification," Gardner claims, is its ability to preempt retaliation—to use the symbolic significance of its processes to "take the heat out of the situation" (Gardner 2007b, 213–238). This "displacement function," as Gardner calls it, is not restricted to the criminal law:

> It is a central plank of the argument for having any law, private or otherwise, that it cools heated reactions to actual and alleged wrongdoing, that it substitutes its laborious rituals and distractions for the horrors of the blood-feud, the vendetta, the duel, the lynching, and so forth (Gardner 2018, 1-2).

As well as protecting (actual and alleged) wrongdoers against recriminations of various kinds, law's rituals also exert pressure on wrongdoers (actual and alleged) to act in various ways—to offer a defense, compensate their accusers, work without pay, etc. To evaluate this exertion, we need to know whether the actions legal proceedings put (actual and alleged) wrongdoers under pressure to perform are actions they already have reason to perform independently of the pressure. We need to work out, in other words, what counts as a rationally appropriate response to wrongdoing, in order to work out whether the responses incentivized by law's processes are responses law should be in the business of incentivizing.

Different parts of the answer are foregrounded in Gardner's work on criminal and private law. When it comes to crime, Gardner emphasizes what he calls our basic responsibility. To be basically responsible is to have a composite ability: an ability to respond to reasons in what one does (or thinks or feels) and an ability to use those same reasons to explain what one did (or thought or felt) (Gardner 2007b, 184). To respect oneself as a responsible agent is to aspire to exercise this ability well: It is to want to live a life that makes sense rationally, and it is to want to make rational sense of that life to others (Gardner 2007b, 272–276). Part of what it is to have this aspiration is to want one's actions to be justified or excused, and to want one's justifications or excuses to be heard when one has them. As we have reason to so aspire—to avoid compromising our self-respect—we have reason to *offer* our justifications and excuses when accused of wrongdoing by others. Gardner argues that one function of criminal proceedings—of the criminal law as a whole—is to contribute to improved conformity with this reason: to elicit justifications and excuses from those not otherwise inclined to give them (Gardner 2007b 190–191). Where this is successful, criminal proceedings have not just instrumental but *intrinsic* value:

> the most fundamental point of all this legal rigmarole, all these pleas and committals and verdicts and even the physical layout of the courtroom with the dock and the stand and the bench. . .is to have structured explanatory dialogues in public in which the object of explanation is ourselves. The point is not a point relative to which the procedure is instrumental; rather the point is *in* the procedure (Gardner 2007b, 189).

It is true, of course, that we can imagine a criminal law that largely did without the rigmarole. But a criminal law which ceased to make space for responsible agents to justify or excuse their wrongs would be a criminal law that fatally compromised its own legitimacy. In Gardner's words, "[c]riminal law can be a proper vehicle for condemnation, deterrence and punishment only because it is a vehicle for responsible agents to answer for their wrongs" (Gardner 2007b, 80, 283).

These remarks help account for the emphasis, in Gardner's thinking about criminal law, on the structure of both justifications and excuses. According to received orthodoxy, (i) justifications deny wrongdoing; (ii) excuses deny responsibility; and (iii) the two jointly exhaust the category of criminal defenses. Gardner challenges the orthodoxy on all counts. We should reject (i) because wrongdoing is often the very thing we are called upon to justify (Gardner 2007b, 79). Imagine that killing a bystander is the only way to save a nearby town. If P kills the bystander, P breaches a duty and thereby commits a wrong. Because there are undefeated reasons to kill, however, P's actions are justifiable. Whether they are also justified depends on why P does what she does. Actions are justified, Gardner claims, only if they are performed for undefeated reasons (Gardner 2007b, 91–103). So P would be justified if she acted in order to save the town, but not if she killed to eliminate her competition for a lucrative inheritance.

What about (ii) and (iii)? We should reject (ii), Gardner claims, because excuses are assertions, not denials, of responsibility in the basic sense (Gardner 2007b, 121–139). Consider those who kill under duress, or because of an understandable mistake. To claim these excuses is not to claim that one lacked the ability to respond to reasons; it is rather to claim that one *exercised* that ability in a manner that lives up to the expectations we reasonably have—that one responded, like those who are justified, to undefeated reasons. The difference is that, while the justified actually *have* undefeated reasons for action, the excused only have undefeated reasons for *believing or feeling* that such reasons exist. Finally, we should reject (iii) because, in addition to justifications (like necessity) and excuses (like duress), the criminal law also makes available irresponsibility defenses (like insanity). To plead these defenses *is* to deny one's basic responsibility for one's actions. It is to accept that, at least on this occasion, one lacked the capacity that makes possible a distinctively human life. This is a status that nobody should wish upon themselves, and that it is inhumane to wish upon others (Gardner and Macklem 2001). True, pleading that status may well get one off the hook. It remains the case that "[n]o self-respecting person. . .would wish this line of defence upon himself" (Gardner 2007b, 275–276).

So much for criminal law. Private law also deals with the aftermath of wrongdoing. In both tort and contract, reparative remedies are available to those who have been wronged. One question about these legal arrangements concerns their focus on wrongdoers (on those who have committed a tort or breached a contract). Once damage is done, why should the cost of repair be borne by those who wrongfully did it, rather than divided up between those best able to bear the cost? A second question is why the law should be concerned with repair in the first place. A concern with repair is, after all, a concern with the status quo—with enabling people to hold on to the lives they were already living, whether or not they (or anyone else) ought to have been living them in the first place. What, if anything, can be said for taking aim at such a conservative objective?

Gardner's answer to the first question is given by what he calls the continuity thesis (CT). According to CT, reasons to which we fail to conform do not simply disappear. They continue to await satisfaction, and to call for the closest to full satisfaction that remains available. This is as true of ordinary reasons for action as it is of reasons that add up to justify duties. When we breach a duty, the justifying reasons remain with us, and call for whatever amounts to next-best conformity. Ceteris paribus, "reasons that were capable of justifying a primary obligation are also capable of justifying a secondary one." Ceteris paribus, CT therefore implies that breaching one obligation only lands us with another—with a secondary obligation "to do the next best thing" (Gardner 2019, 55–61).

What does all this have to do with private law's focus on wrongdoers? According to Gardner, the primary duties that standardly exist in private law are duties not to cause loss to others. When we breach these duties, the (next) best thing we can do is make repair—we can give those wronged back what they lost, or compensate them for their losses. Applying CT, those who breach private law duties incur secondary reparative duties in virtue of the breach. It is partly because tortfeasors and contract-breakers incur these secondary duties that private law is justified in having them bear the cost of repair (Gardner 2018, 98–107; 2019, 61–65). In requiring such wrongdoers to make specific performance, or pay compensatory damages, the law requires them to make reparation they already have a duty to make. A system of private law that contributes to greater conformity with this reparative duty is a system justified in part by the fact that it so contributes.

Or is it? CT can help justify the remedies available in private law only if the primary duties to which those remedies attach are themselves justified. Those primary duties, Gardner observes, are duties conducive to the preservation of the status quo. Their existence "gives the potential plaintiff rights which, if they go unviolated, will help to keep her life on its existing track. . .never mind whether this is the best track or the right track for her life to be on" (Gardner 2018, 183). Whether private law's primary duties are ultimately defensible depends on whether this is the right kind of help for the law to be offering. And *that* depends on whether we have reason to want our lives to continue along the track they are on, even if the lives we might lead by diverting onto others would be of equal or greater value.

Do we have such a reason? Gardner argues that we do. Several lines of argument support this conclusion, but the most general is the following. Whenever we engage with valuable objects—be they lives, friendships, books, or erasers—two questions present themselves for our attention. One is how much value resides in each different object. The second is how much value resides in our *valuing* each object in different ways. The fact that an object exists today does not imbue it with any more value than an otherwise identical object that will exist tomorrow. But we are called upon as valuers to *respect* existing objects of value, in a way that we are not called upon to bring otherwise identical objects into existence. This is why,

> Our reasons to support and care for friendships already made and books already written and food already prepared and children already existing are more stringent, all else being equal, than our reasons to make new friends or write new books or prepare new food or bear new children (or to assist others in doing so) (Gardner 2018, 177).

It is also why we have reason, all else being equal, to prefer the preservation of the lives we are already living, to the creation of (at least some) new and valuable lives we might otherwise live. *This* conservative impulse, at least, is rationally defensible. If Gardner is right, the justification of private law's primary duties—and, in turn, of its entire remedial apparatus—ultimately depends on this being the case.

Law, Positivity, and Morality

Gardner is a legal positivist. Or so many say. If this is a claim about an intellectual tradition, we know Gardner would demur. One thesis to which he does subscribe, however, is that all law is posited. It is, in short, made by people. More precisely,

> in any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it. It is no objection to its counting as a law that it was an appalling norm that those agents should never have engaged with. Conversely, if it was never engaged with by any relevant agents, then it does not count as a law (Gardner 2013a, 20).

It is one thing to understand what makes something a legal norm. It is quite another, Gardner insists, to understand law's nature. One thing it takes to understand the nature of law is an understanding of the many and varied connections between law and morality. It is sometimes suggested that for legal positivists all such connections are contingent. Gardner not only denies this, he condemns it as absurd (Gardner 2013a, 48–49). One necessary connection, Gardner

argues, comes of law's self-presentation: All legal duties (rights, powers, permissions, etc.) are claimed by law to be moral duties (rights, powers, permissions, etc.). These claims are made, on law's behalf, by law-applying officials. Any claim can be false, and laws are no different. Any claimant can disbelieve their claims, and law-applying officials are no exception. It remains true that one thing which distinguishes law from things like recipes and games is the fact that law makes moral claims (Gardner 2013a, 132–139).

Law's claims already amount to a necessary connection between law and morality. For Gardner, however, those claims have a more far-reaching significance. They help give morally successful law a central place in our understanding of law's nature. We can see how they do this by considering cases in which law's moral claim is false. Understanding false claims, Gardner tells us, requires understanding what they purport to be—it requires, in other words, understanding their true counterparts. If this is right, understanding legal duties (rights, etc.) that are *not* moral duties (rights, etc.) requires understanding what *they* purport to be—it requires, in other words, understanding legal duties (rights, etc.) that *are* moral duties (rights, etc.). Simply put, we need to understand law that is morally successful in order to understand law that is a moral failure:

> In this way morally successful law remains the model relative to which all kinds of law fall to be understood. Finnis is right, then, to insist that law has a moral nature. We need to understand law's moral claim—the moral quality that it presents itself as having—if we are to understand even the most immoral of laws (Gardner 2013a, 169).

It is often thought that whether or not law makes moral claims (or makes any claims at all) there are two moral virtues with which law is specially connected. One is the virtue of justice. The other is the rule of law. The former is sometimes said to be law's *first* virtue. The latter is sometimes said to be law's *specific* virtue. Justice is law's first virtue if the shape of the law should be determined above all by that virtue—if what justice requires should be given priority by legal institutions. The rule of law is law's own virtue if the shape of that virtue is determined by the nature of law—if what the rule of law requires of legal institutions is itself a product of that which is distinctive of law.

Gardner argues that the first virtue thesis overgeneralizes. Questions of justice are questions that are *allocative* in character. They are questions about who should get how much of what and on what grounds (Gardner 2013a, 242–244). In the courtroom, such questions inevitably take center stage. Each case gives the court a dispute to resolve and competing claims about how to resolve it. The adjudicative problem is that of deciding who wins and who loses—who gets the benefits and who gets the burdens at stake in the dispute. Solving this problem is an essentially allocative exercise—to solve it *just is* to decide which of the parties gets what and why. This is why justice is indeed the first virtue of adjudicative institutions, including (but not limited to) courts of law (Gardner 2013a, 256–259). Is the same true, as the first virtue thesis implies, of legislative institutions? The answer must be no. It is true that—because the spoils of social cooperation are limited, and many agitate for a larger share—legislative institutions must also face up to allocative questions. It is a mistake, however, to conceive of the legislative task as the task of answering them. There need be no deficiency in a legislature that concerns itself less with how the spoils are allocated, and more with delivering goods that are not up for allocation (like clean air or a peaceful environment) because all of us benefit if anyone does. As Gardner puts the point:

> [J]ustice is the first virtue of those institutions—adjudicative institutions—whose job it is to mop up when things have already gone wrong. . . . The law, on the other hand, has many roles to play in getting things to go right in the first place, in guiding and facilitating people's worthwhile actions. It aims too low if it always conceives all these worthwhile activities in advance as potential sources of dispute, in need of adjudication, and hence fails to exhibit the other virtues needed to regulate a well-rounded society (Gardner 2013a, 268-269).

Unlike the first virtue thesis, Gardner thinks that the specific virtue thesis gets things right. In fact, he thinks that the rule of law is specific to law in two ways. First, the moral duties it imposes are duties that *apply* to legal officials alone. While officials must abide by the law, and ensure the rules they create can be followed, private persons

need do no such thing for the rule of law to be observed. This is the sense in which, for Gardner, the rule of law is *asymmetrical*—in which it entails "an unequal struggle between officialdom and the rest of us" (Gardner 2013a, 213).

Second, the *content* of the duties imposed by the rule of law is determined by the distinguishing features of law. For Gardner, law is distinguished not by an end law alone can pursue—for there is none—but by a technique law alone provides for the pursuit of diverse ends. That technique consists, inter alia, of (i) rules that are generally obeyed by a population and applied by adjudicative institutions to disputes, and (ii) rulings that are issued by those institutions in upholding the existing rules. The moral duties imposed by the rule of law are duties to which legal officials must conform if this technique is to function effectively in its own terms. They include duties (to clarify, publicise, etc.) for those who make rules, conformity to which is essential if the rules are to be usable as such. And they include duties (of impartiality, accessibility, etc.) for those who make rulings, conformity to which is essential if their rulings are to reliably uphold existing rules (Gardner 2013a, 205–211).

We saw above that, for Gardner, law has a moral nature: We understand law that fails morally only by understanding law that is a moral success. The above remarks help us understand what morally successful law looks like. We already know from the previous section that Gardner subscribes to the unity of morality. This is to say that, all else being equal, "[l]aw answers to all moral norms in proportion to their ordinary moral importance" (Gardner 2013a, 192). We have just learned that legal institutions also answer to some additional moral norms, and that some moral norms to which we all answer have additional importance for courts and tribunals. Understanding that these are the standards of moral success for law is crucial to understanding law's moral nature. Understanding law's moral nature is crucial to understanding the nature of law. Each of these claims is consistent with the claim with which this section began: that all legal norms are made by people. Combining them helps show that one jurisprudential conflict—between the natural law tradition and its positivist counterpart—largely amounts to a phony war. Be that as it may, Gardner's main aim—to repeat a point made earlier—is not to encourage us to reimagine our traditions. It is rather to encourage us to put them aside. It is to remind us that in philosophy, unlike in law, the validity of an argument is never dependent on its sources, but always and only on its merits.

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Gassendi, Pierre

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Introduction

The French philosopher, scientist, and priest Pierre Gassendi (1592–1655) is mostly remembered for his revival of Epicureanism – which he saw as the philosophy best suited to the new

science (Jones 1981). But his philosophical project was also nourished by various ancient sources – especially skepticism.

His philosophy was based on anti-dogmatic empiricism and was celebrated in his times as one of the most serious alternatives to Descartes'. An astronomer and holder of a chair in mathematics at the Collège Royal in Paris, Gassendi was an active member of the scientific and philosophical European community of his time, through his friends Marin Mersenne and Samuel Sorbière, his patron Peiresc, and his extended network of correspondents.

Gassendi has been portrayed as a *libertin érudit* because of his connections with friends such as François Luillier, Gabriel Naudé, Gui Patin, Jean Chapelain, or François de La Mothe Le Vayer (Pintard 1943). If this picture is questionable (Osler 2005), one question that remains is: How could a Christian reviver of Epicureanism conceive of law and justice in the early modern period?

Epicureanism and Natural Right

As has been emphasized (Osler 1994), Gassendi estimated that God could change the laws governing the natural created world at will (Gassendi 1658, I, 309a, 381a), contrary to Descartes who deemed them necessary once they had been initially instituted by God. Moreover, given that Gassendi considered that it was impossible to acquire certain knowledge of the intimate nature of things, but that we could only try to infer the most probable hidden causes from the observable effects they produced (Bellis 2017), one understands that Gassendi never conceived the natural philosopher's aim as the establishment of necessary laws of nature. Therefore, the exclusive realm of laws was that of human relationships.

Gassendi's ethics adopted the Epicurean notion of pleasure as the core element in achieving a felicitous life. But pleasure consisted mainly in the tranquility of the mind and, for Gassendi, virtue and knowledge were the main means to reach this state. Gassendi's ethics was based on freedom identified with free will as a condition for the exercise of virtues (Sarasohn 1996).

Gassendi's conceptions of justice and laws are mainly to be found in book II of the third part of the *Syntagma philosophicum*, devoted to ethics. In this book entitled "On virtues," Gassendi stressed the importance of the virtue of prudence to orient oneself according to what is most probable in the realm of human actions marked by contingency and uncertainty, and choose the best in order to achieve a happy life.

Chapter 5 was entitled "On justice, right, and laws" (Gassendi 1658, II, 783–808). Distancing himself from Grotius' notion of natural right (Paganini 1995, 354–355) and echoing Hobbes' approach with which he was familiar, Gassendi connected natural right (*ius naturae primarium*) to the faculty human beings can exert on anything to maintain their life (Gassendi 1658, II, 794b–795a). Natural right prompted human beings to preserve their safety. But *jus* (conceived as law) or what is naturally just was a "pact of utility" (Gassendi 1649, 1748). Following in the Epicureans' footsteps, Gassendi considered that the right according to nature led the human beings to conclude a social pact – albeit a tacit one (Gassendi 1649, 1755), not because of moral norms or in order to live virtuously, but in order for each individual to guarantee their preservation through the establishment of peace – i.e., a non-aggression pact. Even if according to their *jus naturae primarium*, human beings – considered in isolation and in a pure state of nature – had a right to all things, they also had a natural tendency to make pacts in view of their utility and the search for a pleasurable life. According to the *jus naturae secundarium* – after the conclusion of a pact and the apparition of civil society – their right was then limited by laws, but in their own interest, and allowed them to collaborate and help one another (Gassendi 1658, II, 795a).

Positive Laws

The establishment of positive laws was thus rooted in utility. But contrary to the skeptical endorsement of the Epicurean conventionalist approach to laws as could be found in La Mothe Le Vayer (Paganini 1991, 488), Gassendi refused

to conceive of laws as something purely artificial and arbitrary: laws were made by human beings and varied from one society to another, but were rooted in human nature and rationality (Paganini 2001, 19–20). Indeed, nature had made human beings sociable animals (Gassendi 1658, II, 795a). The establishment of a government then followed for reasons of commodity: the multitude willingly (*sponte*) transferred its power to a few or to one because it would otherwise be inconvenient (*incommodum*) to make decisions (Gassendi 1658, II, 755b). As to the preferable form of government, Gassendi inclined toward monarchy also for reasons of efficiency. However, he did not favor absolute monarchy (Sarasohn 1996, 157–158): the king should rule to guarantee the people's health, safety, and interest (Gassendi 1658, II, 758b). For all that, Gassendi denied to the people a right to rebel because peace and therefore obedience were more in their interest (Gassendi 1658, II, 769b–770a).

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Gay Marriage

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Introduction

Conceptualizing "gay marriage" is a two-way road: on the one hand, the reference to the struggle of homosexual couples for a fundamental right; on the other hand, issues about how such demand could be more easily accepted by Western Law since it was encapsulated by the traditional institute of marriage. In other words, that just another "conceptual box" was created to accommodate a monogamous and traditional relationship. This text uses a reconstructive methodology and proposes different readings on the matter. It has as theoretical frameworks gender theories, such as queer contributions, as well as gender decoloniality.

The Struggle for Recognition of Gay Marriage As a Fundamental Right

In the twentieth century, representative democracy built in the Modern Western European reached its peak with the universalization of the right to vote, the constitution of large political parties and unions, and along with that, the expansion of levels of social well-being, notably in the "Global North" (Mignolo 2011; Lugones 2007).

However, all of this changed with the emergence (or visibility) of the commonly named "new social movements" – such as the new feminism, black people, and LGBT+ movements – whose fight was no longer (or not only) for higher/better levels of well-being (redistribution), but for recognition (Fraser 2003; Habermas 1998). Recognition of the right to be "diverse" and not just for isonomy (equal treatment under the law) or equity (material equality) (Bahia 2017).

The LGBT+ movement has developed a broad agenda that began with the end of police violence, the right to exist publicly, the fight against HIV-AIDS, and then progressed to marriage and the right to adoption by same-sex couples, legal protection against homotransphobia, etc. (Green 1999; Aldrich 2010).

As for gay marriage, it seems that such expression has been better understood as "equal marriage." The point is to understand that it is not another form of marriage – as if it was possible to put traditional heterosexual marriage in a "box" and "the other marriage form" in a new conceptual box (Bahia 2017: 499). The struggle for recognition here is for isonomy and not only for diversity. And this is an important issue: the recognition of same-sex marriage only extended to a minority some statutes that were exclusive to the majority – with relevant opposition from some people, as Butler (2002) and Bourdieu (2001) recall. According to Frost and Gola (2015), one of the central arguments for recognizing gay marriage was that it was much more similar than different from heterosexual marriage and, therefore, that it would not fundamentally change the essence of what marriage is, thus disarming those who opposed it. Nowadays, there are 32 countries where same-sex marriage is legal, some of them have done it through legislation (like Portugal), others by court decisions (like Brazil) (HRC 2022).

Therefore, marriage is no longer a privilege, but a fundamental right. That was the guidance of the Supreme Court of the United States (SCOTUS) in *Obergefell v. Hodges* (576 US 644): "The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State" (Scotus 2015). The Supreme Court evokes that marriage has undergone several changes in history – such as the end of arranged marriages – and that the freedoms guaranteed by the Fourteenth Amendment regarding the Due Process Clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs" (Scotus 2015) – about this leading case, see Balkin (2020), McClain (2017), and Jaeger-Fine (2016). And so it must be, according to the provisions of the Ninth Amendment of that Constitution. This is a central point for a Rule of Law: When realizing that a right recognized for some is being denied to others under the same conditions, the constitutional system needs to address the problem and extend such right.

Being a fundamental right, marriage must imply equal conditions, not only of direct rights and obligations (social security benefits, health insurance, right of succession, etc.), but also indirect ones such as the possibility of adopting children. Therefore, any statutes/judicial decisions that guarantee the first part but not the second are unconstitutional, as happened in France and Germany at the beginning of this century when dealing with civil unions (Butler 2002: 232).

Is Gay Marriage a Western and Hygienist Construction?

Although it is seen as an achievement, there are issues concerning gay marriage. One of them is the following: Does it deflate the fight for LGBT+ rights? Is a struggle for just "assimilation" (Matsick and Conley 2015) – and not for "revolution" or even destruction of traditional models – the best form of recognition? Bourdieu draws attention to how male domination contributed to the fact that the gay/lesbian movement, instead of subverting the collective fiction of heteronormativity and seeking diversity, tended, "in a sense to dissolve its own social bases, to the very ones that it has to construct in order to exist as a

social force capable of overthrowing the dominant symbolic order and in order to give strength to the demand of which it is the bearer" (Bourdieu 2001: 121). Some authors of queer studies criticize the fixation of the gay identity that allows the bourgeois assimilation of them as a "subject" (Preciado 2011): LGBT+ people are recognized as long as they go through a hygienist process that conforms them to the heterocisnormativity. "[We] could say that we have gone from a heterosexist to a heteronormative society, from one that took heterosexuality for granted to one that demands that nonheterosexuals adopt its political and aesthetic standards" (Miskolci 2015: 86) – see also Berlant and Warner (1998). But, on the other hand, would it be possible for the State/Law to recognize forms of union between LGBT+ people that were effectively "different" from the monogamy and formed by only two people? (Bila 2018: 165–166; Matsick and Conley 2015) Does the struggle for the recognition of marriage make the struggle for other family and/or affective arrangements unfeasible?

Butler draws attention to the "authorizing" and "normalizing" character given to the State in order for it to recognize marriage:

> The petition for marriage rights seeks to solicit state recognition for nonheterosexual unions, and so configures the state as withholding an entitlement that it really should distribute in a nondiscriminatory way, regardless of sexual orientation. That the state's offer might result in the intensification of normalization is not widely recognized as a problem within the mainstream lesbian and gay movement (. . .). [The] sexual field is circumscribed in such a way that sexuality is already thought in terms of marriage and marriage is already thought as the purchase on legitimacy (Butler 2002: 16–18).

Any other forms of union – other than marriage or civil union, as legitimate forms – are immediately marginalized and placed in an inferior/illegitimate hierarchy. Having their union recognized gives gay couples the feeling of belonging to the "universal" (then, they are not so exotic) and removes the guilt that desire until then carried with it (Butler 2022: 23). The movement, says Bourdieu (2001: 121–122) in claiming recognition by law, what might seem to be a struggle for visibility, actually turns into invisibility – conformation to the "straight" pattern. "With the civil union/marriage, what price did the movement pay for 'acceptance' and for the right to the visible invisibility of the (...) good citizen"? In Brazil, for example, despite the recognition of stable union and equal marriage, polyamory unions are not recognized, which should seem paradoxical even though it is not. In 2018, the National Council of Justice (Brazil 2018) – the external oversight agency of the Judiciary in Brazil – prohibited registry offices from making public records of polyamory unions (Klesse 2007). One can remember the association between gays, AIDS, and promiscuity: With monogamous marriage, the circle would be broken and gay couples could live at the light of the day.

Conclusion

Speaking of gay marriage is not an easy task. It is possible to defend the fundamental right to marriage as a constitutional issue on isonomy and, at the same time, to question the agenda itself for its hygienist and excluding character. It is possible to be in favor of marriage so that whoever wants to make use of the institute may do so on equal terms with the majority, at the same time that it is possible to see in that situation a submission of a way of life to what is authorized by the State and the Law – and, it is necessary to say, there are other legitimate ways of sentimental/romantic realization that do not need authorization from the State, despite also deserving respect and, sometimes, protection against violence/discrimination.

There is no need to dwell in the dilemma between nonrecognition – which creates first- and second-tier citizens – and the problems of recognition – hygienist and cover-up concerning other ways of living. Legislative or judicial decisions in favor of equal marriage (with all the consequences, direct and indirect) are important as a historical landmark and for the lives of those who wish to live this way, as long as the power to regulate the legitimacy of desire and sexuality is not alienated to the State, and more, that recognition does not close the

discussion, so that other claims may have recognition in absentia of the State or also fight for its incorporation.

Even the recognition of egalitarian marriage is a form of questioning about traditional marriage: about the gender roles that are assigned to each one in the relationship. Considering there is no gender diversity in a gay marriage, therefore, there are no (or should not be) naturally indicated obligations regarding the care of the house and children (wife) or the guarantee of a professional career (husband). Of course, the opposite can also happen, that is, gay couples reproducing heteronormative patterns of division of labor – and this needs to be debated (Bourdier, 2001: 119). However, there is a good learning opportunity here for heterosexual couples about denaturalizing those gender roles (Oswald 2002; Ziegler et al. 2014). And yet, questioning the control of the other's body (traditionally of the woman's body), which imposes castrations based on a pseudo and hypocritical monogamy, historically, never made much sense to a large number of gay men and which, perhaps, was not incorporated by those marriages (Porto 2018; Matsick and Conley, 2015: 410–411).

Gay marriage is not the top but only the beginning of the recognition of new forms of relationships/ways of life that must also have their place in the light of law or in the shadow of privacy if so wish those who live in ways that challenge monogamy, stability, the number of fixed or mobile partners (or none), etc.

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- ▶ Habermas, Jurgen: On Justice
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Geiger, Theodor

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Introduction

Theodor Geiger (1891–1952) belongs to the generation of refugee scholars from Weimar Germany greatly enriching scholarly thought. Born outside Munich, he fled Germany in 1933 and arrived in Denmark shortly after. He developed an early interest in Scandinavian language and was rewarded a trip to Norway after graduation (Mayntz 1969). In 1939, he received a chair in sociology at the University of Aarhus, the first one issued in Denmark (Agersnap 2000). With the German invasion of Denmark, he had to escape once more, this time to Sweden. Returning to Denmark after the war, he achieved a great scholarship across the social sciences.

Characteristic of Geiger's general approach is to view social phenomena not as static "social facts" but as emergent and processual in forms and appearances. He was a confirmed positivist throughout, while never shunning away from the central importance of analytical concepts guiding empirical research (Bachmann 1955/1995; Mayntz 1969).

Geiger played an important role in establishing the institutional structure of sociology after the war. With colleagues, he established *International Sociological Association* and also *Scandinavian Journal of Sociology, Acta Sociologica* in 1951. The year after he suddenly died onboard the ship bringing him back from an invited lecture tour to Canada.

Stratification, Class, and Social Mobility

Geiger's lifelong academic interests cover a wide spectrum: the genesis and prospects of industrial society, stratification, the topic of class and class antagonism, and social mobility more generally. His first major study of social stratification in Germany (1932) broke the spell of the binary Marxist class antagonism between capitalists and workers. Geiger identified a number of additional dimensions (as size of enterprise, educational qualifications, and firms with or without workers). Stratum rather than class becomes central.

Sharing the same objective life conditions may or may not result in developing a common (class) consciousness. He agrees with Marx that an emerging class antagonism is important in the formative periods of industrial society, agonizing the middle classes. Farmers and artisans are in Geiger's view prone to conservatism, while the newer strata of salaried functionaries risk being caught in the middle of the class antagonism. Still in Germany, Geiger expresses concerns that the uncertain positions of the latter strata make them prone to Nazi sentiments. However, in later studies, especially the groundbreaking one on social stratification in Danish society, based on empirical register data since the sixteenth century, overturns such concerns. On the contrary, the new managerial and organizational strata may in fact break the spells of old class antagonisms. A noticeable observation from the Aarhus mobility study suggests that the new professionals show fewer ambitions to move up the social ladder (Agersnap 2000). Leveling out old hierarchies creates new life options.

Mass Society

While in Germany, Geiger significantly contributed to the infected studies of "crowd behavior" flourishing on the European Continent (Borch 2012). Was the "revolutionary crowd" progressive or regressive? With the occurrence of November Revolution 1918, Geiger joined the German Social Democratic Party. The proletariat, he surmised, destroyed the asymmetrical power structure of bourgeois society; it contained a "reservoir" of action that could enfold in two ways: destructive or constructive. The untamed revolutionary crowd "tears apart"; it only exists as negation; it is not a group and has no sense of "we." But organized as labor unions, student associations, political parties, and so on, the proletariat possesses constructive power to change the course of history. Dissatisfied with the politics of the Social Democratic Party, he left the party in 1932. In his view, the party, caught in an old-fashioned revolutionary rhetoric, was unable to withstand the onslaught of the Nazi movement.

The distinction between the active and latent crowd was to reappear decades later in the discussion of postwar politics in industrial (mass) society. The term "mass society" emanated in post-war American sociology but with a new twist. David Riesman's *Lonely Crowd* offered a pessimistic picture of modern technological societies: isolated and rootless individuals were easy targets of electronic propaganda and populist rhetoric. Again, Geiger voiced his opposition, now in the dispassionate language of sociology.

Freed from lifelong bondages of old ties, modern individuals are entangled in a web of overlapping networks: intimate family life, schooling, work life, and political life. The socially isolated individual is a philosophical abstraction. Social interdependence and reciprocity characterize human life from birth to death. Family ties are as a rule more feeling-oriented, although inheritance disputes can quickly change such ties into agonistic interests. As members of labor unions or a political party, we need not know the full family history of one another; common interests link us together. Previous Nazi efforts to emotionalize public life such as the *Nation* arouse his fears of such efforts. Modern "identity politics" would not evoke his sympathy. Women – a collection of individuals – do not form a social group; their claim to we-ness rests on a negation. Like the proletariat in earlier texts, also women inhabit a "reservoir" of action, the mobilization of which can assume either constructive or destructive behavior. Women (as workers) in modern societies are not a homogenous category but inhabit a multitude of different interests. He offers a plea for *emotional asceticism* in warning for new "value communities" to arise around easily deployed *common causes* that can instigate destructive activities in crowds.

On a pessimistic note not unlike Max Weber, Geiger fears that modern large-scale societies forming ever more abstract unions – EU, the world society – risk generating a cognitive gulf: ordinary people risk missing out of the cognitive resources needed to grasp rapid social and technological development. With this gloomy light, he is a strong advocate of life-long education and civic training.

On Value Judgment, Ideology, and the Role of Intelligentsia

As a staunch positivist, Geiger advances a sharp separation of facts and values, and subsequently between science and ideology. Factual statements are the result of empirical observations of "real" things out there upon which observers trained in science can agree. Value statements are not about objects "out there" but express the emotional states of speakers: "hyacinths smell very good"; "smoking a cigarette in the morning (as Geiger himself appreciated) makes you feel good." A value statement (what is good and beautiful, morally correct or not) is theoretically speaking meaningless and lies outside the universe of truth/falsity. Hence, there can be no false ideology or false consciousness.

Value statements can be "primary" as "hyacinths smell good" while they can also assume a more reflective form; "there are many persons who enjoy the smell of hyacinths." The latter statement invites to scientific observations as to

the number of actual subjects liking hyacinths. Nevertheless, to export qualities of speakers (subjects) into the world of objects is fundamentally an illegitimate endeavor. Geiger labels such efforts as "paratheoretical"; herein lies also the genesis of ideologies.

To claim that "murder is horrendous" is an instance of "paratheory"; it is not a true neither a false claim. There are societies even today (USA) that approve of such acts as legitimate. Strong moral statements – frequent in criminal law – tend to objectify what initially were emotional states of mind in local communities. An utterance like "hyacinths smell awful" puts a pressure on the speaker to elaborate her lack of disagreement with the majority. As social interaction in general, habitual actions, transmitted via language, help naturalizing evaluative qualities into moral orders across generations.

Why some habits and customs come to dominate, while others fall back in oblivion and remain largely unknown. Diverse social interests might have intervened. To claim that customs had "social functions" and therefore were elevated into "laws of nature" is again, in Geiger's view, to impose alleged objective qualities onto social life. We need take notice of our own ignorance in matters of objectifying moral discourse.

Both being critical of orthodox Marxist views, Geiger has a more restricted view as to the role and function of ideology than his colleague Karl Mannheim (Meyer 2001). He is critical of the distinction between "particular" and "total" ideologies. People occupying the same social positions (i.e., professions) tend to foster special interests as to the values of their positions; intellectuals take an interest in the value of "free speech." However, there is no necessity in such relations but a statistical view of probabilities hold rather. Reflective thought (and education) allows individuals to break out from such captivities. Geiger is skeptical of Mannheim's evocation of "free-floating intellectuals," an elevated free space. Ideologies can for a period of time serve special social interests and thus be beneficial for particular groups in power. Religions are examples of quite stable ideologies that have served the interests of priests and church-people over centuries. The Catholic Church is an instance of a belief system having achieved global institutional power but is in Geiger's view nevertheless an instance of (particular) ideology.

Value judgments as to what is good or bad enhance and strengthen group life. Transmitted in space/time via language, particular interests eventually take on "generalized" (totalized) qualities and pretend to speak for humanity. Intellectuals – a group with quite diverse interests – are strategic in generalizing and objectifying value discourse, sometimes even reified as academic disciplines. The practitioners of moral philosophy, art history, and diverse humanity studies cultivate strong professional boundaries in claiming/disclaiming the universality of their own thought and taste systems.

Critique of ideological thought systems takes two different forms: theoretical or pragmatic. Philosophers and epistemologists engage in the first kind in discovering logical flaws or false (illegitimate) conclusions drawn from certain premises.

The second (pragmatic) kind of critique engages activists in the social sciences. Marx, Nietzsche, Pareto, and more recently Pierre Bourdieu take issue with the "social functions" of objectified value schemes in claiming that these serve the power interests of the privileged. When unveiled, the emancipatory interests of less privileged classes will benefit. Geiger clearly admits (as did Weber) empirical research interests in systematic study (statistical) correlations as to behavioral consequences of various belief systems. As he is strongly against affirming ideologies with truth/falsity claims, he is not an advocate of activist social science studies.

Law and Morality

The legal order, articulated in and by the legal sciences, is a highly specialized form of social discourse with clear practical consequences. Trained in law, Geiger's refugee stay in Sweden offered him an opportunity to confront the school of radical legal realism at Uppsala University,

strengthening his skepticism of value judgments even further. His own contribution to the philosophy of legal realism resides in the sociological scholarship (Trappe 1978). The development of late industrial societies with far-ranging differentiation and specialization places *distrust* as the arch of the social order. The thrust of modern technical law is to mediate the forces of such (systemic) distrust. Common values no longer suffice. The severing of law and morality (as facts and values) is a system requirement of late modernity.

In an imagined primitive beginning of a social order, habitual conducts more or less taken for granted govern group life. Normative expressions, eventually stated as moral maxims, *externalize* customs across time and space. We do not know why some customs survive, while others fade away. Beneficiaries have interests in solidifying some customs into "natural law" – as in the case of nobility's access to land. Law and morality intertwine in customary law. A separate legal order requires that a specialized cadre of *legal honoratiores* emerges in whose power (and training) lies a further cultivation, not the least rationalization of normative maxims into a legal sphere. Positive (written) law is concomitant with the emergence of state societies with central governing powers monopolizing the saying and execution of law. Modern state law replaces the moral community with an external force. The externalization of law enforced by special functionaries (police and judges) corresponds to the loss of a common value community. Modern state societies need governing, often opposing, value communities. State societies may encourage a religiously imposed moral sphere where church rituals and strong taboos spiritualize values as God's Kingdom, different from state law.

Martin Luther – and especially Immanuel Kant – pulverized a religiously imposed morality advocating an individualized morality based on consciousness alone, an antithesis of state law. Although these two orders occasionally overlap ("though shalt not kill"), they are as often in starch opposition. In a "state of war," killing one's enemies is not forbidden but imposed by law. An individual might be violently against law to enforce vaccination on everyone but has to face the consequences, either imprisonment, fines, or else social isolation. Individualized morality cannot command unity in highly differentiated societies but must allow for a plurality of ethical perspectives. Objective ethics, although propagated by various moral philosophies in academia, is in the views of Geiger a chimera. Obligations to follow legal norms can be dressed as modern state morality. However, the obligation of legal norms does not reside in such laws having intrinsic moral value but rather in the calculus of risk-taking.

The independence of modern law from the moral universe places considerable demands on the functioning of the legal community. Contrary to laymen, judges and lawyers need to be informed of principles governing legal rules and have an obligation to follow them. Geiger draws heavily on the autonomous group morale in operation among highly specialized professionals in general, and among the legal community in particular. Their activities are under permanent scrutiny. Professional careers, especially among jurists, are heavily dependent on the "judgment of peers" the social dynamics of which have severe consequences for ambitious legal practitioners. The legal community is, in Geiger's view, paradigmatic for professional communities in general and is surprisingly in congruence with recent theories of professions. Complex social control with a multitude of interdependent actors secures over time the grounding of an objective legal order as an interactive social process. A separate moral order can freely operate in private life, thus opening up a spectrum of moral considerations among individuals with widely different life interests.

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Genovese Legal Realism

► Legal Realism: Genovese

Genovesi, Antonio

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A central figure of the Southern Enlightenment and one of interest for the political economy, Antonio Genovesi (1713–1769) is the expression of a *libertas philosophandi* from the seventeenth century, who found the field of possible reformist action in the policy of the Kingdom of Naples during the eighteenth century. Genovesi was born in 1713 in a small city near Salerno. Coming from a modest background, he embraced an ecclesiastical career, the sole path that allowed him access to study. He entered minor orders in 1735 and was ordained in 1737. He left for Naples where he was decisively influenced by the readings and company of the modernists. In particular, he followed the last lessons of Vico at the University, met Paolo Mattia Doria, and immersed himself in modern thought, in particular Newton, Malebranche, and Locke, but also Bayle, and later Rousseau, Montesquieu, Voltaire, and the *Encyclopedia*. But it was his meeting with Celestino Galiani, one of the main promoters of Newton and Locke's thought in the Southern

Italian world, which was decisive in his academic career. Galiani, who offers his protection to the young Genovesi, then serves as Prefect of Studies of the Kingdom of Naples and is the promoter of controversial academic reform to introduce the teachings to modern authors and issues.

Thanks to Galiani, Genovesi held several positions at the University, notably in 1741 as the Chair of Metaphysics and then Chair of Ethics from 1745 to 1753. During this metaphysical period, Genovesi devoted himself mainly to writing textbooks on metaphysics, theology, and logic for students (see, e.g., the *Elementa scientarum metaphysicarum*, 1743). This focus on metaphysics, however, does not remove Genovesi from the field occupied by the modernists, insofar as this discipline for him is never synonymous with solitary reflection, but always the expression of pedagogical attention to students, and especially insofar as it is developed by following an eclectic method prefiguring the critical spirit proper to the Enlightenment.

This somewhat heterodox approach to metaphysics renders Genovesi suspect to the Church and the Holy Office and prevents him from being offered the vacant theology chair in 1748. This constitutes a turning point in his career and intellectual evolution. In 1754, a chair was created by a philanthropic project on behalf of a private entrepreneur, Bartolomeo Intieri, who charged Genovesi with occupying it, along with the express obligation that he teach in Italian. The creation of this chair, known as "di commercio e di meccanica," is often considered the first European Chair in Political Economy. This chair thus becomes the privileged place for the diffusion of the new ideas, in particular those of Newton and Locke, associated and translated with the particularity of the social and economic issues of the Kingdom of Naples, especially in relation to agricultural issues.

Genovesi's newly oriented thought blatantly appears in his *Discorso sopra il vero fine delle lettere e delle scienze* (1754), dedicated to Bartolomeo, who insists on the need to be "useful to the needs of human life" ("Giovare alle bisogne della vita umana"). From this point of view, the turn taken by Genovesi's thought, even if it is based on orientations already evident in the first texts, is entirely typical of a real change of era, which sees new problems substituted for old ones and, more generally, the anthropological perspective specific to the Enlightenment gradually replacing metaphysics. Although Genovesi's thought here fully follows a movement that can be identified throughout the European Enlightenment, it is nonetheless centered on the social and economic particularities of the Kingdom of Naples. The new orientation of his thought is not limited to establishing the conditions of the theoretical possibility of a new discipline, political economy, but more precisely to set up effective reformist action. From this point of view, one of the characteristic features of Genovesi's work, which is evident throughout his university teachings, the lessons of which will be outlined in his book, *Lezioni di commercio o sia di economia civile* (1765–1767), is the attachment to "things," to the facts proper to the southern world, the nature of which only careful and statistical study can grasp. In the same way, his economic thought is based on a new anthropology of the social body and civil relations, in constant balance between centrifugal and centripetal forces. The possibility of practical and effective reform action within the civil community thus becomes the principle of legitimizing all politics and, more generally, the action of the state.

Genovesi's role in the establishment of reform policy in the Kingdom of Naples was central and part of the "ceto civile" tradition that had developed in the second half of the seventeenth century. From this point of view, Genovesi plays a truly joint role with the modernists from the seventeenth century, in which the *libertas philosophandi* was above all turned toward the natural sciences. Heir to Vico's thought and in relation to other great figures of the European and Neapolitan Enlightenment, such as Ferdinando Galiani and Gaetano Filangieri, Genovesi is the expression of a change of era that sees him develop and confront a new problematic, social, civil, and political horizon, which is the original expression of the contribution made by the Southern Enlightenment to the rise of modern political economy.

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Gentile, Giovanni

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Introduction

Legal philosophy in early twentieth-century Italy forms a composite landscape of markedly different streams of thought, ranging from natural law theory, in Giorgio Del Vecchio's neo-Kantian rendition of it, to Santi Romano's institutionalism, and including Francesco Carnelutti's general theory of law and the antiphilosophical defense of Roman law that Pietro Bonfante made in a famous and controversial academic keynote address delivered in Rome in 1917.

And yet, in the interwar period, this overall picture was further complicated by two new developments, both pushing Hegelian dialectics in a neoidealist direction: one was Benedetto Croce's historicism, the other the actualism put forward by Giovanni Gentile (1875–1944).

Gentile was born in Castelvetrano, Sicily, in 1875, and taught theoretical philosophy and history of philosophy at several universities in Italy. In 1923, as minister of public education under the Fascist government led by Benito Mussolini, he introduced a sweeping reform of the education

system. Gentile holds a prominent place in legal culture as well, having distinguished himself for his committed effort to rehabilitate the philosophy of law.

These were the dark years, marked by the Fascist regime's rise to and consolidation of power, a landscape in which there was no choice but to take sides politically, and in which the two philosophers accordingly went in two clearly different directions: over a long period of rifts and rapprochements, the gap between them grew wider and wider, until Croce penned the Manifesto of Anti-Fascist Intellectuals, published on 1 May 1925, at which point there could no longer be any common ground.

The Law as a Spiritual Reality

For Gentile, the law is not a fact, a mere phenomenon in relation to which there can be no meaningful philosophical inquiry (FFD, p. 34). What holds for law also holds for the other categories of the spirit. Rejecting any reductionist, exclusively empirical representation of reality, Gentile plumps for the spirit, for a vision of man as free in relation to nature. Man is not a fact, "for to stand in front of a reality is to *think* that reality; and thinking is an act, not a fact" (FFD, p. 43, my translation).

From this premise – stated in the main work relevant to our discussion, namely, *I fondamenti della filosofia del diritto* (Foundations of the Philosophy of Law), published in 1916 – we get to the thesis that liberty stems from the unbreakable unity between reality and the subject by whom reality is thought: liberty lies in the full correspondence between subject and object; it coincides with the I, or self-consciousness. If reality cannot be separated from the subject who thinks it, it does not correspond to fact. Law forms part of the spiritual unity that realizes itself as a process, within which differences come to light, but these are never such that they can break up the unity. These differences are intrinsic, immanent in the unity, which through them "installs itself, and it integrates and actuates" (FFD, p. 55). "The process is dialectical, because the reality of the spirit is itself dialectical" (FFD, p. 63).

On this account of history as the life of the spirit, the good corresponds to "the value of the spirit in its dialectical actuality" (FFD, p. 67; cf. GS, p. 52), so much so that the act as a moment in the process of realization of the spirit can be qualified as moral (FFD, p. 67). Evil, for Gentile, is a moment internal to the good, the "negative moment of our effective spiritual reality," for every true enemy is to be found within (FFD, p. 68). Evil is fuel for the good: in itself, evil is nothing; only as functional to the production of the good is it evil (FFD, p. 70; cf. GS, p. 53). In fact, "the whole reality of an injustice does not manifest (it does not count for the moral reality it is) if not in the conscientiousness that is evaluating it" (FFD, p. 68). Even war can be transfigured into something positive and indispensable (FFD, p. 72; cf. GS, p. 104), a point previously argued by Hegel (a philosopher for whom Gentile held great admiration).

The Philosophy of Law Is Necessary: Law and Force

Investigating the law and its nature means asking what the law becomes against the background of this new "actual" idealism, according to which nothing is real that is not thought in actuality.

Even if the law is misunderstood to be a fact, it always implies the act of understanding legal activity, "which is no longer a fact but is rather *the principle by which the fact is produced*" (FFD, p. 45).

In this sense, the philosophy of law is inevitable, even for those who reduce the realm of law to that of facts; and those who are unwilling to concede as much can only "do bad philosophy" (FFD, p. 45). And so it is that philosophy takes on a specific and essential task, a gnoseological one, which is to contribute to the formation of a consciousness that is critical of reality particularly in what concerns our understanding of the moment in the life of the spirit in which lies the source of the legal phenomenon (FFD, p. 46) and which dwells on the social character of the human spirit.

What makes this unity possible is force: it is in force that lies the principle of law. But force, for

Gentile, is Janus-faced – at once natural and spiritual – a quality in virtue of which it alone can form a constitutive nexus with law. And, in this nexus, force is not "a natural force, determined objectively and without any inherent rationality, but is free spiritual force, which can only realize itself through a universal law, constantly denying any particularity" (FFD, p. 82). "The force that is law is an interior force, the activity or power of the spirit in its intimacy" (FFD, p. 83). The law, then, has an internal face – an interiorly perceived coerciveness – to which corresponds the exterior coerciveness of legal norms. This external coerciveness is not, however, essential to the law. The law may or may not provide for a sanction, but it still ranks as law regardless, for law comes into being whenever a subject (a) is confronted with something that is willed which is other than what he is actually willing (FFD, pp. 94–95) and yet (b) recognizes this expressed will as binding, as law that superintends the will.

There is no opposition between the state and the citizen: The state is a society that is interiorly felt to be such by man. There is no ideal dimension set in opposition to a factual one. There is no moral sphere separate from a legal one. There is no subjective law that claims recognition as distinguished from an objective law (FFD, p. 92). As clearly emerges in *Genesi e struttura della società* (*Genesis and Structure of Society*), the ethical conception of the state assumes organicist traits: it is a priori synthetic unity of the body politic, ultimately substantiating itself in the "principle of the leader."

Law and Morality

The distinction between law and morality is no more than a distinction between stages in the realization of the spirit. The law is what is willed, and is so once it has *already been willed*: it is, therefore, a will that has already realized itself. Morality, by contrast, is a will in the *process* of realizing itself, and so a will that has *not yet been willed*.

This framing of the distinction between law and morality should not, however, be taken to suggest that the relation between them is diachronic or that the law is the antecedent and morality the consequent. The law is already present in the moral will: law is morality's internal moment, interacting with morality according to a dialectical dynamic, in the same way that our willing something makes it already willed (FFD, p. 90). Law differs from morality not only in virtue of its having been willed (as against something in the process of being willed) but also in virtue of its empirical opposition to liberty – for this is what law does as "concreteness of the act of ethical volition" (FFD, p. 99) – as well as in virtue of the circumstances of its arising, meaning that the law comes into being when two wills come into conflict, or "when a self-consciousness is first set in contraposition to another self-consciousness" (ibid.). But the opposition is always abstract, only apparent, concealing the underlying dialectical process that, by contrast, in the manner of Hegel, connects two wills otherwise divided and irreconcilable.

As regards the "sameness" of law and morality (FFD, p. 100; cf. GS, p. 59), by reason of which we are always inclined to subject legal activity to moral judgment, it needs to be clarified that "the law exists as law but does not *originate* as law": it rather originates as an "ethical act" (FFD, p. 100), and that is why "the law always finds itself facing a will that is ready to judge it morally" (FFD, p. 101). A law can therefore be unjust, but that is not to say that it thereby ceases to be law. "As long as an unjust law remains on the books (it is not repealed), it exists as the will of a state – a will that is immanent in the citizen – and as such its injustice cannot entirely be an injustice: in fact it can be said to be a justice *in fieri*, one that will gradually mature until the law itself is repealed" (FFD, p. 102).

Law and morality are thus closely entwined, dialectically so: the law, in its essence, is a moment in the process of realization of the spirit, which in turn is morally charged. "Morality," and these are the words with which Gentile closes the appendix to *Fondamenti*, "is not the whole of which the law is a part, but is the real, effective, concrete act of which the law is simply a moment" (FFD, p. 139).

Toward a State-Centric Legalism

From a historical perspective, finally, Gentile ties his concept of law to the concept of an ethical state understood as the condition for the possibility of ultimately attaining liberty (FFD, p. 110), rather than as a hindrance to it (FFD, p. 111). This is a thesis that Gentile would not fail to reiterate in the entry titled "Fascism, doctrine of" which he wrote for the *Enciclopedia italiana* (1931, vol. XIV, p. 847), and which bears the signature of Benito Mussolini.

The state, as conceived by Gentile, is a political society in which authority or sovereignty imparts unity to the multitude of individuals associated with it, subjecting them to a common body of law that operates through the state enacting a plurality of particular laws. Once the state is so equated with society, it takes on that peculiar form which enables it to overcome the particularisms of individual interests and the free individualism of the economy. The best concretization of law is that which endows the law with a "corporative character," making it "a reflection of the more unqualifiedly moral and political character of the state" (FFD, p. 132). The corporative form of the state better corresponds to the will of people who feel itself to be a nation, leading to a celebration of the state as will in action, to its full correspondence with the political dimension (FFD, p. 128). It is into this labored scheme that Gentile ultimately twists the Hegelian conception of the ethical state, moving toward that resolute commitment to Fascism which in 1944 in Florence ends up costing him his life at the hands of the Partisans, who were resisting the regime.

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► Croce, Benedetto
► Hegel, Georg Wilhelm Friedrich
► Romano, Santi

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Gény, François

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Introduction

François Gény (1861–1959) was a French professor of civil law with a great influence, during all the twentieth century, in France and outside France, as a theorist of the so-called free scientific research (*libre recherche scientifique*) in law. His long life (he died almost 100 years old) and his career were not so extraordinary. Born in North-East France (in Baccarat, the town of crystal glass) as a son of a forestry officer, he studied law at the provincial law school of Nancy (1878–1882), worked 1 year in a lawyer office in Paris, obtained his doctorate in 1885, and succeeded at the national competition to become professor in 1888 (Hakim 2015). Nominated first at the Algeria Law School (he taught Roman law and maritime law), he obtained a

professorship in Dijon (1890) and became a close friend of Raymond Saleilles, his elder colleague (born in 1855), who introduced in France many German ideas (as those of Jhering) in order to propose a more flexible interpretation of the Napoleonic Code (Halpérin 2008). Frequenting a conservative and clerical milieu in Burgundy (by his family he was linked with the steel manufacturers in Le Creusot), Gény appeared (as Saleilles at this time) as a rightist man, fighting the school reforms of Jules Ferry. He published his masterwork in 1899, *Méthode d'interprétation et sources en droit privé positif. Essai critique*, with a laudatory preface of Saleilles. The book appeared as a kind of manifesto against the traditional method, pointed out some years later as the École de l'Exégèse. However, Gény was never the chief of a new School, with disciples and students. In 1901, he chose to move to the Nancy Law School in his native Lorraine. He remained in this function of professor of civil law (and of dean of the Faculty from 1919 to 1925) until his retirement in 1931, continuing to publish works (including the participation in a collective brochure about family law during the Vichy Regime) until a small book *Ultima verba* in 1951. Besides a second (and completed) edition of his *Méthode d'interprétation* in 1919, his main book was the fourth volumes *Science et Technique* published between 1914 and 1924. Admired during his life in France and abroad (notably in the United States), corresponding with the Swiss Huber, honored by numerous doctorates and in 1934 by an enormous homage collection (three volumes gathering more than 1,000 pages of contributions under the direction of the comparative law specialist Édouard Lambert), Gény has let a number of texts that are always read (often the only ones of this period for nowadays French jurists). However, it is necessary to quote precisely the main ideas contained in his books and papers (1) in order to relativize his modernity in comparison with German or American legal writers of his time (2).

Gény and Legal Controversy

Gény appeared, from 1899 onward, as an innovative legal thinker in France, because he did not hesitate to be polemical and to attack designed targets with happy turn of phrases. The first pages of his *Méthode d'interprétation* were focusing on the recent development of sociology in France. Durkheim had published his *Règles de la methode sociologique* in 1895, and this new discipline claimed the study of all social facts characterized by constraint, including morals and law. Gény was afraid of a movement of disfavor for legal studies inside the law schools and promoting sociology. To react, he deemed necessary to abandon the traditional method and to follow in Jhering's and Saleilles' footsteps. Gény described the second generation of the commentators of the Napoleonic Code as advocates of the cult of statutory law (he spoke about the "fetishism of the law"), who fixed the interpretation to the text and to the time of the Napoleonic Code. Gény also criticized the logical deductions and the abstract dialectics of Aubry et Rau, approving Jhering's attacks against constructed concepts that were isolated from facts.

In opposition to this traditional method that he did not called "Exegesis," Gény proposed, as a program to reconstitute the method and the theory of sources of law, two wordings that were not frequent at this time in France. According to Gény, the statutory law had to remain "in the front row" of the "formal" sources of law. He defended a strict interpretation of legal provisions, without any recourse to analogy or to the "objective" method of interpretation advocated by Saleilles, which was prone to give new meanings to the words of the law. But, for Gény, the statutory law was not the sole source of law. Against the apparent decline of customary rules and the critics of Jhering toward the romantic conception of the historical school of law, Gény defended the recognition of "legal practices" based on case law and on legal writings. The case law, especially the one of the court of cassation, was not directly a binding source of law but could create new rules as a "propeller" of customs (Gény thought probably to the lawyers' practices influenced by the case law).

Qualified as "authorities" (in consideration of an apparent differentiation with the sources of law that became a "cliché" in French doctrine), the case law and the legal writing were the main means to make the French (civil) law evolve

according to Gény. Whereas Gény was distrustful toward the Republican Parliament, he claimed the development of a free scientific research to resolve all the new challenges linked with social developments: the strict liability for industrial accidents, the abuse of rights, or the status of illegitimate children (significantly Gény did not refer to the situation of women). Paraphrasing Jhering's sentence "to go through the Roman law beyond the Roman law," Gény proposed in his *Méthode d'interprétation* to go through the Civil Code beyond the Civil Code. Reserved to the spaces that the statutory law let free, the free scientific research was in fact the innovative force of the law of the future.

This conception of a "legal discipline" as a true science that was sketched in the *Méthode* and opposed to the excessive "positivism" of Durkheim (accused to be disconnected from morals and superior principles) was developed in the further volumes of *Science et Technique*. The scientific approach of law had to be based, first, on the "given facts" (*donné* in French). Among the given facts, Gény amalgamated the social phenomena (which the lawyer had to analyze), the historical traditions, the rational notions (for fighting against the domination of unconscious phenomena), and the ideal goals. With this element, Gény reintroduced a bit of natural law, considering that the attacks of positivists (he spoke of the "baseness" of Bergbohm) were defamations of natural law theory and had to be "eliminated." Then the second stage, the one of techniques, let a large room to the constructions of jurists and to the domination of law professors that had to guide the case law. Until the end of his life, Gény advocated this conception of a science of law, based on the study of facts qualified as "social science" and at the same time inspired by natural law evolving ideas. Although he is committed to Catholicism, Gény affirmed that his natural law was secular and open to progress, likely to be combined with the intuitionist philosophy of Bergson (Chazal 2010). In cases of "collision" between the given facts and the constructed techniques, Gény gave the primacy to the science, what meant at the same time the respect of the positive law and the reference to natural law. Despite his appetite for controversy (e.g., against Duguit in the second edition of the *Méthode*), his argumentation was likely to convince not only the majoritarian group of politically conservative law professors but also, after the First World War (with the publishing of *Science et technique*), the whole field of nationalist jurists in France. At the same time, Gény was a typical French writer and a worldwide renowned jurist who created links between the German, the Swiss, the French, and the American writers.

Gény as a Linkman Between Different Countries

As his friend Saleilles, dead earlier in 1912, Gény was a good reader of German language and a fine connoisseur of the legal literature beyond the Rhine. Like Durkheim, he was first impressed by the work of Jhering, approving his critics of the jurisprudence of concepts (*Begriffsjurisprudenz*) and his teleological and instrumentalist interpretation of the law. However, Gény was less favorable to other ideas developed by Jhering, as the reject of custom as an independent source of law or the monopoly of the State power to create law. Not only Gény followed all the preliminary works and the promulgation of the German Civil Code (BGB) with great interest (and the will to defend the specificity of the French techniques of writing statutory laws), but he was continually aware of the new productions of German jurists. He quoted with abundance Gierke, Zitelmann, Bierling, Stobbe, Kohler, or Stammler. He also knew the theories of Stirner, Wundt, or Menger. He was the sole French jurist to devote a special chapter of the second edition of the *Méthode d'interprétation* to the movement of free law (*Freies Recht*), with a critical (but very well informed) point of view about the texts of Ehrlich, Kantorowicz, and Fuchs. He quoted very briefly Max Weber's critique of Stammler, considering Weber's text as a gibberish language (Jamin and Audren 2015). Gény was the first to introduce in the French legal languages wordings as "ordre juridique" (legal order as a translation of *Rechtsordnung*), "legal positivism," "normative science," or legal "disciplines" (which meant the different subjects inside of legal science).

The discussion that Gény made of the German concept of "autonomy," in his two main books (*Méthode d'interprétation*, then *Science et technique*), is significant of this critical relationship with German writers. Gény did not hesitate to pose a question, rather unprecedented among French writers, about the private spheres that could be out of the imperative reign of the statutory law. His first answer, in the *Méthode*, consisted in saying that in the French tradition of the national sovereignty, it was inconceivable that other groups than the State could have the power to legislate and to impose their rulings toward third parties. After defending an opinion not so different than the one of Jhering, Gény developed his thought in the first volume of *Science et Technique*, written just before the beginning of the First World War. After rejecting the idea of an autonomous law created by associations or trade unions – it is a hint to Maxime Leroy's *droit ouvrier* (workers law) – Gény considered that the only case of legislative autonomy was the right of the Catholic Church to adopt sanctioned rulings against its own believers. Contrary to Jhering and to French specialists of public law, Gény qualified the Church as a "center of formation of positive law" that the State had to recognize (what the 1905 French Law of Separation rendered difficult) in order to protect the "free development of the human person" (again an innovative wording in the French legal science). It is one of the most innovative quotations of Gény, who was not so far in this case from the thesis later developed by Santi Romano in his 1918 *Ordinamento giuridico*.

At their core, the doctrinal positions of Gény were very conservative and fearful toward the development of socialism. It was one reason, together with a feeling of distrust toward the "amoral" discipline practiced by Jewish scientists (like Durkheim, Emmanuel Lévy, and Lucien Lévy-Bruhl), for his rejection of the French sociological school he accused to serve the interests of the socialist party. Emmanuel Lévy wrote a critical review of the *Méthode* in the *Année sociologique* edited by Durkheim, and Gény was always critical toward any kind of legal socialism. In fact, he was never interested in sociological enquiries, even those directed by the conservative disciples of Le Play (Jestaz 2000). Gény also fought the judicial activism of the "good judge" Magnaud inspired by ideas of solidarity or humanity. As President of the small court of Château-Thierry (in the Champagne province) between 1887 and 1906, Paul Magnaud decided some audacious rulings in favor of women and of poor persons. Once the activity of the "good judge" (according to Clemenceau's words) came to an end, Gény added a chapter in the second edition of his *Méthode* in order to denounce the "Magnaud phenomenon" as a dangerous excess of judicial subjectivism, an unacceptable will to put the political opinions of a judge above the respect of the law.

However, Gény was considered as an innovative writer by the Swiss codifier Huber and by some American "realists" like Cardozo or Pound. Through the alliance between the United States and France at the end of the First World War, Gény's works were partially translated and praised as best examples of the French participation to the renewing of legal thought (Petit 1991). However, it would be erroneous to identify Gény as the theorist of any French legal realism. A common interest for the case law and a general trend toward pragmatism are not sufficient features to bring together Gény and American realists.

Conclusion

From the *Méthode* until his last texts, Gény was convinced that the mission of the legal science was to find solutions consistent with justice in harmony with the goal God has given to humanity. The First World War reinforced his feeling that France has fought for justice (and not for positive law or for culture, because he recognized that Germany had also an efficient system of law and a strong culture), which included the idea of a natural law likely to evolve together with positive law, but without any compromise concerning such values as liberty, property, and respect of the masculine preponderance. What is surprising is the myth constructed about Gény in France and in other countries. Perhaps, because Gény used a common language for the specialist of private

law at the turning point of the nineteenth and of the twentieth century, this French scholar could appear as a legal theorist, though he ignored completely public law and missed the true change of paradigm linked with Kelsen's normativism.

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▶ Ehrlich, Eugen
▶ Legal System and Legal Order

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Gény, François: Influential Ideas

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Introduction

François Gény was born in Baccarat (Lorraine) in 1861. He was the son of a forestry officer and he received a Catholic education from the Jesuits. One of his elder brother was engineer in the steel industry of Schneider Company and, in 1894, he married the daughter of the director of the Decizemines that also belonged to the Schneider family. François Gény studied law in the State Faculty of Nancy. After successfully passing the national competition (aggregation), he became professor in 1887. He was then nominated in Alger (1887–1890), and then Dijon (1890–1901, where he became a close friend of Saleilles) before returning to Nancy (1901–1931). He chose to make all his career in this provincial university that he directed as dean between 1919 and 1925. Even after his retirement he continued to publish, supporting the family policy of the Vichy Regime in 1944 and writing his intellectual testament in 1951 (*Ultima verba)* before dying in 1959.

Gény has written two important books, the *Méthode d'interprétation et sources en droit privé positif: essai critique* which appeared in 1899 as a manifesto for the innovative scholars in France (represented by Saleilles and later Duguit, Hauriou, and Lambert) and outside France (the book was well known in Europe and in America), whereas the four volumes of *Science et technique en droit positif* (1914–1924) developed the program of a legal theory in the new context created by World War I. However, there is a great continuity in Gény's conceptions: he began to write down the first volume of *Science et technique* in 1913 and he completed a new edition of the *Méthode* in 1919. In all his works, Gény showed a double side of his thought – a groundbreaking approach of the codified civil law and a preservative theory of legal doctrine – that can explain the praises (Grossi 1991) and the critics (Lambert 1900; Cayla 1988) he has attracted until today.

From the Destruction of the Traditional Method to the Apology of the Free Scientific Research

The success of the 1899 *Méthode* is undoubtedly linked with the incisive criticism of the method of the interpreters of the Napoleonic Code that is developed by Gény at the beginning of his book. Taking as a point of departure the weakening interest for the legal studies (compared with the

rise of sociology that was exaggerated by Gény) and the new directions of the young generation of scholars (Labbé, Saleilles, Lambert, and Gaudemet were quoted), Gény led the charge into the traditional method of interpretation of the Napoleonic Code. He reproached the nineteenth-century professors of civil law for having followed literally the text of the code and for having believed that all the solutions were in statutory laws. With vivid wordings against the "fetishism" of the codified law, "stagnating" the meaning of legal statements at the moment of their origins, Gény was the first to denounce the abuse of what was later called (by Glasson in 1904 and by Bonnecase in 1918–1919) the "School of Exegesis." The strike was also launched against the "logical abstractions" of some legal writers of the nineteenth centuries, notably the French professors Aubry and Rau who have followed the method and the concepts of the German Zachariae (who was influenced by Kant's theory) for interpreting the Napoleonic Code. For denouncing the sheep-like behavior of the legal dogma, Gény relied on Jhering's formula "Through Roman Law, Beyond Roman Law!". Gény did not fear to oppose the realities of social life to the deception of ideas, with a French neologism, *la piperie des idées* (only the verb *piper* is used in French to speak about loaded dice).

After this brilliant offense against formalism and inertia in legal interpretation, Gény proposed the outlines of what he called a "theory of sources." If this wording appears very common today, it was not the case in France at the end of the nineteenth century. Neither the first book presenting the whole French law at the beginning of the Third Republic – Glasson's *Éléments du droit français* (first edition in 1875) – nor the recent attempt of Capitant to imitate the general part of German jurists – the 1898 *Introduction à l'étude du droit civil: notions générales* – said anything about the sources of law. For French jurists, Gény was the creator of the typology identifying statutes and customs as "sources of law," then "doctrine" and "jurisprudence" (in the French meaning of case law) as "authorities of law." Not only Gény kept the first rank for statutory law, but he criticized the attempts (as those made by his friend Saleilles) to give an objective interpretation of legal statements according to modern requirements: for him, this way of "torturing" the texts gave too much power to judges. Gény preferred to rehabilitate the role of customary law, as a spontaneous set of practices that could become binding through their repeated use by lawyers and common people. Legal doctrine (understood as the reference to the tradition of ancient writers) and case law were only likely, as "authorities," to "propel" a custom, if the rules they proposed were adopted by lawyers and litigants.

After determining the place of every "formal" source of law, Gény returned to his fundamental idea of the incompleteness of legal statements. The issue of interpretation was not exhausted with the enumeration of sources and authorities. Before the manifestos published by Ehrlich (*Freie Rechtsfindung und Freie Rechtswissenschaft*, 1903) and Kantorowicz (*Der Kampf um die Rechtswissenschaft*, 1906), Gény claimed for a "free scientific research." Combining a "certain positivism" with "general principles" of justice, Gény proposed a new science of law that would be based on history, statistics, and compared legislation. He also quoted Durkheim and his 1895 *Règles de la méthode sociologique*, but he added that this discipline was too young and a little "confuse." In the free spaces let by the silence of the Civil Code, the legal writers had to construct a social science, a discipline that would be at the same time scientific and practical, in order to resolve the new questions as the abuse of rights, the strict liability, and the status of workmen. Gény reintroduced the themes he refused for the traditional "doctrine" or for the "case law" in order to militate for his own conception of the legal science that would give the leading role to such scholars as himself, what meant academics with a great knowledge of the legal literature according to the German model.

From the Defense of a Constructive Methodology to an Antipositivist Crusade

As Édouard Lambert has clearly analyzed in his review of the *Méthode*, Gény was more convincing in the "destructive" part of his book than in his

"reconstruction" of a theory of sources, especially in his reject to consider case law as a source of law and custom as a product of case law (Lambert 1900). Furthermore, Gény made his conceptions tougher with the 1919 edition of the *Méthode* and in the four volumes of *Science et technique*. This evolution was not directly linked with the World War I and a refusal of any German literature that Gény continued to quote. It can be better explained by the conservative ideas of Gény who was afraid by socialism as well as by the emancipation of women. However, Gény's prejudices did not prevent his discussion with Huber about the first article of the 1907 Swiss Code (authorizing the judge as acting like a legislator in the silence of the law), his influence of American writers, or the developments of his opinions about sociology or private autonomy.

In the 1919 edition of the *Méthode*, Gény devoted a well-informed chapter to the German school of Free Law (*Freirechtsschule*) in which he contested the risk of arbitrary judging. Relying on the traditional conception of separation of powers, Gény also condemned the audacious case law developed by the judge Magnaud, in the court of Château-Thierry during the 1900s, as an impressionist and anarchical interpretation of laws. However, Gény approved the power given to judges by the Swiss Code and was an advocate for introducing judicial review of statutory laws in favor of French judges. Probably Gény trusted conservative judges, but was afraid by the perspective of a case law inspired by socialist theories.

Concerning sociology, Gény repeated his attacks against Durkheim and his school (especially Emmanuel Lévy and Lucien Lévy-Bruhl, what can be suspected as a manifestation of antisemitism) that he accused to be too descriptive, fatalist, and after all materialist in neglecting moral (especially Catholic) ideas. In the second volume of *Science et technique* Gény spoke about sociology as a point of view to "eliminate" from legal science (Gény 1915). Gény was probably the first jurist to read something from Max Weber in France, but he considered Weber's text about Rudolf Stammler and the historical materialism as written in incomprehensible sociological jargon: it was a lost opportunity to make a link between French jurists and the comprehensive sociology. In his fight against "dangerous ideas," Gény accused Bergbohm to lead a crusade against natural law inspired by baseness and snobbism. Gény rejected all these materialist theories he associated with individualist anarchism or socialism.

For his free scientific research, Gény proposed to associate the "given" and the "constructed" through science and technics. Legal science had to take account of historical, economic, social, and moral data, but Gény did not practice or use any sociological survey (Thomasset et al. 2000). He preferred referring to values in a natural law perspective and also combining Blondel and Bergson in an eclectic manner. The first place remained to technics, a wording more and more popular among French jurists after World War I to promote a purported "neutral" science that was no so different from the "doctrine" that Gény criticized in 1899. Gény participated thus to the "closure" of the French legal literature, refusing the methods of social sciences, aiming at maintaining the Magisterium of professors and focusing finally on the technical analysis of case law.

The analysis of private autonomy that Gény proposed both times in the *Méthode* and in *Science et technique* is meaningful about his conceptions. For Gény, in the modern regime of France, it was impossible to discover a legislative autonomy for a group of citizens independently from the central power. The autonomy of communities or associations, as the ones promoted by Gierke, was inconsistent with the national sovereignty at the core of French law since 1789: there was no more nobility or corporations and the modern trade unions were linked by state laws. However, Gény asked if this French configuration of positive law meant that there was no law outside the state, as Jhering has affirmed. Here, Gény was very cautious, in keeping with the 1905 French law of Separation of State and Churches decided against the will of the Papacy. Making a value judgment, Gény considered that the French state has exceeded its sovereign power and that the free development of human personality (a wording rather rare at this time in France) needed a true

autonomy for the Church to regulate the conducts of faithful through canon law. In recognizing the Church as "a center of formation of positive law," Gény expressed in 1914 an opinion that was not so far from the well-known pluralism of Santi Romano's "*ordinamento giuridico*" in 1918.

Debating with the theories of Duguit (that he considered as a kind of natural law) and with the ones of Hauriou (that he did not approved in its anthropological and institutional perspective), Gény remained the advocate of a "secular" and naturalistic idea of justice exalting the "French conception of law" against the German positivism. Paradoxically, this great connoisseur of the German literature (the best one with Saleilles in this time) and the introducer of many German expressions into the French legal vocabulary (*ordre juridique* for *Rechtsordnung*, *positivisme-juridique* for *Rechtspositivismus, and discipline normative* for *normative Disziplin*) was responsible for a theory of legal sources and of natural law that for a long time isolated French jurists from the twentieth-century trends of legal theory, notably Kelsen's normativism that Gény has completely ignored.

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Introduction

Carl Friedrich Wilhelm von Gerber (1823–1891) was a civil law scholar and Germanist who transferred the conceptual legal method of Georg Friedrich Puchta, Friedrich Carl von Savigny's fellow Romanist, and of the early Rudolf von Jhering (Losano 1984) to the discipline of public law. He developed a conceptual system of public law and underscored its distinct nature by separating it from private law and from historical, political, or ethical lines of argument. He became member of the Reichstag of the North German Confederation (1867) and minister of culture of the Saxon government (1871–1891) (Pauly 2001, 237).

The Autonomy of the Conceptual System of Public Law

In Gerber's system juridical concepts establish the autonomy of public law and articulate the identity of the German people, in as much as the nation becomes conscious of itself in a state that has an organic nature and becomes the highest legal personality capable of establishing a nexus of relationships of willpower (Gerber 1865, 1–4). This reflects basic ideas of the historical school of law. For Savigny, who conceived private law as a system of legal relationships, the legal rule has its deeper foundation in the perception of the legal institution ("Rechtsinstitut"). The organic nature of the latter appears both from the living

connection of its essential elements and from its progressive development that is rooted in the spirit of the people. Every legal relationship is ruled by a corresponding legal institution as its appropriate standard. This is done in the same way as the single judicial decision is governed by legal rules (Savigny 1840, 9). Therefore, legal "institutes" and the corresponding social institutions are distinct from and interconnected with each other (e.g., marriage as legal institute and social institution). Against the backdrop of this conception, Gerber conceives of the law of the state as legal institutes made of legal rules and combined with rights (Kremer 2008, 192). He introduced into public law the so-called legal constructive method which, being a legacy of natural law (Triepel 2000, 182), was used extensively in private law in the first half of nineteenth century. His aim was, unlike the "theory of the law of the state" ("Staatsrechtslehre") before 1850, to separate legal analysis from nonlegal approaches (Korioth 2000, 42). Adhering (Kremer 2008, 158) to the salient features (Bindreiter 2011, 84–87) of Jhering's technique, Gerber set out to extract from the legal material of law a system of ascending principles. In private law the highest principle was the free will of the individual; in public law it was the will of the state. Political and legal fragmentation made it in public law more difficult than in private law (Kremer 2008, 194) to reduce the legal material to logical elements that could be juridically controlled. By the means of the logical operation of "abstraction," Gerber extracts the general legal idea from the contingent relationships. In a next step, using the operation of "concentration," he combines and reduces the legal material, and, finally, with the help of "construction," he uses abstract concepts to arrive at new legal concepts that can even be resistant to legislative and constitutional changes because they comply with juridical consistency and logical necessity. Thus, in Gerber's work "Main Features of a System of German State Law" (Gerber 1865, XI–XII) four areas were recognized as conceptually essential in public law: "'the power of the state' as 'legal ordering of the common life of a people', the 'organs of the state' (monarch and territorial estates), the 'functions of the state' (legislation, administration, justice), and the 'legal protection in the area of constitutional law'" (Stolleis 2001, 318). Practical consequences are drawn from the differences in the legal nature of the rights of the monarch, the civil servant, and the citizen in public law. While the monarch has genuine enforceable rights, the citizen's freedoms are collateral effects of the legal restrictions on the exercise of state power; they are not his/her own rights; they are "objective" reflections of the legal order; therefore, they cannot be enforced in court (Triepel 2000, 176).

Another example of how Gerber used legal concepts is the distinction between statutory law and ordinance (Wilhelm and Robinson 1894, 20). His formal definition of the concept of statutory law focusses on the aspects of law as a general, abstract, and permanent legal rule that ought to be issued with the participation of the representative body of the people. He classed implementing provisions that the monarch had the power to issue alone, with a sort of norms that he named material laws (Kremer 2008, 378–9, 381–2). He thought that emergency ordinances should not be conceived of as an exception from the general obligation of the representative body's involvement in the legislative process. He sees therein an exception merely from the principle of the prior express authorization of the representative body (Kremer 2008, 383–4). The prevailing view in the public law discussion was that pursuant to constitutional provisions in force since 1848, as, for example, pursuant to the Article 63 of the Prussian Constitution of 1850, provisional laws not ratified by the "chambers" (in Prussia) remain in force until the monarch, as he is constitutionally bound to do, revokes them (Wilhelm and Robinson 1894, 41). For Gerber, the refusal of the representative bodies to ratify such provisional laws invalidates them immediately, without there being any need to suspend them. Gerber justified his view by saying that the monarch was bound by the constitution and that an emergency ordinance's validity is of a "resolutive character," i.e., the ordinance ceases to be valid immediately upon refusal of ratification by the representative bodies. However, he was not in favor of an emergency ordinance being declared valid with retroactive effect, because this would reflect a way of seeing the matter under private law and would go against

the principle of legal certainty (Kremer 2008, 386–387).

Social Structure, Representation, and the State

Gerber's concept of a body of representatives reflected the estates-based social structure of the people. All members of the people constitute a single indivisible whole, and, on this basis, the state develops to an entire personified organism, while the political representatives of the territorial estates ("Landstände") become a member of this organism (Kremer 2008, 346). The concept of the "organ of the state" helps Gerber to integrate the territorial estates into the community. Although the territorial estates have legislative rights, Gerber sees the monarch acting as the sole legislator. He believed that Art. 62 of the Prussian Constitution of 1850 pursuant to which "the legislative power shall be exercised in common by the king and the two chambers" conflicted with Art. 57 of the Final Act of the Viennese Ministerial Conferences (May 15, 1820) that provided for the whole power of state to remain unified in the head of state. He found the chambers' right of legislative initiative, on principle, alarming and questionable. In the cases where the constitutions of the German states did not explicitly empower the territorial estates of the land to initiate legislation, he offered to solve the conflict with Art. 57 of the Viennese Act by means of granting to them not a legislative right but, on certain issues, a ratification right or a right to ask the monarch to submit a proposal for a draft law. Furthermore, he found that a parliamentary system of government was compatible neither with Art. 57 of the Viennese Act nor with the system of government of German constitutional monarchy. He also thought that "parliament" is an inappropriate concept in the context of a Confederation of States (Kremer 2008, 350). He categorically rejected the universal suffrage, and he thought that the people were not a homogeneous electorate but subdivided in separate groups. He relentlessly used, in his works, the term "territorial estates." It was only after the North German Confederation had come into existence under Prussian leadership that he accepted to use the term "parliament" and only as it related to the Imperial Diet ("Reichstag") (Kremer 2008, 353).

Safeguarding People's Representation Rights Despite the Monarch's Primacy Within the Dualism of the Constitutional Monarchy

Gerber's system does not contradict the dual constitutional reality of the constitutional monarchy. The solution he found to specific problems served to protect the territorial estates' participation rights. For instance, with respect to the setting up of the government budget, Gerber did not resolve "the budget conflict" unilaterally in favor of the monarch. He called for a continuous attempt to reach an agreement (Gerber 1865, 158–160).

He makes judicial review of the relationship between the monarch and the territorial estates conditional upon whether the territorial estates maintained an alleged infringement of their legislative participation rights. So, Gerber reduces the scope of judicial scrutiny and grants to the courts a neutral conciliatory function. Judicial review is restricted to the resolution of manifest and serious conflicts between the monarch and the social classes over the participation of the representatives of the latter in the legislative process. Such a judicial restraint was not based on the precedence of the constitution in front of the law but, rather, on the concept of the irregularity of a statute. This category comprises cases where a statute is issued in the form of an ordinance the contents of which require review and adoption by the territorial estates, or cases where emergency laws are issued without taking into account the respect for formalities required, or cases where a law was promulgated with indications such as "the law is issued in accordance with the constitutional requirement of the cooperation of the territorial estates," although this did not happen, or did not happen properly (Kremer 2008, 395). For Gerber, a failure to comply with the formal requirements means that the law and the ordinance concerned were invalid. And the courts must apply only valid law.

The standard of review by the courts did not involve a substantive examination of the constitutionality of a statute or ordinance in all respects. The courts' examination of legislative action ought to revolve only around the improperly refused participation by the territorial estates in legislative action. When the representative body is bypassed, Gerber believes that a subsequent acknowledgment of the legislative act by it could have a "healing effect." Detected irregularities can be fixed on an ex post basis. Besides, courts can exercise judicial review only upon opposition, i.e., after an appeal lodged by the representative body, since, in the first instance, the indication that the legislative act is valid and certified by the head of the state demands, for a start, general validity (Kremer 2008, 388–399). Therefore, the political antagonism between the monarch and the representatives of the people becomes a purely legal problem, a conflict of authority amenable to judicial review. Of course, conceptually, Gerber could determine the scope of the territorial estates' legislative participation rights by means of a concept of liberty or a concept of property. The first reason why he did not do so is Art. 57 of the Viennese Act, and the second one is that he was overtly antiliberal, hostile to theories or policies of democracy and against the ideas of 1848. So, he opted for invoking the principle that every general legal statute should be subject to the territorial estates' approval.

Another example is the possibility by the monarch to limit the effectiveness of legislation by unilaterally granting a dispensation. The German theory of the law of the state of the nineteenth century designated by the term "powers of dispensation," the power of the monarch, to preclude the application of legislation for specific cases, and the question was, to what extent the monarch and the administration of the monarchy are authorized to grant dispensation from the application of legislation issued upon approval by the representatives of the people. Should the monarch and his administration have the right to unilaterally grant a dispensation from, say, a generally binding statutory tax duty? In his article "On Sovereign Prerogatives and Powers of dispensation in the modern state" (Gerber 1871), Gerber expresses a view that was considered as a turning point in the theory of the law of the state (Kremer 2008, 405). He sees in the powers of dispensation a problem of administrative action. Gerber inverted the relationship between the rule and the exception that was established till date by basically denying the monarch the right for granting dispensation. For him, the nature of the legislation under public law in the "modern constitutional monarchy" demands that powers of dispensing exist only in those situations where the lawgiver or, in general, the existing legal order expressly provides for this possibility (Kremer 2008, 403–405). Thus, it is neither politics nor revolution but legal concepts that restrict the powers of public authority.

Conclusion

Gerber's work helps understand what legal concepts can and cannot do. They can draw a dividing line between autonomy and heteronomy of legal science, but they cannot provide autarchy, and they do produce political effects. Gerber is not blind to the political reality. Political considerations linked to the goal served by a legal institution are evidently visible for him, but they lie beyond the legal concept of the respective institution. Paul Laband and Hans Kelsen adhered to this idea, while the late Jhering, who in his early phase coedited with Gerber the conceptualist "Yearbook for the Dogmatics of Modern Roman and German Private Law," emphasized the purpose-oriented, interest-laden tenets of law and contributed to the development of legal realism. But even legal realism needs to distinguish between law and non-law and between legal and nonlegal science, and this will not work without legal concepts.

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▶ Jhering, Rudolf von
▶ Kelsen, Hans
▶ Legal Positivism: Exclusive
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Giannone, Pietro

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Born in a small town in Puglia, Ischitella, Pietro Giannone (1676–1748) moved to Naples very early on (1694) to study law and philosophy. There his influences were twofold: firstly, the famous jurists with whom he studied, in particular Domenico Aulisio, and also Gaetano Argento, in the wake of which one of his main works, the *Istoria Civile del Regno di Napoli* (1723), was developed. But besides this influence, Giannone more generally forms part of the Neapolitan *novatores* tradition, which developed in the second half of the seventeenth century, especially through great figures like Tommaso Cornelio, Leonardo Di Capua, Francesco D'Andrea, and Giuseppe Valletta to name but a few figures. These *novatores* were the symbols of the "ceto civile," the new social class formed by "modernists," lawyers, philosophers, scientists, doctors, and booksellers who attempted to influence political power and modernize the Kingdom of Naples through informed and effective political action. The second half of the *Seicento* is thus marked by a merciless struggle between the old order and these modernists who entered into crisis at the end of the century, an internal crisis as a result of the appearance of new scientific models, and an external crisis due to repeated attacks on behalf of the old order, especially from the Jesuit priest De Benedictis, which lead to a momentous trial against the modernists at the end of the century. Receiving this dual tradition from the Neapolitan *novatores*, that is, their modernity but also their crisis, was formative for Giannone. He was just as influenced by the jurists from the "ceto civile" as he was by the Neapolitan *novatores* and their authors of predilection, including Gassendi, Descartes, and Malebranche, but also, more generally, ancient materialism, in particular Lucretia.

Having obtained his *Laurea* in law in 1698, Giannone then devoted himself to an illustrious career as a lawyer while continuing to maintain ties with the *novatores*, in particular Lucantonio Porzio, Gregorio Calabrese, and Nicola Capasso. He attended several Neapolitan academies, in particular the "Accademia di Medicacoeli" and the "Accademia de' Saggi." Parallel to his career as a lawyer, which featured many controversies, Giannone devoted himself to writing one of his greatest works, the *Istoria Civile del Regno di Napoli*, published in 1723. This work, complex in its drafting, as well as in its choice of historiographical methodology (a choice anchored in an ancient historiographical tradition, from Machiavelli to Guicciardini and Giuseppe Valletta's

Istoria filosofica), established a retrospective genealogy of political power in the Roman Curia in response to state power. The Neapolitan laboratory, addressed in a broad diachrony (from the end of the Roman Empire to the Austrian Viceroyalty), allowed Giannone to demonstrate more generally from this significant example the political origin of the Church's power and its purely political character. This approach, which puts the question of the institution at the center (here the "civil" aspect is decisive), thus makes it possible for Giannone to retrospectively demonstrate how the Church's power was established against the autonomy of the Kingdom of Naples and the "buon governo," which puts the *res publica* at the center of its action (see, in this way, his analysis of the revolution of Masaniello of 1647–1648). The historiographic audacity of Giannone aroused many hostile reactions in Naples orchestrated by the Church, which multiplied the preachings against his work (Giannone was excommunicated and his *Istoria Civile* shunned), pushing the philosopher into exile.

Giannone's exile quickly took him to Vienna, where he became acquainted with libertine thought and the texts of the most radical thinkers of European modernity (including Spinoza, whose *Ethics* he apparently consulted a copy of, and John Toland, among others), allowing some interpreters to file him under the category of the "Radical Enlightenment." His time spent in Vienna gave Giannone a truly European perspective (also made possible by the translation of his *Istoria Civile* in English between 1729 and 1731 and in French in 1742). In Vienna, his occupation was analogous to what he had in Naples, between his practice as a lawyer, accompanied by numerous legal texts, and his relations with European intellectuals, especially British and German. His productions during that time include his *Professione di fede* (1729), characterized by its scathing irony against the Church, which cemented his split with the Roman Curia. It was also in Vienna that he began to develop and write his second great work, *Triregno* (1731–1734).

This work, which was only partially published in 1895 and then completely in 1940, is directly in keeping with the method initiated in the *Istoria Civile*. The aim was again to ascertain to what extent the legitimacy and spiritual power of the Church are in reality of a purely political nature. As in his *Istoria Civile*, Giannone established a new genealogy of the political origin of the Church's political power by differentiating three kingdoms: the "Regno terreno" of the Hebrews, which was limited to their mere terrestrial dominion over other peoples, the "Regno celeste" characterizing the first Christianity to introduce an afterlife, and finally the "Regno papale," which highlighted the political role of the pope and his corruption, introducing in fact a real solution of continuity between the two first kingdoms and the third, which in fact corresponds to the one denounced in his *Istoria Civile*. The purpose of this system of religious secularization was to assert that religion does not grant access to any transcendence in hindsight but originates beforehand under political conditions of establishing a particular power, that of Christianity.

The echo of writing such a work is fatal for Giannone who, from 1734, fleeing the henchmen of the Inquisition, passes from town to town in northern Italy, sometimes meeting illustrious modernists, such as Antonio Conti in Venice, but is most often forced to flee from the various attempts of the Sant'Uffizio to capture and deliver him to Rome. Lured into a trap in Piedimonte, Giannone is arrested in 1736 and is locked up in the Fortress of Miolans, transformed into a ducal prison, where he writes his famous autobiography (*Vita di Pietro Giannone scritta da se medesimo*), which demonstrates in particular who his influences were during his formative years. Giannone ends up renouncing in 1738, hoping in vain to seek freedom. He remained imprisoned in various Piedmontese prisons, where he wrote several important texts, notably his *Discorsi sopra gli Annali di Tito Livio* (1738), the *Apologia de' teologi scolastici* (1739–1741), or the *Ape ingegnosa* (1743–1744), before dying in 1748.

Summarizing Giannone's thought may seem a difficult undertaking, as it seems to be situated at the crossroads of a model he inherited in advance, that of the "ceto civile" and the first Neapolitan

novatores, and a work that decisively roots him in the European Enlightenment. From this point of view, the "Giannone Affair," to use the title of one of the last editions of his works, established by one of his greatest specialists, Giuseppe Ricuperati, is entirely representative of a thought that, from analyzing the peculiarity of the Neapolitan political laboratory, established the systematic deconstruction and criticism of the political origin of the Church's power and the strength of its institutions. As a jurist, historian, philosopher, and polemicist, Giannone is one of the striking examples of those men of the European Enlightenment who, by the radicality of their commitment, were able to uncover the conditions of possibility of the Roman Curia's hegemony and more generally the power of religion.

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Introduction

Edward Gibbon (Putney, 1737) was raised as a Protestant in England, became enamored of books as a young boy, and went to Magdalen College, Oxford, at 14. Under the influence of reading Conyers Middleton, he converted to Catholicism in London; he was then sent by his outraged father to Lausanne until the age of 21, where he reconverted after extensive studies that also included the writings of Locke and Bayle.

In 1760, Gibbon and his father enlisted as officers in the militia; even though he did not see action, he would later see his military training as a useful experience for writing Roman military history.

In 1764, he visited Rome where he conceived the idea of writing the history of its decline and fall. Back in England the next year, Gibbon was elected to Parliament as a (conservative) Whig and acquired a sinecure in government, on the Board of Trade, which, however, was abolished in 1782 as a result of Edmund Burke's efforts. By the end of 1774, he had become a freemason. After the end of his career in government, he moved to Lausanne, returning to London in 1788 in order to oversee the production of the last volume of his main work, *The Decline and Fall of the Roman Empire*. He died in London on another visit in 1794.

Early Studies of Ancient History

Gibbon wrote his *Essai sur l'étude de la littérature* (1761) in the spirit of the European republic of letters, following closely the mode of Montesquieu's method of writing. His thorough knowledge of ancient literature and philosophy

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gave to his essay an almost encyclopedic racter, although he critically reacted against what he believed was the encyclopedist d'Alembert's depreciation of the cultural importance of memory.

Gibbon's intention was to defend the study of history and to get beyond the quarrel between Ancients and Moderns that had dominated the early enlightenment in both France and England. He attributed relative truths to both parties to the quarrel; he therefore can be described as a prototypically moderate representative of enlightenment. Even though he later bemoaned the *Essai's* obscurity and lack of method, Gibbon here already articulated ideas that would become essential for his world view. Thus, he considered the political history of empires as equivalent to the misery of humankind, juxtaposing it to the history of sciences as representing their grandeur and happiness.

The Decline and Fall of the Roman Empire, 1774–1788

Gibbon's main work presents a major contribution to historiography and its methods and prominently deals with topics like religion, jurisprudence, and empire. Gibbon's form of historiography, though based on a thorough knowledge of the sources and amply footnoted, was not just an exercise in disinterested scholarship. He was a proponent of so-called "philosophical historiography," but with more emphasis on scholarly reliability and methodical accuracy than can be found in the writings of the popular historian Voltaire.

He strongly held to a normative framework according to which historical actors and periods ought to be judged. In this regard, however, Gibbon was not particularly original as a thinker. Gibbon's insight or judgment that history is "little more than the register of the crimes, follies, and misfortunes of mankind" ch. 3) indirectly expresses the normative dimension of historiography which should be guided by some notion of the general happiness which a given society can achieve.

A key feature of Gibbon's work was to disregard the distinction between "church history" and "secular history," thereby regularly linking the history of Christianity to social and political phenomena. When considering church history, Gibbon focused on what he called the five secondary ("natural") causes for the growth of the Christian church, as opposed to the concept of providential causes: The (1) "intolerant zeal of the Christians," (2) the belief in immortality, (3) the belief in miracles (prodigies), (4) the austere Christian morality, and (5) the establishment of a church hierarchy, the so-called Christian republic (ch. 15).

Without directly refuting the role of providence in this regard, Gibbon, by adducing non-providential causes, renders providential explanations for historical events nugatory. In addition, he assumed the identity of the human condition over time, referring to concepts such as "human nature" or "the human heart."

This firmly set him within the limits of anthropologically oriented enlightenment ways of writing history and understanding past societies. Gibbon seems to have held strong views about the inevitability of decline, as he once remarked that "instead of inquiring why the Roman Empire was destroyed, we should rather be surprised that it had subsisted so long" [II, 509; General observations].

Gibbon's critique of Christianity is a key element of his work which is also relevant to his social philosophy. In the famous 15th and 16th chapters of *Decline and Fall*, he took up again the quasi-legal proceedings, as it were, against Christianity that the last pagan philosophers had started many centuries ago. Here the literary form and technique of Gibbon is crucial for understanding what he intended to do. He not only preferred an indirect rhetoric, often making subtle use of his footnotes for subversive insinuations, but also cultivated the so-called "sneer" method of writing, suggesting that Christianity was in fact a phenomenon of decadence.

An important part of this criticism was directed against one of Christianity's distinctive social forms, i.e., monasticism. This had, for Gibbon, serious implications for social philosophy, for monasticism cultivated the unworldly virtues of a religion that was opposed to the natural virtues

of the pagans. Monasticism had destroyed the freedom of the mind "by the habits of credulity and submission," he argued.

However, Gibbon was not so much opposed to religion as such as to the fanaticism and intolerance it could and did give rise to in history. One feature of his social thought concerns the status of miracles. Gibbon obviously follows the naturalistic views advocated by David Hume in "Of miracles" as well as Conyers Middleton's *Free Inquiry* in examining reports about miraculous events in history by focusing on their social significance. Christianity, on this view, was not the cause of progress in civilization but rather what constituted, in Gibbon's ironical words, the "triumph of barbarism and religion."

One chapter (44) in his *History* stands out in which Gibbon gives an overview of Roman law which under Justinian "was digested in the immortal works of the CODE, the PANDECTS, and the INSTITUTES." Gibbon praises rulers who connect their own reputations with "the honour and interest of a perpetual order of men" and stresses the importance of the principles of jurisprudence "to the peace and happiness of society." Roman law, as codified under Justinian, became one of the great sources of the future development of European civilization. Gibbon acknowledges the possibility of abuses in the legal system of an "elaborate jurisprudence" which can lead one to wish for "the simple and summary decrees of a Turkish cadhi." However, on reflection, Gibbon affirms that legal delays "are necessary to guard the person and property of the citizen" and that "the discretion [arbitrariness] of the judge is the first engine of tyranny." It is a requirement of a republic to foresee and legally determine everything that pertains to the "exercise of power and the transactions of industry."

Gibbon was interested in the workings of power and especially in how empires as political entities were functioning – a topic not far from the concerns of the contemporary British empire. The spectacle of the Roman empire and its transformations over time suggested to him reflections of a more general kind, namely that there was nothing more opposed to nature and reason than to rule foreign countries against their will. The social and political conditions for empires were therefore complex and varied; they could not be governed without a "refined system of policy and oppression," and they had to put fear into their subjects "without provoking discontent and despair" (ch. 49).

In his autobiographical writings, Gibbon reflects on the contingency of human things with a view to his own life. He considers the possibility that his fate could have been that of "a slave, a savage or a peasant," and he regards himself fortunate in having been born "in a free and enlightened country." The value of freedom and civilization is the core of Gibbon's social philosophy. But he also acknowledges the element of chance in this matter, as even "in the civilized world, the most numerous class is condemned to ignorance and poverty."

Conclusion

In line with many moderate enlightenment thinkers, Gibbon's was a rather skeptical stance toward democracy. In his general philosophical outlook, he was close to some of the Scottish moral philosophers and historians (Adam Ferguson, Adam Smith, William Robertson, and David Hume), and he was deeply committed to the then current distinction between "barbarism" and "civilization," maintaining that Europe had achieved in the course of its history an amount of progress that ruled out any future decline into barbarism.

As Gibbon was embroiled in controversies concerning the political status of Christianity as well as the relevance of miracles for (this) religion, it should be noted that no positive proof of his alleged atheism exists. Likewise, it is still controversial how far his reference to the "convincing evidence of the [Christian] doctrine itself" should be taken at face value or considered as ironical. Gibbon did not draw politically radical conclusions from whatever critique of religion he may have offered, siding with Burke in his highly critical evaluation of the French Revolution. He was therefore opposed to the party spirit of democracy trumping "the sober dictates of

wisdom and experience" and strongly objected to what he regarded as "wild theories of equal and boundless freedom." Nevertheless, he differed from Burke's analysis of the intellectual origins of the Revolution, because he did not believe it was caused by free-thinking philosophers and deists. Gibbon thus exemplifies the possibility of the coexistence of fairly radical criticisms of religion and clericalism with social and political conservatism as represented by the eighteenth-century English landed gentry.

Already in his lifetime, Gibbon's works were read widely across Europe. This confirmed the consideration of Rome as a prototypical civilization which also became a test case for reflections on the philosophy of history. As early as the late 1780s, particularly his presentation and discussion of Roman law was studied closely by German jurists like Gustav Hugo, and even though the influence of Gibbon on the development of legal thought was only marginal at best, he still inspired a liberal-republican interpretation of the law by highlighting that studying Roman law meant nothing less than "to breathe the pure and invigorating air of the republic" (ch. 44).

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Introduction

Otto von Gierke (1841–1921) is one of the most important "Germanists" of the Historical School of Law. Son of a Prussian lawyer, he obtained his doctorate in 1866 in Berlin, before teaching law at the University of Breslau (of which he became rector), then in Heidelberg, and, from 1887 onward, in Berlin where his fame became international. He is the author of a monumental history of the law of the fellowship (*Genossenschaft*) in four volumes, *Das deutsche Genossenschaftsrecht* (published in 1868, 1873, 1881, and 1914), which, in Gierke's terms, falls within "the field of legal history, of constitutional history and of economic history" (DGR4, p. VIII). He devoted a book to Althusius (1880), a

Calvinist legal theorist whose writings had been more or less entirely neglected until Gierke rediscovered him (*Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien*, 1880). He also published a combat writing aimed at transforming the dogmatics of German civil law (*Die Genossenschaftstheorie und die deutsche Rechtsprechung*, 1887), a manual on German private law (*Deutschen Privatrechts*, 1895–1907), and many short writings, such as "Naturrecht und deutsches Recht" (1887), "Die soziale Aufgabe des Privatrechts" (1889), or "Das Wesen der menschlichen Verbände" (1902). His criticism of Laband's formalism made him the main opponent of the dominant legal positivism at the end of the nineteenth century ("Labands Staatsrecht und die deutsche Rechtswissenschaft," 1883).

Gierke's relation to philosophy is essential, though overdetermined by the struggle between Germanists and Romanists within the Historical School of Law and by Gierke's permanent criticism of Savigny (who was a Kantian). For Gurvitch, Gierke is an authentic "legal philosopher" since he was able to make German idealism fruitful for law (Gurvitch 1922). Gierke bases his theory of the real personality of the group (*reale Verbandspersönlichkeit*) on the philosophy of Fichte, Schelling, and Hegel. He was also influenced by the romanticism and by Dilthey's philosophy of life (he had met Dilthey, while he was teaching in Breslau). His debt to Hegel is clear when he refuses to define law by force alone in opposition to Laband ("Labands Staatsrecht. . ." 1883, in Gierke 2001, vol. 1, p. 325). The concept of *Genossenschaft* serves him to reintroduce the social dimension into law, comparable to Hegel's concept of the *Sittlichkeit*, whereas the dualism private law/public law had expelled what he calls the social law (*das Sozialrecht*).

Like his mentor Beseler (*Volksrecht und Juristenrecht*, 1843), Gierke considers that "the people" (*Volk*) spontaneously creates law. He criticizes Savigny's intellectualism and individualism. For the Germanists, Romanists break the link between ethics and law and tend to make law an autonomous system. They identify law to the legal science, and thus, they actively repress the organicity of human groups.

Gierke repeatedly interrupts his scholarly work to devote himself to more practical tasks. Member of the *Verein für Socialpolitik* since 1873, he frequents the "Socialists of the Chair" Adolph Wagner, Gustav Schmoller, and Lujo Brentano. Striving for the greatest possible autonomy for communities and associations within the constitutional state, he seeks to revive the legacy of medieval Germanic law by upgrading the principle of subsidiarity. His criticism of the first draft of the German Civil Code at the end of the nineteenth century has borne fruit: it has allowed to transform the *Bürgerliches Gesetzbuch* in a more social sense. Gierke is aiming at transforming capitalist society by law, not by exacerbating the class struggle as the Socialists do, but by refounding the old organic groups on the basis of modern subjective law. The small-scale associations (professional groups, cultural associations, churches, chambers of commerce, trade unions, etc.) cannot quite resemble groups of the old Germanic law (DGR1, § 65, p. 882). Modern individuals freely select their own groups; they leave them as they wish, without being entirely defined by them. However, Gierke counts on associations to counterbalance the individualism and depoliticization of industrial society. He is one of the first legal scientists to recognize British workers' associations of the early nineteenth century (of which legal scientists were hardly concerned at the time) as organs of economic self-determination.

From Liberalism to Conservatism

Initially, Gierke's claim for the independence of corporations perfectly suited to liberal tradition. It is indeed a peculiarity of the German liberals of the nineteenth century that they didn't want to suppress the corporations, but only the ancient privileges attached to them, unlike Benjamin Constant or Guizot in France who considered the corporations as intrinsically linked to feudalism. Gierke's mentor, Beseler, to whom he dedicates the first volume of the *Genossenschaftsrecht*, was one of the liberals of the *Vormärz*. But with time Gierke's writings take on more and more conservative accents.

Surely, Gierke never defended the *Genossenschaft* against the state. He wanted to increase the freedom of associations against bureaucratic centralization and the authoritarian monarchy *within* the state. He defended the constitutional monarchy, which he interpreted as a successful blend of *Herrschaft* (lordship, domination) and *Genossenschaft* (fellowship, community). Thus, his ideal of a law rooted in local customs and issued from a plurality of self-administered associations leads in no way to the relativization of sovereignty, as it will be the case for his English pluralist readers.

"Gierke's uncertainty manifests itself in the fact that he begins as a liberal and ends as a conservative," F. Tönnies writes to Carl Schmitt in a letter dated July 18, 1930. In all matters concerning the family, education, culture, art, religion, and even economy, Gierke defends the local government and the principle of subsidiarity. But in matters regarding the structure of the state, he wants a state above the political parties. For him parliamentarianism rests on a false absolutization of the majority principle ("Über die Geschichte des Majoritätsprinzips," 1913, in Gierke 2001, vol. 2, pp. 831–853). With the Franco-Prussian War and the First World War, his championing of the state become even more nationalistic ("Der germanische Staatsgedanke," 1919 in Gierke 2001, vol. 2, pp. 1063–1091).

Gierke's reception in Germany and in Europe reflects this ambivalence between his liberal and his nationalistic approach. On the one hand, he influenced the theory of the institution of Santi Romano and Maurice Hauriou. The Nazis also tried to instrumentalize his thought (before Reinhard Höhn recognized that it was impossible "to use him to build up the current law" because he was "a child of liberal constitutionalism," Höhn 1936, p. 10). On the other hand, after the great historian of law Maitland introduced his thought to England in 1900, he inspired the English pluralists and the *guilds socialists* (Figgis, Laski, and Cole) who sought to dissolve the state in the articulation of associations (Runciman 2009).

For Lorenz von Stein, Gierke sacralizes a static and pre-industrial social order. Although very influenced by him, Tönnies himself writes that "Gierke's idealism differs from Hegel's as romanticism to rationalism" (in a letter to Carl Schmitt of July 18, 1930). E.-W. Böckenförde goes so far as to talk about Gierke's "failure." However, his image of a thinker locked in secondary and posthumous problems has been since corrected. In fact, Gierke has left a lasting mark in German positive law. In the field of civil and economic law, he managed to impose the *gesamte Hand* against the *societas* of Roman law in the BGB (then taken over by the *Handelsgesetzbuch*). And through his followers Hugo Preuss and Hugo Sinzheimer, he influenced the Weimar Constitution and German labor law (Malowitz 2003).

Furthermore, the lawyer appears as a key figure in the history of the European social sciences. His influence on the fathers of German sociology (F. Tönnies, Max Weber), on lawyers interested in sociology (L. Duguit or R. Saleilles in France), and on socialist lawyers (H. Sinzheimer, H. Heller, O. Kahn-Freud) is now recognized to its true extent. As such, Gurvitch is right to see him as one of the precursors of the "idea of social law" (Gurvitch 1932).

The History of the "Genossenschaft": A German or European History?

In his history of law, Gierke depicts a centuries-old struggle between the fellowship idea (*das Prinzip der Genossenschaft*, which refers to old guilds and corporations, medieval cities, churches, and universities, but also to modern trusts and associations) and the lordship idea (*das Prinzip der Herrschaft*), which is also a struggle between Roman and German traditions. He tries to reduce the classic dichotomy between civil law countries and common law countries. In the systems impregnated by Roman law as he interprets them, the doctrine of sovereignty was built as a monopoly of power. By contrast, in the systems inspired by a common law of Germanic origin, the production of law doesn't result from the exclusive prerogative of a person-state, but from the autonomy and the dynamics of various associations. Gierke opposes an old Germanic freedom based on the reciprocity of rights and duties to Roman law and its "vertical" conception of power.

For Gierke, canonical law has favored a tradition that leads to the principle of the *princeps legibus solutus* and to the absolutist state. The invention by the Pope-lawyer Innocent IV of the theory of the fiction of the juridical person in the thirteenth century is decisive in this respect. It explains that only the individuals are real persons and the collective bodies are only fictitious persons. The unity of the group is a transcendent entity that is *only represented* by the real community. Thus, "the living unity of the group is replaced by a ghost." Placed under the tutelage of the *persona ficta*, it is "like a child, or rather, like an incurable fool" ("Über die Geschichte des Majoritätsprinzips," in Gierke 2001, vol. 2, p. 845). The real community is depoliticized or, as Rousseau and Hegel would say, "alienated."

According to Gierke, this Roman-canonical idea of the corporation as *Anstalt* (transcendent institution) was applied not only to the Church but also to the State. It became crucial to the genesis of the modern *Leviathan*-state itself.

nt to think of the *national* or the *social* root of institutions? The very title of the *Deutsche Genossenschaftsrecht* indicates that for him, as for Beseler, the *Genossenschaft* is above all a form of German association, whose traces he has found among others in the *Deutsche Rechtsaltertümer* of Jacob Grimm (1828). He opposes a national law identified with the medieval experience to the "bourgeois" law that, like the others Germanists, he builds with Roman materials. But on the other hand, by focusing on small-scale groups and by seeing them as a source of law, Gierke's history of law plays the role of a social history avant la lettre. Some have read it this way (Gurvitch 1932; Dumont 1983). Gierke sociologizes law through its material. His work shed light upon transformations that other disciplines of his time do not see (especially history). His criticism of contractualist subjectivism becomes a support for the emerging social science. It is no accident that Tönnies build up his concept of community (Gemeinschaft) from Gierke's concept of "Genossenschaft" in *Gemeinschaft und Gesellschaft* (Tönnies 1887). Regarding Max Weber, even if he rejects the theory of the real personality of the groups that he considers a metaphysical hypostasis, he is also nourished by the works of Gierke (who is more or less his neighbor in Berlin and with whom he develops a friendly relationship). Weber defends Gierke's thesis against his own research director in his doctoral thesis on the history of medieval trading companies (Weber 2008). More generally, he integrates into his method several theses of the Germanists (Marra 1992, Dilcher in Weber 2008).

In short, Gierke's legal history of law is marked by a double paradox. First, it is both a work that played a pioneering role in the emergence of the sociological approach on law and an idealistic work that reduces history to history of law and to the adventures of a few concepts (*Genossenschaft*, *Herrschaft*, *Obrigkeit*, *Anstalt*, *Gemeinde*, etc.). Second, it presents itself as a history of *German* law, while it actually retraces the history of the political modernity *of Europe*. Besides, Gierke's reception in Europe did not have any trouble to release the European content under the Germanic facade.

Althusius, the Other Tradition of Natural Law

Gierke rediscovered Althusius, a German lawyer and Calvinist of the seventeenth century that had fallen into oblivion. More than 30 years before *Leviathan*, Althusius built up the political body on several levels in his *Politica methodice digesta* (1603). Each level is composed of different symbiotic bodies or *consociationes*: families, corporations, cities, and provinces make up the *consociatio universalis*. The key of this construction is the principle of self-government (*Selbstverwaltung*) of the associations and the control of magistrates by the lower level.

Gierke considers Althusius the father of federalism but also the leading figure of a "German" strand of natural law, attentive to communities. He presents him as the first theoretician of popular sovereignty, before Rousseau. This interpretation has been strongly debated. For Duso and the School of Padua, the interpretation of Althusius' *Politica* as a federalist antecedent of the *Social Contract* is an anachronism. For them, the thought

of Althusius is typical of medieval thought and of its legal pluralism (Duso 1990).

Actually, Gierke was perfectly aware of the difference between Althusius and Rousseau. His strategy was twofold: he wanted to inscribe Althusius in the great political thought, in a line starting from Bodin and leading to Rousseau and Kant, in order to draw him out of oblivion. But he also wanted to point out what separates Althusius from it, in order to highlight a dissident line of political thought that goes through Althusius, Milton, Montesquieu, and W. von Humboldt and leads to Gierke himself. Gierke knew that the cause for which Althusius fought (the autonomy of the cities) was already lost in the seventeenth century, in the context of the rise of territorial states.

For him, Althusius is neither modern nor pre-modern. He represents a strand of thought that broke with medieval thought but that *didn't win*. Gierke refuses to relegate to pre-modernity all that is not dominant in modernity. In his preface to the last volume of *Das deutsche Genossenschaftsrecht*, he compared his work to a hike that led him to "really deserted regions" (*durch recht öde Gebilde*, DGR4, preface of 1913, p. VIII). His concern is precisely to clear the precarious space occupied by "untimely" thoughts in legal history. If political modernity goes into crisis, these thoughts can resurface as "postmodern" alternatives to it (Marramao 2000).

Political Philosophy Revisited

Gierke's *Althusius* remained a classic for German lawyers until the 1920s. Considered by the English historian Figgis as one of the best introductions to political thought (Figgis 1907), this book is much more than a monograph on Althusius. With the volume IV of *Das deutsche Genossenschaftsrecht*, it gives a genealogy of modern political philosophy as a whole, asking why it has become a philosophy *of the state*.

Focusing on the theories of natural law of the seventeenth and eighteenth centuries, the matrix of modern political philosophy, Gierke try to demonstrate that the theory of natural law is (1) a theory of sovereignty, (2) a theory of society or a proto-sociology, and (3) a theory that roots in medieval ideas.

1. From Grotius to Kant, the doctrine of natural law is, in Gierke's terms, both a theory of "the sovereign state" and a theory of the "sovereign individual." For him, abstract individualism and absolutist statism are two sides of the same coin. Modern political thought makes inseparable the emancipation of the individual and the centralized and authoritarian state (*Anstaltsstaat*, *Obrigkeitsstaat*). It refuses to allow other sources of law between the State and the individual. It excludes the law of fellowship (*Genossenschaftsrecht*) from the grand theory and relegates it to the field of positive law. For Gierke, the refusal of "intermediary bodies," from Hobbes and Rousseau to Kant, is quite revealing of a tendency of the modern state to absorb all the community life and to reduce the public sphere to the state. All associations are suspected of being "factions." Finally one leaves them nothing but the narrow space of private law.
2. Furthermore, Gierke interprets the natural law of the seventeenth and eighteenth centuries as a theory of the emerging capitalist society. He wonders in which political society something like the state can emerge. Before F. Tönnies and C.B. Macpherson, he discerns what he calls the "natural law's theory of society" (*die naturrechtliche Gesellschaftslehre*, *Althusius*, 1958, p. 103; DGR4, p. 276 *sq*), namely, the possessive individualism common to Hobbes, Locke, and Rousseau. In his perspective, because he keeps in mind the minor strand of the doctrine of naturel law represented by Althusius, commonalities seem greater than differences between these natural law theorists. For example, he takes some malicious pleasure in pointing out all what Rousseau the democrat owes Hobbes the absolutist. Their theories of the social contract are all "mechanistic and atomistic." They "deduce" the community from the individual, and, what is strange in Gierke's eyes, they manage to place a concept

of private law (the contract) in the heart of public law.

3. Finally, Gierke shows that the theory of the social contract inherits medieval ideas (*Althusius*, II, 3, p. 125) despite its self-presentation as a system drawn from reason and not from history. Although this doctrine builds society as a *societas* (a contractual association from which the individual can easily withdraw), it needs the concept of *universitas* to construct the state whole.

The return to the Middle Ages is one of Gierke's most remarkable gestures. He writes that even "the doctrine of popular sovereignty was born in the Middle Ages" (*Althusius*, II, 3, 123). For him, it is absurd to switch between Antiquity and Machiavelli, omitting the Middle Ages, to write the history of political modernity. His main thesis is that the difference between the modern state and the ancient state comes from what the Church as *corpus mysticum* and as *Anstalt* (transcendent institution) has brought to the modern state. It also comes from the fact that the modern state takes the individual as a value, taking over in secularized form an idea that was primarily that of the Church. Certainly, in Gierke's account, Hobbes is the first to switch political thought into modernity. But Hobbes only "completed the Reformation process," for the Reformation had already strengthened the territorial state by making the Church an "invisible Church" (later Carl Schmitt will take back this idea from Gierke, Schmitt 1965). According to Gierke, Hobbes is the first to think of the personality of the state with consistency (by opening fire on the idea of the personality of the people). He brings the notion of juridical person into public law, what neither Roman law nor medieval law had done. Nevertheless, in doing so, Hobbes only brings to an end a theory that had been prepared by the *persona ficta* of the medieval lawyers and theologians.

Figgis (1907), Troeltsch (1912), and Ernst Kantorowicz (1957) each referred to Gierke when they showed, each in their own way, that the rationalization of politics had begun within the Church and religion, and not first in the fight against religion. Max Weber also owes Gierke much of his interpretation of the state as *Anstalt*.

Under the meanders of scholarship, Gierke's diagnosis is quite clear: the victory of the "state form" over the Empire and the *Genossenschaft* results from a series of contingent bifurcations. Things could have turn out differently. There were alternatives, as the model of the free cities of the Middle Ages praised by Althusius. Unlike the "novel of the state" which suggests that the reason itself triumphs with the centralized state, Gierke interprets the *Anstaltsstaat* as an historical experience of depoliticization, even in its democratic form (Gierke 1958, II, 3). That's why he tries to repoliticize the state promoting the freedom of associations and the federal state in German *Kaiserreich*.

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Global Justice and Climate Change

► Justice: Global Justice and Climate Change

Global Justice and Equality

► Equality and Global Justice

Global Responsibility

► Responsibility: Global

Godwin, William

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Introduction

William Godwin (1756–1836) was born in a village of Cambridgeshire, son of a dissenter minister. He was educated in the Hoxton Dissenting Academy to prepare him as a minister too. In 1783, he abandons his congregation position and starts earning his life as independent writer and as journalist. In 1793, he publishes his major work,

An Enquiring Concerning Political Justice, an essay of political philosophy, reacting to the lively discussion originating from Edmund Burke's critical *Reflections on the Revolution in France* and Thomas Paine's *Rights of Man*. Godwin defends the French revolutionary experience and develops a powerful case for a radical democratic political order, indeed – as he says – "a society without government". In 1796, he starts meeting regularly Mary Wollstonecraft, the author of the *Vindication of the Rights of Woman*, a first feminist and enlightened defender of human rights against Burke's criticism and Rousseau's strictures. Mary and William marry a few months after. In 1797, Mary tragically dies by giving birth to their daughter, Mary Godwin, later married to Percy Bisshe Shelley, and the author of *Frankenstein*. Godwin is devastated by the unexpected and sudden death of his wife, whose posthumous work he edits. He also writes *Memoirs of the Author of "A Vindication of the Rights of Women*," an affectionate and intelligent short narrative of Mary's existential and intellectual trajectory. In 1804, William marries his second wife, Mary Jane Clairmont, while the cultural and political atmosphere around him is quickly changing.

In the Nineties of Eighteenth century, Britain seemed to be receptive to the radical liberalism coming from France and there was widespread sympathy towards the French Revolution. This, however, rapidly changed thanks to a hard fight for cultural hegemony. William and Mary were specially targeted as samples of subversive thought and life, and a strong veil of prejudice was laid upon their ideas and figures. In the first decade of Nineteenth century, William lost his centrality in the political debate, and several of his former followers took distance from their previous democratic conceptions, among these William Wordsworth and Samuel Taylor Coleridge, the poets. But Percy Bysshe Shelley's fortuitous acquaintance with Godwin and then his relationship with Mary Godwin Wollstonecraft, William's daughter, somehow revived William's influence in the body of English literature. Much of Shelley's literary production is hardly understandable without reference to Godwin's philosophy. Godwin went on earning his life largely by writing, especially novels, the most important of which are *Caleb Williams* (1794), and *St. Leon* (1799), and other works, among which a general history of England, *History of the Commonwealth* (1824–1828), and an *Essay on the Principle of Population* (1820), contrasting Malthus's theses. He died in London 1836 largely a forgotten author.

A Radical Thought

Godwin's political thought is concentrated and powerfully expressed in his main theoretical *opus*, *An Enquiry Concerning Political Justice*, firstly published in 1793, and then represented with revisions in two further editions, 1796, and 1798. To understand his philosophy of politics and law this is the book one should attentively go through. Godwin's philosophical architecture is built upon an interpretation of John Locke's empiricism: no innate ideas, mind as a mechanism to associate ideas as perceptions of an external material world, judgment as outcome of this exercise of association, language as representation of images, will as an operation of judgment. There is, however, some influence of Hume's evolutionary overview of society, and a general utilitarianism probably taken from the French Enlightenment (Helvetius especially), but also a normative approach to morality which is the outcome on the one side of Protestant moral philosophy: Priestly, Paley, Price are ever present in his work. On the other side, there is an original reading of Rousseau's approach to questions of practical philosophy. Protestant and secular enlightened philosophical motives are both active in his theoretical construction. This is fully anti-skeptical. Truth is claimed possible, and there is only one truth, which is the result of the minds hurting, so to say, each other. Godwin would enthusiastically repeat the French revolutionary slogan: *Du choque des idées jaillit la lumiére*. He says something similar: "If there be such thing as truth, it must infallibly be struck out by the collision of mind with mind" (*Political Justice*, I.iv). And there is only one right answer. Science and practice have an equal cognitive

core. This means that cognition is the basic ground for any form of normativity. Rules express, more than prescription, cognition, this based on the assessment of general utility, and taken from a third person perspective, the impartial spectator's one.

The question then arises whether Godwin defends an utilitarian ethics. This is doubtful, for the fundamental reason that the whole which utility is referred is permanently contrasted to the individual, and the latter, not the former, the individual not the whole, persons, not community, are taken as the holders and the bedrock of morality. General happiness should ever assessed through *private judgment*, and from the point of view of an individual. No aggregative arguments, as those usually employed by utilitarians, were here legitimate. Individuals cannot be sacrificed to the whole. This is a fundamental tenet of Godwin's moral philosophy. So much so that general will, and legislation in general, is considered with much suspicion. Its pivotal role in Godwin's theory is replaced by a different mode: mutual recognition.

Philosophical Anarchism

Godwin's radical individualism is also the basic reason of his philosophical anarchism. Law is traditionally justified as a device offering to morality a supplement of relevance and efficacy. It fills in – it is argued – two main gaps afflicting morality: a cognitive and a motivational gap. Morality is not laying rules precise enough to direct human conduct unequivocally, and its capacity of motivate conduct is only given by conscience, which can often be in contrast with strong affections and interests. Law by sanctions adds a new reason for action and compliance. And law through its positive character determines with certainty the normativity of a behavior. Now, Godwin objects to this strategy of justification. Law as a command cannot have a cognitive content. Cognition is offered through arguments, not through force and punishment. A command is not a reason for action, not even a secondary one, since it cannot as such act as reason. For the command to be treated as a reason depends on the private judgment of identification and assessment. It could but be a motive. On the other hand, a motivational gap if filled through force will deny normativity its meaningful core. A conduct will then be performed not because it is right, but only because of fearing a sanction. Morality is in this way betrayed and people, instead of progressing as good persons, are treated as only possible delinquents.

Moreover, the bulk of doctrines trying to offer legitimacy to political order are uncapable to justify obedience. There are three main doctrines in this area; (i) appeal to divine authority, (ii) appeal to the factual force of the powerful, or the normativity of the factual, and finally (iii) contractarianism. They are all three faulty according to Godwin. Divine authority theories are still silent about the criteria according to which God would grant to a specific norm or power its legitimacy. They do not specify what should be their merits to be approved by God beyond a generic reference to the value of obedience that remains desperately vague and indeterminate and so at the end of the day being just a blank cheque to whatever arbitrary rule. The normativity of the factual confuses the might with the right, leading again to a generic justification of citizens' passivity to authority, and severing the necessary connection between politics and morality. Eventually, a social contract has necessarily to be assessed and confirmed through private judgment, and it could not impose more than private judgment accepts. And even private judgment could not deny individuals moral character: "No consent of ours can divest us of our moral capacity" (*Political Justice*, III.ii). Contractarianism in this way is permanently open to individual contestation. There is no way out from anarchy from a political philosophical perspective – this is Godwin's conclusion.

The British author then tries to build up a legal theory that could be coherent to this ultimate finding, and this he does through a declarative notion of the legal rule. A law is a declaration of what is made evident through moral judgment. Legislation thus cannot be considered as prescriptive capacity. Executive and judicial powers will

be strictly following the legislative deliberations, and mostly operating in a deductive and instrumental manner. Power in this way will be minimized. *Philosophical* anarchism thus opens the door to *political* anarchism, and to a legal order and a political program where authority will never be rendered as a stable devise of society, since it can be permanently asked to offer reasons and explanations. Such a political program is not necessarily hostile to democracy, and to the building of political institutions; these, however, will have to minimize coercion and command to be legitimate. They should mobilize as much as possible individual assessment, "unrestrained communication of men's thoughts and discoveries to each other" (*Political Justice*, II.v). Private judgment will need mutual recognition and the self to find the truth will have to engage in discourse and collective deliberation. Individualism is not Godwin's last word, as it is proven by his thesis of mutual cooperation as an essential feature of human life, and an engine of social evolution, and eventually by his strong criticism of private property as accumulation and monopoly.

A Genealogy of Modernity

An interesting debate has taken place about the intellectual origins of human rights as a concept. This controversy is especially relevant, once one conceives rights as co-original with political modernity. In such debate two camps were confronted. According to the one side, human rights are to be found in the American revolution and in its more general cultural background. This was Protestantism, as it had been interpreted and exported by those Puritans that left England in search of a New Jerusalem in the other shore of the Atlantic. Human rights have in this way to be considered a product of radical individualism as generated by the principle of a direct dialogue between man and God without any clerical mediation. Private judgment and its freedom are to be seen as the core of human rights. According to the other side, it is mainly French secular Enlightenment that is given the main credit of the human rights predicament, whose fundamental document would be the 1789 French Declaration of the Rights of Man and Citizen. In this view, it were Rousseau and his fellow French new philosophers that gave shape and its sting to the notion of human rights, basing more on the design of a secularized world and of a human being no longer subject to divine command and a distant all-powerful God.

In the French tradition, it is rather the self-evolution of society that brings about an autonomous subject, and equality and freedom do not have a first theological justification. Private judgment is still central, but it is declined more in the second person, as an act of giving and taking reasons, not commands. In this view, equality is somehow prevailing on freedom, insofar as the latter is an implication of a more basic principle, which is the basic one of equal concern for all.

Now this debate could reach beyond the controversy about the origins of human rights and be reignited as a controversy about the sense and justification of anarchism as a political philosophy. And the two horns of the interpretive alternative are the same, one is confronted with when approaching and having to explain Godwin's thought. As a matter of fact, anarchism as firstly presented by the British philosopher is a theory of political modernity. Here again we might have two parties confronting opposite views. One party could appeal to a Protestant religious ascendency of anarchism, and Godwin's ideas, while the other would deny any religious background for it, and point out a fully secular, antitheological genealogy. Godwin's philosophy, and anarchism, could plausibly be presented as liberalism, that is as the doubt for authority operationalized, or as the need for justifying obedience to rules, once this is universalized and extended to every territory of social and private life. While liberalism adopts an antiauthoritarian stance only within the precinct or a piece of society, that is "civil society," private conversations, contractual transactions, public opinion formation, it still, however, maintains a good deal of authority and hierarchy within another sector of society, the one monopolized by State power: Now, such limitation can hardly be justified from an anarchist perspective. To the Anarchist, and especially to Godwin, the

requirement of giving and asking for reasons is all encompassing and absolute; no social precinct is excluded from it. Neither families or labor or market could escape the search for justification and a strict claim of autonomy and private judgment. Neither coercion nor automatic institution could be accepted by without mobilizing private judgment made then collective and universal.

This is the fundamental reason why capitalism, even anarcho-capitalism, that needs to have a bulk of operations subtracted to human design and consent, can never comply with the radical principles set by anarchism to social relations. While liberalism accepts property as a matter of course, or a historical *fait accompli* that does not need too much justification, and in any case conceptualizes it in terms of command and exclusion, anarchism will finally conclude that such form of property is equivalent to theft, to a stealing of autonomy and private judgment to people concerned. This is actually the conclusion of Godwin's main work on political justice.

As a matter of fact, to understand such predicament and on the whole the origins of political modernity, that is a permanent mainly unsuccessful run in search for justification for political and more generally existential subordination, as it is shown by Godwin's criticism, anarchism as theory cannot really skipped from the horizon of political philosophy. It is indeed central for an explanation of the birth and the intellectual roots of political modernity.

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The Character

Marie Gouze was born in Montauban on the 7th of May 1748 to petit bourgeois parents, Pierre Gouze and Anne-Olympe Mouisset, perhaps the biological daughter of Jean-Jacques Le Franc de Pompignac,

nobleman and provincial intellectual. At 16 she was made to marry Louis-Yves Aubry from whom she had a son, Pierre. She was soon widowed, refused to take her husband's last name and never wanted to marry again; moving to Paris, she changed her name to Olympe de Gouges (combining her mother's name and her legal father's last name slightly modified). In the capital at first she mixed in the social circles of the salons; later she entered the circles of the *philosophes*, becoming a friend of some of the most noteworthy members of the movement (among those, it is worth recalling Mercier de la Rivière, Condorcet and his wife Sophie), and she was affected in particular by the influence of Helvétius and Rousseau.

In such a way, beginning with a very basic education, she soon became well-read; involved by the revolutionary happenings, she started writing theatrical plays, often socially committed, and many *pamphlets* of political matter. The atmosphere of the time enhanced her interest in the themes of social justice, women's issues, and the problems of the oppressed. Her firm condemnation of the degeneration of the revolution casts a shadow on her among the Jacobins; through a pretext, on the 20th of July 1793, she was arrested, and, after a few months of difficult imprisonment, she was summarily tried and guillotined on the 3rd of November (Blanc 1989; Noak 1992; Blanco Corujo 2000; Perrot 2014).

Her best-known work is the *Déclaration des droits de la femme et de la Citoyenne*, an intelligent reading of the articles of the *Déclaration des Droits* of 1789; however, for a long time, her *Déclaration* and her entire work were ignored or little appreciated, mainly because of some bias about her person: a *sexist* bias (woman, beautiful, uneducated, she was considered frivolous and unable of writing her literary and political works by herself); a *political* bias (royalist for long time; a Girondin; fierce enemy of the Jacobins and Robespierre, she was considered a rearguard scholar); and a *cultural* one (all her writings were judged superficial and of poor quality). Only recently has the attention of the scholars focused on her life before her political-juridical and jus-philosophical thought.

de Gouges and the Enlightenment

Thanks to her insightfulness, de Gouges was able to absorb the distinctive ideas of the Enlightenment's *entourage*: her works reveal the texture of ideas typical of this movement not only as a school of thought but also as the expression of a radically new cultural approach and way of thinking (Blanc 1989, pp. 99 sgg; Blanc 2003; Noak 1992, pp. 51 sgg e 98–99). From the philosophes she acquires her reformist and anti-Jacobean spirit, her trust in the Constitution, her fight against superstition and prejudice, her concern for the oppressed, and her interest in themes such as universalism and natural law which characterize her thinking (de Gouges 1993c, EP II, p. 48); the conceptual grounds of such ideas are, in particular, in the materialism of Helvétius and in a naturalist reading of Rousseau.

Her enlightened inspiration seems everywhere: in her early writings, such as the *Remarques patriotiques* of the December of 1788, de Gouges considers the intervention of the good, wise, and well-educated citizens a solution for the problems of her country; this is because she believes that a revolution without an enlightened guidance will certainly fail (de Gouges 1993b, EP I, p. 49). In the *Déclaration des droits de la femme* – we will come back to this – she goes even beyond the theses of the *philosophes*: reaffirming that reason and nature are tools against superstitions, fanaticisms, and prejudices that are detrimental for the whole female gender (Ivi, p. 209; Beckstrand 2009, pp. 26 and 90), she resumes, in an original way, some universalistic themes peculiar to the Enlightenment. She replaces the terms *homme* with *femme et homme* and *citoyen* with *citoyenne et citoyen*, emphasizing the mystifying character of the term "man" which, when it was employed to indicate all mankind, concealed a political and ideological choice. This does not mean that de Gouges denies universalism (Maino 1992); if anything, she includes "woman", with a meaning that is as generic as that of the word "man" for the revolutionaries; hers is, therefore, a universalism *inclusive* also to women. In a few words, she considers the term *homme* misleading, as it is not a shared name, but it is "gendered" and applied

with the undeclared purpose of excluding women from the enjoyment of civil and political rights, among which she includes the need for an equal divorce law (de Gouges 1993b, EP I, p. 48). She amends, in this way, the *Déclaration* of the 1789 emphasizing how women and men have the same rights; however, at the same time, she highlights their differences and the different needs they have.

In order to defend, besides women, the poor, the sick, and the blacks condemned to slavery, de Gouges often resorts to theatrical plays; in particular, she fights against slavery confronting the hostility of the powerful class of the *colons* (Ivi, pp. 131–133), as it emerges through the comedy *Zamore et Mirza ou l'esclavage des Négres*, which representation was violently boycotted (de gouges 1991; Masson 2002; Tarin 1998; Blac 1989, pp. 46 sgg. and 65 sgg.; Noak 1992, pp. 76 sgg.). Particularly important in forming de Gouges ideas, also in this topic, is the appeal to Rousseau, reading the works of whom she has matured her sensibility against "cette odieuse traite des nègres" and has enhanced her need to defend "cette espèce d'hommes tyrannisés avec cruauté depuis tant de siècles" by the natural indignation of her soul and not through complex political reasonings (de Gouges 1993b, EP I, p. 136). Rousseau is an important inspirator also for the centrality that she gives to her allegiance to her oath for the Constitution of the 1791 (as we will see shortly). Like the Genevan, she is against the death penalty; however, like him, in the *Pacte National*, she supports the capital punishment when the citizen – whoever they are – does not respect such an oath, favoring their private good to the public good (de Gouges 1993c, II, pp. 137–138).

Revolution, Republicanism, and Anti-Jacobinism

In the *Lettre au Peuple, ou le projet d'une Caisse patriotique* de gouges examines in detail the revolutionary events in France; she starts by describing the economic crisis that afflicted France in the last decades of the eighteenth century, the crisis that has been one of the main causes of the revolution. Against violence, she disapproves of popular revolt; the solution is not in the "guerre civile" but in the "lumières des États-Généraux" (de Gouges 1993b, EP I, p. 40). She proposes the institution of a "patriotic purse", a fund to which citizens with civic spirit should contribute according to their wealth in order to combat social and economic inequality (Ivi. p. 41). During the summoning of the Estates General, de Gouges sides since the beginning with the third estate, which at the end of the 1788 was not taken for granted (Ivi., p. 74 e p. 79.); however, at first, she trusts the king's mediation, and, for this reason, she addresses appeals for the respect of the constitution to all political parties, including the monarchy, as we read in *L'esprit français* (Ivi, p. 83; Blanc 1989, p. 111).

Facing the possibility of a civil war, de Gouges disapproves both of those who advise the king to support the breakaway faction and the Girondins who see in the war a solution to the current problems; paradoxically, she shares Robespierre's hostility for the war, albeit with different reasons. The war, in fact, contrasts with the aims of the revolution: gender equality, the freedom of all citizens, the dignity of all human beings, and the solution of social-economic problems.

Soon, estrangement from the monarchy becomes inevitable; in the spring of 1792, de Gouges declared herself a republican (de Gouges 1993c, EP II, p.84). When, on the 25th of September 1792, the republic is proclaimed, she embraces its cause, connecting republicanism and patriotism.

The radicalization of the revolution convinces de Gouges that Jacobin politics is very dangerous for France (Ivi, pp. 110–111): the Jacobins, who presented themselves as an antidote to despotism, are in reality "un vrai poison despotique" (Ivi, pp. 113). Then, in line with her principles, de gouges begins the controversy that will lead her to directly attack the Jacobin's leaders (particularly Robespierre) and that will seal her fate.

She is against the execution of the king and, as a republican, she aims at defending him: Louis Capet (as he is now called), as king, was certainly guilty but once deprived of the title "il cesse d'être

coupable aux yeux de la république"; the winners, having dethroned him, could let him alive. His greatest crime was "de naître roi dans un temps ou la philosophie préparait en silence les fondements de la république." Having clarified that the sovereignty is in the people, de Gouges asserts that it would be more consistent to exile rather than killing Louis Capet (Ivi, pp. 192–194) and more useful to the motherland to exchange the life of the whole royal family for a peace treaty with the European powers (Ivi, page 203).

In two writings of November 1792, she attacked with even more determination the bloodthirsty politics of Robespierre, who gave himself to the revolution, but, being an ambitious man, he allowed unnecessary excesses (Ivi, pp. 169–170). Therefore, faced with the escalation of events, she loses hope to usefulness of her peaceful and conciliatory tones and strongly accuses those whom, like Robespierre and Marat, she considers the biggest threat to the reformist spirit that leads to the achievements of the revolution.

The Terror, as is well-known, triggers a series of dramatic consequences for French politics both domestic and foreign. Although aware of the difficult political situation, de gouges in the pamphlets of 1793 does not change her position: she repeatedly makes exhortation to respect the constitution and the laws, because this is the only way to give new foundations to the republic; she restates her critique against violence, contrary to the goals of the true republicans, and in this way she tries to bring the revolution back to its origins and to limit the disproportionate power of Montagnard and Sansculottes.

In a work of the 9th of June, called *Testament politique d'Olympe de Gouges*, she reasserts both her deep republicanism and the fact that she has defended constitutional monarchy only to avoid the evils that would have resulted from its fall; she is aware of risking death sentence (Marie Antoinette and Madame de Roland have already been condemned to death), but she does not tone down or soften her accusations; and she keeps opposing the republican clemency to violence (Ivi, p. 236). In July she tries to have *Les trois urnes, ou le salut de la patrie, par un voyageur aérien* posted on the walls of Paris, in which she proposes how to sort out the internal disputes of revolutionary France. In her work she argues that citizens could be given the task of choosing among three different institutional forms: "*Gouvernement républicain, un et indivisible, Gouvernement fédératif, Gouvernement monarchique*" (Ivi, p. 247).

The Jacobin government admits only the "one and indivisible republican government"; therefore, the proposal is considered an act of high treason, hence, the pretext for the arrest and conviction of Olympe de Gouges, guilty of maintaining her freedom of thought and of defending the equality and dignity of all human beings, regardless of class, race, and sex (Blanc 2014).

The *Déclaration des droits de la femme et de la citoyenne*

In de Gouges' best-known work, the *Déclaration des droits de la femme et de la citoyenne*, dedicated to the Queen and published in 1791, the themes presented in her literary works and pamphlets are expounded with greater consistency (de gouges 1993, EPI; de gouges 2007; Mousset 2003; Zanelli Quarantini 2009; Loche 2010–2011). The *Déclaration*, with its complementary parts (a Dedication, an Introduction, a Preamble, as well as a Postscript and a "social contract" added later), has a greater consistency of argument than her subsequent writings, often dictated by contingent debates.

The *Déclaration* moves on two levels: on the one hand, de Gouges claims for women the same natural and citizenship rights that men have seized thanks to the revolution; in this case, she argues for an approach to equality which includes *difference* between men and women to the full advantage of the latter. On the other hand, while accusing men of having exploited and oppressed women, she encourages them to take on the leading role in the fight for their own rights.

Men oppress women with a tyrannical and unjustified power: "Homme, es-tu capable d'être juste? C'est une femme qui t'en fait la question; tu ne lui ôteras pas du mois ce droit. Dis-moi? qui t'a donné le souverain empire d'opprimer mon sexe?

ta force? tes talents?" (de Gouges 1993b, EP I, p. 205). In the whole of creation, human beings alone do not have equality between the sexes; men's unjust deeds, therefore, have not only a heavy social and economic fallout, but they are also against nature. Therefore, they must be condemned also by the means of the doctrine of natural law. It is not by chance that in the second article of the *Déclaration* de Gouges introduces a significant change compared to the text of 1789, which states that the natural and imprescriptible rights of man are "*la liberté, la propriété, la sûreté et la résistance à l'oppression*"; de Gouges adds a *surtout*: "surtout la résistance à l'oppression" (Ivi, p 207). This oppression (in the private and in the public sphere), which nowadays is defined as "gendered", vitiates the rights to freedom, property, and security that, at least on paper, women have achieved during the Girondin revolution.

In the *ancien régime*, many women of the upper class had achieved powerful positions but at the price of bending to wholly male standards that had relegated them to the role of intriguers and courtesans (Beckstrand 2009, p.26). However, in terms akin to those used by Mary Wollstonecraft, de Gouges distinguishes this kind of women from all the others, who have known a different fate, too often handled by male arrogance. She writes on that: "une jeune personne sans expérience, séduite par un homme qu'elle aime," who decides to abandon "ses parents pour le suivre," will have her life marked by marginalization and misery (de Gouges 1993b, EP I, p. 210). Alongside with Wollstonecraft, she considers it necessary for the improvement of morals and for the success of the revolution, for women to act without waiting in vain for men to attain their rights for them (Loche 2012, p. 118). According to the principle of equality, taking an active role in her liberation is the only way for the woman "naît libre et demeure égale à l'homme en droits" (Ivi, p 207). Among the two thinkers that, with good reason, can be considered the first feminist thinkers, there are surely many differences, distinguishable in the outline of Wollstonecraft's *Vindication* compared to the Déclaration of de Gouges, in their education or, for instance, in the opposite approach to Rousseau. However, they apply the same innovative spirit in their impetus for the fight for women rights and for the defense of their specific needs.

In addition to these general approaches, de Gouges develops political-social ideas on issues that can nowadays be defined as "feminists": in the Preamble she states that "les mères, les filles, les sœurs", women in a word, as "représentantes de la Nation", must defend their natural rights (Ivi, p 206). This is, in line with the atmosphere of the revolution, the heart of de Gouges' political positions. Women are an active part of the nation, which is "the réunion de la femme et de l'homme": it is not an abstract entity but concretely the whole of *all* those who form it (Ivi, p 207, Beckstrand 2009, p.94).

Concerning freedom, what she stresses in Article 4 is important. She defines freedom and justice together, rooting them in the respect for individual property; in this way she underlines how the issue of private property is one of the biggest obstacles to women's freedom (de Gouges 1993b, EP I, page 207). In the early days of the revolution, there were attempts to intervene for establishing conditions of greater equality between men and women, but they remained almost always on paper; in 1791 de Gouges does not know yet (but clearly fears and senses) that soon the partial achievements obtained by the Girondins will be cancelled by the Jacobins. Among those achievements, the most relevant and necessary are those that allow every woman to own property, to work, to participate in the economic life of the society, to which, moreover, she must contribute by paying the right taxes (Ivi, p. 208). If property is a state of freedom because it is the premise of social equality and autonomy, freedom is, together with equality, one of the imprescriptible natural rights that men have claimed for themselves but of which women cannot be deprived. In particular, de Gouges presses on *freedom of speech* and what she writes in Article 10 will be later on an accusation against her: "Nul doit être inquiété pour ses opinions mêmes fondamentales: la femme a le droit de monter sur l'échafaud; elle doit avoir également celui de monter à la Tribune; pourvu que ses manifestations ne troublent pas l'ordre public établi par la loi" (Ivi, p. 208). The right to

freedom of speech is not an abstract right: in Article 11 she applies it to defending single mothers, arguing that the right must include the freedom of every female citizen to declare to a man that he is the father of her child (Ivi, p. 208; Beckstrand 2009, pp. 91–92).

The capacity to generate, which also shows, according to her, that women have greater physical strength, has been used by men to dominate women socially and economically, and only the natural right to freedom, together with social equality, the enjoyment of political rights and economic independence can break this unjust domination. The end of female submission requires guaranteeing that a woman must have the rights of her children recognized: the *true* "social contract" is an equal "acte conjugal" between a woman and a man who agree to share life, fortunes, and children. Solely in this way it would be possible to fight prejudices and purify morals (de Gouges 1993b, EP I, Ibid, pp. 211).

Modifying Article 12 of the Declaration of 1789 where "la garantie des droits de l'homme et du citoyen" is linked to "une force publique," de gouges stresses that "la garantie des droits de la femme et de la citoyenne nécessite une utilité majeure" (Ivi, p.208), with it she aims to highlight that the situation of women must be not only radically changed but also addressed with specific resources; this approach is present in many other writings, for example, in the *Dialogue allégorique (Projet utile et salutaire)*, which examines some very innovative projects aimed at improving the condition of women.

Conclusions

It has been stressed that the themes of the *Déclaration* that are dedicated to women are also extended to all the oppressed in other works; and de Gouges invites them to leave by themselves their condition of minority, as the Enlightenment teaches, an Enlightenment that she interprets as an invitation toward reason, peace, and the intelligent and gradual reforms of injustice. Having acquired such awareness, it is necessary to move to action, condemning through the strength of reason the oppression by men and powerful people and advocating practical solutions: hospitals for women during puerperium, decent poorhouses, and the organization of a widespread education to hygiene.

From a general point of view must be outlined how in her works de Gouges highlights in particular two themes well-linked to each other: on the one hand, the controversy against the excesses of the Jacobinism and her support for the moderatism of Girondins and, on the other hand, the incessant concern for social-economic and political-juridical reforms. From her point of view, revolution means reform; however, it means also – as a consequence – allegiance to the constitution of 1791, increasing awareness of the uselessness of the monarchic institution, the importance, on the contrary, of the making of a good republican model. Such a model must respond to precise requirements where – politically and in a juridical-constitutional way – the rights of the *citoyennes* and of the *citoyens* are defended, on the basis of a gradual but constant reduction of social, political, juridical, and economic inequalities, for the removal of every kind of privilege and for the spread of education and health for all social classes.

It cannot be denied that, within this overall perspective, the constant fight for women's rights has a privileged role; on the one hand, women must have their equality to men recognized from a general juridical-political perspective; on the other hand, they must gain a legislation that considers the specificities that have historically characterized their social-economic condition. It must be their task to address such specificities and decide when they do not need such legislation anymore; therefore, it must be them who decide and seize practical changes but also philosophical, juridical, and political categories with which achieve and conquer their dignity.

Having said that, in conclusion it is appropriate to outline that the reformist spirit of de Gouges finds a substantial finalization only through the collaboration of everybody, with the achievement of a substantial equality and dignity for every French citizen. The revolution

as negation of violence and openness to reformism is, thus, an incitement to the active participation of male and female citizens to a radical moral, economical, social, juridical, and political change of the nation.

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▶ Rousseau, Jean-Jacques: Theory of Law
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Gournay, Marie de

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Introduction

Marie de Gournay (1565–1645), philosopher, essayist, philologist, and translator of classical authors, was an unusual writer recognized in the European intellectual circles of her time, and her rich intellectual career spanned more than half a century.

She was born in Paris in 1565 into a family of the small aristocracy of Picardy (Northern France), daughter of Guillaume le Jars and Jeanne de Hacqueville, descendant of a family of jurists, and the eldest of a family of four daughters and two sons.

Her father, treasurer and secretary of the King's Chamber, died when she was very young, which led to the deterioration of her family's fortune. Because of this, her mother decided to move from Paris to Gournay-sur-Aronde in Picardy where the manor that her father had bought a few years earlier was located. The house represented the most important property of the family's assets and from which Marie decided to take her surname. Upon her mother's death in 1591, with the family's limited resources, Marie became the head of the family and took care of her three sisters and two brothers.

After 1595, Marie de Gournay spent several decades in Paris where she was active in the life of the salons and the Court. She actively participated in European intellectual life and was attentive to the new contributions to human knowledge.

An Unusual Intellectual

Called by her contemporaries "the French Minerva," "the tenth Muse," and "the Mermaid of France" (Isley 1963: 11), from a very young

age Marie de Gournay was interested and determined to devote herself to study and was not daunted by adversity to carry out her desire, seeking to explore new ways and strategies to move beyond what the society of her time provided for women.

Gournay took charge of her own self-education, as did many women of her time. Aware of the limitations that conventional marriage posed for women and wishing to devote herself to intellectual life, she decided to remain celibate and never married. Her ideas on marriage are set out in her first work, *Le Promenoir de Monsieur de Montaigne*, a fictional story published in 1594, in which she discusses, among other issues, the unequal status of women and the dominant position that men enjoyed in marriage.

Marie de Gournay was a prolific writer interested in many different fields of knowledge, such as philosophy, science, religion, and literature. Inspired by the political and social events of her time, her writings, her moral philosophy for example, are fully rooted in her time. Gournay bequeathed a rich and complex body of work consisting of a wide variety of genres, essays, poetry, and only stopped writing shortly before her death in 1645, at the age of 80.

She also participated actively and passionately in the intellectual debates of the time as, for example, in the debate on the French language that was the subject of reflection in the salons and at Court in 1630 (Viennot 2008, II: 78). Marie de Gournay organized gatherings in her own house, where the most important Parisian intelligentsia gathered. According to Michel de Marolle, "it was in the house of this honest maid that the first idea of the French Academy was conceived by all those who visited her daily" (Fogel 2004: 281), contributing to the writing of four treatises on language.

Interested, above all, in the situation of women, Gournay intervened brilliantly in the political and cultural debate known as the *Querelle des Femmes*, as the philosopher Prudence Allen has pointed out, introducing a turning point in the debate with her ideas.

Despite all her intellectual activity, Gournay is essentially known for her relationship with the philosopher Michel de Montaigne and for being the editor of the *Essais*. She received much praise during her lifetime, and after her death, numerous epitaphs were dedicated to her (Isley 1963: 296–297). Although during her lifetime she was, at the same time, discredited and ridiculed by some of her contemporaries, who disliked her figure and attitude, ultimately, even her enemies recognized her intellectual worth, the sharpness and originality of her thought, and her great scholarship.

Fille d'Alliance de Montaigne and Editor of *Essais*

Fille d'Alliance de Montaigne and editor of his *Essais*, Marie de Gournay's interest in the figure of the philosopher dates back to when she was 18 or 19 years old when she first read the *Essais*, which the author had published for the first time in 1580.

From that moment onward she expressed great enthusiasm, interest, and a desire to meet him personally and exchange her thoughts and intellectual concerns with him. The first meeting with Montaigne took place in 1588 in Paris, where Marie de Gournay was staying with her mother, who had taken her there in an attempt to introduce her to the Court in order to find her a husband. When they met, after the young woman asked for an interview, Montaigne was impressed by the young woman's intelligence, and accepted the invitation of both Gournay and her mother to accompany them to Picardy, where he stayed for a long period. During this period, Gournay and Montaigne worked on the correction and expansion of the edition of *Essais* that the author had just published in June 1588. During the autumn of that year, the relationship of affective and intellectual alliance between Marie de Gournay and Montaigne was sealed: a paternal-filial relationship.

Shortly after Montaigne left Picardy (1588), Marie de Gournay wrote the work *Le Promenoir de Monsieur de Montaigne par sa fille d'alliance*, dedicated to her adoptive father, published in 1594. Intellectually, Gournay is often depicted as

dependent on Montaigne. Although it is true that Gournay's name is linked to Montaigne's, and perhaps without Montaigne she would not have edited and republished *Essais*. The relationship undoubtedly facilitated her entry into the scholarly world of the time and her becoming the "woman of letters," which ultimately, favored the edition of her own works. It is also true, however, that her role as author impacted on Montaigne's intellectual life. In this sense, critics have pointed out a series of aspects that would confirm Gournay's intellectual influence on the illustrious thinker and, in particular, on the opinions about the female sex that Montaigne presents in his *Essais*.

Montaigne died in 1592 when he was preparing his sixth edition of *Essais*, which was completed by his *fille d'alliance* and published in 1595. For this edition Marie de Gournay wrote a long prologue for which she received harsh criticism from her contemporaries, among other things, for her boldness in showing herself as the author she wanted to become and her denunciation of the impediments that the established social order imposed on her aspirations for freedom, in particular, and those of the female sex overall. Between 1595 and 1635, nine editions appeared edited by Marie de Gournay or under her responsibility. The latter makes a correction of meticulous accuracy of *Essais*, tending to the idea of a perfect text (Balsamo 1999: 136), and it would be her who is recognized as the authoritative editor of the *Essais.* The same meticulousness was applied by Marie de Gournay in her works by correcting, rewriting, and overseeing the edition of each of her texts.

On the other hand, Gournay's influence on the knowledge and transmission of Montaigne's work has traditionally been valued, but not her unique and rich contribution to the history of philosophical thought which goes beyond her work as an editor. As has happened with the ideas of other women thinkers throughout history, until the emergence of the women's movement in the nineteenth and twentieth centuries, her contribution to the history of philosophical thoughts or philosophical western tradition has not been highlighted and her legacy has not been given visibility. This has instead been carried out on the whole by academic feminism. Her writings and contributions are now fully recognized.

An Author of *Querelle des Femmes*

Marie de Gournay was one of the most significant French language authors and thinkers of the *Querelle des Femmes*. Her writings in defense of women and equality between the sexes are considered a turning point in the debate: a public debate that had been going on since the end of the fourteenth century in Europe and that acquired a great revitalization in the sixteenth century in France.

The abovementioned debates questioned the dignity of women, their intellectual and political abilities, and the relationships between the sexes. Women and men from the most influential cultural and political circles of the time participated in the debate in various ways. Gournay sought their authorization as a woman of letters – *femme savante* – because she was fully aware of the difficulties she had as a woman to have her opinions and ideas heard and recognized. She understood that her word is "parole de femme" and "parole de savante" two reasons for not being taken into consideration. She knew from her own experience the mechanisms of disavowal of the feminine word and experience, a theme present in *Querelle*, which Marie de Gournay unveiled and denounced with great intelligence and subtle irony in several of her works. But she did not stop at denunciation; she sought ways, paths, and spaces to strengthen her voice. She thus, opened new political and symbolic spaces in which women could be, do, and speak up as men did.

The concept of "equality between the sexes" was introduced by Marie de Gournay, right from the title of her most recent work, *Égalité des hommes et des femmes* [Equality of Women and Men] (1622), thus initiating a new discourse on the relationship between the sexes. The work was published 50 years before the famous *De l'égalité des deux sexes* by François Poulain de la Barre. The concept of equality between the sexes

introduced by Marie de Gournay was developed and affirmed in the orbit of Cartesian philosophy by other authors who would later follow her (e.g., Anna Maria van Schurman, François Poulain de la Barre, and Gabrielle Suchon, throughout the seventeenth century). This concept was to have a, major impact on the philosophical and political thought of the Enlightenment.

For Marie de Gournay, the defense of women was always a central issue in her writings, especially the lack of education to which women were subjected. Gournay points out with forcefulness and conviction that the inequality between the sexes is not rooted nature, but in the prohibition of women's access to knowledge. This idea, which is at the basis of the author's thinking, and which she shares with other thinkers of *Querelle des Femmes*, such as the fifteenth-century writer Christine de Pizan, leads her to claim women's right to education – not just any kind of education, but a quality education that allows them to be independent, free, and also to have the possibility to choose their life path under the same conditions as men.

Marie de Gournay's most significant work in the *Querelle des Femmes* is *Égalité des hommes et des femmes*, dedicated to the Queen of France, Anne of Austria (1601–1666). Gournay maintains a common practice of other authors of works in defense of women in the context of *Querelle*, which consisted in addressing their defenses to an authority figure of the time under whose protection they placed their writings. This text clearly and explicitly offers a defense of the female sex and a vindication of equality between women and men, as well as a denunciation of slander against women and misogyny.

Of a similar nature, though rather shorter, is *Grief des Dames* [Complaints of Ladies] (1626), in which she delves with irony into the fact that women are forbidden to use public speech and where she makes an impassioned denunciation of the pitiful situation in which women found themselves (Noiset 1996: 72).

The two works were expanded and reprinted in the author's edition of her complete works under the title *Les Advis ou les presens de la demoiselle de Gournay* published in 1634 and again in 1645.

In another of her works, *Apologie pour celle qui écrit* [Apology for the Writing Women] (1626), the author defends herself against the slander and insults to which she had been subjected by her enemies and also by supposed friends, who gave credence to the defamations made against her. Throughout her text, Gournay offers us a detailed analysis of aspects that she considers fundamental in her biography, as well as relevant questions of her time.

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Governmentallity and Law

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> We live in an era of governmentality discovered in the eighteenth century. Michel Foucault (2007, p. 109)

Introduction

"Governmentality" is an "ugly word" (Foucault 2007, p. 115). It is, nevertheless, an interesting and important word to understand the institutional processes of governing, and implicitly of law, in our modern neoliberal era. Governmentality is not a "theory"; it is, rather, a concept and a *tool* by which to better understand what governing is and how it can be thought. The neologism is commonly attributed to Michel Foucault, who has at different times been labeled a philosopher, social historian, and poststructuralist. When Foucault gave the "Governmentality lecture" in February of 1978 at the Collège de France his title was Professor of The History of Systems of Thought (Foucault 2007, pp. 87–110); perhaps it is this lack of allegiance to a particular discipline, and focus on *how to think* "things" (e.g., government), that has meant that governmentality has been appropriated by not one but a number of disciplines within the social sciences, most notably criminology, geography, and sociology.

Law has lagged behind somewhat in seeing the value of governmentality to studying, teaching, and interrogating the law. Law and governmentality remains an "alternative perspective" to examine the "what is law" question, with sections on Foucault and law featured in textbooks as "critical jurisprudence" rather than "jurisprudence" per se (Douzinas and Gearey 2005, pp. 43–76 on 'Law's Others: Postsructuralism and Law'; Sokhi-Bulley 2013). Yet there is significant value in a governmentality perspective on law. Law becomes more than (only) rule, dominance, and sovereignty; governmentality means looking at the "tactics, techniques, functionings" of law (Foucault 1991, p. 26) – its institutions, procedures, and processes – to discover law *otherwise*. That is, the way in which law not only provides a normative code of conduct but how it controls behavior, regulates the way in which individuals manage themselves, and produces the way in which we understand subject identities and societal truths in our given social context. This chapter looks at the example of rights to illustrate the relevance of governmentality for (human rights) law.

What Is "Governmentality"?

Whilst obviously a play on the word "government," governmentality is synonymous with power – or, more accurately, power relations. Foucault's work is essentially concerned with the way in which power operates within society to produce certain subject identities and certain societal truths. So, for instance, when in 1975 Foucault first published *Discipline and Punish: The Birth of the Prison*, he described how the subject of the "delinquent" and the phenomenon of "delinquency" is made possible through the operation of a kind of power he calls disciplinary power (Foucault 1991). This is a micropower that targets the body (to produce it as docile), via minute tactics and techniques (including a prisoners' timetable and the layout of prison cells), and that operates via a permanent and automatic surveillance. By the late 1970s, when he gave the lecture series *Security, Territory, Population*, Foucault moved to a macrolevel of power that targets and manages populations and that operates through a concern with security.

He begins the series with a return to a previous theme of biopower (see Foucault 1998, pp. 140–141, 143–144), which describes a kind of power that relies on the biological features of bodies in order to manage the population; that is, "the set of mechanisms through which the biological features of the human became the object of a political strategy, of a general strategy of power" (Senellart in Foucault 2007, p. 1). However, this theme is largely dropped for the most part of the series as the focus becomes the "problem of government," or *governmentality* (Foucault 2007, p. 88); that is, how a new technology of power emerged in the eighteenth century, which signaled a move away from sovereignty over the territory to the management of populations – this being technologies of security. Foucault questions what the effects of this change were on governmental practices and the nature of the new "rationality" that governs them (Foucault 2007, p. 378). "Can we say, then" he asks, ". . .that the general economy of power in our societies is becoming a domain of security?" (2007, pp. 10–11). It is this concern with the general mode of power that regulates populations that has been appropriated by the social sciences and branded "governmentality studies," elaborated below.

It is therefore difficult to ascribe a theory of power, or of governmentality, to Foucault as what he gives us instead are "just fragments" of thought (Foucault 1980, p. 79) or "tools" by which to understand the way in which we are made governmentable (i.e., made into subjects; on Foucault's "tool-box" see Foucault 1994, pp. 523–524). To do this, the word "government" alone was not enough – as it does not connote the "mentality" of government; that is, how to think the processes of government. In definitional terms, then, governmentality has two elements: it refers both to the actual process of government and to a way of thinking about the processes of government. In other words, it is both the art (process, or method) and rationality (way of thinking, or methodology) of government (Gordon 1991, p. 3; Sokhi-Bulley 2016, p. 10).

The art of government needs us to understand "government" as control, or management, or regulation; that is:

> This word [government] must be allowed the very broad meaning it had in the sixteenth century. "Government" did not refer only to political structures or to the management of states; rather, it designated the way in which the *conduct* of individuals or of groups might be directed – the government of children, of souls, of communities, of the sick (. . .) *To govern, in this sense, is to control the possible field of action of others*. (Foucault 2002, p. 341)

Government, then, refers not to a governing body or to a kind of sovereign *power over* individuals – but, rather, to managing the behavior of a collective. Foucault has elsewhere called this the "conduct of conducts" (2002, p. 341); that is, the regulation of behavior. In a lecture given as part of the *Security, Territory, Population* series in 1978, posthumously given the title "Governmentality," Foucault presents his most concise definition of the term (Foucault 2007, Lecture Four). He explains that "governmentality" means three things: first, "the ensemble formed by the institutions, procedures, analyses, reflections, calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population." Second, governmentality refers to "the tendency that,

over a long period and throughout the West, has steadily led to the pre-eminence over all other forms (sovereignty, discipline and so on) of this type of power, which may be termed 'government'." Third, governmentality is the (result of the) process by which the state gradually "becomes governmentalized."

The art, or game, of government draws on discipline and biopower (and comes from yet another tool in Foucault's tool-box, pastoral power). Far from disciplinary technologies of power being removed from the governmentality relation, there is now a triangle, sovereignty-discipline-government (sovereignty is not outside the power relation either – this is important for law and governmentality, since there are clear functionings of sovereign power that we are faced with, for example, judicial or police decisions/actions may be read as such) (Foucault 2007, pp. 107–108). A concern with discipline means that governmentality, though concerned with a macrophysics of power (which has a collective subject, the population, as its target) rather than a microphysics (which targets a singular body, such as the body of the prisoner), retains from discipline a concern with a "multiplicity of often minor processes [which] . . . gradually produce the blueprint for a more general method" (Foucault 1991, pp. 136, 138–139). The focus remains therefore on the mundane, on "meticulous, often minute techniques," which control the behavior of a collective (Foucault 1991, pp. 138–139). In this governmentalized space, tactics – and not *laws* – are what is important to observe the relations of power that produce governor/governed identities. "Governmentality" is, furthermore, a secularization of pastoral power (see further Golder 2007). The objective of governmentality is to introduce "economy" into political practice and to ensure the "proper management" of "a sort of complex of men and *things*" – these things being "men in their relationships, bonds, and complex involvements with things like wealth, resources, means of subsistence, and, of course, the territory with its borders, qualities, climate, dryness, fertility, and so on" (Foucault 2007, p. 96). While the theme of biopower fades, population figures heavily in the *Security, Territory, Population* lecture series as a novel, "absolutely modern" idea key to the functioning of political power. "Population" refers not simply to 'people' but to phenomena and variables, such as birth rate, mortality rate, and marriage statistics (Foucault 1998, p. 11). It thus encompasses the whole field of "the social", a phrase that describes the network of social relationships and the site at which political power – and law – operates (Gordon 1991, p. 1, 28 and 34).

A fundamental rule of the Foucauldian game of power, and thus in understanding governmentality, is that "[w]here there is power, there is resistance" (Foucault 1998, p. 95). If governmentality is the "conduct of conducts," then there must be space for "counter-conduct." If conduct refers to:

> the activity of conducting (*conduire*), of conduction (*la conduction*) if you like, but it is equally the way in which one conducts oneself (*se conduit*), lets oneself be conducted (*se laisee conduire*), is conducted (*est conduit*), and finally, in which one behaves (*se comporter*) as an effect of a form of conduct (*une conduit*) as the action of conducting or of conduction (*conduction*), (Foucault 2007, p. 193)

then there must be a dimension that is "refusal" of the form of being conducted (Foucault 2007, p. 201). Counter-conduct is that behavior which says, "We do not wish to obey these people. . . We do not want this pastoral system of obedience. We do not want this truth" (Foucault 2001, 2007). It is a struggle against the processes of regulation, management, and control (i.e., conduct). It is also a way of (re)thinking the way in which we are taught to think *things* – such as rights (Golder 2015; Sokhi-Bulley 2016), and law (Golder and Fitzpatrick 2009). Thus, adopting a law and governmentality approach might in itself be considered a counter-conduct to the way in which we are taught to "properly" think law – as that which is posited by an authority – rather than a series of governmental practices that operates to regulate behavior, construct subject identities and norms of conduct.

This "thinking" otherwise brings us back to governmentality as a rationality. As a way of thinking, governmentality represents an important methodological *tool* (not theory) within Foucault's "tool-box" that he offers to "users," not "readers" (Foucault 1994, pp. 523–524). It is a "diagnostic tool" by which to observe how

government happens "at a distance," through various practices and processes, that produce our understanding of the social, political, and indeed legal world (Walters 2012, p. 2; Garland 1997). Perhaps the most attractive feature of governmentality is its creativity – it provides a flexible and open-ended lens through which the minor tactics of governing are magnified in all sorts of fields of academia and practice (Rose et al. 2006). These diagnostic studies can all be labeled "governmentality studies," where the "problem of government" is diagnosed in, for instance, the areas of crime control, healthcare, asylum, migration and borders, and human rights (Garland 1997; Rose 2000, 2007; Bigo 2002; Darling 2011; Walters 2004; Golder 2015; Sokhi-Bulley 2016). That *law* and governmentality remains an "alternative" pairing may have something to do with the assumption that Foucault had, at first glance, little to say on law itself (Sokhi-Bulley 2013).

Why "Law *and*"?

There are two things to address with respect to the "law and" label – first, what is "law" (for Foucault) and, second, why "law *and*." First, it is noteworthy that Foucault refers at various times to "law" and to the "juridical" – and to variations of the latter, such as the "juridico-political" and "juridico-disciplinary" (Foucault 1998, pp. 87–88; 1980, p. 108). Is there a distinction between these terms, notably between law and the juridical?

In the first volume of *The History of Sexuality*, Foucault equates law with sovereignty and defines it as the formulation for the exercise of a repressive kind of power: "Law was not simply a weapon skillfully wielded by monarchs; it was the monarchic system's mode of manifestation and the form of its acceptability. In Western society, since the Middle Ages, the exercise of power has always been formulated in terms of law" (Foucault 1998, p. 87), hence his infamous statement: "In political thought and analysis, we still have not cut off the head of the king" (Foucault 1998, pp. 88–89). In performing the beheading himself, Foucault goes on to explain how this kind of repressive power has been replaced in modern society by power relations of discipline and, later, government (Foucault 1980, p. 107, 1991, 2007). The juridical, he writes in this same passage in *History of Sexuality*, refers to "new methods of power whose operation is not ensured by right but by technique, not by law but by *normalization*, not by punishment but by control, methods that are employed on all levels and in forms that go beyond the state and its apparatus" (Foucault 1998, p. 89). Tadros reads from this that law is distinct from the juridical; the latter refers to the conception, the whole network of power relations. And the law then is the *dispositif* (or, apparatus) through which a connection between disciplinary power and governmentality is made. Golder and Fitzpatrick also support a difference: law/the legal is the norm/the normative (constitutions, legal codes, the legislature), whereas the juridical is the "institution of law" – a normalizing power.

So, if Foucault does mention "law," what relevance did it have for his project on power and what can we take from Foucault's law to assess the value of law in modern neoliberal society? Two key texts have dealt with (versions of) this question: the first remains Hunt and Wickham's *Foucault and Law* first published in (1998), and the second is Golder and Fitzpatrick's *Foucault's Law* (2009; see also Munro 2001; Rose and Valverde 1998; Smart 1989). Hunt and Wickham begin with a twofold premise that, first, Foucault was not ever that interested in or even "expelled" law from his oeuvre and indeed from modernity, and second, that law itself is an insular discipline that regards only a narrow range of (legal) scholarship relevant (1998, p. vii). Taking the latter point first, that the law is insular will not come as a surprise to anyone reading this chapter and indeed this volume, for whom the philosophy of law/"alternative methodologies" must hold some appeal (Sokhi-Bulley 2013). It remains the case that "Foucault has gained only the most marginal attention in legal scholarship" and has had more success in convincing other disciplines, such as geography and sociology, of the value of a Foucauldian analytics (Hunt and Wickham 1998, p vii). In explaining that the "expulsion thesis" refers more to a "displacement of law" (where the

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juridical edifice of sovereignty is displaced by a focus on power in dispersed and localized sites), Hunt and Wickham retrieve law using Foucault's account of governmentality as inspiration only (1994, pp. 55–56). He is supplemented with, for example, Weber and Durkheim, to arrive at a new sociology of law as governance. Their law *as* governance is nevertheless a critical, interdisciplinary project where their starting point is to correct the neglect that Foucault had for law by interpreting all operations of law as distinctive instances of governance (Hunt and Wickham 1998, pp. 99, 78–79).

The "expulsion thesis" has been meticulously refuted by Golder and Fitzpatrick, who present in *Foucault's Law* a "counter-reading of Foucault on law" and go a considerable way to present an "elaborated Foucaultian jurisprudence" based in a "law of sociality" (2009, p. 29, 1 and 100). They address the question "what is the fate of law in modernity?" and articulate that "Foucault's law" is the very social bond of modernity. They interpret law as "the key modality of our sociality" that provides an "opening to futurity" by offering possibilities for resistance and for becoming otherwise. Theirs is a reading that is enabled by examining Foucault's later work on ethics and on rights as enabling future inventions of the human (Golder and Fitzpatrick 2009, p. 125). This reading of Foucault's law is a clever and innovative development of a law that they themselves acknowledge Foucault only hints at and is thus (arguably) not readily identifiable in his work.

Both accounts are therefore challenging readings that are Foucauldian in spirit, in that they make Foucault's own work "groan and protest" and take it as inspiration, as a starting point for a "nuanced and radical theory of law" and a "new framework for a sociology of law" (Foucault 1980, pp. 53–54; Golder and Fitzpatrick 2009, p. 11; Hunt and Wickham 1998, p. viii).

Second, and moving on to the question of a "law *and*" label, there is a methodological issue that one can raise here. The need for a conjunction supports the not surprising perception that the Foucauldian (governmentality) framework is not "the 'properly' legal perspective" for those working in the field of law (Minkkinen 2013, p. 119). The law must remain distinct from other disciplines, from outside influence and interpretation – hence, law *and* economics, law *and* literature, law *and* geography, and so forth (Cryer et al. 2011, pp. 76–99). It may be possible to suggest an approach that reads law *as* governmentality but this is not yet an identifiable position within the study, teaching, and interrogation of law; the Conclusion comes back to this observation.

Law and Governmentality

The lawyers among us may be put off by the following passage, taken from the "Governmentality Lecture" in *Security, Territory, Population*:

> . . . what enabled sovereignty to achieve its aim of obedience to the laws, was the law itself. Law and sovereignty were absolutely united. Here, on the contrary, it is not a matter of imposing a law on men, but of the disposition of things, that is to say, of employing *tactics* rather than laws, or, as far as possible employing laws as tactics; arranging things so that this or that end may be achieved through a certain number of means. . . Consequently, *law recedes*; or rather, law is certainly not the main instrument in the perspective of what government should be . . . the ends of government cannot be effectively achieved by means of the law. (Foucault 2007, p. 99)

Yet, as we saw above, there was never a disregard for or ignorance towards law in Foucault's work; he was simply interested in its operation as a complex relation of power rather than as a normative force. There needed to be a shift in focus to show *what else* the law is aside from a sovereign, dominant, repressive relation. The shift in focus (from sovereignty and law to an art of government) is a different understanding of power that is concerned with the *how* of power relations. The shift means looking at law as a process rather than as an outcome, such that we examine the tactics and technologies that enable a wider strategy of government, of regulation, (through) law.

The important question, then, is not "what is law" but "how does law operate"; what are, in other words, the "conditions of possibility" of this type of power (Foucault 1998, p. 93)? The how of law speaks to the mundane and peripheral, rather than the spectacular and the apparent. So

our attention is drawn beyond/not only to judgments and statutes but to the institutions that "do" law and the processes that maintain them. It is drawn, then, to the actors who perform governance through law, the "'(*conducteurs*) and other shepherds" who are involved in the processes of regulation and control of behavior and emotion (Foucault 2007, p. 194; Sokhi-Bulley 2011a). It is drawn also to statistics as a governmental technology that enables the population to be quantified and thereby regulated (Foucault 2007, p. 104; Sokhi-Bulley 2011b). In short, it is drawn to the whole discourse of law and *how* it happens.

How has governmentality been used to understand (the "how" of) law? Studies of rights, for example, have applied a governmentality lens to interrogate the claims (to *only* emancipation), scope, and limits of human rights law and to thereby think rights *otherwise*. Rights clearly emancipate – but what else do they do? Rights can be thought otherwise as technologies of governmentality that regulate as well as emancipate (Sokhi-Bulley 2016). Rights discourse manages the identity of the "victim" (a paradoxical construction that subordinates this victim identity at the same time as empowering it – see, for instance, Brown on how women 'suffer the paradoxes' of rights, Brown 2002), and rights discourse manages the behavior of expert actors within the global human rights architecture (such as international nongovernmental organizations) so that they perform a global governmentality (through) rights. So, for instance, we can read the processes by which an actor such as Human Rights Watch operates as having the effect of governing rights (what rights are) and governing through rights (to alter the behavior of states). These processes are, namely, the use of a particular type of expertise, narration, and self-scrutiny (see further Sokhi-Bulley 2016, pp. 56–78). It is the effect of viewing HRW (and thus rights discourse) through a governmenality lens that is interesting and important; we are alerted to how HRW exercises a humanitarian government (through) rights and, further, to the "dangers" that this might pose. These dangers refer to the extent to which HRW, and other actors responsible for "doing rights" (e.g., the EU's Fundamental Rights Agency, Sokhi-Bulley 2016, Chapter 2) construct dominant narratives on how best to do rights and what rights are, which risks silencing alternative techniques and alternative stories, and how these rights actors construct dominant identities, for themselves, for the UN (and the EU), as *virtuous* rights actors. This has important implications for questions of integrity in doing rights in terms of encouraging critique of who these experts are, how they collect and disseminate data and statistics, how they develop measurement indicators, how they tell "victim" stories and the methodologies that they use to "do" rights. Not only this, but the question of whether rights actors ought to resist the extent to which they govern (through) rights, whether they ought to be trained in how to *think* rights differently, creatively, and perhaps improvisationally in their processes of self-scrutiny also becomes pertinent when a law *and* governmentality approach is applied (Sokhi-Bulley 2016, p. 145).

Thinking rights otherwise can also bring us to what Golder calls a "critical counter-conduct of rights" whereby we understand rights differently and use them as tactical instruments, or tools, of *resistance* in political struggles (Golder 2015). Golder's central question is to ask "what is a Foucauldian politics of rights and how is it to be understood in light of his work as a whole?" In answering it, he unearths an important and thus far largely neglected engagement with Foucault on rights (which he describes as ambivalent, ungrounded and strategic) – which is particularly interesting in terms of engaging the ethical dimension of rights and Foucault's somewhat intangible reference to a "new relational right" (p. 97, 107). New possibilities for rights are pursued also by Whyte, who examines the development of rights talk alongside neoliberal global capitalism and explores possibilities for a "new interventionist politics of rights" (Whyte 2012, p. 210). Odysseos, furthermore, calls for a reconstituting of human rights as an "optics of rightlessness"; writing using the case study of the 1984 Bhopal gas disaster, she points to the important critical imperative of seeing ambivalence in mobilizing the discourse and legal frameworks of rights (Odysseos 2016).

Odysseos writes as a political theorist, or international relations theorist, rather than a lawyer. The

wider field of "governmentality studies," which includes geography and political theory, for instance, provides us with further examples illustrating the relation between law and governmentality. Darling, for example, has examined asylum laws and policies under a governmentality lens to make the interesting and important point that the UK border/laws on asylum act as a site of "domopolitics" (the governing of the state as a home) (Darling 2011). Domopolitics operates as a form of calculation, regulation, and discipline that produces a politics of exclusion and marginality, rendering asylum seekers as those always "at the border," as other (see also Walters 2004). Brown provides a Foucauldian-inspired reading of judicial decisions of the US Supreme Court to examine law's role in neoliberalization – that is, the way in which "political fields, activities, subjects, rights, and purposes" are economized (Brown 2015, p. 154). Law, read under a governmentality lens is thus revealed to be "a force in remaking the concept and practices of democracy."

These readings provide "alternative truths" (Sokhi-Bulley 2013); that is, a different version of the dominant narrative and thus illustrate the value of the law and governmentality relation (we see law *otherwise*). For law and legal practice, seeing law as governmentality means we are alerted to the problematic power relations within the practices, processes, and pedagogy of law that produce the right way to be a subject (e.g., the asylum seeker who does not threaten the "home"), correct codes of conduct (e.g., human rights), and the right ways to *study* law (what Minkkinen calls the "properly legal perspective" of legal positivism).

Conclusion: Law *as* Governmentality

Governmentality is, as Walters says, a "diagnostic tool" (Walters 2012, p. 2). It is also a highly adaptable and fashionable tool, not being confined to a "theory" of anything and relevant to an age of neoliberalism where we continue to negotiate the relation between security-territory-population. It is a diagnosis of the "problem of government" – of how we are governed, by whom and through what means. In the age of Brexit, Trump, and a continual refugee crisis, governmentality allows us to diagnose "law's contribution to neoliberal dedemocratization" (Brown 2015, p. 154); and then, more importantly, to look for resistive, counter-conducting, and transformative possibilities when faced with the realization that we do not want to live, to be governed (through "law"), *like that*. "Law and governmentality" might then become "law *as* governmentality," meaning we implicitly interrogate the *how* of law. That we teach, study and interrogate "law as governmentality" as a "properly legal" perspective, rather than as an "alternative" one. For now, the methodological position of law *and* governmentality is where we are at.

Cross-References

- ▶ Deconstructionism
- ▶ Law as Discourse
- ▶ Postmodern Theory of Law

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Gracián y Morales, Baltasar

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Introduction

Baltasar Gracián y Morales (1601–1658) was a Spanish Jesuit thinker and writer regarded as a master of Baroque "conceptist" prose and author of relevant philosophical and political works, the most influential of which, *El Criticón,* is considered the summit of the allegorical novel in Spanish.

The son of a doctor and his second wife, Baltasar Gracián was born in Belmonte (Calatayud, Zaragoza) in 1601. His family had a strong religious vocation; four of his siblings joined religious orders. After schooling in Toledo and Calatayud, he started his novitiate at the Society of Jesus in 1619, where he studied Philosophy and Theology and was ordained in 1627. He spent the following 10 years teaching in different schools of the Society and had his first controversy with his superiors while in Valencia. From 1637 to 1639, he was appointed at the Colegio de Huesca, which allowed him to meet Vicencio Juan de Lastanosa, who invited him to join his tertulia with local intellectuals at his 7.000-volume library. He would also later sponsor Gracián's publications, namely, his first book, *El Héroe* (The Heroe, 1637). From that first volume on, he started using the name of his brother Lorenzo as a publishing alias to avoid troubles with the Society of Jesus, with which he had a tense relationship until the end of his days.

His appointment as the confessor of the Duke of Nocera, Viceroy of Aragon and Navarra, in 1639, enabled him to travel to Madrid, where the lack of appreciation of his literary conceptions and the decadence of the Court caused him a disappointment. Significantly, shortly after that, in 1640, he published *El Político* (The Politician), a depiction of the ideal ruler inspired by Fernando el Católico proposed in a context where King

Philip IV's reign was facing its darkest hour. During his second visit to Madrid accompanying the Duke of Nocera, Gracián prepared his *Arte de Ingenio, Tratado de la Agudeza* (Art of Wit, Acuity Treaty), a treatise on Baroque aesthetics.

Gracián experienced firsthand the tumultuous socio-political juncture of his time, prompted by the ending and aftermath of the Thirty Years' War (1618–1649) and the Catalan revolt known as The Reapers' War (Guerra dels Segadors, 1640–1652). He lived through both the siege of Tarragona (1642) and the liberation of Lerida (1645), where his performance as military chaplain granted him the nickname of "padre de la Liberación."

Sent to Valencia to recover from his ailments in 1645, he wrote *El Discreto* (The Discreet man), published the following year. *Oráculo Manual y Arte de la Prudencia* (The Art of Worldly Wisdom: A Pocket Oracle), a collection of 300 maxims on practical moral philosophy, was published in Huesca in 1947 and turned to be his most popular and most translated work.

His most ambitious project and masterpiece, *El Criticón* (The Critick), was published in three parts. The first part was published without permission of the Society in 1651 under the anagram García de Marlones, while the second (1653) and third (1657) parts appeared under the usual alias of Lorenzo. The worldly scope and intent of the work gained Gracián the animosity of his Order. He received a public rebuke, was sentenced to fast on bread and water, and was deprived of his Chair. He passed away in Tarazona in 1658, fallen into disgrace within the Society of Jesus.

Prudential Advice for Men and Kings

Gracián's early works share a common goal of providing guidance for model men, adopting an aphoristic and didactic approach common in the *specula principis* popular at that time.

The Hero, despite the epic resonances of the title, aims at describing the qualities and attitudes required for social success. Paraphrasing Machiavelli, such success is attained by means of "razón de estado de sí mismo" (reason of state of oneself). Yet, rather than resorting to the use of force or cold rationality, the hero employs a seductive and convincing ingenuity that creates social admiration; while, at the same time, influenced by Seneca's stoicism, he must control and conceal his passions.

The ideal ruler is depicted and identified with the figure, qualities, and deeds of King Ferdinand II The Catholic (1479–1516) in *The Politician*. Built upon a five-fold virtue scheme (the four cardinal virtues of prudence, justice, temperance, and fortitude, plus faith), and filled with numerous historical and classical references, the treatise presents a hyperbolic and panegyrical representation of Ferdinand II as the founder of the greatest monarchy in terms of religion, wealth, and policy, and, therefore, "the greatest king so far." Rather than advocating for a Platonic model of Government or reflecting upon the well-being and education of subjects, Gracián fully identifies politics with kingship and defines the desired kingship via an empirical example: the most virtuous and successful case in History. Even if this prudential pragmatism brings him close to *Il Principe*, which also presents Ferdinand II as a model, Gracián cautiously excludes the possibility, entertained by Machiavelli, of a nonvirtuous (amoral) individual as a good ruler. *The Politician* is often interpreted as both a nostalgic regard and a compelling call to the rulers to examine and look up to the attitudes of a virtuous and successful model in a severe crisis of the Spanish monarchy.

Considered the Baroque equivalent of Castiglione's *Il Cortegiano* (1528), Gracián's *The Discreet Man* revisits the topic of effective social interaction and engagement. This time the focus is put on the virtue of "discretion," understood as a worldly – and hence aesthetical and ethical – prudence.

The most condensed expression of Gracián's prudential works is indubitably his *Oráculo Manual y Arte de la prudencia*. Composed of sentences and their corresponding commentaries, the treatise continues the medieval aphoristic tradition, particularly its Tacitist trend. Aimed at providing guidance for a meaningful and happy existence, the manual shows a crude anthropological realism that often leads to advice that seems

far from the sometimes supererogatory morals of Catholic Ethics. Still, the Jesuit tradition itself seems to had already included elements of prudentialism (versus moral absolutism); in this regard, Heger has pointed out that Gracián's Ethics unfolds in functional perspectives that relate to each other dialectically and resolves in contextual and effective solutions (1952).

El Criticón: Christian Pessimism and Neo-Stoicism

In his allegoric masterpiece *El Criticón*, the discontent with the world, already present in earlier works, reaches its summit in the figure of the "varón desencantado." Presented as a life journey symbolized by the four seasons, the novel tells the story of castaway Critilo (representing the rational and cultivated man), saved from a shipwreck by young Andrenio (the natural uncivilized man), who grew up in the wilderness of an island. Embarked in a ship bound to Spain searching for her lover Felisinda (felicity), Critilo finds out that Andrenio is actually their son. The journey ends at the Island of Immortality.

Written under the explicit influence of John Barclay (1582–1621, author of the *Satyricon*), *El Criticón* is conceived as a secularized version of the Christianized *topos* of the Odyssey and constitutes a literary mammoth which draws from all sources of traditional Western culture available at that time. Gracián's moral philosophy experiences here a transition toward a relative Christian pessimism in which men need to learn how to be straight in a crooked world, which requires going beyond the appearances of a distorted reality and accepting the world as it is rather than trying to change it. In this regard, Gracián's work is considered to relate to the Christian Neo-Stoic trend initiated by Justus Lipsius (1547–1606, author of *De Constantia*).

Influence and Relevance

Not quite a prophet in his own land, little attention was paid to Gracián in Spain until the beginning of the twentieth century, when it became part of the literary canon thanks to writer and critic Azorín. His philosophy, though, had influenced French moralist La Rochefoucauld (1613–1680) and even Voltaire and was very popular in France at least since the publication of *L'homme de cour* (1648), the French edition of *Oráculo Manual* by de la Houassie.

At the end of the nineteenth century, Benedetto Croce studied Gracián's possible influence on, and parallelisms and differences with Italian "conceptists," namely, with Emmanuele Tesauro (1592–1675, author of *Cannocchiale Aristotelico*), whom he considered to be more systematic and, hence, superior.

However, the most celebrated reception arguably came from pessimism-prompted German philosophers, who shared with Gracián a context marked by decadence and a crumbling worldview. Schopenhauer, who also translated *Oráculo Manual* while working on his eudomology, confessed to having been Hispanicized upon reading Gracián, whom he regarded as his favorite author. Nietzsche did not hide his admiration for the Spanish Jesuit either: his moral perspectivism and his notion of eternal return are influenced by Gracián.

Finally, his aphorisms have recently regained popularity within the English-speaking world as a noble and classic alternative to self-help literature.

Conclusion

Gracián's moral philosophy represents a fascinating crossroads where the Aristotelian-Thomistic tradition of virtue Ethics is complemented by a Baroque conception of "ingenuity," which, rather than abstract rationalism and moral absolutism, implies a contextual and pragmatic skill. This allows the prudent man to be both virtuous and successful in challenging and decadent scenarios requiring Neo-Stoic temperance to live in the world as it is.

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► Machiavelli, Niccolò

G

▶ Nietzsche, Friedrich
▶ Schopenhauer, Arthur
▶ Voltaire (François-Marie Arouet)

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Gramsci, Antonio

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Introduction

Antonio Gramsci (1891–1937) was an Italian intellectual and political activist, imprisoned by the Fascist regime between 1926 and 1937. He studied Modern Philology at the Faculty of Philosophy and Letters at the *Università degli studi di Torino*. At the age of 22, he became a member of the *Partito Socialista Italiano* (PSI) and, later, editor of *Avanti,* the party's central press agency, for which he wrote between 1915 and 1920. From then on, he developed an intense editorial activity on PSI newspapers and later in *Partito Comunista d'Italia* (PCd'I), which he co-founded in January 1921.

One of the most significant editorial experiences occurred in the weekly *L'Ordine Nuovo. Rassegna settimanale di cultura socialista* (along with Palmiro Togliatti, Umberto Terracini, and Angelo Tasca). Founded in 1919, it existed as a weekly newspaper between 1919 and 1920 and from 1921 became an organ of the PCd'I. The *L'Ordine Nuovo* group played a key role in *Biennio Rosso* (1919–1920), which consisted of a period of strikes, workers' demonstrations and factory occupations in the great industrial centers of Italy, in response to the economic and political crisis that was taking place in the years following World War I.

Between 1922 and 1923 he lived in Moscow, where he served as the Italian representative on the Executive Committee of the Communist International (founded in 1919). In 1924 he was elected deputy for the district of Veneto. Despite having parliamentary immunity, he was arrested in 1926 by the Fascist police. The articles published in journals between 1910 and 1926, known as pre-prison writings, were collected in different posthumous editions published in Italy and then translated into different languages.

His last work before being arrested was "*Alcuni temi della Questione Meridionale*" (1926), which contained important notes on the concepts of "hegemony," "subordination," and "intellectuals," that were later developed in prison. While in prison, Gramsci wrote 33 notebooks, which consisted of four translations and 29 notebooks composed of notes of various themes. The latter were published posthumously in *Quaderni del Carcere* (1929–1935). In addition to these notes, in prison Gramsci also produced a significant volume of letters, today gathered in *Lettere dal Carcere* (1926–1937), which reveal, in addition to strictly personal and family issues, sketches of possible areas of study and political, conceptual, and method reflections.

Philosophy of Praxis, Materialism and Idealism

The expression "philosophy of praxis" was primarily used by the Italian Marxist philosopher Antonio Labriola (1843–1904), whose anti-dealist and antipositivist conception of praxis was centered on the notion of work as a unit between theory and practice. Through Labriola, Gramsci came to the interpretation of Karl Marx's *Theses on Feuerbach*, published posthumously in 1888. Based on the *Theses*, as well as on their Labriolan interpretation, Gramsci reinterpreted materialism in terms of "practice" or "praxis."

In *Quaderni*, the philosophy of praxis received centrality and importance as an attempt to renew Marxism, which had suffered a double downgrade by the vulgarization of materialism and neoidealist revisionism. The battle against vulgar materialism coincided with the polemics against the positivism and determinism assimilated to Marxist analyzes within the Second International or Socialist International (1889–1919). Gramsci saw the Soviet political leader Nicolai Bukharin (1888–1938), who wrote *Historical Materialism* (1921), as the main interlocutor for the critique of vulgar materialism and positivist Marxism, to whom he dedicated *Quaderno* 11. Within this critique of "Marxist sociology" put forward by Bukharin, Gramsci identified what he believed to be the great mistake of the positivist sciences in social analysis: the action of separating, classifying, and generalizing data, as done in the natural sciences. To Gramsci, this way of conceptualizing facts did not capture the complex dynamics of historical forces and their contradictions, resulting in a linear and evolutionary conception of history (Cf. Gramsci 2007, p. 1403). Bukharin thus failed to address "a crucial point of all questions born around the philosophy of praxis" that of the birth of the "historical movement based on structure" (Cf. Gramsci 2007, p. 1422).

The methodological principle that should, therefore, guide materialist social analysis was expressed in Marx's 1859 *Preface to the Contribution to the Critique of Political Economy*, and it was based on the dialectic between structure (necessary and sufficient conditions/production relations) and superstructure (ideologies/ philosophies), mediated by organized political action (Cf. Gramsci 2007, p. 1579).

On the other hand, the theoretical battle against neo-idealism was developed through a critique of the Italian philosopher and historian Benedetto Croce (1866–1952), to whom Gramsci also dedicated an entire notebook, *Quaderno* 10. As Croce considered empirically existing facts as a reflection, reproduction, imitation, or consequence of thought, he not only reversed Hegelian philosophy, but "any kind of philosophy, supplanting philosophy with practical activity" (Gramsci 2007, p. 1269–1270). This finding revealed the irreconcilable split between theory and practice that underlay Croce's merely theoretical or "contemplative" philosophical notion. Gramsci, on the other hand, conceived the philosophy of praxis as producing both a "moral" and a corresponding way of acting, thus appropriating Croce's concept of secular religion, that is, of religion as "a worldview (a philosophy) with a standard of proper conduct" (Gramsci 2007, p. 1269). In this light, the philosophy of praxis would consist of the "energetic affirmation of a unity between theory and practice," a "historical philosophy" (Cf. Gramsci 2007, p. 1271–1272).

State, Hegemony, and History

At a time when the communist revolution was receding in Europe and Fascism was deepening its offensive in Italy, Gramsci dedicated himself, in prison, to reflecting on the causes of the defeat of the revolutionary movement born in Russia and the possible ways for the construction of the revolution in the West. The author noted that, unlike Russian society of 1917, embryonic and underdeveloped, Western societies, with their parties, unions, and civil associations, were full of trenches and fortresses (Cf. Gramsci 2007, p. 866).

Theoretically founded on a combination of the Marxist tradition, especially Lenin, and Italian thought, especially that of Machiavelli (to whom he dedicated *Quaderno* 13), as well as on comparative historical analysis, mainly focused on the period from the French Revolution and the Italian *Risorgimento*, Gramsci concluded "that a class is dominant in two ways, namely it is 'leading' and 'dominant'. It leads the allied classes, it dominates the opposing classes. Therefore, a class can (and must) 'lead' even before assuming power; when it is in power it becomes dominant, but it also continues to 'lead'" (Gramsci 2007, p. 41). The concept of hegemony was defined, therefore, as "a combination of strength and consensus that are balanced in a varied way" (Gramsci 2007, p. 1635–1637).

This double perspective of hegemony – strength and consensus – is closely related to the concept of "integral State," which the author summarized in the following formula: "State = political society + civil society, that is, hegemony protected by the armor of coercion" (Gramsci 2007, p 763–764). This integral conception of the state, which encompasses civil society as its concretely inseparable organic part, defines its class character, supported by the unstable balance of the relations of social forces. It is therefore opposed to liberal theories that conceive the state as the area of universality and rationality. According to the author, the bourgeois revolution had produced a profound revolution in Roman law, emptying it almost entirely, preserving only the "pure and simple principle of property" (Cf. Gramsci 2007, p. 643). In this way, "the bourgeois class posits itself as an organism in continuous movement, capable of absorbing the whole of society, assimilating it to its cultural and economic level: the entire function of the state is transformed, the state becomes 'educator'" (Gramsci 2007, p. 937).

Modern law was thus at the basis of the universalization of worldviews and bourgeois domination, contributing to the education of the masses and to the repeated reproduction of social conformism. However, these conceptions, which carry with them notions of individual freedom and the rise of a ruling class open to all individuals, are threatened as soon as they are affected by crises of domination, such as the one that impacted Italian society in the final years of World War I, offering a fertile terrain for the ascension of Fascism. In these situations, "force rises as solution," the class ceases to be a leader, becoming only dominant, "possessing pure coercive force" (Cf. Gramsci 2007, p. 311–312). Thus, from a realistic point of view, law, like politics, is defined by conflict, or, it can be said, results from the unstable balance of the struggle between social classes in the integral state.

A comparative analysis of the history of Italy and that of France, along with the work of Neapolitan historian Vincenzo Cuoco (1770–1823) and French historian Edgar Quinet (1803–1875), brought Gramsci also to begin to formulate the concept of "passive revolution." This concept sheds light on the process of modernization of the Italian state apparatus, which lacked the revolutionary explosion and the organized and permanent popular activism that occurred in France from 1789 onwards. Passive revolution takes place, therefore, through molecular reformist waves, which express the reconciliation of the different fractions of the bourgeoisie with the old feudal classes, which modernize the state apparatus and at the same time keep the social order unchanged. In these contexts, the impetus for development is external. In the case of Italy, it occurred under the cultural influence of the French Revolution. Thus, at the national level,

the group with new ideas was not the economic group, but the intellectuals, especially those directly or indirectly linked to the dominant classes (Cf. Gramsci 2007, p. 1361).

From the widening and politicization of the concept of the intellectual, Gramsci proposed two new categories: "organic intellectual" and "traditional intellectual." While the traditional intellectual represents ethics and politics as anachronistic due to the overcoming of the mode of production that supported them, that is, due to the implantation of a new historical bloc, the organic intellectual, on the contrary, is characterized by its connection with modern social groups, which emerge as they overcome a social situation previously dominated and directed by former groups in power. In this sense, it must be understood that every social group organically creates for itself one or more layers of intellectuals. The difference between traditional and organic intellectuals, therefore, is essentially their class commitment and, consequently, their position in relation to the new social formation, that is, either regressive, seeking to maintain traditional, outdated, conceptions, or, progressive, linked to the economic, political and ethical needs of the most advanced social groups (Cf. Gramsci 2007, p. 1513–1514).

The role of organic intellectuals is, above all, that of class leadership, allowing for organized and cohesive action, capable of interfering in the social relations of forces. In this way, the classes and social groups most able to create their own intellectuals – through political organization – will also be those most capable of universalizing their interests to the whole of society, creating consensus around their demands and effectively becoming the leading class.

Legacy

Under the initiative of the PCd'I, Gramsci's works began to be published in 1947 and translated into different languages from the end of the 1950s, starting with Argentina, also under the direction of the Communist Party (PCA). In effect, through this initial diffusion, the author left an indelible mark on the political and intellectual circuits under the influence of the international communist movement. However, before that, Gramsci's broad and heterodox cultural background had also aroused the interest of important liberal intellectuals of his time, including Piero Gobetti and Guido Dorso.

After the liberation of the Mussolini regime, Gramsci's anti-fascist militancy was honored in the Italian parliament and the editorial production of the time, thus expanding its influence on the liberal culture of the twentieth century.

Gramscian political theory, in general, was able to extrapolate the limits of the specific reflections of the communist circuit, inserting itself not only in the international debates of the more general social and political theory but also in different disciplinary fields such as anthropology, philosophy, history, geography, education, communication, literary criticism, and in cultural and post-colonial studies.

The spread of Gramsci's thought in the 1960s and early 1970s, however, was stimulated by the contexts of social conflicts of anticolonial struggles, mobilizations against dictatorships, and struggles for civil rights on different continents. As a result, its presence in the twentieth century was marked by an immediately political interest that was largely expressed in instrumental uses that operated significant divisions between Gramsci's philosophy and concrete political action, commonly resulting in partial and fragmentary readings.

Despite this, in the 1970s there was also an extraordinary quantitative and qualitative increase in Gramscian production. Among the most expressive publications of that moment we can mention Leonardo Paggi's *Gramsci e il moderno Principe* (1970), which sought to merge the philosopher Gramsci back into the communist leader; the critical edition of *Quaderni del Carcere* (1975), organized by Valentino Gerratana, which for the first time presents the entirety of the notes from the 29 notebooks written in the jail; *Gramsci et l'État* (1975) by Christine Buci-Gluksmann, who proposed the expression "extended state,"

which had a wide reception, in addition to presenting an important dialogue with the currents of French structuralism, mainly with Louis Althusser. Still in 1975, an article by Norberto Bobbio, *Gramsci e la concezione della società civile*, was published. It had been presented in 1967 at the International Congress of Gramscian Studies, held in Cagliari. In it, the turinian philosopher of law enshrined Gramsci's fame as the "theoretician of superstructures" because it moved him away from Marx and Lenin, bringing him closer to Hegel and liberalism. This perspective, however, aroused important criticisms and adhesions that had a significant impact mainly on the circulation of the concepts of civil society, hegemony, and the historical bloc.

In the twenty-first century, a new editorial project for the full publication of the author's works, the *Edizione nazionale degli scritti di Antonio Gramsci*, was conceived from an innovative generation of philological studies, whose attention turned to the rigorous interpretation and contextualization of the Gramscian lexicon. Among the productions that express the first stage of these philological studies is the *Dizionario Gramsciano* (2009). From this approach, to the hermeneutics of the concepts of greater circulation such as hegemony, civil society, intellectuals, integral state, historical bloc, among others, it was added a renewed attention to the concept of subalternity. Subalternity studies, as well as a new look at meridionalism and orientalism, received an international impulse and dimension in the transition from the twentieth to the twenty-first century, especially through the critical debate with "Subaltern Studies," disseminated from the initial effort of the Indian historical research under the direction of Ranajit Guha in the late 1970s.

Finally, it is important to highlight that in addition to the densification of Gramscian studies, the emergence of new methodological instruments and important editorial projects, there was a notable geographical dissemination of the author's thought, which spread across four continents, with penetration not only in his European cradle but also in the Anglo-Saxon, Latin American, Asian, and African world.

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▶ Lenin, Vladimir Ilyich
▶ Machiavelli, Niccolò
▶ Marx, Karl

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Green, Leslie

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Introduction

Leslie Green (b. 1956–) is *Professor of the Philosophy of Law* at the University of Oxford, Balliol College. A prominent philosopher in his field, he has made influential contributions to both political and legal philosophy in the analytic tradition, most particularly on the nature and possible justification of legal obligation. Legal obligations are a kind of focal point of political theory and legal theory, raising questions such as: What is the nature of legal obligation? What does it amount to? Where does it come from and what makes it possible? Is it also a moral obligation?

In attending carefully to these topics, Green has written widely in general jurisprudence, on the nature and authority of the state, in constitutional theory, theories of minority rights, and moral and political philosophy more generally. Widely considered to be an expert in the area of general jurisprudence, he coedits the highly regarded *Oxford Studies in Philosophy of Law.*

Political Authority

Green's monograph, *The Authority of the State*, is a seminal work on the nature of authority, the state, and the possibility and character of political obligation. The book gives a "social relations" account of authority grounded not in practice, acceptance, or legitimacy but rather in authority's modal character. The question of authority, Green argues, is about means, not ends: it is thus importantly distinct from that of the nature of justice. Even if we know that unjust rule can never be authoritative, in other words, that is not yet enough to tell us what authority *is*. Authority is a particular means of achieving an end, and the nature of that means, rather than the proper ends of government, is the subject of the book.

The nature of authority is shown to involve the giving of reasons that are content-independent. Person A has authority over person B in this sense when A's commands are reasons for B just because they were given by A. Having articulated the nature of authority in terms of its structure in practical reasoning, Green goes on to argue that the nature of the state ought to be understood in similar terms: the state is not related to an essential function, or to claimed or actual monopoly on coercion or territory. Rather, it is that which claims to command authoritatively. This claimed authority is necessarily broad: the state purports to regulate the vital interests of all its members.

Having thus characterized political authority, Green goes on to consider what he articulates as the key question: What reason do a state's subjects have to see its commands in the same way the state sees them? What, in other words, could give validity to the reasons the state creates? Green evaluates the most influential justifications for what is commonly known as the question of political obligation. He argues that neither convention nor social contract is necessary or sufficient to justify the state's claim to authority. That authority can be justified by consent, he contends, but only where the latter really obtains. The argument is, in the end, a qualified and contingent support for political obligation: the state has authority only where we find real consent. Since the latter is rare, the state does not have a general or unqualified authority to command its subjects. The more plausible obligation, Green argues, is one based in the civic virtue associated with occupying a certain kind of social role. Green has since gone on to write extensively on corollary questions relating to political authority, such as the limitation of government and the nature of the duty to govern.

Jurisprudence

Green is one of the most influential figures in the legal positivist tradition. As a student of Joseph Raz and a leading expositor and interpreter of H.L.A. Hart, his contributions to jurisprudence

have been significant. His view of law is thematically related to his articulation of the nature of political authority: he views the law in terms of the kind of reasons it purports to give and as resting fundamentally on a foundation of social practice.

Green has, over several decades, clarified and developed themes in Hart's work; he coedited and wrote the introduction for the second edition of Hart's *The Concept of Law* in 2012. Green has clarified misreadings and misunderstandings of Hart's project. He emphasizes, for instance, that the social character of law under Hart's description does not mean that its nature is ultimately conventional. A further misconstrual of positivism Green has clarified is the idea that there is a necessary separation, or "no necessary connection," between law and morality. On the contrary, Green has shown in a series of important articles that the connections between the two normative domains are varied and important. Green charts a nuanced course for positivism in this regard, one which distinguishes his view from the pervasive "exclusive vs. inclusive positivism" debate. Despite his clear positivist commitments, then, Green resists one-dimensional or reductionist accounts of law in many respects – the role of coercion in law, the nature of legal normativity, and the adjudicative role, among others.

Perhaps his most sustained critique of reductionism in jurisprudence has been with regard to the relationship between law and morality. Green develops, on one hand, Hart's suggestion that law is in certain ways importantly connected to value, partly through its potential for doing justice in virtue of treating like cases alike. More generally, because law regulates aspects of our lives that are both other-regarding and vital, it has the potential capacity to do a great deal of good. But, on the other hand, Green makes it clear that this important connection between law and morality can be undercut: the same features of law that make it a nearly universal mode of social control, namely, its effectiveness in guiding behavior and its exploitation of social norms, also give it the capacity to be oppressive and to do great wrong. So Green argues against the widespread misconception that legal positivism involves a necessary separation of law and morality partly by showing that law is morally risky, as well as by demonstrating its innate, important potential to realize moral good. Green has thus steered a course for legal positivism between the legal realists and the contrary claims of natural lawyers such as John Finnis. With regard to the latter, Green has ably argued against the idea that law has an essential coordinating function that imbues it with moral value, as well as against the more classical natural law position that law must be understood in terms of the moral ends toward which it is, in its central or paradigm case, necessarily oriented.

Work on Rights, Groups, and Vulnerable Persons in Society

Green has written on topics at the intersection of moral, political, and legal philosophy, such as the nature and legal categorization of gender, the nature of group rights, linguistic rights, and questions about respect and tolerance, as well as on the right to freedom of expression in particular and on the value of freedom in general.

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Green, Thomas Hill

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Introduction

TH Green (1836–1882) was a prominent English philosopher as well as an educationalist and a political activist in the late nineteenth century. He was the leading theorist of British Idealism, an influential philosophical trend in Britain from the 1870s through to 1920s. Educated at Balliol College, Oxford, he was elected a fellow of the college in 1860 and appointed the Whyte Professor of Moral Philosophy in 1878. His political activities included joining the Liberal Party as well as campaigning for women suffrage and against alcoholic drink; he also was the prime mover in founding the City of Oxford's High School for boys and was an enthusiastic member of both of Oxford's Town Council and School Board.

Common-Good Society

Green targeted for criticism laissez-faire liberalism – dominant in Britain for most of the nineteenth century – which viewed individuals as essentially self-centered and competitive; negative freedom as merely the absence of coercion; and the state as basically a nightwatchman. His crowning achievement was to pioneer a "new liberalism," as it was known at the time, and is now referred to as "social liberalism." Such liberalism understands the nature of individuals as essentially social and cooperative beings, ever-developing throughout their life-span; positive freedom that, though is inclusive of absence of coercion, goes far beyond that to also include the resources and conditions needed for all individuals to achieve self-realization; and a state as an enabling structure, securing a just system of rights.

Green's social liberalism – developed and expanded by L.T. Hobhouse (1864–1929) – was his normative response to the immensely unequal social and economic consequences of the rapid industrialization and urbanization that resulted from an unregulated market. Green aimed to provide a new framework for establishing a just society that will secure an effective membership for all who suffered exclusion and alienation from their own society: a community of good for all or a common-good society.

Green's vision of a common-good society is to be contrasted with the conception of a "private society" (one that is composed of individuals who associate only to further their personal aims). This contrast and its role in Green's liberalism both resemble and anticipate John Rawls's own positing of his conception of human sociability as an alternative to a conception of private society.

My thanks to Abisi Sharakiya and Maria Dimova-Cookson for very helpful comments.

Against that individualist conception of society, the common-good society places cooperation above competition, insisting that individuals' lifeplans are neither competitive with, nor independent of, other individuals lifeplans, but are instead interwoven and complementary. And moreover, Green's theory regards social institutions as constitutive of human development, not just as an external framework for securing the pursuit of private goals.

As a normative theory, the common good in fact plays a dual role: first, it provides a moral model of a cooperative society, a community of good for all, in which all are committed to, and are beneficiaries of, the common good. Second, the common good incorporates a concern for social justice as an internal condition of giving effect to the community of good for all. Justice requires that no one should gain by the loss of another and that fair chances of self-realization are secured to all. A system of rights that gives effect to social justice may be regarded as the political common good which is constitutive of cooperative self-realization, the moral common good.

Central among the normative building blocks of common-good liberalism are conceptions of positive freedom, enabling state, rights that bind, and active citizenship.

Positive Freedom

Green has been widely associated with the liberal shift from negative to positive freedom. Applying this distinction to Green, however, as Isaiah Berlin does in his classic essay on two concepts of liberty, distorts his conception of freedom by forcing it into the binary straightjacket that this distinction presupposes, and to which Green would refuse to subscribe. Though inclusive of both negative and positive freedom, their distinction does not adequately capture Green's complex conception of freedom. Rightly understood, it consists of the entwining together of the internal and external dimensions of human development: individuals' moral capabilities (internal human self) and just social institutions (external world of institutions).

Green's conception of positive freedom comprises three elements. First, the capacity to do – freedom involves the capacity to do things, not the mere absence of restraint; second, exercising the capacity to do something valuable, not merely to act on any preference; third, doing something valuable, pursuing self-realization, should not be enjoyed by some at the expense of denying others the same opportunities to exercise and develop their capacities. Self-realization is a joint achievement. It can only be attained through interrelations with other fellow-citizens in cooperative social relations. This is the core of social justice: nonexploitation and fair opportunities of self-development secured to all.

Green's positive freedom consists, then, of the entwining of individuals' moral capabilities (inner human self) and enabling just conditions (external institutions). Internally, freedom is the capacity for self-determination which requires the absence of internal obstacles, such as lack of education, to the pursuit of valuable goals. Externally, freedom includes the absence of coercion, secured by the negative rights of noninterference, as well as the availability of resources and real opportunities of self-development, secured by the positive rights to a certain standard in education, health, housing, and working conditions.

This new conception of positive freedom was the result of Green's criticism of the classical individualist liberal model of freedom of contract. The liberal individualist doctrine of freedom of contract holds that a contract is a reciprocal bargain entirely dependent upon the will of the parties, with the parties entirely free to pursue their own interests, and that the general law should intervene as little as possible with the freedom of the parties to contract. Faced with the realities of the marketplace where strong parties took advantage of those who were vulnerable to unfair overreaching, freedom of contract, Green held, was exposed as a legal fiction. It could provide only formal procedural protection against coercion and fraud, at the expense of actual protection against unfair bargaining.

Rejecting the unfair individualist model of freedom of contract, Green defended a fair model of freedom of contract by connecting it with substantive fairness and social justice. The nub of his criticism was to deny that coercion (and fraud) was the only obstacle to freedom. Using

concrete cases of contracts between the "starving workers" and employers, and the Irish tenant farmers with landlords, he argued that not only coercion but, importantly, exploitation constitutes legitimate obstacle to freedom of self-development of the weaker sides to these contracts. Exploitation was evidenced by both absence of meaningful choice by the disadvantaged party and unfair bargaining that, in turn, resulted in unfair substantive terms.

Exploitation, Green further claimed innovatively, was also a consequence of the inseparability of labor power from the developing capacities of the personhood of the laborer. Because the worker's labor power is inseparable from his human powers of self-development, the sale of labor power in unfair contracts hinders freedom. If self-development is vital to freedom, then, contrary to neoclassical liberals and libertarians, restricting the sale of labor, was required to promote that development. Such restriction was, in fact, freedom-enhancing, not an imposition of unwanted restraint on people's desires to transact in the market.

Finally, claiming that the unfreedom suffered by the weaker parties to contract is not merely a private matter, since it is detrimental to freedom as a cooperative achievement, Green dissolved the stark private-public distinction that underpinned freedom of contract. That distinction confines contract rights to the private sphere requiring protection from legislative interference by the state. By contrast, Green claimed that contracts should not be only a matter of private relations, that public interest inheres in seemingly private contracts. In this way he recast what individualist liberals regarded as legislative interference with freedom, as freedom-enhancing legislation by connecting freedom of contract with social justice.

Upholding justice is the primary task of the state.

An Enabling State

Green regards the state as a moral institution because of its primary function and its structure as the society of societies. The moral function of the state is to secure equal rights to all its members, such that no one gains at the expense of another, and by securing real opportunities of self-development for all. Rights constitute the external conditions of self-realization. That moral function, however, must be indirect since self-development requires individuals' own effort: It is an achievement of individual active effort, something that could not be given to one by another.

Paternalism is, therefore, unacceptable. Nor is political perfectionism defended. Self-realization is ethically perfectionist since it denies that certain pursuits, such as habitual pleasure-seeking and more generally, habitual selfishness, could provide self-realizing satisfaction. However, ethical perfectionism is not political since political institutions function as enabling conditions, not as deliverers of self-realization. Moreover, ethical self-realization is pluralistic, not monistic; it is "one" in form – developing moral human capacities – but "many" in content: a pursuit multiple valuable goals.

Contrary to some scholars, however, Green does not limit the role of the state to the negative function of "hindering hindrances." The state's role is to both remove obstacles and provide favorable conditions for self-development.

Fulfilling this role required state interference. That was necessary to prevent the freedom of some members of society being curtailed by others. This was the case with unlimited freedom of contract discussed above. Far from securing the freedom of self-development of the "starving laborers" and Irish farmer-tenants, Green held, unrestricted freedom of contract was in fact an instrument of disguised exploitation. To protect and enable the freedom of such disadvantaged groups in society, the state, Green claimed, should go beyond protecting its citizens against force and fraud – the only legitimate function of the nightwatchman state. It should undertake social legislation, securing positive rights to a certain standard in education, health, housing, and working conditions.

The moral nature of the state further inheres in its social complexity, for Green conceptualizes the state as the society of societies rather than a unitary-homogenous entity. As the society of societies, the state, then, is the complex form in which

human possibilities express themselves in culture, human institutions, and practices. The central idea here is that the possibility of developing the human capacity of realizing the best in oneself lies in the integration of the individual with the complex network of institutions which makes up the state.

Green develops this account of the state in criticism of the individualist conception of the state defended by social contract theorists. Their account of the state neglects the entire social fabric in the state that lies between the individual and the political apparatus of the state – civil society: intermediary groups and organizations, social institutions and practices which function as a rich repertoire of shared values and collective achievements. Such neglect is the inevitable result of the social contract theorists positing relations of opposition between individual and society, individual rights and political authority.

Rights That Bind

The first thing to notice is that Green challenges contractarian natural rights for positing individuals and the state in binary relations of opposition. This opposition results from the low value that natural rights place on sociability, and in particular on the trustworthiness and motives of government. Green does not deny that rights belong to individuals, but as individuals-in-relations, that is members of a society of free agents, as recognizing themselves and recognized by others to be such members. In contrasts to natural rights account, then, Green's theory of rights incorporates mutual or social recognition. As mutually recognized moral claims for self-development, rights equally emphasize the development of others, thereby reveal individuals' concern with the well-being of others. Green, thus, replaces the egoism of rights, presupposed by contractarian theorists, with mutuality of rights. Moreover, contrary to natural rights, as socially recognized, rights are themselves subject to historical evolution.

By detaching rights from the justificatory idea of the social contract, Green not only socializes, but also teleologizes rights in the sense that they serve to promote the good of self-realization. His teleological conception of rights defies the standard "mainstream" liberal concern with the foundational versus instrumental status of rights. Green rejects the primary normative status of rights (foundational status) because they serve and are justified by the moral good of human flourishing. At the same time, however, Green does not defend the mere instrumental value of rights because they are a constitutive condition of self-realization. That is, while it is the case that Green's teleological rights are derivative of and relative to the well-being of society (common good), the goal of society is to enable the development of all its members.

Green's claim that there are no rights against the state further raises individualist liberals' ire, though unjustifiably. Essentially, Green's claim is that there are no rights against a *just* state. Acutely aware of the gap between the ideal and the existing state, Green does not deny that there are certainly rights against an *un*just state.

Green's reconceptualization of right reveals their binding force. Critics condemn the "liberal language of rights" for generating and justifying human separateness in terms of competitive and adversarial relations between narrowly self-interested individuals. By contrast, Green's incorporation of social recognition into his conception of rights means that they assist in creating communal relations of mutual concern. Whereas some critics hold that it is more beneficial to focus on the language of the good than on the language of rights, Green renders rights an internal condition of realizing the good. Finally, critics of liberal rights focus exclusively on negative rights that invoke the image of human separateness as a central liberal tenet because they require non-interference. By contrast, Green defends positive rights that are expressive of the way each individual views the well-being of other individuals as bound up with his own self-realization.

Citizenship

Citizenship, for Green, is captured by the idea of active service to the state, where the state is

understood as the society of societies and service is not strictly political in nature, but is broadly civic. With the civic republican tradition, Green places civic service at the center of citizenship. In Aristotelian fashion, he believes that the viability of the state depends on what its members do for the sake of maintaining it. The state is not viewed instrumentally but as a system of institutions and arrangements which embody and enhance the mutual development of individuals regarded as a common enterprise that all share and which is, therefore, intrinsically valuable.

Rendering service to the state, however, is inseparable from and is reciprocal with the state rendering service to its members: securing a just system of rights. Citizens' obligation of supporting a free society depends on the obligation of society to enable freedom of self-realization for all citizens by implementing justice as nonexploitation and justice as fair opportunities of self-development for all citizens.

Insofar as the just state maintains a system of law and rights equally in the interest of all and secures a real opportunity of self-development to all citizens, then supporting the state is mutual support: supporting oneself and others at the same time. Put differently, rendering service to the just state is mutual service to oneself and others because a just state serves everyone.

Green's Influences

Notwithstanding the fact that Green's social liberalism of the common good is his own unique creation, it owes a not insignificant debt to both classical and modern thinkers of the Idealist, contractarian, and utilitarian traditions. So, although he was critical of Plato's and Aristotle's nonrecognition of the universal nature of humanity, it is nevertheless true that Green's conception of self-realization drew heavily on Aristotelian virtue ethics and his (Aristotle's) teleological approach to political life. Also, Green subscribes to the Aristotelian claim that only in and through membership in political community can human beings fulfill their human possibilities, while at the same time, unlike Aristotle, holding to a conception of political community that puts a premium on individuality. That special importance on individuality, which is a major component of Green's political thought, draws heavily on Kant's conception of the moral equality and dignity of individuals, considered as ends in themselves. While Green targets Benthamite utilitarianism for failing to secure this particular kind of moral equality and dignity, he still praised utilitarianism for its beneficial practical reforms. Kant's individualism, however, does not escape Green's criticism. Although he subscribes to Kant's idea of the kingdom of ends – a social union of individuals considered and treated as ends in themselves – Green, now drawing on Hegel's communitarian argument, rejects its abstract and too individualist nature. Critical of Hegel's failure to recognize a gap between the ideal state and the existing modern state, Green is, nevertheless, impressed by the Hegelian argument that social institutions function as enabling tools for they embody the ethical values and cultural achievement of ever-developing humanity.

Conclusion: Legacy

Green's legacy lies with his construction of a new kind of liberalism that he achieved by placing at its heart conception of community/common good, positive freedom, and enabling state. A quadruple legacy stems from this new liberalism. First, Green's common-good-based liberalism serves as an alternative to both rights-based liberalism and utilitarian liberalism. With regard to the former, common-good liberalism rejects the absolute ahistorical nature of rights without devaluing their constitutive role in enabling individual self-development. At the same time that common-good liberalism, like utilitarian liberalism, is good-based, it rejects utilitarian maximization in favor of social justice. Rendering social justice an internal element of freedom as self-realization, Green connects liberalism with positive freedom. This is the second legacy relating to the role of enabling state. Positive freedom is an achievement of entwining internal

capabilities with just institutions. One important consequence of positive freedom was to justify an enabling state the task of which was to secure the necessary social-economic condition for self-development of all. Intervention in laissez-faire capitalism was justified in the interest of freedom for all members. Wedding positive freedom with an enabling state opened the way to the development of the welfare state. Third, Green's liberalism is perfectionist. Positive freedom as self-realization privileges the development of moral and social capabilities. However, Green's perfectionist liberalism is ethical, not political. The task of the state is indirect: providing the necessary enabling conditions of self-realization, not enforcing perfection by moral legislation. Finally, fourth, Green's conceptualization of positive freedom in terms of exercising and developing capabilities anticipates the capability approach to freedom associated with Amartya Sen and Martha Nussbaum.

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Grimké, Sarah Moore

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Introduction

The work of Sarah Moore Grimké (1792–1873) was shaped by a combination of abolitionist and feminist militancy, since she was an agent of the most radical anti-slavery movement as well as author of one of the very first American texts in favor of extending women's rights, also influencing the Seneca Falls Convention (1848).

Her contribution was rediscovered and more widely acknowledged after 1967, when the American historian Gerda Lerner brought to light its theoretical importance. Through an

analysis of the social environment which reveals the ideology of power and female subordination, Grimké juxtaposed the sexual difference with race, providing a justification for the collective actions and claims.

Anti-Slavery Militancy

Sarah Grimké was born in Charleston, South Carolina, on November 26, 1792, to John Faucheraud Grimké, a state superior court judge and a plantation owner, and Mary Smith, a direct descendant of Thomas Smith, the first governor of South Carolina. In 1821 she moved to Philadelphia and converted to the Quaker religion. Along with her sister Angelina Emily (1805–1879), she joined the American Anti-Slavery Society (AASS) and the Philadelphia Female Anti-Slavery Society (FASS).

As members of FASS, in 1837 the two sisters held a speaking tour across the entire country to promote the abolitionist cause: for 23 weeks they held over 88 meetings, speaking to approximately 40,000 listeners (Lerner 1998, 158).

The extraordinary success of the two women from Charleston was yet considered "immodest" and inappropriate in many circles at the time: from the very beginning several political or religious newspapers denigrated the women orators, especially because they insisted on speaking to a mixed audience of both men and women.

Sarah responded to the accusations with a text entitled *Letters on the Equality of the Sexes and the Condition of the Woman, addressed to Mary Parker, President of the Boston Female Anti-Slavery Society*, that represented a turning point in her intellectual biography. While she did not abandon the abolitionist cause (which she had previously written about in *An Epistle to the Clergy of the Southern States* [1836] and *Letter on the Subject of Prejudice Against Colour Amongst the Society of Friends in the United States* [1838]), from that point on she concentrated her best energies on the fight to extend the entitlement of civil and political rights to women.

Equality Between the Sexes and Women's Condition

The 15 *Letters on the Equality of the Sexes and the Condition of Woman* had been published in the "New England Spectator" (1837) and then appeared in the "Liberator" in 1838. Subsequently, they were reprinted by Isaac Knapp (1838). It is notable that in the first months after they were published, the letters had an extensive circulation: in a letter addressed to Elizabeth Cady Stanton, Lucretia Mott defined them the best work since *A Vindication of the Rights of Woman* (1792) by Mary Wollstonecraft (Nies 1977, 78).

The original source and the main argumentative premise of the *Letters* were the Scriptures in their original language. Grimké refused the English translation of the King James version of the Bible, which was in her opinion in many passages fallacious: the starting point was Genesis and specifically the moment when God created man and said "It is not good that the man should be alone; I will make him a help meet for him" (Genesis 2,18). While God created all animals, able to give affection to man, to obey and serve him, the author claimed that the necessity of creating "a help meet for him" was the expression of a different need: that of providing him with "a companion, *in all respects his equal*," a free agent, equally moral and responsible (Grimké 1838, 5).

This idea is supported in the narration of the Fall, which for Grimké implies the loss of innocence and happiness, but not the loss of equality. The earliest form of equality, sharing the image of God and the communality of sin, is then translated in the New Testament into the "reducibility" of all souls in Jesus Christ: "There is neither Jew nor Greek, there is neither slave nor free, there is no male and female, for you are all one in Christ Jesus" (Galatians 3,28).

Women's inferiority therefore is far from being a natural fact, ordered by the Omnipotent. It is rather an illegitimate imposition, nurtured as much by men's interests as by the "limits" of women themselves who are content to degrade themselves as "females" and transform themselves into "animal[s] of dress" (Grimké 1838,

22, 67), renouncing their moral and rational qualities for the desire to please and be pleased.

In the continuation of the *Letters*, Grimké dwells upon other aspects reputed to be key: the condemnation of women to an education which did not enable them to develop moral or intellectual qualities; the state of matrimony as "a divine ordination" between equals (Grimké 1838, 84); criticism of legal orders which denied women legal rights; claiming the possibility for women to become ministers of the faith; and more generally, the need for women's full and active participation in social and moral reform movements.

Equality Before the Law

In the letter *Legal Disabilities of Women*, Grimké also explains the similarity between the conditions of women and slaves. By evoking *Commentaries on the Laws of England* (1765–69) by William Blackstone, she states that women, and especially those who are married, like slaves, are "absorbed in [their] master" (ivi, 75). Therefore the Louisiana law is also applicable to them: "All that a slave possesses belongs to his master; he possesses nothing of his own, except what his master chooses he should possess" (ivi, 80), in spite of their being subject to extremely rigid penal laws. This is an aporia that should be considered scandalous in a democratic country where exactly a "taxation, without representation, be it remembered, was the cause of our Revolutionary war" (ibidem).

Starting from an argumentative approach based on the Scriptures, Grimké thus claims entitlement of natural rights for women, conceived in the wake of John Locke's *Two Treatises of Government*, cited several times in the *Letters*. As for the nature of these rights, there is no differentiation whatsoever: "I know nothing of man's rights, or woman's rights; human rights are all that I recognise" (ivi, 117). The "human rights" are qualified as "essential" and therefore "inalienable" (ivi, 74, 126) attributes of moral beings, a fundamental part of their "nature" (ivi, 127), which entail precise responsibilities. These are broken down in moral, interior terms and become legal, exterior terms when they are recognized by the law. The nexus between rights and responsibilities is thus inseparable. To this extent, God is considered the only true "Judge," as well as "Lawgiver" and "King" (ivi, 8): only to Him are men subject and to the Sacred Scriptures, in that as revealed by Him, they are the primordial source of every command. On the contrary, any doctrine or order that preaches dependence of one human being on another (as in the case of black slaves or women) is conceived of as an "anti-Christian" form of idolatry (ivi, 17), which degrades the moral character and dignity of those free agents created in His image. Grimké's idea of equality before the law could be referred to the classical and formal logic ("treating likes alike"): established that men and women *are* equals in natural terms, they *ought to be* equal on normative grounds.

Education and Citizenship

After the publication of the *Letters*, considered too audacious even by the wing of the movement that until then had supported her, Grimké retreated to private life.

Nevertheless, from the summer of 1854 until 1873, she dedicated herself to creating a coeducational school as part of the cooperative community of Raritan Bay Union, to grant physical, moral, and intellectual growth in a simple, healthy environment, in direct contact with nature, in line with the teachings of Henry David Thoreau and Ralph Waldo Emerson. Moreover, Grimké's teaching method was rooted in sex equality, opposing to the view of the time according to which, differently from men, "chemistry enough to keep the pot boiling, and geography enough to know the location of the different rooms in her house, is learning sufficient for a woman" (ivi, 61). The project also had strong allusions to the "national education" plan formulated in the twelfth chapter of Wollstonecraft's *Vindication of the Rights of Woman*, considering education and intellectual improvements as preconditions for full citizenship.

This period reinvigorated the militant Quaker: she endorsed the first feminist journals, "The Una," directed by Paulina W. Davis, and "The Lily" by Amelia Bloomer, and for a brief time, even wore the Bloomer costume. She also took up correspondence with Harriet Taylor and subsequently popularized John Stuart Mill's book *The Subjection of Women* (1869).

Although Grimké defined women's right to vote as a "blessing" for the whole society, "as was the granting of the franchise to foreign-born immigrants" (Lerner 1971, 334), her active participation in the suffragette movement was relatively limited, as she was already quite elderly when, with the Seneca Falls *Declaration of Sentiment,* a truly collective feminist awareness took form, able to organize within the social space. It was not until 1890 that the National American Women Suffrage Association (NAWSA) was established and the Congressional Union for Women's Suffrage in 1913. Sarah Grimké died in 1873 at the age of 81. Still, her life experience had shown her the importance of formal legal recognition. By focusing on the cases of slaves and women, she understood that the natural rights conferred by God must be recognized by legal systems in order to be enforced and properly enjoyed, while a moral being who is excluded from civil and political subjectivity is degraded in his or her nature.

Conclusion

While Grimké focused mainly on the abolitionist cause in the first part of her life and the feminist one in the second half, she always managed to connect the aspirations of blacks to those of women, intersecting efforts and actions. With theological and rational reasoning, she always aimed at achieving this double militancy.

This position, however, initially shared by many abolitionist women, became a minority one with the ratification of the 14th (1868) and 15th (1870) amendments to the United States Constitution, which represented a real breaking point. These constitutional reforms extended citizenship to Afro-American citizens but only males. In overlooking the active commitment of many militant women (e.g., the FASS), the United States Congress introduced the word *male* into the constitution, thus excluding both white and black women from political citizenship: a vacuum that was only filled in 1920 with the ratification of the 19th amendment.

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Grotius, Hugo

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Introduction

The work of Hugo Grotius (1583–1645), a Latinized version of Huig de Groot, transcends the field of law and legal philosophy, considering his reputation as a humanist, as a poet, and as a historian as well as his contribution to theology. Regarding the first realm, the interest in his work revolves around three main themes which will be the ones explored here: his modern theory of natural law (*infra*, II), his theory of the state (*infra*, III), and his contribution to international law (*infra*, IV). Considering those, his relevance, for better or worse, cannot be ignored.

Modernity is an ambivalent term, but if one understands it – as it is usually the case – as implying an individualistic moral world, thus centered on subjective rights, that can be determined regardless of theological premises, then Grotius played a foundational role in its development. As will be seen, Grotius's natural law derives from human nature "considered on its own" and endows human beings with subjective rights. To the extent that units other than human beings – namely, states – relate to each other in a pre-political state, they should also be conceived as subjects to natural law.

Grotius's relevance is not diminished, being perhaps confirmed, by the instrumental character of his work, originally tied to the advancement of the interests of Dutch expansion in Southeast Asia. Indeed, Grotius's first major work, *De iure praedae commentarius* (*Commentary on the Law of Prize and Booty*, referred hereafter as D.I.P.), eventually published in 1868, was written between 1604 and 1606 on commission from the United Dutch East India Company in order to demonstrate the legality – i.e., the conformity with a binding natural law – of Dutch actions that had interfered in the Portuguese sphere as protected by papal edicts and titles of discovery and possession. The theory thus presented would be further developed in his masterwork *De iure belli ac pacis* (*The Rights of War and Peace*, referred hereafter as D.I.B.P.) written between 1622 and 1624 and originally published in 1625. Later editions have diluted his arguments in order to accommodate the book to the orthodox Calvinist views of his contemporary opponents. In between (1619–21), Grotius wrote one of the major early modern contributions to the study of Dutch private law, the *Inleidinge tot de Hollandsche Rechtsgeleergdheit*, published in 1631.

Grotius's Modern Theory of Natural Law: "Right Reason" as Instrumental Reason

Grotius's theory of natural law is emancipated from theological premises. It is true that in the *Prolegomena* to D.I.P., he begins by accrediting "preeminent authority" to the following rule: "What God has shown to be His Will, that is law." However, he adds that "the Will of God is revealed. . .above all in the very design of the Creator, for it is from this last source that the law of nature is derived" (2006: 19–20). That being so, the natural characteristics of individual creatures really are the (secular) foundation on which the system is based. Therefore the conclusions reached would be true – as Grotius asserted in D.I.B.P.'s most famous passage – even if it were granted "that without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human affairs" (2005a: 1748).

Natural law is defined as the "rule or dictate of right reason, shewing the moral deformity or moral necessity there is in any act, according to its suitableness or unsuitableness to a reasonable nature" (2005: 150–1). The similarity with scholastic definitions should not deceive us. In

Grotius's view of "nature," the individual is the exclusively relevant unit, and thus natural law is detached from a framework placing human beings in an objective order that gives them purpose. The purpose of human beings is now taken to be strictly inherent to themselves as natural beings with drives or "desires," i.e., as subjects in a quite narrow sense. Those subjects are endowed with "rights", the latter term being used in a subjective sense which is opposite to the pre-modern objective sense (Tuck 1979: 60–1; however, see Tierney 1997: 316 ff.).

As clarified in the *Prolegomena* to D.I.B.P. (2005a: 1747 ff.), the determinant of natural law is the "desire for society" (*appetitus societatis*) of each human being – a desire "for community with those who belong to his species; though not a community of any kind, but one at peace, and with a rational order." Therefore, the key to determine what "desire for society" is – and consequently the logic of natural law – is to identify Grotius's conception of rationality, allowing one to qualify an order as the endeavored "rational order."

In a context in which "community" has no ontological status of its own, what is sought after is *peace with other individuals*, which involves the respect for their rights (i.e., for others' possessions and for promises made to them, the compensation for culpable damage, and the suffering of punishment in case of wrongdoing). The endeavored "rational order" consists therefore of rules that protect *individuals*, both others *and oneself*. Indeed, as will be explained, the respect for other peoples' rights is *rational* since it is instrumental to self-preservation, the latter being the true foundation of natural law: to respect others means to protect oneself from the inevitable consequences that would derive from the absence of peace. As society is instrumental to self-preservation, the "reason" in "accordance" with which the "desire for society" develops is also instrumental.

When pointing this out, I am following the Epicurean reading of Grotius, proposed in the last decades by Richard Tuck – in line with earlier claims ultimately made by Samuel Pufendorf or Jean Barbeyrac. According to it, Grotius's most powerful and original contribution is to be found in his "continued attempt to integrate the laws of nature into a system based of self-preservation" (Tuck 1987: 113; 1993: 169 segs.). That attempt is most evident in Grotius's earlier work, D.I.P., which defined the two primary laws of nature as regarding *oneself* – those laws concerning the defense of one's life and the acquisition of what is useful for it – and the secondary laws as those functionally necessary to the peaceful social existence without which self-preservation would be in danger: the "law of inoffensiveness" ("Let no one inflict injury upon his fellows") and the "law of abstinence" ("Let no one seize possession of that which has been taken into possession of another") (2006: 23 ff).

The very same attempt persists in D.I.B.P. As indicated, "desire for society" is not mere "social instinct" but desire for a "rational order" that protects individuals, particularly those for whom one does not have affection and with whose interests one's course may collide. The preservation of oneself – the decisive ontological, moral, and also epistemic unit of the system – is what is ultimately at issue in that "internal principle," which is different from the "extrinsic principle of intelligence," leading other animals to unreflectively "regard partly for their offspring, and partly for the other members of their species" but that "does not appear in other actions of theirs which are equally difficult" (2005a: 1747).

One can therefore speak in this context of "sociability in the Epicurean sense" (Tuck 1999: 89), which more accurately means *enlightened self-interest* or *self-interest well understood*: an interest that is not to be confused with a mere selfish interest lured by immediate advantages but that is consistent with self-preservation in the context of human social existence, considering longer-term benefits. That is well clarified in the passage in which Grotius considers to be in the individual's "permanent interest" not to break the law: the one who breaks it "for the sake of some immediate interest will thereby undermine his own and his descendants' permanent interests, and a nation which violates the laws of nature and nations will have renounced its right subsequently to live in peace" (2005a: 1750).

The emergence of the cited passage in the context of a discussion on civil law – the "occasion" of which Grotius considers to be "utility" – cannot hide the fact that the author is addressing *also* the transgression of "the laws of nature" within a model that applies equally to the rational agency of individuals and states. And it should be noticed that, in Grotius's logic, what makes the transgression of the law irrational is necessarily also what makes the law rational or, in his expression, "appropriate to human nature rationally." Indeed, he is reflecting here his conception of rationality, i.e., what he takes to be good or right judgment and thus definitional of natural law in the first place. In an earlier passage of the *Prolegomena* to D.I.B.P., he affirms that "we should understand that it is appropriate to human nature rationally to follow good judgment. . .and not be disturbed by fear or the lure of immediate pleasure, and whatever is plainly contrary to good judgment is also contrary to the law of nature (that is, human nature)." Not to mention what he had already sustained in D.I.P. about the "rational animal," anticipating the true meaning of "desire for society," the "rational animal" is the one that is "foresightful" and therefore "loves his fellows because it can see beyond the immediate good of sense, what appears immediately useful to it" (Brett 2002: 40).

In Grotius's system, civil law is denser than natural law, in the same degree that the civil state is richer than the state of nature. The former is not a state of "wary defensiveness" in which men merely keep from injuring one another unnecessarily. It is a state in which a civil association has been formed for the improvement of lives with men agreeing to undertake further duties to increase their utility. But the case is not that they reason instrumentally at this "civil" stage, after having reasoned noninstrumentally at an earlier, "natural," stage. What is "appropriate to human nature rationally" cannot coherently be different in the state of nature, on the one side, and, in the civil state, on the other. *Instrumental* rationality, leading to the agreed obedience to civil law at a later stage, is also present in natural law from the beginning – defining the corresponding order as right – there being no "equity/utility disjunction," neither in D.I.P. (which is undiscussable) nor in D.I.B.P. (see, however, Brett 2002: 42–3).

The coherence of Grotius's theory is what allows one to infer from it a nontheological solution to the problem of motivation for obedience to law. Within the scholastic tradition that problem could only be solved by invoking God, even if it were possible to know natural law by strictly considering nature as "God's creation," the fear of God would still be necessarily behind obedience to the corresponding commands. Some believe that Grotius has left the problem of motivation unsolved, focusing exclusively on the knowledge of natural law and remaining uninterested regarding the mechanisms "it manages to obtain any kind of grip on human psychology" (Brooke 2012: 52). However, Grotius's lack of interest is only apparent: the solution to the problem of motivation is exactly the same that he gives to the problem of knowledge of natural law. The "work" in both cases is made by self-preservation, reason being all the more motivating as it is instrumental to that supremely powerful drive.

The Epicurean reading of Grotius is challenged by a Stoic reading, which has been prominently defended in the last decades by Straumann (2015: 97 ff.). In this reading, Grotian natural law is taken to be a modern succedaneum of Ciceronian natural law, and thus the identification between "desire for society" and the Stoic idea of *oikeiosis* – the foundation of Cicero's conception – is emphasized. Therefore, the basis of Grotius's system is not found in self-preservation, namely, in the desire for a social order that is instrumental to it. Rather, social order is desired for itself within an independent liking for society and for our neighbor, which in accordance with reason, a faculty is "more excellent than the body" and able to discern what is right in and by itself (Haakonssen 2002: 31 ff.).

However, even if the distinctiveness of human beings as holders of reason and speech is well considered in Grotius – and even if he cites Cicero when distinguishing those things "which mere natural desire at first prompts us to" from those other things which are dictated by "right reason" (2005: 181) – "reason" is still characteristically

instrumental in the Grotian context. Considering the above, "right reason" shuns "mere natural desire," *not because it opposes self-interest* but because it means to pursue *self*-interest in effective terms, i.e., in "permanent" and not merely "immediate" terms – thus taking due consideration of the need for social order and the inherent use of speech, through which general rules and concepts such as "justice" are formed.

In synthesis, there is a strict correspondence between "desire for society" in "accordance with reason" and self-interest – i.e., rational or enlightened self-interest – and it is that correspondence that makes the resulting "natural law" a "command of right reason," not in Stoic fashion but in modern, instrumental fashion. Moreover it is the same correspondence that reconciles those two sides of Grotius's theory that the Stoic reading does not ultimately manage to harmonize: the consecration of possessive rights as the ultimate criterion of justice, on the one side, and the adoption of a theory of the sources of natural law that – if it had coherently been adopted by Grotius – would determine the outranking of those "indifferent things" to which "mere natural desire" leads human beings, on the other. In fact, since Grotius did not actually adopt a Stoic theory of natural law, for him the – then incoherent – case is not that "private property rights and justice are basic, self-preservation is not" (Straumann 2015: 107 ff). His case is rather different and quite coherent: self-preservation, which is basic, can only be effectively pursued if the rights of others are respected and peace is maintained, this being the dictate of "right" – in the sense of instrumental – reason.

Even if there is a discontinuity between the Stoic and the Grotian conception of "right reason" – this explaining why one same concept structures two different theories of natural law – there is still a parallel between Cicero and Grotius. Both take the dictates of "right reason" to be "law," framing a philosophical concept of it, something that had great relevance in Grotius's context. Indeed, in this way, Grotius had found a theory of the sources of the law applicable to the oceans that advanced the interests of the Dutch expansion and undermined the traditional foundations on which the Portuguese had based their monopolist claims. The applicable law was natural law to the degree in which the sea continued to exist in a pre-political state (Grotius 2005b: 970). According to its dictates, as seen above, one should not take possession of anything belonging to another, including those things pertaining to the common right of all humankind, this being the case of the sea – which cannot become private property and thus cannot come under the control of a state either. If that rule was disobeyed, as it had been by the Portuguese when establishing a trade monopoly in the waters of Southeast Asia, the injured party (the Dutch, in this case) had the natural right to inflict punishment on the offending one.

Grotius's Theory of the State: Toward the "Liberty of the Moderns" and the Liberal State

Grotius defines liberty as a subjective *potestas* over oneself, his analysis applying both to individuals in the state of nature and to the status held collectively by each people. This juridical definition, inspired by the Glossators, allows for paradoxical consequences: a free and sui juris person is at liberty to subject herself to slavery, the same applying to a people who decides to subject to princely absolutism (2005b: 556 ff).

This led many critics – Rousseau to begin with – to take Grotius's theory of the state to be favorable to tyrants. However, Daniel Lee (2016: 266) is right when pointing out that "far from endorsing the self-enslavement of a free people. . ., Grotius's purpose was merely to comment neutrally on the scope of the constitution-making powers vested in a free people." Moreover, "the criticism misleadingly portrays the constitutional choices to be made by a free people in Grotius's theory as nothing more than a stark dichotomous choice between slavery under princely absolutism or liberty in a state of popular self-government. This. . .omits a vast third category of states investigated by Grotius in which popular liberty can continue to flourish even while under legally constituted princely government."

The "popular liberty" which is at issue in that "third category of states" is none other than the "liberty of the moderns" as later defined by

Benjamin Constant – one detached from republican citizenship and multiplied in subjective rights to be enjoyed at the private level. Moreover, one may risk saying that the said "third category" would develop to become the liberal state, one that is not necessarily democratic and in which the apex of human existence is placed in the private sphere, the "public" being functionally defined by its promotion.

As can be inferred from the above, the center of Grotius's theory of the state – and the corresponding locus of sovereignty – is to be found in the constitution-making power of the people, what the Abbe Siéyès would later name "the constituent power." This also identifies the modern character of Grotius's theory. Pre-modern treatments inspired by Aristotle's *Politics* would concentrate on political regimes, distinguishing the "pure" from the "impure" and the just from the unjust forms of government. Inversely, in Grotius, the state, and therefore the political, is neutrally defined as "the common Subject of Supreme Power." How that body might be ruled (by one, the few, or the many) is variable, and thus the form of government is no longer an essential element (2005: 259 segs.).

Conceivably however, the abandonment of the value rationality that had been present in pre-modern treatments of political regimes, and its substitution for a value-neutral treatment of sovereignty, is not entirely impartial. Indeed, there are indications that value rationality is yielding to instrumental rationality: according to Grotius, those framing a government – or subjecting to it – do it "for the sake of some interest. It is also the case that anyone who prescribes laws [be it one, the few or the many] does so with a view of increasing utility, or at least ought to do so" (2005a: 1749). In this context therefore "utility can justify just about anything" (Brett 2002: 48), "association or subjection" being converted into neutral alternatives from a self-interested perspective – the one that really matters in a context in which the logic of the state is "privatized."

There is still another unconventional sense in which "privatization" occurs in Grotius's theory. The state is not understood as an objective order with its own public logic but as a subject analogous to private subjects. That "common subject" benefits from the transferal of rights originally possessed by individuals – including the right of punishment, which Grotius innovatively considers to be already held by the latter in the pre-political state. In a context in which the nature of state power is thus taken to be no different from the nature of originally private faculties, the difference between the public and the private is "fluid and in effect purely a question of numbers" (Tuck 1979: 63).

Grotius's International Theory: Whose Just War? Which International Law?

For Grotius, sovereign states, like individuals in the state of nature, are autonomous agents bound by natural law. The latter does not exhaust the body of law existing among states, the bulk of which corresponds to the law of nations which is introduced through variable custom and agreement. Even though convention and not nature is the "mother" of the law of nations, its "grandmother" – the ultimate source of its authority – is still natural law, applying mutatis mutandis the expressions Grotius uses in the case of civil law that not only because the respect for agreements is mandatory under natural law but, more profoundly, because the (instrumental) rationality that justifies natural law also justifies the law of nations (2005a: 1749).

Indeed, what ultimately explains the body of law existing among states is neither their involvement in relations of friendship nor their sharing of overriding common interests. Rather, the justification lies in the parallel interests of states in preserving their rights as sovereign entities in a "social" atmosphere of peace (Idem: 1750). Many have praised Grotius as the founding theorist of a modern "international society," but "society" means in this context nothing more than the arrangement necessary to the peaceable exercise by each member of its rights – rights which can be maintained against others. As Tuck points out, "in the eyes of an Aristotelian, nothing could be further removed from a true social existence than the antagonisms and bargains of international life" (1993: 197).

Indeed, and in spite of the laws presiding over it, the Grotian "society" is hardly uncontentious. Moreover, even though peace is to be preserved, it can be broken in case there is a "justifiable cause of war," which may regard the exercise of self-defense against an actual or threatening injury, the recovery of what is due to an offended state and the punishment of offences. Considering there is a significant elasticity in those "justifiable causes" – the same being paralleled to all the sources of judicial actions in a civil society – we are not for from a view of war as a method used by states to settle their claims in absence of judicial proceedings. Something that is as disquieting as states will unavoidably be "partial in their own cases" (2005: 393 ff., 968).

As a result, what lurks is a particularly competitive international arena, if not a highly aggressive one. That conclusion is determined, not only by the form in which Grotius conceives the *jus ad bellum* (the law on resort to war) but also by his treatment of the *jus in bello* (the law on the conduct of war). Regarding the latter, Draper (1990: 193) rightly points out that Grotius "moved some way towards the position where *jus in bello* came to be viewed as applicable irrespective of the justness or unjustness of a war." And that movement can only be understood as an implicit acknowledgment that, in the modern world, "war" was de facto becoming just another instrument of policy.

Grotius's treatment of the law of nations has led many legal historians to consider him as a founder of international law, alongside the giants of the Iberian Second Scholasticism, namely, Francisco de Vitoria and Francisco Suarez. That is not however unproblematic since Grotius's portrayal of the international arena and his endorsement of a very flexible set of rights to make war end up being dangerously close from the state-centered humanist vision to which the Iberian founders were opposed. And it is indeed revealing that Grotius's international "jurisprudence," complemented with the most exquisite "examples" coming from the Greeks and the Romans, fits exactly the aggressive interests of the early seventeenth-century Dutch expansion. At one moment the punishment of the Portuguese for their illegitimate *dominium maris* is justified, and at another moment, the same happens regarding other "grievous violations of the Law of Nature" by native peoples, the result being that the Dutch could explore the high seas, seize rivals' ships, annex new territories, and even enslave people, all with a clear conscience (Tuck 1999: 78 ff.).

And even if one admits that Grotius formulated an "international law" that opposes the "reason of state," one is forced to admit that he cannot remain a guide. Indeed, it will still be indisputable that his "international law," even though establishing the principle that states are bound by legal rules, served the interests of the existing legal community – making it possible for European states to conquer and dominate – while not noticeably limiting the sovereign state, converting it instead into the ultimate judge of its own "rightful" interests and causes (Röling 1990: 295).

Cross-References

- ▶ Cicero, Marcus Tullius
- ▶ Natural Law: Protestant
- ▶ Vitoria, Francisco de

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Guicciardini, Francesco

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Introduction

Francesco di Piero Guicciardini (Florence March 6, 1483–May 22, 1540) is an Italian statesman, political thinker, and historian active in the Medici's entourage (in particular but not limited to Popes Leo X, 1513–1521 and Clement VII, 1523–1534) during the "Italian Wars" that saw France and the German Empire fighting for the possession of the Duchy of Milan as well as the Kingdom of Naples between 1494 and 1559.

As a descendant of one of the oldest families of the Florentine's oligarchy and doctor in civil law, Guicciardini began his political career with a diplomatic mission in Spain in the name and on behalf of the Florentine Republic. He was still at Ferdinand of Aragon's court when the republican government collapsed in Florence and the Medici came back into the city which was under the pressure of Spanish troops after the Sack of Prato in 1512.

This Spanish embassy was the first step in a long and tormented political career, but also the period where Guicciardini wrote his first constitutional treatise, the *Discorso del modo di ordinare il governo di Firenze*, a text aimed to determine the best type of government for the City of Lilies, better known as *"Logrogno" discourse* (1512).

In Spain, Guicciardini also wrote a first collection of thoughts, maxims, and aphorisms, which he would expand and amend until 1530 (the *Ricordi*). Since then, political action and reflection would sign all the Tuscan's life. In fact, although he did not allow any of his works to be published during his lifetime, Guicciardini never stopped writing, when he would return from Spain and enter the highest Florentine institutions (Eight of Balia and then Signori) or when he would serve the Medici Popes in their new territories in Emilia-Romagna, as commissioner or governor of Modena, Reggio, and Parma, then as President of the entire papal province, almost continuously from 1516.

"Debating foreign policy": Guicciardini's Opinions on International Politics

In such circumstances, Guicciardini showed Pope Leo his ability to administrate and reestablish order – using severity, inflexibility, and leadership – in a region which was troubled by factional fighting as it also was by attacks of enemy soldiers. During the early 1520s, being the head of the papal troops provided by Leo to support Charles V against the French in Northern Italy, he also exchanged intensively with Cardinal Giulio de' Medici about Florentine's government (Benzoni-Jodogne: 2004). As evidenced by an abundant correspondence with several relatives of the new head of the Catholic Church, after Giulio's election as Pope Clement VII in 1523, Guicciardini did not cease to share his opinion with the Medici on how to manage not only the states of the Church and their importance in a

larger political perspective but also on how to contain the imperial growth. By doing so, he positioned himself as one of Clement VII's privileged advisors.

After the French defeat at Pavia in 1525, war, peace, defense, alliances, and strategies became the core of the Guicciardini's letters addressed day after day at the Curia to exhort the Pope to take collective and conclusive action against the imperial advance. Consequently, when the imperial armies were close to arrive, Guicciardini has been called to join Clement in Rome and to become lieutenant general of the troops of the League of Cognac, an alliance that Guicciardini personally sustained as the only way to hinder Habsburg's power in the Peninsula. To deepen his thoughts on the position to be taken by the Italian States in the conflicts between Francis I of France and Charles V, Guicciardini wrote a series of contradictory speeches – remained unpublished till nineteenth Century – presenting the advantages and disadvantages of each position about a given issue, taking firstly into account all securities, reputation, and profit as criteria (Cesa 2017), but also the psychology of the protagonists towards whom he did not hesitate to be very critical.

The Origins of the Reason of States: "the reason and practice of states"

Disregarding traditional genres (Fournel-Zancarini 2002: 215–246, 293–310), Guicciardini's writings (whether historiographical, autobiographical, aphoristic, or epistolary) are oriented along two axes, closely linked and conditioned by the "calamities" experienced by the author. The Italian Wars, characterized by the confrontation of two foreign powers on Italian territory, constitute the horizon of all Guicciardinian thinking, the coordinates from which his thoughts cannot escape.

On one hand, the Florentine wonders on which would be the best type of government for Florence: the one that would allow the city to navigate through troubled waters, which is, according to him, a "mixed" regime of Venetian inspiration, based on an aristocratic ruling class coupled with selected republican institutions. Such a theory, which is part of an ongoing debate on Florentine politics, finds its most successful explanation in the *Dialogue on the Government of Florence* (1521–1526), which brings together proponents of various forms of state management shortly after Piero de' Medici was driven out of Florence (1494).

On the other hand, Guicciardini carries out an acute reflection on the physiognomy of the ideal leader, captain, or statesman that he is. Guicciardini's texts bear the trace of ancient and more recent thinkers, historians, and lawyers such as Thucydides, Aristotle metabolized by Thomas Aquinas, Cicero, Tacitus, Gratian but also Baldus degli Ubaldi, Leonardo Bruni, Giovanni Pontano, Giovanni Bertacchini, and Filippo Decio. The Florentine, whose worldview is riddled with war, paints the portrait of a rational statesman, with the experience of the *res publica*, prudent, provident, discreet, and skillful. According to him, motivated by his desire of public glory, with his practical wisdom, this member of the ruling class should distinguish himself by his ability to use time wisely when dealing with his power and state, as well as by his ability to fight against misfortune, since he would be able, through conjecture, to anticipate its outcome; he would be a man who is conscious of the fluctuation of public opinion and of the need to use it to achieve his ends, ready to resort to cruelty if the need arises.

Guicciardini is among the first authors to use the expression "reason of state" (Guicciardini 1994: 159) to consider cruel actions – like the eradication of all the perpetrators of the Pisan revolt against Florence and their descendants, suggested in the *Dialogue* – in the name of a greater good (i.e., Florence's conservation).

Francesco Guicciardini: "parens historiae"

Therefore, even if such themes run through the numerous writings, from the records of Florentine history (the early and unfinished *Storie fiorentine*

1508–1509 and the *Cose Fiorentine*, 1527 ca.) to the autobiographical orations (*Consolatoria, Accusatoria* and *Defensoria*, 1527), passing through his abundant correspondence or more familiar texts (*Ricordanze, Memorie di famiglia*), Guicciardini's fame is almost due to his historiographical masterpiece, the only one that was thought, at some point, for a publication: *The History of Italy* (1534–1540, published posthumously in 1561).

Assuming an European perspective, based upon a large variety of sources merely compared and analyzed – including documentary material – and upon Guicciardini's personal experience as general lieutenant of the Papal troops, the twenty-book work retraces the chain of causality that led to the failure of the League of Cognac and the Sack of Rome of 1527. Such a modern approach earned Guicciardini to be considered by Jean Bodin as "parens historiae" and compared to the greatest ancient historians (Bodin, *Œuvres Philosophiques,* ed. P. Mesnard, Paris, PUF, 1951: t. I, 302b, I, 48–49), even if the work, considered in its totality, is a kind of sum of the errors and shortcomings of the leaders – princes and popes – described in it.

Conclusion: Machiavelli and Guicciardini

Francesco Guicciardini is certainly less famous than his contemporary and friend, Niccolò Machiavelli, with whom he maintained a close dialogue since 1521 (epistolary but also materialized in a punctual but unachieved commentary at Machiavelli's *Discourses on Livy*, the *Considerazioni intorno ai 'Discorsi' del Machiavelli*). Nonetheless, since when Giuseppe Canestrini rediscovered and started to publish his entire production (1859–1867), he is considered as one of the precursors of modern political thought.

Although not agreeing with the Florentine Secretary on what use is to be made of Roman history – Machiavelli's confidence in the ancient examples is opposed to the necessity of always adapting the political practice to the specificities of the times, peculiar to Guicciardini – the two friends share similar ideas regarding the posture of the statesman and the realism applied to modern politics.

Trying to identify the form of state capable of countering the rise of foreign powers that threaten the survival of Florence, both of them identify the strong and gifted political leader, capable, among other things, of distinguishing morality from political action.

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- ▶ Cicero, Marcus Tullius
- ▶ Gracián y Morales, Baltasar
- ▶ Machiavelli, Niccolò
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Gumplowicz, Ludwig

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Introduction

The sociologist, social theorist, and jurist Ludwig Gumplowicz (1838–1909) was born in Poland on March 9, 1838, in the Jewish quarter of Krakow, a city that was converted into a state at the Congress of Vienna in 1815 and was annexed by the Austrian Empire in 1846. Ludwig's parents, Abraham Gumplowicz and Henryka Inlender, came from a particularly wealthy Jewish environment; nevertheless, they suffered from various disadvantages in their interactions with Austrian culture. Gumplowicz's life is characterized by a constant coming and going, mainly between Krakow, Vienna, and Graz, which in turn marks the tension with which he, as a Jew, confronts his surroundings, and thus, embraces cultural assimilation – a process that leads him to convert to Protestantism while settling in Graz.

After studying law in Krakow and Vienna, Gumplowicz obtained a doctoral degree in law – his work focused on the scientific and historical development of the *Testaments* – in May 1862, a year before participating in his first political activities. His immersion in Polish nationalist movements, particularly strong in their opposition to the Austrian Empire's absolutism, as well as that of the Russian Empire, overlaps, from the beginning, with his theoretical reflections (e.g., *Acht Briefe aus Wien*), which he develops from a distinct Hegelian idealism based on a dichotomous vision of the political actors between "good" and "bad." That division became even more relevant after the rejection of his habilitation thesis – *Der letzte Wille* and *Die Judengesetzgebung Polens* – mainly for political reasons.

After his participation in Jewish-Polish solidarity movements, Gumplowicz was involved in the foundation of the radical-democratic magazine *Kraj*, a magazine that established a kind of counterweight to the conservative newspaper *Czas*, in 1869. However, just a couple of years later, Gumplowicz's disappointment with the nationalist liberation movement began to corrode his political activist conviction. As Emil Brix has argued in *Ludwig Gumplowicz oder Die Gesellschaft als Natur*, 1875 is a year of deep change for Gumplowicz. At that moment, he experienced the failure of his activism and political idealism, that which had led him to participate, for example, in the *January Uprising* against the Russian Empire in 1863.

Faced with such a moment, Gumplowicz decides to fully embark on a path in social science. This is why he abandons Kraj's leadership, converts to Protestantism, and emigrates definitively to Graz, where he works in various law professorships until his retirement in 1908; a year before committing suicide with his wife due to various unsolved illnesses.

From the Theory of Evolution to the Theory of Racial Conflict

Regarding the development of his general work, Gumplowicz tries to distance his viewpoint from the preceding philosophical perspectives (Mikl-Horke 2011: 88), based on the spirit of a new field of thought: sociology. This purpose, founded on the hope of this "science of the future," as Gumplowicz points out in the preface to *Der Rassenkampf*, which gave him international notoriety, takes root within the context of the *theory of evolution* and within the framework of the *theory of racial conflict*. While the former demonstrates the intellectual spirit of his complete work, the latter more precisely accounts for the formation of his sociological theorization as such.

On the one hand, the conundrum of the theory of evolution is explained by the relevance gained by the natural sciences and takes shape through Gumplowicz's attempt – together with peers like Gustav Ranzenhofer – to transfer Darwin's advances and perspectives to the nascent science of sociology. This was about generating an effective link with the "dominant theory of the English man" (Gumplowicz 1883: 68), to the extent that it would provide an analytical-methodological framework that promised favorable results for the discipline (Gumplowicz 1928: 250). That theoretical endeavor is not exempt, in any case, from the influence of his biographical trajectory; his theorizations about the state – a homonymous concept to that of society – are marked by it. The aforementioned failure in his fight for pro-independence Polish nationalism led Gumplowicz, in the mid-1970s, to definitively renounce idealistic change projects in order to sustain a kind of *theoretical resignation*. Gumplowicz's approach to the theory of evolution is thus marked by profound disappointment with the promise of the Enlightenment; a sociocultural movement that would prove to be a mere illusion promoted by the dominant elite.

On the other hand, this sort of transfer of the potential of the natural sciences to sociology is even clearer with regard to the guiding principle of Darwinism. The conceptual core of his theory of racial conflict can be better understood along the same lines. While Darwin defines natural evolution as a *vital struggle for existence*, Gumplowicz extracts that outline, applies it to society, and defines the latter as a kind of *race struggle for power*; and above all: *for power of the state*. If, for example, Marx and Engels (1972: 462) contend that all history is a history of class struggles, Gumplowicz preserves the law immanent to this premise, varying its internal essence. For him, it is not *class struggles* [*Klassenkämpfe*] but *race struggles* [*Rassenkämpfe*] that account for the "inciting principle" of social and historical change (Gumplowicz 1883: 353–354). The notion of race, despite its semantic virulence, is not defined by anthropological characteristics, but by social, political, and historical factors that explain its identification with the more general idea of *social groups*. Thus, race struggles would account for an evolutionary socio-historical phenomenon impossible to truncate (Gumplowicz 1928: 250). Gumplowicz (1883: 354), in allusion to Kant, clearly states: "perpetual peace is not of this world."

From Race Conflict for Power of the State to Its Manifestation in Law

Based on the above, the position of law in Gumplowicz's worldview can be better understood. According to him, the methodological-argumentative sequence appears to be in contradiction to the schemes of jurists and philosophers of that time. While the latter would erroneously proceed "from law to the state" (Gumplowicz 1902: 31), new sociological thought would have to move from the study of social relations and its struggles "to the state" and, later, "from the state to law." The first moment is related to the transition of the aforementioned race or social group struggles to the power of the state – the latter understood as *Reservoir der Herrschaft* (reservoir of domination). According to Gumplowicz, the state is a form of power with a "dominant minority over a dominated majority" (1905: 199). In it, the statesman who, for philosophers of history and jurists, was conceived as omnipotent, is now understood – from a theoretical spirit which is consistent, for example, with that of Durkheim – as "a blind tool in the invisible but powerful hand of his social group [or race; R.A.]" (Gumplowicz 1928: 192).

Within that argumentative sequence, lies the second moment that accounts for Gumplowicz's conceptual scheme regarding law, which emphasizes the inherent relationship between the state and the law. Once the state's domain is reached, law would appear as a corpus of intrinsic materialization of that state power, thus confirming that "the state is the sine qua non presupposition of law" (Gumplowicz 1902: 147). Despite today's criticism for its evident methodological nationalism, this kind of reduction of law to the state perspective (Verdu 1983: 19) is an expression of the (dis)balance of power between different races or social groups, typical during

Gumplowicz's time. The leitmotif of what is at stake here, beyond the particular discussion regarding national states, has to do ultimately with the power-state-law relationship, which is thoroughly discussed in *Rechtsstaat und Sozialismus* (1881), although it can be traced throughout his work.

By observing the power-state-law trinity, it is clear how law appears as a corollary of the general social struggle process. The *sociological idea of the state*, as the title of one of his works states, "deduces law (. . .) from the struggle of the social components that make up the state" (Gumplowicz 1902: 52), thus linking, abstractly, power with law and vice versa.

This critical idea of law is even implicitly connected with developments of the most current critical social theory, such as the idea of *legal revolutions* by Hauke Brunkhorst who, like Gumplowicz – although with variants of a cosmopolitan nature – mixes theory of evolution with theoretical discussions of law (H. Brukhorst. Critical Theory of Legal Revolutions. Bloomsbury, New York, London, New Delhi. 2014). This idea of law as a narrative of social struggles –according to Brunkhorst in *revolutions* – is already consciously developed by Gumplowicz through his understanding that social struggle makes "the transformation of power into law" indispensable (Gumplowicz 1905: 249–251). Thus, "law" would be "only the reaffirmation of the power obtained (. . .) that is: domination within the limits of the state order" (Gumplowicz 1905: 212).

Conclusion

However, that is not the end of the story and not all is lost in this framework.

Despite Gumplowicz's *staunch positivism*, the last drop of hope for his sociopolitical analysis would be here. Although law is understood as a corollary of social struggles for state power, those who are around it – that lack power – would not, therefore, be "condemned to passivity." The dialectic of the social struggle to dominate the rule of law does not merely include those who remain in privileged conditions but also those who seek their liberation.

Gumplowicz (1905: 249–251) has called this, in a critical tone, a "struggle for emancipation," which would unfold in pursuit of overcoming the socio-legal circumstances of oppression. Despite the transcendental resignation that is indicative of Gumplowicz's work, it is also possible to find spaces to configure different human worlds, anchored in the social materiality of law. Thus, law should be ultimately understood not only as a tool for domination but also for hypothetical emancipation.

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Gurvitch, Georges

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Introduction

Georges D. Gurvitch was born on November 11, 1894, in the Russian city of Novorossiysk, and passed away in Paris, on December 12, 1965. From 1915 to 1920, while being a professor of public law at the University of Petrograd, he had experiences in the working councils and self-management movements, before the Bolsheviks came to power, in 1917. Subsequently, he took a critical stance on the Russian Revolution, despite being profoundly marked by it. After a brief period of time as an associate professor at the University of Prague (1921–1924), he voluntarily exiled himself in France, becoming a naturalized citizen in 1928 and pursuing a doctoral thesis on *L'idée du droit social* (1931). He joined the University of Bordeaux (1934–1935) and the University of Strasbourg (1935–1948), both as a professor of sociology. During the World War II, he temporarily moved (1940–1943) to the United States, where he taught at the New School for Social Research in New York. In 1948, he was invited to minister sociology at the Sorbonne College of Letters, remaining in chair until his death, in 1965. In addition to being secretary of the International Institute of Sociology of law (Paris, 1931–1940), at the same time, he was editor of *Archives de Philosophie du Droit et de Sociologie Juridique*. In 1946, he founded and edited the French magazine *Cahiers Internationaux de Sociologie* (Nascimento 2004, p. 205; Treves 2004, pp. 169–171; Arnaud 1981, p. 120; Balandier 1966, p. 120).

The construction of his social and dialectical thinking, featured by solidity, complexity, and great erudition, starts from political philosophy, then roams general sociology, to later devote itself to the sociology of law and to the "pluralistic philosophy of law." Gurvitch is endowed with extraordinary capacity to develop broad and systematic theoretical-sociological contributions, with endless vertical and horizontal classifications, in macro- and microsociology of social reality (Sorokin 1969, p. 435; Arnaud 1981, pp. 120–121; Tumanov 1985, pp. 261–262). His antidogmatic and eclectic dialectical philosophy and sociology reflected socialist and self-managed political conceptions that clung much more to Proudhon's pluralism than Marx's statism. In turn, his anti-formalist and sociological propositions, defending a pluralism in law, were absorbed and were linked to a trajectory represented by theorists such as F. Gèny, L. Duguit, M. Hauriou, L. Petrazycki, H. Kantorowicz, E. Ehrlich, O. Gierke, and R. Pound (Treves 2004, p. 171; Gurvitch 1945, pp. 71–72, 133–186).

The socio-juridical thinking of Gurvitch focuses on some conceptual cores which dialogue among themselves interacts and compounds a fruitful heuristic totality, represented by normative pluralism and social law.

Inspired by the horizons opened by Eugen Ehrlich, Georges Gurvitch introduced and systematically and comparatively constructed the most comprehensive and extensive theory of legal pluralism in France. In fact, his conception

of pluralism is profoundly anti-statist, dynamic, and complex. Thus, he understands that state law is neither the sole nor the main source of the legal world and that there are numerous other global social groups or societies, independent from the state and capable of producing legal forms. Each group has a structure which engenders its own autonomous legal order regulating its inner life (Gurvitch 1942, 1944, p. 80; 1945, p. 263; 1968; Wolkmer 2018, pp. 159–161).

In particular, legal pluralism is the methodological consequence of a "radical empiricism" produced by the immediate data and intense mobility of the "legal experience." Thus, the capture of the "legal experience" allows to prove pluralism's various ways and criteria of revelation. In the realization of the "normative facts," scales or degrees of differentiated manifestations, a framework constituted by "organized rights" or "spontaneous rights," "institutive rights," "formal rights," etc., are interposed. Accordingly, legal pluralism not only confirms the "plurality of rights" but also its own equivalence. As a democratic ideal that integrates variety and equivalence, legal pluralism harmonizes diversity and unity, thus not ruling out "a certain unity immanent to multiplicity" (Gurvitch 1944, p. 68; Toulemont 1955, pp. 84–87; Belley 1986, p. 366).

Within the scope of active sociability that produces "normative facts," two major types of law, whose hierarchy varies according to the dynamics of societies, must be distinguished: "social law" and "individual or intergroup law." "Social law" has its source in the organized collectivity, trust, and participation of individuals who compound egalitarian groups in collaboration. "Social law" is a right of integration that may never be imposed from the outside, but because it comprises an "immanent totality," it materializes from within. "Individual or intergroup law," on the other hand, involves restricted forms of bilateral sociability between groups or individuals, being developed at the level of the state legal system, more particularly as a result of the social conditions of economic liberalism.

Gurvitch does not lay aside praising "social law" when facing "interindividual law." Such primacy is evoked when he writes that while "social law" is based on "trust, peace, mutual help and common tasks," "individual law" is founded on "mistrust, war, conflict and in separation." In addition to describing "social law" as autonomous and alluding to the fact that "individual law" favors all kinds of alienation, domination, and subordination, Gurvitch proclaims that in social law "distributive justice predominates, while in individual law commutative justice does" (Gurvitch 1944, pp. 83–87; 1945, pp. 230–232; Belley 1986, pp. 363–364; Treves 1978, p. 70).

His pluralistic conceptions of a social law as an "autonomous law" and "community integration," presented in 1932, with *L'idée du droit social*, are resumed and deepened in *Éléments de sociologie juridique*, from 1940, grounding the self-managed proposal to *La Déclaration des Droits Sociaux*, from 1944 (Nascimento 2004, pp. 193–195; Balandier, fl. 1).

Another significant contribution from Gurvitch was to propose and internally structure sociology of law's major themes as an "empirical-realistic" scientific discipline, given a radical critique of monistic formalism and state legalism. This structure that sought to contemplate various types of society and various kinds of law was divided into three parts: First, problems of differential systematic sociology of law (microsociology): it refers to "the study of law's manifestations as a function of the forms of sociability [. . .]," that is, "the different kinds of law present in social reality." Second, problems of differential sociology of law (macrosociology): it is the "differentiation of legal structures and their insertion according to social groups," sometimes private, sometimes total durable societies. Third, problems of genetic sociology of law (dynamic macrosociology): it examines both "regularities as a tendency for change within the legal system" and "the factors of such transformative regularities in the life of law in general" (Gurvitch 1942, 1945, pp. 68–69, 220, 251, 313).

Well, the sociology of law developed by Gurvitch was – as highlighted by Arnaud and Fariñas – "a kind of sociology featured by a historical and theoretical character, with a strong philosophical inspiration, but undoubtedly carried out with an internal and integrative perspective of

law. The decisive step towards an empirical dimension was still missing" (Arnaud and Fariñas Dulce 1996, p. 45). Still, even considering the relevance of his work, as Elias Díaz writes, "as the last of the great systems that preceded the construction in our time (after 1945) of a legal sociology as an already clearly autonomous science [. . .]", there was no shortage of criticism, sometimes for the more continuous absence of an empirical elaboration, other times for the detailed preciosity, and his "love for indications," sometimes excessive, exhausting, and extremely confusing ideas (Sorokin 1969, pp. 450, 457–458; Arnaud 1981, p. 121; Tumanov 1985, p. 269). Now, even considering the misunderstanding (*un rejet viscéral*) or the lack of better recognition (*l'hostilité manifestés*) (Belley 1986, pp. 355–357) from jurists and sociologists of law, undeniably, it is necessary to conceive him as one of the greatest contemporary social thinkers.

Conclusion

Certainly, due to the richness of his globalizing systems and the extent of his formulations, Gurvitch became responsible for the great boost experienced by the pluralist scholarship in general, since, as indicates Renato Treves, the general relevance of his school of thinking "does not lie so much in pluralism, anti-statism and social law, but in the idea intertwined with these principles, that is, in the idea of a liberal, democratic, decentralized, anti-state socialism, which is much closer to Proudhon's teachings than to Marx's" (Treves and Glastra Von Loon 1968).

In short, one may conclude that the period of the great and vigorous scholarship contributions to legal pluralism is mediated, in the first half of the twentieth century, by a historical cycle that begins with E. Ehrlich, advances with Santi Romano, and reaches a more fruitful and systematic elaboration with G. Gurvitch.

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Introduction

Gutmann (b. 1949–) is most known for her work exploring themes in democracy and democratic theory, especially deliberative democracy, democratic education, democratic decision-making,

equality of opportunity, identity politics, race, and multiculturalism. These topics are connected not only because they are required for the implementation of a successful democratic theory but also because they rely on each other as part of an interconnected whole. For example, a robust conception of deliberative democracy requires a background of civic education. Democracies are responsible for educating their young in part because those children will grow up to be citizens who need deliberative freedom. Similarly, democratic education requires mutual respect, which in turn opens up questions of racial and religious identity, affirmative action, and equality of opportunity. And, of course, equality of opportunity itself requires education access. As Gutmann puts it in *Democratic Education*, first released in 1987, "Just as we need a more democratic politics to further democratic education, so we need a more democratic education to further democratic politics. If we value either, we must pursue both" (Gutmann 1999). Gutmann values both and pursues both. Gutmann's work is internationally recognized and often translated into multiple languages. This entry focuses primarily on her single-authored and coauthored books.

Deliberative Democracy

Gutmann is known in part for her major contributions to advancing a conception of deliberative democracy and framing how it can be used in practice. According to Gutmann, "A democracy is deliberative to the extent that citizens and their accountable representatives offer one another morally defensible reasons for mutually binding laws in an ongoing process of mutual justification" (Gutmann 1999). This theory, which recalls but also builds on Rawlsian public reason, provides both an aspirational ideal and a set of guidelines for citizens and public officials.

In their 2004 book, *Why Deliberative Democracy?*, Gutmann and Thompson enumerate the main characteristics of a deliberative democracy: "Its first and most important characteristic. . .is its *reason-giving* requirement" (Gutmann and Thompson 2004). Gutmann and Thompson's deliberative democracy must also dynamically allow for continued discussion, aim at binding decisions, and be accessible. According to Gutmann and Thompson, deliberative democracy has identifiable aims that help us understand the features of the theory. They state, "The general aim of deliberative democracy is to provide the most justifiable conception for dealing with moral disagreement in politics" (Gutmann and Thompson 2004). Secondary aims include inclusivity on perspectives, mutual respect in decision-making, and the ability to correct mistakes.

By establishing principles of preclusion that determine what policies are included in governance and principles of accommodation that recommend mutual respect and actively engaging with opponents, Gutmann and Thompson sidestep common problems in liberalism. They envision a public philosophy that exhibits both broad inclusivity as well as the ability to handle deep moral disagreements through a commitment to reciprocity (Gutmann and Thompson 2004). This account, which they go on to apply to national and international issues such as health care and truth commissions, ". . .is able to maintain its distinctive role as an adjudicator among conflicting theories because it treats its own principles as morally and politically provisional" (Gutmann and Thompson 2004). Gutmann and Thompson focus on the substance and process of deliberation, which they think will lead to just outcomes, rather than defining the right end product and then determining a process that will reliably lead to it (Gutmann and Thompson 2004).

Reasonable disagreement among citizens is a theme in Gutmann's career and a motivating concern behind many of her works. In their earlier landmark work, *Democracy and Disagreement* (1996), Gutmann and Thompson understand deliberative democracy as a way to handle this greatest challenge to democracy: moral disagreement. Laying the groundwork for the conceptual model of deliberative democracy is their main goal.

Three principles govern the conditions of deliberation – reciprocity, publicity, and accountability – and three principles govern the content of deliberation – basic liberty, basic opportunity, and fair opportunity. Reciprocity pushes citizens to seek "fair terms of social cooperation for their own sake" and to resolve disagreements

in a mutually acceptable manner (Gutmann and Thompson 1996). Reciprocity is a foundational principle of deliberation because it influences all the others. Publicity in reasons ensures that others can reasonably accept the terms of discussion. Accountability incorporates a version of the principle of affected interests, in which officials consider the impact of their actions on everyone who will be affected by their governance. The authors supplement reciprocity, publicity, and accountability with utilitarian reasoning as a successful component of deliberative democracy, though in a highly qualified and limited form. These principles offer the parameters of a successful deliberative democracy as well as the framework for handling moral disagreement.

But deliberative democracy also requires principles to help us evaluate the success of our proposed policies to achieve our ideals and values. This aim is covered by the principles governing content. Basic liberty adjudicates conflicts from moralizing and paternalistic inclinations by allowing government intervention but also respecting personal integrity and autonomy. For example, commercial surrogacy would not be ruled out completely, but should allow for certain parental rights of the surrogate to prevent exploitation. Basic opportunity helps establish the distribution of resources. Goods should be distributed not according to need, and not according to ability, but to protect opportunity. Specifically, Gutmann and Thompson defend a policy of "fair workfare" in which we provide basic opportunity goods to citizens while maintaining individual responsibility and recognizing the mutual dependence characterized by advanced society (Gutmann and Thompson 1996). Lastly, fair opportunity recommends preferential hiring over ostensibly egalitarian hiring as a form of non-discrimination in an unjust world. This principle harkens back to Gutmann's earlier work on race and class in *Color Conscious*. These principles, as central to any democracy, play a large thematic role in her corpus, such as her first book, *Liberal Equality*, which explores the potential and perceived conflicts between liberty, equality of opportunity, and distributive justice (Gutmann 1980).

Education

Gutmann argues that education, insofar as it aims at preparing citizens for the hard work of democracy, must be universal within a society. She states, "A democratic society is responsible for educating not just some but all children for citizenship" (Gutmann 1999). Democracies should empower all educable children with the civic and democratic virtues, such as deliberation, that are necessary for citizenship. But this feature of universal access raises the question of authority to educate. Who determines what our civic education looks like and what are the limits of such an authority? Gutmann takes these questions to be the guiding theoretical concerns of democratic education.

In answer, Gutmann defends shared educational authority that incorporates parents, citizens, and educators. She states, "The primary aim of a democratic theory of education is not to offer solutions to all the problems plaguing our educational institutions, but to consider ways of resolving those problems that are compatible with a commitment to democratic values" (Gutmann 1999). By identifying these three groups as sharing authority over education, with each playing significant roles depending on the educational realm, we can resolve problems such as resource allocation, adult illiteracy, multicultural education, and setting controversial curricula like sex education or evolution. On such issues, Gutmann often proposes a fair deliberative process, which promotes greater understanding among opposing viewpoints, with the aim of achieving outcomes that are both legitimate and wise. For example, on the issue of banning and approving books in public schools, Gutmann argues that banning books violates the basic democratic principle of non-repression and advocates for an educational process of democratic deliberation among citizens and professionals selecting books. Gutmann's deliberative perspective focuses on establishing fair decision-making processes, with democratically principled side constraints, rather than on achieving a singularly justifiable outcome. On the controversial issue of sex education, Gutmann defends offering sex education to all children, but exempting those children whose parents have principled

objections rather than losing them entirely from the public school system. If citizens, professional educators, and parents can determine educational policy without falling prey to repressive or discriminatory practices, Gutmann thinks we will have achieved our goal: the democratic ideal of education (Gutmann 1999).

Democratic Decision-Making and Public Policy

In *The Spirit of Compromise*, Gutmann and Thompson tackle the hard choices of governance and democratic decision-making. Using recent and historical events, they analyze famous policy compromises as well as failures in compromise, landing on a set of guidelines for politicians to navigate this difficult terrain. Although Gutmann and Thompson do not advocate eliminating the uncompromising mindset, "the principled prudence of the compromising mindset…is more likely to reveal opportunities for progress" (Gutmann and Thompson 2014). Understanding the needed balance between these mindsets is their overarching goal. Their pursuit leads the authors naturally to consider not only the role of compromising and uncompromising attitudes but also the conflict between campaigning and governing, the problem of endless campaigns and term limits, and the value of mutual respect. Gutmann herself often takes this mindset in her work, forging compromises between deep theoretical and practical conflicts, such as the compromises she suggests in education policy above.

Gutmann and Thompson propose not only a framework for politicians to use but also one for journalists and citizens. Traditionally, journalists are incentivized both to focus on who is winning instead of policy debate and to cast campaigns in the cynical light of a zero-sum game in which every politician's act has the purpose of defeating an opponent. Insofar as journalists do supplement evaluation of policy with strategizing, Gutmann and Thompson recommend "broad strategic framing" as a better alternative. Broad strategic framing encourages the media to include polling and race coverage insofar as this reporting informs the public on how politicians will secure their campaign platforms (Gutmann and Thompson 2014). Civic education can bolster better coverage by motivating citizens to search for truth amid political demagoguery, have the critical thinking skills to separate truth from falsity, engage critically with those who disagree in a productive way, and understand the value of compromise in democratic governance (Gutmann and Thompson 2014).

In fact, when viewed through the lens of Gutmann's earlier work on deliberative democracy, *The Spirit of Compromise* offers a way for legislators to embrace pluralism in a mutually respectful way that leads to binding decisions in the face of moral disagreement – a road map of sorts for applying deliberative democracy to the legislature. In this way, the book demonstrates the connection between the major themes of Gutmann's work: democratic decision-making, deliberative democracy, and education.

But these goals are no mere theoretical concern. For example, in 2011, Gutmann and Thompson wrote op-eds for newspapers like the *New York Times* and The *Christian Science Monitor* that foreshadowed many of the issues they tackle in the book, showing not only their academic engagement with the issue but their aim to positively impact current events (Gutmann and Thompson 2011a, b).

Identity, Religion, and Race

Color Conscious: The Political Morality of Race opens with K. Anthony Appiah's conceptual analysis of race and racial identity and the attending problems therein. Gutmann follows Appiah's account with a series of essays dealing with racial injustice. Specifically, Gutmann investigates class-conscious public policy in addition to what she calls "color-conscious" public policy. She uses term "color consciousness," as opposed to "race consciousness," to acknowledge the fact that race has no biological basis and is merely a fiction (Appiah and Gutmann 1998). For opponents who think that color-conscious policies are inherently wrong, class consciousness seems like a better alternative because it is color neutral.

But, says Gutmann, that fact that color neutrality is a component of our basic principles of justice in the ideal does not mean that it is a component of the application of those principles in our nonideal world. Part of Gutmann's goal in this series of essays is to explain not only why color neutrality is an unadvisable goal in a society plagued by contemporary and historical injustice but also why class-conscious policies are an inadequate replacement. Says Gutmann, "However much we might wish otherwise, class conscious *and* color conscious policies are both necessary, neither sufficient, to address racial injustice" (Appiah and Gutmann 1998). Using empirical studies, Gutmann explains that eliminating color-conscious policies in favor of class-conscious policies would not only fail to address the unique problems of racial discrimination but may also exacerbate current injustices. Eliminating color-conscious policies like affirmative action (though Gutmann eschews that term) privileges some races over others and fails to "treat like cases alike" insofar as some disadvantages are taken into account (poverty) but not others (racial discrimination).

Gutmann's later award-winning book, *Identity in Democracy*, tackles identity and identity politics more broadly construed. In Gutmann's view, "when a sizeable group of people identifies *as* and therefore *with* each other, they constitute an identity group" (Gutmann 2009). When an identity group then engages in organized political action, they are engaging in identity group politics, meaning that identity groups themselves are neither good nor bad for democracy, but depend on their members' pursuit of basic democratic principles like equality, liberty, and opportunity (Gutmann 2009). Gutmann recognizes the powerful and ineliminable role identity plays in politics and considers dilemmas where identity group interests collide such as conflicting religious interests.

Amy Gutmann, Conclusion

Amy Gutmann's rigorous scholarship on the most significant and vexing issues facing democratic citizenship does not alone make her a true public intellectual. However, she fulfills that role by actively engaging in American democracy on a regular basis, not only in her capacity as the president of an Ivy League university and the chair of the Presidential Commission for the Study of Bioethical Issues but also insofar as she takes further opportunities to communicate with a larger audience. In addition to her extensive academic and peer-reviewed work, Gutmann publishes in local and national newspapers often, giving her a bigger megaphone for her ideas and the opportunity to translate her academic thinking to everyday decision-making. She is also a regular interviewee on the news circuit, including *Fox Business*, *CNBC*, *MSNBC Morning Joe*, *C-SPAN*, *The Charlie Rose Show*, and others.

Cross-References

- ▶ Citizenship
- ▶ Education: Ethical
- ▶ Human Right to Democracy
- ▶ Multiculturalism
- ▶ Rawls, John
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H

Habeas Corpus

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Introduction

The Writ of Habeas Corpus – a Latin phrase meaning *you should produce the body* – originated in Medieval England as one of several common law writs. At a time when appeals as of right to a higher court were less common, these writs empowered superior courts to order public officials, private parties, and lower courts to take particular actions. The Writ of Habeas Corpus provided courts the power to compel a governmental authority – whether executive, legislative, or judicial – to produce an individual held in custody and demonstrate proper cause for confining the individual. If the governmental authority could not meet the required standard, the habeas court could grant the writ and order the prisoner's release.

Prior to the fifteenth century, the Writ of Habeas Corpus primarily resolved battles between court systems. At this time, courts disagreed regularly over which had jurisdiction, *i.e.*, the power to decide a case and impose punishment. For example, the King's Bench and Court of Common Pleas used the writ to assert their superior jurisdiction over the various ecclesiastical courts, local and manorial courts, and the Court of Chancery, when these lesser courts held individuals in custody without filing charges (Oaks 1965).

During this period, courts employed the Writ of Habeas Corpus to challenge imprisonment without charge or the refusal to grant bail or hold a prompt trial after charges were supported. But the modern understanding of the writ as a protector of individual liberty was not paramount. Prisoners convicted by a court of competent jurisdiction could not use the writ to challenge the legality of their confinement as resting on a legal error committed during the proceedings, no matter how egregious that error might be (Oaks 1965).

By its nature, however, the Writ of Habeas Corpus always held the seeds of a protector of individual rights. As early as 1215, the Magna Carta recognized the essence of this right, declaring that "No freeman shall be seized or imprisoned . . . except by the lawful judgement of his peers or the law of the land" (British Library 1215). And over time, the writ evolved from being an arbiter among conflicting branches of government to a legal device safeguarding individual liberty.

By the seventeenth century, the modern view of habeas corpus as a guardian of liberty had fully emerged. Parliament began to empower inmates to use the writ to challenge the legality of continued confinement by any court, not just those that lacked jurisdiction. In 1628, Parliament enacted the Petition of Right in response to concerns that the king's jailors were detaining Englishmen

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illegally. In 1641, Parliament abolished the Star Chamber, one of the king's courts that had operated in secret to suppress opposition to the crown. This act empowered the common law courts to grant the writ to any Star Chamber prisoner (Landman 2008). In one famous case, an English court granted the writ in favor of jurors confined for failing to convict a defendant (Bushell's Case 1670).

The Habeas Corpus Act of 1679, which William Blackstone described as another Magna Carta, (Blackstone 1765–1769), expanded the power of the common law courts to grant the writ with respect to prisoners within the jurisdiction of other courts and imposed (1) strict deadlines for producing petitioning prisoners and (2) fines on public officials for violating those deadlines.

In contemporary times, a prisoner can petition for a Writ of Habeas Corpus in a court possessing the power to conditionally order the prisoner's release if the confining authority fails to produce sufficient evidence to justify continued confinement. Grounds for granting the writ have generally fallen into the following three categories:

1. Holding a prisoner without charge
2. Setting bail excessively high
3. Continuing to confine a prisoner who has been convicted when the conviction is infected with legal error

Habeas corpus proceedings are typically adversarial such that prisoners may contest the evidence presented to justify holding them in custody (Hurd 1876).

Although the Writ of Habeas Corpus originated in England, it now exists under different names in both common law and civil law countries throughout the world. Sixty-eight of the 181 countries have constitutions explicitly recognizing the Writ of Habeas Corpus either as an affirmative right or through a prohibition on suspension of an assumed right. Another 50 countries provide constitutional protection against unlawful detention without explicitly referencing the phrase habeas corpus. And other countries provide similar protection through non-constitutional sources of law (Rich 2013).

In addition to the pervasive inclusion of habeas corpus – in name and ideal – in domestic law, during the latter half of the twentieth century, several international human rights agreements effectively incorporated international safeguards against unlawful confinement (Rich 2013). And in 2008, the UN Working Group on Arbitrary Detention suggested that habeas corpus should have the status of *jus cogens*, i.e., a peremptory norm of international law that no country may derogate (UN Working Group Rep. 2008).

Despite near universal recognition of the right, challenges remain in its application. These include the following questions:

1. Who bears the burden of proving adequate grounds for confinement? Must the government prove that its detention of the individual is lawful, or must the prisoner show that the government has not justified the confinement?
2. What is the standard of proof to justify confinement? May it range from some evidence to proof beyond a reasonable doubt?
3. May a prisoner challenge confinement as unlawful after a trial by a court of competent jurisdiction or are challenges limited to situations in which a government entity asserts inadequate grounds for the detention or a court presiding over a conviction lacks jurisdiction?
4. May countries derogate the right against unlawful detention during periods of armed conflict or in other emergency situations?
5. Can the Writ of Habeas Corpus apply to confinement by a government entity outside that government's own sovereign territory?

Domestic law in the United States has grappled with these questions most thoroughly, and in recent years, its courts have been supplemented by the decisions of various international tribunals.

Although the Articles of Confederation, the original governing document for the United States, did not mention the Writ of Habeas Corpus, courts in the states comprising the union had the power to grant the writ (Chafee 1952).

The Suspension Clause of Article I of the US Constitution of 1789 and Section 14 of the Judiciary Act of 1789 embedded the Writ of Habeas Corpus firmly in American legal practice at the national level. The Constitution permitted Congress to suspend the writ only "when in cases of rebellion or invasion the public safety may require it." And the Judiciary Act granted jurisdiction to the Supreme Court and the Federal District Courts to "grant writs of habeas corpus for the purpose of inquiry into the cause of commitment" of prisoners held by the federal, but not state, court systems (Duker 1980). Domestic law in the United States thus prohibited confinement without a showing of sufficient cause, and prisoners could petition for Writs of Habeas Corpus.

A continuing question, however, was how the writ could be suspended during armed conflict or during emergencies. In the early 1860s, at the beginning of the American Civil War, President Abraham Lincoln suspended the writ for a portion of the state of Maryland. Considerable disagreement followed as to whether a president, as opposed to the US Congress, had the authority to take this action. Soon, however, Congress granted Lincoln the power to suspend the writ for the duration of the armed conflict, and the issue whether presidents may suspend the writ on their own during periods of armed conflict thus remains uncertain.

A second question involved whether federal courts could grant the writ in cases where a prisoner had been convicted in a state court with lawful jurisdiction on the ground that the state court conviction and continued confinement were infected with legal error. In 1867, Congress adopted the statutory language defining federal court jurisdiction to grant the writ that remains in force today. Most significantly, the amendment expanded the power of the federal courts to grant the writ to prisoners in state custody:

> [T]he several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.

Despite the apparent clarity and broad scope of the 1867 language, commentators vigorously debated Congress's intent. Some narrowly interpreted the 1867 Act to extend only the then-existing habeas power – prohibiting detention with sufficient cause – to freed slaves when former slave owners tried to bind them to continued servitude (McFeeley 1976). Others argued that the Act created a federal forum to review all questions of federal law that arise in state criminal cases so long as the state continues to confine the defendant (Peller 1982).

Throughout the first half of the twentieth century, the United States Supreme Court often repeated that Federal District Courts could grant the writ after a trial and conviction only if the confining court lacked jurisdiction. Over time, however, the Supreme Court itself granted the writ in cases where courts clearly had jurisdiction but a fundamental error – such as mob domination or lack of counsel – infected the judicial process (*Walker v. Johnston* 1941; *Moore v. Dempsey* 1923).

In the 1950s and 1960s, the United States Supreme Court expanded the use of the writ as part of a broad-ranging project extending many criminal procedure protections in the US Constitution to the criminal justice systems in the states. During this period, the Writ of Habeas Corpus effectively served as a right to petition the federal courts to review any claim of federal constitutional error in a state criminal proceeding that resulted in the confinement of the defendant, even if a violation of a state procedural rule prevented the defendant from raising the constitutional issue in state court (*Fay v. Noia* 1963; *Brown v. Allen* 1953).

The broad scope of the Writ of Habeas Corpus during this era led to a backlash. Commentator Paul Bator and Federal Judge Henry J. Friendly led the intellectual attack on the expanded use of the writ. Bator argued that the precise scope of a constitutional criminal procedure right was necessarily uncertain. State courts had a coequal obligation with the federal courts to interpret federal constitutional rights. No justification existed for empowering lower federal courts to overrule state courts simply because they disagreed. These critics argued for a return to the more limited scope of the writ as a safeguard against detention

without cause or conviction by courts that lacked jurisdiction. As long as the state court process was open and fair, they argued, the result should be respected by the federal court system. Habeas review of state court decisions by federal courts, Bator argued, should not be available (Bator 1963). Judge Friendly emphasized that the lack of justification for the expansive Writ of Habeas Corpus then recognized by the Court was most pronounced when the alleged error had no connection to the innocence or unjustifiability of the defendant's confinement (Friendly 1970). Other commentators, however, disagreed with Bator and Friendly, arguing that expansive federal court habeas review was justified by the need for federal courts to have the final say on federal law (Liebman 1992; Peller 1982).

Beginning in the 1970s, the United States Supreme Court began to cut back on the scope of the Writ of Habeas Corpus as a post-conviction review process. Although the Court reaffirmed that the Habeas Corpus Act granted broad jurisdiction to the federal courts to grant the writ in favor of prisoners who were convicted in state courts if the prisoners continued confinement violated federal law, the Supreme Court held that federal courts as a prudential matter were required to refrain from granting the writ when prisoners alleged Fourth Amendment search and seizure violations on which they had a full and fair hearing in state court or when the petitioner failed to properly present the alleged constitutional violation to the state courts (*Stone v. Powell* 1976; *Wainwright v. Sykes* 1977).

In 1989, the Supreme Court narrowed the scope of habeas corpus review of state court convictions even further, holding that (1) new rules of constitutional law could not be created when a prisoner filed a Writ of Habeas Corpus and (2) a prisoner could petition for the writ based on a new criminal procedure rule created after the prisoner's case had become final only if (1) the defendant's conduct was no longer subject to the penalty that had been imposed on the defendant or (2) the case involved a watershed procedural protection essential to the fairness of criminal trials, such as the right to counsel (*Teague v. Lane* 1989).

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act, limiting the federal courts' ability to grant the Writ of Habeas Corpus to free prisoners convicted in state criminal proceedings. Prior to the 1996 Act, the relevant statutes were silent on the standard that a federal court should apply in deciding whether a petitioner was lawfully confined. In place of the existing judicially created de novo review standard, the new law required a federal habeas court to defer to the state court unless that decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The 1996 Act also imposed a statute of limitations on filing for the writ after a conviction became final.

As the Writ of Habeas Corpus expanded, and then contracted, within the domestic law of the United States, prohibitions on unlawful detention were incorporated into and further developed through international law. In the aftermath of World War II, countries included the protection against unlawful detention – without using the phrase habeas corpus – in five international treaties, including:

- Universal Declaration of Human Rights
- The International Covenant on Civil and Political Rights
- The European Convention for the Protection of Human Rights and Fundamental Freedoms
- American Declaration of the Rights and Duties of Man
- The American Convention on Human Rights

Regional agreements in Europe, the Americas, and to a lesser extent Africa similarly protected against unlawful detention. Together these agreements, and decisions made under them, have taken significant steps toward ensuring global access to a remedy for unlawful detention by defining the procedural aspects of employing the Writ of Habeas Corpus or a similar device and ensuring that a remedy is available (Rich 2013).

In 1992, the UN Commission on Human Rights requested that all countries establish procedures "such as habeas corpus" to guard

against unlawful detention, and, in 2008, the Inter-American Court of Human Rights acknowledged that while these protections should be universal, the particulars would vary across states (Rich 2013).

In recent decades, the war on terror has compelled international and domestic tribunals to grapple with the following three continuing issues about the extent to which habeas corpus law applies:

1. during periods of armed conflict
2. when a state purports to derogate habeas corpus rights in emergency situations
3. extraterritorially when a state has effective jurisdiction outside its own territory

The procedures contained in the Third and Fourth Geneva Conventions are generally believed to be the appropriate form of detention review in the armed conflict context. The procedural requirements of those protections, however, are not well defined, and questions exist about the applicability of detention review during international armed conflict (Rich 2013).

Domestic laws and international agreements also often permit, or fail to explicitly prohibit, derogation of the Writ of Habeas Corpus or similar procedures to challenge unlawful detention. There is general agreement that certain severe emergency situations may require the suspension of these procedures. A disturbing trend, however, has developed over the past two decades of declaring semipermanent *emergencies*, such as in the case of the war on terror. These sorts of declarations place severe strain on the principles justifying derogation of the Writ of Habeas Corpus.

In this area, the international regime has proven to be a strong protector of the writ. In *Habeas Corpus in Emergency Situations*, the Inter-American Court held that, although many provisions in international human rights law are derogable in emergency situations, habeas corpus is vital to protecting non-derogable rights, such as those against torture, and thus habeas itself should constitute a non-derogable right. This decision has proven influential to other courts interpreting human rights treaties (Rich 2013).

The extraterritoriality questions go back to the earliest days of the writ when English prisoners would be moved to Scotland to avoid court jurisdiction. Article 2(1) of the International Covenant on Civil and Political Rights encapsulates the issue, extending habeas rights "to all individuals within [a state's] territory and subject to its jurisdiction." Courts continue to debate the extent to which a state must control a territory outside its sovereign area to trigger the applicability of the Writ of Habeas Corpus or any similar procedure available under the state's domestic law (Rich 2013).

Each of these three challenges to the scope and applicability of the Writ of Habeas Corpus has been examined through the prism of the war on terror. Although the Inter-American Commission on Human Rights held that habeas corpus-type law applies "both during peacetime and during situations of armed conflict" (Abella v. Argentina 1997), after the terrorist attacks of September 11, 2001, the United States took the position that it did not. And, by executive order of the president – as opposed to conviction in court – the United States detained prisoners, who were labeled *enemy combatants*. Although some prisoners were confined within the country, many were held at US-controlled military base on Guantánamo Bay, Cuba, that was part of the sovereign territory of Cuba. The prisoners detained there sought to employ the Writ of Habeas Corpus to force the US government to justify their detention.

The ensuing legal proceedings painted a vivid picture of the resiliency of the writ in a modern context. The Inter-American Commission on Human Rights considering the Guantánamo Bay situation found the key principle to be whether a "person [falls] within the state's authority and control" and that such persons should be protected against the abridgement of non-derogable rights such as habeas corpus. The Commission, however, also recognized the need to limit the writ's applicability depending on the circumstances (Decision on Request for Precautionary Measures 2002).

The United States Supreme Court ultimately took a more definitive position. The US

government relied on armed conflict and derogation-type arguments, contending that enemy combatants – the label it used for Guantánamo Bay prisoners – could not contest their confinement via habeas corpus. The Supreme Court agreed that prisoners taken in an armed conflict could be detained for the duration of the conflict. But the war on terror was not an ordinary armed conflict given that it did not involve ongoing active conflict, nor was there a clear definition of what would constitute the conclusion of the conflict. An American citizen held within the United States pursuant to the war on terror thus had a right to have his status as an enemy combatant determined fairly by a neutral decision-maker, such as through a petition for a Writ of Habeas Corpus to a federal court (*Hamdi v. Rumsfeld* 2004).

Given the Supreme Court holding that the war on terror did not meet the standards of either an armed conflict or the type of emergency that might justify derogating the writ, the executive branch in the United States through the Department of Defense sought to effectively replace the writ. It created a new detention challenging procedure through which military tribunals would determine whether the prisoners were enemy combatants. Prisoners at Guantánamo Bay petitioned for Writs of Habeas Corpus arguing that these procedures failed to satisfy the due process requirements that the Supreme Court had identified. The lower courts refused to consider the writ, holding that they had no jurisdiction because the prisoners were held outside the sovereign territory of the United States. But the Supreme Court reversed, holding that the jurisdiction conferred by the habeas statute extended to Guantánamo Bay (*Rasul v. Bush* 2004).

Without formally suspending the Writ of Habeas Corpus, Congress stripped the federal courts of jurisdiction to grant the writ in favor of Guantánamo Bay prisoners. In its place, Congress granted a narrow, exclusive power to the District of Columbia Circuit Court to review the military tribunals' decisions that prisoners were enemy combatants.

A group of prisoners held at Guantánamo Bay, who were not citizens of any country with which the United States was at war and who denied membership in terrorist organizations or the regimes that supported them, petitioned for Writs of Habeas Corpus arguing that the military tribunals used to determine their enemy combatant status did not comport with basic principles of due process of law. The United States Supreme Court held that the law stripping the federal courts of statutory jurisdiction to grant the writ did not extend retroactively to these cases which were pending when the law was enacted (*Hamdan v. Rumsfeld* 2006).

Congress then amended the habeas statute again, making clear that the jurisdiction-stripping provision applied retroactively to the existing cases as well as prospectively to future ones. The lower courts then refused to consider the writ on two grounds. First, they held that they lacked jurisdiction under the habeas statute because Congress had taken it away. Second, they concluded that any right to file a petition seeking a Writ of Habeas Corpus that flowed from the Suspension Clause in the Federal Constitution did not extend to noncitizens held outside the sovereign territory of the United States, such as those at Guantánamo Bay.

The prisoners sought review in the United States Supreme Court arguing that the Federal Constitution's Suspension Clause provided them with a right to petition for a Writ of Habeas Corpus to challenge their detention.

The United States Supreme Court agreed, holding that the Suspension Clause of the Constitution independently created jurisdiction to grant the Writ of Habeas Corpus to a prisoner held by the United States outside the country's sovereign territory. Whether a court should exercise that jurisdiction as a prudential matter in a particular case, the Supreme Court explained, depended on the location and nature of the confinement. Because the United States had complete control of the prison at Guantánamo Bay and the prisoners had been held there for years with no prospect of a speedy resolution, the federal courts had the power to adjudicate petitions for the Writ of Habeas Corpus from the prisoners and could, in appropriate cases, grant the writ (*Boumediene v. Bush* 2008).

The final question was whether the District of Columbia Circuit Court's narrow, exclusive right to review the military tribunals' decisions constituted an adequate substitute for the Writ of Habeas Corpus. International agreements providing rights similar to habeas corpus generally recognize that the full panoply of rights guaranteed for a fair criminal trial are not required in habeas corpus proceedings. But the precise procedural standards, including who bears the burden of proof and the appropriate standard of proof to justify detention, are uncertain (Rich 2013).

The United States Supreme Court held that the limited statutory review provided by Congress was not sufficient to constitute a lawful substitute for a Writ of Habeas Corpus. In particularly, the Court emphasized that the statute did not provide any avenue for the prisoner to present exculpatory evidence demonstrating that he was not an enemy combatant and thus should not remain in custody (*Boumediene v. Bush* 2008). In 2009, a Federal District Court order granting the writ led to the release of five Algerian men who were detained at the Guantánamo Bay prison (Rich 2013).

Conclusion

In the *Boumediene v. Bush* case, the United States Supreme Court summed up the Writ of Habeas Cogcqrpus's historic and modern role as a guarantor of liberty for those imprisoned without proper cause:

> Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation's present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. . . . Security subsists . . . in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

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Habermas, Jürgen: Faith and Reason

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Introduction

While Jürgen Habermas (1929–) is perhaps best known for his theories of communicative action and discourse ethics, the relationship between religious faith and secular reason has occupied an increasingly central role in his mature work. Habermas's engagement with questions of faith and reason is notable for its interdisciplinary scope and developing perspective on the potential of religious faith and practice to inform responsible public discourse. Setting aside the presumption of progressive secularization as unable to account for the complex trajectories and conflicts of modernity, his writings call for new frameworks for critical reflection on religious belief and a significant reevaluation of the place of religion in the public sphere.

In the five decades of his writing, Habermas's position on the relationship of faith and reason has undergone significant development. While his early work described a need to subordinate religious truth claims to reasoned public critique, his recent writings highlight the ongoing potential of religion to meaningfully contribute to contemporary democratic societies. Accordingly, many critics point to a religious turn in his later work (Gorski et al. 2012: 250). More precisely, however, Habermas's developing treatment on religion proceeds in three phases: (1) the supercession of religious belief by communicative reason, (2) the coexistence of religious faith and communicative rationality, and (3) a genuine cooperation of religion and reason in advancing rational discourse in the public sphere. This evolving perspective reflects both Habermas's ongoing ties to the Frankfurt School and his own influential theory of communicative action.

Habermas and the Frankfurt School on Religion

Habermas's initial treatments of religion built upon the evocative writings of the early Frankfurt School, in figures such as Max Horkheimer, Theodor W. Adorno, Walter Benjamin, and Herbert Marcuse. This eclectic group of thinkers carried out an ambitiously interdisciplinary program of social criticism, centered in the Institute for Social Research in Frankfurt that was founded in 1923. Drawing upon a unique blend of Marxist philosophy and Jewish messianic thought, they marshaled a trenchant critique of capitalism and the amalgamation of technology, the market, and mass culture that prevails in liberal democratic society. They also articulated an enduring philosophical orientation in critical theory, which seeks to uncover the pathologies of modern reason and to work toward the ongoing liberation from ideological forces and oppressive social structures. This critical stance gained particular urgency with the rise of national socialism in 1933, which drove its major figures into exile.

Within the wide-ranging studies of the Frankfurt School, the dialectic of religion and reason

was a recurrent and animating theme. While proceeding with a methodological skepticism and maintaining a critical distance toward religious dogmas and institutions, these thinkers recognized the potential of religion to motivate both resistance and transformative actions. Religion has the capacity to form a powerful engine of social critique, able to unmask reigning structures of domination, delusion, and oppression.

In this fashion, the first generation of the Frankfurt School expressed both a critique of religion as expressed in belief systems and political institutions and an awareness of the power of religion to fuel social criticism. In the longing for redemption and openness to transcendence, religion proves a subversive and destabilizing force against destructive claims to totality. "Without God," Horkheimer writes, "one will try in vain to preserve absolute meaning" (Mendieta (ed.) 2005: 220). Yet at the same time, as Adorno insists, "...God, the Absolute, eludes finite beings" (Mendieta (ed.) 2005: 10). Such yearned-for-religious truth, then, can never be adequately captured in thought or reliably served by social institutions but must be ever subject to negation and ongoing criticism.

Habermas carries on many of the features of the early Frankfurt School's critique of religion. In 1956, following the return of Adorno and Horkheimer from exile, he became Adorno's assistant at the newly reopened Institute for Social Research at the University of Frankfurt. He would later become a professor of philosophy and sociology at Frankfurt in 1964 and director of the Max Planck Institute in Starnberg in 1971. These appointments provided him a platform to develop a modified version of the Institute's interdisciplinary research program (Junker-Kenny 2011: 1–2).

Like earlier figures of the Frankfurt School, Habermas does not reject religion outright but recognizes its enduring importance for meaningful social criticism. Yet his own treatment strikes a more positive note concerning the ability of human reason to engage and salvage the contributions of religion. In the sporadic treatments of religion during the first decades of his work, Habermas maintained that while religious insights are not to be dispensed with by philosophy, they find continuing validity only through their transference into rational discourse. Accordingly, religious traditions, ideas, and symbols must be interpreted and justified; their sacred meanings opened up to rational and discursive treatment. Through such rational analysis and intellectual exchange, these meanings become open and explicit as binding and consensual moral norms. In his 1973 work *Legitimation Crisis*, Habermas asserts, "The idea of God is transformed into a concept of a *Logos* that determines the community of believers and the real life-context of a self-emancipating society" (Habermas 1975: 121). Again, in a 1974 lecture, he claims: "God indicates only approximately a structure of communication," which forces one to look beyond merely contingent existence (Habermas 1976: 101, 2002: 34).

Here, then, the term "God" serves simply to name that which gives coherence, unity, and depth of meaning to communal human interaction and to the potential for human progress. This emphasis on the "linguistification of the sacred" continues in Habermas's work on communicative action and discourse theory (Habermas 1981, 2: 77).

Theory of Communicative Action

Habermas's groundbreaking 1981 work *The Theory of Communicative Action* offers an innovative analysis of rationality and human agency as grounded in dialogue and social interaction. It also sets the stage for later modifications to his early treatment of religion.

Habermas finds a point of departure for this new approach to rationality in human intersubjectivity and the cooperative relationships of dialogue and exchange that constitute human communities. Developing an adequately critical theory of social action, he argues, demands a paradigm shift from the transcendental framework of the philosophy of consciousness to the philosophy of language. Whereas philosophical explorations of consciousness often begin with the solitary autonomous individual set over against the outside world – and the resultant dualism between subject and object – the turn to language

theory recognizes the conscious self as already constituted by shared cultural references, communal interactions, and an ongoing process of social learning. Thus, human rationality is inescapably communicative. It is rooted in dialogue and oriented toward the shared search for understanding. Likewise, meaningful social action is "communicative action." It proceeds through discourse in the public realm, in which persons strive to reach mutual understanding and base their behaviors on binding consensual norms. Such ongoing discourse shapes the "lifeworld" of communities – the common assumptions and "background knowledge" enshrined in cultural meanings, self-understandings, and social values (Habermas 1981, 1: 13), and it forms the locus for both social progress and social critique.

With regard to method, this shift to language theory offers distinct pragmatic advantages. Where the philosophy of consciousness often tends toward solipsistic introspection, the philosophy of language is oriented to public exchange, rational cooperation, and mutual understanding. Accordingly, this paradigm shift entails a further move from metaphysical to "postmetaphysical" thinking (Habermas 1992; Habermas 2012). Instead of holding to timeless principles or invariant structures of thought, reason advances modestly and incrementally as theoretical and practical validity claims – each situated in a particular historical context – are tested and modified through dialogue and argument. This discursive orientation also provides the basis for Habermas's conception of discourse ethics, developed in his 1983 work *Moral Consciousness and Communicative Action,* which anchors moral norms in the practice of dialogue and search for consensus between free and equal participants.

Within these two works, Habermas's position on the question of religion remains largely unchanged. In its relation to such communicative rationality, the significance of religion is effectively transitional, as the lure of the sacred, "the spellbinding power of the holy, is sublimated into the binding/bonding force of criticizable validity claims" (Habermas 1981, 2:77). Here again, Habermas recognizes religion as a catalyst for social development, as it drives communities toward solidarity and instills universal moral norms. Nonetheless, he argues, this socially integrative function of religious practice "passes over to communicative action," as "the authority of the holy is gradually replaced by the authority of an achieved consensus" (Habermas 1981, 2: 77).

In the course of his ongoing work on morality and political theory during the 1990s, however, Habermas began to significantly restructure his position on the relation of religion and rationality and to attend more carefully to the unique contributions of religious insight (Habermas 2001; Habermas 2002). He continued to maintain that communicative rationality and postmetaphysical thinking have no need for a transcendent God as a guarantor of meaning or normative moral claims: "Postmetaphysical thought differs from religion in that it recovers the meaning of the unconditional without recourse to God or an Absolute" (Habermas 2002: 108). Further, within this postmetaphysical context, religious truth claims require a "translation" into publically accessible language of philosophy or the sciences (Habermas 2002: 76). Yet in this period Habermas also acknowledges that religious practices retain meanings and values that cannot be usurped or replaced by philosophy, offering a source both of untrammeled hope and of "consolation" in the face of "unavoidable suffering and unrecompensed justice" (Habermas 2002: 108).

In this regard, religious traditions possess a distinctive competency that is not supplanted by other forms of philosophical or scientific inquiry. "As long as no better words for what religion can say are found in the medium of rational discourse," communicative reason should "coexist abstemiously" with religion, "neither supporting it nor combatting it" (Habermas 1992: 145).

Religious Faith and Public Discourse

Habermas's recent work has continued this deepening engagement with religion. Since the turn of the century, he has produced a growing series of lectures and essays on the continued importance of religion in the public sphere – a subject, he notes, that holds special urgency in the wake of the terrorist attacks of September 11 (Habermas 2003: 101). These studies include considerations

of human nature in light of advances in genetic engineering and biotechnology (Habermas 2003), inquiries into the growing clash of religions and the rise of fundamentalist forms of thought (Habermas 2008), and his prominent public debates with Cardinal Joseph Ratzinger, later to become pope Benedict XVI (Habermas and Ratzinger 2006).

These later writings offer an important corrective to Habermas's earlier approach by disconnecting his theory of communicative action from the secularization thesis that insisted on the inevitable demise of religion (Junker-Kenny 2014: 151). Together with his call to post-metaphysical thought, Habermas's ongoing work on religion and reason highlights the importance of shifting to a "postsecular" understanding of society, a recognition that religious voices have not fallen away but continue to play a vital role in the public sphere and on the global political stage (Habermas et al. 2010; Butler et al. 2011; De Vries and Sullivan 2006). That is, "religious communities continue to exist in a context of ongoing secularization" (Habermas 2003: 104). Moreover, such religious traditions are not merely to be tolerated as lingering remnants of archaic or irrational forms of thought; rather, properly critical religious interpretations of self and world have an "equal claim to recognition" in the public discourse of democratic societies (Calhoun et al. (eds) 2013: 348). While maintaining the priority of postmetaphysical thinking, Habermas thus points to the need to avoid the threat of fundamentalist thinking on both sides: the rigidity of a religious orthodoxy that permits no challenges from secular reason and the equally intolerant forms of scientistic fundamentalism that insist upon a naturalistic worldview and dogmatically reject all religious claims to validity (Habermas 2008: 1–3, 114–117).

Within this postsecular context, Habermas still calls for a process of translation between religious faith and reason, but this work now proceeds as a mutually reciprocal and cooperative task. Religions, he acknowledges, have a still unexhausted potential that provides important contemporary resources of meaning. In the face of pressing global challenges, religious traditions possess distinctive strengths that are not matched by other voices in the public sphere. They have the capacity to engender forms of social solidarity that can confront the dehumanizing power structures of market-driven globalization, to give voice to the vulnerability and powerlessness of the oppressed poor, and – amid the growing commodification of human life in contemporary popular culture – to insist upon the ineradicable dignity of human beings and their freedom for self-determination (Habermas 2003: 114–115; Habermas 2007; Habermas et al. 2010). In this sense, "religious traditions perform the function of articulating an awareness of what is lacking or absent. They keep alive a sensitivity to failure and suffering" (Habermas 2008: 6).

Yet this religious potential for regeneration and resistance must nevertheless be mediated through language. In pluralistic and democratic societies, secular and religious citizens alike participate in the public sphere through reasoned critique and dialogue. While both are thus called to join the interdisciplinary venture of reimagining and rearticulating the core convictions at the heart of political society, the foundation for this cooperative discourse remains the generally accessible reasons of public validity claims, an arena in which the appeal to personal religious experience remains inadmissible.

Consequently, for Habermas, properly critical reason must retain an ambivalent attitude toward religious faith, with a stance that is at once receptive and cautious: "postmetaphysical thinking can relate to religion in a way that is *at the same time* agnostic and ready to learn. Faith retains something opaque for knowledge which can neither be denied nor just ignored. Secular reason insists on the difference between certainties of faith and publicly criticizable validity claims, yet abstains from a theory which judges the rationality or irrationality of religion as a whole" (Habermas 2009: 407; Junker-Kenny 2014: 180).

In this fashion, Habermas maintains that religious faith holds continued promise for contemporary political society, offering meaningful contributions that cannot be dissolved or fully transferred into secular forms of reason. Yet it remains obligated to explicate and justify these positions in the publicly accessible language of rational discourse.

Conclusion

Habermas's critical perspective on the relationship of reason and religious faith is notable both for its wide-ranging scope and its ongoing development. Though his early works portrayed communicative reason and postmetaphysical thinking as superceding the role of faith, he later came to recognize their lasting complementarity, and his recent writings outline a further basis for a cooperative and constructive dialogue between religious faith and secular reason.

Habermas's writings on religion have also exercised a widespread interdisciplinary influence. His works have reinvigorated questions of religion in the public sphere in the various disciplines of moral and political philosophy, sociology and law, cultural studies, philosophy of religion, religious studies, and theology (Habermas 2013; Butler et al. 2011; Reiner 2005). Within theology and religious ethics, Habermas also proves an important interlocutor for the increasing turn from theory to praxis (Adams 2006; Campbell 1999).

Through his evolving treatment of religion, Habermas thus remains an important voice in contemporary philosophical, social, and religious debates. His position enables both a constructive critique of religious belief and an appreciation of religion's own potential for poignant social criticism.

Cross-References

► Critical Theory and International Law
► Habermas, Jürgen: Faith and Reason

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Habermas, Jürgen: Legal and Social Theory

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Introduction

Widely acknowledged as among the most influential philosophers and social theorists of the twentieth century, the detailed and expansive writings of Jürgen Habermas (1929–) have shaped decades of intellectual discussion and debate. His weighty influence is owed not only to his prolific literary output, which has advanced discourses in fields ranging from aesthetics to epistemology and hermeneutics, communication studies, and philosophy of religion. As a public intellectual seeking not just to understand but to participate in the transformation of late modern society, Habermas has also engaged a long line of contemporary social thinkers, participating in many of the most important social, political, and philosophical debates in recent decades (Harste 2021: 25–54). Nestled at the center of these various contributions, however, is Habermas's pioneering analysis of social theory, which binds together his theory of law, his studies of modern political economies, and his discourse theory of morality.

This entry provides a brief overview of the central features of Habermas's mature social and legal thought, while also indicating the development of his approach over the nearly six decades of his active scholarship. Throughout his writings, Habermas's position is characterized by a focus on the conditions for meaningful communication that is free of domination and seeks to understand and orient moral action, yet his approach has undergone significant modification and expansion. Habermas established the framework for his social and legal thought in his early writings, following his engagement with the critical social theory of the Frankfurt School, particularly his 1962 *Structural Transformation of the Public Sphere* (I). He subsequently developed these themes in his successive treatments of communicative rationality and action (II). This developing social theory anchors Habermas's distinctive analysis of the interconnected procedures of legal, moral, and political reasoning (III).

Public Reasoning and the Public Sphere

Many of the categories and concerns of Habermas's mature analyses in legal and social theory emerge already in his early 1962 volume *The Structural Transformation of the Public Sphere*, which treats the rise, expansion, and ultimate disintegration of the public sphere in the modern liberal constitutional state. This sphere emerged amidst the historical circumstances of the developing market economy of the eighteenth and early nineteenth centuries as an arena of informed critical discourse that could mediate between private civil society and the state, serving to publicly monitor and criticize governmental authority. Through the continued broadening of this public sphere, however, together with the growing power of new institutions of the press and mass media and the rise of the heavily bureaucratized state, "the contours of the bourgeois public sphere eroded" (Habermas 1989: 140), devolving into a field of conflicting interests. In modern democratic states of the late nineteenth and early twentieth centuries, then, the political public sphere remained suspended between the two tendencies of a publicness "staged for manipulative purposes" and a "critical publicity" engaged in the critical process of public communication (Habermas 1989: 235).

This rise and collapse of the critical public sphere also traces the modern history of private and public law. The legal advances of the liberal constitutional state were tied to this developing public sphere and the growth of a market in which commodity exchange and social labor were largely freed from governmental control, with the result that legal transactions and legal contracts overall reflected the "exchange transaction" between owners of commodities (Habermas 1989: 74–75). Yet with the disintegration of the public sphere, the legal system became

increasingly positivist, such that legal norms no longer bore marks of "universality" and "truth" but became "specific regulatory measures" or "detailed administrative positions" (Habermas 1989: 179).

This early work provides a helpful lens for viewing Habermas's later contributions, as it anticipates in relatively compact form notable features of his mature work on social and legal theory. It first sets forth a distinctive writing style that combines philosophy and social theory, pursuing a careful theoretical argument about the role of the public sphere in democratic societies while complementing this more abstract position with a detailed historical and genealogical analysis of modern democratic societies. It also captures an abiding tension in Habermas's mature work, which blends enduring confidence in the emancipative potential of critical public discourse with a sober recognition of the precariousness of this hope and a critique of the social paradoxes inherent in modern liberal democracies. This early analysis of publicness furthermore set in motion a broader research initiative exploring social and legal developments in terms of communicative action.

A Communication Theory of Society: Communicative Rationality and Action

Habermas developed his social and legal analysis through critical engagement with both the philosophical tradition of German idealism and with the legacy of social theory, in the works of Karl Marx, Émile Durkheim, Max Weber, and Talcott Parsons. Though remaining indebted in particular to conceptions of reason and autonomy in the philosophies of Immanuel Kant and G. W. F. Hegel, Habermas developed a unique social theory that drew upon important influences from Parsons's work on social systems and from the sociological approaches of Durkheim and Weber, placing particular focus on the forms and conditions for communication (Harste 2021: 101).

Habermas's mature social and legal thought develops an analysis of social meaning that follows upon a "linguistic" or "communicative" turn, shifting away from explorations of the philosophy of consciousness towards inquiries into philosophy of language and into communication systems as distinguishing and clarifying meaning. Accordingly, his theory of communicative action integrates philosophical inquiries into the rationality of belief and action together with sociological methods aiming at a theory of society. It rests upon the "internal connection between the theory of rationality and social theory" (Habermas 1981, 1: 7) and aims to outline a concept of communicative rationality overall, a conception of social action open to the pursuit of validity claims and legitimacy yet tailored to exploring social pathologies and the "paradoxes of modernity" (Habermas 1981, 1: xl.).

Habermas began developing this research trajectory already in the late 1960s and throughout publications of the 1970s, in the concern for adequate notions of legitimacy and communicative meaning (Habermas 1973). And while greater focus at times has fallen on his contributions to discourse ethics and discussions of philosophical hermeneutics, his research project at its core sought to frame a general theory of society. Already at the outset of his 1968 *Knowledge and Human Interests*, Habermas claims that "a radical critique of knowledge is only possible as social theory" (Habermas 1971: vii). Likewise, in his *Theory of Communicative Action*, he notes that his "theory of communicative action is… the beginning of a social theory" (Habermas 1981, 1: xxxix).

Communicative Rationality and Communicative Action

Habermas unfolds his theory of communicative action by joining elements of systems theory with the central concept of the "lifeworld," drawn from the later writings of Edmund Husserl. His *Theory of Communicative Action* combines a theoretical position on communication and societal development with a historical inquiry into the evolution of modern conceptions of rationality.

Habermas saw a kind of normative practical rationality and emancipatory logic already present and embedded in everyday social life, and he

sought to thematize this through inquiries into the communicative and linguistic implications of the enlightened philosophical heritage, exploring the ways sense and meaning are established in social communication (Junker-Kenny 2014: 105–108). He articulates this embodied social reasoning through the related concepts of communicative rationality and communicative action.

Communicative rationality focuses on language as "a medium of communication that serves understanding" (Habermas 1981, 1: 101), moving away from the framework of a philosophy of consciousness centered on the epistemological operations of isolated individuals towards social reasoning and intersubjectivity. It centers on the "unconstrained, unifying, consensus-bringing force of argumentative speech" (Habermas 1981, 1: 10). On one hand, then, the emphasis in philosophical reasoning shifts from the "I" of the transcendental subject to the plural "we" of participants in an open and ongoing conversation. On the other, focus shifts from understanding the particular meaning of individual speech acts to grasping the meaning inherent in coordinated social action, which is uncovered gradually in a "cooperative search for truth" that proceeds argumentation over publicly criticizable claims to validity (Habermas 1981, 1: 25). Such contested validity claims, concerning what can be reasonably upheld and defended in further conversation, lay the basis for further appeals to moral, political, and legal legitimacy.

The meaning of communicative action corresponds to such idealized speech acts yet does not fully coincide with them. It reflects broader dimensions of language, as a medium in which speakers and hearers draw from the customs and values of everyday living to reflectively interpret their connections to the systems and structures of their world (Habermas 1981, 1: 94–100). As Habermas writes: "The concept of communicative action presupposes language as the medium for a kind of reaching understanding, in the course of which participants, through relating to a world, reciprocally raise validity claims that can be accepted or contested" (Habermas 1981, 1: 99). This "cooperatively pursued goal of reaching understanding" arises both from the shared "background knowledge" of a pre-theoretical "lifeworld," a "culturally ingrained preunderstanding" present in the ordinary living of a social group (Habermas 1981, 1: 99–100), and from the concern to relate this background knowledge to the functionally differentiated "system of actions" that structure modern society (Habermas 1981, 2: 117).

In this respect, Habermas's theory of communicative action is also a theory of society, conceived "simultaneously as a system and a lifeworld" (Habermas 1981, 2: 120). Society is namely "a system that has to fulfill conditions for the maintenance of sociocultural lifeworlds" (Habermas 1981, 2: 151–152), and which also involves increasingly complex social structures of action that stabilize and integrate the shared "internal perspective" of participants' lifeworlds (Habermas 1981, 2: 172). His theory thus examines societal development as a learning process, in which social differentiation is embedded in the meaningful communication that mediates between lifeworld and system, with contested validity claims serving as the criteria and norms for meaningful discourse and practical action. With this focus on reasonable deliberation and argument, it is also a position that maintains a critical stance, calling for analyses that resist the modern fragmentation and "colonization of the lifeworld" by increasingly bureaucratized and media-driven systems of economy and state (Habermas 1981, 2: 355).

While Habermas would modify aspects of his theory in subsequent years, further developing his discourse ethics and turning to post-metaphysical and post-secular forms of thinking (Habermas 1991, 1992, 2002), this position on communicative rationality and action has continued to anchor his later work.

The Rule of Law in Deliberative Democracy

This social theory of communication also shapes Habermas's mature theory of law. The rationality that is inherent in legal argumentation of public and private or criminal and civil law is again communicative rationality, which rises from the

communicative meaning embodied in social interaction. Legal procedures "draw their legitimating force only from a process in which citizens *reach an understanding* about their rules for living together" (Habermas 1996: 84; italics original). And while legal reasoning proceeds incrementally through consideration of concrete instances of conduct rather than abstract principles of action, it nonetheless finds its basis in the consensus-forming potential of normative presuppositions and validity claims present in genuine discourse. Habermas's discourse theory thus provides a basis also for understanding the development of modern systems of law: legitimate legal claims have their basis in meaningful communication.

Notably, however, Habermas also emphasizes the complex entanglements of legal reasoning with moral and political discourse. Although these three domains of argumentation remain distinct, with each pursuing different forms of understanding, engaging different audiences, and unfolding through specific procedures, they emerge "co-originally" as they both presuppose one another and are realized fully only in their interconnection with one another (Habermas 1996: 122). Moral and legal norms, upon which democratic principles rest, are "second-order norms of action" (Habermas 1981, 2: 174), arising to maintain the social integrity of the lifeworld when conflict and disputes cannot be settled on the informal basis of shared understandings. As the moral consciousness of the lifeworld develops and grows more internally differentiated, it becomes interconnected with corresponding external developments of increasingly complex legal norms, procedures, and institutions. Within this reciprocal development, interconnected processes of moral communication, legal argumentation, and political discourse mutually reflect and influence one another. The legal system as a whole, then, finds its basis in this interconnection with moral reasoning. Foundational claims to the "basic rights" of all citizens and to the "principle of popular sovereignty," which grounds the legitimacy of legal and political statutes in citizens' assent, embody differentiated "structures of moral consciousness" (Habermas 1981, 2: 178). At the same time, these moral perspectives historically emerged only together with corresponding legal and political social developments and are conditioned by them.

In the wake of his *Theory of Communicative Action*, Habermas further deepened this position, pursuing a growing interest in legal theory in democratic societies. In 1988, he published a seminal essay "Law and Morality," which again took up the complex relationship of morality and legality. And in 1992, he published his fullest treatment of law in the volume *Between Facts and Norms*, a complex and demanding text that joined a dense discussion of legal norms with a detailed commentary of urgent political challenges of European democratic societies after the Cold War.

These works continued to develop Habermas's discourse theory of law but further accentuated the irreducibly complex interconnections of the historical development of moral, legal, and political discourse in modern Western societies, arguing that these forms of reasoning are so interwoven and entangled that they continually influence, modify, and "mutually check each other" (Habermas 1988: 246). Legal norms, insofar as they maintain meaningful claims to legitimacy, respond to genuine moral expectations, and these expectations in turn are further shaped and differentiated by legal institutions and procedures. Habermas describes the "legitimacy of legality" as "due to the interlocking of two types of procedures, namely of legal processes with processes of moral argumentation" (Habermas 1988: 230); yet he also speaks of "the paradoxical emergence of legitimacy out of legality" (Habermas 1996: 292), as legal procedures carry their own legitimacy in defining and stabilizing the democratic conceptions of basic rights and freedoms that in turn animate moral consciousness.

On one hand, then, Habermas's mature understanding of law remains firmly grounded in his discourse theory, modeled on the "subjectless forms of communication" (Habermas 1996: 301) emerging from the structures of practical discourse concerning reasonable norms for action. On the other, it presents a thoroughgoing sociology of modern legal systems, indebted not only to the moral and legal philosophies of Kant

and Hegel but also to modern sociological analyses and social theories (Habermas 1996: 315–387).

Habermas continued to extend this perspective in his more recent work, which moves beyond accepted accounts of the development of modern rationality to articulate post-metaphysical and post-secular forms of thought. From the turn of the new millennium, Habermas has developed a series of studies reconsidering the role of religion in public discourse and outlining a careful critique of naturalism and the pathologies of secular modernity (Habermas 2002, 2008). These publications culminated in his magisterial 2019 volume *Auch eine Geschichte der Philosophie* (*This Too a History of Philosophy*), a work hailed by interpreters as his most significant publication since the *Theory of Communicative Action* (Harste 2021: 347–363), which draws together these later studies into comprehensive analysis of the lengthy processes of secularization and the development of European thought (Habermas 2019, 1: 21–39; Junker-Kenny 2022: 232–234). This later work retains a discourse theoretical understanding of law and society, in which moral and legal norms gain legitimacy from the "transcending force of validity claims" (Habermas 2019, 2: 584; Forst 2021: 21). However, it expands and complements this position through richly detailed genealogical studies of communicative "moral-practical learning processes" in history (Habermas 2019, 2: 806; Forst: 22), as in the consequential shift from natural law to human rights, emerging conceptions of discursive autonomy and reasonable freedom, and the institutionalized political freedoms and legal guarantees that nourish and motivate further moral progress.

Conclusion

Habermas's legal and social theory is marked both by its continuing development and modification and its consistent focus on communicative meaning, interweaving philosophical inquiry with social theory and combining modern philosophical claims to freedom and the enduring force of reason with a focus on the ongoing differentiation of modern rationality in social structures and social systems. Accordingly, Habermas's legal and social theory outlines a complex yet adaptive framework, which holds potential both for substantive social critique and constructive engagement with pressing moral, legal, and political debates.

As such, it is a position that remains both hopeful and critical. It combines stubborn confidence in the prospects of emancipative reasoning for guiding cooperative social action with a critical posture that remains soberly attuned to the ongoing distortions of social life through juridification, forceful abuses of communication, and ever-present temptations to the blocked communication of ideology.

H

Cross-References

► Habermas, Jürgen: Faith and Reason

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Habermas, Jurgen: On Justice

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Introduction

The concept of justice sits at a curious place within Habermas's philosophical oeuvre, being at once central to and curiously absent from his thinking. Throughout his long and remarkable career in philosophy, Habermas's primary concern has been to develop and defend a philosophically and normatively grounded critical theory of society. This lifelong project is informed by a normative commitment to a discourse-theoretical ideal of individual autonomy, which makes intersubjective justifiability the hallmark of just norms and institutions. Yet Habermas offers nothing like an "ideal theory" of justice in the sense familiar from the work of John Rawls, nor does he formulate principles of justice or defend specific moral duties. In fact, Habermas insists that philosophy should not be in the business of justifying first-order moral principles or duties at all but should rather constrain itself to reconstructing second-order criteria for the *justification* of first-order claims about justice. This uncompromising proceduralism gives Habermas's thinking about justice its distinctive character, but it has also attracted criticism from philosophers otherwise sympathetic to his thought.

Critical Theory and Moral Theory

It is crucial to situate Habermas's moral theory in the context of his overall philosophical project of developing a critical theory of society. The idea of a critical theory of society was originally conceived by Max Horkheimer, who, along with Theodor W. Adorno, was the leading figure in the first generation of the "Frankfurt School" and who, in the 1930s, defined critical theory as a theory of society, whose purpose is to illuminate injustices in the basic structure of society and enable the realization of a "reasonable" or just society in practice. Horkheimer further conceived of critical theory as a form of immanent critique, which turns the normative content of "bourgeois moral ideas" against the actual state of affairs of bourgeois society and demonstrates that a realization of their normative content requires a reorganization of the social order as a whole.

It is this idea of a critical theory of society that the young Habermas sets out to recast and reinvigorate, and this has remained the central philosophical ambition of his life. Yet Habermas also identifies a number of philosophical problems in the work of the first generation of the Frankfurt School. The arguably most important problem identified by Habermas is the first generation of critical theorists' inability to account for (or "ground") the normative standard of critical theory. This inability has two worrying implications. First, it weakens the scientific credentials of a critical theory of society, which is left vulnerable to a charge of unjustifiably violating the scientific norm of value freedom. In response to this worry, "a critical theory of society [...] must one the one hand [. . .] attempt to dismantle philosophical questions into scientifically workable problems; on the other hand, it must [...] accept the fundamentally hypothetical nature of its theses" (Habermas 1984, 481). Second, because Horkheimer's model of immanent critique relies

on institutionally embodied moral ideas, critical theory is left without an immanent reference point in social reality in cases where these moral ideas are fundamentally challenged or even abandoned – which is precisely what occurred in the case of the Nazi power grab that forced Horkheimer and Adorno into exile in the early 1930s. As expressed by Habermas, if "bourgeois consciousness has become cynical [. . .and] the bourgeois ideals have gone into retirement, there are no norms and values to which an immanent critique might appeal" (Habermas 1979, 97).

However, this does not mean that Habermas is willing to give up on Horkheimer's methodological injunction of a securing an immanent reference point in social reality for social critique. Rather, Habermas's response to this problem is to seek to establish a philosophical foundation for critical theory that is able to ground its normative standard in a more foundational or basic social practice, namely, in the practice of ordinary language communication. Habermas's "formal pragmatics" – a reconstruction of the rational infrastructure of communicative practice – serves this foundational role in his social and political theory, developed in his twin *magna opera The Theory of Communicative Action* from 1981 and *Between Facts and Norms* from 1992. This body of work represents a crucial context of Habermas's "discourse ethics," which should thus not be read as a freestanding moral theory but as a component part of wide-ranging and interdisciplinary critical theory of society.

Discourse Ethics

Discourse ethics proceeds by reconstructing the validity claim specific to moral discourses, which represent the specifically moral register of what Habermas's universal pragmatics terms "the pragmatic presuppositions of discourse." A discourse refers to a communicative interaction in which hearer and speaker are relieved of pressures to coordinate action and only orient themselves toward reaching an understanding through the exchange of reasons. In such a context, Habermas argues, any competent speaker must necessarily undertake certain pragmatic presuppositions in order to make herself understood, namely, that (a) no one may be excluded, (b) that all enjoy equal opportunity to contribute, (c) that participants must only make truthful contributions, and (d) that communication must not be subject to any form of internal or external compulsion. If "everyone who engages in argumentation must make at least these pragmatic presuppositions," Habermas claims, "only reasons which take account of the interests and evaluative orientations of all equally can have an impact on the outcome of practical discourses [...] and only reasons can be decisive in the acceptance of a controversial norm." Moreover, "this 'free' acceptance can only occur 'jointly' on the assumption that the orientation to communicative agreement is reciprocally imputed to all participants" (Habermas 1999, 44).

In his earlier work, Habermas summarized these pragmatic presuppositions in the idea of an *ideal speech situation*, anticipating a "structure of a social life in uncoerced communication" (Habermas 1987, 176). Moreover, he initially understood the properties of an ideal speech situation as substantively specifying the "necessary conditions of an emancipated form of life [and as reformulating] in linguistic terms what we have traditionally sought to capture in the ideas of truth, freedom, and justice" (Habermas 2003a, 99). However, Habermas later gave up on the notion that the ideal speech situation can be said to substantively anticipate an emancipated form of life, embracing instead a more thoroughgoing proceduralist view of the idealizing presuppositions of discourse, and repudiated the so-called consensus theory of truth implied by his early account of the ideal speech situation, developing instead a pragmatic-realist theory of truth (Habermas 2003b).

By thus reconstructing the pragmatic presuppositions of moral validity claims, Habermas is able to formulate the *principle of universalization* (the "U" principle) as a "rule of argumentation" for moral discourses: "A norm is valid when the foreseeable consequences and side effects of its general observance for the interests and value-orientations of *each individual* could be freely accepted *jointly* by *all* concerned" (Habermas

1999, 42). According to Habermas, the "U" principle thus represents a reconstruction of *the moral point of view* in terms of mutual justifiability, in a way that echoes Rawls's original position and T.M. Scanlon's contractualism. Moreover, Habermas expresses the normative content of the "U" principle in terms of what he calls *the discourse principle*: "Only those norms can claim validity that could meet with the agreement of all concerned in their capacity as participants in a practical discourse" (Habermas 1999, 41). However, neither the "U" principle nor the discourse principle must be confused with action-guiding moral norms – they are, rather, second-order principles that specify the acceptability conditions of first-order moral claims. Indeed, in marked contrast to Rawls and Scanlon, Habermas maintains that it is not up to the moral philosopher to justify first-order moral norms or duties of justice, as moral theory must limit itself to the reconstructive task of clarifying the procedural norms that speakers and hearers necessarily take for granted in justifying first-order moral claims.

To be sure, there is a sense in which "discourse ethics" is something of a misnomer for Habermas's moral theory. Ethics, as traditionally understood following Aristotle, refers to a conception of the good or worthwhile human life. But Habermas's moral theory is explicitly conceived as a deontological theory in the Kantian tradition, which clarifies procedural norms for the justification of universal norms that no one ought to violate, and the "U" principle is cast by Habermas as a reconstruction of Kant's categorical imperative. Indeed, Habermas distinguishes two kinds of normative validity claims: ethical claims, which refer to the values or conceptions of the good of a particular community, and moral claims, which refer to universal norms applicable to anyone affected by norms or actions.

Deliberative Democracy and Kantian Cosmopolitanism

We only get a full sense of Habermas's distinctive methodological approach to matters of justice in his ambitious discourse theory of law and democracy, which purports to offer a reconstruction of the "self-understanding" of modern constitutional democracy. According to Habermas, this self-understanding can be expressed by appreciating how the "interpenetration" of the discourse principle (or the second-order norm of public justification) and the "legal form" elicits the *democratic principle*: "Only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted" (Habermas 1996, 110).

Once the discourse principle is legally institutionalized, Habermas argues, it gives rise to a "system of rights," which comprises five classes of basic rights, namely, rights to equal negative liberties, to membership status, to equal legal protection, to equal opportunities for discursive-democratic participation, and to the social, technological, and ecological provision of living standards necessary for the effective enjoyment of those rights. According to Habermas, this argument reconciles the tension between the "liberties of the ancients and those of the moderns" – or between popular sovereignty and the rule of law – by showing that democratic self-determination and basic human rights are not in fact in tension with one another, but rather *co-original*, expressing mutually supportive ideals of public autonomy and private autonomy. Basic rights can thus be understood as a condition of possibility for democratic self-determination exercised through law, just as basic rights require democratic self-determination in order to flesh out their determinate normative content within a specific legal, political, and ethical community. Finally, Habermas develops a two-track sociological account of how processes of will-formation in the public sphere are channeled into law enacted by a democratically elected parliament, which is able to "anchor" and steer the two principal "functional subsystems" of a modern democratic-capitalist society, namely, the bureaucracy and the economic market.

In recent years, however, Habermas has argued that the disruptive forces of globalization – or specially, the globalization of the capitalist economic subsystem – undermine the steering

capacity of democratic governments institutionalized within the territorially circumscribed framework of the modern nation-state. In response to these developments, he has developed a normative sketch for a multilevel constitutional framework that comprises the existing institutional framework of democratic state governments with a proposal for a comprehensive democratization of the European Union (as well as other "continental" bodies such as the African Union), along with a constitutionalization of international law and a transformation of the United Nations into a world organization tasked with upholding peace and human rights. However, this normative proposal should not be understood as an abandonment of his proceduralism. Indeed, Habermas's "Kantian cosmopolitanism" is restricted to imagining a global institutional framework that is able to re-establish the supremacy of democratic law in a context where market forces have globalized and undermined the steering capacity of existing territorially circumscribed institutional frameworks of democratic law. In this way, Habermas's Kantian cosmopolitanism still shies back from the first-order claims about universal duties of justice that we find in the philosophical literature on global justice.

Proceduralism and the Nature of the Moral Point of View

Habermas's proceduralism has come under fire from political philosophers broadly sympathetic toward his work. In his 1995 debate with John Rawls, which Habermas described as taking place "within the bounds of a [neo-Kantian] family quarrel," a central point of contention was precisely whether Habermas's professed proceduralism was not, in one sense, too substantive after all. According to Rawls, Habermas's philosophical position is a "comprehensive doctrine," since it "covers many things far beyond political philosophy" and aims "to give a general account of meaning, reference and truth or validity both for theoretical reason and for the several forms of practical reason" (Rawls 2005, 376). This distinguishes Habermas's view from Rawls's mature defense of his theory of *Justice as Fairness*, which is presented as a freestanding political conception of justice that eschews judgment on all philosophical matters that cannot be integrated into an "overlapping consensus" between reasonable comprehensive doctrines, each based on their respective philosophical commitments.

In Habermas's response to Rawls, he doubles down on his discourse-theoretical account of public justification, maintaining that the idea of a "consensus" on principles of justice based on different reasons is conceptually flawed: "Whereas parties who negotiate a compromise might accept the results for different reasons, participants in argumentation must reach a rationally motivated agreement, if at all, for the same reasons. Such practices of justification depend on a *jointly and publicly reached* consensus" (Habermas 1999, 76). Only citizens, who affirm the same principles from "a moral point of view independent of, and prior to, the various perspectives they individually adopt from within each of their comprehensive doctrines," will be able to reach an overlapping consensus on matters of justice. There deeper issue at stake between Rawls and Habermas concerns whether public reason is a circumscribed mode of justification possible only on the condition of a prior feature of comprehensive doctrines, namely, that they are *already* "reasonable" and that their reasonableness is what enables debate only on "constitutional essentials and matters of basic justice," as affirmed by Rawls, or whether public reason is a dynamic and disruptive force that reaches into and transforms the worldviews of citizens when called to publicly justify their claims, as Habermas argues.

On the other hand, Habermas's proceduralism has been criticized by his former student Rainer Forst for being insufficiently substantive from a moral point of view – indeed, that Habermas's discourse ethics fails to account for the true *nature* of the moral point of view. According to Forst, knowing the rules of the moral language game is insufficient for assuming the moral point of view – knowing what it means to raise a moral validity claim – since this also requires the insight that one is *categorically bound* by valid moral norms:

"The principle of justification must be viewed, *pace* Habermas, as normatively binding, for otherwise moral persons might indeed know *how* they should justify their actions but not that *that* they are obliged to do so in a moral context" (Forst 2011, 57). At issue in the disagreement between Habermas and Forst is the question whether moral and political philosophy is able to maintain its procedural distance from first-order moral claims, as Habermas insists, or whether it must rather embrace an immediately *practical* reason in moral contexts of justification, as Forst maintains.

As Rawls acknowledges, his much-discussed exchange with Habermas forced him "to rethink things" and realize that his "formulations have often been not only unclear and misleading, but also inaccurate and inconsistent with [his] own thoughts," leading him also to put much greater emphasis on the idea of "public reason" in his mature justification of his theory of justice. Forst is not only a student and philosophical interlocutor of Habermas but also an established moral and political philosopher in his own right, who has taken the framework of discourse ethics into new philosophical territory and developed a powerful constructivist theory of justice that places the moral "right to justification" at center stage. Habermas's debates with Rawls and Forst are thus suggestive of the remarkable influence that Habermas's thinking has exercised on moral and political philosophy, including on the philosophical discourse on justice – even as he has himself tiptoed around the concept.

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Hägerström, Axel

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Introduction

Axel Hägerström (1868–1939) was the initiator and most prestigious figure in the philosophical realism of Uppsala, as well as its leading exponent in practical philosophy.

Born in Vireda, Jönköping County, Sweden, he taught at the University of Uppsala from 1893 until his retirement in 1933. His inaugural lecture, *Om moraliska föreställningars sanning* (On the truth of moral representations), delivered on 18 March 1911 from the chair of practical philosophy, was memorable (Hägerström 1966, 35–57): It was the first time in the twentieth century that a metaethical noncognitivist emotivist view about moral values and duties was clearly presented (see Mindus 2009; Eliaeson et al. 2014).

Hägerström's Reality Thesis

At the basis of Hägerström's metaethics there were a realist epistemology and a realist ontology. In 1908 Hägerström presented his escape from subjectivism in a work whose very title suggests, from the outset, an ambiguous wealth of Kantian themes coupled with realist outcomes. That title was *Das Prinzip der Wissenschaft. Eine*

logischerkenntnistheoretische Untersuchung. I. *Die Realität* (The principle of science: A logical-epistemological inquiry. I. Reality, Hägerström (1908)).

A clear distinction should be introduced between *logical reality*, for the Swedish *realitet* and the German *Realität*, on the one hand, and *effectual reality*, for the Swedish *verklighet* and the German *Wirklichkeit*, on the other. This distinction is being introduced so as to mirror a difference in linguistic usage which occurs in Hägerström's original texts, but which the English language cannot express with the single word *reality*, and which Hägerström's translators and commentators, even those who are native Scandinavian speakers, regularly ignore (see my survey of them: Pattaro 2016, 358–63), thus posing serious obstacles to an understanding of his thought. *Realitet* (or *Realität*) is the reality of possibility, and so is a logical reality. *Verklighet* (or *Wirklichkeit*) is the reality of an actualized possibility, and so, whatever be the actualized possibility, even that actualized in a fiction, this reality will be an effectual reality.

According to Hägerström, through a judgment, the knowing subject (*a*) *attests* (*aussagt*, *utsäger*) the logical reality (determinateness, consistency, non-contradictoriness, *Realität*, *realitet*) of the content of a representation, and (*b*) *judges* (*urteilt*, *omdöme fällas*) whether or not the logically real content of this representation also occurs as effectually real in a wider effectually real complex to which the knowing subject refers the content of the representation attested as logically real.

A knowing subject apprehends in his consciousness a representation whose content is, for instance, men-who-breathe-through-gills (Hägerström's example). The knowing subject attests this content as logically real (as determinate, consistent, noncontradictory), and the same content (so attested) will be the object of an affirmative or negative judgment by the knowing subject.

If the knowing subject refers the content of the representation to a wider effectually real complex where men do *not* breathe through gills, then this judgment will be a negative one: The knowing subject judges that the content of his representation (the object of his judgment) occurs merely as represented, merely as logically real, and not as effectually real in the wider effectually real complex where men do *not* breathe through gills.

If instead the knowing subject refers the same representation (men-who-breathe-through-gills) to a wider effectually real complex where men do breathe through gills, then this judgment will be an affirmative one: The knowing subject judges that the content of his representation (the object of his judgment) occurs not merely as represented (not merely as logically real) but also as effectually real in the wider effectually real complex where men do breathe through gills, as in fictions, I would say (Hägerström 1929a, 116, 120; cf. Hägerström 1957, 120, 126–7; more on this in Pattaro 2016, 356–63).

Hence, with both judgments, the negative and the affirmative one, the object (men-who-breathe-through-gills) is the same. What changes is the effectually real complex with reference to which this object (which is attested as logically real by both judgments) is *judged*: with the negative judgment the effectually real complex is one where men do not breathe through gills; with the affirmative judgment the effectually real complex is instead one where men do breathe through gills.

The widest effectually real complex to which the content of any representation may be referred is the spatiotemporal world of experience. The effectual reality of the world of experience cannot be demonstrated, because any attempt to demonstrate the truth of something (of a representation) *presupposes* the effectual reality of that world. We can, however, demonstrate that anyone attempting to define the world of spatiotemporal experience as a mere illusion will only produce a collection of senseless words (Hägerström 1929a, 131ff.; cf. Hägerström 1957, 143ff.).

The Unreality of Value and the Ought

We may call pseudojudgments those sentences that according to Hägerström are apparent judgments whose subject matter is an *impossible thing*, and so is logically unreal, or contradictory,

a non-object. Their subject matter is a non-entity, a non-thing (*intigt*: see Hägerström 1951, 84): It is indeterminate, and therefore cannot be represented, and cannot be a possible object of judgment. The sentences in which pseudo-judgments are framed as judgments are only strings of words: Despite their misleading formulation as judgments, they do not express cognitive acts of consciousness.

Among the pseudojudgments are not only the statements of metaphysics (*praeterea censeo metaphysicam esse delendam* was Hägerström's motto) but also sentences framed in the form of value judgments and ought judgments, neither of which express authentic judgments but only hypostatizations (or *objektiveringen*: Hägerström 1917, 69) of feelings or of conative impulses arising within us in a simultaneous association with representations of things or of behaviors (Hägerström 1917, 64 ff.). The associations between feelings or conative impulses and representations are expressed in sentences framed in the form of judgments because the representational element prevails in giving rise to a linguistic expression, and it draws the expression of feeling or of a conative impulse into the expression of the objective determinateness (logical reality) of that which is represented, be it a thing or a behavior (Hägerström 1917, 69–70).

The Ought, the Right, and Norms Explained

Ought judgments are pseudojudgments, mere strings of senseless words, but in spite of this they unconditionally reflect a (noncognitive) state of consciousness, so that far from being idiosyncratic, or specific to this or that individual person, they are standardly used by everyone within a language community to express similar states of consciousness: They are supraindividual. Using ought judgments leads us to conjure up a world of duty as existing in distinction to the world of facts but parallel to it.

When we think of a behavior as required by duty we conceive it as having a particular character: We think that the behavior at issue is, in the given circumstances, right (*rätt*). Here the word *right* is to be kept quite distinct from the word *just* if we are to have an adequate understanding of Hägerström's thought concerning the idea of duty: "Rightness" (*rätthet*) or "correctness" (*riktighet*) are not the same as "justice" (*rättvisa* or *rättfärdighet*).

Because commands and prohibitions accompany us from childhood, because they are frequently repeated, and because they are aimed at bringing forth some relatively uniform modes of behavior – no matter what the source of such commands and prohibitions is: family, school, religious power, secular power, the social environment at large – our thinking about certain modes of behavior, Hägerström argues, will bring with it an accompanying perception of an "ought to take place" (*skall ske!*) or a "must necessarily take place" (*måste ske!*).

Since these modes of behavior have always been commanded or prohibited from a variety of sources – from different persons and authorities – and since we have regularly learned these modes of behavior by way of commands and prohibitions, we no longer associate these behaviors with the command or the prohibition of this or that person or authority in particular. The sources of commands and prohibitions have lost their individual specificity: What appears before us is just the visual or sound image of an expression of command or prohibition. Still, even though such imperative expressions have been depersonalized, they do maintain, when connected with the behaviors they refer to, a suggestive force that elicits in us a conative impulse to have the required behavior or avoid the prohibited one.

All this happens not with a single person but with all those in the community one lives in. The association of behaviors and depersonalized imperative expressions – such as "This ought to take place!" and "This ought not to take place!" – is produced in all or nearly all members of a community, and each member can and does see the association in the way others speak and behave. It is little wonder, then, that people come to make the hypostatization whereby "ought to take place!" and "ought not to take place!" become objective characters of certain

behaviors: We come at the idea of a system of modes of behavior that unconditionally "ought to" or "ought not to" take place. The idea of this system of modes of behavior is the idea of a system of norms, and the idea of right is connected with the idea of such a system of norms (see Hägerström 1917, 82–4, 93; cf. Hägerström 1963, 9–12; Pattaro 1974, 171–3).

The word *norm* thus designates these modes of behavior so conceived. Norms have neither a logical reality nor an effectual reality. By contrast, our belief that they exist beyond ourselves and are objectively binding belongs to our psyche: It is a determination of our psyche.

Hägerström also shows that norms are crucially different from commands with arguments that will also be used by Hart (1961) (cf. Pattaro 2005, 133–44).

The Law in Force Is Made Up of Norms. The Role of the Constitution and the Judge-Made Law

According to Hägerström, without a constitution which the members of society regard as binding, and which is regularly observed by those in power, no lasting factual power would obtain in society: Power does not precede norms but instead is created and kept into being by norms. A clear--cut distinction exists between the decisions that sovereigns take in a private capacity and those which they take in their capacity as officials: Only in the latter case will a decision carry the force of law, and this is so because, unlike the decisions that sovereigns take in a private capacity, their *official* decisions rely on previously accepted constitutional norms. The expression force of law (*rättskraft*) designates in Hägerström an effectively operating force capable of binding people concretely (psychologically), thereby determining their behavior (see Hägerström 1961, 72–3, 75–7; cf. Hägerström 1963, 127ff., 223ff.).

A norm in force is one that in a given social group is believed to be in force and hence felt to be binding and is observed, especially by the persons whose job it is to administer justice.

Hägerström shows that the law as interpreted and applied by the judge is not anybody's will (the will of legislator, the judge, the legal system, or the like; Hägerström 1917, 16–51).

Hägerström does not doubt that when judges settle disputes, they also take into account the textual provisions of the law, among other things, but he does deny that this amounts to actuating or declaring the legislator's will: "What for the judge is law in force cannot be identical with the legislator's will." Law in force is, for Hägerström, the law that judges apply. This law, however, is not identical with the judges' decisions, either, because the judges themselves understand the law in force to consist of norms that precede and justify their decisions in concrete cases (Hägerström 1917, 16–18; the quotation is from p. 17).

As Hägerström observes, in order to understand the judge's *modus operandi*, we have to take into account that the common legal consciousness includes the principle under which, whereas the legislator frames rules for social relations to come, the judge issues judgments on relationships existing *before* such judgments: The judge's judgment is understood as stating the truth (*pro veritate accipitur*), not only with regard to matters of fact but also with regard to matters of law and its correct application (see Hägerström 1917, 25–31, cf. 1ff., 10ff.).

The Idea of a Right

According to Hägerström, the idea of a right (*rättsidé*) is a variant of the idea of duty: It is a moral idea framed as a duty (and not as a value), in the sense that we understand a right as the right to expect others to do their duty and not as the right to expect them to act in conformance with our own values or interests.

So the idea of a right can be said to rest on the idea of a general rule that is in force independently of any value (*allmän regel, som gäller omutligt*), in such a way that the right-holder grounds in this norm the rightness of the duty-holders' behavior, even if the right-holder does not value the behavior at issue. A right is commonly held to determine

an obligation for a duty-holder, and according to "the idea of duty the rightness of certain behaviours depends on a fixed rule of conduct; and this rule is blind to the real consequences a behaviour will have with respect to one value or another" (Hägerström 1963, 18,19–20, 27–9, 33–5) – The word *omutligt* (cf. Ibid., 17) properly means "incorruptibly," which in this context suggests that the rule in question must not suffer from contamination with any value; Hägerström adds to this that the ancient Romans used the expression strictum jus to express the concept of an incorruptible rule (Hägerström 1917, 75–6).

The idea of a right as a power is mere fiction, unless a functional legal system equips rightholders with those instruments of power that alone can secure the necessary firmness for these people's capacity to influence others.

It is a matter of fact, in Hägerström's view, that we have no power (*makt*) to make a claim to something unless we consider ourselves capable of influencing others by way of imperative utterances addressed at them, and unless we actually can exert such influence. A power to make claims does not flow simply from the possibility of speaking certain words, because the words so spoken will have to be backed by instruments of power (*maktmedel*), for otherwise we cannot hold ourselves capable of influencing other people's behavior through a claim – at best we can hope a plea will do the job (Hägerström 1963, 57–8).

If, on the one hand, Hägerström foils every attempt at reducing rights to de facto powers, on the other hand he brands as scientifically untenable the theory that presents rights as ideal powers.

Hägerström is not just presenting the idea of a right as irreducible to an empirical concept: He is also arguing that legal dogmatics cannot offer an account of the law without embracing the idea of a right. As with Hägerström's concept of a norm, so also in regard to the idea of a right his realism comes out in full. For, on the one hand, Hägerström points out that certain legal concepts are not scientific, as some pretend them to be, and, on the other hand, he states that such concepts cannot be discarded despite their not being scientific.

Hägerström shows in this regard that even the theory of rights as legally protected interests cannot avoid using the notion of a right as an ideal power (Hägerström 1961, 120–31; 1963, 81ff.).

The idea of a right is not an idle entity in the realm of the law; quite the contrary, it plays a key role (as do the ideas of a norm and of duty with which it is closely linked): It carries out an important imperative or directive function, by affecting individual and collective attitudes, and so also the behavior of law courts, whose task is to protect the factual advantages people are "entitled" to.

In sum, the idea of a right belongs to the complex of factors that operate in society and concur in keeping the legal system alive and well. But the converse is also true: When the same idea acts contrary to the ends the legal system is designed to achieve, it can ultimately undermine the system and contribute to making it fall apart (Hägerström 1927, 16–7; 1963, 58ff., 71ff.; cf. Hägerström 1966, 182–3, 193).

Transactions

Hägerström rejects the common opinion that a transaction consists in a declaration of will; he argues that it consists instead of imperative sentences, and he essentially frames the same problem posed by what J. L. Austin later termed "performative language" (see Hägerström 1961, 100–1, 111ff.; cf. Hägerström 1927, 25ff., 35ff.).

A transaction "imperatively expresses an imaginational representation about the coming into existence of rights and duties"; what is being said in carrying out a legal transaction is that certain "legal rights and duties [. . .] must come into existence" (Hägerström 1961, 106).

The formula "I am transferring my property right" means [not "Have this thing!" but] "This thing ought to be yours"; likewise, the formula "I am offering this to you" means [not "Take what I'm offering to you!" but] "The rights and duties this offer refers to ought to come into existence"; lastly, the formula "I accept" means [not "Give me what you're offering to me!" but] "The rights and duties the offer refers to ought to come into being" (Hägerström 1961, 105).

The parties to a legal transaction behave as if they were enacting a law between them; and laws "are not imperatives in the common meaning of this term: [They are not] commands" (Hägerström 1961, 104, 112; 1927, 586; 1941, 22ff., 35–6).

Hägerström writes that "whoever declares that he *is binding himself* to another person, who thereby acquires a claim, is aiming at an imperative: I *must* perform this or that for you" (Hägerström 1961, 104–5, italics in the Swedish original).

Hägerström here is not stating "the promisor aims to *say*," but "the promisor aims to *do* something, namely, to set up or create an imperative I *must*." And this I *must* is not so much the meaning as the product of the words "I am binding myself to another."

Hence, in a promise, the words *I am binding myself to another* mean "an imperative I *must* (i.e., a duty) ought to come into existence," and in the promisor's mind they effectively create the I *must*, or duty, under consideration. And that is so independently of whether the promise is legally recognized.

Rights and duties are ideas and hence are *not* legal but psychological effects flowing from a transaction and are elicited – by the use of a certain type of language – in individuals duly conditioned by the upbringing they have received and by the social environment around them.

Legal effects, by contrast, are factually determined situations that the legal apparatus ultimately imposes in accord with statutes (and with custom, case law, and so on) regulating transactional activity (Hägerström 1961, 105–6).

Other Investigations by Hägerström

Among the most important investigations carried out by Hägerström are the historico-anthropological ones, and specifically noteworthy among these are the ones he devoted to Roman law (see, among others, Hägerström 1927, 1929b, 1941). There is no room to enter into these investigations here. Karl Olivecrona edited the posthumous edition of *Der Römische Obligationsbegriff*, vol. 2 (Hägerström 1941), and in his own turn conducted some historico-anthropological investigations following the trail blazed by Hägerström. Olivecrona (1953, X–XXVII) figures among the most perspicuous short introductions to Hägerström's philosophy of law, and in it Olivecrona briefly and masterfully presents as well Hägerström's investigations into Roman law (see also Faralli 1987).

Cross-References

- ▶ Austin, John
- ▶ Hart, Herbert Lionel Adolphus: Influential Ideas
- ▶ Lundstedt, Anders Vilhelm: Influential Ideas
- ▶ Olivecrona, Karl Knut Hans: Influential Ideas
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Hampton, Jean

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Introduction

When Jean Hampton (1954–1996) died at the age of 41, philosophy suffered a serious loss. That loss was not just due to the fact that Hampton had already contributed so much to social and political philosophy. Philosophy also lost the chance to see how much more Hampton could have done – one gets the sense that in spite of the philosophical sophistication she already showed, she had only just begun to develop her thinking. Philosophers who knew and worked closely with her described her as "bold" and "unflinching" (Annas 1996). Gauthier recalls his interactions with her as "always strenuous, always fun, and always rewarding" (1996). Murphy, who coauthored *Forgiveness and Mercy* with Hampton and was one of her biggest adversaries, writes: "I miss her and do not welcome a world that lacks her brilliant, creative, and witty presence" (1997). One of the more understated features of Hampton's work in political philosophy is its accessibility. Had Hampton lived, she might have become a prominent public philosopher. Her writing is clear, thoughtful, and blissfully unpretentious. She references *Macbeth* as readily as *Superman 2*. Indeed, at the end of the introduction to her book on political philosophy, she writes that her intentions in the book are to convince her readers that the topics of political philosophy belong to them as well as to philosophers. The introduction concludes: "Philosophy belongs to no particular elite, but rather to all human beings" (1997, xiv).

Hampton graduated from Wellesley College in 1976, where she earned highest honors in Philosophy. She studied under John Rawls and completed her Ph.D. at Harvard University. She was teaching at the University of Arizona at the time of her death, but she also taught at U.C.L.A., U.C. Davis, and the University of Pittsburgh. She was the recipient of numerous awards and visiting lectureships. The Jean Hampton Prize, which is awarded to junior philosophers at the Pacific Division meeting of the American Philosophical Association, was established in her honor in 1997.

Hampton's work spans a number of broad topics, but she dives deeply into each one. Because her work is thematic, dividing it into neat categories would be artificial, but broadly Hampton's thought makes contributions to both political philosophy and moral philosophy.

Political Philosophy

Social Contract Theory

One of the most important contributions that Hampton makes is her nuanced reading of Hobbes. Instead of reading Hobbes' philosophical anthropology as overly pessimistic, Hampton explains the social contract in terms of rational decision theory. On Hampton's reading, Hobbes argues for an "alienation social contract" where individuals confer authority to the sovereign as an "irrevocable grant" (1997, 41). Hobbes' alienation model contrasts with Locke's agency model. For Locke, individuals grant authority to the sovereign as a loan, but for Hobbes individuals relinquish their authority to the sovereign. As readers of Hobbes have often asked, why would individuals agree to this contract if cooperation without alienation is possible? Using the prisoner's dilemma, Hampton seeks to show that the decision to cooperate is only rational against the backdrop of mutual cooperation (1997, 47). But in Hobbes' state of war, we precisely do not have this assurance, and given the conditions, it is unclear how we would get it. As Hampton puts it, cooperative behavior "could threaten the safety of the one performing it" (1997, 48). Thus only way out of the state of war is to ensure mutual cooperation, which can only be accomplished by a sovereign with absolute power. The uniqueness of Hampton's contribution is that she can show how Hobbes' claims about the social contract are consistent with his view about human psychology. On the one hand, Hobbes claims that people possess unruly passions that will inevitably lead to conflict. If this is so, then how do we overcome those passions in order to establish the contract at all (1986, 73)? On the other hand, if we think of Hobbes' individuals as self-preserving rational maximizers, we can explain why they would *enter* the social contract, but we cannot explain why they would choose to *keep* the social contract (1986, 75).

Hampton finds a way out of this dilemma by appealing to the shortsightedness of individuals in Hobbes' state of war. As Hampton argues, people "fail to appreciate the long-term benefits of cooperation and opt instead for short-term benefits of non-cooperation" (1986, 81). Even if individuals know that cooperating is better and safer in the long term, because of the other conditions and distrust in the state of war, their ability to hold that judgment fixed in risky situations is diminished. As such, the individuals in the state of war are making a mistake in their reasoning rather than having their reasoning disrupted by their passions (1986, 82). The sovereign must have absolute power not just to adjudicate conflicts that are already in place but rather to create the conditions for cooperation in the first place (1986, 85). Individuals can correct their mistakes in reasoning in order to set up the social contract, but their shortsightedness and their passions will make life within the commonwealth difficult (1986, 86). Hampton's reading of Hobbes both explains why there is widespread conflict that justifies the absolute sovereign and why individuals would keep the social contract. Hampton's reading of Hobbes makes his theory far more nuanced and plausible than readers often conclude.

Feminist Responses to Contract Theory

Beyond her work on Hobbes, Hampton has made numerous contributions to the contractarian tradition more generally. Nowhere is this clearer than her thoughtful engagement with feminist political philosophy. Hampton recognizes that feminist political philosophers might be dissatisfied with to bargaining-style approach of contract theory. Hampton distinguishes two types of contractarianism that have each been the target of feminist critique. Hobbesian-style contract theory holds that political agreements can arise out of self-interested rational action, but feminists object that it fails to account for our dependency on one another and our emotional ties to others (2007, 10–11). Kantian-style contractarianism holds that political agreements arise out of collective deliberation about what the abstract principles of justice are, but feminists object that it strips persons their socially embedded identities and smuggles in presumptions of a patriarchal society (2007, 14–15).

Hampton finds hope for a feminist contractarianism in the most unlikely place. One of the main threads of the feminist critique is that contract theory leaves no room for intimate

relationships. Hampton argues that intimate relationships need to make room for contract theory. She focuses on the issue of exploitation. As Hampton writes, intimate relationships are often fraught with the dangers of exploitation: "A woman whose devotion to her family causes her to serve them despite the fact that they do little in return is in an exploitive relationship" (2007, 21). Hampton suggests that contract theory provides a test for exploitation: could the parties in the relationship reasonably agree to the distribution of obligations and benefits within that relationship if they were both motivated only by self-interest (2007, 21)? The contract test assumes that the distribution of benefits and duties must be able to be "agreed to" by all parties. Underlying the notion of "agreed to" is presumption that both members of the relationship matter. For Hampton, this means that neither party "can dictate the solution alone," but neither can she "ignore or disregard her own importance in the formulation of the right policy" (2007, 23). Self-interest here is not selfish, but instead self-protecting. Intimate relationships teeter on the edge of exploitation because both parties are willing to sacrifice for the other. Contract theory gives women a way "to be tenacious advocates for ourselves" (2007, 29). Contractarianism can thus be consistent with the feminist project of alleviating oppression against women.

Punishment

Outside of her work on contract theory, Hampton provides an influential account of punishment. Although thinking of punishment as moral education is not original to Hampton, unlike her predecessors, she argues that moral education can provide a *justification* for punishment rather than just a model for it (1984, 209). Moral education theory of punishment holds that "punishment is intended as a way of teaching the wrongdoer that the action she did (or wants to do) is forbidden because it is morally wrong and should not be done for that reason" (1984, 212). On Hampton's view, the moral education theory of punishment incorporates the insights of other justifications of punishment without reducing to those other justifications. For instance, it accepts the insight of a deterrence account because part of the point of punishment is to prevent crime and to promote the public's well-being (1984, 211). But moral education cannot be merely a deterrent because the point is to communicate a message to the offender that her behavior crossed a moral line (1984, 212). Moral education theory also adopts an important insight from retributivism: that the offender's autonomy must be respected even as we punish her. If punishment is supposed to communicate a message, it tries to persuade her through her own reason that what she did was unacceptable. As such, any punishment that damaged an offender's autonomy would be ruled out (1984, 222). On Hampton's view, we teach offenders about the wrongness of their actions through some sort of pain. The majority of actions that are treated as crimes are "insensitive to the needs and interests" of others (1984, 226). In order to teach a moral lesson to the person committing these acts, the law must "disrupt" the pursuit of the offender's own pleasure – only then will the offender "appreciate the special force of 'mustn't" in the punisher's communication (1984, 226). Hampton's moral education theory is emblematic of much of her work in political philosophy. She tries to take the partial truth or insights from other views in order to get to the philosophical heart of the matter in the hopes of bringing clarity to a rich and complex problem.

Moral Philosophy

In addition to her work in political philosophy, some of Hampton's influential writings are in moral philosophy. The two most important areas to which she contributes are the topics of forgiveness and the authority of reason.

Forgiveness

Hampton's book *Forgiveness and Mercy* coauthored with Jeffrie Murphy is one of the most cited philosophical works on forgiveness. It is one of the few places in Hampton's work where her religious commitments are explicitly stated even though she made no attempt to hide those commitments. Hampton's own definition of forgiveness is inspired by an interpretation of Christian

forgiveness. Hampton argues that to forgive is to overcome the "point of view of the other as 'the one who wronged me" (1988, 38). Overcoming this point view requires two stages. The first stage prepares for the change of heart by letting go of the negative emotions that stand in the way of the change (1988, 83). Hampton identifies resentment, indignation, and hatred as emotions that prevent forgiveness. According to Hampton, these emotions are potent because they allow us to bolster our sense of our own worth, which is precisely what has been threatened by the other person's wrongdoing (59–60). The person who wrongs us makes us feel and indeed fear that we are not worthy of respect and equal treatment (1988, 57). To stave off that fear, we hate the wrongdoer – our negative emotions are both ways of shoring up our sense of our own worth and treating the wrongdoer as an enemy to be defeated (1988, 58–60). Letting go of these emotions requires us to believe in our own worth without the support our hatred. As Hampton argues, people who are "beyond resentment" are so because of their confidence in their own value (1988, 58). The second step in forgiveness is to choose to not see the wrongdoer as an enemy. The person who forgives sees the offender as "something other than or more than the character traits of which she does not approve" (1998, 85). On Hampton's view, forgiveness is a valuable and praiseworthy response because it involves a commitment to the decency of human beings even when they seem not to be decent (1988, 152). In this way, forgiveness is a moral achievement.

Authority of Reason

Hampton was working on a book about reason before she died. The book was unfinished, but it was published posthumously. Between this book and her paper "Mens Rea," one can reconstruct her account of reason's authority. In "Mens Rea," Hampton approaches this question by starting with irrational actions: what counts as a blameworthy failure to listen to reason? On Hampton's view, we are rationally culpable when we "defy" the dictates of reason (2007, 77). Typical accounts of irrational action assume that ignorance plays some important explanatory role. But as Hampton points out, appeals to ignorance don't fully capture the culpability of irrational action because such appeals do not distinguish culpably irrational action from mistaken or negligent irrational action (2007, 74–75). By contrast, Hampton argues for a defiance account of irrationality. On her defiance account, an irrational action has occurred when "one installed as authoritative something other than reason which endorsed the irrational action" (2007, 82). Hampton illustrates with a story about an 18 year old who wants to live a "natural life" raising his own food and building his own house in Maine. In spite of the fact that his father built houses for a living, the young man refused to seek help from his father. As one might expect, he failed miserably at building a suitable house and eventually had to seek the help that he had previously refused (Hampton 2007, 76). On Hampton's account, the young man is culpably irrational because he takes as authoritative his own desire to be independent and his own overestimation of his abilities rather than the dictates of reason that tell him he can't build a house on his own. As such, the young man commits an act of defiance against reason (2007, 78). Hampton argues that the defiance account can explain why irrationality is culpable and yet still involves an appeal to ignorance. In the young man's case, he was ignorant of what he could "reasonably accomplish in the world" (2007, 82). This ignorance, on Hampton's view, is a kind of pride – when agents act irrationally they overestimate the control they have over their own lives and over the world. The young man who thinks he can build a house without the requisite knowledge, experience, or help "does not understand that he simply cannot supplant reason's authority with something more congenial" (2007, 83). Hampton's defiance account can explain irrational action that can include both ignorance and culpability.

Conclusion

In spite of her short life, Hampton's contribution to philosophy is substantial. Her work in political philosophy, philosophy of law, and moral

philosophy has been and will continue to be influential in all three fields.

Cross-References

▶ Education: Ethical
▶ Murphy, Jeffrie
▶ Virtue Theory and Law

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Harrington, James

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Introduction

The English Revolution (1640–1660) prompted new thinking about legal and constitutional matters, but also about political institutions and practices. The execution of King Charles I on 30 January 1649, and the subsequent establishment of the "Commonwealth and Free State," forced thinkers in England and beyond to reassess commonly accepted notions, such as the divine right of kings, the ancient English constitution, and the location of sovereign power. Various thinkers developed theories to explain the situation, offered justifications for the new regime, and even proposed novel institutions of their own.

James Harrington (1611–1677) was particularly influential in this regard. His major work – *The Commonwealth of Oceana* (1656) – explained why a commonwealth was theoretically the best form of government; demonstrated why that form was the most appropriate for England in the mid-1650s – and, in doing so, offered an historical explanation for the outbreak of the Civil War; and proposed a detailed constitutional blueprint for a more successful and durable English commonwealth than the one in existence. Moreover he did this in a multilayered work, which interwove various genres and factual and fictional elements into a complex whole.

After the publication of *Oceana*, Harrington continued to push his arguments and constitutional model, and to experiment with genre and style, in a series of publications, most of which either debated his key arguments or offered abridged versions of his model. Harrington's interests were broad, encompassing religious, historical, philosophical, and scientific thought. However, he is best known for his political and constitutional ideas: his theory regarding the economic foundations of political power; his insistence on the rule of laws not men; and the measures he proposed to prevent human self-interest from corrupting the commonwealth. Underpinning all of this was his distinctive division of political power into two components: empire and authority.

Empire and Authority

Harrington grounded his political theory in a naturalistic understanding of human beings and their place in the universe. Since individuals were composed of material, rational, and divine elements, he argued that the state too should embody all three. This was reflected in his distinction between

empire and authority. Empire was concerned with the material foundations of power, or as Harrington put it "the goods of fortune" or "riches." Authority referred to "the goods of the mind," or virtues, and encompassed both human and divine rationality. This distinction challenged Thomas Hobbes's belief that "riches are power" and that "prudence, or the reputation of prudence, is power." As Harrington pointed out, "A learned writer may have authority, though he have no power; and a foolish magistrate may have power, though he have otherwise no esteem or authority" (Harrington 1977, p. 163).

"Empire Follows the Balance of Property"

Empire was dependent on riches, particularly the possession of land. Harrington assumed an economy dominated by agriculture, even though others at the time acknowledged the growing significance of manufacturing and commerce. He insisted that a powerful ruler needed an army to enforce his/her will, and that land was essential to provide the soldiers with food and supplies. Consequently, he concluded, it was the ownership of land within the state that determined who held political power:

> If one man be sole landlord of a territory, or overbalance the people, for example, three parts in four, he is grand signor, for so the Turk is called from his property; and his empire is absolute monarchy.
>
> If the few or a nobility, or a nobility with the clergy, be landlords, or overbalance the people unto the like proportion, it makes the Gothic balance . . . and the empire is mixed monarchy, as that of Spain, Poland, and late of Oceana.
>
> And if the whole people be landlords, or hold the lands so divided among them, that no one man or number of men, within the compass of the few or aristocracy, overbalance them, the empire (without the interposition of force) is a commonwealth. (Harrington, pp. 163–164).

Rule "of Laws and Not of Men"

With regard to empire, then, the appropriate form of government was dependent on the distribution of landed property within a country. When it came to authority, however, one form of government was clearly superior to the rest. At the heart of Harrington's theory of government was the distinction between ancient prudence "whereby a civil society of men is instituted and preserved upon the foundation of common right or interest" and modern prudence "whereby some man, or some few men, subject a city or a nation, and rule it according unto his or their private interest." Or, as he put it more pithily, between the "empire of laws" and that "of men" (Harrington, p. 161). While this idea was attributed by Harrington to Aristotle and Livy, and while it echoed sentiments expressed by Niccolò Machiavelli, Harrington's adoption of it was prompted by his sympathy for Hobbes's negative assessment of human nature.

Positioned between beasts on one side and God on the other, the human soul was "the mistress of two potent rivals": reason and passion. Consequently, human beings could not be trusted to act in accordance with reason and the public good, but were susceptible to passion and inclined to pursue their own interests. Rather than insisting, as other republicans did, on the need for citizens to exercise virtue, Harrington proposed organizing the constitution in such a way that, by acting in their own interests, citizens would end up serving the public good. The key example was Harrington's bicameral legislature, in which the senate could debate and propose legislation, but the popular assembly would vote (without any discussion) to accept or reject each proposed law. Harrington described the way in which this manipulated natural human behavior to positive ends through the analogy of two girls sharing a cake:

> "Divide", says one unto the other, "and I will choose; or let me divide, and you shall choose." If this be but once agreed upon, it is enough; for the dividend dividing unequally loses, in regard that the other takes the better half; wherefore she divides equally, and so both have right. (Harrington, p. 172)

Denying the senate the right to resolve as well as to debate meant preventing its member from both dividing and choosing and thereby from passing legislation in their own interests.

Constitutional architecture, then, could be used to ensure that government was exercised in

accordance with human reason, but what about the other aspect of the goods of the mind: divine rationality? Harrington was adamant that religion was essential to human beings and therefore to society. He developed his own distinctive civil religion which combined a democratically administered national church and liberty of conscience for Protestant sects (Goldie 1987).

"Flesh Must Be Changed or It Will Stink of Itself"

Much recent commentary on Harrington has focused on his credentials as a republican, but scholars have also begun to acknowledge his use of democratic practices in church and state (Foxley 2013; Hammersley 2013; Davis 2018). Alongside his commitment to popular sovereignty, Harrington championed a broad franchise and meritocracy, as well as explicitly embracing the term "democracy." He was, however, aware of the potential dangers of democracy, not least the corrupting effects of power.

Just as the organization of the bicameral legislature was designed to prevent the senate from pursuing its own interests at the expense of the commonwealth, so rotation of office – which was instituted for most offices and assemblies in Harrington's model – was designed to curb corruption on the part of individual deputies and officeholders. As Harrington explained: "Flesh must be changed or it will stink of itself; there is a term necessary to make a man able to lead the commonwealth unto her interest, and there is a term that may enable a man to lead the commonwealth unto his interest" (Harrington, p. 494). Elections would be held annually with one third of each assembly being replaced each year. Members of the senate and popular assembly could only hold office for 3 years, after which they had to spend 3 years out of office before being eligible for reelection. The awareness of deputies and officeholders that they would soon have to return to the status of ordinary citizens and live by the laws they had enacted would, Harrington believed, keep them focused on the common good.

Finally, Harrington sought to prevent corruption among electors by borrowing the complex balloting system practiced in Venice. It used secret voting and a combination of lot and election to create a system that would make a fair choice of good candidates possible.

Conclusion

Despite his best efforts, Harrington's proposed constitution was never implemented in England. Yet the novelty of his proposals, and their utility, led to his ideas being debated – and some of his mechanisms implemented – in revolutionary America and France (Hammersley 2005a, b, 2010). Moreover, his recognition of the tendency of power to corrupt, and therefore of the importance of ensuring political accountability, remain just as relevant to us today as they were in his own time.

Cross-References

- ▶ Aristotle: On Justice
- ▶ Citizenship
- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Constitution
- ▶ Constitutionalism
- ▶ Governmentality and Law
- ▶ Hobbes, Thomas
- ▶ Human Right to Democracy
- ▶ Machiavelli, Niccolò
- ▶ Milton, John
- ▶ Pettit, Philip
- ▶ Rule of Law: Historical Perspectives
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- ▶ Selden, John
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- ▶ Toleration

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Harris, Angela P.

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Biographical Information

Angela P. Harris (b. 1961–) earned a BA in Creative Writing and English Literature from the University of Michigan in 1981, an MA in Social Science from the University of Chicago in 1983, and a JD from the University of Chicago Law School in 1986. Harris clerked for Judge Joel M. Flaum on the Seventh Circuit Court of Appeals and practiced with the firm Morrison & Foerster (San Fransisco). She joined the UC Berkeley School of Law in 1989 and has been a visiting professor at the law schools of Stanford, Yale, and Georgetown. Harris served as the vice dean of research and faculty development at the SUNY Buffalo School of Law from 2010 to 2011 before joining the UC Davis School of Law in 2011. Harris is currently Distinguished Professor of Law and the Boochever and Bird Endowed Chair for the Study and Teaching of Freedom and Equality at UC Davis.

Harris founded the Thelton E. Henderson Center for Social Justice at Berkeley Law and the Aoki Center for Critical Race and Nation Studies at UC Davis and was involved in founding the critical theory organizations LatCrit, Inc., and ClassCrits. Harris is the recipient of the Rutter Award for Distinction in Teaching from Berkeley Law, the Mathew O. Tobriner Public Service Award, and the Clyde Ferguson Award from the Minority Section of the Association of American Law Schools.

Major Themes and Ideas

Harris' work is deep, rich, and transformative, and contains many important themes and ideas. This entry will highlight three such themes: (1) multiple consciousness; (2) the systemic perpetuation of inequality; and (3) transformative justice.

Multiple Consciousness

In "Race and Essentialism in Feminist Legal Theory," Harris introduces the idea of multiple consciousness as a way of conceptualizing a self that is not inherently singular or reducible to a single "voice." Harris argues that "consciousness is not a final outcome or a biological given, but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated" (Harris 1990, 584). As opposed to an idea of the self that reduces the self to one unified element or identity, Harris suggests that we conceive of the self as a complex entity composed of multiple — and sometimes contradictory — elements that are constantly communicating and negotiating with one another.

Harris' multiple consciousness theory serves as a simultaneous critique of two institutions that have historically silenced multiple voices: the US legal system and feminist legal theory. Harris

notes that despite claiming to speak on behalf of "We the People," the US legal system silences contradicting voices in order to maintain a sense of a unified American identity: "this voice does not speak for everyone, but for a political faction trying to constitute itself as a unit of many disparate voices; its power lasts only as long as the contradictory voices remain silenced" (583; see also Harris 1994, 762). Feminist legal theory has critiqued the US legal system for speaking from the masculine perspective and marginalizing the perspectives of women. However, Harris notes that feminist legal theory has itself silenced marginalized voices in the search for a unified feminist voice: "'We the People' seems in danger of being replaced by 'We the Women.' And in feminist legal theory, as in the dominant culture, it is mostly white, straight, and socioeconomically privileged people who claim to speak for all of us" (588).

Ultimately, Harris argues for a "jurisprudence based on multiple consciousness" that would make our categories of definition "explicitly tentative, relational, and unstable" (586), and would "subvert" the monologue of voices claiming to speak for all "with narrative and stories, accounts of the particular, the different, and the hitherto silenced" (615).

Systemic Perpetuation of Inequality

One of the most important themes in Harris' work is that the US legal system continues to perpetuate systemic inequalities even while claiming to be dedicated to the principle of equality. Harris argues that the central tension in US race law is between "the interests of those groups wishing to preserve the political, economic, and social status quo and those groups demanding fundamental social change" (Harris 2000a, 1926). US race law seeks to maintain traditional divisions of power while also acknowledging the formal equality of all people. One of the ways US race law has attempted to resolve this tension is by framing racism as individualized acts that take place in private interactions and are thus outside the realm of public intervention. Harris writes that this way of framing racism "Legally . . . insulates vast expanses of American life from scrutiny and attributes discriminatory effects to preference, 'private' bigotry, and the faults of racial minorities themselves" (2012). In appealing to a public/private distinction, US race law has found a way of claiming to uphold principles of equality while simultaneously failing to enact the widespread social change necessary to bring out real conditions of equality.

The public/private distinction also serves to maintain class inequalities. Harris notes that US legal theory recognizes a tension between democratic institutions that structure public interactions and expectations and capitalist institutions that often structure what are largely considered to be private interactions (Coleman Jordan and Harris 2005, 73). Harris argues US society associates rights almost exclusively with the public sphere, which insulates the private sphere from the language of rights and rights violations (Harris 2009, 37). One of the implications of restricting rights to the public sphere is that class inequality, which is largely perpetuated by capitalist institutions, is relegated to the private sphere and excluded from the discourse of rights. In Harris' words, "Our eighteenth-century national constitution lacks economic or social rights" (37). The public/private distinction becomes a way of avoiding publicly addressing class, as well as race, inequalities.

Transformative Justice

In 2000 Harris identified the need for solutions to gender violence that do not rely on the criminal justice system. Harris notes that law enforcement agencies often themselves encourage violent ideals of masculinity, and criminal justice approaches to gender violence lead to "an arms race of punitive treatment perpetuated by the criminal justice state" (Harris 2000b, 799). Harris argues that public safety "is hindered by the conflation of crime-fighting and gender violence" (802) and calls for "more effective ways of pursuing a truly safe society" (780).

In 2010 Harris expanded this discourse on alternative approaches to gender violence by appealing specifically to transformative justice. Harris argues that transformative justice builds on the community-based solutions of restorative

justice, but with the acknowledgment that conditions of injustice that lead to acts of violence should not themselves be restored: "pervasive group inequality makes impossible a simple 'restoration' of harmony through the actions of individual offenders and victims" (Harris 2010, 211–12). Transformative justice seeks to both heal the relationships harmed by acts of violence and transform the social conditions that enabled the acts of violence to happen. According to Harris, "To truly restore justice means 'making right' not only the wrongs of individual offenders, but also the social institutions that facilitate, reflect, and/or contribute to particular offenses" (212).

Influence

Harris' work has had widespread influence in legal theory. The well-known, and now classic, critical race theory texts *Faces at the Bottom of the Well* (Bell 1992) and *Killing the Black Body* (Roberts 2016) both draw on Harris' work. More broadly, Harris' dual critiques of the US legal system and feminist legal theory have been widely utilized by legal scholars working on intersectionality (Caldwell 1991; Crenshaw 1991), feminist legal theory (Abrams 1995), feminist critical theory (Rhode 1990), poverty law (Alfieri 1991), feminist narrative scholarship (Abrams 1991; Farber and Sherry 1993), and mediation (Grillo 1991). Her theory of multiple consciousness has been picked up by scholars working on issues such as the US Constitution (Gotanda 1991), free expression (Delgado and Stefancic 1991–1992), and environmental poverty law (Cole 1992).

Harris' work on equality and inequality has been used in law review articles about US equal protection doctrine (Goldberg 2004), disparate impact theory (Selmi 2006), racial profiling (Johnson 2010), critiques of post-racialism (Barnes et al. 2010), and the American Disabilities Act (Stein 2004). And her emphasis on transformative justice has been used in law review articles about domestic violence (Weissman 2013), campus sexual misconduct and assault (Coker 2016; Kaplan 2017), and mass incarceration (Part III: Reimagining Mobilization, Action and Pedagogy 2015).

Harris' work has also been utilized by academics outside of legal theory, such as for studies of whiteness and color blindness (Brown et al. 2005), human rights (Ackerly 2008), gender in relation to issues of work and family (Williams 2000), and issues of race and representation in the mainstream media (Peterson 2013). Her work was referenced in the joint statement of some academics about the limitations of the Violence Against Women Act "VAWA is Not Enough" (Bettinger-Lopez et al. 2012). The interdisciplinary appeal of Harris' ideas ensures that her work will have a broad impact on many areas of scholarship for years to come.

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- ▶ Crenshaw, Kimberlé Williams
- ▶ Critical Theory and International Law
- ▶ Delgado, Richard
- ▶ Racism

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Hart, Herbert Lionel Adolphus

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Introduction

A complete introduction to Hart's (1907–1992) contribution to the field needs to discuss not only his important arguments regarding his inquiries into *what the law is*, or as it is generally known, his analytical jurisprudence, but also his equally salient and often overlooked studies in the field of *what the law ought to be*, that is, his normative jurisprudence (e.g., Hart 1963, 1968).

This entry will only deal with Hart's analytical jurisprudence, but more concretely, the principal focus will be on his seminal work *The Concept of Law*, a work that I reckon most of the novel readers to Hart will be interested in. For this, maybe a good idea is to follow, more or less, Hart's lead and tackle the problems as they unfold in the book. Therefore, in Section I will try and put Hart's methodological stance into perspective; Section II discusses the question: How do law and legal obligation differ from, and how are they related to, orders backed by threats, or the coercion issue; Section III will raise the issue of the nature of rules, and finally, Section IV discusses the perennial questions of the relations between law and morality.

Hart's Methodology

Hart is a perfect example of bringing to the forefront of jurisprudence the methods of linguistic philosophy prevalent at Oxford and Cambridge in the 1940s and 1950s. One of the most important

insights of the method of linguistic philosophy is to dissolve many of the problems placed by the previous ways of doing philosophy in that what is thought to be one problem sometimes turns out to be several problems.

According to Hart, the misguided single question we as legal philosophers try to answer is the one related to the inquiry: What is law? Perplexed by the wide variety of answers given to this question by serious thinkers: ones focusing on sanctions, others on what place do rules have in adjudication, and others on the morality of constitutional law, Hart transformed the question into three related recurrent themes that are of concern.

First. There is an automatic tendency to relate what the law is to issues of coercion and threats of unpleasant consequences that might be brought upon us if we "break the law." Having as a background of our explanations the classical example of a criminal law statute, there is even an important and deeper confusion of equating what a legal obligation is to rules that contain a coercive measure in cases of disobedience. Hart considers it is important to deal with these intuitions and poses a first recurrent theme in the question: How do law and legal obligations differ from, and how are they related to, orders backed by threats?

Secondly and on the other side of the spectrum, there is a different tendency to associate what a legal obligation is to a moral obligation because both normativities share basically the same vocabulary. We talk about duties, rules, obligations, justice, fairness both in morality and in the law. In many countries, for example, our courts are called courts of justice, and some of our constitutional texts are filled with moral concepts. So, Hart thinks that a second recurrent theme contained in the general question What is law? is a question of the relations, if any, between a legal obligation and a moral obligation, and more importantly, what relations, again if any exist between our legal systems and morality.

Thirdly. We just mentioned that there is a tendency to relate what a legal obligation is to threats of unpleasant consequences that might happen if we do not act as we are commanded and a different one that associates what a legal obligation is to a moral obligation. The third recurrent theme in Hart is a corresponding one but focused on the aspects of rules.

Regarding the persons that correlate what a legal obligation is to threats of unpleasant consequences, Hart will argue that mere convergence in behaviour and hostile reactions in case we deviate from them is not what characterizes what a social and, more specifically, a legal rule is. Convergent and general behaviour are present even in habits of obedience. But of course a habit of obedience is different from a rule, among the important differences between them being the fact that when confronted with a rule we usually employ an array of normative language not present in habits, for example: we "must" do what the rule requires, it is an "obligation" to perform what is required by the rule, we "should," or "ought to" do so, etc.

But the normative language we might employ should not be placed on the other side of the spectrum as moral normative language. This talk of "obligations," "should," "ought to" is not necessarily a moral one. So, this prompts the third recurrent theme and question: What are rules? And more specifically what are legal rules? if they are not mere convergent behaviours and also are not connected to the normativity of moral rules. Herein lies one of the most important discussions in the form of Hart's practice theory of rules and their internal aspect as distinguishing features of social and legal rules.

These are the three recurrent questions and problems Hart undertakes to treat as conceptual questions, a task that places the concept of law in relation to the concepts of morality and coercion. Hart seeks to draw borders between these three concepts while explaining what the law is. He considers that there have been important confusions arising from the similarities and differences drawn upon by other theories between these three main concepts. Mainly, but not exclusively, he focuses on command theorists like Austin and their simple model of understanding law in terms of coercion (1832) – and on some versions of natural law theory and their understanding of law in relation to morality.

Now, Hart is at pains to immediately clarify one important methodological point. These

borders that are to be drawn are not ones to be expected by the way of a definition of law in the sense of criteria for the correctness of the use of concept. For Hart, the concept law is a vague concept having clear cases and borderline ones. Throughout his analysis, he explicitly mentions certain forms of primitive law and international law as borderline cases of law. This aspect of the concept law prompts Hart to argue against the misguided quest to seek a definition of law. So, for Hart the borders that are to be drawn are not by way of a definition, and establishing criteria for the correct use of the concept, it is by explaining a clear case of what the concept of law designates and its similarities and differences with morality and coercion.

Talk about the "use of the concept" and how this conceptual task is not one of the establishing criteria for its correct application can seriously mislead the person who opens up *The Concept of Law* and finds in the immediate first pages of its preface a reference to J.L. Austin and his recommendation that we use "a sharpened awareness of words to sharpen our perception of the phenomena" to which our words make reference. Equally misleading can be Hart's explicit statement that his book may also be regarded as an essay in descriptive sociology. A plausible way to put this confusion aside is to, again, remember Hart's linguistic philosophical approach to law. For the linguistic philosopher, our conceptual explanations pass through an analysis of the way the concepts are used and there is not much sense in trying to explain a concept without these considerations playing a key role. Thus the sociological part of his enterprise. *But* for Hart – specifically in the case of law and its inherit vagueness – this consideration of how the concepts are used is different from one that argues that *the end results* of our conceptual explanations will be a formulation of *the criteria* for the correct use of the relevant concept.

There is one more issue before we pass on to the substantive aspects of Hart's theory. The conceptual explanations and theoretical accounts of the relations between the concept of law and the other concepts are part of a Project that is both descriptive and general. It is general in that, as Hart claims, it does not have as an objective to explain one or one type of legal system. For Hart, in spite of the many differences in legal cultures we find in the world, the law has taken the same *general form and structure*. And that is what is to be explained.

Hart's project is descriptive in that the methodology he adopts does not carry with it any justificatory aims but is to be carried out in a morally neutral manner. In his Postscript to *The Concept of Law*, Hart discusses Dworkin's alternative methodological approach, remarking that Dworkin's proposal is different insofar as it is in part evaluative and morally justificatory.

Coercion and the Law

To develop his theory, Hart takes as a starting point the ideas of John Austin who, according to Hart, follows the intuition of explaining the law according to the classical case of a criminal law that attaches to an order the threat of unpleasant consequences in case we "break the law." More concretely, for Austin law can be characterized as *commands* where a law is simply an expression by one person of the desire that another person should do or abstain from some action, accompanied by a threat of punishment which is likely to follow disobedience.

Hart's immediate reaction to Austin's account focuses on the sheer diversity of types of law we have to consider in our explanations of what the law is and not only the case of a criminal law statute. For example, we ignore laws that in their *content* confer private or public powers: private powers to make wills, contracts or marriages and public powers that authorize officials to judge, legislate and administer the law, and others that organize public power between branches of government. Nothing in the sense of unpleasant consequences in case of disobedience can be found in these types of laws. Other types of laws have a totally different *origin* than a desire that another person should do or abstain from some action, as in the case of customary law. Also of importance is the fact that even criminal law statutes are not exclusively commands that impose duties to their addressees because in *their range of application*

these types of laws can also impose duties on those who legislate them.

But Hart's most pressing point against Austin is the argument that draws on the important distinctions between obligations and orders backed by threats. Hart famously mentions the example of a gunman who says to his victim "Give me your money or your life." Here, Austin's conditions are met in the sense that the gunman expresses a desire that the money be handed over, and a threat of punishment exists in case the victim decides to disobey. But of course it would be odd to think of this example as exemplifying the establishment of a law imposing an obligation. The most we can say within Austin's framework is that the victim was *obliged* to hand over the money to the gunman, that the victim was *coerced* into giving up the money. But it would be odd to say that the victim had an *obligation*. Being obliged or coerced implies focusing on the psychological aspects of the threat in case of disobedience, but Hart rightly argues that these facts about beliefs and motives are not necessary for the truth of a statement that a person has an obligation, legal, or otherwise. Even if Austin or someone sympathetic to his argument claims that not beliefs and motives but the possibility of unpleasant consequences that are likely to happen if we disobey is what characterizes what an obligation is, Hart again argues that the analysis has gone wrong: The statements that a person is under an obligation are independent of predictions that sanctions are likely to occur.

What is an obligation? Or more concretely, what is a legal obligation? According to Hart, being under an obligation implies the existence of a rule, so it is in Hart's theory of rules where we *might* find an answer to the kind of normativity the notion of a legal obligation relies on, a question to which we now turn to.

The Nature of Rules. Hart's Practice Theory of Rules

In Austin's theory, commands accompanied by threats of punishments are issued by a sovereign who is habitually obeyed by vast portions of society. Hart rightly questions this notion of explaining legal rules as habits of obedience and answers in the negative, due to the fact that rules and habits even though they might share some common traits such as a behaviour that is general, differ in important respects. The most important difference lies in what Hart calls the *internal aspect of rules* where the general behaviour is taken as establishing a *standard* to be followed by everyone. In the case of habits, this general behaviour need not be something that the group considers a guide for action. In fact, members of the group may not even know that their behaviour is general. Due to the fact that behaviour in the case of rules and their internal aspect is seen, by those who follow the rules as a standard to live up to, it follows that in cases of deviations, members of the group have a reflective critical attitude and criticize those who deviate while praising those whose behaviour complies with the rule.

The internal aspect of rules better explains the wide array of normative language employed when criticizing nonconformity to rules such as You ought to do *X*, You have an obligation to do *Y*, or *Z* is wrong. It would be odd, to say the least, to employ this normative language in cases of habits. If a group, of which I am a member, has a habit of eating barbeque outside on sunny days, and one sunny day I decide not to eat barbeque outside and some other members of the group ask me why I did not eat barbeque that day, I can simply answer that I did not feel like it because I was tired. This simple answer, understandable in the case of habits, is not how we usually respond in cases of nonconformity to rules. In the case of rules, people of the group are apt to criticize my behaviour with normative language, employing concepts like ought, obligation, right or wrong, correct or incorrect. Rules also have an *external aspect*, but this external aspect is only limited to the convergence of general behaviour the group exhibits, the regularities in their conduct without the element of a standard as a guide to action. This external aspect of rules is a very preliminary one and it is an aspect, according to Hart, shared by rules and habits.

Therefore, according to Hart, Austin's theory is mistaken in fundamental ways: A characterization of law as commands backed by threats that are

habitually obeyed eliminates the possibility of explaining the normative language of law.

Hart's explanation of rules is not limited to legal rules, but to social rules in general. In what is known as Hart's practice theory of rules, he claims that what constitutes a social rule is "a form of social practice compromising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude to such patterns of conduct .... called 'acceptance'"(Hart 1994, p, 255).

We will discuss more in detail the type of acceptance considered in Hart's theory, but for the moment it is important to address an initial worry: In the case of legal rules, this argument may seem very odd to a lawyer who clearly knows that I can be held accountable for disobedience from the moment a law is enacted. In other words, there is no need for any kind of social practice for a law to exist. Therefore, one might reasonably ask: Is Hart's practice theory of rules an account that also aims to explain what constitutes a legal rule?

The answer to this question is yes, but only indirectly, because it first and foremost explains what Hart calls *The foundations of a legal system* in the form of Rules of Recognition. The Rules of Recognition together with Rules of Change and Adjudication are what Hart calls secondary rules; they supplement a prelegal system that only has primary rules of obligation to conduct their affairs in society. These secondary rules are not obligations for all members of society, but they, in the case of Rules of Adjudication, empower a person or groups of persons to decide on matters concerning the interpretation and application of primary rules and, in the case of Rules of Change, empower a person or groups of persons to amend, repeal, or introduce new rules to the system. The Rule of Recognition is a special one that will be discussed briefly below, but it important to remark that for Hart this union of primary rules and secondary rules is the core of what a legal system is, it is the step from a prelegal system to a legal one.

Let's return to the special case of the Rule of Recognition and its relation to the practice theory of rules and answer the question of what constitutes a legal rule: Unlike rules of change and adjudication, a rule of recognition does not empower a person or groups of persons to carry out a task in the administration or adjudication of law. Rather it establishes certain *criteria* for the authoritative determination of what is to count as a rule of the system. It is here where Hart's practice theory of rules is best explained, because this Rule of Recognition is necessarily constituted, as in the case with other social rules by a general practice. In this instance, the practice can be ascribed to officials – although not exclusively to them – who follow these criteria to determine the existence of legal rules in their particular system. The existence of legal rules in that system is established by conformity with those criteria. In other words, rules that attain the status of being called "valid" legal rules do so because and insofar as they comply with all the criteria established in the practiced rule of recognition.

In this special practice underlying a legal system, officials adopt the internal point of view of characteristic of rules and criticize cases of nonconformity by other officials. Additionally, the Rule of Recognition is a guide for action regarding what is to be considered as valid law for that specific legal system. In other words, and to return to Hart's way of characterizing his practice theory of rules, officials display a "distinctive normative attitude to such patterns" and "accept" the rule as a guide to action.

To return to the lawyers worry and the mention that the practice theory of rules indirectly explains what constitutes legal rules in general, we should add that the lawyer is right in the sense that a valid legal rule, for example, one originating in a statute, can be enforced and recognized as valid independently of a general practice of following that particular rule. So the practice theory of rules *does not explain* what *constitutes* those particular valid legal rules. But *it does explain* what constitutes a Rule of Recognition practiced by officials and this Rule of Recognition in turn explains the validity of those legal rules the lawyer has in mind, legal rules that are considered valid because they meet the criteria established in the practiced Rule of Recognition and may be enforced as promptly as they are enacted.

Of course those validated legal rules might regulate an aspect of society that in time might become a general practice seen in normative terms where individuals accept those standards as guides for action and employ a critical reflective attitude in cases of nonconformity. In this sense, the practice theory of rules and their internal aspect also explain an acceptance on the part of nonofficials of validated legal rules, but they do not explain what *constitutes* them as legally valid. What constitutes them as valid is meeting the criteria established in the Rule of Recognition. Hence, Hart's notion of the internal aspect of rules and the practice theory has a benefit that is twofold: It explains the foundations of a legal system and what *constitutes* a rule of recognition, and it also has a methodological insight that better explains legal rules and phenomena from the perspective of a person who accepts legal rules as guides for their action.

What kind of acceptance does Hart have in mind in his explanation of the internal aspect of rules? This question is of the utmost importance due to the fact that the answer promises to finally explain the normative language in law that he found Austin's command theory incapable of explaining.

Hart explicitly states: "Those who accept the authority of a legal system look upon it from the internal point of view, and express their sense of its requirements in internal statements couched in normative language. . . .Yet they are not thereby committed to a *moral* judgement that it is morally right to do what the law requires" (Hart 1994, p. 203). Hart wants to make clear that the acceptance involved in the internal aspect of rules and the practice theory of rules is not necessarily a moral acceptance. What other type of acceptance can explain the normative language in the law? Hart is not willing to give just one kind of reason that explains acceptance, he mentions various possibilities and goes on to claim: "allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterest interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others" (Hart 1994, p. 203).

This is indeed somewhat of a strange answer because it looked like Hart was willing to account for the *kind* of justification involved in the internal aspect of rules that finally explains its normative language. We must remember that there is a critical reflective attitude involved in social rules and that deviations are *justifiably* criticized on the basis of those rules. But here Hart instead of pressing the issue is open to admitting a wide array of considerations that can make the list. This approach runs the risk of not explaining the normativity of law at all – pick your consideration and it can probably make it to Hart's list. It *seems* that Hart's criticisms of Austin's theory calls for an explanation of what is known as the fundamental sources of normativity where we ask not only what *considerations* can be adduced as reasons to do what the law requires of us, but on *what sort of fundamental reasons* those considerations can be explained (Worsnip 2018). They are not moral reasons, Hart immediately argues, but are they prudential? strictly legal reasons? desired based reasons? etc.

Unfortunately this last question is not answered in Hart's theory, even in his later writings and while tackling Dworkin's criticisms of his practice theory of rules in the Postscript, he insists on limiting the explanation to a list of considerations that can be enumerated as reasons for acceptances, such as acceptance "out of deference to tradition or the wish to identify with others or in the belief that society knows best what is to the advantage of the individuals" (Hart 1994, p. 257).

Maybe there is a rejoinder to the Hartian approach in explaining the normative language of law and it has to do with his methodological approach in that his account is a descriptive one that is morally neutral and has no justificatory aims. In this reading, his aim is not to answer the question on the fundamental sources of normativity, but to describe the *existence* of social and legal rules. Therefore, Hart's task is not to elaborate upon the merits or demerits of those rules, or even if those rules are justified or not. Put in different words: The account is limited to explain how we have people who accept those rules and use them as guides for action,

independently if they belief the reason for accepting is a justified reason or not, therefore the varied list of considerations he insisted upon (Bix 2018, p. 34; Waluchow 2011; Rodriguez-Blanco 2009).

Law and Morality

As was mentioned in the beginning of this entry, Hart recognizes an important "intersection of law and morals" (Hart 1958, p. 598; Fuller 1958): Both normativities use the concepts rules, rights, duties, obligations, etc. Also many constitutional texts are full of references to moral concepts and sometimes the interpretation of our constitutions and statutes are expressed in moral language and argumentation. Despite this important intersection between law and morals, the connections between the two are just contingent. Hart at one point expresses the claim as follows: "*there are no necessary conceptual connections between the content of law and morality; and hence morally iniquitous provisions may be valid as legal rules or principles*" (Hart 1994, p. 268). This has come to be known as the separation thesis. Followers of Hart have struggled with this way of stating the separation thesis in the sense that for some, Hart never denied *some* necessary connections between law and morality (Gardner 2001) and for others, taking the claim literally, we must come to the conclusion that he indeed denied all necessary connections between law and morality (Green 2008).

Why the confusion? Because it seems that in *The Concept of Law*, Hart makes two important concessions concerning necessary connections between law and morality. In the first place, he advances what is called the *minimum content of natural law*. Given survival as an aim for all human beings, together with the fact that we are vulnerable and need food and other goods to survive, it is necessarily the case that all legal systems have rules that overlap with moral rules that prohibit murder, violence, and theft and that protect a minimum form of property. Hart advances this thesis as one of the *natural necessities* in the sense that as long as these natural facts about the world and human nature remain the same, the overlap will necessarily obtain. But things one day might be different and we will no longer need some or many of these rules. Hart mentions the example of species of animals that have carapaces that make them invulnerable from attacks by other members of the species. One day maybe this can also be extended to human beings, in which case, we would no longer have a need for legal rules that protect us from these sorts of threats.

The second concession is what Hart calls a *minimum of justice* in law, due to the fact that rules in our legal systems are general in the sense that they refer to a generality of cases and of persons. This generality introduces, into the law, an element of justice and its requirement of "treating like cases alike" where the concepts of impartiality and equality are also used. In the case of law and its general rules, the law is to be applicable, *impartially and equally*, to all of those that fall under the facts mentioned by the law.

To add to the puzzlement, Hart, in *The Concept of Law*, goes through a list of other possible necessary connections between law and morality (due to authority, influence of morality in law, interpretation, criticism of law, principles of legality and justice, and in legal validity) and even though he answers that most of them reside in a confusion, and that they are not to be stated as necessary connections between law and morality, while discussing the issue of the principles of legality and justice he acknowledges that this possible necessary connection has the same shape as his already mentioned argument of the *minimum of justice*. He even acknowledges the importance of a wider connection in the sense that rules in law, in order for them to be characterized as rules of social control, must not only be general, they must also be intelligible, prospective, and within the capacity of most to obey (Fuller 1958). This prompts the question: Is his minimum of justice and this broader connection due to the form legal rules take in order to guide conduct, necessary conceptual connections between law and morality? Unfortunately, he ends the discussion stating: "Again, if this is what the necessary connection of

law and morality means , we may accept it. It is unfortunately compatible with very great iniquity" (Hart 1994, p. 207).

What are we to make of these apparent contradictions in Hart's way of presenting the separation thesis? One suggestion (Vega 2014) is to take Hart at his word and view him as defending the thesis that there are no necessary connections between law and morality regarding the *content* of law. This strict way of understanding the separation thesis would allow us to make sense of Hart's insistence that morally iniquitous provisions may be valid as legal rules or principles and his broader claim that iniquitous legal systems are still legal despite being morally iniquitous, *but* the claim is not exhaustive in other necessary conceptual connections between law and morality, necessary connections regarding, for example, the *form* rules of law take in order to guide the behaviour of its citizens – other authors within the tradition will go even further and argue for necessary connections between law and morality due to the *claims* the law makes (Raz 2003).

In other words, Hart should have accepted his minimum of justice argument and the connection from the principles of legality and justice as a necessary conceptual connection based on the *form* rules of law take, because it does not jeopardize his main worry regarding the *content* of law, we can have general, intelligible, and prospective laws with iniquitous content. Therefore, Hart is to blame for not being clear enough in expressing the limited range of his separation thesis. He should have more clearly stated that the thesis has a limited scope insofar as it only deals with the content of law and should not be taken as excluding all the other possible connections between law and morality, some of which he seemed more than willing to defend.

Concluding Remarks

We have two important issues remaining in *The Concept of Law*. One of them is on the topic of International Law and the other one on Interpretation. International law discussions are better left to other entries and research done specifically in that field, but we can conclude with a few remarks on the problems of interpretation and the nature of Hart's claims in this regard.

At one point while transforming the question What is Law? into the recurrent theme about the nature of rules, Hart not only asks what are the differences between rules and orders backed by threats or between legal rules and moral standards, he also raises the following question: Do courts really apply rules or do they merely pretend to do so? Hart has the legal realists in mind and their insistence that rules play, at best, a secondary role in adjudication. Hart tries to deal not only with the claims of the legal realists – or rule sceptics – he also confronts a different theory called formalism that claims exactly the opposite: Rules not only play a primary role in adjudication, but they exclusively decide legal outcomes. In the formalist view, this is because the role of judges is simply to identify the relevant facts and rules applicable to those facts and then make a logical deduction of the pertinent legal consequences.

For Hart, both of these theories have some truth in them due to the fact that legal rules have a core of settled meaning and a penumbra of uncertainty as shown by his example of a legal rule that forbids vehicles in public parks. There will, he claims, be a core of settled meaning for the term "vehicle," which applies to automobiles. But there will also be a penumbra of uncertainty regarding cases like bicycles, roller skates, etc. That there is a core of settled meaning gives some sense to the formalist claims in that *sometimes* legal rules can simply be applied to certain facts from which legal consequences clearly follow. But in other cases, legal rules will be best characterized as being located in a penumbra of uncertainty where the creativity of legal interpretation must be acknowledged. The sceptic has it wrong in that not all cases are cases involving the penumbra of uncertainty, and the formalist also has it wrong because neither are all cases, cases involving a core of settled meaning and a simple matter of applying a rule to the facts.

It is paradoxical that these issues of interpretation have been left to a few and brief concluding remarks, due to the fact that Hart's claims on the topic of interpretation are probably the most

known to students of law not necessarily engaged in legal theory discussions. Even though Hart's arguments on the topic of interpretation are indeed relevant and worthy of continued discussion, Hart's intention in this part of the book was not to elaborate a theory of legal reasoning or a theory of interpretation or adjudication, as some authors strangely claim. His aim was a very modest one of trying to answer the following question: To what extent are judges constrained by the law in matters of adjudication? The answer is: to some extent, provided by the settled core of meaning of rules.

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▶ Fuller, Lon Luvois

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Hart, Herbert Lionel Adolphus: Influential Ideas

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Introduction

H.L.A. (Herbert Lionel Adolphus) Hart (1907–1992) is probably the most influential English-language legal philosopher of the twentieth century. He is best known for his work on theories of the nature of law, in particular, for his version of legal positivism. In addition, Hart made important contributions to the debates about the legal enforcement of morality, legal rights, causation, and punishment. There is a substantial literature on his work – among the best sources are MacCormick (2008) and Bayles (1992), the collections Gavison (1987) and Hacker and Raz (1977), and, for the works in the context of the life, Lacey (2004); many scholars continue to elaborate Hart's approach to many topics.

Early Work

In one of his earliest works, Hart introduced two provocative ideas. First, he argued that judicial decisions should be seen as performatives – not propositions that purport to describe the world but sentences that do something or change something in the world; in Hart's terminology, these propositions "ascribe" legal conclusions (Hart 1948–1949). Under this analysis, when a judge declares that "A and B have a valid contract," that judge is *creating a new legal reality* (in analogy to the presiding clergy who states "I now pronounced you man and wife"), rather than purporting to describe some preexisting truth. Secondly, Hart argued that legal reasoning and legal concepts are essentially defeasible (Hart 1948–1949, 174–183) – e.g., the way that offer, acceptance, and consideration (under English or American law) are sufficient to show a contract to

be valid, but if one of the party shows the contract to have been entered under fraud or duress, the contract then becomes void or voidable, despite the presence of offer, acceptance, and consideration. Hart later disowned or downplayed both of these ideas (e.g., Hart 1983, 1–2); however, the second, the defeasibility of legal reasoning and legal concepts, was nonetheless taken up, in different forms, by a number of scholars (e.g., Ferrer and Ratti 2012).

Hart and Legal Positivism

While how best to define and delimit the approach to law and legal theory known as "legal positivism" remains controversial, that approach is generally equated with the distinction between questions of validity of legal norms and the labeling of systems as "legal," on one hand, and the (moral) merits of those norms or systems, on the other (Bix 2015, 33–37). Legal positivism is general contrasted with natural law theory, which holds (among other things) that moral evaluation is central to determining whether a system warrants the label "law" or a rule is a valid legal norm (or that this system and this norm are "law" and "legal" in the fullest form or central case of those categories (Finnis 2011, 9–11)).

Hart's significance was in moving the (English-language) legal positivism of his time from the command theory associated with John Austin toward a less empirical and more hermeneutic approach. Hart's view of law was grounded on his views of rules, in particular on a view of the difference between rules and habits. According to Hart, the difference between these two kinds of regularities of behavior can be seen through the participants' attitudes. With habits, the statement of the behavior is nothing more than a description: e.g., I play basketball every Saturday. With a rule, however, the statement can take on additional roles: as an explanation, a justification, and a basis for criticizing deviation. The statement has a normative role. Many people are not merely "in the habit" of obeying the authorities; they have internalized the rules *as reasons for acting* in certain ways and for criticizing others when they do not behave as required.

Hart argued that John Austin's theory, with its equation of law with commands (orders backed by threats), invited a confusion between imposed force and accepted norms. Hart asserted that a legal system is something different from, and presumably something better than, the rule over a frightened populace by gangsters. Many citizens do not act according to the law simply because of fear, simply because they feel coerced; citizens who (in Hart's terms) take an "internal point of view" toward the law view the law as giving them reasons for action. Hart's emphasizing the internal perspective, his belief that one cannot understand a social system unless one understands how the people who created the system or who participate in the system perceive it, constituted a "hermeneutic" approach, in contrast to the more "behavioral" or "scientific" approach of other theorists. In Hart's words, to understand "any form of normative social structure," "the methodology of the empirical sciences is useless; what is needed is a 'hermeneutic' method which involves portraying rule-governed behaviour as it appears to its participants" (Hart 1983, 13).

Another contrast between Hart's theory and that of his predecessor, John Austin, regarded whether to think of legal rules as having a single essence. Against a view that reduced all legal rules to variations on some single type, as Austin's theory seemed to reduce all legal rules to commands (and Hans Kelsen's comparable reduction of all legal rules to authorizations to officials to impose sanctions (Kelsen 1967, 111–119)), Hart emphasized the multiplicity of law. He contrasted rules that imposed duties with those that conferred powers (whether power conferred on officials within the legal system, or the delegation of certain legal powers to citizens, as can be said to occur through the operation of rules for contracts, wills, trusts, and so on), and he contrasted rules that applied directly to citizens ("primary rules") and rules that governed the operation of the rule system itself ("secondary rules"). The secondary rules include rules of change, rules of adjudication, and the rule of recognition. Hart further argued that there were two necessary and

sufficient conditions for the existence of a legal system: (1) that the valid rules of the system "must be generally obeyed" and (2) that the criteria set forth in the system's rule of recognition "must be effectively accepted as common public standards of official behaviour by its officials" (Hart 2012, 116).

Central to Hart's theory is the concept of a rule of recognition: the set of criteria by which the officials determine which rules are, and which rules are not, part of the legal system. The standards applied are referred to as justifications for the actions of the officials, though to some extent the standards are also created by those actions. The rule of recognition expresses, or symbolizes, the basic tenet of legal positivism: that there are conventional criteria, agreed upon by officials, for determining which rules are and which are not part of the legal system; this in turn points to the separation of the identification of the law from its moral evaluation and the separation of statements about what the law is from statements about what it should be.

In discussing legal reasoning, Hart concluded that judges inevitably use their discretion in hard cases to make new law, particularly on the occasions where the legal rules have "open texture" (Hart 2012, 123–136). He also argued that this was a benefit, not a problem, that judicial law-making at the margins gave needed flexibility to the application of legal rules.

Prominent criticisms of Hart's approach to law and legal theory include those derived from the procedural natural law theory of Lon Fuller (1958, 1969), the traditional (Thomistic) natural law theory of John Finnis (2007, 2011), the interpretive theory of Ronald Dworkin (1977, 1986), and the exclusive legal positivism of Joseph Raz (1990, 2009). Some of the most heated debates surround Dworkin's critiques of Hart's approach. Dworkin argued (among other things) that judges do not have discretion (in any strong or Meaning Full sense of that term), but rather that there was always or almost always a preexisting right answer to legal disputes, that legal systems contained principles as well as rules, and that no conventional and content-neutral "rule of recognition" could distinguish legal from nonlegal standards – that moral evaluation was central to determining what the law required. Hart replied to some of Dworkin's arguments in a posthumously published *Postscript* to his *The Concept of Law* (Hart 2012, 238–276).

Other Contributions

There is space only for brief mentions of other areas where Hart's works were influential. First, Hart had a series of exchanges with Lord Patrick Devlin regarding the legal enforcement of moral norms (Hart 1963; Devlin 1965). Devlin was responding to the 1957 *Wolfenden Report*, which had suggested that prostitution and homosexuality be decriminalized; the report argued that such matters of "private morality" were not the law's business. Devlin argued that communities had a right to defend themselves against actions that would undermine the shared morality that undergird society. Hart's response largely tracked John Stuart Mill's "Harm Principle" (Mill 1974) but also introduced the important distinction between "conventional morality" (what people believe morality to required) and "critical morality" (what morality actually requires). Hart asserted that the defense of a community's conventional morality would not justify the interference with liberty that the legal enforcement of (sexual) morality would entail, especially as there was little evidence, historically, that changes in a society's conventional morality generally undermined society.

Second, in the area of legal rights, Hart advocated a "will theory" (as contrasted to the "interest theory"). This approach claimed that choice is central to the nature of rights. Hart analyzed rights in terms of a protected bilateral liberty, with the right holder "being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed" (Hart 1982: 183).

Third, Hart's work on punishment (Hart 2008) offered a compromise between consequentialist and deontological schools, arguing for a deontological/retributivist approach to *whom* to punish (no punishing of the innocent, regardless of how good the consequences might be) but a consequentialist approach to *how much* to punish.

One should also mention the comprehensive study Hart did with Tony Honoré on causation in the law (Hart and Honoré 1985) and the valuable efforts Hart gave to having the works of Jeremy Bentham edited and published (a process that is still ongoing under the auspices of The Bentham Project). Many of Hart's writings on Bentham are brought together in a published collection (Hart 1982).

Conclusion

H. L. A. Hart's primary significance for legal philosophy was his development of a hermeneutic and convention-based legal positivist theory of the nature of law, an approach that remains central to contemporary Anglo-American jurisprudence. He is also properly remembered for important works on causation, punishment, defeasibility, the will theory of rights, limitations on the legal enforcement of morality, and Jeremy Bentham.

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- ▶ Conventionalism
- ▶ Dworkin, Ronald: Legal Philosophy
- ▶ Hermeneutical Legal Theory
- ▶ Legal Positivism: Exclusive
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- ▶ Positive Law and Natural Law
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Hauriou, Maurice

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Introduction

Maurice Hauriou (1856–1929), a French legal scholar (administrative law) and legal philosopher, is mainly known to be one of the first (if not the first) to elaborate an institutional theory of law, namely his theory of the institution.

A fervent Catholic (attached to Thomist philosophy and natural law), he never departed from an idealistic approach to law grounded in both the force of individual conscience and the existence of a transcendent one. He was a strong proponent of legal philosophy understood in a broad sense, i.e., as a social science concerned with legal technique, speculative philosophy, and history, not to mention sociology (at that time just emerging) and even physics (Poincaré's thermodynamics).

Hauriou's major contribution to the theory of institutions inspired or is acknowledged by prominent legal scholars from various traditions, such as Santi Romano (1918), Carl Schmitt (1928), and Neil MacCormick and Ota Weinberger (1986), as well as nonlegal philosophers such as Jean-Paul Sartre (1960) and René Lourau (1970).

To introduce Hauriou's main contribution to legal philosophy, it is necessary to present the goals of the institutional analysis he conceived, how he was influenced by other theories, and to follow his investigations from a theory of the state to a theory of the institution.

Goals of His Institutional Analysis and Main Influences on the Theory of the Institution

Hauriou is concerned to transcend a descriptive approach to the law, elaborating an explanatory model capable of articulating the state and the law. For him, all the ways to understand the law are interconnected, and the law is grounded in the social medium. Hence his approach is aimed at explicating the social dimension of the state and the law by relying on the concept of power. At the same time, his theory is intended to be fully juridical and appropriated for an account of positive law.

Hauriou was strongly influenced by the vitalistic theories propounded by Henri Bergson (1859–1941), and well-acquainted with the work of Émile Durkheim (1858–1917), who defined institutions as follows: "One can call institution all the beliefs and all the modes of behaviour instituted by the collectivity [...]. Sociology is the science of institutions, of their genesis, and of their functioning" (Durkheim 1895, my translation).

Hauriou's sociological and philosophical analysis aims to challenge the thesis of the objective nature of the collective conscience, a thesis that constitutes the nodal point of Durkheim's theory. Unlike Durkheim, Hauriou lays emphasis on subjectivism and introduces the concept of power, to replace that of the collective conscience.

Hauriou's view is that power is what enables the law to exist and to have an impact over time.

A Theory of the State

Hauriou's theory of the institutions was a continuous work in progress (Broderick 1970). During the first stages (Hauriou 1906, 1910), Hauriou laid the foundation for a broader approach to law, focusing on the explanation of the state, distinguishing two claims in this regard. The first one is that one cannot understand the concept of the state by its purported legal personhood, as a unitary entity. The latter is a construction, and before considering the state's unitary legal status, one must embrace a pluralistic approach, investigating the way various social forces (economic, political, etc.) come together and balance each other out in forming the state. Prior to the state, some equilibrium must be reached, or some measure of organized power. This equilibrium constitutes prestate law. Hence the state is a dynamic construction shaped

by, in Hauriou's view, such juridical elements as the family, the market, and the contract: namely institutions. Hauriou asserts that the power-centered approach to law need not be systematically set in opposition to an approach based on consent. He denies any explanation of the state as a social contract or as the result of a foundational myth, emphasizing instead the role of power and the crucial issue of its acceptance by citizens, through the institutions.

The State as an Institution

At a third stage, he provided his fundamental account of this vague concept of institution (Hauriou 1925), elaborating a theoretical model which does not focus only on the state but articulates the idea of the group as an organized whole. In his own words: "An institution amounts to an idea of an enterprise [*œuvre*] which takes shape and sustains itself over time in a social medium by juridical means; in order for this idea to take shape, a body invested with power is formed, a body starting from which various organs emerge; using different procedural means, the organs direct and regulate the members of the social group, which manifest their communion with one another and are concerned with implementing the idea" (Hauriou 1925; my translation).

Hauriou's theory of institutions articulates three distinct elements: an endeavor, project, or enterprise (*œuvre*), that is, what has to be realized, or a *raison d'être*; the power wielded by an organized government; and the manifestations of communion that mutually engender one another and develop into a hierarchy within the institution. The *idea of œuvre* is the guiding principle of the enterprise and so of the action carried out in the social medium. For Hauriou, no idea can exist as such, without entailing action, and no action can exist that is not the implementation of an idea. The *idea of œuvre* encapsulates at the same time, and with no possibility of separation, the purpose and the means by which to achieve that purpose: It comprises a plan of action, and of organization. Moreover, the *idea of œuvre* is geared toward the future, to that which needs to be done but which cannot yet be determined. "It is through the idea, and within it, that the enterprise is objectivized and acquires a social singularity" (Hauriou 1986, 100; my translation). The idea must undergo a transformation in order to evolve from an objective status to a subjective one, or so that it can become the object of a collective enterprise. Action is necessarily human, and individuals must relate to this idea, whether by (actively) promoting it or (more passively) by subscribing to it. It is because this idea is objective that it can engender subjective actions or acts of adhesion.

From the *idea of œuvre* flows directly the power of organized government, in that it is the purpose of organized government to promote and implement the idea. The subjective reaction that individuals have to the objective idea makes the idea effective, and in this way the enterprise can be said to have an objective status, that is, a social character. Hauriou's theory mobilizes, restates, and enlarges two classical principles from the theory of the state.

His conception of the separation of powers is clearly diametrically opposed to that of Montesquieu: It is a separation which is not structural, but temporal, instituting powers by the succession (and aggregation) of government and adhesion. He distinguishes (chronologically) the three following powers. First, the intuitive competence of an enforceable decision is the power of a minority that has an idea and takes action to implement it by way of a decision: the idea becomes the *idea of œuvre,* and the nature of this power is foundational rather than contractual. Second, discursive competence means that the idea, as seen by the previous power, will have to be scrutinized by way of rational debate: It remains in the hands of a minority of subjects, those who have become cognizant of it. Finally, suffrage, or the power of assent, is the process which allows the idea to move from the sphere of the minority to that of the majority. The majority only reacts to the idea by accepting or rejecting it, once it has been debated or expressed in a form accessible to all.

When it comes to the theory of a representative regime, Hauriou considers that representation is not construed as a relationship between persons (the representatives and those being represented)

but as a relation between individuals and the idea being represented. Representation requires that the government and the members of the group share the same idea of the œuvre at issue: "A body is nothing without its organs, and it wants by (or through) them; but they will want for it, not for themselves; this difficult question is solved by the principle of representation, which rests entirely on the directive idea" (Hauriou 1925; my translation).

Manifestations of communion by the members of the group and the organs of government alike play a crucial role in implementing the institution. This communion indicates the existence of an immediate causal link between objectivity and subjectivity, the collective and the individual, and the group and its members.

The three elements that make up an institution are articulated with regard to a fundamental principle that sustains and explains durability in the social medium: the principle of interiorization (*intériorisation*). This movement from objectivity to subjectivity is made possible by two successive phenomena that characterize the dynamics of institutions: incorporation and personification. The idea is incorporated by the members of the group, who in turn implement the idea through acts of government and the different procedures available to them. This constitutes the intuitive minority government and is a first interiorization. The idea then is interiorized in a second way: It is personified. This happens when the manifestations of communion become apparent, that is, when the members of the group make the defining idea their own, in Hauriou's words, "reflected in the individual consciences" (Hauriou 1925; my translation). This latter moment leads to the birth of an institution understood as a body proper: The majority's adhesion replaces the minority's intuition.

For Hauriou, the law cannot in any strict sense "create" anything; specifically, this cannot be the way an institution is created: Laws exist only in reaction to something. Action works against a major corruptor: time. In order for the group not to dissolve and the idea not to be corrupted by time, it is imperative that a force be deployed to counteract the corruptive effect of time – and this force, according to Hauriou, is the law. Hence, it is not that law creates institutions, but rather that institutions necessarily generate law through the instituted (*institué*), as opposed to that which institutes (*instituant*), which tends to disappear over time: "Legal rules represent ideas of limits, not ideas of enterprise or creation" (Hauriou 1925; my translation).

Conclusion

Hauriou's philosophy of law has often been described, even by those who acknowledge it, as idealist and fuzzy (Millard 2015). But as it is, it had great influence on the ideas of legal pluralism, even if it failed to give an appropriate account of the State as a sovereign, made from and by institutions, or of the State as an institution (like and among others).

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Introduction

Considered one of the most influential thinkers of the twentieth century, Hayek (1899–1992) made an essential contribution to contemporary liberal thought in his extensive, thorough, and interdisciplinary body of work by trying to revive liberal political philosophy, which he believed was consubstantial with Western civilization, and adapt it to the new age. Basing these endeavors on the solid foundations of psychology and epistemology, he also drew on economics, politics, law, and philosophy.

His legal and social philosophy is conditioned by the historical circumstances he lived through. Born in 1899 in Vienna, the capital of the Austro-Hungarian Empire, he was brought up in a particularly intellectually stimulating environment. At university he studied law and then he completed doctorates in this discipline and in Political Science. After graduating, he worked with a man who would become his mentor and friend, Ludwig von Mises, a member of the Austrian School of Economics founded by Carl Menger at the end of the nineteenth century.

He joined Mises in the debate on economic calculation in socialist economies, disputing that this calculation was possible without a market. His intellectual battle against socialism and state interventionism continued in his debate with John Maynard Keynes while he was teaching at the London School of Economics (1931–1949). During World War II, England was also the place where he wrote one of his most famous books, *The Road to Serfdom* (1944), in which he claimed that the fascist or communist versions of collectivism inevitably led to totalitarianism.

He moved to the University of Chicago in 1950 where he wrote *The Constitution of Liberty* (1959), often considered his masterpiece. After many years of teaching in the English-speaking world, he returned to Freiburg im Breisgau as Professor of Economic Policy. However, he did not gain international recognition until he was awarded the Nobel Memorial Prize in Economic Sciences in 1974. Although he was in his mid-seventies by then, this acknowledgment encouraged him to continue his work, as evidenced by the three volumes he wrote describing his legal theory, *Law, Legislation and Liberty* (1973–1979) and his last book: *The Fatal Conceit. The Errors of Socialism* (1988).

When he retired in 1968 he accepted an honorary professorship at the University of Salzburg to which he donated his private library before coming back to Freiburg, where he died in 1992.

Legal and Social Thinking

Hayek's theory of knowledge is a good place to start examining his main contributions to legal philosophy. This theory was mostly influenced by the intellectual milieu of his native Austria, which, besides other issues, focused on psychological and epistemological questions from a largely positivist and anti-metaphysical stance. That is why he was interested in psychology and how the mind works, a fascination that lasted throughout his lifetime and that he explored years later in *The Sensory Order. An Inquiry into the Foundations of Theoretical Psychology* (1952a), which is more popular now than when it was published.

This book plays an important part in helping us appreciate the premises underlying Hayek's theory that the mind's constitutive limits, and human reliability and ignorance, ultimately explain the need for law. In other words, the law stems from our ignorance. As one of his most insightful contributions to liberal legal thought, it reveals the influence of one of the authors he most admired: David Hume.

According to Hayek, the human mind is the result of evolution and subject to constant changes as it needs to adapt. People become more rational the more they act. Action and reason feed off each other and the mind develops as a classification device – using non-fixed categories (because they have also resulted from evolution) – that only allows an abstract knowledge of reality, meaning the world is known very imperfectly. Given that our knowledge is imperfect, and the human mind and reasoning are limited, people must adapt to an ever-changing environment by following established rules. In fact, mankind is a "rule-following animal." Norms are similar to the rules in our brain and there are even some meta-rules that go unchallenged and that the others are subject to.

Unlike believers in an independent and all-powerful human reasoning that designs laws and social institutions (the "rational constructivists"), no one has deliberately created these "rules of just conduct" (*nomos*). They have ensued from the actions and experimentation of generations of human beings, the structure of pre-existing regular behaviors that are learned and imitated. They have evolved spontaneously in a long process of trial and error and cultural selection in which institutions, traditions, and habits also compete. They are general, abstract, and impersonal norms forming a Law that is discovered rather than created, since it emanates from the work of judges and jurists. Law came before legislation. That is why Hayek prefers common law (although he does not believe in natural law) because he is not a positivist either, since the State imposes rather than creates law. The State cannot create law because the knowledge it would need to do so is limited, tacit, and often inarticulable and disperse, which is precisely the knowledge these rules incorporate (in a similar fashion to how prices act in the market).

Such norms lead to a type of order of human cooperation in which some serve the purposes of others they do not even know, without this being planned or designed by anyone. This "spontaneous order," "great society," or "open society" guarantees individual liberty by preventing arbitrary coercion, respecting property and a private context no one can interfere in, thus providing citizens with the security that their legitimate expectations will be met.

Neither does it establish common goals or objectives (there is more than one scale of values in complex societies) as it allows every individual to follow their own. Utilizing our knowledge to pursue our own goals is a trait of liberty, even though this social order not only needs to be upheld because of the liberty it gives, but also because it keeps more people alive and brings more prosperity. Consequently, Law's role must be its own survival and continuity.

On whether this order is just or not, Hayek states that justice involves obeying norms, and it is only attributable to human conduct. Social order cannot be classified as just or unjust as this would succumb to anthropomorphism. The market, a clear example of spontaneous order, is an impersonal process in constant flux that has no will nor decides anything, and the State primarily acts as an arbiter to enforce the law in it.

While this does not mean that the State does not have its own roles (some in collaboration or in competition with private initiative), politics is for facilitating conditions and removing obstacles so this order can function. Allowing State intervention due to the understandable desire to achieve a more just outcome would grant the State an absolute and arbitrary power that would end liberty, the fundamental value of social philosophy.

In other words, a liberal society requires us to sacrifice our feeling of justice, a reflection of atavistic instincts typical of the thousands of years humans spent living in closed societies. Social justice reflects this. It does not have a precise meaning, except that of the State redistributing income, which violates equality before the law, discriminates and confers privileges. It is steeped in ideology to the extent that "social" replaces "moral," and it is dangerous because it extends the power of government and bureaucracy. A State that assumes this role undermines the rule of law and the government of law since it replaces the norms of a spontaneous order (*cosmos*) by the mandates of a made and guided order (*taxis*) – largely the fault of current legislative assemblies – to attain its objective. That is why he proposed constitutional reform based on two chambers with different legislative roles.

However, Hayek is not opposed to a minimum income in rich societies nor to changing or criticizing norms, provided attempts are made to remove injustices, because justice is a negative value and, given the limits of our knowledge, we can only examine whether a new norm is coherent with the rest of the legal system by eliminating anything that diverges from other unquestionable norms (a negative justice test). In other words, criticism can only stem from critical rationalism.

The Challenges of Hayek's Political Thinking

Interest in the origin and function of a type of spontaneous and evolutionary order, which works correctly without anyone having planned or managed it, led Hayek to the Law. This interest was fueled by the work of Menger and other authors such as Bernard Mandeville, Adam Ferguson, and Adam Smith, who the Austrian tried to expand and elaborate on with his ambitious and multidisciplinary work that is not without internal tensions and contradictions.

The theory of cultural evolution, which also presumes the superiority of Western civilization, raises many challenges. These especially include justification for legal rules based on an evolutionary tale of semi-Darwinian cultural selection with barely any intervention by human reasoning, and in which individuals must yield to overwhelming forces they can barely influence because preserving the resulting order seems overarchingly important, which contradicts his declared individualism.

Hayek's legal philosophy has been criticized for its formalism with Kantian overtones (a true law is identified by its formal features), which, as mentioned above, does not prevent injustices as they can occur under general and abstract laws. But his social theory places so much importance on the Law that it pushes politics into the background. Neither does it defend a strong concept of democracy, which is only one method for the pacific change of governors. The only legitimate democracy is democracy based on the rule of law and a market economy, sustained by profound beliefs and liberal principles that are not negotiated and that are dogmatically upheld despite being the result of social evolution, in an obvious contradiction to his evolutionary theories.

Furthermore, there can only be inherent criticism of the system, a criticism that respects the principles an open society is based on, which limits the possibility of change and brings it in line with conservative views. Therefore, his theory that even the most moderate socialism or the welfare state would lead to totalitarianism has been disproved by reality. Nevertheless, his thinking has wielded an enormous influence over politicians and intellectuals, even though he never wanted to devote himself to politics. In 1947, he founded the Mont Pelerin Society to disseminate liberal principles, precisely because he believed in the battle of ideas more.

Conclusion

Numerous interpretations have arisen from analyzing his ideas. Consequently, even though he is considered a leading figure of Neoliberalism, his thinking has also been deemed that of a reactionary, a conservative, a classic liberal, and a libertarian. However, he clarified matters in his famous postscript to *The Constitution of Liberty*: "Why I Am Not a Conservative," in which, as a great admirer of British liberalism, he wrote that he considered himself an "old Whig."

Irrespective of how his work is approached, Hayek is now a classic of political thinking, and without him the history of contemporary liberalism would be unintelligible.

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Hayek, Friedrich August von: On Justice

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This entry concentrates on a curious theme of Friedrich Hayek's work, and a question: why would a 1974 Nobel Laureate in Economics, who did more than anyone in the twentieth century to advance our understanding of price signals and of the emergence of spontaneous orders, be driven to claim that social justice is a mirage?

Hayek Against Justice

Hayek (1899–1992) published his first book (*The Road to Serfdom*) in 1944 and his last (*The Fatal Conceit*) in 1988. Both books warned that central planning could not deliver on its promise of economic efficiency. As events of the twentieth century vindicated Hayek's prediction, perhaps he expected that central planning's confirmed inefficiency would lead socialists to give up on central planning. Instead, they gave up on efficiency, and began to argue that the real promise of central planning lay in its ability to deliver justice.

Thus, a frustration with the very topic of justice – Hayek's seeing it as a disingenuous "bait and switch" in a debate that should have ended with the demonstration of central planning's inefficiency – may explain his reaction. We could imagine Hayek responding to claims about socialist justice with something analogous to his analysis of socialist efficiency. But Hayek's actual response was to dismiss. He declared, "nothing has done so much to destroy the juridical safeguards of individual freedom as the striving after this mirage of social justice" (1978, 110).

Just Price

Clearly, some of Hayek's recoiling from justice stemmed from his sense that talk of justice has (for eons) had a way of turning into talk of just *price* (Hayek 1976, 73). To some degree, then, what motivated Hayek's dismissal of social justice was his dread of central planning's resurrection in the guise of licensing a justice czar to make sure prices are fair, thus derailing the wealth-creating spontaneous trading of a free society within the rule of law. To Hayek, this would have been tantamount to derailing the closest approximation of an all-knowing social planner that is possible in the real world: namely, the twin forces of supply and demand. But of course, those forces speak to people through prices. Hayek was acutely aware

of the monumental cost of silencing that voice. That concern drove Hayek to conclude that "considerations of justice provide no justification for 'correcting' the results of the market" (1969, 175). So long as traders are consensually making mutually agreeable moves, nothing else needs saying by way of justifying the deals they make.

To Hayek, the rule of law needs to be a framework for coordination without presuming to dictate that coordination converge on any particular externally validated outcome (1960, 118). Progress is real and observable, whereas optimality is a theoretical construct corresponding to nothing ever observed. So, Hayek says, "one of my chief preoccupations" has been coming to terms with the idea that social justice is a mirage (1978, 57). By *social* justice, Hayek seems to mean distributive justice, more specifically what Robert Nozick called end-state principles that treat justice as pertaining to outcomes rather than to process. Why would justice so conceived be a mirage? Hayek says, "there can be no distributive justice where no one distributes" (1978, 58 or 1976, 68–69).

Why resist applying conceptions of justice and injustice to situations where no one distributes? What haunts Hayek here is not the truism that one person might be more deserving than another so much as a more general concern about licensing a central planner to make the call, correcting markets that fail to give people what *planners* thinks people deserve. If we operated by end-state principles of justice (Nozick 1974), trying to justify every trade we contemplate in terms of how it will affect the distribution, it would gridlock us rather than facilitate our inventing new ways of making ourselves more valuable to the people around us and thereby making real progress. This, I believe, accounts for Hayek's seemingly dogmatic dismissal of end-state principles of justice. For reasons reminiscent of Nozick's, Hayek finds such principles unaffordable, and incompatible with autonomous agents minding their own business in a free society.

Fearing the potential for tyranny (an all-too-real prospect in Hayek's day), Hayek does not argue that market outcomes are just but rather that they are not the kind of thing that can be just or unjust. As Rawls likewise says, "The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts" (1971, 102). Perhaps this is not really Rawls's view when all is said and done, but it definitely is Hayek's. Where Rawls immediately hedges his statement with, "What is just and unjust is the way that institutions deal with these facts" (1971, 102), Hayek would double down, and stress that if the natural distribution neither just nor unjust, then when institutions "deal with natural facts," they are not undoing wrongs. Where no one distributes, the result may be lamentable, but it will not be unjust – not in the way that *engineering* such a result would be.

Being born with a cleft palate is, on its face, lamentable, but it is not an injustice. Outcomes that would be viciously unjust *if deliberately imposed by a central planner* sometimes simply happen. Of course, cleft palates are bad! Of course, fixing them is good! But to Hayek, fixing what is not unjust cannot count as rectifying injustice. If we feel called upon to help children with cleft palates, it will be because having a cleft palate is bad, not because it is unjust. When we help, we are not fixing an *improper distribution* of cleft palates. We are simply fixing cleft palates. When we help, the stand we take is against suffering, not injustice (1976, 87).

Hayek worries that our sense of justice can make (and has made) it harder for us to live together, and make progress together. If, as per Rawls, the natural distribution were arbitrary in a way that could call for redress, despite being neither just nor unjust, our feeling a need to rectify (inevitably warranted to some degree) will divert us away from progress and toward revenge. (I am here channeling a speech I heard Nelson Mandela give in 1999 in Johannesburg, where he told his countrymen that we can have prosperity or revenge, but we cannot have both. We have to choose.)

Note a similarity between Hayek's view and a view expressed by Rawls (1955). To use Rawls's example, the practice of baseball is defined by procedural rules rather than by end-state

principles dictating what the outcome ought to be. To have a practice is to presuppose that we can be *dogmatic* about how many strikes a batter should get. Hayek could have said that genuine fairness is not about making sure the right team wins. Neither is it about making sure the game ends in a tie. It is not even about making sure outcomes are not unduly influenced by morally arbitrary factors such as how well the players played or how diligently they prepared or any other factors that to Rawls were "so arbitrary from a moral point of view" (Rawls 1971, 104). True fairness is about being impartial, nonpartisan – proverbially, "letting the players play."

This is how Hayek saw a free society, but he seemingly did not see what he was defending as a conception of justice.

Merit

Merit, as Hayek understands it, concerns the character of the action as opposed to the nature of the achievement (Hayek 1960, 94). In other words, to Hayek, merit-claims concern the inputs one brings to a process, not the output. In Hayek's mind, nothing good can come of that. In a free society, to Hayek, rewards track output, not input (1960, 98). Hayek has a point. Among his core concerns is the "mirage" of thinking that justice requires rewarding people for supplying inputs rather than for supplying outputs.

However, if it is a mirage that only inputs should be rewarded, it is equally Hayek's mirage that meritocracy is only, or even mainly, about inputs. Admittedly, if we leave customers to their own devices, output is what customers will reward, which is what Hayek wants. By the same token, when people left to their own devices choose to reward producers for output, their behavior *is* to that extent tracking merit. Even if the tendency of market rewards to track merit is merely a tendency, being a mere tendency is not the same as being a mirage.

A key element of the success of a system in promoting prosperity will be that, as the pattern of market dealing tends to reward excellent output, it tends at the same time to reward the hard work, courage, alertness, and commitment that makes for excellence. It will be rewarding luck too, to be sure, but typically not sheer random fluke. Hayek speaks as if merit has everything to do with trying hard, and nothing to do with excellent output, but saying it does not make it so, and indeed there is no reason to believe it.

The crucial point: wherever it is more rewarding to work hard, more rewarding to do excellent work, more rewarding to be alert to what customers need, a system is tending to reward the right things. In that system, output will tend to be increasingly excellent over time. Products will tend to work as customers expect them to work. People will tend to prosper, and there will even be some tendency for people to be meritorious.

The Right to Distribute

Hayek's critique of social justice is not so much a critique of merit as a critique of centrally planned distribution according to merit. He thought a merit czar would be intolerable. However, the nightmarish aspect of Hayek's vision has everything to do with the idea of central planning and nothing to do with the idea of merit. Imagine that a committee at your school is charged with selecting and honoring the school's most outstanding faculty. In the world we live in, the committee in charge of awarding that prize will consist of people who select colleagues resembling themselves, which is to say, people who have nothing better to do with their time than volunteer to be on committees. Bottom line: if there is no place for a merit czar in a just society, it is not because merit does not matter but precisely because it does (Hayek 1976, 64). What makes merit czars intolerable is that they *do not reward merit*. The market's tendency to reward merit is no more than a tendency, but a real tendency all the same. When markets depart from merit, the departure will be bad luck rather than the petty corruption of merit czars.

Or, where the departure is systematic, that will be when legislation is called for. Hayek was never dogmatic about that. Hayek clearly saw the need for planning even as he clearly saw reason to be

afraid of it. Hayek never doubted that we need legislation, but thought the aim of legislation should be to make things better, not fairer. What terrified Hayek about planning is not aiming at the *wrong* outcome but aiming at outcomes per se. What we observe in the world is not outcomes at all, but processes – ongoing and largely unplanned. Planners can affect a process, and even improve it, but they cannot choose an outcome. Planning can affect and possibly improve a community-as-process by tweaking the rules – the ecological logic – in hope of putting people in a better position to develop and execute plans that are more useful and agreeable both to self and others. Hayek in fact endorsed norms of pure procedural justice, and never denied that there is such a thing, after all, as fairness.

Hayek seemed to take for granted, as do many of his philosophical opponents, that, in a merit-based system, if you can prove you deserve ***x***, that licenses merit czars to give it to you. But this is a non sequitur. Crucially, before we have occasion to ask whether I am giving ***x*** to the most deserving recipient, there is a prior question about whether ***x*** is mine to give. (Hayek saw theories of distributive justice as theories about how to slice the pie, not as theories about how to respect the bakers who brought it to the table. Had he seen justice in the latter way, he undoubtedly would have found it more congenial.) Suppose I receive excellent service at a restaurant and I judge that my server deserves $20. I cannot justify taking $20 from a patron at a neighboring table merely by explaining that my server has done something to deserve the $20. *Once the $20 is mine to give*, then, but only then, I can ask whether my server deserves it.

The point is crucial not because the point refutes Hayek but because it reveals the exact nature of Hayek's real concern. Hayek's concern is not the mirage of thinking merit *does* matter, but the mirage of thinking entitlement *doesn't*.

Hayek may have considered but did not ultimately endorse the common-sense notion that merit is a matter of what people do with what they have, because he saw common-sense judgments of merit wilting in the face of the academic charge that, in the real world, what people have is a matter of chance. He may have thought that a serious debate about justice would be unwinnable. Hayek may not have understood that questions of merit are questions about what we do with whatever opportunities we have, with no assumption that everyone's opportunities are or should be the same.

Note that to say an egalitarian would have a problem with that is simply to say equality and merit are not the same thing. Neither standard answers to the other. A meritocrat has to be egalitarian in the particular sense that if we sought to measure relative merit, such as who is the fastest runner, we would want our measure to be accurate, and therefore, we would want to see them run under the same conditions. But we would not care whether one runner has the advantage of longer legs, because our aim would be to find out who is faster, not why.

For that matter, claims of merit need not be (and often are not) comparative at all. People viewed as meritorious typically say they had a lot of luck, and rightly so. But it also is true that being lucky does not rule out being meritorious. Being *merely* lucky does. To speak of *mere* luck is to say merit is not a factor.

However, there is a world of difference between being lucky and being merely lucky. The degree to which people are meritorious is a function of what they did with whatever lucky breaks they had. Not seeing this, and thus not seeing the merit of providing excellent service to partners in the marketplace, Hayek went instead with the idea that merit is a mirage.

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Heck, Philipp

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Introduction

Philipp Heck was born in St. Petersburg on 22 July 1858. He spent his early childhood in St. Petersburg and Wiesbaden, where he moved at the age of 12. Young Heck began his studies of Mathematics and Natural Sciences in Leipzig but was soon attracted to Jurisprudence, to which he entirely devoted himself for six decades. His itinerary as a Law student, interrupted for a year by military service, followed the cities of Leipzig, Heidelberg, and finally Berlin. According to his own account, it was the late texts of the second Jhering that attracted his attention to Legal Science.

His intellectual work had two strands, one historical-legal and the other methodological. He turned to History under the influence of his two great teachers, Heinrich Brunner and Otto von Gierke. However, his work on the history of German law was controversial and received little attention (Bader 1944, 539). It was his second methodological strand of study that made Philipp Heck one of the most prestigious jurists of his time, a time that was marked by the methodological debates that opened up in the field of Jurisprudence due to Germany's entry into the Age of Codification.

Heck's successful and rapid academic career was consistent with the heyday of German intellectual life at the time. In 1889, he obtained his doctorate under the supervision of Levin Goldschmidt with the doctoral thesis *Zwei Beiträge zur Geschichte der Großen Haverei* and in the same year he attained his "habilitation" qualification in Berlin with his work *Das Recht der Großen Haverei* under the supervision of Goldschmidt and Gierke. Two years later, at the age of 32, he moved to Greifswald as a full professor, a position he exchanged with Halle the following year, replacing Eugen Huber. In 1901, he settled in the small but intellectually stimulating city of Tübingen to take up the professorship of German Law, Commercial and Exchange Law, and Civil Law. There he became Dean in 1904/1905, 1915/1916, 1919/1920, and Rector in 1911/1912. He remained in Tübingen until his emeritus professorship in 1928, surrounded by prestigious colleagues with whom he maintained close ties. Tübingen University hosted the famous school of *Interessenjurisprudence*, defended by Max v. Rümelin and Heinrich Stoll, promoted by Eugen Ehrlich from 1917

and, with some differences, by Rudolf Müller-Erzbach. However, its most relevant advocate was Heck himself, whose work in Tübingen was awarded the Cross of Honour of the Crown of Württemberg.

He took part in the First World War as a reserve officer. In 1936, he joined the *Akademie für Deutsches Recht,* and in 1938, he received the Goethe Medal for Science and Art. Heck, married to Helene Heck in 1895, fathered a son, Karl Heck, who was to become a judge at the German Constitutional Court. Philipp Heck died on 28 June 1943 at the age of 84.

Heck's Methodological Approach

The foundation of the Jurisprudence of Interests, which, as the basis of the Jurisprudence of Values (*Wertungsjurisprudenz*), is still of great importance for the legal methodology in Germany today, is inseparably linked to the name of Philipp Heck. His principal works on the Jurisprudence of Interests appeared between 1905 and 1937, following three phases which are usually periodified as 1905–1914 (the foundation of the method), 1914–1933 (development), and 1934–1937 (defense against National Socialism) (Schoppmeyer 2001, 49 ff.). The doctrine did not undergo significant changes in these periods, and Heck's methodological texts attained scholarly recognition from the very beginning.

Heck tried to extend his methodological postulates to the dogmatic areas of Civil Law, namely that of obligations (*Grundriss des Schuldrechts*, 1929) and rights *in rem* (*Grundriss des Sachenrechts*, 1930).

Heck's theoretical contributions must be read from the political context to which he belonged. Clearly conservative and an advocate of the rule of law, Heck was a member of various right-wing liberal parties of both the Empire and the Weimar Republic, but never of the NSDAP. Heck's relationship to National Socialism has been much discussed. From 1933 onwards, a methodological debate began, leading to the discrediting of the Jurisprudence of Interests. Leading representatives of the new legal worldview, such as Julius Binder, Karl Larenz, Carl Schmitt, and Ernst Forsthoff, identified the liberal features of Heck's work with the enemies of the new "philosophy": positivism, materialism, and individualism (Larenz 1937, 274 ff.). Heck's attempts to adapt his method to National Socialism have fueled views that bring him closer to the new regime. But it is also true that he confronted the objective idealism of Larenz and Binder, i.e., the great names of the movement.

The Jurisprudence of Interests is largely responsible for the shift in German legal methodology at the turn of the century. To understand the key ideas and premises of the Jurisprudence of Interests, one must first be familiar with the preceding methodology, developed at the beginning and middle of the nineteenth century and linked to the Historical School of law and the science of Pandects (Savigny and Puchta). For this nineteenth-century historicist doctrine, law emerges from the popular spirit or *Volksgeist*: it is not a disjointed aggregate of norms, but a rational organic whole, a system. Hence, legal decisions that cannot be derived from the law are derived from the system and the concepts and principles contained therein. The Jurisprudence of Interests, originated in the Jurisprudence of Ends (*Zweckjurisprudenz*), is based on a different concept of Law, which, rather than a product of reason or the national spirit it is of the will of society or the legislator. Law is "erklärte Wille der Gesamtheit" (1914, 14). There is thus a shift from a "rational" or "idealist" conception of law to a "voluntarist-positivist" one.

This new conception began with Rudolf v. Jhering, one of the greatest nineteenth-century Pandectists, who in the third volume of his first monograph, *The Spirit of Roman Law at the Various Stages of its Development*, broke with the methodology of the time and asserted "life" and not "logic" as the decisive factor in law. Heck's Jurisprudence of Interests is the most elaborate version of the new conception of law inaugurated by Jhering (and enshrined in his *Law as a Means to an End*, where he states in the first volume – 1877 – that "The purpose is the creator of all law").

The fundamental premise of the Jurisprudence of Interests is that law must always be derived

from a weighing-up of the interests at stake and not from scientific concepts, as had been proposed by the Pandectists or the Jurisprudence of Concepts (it is, however, important to notice that the recent historiographical readings of the famous *Begriffsjurisprudenz* defend that its methodology was not as geometrical as its critics claimed). According to Heck, the Jurisprudence of Concepts operates with a false "inversion method" (1912, 9), which first forms a general scientific concept from the provisions of positive law, and then "inverts" it and applies it to a case that was not yet known when the concept was formed. The Jurisprudence of Interests no longer works with scientifically constructed concepts and principles, but with a weighing of interests of the individual case. It is "life," the recurring *topos* of the time, which Heck intends to serve (although he clearly distanced himself from the "philosophies of life" in vogue at the time) (1932, 24). According to Heck, the term *interest* should be understood in the broadest possible sense. Interests are "all dispositions of the mind" causal for the creation of law, both material and ideal-normative. These include the interests of justice, fairness, and legal certainty. Therefore, the Heckian thesis of the causality of interests for the creation of law does not imply a naturalistic concept of law, nor the idea that legal agents are bound to the interests of the empirical world without the possibility of attending to their own evaluation in the process of creating law.

The Political Dimension of Method and the Role of the Judge

From a legal-political point of view, it has been emphasized Heck's adherence to modern constitutional requirements. The fact is that Heck constructs his theory in a time, the codification period, which considers the will of the legislator embodied in the law to be supreme, namely in the conflicting interests that each law decides to protect. The legislator is the source of the law and the legal decision-making bodies, i.e., the entire legal profession and especially the judiciary follow the legislator on the basis of a "thinking obedience" (*denkendem Gehorsam*), in Heck's famous expression (1912, 19). The clarification of legal decisions must proceed strictly empirically as an "investigation" of the facts that have had significance as "causes for legislative ideas." The historical investigation of interests thus becomes a fundamental task in the interpretation of norms (a task that Heck details in his *Gesetzesauslegung und Interessenjurusprudenz*, which appeared in the *Archiv für die civilistische Praxis* in 1914, a journal of which he was editor from 1902 until his death). But this is not a subjective theory of interpretation in the classical sense. It is not a matter of knowing the legislator's will; instead, what is sought, is to trace the real conflicting interests that originated the legislative pronouncement. This hermeneutic activity based on factual grounds confers objectivity to this cognitive work (1914, 60, 111).

At the center of all of Heck's legal methodology is the problem of obtaining law through judicial decisions, because these determine most decisively the influence of law on life (1912, 7). The judge is bound to the mandates that have been expressed in the law, which are the expression of the will of the community. This is the point at which Heck and his Jurisprudence of Interests depart from the other great methodological renewal current of the time, the Free Law School (*Freirechtsschule*: Eugen Ehrlich, Hermann Ulrich Kantorowicz, Ernst Fuchs, Ernst Stampe – although the group does not retain the homogeneity in its positions that has traditionally been given to it).

At the center of the discussion is the problem of legal loopholes. For the advocates of the *Freirechtsschule*, the judge is not bound in these cases by the value judgments of the law, but it is the judge's own judgements that provide the standard for the weighing of the case (which will have its own law: *sua lex* 1932, 105). The judge is not here, as for Heck, "thinking assistant" ("denkender Gehilfe") of the law, but "far-sighted judge king" ("weitschauender Richterkönig") (1912, 26). On the other hand, Heck links the application of the law as closely as possible to the law in cases of lacunae. This is done by "indirect" verification of the law, in the comparison of

cases by analogy or *argumentum a contrario* with regulated cases. Only if there is no clue can one finally resort to possible "community values" through "self-assessment" (1905, 1141). Heck rejects the fundamental theses of the *Freirechtsschule* because by detaching the judge from the norm, it authorizes him to create law, thus undermining legal certainty and the identical treatment of similar cases (1933, 7).

Legal Science

Heck famously distinguished between two systems: an external system that refers to the external arrangement of legal material for the purpose of exposition, and an internal system that expresses the factual connection of particular legal ideas, that is, a "system of conflictual decisions." This connection makes it possible to organize the system based on a classification of general concepts (1932, 149 ff.). But this systematization task is always subordinated to the evaluation of the underlying interests; a deductive conceptual system alike the Jurisprudence of Concepts is rejected by Heck. This conception of the system has earned him criticism from those who consider that individual conflict decisions do not provide a general or comprehensive view of the law (Canaris 1969, 35 ff.).

Here again lies a fundamental difference between Heck's thesis and the Jurisprudence of Values (*Wertungsjurisprudenz*), for the latter is based on the Kantian or Hegelian belief in a "reason" which transcends positive law and which allows the "idea of a whole" to be projected onto each individual proposition. In contrast to this view, Heck starts from an empiricist-nominalist understanding which does not recognize any "legal idea" over and above the facts. His doctrine is based on a "conflict theory" (*Konfliktstheorie*): the law does not express a uniform conglomerate of values but results from a kind of state of nature that opens up a field of opposing interests (1933, 13). The influence of Thomas Hobbes and, more closely, of Max Weber, with whom Heck shared his academic training under the joint tutelage of Goldschmidt, is thus apparent (Dorndorf 1995; Schoppmeyer 2001, 160 ff.; Auer 2008, 524). This "conflictual" dimension of the Jurisprudence of Interests also makes it possible to see the differences with the more general teleological jurisprudence, because the latter does not find the law from the empirical needs of the case but arrives at it from a semi-idealized system of ends. This was Heck's criticism of Larenz when he demanded a teleological foundation of the methodology, thus – according to Heck – coming closer to the postulates of the Jurisprudence of Concepts – as a doctrine that starts from a priori legal postulates. Heck's method can therefore be described not so much as "Philosophy-free" (as he nevertheless considered it to be: 1932, 25; 1937, 140) but as "Metaphysic-free" (Auer 2008, 525).

Conclusion

Heck trusted in the possibility of endowing legal thought with an empirically verifiable rationality that would allow the determination of law based on the interests of the concrete case. He was one of the first to point out the need to consider the conflict of interests in formulating any legal decision. It can therefore be said that he was an early thinker of legal weighting (*Abwägungsdenken*), which is so much in vogue in legal theory today.

For Heck, there is no contradiction between obedience to the law and its incompleteness. Although he refers to the judge as a "servant" and in this sense advocates a historical-subjective theory that promotes a methodical and honest approach to the law, in reality, he grants the judge essential freedom in the exercise of his functions. Despite its critics, Heck's Jurisprudence of Interests denied neither concepts, nor the social, nor life, nor even values. But in order to be normatively authorized, they all have to pass through the filter of legislation or the "thinking obedience" of the judiciary and other law enforcers. This last element bears a political dimension that cannot be neglected when attempting a fair assessment of Heck's doctrinal contribution.

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Hegel, Georg Wilhelm Friedrich

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Introduction

Georg Wilhelm Friedrich Hegel (1770–1831) is a main figure in the history of philosophy. His thought is the apotheosis of modern philosophy and German idealism. Hegel's philosophy could be seen as the last specimen of the all-embracing systems that characterized philosophy during this period. His system covers a vast range of topics including many of the most important subject-matters of human reflection, such as metaphysics, epistemology, law, ethics, politics, theology, arts, and history.

Among his most prominent works are the *Phenomenology of Spirit* (*Phänomenologie des Geistes*, 1807), the *Science of Logic* (*Wissenschaft der Logik*, 1812, 1813, 1816, 1832), the *Encyclopedia of the Philosophical Sciences* (*Enzyklopädie der philosophischen Wissenschaften im Grundrisse*, 1817, 1827, 1830), and the *Philosophy of Law* (*Grundlinien*

der Philosophie des Rechts, 1821). Hegel lectured on Philosophy of Law from 1819 until a few days before his death in 1831, the last lecture being recorded by David Friedrich Strauss.

Hegel's Philosophical Project and the *Science of Logic*

In order to reach a meaningful explanation of Hegel's practical philosophy, it is necessary to begin with general aspects of his philosophy and to attend to main technical terms that are present in the different realms of his thought. These are to be found in Hegel's *Science of Logic*. Hegel's Logic is often misleading to modern readers. It does not deal with contemporary formal logic, but it is related to Kant's "transcendental logic" (as exposed in his *Critique of pure Reason*: Houlgate 2006, 12–16). As the first part of his system (fully displayed in the *Encyclopedia*), Hegel's Logic presents his metaphysics and epistemology, and therefore, the conceptual ground to all the other philosophical domains. The Logic provides the inner and purely conceptual development of pure thought and the conceptual apparatus to the other fields of Hegel's philosophy. While philosophy of nature and philosophy of spirit offer a real content to the pure forms of thought studied in the Logic, this work provides the fundamental forms of thought displayed in any other philosophical realm (Hegel 2008, 27–8).

Here Hegel presents many of the most significant concepts of his philosophy, such as *dialectics*, *speculation*, *negation*, *contradiction,* and *sublation* (Aufhebung) (Hegel 2008, 8, 89, 90, 92. They are also introduced in Hegel 1988, 60–1). These terms refer to different facets of Hegel's conception of concepts. According to Hegel, a concept is not a subjective, universal representation but a systematic semantical structure that includes sides or moments and inner semantical references toward other concepts. Each concept, taken in itself and isolated from others, leads to a contradiction. This proves the need to integrate it with the other concepts to which it refers. While this integration is not fully achieved, these different concepts appear as opposites and are related by contradiction and negation. But this contradiction is overcome by integrating the opposites in a new and more embracing conceptual structure. This dialectical-speculative logical movement from one metaphysical category toward others is what Hegel calls *Aufhebung* (sublation) and implies the development of the inner content of categories and their integration into more complex systematic structures. Following this conceptual movement, Hegel's Logic is thought to expose the total structure of pure reason. Thus, the rational (i.e., philosophical) study of any other subject-matter (whether nature or spirit) must consider the pure logical elements exposed in his Logic and will be displayed and presented following the inner logical movement described in his *Wissenschaft der Logik*.

Starting with the *Phenomenology of Spirit*

From the perspective of practical philosophy, Hegel's most relevant works are the *Phenomenology of Spirit*, the *Encyclopedia*, the *Grundlinien der Philosophie des Rechts,* and the "Über die wissenschaftlichen Behandlungsarten des Naturrechts". Written in Jena between 1805 and 1807, Hegel's *Phenomenology of Spirit* was intended to be the first part of his philosophical system (Siep 2000, 52; Hyppolite 1946, 53–4). At that point, Hegel thought that he would complete his system with his Logic (as its second and final part). Finally, Hegel decided to develop his Logic independently of the *Phenomenology*, becoming the Logic the first part of the system and leaving a question open on whether the *Phenomenology of Spirit* should be considered a part of the system at all.

Leaving this topic aside, the *Phenomenology of Spirit* is a significant work in itself (moreover, provided that Hegel will return to many of its topics in the final presentation of his system in the *Encyclopedia*. Hyppolite even goes to the extreme of claiming that the *Phenomenology* is the exposition of Hegel's entire philosophy from a phenomenological perspective, 1974, 53).

Well-known for its complexity and for covering a wide scope of issues (epistemology, metaphysics, politics, law, history and theology), the *Phenomenology* starts by displaying the development of the epistemological relation between consciousness and its object (Hegel 1988, 63–102). Through this development, consciousness discovers that the object is its necessary objective pole and not an independent entity which exists in itself (Hegel 1988, 60–1). By following the path drawn by this development and propelled by the dialectical-speculative movement abovementioned, Hegel arrives at the concept of *spirit* (Hegel 1988, 238 and following). The spirit consists of different forms of intersubjectivity and the inner dynamic of self-development of human culture and its history (Hegel 1988, 240; Siep 2014, 2). In other words, the *Phenomenology of Spirit* starts with a clearly epistemological approach focused in the relation between a single consciousness and its object; and ends with an analysis of historical figures that include different ways of thinking community, law, and God among other important topics for human culture.

Hegel's Concept of *Spirit*

Present in Hegel's *Grundlinien der Philosophie des Rechts* and his mature philosophical system depicted in the *Encyclopedia* (in its third part), spirit is the realm in which pure thought (exposed in the *Logic* and first part of the *Encyclopedia*) and nature (exposed in the second part of the *Encyclopedia*) reconcile. It includes three moments.

In the first moment, the spirit is the singular subject in her/his psychological and biological facets, i.e., *the subjective spirit* (Hegel 2011, 317 and following).

The second one is the social configurations, i.e., the intersubjective forms that society sets for itself: the forms of normativity and the forms that freedom adopts for itself and by itself. This is what Hegel calls *objective spirit*, which is divided into abstract Right, morality and ethical life (Hegel 2011, 389 and following). Objective spirit is also the topic of Hegel's *Grundlinien der Philosophie des Rechts* (Hegel 2017).

Finally, the *absolute spirit* (Hegel 2011, 440 and following) includes religion, art, and philosophy. Spirit is not God, but the inner dynamic of humanity's cultural creations thought as a whole. By understanding the inner dynamic of its own historical and dialectical development, spirit (i.e., humanity as a whole) understands itself, finds itself in its products. In absolute spirit, we find cultural products that transcend all frontiers, creations in which spirit returns to its very soul. In the realm of spirit, Hegel elaborates the figures by means of which humanity understands the world created by it and its own essence. It is humanity's highest point of freedom and self-understanding.

Even though the *Science of Logic* was previously indicated as the epistemological and metaphysical foundation for Hegel's system, when its last stage is reached, absolute spirit reveals as its actual ground. Hegel's works analyze different facets of only one thing: Spirit. Their topic is always the *subjectivity*, but not merely understood as a psychological, empirical, or finite consciousness, not even as a Kantian transcendental subject. The concept of spirit supposes a different type of subjectivity, one that includes these forms of consciousness but also its dynamical, historical, and social facets. As a dynamic subjectivity, spirit expresses itself in different realms and in different degrees of abstraction and concretion. In the logical realm, spirit is pure thought, but in the Real philosophy it includes social forms of subjectivity and a communal self-consciousness of its cultural self-constitution along its history. This particular kind of subjectivity is the subject-matter of the whole system (even of *Logic*) (Kroner 1924, 298). In his works, Hegel presents the different realms in which spirit develops and the way in which it understands itself and its own development. In the end, the last element of the system is its genuine ground, what it was present all along and propelled the development of conceptual categories and figures.

Law, Politics, Society, and State

After considering the concept of spirit, it is time to analyze the proper realm of law and politics:

Objective spirit. In this realm (exposed in the *Grundlinien der Philosophie des Rechts* and the second part of the third section of *Encyclopedia*) Hegel presents objective forms of subjectivity. Here he shows the different ways in which society expresses itself in the objective world by constituting different normative systems and collective organizations. It involves three moments: Abstract Right (Hegel 2017, 51–97; Hegel 2011, 392–397), morality (Hegel 2017, 99–136; Hegel 2011, 397–402), and ethical life (Hegel 2017, 137–282; Hegel 2011, 402–439). As it will be shown, abstract Right and morality taken by themselves will prove to be deficient in order to fully develop and realize the concept of freedom and, therefore, it will be necessary to integrate them as moments of ethical life.

Hegel's *Grundlinien der Philosophie des Rechts* is not restricted to the traditional notion of Right. Hegel's concept of *Right* is wider and includes the three abovementioned realms (abstract Right, morality, and ethical life). *Right* involves all forms of social normativity and the different ways in which spiritual freedom objectifies itself and becomes self-aware. But Hegel also refers to a more restricted concept of Right: Abstract Right.

As the first stage of social normativity, abstract Right corresponds to the traditional understanding of *Right*, i.e., the *positive legal system*. It is the initial objective self-expression of spirit in which freedom is conceived of from the limited perspective of individuals, their individual rights, and the possible interactions between proprietors. In this restricted realm, freedom is thought of as subjects' possibility to constitute contracts and to administer their property. Accordingly, Right is understood as the expression of an objective and intersubjective will that is mainly focused in the contractual relation between individuals. Even though abstract Right is a necessary moment of *Right* (as the complete development of social normativity), it is insufficient to fully achieve freedom's objective realization and spirit's self-comprehension through its cultural products. In other words, abstract Right accurately conceives legal relations among proprietors and individuals, but it does not express an adequate and complete conceptualization of freedom.

Indeed, Hegel thinks that abstract Right isolated from other forms of normativity would lead to society's self-annihilation. As long as abstract Right focuses in individuals, their property, and subjective rights, the normative relation so established is constantly harassed by potential conflict. One's property and rights may imply the suppression of others' property and rights. Each individual emerges as a menace to others and with potentially opposite and irreconcilable interests. Accordingly, without further understanding of social relations and freedom, society would disintegrate due to irresolvable conflicts. The result of such an abstract conception of politics is not a society, but a formal addition of isolated individuals (Taylor 1975, 450–1).

The same topic already appears in section "Legal status" of the *Phenomenology of Spirit* (Hegel 1988, 260–4). Even though Hegel does not use the expression "abstract Right" here, the topic of this section is similar. In a social order ruled by norms conceived of merely as normative relations between private individuals, social relations are converted into commercial transactions and are threatened by potential clash of rights that menaces to dissolve society. At the same time, here the State is thought of as the principal proprietor among other proprietors. Accordingly, the *res publica* becomes the private property of an extremely powerful proprietor that ends up being the only actual rightsholder under whose will and power all other rights are submitted to. The *princeps* becomes the lord of the world.

As the second stage of social normativity, *morality* introduces the introjection of norms into the individual self, the individuals' inner consent to intersubjective norms. Unlike abstract Right, morality includes a consideration of the inner motives to act and obey norms. This means, morality implies a discussion on whether a norm *should* be considered *valid* by individuals and which are the criteria for that purpose. In this context, Hegel discusses (and refutes) main aspects of Kant's practical philosophy.

In Kant's ethics, a moral norm is universally valid (i.e., mandatory) only if it corresponds to the pure form of the categorical imperative. The categorical imperative attributes validity only to norms that are capable of imposing an absolute,

unconditioned, and universal duty. The origin of the categorical imperative is pure practical reason. By means of the categorical imperative, any rational being is able to evaluate the validity of an alleged duty.

However, as Hegel shows in the second section of the *Grundlinien der Philosophie des Rechts*, understanding normativity as norms based on (alleged) pure rationality has several flaws. As ground of validity of norms, the categorical imperative is merely an empty formula that lacks any intrinsic reference to experience. It provides a pure duty without reference to concrete actions and, therefore, it cannot be actualized in reality. Pure reason does not provide concrete duties. There seems to be an unbridgeable gap between pure practical reason's universal principle of morality and concrete norms required by our empirical existence in real world. Pure duty is impossible to actualize and it cannot indicate which concrete actions must be carried out or avoided (Hegel 2017, 118). Moreover, even though Hegel follows Kant's distinction between law and morality, and admits that only the latter considers motives for action (while law only considers external conducts), Hegel sees Kant's practical doctrine as dualistic. Kant is uncapable of granting the integration of law and morality in ethical life. Furthermore, as separated from law, morality has no application or influence in politics (Ritter 1984, 152, 158)

The third and last realm of *Grundlinien der Philosophie des Rechts* is *ethical life*. Ethical life is the element in which abstract Right and morality are integrated into what Hegel calls an ethical substance (Hegel 2011, 143), i.e., an actual community that includes elements such as family, civil society, market, corporations, and the State. In this context, norms are not conceived of only as contractual relations (abstract Right) or as subjective-based moral laws (morality). Norms include complex actual social practices in charge of achieving the integration of individuals and society seen as a whole. This integration is carried out by corporations that accomplish the mediation between opposite private interests and social interests. In this way, the typical conflicts of abstract Right are solved, even though they reappear in the inner dynamic of market (in what Hegel calls the "system of needs"). These conflicts are thought to be solved by corporations and the State.

Here we find one of the most popular (and, at the same time, most controversial) concepts of Hegel's philosophy: The State. Hegel distinguishes between (1) the state within the system of civil society, external state or state of necessity and understanding (Not- und Verstandesstaat) and (2) ethical state. External state can be characterized in two ways. In one hand, it presents itself in the sphere of civil society as a typical liberal state of law (Marini 1989, 231). In the external state, individuals are recognized as citizens. This state guarantees subjective freedom and equality before the law to all, it intervenes mainly in case of conflict among particulars and its main concern is to restore the state of subjective freedom. However, state of necessity and understanding is not strictly restricted to these facets. It also takes care of the welfare of citizens and, to some extent, it confronts market society, its freedom of trade, and it is even capable of interfering in private property with actions to fight poverty (Siep 2015, 520). In contrast to the state conceived of only from the perspective of understanding, the ethical state is intended to guarantee the unity of community, the expression of a unique common spirit, and to sublate the contingency of morality (by establishing a shared moral conviction, institutionalizing social aids, and not leaving social solidarity under the contingent decision of particulars, Siep 1989, 187). Accordingly, ethical state seeks the agreement of particulars' moral convictions, it becomes the promotor of morality and it intends to be the source of social and individual meaningfulness (Siep 2015, 516). In this regard, ethical state competes with churches.

From Hegel's perspective, the state is not a mere instrument destined to protect subjective rights. State is the highest form of freedom. It lets citizens be part of something immortal that transcends individuals' natural mortality. Citizens have the right and duty to be part of the ethical state, which is allowed to demand from them the sacrifice of their rights, goods, and lives. Indeed, this is the case of *war*. War is the occasion for citizens to realize that they are part of something

bigger than themselves, **for the benefit of which** they must sacrifice their private interests. Ethical state implies the "idealization" (Siep 2015, 526) of society's particular moments. This means the integration of particulars into a totality. Ethical state provides society with the consciousness of its unity, a shared morality, surpassing private interests.

Before referring to the relation between states and war, it is necessary to clarify a well-extended misunderstanding regarding the universal character of state in Hegel's philosophy

The state emerges in ethical life as the expression of community's totality and as one of the instances that assure its unity and reproduction. Based on Karl Popper's interpretation (Popper 1945), Hegel has been seen as a precursor of totalitarianism. This interpretation distorts Hegel's actual idea of state (Neuhouser 2003, 6–7, 45, 294–5; Taylor 1975, 414, 449), due to the fact that Hegel's practical philosophy introduces a concept thought to assure a secured political and legal status to individuals: *Recognition* (Hegel 2017, 64–5, 208, Hegel 1988, 109 and following). The concept of recognition implies a relation between self-conscious subjects. In this relation, each subject realizes that in order to be autonomous, he/she must be recognized as such by another autonomous subject. Accordingly, one's freedom implies and requires the freedom of others. The legal, political, and moral recognition of a plurality of individuals is a condition for there to be a society at all. The state is not the instance of an abstract universality above all individuals, but the instance in charge of defending universal interests that include the recognition of individuals as such.

Just as reciprocal recognition among individuals is necessary for the actual constitution of individual subjects as such and their actual freedom, full sovereignty of states requires the reciprocal recognition of peers (Dotti 2007, 76–79). This leads to the relation among states, international law, and war, because such recognition is to be given both through pacific and belligerent means.

In regard to relations among states, it should be noted that Hegel's historical period is very much different from the previous period. During most part of the eighteenth century, war was conceived of and experienced as a circumstantial event based on a personal conflict between regents. War was a well-planned measure, destined to restore the honor or right of the insulted regent. Most of the eighteenth century was characterized by a cosmopolitan and pacifist ideal (spirit in which Kant wrote *Perpetual Peace*, see Cesa 1989, 324). However, the period of revolutions establishes a breaking point. War ceases to be considered an instrument subjected to rational calculus and starts being related to physical and moral vitality of peoples (Cesa 1989, 325–330). Hegel's position on war agrees with such change of perspective. Since end of eighteenth century, war becomes a constant part in relations between states. Hegel experiences a civil war at a European scale (Dotti 2007, 71). In this period, war begins to be seen as a natural force vivifying of civil societies. Just as ethical state must provide some meaning to life, war presents itself as an event that disturbs citizens' everyday lives, it awakes citizens and makes them postpone their private interests, reminding them of the common end expressed in the state. The inner dynamic of market societies and civil societies leads citizens to a progressive isolation in virtue of their pursuing of private interests. The need to endanger their own lives in war is a part of citizens' sublation of their finitude and mortality; through this, they free themselves from mortality and their natural condition as they are integrated into an immortal state (Siep 2015, 531). Hegel's approach on war is a critique to iusnaturalist contractualism: war is a phenomenon that surpasses the utilitarian conception of the state present in contractualism (Siep 2015, 515, 531).

In contrast to Kant, in Hegel's view there cannot be a perpetual state of peace (Cesa 1989, 342). War is a phenomenon of great significance to the reciprocal recognition between states. However, perpetual war is not the goal of history (Ringmar 1995, 96–97). Hegel does not think of International Law as a morality a priori, but as the mores established among states which would be followed even during war time. Even though international community cannot set up an

international state *stricto* sensu (due to ethical state being the only sphere of ethical life), it can be set up a quasi-community of states (Ringmar 1995, 97).

Relations between states lead to the course of history. Armed conflicts in history are the proper space to the emergence and development of principles, self-configurations of spirit embodied in certain people. It is spirit's way to its self-reconciliation through the succession of historical peoples. Nevertheless, history's dynamic does not imply a glorification of war by Hegel. On the contrary, war is spirit's painful inner tearing (Cesa 1989, 337).

Predecessors, Successors and Opponents

Hegel's thought, as an assumed overcoming of all previous philosophies, is based on the works of Plato, Aristotle, Baruch Spinoza, Immanuel Kant, Johann Gottlieb Fichte, Friedrich Wilhelm Joseph Schelling, among others, from which Hegel also takes distance. Hegel understood his own philosophy as the last evolutionary stage of human spirit's self-comprehension and, accordingly, as sublating all precedent philosophical systems, keeping whatever *true* or *real* content they had as subordinate moments of his philosophy, though. This means, Hegel's intention is that previous philosophical systems be, to some extent, integrated in his own philosophy. Ironically, Hegel's successors have taken a similar approach to his works. Some disciples kept true to Hegel's system (or at least this is what they intended), while some others chose to appropriate only some of its elements (for example, the dialectics). These two different approaches to Hegel's philosophy are one aspect of what differentiates "Old" or "Right Hegelians" from "Young" or "Left Hegelians".

This conceptual distinction was introduced in 1835 by David Friedrich Strauss (1808–1874) in his work entitled Das Leben Jesu, Kritisch bearbeitet (The Life of Jesus Critically Examined). This distinction is based on how to interpret spirit and its relation to history, religion, and legal/administrative/political institutions (Roberts 2010, 20–22; Toews 1999, 387–390). Right Hegelians (such as Philip Konrad Marheineke – 1780–1846 – and Karl Rosenkranz – 1805–1879 –) are sympathetic to the reformed Prussian state (propelled by Karl August von Hardenber and Heinrich Friedrich Karl von Stein) and tend to admit full compatibility between Hegel's system, political institutions, and Cristian orthodoxy. Eduard Gans (1797–1839) – representative of Hegelian Center and characterized by Toews as "critical reformist" (Toews 1999, 388) – thought of the task of philosophy as providing the guiding principles to reform the state to actually achieve its forthcoming rational form. Left Hegelians tend to reject this compatibility between dialectical reason, history, religion, and political institutions, even though they accepted different facets of Hegel's philosophy (mainly, reason's dialectic or its triadic scheme).

From 1816 until his dead, Hegel's philosophy was considered by some part of the status quo as an instrument capable of pacifying the revolting spirits of students. This is due to its being based on the idea of reconciliation of opposites. Nevertheless, orthodox religious and political conservatives felt suspicious. Hegelian philosophy looked ambiguous, and they saw in this ambiguity a threat to religious orthodoxy and to the ruling political order (Stepelevich 2010, 238–239). Being a Hegelian and having broken with religious orthodoxy (due to the publication of his *The Life of Jesus*), Strauss' philosophy was seen as a confirmation of these fears regarding Hegelianism (Stepelevich 2010, 244). Strauss rejects God's incarnation in Jesus and rejects miracles being supernatural events. Besides, after 1830 July Revolution, Prussian State felt less inclined to tolerate potential disrupting factors and, thus, suppresses any official support to Hegelianism (Stepelevich 2010, 243). Later, Schelling's philosophy will be propelled as an intent to finally suppress any remaining Hegelianism.

Ludwig Andreas Feuerbach (1804–1872) was also a Left Hegelian. To some extent, he is an adversary to Hegel's philosophy (similarly to the

case of Søren Aabye Kierkegaard; see Houlgate 2006, 55, 88–9). In analogy to Strauss, Feuerbach opposes to the religious doctrine of the immortal personality of the soul. This religious matter is, in this political context, a delicate subject: Prussian monarchy sees an equivalence between God's transcendent personality, the soul's immortal personality, and the personality of the sovereign expressed in the monarch (in accordance with Carl Ludwig von Haller) (Roberts 2010, 18–21). To dispute the religious doctrine of the personality of the soul means disputing one of the pillars of Prussian State. In effect, Feuerbach's work was taken away from the public by means of censorship and he was dismissed from his teaching position (Stepelevich 2010, 242).

Bruno Bauer (1809–1882) was a direct disciple of Hegel. Old Hegelians thought of Bauer as a possible paladin of Hegelianism, intended to restore Hegel's prestige (suspected after his dead to be heretic and founder of a revolutionary philosophy). In his intend to reconcile Hegelianism and religious orthodoxy, he tried to prove the logical necessity of the Virgin Birth (Stepelevich 2010, 246). However, his intent was strongly criticized. Bauer abandons it and adopts a radically critical point of view toward religion. During the 1830s decade, he passes from being a Right Hegelian into becoming the leader of the Left Hegelians (Stepelevich 2010, 247). According to Bauer, religious orthodoxy and the political order based on religion (i.e., the political order of Restauration) are oppressive and opposed to human freedom. However, Bauer is not a revolutionary; his revolution is theoretical. Theory is supposed to produce revolution. This, of course, will be a point of rupture with his former friend, Karl Marx.

Karl Marx (1818–1883) adopts a more radical approach than his former teacher and friend, Bruno Bauer. According to Marx, the political order may only be modified by the use of force; theory has revolutionary potential only if it influences the masses (Stepelevich 2010, 249). He is founder of dialectical materialism. Dialectical materialism states that the course of history is not based on an ideal or spiritual dialectic, but on the development of the means of production. The progress in this development produces changes in social and political order. Each significant progress is both the cause of the forthcoming fall of the actual political order and the germen of the emergence of a new one. Thus, Marx turns Hegelian dialectic – based on the idea and the spirit – into a dialectic based on economy and society's productive capacity.

As we see, Hegel's philosophy – specially, his political works – tolerates a wide scope of interpretations (even opposite approaches). Among other prominent successors of Hegel's thought: Wilhelm Windelband, Theodor Adorno, Max Horkheimer, Georg Lukács, Axel Honneth, and Jürgen Habermas.

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- ▶ Horkheimer, Max
- ▶ Kant, Immanuel
- ▶ Marx, Karl

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Hegel, Georg Wilhelm Friedrich: On Justice

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Introduction

Justice is a central element of Hegel's philosophy, although he does not conceptualize it in conventional terms, e.g., as a question of equal opportunities or fair distribution of goods, rights, and duties. Generally speaking, there are three dimensions of justice, which, although categorically differentiated from one another, have to be systematically considered together: an epistemological, an historical, and a political dimension.

1. The epistemological dimension, developed by Hegel in his *Science of Logic*, deals with the

capacity of a concept "to do justice" (Hegel 1830, § 573, trans. amended) to its own content. Since for Hegel (unlike Kant) reality is always normatively structured and conceptual in itself, justice, understood in those epistemological terms, can be described as the adequacy of the concept to its own reality: the concept *is* real as the normative context within which its actuality can be properly understood and grasped. For only in this manner can the *answerability* of thought to reality, emphasized by John McDowell, become consistently united with the conditions of its conceptual comprehensibility (see Wirsing 2021).

2. The second dimension of justice is captured in the philosophy of history, where Hegel describes justice as the necessity of what is good and just asserting itself within history (see Nuzzo 2012).
3. The political dimension is dedicated to the philosophy of right, where the "ethical state" is a realization of one's individual freedom, which goes hand in hand with certain standards of justice. For Hegel, a genuine state and the constitution have their deeper foundation in "universal and true principles of eternal justice" (Hegel 1830, § 552, trans. amended). The constitution, Hegel claims, "is the existing justice as the reality of freedom in the development of all its rational determinations" (Hegel 1830, § 539, trans. amended).

All three dimensions of justice have given rise to unfair criticisms of Hegel's philosophy: he has been accused of understanding social reality to be logically predetermined, historically rational, and, as a result, politically anti-democratic, because it subordinates the individual freedom to the authority of a totalitarian state, presumed to be fundamentally rational (see Popper 1945). If one were to take these accusations seriously, not much would be left of Hegel's theory of justice. As a consequence, universal norms of justice would always be logically presupposed, always implicit in the actual world, merely waiting to be *discovered*; they would not be seen as *developing* within history where actual things have to unfold in order to become rational.

Hegel does not claim that every extant state constitution is *actually* rational and just, but only that what is *supposed to be* rational and just *must* prevail in a concrete historical form. Hegel's famous dictum "what is actual is rational" (Hegel 1820, p. 20), therefore, claims that all reality is capable of being expressed in rational categories provided by the *Science of Logic*. Our general norms of justice must be realized in concrete terms and become thereby the concept of positive law. Accordingly, a law is only just if it does not contradict the principle of freedom. The law receives its actual legal force only in the political reality of the positive law; but it gains its legitimacy only through the law of reason.

Hegel's idea of justice articulates a general claim to validity, but this claim is not expressed in eternal norms to be subsequently applied by external reason to the actual legal norms in order to decide between just and unjust law. Rather, these norms themselves have to prove their legitimacy within concrete democratic processes and are therefore always grounded in the contexts of empirical reality. It is this factual component of reality that determines how we use the claims to justice generated by reason in a meaningful way. Hegel, thus, gives the phrase "normative force of the factual" (Jellinek 1900) a peculiar twist and a genuine justification: normative reasons must always be understood in their interaction with the external aspect of their social validity (or "facticity",[1] as Habermas would call it), which also depends on the current normative horizon of a historical time. In other words, some normative reasons may be *valid* as good reasons within a certain historical context without being *justified* as good reasons from the perspective of reason in general.

[1] Habermas' *Facts and Norms* is not an exact traslation of *Faktizität und Geltung*. The German "Faktizität" does not just refer to a fact but the *force of a fact*, i.e., a power in virtue of which the fact functions as a fact. "Faktizität" is meant to emphasize the dynamic quality of being a fact. Facticity (of law) entails both – the facts and their normative force – insofar as the empirical reality of social life entails normative considerations of a community acknowledging the law's validity [*Geltung*].

Freedom of Choice vs. Realized Freedom: Elements of Communitarian Justice

Hegel's legal philosophy can be read as a theory of justice (see Honneth (2010), Vieweg (2012), and Walzer (1983)). Justice, however, is not a question of morality; it cannot be reduced to a formal moral principle (see Wood (2005)). Rather, Hegel shifts the question away from morality to the concept of "ethical life" or "ethical order" [*Sittlichkeit*] within the state, which Hegel says is "the *Idea of freedom* [. . .] *which has become the existing world and the nature of self-consciousness*" (Hegel 1820, §142).

This is where Hegel's conception of recognition comes into place. Recognition describes the special interaction between two instances of self-consciousness (whether a person or an embodied institution, such as a court), which is fundamentally mutually conditioned: They recognize each other as mutually recognizing (see Hegel 1806, p. 113). In recognition, two individuals come together to partially negate their own independence for the sake of the other, i.e., to restrict themselves in such a way that the other can exercise their own freedom within the boundaries thereby opened up. Social justice, then, is constrained by the fact that all parties involved can only realize their freedom through interactions situated within the realm of the freedom of others. Therefore, as Axel Honneth points out, justice is defined by a reasonable arrangement of mutual obligations and not by a well-apportioned distribution of goods (see Honneth (2014)). Hegel, like many of the exponents of communitarianism, opposes liberal theories of justice that are primarily interested in the protection of human being's negative freedom. For Hegel, this does not constitute a real form of freedom at all.

Hegel distinguishes between freedom of choice [*Willkürfreiheit*] and realized freedom [*verwirklichte Freiheit*]. Freedom of choice describes a deficient form of freedom, in which a self-determined will decides which of the inclinations and impulses present to a person should be preferred and acted upon. The act of making a decision relates exclusively to the actual individual needs and impulses, regardless of the wishes and interests of others. The problem with this form of freedom, however, is that an individual is no longer able to recognize herself as being free the moment she encounters some external agency which imposes a restriction upon of her isolated individual freedom. For example, many people may understand the payment of taxes, legal punishment, or the obligation to wear a mask in times of a pandemic as a violation of their individual privileges. On this conception of free choice, the subject's desire always dictates the *content* of the choice, because (on this view) individuals are only able to focus on objects that are compatible with their own interests and free development. Hegel describes this as the "*principle of particularity*" (Hegel 1820, § 186, see also § 182) in civil society. Because individuals can only achieve their purposes to the extent that they can negotiate them in the interactions with other individuals, there must be a second principle that applies in civil society – the *principle of universality*. "Universality" describes the condition in which the bare self-interest (individualism) becomes the principle for everyone in civil society. Civil society is the social and legal space that seeks to regulate the social transactions in such a way as to accomplish a largely frictionless coordinated satisfaction of everyone's needs. In this way, individuality becomes a unifying principle of civil society: everyone agrees that they want to develop freely, while being mutually dependent on each other.

Hegel's understanding of the "ethical state" [*sittliche Staat*] entails much more than his description of this second principle of "civil society." Realized freedom only exists where both principles mentioned above are *mediated*. It is only in this mediation that the transition from *bourgeois* to *citoyen* takes place. The state is a community in which citizens no longer relate to one another as *individual* citizens with special interests (as in civil society), but one in which they belong together as part of a whole constituting a kind of higher self. The state thrives on the

trust of its citizens earned by its presumptive capacity to secure their interests. The state guarantees the liberal rights of its citizens who, in turn, identify themselves with the political community through the institutionally secured processes of education, which enable these citizens to look beyond their own private interests and to recognize themselves as part of a political whole (see Hegel 1820, § 253). This political unity, then, is premised on each citizen's recognition that her actual freedom is realized in the objective law and institutions provided by the state.

An individual who exercises her freedom of choice in a critical, reflexive fashion becomes aware of the fact that she is only really free when she concurrently takes into account the freedom of others – and where she does not only consider this freedom of others because it serves *her own* interests, but because she recognizes the wishes and interests *of others* as legitimate in their own right. Simultaneously, Hegel also holds the state responsible and accountable: fully realized freedom is only possible in a just society that renders accessible essential objects of will and desire (e.g., housing, education, employment, property, medical care) that can rightly count as objectifications of one's own freedom. This is what Hegel means by saying (following Plato) that the "*objective* form of justice" can only be represented in the "construction of the *state* as ethical life" (Hegel 1830, § 474, trans. amended).

Just Society and (In)Equality: Elements of Liberal Justice

For Hegel, a just society does not call for the equality of all its members. Although everybody is equal qua a legal person, there remains a necessary inequality with respect to private property (see Hegel 1820, § 49). Hegel thus turns away from the idea of distributive or material equality as a necessary condition of a just society: "In this context, it is false to maintain that justice requires everyone's property to be equal; for it requires only that everyone should have property" (Hegel 1820, § 49, addendum). However, at the same time, the principle of civil society – namely, "that all human beings should have their livelihood [*Auskommen*] to meet their needs" (Hegel 1820, § 49) – remains a moral requirement of justice. Liberal rights are a necessary precondition for personal freedom (according to Hegel, there is no free will without property); however, freedom is not reducible to liberal rights. In this respect, Hegel comes very close to liberal theories of justice: he adheres to the claims of individual basic rights, but, unlike liberalism, does not see the state as an evil that has to be minimized.

Justice is an important feature of the state that goes hand in hand with mutual obligations and rights. Apparently, in this regard Hegel was influenced by Johann Benjamin Erhard's essay "The Idea of Justice as a Principle of Legislation" [*Die Idee der Gerechtigkeit als Princip einer Gesetzgebung betrachtet*] (1795) published in F. Schiller's journal *Die Horen* (see Vieweg (2020), p. 138). According to Hegel, every human being has not only a fundamental right to freedom but also a moral duty to charity. Where this freedom is endangered by disproportionate inequality of property, a restriction of property and individual arbitrariness by the state is required. To the extent that the state fails to fulfill this function, the right to self-defense (emergency law) aimed at the abolition of injustice [*Unrecht*] comes into play. Thus, Hegel's legal philosophy contains the fundamental pillars for the architecture of a modern welfare state under the rule of law, wherein legislation is based on the idea of democratic republicanism striving for social justice and freedom of all citizens.

Social Justice and Regulation

Hegel understood very well that markets and liberal rights are ambivalent in capitalist societies and, therefore, require the state's regulation (see Schmidt am Busch (2016, 2018)). On the one hand, the market-regulating state has to secure and guarantee the mechanisms of the market through measures such as consumer protection

and fostering the security of competition. On the other hand, it has to control the "*excess of wealth*" (Hegel 1820, § 245) and the "excess of poverty and the formation of a rabble" (Hegel 1820, § 245). The "livelihood and welfare of each individual" (Hegel 1820, § 230), then, becomes one of the appointed regulatory duties of the 'Police and Corporations.'[2]

The regulation has to be global and relates to transnational economic activity (see Bung (2021), p. 97): e.g., Hegel mentions the trade wars, for which the *internal* control mechanisms of civil society are no longer sufficient. From the contemporary perspective, this would apply to industry, market, and banking regulation, as well as antitrust agencies, which have to oversee the mergers of large companies in order to prevent the formation of monopolies, which otherwise results in the undermining of market competition by the unregulated market (see Vieweg (2012), p. 315). For Hegel, regulation is an important element of social justice, which cannot be simply made dependent on "*subjective* help" (Hegel 1820, § 242), i.e., voluntary initiative, but can only be realized in the form of objective right. Accordingly, only social policy measures can be sufficiently effective in the fight against poverty. Furthermore, the opportunity to participate in basic property relationships must be guaranteed for all individuals; every exclusion of a person from the membership of a civil society constitutes a violation of the law (see Hegel 1820, § 238).

According to Hegel, the "substantial principles of justice" (Hegel 1820, §317) also include respect for public opinion, as long as it is not a *mere* opinion. Public opinion is not to be trusted, however, when it expresses "all the contingencies of opinion, with its ignorance and perverseness, its false information and its errors of judgment" (Hegel 1820, § 317). In the latter case, the regulatory authority of the state is called for as well.

Retributive Elements of Justice: Punitive Justice

The chapter on "Wrong" [*Unrecht*] is the key part of Hegel's theory of punishment and serves as a conceptual transition to the notion of justice. Crime and punishment are not two evils opposing each other, but rather two constitutive elements of one necessary conceptual connection. The punishment is the neutralization of an injustice, i.e., the "restoration of right" (Hegel 1820, § 99). This means that the "first compulsion" of the crime must be annulled by a "second compulsion" in the form of a punishment (see Hegel 1820, § 93 and § 95). The conflict must be deprivatized (distinguishing it from mere revenge) and dealt with in a neutral fashion. A person driven by revenge only uses the law as something "private," insisting on *her own* right and pursuing *her own* interests. Justice, therefore, must be understood, not as subjective retaliation but from the objective standpoint recognizing the criminal as a legal person. By being punished, the criminal not only receives justice, but the "*right for the criminal himself*, that is, a right *posited* in his *existent* will [...] as that of a *rational* being" (Hegel 1820, § 100). According to this understanding of freedom, an individual (criminal or accuser) does not settle for what she *thinks* is good, but for the general principles of justice of what *is* objectively good.

Hegel advocates a *retributive* theory of justice that does not spring from the victim's need for revenge, but rather from the need to restore the balance of justice. The law must be restored. Without this conceptual framework, punishment can have a *preventive* effect but fails to display the appreciative and liberal character. Prevention theories of justice focus on correction and penalization, directed as a deterrent against the agent's will. Meanwhile, Hegel, instead of simply sanctioning state violence as an external mean to an end, aims for a *justification* of the enforcement of punitive justice that is

[2] "Corporations" is Hegel's term for state agencies designed to regulate the excesses of the market system, whereas police has been commonly understood in Hegel's time to mean something like an orderly administration, a regulator.

compatible with the recognition of a person's own will.

Conclusion

As we have seen, Hegel's philosophy of justice comprises both liberal and communitarian elements. The concept of justice touches upon the relationship between individual autonomy and the social whole as well as the conditions for their interaction. With respect to the perennial debate between liberalism and communitarianism, as Michael Quante has shown, Hegel's position enables us to move beyond the conventional opposition. Thus, Quante provided a clear and workable distinction between "individualism" and "holism" in social philosophy (Quante 2011, p. 257ff.), showing how Hegel is able to overcome the one-sidedness of this contrast. Hegel's complex and comprehensive concept of will, as a principle of the social whole comprising individual elements, entails "a vertical holism combined with a liberal communitarianism" (Quante 2011, p. 264). The combination allows him to account for individual autonomy while simultaneously grasping its dependence on the social institutions within which it has historically been realized as actual freedom. In addition, Hegel also advocates a retributive theory of justice that sets itself apart from prevention theories and aims instead at a justification of justice in criminal theory.

Hegel's theory of justice goes hand in hand with his idea of recognition. Recognition is an ethical-political term that is suitable for understanding structures relevant to justice in free-democratic societies and for normatively evaluating them. The concept of recognition provides information about normative requirements in dealing with other people. It also shows how political and legal institutions must be structured in order to meet these requirements and what measures may be inappropriate (see Correll (2016), p. 14). The "standards of justice" (Correll 2016, p. 14) related to recognition aim simultaneously at securing the autonomy of the individual (positive freedom), freedom from arbitrary interference by the state or private individuals (negative freedom), equality before the law (legal freedom), and an ethical form of life (*Sittlichkeit*).

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▶ Equality and Global Justice

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Held, Virginia

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Introduction

Virginia Held (b. 1929–) is a feminist moral, social, and political philosopher. She is best known for her work in the ethics of care. Evolving over the past three decades in response to the exclusion and undervaluing of women's moral experiences by the mainstream philosophical tradition, the ethics of care sets out an alternative and distinctively feminist moral perspective. Held develops the ethics of care as an important counterbalance to the methodology and conception of the person at work in much moral, political, and legal theory.

Held's work in the ethics of care builds on the work of developmental psychologist Carol Gilligan, who initially inspired the development of care ethics as a distinct moral theory (Gilligan 1993; Kittay and Meyers 1987). Care ethics provides an alternative framework for understanding moral life that is both diverse in its various instantiations and yet unified in its commitment to examining the values, dispositions, and practices that have been historically understood as both feminine and outside of the scope of moral theory. Held defends care ethics as a distinct normative philosophy in contrast to virtue ethics, Kantian deontology, and utilitarianism. Whereas traditional moral theory (i.e., what she and other care ethicists call the justice perspective) focuses on the evaluation of individuals, acts, and states of affairs as well as the formulation of universal moral principles, care ethics focuses on "attentiveness, trust, responsiveness to need, narrative nuance, and cultivating caring relations"(Held 2007, p. 15). Held further differentiates the justice and care perspectives by comparing their respective concerns and domains. The justice perspective, for Held, seeks to protect equality and freedom by fairly adjudicating the competing claims and rights of individuals. As such, Held considers justice-based approaches to moral theory as appropriate for the legal sphere. By comparison, the ethics of care seeks to attend to and preserve moral relations by emphasizing the particular circumstances of individuals in the context of their caring relationships.

In her most systematic account of care ethics, *The Ethics of Care: Personal, Political, and Global*, Held offers a detailed account of the development and applications of care ethics. She sets out five central features of the ethics of care that distinguish care ethics as a distinct normative perspective. The first central feature of care ethics focuses on the moral saliency of caring relations. In doing so, the ethics of care highlights the importance of attending to and meeting the needs of others as a moral practice that is central to moral life. With this focus care ethics both draws attention to the ubiquity of the human need for care and emphasizes how women have historically shouldered the burden of most caring responsibilities. A second central feature of care ethics that Held highlights is its attention to the relevance of emotions in moral decision-making. While other ethical theories, such as Kantian deontology, have rejected the role of the emotions in providing moral insight, Held stresses the role of certain emotions like sympathy, empathy, and compassion as being important for understanding and motivating moral action. A third central feature of the ethics of care is its skeptical stance towards impartial, abstract, and universal moral principles. For Held, a distinguishing feature of care ethics is that it rejects the "views of the dominant moral theories that the more abstract the reasoning about a moral problem is the better

because the more likely to avoid bias and arbitrariness, the more nearly to a science and impartiality" (Held 2007, p. 11). Instead Held argues that moral deliberation is best when it attends to the concrete circumstances of particular individuals in the context of their actual relationships with other individuals. Because of this particularist orientation, care ethics stands in stark contrast, for Held, to the justice-based perspective indicative of many traditional moral theories and legal reasoning more broadly. The fourth central feature of care ethics, Held explains, is its thoroughgoing challenging of the distinction between private and public life and the way these domains are treated by ethical and political theories. Because of its focus on caring relationships, which often exist in the home and between individuals in asymmetrical power relationships (e.g., parents and children, but more generally care-givers and those for whom they care), care ethics undermines the assumption that the private realm is beyond the domain of philosophical analysis. The fifth and final feature of the ethics of care, which Held examines, is its conception of the moral subject. Care ethics outlines an alternative conception of the self as it exists within moral relations, makes moral judgments, and acts. Because it begins with the observation that individuals participate in caring relationships on a daily basis, care ethics puts forward an account of moral subjects as being fundamentally relational and interdependent. Held differentiates this understanding of moral subjects from those put forward by dominant ethical theories (e.g., Kantianism, utilitarianism), which forward a view individuals as primarily independent and autonomous.

Care ethics' emphasis on the moral saliency of caring relationships, Held suggests, offers an important counterbalance to justice-based moral theories and their emphasis on legal rights. She claims that "the value placed by the ethics of care on attending to particular persons and actual contexts in all their diversity, rather than positing abstract rational beings in an ideal or hypothetical realm, casts further doubt on the worth of moralities of justice and rights"(Held 2007, p. 140). While she recognizes the important role that arguments concerning the legal rights of women have played in feminist movements, Held suggests that the ethics of care offers an alternative and more complete lens through which to consider the moral complexities of human experience by highlighting those relationships that have historically been overlooked by philosophers because they are considered private (i.e., familial relationships, relationships between dependency workers and those for whom they care, etc.) (Held 1989). Most importantly, for Held, the ethics of care seeks to limit the scope of legalistic reasoning in moral reflection. The ethics of care is "not directed at overthrowing rights in the domain of law but at keeping legal thinking where it belongs: in the domain of the law. It opposes the view that imagines law and legal ways of thinking to be suitable for all moral problems" (Held 2007, p. 141). In addition to her aim to circumscribe the domain in which legal reasoning ought to operate, Held examines how care ethics can be aptly applied to legal reasoning concerning issues such as legal equality, affirmative action, childcare provisions, and maternity/paternity leave. Held suggests that issues like child custody and domestic abuse are also possible areas in which the law could also be usefully informed by the contextual approach of care ethics. Additionally, Held demonstrates how care ethics offers an alternative lens through which to consider issues in international relations and law, especially concerning the avoidance of violent conflict and war (Held 2011).

Conclusion

For Held, care ethics offers an important counterbalance to the conception of the person that is found in mainstream moral theories, liberal political theory, and the law. From the perspective of the ethics of care, this common understanding of persons is "an artificial and misleading abstraction"(Held 2007, p. 145). Held suggests that care ethics' attention to the ways in which individuals are shaped by their relationships with others and dependent upon others for care offers a richer and more complete conception of the human person. And while she realizes the practical usefulness of conceiving of the legal subject as

independent and autonomous, especially concerning the adjudication of legal rights and obligations, Held is wary of extending this understanding of persons beyond the legal realm.

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Heller, Hermann

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Introduction

Hermann Heller (1891–1933) was a distinguished public lawyer and state theorist during Weimar age. Unfortunately, his work was overshadowed by the two "giants" of that age – Hans Kelsen and Carl Schmitt – and also because he did not live long: the Nazi rise to power in 1933 forced him to flee, as a result of his socialist faith together with his Jewish origins, to Madrid, where he died in the same year.

Yet, by no means, we have to do with a sort of "supporting actor." Heller accepted the challenge of rethinking the theory of state and public law, owing to the crisis of liberal state and the rise of mass democracy; what is more, the way Heller attempted to win that challenge is far more complex than Schmitt's or Kelsen's: by keeping a balance among law, politics, and morality and by enlarging the social and political legitimacy of state, what will bring from the "old" concept of *Rechtsstaat* ("state based on the rule of law") to the "new" concept of *sozialer Rechtsstaat* (roughly, "welfare state based on the rule of law").

Updating the Theory of State

According to Heller, theory of state after the World War I was not in good conditions to face the problems posed by mass democracies like Weimar's. This inadequacy was both substantive and methodological.

From a substantive point of view, Heller's starting point – and not only for him – was the so-called *Zwei-Seiten-Lehre* ("two-sided doctrine") by Georg Jellinek, which at the time summarized all the problems under scrutiny of state theorists (Heller 1926, 12). On one side there was the "juristic concept of state," which was getting more and more a "state in books" with a too little resemblance with "state in action"; on the other side, there was the "social concept of state," and it was not clear how it can get the juristic unity of state, especially during Weimar Republic: the social and political landscape was getting so diverse and conflictual to make law a mere device manipulated by political power.

Hence the question outspokenly raised by Heller was: "How to grasp the state as unity in the plurality, without regarding it as something independent and detached from individuals who produce it, and without explaining it as a mere fiction? In other words: how to understand the state as expression of plurality and, yet, as acting as if one?" (Heller 1934, 340).

That problem, in Heller's opinion, would have had no solution if legal scholars had still embraced the "old" concept of "juristic person of state" (Heller 1929, 268–273). Behind this "person" there were now associations, political parties, trade unions, and interest groups, and all of them were bringing a strong pressure on institutions. Accordingly, not only the twenty-first-century idea of state as detached from society was almost a fiction, but it was also crucial to understand if and how all these elements could build a state. Therefore, Heller suggested to enlarge the scope of theory of state, including not only law but society, politics, and economics

as well (Heller 1934, 122–161), and even legal theory could no longer focus only on the concept of legal validity, but it had to take into account the socio-legal dimension, as well as that of justice, which was quite neglected in the 1920s and 1930s legal debate, which are years, as known, of moral "polytheism." Indeed, Heller had a substantial, not formal, conception of the unity of state, and, unsurprisingly, he did not share the Schmittian notion of representation (Heller 1927) – the idea that the unity of state exists only through its "staging" offered by sovereign (Schmitt 1928, 239–252). Rather, without social homogeneity, without a "*Wir-Bewußtsein*" ("we-consciousness") (Heller 1928b, 428) – what cannot be confused with empty and pointless concepts such as "people" or "nation," due to the "the necessarily antagonistic social structure" (Heller 1928b, 428) – a state has no chance to last.

Now, how to achieve the unity of state? What makes it possible that all the relevant features of social reality join together? At first Heller was influenced by Schmitt and pointed to his well-known decisionism as a primary way to gain unity, which could not be taken for granted as in the nineteenth century: a decision seemed to be now necessary to integrate the masses into state.

But it was decisionism partly other than Schmitt's. First, Heller understands it not in favor of executive branch – i.e., the president of Reich, seen by Schmitt as the "guardian of constitution" – but in favor of parliament, which was mirroring the pluralism of German society of the time (Heller 1928a). In addition, among the two most relevant philosophers of modern sovereignty – Bodin and Hobbes – Heller clearly prefers the former, recalling his dialectic between *ius* and *lex* and, accordingly, criticizing the Schmittian use of "state-of-exception" notion (Heller 1927, 34–38 and 88–92). So, no wonder Heller ends up admitting later the relevance of normativism, albeit far "thicker" than Kelsen's: norms are not just "a scheme of interpretation" of an act or an event (Kelsen 1934, 10) but embody "the ethical principles of law" (Heller 1934, 332): they transcend both state and positive law, and, without them, a state is able to ensure legal order but has no legitimacy (Heller 1934, 325–339).

The result is that every "part" – individuals, social groups, institutions, law, economics, morality, power, and so on – is essential to build unity of state, but none of them can be regarded as the basic frame. That unity does not spring from a *prius*, for example, a "political" constituent decision or a "legal" basic norm, but it is dynamic – it depends on mutual interaction of every part, and what makes it possible, in Heller's thought, is the "organization" (Heller 1934, 341–349). Indeed, the "organization" is immanent in character, which gives it a Hegelian flavor, and Heller himself states that "today the most important spurs to the theory of state come from Hegel and his method" (Heller 1934, 124): it is able, at the same time, to trigger the "pro-state" disposition of every part and to show consideration for its uniqueness. No part can be taken for the whole – even "the ruler has power *in* the state, but he never possesses the power *of* the state" (Heller 1934, 351) – but the whole does not stand for the parts: essentially through cooperation and only exceptionally through coercion, a state is able to gain a dense and stable unity.

Heller and the So-Called Methodenstreit

Of course, a conception of law and state like that requires an appropriate methodology.

Since the concept of juristic person was not able to encompass what the state stands for, no doubt that the legal positivism method was perceived by Heller as completely out of date. That method was now labelled, in a derogatory fashion, as "*Begriffsjurisprudenz*": totally divorced from reality and strictly limited to law and if not, in the worst case, to legal texts analysis.

But Heller was fiercely opposed to the new legal positivism as well, epitomized by Hans Kelsen. Kelsen represented, in his view, the legitimate heir of the nineteenth-century theory of state with all its shortcomings (Heller 1926, 15–24): the separation between "is" and "ought," namely, between law and facts, in the name of an alleged

"purity" or *Wertlosigkeit* of science; theory of state conceivable only in terms of normative legal science (and – what was worse – removing the "state/law" dualism, by turning the former into a normative system); and the formalistic traits of legal concepts, seen as "blown glass balls" (Heller 1926, 16). The end of liberal state urged, instead, a perspective open to the real world. A mass democracy could not be conceptually grasped only from the point of view of "ought" (even legal): theory of state had now to merge "is" and "ought," even if this meant doing without the ideal of detached observer in respect with the observed object.

So, a convincing alternative, in Heller's view, was the *geisteswissenschaftliche* approach – fairly common during Weimar years. It had, in Heller's words, the virtue of thinking "its 'sense-patterns' (Germ. *Sinngebilde*) immanently" and of "letting them 'be equated' to self-supporting forms" (Heller 1934, 141) – an approach able to unveil the sense of social phenomena, otherwise unintelligible, owing to the rigid divide between causality and normativity. Theory of state, though, could not be only *geisteswissenschaftlich*, according to Heller: this method possesses an intrinsic "idealistic" bias that brings to qualify "the state as spirit, idea, ideology, 'sense-pattern' (Germ. *Sinnbild*), normative system, abstraction, fiction, and something like that, depriving it, by all those names, of the predicate of reality" (Heller 1934, 131).

Thus, this approach had to be coupled with sociological research. In Heller's opinion, state is something "real" and not only an act of thinking or a set of norm: accordingly it is open to be empirically investigated, in order to shed light on its causal origins (Heller 1926, 26–30; 1934, 130–142). But, again, it could not be the single method, essentially, because it is at risk of misuse: a purely causal approach could leave open an instrumental view of state, as serving one class in society or simply as a causal output of social bargaining, in both cases not as expression of public interest; moreover, the state could be regarded as rooted in "nature" and at the time who thought that the state was founded upon something "natural" like, for example, "blood and soil" was by no means in the minority (Heller 1929, 259–262; 1934, 129–130).

It is plainly "naive," Heller remarks (1934, 142), to see the state as something static and unchanging: on the contrary, it is a historical fabric and should be studied historically as well. But, again, the theory of state "is structural, not historical science" (Heller 1934, 142), since "a basic human structure underlying all transformation must be certainly assumed, despite every historicization" (Heller 1934, 143) and what theory of state has to do is to hold theory and history together – "to conceive the state as structure in becoming" (Heller 1934, 146).

In truth, it is Heller himself who explicitly rebuts "the imperialism of a single method" and declares his option in favor of "methodological syncretism" (Heller 1929, 278). Theorizing about state means to get "unity in the plurality," i.e., to reflect the pluralism of the social and political life of modern democracy and to convey this life to unity of state, but, at once, not to sacrifice the former to the latter.

Conclusion

As Carl Schmitt stated, Hermann Heller was "damals, der beste Kopf in Deutschland" (quoted in Pasquino 1983, 128) ("at that time, the best mind in Germany"). Indeed, who aims to flesh out the political and legal debate during Weimar cannot but deal with Heller. His work – for the density of content together with methodological pluralism – is worthy in itself and represents an excellent standpoint to shed light on other philosophers who took part to that debate, mainly Carl Schmitt and Hans Kelsen but also Rudolf Smend and Erich Kaufmann (Dyzenhaus 1997; Pomarici 1989).

This is a strength of Heller's thought but at once his flaw. Significantly, his masterpiece – *Staatslehre* – was left unfinished, and probably it could not be finished. His aim was to restrict what a modern mass democracy means within a strong idea of state, by imaging an immanence to unity that was far from being real: the effort of keeping together what was shattering in pieces. First the Weimar experiences, then the post-World War II have abundantly proved how the age of this conception of state is over: contemporary

democracies are too plural and conflictual to let room for a so strong monism like that sought by *Staatslehre*.

This suggests a reason why theories certainly unacceptable from Heller's point of view have been successful in constitutional theory and practice: the theory (significantly, not of state, but) of constitution by Carl Schmitt, which gains a quite formal unity through an authoritarian and divisive decision and, what is more, legitimate qua effective, but not qua just (Schmitt 1928, 1934), and the theory of democracy by Hans Kelsen, based upon a strong value relativism and, therefore, wholly procedural, where almost everything is open to discussion for the sake of social peace (Kelsen 1929).

Yet, there are some issues that those theories almost ignore and Heller takes into account, making his thought still valuable today.

One is the problem of justice. In Weimar, Heller was one of the few to underscore that a democracy is a matter not only of decisions and procedures but also of substantial values. A decision may be the easiest way to suppress a conflict; procedures may help getting a shared solution, but without "the ethical principles of law," without social homogeneity, a democracy is not able to survive in the long run, and law has not even an appearance of neutrality.

To be sure, Heller puts the legislative branch at the center of stage, and, consequently, he made no mention of a possible judicial use of "the ethical principles of law" – especially with respect to constitutional justice – but by bringing into question the separation between law and morality, he can be rightly deemed one of the "fathers" of postwar constitutionalism, which calls for a paradigm shift in constitutional theory due to the recurrent reference to justice in contemporary constitutional texts. From this perspective Heller could even be a good remedy for an uncritical acceptance of that shift, when he reminds us that "moralization and amoralization of law misunderstand the mutual dependence of law creation on power and power creation on law; they both pursue an unachievable and unlikely harmonization of justice and law, of legitimacy and legality, of normativity and positivity" (Heller 1934, 303).

But it is the so-called *sozialer Rechtsstaat* ("welfare state based on the rule of law") the principle to which Heller probably owes his success among scholars (Schluchter 1983; Müller and Staff 1984) – a principle quite disregarded both by Schmitt and Kelsen.

To tell the truth, in Heller, the *sozialer Rechtsstaat* principle is more political than juristic: he does not draw specific consequences on legal domain, and although Weimar Constitution was one of the first charters in Europe declaring social and economic rights, he gives them little attention (Heller 1924). But, as shown before, the entire *Staatslehre* aimed at demonstrating that state has – and must have – a foundation other and larger than in liberal age: for that reason, social justice cannot be deemed neither as a deviation from a state viewed as detached from society nor as one of the many policy options in democratic arena, to be balanced with other issues at stake, but comes to be an essential feature of the concept of contemporary state. In short, the state conceptually cannot but be democratic and social at once – what was greatly influential on the German *Grundgesetz*, declaring in Art. 20 that "the Federal Republic of Germany is a democratic and social federal state."

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Helvétius, Claude-Adrien

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Introduction

Claude-Adrian Helvétius (Paris, 1715–Paris, 1771) was a materialist philosopher, whose version of republicanism is often regarded to have formed a major influence on the political theory standing behind the French Revolution (see Wooton 2000). His understanding of justice as what is useful for a political community takes up a central insight of the Epicurean tradition in early modern France (see Force 2009). It is an understanding of justice that was taken up by Jeremy Bentham, who described Helvétius as one of the decisive influences in the development of his utilitarianism (see Smith 1993; Pacaud 2011). This entry outlines three aspects of Helvétius's legal and social thought: (1) his affinity to the natural law tradition; (2) his account of the desire for esteem in social coordination; and (3) his view that what people esteem could be shaped through republican legislation.

Natural Law

The concept natural law is not explicitly mentioned in Helvétius's two main works, *De l'ésprit* (1757; Helvétius 2006) and *De l'homme* (1773; Helvétius 2011). However, in a postscript to *De l'esprit*, Helvétius describes the project of this work to be a version of natural law theory (Audidière 2016, p. 352; Thomson 2016, pp. 252–254). On natural rights of nations, Helvétius there remarks: "These rights oppose themselves to the despotism of a power that is entirely foreign to primordial convention and to the fundamental laws of the constitution of societies" (Helvétius 1795, 5:280; all following references to Helvétius will be to this edition). What he does reject is a metaphysical idea of natural law as something that is innate or derives from the divine will and intellect: "Experience only proves too much to which point artificial minds have deceived humans through the false interpretation of the abstract idea of natural law" (5:280–281). By contrast, Helvétius holds that reason is what makes it possible to apprehend natural law (5:281). As he also puts it, the task of reason is to recognize "the actual order of moral realities" (5:282). In addition, in his view, sensible interest is necessary for motivating us to act according to what reason demands:

> It is not only the light of reason, nor the inner sentiment of the law alone that guides humans in their deliberations. Inner sentiment makes them

> attentive; reason enlightens them; but in addition, it is necessary that sensations represent the objects that provide the motivations of physical goods or evils, of moral goods or evils, which determine the decisive acts of the will. (5:282)

The commitment to a nontheological version of natural law theory expressed in these passages raises the question of how, in Helvétius's view, positive law relates to natural law. Somewhat enigmatically, Helvétius distinguishes between "primary moral order" (*ordre moral primitif*) and "political moral order" (*ordre moral politique*) (5:282–283). Does this distinction coincide with the distinction between immutable fundamental laws grounded in human nature and different secondary conventions that vary and constitute a purely conventional dimension of justice? Against such a reading, it can be objected that Helvétius associates the "primary moral order" with the *theological* virtues of loving God and one's neighbors (5:283). He does not deny that such virtues could play a role in human life; however, he makes it clear that in *De l'esprit,* his sole interest is in the political moral order, whose object is "the general well-being of a society governed by a sovereign authority, according to the laws of nature and nations" (5:283). What could be made of this categorization?

In a polemical response to one of his critics, Helvétius describes the relation between the precepts, allegories, and advice in the gospel and the principles of natural law as follows: "Allegorical expressions that are open to different interpretations can have an influence on legislation only to the extent that they themselves are subject to the evident principles of natural law" (5:335). This implies that also acts of legislation can be an expression of the norms of natural law. Therefore, he holds that "[t]he doctors of natural law, protected and supported by almost all sovereigns of Europe, will regulate manners better than the dangerous instructions of this journalist" (5:336). As he explains, the task of the philosophers is to think about the morality relating to legislation; the task of the legislator is to find out what, under ever changing circumstances, is useful for a given community. "But the one and the other grounds the institution of public laws on human nature and on the law of laws (*loi des lois*); on the physical dynamics of human actions, and on justice that is co-essential for the general well-being of society" (5:338).

Certainly, the expression "law of laws" is puzzling; perhaps what Helvétius has in mind is something like a generative principle of laws – in which case considerations concerning the physical dynamic of human actions and the role of justice for the general well-being of society give substance to the idea of a such a generative principle. Such a reading is confirmed when Helvétius describes the relation between sensibility, conventions, and natural law as follows:

> If God must be regarded as the author of natural law, he is this only in so far as he is the author of physical sensibility, and as physical sensibility is the mother of human reason. This kind of sensibility, when humans unite in society, forces them . . . to make among themselves conventions and laws, the collection of which encompasses what one calls the law of nature. But has this law been the same with all different nations? No; its more or less great perfection was always proportional to the progress of the human mind, to the more or less extension of the knowledge that societies have acquired concerning what is useful or hurtful for them; and this knowledge was, in all nations, the product of time, experience and reason. (3:273–274, note 35)

Accordingly, there is an explanation for why Helvétius counts natural law as belonging to the "political moral order." For Helvétius, there is thus no distinction between conventions at an early stage of human development and conventions at a later stage. Rather, as long as conventions fulfil the criterion of utility for a community, all such conventions at the same time fulfil the demands of nature. In this sense, natural law, for Helvétius, is built into all legitimate conventions.

Esteem, Pleasure, and Power

Helvétius's social philosophy emphasizes the role that the desire for esteem plays in coordinating human action (see Toto 2017; Blank 2020). In this field, he integrates the striving for esteem into his analysis of the role of weighing expected pleasures and discomforts in motivating actions.

Helvétius is acutely aware that the striving pleasures can lead them to esteem things that are detrimental for the life of society. If people are bad in anticipating what will give them pleasures in the long run, then their practices of esteem tend to be immoral – as, in Helvétius's view, they often are. However, placing the striving for esteem into the context of weighing expected pleasures and discomforts leaves open the possibility that some people may be (sometimes) rational decision makers.

Helvétius claims that the only reason why individuals desire esteem is their expectation that being esteemed will lead to pleasurable experiences. As he observes, "the desire for esteem is common to all humans, not as if no-one would not want to join to the pleasure of being admired the merit of disdaining admiration; but this disdain is not true, and the admirer is never stupid in the eyes of the admired . . ." (1:195). More specifically, the passion for esteem is "an effect of physical sensibility," namely, of the desire for the benefits for our sensible life that being esteemed brings with it (2:112). In this way, Helvétius reduces the love of esteem to the love of the pleasures connected with esteem (2:115–116). This has the consequence that "our love of esteem is proportional to the advantages that it provides to us" (2:113).

In *De l'homme*, Helvétius develops these ideas further by including the concept of power: "The love of power is founded on the love of happiness, and it therefore is the common object of all our desires; also wealth, honor, fame . . . respect, justice, virtue . . . are in us nothing other than love for power disguised under different names" (3:337). As Helvétius argues, even the interest in the esteem of others is nothing but a disguise that the interest in power takes: "The one who spends the night under arms or in the office imagines loving esteem, but that's an error. Esteem is nothing but the name that one gives to the object of one's love, and the thing itself is power" (3:340–341). As he argues, this is so because power is desired as a source of pleasure: "Humans love themselves: all of them desire to be happy and believe that they were perfectly happy if they were in the possession of the degree of power necessary for procuring them all kinds of pleasure. The desire for power thus derives its source from the love of pleasure" (3:145). Aversion to contempt expresses the fear of a loss of pleasures (3:143, note (a)).

Helvétius is aware that the striving for pleasure often leads to distorted self-esteem. This distortion results from the fact that our ideas have the highest degree of conformity with our own ideas. The high opinion that we have of ourselves and the admiration that we show for ourselves is not so much the result of pride than of the "necessity in which we are to esteem ourselves in preference over others" (1:201). Moreover, since no two humans have exactly similar ideas, we think that we think better than anyone else (1:202). This does not exclude the insight that one is much inferior to others in highly specialized skills; still, one believes in one's own superiority over specialists by denying the importance of their skills and by elevating the importance of common sense and social versatility (1:204). Another aspect of irrational practices of esteem shows itself in systematically distorted low esteem for others. One example that Helvétius mentions is the contempt between members of different social classes (1:227). Another example is the contempt for other historical ages (1:324). Helvétius also is aware of the pervasive occurrence of unjustified national biases. One of his explanations for the occurrence of national biases invokes the sensible interest that we have in esteeming only ideas that are similar to our own ideas. As he argues, this psychological mechanism explains why one esteems or disesteems the ideas of other societies according to their correspondence with or divergence from one's own ideas (1:219). In his view, the resulting attitudes toward other nations are systematically flawed because it takes the superiority that one believes to be characteristic of one's own nation to be a gift of nature, while at best it is a result of political constitution (1:369)

Esteem and Distributive Justice

The widespread occurrence of distorted esteem and self-esteem leads Helvétius to the view that social esteem should be an object of legislation.

His emphasis on the connections between utility and natural law leads to a conception of esteem that is owed to all actions and ideas that are genuinely useful for a community – that is, including actions and ideas that relate to genuinely useful legislation. Helvétius holds that honors can create public esteem only if they reward actions that are useful for a nation; in this sense, widespread reputation (*considération générale*) is always an outcome of public recognition (*reconnaissance publique*) (4:47). For tasks of the same usefulness, Helvétius holds, esteem should be given proportional to their difficulty (2:272–273). He offers the following explanation for why the public gives more esteem to skills that are rare: "It is because the public confusedly senses that, in its hand, esteem is an imaginary treasure, which has real value only to the extent that it makes a wise and considered distribution of it . . ." (2:271). Helvétius maintains that the public owes praise to the probity of an individual, even when the usefulness for society is not obvious on first sight. As he argues, this is so for two reasons: (1) Even instances of probity that do not have any effects can serve as an example, which contains the seed of instances of probity that are useful in a more obvious way; (2) even instances of probity and even if this should not be the case, "it contributes to general harmony" – which itself is something useful (1:217–218, note).

Helvétius regards rewarding publicly useful actions through public esteem essentially as a matter of justice. Helvétius maintains that justice "consists in the exact observation of all conventions that common interest, that is, the assemblage of all particular interests, has prompted [nations] to establish" (2:36) – which is exactly what his conception of natural law as comprising all conventions that really serve natural human interests would lead one to expect. Since different legal frameworks fulfil this function in different circumstances, he believes that the best of learning something about justice is to study the history of nations and their laws (4:367). Justice with respect to honors exemplifies this conception of justice since "the wise administration of honors is the strongest bond that legislators can employ to unite particular interest with general interest" (2:199). This is so because honors can generate public esteem only when they are distributed according to standard of justice. The distribution of honors in despotic systems can make clear what goes wrong when such standards of justice are lacking: "if honors derive their price from the manner in which they are administrated, and if in the orient the sultans are their distributors, one senses that they must often discredit them by the bad choice of those whom decorate with them" (2:196). Justice therefore is constitutive of the value of honors: "if, in poor republics, where the nations as a political body is the distributor of graces, it is easy to raise the price of honors, nothing is more difficult to confer value upon them in a despotic country" (2:198).

As to justice with respect to honors, Helvétius is clear that – in spite of historical predecessors in the constitutions of the ancient republics – a legal framework still has to be created. Specifically, he advocates the creation of an institution that, like the ministry of finances, regulates matters of honor (2:198). Prudently, however, he does not engage in arm-chair institution-building but rather gives a rather abstract characterization of the function of such an institution – a function that could be realized in a variety of ways. As he notes, the members of such an institution need to have number of personal qualities, such as the resolution to give rewards to great talents and virtues, and to refuse them to mediocre persons who would discredit the honors – which takes discernment, commitment to serious discussion and strength of character to resist intrigues (2:198). They also need to have an acute sense for the precise moment where already existing honors have become too common to function as motivations for virtuous action: "If public interest forbids to create new coins of gold and silver, it on the contrary demands that one does this in the currency of honors once they have lost with respect to their price that that they owe only to the opinion of humans" (2:198)

Given Helvétius's insight that the desire for esteem is always a desire for power, his discussion of esteem-related justice takes into account the connection between esteem and power. The

public distribution of honors would fail to motivate human action if legislators would not connect power with esteem. In fact, Helvétius is clear that the just reward for virtuous action always should be "general esteem *and the advantages connected with this esteem*" (4:47). With a view to his thesis that "Love of power is … the most favorable disposition toward virtue," he explains that this is so because the legislator "can always can connect esteem, wealth, and finally power … to the practice of virtue" (3:349). As Helvétius notes, only in republican constitution there is a genuine connection between public esteem and power, while this connection is lacking in despotic systems since there the favor of the despot there is the only source of power (3:314). By contrast, under republican constitutions, public esteem is at the same time a real power (3:314). In this sense, using legislation to reward virtuous action through public esteem and to make citizens esteem virtuous actions, for Helvétius, is a genuinely political enterprise.

Cross-References

► Bentham, Jeremy

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Herder, Johann Gottfried

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Introduction

Johann Gottfried Herder was born the son of a cantor on August 25, 1744, in Mohrungen, East Prussia. He studied theology and philosophy from 1762 to 1764 at the University of Königsberg, where he was also taught and mentored by Immanuel Kant. From 1764 to 1769, he worked as a school teacher and preacher in Riga. In 1769, he went on a sea voyage to Paris (a remarkable documentary account of which is his *Journal of my Voyage* published posthumously in 1846). In 1770, he became a tutor to the Prince of Holstein-Gottorp. From 1771 to 1774, he worked as a court preacher and church administrator in the principality of Schaumburg-Lippe. In 1776, Herder was appointed general superintendent and court preacher of the Duchy of Sachse-Weimar where he lived with his wife Caroline von Flachsland (married 1773) until his death on December 18, 1803.

Herder was an *Aufklärer* and freethinker, theologian, and philosopher who communicated with the leading lights of his day (Mendelssohn, Abbt, Lambert, Reimarus, Lessing, Jacobi, Hamann, and Kant) and engaged intensively with Rousseau, Hume, Montesquieu, Voltaire, and Ferguson. At the heart of the young Herder's

thinking is his attempt to capture the essence of finite human reason interwoven with sensuousness, which he contrasts with the productive and pure reason of God. By the 1780s, Herder also lays out a new kind of ontotheology of life that forms the basis for his novel ideas about individuality and humanity (*Humanität*), temporalization and historicization, education and culture. Contributing to the debate on Spinoza's philosophy, he metaphorically interprets the Stoic idea of an all-encompassing nature and immanent God by evoking the image of an immeasurable tree of life in which the divine foundation – *natura naturans* – gives rise to and preserves finite beings – *natura naturata* – through which it is itself effective. In this monistic metaphysics of becoming, finite beings express themselves as spiritually determined forces by way of palingenesis or self-developmental life.

Herder's Understanding of Popular Philosophy

A philosophy grounded in finite human reason must also reflect on itself as an evolved form of science/learning, specifying its relationship to natural understanding and to the time in which it finds itself. Responding to Rousseau's cultural critique in particular, Herder seeks to find a way to reconcile the human being – both as an individual and as a member of a political society – with philosophy. It is in this spirit that, in *How Philosophy Can Become More Universal and Useful for the Benefit of the People* (1765) and in *On Thomas Abbt's Writings* (1768), Herder aligns himself with the Enlightenment view that philosophers have to serve the common people. Philosophers ought to rediscover "the human being, the patriot, the philosopher within themselves" so as to derive the higher principles of morality from their natural sentiments. They should not, however, attempt to teach philosophical reasoning to the common people; instead, they should strive to engage the latter's imagination by using simple but powerful figurative images and real-life examples through which the common people, too, may learn to cultivate their existing sociable sentiments, which in turn will strengthen their motivation to act as patriots. In *Do We Still Have the Public and Fatherland of the Ancients* (1765), Herder attempts to show that patriotic sentiments are not reserved for ancient republicans, but can also be found and cultivated in modern monarchies. In *Fragments* (1767–1768; 1768), *Critical Groves* (1769), *Of German Art and Style* (1773), and *Ancient Folk Songs* (1774, retracted from publication), Herder also gradually lays out a conception of linguistic and cultural patriotism at the center of which is the idea that modern poets and pastors need to become familiar with the linguistic usages and ways of thought of the common people so as to be able both to speak to their hearts as well as to tap into modern creativity more generally.

In the late 1760s, the young Herder also criticizes contemporary political philosophy for an excessive veneration of rational ideas and abstract systems, arguing that such an approach is bound to lead to practical inefficacy.

Referring to Catherine the Great's attempts to ground her new legislation in Russia in Montesquieu's ideas, Herder presents Montesquieu's *Spirit of the Laws* (1748) in his unpublished *Thoughts on Montesquieu* (1769) as a "metaphysics for a dead lawbook" and seeks himself to devise a different kind of "metaphysics for the formation of peoples." In *This Too a Philosophy of History* (1774), Herder mounts a frontal attack on what he regards as the mainstream Enlightenment philosophy (of history), revealing that underlying its critique of prejudices lurks a further unreflected prejudice – the assumption that historically situated eighteenth-century moral and political ideals can also serve as universal standards of morality and politics.

In his later *Ideas for a Philosophy of History of Humanity* (1784–1791), Herder accordingly seeks to trace how particular forms of culture and particular moral practices are influenced by natural and environmental conditions, on the one hand, and by historically evolved cultural traditions, on the other. In his writings of the 1790s and early 1800s, Herder also devises and practices a new kind of *humane* historiography that is particularly interested in the ways of

thought of individual historical actors and that is emphatically based on, as well as seeking to cultivate, self-reflection, cognitive empathy, and a "sense of humanity."

Herder's Views on Modernity

In reflecting on the specificity of his own time, Herder characterizes modernity as a period in which human knowledge and action have acquired global scope. Although he never fully denies the possible positive potential of these developments (for example, the possibility of cultivating a pure form of Christian love), a highly critical attitude prevails in his early writings. Engaging with Scottish Enlightenment thinkers, on the one hand, and Diderot and Raynal, on the other, Herder contrasts the loftiness of modern ideals of liberty and sociability with the actual complacency and inertia of the subjects of modern monarchies. An impressive feature is his diagnosis of the tension between the professed cosmopolitan ideals of modern intellectuals in Europe and the actual ruthless global imperialism and colonialism of modern states, which he critically characterizes as "state-machines." In *Ideas*, Herder reiterates some of this criticism while also offering a cautiously optimistic perspective by predicting the collapse of such states thanks to the rise of the third estate and the awakening of subjugated nations. He also highlights the great potential of both the Christian religion and the mutual emulation of European peoples in the arts and sciences for uniting Europe into a broader moral community, making a call for the cultivation of a "universal spirit" (*Allgemeingeist*) in Europe and beyond.

For Herder, the French revolution initially heralded the coming of a new era. In an unpublished draft of *Letters for the Advancement of Humanity* (1792), Herder explicitly sets out his republican commitments while remaining critical of direct popular sovereignty. In the Tenth Collection of *Letters* (1797), Herder further offers a theory of international peace, presenting an evocative analysis of the "dispositions of peace" that would need to be fostered in order to achieve lasting peace.

Natural Sociability and Individual Languages

In the *Treatise on the Origin of Language* (1770), *This Too* and *Ideas* Herder spells out the moral psychological foundations of his social and political philosophy. Rejecting Rousseau's theory of natural man as an "animal" endowed with the moral faculties of freedom and perfectibility, he argues in the Stoic vein that humans, like other species, seek self-preservation and enjoyment both individually and in groups, and, as such, are not only naturally sociable but also linguistic beings. However, humans' distinctive "reflective awareness" enables them to express themselves in language and the arts (culture) as a means of both adaptation to, and transformation of, external circumstances. Consequently, the possibility of a "state of nature" as distinguished from a state of art or culture has to be denied.

According to Herder, language is not a pure "vocabulary of thoughts"; rather, it reflects and stabilizes specific forms of human life. Following Ferguson, in the *Treatise*, Herder accepts the fact that linguistic national groups or peoples (*Völker*) are consolidated via intergroup conflict while also emphasizing that there is "chain of *Bildung*" established through intercultural communication in human history. In *This Too*, he presents a substantially modified analysis of sociability and intergroup antagonism as grounded in the processes of the human soul, positing attraction and repulsion as the principles operating at all levels of the natural order.

Philosophy of History and Natural Law

Herder's ideas about the relation between different cultures or peoples and humanity – understood as collective unity and as universal character – is worked out in his concept of the history of humanity (*Menschheitsgeschichte*). For Herder, history is a process of humanity's self-production in which the human being – the "first being set free by creation" and precisely for this reason a "God on earth" (*Ideas*, book XV) – realizes his essence by determining himself and the species through

social cooperation. This is the only true final end and vocation of humanity. Herder's philosophy of historical interpretation is grounded in this metaphysically substantiated anthropology. In his works of the 1770s, Herder highlights the natural limitations to intercultural understanding, positing that humans develop fundamentally different ways of thought and conceptions of happiness in diverse climatic and historical conditions. Nevertheless, a sympathetic engagement with foreign ways of thought and behavior is possible and necessary. The shared "humanity" of the subject and object renders fruitful the use of "analogy" as a heuristic tool for discovering deeper analogies between "us" and "them." The aim of historiography is, accordingly, to contribute to the self-understanding of humans as determined by the same essential form manifesting itself in a rich variety of realizations.

Herder's combined attempt to posit the unity of nature and history, on the one hand, and to safeguard the specificity of the evolution of humanity, on the other, is also reflected in his usage of the concept of "natural law" in two different senses: (1) In the *Treatise* and *Ideas*, he uses the term to describe the specific processes of the unfolding of the creative forces of the human soul (including language) and the resulting regularities of individual human development more broadly; (2) in *Ideas* and other later writings, Herder also makes use of the moral principle *vivere secundam naturam* that he derives from Stoic ethics. In *Ideas*, he further attempts to discern natural laws of historical development, emphasizing what he calls the law of "reciprocity" or the "rule of effect and counter-effect," as operating in history.

Herder's Controversy with Kant

Herder's metaphysical anthropology stands in the way of a conception of practical philosophy that, on the basis of an idea of pure reason, elaborates universal, timeless principles of will and action, such as Kant's categorical imperative. Indeed, as revealed in their (often implicit) controversy lasting from 1784 to the early 1800s, Herder and Kant vehemently disagreed about the relationship between nature and culture, morality and happiness, and the relevance of the doctrine of original sin for understanding the human tendency to violate the moral law (or what Kant called "radical evil"). They also held contrasting views about the course and possible goal of human history, including the role of the modern state in the historical process. In *Ideas*, Herder critically responds to Kant's dictum that "man is an animal who needs a master when he lives with others of his species" by retorting that "man is an animal as long as he needs a master to lord over him; as soon as he attains the status of a human being he no longer needs a master in any real sense" (*Ideen*, 249; translation from *Ideas*, 323). Herder thereby rejects Kant's view of the goal of human history as consisting in the realization of the principles of Kant's legal philosophy. While finding value in each individual human being, culture, and historical period, Herder also posits a demanding ideal of a domination-free society as grounded in human nature.

Conclusion: Herder's Influence and Reception

Herder's influence in a wide array of areas of inquiry is far-reaching. His neo-Spinozist metaphysics helped to set the agenda for post-Kantian German Idealism and German Romanticism, while his emphasis on the continuity between natural and human history was positively endorsed by a broad range of writers and public intellectuals (including several natural scientists) all over Europe and across the Atlantic.

Herder's philosophy of language and interpretation inspired new approaches in philosophical hermeneutics, comparative linguistics, and philosophical anthropology in the early nineteenth century (both W. v. Humboldt and F. Schleiermacher were indebted to him); his ideas have also notably inspired several widely known authors engaging with these traditions in the twentieth century (M. Heidegger, H.-G. Gadamer, and C. Taylor).

In the late nineteenth and early twentieth centuries, Herder came to be widely seen as a forerunner of historicism and cultural relativism,

while the metaphysical and naturalist foundations of his unified theory of nature and history were largely neglected.

The reception of Herder's political thought has been influenced by these developments. Whereas in the first half of the nineteenth century he was widely seen as a republican and cosmopolitan thinker, in the second half of the nineteenth century, he came to be seen as forerunner of nationalism; this trend came to be reversed only with the studies of, e.g., F.M. Barnard, C. Träger, and W. Pross in the second half of the twentieth century. I. Berlin's association of Herder's ideas with the "Counter-Enlightenment" has received substantial criticism from various scholars, while most commentators would agree with Berlin's characterisation of Herder's political thought as seeking a balance between different moral values as well as rejecting various kinds of dualisms. In recent years, Herder's political thought has been reconsidered from the perspective of debates on cultural relativism, moral universalism, and postcolonialism (V. Spencer, S. Sikka, J. Noyes).

Cross-References

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- ▶ Kant, Immanuel
- ▶ Rousseau, Jean-Jacques: Theory of Law
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Hermeneutical Legal Theory

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Introduction

Hermeneutical legal theory is one of the oldest and – at the same time – most disputed of all the philosophies of interpretation. The term "hermeneutics" comes from the Greek word ἑρμηνεία, denoting the art of prophesying, translating,

explaining, and interpreting. Its beginnings can be traced back to Roman jurisprudence. Only in the twentieth century did hermeneutical legal theory obtain a more specific status in the theory and philosophy of law. This was a consequence of at least two different factors. Firstly, in the nineteenth century, a debate began over methodology in jurisprudence that has lasted until the present day, a debate in which representatives from all influential movements and schools of legal thought have taken part – with the natural law and legal positivism leading the way. In the course of this debate, hermeneutical legal theory proposed its own methodological approach to law (which served as an alternative and at the same time a rival to other projects). Furthermore, at least certain – phenomenological – variants of the theory developed a distinct ontology of law. Secondly, in the nineteenth century, Friedrich Schleiermacher and Wilhelm Dilthey proposed the idea of creating a general philosophy of hermeneutics, which in essence was to be "a methodology of understanding" for all disciplines in the humanities, including jurisprudence. Ascribing such a role to hermeneutics resulted from its adoption of an antinaturalist approach, an outlook which tends to be criticized today, which contrasted the methodology of the natural sciences – the aim of which is to clarify phenomena – with that of the humanities (hermeneutics), whose goal is, as Dilthey emphasized, to understand manifestations of the human spirit (life) which find their expression in language.

In hermeneutics, fundamental importance is assigned to the concept of understanding. Three other key terms in this philosophy of interpretation are directly linked with this concept: pre-understanding (which in German literature is expressed as *Vorurteil* or *Vorverständnis)*, explanation (interpretation), and application. According to Hans-Georg Gadamer, "the hermeneutical problem" always embraces three inseparably interlinked moments: understanding (*subtilitas intelligendi*), explanation (*subtilitas explicandi*), and application *(subtilitas applicandi*). Understanding is realized through the act of explanation (interpretation), the essence of which is application in practice. Ultimately, hermeneutical understanding may signify the following:

1. A certain kind of cognition in the humanistic sciences (at any rate, this is how the representatives of the methodological current in hermeneutics – Schleiermacher and Dilthey – conceived understanding)
2. A form of the existence of an individual being – *Dasein* (the ontological interpretation of understanding we find in the major work of Martin Heidegger – *Sein und Zeit)*
3. Both (1) and (2), i.e., a kind of knowing and a manifestation of the existence of an individual being (at any rate, this is how Gadamer and Paul Ricoeur defined understanding)

The last of these preliminary remarks concerns the relationship between philosophical hermeneutics and legal hermeneutics. What seems to be a plausible view on this issue is that legal hermeneutics is only one example of the application of general philosophical hermeneutics. On the other hand, the following question remains to be considered: is legal hermeneutics a "model" (paradigm) case of this application, as Gadamer wanted it to be, or does legal hermeneutics have its own "particular character" – if only on account of the fact that every possible application of hermeneutical methods in the process of legal interpretation must take into account the restrictions arising from the existence of legal provisions? However, understanding the status of legal hermeneutics in the latter way entails uprooting it from its philosophical context. We would have to either propose a "specifically legal form of hermeneutics," the assumptions of which would be – beyond the context of philosophical reflection – incomprehensible, or "practice" hermeneutics within the framework of other existing theories of legal interpretation. In such a situation, however, the appropriate question would be: why use a new word to name an "old thing?"

The Methodological and Ontological Current in Hermeneutical Legal Theory

The binding link between the earlier nineteenth-century methodological current in philosophical hermeneutics, developed by Schleiermacher and Dilthey, and its contemporary legal variants are

the ideas of Friedrich Carl von Savigny, which can be found in his work *Juristische Methodenlehre.* Savigny believed that the purpose of legal understanding was to interpret the text of a statute. This consists in recreating (reconstructing) the thought process of the past legislator (the actual author of the interpreted statute). The lawyer has at his or her disposal four means of interpreting the text: grammatical, logical, historical, and systematic. Savigny, just like Schleiermacher, was an advocate of a comparative understanding as well as a grammatical-historical conception of the act of interpretation. Furthermore, he adopted the thesis that the act of hermeneutical cognition (interpretation) is objective. This represented, however, a specific kind of objectivism, built on historical and psychological foundations and on the unity between the actions of the interpreter and the will of the – historical – legislator.

One important – and modern – attempt to apply Schleiermacher's hermeneutics in the legal context was made by Helmut Coing. He set forth his proposals in an essay entitled *Die juristischen Auslegungsmethoden und die Lehre der allgemeinen Hermeneutik*. In this work, he examined the possibilities of utilizing the general canons of interpretation, formulated by Schleiermacher, for the purposes of interpreting and explaining the law. He discussed each canon, in turn making various additions and changes of his own: the canons of objectivity (autonomy of interpretation), unity, genetic interpretation, interpretation in terms of factual and substantive meaning, and, finally, comparison. This approach led Coing to the conclusion that all general canons of interpretation find their confirmation and application in jurisprudence, which ensures that interpretation and understanding of a legal text can be universally valid. Hermeneutics teaches us how to critically assess an interpretation of the law, while at the same time, it reveals that the discipline of law, as an interpretive discipline, not only uses exclusively deductive procedures but also takes into account other approaches, including even topical ones. Within the framework of this "interpretative discipline," jurisprudence enjoys a specific status, for it is an example of an "applied interpretative discipline." As a result, the legal method – both universal and objective in character – constitutes part of a, universal and objective, humanistic methodology, and legal hermeneutics is just one example of the application of general humanistic hermeneutics.

In turn, the theory of legal hermeneutics developed by Emilio Betti and outlined in his *Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften* clearly has its roots in Dilthey's thought. Like Dilthey and Coing, Betti understood hermeneutics to be a universally valid method of the humanities. Betti linked cognitive objectivism with axiological objectivism. Legal hermeneutics cannot be separated from humanistic hermeneutics in general, which assumes an objective and universally valid (for all specific variants of hermeneutics) philosophy of understanding and the theory of interpretation.

Representatives of modern philosophy and legal theory will often advocate a methodological understanding of hermeneutics, especially the German current referred to as *Methodenlehre.* One can find numerous references to hermeneutics – and precisely this methodological approach – in the views of such authors such as Karl Larenz, Josef Esser, Karl Engisch, Ernst Forsthoff, Friedrich Müller, and Martin Kriele. The hermeneutical interpretation of the jurisprudential method was intended mainly to serve as a counterbalance (alternative) to the positivist and analytical school, which prefers a systematic approach to thinking about the law, conceived as a category of an a priori and deductive character. As a consequence, the epistemology of the law presented in hermeneutics pertains to a type of problem thinking (topical thinking), in which the law is conceived as a concrete "interpretative fact" or "interpretative activity."

In the case of phenomenological philosophy, the central issue of hermeneutics – understanding – receives a new, ontological, qualification. Understanding is no longer conceived simply as a method of humanistic cognition, as favored by Schleiermacher and Dilthey, but is also, and perhaps above all, regarded as a form of the existence of an individual being, to which Edmund Husserl assigned the name *Lebenswelt*, and Heidegger – *Dasein.* In this way, hermeneutics becomes a form

of ontological understanding. Hermeneutics is, however, also a method, because, after all, it has to be. Indeed, phenomenological hermeneutics abandons its claims to objectivism, but not to universalism. Hermeneutics is universal, because the very problem of understanding is universal. For the act of understanding is a point of departure for all cognitive activity. Being a "science of first instance," hermeneutics is not only a kind of reflection, connected with understanding, but is also a method for knowing precisely this kind of existence.

One very interesting attempt to apply the phenomenological philosophy of Husserl to jurisprudence was made by Adolf Reinach. Reinach believed that phenomenological analysis lies at the basis of statements concerning the ontological essence of the law and statements of a methodological character. He set out his ideas in *Zur Phänomenologie des Rechts. Die apriorischen Grundlagen des bürgerlichen Rechts*. Due to our intuition, we are able to know and understand the essence of the phenomenon of the law – its a priori structure. Positive law is in constant flux and development. This contingency of law makes it difficult, or downright impossible, to know the essence of the law a priori. We must thus go further and deeper, through positive laws, to the "thing in itself," to the nature of Man and his needs, desires, will and actions. The essence of this reflection is expressed in a priori sentences, which at the same time are also statements (axioms) of a phenomenologically oriented discipline of law. In this way, besides mathematics and pure natural science, we are also dealing with a case of "pure – in a phenomenological sense – legal science."

Another philosopher of law, Gerhart Husserl, author of *Recht und Zeit* (a collection of essays) also refers to Edmund Husserl's phenomenological philosophy. He argues that the essence of legal cognition boils down to a reduction of legal ideas at the ontological level, at which the "law-thing" appears. This process of reduction is, at the same time, a process of actualizing the law itself – its application in concrete situations. For the act of reduction uncovers the basic (original) structure of every possible law – a structure which has an a priori character.

In turn, Werner Maihofer, in his study *Recht und Sein*, adopts a Heideggerian approach. Maihofer attempts to transfer Heidegger's "fundamental ontology" to the domain of philosophical-legal reflection. The hermeneutics of *Dasein* (an individual being capable of understanding itself) is intended to allow *Dasein* to construct an existential ontology of the law. *Dasein* possesses a certain structure and order, which is expressed likewise by the law.

Finally, Gadamer's work in the philosophy of law is continued by Arthur Kaufmann, who provides an ontologically oriented conception of legal hermeneutics. His views on this issue have been presented, among other places, in the works *Beitrage zur juristischen Hermeneutik* and *Rechtsphilosophie im Wandel.* According to Kaufmann, the law emerges (is constituted) during the hermeneutical process of understanding. However, both the legislative act itself and the abstract idea of the law, as expressed by the concept of the just law, are only possibilities of the existence of a "concrete, historical law." Kaufmann reckons that only through hermeneutics – the ontology of understanding – will it be possible to overcome the one-sidedness which has encumbered both natural-legal and positivist methods. The law is not a category in a cognitive and objective sense. The law emerges – comes into existence – through the process of understanding events which happens at a certain (historical) moment in time. It is not a state (substance) but rather an act. Three degrees (stages) can be distinguished in the "actualization of the law" (*Rechtsverwirklichung*).

The point of departure consists in the abstract – extra-positive and extra-historical – legal principles (ideas). The second degree (stage) involves the general – formal-positive – norms contained in a statute. The third stage involves the specific – material-positive – legal norms constituting the basis of decisions in actual legal cases. The making of a legal decision – the act of finding the legal solution – is achieved through an historical act of the understanding, appealing directly to an original analogy contained in the concept of law. For the act of understanding brings together subject

and object, duty and being, norms and an actual state of affairs (*Lebenssachverhalt*). The law is the relationship which exists between a general principle or norm and an actual case. This relationship is ultimately grounded in an individual being – a person. According to Kaufmann, such an analysis of the concept of law leads us to the concept of analogy and this, in turn, directs us to the concept of relationship and, once again, to the concept of the person. In this way, the ontology of substance (characteristic of other philosophical-legal conceptions, in particular "classical" doctrines of natural law) is replaced by the ontology of understanding and by an existential ontology of the relationship.

Controversies

Hermeneutics (both hermeneutics in general and legal hermeneutics) has been often criticized, mainly by advocates of analytical philosophy. However, very often, controversies between the adherents of hermeneutics and those of other currents have arisen out of the latter's ignorance of the basic assumptions of hermeneutical philosophy and its different variants. It should be admitted, though, that the source of many of these controversies lies in hermeneutics itself. A small number of such criticisms will be discussed below:

1. It has been pointed out, and quite fairly, that no single universally accepted definition of hermeneutics exists. As a result, it is very difficult to set the boundaries between particular hermeneutical viewpoints (this concerns the internal boundaries) and between those positions which may be described as hermeneutical and those which should evade such a description. As a result, the concept of "hermeneutics" has often been abused when applied to describe and assess different interpretative philosophies of the analytical, structuralist, and argumentative types.
2. We are dealing with a similar situation in the case of a number of basic, hermeneutical concepts: "understanding," "pre-understanding," or "hermeneutical circle." These terms have fundamentally different interpretations in different conceptions of hermeneutics.
3. Ultimately, we are not able to determine what is meant by the term "hermeneutics": a form of cognition (a method), or an ontology of understanding (a form of the existence of an individual being who possesses the ability of understanding), or perhaps both the former and the latter.
4. Accepting that understanding is – besides representing a form of the existence of an individual being – also a form of cognition, we are still not in a position to determine what kind of cognition this is: direct or indirect.
5. Accepting that understanding is a form of direct-intuitive cognition, we then have a problem with determining what type of intuition we are ultimately dealing with: psychological, analytical, or phenomenological.
6. The thesis of hermeneutical universalism is not entirely clear. The defense of this approach based on a division into naturalist and anti-naturalist methodologies adopted by Dilthey is quite weak, for the division itself gives rise to serious doubts. Moreover, it represents a particular type of universalism, because it is limited solely to the humanistic disciplines. It also appears risky to defend the phenomenological argument regarding the universalism of hermeneutics as a "the first science." Defending ourselves against this argument in this case, we can claim that hermeneutics finds its main, if not exclusive, application precisely in the humanistic disciplines and not in the pure and natural sciences.
7. As a consequence, it is difficult to explain, in a precise manner, how hermeneutics can be applied usefully in legal interpretation, and what is the possible scope of its application (it is at least clear that understanding – interpretation – must also be concerned with the regulations of the valid law). This problem is closely connected with other issues – namely, the freedom of interpretation, the limits of

which are restricted, at least in the continental systems of law, by a prohibition on making interpretations *contra legem.*

Alternative Solutions

At least two such solutions are worth noting. They are interesting from our point of view, because they compete with one another with regard to hermeneutics, while, at the same time, in some way, they are connected with hermeneutics or can be reconciled with it.

The first approach of this type is the "alternative" analytical solution. This does not concern, however, horseshoe analysis (i.e., analysis using logical and mathematical tools), which was anti-hermeneutical in its essence, but rather soft-shoe analysis (i.e., analysis appealing to "softer," mainly linguistic, tools), which provided the basis for seeking a compromise with hermeneutics. This approach has borne fruit in attempts to develop the analytical hermeneutics. One source of inspiration for an analysis of this kind was the "second" philosophy of Ludwig Wittgenstein, who in his *Philosophical Investigations* treats interpretation as a specific kind of "game" played by the interpreter with the text. Such an attempt to develop analytical hermeneutics was also undertaken in jurisprudence by, among others, Aulis Aarnio (*Linguistic Philosophy and Legal Theory*) and Ota Weinberger (*Law, Institution, and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy).*

The second alternative is represented by theories of legal argumentation, which often promote solutions that have also been adopted in hermeneutics. We could even find such an approach in legal topics, especially in its variant proposed by Theodor Viehweg (in his *Topik und Jurisprudenz. Ein Beitrag zur rechtswissenschaftlichen Grundlagenforschung*). Similarities can be seen between the concept of problem-thinking in law, and the concept of a concrete law, resulting from the process of interpretation and explanation. Furthermore, the roots of Robert Alexy's procedural theory of legal discourse should be sought, as with most methodological variants of hermeneutics, in the philosophy of Immanuel Kant or in neo- Kantian approaches. Finally, the "communication theories" can be located at the border between the hermeneutical and argumentative reflection. For some these are hermeneutical proposals, while for others, they are argumentative. It is interesting, moreover, to examine closely the theories of Jurgen Habermas, or Karl-Otto Apel, to recognize the influence of hermeneutic tradition on these thinkers.

Conclusion

The primary intention of the proponents of hermeneutical legal theory is to provide the principles of the interpretation of the legal text. They recognize and discuss numerous difficulties in the quest of finding legal meaning. Perhaps, the crucial obstacle in this context is that interpretation is a historical notion. One of the consequences of this is that the legal interpretator should put himself in the situation of the legislator and try to understand the law from this perspective. Furthermore, when interpreting, he should also be conscious of the influence of his own background knowledge. This methodology – requiring taking into account the subjective points of view of the different legal actors – is often understood as being at odds with the scientific method, one of the hallmarks of which is its objectivity. What is more, hermeneutical legal theory is not a uniform current in jurisprudence. The strands within this school of thought are philosophically influenced to a different extent. The methodological strand carries less philosophical baggage as it understands interpretation in a more straightforward manner, i.e., as an attempt to assign meaning to linguistic expressions. The ontological strand, however, takes interpretation to be the essential capacity of the human mind, which pertains to different types of things, e.g., texts, events, or other persons. Many themes found in hermeneutical legal theory correspond to the issues discussed within other branches of jurisprudence, such as Herbert L. A.

Hart's internal point of view, interpretivism of Ronald Dworkin, or Robert Alexy's theory of legal discourse.

Cross-References

- ▶ Alexy, Robert: Philosophy of Law
- ▶ Law as Discourse
- ▶ Legal Argumentation
- ▶ Reinach, Adolf
- ▶ Savigny, Friedrich Carl von

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Biographical Sketch

Andreas (Andrew) von Hirsch was born in 1934 in Zürich to German émigré parents. After studying at Oxford and Harvard, he worked as political advisor and assistant to a US senator. His switch to an academic career was triggered by his role as executive director of the Committee for the Study of Incarceration, for which he authored the influential 1976 report, "Doing Justice: The Choice of Punishments" (von Hirsch 1976). Von Hirsch held his first professorial appointment at Rutgers University. In 1994, he moved to the University of Cambridge as Honorary Professor of Penal Theory and Penal Law, where he later created the Centre for Penal Theory and Penal Ethics at the Institute of Criminology. Since 2007, he has been based at the Goethe University in Frankfurt, where he founded the *Forschungsstelle für Strafrechtstheorie und Strafrechtsethik*. Until 2008, von Hirsch published most of his work under his anglicized first name, Andrew. Since then he has written under his given name, Andreas.

Von Hirsch is best known for his work on penal theory and desert-based sentencing (e.g., von Hirsch 1976, 1985, 1993, 2005 (with Ashworth), 2017). As the editors of two *Festschriften* published in his honor point out, von Hirsch is rightly "credited with moving desert-based theories of punishment out of classical retributivism and into a mainstream field… attractive to political reformers interested in moderate sentencing outcomes" (Simester et al. 2014: xvi; see also Ashworth/Wasik 1998: 1). Indeed, his approach to proportionate sentencing has influenced sentencing reforms in Finland, Sweden, England, Oregon, and Minnesota. Von Hirsch's "micro-jurisprudence of sentence proportionality" (Simester et al. 2014: xvi) addresses questions such as how to gauge the

gravity of different crimes and scale offenses (von Hirsch/Jareborg 1991; von Hirsch 2017), how to use proportionality as a determining rather than a merely limiting principle for the deserved measure of punishment (von Hirsch/Ashworth 2005; von Hirsch 2017), and how to factor dangerousness and prior record into sentencing decisions (von Hirsch 1985; von Hirsch/Roberts (eds) 2010). The project of legitimating punishment as a state practice has also taken von Hirsch deeper into the question of when the state may deploy the criminal law as a regulatory tool, developing and defending a broadly Feinbergian approach to criminalization (see esp. Simester/von Hirsch 2011) which speaks to, but also contrasts in important ways with, the traditional German *Rechtsgutslehre* (von Hirsch et al. (eds) 2003).

The Evolution of von Hirsch's Desert-Based Theory of Punishment Between 1976 and 2019

In the brief chapter on "Desert" in *Doing Justice* (1976), von Hirsch started out from the "unfair advantage" theory of crime and punishment, which views the person who commits a crime as thereby gaining an unfair advantage over law-abiding citizens that punishment corrects by imposing a counterbalancing disadvantage on him (von Hirsch 1976: ch. 6). But he quickly came to reject that starting point as distorting the true nature of both crime and punishment. In his 1993 book, *Censure and Sanctions*, state punishment is conceived of as a blaming institution where criminal sanctions function as conventionally accepted modes of expressing censure for criminal wrongdoing and as supplying additional reasons for desisting from crime (von Hirsch 1993: 7–14). Conceding that "[a] condemnatory response to injurious conduct . . . can be expressed either in a purely (or primarily) symbolic mode; or else, in one in which reprobation is expressed through the visitation of hard treatment," he argued that criminal sanctions, as "response[s] of the latter kind," were preferable to purely symbolic responses because of their supplementary role as disincentives (von Hirsch 1993: 14). In recent work, von Hirsch has indicated that he "now think[s] that this approach understated the role of hard treatment" (von Hirsch 2019: 87) and stresses the connection between hard treatment's amplifying and scaling functions, on the one hand, and the accurate expression of differing degrees of censure, on the other hand. At the same time, von Hirsch acknowledges that "the link between censure and hard treatment is not straightforwardly analytic" (von Hirsch 2019: 89). With disarming openness, he writes that: "No convincing philosophical argument is available that succeeds in deducing a purported entitlement to inflict penal hard treatment purely from conceptions of censure. Or at least, no such argument has occurred to me, nor have I seen a successful one in the . . . literature" (von Hirsch 2019: 89). He thus continues to base the justification for penal hard treatment in part on the force of existing conventions for the expression of censure and in part on the supplementary deterrent role of hard treatment.

Von Hirsch's (1993) theoretical recalibration is grounded in a conception of human beings as fallible moral agents – receptive to moral appeals, but also assisted in acting morally by prudential reasons that can help them resist temptation. The value of, and need for, censure lies precisely in the fact that it addresses the perpetrator as a moral agent. The criminal law, when threatening those who violate it with the imposition of a sanction, likewise must be sensitive to the need to engage with citizens as moral agents. For this reason, the sanction it threatens ought to provide a mere "prudential disincentive" that supplements the normative appeal to the subject's own reason and moral judgment. If the sanction became too harsh, the penal system would no longer treat its subjects as moral agents but as animals, responsive not to rational appeal and moral persuasion but only to threats of pain (von Hirsch 1993: 13–14). The main driver behind moderation in punishment in von Hirsch's theory is thus the need to preserve the integrity of the criminal law as a system of public moral communication.

The Link to Proportionate Sentencing

Does this theory also provide a strong grounding for deed-proportionate sentencing, as von Hirsch (1993, 15ff.) asserts it does? Censure, taken independently, does not necessarily require punishment in proportion to crime. Considered on its own, censure only requires the effective communication of blame. Since communication is a social practice, all that is required for censure to be effective is a communication of blame and criticism that is understood as such by its addressees and others. This is why communicative theories of punishment do not necessarily make a case for penal hard treatment (see, e.g., Günther 2014) although many of them, including von Hirsch's, do (for a fuller exploration of conceptions and functions of censure, and of the role of censure in von Hirsch's theory of punishment, see du Bois-Pedain/Bottoms (eds) 2019).

Von Hirsch' starting point is that penal hard treatment constitutes a conventional means by which a censuring message is expressed and conveyed to the offender. He then argues that "the severity of a sanction expresses the stringency of the blame." From this, it follows for him that "punitive sanctions should be arrayed according to the degree of blameworthiness (i.e. seriousness) of the conduct," which is a function of harm and culpability (von Hirsch 1993: 15; see also von Hirsch/Ashworth 2005: 134–137). The notion of proportionate sentencing can be made more concrete by distinguishing between cardinal and ordinal proportionality requirements (the former referring to the anchoring points of the punishment scale from least to most serious punishment, the latter to the task of locating different offences at appropriate points on that scale). Ordinal proportionality's three sub-requirements of parity, rank ordering, and spacing guide the construction of an appropriate scale.

Von Hirsch's case for proportionate sentencing, built on the sanction's function of expressing varying degrees of blame, does not in my opinion necessitate the strictly deed-proportionate sentencing to which he is committed. Penal hard treatment is, at best, a clumsy means of communication. It is certainly not the only one in the criminal justice context. Communicative accuracy can be – and is – improved by the judge giving reasons for his or her sentence. This makes room for the possibility for judges to communicate relatively complex considerations of mitigation or aggravation, including considerations of how the punishment will affect an offender's present concerns and future prospects (usually referred to as personal mitigation), that have affected the choice and severity of sentence. This possibility of communicative fine-tuning in my view destabilizes a deed-proportionate sentencing demand based on hard treatment's expressive dimension, as (within certain limits of plausibility and credibility) the censuring message may be retained and the degree of censure accurately conveyed through the sentencer's reasons for sentence.

Yet this does not mean that the demand for deed-proportionate sentencing cannot be developed out of other building blocks of the theory. Von Hirsch and Ashworth's reluctance to open up sentencing decisions to considerations of "equity factors" unrelated to crime seriousness is connected with their concern that punishment is, also, a matter of distributive fairness. Concessions made to some offenders on account of factors unrelated to the crime raise the possibility of unequal – and hence unfair – treatment. They therefore argue that personal mitigation should be linked to what they call "[q]uasi-retributive grounds . . . [which] relate to the wider underlying conceptions of penal censure as a response to criminal offending" (von Hirsch/Ashworth 2005: 174 ff.). Von Hirsch's demand for proportionate sentencing is, thus, ultimately grounded in the citizen-state relationship, which generates a commitment to equal treatment and, in principle, commits the state to a (self-limiting) focus on its public function of securing the conditions of peaceful coexistence (von Hirsch/Ashworth 2005: 100–101).

Location in the Wider Contemporary Discussion

Against the backdrop of a growing backlash against retributivist penal theories in the United

States (see, e.g., Chiao 2019 and Tonry 2019), it is important to stress that von Hirsch's desert-based theory – albeit that it was first formulated in response to uncertainty and inequality generated by rehabilitative ideals – is not concerned with retribution in the classical sense, and certainly not built on a positive valuation of penal suffering.

For von Hirsch, state punishment is a blaming institution rooted in notions of responsibility, culpability, and desert; yet it is also an exercise of state power that, like all such practices, must be shown to be rationally oriented toward the achievement of legitimate objectives of state governance. His is a theory that sets itself against social managerialism through criminal justice – whether welfare-oriented or dangerousness-based – perceiving the future-oriented objectives of criminal justice as potential encroachments upon offenders' liberties that are increasingly disconnected from the offense to which they should constitute a proportionate response (see esp. von Hirsch 1976: chs 2, 3, and 4 and von Hirsch/Ashworth 2005: ch. 7). As is clear from his reliance on convention-based anchoring points of the penal scale, von Hirsch conceives of state punishment as an institutionalized social practice. Judgments of penal desert are not prior to that practice but only arise within it. From his writings on criminalization theory, it emerges that he presupposes a state committed to respect for human rights, human dignity, and individual freedom, constraining the sorts of punishment that can conceivably form the upper anchoring point of the penal scale. The commitment to proportionate sentencing rests on the dual values of legal certainty – setting clear limits to the extent to which the state may control aspects of an individual's (including an offender's) life – and equality between citizens, including offenders.

To the extent that such labels can illuminate the structure of a theory, von Hirsch's theory is thus best categorized as a mixed theory that rests on a combination of desert-based, reprobative, and crime-preventive elements. It is "retributivist" only in the minimal sense that it takes state punishment to be a response to a blameworthy violation of a criminal law. Indeed, this is the very reason why von Hirsch had such an important influence on German scholarly debates at a time when penal theories there were still divided into either "absolute" (broadly, deontological) or "relative" (broadly, purpose-oriented and mainly utilitarian) theories. By defying classification under this scheme, von Hirsch's writings helped expose the blind spots produced by this classification. This also made German scholars located in the "relative" camp open to rethinking their dominant theory of sentencing, the *Spielraumtheorie* which (similar to Norval Morris's limiting or "negative" retributivism (Morris 1974)) allows the sentencing judge to give, within a broad range of "not disproportionate" punishments, decisive weight to deterrent or rehabilitative purposes in sentencing. Influential scholars, such as Tatjana Hörnle (Hörnle 1999), have explored and promoted the applicability of von Hirsch's conception of deed-proportionate sentencing in the German context.

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History of Legal Pluralism

► Legal Pluralism: History of

Hobbes, Thomas

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Introduction

Thomas Hobbes (1588–1679) is widely regarded as one of the finest political philosophers in the Western tradition. His masterpiece – *Leviathan or The Matter, Forme, and Power of a Commonwealth Ecclesiasticall and Civil* (1651) – is famous for its insights into war and peace, for the exploration of the role of power in politics, and above all, for the elaboration of the concepts of state sovereignty and political obligation. At a time when the divine right of kings was still common currency, Hobbes used the *social contract* as a framework to explain the rights and duties of citizens; he appealed to reason instead of tradition and custom; he emphasized the natural equality and liberty of men; he addressed the people and their educators, rather than princes or kings. Hobbes was aware of the novelty of his work; in 1655, he famously wrote that: "Natural philosophy is . . . but young; but Civil Philosophy yet much younger, as being no older . . . than my own book *De Cive*" (Hobbes 1839, vol I, ix). For sure, because of his approach and subject matter, Hobbes is regarded as one of the founding fathers of modern political theory (Goldsmith 1966; Gauthier 1969). In the twentieth century, interpreters have endorsed or opposed the association of Hobbes with a variety of paradigms and orientations, including totalitarianism in politics, positivism in legal theory, utilitarianism in ethics, and realism in international relations.

With the aim of shedding light on Hobbes's legacy and bearing on contemporary studies, the following sections draw attention to the context of Hobbes's texts, to key concepts of his political and legal theories, and to the ever-expanding Hobbesian scholarship.

Hobbes's Life and Times

The main sources of information about of Hobbes's life and circumstances are his prose and verse autobiography (Hobbes 1994, 245–264) and the "Thomas Hobbes" entry in *Brief Lives* by his contemporary and friend John Aubrey (1982). Hobbes was born in Malmesbury, England, on the 5 April 1588; apparently his mother went into labor prematurely at the news of the approaching Spanish Armada; Hobbes referred jokingly to this event by saying that his mother gave birth to twins: himself and fear. Hobbes's father was a minister of little learning and a choleric disposition who, after assaulting someone at the church door, ran away to London where he died in obscurity. Hobbes's education was sponsored by a childless wealthy uncle who was, by profession, a glover. Hobbes was admitted to Magdalen Hall in Oxford at the age of 14; apparently, he took more delight in looking at maps in local bookshops than in attending university lectures. After obtaining his Batchelor of Arts degree, Hobbes worked as tutor for the Earls of Devonshire; thanks to this position, he travelled extensively in Europe where he came into contact with Galileo Galilei, whom he deeply admired, Rene Descartes, with whom he quarreled, and Gottfried Leibniz, with whom he engaged in correspondence.

According to Aubrey's account, Hobbes took his own self-preservation very seriously; he would not eat meat when in London because he did not trust the hygiene standards in the city; he drank with moderation because he thought that wine affected the good working of the brain. He liked living in the country where he had access to his lord's remarkable library, but often went to London because he enjoyed conversation with John Selden and William Harvey among others.

The following anecdote reported by Aubrey is often used to illustrate Hobbes's utilitarian explanation of charity and his affinity to Jeremy Bentham: "One time, I remember, going into Strand, a poor and infirm old man craved his alms. He beholding him with eyes of pity and compassion, put his hands in his pocket, and gave him 6d. Said a divine . . . that stood by – 'Would you have done this, if it had not been Christ's command?' 'Yes', said he. 'Why?' said the other. 'Because', said he, 'I was in pain to consider the miserable condition of the old man; and now my alms, giving him some relief, doth also ease me'" (Aubrey 1982, 158–159).

Another event from Hobbes's life recounted by Aubrey is worthy of attention as it sheds light on Hobbes's interest in methodology: "He was forty years old before he looked on geometry; which happened accidentally. Being in a gentleman's library Euclid's *Elements* lay open, and 'twas the forty-seventh proposition in the first book. He read the proposition. 'By G—', said he, 'this is impossible!' So he reads the demonstration of it, which referred him back to such a proof; which referred him back to another, which he also read. And so forth, that at last he was demonstratively convinced of that truth. This made him in love with geometry" (Aubrey 1982, 151–152).

Hobbes was a great admirer of the discoveries of his contemporaries; he reckoned that the concept of "motion" was at the core of Galileo's great advancements in physics; similarly, "motion" was key to the discovery of the circulation of the blood made by his friend William Harvey. Hobbes employed "motion" as a heuristic tool and applied it to all parts of his philosophy – for instance, he described man as vital and voluntary motion and explained that the voluntary motion (the passions) drives man to keep the vital motion (the body) alive and to resist rest (death) as the worst thing that can come to nature. Under the influence of nominalism, materialism, and skepticism (Paganini 2012), Hobbes regarded "truth" as a characteristic of propositions: "For True and False are attributes of speech, not of Things" (Hobbes 1991, 27).

Hobbes fled to France just before the English Civil War erupted; in exile, he was tutor of mathematics to the future king of England, Charles II. In 1650 or 1651, he returned to London; in 1665, he hoped "to endow a free school" in Wiltshire with the King's assistance "but the queen's priests smelling out the design and being his enemies hindered this public and charitable intention" (Aubrey 1982, 155).

In 1675, Hobbes left London and spent the rest of his life at Chatsworth and Hardwick where he continued his studies in spite of being afflicted by "shaking palsy in his hands" (Aubrey 1982, 158); he died at the age of 91.

In sum, a variety of factors – Hobbes's humble origins, the anxieties of his mother, the absence of a protective father, his studies at Oxford, his job as tutor to an aristocratic and powerful family, the scientific and ideological milieu of the early modern period, the political crisis that brought about the English civil war – provide the complex background and context of Hobbes's political texts: they shed light on his belief in natural equality and on his commitment to education and science; above all, they explain his interest in understanding disagreement, sedition, and civil war and the prominence he attached to physical integrity, security, and peace.

Key Concepts of Hobbes's Political Theory

Throughout his life Hobbes was interested in all aspects of knowledge, from optics to mathematics, from metaphysics to physics, from psychology to politics. His ambition was to construct a system of philosophy made up of three parts: the first on Body and Matter, the second on Man, and the third on the Citizen and the Body Politic. In *De Cive*, Hobbes explains that the political crisis of his country prevented him from following the original order of delivery and urged him to write in the first instance about the rights and duties of citizens. For sure, the struggle between the King and Parliament that culminated in the execution of Charles I had a great impact on Hobbes's life and work. Even his translation and publication of Thucydides' *History of the Peloponnesian War* (Hobbes 1839, Vol. VIII and IX) was motivated by his concern with contemporary politics: he wanted to make his countrymen aware of Thucydides' insights into the shortcomings of democracies and the dangers of civil war.

We have three formulations of Hobbes's political theory: *Elements of Law, Natural and Politic* (circulated among friends in 1640 but published much later), *De Cive* (published in Latin in 1642), and *Leviathan* (published in English in 1651). The Baumgold edition (2017) of Hobbes's political theory facilitates the comparison of the three works and shows that, although there are variations and changes, Hobbes's explanation of the establishment of state sovereignty remains the same. Not unlike Euclid, whose method he admired, Hobbes starts his political argument with assumptions; instead of defining line and point, Hobbes outlines human nature and the natural conditions of mankind.

First, regarding man in isolation, Hobbes emphasizes two main attributes, namely rationality and fear of violent death. Hobbes acknowledges that men are not rational all the time, but stresses that every human being is capable of rationality; he also concedes that there are martyrs and people willing to die for glory or honor, but singles out self-preservation as the common desire of men and the constraint they need to meet in order to attain anything else.

Second, regarding men in relation to each other, Hobbes highlights two main characteristics: their natural equality and their desire of superiority, glory, and dominion. On equality, Hobbes puts across a variety of views, that range from the claim that the difference between man and man is mainly a social construction with the assertion that men are very different from each other except in one respect, namely in their physical vulnerability. On men's desire of superiority too, Hobbes conveys different views in his writings: in *De Cive*, he claims that all men desire superiority and glory, while in *Leviathan*, he suggests that only a minority is driven by the ambition to dominate.

Third, regarding the natural environment, Hobbes singles out two important aspects: first, in natural conditions, resources are very limited because there is no private property and no incentive to increase supplies; second, individuals' liberty is unconstrained as there is no authority and no punishment. In *De Cive*, Hobbes suggests that the state of nature is just a thought experiment (he invites the reader to imagine "the state of nature, and to look at men as if they had just emerged from the earth like mushrooms without

any obligation to each other," Hobbes 1998, 102); in *Leviathan,* however, Hobbes claims that the state of nature may occur in primitive societies, in civil wars, and in international relations (Hobbes 1991, 89–90). In the most well-known piece of his writing, namely Chapter 13 of *Leviathan,* Hobbes discusses the combined result of his assumptions about human nature and the environment; he argues that in conditions characterized by limited resources and lack of authority, men who are rational and equally vulnerable, fearful for their life and diffident about each other's intentions, will anticipate an attack and strike first. As everyone thinks the same, the state of nature turns into a state of "war of every man against every man" (Hobbes 1991, 90). Hobbes makes it clear that "War, consisteth not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary" (1991, 88–89). He concludes that in natural conditions everyone's life is "solitary, poor, nasty, brutish and short" (1991, 89).

According to Hobbes, reason makes man understand that he should "seek peace" (fundamental law of nature) if he hopes to attain it, and use his "right to all things," if peace is unattainable. Perpetual peace can be achieved, Hobbes reckons, if men lay down the right to all things, enter a social contract with one another and appoint a sovereign (that can be a man or an assembly) whose purpose is to protect them. Hobbes stresses that without the establishment of a sovereign capable of implementing sanctions, no peace can be attained because covenants without the sword are "but words." In all three versions of his theory, Hobbes emphasizes that the end or aim of sovereignty is *salus populi*, by which term he means not just people's survival but also their well-being; he stresses that in order to attain its aim, the sovereign power must be absolute (ab legibus solutus), unlimited, indivisible, irrevocable, and inalienable. Hobbes rejects the view that the sovereign is part of the social contract on the ground that this would make its power conditional and limited (Hobbes 1991, 123); he argues that it would be against reason for man on the one hand to surrender his unlimited natural right to defend his life and on the other hand to set limits to the power of the sovereign to protect him. Hobbes maintains that the sovereign's duty to protect requires unlimited obedience from citizens. A citizen put to death, however, has the right to disobey; Hobbes explains: "When our refusal to obey, frustrates the end for which sovereignty was ordained, then there is no liberty to refuse: otherwise there is" (1991, 151). The protection/obedience principle is widely regarded as the skeleton of Hobbes's theory of political obligation. For sure, in "A Review and Conclusion" to *Leviathan* Hobbes summarizes his discourse as the unbiased attempt "to set before mens eyes the mutuall Relation between Protection and Obedience" (1991, 491).

As in the case of the state of nature, so regarding the social contract Hobbes makes ambivalent remarks concerning its historical occurrence; while in the first book of *Leviathan* Hobbes conveys the impression that the social contract is an historical event, in "A Review, and Conclusion" he asserts that "there is scarce a Common-wealth in the world, whose beginning can in conscience be justified" (Hobbes 1991, 486). Hobbes's social contract has been topic of lively debates among commentators (Hampton 1986; Bobbio 1993; Finkelstein 2005).

It is worth noting that, although Hobbes repeatedly claimed that he provided a scientific objective demonstration of political obligation "in prose that was simple and direct, not in rhetoric" (Hobbes 1994, 250), interpreters have brought attention to the rhetorical dimension of Hobbes's discourse in *Leviathan* (Skinner 1996) – Hobbes wanted to persuade his readers, not just to instruct them.

Issues related to sovereignty and political obligation occur in other Hobbesian writings and especially in *Behemoth or the Long Parliament* (Hobbes 2010). Hobbes probably wrote *Behemoth* in the late 1660s but was not permitted to publish it; some editions were published without his consent while he was still alive, but the first official edition appeared posthumously in 1682. Scholarship is divided as to the correct interpretation of *Behemoth*: some read it as an historical account of the constitutional struggle between Parliamentarians and the King – on this view,

Behemoth provides the historical context that inspired *Leviathan;* others regard *Behemoth* as a further elaboration of themes introduced in *Leviathan* – on this view, *Behemoth* is part and parcel of Hobbes's political philosophy and conveys Hobbes's final word on sovereignty and political obligation. While historians have found it easy to dismiss *Behemoth* as a reliable work of history, political theorists have been constantly inspired by *Behemoth*'s insights into the sources and consequences of moral, religious, and ideological disagreements.

Key Concepts of Hobbes's Legal Theory

In Hobbes's writings, we come across natural laws, civil laws, divine laws, laws of nations, and laws of war; although commentators differ on the correct interpretation of each set of laws, they agree that Hobbes's assumptions on human nature and the environment affect his legal theory. Indeed, Hobbes's legal theory is generally seen as a corollary of his political theory (Finkelstein 2005).

The greatest divergence of opinion among scholars is about the laws of nature: interpreters disagree on whether they constitute a deontology; a distillation of Christian teaching; a set of utilitarian rules; or an embodiment of virtue ethics. The majority view is that the recommendations of the laws of nature are inspired by utilitarian considerations and embody prudential morality; in all three versions of his political theory, Hobbes maintains that the overall aim of the laws of nature (which recommend virtues such as modesty, forgiveness, gratitude, equity, etcetera) is to "seek peace," and that peace is sought because it is the only way of securing life – self-preservation is the *summum bonum* at the foundation of the laws of nature.

The interpretation of Hobbes's civil laws has also been the source of controversy. In the three versions of his political theory, Hobbes explains that in the state of nature disputes and quarrels "arise from the fact that men's opinions differ about mine and yours, just and unjust, useful and useless, good and bad" (Hobbes, 1998, 79). For Hobbes, there cannot be peace until men appoint a sovereign who puts an end to moral disagreement by introducing the civil law. He argues that "it is for kings to distinguish between good and evil . . . Just and unjust did not exist until commands were given . . . Legitimate kings therefore make what they order just by ordering it, and make what they forbid unjust by forbidding it. When private men claim for themselves a knowledge of good and evil, they are aspiring to be as Kings. When this happens, the commonwealth cannot stand" (Hobbes 1998, 132).

Hobbes concedes that some acts – for instance murder – are always wrong; he emphasizes though that what is murder or what is legal killing is decided by the civil law. The civil law should serve the purpose for which the sovereign power is created, namely peace. In so far as the laws of nature recommend peace and the civil laws are introduced to attain and maintain peace, it follows that "The Law of Nature and the Civill Law, contain each other" (Hobbes 1991, 185).

On the one hand, Hobbes maintains that the civil law is the product of the sovereign will and that "The Sovereign of a Commonwealth, be it an Assembly, or one Man, is not Subject to the Civill Lawes (Hobbes 1991, 184); on the other hand, Hobbes suggests that the content of the civil law is not arbitrary. In Hobbes's account, the sovereign has two incentives to produce good laws: first, the sovereign is accountable to God for his actions (this of course was an important constraint at the time of Hobbes's writing); second, the sovereign's own safety and wealth depend on the well-being of the people; in other words, it is in the sovereign's self-interest to be a good legislator.

Hobbes lived at a time of deep religious controversies; he was concerned with the practice of appealing to one's conscience to justify civil disobedience and rebellion (Hobbes 1969, 139). He devotes large sections of *Leviathan* to demonstrate that according to the Scriptures, citizens must obey the sovereign even if he is "an infidel"; he points out that "a private man has always the liberty (because thought is free) to believe or not to believe in his heart what he wants"; he emphasizes that "Belief, and Unbelief never follow mens Commands" (Hobbes 1991, 343); in *Elements*, he explains that "no human law is intended to oblige

the conscience of a man, but the actions only" (Hobbes 1969, 142).

Even if in places Hobbes suggests that the sovereign keeps the peace only by means of reward and punishment, there is textual evidence that he attached great importance to education: it is education that fosters fidelity to law (May 2013). Hobbes argues that "it is a duty of sovereigns to have the true Elements of civil doctrine written and to order that it be taught in all the Universities in the commonwealth" (Hobbes 1998, 147); indeed, he offers his *Leviathan* for civic education: "I think [this whole Discourse] may be profitably printed, and more profitably taught in the Universities, in case they also think so, to whom the judgement of the same belongeth" (Hobbes 1991, 491).

Finally, it is worth mentioning a work written by Hobbes in his old age and published posthumously (1681) – *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (Hobbes 2005). While many interpreters have discounted the importance of this work, others have argued that the *Dialogue* sheds light on Hobbes's legal reasoning (May 2013, 85–121). The work was occasioned by the English law of heresy (Tuck 1999); it elaborates on the idea that the sovereign's will is the source of law and supports the view that the power of lawyers is potentially divisive and seditious. In particular, Hobbes targets the standpoint of Sir Edward Coke as capturing the common law position (May 2013); while accepting the notion that law is reason, Hobbes discards the view that lawyers have a special understanding of what is rational.

Hobbes rejects also the belief that custom can provide the foundation of law: "I deny that any Custome of its own Nature, can amount to the Authority of a Law: For if the Custom be unreasonable, [. . .it] ought to be abolished; if the custom be reasonable it is not the Custom but the Equity that makes it Law" (Hobbes 2005, 63). Here as in previous writings, Hobbes emphasizes that the civil laws have to be applied impartially and consistently; he reiterates the view that "the intention of the Legislator is alwayes supposed to be Equity" (Hobbes 1991, 194).

Interpretations: Focus, Approaches, and Trends

Over time, Hobbesian scholarship has reached an outstanding level of sophistication and erudition (Foisneau and Sorell 2004); significant changes in trends, approaches, and focus have taken place especially in the past century (Slomp 2008).

Until the late 1960s, many interpreters were interested in locating Hobbes's political philosophy within his grand theory (e.g., Watkins 1965); in the 1970s and 1980s, however, the attempt to reconstruct "traditions" within Western political thought (e.g., Bull 1977) and the interest in applying game theory to Hobbes's texts (e.g., Gauthier 1969; Hampton 1986) turned scholars' attention towards selected passages of Hobbes's work. Since the 1990s, Hobbesian commentators have tended to focus their attention on "aspects," "themes," "fragments" of Hobbes's texts (e.g., Skinner 1996; Malcolm 2002).

There seems to be some correlation between major political events – for instance, the rise of totalitarian ideologies in the 1930s, the Cold War, the terrorist attack of 9/11 – and the changing focus of Hobbes studies. In each case, however, interpreters have tended to put across opposite readings of Hobbes, arguing for and against his association with totalitarianism, legal positivism, realism, and liberalism.

In the interwar period, when exponents of totalitarian ideologies were looking for founding fathers, there was a debate in Europe about Hobbes's credentials for such a role. Supporters of the association of Hobbes with the total state pointed to his theory of absolute and unlimited sovereign power; to his endorsement of censorship; to his condemnation of resistance; to his remark that tyranny is just the term people use for a government they dislike (Hobbes 1991, 486). Critics of the association of Hobbes with totalitarianism drew attention to his laws of nature (Taylor 1938), to his statements about morality (Warrender 1962), and to the concession he made to the individual (Schmitt 1996); for some readers, far from supporting the total state, Hobbes anticipated John Rawls's strand of

liberalism (Rhodes 2002) because of his emphasis on the paramount importance of equity (May 2013).

After World War II, "the 'following orders' defense" associated with the Nuremberg trials prompted scholars to investigate Hobbes's views on law and individual responsibility. Some interpreters (e.g., Watkins 1965; Goldsmith 1966) saw in Hobbes a progenitor of legal positivism and pointed to Hobbes's famous claim that "Law in general . . . is command" (1991, 183). Critics of such association drew attention to the continuation of Hobbes's quote that reads: "[the sovereign's] Command is addressed to one formerly obliged to him" (1991, 183); they pointed out that for Hobbes political obligation precedes the law as command and that this is a major difference between Hobbes and John Austin (Gauthier 1969, Finkelstein 2005).

During the Cold War, interpreters dissected Hobbes's works looking for insights into international politics. Chapter 13 of *Leviathan* rang true to many political theorists (Gauthier 1969) and scholars of international relations (Bull 1977). During this period, the majority view associated Hobbes with Hans Morgenthau and the realist tradition of international relations; Hobbes's qualifying credentials included his negative notion of human nature, his commitment to security issues, his concept of anarchy, his notion of state sovereignty, his view that a law without sanctions is no law. Critics of the association of Hobbes with realism drew attention to passages where Hobbes highlights differences between anarchy and international relations and stresses the greater vulnerability of individuals vis-à-vis states (Hobbes 1991, 98; Malcolm 2002, 435).

After the terrorist attack of 9/11, Hobbes's texts have been revisited for insights into states of exceptions and international law; for instance, Sorell developed "A Sober Hobbesian Approach" to emergencies in politics (2013) and May advanced "A Hobbesian Defense of International Criminal Law" (2013).

Interestingly, in the early stages of the 2020 pandemic, the *London Review of Books* published a blog that drew attention to the frontispiece of *Leviathan*, designed by the engraver Abraham Bosse under strict instructions from Hobbes: the citadel appears to be in lockdown and the only two figures emerging from the empty streets wear the typical beaked masks of plague doctors (Poole 2020). New questions have been raised for contemporary readers: Does Hobbes distinguish between natural and political emergencies? Does his argument suggest that natural emergencies turn inevitably into political emergencies?

In sum, in the last one hundred years, major political events appear to have driven commentators to resort often to Hobbes for insight and inspiration.

Conclusion

Having faced the dangers of the English civil war, Hobbes made it his business to investigate the causes of order and disorder, society and anarchy, peace and war. At a time when the divine right of kings still resonated with audiences, Hobbes explained political obligation by using the notion of the social contract and the protection/obedience principle. The former concept captures the reciprocity of rights and duties between citizens; the latter explains the relationship between sovereign and citizens as an exchange of obedience for protection. Hobbes adopted what he considered the appropriate scientific method – that proceeds from assumptions to conclusions – to demonstrate to his fellow citizens and their rulers the conditions of war and peace.

Hobbes's theory is complex and selected quotes can be found to support opposite interpretations. For instance, Hobbes maintained that the sovereign power must be unlimited in order to provide unlimited protection; from this perspective, Hobbes's theory is a contribution to absolutism and totalitarianism. On the other hand, Hobbes argued that a citizen condemned to death can resist the sovereign, regardless of the justness of the punishment. From this perspective, the right to self-preservation sets a limit to the sovereign power and Hobbes's theory has been read as proto-liberal.

For sure, over the centuries, Hobbes has been associated with a multiplicity of orientations and

ideologies – Hobbes has been seen as a precursor of Jeremy Bentham and utilitarianism, John Austin and legal positivism, Hans Morgenthau and Realism, John Rawls and political liberalism.

As attention to Hobbes's life and times can illuminate his texts, likewise an overview of the political and cultural context of Hobbesian scholarship can shed some light on its changing approaches and interests. The ever-enlarging literature on Hobbes demonstrates the enduring relevance of his theory and justifies the inclusion of this seventeenth century thinker in the short list of classical political writers.

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H

Hobbes, Thomas: On Justice

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The concept of justice played a central role in the political theory of the seventeenth-century English philosopher Thomas Hobbes. Whereas we today often use the term "justice" broadly, to mean something like fairness, Hobbes introduced a narrow, technical notion of justice as the keeping of valid covenants or contracts. More general

considerations of fairness fell under another of his concepts – equity – which Hobbes associated specifically with the virtuous practice of judging impartially and more broadly with treating people as equals or behaving morally. Scholars have generated an enormous literature seeking to understand justice, equity, and their relationship in Hobbes's theory. This entry will document Hobbes's concept of justice, explore his derivation of justice as a law of nature, explain and assess his arguments that justice "has no place" outside of a political society, engage his reply to the "Foole" who maintains that acting justly is not always rational, contrast justice with the practice of equitable judging he identifies with "distributive justice," and explain his position that sovereigns' treatment of subjects may be iniquitous but can never be unjust.

How Justice Emerges as a Law of Nature

Hobbes famously offered to demonstrate the need for government, and so the rationality of our submitting to government, by imagining a "condition of mere nature" in which every individual permissibly acts on her own private judgment in every matter. As equals, no one has any obligation to defer to another's judgment, nor any enforceable right to demand their deference to her own. Because private judgments conflict due to differences in people's bodily constitutions, life experiences, educations, tastes, and values and because people often take offense at perceived signs of disrespect, the condition of mere nature is a frustrating and insecure social environment that undermines people's ability to achieve their ends. People find themselves in disagreement and at cross-purposes, unable to ensure control over needed resources, needed cooperation, and even sufficient security from encroachment by others to be able to lay and carry out their life plans, whatever those may be. Hobbes allows that no one can reasonably fault another for doing what that other sincerely thinks necessary for her self-preservation, and each is judge herself of what is necessary. Hobbes speaks of this universal moral permission to act on one's own private judgment as to how best to preserve oneself as the "right of nature" and thinks it to entail, in principle, a right to everything, because anything might be judged useful. The "right of all to all" is tantamount to an enforceable right of none to anything.

Individuals must want others to divest themselves of their right of nature, and because reason requires each to do what he demands others do, reason instructs each "to lay down this right to all things, and be content with so much liberty against other men, as he would allow other men against himself" whenever others are willing to do the same (L 14.5). Hobbes thinks of this operation as entering into a mutual covenant with others each to submit their private judgment and private will to the public judgment and will of a sovereign empowered to adjudicate all disputes and enforce its decisions (L 17.13). The sovereign will then settle the scope of individuals' rights and possessions. Hobbes asserts that it follows from the natural law requirement to enter into this mutual covenant, or social contract, that:

> *men perform their covenants made*, without which covenants are in vain. . . And in this law of nature consisteth the fountain and original of JUSTICE. For where no covenant hath preceded, there hath no right been transferred, and every man has right to everything. But when a covenant is made, then to break it is *unjust*; and the definition of INJUSTICE is no other than *the not performance of covenant.* And whatsoever is not unjust, is *just.* (L 15.1–2)

Hobbes describes the justice requirement to perform valid covenants as a law of nature. Laws of nature are precepts of reason, or rules found out by reasoning, accessible to everyone who has enough mental wherewithal to manage his own affairs. Hobbes takes these laws to be normative precepts, eternal and immutable, that always make a claim on every rational person in conscience – *in foro interno* – to do what they require unless her conformity with the laws would assist others who violate the laws in victimizing herself. These natural laws are rules of morality, practical rules for establishing and sustaining peaceful human communities, God's laws in his natural kingdom and, as Hobbes argues, reinforced in Scripture. They direct us to submit to government and refer us to

our governors for interpretation of their meaning and their application to specific cases; natural law is thus self-effacing. Natural law instructs us both to keep our valid covenants and to look to the civil law to ascertain which covenants are valid. Hobbes distinguishes between just acts and just persons; the former are acts that do not violate the requirement to perform valid covenants, whereas the latter are persons who consistently try to act justly, even if sometimes they fail (L 15.10).

Hobbes initially derives justice as a natural law by reasoning that natural law requires us to enter a civil condition, which is done by making a covenant, but that covenant would be "vain" (useless) unless we keep it, so natural law requires the keeping of covenant. The underlying principle may be that what is necessary to doing something that is required is itself required. Hobbes argues that entering but not keeping a covenant is a form of irrational self-contradiction, of willing when we make the covenant that at some later time we shall perform, while also willing at that later time that we shall not perform (EL I.16.2). One noteworthy feature of Hobbes's definition of justice is how contentless it is. What can count as unjust will depend only on limits to valid covenants. One such limit is purely formal: One cannot validly covenant to transfer a right one has already given away, or never had. Previous covenants invalidate later ones when they concern the same rights. Covenants to do what no one has a right to do are invalid; thus, covenants against natural law are void (L 13.33). One-sided covenants, in which we cannot know whether the other party has accepted, are invalid, making covenants with animals invalid and, importantly, covenants with God invalid, unless they are made with someone authorized to accept the covenant on God's behalf.

Were it true that entering a civil condition requires making a covenant, justice in Hobbes's technical sense would be central to his political theory. The wrongness of sedition, rebellion, disobedience, or lawbreaking would consist in breaking a promise. Promise-keeping would be the most important value of all, regardless of whether the promise had been coercively extracted or was only imputed or tacit rather than actual. Reading Hobbes as having placed covenant, hence covenant-keeping, at the center of his theory exposes that theory to a host of powerful objections. If, however, the duty to submit to government can be derived through others of Hobbes's laws of nature, without reliance on the fiction of a contract, promise, or covenant, the theory may be more plausible. Hobbes's wider natural law duties of equity and reciprocity provide promising avenues of derivation.

Although Hobbes sometimes speaks as if the only way to act wrongly is to act unjustly (DCv 3.3–4) by breaking an agreement, he also holds acts of ingratitude, pride, arrogance, partiality, and iniquity to be immoral violations of natural law. Such violations are various ways of failing to treat others as one's equals. Treating others on a par with ourselves is a basic requirement captured in the Golden Rule-like principle with which Hobbes repeatedly identifies the "core" or "sum" of the law of nature. Seeking as we do to avoid infliction of harm on ourselves, "All infliction of harm on men is a violation of natural law and a wrong against God" *except* "what is done of necessity, or in pursuit of peace, or for self-preservation" (DCv 3.27).

Injustice in the State of Nature

Hobbes contended that justice and injustice "have no place" in a condition of mere nature because fear of nonperformance invalidates covenants, and with no power in that condition to enforce covenants, such fear will be omnipresent. If injustice is the breaking of a valid covenant, and there *are* no valid covenants outside of civil society, then there can be no injustice there. This seems, however, not to have been Hobbes's considered position; he allowed that if one does enter into a covenant in the state of nature and the other party performs first, it would be unjust for the second party not to perform. He also insists that the fear that invalidates a covenant must be some new fear arising after the covenant was made (L 14.20); yet the general fear that attends a state of nature will be a background condition to any covenant made in it. Hobbes's more precise claim seems to be not

that there can be no valid covenants in a state of nature but rather that accusations of injustice in that state "have no place" because "all men are equal and judges of the justness of their own fears" (L 14.18). Presumably God, who reads hearts, could know of some covenanter that her nonperformance was not due to a newly arisen fear, and so did not invalidate the covenant, and so that her action was in fact unjust. Humans can't prove any suspicions they might have, and in any case there is no arbitrator with enforcement powers to adjudicate contractual disputes. Even if injustice can exist in a state of nature, *accusations* of injustice have no constructive role to play there (L 14.30).

A distinct argument Hobbes offers for his position that there must be an established civil society "before the names of just and unjust can have place" is that if we understand justice in a traditional way – following the Roman jurist Ulpian – as giving to each his own, this will be impossible in a state of nature where nothing is anyone's "own." Unique proprietary claims are unenforceable, and available to all equally, with the result that instead of being property, objects and liberties are merely possessed by those who are able to get them for as long as they can keep them. Hobbes writes of justice as giving to each his own, "where there is no *own*, that is, no propriety, there is no injustice; and where there is no coercive power erected. . . there is no propriety, all men having right to all things; therefore where there is no commonwealth, there nothing is unjust" (L 15.3). This argument is related to the invalid covenant argument, although different from it; even in a state of nature, if one has covenanted to transfer to another some object in her possession on some condition the other has fulfilled, that object is "his own" as far as she is concerned, and she would act unjustly to withhold it or to hinder his enjoyment of it. But everyone else may still lay claim to it, so his possession of it will not amount to property in it. Both "propriety" and valid covenants depend on the existence of a commonwealth with power to enforce them.

This property argument against the salience of justice in a state of nature does not use Hobbes's definition of justice as the keeping of valid covenant; instead, it uses an alternate conception of justice Hobbes is willing to accept as appropriate for use by officials allocating entitlements within civil society. The sovereign's public judgment settles what counts for each as her own; when the settlement is equitable, that is, conforms to a requirement of impartiality or fair dealing, then it is just. Hobbes includes both notions of justice when explaining that natural law "contains" civil law because "justice (that is to say, performance of covenant and giving to every man his own) is a dictate of the law of nature" and subjects have covenanted to obey civil law (L 26.8).

Hobbes criticizes the traditional division of justice into commutative justice understood as exchange of things of equal value and distributive justice understood as distribution of goods according to the moral desert of the recipient. Commutative justice, the justice of contracting, is served when whatever terms the contracting parties have agreed upon are honored, regardless of whether the exchange was of things of equal value by some independent standard. Distributive justice is not offended when a person gives his own property more to one than another on some basis other than their moral desert, unless he has agreed to do otherwise, for it is his to give as he pleases. Hobbes concludes: "it cannot be denied, perhaps, that justice is some kind of equality; a kind namely which rests simply on the fact that since we are all equal by nature, one may not take for himself more *right* than he allows to another, unless he got this *right* by agreement" (DCv 3.6).

Injustice and the Foole

Readers have long puzzled over Hobbes's effort to address an imagined objection to his contention that justice is a requirement of reason from the character he names "the Foole" (L 15.4–7). Analogously to the Biblical Foole who says in his heart there is no God, Hobbes's Foole says in his heart there is no justice, or, more precisely, he says that reason recommends injustice – breaking covenants – when doing so is profitable to oneself. Justice does not stand with that reason that

recommends pursuit of self-interest. The Foole has no fear of divine retribution for violating natural law because he is also an atheist, so Hobbes's reply cannot appeal to that fear. Hobbes acknowledges that sometimes the wicked do in fact prosper but rejects the Foole's conclusion that in those cases the wicked acted rationally. The sheer accident that a course of action usually harmful unexpectedly happens to turn out well does not vindicate the rationality of the person who undertook it. The vast majority of people who act unjustly in hopes of profiting are sadly disappointed. Citizens have every incentive to be on the lookout for free riders, scammers, and cheaters, and the cost of getting caught as one of those is high. People who depend on deceiving others to get ahead assume their superiority in subtlety or intelligence to others, but people more usually overassess their own abilities and undervalue the abilities of others than is warranted. Thus, the Foole's reasoning is specious but violates the rational cannons of both prudence and sapience.

Justice in Civil Society

Subjects act justly by obeying all civil laws – as is required by their social contract – including civil laws governing private contracts. Judges do justice by conforming to the natural law requiring "equity" – that "if a man be trusted to judge between man and man. . . he deal equally between them" (L 15.23–4), avoiding partiality toward any contending party – and by interpreting the law as requiring equity.

Hobbes insists, on two grounds, that it is impossible for a sovereign to act unjustly toward its subjects. First, subjects have given their sovereign the right to treat them as it thinks fit (L 21.7). By the Roman law maxim "no wrong is done to a consenting party," our having consented to all the sovereign shall do entails that none of its actions are an injury to us (L 15.13; DCv 3.7). Further, in the *Leviathan* account, subjects have agreed to treat all the sovereign's actions as their own – to "avouch" (L 18.3), to "avow" (L 18.4), or to "be reputed author of all that he that is already their sovereign shall do" (L 18.3). On Hobbes's assumption that no one can be unjust to herself, ascribing the sovereign's action to the subject entails that the action, no matter how harmful, cannot be unjust. "It is true," Hobbes writes, "that they that have sovereign power may commit iniquity, but not injustice, or injury in the proper signification" (L 18.6). A sovereign "never wanteth right to anything (otherwise than as he himself is the subject of God, and bound thereby to observe the laws of nature," and a sovereign is "prohibited all iniquity by the law of nature)" (21.7). Hobbes characterizes sovereign violations of natural law as injuries to God.

The second reason Hobbes offers for his position that no sovereign can act unjustly toward a subject is that sovereigns have not entered into any covenant with their subjects and therefore cannot violate their covenant, which is what defines an injustice. Members of a multitude institute a commonwealth by covenanting *with each other* to empower a third party (the commonwealth, represented by the sovereign) to determine how they shall act in pursuit of peace and common defense (L 17.13–14). However, on Hobbes's account of sovereignty by acquisition, the victor/conqueror does enter into a contract with the vanquished promising them their lives and corporal liberty on condition that they obey. For a sovereign established in this way to then kill or imprison an obedient subject would seem to be not just iniquitous but also unjust. Whereas sovereigns cannot act unjustly toward subjects, subjects act unjustly toward one another whenever they disobey laws or seek to rebel, for that violates their mutual covenant of subjection, and they act unjustly toward the sovereign in the equity or distributive justice sense because they are not allowing the sovereign its own, or what is due it under the law.

Cross-References

- ▶ Aquinas, Thomas: On Natural Law
- ▶ Bentham, Jeremy: On Justice
- ▶ Justice: And Social Contract
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EL = *The Elements of Law*; reference is to Part, chapter, and paragraph number
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Hohfeld, Wesley Newcomb

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Introduction

In many, if not most, legal proceedings in which there is intense disagreement over very nuanced legal issues one side often accuses the other of conflating rights and liberties, privileges and powers, liabilities and disabilities, or, in short, of blurring together important legal relations. Inevitably the other side objects, denies the charges, and launches into accusations of its own. The charges and counter-charges and attacks and counter-attacks continue back and forth until an adjudicator finally decides the matter. In part, this is simply a consequent of having a legal system grounded in adversarial review. Indeed, all lawyers are trained to employ every legal tool at their disposal in order to secure the best results for their clients. However, those who are not familiar with the process of adversarial review are often left with the impression that if the lawyers could just get beyond the endless accusations over seemingly unimportant legal relations, the case might proceed to a resolution in a timely manner. But, of course, in order to get beyond the accusation that one side or the other has conflated an important legal relation a judge must have a way of determining which side has the correct interpretation of the relation in question. Even more, to reach a conclusion about who has the correct interpretation the judge would need to have a typology of legal terminology and relations at his/her disposal. In which case, he/she would have to engage in or, at the very least, appeal to jurisprudence. No twentieth century legal theorist saw this as clearly as Wesley Newcomb Hohfeld (1879–1918) did. In fact, many of Hohfeld's publications consist in exegeses of legal terminology and relations because he believed that the study and practice of law could be enhanced if students, practitioners, scholars, and law enthusiasts had a more precise and consistent understanding of the terms and relations employed in the law.

Fundamental Legal Concepts as Applied in Judicial Reasoning represents Hohfeld's most significant contribution to the field of analytic jurisprudence. In *Fundamental Legal Concepts*, Wesley Hohfeld offers us a definitional analysis of the most fundamental terms found in the law: rights, duties, privileges, no-rights, powers, liabilities, immunities, and disabilities. Simply put, he begins by defining rights as legal claims. Additionally, he tells us that rights are articulated in and adjudicated by courts of law. To be sure, in the United States, it is not unusual for a court to find that one citizen, say, Susan Smith, has violated the right of another citizen, Bartolome Vargas. A duty, according to Hohfeld, is simply an obligation. In which case, the court's finding that Susan violated Bartolome's right entails that Susan had a legal obligation to provide assistance or service to Bartolome, or to refrain from interfering with Bartolome, and that she failed to fulfill her duty. As a result, the court might impose penalties and fines on her, require her to fulfill her duty, or, if her failure resulted in a crime for which jail-time is warranted, imprison her. By contrast, Hohfeld defines a privilege as one's liberty of acting, or of refraining from acting, without a legal obligation to do either. So, in the example above, Bartolome has the privilege of exercising or of not exercising a claim against Susan, but he is under no legal obligation to act either way. Or, to

put it more straightforwardly, he may or may not bring a legal case against Susan and whether or not he does so is up to him.

Hohfeld's most counter-intuitive legal concept is that of a no-right. According to Hohfeld, a no-right is the absence of a right. Notice that Hohfeld's definition of a no-right relies on "an analogy to our words nobody and nothing."[1] Also notice that the concept of a no-right is counter-intuitive because we almost always use the article "a" to affirm that one possesses a particular object. For example, one might say that Susan has a Porsche 911 Carrara 4S, Bartolome has a job in forensic accounting with the Securities and Exchange Commission, or that Susan and Bartolome have a three-story investment property in San Francisco, California. In each case, one affirms that there is a thing that Susan and Bartolome possess, either individually or collectively. By contrast, in the case of a no-right Hohfeld uses the article "a" with the term no-right to indicate the absence of a possession, which is counter-intuitive for English speakers. Nevertheless, in order to understand what Hohfeld means by a no-right, one should think of the person who has a no-right as having no legal claim to or against the actions of another person. For example, in the case above in which Susan has violated Bartolome's right, the state has no legal claim to require Bartolome to sue Susan in a court of law for having violated his right. Conversely, the state has no legal claim to prevent Bartolome from suing Susan in a court of law for having violated his right. Either way, the state has no-rights to or against the actions of Bartolome Vargas.

Moreover, Hohfeld defines a power as one's ability to alter legal relations between people, businesses, the state, or some combination of the three. Now, let's return to the scenario in which Susan and Bartolome own a three-story investment property in San Francisco, California. Imagine that Bartolome is no longer interested in being Susan's partner and that he sells his share of the property to a third party. In this case, Bartolome has the ability to alter his legal relations with Susan, and therefore, Hohfeld tells us that Bartolome has a power. A liability, according to Hohfeld, consists in being susceptible to another person's ability to change one's legal relations. In this case, Susan is liable to Bartolome. Notice, however, that before Bartolome sold his share of the property, he was also liable to Susan because she could have sold her share of the property and this would have allowed her to alter their legal relations. Also notice that Susan is not without power altogether. To be sure, she has the power to alter her legal relations with the person who purchased Bartolome's share of the investment property. Nevertheless, Hohfeld also defines immunity as one's exemption from having one's legal relations altered by another person. Notice that since Bartolome sold his share of the investment property he is immune from Susan because she does not have the power to change their legal relations vis-à-vis the investment property. According to Hohfeld, in this case, Susan has a disability. That is, she is unable to alter her legal relations with Bartolome vis-à-vis the investment property.

After defining rights, duties, privileges, no-rights, powers, liabilities, immunities, and disabilities, Wesley Hohfeld turns his attention towards illuminating the legal relations that exist between these terms, the first of which is that of correlativity. To be sure, Hohfeld argues that rights and duties, privileges and no-rights, powers and liabilities, and immunities and disabilities are legal correlatives. Of course, this means that whenever one has a right someone else has a duty; whenever one has a privilege someone else has a no-right; whenever one has a power someone else has a liability; and whenever one is immune someone else is unable to change the legal relations that exist between them. In order to see how Hohfeld's typology of correlativity works, let us imagine that Maximillion Steele (Max) is an American citizen who lives in the state of Maryland, works for the Department of Transportation, and qualifies for public subsidized healthcare under the conditions specified in the

[1] Wesley, Hohfeld. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, edited by Walter Wheeler Cook, with a foreword by Arthur L. Corbin. New Haven: Yale U.P., 1964. 7.

Affordable Care Act. In this case, Maximillion has a right to public subsidized healthcare, and, correlatively, the state has a duty to provide Max with public subsidized healthcare. Moreover, since the *Affordable Care Act* does not require Max to have public healthcare, he might receive private healthcare coverage through his employer, or he might decide to forego having healthcare and simply pay the healthcare tax instead. Either way, Max has the privilege of paying for private healthcare, availing himself of public subsidized healthcare, or of refraining from having healthcare altogether and simply paying the healthcare tax. Correlatively, the state has no-rights to force Max to pay for private healthcare, accept public subsidized healthcare, or to have healthcare at all. Of course, if Max decides not to have healthcare, the state can force him to pay the healthcare tax.

Further, imagine that after considering his options carefully, Max chooses to avail himself of public subsidized healthcare. Moreover, imagine that Max could not be happier with his services. He has great doctors and nurses, he gets regular check-ups, and, as a result, he is quite healthy. Life is proceeding well for Max so he decides to propose to his girlfriend of 3 years, Lisa-Marie. She accepts his proposal and they get married. However, after living together for a number of years, Lisa-Marie realizes that she has made a mistake. She decides to divorce Max in order to become a Buddhist nun in the monastic community of Sertar in the heart of the Sichuan Province of China. Further, imagine that Max challenges the divorce on the grounds that Lisa-Marie is not Buddhist. Of course, Max may be able to slow the divorce proceedings, but he cannot prevent Lisa-Marie from divorcing him. Lastly, imagine that the court grants the divorce request and Lisa-Marie subsequently moves to Sertar, China, and becomes a Buddhist nun. In this case, Hohfeld's conception of legal correlatives entails that Lisa-Marie has the power to change her legal relations with Max, and correlatively, Max is liable to Lisa-Marie's ability to change their legal relations. Additionally, Lisa-Marie is immune from Max's attempts to stop her from divorcing him. Moreover, once the divorce request is granted, Lisa-Marie becomes immune from Max's attempts to change their legal status from divorced to remarried. Correlatively, Max has no power to force Lisa-Marie to remarry him. Max only has disabilities in this case. First, he is unable to stop Lisa-Marie from divorcing him, and, secondly, once the divorce is granted, he is unable to change his legal relations with Lisa-Marie from divorced to remarried.

The second category of relations that Hohfeld is concerned to illuminate is that of opposition. Indeed, Hohfeld argues that rights and no-rights, privileges and duties, powers and disabilities, and immunities and liabilities are legal opposites. In order to see how Hohfeld's typology of opposition works, let us return to the scenario in which Maximillion has decided to avail himself of public subsidized healthcare. Since Max has a right to public subsidized healthcare, the opposite of his right is the state's no-right to prevent him from receiving public subsidized healthcare. Additionally, since the *Affordable Care Act* does not require Max to have public healthcare, he *ipso facto* has the privilege of paying for private healthcare or of refraining from having healthcare altogether and simply paying the healthcare tax. Thus, the opposite of Max's privilege of having public or private healthcare, or of having no healthcare at all, are the state's duties to refrain from forcing Max to pay for private healthcare, accept public subsidized healthcare, or to have healthcare.

Moreover, similar relations exist between powers and disabilities and immunities and liabilities. In order to see this, let us return to the scenario in which Lisa-Marie has decided to divorce Max. In this case, Lisa-Marie has the power to alter her relations with Max by divorcing him. Max, however, is unable to stop Lisa-Marie from divorcing him, and once the divorce is granted, he is unable to change his legal relations with Lisa-Marie from divorced to remarried. Thus, the opposite of Lisa-Marie's power to change their legal relations is Max's disability to change their legal relations. Even more, Lisa-Marie is immune from Max's attempts to prevent them from getting divorce and to change their legal relations after the divorce is granted. Max, of course, is liability to Lisa-Marie's power to change their legal relations. Thus, Hohfeld tells us that the opposite of Lisa-Marie's

immunity against Max is Max's liability to Lisa-Marie's power to change their legal relations.

The final relation that Hohfeld is concerned to illuminate is that of rights *in personam* and rights *in rem*. Indeed, Hohfeld tells us that "a right *in personam* is a unique right residing in a person and availing against a single person."[2] By contrast, "a right *in rem* is always one of a large class of fundamentally similar rights residing in a single person but availing respectively against persons constituting a very large and indefinite class of people."[3] In order to make this category of relations more concrete, let us return to the scenario above in which Susan violated Bartolome's right. Further, let us imagine that Susan violated Bartolome's right by wrongfully preventing him from entering onto their investment property. In this case, Bartolome has a right *in personam* against Susan. That is, the right of entering onto the investment property belongs to Susan and Bartolome insofar as they are the legal owners of the investment property. Moreover, since Susan wrongfully prevented Bartolome from entering onto the investment property, he has a unique claim against a single person, namely Susan. This is what Hohfeld calls a right *in personam*. By contrast, as property owners Susan and Bartolome have property rights against all of other persons. For example, Susan and Bartolome have trespassing rights against all persons generally. In fact, their right against trespassers falls within a large class of property rights that Susan and Bartolome have against all persons. This is what Hohfeld calls a right *in rem*.

Conclusion

Today, many of the legal relations in Hohfeld's typology seem obvious to law students, legal practitioners, scholars, and law enthusiasts. They now pervade much of our jurisprudential reasoning without us even realizing that Wesley Hohfeld is the original source. After all, many of his writings form the basis for contemporary jurisprudence. This is particularly true of *Fundamental Legal Concepts as Applied in Judicial Reasoning*. What's equally important to notice is that Hohfeld's work is not confined to the lecture halls and libraries of elite academies. Quite the opposite, as a result of Hohfeld's influence on the legal community, judges, lawyers, and other practitioners have come to see the value of jurisprudence to the practice of law. For these reasons, Wesley Hohfeld's contributions to legal thought and practice are immeasurable.

[2] Ibid., 72.

[3] Ibid.

Cross-References

- ▶ Claim Rights (Subjective Rights)
- ▶ Dworkin, Ronald: Theory of Rights
- ▶ Hohfeld, Wesley Newcomb: Fundamental Legal Conceptions
- ▶ Rule of Recognition and Constitution
- ▶ Scalon, Thomas Michael

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Hohfeld, Wesley Newcomb: Fundamental Legal Conceptions

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Introduction

Wesley Newcomb Hohfeld (1879–1918) was an American legal theorist whose principal contribution was a pair of essays (one published in 1913, the other in 1917) on "Fundamental Legal Conceptions as Applied in Juridical Reasoning." In these essays – collected in Hohfeld 1923 – Hohfeld offers a framework of eight interrelated normative positions that he presents as "the lowest generic conceptions to which any and all 'legal

quantities' may be reduced" (Hohfeld 1923: 63–64). His analyses remain very influential. This entry reviews Hohfeld's framework and highlights its more controversial assumptions.

The Multiple Ambiguity of "Right"

Building on the work of previous theorists (see Dickey 1971; Losano 1976), Hohfeld identifies four types of entitlements commonly referred to as "rights" in ordinary legal discourse: privileges, rights *stricto sensu* (which he also calls "claims"), powers, and immunities. Rights *stricto sensu* are also normally referred to as "claim-rights," and privileges as "liberties" (see Williams 1956: 1131–1135).

Liberties concern the liberty-holder's own actions or omissions and are defined simply as the absence of duties. More precisely, a liberty to φ is the absence of a duty *not* to φ; a liberty *not* to φ, the absence of a duty to φ. A liberty to φ and a liberty not to φ are therefore independent positions.

Claim-rights, by contrast, concern someone else's actions or omissions: a person *X* has a claim-right that a person *Y* φ (or refrain from φ-ing) if and only if *Y* owes *X* a duty to φ (or to refrain from φ-ing).

Powers and immunities are second-order entitlements. A power is a normative ability to bring about changes in someone's normative positions (i.e., in someone's claim-rights, liberties, duties, other powers, and so on), and to have a certain immunity is to not be subject to a certain power.

Jural Correlatives

Hohfeld plausibly characterizes claim-rights as *relational* positions: to have a claim-right against someone is to stand in a certain kind of normative relation with that person. The claim-right and the other person's corresponding duty, indeed, are for Hohfeld two "correlative" sides of the same "jural relation." This carries two implications. The first is that fully spelled-out statements of claim-rights will specify not merely the right-holder (and the content of the right), but also the person against whom the right is held:

(1) *X* has a claim-right that *Y* φ.

The second implication is that any statement of that form is taken to be semantically equivalent to a statement of the following form:

(2) *Y* owes *X* a duty to φ.

Less plausibly, or at least more controversially, Hohfeld thinks the relational model generalizes to liberties, powers, and immunities. Powers, he says, correlate with *liabilities*. Fully spelled-out statements of powers must therefore specify the correlative liability-holder, as in the example in (3) below; and (3) and (4) are taken to be semantically equivalent:

(3) *X* has, relative to *Y*, a power to impose on *Y*, by γ-ing, a duty to φ.
(4) *Y* has, relative to *X*, a liability to having a duty to φ imposed on him by *X*'s γ-ing.

As to liberties, Hohfeld coins the term "no-right" to refer to the corresponding correlative position, regarding (5) and (6) as equivalent:

(5) *X* has, relative to *Y*, a liberty not to φ.
(6) *Y* has a no-right that *X* φ.

Immunities, lastly, correlate with *disabilities*, with (7) and (8) again treated as equivalent:

(7) *Y* has, relative to *X*, an immunity to having a duty to φ imposed on him by *X*'s γ-ing.
(8) *X* has, relative to *Y*, a disability to impose on *Y*, by γ-ing, a duty to φ.

We end up, therefore, with eight types of normative positions, arranged into four pairs of correlatives (Table 1).

Note that the correlative of duty is rendered as "liberty not," and not, as in Hohfeld's original tables, as "liberty." (Alternatively, we could have given

Hohfeld, Wesley Newcomb: Fundamental Legal Conceptions, Table 1 Jural correlatives

Claim-right	Liberty not	Power	Immunity
Duty	No-right	Liability	Disability

"duty not" as the correlative of "liberty.") As pointed out by both Williams (1956: 1136) and Fitch (1967: 270–271), this amendment is needed to make the table fit Hohfeld's own considered analyses.

Jural Opposites

The same eight positions can also be arranged, according to Hohfeld, into four pairs of "opposites" (Table 2).

What Hohfeld means is that the *negation* of a statement ascribing a certain legal position to some individual can be restated in an equivalent statement ascribing the "opposite" position to the same individual. Take, for example, the negation of (2):

(~2) It is not the case that *Y* owes *X* a duty to φ.

This is equivalent, according to Hohfeld, to

(5) *X* has, relative to *Y*, a liberty not to φ.

The result, then, is that we have two independent groups or "families" of four positions each (see Radin 1938: 1157; Carrió 1990: 305): the family of rights, comprising claim-rights, duties, liberties, and no-rights; and the family of powers, comprising the remaining four positions. The content of any statement of a position can be restated in terms of any of the other positions in the same family. Consider, for example:

(9) It is not the case that *X* has a claim-right that *Y* pay her £200.

This can be restated in terms of any of the other positions in the family of rights; it is equivalent to any of the following:

(10) It is not the case that *Y* owes *X* a duty to pay *X* £200.

Hohfeld, Wesley Newcomb: Fundamental Legal Conceptions, Table 2 Jural opposites

Claim-right	Liberty not	Power	Immunity
No-right	Duty	Disability	Liability

(11) *Y* has, relative to *X*, a liberty not to pay *X* £200.
(12) *X* has, relative to *Y*, a no-right that *Y* pay her £200.

Likewise within the family of powers; the following are all equivalent:

(13) *X* has, relative to *Y*, a power to impose on *Y*, by accepting *Y*'s contractual offer, a duty to pay *X* £200.
(14) *Y* has, relative to *X*, a liability to having a duty to pay *X* £200 imposed on him by *X*'s accepting of his contractual offer.
(15) It is not the case that *X* has, relative to *Y*, a disability to impose on *Y*, by accepting *Y*'s contractual offer, a duty to pay *X* £200.
(16) It is not the case that *Y* has, relative to *X*, an immunity to having a duty to pay *X* £200 imposed on him by *X*'s accepting of his contractual offer.

There is no implication across families, however, from statements ascribing powers to statements ascribing liberties: a power can be coupled with either a liberty to exercise it, or a duty not to exercise it.

There is also no implication from statements ascribing liberties to statements ascribing claim-rights; in particular, a liberty to φ entails no claim-rights to non-interference with the exercise of the liberty. Hohfeld illustrates the point with an example he adapts from Gray (1909: 20): if the owners of a shrimp salad say to *X* "Eat the salad, if you can; you have our license to eat it, but we don't agree not to interfere with you," then, Hohfeld says (1923: 41), "the privileges [i.e., the liberties] exist, so that if *X* succeeds in eating the salad, he has violated no right of any of the parties" [i.e., the owners]; but "it is equally clear that if *A* [one of the owners] had succeeded in holding so fast to the dish that *X* couldn't eat the contents, no right of *X* would have been violated." This is not to say, of course, that our liberties are not often "protected," in HLA Hart's metaphor, by a "perimeter" of duties on others (Hart 1982: 171–173); only that the connection is, logically speaking, contingent rather than necessary.

Nonrelational Positions

Hohfeld claims that the eight positions he identifies are both fundamental and comprehensive: "the lowest common denominators of the law" (Hohfeld 1923: 64). The point is that any legal situation can be analyzed in terms of any one – or any combination of – the eight positions; but the positions themselves are the basic units of analysis.

The comprehensiveness of Hohfeld's framework, however, depends on the overall soundness of his relational framework of legal positions, and there are reasons to be suspicious of such a framework in so far as it purports to extend beyond claim-rights. The relational nature of claim-rights does allow us to derive (2′) from (1):

(1) *X* has a claim-right that *Y* φ.
(2′) *Y* has a duty to φ.

The reverse implication, however, does not hold; (2′) does not imply (1). In order to derive a claim like (2′) from a claim like (1), we would need to know that *Y*'s is a duty owed specifically to *X*. Duties that are owed specifically to someone are commonly called "directed" (or, less often, "directional") duties (see Sumner 1987: 24; Sreenivasan 2010: 467; May 2015). But – arguably, at least – there can be duties that are not owed specifically to anyone, and such undirected duties do not correlate with claim-rights at all (see Pound 1915: 94; Moritz 1960: 63–64; Stone 1964: 140, 160; Feinberg 1966: 139–141; Lyons 1969: 164; Feinberg 1970: 243–244; van Duffel 2012: 107). Given that Hohfeld makes no room in his framework for nonrelational normative positions, his claim to comprehensiveness is undermined (see, for further discussion, Duarte d'Almeida 2016).

This worry can be allayed, though, and the claim to comprehensiveness restored, if relationality is abandoned as a general feature of normative positions. We could then correctly draw out the different logical relations that hold between different statements of normative positions. Consider again the following statements:

(1) *X* has a claim-right that *Y* φ.
(2) *Y* owes *X* a duty to φ.
(2′) *Y* has a duty to φ.
(~1) It is not the case that *X* has a claim-right that *Y* φ.
(~2) It is not the case that *Y* owes *X* a duty to φ.
(~2′) It is not the case that *Y* has a duty to φ.

(1) and (2) are correlative statements in the Hohfeldian sense; they are semantically equivalent. (2) – which states that *Y* has a *directed* duty – entails (2′), but the reverse is not the case. It follows that (1) entails (2′) as well, but again the reverse is not the case. And (1) and (~1) are Hohfeldian opposites: they are logically contradictory statements. By the same token, (~2′), which is the opposite of (2′), entails both (~1) and (~2); but neither (~1) nor (~2) entails (~2′), although (~1) and (~2), which are again correlative statements, entail each other.

What of liberties? Hohfeld's definition of a liberty to φ as the absence of a duty not to φ equivocates between (~2) and (~2′). But again liberties are more plausibly regarded as nonrelational positions: to have the liberty to φ is not to have any duty – directed or otherwise – not to φ. We should therefore say that

(17) *Y* has the liberty to φ

means the same as (~2′); and so while (17) entails both (~1) and (~2), neither of these entails that *Y* has no duty not to φ. All that (~1) and (~2) entail is that *Y* is under no directed duty towards *Y* – owes *X* no duty – not to φ.

Liberties, therefore, do not *correlate* with "no-rights"; nor does there seem to be good reason to adopt "no-right" as the name of the position of not having a claim-right that someone do (or refrain from doing) something. Hohfeld's use of "no-right," indeed, has often been criticized. ("The law is no more constituted of no-constraints," one critic wrote, "than botany is constituted of no-plants": see Kocourek 1922: 236–237, and also Halpin 1997: 35.) Take (~1) again:

(~1) It is not the case that *X* has a claim-right that *Y* φ.

If (~1) is true, then the position *X* occupies is the "opposite" of having a claim-right that *Y* φ. But while " . . . has no claim-right that . . . φ" is indeed a relational predicate (a point that Hohfeld's critics sometimes mistakenly deny), there is little need to adopt Hohfeld's "no-right" to re-describe the corresponding position. We can express it more simply and with full clarity by saying simply that:

(~1′) *X* has no claim-right that *Y* φ.

Conclusion

The importance and analytical usefulness of Hohfeld's main distinction – the distinction between claim-rights and liberties – does not depend on the overall soundness of his relational account of legal positions. Many so-called "rights" are really Hohfeldian liberties they are entitlements (actual or putative) to actions or omissions by the liberty-holder, not to actions or omissions by someone else. Being clear about this will help us to avoid some common fallacies. If we keep in mind that having the liberty to do something is nothing more than *not* having a duty not to do it, we will not be prone to arguing, invalidly, from the sole premise that someone has a certain liberty to the conclusion that someone has a certain duty.

One hundred years on, the Hohfeldian framework is still often misunderstood and misapplied; not every published work on the topic is equally reliable. Williams (1956), Kramer (1998), and Finnis (2011), though, are particularly good, and recommended for further developments of the points raised here.

Cross-References

- ▶ Hohfeld, Wesley Newcomb
- ▶ Legal Relations: Theories of
- ▶ Legal System and Legal Order

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H

Holbach, Paul-Henri Thiry, Baron d'

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Introduction

Baron d'Holbach (1723–1789) was a central figure of the French Enlightenment, best known today for his thoroughgoing atheism, materialism, and determinism, and for his hosting of an important intellectual salon in Paris. In the 1770s, he published a series of major works on social and political philosophy: *Système social* (1773b), *La politique naturelle* (1773a), *Ethocratie* (1776a), and *La morale universelle* (1776b). His views of society, authority, law, and ethics were informed by a categorical secularism and utilitarianism, a conviction that no system could be universally applied but must take into account the peculiarities of particular culture and history, and a belief that enlightened reform was the only alternative to destructive revolution.

Holbach vehemently rejected all notions of a pre-social state of nature and of an actual, historical social contract. For Holbach, human beings were sociable by nature and governed by their inherent passion to pursue their own happiness, from which the essential characteristics of all legitimate authority, laws, and incentives alone could be derived. The only valid criterion in law, government, social and economic structure, and authority was the greatest well-being for the greatest number.

Nature, for Holbach, was governed by mechanistic laws – including the mechanism by which all individuals ineluctably pursued what they believed would bring them happiness – but human knowledge of what did or did not lead to human flourishing was fatally flawed by ignorance of nature and by illusory beliefs. True knowledge of nature would demonstrate – one of Holbach's goals – that only human societies which came to recognize that their very purpose was the secular, natural happiness of their citizens could actualize their members' potential for happiness. From that perspective, Holbach believed that those able to pursue at the expense of others what they wrongly believed to be their happiness ruled, with varying degrees of tyranny, in almost all times and places. Such tyranny had been achieved by an avaricious union of political and religious power, which made its victims believe that blind obedience to inherited secular and ecclesiastical authority would be rewarded by an eternal happiness.

In Holbach's system, we should judge *all* aspects and structures of society and *all* individuals within a society by their provision of natural benefits to our fellow human beings. Every single system of government could be corrupted and could devolve into tyranny – *inherited* royal or princely power most easily, however – so the essential question was not which system was best, but which arrangement brought this or that particular society the most happiness, which could not be decided in the abstract, since it could vary according to time, place, and culture. The crucial issues, then, were, in the largest sense, educational, for when people, freed from supernatural beliefs and traditions, understood their human nature and how that nature interacted with the system of nature, they would seek a society of human flourishing. Who would *not* want to be governed by sovereigns, in whatever secular form, who worked for the happiness of all, not for their selfish, private happiness? Who would *not* want those who produced by their activities and enterprises the most benefits for their fellow citizens to receive the most rewards? Who would *not* want to listen to those with a knowledge of nature and society that produced greater and greater well-being? Who would *not* want the laws of a society to secure life, unequal property derived from utilitarian merit, and equal rights to the pursuit of happiness?

In most societies, for example, armed men – usually in the service of sovereigns whose egoism and power were catastrophic for public well-being – did what they chose, scoffing at laws that applied only to others, seizing what they

could, and having contempt for ordinary citizens. Until the laws controlled such behavior, under sovereigns who understood that their private happiness depended upon the happiness of their citizens, there could be no society organized in conformity with nature. The function of laws, thus, was to provide for the security of persons and property, to align benefits with the merit of being useful to one's fellow beings, and to deter the anti-social effects of particular passions.

Conclusion

For Holbach, human beings were not uniform, and their often very divergent passions and motives arose from physical, temperamental, and experiential differences. Because those passions could separate a citizen's particular interest from that of his fellow-citizens, law was essential to a secure, stable, and ethical society. Education would not suffice, so law, thus, must deal directly with the effects (he specifically uses each of these terms, in French) of lasciviousness, debauchery, license, ingratitude, insensitivity, anger, exclusive self-love, arrogance, intemperance, gluttony, avarice, envy, ignorance, dissipation, and frivolity – in short, with all aspects of what might separate an uncontrolled individual from the general interest.

In his *Ethocratie* – consistently with all of his commentary on the law – Holbach articulated the three essential functions of the laws: to secure (1) liberty, the right to pursue one's own happiness to the extent that this pursuit was not contrary to the happiness or interests of others; (2) property, the safe and tranquil possession of things justly acquired; and (3) security, the protection from harm for every citizen who did not injure the general interest of society. These laws must apply equally to all, from the humblest citizens to those who govern in the interests of all, including the wealthy, the nobility, magistrates, clergy, scientists and men of letters, teachers, soldiers, husbands, and wives. Such laws could only extend to visible and public crimes. The advance of knowledge would have to do the rest.

Such a society could not be truly self-regulating until knowledge and the progress of enlightenment made citizens and sovereigns alike aware of the true sources of their happiness. Until such a time, for Holbach, society stood in need of wise sovereigns and gradual, cumulative reform. Given human passions, it was the case that violent revolution and its ineluctable demagoguery, in the context of prevailing prejudices, supernaturalism, and dysfunctional traditions, would produce abuses worse than those a revolution sought to end. Until reforms and the spread of knowledge had created new possibilities, we would depend on laws derived from utility and on wise governors if we were eventually to live in a society that served the common interest.

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Holmes, Oliver Wendell Jr.

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Introduction

Holmes, Oliver Wendell (1841–1935), was an associate justice of the Supreme Court of the United States (1902–1932).

Holmes, a son of famous raconteur of the same name, entered Harvard law school in 1864 after his 3-year service as a first lieutenant of the Massachusetts Militia in the American Civil War. He received a law degree and started his scholarly career by contributing review works to the American Law Review in 1866. He was admitted to the Massachusetts bar in 1867, and 6 years later, the 12th edition of James Kent's *Commentaries on American Law* was published with Holmes as the sole editor.

After briefly serving as a professor at Harvard law school, he began his judicial career at the Supreme Judicial Court of Massachusetts in 1882. President Theodore Roosevelt nominated Holmes to the Supreme Court of the United States in 1902. During the 29 years of his service, Holmes authored highly influential dissents, several of which later became the majority opinion of the Court.

With his esteemed colleague Louis D. Brandeis (1856–1941), Holmes has been praised as one of "the Great Dissenters."

From Historicism to Positivism

Holmes took a predominantly historicist-evolutionist method of juristic analysis in his most well-known classic, *The Common Law* (1881).

He painstakingly explored the development of Anglo-American common laws "to establish the historical proposition that external or objective standards of liability have progressively been substituted for those which superstition and illusion had ascribed to offending things and offending persons" (Holmes 1963: xxiii). Like many intellectuals of the age, Holmes was under the spells of Henry Maine and von Savigny (White 1993: 131, 149).

However, his future conversion to positivism was foreshadowed. In the same book, Holmes frequently referred to its core doctrines, namely, "the amoral nature of law" and "law as a sovereign policy choce." Taking the common law theory of torts as an example, he noted that "[a]s the law, on the one hand, allows certain harms to be inflicted irrespective of the moral condition of him who inflicts them, so, at the other extreme, it may on grounds of policy throw the absolute risk of certain transactions on the person engaging in them, irrespective of blameworthiness in any sense" (Holmes 1963: 116).

Eighteen years later, Holmes used the "bad man" metaphor to emphasize the predictive nature of law in *The Path of the Law* (1897). "The object of our [legal] study, . . . is. . . the prediction of the incidence of the public force through the instrumentality of the courts" (Holmes 1897: 457). "[I]f we take the view of our friend the bad man we shall find . . . that he does want to know what the Massachusetts or English courts are likely to do in fact. . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (ibid.: 460–461).

This predictivism cannot be fully understood without taking the posivist premise in view, because a legal decision is only meaningful when it is enforced through official coercion, backed by state sovereign.

Around the turn of the century, it was ascertainable that Holmes came to see the essence of law as an external-physical instrument to fulfill the policy goals chosen by majority. Rejecting the moralism of natural lawyers, he firmly believed that the role of ethical value judgment must be eliminated from jurisprudence. "The Path of the Law marks the first clear articulation of legal positivism –that is, an insistence on a sharp distinction between law and morals—by any American legal thinker" (Horwiz 1992: 67–68).

Famous dissenting opinion in *Lochner v. New York* (1905) is better understood as the

philosophical progeny of positivism. In this case, constitutionality of a state statute which limited the work hours of bakers was at issue. On appeal, five justices of the Supreme Court thought it unconstitutional, since the statutory limitation violates the sacred "liberty of contract" guaranteed for both parties by the Fourteenth Amendment to the US Constitution.

Holmes supported the statute, not because labor protection was considered to be a desirable policy, but because state legislation was expressing the policy chosen by sovereign will. "I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . [S]tate constitutions and state laws may regulate life in many ways which we . . . might think as injudicious, or if you like as tyrannical, . . ." (Lockner v. New York, 198 U.S. 45, 75).

Holmesian positivism is widely regarded to be the pecursor of American Legal Realism in the 1930s, the core ideas of which include (i) skepticism about the moral nature of law and (ii) pragmatist-instrumentalist attitude toward law.

Free Speech

During the latter half of his service on the Supreme Court, Holmes had taken a strikingly libertarian stance in free speech cases. In *Abrams v. United Staets* (1919), the majority of the Court upheld the convictions of Russian immigrants who were alleged to undermine the war effort of the American government by circulating seditious leaflets. In dissent, Holmes declared that "the ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market" (Abrams v. United States, 250 US 616, 630).

In *United States v. Schwimmer* (1929), Holmes took side with a Hungarian pacifist who was denied her petition for naturalization in the United States. His dissenting opinion eloquently stated that "if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate" (United States v. Schwimmer, 279 US 644, 654–5).

From the statist-positivist perspective, Holmes saw the essence of speech protection as a constitutional means to the improvement of state governance, assuming that voters make better political choices when diverse opinions circulate as freely as possible within a community (White 1993: 427–453). An unrestrained exchange of ideas serves "the search for truth in a democratic society that valued public discussion" (ibid.: 452).

The democracy-enhancement justification for speech protection was later adopted by his successors on the Supreme Court in "footnote 4" of *United States v. Carolene Products Co.* (1938), the basic theory of which has formed the American principles of when and how the power of judicial review should be exercised (United States v. Carolene Products Co., 304 US 144, 152 n.4).

A Genuine Liberal or Not?

"Holmes is a strange, enigmatic figure. Put out of your mind the picture of the tolerant aristocrat, the great liberal, the eloquent defender of our liberties, the Yankee from Olympus. All that was a myth. . .. [T]he real Holmes was a savage, harsh, and cruel, a bitter and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which the rich and powerful impose their will on the poor and weak" (Gilmore 1977: 48–49).

It was not rare that Holmes unsympathetically rejected the petition for help from needy minorities. In *Giles v. Harris* (1903), a black citizen of Alabama sought equitable relief from racially motivated disenfranchisement. The voter registration system was alleged to be discriminatorily administered against people of color. Holmes delivered the opinion of the Court, stating that "[i]t seems to us impossible to grant the equitable relief . . .. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs" (Giles v. Harris, 189 US 475, 486).

In *Buck v. Bell* (1927), the US Supreme Court upheld a Virginia statute which imposed

compulsory sterilization on the "mentally defective." Holmes wrote the majority opinion, stating that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind" (Buck v. Bell, 274 US 200, 207).

"In the 1940's Roman Catholic natural lawyers and legal moralists like Lon Fuller found Holmes's skepticism toward ideals and absolutes and his apparent reduction of law to positive facts—to predictions of judicial decisions, synthesized from the opinions of the dominant interests of society, ultimately grounded in brute force and brute biological instinct—dangerously akin to fascism" (Gordon 1992: 5).

"[T]he great hero came under attack. It was said that Holmes was not really a good American after all, that he had betrayed American ideals. . ." (Hollinger 1992: 227). Among current historians, the reputation of Holmes as a liberal jurist has been mixed at the very most.

Cross-References

- ▶ Fuller, Lon Luvois
- ▶ Legal Realism, American: Theoretical Aspects
- ▶ Maine, Henry Sumner
- ▶ Savigny, Friedrich Carl von

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Honneth, Axel

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Introduction

Axel Honneth (b. 1949– in Essen, Germany) is the primary figure associated with the third generation of Frankfurt School critical theory (The first generation includes original Frankfurt Institute for Social Research members such as Max Horkheimer, and the second generation is primarily associated with Jürgen Habermas.). Honneth's work has touched on many themes in social, political, and moral philosophy. He is best known for his theory of recognition and his unique application of that concept to social, political, and moral questions. His most recent work has expanded on his early theory of recognition and developed a powerful new conception of social freedom.

After doing undergraduate and early graduate work at the universities of Bonn and Bochum

from 1969 to 1974, Honneth completed his doctoral degree at Free University Berlin in 1982. His dissertation, which was published as *The Critique of Power* (Honneth 1993), was directed by the sociologist and social philosopher Urs Jaeggi. In 1983, he would take a position as assistant professor, working under Habermas, at the University of Frankfurt. In 1990 he received his habilitation (a postdoctoral qualification that enables promotion) at Frankfurt for *The Struggle for Recognition* (Honneth 1996). He would then serve in professorships at the University of Konstanz and Free University Berlin before succeeding Habermas as Professor of Social Philosophy in Frankfurt in 1996. In 2001, he also took on the directorship of the Institute for Social Research in Frankfurt and in 2011 took a partial position in the Department of Philosophy at Columbia University.

Honneth's research from *The Critique of Power* on contains a large body of critical and exegetical work on the thought of his Frankfurt School predecessors and a development of his own version of critical theory. Throughout this work, Honneth rejects what he takes to be the excessively formalistic or functionalistic elements of Marxist social thought (such as the view that social development is wholly dependent on the structural development of the capitalist economic system). Against this he emphasizes an anthropologically rooted view that ties social development to forms of practical action that are structured by basic human needs and faculties. This anthropological aim is seen clearly in Honneth's first book (which was co-authored with the sociologist Hans Joas), *Social Action and Human Nature* (Honneth and Joas 1988) and continues through to his latest works.

Honneth's Conception of Critical Social Theory

While there are vast differences in the thinkers and works associated with the Frankfurt School, according to Honneth the main representatives all engage in a kind of normative critique that "can inform us about the pretheoretical resource in which its own critical viewpoint is anchored as an empirical interest or moral experience" (Honneth 2007a). For Honneth, the critical theorist must pinpoint some nontheoretical element of human social life that can be developed theoretically into a normative position.

The idea of a "moral experience" is crucial to this. In one of his earliest works, Honneth links this to the idea of "hidden morality" (Honneth 2007b). Oppressed people develop context-bound negative valuations regarding their oppression before such feelings are generalized into explicit moral principles (in this sense, the principle is initially "hidden"). It is this kind of direct, contextual feeling of injustice that Honneth calls a "moral experience." The oppressed do not make elaborated normative claims regarding the immoral or unjust conditions they face. Rather, they directly experience an impediment to the fulfillment of their basic human needs.

The next step in Honneth's view is that the moral experience is theorized in such a way that it brings to light "a degree of intramundane transcendence" (Honneth 2007a). The moral experiences are "intramundane" insofar as they come from a part of people's own directly lived experience. The "transcendent" element comes from the critical theorist's reconstruction of these experiences. Rather than taking descriptions of moral experience at face value, the theorist elaborates these experiences into norms that serve as a guide for critique. Furthermore, this typically involves revealing normative grounds that are not evident to the people experiencing the injustice.

Honneth notes that this basic type of theory can be found throughout the works of the Frankfurt School, for example, in Horkheimer's early program for the Institute for Social Research and in Habermas' theory of communicative action. But Honneth claims that his predecessors do not successfully pinpoint genuine moral experience (Honneth 2007a). For example, he argues that Habermas focused too much on a theory of language that tried to find social norms in formalistic rules of communication that are not directly experienced by speakers. For Honneth, neither the first nor second generations of the Frankfurt School properly focused on moral *experience*, and thus the normative potential of their theories were

blunted. Honneth sees his work as correcting this error.

As the director of the Institute for Social Research, Honneth has implemented a program that follows this conception of critical theory. This is seen, for instance, in the projects built around the idea of "paradoxes of capitalist modernization" (Honneth and Hartmann 2012). A guiding idea of this project is that post-war capitalism pushes an instrumentalized conception of individual development that paradoxically undercuts the social relationships people rely on for that development. The critical theorist takes the moral experiences associated with lack of individual fulfillment and tries to reveal their hidden paradoxical link to capitalist individualism.

Struggles for Recognition

Honneth's anthropological perspective and his desire to root critique in moral experience come together in his theory of recognition. On this view, which is most thoroughly developed in *The Struggle for Recognition* (Honneth 1996), human development depends upon the achievement of a self-identity rooted in self-respect. This self-relation is only achieved, however, via gaining recognition from others. The intersubjective process of achieving recognition drives social development, and social pathologies can be analyzed in terms of failures of individuals or groups to attain recognition from others. This means that the moral experiences that Honneth takes to be so central to critical theory are construed as the experiences of those who have not been properly afforded recognition.

Honneth develops his conception of recognition by building on the work of G.W.F. Hegel, who rejects the atomistic, individual-centered conception of social development that dominated modern sociopolitical thought from Hobbes to Kant. Hegel borrows from J.G. Fichte the idea that in order to fully gain an individual sense of self, the human subject must be confronted with another subject who takes a particular stance toward the first subject. One gains one's sense of self from the ways in which one is regarded by others. Honneth takes two crucial ideas from Hegel in further specifying his theory of recognition. First, recognition must be thought of as taking place within the lived contexts that Hegel associates with *Sittlichkeit* (ethical life). Second, the achievement of recognition is construed in terms of conflict or struggle.

Honneth specifies three forms of recognition that fit within particular lived contexts: love, rights, and solidarity. The first form of recognition, "love," is to be understood "neutrally" as "constituted by strong emotional attachments among a small number of people" (Honneth 1996, 95). Thus "love" refers to close, affectively oriented relationships. As we are recognized through the caring behavior of loved ones, we attain basic self-confidence. The second form, "rights," involves being recognized as a bearer of legal rights and duties. This form of recognition leads to self-respect; one gains a sense of one's dignity and worth by seeing oneself as a full and equal member of the legal community. The love relation is affective and based on particular relations of care, while the rights relation is cognitive and based on the knowledge that one is incorporated into a formal legal arrangement. Solidarity, in a sense, goes beyond both of the other forms. It involves being seen by other members of one's community as a worthy and productive member of that community. Like love, it attends to the individual person, in this case by honoring their specific abilities and contributions. But like rights, it goes beyond personal relationships and depends upon the whole community. Through this relation, one acquires self-esteem.

These forms of recognition develop via struggles between subjects with competing interests. In love, one struggles to attain self-confidence by properly maintaining (in friendship, familial relations, romantic relations, etc.) a form of closeness that nonetheless respects individual boundaries. Regarding rights, one can think of the long history of groups fighting to be recognized as equal legal persons, for example, in the civil rights movement in the United States. Solidarity involves struggle insofar as one must work to achieve the standards

of the community, and fight to have one's achievements be honored under those standards.

Honneth describes situations where such struggles fail as involving *disrespect*. Feelings of disrespect occupy a crucial place in Honneth's critical theory, as they provide the moral experiences described in the previous section of this entry. Experiences of physical abuse (love), disenfranchisement (rights), and bigotry (solidarity) would all be examples of disrespect that could lead to both humiliations for the individual and present problems for social integration. Such experiences of disrespect can be theoretically elaborated into descriptions of social pathologies or social structures that are systematically prone to produce or support relations of disrespect. This provides Honneth's critical theory with its "intramundane transcendence," or the perspective from which such social structures can be criticized as pathological, and provides a standpoint from which one can advocate for emancipatory change.

A unique feature of Honneth's theory of recognition is that it results in what he calls a "formal conception of ethical life" (Honneth 1996). On its face, this phrase is self-contradictory. "Ethical life" is associated, in Hegel's works, with the idea that morality cannot be separated from conceptions of the good life that are embedded in specific lived contexts. This is precisely meant to be opposed to a (primarily Kantian) moral formalism that takes morality to be specifiable in terms of decontextualized rules. Honneth's paradoxical formulation is thus meant to indicate a kind of middle ground position. He believes that the moral ground for social critique must be cashed out in terms of human flourishing within specific forms of life. In this regard, his views have strong connections with contemporary communitarianism (Honneth 1995). But like the formalist, he thinks that the standards for such flourishing can be specified in terms of general norms (via the theoretical elaboration of the forms of recognition) that can be applied across a variety of lived contexts. Per this latter point, he also believes that his formal conception of ethical life can accommodate modern pluralism insofar as love, rights, and solidarity can be achieved via multiple kinds of social arrangements.

Expanding Recognition and Freedom

A significant portion of Honneth's work since the publication of *The Struggle for Recognition* has involved expanding on and clarifying the theory initially developed there. For example, in an exchange with Nancy Fraser titled *Redistribution or Recognition?* (Fraser and Honneth 2003), Honneth argues that his theory is flexible enough, and normatively powerful enough, to handle questions of economic justice. Fraser construes struggles for recognition primarily in terms of recent struggles over cultural identities and argues that recognition theories have lost sight of the importance of struggles for egalitarian economic redistribution. Honneth rejects the reduction of the theory of recognition to identity politics and argues that economic struggles can be properly described in terms of struggles for social respect. For example, struggles for equal pay involve solidarity insofar as one wants the contributions of their labor to be fully recognized as worthwhile.

In his Tanner Lectures (Honneth et al. 2008), Honneth expands the theory of recognition to include "primary recognition." Honneth argues that all human interactions are rooted in a basic level of affective interpersonal relation that must be in place before one can take up any cognitive relations to others. The categories of love, rights, and solidarity discussed in *The Struggle for Recognition* develop in differing ways and take on differing empirical forms depending on specific social structures. But primary recognition undergirds all possible empirical permutations of social recognition. Beneath specific relations of recognition is a kind of general openness to the other that stands at the heart of all human life.

In *Freedom's Right* (Honneth 2014), Honneth seems to shift his conceptual focus from recognition to freedom. In that work, which in large part seeks to rework Hegel's arguments in his *Philosophy of Right*, Honneth argues that a proper

conception of social freedom should be at the heart of contemporary moral and political thought. Social freedom is distinguished from negative freedom and reflexive freedom. Negative freedom, an idea associated with early modern liberalism and contemporary libertarianism, is freedom from external interference. But lack of external interference does not guarantee that actions are "internally" motivated by one's own free willing. Thus one might prefer conceptions of reflexive freedom, which can be found, for example, in the views of Rousseau and Kant. For such views, freedom requires that our acts derive from some autonomous or authentic conception of ourselves as willing agents. Both negative and reflexive freedom, however, neglect the ways in which particular social arrangements are necessary for providing a context for our actions.

This brings Honneth to his preferred view of social freedom, which emphasizes the ways in which social institutions enable us to freely realize our self-conceptions. Honneth does not reject negative and reflexive freedom, and he notes that important normative claims can be derived from them. But they both have to be seen as secondary to social freedom; the desire for noninterference, or the desire for autonomy, only make sense within social contexts that support free action. At this point, Honneth's theory of recognition comes back into view. The social arrangements on which social freedom relies are structured by relations of recognition, and the various forms of recognition are required for the realization of freedom. Thus Honneth can assert that "all forms of individual freedom depend in an elementary way on practices of mutual recognition" (Willig 2012).

Conclusion

Through both his scholarly activities and his work as the director of the Institute for Social Research, Honneth has established himself as a worthy successor to previous Frankfurt School figures such as Horkheimer, Adorno, and Habermas. He has also established himself as a major figure in late 20th and early 21st Century social and political philosophy. This has been driven primarily by the development of his theory of recognition, which has been highly influential. As the last section of this entry shows, he has continued to refine that theory, and it should continue to be relevant for contemporary social and political thought. His more recent reinterpretation of Hegel's social thought and the development of his theory of social freedom also show that the significance of Honneth's thought moves beyond the narrow confines of the theory of recognition and should continue to be influential.

Cross-References

► Habermas, Jürgen: Faith and Reason
► Rule of Recognition and Constitution

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Hooker, Richard

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Richard Hooker was born at Heavitree near Exeter in April 1554; he died at Bishopsbourne, Kent, on 2 November 1600.[1] He was educated at Exeter Grammar School and Corpus Christi College, Oxford, where he matriculated in 1569. His tutor was John Rainolds, later President of Corpus Christi and one of the Translators of the Authorized Version of the Bible. Hooker gained a BA and was admitted a "disciple" of Corpus Christi in 1573. In 1577 he proceeded MA and was elected a probationary fellow. In 1579 he was made a full fellow and appointed deputy lecturer to Thomas Kingsmill, Regius Professor of Hebrew. He delivered the Hebrew lecture for the remainder of his time at Oxford. Hooker was made a deacon by John Aylmer, Bishop of London, in August 1579 and was ordained presbyter a year later. He became junior dean of Corpus Christi in 1583. In the autumn of 1584, he earned marked public distinction by delivering a sermon at Paul's Cross, London.[2] Hooker resigned his fellowship in 1584 and was presented to the living of Drayton Beauchamp in Buckinghamshire by the patron, John Cheney. On 17 March 1585, by Letters Patent from the Crown, Hooker was appointed Master of the Temple Church of the Inns of Court where he shared the pulpit with the disciplinarian-puritan divine Walter Travers. Before a congregation of the English judges and barristers, they engaged in a theological controversy which was to occupy Hooker for the rest of his life. He married Joan Churchman on 13 February 1588. In June 1591 he was appointed subdean of Salisbury Cathedral, prebendary of Netheravon, and was presented by Queen Elizabeth to the living of Boscombe. As a member of the Cathedral Chapter, he was present at the election of John Coldwell as Bishop of Sarum and is recorded as having presided over the subdean's court at Salisbury in 1591.

The first edition of his great treatise *Of the Lawes of Ecclesiasticall Politie* was entered in the *Stationers' Register* to the printer and publisher John Windet on 29 January 1593 under the authorization of Archbishop John Whitgift. Initially only the Preface and the first four of eight books were published. A presentation copy was sent to William Cecil on 13 March 1593, the same day on which Sir Edwin Sandys, Hooker's former pupil at Corpus Christi, spoke in the House of Commons in support of legislation "to retain the Queen's subjects in their due obedience."[3] The Act in question was directed against "the wicked and dangerous practices of seditious sectaries," a lengthy account of whom figures prominently in the Preface to the *Lawes*.[4] There is evidence that Hooker consulted extensively in the formulation of the polemical thrust of his treatise with his former pupils Sandys, son of the Archbishop of York, and George Cranmer, grandnephew of Archbishop Thomas Cranmer of Canterbury. The fifth book of the *Lawes* was published in December 1597. In January of 1595, he was presented by the Queen to the living of Bishopsbourne in Kent where he died on 2 November 1600 and was buried in the chancel of the parish church. He left an estate valued at £1092 which consisted mainly of books. A second edition of the first four books edited by Hooker's friend and literary executor, John Spenser, fellow of Corpus Christi, was issued in 1604. In his Preface to the second edition, Spenser refers to the existence of the unpublished "three last books, their fathers Posthumi" and claims that Hooker lived to see the MS perfected. Spenser also edited Hooker's various tractates and sermons which

[1] For a recent and thorough account of Richard Hooker's career, see Gibbs (2008).

[2] David Neelands (2014).

[3] 35 Eliz. I, cap. 1; *Statutes of the Realm*, iv. pt. 2, 841.

[4] *Lawes*, Pref. 8; *The Folger Library Edition of the Works of Richard Hooker* (Cambridge: Belknap Press of Harvard University Press, 1977), vol. 1: 36.18–51.22. All references to the *Lawes* edition cite book, chapter, and section. References to the Folger edition cite volume, page, and line numbers where applicable.

were printed by Joseph Barnes, Oxford University printer, in 1612 and 1614. A complete edition of all eight books of the *Lawes* was not published until after the Restoration.

Much of Hooker's career was spent in theological controversy. As Master of the Temple at the Inns of Court, he preached a series of sermons on themes of Reformation soteriology and ecclesiology. Their doctrinal orthodoxy was formally challenged by Walter Travers in *A Supplication made to the Privie Counsell*.[5] In particular, Hooker was reproached by Travers for maintaining that the Church of Rome can be viewed as a branch of "the true church of Christ" and that "he dowted not but that thowsands of the fathers which lyved and died in the superstitions of that church, were saved becawse of their ignoranc which excused them."[6] In addition Hooker's strong appeal to the authority of reason in religious matters was challenged by Travers as inconsistent with reformed orthodoxy. Hooker's reply to these objections lays the groundwork of the philosophical and theological system expounded later in the *Lawes*.[7]

Of the Lawes of Ecclesiasticall Politie consists of a lengthy Preface and eight books. The first four books address in turn (1) the nature of law in general; (2) the proper uses of the authorities of reason and revelation; (3) the application of the latter to the government of the church; and (4) objections to practices inconsistent with continental "reformed" models. The final four books address more particular issues of (5) public religious duties – in effect the liturgy of the *Book of Common Prayer* (1559); (6) the power of jurisdiction; (7) the authority of bishops; and (8) the supreme authority of the Prince in both church and commonwealth and hence their unity in the Christian state. The treatise is framed rhetorically as a response to Thomas Cartwright who had been John Whitgift's formidable adversary in the Admonition Controversy of the 1570s.[8]

The Preface is in fact addressed formally "to them that seeke (as they tearme it) the reformation of lawes, and orders ecclesiasticall, in the Church of England," that is to disciplinarian-puritans who, like Cartwright and Travers, sought closer conformity to the pattern of the "best reformed churches" on the continent, especially Calvin's Geneva. The Preface sets the tone of the work and announces Hooker's main apologetic intent. There is a significant difference between Hooker's rhetorical approach and that of previous contributions to Elizabethan polemics. He abandons the usual recourse to ridicule and personal abuse which was so characteristic of the vast majority of tracts contributed by both sides of the controversy and speaks irenically to the fundamental theological assumptions with the professed aim of securing conscientious acceptance of the Settlement. To this end he sets out to persuade by an appeal to mutually acceptable theological assumptions and authorities. Hooker's starting point is to affirm the disciplinarian premise that the doctrinal tenets and the pastoral aspirations of the Reformation had to be fulfilled in the polity of the Church of UK. His rhetorical approach is intended to serve the main apologetic aim of the treatise, namely, to justify the Elizabethan Settlement as consistent with the principles of reformed doctrinal orthodoxy. Thus the grand cosmic scheme of laws set out in Book I is intended to place the particulars of the controversy (viz., the precise forms of ecclesiastical jurisdiction, government, ceremonies, and the relation of the church to the civil order) within a foundational context: "because the point about which wee strive is the qualitie of our *Lawes*, our first entrance hereinto cannot better be made, then with consideration of the nature of lawe in generall."[9] His aim is to persuade by tracing the "particular decisions" of the Settlement back to "general meditations" on first principles.

Hooker defines law in general as "that which doth assigne unto each thing the kinde, that which doth moderate the force and power, that which doth appoint the forme and measure of working...

[5] *FLE* 5: 171–210. See Egil Grislis's Textual Introduction, 'Tractates and Sermons', *FLE*, vol. 5, 171.

[6] *FLE* 5: 200.12.

[7] Books I–IV were published in 1593, book V in 1597, and books VI–VIII posthumously.

[8] Peter Lake (1988). Donald J. McGinn (1949).

[9] *Lawes* I.1.2.

so that no certaine end could ever be attained, unlesse the actions whereby it is attained were regular, that is to say, made suteable for and correspondent unto their end, by some canon, rule or lawe."[10] This definition places him in a scholastic tradition dependent ultimately upon Aristotle. Hooker's adaptation of this definition, however, goes beyond any simply Aristotelian or Thomistic account. Working from the definition, Hooker asserts that everything works according to law, including God himself: "the being of God is a kinde of lawe to his working: for that perfection which God is, geveth perfection to that he doth."[11] There are certain structural similarities between Book I of the *Lawes* and Thomas Aquinas's short treatise on law in the second part of the *Summa Theologiae* (qq. 90–96). The principal resemblance is Hooker's adoption of Aquinas's Neoplatonic metaphysical logic. Just as the Neoplatonic cosmology accounts for the genesis of the world by means of a downward emanation or procession from the principle of original unity, Hooker also derives a diverse hierarchy of laws from the eternal law as their "highest wellspring and fountaine." His emphasis upon the divine unity is marked: "our God is one, or rather verie Onenesse, and meere unitie, having nothing but it selfe in it selfe, and not consisting (as all things do besides God) of many things besides."[12] All species of law participate in the undifferentiated unity of the eternal law and are derived from it by way of "procession." Hooker adheres to the Christian Neoplatonic *lex divinitatis* whereby the originative principle of law remains simple in itself while proceeding out of itself in its generation of manifold derivative forms of law. He distinguishes between a first and a second eternal law on the ground that God is a law both to himself (*in se*) in his divine simplicity and to all creatures besides (*ad extra*). His discussion of the first eternal law is thus closely analogous to a traditional *logos* theology.

The second eternal law comprises the divine order as "kept by all his creatures, according to the severall conditions wherewith he hath indued them."[13] It has a variety of "names" depending on the different orders of creatures subject to the one divine government. The two principal derivative genera of the second eternal law are the natural law and the revealed law of the scriptures, sometimes called the divine law. The entire system of the laws is thus expressed in the classically Neoplatonic twofold motion of procession from (*exitus*) and return to (*reditus*) the original unity of the eternal law. The natural law, by a further procession, comprises in turn subordinate species of law which govern irrational natural agents as well as rational; the law governing the rational creatures is distinguished further into the "law cœlestial," which orders the angels, and the "law of reason," sometimes called the "natural law" which orders humankind. All of these subspecies represent the outward and downward *processio* of the second eternal law. On the other side, the law of God's special revelation, the revealed law of the scriptures, presupposes the disorder introduced into the cosmos by the Fall and is provided in order to secure the final restoration or "return" of the creation to its original condition of unity under the eternal law. The distinction between the two *summa genera* of natural law and divine law which corresponds to the logical structure of procession and return is also reflected in the epistemological distinction of a twofold knowledge of God, namely, by the light of supernatural revelation and by the natural light of reason. There are in addition composite species of law, such as human positive law and the law of nations, which are derived by a reflection upon the general principles contained in the natural law. These derivative species of law are a consequence of human sin and, like the divine law, are given as a corrective to the disorder introduced by the Fall (*remedium peccati*). In all of this, the human creature as the *imago dei* is the focal point of the cosmic operation of procession from and return to the original order established in and by the divine cause.

[10] *Lawes* I.2.1.

[11] *Lawes* I.2.2.

[12] *Lawes* I.2.2.

[13] *Lawes* I.3.1.

The structure of this generic division of law shows that Hooker has clearly read Aquinas very closely indeed. The distinction between the first and second eternal laws is nonetheless a significant departure from the scholastic Thomistic model in an unmistakably Augustinian direction. In a manner characteristic of the theology of the magisterial reformers, the effect of this move is simultaneously to widen and decrease the distance between the creator-lawgiver and the created cosmos. The gathering together of all the derivative species of law within the second eternal law reduces the sense of a mediated hierarchy between creator and creature and emphasizes rather the common participation of the manifold derivative species of law in their one source. At the same time, the distinction between the first and second eternal laws upholds the clear distinction between creator and creature. This treatment of the eternal law exhibits the marked Augustinian character of Hooker's thought and distinguishes his Renaissance brand of Neoplatonism from the emphasis found in Aquinas.[14]

In the second book, Hooker addresses the basic hermeneutical question of the definition and the extent of the authority of scripture. The "maine pillar" of the disciplinarian-puritan objections to the constitution established by the Elizabethan Settlement is the claim that "scripture ought to be the only rule of all our actions." The practical question is whether it is necessary to look to the scriptures directly for the structures of church government. Hooker argues that the authority of scripture must be interpreted strictly with respect to "that end whereto it tendeth." He affirms the reformers' doctrine that the Bible contains a complete account of all things "necessary to salvation." Tradition and human authority exercised through the church cannot add anything to God's written word. On the other hand, the grounds of religion are understood by Hooker both to be revealed in scripture and accessible to the light of natural reason. God the creator of the world speaks through nature whose voice is his instrument and is manifest to the eye of reason in the glorious works of creation. Whereas tradition is to be eschewed and scripture alone to be followed in the formulation of the rule of faith, tradition, custom, and human authority, on the other hand, are necessary instruments to avoid "infinite perplexities, scrupulosities, doubts insoluble and extreme despaires"[15] in the external ordering of religion. It is not the purpose of the divine law as revealed in the scriptures to provide prescriptions for the political structure of the church.

In the third book, Hooker argues that the visible church is a human "politique societie" subject to human laws and judgment and is consequently dependent upon the authority of natural law, reason, and custom. In this way matters of ecclesiastical polity are clearly distinguished from matters of faith and salvation. The question is complicated, however, by the ambiguous nature of the church. Just as the professing Christian is *simul justus*, *simul peccator*, as Luther puts it, and lives simultaneously in two realms, in an inward, spiritual realm of the conscience, and, in an outward, temporal realm of political community, so also the church is understood to be simultaneously the mystical body of Christ and a visible association of believers in the world. In this respect Hooker's doctrine of the Church is shaped dialectically by his reformed soteriology.[16]

The fourth book addresses the general principles which underpin the external ceremonies of the church. Hooker justifies the retention of the customs and traditions inherited from the ancient and medieval church which had been rejected by "certaine reformed Churches whose example therein we ought to have followed." Disciplinarian-puritans objected to the retention by the Church of England of ceremonial practices outwardly conformable with the uses of the Church of Rome. For Hooker it is essential to distinguish between the realms where tradition

[14] From "generall meditations" to "particular decisions": the Augustinian coherence of Richard Hooker's political theology," In Robert Sturges (2011), 43–65. See also Torrance Kirby (2005).

[15] *Lawes* II.8.6.

[16] For Hooker's reformed soteriology see his sermon *A Learned Discourse of Justification, Works, and How the Foundation of Faith is Overthrown* (1612), *FLE* 5:105–169.

and scripture are authoritative in combination and where scripture is authoritative alone. The first principles established in the first book which governs the distinction of natural law, human law, and divine law are here applied once again to justify the reformed Church of UK's simultaneous adherence to the rule of faith as defined by the magisterial reformers and to a liberal interpretation of the continuity of ceremonial forms.

The fifth book of the *Lawes*, which is one third longer than the initial four books combined, offers an account of the particulars of "the severall publique duties of Christian religion" as established by the Act of Uniformity of 1559. Hooker addresses the "owtwarde forme" of religion in architecture, decoration, naming, formal hallowing, and dedication of church buildings. He examines the public offices of preaching sermons and reading the scriptures, public prayer and the use of set forms of common prayer, the formality of dress and gesture in divine service, and the proper use of music and the recitation of canticles. The theology of particularly controversial prayers is examined, e.g., the prayer "that all men might be saved." In his discussion of the sacraments in book five, Chapters 50 through 56, Hooker changes the pace somewhat with an extended discourse on orthodox patristic Christology. The formulation of the Council of Chalcedon in 451 is taken as the dogmatic paradigm for understanding the manner of the Christian believer's participation in the godhead:

> Sacramentes are the powerful instrumentes of God to eternall life. For as our naturall life consisteth in the union of the bodie with the soule; so our life supernaturall in the union of the soule with God. And for as much as there is no union of God with man without that meane betwene both which is both, it seemeth requisite that wee first consider how God is in Christ, then how Christ is in us, and how the sacramentes doe serve to make us pertakers of Christ. In other thinges wee may be more briefe, but the waight of these requireth largenes.[17]

Of particular note is Hooker's rejection of the Lutheran doctrine of the ubiquity or universal presence of Christ's human nature and affirmation of the so-called doctrine of the *extra-Calvinisticum* whereby the distinctness of the human and divine natures in Christ and their respective characteristics is sharply defined. The remainder of book five considers the various rites and offices prescribed by the Book of Common Prayer of 1559. The final chapters are devoted to a consideration of the Ordinal, viz. the "power of order" conferred upon the clergy by ordination.

The sixth book, first published in 1648, half a century after Hooker's death, is undoubtedly the most problematic of the three posthumous books. Although the authenticity of authorship is uncontested, the substance of the argument is not easily reconciled with Hooker's own outline in the Preface. Extant notes by George Cranmer and Edwin Sandys based on a lost early draft of book six, first printed by John Keble in the edition of 1836, suggest that Hooker initially intended to grapple with the question of lay eldership. The text of the sixth book as it stands consists mainly of a discussion of the "end" of spiritual jurisdiction, namely, penitence, rather than the external institutional "means." The book has been described as a "tract of confession." Since Archbishop Ussher's publication of this text in 1648, it has been customary to include it in spite of its being, in Keble's words, "an entire deviation from its subject."[18] In this tractate Hooker outlines the three parts of penitence as contrition, confession, and satisfaction and concludes with a discussion of absolution, although the latter element is not treated as an essential moment. The editors of the Folger edition acknowledge that this tractate was not intended by Hooker as a substitute for his treatment of the lay eldership but that it nonetheless constitutes an important part of the polemic with respect to spiritual jurisdiction. On these grounds, the tractate on penitence continues to appear as the sixth book of the *Lawes*.[19]

The seventh book, the most polished of the three posthumous books, contains a defense of the jurisdiction of bishops together with a

[17] *Lawes* V.51.3.

[18] John Keble (1888), I: xxxiv.

[19] See P.G. Stanwood, "Works and Editions," in Torrance Kirby, ed., *A Companion to Richard Hooker* (Leiden and Boston: Brill, 2008), 27–39.

justification of episcopal honors, privileges, and temporal benefits. Hooker approaches the question of episcopal government by examining the evidence of the Bible and the authority of the early church Fathers, historians, and the decrees of the early Councils. One important source is the Justinian *Corpus juris civilis*. A bishop is defined as possessing the powers of order and spiritual jurisdiction possessed by other ministers together with the additional power to ordain new ministers: "A Bishop is a Minister of God, unto whom with permanent continuance, there is given not onely power of administring the Word and Sacraments, which power other Presbyters have; but also a further power to ordain Ecclesiastical persons, and a power of Cheifty in Government over Presbyters as well as Lay men, a power to be by way of jurisdiction a Pastor even to Pastors themselves."[20] Hooker maintains that the authority of bishops is of human institution. Although their jurisdiction does not originate by direct divine right grounded in the scriptures (*iure divino*), nevertheless human institutions acquire divine approbation such that "the same thing which is of men, may be also justly and truely said to be of God, the same thing from heaven which is from earth."[21] The church as a "politique societie" has in it by nature the power of providing for its own safety and continuance. This power of self-preservation on the part of political bodies consists chiefly in their authority to make laws, for "corporations are immortal."[22] On this ground Hooker allows that there may be occasions when, by "exigence of necessity," the ordination of ministers may justly **and reasonably occur without the power of a** bishop: "the whole Church visible being the true original subject of all power, it hath ordinarily allowed any other then bishops alone to ordain."[23] Hooker goes on to affirm the role of bishops as judges and civil administrators since in a Christian society, the civil and ecclesiastical functions may lawfully be united in one and the same person. Here he summons up the Chalcedonian logic of the unity of the divine and human natures which yet continue to be distinct within the undivided person of Christ.

In the eighth and final book, Hooker presents the main elements of his political theory in a defense of the union of church and commonwealth in a Christian state under royal sovereignty. Threads of the argument in all previous books come together in this complex constitutional tapestry. Civil and ecclesiastical power are distinct in "nature" though capable of "personal" union in the Prince. Church and commonwealth represent distinct properties, qualities, or actions which can be united in every subject as well. Hooker rejects the "Nestorian" insistence upon the perpetual necessity of a personal separation: "for the truth is that the Church and the Commonwealth are the names which import thinges really different. But those thinges are accidentes and such accidentes as may and should alwayes lovingly dwell together in one subject."[24] Hooker argues for a conciliar theory of the origin of sovereign power. As with episcopacy "unto Kings by humane right honour by very divine right is due." For Hooker, law is supreme rather than the arbitrary will of the Prince: "Happier that people, whose lawe is their King in the greatest things than that whose King is himself their lawe."[25] In a remarkable theological discourse in VIII.4, Hooker defends the royal headship of the church by an appeal to the most subtle distinctions of patristic Christological and Trinitarian orthodoxy. In subsequent chapters he addresses the chief royal powers in the church, viz., the prerogative to call assemblies, to appoint prelates, to exercise final judgement in ecclesiastical causes, and as the "uncommanded commander" to be exempt from all forms of judicial punishment by the clergy.[26]

Hooker's generic division of laws rests on a carefully defined tension between natural and revealed theology.[27] His affirmation of the authority of human reason consequent upon the revelation of the divine wisdom to the observer of "the

[20] *Lawes* VII.2.3.

[21] *Lawes* VII.11.10.

[22] *Lawes* I.10.8; Hooker repeats this legal maxim at VII.14.3.

[23] *Lawes* VII.14.11.

[24] *Lawes* VIII.1.5.

[25] *Lawes* VIII.2.12. Torrance Kirby (2010), 274–288.

[26] Torrance Kirby (1990).

[27] See Torrance Kirby (2014).

glorious workes of Nature" is a crucial presupposition of his theologico-political system. A significant number of Hooker's seventeenth-century readers shared this view, and some sought to extend the boundaries of his natural theology a great deal further. His influence ranged over classical "anglo-calvinists" James Ussher, Robert Sanderson, and Thomas Barlow; Arminians or "anti-calvinists" William Laud, Jeremy Taylor, and Henry Hammond; Cambridge Platonists Benjamin Whichcote, Ralph Cudworth, and Nathaniel Culverwell; Latitudinarians Edward Stillingfleet, Joseph Glanvill, and John Wilkins; and Deists like John Locke and Charles Blount. As the speculative theological discourse of the seventeenth-century Church of England unfolds, natural theology assumes increasing influence. Hooker was often cited as an "orthodox" authority by representatives of radical theological rationalism. In virtually every generation since Hooker's death, theologians have returned to the *Lawes* as to a mirror of first principles of the doctrine and method of the Church of England. Quite often his readers have found distorted and mutually contradictory images there. It is well-known, for example, that James II attributed his conversion to Rome to the reading of Hooker and that John Locke chose the *Lawes* as his principal authority for the constitutional limitation of royal power in his *Two Treatises of Government*.[28] Throughout the seventeenth century, later attempts were frequently made to claim Hooker in support of a wide variety of divergent theological positions. The diversity of these appeals reflects the complex and elusive character of his thought and possibly also its claim to comprehensiveness.

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[28] See Michael Brydon (2006).

H

Horkheimer, Max

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Introduction

Max Horkheimer (1895–1973) played a very important role in the Frankfurt School tradition of thought. As head of the Institute for Social Research in 1930, he set the theoretical program to guide the research in various disciplines (philosophy, sociology, art theory, or psychoanalysis) by thinkers such as Adorno, Pollock, Fromm, Löwenthal, and Marcuse as well as Benjamin, Neumann, and Kirchheimer. In particular, he defined the method of critical theory which, in contrast to traditional theory, reflects on its social conditions of production and its role in the rational organization of society (Horkheimer [1937], 2002). Horkheimer's own contribution is twofold: first, he developed an original critique of

domination by playing Freud and Marx against each other; and second, he radicalized the critique of reason.

The Critical Method: From Interdisciplinary Materialism to the Dialectic of Reason

In his inaugural address "The Present Situation of Social Philosophy and the Tasks of an Institute for Social Research" (Horkheimer 1993), Horkheimer assigns to social philosophy the task of understanding the social whole; social philosophy is nourished by the results of concrete studies while it can in turn give animating impulses to particular studies, in a dialectic that interweaves philosophical theory and specialized scientific practice (Benhabib et al. 2014).

If social sciences are central to social philosophy, nonetheless social philosophy still retains a decisively philosophical character. The method Horkheimer developed presupposes a discussion not only of Hegel, whose "doctrine of identity" he criticized ("Hegel and Metaphysics," 1932, Horkheimer 1971), but also of Marx. Horkheimer takes up Marx's relation between "presentation" and "research," which refers back to Hegel and his critique of the Kantian distinction between reason and understanding, to characterize the relationship between dialectics and concrete research. Through the dialectical method, the concrete research builds the image of the living object, society. Only the dialectical integration of the results of the social sciences corrects the "transfiguring" dimension of social philosophy.

Horkheimer rejects a simple materialism (Abromeit 2011) that would suppose direct relations of derivation or determination between the economic basis and spiritual constructions. On the contrary, the factors to be taken into account are economic as well as psychological and cultural. The question that guides the study of society, according to him, is: "which connections can be demonstrated between the economic role of a specific social group in a specific era in specific countries, the transformation of the psychic structure of its individual members, and the ideas and institutions as a whole that influence them and that they created?" (Horkheimer 1993, p. 12). The problem of the causal relationship between base and superstructure is to be resituated as a dialectically mediated relationship between the material and spiritual spheres, without neglecting "the complicating role of the psychical links connecting them" (ibid.). Despite the changes in his program in the 1940s, when, in exile on the West Coast of the USA, Horkheimer wrote with Th. W. Adorno the *Dialectic of Enlightenment*, critical theory of society continued to mobilize different disciplines and maintained a multifactorial perspective. The salient feature of Horkheimer's program is thus an original approach to domination considered irreducible to exploitative economic relationships. Confronted with the observation that the forces of unreason seem to prevail in history, the critical program then takes the form of a radical critique of reason.

Psychoanalysis and Theory of Society: Toward a Critique of Reason

The growing distance from the Marxist framework is accentuated by the use of psychoanalysis and the integration of a transformed concept of culture (Genel 2013). Psychoanalysis initially complements Marxist theory, notably in the reflections on the workers' movement initiated by Horkheimer and Fromm. In "Geschichte und Psychologie," psychoanalysis is called upon to explain the various mechanisms that hinder the eruption of social conflicts: it sheds light on the psychic constitution that makes it possible to keep latent the tensions that should erupt on the basis of the relationship between social classes ("*Geschichte und Psychologie*" in 1932, *Zeitschrift für Sozialforschung* 1, p. 136, Horkheimer 1980). Cultural theory and psychoanalysis are decisive in analyzing the loss of the traditional addressee of critical theory, the proletariat, and in explaining the growing rallying of the masses toward fascism, which is at the

heart of the Institute's major examinations (Jay 1984). At the turn of the 1940s, notably with "The End of Reason," the English version of "*Vernunft und Selbsterhaltung*" [1941], Horkheimer modified his use of Freud's concepts. Without giving up the criticism of the ahistoricity of psychoanalytical concepts, he almost anticipates the paradoxical formulas that Adorno will offer about Freud who "was right where he was wrong," suggesting that in analyzing the historical situation of the decline of the bourgeois family, Freud is a bourgeois thinker who grasps something right "objectively." Psychoanalysis then becomes a critical principle rather than a complement to social theory; it questions the Marxist framework and the progressive anthropology that underlies it. During the 1940s, Horkheimer increasingly integrated the drive theory into his analysis of mass culture. His endorsement of a psychoanalytical approach to the relationship with nature, which leads in the *Dialectic of Enlightenment* to the analysis of the mastery of nature as the deployment of instrumental rationality, the vehicle of domination, represents a break with the initial theoretical framework. The domination of nature appears as part of the problem and not as the solution. Paths are then sketched to conceive a reconciliation of the subject and nature without repression; the concepts of mimicry and mimesis evoked in *Dialectic of Enlightenment* and *Eclipse of Reason* (Horkheimer 1947) will be taken up and developed by Adorno.

Culture and Domination

Horkheimer's analysis focuses initially on bourgeois culture as being undermined by economic and political transformations linked to the end of liberalism and the advent of authoritarian states (Horkheimer 1968). The forms of domination are due to the persistence of an obsolete culture in relation to the economic structure, the example par excellence being the maintenance of the patriarchal family as a social and cultural structure overtaken by the liberal stage of society. Under the influence of the Freudian notion of culture, Horkheimer shows that culture increasingly tends to function as a social totality that fails to form individuals; with mass culture, culture no longer designates a separate sphere, but a principle of socialization of individuals. Here again, the critique of domination entails a dynamic articulation between Marx and Freud.

Culture and art contain at the same time normative resources for criticism. In his essay "Art and Mass Culture" (1941), Horkheimer agrees with Adorno's position on culture, which makes it possible to jointly write the *Dialectic of Enlightenment* with a chapter on the "cultural industry" (*Kulturindustrie*) written by Adorno. "Art and Mass Culture" relates the transformation associated with the advent of mass culture to the global evolution of society, the decline of the family, and of authority: it refers to a failure in the socialization of individuals, to what Horkheimer calls, in a 1945 fragment, "The End of Individual" (Das Ende des Individuums" [1945], *Gesammelte Schriften*, Vol. 12, Fischer, 1985, p. 318–319). Besides the gradual dissolution of the family, there is the "transformation of personal life into leisure and of leisure into routines supervised to the last detail" ("Art and mass culture", p. 293) which makes the inner life disappear. Horkheimer insists on the disappearance of the interiority of the individual and the blurring of the boundaries between the private and the social order. Bourgeois inner life had a conservative character, but man has also lost "his power to conceive a world different from that in which he lives" (ibid., 294). While in mass culture, one has to adjust to what the entertainment industry believes people like; art, on the contrary, has its own critical dimension. Authentic works of art are those that "uncompromisingly express the gulf between the monadic individual and his barbarous surrounding – prose like Joyce's and paintings like Picasso's *Guernica*" (ibid., 294).

A few years later, Horkheimer and Adorno diagnose the advent of the cultural industry, which refers to the expansion of the mechanized reproduction of culture. With standardization and mass production, culture is being transformed as a whole. Various technical innovations reproduce identical conformity-behaviors by serving stereotypes and providing dummy models to be

imitated. The industrialization of culture thus represents the emergence of a context of socialization "under the constraint of identity."

Critique of Reason, Philosophy, and Language

During the 1940s, integrating into his philosophy certain aspects of the Benjaminian critique of history, Horkheimer radically challenged the Marxist conception of history, whose metaphysical error was "that history obeys a defined law." The turning point is evident in the text "The Authoritarian State" (1942), which corresponds to the moment when Horkheimer adopts Friedrich Pollock's thesis on state capitalism, according to which the primacy of the political explains the transformations of capitalism. The end of exploitation is no longer conceived as "an acceleration of progress" but as "a qualitative leap out of the dimension of progress" (Horkheimer 1973, p. 12). Horkheimer acknowledges the loss of the addressee of criticism: it can only rely on the "isolated individuals" whose "only weapon is the word" (p. 16).

In the 1940s, Horkheimer developed a critique of reason by itself. According to *Eclipse of Reason*, reason is afflicted with a disease inseparable from its nature. It arises from "man's urge to dominate nature." Thus, the "collective madness" observed "from the concentration camps to the seemingly most harmless mass-culture reactions was already in germ in primitive objectivization, in the first man's calculating contemplation of the world as a prey" (*Eclipse of reason*, p. 176). Even if it is not clear from the *Dialectic of Enlightenment*, the aim is still "to save the *Aufklärung,*" according to the title of a 1946 discussion with Adorno.

The path that remains open to emancipation is entrusted to philosophy, inasmuch as it becomes "more sensitive to the muted testimonies of language" and can "plumb the layers of experience" preserved in it (p. 165). One of Horkheimer's major contributions, in connection with the critique of instrumental reason for which he is famous, is thus a reflection on language that has remained less well-known (Schmid-Noerr 1986). As early as his project of "dialectical logic," he was looking for a language adequate to the criticism of identifying logic and reification. In various fragments from the period of the *Dialectic of Enlightenment* (in *Gesammelte Schriften*, vol 12, Fischer, 1987, pp. 69–74, pp. 277–278, pp. 279–281), Horkheimer develops a critique of identity conveyed by grammar, with Nietzschean accents. *Dialectic of Enlightenment* introduces with the diagnosis that language is affected by reification and becomes itself a commodity. It is necessary to invent another logical form and another type of writing in order to provide the theory of society the rhetorical means for its critique.

Horkheimer's thought is characterized by a constant willingness to put philosophy to the test of history and its madness, which translates into an essayistic philosophical writing. Horkheimer did not write great works but essays, some of which are collected in *Kritik der instrumentellen Vernunft* (Horkheimer 1997), and "critical notes" between 1947 and 1970. The essays are often inspired by Schopenhauer's doctrine, which serves as an antidote to any metaphysical transfiguration. They also draw a "critical theory today" which reevaluates Marx's thought, and no longer advocates revolution. In the face of the administered world, Horkheimer assigns to theory a function of preserving the treasures of individual freedom and autonomy, a liberal legacy that can foster resistance to the irrationality of the social whole.

Conclusion

Despite its inflections and internal tensions, Horkheimer's theoretical program has a coherence of its own. To fully grasp this coherence, we must avoid grasping his thought within the teleological perspective of an alleged theoretical progress according to which Adorno would go beyond the aporias, the performative contradictions of his thought, being surpassed only within Habermas's communicative framework. Horkheimer's critical theory evolved under the

effect of his critique of an optimistic and progressive anthropology on the one hand, and on the other hand under the effect of a radicalization of the critique of reason itself. The elaboration of a critical philosophy that entails a reflection on language, on culture, and on the way in which processes of domination affect theory, constitutes its originality.

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Hotman, François

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Introduction

François Hotman (1524–1590) was a French Protestant jurist who played a leading role in the religious and political controversies of his day, both as a scholar and an activist. He has been called one of the first modern revolutionaries (Kelley 1973).

The first born son of Pierre Hotman, a *conseiller* in the *Parlement de Paris*, the highest judicial court in France, he stood to inherit not only his father's estate but also his office. This was not to be. While at the law school at Orleans, and later in Paris, he studied with several controversial humanist scholars and adherents of the reformed religion. After a visit to Lausanne in 1547, he began a correspondence with John Calvin and soon after committed himself to the Protestant cause. For the rest of his life, he served that cause as a professor at several universities in Switzerland, Germany, and France; as a writer of legal and political tracts, propaganda, and panegyrics; and as a diplomat and advisor to prominent political actors such as John Calvin, Theodore Beza, Henry of Conde, Gaspard de Coligny, Henry of Navarre, and German princes such as Philip and William of Hesse and the Elector Palatine Frederick III.

The religious and political affairs of his native land were what concerned him the most, but the persecution of the Huguenots, and his direct involvement in their struggle, meant that he had to live most of his life in exile.

Tendencies of Hotman's Huguenot Political Theory

Trained as lawyer, Hotman's expertise was primarily in law, history, and political theory. Relative to his output in those fields, Hotman's

contribution to theology is slight. But his Protestantism is likely the source of an important tendency in his thinking, that of assuming that the true form of a thing is to be found by returning to its origins. In *The State of the Primitive Church* (1553) and *On the Sacrament of the Christian Supper* (1565), he establishes the true organization of the church and the true nature of the sacrament by tracing each back to its beginnings. The Pope cannot have supreme authority in the church, because Christ is its head, and not the Pope, and because the early church was national, and not under the dominion of Rome. Likewise, the Last Supper must be understood as it was in the early ecumenical councils. The true nature of the religion is to be found in its original pristine form and not in subsequent deviations therefrom.

Another related tendency, and one that he shared with humanists of his time, is Hotman's rejection of legal universalism. In his view, the genius of every nation is distinct, and, therefore, laws must be adapted to the particular needs and circumstances of each people. The traditions of the nation are almost always preferable to foreign models. Both tendencies are evident in his two most famous and influential books, *Antitribonian* (1567), and *Francogallia* (1573).

Antitribonian

Hotman wrote his *Antitribonian* in 1567 at the request of his then patron, Michel de L'Hospital, Chancellor to King Charles IX. The book was published posthumously in 1603. Like nearly all of Hotman's legal and historical works, it addresses a practical problem: the education of French youth for the practice of law. All the major French universities of Hotman's time subjected their law students to a meticulous study of the civil law, also known as the laws of Justinian, which had been compiled in the sixth century by the Greek jurist, Tribonian. Hotman argues on several different grounds that this excessive focus on Justinian's laws is a mistake. First, much of the content of this Roman law, as such, is not applicable to conditions in France. A country's laws, he says, ought to be adapted to the character of the nation and the form of its constitution. Roman public law refers to a form of government and magistrates that do not exist in France. Roman private law pertaining to contracts, marriages, inheritances, and many other matters is incompatible with French legal practice. Moreover, Justinian's laws do not contain the best of what Rome's legal heritage has to offer. According to Hotman, Tribonian abolished all the books of the great native Roman gentlemen of the republic and instead preserved books by immigrants to Rome who ill understood the country's laws, language, and culture. The civil law, he says, is also a tangle of contradictions, in part because it contains all the arbitrary mandates of particular emperors, many of whom were atrocious tyrants. In these claims, criticism of absolute monarchy is clearly implied. Finally, Hotman argues that the civil law was unknown in France for 800 years, and its introduction was detrimental, for its internal contradictions and unintelligible formulas led to a manifold increase in litigation.

The Franks and Gauls, ancestors of the French, each had their own native laws, and their kings and magistrates had made judgments in accordance with them personally, attesting to the fact that lawsuits then were few. Hotman concludes that a proliferation of lawsuits is a clear indication of the corruption of the laws (Hotman 2021). As such, the *Antribonian* is regarded as "a juridical declaration of independence" for France (Kelley 1973).

Francogallia

Hotman published the *Francogallia* in 1573 in the wake of St. Bartholomew's Day massacre. He held King Charles IX and his entourage responsible for orchestrating the assassination of Huguenot leaders and the mass slaughter of Huguenots throughout France and saw the restoration of France's ancient constitution as the only remedy for their tyrannical rule (Kelley 1973). This is the work that earned him the designation "monarchomach" – fighter against kings, which he shares with fellow Huguenots Theodore Beza and Philippe du Plessis-Mornay, authors of *The Right of Magistrates* (1574) and *Defense of Liberty Against Tyrants* (1579), respectively, and several other Calvinist writers.

The *Francogallia* contains a variety of arguments in support of the right of the people to resist, depose, and replace tyrannical rulers and to participate in the governance of the kingdom through representatives in a public council. A key component is the common law concept of immemoriality: If customary liberties could be shown to be more ancient than the monarchy, then the king was necessarily subject to the laws (Pocock 1987). Roman public and private law concepts also supply some of the content of Hotman's case for popular sovereignty and the rule of law, for instance, the axiom from the *codex – quod omnes tangit, ab omnibus approbetur* – what touches all should be approved by all (Lee 2008).

In *Francogallia*, however, as in other works, Hotman uses Rome and Roman law more as symbols of tyranny and vice, juxtaposing them with native French examples of liberty and virtue. In effect, his argument is also racial as he derives the authentic laws and liberties of the French nation from the character and practices of the ancient ancestors of the French, the Gauls, and the Franks (Foucault 2003). He notes that the Gauls and Franks were prosperous and much feared for their prowess in war while they were free. It was owing to their liberty that they were powerful and honored by other nations. Thus, the core of Hotman's argument for constitutional liberty is one grounded in an appeal to national pride and duty to the ancestors (Alexander-Davey 2016). In his account, according the testimony of Roman historians such as Caesar and Tacitus, both the Gauls and the Franks limited the powers of their kings by law and shared in the government of the community through a public council. In both communities, kings were elective and could be deposed for incompetence or abuse of power. Both Franks and Gauls suffered under the tyranny of imperial Rome, but eventually, by concerted efforts, they overthrew this foreign oppressor and established their own state. The new state reflected the constitutional traditions of the "twin-born peoples."

According to Hotman, France's authentic form of government, which the nation enjoyed for more than a thousand years, is a mixed regime combining features of monarchy, aristocracy, and democracy. The assemblies of nobles and elected deputies from the towns and provinces are the aristocratic and popular elements. Majesty (*maiestas*), or supreme power, is not in the king but in the public council, composed of assemblies of the three estates, clergy, nobility, and commoners. The specific powers of the council include "the appointing and deposing of kings. . .matters concerning war and peace; the public laws; the highest honors, offices and regencies belonging to the commonwealth . . .[and] all those issues which in popular speech are now commonly called affairs of state" (Hotman 1573). The king, according to the constitution, is essentially a chief executive, charged with carrying out the will of the estates. Though the French monarchy had become hereditary by the consent of the same public council, that council, as the representative of the people, could still depose a particular king if necessary.

The focus of the *Francogallia* is on the history of French institutions. However, Hotman includes material on the traditional liberties of other European nations as well, implying that all advanced European peoples had similar historic rights. Naturally, French and other European authorities saw Hotman's call to restore this "ancient" form of government as incendiary and attempted to ban the book. Nevertheless, the original and successive editions with significant revisions and additions were published and circulated widely in France and elsewhere in Europe.

Later Works and Influence

The death of King Henry III's brother in 1584 sparked a succession crisis, which induced Hotman again to take up his pen. The Catholic League favored the Cardinal of Bourbon as the heir to the French throne, whereas the Huguenots backed their coreligionist Henry of Navarre. Henry personally requested a learned treatise from Hotman supporting his claim. The resulting *Disputation on the Controversy over Royal Succession* (1585) grounded the case for Henry in

what Hotman argued was a fundamental feature of French custom that primogeniture passes in the senior line. This reliance on authentic native custom is nothing if not consistent with the nationalist tendency of his scholarship. As he declares in a reply to an Italian critic, "I fight for the triumph of French truth (veritas Francica)" (Kelley 1973). Later that year, Pope Sixtus V excommunicated Henry of Navarre in an attempt to nullify his claim to the succession. Hotman's last major publication *The Brutish Thunderbolt* (1586) counters this attack by refuting at great length the leading arguments for papal supremacy.

As important as these works were in their time, it is the *Francogallia* that had the most lasting influence. In the near term, the Catholic League used Hotman's arguments about the right of the French people to depose their kings against Henry of Navarre after he succeeded to the throne. Beyond the borders of France, Dutch and English writers such as Hugo Grotius and John Selden used the *Francogallia* as a model for their own tracts defending native constitutional traditions against the claims of absolute monarchists (Alexander-Davey 2016).

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Hugo, Gustav

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Introduction

Gustav Hugo (1764–1844) was born in Lörrach, Wiesental, into a well-to-do family. He grew up under the guidance of his father, who, as a jurist, introduced him to the study of law in his early childhood through Heineccius's *Institutes*. This would be his first contact with Roman law and its long scientific history, an intellectual tradition that would accompany him until the end of his life at the age of 80. After going to school in his hometown, young Hugo began his studies in the town of "Montbeliard" (then belonging to Württemberg) between 1776 and 1779. He later wrote that such a time spent in a French-speaking area would be decisive in his life, among other things, because he had read Voltaire, Corneille, or Racine before Goethe's *Werther*. That way, he was able to access, in their original language, the texts of Montesquieu, a fundamental author in the shaping of his historical sensibility.

Still a student, Hugo approached English and Scottish moral and political philosophy carefully reading John Locke, David Hume, or Adam Smith. This cultural contrast could have been a primary reason for his empirical sensibility that prone him to pay attention to the peculiarities and history of each culture. Young Hugo continued his

studies in Karlsruhe. After completing the *Gymnasium*, he attended the prestigious University of the Kingdom of Hannover, Göttingen, where he studied Law. He received classes from Georg Ludwig Böhmer, a Romanist and canonist, from Justus Friedrich Runde, a well-known specialist in Private Law, and from Johann Stephan Pütter, who admittedly became his most influential professor and scholarly inspiration.

During this formative period, he became close to philosopher Georg Heinrich Feder, jurist Johann Friedrich Reitemeier, and historian and theologian Ludwig Thimotheus Spittler, with whom he developed a close friendship throughout his life. Hugo did not finish his studies with a degree exam, as was usual, but with a paper entitled *De fundamento succesionis ab intestato ex iure Romano antiquo et novo* (1785), for which he received the First Prize of the Faculty of Law. After this first success and at Pütter's suggestion, he began a doctoral thesis on Roman *bonorum possessio*. During these years, he combined his research with his work as a tutor for the Crown Prince of Dessau (a job that provided him with important contacts among the high society) and the meticulous reading of Immanuel Kant's *Grundlegung zur Metaphysik der Sitten*. The epistemological principles of the German philosopher accompanied him throughout his life.

In 1788, he defended his doctoral thesis in Halle (*De bonorum possesionibus commentatio*) and was awarded the position of "ausserordentliche Professor" in Göttingen. Four years later, at the age of 28, he became "Professor Ordinarius" at the same university. He remained in Göttingen until the end of his life, rejecting various chairs at several prestigious universities, such as Heidelberg (1804), Halle (1805), Berlin (1810), or Bonn (1818). Gustav Hugo was one of the most illustrious representatives of the cast of universal jurists linked to the University of Göttingen. He received many honors during his fruitful career, which ended with his death on September 15, 1844. It was 6 years after the celebration of the golden anniversary of his chair in 1838, an event that summoned top German legal scholars lead by Friedrich Carl von Savigny, who in a memorable text written for the occasion, *Der zehente Mai*, declared Hugo to be the master of historical studies. For Georg Friedrich Puchta, he was "the Professor of the 19th century."

Hugo's Work Plan

The critical angle of Hugo's work plan is commonly regarded as the most prominent aspect of his work. From an early date, Hugo's scientific efforts were directed toward dismantling rationalist Natural Law and *Usus modernus pandectarum*, which were the dominant trends in the Germanic area in the fields of theoretical and practical jurisprudence, respectively. Young Hugo resorted to Kant's epistemology, which represented a harsh critique of Natural Law dogmas, to contest iusrationalism (Christian Wolff, Daniel Nettelbladt, Joachim Georg Darjes). Before the *Usus modernus* (Samuel Stryk), which mixed the contents of Roman and Germanic law with practical purposes, Hugo responded with a rigorous philological and historical delimitation of the elements that possessed a Roman origin, distinguishing them from those that had a diverse basis. To this thematic separation, Hugo added, following his master Pütter, a chronological delimitation that clearly differentiated what was no longer in force from what was still enforceable, inaugurating the German tradition of "modern Roman law" (Hugo 1789a), a doctrinal trend firmly established with Savigny's *System of the Modern Roman Law* (1840).

Hugo proposed three fundamental questions to which the science of law should respond: a three-fold approach in which some scholars see a resemblance with Kant's three Critiques. The first question is practical and reads: "What is right?"; the second question is historical and reads: "How did it get that way?"; and the third question is philosophical and reads: "Is it reasonable that it is so?" (Hugo 1799: §16). The three corresponding disciplines are identified as Dogmatics, History of Law, and Philosophy of Law, respectively.

These three disciplines were conceived as independent for the first time and worked in a coordinated manner, without being integrated

into a unitary idea of law. This is a clear difference from Savigny's approach, for whom legal science was reduced to the (philosophical or idealistic) History of Law. Hugo addressed these three issues in his famous *Lehrbuch eines civilistischen Cursus*, a textbook designed for his lectures that integrated the various parts of his courses (Natural Law as a Philosophy of Positive Law, History of Roman Law, Modern Roman law, Classical Roman Law, and the *Enzyklopädie*). As part of this project to both criticize and renew Jurisprudence, Hugo undertook an impressive revision of all the scientific production of his time, which was analyzed in detail in his famous *Göttingische Gelehrte Anzeigen.* This collection contains more than 420 book reviews dating from 1788 to 1844, and was later published in a triple volume entitled *Beyträge zur civilischen Bücherkenntniss* (I/II: 1828; III: 1844).

This whole process of review and criticism would leave the way open for the development of the Historical School of Law.

Legal Philosophy

Gustav Hugo's contribution to contemporary Philosophy of Law is essential. We owe him the establishment of the conditions for a philosophical study of positive law.

His most famous work on the subject is his *Lehrbuch des Naturrechts, als einer Philosophie des positiven Rechts* (1798), which constituted a decisive contribution to the discrediting of Natural Law and legal apriorism. Natural law here dissolves into positive law (as the title of the work indicates), and positive law (the adjective became redundant) ceases to be a derivation of the abstract postulates of Natural Law and becomes an aspect of life, which is historical and mutable. This is because the ongoing nature of reality is incompatible with the dogma of the immobility of law. That is why Hugo understood that the Philosophy of Law should be considered to belong to legal studies rather than to philosophy. The focus was no longer on the principles of the metaphysics of law, but on its empirical contents, developed based on a "science of men" ("Lehren vom Menschen") or "legal anthropology" ("juristische Anthropologie"), which analyzed the individual in his triple dimension as an "animal," a "rational being," and a "citizen." This three-fold distinction is related to the three branches of Roman private law: *ius naturale*, *ius gentium*, and *ius civile*. Thus, Law abandoned its position within Philosophy syllabi to end up in the hands of jurists.

Hugo has been labelled as politically reactionary by philosophers like Karl Marx, in his well-known *Das philosophische Manifest der historischen Rechtsschule*, and Georg Wilhelm Friedrich Hegel, in the famous section §3 of his *Grundlinien der Philosophie des Rechts.* The reasons usually invoked relate to his rejection of any metaphysical or aprioristic value judgment and his consideration of law existing in history as rational, since positive law finds its very justification in its historical existence. Significantly, some of his contemporaries called his theory "indifferent Natural Law" ("indifferentistisches Naturrecht").

Nevertheless, his methodological approach can be considered revolutionary, since the situation of law within the realm of facts was an innovative element in a scientific context in which, following Leibniz and Wolff, the study of law consisted of the analysis of a set of propositions systematically ordered according to deductive logics, which operates by means of demonstration. Hugo thus recovered the topical or dialectical nature (in the Aristotelian sense) of legal postulates, which are neither true nor false, but probable or possible, and as such defensible.

This harsh critique of legal rationalism also had significant implications for the scientific character of law. The collapse of ius-rationalism led to the *positivistic* consideration of the contingent nature of law, which is historical in an empirical sense. Therefore, it was no longer possible to deduce logically positive law from natural law (as ius-naturalism postulated instead). In this way, the scientific character of Jurisprudence (i.e., "Dogmatics" in this context) was put into question, given the arbitrary nature of its object, which could not be deduced from necessary or apodictic reasons (as Kantian critical epistemology required). Only later, thanks to the Historical

School, which had an essential affinity with post-Kantianism and early Romanticism (currents to which Hugo did not adhere), was law no longer considered "contingent" ("zufällig") but defined in terms of "necessity" ("notwendig"), as something historically "given" or "objectified" (i.e., "innere Notwendigkeit" in Savigny's words). This step, which associates the empirical knowledge of law with the idea of "rationality," until then referring only to non-empirical elements, allowed the Historical School to recognize the scientific character of Legal Dogmatics. Nevertheless, this idea of objectified historical necessity, which expresses the German *Volksgeist*'s dogma, the core of the School's postulates, cannot be found in Hugo. So, strictly speaking, he cannot be referred to as the "founder" of the Historical School of Law.

Hugo believed in Kantian gnoseological dualism, while Savigny instead opened the way to a historically-based empirical monism. It thus may be stated that historicism as a *method* was born with Hugo, but as a *doctrine* it started with Savigny. For Hugo, the creator of Law is the individual, while for Savigny (and the Historical School) it is the collective conscience. It is understandable why Hugo did not want to be confused with Savigny's supporters.

Legal History

The figure of Hugo has been equally central to the development of modern legal history. Hugo's methodology was characterized by a fidelity to historical data that demanded a philological rigor in the reading of legal sources hitherto unknown. Of course, there existed a historical sensibility in the study of law predating the historicist environment of Hugo and Pütter's Göttingen. Particularly, Roman law was received in Germany in the sixteenth century, where it was both the law in force and the undisputable main subject in law faculties until the end of the nineteenth century. A paradigmatic example was the *Antiquitatum Romanarum Syntagma* written by Johann Gottlieb Heineccius, which had up to twenty editions since its publication in 1719. But these works, which demonstrated an in-depth scholarly knowledge of legal antiquities, did not address legal concepts at the various stages of their historical development. They could be referred to as examples of "elegant jurisprudence," or of history of legal antiquities, but not as legal history properly speaking. This means that they did not advance a pragmatic history enquiring – as would be undertaken from Hugo on – about the development of legal institutions from their genesis to the present, exploring their contemporary relevance. Although for Hugo – partially unlike Savigny – the historical study of Roman law was more oriented toward the jurist's formative aspect than to actual legal application.

As historical law, Rome's law had been the basis of the legal precepts and concepts in force. "Roman Law is our Natural Law," he said in a well-known statement. That is why its historical knowledge became a milestone for accessing the essence of current law. Hugo implemented this distinctly historical part of his project in his *Lehrbuch der Geschichte des Römischen Rechts* (1790a). There he applied, following Reitemeier's path, the synchronic method, dividing the legal past in historical periods that still inform Roman law periodizations used today. Therein classical law stands out for its superior unquestionable value, as opposed to the Roman Justinian law, the one that has been made known to us through the Digest. Hugo dedicated works such as his *Ulpian-Fragment* (1788), the *Sentenzen-Paulus* (1795), or the *Lehrbuch und Chrestomathie des klassischen Pandektenrechts* (1790b) to Pre-Justinian Law.

In his preference for the classical Roman past, Hugo was influenced by Edward Gibbon, from whom he translated the famous Chapter 44 of *The Decline and Fall of the Roman Empire*, which was to become a landmark in the history of jurisprudence regarding the development of Roman law from the early days of the monarchy in the sixth century BC to Justinian's sixth century AD (Hugo 1789b). Gibbon distinguished three periods, similar in length but distinguishable by the mode of instruction and character of the jurists. In line with Gibbon, Hugo recalled the central role that jurists had played in the Roman

times of greatest legal splendor, and defended a strictly scientific model against the approach employed in Modern Enlightenment circles, which condensed all sources of legal production in the law-giver. Thus, against the statutory law defended by the Codification movement, Hugo opposed a customary and doctrinairely rooted law, as exemplified in his famous work *Die Gesetze sind nicht die einzige Quelle der juristischen Wahrheiten* (1815).

Legal Education

Hugo defended a scientific model where the jurist followed the example of classical Roman jurisprudence, which was based on the fundamental idea that *auctoritas*-holders or intellectuals were to be heard by *potestas*-holders or institutional authorities. The jurist would recover that way his historical function of *interpretatio* by assisting, supplementing, and correcting existing law, as Papinian had already defended in Severian times (D. 1, 1, 7, 1). A fundamental aspect for the achievement of this model of jurists with a Roman (and medieval) profile was legal education, which, with the support of ancient texts should still consist of the *studia humanitatis*. Such a *Bildung*, supported by the careful reading of sources, provided legal insight to the jurist-to-be. Hugo's classes in Göttingen were the paradigm of this study of Roman legal sources, based on the method of exegesis. A method that did not reduce methodological knowledge of law to concrete and external rules, as proposed by modern hermeneutics, but instead sought to interiorize the concepts upon slow reading of the texts. This autonomous interpretation of sources found support in the Enlightenment's motto of *Selbstdenken*.

Conclusion

The fundamental legal concepts, "historical" rather than "logical" in Hugo's vision, refuse to be defined, because there is no correspondence between "precision and clarity." Only proper training provided the *methodus* necessary for Legal Science, which is primarily historical.

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Human Right to Democracy

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The central question concerning the human right to democracy is whether there is such a genuine moral right. Some kind of legal human right to democracy appears to be a part of international law (International Covenant on Civil and Political Rights 1966, Article 25). But there is a lot of dispute as to whether there is any such moral right (Buchanan 2013; Cohen 2006; Gould 2004). In order to answer this question, we must examine some different possible conceptions of human rights, and we must examine some different conceptions of democracy. Finally, we will look at what, if any, justification can be offered for the idea that there is a genuine moral human right to democracy. In general, I will use the term "human right to x" with the understanding that we are talking about a moral right to x of a particular sort. When I refer to legal rights, I will explicitly flag the legal character of the right.

Human Rights

There are in contemporary thought about human rights broadly speaking two types of approaches to thinking about human rights. The first type thinks of human rights as natural rights that adhere to persons simply by virtue of the fact that they are persons. This approach seems first to have been suggested in the writings of the Spanish Scholastic writers in their critiques of the Spanish conquest of America (Vitoria 1991) and developed in the writings of Hugo Grotius (2005), John Locke (1980), and Immanuel Kant (1996). This is a complicated thought and is unpacked by philosophers in different ways. I will suggest two different ways in which the idea is understood in the tradition and in contemporary thought. The distinctive feature of this conception of a human right is the immediacy of the inference from enumeration of features of human beings to the statement of a natural right. The traditional approach has it that a person's possession of a natural right to x should be evident to any person who is rational and thinking in good faith. The presence of a natural right is available to the natural light of reason. This inference is undertaken in two different ways in the tradition: the dignitarian way and the interest approach. Francisco Vitoria argues that human beings have a dignity, which is such that they must not be used merely for other people's purposes (Vitoria 1991, 249). They are not to be used as mere things because that is inconsistent with their dignity. The moment one recognizes that a person is a rational being, one recognizes their dignity and one recognizes that they must not

be used merely for one's own purposes. Kant defends a more developed version of this idea when he argues that the natural right of independence is grounded immediately in the humanity of the person (Kant 1996, 30). The other approach essayed by Locke is that the natural rights are grounded in the fundamental interest in life (Locke 1980, 9). Any rational being can recognize the interest in life of any other rational being and can see that they have equal worth and so is committed to respecting the lives of other rational beings See also (Griffin 2008; Miller 2008; Pogge 2008).

The second type is what I will call institutionalist. Probably the first most explicit expression of the institutionalist approach to moral rights is found in John Stuart Mill's Utilitarianism (Mill 2002). On this view, a person has a right to x to the extent that there is some high level of justification for society to be organized legally or perhaps just informally with legal or conventional rights designed to protect a person's interest in x. What is distinctive of human rights on these kinds of accounts is that the society to be organized includes international society (Beitz 2009). In contrast, we could think that a person has a moral right to x on this account without thinking that they have a human right to x because we think that domestic societies would be highly justified in protecting the interest in x but we might not think international society ought to concern itself with such issues. It is important to note that the rights persons have on this account can be possessed in a state of nature and more generally independently of any particular institutional arrangement. To assert a right to x is to assert the high level of justification for the institutions even if they do not actually exist.

Before we discuss the implications of these approaches with respect to a human right to democracy, it is worth noting that we do not need to choose between the two approaches to human rights. We could conceivably accept both approaches and think of them as describing distinct grounds for different kinds of rights. To be sure, many adherents of one or another of these approaches find the other approach defective but it is certainly possible to think that both of these approaches characterize genuine grounds for human rights. Indeed I would argue that each approach suffers to the extent that it is seen as the only approach because each approach can only help us grasp a subset of rights that people have.

A Human Right to Democracy

We need to say what a right to democracy might consist in. In the Universal Declaration of Human Rights Art 21, a right to participation in government is asserted and a right to equal suffrage is implied in section 3; a right to equal access to public service and the requirement to base the authority of government on the will of the people are affirmed in sections 2 and 3. Articles 19 and 20 affirm rights of free expression and free association. Article 25 of the International Covenant on Civil and Political Rights affirms roughly the same requirements although it does not assert that authority must be based on the will of the people. Article 1 is thought by many to affirm this requirement. Articles 19, 21, and 22 affirm rights to freedom of expression and association. This conception of a right to democracy is quite minimal. It does not require free and fair elections; it does not require that persons have rights to equal participation in politics such that differences in wealth, gender, or race have little or no influence on the relative capacities to participate. It does not require a plurality of parties and organizations. One can imagine more or less demanding versions of the right to democracy depending on how robust the rights of participation are and how robust the demand for equality of participation. In this sense, conceptions of the right to democracy can range all the way from equal suffrage through conceptions of democracy that require robust competition among different parties to conceptions of democracy that require a fully egalitarian participation in politics. It is important to note this range of possibilities when we consider some of the sources of skepticism about a human right to democracy. More generally, to attribute a human right to democracy to a person would be to attribute a right to participate as a equal in the governance of their political society.

Grounds for the Human Right to Democracy

I think the most fertile ground for thinking about the human right to democracy is the institutionalist approach, but there have been efforts to ground the human right to democracy in the natural rights of persons. In particular, Locke seems to derive the rudiments of a right to democracy from his conception of natural rights. He argues that one may not impose the authority of government on persons without their consent because they have natural rights to liberty (Locke 1980, 52). Locke seems to argue for a kind of democratic decision-making by arguing that when one consents to be a member of society, one must thereby consent to the choice of form of government being made by majority rule. He argues this on the grounds that there is likely to be disagreement on what the best form is and under circumstances of disagreement one must go where the greater force goes (Locke 1980, 52). If we interpret "greater force" against the background of equality among persons, then we might have a requirement here of equal participation and majority rule. And Locke seems to extend this reasoning to the claim that when taxes are to be raised or limitations on property are to be imposed, this may only be done when the property holders have consented *or when a majority of their representatives have consented*. Locke argues that without this requirement, persons do not hold rights to property (Locke 1980, 73–74). Here we may have an argument from the equal natural rights to liberty to a right to participate in government as equals.

To be sure, this is only a highly suggestive argument, and it may be interpreted in a way that is quite nondemocratic. For instance, if we interpret the idea of property in the argument to refer narrowly to ownership over external things then this argument would be compatible with property qualifications on political participation. And if we excise the background idea of equality from the argument for majority rule and interpret the majoritarian requirement loosely as merely a requirement that something less than unanimity is required, we may not have anything like a right to democracy. Furthermore, as stated, this argument does not quite establish a natural right to democracy since, at most, it asserts that *legitimate government* requires that persons have a right to an equal say in its foundation and operation. Since the option of the state of nature is also compatible with the natural rights to liberty and property, the right to democracy cannot be derived directly from the right to liberty or from the nature of the person. Finally, the assumption of implied consent to majority rule among equals is questionable and would need a great deal of defense. Still, there are here the rudiments of an argument for democratic participation in government on the basis of the natural right to liberty.

Institutionalist Grounds for the Human Right to Democracy

Institutionalist approaches to the human right to democracy proceed by showing that democratic institutions are highly morally justified. For the right to democracy to be a human right, the institutions in question would have to include institutions at the level of the international community. To say that, there is a human right to x is to say that there is a high level of moral justification for societies to include such a legal or conventional right and that there is a moral justification for the international community to try to realize that right in societies.

It is important to note that the high level of moral justification could be an instrumental justification or it could be an intrinsic justification. It is one of the interesting implications of the adoption of the institutionalist approach that there is room for an instrumental basis for a human right to democracy. Such a basis is not possible in the natural right approach because an instrumental connection between a right and human nature does not support the kind of immediate inference we are looking for when we assert a natural right. An instrumental argument requires an examination of the empirical facts relating the legal or conventional right to some set of goods to be promoted or protected.

The institutionalist approach has generated some arguments for a human right to democracy,

but it has also generated some arguments for a right to participation in politics that falls short of a democratic right. The difference between the right of participation generally and the democratic right is that the democratic right is an egalitarian right while the right of participation simpliciter need not be egalitarian. The democratic right involves the right to participate as an equal in the governance of one's political society. In contrast, Joshua Cohen (2006) and Charles Beitz (2009) have argued that there may be a human right to participate in a self-determining political society, but it does not require equality. The right to participation is compatible with a hierarchically organized society in which all persons may participate as members of groups in the governance of society. Though the groups cover all persons within the society, they may be of very unequal size and power. For instance, one may have a legislative body including the nobility, the clergy, and the common people, each with a roughly equal voice though the group of common people represents about 90% of the population. Henry Shue argues for a right to participation as a basic right though he does not insist on equality (Shue 1996, 71).

Instrumentalist Grounds for a Human Right to Democracy

One effort to give an instrumental argument for a human right to democracy is offered by Thomas Christiano (2011). The argument relies on the idea that there are some human rights that are widely accepted as extremely important rights such as the rights not to be tortured, murdered by the state, disappeared or arbitrarily imprisoned. These rights may be natural rights or perhaps they are just very widely accepted fundamental goods. Christiano argues that there is very substantial empirical evidence to show that there is a form of democratic society which is such that societies that are less democratically organized are highly likely to engage in violations of these most widely accepted and profound human rights and societies that are at that level or better are highly likely not to engage in such human rights violations. He calls this form "minimally egalitarian democracy," and it is characterized by (1) equal rights to participate in voting, which determines in the aggregate who acquires power, (2) equal opportunity to participate to run for office, determine the agenda, and influence deliberation and negotiation. These persons are free to form and to join and/or abandon political parties and other political grouping without legal impediment or fear or serious violence. And they have the rights to freedom of expression. Such a society normally supports robust competition among parties and a number of parties are present in the legislature. (3) Such a society operates by the rule of law and an independent judiciary. The idea is that this is minimally egalitarian because the opportunities to participate are essentially formal, they do not imply the more robust notion that people have equal capacities. Such a minimally egalitarian democracy may not live up to the ideals of democracy entirely but the institutions of minimally egalitarian democracy make a huge difference to whether basic rights of physical integrity are being respected or not. There is a kind of threshold effect such that societies that achieve this level of democracy normally guarantee a very high level of protection of basic rights of integrity while those that fall below normally guarantee that there is a high level of violation of these rights.

The thought is that in the light of the widespread acceptance of the centrality of the basic rights of physical integrity and the central importance of minimally egalitarian democracy in protecting these rights, all members of the international community have reason to adopt and promote the adoption of democracy in political societies. This evidence, coupled with the evidence that democracies do not go to war with each other and tend to construct and abide by international institutions, suggest a very great moral interest in the international community in bringing about democracy in all political societies. Hence, by the institutionalist conception of a human right, we seem to have very strong instrumental grounds for thinking that there is a human right to democracy.

Note that this argument amounts to a kind of instrumental argument for equality. The evidence referred to above suggests that societies that permit participation but not equal participation are

likely to be serious violators of rights of physical integrity. Only minimally egalitarian societies will protect these and they do normally protect them.

It should also be noted that the argument above is tentative as all instrumental arguments must be. There are many questions that have to be asked such as whether there isn't some other nondemocratic feature of these minimally egalitarian societies that explains their protection of human rights. We need to be vigilant in attempting to look for other explanations. And we need to pursue more fine grained evidence about democracies. Is it the case that every group that is excluded from democratic participation will have greater rights violations? We have reason to believe that this is the case I think. Increase in African American participation in American democracy seems to be associated with better treatment. Increase in democracy seems to be associated with increased state responsiveness to domestic violence against women. But there is more work to be done here.

Intrinsic Grounds for Human Right to Democracy

Another kind of institutionalist argument for a human right to democracy involves a more intrinsic argument. Here the idea is that democracy is a publicly realized form of equality among persons in the context of disagreement and conflict of interest. To deny a person's right to participate as an equal in the governance of their society on the basis of their membership in some religious, racial, ethnic, class, or gender based classification is to treat their fundamental interests, and consequently them, publicly as inferiors. To the extent that equality is a fundamental value and the public realization of equality, in the sense that people can generally see that they are being treated as equals, is a fundamental value we have reason to have democratic decision-making in political societies. And since the international community is committed to the equality of persons in the international system as is clearly expressed in the various human rights documents, the international community has a basic moral reason for promoting democracy. This added to the facts about democracies as good participants in the international system, give us reason to think that the international system has moral reason to promote democracy (Christiano 2014).

Objections to the Idea of a Human Right to Democracy

Some have worried that human rights are meant to determine a subset of moral rights that delineate a kind of minimum threshold of moral acceptability in global politics (Cohen 2004). They worry that a human right to democracy goes beyond the minimum by defining a maximal conception of justice. But the arguments for a human right to democracy do not demand the complete realization of the ideal of democracy. They suggest that there is a threshold of democratic governance, which is far from ideal, but which nevertheless has very great moral significance. The minimally egalitarian democracy identified by the right to democracy should be thought of as a morally significant minimum standard of democracy and of political morality See also (Rawls 2001; Nickel 2007).

Some have argued that democracy is not an appropriate subject of concern for the international community because the conditions under which democracy is achieved tend to be very much internal to the development of the society in question and not very much under the control of the international community. For example, very poor societies have a much harder time achieving democracy and maintaining it than do relatively wealthy societies. So they argue that the international community does not have a moral justification for promoting a human right to democracy. While it is important to note the limits of the international community's capacity to promote democracy, there are many things the international community can and does do to promote democracy. In particular, the international community has done a lot to protect democracies from being taken over by authoritarian rulers, and it has attempted to aid in the solidification of democracy once a transition has been made.

A Human Right to Democracy and Political Self-Determination

Some have worried that official recognition of a human right to democracy offends against the right of self-determination of peoples as articulated in Article 1 of the International Covenant of Civil and Political Rights (Cohen 2006). This worry may seem to be implied by the idea that the international community has a moral justification in promoting democracy. There are two distinct kinds of worries here that correspond to two different kinds of self-determination. One kind of self-determination of peoples implies a right of noninterference in a society's internal activities: the most serious kind of interference being military interference. Another kind of interference may be noncooperation in terms of commerce and other activities of mutual benefit. The concern is that a human right to democracy may warrant military interference in societies that are nondemocratic for the purpose of making them more democratic. Indeed, we have seen military interventions justified under this pretext in the recent past.

The normal circumstances in the world as we know it should make us extremely skeptical that military intervention would be anything but counterproductive. The reason for this is connected with basic democratic principles. First, an intervening power would not be accountable to the people it is supposedly trying to help. And the costs and sacrifices of intervention are usually quite high so the intervening power would normally be acting in a way that advances its own interests. Hence it would no doubt act in accordance with concerns and interests that are not suited to the interests and concerns of the supposed beneficiaries, even if, what cannot be often supposed, they were acting in good faith. Second, the people it is trying to help must play the dominant role in establishing the democratic institutions they need. Only they know the circumstances in which the institutions are being developed. And they need to learn from the experience of developing the institutions on their own. For these reasons, military intervention is not the normal remedy for authoritarian government. It should be said that it is in principle possible that military intervention could be justified for the sake of promoting democracy. After all, it is people who block the establishment of democracy. If an intervention could simply stop those people from blocking the establishment of democracy, then perhaps that would be a defensible thing to do. But again the normal state of affairs is that this kind of action is counterproductive, and it is so for very deep reasons, so normally military intervention for the sake of promoting democracy will not be defensible.

But there is another worry about self-determination. This corresponds to a different more positive conception of self-determination. We might think of a society being self-determining when it is structured in certain ways because that structure conforms to the commonly accepted ideas in that society of how it should be formed. And we might think that there are certain societies in which the commonly accepted ideas of how it should be formed are not democratic ideas. Here we might think that intervention, even if it could be successful, would be problematic (Cohen 2006). Why shouldn't people be able to live in accordance with norms that they themselves accept? Indeed this seems like a democratic idea and it seems to be violated by the idea that there is a human right to democracy. Admittedly, the idea that there is something like unanimity in a society on certain nondemocratic norms is far-fetched. It appears that people around the world tend to prefer democracy to nondemocratic norms (WIN/Gallup International 2015). But it is worth thinking about this kind of case.

This suggests that we should append some special features to the idea of a human right to democracy. Many rights come attached with such features. What I have in mind is that the human right to democracy may come attached with a power to waive the right. Many rights come with such powers. And those powers enhance a person's capacity to control the world they live in. It would seem especially fitting for the right to democracy to come with the power to waive it. After all, the right to democracy advances interests to control the social world one lives in. And the power to waive the right to democracy

advances those interests as well. Presumably, such a waiver would have to be something one could take back. But most important for our purposes, the power to waive the right to democracy would have to be one that one can exercise only in combination with nearly everyone else in the society. This is because the power to waive can only work when it affects only those who do the waiving. If an individual waives her democratic right by conferring it on someone else, it is not only her right that is affected or the person on whom she has conferred it. Also those who have had no role in the waiver are affected because now they confront the recipient as an unequal. This is a reason why vote selling is not acceptable. There is a powerful external effect on those who have not participated in the transaction, so the initial artificially created regime of equality is breached. (Christiano 2016) The only way to avoid this situation in the case of democracy is to make sure that everyone has waived their rights. In this case, the right to democracy does not imply that the society of people who have waived their rights must be democratic or that others have duties to help them become democratic.

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Human Rights and Justice

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Introduction

This entry explores the relationship of human rights to the classical understanding of justice as the constant and perpetual determination to give to others their due (see Aquinas 2002, II–II, q. 58, a. 1; Justinian 1904, I.I.10). Thus understood, justice is a virtue of human actions and not primarily of social institutions or structures (cf. Rawls 1971, 3). This situates rights as entailments of relationships of justice, such that what one person is due to give to another is what the other has a right to. Human rights correspond both

to natural duties of justice owed to all persons and to duties of justice specified for common good owed to others in one's community. The willingness of modern human rights law to recognize rights to commit injustices is criticized as abandoning the deep conceptual relationship between human rights and justice.

What Is Due to Each and All

Our actions make manifest the source of those actions, the responsible person who intends and is the author of those actions. Each person is wholly distinct from others, yet each one of us is also fundamentally like every other person, for each and every other person is also distinctive in their own individuality and responsibility. They too, no less than you or me, have the capacity – actual or developing or radical – to choose plans of action, to pursue well-being, to participate in human goods. This fundamental alikeness between persons affirms that the judgment that "I matter" ought to entail the judgment that "you matter" and "they too matter." This moral judgment grounds practical norms of friendship even among strangers, such as the Golden Rule that I do (and not do) unto others as I would wish them to do (and not to do) unto me and the precept to love my neighbor as myself, not as a matter of sentiment or emotion but as a matter of willing the good of another as I will my own good (Finnis 2011b, 6–7).

In acting for my well-being and that of my family and friends, I ought not to deny that other persons are also subjects of well-being and, like me, have the capacity to pursue their own good. I owe them recognition as fellow persons; that is their due, just as their recognition of me is mine. Such recognition orients ways of relating to other persons away from indifference and bad will and toward good will and respect. In my practical deliberations and choosing, the good of other persons is always a reason for action, for in understanding something to be an aspect of my well-being, I understand it to be a good for me and all others like me: every human person. This reason for action, though general and open-ended, is a requirement of justice: a requirement about treating other persons as all persons are entitled to be treated.

First among the specific actions called for by justice are a series of forbearances, all duties not to choose to impede or destroy or damage another's pursuit of well-being. These duties of forbearance, restraint, and respect are owed to each and all and may be called "natural" duties, for they are derived by deduction from those aspects of human well-being in respect of which we are all fundamentally each other's equals. Irrespective of any other relationships between us, we all owe it to every other person not to choose to kill or to injure or falsely to accuse that person. Failure to respect these natural duties of justice is to wrong another, to deny that other what is due to them as a person. It is, as we will see, to violate that person's rights corresponding to the natural duties incumbent on us all – their natural rights or, as we now say, their human rights.

Though the specific actions called for by justice increase in number and complexity as relations between persons encompass relationships between family members and friends and neighbors and citizens and the world's richest and poorest, the basic elements of justice are constant (see Finnis 2011a, 161–163; Tasioulas 2013). A first element is the inter-personal, the other-directed, the other-affecting: justice applies to situations or interactions involving more than one person and their actions (including forbearances) vis-à-vis each other. It "belongs to justice to rectify human acts" in their relation to the person or persons to whom those acts are directed, as opposed to rectifying "those matters only which befit a person in relation to himself" (II–II, q. 57, a. 1; q. 58, a. 2; Finnis 1998, Chap. 5; Thompson 2006). Though the *virtue* of justice is the steady willingness, the constant and perpetual determination to give to others their due, the *requirements* of justice all pertain to external actions, which can be evaluated as just or not irrespective of the motivations or attitudes or dispositions of the acting person (II–II, q. 57, a. 1). One may do the just thing in one's treatment of others without thereby manifesting one's good character or respect for justice (see II–II, q. 58, a. 10).

A second element is captured by the idea of what is "due" or "to be given" or "owed" or "rendered" to another: a duty to, a responsibility for another person. There are many ways in which we relate to others not out of duty, but reasonably and optionally, permissibly not obligatorily. And there are many duties – termed imperfect or undirected, such as the duty of charity or beneficence – that, though they concern other persons, are not owed to them. So this second element of justice narrows the object of justice to one's intercourse with others where one owes a duty to another person. The failure to do one's duty in such circumstances is not only to commit a wrong or to do wrong or to act wrongly, but to wrong another person.

A third element sets the regulative standard of what is owed to another and is called "equality" by Aristotle (2000, V. 3) and Aquinas (II–II, q. 57, a. 1). Though of great complexity, it is a standard approached by recalling our equal status as persons with the capacity to participate in human goods, from which are derived the natural duties of justice. Beyond these natural duties, the idea of "equality" takes on a more analogical sense, as in Aristotle's principle of proportionality according to which "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness" (1996, III.12; 2000, V. 3). "Equality" is here evaluated in part by reference to persons who are *not* alike, with some having greater or lesser needs or losses. And it is evaluated by reference to the great many subject matters of human intercourse, including the distribution of benefits and resources and opportunities and burdens and responsibilities and, beyond questions of allocation (cf. Gardner 2012, Chap. 10, 2013), to voluntary and involuntary exchanges, restitution, compensation, and punishment. All of these variegated matters capture the great reach of justice, which is about what should be done and not done by one to another, what is justified for one to do for or to another. In all these aspects of practical life where one is to avoid wronging another, the regulative idea of "equality" recalls that nothing is just unless it is just for each and every one involved in the subject matter of human intercourse.

The Reach of Justice

The reach of justice and the full complexity of the regulative standard of "equality" is approached by exploring the common good in all human associating, which is always the good of persons, all of whom are fundamentally each other's equals. There is a common good that extends to all who "share a world" (O'Neill 2016, Chap. 4), and there is a more specific common good of the members of a family or a friendship or an exchange of promises or a political community that can be explored by holding in view the reasons for coming together with others. What I owe my children and spouse and friends and fellow community members encompasses more than the natural duties of forbearance I owe to everyone. The reasons we have for associating or coming together with others identify the good of our common pursuit, the point or purpose of our community. That common good establishes an equality more specific than the equality of all human persons: it is the equality of fellow community members.

Every community answers to justice, for in every community of persons united by an organizing point or purpose members owe each other something in common pursuit. In that most complete of communities that is the political community, the common good is most far-reaching, as are the requirements of justice. The organizing purpose of associating in political community is to secure "the whole ensemble of material and other conditions" that will enable each and every person to pursue their well-being (Finnis 2011a, 147). In this community, members will owe each other in justice not only the natural duties, but also a full range of other duties to enable, favor, secure, and promote each other's pursuit of well-being.

What are those duties of justice in political community? What is one to do to whom so as to foster the well-being of one's fellow community members? The questions escape ready answers because there is no "uniquely determined" set of favorable conditions across the range of subject matters of human well-being (Simon 1973, 40). The need for coordination between members is disclosed by thinking through a relatively simple

task, such as the building of a hospital or school. Even if a sufficient number of community members stand ready and willing to contribute time, effort, and treasure to promote opportunities for pursuing the goods of health and knowledge, nothing will get built absent convergence on a scheme allocating roles and responsibilities and coordinating resources so that there is a plan for design and funding and materials and construction. Yet, once there is a plan and convergence around it, the "generic, context-dependent and defeasible" *reasons* of community members to advance the well-being of fellow members may be transformed into specific, action-guiding *duties* of justice to advance well-being in this way (Köpcke 2018, 56).

When the comparatively simple undertaking of constructing a hospital or school is situated within the more encompassing schemes within which such episodic projects are nested – a healthcare system, an education system – the need to secure patterns of human coordination is plain. For in addition to the construction of a school, an education system will encompass decisions on funding, staffing, qualifications for teachers, government loans for higher education, school meals for the hungry, and more. And in addition to the construction of a hospital, a healthcare system will encompass decisions and plans on funding, staffing, licensing requirements for medical professionals, and a range of measures to reduce risks to life and health and to manage hospital capacity, such as traffic regulations, drug approvals, occupational safety standards, and building codes. When these patterns of human coordination are situated alongside the great many other patterns of human coordination pursued in political community so as to favor the whole ensemble of material and other conditions to enable each member's pursuit of well-being, the complex and far-reaching scope of common good duties incumbent on members of the community comes readily into view.

The duties specified in schemes of coordination will be owed by community members to each other and so be duties of justice, even though, absent such schemes, no such duties would obtain and even though there was no necessity compelling the making of precisely this scheme with duties of precisely this content (Köpcke 2018, 2019, Chap. 4). So why, despite such contingencies, are these common good duties *duties of justice*? It is because the manifold selections involved in realizing a reasonable healthcare and education system are all shaped by and derived from aspects of human well-being, and the point of community members associating together is to foster each member's pursuit of well-being. These duties are owed to all those persons whose well-being is promoted by that set of material and other conditions secured by the healthcare and education system. These are among the duties one owes one's political neighbors to realize the purpose of associating together in political community.

The Beneficiary of the Just Relationship

The domains of practical life in which one owes another a duty can be more or less exhaustively expressed in the vocabulary of justice: what one owes another, what is due from one to another, what one is to give to another as a matter of right, of justice. The words "due" and "owe" and "give" hold in view two persons united by what one of them owes, is due to do, is to give and, in turn, by what is owed to another, is to be received by another, is due to another person. In Roman legal thought, terms like *obligatio* and *ius* (*jus*) communicated "the chain which bound the two parties together" (Tuck 1979, 9; also Nicholas 1975, 158; Finnis 2011a, 209). Like our word "justice," the terms addressed the relationship between persons and not only the part played by one of them. One's duty to another could be called one's *ius* (right), just as "the position where one benefited from an agreement" could be said to be one's *obligatio*, for always the terms referred to the whole relationship without any firm bifurcation between the one who owes and the other who is owed (Tuck 1979, 9).

Yet, as disclosed by the second element of justice, it is possible to frame a relationship of justice from the point of view of the person who owes another something. That person has a "duty" or "obligation" to another, terms with a narrower

range of meaning than the Roman *obligatio*, for they express the chain which binds from the point of view of one half of the just relationship. In turn, it became possible to express a just relationship from the point of view of the beneficiary of another's duty. By a partial "appropriation" of *ius*, it became possible to say that one has a *right* to what is owed to one, that the person at the advantageous end of a just relationship has *the right* to what is due to them (Finnis 1998, 133–138, 2002, 2011a, 206–210, 423–424, 465–466; Tasioulas 2013; Webber 2018, 45–48). By a slight shift in syntax, it became possible to affirm that what justice requires is that each person be given "their rights."

This shift in emphasis from the "objective" sense of *ius* (the just relationship) to the "subjective" sense of *ius* (the right to another's duty) is significant, but it should not be exaggerated. For while the objective sense signals what is just, what is just is always defined by reference to what one owes another, thereby expressing the relationship between persons and the act (or forbearance) that is due between them. In turn, while the subjective sense situates *ius* "in the hands" of a person and allows for the evaluation of that person's relationships with others from the right-holder's perspective, the right that the subject has is to what is owed by another as a requirement of justice. Thus, while the bifurcation of "duty" and "right" from the more encompassing relationship of justice allows for greater precision in expressing the requirements of justice from different perspectives, it remains that the relevant "duty" is always owed to another and one's "right" is always to what is to be given to one by another.

The shift in emphasis from the objective to subjective sense of *ius* is not without risk of misattribution, however. For sometimes, as in the case of the wrongdoer's punishment, what is due to one is not to be conceived as that person's right; we would not be quick to label the person who is punished as the beneficiary of a just relationship, at least not without special explanation. The subjective sense of *ius* thus has a narrower horizon than the objective sense and aligns with the latter only when the person "*for whose sake* something must be [done]" and the person "*to whom* (or in respect of whom, or through engagement with whom) it must be done" are the same person (Köpcke 2019, 89). Though the alignment holds in a great many cases, sometimes, as in the case of punishment, the two come apart. In other cases, like the payment of taxes on one's annual income, the alignment is maintained, albeit indirectly. Though it is the case that, relative to the taxation scheme now in place, the payment of my taxes is owed to my government, the collection of revenue is for the sake of persons whose pursuit of well-being is enabled by the programs funded by my and others' contributions, so that ultimately, even if indirectly, all contributions are due to those persons for the sake of whom the taxation scheme is now in place. It is they, not the government, that I wrong if programs fail for lack of funding due to tax evasion.

Notwithstanding the relationship of entailment between rights and justice, the expressive contribution of rights is significant. To call the beneficiary of another's duty a right-holder is to make explicit that person's status as more than the passive recipient of another's actions; it conveys that person's standing to claim, demand, affirm, and insist upon the other's duty (Feinberg 1970, 252). Rights help express the relational context according to which directed duties do not only require or proscribe actions, but also direct duty-bearers to think of their actions as belonging to and due to another (Simmonds 2020; Thomas 2015, Chap. 7). Failure to do one's duty is thus to injure another, not in the sense of wounding or physically harming, but in the sense of the Latin *iniuria*: to violate another's right, to act contrary to justice.

Rights help express the requirements of justice by emphasizing that each and every person is a right-holder and fundamentally equal to every other in this respect. Such fundamental equality is captured most transparently by that subset of rights that corresponds to natural duties of justice. These basic duties, owed by each to all, are conveyed in instruments like the Universal Declaration of Human Rights as exceptionless forbearances, categorical injunctions against certain acts: "No one shall . . ." perform torture, hold another in slavery or servitude, or attack

another's honor and reputation, among other forbidden deeds. Though conveyed as duties owed, each one of these duties can be reformulated as the right of every person not to be tortured, not to be held in slavery, not to have one's honor attacked.

The expressive contribution of rights does more, too, for it helps articulate the various aspects of human well-being that are subject matters of justice. All of these various aspects inform the common good of a political community and are conveyed in instruments like the Universal Declaration by the affirmations that "Everyone has the right to . . ." life, liberty, security, education, freedom of religion, freedom of expression, and more. In so formulating human rights, the Declaration is extending the idea of rights, for none of these rights can, without more, be reframed as a relationship of justice. It is not possible, by a shift in perspective, to convey these rights as specific actions owed by some to others. This is not to deny that life, security, and other aspects of well-being are all subject matters of justice – they are. But they are *subject matters* of justice and not *actions* required by justice.

Each one of these subject matters of justice is in need of further specification so as to settle upon duties of justice. Before such specification, these human rights to subject matters of justice are only incipiently rights; though they refer to those aspects of well-being in respect of which we are each one another's equal, they do not, without more, establish what is due from one to another, though they do signal the need to specify and settle such duties of justice. In specifying the requirements of justice in one's political community, one will be arguing *from* incipient (emerging, developing, inchoate) human rights *to* rights properly so-called, *from* one's relationship to a subject matter of justice *to* one's relationship to another's duty (Oberdiek 2008; Webber 2009, 2018; also O'Neill 2016, Chaps. 2, 10).

Specifying Human Rights

The specification of incipient human rights tracks the reach of justice, which reaches as far as the requirements of common good. Though the natural duties of justice set the boundaries for the exercise of judgment on those requirements, there are innumerable possible patterns of human action to secure a whole ensemble of conditions favorable for the pursuit of well-being. The incipient human rights communicate the claim that those with the responsibility to settle on such schemes must, at all times when exercising their judgment, keep firmly in view the well-being of each and every member of the community; this each member is due in justice. The more specific content of what each member of the community is due in justice beyond the natural duties will depend on the pattern of coordination reasonably settled upon for common good.

Though no scheme can be said to be, in every respect, a straightforward deduction from the incipient human rights to, say, life and education, every reasonable scheme completes the incipient rights by positing duties. It does so not because the specification of rights in a given healthcare and education system is the only possible specification, but because each incipient human right disciplines the wide freedom of selection in a way analogous to how the general idea of a school or hospital disciplines each one of the architect's and builder's selections in designing and constructing *this* school or hospital (I–II, q. 95, a. 2; Finnis 1998, 266–268; Köpcke 2018). Even though none of the various selections was necessary and each could reasonably have been different in ways large or small, every selection is disciplined by and makes more determinate the general idea.

In specifying the content of duties of membership in our community, the specification of incipient human rights will set out duties incumbent on some members, such as the duty of a parent to register a child for primary school and the duty of a doctor to schedule a patient for a hospital procedure. These are not natural duties, for they hold only because, in our community, we have schools and fund this procedure. Yet, these duties can be traced to the incipient human rights that they specify and complete, so that what the parent owes the child and what the doctor owes the patient can, by a shift in perspective, be expressed

as what the child and the patient each have a human right to.

Many patterns of coordination in political community are settled by positive laws, and we here come to yet another sense of the Latin *ius*, which, in addition to its "objective" and "subjective" senses, may signify "law" (Finnis 1998, 134–135). Though the English term "law" does not make obvious the deep relationship between justice, rights, and law, the vocabulary of civilian traditions more closely tracks the Latin *ius* by signaling, within the very idea of law, the standard of rectitude (*droit, derecho, diritto, Recht*) and the idea of rights (*droits, derechos, diritti, Rechte*). Though positive law cannot make just that which is unjust and a violation of human rights, it can create requirements of justice and rights that would not otherwise be but for having been posited. The need for law to specify the content of subject matters of justice and incipient human rights in community is revealed by the fact that, but for the decision to enact this scheme, the members of our community would not be given what is theirs by right.

Thus, though I have a legal, not a natural, right according to positive law, your legal duty under this scheme is a requirement of justice and completes my incipient human right. Though it would not have been a requirement but for the fact that, in our community, this is the scheme that has been selected, the directiveness of your legal duty finds its source beyond that contingent fact and in the incipient human right that it in part completes. What justice requires is therefore partly settled by natural duties and partly settled by the content of the duties of membership in our community posited for common good.

Unjust "Rights"

That truth has been eclipsed in much human rights law, where rights have become associated with what is advantageous or beneficial for a person without concern for just relationships between persons. Unmoored from the requirement to evaluate claims of right from the perspective of each and every person concerned by the subject matter of human intercourse, judges and jurists have affirmed rights to violate natural duties of justice and more generally to be free of duties established for common good. Some jurists have affirmed a "right to murder" among other "immoral or evil activities," the doing of which is justified as one's "rights" on the basis of "a commitment to personal freedom" (Möller 2014, 164). Some judges have affirmed a right to possess child pornography as part of one's freedom of expression and, by extension, a right to produce, publish, distribute, and sell such material no matter the exploitation and corruption of children (R v Sharpe 2001). Yet others affirm a right to be free of duties not to steal another's property (Barak 2012, 42–43). In grounding such violations of justice in each person's rights, much human rights law opposes right and duty. If one has a right to be free of duties to others, so too do others, and so all rights are unprotected by duties and nothing is owed by anyone to any other.

The anarchical conclusion compelled by the view that one's rights take priority over one's natural and common good duties is scaled back by denying rights peremptory status "on their own," so to speak. Instead, it is said that a right may be infringed without being violated if the infringement is justified. The justification analysis, though burdened with many infelicities, inquires whether the common good justifies infringing rights (Webber and Yowell 2018; Urbina 2017; Miller 2008). What is justified, what is rightly required or prohibited by law, will often be to *deny* persons their "human rights" so understood. The resulting understanding of human rights law opposes rights and duties, rights and common good, rights and law, and rights and justice.

The conceptual stumbles of much modern human rights law can be traced to the error of equating human rights with what is advantageous and beneficial for persons, without more. One's pursuit of well-being may be "impaired or neglected in all sorts of ways"; it is true, but not all of these ways result in a "wrong being committed" against a person (Tasioulas 2015, 47). Our well-being is the ground or source of our rights,

but it is not to be equated with our rights themselves. Our well-being becomes directive of another's actions only *after* the derivation of natural duties or the specification of duties for common good. Those duties are the content of our rights.

Conclusion

Though our natural duties hold always and everywhere, the specification of our other duties of justice is a more contingent matter. For always, the justice of what one owes to others in the specification of one incipient human right is to be evaluated in the light of what one owes to others in the specification of other incipient human rights, so that a community's specification of the full range of human rights stands together coherently, with integrity and harmony, such that every member of the community has rights and can respect the rights of every other member (Tasioulas 2012; Webber 2018). To fail to do one's duty in the face of such integrity and harmony is to burden one's conscience by disrespecting the judgment that "others matter" as "I matter," a judgment that grounds the practical norms at the foundation of justice and human rights.

Cross-References

- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Justice
- ▶ Rights: General
- ▶ Rights: Legal and Moral

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Human Rights Conventions

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Introduction

Human rights conventions codify a wide range of rights and standards under international law. However, plagued by polarizing disagreements about human rights, views about human rights conventions are equally divided. The main strands of skepticism of human rights conventions are mainly about the pitfalls of the legalization of human rights and ineffectiveness of international instruments and institutions in implementing human rights standards and improving compliance, despite their criticized proliferation. But apart from the skeptical views about what can be more generally described as the praxis of human rights conventions, they also give rise to more fundamental and major philosophical issues. These, for example, include the ability of human rights conventions to clarify the content of human rights or the point and normative justification of having conventions. After providing an overview of conventions, this entry will engage primarily with the former issue and argue that the conceptual content of human rights can be explained through norm-making and subsequent norm-applying in international legal practice. Normativity of human rights conventions will also be discussed, although it will be treated as an open question. It will conclude with some remarks on the continuous nature and authority of international legal practice and argues that human rights conventions do not have to conform to any single philosophical account.

What Are Human Rights Conventions?

Human rights conventions are international treaties that create legally binding obligations for state parties. Referred to, interchangeably, as treaty, convention, or covenant, they are an integral part of the international system for the protection and promotion of human rights. Given the lack of a legislative institution at the international level, they have been the most important source of international human rights law (IHRL) as set out in Article 38(1) of the Statute of the International Court of Justice. This, however, means that by their nature as multilateral treaties, they are legally binding only on those States that have subscribed to them by becoming a party.

There are dozens of international human rights conventions, nine of which are recognized as *core*, indicating their special significance:

- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention on the Rights of the Child (CRC)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)
- International Convention for the Protection of All Persons from Enforced
- Disappearance (CPED)
- Convention on the Rights of Persons with Disabilities (CRPD)

These conventions are the outcome of decades of continuous efforts since the Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly (UNGA) in 1948. The impetus for creating an international system of legally binding human rights protection was created by the horrors of the Second World War which prompted the international community to ensure that such atrocities would never happen again. By then, significant international instruments already contained general expressions on human rights issues. The Covenant of the League of Nations had addressed issues relating to fair and humane labor conditions and just treatment of the native populations (Art. 23). The Charter of the United Nations (UN Charter), more strongly and in more specific terms, had also proclaimed that one of the purposes of the United Nations is to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" (Art. 1, para. 3). Nonetheless, the need for additional sources that would elaborate and set clear standards was evident and would eventually lead to the promulgation of an array of further instruments including human rights conventions.

Given the nonbinding status of the UDHR, the idea that the rights contained therein should be codified into a legally binding convention was pursued from the early stages of its preparation. During the "preparation of an international bill of rights," as envisaged by the UNGA (A/Res/43(I)), it was decided that two separate documents should be prepared: one in the form of a declaration, which would set forth general principles or standards of human rights; the other in the form of a treaty, which would elaborate on specific rights and their conditions. Indeed, on the same day that the UDHR was adopted (December 10, 1948), the UNGA requested the Commission on Human Rights to prioritize preparing a draft covenant on human rights (A/Res/217(III) E).

However, alongside procedural and technical difficulties, political differences and divergence of priorities between liberal Western states and Soviet communists prevented the rights enshrined in the UDHR from being codified in one comprehensive convention. In February 1952, the UNGA decided (A/Res/543(VI)(1)) that two Covenants on human rights were to be drafted and submitted simultaneously. The rights were accordingly divided into two major categories, each addressed in a separate convention. The ICCPR focused on liberty-oriented rights such as freedom of expression and religion, political participation, and freedom from torture and arbitrary detention. The ICESCR concentrated more on welfare rights such as food, housing, education, and healthcare. Together with their Optional Protocols and the UDHR, the two Covenants constitute the "International Bill of Human Rights."

It must be also noted that, despite the expressions of commitment and enthusiasm in 1948, almost two decades would pass before the two Covenants were adopted (in 1966), and a further decade before they entered into force (in 1976). To date, 173 states have ratified the ICCPR and 171 the ICESCR.

International human rights treaty-making did not stop at the adoption of the two Covenants. The view that prevailed was that further specialized human rights conventions were needed to address certain rights or right holders. CAT and CPED respectively were adopted to address the rights to freedom from torture and enforced disappearance. CEDAW, CRC, and CRPD were adopted to deal respectively with the human rights of women, children, and persons with disabilities.

These latter conventions were significant, among other reasons, for integrating into single conventions the full range of human rights (civil, political, economic, social, and cultural) that were previously covered in the separate Covenants. In addition, as the ratification rate goes, some of these conventions have surpassed the Covenants. The CRC with 196 state parties and CEDAW with 189 are two of the most ratified human rights conventions.

The adoption of conventions like the CRC and CEDAW have raised questions about the conception of the rights they contain as human rights, for they could be possessed not by all and every human being, but only by specific groups of right holders. The said conventions also became subjects of skepticism for a more practical reason.

CEDAW, for instance, has received the largest number of reservations, with more than 50 States having made such reservations, some of which are very wide, or go to the heart of the state's obligation to eliminate discrimination against women, which would question the ratification rate as a criterion for compliance or effectiveness. Similarly, Iran, which has one of the worst track records of violating children's rights, has been a state party to the CRC since 1994; however, upon ratification, it made the following reservation which defeats the object and purpose of the convention: "The Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic laws and the international legislation in effect."

The above is also a reality check and a reminder that signing up to a human rights convention is only the first step and is by no means sufficient to guarantee that the rights recognized on paper will be enjoyed in practice. That is the reason human rights conventions are accompanied by specialized committees (generally known as treaty bodies) to oversee the implementation of the legal obligations made by the state parties. Their work is carried out mostly through a system of monitoring, where States must report on their human rights situation. Together with the information received from other sources (e.g., UN agencies and NGOs), the treaty bodies publish their evaluations and recommendations.

In addition to the reporting procedure, some of the treaty bodies are equipped with additional monitoring mechanisms including the examination of individual complaints. For instance, the Human Rights Committee (HRCttee) can, under certain conditions – most importantly provided that the state in question has recognized the competence of the committee by ratifying the relevant Optional Protocol – receive petitions from individuals who claim that their rights under the ICCPR have been violated. This is, however, hardly comparable to the European Convention on Human Rights (ECHR) which was signed only 2 years after the UDHR and entered into force in 1953. To date, the ECHR with its judicial institution (the European Court of Human Rights) arguably constitutes the most advanced and effective example of a human rights protection system.

Finally, a charge frequently laid by some critics against human rights conventions is that of proliferation. Without getting into the merits of the claim, it is now more than a decade since the latest core convention (CRPD) was adopted, which makes it seem like the heyday of creating human rights conventions is over. It is not quite so though; the machinery of creating human rights conventions has slowed down, but it has not fully stopped. Some are still in the process of ratification; others, such as a treaty on business and human rights, are presently being drafted.

What Are Human Rights Conventions *About*?

Human rights conventions are bound to attract a seemingly simple question about what it is that they are conventions *of*. This may not seem to many as presenting much of a problem. Aren't they about human rights, one might say, the rights recognized as such in those conventions? Besides, "human rights" is a phenomenon that is said to have become the lingua franca of our time (e.g., Buchanan 2013). So, surely most people know what they are and share the same concept when they talk about it. Despite appearances, however, this is one of the most fundamental, yet strikingly under-theorized questions about human rights. The way we answer it (i.e., how we conceive of human rights) has profound implications for our approach to the theory and practice of human rights.

Answering this question should therefore take precedence in theoretical discussions about human rights conventions which can be examined by their relation to the concept of human rights. The basic question is whether human rights conventions in any way and to any extent contribute to the determination of the content of that concept, or whether they are mere reflections of a concept separately determined by philosophers. This also raises further questions about the semantic and epistemological status and significance of human rights conventions. Are they the manifestation of

the social dimension of human rights, and should we take that dimension seriously? If so, how and to what extent, and what can be achieved by doing so?

Let us begin by emphasizing that the codification of human rights in international conventions did not start the philosophical debates. Prior to the codification, the concept of human rights had long been discussed although little agreement was achieved as to their content and foundation. However, when the early human rights conventions (and international instruments such as UDHR) were adopted, the political aspirations of the international community were translated into the language of international law, and human rights were conceptualized into a set of legal rights and duties. This kick-started a process where the conceptual content of human rights could be progressively determined through the authoritative international legal practice formed around the conventions.

On the question of how the conceptual content of human rights is determined and whether human rights conventions and legal practice play any role in determining that content, the literature shows two competing approaches: moral and political (or practical). The so-called moral or orthodox approaches attempt to explain human rights from a purely normative perspective claiming that human rights exist independently of social facts. That a human right is recognized as such in a human rights convention, or that it has been further interpreted or implemented by an international court, such theories might say, plays no role in the existence and content of the putative human right, for they are determined exclusively and ultimately by natural moral reasoning, not at all by social facts like adoption of a convention or a court ruling. The practical approach, on the other hand, seems to be more inclined to take into account the practice of international human rights at the political and (to some extent) legal level. Nonetheless, many of those who are sympathetic to the political approach may point out that however intricate the international practice is, it is not capable (yet) of helping with the determination of the content of the concept of human rights (Raz 2010).

Discussion of theories of either sort is well beyond the scope of this entry. However, it is important to stress that many such philosophical approaches to human rights tend to perceive international legal practice as less advanced than it really is, and underestimate how much it has progressed. They also fail to conduct the (prior) task of explaining their conception of human rights and how the content of that conception is determined. This is perhaps because they seem to take it for granted that their conception is true and that they (i.e., philosophers) determine the content of human rights.

The above discussion further highlights a key issue here, which is how to identify the semantic community and where it gets its semantic authority from. The challenge for legal-practical theorists is to explain why the legal practice and international community are elevated to a level of authority to create the semantic material required for determining the content of the concept of human rights, as opposed to philosophers, whom some may want to portray as forming the required semantic community either horizontally now or vertically throughout history (e.g., Griffin 2008).

It must be noted, however, that human rights are practical concepts, that is to say they are not purely ideal or speculative concepts. They set the boundaries and evaluate certain areas of the treatment of individuals within the state's territory, such as permissible use of force and regulation of personal freedoms by the state. As such, they cannot have a conceptual content that is fixed and independent from their implementation over time. Thus, social facts, e.g., agreement on a text and application of the norms of human rights conventions, play a role in determining their content. Take, for example, slavery or the inequality of women which were widely acceptable moral norms until some decades ago but are considered violations of human rights under international law. The same can be said about the criminalization of homosexuality and discrimination on the basis of sexual orientation and gender identity. Thus, it can be argued that the concept of human rights rests on a social practice: the practice of participants in the international legal practice of

human rights. This is what makes them, and not philosophers, the relevant semantic community whose convergence matters, i.e., has the semantic authority. Philosophers who engage in armchair philosophical investigations on human rights are not the ones who *use* human rights; they have therefore to defer to the concept of those who use human rights in practice for they are the holders of the relevant semantic authority.

This is in sharp contrast to orthodox and moral realist theories that tend to locate human rights outside social dimensions. Such theorists may want to counter the above by claiming that social facts and their historical developments only reflect our previous expeditions in search of *true* moral human rights. That slavery or inequality of women or criminalization of homosexuality were acceptable moral norms and are now considered reprehensible and violations of human rights, they may claim, only goes to show that we are now discovering deeper layers of our morality. It is not the social facts that progressively make the concept more determinate; it is perfectly determinate already and all we can do is to find out more about it and adjust our imperfect grasp and compliance accordingly (Tasioulas 2019). Similarly, they may claim that over time we will know more about human rights and their inner meaning, thus objecting that legal-practical approaches take the social dimension too seriously. Some may also want to offer a reconciliatory view and suggest that the legal-practical approach may need not deny the moral realist approach, as it can be argued that the outcome of both approaches is the same: either way the concept of human rights is increasingly becoming more determinate.

But appearance is deceptive and the gap could not be wider. Whereas the practical approach places the authority (and responsibility) in the activities and deliberations of participants in practice to determine the content of human rights, the moral realist approach places the same on a belief in the truth of an existing content that we can only attempt to discover. According to the latter, the legal-practical deliberations such as adoption and implementation of human rights conventions make no difference whatsoever regarding the content of the true concept of human rights. But the question is, how we can evaluate the truth of a philosophical concept so suggested? More generally, can the philosophical discourse *ever* determine the content of human rights or for that matter any practical concept? We are yet to be told whether and how we may know a certain content corresponds to the said true content of human rights and whether we now know more (or less) about human rights compared to what we knew previously. Theorists have failed to give a convincing answer to how we can measure whether we are in (or out of) tune with the said human rights morality and proximity of our understanding of it to the alleged inner meaning of human rights. In other words, it is unclear how we can determine whether by protecting a certain human right (e.g., the recognition of the human rights of people in homosexual relations), we have moved towards, or away from, the said inner meaning.

What Are Human Rights Conventions *For*?

What is the point of having human rights conventions and what purpose do they (or are they supposed to) serve? The way this question is answered can have significant implications and is often influenced by how human rights have traditionally been theorized. For political theorists, the answer lies in the main functions of human rights conventions in the political arena and international relations. They can be said to have codified the standards of political legitimacy, or criteria for international intervention or subjects of concern for the international community (Rawls 1999; Raz 2010; Beitz 2011).

Some theorists might also be prepared to look for those aims within the practice by casting the overarching point of human rights conventions in discursive terms. They may thus attempt to locate the normativity of human rights conventions in the context in which the relevant actors (e.g., states and international courts) are committed to implement their norms. Their actions, it might be argued, would have a normative hold on all those who participate in the deliberative arena within which human rights conventions are used.

Alternatively, the point of human rights conventions can be said to set the basic conditions of membership of the international community. Of course, states might decide to accede to one or more sets of commitments, or opt out from them (for example, Belarus has not ratified the ECHR and Iran refuses to ratify the CEDAW), but that comes with a clear message to the community at large. By not signing one of the conventions, one state is still liable to explain the reasons for lack of adoption to maintain its status as a trustworthy member of the international community.

In the same vein, the point of human rights conventions can also be determined by the difference they make. Such a difference can be considered from various points and at multiple levels. For instance, it can be viewed as protecting certain interests of individuals against their governments and other agents within their territory. But at a higher level, this may be seen as serving a greater goal, such as preventing atrocities and suppression, and by doing so ensuring peace and security in the world. Whether and how effectively the existing practice achieves these aims would require empirical research rather than intuitional statements.

For orthodox moral theorists, however, the question is exclusively normative and constitutes an enquiry about why it is morally justified to have human rights conventions or why their norms ought to be observed based on the moral good they produce. From their point of view, it will be good to have human rights conventions because (and if) they give effect to a certain moral theory or serve to protect some ethical value and normative function that the theorists consider important, e.g., the values of "personhood" (Griffin 2008) or "basic forms of human good" (Finnis 2011). Allan Buchanan has also set out to evaluate and demonstrate the moral value and justifiability of human rights law and the international legal system. He first asks what the international legal system of protecting human rights is for, by which he intends to identify the functions of that system; but then he seeks to justify it normatively by appealing to various moral good and values (Buchanan 2013).

However, attempts to justify human rights conventions on fixed moral values is a mistaken approach that contrasts how international human rights law has developed. Human rights conventions do not need this type of justification, for the same reason that the drafters of the UDHR pursued an approach that would be appropriate for a diverse world and could be maximally endorsed from various types of perspectives. The widely quoted phrase from Jacques Maritain suggesting that "we agree about the rights but on condition no one asks why" (Maritain 1949) is an example of when the abovementioned strategy was employed in order to have maximum convergence about human rights instruments. In the face of divergence and diversity, people can agree on the rules contained in human rights conventions without uniformly subscribing to the same or any supporting abstract theories.

Thus, from a practical perspective, perhaps normative justification of human rights conventions can be treated as an open question which can be answered from many perspectives. It may seem to be a big deal if we have no adequate account of the moral justification of having human rights conventions. But this is not something that the drafters of human rights conventions considered to be essential or existential. There are too many justifications out there and participants in the international legal practice of human rights consider the conventions adequately justified without agreeing on their moral justifications.

Conclusion

The codification of human rights in international conventions has neither started nor ended the philosophical debates about human rights. They have instead given rise to further philosophical questions including the semantic and epistemological status and significance of the conventions.

The view set out above takes seriously the semantics of the concept of human rights and suggests that they are dependent on social facts such as ratification and implementation of human rights conventions. It was also argued that norm creation, institutionalization, and legal

interpretation and implementation of such norms contained in the conventions play a significant role in determining the content of the concept of human rights. The practical record of human rights conventions, particularly of those with authoritative supervising and adjudicating bodies, have helped enormously at the conceptual level, making the content of human rights more explicit.

International conventions are useful starting points to set out what the human rights are and how they ought to be protected. They also provide a legal ground for criticizing or challenging the actions of states (and some other actors) for their noncompliance. But conventions cannot implement their rules and settle disputes by themselves. That is where an institutional system of human rights brings in the relevant actors to implement the norms and promote compliance and protection of human rights.

Philosophers who engage in armchair philosophical investigations about human rights do not possess the relevant semantic authority to determine their conceptual content. Not only is there no agreement among those philosophers, but even if they all agreed on one concept that was derived independently of the practice, it could not be imposed on a practical understanding of human rights. The concept of human rights rests on a social practice: the practice of participants in the international community and human rights institutions when engaging in deliberations about human rights. This is what has made possible the emergence of the language of human rights despite the indeterminacy of its concept, and what continuously permeates and shapes the human rights discourse.

By adopting a philosophical approach that is sensitive to international legal practice, this entry also departs from approaches that claim human rights conventions have to conform to any philosophical account in order to be justified. To focus on the practice rather than on the grounds of human rights makes the path towards the recognition and protection of human rights maximally agreeable in the modern world. We do not have to subscribe to human rights on some speculative grounds that nobody is agreeing on. We can instead agree on the norms that are contained in, among others, human rights conventions and which are further developed in international legal practice.

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► Human Rights and Justice

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Humanitarian Intervention

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Introduction

The dilemma of how to respond to human suffering caused by governments blatantly violating human rights reveals the existing conflict between justice and order in international relations. On the one hand, it seems unacceptable to witness human tragedy unfold and stand idly by, watching people die. On the other hand, the use of force violates a

community's right to self-determination, thereby destabilizing the global order and may harm or kill innocent people. The dilemma lies in the fact that both choices come at a price. But if the afflicted territory's authorities are responsible for the suffering and oppose external help, intervention by force may be the only choice available to address or prevent an unfolding humanitarian disaster (Weiss 2012). These so-called humanitarian interventions are highly controversial and pose serious questions for legal and political science scholars, as well as for politicians and all sorts of practitioners in the field.

Conceptualization

The issue is further complicated by the wide range of activities subsumed under the term "humanitarian intervention." The term is commonly used to refer to military intervention, but is also employed as an umbrella term for all forms of interference in humanitarian emergencies including various forms of peacekeeping missions, requested assistance, as well as the delivery of aid, sometimes including diplomatic efforts or sanctions, sometimes not (Hehir 2010). Our understanding of humanitarian intervention should, however, concentrate on the term's most essential aspects. Namely, a humanitarian intervention involves an effort to prevent or stop large-scale violations of fundamental human rights of foreign citizens within the territory of another state (Holzgrefe and Keohane 2003).

Humanitarian intervention is thus composed of three elements: First, it presupposes a humanitarian emergency. Second, it includes the fact that the response to the humanitarian emergency in question is carried out by a third party who is not the actor under whose authority the emergency is taking place. Third, the external response must follow from humanitarian intentions and address the actual situation on-site.

1. As an explication of the first element, humanitarian emergencies are man-made disasters, committed or willingly tolerated by domestic authorities, resulting in large-scale human suffering and substantial threats to the life and limb of specific peoples or communities (Fassin and Pandolfi 2013). Most humanitarian emergencies are the result of armed conflict, civil wars, ethnic disputes, or violent consolidations of power after a change in government. Some examples of a humanitarian emergency include ethnic cleansing, systematic rape, widespread torture, mass exterminations, massacres, all of which can amount to genocide. Natural disasters such as earthquakes or famines lack the agency component of deliberate human action. However, deliberate neglect of authorities to address the consequences of a natural disaster amounts to a politically induced crisis. The defining criteria for identifying humanitarian emergencies are, in addition to being caused by human agency, a substantial number of people affected and a high degree of human suffering (Heinze 2009). If only small parts of a population or individuals are affected, the suffering, however severe, is not classified as a humanitarian emergency because of the size of the crisis. The same holds true for widespread and systematic violations of human rights that fall short of endangering life and limb. There is, however, controversy over where to draw the line. Proclaiming a case of human suffering a humanitarian emergency is therefore already a political act and a starting point for heated discussions.
2. Humanitarian intervention requires the interference of an actor – states or groups of states acting through international organizations – other than the state under whose jurisdiction the crisis is taking place. In order to distinguish interventions from cases of annexation, colonization, or occupation, the third-party interference must be temporally limited (Seybolt 2007). Interference of the relevant sort takes place as soon as the domestic affairs of a sovereign state are deliberately targeted by such foreign actors, including changes to specific tariffs, monetary sponsoring, sanctions, or the delivery of aid, as well as the deployment of military personnel. The external response must be aimed at a change of the target state's

behavior. In order to speak of an intervention, the chosen measures have to take effect within the borders of the target area. Intervention can be done directly or by pushing the responsible domestic authorities to comply with the wishes of the foreign actors interfering.

3. Humanitarian intentions are what distinguish humanitarian intervention from other forms of third-party interference that might be aimed at goals other than addressing humanitarian crises. Humanitarian intervention needs to be justifiable on humanitarian grounds and displays clearly identifiable humanitarian goals. That does not imply that humanitarian interventions necessarily lack material or self-interested motives, but that addressing the humanitarian emergency must be an essential part of the endeavor (Pattison 2010). An agent's intentions are humanitarian if the anticipated goal includes alleviating the people's suffering. As long as humanitarian goals are a primary concern and the measures taken are aimed at improving or preventing a humanitarian emergency, the intentions are to be classified as humanitarian. The empirical appraisal of humanitarian intentions is a highly politicized matter and raises questions both about the properties of humanitarianism and about the underlying power dynamics.

Humanitarian interventions necessarily share the previously mentioned attributes but can be further disaggregated along various dimensions. The most significant ones are the mode of legitimization, the use of military force, and the degree of coerciveness. The intervening third party might act unilaterally or in cooperation with other actors, with or without the approval of an international body such as the UN. The intervening party might resort to military force or to diplomatic means, either in coordination with or against the wishes of local authorities. All actions taken against the explicit will of the target state's authorities are coercive measures (Chesterman 2001). Additional distinguishing features result from the specific conditions on the ground and the nature of the intervention being pursued in each case, resulting in different forms of humanitarian intervention.

The most intensely discussed instances of humanitarian intervention are coercive interventions by military force. Such coercive military interventions are the most controversial, but also the most prominent form of humanitarian intervention. The use of force for humanitarian reasons is potentially problematic in-its-own-right, but the lack of consent of the target state's authorities greatly exacerbates the controversy (Holzgrefe and Keohane 2003). Much of the debate over the legitimacy of humanitarian military intervention centers on the prominent role coercive force plays in the discussion. It poses the most substantial legal and ethical challenges. Thus, most scholarly discussion focuses on the coercive use of military force as humanitarian intervention, separating it from consent based interventions.

Historical Contextualization

The origins of humanitarian intervention are older than the current discussion implies. It is also important to note that resorting to coercive force for moral reasons is not exclusively a European invention. Notwithstanding this, the current understanding of humanitarian military intervention reflects the experience of the early European states. It draws heavily on concepts derived from medieval European theology and philosophy (Recchia and Welsh 2013). The underlying questions of proper authority, sovereignty, and territoriality – albeit with a different scope or meaning over time – are of central importance. Nevertheless, there is no single, linear narrative linking earlier thinking and practice to the current. Even the terminology used today to characterize the ethical quandary of humanitarian intervention did not exist before the nineteenth century (Klose 2016). Nonetheless, even though the current understanding of humanitarian intervention is substantially different from its historical precursors, it is not a recent phenomenon.

In the sixteenth century, European princes intervened in the affairs of their neighbors against the will of the target's authorities, with the explicit intention of addressing the appalling mistreatment of parts of the population. The justification to end such tyrannical misrule derived from the medieval

conception of the common good in early modern Christendom (Simms and Trim 2011). Protecting Christians from violent tyrannical oppression and punishing the perpetrators amounted to a divine moral obligation. Classical Just War Theory refers to tyranny as a crime against all of Christianity. As such, extreme cases of violence or chaos employed by a ruler against his/her domestic population could warrant the use of military force by a third party in a just war.

The (mainly) theoretical debate over such interventions became a very practical matter due to the reformation and the subsequent fracturing of Christendom. Religious persecution and violent interventions on behalf of communities of the same confession elsewhere were commonplace. The simultaneous rise of centralized political power transformed the relations between individuals and public authorities, as well as the relations between ruling authorities. The common narrative refers to the Peace of Westphalia after the 30 Years' War as the onset of the modern state system based on territorial sovereignty. The treaties regulated the existing relations among overlapping political entities both within and outside of the Holy Roman Empire's political system. However, the so-called Westphalian concept of sovereignty as we understand it today, including a strict rule of nonintervention, never existed (Glanville 2014). Interventions were common exceptions from normal political practice before 1648 and continued to be so thereafter.

The division of the church after the Reformation and the ensuing conflicts gave rise to heated debates about the justification for the use of force. Protestant scholars in particular advanced arguments both for and against intervention, aiming at protecting fellow Protestants. Drawing on earlier theological arguments, the dispute developed primarily into a jurisprudential discussion about the authority of Christian monarchs under natural law, including the treatment of indigenous inhabitants of the New World (Simms and Trim 2011). Natural law assumes a universal morality binding on all rational beings that can be known by reason. The formalization of such natural law-based arguments established a legal practice of justification that reflected the underlying power realities.

Over the course of the seventeenth and eighteenth centuries, the increasing juridification of politics refined and changed the meaning of core concepts such as sovereignty, legitimacy, even humanity, reflecting significant social and economic transformations taking place (Finnemore 2009). The emergence of modern nation states coincided with the beginning of the industrial revolution and a growing sense of national identity throughout Europe. The consolidation of autonomous centralized states superseded hitherto existing overlapping claims of authority. Distinguishing between domestic and external affairs allowed for the classification of interventions as unwarranted outside interferences. The expanding body of international law defined the framework of proper political conduct. These rules, however, only applied to European nation states, introducing the concept of a *Standard of Civilization*.

Accordingly, the emerging humanitarian sentiment grounded in the suffering of fellow humans applied first and foremost to Europeans, or more broadly, to civilized Christian people (Barnett 2011). The arguments advanced to establish the principle of nonintervention among European states simultaneously justified Colonialism and military interventions abroad. The obvious power disparities between technologically advanced European states and the rest of the world determined the international political order. As evidence of this, the first humanitarian interventions in the nineteenth century were undertaken by powerful European states within the jurisdiction of the comparatively weak Ottoman Empire (Rodogno 2011).

In the twentieth century, two consecutive world wars undermined Europe's dominant position, but the European model of sovereign nation states had long since prevailed as a norm of international relations. The newly formed United Nations admitted only sovereign nation states as members. Given their experiences, former colonies and other Non-European nations readily embraced the concept of sovereignty, especially the principle of nonintervention. During the Cold War between the USSR and the USA, the predominance of strategic considerations made interventions for humanitarian motives practically

impossible. After the dissolution of the Soviet Union, the 1990s saw a series of humanitarian interventions with UN authorization. The NATO intervention in Kosovo in 1998/9 serves as an important precedent for unilateral humanitarian intervention without UN authorization. Again, predominantly Western powers intervened in unstable or failed states in the name of humanity.

In an effort to provide a framework regulating humanitarian intervention, a Canadian initiative introduced the concept of a *Responsibility to Protect* (R2P) in 2001, which was endorsed by the UN General Assembly in 2005 and has been referenced in various UN Security Council resolutions since then (Bellamy 2009). R2P aimed at shifting the discussion from a possible right to intervene to a state's responsibility to protect its citizens. So far, there is no consensus on the practical implications of such an understanding.

Moral Justification

The issue of humanitarian military intervention continues to pose a serious moral dilemma. Saving the lives of innocent people by stopping abusive governments from gravely mistreating their own population is certainly desirable. However, the use of military force is tantamount to war and causes enormous suffering, including the loss of human lives. This is the reason for some to reject humanitarian intervention completely, while others think it is permissible, and still others even believe it to be obligatory (Wheeler 2000). In each case, the normative reasoning is based on human life as the fundamental value worth protecting. Both advocates for and opponents of humanitarian intervention invoke the common good and confer moral value on the well-being of individuals (Heinze 2009). Essentially, the ensuing debate revolves around conflicting normative claims of how to justify harming or killing people in order to save other people.

Arguments for or against the legitimacy of humanitarian military intervention arise from diverging ethical commitments and varying theoretical assumptions about the international system. The most central difference between such positions consists in the disagreement of what one takes to be the morally relevant unit at the international level. For some, the only morally relevant units are individuals. The morality of any action, system, or institution ought to be assessed through the lens of individuals both as actors and as subjects. For others, the principal subjects of international morality are nation states. Both perspectives permit humanitarian intervention as an abstract and theoretical matter but disagree on the criteria and the threshold of when and how to intervene, if at all (Nardin 2013).

A cosmopolitan perspective focuses on individuals, emphasizing the inherent solidarity among all human beings and the resulting responsibility of everyone towards everyone else, regardless of culture or state boundaries. Moral values are universally valid and apply to all humans alike. States are merely a means to an end, just like inter- and supranational institutions, ensuring equal rights for individuals as the morally relevant participants of the existing global order (Held 2012). Thus, there is no right to nonintervention for states. Sovereignty is contingent upon a state's treatment of its population. A violently oppressive government fails to satisfy the moral burden it owes to those under its jurisdiction due to its appalling human rights performance. Therefore, humanitarian intervention on behalf of the suffering amounts to a moral duty for those capable of interfering. Humanitarian interventions are justified when they address severe human rights violations.

Communitarian arguments, by contrast, focus on the moral value of communities and on their autonomous right to social development. The relevant groups are shaped by the shared moral culture that defines them and express themselves through the formation of political communities. Morality, it is argued, is impossible outside of those communities. Sovereign nation states represent such communities, each community holding particularistic values. The community bears responsibility for its members and the state is the best available means to safeguard the wellbeing of its citizens. The state's moral value derives from its fit with the community within its borders (Walzer 1977). Humanitarian interventions, in contrast, violate the idea of states regulating their own affairs, thus constituting a paternalistic act of

moral imperialism. Therefore, outside interference lacks moral justification. On the contrary, risking the lives of their own citizens for saving strangers abroad violates the primary moral value upon which the justification of states rests. Hence, the only justification for humanitarian intervention is large-scale human rights violations that are so abhorrent and obviously in violation of the people's most basic interests that the fit between state and community can no longer be assumed.

Both perspectives make use of deontological and consequentialist arguments. A deontological line of reasoning focuses on what is intrinsically right as a matter of principle. Moral obligations are derived purely from the inherent value of existing rights. Arguments for or against humanitarian intervention are either based on individual human rights or refer to self-determination and the principle of nonintervention as basic rights of communities. If an action is not consistent with the moral rules derived from these rights, it is not morally justified. A consequentialist evaluation of humanitarian intervention measures its moral legitimacy by its outcome. An action or inaction is moral if it results in more good than harm. Hence, consequentialists may argue about the greater number of lives saved or emphasize the consequences of a more or less stable global order based upon nation states.

The just war tradition combines deontological and consequentialist concerns and offers a catalogue of criteria including just cause and right intention as well as probability of success and proportionality of means and ends. The moral evaluation of humanitarian intervention depends on how well all the criteria are met. R2P follows a similar approach to find the middle ground between communitarian and cosmopolitan positions. However, neither of these frameworks circumvents the previous discussion. Critics of humanitarian intervention point out the difficulties of determining what exactly qualifies as a reason to intervene or who should decide when to intervene. They decry the endless possibilities for abuse by the powerful (Welsh 2004). Even the proponents of humanitarian intervention disagree on how severe human rights violations must be to warrant violent interference, or how many lives need to be saved to justify the sacrifice of others. There is no consensus on the relevant criteria nor on how to determine the specific thresholds. Whether humanitarian interventions are seen as morally permissible or not eventually depends on the assumed perspective and the combined implications of each line of reasoning.

Legal Classification

Focusing on legal doctrine, the concern with humanitarian intervention is the question of its legality under positive law. The term itself refers to an exception from or a breach of the principle of nonintervention or the prohibition of the use of force, or both. Essentially, there are four identifiable approaches to humanitarian intervention in international law. The first position rejects humanitarian considerations as an independent justification for the use of force. Coercive force is only permissible for self-defense or with explicit Security Council authorization under Chapter VII. The second position perceives humanitarian interventions without Security Council authorization as illegal but legitimate in extreme cases. The extraordinary circumstances of humanitarian emergencies provide justification for temporary breaches of the principle of nonintervention and of the prohibition of the use of force. The existing legal framework remains affirmed, nevertheless. A third position argues for an emerging norm of customary international law under which humanitarian intervention may be developing into an exception in its own right to both the principle of non-intervention and the prohibition on the use of force. The fourth position proclaims humanitarian interventions as legally justifiable under the existing UN framework, pushing for formalized rules on when and under what circumstances humanitarian intervention is permissible. The current debate seems to affirm mostly the second position.

The prohibition of the use of force is contained in Article 2(4) UN Charter, which calls upon all member states to refrain from the use or threat of force for the sake of the territorial integrity or political independence of another state. The principle of nonintervention is expressed in Article 2(7), which prevents the United Nations from

intervening in matters of domestic jurisdiction of a member state. As recognized by the International Court of Justice in its *Nicaragua* Judgment, the principle of nonintervention and the prohibition of the use of force are part of customary international law. Not only have states accepted the prohibition of the use of force as binding, but it largely reflects the established general state practice. The same can be said about the principle of nonintervention. In addition, the prohibition of the use of force has the status of a *jus cogens* norm. A *jus cogens* norm is a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted.

Arguments for the legality of humanitarian intervention argue that exceptions to the principle of nonintervention or the prohibition on the use of force generate justifications for breaches of one or both of these principles. One line of argument excludes humanitarian interventions from the ambit of the principle of nonintervention and from the prohibition on the use of force by relying on the juridical significance of human rights. Through the Universal Declaration of Human Rights (1948), human rights are recognized as the foundation of justice and peace. By now, most of the UDHR provisions have the status of international law due to their recognition in other treaties, declarations, or in national jurisprudence. The obligation of states to respect human rights is not only an obligation of the respective state towards the people under its jurisdiction but also an obligation towards the international community. Thus, the argument goes, humanitarian emergencies involving gross violations of human rights do not fall within the domestic jurisdiction of the offending state as defined by Article 2(7).

Similarly, it is possible to argue that humanitarian interventions involving military force are excluded from the ambit of Article 2(4), because, in these cases, the use of force is not directed against the territorial integrity or political independence of any state. Instead, it is argued, Article 2(4) only prohibits the use of coercive force if its application is inconsistent with the purposes of the United Nations.

While these arguments are widely accepted regarding the principle of nonintervention in the cases where intervention does not involve military force, they are met with more resistance with respect to the prohibition of the use of force (Orford 2003). The International Court of Justice has rejected these arguments in the *Corfu Channel* case and in the *Nicaragua* case. The main rationale behind this rejection is that excluding humanitarian intervention from the ambit of Article 2(4) would undermine the system of collective security put in place by the UN Charter.

Therefore, additional arguments have been made to reconcile the prohibition on the use of force with the concept of humanitarian intervention. The first type of argument justifies humanitarian intervention by relying on already existing exceptions. The most important exception from Article 2(4) is the collective action authorized by the UN Security Council under Chapter VII. Collective action under Chapter VII has to satisfy the requirements of Article 39, stipulating a "threat to the peace, breach of the peace, or act of aggression." According to consistent practice of UN organs, humanitarian emergencies fulfill the requirement of a threat to, or a breach of, the peace. The problem remains, however, that the Security Council often fails to act, even if the conditions of Article 39 are met.

A second type of argument tries to establish humanitarian intervention as an independent exception from Article 2(4). Opinions diverge as to the specific requirements of such an exception because the existing formal law provides no references. Instead, the legal basis for such an exception is the established state practice of partaking in humanitarian interventions as customary international law. The existence of sufficiently consistent state practice accepted as law, however, has been continuously rejected (Chesterman 2001). Moreover, the recognition of such an independent exception faces serious challenges due to the supremacy of the UN Charter over other international agreements and due to the *jus cogens* status of the prohibition on the use of force.

The current legal practice treats humanitarian interventions without Security Council authorization as illegal deviations from international law. Despite the increasing efforts of framing justifications in legal terms, up until now none of the arguments has been able to tip the balance.

Conclusion

Humanitarian intervention by military force is not a new phenomenon. It has a long history of state practice including arguments for and against its legality. The international legal system, however, has been shaped in no small part by the powerful and serves their interests. The current UN framework clearly rejects unauthorized humanitarian interventions as illegal, but makes no claims about their moral desirability. R2P reaffirms already existing legal norms and adds nothing new. Although international law is constantly evolving to reflect emerging normative developments, it cannot solve the underlying moral issues raised by humanitarian intervention. The use of force against states continues to pose serious moral questions, but so do human rights violations by states against their own people. Humanitarian intervention, however, remains a political act; moral and legal considerations do not eliminate the need for a political decision.

Cross-References

- ▶ Cosmopolitanism
- ▶ Failed States
- ▶ Responsibility: Collective
- ▶ Solidarity
- ▶ Sovereignty and Human Rights

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Humboldt, Wilhelm von

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Introduction

The philosopher Wilhelm von Humboldt (Potsdam 1767–Tegel 1835) lived during the

transition from the Enlightenment to the stabilization of the ideals and sensibilities of the Romantic era. This is clearly reflected in his eclectic, far-sighted thought with regard to the study of languages and the development of a type of constitutionalism destined to reckon with the challenges of a multicultural society over time.

Humboldt was born in Potsdam, but his family moved shortly thereafter to the castle of Tegel. He was the eldest of two brothers. While his younger brother, Alexander, became a famous natural scientist and geographer, Wilhelm played a pioneering role in the philosophy of language, making original contributions to classical studies, aesthetics, and anthropology. But more than anything else, he was a dissonant, eccentric figure as a philosopher of law and politics during the short period of the Prussian Reform Movement (1806–1819) and the Congress of Vienna (1814–1815).

Humboldt developed a radical, innovative liberal ideal compared to the thought which had dominated up until that point and to the German context within which it flourished. Hannah Arendt defined him as "one of the rare genuine German democrats." In his more practical profession, he was a man of politics, trying to implement his evolutionary program of non-violent renewal, without abrupt pauses (as he explained in *Ideen über Staatsverfassung, durch die neue französische Konstitution veranlaßt*, 1791) in the various fields that gradually became his areas of expertise, censorship, religion, and education (in 1810, he founded the University of Berlin, asking Friedrich Carl von Savigny to teach, among others), and, last but not least, in the general constitutional-governmental framework (acting as the Interior Minister of Prussia in 1819).

Philosophical interests are apparent at the core of Humboldt's legal and political project: the attempt to realize his ideal of justice (although only partially and via a moderate reformist path) that joins the principle of liberty and equality, relying on a specific anthropological understanding. A vision of the state as a necessary means to ensure internal security, deeply limited in its abilities to ensure it does not jeopardize the freedom of its citizens, underlies a positive image of man, aimed at the enhancement of individual diversity and opposed to any constitution that homogenizes or dulls individual personalities.

As such, the understanding of his political contribution is favored by an outlook aimed at Humboldt's *grand tour* under the guidance of the Enlightenment philanthropic pedagogue, Joachim H. Champe, and the natural law thinker, Ernst F. Klein. This all also revolved around Jacobi's philosophical concepts in contrast with Kant's thought. It was in a letter to Jacobi in February 1789 that Humboldt revealed his departure from the transcendental dimension of Kant's moral philosophy, letting the thematic nucleus that would shape his entire practical reflection emerge: the idea of freedom interlaced with that of concrete and political social relationships. This was also a clear motive for the subsequent lively interest in Humboldt found in *On Liberty* (1859) by John Stuart Mill, a liberal *sui generis*. In addition, the influence Humboldt had on Montesquieu, Beccaria, Mendelssohn, and Mirabeau is evident.

For the formation of his profile, intellectual acquaintances became important (e.g., a close friendship with Schiller). He met them in the most progressive salons and had sincere and attentive discussions with a few of the most prominent female figures of the era. Along with Therese Forster, and Humboldt's wife Caroline von Dacheroden, Sophie de Condorcet has been given a special place in his recollections. She was not only a means for reading and studying the texts of her husband but also a compelling interlocutor in her own right. Humboldt particularly appreciated the appendix that she chose to close her translation of Adam Smith's *The Theory of Moral Sentiments*: the *Lettres à C… (Condorcet) sur la théorie des sentimens moraux*, also known as *Sur la sympathie*.

On the Wealth of Individual Character

Humboldt's reflections hinge on attention to the individual, the defense of freedom of expression, in all character manifestations that help define the details of a single man and enrich the community

he belongs to. This idea is always a clear priority in Humboldt's work, as in his life, friendships and correspondence.

Yet he was never able to find true satisfaction in the classic liberal concept of the state. His interpretation of politics, on the other hand, is more nuanced and complex. The protection of individuals and their diversity is not in opposition to shared lives and the common good. Quite the contrary: they spring from the same source. Social living is a condition of the potential self-expression and education (*ausbilden*) of its members. Humboldt first endorsed this deep-seated, intense conviction in the essays of his youth, especially in a piece titled *On the Limits of State Action* (*Ideen zu einem Versuch, die Grenze der Wirksamkeit des Staates zu bestimmen* 1792). He also sought to implement it in his political service to the Prussian state as far as the constitutional structure, the assertion of fundamental rights, and, not least of all, the renewal of self-cultivation (*Bildung*) were concerned.

Theory and practice merged and established a symmetric relationship. At the core of the institutional practice and its planning in political memory, gathered in the early twentieth century in the 17 volumes of the *Gesammelte Schriften* of the Prussian Academy of Sciences, is a complex concept of man that is the moral motivation behind Humboldt's philosophical and legal-political stance. Theories and practices, conceptual justifications and concrete applications, philosophy and political reality, and anthropology and legal institutions intertwine.

In addition to a deep recognition of human nature, Humboldt carries out a comparative investigation, aimed at defending the diversity of individuals as the "fullness of humanity springs only from the pure strength of different individuals" (*Über Goethes Hermann und Dorothea*, in Humboldt 1960–81, vol. II, p. 304; own transl.). Individuality means exalting the differences and constitutive sociality of man, where the value of the community (a community that does not close and does not oppress diversity) is confirmed in language, understood as an activity whose end is not exclusively instrumental, but contributes to the formation of thought. Every individual element, every difference, including cultural ones, are a source of enrichment and awareness for the comprehension of man. And one may even add: every difference, even in gender, given the pages of the 1792 essay dedicated to marriage and divorce and those in *Über die männliche und weibliche Form,* both full of interesting and potentially fertile ambiguities. In this regard, Humboldt considers all types of individualism worthy of consideration and a potential contribution to the knowledge of human nature in its surprising variety.

Man, according to Humboldt, is an individual first and foremost (GS, I, 5, pp. 105 s.). He thus concentrates on the conditions of possibility for all lifestyles, of all authentic expressions of character, as long as they are compatible with the others, provided they are inserted in a non-repressive collective sphere. "Every citizen must be able to act undisturbed, as he sees fit, as long as he does not break the law" (GS, I, 5, p. 218; own transl.).

Imagination, the *Einbildungskraft*, also characterizes mankind, which is why Humboldt's conceptualization was inspired by Goethe's *Hermann und Dorothea*, Kant and the Scottish School of Common Sense. The recovery of imaginative abilities, as a human ability which isn't contrary to reason and, along with it, relevant to moral action, was decisive to understanding the non-linear complexity of the individual. Imaginative strength is essential to man's *Bildung*, his development, the process of self-assertion, and the blossoming of humanity, found in different forms in each individual. *Bildung* (the promotion of which Humboldt dedicated much of his energy) should not be an external juxtaposition, aimed at homogenizing and denying the multiplicity of characters, but rather the as-spontaneous-as-possible development of each individual's inner reality. The development of the single person, the *Mensch,* must be development that is respectful of his humanity (*Menschlichkeit*) and of humanity at large (*Menschheit*).

The fulcrum of the discourse remains the individual, but the individual (the influence of classical Greek philosophers is apparent) is neither understood in opposition to society nor captured

abstractly. What should be favored is that which doesn't hinder, but rather encourages the free potentiality of the individual, thus also a context characterized by a plurality of life options.

The Defense of a Minimal State and the Synergy Between Individuals and Community

Humboldt's *On Limits of State Action* presents a liberal theory in the German sense of the term. In fact, it is a sort of liberalism that is based on an anthropological vision that is explicitly Aristotelian in structure. It exalts the single person in his individuality and in his original freedom. However, it also immediately ties that richness and opportunity for subjective blossoming to social relationships and a multiplicity of external situations.

"Man's true purpose is the highest and most proportional cultivation of his strengths tending towards unity. For such cultivation, freedom is the main, indispensable condition. But beyond freedom, the development of human forces still requires something else, albeit something closely linked to it: a multiplicity of circumstances. Even the most free and independent human being, placed in a uniform condition, progresses the least in his cultivation" (GS, I, 5, p. 106; own transl.).

In this way, Humboldt founded an ideal of political community that expressed a clear version of the anti-paternalistic option: "True reason," he stated, "cannot want any other condition for man except that in which not only every single person enjoys unlimited freedom to develop on his own, in his own peculiar way, but also one in which physical nature does not receive, from the hands of man, any other form aside from that which every single individual confers by himself and freely, based on his needs and inclinations, within nothing more than the limits of his strength and his right. . . That principle must thus be the foundation for every policy" (GS, I, 5, p. 111; own transl.).

Connected to this conviction is a notion of state limited in its functions. "The state should abstain from all care for the positive well-being of citizens and should not go one step beyond what is necessary for their mutual safety and for that from external enemies, for no other purpose should it limit their freedom" (GS, I, 5, p. 129; own transl.). This is true also for his juridical profile, so much so that Humboldt proposed reforms in civil law (GS, I, 5, ch. XI-XII) and criminal law (GS, I, 5, XIII) in the name of mildness, reason, and moderate ethical relativism. "A government is a machine made of and developed in such a way that laws, which must always be simple, general and few in number, are enough on their own" (GS, I, 5, p. 157; own transl.).

The value and the subsequent moral need for the development of the individual's forces (*Kräfte*) and of society is his ultimate goal also in subsequent productions, including his theory of language. For Humboldt, "the very multiplicity that comes from the union of many is the greater good that society is able to provide and that multiplicity is always lost in proportion to the state" (GS, I, 5, p. 113; own transl.). This moment of the individual's participation in the community, not in the state (see GS, III, 5, pp. 136–170 and GS, XII, I, XXXIV, pp. 234, 236, 243 s.), is aimed at the cultivation of individuals in recognition of their respective diversity and personalities. In promoting the active integration of the individual in the community, Humboldt's intent is not to pursue the goal of reinforcing the nation, much less the nation-state. This is not a contradiction. Rather, for Humboldt, it is to consider the active self-recognition of the individual in a community, we might say, in a group – be it the Jewish community or nation or the country of Germany – integral to individual autonomy. He believed that the individual is – above all – social, and that the freedom of individual self-assertion must appear in a context, it must be positioned, both historically and socially (see GS, II, 1 and GS, III, 6). The priority assigned to the individual is not resolved, in short, in individualism.

The one-to-one connection that Humboldt recognizes between individual and community mustn't be translated into governmental terms, because the defense of the idea of a nation, explicitly different than that of a state, can be traced to a

generic, pluralist concept of community. Accordingly, the tradition of modern natural law seems consistent with his political Aristotelism (see GS, I, 5, p. 158).

Humboldt analyzes and justifies the limits of the state's competences and reduces the state's discretion as much as possible to pursuit of individual freedom. For Humboldt, any understanding of the state that tends to go beyond the mere guarantee of its internal and external security, perhaps introducing determined values and a culture upon others through the forcibility of law in the life choices of the governed, imposing certain morals, would be paradoxical. Such a governmental institution would betray its raison d'être. The idea of an active, dirigiste, if not outright "paternalist" state would thus be incompatible with the motivation that moves toward its constitution. The state must be a mere means; the end always remains the individual.

From Theory to Political Practice

The practical confirmation of Humboldt's philosophical concept is found mainly in his constitutional plans. The constitution is not only meant to safeguard the state's internal and external security but should also develop individual capabilities. This is the key to the understanding of his political activities and the hub around which the entirety of his legal-philosophical thinking revolves.

For Humboldt, the right of each individual to assert and develop his own personality and his own talents must find suitable external protection in the law, in opposition to all possible interference from other individuals or the state. The defense of rights is thus consistent with his vision of man and with the idea of justice founded on the principle of freedom.

On the basis of these convictions, Humboldt elaborated and attempted (ultimately failing) to implement profound reforms to the state. In *Denkschrift über Preußens ständische Verfassung* (1819), he defends the pursuit of external security and inner stability, so that "the administration, on behalf of the government, is thereby made: (a) more honest... (b) stabler... (c) simpler and less burdensome... and finally, (d) more just and regulated" (GS, XII, I, XXXIV, pp. 226 s.; own transl.). The right to complaint, the *Beschwerdeführung*, is a guarantee for the partial limitation of political authority, so that "a more suitable path is created... for the remonstration of every person" (ibid, p. 227; own transl.), in order to encourage a form of political participation (the only one possible de facto), an increase in the number of people involved in society. Thus, the design of a new class-related constitution that begins to "see" the "citizen through participation in legislation, control and administration" (ibid.; own transl.) became decisive.

Although it remained tied to a constitutional structure that was still class based, Humboldt hoped for a turning point in the sense of growth of citizens' civic responsibility and participation, in a sense different from that which was widespread in Prussia up until then but also from that taken on by the classes (*Stände*) in the dialectic understanding of the state presented by Hegel in *Grundlinien der Philosophie des Rechts* (§§ 288 and 303). As Reinhart Koselleck has observed, referring in general to Prussian reformers, even in the continuity with the class-based structure, a break with the "traditional unity between 'state' and 'society' occurs. On the one hand, the state [reveals itself] as an autonomous dimension both conceptually... and in effect; on the other, society changes, going from the old class-based structure to that of 'state classes'. Both of these tendencies connect back to the reform that, through nationalization of the classes, paves the way to general state citizenship" (Koselleck, 1967, p. 77, own transl.). The reason for such close attention being paid to citizenship also has a moral justification: the subjective perception of being the protagonists of political activity becomes a perception of one's autonomous capability, while the increase in individual responsibility with respect to deliberations and, more generally, to the enterprise of law contributes to the growth of the individual, in the sense of overcoming particularistic interests toward a new, more mature interpretation of the relationship between the individual and the community.

Thus, disenchantment with the state is manifested, and the belief in the moral value of society for the individual is reinforced. For this reason, as he matured, Humboldt was still able to demand the legitimization of the limits defined for the state's activities and, at the same time, the enhancement of the idea of the nation, even if toned down and distant from the ideal of Fichte's *Menschenbildung* and his *Reden an die deutsche Nation* (1808). If indeed the nation and the individual were to establish a mutually synergistic relationship, relevant even from a moral perspective, the state, to Humboldt (here revealing a philosophical sensibility that has anarchic overtones), is potentially an obstacle to both, a hidden danger lying in ambush.

Plans for Reform: From the Guarantee of Basic Rights to the Promotion of Individual Cultivation

The meaning of the three principle lines of reformist intervention promoted by Humboldt stands out against this background of general reform principles and plans.

The first regards a project to emancipate the Jews (the plan of 1812, drafted at the time of his role as Prussian delegate to the Congress of Vienna), in which the claim for the rights of the Jews is accompanied by the thesis of the right to non-assimilation and a merely legal understanding of the state, in opposition to all forms of legal and political moralism.

"The state, only through the conferral and the limitation of freedom and through the balance of rights thus obtained, must place citizens in a situation of educating themselves. . . It must act only negatively and leave the nation to the positive work of free activity." Ultimately, the idea that "the state is not a pedagogical institution (*Erziehunginstitut*), but rather an institution of law (*Rechtsinstitut*)" comes through loud and clear (GS, X, XXI, pp. 99–100; own transl.).

This general premise is consistent with the awareness that "no legislation about the Jews will ever achieve its ultimate purpose, if not that of making it possible to say the word "Jew" exclusively in a religious context" and to consider "Jews and Christians as perfect equals" (GS, X, II, XXI, p. 102; own transl.). Within a broader project of reform, the recognition of Jews and an extension of the principle of equality and equity can certainly be an immediately achievable goal, as time for this is already ripe. The state must thus "act only negatively" (GS, X, XXI, p. 100), and the principle of equality must involve all citizens at the same time, regardless of the nation they belong to, putting an end to a situation of religious discrimination and civil inequality. "The state must not directly teach respect for the Jews," as it is not a pedagogical institute. "Instead, it must do away with the inhuman and damaging way of thinking, which judges a man not by his qualities, but by his origins and his religion and, contrary to all authentic concepts of human dignity, does not consider him an individual, rather a member of a race that shares, necessarily in a certain sense, certain characteristics" (GS, X, XXI, p. 99; own transl.). At its core, it is still a moral principle: respect for the dignity of man (see GS, X, XXI, p. 103).

The second perspective of his political action concerns the attempted reform of censorship. He had been a victim of censorship himself in the 1790s, when he could barely publish his most important essay.

Critically revising the Wöllner edict of 1788, which intensified censorship, in 1809 Humboldt as head of the censorship institute tried to translate the ideal of the free press into the Prussian reality. There are numerous documents in which he covers the topic, from letters sent to Ministers Ferdinand von der Goltz and Dohna to the draft of a reform of the *Zensurbehörden*. The changes he hoped for in the short term were found on the line of a clearer distribution of responsibility, the reduction of the number of upper offices that the censors had to refer to, and the centralization, a guarantee of order and coordination, of the entire apparatus in the Council of State. The basic criterion is that the implementation of censorship must then consist only of a suspensive veto, precisely not to dampen the development of intellectual strength and to ensure the freedom of the press. "In itself," in his opinion, "there is no doubt that

the only just principle is unlimited freedom from censorship, for which each person is responsible for the things he writes, publishes or prints. Over time, we must draw increasingly close to this principle" (GS, X, II, XIII, p. 54; own transl.). Thus, a renovation of censorship regulations was necessary with a long-term goal of its elimination.

The third line of intervention, Humboldt dedicated himself to with the greatest passion and tenacity, was self-cultivation, *Bildung* (not *Erziehung*, as was said in contemporary literature). In a sociopolitical context characterized by class inequality and the principle of hierarchy, Humboldt revolutionized (both theoretically and politically) the concept of self-cultivation by two principles: antiauthoritarian and egalitarian, which also led the Directorate of Religion and Education from 1809 to 1810.

That topic, also covered in the draft of 1793s *Theorie der Bildung des Menschen*, was already explored in *On Limits of State Action*, where he points out that it appears "debatable in many aspects [. . .] public education, that is, structured and guided by the state. . . Cultural development of man in its utmost variety is absolutely essential. However, public education, even if one wants to avoid this error and limit oneself only to install and pay educators, necessarily favors a specific form" (GS, I, 5, p. 143; own transl.).

Conclusion

This is the most original and influential moment in Humboldt's contribution to Prussian politics and, more generally, to the history of German states, and perhaps even his greatest insight in the interpretation of the history of European civilization. Indeed, it was a plan that contrasted with the educational model of the time. Take, for example, Campe, Herbart (with his *Allgemeine Pädagogik* of 1806 and the related criticism of the individualism of children), or even Pestalozzi (though relatively appreciated by Humboldt, especially regarding the institutional nature of his educational project) and Rousseau, with education ideally being "constructed" by the educator, designed and planned as if it were a laboratory experiment.

The spirit that animated Humboldt's attempted reform clearly reveals its moral, not moralistic, end. Public institutions influence individuals' development and opportunities for expression. That influence can be negative if it is conditioning or an attempt to shape individual characters in a specific, state-determined direction. On the contrary, it may be a beneficial influence that is limited to ensuring the conditions of possibility of the evolution and maturation of individual strengths. At the heart of the plan is a political-moral requirement that can be traced back to the recognition of a right to public education, free from rigid class structures. The fundamental objective is the promotion of the freedom to teach and a type of education that gives each person the chance to be a free man. Education and freedom united in a double thread to control and reduce the class-based stratification that still deeply characterized the political and social structure of the country.

In an ideal society with a minimal state and a perfect balance between freedom and equality, the whole society should be able to participate in education (letter to Caroline dated March 4, 1809 in Freese, edited by, 1956, p. 591 and GS, I, 5, ch. VI). In his practical work, however, he reformed education more tacitly.

Humboldt's emphasis on *Bildung* is no accident; it does not depend on the external circumstances of his institutional role. Rather, it reflects the regulatory crux of his stance, his battle for civility in law and power.

Humboldt's ideal is a state that takes a step back and a law system that regulates public space, revolving around the intrinsic value of individual character. At its threshold, law must stop; yet for its free promotion, in reality, law must fight.

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H

Hume, David: And Law

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Introduction

David Hume was a leading figure in the Scottish Enlightenment, the period in the eighteenth century that produced new and often radical thinking in philosophy, in economics, in the sciences, in the emerging social sciences, in architecture, and in literature, among many fields.

Although he is now recognized as Scotland's greatest philosopher, Hume's philosophical writings were disdained by his contemporaries as skeptical and irreligious. In his own lifetime (1711–1776), he was probably more famous as an essayist and historian. Certainly, Hume did not then – and does not now – spring immediately to mind as a contributor to legal thought.[1] But, in fact, original jurisprudential insights are found throughout his philosophical and historical

[1] There is only one monograph devoted to Hume's legal theory: Allan (1998).

works. Indeed, Hume's approach to law and legal concepts has had a significant – if not always acknowledged – influence on modern jurisprudence.[2]

Hume was not unfamiliar with the law; he started but did not complete studies in Law at Edinburgh University:

> My studious disposition, my sobriety, and my industry, gave my family a notion that the Law was a proper profession for me; but I found an insurmountable Aversion to everything but the pursuits of philosophy and general learning.[3]

Although he may not have admitted it, Hume's exposure to the law did have an influence on him, for the conception of justice, which he situated close to the core of his moral and political writing, could not have been more juristic: for him, to be just is to abide by the rules of law. He also spent much time analyzing the prevailing social contract theories of legal obligation; he articulated a distinctive justification of private property and a parallel account of the bindingness of contract; and he wove his *The History of England* around constitutional issues and politico-legal ideas such as liberty. But a grand jurisprudential theory is not set out and must be inferred from his analysis of legal concepts and gathered from various sources.

Writings

Hume's writings include *A Treatise of Human Nature: Being an Attempt to introduce the experimental Method of Reasoning into Moral Subjects* (1739–1740), *Essays Moral and Political* (1741–1742), *An Enquiry concerning the Principles of Morals* (1751), *Political Discourses* (1752), and *The History of England* (1754–1762). While it would be difficult enough to build an articulated theory of law from such sources, the task is magnified by the fact that Hume presented different and slightly conflicting arguments in the *Treatise* and the *Enquiry*. Although it is now the *Treatise* that is seen as his most significant work, its challengingly original ideas saw him labelled as a dangerous skeptic. In response to the poor reception it received, Hume largely disowned it and reformulated his ideas in a way that made them more palatable in *An Enquiry into the Human Understanding* (1748), the aforementioned *Enquiry concerning the Principles of Morals* (1751), and *A Dissertation on the Passions* (1758).

All of these writings are shaped by two drivers – empiricism and skepticism – that underpin a methodology, the detailed exposition of which is not necessary for an appreciation of the value of Hume's jurisprudential ideas.

Methodology

Hume's radical reassessments of various core concepts that form the architecture of legal systems are bound together not simply by their juristic subject matter but also by a methodology of empiricism that runs throughout his whole philosophy. The key is to be found in the title – and especially the subtitle – of the *Treatise of Human Nature: Being an Attempt to introduce the experimental Method of Reasoning into Moral Subjects.* This experimental method (by which he means an empiricism that studies the workings of the mind) asserts that all knowledge is assembled in the mind from discrete particulars in the form of sensory impressions. This approach led Hume to reject innate ideas; instead we experience, firstly, impressions, which are vivid, and, secondly, ideas, which appear more as copies or abstractions of impressions. The "external reality" which is generally assumed to give rise to these is merely inferred from these.

An illustration which has relevance to law is provided by his analysis of causation. Hume challenged the view that causation is explicable by reference to unobservable forces. Instead, he asserted, when we experience a constant conjunction of pairs of events, we associate them in our minds and believe one event brings about the

[2] For a discussion of the literature on Hume and the law see my "Introduction" in Mackinnon K (ed), *Hume and Law* (Ashgate Publishers, 2014), on which this entry draws extensively.

[3] Hume D, *My Own Life*, reproduced in Norton (1993) at p 351

other. But there is no evidence that such a causal association exists in any way independently of our minds. Hume's radical presentation of causation is as a construct used to explain what we experience, not as something that exists in the world.[4]

When Hume turned to morals, he followed a similar methodology. Again starting with the impressions in the human mind, Hume came to the conclusion that "morality . . . is more properly felt than judg'd of."[5] Internal impressions, feelings, sentiments, and "calm" passions in the mind (rather than inherent qualities in actions or abstract principles) drive the moral psychology that operates at the core of his moral theory. Reason does have a role in morality, but it is a secondary one: once passion has identified a desirable goal, reason can tell us how to achieve it. Here, reason is subservient to passions, sentiments, and feelings. This "experimental" method revealed that "[t]he chief spring or actuating principle of the human mind is pleasure and pain."[6] We act to bring about these in ourselves or others. When others act, our natural responses are sentiments of approval toward actions (or – ultimately – the character traits underlying them) that tend to cause us pleasure and disapproval when they cause pain. And by the operation of sympathy (a natural mechanism that allows us to experience empathetically others' feelings, and which is the key to Hume's moral psychology), we approve or disapprove, too, when others are benefited or injured. A disposition to act in such a way as to cause pleasure in others is a virtue. With a simple act of kindness, pleasure is produced directly as a result of a natural motive. Kindness or benevolence is therefore a natural virtue.

But the detailed demands of justice are more complex (e.g., requiring that an heir receives an inheritance specified in a will even if he is not morally deserving), and Hume cannot find in us any one natural motive to do all that justice requires. Yet, we do approve of just acts, even when they are counterintuitive. Thus, for Hume justice is a virtue, but he calls it an "artificial" one.

Theory of Law

Although the Enlightenment, in which Hume was a leading figure, has been described as the "Age of Reason," Hume rejected abstract (a priori) reasoning as a methodology in his law-related writing as much as he did reliance on religious faith or on a speculative teleology. So, for example, a social contract theory based on the "self-evident" proposition of "pacta sunt servanda" was no more acceptable to him than assertions of God-given natural law or a hypothesized essential goal for mankind.

Instead, he extended to jurisprudence his empirical method, with its starting point in human experience, perceptions, and feelings, and was thus drawing upon what would later become psychology and other social sciences to create an original account of law and legal institutions.

Hume can be seen as making a significant break with the natural law tradition that dominated both continental Europe and the Scotland of his day.[7] But his denial that the content of legal norms depends either on reason or on the Will of God did not drive him to a hard positivist position which might hold that laws are the arbitrary diktats of legislators or judges. Instead he viewed law as simply a social institution that was useful, the substantive rules of which were effectively institutionalized conventions.

It is to Hume's credit that he is not trapped in a natural law/positivist dichotomy. In his assertion that, while man-made, the rules of justice (a proxy for "law") reflect the nature of the human condition, Hume was laying the foundations for what

[4] *Treatise* I iii XIV p 170

[5] *Treatise* III i 2470

[6] *Treatise* III iii 1574

[7] The leading Scottish jurist of the turn of the seventeenth and eighteenth centuries, James Dalrymple, Viscount Stair, prefaced his account of Scots Law with an accepted rationalist definition of law: "the dictate of reason determining every rational being to what is congruous with and convenient to its nature and condition." Stair, *Institutions of the Law of Scotland* (Edinburgh 1681).

Hart was later to present as a "minimum content theory of natural law." But it is fruitless to debate whether this makes Hume "count as" a natural lawyer or not. The answer to this question depends more on the scope of the label than on the writings of the jurist. Although he talks of the stability of property, its transfer by consent, and the performance of contracts as laws of nature,[8] they have no predetermined content, and his designating of them as natural laws seems almost metaphorical. On the other hand, the fact that laws must be shaped by their own context does not mean that, for Hume, any law is as good as another. Not only are the best laws those that are suited to their people, having emerged from their traditional customs, but good laws are general in the sense that they are consistent with what later became precepts of the rule of law. This concept is seen by Hume less as the constitutional requirement that Dicey explored, but more as an integral part of the nature of law. Following this latter analysis, this aspect of Hume's account of law can be viewed as a forerunner of Fuller's "inner morality of law."

Legal Concepts

Consistent with Hume's refusal to hypothesize, it is through his particularist analysis of various core legal concepts that the full flavor of his jurisprudence is revealed.

Justice

The aspect of Hume's legal philosophy which has attracted most attention has been his account of justice as "an artificial virtue."

At its simplest, justice is a virtue because we morally approve of "just" actions and the motives behind them; but it is artificial in that there is no natural motive (such as there is with benevolence) to comply rigidly with the general rules of justice. An individual just outcome may seem counterintuitive in that it goes against our natural sentiments: an example that Hume gives is that justice requires that a needy pauper returns goods to a rich miser if the latter has better title. Hume sets out to find an explanation of why certain acts are approved as "just."

The establishing of both the concept of justice and its content is, for Hume, a matter of empirical social science and not an abstract philosophical one. The substantive rules that are its content are not universal, but are contextual, arrived at in each society through convention. Historically, the behavior came first, was then commended, and thereby labelled as just. The initial impulse for rules is self-interest, but this is gradually replaced – through the mechanism of sympathetic appreciation of the beneficial outcomes for self and others ("public utility")[9] of following the rules – with the desire to carry out mutually approved rule-bound conduct.

In Hume's powerful metaphor of two oarsmen in a boat adrift on a river, each is intent on promoting his own interest.[10] They do not necessarily have a shared final goal: one may be fleeing an enemy; the other may be travelling to a family reunion. However – and without necessarily discussing it, far less agreeing – each discovers that it is in his own interest to row in unison with the other. Hence a convention of pulling together emerges. The following of that convention turns out to be of mutual benefit, promoting the interest of each. There is probably also an indirect "public good" in that an efficient means has been found for crossing the river. Additionally, spectators, through sympathy, approve the rowers' disposition to observe the rules of coordination and condemn failures to do so. The rowers, too, come to appreciate and internalize that approval and disapproval. In the same way as the beneficial rowing convention is, so justice is the unintended consequence of individual actions.

Both the need for, and the content of, the rules of justice are, for Hume, circumstances-dependent. Since the paradigm rules of justice are, for him, about property, the most important circumstances that are determinative are moderate

[8] *Treatise* II p 293

[9] Hume D, *EPM* 3.11 and *EPM* App 111 para 257

[10] *Treatise* III ii p 490

scarcity and limited altruism. Where things are superabundant (such as air), there is no need for exclusive property rights, nor for rules of justice protecting them. Equally, in times of extreme scarcity – as in a siege – the rules of justice are suspended. The rules are therefore peculiar to each society, and susceptible to change over time.

Although man-made, Hume insists that the content of the rules is not arbitrary: the rules have arisen through the individual circumstances of a particular society, and there will have been good reasons for whatever current rules have emerged. But, importantly, there is no necessary distributive principle underlying them. Nor should they be changed to comply with a distributive principle: an attempt to redistribute would be a breach of justice. Hume's refusal to endorse any specific distributive principle may be unusual in a moral philosopher, but it is worth noting that the stance that the rules should be upheld regardless of their moral content is familiar – and frequently praised when adopted by formal-style judges.

Hume does consider, but rejects as impracticable, commonly advocated distributive principles: deserts, needs, and equality.[11] All would need constant adjustment, and the beneficial certainty of inflexible rule-following would be lost if they were adopted.

While Hume's rejection of a distributive element in his account of justice is explicable, a second limitation in his account is more puzzling. Having taken as a starting point for his analysis of justice the respecting of property rules, Hume failed to extend it (except in the cases of promises and chastity) to other situations requiring just action. However, he does not explicitly rule out extending the concept beyond property rules. Indeed, later, in the *History*, Hume does consider the need to develop rules of justice to regulate and protect liberty.

Because Hume's concept of justice is a juridical (or legalistic) one, the obligation to be just is equivalent to the obligation to obey the law. The reason for respecting and following the rules of justice is not a desire to do good, but equally, it is not a fear of sanction or force. It is not based on any agreement to obey the lawmaker. It is not because the specific act produces the greatest utility in itself. And it is not necessarily in the immediate self-interest of someone to follow them. Instead, the long-term benefit of having conventional rules and of following them emerges as the likely driver. But explaining the basis of that obligation is problematic for Hume, as is evidenced by differences between the *Treatise* and the *Enquiry*.

One of the most significant insights in Hume's moral psychology is that while the original motive upon which justice was founded was self-interest, it is not sufficient for its maintenance.[12] In the *Treatise*, that task was undertaken chiefly by sympathy, whereby we experience vicariously the benefits that others have when they are the objects of just actions, as well as the positive sentiments we feel when we benefit. Thus, we approve just actions and motives even when we do not directly benefit. In the *Enquiry*, however, the task falls to utility: we approve justice because of its overall usefulness. Both sympathy and utility can be reinforced by desire for approval and by a sense of duty.

But is that enough? Hume himself had doubts that he had found adequate and coherent grounds for obligation to justice, sufficient to persuade everyone. Hume conjures up the "sensible knave" who decides to go along with the conventional obligation of law only when it suits him (known nowadays as the "free rider"). The difficulty for Hume is, having asserted that it is in one's long-term or the collective interest to obey the law (even when doing so goes against one's immediate interest), he seems to have no argument to persuade the sensible knave to forgo his short-term interest. There are several possible arguments that Hume might use to persuade the sensible knave to conform. Perhaps a desire for approval and conformity, combined with the long-term inconvenience that the knave would experience, would suffice in all but the most extreme

[11] *EPM* III II para 154

[12] *Treatise* III II p 499

case (when nothing would be likely to be effective anyway). For some, their desire to be virtuous may be enough motive; but if that desire is absent, that argument fails too.

Property

As has been noted, closely bound up with justice, in Hume's mind, is property. Entitlement to property is not derived from, nor governed by, natural laws or natural rights, nor is it in the gift of a human legislator. Equally significant is that because it predates the creation of government, property is not merely the product of positive law. The circumstances in which mankind finds itself – especially the combination of human greed and relative material scarcity – lead necessarily in Hume's view to a particular form of ownership, namely, private property.

Hume points out that there is nothing inherent in an object that makes it the property of one person rather than another. We simply associate in the mind an object with an individual – its "owner." Acts of the imagination (and not rules dictated by nature) serve as the basis of the traditional principles of property: occupation, prescription, accession, and succession. Thus, for example, when a farmer has cultivated a strip of land for a long time without challenge (and has acted as if it were his), we associate that land with him. A legal rule that gives him a prescriptive title to that land over time is consistent with that association in the mind. In looking at what is involved in having property in something, Hume's appreciation is that it lies in an (often symbolic) association in the mind between a person and an object rather than in a physical attribute of the object. This is then reinforced by the attitude/acceptance/approval of others. For example, in the case of planting a flag on a newly discovered shore in order to claim it (and the entire continent behind it!), no external change occurs: it is all in the imagination of the participants and spectators.

Promises and Contracts

Hume's treatment of promises and contracts[13] parallels his accounts of justice and property. As was the case with the following of property rules, Hume can find no natural motive to bind oneself to doing something which may turn out to be inconvenient or painful. The reason that contracts should be kept is not because of a command of God, nor that there is a self-evident a priori duty to do so, nor because legislation commanded it. But that is not to deny that promises and contracts are binding. Hume's explanation is that a social institution of promise keeping has evolved. Complying with that institution is useful and hence receives moral approval.

Hume suggests that the inconveniences of not being able to rely on future exchanges (of services as much as of goods), to use one of his examples, become apparent when I and my neighbor both lose our harvests through a failure to agree to assist each other to bring them in. The overall advantage of a practice requiring others (and, correspondingly, oneself) to commit to a future action is realized. An acting as if each promise creates an obligation becomes self-perpetuating. Again, that moral and social approval has come to be reinforced by the law.

Social Contract and the Basis of Government

The source of the bindingness of contracts had wider significance because of that stream of natural law jurisprudence which based civil society and/or government and/or positive law on an actual or hypothetical social contract. Hume considered such an explanation of "the duty of allegiance" to be ill-founded and unconvincing.[14] Hume's arguments are not only based on the lack of a natural obligation to keep contracts. He also argues that the social contract theory is unhistorical; that it could not bind subsequent generations; and that the idea of a tacit agreement is unrealistic. Hume is less individualistic than the social contract theorists, and for him allegiance to government is built up collectively over time, as a self-reinforcing practice.

[13] *Treatise* III ii V p 516

[14] "Of the Original Contract" in *Essays Moral Political, Literary* (ed. TH Green and TH Grose, 1889)

Influence

In the past century, many philosophers have commented on one or other of the concepts identified above. Hume's demolition of social contract theory is regularly invoked. And there is an extensive literature about his accounts of justice and property as artificial constructs. Rawls noted that his theory of justice, too, owed a debt to Hume.

But to the extent that twentieth-century jurists paid attention to Hume, it was to point out the importance of what was sometimes labelled "Hume's Law" (that ought-propositions cannot be derived from is-propositions) in challenging at least some versions of natural law theory and paving the way for legal positivism.

Perhaps an exception was HLA Hart, who based a surprising amount of his concept of law on Hume's insights: the anchoring of legal obligation in convention; the minimum content theory of natural law; the method of "descriptive sociology"; and the starting point of his account (with Honoré) of causation are prominent examples of Hume's influence.

But, equally, the modern jurist rereading Hume may be reminded variously of Bentham's and Austin's utilitarian positivism when Hume states that laws are to be praised because they promote public utility, the skepticism of the legal realists (both American and Scandinavian), and the historical school, or may see flashes of an economic analysis of law. And his demystification of property rights, contractual rights and duties, and legal obligation will appeal to more recent critical writers.

Hume, then, has had influence on subsequent jurisprudential thought. But his impact has been too often hidden, and his ideas deserve more explicit attention than they have received.

Conclusion

Despite his having apparently turned his back on the law, Hume's thinking is permeated with – almost structured by – legal concepts, values, and methods. Lawyers are certainly familiar with the challenging of what is merely asserted or is unproven, and with reverting to the primary (sensory) evidence to build up an account of what is experienced. But the hours poring over of his texts with an unsympathetic eye seem, too, to have delivered radical insights into the substantive subject.

Superficially, his approach to law and justice appears negative – against natural law, against abstract reason, for example. But this skepticism is purely methodological, a means of clearing away unwarranted assumptions and false premises.

His pioneering social scientific methodology allows Hume to escape this skepticism and delivers a novel perspective, where law is neither dictated by reason nor is the random acts of the powerful but emerges naturally through human interaction, needs, and convention. Law persists but also slowly develops, through social approval of the practice of generally following the resultant rules.

The jurist of today, untroubled by the absence of a divine reference point or by the novelty of social scientific methods, is in an unparalleled position to appreciate the genius of Hume's quintessentially modernist account of law and its concepts, in a way which his contemporaries in the Enlightenment were not.

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Introduction

Edmund Husserl (1858–1938) is one of the founders of phenomenology, a major tradition in Western philosophy since the twentieth century. He

was born on 8 April 1859 in Prostějov, the Czech city then called Proßniz, which belonged to the Austrian Empire. He was from a secular Jewish family but later converted to Protestantism under the influence of an older friend from Moravia, Tomáš Masaryk. However, based on what we now know of his words and deeds, Husserl regarded himself as belonging to Germany, where he was based after the autumn of 1886 until his death. For example, in his obituary of Brentano published in 1919, he admired Prussia, recalling his disagreement with his teacher's Great Germanist political position (Husserl 1950ff, vol. XXV, 307). These complexities of his identity may well be relevant for his discussions of communities (for a more detailed biography of Husserl, see Moran 2005, chapter 1).

Although he did not consider himself a philosopher of law or a social philosopher, he left his mark in social sciences and discussions over their foundation. His *Logical Investigations*, published in 1900/1901, provided the impetus for forming the early phenomenological schools in Munich and Göttingen, where society and law were central topics (Salice 2020). His phenomenology of internal time consciousness and intersubjectivity played a decisive role in Alfred Schutz's conception of phenomenological sociology (Schutz 2011, 2). As exemplified by, among others, Schutz's close friend Felix Kaufmann, a legacy of Husserl is also found in the history of philosophy of law (Loidolt 2010).

It should be noted that those influences can be attributed mainly to Husserl's published works in his lifetime. In those writings, he seldom dealt directly with issues from philosophy of law or social philosophy. Therefore, in the cases mentioned above, Husserl brought about the influences primarily by providing *general* ideas of phenomenology, which his successors would apply for *particular* topics such as law and society.

With the publication of *Husserliana*, the complete works of Husserl (1950ff), it turned out that Husserl had a more detailed idea of social philosophy than what transpires from his published works. The vast amount of his *Nachlass* included many discussions of topics such as communities, (social or shared) norms, and their connections. The present entry overviews this aspect of Husserl (for more comprehensive studies, see Hart 1992; Perreau 2013; Schuhmann 1988).

The Constitution of Social Reality

In §152 of *Ideas I*, published in 1913, Husserl passingly but unambiguously holds that the potential topics of his phenomenology include law and society. He raises as his future agenda the problem of the *constitution* of social objects, namely, such as state, law, custom, church, etc. (Husserl 2014, 304–305). Such a problem is part of his project of the constitutive analysis, according to which "[e]ach objective region constitute itself in accordance with consciousness" (Husserl 2014, 296). Like the region of nature as the research field of natural sciences, the region of society or "Spirit [*Geist*]," which *Geisteswissenschaften* – humanities and social sciences – investigate, is "constituted" in consciousness. Guided by this idea, Husserl sees it as a task of his phenomenology to analyze how varieties of social objects are "constituted."

In §58 of *Cartesian Meditations*, first published in 1931 in the French translation, Husserl sketches how to analyze social objects. To understand the essence of sociality, we need to study the class of experiences called *social acts* (cf. Husserl 1950ff, vol. I, 159; see also vol. IV, 194). Social objects, he maintains, are created through communicative interactions between subjects.

Here, we must clarify what "constitution" is according to Husserl. As many commentators have pointed out, Husserl's notion of constitution is notoriously difficult to interpret (see Zahavi 2003, 72–77). As far as social objects are concerned, we can claim that constituting them is just creating them. However, it would be too hasty to generalize this claim to every kind of object. Doing so would lead Husserl to an extremely idealist position, according to which consciousness creates everything. Many of his interpreters have been trying not to ascribe such an idea to him.

However, it suffices to give a minimal interpretation to Husserl's notion of the constitution for the present purpose. No matter how this notion should be interpreted more adequately, virtually all serious readers of Husserl would agree that the constitution of an object involves an experience in which the subject is presented with that object. When Husserl claims that objects in nature are constituted in perception, he holds, possibly among other things, that we are presented with them in perceptual experiences. Likewise, when he claims that social objects are constituted by social acts, his contention, minimally, is that we are presented with those objects in bringing them about through communicative interactions with each other. Understood in this way, the creation would be just a *particular* form of the constitution of objects, which may not be the general principle of it.

Social Acts

Even though Husserl does not make it explicit, it is evident that he owes much to Adolf Reinach, a student and colleague of him in Göttingen, not only for the term "social acts," but also for the characterization of experiences it designates. In his *Apriori Foundations of Civil Law,* published in 1913, Reinach introduces the concept of social acts, which is applied to communicating, promising, ordering, etc. (Reinach 2013). According to him, social acts have at least two features that distinguish them from non-social acts. First, they are necessarily turned to others and thus need their uptake. Second, *almost all* of them would bring about social objects if they are received by others to which they are turned. For instance, an act of promising, if it is received by the promise(s), would generate a commitment. Exceptionally, Reinach holds that acts of communicating do not have such a function.

However, Husserl does not borrow Reinach's concept of social acts as it stands. While agreeing with Reinach concerning the first of the two peculiar features of social acts, Husserl has a different take on the second feature. According to him, even an act of communicating would bring about a social object if received by its addressee(s). As Husserl observes in a manuscript in 1931, "[e]very friendly conversation is already the communization of humans" (Husserl 1950ff, vol. XV, 423; see also Averchi 2021, Section 5). This idea leads Husserl to a considerably broad concept of communities.

Communities and Norms

As a natural consequence of his relaxed view on communities, Husserl admits that communities come in great variety (see Petranovich 2021). Then, the next task is to differentiate them appropriately.

In Husserl's discussion of varieties of communities, the notion of *norms* plays an important role. For him, norms are constitutive for the being of communities (Husserl 1950ff, vol. XV, 422). Of course, he does not mean to claim that there is a set of norms that alone would make up all communities. Instead, admitting that each community has its norms, he analyzes how "normal" things in a community could be experienced as "anomal" for outsiders of the community (see Steinbock 1995). Accepting different kinds of norms also guides Husserl's analysis of states and (positive) laws. Characterizing legal norms as compulsory rules (*Zwangsregeln*) as opposed to non-compulsory customs, he comes to an idea reminiscent of Hans Kelsen, namely, that the unity of a state is that of laws (Husserl 1950ff, vol. XIII, 106). At the same time, Husserl comes closer to social contract theories by regarding legal norms as a product of the unified will of the relevant community members (Husserl 1950ff, vol. XIII, 106). That is why he classifies states under what he calls *personalities of higher order*, namely, communities with their own aims and projects (Husserl 1950ff, vol. XIV, 182, 405; vol. XV, 415; see also Szanto 2015).

Social Ethics

Husserl's social philosophy reconstructed so far deals exclusively with descriptive questions such as *what are communities?* However, with the idea

of communities as personalities of higher order, he also envisions a normative theory of society under the heading of *social ethics* (for an overview of Husserl's ethics in general, see Melle 2002). According to him, just like an individual person, a community has its own life that it ought to lead under the guidance of ethical ideals (Husserl 1950ff, vol. XXVII, 48–49). Accordingly, Husserl occasionally talks about a rational "community of love [*Liebesgemeinschaft*]" as an ideal form of community, which, according to Schuhmann (1988), would ultimately replace states.

Research on Husserl's social ethics is yet to be developed (for an in-depth study on this topic, see Hart 1992; for an attempt to contextualize Husserl's social ethics, see Gubser 2014). And we should not forget that we have, unfortunately, only a limited textual basis on which we could reconstruct Husserl's view on how we ought to live together.

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Introduction

Francis Hutcheson (1694–1746) was part of a group of philosophers called Scottish sentimentalists, known for defending the existence of a special faculty, the moral sense or moral feeling, which is the origin of morality. Hutcheson's philosophy closely follows the theses of the Earl of Shaftesbury (1659–1729), who is considered the initiator of the school.

Hutcheson was born in 1694 at Drumalig, Ireland, into a family of Presbyterian tradition of Scottish origins. The first school he attended was one of the Dissenters schools, a religious tendency that did not follow the dictates of the Church of England. To continue his training, he entered into one of the Academies the Presbyterian founded to

supply the lack of Presbyterian universities in Ireland. At this academy, Hutcheson studied Classics, Theology, and Scholastic Philosophy. Subsequently, between 1710 and 1716, he studied Philosophy, Theology, and Maths at the University of Glasgow, where he was taught by Gershom Carmichel (1672–1729).

After his training period in Scotland, Hutcheson returned to Ireland. In 1721, he opened an Academy in Dublin where he taught for 10 years. On Carmichel's death (1729), he was hired by the University of Glasgow as a Professor of Moral Philosophy. In 1730, he delivered the inaugural lecture *On the Natural Sociability of Mankind*. Hutcheson died in 1746 in Dublin.

Human Nature

Hutcheson takes the observation of human nature as a starting point in order to explain what morality consists of. This observation leads the author to affirm that in human beings, there are two natural affections that are the origin of all the aims they seek: the affection to pursue one's own happiness and the affection to be concerned by the happiness of others (benevolence). By happiness Hutcheson means a pleasant sensation of any kind or a continued state of such sensations.

The aims that the agent tries to achieve are the origin of actions. Affections are natural dispositions that cannot be directly taught and determine the purpose of human life. Hutcheson distinguishes two sorts of aims according to the inclinations they come from: aims concerning individual happiness and aims related to the other's happiness. Affections are the primary elements of morality. Reason provides the necessary means to achieve the aim proposed by the inclinations. Reason is the sagacity, the ability to analyze and decide the most adequate means to achieve the agent's aim but does not determine the purpose of the agent. Instinctively agents seek a goal that is their own happiness, but there is also another instinct toward the public, or the good of others, which is a principle of virtue (*An Inquiry into the Original of Our Ideas of Beauty and Virtue*). For Hutcheson, there are no reasons that by themselves move agents to act; in all cases, it is necessary to presuppose previous affections that point to the aim; reason will then propose the most convenient means to achieve it. Moral sense and affections determine human purposes but reason must find out the means.

Each affection, aim, and act is analyzed from the double perspective, private and public, and Hutcheson's conclusion is always the same: "Publicly useful" constitutes the foundation of morality.

Virtue

Hutcheson explains the concept of virtue on the basis of the idea of benevolence, equated to that of virtue in many of his texts. Benevolence is one of the affections that composes human nature.

Interest in others' happiness or benevolence is the origin of disinterested deeds; both affection and action are called virtue. Virtue is presented, in part, as something constitutive of nature, as a good disposition of mind which is not directly produced by instruction; it has been implanted in human nature by its author and strengthened by education. The possibility of moral education is based on a natural inclination to virtuous acts. From Hutcheson's point of view, moral education improves nature. Hutcheson's theses are contrary to B. Mandeville's (*The Fable of the Bees: or, Private Vices*). According to this author, moral education introduces in moral agents a tendency to be interested in the happiness of others that is contrary to their nature, because human beings are naturally selfish. Moral education does not go against the nature of the individual because God has placed in this a natural interest in the happiness of others, which is as natural as the interest of ones' own happiness. Education only develops, it does not create.

Affections are the immediate cause of actions. The goodness or wickedness of these dispositions and of the acts that they give rise to strictly depends on their reference to a rational being. Thus, every act considered morally good or bad proceeds from an inclination towards rational agents, in the same way that a religious act is

considered as such only if it proceeds from an inclination towards God. Therefore, any act that arises from an inclination whose object is not other people or God, cannot be morally good or bad, nor religious. The dispositions, natural or acquired, that enable human beings to seek the good of others, are called good, and the acts that arise from those dispositions are also good.

According to Hutcheson, cardinal virtues (prudence, courage, justice, and temperance) are qualities that can be considered virtues because of their ability to promote public good. Otherwise, they would not be virtues. Prudence, for example, would not be considered a virtue if it were only a quality to promote private interest.

To the extent that benefit to others as an aim of a moral agent serves to qualify a quality as a virtue, Hutcheson introduces a quantitative concept into the definition of virtue. Considering that moral agents must decide which act to perform, the number of beneficiaries that receive the consequences of their acts will determine the degree of virtue, since the proportion of virtue of an act will be necessarily related to the number of people in whom that act generates happiness: "(. . .) In equal degrees of happiness, expected to proceed from the action, virtue is in proportion to the number of individuals to whom the happiness shall extend; (and here the dignity, or moral importance of people, may compensate numbers) (. . .)" (*An Inquiry into the Original of Our Ideas of Beauty and Virtue. An Inquiry Concerning Moral Good and Evil*, Section III, VIII).

The sense of virtue is a priority for the moral agent when choosing among possible acts that are compared for their moral qualities. Faced with acts that generate the same degree of happiness, virtue is proportional to the number of people affected by such happiness, taking into account that the dignity or moral importance of people can compensate for the numerical ratio. Virtuous people are distinguished by their ability to act out of love for their neighbor and to seek public good through action.

Benevolence assumes that the intention of the moral agent is placed on the good of others and that the consequences of the act, beneficial to others, cannot be reduced to means to achieve a personal interest: people are benevolent only if they understand their own interests as delight in the good of others. The best way to achieve one's aims is to bear in mind the happiness of others. Seeking the benefit of the community thus reverts to being able to achieve one's own aims.

Hutcheson's definition of virtue is based on human inclination to take an interest in benevolence or the happiness of others. To be interested in the happiness of others is not acting against one's nature. Harmonizing one's happiness with that of others, in fact, is to be virtuous. This affection is set in human beings by their Creator as a starting point of behavior. The social element of the definition of virtue must be sought in a nature whose natural tendency is to be benevolent.

If Hutcheson's idea of human nature was changed, the concept of virtue would also have to be changed. Mandeville**,** whose vision of the nature of man does not lead him to share the optimism of the Scottish sentimental school, defines (authentic) virtue according to his selfish concept of the human being. Mandeville has to explain why the social concept of virtue is contrary to the interests of human nature. If for Hutcheson the benevolent nature of man is the key to understand the definition of "virtue," for Mandeville the education to which a human being is subjected leads him to define virtue as the pursuit of self-interest. In both cases, however, there is an inevitable starting point to which they are linked and from which the concept of virtue, that is, the nature of man can be defined.

Moral Sense

All of Hutcheson's considerations of the evaluation of acts is done from the perspective of an observer. The question here is to analyze the quality of another person's actions so that they awaken in the observer a feeling of approval or disapproval. The center of consideration moves from the moral agent as the cause of the act to the assessment made by any member of the community who observes the consequences of the actions of the agent. Actually, all members of the community perform both roles, and it is thanks to this

double action that public and private good can be intertwined.

We mean by it (moral sense) only a determination of our minds to receive amiable or disagreeable ideas of actions, when they occur to our observation antecedent to any opinions of advantage or loss to redound to our selves from them; (. . .)." (*An Inquiry into the Original of Our Ideas of Beauty and Virtue. An Inquiry Concerning Moral Good and Evil*, Section I, VIII). Without clear will, the moral sense, universal and prior to any kind of education, makes the human being sensitive to certain aspects of the observed acts, thus becoming a condition of the possibility of moral evaluation. Along with the capacity for moral evaluation, moral sense grants the necessary objectivity so that the evaluation is made independently of the interests of the observer who judges. Through the moral sense, acts are approved regardless of whether they favor or harm those who value them. Without the faculty of moral sense, observers would only approve what would be most beneficial to their interests without paying attention to virtue. Acts that the observer approves are useful for others, but not always useful for the one who approves them. The affection of benevolence remains active in the evaluation of the moral sense preventing an approval only in case of a private interest.

Acts that benefit others have a "*lovely form*" (*An Inquiry into the Original of Our Ideas of Beauty and Virtue. An Inquiry Concerning Moral Good and Evil*, Section III, VIII). Under this aspect they are presented and affect the moral sense of the agent and of the observer. The ability to distinguish between virtue and vice is possible because of the constitution of the rational agent and also because virtue is in itself kind and vice hateful. The ease with which one can discern between virtue and vice makes happiness attainable only through the pursuit of virtue.

Moral good is a quality that belongs to actions and causes in the observer approval of the action and love towards the agent. The inclination towards one's own good and the good of others gives way to the apprehension of the moral goodness of acts. Moral goodness is a quality that affects human beings through their moral sense. On the other hand, the qualification of natural good or useful good is reserved for everything that provides pleasure to the observer. The pleasure provided by the useful good is sought out of interest or self-love and its valuation can only be subjective. That is why we feel differently towards the virtuous and towards the person who possesses material goods. Only the first is capable of awakening in the observer the approval (of the acts) and the love (towards the agent). The virtue apprehended in the moral agent awakens the feeling of approval, esteem or admiration and, consequently, good will towards the agent, since we consider that the quality approved by the moral sense is in the agent.

Moral objectivity of the evaluation of the acts derives from the universality of the moral sense that allows the approval and disapproval of what any observer would approve or disapprove. Although we cannot be certain that we approve of what another person would approve, it is likely that all people consider good acts those which are socially useful.

Natural Sociability

Hutcheson bases the origin of society on the natural human tendency to benevolence and the judgment of the moral sense. Natural concern for others is the foundation of natural sociability. Hutcheson shares with R. Cumberland and S. Pufendorf the idea that social life is natural to human nature. The origin of the society is neither security nor personal pleasure, but rather a non-selfish inclination of human nature that seeks the happiness of the others: "For human nature is not sociable only in this secondary sense for the sake merely of our own advantage or pleasure, whatever it may be, but is in itself immediately and primarily kind, unselfish, and sociable without regard to its advantage or pleasure." (*On the Natural Sociability of the Mankind*, p. 205). Society is the result of several acts: a union contract between people, a decree or ordinance of the people concerning the plan of government, the nomination of governors and their contract with the people. Prudence must be the quality of the ruler

whose purpose is to apply the principle of happiness. All laws, rights, and duties are at the service of achieving the happiness of the community. The same principle that governs the decisions of the moral agent must govern the decisions of the rulers.

Natural and Positive Law

Hutcheson defines the law as "The will of those vested with just power of governing, declared to their subjects, requiring certain actions and forbidding others with denunciations of rewards or punishments." (*A Short Introduction*, II, ch. I, I). The sense of right and wrong and the faculty of reason that distinguishes them has been implanted in human nature by the creator. According to their different manners of promulgation laws are either natural or positive: "Natural laws are discovered by our reason observing the nature of things. Positive laws are revealed only by words or writing." (A Short Introduction, II, ch. I, IV). The set of precepts that make up natural law are divided into primary or immutable and secondary or mutable. The precepts that are necessary for any social status are primary while the secondary ones promote the improvement of life without being strictly necessary. The two precepts from which all duties derive are (a) that God must be loved and obeyed and (b) the common good must be promoted. Rights that favor the public interest can be perfect or imperfect. Perfect duties are those that must always be maintained for the benefit of society. Imperfect duties are those that are fulfilled in accordance with personal conscience and are not necessary for the subsistence of society.

The Former Utilitarianism

The weight that Hutcheson places on the general happiness of society or a person's as the basis for the approval of acts considered right constitutes a clear precedent for utilitarianism. Hutcheson lays the foundations of what would later become the fundamental principle of utilitarianism, the moral evaluation of acts based on the consequences that generate maximum happiness for the maximum number of people: "(...) Action is best, which procures the greatest Happiness for the greatest Numbers; and that, worst, which, in like manner, occasions Misery." (An Inquiry into the Original of Our Ideas of Beauty, sect. III, VIII).

However, Hutcheson is not a utilitarian because the faculty of the moral sense objectifies the terms with which happiness is defined. Moreover, it relates the intention of the moral agent with the consequences of the act. The structure of the human mind is in such a way that the mere consideration of the happiness of others causes in us an altruistic sentiment that has nothing to do with any particular interests.

Conclusion

Hutcheson systematized the philosophical insights of the Earl of Shaftesbury and developed two concepts that would be crucial to the development of the Scottish sentimentalists: the idea that human nature is naturally inclined to seek private and public happiness, and the defense of a specific faculty thanks to which the human being is a moral being.

According to the interpretation of A. MacIntyre (1988), Hutcheson's philosophical ideas stand at a crossroads from which two diverging paths start. One path is the one undertaken by Thomas Reid (1710–1796) and Dugald Stewart (1753–1828), who accept the central theses of Hutcheson's ethics and theology, but reject his epistemology. The other is the one that run through David Hume (1711–1776) and Adam Smith (1773–1836), who accepted and corrected Hutcheson's epistemology while rejecting his theory of moral principles.

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► Hume, David: And Law
► Mandeville, Bernard
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Introduction

Michael Ignatieff's Lesser of Two Evils Philosophy fits within a long tradition of pragmatist thinking about the right of the state to do anything to protect its citizens and preserve itself in times of emergency. Pragmatist philosophers and politicians who articulate this position privilege national security over civil liberties, even when it comes to engaging in torture. Michael Ignatieff adds to the tradition by arguing that sometimes liberal democracies must engage in the lesser evil in order to avoid committing greater evils, but they should do so as a last resort and only under conditions designed to prevent them from destroying civil liberties and devolving into dictatorships. Ignatieff's philosophy has received considerable attention in post-9/11 America, especially in light of the reports that the Bush Administration sanctioned the use of torture in the Guantanamo Bay detention facility in Cuba.

Torture

In *The Lesser of Two Evils*, Michael Ignatieff explains that the rules in Western liberal democracies require politicians to engage in political or legal procedures that are based on adversarial review before they can place constraints on the civil liberties of citizens. In most liberal democracies, adversarial review is reinforced at different levels in legislative sessions, in courtrooms, and in the court of public opinion via competing news networks so that any politician who wishes to place restrictions on civil liberties must meet the highest standards of scrutiny before he can do so. If, at any time in the review process, a politician violates the public's trust he can be reprimanded, censured, excluded or expelled from office, or, in the worst case scenario, if he violates the law he can be arrested, charged with a crime, and jailed or placed on probation. However, as John Locke points out in his discussion of executive prerogative in the *Second Treatise of Civil Government*, governmental actions require the convenience of time but exigency often demands an immediate response. For example, the adversarial review procedures that Ignatieff discusses require that the competing sides have time to gather and present their

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evidence, articulate their arguments, and debate complicated legal nuances. The judges, in turn, must have time to hear and deliberate about the arguments, draw conclusions, and then render their verdicts. Or, in the case of Congress, there must be a motion, debate, and then a vote. Either way, all of these procedural steps take time to execute. By contrast, a large-scale terrorist attack requires an immediate response, and Ignatieff argues that sometimes the best response entails placing constraints on civil liberties.

To highlight his reasons for supporting placing constraints on civil liberties, Michael Ignatieff develops a thought experiment in which a suspected terrorist in the custody of the CIA admits to hiding a bomb in a crowded city. Time is of the essence because the bomb will detonate within 2 hours and the terror suspect refuses to disclose the location of the device. In this scenario, the question becomes: Should to CIA engage in torture in order to discover the location of the bomb? For Ignatieff, thought experiments like this one forces us to weigh our commitments to civil liberties against our intuition that the state should do whatever is necessary to protect the lives of innocent citizens and preserve itself. He argues that even if we start from the position that physical torture is an immoral and dehumanizing practice that violates human dignity we must acknowledge that all Western liberal democracies have a right to do whatever is necessary to ensure their own survival. This conundrum forces Ignatieff to seek a middle ground between staunch prohibitions against torture and the state's need to acquire information in order to protect its citizens and itself. He begins by drawing a distinction between impermissible and permissible enhanced interrogation techniques. Impermissible enhanced interrogation techniques include physical abuse and the deprivation of food, water, medicine, and other things that are necessary for survival. These kinds of enhanced interrogation techniques are impermissible because they cause physical harm, psychological harm, and ultimately death. By contrast, permissible enhanced interrogation techniques include sleep deprivation, disinformation, and lying. These kinds of enhanced interrogation techniques are permissible because they do not cause physical harm, psychological harm, or death. This is a standard distinction among those who argue in favor of enhanced interrogation. Nevertheless, Ignatieff concludes that, ideally, liberal democracies should only engage in permissible enhanced interrogation techniques, but he acknowledges that circumstances may require us "stray from democracy's own foundational commitments to human dignity".[1] In these cases, politicians ought to use torture only if it is the last resort and only if it is likely to be effective.

Of course, there is an ongoing debate about the effectiveness of torture. In Ignatieff's ticking time bomb scenario, by hypothesis, normal interrogation techniques are ineffective and time is of the essence. Thus, torture is the last resort. In terms of whether or not torture is likely to be effective, scholars and intelligence experts disagree. For example, on December 10th, 2014, the Public Broadcasting Service (PBS) hosted a debate between former CIA Spokesman, Bill Harlow, and former Guantanamo Bay Prosecutor, David Iglesias, on the question of whether or not torture is effective. Bill Harlow argued that torture worked in the case of a Guantanamo Bay detainee who was familiar with several people who were in direct contact with Osama bin Laden. He concluded that the detainee was subjected to "enhanced interrogation" and he revealed important information that ultimately helped the military uncovered the location of Osama bin Laden's safe house. Former prosecutor Iglesias disagreed. He pointed out that most of the information extracted by torturing the detainee was useless on its own. The information that lead to the identification of the safe house came from others who had not been subject to "enhanced interrogation." Prosecutor Iglesias argued that torture is ineffective because people will say whatever they believe their captives want to hear. He concluded that there are more reliable ways of gleaning information from suspects.

Since there is no way to settle the debate about whether or not torture is an effective way of extracting information from terror suspects, politicians

[1] Ignatieff (2004).

will have to use their judgment in determining whether or not to sanction torture. Either way, according to Ignatieff's Lesser of Two Evils Philosophy, politicians should only sanction torture when they can articulate justifications for their actions, *ex ante* or *ex post facto*, to their constituents and in full view of the press. For Ignatieff, these conditions are important because they force politicians to make the case for torture before those to whom they are responsive, and in full light of day. He adds the additional constraint that the decision to use torture must be subject to adversarial review, either in political chambers, before courts, or in the public discourse. The advantage of this condition is that both proponents and opponents of torture will have a chance to make their case. Moreover, given that the stakes are high, both sides will put forth their best evidence and articulate their best arguments. Even more, in the case of the ticking time bomb, where time does not allow us to engage in adversarial review before making a decision about torture, *ex post facto* review will nevertheless yield important information if we decide to torture a suspect. For example, we might learn that our officials made mistakes in interpreting or gathering evidence, or in interrogating the suspect. This will allow us to correct our mistakes so that they do not occur in the future. Finally, Ignatieff argues that there must be a sunset clause on our policy to use torture. In other words, we must only allow ourselves to engage in torture in extremely rare cases and for short periods of time. This will prevent us from defaulting to torture as a standard practice. In other words, once the time allotted for the exceptional case has elapsed, we will not be able to continue with the practice of torture. Rather, those wishing to continue the practice will have to begin the process anew. Thus, politicians will have to continually make the case for torture to the public and in full light of day.

A standard criticism of Michael Ignatieff's Lesser of Two Evils Philosophy is that it would diminish civil liberties and allow ambitious politicians to become dictators. Of course, Ignatieff knows that democratic policies and procedures are only as good as the people executing them and the public that is willing to accept them. He argues that, ultimately, protecting civil liberties, national security, and democracy rests in the hands of those who are responsible for protecting them, i.e., judges, politicians, and the citizens. Nevertheless, the objection is important because it seems to place Ignatieff's lesser of two evils approach on tenuous ground. After all, even Ignatieff admits that "once a constitutional order sacrifices its commitment to liberty, it quickly sacrifices everything else."[2]

Moreover, Ignatieff's appeal to the public may be a good start but it gives us no reason to believe that the public will not support the state's infringement of civil liberties. For example, Adolph Hitler gave public addresses to hundreds of thousands adoring Germans citizens. Moreover, he openly vilified Jewish people in his public addresses, imposed over 400 state restrictions and obligations on Jewish people – like preventing Jews from working in the civil service and forcing them to wear the yellow star – and he went unopposed by the masses. In fact, he did so in full view of the German press. Under these conditions, Ignatieff's sunset clauses and disclosure requirements would have had little to no effect on the public's perception of Hitler or Jewish people. Indeed, given the public's perception of Adolph Hitler, sunset clauses and disclosure requirements would have failed to prevent the Nazis from continuing to violate the civil liberties of Jewish people. In fact, when we take into account the "occult of personality," the Hitler example might well highlight a fatal flaw with Ignatieff's lesser evil approach: in the case of a charismatic, populist, nationalist leader, the lesser of two evils could easily become the greater of two evils.

International Human Rights

Ignatieff is aware of the problem of populist nationalism. Nevertheless, he thinks that contemporary Western liberal democracies are better situated to prevent populist, nationalist leaders from

[2] Ibid., 43.

becoming dictators, because most countries in the west are parties to international human rights conventions, like the *United Nations Declaration on Human Rights*, *European Human Rights Convention*, and the *International Covenant on Civil and Political Rights*, which, he argues, "enables judges and politicians to stand back from the solipsism of threat and victimhood... that often leads to excessive, arbitrary, and abusive measures."[3] This, however, ignores the real difficulty with populist movements. After all, if populist leaders were easily hamstrung by courts and congresses, then those living in Western liberal democracies would have little to fear. In reality, populist nationalist movements often sweep across entire countries, engulfing the powerless and powerful alike, particularly in times of emergency. Thus, preventing populist leaders from becoming dictators requires much more than a simple law suit because judges and politicians are often swept up in the fervor of the movement. Moreover, astute lawyers and judges working on behalf of the populist leader often appeal to the very human rights agreements, conventions, covenant, and declarations that Ignatieff believes will prevent human rights abuses in order to justify them. After all, the *European Human Rights Convention* allows states to suspend human rights during war times and times of severe emergencies. Similarly, the *International Covenant on Civil and Political Rights* allows states to suspend human rights provided that the suspension is not based on racial, sexual, religious, or any other form of discrimination. Notice, however, that determining whether or not an emergency is severe enough to warrant a suspension of human rights is, at this point, a matter of judgment. In which case, reasonable people will reach different conclusions about whether or not torture is justified even when they are parties to the same international human rights agreements, conventions, covenant, and declarations.

Michael Ignatieff's defense of the lesser of two evils approach rests on the fact that Western liberal democracies are parties to international human rights agreements. He argues that since Western liberal democracies are signatories to human rights conventions, they have an additional level of protections that will prevent them from abusing human rights continuously because other Western liberal democracies have international obligations to intervene to protect human rights. However, in practice, such interventions are limited to public statements denouncing the human rights abuses as unconscionable. At best, Western liberal democracies might introduce a resolution in the United Nations General Assembly calling on the offending nation to honor its human rights commitments. Indeed, Western liberal democracies rarely sanction one another, and they are less willing to engage in military action against one another. So, in the end, Michael Ignatieff's appeal to international human rights might well rest on a false sense of security.

Conclusion

Despite its challenges, Michael Ignatieff's Lesser Evil Philosophy remains one of the most interesting approaches to the problem of balancing civil liberties and national security in times of emergency. Moreover, given the rise of populist nationalist leaders like President Trump who have promised to increase the number of detainees in Guantanamo Bay and sanction the use of enhanced interrogation in the fight against terrorism, the conversation about the use of torture will likely continue. Either way, it is important to keep in mind that terrorists seek to seduce democratic politicians into violating civil liberties as a way of eroding our commitments to democratic principles. They seek to do this because they know that every time we choose the lesser of two evils, it becomes easier to choose it again and again until our democracies become dictatorships, and we become the very terrorists we seek to destroy. To prevent this from happening, whether or not we agree with Ignatieff's premise that torture is justified in limited circumstances, we ought to agree with his conclusion that politicians should

[3] Ibid., 44–45.

only sanction torture when they can articulate justifications for their actions in full view of the press, their use of torture is constrained with sunset clauses, and they articulated additional conditions designed to prevent the state from destroying civil liberties and devolving into a dictatorship.

Cross-References

- ▶ Constitutionalism: Political
- ▶ Ethics: Legal
- ▶ Rule of Law: Historical Perspectives
- ▶ Sovereignty and Human Rights
- ▶ Surveillance Society

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Illiberalism

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Introduction

In this entry, a contemporary phenomenon *illiberalism* is discussed through the review of mainstream opinions in the literature on its nature, i.e., whether or not it is an ideology (section "Nature of Illiberalism(s)"), and if understood as ideology, its detectability (section "Detectability of Illiberalism(s)"), conceptualization (section "Concept of Illiberalism(s)"), and characteristics (section "Characteristics of Illiberalism(s)"). Illiberalism research has emerged in the last two decades (Laruelle 2021), which has also coincided with the rise of populism and democratic decay (backsliding, constitutional erosion, authoritarianization). While at the beginning of these 20 years, many conducted research on the latter two phenomena, until recently, only a few focused on what illiberalism – as an "ism" – can be and how it relates to populism and democratic decay. In fact, contemporary literature studies *illiberalisms* in the plural.

Nature of Illiberalism(s)

Nowadays, two diverging mainstream lines on illiberalism research can be identified, the main difference being whether or not it is conceptualized as an ideology (Laruelle 2022; Smilova 2022; Main 2021) or not (Uitz and Sajó 2022). Those who consider illiberalism as an ideology tend to reject the conceptualization of populism as such, and vice versa.

Scholars, nevertheless, agree on at least four factors. The first is that illiberalism has its roots in post-liberalism and is strongly connected to backsliding, right-wing movements, conservatism, and populism. The second common ground seems to be connected to what it is not, i.e., it does not refer to a regime type and it does not equal non-liberalism. Thirdly, they find the reason for avoiding using the term in the literature so far in the perception of creating oxymorons, such as illiberal democracy and illiberal constitutionalism, and in the limitations of different disciplines. Lastly, and mainly due to the limitations of the narrowly constructed disciplines, they agree that researching illiberalism would require an interdisciplinary approach. The third line of research studies the interaction of illiberalism as an ideology and constitutional law and politics in particular states (Drinóczi and Bien Kacala 2022a, Drinóczi and Bien Kacala 2022b).

Not an Ideology

Conceptualizing Democratic Decay in the 2000s

In the context of early 2000, both populism and backsliding mainly originated from and affected constitutional democracies. Thus, studies tried to understand and describe primarily how the substantive constitutional democracy and its

components (democracy, the rule of law, and human rights protection) have become victims of these processes and the populist state leadership (elected representatives). It had two consequences. First, a top-down approach was prioritized, i.e., how an autocratic and populist leader deteriorated the former constitutional democracy (Trump, Bolsonaro, Brexit phenomenon, etc.), which has also appeared in the opinion about the source of illiberalism. It is viewed as a result of political, social, and economic practices that unduly concentrate powers in the executive or limit social diversity or political pluralism (Sajó et al. 2022). Second, the concepts of populism, as a thin ideology constructed against pluralism (Müller 2016) and populist constitutionalism (Blokker 2019), have emerged. At the same time, the adjective illiberal has been rejected, as terms such as illiberal democracy and illiberal constitutionalism have been viewed as an oxymoron (Halmai 2019); consequently, the term illiberalism has, for a while, remained understudied.

Practice, Phenomenon, and Process

Comparative constitutional law scholars still tend to refuse the categorization of illiberalism as an ideology. It is challenging to define illiberalism as a denial of liberalism because the term liberalism itself is contested (Sajó et al. 2022). These scholars view it as a set of social, political, cultural, legal, and mental phenomena, a social mentality, or a culturally entrenched pattern with democracy while still considering populism as a thin ideology (Uitz and Sajó 2022). They feel discomfort when using terms such as illiberal or illiberalism as they feel that by doing so illiberal autocrats are legitimized (Landau 2022), and the vocabulary and conceptual frames of constitutionalism and constitutional democracy are lost for its illiberal abusers (Uitz 2022).

They hold that there is no illiberal theory of constitutionalism, and there is no need for one for the following reasons. First, illiberal leaders can abuse democratic constitutions without developing a theory. Second, constitutional practices can also be examined within the existing conceptual tools, for which a context-sensitive analysis can assist (Uitz 2022). Third, there is no illiberal democratic constitutional design, as it is unstable and eventually collapses into liberal constitutionalism or authoritarianism. What is seen as an illiberal constitution is nothing else but, (i) a mere combination of liberal democratic norms that are designed to produce illiberal effects, (ii) interaction between formal and informal rules to achieve this goal, and (iii) a collection of repurposed decisions, concepts, and values from liberal constitutional order (Landau 2022). Fourth, a new vision of constitutional review has not been offered (Wyrzykowski and Ziółkoswki 2022). Based on mainly the Hungarian and Polish experiences of the last decade, the lack of an illiberal constitution and constitutional review has been challenged (section "Thin Ideology: Possible Regime Description" below).

In other social science literature, illiberalism is described as a political categorization and moral condemnation and response to liberalism's estrangement from democracy and populist movements (Furedi 2022). It is also conceptualized as a process, i.e., a set of contemporary political practices of government and social relations in the economy and culture leading to varying degrees of regime change toward hybrid or openly authoritarian regimes (Scheiring 2022). As a mental phenomenon, illiberalism posits itself as a set of perceptions, inclinations, and dispositions into the existing categories of populist nationalism, authoritarian populism, and autocratic legalism (Oklopic 2022).

Illiberalism(s) as an Ideology

Thin Ideology: Not a Regime Description

Social science and ideology researchers, based on Michael Freeden (1996), conceptualize illiberalism as at least a thin ideology and reject the conceptualization of populism as such (Laruelle 2022, who sees it as a discursive frame, Smilova 2022; Aslanidis 2016). Illiberalism(s), contrary to populism, meet the requirements of (thin) ideology based on Freeden's conceptualization. Populism does not have long-standing and relatively durable core concepts or ideas. Neither has it a plural set of adjacent concepts that pull them toward diverse ideological variants. On the other

hand, illiberalism is distinct enough to be analyzed as a separate ideology as it has an ideational core and is capable of justifying and directing political actions as they provide a minimal positive program for an alternative political order. It qualifies as a thing ideology as it provides alternative explanations as to the source and legitimacy of power, central political values of community, and what makes good economic and social policy (Smilova 2022).

Thin Ideology: Possible Regime Description

There is another emerging field of research that links illiberalism, as a thin ideology, to regime description in the context of a particular state (Smilova 2022). This constitutional structure is called illiberal constitutionalism (Drinóczi and Bień-Kacała 2022a), the "ism" part of which is yet underdeveloped. So far, it has been suggested that, in Hungary, a rather rudimentary, ideational core of a special state-driven Hungarian illiberalism is unfolding. This illiberalism connects the political and legal arena and resurges in the concept of the constitutional identity of Hungary and Hungarians and the constitution, which features exclusive (etno)nationalism (even nativism), sovereigntism, traditionalism, and heteronormativity. Also, in Poland, a similar trend could be detected, where the culture and tradition of the constructed homogenous nation and the state sovereignty are defended vis-à-vis "others" through the reinterpretation of individual freedom and national sovereignty (Drinóczi and Bień-Kacała 2022b). Based on these states, it is argued that illiberalism challenges liberalism also by its aggressive protectionalism and ethnicized redistribution aiming at social cohesion. It finds its source in collective victimhood and the image of a strong leader and pledges war against political correctness in the name of pluralism (Smilova 2022).

Detectability of Illiberalism(s)

As for the definitional challenge, illiberalism is proposed to be defined against the detectable principles of liberal democracy. In the USA, the Declaration of Independence can be used as a document that contains the most important ideals of liberal democracy: political egalitarianism, human right, limited governance, democracy, change and revolution, ethics of controversy based on reasoned discussion, the rule of law, and tolerance. Consequently, illiberalism can be identified where there is discrimination and a lack of political equality, human rights are under attack, for instance when they are seen as an instrument of domination, a rejection of ethics of controversy and celebration of irrationalism, dissemination of obvious lies, exaggeration and oversimplification (indifference to truth), lack of respect, which also manifests itself in the friend-versus-enemy narrative, and the concept of politics, where politics are seen as war and opposition as treason (Main 2021). By the same token, principles of liberal democracy can be found in the constitutions of contemporary constitutional democracies, which offer firm and reliable ground for benchmarking.

Concept of Illiberalism(s)

In the conceptualization of what illiberalism is, the central and consensual idea is that it challenges the dimensions of liberalism. Politically, it focuses on criticism of the liberal assumption that individuals and their rights are at the center of the democratic system so that the rights of the majority are limited by the rights of the minority. In the economic dimension, illiberalism challenges the preference for a free-market economy and private property, which ignores or significantly limits the possibility of the state's protective action and intervention in order to secure the rights of economically weaker entities. In the cultural dimension, illiberalism is a response to the uncertainty brought by the development of extreme individualism, which emphasizes the rights of ethnic groups, diversity of gender identity, and other than traditional social and family roles. The geopolitical dimension of the criticism of liberalism is based on the hegemony of the message coming from the so-called West. Illiberalism draws attention to the fact that the world is

not homogeneous and seeks to eliminate the hegemony of the Western view of liberalism. The last dimension of liberalism is related to the consequences of colonialism. This kind of criticism is based on the indication that it is an external category and imposes a narrative of the "liberal world" and the "postcolonial periphery" that seek to catch up with the liberal world (Laruelle 2022).

Characteristics of Illiberalism(s)

Illiberalism offers insight that competing notions, such as conservativism, ultra-right, and populism, cannot. While illiberalism shares a similar set of philosophical values with conservativisms, such as humanity, identity, morality, authority, conformity, and hierarchy, it challenges political rights and constitutionalism, which are very much supported by classical conservatives (Laruelle 2022).

Ultra-right and illiberalism may be "mutual borrowings in terms of ideological products and personal connections between the two"; "they have different constituencies, audiences, rhetorical and ideational tools, and political strategies" (Laruelle 2022). Moreover, right illiberalism is much more radical, salient, and corrosive of liberal democratic values than is the political correctness of the academic and intellectual left. It also expropriates the inversion thesis by establishing the marginalized status of its members and claiming epistemic privileges. Thus, they can declare their political adversaries an oppressive status quo and offend them. The status quo members respond with shock and rejection, which pushes illiberals to the margin: exactly where they think they need to be to claim epistemological privilege (Main 2021).

Populists get inspiration from leftist and rightist ideologies, while illiberalism(s) is(are) inspired by the former. Populism, unlike illiberalism(s), need a charismatic leader and posits itself as anti-intellectual. Some movements are populist without being illiberal, and some illiberal movements or leaders are not populists (Laruelle 2022).

Conclusion

Beyond the commonalities of the mentioned works – such as encouraging research on illiberalism as an ideology and not as a regime type – they offer avenues and frames for further research. This research is needed as constitutional democracies have to find a cure against illiberal movements, speeches, and constitutional remodeling.

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Immigration

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Introduction

Questions regarding immigration are among the most controversial topics of social and legal philosophy, as well as of ethics, political theory, and politics itself. The tensions can be framed as the conflict between positions of moral universalism (or cosmopolitan individualism) and particularism (often a form of communitarianism). However, in jurisprudence, it is mostly treated as an antagonism between a human rights-based and a sovereignty-based approach to international law.

Despite their significance today, few philosophers have discussed questions of immigration ethics before the twentieth century. Among the most prominent exceptions are Immanuel Kant, Emer de Vattel, and Henry Sidgwick.

According to Kant, in a brief section of his 1795 essay *Perpetual Peace* (*Zum Ewigen Frieden*), what follows from the original common possession of the surface of the earth is only the cosmopolitan right to hospitality, which is supposed to be a right of temporary sojourn (*Besuchsrecht*), not a right to be a permanent visitor (*Gastrecht*) – except for those who would otherwise face the danger of destruction (*Untergang*) (Kant 1901, 137–142). Similarly, though more rigorously, de Vattel argued in his 1758 *Law of Nations* (*Droit des gens*) that sovereignty ultimately supersedes the migrant's individual right to seek residence abroad so that there was no "absolute duty" of any state to accept immigrants – not even toward refugees (de Vattel 1883). Sidgwick, in his 1891 *The Elements of Politics*, framed the conflict as one between "the cosmopolitan and the national ideals of political organization." While he admitted that cosmopolitanism may be the "ideal of the future" and appraised past migration flows as advantageous for admitting countries, Sidgwick remained skeptical about the consequences of a duty to admit immigrants, fearing this may undermine social cohesion (Sidgwick 1908, 308–310).

After World War II, Hannah Arendt's reflections on issues of human rights and refugee law in the wake of the Holocaust became a point of reference and remain relevant today. Although she expressed a deep ambivalence toward the nation state, Arendt, in her 1951 *The Origins of Totalitarianism*, believed that the "restoration of human rights (. . .) has been achieved so far only through the restoration or establishment of national rights" (Arendt 1968, 299). Famously, she stated that "the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible" (Arendt 1968, 297). Arendt's critique of the failure of abstract rights in the face of the *Shoa* inspired postmodern philosophers like Jacques Derrida and Giorgio Agamben who have highlighted the radical legal exclusion of refugees and their reduction to "bare life" as the modern "*homo sacer*" by contemporary Western politics (Agamben 2000) and have proposed the establishment of "cities of refuge" based on an unconditional right to hospitality (Derrida 2000).

A more comprehensive debate on the legitimacy of immigration restrictions started in the 1980s in the wake of the larger controversy between liberal and communitarian conceptions of justice and the publishing of major works by Michael Walzer and Joseph Carens who broke the unsettling silence of practical philosophy on issues of immigration. The debate continues today as the challenges of globalization, global poverty, and international migration persist. More recent works

attenuate the antagonism between a human rights-based and a sovereignty-based approach by proposing a system of cosmopolitan federalism with *porous* instead of open or closed borders, as well as processes of democratic iterations of universal norms on national or even local levels (Benhabib 2004).

The following two sections focus on the central controversy of immigration ethics: arguments in favor of and against open borders. Further issues are briefly mentioned in section "Some other topics."

Arguments for a Human Right to Immigration ("Open Borders")

While both the freedom of movement within the borders of a country and the freedom to leave a country are protected by Art. 13 of the 1948 Universal Declaration of Human Rights (UDHR), there is no *legal* human right to immigration for non-refugees. However, the existence of a general *moral* human right to immigration and a corresponding duty of states to admit immigrants are claimed by proponents of the open borders movement.

Inference from the Right to Emigration

Some infer the right to *immigrate* from the right to *emigrate*. According to Art. 13 UDHR, "everyone has the right to leave any country, including his own." It has been argued that the right to leave one's country logically presupposes the right to not be impeded from entering another country, for in a world entirely consisting of nation states, the former right would be void if there were no state willing to allow entry (Cole 2000, 56–57). Others have stressed the importance of the right to exit in comparison to the right of entry by referring to the partly instrumental value of the former in preventing states from mistreating their citizens as well as the human interest in not being forced to remain in association with those whom one finds "deeply uncongenial" (Miller 2014, 366).

Comparing migration to marriage, it is however argued that there is no right to an *unlimited* choice among all possible spouses/host countries as long as *some* partner/state is willing to accept one's request (Miller 2014, 367). But, as others observed, theories which restrict the right to immigration to only one possible host state or a reasonable number of such states would in fact make the individual's moral rights dependent on agreements between states. Furthermore, the purpose of the right to emigration would likely be missed if states could arbitrarily form confederations or zones of states to which mutual migration would be restricted (Cole 2000, 57–58).

On the other hand, even the right to exit is not guaranteed without limit: The right to leave may be restricted, e.g., when one intends to evade the consequences of a conviction by a criminal court, to avoid paying one's debts or, arguably, to avoid compulsory military service.

Furthermore, the legal (and, according to some, also moral) asymmetry of immigration and emigration has been compared to *clubs* (e.g., tennis clubs) in domestic society: Both are supposed to legitimately regulate admission but cannot bar withdrawals (Walzer 1983, 40).

Global Original Position

One of the most powerful arguments for open borders was formulated from an egalitarian cosmopolitan perspective and based on John Rawls' *theory of justice*. Although Rawls conceived his theory to find the principles of justice for a closed society, it is possible to apply his thought experiment on a global scale (Carens 1987): What would be the general principle of regulation of migration chosen by agents in a *global* original position behind the veil of ignorance, not knowing their future nationality?

Following Rawls' assumption of risk aversion, one would adopt the perspective of the one who would be most disadvantaged by immigration restrictions. Thus, in the original position, it would seem likely that everyone would favor a system in which the right to migrate is included in the system of basic liberties, for the right to immigration may prove as essential to one's life plan as other liberties (Carens 1987, 258).

Applying the Rawlsian rationale on a global scale by assuming a global original position may be justified because the place of birth or the membership in a given society are morally arbitrary contingent facts like one's gender or the color of one's skin (Carens 1987, 256). Because of today's global inequalities in the distribution of resources, wealth, and freedoms, citizenship in Western liberal democracies may, according to a famous analogy, be regarded as the modern equivalent of medieval feudal privilege (Carens 1987, 252).

These assumptions are founded on premises of normative individualism, liberalism, as well as cosmopolitan egalitarianism: Every person's life, regardless of her or his nationality, has the same moral value, and priority must be given to the freedom of individuals over community-related considerations.

While some have argued against these fundamental assumptions – for example, from a communitarian perspective (see section "Community and Self-determination") – others have claimed that it is not self-evident that people under the veil of ignorance would choose a system of no or open borders. Instead, one may argue that a system of controlled territorial dominions (as is supposed to be the case for private property) tends to be more beneficial to all and can thus be fair (Finnis 2011, 120). Others have objected to cosmopolitan views of justice by holding that "the very goods whose distribution is a matter of justice gain their meaning and value within particular political communities." Thus, principles of justice may only apply *inside* a given society (Miller 2014, 367–368).

Poverty Reduction

Open borders are sometimes regarded as helpful in reducing global poverty. To people from poorer countries, emigration to a more prosperous region of the world often constitutes the only possibility to escape indigence and enhance one's life chances.

Furthermore, a lot of migrants from poorer countries transfer considerable parts of their income to relatives and friends in their home country. Such economic remittances together with the "social remittances" of returning migrants, like the transfer of skills and the establishment of networks, may be of great importance for alleviating poverty.

On the other hand, some have observed that rich countries in general admit "more privileged persons" and not those who "are really amongst the worst-off" (Pogge 1997, 14). By attracting professionals like doctors and engineers from poorer countries ("brain drain"), a policy of open borders may deprive poor countries of vital skills and leave the poorest even worse off (Miller 2014, 368).

However, empirical data suggests that, by way of remittances, migration is effective at reducing poverty in the migrants' countries of origin. While "brain drain" constitutes a real problem – for example, regarding healthcare professions in sub-Saharan Africa – it also has positive effects like incentivizing education in those countries (Oberman 2015). It is also disputable if a society can legitimately require, for example, a doctor to "sacrifice" her or his chance to emigrate to a prosperous country for the compatriots' well-being. Such balancing of an individual's most fundamental choices in life against considerations of collective utility would be regarded as impermissible in most other cases.

Despite the net benefits for global poverty reduction, a *focus* on open border policies for fighting poverty could lead to forced migration and could thus violate the migrant's right to stay in her or his country of origin (Oberman 2015). Some therefore assume a moral priority of projects that address poverty directly (Pogge 1997, 22). However, the "threat" of a growing number of immigrants from poorer countries may be an effective way to put pressure on Western countries to strengthen their engagement in direct aid for those countries.

Democratic Justification

According to another position, the exclusion of foreigners by national migration laws is inconsistent with the most basic principles of democracy and popular sovereignty. Democracy requires public autonomy: the subjects and the authors of laws have to be identical. Immigration

restrictions, however, are, even in a democratic country, inherently *unilateral*: Those affected by the provisions (the aliens) are different from their authors (the citizens of a community).

This practice was criticized on the grounds that "the demos of democratic theory is in principle unbounded." Instead, any regime of border control, as it affects the alien's autonomy as well, would have to be democratically justified by both foreigners and citizens or be abandoned (Abizadeh 2008, 38).

It remains unclear, however, how potential immigrants – other than through representation by their respective governments in negotiating international treaties on migration – could be involved in such processes. At least in the absence of a world state, democracy may presuppose certain forms of exclusion in order to define the reference point for representation and accountability (Benhabib 2004, 219). The observed paradox of democracy may thus be inherent and unresolvable.

Arguments for the Legitimacy of Border Controls

Community and Self-Determination

The classical view on immigration ethics and the assumption underlying the policies of virtually all of today's states is that immigration may be legitimately controlled on the basis of a country's *sovereignty*. The right to exclude aliens is assumed to be essential to national self-determination. With a few exceptions, mostly regarding refugees or family reunion, political communities are supposed to have nearly unreviewable discretion for granting or refusing foreigners the privilege of entry into their territory.

One of the most powerful justifications of such an approach stresses the importance of communities. According to communitarians, the community is the crucial entity for defining, protecting, and distributing values and goods: Concepts like liberty, equality, and justice only make sense within the framework of a particular, culturally shaped community. Liberalism and individualism, they criticize, err in detaching these values from specific communities by postulating universal principles of justice.

Membership is thus regarded as the primary good that current members of a given community may distribute to potential ones. Because of its fundamental significance, however, the distribution of membership itself is in general not subject to the constraints of justice: "states are simply free to take strangers in (or not)" (Walzer 1983, 31, 61).

Border control may thus be a prerequisite for self-determination: "Admission and exclusion are at the core of communal independence. (. . .) Without them, there could not be *communities of character,* historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life" (Walzer 1983, 62).

As communitarianism presupposes an intrinsic value of communities or at least a priority of *the common good*, it may be challenged from the perspective of value individualism which states that only individuals can be regarded as relevant entities for ascribing values. Thus, one may have to break down the abstract worth of communities to the particular merits they entail for their individual members. Furthermore, from the point of view of cosmopolitan universalism, these advantages would have to be balanced with the interests of potential international migrants, including those from poor countries.

Freedom of Association

Closely related to the position just described, arguments for the legitimacy of immigration restrictions are frequently based on the *individual* freedom of association of a given community's members. This freedom is supposed to include not only the positive right to associate with others but also a negative right to reject any association (Wellman 2008, 110). Comparing political association to martial and religious associations, this freedom is thought to encompass a right to determine whom a group of fellow citizens would like to invite into their political community (Wellman 2008, 110–111).

Some have therefore proposed the analogy of clubs (e.g., sports clubs) in domestic society

(Walzer 1983, 40–41). It may follow that "if there is nothing mysterious about people caring about who are (or could become) members of their golf clubs, there is certainly nothing irrational about people being heavily invested in their country's immigration policy" (Wellman 2008, 114).

The comparison with private clubs seems to be problematic on several grounds. First of all, in terms of sheer numbers, the personal attachment to fellow members in a club is most likely to be significantly higher than to one's compatriots even in small states. Furthermore, at least in most Western countries, even private clubs are not entitled to discriminate among applicants on certain grounds. Most importantly, however, unlike clubs, states have a *monopoly* on stretches of territory as well as on certain services and benefits (e.g., fundamental rights, security, social services) that are not provided by private associations. That is why "the 'go and start your own club' response to immigrants is not very plausible" (Miller 2014, 374, 369). The club analogy, one may conclude, ignores the important distinction between public and private (Carens 1987, 267).

Property Rights

Another common reference in debates about immigration ethics is, sometimes implicitly, made to *property* rights (as in, "it's our country – we can do whatever we want with it"). Just as one can exclude others from privately owned land, a country and its citizens may by collective ownership be in a legitimate position to exclude any foreigner from its territory.

What is difficult about such a position is that it may amount to a mere *description* of the status quo and not to a *justification*. A qualification of collective property seems to be necessary. What appears to be the most convincing argument is the basing of the property claim on a process of appropriation by work: Thus, for example, a person who has cultivated a parcel for decades and has constructed a house on it may have acquired, by this work alone, a preferential position to make use of it compared to a newcomer unfamiliar with the territory.

This argument, however, does not seem to apply to children who have not gained any special position with respect to a given territory through work but whose future legal property rights may simply follow through inheritance. While the legitimacy of the institution of inheritance is in general highly contested among moral philosophers, it may be, in the absence of similarly close personal relations, even harder to defend it regarding collective property rights.

Furthermore, property rights-based approaches are likely to lead to contradictory results as they may face the problem of a conflict between individual and collective property rights. "Property cannot serve as a protection for individuals *against* the collective if property is collectively owned" (Carens 1987, 254). A consistent application of libertarian arguments, for example, of the Nozickian type, stressing the importance of private property rights over any collective interference, may lead, rather, to an argument in favor of open borders.

Culture and Identity

Border controls are often legitimized for the purpose of protecting a country's culture or national identity. Most people have an interest in shaping the way that their nation develops and in maintaining cultural continuity (Miller 2014, 370). Particular ways of life and practices of social organization are regarded by many as valuable, and it is hard to contest that "there is a general reason to preserve what is of value" (Raz 2001, 162). Thus, one may conclude that, at the very least, a quick and large influx of people from foreign countries may pose a threat to the preservation of a nation's culture, which would provide a reason to limit immigration.

However, identity is a protean notion which may encompass a large variety of aspects (e.g., regional, religious, gender, and occupational), and the presumption that each person's most fundamental identification must have their source in a fixed culture seems to be false (Scheffler 2007, 101). Even presupposing the value of preserving a given culture, it is not clear that closing a country's borders is the most effective way to reach this goal. In fact, adaptation to a changed environment instead of self-enclosure may be the

precondition for the survival of a culture, whereas preventing people from changing may hinder the creative reinterpretation of inherited cultural materials (Scheffler 2007, 109). Additionally, the reference to "culture" may be conceptually inapt for legitimizing practices of exclusion as cultures are not explicitly justificatory structures and thus do not constitute sources of normative authority the way moral, religious, or philosophical outlooks do (Scheffler 2007, 119–120).

It has also been argued that *cultural diversity* – that is, cultural distinctiveness *between* different countries – constitutes a value in itself as it gives one the choice between different ways of life. Thus the aim of preserving this value may constitute a reason for border controls (Walzer 1983, 39). However, the assumption that cultural diversity between different states depends on restrictive border policies may be too strong. Diversity persists also between different multicultural countries, for example, Canada and Brazil.

Democracy and Civil Rights

According to a more refined line of argument, a certain form of closure is a precondition for democracy. Democratic governance and decision-making may require well-defined and stable rules of membership: "democratic representation must be accountable to a specific people." Only empires can afford to have "frontiers"; democracies need to have "boundaries" (Benhabib 2004, 219). Likewise, it may pose a practical problem for a state to guarantee the civil rights of all its inhabitants if a large number of immigrants arrive within a short time.

Apart from these technical aspects, democracy and a system of civil rights also require a democratic culture as well as mutual trust and respect, which could be endangered by open borders, especially in the case of an influx of people who do not share liberal values. Border controls may therefore be justified in order to "protect a people's political culture and its constitutional principles" (Rawls 1999, 39).

While some of these considerations may be valid arguments against anarchism, abolitionism ("no borders"), or other radical stances on immigration law, it is not clear that they would also apply against moderate positions which propose a general, though not unconditional, right to immigration while upholding certain regulatory procedural requirements and argue for "porous" (Benhabib 2004, 221) or "fairly open" (Bader 2005, 353) borders.

But even "open borders" may be compatible with democracy. On the one hand, immigration does not always lead to naturalization, and the demos is in principle not bound to a given territory (Abizadeh 2008, 38). On the other hand, some have suggested that "democratic rights can be confined to a region, with people entering and leaving that region freely and exercising the local democratic rights during their residency" (Cole 2000, 184).

Security and Health

Immigration restrictions may be justified on the ground of public health and security considerations. In general, such reasons appear to be less contentious than most other grounds for exclusion. This is because they may follow rather readily from individual and/or collective rights to self-preservation.

But difficult questions arise regarding the quality, degree, and probability of these threats. For example, it would be difficult to argue that *irrational* fears, even of the majority of a population, should be used to legitimize border controls. Thus, such restrictions should be limited to reasonable expectations based on evidence and ways of reasoning acceptable to all (Carens 1987, 259).

What is more, from the point of view of cosmopolitan egalitarianism, it may make no difference if a person commits a crime in her or his country of birth or abroad. As the total quantity of harms remains, on a global scale, unchanged in both cases, one may argue that no country should have a right to refuse or expel persons on the grounds that they could commit (further) crimes on their territory. However, even under these conditions, certain public restrictions on immigration can be made when the danger results from the particular *relation* of the potential immigrant to the potential host country (e.g., when the potential

immigrant intends to spy or to carry out a terrorist attack).

Welfare System and Employment

Another common concern, especially in countries with high welfare standards, is that a rapid influx of people may overtly burden social services like social security and healthcare provisions as well as a county's infrastructure. It may be regarded as unjust by citizens if a newcomer immediately profits from a welfare system that she or he did not contribute to.

However, this argument would also apply to each new generation as their members also have not contributed to a society's wealth yet. Thus, the underlying problem may be rather a lack of trust. One road a number of countries in fact take to smoothen this conflict is the introduction of transitional periods in which foreigners do not fully participate in the benefits of a social welfare system.

Another common concern is that immigration, by increasing competition on the job market, could lead to higher unemployment and lower wages, especially among the poorer members of a society. As states have the duty to promote the well-being of their citizens, their governments may be obliged to restrict immigration and/or the employment of migrants.

On the other hand, this presupposes a general right to be protected from fair competition. While today many share the ideal of a world with free trade (which may in fact highly favor industrialized, export-oriented countries), it is not clear why the same rationale should not apply to the free movement of people. In fact, the latter may be regarded as the "price of globalization" that people in Western societies have to pay.

While the lack of internationally recognized standards for labor protection and an effective transnational cooperation of working unions may in fact endanger the status of some of the more vulnerable people of a host country, the overall benefit for society added to the individual benefits for the immigrants may outweigh these disadvantages. Still, the consequences of an opening of the labor market can also be smoothed by an increased enforcement of existing worker protection laws.

Further Contentious Issues

There is a large variety of contentious issues concerning the ethics of immigration beyond the central controversy over the legitimacy of border controls. Some of the most relevant as to immigration ethics are treated in the entries on refugees, civic and social integration, and multiculturalism.

An important problem also arises in the case of irregular (aka "illegal") migrants – people who entered a country in violation of the law. Under which conditions may they have a moral right to stay? The practice of states varies significantly in this respect, but it seems to be clear that the length of the residency as well as established relations of various kinds in the host country should be weighed against the public interest in maintaining respect for and enforcement of a state's laws.

Another intriguing question concerns the applicability of basic rights to foreigners who have not yet entered a state's territory, particularly during the visa process. While many countries grant them standing in judicial proceedings concerning entry, in general, immigration laws remain fundamentally sovereigntist without the comprehensive constraints of constitutional norms. It is not clear, however, if in the long run liberal democracies can afford to uphold such clear demarcation lines of the validity of constitutional guarantees without appearing to act unjustly.

Conclusion

The fact that many of the most important arguments in immigration theory are based on analogies (e.g., comparing citizenship to feudal privilege or to membership in a club) shows that it was, for a long time, neglected by social and legal philosophy. But the amount and depth of research and theorization in this field have grown as the challenges (or "pressures") of international migration grow and the ethical dimension of the underlying questions becomes more apparent.

The two positions of the central debate between advocates for open borders and advocates for border control both seem to suffer from severe shortcomings.

On the one hand, a close look at immigration policies reveals a fundamental lack of consistency in Western liberalism: "while liberal principles are applied within the border, illiberal principles and practices are used to police those borders" (Cole 2000, 161). One may even suspect that arguments in favor of border controls often hide other motives like an underlying "welfare chauvinism" of those living in prosperous countries. As such, they may even, as some suggest, appear to future generations as odd as pro-slavery arguments appear to us today (Bader 2005, 353–354).

On the other hand, some of the proponents of the open border movement may be underestimating the fragility of democracy and constitutional protections – both achieved and perpetually realized within the nation state. Undermining this entity without having any adequate replacement (e.g., an effective form of the United Nations) at hand may be naïve and irresponsible. Attempts to harmonize the universalism of human rights with the particularism and reality of the nation state by democratic iteration of abstract norms as well as a cosmopolitan federalism of states with *porous* borders (Benhabib 2004, 113, 221) may be among the best alternatives to any "easy answers."

It is also hard to imagine that today's challenges of international migration can be successfully handled unilaterally with domestic measures such as new immigration legislation or even the construction of fences. Instead, the strengthening of international institutions and the establishment of a transnational set of rules for the fair and equal treatment of migrants seem to be urgently needed. Some demand a binding multilateral treaty on the migration of human beings similar to the General Agreement on Tariffs and Trade (GATT) for the "migration" of goods. Why shouldn't it be possible?

Cross-References

- ▶ Citizenship
- ▶ Human Rights and Justice
- ▶ Integration: Civic and Social
- ▶ Multiculturalism
- ▶ Refugee

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Impeachment

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The core idea behind *Impeachment* is that political power doesn't belong to the ruler, but to the people. While a ruler exercises power over the people of a State, his authority comes from the people itself, and therefore the will supporting public policies is not the ruler's will, but the people's will. And since the will (in a democracy) is always the people's will, the exercise of power is always accountable. Despite the idea seeming almost pedestrian to west societies, it is a somewhat recent one.

Although we can track this idea back to the *Magna Carta* (from the thirteenth century), and to the *Conciliarism* (the fourteenth century doctrine advocated by *Marsilius of Padua* and *William of Ockham* used to put an end to the *Western Schism*, according to which the same subject who gives power to the ruler – the Council to the Pope – is allowed to recall this power back), it was during the *Bourgeois Revolutions* of the eighteenth century that this idea became a legal institution (despite the fact that there was a previous *Impeachment* proceeding in United Kingdom, although it didn't mean accountability and liability of the ruler before the people but quite the opposite: accountability of the ruler's deputies before him or her). The legal technique of empowering three different branches (Legislative, Executive, and Judiciary) as a mean to control power reached its developed form in the *American Constitution* with the idea of *Checks and Balances,* a system of reciprocal control among the branches that is able to avoid both dissention (by a minority) and parochial government in which the elite rules for its own benefit.

Under the influence of the American Constitution, other countries' constitutions also provided for Impeachment proceeding, and, as in the American Constitution, it is generally exercised by the Legislative Branch over the members of the Executive branch, but also over the members of the Judiciary branch. Although this influence is very important, it is impossible to establish an unique constitutional configuration to this legal institute. Take for instance the Brazilian and the American configurations. While in the USA the *Impeachment* designates only authorization by the House of Representatives to the Senate to try an official, in Brazil it designates both the authorizing proceeding (by the lower house) and the trial itself (by the Senate) (Galuppo, 2016). In the USA, almost all provisions are made by the Constitution itself, while in Brazil there are legislative provisions (Statute 1.079, from 1950) (Brossard, 1992). In the USA, it is quite vague which behaviors can be impeached and tried under the Constitution (Section 4 of Article II says that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other Crimes and Misdemeanors"), while the Brazilian Constitution (and even more the beforehand Statute) specifies what are to be taken as impeachable crimes (in the case of the President and of the Vice President, the Constitution reads: "art. 85 – Those acts of the President of the Republic which attempt on the Federal Constitution and especially on the following, are crimes of malversation: I – the existence of the Union; II – the free exercise of the Legislative Power, the Judicial Power, the Public Prosecution, and the constitutional powers of the units of the Federation; III – the exercise of political, individual, and social rights; IV – the internal security of the country; V – probity in the administration; VI – the budgetary law; VII – compliance with the laws and with court decisions" – in the Brazilian case, the aforesaid statute specifies these crimes even more, stipulating the elements of the offense, as in Criminal Law, making them true *Tatbestanden*). Among the differences of proceedings, an important one is that while in the USA the President and the Vice President are not removed from Office before

conviction (by the Senate), in Brazil they are preventively removed since the Impeachment by the House. These differences indicate that there isn't a unique way of impeaching officials in Western democracies, and not even a common understanding about what behavior should lead to Impeachment.

Since Impeachment is usually assigned to Legislative Power, a controversial issue concerning Impeachment is how far its power to access and to control other branches should go. This question could be stated in another way: Are the decisions about Impeachment taken by Legislative Power also submitted to some kind of access? The first way of answering this question is to evaluate if the Judiciary Power has any kind of control over it. This is a tricky question. Chief Justice Rehnquist said (in Nixon v. US, from 1992 – which concerns not President Richard Nixon, but Judge Walter Nixon) that, although the power to define the meaning of "*trying*" belongs only to Senate itself, "courts possess power to review legislative action that transgresses identifiable textual [constitutional] limits". It would be a violation of the core idea behind Impeachment if there wasn't a way to also make accountable legislative decisions. Nevertheless, Judicial Power has refused to overrule most cases, especially when it refers to presidential impeachments, both in Brazil as in USA. But there is a second way of answering the question about the extent of Legislative power to control other Branches: The definition of what is an infringement of the duties of an Office depends on political arrangements that make different societies perceive in different ways what is to constitute an infringement. Actually, recent History shows that Impeachment can be used to make politics. The number of Impeachment processes has raised in the last years all over the world. Before Clinton (in 1998), the last American president to be impeached by the House was Andrew Johnson (in 1868). The same happened in Brazil: all eight presidents after re-democratization were subjected to some degree of Impeachment processes before the House (although "only" two – Fernando Collor de Mello, in 1992, and Dilma Roussef, in 2016 – were impeached by the House and tried guilty by the Senate). Also in Latin America, many presidents – Perez, in Venezuela (in 1993), Samper, in Colombia (in 1996), Bucaram and Gutiérrez, in Ecuador (in 1997 and 2005), Cubas Grau, González Macchi and Lugo in Paraguay (1999, 1999 and 2012), Fujimori and Kuczyinski, in Peru (2000 and 2018) and Pérez Molina, in Guatemala (2015) were impeached. In at least two of these cases there were also attempts to perform a *coup d'état* (in Pérez and González Macchi cases). As Pérez-Liñan says, Impeachment has been used as a new mechanism of solution of political instability that characterizes Latin America's politics, which now sees the rise of stable presidentialism with unstable presidents (2007, p. 205). In Latin America, Impeachment has somehow substituted the military power as the way the elites use to control government. This has led to the supremacy of Legislative Branch over other branches, transforming presidentialism into semi-parliamentarianism in many States, giving place to new forms of political power legitimation, transforming *Impeachment* into a kind of *Recall,* by which the people access the (in)adequacy of political platforms despite the fact that there are no (impeachable) crimes (or misbehave) in the Presidents' behavior. Impeachment became, in many cases, a third turn in presidential election. The only way to avoid this is to remember Cass Sunstein's advice: "Try to put yourself behind a veil of ignorance, in which you know nothing about the president and his policies. You have no idea whether he would win your vote or your support. All you know about are the actions that are said to be the basis for impeachment. If that is all you know, would you think that he should be impeached?" (2017, p. 14).

Cross-References

- ▶ Constitution
- ▶ Human Right to Democracy
- ▶ Rule of Law: Theoretical Perspectives

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Incarceration

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Introduction

Incarceration refers to the confinement of individuals in prisons and jails in connection with criminal matters. In addition to being in prisons or jails as a matter of punishment, people may also be incarcerated in jails as they await trial. Those who are detained for non-criminal reasons, including civil commitment and immigration detention, are generally not considered to be "incarcerated" even though they often are housed in prison-like conditions, sometimes even in dedicated wings of prisons.

Philosophers of punishment rarely treat incarceration as a distinct topic of inquiry, tending more to address incarceration indirectly through discussions of the purposes of punishment, which include rehabilitation of the offender, retribution, incapacitation, and deterrence for the offender and the community at large. Incarceration is often assumed in discussions of proportionality of punishment.

Philosophers occasionally focus explicitly on incarceration. Recently, there have been more philosophical discussions of mass incarceration in the United States (and the disproportionate impact of mass incarceration on racial minorities), investigations of particular incarceration practices like solitary confinement, and arguments about prison abolitionism.

Historical Development of Incarceration as the Primary Form of Punishment

Incarceration as a form of punishment began in Europe and the United States. In United States and Europe in the eighteenth century, punishments for crimes were largely public corporeal or capital punishment or forced public labor. The motivation of punishments was typically to show the power of the sovereign state in highly visible acts of violence. Cesare Beccaria, an Italian philosopher, jurist, and economist, criticized these goals and means of punishment in his 1764 book *On Crimes and Punishments* (Beccaria et al. 2009). During the late eighteenth century, there was massive reformation of punishment across Europe and in North America with the putative goal of making punishment more humane, focused on rehabilitation of offenders and the deterrence of crime. Prisons, formerly used only to hold criminal defendants before trials, started to be used as places of punishment and correction. The first "penitentiary" opened in Philadelphia in 1790, and it operated under the idea that those who were incarcerated were performing penance for their wrongdoings. Prisoners were expected to remain silent and usually solitary in order to wrestle with their consciences. Often, they were also required to perform labor so that when they were released they would be used to leading productive lives. This was a marked shift from public, highly visible and incredibly violent punishment. For philosophical discussion of the development of prisons in the United States, see Guenther (2013).

Becerria's work strongly influenced Jeremy Bentham, an eighteenth and nineteenth century British philosopher and social reformer. Bentham advocated against the death penalty and argued that only punishments that were effective at deterring crime were justified. He supported the movement from corporeal punishment to incarceration because he believed that this was a more effective deterrent and that it caused less unnecessary suffering (Bentham et al. 1996). Bentham is perhaps best known for his proposed prison design of the panopticon in 1787. In the panopticon, there is a large central guard tower, and the cells of the prison encircle the guard tower. Each cell has walls preventing the

prisoner inside from seeing into neighboring cells, but the side facing the tower is open, except for bars. The goal of the design is to ensure that prisoners feel that they are always potentially being watched, but they cannot know exactly when. Bentham thought that this would allow the prisoners to be guarded with minimal cost, as only one guard would be required, and they need not even be there constantly. The prisoners would behave well by essentially guarding themselves (Bentham and Božovič 1995). Despite years of advocating for the prison to be built, it never was.

The fact that Bentham is more known for his development of the panopticon than for his theory of punishment is at least in part due to Michel Foucault's treatment of the panopticon in his 1975 book *Discipline and Punish.* For Foucault, the panopticon encapsulates the idea of "discipline" in which power is not really centralized in one place, but internalized in every person, just as every prisoner in effect becomes their own guard. For Foucault, the movement from corporeal punishment to incarceration, which was explicitly supposed to be more humane, in fact created a more effective means of controlling the masses. The creation of the prison coincides with the development of "discipline," by which he means the vastly increased regulation of every aspect of people's lives and bodies through dispersed power. Prisons are continuous with schools, the military, factories, and hospitals, where one is potentially constantly monitored and learns to monitor themselves. Foucault emphasized that though incarceration is a less overtly violent form of punishment, the discipline that prisons exhibit is also a manner of social control (Foucault 1979).

Angela Davis, a philosopher and activist, agrees with Foucault that prisons are sites of social control, but she critiques his inattention to the deeply racialized aspect of incarceration in the United States. She argues that the early penitentiaries in the United States were meant to reform only rights-bearing citizens, that is, only white men. When slavery ended, however, the legal structures changed so that punishment and incarceration were "means of managing former slaves" (Davis and James 1998, 99). In the immediate aftermath of the US Civil War, the prisons suddenly became predominantly black, and prisoners often were leased to work at the same plantations that they had been enslaved at. Unlike Foucault's narrative, actual violence was very common in prisons (Davis and James 1998).

Davis argues that prisons in fact work to "warehouse people who represent major social problems" (Davis 2016, 25), which means that incarceration shapes the social world beyond the prison itself. This can be seen in the United States' incarceration of black people and the effects of this on American society as a whole. It is also evident in patterns of incarceration around the world. Davis argues that the same logic is at work in the incarceration of Aboriginal people in Australia and the detention of immigrants throughout Europe. She also argues that global "security" corporations reveal how interconnected this function is. She focuses on the largest security corporation in the world, G4S, which runs private prisons in the United States and South Africa, facilitates deportations in the United Kingdom, and operates prisons and check points for the state of Israel in Palestine (Davis 2016, 142–143). It is also "the largest corporate employer on the continent of Africa" (Davis 2016, 143).

Incarceration, Severity, and Proportionality

As Davis notes, in line with the Enlightenment-based humane reforms that incarceration was supposed to represent, the movement from corporeal punishment to incarceration allowed for more precise measurements of the severity punishment based on time spent imprisoned (Davis 2003, 44).

The fact incarceration lends itself to easy measurement of severity based on length of sentence means that debates about proportionality in punishment directly or indirectly discuss incarceration. Proportionality is the idea that the severity of punishment should match the seriousness of the crime and is mostly associated with retributivist theories of punishment. Retributivist theories of

punishment argue that the justification for punishment is not to deter crime or to achieve other social goods, but simply to give the offender what justice requires. There are two ways of thinking about proportionality. Ordinal proportionality is relational proportionality, where the severity of punishments is fairly ordered by the relative seriousness of crimes. This is achieved if more serious crimes are punished more severely than less serious crimes. Cardinal proportionality is achieved when the individual punishments are thought to be proportionate to the seriousness of the crime. This requires establishing a correct amount of punishment for any single given crime, and philosophers find cardinal proportionality more difficult to achieve.

The literature on proportionality is vast, and some of that literature simply implicitly assumes incarceration without directly addressing it. The discussion that follows illustrates how three different philosophers' approaches to proportionality include discussions of incarceration.

Franklin Zimring warns against reforms limiting the discretion of judges and parole boards in the name of achieving stricter proportionality. He maintains that the current injustices of the system are intolerable, but limiting the discretion of judges and parole boards, he argues, would have even worse consequences. He (accurately) argues that the limiting of a judge's discretion by stricter sentencing guidelines would give prosecutors much more power because they have the discretion to charge defendants with crimes that have vastly different sentences, and a judge may not be able to correct this overcharging by setting a lower penalty (Zimring 1977). He doubts that even ordinal proportionality is remotely possible to achieve.

In contrast, Andrew von Hirsch argues that cardinal proportionality is achievable. He argues that ordinal proportionality should be set by the amount of censure required to respond to the seriousness of the crime, but that cardinal proportionality should be determined by the most lenient punishment able to effectively deter crime. Rather than set punishment for each crime in this manner, which would sacrifice ordinal proportionality, deterrence calculations are made only for key anchoring crimes. He suggests no more than 3 years of incarceration for seriously violent crimes and serious white-collar crimes and no more than 5 years for murder (von Hirsch 1993, 44).

Michael Tonry disagrees with von Hirsch's proposal, arguing that the principle of parsimony, that is, preferring the least severe sentence, is more important than proportionality. Strictness in proportionality takes power from judges to take into account the background of the offender that affects their culpability, the possibility of harder to measure non-carceral punishments designed to rehabilitate, and how the same sentence will affect different people (Tonry 1994).

Mass Incarceration, SuperMax Prisons, and Solitary Confinement

The problem of mass incarceration in the United States refers to the fact that the United States has approximately 5% of the world's population but 25% of the world's prisoners. Incarceration rates in the United States were on par with most other industrialized countries in the early 1970s, but today they hover at approximately 700 people in prison or jail per 100,000 adult residents, about seven times higher than the 1970s (Chiao 2019, 111–112). Vincent Chiao argues that if one assumes that mass incarceration is unjust, then one cannot hold a strictly deontological view of punishment, where one is appropriately punished when they are guilty of committing a crime, regardless of social costs and benefits. Strictly deontological views of punishment can be retributivist – where punishment is justified simply because it is the correct response to crime. However, they do not have to be. A "rights forfeiture" justification, which states that in committing a crime, a person forfeits their right to not be punished, is strictly deontological without being retributivist. Deontological views cannot take into account the accumulated costs of incarcerating so many people and, therefore, cannot account for the particular injustice of mass incarceration.

Other philosophers have explained why a retributivist and deontological theories of

punishment can explain the injustice of mass incarceration. Hamish Stewart argues that if retributivism is seen as one of the important goals of a state in its effort to create a society of free equals, then the system of punishment that produces mass incarceration is seen as undermining the bigger goal of creating a free and equal society and is thus unjust (Stewart 2016).

Similarly, Richard Dagger argues that it is hard to square our society as a cooperative enterprise when incarceration rates are so high. Dagger argues that punishment is a justified response to people taking advantage of cooperative systems by not playing by the rules (i.e., committing crimes), so his justification is retributivist. However, Dagger argues the possible reasons for mass incarceration—too many people are committing crimes, too many people are being incarcerated (for too long) even though they have committed crimes, and there are too many activities that are criminalized—each suggest that the system of social cooperation is not a fair one in the first place. This means that those who committed crimes did not take advantage of a fair system of cooperation because it did not exist, and their punishment is not justified (Dagger 2016).

Peter Ramsey also attributes mass incarceration to the degraded state of democracy in the United States, where there has been a decline in the robust participation of each member in the creation of the state that they live in. He concedes that imprisonment and democracy are "antithetical" to one another and that incarceration is a denial of the political equality of the incarcerated person. Nevertheless, it is necessary to incarcerate those who violate the rights of others. Combating mass incarceration requires restoring democratic values and political equality. In a well-functioning democracy, people will be more invested in the laws that they co-author. Rebuilding democratic political equality will ultimately reduce reliance on incarceration (Ramsey 2016).

R.A. Duff and S.E. Mitchell argue that imprisonment itself is hard to square with the ideal that, in a democratic society, even a convicted offender is still an equal member of the civic community. For this reason, they argue that actual imprisonment in a democratic society can only be used as a last resort when a convicted offender has eluded non-custodial punishments, and even then, this is an injustice, even if it is a necessary one. With this ideal, they argue it is clear how far the current state of mass incarceration is from it (Duff and Marshall 2016).

For further discussion of democracy and mass incarceration, see Dzur et al. (2016).

In addition to mass incarceration, the supermax prison is another American phenomenon that philosophers have theorized about. Supermax prisons are typically reserved for those considered to be very dangerous and those who are so infamous that they need special attention to avoid being harmed by other inmates while incarcerated. While the supermax is usually considered an American invention, many other countries have built such prisons, including Canada, Brazil, South Africa, Australia, Saudi Arabia, and Colombia (Ross 2013, 185). Still others eschew the label but have facilities that share much with American supermax prison, including the Netherlands, the United Kingdom, and Mexico (Ross 2013). Several philosophers have argued that these prisons are unjustifiable because of their extremely harsh impacts on those inside them, including extreme isolation and sensory deprivation. See Lippke (2004) and Abrahmsky (2015). Others examine the particular ways that the technologies used in supermax prisons impact prisoners, prison staff, and society at large. Lorna Rhodes (2007) argues that the appearance of apparently complex technological (solutions) to penal problems obscures the reasons for these problems (which is the criminal justice system itself). See also Reiter (2014).

Solitary confinement is used in many prisons and jails beyond the supermax. In her book *Solitary Confinement: Social Death and Its Afterlives,* Lisa Guenther draws on history, phenomenology, and critical theory to argue that incarceration, especially solitary confinement, results in civil and social death. Civil death occurs where a person's legal powers are severely curtailed. Social death occurs where one is so disconnected from basic community that they have no support or

even basic ability to make sense of their lives (Guenther 2013).

Anti-Black Racism and American Abolitionism

Before Michelle Alexander (2010) *The New Jim Crow* argued that mass incarceration replaced Jim Crow just as major civil rights victories were won, Davis had already pointed to the fact that the Thirteenth Amendment, which abolished slavery, made an exception for forced servitude that was punishment for a crime. Davis tracks how new criminal codes explicitly designed to criminalize black people impacted the racial make-up of the prisons just after the US Civil War. Through a practice known as convict leasing, the plantation owners who had previously relied on slave labor could pay a fee to the prison, which would then "lease" the incarcerated people as labor, so that black people moved "from the prison of slavery to the slavery of prison" (Davis and James 1998 74–78). Davis argues, "Through this transference, ideological and institutional carryovers from slavery began to fortify the equation of blackness and criminality in US society" (Davis and James 1998 75).

For further philosophical discussions of the connection between slavery and Jim Crow and incarceration today, see Heiner (2015) and Manos (2015). For a philosophical discussion of how the political resistance of incarcerated people today has resonance with fugitive slave communities in the past, see Shoatz and Guenther (2015). For a discussion of how the deep association between criminality and non-white people has interacted with punishment theories to produce mass incarceration, see Altman and Coe (2021).

Angela Davis argues for prison abolition largely by drawing on her analysis that the prison system is deeply intertwined with anti-black racism (as well as racism against Indigenous Americans, Latinx people, and some Asian groups). She argues that prison reform is not enough, pointing to the historical example of the penitentiary as punishment reform that grew into the system of mass incarceration, including solitary confinement and supermax prisons of the twenty-first century in the United States. Although they are a relatively recent human intervention, Davis argues that prisons are now seen as inevitable, natural, and unavoidable in western society. Given all the harms of mass incarceration, especially for non-white people, prisons should be abolished. There is no single institution that can replace prisons. "Rather, positing decarceration as our overarching strategy, we would try to envision a continuum of alternatives to imprisonment-demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance" (Davis 2003, 107).

Tommie Shelby's book *The Idea of Prison Abolition* is an extended engagement with Davis's abolitionist writings as well as those from other black radical thinkers. He argues that the utopian project of abolitionism is valuable because it denaturalizes prisons. However ultimately, he argues that there is likely a legitimate place for incarceration even in a racially just society. Without defending any current incarceration practices, Shelby suggests that many of the most pressing justice issues surrounding prisons have their roots in racial injustices throughout society, rather than in incarceration itself (Shelby 2022).

For feminist arguments in favor of prison abolition, see Zurn (2021) and Tyson (2015).

European Abolitionism

In the 1970s in Europe, a penal abolitionist movement reached academia, especially in the Netherlands and Norway. While many American calls for prison abolition connect incarceration to slavery, European abolition arguments do not focus on race. Following Foucault, they argue that incarceration and punishment are repressive, desocializing responses to disputes. Several abolitionists argue that the idea that individuals should be able to adjudicate their disputes on their own terms, and the penal systems have "deskilled" people and communities from having

productive dispute resolution (see Christie 1977, van Swaaningen 1986). Informed by "critical criminology," most European abolitionists emphasize that crime is a socially created category, and as such, it can be changed if it is not actually helpful. As empirical evidence began to show that the penal programs of the early twentieth century were not effective at rehabilitating criminals or reducing "crime" (which they would call disputes between individuals), critical criminologists argued that the category of crime and the penal system that accompanied it should be abolished. Importantly, specifying one definitive replacement for the penal system is problematic. While "one means to present an alternative, those same repressive thoughts [that undergird the current penal system] can spring up in different guises which one might not recognise at first sight. All these 'guises' need a specific abolitionist answer" (van Swaaningen 1986, 11). See also see Rotman (1990).

Conclusion

While philosophy of punishment often implicitly assumes incarceration as punishment, it rarely makes incarceration itself a topic of study. However, increasingly there is pressing interest in philosophical treatments of incarceration because of the phenomenon of mass incarceration in the United States as well as questions of racial justice and the moral and social implications of supermax prisons and solitary confinement. Prison abolition in the United States continues to garner philosophical interest, and abolitionism of the entire penal system in Europe has been a well defended position since the 1970s.

Cross-References

- ▶ Beccaria, Cesare
- ▶ Bentham, Jeremy
- ▶ Capital Punishment
- ▶ Crime
- ▶ Crime: Philosophy of
- ▶ Criminal Justice
- ▶ Critical Theory and International Law
- ▶ Foucault, Michel

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Inclusive Legal Positivism

► Legal Positivism: Inclusive

Indifference

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Introduction

The term "indifference" has been used as a philosophical concept in some different, nuanced ways. This entry will discuss four main areas that indifference is used: oppressive indifference, the bystander effect, climate change and psychic numbing, and indifference curves in economics.

Oppressive Indifference

In oppressive indifference, an oppressor is indifferent to the oppressed's subjectivity. This means the oppressor treats the oppressed as if the oppressed was merely an object. Perhaps counter-intuitively to some, this indifference leads to some of the most actively terrible forms of oppression. Consider a wooden chair. Because a wooden chair is merely an object, one could exercise power over a wooden chair, if one so desired; one could throw it, kick it, smash it with a baseball bat, burn it, or sit on it. Thus, being indifferent to another's subjectivity leads one to do some terrible things to that other.

This mode of oppression is often based on group membership. One's subjectivity is disregarded because one is Black, Native American, a woman, gay, trans, autistic, etc. Instead, the oppressor thinks of the oppressed (of any particular group) in terms of the relevant stereotypes. Instead of being understood as one's own person, one is categorized. As Kruks puts it, "Individuals may be treated as no more than anonymous members of a social category, as interchangeable units in a 'series'" (Kruks 2012). One is understood in terms of what social category to which others recognize one as being a member, and that category is understood in terms of the stereotypes that define that category. Consider once more a

wooden chair. The wooden chair is understood as having essential properties such as being sittable and made of wood. These properties are shared among all wooden chairs. Similarly, an indifferent oppressor considers the stereotypes of oppressed groups to be essential characteristics of the members of the group.

The Bystander Effect

While oppressive indifference takes a lack of recognition of the oppressed's subjectivity as an explanation for how one becomes a perpetrator of oppression, the indifference of a bystander – one who does not carry out oppression, but merely allows it to happen – explains how a minority of oppressors can get away with committing atrocities. This sort of indifference is heavily discussed in research on the Holocaust. Ian Kershaw is famously quoted as saying "The road to Auschwitz was built by hate, but paved with indifference." "Apathy" is a synonym for this form of indifference.

This form of indifference is passive, which is in contrast to the activity of oppressive indifference discussed above. One who is oppressively indifferent to, for example, Native Americans is one who treats Native Americans as if they were objects. But those who are indifferent to atrocities committed by others make themselves into objects. Instead of doing something to stop the atrocities, they act as if they are a rock to the side.

Norman Geras has said that this form of indifference takes the force out of the most basic of rights. Jews who were victims in the Holocaust had rights to life and liberty, but when nobody would stand up for those rights, it was as if the rights did not exist (Geras 2020).

Climate Change and Psychic Numbing

Climate change has been widely recognized as an existential threat to human civilization. Yet, the actions of many have not changed despite knowing this threat. The fact that it is known is important here. In each form of indifference discussed so far, some knowledge is assumed on the part of the one who is indifferent. Here, knowledge must be assumed to distinguish indifference from outright denial or ignorance. In this case, due to the abstract, far-off (or at least seemingly far-off) nature of the threat of climate change, and the grave, disturbing threat that it imposes, many people act indifferently toward it as a form of psychological preservation. Robert J. Lifton has called it "psychic numbing" (Lifton 1982).

This form of indifference can be compared to the passive form discussed in the previous section. A great tragedy that will cause many to suffer and die is looming, yet many do little to nothing about it. However, I distinguish the two here because of some key differences. First, this threat is a threat to all of us. The bystanders discussed in the previous section were themselves unaffected by the given atrocities. Second, climate change is a systemic problem. Individuals and households can do very little to cut carbon emissions. To effectively address climate change, society must undergo great systemic changes. Thus, political activism is the most effective thing an individual can do to address climate change. This means that even if an individual has a small carbon footprint, if she is political passive, then she can still be considered indifferent to climate change. Finally, the psychic distance between the one who is indifferent and the tragedy is in contrast to the atrocity that was, for example, the Holocaust for many German citizens at the time. This third aspect is applicable to other issues such as global poverty. Peter Singer famously argues that the difference between saving a child from drowning and donating money to combat world hunger is merely a psychological one (Singer 1972).

Indifference Curves

In economics, the term "indifference" is used to describe an individual's attitude toward different combinations of two different goods. If option A is one combination of two different goods, say 4 apples and 2 oranges, and option B is another combination of the same two goods, say 3 apples and 3 oranges, and a consumer considers A and B to be of equal utility, then the consumer is

indifferent between A and B. An indifference curve can be graphed using two axes, each representing one of the two goods.

What makes these graphs curves is the effect of diminishing marginal utility. For every additional unit of a good one has, the subjective value one ascribes to it is less than the previous unit.

Analyses of indifference curves are purported to help consumers with choosing what goods to get when their disposable income only allows them to afford so much. However, indifference curves are often criticized for oversimplifying and making too many assumptions, such as consumers having stable preferences.

Conclusion

The term "indifference" has been used by political philosophers, existentialists, economists, and ethicists. It is one of those terms that has enough malleability to be used in the sorts of nuanced ways discussed here. Of course, philosophers need to embrace clarity and shun ambiguity and hence, the need for these explicit distinctions among the varied uses of "indifference."

Cross-References

- ▶ Beauvoir, Simone de
- ▶ Human Rights and Justice
- ▶ Racism
- ▶ Rights: General
- ▶ Rights: Legal and Moral

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Inferentialism

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Introduction

Legal inferentialism consists in providing an inferential analysis of the argumentative patterns actually used in legal practice – with reference to interpretation in particular – and in making explicit the rules of inference that are *internal* to the practice, i.e., that govern it on the basis of what judges and other legal practitioners actually do (Canale and Tuzet 2007).

The approach takes inspiration from the philosophical work of Wilfrid Sellars and Robert Brandom (Sellars 1953; Brandom 1994, 2000) and elaborates a theoretical framework in which legal arguments are conceived of as inferential moves in a practice of giving and asking for reasons (see also Klatt 2004, 2008). This approach makes it possible to bring together the semantics and pragmatics of legal argumentation.

Section "The Semantics/Pragmatics Debate and Legal Interpretation" of this entry considers the issue in the context of contemporary philosophy of language and relatively to legal interpretation. Section "Pragmatics of Semantic Content and Inferentialism" articulates the relation between a pragmatic approach to semantics and an inferentialist conception of content. Section "Inferentialism and Legal Interpretation" considers how inferentialism can be applied to legal interpretation. Finally, Section "Advantages and Drawbacks of Legal Inferentialism" points out some virtues and limits of inferentialism applied to the study of legal interpretation and adjudication.

The Semantics/Pragmatics Debate and Legal Interpretation

One of the most interesting topics of contemporary philosophy of language concerns the relation between semantics and pragmatics, and the

attempt to redefine it (e.g., Récanati 1993; Bach 1999; Bianchi 2004). Based on the theoretical framework provided by Charles Morris (1938) and Rudolf Carnap (1939), scholars usually divide the study of language into three main fields: syntax, semantics, and pragmatics. Traditionally, *syntax* deals with the study of the relations between linguistic expressions; *semantics* with the study of meaning (the relations between expressions and what they stand for); and *pragmatics* with the study of the relations between expressions and those who use them in communicating the content of mental states such as beliefs, desires, and intentions.

Such a distinction is still generally accepted not only in linguistics but also in legal theory. For instance, it is generally accepted that there are syntactic, semantic, and pragmatic problems in legal interpretation, together with the claim that each of them has its own solutions that are relatively independent from one another.

A typical example of this approach is given by the standard account of the problem of ambiguity in legal interpretation (see, e.g., Guastini 1993: 351–355). According to this account, there are (1) cases of syntactic ambiguity, in which the structural connection between the syntactic elements of a provision admits multiple meanings, (2) cases of semantic ambiguity, in which the meaning or reference of a term is not straightforwardly determined, and (3) cases of pragmatic ambiguity, where the context does not provide the information needed to fix the linguistic content of a term or expression. These and other classifications of various problems in legal interpretation follow from the triadic division of the theoretical understanding of language outlined above.

Nevertheless, the traditional boundaries between syntax, semantics, and pragmatics have been challenged by philosophers, in particular by authors such as Wittgenstein, Austin, Grice, and Sellars, provoking a general drift toward the "pragmatization of semantics" (Peregrin 1999: 420). The approach of such authors to language, even though for different reasons and to different extents, involves an alternative conception of semantics: terms and expressions are seen as tools used in linguistic practice rather than as signs standing for something else. From this angle "it seems that it must be pragmatics, as the theory of how people use linguistic signs, rather than semantics, which should be the heart of a theory of language" (Peregrin 1999: 425). In this sense the semantic content of a linguistic expression can only find a pragmatic account. At the same time, if legal language is an aspect of human action too, legal interpretation cannot be seen as a means to determine the relation between signs and what they stand for (objects, properties, relations, events, ideal entities, etc.), but as an aspect of legal practice that aims to clarify the relation between different linguistic actions.

This philosophical point of view has had a relevant impact on jurisprudence, leading to a practice-based approach to law and legal interpretation. In particular, the insights of the philosophers mentioned above have prompted different accounts of linguistic content in law. According to Hart, for example, the meaning of a legal provision depends on the conventional use that jurists make of it, and its determination in hard cases is the result of new conventional ways of understanding it (Hart 1994: 245–246). In Dworkin's view, on the contrary, the linguistic content of legal provisions is given by the best constructive interpretation of the legal system, which presents the object of interpretation in its "best light" (Dworkin 1986: chaps. 4–10).

On the one hand, it is clear that the two conceptions endorse different practice-based approaches to legal interpretation. On the other, apart from their theoretical differences, it is easy to show that they still consider the relation between practice and meaning through the lens of the traditional distinction between pragmatics and semantics. In the first case (Hart), interpretation is the way to determine new semantic conventions for lack of understanding; in the second (Dworkin), interpretation is the way to discover the set of principles that best fit and justify the materials and practices of a legal system, including constitutional provisions, statutes, and judicial decisions. In both cases, the interpretation of a legal provision is seen as a way to determine what a term or expression stands for, and not what a term or expression is used for. In other words, such conceptions maintain that it is

possible to say what a legal provision means independently from the particular context of a linguistic practice, and the propositional attitudes of the participants.

Yet it can be argued that the semantic content of a sentence or of a legal provision, as conceived following the traditional distinction between pragmatics and semantics, is *never* sufficient to determine what the sentence or provision means (Searle 1980: 221–231; Travis 1997; Poggi 2013). Consequently, what a linguistic expression stands for in legal practice is always determined by the linguistic interaction performed by the participants in the practice. Why? First, that is a result of the great variability of the contextual background of interpretation. There is no unique set of conditions of significance for a legal provision and, at the same time, there is no unique criterion that identifies the conditions of variability of such a set. The *way* of contextual dependence of semantic content depends upon the context itself (Brandom 1994: 144). Second, the participants in linguistic practice have different masteries and propositional attitudes their use of language depends on. The criterion of correctness in the application of a legal concept is not preestablished with respect to the legal practice. The very criteria of correctness in using language depend on the pragmatic interaction of the participants.

Pragmatics of Semantic Content and Inferentialism

The issues we have just underlined seem to foster a radically skeptical view of legal interpretation. However, this is not the only alternative we have. It is possible to adopt a different strategy to analyze semantic determination: developing a pragmatic account of the semantic content of legal provisions.

In order to develop an account of this kind, it is necessary to take as basic unit of linguistic content not the sentence, but the inferential relations among sentences. This approach is taken, in particular, by Sellars and Brandom. Sellars (1953) claims that the content of a linguistic expression is determined by the set of material inferences in which the expression is involved within an exchange of reasons. In other words, linguistic content depends on the inferential role of sentences, and the inferences that matter for it include those that are materially correct, that is to say the inferences the correctness of which is an aspect of grasping or mastering the sentence. For instance, to determine the content of the term "contract" we need to analyze the inferences in which this term is used and which the speakers take to be correct.

Brandom (1994, 2000) takes a further step. The inferential relations among sentences are considered under a strictly pragmatic point of view. Any assertion or prescription can be seen as a speech act committing the speaker to a determinate set of inferences, a commitment instituted by the participants in a legal practice attributing such a status to each other. If the commitment undertaken in asserting "*p*" or in prescribing "*q*" is discursively fulfilled, so that the speaker is entitled by the others to assert that *p* or to prescribe that *q*, the inferences used are taken as valid from an intersubjective point of view, determining, in the case of a legal provision, the semantic content of it. In particular, the structure of the pragmatic interaction attributing commitments and entitlements is described by Brandom through a deontic scorekeeping model of semantic determination. Competent practitioners keep track of their own and each other's linguistic actions: They "keep score" of commitments and entitlements by attributing these statuses to others and undertaking them themselves. According to this model, the semantic content of a sentence, that is the set of the correct inferences it can be involved in, is instituted by the practice consisting in keeping score of discursive duties (commitments) and authorities (entitlements) of the participants in the practice. In this sense, it has been correctly argued that inferentialism is first and foremost a meta-semantic theory. It is a theory about why a linguistic expression has the meaning it has, and about what it takes to understand a linguistic expression (Murzi and Steinberger 2017: 199).

Once this point of view is assumed, what about legal interpretation and legal reasoning? Legal interpretation ceases to have the semantic content

of legal provisions as subject-matter and its determination as goal. The subject-matter of legal interpretation are instead the deontic statuses of the participants in an institutional exchange of reasons, on which the semantic content of legal provisions depends. At the same time, the goal of interpretive practices in law consists in determining the inferences that can be taken as correct in the context of decision-making.

Inferentialism and Legal Interpretation

We provide in the following an example of an inferentialist account of linguistic content in legal interpretation and adjudication.

Take the well-known example, provided by Hart (1994, chap. VII), of the legal provision "No vehicle may be taken into the park." Considering a series of puzzling cases such as roller skates, bicycles, and ambulances, Hart shows that the content of "vehicle" is not entirely given, and that the task of interpretation consists of determining such a content in hard cases in particular. There is a huge amount of literature on this issue, in which the different approaches to the issue are analyzed, together with their consequences concerning, for example, the concept of law and the relationship between law and morality (see, among others, Endicott 2000; Raz 2003; Alexy 2004; Schauer 2008; Flanagan 2010). But notice the following point, which is often neglected in the literature: the subsentential elements of the legal provision considered by Hart are semantically determinate or indeterminate depending on the context, i.e. the pragmatic dimension of linguistic content. In some contexts the linguistic element that prompts interpretive concerns may be the verb "to be taken" (think of a vehicle taken by a thief outside the park), in some other contexts the preposition "into" (think of a bicycle leaning against the wall of the park), in some others the term "park" (is my own park semantically equivalent to the public park?), in some others the connection between these subsentential elements. Thus, we cannot provide a purely semantic account of the content of the legal provision considered above, nor identify such a content independently from the context of discourse.

However, a partisan of the traditional account of linguistic content may object that such an analysis is perfectly possible without having recourse to inferentialist meta-semantics. One may claim that semantics is to be seen as specifying the constraints that word meanings, and the referential relations they bear, place on what a speaker says when uttering "*p*." In this sense, a complete "pragmatization of semantics" is neither necessary nor desirable. In what sense, then, does an inferentialist account of content really differ from the traditional account of it? To answer this question, it is necessary to stress the role of the pragmatic interaction of the speakers, and the deontic statuses they assume in using language. Suppose there is a legal dispute between Theodor and Basil, and that Basil's lawyer (BL) presents the following argument in courtroom:

(BL) The legal provision "No vehicle may be taken into the park" provides, among other things, that no bicycle may be parked in a private garden. Given that Theodore has parked his bicycle in Basil's garden, Theodore must be sanctioned thus-and-so.

To establish the significance of BL's argument, Theodor's lawyer (TL) attributes to BL the commitment to a number of inferential relations that determine the application conditions of subsentential elements such as "vehicle," "park," "to be taken," "bicycle," "garden," "into," and the validity conditions of the interpretive sentence "No bicycle may parked in a private garden." This interpretive sentence expresses the content of the legal provision in relation to the disputed case. TL may take such inferences to be correct, using them in her own reasoning. If this occurs, TL recognizes that BL is entitled to such a prescription on the basis of the inferential articulation of her reasoning. However, TL may also propose some alternative inference as the following:

(TL) Since Theodore has parked his bicycle in Basil's garden, but a bicycle is not a vehicle and Basil's garden is not a public park, Theodore must not be sanctioned thus-and-so.

With this new speech act, the subsentential elements that were already present in BL's reasoning acquire a different content, which corresponds to an alternative interpretation of the legal provision. This shows that in an exchange of reasons the meaning of these elements is not determined in advance, or once and for all. Furthermore, a subsentential element is semantically indeterminate in so far as the inferential relations that fix its content are disputed in the exchange of reasons (see Canale 2017).

The conclusion of an exchange of reasons of that sort in a litigated case will be the decision of the judge who keeps score of the inferential moves performed by BL and TL before the court. In particular, the judge will establish whether the inferential commitments undertaken by BL and TL have been fulfilled, and which party is entitled to a claim about the content of the legal provision on the basis of the reasons provided. The result of the judge's scorekeeping will determine the content of the legal provision with respect to the litigated case.

If one takes this perspective, judicial decisions can be seen as responses to problems arising from interaction in a social context. According to George H. Mead (1967: 265–266), individual acts elicit organized sets of responses in a social context. These sets are related to each other: If one calls forth certain responses, they are implicitly calling forth others as well. An example given by Mead makes reference to the concept of theft:

> In the case of theft the response of the sheriff is different from that of the attorney-general, from that of the judge and the jurors, and so forth; and yet they all are responses which maintain property, which involve the recognition of the property rights in others. There is a common response in varied forms. (Mead 1967: 261)

A theft elicits a set of responses that maintain property by recognizing property rights. Now, to put it in inferentialist terms, the application of "theft" gives rise to a set of inferences applying the concept of property and other related concepts, together with the relevant subsentential elements depending on the case. Thus, such a general view of social interaction is significantly exemplified by the interaction taking place in a legal process (Mead 1967: 267–268), and the judicial decision issuing from the process is better viewed as an outcome of that very process and of scorekeeping rather than an authoritative decision *simpliciter*.

Advantages and Drawbacks of Legal Inferentialism

An inferentialist explanation of linguistic content seems to offer some significant advantages for a theory of legal interpretation. In particular the following:

Context sensitivity: An inferentialist account of content makes it possible to identify those sentential and subsentential items that are contextually "sensitive" with regard to an actual case, and which determine the significance conditions of a legal provision with respect to it.

Process sensitivity: An inferentialist approach shows how the significance conditions of legal provisions are elaborated within a legal process by means of the pragmatic interaction of the speakers (lawyers, judges, experts appointed by the court, etc.) concerning the content of the provisions.

An account of contextual constraints and correctness conditions: An inferentialist view of interpretation makes it possible to identify the correctness conditions of an interpretive sentence in light of the contextual constraints placed on interpretation. The interpretation of a legal provision is correct or sound in so far as it is the result of the judicial scorekeeping of linguistic interaction between the parties in a legal dispute.

An account of the distinction between interpretation and understanding: An inferentialist approach shows how to maintain a distinction between interpretation and understanding. On the one hand, inferentialism seems to be a broad version of interpretivism: The understanding of a legal provision is the result of an interpretive practice, which aims at negotiating the discursive inferences we can treat as correct. On the other hand, however, inferentialism makes it possible to draw a line dividing understanding from interpretation *within* legal practice. In brief, there is "understanding" if commitments and entitlements are immediately acknowledged by the participants; there is "interpretation" if they are not. In

this case, the speakers' mastery of legal concepts will be updated through the scorekeeping of practitioners' contributions in articulating reasons for adjudication.

Clearly, there are also possible objections and challenges to an inferentialist view of legal interpretation. In particular the following:

The skeptical objection: The question is whether an inferentialist view really differs from a skeptical view of legal interpretation. On the one hand, it does not seem to. Semantic content depends first on *subjective* competence in using legal language, and secondly on the practitioners' scorekeeping of different inferential treatment of concepts and their application. On the other hand, however, such a subjective competence is seen as a *result* of social interaction: It rests on a social level of meaning that cannot be reduced to the propositional attitudes of the single speaker. If this is true, the problem of semantic determination would be transposed into a socially construed normative scenario as the one outlined by Mead.

The semantic objection: The question is whether an inferentialist view is a real alternative to traditional truth-conditional semantics. At the end of the day, truth-conditional semantics, and a referential conception of content, are perfectly able to explain the linguistic phenomena that inferentialism focuses on. Why should we embrace a new conception of content if the old one is perfectly able to do the same explicative work? (Williamson 2010: 23). One could reply that the context of legal adjudication has specific characteristics that differentiate it from other forms of linguistic interaction. Interpretive practices in the law cannot be accounted for by abstracting from the pragmatic interaction of the speakers, the inferential roles of legal concepts in judicial reasoning, and the deontic statuses assumed by the participants to legal proceedings. If this is true, legal inferentialism could provide a better account of interpretive practices in the law, and of the way in which legal contents are elaborated over time. In other words, an inferentialist explanation of content can be fruitfully applied locally, that is, to specific languages, such as that of the law.

The fact-finding challenge: The question is whether an inferentialist view provides a satisfying account of the process of fact-finding. Is an inferentialist conception capable of providing an account not only of the semantic content of normative claims but also of factual claims? In particular, when scientific evidence is given in favor or against a factual claim, the most important issue, it seems, is not what the inferential relations are among the relevant sentences, but how the case is as a matter of fact.

The acceptability problem: The question is whether we should accept any concept that has an inferential role. What about concepts and words devoid of scientific content like "witch," for instance? If in context C the inference from W's possessing characters P_1, P_2, and P_3, to W's being a witch is taken as correct, are we to accept it as correct? This objection can be resisted from the point of view of Brandom's scorekeeping theory of content. There is no inferential content that *ought* to be taken as correct by participants. New scientific information and theories can be used in an exchange of reasons and so modify the inferential structure of the discourse (the content of the relevant concepts). The normative character of the practice concerns the way of articulating reasons within a community rather than the propositional content of a sentence.

Judging whether an inferentialist conception of legal interpretation and adjudication is a suitable one, or a better alternative than other accounts, requires a discussion of these points at least, in order to assess the possible advantages and drawbacks of it.

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Information Communication Technology

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Introduction

Information communication technology (ICT) is not only a technical term, identifying specific forms of hardware or software, but also a subject of moral, social, and legal analysis. While there is historical precedent for such analyses (Mitcham 1990), the contemporary ubiquity of technology in many societies gives new character to historical concerns, raising a variety of issues for philosophers, policymakers, technologists, and everyday users of ICTs. The present entry examines some of the critical concerns over current and emerging ICTs, including philosophical issues which arise from human-technology relationships.

Definition and Major Areas of Application

The definition of ICTs admits of many applications. At a very basic level, ICTs are a diverse set of technological tools and resources that communicate, create, disseminate, store, and manage information. This definition includes hardware, software, and various applications and platforms. Thus, the oldest of radios and telephones are information communication technologies, as are the personal computer, smartphone, social networking applications, and recommender systems based on artificial intelligence. Note that the definition comfortably includes emerging technologies, such as robotics, or technologies which do not necessarily require a human intent to communicate. For example, some smart cities' sensor

technologies automatically process, store, and communicate data from a cloud network without human prompting (Alharbi and Soh 2019).

Recent decades has seen the proliferation and use of ICTs across a wide variety of human domains and practices. As a result, there has been a spread of qualitative, quantitative, and philosophical analyses of the role of ICTs in domains such as education, health care, business management, and developmental economics. Similarly, ICTs have spread to much more general areas, such as interpersonal communication, knowledge acquisition, and social relationships.

Philosophical Perspectives on Human-ICT Relations

The proliferation and application of ICTs in a variety of domains and practices has prompted philosophical reflection on the nature of technology and human-technology relations. Scholarly investigations in the second half of the twentieth century in particular seem to reflect growing public concern over technology in some Western nations (Vogels et al. 2022) by examining the way ICTs affect human social, ethical, and political life.

Implicit in such a turn toward the ethics and politics of technology is a response to the value-neutrality thesis (VNT) of technology. The dominant defense of the VNT (Pitt 2014) contends that technological artifacts, such as ICTs, do not have values contained or embedded within them. Responses have been numerous and vary in the degree of moral agency ascribed to various technologies. Stronger ascriptions of the possibly of granting moral agency to technological artifacts can be found in Latour (1993); Sullins (2006); Verbeek (2011) and Wallach and Allen (2010). An instructive account of the debate can be found in Kroes and Verbeek (2014).

Scholars have noted that granting moral agency to technology is not required for technologies to have values embedded within them. As Johnson (2006) argues, a computer system is designed and deployed with intention and thus behaves with some intentionality. Such an ascription of intentionality need not grant that the computer system has mental states or freedom characteristic of human agency, but it does grant that the actions of a user of a technology are affected by the nature of the technology's possesive design. Thus, the focus of moral evaluation should contain three interrelated components: artifact designer, the artifact, and artifact user.

One approach to analyzing the interrelatedness of human-ICT interaction is the mediation theory of Verbeek (2005, 2011). Verbeek argues that technologies help shape experiences, such as perceptual and hermeneutical experiences (Ihde 1990), and practices of everyday human life. Consequently, artifacts are morally charged in that they mediate moral decisions, shape moral subjects, and play an important role in moral agency. Verbeek's paradigmatic example is the obstetric ultrasound, which helps frame an unborn fetus as patient and person, due to the nature of how the technology provides information about the fetus to parents and medical professionals (Verbeek 2011).

Some alternative pictures of human-technology interaction depart from posthuman or transhumanist premises. Although their suggestions and trajectories for the future of humanity differ, both approaches attempt to reconfigure or abandon philosophies which place the human animal and its cognitive, affective, and bodily capacities as a unique domain within nature.

Posthumanists typically reconsider what it means to be human. Although posthumanists argue human beings have always been embedded in technological contexts, they are particularly interested in examining the nature of human-technology relations in an age rife with ICTs, and without the need for direct technological integration within the human body. So, for example, Andy Clark (2003, 2010) defends a thesis of the extended mind (Clark and Chalmers 1998), arguing that when technologies are actively being used to enhance or grant cognitive or perceptive abilities, they count as extensions of minds. Consequently, to view human nature as constrained by bodily limits or default cognitive processes is mistaken. Restricting human nature to body or mind, argues Clark, ignores the interaction with cultural and technological environments or tools

which help shape the nature of human biotechnical unions. In contrast, and more controversially, transhumanism is not only a philosophy of human-technology relations but a program which argues for the direct enhancement of humanity in order to overcome bodily and cognitive shortcomings. See, for example, Fuller (2011, 2013) and the Transhumanist Declaration in Bostrum (2005). For a criticism of this framing of "humanity enhanced" by technologies versus "humanity incorporated" with technologies, see Theiner (2021).

Such a reconceptualization of the human being as mediated by, enhanced by, or integrated with ICTs poses difficulties for regulative policy, law, and punishment. With the extended mind thesis in particular, scholars have examine the viability of the EMT as a basis for rethinking laws and punishment, either in promoting corporate algorithmic accountability (Diamantis 2019) or in the context of criminal law (Mamak 2020). For an account of some of the regulatory challenges that arise in cognitive enhancement, including brain-computer interfaces, and hardware or software systems, see Bostrum and Sandberg (2009). Relatedly, Fuller (2013) offers an exploration of welfare policy issues liberal societies may encounter in a post- or transhuman future. Finally, for an exploration of present policy issues, Tribe (2009) offers a classical account of the possibility of constitutionalism to address issues in the digital frontier; following Tribe's thematization of digital constitutionalism, Gil et al. present a map of attempts to craft an "Internet Bill of Rights" (Gill et al. 2015).

Human-ICT Relations: Ethics, Epistemology, and Politics

While the use of ICTs prompts reflection on classical issues in social and moral philosophy (e.g., human autonomy, hedonism, and the cultivation of virtue), a wide variety of scholars contend that ICTs present unique challenges to the character of contemporary life (Borgmann 1984). The ubiquity of ICTs challenges how we think not only of human morality, but the nature of technological development itself. For example, it is not uncommon to see scholars use the term "techno-social" in order to highlight the how, when, and the question of which technlogies are pursued arguing that ICTs bear the mark of societies and cultures in a particular place and time (Winner 1993; Vallor 2016; Frischmann and Selinger 2018). Similarly, even early reflections at the dawn of personal computing reflect deep concern over human domains where computing power could be wrongfully deployed (Weizenbaum 1976).

An acknowledgment and concern over the ubiquity of ICTs in human life is common to social and ethical analysis of ICTs. One influential account refers to this ubiquity as the "device paradigm" (Borgmann 1984) whereby a wide proliferation of devices promises to enrich human life, but instead provide trivial, frivolous, and easy cycles of consumption at the expense of social interactions and everyday practices. A related concern is reflected in Marcuse (1991) who laments the deployment of ICTs for stabilizing passive consumption.

In a separate examination, Frischmann and Selinger (2018) express concern over what they call the techno-social reengineering of human beings. For Frischmann and Selinger, ICTs provide affordances (i.e., capabilities enabled by a relationship between tool and user) which ultimately undermine the freedom afforded by human practical agency. On their view, ICTs do this by offering routes to outsourcing a wide variety of physical, cognitive, emotional, and ethical tasks to technical devices, systems, or applications. One example is GPS devices and the capacity for navigation (Dreyfus and Kelly 2011).

In Vallor (2014), we find a related concern retranslated into the language of neo-Aristotelian moral philosophy. Vallor draws parallels between industrial and professional deskilling (and sometimes upskilling) through outsourcing tasks to ICTs (Davis 2008) with the practice of ethics. Vallor follows Julia Annas (2011) in interpreting Aristotelian virtues as skills that require a knowledge not only of what human activities and behaviors are worth doing, but how best to do them. So, for example, a child learning the virtue of honesty needs to know what it means to be honest, why

they ought to be honest, but also have opportunities to exercise the capacity for honesty. One issue with ICTs identified in Vallor (2010, 2014) which undermines the practice of a variety of virtues is that of attention and media multitasking, which involves the cognitive and moral dimension of adequately paying attention. For example, knowing the what, when, and how of paying attention to the demands of virtuous friendships. Following Wang and Tchernev (2012), Vallor expresses a concern over the threat to attention resulting from a habituation to media multitasking. For a further examination of the ethics and conceptualization of the attention economy, especially in the context of social media, see Castro and Pham (2020) and Bhargava and Velasquez (2020).

Among the classic concerns of human use of ICTs is informational privacy. An instructive account can be found in Van Den Hoven (2008) who identifies the wide variability in both the construal and justification of privacy. Privacy can be construed as a need, or right to be left alone (Warren and Brandeis 1890), a condition, or an aspect of human dignity; privacy can be further thought either intrinsically valuable or as conducive to some other good such as autonomy or freedom (Van den Hoven 2008; Rachels 1975). While Van den Hoven (2008) offers moral reasons to protect privacy, others have analyzed privacy in terms of corporate and political power (Véliz 2021), or the relationship of privacy and surveillance (Foucault 1995; Frischmann and Selinger 2018; Vallor 2016; Zuboff 2020). Furthermore, philosophers of technology have developed counterintuitive approaches to privacy, including conceptualizations and defenses of "group privacy" (Floridi 2019) and arguments for understanding calls for transparency as but another form of surveillance (Nguyen 2021). Finally, debates over surveillance and policy have been useful in highlighting the differences and possible incommensurability of Western values with those of other areas of the world, such as China or Japan. For an optimistic view of the possibility of pluralistic global information ethics, see (Ess 2008). On the possibility of reconciling Aristotelian, Buddhist, and Confucian virtue ethics for technology ethics, see (Vallor 2016). Finally, for challenges to such approaches, especially from the perspective of Confucianism and alternative cultural contexts, see (Wong 2013; Bay 2021).

Much attention has been given to the capacity for ICTs to become socially disruptive technologies. On one definition, a technology is considered socially disruptive it must be ethically salient, relevant, disruptive of human nature, social life, or nature itself, it must also occur rapidly, create some degree of uncertainty, and difficult to reverse once deployed (Hopster 2021). Some representative historical examples are the printing press and the Internet. From our current and prospective vantage point, we could add smartphones, big data analytics, autonomous weapons, as well as machine learning and artificial intelligence technologies.

Among the chief socially disruptive aspects of the Internet, computer, and smartphones is the nature of information (Floridi 2013, 2014). The conceptualization of information presented here includes the nature and validity of the information itself, how information is stored, used, and spread, who has access to information and ICTs, how we interact with information, and how we categorize, conceptualize, and use the information of users of ICTs. One particularly fruitful avenue of research which addresses contemporary concerns over misinformation, disinformation, and trust, can be found in socially epistemological approaches to the Internet and ICTs more generally. In contrast to traditional epistemology, social epistemology is concerned with knowledge acquisition and validity within interactions with others or tools like ICTs.

Concepts such as echo chambers, epistemic bubbles, and the use of search engines offer instructive examples. Within the context of social media, Nguyen (2018) understands an epistemic bubble to be a social epistemic structure which leaves out relevant contributors to a domain of knowledge. In contrast, an echo chamber is a social epistemic structure which actively undermines relevant contributes to a domain of knowledge. By distinguishing the two, Nguyen argues we will be better positioned to understand and address unintentional and intentional disregard for truth and validity in online networks

(Nguyen 2018). Such issues notwithstanding, scholars have sought to articulate frameworks and specific intellectual virtues that can be exercised so as to navigate the Internet prudently (Heersmink 2017; Ess 2010), especially in the face of the many opportunities for misinformation, bias, or outright racialized data discrimination (Noble 2018). On the side of technological development, critical concerns have prompted the introduction of features and changes on the interfaces of platforms themselves, such as prompting users when they share content that is factually contested or that has not even been read.

Conclusion

Among emerging areas of research in philosophy, the philosophy and ethics of technology (as well as neighboring fields such as science and technology studies and human-computer interaction) represents an incredibly lively and dynamic field of inquiry. The current and emerging concerns over the effect of ICTs on humanity are vast and will only continue to expand. Present in this article is a snapshot of some of the major framings, ideas, and issues which drive a wide variety of academic techno-social research projects. That such research programs continue will be crucial for coming to terms and managing the socio-philosophical consequences of ICT ubiquity.

Cross-References

- ▶ Artificial Intelligence
- ▶ Artificial Intelligence, Ethics Of
- ▶ Computer and Information Ethics
- ▶ Surveillance Society

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Informed Consent

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Introduction

Informed consent is a central concept in medical ethics and law. As the term suggests, informed consent refers to the process in which a physician or researcher discloses relevant information to a competent individual for the purpose of gaining authorization for a medical intervention. This process transforms acts that would be otherwise morally impermissible into permissible ones, such as injecting a patient with a syringe in the clinical setting or administering experimental drugs on subjects in the research setting. With the patient's or subject's informed consent, interventions become recognized as legitimate, making the notion fundamental to the practice of medicine.

History of Informed Consent

Historically, informed consent as both an ethical notion and legal doctrine evolved in a symbiotic manner, with the most significant developments occurring in the twentieth century. Various legal cases often brought the notion of informed consent to the public eye, which in turn motivated a more nuanced philosophical analysis of the parameters and nature of the concept. The legal doctrine of informed consent served to reinforce the development of the ethical notion and vice versa – as is often the case with law and ethics.

The legal landscape, and particularly case law, offers insight into the evolving notion of informed consent – though notably often through the lens of the United States and Western Europe. Scholars often point to cases such as *Schloendorff v. Society of N.Y. Hospital* (1914), *Salgo v. Leland Stanford University Hospital* (1957), and *Canterbury vs. Spence* (1972) as ostensible evidence of the development of informed consent in law and ethics alike. The *Schloendorff* case represented an early acknowledgment of the consent requirement in the clinical setting, without which interventions would amount to assault on the patient. *Salgo v. Leland Stanford University Hospital* saw the first appearance of the phrase "informed consent" as used today, emphasizing the need for appropriate disclosure of risks as deemed pertinent by the physician. *Canterbury vs. Spence* affirmed the need for both consent and disclosure, but the standard for disclosure shifted from the physician's discretion to that of a reasonable person. Thus, these three cases highlight the growing importance of informed consent since the early twentieth century. Importantly, the reasoning behind each case reflects the ongoing philosophical discussions underlying the notion of informed consent regarding the incorporation of the patients' consent and the changing model of how physicians should disclose information.

Perhaps the single most important influence in bringing the informed consent doctrine to international attention was the Nuremberg Trials, which began in 1946, and the resulting directives now known as the Nuremberg Code. Following revelations of the horrific experimentation on human beings at the hands of the Nazi Party during the Second World War, the Nuremberg Code identified the voluntary consent of human subjects as one of the ten fundamental ethical principles. Though the Code did not enjoy immediate widespread attention, by the 1950s it had become a global centerpiece of medical research ethics (Faden et al. 1996). Later, in the 1964 *Declaration of Helsinki*, the World Medical Association identified informed consent as a central ethical principle guiding clinical research on human subjects. The Belmont Report of 1979 further cemented the centrality of informed consent, and by the early 1980s, informed consent had become a consensus-driven established ethical and legal principle in Western medicine.

The shift towards the consent requirement and, more broadly, the growing role of the patient or research subject in decision-making marked a significant transition from the traditional paternalism adopted in the medical profession in previous eras, where physicians saw little professional or

ethical need to garner decisional input from patients. The Hippocratic oath, for example, explicitly advised against transparency and advocated withholding most information from patients. Once established, however, the notion of informed consent became a fertile ground for philosophical debate. As the obligation to obtain informed consent and the basic elements of the notion have gained growing (though sometimes reluctant) acceptance among medical professionals, legal scholars, and philosophers, the theoretical underpinnings of the concept have often been called into question. From the 1970s and continuing today, informed consent has come under increasing philosophical scrutiny as a more nuanced understanding of the concept developed. The following will focus primarily on the philosophical notion of informed consent in clinical and research medicine and the various theoretical issues that have arisen.

The Elements of Informed Consent

Since the establishment of informed consent as central to the practice of clinical and research medicine, the medical profession has recognized certain conditions that are necessary for obtaining valid informed consent: capacity, voluntariness, deliberation and comprehension, and the expression of consent. Each, in turn, has raised important theoretical and practical questions.

Capacity

The first condition of informed consent requires that the patient or subject must have decisional capacity; that is, they ought to have sufficient mental capabilities to understand the relevant information and make a decision based on this information. Though competence and capacity are sometimes used interchangeably in literature, competence more often refers to a binary legal judgment about capacity – one is deemed either competent or not – whereas decision-making capacity itself is the ability of a person to make their own medical decisions in the medical setting. Patients with decision-making capacity are often described as "capacitated" or "having capacity," while those who lack decision-making capacity are often described as "incapacitated."

Unlike competence, decision-making capacity is scalar rather than binary: one could have higher or lower degrees of decision-making capacity. It is also decision-relative, in that one can have decision-making capacity for certain decisions but not others. Some patients may lack capacity for complex high-stakes decisions but have decision-making capacity for simpler, lower-stakes issues. Moreover, a person's decision-making capacity can fluctuate across short or long periods of time, such as when a delirium subsides or during periods of lucidity that some patients with dementia experience.

In the clinical and research settings, physicians typically can assess that an individual has the required mental capacity by simply interacting with them. Some patients, however, are clearly incapacitated, such as the unconscious, sedated, or delirious. When a patient lacks capacity, a surrogate is called upon to make decisions and provides consent on the patient's behalf. These surrogates have either been appointed by the patient in advance (e.g., through a medical power of attorney) or are identified as default surrogates by law. Ethically and clinically challenging cases arise when a person's level of capacity is unclear. In such cases, clinicians might informally assess a patient's capacity through various questions or draw upon formal capacity assessments (Appelbaum et al. 1988). Questions have been raised, however, about the inter-reliability among clinicians in judgments of capacity and the validity of such assessments (Marson et al. 1997). Further, performing such assessments raises the problem of consent for the assessment itself (Koch 2019). Finally, in cases when a surrogate decision-maker is called upon to make decisions for an incapacitated patient, it is practically and ethically challenging to perform capacity assessments on the surrogate with questionable capacity, as surrogates are not engaged in a physician-patient or subject-researcher relationship and so are not candidates for such assessments (Bramstedt 2003). Thus, while confirming decision-making capacity is a necessary step in the informed consent process, it can be rife with philosophical and practical challenges.

Voluntariness

Second, individuals must voluntarily provide their consent. The condition of voluntariness can be undermined through various factors, such as coercion, manipulation, or persuasion (Faden and Beauchamp 1986). Coercion, or compelling the expression of consent through threat of harm, is usually taken as the strongest form of undermining voluntariness. Manipulation through information – for example, benevolently withholding information about risks or nudging patients towards certain outcomes – can undermine voluntariness as well by framing options with an inaccurate positive or negative valence (Eyal 2016). Voluntariness can also be undermined by persuasion or undue inducement. For example, this may occur if a researcher offers incentives that are so attractive that they obfuscate the decision-making process of a subject (Wilkinson 2003). Even absent these features, the ideal of complete voluntariness may be rarely achieved, given the many influences that may impact decision-making, such as familial or professional pressures.

Deliberation and Comprehension

Third, the individual must be provided with the relevant information pertaining to the nature and consequences of the proposed intervention, along with the nature and consequences of alternative treatments. For example, in order to provide their informed consent to a proposed treatment, a patient ought to be properly informed of their diagnosis, prognosis, and the potential risks and benefits or a proposed treatment and alternatives, along with the likelihood of such outcomes. One challenge is that it is difficult to identify which features of a treatment option are important to individual patients and ought to be disclosed. In many cases it is clear that not *every* potential outcome can be discussed, and so certain outcomes must be chosen by the physician or researcher as relevant for discussion (Veatch 1995).

However, what is pertinent to the physician may not be relevant to the patient or subject. To address this problem, three philosophically informed legal standards of disclosure have been proposed: the professional standard, the reasonable person standard, and the individual standard (Beauchamp and Childress 2008). The professional standard requires that relevant information is that which meets the conventions of the profession. There are, however, no such standards agreed upon and endorsed by the profession. The reasonable person standard requires providing the information that a reasonable person would find relevant. This leaves open what precisely a reasonable person would want to know and whether this offers any practical guidance to those who disclose the information. Finally, the individual or subjective standard says that physicians and researchers ought to disclose that which is pertinent to the individual. The challenge of this, however, is that physicians and researchers cannot be expected to know the values and preferences of each patient or subject and cannot practically be bound by an additional duty to solicit such preferences (Veatch 1995).

A related element of the disclosure process is the comprehension of patients or subjects; after all, disclosure without corresponding comprehension contributes little towards a patient becoming informed (Beauchamp and Childress 2008; Manson and O'Neill 2007). Towards this end, physicians and researchers are often encouraged to ensure comprehension through various communication strategies, such as the teach-back method (Yen and Leasure 2019); through the development of comprehension aids, such as decision guides; or through increased awareness of potential hurdles to health literacy, particularly for vulnerable populations (American Medical Association 1999).

Consent

Finally, the individual must consent. In the clinical setting, the kind of consent that is required after disclosure often depends on the severity or risk of the corresponding intervention. For invasive, high-risk interventions, such as the amputation of a limb, written explicit consent is necessary. The legal requirement for informed consent applies to such cases, and the attendant documentation and signature fulfill the need for explicit consent. For low-risk interventions or

noninvasive evaluations, such as evaluating minor pain, verbal consent may be sufficient. Further, many common medical interventions do not require an explicit communication of consent. Rather, implied or tacit consent suffice, in which one implies consent through acts or non-refusal. For example, if a nurse asks a patient to sit on a chair and explains that she is going to take a sample of their blood, the patient's act of raising their arm implies their consent to the blood draw.

Another related form of consent is presumed consent. In emergent cases when treatment is required but a patient is incapacitated, physicians are justified in treating patients without consent on the grounds that the patient *would have* consented if they were capable of doing so. In such cases, however, such consent cannot be legitimately described as informed. Further, presumed consent is only legitimately invoked when medical professionals have a high certainty that the individual would have actually consented; it is essentially an empirical claim (Veatch and Pitt). This is a point worth stressing because presumed consent must be supported by evidence that such a presumption is justified. For example, some arguments invoke presumed consent in favor of mandatory organ procurement policy. However, the relevant data suggest that most people in fact would not consent to offering their organs after death and so their consent cannot be presumed. The use of presumed consent, then, must correspond with the justified presumption that the individual in question would most likely have consented, if asked.

Ethical Groundings of Informed Consent

Although there is widespread agreement about the importance of informed consent, there are differing philosophical views as to what grounds the doctrine. The most common contemporary rationale is that informed consent is grounded in the autonomy of the patient or subject; the fact that informed consent promotes autonomy is taken as axiomatic (Beauchamp and Childress 2008). Following this kind of rationale, many invoke a Kantian notion of a person's autonomy as demanding respect in itself and not for some further end (Beauchamp and Childress 2008; Pellegrino and Thomasma 1993; Dworkin 1988; Donagan 1977). Informed consent allows individuals to act according to values that they have adopted for their lives, thus promoting the self-rule, that is, autonomy. It is worth noting, however, that the principle of respect for autonomy through informed consent does not imply that medical decisions fall fully into the hands of patients. Rather, informed consent permits patients and subjects to exercise their autonomy and select among medically indicated options provided by medical professionals.

While citing autonomy is the most common grounding for informed consent, it is not without its challenges. Some have pointed out that promoting autonomy may be detrimental to patients, in that decision-making may cause distress or the introduction of options involves new burdens and challenges (Dworkin 1988; Velleman 1992). Further, it is unclear which understanding of autonomy is best applied to the informed consent principle, if any (O'Neill 2003). In any case, while the autonomy-based grounding of informed consent remains the most prevalent rationale, philosophers have proposed alternatives, two of which are well-being-based and trust-based rationales.

Well-Being-Based and Protective Rationales

One alternative rationale is that voluntary consent best promotes the well-being of the patient and, relatedly, protects them from harm or other rights violations (Manson and O'Neill 2007). After all, it seems that by allowing an informed patient to choose one treatment over another, that patient would opt for what is most beneficial for them and refuse those which are harmful. In the research setting, obtaining informed consent provides subjects with the opportunity to balance the risk of harms with the promise of benefit, either to themselves or the broader patient population.

An extension of this view, beyond the promotion of well-being through leaving decision-

making to the patient, stems from the history of informed consent as arising in part from the Nuremberg Trials and the Nuremberg Code. According to this rationale, informed consent prevents against assault, death, and other grave rights violations that have darkened the history of medicine. The centrality of informed consent as an international medical ethical principle was motivated by the actual and potential serious harms that medical practitioners had inflicted on subjects without their consent. Thus, requiring informed consent serves today as a barrier against such violations.

However, some have pointed out that, even if a patient is fully informed and fully capacitated, and even if one option is evidently and glaringly better for the patient, it is not always the case that patients choose the well-being-promoting option (Velleman 1992). This has motivated the common challenge to a well-being-based view, since such views cannot account for the importance of consent when a patient or subject clearly makes choices that are contrary to their own well-being. These kinds of patients are not merely cited as theoretical counterexamples but constitute a common kind of ethical dilemma in medicine. If the importance of informed consent derives from well-being, then cases where informed consent does not promote well-being cast doubt on its moral weight.

The Promotion of Trust

A third rationale is that informed consent promotes trust in the relationship between the medical profession and society, the physician and patient, and the researcher and subject (O'Neill 2002; Jackson 1994; Kass et al. 1996). Such trust is essential to any profession, in that professions and society are bound by a covenant in which the profession fulfills an important need in exchange for self-governance and various privileges. If trust is undermined, then the covenant is threatened. Disclosing true and relevant information to patients and allowing them to choose their own course of treatment or their own level of acceptable risk in research foster and maintain this essential trust. This view, however, seems to lose the intuitive pull of informed consent as protecting or promoting some feature of an individual patient, rather than only contributing to a broad social relation (Eyal 2014). While it may well be true and important that informed consent strengthens the covenant binding the medical profession and society, this fails to capture the person-protecting feature of procuring a capacitated individual's consent.

Exceptions to Informed Consent

In some instances, informed consent may not be required from patients or subjects (Wear 1998). Such exceptions have been argued on ethical grounds and are often recognized in the law. The first exception occurs when incapacitated patients require emergent care and no surrogate decision-maker is available. In these instances, it is widely accepted that physicians may perform medical interventions without consent. A third exception emerges when a patient voluntarily waives their future right to obtain consent, with the caveat that they may return to the role of decision-maker when they wish.

Although such cases are often described as exceptions, they arguably reflect the broad principle of informed consent. In the case of incapacity, one *cannot* obtain consent, and so the obligation to obtain consent does not apply. In the case of voluntarily waiving the right to consent, such individuals exercise their autonomy in the very act of (temporarily) waiving the right to informed consent (Dworkin 1988). One bona fide exception to the requirement of informed consent, however, may come into play in cases in which consent is foregone in pursuit of a sufficiently necessary social good, such as mandated psychiatric treatment of capacitated patients, the treatment of individuals who are threats to public safety, or mandatory quarantines in case of highly contagious and dangerous diseases. In these cases, the individual is able to provide informed consent, yet the obligation to obtain consent may be outweighed by another obligation to society or others.

Conclusions

In any case, and despite the many layers of philosophical interest that underlie the notion of informed consent, it remains a foundational and dynamic concept in medical ethics and law. Both the ethical principle and legal doctrine continue to evolve along the dimensions of capacity, comprehension and deliberation, voluntariness, and the expression of consent. And, while the rise of informed consent marked the end of the traditional paternalism of medicine, the shifting power between physician and patient and researcher and subject remains in a perpetual state of renegotiation, driven by such concepts as informed consent.

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Institutional Control of Interpretation

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Ascription of Meaning in Contemporary Legal Systems

According to the standard, formalist or neo-formalist view on legal interpretation officials

applies legal rules or principles whose meaning is settled and uncontroversial in virtue of them being clearly worded. The common, skeptic, or neo-skeptic challenge to the standard view holds that due to ubiquity of indeterminacy in legal language, the results of the ascriptions of meaning by authoritative legal interpreters are normative in character, and interpretative statements do not have truth value. On both accounts on the nature of legal interpretation, when we have an interpretative problem, we defer to normative theories of interpretation to ascribe a meaning to a legal text. Most of these normative theories, be it doctrines of legal interpretation or philosophical theories of meaning, fail to account for how meaning is ascribed within a complex interpretative community framed by an institutionalized system, and consequently they fall short when trying to account for the ascription of meaning in law.

The starting epistemological point of most doctrines or interpretation is epistemic individualism – the view that we are to be entirely epistemically self-reliant in the sense that we are to disregard, refuse, or personally examine every reason that we were given to believe something (Zagzebski 2012: 52). But the contents of interpretive utterances as well as the "material rightness" of results of interpretative act are ultimately influenced and even determined by the level of acceptability that an interpretive utterance has in a legal community (Aarnio 2011: 135). Before engaging in a method of interpretation, or following any normative guideline on how to ascribe or disambiguate meaning, individuals within every interpretative community operate with "normal intellectual inertia" within "paradigms" or "quasi-paradigms of the day" (Dworkin 1986: 89). Decisions in law, along with interpretative decisions – ascriptions of meaning – are often "chosen out of habit, out of respect for the (. . .) practices and traditions" (Raz 2009: 328). The interpretative task of adjudication starts from the practices within a community; they are "dependent on understanding already being in place" (Patterson 2005: 696).

If we are to provide a descriptive account of meaning formation within a legal community, it seems, thus, not sufficient to expound on a philosophical theory of meaning or an ideal model of legal reasoning, along with the standards of rationality that a certain ideal model entails. This is indeed an important task of normative theory of law and legal philosophy. To identify the modes and traits of the enterprise of legal interpretation as it occurs in every contemporary legal order, it is necessary to identify the specificities of the ascription of meaning within the realm of law by identifying essential components of actual practices within a specific epistemic community. In other words, overlooking the fact that interpretation is "deeply embedded in a societal context where different actors interact with each other" leaves us without a satisfactory account of interpretation in law (Bianchi 2010: 35).

Communities of Jurists and Institutional Control of Interpretation

Most of the problems that arise in the decision-making of legal officials are problems of interpretation (Poscher 2012: 128). It is a trivial truth that the interpretative position of legal officials is not a position of absolute, unbound, unrestricted discretion. Their work is conducted with awareness of the limits for ascribing meaning, weather those limits are overt, legally enforceable sanctions, or simple influences that in case of noncompliance do not entail any sanctions at all. Those pressures and interventions are operational in any community of interpreters, they exist as a matter of fact, without the need for any particular normative theory of interpretation (Gadamer 2006: 281).

Legal interpretation takes place within intricate determinable communities, with strong ties to other communities, the general public, and within a legally established system of formally or substantially interdependent institutions. The process of interpretation and its results are consequently heavily dependent on the relations within this determinate community, on its complexities and ties to other relevant communities, as well as on the relations between institutions in which individuals interpret legal materials.

Having in mind the complexity of contemporary legal systems, relying only on personally examined reasons in every single decision within

an irreducible amount of different subject matters would make it impossible to reach interpretative decisions (Pierson 1994: 398). Complete epistemic self-reliance in the domain of law, or in any other domain for that matter – a complete lack reliance on the interpretive beliefs and opinions in a community – would leave us with very few beliefs in the first place and with very little starting points in interpreting legal texts (Zagzebski 2012: 53). But even legal theorists and philosophers that put a strong emphasis on the legal community and shared mutual beliefs in interpretation and determination of meaning pay very little attention to the specificities of this community, preferring normative consideration of a one right answer, ideal speech situation, universal auditorium, etc. (Aarnio 2011: 102).

Some of those overlooked specificities of legal interpretation in the legal domain can be accounted for by employing the concept of institutional control of interpretation proposed in the domain of literary theory by Frank Kermode. According to Kermode, the process of interpretation is limited even when there are no formally established rules to guide it – "no person can go about the work of interpretation without some awareness of forces which limit, or try to limit, what he may say, and the ways in which he may say it" (Kermode 1979: 72). They are in fact limited by the community or, in a broad sense of the word, institutionally. We conceive of institutions as ordered systems of information, either explicitly formulated or not, capable of being effective in conjunction with psychological and social facts (Weinberger 1991: 21). In the context of interpretation, institutions can be defined as "organization of opinion which may either facilitate or inhibit the individual's manner of doing interpretation, which will prescribe what may legitimately be subjected to intensive interpretative scrutiny, and determine whether a particular act of interpretation will be regarded as a success or a failure, be taken into account in licit future interpretation or not" (Kermode 1979: 72). The institution in this sense is a medium of pressures and interventions that do not have to be explicit or formulated as standards of behavior but that the individual still adheres to if his interpretation purports to be of any significance in the specific regional context in which it is undertaken. The influence of institutions on interpretation is at least twofold: they facilitate or inhibit individual acts of interpretation and discriminate between successful and unsuccessful acts of interpretation (Kermode 1979: 72).

The community, which forms the set of opinions that comprise the institution, thereby limiting interpretation, is in principle determinate or determinable. It is primarily "the professional community that interprets (...) and teaches others to do so". This community "has authority (not undisputed) to define (or indicate the limits of) a subject; to impose valuations and validate interpretations" (Kermode 1979: 72). The given authority is not an authority in the strong sense, but is the dominant set of opinions, which by strength of argument or habit (and even, trivially but nevertheless worth mentioning, the denial of promotion within the field) limits and guides individual interpretations.

In most domains, this institution arising within a professional community doesn't have the power to bind and enforce compliance. This is however not the case with more "despotic" communities such as the legal community. The underdetermined concepts of community of jurists leave us clinging on philosophical conceptions of meaning and reference that don't do justice to the modes of meaning ascription within legal interpretation.

Authority and Institutional Control of Legal Interpretation

The relations within the legal community (and arguably within all other interpretative communities) are not ones of horizontal, equal positions of interpreters exchanging arguments as peers. The structure of this interpretive community is established as hierarchical formally by law, but it is also a hierarchical in virtue of the existence epistemically authoritative interpretations of legal texts and the instruction of others in orthodox modes of interpretation and concrete ascriptions of meaning.

The community of legal education, legal practice, and legal scholarship – a "certain form of life that connects lawyers and legal scholars among them to a common language and a common culture" (Aarnio 2011: 43) – within a society governed by an institutionalized system of rules follows more or less specific modes of ascribing meaning to legal texts that influence individual acts of interpretation to a significant degree. On the most general level, the interpretative ascription of meaning is a choice among meanings that a legal text can have within a community of interpreters which are determined by linguistic rules, interpretative techniques, and conceptual constructions (Guastini 2013).

In a community of jurists, defined by the legal system and its specificities, with strong ties to systems of legal education and legal scholarship, the results of interpretation are for the most part not the result of personal examination of reasons – interpretative decisions are not "arrived at methodically." They are based, partially or entirely, on previous interpretative decisions made by hierarchically superiors (Kermode 1979: 74–75) but also on opinions of other influential figures in legal practice, legal education, and legal science, since "individual interpreters (...) cannot simply cast aside their educational and professional background" (Waibel 2015: 148).

In law, the institutional authority over interpretation presents itself either as a *practical authority*, in the sense that interpretation of certain authoritative interpreters is subject to the normative power of exercising control of the results of interpretation of other authoritative interpreters. Institutional authority over interpretation is not only formal in this sense but can also present itself as authority over belief, i.e., *epistemic authority*. This authority is excessed overtly every time a court opinion invokes the work of an authority in legal science and philosophy, the opinion of a foreign court, or legislative trends that do not oblige the court in any formal way. In most cases, epistemic authorities are not overtly mentioned in judicial decisions but are still operational in the ascription of meaning to legal texts.

Having in mind the specificities of law and its relations to other communities, it is important to differentiate between (1) institutional control of interpretation in the weak sense, which does not allow institutions to invalidate deviant interpretations, and (2) institutional control of interpretation in the strong sense, which gives the possibility to the institution to invalidate an interpretation.

Some Instances of Institutional Control of Interpretation in Law

Institutional Control of Interpretation in the Strong Sense

By relying on contemporary practice of adjudication, we can identify some instances of institutional control of legal interpretation in the strong and in the weak sense that are operational in contemporary legal systems.

Formal control of interpretation in law or *institutional control of legal interpretation in the strong sense* is, of course, highly dependent on the political or constitutional structure of a society. Contemporary legal systems have certain salient properties which make individual acts of interpretation within them uniform, predictable, and overall expected. (1) The first of those features is that contemporary legal systems are institutionalized in character (Raz 1999: 141–153). (2) This institutionalized system is hierarchical in the sense that bodies that are higher in the system exercise practical authority over institutions on lower positions. (3) The most significant trait of formal institutional control of interpretation is the fact that contemporary legal systems do not allow for infinite interpretive quarrels. (4) The all-encompassing character of contemporary legal systems entails necessarily such a level of complexity that no single individual can even hope to master the entirety of regulations in various domains that are legally regulated. In contemporary, complex legal systems requiring specialization officials rely on interpretative statements of other officials and other authorities in the domain of law (see Polanyi 2009: 64).

This modality of influencing interpretation is in most jurisdictions exercised through *the process*

of review, which entails the power of a higher-ranking official or body to invalidate or overrule decisions of lower-ranking officials or bodies, along with the accompanying interpretations of legal texts on which the decision was based. This possibility is in civil law countries often formulated as the power to invalidate decisions based on the "wrong application of material law," which includes the power to invalidate a decision based on the "wrong" interpretation of legal texts. The interpretation of the higher-ranking official is in these cases binding for the lower-ranking officials as a matter of law – there are either legal or prudential reasons to follow decisions of officials and bodies ranked higher in the hierarchy of a legal order.

The Supreme Courts of many European countries have the possibility of issuing *general legal opinions* which serve as a guide in interpretation and adjudication and ultimately aid the uniform application of law. These opinions are not formulated as rules, nor are they explicitly mentioned as sources of law in respective constitutions. They are nevertheless binding for the lower courts. An interpretation of the lower court that doesn't concur with the general legal opinion of the Supreme Court will be invalidated in the process of review.

Institutional Control of Interpretation in the Weak Sense

Some of the most prominent contemporary examples of *institutional control of legal interpretation in the week sense* are *legal scholarship* (legal doctrine or legal dogmatics) and *judicial dialogue*. The work of legal doctrine is done in large part through the interpretation of legal texts, and its influence on legal interpretation is immense. As a reason for a certain interpretation, *legal scholarship* has such a role that "one may pay attention to thesis developed in legal writing not only because of the quality of the reasons proffered therein, but also due to the authoritative position that legal writers occupy" (Peczenik 2008: 4, 17). The authority of legal scholarship in the domain of the ascription of meaning to legal texts in most cases doesn't take the form of citations. The very relation between legal texts and authoritative interpreters is mediated by legal science – "a very large part of what law-making officials produce reaches the judge and the practitioner only after passing through the interpretive sieve of the scholar" (Shecaira 2013: 44). In this way scholarship isn't merely persuasive, but is epistemically authoritative – it standardizes certain interpretive ascriptions, especially since the road to admission to a legal community is legal education.

With the development of international law and the radical technological simplification of cross-border communication, national and international courts participate, without any whatsoever formal obligation, in what came to be known as *judicial dialogue*. In general theory of law, the informal communication between courts of the same legal status, for example, two national appellate courts, has been named horizontal, and the communication between institutions of a legally different status, like national and supranational courts, has been named vertical (Slaughter 1994: 104). Authors that have assumed a philosophical perspective emphasized a strong element of persuasion in the relations of courts, trying to figure out how does this communication work and why is the case that some authors and some courts have more influence than others (Flanders 2009: 56–57). The epistemic community made possible by contemporary advances in communication is not a community of peers – some authorities have been identified as "*generally* more persuasive than other authorities" (Flanders 2009: 74). In these cases the idea of persuasion gives way to the idea of "optional authority" (Schauer 2008). Foreign case law is in fact regarded by officials as epistemically authoritative – interpretative stipulations of foreign officials are exclusionary but defeasible reasons for national courts to interpret similar provisions in the same way in analogous cases (Doyle 2016).

Conclusion

A general account of institutional control of legal interpretation expounded with an account of epistemic authority is potentially able to fill some important gaps in contemporary theory of legal

interpretation and to shift its focus from traditional problems to issues of operation of contemporary legal systems and officials within those systems. The influences on interpretation that the concept of institutional control of interpretation denotes can be analyzed from at least three perspectives:

1. They can be analyzed as legitimate or illegitimate *de lege lata* and *de lege ferenda* on a case-by-case basis in *various legal disciplines*. We could argue, for example, if an expert opinion that was used to reach an interpretation of the right to a reasoned judgment in the European Court of Human Rights is unanimously held within legal scholarship, is it coherent or not, does it have adequate backing in the text of the Convention, is it in accordance with previous decisions of the Court, etc.
2. In *general theory of law*, institutional control of interpretation could entail the analysis of modes of influence that are shared among some, most, or all existing legal systems. From this perspective, it is possible to identify nonformal sources of interpretive ascriptions, for example, legal science and inter-judicial dialogue, as ubiquitous modes of influence on legal interpretation in contemporary legal systems.
3. The third perspective is *philosophical*. Insofar as "the demands of everyday life require us to make many more decisions and hold many more opinions than we could ever base on personally examined reasons" (Pierson 1994: 398), the same demands of contemporary legal systems require those model legal interpreters that we call judges to rely on reasons that are not personally examined. The philosophical study of those influences on individual acts of interpretation would involve the clarification of concepts of community, shared beliefs, and epistemic authority.

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Institutional Facts

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Introduction

Expressions which are used to refer to institutions are in some sense like theoretical terms. The word "state," for example, does not refer to anything directly observable. We say that "the state" has some properties, or even that it does something, but all we can perceive are people and their doings (plus certain physical objects). "State" seems to have something in common with, say, "electron" or "ecosystem," which are theoretical terms having a meaning only as parts of scientific theories. However, it is not only political scientists or legal theorists who use terms like "state." Ordinary people have to deal with the state almost daily, and when referring to it, they do not usually suppose the truth of any scientific theory. These terms cannot be removed from our vocabulary. A scientist could claim that the extension of an established theoretical term is empty. The expression "state" is clearly different. The state as an institution could perhaps wither away, but it cannot be proven to be nonexistent.

Institutional terms seem to refer to real things. We say that here *are* states and legal rights, and by saying that they are there, we mean that they are more than mere fictions or illusions. Statements about institutions and institutionally defined actions and properties are not statements about people's mental states or physical movements. Nevertheless, they are conceptually connected with actions and interactions of individual people. A state, for example, can do something only if particular individuals do something. And, most strikingly, the truth of statements about institutions is at least partly dependent on people's attitudes toward those institutions. A necessary condition of something being "money" in a society is that it is generally accepted as money.

Institutional expressions have a further interesting feature. Somehow they are connected with norms and rules. When we refer to something as a "legislature," we suppose that its existence as a legislature is based on some norms which make it what it is. Furthermore, these rules and norms can be fully understood as normative *reasons*, not just as regularities of human behavior. A legislature is not simply a group of people who have the habit of gathering together in a big building. Moreover, these norms form a part of a larger normative structure, and the actions of a legislature and even the fact that some actions are ascribed to it can be understood only by grasping the content of this structure.

Those states of affairs which make statements containing institutional expressions true or untrue are here called *institutional facts*. Institutional facts are a subspecies of social facts, one central topic of the branch of philosophy called *social ontology*.

The Searlian Analysis of Institutional Facts

Although the term "social ontology" is recently established, the roots of the discipline stretch back to Aristotle. Classical philosophers such as Hobbes, Hume, Rousseau, or Hegel; classical figures of sociology such as Émile Durkheim (2014), Georg Simmel (2009), or Peter Berger and Thomas Luckmann (1966); and those of legal theory such as Karl Olivecrona (1939), Hans Kelsen (1967), or H.L.A. Hart (1961) all dealt

with issues related to social ontology. However, the recent revival of social ontology is largely due to the influence of one man, the American philosopher John Searle.

In an article initially published in 1964, and again in his immensely influential work *Speech Acts* (1969), Searle developed the distinction between *brute* and *institutional* facts – a distinction originally made by the Oxford moral philosopher Elizabeth Anscombe (1958). According to Searle, "brute facts" are the furniture of our physical (or physical and mental) world. Institutional facts are different. They presuppose the existence of *constitutive rules* of the form "X counts as Y in context C." In this scheme, "X" refers (typically) to a physical object or event, while "Y" is an institutional term. For example, in certain contexts, some pieces of paper (X) are counted as money (Y). Raising one's hand (X) is in some contexts counted as a voting act (Y), while in another context, the same physical movement is an instance of greeting (Y*). This characterization of institutional facts has inspired many social and legal theorists. Most notably, Neil MacCormick and Ota Weinberger (1986), as well as Dick P. Ruiter (1993), have based their institutional legal theories on Searle's distinction. Searle's own views have matured later: only in his *The Construction of Social Reality* (1995) and again in *Making the Social World* (2010) he has formulated a full-blown theory of institutional facts.

In Searle's later works, constitutive rules are grounded on *collective acceptance* in the relevant community. This move is understandable. If Searle's classification of facts as "brute" and "institutional" is meant to be exhaustive, facts about constitutive rules existing in a particular community at a particular time must themselves be institutional facts. (They can hardly be brute facts.) Then we need a new constitutive rule saying that, in a given context, something is counted as a constitutive rule. We seem to be trapped into an infinite regress. The regress is halted by supposing that some facts hold by virtue of direct acceptance in the community. H. L. A. Hart's "rule of recognition" may be a case in point. Most rules belonging to a legal system are legal rules because they are recognized by other rules and ultimately by the rule of recognition. This rule of recognition, however, exists only as an accepted practice in the legal community of a society. It is there because officials and other key actors of the legal community accept it. For Searle, this kind of collective acceptance is a form of *we-intentionality*. We-intentionality is, according to him, a primitive phenomenon, not reducible to other attitudes, for example, to first-person singular intentions and related beliefs.

When accepting constitutive rules – for example, "a group of people satisfying the condition X is the legislature," "a flag of the type X* is the symbol of our party," and "a piece of paper of the type X** is money in our country" – people are, according to Searle, collectively assigning *status functions* to "brute," independently existing entities and events. Generally, an assignment of a function to an object requires *intentionality*. For example, something is a tool only if it is intentionally treated as a tool. Status functions are a special case because objects and events can have them only by the virtue of having a collectively accepted status. Unlike the existence of a tool, the existence of money or a state is a social or institutional and not a private matter. Private money is as impossible as private language. Moreover, the assignment of status functions changes the *deontic powers* possessed by individuals and groups. By becoming a member of a legislature or by acquiring money, people acquire new rights, duties, responsibilities, permissions, competences, and immunities.

Searle (unlike some other contemporary social ontologists, e.g., Margaret Gilbert or Eerik Lagerspetz) is not particularly interested in law. Nevertheless, legal theorists may recognize that there is something familiar in Searle's description. Hans Kelsen's *Pure Theory of Law* is usually treated as an epistemological, not as an ontological, view; however, the problem formulated on the first pages of his *Pure Theory of Law* (the second edition of *Reine Rechtslehre*) is clearly an instance of the general problem that motivates modern ontology of institutions:

> People assemble in a large room, make speeches, some raise their hands, others do not – this is the external happening. Its meaning is that a statute is

> being passed, the law is created. (. . .) A man in a robe and speaking from a dais says some words to a man standing before him; legally this external happening means: a judicial decision was passed. A merchant writes a letter; this means they have concluded a legally binding contract. (Kelsen 1967, 2)

According to Kelsen, "external natural facts" (the *X*-terms in Searle's scheme) acquire a legal meaning because they correspond with legal norms (Searle would speak about constitutive rules). "Parliament" and "contract" are legally defined entities (i.e., *Y*-terms). All the members of a parliament change during the course of time and its physical location may also change. Nevertheless, it is the *same* entity, the parliament, because it is identified by referring to the relevant norms. On the other hand, the very same people who constituted the parliament may assemble in the same premises and make similar external actions without being a parliament. Searle (2006) tells how "human beings have the capacity for seeing and thinking at a double level. We can both see the piece of paper and the dollar bill." This statement could work as a nice summary of Kelsen's neo-Kantian view that human beings have an inherent ability to conceptualize the world both in causal and in normative terms.

Searle's theory is certainly the most influential account of institutional and social facts in contemporary social ontology (Koepsell and Moss 2003). Largely independent but somewhat parallel approaches to social and institutional facts have been developed by Raimo Tuomela (1995, 2002, 2013), Margaret Gilbert (1989, 2000), Eerik Lagerspetz (1989, 1995), and by others. They disagree on many issues, most notably on the question how the underlying collective attitudes should be analyzed. However, they all accept at least three theses which they share with Searle, and which, in an oblique way, were already present in Kelsen's works. First is *performativity*. A shared attitude of a certain type toward an institutional fact contributes to the truth of a sentence describing the fact. For example, if a group accepts certain objects as money, then, under the appropriate circumstances, these objects are money for that group. Second is *reflexivity* or *self-referentiality*. If a sentence describing an institutional fact is true, the relevant attitude is present. If, for example, it is correct to say that certain objects are money for a group, then its members do accept them as money. In some cases, the self-referential speech act is explicit. For example, it is printed on a dollar bill that it is legal tender; a preamble of a constitution says that the constitution is binding and so on. Together, performativity and reflexivity imply that a proposition expressing an institutional fact is true if and only if it is accepted by the relevant people. Third is *qualified ontological realism*. In spite of their attitude dependence, institutional terms refer to things and properties that exist. Their referents are not fictional. Therefore, statements and beliefs about their referents can be literally true or false, and some of them are literally true. Institutional facts are like natural facts in the sense that they are not dependent on the beliefs and actions of any particular individual. They are unlike natural facts in the sense that they are dependent on the beliefs and actions of *all* relevant individuals. Berger and Luckmann (1966) discuss the paradox that human beings are capable of producing a world they then experience as something other than a human product. The source of this experienced paradox is that while we all contribute to the existence of institutions, and in that sense they are *our* products, none of them can be *my* or *your* product. According to Searle's formulation, these facts are *ontologically subjective* but *epistemically objective*.

Consequently, there are acts which are possible for any one individual without being possible for all individuals. An individual may withdraw his deposit from a bank, or break the law, or the rules of a game, without causing the change to or collapse of the institutions concerned. Such an action would not be possible for all individuals acting as a collective. Conversely, there are acts which are possible only for all individuals, but not for any single individual. Changing, creating, maintaining, or destroying institutions are examples of this. In institutional contexts, all individuals, taken as a collective, can be free, while the possible actions of any one individual are strictly constrained. Only groups and communities can establish or change laws, monies, or symbol systems. The fact that the options open for any

individual are not the same as the options open for all individuals is not a contingent matter; rather, it follows conceptually from the nature of institutions.

Criticisms, Qualifications, and Rebuttals

The theories of social ontology have invited plenty of discussions and criticisms. To take an example, long before the advent of modern social ontology, the Scandinavian legal realist Karl Olivecrona denied the reality of such institutional entities as rights, duties, or money. His argument was that because these "things" were dependent on human attitudes and on the use of language, they *could* not be real (Olivecrona 1939). (To put it in Searlian terms, in Olivecrona's ontology, there were only brute facts.) By looking some of the standard criticisms more closely, we may be able to understand better the views put forth by the social ontologists.

It seems that many facts about our societies and their institutions do *not* exhibit performativity and reflexivity properties. Indeed, most facts which are in the interest of empirical social scientists and historians are not *directly* dependent on general acceptance (Epstein 2015). Consider the sentence expressing a (alleged) fact "In the developed market economies, the income inequalities have increased during the last twenty years." The truth of the sentence is not dependent on any collective attitude. Even if all people in developed market economies were unaware of its truth, or even if they unanimously rejected it, it might still be true. The same holds with most empirical and theoretical generalizations in economics, sociology, political science, and social psychology. They are often or always *indirectly* related to some facts which have the properties of reflexivity and performativity. Arguably, that something is money in a society is such a fact. Nevertheless, all the theoretical and empirical findings of monetary economics are essentially independent of our attitudes toward these findings. However, there seems to be an obvious reply to this criticism. The recent theories of social ontology are simply over-advertized. In spite of all the talk about "social reality," "social world," and so on, these theories are actually dealing with a small – albeit important – segment of the social world. They are about its institutional building blocks, not about everything that may justly be called as "social" or "institutional."

Furthermore, it may be asked whether Searle's constitutive rules are actually a necessary element in the analysis. We noticed that the existence of such a rule must itself be an institutional fact. In order to avoid infinite regress, we have to suppose that at least some institutional facts – for example, the existence of an ultimate rule of recognition in a system of rules – must be based directly on collective acceptance. Then, constitutive rules seem to be a dispensable element in the analysis. To take another example: suppose that in an improvised political meeting, somebody starts to wave a homemade flag, shouting "Let this flag symbolize our movement!", it may well happen that the flag will start to symbolize the movement in question. Again, there is no preexisting constitutive rule that makes the flag a symbol. The relevant constitutive rule –"an X-colored flag counts as a symbol of the Y movement in C" – emerges together with the performance. In a recent formulation, Searle (2010) emphasizes the role of declarative speech acts of the type "Hereby, X is declared to be Y." As in the flag example, such a declaration may have the effect that X is counted as Y, although there is no preexisting rule, norm, or precedent with that effect. However, it is *not* true that every institutional fact is established by a definite foundational speech act. Many institutional practices, most notably (but not exclusively) linguistic practices, are results of slow evolutionary processes.

A potentially more serious problem is that collective acceptance is not a necessary element. For example, there is a constitutive rule in every organized modern society that standard bank notes are money. If there is an automatic printing machine producing bank notes, the produced items are money at the moment they come out of the machine. Suppose that some bank notes are immediately destroyed in a fire when they emerge from the printing machine. No one would have had time to form an attitude toward these particular pieces of paper, to accept or reject them, or

even to become aware that they had existed. Nevertheless, by virtue of a well-established constitutive rule, these objects were money. Similarly, although perhaps less obviously, a legislative proposal that is accepted and promulgated by the parliament may be a valid law even if it is not generally known or is systematically disregarded by the citizens. There are those – for example, the Scandinavian realists in legal theory (e.g., Olivecrona) and finitists in metaphysics and in sociology of knowledge – who actually think that ineffective rules do not exist or that the bank notes which were destroyed before people recognized their existence were not money. But the mainstream thinkers in social ontology are willing to admit that an institutional fact may have different grounds. A statement "*a* is *Y*" describing an institutional fact may be true either (a) because in the relevant community, people collectively accept that *a* is *Y* or because (b) there is a generally accepted rule, norm, or practice in the relevant community that *X*s are counted as *Y*s and *a* happens to be an *X*. By becoming *rule dependent*, some particular institutional facts – e.g., that a particular piece of paper is money or that an act of parliament constitutes a valid law – may gain a relatively independent existence (Lagerspetz 1995).

In Searle's initial scheme, the *X*-term refers unambiguously to a physical object or event, to "brute" facts. However, in some cases, the *X*-term can itself refer to something institutional. Consider a case in which a work of art (*Y*) is made of dollar bills (*X*). In this case, it may be an essential aspect of the new institutional object that its parts already have an institutional status function, that is, they are real money. More intriguingly, there seem to be cases in which there is no identifiable *X*-term. For example, in many jurisdictions, a corporation exists if it is established in an appropriate way. There is no preexisting object *X* which becomes a corporation. Rather, the law only requires that a certain speech act (according to Searle, a declarative speech act) be performed in the right context. Interestingly, Hans Kelsen (1949) thought that the state was the prime example of such a situation. According to him, there was no *nonlegal* fact or set of facts which could be identified with the state; the state could be identified only by referring to the relevant legal norms.

The above analysis of institutional facts is often refuted on the grounds that it seems to move in circles. According to the reflexivity thesis, a necessary condition for the existence of an institutionally defined property or entity is that it is believed to exist. Then, the term which appears in analysandum also appears in analysans. Is this not an obvious logical defect? It would be if our purpose were to give a *reductive* definition of the analyzed notions. ("Instead of saying 'P,' you may say 'Q & R'.") However, this is not the aim of any of the analyses. By analyzing "money" as something which is believed to be money in the relevant community, the social ontologists try to discern a connection between the use of the concept and a condition which holds with respect to money, but not with respect to some other concept or class of things. While a circular or reflexive analysis of this kind does not give us the meaning of the word "money," it provides us with some information which may help us to determine the extension of the concept.

There is a more subtle answer to the circularity charge – not accepted by all social ontologists (e.g., not by Searle). The seemingly circular nature of institutional facts is not an anomaly, for there *are* things in the world which are capable of self-reference and for cross-reference. Propositional attitudes – such as believing, knowing, intending, hoping, and fearing – have this capability. We may have beliefs about other people's beliefs, while they have at the same time beliefs about our beliefs. This gives rise to the phenomenon called *mutual* or *shared* belief or common or mutual knowledge (the terminology is not well established): everyone in a group believes that P, everyone believes that everyone believes that P, and so on. The analysis is circular, or reflexive, because the things referred to in the analysans, beliefs, are themselves reflexive (Lagerspetz 1995).

The nature of collective attitudes is the most disputed issue in social ontology. Searle, Tuomela, and Gilbert all maintain, in spite of their numerous differences, that collective intentionality or we-intentionality is an irreducible attitude which is needed to explain the emergence

and persistence of institutions. Searle has emphasized that collective intentions are sui generis. They cannot be analyzed in terms of individual I-intentions plus shared beliefs. Consider a symphony orchestra: when the members intend to play, say Sibelius' Symphony No: 7, the individual performances of the members are tightly coordinated and interdependent. The intention of, say, a clarinet player is not just that he or she is going to play the relevant part; he or she intends to play it only *as a part of the general performance*. Such strong forms of collective intentionality are often necessary for the *creation* of institutions; consider the preparation, acceptance, promulgation, and implementation of laws and policies in a modern state.

However, institutions are not necessarily *maintained* by such "stronger" collective propositional attitudes. Consider the creation of the common European currency. The politicians and top bureaucrats in the European Union certainly shared a common purpose – perhaps a Searlian collective intention – to create a European currency. The ordinary Euro-citizens did not, however, participate in the intention. They did not intend to create a new currency (not even when they liked the idea), because that was beyond their powers, and, for conceptual reasons, one can intend only such things one is able (or believes to be able) to accomplish. Most people just had to accept the new currency, pretty much as they have to accept a change of weather. Unlike the weather, the continuous existence of a European currency depends on the fact that the Euro-citizens believe that certain items given to us are money, that they believe that their fellow Europeans are willing to accept them as money, and that they all act accordingly. The existence of large-scale institutions is not dependent on anything like a common purpose or agreement in a strong sense. Rather, it depends on the fact that, as anonymous members of a society, we have to take it as given that our fellow members have certain beliefs and expect us to have certain beliefs. Also, the *collapse* of such institutions – when, for example, a legal system ceases to be effective in a civil war or a currency ceases to work as a means of exchange in hyperinflation – does not require strong collective intentions. In many cases, such collapses are completely *unintended* results of other (perhaps collectively intended) actions and events.

Conclusion

In their sociological work, Peter L. Berger and Thomas Luckmann describe what might be called the basic paradox of institutional facts:

> The institutions, as historical and objective factities, confront the individual as undeniable facts. The institutions are *there*, external to him, whether he likes it or not. (. . .) Since institutions exist as external reality, the individual cannot understand them by introspection. He must 'go out' and learn about them, just as he must learn about nature. This remains true even though the social world, as humanly produced reality, is potentially understandable in a way not possible in the case of the natural world. (. . .) The institutional world is objectivated human activity, and so is every single institution. In other words, despite the objectivity that marks the social world in human experience, it does not thereby acquire an ontological status apart from the human activity that produced it. (Berger and Luckmann 1966, 57)

As Berger and Luckmann remark, the "objective" nature of institutions is a potential source of alienation. Institutions, although built on human conventions, tend to appear us as natural facts which are outside any human control – a phenomenon already noticed by Marx as well as Durkheim (2014). It is also clear that institutions are always sources of power.

Nevertheless, it is important to notice institutions are *also* potential sources of human freedom, in three different ways. The standard liberal argument is that institutions extend our freedom by protecting us against the unjust intrusions of *others*. However, there are two other, less obvious connections between institutions and human freedom. First, by facilitating *coordination*, institutions make us possible to act in concert. Second, institutional rules create normative powers: by virtue of institutional rules, we may promise and make contracts, vote and marry, commit ourselves, and step into institutional roles. Because of institutional facts, we are able to do new things, things we cannot do outside institutional contexts.

Cross-References

▶ Conventionalism
▶ Institutionalism: Legal
▶ Institutionalist Theories of Law

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Institutionalism: Italian

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Introduction

It is beyond doubt that Italian jurisprudence left a mark on the concept and philosophy of "institution." Not only because the Italian jurist Santi Romano and the French jurist Maurice Hauriou are the founding fathers of legal institutionalism, but also because of the specific nature of Italian institutionalism. Italian legal institutionalism offers more than a theory or conception of law: it can be regarded as the seedbed of a counter-history of the legal phenomenon in the modern and the late-modern eras. In the beginning of the twentieth century, the exponents of legal institutionalism moved away from conventional legal paradigms to yield a variety of concepts that are helpful to understand the roots of some contemporary legal and political phenomena that do not take the form of state-based legal productions.

The strongest reason for such a seemingly bold portrayal of a context-specific theory of law and the state is that, in the span of 30 years, Italian legal institutionalism served as the battlefield for three groundbreaking conceptions of law that deftly touched upon and rethought many of the most relevant aspects of the legal phenomenon. The three theories I will briefly discuss in the following entry impact the nature of law as a foundational element of human sociality; I will argue that these three theories are incompatible because premised upon particular forms of social ontology and conceptions of normativity.

Although the jurists and philosophers who contributed to Italian legal institutionalism are numerous, my analysis will revolve around the work of Santi Romano, Widar Cesarini Sforza, and Costantino Mortati, who are the authors of the aforementioned theories. I claim that the interplay of these three theories allows a rare foray into some of the fundamental questions of legal theory.

Before proceeding with this analysis, a proviso is required: "institution" is a signifier that hardly refers to the same signified. My suggestion is to view it as a volatile, unfixed, hollow space that gets filled with different contents depending on a more complex interaction among the constituent elements of these authors' overall theory. This explains why I will not discuss the meaning they attribute to the term "institution," or whether or not one version dovetails with another. Rather, I will home in on the basic elements of their portrayals of law. My goal is to outline three fundamental institutionalist models, which I will label "pluralist institutionalism," "decisionist institutionalism," and "material institutionalism." In doing so, my concern will be with casting light on how these authors investigate and finely arrange the main concepts of legal and political theory in such a way as to produce three compelling readings of the relation of politics, law, and society.

Santi Romano: Pluralist Institutionalism and the Identity Between Law and Institution

By breaking the ties with dominant traditions of legal formalism and legal positivism, Romano's body of academic work on the law and the state provided a set of conceptual lines that served as a refined interpretation for such a tumultuous epoch. Indeed, the complex sociopolitical conditions of early twentieth-century Europe were posing a lethal threat to the sturdy continental nation-states of the late nineteenth century. Anti-parliamentarist, socialist, and Marxist movements, insurrectionary anarchism, irredentism, revolutionary syndicalism, and other anti-systemic turbulences challenged the authority of the state and the pre-eminence of state law over alternative forms of governing and, even more profoundly, structuring the social world. As early as 1909, Romano identified the pluralist state as the political form that would follow the more cohesive nation-state. In an essay called *Lo Stato moderno e la sua crisi* (*The Modern State and its Crisis*), he made the claim that such a political turmoil would change once and for all the shape of the state as a supreme authority endowed with exclusive legislative powers and the monopoly of coercion. For the alleged unity of the state – which Romano regarded as a fictitious production of state public law – was confronted with a set of organizations and associations that were developing power and tended to connect with each other to launch a violent attack on the state-form. Romano believed this process was conducive to the gradual decline of the legislative state emerged out of the French Revolution and to the complete reorganization of its apparatus as a much looser complex of semiautonomous sub-state bodies.

Romano regarded this novel, astounding scenario as the materialization of a factual though neglected historical circumstance: the fragility of the link between the general phenomenon of law and the law of the state. In his view, these are two distinct phenomena that merged on account of transient historical events. Accordingly, the teleological interpretation of state law as the "destiny" of law – as if the legal system of national states represented a perfected form of law – was nothing else than an unquestioned assumption of mainstream state-centered paradigms. Thanks to his deep sensitivity to the history of law, international law, and canon law, Romano put forward a theory that was meant to do justice to the law as a broader phenomenon than modern statehood. To achieve this, he did not go down the road of a historical analysis of legal regimes preceding the modern state-form; nor did he, as contemporary legal sociologists or legal realists did, provide an empirical account of the role played by elements other than legal norms, such as processes, disputes, and other mechanisms. Romano was adamant that his inquiry should be strictly confined to the field of law and set out to demonstrate that the concept of law is more comprehensive that the contingent

form law took in between the eighteenth and the twentieth centuries.

In 1918 Romano licensed his jurisprudential masterpiece, *The Legal Order*, which immediately met with phenomenal success (not only in Italy, as translations of this book are available in a variety of languages). Such a milestone of Italian jurisprudence kindled a series of debates on a host of themes running from the nature of law to legal pluralism, so as to touch, with incomparable virtuosity, upon the most fundamental issues of legal theory, public law, and international law. The pillar of Romano's theoretical edifice is his notion of institution, which he introduced to unravel the conundrums that he claimed jurisprudence had vainly wrangled with. Romano singled out three basic shortcomings of state-centered theories of law. First, they postulate an intrinsic link between the law and the state. Second, they reduce the law to a set of norms. Third, these norms are only conceived of as rules governing conduct. The first of the two chapters of *The Legal Order* is intent on doing away with these assumptions as, Romano maintains, they impair a sounder understanding of the legal phenomenon.

Unfortunately, understanding what the law is by perusing Romano's considerations on the institution is far from easy. His arguments are beset by a few circularities and some sophistications. However, if one looks closer, these prima facie flaws turn out to be a pointer to a more ambitious inquiry into the *onto-normative* character of the legal phenomenon. This means that the key to Romano's inquiry does not lie in his notion of institution but in his more complex conception of normative phenomena. Indeed, the law cannot be disentangled from the more general process of *organization*. On his reading, the law is neither prior nor subsequent to the entity that issues it, as it is that particular normative frame – one that could be called "constitutional frame" – that makes an entity that entity. With a terminology that is certainly alien to Romano, I would put it as follows: the law is something with reference to which an entity constitutes itself and accounts for itself as that particular entity.

Evidently, this conception feeds off an inextricable conjunction of the factual and the normative spheres. Such a constitutional frame is normative insofar as it successfully brings the entity into life. The fact has a normative force, while normativity has a factual origin. Using my own words again, I would say that the fact of an entity becoming that entity provides the *existence condition* for the constitutional frame, while the latter provides the *intelligibility condition* for an entity to be understood as that entity. Within Romano's conceptual framework, the notion of institution epitomizes such a special coalescence of existence and intelligibility conditions. The brocards Romano evokes to make sense of his concept of law – "ubi ius ibi societas" and "ubi societas ibi ius" – gesture to the circularity that this coalescence brings about. On one side, there cannot be any organized group without a basic normative regime, however tacit and unreflective; on the other, a normative regime always implies the factual existence of a group. Importantly, one's being a member of a normative regime changes one's position and identity. As a consequence, one's identity changes according to the normative regime to which one belongs. This means that the same individual is likely to be the bearer of as many identities as the normative regimes she is member of (the state, a religious or ethnic group, a political party, or even a criminal gang). In this regard, it is worth noting that Romano embraces the positivist separation of law and morality. He thinks morality is a normative order among others, while the influence between the orders is, and cannot be but, circumstantial and contingent. This means that, in his eyes, the question of whether or not a criminal gang's normative order amounts to a legal order is simply misguided, as it presupposes a moral assessment of something that is to be scrutinized from a purely jurisprudential standpoint.

Romano nonetheless constructs no hierarchies or taxonomies for distinguishing legal normative regimes from nonlegal ones. He never gets tired of repeating that "law" means "institution" and "institution" means "law." As the two are synonymous, every organized group that is recognizable as such in the light of a constitutional frame can be regarded as a legal entity. This pluralist conception of law, therefore, severs all ties with monist, state-centered conceptions and refutes the three

assumptions mentioned above. First, the link between the law and the state is historical and circumstantial, while the state-form by no means exhausts the gamut of legal forms. Second, law is a complicated interaction between the factual existence of a normative entity (existence condition) and that normative entity's accounting for its own existence with reference to a constitutional frame (intelligibility condition). Third, norms governing conduct are certainly important, but in order for the institution members to issue them, a broader organizational mechanism (i.e., the institution) is needed.

Widar Cesarini Sforza: Decisionist Institutionalism and the Jural Value of Interactions

Romano's conception of law comes down to the conclusion that any organized social entity possesses its own legal order and that the law is that which allows an entity to conceive of itself as an organized entity. In *Il diritto dei privati* (*The Law of the Private Parties*), Cesarini Sforza took issue with this conclusion as he accused it of objectivism. He praised Romano's elaboration on the notion of institution as the key to the legal phenomenon but contended he overlooked the individuals' contribution to the establishment of the legal order. In my own terminology, I would say that Cesarini Sforza objects to the constitutional frame as a whole being an intelligibility condition and breaks down such an integrated order into a multiplicity of legal relationships. The law as an objective order is nothing else than the recognition, and sanction, of a set of rules that private individuals develop within smaller practices to govern their interactions. This insight leads to Cesarini Sforza's intriguing theory of "jural relationships" (the literal translation of "rapporto giuridico" is "juridical" or "legal relationship," but I believe "jural" is better suited to render what Cesarini Sforza means in this context). These are interactions characterized by the interdependence of two agents such that the one is the bearer of a right vis-à-vis the other, while the latter has a duty to the former. To put it otherwise, jural relationships are interactions that can be cognized and described only with reference to the rule that makes them intelligible as relationships. If this is the case, Cesarini Sforza's inclination is even more pluralist than Romano's, because the source of legality is not the objective order that constitutes an entity but all distinct relationships that can be defined as "jural."

Romano's and Cesarini Sforza's theories, nonetheless, cannot be straightforwardly read on a continuum of different degrees of pluralism. For the latter's conception is conducive to a notion of law that is not reconcilable with the former's and yet exhibits a conceptual originality of its own. On my reading, Romano can be regarded as an example of *pluralist institutionalism*, while Cesarini Sforza as an example of *decisionist institutionalism*. If according to Romano there are as many legal orders as institutions, Cesarini Sforza believes that the legal order works as a jurisdictional agency conferring legality on jural relationships, or rather, making them enforceable through state power. This means that, while "jurality" is equivalent to "normativity," "legality" is equivalent to "enforceability." Accordingly, all jural relationships possess a normative value of their own, which is utterly independent of the legal order, despite the fact that the state only attributes legality (viz., public enforceability) to a limited number of them. In other words, the official legal order in a given geohistorical context selects and recognizes some jural relationships in order to transform them into public, compulsory legal standards, binding on the population as a whole. The official legal order of the state is a jurisdictional device that recognizes and incorporates only some of the potentially countless jural relationships created by social actors within the social realm.

Based on this, Cesarini Sforza's criticism of legal monism and state-centrism has different nuances than Romano's. While Romano insisted that all legal orders are on an equal footing and struggled, especially in the second chapter of *The Legal Order*, to determine the criteria that are supposed to govern their relations, Cesarini Sforza's turns out to offer a realist criticism of the equivalence between law and state legal

order. He takes the decisionist factor seriously; it is intrinsically connected to the way in which official law works in the social realm, as he averred that in every geohistorical context there is someone or, better, some elites who hold a monopoly on force and therefore are able to make a selection among the various jural relationships. Cesarini Sforza made it clear that all legal orders (including those many non-state, smaller legal orders Romano had in mind) always imply different degrees of selection, reduction, and exclusion.

The institutionalist nuance of Cesarini Sforza's conceptualization is particularly manifest in his theory of organizations, as he drew a fundamental distinction between organizations at a *fluid* (or *diffuse*) state and organizations at a *solid* state. Although he insisted that this distinction is neither ontological nor socially stable, it captures the core of the institutionalization process. In effect, fluid and solid organizations are elements of the same normative continuum, in which some organizations are merely transitory while some others undergo a process of institutionalization that stabilizes them. To explain what a fluid organization is, Cesarini Sforza made the example of a queue as a rudimentary form of institutionalization: a queue in a post office is institutionalized when there is a distribution of numbers, so that each new arrival may take a consecutive number and wait for it to be called. This view implies that every practice can deploy an internal, though elementary, form of organization that turns it into an ordered activity. More than three decades ahead of H.L.A Hart's practice theory, Cesarini Sforza made the case that institutionalization amounts to the emergence of a second layer of control made up of an organizational agency designed to supervise the activities undertaken in a specific interactional field, be this area transitory (such as a queue) or permanent (among the examples provided by the author, some of them fairly old-fashioned, there are social manners, chivalry, sports). It follows that solid organizations are fluid practices that have undergone a process of institutionalization and that have permanently adopted this more complex configuration. Within them, a more detailed specification of rules is structurally tied to the emergence of specialized bodies or agencies designed to govern the activities of the broader range of a population.

Costantino Mortati: Material Institutionalism and the Political Nature of Law

While Cesarini Sforza's conception of organization might seem to leave some room for a reconciliation between his theory and Romano's portrayal of institution, in reality they build on quite different conceptual devices. In particular, for Cesarini Sforza, crucial to the ignition of the institutionalization process is the reflective use of the rules – mainly produced within the interactions among individuals – on the part of someone who takes it upon herself to create a second layer of administrative control. Rules and procedures, however informal, turn out to be key to the emergence of the legal phenomenon. Quite the opposite occurs in *The Legal Order*: Romano indefatigably reiterated his conviction that there is no gap (either temporal or ontological) between the emergence of an institution and the emergence of its constitutive rules. The institution is a whole that allows no gap between the normative and the ontological phases. This element of Romano's theory attracted the fiercest criticisms, as Costantino Mortati pointed out. In a book that was destined to become a hallmark of a century of constitutional theory and constitutional practice in Italy, *La costituzione in senso materiale* (*The Constitution in a Material Sense*), first published in 1940, he chided Romano for the ambiguity affecting the clash he produced between the normative and the ontological.

Mortati raised the issue of the temporal relation between the emergence of the institution and the production of rules and drew from a range of authors who criticized Romano on this point. These criticisms by and large stressed that either the institution presupposes the interactional activity of individuals and the rules it produces or it is a sociological bedrock in terms of social forces and powers, one that sets in motion an institutionalizing movement. If Cesarini Sforza, as I explained,

opted for the former hypothesis, Mortati constructed a whole theory on the latter. Much in the same way as Carl Schmitt argued against Hans Kelsen in *Political Theology*, Mortati maintained that when Romano wrote about the nature of the institution, and claimed he wanted to remain within the boundaries of jurisprudence, he simply neglected that the powers that bring an institution about are thoroughly legal. Accordingly, Romano's main flaw is that he failed to appreciate the *legal* relevance of something that precedes the production of norms. The nature of the institution, in Mortati's view, is the end, or the series of ends, that the political forces believe to be indispensable to the existence of their community and the coexistence of its population members. This is the meaning of the adjective qualifying Mortati's conception: "material." It is a "matter" that cannot be reduce to a sociological residue presupposed by the law, nor is it something that can be absorbed by the law through constitutionalization (like a sort of unreflective morality tacitly molding the legal order and subsumed under legal norms). Rather, like Romano, he thinks it is at one and the same time a condition of existence and a condition of intelligibility; unlike Romano, though, he thought these conditions do have a material nature, that they are concretely given, and that it is up to the jurist to identify and describe their constitutive elements.

Mortati had no qualms about the *political* nature of this matter. It is a force that emerges out of the organization of a group that affirms its own identity and its own ends by countering and defeating antagonistic groups that are the bearer of antagonist identities and pursue antagonistic ends. In other words, the prevailing group fosters its particular view of what a society should be like and what it takes to concretize this ideal. Yet, while the sociologist can look at this material state of affairs from a factual viewpoint, the jurist is called upon to dig deeper in order to discover its legal nature. For, this is a *normative fact*, established by the prevailing group, which *binds* and *constrains* the production of constitutional rules and the definition of legal procedures. It works like a material, mostly invisible, constitution that shapes the formal, visible constitution. Mortati clarified that the prevailing group does not simply impose a given set of goals that have to be achieved through public means and bodies but furthers a specific *way of understanding* what the public is, as well as its means and bodies. The material constitution is the outcome of a genuine and irretrievable battle for hegemony, a battle over the meanings that shape, and intend to shape, what the members of a population perceive as public. This is why the intelligibility condition, in this case, comes down to a conceptual grid impacting on the way people understand who they are and where they belong.

As I noted above, according to Mortati, Romano's theory, most constitutional theories make the mistake of regarding the material ground and the material contents of the constitution as falling outside the scope of legal inquiry. This amounts to qualifying the material constitution as a factual precondition necessary for a legal order to be grounded that, nonetheless, has no legal value of its own. In reality, he averred, determining the fundamental condition of the constitution is vital to the conceptualization of law, and this fundamental condition is nothing else than the political force that unifies and systematizes the body politic and, by doing so, molds the legal system. On this account, the primary function of any constitution is to provide and assure a stable conformation for the political form: (formal) constitutional law is nothing other than the provisional and contingent and thus mutable enforcement of the immutable and necessary stabilizing function that characterizes the material constitution. This is conducive to a confluence of is and ought that Mortati seeks to vindicate: the fact of a group imposing its own power provides the social world with an all-encompassing, systematic, and durable order. Following in Schmitt's footsteps, Mortati drags the political element of establishing a concrete order into jurisprudence as it offers the lens through which the legal order can be appraised as an intelligible and systematic whole.

Based on this, dubbing Mortati's as pure institutionalism would be a theoretical hazard. However, in its own way, his theory tried to make up for the ambiguities of Romano's conceptualization. He anchored the institution onto its material

ground and flexed the theoretical gap between the normative and the factual in such a way that the latter might serve as the entry into the former. It is in this sense that Mortati can be considered the advocate of *material institutionalism*. He got rid of the pluralist vocation of institutionalism and gave it a realist tinge, whereby the construction of a hegemonic conceptual grid to make sense of the constitutional order, as well as the society it governs, rests on a basic, ineradicable political effort to gain power. Indeed, one of the consequences of his legal theorizing was that the qualifier "legal" cannot be used as lightheartedly as Romano and Cesarini Sforza did. To define an order as *legal* is the upshot of a battle over meaning that entails a concrete struggle for power. Those who can lay a symbolic claim over the legal are those who managed to wipe out rival groups pursuing alternative ends. In doing so, Mortati does not merely aim to justify a theory of law as merely based on power. Rather, his concern is with unravelling the paradox of positivist thinking that envisages a sort of "conceptual stop," i.e., the jurist ought not talk about what lies outside the jurisprudential field. Mortati's investigation into the material constitution is a compelling attack on those theories (including, at least to some extent, those of Romano and Cesarini Sforza) that are blind to the political nature of the law. His reflections lie at the intersection of the legal and the political, where the legal order reveals itself as a political form, or even a political *choice*.

Conclusion

Based on my examination of these ambitious theories, I believe it is not a mistake to define, as I did at the outset, legal institutionalism as a counter-history of the legal phenomenon in the modern and the late-modern eras. Romano, Cesarini Sforza, and Mortati took issue with some of the most significant notions in the field of jurisprudence, public law, and private law in a truly innovative way vis-à-vis their contemporaries and even succeeding generations of legal scholars. Romano's premonitory depiction of a waning state that gives way to a plethora of non-state *legal* orders sheds light on the intimate link between the law and the process of organization. In doing so, he lucidly anticipated most of the criticisms that international law scholars, legal pluralists, and global legal pluralists in the last four decades have addressed to state-based, monist theories of law. Cesarini Sforza laid emphasis on a law that is naturally a-public, a law springing from small-scale, sectional, object-oriented interactions not aiming to construct any grandiose public bodies. More humbly, they aim to regulate autonomous spheres of activity. This conception disposes of both top-down, descending and bottom-up, ascending images of law that try to reconcile the private and the public. Cesarini Sforza's theory of law made room for all that is horizontal and rhizomatic and has no interest in the arborescent enterprise of making up the political. His concern with this aspect of legal life makes him a forerunner of contemporary approaches that break with the modern binary public/private and pay heed to semiautonomous phenomena of self-regulation. Mortati, in this sense, went in the opposite direction of Cesarini Sforza and concerned himself with the public-political. He made sense of the constitution as the hegemonic matrix that makes a legal order intelligible and effective and yet claimed it is something utterly material. He emphasized the propulsive force of establishing an end that lays out the rationale of the unity of a population, whose members would otherwise be exposed to the disaggregating push of antagonistic interests. In doing so, Mortati captured the indelible nexus between the political and the legal as something that cannot be reabsorbed by any written texts, as it has to be kept alive by averting the gap between the "letter" of the constitution and the fundamental political end which gives it meaning.

As I noted at the outset, in the span of 30 years, these authors advanced theories that offer precious diagnostic instruments to detect the developmental trajectories of the state-form. The decline of state legal orders, the rise of the private/public (or better, the "neither private nor public"), the renewed role of political elites, the

proliferation of sectional processes of organization, the collapse of legal monism: these are only few of the elements that we can borrow from Italian legal institutionalism. At the same time, more than in the past, these theories are amenable to intriguing developments and contaminations for contemporary legal scholars to take issue with emerging phenomena of legal assemblages that are less and less dependent on traditional legal apparatuses. These theoretical approaches can decisively help us understand how the social world and its political machineries are being reconstituted and reassembled in the wake of the growing self-regulatory dynamics of groups, collectivities, and whole sectors of the social realm.

Cross-References

► Legal Positivism: Inclusive
► State of Exception

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Institutionalism: Legal

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Introduction

"Legal institutionalism," like so many other apparently simple terms, is anything but a single, univocal idea. Rather, "legal institutionalism" is a term found in historic and present use in a range of disciplines, with so many variations in meaning as to elude brief definitional statement. Instead, it is more helpful to identify in a thematic way the main threads of legal institutionalism found in approaches to law that take understanding of social and legal institutions as key to explanation of the nature of law more broadly in its social context.

This entry proceeds in four sections following this introductory section "Introduction." In section "Institutions and Institutional Facts," we lay out in general terms what is typically meant by "institution" in institutional theories. In section "Legal Institutionalism and the Nature of Law," we discuss the first style of legal institutionalism, a conceptual approach found primarily in the work of analytical philosophers of law. In section "Social-Scientific Legal Institutionalism," we turn to a second style of legal institutionalism, prominent in social scientific disciplines such as economics and political science, which may be called social-scientific legal institutionalism. Section "Prescriptive Legal Institutionalism" presents a third, normatively oriented style of evaluative or prescriptive legal institutionalism, which aims to support the creation, use, and reform of institutions in law to achieve particular moral, political, or economic goals. We conclude in section "Conclusion" with consideration of opportunities for convergence of these styles of legal institutionalism, beyond their family resemblance insofar as they deploy similar terms in overlapping ways.

Institutions and Institutional Facts

Discussion of institutions is often conducted in the language of social facts and social rules, with "institution" reserved for special combinations of such facts and rules. Early sociologists such as Emile Durkheim and Max Weber suggest that understanding social order is usefully advanced by accounting for social facts, each such fact combining objective and subjective features: externally observable patterns of behavior (objective) coupled with individual understandings and commitments to those patterns of behavior (subjective) (Durkheim 1964; Weber 1922). This conception of social fact provided a basis for HLA Hart's later development of the idea of social rules, consisting in a number of distinguishable features whose combination constitutes the conditions of obligation. For Hart, a social rule consists in a pattern of externally observable behavior, a view on the part of the participants in the pattern of behavior that the behavior is in fact required, criticism directed toward those who deviate from the pattern of behavior, and an attitude that such criticism for deviation is justified (Hart 2012). A combination of social fact and social rule accounts of social order seems to be the grounding for various institutionally focused writers' finding of institutions in such situations as queuing at a bus stop (MacCormick 2007), treating a piece of paper as a five-dollar bill (Searle 1995), or burying the dead (North 1990, 4).

The distinctive features and merits of an institutional approach to understanding social order may be difficult to discern when looking for instances of the simplest form of institution. The idea of an institution finds much more use in situations where a plurality of social facts and social rules interact in a broader context, in clusters of rules, principles, practices, and shared understandings and expectations centered around particular topics or subject matters. So, for example, the idea of the institution of friendship marks not simply a set of social facts and rules regarding such matters as honesty, loyalty, and sharing amongst friends but the interaction of those rules with particular practices for their implementation, the relative priority of obligations of friendship relative to other obligations, and so on. Similarly, the institution of burying the dead must also be understood against a background cluster of norms, values, and understandings of such matters as personhood, respect, memory, membership, and more.

While there is disagreement about the best explanation of institutions and their constitutive elements in social facts, rules, perhaps principles, and other considerations, most agree on the general claim that institutions and institutional facts are ontologically different from their elements and from particular other combinations of their elements. John Searle, for example, marks the distinctiveness of institutions via a distinction of "brute" from "institutional" facts (Searle 1995; see also Anscombe 1958). As he explains, brute facts are independent of (so not constituted by) personal or social views or agreement. For example, that there is a river at the base of a particular mountain does not depend for its truth on whether we believe it or not, or whether we agree on it or not, or even whether we have the language to express it. It is simply an independent fact about the natural or physical world. (Some may insist that such a fact is indeed partly dependent on us, in the sense that it requires a language to express the fact that there is a "river" at the base of a particular "mountain." But this is a misunderstanding. The fact itself does not depend on our or anyone else's language, even though *expression* of the fact requires language of some kind.) Institutional facts are different in precisely this way, since they do depend on (i.e., are constituted by) our particular beliefs, understandings, and practices. That some particular piece of paper or bit of metal is a five-dollar bill or twenty-five cents is not a basic or brute fact of the natural or physical world. Rather, such facts depend on a community's beliefs, agreement, and practices that particular pieces of paper and metal are to count as money of a particular denomination. Absent such beliefs, agreement, and practices, money simply would not exist. In a series of influential books, Searle makes the sustained case that the social world in its entirety is essentially an institutional world composed of

institutional facts about all aspects of social life (Searle 1983, 1995, 2010).

Karl Popper also offers a helpful and influential three-fold distinction for understanding the ontological status of institutional facts. In Popper's view, there are three related but distinct worlds (Popper 1992). In World 1 are basic natural or physical facts about natural or physical objects in the world, such as facts about plants, mountains, and rivers. This world is composed of what Searle and others call brute facts. In World 2 are subjective facts. These are facts about the individual perceptions, consciousness, and experiences of subjects. World 3 is the world of institutional facts, which Popper describes as resting between the world of objective (or natural and physical) facts and the world of subjective facts. In World 3 are intersubjective understandings, beliefs, and commitments which create things such as social norms and social institutions. For such institutional facts to exist, neither natural nor subjective facts (nor both together) are sufficient. Instead, a social collective with shared beliefs and practices is required to bring institutional facts into existence.

Legal Institutionalism and the Nature of Law

The preceding account of institutions and institutional facts finds ready application in an institutional approach to law as a distinctive form of social order. Law and legal institutions are exemplary instances of social construction of facts insofar as law and legal institutions are the products of the beliefs and practices of their societies. In the Anglophone legal positivist tradition – from Thomas Hobbes, Jeremy Bentham, and John Austin to H.L.A. Hart and Joseph Raz, among others – the belief and commitment that law is a social construction has been taken as a kind of bedrock presumption, such that the jurisprudentially interesting question to be answered about law's relations to institutions is not whether law is institutional but rather to inquire into law's particular institutional form in contrast with adjacent institutions such as those of religion and art.

Early positivists including Hobbes, Bentham, and Austin found the key to understanding law in regarding it as an institution composed of a superior and inferiors (Hobbes 1985; Bentham 1970; Austin 2000). On these views, law exists in some particular community when the following conditions are met. A superior sovereign (some determinate person or group of persons) is effective in coercing inferior subjects to obey general or particular orders backed by the threat of sanctions or punishment. The sovereign itself is independent, so commands but is not itself commanded. According to this "command" or "imperative" theory of law, the institutional nature of law is a form of hierarchical relationship of power and force.

Later positivists, such as Hart and Raz, rejected the centrality of the idea of an independent sovereign and the use of force as key to understanding the nature of law. Instead, both developed the view that law's nature is best understood and explained by reference to its systematic structure. According to both Hart and Raz (here following Kelsen), there is nothing unique about the content of legal norms which distinguishes them from other kinds of norms (e.g., norms of morality, religion, or etiquette). Instead, the uniqueness of legal norms is to be found in their "mode of existence" (Kelsen 1967) in the special institution of a legal system. Hart famously introduced the idea of a union of primary and secondary rules to explain the idea of a legal system, with a special secondary rule, the rule of recognition, serving as the ultimate foundation of law in some social setting (typically a state) (Hart 2012). The rule of recognition is a special social rule, practiced by a legal system's officials, which sets out membership or validity criteria for all the legal norms of the legal system. Raz questioned the view that each legal system had a single rule of recognition (Raz 2009a, Chap. 5) but maintained many of the elements of Hart's view while adding others. In "The Institutional Nature of Law," Raz argued that a legal system is unified in the following way: a legal system consists of all those legal norms which law-applying institutions (primarily courts) are under a duty to apply as norms of the system, and which together form a system of

norms which makes a general claim to be comprehensive, supreme, and open (Raz 2009a, Chap. 6).

Hart's and Raz's theories are institutional theories in a second important sense, beyond their assertion that law's existence is best explained in terms of the institution of legal system as a particular kind of combination of social facts, rules, presumptions regarding reasoning and agency, and so on. Both additionally argue that the institutional nature of law is also to be found in the shared attitudes of a legal system's officials and primary actors. In section "Institutions and Institutional Facts" we introduced Hart's notion of a social rule, which involves the crucial idea of a critical reflective attitude or "internal point of view." While the spatial metaphor is somewhat misleading, the internal point of view is meant to mark the presence of an intersubjective belief and practice that some particular form of conduct is either required, prohibited, or permitted. Without the presence of the internal point of view on the part of the relevant actors or participants, some particular pattern of behavior would not be law or normative but would be more akin to a regularity of nature. Similarly, Raz argues that while not all societies need to have "our" concept of law to have law, their members, or some relevant subset of their members, must be aware of their rules *as rules* for there to be law (Raz 2009b, Chap. 2). Without such an intersubjective or institutional understanding, there would be no rules and therefore no law.

The views of Hart and Raz are unmistakably institutionalist theories of law, yet it is worth noting that each makes a relatively limited explicit appeal to institutionalist ideas. For both, institutionalist ideas are used mainly to explain the ultimate foundations of legal systems, found in the special attitudes of officials and law-applying institutions toward their rule(s) of recognition. Yet once such a foundation has been established, Hart and Raz move on to other tools to explain the distinctive features of law as a system of interrelated rules and norms. In particular, to explain legal obligation, the idea of a content-independent, peremptory reason for action was first introduced by Hart (Hart 1983, Chap. 10) and then developed to new heights by Raz (1975, 1995). The idea of a content-independent reason for action is of course a groundbreaking idea for thinking about law as a special kind of practical reason and fully deserves the attention it has received. Yet it is important to note that the idea of a content-independent reason, and related ideas such as peremptory norms and exclusionary reasons, presumes yet makes no further use of law's special institutional nature. This gap or neglect has, however, been addressed by later theorists.

In English-speaking legal theory, the institutional nature of law has been most thoroughly investigated by Neil MacCormick (MacCormick and Weinberger 1986; MacCormick 1999, 2007; but see also Morton 1998). Over 30 years, MacCormick developed an understanding of law as "institutional normative order." This term summarizes an extensive set of preceding arguments. In saying that law is normative, MacCormick captures the general fact of social life that humans use norms to govern their conduct and to assess the conduct of others. Such norms are often informally created in the sense that no particular individual or even determinate group of individuals can be said to be responsible for their creation. Informal norms, in this respect, grow organically out of social life (the norms of language acquisition and use are a useful example) (MacCormick 2007, 1). Where there are norms, order can often be found in a coincident fashion, since where there are social norms, there are people following common standards or patterns of conduct. MacCormick's famous example, mentioned above, is the norm of people queuing at a bus stop. This example is particularly instructive as a means to demonstrate how the same norm can be institutionalized in different ways. The practice of queuing embodies a norm which asserts the imperative that each must await his or her turn. In the case of queuing at the bus stop, in many instances of the practice, the norm is often informal. People take their place in the queue on the basis of their time of arrival at the bus stop (though perhaps with some informally accepted exceptions, such as stepping out of the queue for a moment to grab a coffee, or

allowing a parent with a small infant priority to board the bus, etc). When the bus arrives, people then board the bus in the order established by the queue. As MacCormick notes, where this norm is present it tends to establish and secure normative order on the issue of boarding buses where there are multiple people wishing to do so, and the informal norm does so precisely without pre-established, publicized rules or authorities to formally create and enforce the norm. The presence of the norm of queuing is to be understood itself as the presence of an institutional fact, albeit an informal kind (MacCormick 2007, 31). Yet the institutional fact underlying the norm of queuing could have a different normative status and force, including institutionalized legal force, even while the content of the norm of queuing remains the same.

What transforms an instance of normative order into an institutional order characteristic of law is, for MacCormick, the accompanying presence of formal authorities embodying assertions of warrant to control the normative order in particular ways. As MacCormick writes, "[c]onvention is not all. Queuing itself is not always a matter of purely informal normative order grounded in the social conventions of ordinary everyday life. It is often organized under authority of one kind or another" (MacCormick 2007, 21). For example,

> [o]utside stations and airports, there are taxi-marshals who organize and police taxi-queues, both to secure a taxi quickly and fairly for each passenger in turn and to ensure speedy throughput of taxis at the bottleneck that typically forms at the pick-up point at busy times. Sometimes (especially welcome in cold places) the taxi-line incorporates use of a numerical ticket roll, so that passengers can safely wait their turn in warmth indoors rather than brave sub-arctic temperatures on the sidewalk. (MacCormick 2007, 21)

Where formal claims to authority and explicit assertion of rules add to or displace informal conventions and norms, the presence of authorities gives the formalized institution a special character. First, there are now not only norm-users but also norm-givers and norm-enforcers, in the form of officers or systems holding positions of authority. Second, what might otherwise remain vague and possibly inefficient informal norms now become an institutional normative order where explicit rules are established and means of dispute resolution are provided. In MacCormick's view, such institutionalization of normative order is the defining aspect of law.

In *Institutions of Law* (MacCormick 2007), MacCormick offers his fullest statement of law as institutional normative order, with equal attention to two intertwined dimensions of institutions. MacCormick examines both the sense in which institutions are clusters of norms (defining particular wrongs, rights, and liberties) and the sense in which they are agents carrying out particular functions in the creation, application, implementation, and enforcement of norms. Attention to these two dimensions of legal institutions is an important aspect and insight of institutional theories of law, as they recognize that, while we can focus on the nature and function of norms in a formal manner detached from practice, comprehensive understanding of those norms must include understanding of the contexts in which they operate (See also Morton 1998). MacCormick's work investigates at length various kinds of public institution agencies and their powers and responsibilities, together with various economic and commercial institutions and civil society more generally.

The characteristic institutionalist concern with norms in context is evident in MacCormick's early work in the context of the modern state system of law and in his later exploration of newer forms of legal order. In early work on sovereignty, MacCormick distinguishes legal from political ideas of sovereignty, while insisting that each conception of sovereignty can only be fully understood in light of understanding of the other (MacCormick 1999). This attention to context enables MacCormick's institutional approach to apply to modern state systems of law while extending further into the law of supra-state orders, particularly the law of the European Union (MacCormick 1999). The scope of MacCormick's work demonstrates a special strength of the institutional normative order view: its capturing both familiar instances of law in state legal systems and its further application in explanation of various other levels and varieties of legal order (Culver and Giudice 2010). As we

shall explain further in the conclusion, MacCormick's extension of an institutional approach beyond familiar confines may offer inspiration to scholars seeking to develop explanatory approaches to an increasingly globalized world in which legality operates across and beyond historic borders.

Social-Scientific Legal Institutionalism

The approaches to law's institutional nature and context we have just surveyed are likely the most prominent instances of talk of legal institutionalism, for reasons including the professional prominence of the authors we have surveyed and the influence of their academic home institutions on legal education. There are nonetheless other authors considering legal institutions while asking different questions and applying different methods, resulting in quite different yet potentially no less valuable insights into legal institution. One area of exploration worth particular attention is the family of social-scientific approaches to understanding the causal and contributory roles of legal institutions in the development, shape, and performance of various political, economic, and social institutions more broadly. As is often the case, our descriptive title for this set of approaches risks giving the impression of a unified school where in fact diverse kinds of social-scientific legal institutionalist projects dwell. There is little point to isolating a core set of shared features across these projects in light of their diversity; yet it is safe to observe that such projects share the presumption that legal institutions do in fact make a difference to the behavior of individuals, groups, and communities, such that any introduction or change to a society's legal institutions can be seen to lead to or contribute to change in the development of various aspects of that society in turn. The goal of such projects is to understand these contributions and changes using the familiar social-scientific method of cause-and-effect analysis.

One early and influential example of social-scientific legal institutionalism is Douglass North's *Institutions, Institutional Change, and Economic Performance* (North 1990). North provides a helpful analytical framework for thinking about both formal and informal institutions as conventional norms with intersubjective meanings. He deploys this framework to show how particular kinds of legal-economic institutions, such as transaction costs, play a key role in explaining the performance of markets and economies, both where these succeed in reaching efficient levels of trade and commerce, and where markets and economies persist despite failing to provide the means of growth or conditions of adequate mutual benefit. The transaction costs include both formal institutions such as those of contract law, property law, and tax law and informal institutions such as those of reputation and information (i.e., the ways in which the reputation of economic actors are intersubjectively generated and understood and how information about actors, goods, and trade is generated, shared, and limited in socially relevant ways). Much of North's argument is of course designed to show the pitfalls of neoclassical economics, which focuses on the interests, preferences, and behavior of individuals as rational maximizers as key to understanding the behavior of economies and markets. As North and others argue, such a focus, which ignores the presence and effect of institutions, will inevitably fail in its social-scientific explanatory task.

A second important example of social-scientific legal institutionalism, also drawn from economics, is found in Hernando de Soto's *The Mystery of Capital* (De Soto 2000). De Soto sets out to explain why capitalism and economic development succeeded in Western states such as the USA but stagnated and continues to stagnate at far lower levels in other parts of the world, such as various South American countries, third-world states, and post-communist nations. One main reason (albeit not the only reason) is the emergence of centralized official legal-economic institutions in countries such as the USA. De Soto argues that capitalism led to such high levels of development in the USA (as well as unification of the USA) largely as a result of the establishment of institutions such as land registries and property laws. Land registries in particular were crucial, as these provided both a means of putting an end to

disputes and conflicts between federal government forces and settlers and established secure forms of title where only informal and localized norms of title existed before. Landowners' possession of legally recognized assets enabled them to offer collateral against loans from banks, supplying capital for landowners' investment in new opportunities. As security of title supported development of banks in tandem with development of land registries, property laws, tax laws, and associated legal-economic institutions, new forms of social interaction and order became possible and formed the preconditions for capitalist society and its characteristic economic growth. In contrast, de Soto argues many South American and less developed countries lack such preconditions, largely because the institution of land registries is absent, and with it forms of secure title necessary for comparable economic development.

There is an important commonality in the accounts of North and de Soto, exemplifying the kind of institutionalism found in economics. It is the idea that institutions play a role in shaping markets and economies, as well as their performance (either negatively or positively) by creating and altering incentives and opportunities for actors. And while some of the interests, needs, and desires of actors are given, other preferences can be and are generated by institutions themselves. This view is indeed not only present in institutional theory in economics but also in institutional theory across many social sciences, including sociology and political science (Peters 2012). The idea that institutions matter to the preferences, choices, and actions of relevant actors is also important for the third general kind of legal institutionalism, what we can call prescriptive legal institutionalism.

Prescriptive Legal Institutionalism

The first kind of legal institutionalism we have surveyed employs the idea of institutions to explain by philosophical means *what* law is. The second kind of legal institutionalism focuses on institutions to explain, using a social-scientific method of cause and effect analysis, how institutions play a contributory role to the shape, development, and performance of various aspects of society. Each instance of legal institutionalism has sought to answer significantly different questions using significantly different methods. The third kind of legal institutionalism we survey is no less distinctive than the others and answers a different set of questions while remaining sensitive to philosophical legal institutionalism and social-scientific legal institutionalism. Prescriptive legal institutionalism seeks to provide accounts of how to design, reform, or improve institutions according to values, principles, or goals deemed worthy of pursuit. Such values, principles, and goals can be of many kinds, including both economic principles such as efficiency and moral principles and values such as fairness and equality. Often a mixture of different kinds of objectives is found in legal institutional theories which aim to improve existing institutional frameworks.

An instructive example of prescriptive legal institutionalism can be found in recent work in the philosophy of international law. In *Justice, Legitimacy, and Self-Determination*, Allen Buchanan compares what he calls "primary right" and "remedial right only" theories of self-determination. Both theories attempt to guide interpretation and application of vague general norms of international law regarding self-determination, such as Article 1(1) of the International Covenant on Civil and Political Rights: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[1] According to primary right theories, any group constituted by either shared characteristics (ethnicity, culture, language, etc.) or voluntary association (e.g., by plebiscite) and capable of self-governance has the right to exercise self-determination, which includes unilateral secession to become a sovereign state. According to a remedial right only theory, peoples have a right to exercise self-

[1] http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf

determination, primarily in instances where this would involve secession, only as a last resort and remedy for systemic human rights violations or to prevent widespread human rights violations.

Both types of prescriptive institutional theory share many objectives, including the flourishing of peoples, protection of human rights, and liberty and equality. However, as Buchanan argues, each type of theory must be subjected to "institutional moral reasoning" to see which ought to be adopted in practice. Such institutional moral reasoning requires that each theory be responsive to existing institutional conditions while also aiming to improve on these. Buchanan identifies four success criteria, based on institutional moral reasoning, for theories of self-determination. Such theories must be minimally realistic, consistent with existing moral ideals in international law, morally progressive, and avoid perverse incentives (Buchanan 2004). These success criteria are meant to emphasize the relevant context for any development or modification to the international law of self-determination. Two main features of this context are particularly important in Buchanan's view: the increasing recognition and institutionalization of human rights since the second world war and the continuing prominence of state sovereignty (itself an institutional framework), where territorial integrity is highly valued and the imperative of its protection is a typical cause of conflict with other state and non-state actors. It might be the case that when these institutional facts of international life are absent, primary right theories of self-determination would be superior; but as Buchanan argues, such institutional facts are taken as real by various actors in international affairs. Therefore, they must be taken into account by any plausible theory of self-determination. In Buchanan's view, only remedial right only theories succeed on this score, and so they are to be preferred in the development of the international law of self-determination.

Theories of self-determination in international law, such as Buchanan's, are of course only one example of prescriptive legal institutionalism; but they do helpfully display the main features of this third kind of legal institutionalism. Prescriptive legal institutionalism aims to offer normative or evaluative guidance in the creation, development, or reform of existing institutions according to particular objectives (be they moral, economic, or other) but always in a way which is sensitive to existing institutional facts, whether these are of a formal or an informal kind.

Conclusion

Our survey of the diverse forms of legal institutionalism has demonstrated that there is as much diversity as commonality across the forms we have identified, leaving room for the impression that legal institutionalism does not refer to any particular substantial theory or practice. Legal institutionalism is better regarded, it might be said, as a special term for reference to a particular kind of relative density or clustering of norms. On this view, an encyclopedia entry of this sort serves largely as a kind of lexical definition reporting and disambiguating various uses of the term. We suggest, contra this view, that in MacCormick's work and elsewhere, there are important signals indicating that legal institutionalism is indeed worthy of being called an "ism" driven by specific questions and methods culminating in descriptive and prescriptive theories. As we noted in passing above, MacCormick's conception of legal institutions, growing from examination of other forms of social institution, is adapted to characterization of modern state systems of law. Yet this approach can extend beyond state systems of law, at least to the European Union as MacCormick has done, and beyond. The question of what might be beyond the European Union and likely to benefit from a legal institutionalist approach is worth further consideration in a world which is simultaneously globalizing and regionalizing.

We take globalization to refer to the increased pace of highly interconnected methods of global exchange in the form of flows of goods, funds, people, and information, and we take regionalization to refer to the chosen or unchosen rise of interconnected geographically proximate centers of interaction nonetheless connected to global flows. The role of various kinds of legal institution in these contexts warrants not just further investigation but investigation via extensions of legal

institutionalist questions and methods. As the rise of globalization has offered new opportunities for trade, migration, knowledge generation, and so on, issues beyond the interests of any single state and needing the active collaborative management of multiple states have given rise to institutions whose origins may be in international agreement yet appear now to have taken on quasi-independent roles yet to be fully understood. Some of such institutions are longstanding, such as the International Monetary Fund. Others are much newer and their status in an international institutional system is much less certain, such as the International Criminal Court. These institutions growing from initial formal agreement and control of states are accompanied by institutions whose legal status and interaction with other institutions is much less clear, such as the growth of blockchain technology (e.g., Bitcoin) enabling trusted transactions without a certifying authority and the associated rise of normative communities beyond the effective control of states. The prominence of such globally evident institutions and practices should not distract from attention to the rise at regional scale of a range of institutions whose relation to legal order is just as much a product of globalization. Some of the most striking examples of globalization are those which give novel institution-building options to social groups united by common interests yet divided by distance. The Inuit Circumpolar Council, founded in 1977, is an institution providing a forum for exchange and collaboration among Inuit peoples in Alaska, Canada, Greenland, and Russia. While the institution's present claims and actions are limited in scope, as a Consultative Status II United Nations body, it may nonetheless serve as a source of norms such as calls for inclusion of traditional knowledge in evidence-based decision-making and may yet develop greater institutional force for its claims (www.inuitcircumpolar.com/). Similar observations may be made regarding the Alliance of Small Island States, which "functions primarily as an ad hoc lobby and negotiating voice for small island developing States (SIDS) within the United Nations system"(http://aosis.org/about/). The forces of globalization have enabled the formation and operation of these institutions as communications and travel within and to and from remote regions are more frequent than ever before, at the same time as global developments give inhabitants of such remote regions new reasons to seek community and shared institutions advancing their interests.

Whether institutions of the various types just surveyed are sources of legal norms, authoritative determiners of the content, and application of legal norms or in some other way participants in law's function in social life varies by institution and may vary over time. Since our purpose here is largely to summarize, we cannot attempt to assess whether particular instances of novel institutional facts warrant the attention of institutionally oriented legal theorists. We can, however, suggest that the rise of a range of institutional facts of the sort just described may offer fresh reasons for theorists of legal institutions to give greater attention to overlaps and continuity among what we have depicted as relatively independent forms of analysis. This attention may be rewarded by both greater understanding of the relation between legal and other institutions and further improvement of the methods of investigation associated with legal institutionalism. Where conceptual or philosophical inquiries into legal institutions have focused largely on the most prominent phenomena within state systems of law, new social institutions with law-like features demand better analysis beyond insistence that explanation of their nature in the terms of state-based jurisprudence is sufficient. Whatever conclusions might be reached by conceptual or philosophical inquiry seeking to understand varieties of social and legal institutions, those conclusions seem likely to be aided by social scientific approaches whose examination of causes and effects – so the careers and evolution of particular forms of social institution – may contribute to better understanding of the ways legal institutions develop in relation to other social institutions. Both of these styles of legal institutionalism may serve as explanatory bases or accompaniments for normatively committed, prescriptive approaches to legal institutions. Prescriptive approaches may be particularly in demand as competing claims to institutional legitimacy in matters such as regional representation of indigenous peoples require development of suitable evaluative responses

unencumbered by the presumptions of state-rooted jurisprudence, which has yet to imagine a legal world composed of states and their institutions alongside other forms of non-state yet no less legal institutions. This last possibility warrants imaginative investigation from diverse perspectives associated with legal institutionalism, as an exercise in understanding what legal institutions can and cannot do, and just what various actors can expect of law as a means of social organization in a globalized world.

Our closing suggestion that overlaps in questions and methods among legal institutionalist approaches which warrants further attention is far from supposing that some sort of grand unified descriptive and prescriptive theory might emerge. Rather, we mean to suggest only that the range of new peri-legal institutions arising at global and regional scales of organization offers an opportunity to explore complementarity among diverse approaches which at present are at least largely non-conflicting while sharing concern with the same range of social facts. In this context, legal institutionalism might in time grow from these diverse roots to become a fully fledged theory of law explaining and advancing the normatively best possible legal institutions within and beyond state systems of law.

Cross-References

- ▶ Behavioral Economics and Law
- ▶ Hermeneutical Legal Theory
- ▶ Institutional Facts
- ▶ Institutionalism: Italian
- ▶ Institutionalist Theories of Law
- ▶ Legal Theory: Descriptive

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Institutionalist Theories of Law

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Legal institutionalism is a current of thought that is part of the broad "revolt against formalism" that took place in the late nineteenth century. This framing applies to the "classic" institutionalism

associated with Santi Romano (1977, 1983) and Maurice Hauriou (1925, 1929, 1933), as well as to the more recent neoinstitutionalism developed by Ota Weinberger (1988, 1991) and Neil MacCormick (MacCormick 1973; MacCormick & Weinberger 1986). Institutionalism can, in this sense, be described as an attempt to solve the many problems deriving from a narrow conception of law – essentially conceived as the authoritative issuance of a "political superior" or of the state – and from legal science as a purely logical and systematic arrangement of legal norms and concepts or "institutes."

In opposition to legal positivism – with its insistence on bracketing out any strong normative (moral or political) arguments and on discounting the social context in which legal norms operate – institutionalism asserts the normative, and hence legal, bearing of social facts. This new paradigm has taken several forms, the least extreme of which, and the most epistemologically grounded, is legal institutionalism itself.

In a 1917 article titled "L'ordinamento giuridico," the Italian jurist Santi Romano offers an initial, fully fleshed-out account of institutionalism as a legal theory. This account rests on two main tenets, one equating the legal system with an "institution," and the other equating an institution with an organized social form. This is tantamount to breaking with one of the main dogmas of legal positivism, namely, the unity of the sources of law, all of which are embodied in the form of the state. Romano's institutionalism thus posits a *plurality* of legal systems, all of which are open-textured and indeed "contextured": They are not sealed off from society but rather woven into it, tracking its every movement. But this paradigm shift comes at some cost to the concept of a norm, with which the concept of an institution is set into sharp contrast.

The approach Romano takes in dealing with the sources of law is antivoluntarist, and it could even be qualified as anticreationist, which is to say that Romano sees the law not as a norm that is willed into existence, and thus created, by an enacting authority, but rather as something that comes into being by spontaneous production and is always in effect wherever there is a sphere of social relations. As he puts it, "statutory enactment is never the beginning of law: it is, on the contrary, an addition to pre-existing law [. . .] or a modification of it." (Romano 1977: 82). In this sense, the lawmaker or legislator cannot properly be described as a "maker" or "creator" of law.

Another important version of institutionalism is the one offered by the French constitutionalist Maurice Hauriou, who reengineers Romano's construction in three ways. First, he introduces a somewhat idiosyncratic ontology of legal objects, distinguishing between institutions as persons and institutions as things. Second, he relocates the notion of institution as person into the realm of the political by making it roughly coextensive with the notion of the state as a representative body. And third, he debatably gives representation an irrationalist slant, introducing the interesting concept of a "guiding idea." It is this idea that forms the core of an institution, giving it force and accounting for its existence: The institution is thus construed in existential terms, in the sense that it owes its very existence to the guiding idea lying at its core, an idea of which it is the essential embodiment. This makes for a conception that easily lends itself to genuinely illiberal outcomes. In fact, it is to Hauriou and his conception of political representation that we can trace Eric Voegelin's theory of the authoritarian state (Voegelin 1999). The same can be said of the spurious German institutionalism of the 1930s, whose chief proponent is Carl Schmitt. Indeed, Schmitt continues to set norms and institutions in opposition to each other (albeit dramatizing this opposition), in part because in the notion of a norm he makes out a principle of equality that cannot be reconciled with his radically antidemocratic vision of law and politics.

There are therefore three varieties of "classical" institutionalism, two of them legitimate, so to speak, and one more or less "illegitimate," whose ascription to institutionalism is controversial. The first two varieties, the "legitimate" ones, are the French and the Italian, captured in the work of Maurice Hauriou and Santi Romano, respectively. The third variant, the "illegitimate" one, is Germanic and is found in the work of authoritarian-minded authors such as Rudolf Smend (1969: 66 ff) and Eric Voegelin (1999) but above all in the constitutional theory of Carl Schmitt,

particularly in the period from the early 1930s to the mid-1940s, in what came to be known as *konkretes Ordnungsdenken* (concrete order thinking). It is worth noting that all these authors are public and constitutional lawyers, suggesting that institutionalism came as a response to issues that are felt to be most urgent in public law, such as the need for a collective framework under which individuals can interact with one another, along with the need for stability in this scheme of interpersonal relations, all the while conferring legitimacy on political authority.

Before we go deeper into the differences between the three "classic" versions of institutionalism, however, it is worth pointing out that, for all the diversity that sets them apart, they can all be seen to share an understanding of law as marked by three features: Law is conceived as "societal," "ordinative," and "plural." This means that, in the first place, as we have seen, law is closely bound up with society, so much so that for some institutionalists the two terms are synonymous. In the second place, law serves an ordering or organizing function. And, in the third place, law is not monolithic: Far from being a single, coherent, self-enclosed system of rules that governs across a territory, law is actually a plurality of interconnected legal systems that interact with one another on various levels and in various areas of social life.

Having said that, we can now go back to the two "legitimate" institutionalist theories – those of Hauriou and Romano – and point out four marked differences between them. First, for Hauriou, an institution is in a sense *prior to* law. "An institution," he says, "is an idea of a work or enterprise that is realized and endures juridically in a social milieu" (*Une institution est une idée d'œuvre ou d'entreprise qui se réalise et dure juridiquement dans un milieu social*) (Hauriou 1933: 96). For Romano, by contrast, the concepts of law and institution are one and the same thing. "Every legal order," he writes, "is an institution, and, vice versa, every institution is a legal order: the equation between the two concepts is necessary and absolute." (Romano 1977: 27, see also 1946: 55).

Second, while Hauriou argues that institutions must have a constitutional and representative form if they are to properly qualify as such, and that they must therefore realize a kind of rule of law, even if only on a minimal scale, Romano is deeply critical of that idea, arguing that to invoke the rule of law is to conflate two descriptive planes: that of the "scientist," and so of legal theory proper, and that of the moralist or politician, whose view is instead foreign to "legal science." (Romano 1977: 33–34).

Third, what count as constitutive elements of an institution are one thing for Hauriou and another for Romano: Hauriou identifies these elements as consisting of (1) an idea of social action that is to be realized, (2) an organized power through which that idea is realized, and (3) social acceptance of the same idea (Hauriou 1933: 91 ff). Romano, by contrast, identifies these elements as consisting of (1) a plurality of subjects, (2) the organizing structure that links them to one another, and (3) the regulating or governing power exerted though this ordering (Romano 1977).

And fourth, while Hauriou's view, influenced by Bergson's vitalism, is sometimes presented as a political philosophy, Romano's view – fully set in the legal positivist tradition and influenced by Otto von Gierke's *Genossenschaftstheorie* (von Gierke 1887, see also Fuchs 1979: 117 ff) – crosses into sociology. Indeed, for Hauriou, an institution is essentially normative, for at its core we find the ideal element, consisting not in the idea of the project or enterprise around which the institution is built, but in the principles of the rule of law or of political representation. Romano, on the other hand, is more realistic or, if you will, more cynical, considering that even the mafia, on his conception, is an institution: What matters, then, is not so much the underlying ideal element as the degree to which the institution is developed (its evolutionary stage) and how effective it is at doing what it does.

The outlines of the "illegitimate" variant of institutionalism are paradigmatically sketched out in a more or less occasional paper that Carl Schmitt wrote in 1934 titled "Über die drei Arten des rechtswissenschaftlichen Denkens" (On the Three Types of Juristic Thought) (Schmitt 1934). What is distinctive here is that, on the one hand, as

noted, institutions are clearly set in contrast to norms, but on the other, they are akin to decisions. In Schmitt's *konkretes Ordnungsdenken*, an institution is an organic community – not bound by any set of standards or conventions – in which individuals are embedded as parts of a whole they cannot transcend: This is a spontaneously self-regulating community that accordingly does not need any norms (always abstract and general) but rather owes its regulation to the vital manifestations that arise out of the mutual engagement of the members of the community (Schmitt 1934: 13). But what the community's regulation *ultimately* rests on is the decision-making of individuals who can establish a privileged position of contact with the same community, and in fact this is the *best*, most effective mode of regulation. Such institutionalism, then, rejects normativism – namely, the supremacy of norms – on account of the suspicion with which it views the latter's reliance on conventional rules understood as universalizable provisions: So construed, rules can only rely on a minimal set of factual assumptions and so cannot serve as explicit reasons for action – they cannot stand in for the capacity of subjects to think through the practical decisions that need to be made.

Schmitt thus uses institutionalism as a somehow hidden ideological justification for decisionism, which is the practical upshot of *konkretes Ordnungsdenken* (Schmitt 1934: 6 ff). Obviously, neither Hauriou nor Romano is a decisionist, and the latter even defends the normativist stance, which, unlike Schmitt, he does not understand to be inconsistent with the institutionalist stance. "Legitimate" institutionalism remains linked to a rationalist worldview, and one that, in the case of Hauriou, remains somehow wedded to the Enlightenment. Not so with Schmitt, whose intellectual impetus is anti-Enlightenment, irrationalist, and illiberal.

An altogether different development is the neoinstitutionalism that many years later would be advanced by Ota Weinberger and Neil MacCormick. Both started out not from an anti-formalist outlook but rather from ordinary language and the idea of "institutional facts" (MacCormick & Weinberger 1986: 49 ff; MacCormick 1973). What most fundamentally sets this new institutionalism apart from the earlier conceptions just surveyed is that it recovers the notion of a norm, which is now brought back into full relief.

Legal neoinstitutionalism springs out of two converging traditions of thought: analytical jurisprudence in the renewed form advanced by H. L. A. Hart (see Hart 1961) (of whom MacCormick was a disciple) and the "pure theory of law" in the critical and heterodox version constructed by Franz Weyr, a Czech thinker personally close to Kelsen – to whom the 1922 book *Der soziologische und der juristische Staatsbegriff* (The Sociological and Legal Concept of the State) (Kelsen 1922) was dedicated – and a professor at the law school in Brno (where Weinberger studied) (Weinberger 1988). Even if, at places, the philosophical positions staked out by MacCormick and Weinberger differ in significant ways, the differences are outweighed by the similarities. Hence the neoinstitutionalist label can be applied to both theories, whose common features can be described as follows.

To begin with, the two theories are broadly *antireductionist*. We can see this in the first place in the two theories' social ontological commitments, according to which social reality cannot be completely reduced to the material spatiotemporal reality (as the Scandinavian realists *à la* Olivecrona claimed). Accordingly, following the philosopher John Searle (1969: 50 ff), a distinction is drawn between "brute facts" and "institutional facts." Thus, law cannot be reduced to a set of rules, no matter how systematized they may be, for this does not account for the whole of law: In defining its concept, we need to also take other elements into account. These include the spheres of action made possible by the rules, as well as the principles of action at work in different social contexts: These principles inform the rules making up the legal system, and they form the basis on which judgments of right and wrong are made (see Weinberger 1987: 14, 1988: 79). So, in alignment with this antireductionism, neoinstitutionalism also moves away from an obsessively prescriptivist view of norms, which are now understood not only as restrictions but also as ways of

shaping the social space. So conceived, they do not only conventionally *restrict* spheres of action but also *expand* them. Law in this view is not mainly constraining human conduct; it first and foremost makes it possible, and then it constitutes it. Indeed, as MacCormick points out, institutions (such as contract, property, and marriage) enable human beings to increase the number of (institutional) facts existing in the world without necessarily increasing the number of physically existing objects (see La Torre 1993, 2020: 112).

Nonetheless, neoinstitutionalist anti-reductionism is primarily *methodological, not ontological* (La Torre 2020: 112). This means that, on this conception, legal concepts cannot be reduced to the normative or prescriptive structures through which they are implemented, that is, to mere instruments in the hands of the legal scientist (as legal realists in the manner of Alf Ross would have it). Legal concepts are not just devices for collecting data but are something productive of data themselves.

Two other common traits of the two main neoinstitutionalist theories are their *anti-prescriptivism* – under which norms cannot be reduced to imperatives, mandates, or rules prescribing a course of conduct – and a tempered or *moderate legal positivism*, which, on the one hand, conceives of law as a human-made construct (an artifact, the product of a deliberate design) but, on the other hand, recognizes that not everything that is law can be expressly intentional (there may be norms that are law and yet have not been expressly enacted by a legislator or established by a judge). Law is thus better seen as a practice that might also be not fully explicitly intended or constructed, but that is however open to its being made explicit by both conceptual and justificatory reflection and reasoning. There also seems to be a fourth common trait: Despite some reservations expressed by MacCormick, neoinstitutionalism could be described as embracing (or at least as consistent with) *metaethical non-cognitivism*, for on the one hand, it asserts that law can be known (once the rules and principles have been established), but on the other hand, it denies this to be the case for (critical) morality, understood as a sphere that is clearly separate from law. This approach is strongly vindicated by Ota Weinberger (MacCormick & Weinberger 1986: 30 ff; Weinberger 1987).

Although neoinstitutionalism is methodologically much more refined than "classical" institutionalism, there is significant overlap to be found here, too (La Torre 1993). Romano, for example, would welcome neoinstitutionalist anti-reductionism (both the ontological and the methodological kind), would not have too many qualms about embracing a nonprescriptivist conception of law, and would not hold back from defending the separation of law and morals. And he, too, can be described as a "moderate legal positivist." No less significant, however, are the differences, of which at least two can be pointed out.

First, for MacCormick and Weinberger, an institution is an *institutional fact* (MacCormick & Weinberger 1986); for Romano, by contrast, it is the whole of *society* – and, needless to say, not every institutional fact (say, a contract) amounts to a "society." And, second, whereas Romano at a later point in the arc of his theoretical enterprise attempted to redirect the "ought" of norms (their validity) toward their "is" (or efficacy), neoinstitutionalism maintains a clear and unequivocal distinction between the two categories (Weinberger 1981, 1987). This, however, comes at the cost of some obscurity and a good deal of ambiguity: How, for example, can one take up the idea of an "institutional fact" without at the same time bringing into play the concept of a "constitutive norm," so criticized by Weinberger? (La Torre 2021: ch. IV, 2020: 113).

In short, as a philosophically less refined conception, Romano's "classical" institutionalism has an advantage over the more recent institutionalist theories when it comes to coherence. But while coherence may confer elegance on a theory, it is otherwise, on its own, idle: A coherent yet uninformative theory is of little value. And, conversely, from the inconsistencies and tensions of neoinstitutionalism we can glean insights into the concept and pragmatics of law. Consider the tension between a still substantially prescriptivist notion of a legal norm and its conceptualization within the framework of "institutional facts," or

the stripped-down neoinstitutionalist semantics – constructed as a simple descriptive/prescriptive binary – coupled with a "liberal" ontology comprising both "institutions" and "institutional facts."

As suggested, what the notion of institution offers is somewhat of a compromise, hovering between a descriptive account and one that must necessarily make some concrete normative assumptions about law. But it is also a "compromised" notion, and this has to do with its history, which is anything but simple, nor is it merely conceptual.

In a first, purely linguistic sense, the term *institution* is understood to encompass the meanings "organization," "organ," "authority," and "power." *Public institution* may well mean "public power." The first specific use of the concept of institution in the philosophy of law came in the form of Friedrich Julius Stahl's *Anstalt* (Stahl 1840), a fundamental concept in his legal philosophy, which presents itself as an alternative to the philosophy that sees law as the expression of free association within a body politic. Stahl's *Anstalt*, by contrast, idealizes the medieval corporation, conceived as an authentic, unprocessed expression of the social fabric. The paradigmatic model for this concept of *Anstalt* is the language, a spontaneous construction, the product of human action but not of human design.

From the outset, then, the institution (what in German can be translated as *Anstalt*) is set in opposition to the sphere of voluntary relations, to deliberation, and also to norms as voluntary and reasoned manifestations of law. But it is only with Romano and Hauriou that the concept of institution is specifically and explicitly accorded a foundational role in the philosophy of law. Here it provides the basic framework within which to configure the very concept of law, with an accordingly broad-gauged definition: An institution, writes Romano, is "any entity or social body that has a stable and permanent order and forms a body in itself, with a life of its own." (Romano 1983: 82).

So defined, the idea of an institution bears a close resemblance to that of a community, as contrasted with that of an individual. Institutionalism accordingly takes on an anti-individualistic normative cast, conferring on the community an ontological primacy over the individual and, in Romano, effecting a certain separation between law and morality. In fact, while law is equated with the communitarian phenomenon, morality is reduced to the subjective: to individual (and hence subjective) judgments of good and bad or of right and wrong. The same anti-individualistic primacy of the community can also be seen in the theory developed by Hauriou, who (as noted) defines an institution as a kind of operating "social-enterprise idea," *the idea behind a project or enterprise that, through law, is carried forward in a social milieu and endures within it* (Hauriou 1933: 96). For Hauriou, who distinguishes between institutions as people and institutions as things, rules are themselves institutions (institutions as things) (Hauriou 1933: 116). This institutionalist reductionism gets radicalized in the Thomistic doctrine developed by Hauriou's disciple, Georges Renard (1939), reaching a climax in the makeover of the concept of an institution receives in German legal philosophy with the work of thinkers like Carl Schmitt, Karl Larenz (1943), and Arnold Gehlen (1950, 1986). For Schmitt and Larenz, law is an institution as *Selbstgestaltung*, self-affirmation of the community. For Gehlen, moreover, even the individual is an institution.

The neoinstitutionalist concept of an institution has developed in a variety of ways, not only in legal institutionalism but also in political institutionalism. We indeed have institutionalism well beyond the precinct of legal theory. In political science, for example, the concept has been revisited in moving away from the behavioral approach centered around the myth of Homo oeconomicus. On the one hand, this has led to a rethinking of institutional facts as the result of constitutive rules. On the other hand, particularly in the work of James G. March and Johan P. Olsen (1996), neoinstitutionalism has reacted against the

reductionism of decision theory and the methodological individualism of an empiricist lineage.

Also important is the theory of the institution developed by Cornelius Castoriadis (1975), a philosopher, not a lawyer, for whom the term *institution* refers to the social reality at large, where law fits in as a "secondary institution." An institution, for Castoriadis, emerges at the intersection of two motive forces which constantly drive the activity that humans engage in as social beings: There is an "instituting" activity that intersects with what is "instituted," in an incessant dialectic through which meanings and forms of life merge, regroup, and crystallize. Castoriadis distinguishes between a "primary institution," which essentially is society itself, and "secondary institutions," which are normatively denser but whose existence depends on the primary institution. As a secondary institution, law can thus be distinguished from society in such a way as to avoid the vague identification between the two that can often be found in legal institutionalism. Behind Castoriadis' theory lies a complex and refined metaphysics that could be useful in reconsidering the philosophical underpinnings of the research project undertaken by legal neoinstitutionalism, helping it succeed in what has so far been a somewhat ambiguous attempt to wrest itself from the dogmas of neo-empiricism and positivism.

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Integration Through Law

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Introduction

In the mid-1980s, Mauro Cappelletti, Monica Seccombe, and Joseph Weiler published the outcomes of a collaborative research project on European legal integration conducted under the auspices of the European University Institute in Florence. "Integration through Law" (ItL) owes its enduring significance to the pivotal role it played in shaping the contours of European law as an academic discipline. The research project also made an important early contribution to studying the role of law in integration processes beyond the state. Many of its conclusions are captured by Joseph Weiler's often repeated observation that law is both an object and an agent of integration: while law is a product of the polity, the polity is also to some extent a creature of the law. This mutual conditioning of political process and legal structure was to explain the concurrent integration *of* and *through* law in the European Union (EU). The entry traces the career of ItL from its inception in the early European Communities to the maturation of the European Union and the contested future of the European integration project.

Europe's Integration of and through Law

ItL posited law as both the object and the agent of European integration. As an object, law is one distinctive field of European integration alongside politics, economics, culture, etc. Legal integration here denotes the integration *of* law, that is, the reciprocal adaptation of state legal orders in (relation to) a European legal order that aims at the gradual removal of differential treatment. As an agent, law is a relatively independent variable that influences other key dimensions of the integration process. Legal integration here denotes Europe's integration *through* law that should lead to the gradual emergence of a common European identity. On the one hand, ItL thus capitalized on the instrumental role of positive law in integrating modern societies characterized by a complex differentiation of functional spheres of social reproduction (politics, economics, culture, etc.). On the other hand, it imbued European legal integration with a telos of "convergence" as "*sine qua non* for the productive and peaceful coexistence of peoples and, indeed, for their very survival" (Cappelletti et al. 1986: VI).

ItL's original contribution lay less in pointing to the dual nature of law in integrating modern societies than in reflecting on the implications of this duality for legal integration processes beyond the state (Augenstein 2012). When the governments of Germany, France, Italy, and Benelux signed the 1957 Treaties of Rome that established the European Communities (later joined into a single European Community (EC)), they did not envisage creating an autonomous European legal order. They merely agreed on a set of common rules for intergovernmental cooperation motivated by the enlightened self-interest of the participating states. What drove the early integration process was the functional imperative of creating a common market that was seen both as an end in itself (reviving Europe's postwar economy) and as a means to the end of political stability (taming political power through economic interdependencies). It fell upon the European Court of Justice (ECJ) to constitutionalize European law by endowing it with a claim to supremacy (EU law is supreme in relation to conflicting norms of national (constitutional) law) and direct effect (EU law can be directly invoked by private parties in legal proceedings before national courts). The ECJ thus laid the foundations of a *supra*national

legal order that transcended the state-based constitutional/international law divide and challenged traditional assumptions about the derivative relationship between positive law and the state (Dickson and Eleftheriadis 2012).

The combination of supranational legal positivism with the functional imperative of creating a common market propelled Europe's early integration through law. Yet it also sidelined concerns about the political credentials of a European polity whose democratic legitimacy was – following the contractual tradition of international law – mainly supplied by the national parliaments of the member states. When further integration efforts were stalled by member states' resistance to surrendering the popular sovereignty and constitutional rights of their peoples to the European Community, it was again the telos of economic integration – the realization of the EC's fundamental market freedoms of movement of goods, capital, services, and people – that consolidated the autonomy of the European legal order (Augenstein 2013). At the same time, the lack of political enthusiasm for integrating Europe in a more holistic sense helps to explain the centrality and precariousness of positive law in European polity building (Walker 2005). Supranational legal positivism owes its central role in the broader integration process to the EU's lack of a robust sociopolitical pedigree comparable to those that underpin the production of and compliance with legal norms in the member states. Yet the weakness of its social foundations ("solidarity") and political steering mechanisms ("democracy") that makes EU law central to European integration also renders it precarious. Recurring institutional setbacks of Europe's integration through law coupled with a growing political apathy of its people(s) point to the limitations of the EU legal order in accommodating (if not resolving) deep-rooted divisions between the member states and dishearten ItL's dream of convergence.

European Polity Building and Constitutionalism

The 1991 Maastricht Treaty on European Union (TEU) marked the maturation of a European polity that no longer considered legal integration a mere byproduct of establishing a common (now called "internal") market. The supranational European Community became the first pillar of a newly fashioned European Union, complemented by two intergovernmental pillars dedicated to a common foreign and security policy and justice and home affairs. These institutional reforms built on previous efforts to endow the *sui generis* European polity with more state-like features in order to "create an ever closer union among the peoples of Europe" (Article 1 TEU). Human rights had already entered the European legal order via their recognition as general principles of Community law by the ECJ – yet another judicial contribution to Europe's integration through law that found its political endorsement in the later adoption of an EU Charter of Fundamental Rights. Maastricht addressed the EU's "democratic deficit" by further enhancing the powers of the European Parliament and by introducing a European citizenship that was to supplement the four fundamental market freedoms. The incorporation of a subsidiarity principle into the European Treaties aimed at strengthening the rule of law by curbing the EU's "competence creep" in relation to the Member States.

These institutional reforms pursued a twofold objective: enhancing the EU's own political legitimacy by reaching out to the European citizenry; and curtailing the impacts of EU market integration on the legal and political orders of the member states. As concerns the latter objective, functional spillovers from the internal market into other policy domains enabled the European Union (cum member state executives acting through the EU institutions) to extend its regulatory grasp over an increasing range of domestic politics. Had Joseph Weiler once praised EU law's "civilizing" mission in "tam[ing] the national interest with a new discipline" (Weiler 1999: 350), more recent critiques lament the corrosive effects of the technocratic and neoliberal facets of Europe's integration through law on the member states (Somek 2011). Externally, the successive waves of enlargement increased membership in the European Union to presently 28 states. This territorial expansion of the EU's *acquis communautaire* (its acquired body of legislation,

legal acts, and court decisions) went hand in hand with new challenges to ItL's capacity to generate civic solidarity and social cohesion among the peoples of Europe. The spectre of Turkey's accession – an otherwise useful alley in trading goods and securing the EU's external borders – is a case in point.

As concerns the former objective (enhancing the EU's political legitimacy), these developments nurtured a debate about the *finalité* (the envisaged endpoint) of European integration and triggered a renewed interest in the constitutional fate of the European polity inspired by ItL's "federal idea" (Cappelletti et al. 1986: 3, 11). Should EU supranationalism be pruned into intergovernmental cooperation in a confederation of states or should the European Union instead reinvent itself as a federal state? In 2001, the Laeken European Council convened a Convention on the Future of Europe that 2 years later presented a Draft Constitutional Treaty for the European Union. The treaty was endorsed by all member state governments yet failed to garner the necessary support of French and Dutch voters in national referenda. ItL instead proceeded through the constitutional backdoor as many changes envisaged by the Draft Constitutional Treaty found their way into EU law via the 2009 Treaty of Lisbon. At the same time, the EU's elapsed constitutional moment cast further doubts on the capacity of supranational legal positivism to create "an ever closer union among the peoples of Europe."

Legal Disintegration and Europe's Quest for Justice

The maturation of the European polity went hand in hand with increasing signs of legal disintegration. Firstly, the implementation of "differentiated integration" in a "multispeed" Europe parcelled out the unitary space that EU law was meant to integrate: the Euro-"zone" circumscribed by the common currency of its 19 members and the Schengen "area" without passport and border controls that comprises 22 member states and four non-member states. Secondly, ItL became rivalled by narratives of constitutional pluralism that more readily acknowledged the heterarchy of Europe's constitutional landscape and the irresolvability of conflicts of (ultimate) authority between the EU and its member states (Avbelj and Komarek 2012). Not only did this inject competing (national) conceptions of the "good life" into an EU legal order whose substantive unity and efficacy had traditionally been ring-fenced by the internal market. Constitutional conflicts between different sites of (EU and member state) legal authority also, and thirdly, pushed for "softer" modes of legal integration such as the Open Method of Coordination (OMC). The OMC pursues Europe's integration of law through flexible standards, negotiable goals, iterative benchmarking, and mutual learning processes – features that sit uneasy with more traditional (statist) accounts of the role of law in subjecting human conduct to the governance of rules.

The more recent waves of "crisis" that have shaken the European Union – the Euro crisis, the refugee crisis, and the membership crisis – call into question the future of the European polity. Notwithstanding recurring appeals to Europe's value basis (be it its common Judeo-Christian heritage or its shared history of violent religious and nationalist conflict) and demands that the European citizenry develop a "patriotic" attitude toward EU constitutionalism: the European Union appears overburdened by the political responsibility that comes with its attempts at crisis management. The rather brutal austerity measures imposed on member states in economic hardship to save the common currency have created new cleavages between Northern and Southern Europe. They also perpetuate the EU's long-standing prioritization of negative integration (removing market barriers) and output legitimacy (delivering growth) over developing integrated economic and fiscal policies – domains still jealously guarded by the member states. While the recent influx of refugees proves to the inevitability of closer cooperation in patrolling the EU's external borders, the legal framework governing people's whereabouts inside the "Fortress Europe" has meanwhile collapsed owing to a lack of mutual trust and assistance between the member states. The EU membership crisis instead signals a revival of national self-interest. Following a popular vote to leave the Union, the UK's "Brexit" is

to redomesticate its laws and to close its borders to foreign workers. Euroscepticism and nationalism are on the rise in the majority of member states, in some cases (Hungary and more recently Poland) accompanied by an open defiance of the European rule of law.

In response to the legal disintegration of the European polity, a new justice discourse has emerged that calls for a revival of the European integration project (Kochenov et al. 2015). Some put their hopes in the political innovations of European supranationalism, such as more participatory and polycentric forms of governance and rulemaking or a further decoupling of EU citizenship from national membership. Others draw on broader conceptions of cosmopolitan democracy and see the EU at the political vanguard of counteracting the disempowerment of the state under conditions of globalization. For these normative visions to gain political traction, member state governments and their citizenries would have to transcend the horizon of national self-interest and view themselves as participants in a public debate centred on questions of common European concern (Habermas 2001).

Conclusion

With historical hindsight, ItL's vision of "convergence" overtaxed the capacity of supranational legal positivism in integrating European societies – at the expense of exploring more pluralistic modes of living together under a common rule of law. At the same time, the trajectory of Europe's integration through law suggests that a return to the nation-state offers no plausible solution to today's predicaments of the European polity. Attempts to "free" national democracy from the clutches of EU bureaucracy have led to increasingly authoritarian interpretations of "home rule" in a number of member states. This betrays the liberal ambitions of the early European legal integration project which in consolidating the common market also aimed at emancipating the citizen from the state. The new national parochialism moreover ignores that the EU's transition from economic policy to constitutional polity was an attempt to respond politically to the expansionist impacts of market integration on member state democracies. On both counts, the European Union has fared better than any of its global competitors in designing democratically accountable institutions beyond the state – recent setbacks and an uncertain future notwithstanding.

Cross-References

- ▶ Cosmopolitanism
- ▶ Integration: Civic and Social
- ▶ Legal Positivism: International
- ▶ Patriotism: Constitutional
- ▶ Rule of Law: Theoretical Perspectives
- ▶ Transnational Legal Normativity

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Integration: Civic and Social

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Introduction

The concept of integration is mostly invoked in debates about (transnational) immigration. In most states of the world, integration is (still) the most popular answer to the question how the receiving state and society should deal with immigrants. The concept of integration thus concerns the conflict between transnational migration and national identity and between cultural diversity and social cohesion, and it asks for a fair distribution of rights and duties of the immigrants in order to achieve their full inclusion and participation in the receiving society. However, social integration is not only a process that concerns migrants but all members of society. Nonetheless, this entry aims to describe not only the process of social but also of civic integration, which, at any rate, only addresses foreigners or "aliens." In this regard, this entry only deals with civic and social integration of "aliens."

Definitional Approaches

Integration is a vast, complex, and confusing term. It is a subject of many scientific disciplines and has **descriptive and normative meanings**. While sociologists, anthropologists and cultural scientists use the term to **describe** a social process, which not only affects the individual and his or her relationship to the society, but also the society as a whole, political scientists, philosophers and legal scholars are interested in its **normative** meaning, which addresses – in a very broad sense – the question of how to ideally cohabit in a modern, highly differentiated, and diverse society. Even at this very vague and abstract stage, integration can be both from a descriptive and a normative standpoint distinguished from the related concepts of **assimilation** and **multiculturalism**: While assimilation requires individuals or groups of minorities to fully adapt to the majorities' way of living (in terms of cultural habits, belief, and law observance), multiculturalism expects members of cultural minorities only to live in accordance with the community's legislation. As will be shown, integration is placed in the middle of these two concepts. To exemplify this argument, the concept and conception of integration have to be developed further. Debates on "integration" raise at least the following *three questions* (Murphy 2013, 41–47). The *first* is the question of ► "National Identity". Any nation needs to determine what its constitutive elements are, how it can be distinguished from other nations, and who is and should become its member. Even if integration processes actually occur mainly on the local level (e.g., within a specific district, city, or village) and its legal framework is highly influenced from the international and supranational level (e.g., EU law), most people still perceive that the process of integration occurs in the national context. The *second* strand of debates on integration is the relation of (social, ethnical, cultural, and religious) **diversity and social stability**. Within this branch of the integration debate, the following questions need to be answered: What effect does diversity have on a society? To which extent does it promote desired targets such as pluralism of opinions, tolerance, social progress, etc.? And at what point can diversity have negative effects on social stability and social peace? *Thirdly*, debates on "integration" raise the question of **inclusion, participation, and social equality**. Almost any integration theory would assume that social, cultural, or "racial" segregation leads to social inequalities, conflicts, and tensions. Accordingly, integration as "the negation of segregation … requires the ***full inclusion and participation as equals of members of all races in all social domains***, especially in the main institutions of society that define its opportunities for

recognition, educational and economic advancement, access to public good, and political influence" (Anderson 2010, 112, 113).

The terms "**civic**" and "**social integration**" mainly refer to the last of the aforementioned dimensions of the integration debate. **Civic** integration addresses the question under which conditions a foreigner (or "alien)" is and should be permitted to gain membership of the receiving ***state*** and all the (civil, social, and political) rights ▶ "Citizenship" encompasses. Debates about citizenship are deeply connected with debates about national identity as the first branch of integration debates. **Social** integration is, in contrast, dedicated to the problem under which conditions an individual should be perceived as a member of the ***society*** and which rights should thus be granted to her or him. As a political goal, social integration has to respect both (social, ethnical, cultural, and religious) **diversity** and **social stability**. Which rights and obligations each individual faces for the sake of social integration varies from country to country. Despite the great variety of national integration policies, it can be found that political rights are generally reserved for citizens of the receiving state. Accordingly, **civic** integration refers to a deeper form of integration than **social** integration. On the other hand, it is a far wider concept than **civic** integration. Firstly, social integration does not only address foreigners seeking for naturalization but principally all people – citizens and aliens – living in the receiving society. Secondly, the goal of social integration requires integration of the individuals in various social subsystems (such as the economy, the culture, the religion, the educational system). Herein lies a great difficulty of any legal or political approach aiming to promote social integration: While the consequence of civic integration is clear – equal distribution of rights and duties as any other citizen – it is less obvious which rights and duties should be granted to an alien for the sake of her or his social integration. Notwithstanding fundamental human rights, which are owed to any human being despite their nationality and their legal status, the states are free to decide which individual rights they grant to the migrants. Generally speaking, the longer migrants stay in the receiving country, the more rights they are being granted. For example, while long-term residents are in many countries permitted to work, tourists are not. On the other, many countries expect migrants to show specific integration efforts (e.g., learning the language of the host society, finding a profession) in order to grant them individual rights. This combination of "integration requirements" – legal norms which expect migrants to show integration efforts – and the continuous and increasing amount of rights the migrants are granted can be described as "integration paths" (Davy 2005, 144). These paths can be found in many legal systems. They assume that civic integration is the goal and "completion" of any process of social integration (Kießling 2015, 3). A migrant would accordingly live in the host society with less rights and more obligations than the citizens of the host state as long as she or he were in the process of being naturalized. Since the citizenship law of many countries requires the migrants to demonstrate certain integration efforts to improve their ability to integrate (e.g., learning the language of the host society, finding a profession), civic integration as a legal concept is first and foremost an obligation of the migrants. However, many countries provide special rights and programs for migrants to support them in their "integration efforts" (e.g., integration courses, job preparation classes, migrant consultations, etc.). These supportive measures are often perceived as the host state's contribution to the integration process.

Integration is namely often described as an "on-going, multidimensional, **two-way process** between, on the one hand, migrants, and on the other hand, existing members of the receiving society along with the receiving state itself" (Murphy 2013, 49). Herein lies one of the main differences from the concept of **assimilation** as a process of one-sided adaption. The other difference is that social and civic integration do not require the migrant to give up her or his cultural heritage. The conception of **multiculturalism** does, in contrast, not expect the migrants nor the receiving society to take any "integration efforts." On the one hand, this conception seems to be in accordance with the anthropological observation

that social segregation is the default setting of human nature. On the other hand, multiculturalism has often been criticized for neglecting the need of social stability and not caring enough about the fundamental values of the host society (unless they are carried out in legislation). In contrast, "integration does call for full participation of members of salient social groups on terms of equality, cooperation, and mutual respect in all domains of civil society. (. . .) It requires the construction of a superordinate group identity, a 'we,' from the perspective of which cooperative goals are framed, and appropriate policies selected and implemented. In a democratic society, this "we" is most importantly a shared identity as citizens" (Anderson, 184).

The aforementioned explanations have shown: integration is an ambivalent conception. On the one hand, it aims to preserve social stability, social peace, and social justice. From this point of view, segregation has to be prevented since it is a product of unfair living conditions. This observation is shared by antidiscrimination policies. Likewise, integration policy aims to enable the individual to live a self-determined life within the receiving society (Benhabib 2004, 82). Civic integration allows individuals to overcome their alien status and therefore to gain all political rights like citizens of the host state. It therefore realizes the democratic principle "no taxation without representation." Consequently, **integration serves both collective and individual goods**. On the other hand, integration policies may also restrict the individuals' right to freedom and privacy (e.g., when the law of the receiving state forbids cultural practices that are not compatible with the fundamental values of the receiving state). Integration is thus often perceived to be a threat to cultural diversity.

Civic Integration as a Matter of Law and Legal Philosophy

"While the theme of integration fuses emotive social issues such as identity, belonging and social cohesion, it also raises essential legal issues which must be dealt with within the confines of domestic, EU and international law" (Murphy 2013, 2). Indeed, law is of enormous importance for integration processes. Law can firstly preserve or change images of national identity. It secondly balances cultural and social diversity with social stability. Thirdly, law is the key instrument to promote (or hinder) inclusion, participation, and social justice, since it provides individuals with subjective rights to participate in the society or state. Accordingly, **civic integration** is first and foremost a **legal conception**. It deals with a transformation of a legal status: from **alienage to** ► "Citizenship" (Bosniak 2006). Civic integration must not be confused with **naturalization**: While naturalization refers to the external "assignment" of an individual to a state in international law, civic integration is a matter of national law, since citizenship encompasses the rights an individual has against and within the state of her citizenship.

Despite the great variety of national citizenship laws, citizenship can be purchased in two ways: by **birth** or by **civic integration**. Some states provide citizenship to an individual, if that individual was born as the child of at least one citizen of the concerning state. This model, *jus sanguinis* (law of blood), ties citizenship to the descent. The other principle, *jus soli* (law of land or ground), makes citizenship depend on place of birth, no matter who the child's parents are (Motomura 2006, 72). **Civic integration**, however, occurs to an individual in a later stage of her or his life. It usually requires an individuals' formal application and various forms of **social integration** such as a long-term residence in the receiving state and (successful) efforts in terms of social, cultural, or economic integration (e.g., language skills, knowledge about the hosts' country's culture, history, or society, a secure livelihood, etc.). Obviously, these (successful) efforts shall not only demonstrate that the individual has become a member of the receiving *society* but also her or his will to become a member of the receiving *state*. Accordingly, **social integration** is often perceived as a **precondition of civic integration** and civic integration as the **completion** of social integration. Accordingly, migrants could only gain citizenship of the receiving state if they

were – to a certain amount – socially integrated. As Seyla Benhabib puts it: "Migration involves emigration . . .; actual first entry into a foreign country; civil, economic, and cultural absorption of a shorter or longer duration (visitation, business, study); incorporation, that is, residency of a significant duration; and finally naturalization, i.e. access to political membership" (Benhabib 2004, 136). This gradualist view described by Benhabib, can be criticized from two ways: Firstly, the idea of a "completed" social integration can be challenged. Sociologists would argue that hardly anyone is "fully integrated" since integration is always a relational term, and, secondly, one can be integrated in one specific school class, company, etc. But no one is "fully integrated" in a country. The other critique carries even more weight: Since **citizenship** provides an individual with many civil, social, and political rights, **civic integration** must not only be regarded as the goal but also as a **tool of social integration**. Civil, social, and political rights provided by citizenship may not only promote the individuals' inclusion and participation but probably also his identification with the receiving state, which is – as will be shown (III.) – an important and the final step for social integration.

Accordingly, **civic integration embraces (civic, social, and political) rights and identity**. But, as *Yasemin Nuhoğlu Soysal* observes: "Whereas rights, and claims to rights, become universalized and abstract, identity is still conceived of as particular and bounded by national, ethnic, regional, or other characteristics" (Soysal 1994, 8). Accordingly, a certain tension or even a contradiction (Soysal 1994, 8) between the emerging "universalization" of individual rights on the one hand and the ongoing tendency to connect the collective identity of a society with a nation state on the other hand can be identified. Indeed, this "conceptualization of integration requires immigrants to re-mould themselves in the model of an idealized national citizen" (Murphy 2013, 26). In this regard, citizenship and civic integration can also have an **exclusionary effect**, since citizenship excludes the non-citizens from the civil, social, and political rights it encompasses (Murphy 2013, 205). This exclusionary effect of domestic civic and social integration laws is often used as a **political tool to prevent immigration**, which shows that immigration and integration policies are closely interwoven. The more a state emphasizes the importance of its own "national identity" and the more it ties this idea to the aim of a (social, cultural, and religiously) "homogeneous society," the less (social, cultural, and religious) diversity the state might accept among the society and the less rights and citizenship the state might be willing to grant a migrant. However, these assumptions are fundamentally challenged in the times of globalized values, universal human rights, and evolving supranational citizenship models like the EU citizenship (▶ "Citizenship").

Social Integration as a Matter of Law and Legal Philosophy

Whereas civic integration is a conception being highly influenced by law and debated among legal scholars, social integration is still rather a subject of philosophy, sociology, economy, political science, or cultural studies. Even though law has a great impact on the dynamics of social integration, this issue has not gained much attention from many legal scholars. The reason for this might lie in the **multidimensionality, complexity, and interdependency** of this concept.

As mentioned above (II.), the conception of social integration has descriptive and normative meanings. Descriptive approaches are usually the domain of sociologists and political scientists. They answer the questions, such as what integration *is* and when an individual can be called "integrated." Many empirical and theoretical works on social integration have been done in those disciplines, and it is impossible to provide an overview that claims any sort of completeness. However, some ideas shall be presented in the following to structure the problem of social integration. *David Lockwood* has made a very fundamental distinction between the integration of an individual "into" society (which he calls **"social integration"**) and the integration of the society as a whole in terms of social stability (what he calls

"system integration"). Based on this distinction, the German sociologist *Hartmut Esser* has developed three stages of social integration of migrants in the host society (Esser 2001). The first stage is called *(ac-)culturation*. It describes the purchase of knowledge and competences that are essential to communicate in the receiving society. The next stage is the *placement* of an individual on a social position. Here, the law plays an important role, since it provides the individual with rights and duties, which will decide to some extent which social position a migrant is allowed to take in the receiving society. According to *Esser*, placement entails *interaction* or at least the capacity to interact in the receiving society. The last stage is *identification*, which can – according to *Esser* – possibly only be achieved after generations. The strength of this model is that it can describe both the potentials and the limits of the law in promoting social integration. Legal rules can require and promote *acculturation* by requiring and promoting migrants to take (successful) "integration measures." At the same time, it is the key instrument to determine the *placement* of an individual, since it provides or denies him or her the civil, social, and political rights to take further integration efforts. In contrast, law is not able to regulate *interaction* and *identification*, since it is up to the individual whether she or he wants to interact with others or identify her- or himself with the values of the host country. Whether a migrant is willing to communicate in the language of the receiving society or to even identify with the receiving state is only up to the individual migrant. Other theorists have emphasized the importance of other institutions for the process of social integration. The process can be distinguished between the following approaches: integration through communication (Habermas 1985), integration through social systems (Parsons 1952; Luhmann 1995), and integration through constitution (Smend 1994).

It has also been mentioned that social integration needs to be distinguished from the conception of (social, cultural, or "racial") **assimilation**. Assimilation takes a dominant social group as fixed and demands that other groups join it by abandoning their distinct group identities and conforming to what the dominant group takes to be its defining norms, practices and virtues" (Anderson 2010, 114). The goal of assimilation would therefore consist in the "elimination of group difference or group identity" (Anderson 2010, 183, 184). This process can also be described as a "one-sided process of adaption," which expects migrants "to actively take on the culture and language of the majority population and renounce their own ethnic or cultural identity" (Murphy 2013, 21). Integration does likewise expect migrants to take integration efforts, but the goal of integration policies is not as clear as the goal of assimilation. Ideally, it has been described as a double-sided process between the individual and "the society," which had to promote social integration through the provision of "integration-friendly" law. That means that individuals should be supported in their "integration efforts" (see above, II.) through legal provisions which promote social inclusion and participation of migrants. At the same time, social integration does not expect the migrants to resign their culture. However, it is true that "(social) integration . . . can too easily imply a largely one-sided process in which newcomers adapt themselves to the structures of life and dominant culture of their host society" (Aleinikoff and Kluesmeyer 2000, 20). Moreover, "integration policies are often simply a slower and gentler form of assimilation" (Castles and Miller 2003, 250). The concept of **multiculturalism**, on the other hand, grants immigrants "equal rights in all spheres of society, without being expected to give up their diversity, although usually with an expectation of conformity to certain key values" (Murphy 2013, 16). While legal equality for migrants and other minorities is perceived as a political goal in Canada, Australia, and Sweden, the aforementioned laissez-faire attitude toward the conformity to certain key values of the host society can be found particularly in US law (Castles and Miller 2003, 250).

At this point it has to be reiterated, **why social integration is worth being promoted by the state**. Here, several **public and individual goods** can be mentioned. Some of the public goods (social stability and peace, social justice)

have been mentioned already above (I.). This observation can now be continued: The issue of "integration requirements" has shown that integration policies also aim to reduce unemployment and dependency on social welfare. At the same time, it promotes individuals to actively contribute to the common market and therefore to generate wealth. Finally, integration policies are also of importance in terms of security, since integration law of many countries requires the individual not to commit any crime. But integration policies do not only serve public interests. They are also in the interest of the individual addressed by an integration measure. As *Sheryll Cashin* has put it: "Separation is not in our collective self-interest, and integration – efforts to reduce such separation – will benefit everyone" (Cashin 2004, 29,293). Integration measures serve the individual in a paternalistic way: They predefine what is good for her or him and then oblige the individual to take measures to achieve these goals. In this paternalistic view, **social integration seems like an opponent of privacy and autonomy**. However, this observation is only justified if privacy is seen as an individual right to freedom. From this standpoint, integration policies had to be regarded as an interference in this sphere of autonomy and liberty. On the other hand, integration policies (like any social policy) grant the individual a lot of new perspectives and therefore the possibility of autonomous decisions. In the end, every state has – according to its own constitutional values and traditions – to decide how it solves the normative conflict between the individual autonomy and the individual and common goods of social integration.

While **"liberal models"** would emphasize the importance of the individuals' autonomy and thus try to solve the conflict through **legal equality and mutual recognition** of the cultures, **"communitarian positions"** would emphasize the importance of **common values and social cohesion**, which in a normative conflict tend to trump the individuals' right to freedom and autonomy. Accordingly, liberal and communitarian models give different answers to the question how social integration shall be achieved in a diverse society. Still, both positions would not deny that social integration in terms of inclusion and participation requires the state to grant the individuals rights. **Liberals** would argue that minorities (such as migrants) should have **equal rights** as citizens of the receiving state. This can be achieved either through **civic integration** (II.) or by granting all migrants or specific migrant groups equal rights as the citizens. This concept is partly realized for "denizens." Accordingly **"denizenship"** can be regarded as a real alternative to ▶ "Citizenship". At the same time, liberal positions require every member of the society to accept and promote cultural diversity. Legal equality is a very important instrument to achieve social integration, since it prevents the migrant from any form of legal discrimination, which could lead to disintegration or segregation. If migrants are granted less rights than the citizens of the receiving state, the migrants are the ones who carry the integration costs. As *Elizabeth Anderson* emphasizes, "integration does not proceed without cost. The experience of integration is often stressful and causes the loss or alteration of cherished racially homogeneous institutions. (. . .) The integration of long segregated groups carries psychological costs. (. . .) Given these costs, members of stigmatized groups need places of refuge, social settings in which they can count on unquestioned acceptance and affirmation, share these experiences among themselves, and generate strategies for coping with the stresses of integration" (Anderson, 180, 183).

Social but not civic integration can also be achieved through **"affirmative action."** This model asks for specific rights that are only secured to minority groups or its individual members, which have to be added to universal human rights in order to achieve social justice or "true equality" (Kymlicka 1995, 108). Moreover, cultural diversity and membership in different cultural groups should be acknowledged as an important value (Kymlicka 1995, 84, 121). Migrants would therefore to some extent have more rights than citizens. This result is criticized for rather emphasizing the differences between groups or individuals than contributing to overcome these differences – which would be an essential goal of social integration. This critique would especially have been

formulated by advocates of the communitarian approach. Communitarians doubt that social integration can only be achieved on the basis of a distribution of rights. They seek for a "deeper form" of social integration, such as shared values, which are often established in the Constitution or are not laid out in law at all. However, these deeper forms of integration cannot be prescribed by law, since it is the decision of an individual whether she or he wants to identify with the values of the receiving society. Nonetheless, many countries establish special "integration duties," whereby migrants are obliged to consent to the values of the receiving state. Most legal systems have an approach that combines liberal, communitarian, and "affirmative action" views. As Sheryll Cashin pointed out, "meaningful integration will not come about by any command-and-control forcing of race and class mixing. The answer lies, I believe, in the changes that have already begun to happen in communities across the country" (Cashin, 318).

Conclusion

Civic integration as the process of transition from being an alien to a citizen of the receiving society is first and foremost a legal concept carried out in the citizenship law of the receiving state. The process of social integration is however a broader and more complex issue and thus object of many fields of law (e.g., immigration law, labor law, social security law). While civic integration has a clear and transparent goal, the naturalization, the goals of social integration are far from being undisputed. While some request special obligations for immigrants to show "integration efforts" (e.g., learning the language of the host society or finding a job), others emphasize the importance of providing the immigrants with equal rights for them to be able to integrate themselves. Most countries therefore combine "integration requirements" with the continuous and increasing grant of rights. These legal "integration paths" enable the migrants not only to integrate socially but also to gain citizenship, since the citizenship law of many countries tends to refer to these "integration measures." While these forms of integration policies can only be enforced by legal norms, there are also aspects of social integration, which cannot be regulated by law. The law can neither prescribe migrants to interact with the citizens of the receiving society nor to identify with its fundamental values.

Cross-References

► Citizenship
► National Identity

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Integrity

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Introduction

A person of integrity is consistent and acts according to coherent moral principles. Integrity manifests itself in particular when steadfastness is challenged by the prospect of short-term gains or risks of conflict. With recent decades' rise of globalized capitalism, the concept has gained significance within the field of business ethics. Arrogant business cultures incentivizing deception, corruption, and fraud have contributed to undermining public trust in the managerial elites and in the free market economy as such. Corporate scandals, such as the fall of Enron (2001) and WorldCom (2002), the Siemens corruption scandal (2006), the subprime mortgage crisis (2008), Volkswagen Dieselgate (2015), Theranos (2018), and Wirecard (2020), have made it clear that compliance with legislation and ethical custom of society cannot be taken for granted. They have shown that some corporations engage in corruption and fraud and therefore lack integrity. This entry will introduce the concept of integrity from three different perspectives. The first and second part introduces the concept by outlining essential points in the debate on how to define personal and corporate integrity. The third part describes some of the challenges of managing integrity in corporations.

Personal Integrity

In everyday language, a person of integrity is a person with strong moral values, a whole person, and a coherent person: someone who walks her talk. She is characterized by self-integration, maintenance of identity, standing for something, living a convincing life, a life of moral purpose (Audi and Murphy 2006, 14). The concept has two aspects. The relationship between these two aspects is characterized by a potential conflict. Integrity implies acting *consistently* according to whichever principles the person might be supporting. Here, the emphasis is on wholeness and completeness. In this sense, the territorial integrity of a country is given when its geographical borders are intact. Integrity also implies acting according to the *right* principles. The second element is the moral aspect of personal integrity. A person of integrity has stable moral values which are enacted coherently in different social contexts. Integrity as the attribute of a person is therefore synonymous with moral integrity.

This second quality is ambiguous because values are relative. From a normative point of view, it is not clear which values would qualify as the right moral values. Would coherence between actions and any values suffice to constitute integrity, or does integrity require specific moral values? Could a proponent of unacceptable moral values be a person of integrity? Could a Nazi be a person of integrity? And if not, which moral values would qualify for integrity?

As a normative concept, that is, as a concept which can guide human action, integrity is challenging to define, but a more descriptive approach on how the concept is used can provide clarification. Since the majority of people agree that Nazis were evil, there is a wide consensus that those who challenged the Nazi regime would be persons of high moral integrity. The Nazis themselves, however, would not be persons of integrity, however consistently they acted according to their Nazi

values. This example is unambiguous for a proponent of democratic values. There are, however, other examples which are less clear. Supporters of the WikiLeaks founder, Julian Assange, would see him as the very personification of moral integrity. He has consistently stood for the values of transparency and free speech in spite of risking prosecution. For others, Julian Assange is a criminal endangering national security by stealing and publishing classified documents. Both those who support and those who condemn Julian Assange may be dedicated to democratic values.

The philosopher Cheshire Calhoun has suggested a definition of integrity which can help resolving this tension between integrity as coherence and integrity as a manifestation of specific values. She sees integrity as a social virtue defined by a person's relation to others (1995). As a social virtue, the person has to be coherent with regard to values which are relevant for a social context. One could, for example, be an ardent supporter of improving the social standing of a specific minority group, but if one were never to be confronted with members of this group or with their supposed oppressors, the values be socially irrelevant. Integrity requires coherence, not with any so-called moral values, but with values which make a difference to how a person acts in a social context.

A second suggested resolution to the tension is the definition of integrity as an epistemic virtue, that is, as a virtue of wanting to understand, the virtue of being able to face the truth (Scherkoske 2013). This idea of integrity as an epistemic virtue, as honestly facing a perhaps inconvenient reality is first of all coherent with the idea of socially relevant values, because it connects integrity to an external reality. Secondly, facing reality is incompatible with pretense and deception.

Integrity therefore describes agency in a social context characterized by loyalty towards a certain group or cause, and it requires the discipline to disregard short-term self-interest in order to focus on this relevant social context. Such an understanding of integrity may allow for a variety of values, but it is incompatible with atrocities of tyrants. Though the methods of political suppression may be known and feared by a population, they are never advertised in public debates as achievements. Injustice always remains hidden underneath the pretense of moral legitimacy. For this reason, a tyrant could never be a person of integrity.

Corporate Integrity

Just as the concept of personal integrity has an inherent tension, so has the concept of corporate integrity been subject to debate between an idea of corporate integrity as economic wholeness, i.e., as economically sustainable and a corporate conduct grounded on moral values. The concept of integrity is particularly suitable for the evaluation of corporations' state of ethics for two reasons.

First of all, corporations are collective agents. They are composed of many individuals, and just as personal integrity involves coherence between different parts of a person, i.e., their talk and their walk, so does corporate integrity require values being enacted coherently throughout the agency of the whole organization.

Secondly, integrity is challenged in situations where moral values are challenged. In this sense, integrity is a dormant property. As private individuals, we have no knowledge of our own integrity until our values, our comfort, and our steadfastness have been challenged in situations of choice between doing what is easy, convenient, and self-serving, and acting according to what we believe is right. Many individuals who live their lives in peaceful and prosperous societies are never challenged with respect to their moral integrity (Thejls Ziegler 2020). The competitive environment of a corporation differs considerably from that of many individuals. In the globalized business environment, corporations operate under relentless commercial pressure. The temptations to compromise moral values for the sake of short-term profitability are therefore omnipresent.

The literature on corporate or organizational integrity distinguishes between two approaches. Corporate or organizational integrity can either be defined in terms of an instrumental cost-benefit activity, which is distinct from the normative realm or as ethical integrity (Rendtorff

2015). An economic corporate integrity emphasizes compliance with rules, such as codes of corporate governance, and legal regulations for the purpose of minimizing risks of fraud and maintaining a reputation as a reliable business partner.

A less narrow definition sees organizational integrity in terms of "self-governance, responsibility, moral soundness, adherence to principle, and constancy of purpose" (Paine 1997). This version emphasizes the moral values of individual executives. Accordingly, corporate integrity is rooted in high moral standards and personal convictions of managers and employees, and they serve as foundation for the compliance with both legal regulation and ethical custom.

Even though the attributes of economic integrity are essential for corporations to maintain their competitiveness, examples from the past indicate that the moral values of individual executives are of equal importance. An illustrative example is the fall of the fraudulent Texan energy company Enron in 2001. Andy Fastow, the CFO of Enron from 1998 till 2001, served a 6-year prison sentence for his role in the collapse of the corporation. At a speech in 2019, he told his audience: "Every single deal I did was approved by Enron's accountants, by the outside auditors, by Enron's attorneys, by Enron's outside attorneys, by the bank's attorneys when appropriate and by Enron's board of directors" (https://www.ucalgary.ca/news/former-enron-cfo-accounting-hero-convict). Though the holding constructions and the financial statements were created to conceal Enron's actual financial situation, they appeared to be legal. Participating in deception at this level, however, still indicates a lack of moral and sound judgment. The managers of Enron should have been aware of their wrong doings, even though the balance sheets were approved by accountants and by the bank's attorneys. As the German Wirecard scandal from 2020 confirms, criminal energy still finds its channels in spite of improved legislation.

The complexity of large, international corporations, of their financial structures, their holding structures, their money flows, etc., undermines transparency. Executives are therefore regularly faced with dilemma situations between the requirement to optimize the corporation on a short-term basis and need to mitigate risk. Because legislation cannot capture the full complexity and all contingencies of corporate conduct, an action may appear to be legal from a technical point of view, but fraudulent from a moral point of view. Corporate integrity therefore requires a foundation in the moral sensitivity of the individuals.

Integrity Management

The aim of corporate integrity management is to mitigate the risk of unethical conduct and of fraud and corruption. It encompasses all areas of agency where employees at all levels are faced with temptations to commit fraud or engage in corruption or unethical conduct. In order to accompany all of these activities, integrity management involves the development of an individual code of ethics, its implementation, and its auditing in an ongoing process. The code has to fit the risk profile of the corporation. Once it is established, it needs to be communicated to all members of the organization. The challenges of communicating the code throughout the organization are considerable. Each business area will have its own risk profile. In order to ensure efficient communication, integrity management therefore needs a system for identifying risks of individual employees and of specific situations. In large organizations, thousands of employees are required to receive the relevant information and training without causing an overload of irrelevant material (Walden et al. 2018).

This communication of values and risks throughout the organization serves two purposes. First of all, employees are informed of both general and more specific compliance risks. The second purpose of integrity management systems is to also ensure legal reliability. Employees are required to confirm having received and understood the information on relevant codes, risks, and legislation presented by management. An effective compliance management therefore also serves to protect the organization and the higher

level executives against of unethical or fraudulent agency of individual employees.

The establishment and maintenance of integrity management systems have opened new business areas for large auditing firms, who offer corporations their assistance to create and implement integrity management systems. The systems can also be certified, for example, according to the *Governance of Organizations* guidance from the International Organization for Standardization (ISO 37000).

Conclusion

The debate on individual and corporate integrity is of essential importance to society, because they identify a field of reflection in which individuals are required to balance two basic human energies: the desire to feel and be seen as worthy and competent in a social context, and the moral impulse which unites human beings with each other. Balancing these two forces of human nature are in particular a challenge for ambitious professionals, not only in the corporate world, but in all organizations where individual interests are in potential conflict with the long-term aims of the organization. Increasing political and social polarizations only confirm that the debate and the endeavor is far from over.

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Intentionalism

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Introduction

What role should the intentions of legislators play in statutory interpretation? *Intentionalism* is the claim that said intentions are, or should be, the primary object of interpretation. Richard Ekins, a modern proponent of intentionalism, puts the basic idea in this way:

> In enacting statutes, the legislature forms a complex lawmaking intention, which it aims to convey to the subjects of law by way of the intended meaning of the statutory text it promulgates. This legislative intent should be, and traditionally has been, the object of statutory interpretation, the determinant of the legal meaning and effect of statutes. (Ekins 2019, 157)

This definition raises many questions. What is the relation between intention and the meaning of the statutory text? How can the legislature form intentions? Where can the legislative intent be found? Why should it be followed? Can legislative intent be the *object* of interpretation? This entry is structured around these questions.

Radical Meaning-Intentionalism

Intentionalism comes in different varieties. According to the most radical version, all legal interpreters are necessarily intentionalists: there are no alternatives to it. Stanley Fish, an advocate of this radical version, claims that intentionalism is "the right answer to the question, and therefore the right definition of what interpretation

necessarily is" (Fish 2008, 1113). Such a view is based on the idea that words get their *meanings* from speakers' (or authors') intentions; therefore, if interpretation is about finding the meaning of the legal text, the interpreter must search for the author's intentions. It is a radical view because it supposes that words are just dead marks without an "animating intention" (Fish 2005, 632) and that the author can make words mean whatever she wants. As Fish puts it, "words cannot refuse the intention assigned them [. . .] Theoretically, nothing stands in the way of any string of words becoming the vehicle of any intention" (Fish 2005, 634). Likewise, Alexander and Sherwin (2021, section 2.1) claim that "Symbols signify whatever their users intend to signify thereby."

In this kind of intentionalism, intentions logically precede meanings: "intentions come first, words with meanings second" (Fish 2008, 1137). This is a more radical type of mastery of the meanings of words than just *changing* the meanings of words, like Humpty Dumpty does in Lewis Carroll's novel when he tells Alice that "glory" for him means "there's a nice knock-down argument for you!" (Carroll 1996, 196). Humpty Dumpty is building his private code with an already existing language, and he can teach this code to Alice. But in Fish-type intentionalism, a speaker should be able to create meanings *ex nihilo*, without relying on any existing language and without being able to communicate those meanings to anyone. Radical intentionalists claim that a person can genuinely mean something even though others cannot understand her (Knapp and Michaels 2005, 659; Alexander and Prakash 2004, 978; Fish 2005, 634).

But how can a speaker herself know what she intends without some means of expressing and explaining her intentions? Doesn't the formulation of an intention presuppose meaningful language and not the other way round? And who actually first connects intentions (as if some kind of tags) to words and only then utters something? Ordinarily we simply say something without first attaching meaning-endowing intentions to words – and mean just what we say, so that intention is inseparable from the expression of intention.

Of course, sometimes what words mean and what the speaker means come apart: we say things we do not literally mean (if we are, e.g., being ironical) or mean to say things that we fail to say (if we are, e.g., absent-minded: "Did I say dogs? I meant cats"). But these are exceptional cases that presuppose the normal case where word meaning and speaker meaning coincide (Raz 2009, 278). The context of legislation is hardly the exceptional case where legislators employ ironical language or make absent-minded mistakes all the time. Thus, intentionalism as the thesis that the speaker's private intentions precede meaning and the speaker can completely control the meanings of words by her intentions – and that this possibility should always be kept in mind when interpreting statutes – can be rejected.

Minimal Intentionalism

Intentionalism can also mean the trivial claim that when the legislature enacts a statute, they do it intentionally; that is, they do not do it accidentally or unconsciously. This follows if we assume that legislators are vested with power to make law. Then they must exercise voluntary control over the development of law; and "this is inconsistent with the idea of unintentional legislation" (Raz 2009, 282). Raz calls this "The Authoritative Intention Thesis" (Raz 2009, 275).

Of course, legislators must not only intend to legislate, but they must also know what they legislate: "One is hardly in control over the development of an aspect of the law, if, while one can change the law by acts intending to do so, one cannot know what change in the law one's action imports" (Raz 2009, 282). But knowing what one legislates does not necessarily mean that one knows the full content of what one legislates: it is enough that one just somehow identifies the law being enacted. One may legislate with the knowledge that there are other persons who know the full content of the enacted law. In this sense, the required intention in Raz's "Authoritative Intention Thesis" is minimal: it does not require knowledge of the content of the enacted statute. This kind of minimal intentionalism is hard to dispute,

but as Raz points out, it plays no role in the interpretation of legislation (Raz 2009, 286). It hardly helps the interpreter of an unclear statute to know that it was enacted voluntarily and not, e.g., asleep or under hypnosis. Thus, we can also dismiss minimal intentionalism as irrelevant to the practice of legal interpretation.

Moderate Intentionalism

If there is to be a genuine debate between intentionalism and other theories of interpretation, then intentionalism must be understood so that it is not a necessary or a trivial truth that applies to all acts of interpretation. In a moderate sense, intentionalism need not deny the possibility of literal meanings and textual interpretation (as radical intentionalists do). It can be understood as a method of interpretation that one needs when literal interpretation is not possible or when literal interpretation leads to absurd or unjust consequences.

Thus, in a moderate sense, the role of legislators' intentions need not be ubiquitous: there can be uncontroversial cases where the language of the statute is clear and should prevail. But, as Lawrence Solan puts it, "language can take us only so far" (Solan 2005, 430). Sometimes the statute contains an obvious mistake; or the statute may be ambiguous. Sometimes applying the statute literally would just have "intolerable consequences" (Goldsworthy 2005, 496). The most famous case in legal theoretical literature is probably *Riggs v. Palmer* (115 N.Y. 506 (1889)), where a literal reading of the New York Statute of Wills would not have prevented a murderer from inheriting under his victim's will.

According to moderate intentionalism, the way to correct the mistakes of statutory language or to resolve ambiguities or to avoid intolerable consequences of literal application is to turn to the intention of legislators. Intentionalists point out that this is what we do in ordinary conversation: if someone says something that doesn't seem to make sense or can be understood in different ways, a natural reaction is to ask: "What did you mean by that?" Likewise, in legal interpretation, it is natural to turn to legislators' intentions, if there is reason to doubt that they have made some mistake or have not expressed their intentions clearly or have left something important unexpressed in the statute (Solan 2005, 471). Thus, intentionalism can be understood as the moderate claim that:

> it is often reasonable for a court to depart from a provision's literal meaning on the ground that it is not its true meaning. Its true meaning is, instead, partly a function of its intended meaning, at least insofar as evidence of its intended meaning is readily available to the legislature's intended audience. (Goldsworthy 2005, 502)

However, even if it is possible for an individual speaker (but only in exceptional cases, as we saw earlier) to intend something different than what she said, is this possible for a multi-member legislative body? Can a legislature have intentions?

The Problem of Group Intention

If we concede the moderate intentionalist's point that in unclear cases the interpreter must (or is allowed) to turn to legislature's intentions, to what does she turn? What is an intention? In the discussion about intentionalism, it is typical (especially among the critics of intentionalism) to view intentions as *mental states*. This is understandable: if there is to be an *actual* thing that the intentionalist interpreter is looking for, it seems that it has to be "a real psychological state of the relevant body" (Greenberg 2021, section 4.1.1). An alternative would be a hypothetical or objectified intention. The construction of such intentions characterizes *purposivism*, which is a method of interpretation that seeks idealized intentions that reasonable legislators would have. But often intentionalists reject such fictional intentions: Fish thinks that resorting to the intention of a "reasonable author" is no longer interpreting the text but "re-writing" it (Fish 2008, 1133). Similarly, Alexander and Sherwin (2021, section 2.1) claim that "[t]o seek the meaning of a purely hypothetical author of the lawmakers' words is to flout [their] authority and produce governing norms that no one actually

has chosen." Therefore, it seems that the intentionalist interpreter must be "in search of the lawmaker's mental state at the time of enactment" (ibid., section 2.2).

However, if intentions are mental states, it is hard to see how there could be such a thing as legislative intent. Intentions require a mind in which they occur or exist. But a legislature is usually a *group* of people – often including hundreds of members – and a group doesn't have a mind. Only individual members of the group have minds (Marmor 2005, 124). How can the intentions of these individuals be transformed into a single collective intention? (See Dworkin 1986, 315–6.)

Perhaps it is possible to speak of collective intentions if one understands them as *shared* intentions. The idea here is that a certain intention is "shared by all, or perhaps most, members of a certain group of people" (Marmor 2005, 124). This view admits that strictly speaking, only individuals have intentions, but several individuals can have an intention that has the same content. But now a critic of intentionalism can ask: Do legislators share the same intention when they enact a statute? Do they have *any* intentions (apart from the minimal intention to legislate)? Max Radin famously claimed that:

> [a] legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, differing ideas and beliefs. (Radin 1930, 870)

Antonin Scalia and Bryan Garner similarly think that collective intention is "pure fiction" because:

> dozens if not hundreds of legislators have their own subjective views on the minutiae of bills they are voting for – or perhaps no views at all because they are wholly unaware of the minutiae. [. . .] Each member voting for the bill has a slightly different reason for doing so. There is not a single set of intentions shared by all. (Scalia and Garner 2012, 392)

If there in fact are no shared intentions, but only different and possibly conflicting individual intentions, then the shared intention cannot function as the object of interpretation – something that serves as the criterion for correct and incorrect interpretations. Instead, judges who pursue legislative intents "will in fact pursue their own objectives and desires" (Scalia 1997, 17).

Non-mentalist Understanding of Legislative Intent

Some intentionalists have replied to these criticisms by drawing on our everyday ways of talking and to philosophical research on group agency and collective rationality. As, e.g., Solan reminds, we talk of groups as units and attribute beliefs, intentions, and other mental states to them all the time (Solan 2005, 438–441). Examples are not hard to think of: "The university decided to recruit new teachers"; "The Church regrets its past actions"; "The Finnish government believes that joining Nato is necessary." Does the anti-intentionalist want to eliminate all groups from our social reality? As Victoria Nourse points out, this would be "an extravagant argument amounting to the rejection of most of our social world, from Microsoft to Harvard to the Catholic Church" (Nourse 2014, 1625).

But does it make sense to talk of groups having intentions if groups do not have a single mind that contains those intentions? Philosophers of group agency have argued that a collectivity can act as a unit and have shared intentions through its rules and procedures and through its members accepting those rules and procedures as binding. Solan illustrates the idea of group agency by a married couple which has an agreement that one of the spouses always plans and organizes their holiday trips and the other one accepts the plans and just follows along. Although only one person does the actual planning, it is still natural to talk of "the couple's holiday plans" or, from the first-person perspective, of "our holiday plans." In general, people in long-term relationships often fuse into a "we" (Solan 2005, 437–438; Gilbert 2013, 259–270). Similarly, in a larger organization, only a small subgroup may, e.g., draft the strategy of the organization, but, perhaps after a round of meetings and discussions, the whole

organization accepts it as "our" strategy to which they are committed.

In a similar way, a legislature can be conceived as a group agent that acts via its decision-making procedures. When a new law is enacted, it doesn't matter that its details are written by only a few committee members, that there are some legislators who oppose it, and that there are many legislators who do not know or understand its full content (if it is, e.g., a highly technical law), and they only vote for it because their party leader tells them to do so. What matters is that all legislators are committed to legislative meta-rules and procedures and accept that the end result – no matter who wins or loses – represents the intention of the legislature (Solan 2005, 444–449). Nourse sums up this type of approach to legislative intent in the following way (although she speaks of the US Congress, this can be taken to apply to democratic legislatures generally):

> there is such a thing as legislative intent, but only if we define intent in a way that does not carry with it embedded assumptions that, by definition, only apply to individuals. Congress has the functional equivalent of intent by acting through its sequential procedures. When we ask about Congress's intent, what we are asking for is not its mental state, but an elaboration of its actions within the procedural context in which it acted. (Nourse 2014, 1625)

What implications does this account of group agency and legislative intent have for legal interpretation? If the interpreter turns to legislative intent to clarify an obscure statute, it seems that she just has to scrutinize the legislative decision-making history. But how is this different from purposivism? Usually, the difference between intentionalism and purposivism is explained so that the intentionalist seeks the actual mental states of legislators at the time of the enactment, while the purposivist constructs an objectified intention on the assumption that the legislator was reasonable (see, e.g., Greenberg 2021). But if the idea of legislative intentions as mental states is rejected, does not intentionalism collapse into purposivism?

Nourse argues that if legislative intent is understood as sequential decision-making according to specific rules, it limits the sources from legislative history that are relevant for interpretation. She accuses purposivists of allowing all kinds of material as evidence of statutory purpose, which entails that the interpreter can choose materials that suit her own preferences: "Purposivism's permissive everything-is-ok approach toward legislative history can quickly get the interpreter in trouble. It is likely to lead to the familiar charge of 'picking one's friends'" (Nourse 2014, 1648). But if one is familiar with law-making procedures, then one knows, e.g., that some texts in legislative history are much more important than others and that stray remarks of individual legislators outside the decision-making context are irrelevant (Nourse 2014, 1626, 1652; Solan 2005, 447–448). Thus, on the basis of this, the difference between intentionalism and purposivism seems to be that they have different views of legitimate interpretive sources.

What Justifies Intentionalism?

Let's assume that there is such a thing as legislative intent and that sometimes it is different than what the statute literally means**.** Why should the interpreter turn to legislative intent in hard cases?

One way of justifying intentionalism is to resort to the rules of democratic government. It could be claimed that if we want to maintain the principles of division of powers and legislative supremacy, then judges must defer to the legislators' will (intention):

> The importance of legislative intent in statutory interpretation and of original intent in constitutional interpretation is often thought to follow from the demands of democracy. A familiar democratic idea, for example, is that courts should faithfully carry out the intentions of the people's chosen representatives. (Greenberg 2021, 4.1)

But opponents of intentionalism think that the argument from democracy is on their side. Thus, textualists argue that democracy, division of powers, and other rule of law values are best protected by following the statutory text rather than the intentions of legislators. However, this criticism is usually founded on the assumption that

intentions are private mental states, and because of that, they cannot be known with certainty. Thus, Scalia and Garner think that trying to discover legislators' intentions would involve "mind-reading" (Scalia and Garner 2012, 92); but we "can't know what's in the minds" of legislators (Scalia and Manning 2012, 1613). If we can't know this, then interpretation according to their intentions becomes just guessing or speculation, which in practice gives license to the interpreter to smuggle into statutes her own views of what is reasonable and to usurp power that belongs to democratically elected legislators (Scalia 1997, 17–18; Scalia and Manning 2012, 18–22).

If the assumption of legislative intent as a mental state is rejected, this criticism loses its force. However, another textualist argument against intentionalism is that even if intention were understood as residing in the decision-making procedures culminating in the enactment of the statute, it is *only* the statute that is enacted, not any other prior documents. And the legislators agree only on the final *language* of the statute that they pass as law, not necessarily on all the details that can be found in committee reports (Scalia and Garner 2012, 393). As Antonin Scalia famously put it, "men may intend what they will; but it is only the laws that they enact which bind us" (Scalia 1997, 17).

How then should hard cases be decided if it is forbidden to utilize any other material than the enacted text (and perhaps dictionaries)? Remember that moderate intentionalists resort to intentions only if the text of the statute makes it necessary: if it contains a mistake, is ambiguous, or leads to intolerable consequences. Goldsworthy argues that in such cases, true respect for legislative supremacy requires that the interpreter searches evidence of legislators' intentions, at least if one adheres to a positivist view of law, according to which valid law must be connected to legislators' actions. But if the actual statutory text is unclear, and the interpreter cannot use legislative history, it seems that the only alternative is to resort to the interpreter's own moral values or political preferences – exactly the conclusion that textualists want to avoid (Goldsworthy 2005).

Andrei Marmor has a slightly different strategy for defending (moderate) intentionalism. He thinks that in some hard cases, where the language of the statute is unclear, interpreting statutes according to legislators' intentions is the correct method. But this is only if legislators are *experts* in the sense that they have more knowledge than judges about the underlying aim of the statute and about ways to achieve that aim. Furthermore, legislators must have expressed their intentions during the legislative process, and judges must have access to this information; and the statute must not be very old. Under these conditions judges should revert to legislators' intentions when deciding a case (Marmor 2005, 132–139). The main justification is the condition about expertise: legislators must really know better than judges (about the restricted issue at hand) if they are to have the required authority. If their expertise is doubtful, then their intentions can be ignored.

But even if all these conditions were fulfilled, should legislators' intentions be more important than the legal text itself? Waldron thinks that this puts *legislators* above the law; we are then, strictly speaking, ruled by them, rather than by the laws they make. This flouts the fundamental rule of law maxim, according to which we should be ruled by laws, not by men (Waldron 1995, 349).

Conclusion: Intention as a Result of Interpretation

The debate between intentionalism and textualism seems to lead to a stalemate: each party sees itself as the true faithful agent of the democratically elected legislature. Perhaps the debate should be understood in a different way. It can be argued that the debate is not really about what is the proper *object* of interpretation. The real object of interpretation for both parties is a *text* or a collection of texts. As we saw, there is not a mental item (the legislature's intention) that the intentional interpreter tries to understand. There are just various texts that the intentionalist reads. The intention of the legislator is rather the *result* of interpretation (see Aalto-Heinilä et al. 2020). After reading what

she thinks are the relevant materials, the interpreter can conclude: "this is what the legislator must have meant." The difference between intentionalists and nonintentionalists then seems to boil down to from which materials the intention of the legislator may be constructed.

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Intentions: Collective

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Introduction

We have a remarkable, perhaps unique (Tomasello and Racokzy 2003), ability to act together with others purposefully. Many of the things we do would be harder, if not impossible, to achieve were it not for this ability. It is much easier, and perhaps less dangerous, to lift a couch together, and under no circumstances can anyone dance a tango alone. At times, we find uniting with others as part of a common pursuit a fulfilling experience in itself, worth pursuing for its own sake. Much of our lives are framed by the collective actions of which we are a part: games, plays, performances, research, rites, political action, and family trips. Moreover, social and legal structures are often instituted and preserved but also reshaped and overthrown by collective action.

So, what do collective actions involve? How do we get to act together with others? To answer these questions, it is natural, as many philosophers have done, to enlist the notion of *collective intention* (synonymously, *shared* or *joint* intention): we φ together if we enact a collective intention to φ.

There is a risk, however, in enlisting the concept of collective intention for the explanation of

collective action. For most contributors to that literature (Bratman 1987; Davidson 1980; Harman 1976), individual intentions are mental states – though see Anscombe (1963) for contrast, as well as Stoutland (1997) and Laurence (2010) for Anscombian approaches to collective intention. One might therefore worry that those who accept collective intentions have no choice but to buy into the existence of collective minds. This is a consequence many would like to avoid for a variety of reasons. Some see it as self-evident that minds belong only to individuals (Searle 1990). Others are concerned about the way a collective mind would undermine the autonomy of the individuals who constitute it.

Suppose we wish to avoid positing collective minds. What might collective intentions look like? More specifically: (1) When a collection of individuals has a collective intention, how do these individuals' psychologies stand to that collective intention (section "Collective Intention and Individual Intention")? (2) Are the ties between such individuals psychological or normative – or both (section "Normativism Versus Non-normativism (Versus Dual-Aspect Theories)")? And (3) how tightly knit do these individuals need to be (section "Maximalism Versus Minimalism")?

This entry lays out the literature's answers to these questions. It also considers applications of the concept of collective intention in legal and moral philosophy. After all, shedding light on foundational questions about our capacity to act together is not the only reason why one might be interested in elucidating the notion of collective intention. Another reason, indeed, is to advance our understanding of collective wrongdoing and, relatedly, to clarify our thinking about collective responsibility. Interestingly, those who have pursued these theoretical goals have often felt compelled to take issue with dominant accounts of collective intention and, accordingly, to propose alternative accounts (see section "Maximalism Versus Minimalism").

But before going any further, more should be said about how the notions of collective intention and collective action interact (section "Collective Intention and Collective Action").

Collective Intention and Collective Action

As observed earlier, philosophers often invoke the notion of collective intention in order to elucidate the nature of collective action. To understand why they do so, it will be helpful to take a detour via theories of individual action. Since at least the work of Ludwig Wittgenstein (2010), philosophers of action have observed that there is an intuitive difference between actions and mere behaviors, that is, between the things that agents do (as when one raises one's arm) and the things that merely happen to them (as when one's arm rises, say, out of mere reflex). To explain this difference, philosophers have invoked the notion of intention: according to a popular view in philosophy of action, an action is a piece of behavior in the production of which one's intentions were involved. The production of mere behaviors, by contrast, does not involve intentions in any way (e.g., Davidson 1963).

With this in mind, consider collective action. As collective action theorists have observed, there is an intuitive difference between collective actions and parallel individual actions, that is, between the things that together we do (as when dancers of an outdoor ballet company run to a gazebo in a park as it starts raining) and the things that we merely do in our capacity as individual agents (as when parkgoers run to a gazebo as it starts raining). (The example is adapted from Searle (1990).) To explain this difference, it is tempting to take one's cues from individual action theory and, accordingly, to invoke the notion of *collective* intention: a collective action is a piece of collective behavior in the production of which a collective intention was involved. The production of parallel individual actions, by contrast, does not involve in any way one such collective intention.

Collective action theorists disagree about whether collective intentions are, as this argument might suggest, *necessary* for the performance of collective actions (Asarnow 2020; Butterfill 2012; Butterfill and Sinigaglia 2022; Ritchie 2020; Salomone-Sehr 2022, accepted; Shapiro 2014). In light of this argument, however, one thing is for certain: the enactment of the collective

intention to φ is *sufficient* for φ to count as a collective action. So even if collective intentions might not be the only way in which human agents pool their agential powers, it is still a way – and arguably a central one. There is, thus, good reason to search for answers to the questions outlined in the introduction.

Collective Intention and Individual Intention

The answers on offer can be classified along several axes. One axis concerns the strength of connection between individual psychological states and collective intentions – see question (1) above. There are three major kinds of theory: psychological, non-psychological, and quasi-psychological.

Psychological theories hold that collective intentions are a special kind of intention had by individuals, thereby obviating any concerns about collective mind (e.g., Searle 1990). This is the only kind of theory we will consider on which collective intentions are, strictly speaking, mental states. According to these theories, individuals are capable of intending in two ways, individually and collectively. Individual intentions are private, expressible in sentences of the form "I intend to φ," while collective intentions implicate a group and are expressible by sentences of the form "We intend to φ." This latter state is not reducible to a combination of individual intentions and beliefs and desires. Instead, it is either a primitive, built-in capacity for social directedness of which human agents are capable (Searle 1990) or a functionally defined role with a distinctive characterization (Tuomela 2005: 358).

This kind of theory is tempting because it involves the fewest theoretical complications. But it might have a serious shortcoming that has to do with one function that intentions are widely thought to serve. Individual intentions, as commonly conceived of, *settle* an agent on a course of action. Similarly, one would expect collective intentions to settle a collection of agents on a course of action. The problem with we-form intentions is that they do not, on their own, settle anything. Even though these intentions purport to make reference to a collection of agents, that collection of agents may or may not exist (Searle 1990: 415). Since we-intentions are psychological states of individuals, a completely isolated individual can have one. It is therefore a mistake to identify collective intentions with individually held intentions expressible in the first-person plural. At the very least, we need *shared* we-intentions, which we can understand as being in place when a collection of people each have tokens of the same type of we-intention.

But even this might fail to explain adequately the notion of collective intention. The shared we-intention view is consistent with the individual we-intentions simply happening to coincide. This creates two problems. First, in order for a collective intention to settle a collection of agents on a course of action, it would seem that there must be mutual responsiveness between the agents' mental attitudes. Each participant needs to pay close attention to their partners' individual intentions regarding how they will do their part, and each needs to be ready to respond to changes. If this is on the right track, then shared we-intentions are in trouble. For it is not clear how shared we-intentions can account for this form of mutual responsiveness. Coincidental we-intentions do not seem to put participants in a position to coordinate their attitudes with one another, since such attitudes need not be related in any way. Second, having tokens of the same type of we-intention does not entail that we have any belief or knowledge of the other participants' attitudes. Without this information about the intentions of the others, and thereby information about the likelihood of the others' parts being performed, it is unclear how each individual can be in a position to rationally intend something about what *we* are going to do. To summarize: psychological views fail to capture the distinctive form of *interdependence* that arguably binds together bearers of a collective intention. For most, considerations of this sort speak decisively against psychological theories, and thus, against the idea that collective intentions are strictly speaking mental states (Bratman 2014; Gilbert 2013; Velleman 1997).

At the other end of the spectrum are non-psychological theories, which hold that when a collection of agents has a collective intention, that collective intention need not bear any particular relation to the intentions of the agents of that collection. Instead, on any plausible version of this kind of theory, collective intentions are normative states of affairs. They are social commitments binding each participant to the performance of the action and created by some form of communication or signaling. Such commitments, in turn, generate interpersonal obligations between participants (Gilbert 2013).

The issue many find with such theories is that a social commitment divorced from corresponding individual intentions does not describe a situation in which people are *motivated* to engage in collective action. Since a social commitment does not entail an individual intention to do one's part for any of the participants, these theories do not explain how any of the individuals are settled on the collective performance. In fact, each individual may be settled on *not* doing their part without having yet rescinded the commitment (Gilbert 2009: 171–172). And it is not clear in what sense a collective can be settled on doing something when the individuals who make up the collective are settled on not taking the necessary steps. Normative states of this kind therefore appear insufficient to play the roles that, according to many, collective intentions are supposed to play (Bratman 2014: 116–7).

Quasi-psychological theories occupy a middle ground between psychological and non-psychological theories. According to quasi-psychologism, collective intentions amount to combinations of interrelated, individual psychological attitudes (Alonso 2016; Bratman 2014; Ludwig 2016; Roth 2004; Tuomela 2005). On one version of this kind of theory, agents with a collective intention each have individual intentions about a shared aim, about their part in achieving that aim, and about the intentions of the other participants. And, usually, such accounts also posit common knowledge about the attitudes of the others between the participants. The claim then is that when each individual has the requisite intentions and there is common knowledge about such intentions between participants, a state of affairs obtains that guides the behavior of the collective in the ways that regular intentions are commonly thought to guide the behavior of individuals.

Strictly speaking then, neither quasi-psychological accounts nor non-psychological ones regard collective intentions as genuine psychological states. Accordingly, such accounts run in no way the risk of ending up committed to the existence of collective minds. In contrast with non-psychological accounts, quasi-psychological accounts argue that collective intentions are inextricably linked to the participants' individual mental states – hence the idea that such accounts are *quasi-psychological*. By analyzing collective intentions in terms of interlocking individual mental states, quasi-psychological views (unlike psychological accounts) capture the distinctive *interdependence* that brings together bearers of collective intentions. By maintaining a strong connection between individual intentions and collective intentions, quasi-psychological views (unlike non-psychological ones) do justice to the intuitive idea that, to count as having a collective intention, participants must be adequately *motivated* to partake in collective action. In part for considerations of this sort, quasi-psychologism has arguably become the most popular theory of collective intention.

Normativism Versus Non-normativism (Versus Dual-Aspect Theories)

Another distinction between kinds of theories concerns the role of interpersonal obligations in collective action. This distinction is, for the most part, orthogonal to the psychological/quasi-psychological/non-psychological distinction, but some combinations of views are more plausible than others (as will be noted below).

Normativists contend that collective action inherently involves a special *normative* status amongst participants, which, depending on the account in question, may include a variety of obligations, including obligations to do one's part, to take due care for expectations generated in other participants, and even to faithfully follow through on others' intentions (Gilbert 2013; Roth

2004). For normativists, adequate accounts of collective intention must therefore explain the presence of these obligations.

In addition to their various positions on the content of the mutual obligations generated by collective intentions, normativist accounts may differ on whether or not these obligations are directed (and what directedness might entail), tied to the psychological attitudes of the participants, and/or present in cases where the jointly intended activity is immoral (Gilbert 2013; Roth 2004). Normativism fits nicely with non-psychologism, since seeing collective intention itself as a normative state explains why there are interpersonal obligations in collective action (Gilbert 2013). But normativist views need not be non-psychological. Directed commitments to perform one's part may also arise from the relationship between the component individual intentions taken to constitute the collective intention, resulting in a normativist form of quasi-psychologism (Roth 2004).

Non-normativists, by contrast, argue that not all collective actions involve normative relations. If they are right, it would be a mistake to analyze collective intention itself as an inherently interpersonally normative phenomenon. It seems intuitively clear that at least some collective actions involve obligations. To account for these cases, non-normativists claim that there may be further normative principles that are engaged by features of certain collective actions (Bratman 2014; Ludwig 2016; Salomone-Sehr accepted; Searle 1990). For example, in high-stakes cases, participants may promise one another to do their parts or accrue obligations of due care based on the expectations of performance they generate in their co-actors.

The foregoing distinction between normativism and non-normativism is not exhaustive. *Dual-aspect theories* recognize that collective intentions are intimately connected to interpersonal obligations but deny that collective intentions necessarily generate such obligations (Alonso 2016). On such views, positing a necessary connection between shared intention and interpersonal obligation overstates the case. Instead, shared intention contains a *basis* for interpersonal obligation: a structural feature that connects shared intention and interpersonal obligations when other contextual factors are fulfilled. For example, collective intentions may inherently involve reliance between participants, which, in conjunction with a moral principle about the implications of creating and reinforcing reliance in others, generates obligations in regular circumstances.

The debate between normativists, non-normativists, and dual-aspect theorists is unresolved, perhaps because of the methodology adopted by opposing parties. For the most part, normativists, non-normativists, and dual-aspect theorists alike have relied on thought experiments that have given rise to little more than clashes of intuitions. Recently, however, some experimental research aimed at revealing common judgments about collective intention and obligations has been conducted (Gomez-Lavin and Rachar 2019, 2022; Löhr 2022; Michael et al. 2016). This research suggests that in our everyday understanding, collective intention is intimately tied to interpersonal obligation, but in a way not fully captured either by normativist or dual-aspect theories – at least as they are currently articulated in the literature (Rachar 2021).

Maximalism Versus Minimalism

In addition to shedding light on the nature of collective action, an account of collective intention is also likely to clarify the nature of collective wrongdoing, as well as the responsibility we might bear for it. To give a few examples: it has been claimed by philosophers and legal theorists that an essential feature of the crime of genocide is the collective intent with which it is perpetrated (Kim 2016: 180; May 2010: 126), where the collective intent in question is not just an aggregation of individual intents (May 2010: 116). A good account of collective intention, thus, is likely to refine our understanding of the crime of genocide – as well as to help with its prosecution. Less dramatically, the crime of conspiracy is commonly conceived of as involving the collective

design of a plan to do something wrong – whether or not the plan in question winds up enacted. It would therefore seem to involve a collective intention to arrive at the plan in question. An account of collective intention, accordingly, may illuminate what is at stake in the crime of conspiracy. (For a recent attempt to work out, more generally, the normative implications of having, together with others, a collective intention to do wrong, see Saba Bazargan-Forward (2022: 88–94).)

Interestingly, however, philosophers who have attempted to understand the nature of collective wrongdoing and, relatedly, the nature of collective responsibility have sometimes taken issue with dominant accounts of collective intentions.

Dominant accounts of collective intentions are *maximalist* in the sense that the kind of sociality they seek to explain is one where coparticipants are tightly knit and their psychologies deeply intertwine, at least when collective intentions are understood along quasi-psychological lines. As we have seen, proponents of quasi-psychological accounts commonly assume – with some exceptions (Blomberg 2016; Ludwig 2016) – that, to have a collective intention, participants' mental attitudes must be common knowledge between them. They also commonly assume that having a collective intention to φ entails that each participant intends the achievement of φ. This implies, in turn, that participants are disposed to track the likelihood of their common plan achieving their aim and, should they notice things going off-track, to revise that plan so as to increase their chances of success.

It is often the case, however, that when engaged in collective wrongdoing, the relationships between coparticipants are considerably attenuated, sometimes to maintain some form of deniability. As Christopher Kutz notes (2000: 90–91), it is indeed often part of the design of criminal organizations that participants have very incomplete knowledge about the goals that their tasks serve or about the identity of their coparticipants, making it harder (or even impossible) to track success and revise the common plan on the fly. In a similar vein, the division of labor in such organizations is often such that participants need not intend the achievement of the organizations' goals in order to succeed, nonetheless, in playing their respective part. If some form of collective intention is to serve as a ground for holding responsible the participants in collective wrongdoing, then there is good reason to search for *minimalist* accounts of collective intentions, that is, accounts on which the conditions for having a collective intention are a lot less stringent than those included in dominant accounts.

Kutz's account is one such minimalist account. At its core, his account only requires, for there to be a collective intention to φ, that a collection of agents have overlapping participatory intentions to φ, where a participatory intention to φ is an intention to contribute causally, constitutively, or expressively to φ (2000: 82). On Kutz's view (fleshed out in greater detail in (2000: 108)), participants must be committed to their bit counting as a contribution to φ. This kind of commitment, however, leaves open the possibility (*pace* most accounts of collective intention) that a participant might not be committed to the success of the overall endeavor. And as Kutz views participatory intentions as forming the basis of accountability, even such relatively uncommitted participants wind up nonetheless on the hook when the collective action they intentionally contribute to is ethically wrong.

There are at least two other families of reasons why one might be interested in a minimalist account of collective intention. One has to do with cognitive sophistication. The more maximalist an account of collective intention, the more cognitive sophistication that account requires from the kind of agents it deems capable of forming collective intentions. Maximalist accounts of collective intentions, as a result, are likely to reach the verdict that young children cannot form collective intentions, a verdict that some collective intention theorists find implausible (Pacherie 2013; Tollefsen 2005). These theorists have therefore endeavored to develop accounts of collective intention that demand less cognitive sophistication. The second family of reasons favoring the search for a minimalist account has to do with collective actions where the number of participants is extremely high. The more maximalist an account, the less likely it is that that account deems big collections of agents capable of forming collective intentions. Accordingly, those who think that

collective intentions can be had by big collections have, too, endeavored to develop minimalist accounts of collective intention (e.g., Paternotte 2012).

For their part, maximalists may respond in the following two ways. First, weakening the notion of sociality that serves as the target of explanation threatens to collapse a prevalent, deeply seated form of intersubjectivity into something less robust, thereby possibly impoverishing our account of the social world. After all, it may be that there are features of the interactions of agents with a certain level of cognitive sophistication that cannot be captured by minimalist accounts. Second, it is unclear to what extent normative judgments about responsibility should drive an account of intention. It may be, for example, that our responsibility judgments track *intentional actions* rather than *intentions* themselves. In addition to general concerns about whether this is an appropriate methodological strategy, one may have the specific worry that approaching the issue this way hinders the pursuit of a unified account of intention. Judgments of individual responsibility are unlikely to accord completely with judgments of collective responsibility. If accounts of individual intention and collective intention are dependent on those judgments, it is hard to see how we could develop an account on which, roughly, collective intentions play the roles for collectives that individual intentions play for individuals.

In light of these considerations and the various theoretical (and practical) interests served by an account of collective intention, the most appropriate path forward may be the adoption of a kind of pluralism. On this approach, rather than searching for a single account, we recognize that there are a variety of collective-intention-like posits that explain different but related parts of our social and moral worlds.

Conclusion

As this entry suggests, there are at least three axes along which accounts of collective intentions might be categorized. One first axis bears on the mental character (or lack thereof) of collective intentions, that is, on whether collective intentions should be understood as mental states or not. A second axis concerns the kind of normative relations that might or might not bind together the bearers of a collective intention. A third axis has to do with how tightly knit bearers of a collective intention are. These axes help regiment the diversity of views that collective intention theorists have developed – in part because of the diverse theoretical (and practical) purposes that they have pursued.

Cross-References

► Intentionalism
► Responsibility: Collective

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International (Criminal) Justice: Punishment

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Introduction

This entry discusses philosophical approaches to punishment as a part of international criminal justice (ICJ). Punishment involves "the infliction of hard treatment by an authority on a person for his prior failing in some respect (usually an infraction of a rule or command)" (Feinberg 1965: 397). Punishment is different from other unpleasant treatments in that it also has a symbolic significance that expresses "attitudes of resentment and indignation, and [. . .] judgements of disapproval and reprobation" (Feinberg 1965: 400).

In this entry, I focus on punishment as a part of contemporary ICJ. As such, it implies a trial that determines what punishment is adequate for liable individuals. Punishment can in principle also be inflicted on groups, but international criminal law is committed to individual criminal responsibility (Rome Statute, Art. 25). ICJ belongs to the more general ideas of transitional justice and *jus post bellum*. The practice of prosecuting and punishing persons who committed international crimes is one of several mechanisms to bring about efforts of reconciliation and justice in the aftermath of atrocities; others are truth commissions, victim compensation, reparations, or institutional reform. Some argue that reparations are also a form of punishment (Orend 2002: 47), but for the purpose of this entry they are treated as separate, non-punitive measures of expressing justice.

Modern ICJ is usually thought of as having been born in the german city of Nuremberg in the aftermath of World War II (Luban 2010: 573). While its beginnings can be traced to World War I (Schabas 2012: 6), the first trials began in 1945 in Nuremberg at the International Military Tribunal (IMT) and in 1946 in Tokyo at the International Military Tribunal for the Far East (IMTFE). After their conclusion, and as a

consequence of the Cold War, international criminal law lay dormant for several decades, until the international community decided to establish a number of ad hoc tribunals in the 1990s. Two of the more prominent ones were the ICTY, which dealt with the atrocities committed in the aftermath of the dissolution of Yugoslavia; another directed its efforts to the prosecution of those responsible for the genocide in Rwanda (ICTR). Others operated in Sierra Leone, Cambodia, and East Timor. In 1998, an international conference of diplomats adopted the Rome Statute, which established the first permanent International Criminal Court (ICC) that formally became operational in 2002.

Some philosophical problems of punishment translate – or even appear more poignant – in the international context and have thus generated substantial debate. To structure the debate about punishment and the philosophy of international (criminal) justice, I distinguish three main questions. The first is: What crimes are punishable? The second is: Why may we punish? And the third is: Who is authorized to punish? I present the main points of discussion under each question.

Three Questions About Punishment in International Criminal Justice

What May We Punish?

One fundamental observation about the category of crimes punishable under international criminal law is that its range is much narrower than the range of crimes punishable within states. The Rome Statute lists the following four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression (Rome Statute, Art. 5–8). Schabas argues that "[p]robably no single explanation accounts completely for inclusion in or exclusion from the list of international crimes" (Schabas 2012: 45). There are sophisticated debates on the question what conceptually constitutes international crimes, particularly about crimes against humanity (Vernon 2002; May 2005; Renzo 2012) and genocide (Boghossian 2010; May 2010).

An important question thus is: What makes a crime an *international* crime that justifies involvement of the international community in its prosecution and punishment? Early accounts posited a *war nexus*. For example, IMT's lead US prosecutor Justice Jackson argued that crimes against humanity are crimes because they were undertaken with the purpose of planning and waging an aggressive war (Altman and Wellman 2009: 74). Such wars threaten the international order, and thus, crimes against humanity are punishable as part of them.

But this explanation is problematic because it does not include crimes that were perpetrated by a state against its own population. In the context of genocide and crimes against humanity, ICJ targets political and military leaders that commit crimes *against their own people*, thereby radically curtailing their claim to sovereignty. Altman and Wellman argue that the strategy of subsuming crimes against humanity under the crime of aggression fails to account for the fact that those are separate crimes; if they were not, why there should be a separate punishment for crimes against humanity (Altman and Wellman 2009: 74)? Vernon suggests that not every crime against humanity is a prelude to war, making the war nexus strategy "too selective and conditional" (Vernon 2002: 239).

May has written carefully argued studies on all four international crimes (May 2005, 2007, 2008, 2010). For crimes against humanity in particular, he proposes an *international harm principle*. Its role is to explain why some crimes concern not only the individuals and the state directly involved, but also why those crimes should be under the jurisdiction of the international community. The idea is that certain crimes are so egregious that they harm not only the victims and the domestic community, but humanity as a whole. In that sense, the international harm principle echoes some of the wording in the Rome Statute, which speaks of crimes "that deeply shock the conscience of humanity." Arendt made a similar point regarding the Eichmann trial in Jerusalem. In her view, "insofar as the victims were Jews, it was right and proper that a Jewish court should sit in judgement, but insofar as the crime was a crime

against humanity, it needed an international tribunal to do justice to it." (Arendt 1994: 269). She argued that that "the international order, and mankind in its entirety, might have been grievously hurt and endangered" (Arendt 1994: 276).

May argues that the international harm principle can be satisfied from either the victims' or the perpetrators' side (and ideally from both): "*either the individual is harmed because of that person's group membership or other non-individualized characteristic, or the harm occurs due to the involvement of a group such as the State.*" (May 2005: 83; see also Vernon 2013 for a group-based, state-centered view). Such group-based harms also damage the international community because they tend to cross borders (ibid.). Some have pointed out that the international harm principle is unable to explain in detail in what sense other individuals than the actual victims – let alone all of humanity – are in fact *victimized* by international crimes, and that the international harm principle has counterintuitive consequences when the border-crossing character of the harms are taken seriously (Wellman 2009: 435; Renzo 2010).

One might also reject the international harm principle because it presupposes an inadequate conception of sovereignty: It seems to work on the assumption that states are generally permitted to treat their constituents as they like, provided conflicts do not spill over state borders. Wellman and Altman argue that such a "westphalian" conception of sovereigny is mistaken: Only *legitimate* states that tie their power to the protection of human rights qualify for sovereign status in the first place. States that regularly violate or fail to protect their constituents' basic human rights have no claim that other states do not intervene in them (Altman and Wellman 2009; Wellman 2009: 435). To Wellman, talk of "crimes against humanity" is therefore confused, as it implies westphalian concepts that have no normative basis in a world of human rights (Wellman 2009: 438). As an alternative, Altman and Wellman argue for basic human rights as the basis for identifying crimes that can be prosecuted internationally. For human rights violations to qualify as international crimes, Altman and Wellman require them to be widespread or systematic (Altman and Wellman 2004: 47; Altman and Wellman 2009: 80). To Renzo, all violations of basic human rights constitute a crime against humanity in principle, because in committing them, criminals fail to discharge the duties they have *qua* human beings and thereby become accountable to all of their fellow human beings (Renzo 2012).

Why May We Punish?

One widely debated question in the philosophy of punishment is its justification. In the context of ICJ, the focus is on whether existing justifications of punishment fit the aim and practice of international criminal law. While Drumbl (2007) expresses fundamental doubt that the aims that justify domestic (liberal) punishment translate well into ICJ, other defend single- or multipurpose justifications. Luban mentions a number of purposes that international criminal law follows: retribution, deterrence, incapacitation, rehabilitation, the promotion of social reconciliation, giving victims a voice, and collecting and crafting historical records (Luban 2010: 575). He argues that the most promising justification of ICJ is the expressive dimensions of the trials: "The point of trials backed by punishment is to assert the realm of law against the claims of politics" (Luban 2010: 576). In international trials, the international community projects its norms. These norms express respect for the law, and that political violence against the innocent is criminal. On this view, international trials turn powerful politicians into mere criminals in the public eye; a forceful public conversion some defendants, like the Nazi war criminal Robert Ley (Tusa and Tusa 2010: 133), found degrading.

While the trials and their subsequent punishment certainly have an expressive dimension – as Feinberg (1965) argues, it is what distinguishes them from other forms of hard treatment, like penalties or quarantines – it is not clear that this function *justifies* the practice of punishment, as Luban suggests. It might be argued that the *aim* of expressing moral condemnation might be served better by other means than by lengthy and legally complex trials that are inaccessible to most people.

The preamble of the Rome Statute implies that ICJ serves both retribution and deterrence. On the one hand, it states that the most serious crimes simply must not go unpunished and that their effective prosecution must be ensured. This echoes the retributive principle that those who commit atrocities deserve to be punished accordingly. On the other hand, the signatories of the Rome Statute vow to end impunity and thereby contribute to the prevention of such crimes. Language like this implies a deterrent principle. Presumably, the goal is to make committing international crimes so costly that future atrocities might be prevented. If ever more disputes are settled without resorting to violence, a peaceful and secure world is possible.

May and Fyfe argue for a *collective rationale* that incorporates retributivist, deterrent, and expressive aims of punishment (May and Fyfe 2017: 64). Similarly, Altman and Wellman argue that both desert/retribution and deterrence are the most plausible justifications for ICJ, but focus mainly on deterrence (Altman and Wellman 2009: 90). Theories of deterrence rely on their empirical correctness, that is, should it turn out that ICJ does not in fact deter crimes, deterrence ceases to be a justifying aim. International relations scholars study the efficacy of international criminal law and its ability to deter future crimes with sophisticated quantitative methods and present reliable, if modest, evidence that ICJ fulfills this function (Sikkink and Kim 2013; Jo and Simmons 2016).

One concern for retributive theories is proportionality: They might not fit ICJ because international crimes are so atrocious that even the hardest punishment never suffices – how can an adequate punishment be calculated for crimes like genocide? Another concern is this: For theories of desert or retribution, fairness in the distribution of punishment is an essential normative desideratum. That like cases are treated alike is an important part of justice. However, in the real world, prosecutions are highly selective, evidently leading to the problem that not all individuals guilty of international crimes are punished. One example: despite our knowledge that international crimes are committed in all parts of the world, including by powerful states, a majority of the cases prosecuted by the ICC involve defendants from the African continent. While there are multiple factors that explain such selective prosecution – the ICC is not backed by a world state that would, with the help of the monopoly of force, ensure that all cases are investigated, and our world is characterized by deeply unequal power structures in which the powerful successfully resist policy that they deem to be disadvantageous (Wellman 2009: 91) – the unfairness is evident.

Selective prosecution is not inevitable, but will likely remain a structural feature of ICJ. Several scholars argue that selective prosecution challenges (May 2005: 214) or impugnes (Christiano 2021) the normative legitimacy of the court. It is an open question how we should deal with the exercise of less-than-ideal justice in an unjust world. Altman and Wellman argue that despite its evident injustice, selective prosecution is permissible in this context because the goals of preventing atrocities and the lack of feasible alternatives override this consideration (Altman and Wellman 2009: 94). May proposes to distinguish between selection of cases based on administrative issues, and selection of cases based on the characteristics of the victims or perpetrators; and only the former is justified (May 2005: 212). Christiano contends that bias in prosecutorial decisions, even if grounded in political facts about international relations, lessens the moral duties to comply with the directives of ICJ institutions (Christiano 2021: 13).

Who Has the Right to Punish?

Finally, a considerable part of the literature is concerned with questions that connect the permissibility of punishment to the problem of authority, which is: *Who* is authorized to mete out the punishment, and why? Most scholars of punishment have been and still are "unreflective statists" (Wellman 2009: 420) when it comes to this question. While we usually assume that the state has the sole authority to punish its citizens, once we focus on ICJ, this assumption is inadequate; often, the respective states are unable or unwilling to prosecute and punish international crimes. Besides this functional reason, there might also

be principled reasons for laying the authority to prosecute and punish international crimes on international institutions.

There are different theories that purport to explain how institutions of ICJ gain legitimacy, that is, having "the moral power to impose a set of rules by which others must regulate their conduct" (Christiano 2012: 381). The traditional theory is the doctrine of *state consent*: international institutions are legitimate when states submit themselves to their authority. Christiano argues that consent, suitably modified, is an adequate standard of the legitimacy of international institutions. His theory of bounded state consent, as it applies to institutions of ICJ, implies that states have a duty to cooperate in order to realize morally mandatory aims, to which international security and the protection of basic human rights belong. Christiano argues that while states may not choose *if* they cooperate on reaching morally mandatory aims, they may choose *how* they want to fulfill their duty: they are free to enter the association which, in their opinion, does best in tackling those problems. At the same time, exiting or withdrawing from international institutions with morally mandatory aims is only permissible if the state has good reasons – if not, it is subject to sanctions or coercion (Christiano 2012: 389). One concern about state consent as a standard of legitimacy is that unified coordination is necessary for some morally mandatory goals, and that this might be the case for the goal of ending impunity for mass atrocities.

Luban proposes an instrumental theory of legitimacy that centers on the concept of *fairness in criminal procedures*: International tribunals must self-generate their legitimacy through their "champagne-quality due process and fair, humane punishments" and "strict adherence to natural justice" (Luban 2010: 579). Natural justice includes things like right to a speedy trial, impartial judges, the right to offer a defence, the right to appeal, and the ban on double jeopardy (Luban 2010: 580, ibid. for the full list). While nothing in principle speaks against granting legitimacy to just any kind of organization that delivers "champagne-quality" trials on Lubans instrumental view, he argues that realistically, only states and state-authorized tribunals can satisfy the high standards of procedural fairness (Luban 2010: 580). In a similar vein, Wellman proposes an instrumental theory of legitimacy that centers on the idea that the aims of punishment are of particular importance and that international institutions are particularly well equipped to realize those aims (Wellman 2009). A concern about instrumental accounts is that they do not distinguish between what makes institutions good or fair, and what gives them the appropriate standing to punish (Duff 2010: 591), and that they therefore fail to establish why a *particular* institution has the standing to punish (Müller 2019a: 311).

Finally, the case may be made for a democratic theory of legitimacy of ICJ institutions. Elsewhere, I defend a democratic principle for the authority of the ICC based on the idea that we collectively hold a right to punish international crimes, which can be vindicated in the form of an international criminal court that is placed under the equal democratic control of its subjects (Müller 2019a).

Connected to the question which theory best explains the authority of ICJ institutions is the question how to institutionally organise the prosecution and punishment of international crimes. The first exercise of international criminal justice in Nuremberg and Tokyo was in the hands of the Allied Powers who shared institutional authority for the tribunals. This raises difficulties for the legitimacy of the IMTs because it can be seen as "victors justice." Lazar cautions against victors justice as "it seems clear that permitting victorious belligerents to exact compensation and impose punishment invites radical injustice" (Lazar 2012: 214), because victors are both judge and beneficiary, and likely harbor resentment and prejudice (ibid.), leading to unjust punishment. Lazar also argues that victors justice may hinder peace because the defeated state will not accept the punishment as just (even if it was). This reasoning implies that the punishment should be done by an impartial institution.

Under the principle of universal jurisdiction (UJ), domestic courts can implement international criminal law regardless of where, by whom, or

against whom a crime is committed. Song (2015) argues that the legitimacy of the principle of universal jurisdiction can be explained by its function, which is to fill the gaps of national jurisdiction that arise when states are either unwilling or unable to prosecute international crimes. On her *gap-filling account of universal jurisdiction*, it is not the special heinousness of international crimes that explain why another state is permitted to pick up the slack, but the fact that international law must be enforced, and prosecution and punishment is one way of doing so. Song's theory of UJ is remedial (it permits foreign states to punish only if the respective state is unable or unwilling), permissive (it does not proscribe but merely permits to punish), and competitive (any state is free to take on the prosecution and punishment).

A concern about the competitiveness of UJ might be that states often disagree about criminal justice, just as they disagree about social justice. When states punish citizens of other states, they apply their own version of criminal justice to them. The details of punishment and the procedures with which we determine who gets what are subject to reasonable disagreement, and we might need a procedure that helps make fair decisions in the face of incompatible views and traditions (Müller 2019b). Another concern is that domestic institutions are unable to provide the goods of international criminal law. Gur-Arye and Harel (2016) defend a *robust internationalism*, arguing that tribunals that apply international criminal law must necessarily be international in character in order to successfully fulfill their mission; an argument that speaks in favor of establishing international courts.

Some of the problems discussed earlier apply to international tribunals and the ICC to a lesser extent. For example, the fact that the ICC is permanent alleviates one fundamental problem that plagued the early military tribunals and – although to a much lesser extent, the ad hoc tribunals – which is retroactive justice. The IMT applied law that simply did not exist when the crimes in question were committed. Neither "crimes against peace" nor "crimes against humanity" were established as international crimes then; in that sense, the IMTs can be characterized as having violated the important principle banning retroactive punishment (Luban 2010: 581). As the ICC is based on a treaty that establishes the crimes and procedures governing the exercise of ICJ, retroactivity is no longer a problem. One might also argue that the aims of punishment, and especially the aims of deterrence and ending impunity, are better served by a permanent court. A pressing problem for international criminal tribunals and courts remains that they are "free-floating" (May and Fyfe 2017: 11): Unlike domestic criminal courts, they are not really embedded in a legislative system controlled by the ruled. As such, tribunals and courts are clearly coercive in their function of trying and punishing criminals; this points toward problems concerning their democratic accountability. Making them less free-floating is a difficult task in the absence of a world government, but their democratic credentials are strenghtened by broad UN and state support, for example, in the form of treaty ratification. Then again, as a treaty-based institution, not all states are currently under the ICC's jurisdiction; nonsignatory states are normally beyond its reach. Although there are mechanisms that allow for prosecutions in nonsignatory states beyond the ICC's jurisdiction, their use can be expected to be highly politicized. This "arbitrary circumscription" of the ICC damages its moral and political legitimacy, Christiano argues, as it is "a kind of public embodiment of the treatment of some societies and persons as inferiors" (Christiano 2020: 359).

Conclusion

As we have seen, there are sophisticated philosophical debates on all three questions of punishment I identified as fundamental to the philosophy of international criminal justice. The contributions of philosophers to these debates mainly theorize what makes international crimes special, and how to align punishment in international criminal justice with the moral autonomy of persons and the democratic equality of states.

Cross-References

- ▶ Amnesty, Post-conflict
- ▶ Authority of Law
- ▶ Crime: Philosophy of
- ▶ Criminal Justice
- ▶ Justice: And International Law
- ▶ Justice: Retributive
- ▶ Justice: Transitional Justice
- ▶ Liberty and Equality in Criminal Law
- ▶ Reconciliation: Political
- ▶ Sovereignty and Human Rights

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International Law

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Introduction: The Nature of International Law as a Jurisprudential Problem

Jurisprudence deals with in-depth research into the nature of law; doctrinal studies deal with the problem of knowing the legal rules in force in a

certain society at a certain time; and sociological studies of law are focused on law in action and on the relationship between law and society (Ross 2004, 1, 20). Jurisprudence can and must deal with the problem of the nature of international law within its domain of legal knowledge. Contrary to this claim is the perception of an insufficient engagement of jurisprudence with this field.

Legal theorists are able to contribute to solving the problem because they use theoretical tools and methods useful for studying the nature of law in general. They should discuss this problem for several reasons. The first is the fact that their insights about the law in general remain incomplete without an explanation of the nature of this special kind of normative phenomenon. The second stems from the purpose of jurisprudence in relation to other legal sciences whose practices jurisprudence studies (Ross 2004, 25). Research of the nature of international law makes the doctrinal study of international law more precise. Such research can shed light on shortcomings of the international law which provides a basis for legal politics. Finally, it can contribute to the practical reasoning about the content of international law.

The Legacy of Contemporary Jurisprudence (Nineteenth–Twenty-First Century)

Jurisprudence recognizes the nature of international law as an important topic for its discipline. Older classics such as John Bentham and John Austin incorporated this topic into their view of law. Their thesis about the negation (or at least doubting) of the legal nature of the international normative system (Austin 1832, 207–2008; Bentham 1962, 149–150; 1970, 16) was questioned by other early contemporary legal theorists such as Oliver Wendell Holmes (1870, 5). In the mature phase of the development of the jurisprudence during the twentieth century, the topic was treated by newer classics: Hans Kelsen (1948, 1949, 1951, 1952, 2001, 2005, 2008), Alf Ross (1950, 1966, 2004, 2006), Herbert L.A. Hart (1983, 1994), and Ronald Dworkin (2011, 2013). We can also add Hersch Lauterpacht (1991, 2000) to this group because although he is primarily an international law scholar, his writings significantly delve into issues of jurisprudence.

Among the analyses following the classical authors, published particularly in the twenty-first century, we can distinguish among the following analyses: (a) the presentations of individual features of international law, (b) comprehensive presentations of the nature of international law, and (c) applications of the international law to explain law in general. Jeremy Waldron (2013) critically reflected on insufficient study of the nature of international law and on thesis that the international law does not have a legal character. The analysis of the positions of classical authors regarding this thesis, above all Hart's position, is the central topic of legal theorists dealing with international law – consider David Dyzenhaus (2020) and John Tasioulas and Guglielmo Verdirame (2022). Miodrag Jovanović (2019) has systematically presented the nature of international law connecting it with the prototype theory. Kenneth Einar Himma (2020) fitted important insights on coercion in international law into the broader context of research on coercion and law. Mario Krešić explained some features of international law using the theories of justiciability (Krešić 2013a, 2022a), international adjudication (Krešić 2012, 2013b, 2014b, 2021c), implied features of law (Krešić: 2019, 2022d), relations between systems (Krešić 2014a, 2021b, c), identification of the content of law (Krešić 2019, 2020b, 2022b, c), emerging norms (2022a, b), and international sanctions (Krešić 2021a). Westerman et al. (2018) showed how the presentation of the specifics of international law, e.g., soft law, can shed light on the characteristics of law in general, e.g., legal validity.

Brian Tamanaha (2011, 2017), William Twining (2005, 2008) and Julius Stone (1984) belong to the group of authors who emphasize the sociological approach to international law and point to legal pluralism. A sociological approach can be observed in authors who start from the historical analysis of international law, e.g., Scott J. Shapiro and Martin Koseknniemi. Oona A. Hathaway and Shapiro (2011, 2017) explored the development of international law from the old to the new regime, discussing the peacekeeping function and the concept of sanctions. Koskenniemi (2001, 2005, 2021)

presented the development of international law under the influence of other social factors and explained different methods of analyzing international law. A special subgroup of authors who follow a sociological approach consists of authors who start from critical theory of law in the evaluation of international law, including the exposure of ideologies and the transfer of power relations into legal discourse (Kennedy 2006, 2016). From the position of an axiological approach to law, there are noticeable attempts to apply the theory of law of classical authors to international law. Jutta Brunée and Stephen J. Toope (2010) developed an interactionist theory of international law based on Fulller's Rule of Law theory. John Tasioulas (1996), Anthea Elizabeth Roberts (2001), George Letsas (2007, 30–32, 111–119), Basak Çali (2009), and Patric Caps (2012) have conveyed Dworkin's theory – which includes political morality as relevant for determining the content of law – into the arena of international law. Finally, considering the topic from the perspective of shaping legal politics, all three approaches to law can be used. Myres S. McDougall and Harold D. Laswell's policy analysis (1980) applied to international law is dominantly characterized by an axiological and sociological approach.

A significant contribution to the topic comes from authors who primarily deal with the doctrinal study of the international order using different jurisprudential tools. Koskeniemi et al. (2006), dealing with the fragmentation of international law, was guided by the insights of the classics of jurisprudence. Aleksander Orakhelashvili (2008, 2011) explained international law using insights of jurisprudence such as the division into legal and non-legal normative systems. Bardo Fassbender (2009) applied the idea of the constitutionalization of international law, an idea originally belonging to jurisprudence concerned with national orders. Federica Paddeu (2018) applied Hohfeld's theory of legal positions to explain some concepts of international law.

The Nature of International Law

The characteristics of international law can be reduced to two large groups: (a) features that tell how international law does what it does (Kelsen 1952) and (b) features that tell what the purpose (function) of international law is (see Jovanović (2019) and Ross (1950)). The most common characteristics seen as belonging to the first group are precisely those the legal theorists discuss when dealing with law in general: normativity, systematicity, institutionality, and coercion (Jovanović 2019, 76, 210).

The Function of International Law

If law is an artefact, then it must have a function (Ehrenberg 2016, 137; Burazin 2019, 2). By the same logic, international law must have a function (Jovanović 2019, 68). The two functions that are most often mentioned as a feature of international law are ensuring justice (Jovanović 2019, 68) and ensuring peace (Himma 2018; Kelsen 2001; Lauterpacht 2000, Krešić 2019). Some authors also consider the function of ensuring the international rule of law (Lauterpacht 2000; Kelsen 2008, Krešić 2021c).

Ross (1950, 1966) defined the goals, functions, and (limiting) principles of the modern international order. Following his analysis (1950, 108–136), we can conclude that the contemporary international order has the function of protecting the following values: peace, peaceful settlement of disputes, freedom from forced interference in the interests of states, self-governance of states, freedom from global disasters, freedom from the systematic violation of human rights (atrocities), equality (with the exception of the special position of permanent members of the Security Council), justice, international law, self-determination of peoples to exercise the right to self-governance, and self-determination of peoples to choose the norms that will be created and applied (democracy). According to Ross, the value of peace is the ultimate goal (the highest value), primarily between states, whereby peace is understood as more than the absence of physical violence. From Dworkin's (2011; 16–19; 2013, 332) writing, it can be concluded that the functions of contemporary international law are the protection of peace, freedom from atrocities, cooperation in eliminating global threats, and democracy.

However, if following Kelsen (1952, 57) military or non-military sanctions authorized by the UN are viewed as sanctions for delicts, then the only international (UN) delict of the state is a violation of the value of peace. The extent to which the protection of other values can be included under this function depends on the practice of the Security Council (SC) and states (see Orakhelashvili (2011), 19 and Krešić (2019)). Since the practice shows that the SC reacts to acts of atrocities, these behaviors also constitute a delict under international law (Krešić 2022b, 365; 2022c, 11). In the case of the protection of other values, there is no evidence for such claim (see: Krešić (2022c)).

The Systematic Nature of International Law

Regularly, international law is defined as a system of norms intended to govern the behavior of states. The term "system" can be understood in several ways.

First of all, the term means that there are criteria for what belongs to that system and what is outside it (Orakhelashvili, 2008, 195; Krešić 2020b, 32). The membership question raises the question of the relationship between the international system and other types of systems such as national legal systems, regional legal systems, and non-legal systems. These relations are considered within the theories of dualism and monism of law (Kelsen 2005, 328; Krešić 2014a, 2021b, 166; 2021c, 824).

Secondly, the system can be said to regulate the mutual relationship between norms including hierarchical relations. Several theories try to present some norms of international law as higher norms than other international and national norms (see Krešić (2020b)). Among such theories are those that deal with the content of jus cogens norms, erga omnes norms, and general principles of law. In addition to material hierarchies, legal theorists know that the concepts of formal, logical, and value hierarchies (see Guastini (2014), 229) can be used in the effort to establish international law as a system of norms. A separate topic concerning the relationship of international norms (and other norms) is the problem of their conflict (see Dyzenhaus (2020)). This question comes to the fore especially in the situation of the existence of different legal regimes such as world trade, regional, and human rights regimes (Koskenniemi et al. 2006; Koskenniemi 2007; Simma 2004). Finally, a system of norms can be spoken of as if it had already been established or that interpreters have the task of establishing it, which means solving antinomies, filling legal gaps, and removing redundancy (Guastini 2014, 224; Krešić 2021c).

In the context of the conflict between norms, there are attempts to use principles recognized in national laws: lex superior, lex posterior, and lex specialis (Koskenniemi et al. 2006). However, the question is whether these principles are really norms of international law (Guastini 2014, 369). The issue of gaps in international law has been considered using different approaches. According to one opinion, international law is a closed system because there is a closure rule that enables the solution of every dispute. Kelsen finds the existence of an excluding closure rule according to which everything is permitted that is not prohibited (Kelsen 2008, 27). Lauterpacht (1991, 206; 2000, 80, 86) adds an "including" closure rule which, in the absence of a formulated norm for a certain case, enables the application of analogies respecting the progressive development of law. According to another opinion, international law is not a closed system because it lacks a closure rule, so that in the case of a gap, the principle of non liquet should be used according to which the judge can leave the dispute unresolved (Stone 1959).

Normativity: The Binding Force of International Law

The topic of normativity involves seeking solutions for different problems. On the one hand, we can deal with the problem of where the binding force of the norm comes from and, on the other hand, how to arrive at a binding norm in a specific situation. Regarding the first problem, we distinguish between theories that derive the normativity of international law exclusively from

internormative relations (Kelsen 2005) and theories that derive normativity from the realization of law in the livesof communities governed by law (Ross 2004, 2006). Regarding how to derive normativity from the realization of law, we again distinguish between those that find the facticity of normativity in the behavior of states and theories that find such facticity in the action of international bodies when they apply law (see Ross (2004, 2006)). Among the latter, we again have those who advocate that law is what judges decide is law regardless of norms (realism) and those who see a source of the normativity in the "normative ideology" of judges (Ross 2004, 70–74). Some theories denied international law the normativity characteristic for legal orders (Austin 1832; Bentham 1962, 1970) and attributed to it the normativity of positive morality (Austin 1832). Other theories consider that it has normativity like other legal systems (Kelsen 2005). Finally, some argue that international law has derived normativity since participants in international law transfer the ideas they have about national law into their international relations (Ross 2006, 54).

Normativity: Identifying the Content of International Law

The determination of the international norm on the basis of which a specific case will be resolved is conditioned, among other things, by normative ideology (Ross 2004, 75, 108–109) which refers to the determination of legal sources and legal reasoning. The latter includes the techniques of interpretation in the narrower sense of determining the meaning of a text or custom (including precedents) and techniques of "legal construction." The legal construction is neither interpretation in the narrow sense nor the creation of law stricto sensu (Guastini 2014, 411).

Sources of International Law

It is precisely in the field of international law that the particularities of individual sources of law that are not always visible in national law come to the fore (see Ross (2004, 2006)). According to the positivist approach to the sources of international law, only sources based on the consent of states – texts adopted as treaties and customs recognized as international legal customs – are valid. Precedents can be added to this group as judicial customs if the states agree that they are a source of law. According to a non-positivist approach, there are also sources that are not obviously based on the consent of states: unformulated principles inherent in law, unformulated norms arising from the "constitution of international law," and unformulated norms arising from the culture of the international community (see Ross (2004), 78, (2006), 81 and Krešić (2022a), 42). Among the non-positivist theories, we can highlight (see Krešić (2019, 2020b)) theories on the inherent values of law such as peace and the rule of law (Kelsen 2008; Lauterpacht 2000; Brunée, Toope 2010), constitutional norms that protect values of international law (Fassebender 2009), and legal values based on the political responsibility of the community (Dworkin 2013). Another distinction, between "posited" and "justiciable" norms, is linked to the difference between understanding the legal norm in binary categories ("binding" – "not binding") and understanding the legal norm in categories of gradual obligation (more or less binding) (see Ross (2004), 45 78, (2006), 81, Jovanović (2019), 147–152, and Krešić (2022a), 46).

Techniques of Legal Reasoning about International Law

The identification of norms is connected with techniques of legal reasoning used by bodies that apply international law (Ross 2004, 108–111; 2006, 83). One of the differences in approaches to legal reasoning is due to different types of orders: non-constitutionalized and constitutionalized (see: Guastini (2014), 189). If international law belongs to the former, then international legal norms are only those norms formulated (fully or partially) by states as a legislator. If it belongs latter type, international legal norms result from the activities of legislators and courts based on the attributed specific properties of constitutional norms. This difference in the understanding of the nature of international law causes differences in legal reasoning (see Krešić 2020a).

Institutionalization of International Law

The term "institutionalized normative order" can mean the existence of (a) norms that determine the circumstances for the creation or application of law (Kelsen 2005, 71) and (b) centralized institutions that create and apply law (see Krešić, 143).

In the first sense, international law is institutionalized because there are norms governing the creation and application of international law, i.e., the international order has a monopoly over its creation and application (Kelsen 2005, 71; 1952, 303). Creation and application can be decentralized, which means that international law is law even if the norms are created by customs or by concluding international treaties and if the law is applied by the states themselves (see Krešić (2013b) and Krešić (2022d), 52). International legal orders throughout history were characterized by such a decentralized way of creation and application. If we were to equate the order of the UN with general international law (Kelsen 1951, 76, 110, 116), then we can identify the norms that authorize a specialized international body – the Security Council – to create and apply international law (Krešić 2013a, 131; Krešić 2014b). However, the area of creation and application of law by this body is limited only to those areas of life that can be linked to the prohibition of the use or threat of force. Furthermore, in ordinary language, it is unusual to speak of the SC as a judicial body. Nevertheless, there are opinions that the SC has the form of a quasi-judicial body (see Krešić (2014b)).

The lack of "real" specialized bodies for the creation and application of law was often the reason why some legal theorists denied international law a legal character or at least limited it to a peripheral place (Hart 1994, 3–4). The first response to such a position is that the existence of norms on the decentralized creation and application of norms is sufficient to assess the legal nature of this order (Kelsen 2005, 323; Krešić 2021a, 142). Decentralized creation of law does not seem to be a problem for the legal nature of international law since there are known national orders in which law was created by custom. However, can we talk about a legal order if there is no centralized international adjudication to which all states are subject for all disputes (Krešić 2013b)?

Coercion and International Law

Some theorists (Kelsen, 2005, 53, 216; 1952 14, 25) believe that international law must regulate the use of coercion and, separately, the use of physical coercion as a last resort when the state manages to avoid the use (or consequences) of other forms of coercive sanctions. At the same time, the system of applying physical coercion can also be decentralized. Other theorists do not consider such a normative establishment of applying (physical) coercion to be essential for the legal character of international law if there are some other guarantees for the implementation of norms (see Jovanović (2019), 185). Closely related to this kind of thinking are theories that define the term coercion in such a way as to emphasize the whole range of possible reactions to the undesirable behavior, whereby the legal character of the system remains even if there is no norm stipulating physical coercion as a sanction (Hathaway and Shapiro 2011, 271; 2017, 371–390). The problem of coercion in international law is related to problems of systematizing international sanctions (Krešić 2021a, 150–154) and practical problems arising from the current system of international sanctions (Krešić 2019, 495).

Conclusion: The Practice of Jurisprudence in Studying International Law

According to some opinions, international law is insufficiently treated theoretically (Bianchi 2017, x; Jovanović 2019, 2; Waldron 2013, 210). The insufficient involvement of jurisprudence in researching the nature of international law cannot be attributed to any characteristic of the discipline or any other discipline that would prevent such research. This claim is supported by a proper understanding of the disciplines dealing with

law. Although possibly, but certainly contingently, understood as a peripheral topic, a review of previous jurisprudential works shows that the topic is still recognized as relevant for jurisprudence. Legal theorists are able to contribute to the research of the topic, which is evident from an overview of the tools they use and the problems they already deal within the framework of jurisprudence. The engagement of jurisprudence in the study of this topic is important both for jurisprudence itself and for other sciences that study law. The importance of studying the topic with the engagement of jurisprudence stems from the benefits that the discipline can offer from undertaking such research and providing a proper understanding of the relationship between jurisprudence and other sciences. The importance is also shown on the basis of an overview of problems that can be solved within the framework of jurisprudence. Therefore, the reasons for the insufficient engagement of jurisprudence in the field of international law are clearly not part of the very characteristics of the disciplines mentioned. If this is so, then the causes should be sought in the research of sociological factors that condition the practice of disciplines.

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International Law: Legitimacy of

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Introduction

Theorists of global justice have often criticized international law as it stands as either being unjust or less than fully just. Nevertheless, only a few deny the legitimacy of existing international law altogether, unleashing states and non-state actors from the moral requirement to respect international legal rules and principles. Conversely, the common assumption is that international law as a whole, despite all its deficits, can in one way or another be morally defended. The claim for the reform of the existing international legal order purports to enhance its legitimacy, rather than to reject it. One example is Thomas Pogge's proposition for the elimination of global injustice through institutional reform, particularly by abolishing the international borrowing and international resource privileges, which are currently attached to oft-corrupt political leaders by international law (Pogge 2008: 119). Another example may be found in Allen Buchanan's analysis of the principle of self-determination in international law, which leads to a proposal for the reform of relevant international legal rules (Buchanan 2004). These calls for reform would be meaningless if these authors saw the existing international legal order as morally abhorrent and unworthy of moral support.

At this point, the issue of the legitimacy of international law arises. What justifies the belief that existing international law with its various shortcomings is morally defensible in such a way that its total repudiation is precluded? Some may respond to this question by taking a pragmatic stance towards institutional reform. It is not possible to start from scratch in the real world. A proposal for institutional reform should be accessible from the point at which it is made. Regardless of whether the status quo is morally justified, it must be taken for granted as the starting point.

Buchanan appears to have once subscribed to such a line of argument, though he later submits a more substantive argument, as can be seen below (Buchanan 2004: 60). Attractive as this kind of pragmatic view may be, for it appears that it conveniently avoids the perplexing issue of the morality of the current international legal order, it actually fails to do so. It fails, because pragmatism is warranted only to the extent that the status quo is better than anarchy; in other words, when the moral cost of sustaining the current international legal order exceeds that of its total abolition, nothing prohibits its overthrowing. While the importance of accessibility and other pragmatic considerations certainly cannot be underestimated, they cannot make moral evaluation superfluous.

Before the inquiry, it is appropriate to provide the definition of the legitimacy of international law in this entry. The legitimacy of international law refers to international law as it stands, being morally justified on an independent basis from the substantive justice of its rules and principles. This definition distinguishes legitimacy from justice (Inoue 2011: 1395–1397), accommodating the possibility that international law can be legitimate without being just. It is vital for international law to be legitimate as a means to secure cooperation among state and non-state actors at the global level, for international law's legitimacy provides a moral ground for its acceptance in the circumstances of deep disagreement about justice among reasonable people (Buchanan and Keohane 2009: 35). It should also be noted that this definition is limited to existing international law, rather than international law in the abstract, as it existed in the past and may exist in future. Before examining the issue of what reform is necessary to make international law legitimate, we must answer the question of whether international law as it is should be regarded as legitimate.

Defining the Legitimacy of International Law

The Sociological and Normative Senses

There are different approaches to international law's legitimacy. First, its normative from sociological sense must be distinguished: sociological studies focus on the notion of legitimacy in the sociological sense, i.e., the perception by legal subjects of international law that it is legitimate (or illegitimate); legal and political philosophers understand the term largely in its normative sense, arguing whether international law is legitimate *simpliciter* (Buchanan 2010: 79). For the purpose of this entry, legitimacy is understood to be the latter, normative sense. However, it is necessary to note the relationship between the two senses. The sociological and normative senses of the legitimacy of international law may be seen as intertwined to the extent that the effectiveness of international law composes part of its legitimacy. Unless international law is perceived as legitimate, its role in coordinating the behavior of states and other legal subjects is hardly obtainable. Since, arguably, law's normative legitimacy lies in the fact that it effectively carries out this coordinating function, law's sociological legitimacy provides an important basis for its normative legitimacy. This is all the more so in the international sphere, in which the effectiveness of law is largely dependent on voluntary compliance by states.

The deep moral, social, economic, and cultural discrepancies prevalent in the international sphere inevitably lead to a diversity of opinions among states as to the necessary global regulatory order, which may occur at various levels. It is always a controversial matter how to identify the goals to be collectively pursued. Even if there is a rough consensus among states, owing to the urgency of the issue, about which end should be achieved, states may still disagree on which international mechanism must be adopted as a means. States tend to have different views on how responsibilities are to be distributed internationally, or how specifically obligations are to be formulated. These disagreements do not necessarily emanate from the fact that some states are unreasonable. In as much as it is true at the domestic level, reasonable people may disagree on what decisions ought to be made at the international level. In these circumstances, international law must be at least morally defensible in order to make coordination among states possible. The normative legitimacy of international law gives legal subjects a moral

reason to abide by the law even if they hold a different view on substantive justice.

The Political Legitimacy of Institutions and the Legitimacy of Law

Secondly, some scholars adopt what may be called the "political legitimacy approach" which focuses on the legitimacy of international legal institutions by defining their legitimacy as having *the right to rule* (Buchanan and Keohane 2009: 29; Buchanan 2010: 79). Allen Buchanan once defended his primary focus on international legal institutions on the grounds that laws can only be legitimate when institutions that create, interpret, and apply them are themselves legitimate (Buchanan 2010: 79). However, the focus on institutional bodies that exercise the right to rule appears to be too narrow when discussing the issue of legitimacy in the international sphere. Unlike modern domestic society, international society lacks a central government with coercive power to make, declare, or enforce the law that is generally applicable to all of its members. Even within each international legal regime, in which laws are in general uniformly applied among states parties, international organs can rarely be seen as ruling with coercive power. To be sure, Buchanan, paying closer attention to the fact that many international institutions do not even attempt to rule or govern, later expanded his definition. Nevertheless, his focus remains limited to international legal institutions as organized bodies (Buchanan 2013: 173).

A different, perhaps complementary approach is to examine the legitimacy of international law as distinguishable from that of any particular institutional body. Scholars who adopt such a view see international law from a broader perspective and focus on the reason it gives to legal subjects for action (Besson 2009: 60; Tasioulas 2010: 80). Most international legal regimes lack an organ with coercive power to enforce the rules; instead, the rules are used predominantly by state and non-state actors in their mutual relations when they decide and justify their actions or criticize others' behavior. When a claim of law is made by a state or non-state actor, it is distinguished from an expression of its individual preference or moral judgment. When a claim takes the form of law, it appears to gain additional moral authority, even if there is hardly any possibility that it will be enforced by an institutional body with coercive power. If that is the case, the question of what gives this extra moral force to law arises, apart from that of the basis of the right to rule that some institutional body may have in its enforcement.

This leads to the point that the political legitimacy of an institutional body and the legitimacy of law should be distinguished from one another. Even if some institutional bodies may rightly be seen as having a right to rule, albeit with a limited scope compared with that which the state government in domestic society has, this cannot make the legal rules which they create, apply, and enforce always legitimate. The United Nations Security Council may be politically legitimate as an institutional body, yet its political legitimacy does not guarantee that all decisions it takes are lawful, i.e., worthy of being respected as law. As has been discussed by several authors, although having broad discretion, the Security Council may act ultra vires; and when it does, some argue that it is doubtful that its decisions have the same character as other, lawful decisions (Alvarez 1996: 3). The political legitimacy of an institutional body may be part, but not all, of the reason for legal subjects to obey its decision.

Why Should the Legitimacy of International Law Be Discussed?

Departure From the Traditional Concept

International law has traditionally been regarded as being based on state consent. Contemporary international law, however, has shown significant deviation from the consensual basis. Firstly, some rules and principles of international law are regarded as being applicable to all states, without requiring their individual consent. The most conspicuous example is *jus cogens*, or peremptory norms, which are binding on any states regardless of their consent, including the prohibition of the use of force, torture, and slavery (Orakhelashvili 2006: 7–35). Less obvious are the norms that structure international relations, such as the

principle of state sovereignty and its corollaries, including the principles of sovereign equality and non-intervention, and the principle of *pacta sunt servanda* itself. Although these rules and principles are often explained as part of customary law, there appears to be no serious discussion as to the applicability of the persistent objector principle, a principle setting an important limit for the general applicability of customary rules, or to *jus cogens* and the structuring principles.

Secondly, states may find their multilateral treaty obligation becoming more exacting than was originally agreed to at the time of ratification. Obligations under a multilateral treaty regime evolve through the making of so-called secondary norms by treaty organs. Perhaps the most conspicuous example is the practice of the United Nations Security Council to "legislate," i.e., to make decisions establishing a general scheme for counterterrorism. This was a significant development for the organ endowed with the power exercised in reaction to concrete cases concerning the maintenance of international peace (Szasz 2002).

Thirdly, and even more fundamentally, the development of human rights norms has given rise to doubt about the moral significance of state consent. Even if the *pacta sunt servanda* principle is still regarded as the basis for law's bindingness in international legal scholarship, it is not at all clear what role the consent of a state plays in the moral debate on the legitimacy of international law, when people are deprived of their human rights and banned from the democratic process of their own state.

The Need for More Serious Attention to the Legitimacy Problem

The issue of the irrelevance and inadequacy of state consent would be less compelling if, as was traditionally the case, international law were concerned only with the "external" conduct of states, such as the use of force or diplomatic relations between sovereign states. Contemporary international law, however, also regulates the "internal" exercise of state power (Bodansky 2010: 206). In so doing, international law attempts to extend its control to the behavior of individuals and other private entities, which has traditionally fallen solely within state jurisdiction. This sometimes involves imposing an obligation on states not only to achieve an agreed objective but also to take certain specified measures, including national legislation.

At the root of this new global regulatory mode is an increased awareness that there is an urgent need for domestic regulation to establish global standards with regard to certain activities. In the current sovereign state system, regulation of private activities must rely on the exercise of state power within each jurisdiction. Accordingly, when the achievement of global policy goals, such as the suppression of international organized crimes and the prevention of environmentally hazardous materials, essentially requires such regulation, the exercising of state regulatory power must be controlled internationally, most typically by imposing treaty obligations on states. At times it becomes necessary to specify the measures to be adopted by states to ensure the effectiveness of international regulation at the domestic level. For the effective suppression of international organized crimes, enactment of a law uniformly criminalizing certain acts is essential. One implication is that when a decision is made at the international level, only a limited scope of choice may be in effect left to the domestic political process. It is doubtful that the decision is the genuine product of the democratic will of the people when the only remaining choice is to concede to international decision. If international law thus penetrates domestic legal systems in this way, the legitimacy of the regulatory measures taken at the domestic level must be in part defended at the international level.

What Makes International Law Legitimate Beyond State Consent?

The Consent of Democratic States

If the legitimacy of international law cannot rest on state consent *simpliciter*, an immediate alternative is to limit the scope to democratic states. When a democratic state, whether explicitly or implicitly, consents to international law, its will

to be bound must be traced back to the collective will of its people. Thus, when limited to that of democratic states, consent can serve as a morally relevant basis for international law's legitimacy.

There are several reasons, however, for repudiating this strategy. One is that democracy is notoriously difficult to define. The broadest definition would include those self-proclaimed democracies in which there is no opposition party in the election process. The narrowest definition would preclude most accredited democracies on account of, for example, low voting rates or weak popular support for the government. Moreover, even in democratic states, people tend to have less than effective control over government diplomatic policies. In most states, democratic scrutiny during the process of treaty ratification is less stringent than in the case of domestic legislation since, with the US being an important exception, the legislature can only choose between approval and disapproval, but not amend the proposed treaty text.

A Global Democratic Institution

Some scholars argue that a global democratic institution is a prerequisite for international law to be legitimate. This appears to be unduly restrictive. Global democracy has many practical difficulties and is unlikely to be achieved in the foreseeable future. If it is true that international law cannot be legitimate until a global democratic institution is established, states rightly regard themselves as having no moral obligation to abide by international law. This not only inevitably obstructs the function of international law to control state behavior but also runs counter to the fact that states, when they choose their course of action, take international law into careful consideration.

Although it is arguably desirable that international law is created or otherwise endorsed by global democracy, focusing solely on democracy would be futile. Global democracy must not be deemed as a necessary condition for legitimate international law. International law plays a valuable role in enabling and promoting cooperation at the international level. Were it not for international law, the global protection of human rights or maintenance of peace among nations would never be achievable. The valuable role legal institutions play in pursuing these and other goals must be taken seriously, despite the absence of a mechanism of global democracy (Buchanan and Keohane 2009: 40; Caney 2009: 113–115).

Global *Demoi*-cracy

Samantha Besson advocates the notion of global "*demoi*-cracy," following van Parijs's work on the European Union (van Parijs 1998), a multilayered, multicentered mode of democratic governance covering both national and global levels (Besson 2009: 67–68). Global *demoi*-cracy is not founded upon "a unitary global demos"; instead, it is conceived as "a directly *democratic* global polity qua union of peoples" (Besson 2009: 69). One of the important features of global *demoi*-cracy is that it is de-territorialized (Besson 2009: 70). When democracy is cut off from fixed territorial boundaries, it may take place at different levels of decision-making: national, international, supranational, and transnational (Besson 2009: 77–81). The development towards this direction appears to be already occurring, and Besson's idea may be seen as promoting the trend.

The idea of *demoi*-cracy, however, does not provide a full explanation of the legitimacy of international law. Multiple levels of democracy will inevitably conflict with one another, and this conflict must be resolved by reference to the law in order to avoid the circularity of determining a proper democratic procedure democratically. Law cannot resolve such a conflict unless it has a relatively independent status from the democratic process, a process it intends to sustain and delimit. Though the notion of global *demoi*-cracy captures an important aspect of legitimacy of international law, there is further need for discussion in order to draw a comprehensive picture.

"Thin Justice" of International Law

Other scholars have attempted to found international law on a set of substantive values. Steven R. Ratner argues for "thin justice" of international law, claiming that core norms of international law ought to be appraised on the basis of the standard of justice, which comprises two principles or

"pillars": that they advance international and intrastate peace and that they respect basic human rights. The idea of justice Ratner offers at the global level is "thin," in the sense that it is less dense and less demanding of individuals than justice at the domestic level (Ratner 2015: 64–99).

The two pillars of thin justice, however, secure only limited ground for the legitimacy of international law. The moral value of peace and human rights may be shared globally, though this does not mean that there is also agreement on how to interpret and respond to the demand of global justice. Those who have faith in the pillars of global justice may still deny that there is any reason to abide by international law, because they regard it as simply misdirected as a way of achieving global justice.

The Transcivilizational Approach to International Law

Another approach that mainly focuses on the substantive aspect of international legal rules and principles is offered by Yasuaki Onuma. The major theme of his "transcivilizational" approach to international law is that international law should be seen from the transcivilizational perspective to rectify the modernist and West-centric bias prevalent in the international legal scholarship. International law should be founded on "the common normative consciousness" among people all over the world because the "globally shared perception of international law as legitimate and indispensable for the management of global affairs" guarantees international law's validity and effectiveness (Onuma 2017: 54 (emphasis omitted)). International law is "an inter-subjective product of humankind" (Onuma 2017: 55), not only of the European or Western peoples, though it should be seen as "still in the process of being accepted as the law of global international society in the civilizational sense" (Onuma 2017: 57).

It can hardly be denied that international law is more legitimate when it is accepted by people all over the world than by people who share a specific cultural or civilizational tradition. Yet, it is unclear whether the idea of civilization plays a significant role in establishing the legitimacy of international law. The current position of European states or the United States as powers in world politics would never have been obtainable had it not for the colonization of Asian and African societies. The predominance of the European military and economic power was the major drive in the process that European international law has become globalized. As a result, contemporary international law is founded in a major part on European-originated ideas and principles. However, this does not warrant the conclusion that international law should be vindicated from the transcivilizational perspective.

As it is noted earlier, the current international legal order is causing, or at least prolonging, many injustices on a global scale, some of which allegedly being a result of Western domination. Nevertheless, it is doubtful that these injustices could be rectified by merely adopting the perspective of another civilization. There is no guarantee that non-Western civilizations can offer a more just alternative. The equality between men and women, an idea enshrined in international human rights law, cannot be refuted by the fact that many historical and contemporary civilizations treated and still treat women as inferiors. Whether a rule or principle is prejudicial to certain individuals or groups and therefore unjust should be determined independently of whether it is to be accepted from the transcivilizational perspective.

Onuma's criticism is understandable. English (and French, before long losing its position as the diplomatic language) largely prevails in the discourse of international law. Scholarly attention rarely goes beyond the practice of the major (Western) states when it is at issue whether there is a rule of customary international law. General principles of law are implicitly regarded as those found among the law of the Western states. In these cases, the transcivilizational approach can be used as a heuristic for revealing implicit cultural imperialism. The problem, however, is that it masks rather than reveals the real source of injustices and is ultimately useless in identifying it. During the imperialist era, the Western powers treated the vast areas of Asia, Africa, and Oceania as *terra nullius*, to which they might gain territorial title by way of original acquisition. This meant that in the process of colonization, the local

inhabitants were considered to have no territorial title to their land. This was certainly a result of the disrespect for the culture and political structure of the local society. Nevertheless, the source of injustice should be detected elsewhere. Ultimately, respect for the culture does not necessarily mean respect for the people whose culture it is. There is no reason to believe that international law is more legitimate if, for example, it recognizes the sovereignty of the local despot in a traditional community.

The Complex Standard

It appears that none of the above factors separately give an adequate basis for assessing the legitimacy of international law. This leads some authors to propose a composite test with several of them. Buchanan and Keohane suggest that the consent of democratic states is a prerequisite for international law's legitimacy. They further point to three substantive criteria for assessing the legitimacy of global governance institutions: minimal moral acceptability, comparative benefit, and institutional integrity (Buchanan and Keohane 2009: 42–45). An institution must also have "epistemic-deliberative quality," given the factual and moral disagreement over these substantive criteria. The requirements of epistemic-deliberative quality are threefold: the reliability of the information it provides; the transparency necessary to hold it accountable; and the capacity for revising its terms of accountability (Buchanan and Keohane 2009: 49–50). The consent of democratic states, the substantive criteria, and the epistemic virtues together make up the "Complex Standard of legitimacy." Simon Caney adopts a similar approach called the "Hybrid Model" to economic international institutions such as the WTO, IMF, and World Bank (Caney 2009: 117–118).

However, the Complex Standard of legitimacy actually focuses on an institutional body that exercises power. It can be useful in assessing the legitimacy of governing institutional organs. However, as discussed above, this leaves many parts of international law unexplained. International law is predominantly used by individual states to evaluate their own and others' behavior and decide the course of action. In the majority of circumstances, treaties or customary rules are not imposed by any institutional body but are accepted and employed by states. The legitimacy of international law is often at issue when the legality of an action (or inaction) by an individual state appears contradictory to morality. Is the action morally permissible in virtue of its legality? Is the action morally permissible despite its illegality? These questions are unanswerable from the political legitimacy of an institutional body. Instead, it must directly be asked whether international law has legitimacy.

An Underexplored Route: The Rule of Law

The upshot of the above discussion is that there is currently no major analytical framework that fully explains international law's legitimacy. Nonetheless, the issue is of special significance in the contemporary world. International law defines the global legal and political framework, which many see as perpetuating or at least not adequately addressing a number of serious moral problems such as global poverty, oppression, military conflict, and refugees. Despite all these problems, it is not wholly credible that the existing international law has no positive role to play in ordering human relations on a global scale.

Recourse might be had to the concept of the rule of law at the international level, as some argue (Waldron 2011; Tamanaha 2004: 127–136). Although the rule of law has often been associated with the domestic constitutional arrangement, this is not inescapable. If the rule of law is conceivable as an inherent feature of law, it might provide a more comprehensive basis for international law's legitimacy. One possibility is to take reference to Lon Fuller's idea of "the inner morality of law." According to Fuller, there is a kind of reciprocity between the ruler and the ruled. As long as the ruler adheres to the inner morality of law, the ruled must accept the duty to obey the law on their side (Fuller 1969: 39–40). Fuller further argues that this is also applicable to international law. In the

horizontal relationship between states, international law merits obedience provided that it conforms to the eight principles of law's inner morality (Fuller 1969: 233). In his postmortem paper, Ronald Dworkin proposed "the duty of mitigation," which connects the legitimacy of international law to that of the state. He argues that the state owes a moral obligation to its citizens to enhance its legitimacy, and it can do so by mitigating the moral deficiencies of the sovereign state system (Dworkin 2013: 19).

Although each takes a different perspective and focus, they all seem to agree on the rule of law as the fundamental principle of a pluralist global legal order composed of a multiplicity of relatively independent but mutually connected legal orders at both the domestic and international levels.

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I

Interpretation: Systemic

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Introduction

The expression "systematic interpretation" indicates a method of legal interpretation, according to which the meaning of a provision has to be established taking into account the context in which the same provision is situated, namely its position and function within a coherent group of related legal rules (Lazzaro 1965).

It is founded on the assumption that legal rules are reciprocally linked, within a logically and syntactically coherent universe. Every disposition, therefore, has to be coordinated with other previews or following dispositions which belong to the same legal text and/or legal system.

The proper understanding of the previous statements needs two more clarifications.

First. Interpretation is not a mere technical tool, but a political matter that affects the way in which law is acknowledged. If so, the choice of the interpretative method has a crucial relevance, as it influences legitimacy, predictability, and consistency of judicial reasoning.

Second. System has to be considered as an artificial organization of some elements, following a certain idea (Prigogine and Stengers 1981: 1023; Jensen 1983: 9). It is conceived to settle conflicts, in order to find the solution that is more consistent with that original idea. In this perspective, we can affirm that every juridical decision (of the judge, of the administration, of the parliament) properly is the solution of a contrast between different claims. But the risk of arbitrariness is high. In the jurists' view, «the value of the "internal" juridical system as a logic and deductive system properly lies in its pretended capacity of producing juridical rules which guide the application of law. The concrete (judicial) decisions take the form of logic and systematic deductions» (Modugno 1993: 3; Tarello 1978: 10).

In the light of these premises, systematic interpretation becomes a necessary guarantee that decisions are not arbitrary and that law evolves in accordance with society (with a predetermined ideology). In this sense, the only "chance of survival for law is to distinguish the notion of law from the notion of positive law, to make it something wider, a scientific discipline able to adapt itself to historical changes" (Saleilles 1904: 127).

Methods and Contents of Systematic Interpretation

Systematic interpretation is one of the so-called "classical" methods of interpretation, following Savigny's classification, which distinguished grammatical (also called textual, semantic), systematic (contextual, structural), historical, and teleological (purposive) interpretation.

It is very common in Western Legal tradition, both in civil law and in common law countries.

This statement needs to be shortly clarified. Some authors consider the mentioned canons as strictly linked with the civil law tradition. It is certainly true that they were conceived in the context of the European continental positivism. However, they can be easily adopted (and they are commonly adopted) in common law systems, in the sense that they are applied "with a view to deducing objectively right decisions from preexisting legal material" (Parsons 1970: 826, 868). It is possible to find in common law the logical connection which links norms to the principles, although with an inductive, not deductive reasoning, from particular to general.

The way in which systematic interpretation is conceived, such as its practical implication, strictly depend on the adopted concept of system (Viola 1990). If systematic interpretation takes into account the intimate connections among various juridical elements, so it must be clearly defined what is intended as "connected juridical element" (namely, as juridical system). For this reason, understanding systematic interpretation requires to define the context in which the interpretative process is performed. It is not a case if, how it has been noted (Velluzzi 2002), in most cases, systematic interpretation occupies a minimum space within the researches devoted to that topic, while there are many references to the role and the meaning of the system within the interpretative process.

The next pages will try to contribute to this effort. Before proceeding with this analysis, however, it is useful to determine the content of systematic interpretation, that is, interpretative canons which can be re-conducted to the systematic approach.

In the light of the assumptions adopted by the interpreter, the following types of systematic argumentation have been distinguished: (a) teleological interpretation, (b) literal interpretation, (c) logical interpretation, (d) dogmatic interpretation. Systematic-teleological interpretation moves from the assumption that the system (the legal order as a whole, or a particular legal institute) includes norms having homogeneous purposes. Systematic-literal interpretation should be based on the idea that legal dispositions are part of a "legal text," that is, a part of a sequence of statements which are reciprocally connected. Systematic-logical interpretation assumes that juridical systems are, or should be, intimately coherent (that is, without antinomies) and that coherence should be preserved by the interpreter. Systematic-dogmatic interpretation presupposes the relevance of doctrinal or judicial categories

in the interpretative process (Tarello 1980; Aléxy 1973).

Some Authors (Aléxy 1973, 1996) include on the previous list other elements, as judicial precedents, historical context, comparative method, analogy. Criticisms have been leveled against this proposal, since these last elements have in common the need of filling legal loopholes, that is, they are part of an integrative, not interpretative process. However, from an opposite perspective, analogy could be assumed as a fundamental step, establishing a reciprocal dialogue between norms and principles, and ensuring to retrace the logical coherence of the norms. Analogy as an instrument of cohesion of the system: the difference between interpretation and integration is denied.

The difference lies, once again, in the concept of legal system that the interpreter has adopted.

The Birth of the Modern System: System as Representation of the Institutional Space

The relation between law and system officially originated as a solution to the necessity of organizing juridical materials: to guarantee their knowability and their logical foundation (Losano 2002).

However, it is only from the beginning of the nineteenth century that the aspiration to the order interlaced with the conscience (although so far vague) of the political implications of this model.

A law systematically organized is, first of all, a law that can be known and coherently applied. This presupposes the possibility of removing the political choice, placing it outside of (or before) the juridical: "The systematic concept of the law allows to conceive the research of the law as a merely cognitive process, which ignores the creative dimension. The existence of a system with a practical relevance resolves the problem of the policy of law and of the implementation of the law by separating them clearly. Juridical science and the jurisprudence are made politically unsuspecting" (Grimm 1971).

Furthermore, the invention of the system answers to the need of denying, or at least of controlling, any interpretative dimension of the law. This is especially true in those countries, where the freedom of the interpreter is perceived as a risk of arbitrariness.

Such a modern notion of the system is not limited to satisfying knowability of laws and ensuring the whole normative coherency. In addition, it also goes so far as to select the sources of law in every country: the construction of the system becomes the basis of a certain way of conceiving the interpretation of the law (that is, the law). So, the system enters in the political and institutional space, of which it proposes a particular representation (Tarello 1971: 9–10; Betti 1955).

The "French" Model: The Primacy of Literal Interpretation

In 1804, the Code Napoléon represented the first experiment in order to implement the abstract model of the juridical system in a modern sense.

The completeness and the self-sufficiency of the law were assumed. The relationship between judges and the legislator, which characterized this model, was perfectly described in the preparatory works of the Code civil. On 4 ventose Year XI, in presenting the draft of the Preliminary Title of the Code ("De la publication, des effets et de l'application des lois en general"), Portalis expressly admitted that the idea of a perfect and complete code was a mere illusion: "C'est une sage prévoyance de penser qu'on ne peut tout prévoir (. . .). Il faut donc laisser alors au juge la faculté de suppléer à la loi par les lumières de la droiture et du bon sens." However, against the protests following his words, he promptly gave the solution: "mais en laissant à l'exercice du ministère du juge toute la latitude convenable, nous lui rappelons les bornes qui dérivent de la nature même de son pouvoir (. . .) une loi est un acte de souveraineté, une décision n'est qu'un acte de juridiction ou de magistrature" (Fenet 1836: 358–361).

Consequently, if the law (or even better the sequence of the juridical rules) does not provide the prompt solution for a case, the interpreter will not give up. The system becomes the instrument through which the juridical order guarantees its

own survival and makes it possible to resort to the grammatical interpretation, or to the logical, or extensive interpretation.

Such a theoretical model requires a strong political will, which guarantees a particular social organization, following new schemes for new values. The law, the codes, the *system* of the codes are instruments for implementing this model (Arnaud 1973).

Within the French conception, the judge does not create law for the simple reason that he cannot do it. He applies the political will (converted in the legislator's command) in an apparently neutral way, within a universe that does not know the void. What is not disciplined is irrelevant: there are cases in which "juridical norms don't exist and should not exist" (Romano 1969: 173). The fullness of the law (that is, the completeness of the juridical system, the absence of juridical gaps) prevents judges from taking the place of the political power in their activity of law-making.

It is precisely for this reason that the analogical process will be historically structured as a process aimed to fill the residual spaces, in the twofold premise of the absence of a norm directly related to the case and, at the same time, of the existence, inside the system, of norms or principles which could be adapted to – which could cover – the case in question (Bobbio 1974: 601).

This marks the primacy of the literal interpretation, over other interpretative canons: when the text is clear, there is a perfect coincidence between the text itself and the legislator's will, so, every other interpretative step is simply useless (Thibaut 1872).

There is no coincidence between system and interpretation here. These two terms are situated in two parallel planes, in a model where the system is a necessary precondition for the interpretation, but the interpretation is totally unnecessary to the existence of the system. As we said, interpretation is not necessary when the text of the norm is sufficiently clear (the clarity of the norm becomes a guarantee – historically necessary – against the abuses). However, if there remains a doubt, the interpreter can always make a decision without betraying the theoretical model: he can use logical connections which link legal rules to each other, or he can expand the semantic horizon of a certain word. Reference to the concrete case, in the Exegetical approach, is only aimed to confirm the truth of the system.

The system guarantees the success of this operation. It guarantees the coherent and reciprocal connection of the norms and, at the same time, the possibility of finding the principle (first of all, the logical principle) – the ultimate reason which gives global coherence to those norms. In other words, it is always possible to find a solution for any particular case *inside* the system: every law can be used in order to determine the meaning of other laws, and to find elements *outside* is simply useless. That is, the system prevents the interpreter (the judge) from occupying the void, or getting out of the system itself, from breaking its homogeneity by arbitrary decisions, at the risk of betraying the original political project.

The "German" Model: System as the Inner Linkage Among Legal Elements

The German approach to the juridical system confirmed and improved the French model, yet adding some relevant differences.

Legal interpretation was always an activity aimed at explaining, not at creating, juridical realities: "The law was considered a reality which preexists the interpretation, and the interpretation was the process of recovering the real sense of that pre-existent reality" (Tarello 1971: 10). Self-sufficiency and the completeness of the system were also confirmed: the system was constructed through a deductive logical process (von Savigny 1951).

However, if the Exegetical School identified the system with the code and the code with the law itself, the German historical school breaks the banks of the codified text. The system was designed as a wider and more complex reality, giving logical coherence to the "'real' discipline of juridical relationships" (Tarello 1971: 10). The German system was a 'perfect organic unity': the

task of the jurists was to discover connections, which reciprocally link all juridical elements in a coherent whole.

Interpretation becomes a necessary tool not only for the knowledge of the law ("(Law) always requests an intellectual apprehension, hence it must always be submitted to the interpretation of the juridical science" (Tarello 1971: 13)), but also for the construction (thus, for the existence) of the system itself. It is now a necessary step that confers to the law a productive dimension.

Law becomes a productive science: jurists can be creative because they know the internal legal structure. However, the product of this creative activity properly marks the boundaries of the juridical experience. It is not a case if the nineteenth century was opened by the arrival of the system of the civil code, and closed by the construction of the system of the BGB. The BGB is a sophisticated structure, created by the jurists for the jurists – that is, destined to make law a technical science, which could only have been known by the few who possessed the same technical instruments. The system was born as a model aimed at ensuring knowability of the sources of law and at controlling their application; it becomes a scientific instrument, which could (only) be understood and, mostly important, controlled by the same priests that had created it.

The ideological significance of this operation is self-evident. To say that the interpretation is a scientific work means that all studies of juridical phenomena conducted by non-jurists are anti-scientific; it means to reserve the elaboration of the juridical organization to a specific professional and social class, establishing the primacy of the doctrine and the ancillary role of the jurisprudence; it means to affirm the irrelevance of the aims belonging to the legal interpretation and to the social class of the interpreters, excluding the possibility of a widespread control. By this way, the definitive rift between juridical and social systems (or, if preferred, between Sollen and Sein) is fixed. Reality in itself does not have a juridical significance: as early as the Savigny's doctrine of juridical institution, the concrete social relationships can be considered and classified only if reduced into these juridical schemes.

Interpretation is necessary to retrace the links between these schemes, to retrace the will of the legislator inside the law, following a rigorous process which reflects, with its logical coherence, the logical coherence of the system. In this perspective, Savigny builds for the first time on the interpretative process as an ordered application of a precise sequence of predetermined criteria, namely the grammatical, logical, historical, and finally systematic canons. This latter is referred "to the inner linkage which connects all legal institutes and all juridical rules so as to form one unitary whole», following the project «which was in the mind of the legislator" (Savigny 1886: § 33). Hence, the interpretative process is aimed at the knowledge of the law, where law is limited to legal acts and institutions and does not include "external" elements, as the social context in which interpretation occurs. By this way, Savigny precludes the interpreter from every possible evaluative space, from every consideration of a reality which could be different from the juridical one: "he clearly wants that will of the legislators does not interfere with juridical science" (Tarello 1971: 13). Thereafter, with the Pandectistic school, law definitively becomes a logical product, axiologically neutral, which ignores any connection to external elements of the system and to its consequences in social reality.

Nevertheless, the system and its interpretation are not yet reciprocally necessary. The system confers scientific dimension to the interpretative process, allowing the verification of the interpretative result following logical principles (thus, it allows the control of both the legislator and the interpreter itself). At the same time, the absence of law becomes a possible scenario. But, the system prevents that this absence becomes a legal vacuum: the gap can always be filled through a set of interpretative instruments, or, at least, through the analogy (which is however conceived as a distinct step, related to the integrative, not interpretative activity). The analogical process becomes another condition for the existence and the functioning of the system. The system is, at the same time, the precondition and the product of the interpretation; but interpretation is not sufficient for the system.

The XX Century: Law as a Social System

The jurist of the twentieth century inherited from the nineteenth century a model, with two possible variants (the French legislative one and the German doctrinal one), neither of which being able to dialogue with the new world. The idea of system still resists, but it is sophisticated, in its Kelsenian version, or it is transformed, changing its function and consequently its symbolic (*rectius* ideological) meaning.

The influence of Jhering's theories in that transformation is well known. With Jhering, the system is a construction that reflects the internal structure of juridical matter, allowing its evolution (Jhering 1852; Id. 1877): he distinguished the structure of law from its function, and pointed out that function influences the structure. Hence, the teleological analysis becomes necessary: for these reasons, Jhering is considered as the author who signed the transition from the nineteenth to the twentieth century (Losano 2002: 217).

The interpretative dimension of the law is (re) discovered. Between the end of the XIX and the beginning of the twentieth century, the contribution of Gény, Saleilles, Duguit confers decisional power to the interpreter (to the judge), opening the way for a reflection about (new) social purposes to which law must respond (Gény 1899, 1914; Saleilles 1904). Jurisprudence becomes "the element that conciliates the necessary stability and cohesion of juridical principles and evolution of rules . . . in order to adapt them to the requirements of life" (Arnaud 1981).

The system resists and remains logical, coherent and self-sufficient. But it is now the result, not the premise of the interpretation. Its notion irreversibly changes: "the twentieth century does not ask the theory of law for an instrument to organize a disorderly set of rules: it asks for help to decide concrete cases" (Losano 2002). Jurisprudence is the cornerstone of this new model: the myth of the legislator's omnipotence gets irremediably resized out of the matter. If the reality changes, law also must change: judges are instruments of this transformation, still called to settle conflicts, but now on a case-by-case basis (Bobbio 2011: 77–79).

It is evident that the focus of the theoretical debate has changed. The authentic question at stake is the (re)definition of the law-making process. We are dealing with the political problem of creating norms: *legal certainty*, which entrusts to the legislator the definition of the idea of justice; or *justice*, concretely implemented by judges in each individual case. The solution is the consciousness of the interpretative question: the problem shifts from the law in itself to the way in which law is interpreted (and so, applied). "In the modern European juridical culture, every application of the laws (. . .) presupposes or implies the interpretation of the laws themselves. There are no jurists, today, who thinks that it could be possible (. . .) to apply a law without interpretation, that is, without giving it a significance" (Tarello 1971: 5). Law *is* interpretation, and interpretation *is* the law: the question of the discretionary powers of judges becomes more crucial than ever.

Within this context, the juridical solution (decision) cannot be exact, nor true. It can simply be reasonable, following available arguments. The interpretative activity is no longer a logical, but a semantic operation (Gadamer 1960; Perelman 1965; Viehweg 1953). The following step is the construction of a complex model, balancing both dogmatic and problematic approaches. The topic is not conceived as a technique to make decisions, but rather to make hypotheses of rational solutions, while the dogmatic is necessary to verify the coherence of these solutions with the system (Mengoni 1976: 33).

In this way, the ancient theme of the control over the interpretative activity re-emerges: it becomes necessary to verify the grounds on which the interpreter based his choice. The possibility of evaluating the premises – both factual and theoretical – of the decision is the condition for making the norm adequate to social reality: criteria need to be established, making possible such an evaluation (Esser 1956). Systematic interpretation can still be the solution, but the system must be now open to society, to the extra-positive context. This marks the passage from the law as an

autonomous and isolated system to the law as a system which constitutes, among other systems, society. Law and judicial decisions are definitely part of the society: legal solutions have to be consistent with their own social and cultural context, as reflected in the legal framework.

Law becomes a sub-system of the Social System (Luhmann 1974; Teubner 1989).

Conclusion

From the jurist's point of view, the discourse about the system essentially is a discourse about the problem of the sources of law – that is, a discourse about the construction of possible models to govern conflicts or to ensure the political balance among different powers that constitute juridical reality. If so, systematic interpretation can be intended as a tool to make such a balance more transparent, aimed at verifying if legal decisions are logically coherent and consistent with context (with factual and theoretical premises), in the sense that interpreters should assume that every norm corresponds to an interest which has already been selected by the legislator.

This is relatively easy, when political choices are clear and the ideology which is subsumed in the system is well defined. However, since the second half of the twentieth century, the faith on the legislator's rationality declines, faced to the proliferation of rules that often contradict each other. The system loses its own territoriality (the link to a territory that defines its limit of validity) and stability (given that stability is the essential condition for predictability, and thus for legal certainty). In return, it acquires new elements, as it includes not only the legislator's will, but other elements derived from society: in some theories, it is expected to assume a globalized dimension, which coincides with the protection of fundamental rights (neo-constitutionalism).

Nevertheless, the identification of that ideology still is the unavoidable condition for a transparent selection of protecting interests. The apparent absence of the system is a new model of system, having an opaque inspiring ideology. Hence, law must keep aiming at the system, ad infinitum, in order to survive – in order to make sense. For jurists, the juridical system fundamentally remains the hope for an organized and logically coherent set of dispositions and institutions. But it acquires a wider meaning, embracing *all* juridical rules, produced both *inside* and *outside* the legal order in a strict sense (e.g., foreign sentences, standard clauses in globalized markets).

Systematic interpretation, in its turn, does not lose its function, but has to adapt to such an augmented complexity. It is now conceived as a fundamental step of the legal argumentation, ensuring that normative statements, such as legal decisions, can be justified in a rational way. The precondition, however, is the definition of the notion of "system" we refer to and of the validity criterion adopted (the requirements for belonging to the system). This criterion could be the respect of a more or less fundamental norm (the Kelsenian Grundnorm); a set of normative criteria (Bobbio 1968: 186); the behavior of certain institutions (Raz 1977); and so on. The list could be very long, in the pluralism's name. In any cases, systematic interpretation remains a tool to control legal argumentation and confirms its crucial role in building processes to reduce arbitrariness and to ensure that normative choices can be transparent, namely reasonably justified. But, it also serves to make homogeneous decisions in different concrete cases. Systematic interpretation ensures, at the same time, transparency and equal treatment, even in such a complex universe.

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Interpretation: The Realist View

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The Manifold Ambiguity of "Interpretation"

In common legal usage, "interpretation" is affected by a multiple ambiguity (Guastini 2011b).

(1) First ambiguity: "interpretation" refers sometimes to the ascription of meaning to a legal text ("The text T means M," or "The legal provision P expresses the rule R," which amounts to the same thing), and sometimes to the inclusion of a particular case in the class of cases regulated by a rule ("The fact F is a case of robbery")

which is the final move in view of deciding – or justifying the decision in – the case at hand (Guastini 2011a, 15 ff.).

It is quite possible that in legal (especially judicial) reasoning, understood as a *psychological* process, ascribing meaning to a normative text and subsuming a case under a class of cases cannot be sharply distinguished. Maybe judges first classify the case at stake, and only afterwards inspect legal texts and ascribe them a meaning in order to find the rule that "fits." "The [American] Realists all embraced the following *descriptive* thesis: in deciding cases, judges react primarily to the underlying facts of the case, rather than to the applicable legal rules and reasons (the latter figuring primarily as ways of providing post-hoc rationales for decisions reached on other grounds)" (Leiter 2007, 61). Nonetheless, from a *logical* standpoint, ascribing meaning to texts and classifying cases are two different although obviously related matters, and the ascription of meaning is logically prior to the classification of cases. It is one thing to wonder about the rule (or rules) expressed and/or entailed by a legal provision and another to consider whether such a previously identified rule applies to a particular case or not. Legal scholars normally confine themselves to the first operation, while judges, as law applying organs, must perform both.

As a consequence, we should distinguish between (see e.g., Aarnio 1983, 65; Twining and Miers 1982, Chap. 4):

(i) Text-oriented (or "in abstracto") interpretation, which consists in identifying the meaning-contents, i.e., the rule or rules expressed and/or entailed by a legal text, with no reference to any particular case
(ii) Fact-oriented (or "in concreto") interpretation which consists in subsuming an individual case under the scope of a rule previously identified "in abstracto."

There is no need, I suppose, to provide examples of problems raised by fact-oriented interpretation (does the rule "No vehicles in the park" apply to bikes or not? Does a constitutional rule concerning "freedom of religion" apply to so-called Scientology or not? etc.). On the contrary, some examples of problems raised by text-oriented interpretation are in order.

(a) Article 13 of the French constitution states: "The President of the Republic shall sign the ordinances and decrees deliberated by the Council of Ministers." Should we understand that the President has the power to sign, or that he/she is under the obligation to do it (Troper 1994, Chap. 18)?
(b) Article 11 of the Italian constitution authorizes the Republic to accept "the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among Nations." Does "sovereignty" means, in this context (roughly speaking), state independence in international relations? Or does it refer to the supreme political power mentioned by article 1, according to which "sovereignty belongs to the people?" In other words, should we understand that article 11 authorizes limitations (only) to the international sovereignty of the state or (also) to the supreme political power of the people?
(c) Article 2 of the Italian constitution solemnly proclaims the "inviolable rights of man." What does "inviolable" mean? Is it but a piece of ordinary "constitutional rhetoric", which does not express any rule at all? Is it a simple reiteration of the "rigid" character of the constitution (constitutional rights may not be violated by ordinary legislation)? Or does it mean that such rights are not even subject to constitutional revision (not even by means of constitutional amendment: this is the opinion of the Italian constitutional court: Corte costituzionale, decision 1086/1988)?

Text-oriented interpretation resembles translation, since it consists in identifying the sense (*Sinn*, in Frege's terms) of a text and rewording the interpreted text: e.g., "The President of the Republic shall sign the ordinances" means that the President is under the obligation to sign; "The republic recognizes and guarantees the inviolable rights of man" means that the constitutional

provisions ascribing the mentioned rights are not liable to constitutional amendment. Fact-oriented interpretation, in turn, is but a decision about the extension or reference (Frege's *Bedeutung*) of a concept as regards a particular case.

The subject matter of text-oriented interpretation is (complete) normative sentences, while fact-oriented interpretation bears upon predicates. By means of text-oriented interpretation, one identifies legal rules (and *classes* of cases), while by means of fact-oriented interpretation, one contributes to identifying the particular cases which are regulated by each rule.

(2) Second ambiguity: "interpretation" refers sometimes to a pure matter of cognition, sometimes to a decision, and sometimes to rule-creation. Therefore, we should further distinguish (see Kelsen 1992, 80 f.; 1967, 354 f.; 1950, xv) among:

(i) *Cognitive* interpretation, which consists in identifying the various possible meanings of a legal text – the meanings admissible on the basis of shared linguistic (syntactic, semantic, and pragmatic) rules, accepted methods of legal interpretation, and existing juristic theories – without choosing anyone of them
(ii) *Adjudicative* interpretation, which consists in settling one definite meaning, chosen among the meanings identified (or identifiable) by means of cognitive interpretation, discarding the others
(iii) *Creative* interpretation, which consists in ascribing the text a "new" meaning not included in those identified (or identifiable) by means of cognitive interpretation.

Suppose a legal provision P is ambiguous in such a way that could be interpreted either as expressing rule R1 or rule R2. Purely cognitive interpretation will take the form of a sentence stating "P may mean either R1 or R2"; adjudicative interpretation, in turn, will be expressed by a sentence stating either "P means R1" or "P means R2"; creative interpretation, in turn, will consist in saying, e.g., "P means R3! (remark that, by hypothesis, R3 is not one of the admissible meanings of P, as identified by cognitive interpretation).

Cognitive interpretation, as the name is meant to suggest, is a purely cognitive operation devoid of any practical effect. Adjudicative and creative interpretations, in turn, are "political" operations, which can be accomplished by judges as well as legal scholars (the only difference being that judicial interpretation is "authentic," in Kelsenian sense, i.e., is authoritatively binding: it has legal effects whereas juristic interpretation has not).

Let me provide just one example of "creative" interpretation drawn from Italian constitutional law. A constitutional clause refers to "statutes in constitutional matters." The phrase is obviously vague but not ambiguous: in juristic common usage, it means the same as "*ordinary* statutes bearing upon issues of constitutional significance" (paradigmatic example: statutes concerning the electoral system of the Chambers). However, the Constitutional Court construes the phrase as meaning *constitutional* statutes, i.e., statutes passed by the special proceeding required for constitutional amendments (see Corte costituzionale, decision 168/1963).

It should be stressed, however, that creative interpretation, as defined above, is somewhat unusual. In most cases creative interpretation assumes a slightly different form – it consists in deriving from a legal text some unexpressed ("implicit", in a large, non-logical, sense) rules by means of a great variety of nondeductive arguments (e.g., *a contrariis*, *a simili*, etc.). But deriving (constructing) unexpressed rules, strictly speaking, is not an "interpretive" act – it is a genuine form of so-called "interstitial legislation" by interpreters that we could name "juristic construction." But this last remark leads us to the third ambiguity of "interpretation."

(3) Third ambiguity: "Interpretation" is sometimes used to refer to jurists' and judges' operations as a whole. Nevertheless, among such operations an important distinction should be drawn between:

(i) Interpretation, properly so-called, i.e., the ascription of meaning to legal texts in one of the senses and modes made clear above

(ii) "Juristic construction," i.e., many operations accomplished most of all by legal scholars (although by judges as well) that would be hard to list exhaustively – e.g., conjectures about the so-called *ratio legis*, counterfactual hypotheses about the intention of the law-givers, creation of axiological hierarchies between rules, construction of unexpressed rules, concretization of abstract principles, balancing (especially constitutional) principles, and so on

Among such operations, the construction of unexpressed rules has special importance. By "unexpressed rule," I mean rules that no normative authority ever formulated, rules that cannot be ascribed to any definite enacted text as its meaning-contents or direct implication.

Every unexpressed rule is the result of an argument in which some expressed rule is one of the premises and the unexpressed one is the conclusion. But it has to be stressed that in most cases such arguments, first, are not logically valid and, second (most of all), include premises which are not expressed rules but arbitrary dogmatic conceptual constructs and theories.

Some examples are in order.

(a) Article 139 of the Italian Constitution prohibits whatever revision (even by means of constitutional amendment) of the "republican form" of the state. Most constitutional lawyers, however, assume that a republican state is, by definition, a democratic one, and conclude that no revision of the democratic form of the state is allowed. No need to say that this conclusion, whose only ground is a disputable juristic concept of "republic," has the outstanding effect of excluding from constitutional amendment nearly the whole constitutional text.

(b) The Court of Justice of the European Community assumes, on the one hand, that the European Community law and the law of the member states form a unified legal system and, on the other hand, that European law is superior to state law, and draws the conclusion that state legislation is invalid (or, at any rate, non-applicable) when incompatible with Community law (European Court of Justice, July 15, 1964, Case 6/64, *Costa*. Cf. also European Court of Justice, March 9, 1978, Case 106/77, *Simmenthal*). No need to say that both assumptions have no textual counterparts in the EEC Treaty.

(c) According to the "classical" constitutional theory of the Enlightenment, the function of every constitution is limiting political power: "Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution" (*Déclaration des droits de l'homme et du citoyen*, art. 16). This view implies that constitutional rules are addressed (only) to the supreme state organs and in no way subject to judicial application. Nowadays, on the contrary, most constitutional lawyers think that the function of the constitution is (also or essentially) moulding social relationships among citizens; from this view, they draw the conclusion that constitutional rules should be directly applied by any judge in any controversy (what is called "Drittwirkung" in German jurisprudence) (see, e.g., G. Zagrebelsky 1992).

Constructing unexpressed rules amounts to underhanded legislation by interpreters. And, as a matter of fact, it constitutes the main and most significant part of legal scholars' work.

Two Kinds of Legal Indeterminacy and Their Grounds

Text-oriented and fact-oriented interpretation, respectively, respond to two quite different kinds of indeterminacy that affect the law.

In the first place – *indeterminacy the legal system as such* – law is indeterminate in the sense that is not determinate what rules are expressed by legal sources and, in this sense, belong to the legal system. The kind of indeterminacy at stake (*interpretive* indeterminacy) is not to be confused with indeterminacy depending on the vagueness of the criteria of validity (so-called rule

of recognition in Hart's language). One thing is wondering whether a given text expresses a certain rule R or not; a different thing is wondering whether R (provided that it is actually expressed) is valid or not (e.g., whether it is compatible with the constitution or not).

In the second place – *indeterminacy of any particular rule* – the law is indeterminate in the sense that is not determinate what cases fall under the scope of each rule.

(1) The indeterminacy of the legal system as a whole depends on the *ambiguity* (in a large non-technical sense) of normative sentences. Ambiguity is the property of expressions capable of more than one meaning (i.e., of multiple interpretations). Hence, an ambiguous text, first, is not *meaningless* and, second, does not admit *whatever* interpretation. For example:

(a) Sometimes a normative sentence S is ambiguous in the strict sense for either syntactic or semantic reasons: one wonders whether it expresses the rule R1 or the rule R2.
(b) Sometimes everyone agrees that the normative sentence S expresses the rule R1, but one wonders whether it also expresses the rule R2 or not.
(c) Sometimes everyone agrees that the normative sentence S expresses the rule R1, but one wonders whether such a rule entails, or not, the rule R2.
(d) Sometimes everyone agrees that the normative sentence S expresses the rule R1, but one wonders whether such a rule is defeasible (i.e., subject to unexpressed exceptions) or not.

Let me provide some examples drawn from Italian constitutional law (Schauer 1991).

Case (a). Under the Italian constitution, statutes are subject to possible derogation by way of referendum. A statutory provision, however, states that no derogatory referendum is admissible "in the year antecedent the end of the Chambers." What does "year" mean in this context? Does it mean 365 days (French: *an*)? Or does it mean the period between January 1st and December 31st (French: *année*)? Suppose the Chambers will end on May 1st, 2010. Should we conclude (R1) that no referendum is admissible from May 1st, 2009, till April 31st, 2010? Or should we conclude (R2) that no referendum is admissible during the whole year 2009?

Case (b). A statutory provision states that no new derogatory referendum concerning the same statute is admissible when a first referendum failed. Now, according to the constitution, a referendum may fail in two different ways: either because the majority votes "no," or because the majority does not vote at all. Well, no doubt that a new referendum is precluded when the majority voted "no" (R1). But is a new referendum also precluded when the majority did not vote (R2)?

Case (c). The Constitution expressly states that the Chambers may address a vote of censure against the Government (R1). Does it entail that the Chambers may address a vote of censure against one single Minister as well (R2)?

Case (d). The Italian constitution grants the President of the Republic a veto power on statutes. No doubt, this holds for "ordinary" legislation (R1). But does the same hold for "constitutional statutes," i.e., statutes passed with a special procedure and providing constitutional amendments, too (implicit exception)?

This is the kind of questions answered by text-oriented interpretation. By answering such questions, text-oriented interpretation reduces the indeterminacy of the legal system.

Rule-skepticism amounts to maintaining that any one-right-interpretive-answer thesis – any thesis claiming that interpretive problems admit but one "right" (i.e., true) answer – is false, and this is so precisely because of the indeterminacy of the legal system in the sense specified, which involves that interpretive sentences have no truth-value. The interpretive indeterminacy of the legal system is the very ground of realistic rule-skepticism.

(2) The indeterminacy of each rule depends on the *vagueness* or open texture of any predicate in natural languages (see, e.g., Luzzati 1990, Endicott 2000).

For any legal text whatsoever, there are easy or clear cases which definitely fall within the core of reference of the terms used in the wording of the

text, in such a way that the rule is quite obviously applicable to them, as well as borderline hard cases which fall within the surrounding area of penumbra of the reference of the terms, in such a way that the application of the rule is uncertain, disputable.

Fact-oriented interpretation answers this kind of doubts and, this way, reduces the indeterminacy of rules.

The indeterminacy of rules, too, provides a foundation for rule-skepticism, but a minor one, since the indeterminacy of rules arises only after the accomplishment of text-oriented interpretation, i.e., after the identification of rules themselves, and raises serious problems only in hard cases, while problems of text-oriented interpretation (which give rise to the interpretive indeterminacy of the legal system) are pervasive.

The indeterminacy of the legal system calls for a careful distinction between the normative sentences (rule-formulations) contained in legal authoritative texts and their meanings – i.e., the rules expressed and/or entailed (Guastini 1997a). This is so for three main reasons:

(i) First, many normative sentences are ambiguous (in the strict sense): they express two (or more) rules alternatively.
(ii) Second, many normative sentences (maybe all of them) have a complex meaning: they express and/or entail not just one rule but more rules jointly.
(iii) Third, according to common legal understandings, each and every legal system is crowded with a great deal of "unexpressed" rules, i.e., rules that do not correspond to any definite normative sentence, since they were not actually formulated by any normative authority.

The Main Sources of Legal Indeterminacy

It is important to notice that the indeterminacy of the law (most of all, the indeterminacy of the legal system as a whole) does not depend only on certain "objective" flaws of constitutional and statutory language. Rather, the main sources of indeterminacy are:

(i) The plurality of interpretive methods: "the set of *interpretive* operations that can be legitimately performed on [legal] sources (to generate rules and principles of law)" (Coleman, Leiter 1995, 213).
(ii) Juristic theories (so-called "legal dogmatics" in continental jurisprudential language) (Tarello 1974, 329 ff.).
(iii) The ideas of justice of interpreters, i.e., their ethical and political preferences (be they expressly declared by means of value-judgments or not) (Ross 1958, 145 ff.).

The import of interpreters' sense of justice on interpretive choices is so manifest that there is no need to elaborate the point. As to interpretive methods and juristic theories, a couple of remarks are in order.

First, in most cases one and the same normative sentence may express different meanings depending on the interpretive technique to which it is submitted (Llewellyn 1950; Tarello 1980, 341 ff.; Diciotti 1999, Chap. 5; Chiassoni 2007, Chap. 2). Take, for example, an Italian constitutional provision referring to "statutes." Arguing *a contrariis*, one can conclude that such a provision applies to any kind of statute and only to statutes. Arguing by analogy, one can conclude that the provision at stake applies to statutes as well as to executive regulations (since both are "sources of law"). Arguing by the distinguishing technique, one can conclude that, since the class of "statutes" includes different subclasses (constitutional and ordinary, on the one hand; state and regional, on the other), the provision – in the light of its *ratio* – only applies to one of such subclasses. As a matter of fact, the set of interpretive methods (commonly accepted in the legal community at stake) is sufficient to warrant a great deal of competing results.

Second, any interpreter approaches legal texts equipped with many conceptual and theoretical presuppositions which inevitably condition his/her interpretation, either orienting it in a definite direction or excluding certain otherwise eligible interpretations. Such presuppositions are

but the theories elaborated by jurists in a moment logically previous to the interpretation of any definite text. I have in mind such theories as, e.g., the theory of written constitutions presupposed in *Marbury* (any written constitution entails the principle according to which whatever statute incompatible with the constitution is null and void), the theory of the relationships between the European Community law and the legal systems of the member states presupposed by the European Court of Justice in a lot of decisions (the European law and the states legal systems are parts of a unified legal system), the theory of parliamentary government presupposed by most continental legal scholars (e.g., to the effect that the Head of the state is a "neutral power" with no legal capacity in strictly political matters), the competing theories of contract, property, liability, and so on.

Criticizing the Mainstream View

Nowadays, the most influential theory of interpretation – that can be traced back to Hart (1961, Chap. 7; 1983, 64 ff.) – claims to be a middle-way between cognitivism and skepticism.

Roughly speaking, according to cognitivism – the theory of interpretation widespread within the legal culture of Enlightenment (Montesquieu, Cesare Beccaria. . .) – interpretive statements, such as "The text T means M," are cognitive, descriptive sentences, which can be either true or false.

According to skepticism – the theory of interpretation shared by contemporary Legal Realism (American, Scandinavian, Italian, French. . .) – such statements, at least when uttered by law-applying organs such as judges, are adjudicative, ascriptive sentences that have no truth-value (Gray 1948, 120, 170; Troper 1994, 69 ff.). The meaning of any legal text is not the object but the product or result of interpretation (Tarello 1974, 265 ff., 389 ff.). Hence, legal interpretation is not a cognitive enterprise at all – interpreting is an "act of will," not of cognition, i.e., it is a matter of values, choices, and decisions.

The middle-way theory, in turn, has a mixed attitude toward legal interpretation. It distinguishes between easy and hard cases (see, e.g., Carrió 1994, 49 ff.; Bulygin 1995, 11 ff.). Legal texts – so the theory runs – are worded in natural languages by means of "general classifying terms" (i.e., predicates in the logical sense: terms that denote classes), and such terms are fatally vague or open textured (Waismann 1952). As a consequence, given any rule whatsoever, there are cases which surely fall under its scope, as well as cases which do not. But, side by side with such "easy" cases, there are also "hard" cases – cases to which the application of the rule is dubious and disputable. In easy cases judges have no interpretive discretion at all, while in hard cases the chosen interpretations are the result of discretionary decisions about the extension or reference of the concepts expressed by general terms. In easy cases, one can surely distinguish between legally correct and incorrect interpretations, while in hard cases one cannot.

Thus, one should distinguish between two kinds of interpretive statements (Guastini 1997b). In easy cases, the meaning of legal texts can (and should be) simply ascertained; in hard cases, it must be discretionally decided. That amounts to saying that interpretive statements, when uttered in easy cases, have truth values, while in hard cases they do not. This is so since legal texts in fact do have an objective meaning, but unfortunately such a meaning is indeterminate and therefore leaves room for discretion in borderline cases. Only hard cases give rise to interpretive doubts and interpretation.

So, after all, according to this view, legal texts have an *objective*, although indeterminate, meaning, which depends on the existing linguistic conventions, and is susceptible of neutral cognition ("understanding" as opposed to "interpreting"). This is why the middle-way theory turns out to be a sophisticated (unconfessed) form of cognitivism in matters of interpretation. Such a theory is unsounded for several reasons.

According to this theory, it seems that the controversy between rule-cognitivism and rule-skepticism bear upon fact-oriented interpretation, i.e., upon the logical status of

subsumptive sentences, such as "The fact F is (is not) a case of murder," "Skateboards are (are not) vehicles," and so on. However, things are not like this.

The object of the controversy are interpretive sentences *stricto sensu*, i.e., sentences of the form "T means M," pertaining to text-oriented interpretation. That *subsumptive* sentences can have truth values may be admitted (although under certain conditions). But a good theory of interpretation ought to provide convincing answers to the question whether *interpretive* sentences can really have such values or not.

Apparently, the middle-way theory does not even distinguish between these two kinds of issues. For example, it seems to treat as equivalent such questions as: (a) whether the rule-formulation "No vehicles in the park" applies, e.g., to skateboards and tricycles, and (b) whether it applies, e.g., to ambulances or fire engines. Such questions, however, are quite different in nature. The question about skateboards and tricycles concerns the extension of the predicate "vehicles" – it is a matter of fact-oriented interpretation "in concreto" (fact-classification), since it is disputable whether skateboards and tricycles are vehicles or not (e.g., maybe they are but toys). While the question about ambulances and fire engines is a matter of text-oriented interpretation "in abstracto," it concerns the identification of the rule itself. This is so since ambulances and fire engines as a matter of course *are* vehicles to all intents and purposes. So, the question is: does the text express a rule referring to vehicles of any kind (without exceptions), or does it express a defeasible rule subject to a number of unspecified implicit exceptions (concerning, e.g., ambulances and fire engines)?

As a matter of fact, the middle-way theory – obsessed by vagueness in natural languages and only interested in judicial application – has no definite explicit view about the ambiguity of legal texts and text-oriented (i.e., mainly juristic) interpretation. The reason why, apparently, is that this theory takes for granted that ambiguity (in the large sense I suggested above by way of examples) is a borderline, not serious, problem of interpretation. It is no problem since, according to a tacit assumption of the theory, the meaning-contents of normative texts can be easily ascertained by applying the existing rules of ordinary language. In such a way, judges have (sometimes) discretion in deciding particular cases but have no discretion at all in identifying rules "in abstracto": text-oriented interpretation is an act of knowledge, not of decision. Text-oriented interpretive statements are true or false.

This view is strictly connected to the (naive) assumption that legal language is parasitic of natural language, in such a way that "legal communication" between normative authorities and interpreters, in turn, is parasitic of ordinary conversation. That amount to ignoring or denying the very peculiarities of actual legal practice, such as conflicts of interests, juristic interpretive methods, and so-called "legal dogmatics" (German "Rechtsdogmatik", French *la doctrine*, i.e., the set of concepts and theories worked out by legal scholars: see Chiassoni 2000).

Unfortunately, this is a very naive view. Judges do not always stick to plain, ordinary meaning – sometimes they do, more often they do not. Ordinary meaning, in fact, is but one of the multiple arguments used by judges (as well as jurists) to justify the choice of one definite meaning, deemed to be correct, discarding any other possible meaning – and it is neither the more frequent nor the most important argument.

Besides, the middle-way theory has no definite view as to legal scholars' interpretation – it is focused only on judicial interpretation. This is a serious shortcoming, for two main reasons. First, juristic and judicial interpretations deserve different logical analyses: e.g., in no case judicial interpretation may be merely cognitive and/or merely text-oriented. Second, judges, before undertaking their office, attended law faculties, and this implies that juristic thinking – viz., juristic theories and interpretive methods – conditions judicial views about law in general, legal concepts, and judicial interpretation: in fact, it conditions the very *forma mentis* of judges. The theory at hand completely ignores the import of legal dogmatics – and juristic construction, in particular – on judicial interpretation.

Moreover, the middle-way theory has no clear view about the distinction between cognitive and adjudicative interpretation. It assumes judicial interpretation to be cognitive in nature, except in hard cases. But the distinction is unrelated to the nature of cases. Suppose a given legal provision is not ambiguous at all, in such a way that it admits just one interpretation. Nonetheless, the neutral (e.g., juristic) identification of that meaning and the ascription (e.g., judicial) of the same meaning to the provision, respectively, amount to two different speech acts. Deciding is not cognizing. Adjudicative statements resemble performatives – they are not truth-apt.

"Whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *he* who is truly the *Law-giver* to all intents and purposes, and not the person who first wrote or spoke them" (Benjamin Hoadley, Bishop of Bangor, quoted by Gray 1948, 102).

Such a realistic view is a true description of the actual working and contents of (most) positive legal systems (Troper 2001, 85 ff.). It is a matter of fact that last resort judges as well as other interpretive authorities whose decisions cannot be overruled (viz., supreme constitutional organs, as far as certain constitutional clauses are concerned) can ascribe normative texts whatever meaning they please, and it is true that law usually grants their "authentic" interpretations direct legal effects (at least *inter partes*).

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Interpretivism

▶ Dworkin, Ronald: Constructive Interpretation *aka* Interpretivism

Irony and Law

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Introduction

The concept of irony has already been the object of study in different areas of knowledge. Naturally it appears as an important concept for rhetoric (Booth 1974) and for literary theory and criticism (Eco 1998, 2003). But it has also been studied from a historical perspective (Behler 1990, 1998) and also by philosophy (Hegel 2000a, b; Kierkegaard 2006; Rorty 1989; Colebrook 2002), by political science (Dye and Zeigler 1975), and even by psychology and by cognitive sciences in general (Stringfellow 1994; Gibbs Jr 2002; Gibbs Jr and Colston 2007). But we will hardly find scholarly works by jurists dealing with the relations between law and irony, even though it is possible to relate countless everyday experiences with certain legal phenomena that could be labeled as typically ironic.

Three Legal Ironies According to Common Sense

It is common to classify as ironic some contradictory or paradoxical situations in which there is, for example, a conflict between legality and legitimacy, or between the legal validity of a norm and the unfair results of its application. This is what we could call the "irony of laws" (Lima 1928). We might also recognize certain tricks, or the cunning of lawyers themselves, as ironic practices that often challenge entrenched beliefs in society or manipulate the system of legal rules against generalized common-sense expectations. Or we could identify in legal literature certain styles of writing that could be classified as ironic, as in the case of Rudolf von Jhering's famous *Scherz und Ernst in der Jurisprudenz* (1974). Incidentally, it is not uncommon for jurists to adopt an ironic tone when writing about law. The critical stance of various authors is often based, for example, on arguments ad absurdum, or on the appeal to ridicule, satire, sarcasm, scorn. The irony here is recognized as a powerful argumentative weapon capable of transcending logic, even when temporarily and strategically appropriating some of its instruments. Obviously, in this sense, the irony would not be an exclusive strategy for lawyers.

These would be three examples of law-related ironies that often serve as caricatures to represent the work and posture of lawyers, judges, public administration officers, legal philosophers, etc. Nevertheless, it is possible to speak, beyond common sense, in law as a kind of ironic game, that is, as a practice that depends on certain agreements in relation to what is explicitly said and what is meant by a continuous game of overcoming opposites, contradictions, and paradoxes that give an agonic character to the law. The seemingly impartial discourse of lawyers is contradictory to their necessarily interested stances. While calling for the neutrality of their linguistic formulations and the impartiality of their judgments, in an eternal search for interpretive and argumentative objectivity (Bourdieu 2014; Just 2014), jurists are always ideologically biased.

Irony as a Rhetorical Figure

In the long history of irony, both the concept and the phenomenon, which often has its origins in the *eironeia* of Greek comediographers (Muecke

1982; Colebrook 2006) or at least in the Socratic attitude to philosophy (Kierkegaard 2006), we perceive the many uses of the word irony throughout the centuries. We have heard of verbal irony, irony of fate, tragic irony, gentle irony, irony of the world, satirical irony, existential irony, postmodern irony among several other forms of irony that can hardly be accurately and exhaustively categorized (Muecke 1969). Several of these meanings were coined in more recent times, especially by the romantic thinking of philosophers like Friedrich Schlegel (Behler 1998; Medeiros 2014). But what would there be in common between all these and other forms of irony? Not to mention the figures that are related to them like antiphrasis, hyperbole, meiosis, auxesis, paralepsis, proslipsis, epitrope, sarcasm among several others. Rhetoricians are never tired of enlarging and subdividing the figures that often overlap in a tangle of tropes that have been accumulated over centuries. In dictionaries, irony is usually identified with its most direct form, the antiphrasis, that is, the irony of a word, which states the opposite of what is meant. But ironic discourse is not always the exact opposite of what is said. It is not necessarily a relation of opposition, but of contrast between the said and the unsaid. Irony presupposes a disparity between the revealed expression of the discourse and the veiled sense of the message that is intended to convey, but not exclusively in a relation of opposition. The patent contradiction between what is affirmed and the context, or the purpose, or a set of beliefs, or any other fact or linguistic fact, leads to the need for an ironic interpretation before any statement. Thus, between the revealed statement and the veiled sense, there is some form of paradox or contradiction that leads the interpreter to seek a different, often opposite, meaning from the supposedly literal meaning (Booth 1974).

Irony and Legal Dogmatics

Irony can therefore be understood as a play between the apparent and the real, between the revealed and the hidden, between surface and depth, appearance and essence. A game that characterizes dogmatic activity itself and, in doing so, assures credibility (Parini 2016). Be it played by lawyers who interpret, reason, and argue strategically to defend one side of the story; or when it is played by the magistrate who interprets, rationalizes and also argues strategically in defense of a third point of view, seeking to seem impartial towards the litigants in a judicial process. It is in this sense that irony can characterize not only isolated events (even if abundant) as unjust norms although legally valid, unreasonable decisions of the judiciary, or ironic attitudes of lawyers (Parini 2017).

Conclusion: Irony as an Outlet for the Paradoxes of Law

Understanding law as an ironic game is a way out to sublimate its paradoxes and contradictions. Let us look at some contradictory situations, intrinsic to the play of law, which, when interpreted as ironic, are accepted or at least tolerated: (1) the strategy of defending the literalness of the interpretation of expressions that form a vocabulary full of metaphors; (2) the transference of what belongs to the political and ethical will for a scientific or technical knowledge; (3) the theorizing about a reality that only exists as a product of the theoretical work of academics; (4) the confusion and separation of the descriptive from the prescriptive, or between the effectiveness and the validity of norms. This is how one can speak of a "fictional reality" of law (Parini 2015) without falling into logical embarrassment in the face of fallacies, paralogisms, paradoxes, oxymorons, or contradictions that characterize the whole of law.

Cross-References

- ▶ Interpretation: The Realist View
- ▶ Legal Argumentation
- ▶ Legal Knowledge: The Hermeneutical Point of View
- ▶ Legal Rhetoric
- ▶ Literature and Law

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Is and Ought Distinction in Legal Philosophy

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Introduction

The controversy over "Is" and "Ought" distinction appears in legal philosophy in two different contexts: of the discussion about the nature of legal reasoning and of the discussion about the sources of legal normativity (of "legal Ought"). In the former context, the controversy concerns the existence of the so-called logic of norms; in the latter it concerns the nature of "legal Ought," viz., its relationships to "moral Ought" and to "Is" (social facts). At first glance these two discussions may seem unrelated to each other, but, as will be shown in Conclusions, there are interesting connections between them. At the outset, prior to presenting these discussions and connections, one important observation needs to be made. The legal philosophers participating in these discussions are rarely interested in the problem of deriving "Ought" from "Is." They, in general, deem this task unfeasible and thereby, so to speak, respect Hume's famous ban called by Max Black (1964) "Hume's guillotine." It must be admitted, though, that there have appeared occasional discussions of this problem in legal philosophy (e.g., von Wright 1985), but their conclusions were usually that the purported derivations of "Ought" from "Is," proposed, e.g., by John Searle (1964) or Max Black (1964), are not convincing. They were regarded as unconvincing on three different grounds: that the "Ought" these derivations generate is tacitly included in the premises; or is a "technical Ought" (which specifies what ought to be done if a *given* norm "endowed" with "normative Ought" is to be satisfied); or is a

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hypothetical imperative in Kant's sense (which makes the duty –"Ought" – conditional on the agent's willingness to achieve a certain goal). However, it bears repeating that the problem the legal philosophers most frequently tackle in the context of the discussion about the existence of the logic of norms *is not* whether "Ought" can be derived from "Is," i.e., whether "Ought-sentences" can function as conclusions in inferences with descriptive premises. The problem they usually tackle is, *firstly*, whether *normative* logical inferences, i.e., inferences in which "Ought-sentences" function as conclusions *and* premises, are possible and, *secondly*, whether "Ought-sentences" can, similarly to "Is-sentences," be assigned truth values (the positive answer to the latter question does not, of course, infringe upon Hume's ban: from the fact that norms can be true or false does not follow that the gap between "Is" and "Ought" can be bridged). In the context of the problem of the sources of legal normativity, the question they pose is how to justify the normativity of law (i.e., the fact that legal statements can be aptly conceived of as "Ought-statements") on the assumption that "legal Ought" cannot be derived from "Is" (factual statements).

The Problem of the Logic of Norms

The problem of the existence of the logic of norms was famously stated by Jörgen Jörgensen (1937) in the form of the following "dilemma":

1. Norms have no logical value: they are not capable of being true or false.
2. Only those sentences which are capable of being true or false can function as premises or conclusions in logical inferences.
3. Therefore norms cannot function as premises or conclusions in logical inferences.
4. Nevertheless, they seem to be able to function as premises and conclusions in logical inferences (Jörgensen provides the following example of such an inference: Keep your promises; This is a promise of yours; therefore: Keep this promise).

As can be easily seen, the core of the dilemma is the conflict between sentence (3) and sentence (4). And since sentence (3) is a conclusion derived from sentences (1) and (2), the dilemma could be resolved by rejecting one of these sentences or by rejecting sentence (4). Given that sentence (4) can hardly be rejected (since reasoning on norms is very intuitive, norms can hardly be regarded as incapable of functioning as premises and conclusions in logical inferences), the only "strategies" of resolving the dilemma seem to be the rejection of sentence (1) or (2). The rejection of sentence (1), which expresses the noncognitivist view of the nature of norms, is tantamount to accepting the cognitivist view, according to which norms are capable of being true or false. This "strategy" is much less "revolutionary" than the strategy which assumes that premises and conclusions of logical inferences need not have a logical value; the latter strategy would amount to the rejection of the standard metalogical view according to which logical entailment (consequence) is a "truth-preserving relation," which consists in "the transmission" of truth from premises to conclusions (more precisely: a set of premises P logically entails a conclusion C if whenever P is true, C must also be true). However, the former strategy, i.e., the rejection of the noncognitivist view of norms, is not attractive for the naturalistically minded philosophers, especially those who feel sympathy for logical positivism. But there is one more option open for these philosophers: they can *partly* reject, or, rather, modify, the sentence (4) by claiming that the purported inferences on norms are in fact inferences on factual statements. This view can be assigned to Jörgensen whose one solution (of the two he proposed) to his "dilemma" was that norm (imperative) sentences can be analyzed into two factors: the imperative and the indicative, the latter describing the factual contents of the norm. As he wrote: "the ordinary rules of logic being valid for the indicative sentences which can be derived from the imperative ones, and no specific rules for the imperatives being known (unless it should be the rule governing the derivation of the indicative sentence from the imperative one) there seems to be no reason for, indeed hardly any possibility of,

constructing a specific "logic of imperatives" (Jörgensen 1937: 296). However, his second (alternative) proposal, arguably less preferred by him, did not imply (though Jörgensen did not say it explicitly) that there is no need for a specific logic of normative sentences (even if it *did imply* that there is no need for *the logic of imperatives*). According to this proposal, imperative sentences of the form "Do so and so" should be transformed into indicative sentences of the form "Such and such action is to be performed, resp. Such and such state of affairs is to be produced"; as he wrote: "here the imperative factor is transformed into the phrase "is to be etc.," which is a kind of auxiliary concept that may function as a predicate in an indicative sentence" (Jörgensen 1937: 292). This second solution proposed by Jörgensen but not developed by him at greater length anticipates deontic logic, i.e., the logic with the normative (deontic) operators referring to basic normative concepts such as obligation, prohibition, and permission.

Deontic logic was put forward in the 1950s and 1960s (cf. von Wright 1951, Kalinowski 1953, von Wright 1963), and with its emergence, the discussion about the existence of the logic of norms took a new turn. The question was no longer whether logic of normative concepts is at all possible (deontic logic *is* a logic of this kind) but how it should be philosophically interpreted. Since deontic logic operates on norm-sentences (e.g., "it is obligatory that *p*" or "it is prohibited that *p*," where "p" refers to what Jörgensen called the "indicative factor," i.e., the state of affairs or an action to which the deontic operator refers), the problem of interpretation boiled down to *the question of whether norm-sentences are normative statements*, i.e., *expressive of norms* (*equivalently: are norms themselves*) *or whether they are descriptive statements about norms* which state that, according to a given normative (e.g., legal) system, an action or bringing about a certain state of affairs is obligatory, prohibited, or permitted. To paint with a broad brush: noncognitivists interpret deontic logic as operating on descriptive statements about norms, whereas cognitivists tend to take one of the following views: (a) that deontic logic may be viewed as a logic of norms and thereby can be interpreted as referring to norms themselves rather than to statements about norms or (b) that apart from deontic logic there exists a separate logic of norms (cf. Kalinowski 1972, 1985). It should be mentioned in this context that logic of norms and deontic logic are to be distinguished from "legal logic (*logique juridique*)" analyzed and developed by Chaim Perelman (1976): while the former types of logic refer to reasoning on norms, i.e., formalize relationships between normative or mixed (normative-factual) premises and normative conclusions, the latter is focused on the premises themselves, viz., on what type of argumentation makes them justified. Now, the basic difference in the state of the discussion about the existence of the logic of norms in the 1950s and later as compared to its state at the time when Jörgensen formulated his dilemma can be stated as follows. After the emergence of deontic logic, cognitivists have not only believed (like in Jörgensen's times) that a logic of norms *is possible* but, also, that *such a logic exists*, viz., as deontic logic or as a separate logic underlying deontic logic (cf. Kalinowski 1967, 1972, 1985). Noncognitivists, in turn, have maintained that the logic of norms is impossible but added that such a logic (even if it were possible) is not necessary because its function (that of the formal analysis of the relationships between normative premises and normative conclusions) is fulfilled by deontic logic. Their view is, therefore, in an essential point different from Jörgensen's first solution to his dilemma. While Jörgensen asserted that there is no need for the logic of norm-sentences, because, given the indicative factor of norms, its function is fulfilled by the "ordinary logic" operating on indicative sentences, they have believed that there is a need for such a logic because it allows to capture the relations between deontic operators of obligation, prohibition, and permission. Interestingly, one may argue for the impossibility of the logic of norms (as distinct from deontic logic) in two different ways. The standard way consists in denying the "cognitive" character of norms, i.e., in claiming that they are not capable of being true or false. The nonstandard way consists in negating the linguistic status

of norms (and, as a result, their "cognitive" character); according to the latter view, norms are not linguistic statements, but *nonlinguistic* products of performative (linguistic) acts (cf. Woleński 1980).

By way of summary, it is worth repeating what has been already hinted at in the Introduction, viz., that the problem of the existence of the logic of norm-sentences is independent from the problem of whether "Ought" can be derived from "Is." In other words, Hume's guillotine poses no obstacle for constructing a logic of norm-sentences: what is crucial for the question about the existence of the logic of norms, its relation to deontic logic, and the interpretation of deontic logic is not whether "Ought" can be derived from "Is" but whether norms are capable of being true or false.

At the end of this section, one more aspect of the problem of the relations between "Is" and "Ought" should be mentioned, viz., the aspect connected with the principle "Ought implies Can" One might argue that the principle shows that "Is" ("Can" is a factual statement and therefore is a kind of "Is") can be inferred from "Ought." This argument, however, cannot be sustained; as was aptly remarked by Georg Henrik von Wright, "'you ought so therefore you can' is not a logical entailment but an affirmation of the reasonableness of the command" (von Wright 1985: 269).

The Problem of the Normativity of Legal Rules

The problem of the normativity of legal rules boils down to the question of what features of a legal system justify the claim that legal rules provide reasons for action and that thereby they give rise to "Ought." Clearly, the very fact that the observance of legal rules is enforced by sanctions executed by the state does not provide a sufficient explanation of the normativity of law. If any system of rules enforced by sanctions could count as creating "Ought," then even purely criminal organizations, unaccepted by citizens but exerting power over them, might be regarded as generating a system of rules. This is counterintuitive: for rules to be *rules*, i.e., to be endowed with "Ought," they must be embedded not in – or not only in – the citizens' fear of sanctions for violating these rules; they must also give rise to their conviction that it is (at least prima facie) *right* to comply with these rules. How, then, the normativity of legal rules can be justified? There are two main approaches to this problem: the legal-positivistic and the *ius*-naturalistic. The first approach implies that the normativity of legal rules is to be strongly distinguished from the normativity of moral rules; "legal Ought" is therefore essentially different "moral Ought." The second approach implies that "legal Ought" has a moral aspect and therefore can be dubbed "legal-moral Ought." It is worth discussing these two approaches in somewhat greater detail.

(*Legal positivism:* "*legal Ought*") According to the adherents of legal positivism, law is a system of rules created in a way determined by a specific social rule called by Herbert Lionel Adolphus Hart "a rule of recognition." This rule determines the conditions of legal normativity, i.e., specifies what conditions must be satisfied for a legal rule to be created, modified, or annulled or, more generally, for a rule to acquire a normative aspect of "legal Ought." On this view, law is therefore ultimately embedded in a social rule which is special kind of a social fact, viz., "a form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts (Hart 1994, p. 256)." This is the so-called *Social Thesis* of legal positivism (this thesis implies the so-called *Separation Thesis*, which says that there is no definitional connection between law and morality and that thereby it may be the case, if the rule of recognition does not count among the conditions of normativity of legal norms their consistency with morality, that even immoral law is still law). But, given its Social Thesis, one may argue that legal positivism reduces "legal Ought" to "Is," i.e., to a social fact, violating Hume's ban, and that thereby it does not provide an adequate explanation of the fact that legal rules provide reasons for action (*assuming it to be the fact* because some legal philosophers, e.g., American and Scandinavian legal realists, on some

interpretation of their views, claim that there is no "legal Ought" and that thereby the phenomenon of law can be exhaustively described in purely factual categories). In response to this argument, a legal positivist may adopt three different strategies.

Firstly, he may argue that the social fact in which "legal Ought" is grounded is *a rule* and that thereby the justification of the normativity of legal rules is based on "Ought" rather than on "Is." This argument, however, cannot be sustained since the rule of recognition is conceived by legal positivists in factual terms – as a certain kind of social practice, viz., the practice of judges which consists in accepting and applying in their activities the law-identifying criteria.

Secondly, some legal philosophers (cf., e.g., Postema 1982) have argued that the rule of recognition is a *special kind of fact*, namely, *social convention* (in a game-theoretic sense), which *by its very nature* is normative and thereby can "generate" legal normativity. According to the famous definition of convention provided by David Lewis (1986: 76), a regularity R in the behavior of members of a population P when finding themselves in a recurrent situation S is a convention if and only if it is true that, and it is common knowledge in P that, in any instance of S among members of P:

- Everyone conforms to R.
- Everyone expects everyone else to conform to R.
- Everyone has approximately the same preferences regarding all possible combinations of actions.
- Everyone prefers that everyone conform to R, on condition that at least all but one conform to R.
- R is arbitrary, i.e., everyone would prefer that everyone conform to R', on condition that at least all but one conform to R' (where R' is some possible regularity in the behavior of members of P in S, such that no one in any instance of S among members of P could conform both to R' and to R).

The feature of convention which is important in the context of the discussion about the sources of legal normativity is that it is a Nash equilibrium and thereby is *self-enforcing*, i.e., no one has an interest in violating a convention if everyone follows it. In other words, the normativity of conventions directly stems from the requirements of instrumental rationality. Now, if the rule of recognition were a social convention in the game-theoretic sense, one could say that normativity (in the sense of instrumental rationality) is, so to speak, inscribed in it and is subsequently "transmitted" from it to lower-order (primary) legal rules. Unfortunately, it is by no means clear that the rule of recognition is a social convention (in the game-theoretic sense). One can raise at least two arguments against this interpretation of the rule of recognition:

(a) It is not very plausible to maintain that judges follow the rule of recognition just because it is generally practiced; it seems they have other (or additional but more important) reasons to follow it, e.g., their reasons for their regarding legislation as a source of law may be that it is a democratic and economically efficient way of lawmaking (cf. Green 1999: 39–40).
(b) It can hardly be argued that for each rule of recognition, one can imagine an alternative rule that enables achieving the same purpose (and therefore that the rule of recognition is arbitrary in the relevant sense); it is not obvious that having some rule of recognition is more important than having any particular rule. The question of whether the rule of recognition is a social convention, however, is still an open one. For instance, Andrei Marmor (2009) argues that the rule of recognition can be regarded as a convention, giving rise to a specifically "legal Ought," on condition that convention is conceived of as *constitutive* (rather than, as within game theory, as coordinative), i.e., as *constituting the very phenomenon of law.*

Thirdly, one may reject or weaken the Social Thesis of legal positivism. This step was taken by Hans Kelsen (1967), whose so-called pure theory of law is sometimes dubbed "critical legal

positivism" (though one may justifiably ask whether a theory of law that rejects the Social Thesis can still be regarded as a version – even if critical – of legal positivism). Kelsen treated the fact that the law's requirements are imposed by sanctions as its essential feature. In his view, thus understood law is a unique entity (quite separate from morality as well as from natural and social facts) which belongs to a nonfactual sphere of *Sollen* ("Ought"). Kelsen therefore posited the existence of a separate sphere of *Sollen* (as opposed to the sphere of *Sein*) where he "located" legal norms. This view encounters manifold difficulties (e.g., it is not clear whether the distinction between *Sollen* and *Sein* is ontological or only epistemological or to which sphere moral norms belong), but they will not be discussed here. The point that is important in this context is how Kelsen introduced "legal Ought," i.e., legal normativity. Now, Kelsen claimed that *the normativity of law is presupposed by each legal system*. More precisely, in Kelsen's view, each and every effectively functioning legal system presupposes the Basic Norm – a kind of norm that "confers" normativity on the entire legal system (from constitution through statutes to judicial decisions) and thereby gives rise to the sphere of "legal *Sollen*." Kelsen justified this claim by means of transcendental argumentation. He started from the assumption that legal rules possess a normative aspect, i.e., that they provide reasons for action, and then posed the question as to what must be presupposed for this normative aspect to be conceivable. His answer was that what must be presupposed in the Basic Norm. The notion of the Basic Norm as the source of normativity of all the other legal norms enabled Kelsen to avoid the (ungrateful) task (undertaken, in fact, by "non-critical" legal positivists) of deriving "legal Ought" from "Is."

None of these three strategies seem satisfactory: the first one omits the fact that the rule of recognition is a social fact (even if a complex one, embracing a set of normative convictions of judges); the second one makes a controversial assumption that the rule of recognition is a social convention; and the third one introduces ad hoc the Basic Norm whose ontological status is notoriously unclear. Accordingly, it seems that legal positivism does not tackle effectively the problem of the sources of legal normativity.

(*Ius-naturalism*: "*legal-moral Ought*") According to the classical theories of natural law, law is a system of *right* rules, i.e., rules concordant with morality; in consequence, "*lex iniusta non est lex*." This basic claim common to all classical natural law theories implies that among the necessary conditions of legal normativity, there is the requirement of concordance with morality. It is worth noticing that one can imagine an *extreme* version of natural law theories according to which concordance with morality is a necessary *and sufficient* condition of the normativity of a legal rule. But such a version was not supported by any serious representative of *ius*-naturalism. According to its dominant version, the source of normativity of (human-made) legal norms lies in morality, but one cannot speak about legal rules if some additional conditions are not fulfilled, i.e., if legal rules have not been adopted in a proper way determined by some "rule of recognition." As can be easily seen, the theories of natural law imply that the source of the normativity of legal rules is more variegated than the source of the normativity of moral rules: while moral rules acquire their normative character only by virtue of their satisfying certain criteria of moral acceptability (determined by a given moral theory, e.g., Kantianism or utilitarianism), legal rules become normative if and only if they satisfy the criteria of moral acceptability *and* have been properly enacted, i.e., in accordance with some social rule which provides conditions for creating legal rules (though, perhaps, it would be more apt to say, that, on the *ius*-naturalistic theories, legal rules are *rules*, i.e., provide reasons for action, and thereby are normative, because they are concordant with moral rules, and are *legal* rather than moral, because they satisfy the conditions of "legality" provided by some rule of recognition). Since natural law theories embed "legal Ought" in "moral Ought", the former has in fact also a moral aspect;

hence, on the ground of the *ius*-naturalistic theories of law, "legal Ought" is in fact "legal-moral Ought."

The theories of natural law, in contradistinction to legal positivism, have no difficulty with finding the source of legal normativity: the source is "moral Ought." However, their success in this regard is achieved at the cost of introducing a notoriously unclear (which does not mean implausible) concept of "natural law."

Conclusions

The two problems discussed in this article – that of the existence of the logic of norms and that of the sources of legal normativity – might seem at first glance unrelated to each other in the sense that one can consistently combine every answer to the latter with every answer to the former. But this impression would be mistaken, since, on closer analysis, it turns out that certain combinations of the answers to these problems prove to be mutually inconsistent: the "link" between these problems is the controversy "cognitivism versus noncognitivism." If one is a cognitivist, and thereby accepts the logic of norms (as different from deontic logic), then one will be more likely to prefer the *ius*-naturalistic approach to the problem of the sources of legal normativity than the legal positivist approach. In other words, if one believes that a certain system of moral norms is *true*, and that thereby "moral Ought" exists, then one will be reluctant to separate this "Ought" from "legal Ought"; rather, one will be inclined to embed the latter in the former. But there is no inconsistency in being a cognitivist and legal positivist. By contrast, if one is a noncognitivist (and thereby accepts only deontic logic and interprets it as operating on statements about norms rather than on norms themselves), one cannot adopt the *ius*-naturalistic approach to the problem of the sources of legal normativity: the existence of "moral Ought" is the assumption of the theories of natural law and noncognitivism implies that "moral Ought" is a fiction.

Cross-References

- ▶ Deontic Logic and Legal Rules
- ▶ "Is" and "Ought" in Hume's and Kant's Philosophy
- ▶ Legal Science
- ▶ Legal System and Legal Order
- ▶ Natural Law: Contemporary
- ▶ Ontology of Law
- ▶ Positive Law and Natural Law

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"Is" and "Ought" in Hume's and Kant's Philosophy

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Introduction

The importance of Hume and Kant in the history of the discussion about relations between the sphere of facts ("Is") and the sphere of duties ("Ought") cannot be overestimated. In point of fact, it can be said that they initiated this discussion by formulating the problem explicitly. They also provided two "paradigmatic" answers to the question of the relations between "Is" and "Ought", which determined the course of further discussions: generally speaking, both Hume and Kant agreed that there is no legitimate logical transition between "Is" an "Ought," but while Hume (on one interpretation) believed that "Ought" can be reduced to "Is," Kant strongly objected to this kind of reduction, stressing the autonomy and irreducibility of the sphere of "Ought." But this general account of their views simplifies a lot. We shall try to highlight the complexity of their investigations in the following sections.

Hume

The issue of the mutual relation of "Is" and "Ought" is tackled by Hume in the last paragraph of the first section of the Book 3 ("Of Morals") of his *A Treatise of Human Nature*. It comes as follows:

> I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason shou'd be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the reader; and am perswaded, that this small attention wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason (Hume 2000: 302).

The above paragraph, often referred to as the *Is–Ought Paragraph* (*IsOP*), is one of the most frequently cited and, at the same time, the most controversial passage from *Treatise*. There is a great controversy between Hume's interpreters, concerning not only what Hume exactly has in mind under vague notions of "is" or "is not" and "ought" or "ought not" but also what it means that his "attention wou'd subvert all the vulgar systems of morality" and what "systems of morality" he is concerned with at all. The significance of the closing line of the *IsOP* ("the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason") is also not clear.

One can distinguish two approaches to the interpretation of the *IsOP* – the textual one and the contextual one. In general, the textual interpretations are based on the literal reading of the cited passage, whereas the contextual ones tend to bear in mind the historical background of Hume's work, as well as his overall epistemology and the psychology of morals. The textual interpretation, sometimes referred to as the standard interpretation, was the dominant interpretation of the *IsOP* for the most part of the twentieth century, although in recent years, as a result of an intensified interest in Hume's overall moral theory, the contextual interpretation is often considered as the more

accurate one. The division between these two approaches should not be treated as the definitive one – it should be considered as the typology instead. Each researcher may be classified as textualist or contextualist due to features dominant in her reading of the *IsOP*. The distinctive features of both approaches are introduced below.

According to the standard, textual interpretation in its most popular variation, Hume in the *IsOP* formulates some putative thesis of logic that one cannot deduce (derive) nonfactual (e.g., normative) conclusion from factual premises, the thesis which relies on the rules of the valid syllogism. That thesis is sometimes referred to as "Hume's Law" or "Hume's Guillotine." There are two basic versions of the textual interpretation of the *IsOP* – the strong and the weak. The former is adopted by, among others, R.M. Hare or P.H. Nowell Smith and the latter by such scholars as Ch. Pidgen, J. Searle, or A.N. Prior. According to the strong textual interpretation, Hume's Law creates "an unbridgeable logical gap between 'Ought' and 'Is'" (Black 1964: 169). Therefore, Hume's argumentation literally "subverts all the vulgar systems of morality," i.e., systems of morality that try to bridge that unbridgeable gap. According to the most radical readings, the conclusion of the *IsOP* is that it is entirely impossible to build any ethical system at all. Readings like that often go hand in hand with the noncognitivist view of moral judgment – the view that moral judgments do not express any beliefs or state any facts but, rather, express speaker's emotions, which means that they cannot be truth-evaluable. Weak textualists claim, on the other hand, that the above conclusions are too far-reaching. They agree that there is the "unbridgeable *logical* gap between 'Ought' and 'Is'" – but they also stress that the gap is merely logical and that one can actually get "moral conclusions from non-moral premises by logic plus [*some*] analytic bridge principles" (Pidgen 2011) or by means of logic plus some "constitutive rules of the institution" – which are the rules "that give the word 'promise' its meaning" (Searle 1964: 57–58). This reading of the *IsOP* may be more proper but, as some scholars point out, also makes it quite trivial. There is also a group of interpreters who claim that in the cited passage, Hume simply recommends a profound caution in the course of deriving normative conclusions from factual premises. Hume's Guillotine, according to them, undercuts these "vulgar systems of morality" whose authors do not think and argue clearly enough.

Other interpreters – the more contextual ones – try to read the *IsOP* against the background of Hume's critique of the seventeenth- and eighteenth-century ethical rationalism, which he undertakes in the Book 3 of *Treatise* (first section of which is entitled *Moral Distinctions Not Deriv'd From Reason* – section, which ends up with the *IsOP*). Rationalists, like W. Wollaston, R. Cudworth, or S. Clarke, claimed that moral laws exist objectively and can be recognized by reasoning and their recognition intrinsically gives us reason to act in accordance to them. Hume's moral theory, sentiment-based and anti-rationalist, was in large part an attempt to rebut the rationalists' doctrines. His argumentation, in broad outline, was as follows. The function of reason is, generally speaking, discovering relations or the matters of fact (Hume 2000: 14–15). We can't find the basis for our moral distinctions among relations or facts in the physical world (Hume 2000: 301). Moreover, even if such basis were to be found, rationalist would have to demonstrate in what way those relations or facts discoverable by reasoning "wou'd be universally forcible and obligatory" (Hume 2000: 300) or, using more contemporary language, how they could give us authoritative reasons for actions. That argumentation, additionally strengthened by the so-called Representation Argument (Hume 2000: 295) (according to which passions or volitions cannot be contrary to reason because they are not representations of any objects), entails that ethical rationalists are wrong and that "the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason." However, the thesis that Hume's main target in the *IsOP* was ethical rationalists is not commonly accepted. S. Botros, for example, claims that Hume in the cited passage attacks not only rationalists but also other thinkers, such as his mentor, sentimentalist S. Hutcheson (cf. Botros 2006: 72–95). Others, including A. MacIntyre, think

that Hume's main antagonists are dominant religious beliefs of his times and his main aim was to ground his naturalistic view of ethics (MacIntyre 1959: 451–468). As was in the case of the textual interpretation, there are stronger and weaker conclusions, which may be entailed by the contextual interpretation of the *IsOP*. The most radical interpreters claim that Hume's aim is the absolute "rejection of 'Ought' as a moral category" (Capaldi 1966: 126–137). Less radical scholars, rejecting such far-reaching conclusions, claim that Hume rejects only metaphysical, external "Ought" and simultaneously establishes internal, human-dependent "Ought" (cf. Darwall 1995: 1–22; Korsgaard 1996: 49–89). Some others say that Hume, in the *IsOP*, does none of the above. According to that view, "Hume's task in his moral philosophy is completely analogous to his task in epistemology: to explain how a common world is created out of private and subjective elements" (Haakonsen 1981: 4). Thus, Hume's reasoning does not "subvert vulgar systems of morality." Quite the opposite – the Scottish philosopher tries to defend the common sense morality (understood as the whole system of beliefs, not as the set of particular moral beliefs) before he attacks counterintuitive ethical theories. The commonsense morality would be subverted if ethical rationalists were right. Since they are wrong, and we put the sentimentalist view in their place, we can still rely on common sense while building our moral systems. The contextual interpretation of the *IsOP* is often accompanied by more cognitivist views in metaethics (e.g., Cohon 2008: 96–125). But here there are also some exceptions – J.L. Mackie, for example, interprets Hume as ethical anti-realist (which is an non-cognitivistic approach) and attributes to him the view called "objectification theory," which is compatible with his own ethical doctrine, ethical falsificationism (Mackie 1980: 144).

Some people interpret the *IsOP* as the anticipation of the so-called naturalistic fallacy. G.E. Moore famously claimed that naturalists were guilty of what he called the "naturalistic fallacy," viz., the attempt to define ethical predicates (such as good or right) in nonmoral terms. This is, according to Moore, a "fallacy" because no such definition can pass the test of the "open question argument," i.e., we can always reasonably ask whether what is supposed to be the definiens of the predicate "good" is really "good"; the possibility of asking such a question attests, in Moore's view, that all definitions of "good" are mistaken (cf. Moore 1903: Chap. I). According to some views, Hume, in the *IsOP*, formulates a similar critique. Opponents of the view that Hume's intentions were similar to those of Moore point out that Hume himself was a naturalist who analyzed moral terms by reference to various natural properties (such as agreeable or useful to oneself or others, or eliciting approval in the impartial spectator), and thereby it makes little sense to connect him with the formulation of the naturalistic fallacy. These opponents, however, omit the possibility that Hume's view may be inconsistent: in the *IsOP* he may have anticipated the "naturalistic fallacy" but, at the same time, may have also constructed normative ethic which is based on precisely the same fallacy – of identifying moral properties with some natural properties.

Kant

As was shown above, given Hume's moral theory, within which "Ought" appears to be defined in factual terms, one may doubt whether he really makes a clear distinction between "Is" and "Ought." In Kant's moral philosophy, by contrast, facts and duties are kept very strictly distinct. The differences between Kant and Hume in this context can be stated more precisely in the following way:

1. As was mentioned in section "Hume," commentators of Hume's works are in disagreement as to whether he admitted "Ought" at all. What can be said for sure is that if there is a place for "Ought" in his moral philosophy, this can be only weak, internal "Ought." Thus, if Hume introduces any normativity ("Ought") at all, he locates it at the level of facts. Kant, by contrast, unambiguously separates the sphere of facts from the sphere of duties, believing

that they are to be situated at metaphysically different levels which are irreducible to each other. He therefore explicitly introduces "Ought" in the strong, external sense, believing that it can be defended only if the separate sphere of normativity (as distinguished from the sphere of facts) is postulated.

2. Kant agrees with Hume (at least if we assume the standard, textual interpretation of the latter's views) that one cannot "deduce" any normative truth from the factual truths, but the way of apprehending normative truths is conceived by both philosophers in entirely different ways: for Kant moral truths are synthetic a priori judgments, i.e., judgments which are formulated without recourse to sense experience and whose truthfulness is not determined by the meaning of its component terms – thus they can be known by reason; for Hume, by contrast, they are either factual truths (on the cognitivist interpretation of his theory) or have no truth value (on the noncognitivist interpretation of his theory).

These two points of Kant's moral theory – i.e., the strict separation of the realm of facts and the realm of duties and the claim that it is thanks to reason that we know the truths belonging to the sphere of duties – are, of course, strictly connected. Let us now analyze them in somewhat greater detail, starting from the basic epistemological point concerning the role of reason in moral cognition. Then we will pass to some more detailed questions.

Unlike Hume, who assigned a purely instrumental role to reason in the sphere of action (the role of finding appropriate means for realizing ends determined by "passions"), Kant's central point, formulated in direct polemic with Hume, is that reason has also a practical (moral) dimension: that is, its role consists in guiding the course of human action in the fundamental sense of discovering or constituting an unconditional rule of conduct, viz., the categorical imperative, which human beings (or, more generally, all rational agents) ought to follow. This belief is deeply embedded in his philosophy with its central claim about the active role of reason in constituting our cognition, but, interestingly, Kant formulates also a strictly empirical argument for it: he asserts that the function of reason consists in producing a goodwill in human beings (i.e., a will whose motive is the obedience to the categorical imperative) rather than in securing their preservation, since "in a being which has reason and a will, if the proper object of nature were its conservation, its welfare, in a word its happiness, then nature would have hit upon a very bad arrangement in selecting the reason of a creature to carry out this purpose" (Kant 1964: 12). To return to the categorical imperative, the imperative discovered or constituted by reason is categorical in the sense of being unconditioned by the previously existing ends or desires of the agent. In other words, it formulates a duty which is binding for all rational agents, irrespective of whether following this duty is in accordance with their preexisting desires or ends. The exact content of this rule (in its basic formula called "universal law") is as follows: "Act only on that maxim through which you can at the same will that it should become a universal law" (Kant 1964: 51) (it is usually assumed that Kant proposed five various formulations of the categorical imperative, which he believed to be equivalent. Arguably the most famous, apart from the Formula of the Universal Law, is the Formula of the End in Itself, according to which one ought to act in such a way as to treat humanity, whether in one's own person or in any other person, always at the same time as an end, never merely as a means). As mentioned before, Kant believes that the categorical imperative is an a priori synthetic judgment and, consequently, that the requirement that maxims (personal principles) of human conduct must be such that agents can will them to become a universal law *is not part of the definition* of the concept of moral action (even though, in his view, moral action *does consist in fulfilling such a requirement*). Kant also strongly emphasizes that one needs not engage in deep philosophical thinking in order to understand that the categorical imperative is a cornerstone of (proper) morality; he claims that this supreme principle of morality is presupposed or "encoded" in the common man's awareness of duty; the only merit of the

philosopher (Kant himself) is to bring to light, i.e., formulate explicitly, what is understood implicitly by every common man. He also distinguishes between *the* categorical imperative and *a* categorical imperative (or categorical imperatives). *The* categorical imperative (in its various formulations) is the supreme principle of morality which enables testing various maxims of actions as to whether they are moral; a maxim that passes this test becomes *a* categorical imperative. One can therefore say that the sphere of "Ought" (or, more precisely, of "moral Ought") consists of the categorical imperative (in its various formulations) and a broad (potentially infinite) set of categorical imperatives. How this sphere is exactly known and what ontological status it has are controversial points of Kant's moral philosophy that we shall deal with in the remainder of this section.

From what has been said above, it follows that Kant emphasized a strict relation between rationality and morality. In fact, on his view, morality becomes a part of rationality: reason, acting in the practical sphere, points at the rules of moral actions. However, the question arises (we have left this question open in the initial description of Kant's theory) how exactly reason "points at" the rules of moral action: whether it *discovers* or *constitutes* them. Kant does not decide this question with full clarity, but it can hardly be doubted that the second alternative ("constituting") is more consistent with his "transcendental" approach to philosophical problems (within which the emphasis is laid upon the active role of reason in human cognition), as well as with his insistence on the fact that rational agents are "self-legislators" who autonomously impose on themselves moral duties (the claim that there are some binding moral duties which exist in the sphere of "Ought" and which are to be discovered and obeyed by rational agents would be viewed by Kant as incompatible with these agents' autonomy and as an instance of a "heteronomous" moral theory). Consequently, one should say that, according to Kant, reason does not discover the categorical imperative purportedly preexisting in some mysterious sphere of moral "Ought" but rather, by virtue of its own activity, constitutes it (and thereby the sphere of moral "Ought"). It may be noted in this context that only on this interpretation Kant's view of the sphere of moral normativity can be regarded as truly original: if Kant just claimed that reason "discovers" preexisting moral truths, his view would be in essential points similar to the view of the seventeenth- and eighteenth-century ethical rationalists (which, as was mentioned, were strongly criticized by Hume).

Another interpretational problem of Kant's moral theory (related, as we shall see, to the problem of whether reason discovers or constitutes the categorical imperative) is connected with an ambiguity in Kant's works regarding the question of whether the categorical imperative can be justified in the sense of being derivable from some more fundamental principle (cf. Paton 1946: 203–205). On the one hand, in *Groundwork of the Metaphysics of Morals*, he seems to suggest that the categorical imperative can be justified by *an independently established* presupposition of freedom. On the other hand, in *Critique of Practical Reason*, he conceives of the categorical imperative as "a fact of pure reason" which we know a priori as a certain truth; accordingly, it need not (and cannot) be derived from anything else and, furthermore, is itself a basis for conducting a "deduction" of freedom as a necessary presupposition (postulate) of moral judgments, since in making a moral judgment of an agent's action we assume, in Kant's view, that the action was "freely chosen," i.e., the agent could have acted otherwise (as is well known, according to Kant, the other presupposition of practical reason are the immortality of soul and the existence of God). Accordingly, in Kant's view expressed in *Critique of Practical Reason*, freedom is a presupposition of making moral judgments but not a principle from which the categorical imperative can be derived, whereas in *Groundwork* he seems to assign to freedom *both* roles. As can be easily seen, Kant's claim that the categorical imperative is a "pure fact of reason," not derivable from anything else, provides another argument for such an interpretation of his ethical view which assumes that reason constitutes rather than

discovers moral truths. It is worth invoking in this context the opinion of H.J. Paton: "Kant's ethics is not based on metaphysics: it would be truer to say that his metaphysics, so as we take this to be concerned with supersensible reality, is based primarily on ethics. Whatever confusion or error there may be on this topic in the *Groundwork* is to a great extent cleared always by the *Critic of Practical Reason*" (Paton 1946: 203–205). This opinion is (generally) apt but it should be qualified. Truly, Kant's metaphysics understood in this strong sense (the existence of supersensible reality: soul, God, freedom) is indeed based on his ethics. But it should be noticed that his ethics is metaphysical in some weaker sense, especially if compared with an unambiguously naturalistic ethics of Hume. Kant believes that reason (the distinguishing capacity of all rational agents) constitutes a sphere of moral "Ought" which is irreducible to the sphere of facts; and even if he does not confer a strongly metaphysical status on this sphere (as existing independently of rational agents), its status can nonetheless be regarded as metaphysical, given the metaphysical status of the very reason (as imposing necessarily true laws in moral and physical sphere). One more remark seems to be in order here. The fact that we regard Kant's ethics as metaphysical does not mean that we agree with G.E. Moore that Kant's ethics is based on the naturalistic fallacy (in its wider sense, embracing also the attempts to define ethical predicated in metaphysical, not only naturalistic, terms). Moore (1903: Chap. IV) claimed that Kant identifies the predicate "good" with the predicate "required by the rational will" or "required by reason" and thereby commits the naturalistic fallacy. But this interpretation of Kant's moral theory cannot be defended, since Kant, though associating the categorical imperative with the capacities of reason, does not make any definitional claim; he asserts that the categorical imperative is known by reason (or, as we propose to interpret his theory, the categorical imperative is constituted by reason in the sense that in the absence of reason, there would be no categorical imperative); it is, as Kant strongly emphasizes, a synthetic a priori judgment, whose truthfulness cannot be derived from any other statements (e.g., about reason or rational will).

Conclusion

As can be inferred from the above account of Hume's and Kant's views on "Is" and "Ought," the interpretational problems they engender are of a different kind – much more serious in the case of Hume. Even though it is clear, at least for most of his readers, that Hume did not believe that there exists some form of reasoning that can justifiably lead us from "Is" (statements about facts) to "Ought" (statements about duties), one can plausibly argue that Hume believed that reduction of "Ought" to "Is" is feasible, i.e., that statements about duties are in fact statements about facts (about what is agreeable or useful to oneself or other persons or what would be approved by the impartial spectator). There seems to be an inconsistency in the claim that one cannot derive duties of facts and that duties are reducible to facts; however, this inconsistency could be eliminated if Hume's purportedly normative moral theory was interpreted as a descriptive moral theory (saying how people do in fact make moral judgments). Perhaps this was Hume's intention, but this issue is hard to settle. The interpretational problems of Kant's theory are of a much less serious nature. There is no controversy as to the basic claims of Kant: he believes that "Ought" cannot be either derived from "Is" or reduced to it; that it constitutes a separate realm, radically different from the realm of facts; and that it may be known by means of reason. The crucial interpretational problem of Kant's moral theory concerns the very relation between the sphere of "Ought" and reason: whether reason constitutes it or discovers it; and if reason constitutes it (what seems to us to be a more plausible interpretation), what specific implications this "constitution" has for the question about the ontological status of the sphere of "Ought" (it is clear that this account of the sphere of "Ought" makes it metaphysical, but it remains unclear what is the difference between the strong, external "Ought" understood in the

Kantian way and the strong, external "Ought" understood in the spirit of ethical rationalists).

Cross-References

- ▶ Deontic Logic and Legal Rules
- ▶ Is and Ought Distinction in Legal Philosophy
- ▶ Legal Norms as Hypothetical Imperatives
- ▶ Legal Science

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Italian Legal Institutionalism

▶ Institutionalism: Italian

J

Jaggar, Alison

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Introduction

Alison Jaggar (b. 1942–) is an American feminist philosopher who works in the areas of contemporary social, moral, and political philosophy. As a professor in the early 1970s, Jaggar was integral in introducing feminist theory and feminist concerns into philosophy through her academic research, university course instruction, and professional service. For example, she taught some of the first-ever courses in the United States on feminist philosophy, cofounded the Society for Women in Philosophy (SWIP), and the journal of feminist philosophy, *Hypatia*. Jaggar's scholarship centers broadly on issues of gender and globalization, which she approaches from methodological, epistemological, and normative considerations. In the most basic of terms, Jaggar throughout her work intends to reframe traditional debates about what justice and political justification looks like in terms responsive to gender, globalization, post-colonialism, and local intersectional politics. Methodologically in all her work, Jaggar seeks to center marginalized perspectives engaging a feminist standpoint theory to understand the experiences of women, poor folk, and postcolonial subjects. Yet, like all feminist political philosophy, Jaggar's work seeks to not only to understand the world but to change it by developing new ideals, practices, and justifications for organizing political institutions and structuring practices.

Feminist Politics and Human Nature

Jaggar's now-classic text, *Feminist Politics and Human Nature* (1983), classifies four broad traditions in feminist political philosophy and considers how each ideological approach drew feminist scholars who would take their cue from and borrow the language of a particular ideology. One of the most lasting components of her work in this text is its demarcation of feminist political philosophy into the following four broadly conceived groups: liberal feminism, socialist feminism, Marxist feminism, and radical feminism (Jaggar 1983). The first three groups followed and developed associations with the lines of Cold War global political divisions: American liberalism, European socialism, and a revolutionary communism. Theorists working within these traditions generally operated within the language and framework of their chosen approach to political philosophy even as they criticized the gender politics and inequitable effects of the dominant patriarchal framework. By contrast, radical feminism was the most indigenous of the feminist political philosophies, as it developed its own

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political vocabulary and is rooted in the deep criticisms of patriarchy that a feminist consciousness draws to collective attention.

Global Gender Justice

One of Jaggar's larger projects spread over the course of her scholarship has been to "develop an account of moral reason that shows how respect for cultural difference may be combined with claims to postconventional moral objectivity" (Jaggar 1998). Inspired by the dialogical tradition in Western moral theory, Jaggar takes seriously the ideals and practices centered in this tradition from Plato to Habermas including the values of discursive equality, openness, and inclusivity. However, as a feminist philosopher, she brings to this philosophical tradition an understanding of the way in which practical discourse is shaped by gendered politics both local and global.

For one, Jaggar considers throughout her work the fact that the effects of poverty do not fall equally on men and women, nor on boys and girls (1993, 1998, 2005, 2014). Generally, poverty the lives of women and girls in more persistent and consistently destabilizing ways than men and boys, in part because local and global cultural expectations often dictate that women and girls perform care and domestic work that is unpaid, as well as sacrifice their own needs when resources are scarce, putting their brothers, sons, husbands first. And while there are variations on the status of women vis-à-vis men within different regions of the world, there are transnational patterns of gendered disparities that thwart as effects women and girls' well-being and their access to basic resources like education, health care, and food in favor of distributing them to men and boys.

Similarly, Jaggar prominently argues that various structures create and recreate transnational gendered vulnerabilities and she illustrates with practices common in domestic work and the sex industry (Jaggar 2009). Cultural perceptions of gender roles can contribute to practices highly damaging to the most fundamental interests of women and girls such as "honor killings" (where it is believed culturally permissible to kill a girl or woman who is perceived to have brought shame to the family), genital mutilation, infanticide, forced prostitution, arranged marriage, and legal recognition of property and inheritance rights that significantly disadvantage women and girls. Poverty can exacerbate such vulnerabilities, so we have further reasons to address it as a matter of urgency (Jaggar 2009, 2014). Yet, the dominant political approaches in philosophy, which Jaggar categorizes into five broad categories, have failed to duly respond to transnational gender disparities (2014). The first response has been to simply ignore transnational gender disparities, mentioning women or gender only in passing. The second treats women instrumentally focusing only on the ways in which women's poverty impedes overall economic growth, inevitably treating women merely as instruments to a desired end rather than considering how marginalization of women is itself an issue of justice. The third treats women's oppression and global gender disparities as biologically determined and thus natural. Sex on these models determines the suffering of women as female-ness is framed as disabling in comparison to male-ness. However, as Jagger makes clear, "the central question for political philosophers is not whether any particular abilities are advantageous but rather how social institutions may be constructed so as to be fair for individuals whose capacities differ on many dimensions" (2014). The fourth failed response occurs when responsibility for gender inequities is placed on non-Western cultures. Typical of Western philosophers in the 1990s, "the plight of poor women in poor countries" (Okin 1994) was exclusively blamed on the unjust cultural norms of "developing countries" without connecting the subordination of "third-world women" (Mohanty 1988) to the subjugation of women in Western societies or to global power structures, political and economic. Finally, the fifth inadequate approach blames the victims of global gender injustice by treating gender inequities as resulting from the bad decisions made by women out of ignorance or false consciousness. This approach, Jaggar notes, directs philosophical consideration away social institutions that frame and structure

individual decisions and locates full agentic capacities within the individual (2014).

Before social, political, and moral philosophers begin to offer moral analyses of global gender disparities and assess the justice or injustice of distributional disparities, they must, Jaggar argues, first ask the right questions and understand the causes of global gender disparities. As editor of the book *Gender and Global Justice*, Jaggar seeks to do just this arguing that "the model of transnational cycles of gendered vulnerability helps political philosophers identify some of the right questions about global gender justice" (2014, 23). The strengths of this model include that it is able to account for the gendered and racialized dimensions of global inequities that are routinely overlooked, it sketches an interactive and dynamic causal account of disparities that emphasizes the significance of transnational political and economic structures, and while it does not seek to universalize gendered and racialized experiences, it rejects a hyper-localized position that treats gender disparities in particular locations as self-contained phenomena. Two issues Jaggar uses a transnational model to understand how gender and gendered vulnerability operate are domestic work and sex work.

Jaggar's consideration of the gendered cycles of vulnerability in both cases begins with basic ideas in feminist theory: (1) the recognition that inequalities in one area of life connects causally with inequalities in other aspects of life and (2) gender assignments are a crucial causal factor in producing and reproducing gendered cycles of vulnerability (2014). Additionally, however, to understand a global system of gendered vulnerability as it manifests in the politics of domestic work and sex wok, we have to look simultaneously at the cuts in social welfare policies in the Global North following the collapse of the Soviet Union, the effects of debt and indebtedness in the Global South, and the creation of a global domestic and sex work industries. For example, as a group migrant domestic workers, most of whom are women, are extremely vulnerable to forced and exploitative work, the withholding of pay, violence, and sexual assault. The global domestic work industry, Jaggar writes, "appears to be a new link in a cycle of gendered vulnerability that stretches across the globe. . .increas[ing] the domestic burdens carried by female members of the migrant woman's families, which reinforces the gendered vulnerability of migrant women's mothers, sisters, and daughters" (2014, 28–29). Similarly, gender is central to the sex trade, which functions as one of the largest global industries. And while conditions for sex work and sex workers vary widely, the gendered constructions of sexuality create the meaning of who and how gendered persons may participate in the global sex trade with women and girls working as the suppliers and men and boys as consumers. But, the fact that there are many risks and the pay is generally quite low (and at times withheld altogether), one must ask why women and girls enter the global sex industry if the terms are so unfavorable. For Jaggar, it is easier to understand the entrance of individual women into sex work when the decisions are viewed in the context of intersecting cycles of gendered vulnerability. Thus, Jaggar writes, "most sex work is chosen in some sense, but the extent to which sex workers' choices can be regarded as free depends on the situation" (2014, 31).

Generally these disparities, and others such as marriage, social welfare, femicide, should be understood by analyzing their gendered contours and seen ultimately as components in transnational cycles of gendered vulnerability that are systematically produced and reproduced. And while understanding the systematic (re)production of gendered cycles of vulnerability raises moral questions about the justice of said global systems, it does not specifically diagnosis their injustice without furthering theorizing such as is produced in liberal theories that speak of disproportion in the benefits and burdens of social life and inequality in opportunities or Marxist (and non-Marxist) analyses that speak in terms of exploitation and domination. For Jaggar, feminist philosophers and social theorists do not have to be committed to merely one of these normative theories to think through the terms of transnational cycles of gendered vulnerability. Rather, the model of transnational cycles of gendered vulnerability derives "from the assumption that

gendered disparities matter morally and that treating them instrumentally is morally unacceptable (2014, 34). This model avoid the trappings of the five problematic approaches mentioned earlier, and while it does not seek to explain the multiple and diverse sociohistorical origins of gendered divisions of labor, it does identify and analyze how they are maintained transnationally. Gendered institutions make many women across classes, racialized identities, and nation-states, though especially poorer women and gender marginalized folks from poorer countries, systematically and unequally vulnerable to both calamities in nature (climate change, natural disasters, etc.) and social domination.

Postcolonial Feminist Theory: Universality Versus Multiplicity

The development of postcolonial theory further heightened the debate between feminist political philosophers who wanted to identify a universal feminist subject of woman such as Okin, Nussbaum, and Ackerly, and those who call for recognizing multiplicity, diversity, and intersectionality, such as Spelman, Spivak, Narayan, and Jaggar. Nussbaum, for example, in *Women and Human Development: The Capabilities Approach* (2000) and *Sex and Social Justice* (1999) has argued for a list of ten capabilities that all human persons ought to be positioned to exercise. This capabilities approach offers a powerful tool, Nussbaum argues, for persuasion in cases where girls and women are denied opportunities by local actors across cultures. Jaggar, however, disagrees with this approach in that it fails to attend to asymmetrical power relations not just between men and women, but also between Western and non-Western folks. In addition, Jaggar argues the intuitionist and proceduralist justifications integral to Nussbaum's capabilities approach are neocolonialist and illiberal.

Jaggar's first major criticism of Nussbaum's theory is that it functions as neocolonialist insofar as those in power have the "final authority. . .to assess the moral worth of. . .[other's] voices" without requiring interrogation of the interests and power of folks assessing from dominant positions (2006). This is, furthermore, problematic for the intuitionist justification of moral values Nussbaum advocates for since those who possess intuitions that do not match the capabilities list will be interpreted as misguided and possibly jettisoned. Put differently, for Jaggar, there are no mechanisms in Nussbaum's approach that allow us to encourage self-criticism from those who possess the list and had or have power to make said list. Furthermore, Jaggar emphasizes that while Nussbaum claims to be committed to a politically liberal project where all persons' intuitions are considered, the intuitionist justification paradoxically dismisses ideas that do not match the theory put forth by Nussbaum herself, and thus illiberally disregards others. For Jaggar, in order for Nussbaum's theory to encourage self-criticism, she must include all intuitions, even those that do not match the capabilities list.

Jaggar's second major criticism of Nussbaum's argument (and by extension the attempt to take a universalist approach to gender) is that the capabilities list seems to be in-itself illiberal since "other voices" (i.e., those voices that are mistaken or exhibit uninformed desires) are not ready for a proceduralist justification. Since Nussbaum demands only informed desires participate in the proceduralist justification for the list, desires that do not match the list will be unable to partake in the discourse process of value formation and validation. Furthermore, because these "other voices" are silenced, there may be capabilities missing from the list or capabilities on the list that ought to be challenged yet remain intact. Jaggar maintains, by contrast, that theories, as well as the activist practices that are built from the lessons of these theories, must not limit discursive openness and simultaneously be attentive to the ways in which empirical discussions are always infused with power (1998).

In short, Jaggar criticizes Nussbaum's justifications for the capabilities approach since they ignore asymmetrical power relationships. Even though Nussbaum claims to be paying attention to such relations, Jaggar notes, she paradoxically fails to produce a theory that is cognizant of power discrepancies (even those having to do with gender). Importantly, Jaggar does not believe these criticisms require rejecting the capabilities model,

rather, the theory must have the space to be self-critical which she believes may occur through setting discourse ethics as the main justification for the capabilities listed as necessary and just. Unlike Nussbaum and universalist approaches to gender and global justice, Jaggar seeks the abandonment of the search for a one-size-fits-all-contexts method of moral justification. Instead, like Spivak, Narayan, and other postcolonial feminist theories, she argues for a naturalized case-study approach, which investigates how moral claims are justified in the real world. Through interdisciplinary teamwork and moral fieldwork, like that performed by Jaggar as a member of "Fempov," philosophers should develop different models of moral justification based upon varying contexts and endeavor to explain why some models "fit" some contexts better than others.

Conclusion

While inspired by Western moral philosophy, Jaggar is critical of the ways in which many Western accounts of moral rationality invoke idealized conceptions of moral community. Throughout her work, Jaggar ultimately seeks to develop a feminist conception of practical moral discourse that does not obscure the features of empirical moral discourse, including considerations of social power, the fluidity and internal heterogeneity of actual communities, and the shifting, permeable, and frequently contested boundaries of empirical communities (1998). There are real dangers both in imagining an inherent global feminist sisterhood and in reifying local communities of gendered folks as "sealed rooms" disconnected culturally from a larger global gendered framework. However, despite these potential pitfalls, Jaggar argues it is possible to imagine a global feminist discourse community so long as it is accepted that it is not singular, separate, or linear. Rather, a global feminist discourse community occurs in multiple, overlapping, intersecting, and even contradictory networks of individuals and communities with disparate and changing agendas. "Indeed," Jaggar writes, "it is a community in the making and, in this sense, it is not only both ideal and imagined but continually being reimagined" (1998, 27).

Cross-References

- ▶ Claim Rights (Subjective Rights)
- ▶ Rights: Social Rights
- ▶ Young, Iris Marion: Political Philosophy

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James, William

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Introduction

The philosophical ideas James (1842–1910) stated in his major works deeply changed American scholarship and intellectual culture in the twentieth century: *The Varieties of Religious*

Experience (1902), *Pragmatism* (1907), *A Pluralistic Universe* (1909), *The Meaning of Truth* (1909), and the posthumously published *Some Problems of Philosophy* (1911) and *Essays in Radical Empiricism* (1912).

As John Dewey memorably claims, James' philosophy not only redefined the terms of professional philosophy in the United States, but also articulated an entire phase of American life-experience. Similarly, the editor of James' collected writings, John J. McDermott, claims that the "Golden Age" of American philosophy (Charles Sanders Peirce, Josiah Royce, George Santayana, John Dewey, and George Herbert Mead) is inconceivable without James as an original force. Through "the interweaving of reflection and action, the valuation of time and ideals in the transformation of reality, and the importance of keeping all of our thinking in contact with the entire culture, not only its problems but its aspirations as well," James becomes an "indispensable philosopher with regard to social philosophy" (McDermott x). More recently, Joshua Miller explores James as part of the intellectual center of progressive political thought in the early twentieth century, and Alexander Livingston calls James an important resource for political theory.

Going further, Alfred North Whitehead declares that the four prodigious philosophical "assemblers" are Plato, Aristotle, Leibniz, and James, seeing James' contribution in discovering "intuitively the great truth with which modern logic is now wrestling [... namely] that every finite set of premises must indicate notions which are excluded from its direct purview" (3–4). It is thus no surprise that James' impact and legacy continue into the twenty-first century, reflecting the width and depth of his thinking in philosophy, psychology, and religious studies.

Making Truths

From early writings like "Remarks on Spencer's Definition of Mind as Correspondence" (1878) to *A Pluralistic Universe*, James explores the concept of truth. James continuously warns against the dangers of relying uncritically on fixed truths. Following such a rigid path means relying on the experiences and valuations of either others or our past selves, which might have lost their appropriateness in the current experiential contexts. Conversely, pragmatism insists on the crucial element of openness to experiential novelty. Again and again, James highlights that truth is not something that can simply be discovered, as if it exists in primordial form. Rather, beliefs or ideas are "made true" – although this making true happens retroactively (cf. Putnam 2017, 177). While Peirce famously gave his definition of a pragmatic truth as "the opinion which is fated to be ultimately agreed to by all who investigate" (1878, 85), James extends this conception of truth to a complex (and throughout his writing somewhat varying) notion.

His text most explicitly dealing with his theory of truth is *The Meaning of Truth*, written shortly before his death. Here James contends that theoretical speculation is idle unless it can be tested in the world outside the mind. He concludes that disagreements about ideas should be settled according to their practical issue. In other words: James was opposed to evaluating ideas relative only to other ideas; instead, he professes that they carry weight as applied to actual situations. Moreover, his pragmatic theory of truth claims to make truth comprehensible in the human sense of an open, constantly changing practice of truth. James therefore understands human truths also as an open process of sharing a world with one another, which he positions against the notion of unchanging "Truth."

Furthermore, it is one of James' central insights that "knowing" is a process which takes place inside the relational field of concrete experience. Radical empiricism was James' effort to describe this process. And he was a proponent of radical fallibilism. As the neo-pragmatist Richard Rorty later states in *Consequences of Pragmatism*, there is no extra-historical Archimedean point from which to think or do philosophy (1982, xl).

Humanism

In *Pragmatism,* James famously claims that the "trail of the human serpent is thus over

everything" (37). Humanism plays an important role not only in *Pragmatism* but also in two chapters in *The Meaning of Truth*, namely "Humanism and Truth" and "The Essence of Humanism." Within James' pragmatic world-view, he does not see reality as something "there" apart from human action. As stated in *The Principles of Psychology,* "reality means simply relation to our emotional and active life" (1890, 295). In contrast to idealism, he insists that truth about the real is always relative to human interests and to human experiences. The function of thought is to organize experience. However, organization and order are always in the making, and individuals, through their thinking and acting, participate in that making. Thus, individuals unceasingly play a creative and central role in (re)structuring and enriching the world surrounding them.

James' humanism is connected to his notion that doubt, belief, and knowledge grow out of (social) interests, out of experiences and transactions with the environment. Moreover, experiences – what James calls the flux – can be interpreted or cut in different ways; and the way the flux is cut is determined by social and cultural interests and values. Statements whose truth-value is tested through experience are made in relation to a group world-view (often conceived as the common world-view), which grows out of past experiences and interests. As a consequence, James sees various equally valid ways of structuring the world, none of which are absolute or final – a belief leading James to his pluralism.

Pluralism and Tolerance

Indeed, pluralism is one of James' central concerns. In *Pragmatism,* James states that possibilities abound, "[a]bsolute insulation, irreducible pluralism, is the law" (1907, 20). James engages pluralism to vanquish "monism," developing pragmatism as a device for the "pluriverse" or "multiverse" he is trying to stage. Nevertheless, as Michael Slater maintains, James' pluralism has received less discussion than other areas of his philosophy "because James himself sometimes used the term 'pluralism' as a synonym for his radical empiricism" (2009, 66). Furthermore, James continuously associates pluralism with pragmatism; as in *Pragmatism's* chapter "The One and the Many": "Pragmatism, pending the final empirical ascertainment of just what the balance of union and disunion among things may be, must obviously range herself upon the pluralistic side" (1907, 72).

Pluralism, James also argues, is based on a theory of relationality, according to which nothing can be understood in and by itself, but rather in relation to other things, in a network of relations. In this relational view, "we can understand the identity of something only by grasping the fabric of relations in which that thing appears" (Medina 2010, 124). In *A Pluralistic Universe*, his most extended version of his pluralism, James states: "Things are 'with' one another in many ways, but nothing includes everything, or dominates over everything. The word 'and' trails along after every sentence. Something always escapes. 'Ever not quite' has to be said of the best attempts made anywhere in the universe at attaining all inclusiveness" (321–322). Additionally, James acknowledges that not only do our ideals have many sources but he also recognizes with regret that they cannot all be realized. Thus, the aim can only be to seek those goods most apt to be part of a more inclusive and democratic whole.

However, James' value pluralism does not entail relativism. Kennan Ferguson emphasizes that although James dismisses the idea that intellectual inquiry will result in a unified theory of things, pluralism does not reject attempts to bring together multiple meanings. James further distinguishes radical pluralism from solipsism and isolationism. Understanding how the world's various parts relate is just as important as understanding how they differ; the goal is to comprehend both (cf. 2007, 3–4).

José Medina focuses on James' pluralism when exploring a "politics of specificity." Despite the merely tentative understanding and appraisal of ideas and beliefs, Jamesian pluralism contains a multiplicity of perspectives that speak to each other and engage one another: "Epistemic contents are not properly examined until they have been considered from different angles (as many as possible) in relation to each other, that is, as they reflect each other in complex ways" (2010, 125).

Accordingly, in James' pluralistic approach, epistemic analyses and evaluations must be polyphonic.

As a consequence of his pluralism, Ruth Anna Putnam calls James "an ardent believer in tolerance, in respect for a multitude of ways of life" (1997, 9). His notion of tolerance, most explicitly stated in his essay "On a Certain Blindness in Human Beings" in *Talks to Teachers,* correlates to his pluralism. James warns of "the blindness with which we all are afflicted in regard to the feelings of creatures and peoples different from ourselves" (133). Indeed, James sees this blindness as the root cause for a sense of moral superiority that leads people to take their own perspectives as universal and to discredit those of others.

In contrast, James believes that people should tolerate a wide and diverse range of values, ideals, and ways of life. In fact, one of the qualities that feminist pragmatist Charlene Haddock Seigfried sees at work in James is his focus on feeling and sympathy: "The reclamation of feeling as cognitive is central to James's reconstruction of philosophy" (1990, 167). Cathryn Bailey similarly reads James' tolerance not as a moral dictate, but as "naturally from one's heightened sympathetic awareness," concluding that his stance presents an "epistemic humility" (2012, 193).

But just as James does not believe that *anything* can be stated as a truth, insisting that a truth must put us in fruitful contact with reality, his tolerance does not entail the untenable belief that all values, ideals, and ways of life are harmless, much less the relativistic view that all values, ideals, and ways of life should be tolerated. James' tolerance of different ways of life and values does not extend to all ways of life and values, but only to those that do not harm others.

Politics, Cultural Pluralism, and Diversity

In the *Principles of Psychology,* James devotes a chapter to "Attention," showing the interrelationship between interest, selectivity, and personalizing activity at the level of experience: "Millions of items of the outward order are present to my senses which never properly enter into my experience. Why? Because they have no interest for me. My experience is what I agree to attend to, only those items which I notice shape my mind – without selective interest, experience is an utter chaos" (1890, 402).

The attention he pays to racism, cultural pluralism, and diversity differs when comparing his personal politics to his philosophical works. On the one hand, James explicitly criticizes racism and oppression when he fights to have African American students admitted into Harvard University as well as in some letters (including his 1903 letter to the Editor of the *Republican* later published as "A Strong Note of Warning Regarding the Lynching Epidemic"). Moreover, he argues against imperialism and isolationism (cf. Livingston 2016, 142). He stands for free speech, free thought, and free individuals. For Cornel West, therefore, James' radical pluralism can be used as antidotes against the antiempirical attitude that leads to the essentialization and exoticization of non-Western cultures. Livingston explores James, especially his *Nachlass,* in order to show him to negate the image of an "apolitical scholar" or only "proto-Deweyan democrat," calling James an "anti-imperialist thinker who was profoundly attuned to the psychological and existential dimensions of politics" (7).

Yet, on the other hand, his major publications display no interest in attacking racism or vindicating diversity; it took his students (especially Alain Locke, W.E.B. DuBois and Horace Kallen) to do so (cf. Strube 2012). Alain Locke, for example, absorbs James' pluralism but, in good pragmatist fashion, revises it in his own way. Locke considers such a revision necessary, firstly when claiming that pragmatism, as a philosophical movement, had itself become a conservative dogma by the late 1930s and, secondly, when criticizing that it failed to recognize its own ethnocentrism.

While not engaging in a systematic critique of James, Locke often references James' arguments as sufficient warrant for rejecting absolutism, universalism, and dogmatism. He then develops his own theory, insisting on imperatives of tolerance, reciprocity, and parity as conditions for the

possibility of the peaceful coexistence of cultures. Locke rejects the conception of philosophy as a value-free striving, as a merely textual "sphere of intellectual dialogue over universalizable principles of rationality, knowledge and nature or a domain of discourse that is or should be unconcerned with the human condition" (Hutchinson 1996, 20). Locke furthermore calls for a cultural pluralism that includes tolerance as an everyday habit, contrasting it with a democratic liberalism in which tolerance exists primarily as a value. In his essay "Pluralism and Intellectual Democracy," Locke argues that there are differences between racial groups or cultures, yet one can find "functional similarities" or equivalences, which help to discern "culture-cognates" underneath superficial difference (2002, 443f.).

Conclusion

James calls his philosophy a radical empiricism, a pluralism, and a tychism, the latter being a notion taken from Peirce that affirmed the role of spontaneity and chance in the origin and activity of experience. This tychism represents order as only gradually won and always in the making. While James' philosophy could also be called theistic, especially when focusing on James' *The Varieties of Religious Experience,* his philosophy is not so *essentially*, as McDermott rightly emphasizes, given that it rejects *all* doctrines of the Absolute (cf. xlii).

Pragmatism, pluralism, and radical empiricism are instruments for James to provoke his readers to look at themselves, at fellow human beings and the world in new ways. James offers his own point of view as an invitation, an engagement, a way that might lead people to act in order to transform the world, possibly in a more democratic and melioristic manner. How exactly this is to be done he purposefully leaves open. After all, his lecture "What Pragmatism Means" characterizes the pragmatic attitude as one of "looking away from first things [. . .] and of looking toward last things, fruits, consequences" (32). James' philosophy calls for a never-ending series of descriptions and analyses, from specific and ever-changing vantage points, none having to account for everything and, as emphasized in *The Will to Believe,* "open to the voice of complaint" (1897, 159).

Cross-References

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Jefferson, Thomas

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Introduction

Thomas Jefferson was a Virginia slaveholder (1743–1826), the author of the American Declaration of Independence (1776), and the third president of the United States (1801–1809). He was also the leader of the early Democratic-Republican party, which opposed the Alexander Hamilton-led Federalist party in the late 1790s – all this to the effect that the period of American history after his election to the presidency in 1800 is known as the Jeffersonian Era. Jefferson can also be characterized as the very embodiment of the American Enlightenment, because alongside his impressive political career, he was a cosmopolitan intellectual, a famous architect, an amateur botanist and anthropologist, and a champion of religious freedom. Particularly, he is known for his inveterate, even if typically eighteenth-century optimism about human progress in sciences, in morality, and in material welfare.

Early Life

Thomas Jefferson was born at Shadwell plantation in Albemarle County, Virginia, on April 13, 1743 (o.s. April 2), to Peter Jefferson and Jane Randolph Jefferson. After his years at the College of William and Mary in Williamsburg, Jefferson studied law under lawyer George Wythe, a long-standing mentor and friend, and was admitted to the bar in 1767. Two years later he began building his famous mountaintop plantation, Monticello, near Charlottesville in Virginia. Jefferson soon began practicing law and became a member of the Virginia legislature and, in the first phases of the Revolution, one of the Virginia delegates to the Continental Congress. He married Martha Wayles Skelton in 1772, and the two had six children of whom two daughters survived to adulthood, Martha and Mary (Maria). From his father-in-law, John Wayles, he also inherited a large quantity of additional land and slaves, and became one of the largest slaveholders in Virginia. But to Jefferson's shocking sorrow his wife died as early as 1782. Later on, Jefferson most likely also fathered Beverly, Madison, Harriet, and Eston Hemings, who were the children of Sally Hemings, his slave mistress.

Political Life: Jeffersonian Equality, Democracy, and Constitutionalism

Jefferson's spectacular political career began during the early phase of the American Revolution in the Continental Congress held in Philadelphia, to which the British colonies sent representatives to coordinate their war efforts against Great Britain. Jefferson was assigned the task of chairing the committee to draft the Congress's Declaration of Independence in the summer of 1776, while in the midst of writing his own draft proposal for the Virginia Constitution. Other committee members,

among them John Adams and Benjamin Franklin, and the Congress itself took part in the final formulation of this sacred document in the history of the United States. Particularly famous is its formulation regarding the natural rights of human beings, the revolutionaries holding it to "be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." To be sure, Jefferson did not, in his original draft, mention the term "Creator," referring only to "equal creation."

After the Continental Congress, Jefferson advocated his remarkably liberal proposal for Virginia's state constitution, but the legislature chose a more conservative version, which to Jefferson's disappointment allowed only approximately half of the adult, free white males to vote. He was similarly disappointed in the Virginia legislature's disinterest in any suggestions for gradual slave emancipation. Jefferson then served two terms as the Governor of Virginia in the middle of the War of Independence, and faced embarrassing charges of cowardice for fleeing the British troops that invaded inland Virginia in 1781.

Soon after the War of Independence, Jefferson drafted what was later to become the American Confederation's lasting legacy to the country, the 1787 Northwest Ordinance. In this remarkable law the Union set rules for how new territories would be surveyed and governed until accepted as states. Jefferson's suggestion for the method of land surveying, based on the 36-square-miles township model, was to shape the American landscape throughout the American West, with its conspicuously straight roads and boundaries.

In 1784 Jefferson traveled to Europe and served as the United States Minister to France in 1785–1789. There he witnessed the early phases of the French Revolution and even hosted meetings with the moderate revolutionaries, such as Lafayette. He also offered editorial help with one of the early drafts of the French Declaration of the Rights of Man and of Citizen. John and Abigail Adams became family friends of Jefferson during their long stays in Europe. During the 1787 Constitutional Convention in Philadelphia Jefferson corresponded from Paris with the "father of the Constitution," James Madison, on its merits and faults. Jefferson was appointed the Secretary of State in George Washington's first cabinet, and traveled back to the United States in late summer of 1789.

As Secretary of State (1790–1793) Jefferson soon became the main opponent of Alexander Hamilton, Washington's Secretary of Treasury. There was hardly an issue on which the two most influential members of the cabinet would agree: Jefferson was a Francophile, Hamilton Anglophile; Jefferson opposed a strong central government, while Hamilton thought that a powerful government was the only guarantee of national success. With the help of James Madison, at the time an influential member of the House of Representatives, Jefferson opposed Hamilton's financial policies, which apparently favored the rich at the cost of the poor and cities at the cost of the countryside. Of particular concern for Jefferson and Madison was the national bank, which, in their eyes, offered Hamilton's friends and other private shareholders limitless opportunity for private profit and hence threatened to corrupt the national government. Jefferson eventually consented to Hamilton's plans once he was promised that the new national capital would be built in northern Virginia, far away from the cities and their commercial elites, an area today known as Washington, D.C. Eventually Jefferson left the cabinet in 1794, although only to become the vice-president during John Adams's presidency (1797–1801).

John Adams's administration's infamous Alien and Sedition Acts (1798) provided the newly organized Democratic-Republican Party reason to attack the administration's clear-cut attempt to censor political discussion as unconstitutional. In the election of 1800 Jefferson was elected the third president of the United States and the Jeffersonian Democratic-Republicans gained a majority in both houses of Congress.

Jefferson's greatest achievement during his presidency (1801–1809) was the 1803 Louisiana Purchase from Napoleon, an area that covered portions of 15 later states from Louisiana to the Canadian border and almost doubled the size of the country. Jefferson also aimed to

secure American access to Mediterranean commerce by a series of navy skirmishes with Muslim pirates along the North African coast, known as the Barbary Wars, although the latest of these battles took place during Madison's presidency (1809–1817). In its effort to secure the Atlantic trade for neutral nations during the Napoleonic Wars Jefferson's administration fared considerably worse. His trade embargo, declared in 1807, against the British and France failed, and instead propelled an economic crisis at home and large-scale smuggling across the Canadian border. These problems eventually led to the War of 1812, declared by James Madison, Jefferson's successor and his most trusted political and personal friend throughout his life.

Notably, Jefferson's most deeply held political convictions offer little support to the time-honored American tradition of regarding the Constitution as the key guarantee of civil liberties in the United States. Jefferson was skeptical even of constitutions as any permanent guarantees for liberty, which is why he held on to his own republican doctrine that every generation is "as independent as the one preceding" and has therefore "a right to choose for itself the form of government it believes most promotive of its own happiness" (TJW 1402). As for Jefferson's later fame as a champion of small government, it is worth keeping in mind that this doctrine concerned the central government, not the states. Throughout his life he promoted tax increases in his home state for guaranteeing equal access to elementary education to all Virginia boys and girls and for his astonishingly costly plan of gradual emancipation of Virginia slaves. Similarly, he always thought that such questions as equal democratic rights and religious freedom were to be taken care of by the states, just as the contemporary national Constitution had at the time left them.

The Problem of Slavery and the Concepts of Natural Rights and Federalism

Jefferson was always convinced that slavery was against natural human rights. He condemned slavery even in his first draft of the Declaration of Independence, although the paragraph was censored from the final version. During the Revolution he apparently advocated special legislation for the abolition of slavery in Virginia, and in his *Notes on the State of Virginia* he stated that "the whole commerce between the master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other" (TJW, 288). In his drafts for the Northwest Ordinance of 1787 and in the ordinance itself, slavery was banned in the northwestern territories. During Jefferson's presidency the federal government banned the importation of slaves to the country. Jefferson's plan for emancipation always included the provision that the entire slave population be compelled to depart the country and find an asylum outside the United States – hopefully in Haiti. Jefferson, nevertheless, always chose the goal of keeping the nation together over the flammable issue of slave emancipation.

Most important, Jefferson never thought that solving the problem of slavery could concern the federal government, given that Massachusetts, New York, and a number of other northern states had enacted laws for gradual emancipation soon after the Revolution, if not before. Jefferson remained convinced that Virginia or some other large slave state would eventually enact a law of gradual emancipation and thus press the rest of the South to follow suit. This is why he was genuinely astonished when some Northern Congressmen turned the question of slavery's extension to the newly acquired areas of the Louisiana Purchase into a matter of federal government policy during the crisis that led to the famous 1820 Missouri Compromise. Jefferson argued that the extension of slavery at the time would help the Southern states in enacting their own emancipation laws and "would never make a slave of one human being who would not be so without it" (TJW, 1449). Jefferson's constant advocacy of a political solution to the problem was nevertheless dramatically weakened by the fact that he himself remained a slaveholder throughout his life.

Jefferson's position on slavery should not be confused with his personal racist opinions of people of African origins. Neither did Jefferson ever suggest that his personal convictions on

African Americans' lesser intellectual capacities compared to people of European origins should not be put to a scientific test, even if his hypothesis should be proven faulty. Hence, he proclaimed to his European correspondents that "the black man, in his present state, might not be" equal to the white man, whereas "it would be hazardous to affirm, that, equally cultivated for a few generations, he would not become so" (TJW, 801).

Jefferson's much debated sexual relationship with his slave, Sally Hemings, cannot be declared as a historical fact for the simple reason that we do not have a single written source by either Ms. Hemings or Jefferson confirming it. The famous DNA tests proved that some, but not all, of Hemings's children's relatives living in the 1990s carried the same Y-chromosome as did Jefferson's family members. Given that all circumstantial historical evidence and Hemings family traditions also speak to the possibility of Jefferson fathering her children, it is highly unlikely that Thomas and Sally did not have a special relationship, particularly given that Sally worked as a household slave for Thomas for about 50 years.

Intellectual Life and Commitment to Freedom of Conscience

Alongside his political career Jefferson was a well-known amateur anthropologist and archeologist and served as the President of the American Philosophical Society in 1797–1814. In what can well be characterized as an emblem of the American Enlightenment, Jefferson, who knew French, Greek, Latin, and Spanish in addition to his exemplary command of English, also owned a huge library, parts of which were later sold to Congressional Library. This library included all the classics in natural law and in natural history, a large number of books on political science, ancient philosophy, moral studies, and on practically everything else one could imagine a scholar to read in the late eighteenth century. Jefferson could, for example, translate extracts of international law classics such as the works of Hugo Grotius and Samuel Pufendorf for administrative purposes whenever needed.

Jefferson's famous encyclopedic study of his home state, *Notes on the State of Virginia* (1785), included extensive data not only about local geology, climate, animal nature, plants, economy, and the history of Virginia, but also considerations of the state's contemporary political status – among them a clear condemnation of the institution of slavery as opposed to natural law. Jefferson also criticized the contemporary Virginia Constitution for its not allowing all free white men to vote. From the time of the enactment of the original constitution during the Revolution, Jefferson fought this battle in vain. Even Madison could not get such a democratic reform to pass in the next constitutional convention of Virginia, years after Jefferson's death. Compared to the *Notes*, a good deal less known is Jefferson's hundreds-pages-long *Manual of Parliamentary Practice for the Use of the Senate of the United States* (1801), still considered an important source for Congress's practices in lawmaking.

As an inveterate champion of the Enlightenment Jefferson had little stomach for persistent theological disputes among his fellow Americans, being personally convinced, for example, that "the day will come when the mystical generation of Jesus, by the supreme being as his father in the womb of a virgin will be classed with the fable of the generation of Minerva in the brain of Jupiter" (TJW 1469). Jefferson was a Deist himself, but never suggested that one's personal religious beliefs could overcome the natural right of individuals to believe what they found to be the most convincing argument, even if leading to an atheist worldview. Hence, Jefferson declared that his 1786 Virginia statute for religious freedom concerned equally every Christian, the Jew, the Muslim, and the Hindu as well as "the Gentile" and the "infidel of every denomination" (TJW, 40).

As for the repercussions of Jefferson's typically eighteenth-century belief in scientific, moral, and material human progress, he never harbored any doubt about this progress originating solely in European civilization. For example, Native Americans, in his view, needed much help in adopting the blessings of human progress,

which is why Jefferson thought it morally defensible to manipulate them to sell their lands to the Americans and eventually to move out of the country or to adopt the Euro-American ways of living (TJW, 1118). Jefferson's greatest heroes of human history were Lord Bacon, John Locke, and Isaac Newton. All modern science appeared a matter of dealing with yet imperfect knowledge, and thus all hypotheses needed to be put to empirical test. Accordingly, Jefferson did not think that, for example, his personal belief in the natural moral sense of man would amount to truth in any scientific sense of the term. This is also why Jefferson's philosophical views have been a subject of continuous scholarly debate. It remains unclear whether he ever thought of himself as a philosopher to begin with.

Later Life and the University of Virginia

Throughout his life Jefferson remained a keen advocate of equal elementary education for all, including girls. During his retirement years, however, he mainly preoccupied himself in establishing the University of Virginia. He not only offered the proper location for the institution near his beloved Monticello in Charlottesville, but also planned the buildings of the university's central lawn, the famous Rotunda, and the adjoining ten Pavillions, still considered one of the most important American architectural achievements of the time. The university was needed for higher education of the Southern elite, which Jefferson saw as clearly lagging behind the education that Harvard and Princeton could provide in the North. Nothing short of scandal was caused by Jefferson's further insistence that the new university would not house a theological department, not even a house of prayer. Jefferson wished to keep all theological disputes out of the campus as irrelevant to enlightened progressive thinking and empirical science. To his disappointment most of the European intellectual luminaries he hoped to recruit to the university as professors refused the honor, including Adam Smith's most famous student, Dugald Stewart. The university was nevertheless established in 1819 and offered its first classes in the spring of 1825. It has since grown into one of the most esteemed American institutions of higher education.

Throughout Jefferson's later life, his two slave plantations, Monticello and Poplar Forest, housed almost 200 slaves in addition to hired hands and often a considerable number of grandchildren, their spouses, and other relatives and guests. Jefferson, however, remained heavily in debt all his life. The plantations and slaves were auctioned off after his death to clear the debts. Jefferson died on the same day as his long-time friend and coauthor of the Declaration of Independence, John Adams, both on the fiftieth anniversary of the United States, July 4, 1826.

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Introduction

Georg Jellinek (1851–1911) was a member of the famous German School of Public Law, founded in the late nineteenth century. He taught legal philosophy and public law for a long time in Vienna (1883–1889). In 1889, he taught at the University of Basel. He then moved to Heidelberg. At the University of Heidelberg, he was a professor of constitutional and international law and political science, from 1890 until his death.

In Heidelberg, he joined Ernst Troeltsch (1865–1923) and sociologist Max Weber (1869–1920) at Eranos Circle. These scholars were interested in knowing the origins of the forces that drove modern Western capitalism and rationalism.

In addition to being a jurist, Jellinek was undoubtedly a political thinker, one of the most prominent thinkers in the nineteenth-century European liberalism and one of the leading authors identifying in the State the center of gravity of the theory of law. In this sense, his concept of State self-limitation stands out. Jellinek was a complex thinker who addressed important issues in the field of law. War, the validity of norms, public law, the constitution, positivism, and the nature of law were all areas of inquiry to which the German author made great contributions.

Social and Legal Aspects of the State

Fernando de los Ríos – Jellinek's translator and prologue writer for the Spanish edition of *Teoría General del Estado* (1900 – Allgemeine Staatslehre) – says that it is necessary to consider the strong influence that the thoughts of jurists Gerber and Gierke had on Jellinek's ideas (2000a, prologue, p. 13–52).

In 1865, the work of Gerber, *Grundzüge eines Systems des deutschen Staatsrechts*, presents two notions that will be fundamental to the legal theory of the State: the notion of political power as a right of the State and the question of the moral personality of the State. For Gerber, Political Law must be investigated and exposed from an exclusively legal perspective (2000a, prologue, p. 13–52).

In 1874, Gierke writes *Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien*, and, from the questions raised by Gerber, it opens "a new path for legal ideology." Gierke recognizes the State's organic nature and attributes to law the essential function of limiting the external domain of the will within the human community. State and law need each other. The author creates the concept of the existence of organs for absolute public law (political law) to make the idea of personality possible outside the field of private law, since, for him, all law is born from personality.

All of these ideas have an influence on Jellinek's work and on his interest in the scientific treatment of public law. In Jellinek, law is one of many social attributes, an ethical minimum that exists to keep society alive. The law should be created systematically by the same will, and the protection and realization of the interests supported by the law becomes the State's main end. According to Jellinek, the State has social and legal aspects. As to the social aspect, the State is a social construction, the State limited itself (Selbst-beschränkung) by relating itself to citizens. This concept is clearly theorized in Das System der subjektiven öffentlichen Rechte (1892). As to the legal aspect, the State is a subject of law (2000a, prologue, p. 13–52).

Ethical and Legal Order and the International Law

In *General Theory of the State*, when raising the question of the obligation of law, Jellinek points to the principle of moral self-obligation as the ethical

foundation of the legal order. Although he uses an extra-legal property to identify the root of the mandatory force of law, Jellinek takes a more formal position when considering the possibilities for changing constitutional rules (2000a).

In *Verfassungsänderung* and *Verfassungswandlung*: *Eine staatsrechtlich-politische Abhandlung*, of 1906, Jellinek distinguishes reform in the Constitutions from constitutional mutation by the presence or absence of the intention to modify them. Constitutional reform is the change produced through voluntary and intentional actions, whereas in the constitutional mutation there is an absence of the intention to change. In this case, the constitutional text remains, formally, intact. Normative acts, customs, interpretations, and administrative and parliamentary practices would be examples of means for constitutional mutation. Smend and Heller will deepen the idea of constitutional mutation developed by Jellinek (and elaborated by Laband) in *Theory of the Constitution*.

Another contribution by Jellinek is included in voluntarist and objectivist views about the foundation of International Public Law. In the theory of self-limitation (Jellinek), collective will (Triepel), the consent of nations (Hall, Oppenheim), and the delegation of domestic law(Wenzel), the foundation of international law starts from the will of States. In the basic rule theory (Kelsen), as to the fundamental rights of States (Grotio, Wolff, Pillet, Rivier), in sociological theory (Duguit, Georges Scelle), in natural law (Le Fur), in the theory of necessity (Bentham), as to nationality (Mancini), and as to *pacta sunt servanda* (Anzilotti), the obligation of international law resides in an element above the States; therefore, they are objectivists.

Monists do not deny the possibility of conflict between the legal norms of international law and the legal norms of domestic law. Two solutions emerge from this situation: monism with primacy of international law and monism with primacy of domestic law. The latter reveals a strong influence of the Hegelian notion of the State characterized by its absolute sovereignty. State self-limitation reduces international law to an external representation of state law. According to Jellinek, international law is at the service of States (2000, p. 354). This movement was also adopted by Georges Burdeau, who pointed out the legal value of declarations of law as statements of positive law but restricted its positivity (in the sense of creating law) to the activity of the internal legislative authority (Burdeau, 1961, p. 21–22).

Subjective Rights

Jellinek also contributed to the analysis of subjective rights. He developed the theory of "subjective rights" in his work of 1892, and with the essay of 1895 on the Declarations, he made a step forward, explaining how concretely and historically the State self-limitation process took place. Gregorio Peces-Barba (1981, p. 169–253) points out in *Erklärung der Menschen- und Bürgerrechte*, including the response to Émile Boutmy, that Jellinek made a significant contribution to the historical analysis of the origin of human rights. Jellinek presented a new path to the analysis of rights by seeking the historical origins of the rights of man. This critical reflection, within the tradition of Western thought, contributed to an emphasis on the religious dimension of these rights, including the level of formation of their values and ethical principles. It is undoubtedly an important source for possibly redefining the idea of axiological inheritance in the Universal Declaration of Human Rights. The debate between Jellinek and Boutmy over the foundations of the 1789 French Declaration added important nuances to Jellinek's thinking. According to Jellinek, the birth of the philosophy of the rights of man took place with the Declarations of Rights.

The French Declaration of 1789, according to Jellinek, reveals political and historical aspects, as well as legal aspects. For him, before the French Declaration, the juridical-political literature only knew the rights of the Heads of States, privileges of class, individuals, or corporations. The Declaration would have influenced the French Constitutions of September 3, 1791, and November 4, 1848, to include recognized rights of people (previously known only under natural law). Until

1848, most German constitutions talked about subjects' rights. After that date, the German Assembly began to legislate what the author calls the fundamental rights of the German people (Jellinek, 2000, p. 42).

The reference to the German people expresses the crucial connection between subjects' rights and the relevance of the State. It is but the State as a subject of law that establishes rights for persons as subjects in law.

Jellinek criticizes the superficial approach of research on the origin of the French Declaration of 1789. For him, the works of political law only listed the precedents of the Declaration (from the Magna Carta to the American Declaration of Independence) without further investigating the sources that inspired the French. Social contract theory (as the basis for the French Declaration) and the Declaration of Independence of the 13 United States of America (as a model for the French Declaration) were at the center of Jellinek's reflections on the sources of the Declaration.

The Social Contract and the Origins of the Rights of Man

Another point that deserved criticism from the author was the idea of the influence of the social contract on the French Revolution because, for him, Rousseau only presented one principle in the social contract – the transfer of all rights of the individual to society. Any right would follow from the general will. In view of this, there would be no conservation of any individual rights upon entering the State. All civil freedom would be lost. There would be no idea of original right transferred to society to legally limit the sovereign. There would even be freedoms contrary to the State (freedom of religion; right of association). The social contract would not be born of individual rights, but of the omnipresence of the general will; therefore, nothing would be more contrary to the Declaration than the basis of Rousseau's social contract (Jellinek, 2000, p. 45–47). Thus, Jellinek's interpretation of Rousseau implied a critical view of democratic liberty as opposed to liberal liberties. For Jellinek, liberal liberties were the ability of individuals to conquer a space of personal freedom, and it is in self-limitation that this space was delimited by law.

As for the influence of the social contract on the French Declaration – it generally points out in arts. 4, 6, and 13 – Jellinek examined the Bills of rights of the Particular States of the North American Union. For Jellinek, in the French parliamentary archives, there was already a chapter dealing with the need to establish rights for the people, and it was the Marquis de Lafayette who presented this proposal to the National Assembly on July 2, 1789. Although Lafayette, a French aristocrat, participated in the War of Independence of the United States of America and the beginning of the French Revolution, Jellinek dismissed the claim that the Marquis had been influenced by the United States Declaration of Independence. According to the Marquis' memories cited by Jellinek, the Declaration of Independence only formulated principles of national sovereignty and rights to change the form of government (Jellinek, 2000, p. 49–53).

Regarding constitutional movements prior to the French Revolution, Jellinek pointed out that the Constitutions of the Particular States of the Union were preceded by Declarations of Rights. The first was the Virginia Declaration (Jellinek, 2000, p. 51). On May 15, 1776, the Philadelphia Congress represented the colonies that wanted the separation from the English Crown. Of the 13 colonies, 11 had joined the rupture, while 2 transformed the colonial letters granted into Constitutions (Connecticut Letter of 1662 and Rhode Island of 1663). The State of Virginia was the first to adopt a constitution with a Bill of rights between June 6 and 29, 1776, at the Williamsburg Convention. It influenced the other Constitutions and the United States Congress. Jellinek recalls that Jefferson, a citizen of Virginia, was his editor. Thus, the author admits the influence of the Virginia Declaration on the model adopted by the French Declaration of 1789.

The English Declarations, on the other hand, did not have as much impact on the model adopted by the French revolutionaries. For Jellinek, both the French and the American Declarations enunciated abstract principles with the same passion.

However, the French Declaration, by adopting the American model, would have "fallen short" of it. It would only surpass it in content when, briefly, it dealt with, in art. 10, expressions of opinion in religious matters. And yet, it only proclaimed tolerance and not religious freedom. According to the author, the abstract principles enunciated created organized communities in the United States, while in France, they generated social disturbance (Jellinek, 2000, p. 67–70).

Jellinek maintained that English texts (Magna Charta Libertatum of 1215, Petition of Rights of 1627, Habeas Corpus of 1679, and Bill of Rights of 1689) would not remain the foundation of the American Bill of Rights. In addition to the lapse of time, Jellinek pointed out (based on Baneroft, historian of the American Revolution, and Sir Edward Coke, English jurisconsult) that English laws were purely historical and timely and had no intention of recognizing general "man's" rights. The American Bill of Rights determined the line of separation between individuals and the State, while English laws dealt with State duties (Jellinek, 2000, p. 71). Only 2 (of 13) points referred to the rights of subjects. The people's rights were limited to the idea of restrictions imposed on the Crown (medieval conception – fifth and fifteenth centuries – visible in the Germanic state in which the people and the prince, being opposed and independent, would need to establish a contractual relationship). English laws only spoke of the old rights and freedoms.

The American Declarations recognized a much larger list of innate and inalienable rights for everyone from birth. Since the model adopted by the American Declarations would not come from English law, Jellinek turned to the conceptions of natural law at the time. Rather, such conceptions emphasized that the old conceptions of natural law had not been developed to be confronted with positive law (e.g., Ulpiano viewed the equality of men by natural law and accepted slavery as an institute of civil law, as well as Locke in the Constitution of the North Carolina) (Jellinek, 2000, p. 77–79).

The origin of universal rights "of man" would be in the religious freedom of the Anglo-American colonies, especially in the Congregationalism of Brown – at the end of the sixteenth century in England – the origin of the primitive form of Independentism. It was about the idea of the separation between Church and State, as well as autonomy for each community. The milestone in England for the development of this thought was the submission of the agreement of the people to the General Council of Cromwell's Army on October 28, 1647. The agreement, transformed into a project and presented to the English Parliament, contained the proposal to limit the Parliament and leave religious issues to individual conscience.

These "settlement pacts" were carried out by the congregational pilgrim priests at the foundation of the English colonies in the new world who created contracts in accordance with their ecclesiastical and political principles. The pacts recognized and guaranteed religious freedom. They were celebrated both in Salem (Massachusetts), founded by Puritans in 1629, and in Providence, founded in 1636 by Roger Williams, based on the ideal that "man's conscience belongs to himself, not to the state." In one way or another, the pacts regulated only civil matters. From there, the form of direct democracy would have "naturally" emerged (Jellinek, 2000, p. 79).

The absolute religious freedom sought by Roger Williams was only officially recognized through the Rhode Island Code (1647) and the Charter (1663) that Charles II granted to the Rhode Island colonies and Providence Plantations. Europe would only experience something like this with the Maxims of Frederick of Prussia in 1740. The principle of religious freedom would have achieved a legal-constitutional consecration in America. The right to freedom of conscience proclaimed the birth of a "man's right." Jellinek noted that the idea of making such rights positive was not political; it was, however, religious. According to the Jellinek, it was actually Roger Williams, and not Lafayette, who was the first apostle of "human rights" (Jellinek, 2000, p. 80).

The strength of historical events helped to emphasize theories of natural law. Jellinek criticized the abstraction of these rights and pointed to

the requirement for a list of fundamental rights recognized expressly by the State. Crucial aspects of the theory of the state were raised from this perspective. It is the state that recognizes rights in order to allow the implementation of its own functions and powers.With the economic development of the colonies, more measures emerged in an attempt to restrict their economic activities, even in the face of the recognition of American colonists as English citizens. At this time, the idea of freedom of conscience already existed, as well as the recognition that people keep their rights in society – rights recognized by the State and against the State (Jellinek, 2000, p. 80–86). In this regard, Jellinek's theory on the State self-limitation shows the absence of intra-systemic limits; as a matter of fact, within the dimension of rights recognition, the State capability to limit its action is related to a people civilization degree.

Attempts to limit colonies spurred the movement to formally declare these rights. These declarations recognized rights to personal freedom, property, and conscience and rights to individual freedoms (press, assembly, establishment); they also recognized rights of petition, legal protection, applicable judicial procedure and political guarantees, and in general, public rights of individuals. The texts also provided for the principle of the separation of powers and the responsibilities of civil servants, the temporality of occupying positions, and the limits to their exercise. Sovereignty belongs to the people, and the constitution must be formulated by all. Jellinek points to the contradictions in the use of the terms man and freeman, in place of the term citizen (2000, p. 87–89). The original terms gave rise to the denial of humanity by some human groups (by race, gender, etc.).

While the Americans proclaimed what they already had, the French declared what they wanted to build. This would be the biggest difference between the declarations. So, why did the doctrine of the original rights of man become so important? Jellinek pointed to the strong opposition to monarchies with absolutist tendencies. For him, Locke's doctrine only exercised greater influence after the French Revolution, with the transformations it brought about. The nineteenth-century philosophical theoretical reflection overcomes a monistic perspective toward the Lockean dualistic one. Roman law failed to penetrate England. However, the Reformation and the performance of the Church provoked reflections in the sense of limiting the State (Jellinek, 2000, p. 96).

In this way, Jellinek presented a historical and positivist foundation of the rights of man in his 1895 work. His approach is thoroughly coherent with the relevance of the State in the understanding of the subjects' rights foundations. The history of religious freedom in the first North American colonies impacted the development of the Declarations of rights, and these included a series of freedoms already experienced by the American colonies. Therefore, historically recognized liberties became rights through State recognition. As such, Jellinek was moving away from the foundation of rights by jus-naturalist theories and overcoming the notion of "natural rights" through classical positivist and historical arguments. This argumentative conceptual construction in Jellinek's jus-positivism is, without a doubt, one of the most striking differences between him and his predecessors, such as Gerber and Laband.

In response to the theory supported by Jellinek about the contradiction between the Declarations of law and the principles of the Social Contract, Émile Boutmy (1907, p.122) argued that Rousseau's philosophy and the maxims of the Social Contract could have influenced part of the articles of the French Declaration of 1789. According to Boutmy, the Declaration is in no way contradictory to the principles of the Social Contract. The social contract would represent a convention between two characters, one abstract (the totality of individuals) and the other concrete (the unanimity of individuals considered in isolation). The consequences of the Contract would be the constitution of a political body, composed of the State (or sovereign) and citizens (or subjects), and the establishment of the relationship between the members of that political body. The link between them (State and citizens) would consist in the complete alienation of the individual, his

personality and his assets, to the State and then in the reconstruction of the individual by the State, with the guarantee of everything that was necessary to ensure to each one the same enjoyment of rights. That is why the citizen would be freer before the Contract than afterwards (1907, p. 124–125).

Conclusion

Like the Declaration, according to Boutmy, the essence of the Contract would be equal rights for all citizens, the foundation of the law with a view to maintaining equality between them and the inexhaustible generality of the law. This would remove any idea of contradiction between the Declarations of law, especially the French Declaration of 1789, and the principles of the Social Contract and Rousseau's philosophy (1907, p. 125).

Is the search for the origin of the 1789 French Declaration at the same time a foundation for a historical vision of human rights? The French Declaration of 1789 should not be reduced to a mere copy of the American Declarations, and this was pondered by Jellinek in responding to Boutmy's criticisms.

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The Historical School of Law and the *Volksgeist*

Rudolf von Jhering (1818–1892) was Professor in Roman and Private Law since 1845 and one of the most important German jurists of the nineteenth century. His very rich literary production lasted 50 years. In such a huge period of activity, Jhering's legal perspective and method changed. Thus his jurisprudence is usually divided into two periods: The first one is considered as the formalist, constructivist, and systematic phase (from 1842 to 1871) and the second period (from 1872 to 1892) represents the realist, teleological, and proto-sociological phase of his production.

The passage to the second stage took a transition period from 1859 to 1871, when Jhering expressed a kind of dissatisfaction for a purely formal study of law, which was mainly based on systematic and formalist thinking and scarcely involved with the "substantial element of the law."

Interpreters agree (see Mecke 2010, 11–15) that the formalist period begins with some articles about "Die historische Schule der Juristen" [the historical school of the jurists], anonymously published in 1844 in the *Literarische Zeitung*. In those pages, Jhering dealt with the legal doctrine of Friedrich Carl von Savigny, which was the leading one in the Germany of that time.

In *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* [Of the Vocation of Our Age for Legislation and Jurisprudence] (1814), Savigny set forth two constitutive aspects of law: the *political element*, where law is strictly connected with the "life of the people in general," and the *technical element*, which represents the "specifically scientific aspect of law's life." Like language and the ways of life, law is a product of a people's culture. It means that law has an historical, habitual nature, immediately performed by citizens. In short, it is a *positive*, *concrete law* (see Behrends 1993, 144–146; Belvisi 2003, 430–432).

During the nineteenth century and until the creation of the German *Reich* realized by Otto von Bismarck (1871), Germany was fragmented in a multitude of *ancien régime* States. On the one hand, five main legal orders were effective until 1 January 1900, when the German Civil Code (*Bürgerliches Gesetzbuch*) entered into force: the Roman law (*usus modernus Pandectarum*), the Prussian Code of 1794, the Napoleonic *Code Civil*, the Saxony Civil Code, and the Law of Baden. On the other hand, the German society was culturally lively (Romanticism), and was troubled by revolutionary and liberal revolts, and by a great agrarian reform, accompanied by a rapid industrialization. In such a complex situation, the law of the different territories was insufficient to rule the life of that evolving society, because it was full of normative lacunae.

According to Savigny, who was against codification seen as the product of an arbitrary legislator, jurists were the people's "representatives" with respect to law, and they were assumed to be able to interpret, from a technical and scientific point of view, the *Volksgeist* [spirit of the people], i.e., the legal conscience and the people's feeling of justice. They should *perfect* the legal order, by developing a system of concepts able to provide judges with the normative tools to adequately solve the concerns emerged by cases not envisaged by law. Those concepts should be derived from Roman law, as it was collected in the Justinian *Corpus iuris civilis* (sixth century), namely, in the text that, since the Middle Age, was the common law of continental Europe: Roman law had to be applied when a particular law of a land was unable to provide an adequate solution to cases.

In the first writings about the Historical School of Jurists, on the one side, Jhering accepts Savigny's view on the "peculiar and national character of law." As an emanation of the "spirit of the people," law is "the product of existing

relationships" arranged in an "organic unity" (Jhering 1844, 199). On the other side, Jhering criticizes the fact that jurists of the Historical School were unable to reconstruct the legal system, because they could not consider the "spirit of the people" as a proper source of law. In this way, they proved to be too much bound to the Roman law and the result of their work became a "conglomeration of single notions" without any internal "order and consistency" (421–422, 535–536; Jhering 1852, 25, 47, 55–57).

According to Jhering, in order to work out an *organic* legal system, the legal theorist should try to reproduce "the integrity of the legal feeling," expressed in "the statutes and habits, in the ideas and aspirations" of a people (Jhering 1844, 422). This task could be "filled out only approximately," overcoming "the accidental scarcity of the sources" available to jurists, "with the help of a happy combining talent," able to free itself from the "letter" of law and to find "the criterion of truth" in the "internal necessity" of the system (409, 423). This "internal necessity," governing the legal relations, was dynamic in nature: The legal system evolved with the development of the legal conscience, which was taken to animate the spirit of the people and so to be coherent with the "spirit of the time" (see also Jhering 1852, 44–45). The evolution of law, therefore, constituted a dialectic process between historical necessity and human action. Thus, the "spirit of the time" has an "objective existence" with respect to "individuals who are subjected [to it]" (Jhering 1844, 566–567) but at the same time determine that spirit: "history is not possible without actions." People should therefore "fight to reap those fruits" of progress that historical necessity and time had ripened. It was a task "realized by human beings, but which [has been] given by history itself" (568).

In *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* [the spirit of Roman law at the various stages of its development], those issues are again at stake. On the one hand, however, Jhering refuses the conception of *Volksgeist* relative to the "national character of the legal orders," because the "power of the spirit" of Rome and its law expressed a universal nature: The Roman law "became a cultural element of the modern world" (Jhering 1852, 1, 3). In order to preserve this meaning, the legal science should become a "historical and philosophical criticism" of the "positive substance" aiming at catching "the hidden impulses, the last foundations and the spiritual connection of the whole development of law" (15–16). This understanding of the "true essence of Roman law" would be possible by applying the "general doctrine of the nature of law" (*allgemeine Naturlehre des Rechts*) in order to observe the characteristics of law and of the order derived from it (23, 24).

This is the reason why, on the other hand, Jhering embraces the doctrine of the "spirit of the people" with reference to the conception of law seen not as the effect of the free will of the legislator, but as the "wholly completed product of history" (25–26). In an organicist-evolutionary sense, law is "positive, historical" (see Behrends 1993, 143–146), because it reflects "the way of thought of a people and its whole way of life" (Jhering 1852, 26, 29).

The System of Freedom and the System of Coercion

Under certain aspects, Jhering expresses a *liberal* view of law. He believes that law is enlivened by three main "impulses": *autonomy*, *equality*, and *liberty* (19 ff.). Nonetheless, he does not follow an axiological conception of law, but a functional one. Law is not conceived as an order founded on principles of justice and moral values – as natural law doctrines or idealist philosophy would do – but it is conceived in terms of its aim: "The purpose of law is to realize itself" (49; Jhering 1858, 322).

However, law can realize itself only if, on the one hand, "it is independent from morals, customs, and religion" (Jhering 1854, 30–33) and, on the other hand, it enjoys "practical autonomy" (20), i.e., it has the property to act freely from the "external influences" of the politics' "free will," the judges' discretion, and even the simple and ingenuous "legal feeling of the people" (31–33, 35–37).

The practical autonomy of law is granted by the "internal organization" of an independent body of judges, by the elaboration of legal "technique, method, and construction" and – moreover – by the written law as a specific legal "form" (35–39). Law represents in fact the "guarantee of the true justice, [...] which is always equal to itself" (49), in terms of "impartiality" and "uniformity" (22–23, 33, 35). In brief, the purpose of law is being applied according to the principle of "equality before the law" (22, 34, 89).

Despite the relevance of its practical autonomy, law has also an "internal autonomy," which is even more important. Without the internal autonomy, in fact, the passage to the written form of the law could be detrimental and harmful. Law is not "a mere form, which can adopt any content whatsoever." Its internal autonomy "postulates" that law could accept only the contents which are "coherent to its idea." This idea, however, is not a principle or a value, but it is the indication of "the right way of [human beings'] will," "the guarantee" of it and the "increase of its power," and at the same time its "limitation" with respect to the life that humans lead in a society organized through institutions (23–24, 123).

In this context "equality" and "freedom" are seen as *anthropological premises* close to the idea of the Hartian "elementary truths concerning human being" (Hart 1994, 193). Equality and freedom are needs of individuals acting in a society, and they are actualized by each people in a peculiar way (Jhering 1852, 26; 1854, 18–19). Jhering has an "ideal type" view of freedom (Belvisi 2003, 437–444). Law is an "objective organism of the human *freedom*" (Jhering 1852, 25): The latter is, however, not the fundamental principle of law but merely a "system" of possibilities of action, within a certain society, a system which is alternative and equally functional to the "system of coercion." In the "system of freedom," or the system of "self-government," the legislation is only limited "to produce and grant the premises that are necessary to pursue" the aims of the community, leaving much space to the free activities of the people. This system is compared to that of the "coercion or non-freedom," in which legislation and government "try to directly pursue the realization of those aims through law and coercion." As models, the two systems represent the two "extremities of a range," but they actually do not represent an "absolute antithesis," because a State could neither let the people act completely freely nor impede them totally (Jhering 1854, 123–124).

In Jhering's legal theory, freedom is a sort of unit of measurement in order to determine the level of civilization gained by a people and its political institutions. Moreover, the fact that a legal system is defined by means of one of the two models does not involve the evaluation of its functional capabilities. Depending on the ideal type to which a legal order is similar, firstly, the degree of independence and differentiation of the law with regard to morals, politics, and religion will change. Secondly, the quality and the amount of subjective rights will also change, and therefore the extension of the sphere of the individual freedom within the society will vary. Accordingly, the political system will be more or less liberal. This does not involve the functional capabilities of law. For Jhering, the system of freedom transforms the problem of the foundation of law in the question relative to the "moral mission of the State," which is solved with reference to the individual autonomy, measured by the scale of the "character, the cultural level, the religious and moral ideas [...], but moreover the customs" of a certain people (124–130, 132).

According to Jhering, even the formal equality is simply an "ideal," an "aim to realize," and therefore an "impulse" for the legislative production of law (19, 88–97; Mecke 2018, 295–307). In the "moral world," every day history produces diversities to a greater extent depending on the number of evolving social phenomena. The plurality and the inequality of forms are the vital impulse necessary in order to grant a society's life. Equality before the law goes hand in hand with the idea of justice, but its meaning changes during time, both because the social relationships change and because, together with them, ideas and the way inequalities are perceived change as well within a given society (Jhering 1854, 88–92).

Jhering's legal conception could be considered as pragmatic. Freedom and equality are not contents of law, but functional performances of the whole legal system. Freedom represents a characteristic of the political and legal system producing norms: It could be defined only a posteriori, with respect to the freedom a regulation recognizes or to the duties it provides. Equality is also a performance of the legal system, because it is the product of the legislation and the norms' enforcement. Therefore, it is not abstractly presupposed, but it represents, in a real case, the procedural result to which the judge comes when it applies the principle of equal treatment (34–38).

The Organic System and the Aesthetic Overstatement

Jhering analyzes the law, conceived as a "system," i.e., as an "objective *organism* of the human freedom," both from an "anatomical" and from a "physiological" point of view (Jhering 1852, 25–27). Following the anatomical perspective, he considers the "structure" of law, which is its practical "outward aspect" which develops in "formulations" of rules (27–33) and especially in "legal institutions" and "concepts." The latter compose the norms and are "logical moments of the system," its "simple bodies" (36–37) which legal science should work out. According to Jhering, the concepts are not merely the result of a decomposition of the legal clauses but, through them, the law "increases itself, [. . .] from within"; combining the "different elements, science can create new concepts and new norms: The concepts are productive, they mate and generate new ones" (40).

By elaborating the concepts, the knowledge of the "logic organism" is reached. It composes the "logical substance" of law (42, 43). However, in Jhering's view, the legal science should go one step further, in order to discover the "motive forces" which "determine the spirit, the kind, the direction of the single institutions" and which express "the unity and individuality of the organism." These forces represent the "spirit of law," which coincides with the "spirit of the people and the spirit of the time" (44–45). The latter impacts also the work of the legislator, because the law he produces receives "the matter from which he creates it" from the "spirit of the time." This is the reason why the legal theorist can subsequently observe "the unity and necessity" of the production of a law, which is "a single moment of the entire evolution of law, a moment that is fully accomplished" (46).

The anatomical analysis of law is therefore based on a purely spiritual conception, which allows – according to Jhering – to retrospectively understand the *necessary* integrity of the form assumed by a legal order. However, in order to catch the reason why the law should be produced in conformity with the "spirit of the people," it is necessary to adopt a "physiological consideration of the legal order" and to study the "general [. . .] function." In order to be applied, the law should be adequate to "the needs of life," to the "real conditions" of a people, and to its time; otherwise, it is like a good "project of a machinery," which does not work (49–50, 56).

The *Geist des römischen Rechts* is dedicated to "the memory of the great master Georg Friedrich Puchta." Until this point, Jhering moved indeed within the methodological area of the systematic elaborated by Puchta. From him Jhering took the idea of a critical behavior with respect to the Roman law. Like his "master," he develops an organicist doctrine of the system of law. He also theorizes the productive role of the legal science and, finally, outlines the meaning of the logic for the "genealogy of the concepts" (Puchta) concerned by the completeness of the conceptual system. Jhering, however, brings to the extreme consequences this constructivist doctrine (Losano 1984, 114–129).

In "Unsere Aufgabe" [our task], Jhering moves from the statement according to which the jurisprudence "has the right and the vocation to a *productive* shaping" of the historical material, through which the legal science reaches what is not immediately "noticeable" within the law, being at the same time "more elevated" (Jhering 1857, 4–5). It means to "deduce the *principle* from the single decisions which are contained in the law and, vice versa, to develop the

consequences from the principle formulated there." The science operating in this way is defined "superior jurisprudence," because, through the "legal construction," it creates a "superior aggregation status of law" (7; 1852, 37; 1858, 358–361) that transforms the matter contained in the legal rules into concepts. In this way, the positive material takes "the form of a legal body" that possesses "a peculiar species, nature and qualities" (Jhering 1857, 8; 1858, pars. 38–41).

Almost evoking the classical criterion according to which what is true is also just and beautiful, Jhering believes that the research conducted through the natural-historical method produces a proper "artistic creation," because the jurist *transforms* the legal matter, giving to it "a new shape" (Jhering 1852, 37, 42; 1857, 9–10). The "plastic form" that law receives through the construction satisfies a specific "aesthetic and juridical need," which is "one of the most important impulses of the jurisprudence" (Jhering 1857, 10; 1858, 371–382).

Therefore, without any fear of being victim of irony, according to the enthusiastic Pandect lawyer, it is possible to consider law in "artistic" terms. He states in fact that modern jurists recognized the Roman law "mainly" because it satisfies these terms: "The love of the jurist for his branch of knowledge [. . .] founds his roots in the artistic element of law; [. . .] in the order and harmony, in the simplicity and beauty that reign there" (Jhering 1857, 11).

In Jhering's intentions, historical-natural considerations and aesthetic sense should allow *productive* jurisprudence both to completely shape the existing law and to create new law. This should also permit jurisprudence to construct a legal order which is valid for future times. This attitude recalls the old natural law doctrine's aspiration to produce a complete system of law. However, Jhering does not aim at applying the logic deduction to the principle of an abstract reason; rather, he tries to discover the logically immanent reasons of the legal system/organism, through "the motive force of thought, the internal dialectic of the legal relation," which "becomes truth" (16).

Subsequently, "a fully-evolved jurisprudence should not fear the absolute lack of legal principles." Even if the new legal relations could assume unusual forms, it is completely not "justified the concern according to which they could bring us something absolutely new, i.e., something which is not under the dominion of an already existing concept [. . .]. A thousand-year-old jurisprudence has already discovered the forms and the fundamental types of the legal world": "A mature jurisprudence is not embarrassed by history" (14).

According to Jhering, the aesthetic-creative tension referred to the legal system leads the superior jurisprudence to a result which is "not immediately practical." The organicist articulation of the legal bodies can lead to *find out* legal principles that "could stay unused for a century" or maybe "won't have any implementation" at all: however, this kind of principle "exists for itself, because it is not possible that it does not exist" (15). The historical-natural method allows legal science to "give answers that precede the questions coming from the practice. This avoids to science the humiliation of being stimulated only by the practice in the quest of new discoveries, merely following such practice and – in a certain way – limping after it" (16).

When contrasted with the standard understanding of jurisprudence as a practical knowledge, the results of Jhering's logical and aesthetic conception of the legal system may sound as paradoxical. The very use of the organic metaphor and the "poetical language" (Losano 1970) constitutes indeed the primary ingredients of a theory of construction which won't have a perfect correspondence in the practical activity of Jhering himself. Thus, in the writings in which he considers legal cases (Jhering 1881–1886), their solution will depend on a logical reasoning or on an "analogical extension" (*analoge Ausdehnung*: Jhering 1857, 12–14; 1858, 342–343), not on conceptual creations.

However, the theoretical overstatement, aesthetic and organicist in nature, depends on practical important motives (Seinecke 2013) that are related to the need for the creation of a legal system functional to a German reality that was

opposing the codification in its numerous territories. In addition to this practical need, Jhering believed that the improvement of the legal order could not happen on the simple basis of a kind of loyalty to Roman law. This kind of loyalty – that was often criticized as a "civil law worship of mummies" (Jhering 1857, 26, 33, 39, 44) – led to unsatisfactory results, showing the lack of a "fusion between science and life" (24). According to Jhering, therefore, the task of jurisprudence could not be only that of "constructing," but should also include that of "destroying" all those Roman law institutions that were inadequate to the modern society (26). It was exactly the study of Roman law that should provide the "spiritual freedom" with reference to the concepts and principles that could not be applied any longer, because they were "specifically Roman" (35–36). Thus, Jhering felt the need for "breaking the prevalence of the Roman law from the moral point of view," in order to proceed "through the Roman law, beyond the Roman law" (45; Jhering 1852, 14; 1858, 455–470).

The necessity to overcome the Roman law shows that Jhering was aware of the socially and historically determined nature of law. Moreover, his intellectual honesty led him to criticize his own constructive conception, because it had been formulated by a "fanatic of the logical method" and was motivated by an "interest for a construction that is made *a priori* from a logical point of view" (Jhering 1884, 338). In the first of the *Vertrauliche Briefe über die heutige Jurisprudenz* [confidential letters about today's jurisprudence], he blames that his "superior jurisprudence" had conceived a "mystical procedure," through which the hands of the jurist give to the rough matter an artistic form according to the civil law canons. Thus, that matter "becomes a living being [so that] the civil law *homunculus*, i.e., the concept, becomes fertile, mates with his fellow creatures and breeds children" (Jhering 1861, 7). Polemically Jhering was the first author to define this constructive doctrine as a "*Begriffsjurisprudenz*" (jurisprudence of concepts: Jhering 1884, 337, 362–363). His dissatisfaction for this formalistic approach to law would lead him to a new phase of his theoretical reflection: the one that studies the "*Zweck im Recht*" [purpose of law] (1877).

The Substantial Moment of Law

Jhering gave the most radical example of a constructive method. Its weakness was not the claim to create a system of concepts, but the idea to conceive of the concepts as "causes" which produce norms and therefore to link them with legal consequences (Heck 1909). Those norms were arbitrary, because they matched with the ideas and the dogmatic will of the jurist, without deriving from any logical-systematic *necessity*.

On the contrary, according to the anti-formalist phase of Jhering's thought, the fundamental legal concepts (property, possession, servitude, obligation, etc.) "change their meaning in time." They "are also logic categories, but they represent the form in which the normative matter is concentrated, that changes together with the relationship and the needs of life. To believe in the immutability of the Roman legal concepts leads to a totally immature view, which testifies a completely uncritical study of history" (Jhering 1865, 314). Imprisoned by a "logical self-deception," the "jurisprudence of concepts" conceived the Roman law as a truth grounded on a purely logical basis. This "insane logic tendency" has been produced by a proper "worship of the logics, which induced to elevate the jurisprudence to mathematics of law" (321; see Savigny 1814, 110). "It is not life to be the cause of concepts; concepts exist indeed because of life. What happens does not derive from logics, but from life, the trades and the legal feeling" (Jhering 1861, 363; 1865, 321; 1868, 81–82). The distance from his own previous productive conception of law could not be more resolute and radical.

"Law exists to realize itself" repeated Jhering in 1858 (322; Jhering 1852, 49). However, in order to completely comprehend this statement, the point is not that of understanding the "popular legal feeling," or the productive meaning of the concepts, but the "substantial element" of law. The latter is not represented by the will, like Georg W.F. Hegel stated (Jhering 1865,

328–331), but by the *purpose* (338; Jhering 1877, 274). This is true both with reference to the right and the law. "Rights do not exist in order to realize the abstract idea of 'legal will' but in order to serve the interests, the needs, the purposes of the circulation of goods." In the substantial moment of law, it is possible to find out its practical purpose, i.e., "what is useful, the benefit, the profit which should be protected by the law. The concept of law lies on the safety that law grants to the enjoyment [of goods], and rights are interests which have been legally protected" (Jhering 1865, 338, 339). Interests, displayed in subjective rights and affirmed in "*Der Kampf ums Recht*" [*The Struggle for Law*] (1872), correspond to those purposes which have been recognized by the law and the legal order. Therefore, "the purpose is the creator of the whole law: Any legal norm has its origin in a purpose, i.e., in a practical scope" (Jhering 1877, V), while law is "the form which grants the living conditions of the society, through the coercive power of the State" (345, 360, 399). Here Jhering adopts a State-oriented perspective and a coercive view of law: "Law is the essence of the coercive norms applicable in a State," which is "the only source of law" (247, 249).

The basis of his teleological approach is made by a mechanistic social conception. As law is "the coercive mechanism organized and manipulated by the State's power" (261), society and social life are moved by impulses and driving forces, mechanisms, and levers, which operate in order to realize individual and social purposes. The individual is conceived as a selfish being, who aims at affirming himself. In the interaction, where two wills try to realize their own selfish interests (44, chapter 5), law grants the stability of interests, such as those deriving from a contract. Despite the human will is an impulse "characterized by freedom" and, therefore, it is an unstable element, and notwithstanding the following "fight of interests" (72), the society and the State "bring" the individual to cooperate to the realization of purposes through means who "control" the individual selfishness: "the reward (*Lohn*) and coercion." The first one is typical of the economical relationships in the forms of salary, profit, compensation, and prize, the second one is typical of the State, and it is ruled by law (45, 73, chapters 7–8).

Between law and power, there is an essential and not secondary relation, firstly because, from an evolutionary point of view, power is the origin of law (Jhering 1852, 107–140; 1877, 186–232; Duxbury 2007, 25, 38–39) and secondly because the law is "influenced by coercion," i.e., the power ruled by the law and organized by the State (Jhering 1877, 240, 242). The "absolute criterion which distinguishes law is the coercion exercised by the State during its execution: A legal norm without legal coercion is self-contradictory" (250). However, in the modern civil society (*bürgerliche Gesellschaft*: 274), another characteristic is necessary in order to have a proper legal order in which "constancy, security and predictability of law" exist (278). The norm should be "bilateral binding," so that even the State's power is subjected to the laws that it sets forth (278–279). In this way, Jhering embraces the legal positivism's theory of "*Rechtsstaat*."

This conception is developed from an evolutionary point of view. Law develops from the primitive powers between individuals to the self-regulated associative relations, until the social relations protected by the State's coercion (186–242); the norms move from individual precepts to unilaterally binding commands, until bilateral binding norms (244–255); the State evolves from a despotic regime into *Rechtsstaat* (273–274); the legal order moves from an apparatus subjected to arbitrary will and chance into a system where norms are applied with consistency, certainty, and predictability (255).

This evolutionary legal conception, however, maintains the previous legacy deriving from the Historical School of Law, emphasized with respect to the positivity of law. According to his view, indeed, the law is produced through the legislator's will, which can also modify it, but the change of law is *necessarily* linked to "the situation of the people, its cultural level, and the exigencies of the time," therefore law is "an historical fact, which realizes itself by necessity" (342; Jhering 1844, 199; 1852, 46). Thus, there is no room for the *contingency* of the law

(Luhmann 1985, pars. 2.1, 4.1) which is a consequence of its being positive. On the other hand, there is a kind of social *determinism*. In Jhering's legal jurisprudence, the production of law is not depending on the changing legislator's will, but it depends on the necessity determined by the social conditions. The modern aspect of Jhering, his capability to anticipate "legal realism" and "sociological jurisprudence," stops before the concern of the *nature* of law and its contingency.

Conclusion

With reference to the development of Jhering's thought, some concerns have aroused the interpreters' interest. Two of them will be briefly presented hereinafter: the issue relative to the different phases of Jhering's scientific activity (see, e.g., Fikentscher 1976, 201 ff, 273 ff; Gromitsaris 1989, 131–132; Seinecke 2013, 244–245, 279–280; Mecke 2018, 13–26) and the concern regarding his belonging to the first stage of legal positivism (see, e.g., Behrends 1993; Dreier 1993; Duxbury 2007, 39–40; Lloredo Alix 2012, 158–171).

According to Losano, looking at the evolution of Jhering's doctrine, his thought appears as a "unique *continuum* made by distinct moments, where the rigid distinction between the first and the second Jhering dissolves" (Losano 2014, XXVI). Even in the writings oriented to the formal analysis of law, assumptions on the function of law or concerns relative to the purpose emerge, i.e., those issues he will develop in the second phase. Even if the object of his study is always law and some topics are considered more and more times during his analysis, since the beginning of the 1870s of the nineteenth century, his research *method* changed. Jhering abandoned the logic-constructivist method – maybe he did not deny it completely, but he certainly abandoned it – in order to adopt a teleological method. Moreover, another change concerns the consideration of the sources of law, which are in the first phase the spirit of the people and the jurisprudence, while in the second stage there is only a legal source: the State's legislator. This leads to the issue of legal positivism.

Jhering has been influenced by the cultural climate of his time. Together with his roots in the Historical School of Law, some aspects of the German liberalism, the philosophical positivism, and the social Darwinism left their traces in his writings. The idea of the legal code and the doctrine of legal positivism were stated in Germany since the foundation of the German *Reich*. Evidently, Jhering was "converted" (Kantorowicz 1914) – at least partially – by these conceptions. However, reminding the Historical School of Law and its lessons, during his "legal positivist" period, he researched – almost sociologically – the sources of the norms also in the good manners, the uses, the habits, and the lifestyles, by so seeking to understand how the changes of the ways of life could result in normative expectations and rules (Jhering 1883, 2004).

Jhering was a great jurist and legal theorist, whose thought could be studied through the "various stages of his development"; but overall, Jhering was Jhering (see Duxbury 2007, 25–26).

Cross-References

- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Hart, Herbert Lionel Adolphus: Influential Ideas
- ▶ Heck, Philipp
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John of Salisbury

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Introduction

John of Salisbury (c. 1115/1120–1180) was a leading humanist in twelfth-century Europe, in as much as he reflected, and contributed to, the revival of classical thought in that century (Nederman 2005).

He was educated in the schools of Chartres and Paris during the 1130s, receiving training in the liberal arts from a number of notable scholars, including Bernard of Chartres, Abelard, and Gilbert of Poitiers. Subsequently he served in the Papal Curia and in the court of Thomas Becket. He was a prodigious writer, producing important texts in a number of genres, including historical writing, educational theory, and political theory. He left a large, for the time, corpus of letters. As an

intellectual, he does not fit modern categories. He was not strictly a theologian, historian, jurist, or philosopher, and yet his writings make significant contributions to each of these areas. The diversity of his contributions reflects the relative looseness of disciplinary boundaries in that period. During the twelfth century in Europe, professions and institutions were in nascent periods of consolidation and codification. By the end of that century, structures of governance, law, and education would become increasingly formalized and would be increasingly fortified by written constitutions, curricula, and codes of practice. During the period of John's formation and career, however, professions and bodies of knowledge were less demarcated. In his service as an ecclesiastical administrator, he performed roles that demanded knowledge of canon law, theology, and letters, but he was not a dedicated specialist in any of those areas.

The Prince and the Law

Although a generalist, law and philosophy were never far from John of Salisbury's mind. In his book of advice for statesmen, the *Policraticus* (John of Salisbury 1990), he articulated a theory of kingship in which the legitimacy of the monarch was contingent upon his obedience to the law and his capacity to govern within it. He wrote that "The prince fights for the laws and liberty of the people; the tyrant supposes that nothing is done unless the laws are cancelled and the people are brought into servitude" (John of Salisbury, p. 191). John insists that legality itself is the foundational principle that should be deployed when making an assessment of a prince. Does the prince recognize the authority of the law, and does he refract the law throughout the body politic as a governor and as a minister? Or does the prince repudiate the law, flout it, and spread corruption and contagion to his subjects as a result of his own violation? According to John of Salisbury, a legitimate prince will conduct himself in accordance to the law, recognizing himself as its subject and its representative. Should the prince flout and repudiate the law, however, he can rightly be considered a tyrant, and his rule need no longer be considered legitimate, perhaps warranting tyrannicide.

John of Salisbury was not the first theorist of the European Middle Ages to insist upon the axiomatic status of legality when it came to governance, but he was the first to articulate the principle alongside a rigorous account of what constituted the law, as he understood it. That is, he did not only inscribe legality; he also offered a nascent philosophy of law as well, one that combined Christian theology and virtue ethics with a Ciceronian skepticism.

The Nature of the Law

For John of Salisbury, the law within which the prince is bound is divine law, issued by God. This is not to say that the ruler cannot legislate particular laws and regulations pertaining to the affairs of the kingdom. But it is to say that laws promulgated by the prince must be consonant with the *equity of justice* that John holds to emanate from God. The task of laws made by humans is to reflect the image of divine will and manifest justice on its behalf. Equity of justice, for John, does not correspond to modern notions of equality; rather it refers to the "cosmic harmony willed by 'God'" (Sassier 2015, p. 248). And how is the prince to understand the nature of the cosmic harmony to which he is subject, and for which he is responsible in the world? The answer can only be found in the scriptures, and the laws embedded within them, as well as in the ongoing apostolic authority of the Church. John of Salisbury does not theorize in particular detail the relationship of the legitimate prince to the Church, but it is clear from his insistence that the prince submit to equity of justice, and the law which represents it, that the prince must work in consonance with the Church in the service of cosmic harmony. The task then, of the ruler, is to enact and enforce laws which themselves manifest God's equality of justice. The duty of the prince is to embody the will of God, protect the Church, and enable his subjects to perform their own roles in a manner consistent with the divine order. The

principle of legality which underscores John's theory of kingship subordinates the juridical to the theological.

Typology and Law

As an embodiment of the law, the prince must have internalized it spiritually and intellectually. The prince is "the public power and a certain image on earth of the divine majesty"; there can be no exigency or demand placed upon the prince that permits his abrogation of the law because its fulfilment is his duty (John of Salisbury 1990, p. 28).

The prince must not only recognize the letter of the law, but he should absorb its spirit. In reprising the Pauline distinction between law and spirit, John applied Christian exegesis to the problem of righteous governance. He noted that the first law, that of Moses, was imprinted on stone tablets and constituted the letter. The second law, that of Deuteronomy, represented the spirit, as it "was not imprinted, except upon the purer intelligence of the mind" (John of Salisbury, p. 41). The ruler must be cognizant of both the letter and the spirit of the law in order to execute his role as a Christian king.

Moderation

How does the prince achieve this consonance with the law, of virtuous spiritual embodiment? John of Salisbury's answer derives from his adoption of Ciceronian precepts of moderation and enlightened eloquence, themes which recur throughout all his works. In order to understand the law, in its letter and its spirit, the prince must cultivate circumspection and moderation in all things. John writes that "the honour of the king esteems justice and restricts the faults of wrongdoers with a tranquil moderation of the mind" (John of Salisbury, p. 52). Moderation, here, implies a cultivation of virtue that seeks balance in all things and subordinates excessive passion or desire to an apprehension of the needs of the common good. The exercise of reason is fundamental to this idea of moderation, for it is reason that enables man to articulate himself in thoughtful speech, reside in harmonious communities, and ascertain a moderate mean in all things.

The Christian prince must be faithful to Christian revelation, but in order to understand the implications of that faith for governance, he must deploy his reason to do so consistently, fairly, and judiciously. The prince must be "sufficient in himself to seek out and bring about the utility of each and all, and that he may arrange the optimal condition of the human republic" (John of Salisbury 1990, p. 28). The prince's task, then, is to embody and enforce the law in a way that engenders a social harmony reflective of cosmic harmony. The prince is not above the law, but he must contain the law; he "ought to imagine himself permitted to do nothing which is inconsistent with the equity of justice" (John of Salisbury 1990, p. 29).

Conclusion

The ideas promulgated by John of Salisbury in the Policraticus were discussed and deployed across the European continent throughout the Middle Ages (Lachaud 2015). His articulation of the principle of legality was not original in itself; he drew upon classical and early medieval sources to make it. His particular vision of the political, however, within which legality stood at the center, offered a bold coupling of Christian theology and Stoic thought that not only defined the Christian commonwealth but explained how it could work in practice.

He explained the relationship between social hierarchy and cosmic justice, as he saw it, and constituted the prince as the guardian of the law that bound society together.

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Jonas, Hans

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Introduction

Hans Jonas (1903–1993) was a German-born American Jewish philosopher. After studying theology and philosophy, Jonas earned his doctorate on Gnosticism at the University of Marburg in 1928. He particularly followed the courses of Edmund Husserl, Rudolf Bultmann, and Martin Heidegger, alongside Hannah Arendt. Leaving Germany in 1933 to take refuge in England, he joined Palestine in 1934. He taught briefly at the Hebrew University of Jerusalem before moving to North America where he taught successively at Carleton University (Canada) and at the New School for Social Research in New York (USA). His life story, marked by the murder of his mother in Auschwitz, is recounted in his rich autobiography, Erinnerungen, published in 2003.

Jonas was famous for having written *The Imperative of Responsibility*, published in 1979, which has since influenced ecological thinking in particular. His concept of responsibility was a response to technical utopias and sought to re-found principles of obligation of human action in the face of a future threatened by the consequences of technological immoderation.

If *The Imperative of Responsibility* has generated prerogatives of an ecological type, the fact remains that it is a book of philosophy and more precisely of moral philosophy. From this point of view, Hans Jonas sought to formulate a new legitimacy of moral law, in the Kantian lineage, stated as follows: "Act so that the effects of your action are compatible with the permanence of genuine human life" [p. 11].

A New Categorical Imperative

The legitimization of a new moral law, of what is called a "categorical imperative," faces two pitfalls: first, in the history of philosophy, the notion of moral value has become, in the modern era, all relative. Moreover, the moral obligation to be formulated is an obligation toward times and generations that do not yet exist. Indeed, human technological activity, under the impulse of capitalistic productivity, as Jonas announces from the very first lines of his work, extends its field of consequences into a very distant future.

The content of the future, thus indeterminate and feared, is quick to legitimize a posture of restraint toward it. Hans Jonas developed the concept of the heuristics of fear in order to precisely rationalize and structure this peculiar kind of fear. But before, Jonas resolves the two pitfalls by taking the following intellectual paths: basing the notion of obligation on a new ontological approach and provoking a reflexive attitude capable of curbing a type of alienating productivity based on obsolescence and in any case opposing a normative and axiological temporality.

Ontology, the Essence of the Being: Preserving Moral Freedom

Why is a new approach to ontology needed, and what does it mean? Ontology, the science of being, has the vocation to be the support of moral duty, or of ethics, in Jonas' terms. In other words, the being

must be able to provide indications for the orientation of human action. Without returning completely to the Aristotelian model according to which nature is endowed with a *telos*, a finality, Jonas wants however to circumscribe the tendencies of being, the inherent dimensions of being, that is to say the essential elements for its durability. But it is then necessary to specify that the being is not an abstract or speculative or metaphysical concept in Jonas, the being is the living. So, Jonas undertakes what he calls a phenomenology of biology or a philosophy of the living that will allow him to grasp simultaneously the determinations of organic life and the existential meaning that these determinations have for the human kind.

Organic life is usually characterized by a tendency to self-preservation. But Jonas adds two other characteristics to this tendency. Firstly, there is an original freedom which presides over the appearance of organic life. The latter tears itself away from the inorganic while proceeding from it. Secondly, the functioning of the metabolism shows a dependence on the outside world for the renewal of its being, but is also capable of relative autonomy. Thus, the Jonassian philosophy of biology assumes that the determinations of the living, or ontological determinations, are coordinated by a fundamental freedom and moreover by an attachment to the environment.

Therefore, what must be preserved in man and in the world is precisely this freedom, and a link with the world, which will be formulated in Jonas philosophy in terms of responsibility. The inaugural freedom of organic life takes a particular form in the man who is aware of this freedom and who is a symbolic animal: moral freedom. Moral freedom presupposes that man is willing to choose, between good and evil, but also that he can transgress just as freely what would be good for him. A new ethic will have to show how to preserve the essence of man, namely, a freedom to act that does not turn against himself.

Political Issues

The technological challenges are commensurate with this new responsibility. The use of technology can be struck with *hybris*, excessiveness, and this is not a new fact, since Greek antiquity already warned man against excess. But the excessiveness of our technological activity now raises an important political question.

According to Jonas, if we do not limit our technological power in part, it is possible that the irreversible ecological consequences will force states to restrict the freedoms of individuals in a context of resource or energy scarcity. Anticipating a political constraint not chosen by the people, that is to say, one that is outside the democratic system, means committing oneself to ensuring that the limitations are decided freely and progressively in the present.

Ultimately, Jonas wishes to formulate a principle of responsibility capable of preserving man's freedom of choice in the perspective of a future made uncertain by his own activity. In doing so, Jonas does not criticize science, but rather the use of technology. It is a matter of questioning and evaluating the point at which technology affects the environment conducive to the authentic living conditions of individuals. Authentic here therefore means free or capable of exercising the moral freedom that defines the human being. In essence, an ethics of the future claimed by Jonas is that of preserving the image of a free human. This image of freedom put on the horizon of decisions is a form of regulatory ideal. It is, however, formulated on the basis of a concrete study of the living.

Conclusion

Jonas developed a philosophy of the living capable of establishing solid epistemological foundations for an ethics of the future. But beyond the analysis of the living, a cosmological dimension appears in Jonas work. It is not a question of studying the living for itself, but in its place and conditions of existence. If cosmology was the discipline of Greek antiquity, Jonas evaluates our relationship to the world also from an astrophysical perspective. The matter of the universe has made it possible at one point that the living develops and, furthermore, that space for subjectivity – and thus embryonic freedom – exists.

These reflections, notably from a chapter published in the margins of the edition of *The Imperative of Responsibility*, attempt to overcome the pitfalls of dualism, and in particular the feeling of isolation of the *cogito*, or of subjectivity. Although dualism has a function, to define consciousness, it can also forget the information of matter and, for the human being, to operate a dissociation that occults the dynamic indications of the body. It should be noted, however, that Jonas work, turned toward the resolution of dualistic aporias, is born out of a critique of ancient Gnosis. Jonas' first philosophical work was indeed a thesis on the essence of Gnosis, directed by Martin Heidegger. However, Jonas describes in his memoirs how the structure of Gnostic thought was illuminated by the thought of its thesis director and vice versa.

At the heart of the two thoughts, there is indeed a feeling of alienation, which nevertheless also constitutes an intellectual motor for the unveiling of truth. The feeling of abandonment and of being thrown away, in both thoughts, but also a form of anti-cosmism, are the postures against which Jonas' work is forged. At the origin of this ontic posture, Jonas supposes an oblivion of the living unity, which is a synthetic unity, just as the view of a landscape is first of all a perceptive synthesis before being decomposed into localized perceptions. The return to a unified philosophical understanding of matter and the living is therefore a means not only to preserve oneself from the excesses of dualism but also to found a responsibility of the humanity for his world.

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Jurisprudence as Normative Science

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Introduction: Defining the Problem

Before defining what exactly jurisprudence as a normative science means it is necessary to clarify how the term "jurisprudence" will be understood in this entry. For reasons of space, we shall limit ourselves here to analyzing the concept of

jurisprudence exclusively from the traditional viewpoint of Continental legal culture – where "jurisprudence" basically amounts to a general theory of positive law, to wit, of legal norms and legal orders (in this context we shall not consider the relationship among jurisprudence, sociology of law, and legal dogmatics) – and not according to the more sociological and pragmatic standpoint of the Anglo-American, Common Law legal culture. Nonetheless, there is an Anglophone approach to philosophy of law, to which only a brief reference will be made, represented by analytical jurisprudence, which engages in a conceptual analysis of the concept of law in the search for a general theory of law and corresponds, so far as contemporary legal thinking is concerned, to the Hart-Raz-Coleman–Dickinson-Shapiro tradition.

Foundations of Normativity: Kelsen–Hart–Raz–Austin

Jurisprudence as normative science is the study of legal norms, or, to put it slightly differently, legal oughts. Jurisprudence as normative science does not study what law ought to be, but does study how law tells others – the subjects of law, or judges – what they ought to do. In studying normative orders, jurisprudence as normative science seeks to explain and analyze how normative orders do operate, as opposed to how they ought to operate. In that sense, the Continental normative tradition is still within the positivist tradition, although with a very different focus from the positivist approaches of John Austin, H. L. A. Hart, Joseph Raz, and others in the Anglophone analytic tradition. Within Continental law, the normative character of law, that is of legal systems with patterns of command and obedience, and characterized by the role of coercive force and by the threat of sanctions, was theorized by the Austrian jurist Hans Kelsen (1881–1973), whereas the two main figures for a revised form of legal positivism in the Anglo-American analytic philosophy of law tradition are H. L. A. Hart (1907–1992) and Joseph Raz (1939–). Interestingly, however, Kelsen's understanding of the centrality of sanctions and coercion followed, as he recognized, from the writings of John Austin (Kelsen 1941), even as Hart and his successors in the Anglo-American analytic tradition rejected Austin's view of threats of sanctions as necessary to an account of the operation of law.

Hans Kelsen

For Hans Kelsen, and for an important part of the Continental tradition (e.g., Norberto Bobbio (1904–2004)), law is normative (i.e., basically constituted by duty-imposing norms) and must be understood as such. For Kelsen, the law is a system of norms that regulate coercion. Coercion is the characteristic substantive feature of the legal norm, and of the legal order that is meant to apply the coercive sanctions. That means that the form of every "primary" law is that of a conditional prescription to judges or legal enforcers as to where sanctions ought to be applied if a certain behavior, the "delict," is carried out. The legal order thus becomes a system for behavioral guidance, not because it tells law's subjects how to behave, but because it tells officials how they ought to deal with the subjects under certain conditions. The legal order for Kelsen is therefore a *normative system*, and law is a set of norms with the kind of unity that is typical of a system. This unity of the legal order is based on a basic norm (the *Grundnorm*): this is a norm, albeit not posited through positive law, which Kelsen regards as the fundamental prerequisite for legal thinking and which explains the "validity" or binding force of law, with the result that the grounding foundation of the validity of a norm is always another norm. No *ought* can be derived from a fact – from an *is*. It follows that the legal order is a chain of norms in the form of a pyramid, where the basic norm is a hypothetical and transcendental norm that is the epistemological condition needed for regarding all the norms of a given legal order as objectively valid or endowed with binding force. The specific point of reference of any legal norm is the constitution, which was itself created by an earlier constitution, and it is possible to trace this line back from constitution to constitution through to the very first constitution. According to Kelsen, the authority (validity, or binding force) of the *Grundnorm* (the "constitution" in a "logical-

transcendental" sense) is to be presupposed, and this endows the first historical constitution (the "legal-positive constitution") with binding force.

For the school of the *Reine Rechtslehre* (Kelsen, Adolf Merkl (1890–1970), Franz Weyr (1879–1951)), legal science is only legal noetics (jurisprudence deals with the question of knowledge of law), legal logic, and legal methodology. On this view, philosophy of law is a fundamental theory of law: that is a system of basic legal concepts which constitute the prerequisites for a possible science. Jurisprudence as a science of law has the task of determining the concept of law and the "formal" or "structural" connections between norms without consideration as to their specific content and providing a methodological theory for legal science. Jurisprudence may thus be designated as legal science, as a science of the "form" of law. Compared to the form of law, the norm as an idea is the quintessence of legal thinking in general. It is this form which gives legal character and normativity. The character of normativity (Kubeš 1977) may be recognized precisely in the phenomenon of law. However, the origin of normativity cannot be inferred from the real world. It is therefore impossible to infer an *ought* from an *is* (Kelsen 1967). Nevertheless, the normativity of the legal sphere is closely related as ideality to the reality of the world. This becomes possible because man is capable of transposing the *ought* and the content of the norm as an idea of law into reality in the form of an imperative. The legal norm becomes the foundation of normativity, that is, of the obligatory character of law. The transfer of the norm as an idea of law into the world of reality thus occurs, when, contingently, individuals make the norms a part of an actual legal system and of a functioning legal order.

A large number of basic concepts (such as, for example, the concepts of norm, duty, person subject to a duty, and subject of the law, along with the concepts of right and validity) that are constantly used in legal science have been premised on the concept of normativity: that is, of the imperative or prescriptive or obligatory nature of law, as opposed to the simply descriptive. And thus a law is, by definition, normative, and only valid legal norms – those that impose sanctions and are part of a system of organized coercion – are in fact normative (Kelsen 1960). Thus, having a legal right or an obligation means having a *strictly legal* right or obligation, that is a legal right or obligation *tout court* (Spaak 2003).

H. L. A. Hart

Kelsen's basic norm, as a presupposed norm, does not explain the empirical existence of legal systems, and thus does not explain a legal system as an existent set of rules endowed with the force of law or with authority. A significant solution to this problem was proffered by H. L. A. Hart (1961) who makes the existence of a (mature, municipal) legal system depend on a social rule that is actually practiced, and is thus real: the *ultimate rule of recognition*, a meta-rule in any legal system which contains the criteria of legal validity for all the other rules within the legal system. For Hart, the existence of the ultimate rule of recognition rests on acceptance among *officials* (it is an important feature that the rule of recognition is an official custom) about who shall have authority to decide concerning legal matters, what judges or other officials will treat as binding reasons for decision, what sources of law will be deemed legitimate, and what rules and sources will govern the actions of officials. The content of the ultimate rule of recognition can be identified from the social practices of officials who acknowledge the rule as a legitimate standard of behavior and satisfy the rule's requirements. For Hart this ultimate rule of recognition has following functions: (1) to establish a test for the validity of law in the underlying legal system and to all that belongs to the legal system, (2) to give unity to the legal system unifying its laws. A legal rule is thus a valid legal rule insofar as it is produced in a certain way (prescribed, e.g., by a rule of change) as mandated by the rule of recognition. So any rule that complies with the rule of recognition is a valid legal rule. It follows that the rule of recognition and its normative force determines what is to be considered an actual law. The normativity of law, to Hart and others in his tradition, rests on the factual existence of what are ultimately social norms.

Legal Positivism and Legal Science

Classical legal positivism provides an account of the validity of law. For Kelsen, validity is the specific mode of existence of a norm. A valid norm is one that is systematically valid and is part of the legal system. Legal positivism in fact tends to establish the sources of the validity of the legal system. In that sense we can say that jurisprudence, as conceived by positivists, fulfils the need for a general theory of positive law, but is not concerned with handling the problem of justice, whereas "legal philosophy", as the expression is sometimes employed, is more concerned with the theory of natural law and the law of reason: that is the theory of right or just law (Alexy and Dreier 1990). Yet both jurisprudence in the positivist tradition and legal philosophy in the natural law tradition share some of the same features, such as the conceptual analyses of the most important concepts of law in general and of positive law in particular: that is the concepts of the legal norm, of legal obligation, and of legal validity. Obviously, to study norms and to consider law in terms of norms is to offer a general theory of legal norms and thus of law. To engage in conceptual analysis of the concept of law – Raz, Coleman, Shapiro – is to engage in jurisprudence in the search for a general theory of law, and in that sense philosophy of law is just a synonym for jurisprudence in other traditions.

Jurisprudence as a normative science may thus coincide with legal philosophy if both work as a discipline that operates in a normative way but not if we understand jurisprudence as analytical jurisprudence, which deals mainly with the structural analyses of the law and its concepts. Science in that sense has little in common with natural science or even social science, and as normative science it must be understood as the study of norms and the normative order, and not as an empirical inquiry. Legal science as *Wissenschaft* should not therefore be understood as (necessarily) a science in the sense in which that word is used by natural and social scientists. The object of normative jurisprudence is norms and not patterns of actual behavior and must not be confused with causal empirical science: the law is not the same as the science of law (Kelsen 1945). However, law as the subject-matter of scientific research can be considered from various standpoints, that is, historical, logical, ethical, sociological, or economic. Nevertheless, the main juristic task, for theorists who are doing "legal science," is to inform about (or "correctly" establish) what people are legally obliged, enabled, or permitted to do or prohibited from doing (Alexy and Dreier 1990), whereas legal philosophy is often understood to be based on more general philosophical aspects of law, such as ethical questions about rightness and justice. Accordingly the general theory of law, legal methodology, and the theory of legal science all belong to jurisprudence, whereas the history of legal philosophy and legal ethics belong both to philosophy of law (Alexy and Dreier 1990). This means that jurisprudence has both an empirical and a normative dimension, whereas analytical jurisprudence deals with a logical and conceptual analysis of the concepts of law and legal science. Taking account of the normative aspect of law, jurisprudence is concerned with how the law and legal science should be. The normative dimension deals not just with the role of norms and the structure of the legal order but also with statements concerning right or just law and the ethical aspect of law encompassing the problem of justice. The question thus arises as to whether right or just law can be universally valid in all legal systems. If we consider just law to be one that is based on a rational justification, then this assertion makes sense and will create an argument in favor of universal validity. On the other hand, if it is considered in relation to the different legal cultures of the various legal systems, the abstract idea of validity that is common to all legal systems will as applied become relative and be limited to particular legal contexts.

Joseph Raz

Joseph Raz who in one of his earlier books – *The Concept of a Legal System* (Raz 1980) – relied heavily on Kelsen, also focuses on normativity and above all on three problems: (1) How are rules normative, and how do they differ from ordinary reasons? (2) Why are normative systems systematic? (3) What distinguishes legal from other systems, and in what does their normativity

consist? Raz (1999) answers all three questions by considering reasons for action as the basic normative concept, and providing in his theory of norms a unified account of normativity. Norms are rules, which require that a certain action be performed, as well as rules granting permission. The different types of norm and their logical features make up the normative systems, that is, the systems of norms. For Raz, one of the most important types of normative system is the legal system. For Raz, some kinds of rules, such as categorical and permissive ones, are reasons for action of a special type, and other rules, such as power-conferring rules, are logically related to these reasons. Raz has tried to show how norms and reasons contribute to explaining prescriptions such as commands and orders. Raz asserts that normative theory is mostly concerned with what people ought to do. Individuals should behave on the basis of values derived from a theory of values, and normative theory should define who and which values should be realized. The main concepts are "oughts" and reasons for action (as the most fundamental), rules, duties, rights, and norms with binding force. So for Raz theory is conceptual analysis. Conceptual analysis also covers the logical features of concepts such as value, norm, and the nature of the rules governing practical reasoning, and thus goes beyond the mere analysis of norms and normative systems.

John Austin

An important contrast to the accounts of both Kelsen and Raz, as well as to those in the natural law tradition, is that which was offered by John Austin (1790–1859). As is well-known, Austin defined a law "properly so called" as that which threatened the imposition of negative sanctions – evils – upon disobedience. A prescription or an imperative that was not accompanied by a sanction was simply not a law at all. As a result, the idea of normativity was inextricably tied to sanctions, and the force of law was a function of law's sanction imposing capacity. Insofar normativity is the feature that explains how law can provide reasons for actions to its subjects. Austin insisted that the fear of sanctions was a necessary or essential property of law's normativity. Without a sanction the subject would have no reason to follow the law or to take a law as providing a reason for action at all.

The critique of Austin's conception of normativity is an important component of the insights of Hart and his followers. Arguing against Austin, Hart argued that it was possible for both officials and subjects to take laws as reasons for action even were there no sanctions attached to those laws. Hart called this "internalization", and it was central to his arguments against the Austinian picture that internalization was conceptually possible without sanctions. Although there is debate about the extent to which Austin (and Jeremy Bentham before him) actually maintained that a sanction-free legal norm was a logical or conceptual matter, the normativity of law with the sanctions that law contingently imposes is a position rarely held by contemporary legal theorists.

Conclusion

To summarize the concept of "jurisprudence as a normative science," the term "normative" must not be understood as a description of particular laws or legal systems, but rather in the sense of a field of study and a field of cognition that has norms as its object. In the latter case, legal science can be understood as being "normative" in the sense that norms constitute its object. The task therefore of legal science is not to prescribe norms but to describe them, and, perhaps more importantly, to offer an analysis of just what norms – in general – are, and what follows from the existence of a norm.

A core concept of law as the matter of normative science is the term "ought," which must be construed in a strictly normative sense. It is through the "ought" that legal science grasps the normative characteristic of its object, not in the sense of laying down an obligation but according to a relationship of imputation, that is, according to the Kelsenian schema, "if A then [it ought to be] B."

It is worth noting in conclusion that the study of the logical form of legal norms is not a characteristic feature solely of legal science but also of

the more empirical sociology of law. While the analysis of the logical form of the norms analyzed by sociology of law and the logical concepts as nexuses for imputation is a common feature to all normative social sciences, the empirical sociology of law, as well as the doctrinal study of law legal seek to determine the specific content of legal rules compared to other social-normative laws. Legal concepts may only be elaborated and the specific content of legal rules may only be determined on the basis of empirical and normative enquiries based on contingent historical-social reality.

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Jurisprudence of Interests

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Introduction

Jurisprudence of Interests is a legal methodology established in Germany in the early twentieth century. It derived its premises from the scientific positivism and legal voluntarism of the second half of the nineteenth century and involves two key tenets:

Firstly, according to the methodology of the Jurisprudence of Interests, the law should be applied and developed solely by the judge in each legal case on the basis of his investigation of the interests underlying the applicable law. Secondly, the view of the Jurisprudence of Interests on judicial activity derives from the idea that the law is not created from ideas about legal norms and legal concepts but arises from the *interests* causally underpinning the legal norms. Thus, Jurisprudence of Interests was in particular

directly opposed to what is known as the so-called Jurisprudence of Concepts ("*Begriffsjurisprudenz*") of the nineteenth century.

Even in the view of its erstwhile critics, the influence of the Jurisprudence of Interests on legal methodology and jurisprudence practice in Germany can "hardly be overestimated" (Larenz 1960, 48).

Jurisprudence of Interests as a Legal Methodology

Definition

The term "Jurisprudence of Interests" (*Interessenjurisprudenz*) was coined by the founder of this legal methodology, the Tübingen legal scholar Philipp Heck (1858–1943). Heck first used the phrase "Jurisprudence of Interests" in an essay published on December 15, 1905 to describe a view of the law according to which "legislation does not derive from ideas" developed by legal scholars but from relevant decisions taken by the legislator relating to specific "conflicts of interests" (Heck 1905, 1140 f.).

According to Heck, the "real method" (Müller-Erzbach 1905, 92ff.), which was applied, also in 1905, to a specific problem of private law in the habilitation thesis of Rudolf Müller-Erzbach (1874–1959), differed from the Jurisprudence of Interests "only in name" (Heck 1905, 1140 note 2). Heck 1912, 28; 1932, 50 himself regarded the Jurisprudence of Interests as a development from the jurisprudence of "purpose" (*Zweckjurisprudenz*) of Rudolf von Jhering (1818–1892).

The term "Jurisprudence of Interests" was not completely undisputed, even among its first adherents. Heinrich Stoll (1891–1937), for instance, at the time the most important proponent of the Jurisprudence of Interests aside from Heck and Max von Rümelin (1861–1931), preferred the term "Jurisprudence of Values" (*Wertungsjurisprudenz*) rather than "Jurisprudence of Interests" (Stoll 1931, 67f. note 1 at the end). Heck 1929, 473 note 1; 1932, 50, on the other hand, considered all his life that the term "Jurisprudence of Interests" was the "most precise characterization" of the methodology he propounded. Aside from a few scattered appropriations of the term during the Nazi period (Lange 1936, 924 and in this regard Rückert 2008, 227, 229, 234), Stoll's suggested terminology did not achieve wide currency in German-speaking methodology until the second half of the twentieth century.

Apart from the area of private international law (Flessner 1990), the term "Jurisprudence of Interests" has today largely been displaced in German-speaking methodology by the term "Jurisprudence of Values" as a collective label for methodological concepts, which are by no means mutually consistent, but which are nonetheless in principle within the tradition of the Jurisprudence of Interests.

In international secondary literature on the legal methodology and its history published since 1950 the term "Jurisprudence of Interests" is also used occasionally in a wider sense, primarily in Anglo-American legal circles, to describe related methodologies (Power 1953; Friedmann 1967, 336; Kennedy 2011, 203).

Precursors

Heck stressed time and again that he was already propounding the substance of the Jurisprudence of Interests as a methodological doctrine long before the term was coined. He claims, for instance, that his habilitation thesis, *Das Recht der Großen Haverei* (The Law of the General Average) on maritime commercial law and maritime insurance law, published as early as 1889, may be regarded as a "programmatic text" in which the new method is applied (Heck 1905, 1140 note 2; 1929, 471 note 1; 1935, 263f.). Indeed, there are substantive overlaps, even of terminology, in this text (Heck 1889, 589–591) and in immediately subsequent publications with the programmatic tenets of the Jurisprudence of Interests.

Heck later repeatedly pointed out, however, that he himself "found" important "fundamental ideas" for his methodology already in existence in 1889 in the "genetic theory of interests" (*genetische Interessentheorie*), and that by formulating what he called the "productive theory of interests" (*produktive Interessenjurisprudenz*) he was merely giving them "due appreciation" and systematically developing them further (Heck

1935, 267 note 27[a]). The most important precursor Heck 1932, 32 names is Rudolf von Jhering, even saying in hindsight, "Jhering made me a jurist of interests." This is in fact doubly true. On the one hand, from 1909 on Heck, indulging in some gross oversimplification, made Jhering out to be the representative of the very "technical jurisprudence of concepts" against which Heck was arguing, in other words making him *in this regard* posthumously into his main opponent (Heck 1909, 1457f.; 1929, 473–478; 1932, 3, 67). On the other hand, Heck rightfully considers Jhering, whose methodological views changed fundamentally since 1859, turning him "from Saul into Paul" (Heck 1933a, 12), to be the founder of the "genetic theory of interests" as a methodology for explaining the creation of law (Heck 1932, 33 note 3, 51).

However, there are other precursors as well, both for seeing interests as the basis of the content of law and for the fundamental idea underlying the Jurisprudence of Interests, i.e., that the law is incomplete and has lacunae (Edelmann 1967, 15–82). The term "interest" and thus too the idea of a social conflict among individual interests gained increasing prominence in the German social and legal sciences in the second half of the nineteenth century. For instance, as early as 1850 the jurist, economist, and early sociologist Lorenz von Stein (1815–1890) described the "*interest [. . .] of each* individual in relation to every other" as the "*principle of society*" and the "social order surrounding" each individual as "a system of [*sc*. antagonistic] interests." In doing so, he set the abstract "world of concepts" in opposition to the empirical "world of facts" (Stein 1850, XLIf., 27). From 1865, Jhering considered "benefit" to and "interests" of the individual to be the "substantial element" of the individual's own subjective rights (Jhering 1865, § 60, pp. 307–327). The legal and social historian Wilhelm Arnold (1826–1883) even saw "economic life" as a "number of interests crossing each other, in conflict with each other and opposing each other," which "the legislator [. . .] has to weigh up against each other, examining their greater or lesser entitlement and thus arriving at its decision" (Arnold 1865, 117f.). Here, Arnold is already putting crucial assumptions of the later Jurisprudence of Interests into words. From there, it was merely a small step to Jhering's reduction of the law to the "power relationship between opposing forces" and to the comparison of social power relationships to a "parallelogram of forces" and interests (Jhering 1872, 14). In this, Jhering was anticipating Heck's view of the law as a "product of conflicting forces" (Heck 1889, 591) and his simile of the law as "the result, as it were the diagonal of forces of struggling factors," "the effect of which we are able to register only as conflict of interests" (Heck 1932, 46).

These views, influenced by scientific positivism, which sought to reduce intellectual and social structures as it were to physically measurable units, signified a fundamental caesura of German legal scholarship, which had been dominated since the early nineteenth century by the German Historical School of Jurisprudence founded by Friedrich Carl von Savigny (1779–1861). True, the "Jurisprudence of Concepts [. . .] under the influence of the Historical School of Jurisprudence" had also not at all "ignored the fact that the judge must do justice to the conditions of life and take interests into consideration" (Stoll 1931, 65f.) as, for one, Heinrich Stoll, but not, however, Philipp Heck, as one of the main proponents of the Jurisprudence of Interests in the twentieth century rightly admitted. The evolutionary character of law, i.e., the historical mutability of the law on the basis of shifting collective "needs" ("Bedürfnisse"), but not, however, on the basis of antagonistic individual interests, was already one of the core messages of the German Historical School of Jurisprudence. What was completely incompatible, however, with the theory of the creation of law in the German Historical School of Jurisprudence was the realization, which gained currency in Germany only after 1850, that *conflicting interests* do not necessarily have a destructive effect on the law and must not and indeed cannot be prevented from influencing law-making, because conflicts of interest in the reality of society are in fact actually *constitutive* for the creation of law.

As an historian of Roman Law, Jhering differentiated as early as the 1850s, as Heck 1929,

472 did later, between an "anatomy" of the systems of legal concepts, focusing on the structures of law, and the "physiology" of law, which investigates its actual functions in life. However, before his methodological rejection of what he likewise pejoratively called "Jurisprudence of Concepts" in 1884 (Jhering 1884, 337, 345, 347 et passim), Jhering restricted this "physiology" of law to the study of legal *history*. By his own admission, Jhering only noticed with hindsight (Jhering 1866, § 3, p. 27 note 2[e]) that there was a "similar way of looking at law" in the work of the founder of classical Utilitarianism, Jeremy Bentham (1748–1832). Even so, no adequate answer has yet been found to the present day to the question as to how far the ideas of English Empiricism and Utilitarianism, spread through German translations of the works of Bentham and those of John Stuart Mill (1806–1873) and Herbert Spencer (1820–1903), directly influenced, via Jhering, the Jurisprudence of Interests theory in the twentieth century (Coing 1968; Luik 2003).

The reduction of the law to antagonisms between interests meant that the "*Volksgeist*" (spirit of the people) of the German Historical School of Jurisprudence and the consistent system deriving from the unity of the "*Volksgeist*," or the "organism" of the law, now became nothing more than "slogans," "empty words with which we push problems to one side rather than solving them" (Arnold 1865, 9). The spirit of the people ("*Volksgeist*"), according to the German Historical School of Jurisprudence, represented as the ongoing making of law by the trained legal mind of jurists, is replaced towards the end of the nineteenth century, in both the theory and the practice of legal sources, by the historically specific will of the state legislator (Schröder 2012, 281ff., 305ff.). With the replacement of the spirit of the people by the will of the legislator, the systematic unity of law, hitherto attributed to the homogeneous spirit of the people, is also replaced by the idea of the extensive contingency of its contents.

The increased focus on the state lawgiver as the crucial arbiter in the struggle between conflicting interests and the associated loss of legitimacy of legal scholarship as an independent source of law (Mecke 2008, 167) meant that the problem of "lacunae in the law" (Ehrlich 1888) and the authority of the judge in relation to that of the legislator independently to close lacunae in the law became prominent in methodological discussions. This trend was given considerable impetus towards the end of the nineteenth century by the accelerating social and economic change brought about by industrialization, which further increased the need for rapid reaction and adaptation of the law to social changes. It was further fueled at the turn of the nineteenth to the twentieth century by the intensification of contrasts between various social, political, and ideological interests within society which were triggered by economic change.

Proponents

The foundation of the Jurisprudence of Interests as an independent methodology is inseparably associated with the almost simultaneous rise of the Free Law Movement (*Freirechtsbewegung*) in Germany. Proponents of these two reform movements, which were soon to become rivals, carried on an intensive debate on legal scholarship methods in German jurisprudence in the years leading up to the outbreak of the First World War. Heck's first essay, focused purely on methodological theory (Heck 1905), was a direct reaction to three essays by Ernst Stampe which had appeared in the same year in the *Deutsche Juristen-Zeitung*. These essays triggered the debate on methodology which ensued from Eugen Ehrlich's lecture on *Freie Rechtsfindung und freie Rechtswissenschaft* (1903) to the Vienna Law Society (Edelmann 1967, 85, 90).

Today, however, it is Heck's lecture as Rector in Tübingen *Das Problem der Rechtsgewinnung* that is taken to be the programmatic text of the Jurisprudence of Interests (Heck 1912). In particular, Heck dealt with the two central problems of the Jurisprudence of Interests, namely the way judges decide cases and the relationship of this to the formation of scholarly concepts and systems, in his two monographs *Gesetzesauslegung und Interessenjurisprudenz* (1914) and *Begriffsbildung und Interessenjurisprudenz* (1932). It was especially in his two textbooks *Grundriß des Schuldrechts* (1929) and *Grundriß*

des Sachenrechts (1930) that Heck attempted to demonstrate the application of the method of the Jurisprudence of Interests to individual problems of legal dogma in two central areas of private law.

As well as Heck, it was mainly Max von Rümelin and Rudolf Müller-Erzbach, followed later by Heinrich Stoll, who were instrumental in the development of the Jurisprudence of Interests in the first half of the twentieth century. However, even among this founder generation, Heck remained "primus inter pares" and after the First World War he saw himself increasingly in relation to friends and foes alike as the keeper and uncompromising defender of the methodological school he had founded (Hippel 1972, 84f.). Among the few early proponents of the Jurisprudence of Interests beyond the field of private law are August Hegler (1873–1937) in the field of criminal law and Heinrich Triepel (1868–1946) in the field of constitutional law.

Basic Methodological Assumptions

The Jurisprudence of Interests makes statements about the creation of legal norms (see a.), about the interpretation and development by the judge of legal norms (see b.), and about support by legal scholars for the preparation of legislation and court rulings (see c.).

However, the Jurisprudence of Interests refrains from passing any judgment on the value assessments underlying the law, since "the Jurisprudence of Interests [. . .] is not a theory of material values," but is rather "quite independent of any ideology and equally of value for every ideology" (Heck 1932, 28).

Nor do the proponents of the Jurisprudence of Interests claim to have invented the "settlement of conflicts of interests, [the] balancing of interests" which has since ancient times been the job of legislation, the courts, and legal scholarship. What they do, however, claim for the Jurisprudence of Interests is to have drawn from the theoretical "recognition of the process" of the balancing of interests an "aim and [. . .] implications" for the methodology of legal scholarship commensurate with this recognition (Heck 1933b, 56).

Creation of Legal Norms

The statements of the Jurisprudence of Interests about the creation of legal norms, what Heck called "genetic theory of interests," include the assumptions for legal methodology with regard to the application and development of law by the judge, which Heck called the "productive jurisprudence of interests" (Heck 1932, 32f.).

According to the "genetic theory of interests," interests are the *only* "causal" originating factor for the content of legislation (Heck 1914, 104). This meant that the proponents of the Jurisprudence of Interests were taking a decided stand against what Heck called the "technical Jurisprudence of Concepts" (*technische Begriffsjurisprudenz*) (Heck 1909, 1457). This "was widespread and almost unchallenged before the German Civil Code [BGB] came into force [in 1900]" and, in an *inversion* of the true relationship, treated the abstract legal concepts originated by legal scholars as an inexhaustible source of legal provisions, instead of acknowledging the legal provisions brought forth by interests as the sole source of the law. Heck also described this "incorrect Jurisprudence of Concepts" which considered the source of law to be the concepts and systems formulated by legal scholars as an "inversion method" (Heck 1905, 1458; 1914, 2).

The term "interests" in the sense of the Jurisprudence of Interests should be understood in the "widest sense" (Heck 1912, 31). According to Heck, it covers not just "material interests," but also "ideal, religious, national, ethnic interests" (Heck 1912, 30) and not just individual interests but also "more fundamental interests of the community" (Heck 1914, 232 note 357), not just "interests of further development" (Heck 1914, 68, 82) in terms of the development of the law, but also the "interests of stability" inherent in the preservation of the current law (Heck 1914, 191). The purpose of the law is the "settlement of conflicts of interests" by means of a "balancing of interests" (Heck 1933b, 56).

To be sure, Heck in no way disputes the "normative significance of customary law" which he attributes to being in the "interests of stability" and "the analogous, but weaker, effect of 'prevailing practice'" in the case law of the courts

(Heck 1914, 191). Crucially, however, it is the state legislator who creates the law. After balancing the interests (Heck 1914, 17), the legislator is reaching a decision by means of a "value judgement" (Stoll 1931, 67) as to which interests should be granted full or partial legal recognition and which interests must wholly or partially give way.

Theoretically, from the point of view of the Jurisprudence of Interests, the legislator has complete freedom in determining the procedure and criteria in terms of content according to which the balancing of interests is undertaken. At the same time, however, Heck assumes that the legislator can be characterized as a "summarizing description for the confluence of causal interests" and state laws as the "resultants of the interests opposing each other and jostling for acknowledgement in any legal community" (Heck 1914, 8, 17).

Application and Development of the Law by the Judge

The opus proprium of the Jurisprudence of Interests is the methodology regarding the application and further development of the law by the judge. In view of the controversies surrounding methodological theories in the first third of the twentieth century, the proponents of the Jurisprudence of Interests saw themselves faced by "two [*sc.* opposing] fronts" (Heck 1932, 9), namely, on the one hand, the traditional methodological idea of the so-called Jurisprudence of Concepts, which subjects the judge to the imperatives of legal scholarship on the basis of a cognitive concept of truth; and on the other hand the Free Law Movement (Eugen Ehrlich, Hermann Kantorowicz, Ernst Fuchs et al). This rival reform movement to the Jurisprudence of Interests liberated the judge completely from the imperatives of legal scholarship and as far as possible from the imperatives of legislation with a conception of the law which was rigorously voluntaristic and stressed the "free" will of the judge.

What proponents of the Jurisprudence of Interests shared with the Free Law Movement was the conviction that the "lacunae, errors and contradictions" (Heck 1914, 20) which are unavoidably present in every law should not be removed with concepts formulated by legal scholarship ("Jurisprudence of Concepts") but solely by the judge. Unlike the Free Law Movement, however, which saw the binding of the judge to the law as only being restricted to the event – which seldom occurred – that the letter of the law was unambiguous, the Jurisprudence of Interests saw the judge as being absolutely bound by the "will of the legislator" as determined by "investigation of historic interests" (Stoll 1931, 71f.).

On the basis of this double rejection of traditional "Jurisprudence of Concepts" *and* of the contemporary Free Law Movement, Heck developed his own "productive theory of interests." On the one hand, this recognized the "authority of the judge to create law" (Heck 1914, 250), but on the other hand it also demanded the strict subordination of the judge to the will of the legislator. What this means is that every judge is obliged to establish the "normative will" of the legislator what is in sharp contradistinction to the will "in the psychological sense" (Heck 1914, 50). In an initial step this involves a comprehensive investigation into all the affected interests on which the legislator had to reach a decision. This "investigation of interests" to be made by the judge does not coincide "with the question as to the purpose of the law" (Heck 1912, 33; 1932, 46), but is more all-encompassing, since it also includes the "counter-interests" not legally recognized by the legislator (Heck 1914, 72, 81ff.) in the judicial reconstruction of the "conflict of interests decided on" by the legislator. In these terms, according to Heck, "Jhering's mere jurisprudence of purpose [is] not sufficient" (Heck 1933a, 13f.).

As a second step, the judge has to follow and understand how the legislator arrived at the value assessment with regard to the interests and transfer this understanding to his own application of the law. In this way, "the normative development" of the law follows "closely" on from the findings yielded by an investigation of the historical interests (Heck 1914, 50, 65). For what Heck demands of the judge is not "blind" but "thinking obedience" (Heck 1914, 51; 1932, 106f.) which "does not merely respect the letter of the law but enters into the intentions of the legislator." The judge should then, following his "own review of

interests" and after "comparing the conflict of interests requiring a decision with the one which has been authoritatively decided," apply "the value assessments" of the legislator to the legal case being decided or, if there is a lacuna in the law, to "the substantive situations for which no provisions exist" (Heck 1912, 32; 1932, 107; Stoll 1931, 67). In certain exceptional cases, the judge should even be permitted to correct the wording of the law according to the yardstick of the will of the legislator as it has been established (Heck 1914, 206f.; Stoll 1931, 68).

The Jurisprudence of Interests sees as a "rare exception" (Heck 1912, 35) the "complete failure" of investigation of interests "in modern laws." For this reason, it regards the unavoidable cases in which "judicial discretion" (*Eigenwertung des Richters*) becomes necessary as being very limited (Heck 1912, 32). However, to the extent that judicial discretion is unavoidable for lack of a demonstrable statement of values in the law, the judge is left to hand down a judgment on the basis of his own personal beliefs and values; in this case, the "Jurisprudence of Interests has to stay outside the door" (Heck 1933b, 63).

Supporting Function of Legal Scholarship

In an inversion of its dominating function, especially in the first half of the nineteenth century, legal scholarship is limited by Heck 1929, 471 "primarily to serving the application of law by the courts and administrative bodies." Since the work of judges, in contrast to the "Jurisprudence of Concepts," cannot be judged according to the criteria of the truth but according to the "life or interest value of the results of thought" (Heck 1914, 11), legal scholarship cannot itself creatively supplement any existing law but only set forth the content of existing law by, for example, making classifications to aid clarity and understanding. The job of legal scholarship should also be to assist the judge with the investigation of historical interests and the legislator in preparing proposals for new laws (Heck 1929, 471).

This is a continuation of the shift of focus which already set in during the second half of the nineteenth century away from legal scholarship dedicated to seeking the *truth* to legislation and case law guided by the *will* (voluntaristic concept of law). However, even in the founding generation not all proponents of the Jurisprudence of Interests shared Heck's rigorous limitation of the role of legal scholarship. Rümelin and Stoll, for example, were unwilling to deny the usefulness of the concepts and methods of legal scholarship, and even of the inversion method, as provisional decision-making hypotheses – subject, however, to an investigation of interests – for judicial practice (Rümelin 1922/23, 350–354; Stoll 1931, 115).

Criticism

Notwithstanding its undisputed achievements and the influence it still exerts to the present day, the Jurisprudence of Interests was not free of faults and one-sidedness. The "technical Jurisprudence of Concepts" attacked by the proponents of the Jurisprudence of Interests may be described from today's historical perspective as a somewhat simplified "construction typifying an idea" allowing them to gain better prominence for their own opinions (Ellscheid 1974, 10). Furthermore, Heck's accusation of deliberately obscure production of norms (Heck 1932, 3f.) ignores the other, quite different, theoretical premises from the period of the German Historical School of Jurisprudence, which caused even Jhering still to assume analogous laws in nature and the mind and an inner connection between what is and what ought to be, between truth and justice.

Today's critics of the Jurisprudence of Interests also claim that the very method of the Jurisprudence of Interests itself failed to reflect in any detail on its *own* theoretical premises (Ellscheid 1974, 4, 7). This allowed Heck to preserve the illusion that "the method of the Jurisprudence of Interests [took] its principles solely from the experience and needs of the work of jurists." The "juristic independence" of this method of legal scholarship from all other "neighboring legal sciences" (Heck 1932, 20f., 25), even from the "hermeneutics of Philology" (Heck 1914, 24), distorted the ability to see connections across scholarly disciplines, which Savigny, on the other hand, the founder of the German Historical School of Law criticized by Heck as the

"Jurisprudence of Concepts," was still able to see. It is the legal hermeneutics of Savigny, formulated on the wave of a reformation of general hermeneutics in contemporary philology around 1800, which has such a crucial influence on the legal hermeneutics which dominates legal scholarship in the German-speaking countries today (Meder 2004, 24–27, 85–105, 204–221).

The ambiguity defended by Heck of the term "interests," covering as it does both the interests which are causative for the law and the presumed effects of the law on interests (Heck 1932, 41f.) and not differentiating in principle between actual life interests and normative values, has frequently been criticized. In the second half of the twentieth century this even triggered a further development of the Jurisprudence of Interests bearing Heck's stamp into the Jurisprudence of Values (Auer 2008, 522f.).

Heck 1933a, 14 himself later admitted that comprehensive investigation of interests was hardly practicable in the day-to-day professional working life of a judge ("demands self-discipline") and at Stoll's suggestion it was relaxed, at least for the "mass" of simple legal cases needing to be decided quickly (Stoll 1931, 90f.; Heck 1932, 115f.).

Above all, however, Heck's critics have to the present day considered his "methodological U-turn" away from the formation of concepts and systems to be historically "understandable [. . .], but exaggerated and misplaced," which can be seen especially in the filling out of general clauses (Wolf 1996, 303f.) and the balancing of legal principles. On the whole, it is claimed that by focusing on the investigation of historical interests and the will of the legislator in relation to individual laws, the Jurisprudence of Interests neglects the importance of independent evaluation by the judge and shows no understanding for the unity of the system of legal values (Schoppmeyer 2001, 268f.).

Reception History

The history of the Jurisprudence of Interests as a methodology dominated by Heck came to an end in Germany in the National Socialist era, when the Jurisprudence of Interests came under strong pressure because of its alleged intellectual origins in the liberalism and individualism of the nineteenth century. Heck, and indeed Stoll, countered this accusation in their final theoretical treatises in defense of their methodology (1934–1937) by attempting to demonstrate the compatibility of the methodology of the Jurisprudence of Interests with the aims of Nazism.

The reception history of the Jurisprudence of Interests in Germany since 1945 is marked by the fact that, on the one hand, central topoi of the Jurisprudence of Interests such as "conflict of interests" and "balancing of interests" have become uncontested common currency in all areas of legal methodology as well as in the practice of the courts, in particular of German constitutional jurisprudence. On the other hand, even those methodological theorists who are in the tradition of the historical Jurisprudence of Interests have dropped anachronistic characteristics of Heck's theory such as the almost scientific-mechanistic manner in which his "genetic theory of interests" was understood. This involved a shift from historical investigation of interests to the evaluation of interests, from the historic will of the legislator (*ratio legis*) for the individual law being applied by the judge to the value system of the law that can be derived from the unity of the legal system as a whole (*ratio juris*) as a potential authority for supplementing and correcting legal principles and individual laws. So too has Heck's theory of subjectively historical interpretation been superseded since Harry Westermann (1951ff.) by the theory of objectively teleological interpretation which is dominant today. These modifications in terms of content of the "Jurisprudence of Interests" which, in Germany, is inseparably linked to Heck's name are also manifested in the terminology of what German theorists of method today prefer to call the "Jurisprudence of Values," using the term proposed as early as 1931 by Stoll. This has become a collective label for the – far from homogenous – legal methodologies in the tradition of the historical Jurisprudence of Interests (Schoppmeyer 2001, 220–285; Petersen 2001, 9).

The question as to whether and to what extent there is such a thing as international reception of German Jurisprudence of Interests has remained an unfulfilled research objective to the present day. Heck himself explicitly wished for international discussion and reception and for this reason even favored the term "Jurisprudence of Interests" as being linguistically compatible internationally (Heck 1932, 51). However, selections from Heck's were not translated into English until 1948, after his death, and hardly elicited any reaction at all internationally.

On the other hand, it is also a fact that related methodologies were being developed in the USA and in France around 1900, although the legal parameters there, especially in US common law, were different from those in Germany. It is only in recent years that more focused international research efforts have been made to undertake comparative theoretical history studies into this Jurisprudence of Interests in the *widest* sense, as it is now in retrospect being called. These have found that the central idea of closing lacunae by means of a comparison and balancing of interests was already present as early as 1899 in the work of the French jurist François Gény (Bomhoff 2013, 56–60). Moreover, it has now become clear that three legal scholars – Philipp Heck (1889ff.) in Germany, Oliver Wendell Holmes Jr. (1894ff.) in the USA, and René Demogue (1911) in France – in three different legal systems were almost simultaneously, but, as far as we know today, without any knowledge of each other, taking the step from Jhering's jurisprudence of purpose, or teleological jurisprudence, to the judge-based theory of interests and purposes of the law conflicting with each other and being weighed up against each other (Kennedy and Belleau 2006, 168ff., 176, 181ff.; Kennedy 2011, 194ff.).

Conclusion

In conclusion, a distinction can be drawn from today's point of view between (1) the historical Jurisprudence of Interests as a legal methodology in Germany which was dominated by Heck in the first half of the twentieth century and which centered on investigation of interests by the judge and the binding of the judge to the historical will of the legislator; (2) the directions taken in the second half of the twentieth century developing out of the Jurisprudence of Interests approach, generally known in Germany as the Jurisprudence of Values, with a particular view to the problem area of the unity of the legal value system and evaluations undertaken within the discretion of judges; and (3) what is only today known as the Jurisprudence of Interests in a wider international sense, the proponents of which, especially in the USA, began, almost at the same time as the Jurisprudence of Interests in Germany, to develop those ideas which are today central to all legal theory of the conditionality of the law on conflicting interests and the necessity for legislation and the courts to weigh up interests and values, thus drawing conclusions in terms of legal theory and methodology from the formation of a pluralistic society.

Cross-References

- ▶ Hermeneutical Legal Theory
- ▶ Is and Ought Distinction in Legal Philosophy
- ▶ Legal Positivism: Inclusive
- ▶ Legal Realism, American: Theoretical Aspects

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Justice

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Introduction

Justice is a broad concept – John Rawls called it "the first virtue of social institutions, as truth is of systems of thought" (Rawls 1971, 3). Nevertheless, justice does not compass all of practical reason; and to call an action "just" is not simply another way of saying that it is what an agent, all-things-considered, has most reason to do. Rather, justice emphasizes that part of practical reason that concerns how persons should live together, alongside one another, in light of the fact that each person's life constitutes a free-standing source of moral value. Competing approaches to justice give this part of practical reason a broader or a narrower focus. Broad conceptions treat justice as compassing all of morality as applied to collective life, so that a theory of justice comprehensively describes the conditions of communal and individual flourishing. Narrow conceptions limit the domain of justice to giving every person their due and emphasize that justice imposes a set of directed obligations on agents, owed to each person who claims their due, one-at-a-time. (Narrow approaches came to dominate philosophical treatments of justice in the second half of the twentieth century, and for this reason the unmodified term will, going forward, be used to refer to justice narrowly understood.) Many narrow approaches to justice (including both Rawls's and the utilitarian and libertarian conceptions that he took as his principal competitors) are not only narrow but imperialistic, taking the reasons for giving every person their due to dominate other ethical considerations, such as excellence, beneficence, mercy, or repair (Williams 1986). This feature of narrow approaches to justice, combined with their recent dominance, has led some moral theories that view collective flourishing more broadly to frame themselves as criticisms of justice (Tasioulas 2013).

The connection between justice and what is owed immediately entails that justice concerns relations among persons rather than between a person and fate or the natural world. Laws of nature, or simply good- or ill-fortune, cannot be either just or unjust. Rather, ought implies can; and a state of affairs may be aptly evaluated for its justice only where it might possibly have been otherwise and where there exists an agent who might have prevented or might now reverse or at least remedy it. This focus gives justice a structural connection to the right rather than to the good (an arena where prudence figures as the central virtue). It also establishes the domain of justice. Where superabundance makes it unnecessary to choose whose interests to favor, and also where insufficiency makes it impossible to serve anyone's interests, justice has no purchase. Instead, claims of justice characteristically arise under conditions of moderate scarcity, in which conflict requires balancing people's interests against one another. Justice is therefore especially important in allocating positional goods, including in particular status and its concomitants, whose value depends not just on a person's absolute holdings but also on whether that person has more or less than others do.

The Scope of Justice

Justice is owed to all persons, and both social and philosophical movements concerning justice have (historically and still today) worked to expand the set of beings whose personhood, and entitlements to equal justice, are fully recognized. Ideals of justice that privileged a narrow elite (aristocratic, white, male, propertied) have – by fits and starts and imperfectly, but in material ways – been displaced by ideals that apply a uniform standard of justice, and grant equal concern and respect, to all people. Unsettled frontiers for the scope of justice remain, however, even for those who embrace universalism in principle. Do the unborn count as persons for purposes of justice? (This question, which concerns the scope of justice, is distinct from the further question asking, if they do count, how justly to balance the interests of

unborn fetuses against the interests the women who bear them.) Does justice require reciprocity, so that a creature must be subject to the demands of justice in order to assert an entitlement to just treatment, and how does this question influence the justice-claims of non-human animals? And do the demands of justice compass artificial persons including corporations today and, perhaps in the future, AIs?

Another set of questions asks in what capacity the subjects of justice assert their claims of justice, and in particular whether they assert claims purely and exclusively as individuals or also as members of (unjustly disadvantaged) groups. These questions become especially pressing in connection with justice claims that are related to discrimination and racial, ethnic, gender, and sexual identities. Can claims of racial discrimination, for example, be rendered intelligible as purely individual wrongs, without making reference to the collective identities and forms of group-based subordination by means of which the social construct "race" arises? (Fiss 1976). Similarly, can racial subordination be adequately redressed by purely individualistic remedies, or does racial justice require remedies that directly address and deploy the racial categories on which discrimination is based? These questions have immediate and enormous practical importance, including for legal debates about how to understand constitutional guarantees of racial equality. An individualistic anti-classification agenda would forbid states from ever using race or racial categories in administering their policies; while an anti-subordination agenda, which sees group identities as essential to understanding racial discrimination, would require states to act affirmatively to dismantle racial hierarchies. (Siegel 2004). This contrast substantially drives debates over affirmative action or positive discrimination. Anti-classification approaches to racial equality reject these policies as impermissibly racialized; whereas anti-subordination approaches view the policies as essential to undoing structural discrimination and hierarchy.

A final set of questions about scope concerns the role that institutions play in underwriting the demands of justice. On the one hand, can claims of justice arise among any group of people, or only among people who share institutions (or even certain kinds of institutions), perhaps because a collective scheme (of a certain sort) must exist before people can assert claims to their due shares under the scheme? On the other hand, do the demands of justice – including especially claims of distributive justice – apply only to a society's fundamental institutions or also more broadly, including directly to individuals? (Cohen 1997).

Once again, both questions have substantial practical importance. The answer to the first question informs assessments of global economic arrangements: is the global political, legal, and economic order the sort of scheme whose institutions render inequalities unjust; or are the global poor limited to asserting humanitarian claims based on dire absolute need? (Pogge 2002; Nagel 2005). The answer to the second informs individual responses to injustice even within a state: Do rich citizens (who have more than their due) owe their poor compatriots only a mediated duty to act, in politics, to promote just state policies; or do the rich have an immediate duty to act individually (perhaps by making private payments) to divest themselves of their unjust advantages and to relieve the unjust disadvantages suffered by the poor (including even where there is no public policy or general practice of redistribution)? (Cohen 2001).

Types of Justice

Principles of justice may usefully be divided into types, arranged along three dimensions. The first dimension concerns the sphere within which justice applies and distinguishes familiarly between distributive and corrective justice and (a little less familiarly) between both of these and relational justice. The second dimension concerns the form that justice takes and distinguishes between substantive and procedural conceptions of justice. And the third dimension concerns the focus of philosophical argument and distinguishes between ideal and non-ideal theories of justice.

A familiar distinction differentiates distributive and corrective justice (Aristotle, book V). Distributive justice concerns the allocation of the full benefits of a collective endeavor (typically, of social cooperation, writ large) among all participants in it. Distributive justice therefore applies across a broad sphere of goods, potentially including resources or access to advantage quite generally, and has a multi-lateral quality, insisting that every person gets their due as compared to every other person. Corrective justice, by contrast, concerns each person's entitlement to have their established holdings protected against wrongs by others. Corrective justice therefore applies narrowly (even conservatively) to protect legitimate expectations and has a bi-lateral quality, connecting particular entitlement holders to particular transgressors. These differences straightforwardly entail that distributive and corrective justice can push in opposite directions. For example, if a poor driver negligently crashes into a rich driver's car, corrective justice may require the poor driver to repair the damage, even as distributive justice requires a transfer from the rich driver to the poor. Other aspects of the relationship between distributive and corrective justice are less straightforward. On the one hand, it is not clear that corrective justice can be rendered intelligible save in the shadow of distributive justice, as distributive principles are required for setting the baseline entitlements that corrective justice protects. These considerations have even led some theorists to suspect that corrective justice – and the notions of wrong, responsibility, and legitimate expectations that corrective justice invokes – may be reduced to an application of distributive justice (Coleman and Ripstein 1995; Murphy and Nagel 2004).

On the other hand, it is not clear that principles of distributive justice can ignore the notions of legitimate entitlement and individual responsibility that corrective justice emphasizes. These considerations have even led some theorists to suspect that distributive justice may be reduced to an application of corrective justice – that any defensible conception of just multi-lateral distribution must track the historical path of just acquisition and just bi-lateral transfer (Nozick 1974).

A slightly less familiar, relational approach to justice elaborates the just allocation of benefits and burdens associated with a particular relationship – a family, a firm, a guild, a friendship, or even a long-term contract – and therefore applies at a scale in between distributive and corrective justice (Ackerman 1997). Theories of relational justice emphasize principles that reject exploitation and demand good faith. Often, such theories engage hermeneutically with particular relationships, to divine the principles of allocation that people who embrace these relationships in good faith will adopt (Walzer 1983). The interactions between relational justice and its corrective and distributive counterparts can again be complex. Insofar as relationships build on prior entitlements and reallocate established holdings, relational justice will reflect (and might be reduced to) corrective justice. And insofar as relationships collectively constitute the general scheme of social cooperation that allocates advantage overall, relational justice must respect (and might be reduced to) distributive justice.

Theories of justice may also be classified, along a second dimension, according to whether they style themselves as substantive or procedural. Substantive theories seek directly to identify the outcomes that justice requires – to describe the allocations of benefits and burdens that deliver every person their due share. For example, the rule that justice requires that some good be apportioned equally among all people states a very simple substantive principle of justice. Procedural theories of justice approach giving all people their due indirectly, by elaborating processes that will yield justice when followed. Some versions of procedural justice seek to design mechanisms that may be used to achieve substantive outcomes whose justice is determined by considerations that stand apart from the procedures used to produce them. Perfect procedures are guaranteed to achieve these outcomes: for example, if a just distribution of a cake between two people requires both to get precisely half, then allowing one to cut and the other choose is a perfect procedure for producing this outcome. Imperfect procedures tend toward just outcomes, but with a possibility of error. Criminal trials tend

to convict the guilty and acquit the innocent, but they sometimes go wrong; and adversary criminal procedure aims, among other purposes, at reducing their error rates. Other versions of procedural justice reverse the direction of inference and make a procedure constitutive of the justice of the outcomes that it produces. Rawls calls this pure procedural justice, and he proposes his Original Position (in which people are imagined to choose principles of justice behind a Veil of Ignorance that prevents them from knowing what place they will occupy in the society that these principles govern) as an exemplar of pure procedural justice with respect to distributive justice. (Rawls 1971, 74).

The turn to procedure brings theories of justice into contact with an adjacent concept, political legitimacy, from which they should be distinguished. Political arrangements are legitimate insofar as there are grounds for agreeing about which rules to obey even in the face of (intractable) disagreement about which rules to adopt. (Legitimacy may arise de facto, insofar as people do agree about which rules to obey, or normatively, insofar as people have reason to agree about which rules to obey.) Importantly, political arrangements maybe legitimate even when they are not just. (Where reasonable disagreement about justice is ineliminable, the legitimation of arrangements that some reasonably think unjust becomes especially important.) Procedures – including some of the same procedures deployed by procedural theories of justice – often legitimate, both de facto and normatively. (Tyler 1990; Rawls 1993). But this does not reduce legitimacy to justice. Indeed, the procedures' powers to legitimate outstrip their capacity to settle (reasonable) disagreements about justice.

A final dimension for classifying theories of justice distinguishes between ideal and nonideal theories. Ideal theories proceed counterfactually, specifying what perfect or complete justice would require of each person, always imagining that all of the other people that they describe conform their conduct perfectly to justice's demands. Nonideal theories begin from actual arrangements – including by identifying existing injustices – and ask what justice requires of each person, in the context of these injustices. The relationship between ideal and nonideal theory is disputed. Some argue that ideal theory must come first, because existing injustices can be reliably identified and fully characterized only by reference to the ideal. On this view, nonideal theory's principal contribution to the study of justice is to elaborate how just people should react a compromised world. Others reject the primacy of the ideal and claim that it is possible to identify injustices, especially grave ones, directly and without measuring them against a perfect world. On this view, nonideal theory comes first, and one of its main contributions is educative and instructive – to identify (grave) injustices and focus practical work on stopping or even rectifying them.

Skepticism About Justice

Political and philosophical traditions that approve of justice enjoy a high profile among both intellectuals and social and political actors, and these traditions are widely celebrated as among the signal moral achievements of human history. This can make it appear that justice is obviously desirable and that, once internal disputes about justice are resolved, one or another theory of justice should organize political thought and action. But powerful traditions remain skeptical of justice – at least on the narrow approach that emphasizes giving everyone their due – and argue that giving justice a central role in practical reason distorts ethics and politics and sets back human flourishing, especially in its communal forms, more broadly understood. Marxists, certain feminists, and certain critical race theorists embrace varieties of the skepticism, as (although in a very different way) can utilitarians.

Marx, although of course critical of capitalism, resisted framing his criticisms in terms of justice, at least where justice is understood as giving every person their due. He believed that this justice frame implicitly embraces a juridical conception of society and mistakenly places the state at the center of social thought. (Wood 1972). To do this is to decenter production and in particular to fail to

recognize humanity's distinctive nature as a self-producing laboring species and the state's place as just one force within a mode of economic production. Moreover, the idea that distributive justice requires giving each citizen a fair share of the benefits of social cooperation treats each person as an abstract juridical subject and therefore prioritizes individual over class interests. Claims of justice therefore implicitly adopt precisely the conception of the person – as a purely abstract, formal, individual legal subject – that lies at the heart of market exchange. It is no coincidence, some Marxists say, that contract provides the model for leading liberal theories of justice, which proceed in the social contract tradition (Pashukanis 1924, 109–133). For all these reasons justice is revealed, on this reading of Marx, to be literally a bourgeois concept.

Certain feminists propose formally similar, if substantively very different, critiques of justice – or at least of placing justice at the center of political thought. Feminist ethics of care emphasize empathetic responses to particularized felt needs – experienced in both personal and political contexts (Noddings 1984; Held 2007). These ethical approaches worry that actuarial or otherwise calculated tabulations of abstracted entitlements or interests, of the sorts that dominate theories of justice, neglect important virtues and draw an incorrectly sharp distinction between rational judgment and emotional sentiment. They worry, further, that when theories of justice focus on entitlements vis-à-vis that state, they neglect private power, hierarchy, and subordination. In addition, some feminist theorists worry that justice-based practical thought denies central features of girls' and women's moral experiences and educations.

Some critical race theorists also condemn justice-based political thought and in particular the philosophical traditions that deploy social contract theory to develop principles of equal treatment for all persons, in light of their universal humanity. (Mills 1997). The trouble with such universalist theories of justice, these theorists say, is not just the obvious one that the theories have tended, in historical fact, to limit their reach to white people of European origin, excluding people of color from the protection of the universalist umbrella. Rather, universalist justice affirmatively harms non-white people. The emphasis on universal equality distracts political thought and action from immediate and profound racial inequalities and can even disguise powerful forms of racial subordination. This complaint is related to the nonideal theorist's complaints about ideal theory. Moreover, universalist principles of justice make existing exclusion and subordination worse. It is bad to be consigned to a subordinated caste in an open caste order, based on explicit principles of hierarchy. But it is much worse to be consigned to subordination in a regime that purports to demand justice and inclusion equally for all persons, based on principles of universal humanity. If such a regime excludes nevertheless, then the regime must insist that those whom it subordinates are not in fact persons at all, so that they fall outside of the protections that justice accords to all who are persons. This theoretical insistence, moreover, has practical consequences, perhaps no place more so than in the United States, whose slave law treated enslaved persons as chattel and was on this account especially brutal, even as compared to other forms of slavery. Other regimes constructed slavery as a status that a person might have; but chattel slavery, following the inexorable logic of justice against a backdrop of universal human equality, could rationalize its subordination only by denying that slaves are persons at all, and subjecting enslaved persons to the extreme forms of brutality that follow inexorably from this denial.

A final variety of skepticism about justice comes from a more surprising source, with a different political valence, namely, utilitarianism. The utilitarian insistence that the good is prior to the right puts pressure on the very idea of giving every person their due and therefore on justice also. To be sure, some utilitarians (including prominently both Mill and Sidgwick) devote considerable effort to showing that utilitarian reasoning can sustain versions of many of the substantive rules of conduct that constitute everyday morality, including some principles of justice (although others, perhaps most notably Bentham, were less inclined in this direction).

But even where utilitarianism coincides with principles of justice, it does not endorse them, at least not as principles specifically of justice. "Utilitarianism," as Rawls has said, "does not take seriously the distinction between persons;" (Rawls 1971, 24), and the structure of utilitarian thought therefore rejects the idea that individual entitlements or obligations – to receive or provide a person's due – play any fundamental role in morality. Accordingly, utilitarianism threatens not just to colonize but to eliminate other parts of ethics, so that justice can only be a special case of doing what is all-things-considered best, which is precisely what (for all its breadth) this entry began by insisting that justice is not.

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Justice: Amartya Sen's Perspective

► Sen, Amartya: On Justice

Justice: And Beauty

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Both *beauty* and *justice* have in English a shared synonym: the word "*fairness*." In the realm of beauty, we every day speak about fair vistas and fair skies and fair faces. So, too, in the realm of justice, we speak about fair playing fields and fair arrangements. The word "fair" in "fair play" and "fair practices" comes etymologically from the aesthetic word for fairness meaning loveliness of countenance or perfection of fit. Both beauty and justice have "*injury*" as their opposite term. In the realm of justice, this is literally the case: the second syllable of "injury" is the same root as in "justice"; and "injury" is arguably the most accurate opposite to beauty.

When we speak about beauty – whether it's a poem by *John Keats* or the account of African-American "*Sorrow Songs*" given by *W. E. B. DuBois* or a painting by *Matisse* or a lover's face or a mathematical proof or a principle in physics or the structure of DNA – we are speaking about three different sites and at each of them the connection between beauty and justice can be glimpsed.

First, often when we speak about beauty, we are speaking about the beautiful thing itself: so, the beauty of Dante's Beatrice, or the beauty of a particular Greek vase, or the beauty of a river, or the beauty of Maxwell's equations, or the beauty of a snowflake. When doing so, we often talk about the formal features of that thing that account for its beauty, such as symmetry, vivacity, and unity. In the **Second** site of beauty, we speak not about the object – the face or the sunset or the flower – but about the experience of the perceiver when that person comes into the presence of the beautiful thing. Over centuries, we have scores of accounts of this phenomenon, probably most famously when Socrates in *Plato's Phaedrus* talks about coming into the presence of a beautiful youth and finding that his knees buckle, he breaks into a sweat, and out of his shoulder blades, feathers begin to grow. John Keats describes the moment he opened and began to read Chapman's translation of Homer: "Then felt I like some watcher of the skies / When a new planet swims into his ken. . ." The **Third** site again involves the perceiver, but this time, it is not the perceiver in the first split second after coming into the presence of the beautiful, but in the minutes or hours or days or even months in the aftermath, and what happens in that aftermath is an act of creation.

One can go back through each of those three and perceive how it comes to be a precursor and a pressure towards *justice*. So, the **first** site: the vase, or the flower, or a lover's face, or a child's face, or a painting, or a poem, or $2 + 3 = 5$. Formal attributes such as *symmetry* or *vivacity* anticipate parallel but much more difficult to attain attributes in the realm of justice. The symmetry of the beautiful face, or poetic meter, or equation anticipates *John Rawls*'s definition of *justice as fairness*, in which fairness requires a symmetry in our relations with one another. Today, Rawls's theory of justice is one of the most widely known theories of justice, but over many centuries, it is hard to find *any* theory of justice that does not focus on symmetry, whether it is a symmetry that must exist between crimes and *punishments* (an issue *Plato* raises and one to which we still haven't figured out the answer), or between work and compensation (as in the writings of *Marx*), or between an object and its price (as in the "just price" arguments of *Aquinas* or the "supply and demand" arguments of *Adam Smith*) or even *Hume*'s idea of *symmetry* between expectations and their fulfillment.

We again see an anticipation of "*justice*" when we turn to the **second** site of *beauty*, not the beautiful object itself but the *cognitive event* that happens when the perceiver comes into the presence of the beautiful object. Of hundreds of accounts we have of this moment, two of the most striking are given by the mid-twentieth century philosophers, *Iris Murdock* and *Simone Weil*, who speak of the "*unselfing*" or "*radical decentering*" that comes about in the presence of beauty. Iris Murdoch gives the example of being in a state of self-preoccupation, worrying about her work, wondering whether her own status and stature have been fully enough appreciated, and then suddenly seeing a bird – a kestrel. At that moment, she says, all one's self-absorptions fall away and one undergoes an unselfing. The French philosopher and mystic *Simone Weil* referred to this phenomenon as "radical decentering" because we are suddenly swept to the sidelines of our own world. There are many things in life that give us pleasure and many things in life that make us feel marginal, or lateral; but perhaps, only in the presence of the beautiful do the two happen simultaneously. Beauty makes us feel pleasure at the very moment we feel marginal. Beautiful things make us happy to be in a supporting, rather than a central, role. None of us is the center of the world, but we can easily make the mistake of believing so. Beauty relieves us of this misconception. It not only puts us on the sideline but makes us acutely happy to be there. Becoming capable of experiencing bliss at one's own lateralness may not be itself a state of *justice*, but it may prepare us for doing such work in the world. *Murdoch* arrives at her account of beauty by asking, "What is it that helps us to become *good*?" Not, she stipulates, what helps us to speak about being good, but what helps us actually to be good. She concludes that of all things, it is *beauty* that does this.

At the **third** site of beauty, one is speaking again of the perceiver, but this time the perceiver in the enduring aftermath of coming into the presence of what is beautiful. Accounts given over many centuries report the link between exposure to the *beautiful* and the desire to *create*. *Diotima*

told *Socrates* who told *Plato* who tells us that the beauty of the face of the person one loves gives rise to the desire to bring children into the world. But Diotima says that beautiful persons and things prompt not only the *creation* of children but the creation of poems, plays, laws, and philosophic treatises. Twentieth-century philosophers agree with Diotima and Socrates and Plato. What it is, *Wittgenstein* asks, that happens to us when we come into the presence of a beautiful cathedral or boy or flower? He answers: When the eye sees something beautiful, the hand wants to draw it. Mathematicians, too, focus on this creation that comes about with each new solution. *Robert Langland* says, "*Math* must be pregnant with possibility and endure for millennia." Astro-physicist *Mario Livio* says that mathematicians saw that many new things came about after cubic and quadratic equations and made people hope that *quintic equations* would be equally fertile. Instead of the word "*creation*" the alternative and more prosaic word "*replication*" may be helpful because this second word makes clear how widespread the impulse is. There may be great outcomes to seeing someone or something beautiful – such as a painting or conceiving and giving birth to a child – but the same impulse is evident even in the fact that when we see something beautiful, we want to pass it on and tell someone else. Or, if we see something beautiful, we want to photograph it. When we come upon a ravishing passage in a novel or a poem, one wants one's students, one's teachers, one's friends to read the passage. The very *brevity* of some beautiful things – such as flowers and faces – goes along with the impulse to create: it is as though we say, this particular instance of beauty may soon disappear but by the time it does, I will have passed it on, as will the next person, and the next, thereby keeping it perpetually in the world. *Beauty* is the guarantor of its own *stay* in the world.

How is this **third** site – the *instigation to creation* – connected to *justice*? It is in two ways. First, beauty may be either *natural* or *artifactual*; it may occur in a field of wild flowers or along the highway, or instead in a painting of wildflowers (as in *Monet*) or a poem about wildflowers (as in *Ophelia*'s song in *Shakespeare's Hamlet*). Justice, in contrast, is always artifactual. It always requires human intervention and work and creation. Anything which puts us in touch with our own powers of creation is therefore a contribution to the ongoing aspiration for justice. The philosopher *David Hume* is among those who have emphasized this point. Hume says that a "*natural virtue*" is one which has to have a benign outcome to be good; whereas an *artifactual virtue* need not have any immediate useful outcome since the mere exercise of the capacity for artifice is itself a virtue. It keeps limber the ability we are going to need in many different circumstances not to simply accept what is given but to change and create a different world. The second way in which beauty by at once awakening us to our capacity for the artifactual contributes to justice is simply that is tied to the desire to bring more and more into the world so that there is eventually enough. This impulse toward plentitude has many names. In past centuries, it was apprehended in terms such as *Infinity* or *Caritas*. It can be recognized today in the language of *fair distribution*, as in the recognition that more and more health care (vaccines, antibiotics, bandages, kindness) needs to be made so that it can be available to all who want it. This third site is important both because it incites us to the exercise of the artifactual needed in the realm of justice, and because it is bound up with the pressure towards *distribution*, the making of more and more until there is finally enough.

Beauty, as noticed above, perpetuates its own stay in the world; and it may also encourage us to "*stay in the world*." Poets, philosophers, and art theorists have over millennia seen beauty as a *life pact*. In the sixth book of the *Odyssey, Homer* describes the moment when Odysseus is saved from the man-killing ocean. He sees the child Nausica and sees in her new life, new bornness. So, too, *Augustine* in *De Musica*, describes beauty as a life-saving "plank in the midst of the ocean." *Dante*, seeing Beatrice's face, was inspired to write the *Divine Comedy;* but first he wrote *The New Life, La Vita Nuova. Rilke* in "*The Archaic Torso of Apollo*" says beauty confronts us with the imperative, "You must change your life." *Kant* in *The Third Critique of Judgment* repeatedly asks us to recognize the bond between beauty and "aliveness," as the philosopher *Rudolph Makkreel* makes us aware. There are examples from other

cultures. When anthropologist *Francesco Pellizzi* asked a group of Native Americans what was the word for "beauty" in their language, they answered: "aliveness."

Is this widespread assertion of the bond between *beauty and aliveness* really the case? Or is it wishful thinking? The idea may sometimes be embedded in a melodramatic vocabulary – "life-saving planks in the midst of the ocean" and rescue from "man-killing seas" – but it contains two literal claims. One is that an encounter with beauty repairs the ground and restores our *trust* in the world. It puts ground under our feet. It is a feeling state that affirms our wish to *stay* in the world. Second, it demands of us a higher level of *perceptual acuity*, a *vivacity* of *perception*. It raises the bar for what counts as *perception*. The beautiful thing may awaken us to higher levels of attention which we can then give even to objects that earlier seemed ordinary to us. When a person walks down the street and is suddenly stopped in their tracks by a beautiful face or flower or sunset, is it more often the case that the person had been walking along generously contemplating the world and its problems, or instead that the person was in a comparative state of numb inattention until the face or the flower or the sky suddenly brought a high level of *attention*?

Is this life pact only one-directional? Beautiful things, like poems and math equations, heighten our own *aliveness*. But in what sense does the *reciprocal* act occur? The answer is this: it elicits from us the desire to protect and take care of things if the thing is already alive, such as a garden, or a stream, or a child, and it gets us to confer the privileges of *life-likeness* onto the thing, if it is an artifact and not actually alive. If a painting is stolen from the *Gardener Museum in Boston* or from the *National Gallery in Berlin* or from the *Songgwang Temple* in Suncheon, we have concern for its surface and wellbeing, as though it were alive and itself *sentient* and subject to *injury*. To become the steward or *guardian* or protector of such things is the work carried out by museum curators, librarians, and teachers; but it is also an act of *stewardship* that is carried out every day by people everywhere.

Beauty and *justice* are, then, allied in three ways: the *formal features* of a beautiful object anticipate those same formal features in the difficult to attain sphere of justice; beauty brings about in the perceiver an *unselfing* that is prelude to a *fair* stance in a shared world; and beauty instigates in us the impulse to *create*, an impulse needed to bring about *just arrangements*. Along the way, beauty perpetuates its own presence in the world and affirms our commitment to *staying in the world*. Should justice one day be instantiated on earth, it will itself have these same three features: in form it will be *symmetrical* and *vivid* (a sphere, everywhere equidistant from the center); its inhabitants will be at ease in their universally *lateral positions*; it will incite its inhabitants to perpetuate it, as when long ago *Aristotle* observed that a good government is one that makes its citizens desire to be good.

Cross-References

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- ▶ Aquinas, Thomas
- ▶ Burke, Edmund
- ▶ Cassirer, Ernst
- ▶ Dewey, John
- ▶ Emerson, Ralph Waldo
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- ▶ Lessing, Gotthold Ephraim.
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- ▶ Shaftesbury (Anthony Ashley Cooper)
- ▶ Thoreau, Henry David
- ▶ Weil, Simone

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Justice: And Children

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Introduction

Sustained attention by political philosophers to how accounts of justice should speak to the distinctive interests and claims of children is a

relatively recent phenomenon. The highly influential contemporary theories of justice articulated by figures such as John Rawls (1993, 1999, 2003), Robert Nozick (1974), Ronald Dworkin (2000), G. A. Cohen (1989), and David Gauthier (1986) contain almost no discussion of the justice-based entitlements of children. Even feminist theories that focused attention on issues of gender in relation to the family devoted little direct attention to the claims of children (Okin 1989). This neglect is due, at least in part, to the assumption that the main questions for a theory of justice concern the principles that should regulate the interaction of competent rational agents who are engaged in various forms of mutually beneficial cooperation. Since children do not begin life as such agents and only gradually acquire agential capacities, they fall outside the ambit of justice so conceived. Most theorists implicitly recognized that children do have some justice-based entitlements connected to promotion of their basic welfare and healthy development into mature agents. But express analysis of these entitlements was sparse, and it was widely assumed that attending to the needs of children is principally the responsibility of parents and families. There is now widespread recognition that a comprehensive theory of justice must grapple directly with children's complex and evolving interests (Archard and Macleod 2002; Richards 2010; Brighouse and Swift 2014).

Justice and Children's Rights

Considerations of fundamental justice are frequently linked with the idea that justice involves, at least in part, the recognition of individual rights. Some basic moral rights, such as the right to life, that are attributed to adults seem to extend to children. In normal circumstances it is a great moral wrong to kill children and a just society affords all its members, including children, protections against murder and other forms of wrongful killing. By the same token, some basic rights that are routinely attributed to competent adults, such as basic liberty rights, seem ill-suited for young children and only seem suitable to older children in qualified ways. Because children lack the agential capacities requisite to autonomy and only acquire these capacities gradually, the assignment of autonomy protecting rights to children is not appropriate. In light of the partial differentiation between the rights of children and adults, Feinberg drew a tripartite distinction between "A rights" (rights held only by adults), C rights (rights possess uniquely by children), and "A–C rights" (Feinberg 1980). A good deal of attention is now devoted to the analysis and elaboration of "C rights." Some so-called child liberation theorists denied that there were significant differences between the rights of adults and children (Farson 1974; Holt 1975). This position has little traction today.

Skepticism About Children's Rights

Although there is agreement that children have key interests that merit protection and that justice must be suitably responsive to these interests, some theorists are skeptical about attributing rights to children at all. This skepticism takes different forms. Some skeptics about children's rights adopt a will or choice theory of rights according to which the fundamental moral function of moral rights is to protect the exercise of agential capacities (e.g., rational autonomy) (Griffin 2002, 2008). On this view, children are disqualified as bearers of rights because they lack the developed agential capacities that are alleged to be prerequisites of having moral rights. Defenders of this kind of justificatory skepticism do not deny that children can be seriously wronged by actions such as torture or murder that would constitute violations of the rights of adults. And they allow that it may be appropriate to assign legal rights to children that function to protect fundamental interests of children. However, they insist that the wrongness at stake in the murder or torture of children does not involve a violation of a moral right.

A different form of skepticism about children's rights is focused on the putatively damaging effects on relations between children and adults, especially parents, of employing a discourse of rights to regulate ordinary relations between

children and adults (Hardwig 1984; Shoeman 1980; Glendon 1991). The suggestion here is that rights discourse can have a corrosive effect on values such as familial intimacy that advance the interests of children and adults alike. Viewing children via a lens of rights is said to create alienation and antagonism between parents and children of a sort that is inimical to love and emotional closeness between family members. A different facet of discourse skepticism is that an emphasis on rights can lead to a distorting inflation of rights claims in which small or trivial interests of children get elevated to the status of rights. Properly caring for children is less a matter of enumerating and responding to their rights and more a matter of attending to their, often idiosyncratic, interests, desires, and needs in a context-sensitive matter. The universalizing character of rights discourse can present an obstacle to exercising parental authority over children in an appropriately nuanced fashion. Discourse skepticism about children's rights need not rest on the denial that children are, strictly speaking, bearers of some moral rights and it is not, therefore, committed to the will model of rights.

The Content of Children's Rights

A standard alternative to the will model of rights is the interest model in which the core function of moral rights is to identify certain fundamental interests as worthy of special recognition and protection. (For general treatments of children's rights see Archard 2004, Dwyer 2006, Eekelaar 1986, Macleod 2018b.) The interest theory is hospitable to the recognition of children's rights since, even if children lack agential capacities, it is obvious that they have fundamental interests that merit special protection. Justification of children's rights on this model is a matter of identifying especially weighty interests that children have qua children and demonstrating that justice requires affording those interests special protection. The failure of the will model to capture this point is often taken to furnish a decisive objection to it (MacCormick 1984). The interest model has no difficulty vindicating the claim that both children and adults have a right to life and yet since the interests of children and adults differ in some important ways, the interest theory can allow that there are some rights that are unique to children and some that are unique to adults. Some theorists are attracted to a hybrid conception of rights in which rights initially function as protections of fundamental interests of children but then function to protect agency of adults (Brennan 2002). The principal theoretical attraction of this position is that it can capture the intuition that children have rights while allowing that, at least for a set of rights, adult rights seem to have a choice-protecting character. One matter at issue here is the status of some rights that are attributed to adults that do not seem to secure the welfare of adults. With respect to some liberty rights, for example, it might seem that protecting the liberty of adults to make dangerous lifestyle decisions does not advance their well-being overall. These are precisely the kinds of rights that are denied to children precisely because children usually lack the capacities to make decisions that reliably track their important interests (e.g., in matters of diet, health, and education).

Although debates about the appropriateness of extending rights to children are philosophically interesting, the practical significance of these debates to the issue of how theories of justice should accommodate children is relatively modest (Macleod 2018b). This is because whether or not theorists of justice are disposed to employ rights discourse, there is broad acceptance that children have distinct justice-based entitlements that merit recognition. The real issue is what those entitlements are. However, since some of the interesting issues that arise are couched in the language of rights, it is worth drawing attention to three important sites of debate concerning children's rights. Discussions about the substantive content of children's rights usually proceed from shared general background assumptions: Children are vulnerable, dependent human beings who initially lack and only gradually acquire agential capacities. The cognitive, physical, and moral immaturity of children means that children cannot be expected to secure their own interests to any great extent and that they are subject to adult authority during

the process of development. The character of the authority that adults appropriately exercise over children and the exact content of the proper nurturing of children changes through the maturation process. The way children are raised can profoundly influence their subsequent characteristics, capacities, and life prospects. Debates about the content of children's rights consider what distinctive interests of children merit special attention and how just treatment of these interests interacts with the claims of other persons, especially those who care for and exercise authority over children.

Although many children in the world do not have their basic needs adequately met, it is relatively uncontroversial claim that all children have a right to a nutritious diet, environmentally suitable clothing, adequate and safe shelter, and basic education. Only extreme libertarians adopt a skeptical position about these core rights. The fact that so many children's basic needs along these dimensions go unmet is evidence of profound injustice. The theoretically more interesting, though less practically urgent, discussions of children's rights focus on more contentious claims about the distinctive rights of children. Frequently, these claims revolve around the way in which children's general vulnerability and dependency on adults interact with prerogatives and responsibilities that parents have in raising children.

The Right to Be Loved

Consider first the claim that children have a right to be loved (Liao 2006). Attending to the interests of children appropriately arguably requires more than the mere provision of resources and opportunities that contribute to children's well-being. Instead, effective nurturing has a strong affective dimension: good parents express their concern for their children's well-being to their children and they manifest close emotional ties to their children. In effect, good parents love their children. Children's experiences of parental love both enhance the quality of children's lives as children and contribute to healthy psychological and cognitive development. In light of the extremely strong interest that children have in being loved, some theorists contend that children have a right to be loved and that children are seriously wronged when children are deprived of parental love. Where would-be parents cannot reliably display love to their children, they may be deemed unsuitable parents. For example, extremely homophobic parents who will withdraw love from children who turn out to be gay may lack a right to parent (Brennan and Macleod 2017). Skeptics of the right to be love express reservations about the idea that morality can require that people have specific emotional responses or attitudes to others (Cowden 2012).

The Right to Autonomy Facilitation

A second area of debate focuses on whether children have a right to an autonomy facilitating upbringing (Macleod 1997). Autonomy here is typically understood as the capacity to deliberate reflectively about different ends and conceptions of the good and to adopt and pursue the ends that strike one as most appropriate in one's circumstances (Callan 2002). Although most children will acquire agential powers as they mature, the way children are raised can diminish or subvert the development of robust autonomy. Moreover, parents often have strong preferences to shape their children's conception of the good. Many religious parents, for instance, seek to instill religious convictions in their children in a way that renders those convictions immune from critical consideration and revision. Such attempts at indoctrination may not always succeed but the key issue is whether parents have the prerogative to try to set their children's ends in this way. Attempts to indoctrinate competent rational adults constitute a clear violation of rights. But in the case of adults, it is assumed that attempts at indoctrination interfere with the prerogatives of adults to set and pursue their own ends and this in turn rests on the supposition that adults have their own ends and have the capacities to pursue them.

Since children initially lack both capacities and ends, and since parents often view the project of raising children as giving effect to their own conception of the good, some theorists view the

parental prerogative to fix children's ends as a corollary of their own right to implement their own life plans. For instance, raising children with a specific religious identity is a way for parents to implement their own religious convictions. On this basis, some conservative theorists deny that children have a right to an autonomy facilitating upbringing (Fried 1978; Lomasky 1987). Other theorists are sympathetic to the prerogatives of parents to shape their children's outlook but also view children as future citizens. They hold that children should be raised in a way that ensures development of moral powers sufficient for responsible participation in democratic processes (Gutmann 1999). On this view, children need to have education and upbringing that permits them to respect the plurality of conceptions of good within a democratic community and to participate in democratic processes in a responsible fashion. Development of the moral powers requisite to democratic citizenship may generally foster autonomy in children but that does mean that justice requires full autonomy facilitation (Rawls 1993).

Many theorists, however, hold that parental prerogatives to shape children's worldviews are constrained by children's rights to autonomy development (Macleod 1997; Clayton 2006; Brighouse and Swift 2014; Bou-Habib and Olsaretti 2014). Children should be respected as separate persons who are not mere ingredients in their parents' life plans. Respect for the moral independence of children requires providing them awareness of the plurality of reasonable conceptions of the good that different people chose to pursue and equipping them with the critical skills and dispositions to deliberate what commitments to embrace and pursue. No reasonable conception of the good should be insulated from consideration or scrutiny. Within this camp of theorists, there is debate about the degree to which some parental shaping of children's views is compatible with respect for children's right to autonomy facilitation. Some hold that parents may provisionally privilege a conception of the good in raising children providing that they do so in a manner that does foreclose meaningful consideration of other views by children as they mature (Macleod 1997). Here some claim that parental interest in sharing their conception of the good with their children has some weight and that parents have a legitimate claim to creative self-extension in raising their children (Macleod 2010b). Others express skepticism about the shaping prerogatives of parents per se but allow that some parental shaping activities are integral to realizing the great good of familial intimacy that enriches the lives of both children and parents (Brighouse and Swift 2014). Still others contend that justice requires parents and other adults to forgo any efforts aimed at comprehensive enrollment of children into a good conception of the good (Clayton 2006). On this view, respect for the right to autonomy facilitation requires parents, in their child rearing practices, to strive for a kind of neutrality concerning conceptions of the good.

The varying views about children's right to autonomy facilitation have dramatically different implications not only about permissible conduct of parents within families but also about the appropriate character of formal education in schools. Here issues arise as to whether parochial religious education is compatible with autonomy facilitation and how required elements of the curriculum in schools should teach children about potentially contentious issues associated with pluralism in domains such as religion, sexuality, and gender.

The Right to the Best Parent

Children's dependency on adult care raises a third puzzle concerning the quality of care to which children are entitled. Not all would-be parents succeed in meeting the needs of their children. Some are abusive or negligent and fail to provide an adequate level of care to children. Others, though not grossly incompetent or callous, may simply not be as good at parenting children as others would be. Children do not choose their parents and their well-being is highly influenced by the way they are treated by parents. So, the assignment of children to parents must be sensitive to some standard of parental competency. Although it is hard to define precisely, children have a justice-based entitlement to some

minimum threshold of parental care. Would-be parents who fall below a threshold of competency (e.g., because they are abusive or negligent) lack a moral right to parent and if they have custody of children, they may lose custody and custody will be awarded to suitably competent parents. Meeting the rights of children to adequate rearing means that the right to parent is itself conditional on some standard of parental competency.

There are two main approaches to delineating the standard. First, there is a broadly fiduciary view of parenting according to which parents have a responsibility to act in the best interests of their children and that in assignment of children to parents, children have a right to be parented by the best available parents (Gheaus 2021). Although in practice it would be difficult to reliably determine which adults would be the best available parents for given children, this view is in principle compatible with reassigning children from parents who are good parents to parents who are (slightly) better parents. In assigning parents to children, this view gives no weight to the interests that adults have in being parents or to facts about how the children came to exist in the first place. So, the fact that a couple deliberately set out to conceive and raise a child and that they view parenting as a highly valuable activity has no special role to play in determining whether they may serve as parents to the child brought about by their procreation. All that matters, at least in principle, is whether they are best available parents for that child.

By contrast, so-called dual interest approaches to the right to parent hold that establishing a right to parent is influenced by the interest that adults have in being parents and the interests of children in having adequate parents (Macleod 2015; Clayton 2006). On this view, children do not have a right to the best available parents but instead have a right to parents who meet some threshold of adequacy. In normal cases, the fact that adults deliberately set out to have a child (e.g., by engaging in procreation) is sufficient to secure the right to parent the child that they are responsible for creating. This does not mean, however, the threshold of parental competency requisite to acquiring a right to parent must be low. For example, children may be entitled to parents who are capable of reliably meeting their children's justice-based entitlements for which it falls to parents to provide (e.g., a safe and loving household).

Distributive Justice and Children

The domain distributive justice cannot be sharply delineated from issues about children's rights since the social and political arrangements needed to respect children's rights will have distributive implications. This is perhaps most obvious with regard to the rights children have to adequate satisfaction of their basic needs. A society cannot adequately feed children or meet basic health care needs without ensuring that relevant resources are properly allocated to children. Nonetheless, the focus of many discussions of distributive justice goes beyond meeting basic needs. There are, of course, various competing theories of distributive justice and a comprehensive treatment of different strains in the literature is not possible here. Instead, I will review three topics about children and distributive justice that arise in the context of broadly liberal egalitarian approaches to justice.

The Goods of Childhood and the Metric of Justice

Principles of distributive justice provide guidance about the fair distribution of various resources and opportunities that are or can be created via complex forms of social cooperation and interaction. In determining what constitutes a just distribution of resources and opportunities, we need a metric for gauging advantages and disadvantages. Most of the influential approaches to justice have addressed this question by focusing on what seems salient to comparing the relative standing of responsible adults. For instance, Rawls' theory focuses on principles for the distribution of social primary goods – e.g., basic liberties, income, wealth, and opportunities (Rawls 1999). These goods are themselves identified via consideration of the role of such goods in the development and

exercise of the two moral powers – a sense of justice and a capacity for a conception of the good. Important though these goods are for gauging the distribution of benefits and burdens among adults, they do not provide an adequate metric for extending principles of distributive justice to children. Although the quality of children's lives is clearly affected by the resources to which they have access, we cannot properly gauge the justice-based entitlements of children by considering what share of income or political liberties they have. The value for individuals of having such resources is dependent on persons having the agential capacities that permit them to deploy them fruitfully in the pursuit of a conception of the good. Young children have an interest in leading a good life as children but facilitating a good life for them (or a fair opportunity to lead a good life) cannot be secured simply by providing them with a share of income and basic liberties. Instead, a metric suitable for assessing the justice-based entitlements of children must be one that is sensitive to their status as individuals who initially lack and only gradually develop the agential powers. Ensuring that children have reliable access to the material and social conditions that are conducive to the development of agential powers is obviously important here. Children can be unjustly treated if they have inadequate or unfair access to these conditions. However, the fair facilitation of agency is arguably not all that matters for a child-sensitive account of distributive justice. Thus, several theorists have suggested that in assessing the distinct entitlements of children, theories should recognize special goods of childhood (Macleod 2010a; Brennan 2014; Gheaus 2014). These are goods such as opportunities for carefree play, preservation of innocence, and having a secure and loving family life that can enrich the lives of children and have value for children, but which fall outside the goods typically recognized as important from the point of view of distributive justice. Recognizing the importance of the goods of childhood can make a significant difference to our understanding of how to understand and respond to injustices faced by children. For instance, in the domain of educational justice there is reason to be concerned not only with the distribution of educational resources that bear upon the acquisition of literacy, numeracy, and other valuable skills but also with the distribution of opportunities for play, adventure, and rewarding aesthetic and recreational experiences (Macleod 2018a).

Justice and Parental Partiality

Many contemporary liberal egalitarian theories of justice are animated by the idea that a just distribution of resources and opportunities should eliminate (or where elimination is not possible, reasonably mitigate) differences in the life prospects of persons that arise in virtue of morally arbitrary factors. Thus, a person's race, sex, and class should not determine the access they have to valuable resources and opportunities. However, inequalities between persons that arise from the responsible choices they make against fair background conditions can be compatible with justice. For instance, different choices about what work to perform or what risks to take can generate some economic inequalities that are not unjust. The special relations between parents and children in families creates a challenge for this kind of liberal egalitarianism (Macleod 2002; Brighouse and Swift 2009; Seglow 2019). Since children cannot be held responsible for the families into which they are born, it seems that egalitarian justice should condemn inequalities between children that arise out of the social and economic inequalities that can legitimately arise between parents due to the reasonable choices of adults about how to respond to economic opportunities, etc. However, it also seems reasonable for parents to display a form of partiality toward their own children. Loving and engaged parents care more about their own children than other children and partiality toward their own children will motivate them to confer benefits on their children that may generate unfair inequalities between children. Wealthy parents, for instance, may seek to secure special educational benefits for their children by sending them to elite private schools that are not accessible by families who are less well off. Some expressions of parental partiality seem important

to the cultivation of valuable forms of familial intimacy that benefit both children and parents, so there is reason to welcome the forms of parental partiality that are essential to rewarding affective facets of family life. Nonetheless, some expressions of parental partiality can generate unjust inequalities between children.

One unattractive and almost certainly impractical response to the problem of unjust inequalities generated by parental partiality is to eliminate the family as a social institution for raising children (Munoz-Darde 1999). A different, and more promising, strategy is to create institutional arrangements that prevent the expression of forms of parental partiality that seem especially problematic. For instance, a just society may eliminate advantage conferring private schools or the private provision of health care (Macleod 2002; Swift 2003). Generous public provision of opportunities for recreation and leisure activities (e.g., public parks and community centers that give families from all economic classes ready access to recreation and extracurricular activities) can mitigate the most egregious inequalities that might otherwise obtain between children if parents are given free rein to confer advantages on their children. Similarly, steep inheritance taxes can reduce unjust inequalities between children. These ways of blocking equality disrupting forms of parental partiality will not eliminate all inequalities between children, but they will mitigate those inequalities without compromising close bonds and displays of affective concern that are morally appropriate between parents and their children.

Conclusion

The foregoing discussion is not fully comprehensive. (See Gheaus et al. (2019) for diverse essays about the philosophy of childhood.) It aims at identifying some of the main issues and developments in the contemporary literature about children and justice. The field is rapidly developing and there are many other issues and positions worthy of consideration.

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Justice: And International Law

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Introduction

Justice, that "segment of morality" pertaining to fairness among competing claims of bearers of moral standing (Hart 2012, 157–59), has an evolving and contested relationship to international law. International law is a body of norms generally understood to emanate from interactions among states, though various other actors (e.g., intergovernmental organizations, international courts, nongovernmental organizations, and expert bodies) influence norm formation to varying extents. Contemporary international standard-setting endeavors range from traditional efforts to coordinate self-interested state behavior (e.g., in matters of navigation, commerce, diplomatic exchange, and reciprocal arrangements for reparation of injury to aliens) to newer and more fraught efforts to establish the terms of international public order (e.g., constraints on the use of force, independence of colonized territories, implementation of fundamental human rights, and imposition of criminal justice on individuals acting under color of state authority). Whereas international "justice" was once largely reducible to reciprocity among the corporative entities to which the legal status of statehood was ascribed, the twentieth-century advent of complex international organizations with wide-ranging mandates

raised more general questions about the international legal order's relationship to political morality, and thus to the moral claims of individuals and substate groups.

It is nonetheless important to avoid overstating the relationship between legality and justice in the international order. Indeed, one might question whether international law can be markedly better, fairer, or more elegant than the actual conditions of global society permit. An international order's need to accommodate a plurality of prevalent conceptions of justice has preoccupied political theorists (e.g., Rawls 1999) as well as scholars of international law. The legal project needs to bind together "a world of diversity, incorrigibly plural, where perceptions of freedom, well-being and self-rule vary and often conflict in specific cases" (Schachter 1989, 18).

Three decades ago, leading scholar Thomas M. Franck sought to identify the bases of international law's legitimacy in a world lacking consensus on principles of justice. He ascribed the international legal order's "pull toward compliance" to a widely shared belief that "the rule or institution has come into being and operates in accordance with generally accepted principles of right process" (Franck 1990, 24). He included within this conception of "right process" the qualities of "[d]eterminacy, symbolic validation, coherence, and adherence" but pointedly excluded "justice" (Franck 1990, 235). The global system, Franck explained, "accommodates differing moral values within one functioning secular community ... by *de-emphasizing* the importance of diverse precepts of right." A broadly shared sense of legitimacy is "made possible by ... deliberately postponing to another day considerations of justice" (Franck 1990, 235–36).

Yet the immediate post-Cold War era brought to the forefront a different sensibility among legal scholars. The end of the bipolar geostrategic divide and of the associated clash of liberal-democratic and revolutionary-socialist ideologies occasioned optimism that international law could be a force for democratization, human rights, protection of civilian populations from mass atrocities, and international criminal justice. Meanwhile, the increased prominence of inter-governmental and nongovernmental organizations in international affairs and of transnational pooling of expertise on common challenges prompted greater attention to less state-centric and positivistic methods of deriving international legal norms. Thus, justice came to receive greater emphasis, not only as a goal of the international order, but also as an ingredient of the methodology for deriving international legal norms.

Challenges to the Dominance of International Legal Positivism

The traditional approach to international law is "positivist," in that it seeks, by the value-neutral application of formal criteria, to deduce from observed social behavior a body of rules accepted as law within the pertinent community. One discerns the existence of a rule specifying obligatory conduct – a "primary" rule, to use H.L.A. Hart's terminology – by evaluating empirical data according to the criteria of the community's "secondary" rules: the standards that a community is observed to have adopted as its bases (a) for acknowledging primary rules as authoritative (a unifying "rule of recognition"), (b) for applying them in practice ("rules of adjudication"), and (c) for changing them from time to time ("rules of legislation"). As law is on this account a matter of social fact, the question of a putative norm's legal validity is separable from the question of its justness (although on some positivist accounts, including Hart's, a given legal order's secondary rules may incorporate moral principles (Hart 2012 (250–53)).

Accordingly, the international system's rules of recognition identify three foundational sources of law, by virtue of which presumptively free and equal "sovereign" entities may be said to be bound: (1) custom (a pattern of state practice accompanied by *opinio juris* – a manifest collective consciousness of the pattern's obligatory character), (2) treaties, both bilateral and multilateral; and (3) "general principles of law" broadly shared among legal systems. Each source of law entails a separate method for establishing the

existence of a legal obligation. Each, however, remains subject to substantial controversy, centering less on the means by which a given empirical proposition can be reliably established (method as understood by social scientists) than on which empirical propositions are legally probative. (It should be noted that Hart himself – though subsequent Hartians less so – questioned the existence of secondary rules in the international legal system, and therefore doubted that system's status as a full-fledged legal order (Hart 2012, 214).)

To establish the existence of a legal norm is ordinarily to overcome a presumption that states remain juridically free to act as they choose (at least, within their respective national territories); as the traditional maxim (the so-called *Lotus* principle, from a 1927 Permanent Court of International Justice decision) has it, "[r]estrictions on the independence of states cannot ... be presumed." Thus, insofar as this presumption (which is not intrinsic to positivism, but which international legal positivists have tended to accept as a component of the international system's rule of recognition) operates, the primary methodological problem is not one of empirical "research design," but of interpretation of a foundational norm. Disputes that purport to turn on the strength of the adduced evidence are most frequently, in reality, disputes about the nature and strength of a presumption that reflects the balance of underlying purposes (contestably) ascribed to the international legal order (Çali 2009, 808).

This observation points in the direction of an interpretivist critique of legal positivism, of roughly the sort that Ronald Dworkin directed against Hart (Dworkin 1986). Law's social sources do not constitute a coherent set of emanations from a single legislative mind that a society acknowledges as authoritative. Far from speaking for themselves, the fragments that comprise law's source material (all the more so in a decentralized international legal order) need to be actively configured into a coherent account – an explanation superimposed upon, not self-evidently flowing forth from, social facts. The application of old source material to new facts necessarily entails a creative element. Law, then, is not so much something that one *finds* as something that one *does*, whether well or badly.

There is thus reason to doubt that law can be separated from justice in quite the manner that international legal positivism asserts. As Dworkin put it, "constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best example of the form or genre to which it is taken to belong" (Dworkin 1986, 52). One does not ask simply how the fragments of source material might be configured so as most closely to cohere in the furtherance of any end that a single mind might set for itself (whether or not purely esthetic; whether or not gratuitously sadistic; etc.); one rather asks how the fragments might be configured so as most closely to cohere in the furtherance of *governance by law*. Law as a purposive project thus can be seen to incorporate at least some elements of justice as part of its very essence.

For Dworkin, legal interpretation properly entails a "moral reading" of the source material that, "all things considered, makes the community's legal record the best it can be from the point of view of political morality" (Dworkin 1986, 411). Yet the practical implications of Dworkin's departure from positivistic premises are mitigated by his emphasis on the need for any new conclusion to "fit" within the overall account of past authoritative practice. He therefore acknowledged the frequent need for the jurist to uphold one party's "right to a consistent application of the public order," notwithstanding the other party's "right to a better public order" (Dworkin 1982, 186). (Dworkin did not turn substantial attention to international law until his final, posthumously published article (Dworkin 2013); that article's specific content, impelled by historical developments of the moment, represented a contestable understanding of the international order's foundations and so need not dominate discussions of the interpretivist framework's application to international law.)

Thus, on the one hand, what counts as law is open to creative efforts to attribute to the society's processes of political decision a normative scheme that is coherent and that has a presumptive orientation toward values inherent in legal order

as a distinctive project. Yet, on the other hand, creativity in legal interpretation is bounded by methodological standards that condition the plausibility of the account of any given society's governing norms.

A demand for justice in the name of law that fails to appreciate this latter consideration can be self-defeating. International legal positivism's great virtue – which can be fully accommodated within an interpretivist scheme – is its acknowledgment of law's role as a crucial framework of accommodation among diverse efficacious actors that cannot be expected to share a common moral philosophy (Simma and Paulus 1999, 303). Positivism stresses the role of formal sources of legal authority that are manifestly accorded acceptance in the international community of states; law's capacity to constrain or impel conduct depends on its being grounded in an existing social accord. Accordingly, if adjudicators, as delegates of the legal order, "exceed the discretion inherent in the delegation, they act *ultra vires* and are prone to lose not only their legal authority but also their practical influence" (Simma and Paulus 1999, 307).

Worse, if international legal processes are valued for nothing beyond their contribution to the pursuit of a particular conception of justice's substantive demands, then norms and doctrines that block the most direct path to the implementation of that conception may appear as obstacles to be circumvented, not limits to be respected. Where designated decision processes that represent diverse viewpoints fail to yield authorization of the coercive or forcible measures purportedly needed to implement universal norms, the unilateralist "seeks alternative modes of enforcement" (Reisman 2000, 15). Yet unilateral implementation of even authentically universal principles tends to be both untrusted and untrustworthy in a global community marked by disparities of power and conflicts of interest. Moreover, a superficial universality of norms tends to mask contradictory interpretations and priorities. Martti Koskenniemi therefore criticizes "advocates of deformalization" (i.e., advocates of pursuing purportedly just outcomes by recourse, if necessary, to unilateral and unauthorized measures) who would invoke a supposed universality of moral norms to justify disregard for opposing perspectives (Koskenniemi 2001, 489–490).

Overidentification of law with a given conception of justice, however well grounded, neglects law's indispensable role as a brake on empowered righteousness, in a world where the moral imperatives include peace and cooperation among bearers of conflicting conceptions of justice. That role is all the more significant in light of the dexterity historically exhibited by the great powers' publicists in portraying those powers' partisan agendas as serving a universal moral project (Carr 1964, 41–62).

Peremptory Norms (*Jus Cogens*): An Opening to Natural Justice?

State consent – express, implied, and by various methodological finesses imputed – plays a central role in the formation of international legal norms. (Even the process of customary international law formation, which operates without individualized state consent, is ordinarily thought to exempt a "persistently objecting" state, and general principles of law are typically understood to incorporate essentially uncontroverted propositions.) Nonetheless, there exists some set of unquestionable norms widely deemed to be essential to the project of international legal order. The derivation, content, and effects of that set of "peremptory" norms (*jus cogens*) remain highly controverted.

The most prominent official acknowledgment of *jus cogens* is found in the 1969 Vienna Convention on the Law of Treaties (VCLT). Just as domestic contract law renders unenforceable clauses that are incompatible with the forum state's public policy, so too international law nullifies any treaty provisions that transgress the international system's fundamental commitments.

The VCLT employs an ostensibly positivistic test for identifying a norm "from which no derogation is permitted," requiring recognition as such by "the international community of States as a whole" (art. 53). Thus, although the formation of *jus cogens* bypasses individual state consent – including the principle of "persistent objection"

that ordinarily exempts determinedly non-consenting states from emergent customary norms – an insistent near-consensus of states is presented as both a necessary and a sufficient condition of the norm's enhanced status. The International Law Commission's 2017 report on the topic maintains this position.

Nonetheless, peremptory status appears to derive, at least in part, from content rather than mere pedigree. The VCLT's negotiating record (*travaux préparatoires*) identified *jus cogens* with, in the words of Mexico's representative, "rules which derive from principles that the legal conscience of mankind deemed absolutely essential to the co-existence of the international community at a given stage of its historical development" (van Hoof 1983, 153). Many scholars and advocates have since expanded on this theme, ascribing to *jus cogens* a suprapositive character.

Initially, the VCLT provision appears to have been contemplated as, above all, an effort to bolster the sovereign equality of weak states in the face of the continued admissibility of disparate leverage (other than the unlawful threat or use of force) in treaty negotiation. The imbalance of bargaining power among treaty parties – especially in regard to the newly independent states – appeared to call for some hedge against the imposition of egregious treaty terms that could perpetuate colonialism by other means. States from the global East and South welcomed the provision as consistent with their far broader campaign to invalidate "unequal treaties" associated with neo-colonialism (Schwelb 1967, 961–62, 966).

In recent literature, however, *jus cogens* has lost all connection to the project of bolstering the sovereign prerogatives and inviolabilities of weak states, instead becoming associated almost exclusively with human rights – and thus, at least indirectly, with impositions on states weak enough to be susceptible to coercive measures. A standard list of peremptory norms includes the prohibitions on genocide, crimes against humanity, war crimes, slavery, and torture. Although the long-recognized *jus cogens* norms that are protective of weak political communities – in particular, the right of peoples to self-determination and the prohibition of the use of force against the territorial integrity or political independence of states – are seldom directly disparaged, the prevailing ethos of scholars and advocates has been to invoke *jus cogens* to diminish legal barriers to transboundary exertions designed to vindicate the rights of those communities' inhabitants.

For all of the natural law rhetoric that has been invested in the discourse of peremptory norms, it is hardly clear that *jus cogens* has dramatic practical implications. The established consequences of peremptory status are precisely those least likely to have realistic application where the norm represents a widely accepted (whether or not widely implemented) moral imperative: Most often, there is no persistent objector to be bound against its will and no offending treaty provision to be voided. (Further legal consequences are that violative conduct cannot be defended as a countermeasure in response to another state's internationally wrongful act and that any "illegal situation" arising from violative conduct must be denied recognition; the former circumstance seldom arises, and the latter typically involves a territorial claim rather than a human rights issue.)

It is often imagined that a prohibition's *jus cogens* status entails a similar status for measures undertaken to enforce the prohibition, thereby overriding the limitations on enforcement posed by mere *jus dispositivum* norms such as immunities. That conclusion is by no means logically compelled. As it happens, the great bulk of juridical authority, both on state immunity and on the immunities *ratione personae* and *ratione materiae* of state officials, reaffirms that immunities continue to apply as a general matter against measures intended to redress *jus cogens* violations; only where a norm has been deemed specifically intended to override an immunity, as in the case of criminal (but not necessarily civil) liability for state officials under the Torture Convention, has the immunity been pierced. Nor is there any general rule that an exercise of domestic legal authority in breach of a *jus cogens* norm is either null and void within that domestic order (since domestic orders vary as to their reception of international legal norms) or inherently incapable of creating legal facts of which international

law would otherwise, by operation of its own doctrines, take cognizance (since, for example, the undertaking of a war of aggression does not vitiate the combatant privilege of soldiers fighting on the aggressor's behalf) (Roth 2021, 83).

What remains is a rhetorical inflation that runs some risk of debasing the currency of international legal norms generally. It is frequently implied that whereas norms reflecting coordination of states' interests derive their validity from the will of states, by virtue of which they are mere *jus dispositivum*, moral norms of the international order derive their validity from a higher source, and are therefore peremptory. But norms of justice are every bit as much subject to disagreement as norms of coordination and thus admit of similar positivistic resolution. And although *jus cogens* norms tend to be morally freighted, the vast majority of human rights norms – all pertaining to fundamental questions of justice – cannot be said to have a peremptory character.

Human Rights and Related International Obligations: Treaty and Customary Law

Ordinary positive international law, of course, has a great deal to say about justice, and not merely among state entities. Prior to World War II, the international legal order extended its reach beyond coordination of state interests only to a limited extent. International treaties and customary law had long sought to restrict unnecessary inflictions of harm in armed conflict – largely not only in consideration of enlightened self-interest or a code of honor of professional men at arms, but also out of respect for the perceived "laws of humanity" and "dictates of public conscience" referenced in the Hague Conventions of 1899 and 1907. After World War I and the Bolshevik Revolution, international legal efforts were made to protect minority populations within the ethnonational states emerging from the breakup of the defeated empires, as well as to regulate conditions of labor so as to dampen the appeal of destabilizing revolutionary movements. But the post-World War II order went far beyond previous efforts, seeking to systematize "co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (UN Charter, art. 1(3)).

Following the 1948 Universal Declaration of Human Rights (UDHR), the United Nations system (along with regional systems such as the Council of Europe, the Organization of American States, the Organization of African Unity/African Union, and others) sponsored the promulgation of multilateral treaties in an effort to work toward a common standard of justice applicable to states' internal practices. These treaties cover both "first-generation" civil and political rights (corresponding to UDHR articles 1–21) and "second-generation" economic, social, and cultural rights (corresponding to UDHR articles 22–27) – the former consisting principally of "negative" barriers to state infringement on the physical integrity of the person and zones of individual liberty, and the latter consisting principally of "affirmative" demands that states establish and maintain, within the limits of their available resources, the material conditions of a dignified human existence. Specialized instruments have increasingly been developed to address categories of injustices not otherwise adequately covered, such as those pertaining to race, gender, childhood, and disability.

Slower to develop has been a scheme of "third-generation" rights directed toward establishing "a social and international order in which the rights and freedoms set forth in [the UDHR] can be fully realized" (UDHR, art. 28). By taking existing territorial state entities and the disparities in their resource endowments as given, the international order naturally reaffirms and reinforces a vast array of widely acknowledged injustices. The one well-developed corrective to the post-World War II global order is the right of "peoples" – including, but not necessarily limited to, the populations of territories still under colonial rule in 1945 – to self-determination; as anticolonial struggles gained success in the generation following the UN's establishment, the international system came to repudiate the remnants of European

colonial rule, including South African *apartheid*, and to establish a legal right to sovereign independence for subjugated territorial populations. However, efforts to remediate the historical plundering of the global South's resources through the proposed establishment of a New International Economic Order (NIEO) in the 1970s, later recast as a human right to development, have been far less availing.

Other proposed "third-generation" rights have included rights to peace, to a healthy and balanced environment, to humanitarian disaster relief, and to participate in and benefit from "the common heritage of mankind" (Weston 1984, 266). A major difficulty in establishing these rights – apart from the lack of leverage of the global "have-nots" vis-à-vis the "haves" – lies in the specifying and allocating of the duties that are the necessary concomitant of meaningful rights. Whereas the duty-bearers corresponding to first- and second-generation rights, as well as to the right to self-determination, can be straightforwardly identified and their performance assessed, the diffuse nature of the duties corresponding to other third-generation rights threatens to frustrate these rights' realization. Thus far, treaties responsive to these demands have been slow to be proposed, let alone enacted.

One set of transnational justice issues as to which the duty-bearer can be identified concerns the plight of refugees. Although far less effective than required to meet the calamitous global need, refugee protection has been established in positive international law. Primary among the legal imperatives in this area is the principle of *non-refoulement*: No state "shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (Refugee Convention of 1951, art. 33).

The international regulation of armed conflict has also developed well beyond the reciprocity-based conceptions that dominated its earlier iterations. The four Geneva Conventions of 1949 and two Additional Protocols of 1977 establish rights derived from considerations of human dignity, often in unconditional terms. Thus, even captured domestic insurgents are legally protected from "[o]utrages upon personal dignity, in particular humiliating and degrading treatment," and from "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" (Geneva Conventions, Common Article 3).

The developments thus far discussed reflect principally the establishment of human rights and humanitarian law through multilateral treaties – many of them adopted (though sometimes with significant "reservations" that withhold the undertaking of particular obligations) by the great majority of states. But there also exist customary international human rights and humanitarian law norms that bind states irrespective of their ratification of or accession to treaties.

As noted above, state practice and *opinio juris* may combine to establish a legal norm. Where governments denounce foreign-state practices and respond to accusations against their own states' practices by way of denials or excuses rather than repudiations of the putative norm, they manifest a consciousness of the norm's validity. Where a multilateral declaration is both determinate in its demands and adopted by a vote that is nearly unanimous and cuts across geo-strategic, ideological, and cultural divides, that declaration can constitute evidence of a collective judgment of a norm's bindingness. Where nonparties to a multilateral treaty orient their conduct and rhetoric to the treaty's terms, they may come to be regarded as bound, not to the treaty itself, but to the substantive standards that the treaty's terms reflect. Thus, even as a matter of positive law, a state's treaty commitments are not necessarily exhaustive of their international human rights and humanitarian law obligations.

International Law and International Criminal Justice

In the period since the end of the Cold War, "justice" in the international law sphere has ever

more come to mean an emphasis on ending impunity for individual violators of a discrete set of human rights and humanitarian law norms that entail penal consequences (Engle 2015, 1073–1079). This development has included the creation of *ad hoc* international and hybrid tribunals as well as a permanent International Criminal Court, along with pressure brought to bear on postconflict and postauthoritarian societies to pursue retrospective penal accountability and an expanded exercise by external domestic courts of extraterritorial criminal (and, in some systems, civil) jurisdiction over violations that took place within those societies.

Prior to this period, the rhetoric of human rights operated primarily as a shield rather than as a sword; it was a language of obligation, not a language of authorization for the projection of official power. In the previous global system riven by both geo-strategic and ideological contestation, presumptive "impunity," far from being considered the antithesis of international legality, was understood to be implicit in any international order that could not (as in the Nuremberg moment) presuppose victor and vanquished. Indeed, international law was tasked with providing a foundation for peace and cooperation among global actors who tended to regard one another as criminals.

The post-Cold War era brought on a different ethos. International legal scholarship today frequently suggests creative circumventions of constraints on penal accountability, routinely disparaging a range of doctrines (above all, conferrals of immunity) rooted in deference to state authority. State sovereignty is routinely cast as a realm of lawlessness that recedes as international law advances; nothing is seen to augur the advent of the international rule of law quite so much as extraterritorial prosecution of state agents for human rights and humanitarian law violations.

The turn of the 1990s had numerous precursors. The post-World War II tribunals at Nuremberg and Tokyo, even though inherently limited by the exclusivity of their treatment of the defeated enemy (famously criticized in the dissenting opinion of the Tokyo Tribunal's Judge Radhabinod Pal), were intended to demonstrate the subordination of political will to the rule of law. In addition to pursuing "crimes against peace" (i.e., inter-state aggression), Nuremberg established as internationally prosecutable not only traditional war crimes (perpetrated against enemy nationals), but also attacks on and persecutions of any civilian population (including nationals of one's own or of an allied state). Even though the advent of the Cold War thwarted an early effort to establish a standing international criminal court, several treaties – starting with the Genocide Convention of 1948 and the Geneva Conventions of 1949 and followed most prominently by the Torture Convention of 1984 – came to establish criminal penalties for aggravated human rights and humanitarian law violations, to be enforced in the courts of member states. The prosecution in Israel of captured Nazi fugitive Adolf Eichmann represented a milestone in the development of the doctrine of universal jurisdiction, whereby an enemy of humanity could be prosecuted in the court of any state.

Shortly after the Cold War's end, the UN Security Council authorized criminal tribunals to address international crimes, including genocide, committed during armed conflicts in the former Yugoslavia and Rwanda. The lengthy trial in The Hague of former Serbian President Slobodan Milošević symbolized the determination to demonstrate that even someone whose word was once law could be held to answer criminal charges. Relatedly, British extradition proceedings against former Chilean dictator Gen. Augusto Pinochet, responding to an arrest warrant from Spain, established that the Torture Convention overrides the immunities otherwise assertable by former heads of state in external domestic courts. The International Criminal Court has gone on to indict sitting and former heads of state, though thus far none has been convicted in that venue.

Although international criminal law represents the imposition of retrospective justice on one-time bearers of arbitrary power – and even more importantly, perhaps, the prospective threat of its imposition – there remain concerns about tendencies toward "victor's justice," about the retributive urge to neglect the fundamental rule-of-law constraints of *nullum crimen sine lege* and *in dubio*

pro reo (Robinson 2008, 934), and about potential tensions between the insistence on penal accountability and considerations of both inter-state and intrastate peace. One concern is that a legal attribution of criminality to adverse regimes will tend to present international institutions with enforcement demands that such institutions, dependent on consensus among non-like-minded states, characteristically cannot fulfill, potentially leading either to cynical resignation or to a reckless unilateralism (Roth 2011, 285).

Conclusion

The foregoing discussion has portrayed justice as having a real but confined role, both in the established methods of discerning international legal norms and in the objectives of the international legal order. It has thus highlighted international law's dependency on the empowered interests that sustain the global system as it is. In doing so, it has sought neither to legitimate existing power relations nor to unmask international law's role in normalizing and reinforcing such phenomena as neocolonialism (Chimni 2012) and gender domination (Charlesworth and Chinkin 2000). Rather, the above summary has highlighted both the potential and the limits to what can be accomplished "inside the box." International law establishes a framework of accommodation among efficacious actors, furthering mutual restraint and productive cooperation; it can accomplish justice only subject to the social realities that render legal assertions institutionally relevant. A more fundamental international justice – accomplishing a global egalitarian redistribution of resources and rendering decisions of governments, international organizations, and multinational enterprises accountable to all those affected – will require a different instrument.

Cross-References

- ▶ Critical Theory and International Law
- ▶ Humanitarian Intervention
- ▶ International Law: Legitimacy of
- ▶ Legal Positivism: Inclusive
- ▶ Legal Positivism: International
- ▶ Positive Law and Natural Law

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Justice: And Social Contract

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Introduction

The idea that principles of justice are best understood by reference to a social contract is an ancient one, going back at least to the fifth century BCE. In *The Republic,* Plato has Glaucon say that justice can be understood as an agreement "neither to do wrong nor to suffer it," and he traces the motive for the agreement in the desire to avoid jointly disadvantageous mutually aggressive behavior (Plato 1941: 42–43). The idea is presented as a commonplace ("what people say"), although it was usually associated with the Sophists in classical Athens, before being taken up by the Epicureans in Hellenistic Greece.

For many centuries, the idea of political society as a contractual association lay buried. It reemerged in early modern political thought, 1600 to 1800 CE, where it was used not to provide a theory of justice, but rather to support theories of political obligation, understood as the duty to obey state authority, notably in the works of Hobbes, Locke, and Rousseau (Lessnoff 1986). Since 1950, however, contract theories have emerged as one of the dominant accounts of justice, the principles of right that should govern the economic and political order.

Forms of Social Contract Theory

Though varied, modern social contract theories share a common basic logical structure. Within that structure, principles of justice are to be derived from a hypothetical thought-experiment, in which individuals agree to certain principles to govern the terms of their association. The hypothetically contracting individuals are imagined as being located in a preagreement situation, usually known as the original position, from which they reason their way to a definition of the principles of economic and political justice. Within this general structure, different particular theories can be conveniently classified in two dimensions. The first relates to the knowledge allowed to the contracting parties, and in particular whether or not they know their own personal circumstances and social role. If lacking such knowledge, they are said to be behind a veil of ignorance. Conversely, if there is no veil of ignorance, the contracting parties are presumed to know their personal circumstances and social role. The second dimension relates to the rationality or reasoning power of the contracting parties. In some theories, they are presumed to act in accordance with the utility theory of choice as found in modern economics; in other theories, the parties are presumed to deliberate on the basis of reasons for action. Putting together these two ways of classifying the theories, we can locate different theories in a two-by-two matrix (Weale 2020), as illustrated in Table 1, in which leading authors in each category are identified (Table 1).

The hypothetical contract is a logical model providing a method for determining the principles of justice. In this respect, contract theory exemplifies a philosophical approach to normative reasoning known as constructivism. Constructivism is the view that moral and political principles can be determined as the outcome of a specified procedure of thought. Contract theory is one candidate for such a procedure. Justifiable principles are to be derived from the reasoning of the parties in the hypothetical thought-experiment.

Contract theorists vary in the way they define the scope of application of their theories. Some, like Harsanyi and Gauthier, are principally concerned with economic justice, understood as the principles that should govern to distribution of

Justice: And Social Contract, Table 1 Forms of Modern Social Contract Theory

		Rationality of the parties	
Veil of ignorance?		**Rationality as utility**	**Rationality as deliberation**
	Yes	Harsanyi	Rawls
	No	Gauthier	Barry

the benefits and burdens of economic activity. Others, like Rawls and Barry, in addition to principles of economic justice, are also concerned with questions of political justice, setting out principles to govern the scope and limits of political authority and to provide guidance on the design of political institutions.

Whatever the scope and character of the principles advanced, one essential test of contract theory is whether the principles are derivable by a valid chain of reasoning from the assumptions contained in the postulated contractual construction. Rawls, for example, speaks about striving "for a kind of moral geometry with all the rigor which this name connotes" (Rawls 1999: 105). In other words, for the procedure of thought to be a good guide to the principles of justice, its premisses need to be sound, as does the chain of reasoning deriving from those premisses.

Harsanyi

In two important papers, Harsanyi (1953, 1955) assumes that individuals have different views about how society is to be ordered, and that these differences reflect their personal circumstances. For example, someone who is relatively poor is likely to favor the redistribution of income, whereas someone who is rich is less likely to do so. Each is thinking about how society should be organized from only their own point of view. However, if each person could think in an impartial way, there would be greater agreement. To think impartially means that each person must abstract from their own personal circumstances. In the limit, an impartial judgment is one in which each person is behind a complete veil of ignorance, and so does not know their own place in society, for example, where they might be in the distribution of income. Suppose such a person reasoned that they had an equal chance of being anyone in society. Then, the principles that should govern the economic order are those that correspond to the most preferred social alternative. For example, if a rational chooser behind the veil of ignorance would prefer a more equal to a less equal distribution of income, then the more equal distribution is the right one, or at least the better one of two alternatives.

Because no one can know their own personal circumstance behind the veil of ignorance, there can be no differentiation of separate individuals. The construction thus makes the choice of principles depend on the choice of one rational person. Some commentators hold that, by virtue of that fact, Harsanyi's theory is not properly a social contract theory, since a social contract theory necessarily involves a plurality of actors. However, in at least one place, Rawls (1999: 120), who is undoubtedly a contract theorist, says that agreement in the original position can be viewed from that standpoint of one person selected at random, so that Harsanyi cannot be easily excluded from the category of contract theorist, at least on a generous interpretation of the term.

A second reason for distinguishing Harsanyi from other contract theorists is that the principle of economic order that he derives from his construction is that of maximizing average utility, whereas by contrast the general drift of contract theory has been antiutilitarian. The principle of average utility says that the sum of net happiness for the average person (so abstracting from considerations of population size) should be as large as possible. The derivation of the principle of average utility is not an incidental feature of Harsanyi's theory but follows directly from the way in which he defines a rational choice. So if he is right, the general drift of modern social contract theory has been wrong.

In orthodox modern utility theory, decision makers are assumed to choose rationally when they prefer an option that maximizes their expected utility. For example, confronted with two lotteries in which a person is offered £50 if a red card is drawn from a pack or £100 if a jack is drawn from the pack, the rational person would choose the first lottery, since there is a fifty-fifty chance of winning £50 in the first case, but only a one in thirteen chance of winning £100 in the second. The expected return of the two lotteries is the value of the prize multiplied by the probability of receiving it, which with the red card choice is £25 but with the jack card choice is less than £8.

Modern utility theorists have taken this intuitive notion and formalized it in a set of axioms, or

principles of rational choice. Harsanyi (1955: 313) takes these axioms to form the "essential requirements for rational behavior." Just as a rational person would prefer a lottery that yielded the highest expected return, so a rational person behind the veil of ignorance would prefer a society with the highest average level of utility. It follows directly from the expected utility principle that if two societies have a different spread of incomes but the same average value, then the rational decision maker behind the veil of ignorance will rank them equally. So there might be a society with a highly unequal distribution of income and another society with a highly equal distribution of income, but they could be ranked the same behind the veil of ignorance. If the wealth of the high-income groups outweighed for the expected utility-maximizing rational decision maker the poverty of the low-income groups in the first society, then the mere fact of inequality ought not to count. The principle of expected utility is an additive one: Gains and losses are simply added or subtracted.

From the earliest days of modern utility theory, its critics (in particular Allais 1953) have contested the idea of defining rational choice in a purely additive matter. Being prudent in choosing lotteries may lead one to prefer the lottery with the smaller gains but accompanied by the smaller losses, even when the expected values are the same. By implication, when choosing in the lottery of life the type of society in which one would want to live, it is not irrational to take into account the way that the utilities of different persons are related to one another. Expected utility does not capture the requirement of prudence in rational choice. Harsanyi's construction promised a theory of justice as the outcome of an indisputably rational choice by a person in a situation of impartiality. Given the assumptions, the derivation is impeccable: but the assumptions are too contentious to support the weight put upon them.

Gauthier

Like Harsanyi, in *Morals by Agreement* Gauthier (1986) is concerned with questions of economic justice, and he too draws on the modern theory of rational choice. However, unlike Harsanyi, he does not assume that the contract is made behind a veil of ignorance. In his construction, individuals have, and know they have, different abilities and productive talents. As a result, their rational choice problem is not how to make a rational decision under uncertainty, but how best to bargain with others over the economic resources that are the result of productive activity. Rational self-interested individuals form a social contract by rationally bargaining with each other over the terms of their cooperation. The requirement of joint agreement replaces the veil of ignorance as the crucial device.

Gauthier assumes that a world before any social contract can be represented as a perfectly competitive market in which individuals are price-takers for the product of their labor. In this set up, there is no need for bargaining. If you do not like the price you are offered for your labor, you can simply see if someone else will offer more. Individuals exchange their produced goods at the best prices they can secure, thus receiving the full fruits of their labor. A market equilibrium arises from each seeking the best return and results in an optimal allocation of resources, in which no one can be made better off without making someone else worse off. However, for Gauthier, though a starting point for analysis, this is an unrealistic characterization of the economic process. In the real world, some economic activities have spillover effects on the activities of others. There are public goods like lighthouses from which some can benefit without paying and public bads like pollution that reduce the value of others' production without compensation. To deal with these spillover effects requires an agreement – a social contract – based on the principle of mutual advantage. There is a cooperative surplus to be achieved by jointly agreed rules.

It is at this point that Gauthier appeals to the theory of two-person bargaining. Here he faces a problem similar to that of Harsanyi, since there is no undisputed rational choice theory of bargaining. In the original presentation of his theory, Gauthier adopted an account of rational bargaining known as minimax-relative

concession. In that account, individuals start by laying claim to the whole of surplus generated by social cooperation, and before conceding some share to the other. In the final solution, each concedes the same proportionate amount, for example, 50% of their original claim. This solution differs from the dominant orthodox theory in which the agreement maximizes the product of the jointly feasible gain. Gauthier later came to accept this latter principle. However, the two principles tend to yield similar results and also tend to favor those who can hold out more against agreement, who therefore have the stronger bargaining power.

A more serious problem for Gauthier's theory is related to the question of what is included in the cooperative surplus that arises from joint action. Gauthier argues that factor rent from labor ought to be included in this surplus. Factor rent is the difference between the income someone earns from working and the income the person would accept for doing the same work. Most workers would do the same job for less; only those who would find it advantageous to shift to another job for a small reduction in income do not earn factor rent. According to Gauthier, individuals, including high-earning individuals, should regard their factor rent as part of the social surplus sharable according to what agreement is reached by bargaining. However, this claim about factor rent is incompatible with the basic underlying logic of a theory that stresses bargaining to mutual advantage by self-interested individuals. Such individuals would contest the assumption that their factor rent should be regarded as part of the common pool of a social surplus on which others have a claim. Instead, they would assert that factor rent is part of the fruits of their labor. There is no reason in bargaining theory to assign factor rent to a common pool; it is an assumption that is incidental to the main principles of the theory.

More generally, the question of whether the returns to the labor of individuals should be regarded primarily as accruing to those individuals or whether those returns should be regarded as part of a common pool available for redistribution is a substantive issue in the theory of justice. If this question is settled by an auxiliary assumption, it suggests a theoretical incompleteness in contract theory.

Rawls

With Rawls we come to the leading figure of modern social contract theory, a theory known as justice as fairness, as set out in *A Theory of Justice* and *Political Liberalism* (Rawls 1999, 2005). Yet, despite the deservedly high stature of Rawls' work, it shares a number of key elements with other social contract theorists. His veil of ignorance condition is similar to Harsanyi's earlier account, a fact that Rawls (1999: 118) himself acknowledged. Where Rawls differs from Harsanyi is in having a distinctive account of the reasoning of the parties, who do not take a bet on the outcome of their choice by maximizing expected utility, but instead seek to avoid balancing the interests of some individuals against others. Their aim is to determine for themselves a secure guaranteed position in the political and economic order.

The scope of Rawls' theory is wider than that of both Harsanyi and Gauthier. Its principles cover the justice of the political constitution as well as principles of economic justice. In relation to the political constitution, Rawls (2005: 5–6) proposes that each person rightfully has an equal claim to a fully adequate scheme of basic rights and liberties. In relation to economic justice, Rawls proposes that economic inequalities may be rightfully allowed, provided that they are attached to positions open to all under conditions of fair equality of opportunity and that they are to the benefit of the least advantaged in society. This last condition is known as the difference principle. The equal liberties principle takes priority over the principles governing economic inequalities, meaning that constitutional liberties cannot be sacrificed for economic advantage, and the equal opportunities principle takes priority over the difference principle, meaning that one cannot deny people an equal opportunity to seek an advantageous position in the economy in order to benefit the least advantaged in society.

Rawls intends these principles to be justified by a valid chain of reasoning about the ways in

which agents would deliberate behind the veil of ignorance. This is the "moral geometry" of his theory. As it developed from its original statement (Rawls 1971), the theory went through a number of important changes in characterizing the reasoning of the parties in the original position. However, the mature arguments for his principles (Rawls 1999, 2005) can be stated in three stages as follows:

1. Behind the veil of ignorance, the parties to the contract do not know their own ends, or purposes in life. However, they will wish to ensure the conditions for the achievement of any end they might have.
2. Given the importance of securing their ends, the parties cannot rationally gamble, for example, by supposing that increased advantages to those in one social role will compensate for increased disadvantages to those in another. The parties do not just sum up the advantages to each position across society as a whole but seek guarantees for their basic interests.
3. A paradigm example of a fundamental interest that needs to be protected is freedom of conscience and freedom of religious (or non-religious) practice.

Stated in this way, Rawls's argument is formally valid, at least as it applies to the equal liberty principle. Practical reasoning requires one to create, if one can, the necessary condition for bringing about an end that one favors. For example, if my end is sitting in a warm room and lighting a fire is a necessary condition for making the room warm, then I have reason to light the fire. Similarly, if I attach importance to the pursuit of my religious ends, and a regime of freedom of conscience is necessary to enable me to pursue my religious ends, then I have reason to support a regime of freedom of conscience.

It may be asked what is distinctively contractual about this argument. After all, it has been a standard utilitarian argument for at least two centuries that representative government is a necessary condition for protecting individuals from political tyranny (Mill 1823). The answer to this question is that the contract construction shows how the protective argument generalizes to all members of a society. Behind the veil of ignorance, one does not know one's future position in society, including such things as one's religious commitments, political orientation, or productive capacities. So, for example, if one could be a member of any confessional group or none, there is a reason behind the veil of ignorance for protecting the liberty of conscience of any such group. Justice for some requires justice for all.

Rawls (2005: 48–54) goes on to explicate this aspect of his theory by distinguishing between the rational and the reasonable. Rationality is exhibited behind the veil of ignorance in the desire to advance one's ends, whatever they may be. Reasonableness is shown in being willing to cooperate with those who have different ends in a fair scheme of mutual cooperation. In some ways, this terminology is unfortunate, since it might be taken to mean that those who are reasonable are not somehow also rational. However, the distinction does help to mark the difference between theories like those of Harsanyi or Gauthier, for whom practical reasoning can be fully understood in terms of the self-interested pursuit of one's own ends and Rawls', for whom deliberation on the fair terms of cooperation requires the virtue of reasonableness.

Another aspect of Rawlsian deliberative rationality is that behind the veil of ignorance the contracting parties will be motived to honor the commitments into which they enter as part of the contract. This condition is related to his desire to avoid a balancing approach to conflicting interests, which Rawls thinks is incompatible with justice. The interests of some are not to be sacrificed for the advantage of others. Thus, the difference principle allows for economic inequalities provided that they benefit the least advantaged, say by providing incentives for the productive to raise the all-round standard of living. The inequalities allowed by the difference principle, therefore, do not advantage some at the expense of others, since without those inequalities, the least advantaged would be even worse-off than they are.

Can the difference principle be validly derived from Rawls' contractual construction in the way

that a moral geometry would require? To this question, the answer is no. To derive the difference principle, Rawls has to ascribe to the contracting parties an attitude he calls "mutual disinterestedness" which means that in their reasoning about alternatives each party focuses upon how well they themself do, without making comparisons with others. Many have seen this as a purely ad hoc assumption. More seriously, however, it is impossible to derive the difference principle for anything other than a two-group society. While in a two-group society, the least advantaged might rationally allow the more advantaged greater income and wealth, provided it made them better off, the same logic cannot be carried over to a society containing three groups or more. Anticipating such a society behind the veil of ignorance, one might rationally opt for an economic order in which those in a middle income group were better off at the cost of a small drop in income and wealth for the worst off. To be sure, the motive of honoring one's commitments might lead the contracting parties to insist on there being a minimum income floor for all, as a constitutional essential. Rawls (2005: 228–229) allows for this possibility, but it clearly shows the difficulty of deriving the difference principle from his construction.

Barry

In *Justice as Impartiality,* Barry's (1995) contractual construction differs from that of Rawls by dropping the veil of ignorance requirement. However, like Rawls, he proposes principles both for a political constitution and for the economic order. He also ascribes a deliberative conception of rationality to the contracting parties. Barry characterized his theory as one of "justice as impartiality," though he treats the notion of impartiality in a different way from that of Harsanyi.

The key idea in Barry's contract theory is that, in the original position, the contracting parties must offer reasons for the design of a political constitution and economic order that could be reasonably accepted by those with whom they are seeking to form a contract. The idea derives from the principle that an act is wrong if it would be disallowed by a set of rules that no one could reasonably reject. This formula is taken over from Scanlon (1982) but adapted by Barry in two distinctive ways: Its scope is restricted to questions of justice, and it is defined in terms of reasonable acceptance rather than rejection. (Scanlon 1998, himself also offers an interesting contract theory, which is not treated here because it is primarily developed in relation to inter-personal morality rather than political and economic justice.)

To see how Barry's formula works, it is useful to consider how different confessional groups might or might not have a claim to support from the state. Suppose a confessional group sought to advance its conception of the good by claiming privileged political and economic status, say by establishment or tax advantages. Since religious beliefs define people's conception of the good, in making claims for certain privileges, any group would have to recognize that its conception of the good would not be accepted by other religious or nonreligious groups. Given this constraint, all groups would reason their way to the conclusion that that state should be constitutionally neutral between different conceptions of the good, and so between different religions.

Does this construction suggest any particular types of reasons that would carry weight in the original position? Barry suggests that a party to the contract could reasonably veto any political or economic design that threatened absolute deprivation (some public arrangements would need to be established to prevent poverty), relative deprivation (no groups should suffer discrimination), or prevented the supply of public goods (goods like internal law and order or an unpolluted environment). He suggests that the reasoning of the parties in the original position rests on an idea of human decency, in which, while people do not give up their own interests and point of view, they are responsive to the claims of others.

Using these assumptions, Barry also seeks to derive the Rawlsian difference principle. If we imagine two groups, with different productive endowments, members of the less well-endowed group might agree that the better-endowed group should gain, so long as the gain was also of benefit

to them. There would be mutual agreement. This argument for the difference principle, however, suffers the same flaw as we saw in the case of Rawls. It does not allow for cases where more than two groups are involved, and where the economic interests of the third group need to be balanced against the other two.

More generally, Barry's test of reasonableness lacks the deductive rigor – the aspiration to moral geometry – to which other contract theorists have aspired. This was not of concern to Barry himself, who thought his construction was merely one way of presenting a theory of justice in which the idea of human equality was central. However, the theory can also be used to think about the characteristics of a political culture. Barry (1989: 347–348) suggests that some political cultures are closer to what he terms the "circumstances of impartiality" than others. These cultures rest on a deliberative conception of political problem solving; their media are not unduly partisan; there is a culture of compromise; and different social groupings are represented by different political parties. In these circumstances of impartiality, Barry suggests, we might also find an empirical way of thinking about justice, relying on observation of the reasoning and outcomes that occur, rather than on a priori speculation about what would be agreed in a hypothetical original position. This last idea feeds into the overall conclusion that we should draw about contract theory.

Conclusion

None of the contract theories discussed here, all leading examples of their type, meet the test of moral geometry. Their contribution to a constructivist ethical theory remains a promise, rather than an achievement. In a broader sense, however, contract theory marks an important development in accounts of justice.

First, as Barry suggests, the principles of well-functioning democracies show an intellectual affinity with the principles of social contract theory, and Barry's proposal for an empirical method can be developed to show how democratic procedures, under favorable conditions, provide insights into what principles of economic and political organization would be generally acceptable to those reasoning with one another about the terms of their association (Weale 2013). The key condition for the circumstances of impartiality is that there be no undue inequalities of power among those negotiating with one another. In the hypothetical contract, this condition is guaranteed by the veil of ignorance. Even without a veil of ignorance, however, there is sufficient variation in observable human societies for at least some to satisfy the requirement of approximately equal power between different persons and groups. Inductive generalization from these cases can help correct the shortcomings of a priori reasoning from an imagined original position.

Second, the problems of justice are increasingly transnational, and not simply domestic matters for different societies, of which climate change is the leading but by no means sole example. Social contract theory is sufficiently abstract, such that it can be used to model relations among actors other than natural persons, including corporate actors like states in the international system. It should be possible to think through the terms of international relations, abstracting from prevailing power relationships, to determine what a just solution to those problems might be. In this way, social contract theory enables us to understand how justice requires treating humanity as an end in itself.

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Justice: And the Family

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Introduction

The topic of justice and the family encompasses a great many interrelated issues. Here we focus only on questions concerning the limits to parental authority that stem from what is owed to children. The debates surrounding the limits of parents' authority raise philosophically important questions which are currently discussed by moral and political philosophers. They are also addressed by legal scholars, and we make a move toward integrating these bodies of literature. The questions at stake are at the heart of the justification of the family, understood as an institution in which one or more adults (parents) have legal and moral rights and obligations – including those that define their authority – vis-à-vis children who are in their care (typically, but not always, their biological children). They are, moreover, questions that have become increasingly pressing. Within a broadly liberal political philosophy, the conferral of rights on some people to exercise authority over others must be justified to those others; hence, the growing recognition of the child's moral status puts pressure on some received wisdom concerning the family.

In what follows we assume that children's moral status means that their interests carry as much moral significance as the comparable interests of adults and we will center our discussion on how children's – rather than third parties' – interests limit the remit of parental authority. We identify three kinds of interests of children that generate such limits: their interests in well-being, their interest in autonomy, and their interest in acquiring a sense of justice. The analysis of how these interests limit the rights of parents has implications for a wealth of policy issues and decisions, such as those involving parents' freedom to choose schools for their children, or homeschool them, enroll them in religious practices, modify their bodies (for instance, by circumcising them), raise them as vegans, restrict their access to relationships with others, and dictate how they should spend their free time. These are matters of parental ethics more broadly, but since they can involve violation of children's moral rights, at least some of them are also a fitting object of some legal regulation, including, possibly, the establishment of a parental licenses scheme aimed at ensuring that parental authority is assigned to those who are not likely to abuse it or disrespect its limits (LaFollette 2010).

Sections "Children's Moral Status" and "The Grounds, Assignment, and Limits of Parental Authority" explain the significance of questions concerning the limits of parental authority and locate them within several on-going debates on the family. Sections "The Well-Being Interests of Children", "Children's Interests in Autonomy and Independence", and "Children's Interest in Developing a Sense of Justice" discuss the three sources of limits on parental authority stemming from children's interests. Section "Other Important Matters Concerning the Family and Justice" concludes with a very brief overview of other important questions concerning justice and the family.

Children's Moral Status

For a long time, the law and philosophers alike assumed that children lack moral status or, at the very least, that their moral status was such that they cannot be rights-holders. For instance, the law permitted parents to sell their children, and, at least when very young, to let them die through exposure; today we believe that children have rights and are owed corresponding duties (Eekelaar 1992; Archard 1993). This claim is most plausible on an interest account of rights, but some argue that friends of the will theory can also accept it (Noggle 2018). Does this mean that children's moral status is equal to that of adults? This surely depends on how one understands moral status; children, it is generally thought, are not fully autonomous individuals, and therefore do not have the same rights adults have to direct their own lives. If equal moral status means equal rights, then the moral status of children is, at least in one sense, lower than that of adults. But some political philosophers assume children's and adults' moral statuses are equal in the sense that a child's interests are as worthy of protection as the similar interests of an adult, and that it is equally morally objectionable to use children and adults as mere means (Brighouse and Swift 2014; Gheaus 2021).

At least one prominent legal scholar has advanced the view that children have *higher* moral status than adults, because they possess, to a higher degree than adults, status-conferring characteristics such as potentiality, aliveness, and beauty (Dwyer 2011). This view is arguably implausible as it downplays the importance we ascribe to being fully rational, in control of the expression of one's emotions, having a settled practical identity, and to the various kinds of achievements that are most typically only within the reach of adults.

Assuming, then, that children have the same moral status as adults, the challenge is to develop a theory of legitimate exercise of power over children which recognizes this fact and yet justifies giving children a different standing concerning their rights to control their lives.

A general agreement seems to be taking shape that children have two main kinds of rights-grounding interests: well-being interests and autonomy interests (Clayton 2006; Brighouse and Swift 2014). The first type of interests has to do with the conditions that are necessary to protect children's physical, emotional, intellectual well-being, both *qua* children and *qua* future adults. As for autonomy interests, we take these to refer to the interest in personal, as opposed to moral, autonomy, that is, the interests in being in some sense the author of one's life; even so understood, they are quite wide-ranging. They include the interest in acquiring the capacities to become autonomous adults, in acting as an increasingly autonomous person as one grows up, and the interests in what others have called "independence" and "agency" (Clayton 2006; Dailey and Rosenbury 2018). We also discuss a third interest of children, that in acquiring, and, from a certain age onwards, acting on, a sense of justice. We believe that this interest warrants more attention than it has been given, so we discuss it separately, while explaining its connection to children's autonomy and/or well-being interests.

The Grounds, Assignment, and Limits of Parental Authority

The core defining feature of the parental role is the authority which parents have over children in their care. Parental authority refers to a set of rights parents have to make and execute decisions for and on behalf of their children, with regard to many matters, both trivial and of great importance, over many years and sometimes until their children attain the age of majority. This set of rights consists of claims, liberties, immunities, and powers in the Hohfeldian sense. We assume here that this set of rights is morally justified, and accordingly, by parental authority we refer to justified (i.e., legitimate, or minimally just, and not merely descriptive) authority (Clayton 2006). By asking what the limits of parental authority are, we are therefore asking about the scope of parents' justified authority. The questions that ensue are an integral and important part of a justification of the family, insofar as, whatever else may be involved in a justification of the family, the latter must

provide an account of the limits of parental authority.

The limits of parental authority, addressed in the following sections, are related to and partly overlap with other debates in ethics and political philosophy concerning parental authority.

The first concerns the *grounds* of parental authority and asks whether and why any adults are morally permitted, or perhaps even required, to exercise authority over children; and whether and why the best form of childrearing is the family, in which one or a few adults are conferred authority, rather than, say, institutional settings. The questions raised here, which we assume have an affirmative answer, have been usually answered by appeal to the interests of parents, of children, or of both, and with the interests of third parties acting as constraints. (See, however, Munoz-Dardé (1999) on justifying the family by appeal to its role in ensuring a plurality of conceptions of the good.)

Parent-centered accounts, now the outliers, take the interests and the decisions of prospective parents as the only grounds for parental authority. Some libertarians, for instance, think that procreators typically have the right to rear their offspring because the latter are produced from their labor, or from their bodies; ownership over one's labor or body gives them (encumbered or quasi) ownership over their children (Steiner 1995; for a critical overview, see Gheaus 2018). Child-centered accounts take the interests of children as the only grounds for parental authority (Vallentyne 2003; Gheaus 2021). Dual-interest accounts assume that both parents' and children's interests have a grounding role in justifying parental authority (Brighouse and Swift 2014; MacLeod 2015); sometimes they note that, since childhood and adulthood are two stages of life – at least for most people – the seemingly interpersonal conflict of interest here, between the interests of children and the interests of parents, is solvable by appeal to what is each single person's best interest over a complete life (Clayton 2006).

A second, closely related, debate concerns the criteria for the assignment of parental authority to particular adults over particular children: which person(s) may or should be granted that authority over which children, and why? Views about the grounds of parental authority can have implications for answering this question, but they need not settle it. For example, a libertarian account, mentioned earlier, of what justifies parental authority also yields an answer to the assignment question. But dual-interest and child-centered accounts of the grounds of parental authority may underdetermine who should be assigned authority over which children, and leave open the possibility that we appeal to some interests of adults (e.g., the autonomy interest in controlling what obligations they incur) to justify ascribing parental authority, and its attendant obligations, only to (a) those adults who voluntarily take up the parental role (O'Neill 1979; Brake 2010), or (b) those adults who have a special interest in rearing a particular child because of biological ties – whether genetic or gestational – to them (Kolers and Bayne 2001; Gheaus 2012; for discussion, see Magnusson 2020); or (c) those adults who have incurred special obligations to particular children, for example, as a result of procreating them (Porter 2012; Olsaretti 2017).

The debate, in ethics, on "Who is a parent?" is in good part coextensive with the debate on the assignment of parental authority. The "Who is a parent?" question is ambiguous between two questions: who has special obligations which parents typically have toward children, and who has the right to take up the parental role. It is true that parents will always have some hands-on special duties toward their children: to provide them with daily care and maybe with an emotionally close relationship. But note that adults could have certain special obligations *qua* procreators – for instance to provide (e.g., financial) resources to the child – and yet, perhaps because they cannot be sufficiently good at parenting, lack the right to raise their offspring themselves (Archard 2010). In such cases, other people will have the duties (and rights) associated with the parental role, which they may have acquired, for instance, by volunteering to be parents. When this happens, more individuals will have special obligations toward children than those who have the right to parent.

Although this is not usually considered in the literature on "Who is a parent?", note that the

criteria for the assignment of parental authority to particular parents, and over particular children, should also take into account children's interests, and indeed, could be determined *solely* by children's interests. On a fully child-centered view, the rights to exercise parental authority, together with the concomitant obligations, could be assigned to particular adults on the basis of what best serves particular children's interests.

The Well-Being Interests of Children

We begin with the least controversial set of claims about the limits of parental authority: children's needs constrain parental authority. Needs are especially weighty interests the non-satisfaction of which involves a *harm* (Frankfurt 1999). Children's needs include physical, emotional, and cognitive ones, and children have both claims to their satisfaction during their childhood and to the developmental conditions that will enable the satisfaction of their needs as future adults.

Children's needs undoubtedly set a minimum requirement for parental authority on which all justifications of the family concur (Bennett-Woodhouse 1994). To say that needs set a minimum requirement for parental authority is to say that parents' failure to ensure that their children's needs are adequately satisfied (whether by them directly or, where possible or necessary, by relying on third parties, e.g., child-carers, medical experts, teachers), such that children are said to suffer abuse and/or neglect, means that these parents lack the rights, both moral and legal, to exercise authority over their children. So, as well as providing a standard of parental ethics (i.e., what norms parents should guide themselves and be judged by), the failure to secure one's children needs warrants state interventions with the family. Some philosophers have argued forcefully that, alongside interventions which respond to harm to the child once it has occurred, justice for children requires adopting preventative measures in the form of a scheme of parental licensing; such a scheme seems most defensible where it aims to defend competence understood minimally, that is, as the capacities to ensure that one's child's needs are satisfied (LaFollette 2010; Vopat 2015; for discussions see Tittle 2004; De Wispaelere and Weinstock 2012; McLeod and Botterell 2014).

While it is uncontroversial that children's needs constrain parental authority, there is disagreement among philosophers on how to answer some further questions about what children's well-being interests include besides needs, and about how they constrain parental authority.

Consider, first, the questions of what contributes to children's well-being over and above the satisfaction of their needs. As far as adults' well-being is concerned, there are, broadly speaking, three main theories of well-being: desire-based theories, hedonist theories, and objective list theories. One important issue is whether it makes sense to conceive of children's wellbeing in terms of either the desire-based or the hedonist conception, as the plausibility of thinking that the only thing that contributes to a person's good is the satisfaction of her desires, or that she have pleasurable mental states, seems to depend on assuming that that person is a well-formed agent with sufficiently stable and reflected upon desires, and who is capable of obtaining pleasure from various sources. So, whatever we think about what makes adults' lives go well for them, in the case of children, it seems plausible that we should think of their well-being by reference to an objective list theory, on which well-being (or flourishing), consists in obtaining some independent goods, or what some call valuable "functionings" – that is, valuable states of being and doing, such as friendship, play, learning, creative exploration, and pleasure (Macleod 2010). Some of these goods are the "intrinsic goods of childhood," that is, goods which are either uniquely or more easily accessible to, and perhaps of greater value for, children (Macleod 2010, Gheaus 2015; see also Ferracioli 2020).

Another important question concerning children's well-being interests is whether children have a distinctive interest in being loved, and being loved, specifically, by their parents. A parent loves her child if she cares about, and is disposed to promote, her child's well-being for its own sake, and also has certain emotional

connections to the child. The case for why children have an interest in being loved (and, so some argue, a right to be loved) sometimes appeals to the fact that children who are not loved but only cared for adequately seem to exhibit cognitive, emotional, and sometimes physical harms as children and later as adults (Liao 2015). On this line of argument, whether children have a right to be loved by appeal to their needs is in part an empirical question; some deny we have adequate evidence (Cowden 2012). But even if children's needs, both as children and as adults, could be satisfied by their receiving adequate but not loving parental care, on an objective list theory it may be argued that being the object of love, especially in the context of a parent-child relationship in which one is vulnerable and entrusts herself to another, is a further good, something that contributes to her well-being (Brighouse and Swift 2014).

Even if children have an interest in being loved, a controversial issue is whether this interest grounds a right and, correlatively, parents' duties to love. This depends, in part, on how we answer a second question, concerning how much parents owe their children, over and above needs satisfaction.

Note, first of all, that this question is not fully settled by appeal to what is in children's well-being interests. Even if it were unequivocally in a child's best interests, for example, to have a stay-at home parent for many years, and to be sent to a high quality private school, most do not believe that parents owe these things to their children, as children are not entitled to maximal promotion of their well-being. This is in part because parents are persons with their own interests (e.g., in maintaining their career or in cultivating their friendships), and these too seem to matter for determining how much parents owe children. At the same time, however, it seems plausible that, at least when they can, parents owe their children more than adequate needs-satisfaction (for a minimalist view, however, see Vallentyne 2003). Whether and how a principled middle ground position can be defended is a difficult question. Some have proposed a list of some central interests of children, which are said to be claims *of justice*, which includes, alongside needs satisfaction, the right to intimacy and love in the context of the parent-child relationship and the right to the intrinsic goods of childhood. (Macleod 2010; Gheaus 2015). (Note that these lists also include rights to autonomy and to a sense of justice, which we discuss below). Others have suggested that we settle the question of how much parents owe children by treating the trade-off between children's and their parents' interests as an intra-personal problem and ask what ideally situated people would choose for themselves rather than stipulating some objective list. More precisely, the proposal is that, since childhood and adulthood are different phases of a life, we should ask how an ideally situated person would choose to allocate the resources and opportunities that she is entitled to over her lifetime across her childhood and her adulthood (Clayton 2006). Knowing about her needs and other well-being interests as a child, she would devote many resources to that important phase of life, but would also be mindful that whatever she allocates to her childhood comes at a cost to her later self and would likely leave for herself substantial opportunities and resources for when she is an adult and may choose to be a parent (thereby avoiding making the parental role extremely demanding). On the view just sketched we would likely say, like on the objective list theory, that parental authority is limited by the obligation to promote children's well-being over and above needs satisfaction, but not by a requirement to maximize children's well-being.

Children's Interests in Autonomy and Independence

Here, too, we begin with the least controversial claim on how a concern with children's autonomy limits parental authority: all liberal philosophers agree that children's *future* autonomy guides and sets limits to what parents should and may do for their children while these are growing up. This view is compatible with believing, and typically is based on assuming, that children, while they are children, lack the capacities for both moral and personal autonomy; they lack the stability of desires, the capacity for reflection, and the

motivational control that are necessary for being self-governing in a meaningful sense, and for being able to set themselves long-lasting aims and pursue long-term projects (Schapiro 1999; Hannah 2018). But the future adults which children will become can have, and should come to have, those capacities; a concern with their autonomy is therefore appropriate, and it has implications for what individuals are owed while they are children. In this section we focus on personal autonomy – which regards choosing and pursuing projects for oneself – and leave the discussion of children's acquisition of a moral sense and a sense of justice till the next section. The "anticipatory autonomy rights" (Feinberg 1992) of children – rights which, though only exercisable by the later adults they become, can be infringed during their childhood – include the right to the protection and development of the cognitive and motivational capacities that are necessary for self-government and further, the development of skills and abilities that they need for an open future, that is, that will enable them to choose, at the onset of adulthood, what path of life to choose.

These anticipatory autonomy rights of children, alongside with rights to having their needs satisfied discussed above, are widely thought to be part of the minimum requirement for parental authority. The limitations on parental authority they imply are substantial (Brighouse 2002; Dailey and Rosenbury 2018). For example, because of the child's right to an open future (Feinberg 1992), parents lack discretion over whether their children should receive a primary and secondary education, and where some discretion has been granted over post-14 education, as in the case of the Amish community in the USA, it has been forcefully argued that this infringes the child's right to be exposed to a wide range of paths of life (Gutmann 1980).

Increasingly many philosophers, however, now argue that a concern with children's autonomy goes further than is captured by the focus on the child's future. In particular, children *qua* children arguably have autonomy interests of two different kinds.

First, children's *growing* autonomy (or agency) sets constraints on what parents may do to children. While infants and very young children, on most views, do not count as sufficiently autonomous for their desires to do, or not do, certain things to count as authoritative, it seems plausible to adopt a gradualist view of autonomy (Mullin 2007). On this view, the difference between children and adults, in terms of their capacity for setting themselves and be committed to pursue ends, is one of degree. As children grow, so does their capacity for autonomy, and accordingly, they should be granted gradually more power to determine certain matters for themselves (Brennan 2002) and their voices should be heard even on matters on which they do not yet have deciding power (Brighouse 2003; see also Freeman 1992).

Second, and more controversially, it has been argued that children also have an interest in being treated as morally *independent* in a sense that entails generally overlooked constraints on parental authority (Clayton 2006). Independence here is a guiding ideal that refers to children's separateness as persons, grounding a duty to treat children, in certain respects, analogously to how a liberal state should treat citizens. Children are non-voluntarily subjected to the coercive authority of their parents in a way that deeply affects their prospects, just like citizens are non-voluntarily subjected to, and their prospects are affected by, the coercive authority of the state. For this authority to be justified to all citizens, who are free and equal, it cannot be exercised so as to enforce controversial views of the good, for instance about religion or about virtues, which we recognize, in a pluralist society, to be a matter of reasonable disagreement between persons. Similarly, parental authority should not be exercised so as to "enroll" children in, say, a particular religion or in a humanist worldview: parents may not bring up their children as Catholics, for example, nor as atheists, because we assume that in a liberal state, the choice of whether to be a Catholic or an atheist is one that may not be imposed on others. To be sure, parents have duties toward children which the state lacks, that is, the duties, discussed above, to provide for their needs and ensure their right to an open future is satisfied, as well as that to instill in their children a sense of justice (see section

"Children's Interest in Developing a Sense of Justice"); but assuming these duties can be fulfilled without bringing up their children with reasonably contestable views of the good, this is what parents should do.

This novel view of children's autonomy as independence is highly revisionist, so it is not surprising it has attracted criticisms. Because it relies on a particular, neutrality-minded liberal view of the limits of legitimate authority, liberal perfectionists, who reject neutrality and believe the liberal state should be guided by considerations about the good life, will not be moved by it. Some argue that the differences between children and adults are such that, even if we favor neutrality for (adult) citizens, perfectionism is appropriate for children (Fowler 2020). It has also been argued that parents' duties to help prepare children for leading a good life – a duty which states lack – means they are permitted or even required to steer the child toward some views of the good: those views of the good which seem aligned with the child's emerging qualities and inclinations, if not parents' own (Richards 2018; for other discussions of Clayton's view, see Cameron 2012; Bou-Habib and Olsaretti 2015; Arjo 2017).

Whether and how parents may promote their children's well-being over and above satisfying their needs depends importantly on whether children's autonomy and independence constrains what parents may do. Respect for the growing autonomy of children requires that parents offer them opportunities for well-being but refrain from forcing them to pursue particular, well-being promoting goods. (In other words, as they grow up, children should be offered capabilities, rather than being forced to obtain valuable functionings over and above their needs.) Parents may not decide, for example, to force their children to learn classical music over many years or to train so as to become top-class athletes, no matter how valuable these activities are, if their growing child consistently and persistently resists them.

What the autonomy interest of children include, how they intersect with their well-being interests, and how they constrain parental authority, are still highly controversial questions in philosophy whose resolution has many practical implications for parental ethics and the legal regulation of parental rights, including the rights of parents to circumcise their children (Mazor 2013), homeschool them (Dwyer and Peters 2019), choose religious schools (Dwyer 2001; Tillson 2019), or control children's beneficial relationships with other adults and children (Dailey and Rosenbury 2018; Gheaus 2021).

Children's Interest in Developing a Sense of Justice

The family's relationship with social justice is complex. On the one hand, the family threatens equality of opportunity, as parents are unequally partial toward their children, and unequally able to confer advantages on them (Rawls 1971; Fishkin 1984). Having and raising children can also create other, potentially unjust, externalities; an example, mentioned above, is the negative environmental externalities which procreators cause by creating new persons and raising them as conspicuous consumers (Young 2001). On the other hand, under the right conditions, the family is also argued to be necessary for, or at least most conducive to, ensuring children's moral development, and thus to turn children into citizens with a sense of justice (Rawls 1971). This last claim is not unchallenged (Munoz-Dardé 1999) but it seems indisputable that, in order to be justified, families must fulfill the important function of moral education: because of the interest we all have in interacting with others who respect our rights, parental authority is constrained by a duty to ensure that children develop a sense of justice.

It seems plausible, moreover, that children themselves – rather than only third parties – have an interest in developing, and gradually exercising, a sense of justice (Noggle 2002; Dailey and Rosenbury 2018). This conviction can be justified by appeal to certain conceptions of well-being (Raz 1986; see also Dworkin 2000). If well-being is construed as requiring the pursuit of valuable goals, and assuming that justice-infringing goals are not valuable, then children's own future well-being is well served by their

developing a sense of justice. Alternatively, or additionally, children's interest in developing a sense of justice can be defended by appeal to their interest in personal autonomy, as it can be argued that while it is possible to be autonomous while pursuing morally bad or unjust courses of action, such autonomy lacks value (Raz 1986).

Parents' duties (to their children, and to third parties) to ensure that their children acquire and come to act in line with a sense of justice places obvious limits on the exercise of parental authority. Parents have a duty to help their children form, pursue, and revise a conception of the good, but they ought to teach and motivate their children to do these things while respecting other people's rights (Clayton 2006); this much is uncontested. But there is disagreement regarding whether parents have a duty, or even a permission, to include in their moral teaching more than those beliefs about people's rights and duties of justice that are part of the public reason of their societies. Common sense morality assumes that parents may (and perhaps must) cultivate their children's virtues, even when parents' conception of what is virtuous is itself controversial. The revisionist view of parental ethics explained above (section "Children's Interests in Autonomy and Independence") denies this and claims that parents are constrained, even in their moral teachings, by what is beyond reasonable disagreement (Clayton 2006).

Particularly interesting cases in this respect concern practices and beliefs concerning highly disputed issues of justice, such as animals' rights, the rights of the global poor, and the rights of future generations. Recently, philosophers have argued that parents ought to raise frugal children, since frugality is necessary to comply with distributive obligations (Zwarthoed 2018); and that parents ought to cultivate children's dispositions to comply with their duties of climate justice (Cripps 2017). With respect to some of these issues, it seems possible to avoid arguments that rely on controversial moral views and rely, instead, on the path-dependent development of people's desires and dispositions. For instance, they may be a case to require parents not to feed meat to their children (absent compelling countervailing reasons), given the powerful influence of childhood dietary choices and the wrongness of eating meat, in order to make is less costly for them to adopt vegan or vegetarian lifestyles once they become adults (Butt 2021).

Another question raised by parents' duties to provide moral education is triggered by the fact that children learn, to a large extent, by emulating their parents. If so, what parents model for their children, in their own, seemingly self-regarding, life choices, may also be constrained by their role in cultivating children's sense of justice. Susan Moller Okin (1989) has argued that, since the family is the first school of justice, parents who comply with sexist norms that disadvantage or outrightly discriminate against girls are teaching their children the same (wrongful) norms.

Other Important Matters Concerning the Family and Justice

We conclude by briefly flagging other issues central to the subject of family and justice.

A first group of issues concerns family-formation. Most basic here is the question of whether procreation is ever morally permissible, and if so, under what circumstances (Benatar and Wasserman 2015). Further questions concern who should have access to the family and what forms of families are admissible. For instance, should society broaden access to Assisted Reproductive Technology and adoption, or favor the biological family? May or should the state privilege two-parent families over single parenting, and may it permit, or even encourage, multi-parent families? And how should child custody be allocated when parents separate, and what rights regarding children, if any, should be given to step-parents?

A second group of issues concerns duties within the family other than the ones parents owe children. Most widely discussed here are questions about gender and the family, concerning a fair division of household labor and caring work, in particular, among adult members of the family, especially in light of the threat that a gendered division of labor and care poses to gender justice (Okin 1989; Lloyd 1995). A different set of

questions here concern filial duties: whether and why grown-up children have duties toward their parents (Keller 2006).

A concern with gender justice also plays a role in the discussion of a third set of issues, concerning whether and how society at large should support the family. Here there are questions about how the costs of procreation and childrearing should be shared by parents and non-parents and how to valorize caring work in order to determine, not what co-parents owe one another, but what society owes parents (Olsaretti 2021).

A final set of issues concerns the way in which the family should be regulated – and indeed, whether it is permissible at all – given that it can hinder social justice by undermining (fair) equality of opportunity for all (Munoz-Dardé 1999; Brighouse and Swift 2014). Recently, there has also been growing discussion of how climate justice may be in conflict with supporting the family, and specifically unlimited procreative liberty, given the substantial negative environmental externalities of children, especially in highly industrialized societies (Kates 2004; McIver 2015; Conly 2016).

Some of these issues, like the ones about the limits of parental authority in the name of children's interests discussed in this chapter, highlight the importance of determining in what respects, exactly the family should be seen as a private association which should enjoy some degree of autonomy from state intervention, and in what ways, by contrast, it should be considered as part of the basic structure of society and thus as both deserving of societal support and liable to being constrained by justice.

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Justice: Aristotle's Perspective

► Aristotle: On Justice

Justice: Climate Justice

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Introduction: A Changing Climate in an Unequal World

In one of the first treatments of global warming in analytic philosophy, Dale Jamieson (1992) contends that the issues raised by climate change are not merely problems in natural science but affect the way in which we live together and how humans relate to each other and the rest of nature. Ten years later, Paul J. Crutzen (2002) argued that humanity has become a geological force, coining this new epoch the "Anthropocene." Again 20 years later in 2022, climate justice is consolidated as an ever-growing field in academic philosophy.

It is a truism by now – both in and outside academia – that anthropogenic climate change poses tremendous threats to the lives of many people and even more people in the future. Among those threats are rising sea levels and extensive droughts that lead to the failure of crops, which in turn might force people to flee due to extensive famines and the destruction of land. Furthermore, significant losses in biodiversity loom large. The human-induced main driver of this process is the continuing emission of greenhouse gases (GHGs) into the atmosphere. Responses to climate change, canonically, include *mitigation*, for example, through the reduction of GHGs, and *adaptation*, for example, through changes in infrastructure. In addition, failures to mitigate or adapt might justify compensation claims, sometimes through *litigation*.

Inquiries into the ethical facets of climate change often start with this observation: States in the Global North have historically been emitting the most GHGs while states in the Global South experience the most immediate and drastic consequences of a warming planet. How should we think about this as an issue of justice? How do we assess climate vulnerability? Who is responsible to take up what kind of action to mitigate or adapt? What is it, if anything, that we owe to future generations who are likely to suffer catastrophic consequences? Within the (analytical) climate justice literature, there is an emphasis on addressing these questions in distributive terms, relating to the just distribution of burdens and benefits. However, others, among those thinkers coming from a critical, feminist, and decolonial tradition, have pushed for a wider understanding of climate justice that includes recognition and enablement. To be sure, the boundaries here are often fluid and exemplify a difference in emphasis. Therefore, climate justice concerns all these interlinked facets: (1) the just distribution of burdens and benefits in combating the climate crises; (2) the recognition of differentiated positions, backgrounds, and knowledge as well as relationships to nature; and (3) the enablement of particularly vulnerable individuals and social groups in the process.

Dimensions of the Problem

Take the observation about the different historical emissions and vulnerabilities to explicate a few general points about the ethical facets of climate change. First, climate change is characterized by spatial and temporal dispersion. GHG emissions do not necessarily affect the place where they have been emitted, that is, emissions from EU states can lead to more significant droughts in Western Africa. Similarly, emissions last in the atmosphere for a long time; therefore, the effects might only cumulate decades after being emitted. Hence, the causality between a specific emission and an extreme weather event is not straightforward – although a scientific field of *attribution science* has emerged over the last decade (Otto et al. 2019). Second, climate change is not caused by one but many agents, both individual and institutional. Stephen Gardiner (2011) refers to this as the "fragmentation of agency." Climate change has canonically been understood as a collective action problem. The general idea is that cooperation involves a common lead to a paradoxical situation. As the individual benefits from GHG

emissions, the burdens (understood as the depletion of the common) are borne by everyone. Hence, while it is *individually rational* to emit GHG, it is *collectively rational* to avoid further emissions. Some authors have questioned whether this holds empirically (Aklin and Mildenberger 2020).

From the perspective of justice, another complication is relevant. In reality, parties in the collective action scenarios are constrained by other background conditions that limit their options and increase dependencies on more powerful parties. For example, Henry Shue has pointed out that Haiti has little leverage in climate negotiations due to its poverty-related dependencies arising from colonialism, coining the term "compound injustice" to grasp this notion (Shue 2014). The question remains how these constraints are related to each other, as the next section shows.

Methodologically, the question of how, if at all, one should consider background conditions in the pursuit of climate justice can be captured by the difference between *isolationism* and *integrationism* (Caney 2012). Isolationists argue that we should treat climate justice *isolated* from other issues such as poverty, trade, colonialism, or health. Posner and Weisbach, for instance, propose International Paretianism in this light (Posner and Weisbach 2010). Integrationists, in contrast, argue that we should treat climate justice as *integrated* with justice concerns. While isolationists often refer to feasibility under time pressure, integrationists can indeed point to cases, like Haiti, where climate change intersects with other facets of (in-)justice.

Climate Vulnerability

There is little disagreement that the uneven distribution of vulnerability to climate change is unfair. However, this is still an unsatisfactorily broad assessment. How should we assess the differentiated vulnerabilities that individuals and social groups face? What claims of justice follow from this?

Analyses by Peter Newell (2005), Chris J. Cuomo (2011), as well as Healy et al. (2019), show that class, race, and gender serve well as proxies to understand who is most likely to suffer injustices resulting from climate change-related disasters. Greta Gaard and Lari Gruen (1993) surveyed ecofeminists' analyses of climate vulnerability pointing to the intimate relationship to the subordination of both women and nature. Relatedly, Nancy Tuana (2019) has shown that there is a deep connection between racism and environmental exploitation. Kyle Powys Whyte (2016), in turn, argues that Indigenous communities are particularly vulnerable due to the way colonial and capitalist legacies shape their territory and the socioeconomic conditions they live in. These approaches share a commitment to the (intersectional) nature of climate vulnerability (a) as interplaying with an already marginalized group, thereby not only worsening their situation but creating specific forms of vulnerability that (b) requires interconnected social changes on multiple levels and regarding multiple processes without falling back into the same categories and dynamics.

Caney has argued that not responding to climate change and the differentiated climate impacts violates human rights, including the ones to physical security, health, and not being displaced (Caney 2010b). Others, like David Schlosberg, favor the capabilities approach to capture the claims of justice individuals and communities can make concerning the satisfaction of their fundamental functionings (Schlosberg 2012). Krushil Watene has critically assessed the compatibility of this approach in light of other values communities expressed in Maori philosophy (Watene 2016).

The differentiated climate vulnerability is prevalent at the state level, too. Darrel Moellendorf has alluded to the specific relation between climate change mitigation and poverty eradication (Moellendorf 2014). According to Moellendorf, we should follow an "anti-poverty" principle that assesses the trade-off between the two urgent projects (Moellendorf 2015). Roberts and Parks have shown that the vulnerability of states to climate change correlates with colonial legacy (Roberts and Parks 2007). In a similar vein, Aragwal and Nassain argue that climate change policies reinforce and reproduce colonial

mechanisms in the international order (Agarwal and Narain 2019). Understanding these facets can inform, among other things, adaptation policies.

Justice in Mitigation

Mitigation is a pivotal response to climate change. It is helpful, following Caney (2020), to differentiate between three questions: What should be done to mitigate climate change? Who should be doing it? And who should pay?

One obvious mitigation strategy is GHG emissions reduction. How should we distribute entitlements to emissions? In light of the imbalance of past emissions and vulnerability, Shue distinguished between *luxury* and *subsistence emissions* where the latter take priority in order to meet basic needs (Shue 2014). Moellendorf underscores the importance of prioritizing developing states' emissions to continue developmental policies (Moellendorf 2011).

Alternatively, the *equal per capita view* states that emission rights ought to be distributed equally. This view has been proposed in various forms: Some argue that states should be ascribed entitlements correlating to the size of their population, while others propose to understand the notion of equality embedded here as applying to individuals (Agarwal and Narain 2019; Caney 2012; Jamieson 2010; Vanderheiden 2008). Meyer and Roser propose that past emissions should matter in the effort to distribute emission rights equally because industrialized states have already benefited greatly in the past (Meyer and Roser 2010). Quite to the contrary, the concept of *grandfathering* correlates past emissions to greater future emissions entitlements (Caney 2009). Even though grandfathering is often considered to be unjust (Caney 2012), there have been instrumental justifications for a moderate version of grandfathering (Knight 2013).

Mitigation encompasses a broader project than GHG reductions. It includes, for instance, the transition to renewable energy as such, which poses the question of whether the current capitalist economic order can be reformed (Pollin 2016) or must be overcome in order to combat climate change (Klein 2014; Moore 2015). Notwithstanding this, Newell and Mulvaney (2013) argued that any transition must avoid recreating the same patterns of vulnerabilities and dependencies as they are observable right now. Theorists employing a structural perspective on climate justice have emphasized the importance of fossil fuel divestment to shift our economies away from fossil fuel energy (Godoy 2017; Sardo 2020).

Besides the content of mitigation, who are the agents to act? While it is commonly accepted that states bear responsibilities, the role of individuals or group agents, such as corporations, has been debated (Moss and Umbers 2020). Focusing on the former, Walter Sinnott-Armstrong (2010) argued that there is no individual (moral) responsibility to reduce one's GHG emissions because individual emissions do not make a difference to climate change. Instead, individuals ought to attend to their governments to implement sufficient policies. The claim about *individual causal inefficacy* has been disputed on the grounds that it, following Parfit (1987), makes mistakes in moral mathematics, underestimating how emissions "add up." In this light, Avram Hiller (2011) argues that individual emissions make an *expected difference* and result in *expected harm*. Elizabeth Cripps ascribes *promotional duties* (instead of *direct duties*) to achieve the needed collective action to individuals (Cripps 2013). These include not only campaigning and protesting but also signing petitions. Dan Boscov-Ellen builds upon Iris Marion Young's social connection model of responsibility to tentatively argue for a "responsibility to revolt" (Boscov-Ellen 2020). Hence, there is an overlap between accounts of civil disobedience and the ethics of activism (Malm 2021).

Mitigation, independently of the responsible agents and the proposed content, infers costs. How should these costs be distributed? One might hold that the agent who emitted should pay for the costs (Caney 2010a). This is often referred to as the *polluter pays principle* (PPP). Critics maintain, however, that it seems unfair to hold agents responsible for the costs they unknowingly incurred. Edward Page (2012) defends the *beneficiary pay principle* (BPP), which widens the focus from polluters to include

all those who benefited from carbon-intensive activities. Note that the BPP might include states that have not historically emitted the most but are relatively recent emitters. Instead, the *ability to pay principle* (APP) suggests that the agents that can bear the costs should do so (Moellendorf 2014). Each of these principles captures important normative commitments. Yet, as Shue has pointed out, they all underscore the assessment that the industrialized states should bear the biggest share (Shue 2014).

Adapting to a Changing Climate

Mitigation is likely not enough to combat climate change. As heat waves, floods, and extreme weather events are becoming more likely, steps toward adapting to a warming planet are urgently needed.

Adaptation policies usually include the building of sea walls, or other means to protect areas from extreme weather events. Enabling this, Sardo (2020) takes providing climate adaptation funds or patent-free technology transfer to be crucial in adaptation policies.

When failures to respond to climate change lead to the destruction of crops, the number of climate refugees will increase. This raises the question of whether states have a special (reparative) duty to help climate refugees (Buxton 2019; Lister 2014). Besides refuge, labor migration seems to appear as a mechanism of climate adaptation when we are considering the destruction of (economic) livelihoods. Draper (2022) points this out and discusses whether states may permissibly use this tool.

Geoengineering

Considerate attention has been paid to the ethical dimensions of research into and deployment of geoengineering. Two technologies are prevalent: *carbon dioxide removal* (CDR), which refers to the extraction of carbon dioxide from the atmosphere, and *solar radiation management* (SRM), meaning the reflection of sunlight back into space. In light of uncertainty about the side effects of deployment, research into these technologies might lead to a *slippery slope*. While Callies (2019) aims to refute this argument, instead cautiously arguing for further research, Gardiner (2010) contends whether "arming the future" with the option of deploying geoengineering is indeed the "lesser evil." Furthermore, geoengineering has been seen as distracting from mitigation policies and Jamieson (2014) worries that the side effects would fall disproportionately on the already vulnerable.

What Do We Owe, if Anything, to Future Generations?

Many of the possibly catastrophic consequences of climate change will be borne by people who do not yet exist. Do we harm future generations when we do not mitigate climate change? When a group decides to either deplete or preserve a resource, can we say that they harmed future people if depletion is chosen? Intuitively, an affirmative answer seems reasonable, but Parfit's Nonidentity Problem (NIP) poses a challenge: Over time, both the depletion and the preservation scenario would create a different set of persons living whose existence depends on either choice. If we further consider the lives of these persons worth living, we cannot say we harmed them.

Notwithstanding this, intergenerational justice entails broader debates than responding to the NIP. McKinnon (2009) has made the Rawlsian case for a precautionary principle in relation to future generations. Meyer and Roser (2009) propose a sufficientarian account as *enough for the future*. "Enough" refers to a threshold in need of specification but it does not necessarily entail that future generations should have equal access to a resource. Janna Thompson (2009) lays out a communitarian conception of intergenerational justice by understanding nations as *transgenerational polities and relationships.* Recently, Táíwò (2022) has made the argument that we should understand ourselves as ancestors in an intergenerational struggle to achieve a better world.

Within the field of climate economics, much attention has been paid to the *social discount rate* (SDR) to assess the economic costs of climate change over time. William Nordhaus (2007) and Nicholas Stern (2007) represent two cardinal approaches to the problem. Leaving aside the calculations, Stern argues that urgent action against climate change is needed and estimates that we ought to invest 1% of the global GDP to stabilize GHG emissions below the threshold of 550 ppm, which captures the maximum concentration of GHG in the atmosphere. In doing so, Stern is committed to weighing the welfare of current and future generations equally. Nordhaus, contrary, suggests a less aggressive investment into climate mitigation, that is, he favors current consumption and welfare over longtime expected values. Moellendorf and Schaffer (2016) offer an account of equal distribution of costs over time by connecting the SDR to the expected GDP.

Conclusion: Being Pivotal, Making Progress

As Jamieson rightly pointed out 30 years ago, climate change is a deeply interdisciplinary issue that needs the attention of scholars from all fields of research. His argument that climate changes poses a fundamental challenge to our morality and conceptions has proven to be true and sparked a lasting interest among many philosophers. Since then, the climate justice debate has made considerable progress in refining, redirecting, or rethinking our normative commitments to face a possibly existential threat. Interdisciplinary work on understanding and assessing, for instance, planetary boundaries is still needed and emerging (Rockström et al. 2009). However, the academic progress made stands in stark contrast to the little political progress achieved in international negotiations or in climate policy implementation within the high-emitting countries. This is especially daunting as we are under time pressure to take meaningful action: If emissions continue at the current pace, the 1,5 °C mark will be reached between 2030 and 2052 (IPCC 2018). In light of the little meaningful progress that has been made to avert the catastrophic consequences, climate justice is also a political struggle for change. As Shue (2021) points out, we may well be the *pivotal generation* to act. Hence, philosophical inquiries into climate activism are on the rise, positioning climate justice as a political project meeting fierce resistance.

Cross-References

► Justice
► Responsibility: Global

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Justice: Divine

▶ Divine Justice

Justice: Friedrich August von Hayek's Perspective

▶ Hayek, Friedrich August von: On Justice

Justice: Georg Wilhelm Friedrich's Perspective

▶ Hegel, Georg Wilhelm Friedrich: On Justice

Justice: Global Justice and Climate Change

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Introduction

Greenhouse gas (GHG) emissions are an unavoidable by-product of most actions that contribute to human well-being. However, emission-generating activities are one of the main causes of anthropogenic climate change, one of our era's major threats. As is widely known, if not appropriately addressed, climate change will cause a worsening of people's conditions of life and a significant number of human and animal deaths (IPCC 2018, 2022). These bad and, quite possibly, catastrophic consequences of climate change place currently living people under duties of intergenerational justice towards future people (Meyer 2013: 599–600; Gough 2017: 24–27).

There are at least two kinds of climate-connected duties towards future people: adaptation and mitigation. *Mitigation* focuses on ameliorating or preventing the effects of climate change. *Adaptation* concerns those measures required to cap and minimize the adverse effects of climate change that have not been prevented (Meyer 2013: 609). *Mitigation* duties towards future people limit the amount of GHGs the current generation is permitted to release. This is quantified in the global carbon budget (GCB), which is the remaining permissible GHG emissions compatible with the fulfillment of our intergenerational duty not to wrongfully harm future people (Meyer 2013: 599–600; Truccone-Borgogno 2022a: 369–370). A way of understanding this duty of intergenerational justice is by relying on the well below 2 °C or 1.5 °C degrees mitigation target. On this threshold, we would wrongfully harm future people by our emission-generating activities if we do not seriously intend to achieve the goal of keeping the temperature well below 2 °C above preindustrial levels and earnestly strive to reach the 1.5 °C degrees target as stated in Article 2, Section (a) of the United Nations Framework Convention on Climate Change (UNFCCC). *Adaptation* duties towards future people require providing resources to reduce their vulnerability to the adverse effects of climate change that have not been prevented (Gough 2017: 112). Fulfilling these duties demand, for instance, supplying material means so that affected parties can build coastal defenses against the effects of sea-level rise, constructing irrigation systems to counteract severe droughts, or providing sufficient resources to offset the more rapid spread of infectious diseases favored by global warming (Caney 2010: 204).

Fulfilling climate mitigation and adaptation duties is burdensome for currently living people. The International Panel on Climate Change (IPCC) has emphasized that 1.5 °C-consistent pathways assume substantial changes in behavior (IPCC 2018: 362), that is, compliance with intergenerational climate duties is not without costs. In particular, fulfilling climate mitigation duties has substantive effects on citizens' ways of living: some projects and long-term plans, grounded on certain current conditions, will have to be sacrificed for the sake of future people's well-being (Meyer and Truccone-Borgogno 2022). As expressed by Gough, "the ultra-fast climate mitigation that is now needed, especially in the global North, will upset taken-for-granted economic and social practices in every domain of life" (2017: 113). Complying with climate adaptation duties is also burdensome for currently living people since it requires devoting resources to future people to deal with the adverse effects of unmitigated climate change. Were these resources not transferred to future people, currently living people would have them at their disposal.

In light of the costs currently living people have to bear in fulfilling their intergenerational climate duties, one of the most relevant questions is: how ought climate mitigation and adaptation duties be globally allocated? Since climate change is associated with GHG emissions, it is required to analyze whether and, if so, how to account for historical emissions of GHGs in the allocation of these duties. In this contribution, I describe the main principles that can provide guidelines for the global allocation of climate duties and some of the most important challenges these principles have to address.

Historical Emissions of GHG: Between Justice and Feasibility

If we consider that "highly industrialized countries are causally responsible for more than three times as many emissions [of GHGs] between 1850 and 2002 than developing countries" (Meyer 2013: 603), that these emissions have had and will continue to have more negative effects on developing countries than on developed countries (Gough 2017: 24–27), and that there is a strong correlation between having emitted more in the past and having more benefits in the present (Williges et al. 2022), then it seems that historical emissions of GHGs should affect the global allocation of climate mitigation and adaptation duties. Particularly, these considerations seem to advocate that present members of developed countries bear greater mitigation and adaptation costs than those they would bear had historical emissions not been taken into account.

At least two groups of challenges must be addressed to defend the view that present members of developed countries bear greater climate duties owed to their historical GHG emissions. The first group of challenges demands an explanation of why this is *just*. The four main arguments in this group of challenges are: first, currently living members of developed countries did not cause the entire problem, since a substantive part of GHG emissions were released by their predecessors ([1] *dead polluters objection*) (see García-Portela 2019); second, even if currently living members of developed countries contributed to causing the problem, they were blameless ([2] *excused ignorance objection*) (see Gosseries 2004); third, no one can claim to have been harmed (to be worse off than they would have been) had historical emissions not been released ([3] *non-identity objection*) (Parfit 1984: Ch. 16; see Meyer 2013: 604–605); fourth, even if historical emissions are linked to climatic alterations, and even if it can be explained how present people are harmed (or benefited) despite the non-identity objection, those historical emissions cannot be accurately linked to specific harms (or benefits) ([4] *causation objection*) (Caney 2010: 206–207).

The second group of challenges asserts that no just scheme of global allocation of climate mitigation and adaptation duties is *feasible*. To claim that some state of affairs or arrangement is feasible is to claim that it can be brought about. The IPCC clarifies that "to limit warming to 1.5 °C above preindustrial levels, the world would need to transform in a number of complex and connected ways" (IPCC 2018: 392). However, the IPCC also considers that "there are many

factors that affect the feasibility of different adaptation and mitigation options" (IPCC 2018: 392; also IPCC 2022: 24). The issue is that, as highlighted by Meyer and Sanklecha, the practical urgency of responding adequately to climate change plus the structural character of the required transformation might lead us to be willing to sacrifice justice in the distribution of mitigation and adaptation duties in order to gain feasibility in dealing with climate change effectively (2017: 15). Indeed, some theorists even suggest that most justice-based theories of climate justice recommend infeasible measures, and, for that reason, they should be rejected (Posner and Weisbach 2010).

In the light of the above challenges, any plausible account of how to allocate climate duties should be in accordance with justice-based and feasibility-based considerations. To date, many authors have developed different conceptions of climate justice aiming to cover these two aspects. In the next Section, these views will be described and assessed.

Global Allocation of Climate Duties

The Polluter Pays Principle

There are two groups of competing views about how to consider historical emissions for the global allocation of climate duties. *Historically informed* views contend that historical emissions of GHGs should affect the present distribution of climate mitigation and adaptation duties. *Non-historically informed* views favor schemes of distribution of climate duties that disregard past uses of carbon sinks. The most widely accepted *historically informed* view is the *Polluter Pays Principle* (PPP). The PPP holds that the agents who have caused the problem should address it. The PPP seeks to ensure that burdens in dealing with climate change are not primarily carried by victims but by historical emitters (Neumayer 2000: 187). It is an intuitive appealing backward-looking principle that fits well with the fact that climate change is caused by emissions released over a long period. Part of the attraction of the PPP is that it is a principle of corrective justice and claims of corrective justice are particularly forceful (Butt 2021: 1170). The PPP asserts that developed and historically high polluters should bear greater mitigation and adaptation burdens.

The PPP might respond correctly to the [3] *non-identity objection*, if a non-comparative or a threshold notion of harm is used instead of a counterfactual or comparative one (Meyer 2021: Sec. 3.1). However, one problem with the PPP is that it is vulnerable to most of the justice-based objections highlighted above. The PPP requires that those who wrongfully emitted GHGs that harm others should bear more significant climate duties. The issue is that, as aforementioned, many emissions were released not by the present generation of developed countries but by their predecessors ([1] *dead polluters objection*), and many emissions were blamelessly released ([2] *excused ignorance objection*). Finally, even if it can be explained that people are harmed despite the [3] *non-identity objection*, the PPP still has to explain why those harms can be accurately linked to specific historical emissions of developed countries ([4] *causation objection*).

The Beneficiary Pays Principle

Benefiting from Wrongdoing

Some scholars who favor considering historical emissions in the allocation of climate mitigation and adaptation duties drop the PPP in favor of what has been called the *Beneficiary Pays Principle* (BPP). This principle draws on ideas of those who assign responsibility for having benefited from others' wrongdoing (for an overview of different versions of these types of principles, see Pasternak 2017). Like the PPP, the BPP can also be understood within the corrective justice framework. Daniel Butt defends a reading of the BPP according to which "individuals and groups can come to possess rectificatory duties to others through involuntary benefiting from the wrongdoings of others, and they act wrongly if they fail to act upon those duties" (Butt 2014: 337; see also Barry and Kirby 2015). In this wrongful enrichment-BPP, as Page calls it (2012: 308–313), owing to the benefits received from historical emissions, present members of

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developed countries act wrongly if they do not fulfill their rectificatory duties toward current and future members of developing countries.

The wrongful enrichment-BPP seems to overcome the [1] *dead polluters* objection since duties of rectification arise not from historical emissions *per se* but from the fact that present members of developed countries benefited from them. As long as the rectificatory duty stems from having been benefited (and not from having emitted), it is irrelevant that many emissions were released by persons who are no longer with us. The principle might also overcome the [3] *non-identity objection* if a comparative account of benefit is dropped in favor of a non-comparative one (Barry and Kirby 2015: 6–7). However, like the PPP, this backward-looking version of the BPP still has to confront the [2] *excusable ignorance* and the [4] *causation objections.* Concerning the former [2], since this version of the BPP asserts that beneficiaries of "wrongdoing of others" should bear greater climate burdens, its defenders still need to explain why historical emissions released in a state of ignorance can be considered wrongful. Concerning the latter [4], the defenders of this principle have to explain not only how much of the harm caused by climate change but also how much of the benefit currently living members of developed countries enjoy can be accurately linked to historical emissions (Heyward 2021: 132–133).

So far, I have examined how justice-based objections cast several doubts on different versions of *historically informed* corrective justice accounts about the global allocation of climate mitigation and adaptation duties. Feasibility-based objections also apply to the PPP and the wrongful enrichment-BPP. One relevant facet of feasibility is what the IPCC calls *sociocultural feasibility,* which pertains to whether the required transformation is socially acceptable (IPCC 2018: 72). Concerning this dimension of feasibility, it is relevant "how cultures relate and what values people associate with the transition and the current regime" (IPCC 2018: 383). The problem is that most developed historically high emitters countries seem not to accept and indeed oppose global schemes of allocation of climate duties premised on their backward-looking moral responsibility for the current state of the climate system (Posner and Weisbach 2010: 117–118).

The Climatic Unjust Enrichment Principle

One way of addressing the remaining justice-based objections and the feasibility concerns within the corrective justice framework is by appealing to the unjust enrichment legal doctrine. Unjust enrichment actions seek to reverse transactions or transfers of goods that are defective for some reason. The benefited party of unjust enrichment is usually liable for restitution without the need to show wrongfulness or fault in his behavior (Virgo 2015: 34). Therefore, this doctrine seems well suited as a basis for claiming that present members of developed countries have remedial responsibility for the current state of the climate system even if they play no or moderate role in causing such a state of affairs. According to what Page calls the unjust enrichment-BPP, "those states unjustly, but not wrongfully, enriched by activities that cause climate change should pay" (Page 2012: 308). This *climatic unjust enrichment principle* asserts that if the present generation of developed countries unjustly benefited from historical emissions at the expense of currently living members of developing countries, the former can be remedially responsible for redressing the current state of the climate crisis.

Concerning the global allocation of climate mitigation and adaptation duties, the climatic unjust enrichment requires showing not only the *unjust enrichment* of currently living members of developed countries but also the absence of *defenses* able to block the existence of a duty to provide restitution. To show *unjust enrichment*, it has to be explained (1) in what sense currently living members of developed countries have *benefited* from historical emissions, (2) that those benefits were obtained *at the expense of* currently living members of the developed countries, and (3) that those benefits are *unjust*. A way of showing this is as follows. Present living members of developed countries (1) have *benefited* from historical emissions not only because they are wealthier and have good infrastructure owed to historical emissions but also because they are

less vulnerable to adverse effects of climate change (Meyer 2013: 606–8; Williges et al. 2022). Those benefits were obtained (2) *at the expense of* the currently living members of developing countries since historical emissions of the developed ones deprived currently living members of developing countries of being able to fulfill their mitigation and adaptation duties without compromising the development of their economies (Page 2012: 315; Heyd 2017: 38). Finally, those benefits (3) are *unjust* – in part – because owed to historical emissions of their predecessors, currently living members of developed countries have received benefits from developing countries without a reciprocal transfer of something of equivalent value, without their consent.

Thus understood, the climatic unjust enrichment principle responds to the justice-based objections against considering historical GHG emissions for the global allocation of climate duties. Against [1] the *dead polluters objection*, the principle asserts that the benefits that can be subject to duties of restitution are only those enjoyed by currently living members of developed countries. However, these benefits might stem from emissions released before they came into existence. Against [2] the *excused ignorance* objection, the unjust enrichment principle does not require showing that emitting GHGs in the past was wrongful. It only needs to show that the benefits of the present generation of developed countries come from, in some relevant sense, the present generation of the developing ones. Concerning [3] the *non-identity objection*, the unjust enrichment principle does not claim that present members of developing countries are worse off than they would have been had the industrialization process not been carried out in the developed world. Instead, it claims that historical emissions of developed countries caused a state of affairs in which the present generation of developing countries does not have enough remaining emissions to engage in economic progress that could improve their level of well-being to similar levels to those enjoyed by the developed ones. Regarding the [4] *causation objection*, the climatic unjust enrichment principle asserts that to claim that present members of developed countries have benefited at the expense of developing countries, it does not matter that we cannot identify, for instance, that this or that extreme weather event can be causally linked to past emissions. What matters is that developing countries cannot deal with them without compromising their option of enhancing their economies further (Truccone-Borgogno 2022b: 14).

One advantage of the climatic unjust enrichment principle is that it diminishes some sociocultural feasibility concerns. On the one hand, it entails that the distribution of climate duties be informed by historical considerations, as many developing countries claim. On the other hand, it also accounts for some of the preferences of many developed countries since it does not entail that they are morally responsible for their historical emissions.

Thus understood, the climatic unjust enrichment principle explains that currently living members of developed countries were unjustly enriched from historical emissions, responds correctly to the four justice-based objections against taking into account historical emissions for the global allocation of climate duties, and reduces sociocultural feasibility concerns. However, this does not necessary entail that currently living members of developed countries have to comply with duties of restitution. The reason is that in unjust enrichment actions, the defendant can accept that she was unjustly enriched and still resist the duty to provide restitution by making use of *defenses* (Birks 2005: 207). In contrast to denials that intend to show that there is no unjust enrichment, defenses aim at showing additional reasons that may override or reduce in extent the duty of restitution (Virgo 2015: 663). In the climate justice discussion, currently living members of developed countries might think that the duty to provide restitution no longer has moral weight if many benefits were already consumed, if the particular benefits obtained from historical emissions cannot be transferred from one country to another, or if present members of developed countries framed their life plans based upon the expectation of continued possession of those benefits. Defenders of the climatic unjust enrichment principle need to account for these defenses (see Truccone-Borgogno 2022b).

The Distributive Justice Beneficiary Pays Principle

Some scholars who defend historically informed accounts drop the corrective justice approach in favor of a historically informed distributive justice account (Gosseries 2004: 380; Meyer 2013: 603–614). Within this framework, for instance, Lukas Meyer (2013) argues that even if currently living members of developed countries are not morally responsible for the consequences of historical emissions of GHGs, historical emissions can still be accounted for in the global distribution of climate duties. This is so because regardless of who released historical emissions and their moral status, past people's emissions unevenly benefited and harmed different groups of currently living (and future) people. Given these unequal consequences, undeserved benefits and harms stemming from past emissions should be redistributed between developed high emitting countries and developing ones. Meyer's conclusion is that those countries who received fewer benefits should get a disproportionate share of the GCB as well as payments to cover adaptation costs than those they would receive had historical emissions not been taken into account (2013: 614).

This view can be understood as a distributive justice version of the BPP. Thus, it is immune to the majority of the aforementioned justice-based objections against considering historical emissions. First, concerning the [1] *dead polluters objection,* in ascribing a duty to someone of redistributing benefits and harms that arise from historical emissions, "no responsibility for the emission-generating activities of past people is attributed to currently living people" (Meyer 2013: 607). Second, with respect to the [2] *excused ignorance objection,* it is also irrelevant whether or not historical emissions were wrongful. Regardless of the status of historical emissions, unequal benefits and harms arising from the behavior of others are underserved and might call for redistributive measures (Meyer 2013: 608–609). The [3] *non-identity objection* does not apply either since this distributive justice version of the BPP considers that "the circumstances in which people find themselves since their conception can be more or less beneficial to them" (Meyer 2013: 607). It does not claim that currently living members of developing countries are worse off (and members of developed countries better off) than they would have been without the industrialization process.

However, it is less clear whether this distributive justice-BPP can respond correctly to the [4] *causation* objection. The advocates of this principle still need to explain in what sense and to what extent the benefits and harms to be redistributed are connected with historical emissions. Further, the distributive justice-BPP can be the target of some objections not applicable to the previous principles. One challenge is to explain why climate duties must be allocated according to distributive justice instead of corrective justice considerations. As Charles Mills asserts, "justice, and morality in general, requires that moral actions be carried out under a certain description for them to have the appropriate identity" (2019: 116–118). Thus, even if the distributive justice-BPP sidesteps many objections against the requirement of transferring resources from developed to developing countries, it still has to be explained why transferring resources in such a manner must be described and justified in distributive justice terms. This problem is more stringent when we realize that the status of distributive justice duties in the international arena is contested. Although there are duties at the global level that are rarely disputed, such as the duty not to wrongfully harm others, it is less clear if the same holds with respect to duties of redistributing goods not wrongfully obtained (see Rawls 1999; for an alternative view, see Føllesdal 2011). Thus, defenders of this view need to explain why developed countries are bound by climate duties of redistribution at the global level ([5] *global distributive justice* objection).

Concerning feasibility issues, in particular sociocultural aspects, like the climatic unjust enrichment principle, the distributive-justice-BPP also seems to account for some of the preferences of developing countries since it requires that [a] the distribution of climate mitigation and adaptation duties be informed by historical considerations. At the same time, the principle is built on the assumption that [b] countries are not

morally responsible for their historical emissions, accounting for part of the developed countries' preferences. However, some empirical studies seem to support that corrective justice principles can gain more intuitive support than the distributive justice-BPP. These studies have shown that people have a significant preference to give the benefits unjustly received to the victim of that injustice over those who might be equally badly off but are in their conditions as a consequence of luck (Lindauer and Barry 2017: 677).

The Ability to Pay Principle

Given the objections the historically informed accounts have to face, a plausible alternative is to opt for *non-historically informed accounts* on how to allocate climate duties. The most widely accepted non-historically informed account is the Ability-to-Pay Principle (APP). This principle asserts that the more resources the agent has, the contribution to solving the problem should also be greater (Caney 2010: 213; see also Miller 2008: 148). This principle is forward-looking since it is indifferent to who historically contributed most to climate change. Since the APP disregards the normative relevance of historical emissions, it does not have to confront most of the justice-based objections referred to above: [1] *dead polluters*, [2] *excused ignorance*, [3] *non-identity*, and [4] *causation*. This is so because these objections question the normative relevance of historical emissions.

At least two ways of interpreting the APP need to be examined. First, the APP might be understood as a principle of distributive justice. In this version, the APP places developed countries as bearers of *global distributive justice* duties towards the developing ones. In a second version, the APP requires "only" duties to *assist* developing countries. The first version of the APP, like the distributive justice-BPP, needs to address the [5] *global distributive justice* objection. It needs to explain why the allocation of climate duties is not to be understood in corrective justice but in global distributive justice terms. Further, the extent of the global duties of distributive justice should also be specified.

The second interpretation of the APP understands it as a principle of beneficence. Unlike the distributive justice understanding, this version does not imply that members of developing countries are wronged if developed countries do not discharge their duties toward them. Principles of beneficence appeal "to our general moral reason to benefit other people, and to protect them from harm" (Parfit 1984: 371). Thus, the beneficence version of the APP appeals only to general moral reasons members of developed countries might have to benefit those who will suffer harm as a consequence of climate change. If the APP is understood as a mere principle of beneficence, it does not need to respond to the [5] *global distributive justice* objection. However, this advantage comes with a cost. If we are not talking about a duty of justice (corrective or distributive), as claimed by Roser and Seidl, "the bare fact that someone is particularly well placed to help someone else does not of itself mean that he or she is morally required to do so – at least not in the sense that the person in need is entitled to this assistance" (Roser and Seidl 2017: 146).

With respect to *sociocultural feasibility* issues, the main problem with the APP is that, in discussing the global allocation of climate duties, developing countries and also historically low-emitters ones but now powerful states (such as China) advocate in favor of principles associated with historically informed views that account for historical emissions of GHGs (Caney 2010: 205–206; Gosseries 2004: 356).

Conclusion

This contribution provided an overview of the main principles discussed in the literature regarding the global allocation of climate mitigation and adaptation duties. I distinguished between historically informed and non-historically informed views. Concerning historically informed views, I highlighted the main strengths and weaknesses of the PPP and different versions of the BPP. At the same time, I analyzed the APP as the main example of a non-historically informed view on how to globally allocate climate duties.

I explained how both kinds of principles need to accommodate justice-based and feasibility-based concerns.

Cross-References

- ▶ Equality and Global Justice
- ▶ Justice: Climate Justice
- ▶ Natural Resources
- ▶ Responsibility: Global

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Justice: In Classical Indian Philosophy

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Introduction

In classical Indian philosophy, justice, whether social/political or individual, involves a seeking, or promoting, of the Good; it involves flourishing, structure, harmony, and the establishment and enacting of roles. Still social/political justice and individual justice are not quite the same but are deeply intertwined. One cannot have one without the other – at least not easily. The primary focus, here, will be more toward the social/political side. This brief entry presents the basic idea of the concept of justice in classical Indian philosophy.

Considering the breadth, depth, and diversity of Indian thought of necessity, there will need to be a significant amount of generalization, abstraction, and so forth. An additional challenge is that Indian philosophical concepts cannot be directly mapped onto Western concepts and are imbedded and depend on a larger philosophical and cultural worldview that differs in important ways from the West. For simplicity, references to obscure, or even lesser known, texts will be avoided as will the use of too much technical language. As a way to organize the discussion, it will revolve around the distinction between ideal and nonideal theory.

The entry will proceed as follows: First, using the *Law Code of Manu*, some of the core features of the social/political structures that undergird an ideal theory of justice in classical Indian philosophy are presented. Second, there is a discussion of the central role the king plays in creating and maintaining justice, both at the communal and individual levels. Third, the focus shifts from the more ideal to the nonideal and how one ought to pursue justice in social circumstances that fall far short of the ideal.

Law Code of Manu and Ideal Theory

When one thinks of the concept "justice," there is, typically, an immediate connection drawn to ideas involving law, government, and rule. Thus, a natural place to begin is with a text like *The Law Code of Manu* (*Mānava Dharmaśāstra*) (Olivelle 2004). Though certainly the best known, and widely influential, it is not the only such text and draws heavily from earlier sources. It discusses issues in legal theory, metaphysics, religion, but a critical component is the articulation of varying social classes. Though the caste system in India, then and now, is rather Byzantine, in the *Law Code of Manu*, and elsewhere, four main groups (*varṇa*) are identified and their roles are articulated, explained, and justified.

The four main groups are a priestly/learned class (*brahmin*), a warrior class (*kṣatriya*), a business class (*vaiśhyas*) – e.g., merchants, trade professions, landlords, et cetera – and a working or laboring class (*śūdras*). The divisions share some commonalities with Plato's ideal social structure of philosopher kings/queens, guardians, and a producer/working class. However, there are important differences. For the classical Indian account, the priestly/learned class is entirely distinct from the warrior class. The leadership of society is drawn solely from the warrior class, not the learned "philosophers." Further, the distinction between a business and laboring class in the caste system allows for a much more fine-grained understanding of social roles than is present in Plato, who groups them together.

As with Plato or Hegel, a just society involves the establishing and maintenance of social roles within a larger context of norms, values, and institutions. Thus, a just society would be one that exists harmoniously where everyone is fulfilling the roles for which they are naturally best suited. These social roles and one's natural tendencies link up to the very important concept in Indian philosophy of *dharma*. The term *dharma* has a variety of meanings, and there is no real way to capture the diversity of meanings easily in English or other Western languages. The word is based on the Sanskrit root "dhri" which connotes a sturdy

foundation or base and at times *dharma* is used in that sense. Among other things, it can also be used to refer to custom, prescribed conduct, according to or in line with nature or the divine/cosmic order, rules or law, justice or right. It also covers a number of general moral ideas such as virtue, duty, morality, doing right, following the rules, acting justly or holding to the law. The idea is that both individuals qua individual and individuals qua role carry with them distinct obligations, requirements, virtues, and duties. While the ultimate end of life and the purpose of *dharma* is liberation (*mokṣa*), it also has this worldly benefits. If executed, one's *dharma* helps ensure the smooth running of society and a just social order, as well as individual flourishing.

To be clear, though it may strike the contemporary mind as odd, one's *dharma* is metaphysically based in an individual's nature or the nature of their role. The "mythology" that underwrites one's status is not the "noble lie" of Plato (1993). It is meant quite literally and carries all the weight of objective truth from time immemorial. As it says in the *Law Code of Manu*: "I have described to you above succinctly the source of the Law [this should be understood quite broadly], as also the origin of this whole world" (Olivelle 2004).

The King and the Responsibility for Justice

While it is everyone's duty/*dharma* to play out their own social role both for their own individual flourishing and for the flourishing of society, and the world, as a whole, it is the king whose role is considered integral to ensure justice, peace, right, and order occur. In that sense, the *kṣatriya* have a distinct role to play in social/political justice. The role of the king could be seen as a complicated combination of deontological ethics, virtue ethics, and consequentialism. Some duties, pre-/proscriptions, and so forth are directly related to statecraft and executive authority; for example, meeting out punishment – it is actually seen as a tremendous failure to not punish a wrong doer appropriately – military action, setting up councilors, envoys, and the whole state bureaucracy. Some are civic, economic, and social in nature. This would include issues related to marriage, protecting, increasing and distributing goods, services, and resources, and more ritualized daily routines. Relatedly, there are also religious obligations – for example, duties that govern the relationships between the various classes, particularly the king and the priestly class (Olivelle 2004).

To be sure, all these duties are religious, ethical, and political, but they are also pragmatic in the sense of promoting the more virtue theoretic and consequentialist side of *dharma*. Enacting one's role, fulfilling one's duty is both the cause of and constitutive of actualizing the virtues appropriate for anyone of any class, but distinctly so with the king. The virtue of the whole society depends on the virtues of the king and their successfully fulfilling their duties. Thus, a society can be just if, and only if, the king is a good, dutiful, and virtuous king. One of the most interesting things about all this is that it goes far beyond Aristotelian virtue theory where being virtuous is a necessary but not sufficient condition for the good life (Aristotle 2014). Throughout the literature in classical India, and after, a virtuous king not only provides the basis for a just society, in a more procedural sense, but in a consequentialist sense. A just and virtuous king and society, procedurally, is also a society where external goods are maximally present – at least according to ideal theory. Thus, you find in the end of the Indian epic the *Ramayana* when describing Rama's rule:

> While Rama was ruling the kingdom, there were no widows to lament, nor there was no [sic] danger from wild animals, nor any fear born of diseases.
>
> The world was bereft of thieves and robberies. No one felt worthless nor did old people perform obsequies concerning youngsters.Every creature felt pleased. Everyone was intent on virtue. Turning their eyes towards Rama alone, creatures did not kill one another.
>
> While Rama was ruling the kingdom, people survived for thousands of years, with thousands of their progeny, all free of illness and grief . . .
>
> The trees there were bearing flowers and fruits regularly, without any injury by pests and insects. The clouds were raining in time and the wind was delightful to the touch.
>
> Brahmins (the priest-class), Kshatriyas (the warrior-class), Vaishyas (the class of merchants and agriculturists), Shudras (the servant-class) were performing their own duties, satisfied with their own work and bereft of any greed. While

> Rama was ruling, the people were intent on virtue and lived without telling lies.
>
> All the people were endowed with excellent characteristics. All were engaged in virtue. Rama was engaged in the kingship thus for one thousand years (Valmiki 1998).

As with Aristotle, communities, in general, and states, in particular, are established for the sake of some good – viz., justice understood in terms of flourishing (Aristotle 1999). In this case, for classical Indian philosophy, it is not merely that people live virtuous lives, but there are decidedly material benefits that are causally related to the virtues of the king and their successfully acting out their role. In the ideal, that means a maximally good life – across all domains – only occurs within a just social order.

The Bhagavad Gita and Nonideal Theory

The above discussion is more ideal theory. The classic Indian text, *The Bhagavad Gita* (Gita), helps with an understanding of a nonideal theory of justice in classical Indian philosophy. The Gita is not technically scripture nor a fully authoritative text – it is a section of the Indian epic the *Mahabharata*. De facto, however, it does play that role (Davis 2015). The Gita is a dialogue between *Kṛṣṇa* (an avatar of the Hindu god *Viṣṇu*) and one of the protagonists of the epic the *kṣatriya*, *Arjuna*. It takes place before the beginning of a battle that will determine the fate of the kingdom. The battle is between the just *Pāṇdava* – of whom *Arjuna* is their most respected and gifted general – and their allies and the *Kaurava* – the unjust usurpers of the kingdom that rightfully belongs to the *Pāṇdava* – and their allies. *Arjuna* becomes overwhelmed due to the immanent carnage, and the fact that on both sides of the battle are teachers and family members, individuals for whom there is a special duty to protect. He states that he will not fight and asks *Kṛṣṇa* for guidance. *Kṛṣṇa*, in turn, reminds *Arjuna* that he is fighting on the right side of a just war and that his duties as a *kṣatriya* require him to engage in the battle.

Arjuna states that "we cannot in justice slay our kinsmen." There has been much debate over why *Arjuna* believes or feels this way, which need not be addressed here. On a plausible interpretation, *Arjuna* may be arguing that he ought not fight for the following reasons: (1) it would require killing the teachers and family who had benefited him greatly throughout his life; (2) since so many men would die as a result of the battle it would lead to the destruction of families, the caste system and all of society; (3) the "evil . . . would cling to us [the *Pāṇdava*]" for, among other, reasons (1) and (2). Worded differently, the *Pāṇdava*, specifically *Arjuna*, would be personally responsible for all the deaths and the negative consequences that might result from all the death and destruction. Further, in a sort consequentialist calculation, the benefits that might result from the battle – i.e., the *Pāṇdava* having the kingdom that is rightfully theirs returned – do not outweigh the negative results.

Kṛṣṇa then provides, guidance and counter arguments to *Arjuna*. In Western terms, *Kṛṣṇa* is often seen as advocating from a very pure deontological perspective where the right action is to fulfill one's duty/*dharma* solely for the sake of duty irrespective of the consequences. Again, *Kṛṣṇa* councils *Arjuna* that despite his misgivings, he is not thinking clearly and that it is his duty as a *kṣatriya* to fight. However, he should do so free from desire or expectation. *Kṛṣṇa* states that "Your concern should be with action,/never with an action's fruits;/these should never motivate you,/nor attachment to inaction" (Flood 2015). The similarity with Kant is obvious, thus making the interpretation of *Kṛṣṇa's* position as strongly deontological, not unreasonable. For example, in the *Groundwork for the Metaphysics of Morals*, Kant's second proposition of morality is:

> an action from duty has its moral worth *not in the purpose* to be attained by it but in the maxim in accordance with which it is decided upon, and therefore does not depend upon the realization of the object of the action but merely upon the *principle of volition* in accordance with which the action is done without regard for any object of the faculty of desire (Kant 1997).

Yet, such an interpretation of *Kṛṣṇa's* position is inconsistent with the ideal theory discussed above. There, at least part of, the justification for following one's *dharma* or fulfilling one's duties – especially for a King or *kṣatriya* – was exactly the

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consequences that result materially, morally, politically, and spiritually. *Kṛṣṇa* actually refers to consequences in his criticism of *Arjuna*. Indeed, he points out that exactly the consequences *Arjuna* fears are just as, if not more, likely to occur if he does not fight. Thus, "you should not mourn what is merely/inevitable consequence" (Flood 2015). The point is, if the consequences will be similar either way, sticking to one's duty becomes the most relevant feature in the decision-making process.

Importantly what the dialogue in the Gita illustrates is how one should navigate nonideal circumstances to reach the most just outcome. First, a more restricted moral/political theory is insufficient for determining the best, or best possible, course of action. Rather, moral/political theory requires a comprehensive set of lenses, ideas, and values that may not always perfectly cohere, but are all essentially valid. This is consistent with the broader Indian philosophical worldview. In Indian philosophy, there are a variety of orthodox and heterodox schools of thought. Arguably all are valid, but certainly all the orthodox schools are despite important differences.

The Gita, particularly the *Kṛṣṇa-Arjuna* debate, is also illustrative of how to navigate nonideal circumstances, by underscoring the relationship between *Kṛṣṇa* and *Arjuna*. *Arjuna* understood that he was not actually in a position to properly judge the situation, which is exactly why he asked *Kṛṣṇa* for guidance. *Kṛṣṇa* is in every way *Arjuna's* superior. "Only you and no one other/can totally efface my doubts; none but you comes forth, O Krishna/to efface my uncertainty" (Flood 2015).

What is demonstrated is that where ideal theory leaves off, authority and expertise come in to fill in the gaps. This is common in classical Indian philosophy; the basic scriptural authority is the source of truth. However, to be understood it requires interpretation which involves developing the wisdom and experience for interpreting and applying the texts correctly. While in the epic *Kṛṣṇa* is a *kṣatriya*, and therefore represents the important role and hierarchy of teacher and student within a caste, he is also an emanation of the Supreme Deity and thereby represents the learned religious authority of the *brahmin* caste. Note that the relationship is both deferential and advisory – i.e., the political and military authority should seek out the wisdom of the learned class, but the learned class's role is limited to advising, it is ultimately the political and military leadership's role to make the final decision and act on it.

What is found in nonideal theory is exactly what was found in ideal theory. In terms of justice, it is the king, or more broadly the political class, that is most responsible for maintaining and ensuring a just social order. It does require an impartial appreciation of not just one's duty/*dharma*, but of the actual consequences of one's actions and choices. Nonaction is not an option. Like most contemporary consequentialists, nonaction is itself an action, the consequences of which must be evaluated alongside other possible actions. Practically, one's duties and virtues, when properly informed and habituated, typically lead to the best consequences, but there is a recognition, *pace* Kant, that there can be legitimate conflicts of duty. Reconciling those conflicts leaves no space for parochialism and requires, again, impartial evaluation. In nonideal situations, sometimes there will be no best option just more or less bad ones. Then, the society as a whole is active in maintaining the just social order precisely by following their particular *dharma*.

Conclusion

Justice in classical Indian philosophy is a complex concept that has similarities to how the concept is used in the West. It has both ideal and nonideal aspects. Both social roles and *dharma* do a lot of the grounding and justification, and are causally primary in the establishing of a just society. In turn, a just social order is a necessary and sufficient condition for individual justice and communal and individual flourishing. The greatest departure from Western accounts of justice is that in classical Indian philosophy, it is much more capacious and broad based. Whereas in the West, theories, ideas, and values are often compartmentalized or seen as mutually exclusive alternatives, in classical Indian philosophy, it rests much more comfortably with tension and is

thus able to use a variety of different approaches. In turn, this creates a theory of justice that is more comprehensive and adaptable.

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Justice: Jeremy Bentham's Perspective

► Bentham, Jeremy: On Justice

Justice: Jürgen Habermas' Perspective

► Habermas, Jurgen: On Justice

Justice: Juvenile

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Introduction

Juvenile justice refers to the domain of legal punishment appropriate for people who are not yet adults. The motivation behind this area of justice is that there is a moral difference between crimes committed by adults and those committed by juveniles. The main reason for drawing a distinction between juveniles and adults within criminal justice is the belief that children are *less* responsible for their bad actions than adults are, so it would be unfair to hold them to the same standards as people who are *more* responsible. Therefore adult punishment should be withheld from juveniles. In law, the juvenile justice system exists as an alternative to adult courts. Yet the boundaries between the two are not fixed as there is a process for transferring youth crimes into adult courts. This entry will discuss some contemporary arguments for treating juveniles differently from adults within criminal justice, and the philosophical, empirical, and practical challenges that these arguments face.

Youth, Criminal Law, and Responsibility

In the modern era there has been a trend towards prioritizing and protecting the welfare needs of children as they develop from infants into adults (see Feinberg 2007). The UN's Convention on the Rights of the Child (UNCRC 1989) affirms that States must put the best interests of the child first in their policies. In the context of punishment the UN supports developing "conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible" (Beijing Rules 1.2 1985). Many nations have created juvenile courts that follow different rules from adult courts, specifically so that the consequences for anti-social behavior at this stage of life won't carry over to adulthood. In many jurisdictions, a youth sentence cannot extend beyond the age of 18. This reflects the goal of reforming children for the things they do as children, before treating them as adults for things they do as adults.

Yet, there has also been an opposing trend of enabling the transfer of cases from juvenile courts to adult ones (see Whitehead and Lab 2018, Chap. 8). The reason for these transfers is to access the harsher sentences that juvenile courts

specifically forbid. Depending on local law, the transfer can be done at the discretion of the judge in juvenile court, while in other cases the transfer can be requested by the prosecutor. In some places there is no individual discretion one way or the other, as the law dictates that crimes meeting certain severity conditions must be transferred to adult courts. Once the case is before an adult court, many jurisdictions impose mandatory sentencing, for example, life without parole, for crimes regardless of the age of the offender.

These two approaches are at odds with each other. If youth is characterized by a special susceptibility to deviant behavior, then youth crimes mean something fundamentally different from adult crimes (see Scott and Steinberg 2003). A childish action done by a child is understandable while the same behavior from an adult is not. This point remains true even if the action in question involves severe deviance. Thus, treating some youth crimes according to adult standards via transfer between courts appears to be inconsistent. If the goal is to reform behavior, then this should apply evenly. On the other hand, if the distinction between adulthood and childhood is largely conventional, then States can simply decide to punish some youth crimes more harshly than others. On this view, as people near the age of 18, they become more and more like adults, and their individual bad behavior can justify withdrawing the general protections offered to children.

Some jurisdictions operate with defeasible presumptions in the case of severe crimes committed by youths (see *Miller v Alabama* 2012). This is an attempt to strike a middle ground between these two approaches. The presumption acknowledges that juveniles *generally* lack the capabilities that adults possess, while leaving open the possibility that some *individuals* are functionally adults and we can hold them to adult standards based on what they choose to do (see Bryan-Hancock and Casey 2011). This raises the question of what kinds of capacities are relevant to deciding whether someone is a juvenile or an adult for criminal purposes. This has both a moral and an empirical dimension, which will be treated in the next two sections. Following these analyses, we will return to the issue of severity to discuss how it is relevant to juvenile justice.

Moral Arguments

Thinking about the justifiability of transfers from juvenile courts to adult courts forces one to consider the morality of criminal punishment in the first place. One of the most widely shared beliefs among theorists is that it is wrong to punish people for things that are not their fault (see Tadros 2017). Call this the No Fault premise.

Showing that something bad that happened is not your fault can consist of different sorts of evidence. In some cases it is enough to show that you didn't do the thing in question. For example, if someone pushes you into someone else, then you should not be punished for making them drop their ice cream cone. This is not something you did. Rather you were acted upon by another. In other cases, while you may be to blame for causing some bad outcome to another, you have an excuse that cancels out punishing you for it. For example, if you act under the reasonable but mistaken believe that an umbrella is yours and accidentally take someone else's property, then you should not be held liable for theft. Anyone in the same position would have made the same error. These two examples speak about two conditions generally required by criminal law: (1) actually having done something bad, and (2) doing that thing with a guilty mind. Showing that one or both of these is missing can either completely or partially eliminate the justification for holding someone responsible through punishment.

This general analysis of the No Fault premise explains why we treat children differently under the law. During early stages of life, children are like the person who gets knocked into the bystander. Their emotions and desires act upon them, causing physical and verbal outbursts that sometimes negatively affect others. It would be wrong to hold them responsible through punishment, as they lack the ability to do otherwise. To blame a child is to make the incorrect assumption that their actions are under their control. As a child

develops, they gain the ability to respond to instructions about what to do and not to do, but still lack knowledge and understanding about *why* they must not do these things. The ability to distinguish right from wrong requires a level of intellectual sophistication that emerges later on in childhood. Prior to this development it would be wrong to impute bad intentions to children as they cannot yet know that what they are doing is wrong.

There is a third component beyond the powers of action and intention that also develops as children become adults. This is the ability to convert one's knowledge of right and wrong in to action when under stress. In adolescence we see an increased susceptibility to external influence, like peer-pressure (see Maroney 2011). The consequence of this pressure is that teenagers succumb to making bad choices that they would not make under cooler conditions. Naturally this happens to adults as well. However findings from neuroscience demonstrate that the teenage brain is still developing the ability to resist this pressure. What this means is that the underlying physical supports for certain advanced decision-making abilities are not present for a period of time. More will be said about this in the next section.

Some of our linguistic practices reflect this reality. Chastising a young teenager means telling them they should have *known* better, but more often with older teenagers the criticism is that given what they know, they should have *done* better. Conventionally we use the word maturity to refer to this ability to combine epistemic considerations with volitional ones. Lack of maturity is precisely the gap that exists between the two: a juvenile is someone who cannot reliably act on what she knows to be right. This gap is not a defect but rather a normal part of human development. Recognizing it as normal means withholding punishment from teenagers for deviant behavior. Immaturity just means there is more growing to do.

This is an underappreciated implication of the moral logic of holding people responsible, as applied to teenagers (see Kessler 2019). Just as it would be wrong to punish infants who can't control their bodies, and just as it would be wrong to punish children who don't know right from wrong, so too it would be wrong to punish teenagers for failing to act rightly in the face of peer-pressure. All three of these follow equally from the No Fault premise in the context of normal human development. This argument does not mean that one can never punish children and juveniles. Rather it frames the point of punishment differently from the domain of adult justice. In the latter, the motive is to hold people responsible for their actions. In the case of juvenile justice, punishment needs to *support* progress through the normal stages of human development so that youths can become the kind of moral agents whom we can eventually hold responsible for what they do. This is why the UN's Beijing's Rules emphasize special protections for the stage of life where delinquency is especially prominent. The propensity for anti-social behavior will usually pass. Hence it is important not to hold these bad choices against a person into adulthood, as this would unfairly impair their chances at a "meaningful life in the community." The community in question includes the moral community of agents who take responsibility for their actions. Joining this community is a kind of achievement that depends on being afforded the space to move through the stages of human development. That is what juvenile justice aims to protect.

The Role of Empirical Findings

Advances in neuroscience and developmental psychology have led to greater understanding of why adolescence is characterized by a period of impulsivity. As the brain grows, different systems mature at different times. Through a process called synapse-pruning, the brain prioritizes growth in certain areas before others. The system that enables intellectual gains is in place sooner than the one that enables impulse control (psychological maturity). The behavioral manifestation of this developmental delay is that juveniles can show advanced knowledge and skill but lack the ability to regulate their desires in the face of attractive social rewards. According to some

research, the neurological basis for reliable impulse regulation isn't fully in place until a person's mid-twenties (see Steinberg 2008). As with any biological process, there are outliers on both ends of the spectrum. Some young people will develop adult psychological maturity faster and others will develop it more slowly, with the majority failing within the middle.

These discoveries have been welcomed by proponents of reduced sentences for youths (see Monahan et al. 2015). Previously arguments for leniency needed to rely on an element of compassion for juveniles, based on the capriciousness of adolescence and how much of their life lies ahead of them. With scientific evidence that these young agents, despite their grown-up appearance, still lack adult cognitive capacities this changes the character of what is being argued. When we can point to an observable developmental process that is ongoing, the legal practice of discounting crimes committed by juveniles is less about compassion and instead about moral consistency with adult criminal justice. If one of the moral preconditions for punishment is missing – being able to *do* what one knows to be right – due to a lag in development, then it would be wrong to hold juveniles responsible as if they were adults. They are, in some ways, like the child who cannot control his outbursts. This power is on its way to being in place but is not there yet, and society must provide individuals with the chance to fully develop into adults before holding them responsible as adults.

This picture of juvenile agency creates some problems for accounts of justice that rely heavily on the No Fault premise. The problem is that law requires bright lines: can we hold this person responsible for their crimes or not? The answer sketched above is that we can hold them responsible *if* their crimes are the product of powers under their control, but not otherwise. However, there is no moment at which this ability switches from being unreliable to secure (see Carbone 2011). Rather, adolescents tend to improve with a mix of time and experience. At some point (that is currently impossible to identify precisely) individuals are able to exercise self-control in situations that would have been near impossible earlier. So while the neuroscientific evidence is compelling, it is not fine-grained enough to settle the question of whether someone has or lacks adult levels of impulse control.

A question we are then left with is how we can incorporate the fuzziness of this boundary between adolescence and adulthood within a system that needs determinacy. The challenge is that the capacity in question (psychological maturity) is both hard to quantify and it emerges after large increases in intelligence. So you can have individuals who are very criminally capable yet, through no fault of their own, still possess weak impulse control. Given a bit more time they would possess, for the first time, the power to reliably refrain from committing these crimes. Treating them as adults for the purposes of criminal punishment is wrong because they are not adults, yet the fact of the matter that would show this is not demonstrable.

The problem for juvenile justice is even deeper than it appears at first glance. Punishment is a matter of holding *individuals* responsible for their actions, while developmental considerations are generalizations based on the age most people are at various life stages. No matter where we set the age cut-off for juvenile sentencing we will end up being either over or under inclusive. Some individuals will, based on being below the age cut-off, benefit from lighter punishment than they should receive given their actual psychological maturity. In these cases, their capacities will have fully developed and therefore they don't meet the criteria for lighter sentences reserved for those who are still developing. In other cases, individuals will experience arrested development and fail to have adult capacities even when they are well above the age cut-off. In order to match punishment to their actual psychological condition, adult sentencing would need to be withheld deep into adulthood.

For some theorists, these problems are reasons *not* to tether an account of juvenile justice to empirical considerations like those discussed in this section. A better approach is to argue directly for a moral distinction between children and adults based on their political status (See Yaffe 2018). We withhold some rights – voting for example – and privileges – signing up for a credit

card – from children. As such, youths belong to society without possessing full membership in society. Withholding adult punishment can be justified according to this rationale. When children graduate from partial to full membership, then it becomes fair to hold them to higher standards. Sentencing discounts are part of the trade-off for their less than full membership. This argument is not prey to worries about under or over inclusion as the line between adults and juveniles is set by a larger convention, not scientific facts about the brain and its development. Social conventions do not claim to be directly tracking something that can be measured, though they are informed by these factors. Given the impossibility of individualized criminal justice we should instead adopt age-based bright lines, with the possibility of sentencing adjustments based on the facts of a given case.

These different approaches lead to subtle differences in how we talk about juvenile justice. One way to see this is to consider whether 17-year-olds are "almost adults." One interpretation is that they are indeed almost adults, since adulthood is a chronological concept and we can count down the days until it arrives. Another interpretation is that whether or not someone is almost an adult depends on where they fall on a continuum of development. Getting into the adult range is not a matter of time but a matter of growth. Both models involve conventionality, since what counts as the adult range on the continuum will be set by contemporary social and scientific standards. The difference lies in what explains why we are treating this person according to juvenile rather than adult standards. On the chronological view, a person can be mere days away from much stiffer punishments for their choices. Youth sentencing discounts can therefore seem like an unjustifiable technicality. On the other view, there is no set number of days until adulthood, so it is more like a developmental achievement than a temporal inevitability.

The Relevance of Severity

Beyond considerations about developmental versus age-based standards, juvenile justice also looks at the severity of the crime committed when deciding how to punish the act. Transfers from juvenile to adult courts are motivated by a desire to access harsher sentencing. However the transfer is not available in every case. Rather the law justifies transfers only for the most violent and dangerous crimes. From the standpoint of morality, treating severe juvenile crimes differently from less severe ones raises some problems of consistency. If a juvenile meets the No Fault premise, then they are not to blame for their bad actions. This does not change when their bad actions have very bad consequences for others. Recall that the key incapacity in adolescence is not knowledge of right and wrong but the ability reliably to act on what is right in the face of pressure. Depending on their circumstances and peer groups some youths will gravitate towards petty crimes like shoplifting while others will engage in things like assault or even murder. All these choices, however, come from the same underlying adolescent tendency to deviant behavior.

While it is understandable to want to treat severe crimes more harshly than petty ones, in the case of juvenile justice this can involve a mistake in logic. Severe crimes are not evidence of adult capacities in a young offender. If adult sentences are sought because the goal is to hold individuals responsible for their actions, then charging juveniles as adults only for severe crimes is internally inconsistent. Why should some young offenders be treated more harshly than others if both groups are fully responsible for their crimes? And if both groups of juveniles equally lack adult capacities and are not fully responsible, then overcharging the violent young offenders commits the injustice of treating them disproportionately in order to satisfy society's desire for vengeance. When we consider the victims of violent crime, it is clear that doing right by them means holding perpetrators fully responsible. Yet when the perpetrators are adolescents who are still developing their volitional powers, doing right by them means not holding them to higher standards than should apply to them. Holding both of these thoughts together at the same time is difficult, especially when the crimes in question are heinous.

Many young offenders commit crimes that they would not commit once they are more psychologically mature. But this is not true across the board. Some juvenile crimes do actually testify to what we can expect from the adult to come. In these cases it can be tempting to reason that society would have been better off if we had sentenced the youth crimes more harshly so as to keep this person incarcerated for longer. Youth sentencing just puts a dangerous person back on the street. Unfortunately, there is no forensic test for distinguishing when this is the case. It is possible that advances in developmental psychology may one day be able to sort future career violent criminals from those who are in a state of adolescent deviance (see Mulder et al. 2012). If it were possible to diagnose in adolescents a permanent inability to suppress violent impulses, then moving the case out of the juvenile justice system can be justified. But notice it would not be in accordance with the No Fault premise. A young person who never develops the normal ability to act on what he knows to be right is not to be blamed for this outcome. This is not their fault. If we were to hold this person to harsh sentencing it would be based solely on needing to protect society from their bad actions. This is in keeping with other practices like indefinite detention for those found to be not criminally responsible.

In the majority of cases involving young offenders, there are strong developmental reasons to conclude three things. First, that this individual probably lacks the power to reliably suppress the impulse towards deviant behavior. This is based on a generalization about the teenage brain. Second, that with more time, this individual will probably develop the ability to act on what they know to be right under pressure, and would thus be less likely to commit this crime on that basis. And third, that the crimes they may commit going forward would be done with adult powers and thus be eligible for adult punishment. Each of these points holds true to the same extent whether we are discussing more or less severe crimes. Therefore transferring violent crimes from juvenile to adult courts is inconsistent with the moral logic of withholding adult punishment so that youths can join the wider community as full members.

The foregoing points to a fundamental choice about the objective of juvenile justice. Any system will approximate perfect justice, where all and only genuinely guilty people are punished, and only punished as much as is appropriate given what they have done. This goal is hard to achieve with adult justice, and one can look at crimes involving youths as simply replicating these same challenges, just with younger offenders. In that case juvenile justice should be roughly symmetrical with adult justice on how we treat more and less severe crimes. Alternatively, we can think of juvenile justice as a separate system that is designed to reflect the reality of what it is like to be an agent who experiences the world differently from fully competent adults (see Feld 2017). In that case there can be significant asymmetries between adult and juvenile criminal punishment (See Brink 2019). The decision to treat more and less severe crimes similarly is an example of one such asymmetry. Adopting this approach in the case of juvenile crimes does not imply that differences in adult crimes should be ignored or that they don't matter.

Conclusion

In this entry we have surveyed a range of considerations that explain why juvenile justice deserves special treatment apart from adult criminal justice. The clearest line between the two is that adolescence marks a transition between being incapable of bearing criminal responsibility for one's actions to being appropriately held responsible for one's actions. The transition involves the acquisition of a set of capacities necessary for the imputation of culpable action. Most importantly, adolescence is marked by inconsistent possession of the capacity for impulse regulation. Adulthood is marked by secure possession of this capacity. Hence the difference between adults and juveniles is whether we can reasonably expect them to act rightly across a range of challenging choice contexts. According to the developmental picture of youth discussed here, deviance is to be expected because it is normal.

A system of juvenile justice must leave room in its treatment of youth crimes for the fact that this is a stage of life most people grow out of. Age is the proxy that legal systems use to track when someone can be expected to both know and act better. However age is a crude guide for the relevant capacities. Furthermore, there are empirical reasons to believe that setting the difference between adults and juveniles at 18 doesn't reflect the reality of when a person usually acquires adult capacities for refraining from deviance. Focusing on age as a reason for transferring cases from juvenile to adult courts can lead to punishment that lacks moral justification. The same point applies to using severity as a rationale for transfers. Committing a severe crime doesn't make you more like an adult than if you had committed a less severe one. While there is an established social sense in which juveniles are almost adults, legal systems need to firmly protect the boundaries between the two.

Cross-References

- ▶ Equality and Global Justice
- ▶ Human Rights and Justice
- ▶ Human Rights Conventions
- ▶ Neuroscience and Law
- ▶ Rights: Legal and Moral

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Justice: Retributive

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Introduction

"Retribution" has its roots in the Latin word *retribuere*, a verb that is composed of the prefix *re-*, "to return," and *tribuere*, "to divide among tribes." Taken together, *retribuere* means roughly "to pay in return" (Fassin 2018, p. 48). In modern times, "retribution" and especially "retributive justice" are, at least within academic circles, associated almost exclusively with retributivism and retributive theories of punishment (see, e.g., Walen 2020).

There have been many different kinds of theories for the justification of punishment that either self-identify or are at least regarded by others as offering a "retributive" theory of punishment (see, e.g., Cottingham 1979 and Walker 1999). The consensus in recent years is that a "retributive theory" is one that justifies punishment in terms of the desert of the wrongdoer (Berman 2011, p. 437). Many trace the intellectual roots of such a retributive theory back to Kant (e.g., Murphy 1973; Honderich 1984), though it is debatable to what extent Kant was a retributivist in this sense (Tunick 1996).

Against this background, we can therefore understand retributive justice as the general idea that wrongdoers deserve to be punished for and in proportion to their culpable wrongdoings and that it is at least a matter of justice that they get what they deserve – or more strongly – that justice demands they get it. To this positive claim, we can also add a negative one: it is unjust to punish those who do not deserve to be punished and for wrongdoers to be punished more than what they deserve. Given limited space, this entry will focus on the positive claim. For a dedicated discussion of the negative claim (or "negative retributivism" as it is referred to in the literature), see Lippke (2014). What I shall do in what follows is to give substance to the general positive claim by introducing and critically discussing some of the central contemporary theories and debates relating to it.

Besides punishment, one of the main reasons behind recent interests in retributive justice (and in theories of punishment more generally) is also its normative implications for criminalization – on what, for example, should or should not be criminalized (Moore 1997; Alexander and Ferzan 2009). This has been subjected to some recent challenges (e.g., Chiao 2018). This entry, however, will mainly focus on retributive justice in relation to the justification of punishment, including but not limited to legal punishment.

Finally, one major assumption of retributive theories is that people have the kind of free will that enables them to be morally responsible for their wrongdoings. This entry will set this issue aside due to limited space. For a recent collection of essays on this, see the collection edited by Caruso, Pereboom, and Shaw (2019).

Three Retributive Theories

There are at least three broad kinds of retributive theory that are widely discussed among contemporary theorists. Each provides a different story for why wrongdoers deserve to be punished for their culpable wrongdoings.

The first kind is by far the most recognizable and the one that most immediately comes to mind when one talks about "retributivism" and "retributive justice." For this reason, I shall refer to it as "traditional retributive theory." According to this view, wrongdoers deserve to be punished because they deserve to suffer in virtue of their culpable wrongdoings, and their deserved suffering is intrinsically good. Prominent contemporary defenders of this traditional view include Moore (1997), Zaibert (2006, 2018), Berman (2008), and Alexander and Ferzan (2009, 2018).

Defenders of this traditional view typically appeal to thought experiments and intuition pumps in support of their position. Thus, we are asked to imagine, for example, stripped of all consequential considerations, whether a world in which a (typically egregious) wrongdoer suffers in virtue of her wrongdoing is better than a world in which she does not and lives happily ever after. One standard criticism is that even if one shares the retributive intuition here, it is not clear just how reliable that intuition is and whether it is not simply at base motivated by maliciousness and spite toward those who have wronged us. One of the most sophisticated responses to this criticism is by Moore, who argues, among other things, that we should instead defend the retributive intuition from the first-person point of view and rely on the arguably more virtuous feeling of guilt (1997, chapter 3). Critics, however, point out that despite its sophistication, Moore's argument is nevertheless simply a brute appeal to the intuition that "the guilty deserve to suffer" without any explanation of why they deserve this (Duff 2001, p. 25), and it fails to rule the intuition out as something we are simply conditioned to feel and believe in

(Matravers 2000, pp. 81–88) – perhaps (as a cynic might suggest) self-deceptively in light of our spitefulness and maliciousness (see also Murphy 2011a).

One classic criticism of the traditional view is that "...it appears to be a mysterious piece of moral alchemy in which the combination of the two evils of moral wickedness and suffering are transmuted into good" (Hart 2008, pp. 234–235, and more recently Tadros 2011, pp. 73–78). One response here is to appeal to the idea of "organic unities" (Zaibert 2006, Chapter 7; 2018, Chapter 2). See also Berman (2008, pp. 263–271) for a potential alternative response.

An increasingly popular criticism in recent years that potentially has wider implications relies on the "proof beyond reasonable doubt" (BARD) standard used in criminal trials (Caruso 2020; Hanna 2014; Kolber 2018). According to this criticism, the same standard should also be used to assess any proposed justification of punishment, and the problem with at least the traditional view is that thought experiments and intuition pumps fall short of this epistemic standard. One question to ask here is just what exactly it means to apply this standard to normative claims as opposed to the factual claims in criminal trials where it is standardly applied, and whether it is appropriate to do so in light of their differences (Sigler 2018).

Rather than generalizing from particular judgments, the second kind of retributive theory bases its arguments on a more general moral principle. According to what can be referred to as "fair play" or "fairness-based" retributive theory, culpable wrongdoers have taken an unfair advantage when they commit wrongs. They therefore deserve to be punished in a way that would remove the unfair advantage that they have gained. See Morris (1968) for what is regarded as the classical statement of this view. Prominent defenders of other versions of this view include Sher (1987), Finnis (1999), and more recently Dagger (1993, 2008, 2018) who defends it specifically in relation to legal punishment.

One of the main objections against fairness-based retributive theory is that it "offers a distorted picture of the punishment-deserving character of" certain paradigmatic wrongs and crimes (Duff 2001, p. 22). While it is plausible to characterize some wrongs and crimes as free riding and unfair advantage taking, this seems implausible for the more paradigmatic wrongs and *mala in se* crimes like murder and rape. What makes them wrong and deserving of punishment is arguably what they do to their victims and not that they somehow involve taking advantage of those who did not murder or rape, an unfair advantage to be removed by punishment.

A related objection concerns proportionality in punishments, which is central to both retributive justice and retributivism. It is unclear that fairness-based retributive theory can properly account for the intuition that more severe wrongs and crimes deserve a more severe punishment and *vice versa*. If, as the theory argues, all wrongs and crimes that deserve to be punished are simply unfair advantage taking, then, unless there is a way to distinguish between more serious and less serious takings of unfair advantage, this seems to imply all wrongs and crimes deserve to be punished equally. One way to avoid this conclusion is to focus on the level of forbearance that others have undertaken in relation to a particular wrong or crime but renounced by those who commit them. The problem with this is that most people typically find themselves needing to exercise greater restraint against committing a minor wrong or crime (e.g., running through a red light or jumping the queue) than the more serious ones like murder and rape. For a response to this particular issue, see Sher (1987, Chapter 5); for criticisms, see Matravers (2000, pp. 65–68) and Boonin (2008, pp. 126–129). Dagger (2008, 2018) has recently sought to respond to this and the earlier objection (among others) by defending a version of fairness-based retributive theory that is grounded in a broader political theory. Critics, however, remain unconvinced (Duff 2008; Moraro 2020).

The third kind of retributive theory is the communicative theory. Drawing on Feinberg's (1965) insight that the hard treatment in punishment does not simply burden and harm those who are punished but also serves an expressive function, advocates of the communicative theory argue that

wrongdoers deserve to be punished because it communicates to wrongdoers the censure (or blame) that they deserve for their wrongdoings. For one of the most prominent and influential defenses of communicative theory, see Duff (2001). For slightly different versions, see, e.g., Tasioulas (2006) and Lee (2017).

The main challenge for any communicative theory is to show that it is appropriate and justifiable to communicate deserved censure with something as burdensome and harmful as punishment when other alternatives are available. As Duff explains, "[C]ensure can be expressed by a formal conviction, or by a purely symbolic punishment that burdens the offender only insofar as she takes its message of censure seriously. Why then should we express it through... punishments that are burdensome or painful independently from their communicative content?" (2001, p. 82).

One influential response to this challenge is to see the hard treatment in punishment as serving as a prudential disincentive (Ashworth and Von Hirsch 2005). However, this response basically concedes that wrongdoers do not strictly speaking deserve to be punished in virtue of their wrongdoings. Rather, what they deserve is simply to be censured or blamed, but it is appropriate or justifiable to censure them through punishment for reasons of preventive deterrence. For a critical discussion of this view, see, e.g., Lee (2017).

Duff's own response to this challenge is to defend punishment in communicative theory as a form of "secular penance" that is aimed at "three R's" – repentance, reform, and reconciliation. The argument is that it is appropriate to pursue a communicative process of censure that involves hard treatment because it serves both to induce wrongdoers to repent, reform themselves, and reconcile with those whom they have wronged and as a vehicle through which they can come to do so (2001, Chapter 3).

Duff's ambitious communicative theory has been subjected to many challenges and criticisms. Besides questioning whether it is indeed able to meet the above-discussed justificatory challenge (Matravers 2011; see also Tadros 2011, Chapter 5), critics have also questioned whether it is plausible to think of legal punishments imposed by the state in the same dialogical terms as suggested by Duff's communicative theory (Brownlee 2011, but see Duff 2011, pp. 372–376, for his response to both criticisms). Another criticism is that under Duff's view, when the state punishes, it seems to be doing something that is not so different from what an abbot would be doing in a monastery when he imposes penance on sinners so that they come to repent and expiate their sins, thereby achieving absolution and salvation. This, critics argue, is in tension with the commitments of a secular liberal democratic state (Ashworth and Von Hirsch 2005, Chapter 7; for a critical discussion of this, see Lee 2017).

This brings me to a more general point. One of the main criticisms of retributive theory, especially with the traditional view and its focus on the intrinsic goodness of deserved suffering, is that it only gives us a *moral* justification for punishing wrongdoers as they deserve. However, when it comes to legal punishment, given that it is imposed by the state, critics argue that what is needed is not simply a moral justification but a *political* one that shows, among other things, that it is legitimate for the state to pursue this moral good and to coerce its citizens when pursuing it (e.g., by taxation; see Tadros 2011, pp. 79–84, and for a response, Alexander and Ferzan 2018, pp. 189–194). One recent criticism along these lines draws on the Rawlsian idea of public reasons and on how certain retributive commitments do not satisfy this Rawlsian requirement (Kelly 2018, p. 102). Chiao has also recently offered a sustained argument calling for a "political standard of justification" when it comes to criminalization and criminal punishment and how retributivism falls short of providing such a justification (2019, Chapter 2).

One general upshot of these criticisms (assuming one accepts them) is that to offer an adequate theory of legal punishment, retributivists must set their theory, to quote Duff's words, "within the structure of a larger political theory about the proper character and role of the state and about the proper relationship between citizens and between citizen and state" (2008, p. 277). For views that embrace this, such as Dagger's and Duff's, the question then is why we should accept

the broader political theories that underlie their theories as opposed to, for example, a Rawlsian one or, in the case of Duff's, the one that is implicit in Ashworth's and Von Hirsch's criticism. For the broader political theories that underlie each of their views, see Dagger (2008, 2018) and Duff (2001, Chapter 2, and 2018, Chapters 4 and 5; see also the latter Chapter 4 for a response to Chiao). For an alternative "political" conception of retributivism that draws elements from the three theories discussed, see Markel (2011).

Retributivism, Retributive Justice, and the Normative Force of Desert

Although retributive justice is frequently understood in terms of retributivism and retributive theories of punishment, not all retributivists defend their views as a theory of justice (see, e.g., Berman 2016). One way to draw out this difference is in terms of the normative force of the wrongdoer's ill-desert. Thus, Berman (2008), for example, argues that the wrongdoer's ill-desert provides only a "tailored justification" of punishment – one that gives us a reason to punish but only addresses the objection that punishment involves inflicting suffering on those who are punished. It does not (nor should it) provide an "all-things-considered" justification of punishment, including the establishment of institutions for dispensing it. The latter raises other objections – e.g., the inevitability of mistakes and errors given our fallible nature and that of our institutions – which Berman argues cannot be adequately answered and justified simply by the value of the wrongdoer's ill-deserts (see also Husak [1992] on the potential for abuse and their associated financial costs). Contrast this with Moore, who argues instead that "[a]s a theory of justice, [retributivism] *obligates* us to seek retribution through the punishment of the guilty. This means that officials have a duty to punish deserving offenders and that citizens have a duty to set up and support institutions that achieve such punishments" (1997, p. 154).

One question to ask here, which I don't have the space to go into further detail, is whether and to what extent these more demanding claims of retributive justice can be supported by one's underlying retributive theory. For a comprehensive discussion of this in relation to, for example, the traditional retributive theory, see, e.g., Dolinko (1997) and Husak (1992) and Moore (2016, pp. 347–350) for a response. Moore also argues that retributive justice can only be achieved when wrongdoers are punished for the reason that they deserve it (1997, p. 28). For a critical discussion of this, see Berman (2016, pp. 43–46).

More generally, however, while a "duty to punish" seems essential to any conception of retributive justice that takes seriously the idea that justice *demands* wrongdoers be punished as they deserve, it alone cannot be what makes a retributive theory a theory of justice. This is because not all duties are duties of justice. The duty to keep one's promises, for example, is not normally conceived as a duty of justice (of course, i.e., unless one simply equates justice with the whole of interpersonal morality, e.g., for Aristotle, justice is "complete virtue. . . in relation to another person" (Nicomachean Ethics, Book V Chapter 1)). More therefore needs to be said about why the duty to punish wrongdoers as they deserve is a duty of justice. Furthermore, duties of justice are typically taken to be more stringent and weightier than your run-of-the-mill duties of general morality. They are also frequently accepted as having a certain normative significance in institutional contexts: justice is, to quote Rawls' famous words, "the first virtue of social institutions" (1971, p. 3). Thus, unless one spells out the sense in which the duty to punish is indeed a duty of justice, then the appeal to retributive *justice* seems like a suspicious attempt to give the punishment that wrongdoers deserve a normative force and significance that is perhaps greater than what it actually deserves. However, very few retributivists spell out the alleged relationship between retribution and justice. Exceptions to this are Tasioulas (2010) and Zaibert (2018, Chapter 2). The relationship between fairness-based retributive theory and justice is also less opaque since it sees retributive desert as restoring a fair distribution of benefits and burdens.

In any case, even if there is a duty of justice to punish wrongdoers as they deserve, retributivists do not have to think of it as an absolute duty and that justice be done even if the heavens were to fall because of it. Thus, Moore, for example, defends his retributive view as a "threshold deontologist" (1997 p. 159), according to which the duty to punish would be overridden or outweighed if fulfilling it would unavoidably lead to catastrophic consequences. Though for this to help guide decision-making, more needs to be said about when consequences are catastrophic enough, as it were, to pass the "threshold."

More generally, unless a retributivist holds the (arguably implausible) view that retributive justice is the only good we have a duty to pursue or that it necessarily trumps all other values and duties, she would also recognize that there are other goods that we have, or at least the state has, reasons or even duties to pursue as well. As Moore explains, "attainment [of retributive justice] is no more of a categorical obligation than is the attainment of distributive justice, corrective justice, rights-preservation, etc. Trade-offs. . . are not only inevitable but desirable" (2016, p. 347; see also 1997, Chapter 18, on the limits that are imposed by liberty). Taking distributive justice as an example, the question then is whether and to what extent the demands of retributive justice conflict or compete with the demands of distributive justice and how we should go about resolving or balancing them when it happens.

One classical paper on the difference between retributive justice and distributive justice is Scheffler (2000). For a recent attempt at exploring the compatibility between the two, see, e.g., Alexander (2018). Besides compatibility, there is also the issue of resource allocation between the two. Pursuing retributive justice is a costly endeavor. The US criminal justice efforts in 2012, for example, exceed US $270 billion (Lippke 2019, p. 54). How much of our resources should we therefore devote to pursuing retributive justice and distributive justice, respectively? For a systematic discussion of the issues involved in answering this, see Lippke (2019).

One important perennial issue here is how distributive *in*justice (and other kinds of social deprivation) affects the demands of retributive justice. Theorists have argued for at least three ways in which the former can undermine the demands of the latter. It can do so by reducing a wrongdoer's responsibility for her wrongdoing, so that she deserves less or even no punishment because of it. Alternatively, it can constitute grounds for punishing her less than she deserves. For a general critical discussion of these two, see Ashworth and Von Hirsch (2005, Chapter 5). The third way is that it can, depending on the state's role in it, undermine the state's standing or legitimacy to punish the wrongdoer in question. For a critical survey of the recent literature on these three ways and more (but with a focus on criminogenic disadvantage more generally), see Ewing (2018). See also Green (2011) for a discussion of the different approaches to this issue.

Besides distributive justice, some retributivists have also argued for the role of mercy and forgiveness in the justification of punishment and how they can (when well grounded) give us good reasons to punish wrongdoers less than what they deserve for their wrongdoing or refrain from punishing them altogether. Tasioulas (2003, 2011), for example, defends this in relation to mercy within a broadly communicative theory of punishment. Zaibert (2018) has also argued for similar conclusions within a traditional retributive theory. One recent debate here concerns the proper grounds for mercy and forgiveness and whether it should include repentance or not. On the latter, see, e.g., Murphy (2011b) and Tasioulas (2011).

Of course, retributivists can disagree over the extent to which the demands of retributive justice can be overridden, outweighed, or balanced with these other considerations and values. However, the point is just that far from being "monomaniacal about the achieving of retributive justice" (Moore 1997, p.186), retributivists are, and arguably should be, pluralists when it comes to the justification of punishment at least at the level of all-things-considered justification, and to the extent that there is a duty to punish wrongdoers because they deserve it, it is only a *pro tanto* and defeasible duty. One might deny that this is a possible position (see, e.g., Zaibert 2018,

Chapters 4 and 5). But putting that to one side, there are at least two implications in embracing such a pluralist view.

First, one popular recent criticism of retributivism is that it is unable to account for the problems with mass incarceration as long as offenders are punished as they deserve. This is because it is solely focused on giving offenders what they deserve and excludes from the justification of punishment the aggregate social cost of doing so (see, e.g., Chiao 2018, Chap. 4, and Yankah 2020). This, however, seems to be attacking a straw man in light of the above discussion (see, e.g., Katz 2018, pp. 125–126). Even if there is a duty to punish because offenders deserve it, this does not necessarily mean it is an absolute duty that cannot be overridden or traded off with the aggregate social cost in doing so.

Second, admitting that there are other values at stake and that the duty to punish is a defeasible one also implies that one should not be quick to judge as "unjust" whenever a wrongdoer is punished less than she deserves or not at all, at least insofar as we take "unjust" to be "conceptually verdictive" with the implication that "the requirements of justice have been ignored or transgressed without justification" (Tasioulas 2003, p. 124). One must therefore be careful to distinguish such cases of injustice from those cases where the requirements of justice are regrettably but justifiably set aside or transgressed. Even if there remains something "unjust" in the latter, they are very different from the injustice of the former.

Retributive Proportionality

Central to retributive justice (and retributivism) is the idea of proportionality in punishment (note that this needs to be distinguished from other non-retributive conceptions of proportionality in punishment; see Tadros 2011, Chapter 15). What wrongdoers deserve in virtue of their culpable wrongdoings are not simply any punishment but ones that are proportionate to their culpable wrongdoings. As the saying goes, the punishment needs to "fit the crime." One extreme view of proportionality is *lex talionis* or (as it is more commonly expressed) "an eye for an eye" (Exodus 21: 23–25). However, retributivists do not have to hold such an extreme view (Moore 1997, p. 82), and many of them do not (but see, e.g., Waldron 1992).

For those who eschew *lex talionis*, the onus then is to offer an alternative account of what it is for punishments to be proportionate to the wrongs in question. For a general discussion of what this involves, see Ashworth and Von Hirsch (2005, Chapter 9). One problem here is that, besides relying on some very basic examples of grossly disproportionate punishment (e.g., long-term imprisonment for littering or a small fine for a brutal murder), it is unclear how the severity of different punishments should be "matched" with the seriousness of different crimes. This is commonly referred to as the "anchoring problem" in the literature. For a critical discussion of the different ways to resolve this problem, see Roebuck and Wood (2011) and the various chapters in Tonry (2019).

Recent discussions have also centered on the nature of suffering and how that affects the amount of punishment that one deserves. One issue here is that different people can experience different levels of suffering from the same punishment. If what wrongdoers deserve is a proportionate level of suffering understood in this subjective sense, then this implies the proportionate punishment for the same wrong can differ from one wrongdoer to the next (Kolber 2019). Another issue is whether what one deserves for a given wrong depends on how one's life fares in relation to one's deeds across one's whole life (the "whole-life view") or whether it only depends on the severity of the wrong in question (the "current-crime view"). For a critical discussion of these two views (and how they pose problems for retributivism more generally), see Kolber (2020). Even if one rejects the whole-life view, one can still argue that a wrongdoer's prior suffering matters either because it counts towards the punishment and suffering that she deserves for her current wrong or that she should be punished less than she deserves as a matter of distributive justice (Alexander and Ferzan 2018, pp. 198–207).

Conclusion

This entry has sought to substantiate the general ideas behind retributive justice by looking at some of the contemporary theories and debates surrounding the following three general issues: (a) why culpable wrongdoers deserve to be punished, (b) the relationship between deserved punishment and justice, and (c) the nature of retributive proportionality. Articulating a defensible substantive idea of retributive justice will involve properly addressing at least some of the debates and questions that were raised in relation to these three general issues.

Cross-References

► Capital Punishment
► Justice

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J

Justice: Ronald Dworkin's Perspective

▶ Dworkin, Ronald: On Justice

Justice: Structural Injustice

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Structural accounts of injustice counter dominant conceptions of injustice that seek to frame it as based in individual responsibility. Accounts of structural injustice hold that widespread injustices are structural and, thus, cannot be explained with exclusive reference to the decisions made by those experiencing deprivation. Instead, they claim that we can only make sense of a phenomenon like, say, poverty if we likewise make sense of the social structures that condition agency. It is with reference to the latter set of commentators that this entry is concerned. But first, what makes something structural?

Reference to a structure, then, is to note that there are social relations reproduced by the actions of many different actors, each adhering to shared rules and norms, that, when combined, construct a certain material reality. In so doing, people's lives are conditioned in ways that can often give social structures the appearance of being natural and, thus, immovable. Consider how the "naturalization" of capitalist structures means that the notion that it is impossible to transcend them appears tenable. Thus, what makes social structures *social* is precisely the fact that they are reproduced on a daily basis by a wide range of actors, and without human agency, they would cease to exist.

To structuralize one's analysis is to note that there are certain social relations that are akin to a structure, insofar as they structure society in accordance with certain hierarchical stratifications (e.g., class, gender, and/or race). It should be said that how people relate to each other, with regard to the stratifications in which one is placed, are not fixed, but alter across time and space depending upon the context in question. For example, a rich white woman is relatively advantaged by present social structures in relation to a black woman who cleans the office in which the former works. Yet, the former still faces gendered forms of oppression.

Consequently, as certain social groups, and members thereof, navigate the social world, widespread action reproduces social relations that condition what is possible (or thought to be) and what is not possible (or thought to be). Social structures are reproduced by actors and, consequently, give rise to a range of injustices that those placed in positions of relative inferiority are prone to being subjected to. Although stubborn and difficult to change, if something is produced everyday by human action, then another world can be produced by the same set of actors. What structural injustice theory attempts to do is make sense of these injustices precisely to understand what we, as actors, ought to do about them.

Structural Injustice Theory

It could be said that structural injustice theory attempts to deal with a class of injustices that are, by their very nature, structural. While not wrong per se, it is perhaps more accurate to suggest that what is really going on is an attempt to structuralize analyses of injustice. That is to say, we cannot sever injustices from their broader structural context, no matter how much they appear as isolated incidences. To this end, Iris Marion Young's (2004, 2006, 2011) theory provides the most influential conception of structural injustice; it is with reference to her work that this entry will focus.

Young (2004, 2006, 2011) observes that there are many injustices that occur across borders that most people shirk responsibility for, and thus, injustice persists. Consider the feeling of sorrow people often express when confronted with instances of extreme poverty, only to suggest that it is not their responsibility to do anything about it given that the instances of poverty they are observing derive from the actions of other agents and not themselves – e.g., corrupt governments. This way of thinking about injustices is common, and for Young (2011, p. 97–99), it is evidence of what she calls *the liability model*: a framework that attempts, in keeping with a legalistic lexicon, to trace backwards from a set of injustices in order to identify a party responsible for bringing about the present state of affairs.

For Young (2011, p. 52), the liability model does not account for how most (if not all) widespread injustices are the result of largescale, aggregated actions taken in accordance to accepted rules and norms, by a wide range of actors occupying a plethora of social positions. While actors' non-trivial everyday acts are intentional, the consequent structural injustices that these actions contribute to are not (Young 2011, p. 97–99; see also Giddens 1984).

Therefore, actors should not be blamed, because structural injustices "have no isolatable perpetrator, but rather result from the participation of millions of people in institutions and practices that result in harms" (Young 2004, p. 377). Importantly, because these actions take place in accordance to accepted rules and norms, rather than reflect an aberration from accepted practices, a structural account attempts to call into question

the background conditions that structure these practices (Young 2006, p. 120). On this reading, it would be wrong to blame individuals for, among other things, driving their car to work, given the impact driving has on the environment, when, taken in isolation, such actions are trivial and, importantly, occur in relation to accepted rules and norms.

With this in mind, Young (2011, p. 95) advocates for what she calls *the social connection model*: all those who are causally connected to an injustice (essentially everybody), insofar as their actions contribute to injustices, have a remedial responsibility to collectivize – in pursuit of what is often referred to as *structural justice* – in order to implement reforms that strive to mitigate the harms they produce (Young 2011, p. 95). Thus, the thinking is that if one evidences the connection that most, if not all, people bear in relation to injustices, regardless of where they take place, then connected actors will come to the assistance to do something about them.

To do so, Young (2006, p. 114; 2011, p. 95) argues that in order to encourage people to do something about injustices, we ought not to blame them, this time on practical grounds, because doing so will make them defensive and more likely to shirk responsibility as a result. Hence, the social connection model is "forward-looking" because it attempts not to apportion blame for injustices that do exist, but asks what we ought to do about them now that they do (Young 2011, p. 104).

What are some examples of structural injustices? Young (2011) relies upon the phenomena of housing shortages and sweatshops as exemplars of structural injustices. The main example – sweatshop working conditions – is illustrative of an injustice because of the exploitative working conditions (e.g., long and grueling hours under awful conditions, unpaid overtime, intense targets, sexual assault, the banning of toilet breaks, violent trade union breaking, etc.) (Young 2004, p. 366). The cause of this injustice, however, is the consequence of the actions of a wide range of actors (e.g., states, international institutions, corporations, factory owners, consumers, etc.), all of whom are said to have, albeit to different degrees, remedial responsibility to make conditions more just (Young 2004, p. 379).

The first implication is that connection to a certain injustice is a much lower threshold for mandating action when compared to the liability model. The second is that because structural injustices are the result of a complex web of actions, it is thought that the only way to make them topple is if everybody is working together to undermine them. The remainder of this entry will be spent highlighting the social connection model's applicability, potential points of weakness, and further research.

Application

As noted above, structural injustice theory seeks not simply to define a class of injustices, but is an attempt to structuralize one's analysis so as to produce more just outcomes. Consider the following examples.

First, there are those theorists who note how a structural reading of certain human rights ensures that these rights have a better chance of being upheld. For instance, the right indigenous people have to sacred sites and practices (Ypi 2017) and claims women refugees have to gaining asylum (Parekh 2012) are both said to be better protected if we first understand these phenomena as instances of structural injustice. That is because better accounting for the hierarchical nature of social structures that give rise to these claims will better help to realize human rights.

Second, rather than attempting to determine who is to blame for global injustices (see Pogge 2002), structural injustice theory attempts to call into question why injustices arise in the first place as a prerequisite to overcoming them. Examples include working to realize the human right of just and favorable working conditions (Kahn 2018), in addition to calls to make indigenous women more safe in response repeated instances of violence (Lu 2017, 2018). What is further illustrated by these accounts is that structural injustice theorists do not call for doing away with the liability model (Young 2011, p. 100; Lu 2017, 2018). Rather, they suggest that the liability model is insufficient,

taken alone, and requires the supplementation of structural injustice theory.

Third, there are those who argue that the social connection model prompts action from actors who may otherwise be tempted to shirk responsibility on account of not being wholly responsible for injustices. For example, it is true that the state, international institutions, NGOs, corporations, etc. are not individually responsible for present instances of injustice (Parekh 2011; Kahn 2018). Nevertheless, the state, for example, is connected, insofar as it plays a part in conditioning, and thus reproducing, these relations (Parekh 2011; Young 2011; Kahn 2018). The part played is sufficient, in accordance with the social connection model, for movements to call upon the state to act (Parekh 2011; Young 2011; Kahn 2018).

These applications highlight the impact that structural injustice theory has had on how injustice is theorized. The remainder of this entry will consider what the weaknesses of structural injustice theory are and what impact this has on structural justice.

The Role of Blame

The main tension within the structural injustice literature is the theoretical and practical role that blame plays. As should become clear, whether we *can* theoretically blame agents and whether, practically speaking, we *should* blame agents has implications for the type of structural justice one advocates.

On the more theoretical side of the coin, we find claims that it is, contrary to Young's assertion, still worthwhile to apportion blame regardless of the fact that structural injustices are brought about by widespread action (Sangiovanni 2018; Atenasio 2019; Nussbaum 2011; Gould 2009). One reason for this is because structural injustice theory *can* still perform a backward-looking role to identify a moral harm that one's actions have brought about, that would otherwise not be relevant had agents played no part in engendering a certain state of affairs (Sangiovanni 2018, p. 468; Nussbaum 2011). In this case, we might want to say that the person who drives to work *is* responsible, albeit for their small share, in bringing about climate change.

It appears possible to be even more precise about who really reproduces structural injustices (blameworthy) and those who do not (not blameworthy) (Atenasio 2019). Take the exploitative global garment industry, it seems plausible to suggest that we only need to blame those who cannot afford to make more ethical consumer choices a little bit (if at all), while apportioning the lion share of the blame to majority shareholders and executives of major corporations (many of which rely on sweatshop labour) (Atenasio 2019, p. 157).

If we begin to think about who is, and who is not, responsible for bringing about a certain injustice (or set of), it could be said to detract from adopting a more structural approach and collapsing back into the liability model, the problems with which have already been identified. However, it could well be that the vagueness of identifying precisely who, for the most part, brings about structural injustices, in fact, undermines a more structuralized analysis (Gould 2009). After all, if social structures reproduce stratifications that place agents in hierarchical relations of power and disempowerment, then is part of bringing these hierarchical relations to bear not a matter of apportioning different degrees of blame accordingly? (Gould 2009; Atenasio 2019).

What about blaming agents for their inaction with regards to structural justice? Some theorists, contra to Young, claim that blame could play a useful role in motivating agents to do something about large-scale injustices (Nussbaum 2011; Abdel-Nour 2018). To understand what function blame could play, consider how Young does not distinguish between actors who are causally responsible and those who are remedially responsible for structural injustices (Abdel-Nour 2018, p. 19). Hence, there is an assumption that so long as agents are made aware of their causality, they will inevitably acknowledge their remedial role to take action (Abdel-Nour 2018). Blame, therefore, could be a useful tool for

motivating agents to acknowledge their causal connection to structural injustices and their duty as collective agents advocating for structural justice (Abdel-Nour 2018).

What is more, what about instances in which agents do not simply shirk responsibility but deny connection outright (Hayward 2017)? What about those who go further and actively push back in an attempt to reassert the present composition of social structures (Hayward 2017)? Consider the negative responses to the Black Lives Matter movement in 2020; it was not that actors accepted their connection to injustices only to then shirk responsibility, but rather, opponents peddled narratives that questioned the very existence of racialized social structures.

In these instances, it would seem absurd to suggest that what is necessary is simply not to blame these agents and they will eventually see the connection they bear to structural injustices across borders. With this phenomenon in mind, what might be necessitated, then, is more disruptive modes of resistance (e.g., sit-ins, boycotts, direct action) that attempt to call attention to how social structures reproduce exploitative stratifications in the hope that more people will be motivated to do something about it (Hayward 2017).

What Does All This Mean for Structural Justice?

Although we have considered the practical role of blame and agitation in highlighting one's connection to social structures, we have yet to say anything about what it means to pursue structural justice. One implication of the above discussion is that one could well remain ambivalent with regard to the role blame plays in motivating agents to do something, while still noting that a blameless structural justice is too congenial in its sanitation of agitational modes of resistance.

Is it necessarily the case that an agitational mode of politics sits outside of the remit of the social connection model? Catherine Lu (2018, p. 49) argues that Clarissa Hayward's (2017) call for a more agitational politics is not at odds with the social connection model. After all, Young (2004, p. 388; 2011, p. 151) is keen to ensure that her account is not too reliant on states and provides a clear space and role for bottom-up social movements, including, but not restricted to, the trade union movement, and has historically engaged in agitational forms of resistance.

Yet, at the same time, Young (2011, Chapter VI) is likewise keen to ensure that as fewer agents as possible pass the buck when it comes to doing something about injustice. This is most evident when different degrees of remedial responsibility are assigned based on one's power, privilege, interest, and collective ability (Young 2011, p. 144–147). The powerful and privileged are placed alongside victims (i.e., interests) and those with collective ability (e.g., trade unions) (Young 2011, p. 144–147) as the four main groups that bear the most remedial responsibility on account of their capacity to have an impact. What this tension illuminates is that the logical conclusion of the social connection model is that everybody that makes up a social structure should come together to reform it.

One potential weakness of conceptualizing structural injustice in this way is that it becomes possible to imagine a situation in which social movements may, even tacitly, become co-opted and appropriated by the powerful and the hegemonic rationalities that reproduce their power (Kenny 2022). Some have noted that this has already taken place within the anti-sweatshop movement itself, a movement considered by Young (2011, p. 123) as emblematic of her social connection model (Langlois 2014).

The measures taken by major corporations in response to the anti-sweatshop movement are not, or so it is argued, exemplars of particularly *structural* reforms (Langlois 2014). That is because the largely voluntary measures taken by multinational corporations can be explained as an attempt to stave off the possibility of profit losses that negative publicity would inevitably engender (Langlois 2014). As opposed to implementing long-term solutions that mandate companies to enforce better practices (Langlois 2014).

Alternatively, one may ponder whether what might thus be necessitated is a more transformative politics when it comes to structural justice (Kenny 2022). This could take the form of democratizing workplaces with the aim of providing workers with greater autonomy over what is produced and on what terms, rather than simply calling for minor improvements to present social structures (Gould 2009).

In sum, this would call for modes of structural justice that actively attempt to delineate, so as to exclude those most responsible for perpetuating present social structures, say, those whose class interests are maintained by the present composition. Instead of seeing all those connected as bearing remedial responsibility – especially the powerful and privileged (Young 2011, p. 144–147) – social movements could seek to exclude from their ranks precisely those who presently benefit from the current state of things, as a prerequisite to a more agitational structural justice. This is surely what some of the theorists considered in the previous section would call for.

Readers and commentators alike may, or may not, insist that Young's social connection model need not stifle such modes of politics. Either way, further theorization is necessitated to unpack and problematize the tension between ensuring that nobody can be said to be shirking their responsibility, on the one hand, and whether, on the other hand, doing so is a precursor to including actors that do not belong anywhere near social movements for structural justice. What this tension further highlights is the need to consider whether the concept of responsibility is sufficient for thinking about how structural injustices arise *and* what we ought to do about them. Perhaps, what is needed are alternative conceptual frameworks.

Conclusion

The aim of this entry was to introduce readers to structural injustice theory, but to do so in a way that makes clear that structural injustice remains a contested term. Many of us remain committed to insisting that widespread injustices should be thought of in structural terms. If so, structural injustice theory seeks to provide theorists and social movements alike with the tools to better understand how injustices arise, so as to better understand what it is we ought to do about them.

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Justice: Thick Versus Thin

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Introduction

Ethicists often divide evaluative terms and concepts into thick versus thin. This distinction is supposed to make a difference for metaethical questions such as whether there's a fact-value gap, whether there are ethical truths, and, if there are such truths, whether they would be objective. Assuming *justice* is an evaluative concept, we can thus ask whether it should be classified as thick or thin and whether its classification as such might have any significant implications.[1]

Of course, the question of whether *justice* is thick or thin depends heavily on what thick and thin concepts are and how they differ. This matter is hotly debated. Three different approaches will be considered later in this entry. But for now, let's focus on a rough approximation. According to this rough account, thick concepts are specific evaluative concepts that are substantially descriptive. Sample thick concepts include virtue and vice concepts like *generosity* and *cowardice*, action concepts like *murder* and *betrayal*, epistemic concepts like *dogmatic* and *wise*, and aesthetic concepts like *gaudy* and *brilliant.* These concepts seem evaluative, much like *good* and *right.* But they also seem descriptive in a way that *good* and *right* are not. *Good* and *right* – along with *bad, wrong, ought, permissible,* and many more – are paradigmatic thin concepts. Roughly, a thin concept is a general evaluative concept that is not substantially descriptive. When Sue says that Max is good – thereby applying a thin concept – she is evaluating Max without providing much description, if any. Thick concepts, by contrast, involve significant description. If Sue says that Max is courageous, she is not only evaluating him but is also describing him as willing to face risk.

What difference does it make whether an evaluative concept is thick or thin? Because of their descriptiveness, thick concepts are especially good candidates for evaluative concepts that represent properties. It's hard to deny that some actions have the property of being courageous, or generous, or dishonest, or treacherous, etc. But, arguably, it's much easier to deny that some acts have the property of being right or good. According to two prominent positions in twentieth-century ethics – error theory and non-cognitivism – there are no such properties as rightness or goodness. So, if *justice* is a thin concept, then the same metaethical problems that beset *good* and *right* might also apply to *justice.* On the other hand, if *justice* can be classified as a thick concept, then this may provide an avenue for thinking of justice as a genuine value property, alongside courage, generosity, honesty, etc. It should be noted that some argue that thick concepts do not have the sort of significance commonly attributed to them (e.g., Väyrynen 2013). Nevertheless, the classification of *justice* as thick would be an important claim, if we assumed that the thick/thin distinction had the significance it's often thought to have.

For the most part, this entry will focus on the question of whether *justice* should be classified as thick or thin or neither. The question is framed in a way that allows for the possibility that *justice* might be an evaluative concept that's neither thick nor thin. As we'll see, some accounts of the thick/thin distinction allow for evaluative concepts that fall in neither category.

First, however, it's important to note that substantive theories of justice do not automatically entail answers to our main question. To illustrate this, let's consider a specific theory of justice, such as Plato's view that the just person is one with a harmonious soul – a soul whose parts all play their proper roles without interfering in the roles of others (2004, bk. IV, 442d–444e). Given that *proper* is evaluative, it could be argued that the concept of a harmonious soul is thick – i.e.,

[1] Italicized expressions refer to concepts; expressions within quotations refer to words (except when used for quoting another author).

a specific evaluative concept that's also substantially descriptive. Nevertheless, even if Plato's theory were correct, this would not automatically establish that *justice* is thick. What also needs to be established is that the concept of justice is identical to the concept of a harmonious soul. And Plato does not show that these concepts are identical. At best, he only establishes a weaker claim, such as that these concepts represent the same property. Similar points apply to other theories of justice. Substantive theories of justice don't automatically answer our main question. To answer this question, we must consider the various ways in which thick and thin differ and whether *justice* bears any similarity to one or the other.

The literature on justice often distinguishes between different forms of justice, such as distributive versus corrective justice and justice of laws versus justice of persons or institutions. With only one exception (Elstein and Hurka 2009, 522), the thick concepts literature discusses our main question on a very general level, without drawing such distinctions. This entry will not veer from that path, although it's possible that progress could be made if one does.

Is *Justice* Thick, Thin, or Neither?

Various ways of distinguishing thick from thin have been proposed. Although there is currently no consensus around a particular approach, we can consider how the three main ways of drawing the distinction come to bear on the question of whether *justice* is thick, thin, or neither. We begin with Bernard Williams' distinction, which occurs in his 1985 book *Ethics and the Limits of Philosophy.*

Williams on Thick and Thin

Williams holds that thick terms are both world-guided and action-guiding, whereas thin terms are action-guiding but not world-guided (1985, 152). A world-guided term is one whose usage is "controlled by the facts" – i.e., there are conditions for its correct application, and competent users can largely agree that it does or does not apply in new situations. An action-guiding term is one that is "characteristically related to reasons for action" (1985, 140–141). With this distinction in hand, let's return to our main question: Is *justice* thick, thin, or neither?

Unfortunately, the answer is unclear. Indeed, this very question is used to criticize Williams' distinction between thick and thin. Samuel Scheffler claims that Williams' distinction makes it hard to classify many evaluative concepts, and *justice* is one of Scheffler's prime examples (alongside *fairness, impartiality, rights, autonomy,* and others). According to Scheffler, these concepts are relatively general, which makes them seem thin, but they also appear to be world-guided, which makes them seem thick (1987, 417–418). We are thus left to wonder whether Williams' 1985 distinction ought to be rejected. And if not, how then should we classify important ethical concepts like *justice*?

In a later essay, Williams' responds to Scheffler. His response raises a number of issues pertinent to our main question. Williams writes:

> Obviously, in some sense, thick concepts have a higher empirical content. It is worth adding, as Samuel Scheffler has pointed out, that there is an important class of concepts that lie between the thick and the thin, notably the concept of justice. There is more to it than to a concept like 'right': that an action is just is *one reason* it can be right. On the other hand, the content of 'just' is in a certain way indeterminate or disputable or open to a variety of conceptions. (1995, 234)

There are four main things to observe about this passage.

First, when Williams mentions "an important class of concepts that lie between the thick and the thin," he appears to be claiming that there are action-guiding concepts that are neither thick nor thin. If so, then his claim in the above passage is inconsistent with his 1985 distinction between thick and thin. According to his 1985 distinction, there are action-guiding concepts that are world-guided, which Williams labels "thick," and there are action-guiding concepts that are not world-guided, which Williams labels "thin." It's impossible for there to be an action-guiding concept that doesn't fall in one of these two categories. So, on William's 1985 distinction, every action-guiding concept is either thick or thin. How then can there be action-guiding concepts "that lie between the

thick and the thin," as Williams later affirms? The answer is unclear. Indeed, the tension leads one to wonder whether Williams rejects his 1985 distinction in favor of a different approach.

Second, the Williams/Scheffler exchange has in fact led many ethicists to a different approach – the view that thick and thin differ only in degree, not in kind. The basic idea behind this approach is that thick and thin lie on opposite ends of a continuum of evaluative concepts, with no sharp boundary between them. For example, *good* and *bad* lie on one end of the continuum, with *kind*, *compassionate*, and *cruel* on the other end. The ends of this continuum can be distinguished based on degrees of specificity, or amounts of descriptive content. In general, a concept must have enough specificity, or enough descriptive content, for it to reside on the thicker end of the continuum. Let's call this the Continuum Approach. This approach helps to make sense of Williams' claim that thick concepts have "higher empirical content" – Williams is here using a gradient notion to distinguish thick from thin, just as the Continuum Approach does. This approach also clarifies how it's possible for an evaluative concept, like *justice*, to "lie between the thick and the thin." The concept may not have enough specificity and/or descriptive content for it to count as thick, and it may have too much specificity and/or descriptive content for it to count as thin. It's not immediately clear that Williams accepts the Continuum Approach in his later work, but it is clear that others have accepted it (e.g., Smith 2013; Chappell 2013).

Third, let us pause on Williams' final comment that "the content of 'just' is in a certain way indeterminate or disputable or open to a variety of conceptions." Williams' basic point is that proponents of rival theories of justice can engage in disputes about justice without talking past one another. For example, egalitarians and desert theorists have rival theories of justice but often engage with one another in attempts to resolve their disputes. And their differing theoretical views do not create a situation where they are applying different concepts of justice and are therefore talking past one another. This is arguably an important feature of the concept *justice*.[2] For our purposes, let us note that Williams and others (e.g., Elstein and Hurka 2009, 522) hold that the feature in question disqualifies *justice* from being a full-fledged thick concept.[3] It's an important question, however, as to whether such a feature should disqualify concepts from counting as thick. No one has actually defended a restriction like this. And it naturally leads one to ask whether there are also competing theories of, say, courage, whose proponents can disagree about what's courageous without talking past one another. This would be a problem for the restriction, as well as for Williams' attempt at using it to preclude *justice* from the thick. Furthermore, even if the feature in question does preclude *justice* from the thick, it behooves us to notice that the feature is shared by most, if not all, thin concepts. The content of "right," for example, is disputable and open to various conceptions (e.g., utilitarian, deontological, etc.), and proponents of rival theories are not doomed to talk past one another. So, even if this feature disqualifies *justice* from the thick, it certainly leaves open the possibility that *justice* might be thin.

And finally, the foregoing should leave us to wonder why *justice* does not count as a thin concept. Williams says only two things aimed at precluding *justice* from the thin, but both claims are inadequate. He claims, first, that *justice* has more empirical content than *right* and, second, that justice is only one reason an action can be right. Notice, however, that similar reasoning would require us to deny that *right* is a thin concept. It seems equally plausible that *right* has more empirical content than *good*. The concept *good* can be applied to various things (e.g., food, cars, consequences, etc.), but *right* presumably has some empirical content that prohibits it from being applied to all these things. Furthermore, rightness is only one reason an action can be good – other reasons might be that the act is

[2] For a general account that explains the feature in question, see Elstein and Hurka (2009, 522).

[3] Elstein and Hurka locate *distributive-justice* "in a middle position between purely thin ones and fully thick ones" (2009, 524).

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an achievement, or skillful, or beautiful, etc. So, Williams' reasoning seems to preclude *right* from counting as a thin concept, which is a problem, since *right* is a paradigmatic thin concept. Williams therefore does not supply any good reason to deny that *justice* is thin.

To sum up, Williams' 1985 distinction between thick and thin is rendered problematic by the very question we're concerned with – the question of whether *justice* is thick or thin. Williams replies to this concern by claiming that *justice* is neither thick nor thin, but he does not supply any convincing arguments for such a claim.

We have so far seen two ways of understanding the difference between thick and thin – Williams' 1985 distinction and the Continuum Approach. However, it's only according to Williams' 1985 distinction that it makes any difference whether justice is thick or thin. On Williams' 1985 distinction, thin concepts are not world-guided and are therefore not "controlled by the facts." If *justice* turns out to be thin, understood in this way, it follows that justice is not a genuine feature of the world and that our employment of the concept is not controlled by the facts. This would make a big difference to theories of justice, and Williams says nothing convincing that would rule it out. On the Continuum Approach, however, the view that *justice* is a thin concept has no such implication. For a concept to be thin, it needs to have relatively little descriptive content and/or specificity. But this doesn't imply that such concepts fail to pick out genuine features of the world, or that they're not controlled by the facts. So, if justice is a thin concept, as construed by the Continuum Approach, there may be no significant implications for theories of justice.

Hare on Thick and Thin

Williams was not the first to distinguish between thick and thin. That title goes to R.M. Hare, who drew a slightly different distinction in his 1952 book *The Language of Morals* and later in his 1963 book *Freedom and Reason*.[4] Hare's view is that both thick and thin terms have descriptive and evaluative meanings associated with them. The difference between thick and thin has to do with the relationship the two meanings bear to the term in question. A thin term is one whose evaluative meaning is "more firmly attached" than its descriptive meaning. And a thick term is just the opposite – a term whose descriptive meaning is "more firmly attached" than its evaluative meaning (1963, 24–25).

What does Hare mean by "more firmly attached"? The more firmly attached meaning is the one that is less likely to change when language users alter their usage of the term. For example, it is less likely that "right" will eventually be used to evaluate actions negatively than that it will be used to describe lying, promise-breaking, killing, torture, and so forth. The reason is that, if we started using "right" to evaluate actions negatively, there's a great chance we would be misunderstood or accused of misusing the word. In this sense, the evaluative meaning of "right" is more firmly attached than its descriptive meaning. But just the opposite holds for thick terms like "generous." If we started using "generous" to evaluate actions negatively, we would not be misunderstood (Ebenezer Scrooge, e.g., could use "generous" negatively, and we would still understand him). Yet, if we started using "generous" to describe, say, selfish acts, then we would most likely be misunderstood or accused of misusing the term. In this sense, the descriptive meaning of "generous" is more firmly attached than its evaluative meaning (1989, 125).

It's worth noting that, unlike Williams' 1985 distinction, Hare's distinction allows for a class of evaluative terms that are neither thick nor thin. Any evaluative term whose descriptive and evaluative meanings are equally firmly attached will count as neither thick nor thin. Although Hare never mentions this third category, it is at least a potential category for some hard-to-classify cases, such as those cited by Scheffler.

Might "justice" fall into this third category, as Scheffler's critique suggests? Or would it classify as thick or thin? Hare does not explicitly address these questions, but it's possible to argue that "justice" would count as a thick term on his

[4] Hare actually calls them primarily evaluative words and secondarily evaluative words (1963, 121–122). But he later identifies the former with thin terms and the latter with thick terms. (1997, 54).

view. First, consider that the descriptive meaning of "justice" is quite firmly attached, more so than paradigmatic thin concepts like "right." A passage from G.E.M. Anscombe helps to illuminate this:

> [I]f a procedure *is* one of judicially punishing a man for what he is clearly understood not to have done, there can be absolutely no argument about the description of this as unjust. [...] Someone who attempted to dispute this would only be pretending not to know what "unjust" means [...].
>
> And here we see the superiority [of] the term "unjust" over the terms "morally right" and "morally wrong." For in the context of English moral philosophy since Sidgwick it appears legitimate to discuss whether it *might* be "morally right" in some circumstances to adopt that procedure; but it cannot be argued that the procedure would in any circumstances be just (1958, 16).

According to Anscombe, anyone who sincerely claims that it's just to punish a known-to-be innocent person must fail to grasp the meaning of the word "just." This would count as a misuse of the word, at the very least. But one who sincerely claims that such an act is right need not be making the same sort of mistake. So, it appears the descriptive meaning of "just" is quite firmly attached, more so than the descriptive meaning of "right."

But is the descriptive meaning of "just" more firmly attached than its evaluative meaning? Arguably it is. Consider that one can use the term "just" in a negative way without being misunderstood or accused of misuse. A classic example comes from Plato's *Republic*, where Thrasymachus speaks disparagingly of justice – e.g., "injustice [. . .] is stronger, freer, and more masterful than justice" (2004, bk. I, 344c5).

Given that such uses are tolerated, without any misunderstanding or accusations of misuse, we can see how the positive evaluation could eventually become detached from the word "justice." The suggestion, then, is that the descriptive meaning of "just" is more firmly attached than its evaluative meaning. If so, then "justice" would count as a thick term on Hare's view.

Why would it matter if "justice" is thick according to Hare's distinction? First, one might recall a general point made earlier: thick terms are value terms that plausibly represent properties. Given this point, one might think that the classification of "justice" as thick secures a strong case for taking justice to be a genuine value property. This is a potential conclusion to draw, although it cannot be inferred without an additional claim. To see what else is needed, let's consider what Hare himself thinks about thick terms. Hare took thick terms to be value-words in a "less full sense" than thin terms like "good" (1952, 121). Indeed, he likened thick terms to slurs in the following way: although thick terms and slurs are both evaluative, there could be "evaluatively neutral" expressions that are coextensive with them (1963, 189). On Hare's view, then, there's no reason to think the properties represented by thick terms are value properties, given that the same properties can be represented by value-neutral expressions. So, for one to argue that the thickness of "justice" implies the existence of a value property, one would have to argue that there could not be a value-neutral expression coextensive with "justice." This sort of claim has been advanced by proponents of the so-called disentangling argument, originating with John McDowell (1981) and advocated by many others (e.g., Williams 1985, 141). But the matter is hotly contested (Väyrynen 2013, Chap. 8).

Another potential implication stems from the claim that thick terms are culture-bound. Many ethicists hold that the meaning of a given thick term "T" must be closely tied to the common beliefs and values of a particular cultural group; consequently, there are bound to be other cultures that lack an expression equivalent to "T." Even if another culture tries to formulate an expression like "T" (say, for the sake of intercultural dialogue), their expression would mean something different from what it means in the first culture. As a result, members of one culture may be unable to use "T" to deny what speakers of the first culture say with "T." So, moral disagreements between the two cultures may break down if those disagreements are centered on the question of whether "T" applies. Both Hare and Williams agree that thick terms are culture-bound in the sense just outlined (Hare 1989, 121; Williams

1985, 146; 1995, 239).[5] Now, if "justice" is a thick term, it may follow that "justice" is not an apt vehicle for communication between certain cultures, such as the ones just described. Intercultural moral disagreements about, say, female circumcision might be intractable if they're framed around the question of whether this practice is just or unjust. For Williams, this might be a reason for pessimism about intercultural moral discussion. For Hare, it's not. Hare holds that thin terms – e.g., "good" and "ought" – are culture-independent and are available for use in most intercultural disagreements, even where discussions involving thick terms break down (1989, 122). Thus, Hare would say that intercultural disagreements about whether female circumcision is just might be intractable, although such disputes could be resolved if they're conducted with a thin term instead of "justice."

Why are thin terms useful in this way while thick ones are not? Recall that thin terms can easily be used with different descriptive meanings without their users being misunderstood or accused of misuse. So, it's possible for discussants from another culture to agree with us that female circumcision is bad, even if that violates the descriptive meaning they attach to the thin term "bad." Nothing similar is true for thick terms, like "justice" and "injustice," since their descriptive meanings are so firmly attached (1989, 125–126). The upshot is that, if Hare is right, then "justice" might very well be a thick term, although some intercultural disagreements involving this expression might be interminable.

Conclusion

This entry has addressed the question of whether *justice* is thick, thin, or neither. We have seen three main ways of understanding the difference between thick and thin – Williams' 1985 distinction, the Continuum Approach, and Hare's distinction. The question of how to classify *justice* turns out to be a problem for Williams' 1985 distinction. And Williams' way of addressing the problem leads to the Continuum Approach, where thick and thin differ in degree but not in kind. Although Williams and others want to classify *justice* as a concept that lies between the thick and the thin, no one has provided good reasons for classifying it as such. Moreover, if the Continuum Approach is correct, it's far from clear why it would matter whether a given concept is classified as thick, thin, or neither. Hare's distinction, on the other hand, allows for a strong case to be made for the claim that "justice" is thick. And if "justice" is thick, in Hare's sense, then there are at least two potential implications. The first is that justice might be a genuine value property, assuming it's impossible for "just" to have a value-neutral counterpart. The second is that there might be intractable intercultural disagreements about what things are just.

[5] On Williams' view, a sympathetic outsider who "imaginatively grasps" the evaluative point of "T," at least for the purposes of anticipating its usage, could become competent with "T" and thus engage in fruitful moral discussion involving "T." However, she could not express the same thoughts in her native tongue (1995, 239).

Cross-References

► Justice
► Williams, Bernard

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Justice: Thomas Hobbes' Perspective

► Hobbes, Thomas: On Justice

Justice: Transitional Justice

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Introduction

This entry aims to present the core of the notion of transitional justice, which is a transdisciplinary idea that cannot be reduced to the contours of jurisprudence. As such, it is a concept originating from the relationship between academic investigations and the engagement of researchers in state policies. Exploring these links, the entry encompasses a historical background, an attempt to shape the concept of transitional justice, some of the critical approaches to the theme based on the universal claims of the concept and new developments in the field related to the crises of democracy. Finally, the conclusion will detail the importance of making effective transitional justice taking into consideration not only the criticism the concept must address but also the current challenges posed by a growing wave of authoritarianism around the globe.

Historical Background

Paige Arthur (2009) tries to recover the definition of an autonomous field of transitional justice when she refers to the dynamic relationship between academic investigation and political engagement. Going back to the 1980s and 1990s, one can perceive that a series of conferences convening overlapping participants revealed that there was a similar concern in shaping the general area of human rights in a way that was designed to be sensitive to the particular problems related to transitions to democracy. For example, a 1988 seminar at the Aspen Institute brought scholars from diverse fields to debate the risks and opportunities of transitions from authoritarianism to democracy. Such scholars included José Zalaquett (the former member of Allende's Chilean government who worked for International Amnesty when in exile), John Herz (a prominent activist in the postwar denazification process), Juan Méndez (the then president of Americas Watch and one of the founders of the International Center for Transitional Justice), Ronald Dworkin (who observed the trial of the Argentinean junta by invitation of Carlos Santiago Nino and wrote the preface of the English version of the report of that country's pioneer truth commission), Diane Orentlicher (who served as Deputy for War Crimes Issues in the US Department of State), and Paulo Sérgio Pinheiro (who was part of the Brazilian National Truth Commission in 2014).

The timing and significance of these activities give us a glimpse of the contemporary inception of transitional justice. Contrary to some canonical texts that were written afterwards, like Elster (2004) or Teitel (2003), transitional justice is not supposed to be directly linked to the political changes in Ancient Greece or to the end of the Second World War. Even in the twentieth-century postwar period, the phrase was not commonplace,

although, as Arthur (2009) reminds us, a book by Arie Poldervaart mentioned the term in 1948. Transitional justice is a concept that emerged in the 1980s and 1990s to advance normatively some of the results obtained by political engagement and academic research in helping to consolidate democracy after periods of conflict or authoritarianism.

Attempts to Shape the Concept

The construction of the concept of transitional justice is definitely transdisciplinary: it can be seen as a normative aftermath of the field of political science referred to as transitology, in which authors such as Guillermo O'Donnell and Philippe Schmitter (2013) tried to understand empirically how transitions occurred. The seminal texts that were produced during the 1990s and 2000s by Neil Kritz (1995) and Ruti Teitel (2000) were the first attempts to universalize the obstacles, problems, and solutions of transitional justice. As such, the field has drawn on different disciplines such as Constitutional Law, International Human Rights Law, Political Science, Social Psychology, and others. Institutionally, one example of the main characteristics of transitional justice came with the 2004 UN Report of the Secretary-General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Although it expressly recognizes the demand for a definition of the political context of transitional justice, the report reveals its basic structure: being both a field of research and political activity, it addresses the questions of how to foster the consolidation of democracy in post-conflict or post-authoritarian societies, using tools that have been utilized in different societies.

In other words, transitional justice refers to the collection of normative instruments that allows the progressive overcoming of situations of authoritarianism or conflict and the consolidation of a democratic environment: access to truth and memory, liability for crimes against humanity, reparations, and institutional reforms. Transitional justice, in this sense, depends on the temporal limits of each society – there is no specific term in which the process should happen. Its *transitional* character is linked to the necessity for incremental democratic consolidation. Stating and recognizing that a transitional period has past is not an easy task, since the violations of human rights that have occurred at exceptional moments are experienced differently by victims and also by each society that has to confront its past.

To the construction of the transitional justice toolkit, diverse experiences have been important around the globe. For example, the access to truth and memory adopted the principal formula of using truth commissions, such as the Argentinean National Commission on People's Disappearance and the Truth and Reconciliation Commission of South Africa which were the references for the 1980s and 1990s (Hayner 2002). Moreover, in Argentina, the broad and effective procedures of criminal liability against former torturers of the 1976–1983 dictatorship inspired other countries in the region (González-Ocantos 2016). In the case of Brazil, a paradigmatic system of reparations through its Amnesty Commission was set up (Abrão and Torelly in Lessa and Payne 2012); however, this was severely restricted during the Michel Temer and Jair Bolsonaro administrations. Post-socialist countries have produced multiple processes of vetting and purging (Teitel 2000), such as the former Czechoslovakia, Bulgaria and Albania, although Argentina has remained a reference by using criminal procedures against military figures and judges who were involved in committing crimes against humanity.

Critical Approaches

As it can be reasonably claimed, the main critical approach to transitional justice is derived from its apparent universal design. Should there be recourse to a general toolkit containing the most important components of transitional justice? Or should there be a substitute for the holistic comprehension of the elements of transitional justice by formulating a political analysis of electing, for example, reparations rather than criminal liability? In the case of Colombia, the peace agreement fostered a debate on how to deal with and to what

extent criminal liability should be set: one of the conclusions was that the responsibility for crimes against humanity could only be negotiable if it there were no provisions granted for total amnesty. Moreover, the Colombian case showed sensibility to themes that have been traditionally neglected in previous traditional measures of transitional justice, such as abuses against Afro-Colombian and indigenous people, forced displacement, and gender-based violations.

In relation to the South African context, Matthew Evans (2016) proposes substituting transitional for transformative justice, in which socioeconomic rights and landlessness would be important measures that could be used to confront structural violence. Taking into account South Africa's long-standing gross inequality problems, this criticism has consequences on how to define the objectives of transitional justice, especially over the long term. His criticism is in accord with Rosemary Nagy (2008), to whom the traditional approach to transitional justice is deemed to be technocratic and decontextualized and, thus, blind to gender and social justice. Perhaps the ties transitional justice has with traditional liberal democracy have limited its ability to not only enhance its capacities but also avoid some of the current challenges.

New Developments

The relationship between social media and transitional justice is still a field to be developed academically, as Vinck (2019) recently noted in the *International Journal of Transitional Justice*. Problems that have arisen from this relationship are vital to the debate, but there are other matters too. At the same time that transitional justice was trying to define itself as an idea that could help consolidate democracy, the basic structure that has formed traditional liberal democracy has been seriously degraded. Examples of this include the impeachment process in Brazil, which was akin to a parliamentary coup (Meyer 2018) and the current presidency's support for the dictatorship, the election of Donald Trump in the USA, Orbán's authoritarian government in Hungary (Halmai in Graber, Levinson and Tushnet 2018), Duterte's brutal war on drugs in the Philippines, and the Brexit deadlock in the UK. Such cases amply demonstrate that Francis Fukuyama was blatantly wrong in 1992 when he argued that democracy was the end of history (Fukuyama 2006).

Contemporaneously, it has never been more important to debate and confront the rise of fascist politics (Stanley 2018), the supposed death and end of democracy (Levitsky and Ziblatt 2018), the possibility of the people to reconsider the basic rules and framework of democracy (Mounk 2018), as well as what should be done in order to save constitutional democracy (Ginsburg and Huq 2018). These debates try to give the public an idea of what kind of threats democracy can suffer. New concepts have been formulated so as to address the problem of the rising of authoritarian tendency and its popular appeal: "authoritarian backsliding" (Dresden and Howard 2016), "democratic recession" (Diamond 2015), and "democratic decay" (Daly 2019) are indicative of the new terminology and historical juncture. This current literature summarizes the main challenge at the moment: the survival of the principal tenets of transitional justice.

Conclusions

As with any political and juridical concept, transitional justice is in permanent transformation and has to deal with different questions from time to time. If, on the one hand, it is accepted that shortcomings must be addressed, on the other, this does not mean that abdicating from the core of transitional justice or the basis of liberal democracy is a way out. Suffice to say, one must not presuppose that liberal democracy can be reduced to a neoliberal reasoning (Brown 2015). The survival of transitional justice depends on reinforcing its basic structure and enhancing it so as to deal better with socioeconomic politics and rights. Not only is inequality at stake here, however. Gender-based issues, ethnic demands, and problems of the global south must also be part of the transitional justice agenda. Additionally, avoiding the return of authoritarianism is a permanent and ongoing

demand that requires wider guarantees of non-repetition.

On the roadmap for traditional transitional justice, a cautious reading and application of the institutional reform element may be useful. In several cases of authoritarian backsliding, the problem is related to the unresolved questions of the previous regimes: inadequately addressed civil-military relationships post-1988 have had direct connections with the current return of the military albeit via elections in Brazil, for example. To deal efficaciously with the past requires more than the transitional justice toolkit as there needs to be strategies designed to safeguard democracy from the future shadow of authoritarianism.

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Juvenile Justice

► Justice: Juvenile

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Kant, Immanuel

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Introduction

Immanuel Kant (1724–1804) was a Prussian German philosopher in the Age of Enlightenment and became the central figure in modern philosophy. Bridging the conflict between early modern rationalism and empiricism and setting the terms for much of nineteenth and twentieth century philosophy, Kant up till today continues to exercise a significant influence in metaphysics, epistemology, ethics, political philosophy, aesthetics, and other fields. Born and raised in Königsberg (today Kaliningrad, Russia), Kant studied among other things philosophy, physics, and mathematics at the University of Königsberg. After working as a tutor, lecturer, and librarian in Königsberg for several years, he was appointed Professor of Logic and Metaphysics at the University of Königsberg in 1770. From then on, he developed – especially in his three Critiques: the Critique of Pure Reason (1781, 1787), the Critique of Practical Reason (1788), and the Critique of Judgment (1790) – his "critical philosophy", which is still so influential today.

Kant's legal philosophy, however, is mainly presented in his *Metaphysics of Morals* (1797). Its central claim is to understand right (*Recht*) as a system of equal freedom which is the mandatory moral requirement for the coexistence of free rational beings. As such Kant's legal philosophy is part of his moral philosophy, although it is controversial in how far it shares the metaphysical underpinnings of his ethics (Kant uses the term "morals" (*Moral* resp. *Sittenlehre*) as a generic term for "right" (*Recht* resp. *Rechtslehre*) and "ethics" (*Ethik* resp. *Tugendlehre*)). Kant's concept of right gives rise to the innate right to freedom, from which he deduces the moral possibility of acquired rights as well as the necessity to enter a civil condition of Public Right. With his understanding of right, Kant by and large breaks with the natural law and the social contract traditions of the seventeenth and eighteenth century and exercises a significant influence in today's legal and political philosophy.

What Is Right?

Right (*Recht*) formulates the conditions under which actions of free embodied beings are universally compatible: "Right is [. . .] the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom." (*Metaphysics of Morals* [MM], 230). Kant's notion of right is defined by three provisions: First, right refers to the external relations of persons insofar their free actions do influence each other. Second, those

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actions have legal relevance only insofar as they concern the choice of others, meaning their freedom of action (hence rendering "the mere need" of others legally irrelevant). Third, right does abstract from all aims and motives of the agents. "All that is in question is *the form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free* [. . .]." (MM, 6: 230).

Formality and externality are the key features of Kant's notion of right in two decisive ways: First, right contains a *formal* determination of freedom of choice entirely abstracting from the agent's aims and motives. It only requires me not to "impair [other's] freedom by my *external action,* even though I am quite indifferent to [their] freedom or would like in my heart to infringe upon it" (MM, 6: 231). Second, right allows for coercion, because it is about bringing *external* actions into a universal relational structure. For one thing, actions are (contrary to mental states) in principle externally enforceable. For another thing, the authority to coerce is – according to the principle of contradiction – implicit in the notion of right as external actions being compatible according to a universal law. For coercively hindering wrongful actions is "a *hindering of a hindrance to freedom*" and as such "consistent with freedom in accordance with universal laws, that is, it is right" (MM, 6: 231).

Nonetheless, right is still an *imperative principle* of practical reason: Even though others can physically coerce me if I do not live up to it, right is in the first place "a law that lays an obligation on me" to act so that "the free use of [my] choice can coexist with the freedom of everyone in accordance with a universal law" (MM, 6: 231). And as much as right allows for physical coercion against wrongful actions, as much the general law of right (*allgemeines Rechtsgesetz*) allows for the *threat of physical sanctions* (i.e., punishment) to motivate legal behavior (Kant calls this *juridical lawgiving*, because *lawgiving* is defined as connecting the action required by law with an incentive, cf. MM, 6: 218 *et seq.*). Motivationally, however, the law of right is not restricted to *other* people threatening me with sanctions (Kant calls this juridical lawgiving *external*, because the "*lawgiver (legislator)*" is the "one who commands [. . .] through a law," MM, 6: 227). If external incentives are not sufficient to motivate me to fulfill my legal duty, the latter remains in force, so that – in the absence of sufficient external motivation – I must compel myself to act legally by the idea of duty itself (Kant calls this internal ethical lawgiving, cf. MM, 6: 219 *et seq.*).

Complementary to this notion of *objective* right (i.e., right as a normative principle prescribing human actions as well as restricting their moral permissibility), Kant develops a notion of *subjective* right: the "one innate right" of every human being to "*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law" (MM, 6: 237). Thus, from the perspective of the individuals being under the law of right, right confers reciprocal entitlements and obligations. Those entitlements (i.e., *subjective* rights), however, do not only assign a space of rightful action. Moreover, they can be asserted and claimed and it is claiming that gives subjective rights their special moral significance in intersubjective relations, since they are – as Kant defines it – "the capacity for putting others under obligation" (MM, 6: 239). This is the other side of the coin that duties of right allow for external lawgiving, for it is for the right-holder to demand the action required by law by connecting it with a threat of sanction. As a corollary, duties of right are according to Kant directed duties, that is, duties owed to the right-holder who can claim their performance.

The Relationship of Right and Kant's Overall Moral Philosophy

Kant's philosophy of right (*Recht*) is a branch of his practical philosophy (in contrast to his theoretical philosophy) and must be distinguished within practical philosophy from both, empirical elements and virtue (*Tugend*). For Kant, practical philosophy, as a set of rules governing free behavior of rational beings, covers all human action in both its *a priori* and empirical (today we would say "applied") aspects. His legal philosophy, however, only deals with the former and is part of a

pure "metaphysics of morals", which is "a system of *a priori* cognition from concepts alone," which has "freedom of choice for its object" (MM, 6: 216). Thus, Kant's notion of right is *metaphysical*, because it does not matter what the empirical circumstances of action are or "how well-disposed and right-loving human beings might be" (MM, 6: 312). And it is a *practical* metaphysics, since it is not a catalog of claims about what is most real, but articulates the limits to each person's freedom of choice.

Within the practical philosophy so defined Kant distinguishes right from virtue (*Tugend*) along the lines of the formality and externality of the former (cf. above). First, right is about compatibility of actions; virtue about morally necessary purposes of action: "[V]irtue goes beyond the concept of outer freedom" (MM, 6: 396), because it commands us to set ourselves ends (e.g., the end to promote the happiness of others). This is – contrary to the *formal* principle of right – a material determination of choice, because ends are matters of choice (cf. MM, 6: 389). Second, right allows for coercion; virtue does not: Duties of virtue are conceptually non-coercive, since setting oneself an end "is an internal act of the mind" (MM, 6: 239), which cannot be enforced *externally*. Nonetheless, right and virtue are both moral laws (Kant uses "morals" as a generic term) and are treated together in the *Metaphysics of Morals* (which was published as comprising of both, the *Doctrine of Right* (1797) and the *Doctrine of Virtue* (1797), cf. below). This raises the question, of whether right and virtue share the same normative foundations or – in light of the aforementioned differences – not.

With regards to the *Doctrine of Virtue*, it is generally accepted that it depends upon the critical foundation of Kant's moral philosophy developed in the *Groundwork to the Metaphysics of Morals* (1785) and the *Critique of Practical Reason* (1788). There Kant developed the idea that moral obligation can only be established autonomously, i.e., through self-legislation. Moral laws determining choice have to be grounded in one's own will (*Wille*, or practical reason itself). Something independent of the will, such as happiness, would lead to heteronomy and cannot be the basis of moral laws (cf. *Groundwork*, 4: 440 *et seq.*; *Critique of Practical Reason*, 5: 33 *et seq.*). The corresponding principle for all human deliberative action is the Categorical Imperative: "So act that the maxim of your will could always hold at the same time as a principle in a giving of universal law." (*Critique of Practical Reason*, 5: 30).

Whether Kant's *Doctrine of Right* is as well an embodiment or derivative account of this critical moral philosophy is, however, very controversial. Some claim that Kant's provisions of right are at odds with pillars of his moral philosophy: The Categorical Imperative prescribes to act upon inner maxims; rightful conduct depends only on the outer form of interaction between persons. Autonomy of pure reason seems to call for the idea of duty itself to be the only incentive consistent with it; rightful conduct can be induced by incentives provided by others. Those differences are said to preclude any direct appeal to the autonomy of pure reason and the Categorical Imperative as the grounding principle of the principle of right, so that the latter must have an independent justification (e.g., Geismann 2006; Willaschek 2009; Ripstein 2009).

However, most interpreters reject this idea of a justificatory independence of Kant's legal philosophy from his critical moral philosophy, because otherwise it would be impossible to explain the binding force of right on Kantian grounds. If according to Kant the "*[a]utonomy* of the will is the sole principle of all moral laws and of duties in keeping with them" (*Critique of Practical Reason*, 5: 33) and if right is "a universal law [. . .] that lays an obligation on me" (MM, 6: 231), then the latter must be grounded in Kant's critical moral philosophy (e.g., Kersting 1984; Ludwig 1988; Seel 2009; Byrd and Hruschka 2010; Hirsch 2017). Kant is said to implicitly confirm this dependence by referring right to external relations of *persons* and defining the latter in the "Introduction to the Metaphysics of Morals" – which sets the conceptual framework for the succeeding *Doctrine of Right* – as morally autonomous beings, that is a being "subject to no other laws than those he gives to himself (either alone or at least along with others)" (MM, 6: 223).

The Systematic Unfolding of Kant's Legal and Political Philosophy

Kant's legal philosophy presented in the *Doctrine of Right* has three parts: The first part (MM, 6: 229–242) outlined above is foundational and establishes innate rights. The second part (MM, 6: 243–305) deals with acquired rights. Both belong together to the domain of Private Right (*Privatrecht*), meaning the rights and legal duties in the state of nature, i.e., in the absence of a state. The third part (MM, 6: 305–372) establishes Public Right, which deals with, first, the transition from a state of nature to a civil condition and the consequences for innate and private rights following from that, second, domestic constitutional law especially explaining the creation and binding force of positive law, and third, international and cosmopolitan law.

Innate Rights

In the first part, Kant lays down his general notion of right, outlines its relationship to virtue, and develops the innate right of persons (cf. above). The latter is the aforementioned right to freedom, which is presented as a single right, but contains several legal privileges, in particular, innate legal equality among and independence from each other. It "is the only original right belonging to every human being by virtue of his humanity" (MM, 6: 237) and thus finds its normative foundation in every human's "capacity for freedom, [. . .] his personality" (MM, 6: 239). The duty of other's corresponding to this innate right is "*Do not wrong anyone*" (MM, 6: 236), which is nothing else but a restatement of the law of right (*Rechtsgesetz*, cf. above). However, not only others must not wrong you. You too, by virtue of your moral personality, are obliged not to "not make yourself a mere means for others," which is an "obligation from the right of humanity in our own person" (MM, 6: 236). This duty of "*rightful honor*" is a duty owed to oneself, limiting the ways in which one can exercise his or her freedom in relation to others. For example, one cannot sell oneself into slavery.

Acquired Rights

Innate rights and their corresponding legal duties govern the interactions among free persons. However, they do so in a way that is incomplete, because the scope of right is broader than only a person's entitlement to his or her own person. Therefore, Kant claims that right has to be extended to external objects, thus allowing for acquired rights like property. His three-step-argument is basically, that right – if it allows for physical possession of objects – must allow for property rights, because right as a metaphysical concept cannot be limited to empirical circumstances of possession (cf. MM, 6: 246 *et seq.*):

(1) The principle of right allows for any action that "can coexist with everyone's freedom in accordance with a universal law" (MM, 6: 231). This includes the *physical* use of external objects of choice (e.g., things like an apple), because things – contrary to persons – have no right that could be violated by taking possession of them. Nor do I wrong any person, if I *physically* use external objects of choice (e.g., by picking up an apple), because this use is in conformity with the provisions of other's innate right to freedom. (2) However, the universal principle of right as a *metaphysical* principle cannot be restricted in its application by empirical conditions (in the example: the *physical* possession of an *apple*). (3) Consequently, it must be "possible for me to have any external object of my choice as mine" irrespective of its empirical embodiment and my "physical possession" (MM, 6: 246), that is to say *property rights* must be possible.

Therefore, Kant concludes, it is a "*postulate of practical reason with regard to rights"* (MM, 6: 246) to have rights to external objects of choice. An external object of choice, however, is not only "a (corporal) *thing* external to me," but as well "another's *choice* to perform a specific deed" and "another's *status in* relation *to me*" (MM, 6: 247). Consequently, acquired rights are not only property rights (cf. MM, 6: 260 *et seq.*), but as well contractual rights (one person consensually makes her choice available to another, cf. MM, 6: 271 *et seq.*) as well as status-rights (e.g., of parents and children, cf. MM, 6: 276 *et seq*).

Public Right

Although innate and acquired rights together provide a complete picture of intersubjective legal relationships, this legal situation is precarious, because "when rights are *in dispute (ius controversum),* there would be no judge competent to render a verdict having rightful force" (MM, 6: 312). Therefore, there is according to Kant a moral duty to leave this state of nature ("a state of externally lawless freedom," MM, 6: 307) and to enter a civil condition, in which freedom is "in a dependence upon laws" and is "as such undiminished, [. . .] since this dependence arises from [one's] own lawgiving will (MM, 6: 316).

Depending on how the deficiency of the state of nature is understood, this *Postulate of Public Right* – as Kant calls it (MM, 6: 307 *et seq.*) – has been interpreted differently: Some see (similar to a Hobbesian account) the problem of the state of nature in a lack of assurance of rights. According to those interpreters, the civil condition is necessary to provide security against unilateral force (e.g., Byrd and Hruschka 2010). Others regard the problem of the state of nature as an epistemic problem, consisting (similar to the Lockean picture) in a lack of determinate judgment. Thus, public right is said to be necessary, in order to establish an objective standpoint to decide legal controversies (e.g., Ripstein 2009). However, some interpret the problem, that there is in the state of nature "no judge competent to render a verdict having rightful force" (MM, 6: 312), not as an epistemic, but as a moral problem. According to those authors, private rights in the state of nature conceptually conflict with individual moral autonomy, because rights allowing for external legislation seem to be the epitome of heteronomous lawgiving: The right-holder is entitled to "put others under an obligation" (MM, 6: 237, 239), whereas the person addressed by rights can claim to only be obliged by means of autonomous self-obligation (cf. MM, 6: 223). Therefore, the establishment of a civil condition, in which legal "dependence arises from [one's] own lawgiving will" (MM, 6: 316), is said to be necessary in order to overcome the heteronomous state of nature (e.g., Ludwig 1988; Hirsch 2017).

This interpretatory controversy aside, according to Kant a social contract is necessary in order to bring about a civil condition. This "*original contract*", however, is no historical event but only an idea of reason, that is a moral imperative demanding to conceive of the actual political rule as the representation of the united lawgiving will of the people, "in terms of which alone we can think of the legitimacy of a state" (MM, 6: 315). Thus, the consent at issue is not an empirical consent based upon any actual act, but a practical ideal, which has a twofold function: On the one hand, the original contract is a *regulative principle* requiring political rule to be a possible expression of the united will of the people. This renders positive laws to which "a whole people *could not possibly* give its consent [. . .] (as, e.g., that a certain class of *subjects* should have the hereditary privilege of *ruling rank*), unjust" (*Theory and Practice*, 8: 297). Besides this, the original contract constitutes the ruler's duty to govern in a republican way, i.e., practicing a functional (not institutional) separation of powers and respecting the citizen's natural rights (cf. MM, 6: 313 *et seq.*). This, however, does not prescribe any form of political organization or checks and balances, or any form of democratic consent to positive laws, legal judgments, or political decisions, e.g., by means of parliamentary election.

On the other hand, the original contract is a *normative principle* that identifies the actual ruler as a legitimate ruler and prohibits any resistance against allegedly unjust rule: If the *de facto* ruler is to be regarded as representing the united lawgiving will of the people (because this is the only way to overcome the state of nature), then the state is *legitimate* as soon as it effectively performs the function of legislation and law enforcement by virtue of its monopoly on the use of force (cf. MM, 6: 372). The state is *just*, though, only if the political rule actually follows the provisions of the original contract, i.e., the ideal of the united will of the people. Nonetheless, "even if the organ of the sovereign, the *ruler,* proceeds contrary to law, for example, if he goes against the law of equality [. . .], subjects may [not] oppose this injustice [. . .] by resistance" (MM, 6: 319). For if a civil condition is necessary to claim and assert

rights in the first place, then there can be no legitimate enforcement of rights against the state.

Kant's account of Public Right also contains provisions on public administration, taxation, and civil service (cf. MM, 6: 323 *et seq.*). Furthermore, he develops a retributive theory of criminal law according to which state punishment "can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*" (MM, 6: 331). Besides this, Public Right deals with international law, which does (contrary to other contemporary international law theories) not only contain provisions on the law of war and peace (MM, 6: 345 *et seq.*). Beyond that Kant is the first to bring up the idea of a rightful global world order, which he develops in analogy to domestic Public Right (MM, 6: 343 and 350 *et seq.*; *Toward Perpetual Peace* [TPP], 8: 358 *et seq.*). Nation states are – like individuals – in need of a rightful condition of distributive justice. But since nation states are sovereign by already providing a rightful condition for their citizens, they cannot be forced into a global legal world order (e.g., a unitary world state). Therefore, Kant argues for the negative surrogate of a peace federation, by which Kant means a voluntary association of sovereign states with means and rules of procedures to settle international conflicts peacefully and which is often interpreted as a precursor to the United Nations. Kant's systematic keystone of Public Right is the idea of cosmopolitan right, which specifies the legal relations between nation states and foreigners (MM, 6: 352 *et seq.;* TPP, 8: 358 *et seq.*). It, too, stems from the idea of a global legal community and provides a right to hospitality for peaceful visitors of foreign countries. It is often seen as an intellectual precursor of the right of migration and asylum, but it has in Kant's works primarily an anticolonialist character.

Genealogy and Influence of Kant's Legal Thinking

The *Doctrine of Right* was published as a stand-alone book in 1797 as the first part of the *Metaphysics of Morals* and is Kant's main and comprehensive book on legal and political philosophy. Before that, Kant addresses selected questions of legal and political philosophy in several shorter works (esp. *Theory and Practice* (1793) and *Toward Perpetual Peace* (1795)) and makes incidental references to matters of right and politics in the *Critique of Pure Reason* (1781) and the *Critique of Practical Reason* (1788) as well as in the *Groundwork* (1785). However, Kant devoted himself to legal philosophy from an early age, offering a biannual lecture course on "Natural Right" at the University of Königsberg from 1766 to 1788. Student transcripts of his lectures show that Kant has developed key elements of his legal philosophy already back then (cf. Hirsch 2012).

However, as much as Kant's legal philosophy can be seen as the systematic keystone of his own moral philosophy, as much it evolves along the lines of the contemporary natural law doctrine, at that time dominated by Pufendorf and his successors Christian Thomasius and Christian Wolff. Consequently, not only the structure of the *Doctrine of Right* is to some extent modeled on the architectonics of the natural law compendia of the Pufendorfians and Wolffians. Moreover, the *Doctrine of Right* has the same programmatic goal: a nonpositivist account of right as well as a contractualist justification of positive right and state power. Yet, Kant is pursuing that goal within an entirely new justificatory framework: Kant develops a metaphysical and formal conception of right grounded in pure practical reason, whereas Hobbes or Pufendorf, for example, founded natural law on material (empirical) principles of self-preservation and/or sociability. If, however, the binding force of right is grounded in self-legislation of pure practical reason, there is neither a need for divine commandments endowed with natural sanctions (Pufendorf) rendering natural law obligatory. Nor does the justification of state power rest on the prudential preferability of a public legal condition backed up by force (Hobbes).

However, Kant's new conception of right initially had only a limited impact. On the one hand, the contemporary "Kantians" had expected the

Doctrine of Right to be entirely different and were to some extent disappointed. On the other hand, Kant's *Doctrine of Right* was outshone by Fichte's *Foundations of Natural Right* (1797) and Hegel's *Elements of the Philosophy of Right* (1820). Neo-Kantianism did not take up on Kant's legal philosophy either. Therefore, Kant's legal and political philosophy has (compared to the longstanding significance of his ethics) returned to increased scientific focus in Germany only in the late twentieth century (cf. in particular, Kersting 1984; Ludwig 1988) and in international research only in recent decades (cf. in particular Ripstein 2009; Byrd and Hruschka 2010). Today, however, Kant's legal thinking exercises a significant influence not only in Kantian research but also in contemporary legal/political philosophy, for example, in debates on cosmopolitanism (cf. e.g., Benhabib 2004) or on the constitutionalization of international law (cf. e.g., Habermas 2006).

Conclusion

Immanuel Kant's legal philosophy is an integral part of his practical philosophy, defining the conditions under which actions of persons are universally compatible, so that each can enjoy their freedom. This rightful freedom is initially defined by the provisions of Private Right stating the rights which persons have against each other, either by virtue of their humanity or through acquisition. Private Right, however, requires Public Right, since a plurality of persons can enjoy their rightful freedom only within a legal state, realizing everyone's freedom in accordance with a universal law, both at the national and supranational levels. With this conception, Kant did not only develop a novel theory of natural law at the end of the 18th century, but exercises a lasting influence on contemporary legal and political philosophy today.

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Kant, Immanuel: On Justice

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The following overview mainly focuses on Immanuel Kant's treatment of justice in the *Metaphysics of Morals* (MM), his central work in philosophy of law. Unless stated otherwise, page references are to the MM, Academy Edition volume VI.

The Scope of Kant's Discussion of Justice

For readers who have the classical Aristotelian-cum-scholastic views on justice in mind as well as for those who come from the background of contemporary discussions, the treatment of justice ("Gerechtigkeit") in Kant's writings cannot be but surprising. The former will be struck by the fact that justice as a personal virtue, as well as a qualification of individual actions outside a legal context, plays virtually no role in Kant's moral theory. Kant does not discuss "justice" in the *Groundwork*, and while it is mentioned in the *Critique of Practical Reason* several times, this is almost always in connection with divine retributive justice. In the *Metaphysics of Morals*, Kant characterizes "gerecht" and "ungerecht" as qualifications of actions explicitly in terms of compliance with *external* laws ("[w]hat is right in accordance with external laws is called *just*," 224; external laws are those which do not require a specific motive for compliance), and justice plays a significant role in his exposition of the role of the state and the moral requirement to enter a state of public law. But when it comes to individual morality and virtue, talk of "justice" is significantly absent (with rare exceptions) (see also Brandt 1993, 25). This cannot be satisfactorily explained by Kant's general rejection of much of the framework of Aristotelian virtue ethics – especially not since justice, being connected to perfect duties rather than duties leaving "latitude" in fulfillment, seems best placed among the classical cardinal virtues to escape Kant's general criticism of the Mesotes theory of virtues (432). It seems rather a terminological decision on Kant's part to mainly use "Gerechtigkeit" in relation to external actions and to the external, rather than ethical, duties with which the Doctrine of Right is concerned, as well as to institutional settings (see also Hruschka 2015, 767), which sets him somewhat at odds with historical usage (apart from the context of retributive justice).

The surprise readers well acquainted with contemporary discussions will experience is somewhat different. They will expect a theory of justice to deal, inter alia, with the question of "the appropriate distribution of the benefits and burdens of social cooperation" (Rawls 1971, 4), i.e., to deal not only with the question of liberty rights but also with the interpersonal distribution of goods and material advantages (at least when these are distributed by a central agency like the state). But while Kant does address issues of liberty rights, his remarks on justice are almost completely silent on the latter question and on questions of "social justice" in general. Though he talks of "iustitia distributiva" repeatedly in the MM, this is not in the context of a discussion as to *how* goods should be justly distributed but only of a public judicial system which can authoritatively decide cases.

The reason for this is not that Kant believes there is no moral question how goods and wealth should be distributed, nor that he thinks that the distribution of goods is completely beyond the remit of what the state could legitimately do. He explicitly argues that the state has a duty to support those unable to maintain themselves and that

the state can tax those who are more affluent for this purpose (325f.). But the extent of this duty is very limited – it only covers the "most necessary natural needs" (326) – and it is a far cry from a general duty to remedy or prevent major inequalities in wealth or income. Indeed, Kant seems to have few resources within his theory of Right to justify any general duty to remedy or substantially limit such inequalities, since he holds that even major inequalities in wealth are fully compatible with legal equality within a state (Gemeinspruch AAVIII, Gregor 1996, 291). The latter rules out entrenching these inequalities by establishing hereditary privileges, inaccessible to those not born into the ranks in question. But it does not rule out that, e.g., by inheritance of material wealth, some citizens will become massively richer than others (Gemeinspruch AA VIII, 292f.). Furthermore, the duty to support those in need does not derive from individual claims of the latter, but from the preservation of the legal community, which extends to the preservation of the physical existence of its members. Beyond that very limited duty, there is no legal duty of the state to prevent material – as opposed to legal – inequality, though there is presumably a farther-reaching *ethical* duty of beneficence of the sovereign (qua sovereign) to support the needy which goes beyond mere physical subsistence (Ludwig 1993, 237ff.). (Ripstein (2009, 284ff.) and Wood (2016) are more optimistic about deriving a more extensive legal duty in Kant. O'Neill (2000) argues that, on the Kantian approach, a realization of liberty rights also requires limiting poverty and relative power, because we, and our agency, are dependent on and vulnerable to interference by others. See also Rosen 1993, Chap. 5.)

The virtual absence of questions of the distribution of goods in Kant's discussion of justice is due to his understanding of Right and of his usage of "Gerechtigkeit" primarily within this context. Right, for Kant, is only concerned with the external relation between the individuals' capacities for (free) choice, i.e., the question of whether my exercise of this capacity is compatible with the formally same exercise of choice by you. In focusing exclusively on the relation between exercises of the capacity of choice, Kant's theory of Right abstracts, first, from how actions impinge on another's desires or needs, as opposed to her choices (230), and, second, from the particular matter of choice at issue, i.e., from whether someone in fact succeeds in attaining what she intended to attain by her choice (loc. cit.). Right is solely concerned with delimiting and safeguarding equal spaces of individual freedom for each individual, as expressed in Kant's Principle of Right. ("Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" (loc. cit.).) This rules out that Right is directly concerned with questions of social justice or with correcting inequalities that have resulted from free market transactions (as long as the latter have not contravened the Principle of Right).

Iustitia Commutativa and Iustitia Distributiva in the MM

Kant's most extensive discussion of "justice" in the MM occurs in connection with the transition to the state of public law or the "judicial order" ("rechtliche Zustand," 305) at the end of the section on private law and the beginning of the section on public law (§§ 41–44). In a nonjudicial state (or "state of nature"), persons have rights, but it is only within the "judicial order" that these rights are secured and "everyone is able to *enjoy* his rights" (305f.). A crucial condition for realizing the judicial order (306) is the establishment of "public justice," of which Kant distinguishes three subparts: iustitia tutatrix, iustitia commutativa, and iustitia distributiva.

The terms "iustitia commutativa" and "iustitia distributiva" were well established in the debate prior to Kant, but Kant gave them an importantly new twist, under the influence of Thomas Hobbes's usage of the terms (Byrd and Hruschka 2010, Appendix to Chap. 2; Hruschka 2015). Commutative justice concerns the relations and transactions between private individuals, such as (contracts for) mutual exchange of goods and services ("the *justice* that holds among persons

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in their exchanges with one another," 297; Byrd and Hruschka characterize it more narrowly as "the justice of the public market," Byrd and Hruschka 2010, 36). Distributive justice, by contrast, relates to the activity of judicial courts which can unilaterally and peremptorily decide cases brought before them (306). Distributive justice, in this sense, is given particular emphasis by Kant, who explicitly notes that one can call the judiciary and thus the system of "distributive justice" itself a country's "justice" (loc. cit.).

Kant sometimes characterizes the difference between the "judicial state," or state of public law, or "civil state," and the "state of nature" in terms of the difference between iustitia distributiva and iustitia commutativa. In the state of nature, there are already natural rights of individuals and corresponding duties of "commutative justice"; there is already a natural "private law" governing the relation between individuals, and Kant at points equates the status naturalis with the state of private law (306). The "natural rights" are established by reason, without any need to refer to state authority. But there is no judiciary in the natural state to authoritatively settle cases of conflict and to determine who is entitled to what; instead, everyone can, and is entitled to, judge for herself what her rights are (312). This state is one of lawlessness ("Rechtlosigkeit") rather than of injustice ("Ungerechtigkeit") (loc.cit.). The establishment of the judiciary – and therefore of distributive justice – is the crucial step in the transition to the "judicial order," and Kant sometimes directly equates the states of "judicial order" and of "distributive justice" (307). The transition is not meant to change the *content* of the natural rights governing the relation between individuals, though more duties are added by the establishment of the state, and many ways in which individual rights are to be exercised are made more determinate or modified by the positive laws enacted by the state. The latter modifications can be quite significant (e.g., 302f.), though Kant insists that the "matter of private law" remains the same ("contains no further or other duties of human beings than can be conceived in the former state," 306). However, the crucial difference between the natural and the civil state is that only the latter contains the conditions under which these rights (especially property rights) are secured and can be exercised ("the civil condition provides the conditions under which these laws are put into effect," 313).

Kant believes that, in the natural state, we have a moral duty to transition to the civil state (the "Postulate of Public Right," 307), given that we cannot avoid contact with others and that only in the latter state individual rights can be safeguarded against others (237). But why precisely we have this duty, and in which respects our natural rights cannot be properly safeguarded in the state of nature, has been a matter of dispute among Kant's interpreters. Different passages suggest different arguments as central, some being reminiscent of earlier writers.

(1) While Kant sharply diverges from Hobbes's account of the need for the institution of the state, by insisting that the need for the transition does not arise from an empirical fact of human depravity or aggressiveness (312), in one passage he stresses that without some guarantee of others respecting my property rights, I am not obligated to respect theirs (307) and am allowed to use preemptive force against them. This latter idea is clearly reminiscent of Hobbes' argument that, in the state of nature, we cannot be expected to follow the laws of nature in our dealings with others since we lack security that they will reciprocate (Hobbes 1991, 110).
(2) In another passage, Kant provides a specific explanation for why we cannot rely on others respecting our rights in the state of nature, which is more reminiscent of John Locke. In the state of nature, everyone will rely on her own judgment about what is right, not on the judgment of others (312), which will lead to violent conflicts when individual opinions diverge. The institution of distributive justice eliminates this source of conflict by establishing a judiciary which can settle these disputes.
(3) Yet another line of argument (see, e.g., Hirsch 2017; also Ludwig 1988 with a specific focus on property rights) is suggested by Kant's

somewhat cryptic statement that the Postulate of Public Right can be developed "analytically" from the contrast between right and violence (307). According to this argument, transition to the judicial state is required to resolve a conflict existing in the state of nature between the possession and exercise of individual rights and the individual's claim to autonomy. Rights conceptually include the entitlement to unilaterally obligate others ("the capacity for putting others under obligation, i.e., the concept of right," 239). But in the state of nature everyone has the right to act as she herself thinks right "and not to be dependent upon another's opinion about this" (312), which follows from her general right to autonomous self-determination. The latter seems incompatible with anyone else's entitlement to impose obligations on me, independently from my own agreement and judgment, which seems to rule out the exercise of any individual rights in the state of nature (see Hirsch 2017, 220ff.). Only when the imposition of duties by others can be understood indirectly as an expression of the person's own autonomous self-determination can this tension be dissolved and can rightholders exercise their rights in a way compatible with the autonomy of others. This is only realized in a state where laws can ideally be seen as imposed by the united will of all rational members (Hirsch 2017, 240ff.), such that the exercise of another person's rights by imposing duties on me in accordance with those laws can still be seen as stemming, indirectly, from an exercise from my own autonomy.

The third argument has the merit of developing the Postulate of Right most directly from Kant's view on the nature of rights and their exercise. However, these lines of argument (and some others) are not mutually exclusive (Ripstein (2009), Chap. 6, ascribes to Kant versions of each; in Byrd and Hruschka (2010), we find at least versions of (1) and (2), see 26f. and 212), and Kant may well have subscribed to all of them. Nor is the fact that the need for a transition to the judiciary state is sometimes connected to concerns about property in particular (e.g., 307, 312f.), a compelling reason to believe that an argument like (3), which would be a general argument about the exercise of *all* rights, was not accepted by him as well (Hirsch 2017, 249ff.).

The third form of "public justice" is iustitia tutatrix, which is best understood as the giving of public laws (Byrd and Hruschka 2010, 33ff.). It is "protective," because our natural rights need to be enacted in the form of positive laws in order to be safeguarded. This need arises from the concerns mentioned above in arguments (2) and (3): There have to be positive laws which the courts can apply, and only once individual rights have been "enacted" by some public authority which can be seen as the expression of my own will can it be consistent with my autonomy for another to force me to comply with her rights "against my will" in the particular case. Of course, the admissible content of these "protective" laws is mostly predetermined by our natural rights, not just because it is their "function" to protect these rights but also because Kant clearly does not want to eschew standards (from natural law) for whether a positive law is materially just. No public law can count as (materially) just, he holds, if it "is so constituted that a whole people *could not possibly* give its consent to it" (Gemeinspruch AA VIII, 297), and laws which denied our natural rights to us could not pass this test.

Kant and Criminal Justice

In his discussion of criminal justice, Kant is most in line with both traditional and modern uses of the term "justice." His conception of criminal justice has traditionally been understood as a rigid theory of retribution, as he insists "on the principle of retribution, of like for like [Gleiches mit Gleichem]," at least "in terms of effect" (332). He describes the punishment of legal violations as a categorical duty and makes the notorious claim that even when a civil society is about to dissolve itself, all death sentences must still be carried out (333).

It is important to see that retribution for Kant is necessary to ensure a system of equal freedom under the law: the criminal violates a public law and thus tries to exempt herself from what the law requires of everyone. Since the law cannot allow unilateral exceptions on an individual's part, punishment is necessary to annul, and render ineffective, such unilateral exceptions (quite apart from issues of material compensation) (Ripstein 2009, 302 and 308). Punishment is thus a necessary part of the law remaining in force. Crucially, only a court of law has the authority to determine "quality and quantity" of punishment (332).

Kant argues against an instrumental justification of punishment with the purpose of preventing potential crimes, because this would amount to instrumentalizing the criminal. The criminal should only be punished because she has committed a crime (331). However, prevention does play a role in Kant's understanding of punishment (see also Byrd 1989): the threat of punishment provides an external incentive not to violate the law (235), and it must provide this incentive in order for punishment to be justified. If it fails to do so – e.g., because the threat of punishment is less severe than the harm the wrongdoer tries to avoid by her action, as in the plank of Carneades case-, punishment is illegitimate. The wrongdoer's action remains wrong (culpabile) but may not be punished (inpunibile) (236). This is compatible with Kant's insistence that *if* the criminal is to be punished, the measure and degree of punishment must be determined by the principle of equality. From this latter principle, Kant allows only very few exceptions, which arise either from our duty to respect the criminal's humanity or from the end of punishment and the state itself. Thus, even a torturer may not herself be punished by torture (333), and the sovereign should, if a retributively justified capital punishment for too many persons were to lead to an emergency for the state (casus necessitatis, 334), reduce that punishment.

Kant's discussion of retributive justice shows closer connections to earlier discussions of "justice" because here he comes closest to identifying justice in a traditional way with the idea of "parity" or "equivalence" ("the principle of equality [in the position of the needle on the scale of justice]," 332). This connection plays an important role in his argument for the "ius talionis," when he insists that only the idea of strict parity between crime and punishment allows for a precise determination of the right degree of punishment. Thus, despite important terminological differences to earlier discussions, some common strands remain visible.

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Kantian Autonomy

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Introduction

> Two things fill the mind with ever new and increasing admiration and reverence, the more often and more steadily one reflects on them: *the starry heavens above me and the moral law within me*... The first begins from the place I occupy in the external world of sense and extends the connection in which I stand into an unbounded magnitude with worlds upon worlds and systems upon systems, and moreover into the unbounded times of their periodic motion, their beginning and their duration. The second begins from my invisible self, my personality and presents me in a world which has true infinity but which can be discovered only by the understanding, and I cognize that my connection with that world (and thereby with all those visible worlds as well) is not merely contingent, as in the first case, but universal and necessary. (Kant 1996a: 269–70/CPrR 5: 161–2)

Whether we search for truth about what exists in the universe – the starry heavens above – or try to figure out what we should or should not do – what the moral law commands of us – our ability to use reason to find necessary, universal laws, Kant proposes, is at the heart of our activities. More specifically, when we look for truths about the scientific world, we start with hypotheses (that centrally use the category of "causality" of "the understanding") about possible, necessary relations that can explain (features of) events in spacetime and then we use empirical facts and experiments to investigate the plausibility of these hypotheses. Our aim is to discover laws that can explain why a type of event proceeds as it does; each time we succeed at finding plausible candidates for such a law, we add to our scientific knowledge.

In addition to our ability to engage the universe through scientific investigations, Kant maintains, we are rational in that we can set and pursue ends of our own. In other words, we participate actively in the universe by setting ends of our own, and our reason enables us to do so responsibly. When we use our reasoning powers in this practical (rather than theoretical) way, instead of starting with a hypothesis, we start with a maxim (a subjective rule of action) that specifies which end we would like to pursue. We then use our reasoning powers to investigate whether acting on this maxim could hold as a universal law for all rational beings. More specifically, if our maxim could hold as such a law, then our reason judges the proposed action to be morally permissible (i.e., it is consistent with our perfect duties); moreover, if a proposed action is supportive of bringing about a more rational world, then reason judges it to be a morally estimable maxim (i.e., it fulfills our imperfect ethical duties). For example, I am not morally justified in setting ends that involve physical violence to another human being, since if I do, then by definition – in using physical violence against another – I make it impossible for that other human being to set and pursue ends of their own (since they have to focus their energy on defending themselves against my aggression). Hence, if I think about whether it is morally permissible to do this, my mind says "no" because my reason cannot think this maxim as a law for rational beings. Finally, because I can be motivated by my reason, I can refrain from engaging in activities, such as acting aggressively, even if I can feel that I want to. I can, in Kant's language, act "from duty," meaning I can do something just because it is the right thing to do and I cannot do something because it is wrong. This entry provides a short overview of how Kantians in the English-speaking world have engaged Kant's writings on self-governance or autonomy in the last few decades as well as identifies some current trends in the scholarship.

Kantian Autonomy: Rawls and Nozick

For a long time, Kantian autonomy – self-government through practical law – was understood in the sense sketched in the previous paragraph. It was a reading that focused primarily on Kant's writings on (meta-)ethics, such as the

Groundwork for the Metaphysics of Morals and the *Critique of Practical Reason*. For example, this is how John Rawls (1971/1999, cf. 2000) understood Kantian autonomy in *A Theory of Justice*, which is why he thought the concept of Kantian autonomy must be broadened and re-envisioned in order to capture what justice requires of us (including through the state), and it is also why Robert Nozick (1974) famously disagreed with him. To make a rather long story short, if the above interpretation of Kant's theory is correct, then the state's proper function is only to stop people from acting on maxims that conflict with our perfect duties toward others, such as stealing and murdering (Varden 2016, forthcoming). Importantly, the state must refrain from any institution-building activities that involve more proactively or positively creating a just and good world suited not merely for rational beings but rational, vulnerable *human* beings (imperfect duties). In other words, the result can be seen as a libertarian minimal state, which is exactly what Nozick defended. In contrast, Rawls (1971/1999) reconceived the Kantian approach by constructing his "original position," which was a theoretical devise that enabled us to identify two principles of justice – the principles of justice as fairness – that rational agents with certain, distinctly human needs (the list of primary goods) hypothetically would choose as the foundational ones for their public, legal-political institutions. Much of the dispute in the literature in the 1970s onwards consequently focused on issues of redistributive justice, and, simplified, those who were not convinced by Nozick's right-wing libertarian approach found it more tempting to follow Rawls's basic lead of trying to develop a theory of justice from scratch – either their own or working with Rawls's theory – and in a way that takes into account human vulnerabilities and needs.

In his later work, Rawls (1996) re-envisioned his theory of justice as fairness as one of a family of liberal, political conceptions of justice that can be seen as identifying the normative basis for the basic structure of public, legal-political institutions in modern, liberal democracies. These states are characterized by a reasonable pluralism, meaning that the citizens of such states would differ fundamentally about how to live a good life but also agree that these differences are valuable and must be respected. Rawls also supplemented this analysis of modern, liberal democracies with a conception of a law of peoples – modeled on Kant's idea of "perpetual peace" – that envisioned how liberal and other, "decent" (nonliberal) peoples could live peacefully together autonomously (side by side) without shared governance through a world state. Naturally, also Rawls's conception of global justice has inspired a lot of engagement, including discussions of to what extent Rawls's Kantian theory is philosophically similar to or different from Kant's own approach. (For an entrance to the related, earlier literature, see Axinn (1998), Carson (1988), Cavallar (1999), Dodson (1993), Doyle (1983), Habermas (1997), Höffe (2006), Kokaz (2007), Maus (2006), Mikalsen (2011), Nagel (2005), Pogge (1988, 1994), Varden (2011), Williams (2006). For an entrance to where many of these discussions currently stand, see Kleingeld (2012) and Ripstein (2021).)

Kantian Autonomy: Onora O'Neill, Sharon Byrd, Joachim Hruscka, Ingeborg Maus

An early challenge to Rawls's basic understanding of Kant's or Kantian autonomy came from one of Rawls's students, namely, Onora O'Neill (1989, 1998, 2000). In her view, both of Rawls's versions of justice as fairness lost some of the philosophical strength of Kant's position because Rawls (in different ways) "idealized" certain ways of life rather than "abstracted" relevant, shared human features that could yield a basis for moral Kantian theories of virtue and justice. A central interpretive move for her as she was developing her own theory of justice was to turn to away from Kant's (meta-)ethical writings to Kant's Doctrine of Right in the *Metaphysics of Morals* and then complement this theory with ideas found in his Doctrine of Virtue in the same work to make space for human vulnerabilities. (For a feminist approach to Kant that also follows O'Neill's lead

in making imperfect duties important to how we conceive of justice, see Hay (2013).)

This change in focus from Kant's (meta-) ethical writings to those of his on right and justice soon became prominent among Kant scholars. (This move to Kant's *Metaphysics of Morals* was not original with O'Neill. A pioneer in the English-speaking world here was Mary Gregor (1963).) Importantly too, the first readings of the Doctrine of Right typically attribute to Kant a legal-political philosophical position, according to which the structure of Kant's theory is legal positivist (à la Hobbes), libertarian (à la Locke), or liberal participatory democratic (à la Rousseau). O'Neill, for example, viewed Kant's own theory as having a legal positivist character (while Hans Kelsen (1992) famously developed such a Kantian account on the basis of Kant's (meta-)ethical writings). The most influential, libertarian interpretation is that of Sharon B. Byrd and Joachim Hruscka (2010), and the most influential democratic one is that of Ingeborg Maus (1992) – an inheritance Macarena Marey (2018) has recently taken up and developed further. (For more on these interpretive approaches, see Flikschuh (2008) and Varden (2008, 2010).)

Kantian Autonomy: Julius Ebbinghaus, Ernest Weinrib, and Arthur Ripstein

Another type of approach to the basic question of Kantian autonomy originally arrived in the English-speaking world through the work of Julius Ebbinghaus (1953), though it really took off with the related writings of Ernest Weinrib (1995) and Arthur Ripstein (2009). This approach incorporates important features of the approaches discussed above, but it integrates them in a new way that can be labeled a liberal republican approach. According to the liberal republican approach, Kant agrees with Hobbes that justice is impossible in the state of nature, with Locke that not all law-organized uses of coercion constitute a legitimate public authority, and with Rousseau that a people have a right to transform their state into a democracy. In addition, on this approach, constitutive of reforming a state into a more flourishing legal-political institutional whole is for citizens to develop an ability to engage in public reasoning by means laws of freedom – and, so, in this regard, they view Kant as agreeing with Rawls's general emphasis on public reason. (For more on this, see Deligiorgi (2012), Peterson (2008), and Ripstein (2006).) Liberal republican interpretive Kantians are furthermore sympathetic to O'Neill's worries about the idealization rather than abstraction in Rawls's theories of justice as fairness, though they worry about her invoking considerations of virtue when developing a theory of justice. Kantians of this interpretive stripe also strive to stay consistent with Kant's general claim that when we move from virtue to right, we move from a sphere that is inherently impossible to enforce to one that is enforceable – and, so, maxims and moral motivations (virtue) are necessarily out of reach. (For more on this point, see Varden (2015).) It is fair to say that this liberal republican interpretive approach is the most dominant today, though as the literature focused on Kant's legal-political philosophy matures, the debates between the different interpretive strands will likely also deepen and become increasingly interesting.

Kantian Autonomy: Human Nature, Feminism, Philosophy of Care, Philosophy of Race

The above theories of Kantian autonomy – in all the interpretive traditions – have been steadily complemented by nonideal Kantian theorizing, from general theories on human (as distinct from merely rational) nature to theories that aspire also to address our human tendency to dehumanize and make it impossible for everyone to participate in active self-governance through laws of freedom. In the English-speaking world, Robert Louden (2000) paved the way for a more general interpretation of Kant's account of human nature, while attention to the problem of dehumanization – entailed, for example, in racism, sexism, and ablism – unsurprisingly tended to come from groundbreaking works by women and nonwhite scholars, such as Annette Baier (1993, 1996),

Marcia Baron (1985, 1995, 1997), Robin S. Dillon (1992a, b, c, d, 1997, 2001, 2003), Virginia Held (2006), Barbara Herman (1993a, b), Thomas E. Hill Jr. (1991, 1992), Bernard Boxill and Thomas E. Hill Jr. (2001), Eva Kittay (1999), Pauline Kleingeld (1993), Jane Kneller (1993a, b), Christine Korsgaard (1996), Rae Langton (1992), Charles Mills (1999), Susan Moller Okin (1989), and Onora O'Neill. (For an overview of the entrance of women into Kant scholarship and much of the existing feminist Kantian literature, see Varden (2020).) This literature was tremendously important not only in drawing attention to related failings in Kant's own texts but also to those in the Kantian interpretive tradition and the canon of Western philosophy as a whole.

Conclusion

Many Kant scholars today strive to continue the effort at humanizing Kant and the Kantian philosophical tradition. (For an overview of much of the literature on Kant, race, and care, see Varden (2022).) We are currently witnessing, in countries around the world, a reckoning with how inherited legal-political institutions and cultures channel and participate in oppression of various social groups and make it impossible for them to live autonomously – as private persons and as citizens engaged in public self-governance through public reason. Insofar as we are able to progress rather than regress, and insofar as critical reflection on the oppression wrought by those institutions and cultures deepens and expands, we will likely see more Kantian nonideal theory as well as more complete Kantian theories that integrate ideal and nonideal theories in the years to come.

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Kantorowicz, Hermann

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Introduction

Hermann Kantorowicz (1877–1940) was born in Posen and educated (law, philosophy, economics) in Berlin, Geneva, and Munich. In his academic career, Kantorowicz dealt with Criminal Law, Legal History, Legal Theory, and Legal Sociology (Paulson 2008, 16, n. 46). In 1907, he gained the title of *Privatdozent* in Criminal Law, Philosophy of Law, and History of Law at the University of Freiburg, while in 1928, he managed to get a chair in Criminal law at the University of Kiel despite the obstruction by the German Ministry of Foreign Affairs (*The Auswärtiges Amt*) (Moses 2015, 132; Würtenberger 2021; Paulson 2008, 16, n. 46). The path to gaining the status of the head of the above department was thorny for him after he had completed the task of providing a report on the responsibility for causing the First World War, which was entrusted to him by the German Parliament (*Reichstag*). In that report, Kantorowicz concluded that Austria-Hungary and Germany were to be blamed for the war. In this context, his work *The Spirit of British Policy and the Myth of the Encirclement of Germany* (William Johnson trans., 1931) is particularly interesting. The book was eventually ceremonially burnt by the Nazis (Kantorowicz Carter 2006, 694).

His university career in Germany ended, primarily due to his Jewish origin, in 1933 with the entry into force of the "Law for the Restoration of the Civil Service" (Paulson 2008, 16, n. 46). Kantorowicz spent the rest of his life in exile. He first went to the United States (New School for Social Research of New York), and in 1935, he went to the United Kingdom (Cambridge University) (Würtenberger 2021).

The German Free Law Movement

The Free Law Movement (*Freirechtsbewegung*) emerged in the German Empire at the turn of the twentieth century (Tucak 2019, 682, 683, 687). Members of the Movement criticized the shortcomings of the dominant court methodology of the nineteenth century, pointed out gaps in legislative texts and called on judges to abandon legal positivism/formalism and interpret law in accordance with one's own sense of justice that should reflect people's sense of justice (Dubber 1993, 1819–1820). They actually sought to improve the court methodology. Recognizing the necessity of the discretion of judges, the Movement requested instrumentalization of the creativity of judges in order to improve the law (Joerges 1994, 186–187).

The initial stage of the movement was marked by a lecture given by Austrian lawyer Eugen Ehrlich in 1903 (Lubben 1988, 90; Kelly 2010, 359; Schmidt 2014, 455). The lecture was entitled *Freie Rechtsfindung und Freie Rechtswissenschaft*, which enticed Kantorowicz to name the then rising movement. He did it in his book called *The Battle for Legal Science* which he published in 1906 under the pseudonym "Gnaeus Flavius." It is in this book that Kantorowicz's basic ideas on law, legal science, and the role of judges can be found.

Free Law as a Natural Law

Kantorowicz held that the concept of law could not be equated with positive state law (Hart 1960, 272; Flavius 2011, 2008–2009; Tucak 2019, 688–691). In his article named *Some Rationality about Realism*, which was published in the Yale Law Journal in 1934, he summarized the doctrine of free law as follows: Formal law encompassing laws and precedents has gaps that must be filled by law of a general nature. The material that fills legal gaps must contain legal rules. For Kantorowicz, it is a free law in the sense that it is not formalized and that it is in a "state of transition," e.g., "bills, policy principles, business customs, emotional preferences." Many of them

were shaped by courts within their discretion in making a particular court decision on the ground of a process of will and value judgment (Kantorowicz 1934, 1241). Free law "lives" independently of state law. Moreover, state law is derived therefrom since almost all ideas that were later embodied in the laws originally existed as free law (Flavius 2011, 2010).

When it came to choosing a term to denote this phenomenon, Kantorowicz opted for the term "free" which did not prove to be a good choice. Kantorowicz stated that he had found a model for naming the Free Law Movement in a free religious movement (Flavius 2011, 2010). The misunderstanding that arose from the chosen name, i.e., that judges can ignore legal rules, followed him until the end of his career and exposed his ideas to harsh criticism (Kantorowicz Carter 2006, 685).

Kantorowicz referred to free law as the "natural law of the 20th century" (Flavius 2011, 2009). His concept of natural law is not based on divine morality or reason. Free law as a new natural law emerges exclusively from human experience (Schmidt 2016, 135). Representatives of natural law mistakenly thought, Kantorowicz pointed out, that there were immutable and universal truths supporting the law, that there was one universally valid law, the law was always "individually and historically conditioned" (Flavius 2011, 2008; Grosswald Curran 2001a, 90).

A New Understanding of Legal Science and the Role of Judges

Kantorowicz as well pointed to a new understanding of legal science as a source of law. Since the law cannot satisfy all legal needs, legal science should come to its aid (Flavius 2011, 2013; Tucak 2019, 691–692). Legal science thus acquires a new and decisive role. Its task is to remove the dead elements of the law and to support those who are flourishing (Flavius 2011, 2013). As a source of law, it is no longer just "the recognition of the recognized" (Flavius 2011, 2013). Like the law itself, it must be the will (Flavius 2011, 2014). Hence, legal science, like other humanities in the nineteenth century, enters a "voluntaristic phase" (Flavius 2011, 2014). Legal science is no longer "verbal science" and its tasks are not exhausted by the interpretation of established words, but it is deemed as "science of values" in the service of the purposes of social life (Kantorowicz 2006, 91).

Kantorowicz and other members of the Free Law Movement propagated the development of a class of creative judges (Flavius 2011, 2024; Joerges 1994, 172; Lubben 1988, 82; Tucak 2019, 692–695). They developed notions by which they criticized the previous understanding of the judicial role as mechanical and less important (Grosswald Curran 2001b, 157). Kantorowicz rejected the then prevailing legal methodology of conceptual jurisprudence, which he described as "literal jurisprudence," implying that a lawyer can solve any case by "subsumption under the law" (Kantorowicz 2006, 83, 91; Schmidt 2014, 458). It is inappropriate, according to Kantorowicz, as it does not take into account the purposes of the law and the necessities of life (Kantorowicz 2006, 91). However, at the same time, he had a clear position on adjudication *contra legem*. In his opinion, a trial according to the law (*ex lege*) should remain dominant (Kantorowicz 2006, 91).

The most important area where this permeation should take place is the area of the *sine lege* trial (Kantorowicz 2006, 92). Therefore, the Free Law Movement is focused on the area that is not covered by legislative acts, i.e., on the interspace between legislative acts (Grosswald Curran 2001b, 158).

Given that judges no longer have only a mechanical role, the selection of judges is crucial. Moreover, the selection criterion must be their excellence and not only their knowledge of legal rules. Kantorowicz argued that judges were needed who were familiar with the prevailing legal understandings in the nation, and with the life facts and results of law-related sciences (Flavius 2011, 2027). Sociology is described as the "noblest auxiliary science" of jurisprudence (Kantorowicz 2006, 91–92). The battle for legal science, as Kantorowicz accentuated, has not a

constitutive but declarative character since it only declares what judges already do and have always done (Flavius 2011, 2007).

Authors generally agree that the movement came to an end in 1914, just before the outbreak of World War I (Schmidt 2014, 458; 2016, 125; Herget and Wallace 1987, 417; Tucak 2019, 695–696). The emergence of "institutional nationalism, anti-Semitism and right-wing idealism" certainly contributed to its end (Schmidt 2016, 128; Cf. Schmidt 2014, 458). Hence, Schmidt stressed, the historical moment in which German jurists were in a position to systematically reshape the methodological foundations of law without much fanfare eventually disappeared.

Kantorowicz's Critique of American Legal Realism

In Anglo-American legal circles, Kantorowicz became a well-known name for a critical article named "Some Rationalism about Realism" which he published in the Yale Law Journal in 1934, during his work at the New School for Social Research (Hart 1960, 270). H.L.A. Hart described it as a call to common sense at the time when American legal realism and its "rule scepticism" were at their peak (Hart 1960, 270).

In this article, Kantorowicz rejected the status of the forefather of the American legal realism movement, which some attributed to him, including Karl Llewellyn (Grosswald Curran 2001a, 70; Llewellyn 1934, 10; Kantorowicz 1934, 1242). Despite Kantorowicz' s explicit denial of the progenitor status, these ideas were revived by Herget and Wallace in their influential 1987 article marking the Free Law Movement as the "fully elaborated source" of American legal realism (Herget and Wallace 1987, 401). According to Herget and Wallace, their findings contradict the thesis that American legal realism is "the only original American contribution to jurisprudence" (Herget and Wallace 1987, 400).

It can be said that Kantorowicz's criticism of American legal realism boils down to two arguments: "the law is not a body of rules but of facts" and that legal science is not rational and normative but natural science (Capestany 1999, 144; Kantorowicz 1934, 1240, 1248). Kantorowicz denied these postulates. He opposed the views of realists that law is an empirical science with its methods: "observation; the purpose, foretelling effects" (Kantorowicz 1934, 1248). According to Kantorowicz, legal science is a cultural science that is not governed by the laws of nature but is subject to human action governed by laws (Kantorowicz 1934, 1248). Legal science "tries to transform the given law into a more or less consistent system of rules" (Kantorowicz 1934, 1248). According to legal realists, "the Law is not a body of rules, not an Ought, but a factual reality" (Kantorowicz 1934, 1243). It is "the real behaviour of certain people (. . .) especially of the judges who make the Law through their decisions, which, therefore, constitutes the Law" (Kantorowicz 1934, 1243). On the other hand, Kantorowicz believed that "the law is not what the courts administer but the courts are the institutions which administer the law" (Kantorowicz 1934, 1250). Only because judges respect the law can lawyers predict what decisions they will make. Other sources of court decisions are unknown and will always remain as such (Kantorowicz 1934, 1250).

The Definition of Law

In 1938, Kantorowicz became the editor of *Oxford History of Legal Science*, a three-volume edition that was to cover the history of legal science from the Far East to South America, from its very beginnings to the Imperial Codices (Hughes 1960, 1002). This project was never completed as Kantorowicz died while working thereon. The only thing he managed to complete was the introduction which was published 18 years after his death in a small book entitled *The Definition of Law* (Paulson 2008, 16, n. 46). The efforts of A.H. Campbell, who supplemented Kantorowicz's text with notes and references to the literature, were of decisive importance for the publication (Hart 1960, 270).

It is worth emphasizing that this essay is not about the history of law but about the study of law

and criticism thereof (Hart 1960, 270). In this essay, Kantorowicz wanted to determine the subject of this extensive history. His approach to the issue of the definition of law was actually its rejection (Hart 1960, 270). He found that the adequacy of the definition did not depend on its conformity with some "imagined essence" (Hart 1960, 271). For Kantorowicz, the chosen definition cannot be "true or false in itself," it must be "fruitful" and "useful" for a particular science (Kantorowicz 1980, 7). It must connect what needs to be connected and separate what needs to be separated (Kantorowicz 1980, 7). In particular, this means separating law from customs and morality. That was his "conceptual pragmatism" (Hart 1960, 271; Kantorowicz 1980, 5–10). Kantorowicz highlighted that his definition of law conceived as a subject of historical legal science would be useful only if it serves as a basis "for a universal history of every known type of legal thought and legal science" (Kantorowicz 1980, 21). The result of such a deliberation is the following definition. "A body of rules prescribing external conduct and considered justiciable" (Kantorowicz 1980, 21). Kantorowicz's essay is an example of a "linguistic, analytical approach" which has been further developed by legal scholars such as Glanville Williams and H. L. A. Hart (Hughes 1960, 1002–1003). According to Grosswald Curran, Kantorowicz was among the first to point to "the contextuality of meaning and in taking an anti-essentialist, semiotic approach to legal analysis."

Cross-References

- ▶ Ehrlich, Eugen
- ▶ Hart, Herbert Lionel Adolphus: Influential Ideas
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Tucak I (2019) Pravna misao Hermanna U. Kantorowicza i vrijeme nacionalsocijalizma [Hermann U. Kantorowicz's legal thought and the era of national socialism]. Collected papers of Zagreb Law Faculty 69(5–6):681–714. This entry relies heavily on this article (especially chapters: the German free law movement; free law as a natural law; a new understanding of legal science and the role of judges)

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Kautsky, Karl

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Introduction

Karl Kautsky (1854–1938) was a leading theoretician of the Social Democratic Party of Germany (Salvadori 1979; Steenson 1978; Lewis 2019). Kautsky published tens of books and hundreds of articles on economic theory as well and on social history and actual politics. For 34 years, he was the editor-in-chief of *Die Neue Zeit*, the theoretical organ of the German Social Democratic Party SDP, the most influential Party of the Second International.

In 1890, Kautsky was commissioned to draft the party program of the Party, known as the Erfurt Program. The program acted as a model for many Social Democratic parties. Kautsky's extensive commentary on the program (1906a (1892)), known in English as the *Class Struggle* (1910), became the Catechism of Socialism together with his work *Karl Marx's oekonomische Lehren* (1906b (1887), *The Economic Doctrines of Karl Marx* (1936). To many, Kautsky represented genuine Marxism. He edited and published Marx's posthumous works, including the first published version of *Theories of the Surplus Value* (1904, 1905, 1910).

Kautsky's Theory of Capitalism and Imperialism

Kautsky understood Marx's Capital to present the historical laws of capitalism, from the simple commodity production in which producers owned their own means of production and exchanged their products according to the law of equal exchange, to capitalism in which the capitalist class exploited the wage workers by appropriating the surplus product of their labor. The accumulation of capital led to the concentration of capital in the hands of capitalists. The immiseration of the working class led to the polarization of the bourgeois society into two antagonistic social classes making the coming socialist revolution inevitable (Kautsky 1907–08).

From Engels' *Anti-Dühring*, Kautsky (1936, 244) adopted the idea of the contradiction between the social character of capitalist production and its private mode of appropriation. In capitalism, the products of labor were no longer the products of any individual laborer but of the collective work of thousands of workers. Capitalist profits could not be justified as originating from the labor of the private owners of the means of production. Marx had revealed the principles of capitalist exploitation, which violated the right of the worker to the products of his own labor (Gronow 2015, 22–26). Since the production process is socially organized in capitalism, all one has to do to establish socialism was to "appropriate the capitalist appropriators." Kautsky did not pay attention Marx' analyses of the value form of a commodity and labor power and the reification of the social relations in capitalism following from it. Kautsky's Marxism was during his lifetime the target of many critics. The so-called revisionism dispute, put forward by his close friend and collaborator, Eduard Bernstein (1909 (1899)), at the very end of the nineteenth century was the starting point of the reformist Social Democracy. Bernstein agreed that if the capitalist mode of production would, Kautsky claimed, lead to the increasing concentration and centralization of capital accompanied by the growing immiseration of the working class, then socialist revolution would be inevitable. The question of the fate of

the small-scale independent producers, merchants, and artisans, as well as peasants in capitalism was decisive. If their numbers diminished, the only alternative open to the laboring masses would be to become wage workers exploited by the big capitalists. If, as Bernstein on the contrary argued, increasing polarization was not unavoidable, socialist revolution would not be their only alternative. More principally Bernstein accused Kautsky of historical determinism or fatalism but even he admitted that if capitalism developed as Kautsky predicted, capitalism would soon come to its end. Kautsky (1899a, see also 1899b) claimed that Bernstein lacked empirical evidence and his critique was based on misunderstandings.

The question of imperialism occupied the minds of Kautsky's contemporaries. Kautsky's own position with regard to its driving forces and basic nature (Kautsky 1907a, b, 1908–9, 1911) changed over time. He was, arguably, the first one to develop a theory of the historical stages of the development of imperialism in 1897–1898. Marxist theorists of imperialism were inclined to look for the increasing economic contradictions of capital as the main causes of Imperialism. Kautsky looked for other political alternatives to colonial policy, such as the democratic union of states, presumably more favorable both to the working class at home and in the colonies. His concept of Ultra-imperialism (2011a, b (1913–14 and 1915)) has become famous as the target of Lenin's critique in Imperialism as the Highest Stage of Capitalism (1967a (1917)). What caused Lenin's anger was that Kautsky did not recognize the inevitable aggressive and reactionary nature of imperialism but believed in the prospect of a peaceful coalition of democratic nations as an antidote to Imperialism. According to Kautsky, the concentration of capital and annexations of colonies by the great colonial powers could lead to a worldwide organized capitalism when the big cartels would divide the whole world among themselves. Ultra-imperialism was only a hypothetical thought-construction because capitalism would, long before reaching the stage of Ultra-imperialism, collapse into its internal conflicts and contradictions.

Parliamentary Democracy and the Socialist Revolution

Kautsky was convinced that since the working class would become the overwhelming majority in the capitalist societies, it could accomplish its historical task, the socialist revolution through parliamentary elections if only the Social Democratic Party could freely mobilize and organize the working masses. Under the conditions of universal suffrage, freedom of assembly and organization as well as the free press, the Party and its "intellectuals" could effectively propagate Marx's and Engels' teachings among the workers, a task to which Kautsky committed himself for the best part of his life. Even if the coming social transformation could be realized through parliamentary politics, Kautsky (1909, 1911) understood it to be a genuine social revolution, leading to a radical social and economic restructuring of the society vehemently opposed by reactionary political forces.

Kautsky's position has been characterized as "revolutionary attentisme" and "tiring-out" strategy. He was warning for any kind of adventurousness which would only endanger the power base of the Social Democrats, its Party Organization with millions of members. Kautsky's thinking combined revolutionary vigor with practical cautiousness (Lichtheim 1964, 259–264; Groh 1973). All the working class had seemingly to do was to wait and see until its organizations had grown in size and strength to take over the state power (Bonner 1982, 597–598). Kautsky's opponents ridiculed his tactic as ballot box revolutions. Recent scholarship has pointed out (Gaido 2008; Lewis 2019) that Kautsky throughout his career understood that a genuinely socialist parliamentary regime necessitates, in addition to universal suffrage, the election of judges and other state officials as well as a people's army.

Lenin was a most ardent admirer and pupil of Kautsky's until World War I. Their views were closest during the first Russian Revolution in 1905 (Kautsky 1906c). They both welcomed it as the first, democratic stage of the expected two-stage revolutionary process, the second

stage of which would be the final socialist revolution which could take place first after a long period of bourgeois rule during which both the economic and social conditions as well as the working class organizations matured to accomplish the socialist revolution. Both Kautsky and Lenin thought also that since the bourgeoisie had become reactionary, it could not anymore be relied to accomplish the historical task. Only the working class and its political organization, the Social Democratic Party stood for a genuinely democratic constitution. Once in power, they could speed up the historical process of the maturing of the conditions of socialism within capitalism, thus shortening the period between the two revolutions. Kautsky condemned vehemently Lenin's Bolshevik rule after the October Revolution as a dictatorship of a small minority, which he thought to be an inevitable consequence of the premature takeover of the state power in an undeveloped country like Russia (Kautsky 1918b, 1919). As he argued, Lenin had abandoned the Marxist two-stage revolutionary formula and defended the Russian Bolshevik dictatorship of the proletariat as socialism. Lenin answered by labeling Kautsky a Renegade of Marxism (1967b (1918)).

Conclusion

Karl Kautsky lived 20 years after the First World War and the great social and political upheavals that followed it. He lost his position as the main ideologist of the party and of the Second International already during the war. The decline in his status was a dramatic one. It was partly due to the inability of the Workers' International to prevent the outbreak of the war. Many radical Social Democrats thought that Kautsky had personally betrayed their course. In 1918, Kautsky left his old Party and joined the new Independent Social Democratic Party, USPD, losing also his position as the editor-in-chief of *Die Neue Zeit*. Kautsky's theoretical – centrist – position did not fit into the divided labor movement. He was too far to the right for the Communists, too far to the left for the Social Democrats. He did, however, contribute to the unification of the two Social Democratic parties in Germany and some of his ideas found resonance in the new party program of 1925 (Morgan 1989, 61). Kautsky continued his literary activity until the end of his life. His *Materialist Conception of History* (1927) was a comprehensive general outline of human history influenced by evolutionist thinking. In the 1930s, Kautsky (1932, 1937) addressed the question of socialism, democracy, and the war.

Kautsky died in Amsterdam, The Netherlands, in 1938, shortly after Hitler had annexed Austria. Reflecting on his life, Kautsky (2017, 40 (1924) wrote: "So I will die as I have lived, an incorrigible Marxist."

Cross-References

▶ Bernstein, Eduard
▶ Engels, Friedrich
▶ Lenin, Vladimir Ilyich
▶ Marx, Karl

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Kelsen, Hans

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Hans Kelsen was born in Prague in October 11, 1881, in a Jewish family. His father, Adolf Kelsen (1850–1907), was born in Brody (Galizien). He was the owner of a lamp manufacturing company; he died in Vienna. His mother, Auguste (Löwy, in her maiden name), was born in Neuhaus (Bohemia) and died in Bled. Hans had three siblings: Ernst (Prague 1883–London 1937), Gertrude (Vienna 1886–Hertford, UK, 1951), and Paul Friedrich (1898–Vienna 1975). In 1884, the family moved to Vienna. Hans Kelsen lived there until 1930 when he joined the University of Cologne.

Kelsen did not particularly excel at the *Gymnasium.* By then, however, he already showed a strong intellectual curiosity: he was attracted by literature and, especially, by physics and mathematics. His decision to study at the Faculty of Law and Political Sciences at the University of Vienna (Alma Mater Rudolphina) was motivated by a pragmatic reason: the range of professional possibilities offered to lawyers. He started his undergraduate studies in 1901, and in 1906 he received his doctorate (as it was habitual in these days, after having successfully passed some examinations: the *rigorosa*, not via a dissertation).

His days in this faculty were a major disappointment for the young Kelsen: the different disciplines were characterized by a mixture of sundry approaches. He did not meet a proper *legal* method. Law professors would expound their subjects in class as well as in their books,

jumbling reasonings of all kinds: they would mix together normative, historical, sociological, economic, philosophical, theological, and even biological approaches. Kelsen felt already in those days that a true Legal Science, with its own methods and object, was conspicuously absent. This early impression will give a distinctive mark to the work he would develop throughout his life, for – as we shall see – his goal was no other than to elaborate a Legal Science that would be at the same level as other sciences, that is, with its own object and methods.

Edmund Bernatzik was a professor in Constitutional Law who was characterized by his wit, as his critiques to Austrian constitutional law and the Austrian Constitution showed. Leo Strisower was a professor of International Law and Legal Philosophy; it was in his lectures on the History of Legal Philosophy, of which Kelsen was a frequent attendee, where Kelsen learned that Dante Alighieri was the author of a prominent book of political philosophy: *De Monarchia.* Kelsen asked Strisower whether it was possible to write an essay on Dante, but Strisower advised against the endeavor, first, because an extensive bibliography on the Italian poet was already available and second because he thought it was more convenient to study courses properly and to prepare for exams. Yet, Kelsen did not follow his professor's advice: he longed to find something which, in the context of his legal studies, gave him enough incentives. This is how Kelsen wrote his first book, *Die Staatslehre des Dante Alighieri*, published in 1905 in a series run by Bernatzik.

After finishing his law degree, Kelsen suggested Bernatzik the possibility of obtaining his certification to teach at the university, but the latter replied suggesting that it was much better for him to prepare for the bar or for the judiciary: there were already too many Jewish scholars at the university, he said, and this was not helpful. On the other hand, his family's financial situation was harsh and worsened when Kelsen's father died in 1907. Kelsen worked as a practicing lawyer and also taught in several institutions. In spite of the difficulties, Kelsen decided to write his *Habilitationsschrift* under the supervision of Georg Jellinek (1851–1911), unquestionably the most important professor in public law at Heidelberg. Kelsen asked for a scholarship, which he obtained after applying three times (probably, says he in his "autobiography," because he was the only applicant). From 1908 to 1919 he spent several semesters in Heidelberg, as well as in Berlin, attending Gerhard Anschütz's (1867–1948) seminars. These visits were often interrupted, as he needed to provide financial support to his family. He practiced law and taught in different institutions, and even taught Military Law. Despite the difficulties, those were happy years for Kelsen: the feeling of opening his own path, by engaging with the work of numerous authors and doctrines of General Jurisprudence and Theory of the State, represented to him a great intellectual pleasure and an intense vital experience.

Although Kelsen refers to Jellinek as his "cherished professor" (*Allgemeine Staatslehre*, 1925, Prologue), their relationship was not as good as one would expect. The likely cause is the young Kelsen's critique to Jellinek's conception of the "two faces" of the State. For this author, a General Theory of the State must account for those two "faces": social and legal. He claims this in his magnum opus: *Allgemeine Staatslehre* (1900). Jellinek divides this work into an "Introduction" and two basic sections: The Social or Sociological Theory of the State and The Legal Theory of the State. For Kelsen, Legal Science must only be concerned with the latter: from a legal point of view, the State is equivalent to the legal order itself.

Kelsen passed his examination in 1911 with a major essay entitled: *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze* (J.C.B. Mohr, Tübingen 1911). He obtained his venia docendi for the subjects of "Staatsrecht" (Public Law) and Legal Philosophy. This work is decisive for understanding the birth of the *Pure Theory of Law*, which Kelsen developed throughout his life. It is an essentially polemical work: in it, Kelsen critiques the main contributions to the Theory of Law and the State, dominant in his days. The center of his interests was constituted by methodological issues. Kelsen argues especially against the psychologistic and

sociologistic trends developed within legal positivism. He distinguishes being or *facticity* ("sein") from duty or normativity ("sollen"), between causal disciplines and normative disciplines. Legal Science is a normative, not a causal science. The separation between form and content leads him to champion methodological purity, albeit in this work the expression *Reine Rechtslehre* is absent (it is not, however, in Kant's *Metaphysik der Sitten*, as well as in Stammler's *Theorie der Rechtswissenschaft*, 2, ed., 1923). The work is divided into three "books." The first (Preliminary Investigations) deals with the basic questions of legal method. In this part, one can perceive certain neo-Kantian and phenomenological influences. Kelsen studies the differences between the laws of natural sciences and norms, the distinction between moral law and legal norm, and concludes with an examination of the relation between the causal-teleological perspective and the legal perspective. The second book focuses on the logical-objective ways in which legal norms exist; he criticizes the concept of legal psychologism (theory of the will: imperativism). The third book is longer. It derives from the preceding books. It scrutinizes the subjective legal forms: legal duty and, as derived from it, subjective right. In this work, Kelsen is determined to build the General Theory of the State. He defends the need to give up on the public law/private law duality, for he claims that all law is State-made law. Provided that the State – from a legal point of view – is equivalent to the legal order, the General Theory of the State ("Allgemeine Staatslehre") is equivalent to the General Theory of Law ("Allgemeine Rechtslehre"). This explains why Kelsen's analyses are not limited to the "law of the state" or "public law" (i.e., to constitutional or administrative law). They are also applicable to private and criminal law. It examines law in its integrity and complexity.

The reception of the *Hauptprobleme* was scarce and cold. It was briefly commentated (Kant-Studien 17, 1912) in the context of a review of the bulk of the hitherto available literature on German philosophy. Its author, Oscar Ewald, underscores the influence of neo-Kantianism. It appears that this motivated Kelsen to be more deeply familiar with neo-Kantianism, especially Hermann Cohen's. The *Hauptprobleme* also drew the attention of Friedrich Tezner and Franz Weyr.

In July 1911 he teaches Constitutional and Administrative Theory at the "Exportakademie des k.k. österreichischen Handelsmuseum" (since 1975, "Wirtschaftuniversität Wien").

During those years, before the war, Kelsen published book reviews as well as some works leading to what would later become *The Pure Theory of Law*: *Zur Soziologie des Rechts* (1912); *Politische Weltanschauung und Erziehung* (1913); *Rechtsstaat und Staatsrecht* (1913); *Über Staatsunrecht* (1913); *Zur Lehre vom Gesetz im formellen und materiellen Sinn* (1913); and *Zur Lehre vom öffentlichen Rechtsgeschäft* (1913).

In 1914, the First World War breaks out. Kelsen was recruited in August. He becomes ill, with pneumonia. Once recovered, and due to his condition of jurist, he is destined to work in an office. One day he receives an order to present himself before General Stöger-Steiner. The latter, angry, rebuked Kelsen for having published an article in a journal of military law without his permission. Kelsen had long ago written the article and gave it to one of his companions. Kelsen had forgotten about it, but his colleague had it published. Once clearing up the misunderstanding between the Kelsen and the general, the latter offered the former to be his legal counsellor. Little after, the General was named Minister of War. These circumstances changed Kelsen's destiny: he became acquainted with the entire political and military class, continued his studies, and was now treated as an "excellent jurist." When the war was over, Bernatzik told him that his luck had changed: now it was much easier to get a professorship at the Vienna Faculty.

One thing to highlight from those years is the debate he held with Eugen Ehrlich (1862–1922), then Rector of the University of Czernowitz. Ehrlich published his best-known work in 1913: *Grundlegung der Soziologie des Rechts.* He criticized the traditional way in which jurists practiced legal theory and claimed that legal sociology was the true Legal Science. In a

nutshell, Ehrlich championed precisely those theses to which Kelsen opposed. In 1915, Kelsen published a long review of Ehrlich's book where he defended his stances and criticized Ehrlich harshly. The debate is now considered to be the paradigm of the normativism and sociologism divide, between the perspective of the jurist and that of the sociologist.

In November 1918, Kelsen was nominated ausserordentlicher Professor, and after Bernatzik's death in 1919, ordentlicher Professor and judge of the Constitutional Court.

When the war was over, Chancellor Karl Renner (1870–1950) set up a commission of lawyers charged with the task of writing a draft of a constitution. Kelsen was one of its members. He concentrated, especially, on the chapter dedicated to constitutional and administrative guarantees. To do so – he claimed – he relied on two institutions of Royal origin: The *Reichsgericht* and the Administrative Court (Verwaltungsgerichtshof). "The latter, without substantive modifications, could be incorporated. The *Reichsgericht* was transformed into a real Constitutional Court – the first of its kind in the history of Constitutional Law. Until then, no court had existed with competence to declare the invalidity, with general effects not limited to the concrete case, of legislation due to its unconstitutionality" (*Hans Kelsen im Selbszeugnis*, 2006, p. 69).

In early May 1919, Kelsen integrated the *Deutschösterreichischer Verfassungsgerichtshof*, created by law in January 25, 1919, replacing Bernatzik, who passed away in March that same year. A year after, he practiced as a judge of the Constitutional Court, created by the 1920 Constitution, until 1929.

A group of young scholars, later known as the "Vienna School," began to gather around Kelsen. Kelsen run a private seminar; its meetings were held usually at his private domicile, 23 Wickenburggasse, on Sundays during the afternoon. At the seminar, the discussions were about the work of its members: Adolf Julius Merkl and Alfred Verdross, also Fritz Sander, Leonidas Pitamic, Fritz Schreier, and Felix Kaufmann, among others. What was characteristic of this group was not that its members shared the same ideological or scientific stance but the common interest in debating their theoretical concerns. Kelsen was a liberal scholar who, although a strong and rigorous defender of his own positions, never wanted them to prevail because of his mere *auctoritas.*

The 1920s were for Kelsen and the Vienna School a prodigious era in terms of scientific production. In 1920, Kelsen published *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu reinen Rechtslehre*. J.C.B. Mohr (Paul Siebeck), Tübingen 1920. The same year he published an important study on Marxism: *Sozialismus und Staat. Eine Untersuchung der politischen Theorie des Marxismus.* C.L. Hirschfeld. Leipzig 1920. In 1922 he also published another monograph in which he champions the identification between law and the State and criticizes the possibility of a sociological concept of the State: *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht.* J.C.B. Mohr (Paul Siebeck), Tübingen 1922. Three years after, he collected all his studies on the State and published his monumental *Allgemeine Staatslehre*. Julius Springer. Berlin 1925.

In the prologue to this latter work, Kelsen avows that his purpose is to produce a Theory of the State "from the standpoint of methodological purity." He affirms that, in undertaking this task, he feels close "to that scholarly tradition in Germany whose most prominent representatives were Karl Friedrich von Gerber, Paul Laband and Georg Jellinek (. . .) Their method was influenced, in a more or less conscious and consequent fashion, by the Kantian critique of reason: dualism of being (sein) and duty (sollen); substitution of hypostasis and metaphysical postulates by transcendental categories as conditions for experience; transformation of absolute antitheses (for qualitative and trans-systematic) into relative differences, quantitative, intra-systematic; move from the subjective sphere of psychologism toward the sphere of logical-objective validity: these are the essential parts of this method, and the guidelines of my theoretical endeavour." The work is divided into three "books." The first is

about the "essence of the State." After criticizing the Theory of the State, understood as sociology and politics, he advances his basic idea: The Theory of the State is the Theory of the Law of the State; the State is the Law. The second is about statics, the validity of the State order, which is tantamount to the validity of the legal order. The third discusses dynamics, the creation of the State order, which is tantamount to the creation of the legal system.

A summarized version of *Allgemeine Staatslehre* was published as a short volume entitled *Grundriss einer allgemeinen Theorie des Staates*. Als Manuskript gedruckt. Wien 1926. This work was translated into several languages, Spanish, French, Italian, Chinese, Japanese, Portuguese, Czech, and Hungarian; this contributed to the expansion of Kelsen's ideas about law.

Among the works published by Kelsen in the subsequent years, his *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus.* Pan-Verlag Rolf Heise. Charlottenburg 1928 and, above all, his *Vom Wesen und Wert der Demokratie*, 2. Auflage. J.C.B. Mohr (Paul Siebeck). Tübingen 1929 stand out.

During the 1920s the scientific production of Kelsen's school members was also quite relevant. Kelsen himself referred to Adolf J. Merkl as a "genius of legal thought" and as the "co-founder of the Pure Theory of Law." And he can, indeed, be considered as such, given his decisive contribution to the idea of the hierarchical structure of the legal order (which he fully elaborated following Bierling's footsteps) in different works: *Die Lehre von der Rechtskraft entwickelt aus dem Rechtsbegriff* (1923); "Prolegomena einer Theorie des rechtlichen Stufenbaues" (1931); and *Allgemeines Verwaltungsrecht* (1927). Alfred von Verdross came up with the concept of "constitution in a logical-legal sense," thus giving a proper definition to the idea of a basic or fundamental norm (Grundnorm). He also contributed to one of the basic dogmas of the Pure Theory of Law, the principle of monism of the legal order on the basis of International Law. His most important works are *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (1923); *Die Verfassung der Völkerrechtsgemeinschaft* (1926); and years later, *Völkerrecht* (1937). Republished in several subsequent occasions, this work would become an essential treatise on International Law.

Another important disciple of Kelsen was Fritz Sander (1889–1939), with whom he had a complicated relationship. Kelsen constantly supported Sander's career until he got a professorship at the University of Prague. It was then when Sander, in his *Kelsens Rechtslehre. Kampfschrift wider die normative Jurisprudenz* (1923), accused Kelsen of plagiarism. In response, Kelsen accused himself. The official verdict was that "not the least reproach could be made" against Kelsen. Kelsen explained Sander's behavior relying on psychoanalysis (he was a member of Sigmund Freud's seminars).

The Pure Legal Theory was developed in the vicinities of Vienna, in Brno (Czech Republic). Its most conspicuous representative was Franz Weyr (1879–1951), with whom Kelsen maintained a strong friendship.

The Vienna school also received foreign scholars: the Spanish Luís Recaséns Siches and Luis Legaz Lacambra, the Danish Alf Ross, the German Julius Kraft, the French Charles Eisenmann, the Dutch Marinus Maurits van Praag, the Japanese Tomoo Otaka, and the Polish Wiktor Sukiennicki.

Kelsen received an invitation from the University of Cologne to become part of the Law Faculty. It was in 1929 when he decided to leave Austria; the cause: the attacks he received due to a procedural issue regarding matrimonial exemptions. Deeply upset and disappointed, he decided to start anew.

The 3 years he spent in Cologne (1930–1933) were very good for him and his family. He was asked to be a professor of International Law. He had only hitherto studied the subject in a tangential manner. He then spent those 3 years studying International Law. In 1932 he was elected dean. Yet, everything was over by April 1933: he learned through the press that he had been removed as professor. He thought of leaving Germany and moved to Geneva to the *Institut Universitaire* d'*Hautes Études Internationales.*

He encountered, however, one problem: how to get a visa. "Given that I was a pacifist and the author of the Democratic Constitution of Austria, it was pretty certain that I would be deported to a concentration camp." He tried to get the visa without success. Unexpectedly, he received the visit of an individual who told him that, as a member of the Nazi party, he could get the precious visa. "It was in this way that this man, selflessly saved my life. I never got to know his name" (*Hans Kelsen im Selbszeugnis*, p. 83). During that period Kelsen published some studies, among which *Wer soll der Hüter der Verfassung sein?* (1931) stands out, also *Théorie générale du droit international* (1932), as well as several studies on Plato and Aristotle.

Kelsen's financial situation was not as good in Geneva as it was in Cologne, but he did have plenty of time to do research. In 1934 he publishes his best-known and most widely read work: *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*. Franz Deuticke. Leipzig & Wien. In this first edition, all the essential components of the Pure Theory of Law are expounded. It is a positivist theory, characterized by its formalism and normativism. It is a "geometry of the legal phenomenon," its object the legal forms. These are only able to be examined from the basic legal form, which is the legal norm. Critically, the objective is to purify Legal Science from every possible extra-legal aspect – hence the adjective, "pure" – especially from those of a sociological and psychological kind, as well as those of an ideological nature (critique of natural law as a manifestation of political ideologies).

Regarding its more positive aspects, the book starts with *legal statics.* Here Kelsen theorizes formal legal concepts from the notions of legal norm (*Rechtssatz*). This is a "hypothetical statement" that links, through the notion of *ought to* (*sollen*), a factual hypothesis (concretely, an illegal fact) with a legal consequence (concretely, a sanction). Kelsen does not separate what could be seen as a common place in the legal positivism of his days; here the influence of authors such as Binding, Thon, or Bierling is evident. His method is normativist: it extracts, directly or indirectly, legal concepts from the concept of legal norm. These concepts, because they are formal, are universal, applicable to any positive legal system. The illegal act is a hypothetical legal fact. The legal duty is the one the adjudicator has; that duty entails a secondary legal duty, addressed to the addressees of the norm for them not to perform the illegal act. The sanction is the second element of the norm and consists in the privation of a legal good: the illegal act is imputed directly or indirectly to one or many of the persons responsible for that act. The subjective right is the possibility that the legal order gives a person to have the duty holder to comply with such duty. A person is a unitary construction of a group of norms, a group to which acts, responsibilities, and sanctions are attributed. The State is the legal order itself. *Legal dynamics* is the category in charge of creating and applying law. The pyramidal structure of the legal order (*Stufenbautheorie*) allows us to account for the internal organization of the norms according to hierarchical criteria. The superior norm of the legal system is the constitution; the constitution applies to legislation, and legislation to executive decrees, as well as to the rest of the norms emanating from the administration. Together with these norms of a general character, individual norms are situated at the inferior steps of the construction: judicial decisions (precedents), administrative acts, and contracts among private persons. The base of this stepped edifice is formed by acts of application or execution of other norms. Regarding the question why legal norms are valid, it is answered: because their validity derives from superior norms. When we reach the constitution, we also find an answer; but the answer is not provided by positive law, because its validity, its legal bindingness, is *presupposed*; it is valid because it starts from the assumption or hypothesis that there is a non-posited, hypothetical norm, which says that it is legally binding to obey the constitution. It is the fundamental or foundational norm (*Grundnorm*).

An important part of *Reine Rechtslehre* is intended to "deconstruct" the so-called legal dualisms that, for Kelsen, were manifestations of iusnaturalistic stances. He begins with a criticism of the natural-and-positive-law dualism; he also

attacks the distinction between public and private law, objective and subjective law, State and law, domestic law, and International Law.

The final part of the book delves into a theory of legal interpretation, according to which the norm is a framework that is open to different alternative interpretations, all of which are "correct" and among which the judge chooses one. Such decision cannot be justified scientifically. This means that it has an "irrational" character. Legal Science must limit itself to the description of the different interpretive possibilities.

In 1936, Kelsen was awarded with an *Honoris Causa* Doctorate by Harvard University and the University of Utrecht. From October 1936 to February 1939, he spent a "short and not very happy time at the German University in Prague" (*Hans Kelsen im Selbszeugnis*, p. 87), together with his academic duties in Geneva. Due to some death threats by the Nazis, he decided to abandon his attempt to get a professorship at the aforementioned university.

During those days, Kelsen focused on something which attracted his attention since his days in Vienna: anthropology. In 1939 he submitted his *Vergeltung und Kausalität* to a Dutch press. This work, however, would not be published but until 1946.

When the Second World War broke out in 1939, Kelsen was convinced that the German army would invade Switzerland. This was the reason why in May 1940 he and his family moved to the United States. They reached New York early in the summer. First, he was awarded with a scholarship and worked at the New School of Social Research. He hoped Harvard would hire him after 2 years of teaching, but the university President had different plans. "This fiasco – Kelsen avowed – humiliated me deeply, for having been awarded with an honorary doctorate from Harvard, I would have expected a better treatment" (*Hans Kelsen im Selbszeugnis*, p. 93).

In 1942, Kelsen received an invitation to become a visiting professor for 1 year at the University of Berkeley California. It was in this university, specifically in the Department of Political Science, where Kelsen found a tenured position. His professorship was named "International Law, Jurisprudence and Origin of Legal Institutions." In 1945 he was named *ordinary* professor. He was 64. For the first time in his life, he owned a house.

In 1945 Kelsen published his *General Theory of Law and State*. Harvard. In this book Kelsen sought to engage with Anglo-Saxon literature on his topics of interest, adapting his ideas to the American mentality as much as possible. In 1950 he published *The Law of the United Nations*. London-New York and in 1952, *Principles of International Law.* New York.

In 1960, the second edition of *Reine Rechtslehre*, Franz Deuticke, Wien, is published with an addendum on "The Problem of Justice." This edition is significantly different from the first, not only in its length but in its perspectives and contents: it is more voluminous and complex. Notwithstanding these differences, it keeps the theory's basic principles: positivism, formalism, normativism, separation of *sein* and *sollen*, norms hierarchies, etc. However, differences in terms of the detail with which the analyses are undertaken are significant. Unlike the first edition, no explicit formulation of the concept of legal norm can be found in the second. Kelsen now limits himself to defining the generic concept of "norm": "By 'norm' we mean that something *ought* to be or *ought* to happen, especially that a human being ought to behave in a specific way" (p. 4). Although the duality to be (*sein*)/ought to (*sollen*) is kept, and that Kelsen holds that it is the latter (*ought to*) what defines any type of norm, also the legal norm, he still distinguishes different kinds of norms, each of which is characterized by a modal verb: *sollen* but also *können* (can) and *dürfen* (may). In order to save the concept of legal norm expounded in the first edition (factual hypothesis and legal consequence connected through the logical link "ought to" – *sollen*), Kelsen introduces the difference between complete or independent (*selbständige Normen*) norms and incomplete or dependent norms (*unselbständige Normen*). The treatment of legal concepts is more profound than in the first edition and, in some respects, different. Consider some

examples. Whereas in the first edition efficacy (*Wirksamkeit*) is a condition for the validity of a legal order and not for individual norms, in the second edition, efficacy is seen as a condition of validity of the legal system in toto as well as a condition of validity of individual norms. This is a move inclined toward legal sociologism to American legal realism. Also, the theorization of subjective rights is more profound than in the first edition, and they are now considered independent entities, and not mere derivations of a legal duty.

In 1971, in the context of the commemoration of Kelsen's 90th birthday, the Hans Kelsen Institute was founded in Vienna, with the purpose of disseminating and continuing the legacy of this great jurist, thus contributing to the development of legal studies and, especially, to legal theory.

Kelsen passed away in Berkeley in April 19, 1973. His wife, Margarete, had passed away in January, the same year.

After Kelsen's death, several of his works have been edited and published, among which the following three stand out.

First is *Allgemeine Theorie der Normen*. Manz. Wien, 1979. In this book, Kelsen examines norms in general, of which the legal norm is a species. This work is unfinished, so one can put into doubt whether the author had accepted the text as is. It has the peculiar feature that, of all Kelsen's books, it is the one with the highest number of references: 142 pages of references of a total of 362. It has 61 chapters, all of them very brief, divisible (the index does not divide the book in this way) into three sections: theory of the norm (in general, any kind of norm, not just the legal norm) (37 chapters); "norm and statement" (chapters 38–49); and "logic of norms" (chapters 50–61). Regarding this latter aspect, it must be underscored that Kelsen categorically denies the possibility of applying logic to norms, for these are always expressions of an act of the will.

Second is *Die Illusion der Gerechtigkeit. Eine kritische Untersuchung der Sozialphilosophie* Platons. Manz. Wien, 1985. As the subtitle indicates, it is a treatise on Plato's social and political philosophy, about his concept of justice.

Third is *Secular Religion. A Polemic Against the Misinterpretation of Modern Social Philosophy* Springer. Wien/New York, 2012. Kelsen finished this work in 1964, but he ultimately prevented its publication and had to compensate the academic press for its expenses. One can only guess why. In its preface, Kelsen states his intentions: "This book is directed against the attempt made by several authors to interpret the most important works in social philosophy, especially philosophy of history, in modern times, (. . .) as theology in disguise (. . .), and to interpret certain political ideologies of our time as 'secular religion'" (p. 3).

[Summary of Gregorio Robles, *Hans Kelsen. Vida y Obra.* Civitas, Navarra 2014]

Works of Hans Kelsen: *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatz* (1911, 1923); *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (1920); *Sozialismus und Staat. Eine Untersuchung der politischen Theorie des Marxismus* (1920); *Der soziologische und der juristische Staatsbegriff* (1922); *Allgemeine Staatslehre* (1925); *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928); *Vom Wesen und Wert der Demokratie* (1929); *Wer soll der Hüter der Verfassung sein?* (1931); *Théorie générale du droit international public* (1932); *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1934); *Vergeltung und Kausalität* (1941); *Law and Peace in International Relations* (1942); *Society and Nature. A Sociological Inquiry* (1943); *Peace Through Law* (1944); *General Theory of Law and State* (1945); *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* (1950); *Principles of International Law* (1952); *Théorie pure du Droit* (1953); *What is Justice?* (1957); *Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit* (1960); *Allgemeine Theorie der Normen* (1979); *Die Illusion der Gerechtigkeit* (1985); *Secular Religion* (2012).

Other works are as follows: H. Kelsen, A. Merkl, and A. Verdross, *Die Wiener rechtstheoretische Schule* (1968) and *HANS*

KELSEN-WERKE, herausgegeben von Matthias Jestaedt in Kooperation mit dem Hans Kelsen-Institut: Band 1 (2007); Band 2, I and II (2008); Band 3 (2010); Band 4 (2013); and Band 5 (2011).

Kelsen, Hans: Causality and Imputation

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Introduction

Imputation is a normative category analogical to causality. It was conceived among others by Hans Kelsen, who made it the central category in his pure theory of law (Paulson 1996). Kelsen, influenced by Immanuel Kant, regarded imputation as a promising foundation for legal science. It serves as the element which distinguishes legal science from natural (explicative) types of science governed by the principle of causality. Kelsen's focus on imputation differs from previous attempts to describe it, to a certain degree: instead of asking about the rules which allow legally or morally relevant events to be differentiated from irrelevant ones, Kelsen analyzes:

1. The function of imputation in the context of legal science and law itself, based on analogy and contrast with causality. By taking this approach, he can identify the difference between legal and natural science and legal and social phenomena.
2. The distinct formal structure of imputation in law. This allows him to identify the difference between legal and moral norms.

To do so, Kelsen distinguishes two types of imputation:

1. Central imputation, later called as *Zuschreibung*, which binds the fact with the organ.
2. Peripheral imputation, which Kelsen defines as a link between fact and a sanction. It has the structure: when A, then ought to B.

The following paragraphs present the evolution of the relationship between causality and imputation. They begin by outlining the historical background and then giving general remarks about causality and imputation in Kelsen's theory. Finally, the two last paragraphs focus on two distinct types of imputation, central and peripheral, and their relationship to causality with regard to the evolution of Kelsen's thoughts.

Historical Background

The genesis of Kelsen's imputation has a historical background. The problem, later labeled "imputation" by Samuel von Pufendorf, was first noted by Plato in *Timaeus* and then by Aristotle in *Nicomachean Ethics*. It was bound with the question of how certain facts should be ascribed (imputed) to a certain person: for instance, the damage caused by an animal can be imputed to the animal's owner, although it lacks a direct causal link. Pufendorf developed this idea as a series of logical links in the sphere of freedom. Hence, imputation was the answer to the question of free will in a world determined by causality. Finally, the most famous concept of imputation was introduced by Immanuel Kant in *The Metaphysics of Morals*, where Kant perceives responsibility for an event as a condition of imputation. Therefore, while the causality rule enables truth to be achieved, imputation allows justice to be achieved.

Imputation and Causality: General Remarks

Kelsen first devotes his attention to the problem of causality and imputation in his habilitation *Hauptprobleme der Staatsrechtslehre* (HP), in a phase called critical constructivism (Paulson 1996). Later, as Kelsen progressed into his next, most famous Neokantian phase with his book:

Pure Theory of Law, he began to distinguish two types of imputation: central and peripheral. At this time, peripheral imputation was the crucial element of Kelsen's theory, parallel to causality, which was understood by Kant as a category which enables cognition. Later, Kelsen's view on imputation became more skeptical, and this could be seen in his article *Kausalität und Zurechnung* from 1954. In his skeptical phase, as the *General Theory of Norms* (ATN), central imputation lost its significance; peripheral imputation remained a relic of Neokantian influences and lost its coherence.

Causality in Kelsen's Theory

As a starting point, Kelsen draws a distinction between natural and social science. While the former is ruled by the principle of causality, the latter is perceived from the causal normative point of view, depending on whether a human is perceived as a part of nature or part of society. In this context, Kelsen describes the different types of usage of the term "law." In nature, the task of law is to explain reality, the is sphere; however, in normative meaning, law is used to establish ought. Hence, while reality is ruled by the principle of causality, the normative sphere is ruled by the principle of imputation. From this observation stems the main methodological assumption of Kelsen's theory: the duality of is and ought. As a result, Kelsen criticizes any attempt to explain the nature of law as a fact of the causal world; for him, the rule which is applicable in this context is imputation. Kelsen had several reasons to reject causality in legal norms. He admitted that imputation can be parallel to causality, but in most cases, the lawmaker has to identify one link as being the most important of all those in a causal chain. Furthermore, sometimes legal liability can occur without causality. According to Kelsen, omission is such a case, since the cause must be bound with a change of activity. Omission belongs to the broader category of cases in which liability is dependent not on the action of the agent but on the result which occurred in reality. Kelsen believed that lack of activity excludes the cause; the effect is the result of other factors. Moreover, Kelsen argues that the effect can be a result of many causal chains. In this context, Kelsen and the doctrine (Hruschka 1991, 45–54; Renzikowski 2002, 259–60) list further differences between causality and imputation.

Differences Between Causality and Imputation

1. In causality, the causes are equal, while in imputation, some causes stand out.
2. Propositions based on the causality principle can be falsified, while legal norms based on imputation cannot.
3. Causal links are infinite, while imputative links are not: one factor is privileged by the lawmaker. In this context, Kelsen distinguishes the endpoint of imputation, which is a certain human's behavior described in norm as the source of responsibility.
4. Imputation relies on will, in the case of the lawmaker, while causality does not.
5. Causality has a dynamic character, one which concerns movement and change in the physical world, while imputation is static.
6. Causality concerns objective processes, while imputation depends on the arbitrary decision of the lawmaker.

In Kelsen's theory two competing conceptions can be observed: (1) the Kantian tradition and (2) Hume's tradition. Both conceptions will be presented only to the extent used by Kelsen, and it must be noted that Kelsen treated them as being rather superficial.

In the Kantian tradition, causality has an epistemological function. Having a priori categories allows empirical material from the senses to be organized, thus allowing the phenomenal world to be cognized. However, Kelsen does not examine causality in this sense in any great depth; he only does so as long as he finds Kant's terminology useful and as long as causality helps him to explain peripheral imputation in the context of the cognition of legal norms.

Later Kelsen began to favor David Hume's conception of causality over the Kantian approach. Hume believed that causal links only project to the future that which has been gathered

from experience, based on the principle of habit. In *Society and Nature*, Kelsen analyzes the causality principle in detail in Hume's tradition. Kelsen notes that "primitive" men did not recognize the principle of causality. They believed that the world was based on the retribution principle, which is similar to imputation, stating that a reward is appropriate for good deeds and punishment for bad ones. For instance, an illness should be regarded as a punishment for a past misdeed. Therefore, the facts are not linked by the retribution principle by causality. Such a world was full of spirits and gods: if lightning struck or a tree did not bear fruit, it was attributed to the anger of the god responsible for thunder or the one living in the tree. As human beings were part of this order, there was no sharp distinction between human beings and objects. When this distinction later arose, in Ancient Greece, the ability to objectively explain natural events demanded the conceptualization of the causality rule. This moment could be regarded as the birth of scientific thought. In causality, the links between facts can be of a necessary character. This necessary character can be a result of the belief in absolute will, which was the case in the Middle Ages; however, this absolute will of God was later substituted by the necessity of human cognition. After the Enlightenment, causality became a very popular device in empirical science, as well as in psychology, sociology, and law, which were treated as empirical areas. Kelsen develops this idea further in *Kausalität und Zurechnung*. Not only does he analyze causality in Hume's tradition, but he also tries to support his view by recalling scientific discoveries in the field of Physics, particularly in quantum mechanics. Kelsen recalls such names as Planck, Bohr, Schrödinger, and Heisenberg, whose uncertainty principle serves Kelsen to support the thesis that causality and imputation are of the same character: both signify only probability, with the difference only lying in the degree of uncertainty. While causality is bound with more certain events, imputation indicates less certainty. The two rules are not contradictory but are perceived as merely two distinct modes of interpretation, i.e., according to natural or social rules. While nature is bound with determinism caused by a causal indefinite chain of events, the normative world indicates freedom guaranteed by the endpoint of imputation. For Kelsen, imputation and freedom are strictly bound together. Freedom (free will) defined not as the absence of causality but rather as existence of the final point of imputation (human's behavior) is associated with responsibility.

Central Imputation and Causality

Kelsen's primary idea about imputation appeared in his habilitation, which signifies the first phase – critical constructivism. This primary idea of imputation bore the qualities of both central and peripheral imputation: while its structure resembles that of central imputation, Kelsen also ascribes to its functions reserved for peripheral imputation, such as its importance in the program of legal science. Later, Kelsen divides primary imputation into two types: central, which accounts for the links between several organs, and peripheral, which is crucial for legal science. Central imputation acts as a link between the fact and the organ. Hence this type of imputation resembles the classical idea, where the fact was ascribed to the person. Kelsen adapted this idea to the legal realm, substituting the physical person with the legal entity: a legal organ or a state. In addition, the subject of his imputation is different: placing the emphasis on duty, rather than on responsibility, as given in classical imputation. The other difference is that while classical imputation concerns past events, central imputation concerns all the events which occur at the time when the norm is valid. Such a change in emphasis has an impact on the relationship between imputation and causality. However, the link between central imputation and causality is far from clear. In order to clarify these relations, the elements of imputation, such as organ and fact, shall be analyzed in the following paragraphs.

Kelsen defines law as the will of state. The will is perceived in the ought realm as the assumption that is the norm is valid, which is the result of the will of the state. Consequently, Kelsen changes the perspective. Instead of inferring: "if

something is the will of the state, it is imputed to the state," the inference: "if something is imputed to the state, it is the will of the state" is valid. Hence, for Kelsen "will of the state" is an anthropomorphic expression of ought (Paulson 1990, 27–28). In such a schema, the state is the endpoint of imputation, to which all the particular lines of imputations are drawn. The particular lines of imputation are bound with the activity of the organs, which are perceived as points of imputation. The will of the state is distinct from the will of the organs; if this were not the case, the president's veto would mean that this will contradicts itself. Central imputation is expressed by the rule of imputation. Such a rule exists in the norm, which indicates that the will of the state exists to consider certain facts, such as the activity of the state. Thus, imputation allows the cognition of law, because it can ultimately be interpreted as the will of the state (Paulson 2004, 101).

Such approach has a flaw. Kelsen notes that in the lawmaking process, the norms which would express the rule of imputation do not exist. Such a norm would have to consist of the will of the state in making the law, which would lead to the construction of a "will of the will." In Kelsen's habilitation, this remark compels him to propose the lawmaking process as occurring outside of the sphere of legal interest. Perhaps this incompleteness of the theory later forced Kelsen to adopt the concept of the hierarchical structure of law (*Stufenbau*), with its core principle being its formal links between norms: these links being formal in the sense that they are based on the competence, rather than on the content, of the norm, as in the case of morality. While it is possible to infer the lower norms "do not kill" or "help the neighbor" from the norm "Thou shalt love thy neighbor as thyself" in morality, such an operation is impossible in the case of law. The constitution gives Parliament the competence to pass statutes, and statutes grant the competence to pass ordinance. All steps in the process, apart from the first and the last, are of both lawmaking and law-applying character. Finally, central imputation has been eliminated in the *General Theory of Norms*.

As the two are analogous, how exactly does causality resemble central imputation? Firstly, the resemblance lies in the structure. Both causality and *Zuschreibung* are based on the metaphor of the chain. In both cases, there are certain points (nexus) which are linked. In the case of causality, these are certain facts, while in case of imputation, these are facts and points of imputation (organs and state). However, the main factor which should determine whether such an analogy is justified is their function. The function of causality is to explain some events which occur in nature. In case of imputation, the function is normative: to prescribe certain forms of behavior or duty to the subject. However, contrary to classical imputation, which concerned responsibility, these two functions do not seem to be sufficiently similar. The genesis of classical imputation was founded on the observation that some facts cannot be ascribed to the person based on the rule of causality; therefore, a new rule needed to be provided. This ground vanishes in the case of central imputation. The causal chain is by no means the alternative rule for links between organs. It is worth noting that this analogy was justified in the habilitation because Kelsen considered only one type of imputation and ascribed it a second function. Imputation in HP was proposed as the factor which allows law to be cognized. In this sense, imputation from HP can be considered as analogical to causality: while causality explains reality, imputation allows law to be cognized. However, later Kelsen ascribed this function to peripheral imputation.

It can be seen that for Kelsen, imputation had an analogical character to causality, in the sense of the role it plays in legal science. Namely, it allows law to be cognized. While in his first book (HP), Kelsen proposes that imputation plays this role and has the structure of central imputation, and he does not distinguish between central and peripheral imputation, he later attributes the function of legal cognition to peripheral imputation. When this function, legal cognition, is not clearly stated, central imputation loses its analogical character to causality.

Peripheral Imputation and Causality

Peripheral imputation appears in the evolution of Kelsen's views. After writing his habilitation,

Kelsen improved his theory, supplementing it with his famous basic norm and the hierarchical structure of norms (*Stufenbau*). He also created a distinction between central and peripheral imputation. According to Kelsen, peripheral imputation binds two facts, which resembles the concept of causality. The difference between imputation and causality lies in the nature of the link. While the causal link is ruled by necessity (if A then *is* B), the imputation is ruled by ought (if A then *ought* B). The expression "ought" in the norm highlights peripheral imputation. Facts A and B can be distinguished; thus, the first breaks some sort of norm, for example, murdering a man, while the second is the act of coercion derived from the empowered organ. Such empowerment is believed to be the most important component of the second fact bound by imputation (Paulson 1988). It is also the component which is characteristic of legal norms only. Kelsen develops this idea by introducing the concept of the reconstructed ideal form of the legal norm (Paulson 1988). Such a norm binds the description of the delict and sanction, and since it is addressed to the organ, it is characteristic of law, thus distinguishing law from morality and other normative systems.

On the level of legal science, Kelsen perceives peripheral imputation as one of the relative categories a priori. Part of the doctrine binds it with the transcendental argument provided by Neokantians. Such an argument in Kelsen's case has the following structure (Paulson 1992, 326–332):

1. One has the cognition of a legal norm.
2. The cognition of a legal norm is only possible if the category of normative imputation is presupposed.

Therefore the normative imputation is presupposed.

This argument allows us to assume that peripheral imputation is analogical to causality but in a more profound way, as seen in the category allowing cognition. In Kant's *Critique of Pure Reason*, causality was perceived in similar way: as a category which enables empirical material to be organized as phenomena, or rather, the final product of our cognition. Imputation has a similar function in law, in that it allows alogical legal material to be represented as legal norms. The transcendental argument is intersubjective and valid only for those who acknowledge the existence of law. For example, the anarchist would deem such an argument as invalid by rejecting the first premise. The argument also has a flaw, namely, that it can only be valid if there are no competing theories to the *Pure Theory of Law* (Paulson 1992, 331). Since there are many such theories, the second premise is deprived of necessity.

Later Kelsen rejected Neokantian themes. In his final book, *General Theory of Norms*, the function of imputation is simplified and limited only to the first aspect: as a link between two facts. As such an imputation exists in both legal and moral norms, the two cannot be distinguished from one another in this regard. Also, Kelsen states that the imputation is of the same logical character to causality. Imputation and causality could be understood as implication, which binds either true-false facts or normative facts. The nature of imputation in the *General Theory of Norms* may also be bound with pragmatism; in such an interpretation, imputation would allow legal norms to be differentiated from other statements, and such a function would explain how the legal norms are recognized, even though they are not formulated as norms. Obviously the context of such a statement is decisive, e.g., the statement is found in the penal code. However, as Kelsen is unable to account for the separation of facts and normativity, he needs to find this justification in the normative sphere. Imputation might be such an indicator, one which suggests that a certain statement is of a normative character (Zalewska 2016, 162).

Other conceptions perceive the function of the imputation as the transformation of meaning (Jackson 1987, 229–235; van Alphen 1993, 169–175). When in court, the parties tell stories which reconstruct some aspect of the fact and are then transformed into the legal sphere. Imputation adds legal meaning to the reconstructed fact, and this can be perceived as the rule for how a normative character can be attributed to the fact. However, it must be borne in mind that in the *General Theory of Norms*, Kelsen perceived imputation as

universal for both legal and moral norms. Fortunately, the conception of the transformation of meaning seems to work also in the context of moral norms. Some facts can be transformed into the moral sphere.

Kelsen's claim that imputation and causality are two interpretation schemes might support all the readings.

With the imputation being common for both the legal and moral spheres, another difficulty arises. In the Neokantian phase, imputation was bound with empowerment of the organ to impose the sanction. As such a construction is impossible in morality, Kelsen simplifies his concept, stating that imputation binds the fact with sanction. As a result, in the skeptical phase, imputation cannot be used to distinguish legal from moral norms.

In the *General Theory of Norms*, Kelsen still perceives imputation as analogical to causality. However, Kelsen attributes them the same logical character, with the difference lying in their function. Causality binds the facts and allows them to be recognized. Imputation either allows legal norms to be recognized in the linguistic sphere or serves as the rule which allows fact to be transformed into the normative sphere: The first interpretation can serve legal science as a demonstration of how to distinguish norms from other statements, while the second is more bound with legal practice.

Conclusion

Hans Kelsen's concept of imputation is his original construction. Although it may resemble traditional imputation, its functions and the manner by which it fits into the pure theory of law allow Kelsen to reach a new quality. While central imputation explains the law-applying process, peripheral imputation is an essential component of Kelsen's theory: it creates a sharp distinction between factual and normative phenomena, as well as between law and morality, except in the *General Theory of Norms*. Kelsen perceives imputation as analogical to causality, and both types of imputation resemble causality. However, do they resemble each other sufficiently to discuss the analogy between them? While the accuracy of this analogy may be disputable in the case of central imputation, it is sound in the case of peripheral imputation.

Cross-References

- ▶ Coercion and Law
- ▶ Is and Ought Distinction in Legal Philosophy
- ▶ Jurisprudence as Normative Science
- ▶ Kelsen, Hans
- ▶ Legal Science
- ▶ Neo-Kantianism
- ▶ Positive Law and Natural Law

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Kennedy, Duncan

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Introduction

The story of Duncan Kennedy's (b. 1942–) key intellectual contribution to jurisprudence – legal structuralism – has its origins in the French intellectual universe of the twentieth century. Of course, there are many ways in which to stylize the contours of French social theory. The most relevant here, however, begins with Jean-Paul Sartre's existential philosophy, which is then eclipsed by Claude Lévi-Strauss's structural anthropology, which is in turn swallowed up in the glare of Jacque Derrida's supernova that was deconstruction. Hovering in and around all of this like so much dark matter was a reconceived idea of language, and in particular, the influence of the Swiss linguist Ferdinand de Saussure's *Course on General Linguistics*. First put into print by Saussure's students in 1916, Saussure's *Course* offered a new platform for understanding the semiology of language systems, and it is here that structuralism is typically thought to begin. Indeed, as the historian François Dosse has suggested, "In order to understand the structuralist paradigm we have to begin with the Saussurean break, since an entire generation read and considered [the *Course*] to be the founding moment" (Dosse 1998: 45).

In the context of jurisprudence, the most important member of that "generation" was Duncan Kennedy. Kennedy joined the law faculty of Harvard Law School in 1976, where he remained until the present time, and in a series of immensely influential works written in the 1970s and 1980s, laid the foundations for a structuralist approach to law. Guided by semiotics, existentialism, phenomenology, neo-Marxian theory, and a blend of modernist/postmodernist commitments, legal structuralism was the core of what was known in the last decades of the twentieth century as "critical legal studies." Nevertheless, while legal structuralism was an important feature of the early iteration of critical legal studies, the two spaces ought not to be confused. To be sure, Kennedy was a founding member of critical legal studies, but rather than focus on the intellectual history of that movement, this brief essay spotlights the core ideas of the structuralist arc that began with Kennedy's first work, *The Rise and Fall of Classical Legal Thought*, developed through *The Structure of Blackstone's Commentaries* and *Form and Substance in Private Law Adjudication*, matured in *A Critique of Adjudication*, and elaborated in his later works from the first decades of the twenty-first century. Those ideas, canvassed below, include (i) legal consciousness, (ii) legal grammar, and (iii) legal indeterminacy.

Unfortunately, it is beyond the scope of this essay to discuss an important fourth feature in the structuralist arc, Kennedy's periodization of legal thought (Kennedy 2006). The concepts of legal consciousness, grammar, and lexicon are elements of Kennedy's theory of legal structure. Legal consciousness refers to the phenomenological interplay between the human agent, the jurist, and the law, conceptualized as a language-system. The legal grammar consists of those fixed rules ultimately giving form and shape to the jurist's techniques and patterns of legal argument. The legal lexicon refers to the plane of legal concepts operative in any given legal system. These legal concepts are often open-ended, and depending on the sub-system of the structure in which they are operating, may be more or less "indeterminate" in their capacity to generate necessitated legal conclusions. In Kennedy's periodization of legal thought, ranging from the 1870s to the present day, the structure of these elements morphed over time, yielding three related though analytically distinct systems of legal thought. Kennedy called these structures "classical legal thought," "social legal thought," and "contemporary legal thought" (Kennedy 2017).

The Language of Legal Consciousness

For present purposes, Saussure's two distinctions of *langue*/*parole* and synchronic/diachronic are the most relevant to understanding Kennedy's legal structuralism. *Langue* refers to the fundamental rules of syntax shaping the grammatical horizon of the linguistic structure. As Saussure explained, the *langue* represents "the whole set of linguistic habits which allow an individual to understand and be understood" (Saussure 1959: 77). Denying it a natural or necessary character, Saussure situated the *langue* as a social construction with a determinate scope. Its contents were fixed and closed, and in the background context of the system, the *langue* governed the forms in which the language was uttered. In contrast is *parole*, the open, arbitrary, and individually created speech-act. Thus, where *langue* is prereflective, preconceptual, and often out of mind, *parole* is the surface manifestation. Where *langue* is unnoticed syntax, *parole* is deliberate utterance. Where *langue* represents a field of coercion, *parole* is free.

Structuralism, as the name suggests, was not a theory of free-form, anything-goes, chaos. There was some of that, but it was more an argument about the background *constraints* in a given system, limits found in the structure's *langue*, governing and shaping the surface-level forms in ways that were almost always invisible to the user of the grammar, at least when everything was working normally. As Jonathan Culler explained, "structuralism thus involves the attempt to spell out, explicitly, what members of a culture know without knowing it: the structures that underlie cultural practice, and make possible, for instance, people's judgments about what is ordinary, strange, meaningful, or meaningless" (Culler 2006: 3).

What the structuralists were *not* generally interested in explaining, however, was the role of individual agency, the moment of existential decision that might operate from within the structure. And it is here that the conflict between structuralism and existential phenomenology seemed its most severe. For whereas structuralist analysis appeared to be decisively in favor of dehumanizing the analysis of structure and agent, existential phenomenology was entirely committed to the reverse. Or, at least, so the story went. It is here that we can isolate an initial toehold in the project that became *legal* structuralism, in the meeting of phenomenology and structure in the space of a jurist's legal consciousness.

For Kennedy, the "jurist" was a person trained to "think like a lawyer," whether a judge, professor, attorney, or some other legal sophisticate. In contrast is the legal object, law's language system. In the analytic philosophy of language, one might approach the relation as unpacking what looks like a fairly conventional subject-object interface. But the structuralist approach is phenomenological and semiotic rather than analytic. From this perspective, the legal language has no positive essence or ontologically uniform objectivity that might be conceived or articulated independent of the jurist's consciousness. The reality of the language englobes the jurist, and manifests once it is already in the interactive space of juridical speech. This embeddedness, in which legal subject and legal object are now really two words for what is practically the same thing, is what Kennedy called "legal consciousness" (Kennedy 2006: 2). And legal consciousness is "legal thought," "the conceptual apparatus, the reasoning techniques, the legal ideals and the key images that the elite bar, including judges, treatise writers and important lawyers, deploy when they make legal arguments or give opinions or declarations about what the law 'is' or ought to be" (Id. at ix). Drawing on Sartre's reworking of Husserl in *Being and Nothingness*, Kennedy suggested that the legal language had an existence-as-appearance made real in the encounter with the jurist's legal consciousness. That is, while it could be that a universe of law existed outside of or beyond its solicitations to legal consciousness, there was no way to understand that "object" in any meaningful way. The meaningful existence of the legal language could only be found in its "adumbrations" for and "solicitations" of the jurist's consciousness. To further underline the point, there was nothing ontologically independent about the legal language – the language of law never comes *to* the

jurist's consciousness. The structure of the legal language was always already the very stuff of legal consciousness. Legal consciousness, that is, does not exist in the absence of the legal language.

The Sartrean variety of phenomenological existentialism counsels an absolute view of freedom through consciousness – consciousness *decides*, intends to encounter an object, always. But in Kennedy's work, a Sartrean freedom of decision immanent in consciousness was realized only in the constraints of the legal language and its backgrounded interactions *with* legal consciousness. Legal consciousness, in other words, always exists in a unity of freedom and constraint (Kennedy 1986). This is a version of what Sartre called the "paradox of freedom," in which consciousness is at once totally determined and totally free. The situation of the legal object may be determined – the jurist has no control over the existence of the legal materials that appear to her. Those materials are sourced in the decisions of other people, often ranging over the course of several centuries, and it would be silly to suggest that the jurist is "free" to characterize those materials any way she might like. Nevertheless, while the situation of the legal object is determined, the meaning of the object is open: the jurist *always* has a decision to make about what to do with the situated materials, which materials to read, which materials to ignore, which materials to read closely, and so on. It is because the jurist *always* faces such decisions that we sense the resonance of Sartre's remark: "We are condemned to be free."

The Grammatical Constraints of Legal Thought

For Kennedy, this attachment to an existential conception of freedom and constraint was consistently fastened to the structuralist view of law, and ground zero was the "experience of unresolvable conflict among our own values and ways of the understanding the world" (Kennedy 1976: 1712). Although it is certainly true that Sartre's phenomenology and Lévi-Strauss's structuralism generally came to be seen as incompatible in their central commitments, it is also easy to see why Kennedy was so interested in bringing together these phenomenological and structuralist ideas in the terrain of a stylized and structured form of legal consciousness: In the context of the object of legal language, the semiotic *langue* and *parole* bore an undeniable resemblance with the "situation" and "decision" of phenomenological existentialism. But before pressing that issue further, we must turn to the jurist's know-how, the terrain of the legal language.

Despite the prevalence of views that suggest that Kennedy's target was "all law everywhere," the better view is to understand the language-system under scrutiny to be that of "liberal legalism." What was liberal legalism? First, here is what it was not. It was not the universe of Law, a legal reality encompassing pretty much whatever one might want to define as having a legal aspect. "Law," in this extremely broad sense of actors, institutions, processes, and the like, *could be* synonymous with liberal legalism. But this is a sociological and economic and anthropological set of questions, and clearly beyond the scope of the legal structuralist project as Kennedy defined it. Second, even in the more particular territory of legal language, liberal legalism should not be confused for the entirety of legal thought. Liberalism is merely a subset in the larger category of legal language, whereas "Republicanism" or "Buddhism" or "Scholasticism" might be contenders for other structures of legal thought.

What then *was* liberal legal thought? At the level of deep grammar – the *langue* – liberal legalism was constituted by an antinomy between two general theses. The first thesis was that human beings are and ought to be motivated by Thomas Hobbes' theory of social conflict, rooted in equal rights of self-preservation. We can call this the first thesis of free competition. The second thesis was that in order for society to enjoy the benefits of the new individualism, the freedom of the individual could never be free. Let us call this the thesis of social control. The antinomy between these two theses was pervasive in its constitution of an entire legal language, the language of liberal legalism. Kennedy wrote that there existed a "fundamental contradiction" between the theses of

free competition and social control, and that it formed the very "essence of every problem" and that "there are simply no legal issues that do not involve directly the problem of the legitimate content of collective action" (Kennedy 1978: 213).

We should be careful to see, however, that this antinomy constitutes *liberal legal thought*, and is not the human condition or natural society or Law, writ large. Kennedy clarified that the structure ought to be seen as a set of "contradictory utopian visions" (Kennedy 1976: 1722), visions which were "neither falsifiable empirical statements about a determinate mass of data, nor logically pure 'models' totally abstracted from reality" (Id. at 1722–1723). The antinomies of liberal legalism were best rendered in the language of style, rather than logic, a mode of argument rather than a natural condition of thought. As Kennedy put it, "liberalism is a way of thinking about [antinomies], a way of thinking that begins with rights and constructs the state and its powers as a means to their protection" (Kennedy 1978: 294). But these antinomies were just that—ways of thinking and patterns of argumentative practice.

The theory of liberal legalism, and the constitutive antonomy of the theses of individual right and social control, begins with the invention of the *Individual* – not the *human being*, but the individual qua "rights-bearing subject." No longer predefined in terms of good and virtue and telos, the newly minted liberal individual determined for himself what it meant to lead a good life. This liberal individual enjoyed "total arbitrary discretion (often referred to as total freedom) to pursue their ends (purposes, values, goals, interests) without regard to the impact of their actions on others" (Kennedy 1976: 1767–1768). At the heart of individual *right* was the notion of self-preservation. For in this new liberal world, all individuals possessed this ultimate entitlement, and each could decide just what the right of self-preservation entailed. For theorists like Hobbes, this led to a war of all against all, as there no longer existed an objective standard of justice determining when one individual had wronged another. There was, in other words, no meaningful idea of right and wrong that could exist independently of the individual's subjective perception of it. Freedom, in this liberal view, "has no moral content whatever" (Id. at 1774). Of course, the precise context of individualism varies in this respect, depending on which liberal theorist is serving the gospel. In Locke's mercantilist version, for example, the situation led to the creation of a market society in which people happily became property owners, buying, selling, and elaborating ever more sophisticated forms of economic transaction.

The problem was that liberal individualism required a degree of political *order* in order to do what it was meant to do, to realize individualism in a functioning *society*. To be sure, for liberalism the individual was natural, society artificial. But the artifice of order and the reality of the police power, on liberalism's own terms, was a necessity. For as much as liberalism touted the primacy of self-reliance, liberalism also countenanced its *natural* limits and the necessity of social cooperation. Here was the problem, and the problem that continues today in the grammar of liberal legal thought: How might liberalism produce a political order that at once facilitated the equal rights of autonomous beings and instituted a degree of coercion that was uniform, general, and comprehensive? As the many variations of social contract and democratic theory would eventually suggest, the answer began with the realization that if order was to be achieved, certain natural rights would have to be renounced. In exchange for the renunciation of an individual's monopoly over how to define the just, political society would form, and a sovereign would come into being as the guarantor of order and wielder of the police power. Here emerges the characteristic split in liberal theory between civil society on one side and political society on the other. Liberal theory presents a way of styling the relation between the new liberal being and the secular state that would come to facilitate the possibility of a functioning society of "rights-bearing individuals." In order for individuals to enjoy their natural rights in civil society – the rights they still retained after the renunciation – the artifice of government was defined as something *other* than civil society.

It is here that the master grammar of liberal legalism emerges in the form of antinomy, a basic tension between the problems of individualism and political order. The renunciation of the full cache of natural rights and the formation of political society, in other words, was only a start and not a solution; this compromise did not yet help us know how to fashion a government in the absence of an Aristotelian theory of intelligible essences. If it were a solution, we would have known how to resolve the following tasks: respect the thesis of individualism and its demand that we honor the individual as a source of subjective value, and respect the thesis of political order that necessarily limits the freedoms of certain individuals at the expense of others. In the absence of a theory of objective value, the only "good" is the satisfaction of personal desire. But the very purpose of law is to empower some desires and restrict others, to assert a view of "justice consisting of an order according to shared ends" (Kennedy 1976: 1771). It is in this way, as Kennedy explains, that "mechanisms of social order dependent on consensus about ends will run into terrible trouble" (Id. at 1769). He continued, "The creation of an order within which there are no occasions on which it is necessary for group members to achieve a consensus about the ends they are to pursue, or indeed for group members to make the slightest effort toward the achievement of other ends than their own, makes perfect sense" once one begins with the principle of individualism (Id. at 1769). But once we advantage certain values as against others, we violate the standard of equal rights. And then, when we resuscitate the thesis with a return to ideas of subjective value, self-reliance, etc., we violate the thesis of political order, which demands we place limits on what individuals ought to be able to decide.

The traditional way in which liberal theory sought to escape this fundamental antinomy was through the elaboration of a third grammatical thesis, a thesis we can call "naturalizing juridical science" (Desautels-Stein 2018). Why turn to law for the remedy? In a world without objective value, a concept of order can only be sustained through the creation of something that might perform in the guise of objective value. This "something" needed to be impersonal, general, and defined in opposition against the notion of subjective value. If law could be a device for placing objective limits on individual freedoms, the liberal effort to succeed its Aristotelian predecessor might take flight. Could it?

In Kennedy's structuralism, the answer was, decidedly, no. The third thesis of naturalizing juridical science functions to *mediate* the antinomy, to place its tensions at such a distance from the immediate experience of jurists that they never come to consciousness. This mediation of the basic antinomy between the theses of free competition and social control took a doubled form. The third thesis attempts to mediate the antinomy in the context of theories of law creation, or legislation, and in the context of law application, or adjudication. Together, these modes represent the double task of mediating the antinomy between the demands of order and freedom, rule, and value. As Kennedy argued, "One of the functions of systems of legal thought – one of the reasons for their existence – is the reconciliation of what appear to be conflicts between institutions and contradictions among ideas. In other words, system is necessary not just to permit us to deal in a cognitively effective way with the chaotic mass of rules. It is also necessary because the theorist wishes to show that where many perceive confusion, danger, insecurity, rivalry, and aggressive action, there exists a latent order that has a legitimate claim to our respect" (Kennedy 2006: 8).

To sum up so far, Kennedy's legal structuralism urges a step away from the tendency to think about questions of epistemology and politics as separate fields with separate problems. Instead of compartmentalizing the various segments of society, the structuralist encourages a view of social practice as language, a language that resists segmentation along social vectors. The language's borderlines, instead, are semiotic rather than political or cultural or whatever. Second, it identified liberal legalism as itself a kind of language system, with a grammar and lexicon and rhetorical pathways, rather than a philosophy or a politics or an epistemology. Third, the grammar of liberal legal thought is shaped out of an antinomy between the theses of free competition and social

control, and the mediating effects of a third thesis: faith in the power of a naturalizing juridical science to resolve the antinomy. These three theses constitute the master *langue* of liberal legal thought, the governing mechanism for the conceptual lexicon, and its styles of argumentative practice.

Lexical Indeterminacy

Thus far the discussion has focused on the idea that legal consciousness is a structure of legal thought, and that in liberal legalism this structure is governed by a triumvirate of grammatical theses. We now turn to the lexical plane of the structure, the terrain of legal concepts. As discussed above, whereas the deeper grammatical level provides hard constraints on juridical speech, the lexical level is more discretionary, or to use a term that became increasingly popular at the time, "indeterminate" (Kennedy 2008). It is important to note how Kennedy managed this distinction between a hard system of constraints in the structure's *langue* and a loose and indeterminate sea of legal concepts, as Kennedy's structural concept of lexical indeterminacy is significantly different from the idea of legal indeterminacy that became so powerfully associated with the critical legal studies movement.

Throughout the 1980s and 1990s, it was often believed that Kennedy claimed that judges could decide cases in any way they liked, that law was nothing more than politics. This view yielded a nihilistic takeaway: forget the *rule* of law and learn the *politics* of law, because law was nothing more than a smoke-screen blinding us to what was really going on behind the scenes. The "politics of law" was a phrase at times connected with another: "trashing." The caricature of the trashing jurist suggested the limitless ways in which legal concepts and legal reasoning might contort to justify any imaginable conclusion, and also tended to conflate critical legal studies with its predecessor in American legal realism. Indeed, the idea that a given set of legal materials often failed to produce logically necessitated legal conclusions had been thoroughly debated since at least the work of thinkers like Rudolph von Jhering and Francois Geny.

To be sure, Kennedy was very interested in the ideological content of the structure's lexicon, that is, at the level of legal concepts, in *parole* (Kennedy 1991). In this lexical space, the affordances of argumentative practice are undeniably political, and the structuralist does have, at least in the language of liberal legalism, an interest in pointing to the "politics of law." Nevertheless, the structuralist view of lexical or conceptual indeterminacy is something quite different from both the "realist" version of the idea that had surfaced earlier in the century, as well as the popular notion of trashing that was in the air of the 1980s and 1990s.

For the structuralists, the legal structure *was not* just politics, it was not simply a cue for social science, and it was not about what you'd had for breakfast. It was an entire language system, with its grammar, concepts, and styles of argumentative practice. Kennedy's take on legal indeterminacy was categorically separate from and far more specific than the idea that all legal rules were vulnerable to political cooptation. From the structuralist perspective, yes, jurists encounter open-ended legal concepts and make ideological choices. But they can't flip *any* rule, *any* time, to justify *any* conclusion. There are, at least in liberal legal thought, structural constraints in the form of the *langue*, with its grammatical power to shape arguments as they move through the terrain of the lexicon on their way to legal conclusions. The extent to which a jurist is capable of generating arguments and counterarguments is ultimately a question about the bounds of the structure in question and the frontiers of the subsystem the jurist happens to be operating. This is why there are so many cases with right answers (or at least, why there are so many cases in which the effect of legal necessity is overpowering): Much of the time, (and especially with regard to questions that precede the level of appellate review), the subsystem in which the jurist is arguing is subject to such strict grammatical constraints that there really are only a few ways, maybe even just one way, to come out (Kennedy 1997). In other subsystems governed by a broader practice (think

now paradigmatically of cases that are heard by the US Supreme Court), however, the jurist will have more styles of decision to choose from, more affordances to accept. Thus, from the structuralist's point of view, the reason for the jurist's discretion has little to do with cores and penumbras, or law as integrity, or any such thing. It has to with the idea that jurists are immersed in legal languages, and that if a jurist wants to be recognized as speaking the language – which all jurists do – then they have to follow its rules. And depending on the particular legal concept, operating in a particular field of the structure, operated by a particular jurist with particular interests and time constraints, the lexicon will be more or less determinate.

Furthermore, the mantra that law was politics was not only misleading for its tendency to conflate lexical indeterminacy with politically infused "judicial activism." It also obscured the structural idea that *politics is law*. In liberal legal thought, we might say that the designation *law is politics* is doing considerable work at the level of the conceptual lexicon, the level at which jurists encounter so many conflicting choices immanent in the legal concept. Confusion about legal structuralism's *law is politics/politics is law* distinction was present even among the friendliest of audiences. In his contribution to a 1984 Symposium on Critical Legal Studies in the Stanford Law Review, David Trubek suggested that the idea of legal consciousness was a valuable addition to the theoretical toolkit, but what was largely lacking in it was work on the social dynamic of legal practice. Studying legal doctrine was important, because it provided the scholar with a better understanding of the structures of legal thought. But where, Trubek asked, did these structures come from? What put them in place? Why did they change? And what were the effects of the structures gleaned from doctrine on actual experience? What of the law in action? (Trubek 1984).

Five years earlier, Kennedy had explained that "what I have to say is descriptive, and descriptive only of thought. It means ignoring the question of what brings a legal consciousness into being, what causes it to change, and what effect it has on the actions of those who live in it" (Kennedy 1978: 220). Trubek's reaction in 1984: "If Kennedy omits any discussion of the effects of legal consciousness in a 173-page article on Blackstone's legal thought, how confident can he be that his method bears any relationship to his political intent?" (Trubek 1984: 612). The problem was that the *politics is law* idea simply had no meaning unless it was grounded in empirical analysis, and as Trubek concluded, "This is a challenge that CLS must meet. Until we can produce convincing maps of the relationships between elite ideological production, the social definition of meaning, and the history of social relations, we will not be able to sustain the claims made for Critical studies" (Id.)

The law-and-society critique misses an essential point about the structuralist understanding of the relation between legal thought and legal practice. What Trubek was concerned about was the place of the social, and the lack of concern in legal structuralism for "the law in action," as opposed to its stale life in the law of the books. While it is certainly true that legal structuralism makes no claims for causal explanation, and that it remains agnostic on the empirical analysis of law in society, this critique of legal consciousness is off the mark. In contrast with a conception of legal consciousness as distant and detached from legal practice, Kennedy consistently argued that adjudication phenomenologically manifested as a *practice* of legal argument. Legal thought only happens – *can* only happen – in the embodied practice of legal argument, in some actualized structure of legal language. A study of legal consciousness is, as a result, nothing other than a study of the jurist's experience, of the law *in action*. To think otherwise is to indulge in the Cartesian split that the structuralist approach so vehemently contested.

Conclusion

As mentioned above, an important aspect of Kennedy's work has been the effort to situate the structuralist analysis of legal thought in time (Kennedy 2004). Over the last 20 years, Kennedy has focused on questions of structural

morphology, on how the structure has transformed between the last decades of the nineteenth century and the first decades of the twenty-first century. In the nineteenth century, liberal legalism's structure was dominated by what Kennedy called "classical legal thought." As Kennedy explained, "among its important traits were that it was a way of thinking about law as a system of spheres of autonomy for public and private actors, with the boundaries of the spheres defined by legal reasoning understood as a scientific practice" (Kennedy 2006: 20–22). Between 1900 and 1970, Kennedy argued, classical legal thought morphed into a second structure, what he called the "Social." The Social was "a way of thinking without essence, but with, as an important trait, preoccupation with rethinking law as a purposive activity, as a regulatory mechanism that could and should facilitate the evolution of social life in accordance with ever greater perceived social interdependence at every level, from the family to the world of nations" (Kennedy 2006: 22).

Kennedy suggested that the Social was followed by the advent of a third structure, what he calls "contemporary legal thought." Much of Kennedy's writing since 2006 has been devoted to the development of this contemporary structure of legal thought, of its timeframe, its content, and its ontology. Its defining characteristic, Kennedy explained, was "the pragmatic balancing of conflicting considerations in administering the system created by the social jurists. At the same time, there was a seemingly contrary trend to envisage law as the guarantor of human and property rights and of intergovernmental order through the gradual extension of the rule of law, understood as judicial supremacy" (Kennedy 2006: 22). This question about "who we are," or what it means "to think like a lawyer today," continues to hover around Kennedy's most recent works. For some, the notion of whether there is something called "contemporary" legal thought is simply a nonstarter, since there simply is and could never be any such thing. For others, the question of the contemporary is helpfully analogized to debates among art historians about whether and how to identify "contemporary art."

For example, Kennedy's theory of a contemporary structure of legal thought resonates with some of the works of the art critic Arthur Danto. Like Kennedy, Danto argued that "modern" and "contemporary" work simultaneously in double registers. On the one hand, modern means "recent," and contemporary means something like being in tandem with "the current moment." This is a temporal register, and we casually use both modern and contemporary in this temporal sense all the time. But on the other hand, Danto wrote, "just as modern is not simply a temporal concept, meaning, say, 'most recent,' neither is 'contemporary' merely a temporal term, meaning whatever is taking place at the present moment" (Danto 2014: 9). Danto's "on the other hand" is therefore a second register of use, denoting a style, or "deep structure" (Danto 2014: 147). The modern, that is, suggests a family of forms that will, at some point in the future, no longer be "very recent" at all. What then, of a *contemporary* style? Danto believed that with the end of modernism, art ended as well, and that *after* the end of art, came the art of the contemporary.

What Danto thought had ended in the 1960s and 1970s was a modern style of thinking both about the nature of art and how that nature contrasted with the art of its traditional antagonists. By the time Andy Warhol set up his pile of store-bought Brillo Boxes in 1964, the story of modern art was finished. Works like Warhol's lacked all the convictions of Modern art, "had no brief against the art of the past, no sense that the past is something from which liberation must be won, no sense even that it is at all different as art from modern art generally" (Danto 2014: 5). Danto continued, "The narrative structures of traditional representational art, and then of modernist art, have eroded in at least the sense that they have no longer an active role to play in the production of contemporary art" (Danto 2014: 48). Indeed, it is precisely the decoupling from historical narrative that, for Danto, defines a contemporary style.

For Danto, the end of art means the end of western historical narratives of art. Again, not the end of art of the Present, which ostensibly includes all art being made everywhere, "of what

we have directly in front of us, and what they have in front of them over there." What ended was not the entirety of artistic practice, but rather a discernible structure of *modern* practice, a very specific story to which one among many possible postscripts is called contemporary art. But, said Danto, it ended in such a way that the art world took no notice, and it was this surreptitious conclusion which did so much to conflate Contemporaneity with our sense of the Present: "It is a characteristic of contemporaneity – but not of modernity – that it should have begun insidiously, without slogan or logo, without anyone being greatly aware that it had happened" (Danto 2014: 5). Make no mistake, the arrival of *post-modernism* was loud. But Danto's point was that in contrast with the way in which the Moderns waged a historical battle, Warhol's art signaled the end of the fight and a situation in which no one anymore even knew who the protagonists might have been (Danto 2014: 48). It was now fireworks rather than artillery shells, explosions for excess, not enemies.

And so, what came "after" the end of art? A very *particular* phenomenon: "artists, liberated from the burden of history, were free to make art in whatever way they wished, for any purposes they wished, or for no purposes at all," the very vacancy of the Contemporary style coming into focus. The mark of Contemporaneity was a broad relation to art in which faith in the singularity of artistic practice – what Danto called the Age of Manifestos – had been replaced by faith in the wonder and usefulness of the many, the plural, the eclectic, "a style of using styles" (Danto 2014: 9–10), with no style to call its own. "It is part of what defines contemporary art" said Danto, "that the art of the past is available for such use as artists care to give it. What is not available to them is the *spirit* in which the art was made" (Danto 2014: 5). "It is no longer something available to us as something we can live. Or, in a way, we can live it only in the mode of pastiche and pretense, and that is not really living it since no one lives it with us" (Danto 2014: 202).

Contemporary art, in the end, was something quite other than art "in the current moment," since anyone might do anything in the *Present.* But to do contemporary art, at least for Danto, meant something very specific, for it was a dialectical response to the end of the Moderns and the formation of a "post-historical" art world (Danto 2014: 47). It meant to do work in such a way that the art bore the mark of art's historical conclusion, to do art after the history of art had ended. To make art in the Present, by contrast, well, that didn't mean – it couldn't *mean* – anything at all.

Kennedy saw the emergence of contemporary legal thought in the same milieu as Danto saw contemporary art, a structure of legal argument coming into dominance in the late 1960s and 1970s. And just like Danto described this as a time in which art had ended, so too Kennedy suggested that the "classical" and "social" had lapsed. Like Danto's vision of a coherent modern practice of art ranging between 1880 and the 1960s, Kennedy described a coherent practice of legal argument covering that same slate of years. To be sure, neither Modernism, as Danto saw it, nor legal thought, as Kennedy saw it, was even remotely uniform. But what was gone by the 1960s, according to both, "was a large integrating concept" parallel to what had gone before (Kennedy 2006: 63). Instead, the deep structure of what Danto and Kennedy both called the "contemporary" could be understood "as the unsynthesized coexistence of transformed elements" borrowed from earlier, vanquished times (Kennedy 2006: 63). Unlike prior structures of legal thought, Kennedy saw contemporary legal thought as an open-ended language, sourced in the scattered debris left over from the demolished remains of the Moderns. Frederic Jameson's view of the postmodern pastiche provides a nice exclamation point here. Pastiche, for Jameson, involved a blank and blind "imitation of dead styles, speech through all the masks and voices stored up in the imaginary museum of a now global culture" (Jameson 1992: 19). It is a practice, once more, "which randomly and without principle but with gusto cannibalizes. . .styles of the past and combines them in overstimulating ensembles" (Jameson 1992: 19). Jameson, Danto, and Kennedy are all telling very similar stories.

Contemporary legal thought for Kennedy, like contemporary art for Danto, marks the end of legal thought. It is a time of ruin and rule by the dead. Nevertheless, Kennedy didn't think that liberal legalism had ceased in the 1960s. Indeed, a great deal of Kennedy's work over the past few decades has been precisely directed at an understanding of the argumentative practices of jurists living in his generation, his current moment, what came *after* the end of legal thought. But contemporary legal thought, like contemporary art, has remained a marker, a placeholder, a proxy, awaiting a time in which we can see in that special darkness what it has become. The structure of contemporary legal thought awaits its name.

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Kierkegaard, Søren Aaybe

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Introduction

Søren Aaybe Kierkegaard (1813–1855) was a Danish philosopher, theologian, and social critic.

Philosophically, he engaged mainly in disputes with Danish exponents of Hegelianism, such as Hans Lassen Martensen (1808–1884) and Johan Ludvig Heiberg (1791–1860). Theologically, he opposed two Danish variations of Lutheranism: the one defended by Jakob Peter Mynster (1775–1854) and the one led by Nikolaj Frederik Severin Grundtvig (1783–1872).

Socially and politically, he reacted above all against the elitist liberal movement that transformed Denmark into a Constitutional monarchy in 1848. The impact that this new regime had both on political and ecclesiastical institutional matters triggered Kierkegaard's public attack on the Danish established Church in 1854.

Given the twentieth-century existentialist appropriation of his thought, and given his own emphases on topics such as anxiety, choice, and faith, Kierkegaard is often thought of as lacking legally and politically relevant reflections. Given his work as a deep cultural critic and his attack on the established church, this impression must be carefully nuanced.

Life and Writings

Throughout his life, Kierkegaard was an increasingly critical and polemical author. He began his

career as a writer with a series of newspaper articles published between 1835 and 1836, where he criticized young Danish liberals such as Johannes Ostermann (1809–1888) and Orla Lehmann (1810–1870). In these short pieces, Kierkegaard ridiculed the supposed value of political changes and scorned the role played by the liberal press in carrying them out (Kierkegaard 1990a). Kierkegaard engaged polemically with the press again in 1846. This time, his enemy was *The Corsair*, a renowned satirical newspaper based in Copenhagen (Kierkegaard 1982). This quarrel motivated the cultural critique in *A Literary Review,* a turning point in Kierkegaard's work. To his religious approach, a more radical and defined cultural, social, and political critique was now increasingly added.

Sporadically, in articles signed by his name and in pseudonymous works such as *Practice in Christianity* (1850), Kierkegaard expressed his concerns about ideas such as a Christian State, a State Church, or a People's Church (Kierkegaard 1991; Kirmmse 1990a). At the same time, he was suspicious of democracy as an expression of a perverted impersonal society. Denmark's transition from an absolute to a constitutional monarchy in 1848 added even more fuel to this fire (Kirmmse 1995: Svensson 2013). In Kierkegaard's view, both divine authority and political authority were being threatened by the power of majorities. In 1854, after 2 unusual years of silence, these scattered yet periodical grievances were channeled into Kierkegaard's final attack on the Danish State Church. His messages of precaution and his requirement for separation of Church and State turned into harsh affronts to the clergy and an open call for civil disobedience. In incendiary newspaper articles at first and later in *The Moment* (1855), his one-man journal, Kierkegaard appealed to the common man's conscience and asked him to refuse to partake in the State's derision of Christianity, i.e., established Christendom (Kierkegaard 1998a).

Kierkegaard's Social Philosophy

Kierkegaard strictly distinguishes religion from society and politics (Nicoletti 1992). He engaged publicly with theologians and politicians in order to create awareness about the increasingly disastrous confusion between them (Kierkegaard 1982, 51–61). Kierkegaard regards religion as the completion of politics' most longed-for dream, that is, human equality (Kierkegaard 1998b, 103–104). Since politics belongs to the quantitative sphere, everything is measured endlessly in comparisons of more or less. Religion, on the other side, points toward the basic and universal equality that qualifies human beings. In that sense, politics has a mere relative value on Kierkegaard's account. For him, political institutions provide the external material frame for society to work. Embracing an absolutist position (Sløk 1980), Kierkegaard saw society as an ordered whole oriented to the covering of prosaic needs. With these needs covered, people have space for private self-improvement. Although with different approaches, this was the general political vision of the Danish Golden Age intellectuals (Kirmmse 1990b). While for other representative figures of that age culture was the instrument for self-improvement, for Kierkegaard it was religion.

Kierkegaard's only straightforwardly sociopolitical work is *A Literary Review* (1846), specially the section titled *The Present Age*, which has often been translated as a stand-alone piece. Disguised as a commentary on Thomasine Gyllembourg's (1773–1856) play *Two Ages*, Kierkegaard develops a critical contrast between the age of the French Revolution and the modern reflexive age that he claims to be witnessing (Kierkegaard 1978). In opposition to a revolutionary age where individuals related to each other through the bonds of an action-oriented cause, Kierkegaard states that in the nineteenth-century society people are too concerned with reflection to act. Though concretely ineffective, the abstract power of reflection leads to a series of perversions that move us toward weakened social interactions (Cutting 1984; Søltoft 1999). The relations between king and subjects, teachers and students, and parents and children, thus remain in place, but they are abstractly considered from the outside: Our education now consists in being concerned for the problem of education, and our life as citizens consists in being spectators who study the relation between a king and his citizens. Kierkegaard's concern, in

other words, is with the decay of the relations. The flipside of this decay is the emergence of the crowd. Kierkegaard is one of the great early critics of the emergent mass society. The crowd is everyone and no one; it is a leveled conglomerate where the individuals become unrecognizable. Its instrument is the press, which shares messages for which no one can be held accountable. In the revolutions of 1848, as recorded in numerous entries in his *Journal*, Kierkegaard came to see the realization of the worst of these tendencies.

The critical view of the "present age" in *A Literary Review* should thus not be read as a preference for the "age of revolution" (which in 1846 was in the past, but which 1848 brought back to life). The "age of revolution" and "the present age" rather represent two different forms of a revolutionary mentality. Kierkegaard's main contribution in this field, then, lies not in the analysis of a violent revolutionary spirit, but in his dissection of revolutions devoid of passion. On the other hand, his critique of the demoralizing effects of mass society should not be read as unequivocal indication of a Kierkegaardian individualism. As we have seen, some of Kierkegaard's observations point precisely to the erosion of relations that follows from the patterns he criticizes. In any case, Kierkegaard considers that religion is the true way out of this impersonal age. Although he does not provide a detailed account of the social effects such a turn would have, Kierkegaard outlines society's well-being as the accumulative result of personal ethico-religious development. Unless we want something as depraved as a child-marriage, he writes in *The Present Age*, the individual must relate first to God and then to the community (Kierkegaard 1978, 106). God as the middle term in intersubjective relations is a central component of Kierkegaard's metaphysics and ethics, as well as of his underdeveloped social and political philosophy.

Law

A Kierkegaardian philosophy of law may be harder to extract from his writings than a social philosophy, since his approach to the idea of law is more exclusively theological, centered on classical Christian themes such as Christ's own perfect fulfillment of the law and the incapacity of fallen human beings for such a fulfillment. Such themes are discussed striking a difficult balance: On the one hand, Kierkegaard developed a sharp critique of the failures of contemporary Lutheranism, which he saw as severely compromising with bourgeois modernity; on the other hand, he is approaching these issues in a manner that is consistent with a Lutheran view of sin and grace, law and gospel. In *For Self-Examination* (1851), for instance, Kierkegaard condemns two misinterpretations of God's law (Kierkegaard 1990b). On the one hand, he criticizes Pelagianism as a unilateral trust on meritorious works, without taking faith and grace into account. On the other hand, he attacks antinomianism, because it overemphasizes faith and grace while freeing the believers from observing the divine law.

In *Works of Love* (1847), a significant text for Kierkegaard's social thought, we find a sustained reflection on the sense in which love can be a duty (Ferreira 2001). Some of the first discourses focus precisely on this injunction, "you shall love," which sharply contrasts with contemporary expectations regarding the spontaneity of authentic love (Kierkegaard 1995, 17–91). The contrast between these two understandings of love, Kierkegaard argues, has been weakened in contemporary society. The poets, who should sing of only one love in our whole life, now allow for various successive loves; Christians, who should argue for a duty of love toward every human being, are content if we love a smaller circle, perhaps our nation. Against this relaxation of the contrast, Kierkegaard retrieves the idea of a duty of love, a duty which he moreover understands as a peculiarly Christian novelty. The duty to love the neighbor is a direct and universal requirement from God to which every person has to conform individually. Once aware of this duty, Christians will joyfully dedicate their lives to the fulfillment of the law (Kierkegaard 1995, 91–154).

The Attack Upon Christendom

In 1854 and 1855, Kierkegaard radicalizes his defense of true Christianity (Kierkegaard 1998a; Kirmmse 1998). The doctrinal, pedagogical, and

yet demanding tone used in his previous works now turns into an unembellished attack upon what he called "Christendom." Christendom represents the illusion that bounds together Christianity with culture and nationality. The fact that a person born a Dane is regarded immediately as a Christian is seen by him as a complete perversion. Thus, both State and Church become his target. Philosophically, Kierkegaard denies the Hegelian conception of the State as a moralizing agent (Tapia and Albertsen 2018). Its thrive to dominate everything led the State to take over Christianity when it was a profitable source of loyal servants. In this sense, Kierkegaard stresses, Constantine's conversion marks an inflection point in the political history of Christianity.

In Kierkegaard's eyes, this critique of the State does not absolve the Church. In his account, the Church embraced the State's protection and found refuge in a tailored institutional environment. According to Kierkegaard, Christ's message of a militant Church is replaced with the human glorification of the established Church. Kierkegaard relentlessly criticizes this demoralization in his final attack. Priests are publicly insulted by him as swindlers and even cannibals. Convinced that nothing diminishes spiritual conviction more than money, he instigates the common man to pay double in taxes and refuse to attend Church services (Buckdahl 2001).

Reception

Kierkegaard's final attack on the Danish established Church served as an inspiration for radical and socialist movements in Denmark, which toward the end of the nineteenth century and the beginning of the twentieth century adopted an active antiauthoritarian and anticlerical position. Although these agitators regarded Kierkegaard as a conservative, they gave credit to his critical ideas as a paradigm of liberation. The same approach was followed by the *Tidehverv* theological movement, which arose in the 1920s.

Outside Denmark, Kierkegaard had a considerable impact on the revitalization of Christian social thought in Germany. Among European authors positively and negatively influenced by Kierkegaard, we can find Carl Schmitt, Eric Voegelin, Hannah Arendt, Theodor Adorno, Herbert Marcuse, György Lukács, Theodor Haecker, Jean-Paul Sartre, Emmanuel Lévinas, Jacques Derrida, Jürgen Habermas, Alasdair MacIntyre, and many others.

The cultural radicalism of the 1960s certainly had less space for his religious views than previous generations. However, his social thought has been the object of renewed attention in the Kierkegaardian scholarship of more recent decades, as can be seen in the work of scholars such as Jørgen Bukdahl, Johannes Sløk, Merold Westphal, Martin Matuštík, Bruce Kirmmse, M. Jamie Ferreira, C. Stephen Evans, George Pattison, Stephen Shakespeare, Robert Perkins, Pia Søltoft, Jon Stewart, Patricia Cutting, Mark Dooley, and Sylvia Walsh, among others.

Cross-References

► Hegel, Georg Wilhelm Friedrich: On Justice
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Killing: Ethics of

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Introduction

From a legal point of view, the question about killing may seem straightforward. In all jurisdiction in well-ordered states murder is criminalized. The legal case is not so clearcut, however. It is true that murder is typically legally prohibited, but in certain circumstances you are legally *required* to kill other people (such as in war or when capital punishment is practiced). On the other hand, even if a person suffering in a terminal state requires help to die, it is in many countries forbidden for a physician even to help this person to commit suicide (physician assisted suicide), let alone actively and intentionally to kill this person at request (euthanasia). All this means that it is of interest to view the subject matter of killing from a *moral* point of view. In particular, it is of interest to try to find out what different moral theories tell us about when we should, and when we should not kill, and why. Both moral guidance and moral explanation are needed.

Now, since the views of the ethics of killing are as varied as are the legal practices in different times and places, it is necessary to look into the implications from the most influential moral theories, which are giving clear answers to the question of when we should (and when we should not) kill one another, and also to find out what kind of moral explanations are giving for the respective verdicts. Since there is disagreement among contemporary competent philosophers, it is necessary to draw a map of the moral landscape as it is seen from the perspective of each and any one of them. Here are the more specific topics that will be discussed:

- Killing in order to save lives (the trolley-cases)
- Suicide
- Euthanasia
- Abortion
- Capital punishment
- Killing in war

Killing of non-human animals will be left out of the discussion.

A description of the implications from the following three influential moral theories will be examined:

- Deontology
- Moral rights theories based on the notion of self-ownership
- Utilitarianism

This entry relies heavily on Tännsjö (2015). Other extensive treatments of the ethics of killing are Glover (1977) and McMahan (2002).

These theories will be clarified and then applied. They are special in that they often provide conflicting answers to the questions of killing, which means that at most one of them can be correct. They are also special in that they are supported by competent contemporary philosophers, who are unable to convince one another about their favored answers to the questions.

It is not possible to cover every theory in the field. However, a brief comment will also be made about some less deterministic and more context-sensitive theories.[1]

The Three Theories on the Ethics of Killing

Deontology is the idea that some actions are right or wrong or obligatory, regardless of the consequences. It comes in two versions of importance in the present context. On the one hand we have a tradition with roots in Thomas Aquinas, referred to in modern bioethical discussion as the Sanctity-of-Life Doctrine.[2] According to this doctrine, it is wrong intentionally to kill an innocent *human* being. There is also a Kantian version of deontology, claiming that it is wrong intentionally to kill a *rational* being, again regardless of the consequences.

In addition to the strict prohibition against intentional killing of the innocent, there is also a related deontological view called the principle of double effect. According to this principle, it might be right to kill an innocent human or rational being, if the death of this being is merely foreseen, not intended, and provided there is a reasonable proportionality between the good intended effect and the bad foreseen effect stemming from the same action. Furthermore, the good effect must not come as a consequence of the bad effect.

Immanuel Kant has also defended the view that one may never use a rational being merely as a means. All this will turn out to be of importance to the ethics of killing.

The moral rights theory, in the form here discussed, has been developed in modern time most famously by Robert Nozick.[3] According to the theory, morally speaking we own ourselves and we own what we have acquired in an appropriate manner. These rights are negative. They make up a kind of fence around each individual, a fence that should not without permission be transgressed by anyone else. No one should be killed, unless the individual in question has commissioned someone to do the killing, no one should be robbed of morally legitimate property. Each person possesses a categorical right to self-defense. The crucial idea is that no boundary-crossings should take place without the consent of the owner of the property.[4]

The moral rights theory, like Kantianism, focuses on *rational* beings (persons, or moral agents), rather than *human* beings. Some human beings, who are not moral subjects, such as severely demented people, lack moral rights. In principle there may also exist rational beings (aliens or sentient AI's) who are not humans. If there are such rational non-human beings, then they possess rights.

According to utilitarianism, an action performed by an agent in a situation is right if, and only if, there was nothing else in the situation the agent could have done such that, had she done it, the total consequences would have been better. What does "better" mean? Utilitarians give different and conflicting answers to this question. Some (hedonists) argue that what should be maximized is the sum-total of happiness (Jeremy Bentham and Henry Sidgwick). But since G.E. Moore, utilitarians have added other items to the list, such as knowledge, friendship, beauty, achievements and so forth. Derek Parfit has coined this view the "objective list theory".[5] There are also utilitarians who have stressed, in line with how economists and decision-theorists tend to think, that what

[1] For simple and broad introductions to normative ethics, including the theories discussed here but others as well, see (Rachels and Rachels 2019) and (Tännsjö 2013).

[2] About this tradition, see for example (Finnis 1983), Chap. 5.

[3] (Nozick 1974).

[4] (Nozick 1974), pp. 57–9.

[5] (Parfit 1984), App. 1.

should be maximized is the satisfaction of preferences (preferentialism).

Kill to Save Lives: The Trolley Cases

Killing is wrong, it is natural to believe. But what about killing that saves lives? Much discussed examples of killing in order to save lives are the "trolley" cases. They illustrate nicely the differences between deontology, the moral rights theory and utilitarianism. Here are the three standard trolley examples: The Switch, The Footbridge, and the Loop. They are extensively discussed in a debate inaugurated by two important moral philosophers, Philippa Foot and Judith Jarvis Thomson.[6] They are presented here and discussed in order.

The Switch. A trolley is running down a track. In its path are 5 people who have been tied to the track. It is possible for you to flip a switch, which will lead the trolley down a different track. There is a single person tied to that track. Should you flip the switch and have one person killed in order to save the five?

Deontology. It is received wisdom that, according to this theory, it is morally acceptable to flip the switch. The death of the person on the side track is merely foreseen, not intended, when the switch is flipped in order to save the five on the main track. And there is a reasonable proportionality between what is intended (five lives saved) and the bad effect foreseen (one dead).

From the moral rights perspective the conclusion is different. It is morally prohibited to flip the switch. Actively and physically to intrude on the private territory of the person on the side track, without consent, is wrong, period. It doesn't matter if this means that five other lives are saved. It took Judith Jarvis Thomson long time to reach this conclusion, but it is congenial with the moral rights theory.[7]

From the point of view of utilitarianism, it is morally obligatory to flip the switch. Flipping the switch saves lives.

The Footbridge. You are on a bridge under which the trolley will pass. There is a big man next to you and your only way to stop the trolley is to push him onto the track, killing him to save five. Should you push him?

Deontology. On the Sanctity-of-Life interpretation is should be permitted to push the big man. His death is a merely foreseen, not an intended effect of pushing him. And there is a reasonable proportionality between what is intended (the saving of five lives) and that bad effect foreseen (the death of the big man). Not all deontologists have accepted this assessment but it follows when the doctrine of double effect is applied to the case.

On the Kantian interpretation of deontology, however, it is wrong to push him. If he is pushed, then he is used as a mere means. It doesn't matter to Kant if he is treated as a means to the saving of lives. No end justifies the using of anyone as a *mere* means.[8]

The moral rights theory. Again, it is wrong to push him, and for the same reason that it is wrong to flip the switch in the previous example.

According to utilitarianism, it is obligatory to push the man. According to utilitarianism, the end justifies the means.

The Loop. As in the first case, you can divert the trolley onto a separate track. On this track is a single big man. However, beyond the big man, this track loops back onto the main line towards the five, and if it weren't for the presence of the big man, flipping the switch would not save the five. Should you flip the switch and have the big man killed in order to save the five?

Again, the Sanctity-of-Life Doctrine permits that the switch is flipped (the death of the big man on the track is a merely foreseen, not an intended effect, when five lives are saved). According to Kantianism, it is wrong: the man is used as a mere means. According to the moral rights theory, flipping the switch is wrong. His privacy (body) is invaded without his consent. And according to utilitarianism it is of course right to flip the switch.

[6] For the first contributions to this discussion, see (Foot 1978) and (Jarvis Thomson 1976).

[7] (Jarvis Thomson 2008).

[8] Pauline (Kleingeld 2020),

We get clear answers from the respective theories, then. It is of note, however, that most people (common sense morality) don't conform to *any* of them. In repeated experiments people have been willing to flip the switch in the loop and yet, they have not been prepared to push the big man in the footbridge.[9] What does that show? It is difficult to come up with a rationale behind common sense morality here, so perhaps this shows that there is something wrong with it?

Suicide

The implication from deontology, in both its Thomistic and Kantian versions, is straightforward. It is wrong intentionally to kill oneself. And on a plausible definition of "suicide," suicide means just that. It is no better intentionally to kill oneself than intentionally to kill another person.

The implication from the moral rights theory is equally straightforward. Since morally speaking we own ourselves, we are allowed to do as we see fit with ourselves. If we want to kill ourselves this is none of anyone else's business.

The utilitarian verdict is less clear. One might believe that, if the rest of a person's life is not worth experiencing, then this person has a right to commit suicide. This was David Hume's view.[10] However, Hume doesn't take seriously enough the external effects of our actions. When a person commits suicide, many people are affected by the action. Hence, it might be wrong to commit suicide even if the rest of life is not worth living. Only if committing suicide maximizes the sum total of happiness in the world is it permitted.

Euthanasia

"Euthanasia" means, in the present context, the intentional and active killing of a patient at the patient's request. Euthanasia is legal under certain circumstances in the Netherlands, Belgium, Luxemburg, and in Canada. According to Dutch legislation a physician is allowed (not legally required) intentionally and actively to kill a patient at the patient's request, if the patient finds her situation unbearable and if it is not possible through medical interventions to obviate the symptoms. The patient need not be terminal. This may seem reasonable. It is worse to have to linger on for a long rather than for a short time with unbearable suffering.

According to deontology, in both its versions, euthanasia is wrong. The patient is an innocent human (rational) being and must not be intentionally killed. Remember that even suicide is morally prohibited. According to the doctrine of double effect, it can be morally right to give a painkiller that, as a merely foreseen effect, kills the patient, but then the intention behind giving the painkiller must be to kill the pain, not the patient. In euthanasia the intention is to kill the patient (in order to save the patient from further suffering).

According to the moral rights theory, euthanasia is trivially right. Every person owns herself. Everyone is allowed to do as she sees fit with herself. If the patient and the physician agree that the patient should be killed by the physician, this is their business and the business of no one else.

According to utilitarianism, there are cases where it is clearly in the best interest of the patient to receive euthanasia. This does not settle the legal case, however. The utilitarian must query about the consequences of having euthanasia legalized. Most of the discussion about euthanasia, pro and against, has been conducted in utilitarian terms. Those who oppose legalization point at possible bad effects of such a system, they speak of a "slippery slope" we may end up on if we take the first legal step for allowing euthanasia, and so forth. Those who defend the practice have argued, on the other hand, that the consequences of legalization are on the whole better than the consequences of a system where euthanasia is prohibited.[11]

[9] The results are strikingly similar between all sorts of cultural variables, but there exists some recalcitrant evidence here. See (Ahlenius and Tännsjö 2012).

[10] (Hume 1777/2005).

[11] For a critical review of the evidence, see (Rietjens et al. 2009).

Abortion

What does it mean to perform an "abortion"? Here it will be assumed that an abortion means an active and intentional killing of a human fetus. When women defend their right to abortion this is typically what is meant. They do not want anyone else or an artificial womb to carry their pregnancy to term. They want no child to be born as a result of their pregnancy.

Here deontology comes apart in the verdict, as it did in the trolley case, but for different reasons. According to the Thomistic Sanctity-of-Life Doctrine, it is wrong, period, intentionally to kill an innocent human being. And it is clear that a fetus is an innocent human being. However, according to Kant, it is only the intentional killing of innocent *rational* beings that is prohibited. And a fetus is not a rational being. So, the intentional killing of a fetus is not wrong, according to Kant.

The moral rights theory concurs in the Kantian verdict and for the same reason. Fetuses are not rational creatures; fetuses are not *persons*.

According to utilitarianism, both persons and human beings are morally exchangeable. It might be obligatory to kill one fetus and to have another child instead, with better life prospects. However, in many situations where abortions are performed, the child, if it had been allowed to be born, would have enjoyed a long and satisfying life. And often there is no replacement for the aborted fetus. It is difficult to find a utilitarian defense of many abortions.

Kantians, moral rights theories, as well as utilitarianism struggle with an answer to the following question. If abortion is morally permitted, should the same be said about infanticide? For the utilitarian this boils down to the question about the consequences of having such a practice. For Kantians and moral rights theorists, the problem is where to draw a line when a child has developed rationality or personality. Up to that point it is morally permissible to kill the child. Michael Tooley has defended infanticide on such grounds.[12]

[12] (Tooley 1972).

Capital Punishment

Typically, deontologists have defended capital punishment for murder. The idea that human (or rational) beings must not be killed has been qualified: only *innocent* life is protected. If a person has committed murder, then this person ought to be executed.

When a murderer is executed, according to deontology, society pays respect to the murderer. By murdering a human (rational) being, the murderer has legislated for himself; when he is executed, he is given what he deserves and what he has implicitly asked for. This is so according to a standard understanding of Kantian thinking. A quote from Kant illustrates this:

> Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice (Kant 1999, p. 140).

However, the Sanctity-of-Life doctrine is sometimes taken to imply that even the life of the murderer is morally protected. Recent Popes have argued in principle against capital punishment.

Strictly speaking, from the point of view of the moral rights theory, there is no room for punishment. There is room for self-defense, there is room for restitution, and so forth. However, when a murder has been successfully committed, there is no way the victim can be compensated.

Few adherents of the theory have been happy with this implication from it. Robert Nozick has famously added to his theory some retributivist (deontological) thinking, to the effect that punishment is essentially "an act of communicative behavior" and the "message is: this is how wrong what you did was,"[13] and he has even

[13] (Nozick 1981), p. 370.

contemplated the possibility that the death penalty would be in some situations required. These deontological ideas of his sit ill with the core of his moral rights theory, however.

A utilitarian must take up a pragmatic view on capital punishment. If it can be proved to have a superior deterrent effect, if the practice of it means that fewer persons are murdered (and fewer persons become murderers), if there are no bad side-effects of practicing it, then a fairly strong utilitarian case for capital punishment can be constructed. To this can be added J.S. Mills observation that a life time in prison may mean more suffering for the murderer than being executed. For a critique of his view, however, see (Ten 2017).

On the other hand, if other kinds of punishment can achieve the same or better deterrent result, perhaps also cheaper, and with less serious side-effects, then the utilitarian must reject capital punishment.

Killing in War

During the last century a lot of rules, with their roots in an old moral — philosophical — tradition about just and unjust wars, have been established in international law, codified in the Laws of Armed Conflict (LOAC).[14] They specify both when war is legitimate, *jus ad bellum*, and how a war should be conducted, irrespective of whether it is just or unjust, *jus in bello*. Roughly speaking, the only just cause for war is self-defense (setting in the present context the thorny issue of humanitarian wars to one side), and *in* war, one can say that the doctrine of double effect is put to work. Regardless of whether the war has a just cause, it must be fought in a manner where civilians are not targeted, and where foreseen civilian casualties are kept at a minimum. Here a reasonable proportion must exist between what "good" you achieve (victory in the war) and the number of civilian losses. The situation may be such that even if a just war can be won it must not be fought since it cannot be won in a manner that respects the proviso about proportionality. On the other hand, an unjust war can be fought in a just manner.

It is of interest to try to find out whether a moral rationale can be found behind the LOAC. Here are the verdicts from deontology, the moral rights theory and utilitarianism respectively.

According to deontology, no human (or rational) life must intentionally be taken. Does that mean that radical pacifism follows from deontology? Perhaps not. Just as in capital punishment, there is a qualification of the prohibition against killing. We are allowed, perhaps even morally required, to kill those who deserve to be killed (murderers). This may prepare room for killing in self-defense, to the extent that the enemy soldiers can be seen as guilty of murder. It might be difficult to establish *mens rea* (a guilty mind) among drafted soldiers; however, who are perhaps lured into taking part in the aggressive war. And, certainly, it is impossible on this ground to establish a moral right for killing soldiers defending in a just war themselves and their country. Jeff McMahn has stressed this asymmetry which bodes ill for a moral justification of the LOAC. If the intention behind the war is evil there is no room for any reasonable proportion between the ill that is foreseen and the good that is intended. In aggressive war no good intention exists.[15]

The idea that civilians must not be targeted may seem too strong. What if it is possible to save some civilians in a group of people if this group is targeted? If, instead a military target is sought, these civilians will *all* be killed – but not intentionally. Should there be room for the intentional killing of some civilians in order to save some other civilians (in the same group)? Yes, says Frances Kamm.[16] No, a stricter adherent of the deontology would claim. After all, the very

[14] The extent to which these rules have roots in the philosophical tradition may sometimes have been overemphasized in the present discussion. See (Reichberg 2008).

[15] (McMahan 2009)

[16] (Kamm 2012), p. 447.

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point in deontology is the idea that one should never aim at something evil. This is the rationale behind the theory famously given by Thomas Nagel:

> . . . to aim at evil, even as a means, is to have one's action guided by evil. One must be prepared to adjust it to insure the production of evil: a falling-off in the level of the desired evil becomes a reason for altering what one does so that the evil is restored and maintained. But the essence of evil is that it should *repel* . . . so when we aim at evil we are swimming head-on against the normative current.[17]

According to the moral rights theory there is a right to self-defense, which doesn't rely on any ideas about the perpetrator deserving to be punished. So defensive war, where attempts are made to save civilians, can gain support from the moral rights theory. However, once again, it is difficult to see how the symmetry can be maintained. It is wrong, plain wrong, to invade the private space of others without their consent, and when they defend themselves, they are allowed to take what measures are needed to ward off the attack. An aggressive war cannot be fought in a just manner, according to the moral rights theory.

Utilitarianism may seem to present a more promising ground if the idea is to find a moral rationale behind the LOAC. If the consequences of having them in place are the best, then there should be such international law. However, this does not mean that utilitarianism provides a rationale for abiding by these laws in every instant. These laws prohibit state terrorism, they prohibit atrocities such as the atom bombs over Hiroshima and Nagasaki. And yet, for all that, if it can be shown that these acts of state terror shortened the war and saved lives, they may find a utilitarian defense. The utilitarian will then have to say that these acts were morally right, however blameworthy. And in order to keep the respect for the LOACs, it would perhaps have been right, according to utilitarianism, to punish Harry S. Truman for his morally blameworthy right-doing.

[17] (Nagel 1986), pp. 181–182.

Other Theories?

The three theories discussed so far yield conflicting implications. This means that at most one of them can be true. But are there no other alternatives to be considered?

First of all, ethical egoism is clearly an alternative. It is debatable whether egoism should be considered a moral theory, but since it has implications inconsistent with the ones from moral theories such as the three here discussed ones, it is reasonable to acknowledge it in the present context. However, the idea that an agent ought to kill if and only if there is no alternative with better consequences *for the agent*, doesn't seem very attractive.

There is an approach to moral theory called intuitionism. The main advocate of intuitionism was W.D. Ross.[18] According to intuitionism moral theories provide us with no categorical answers to the question what to do but merely with prima facie or pro tanto *reasons* for action. This allows the intuitionist to claim that all the theories we have discussed may be true, and when they all point in the same direction it is clear what to do. However, whenever there is conflict — and we have seen that conflict is typical of problems with killing — they are silent. Yet, some alternative in the situation is morally permissible or obligatory. Which one? It takes a special sensibility, according to the intuitionist, to decide (in the situation) which principle takes precedence.

An even more context-sensitive approach is presented by particularism. The main advocate of this position is Jonathan Dancy.[19] According to particularism, all moral theories are false. However, in line with how intuitionists think, the particularistic thinker holds that in a situation there are right and wrong particular actions.

How could the right action be found? Both intuitionism and particularism often come with a virtue ethical addition. It is possible to develop a kind of moral expertise, characteristic of a

[18] (Ross 1930/1973.

[19] (Dancy 2003).

virtuous person, allowing that one can decide reliably in the situation about right and wrong action.

Conclusion

In contradistinction to the three categorical theories here discussed, intuitionism, particularism and virtue ethics in general do not lend themselves to any simple kind of refutation. It is possible to find that the implications from, say, deontology, are not acceptable, and hence reject the theory and start a search of a better alternative theory (explaining the relative success of deontology and at the same time catering better for our intuitions in relation to some of its implications). It is difficult to see that intuitionists or particularists can avail themselves of any similar method in their search of moral truth.

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Introduction

Otto Kirchheimer (1905–1965) was one of a group of young German-Jewish lawyers driven into exile after 1933, where they had to establish new livelihoods and restart their professional careers as scholars, some under the most difficult conditions.

The political and academic experiences and conflicts he lived through in the Weimar Republic, the National Socialism, the French and American exile, and the phases of the founding and establishment of the two newly emerging German

states after 1945 are reflected in Kirchheimer's multifaceted academic oeuvre in a virtually unique way (Schale et al. 2018).

Kirchheimer was born on November 11, 1905, into a German-Jewish family in Heilbronn, in a small city in the southwestern German state of Baden-Wuerttemberg. He was the youngest of six children. Both his mother and his father died during his childhood and teenage years. Thanks to the family money he inherited, he could be sent to excellent private boarding schools. As a boy, he enthusiastically joined the socialist German-Jewish youth movement *Die Kameraden.* Later on, Kirchheimer studied philosophy, history, sociology, and law from 1924 to 1928.

Loyal Critique of the Weimar Constitution

He began his studies with the neo-Kantian philosopher Karl Vorländer in Münster. During this time, he joined the German Social Democratic Party (SPD) and became active in the left wing of their youth movement (*Jungsozialisten*). In 1925, he moved to Cologne to take classes with the sociologist Max Scheler and then to Berlin to study law and constitutional theory with Rudolf Smend and Hermann Heller.

Smend encouraged him to move to Bonn in order to study with Carl Schmitt. Despite their diametrically opposed views, the polemically minded Schmitt relished the discussions with the young Kirchheimer, who quickly became a sort of leftist "wunderkind" in Schmitt's Bonn circle (Mehring 2014: 131–163; Breuer 2012: 111–41). Under Schmitt's supervision, Kirchheimer completed his doctoral thesis on constitutional theories in socialist and Bolshevik political thought in the beginning of 1928 (Kirchheimer 1928).

In 1930, Kirchheimer moved back to Berlin where he got a job at the law office of Franz L. Neumann and Ernst Fraenkel. The office worked for the labor unions and the SPD. Kirchheimer was skeptical of Fraenkel's and Neumann's defense of social democratic reformism. He also reestablished contact with Schmitt who had also moved to Berlin too. Schmitt's diaries indicate the intellectual exchange between the two of them as well as the harsh anti-Semitic reservations Schmitt personally had about Kirchheimer.

Kirchheimer became prominent among left social democratic circles with his article "Weimar – and What Then?" in which he diagnosed the constitution of the Weimar Republic in all of its details as a "constitution without decision" (Kirchheimer 1930: 71) and his call to move ahead in order to found a socialist democratic republic. After 1930, he defended the Weimar constitution in a number of articles against its enemies on the political right and focused his criticism against Carl Schmitt in particular (Kirchheimer 1932) as a loyal critique of the Weimar Republic (Buchstein 2018b).

Entanglement with the Frankfurt School in Exile

Shortly after the election in March 1933 that secured Hitler's power, the Gestapo took Kirchheimer into custody. After his release, he quickly managed to escape to France. In Paris, he rejoined his wife. Having lost all his inheritance, he desperately tried to find work as a journalist and translator. In Paris, Kirchheimer joined a group of young academics including Walter Benjamin and Arkadij Gurland and got on the payroll of the exiled Frankfurt Institute for Social Research (ISR) on a part-time basis in order to do research on criminal law and criminology.

In 1937, he moved to New York where he got a part-time contract at Max Horkheimer's ISR, which was now loosely affiliated with Columbia University. During this time, he completed the book *Punishment and Social Structure* (Kirchheimer and Rusche 1939) which soon became a classic in the field of Critical Criminology. The book presents the historical evidence for the economic reasons for certain regimes of punishment and its changes. Kirchheimer also published on the legal structure of Nazi Germany and became an internal Marxist critique of the theory of State Capitalism formulated by Horkheimer and others at the ISR (Kirchheimer 1941; Buchstein 2020).

In 1943, Kirchheimer was employed in the Research and Analysis Branch of the newly established Office of Strategic Services (OSS) in Washington DC. In collaboration with John H. Herz and Herbert Marcuse, he prepared documents on the legal grounds for bringing the political elite of Nazi Germany to trial after the war.

After the war, his branch was moved to the Department of State where Kirchheimer stayed until 1955. During this time, he wrote extensive reports about West European politics, including political parties, the judicial systems, elections, and foreign policy. He achieved a professorship in political science at the New School for Social Research in New York in 1955 and a full professorship in political science at Columbia University in 1960.

Late Work on Political Justice and Political Parties

Kirchheimer became a very productive academic writer. He finished his opus magnum *Political Justice* in 1962, wrote numerous reviews for newspapers and journals, and published a number of articles about European political systems in general and about structural changes in party systems in particular.

In his late work, Kirchheimer tends to sound more skeptical than in his early writings. He diagnosed Western countries like the United States in particular as consumer-dominated societies which individualize and depoliticize its citizens (Kirchheimer 1967). His invention of the label "catch all party" for the emergence of a new type of political parties soon gained him lasting prominence in the field of comparative political science (Kirchheimer 1965). His next plan was to write a comprehensive book on the role of political parties in late capitalist societies. Otto Kirchheimer died by a fatal heart attack on 22 November 1965.

Conclusion

Today, Kirchheimer is received above all as a leftist student of Carl Schmitt, as a critical analyst of the Weimar Constitution, as an inspirator of comparative political science research on parties, as the author of the book *Political Justice*, and as one of the founding fathers of Critical Political Science who paved the way for the work of early Jürgen Habermas.

Furthermore, his work is particularly discussed in the context of the historiography of the Frankfurt School in exile. The edition of his Collected Works in six volumes appeared between 2017 and 2021.

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Introduction

Julius Hermann von Kirchmann (1802–1884) was a German jurist, philosopher, and politician. Although he went down in history for his lecture *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (*The Worthlessness of Jurisprudence as a Science*), he was a man who intensely engaged in various activities. His prolific literary production includes *Die Philosophie des Wissens* (*The Philosophy of Knowledge*), *Aesthetik auf realistischer Grundlage* (*Aesthetics on a Realistic Basis*), *Die Bedeutung der Philosophie* (*The Significance of Philosophy*), *Ueber das Prinzip des Realismus* (*On the Principle of Realism*), and *Katechismus der Philosophie* (*Catechism of Philosophy*). Thanks to his erudition and intellectual depth, as well as his vast command of languages, he bequeathed to posterity a collection of inestimable cultural value, the *Philosophical Library*, of which he was founder, editor, and translator.

Kirchmann was born on November 5, 1802, in the village of Schafstädt, west of Merseburg, Germany (then Prussia). He began his law studies at Leipzig University in 1820 and graduated from the University of Halle. In July 1823 he was appointed *Auskultator* to the Magdeburg courts, where in March 1827 he assumed office as *Referendarius* and in January 1829 as *Assessor* at the Higher Regional Court.

In May 1829 he was designated *Assessor* at the Higher Regional Court of Naumburg and in December 1833, criminal judge in Halle. A year later, he married Henriette Butte (1815–1880), a woman especially interested in literary and historical issues, with whom he had two daughters (Wiethölter 1988).

He was *Landgerichtsdirektor* and *Kreisjustizrath* from 1834 in Querfurt and from 1839 in Torgau. In 1844 he received the Order of the Red Eagle, 4th Class, in recognition of the creation of the land registry for most of the Province of Saxony (Holz 1977). In 1846 he settled in Berlin, where he became prosecutor (*Staatsanwalt*) of the criminal court, and two years afterward he was chosen to the Prussian National Assembly as a member of the center-left sector led by Rodbertus.

In July 1848 he was appointed vice president of the Racibórz Court of Appeals and president of its criminal tribunal. Owing to a controversial decision in favor of Count Oskar von Reichenbach, who had been accused of high treason, in 1850 Kirchmann was suspended and his salary halved. After several unanswered requests for transfer, he was granted five years' paid leave in 1855, subject to the conditions that he did not reside in Berlin or Königsberg and that he refrained from any political agitation (Sternberg 1906). He then purchased the Rabenau estate, located between Dresden and Tharandt, where he would spend a long period dedicated to studying and writing, given that in 1860 his leave was extended. In 1861 he was elected deputy of the Progressive Party to the Prussian House of Representatives, and in June 1863 he resumed his service at the Racibórz Court of Appeals. In 1866 he gave a lecture at the Berlin Workers'

Association entitled *Über den Communismus der Natur* (*On the Communism of Nature*), in which he advocated birth control. This led to his dismissal the following year along with the loss of all pension rights.

Once again based in Berlin, he became a member of the Reichstag of the North German Confederation (1867–1871) and of the German Empire (1871–1876) and performed a prominent role in the reform of the Penal Code in 1870. Simultaneously, he served a second term as a deputy in the Prussian House of Representatives (1873–1876). Furthermore, he regularly participated in the Philosophical Society, whose presidency he assumed in 1878. This was also his most fruitful intellectual stage, as he published ten books of his authorship and more than forty analytical commentaries of classical works. His last task, which he carried out while struggling with severe ailments, was the translation of Comte's *Positive Philosophy*. He died in Berlin on October 20, 1884.

Philosophical Thought

Kirchmann is considered an exponent of direct realism, as well as an opponent of materialism, idealism, and apriorism. He described his realism as a science of experience in which philosophy is forced to abandon its hubristic attempts to cognize beyond perception. In his view, even if philosophy could accomplish such a cognition, it would fall silent in its attempts to communicate it (Giesbers 2017).

One of his theses was, "Being is inexhaustible." From this principle, he derived the necessity to combine thinking and acting, knowledge and reality, the general and the individual, to achieve the greatest possible harmony. Besides, he argued that the theory of science was the result of a complementary balance between philosophy and particular disciplines (Holz 1977). The two fundamental tenets of his realism were, "What is perceived is, i.e., it exists," and, "What is self-contradictory is not," (Hartmann 1875) an assertion which showed his rejection of Hegel's dialectic.

In his opinion, ethics is based solely on feelings of respect, not on those of fear. Instead of autonomy, he used heteronomy for the empirical universe. The Kantian categorical imperative is not consistent because of its purely formal character; every moral judgment is linked to an idea of commandment and is tantamount to respecting the authorities, who, in turn, act driven by their desires but conditioned by their time and in accordance with the popular spirit. Thus, arbitrariness is not the culmination; there actually is a moral world (Sternberg 1906).

From the jusphilosophical perspective, Kirchmann was critical of positivism, formalism, and legalism and anticipated the anti-formalist movements – the Heck's *jurisprudence of interests*, the Jhering's *teleological jurisprudence*, and the Fuchs and Kantorowicz's *free law school* – that flourished in the late nineteenth century, of which he can be considered a forerunner.

The Worthlessness of Jurisprudence as a Science

In 1847 Kirchmann gave a lecture at the Juridical Society of Berlin, entitled *The Worthlessness of Jurisprudence as a Science*, which caused an unusual sensation (Larenz 1966).

He asserted there that jurisprudence lacked scientific value, prestige, and influence on the life of peoples. He argued that it had been stagnant since the time of Bacon, stuck in the principle of observation and the subordination of speculation to experience. Its controversies had not diminished but increased. However, its nonscientific character was beyond human intervention and arose from inhibitory forces inherent in its object of study, which hindered efforts for its knowledge.

On the basis of this assumption, Kirchmann commenced a comparative analysis between the object of natural science and that of jurisprudence. Unlike other academic disciplines, the object of jurisprudence is in constant flux. While the phenomena of nature maintain their characteristics over time, legal changes seem to be erratic and accidental. Marriage, family, the state, and property have taken on various forms throughout

history. It is typical of every science that its truth is slowly attained; but although the discovery of the laws of nature has required copious efforts, they operate for today, the past, and the future. The situation of jurisprudence is different: when, after many years, it manages to find out the law of an institution, its object of study has already changed (Novelli 2018). Jurisprudence is always behind time; it can never reach the present. "Three corrective words of the legislator and entire libraries turn into waste paper" (Kirchmann 1848).

A second issue noted by Kirchmann was that jurisprudence does not develop with the objectivity of the natural sciences. Its object is not only in knowledge but also in feeling. Legal research is interfered by human inclinations, which present problems solved in advance and do not pursue the search for truth but the satisfaction of the passions of judges, lawyers, and legislators.

A third question that he identified by means of the aforesaid comparison was positive law. All the natural sciences have laws that do not influence their object. In contrast, positive laws, hybrid entities composed of being and knowledge, act backed by force and prevail over the object. An error in jurisprudence affects its object, since the legislator stamps on his creation the scientific errors in which he himself participates. Jurisprudence thus precludes the juridical progress. "Positive law is a weapon without a will, submissive to the wisdom of the legislator and the passion of the despot" (Kirchmann 1848).

Kirchmann adopted the predominant positivist scientific paradigm at the time. Since the Renaissance, for its validity, science had to be based exclusively on universal notions, as postulated by Aristotle. There could only be science of *the general*. Kirchmann's principal objection laid, ergo, on the *individual nature* of law compared to *generality* of other scientific subjects, since the possibility of disciplines of *the particular* had not yet been discovered (Novelli 2018).

However, this argument, pointed out as a determining factor to prove the lack of scientific rigor of jurisprudence, gradually weakened during the second half of the nineteenth century and the first half of the twentieth century, with the emergence of an idea of science of *the singular*, initially intended to substantiate the scientific character of history (Novelli 2006).

Kirchmann likewise focused his criticism on the activity of jurists. He even advocated the abolition of lawyers and judges, by recalling ancient cultures which did not know the legal profession and yet had achieved great development.

In the end, he stated that jurisprudence was not only methodologically pointless but highly harmful because its abstractness destroyed the feeling for justice (Reimann 1990).

The *Philosophical Library*

The *Philosophical Library* (*Philosophische Bibliothek, PhB*) constitutes another imperishable legacy that Kirchmann left to humanity. It is the oldest and most comprehensive collection of scientifically commented and systematized philosophical writings, which continues to be published today. Kirchmann founded it in 1868 with the aim of bringing together the main works of philosophy of all time, making them widely available in their original wording and, in the case of texts in a foreign language, in their German translation.

The series was primarily published by Ludwig Heimann (Berlin), then by Erich Koschny (Leipzig) from 1872 and Georg Weiss (Heidelberg) from 1882; other companies proceeded with the task later. As a cultural phenomenon, the *Philosophical Library* extended the dissemination of knowledge to a nonacademic environment, given that readers had access in their native language.

Kirchmann was the editor of the collection for sixteen years and accomplished an extraordinary labor. Thanks to his mastery of Latin, Greek, French, English, and Italian, he translated twenty-six works by authors like Aristotle, Cicero, Bacon, Grotius, Hobbes, Descartes, Locke, Spinoza, Leibniz, Hume, and Comte. He also published forty-two volumes of commentaries on such texts, as well as on others by Plato, Kant, Fichte, and Schleiermacher, which earned

him especial praise from his contemporaries (Schneider 1999). Additionally, he incorporated two lengthy treatises of his own, entitled *Die Lehre vom Wissen* (*The Theory of Knowledge*) and *Die Grundbegriffe des Rechts und der Moral* (*The Fundamentals of Law and Morality*).

Kirchmann's relentless work resulted in the fact that, at the moment of his death in 1884, the *Philosophical Library* had already published 105 volumes and over 160 editions, including texts of classical Western philosophers from roughly 2,400 years of history.

Conclusion

Kirchmann was a multifaceted person committed to society. Moreover, he made contributions that transcended his time and reached the future, like his famous lecture *The Worthlessness of Jurisprudence as a Science* and the *Philosophical Library*. Such milestones, products of an intellectual brilliance that he complemented with determination, established him as an outstanding figure in the philosophy, law, and political life of nineteenth-century Germany.

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Kirste, Stephan

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Introduction

Stephan Kirste (*12 November 1962 in Oldenburg, Germany) is a German legal scholar, focusing on legal philosophy, interdisciplinary relations

of legal science, and constitutional law. His research interests include human dignity, legal anthropology, freedom of will, the rule of law, and law and literature. He holds positions as a professor of legal and social philosophy at the University of Salzburg and associate professor ("professor colaborador") at the Brazilian Pontifícia Universidade Católica do Rio Grande do Sul.

Biography

Stephan Kirste completed his doctorate at the University of Freiburg under the supervision of Alexander Hollerbach on the topic of "The Temporality of Positive Law and the Historicity of Legal Consciousness" (Kirste 1998) and subsequently passed the German bar examination (so-called 2nd state examination). Since 2004, Kirste has been qualified to teach German public law, philosophy of law, sociology of law, and constitutional history, which the University of Heidelberg awarded him (so-called Habilitation). His habilitation thesis was published under the title "Theorie der Körperschaft des öffentlichen Rechts – verwaltungsgeschichtliche, organisationstheoretische und verwaltungsorganisationsrechtliche Aspekte" (Kirste 2017). From 2006 to 2009, Kirste acted as Dean and Professor of Public Law and its International Relations at the International Andrássy University of Budapest followed by the position as Professor of Philosophy of Law and Social Philosophy at the University of Salzburg since 2013. In 2021, he was announced as Head of the Department of International Law, European Law, and Foundations of Law.

Kirste is strongly committed to cultivating current German-language, Brazilian, and international philosophy of law. Inter alia, he acted as president of the German section of the International Association for Philosophy of Law and Social Philosophy (IVR) from 2010 to 2018, is a visiting professor at various universities in Brazil and the USA and, together with Mortimer Sellers, edits the present "Encyclopedia for the Philosophy of Law and Social Philosophy" (Kirste and Sellers 2020) as Chief Editor on behalf of the IVR.

About the Work

Stephan Kirste is a German-speaking, continentally oriented legal philosopher who deals broadly with historical and theoretical topics: Namely, he devotes himself to the concepts of human dignity, justice, and freedom and, on the historical side, to the philosophy of law in the modern era.

The foundation of his theory of law is a theory of legal philosophy and jurisprudence. Accordingly, Kirste defines legal philosophy as a reflective discipline of all forms of legal thought. He, therefore, strives for active interdisciplinarity (Kirste et al. 2012; Kirste 2016), especially in the field of law and literature (Kirste 2015, 2021, 2022).

Kirste has contributed to legal theory with studies on concept and validity, the temporality of law (Kirste 1998), and the legal person (Kirste 2015). According to Kirste, law consists of the conglomerate of norms whose setting and enforcement are standardized. This reflexive structure distinguishes it from both forms of violence and morality. They require a subject of attribution. This is the legal person. Their dignity demands that all human beings be recognized as legal persons. Besides human beings, other entities can also be constructed as legal persons (Kirste 2015, 484; Kirste 2017, 41 f.). For him, human dignity is the basis of human rights, but its content is exhausted in the mediation of the *status subjectionis* (Kirste 2010). For Kirste, this status includes submission to law, which is determined by active participation itself.

In legal ethics, he works on justice, defined as the balance between freedom and equality based on human dignity. Legal equality is based on the equal dignity of legal subjects. This is also the basis of legal freedom (Kirste 2020b, 184). This theoretical approach builds a bridge to current issues such as populism (Kirste 2019; Kirste and Paulo 2021). In the field of legal ethics of

medicine, he works on the tension between paternalism (Kirste et al. 2006) and self-determination (Kirste 2011) and currently on global pharmaceutical justice.

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Kollontai, Alexandra

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Introduction

Alexandra Kollontai (1872–1952) was a Russian revolutionary, minister, diplomat, and socialist feminist thinker. From 1908 to 1917, in political exile from the Tsarist regime, she traveled in Europe as a political agitator. In this period she wrote her first essays and fiction stories on love and politics, and on connections between the private and the political.

Returning to Russia she became part of the first revolutionary government, headed by Lenin. Before long, however, their different political priorities and styles became apparent. Kollontai was an internationalist, and like Rosa Luxemburg she believed in the creative force of proletarian mass movements for changing not just state and politics, but also daily lives. She was a leading force in setting up a specific women's organization within the Bolshevik Party. In 1921 she acted as a spokesperson for the Worker's Opposition, critical of Lenin's top-down political style. In 1922 she was removed from the Soviet Union, posted as a diplomat in Norway, later Sweden, and in 1945 she was called back to USSR, living her last years in Moscow.

1899–1917: Political Activist and Agitator with a Focus on Women's Lives

Kollontai grew up in a liberal-minded upper class family in St Petersburg; her father was a general. She married young; her son was born 1894. In 1898 she left her family for Switzerland, studying Marxist economics. Nevertheless, all of her life she maintained a close relationship with her son. In 1899 she returned to Russia, a lady of the bourgeoisie, secretly however a political activist and writer. In 1908 she was forced into political

exile in Europe, on the run from the Tsarist police. From 1908 to 1914, most of the time she lived in Berlin and Paris, traveling from there to other European countries as a Social Democratic speaker and agitator. With the outbreak of World War I she was expelled from Germany, from 1915 living mainly in Norway. Kollontai was a very good-looking woman with a charismatic personality, prolific as a political speaker, spellbinding her audience. In this period she gained international acclaim as an orator of great talent and in many languages: Russian, German, French, and English, later also Norwegian and Swedish. The period before 1914 was a time of internationalism and unity of the European working class movement. The German Social Democratic party had a leading role, and as for working class women, Clara Zetkin (1857–1933) was the key political organizer and theorist. During these early years Zetkin acted as a mentor for the younger Kollontai.

1917–1922: People's Commissar for Social Welfare; Head of the Zhenotdel; Disagreements with Lenin

Having oscillated between the Menshevik and the Bolshevik fractions of the Russian Social Democratic Party, Kollontai in 1915 joined the Bolsheviks. On her return to Russia in 1917, after the February Revolution, she worked closely with Lenin. When after the October Revolution the first Soviet Government was put in place, Kollontai was appointed People's Commissar (Minister) of Social Welfare. As a People's Commissar she was responsible for change of laws in various fields pertaining to family and welfare, partly in order to limit the influence of the Church, and partly in order to introduce welfare measures for people in need, orphaned children, and pregnant mothers among them. Nevertheless, after just half a year, along with other left wing members of the cabinet in protest against the Brest-Litovsk peace treaty March 1918, she resigned from her position as a minister. This was the starting point of her disagreements with the Leninist line, to be continued in following years. The Bolshevik left wing saw in the separate peace between Soviet Russia and imperial Germany the beginning of "Socialism in one Country" politics, and thus a betrayal of internationalist solidarity with working class struggles elsewhere. At this point in time, with fierce class struggles in several European countries, a world revolution was still on the agenda.

Kollontai nevertheless continued with Party work, predominantly engaged in work among working class women, preferably at district and factory levels, in direct contact with the women; this was where she learnt about women's lives and their ideas. Along with other Bolshevik women she worked incessantly for persuading Party bosses to allow a separate Party section for work among women. This was an uphill struggle; Party men labeled such work bourgeois feminism, seeing it as undermining the unity of the working class. Nevertheless, in 1919 Kollontai and her co-fighters obtained the necessary support, and the Zhenotdel was created (Farnsworth 1980). The Zhenotdel had representatives in each of the Commissariats to protect women's interests. From 1920 to 1922 Kollontai worked as director of the Zhenotdel.

Kollontai's second head-on disagreement with the Leninist line of the Bolshevik Party happened in 1921, when at the tenth Party congress she acted as a spokesperson for the Workers' Opposition. The Opposition was a critique of Lenin's so-called New Economic Policy (NEP), in which he diverted from the principle of collectivism, which had been the ruling order during the Civil War period (1918–21), going back to a more bourgeois style of one-man expert leadership of industry and production, drawing on economic and practical expertise by persons from the previous ruling class. The Workers' Opposition feared that the collective spirit and the dynamics of the revolution thereby would be lost, and Kollontai in addition feared a reemergence of old style gender relations of dominant men and dependent women. In her arguments for the political position of the Workers' Opposition, she insisted on socialism as rooted in lived experience: The vanguard of the class (i.e., the Party) can organize the revolution, but socialist society as such must be constructed

bottom-up, building on experience and struggles of working class men and women.

In this line of thinking Kollontai was inspired by Rosa Luxemburg: "Socialism will not be and cannot be inaugurated by decrees; it cannot be established by any government, however admirably socialistic. Socialism must be created by the masses, must be made by every proletarian" (Luxemburg 1918/2010, 252). Kollontai criticized Bolshevik Party bosses for treating trade unions as organizations for teaching workers principles of socialism, the Party bosses themselves being the teachers. No, she said, this is not how it is; top-down command does not make it, "[communism] can be created only in the process of practical research, through mistakes, perhaps, but only by the creative power of the working class itself" (Kollontai 1921/1977, 187).

Lenin and Trotsky had different opinions. Significantly, in the ensuing discussion Trotsky spoke of "the dictatorship of *the Party,*" not the dictatorship of the proletariat, as classical Marxism has it. Kollontai and the Workers' Opposition were thoroughly rebuked and ridiculed; the response from Lenin was a decree banning future fractioning within the Party. Kollontaj was removed from all positions of responsibility, including her membership of the Executive Committee of the Komintern and her directorship of the Zhenotdel. The following year she was exported out of the Soviet Union returning only on visits, until after the end of World War II, when – now an old woman – she was allowed to live again in the Soviet Union.

Socialist Feminist Thinker

In some respects the exile years in Europe – including a trip to the USA in 1915 – was a peak period in Kollontai's career. She was young, she was beautiful, she was sharp and engaging in her political address, audiences loved her. In this period, in addition to political speeches and pamphlets, Kollontai also wrote fiction stories, often working through problems and dilemmas in her own life, and she wrote essays. In essays and fiction, problems and issues of gender relations and meanings of emotions and love are predominant. Kollontai was exceptional in her time, because she insisted on connections between the private and the political, along with the necessity of changing power relations of gender along with changing power relations of class. Power relations of gender she saw as prevalent everywhere in society, manifesting itself not just in economic and political power, but also in the minds and feelings of men and women of all classes. One area where she perceived it clearly and where she also objected to it in her own life was the ways in which women came to see themselves through the eyes of their husband or lover: how the male gaze determined the self-conception of a woman. Kollontai wanted women to rely on their own merits, to see themselves with their own eyes.

Kollontai was a socialist and a marxist; nevertheless, in order to develop her ideas she sought inspiration from nonworking class authors. In the late nineteenth and early twentieth centuries women fiction writers wrote about women's dilemmas between love and work. Kollontai read their books, applying their thinking to working class women's situation. In her essay "The new woman" (1913), she describes the unmarried working class woman as the new woman of the future. Brought up in a male-dominated world, the new woman has to fight not only capitalism's subjugation of the working class, to which she belongs, she also has to fight her own inclination to let her life be determined by relations of love: "She is constantly fearful that the power of feeling might [induce] her to become the shadow of the husband, might tempt her to surrender her identity, and to abandon her work, her profession, her life-tasks" (Kollontai 1913/1977, 89).

Kollontai's heroine is the woman who relies on herself and her work, and who – even in an intimate relationship – maintains her independence of her husband/lover, emotionally as well as economically. However, coming thus far is not plain sailing, it is a constant struggle. "The old and the new struggle in the souls of women in permanent enmity. Contemporary heroines therefore must wage a struggle on two fronts: with the external world and with the inclinations of their

grandmothers dwelling in the recesses of their beings" (ibid. 102).

Kollontai developed her socialist-feminist thinking in a new round of essays and fiction writings in the first year of her Norway exile, 1922–23. In the fiction stories, published in Russia in 1923 as "Love of the worker bees," she presents in a fictional form her critique of the New Economic Policy (NEP), focusing on its implications in terms of re-traditionalizing gender relations. The essays have as a common title "Letters to the working youth." Here Kollontai again makes it a point to pull down the distinction between the private and the political, arguing for the need to extend the arena of political struggle to private lives, and also the other way round: bringing emotions from private lives into politics. In her essay "Make Way for the Winged Eros" (1923) she develops a notion of "love" beyond the conventional idea of marital love between a man and a woman, into an idea of love-comradeship as a strong and creative social force: "The new communist society is being built on the principle of comradeship and solidarity. Solidarity is not only an awareness of common interests; it depends also on the intellectual and emotional ties linking the members of the collective. For a social system to be built on solidarity and cooperation, it is essential that people should be capable of love and warm emotions. . . . All these 'warm emotions' – sensitivity, compassion, sympathy and responsiveness – derive from one source: they are aspects of love, not in the narrow sexual sense, but in the broad meaning of the word. Love is an emotion that unites and is consequently of an organizing character" (1923/1977, 285). Kollontai is hopeful and optimistic about the future: "With the realization of communist society," she says, "love will acquire a transformed and unprecedented aspect. . . . Love potential will have increased, and love-solidarity will become the lever that competition and self-love was in the bourgeois system" (ibid. 290).

Kollontai's lofty ideas about love-comradeship and love-solidarity in the collective were not much appreciated by her fellow Bolsheviks. In 1923 her "Letters to the Working Youth" were fiercely and hatefully criticized by women of the Bolshevik party in the increasingly harsh climate of political debate in Moscow and Leningrad (Clements 1979). The openness toward new ideas and new ways of life, characteristic of the first years after the 1917 Revolution had come to an end. Kollontai's last intervention in Soviet debate, commenting in 1926 on a new family law, was partly criticized, partly bypassed in silence; she was already marginalized. In 1924, she realized with sorrow and pain that a book published in Moscow, on the history of organizing of women in Soviet Russia, did not even mention her name – she, who had been the soul and the driving spirit of the women's organization (Farnsworth 2010). The maneuvers of political erasure, plentiful during the Stalin era, had begun.

1922–1945: Soviet Diplomat. Confinement and Acquiescence

In October 1922 Kollontai was assigned to a post in the newly established Soviet representation in Oslo, Norway. She was happy about the assignment, because she needed a break, but in no way did she expect to be a diplomat for the rest of her life. Seeing herself as a spokesperson for women's politics rather than as a promoter of trade arrangements of Norwegian herring to Soviet Russia (her initial task in Norway), she wanted to get back to writing and politics. In Paris and in Berlin her stories and essays were very well received. In Paris 1923 a selection of short stories and essays had been published with illustrations by Matisse, and in Berlin 1925 her "Love of the worker bees" (in German "Wege der Liebe") was published in large editions with much acclaim. After 3 years in Norway, also having arranged for Norway's *de jure* recognition in 1924 of the Soviet Union (as one of the very first countries to do so), she asked for resignation from her diplomat job. This was granted in the spring of 1926, initially in terms of a long-term leave of absence to be spent in Baden-Baden, a German health resort.

The year 1926 seems to have been one of uncertainty in Kollontai's life. In letters to

European friends she considers the possibility of quitting the Soviet Union and the Bolshevik Party for a life as an independent writer somewhere in Europe (Kollontay 1977). On the other hand, quitting the Party was not easily done, neither in practical nor in emotional terms (Clements 1979). Her personal and political identity was tied up with the Russian revolution; the Bolshevik Party was her home. Most likely she realized that her options were limited, and that after all continued life as a diplomat might be a lesser evil. Kollontai's uncertainties are exposed in her substantial corrections in July 1926 to the autobiographical text: *The Aims and Worth of my Life* (Kollontai 1926/1972), which few weeks before she had sent to a German editor, as a contribution to a book of autobiographies of prominent European women. In the original text there is very little on her more controversial views on sexual politics, and nothing on her disagreements with the Leninist line regarding Brest-Litovsk and the Workers' Opposition. Nevertheless, in the final, corrected version the text is even further sanitized, erasing also all mention of individual positions and achievements.

At this point in time, in 1926, Kollontai was assigned to a new diplomatic position in Mexico. Dutifully she traveled to Mexico, at the same time stepping back from feminist-socialist politics publicly and on the Soviet scene. How she conducted her personal life is another matter. But she took care to be on good terms with Soviet power, which increasingly meant Stalin. When after a few months in Mexico she realized that her health could not endure the thin air of Mexico City, she asked for a retransfer as ambassador to Norway, which was granted. In 1930 she was moved to Stockholm, as Soviet ambassador to Sweden. In Norway as well as in Sweden, Kollontai had large and friendly local networks.

In Norway she turned the Soviet embassy into a cultural center, a meeting place for writers, actors, musicians, and intellectuals with native and foreign politicians (Hauge 1971). Also in Sweden she was very popular, with large networks of friends. She was much respected as a clever and efficient diplomat, counting among her achievements her role in bringing an end to the Finnish so-called Winter War against the Soviet Union (November 1939–March 1940) and likewise – toward the end of World War II – in securing a separate Finnish-Soviet peace in September 1944, including post-war Finnish independence. Kollontai's daily life as a Soviet employee was, however, not easy. Her subordinate staff was spying on her, sending reports back to Moscow, and every so often she was called to Moscow on duty.

The worst was in July 1937 and July 1938, during the years of Stalin's terror, when most of Kollontai's comrades from the revolutionary days were murdered. Her apprehensions before both of these trips are documented in letters to her Swedish best friend Ada Nilsson, whom she asks to take care of her personal papers and documents in case of her death. Both times she did, however, return to Stockholm.

In her life as a diplomat, Kollontai was the official representative of the Soviet Union, however much she might disagree with Stalinist politics. She made an effort to maintain friendly personal relations with Stalin – a fact that most likely saved her life. But also, to the end of her life, she took pride in seeing the Soviet Union as a workers' state: nationalized industry, a planned economy, and a social welfare program.

In 1945–73 years of age and half-way paralyzed from a stroke in 1942 – she was called back to Moscow, where she spent the last years of her life editing her diplomatic diaries. These diaries – two large volumes – were published in Russia 2001, parts of them later published in German (Kollontai 2003), Swedish, and Norwegian.

Conclusion

Kollontai's writings were exceptional in her own time, and they are so even today. Her thinking was rediscovered and appreciated by the New Women's Movements of the 1970s, when her writings were again translated and published/republished.

Still, however, the ideas that Kollontai sketched out regarding broader notions of love, and of love-solidarity as a social force, have not really been developed since she introduced them 100 years ago.

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▶ Lenin, Vladimir Ilyich
▶ Luxemburg, Rosa
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Korsgaard, Christine

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Introduction

Christine Korsgaard (b. 1952–) studied with the renowned moral philosopher, John Rawls, at Harvard University, where she is currently the Arthur Kingsley Porter Professor of Philosophy. Rawls' influence on Korsgaard's thought manifests itself particularly in the Kantian Constructivism at the heart of her work. Yet as a gifted and subtle reader of Immanuel Kant's moral philosophy, Korsgaard's contributions to Kant scholarship outstrip those of her mentor, and her original work in moral philosophy has ranged beyond Kant to incorporate elements of Plato, Aristotle, Hume, and others. Through serious engagement with the history of moral philosophy, Korsgaard has made signal contributions to contemporary issues in moral philosophy, including questions of normative ethics, the constitution of agency, and the moral standing of animals.

Korsgaard's Kantian Constructivism

Korsgaard made her initial mark in philosophy as a careful (though sometimes controversial, see Wood 1998; Audi 2004, Chap. 3) reader of Kant's moral philosophy, and her first book, *Creating the Kingdom of Ends*, consisted of a collection of her widely discussed essays on Kant. Korsgaard's reading of Kant owes a debt to Rawls, whom she credits with "helping create my great respect for Kant" (Korsgaard 2003a, 50). In particular, the Kantian Constructivism of Rawls' influential 1980 Dewey Lectures has profoundly shaped Korsgaard's work right down to the present. Rawls defended the view that apart from the procedure of constructing the principles of justice, there are no moral facts. Whether certain facts are to be recognized as reasons of right

and justice, or how much they are to count, can be ascertained only from within the constructive procedure, that is, from the undertakings of rational agents of construction when suitably understood" (Rawls 1980, 519). For this reason, "justifying a conception of justice is not primarily an epistemological problem. The search for reasonable grounds for reaching agreement rooted in our conception of ourselves and in our relation to society replaces the search for moral truth interpreted as fixed by a prior and independent order of objects and relations" (Rawls 1980, 519). Rawls holds that the binding normativity of our conception of justice in politics arises from it being *our* conception – a conception constructed in "congruence with our deeper understanding of ourselves and our aspirations" as we seek answers to the problems we cannot avoid as rational animals (Rawls 1980, 519; cf. Korsgaard 2003c, 112–119, 2010, 15, 21, 23, 24). Practical problems, such as the problem of justice in society, do not require an epistemic solution where one *discovers* some reality about God, or a fact about something intrinsically good, or an optimal aggregate of good and then *applies* it to the problem (Korsgaard 2003c, 110–112). Rather, such problems "are practical all the way down"; they require us to think about them and solve them – to think rationally about them (Korsgaard 2003c, 112). "If you recognize the problem to be real, to be yours, to be one you have to solve, and the solution to be the only or the best one, then the solution is binding on you" (Korsgaard 2003c, 116). Much like a chair or a house answers particular human problems arising from our physical abilities and needs (the ability and need to sit down or to have shelter), and our human constructions are *answerable* to those abilities and needs such that there *really are* good chairs and bad chairs, so it is with other practical problems like political justice or morality: our abilities and needs put these problems on our plate and the only way forward is to seek to solve them – which, for beings like us, will involve *rational thought* about them (Korsgaard 1996b, 46–47, cf. 2003b, 70–71, 2003c, 116–117, 2009, 28–32). In the same way that good chairs *really do* exist as successful answers to *our* problems (rather than as a putative discovery and application of some fact independent of us), so a good conception of justice or morality *really does* exist when we successfully solve the *human problems* represented by those normative terms. In both cases, when we construct the answers to the problems set by our abilities and needs, a good answer gets something right in relation to the sort of beings we are and is therefore binding on us. Such constructions give us all the moral realism we could possibly need (Korsgaard 1996b, 108–113) – without the metaphysical baggage that comes when we inappropriately use discover/apply language when faced with *irreducibly practical* problems.

Following Rawls, then, Korsgaard reads Kant as a metaphysically thin Constructivist. For Constructivists, talking about the existence of values that somehow exist independently of us "is just misleading shorthand for something else – namely, valuing, which is a thing that we *do*" (Korsgaard 2003b, 68; cf. Kant 1997). So when Korsgaard lays out "the Kantian solution" to problems about the normative standing of our moral claims, she argues that for Kant "ethics is grounded not in some set of moral facts that we know about and apply, but in something we *do*" (Korsgaard 2013, 8). Korsgaard seems to relish putting the matter bluntly: "On Kant's view it is human beings, with our capacity for valuing things, that bring to the world such value as it has" (Korsgaard 1996a, 131, 1998, 57, 63, 2014, 429). Yet as Korsgaard notes, "the philosophical worry about this kind of theory is of course that it will render obligation arbitrary or contingent" (Korsgaard 2013, 8). It seems that the human activity of valuing will confer a welter of differing values, and the normative authority of moral reasons will dissipate across a sea of arbitrary human valuations of this or that.

Such worries fail to appreciate fully that "valuing has its rules" (Korsgaard 2003b, 68). Again, there *really are* rules that bind the construction of chairs – rules tied to our abilities and needs. A "chair" that consisted of a ball of razor-sharp spikes or a single post-it note would not be a good chair. Korsgaard's most sustained and vigorous attempt to spell out the rules binding our

construction of moral normativity may be found in her influential book, *The Sources of Normativity*. At the heart of Korsgaard's account hinges on her notion of a "practical identity." As she states the idea in her later book, *Self-Constitution*, your practical identity is "a description under which you value yourself, a description under which you find your life to be worth living and your actions to be worth undertaking" (Korsgaard 2009, 101). Your practical identity is an understanding of yourself – your relationships, religion, profession, hobbies, loves, etc. – that you *endorse* and that therefore sets the reasons for the things you do. The practical identities we endorse "give rise to reasons and obligations. Your reasons express your identity, your nature; your obligations spring from what that identity forbids. . . the normativity is built right into the role" (Korsgaard 1996b, 101). Normativity therefore poses no great mysteries, and the same holds for obligations, because obligation "always takes the form of a reaction against a threat of a loss of identity" (Korsgaard 1996b, 102). There is no need for any sort of mysterious entities or futile attempts to aggregate some notion of what is good (although for no one in particular).

But the arbitrariness problem still remains. For what if someone adopts the practical identity of a Mafioso? Doesn't he have reasons to kill those who oppose the interests of the Family (Cohen 1996; Schneewind 1997)? The Mafioso has reasons by way of his endorsement of that practical identity, just as Mother Teresa has reasons by way of her endorsement of her practical identity.

The Mafioso, however, has failed to *reflectively endorse* the identity and so stands in a "performative contradiction" with himself. Korsgaard rejects the idea that "the Mafioso's obligation to give up his immoral role is something that exists only from the perspective of the rest of us, and not in his own. For he *is* a human being, who arrives at his reasons through reflection. And the activity of reflection has rules of its own" (Korsgaard 1996b, 257). The very adoption of any practical identity at all places value on the humanity that allows the agent to take up that identity; performatively, one cannot help but value the personhood of being human – a rational being whose choices confer value – for *you are in fact conferring value in taking up a practical identity*. You *thereby* confer value on that *human* identity – an identity shared by all other persons, who *also value* their practical identities on the basis of *their* humanity. "In this way, all value depends on the value of humanity; other forms of practical identity matter in part because humanity requires them. Moral identity and the obligations it carries with it are therefore inescapable and pervasive. Not every form of practical identity is contingent or relative after all: moral identity is necessary" (Korsgaard 1996b, 121–22). Valuing, Korsgaard argues, has its rules; these rules account for the binding authority of moral obligations.

Does the human activity of valuing also construct the value of personhood?. In her recent work, Korsgaard has pursued "a question about how 'deep' constructivism can go. Can even our own most basic reasons themselves be constructed?" Can constructivism "go 'all the way down'? I of course think it can" (Korsgaard 2003c, 118). In short, Korsgaard sees our very personhood as a construction effected by practical reflection; we constitute our own human agency in the moment of taking up the categorical imperative, for this is the moment of freedom in which we break from the oppressively close teleology built into the instincts of other animals (Korsgaard 2009, 212). Korsgaard calls this the "paradox of self-constitution": "there is no *you* prior to your choices and actions, because your identity is in a quite literal way *constituted* by your choices" (Korsgaard 2009, 19). In taking up any practical identity at all, "it is in choosing your actions that you create that identity. What this means is that you constitute yourself *as* the author of your actions in the very act of choosing them" (Korsgaard 2009, 20). "I know that it sounds backwards," admits Korsgaard. "How can the agent perform an action, you will ask, unless she is already autonomous and efficacious?" (Korsgaard 2009, 20).

This "paradox of self-constitution" (Korsgaard 2009, 83) is a *practical* problem, and we should not approach it as a theoretical problem – but this

time it is a problem that nature itself has set for us: "the form of the human is precisely the form of the animal that must create its own form. For nature sets each human being a task: self-consciousness divides his soul in parts, and he must reconstitute his agency, pull himself together, in order to act" (Korsgaard 2009, 130). We need some principle, some rule to effect this reconstitution. "Where are you to find it? It is implicit in the demands of your agency itself" (Korsgaard 2009, 213). Agency demands freedom and the integrity of lining up behind your own choices; it demands only what Kant called a good will (Korsgaard 2006a, 61–67, 2009, 68–72; Kant 7, 4:393). Thus in an essay entitled "Morality As Freedom," Korsgaard contends that "at the standpoint of spontaneity, the will must, in order so to speak commence operations, choose a principle or a law for itself. Nothing provides any content for that law. *All that is has to be is a law*" (Korsgaard 1996a, 166). This *just is* the categorical imperative, and so "the moral law is the law of self-constitution" (Korsgaard 2009, 214). Our very agency is a *practical construction* rooted in moral reflection.

Contributions and Disputes Within Contemporary Moral Philosophy

Korsgaard has engaged in lively and thoughtful conversations across the contemporary scene in moral philosophy. One part of those conversations has included issues of animal ethics. For someone whose "basic claim" is that "moral duty follows from seeing us as valuable because of our humanity," questions of animal ethics might seem particularly pressing (2003a, 60). Korsgaard rejects what she calls the "legal bifurcation" of the normative status of beings into "persons" and "property"; instead, "there are three fundamental normative categories, not just two" (Korsgaard 2013, 1–2, 20). The normative status of animals is, of course, a *practical* problem that *we* work on through our own reflection on the problem as rational animals. Accordingly, we will not *discover* metaphysical facts about the relative status of human persons and animals that we need only *apply* to the issue; nor will we attempt the strange utilitarian task of trying to determine an aggregate good that factors in all the relevant beings. Likewise, Korsgaard argues strongly against various evolutionary views that in effect flatten out personhood in order to maintain an evolutionary gradualism: "The other animals do not need to justify their actions. Why do we?" (Korsgaard 2010, 16, 2011c, 79–80). "The difference here is not a mere matter of degree. And it isn't a small difference, that ability to be motivated by an ought. It does represent… a saltatory change" (Korsgaard 2005, 18, 2006a, 117, 2006b, 102–103, 104, 114, 116–117). But *our* jump from the mere sentiments accompanying cooperation and altruism into being responsive to practical reflection itself gives moral standing to animals, though not the same normative standing fitting for persons. As rational animals, we find ourselves valuing not only our humanity, but also inevitably aspects of our animal nature: "Food, sex, comfort, freedom from pain and fear, are all things that are good for me insofar as I am an animate and sentient being… other animals are no different from us in that respect. So it seems natural to suppose we make this claim on behalf of our animal nature: not as autonomous beings whose choices must be respected, but simply as beings for whom things can be good or bad" (Korsgaard 2013, 15). Practical reflection thus leads us to recognize a "kind of normative standing we share with the other animals," though it is not the same normative standing we accord "to each other as free and autonomous beings" (Korsgaard 2013, 20). Korsgaard's work on animal ethics has generated much conversation (de Waal 2006; Bekoff and Pierce 2009; Skidmore 2001; O'Hagan 2009; Timmerman 2005).

Korsgaard has running disputes with other contemporary approaches to moral philosophy. As one might expect, a Kantian philosopher like Korsgaard is very skeptical of utilitarian approaches to moral philosophy, going so far as to say that consequentialism "in a certain way is not actually a moral theory… It is a kind of technological vision of something you would put in place of a moral theory. It is a social

engineering project" (Korsgaard 2003a, 57). As we have seen above, she is also deeply skeptical of "the aggregation of goods across the boundaries between persons (or animals)" (Korsgaard 1996a, 275–310, 2011a, 386, b, 22; cf. Cummiskey 2011). Additionally, Korsgaard strongly disagrees with anything resembling value realism. But Korsgaard has been pushed here. Joseph Raz, for example, wonders if it makes any more sense to speak of the sources of normativity than it does to talk of "the sources of properties, or the sources of objects" and argues that "the value of what we care about gives us reason to care, making our caring intelligible to ourselves and others" (Raz 2003, 140, 146; cf. Shafer-Landau 2003; Wood 1998; Arroyo 2011; Schneewind 1997). Others have questioned if Korsgaard successfully avoids arbitrariness in her account of moral reasons after all, or if her attempts to ground binding moral reasons in our solutions of practical problems finally succumbs to a problematic circularity (Shafer-Landau 2003, 42–43; Seeman 2016).

One final dispute should be mentioned, bringing us full circle to Korsgaard's connection with Rawls. Rawls' exchange with Jürgen Habermas brought out some differences between the Kant-inspired approaches of these two influential philosophers. The difference shows up in the title of Thomas McCarthy's comparison of Rawls' and Habermas' versions of Kantian ethics: "Kantian Constructivism and Reconstructivism" (McCarthy 1994; cf. Habermas 1995; Rawls 1995; Rosenfeld and Arato 1998). Rawls' Constructivism proceeds by giving "a certain primacy to the observer's perspective," the perspective of the individual practical reasoner (McCarthy 1994, 60). Habermas, on the other hand, advocates for "the primacy of the participant's perspective" (McCarthy 1994, 61–62). Korsgaard would seems to side with Rawls rather than Habermas in this dispute, privileging the reflections of an individual's first-person practical rationality over the performatively constrained but strongly dialogical second-person approach of those who champion a "deliberative democracy." Further discussion along the lines of these questions in political philosophy and the philosophy of law would likely be fruitful.

Conclusion

Christine Korsgaard's Kantian Constructivism makes important contributions across a wide array of contemporary conversations in moral philosophy, especially in regard to puzzles about normativity. According to Korsgaard, the key to solving these puzzles is realizing that moral problems are not *theoretical* quandaries requiring us to discover moral entities or facts of some sort, but *practical* problems *we face* (much like the design of a good chair or a good house) requiring rational thought. Normativity arises when we face practical problems by endorsing various *practical* identities–identities that require us to value our own *practical* agency (that is, our *humanity*). Paradoxically, our own activity of valuing constitutes our fundamental human identity, thus conferring value on our ways of solving our practical problems.

Cross-References

- ▶ Authority of Law
- ▶ Habermas, Jürgen: Faith and Reason
- ▶ Neo-Kantianism
- ▶ Ontology of Law
- ▶ Rawls, John
- ▶ Raz, Joseph

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K

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Biographical Introduction

Karl Christian Friedrich Krause (1781–1832) studied philosophy in Jena, where he heard Fichte's lectures (his manuscript of one of Fichte's lectures was rediscovered and published in the twentieth century, cf. Fichte 1994). For some time he also was a lecturer there. Nonetheless, despite three different "Habilitationen" (at the Universities of Jena, Berlin, and Göttingen), he never became a full professor of philosophy. His last position as a lecturer in Göttingen, where he lived from 1823, was revoked after the revolutionary disturbances in 1831. His son-in-law was

involved in these disturbances, also his student Ahrens (1808–1874) (Forster 2022, 93–95).

Krause had to move to Munich, where he died 1 year later without having gained admission as a lecturer at the University. In all his living places, with or without the possibility of giving academic lectures, Krause kept on writing, so that in Göttingen he struggled with nearly 100 volumes of unpublished manuscripts (Ureña 1991, 577; for a shorter biography cf. Göcke 2018, 15–30).

During his lifetime, his only work to have some kind of success was the *Urbild der Menschheit*, containing his social philosophy based on the harmonious associations of human beings and culminating in the idea of a cosmopolitan association of all humankind (Krause 1811/2018). In the field of legal philosophy, his main works, apart from the *Grundlage des Naturrechts* (Krause 1803/2022), written by him at 21 years of age, are the *Abriß* (Krause 1828a/2022), meant to be used by the attendants of his lectures in Göttingen, and the posthumously published text of these lectures (Krause 1874).

Krause's Panentheism

While his habilitation thesis of 1802 and his early work on legal philosophy are influenced by the philosophical tradition of the idea of "The Great Chain of Being" (Lovejoy 1971; cf. Forster 2000, 178–209), Krause in the following years developed his own metaphysical concept of panentheism: God is the supreme principle; the universe is in God, but the universe is not identical with God (as in pantheism). "Panentheism considers God and the world to be inter-related with the world being in God and God being in the world. . . . [W]hile pantheism emphasizes God's identity with the world, panentheism maintains the identity and significance of the non-divine" (Culp 2021; for a historical overview cf. Cooper 2006). Indeed, it was Krause who coined the term "panentheism" (Krause 1828b, 256).

In his system, God is the one principle of being and understanding and therefore also the one principle of science (Göcke 2012, 30; for an in-depth study cf. Göcke 2018). Consequently, Krause's main argumentative structure is twofold: First, in an "analytic-ascending part," one has to analyze the cognitions found in the self-reflection of the conscious human being. This finally leads to the intellectual intuition of the Absolute, in this way also demonstrating that every human being implicitly is aware of the knowledge that has become explicit in the intellectual intuition. The "synthetic-descending part" then can unfold science in the sense that recognition is now based in the one principle of being. This part develops a system of science in which every cognition, founded in the same principle, is united with every other cognition and the whole system of cognitions. The result is an organic system of knowledge, or, in Krause's diction, an "absolute-organic science" (Krause 1828b, XXII and 359). Here, one main problem of Krause's philosophy becomes apparent: He presented his ideas within a complex system in which everything – as founded in the Absolute – is, on different levels, related to everything (and to the Absolute in its different forms of appearance). This leads to repetitions and to an artificial language that made particularly his later works hard to grasp.

Krause's Legal Philosophy

Philosophy of law is a partial philosophy within this organic system of science. Human law is part of the one law that is a manifestation of the Absolute, that is, of God's law (Krause 1828a, 45–47; cf. Dierksmeier 2003, 335–353). Law therefore is also one instance of the relation of the human and the Absolute, especially as it is founded on the harmonic interaction of nature and reason in humankind. This entails Krause's fundamental claim (and also his specific methodological undertaking, Dierksmeier 2003, 330) that law is not the product of interaction between human beings. Law in itself is something primarily internal – primarily in God, then in all finite beings – and only in a second step something external (Krause 1828a, 209; cf. Querol Fernández 2000, 90, 129). Law is a product neither of the state nor of a social contract. This combination of law as an instance of the Absolute with the existence of humans as

free and conscious but finite beings leads to Krause's definition of law. Human law, as the law of any finite being, is included in the one law of God. It is the sum of the conditions contingent on freedom needed for the attainment of their vocation (Krause 1828a, 48; Krause 1874, 62).

One conclusion is that, while law is not the product of human interaction, human communities (in their organic structure mirroring the panentheist Absolute) have a respective law, depending on their purpose. Law exists as basic human communities form themselves in families, cooperatives, and associations, the latter including religious communities. The existence of the state, as a human association to fulfill a certain purpose within certain conditions, is included in the concept of law. Krause describes these different human entities, their respective law, and their harmonious coexistence with the concept of the organism (just as he tagged the descending part in his system as "organic"), beginning with individual persons and ending with the perspective of a future state of global humankind (Krause 1828a, 189). Thereby, human law in its totality is presented as an organism (cf. the chapter titles in Krause 1828a, XI–XII).

In line with his deduction of law from the Absolute, Krause even hints at the law of "unlimited mankind in cosmos" and of inhabitants of other planets (Krause 1828a, 128–129). Furthermore, gender (Krause 1828a, 145; Krause 1828b, X) or race (Krause 1874, 470) cannot be criteria for the fundamental legal status of human beings. However, as law is conditioned by the individual's purpose, there is no individual material legal equality per se (Krause 1828a, 49).

"Krausismo" in Spain and Latin America

Krause's harmonist philosophy and especially his legal philosophy, while generally ignored in Germany, had a special fate in Spain and Latin America in the form of the philosophical movement of "Krausismo" (Abellán 2002; Capellán 2006). This movement had its roots in the work of Krause's student Ahrens, who, as professor of philosophy of law in Brussels, wrote a textbook based on Krause's concept of law (Ahrens 1838) that had an enormous success; there were eight French editions and translations in several other languages (Forster 2022). This text and its first Spanish translation (1841) started the interest in Krause's philosophy in Spain and led to the journey of the young professor Sanz del Río (1814–1869) to Paris, Brussels – where he visited Ahrens – and Heidelberg in 1843/1844. In 1860, Sanz del Río published his main work, *Ideal de la Humanidad para la vida* (Sanz del Río 1860/2002). He presented this as his adaptation of Krause's *Urbild der Menschheit* to the needs of the contemporary Spanish society. But in fact, the *Ideal* is a nearly literal translation of a series of articles written by Krause, published in a short-lived journal edited by himself (Abellán 2002, 131), a fact discovered by E Ureña (1988; ed. of Krause's and Sanz del Río's texts: Fernández et al. 1997). In this purportedly transformed form, Krause's harmonist vision of an organically structured society was attractive to reformist thinkers interested in modernizing Spain as well as to liberal or conservative intellectuals that wanted to refute materialistic theories by pointing to Krause's teachings as the more modern German philosophy. "Krausismo" had an enormous impact in Spain and Latin America (Stoetzer 1998; Capellán 2021). In the rest of Europe, in the middle of the nineteenth century, Krause's thought, seen as one source for reformist political concepts, was better known than at its end. As M Sonenscher succinctly has put it: "Before Marxism, there was Krausism" (Sonenscher 2020, 20).

Conclusion

Krause claimed that his philosophy of the Absolute was superior to that of Schelling and Hegel, who merely had posited their philosophical principle arbitrarily (Krause 1828b, 25). While his philosophy has its roots in the European metaphysical tradition, the results of Krause's legal thinking appear distinctly modern, especially compared to that of his contemporaries. C Dierksmeier has pointed out a further point

linking Krause to contemporary thinking: Krause's arguments against a foundation of law in a social contract resemble those formulated by proponents of the "capabilities approach," namely, M Nussbaum and A Sen (Dierksmeier 2016, 2022). In this sense, Krause's legal philosophy might have a perspective quite apart of the historical phenomenon of "Krausismo."

Cross-References

- ▶ Fichte, Johann Gottlieb
- ▶ Nussbaum, Martha
- ▶ Sen, Amartya

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Kropotkin, Pyotr Alexeyovich

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Introduction

Pëtr Kropotkin (1842–1921) was a writer and propagandist active in the international anarchist movement from 1872 to 1921. As well as co-founding two influential anarchist papers, *Le Révolté* and *Freedom*, he lectured and toured extensively. He completed ten major books, several important pamphlets, and reports and regularly contributed articles to the anarchist press and intellectual periodicals. His writing, published in cheap editions and in translation, circulated widely throughout Western Europe and North America. His influence was immense: his ideas were adopted by activists involved in the 1911 Mexican Revolution and the 1929 Korean Anarchist Federation in Manchuria. Although Kropotkin's support for the Entente against the Central powers in 1914 damaged his standing in the anarchist movement, his status as a leading theorist of anarchism was unaffected.

Early Life and Political Development

Born in Moscow in 1842 Kropotkin was brought up in aristocratic society, in a family that had been powerful before the reign of Tsar Peter I but which had been displaced in the early seventeenth century by the Romanovs. The Kropotkin family descended from the Ruriks, the first Tsars of Russia and Kropotkin, who traced his ancestry to a thirteenth-century Grand Prince of Kiev, was well-aware of the advantages of his social position. He was also conscious of the effects of inequality and the inherent injustice of serfdom. Swayed by his tutor's republican sympathies and particularly impressed by his tale of the French revolutionary leader, the Comte de Mirabeau, he distanced himself from his inherited status. When he heard that Mirabeau had relinquished his title to show his disdain for aristocratic privilege, Kropotkin followed suit. He dropped "prince" from his name when he was only 12 years old. At this time, most of the subversive literature circulating in the 1850s was inaccessible to him, but he knew it by repute.

Kropotkin made a favorable impression on Nicholas I (1796–1855) when the Tsar visited Moscow in 1850 and was granted a place in the elite military academy, the Corps of Pages. His training began in 1857. He found military drill unappealing but enjoyed the schooling and excelled academically. Graduating with distinction, he turned down the chance to enter the Guards at St. Petersburg, a coveted court position, and opted instead to join the Cossacks of the Amur. The decision bewildered his family, but the move was serendipitous: the unit was based on Eastern Siberia and Kropotkin was anxious to see life in the remote parts of the Empire. He had begun to edit his first revolutionary paper as a liberal constitutionalist in 1859 or 1860.

When he arrived in Siberia in 1862, he found himself in in congenial company. Appointed Lieutenant of the Cossacks and later *aide-de-camp* to the Governor of Transbaikalia, he pursued civil rather than military projects, producing reports on conditions affecting coastal settlements on the Amur and the causes of famine. Finding that the authorities in St. Petersburg were uninterested in his proposed reforms, he concluded that it was pointless to continue working in the military. He left the service in 1867 and returned to St. Petersburg. Resuming his education, he worked on the orography of Asia and from 1867 to 1874, serving as secretary to the Physical Geography Section of the Geographical Society. During a tour of Finland, he decided that his political ambitions were also ill suited to a research career. Turning down an invitation to become secretary to the Russian Geographical Society, he gravitated towards St. Petersburg's nihilist circles.

In 1872 Kropotkin made his first visit to western Europe. Having joined a local section of the International Workingmen's Association (IWMA)

in Zurich, he made his way to the anarchist haven of Neuchâtel in the Jura. There, he met Michail Bakunin's comrade James Guillaume but missed Bakunin himself, who was in Locarno. Witnessing the deprivations of the western workers and hearing first-hand accounts of the brutal suppression of the Paris Commune (1871), Kropotkin returned to Russia disillusioned with liberalism. He now called himself an anarchist. Back in St. Petersburg he joined the Chaikovsky Circle, a group with organizations across Russia. The Circle brought progressives from different parts of the anti-Tsarist movement into contact with each other and served as a launchpad for Kropotkin's revolutionary career. In 1874 he was arrested and then imprisoned without trial. After a dramatic escape from the infirmary of the Peter-Paul Fortress in 1876 he left Russia, making a brief stop in Britain before re-joining Guillaume in Switzerland, setting in La Chaux-de-Fonds just after Bakunin's death.

In 1879 Kropotkin co-founded *Le Révolté* to direct anarchist propaganda to French workers. He began a collaboration with fellow geographer Élisée Reclus, re-locating to Clarens, near the French border, to be near him. After the Swiss Government expelled him in 1881, he attended the London International Anarchist Conference and stayed for a year. By the time he returned in 1882, France was in the grip of a red scare. He was arrested and imprisoned for his membership of the then defunct IWMA. After an international campaign secured his release, he settled in London in 1886 and remained in Britain until 1917, when he returned to Russia. His stature made him unwelcome in Soviet Russia. After the 1917 Bolshevik revolution, he was ordered from Moscow to Dmitrov, a small town some 80 km north. Kropotkin died in 1921. His funeral was the last occasion that anarchists gathered *en masse* in Russia.

Political Theory

Kropotkin's disillusion with western liberalism was reflected in his first collection of essays, *Paroles d'un Révolté*. This presented a critique of antiparliamentary socialism and representative government, a defense of communism and communalism, and an account of revolutionary action. Kropotkin's advocacy of anarchist communism was novel: the Bakuninist movement had described itself as collectivist. Kropotkin's political theory was otherwise a comprehensive, accessible restatement of anarchism rather than a new departure. At its center was critique of social contract.

Kropotkin understood contract as a conceptual device to legitimize domination through the appropriation of individual sovereignty by the state. The concept of consent was used to establish a permanent, fixed point of authority and present the rule of law as a neutral instrument of justice, although political arrangements actually embedded inequality through the defense of property and perpetuated repressive norms, for example patriarchy, by normalizing existing social hierarchies. The resulting political order bred social division, competition, and international instability.

Kropotkin enriched his analysis with a historical sociology of the state. He defined the European state as a colonizing force which enjoyed a territorial monopoly of violence. State formation was a process through which those functions vested in established community institutions were forcibly appropriated by absorption, preventing organic development. Driven by religiously sanctioned military-industrial elites, the state stretched itself globally through replication, and imperialist colonization of non-European territories. His book *In French and Russian Prisons* (1887) presented an account of the state modeled on the prison.

State and Anarchy

Kropotkin argued that democratic control of the state would leave relationships of domination intact and that the abolition class power within the state would place the instruments of control in the hands of a new elite. Calling for the state's abolition, in *Fields, Factories and Workshops*

(1898) and *The Conquest of Bread* (1906) he investigated decentralized federation, using the Paris Commune to model the constituent social units. A new political economy of needs, based on the integration of agriculture and industry in localities, the abolition of labor divisions, wage systems, and international trade, underpinned his system.

In his best-known book, *Mutual Aid* (1902), Kropotkin argued that the principles of co-operation that anarchy relied upon were visible in the natural world and environmentally conditioned, just as in the state competition was cultivated. However, the success of anarchy was not historically guaranteed. Kropotkin attributed this position to Marx and rejected it. Rebellion against capitalism and repression was likely to occur in the future, but the lesson he took from the French Revolution was that success required revolutionaries to work consciously towards a definite aim. His political theory was a contribution to this goal. It presented anarchy as attractive and achievable and set out a series of constructive proposals for its realization.

Challenging the foundational idea of the contract, Kropotkin also highlighted the partiality of political theory itself. He argued that the prevailing construction of anarchy as a condition of disorder gave rise to a conceptual language biased towards statism. To remedy this, he proposed that all fields of knowledge be revised "from the bottom up" to facilitate genuinely open analysis. To achieve this end, he adopted new concepts, "mutual aid" and "free agreement" into political theory, arguing that both were embedded in working people's everyday practices. Mutual aid described a learned ethical disposition towards justice "without sanction or obligation," adaptable to social conditions. Free agreement was a principle of consensus predicated on individual sovereignty and essential to co-operation without domination.

Cross-References

▶ Bakunin, Mikhail Aleksandrovich
▶ Marx, Karl

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La Boétie, Ètienne de

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Introduction

Étienne de La Boétie was born in 1530, in Sarlat, Périgord (Southwest France). From an aristocratic background, he studied Law in Orléans in 1553 and had a brilliant but brief career as a judge and politician, as he died in 1563 at the age of 32. Between 1550 and 1560, with some overlap, La Boétie and his friend Michel de Montaigne were part of the group of councilors at the Bordeaux Parliament. Members of Parliament then came from family clans, and their positions were inherited. La Boétie came to hold his position through the intermediation of his mother's brother, an influential member of the Périgourdin Parliament clan. Furthermore, his wife, Marguerite de Carle – whom he married in 1554 –was a member of one of the landowning families in the town of Arsac in Médoc. His father-in-law and brother-in-law, former Presidents of the Bordeaux Parliament, were a great support to him in his political career (Cocula 2004).

But he did not devote all his short life to his political career. La Boétie was also a great poet and humanist, the translator of Xenophon and Plutarch.

He wrote two short works, the *De la servitude volontaire* (*Discourse on Voluntary Servitude)* and the *Mémoire sur la pacification des troubles*, which were both published posthumously. Although the *Mémoire* is still little known, the *Discourse* entered the political canon and has not ceased to arouse interest since (Panichi 2008).

The *Discourse* or the Importance of Consent

The basic thesis upheld by La Boétie in the *Discourse* is that *there is no legitimate power without consent.* The only natural authority is paternal authority, but no obligations other than family ones derive from it. For this reason, it can be said that independence is an innate attitude, a basic propensity that we share with animals, which prefer to die rather than accept captivity (*Discourse* 52). The desire for freedom is thus natural: it is what makes us equal and allows us to acknowledge each other as brothers. This basic equality certainly does not imply the absence of politics, but only the absence of subordination (*Discourse* 50). The reason is simple: merits are not equally distributed among men, but rather some men are more virtuous than others. Men who are more virtuous are acknowledged this merit, and it is on this basis that their authority is accepted. Echoes from Plato can be heard in his thesis that there is no foundation for political legitimacy other than the consent given by equals

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or brothers (Allard 1998). This legitimacy cannot be achieved by tyrants, who have no friends and are impossible to love (*Discourse* 77).

However, if political authority is only legitimate when it is based on the consent of equals and freedom is an essential quality, slavery – political servitude – can only be derivative and unnatural. Thus, nothing can be more wretched than being subjected to an arbitrary power that prevents us from enjoying our original freedom. Certainly, education and customs can account for this situation (*Discourse* 55), but not for its persistence, which is only due to cronyism, based on such vices as ambition and the yearning for impunity (*Discourse* 72). Thus, it is moral vices that generate political corruption. For this reason, many of the historical examples cited in the *Discourse* are intended to highlight the value of freedom, following a progression from the Greeks' national heroism, through Brutus' civic conscience and Cato's flight, to Hippocrates' resistance. His quotations from Terence and Virgil also include multiple examples of tyrannies and the moral degeneration they breed. With these examples, La Boétie intended not only to illustrate the doctrine he was opposing, but to arouse a negative judgment against those practices in his readers.

The *Mémoire,* Against the Politics of Toleration

In 1551, the *Edict of Châteaubriant* was published, in which Protestants' property was seized, censorship of the press was extended, and courts were reinforced, empowering them to judge heresy. The increase in repression in 1554–1555 ended with the publication of the *Edict of Écouen* in 1559, which sentenced any Protestant who took part in political riots to death with no trial. Only 2 years later (1561), when France was on the brink of the *Wars of Religion* (1562–1598), he wrote the *Mémoire sur la pacification des troubles.* Montaigne's efforts to keep it hidden – perhaps out of fear that his friend would be regarded as a Gallican (Smith 1983) – were successful until 1917, when it was discovered by Paul Bonnefon.

In this text, La Boétie states that religious division has two terrible consequences for the peace of the realm: civil division and armed resistance (*Mémoire* 36). He was persuaded that there was no greater evil than the existence of two churches in the same territory. If there were two, there would be no reason not to accept an infinite number of them, which could only lead to anarchy (*Mémoire* 56). The policy of peaceful toleration between Catholics and Protestants had in fact only served to cause a civil war in the Kingdom of France (*Mémoire* 51–52). The coexistence of various religious confessions was not a solution to the riots but left the country open to dissent. After all, where Protestants were the majority – as in Calvin's Geneva or in England – they were intolerant toward other confessions (*Mémoire* 94). The only solution was to carry out a disciplinary reform in the Church that would allow dissidents to rejoin it (*Mémoire* 62). This reform should be headed by the King himself, so that France would be unified in its religion, both in liturgical (worship) and legal (discipline) terms (*Mémoire* 82). As we can see, there is a certain intellectual kinship between the theses expounded in the *Mémoire* and the ideas of Pierre Pithou (1539–1596), one of the leading Gallican thinkers.

Thus, even though the link between La Boétie and French reformers has kept historians and philosophers busy (Gadomski 2007), it is hard to see La Boétie as pro-Huguenot. Indeed, the subtitle of the *Discourse* in French, *Contr'Un*, was the work of Huguenots, who in 1574 included part of its contents in the anti-monarchical pamphlet *Reveille Matin des François*. It was later fully published in French in 1577 in a collection of Protestant pamphlets entitled *Mémoires de l'estât de France sous Charles neufiesme.* But the use given to it by Protestants does not make La Boétie pro-Huguenot, as can be seen when the *Discourse* and the *Mémoire* are read together. Not only because in the *Mémoire* La Boétie defends a

policy of religious reunification, not a toleration policy, but because his defense of political freedom was never intended to be the basis for any active resistance, which makes him far removed from the French monarchomachs. His proposal to fight tyranny was always withdrawal of consent, never sedition (*Discourse* 47). When consent is withdrawn from a ruler, nothing is taken from him, for only that authority that has the consent to rule is legitimate. For this reason, the withdrawal of consent is a *political*, not a personal, act, and the only one that La Boétie accepts as a way to overthrow a tyrant (*Discourse* 44). Certainly, the only way that consent can be withdrawn is to become aware of one's actual situation. For this reason, we must realize this and desire to be free again. We should be persuaded that the benefits of being free are greater than those offered by tyrants in exchange for servitude. The good politicians will serve as a role model for other citizens. The people should allow themselves to be guided by virtuous politicians, for when guided by a tyrant they only become brutes.

Conclusion

The *Discourse* can thus be read as a lawyer's *pleadings* against the tyrannical policy of a monarchy that thought itself independent from the freemen of its time: the parliamentarian nobility, understood in Ciceronian terms (Weber 1974). It should be borne in mind that the political success of the Crown relied on the implementation of its measures in the provinces – religious legislation, taxes, etc. – through the Parliaments. Consent, thus, was the necessary condition of the political freedom enjoyed by the parliamentarian nobility (García-Alonso 2013).

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► Montaigne, Michel de
► Plato

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La Mettrie, Julien Offray de

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Introduction

Julien Offray de La Mettrie was born in Saint-Malo in 1709 and died in Potsdam in 1751. During his youth, he studied medicine in Paris, Reims, and Leiden with the famous in these respects Herman Boerhaave (1668–1738).

Even though he was one of the main figures of Enlightenment, particularly in the field of medicine, his provocative opinions on morality elicited criticism from many of the movement's most prominent representatives.

While his works have been insufficiently studied for a long time, they have met with greater approval in recent years. The reason is a growing interest in materialism, clandestine literature, and the "radical" stances of the seventeenth and eighteenth centuries (Israel 2001; Jacot Grapa 2019; Paschoud and Pépin 2017).

Between Medicine and Philosophy

In *La Description du corps humain* (1648), Descartes proposed that there is no reason to attribute bodily movement to the soul, stating that it occurs as a result of material reasons that can be explained through mechanics. This theory allowed him to explain the functioning of the heart, brain processes, digestion, and other phenomena without turning to the idea of the soul. Thus, he distanced himself from traditional Aristotelian physiology, which proposed the soul was the form of the body and connected to it. This established the distinction between res extensa and res cogitans in Descartes's philosophy, which La Mettrie proposed to improve in *L'homme machine* (1747).

In *L'homme machine*, La Mettrie, who was a medical doctor by profession and an acute observer of the human body – he wrote several treatises on the subject and translated texts by Boerhaave – strives to extend Cartesian mechanistic materialism to the entirety of human nature (Richard 2006: 21–43; Rosenfield 1940). After declaring that he is a "materialist," he concludes that "man is a machine, and in the whole universe there is but a single substance" (La Mettrie 1987a: 117) and endeavors to explain human behavior resorting solely to matter. La Mettrie proves that matter can account for what was traditionally attributed to a spiritual substance. He had already begun following this path, although with greater discretion, in his *Histoire naturelle de l'âme* (1745).

Thus, his reflections present a materialistic and fatalistic ontology that countered different traditions, particularly Christian theological metaphysics, which observed the soul as immortal and independent of the physical body. From an ethical point of view, behavior seems to depend on no more than the pleasurable and painful sensations experienced by material organisms.

In *L'homme machine*, however, the feeling of "remorse" suffered by those who commit crimes serves to define the limits of morality, and La Mettrie does not hesitate to associate it with the idea of "natural law" that he defines as "a feeling that teaches us what we should not do, because we would not wish it to be done to us" (93). This feeling, he explains, is awarded to all beings by nature, and therefore "does not presuppose education, revelation, nor legislator" (92, 93) (Thomson 2016).

A year later, in 1748, he wrote the introduction to his French translation of *De vita beata* by Seneca, which was later published as an independent text titled *Anti-Sénèque ou Le souverain bien* – posthumous editions were published under the title *Discours sur le bonheur* – and took his hedonistic principles even further, reducing all morality to the search of "organic happiness" (La Mettrie 1975: 126). He then rejects the existence of natural law, shows the futility of remorse, and promotes its elimination: "let us, in short, destroy remorse!" (156). Thus, there is only matter in the universe; good and evil are created

by society and man is called to pursue physical happiness.

Materialism and Politics

The provocative stance introduced by La Mettrie in the *Anti-Sénèque* was rejected not only by his detractors, but also by authors with similar ideologies who worried over the social consequences of this posture. In a letter to the Duke of Richelieu on January 27, 1752, Voltaire wrote in reference to La Mettrie that "there is a great difference between battling the superstition of man and breaking all bonds of society and the chains of virtue" (Voltaire, À M. le maréchal duc de Richelieu. In: Œuvres complètes de Voltaire, ed Louis Moland, vol 37. Garnier frères, Paris. 1880: 363). A few years later, in his famous *Système de la nature* (1770), Baron d'Holbach stated that La Mettrie, like other atheists, "negated the distinction between vice and virtue and preached debauchery" (Holbach, Système de la nature ou des lois du monde physique et du monde moral (ed Josiane Boulad–Ayoub), t 2. Fayard, Paris 1990: 339) and Denis Diderot did not hesitate to accuse him, in his *Essai sur Sénèque* (1778), of protecting "crime" and "vice" (Diderot, Essai sur les règnes de Claude et de Néron, et sur les mœurs et les écrits de Sénèque [ed Annette Lorenceau]. In: Œuvres complètes de Diderot [ed Jean Fabre, Herbert Dieckmann, Jacques Proust and Jean Varloot], vol 25. Hermann, Paris, 1986, p 1–441: 246).

La Mettrie attempted to allay such doubts about his work through an extensive "Discours préliminaire" published as an introduction to his *Œuvres philosophiques* (1750), which elucidates the practical aspects of his philosophy. There, he maintains that his philosophy does not endanger "social bonds" (La Mettrie 1987b: 9).

Firstly, recapturing the anthropological pessimism of the previous century's *libertins érudits* – authors such as François de La Mothe Le Vayer (1588–1672) and Charles de Saint-Évremond (1613–1703), expressly mentioned in his texts – he explains that even if philosophy presented any danger to society, men could not understand its message: "no matter how well the materialist proves that man is but a machine, the general populace will never believe it" (20).

Secondly, he continues, likewise in line with the *libertins érudits*, philosophers do not want social disorder and will make sure not to spread their principles beyond a small circle of enlightened men: "at home, I say what I think is true, but outside I say what I deem useful, healthy and beneficial. Here, I prefer the truth as a philosopher; there, the mistake as a citizen" (32).

Lastly, he maintains, not without creating some friction within his work, that the materialist and fatalistic philosopher, related in his writings to the idea of the good physician, can contribute to the "public good" and can serve "humanity" by illuminating the task of "legislators, judges and magistrates" so they "do not commit so many injustices, inequities, and disgraces" (41, 42). "I only want those in charge of the state to be a little more like philosophers" he concludes (42) (Ratto 2018: 31–46; Wellman 1992: 246–272).

Conclusion

The apparent extreme hedonism of the *Anti-Sénèque* caused not only a scandal that compelled the Malouin physician to abandon Leiden and seek refuge in the court of Frederick the Great in Prussia, where he died in 1751, but also opprobrium from important figures of Enlightenment.

However, a more thorough reading of his works shows he was much closer to those men than would be originally assumed, whether by virtue of his materialist and fatalistic ontology – which distanced him from, among others, Christianity, his advanced position in the field of medicine, or his reformist stance in the political arena.

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La Mothe Le Vayer, François de

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La Mothe Le Vayer (1585–1672) was born in a French family belonging to the "nobility of the robe". He could have followed in his father's footsteps and pursued a career as a lawyer at the parliament of Paris, but he hated studying and practicing law. No longer convinced by the virtue of political science, he devoted himself to philosophy and literature. He became one of the greatest scholars of his time and was made a member of the "Académie française". However, he did not neglect the French Court, since he was Richelieu's Secretary, then tutor of the Duc d'Anjou, the Sun-King's brother. As a writer, he is famous for his *Dialogues faits à l'imitation des Anciens* (2015), composed in about 1630, which brought to the stage his friends from the "*Tétrade*" (Gabriel Naudé, Pierre Gassendi, Guy Patin). He is also the author of numerous short treatises (1678, 1970), only one of which: *Of Liberty and Servitude*, which he dedicated to Mazarin, was translated into English by John Evelyn, in 1647.

La Mothe Le Vayer is considered as a skeptical philosopher as well as a representative of the religious and moral heterodoxy of his time, and we are entitled to ask how both considerations can work together: is the skepticism he boasts in most of his works the mere rhetorical disguise of his libertinism, i.e. a desacralisation of Christian values? Or could this scepticism be sincere, based on discredited reason, reduced to fantasy, which condemns men to disorder, under the reign of a "deceiving God" that Descartes had not been able to transform or surpass? One must first concede that it is hard to believe La Mothe Le Vayer when he claims in his dialogue "De la divinité" that his "skepticism is a perfect preparation for Christian faith" since it leads to the submission of reason. La Mothe Le Vayer claims to be the disciple of the skeptical tradition of the New Academy, which in no way sought to engender belief, but rather aimed to sever attachments to the different philosophical sects and to beware of any submission to authority. To this point we must add that, unlike Pascal, for instance, whose sincerity in matters of faith cannot be suspected, La Mothe Le Vayer never sought to take the weakness of reason as a starting point from which to lead his readers to God. For example, he does not invoke the authority of tradition to induce people to believe, as might be expected in the context of a Christian skeptical anthropology. On the contrary, La Mothe Le Vayer clearly claims to adhere to a whimsical and boundless liberty that tolerates no constraints on his freedom of thought. As a result, it is unclear what status to attribute to the "pious exception" made for the Christian religion in the conclusion to some of his texts. The professions of

faith by the writer who was hailed as the "French Plutarch" even sound like theatrical statements that could almost make one laugh.

That does not mean that we must choose between skepticism and libertinism to understand La Mothe Le Vayer's philosophy. Indeed, the sceptic, sowing the seeds of his doubts, maintains discordance, encourages the use of paradox, so that his philosophy can lead – without self-contradiction – to an emancipation from and a subversion of religious and socio-political norms.

However, there is still a difference between Montaigne, who is La Mothe Le Vayer's skeptical predecessor and La Mothe Le Vayer himself: while the former, because he is a sceptic, seeks to promote an easy and serene way to life, full of humor even, by subverting his relationship to normative thought, the latter enables the reader to free himself from many kinds of cultural norms (religious, moral, aesthetic, philosophical) in order to enjoy the transgression itself.

This is probably due to the fact that La Mothe Le Vayer wavers between a skeptical conception of reason as a flexible faculty that cannot serve as a criterion of judgement and an Averroist conception of reason (which can also be found in Vanini's works and in the *Theophrastus redivivus*) which maintains, at least in "free thinkers", a natural reason free of disrupting cultural influence (religious education and traditional education). And it would be inappropriate to choose between these two definitions, since, in his different texts, La Mothe Le Vayer invokes one connotation or the other: in the dialogues (*Dialogues faits à l'imitation des Anciens, Promenade en neuf dialogues*) and in a number of treatises entitled "skeptical", despite rhetorical blurring of the expression of libertine theses, it seems that La Mothe Le Vayer enjoys introducing his readers to subversion. However, in the *Petits traités sceptiques en forme de Lettres écrites à diverses personnes studieuses,* and some *Opuscules sceptiques* and especially in *Prose Chagrine* (2012), it is rather the skeptical point of view that prevails in the use of rationality within the discourse.

In the wake of Montaigne, La Mothe Le Vayer indeed favors the power of creative reason to create a diversion from and transfiguration of reality: reason is in this sense comparable to imagination (because of its capacity of fantasising), in the attempt to remedy the disturbances of the soul by the vagaries of life (i.e. for La Mothe Le Vayer, diverse misfortunes and the unexpected interventions of stubborn interlocutors).

He also returns to a skeptical ethic of expediency initiated by Montaigne (see "Montaigne, Michel de", Comte, M), which here consists in taking advantage of the confusion of our representation of the world, highlighted by the skeptical New Academy (which remains the major ancient skeptical source of La Mothe Le Vayer's thought), thanks to the systematic use of the sorites paradox, which "deceives suffering" and brings consolation. Through this skeptical use of discourse, La Mothe Le Vayer redefines philosophy as a "sophisticated poetry" and contributes to the textual practice of re-elaboration of our representations of life for therapeutic purposes. The relationship to reality is no longer conceived in terms of knowledge and control, but aims to protect the human soul from its brutality and to soften the psychological suffering it provokes.

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Laband, Paul

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Paul Laband (1838–1918) is seen as a father of modern constitutional law and methods of jurisprudence that are based on the rule of law, clearly

defined systems, logical assumptions, and unambiguous, definable terminology. This major leap forward for jurisprudence took place in the Era of the constitutional and more or less parlamentary National State (Nationalstaat) in Europe, in Germany particulary represented by the federal German Imperial Reich (Deutsches Kaiserreich) founded by Otto von Bismarck in 1871 and composed by plenty individual German states (constitutional monarchies and republics without Austria and Bohemia) of the era.

Paul Laband was born on 24 May 1838 in Breslau, then a part of German-Prussian Silesia, now part of Poland. He died on 24 March 1918 in Strassburg in Elsass-Lothringen (Strasbourg in Alsace-Lorraine). Prior to its annexation by the French in 1681, the city had been a free city-state (Freie Reichsstadt) in the Holy Roman Empire, and it reverted to German rule once again in 1871 following the Franco-Prussian war. A year after Laband's death, it once again became part of the French state in 1919. Although his family was of ethnic Jewish origin, he was baptized a Protestant; a common situation in an era when Jews did not yet enjoy full civil or professional rights.

The locations of his birth and death alone already start to give us clues about the historical situation and territory of the German states, and later the German Reich, which played such a decisive role in determining the course of Paul Laband's life. They also point to future dislocations that Laband could only begin to guess at, but did not live to see, as his death came shortly before the collapse of the German Reich and the annexation of Alsace-Lorraine by France at the end of World War I.

The life and work of Laband cannot be fully appreciated without understanding the rich historical and political setting. The Imperial German Reich of Paul Laband's adulthood is also known as the Second Empire, which was in some ways seen to follow in the footsteps of the thousand-year Holy Roman Empire (Heiliges Römisches Reich) with its roots going back to the Middle Ages. This ancient multinational, multicultural state ruled large portions of Europe and had as its main institutions the Emperor (Kaiser) and the Imperial Council (Reichstag), an assembly of hundreds of dukes, knights, monastical territories, and city-state republics. In 1806, the Holy Roman Empire, already weakened by the effects of the 30 Years War and the conflict between Prussia and Austria, finally met its end with Napoleon's military invasion.

It was first succeeded by a so-called German Confederation (Deutscher Bund), dominated by enlarged monarchical territorial states such as the newly created "Empire" of Austria, the newly created monarchies of Bavaria, Belgium, and Württemberg, the historic kingdom of Prussia and traditional city-state republics such as Hamburg, Bremen, and Frankfurt am Main.

In line with the general political trend towards nation states, it was the Prussian Prime Minister Bismarck who in some sense created the first real German nation state with the German Imperial Reich (Deutsches Kaiserreich), although it did not include Austria and its crown-controlled territories. Though this strong entity was conceived to protect Germany from the further expansion of France, it could never have adopted a centralized structure on the French model, but could only be a federal state in line with the long German tradition of decentralization and diversity.

Bismarck did base this state on the "monarchical" principles of the time, insofar as the head of state bore the title of German Emperor (Deutscher Kaiser), and in that the government of the Reich was appointed by the Emperor, and ruled at his pleasure, but also at the same time was bound by the written constitution and the laws made by parliament. In addition, the Prussian monarchy and other German state monarchies exerted de facto control of the Bundesrat, the upper legislative chamber.

However, the new Reich structures did make certain concessions to the new democratic and social movements. The parliament (Reichstag), was elected under free suffrage based on one man, one vote, although women were excluded until true universal suffrage was introduced in 1918. At the time, this was quite a progressive innovation, one which contrasted sharply with the situation in other independent German states, some other European countries, and even internationally. This wide-ranging suffrage soon led to

the Social Democrats and bourgeois forces regularly winning majorities in parliament.

The Reich also had a written constitution. However, unlike the enlightened tradition of Prussia and Austria of the eighteenth century and the attempted Frankfurt Paulskirchenverfassung of 1849 might have led one to hope, it still contained no written catalog of fundamental, constitutional rights.

This omission was – from today's point of view – somewhat offset by the fundamental rights that *were* included in the written constitutions of the individual German Reich member states such as Prussia and Bavaria, as well as by a fairly exemplary, albeit elite, rule of law and a well-functioning judiciary. Added to this were the time-honored traditions of free city republics and local self-government, ones which were sorely missed in Alsace and other former German territories after 1918.

Moreover, at the Reich level, this state was not really a monarchy in the traditional sense. The Prussian King was indeed President of the Bundesrat, and as such did bear the title of German Emperor. But even here in Prussia, a vibrant multiethnic state ranging from the traditions of Junkerdom to the highly liberal, Kantian spirit of the port and university city of Königsberg (now the Russian Kaliningrad), not everyone was a friend of the new nation-state ideal. In fact, the very first Prussian bearer of the Deutsche Kaiser title, Wilhelm I, was vehemently against being made German Emperor, and only accepted this newly created national designation under great personal pressure from Bismarck.

Bismarck also injected his own personal influence into this new constitutional mix with a remarkable innovative program of social legislation, in particular the creation of social insurance, which is definitely still a landmark in international social history.

In some ways deeply traditional and in other ways startlingly modern, these new and freshly assembled political structures of the German Reich made for an extremely complex and highly interesting legal environment; one which could be analyzed from a wide range of different perspectives, and one which could be interpreted – and even shaped – by an excellent constitutional lawyer.

One such legal scholar, university lecturer, politician, and publicist was Paul Laband, who had studied in Breslau (Polish Wroclaw), Heidelberg and Berlin, and who had been a professor in Königsberg in Ostpreussen (East-Prussia) since 1864. From 1872 onward, he spent the remainder of his life at the newly founded University of Strasbourg in Alsace. The Kaiser Wilhelm University was based on the older collegiate structures of the Holy Empire, which had been subsequent preserved mainly in medical education during the French era. This institution was one of the major scientific undertakings of the German Empire and the Kingdom of Prussia, which as state had the responsibility for culture and science, later transferred to the newly created local entity, the Reichsland Alsace-Lorraine. This small state was later also equipped with its own constitution and parliament. So for legal minds, this setting offered both imperial constitutional matters as well as an ample amount of legal and scientific casework under new state law.

Labands main work, "Staatsrecht des Deutschen Reiches" (Constitutional Law of the German Reich) was continually updated and reissued, and was considered the standard legal work of the Empire. As such, it stood in every lawyer's office and was consulted by every judge, and soon came to be considered the constitutional law reference work par excellence, both nationally and internationally. Laband was also well versed in commercial law and legal history.

Prior to the founding of the Reich, Laband was already known for a document on Prussian budget law which codified the critical distinction between "material" and "formal" law ("Gesetz im materiellen und formellen Sinn"). He also favorably impressed the then Prussian Prime Minister Otto von Bismarck with his involvement in a decisive legal battle on whether parliament or government controls the budget. Bismarck urgently needed this budget to lay the groundwork for his successful wars against Austria and France, and thus to found the new Reich. It is interesting how closely Laband's career was linked with the new state, even before its founding.

However, it would be a great mistake to label Laband as a simple lackey of those in power. He was most definitely both a proud Prussian and proud German, a friend of the new state and constitution. But he was also a free-thinking scientist and scholar who closely followed his own advanced scientific reasoning. He was certainly not a person to be dictated to by the government of the day. Also, at this point, German universities were not deeply involved in official, autocratic policing or control systems, despite some early attempts by the Prussian Ministry of Culture to exert its influence.

Laband placed a high priority on clear and logical lines of reasoning and definable terminology, and this is what led to his renown. Thus, following in the footsteps of Carl Friedrich von Gerber, he built on a tradition of civil law (Carl Friedrich von Savigny) which since the beginning of the nineteenth century had been attempting to systematize and summarize the boundless sources of Roman, Germanic, and Napoleonic law that all co-existed in Germany. To do this in constitutional law meant performing a service whose scale and importance that even today we can barely begin to recognize: namely, establishing the rule of law, clarity, and transparency in state legal decisions and opinions.

Precedents were a review of the constitutional bases, which were made comprehensible and manageable by abstraction. The later accusation of "formalism" and the classification of Laband as the father of "constitutional positivism" or, to be more blunt, as a lackey of the ruling government's own laws, does him a great disservice.

Laband never focused solely on a specific political direction, nor on formalities or phrases. Instead, he was guided by well-derived constitutional principles such as the monarchical principle, and both the material and the formal constitutional content. In this respect, the label of "positivism" is only partially appropriate.

The pure positivist will automatically process everything that the state puts into law as if he or she were a machine, regardless of how the state stands in relation to higher principles, the foundations of legal philosophy or minimum requirements such as basic humanity. If one views positivism as the antithesis to natural law, i.e., as directly opposed to the Kantian idea of innate human rights, and if one then in turn reproaches Laband mainly for the fact that he does not base his dogmatics on human rights (in the current sense), it is critical to remember one thing. At this time, only the individual German states - *not* the Reich Constitution – possessed a catalog of fundamental rights at all. It was only the Weimar Constitution of 1919 (Weimarer Reichsverfassung) and after the horrors of the Nazi regime, the Basic Law (Grundgesetz) of 1949 that made a human law dogmatism more manageable. In his own time, and much like many of his international contemporaries, Laband viewed fundamental rights as a limitation of state power, and not as a subjective right belonging to the individual.

On the other hand, Laband was indeed a child of his time, growing up under the repressive Metternich system, with a conscious negation of the entire concept of human rights while witnessing the revolutionary times of 1848. He saw the new Prussian parliament and the constitutional period arise, and intentionally made himself a part of the official elite.

Paul Laband is known as the founder of constitutional positivism, but not everything he did was necessarily derived from positive law. He interprets the constitution of the Reich as an embodiment of the monarchical principle, a principle which he could have also chosen to weigh up differently in the face of modern universal suffrage, the influence of parliament, and scale of republican or imperial factions. But it was not the will of the monarch, but rather the will of the monarchial state (der Staatswille) that formed the key progressive element in his thinking.

The name and work of Laband will remain forever linked with his Strasbourg University. The Kaiser Wilhelm University was not only one of the best equipped in Europe with modern institutes, scholarly views, and richly appointed buildings, but it also held a Germanic political-cultural mission in the French-influenced Alsace-Lorraine. At times, this mission was pursued quite aggressively and arrogantly. The new German inhabitants, officials, and soldiers were not

welcomed by every Alsatian, nor by sympathizers of the French cause. This cultural mission did also influence the university's scholars to some extent, but this is still not really comparable with how more recent authoritarian regimes closely control and implement content, but rather something more akin to patriotic attitudes still found today in France or Poland, or in the patriotic appeal of the US flag.

In addition to the constitutional law of the Reich (Reichsstaatsrecht), the new state of Alsace-Lorraine and its special constitutional structure demanded the closest attention. Again, Laband was not only the leading constitutional interpreter but also a co-designer. He was a member of the State Council and the first chamber of the Landtag, so was both a parliamentary representative at the national level as well as a smart and well-balanced politician at state level. His impressive work as a state law teacher has been handed down in his Staatsrechtliche Vorlesungen (lectures on constitutional law) in the Berlin Federal Archives, and they have since been edited and reissued.

At the end of World War I, the state of Alsace-Lorraine region and the Kaiser Wilhelm University came to an end when French troops occupied Strasbourg, dismissing the "German" professors and expelling them across the Rhine. The university, with its well-equipped institutes, became one of the largest in France overnight and was reorganized along French lines. With their right to local self-determination, a parliament of their own and administrative jurisdiction, the new French citizens were on the one hand happy returnees to the republican French state, but on the other hand many felt themselves alienated from the other side.

Today, the University of Strasbourg is a modern, international university which also cultivates and represents its German and Alsatian heritage. From Bismarck's Empire, modern Germany has inherited many positive traits, including not least modern universal suffrage, the Federal Council, and more importantly basic jurisprudence, along with the milestones of the rule of law, social law, administrative law, and judicial administrative authority.

Moreover, we owe to Paul Laband the timeless insight that without clear systematics and conceptualization, without comprehensible derivations, solid legal principles, and a politically detached and neutral attitude, the modern state cannot be considered a constitutional state under the rule of law.

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Labor Migration: International

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Introduction

Labor migration is a global phenomenon shaped by broader social, political, economic, and technological developments. This type of migration, whose scope expanded as of the 1600s (De Haas et al. 2020), can be voluntary (quest for new economic opportunities) or involuntary (enslavement or deportation). Historically, international labor migration has been characterized as the movement of mostly low-skilled, male jobseekers both within and across national borders, linked to the process of capitalist development. Due to broader transitions from agrarian to industrial societies during the 1800s, large population groups turned to seeking employment beyond their native lands. From the mid-nineteenth century on, industrialization stimulated large-scale population movements from Europe, China, and India to North America and Southeast Asia (De Haas et al. 2020). However, border regulations and restrictive immigration policies eventually hampered the free movement of labor between countries. The turning point in international migration came after World War II, as globalization and the need for labor supply accelerated labor migration flows across states. Owing to the economic boom, traditional emigrant countries such as Italy, Portugal, and Spain received massive migrant flows to meet the demand for labor. Meanwhile, the share of women labor migrants gradually increased, reaching nearly 42% in 2019 worldwide (ILO 2021).

Over the past decades, international labor migration has grown considerably and reached most parts of the world. The exodus rate has been particularly high for Central America, the Caribbean, Eastern Europe, the Middle East, Indochina, and the African continent. Formerly emigrant countries of Europe have now become established as destination countries for many foreign workers seeking employment. The Population Division of the UN Department of Economic and Social Affairs (UN DESA) estimated the number of international migrants to have reached 272 million globally, with nearly two-thirds, or 169 million, being labor migrants (UN DESA 2019). In 2019, the United States was the top destination country for migrants, followed by Germany and the Russian Federation. From 2013 to 2017, the stock of international labor migrants increased from just under 150 million to just over 164 million, based on the reports published by the International Labour Organization. International migrant workers aged 15 years and older constitute 5–10% of the labor force in most destination countries and about 5% of the global labor force. This indicator is higher in the Arab States, where foreign-born workers account for over 40% of the labor force. More than 60% of migrant workers are employed in services, followed by industry and agriculture (ILO 2021).

Theoretical and Conceptual Approaches to Labor Migration

Labor migration has been viewed as the prime cause of population movements internally as well as internationally. A key approach to international labor migration assumes that it "is a response to a wage differential or inequality between the source and destination countries caused by a difference in the level of socioeconomic development" (Goss and Lindquist 1995: 317). From a neoclassical economic perspective (Massey et al. 1993), labor migration

results from actors' cost-benefit calculations. However, as a highly complex, dynamic, and often politically contested issue, labor migration cannot be conceptualized solely on the basis of economic theories. Hence, attempts to address the causes and consequences of international labor migration have led to the development of numerous, and sometimes conflicting, theoretical approaches. While theories on global migration differ in origin, focus, and level of analysis, much of the research on labor migration has concentrated on the social, political, and economic determinants of population movements. Macro- and micro-level approaches to international migration are central to the study of population movements, allowing scholars to integrate individual behavioral with socioeconomic determinants of such flows.

The *macro-approach* (Massey et al. 1993) is generally concerned with the broader socioeconomic and physical environments and how these generate or hinder global population flows. Borrowing from neoclassical economics in principle, macro-level approaches depict large political and economic systems as the principal mechanisms shaping the volume and directions of international migration. In this view, wage rates, cost of living, employment opportunities, infrastructure, and technological innovations are critical indicators of destination countries' socioeconomic environments. Labor migration is also sensitive to the physical environments within which population movements occur; such elements are typically broad and may range from population density to climatic factors. In the context of climate change, the physical environment is likely to increasingly affect the outcomes of current and future global population flows and, thus, labor migration realities (Cadwallader 1989).

The *micro-approach* (Massey et al. 1993) stems from theories of human behavior that link permanent or semi-permanent migration to individual reasons. Much of the extant micro-level research has been inspired by the pioneering study in which Lee (1966) argued that migration could result from individual choices, based on a comparison of "push" and "pull" factors at the source and destination countries, respectively. From this perspective, labor migration is treated as an investment in one's human capital (e.g., skills, abilities, and knowledge). Factors associated with the sending and receiving countries, intervening obstacles, and personal preferences are perceived as the key indicators contributing to the development of migratory patterns at the micro level. Among the factors influencing the decision to migrate, the author mentions personal networks and sources of information regarding the situation in the destination country.

Two theoretical approaches have been crucial to the study of contemporary labor migration. The first, known as the *functional perspective* (Lewis 1954), portrays labor migration as a process by which surplus labor is transferred from the agricultural economy to the urban industrial economy (Goss and Lindquist 1995). For international labor migration, this approach suggests that labor supply moves from rural to capital-rich urban areas with labor scarcity in search of better income, which, in turn, eventually stimulates economic growth and eliminates spatial inequality. The functional approach assumes that, largely guided by an economic rationale, labor supply is distributed from low-income to high-income areas through individual cost-benefit calculations. Within this perspective, functioning is understood in terms of people's capability and function to act (relocate) freely if they choose to do so (De Haas 2014). In essence, functionalist approaches view migration as a positive social and economic phenomenon, leading to greater equilibrium via the redistribution of labor supply and capital. Among the most influential examples of this perspective are push-pull models (Lee 1966), neoclassical migration theory (Harris and Todaro 1970), and human capital theory (Sjaastad 1962).

The second approach, referred to as the *structural* or *historical-structural perspective* (Wood 1981; Massey 1990), suggests that the need for cheap and exploitable labor drives the circulation of the labor force. Unlike functionalists, historical-structural theorists do not see labor migration as a free choice resulting from individual actions: The latter maintain that the constraints and conditions from traditional economic and social structures force rural populations to migrate

from rural to urban, developing to developed areas, as a matter of survival. They see labor migration as a manifestation of capitalism and the legacy of colonialism, with the control and exploitation of migrant labor being vital to the survival of the capitalist system (Goss and Lindquist 1995). Historical-structural theorists argue that international migration, in fact, deepens the inequality between wealthy and poor states, reinforcing disequilibria between the respective societies. The roots of this theoretical approach lie in Marxist political economy (Marx 1867/2013), dependency theory (Frank 1966), world systems theory (Wallerstein 1974), and globalization theory (Castles and Miller 1998).

While the early works of Harris and Todaro (1970) and later refinements of neo-classical migration theory on labor migration focused on the economic and individualistic determinants of population movements, more recent works (De Haas et al. 2019; McGovern 2007; Arango 2000) have come to emphasize more complex historical and institutional processes and structural factors underlying labor migration patterns. The changing patterns of labor and of socioeconomic and political environments, as well as climatic conditions, necessitate new methodological and theoretical approaches to the analysis of international labor migration.

Impact on Sending Countries

The most harmful impact of population outflows on sending countries is perhaps the withdrawal of skilled human capital, often referred to as "brain drain." From a broader perspective, brain drain implies the long-term or permanent transfer of high-skilled human capital from developing to developed states. Hence, often viewed as a loss of human capital, the emigration of skilled workers is believed to have negative repercussions for the source country and aggravate the inequalities between developed and developing states (De Haas et al. 2020). However, according to some recent studies, emigration does not necessarily deplete the sending country's human capital; to them, the movement of qualified persons stimulates the formulation and dissemination of knowledge across borders and creates business and trade networks. Collectively known as "brain circulation," the growing mobility of human talent, knowledge, and technology across boundaries could be a solution for both sending and receiving states (Chen et al. 2021).

Moreover, migrants often serve as suppliers for global finance by facilitating the flow of capital between their sending and receiving states. Remittances received in the home country tend to be seen as a positive outcome of population outflows for sending states. The report produced by the Global Knowledge Partnership on Migration and Development (KNOMAD 2022) has revealed that remittance flows had become a substantial source of transfers to low- and middle-income countries, often surpassing international investment and aid. For several major emigration countries, remittances are found to provide a critical source of income and stimulate the domestic economy by boosting entrepreneurial and investment activities. Developing economies witnessed a considerable rise in remittances in 2021, when officially recorded flows reached $605 billion. India was the largest recipient of remittances, followed by China, Mexico, the Philippines, and Egypt (KNOMAD 2022). Notably, remittance flows to high-income and middle-income countries have exceeded those to low-income countries. In 2017, nearly half of global remittances were received by lower-middle-income countries (46%), whereas the share of lower-income countries among remittance recipients was only 5% (De Haas et al. 2020).

Impact on Receiving Countries

Although it is often difficult to find precise estimates of the economic and social impact of labor migration on receiving countries, increasing evidence indicates that foreign-born human capital stimulates economic growth (Chen et al. 2021). Moreover, across developed states, where employers struggle to replace an aging labor force and find the required skillset to fill jobs, demand for immigrant labor has risen in the recent

years. Both states with industrialized and developing economies often rely on the export labor force to outsource certain types of lower-skilled, low-wage, and unattractive jobs.

As population demographics shift and fertility rates reach below replacement levels among the native-born in the world's most developed states, new approaches and solutions become necessary to manage migration. Among the member states of the Organization for Economic Co-operation and Development (OECD), where labor market shortages have been observed both for high- and low-skill occupations, immigration is considered a key driver of population growth. For instance, in the United States, older adults are expected to outnumber children and international migration is projected to overtake natural growth by 2034 (Vespa et al. 2018). Likewise, immigration constitutes a considerable part of the population increase in Canada. From 2016 to 2021, immigrants accounted for 1.8 million, or four-fifths, of the overall population growth in Canada (Statistics Canada 2022).

Developed industries increasingly rely on permanent and temporary immigration programs to address labor market and demographic needs. To maximize the benefit of migrants, some counties, including Canada, New Zealand, and Australia, have introduced point-based systems (De Haas et al. 2020). The point-based system allows the national government to identify the best candidates based on levels of education, work experience, age, language proficiency, and other factors. Furthermore, temporary worker programs enable developed industries to pursue sector-specific and targeted initiatives to hire employees on a short- or longer-term basis. Reliance on migrant workers for seasonal employment in sectors such as hospitality and agriculture has remained high in most developed countries over the past years. Nevertheless, national and subnational lockdown measures amid the COVID-19 pandemic have caused significant disruption to such employment relationships, exacerbating migrant workers' vulnerability.

In many cases, migrants' employability depends upon the host country's conditions and how well their skills match the needs and demands of employers. Compared to native-born persons, labor migrants tend to face worse, substandard conditions of employment, pay rates, and benefits. It follows that an additional dimension of migrants' labor market integration is discrimination by nationality: A recent study on the European Union indicated that while national borders did not impose explicit barriers to potential labor migrants' relocation across the member states, jobseekers' linguistic, cultural, and religious identifications played a considerable role in their labor market entry and career progression (Dorn and Zweimüller 2021).

Labor migration is often blamed for unemployment and declining wages in receiving states. Although Western European states such as Germany and Switzerland implemented temporary guest worker programs to enhance the labor supply through bilateral agreements after World War II, the economic downturn and increasing unemployment rates among native populations in the 1970s led to the introduction of more restrictive immigration policies. This trend has continued in subsequent decades. The 2008 recession was followed by restrictive labor migration policies and caps on temporary and permanent migration levels across the states with advanced economies (Cerna et al. 2015).

Finally, internationally educated professionals in regulated trades and fields, such as medical doctors, nurses, engineers, and teachers, often face various barriers that devalue their human capital. National and regional licensing and certification requirements in the receiving states push highly skilled migrants into unstable, low-wage, survival jobs. To ease labor market adjustment for skilled migrant workers, some states have sought to establish a policy framework for the mutual recognition of foreign qualifications, licensing, and certification requirements for professionals and introduced dedicated bridging programs.

Conclusion

International labor migration flows are found to contribute to industrialization and technological advancement processes in both the source and destination countries. Although the dynamics

and patterns of population flows have changed over time, most developed countries continue to rely on migrant labor and skills to fill labor market gaps and drive domestic economic growth. Scholars attempting to explain labor migration behavior have emphasized either macro- or micro-level approaches. While both these approaches hold the potential to provide valuable insights into international labor migration, more recent studies (De Haas et al. 2019; McGovern 2007; Arango 2000) suggest that a synthesis achieved by combining the macro- and micro-level factors is more appropriate.

The processes surrounding international migration, mainly from developing ("Global South") to developed ("Global North") states, are multifold. Related aspects such as brain circulation, migrants' remittances to countries of origin, and relocation to countries with better quality of life and benefits are regarded as positive factors; meanwhile, family separation, discrimination in labor compensation and conditions, and other barriers in accessing social and economic benefits represent the downside of labor migration. Whether migration can play a positive role and reduce inequality in the sending country also depends on the broader conditions in the country. Notably, favorable socioeconomic conditions and political stability tend to encourage emigrants to invest in their source countries – reinforcing positive reforms by investing, trading, circulating, and returning. Under unfavorable investment conditions for migrants, however, development trends have been comparably low due to reduced remittance flows (De Haas et al. 2020). While recent developments at the global level, including economic crises and the COVID-19 pandemic, have impacted labor migration patterns between states, the expansion of the aging workforce, coupled with the need for both the skilled and unskilled labor force, means that international labor migration will continue to play a critical role in the world economy.

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Lacey, Nicola

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Introduction

Professor Nicola Lacey (b. 1958–) is a leading British feminist legal theory and comparative criminal law scholar. Lacey is School Professor of Law, Gender, and Social Policy at the London School of Economics (LSE), affiliated to the Department of Law, Department of Social Policy, and Gender Institute. This broad affiliation reflects her commitment to theorizing law as a social phenomenon (2006), drawing on social, cultural, political, and economic contexts to understand the development of legal orders. She is a Fellow of the British Academy (2001); an Honorary Fellow of New College (2007) and University College (2010), Oxford; and an Honorary Bencher of the Inner Temple (2011). She held a Leverhulme Major Research Fellowship 2006–2009 and was awarded the Hans Sigrist Prize (2011), for work on the rule of law in modern societies, and the Swiney Prize (2004) for her biography of Herbert Hart, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (2004a). Lacey was awarded a CBE in the 2017 New Year's Honours, for services to Law, Justice and Gender Politics.

Lacey earned her LLB Law Degree at University College London (UCL) and Bachelor of Civil Law Degree at University College, Oxford. She began her career at UCL in 1981, moving to New College, Oxford, in 1984. She was appointed Professor of Law at Birkbeck College, University of London, in 1995, and Professor of Criminal Law and Legal Theory at LSE in 1998. Lacey was a Senior Research Fellow at All Souls College, Oxford, and Professor of Criminal Law and Legal Theory at the University of Oxford 2010–2013. Selected visiting appointments include Harvard, Yale, the Australian National University, Humboldt University, and Stanford. Notable prestigious lectures include the Leon Green '15 Lecture in Jurisprudence 2004 (University of Texas), the Clarendon Law Lectures 2007 (University of Oxford), the Hamlyn Lectures 2007 (University of Exeter), and the Bernstein Lecture in Comparative Law 2013 (Duke University).

Criminal Law, Penal Philosophy, and Legal Theory

Lacey considers the attribution of criminal responsibility in her book *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (2016a). Lacey's characteristically interdisciplinary approach draws together criminal law, legal theory, social theory, and political economy. The book displays her interest in historical aspects of criminal law and its development. Despite modern criminal

law requirements of *actus reus* (action) and *mens rea* (intention), she argues that character-based criminal responsibility-attribution persists in character evidence and status offenses. Lacey advances a new account of the conceptual structure of criminal responsibility, influenced by developments in the institutions and social functions of criminal law. This long-term project continues themes of character and criminal responsibility raised in *Women, Crime and Character: In Search of Criminal Responsibility* (2008a).

Other recent work on criminal justice includes a normative reconstruction of blame and analysis of the implications for criminal justice, developed jointly with Hanna Pickard (Lacey and Pickard 2013, 2015a). This collaboration also produced reflections on the salience of abstract ideas of proportionality in legal and political discourse (Lacey and Pickard 2015b; Lacey 2016b). Lacey has coauthored criminal law and jurisprudence texts for students and scholars of law at all stages (Lacey 2002, 2004b; Lacey and Jackson 2002; Braithwaite et al. 2004; Lacey et al. 2003).

Lacey's first monograph *State Punishment: Political Principles and Community Values* (1988), a philosophical work employing a communitarian perspective, is widely recognized as an excellent, accessible, and concise introduction to core philosophical perspectives on the justification of criminal punishment. Punishment is placed in the context of political questions of obligation and the role of criminal law and socially situated as a socially constructed system. Lacey advances a theory of punishment centered on the values of the particular community, linking punishment to the recognition and maintenance of many community members' commitments to these values.

The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies (2008b), Lacey's 2007 Hamlyn Lectures, offered an innovative analysis of penal practice trends, against a political economy backdrop. "Penal popularism," rising prison populations and penal severity in conjunction with popular anxiety about crime, she argues, is not inevitable for contemporary democracies. Understanding institutional differences as preconditions for penal tolerance or moderation provides scope to consider reform options for particular systems, appropriate to political context. Her 2007 Clarendon Lectures, *Women, Crime, and Character* (2008a), drew together philosophy, social history, and classical literary representations of the female offender. This interdisciplinary approach illuminates a radical shift in literary perceptions of women's agency and the legal attribution of criminal responsibility across the eighteenth and nineteenth centuries. The lectures discuss the implications for the criminalization of women, suggesting that some link to character remained, modified by some social environment considerations, in the attribution of criminal responsibility. These themes are picked up in her recent work. This volume bridges between Lacey's interests in a critical understanding of the criminal law and its historical development, to her interests in feminist theory.

Feminist Legal Theory

Professor Lacey's prominent work in feminist legal theory was inspired during her early career by the "Women Law Teachers Group" at UCL and influenced by leading feminist scholars, including Drucilla Cornell, Catherine MacKinnon, Judith Butler, Luce Irigaray, Katherine O'Donovan, and Carol Smart. *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998) considers the conceptual framework of legal practices, traversing public law, criminal law, and anti-discrimination law, and critiques the gendered nature of the structure and methods of law. As with much of Lacey's broader work, the essays critically examine a wide array of socio-legal problems within social contexts that showcase the utility of using a feminist legal lens. Practical legal examples illustrate these issues, including sexual offenses, pornography restrictions, and race relations law. The book covers a range of conceptual topics, including equality, freedom, justice and rights, and the construction of the public/private divide. Lacey's innovative discussion of the construction and socio-legal impact of the public/private divide provides a point of engagement between feminist and mainstream legal theory, drawing critical feminist thought into mainstream debate. Lacey challenges understandings of what is possible by developing her critique to offer alternatives. This normative reconstruction allows a

reconsideration of the conceptual framework of law and legal orders.

Other Writings

Professor Lacey is the highly acclaimed biographer of H. L. A. Hart, having been an acquaintance of the Hart family. Lacey met the then retired Professor Hart during her time as a graduate student at University College, Oxford, in the late 1970s. Lacey was invited to compile the biography in 2000 and given access to Hart's unpublished personal papers, by his widow, Jenifer Hart, following Herbert Hart's death in 1992. Although a departure from academic writing, Lacey's award-winning biography of Hart (2004a) provides detailed insight into his life and context for his intellectual work.

Conclusion

Professor Lacey's innovative interdisciplinary approach to law and legal theory highlights the relevance of context in understanding legal development. She draws on distinctive range of perspectives, social, legal, economic, and political, to scrutinize and problematize long-standing presumptions, opening them up to fresh debate. Her acclaimed biography of H.L.A. Hart weaves into her broader academic work in law and legal theory, in light of her wider emphasis on the role of social contexts in shaping legal orders.

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Lamennais, Hugues-Félicité Robert de

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Introduction

Hugues Félicité Robert Lamennais (de Lamennais, or de La Mennais; June 19, 1782,

Saint Malo/Bretagne to February 27, 1854, Paris) was a Catholic priest and theological as well as political writer. Lamennais, whose Father was a shipowner ennobled by Louis XVI, was ordained priest in 1816. In the spirit of the traditionalism of Joseph de Maistre (*Du pape*, Paris 1819), as a teacher and writer, he initially attacked Gallicanism, a complex of French ecclesiastical and political doctrines and practices advocating restriction of papal power (*Essai sur l'indifférence en matière de religion*, 4 vol. Paris 1817–1823; *Défense de l'essai,* Paris 1821*; De la religion considérée dans ses rapports avec l'ordre politique et civil,* Paris 1825). In 1830, he founded the journal *L'Avenir,* whose campaign for freedom of belief and conscience soon made it the voice of liberal Catholicism in France.

The Constitution of Belgian Catholics and Liberals

In 1830, Belgian Catholics and Liberals had together adopted a constitution that declared the separation of church and state. The constitutional efforts of the Catholics in Belgium, Ireland, and Poland helped convince Hugues Félicité Lamennais to give up his traditionalist demands in favor of liberal and democratic ones, which he defended in the journal *L'Avenir* along with Charles de Montalembert and Henri-Dominique Lacordaire (cf. Uertz 2005, pp. 49ff., 91ff.).

The hatred of the Breton priest for the Bourbon monarchy had intensified, but he was even more decisive in his struggle against the government of the "citizen king" Louis Philippe, whom he accused of failing to comply with the liberal principles of the Charter of 1814, which ostensibly formed the basis of the regime. Lamennais recognized that the new order with its constitutional foundation had definitively disposed of Gallicanism, meaning that the Church could expect nothing more from an alliance with the monarchy. He now became a staunch defender of the alliance between democracy and the Church, so that H Maier might say that if Lamennais in his traditionalist period had tried to Christianize the monarchy, he was now trying to Christianize democracy (cf. Maier 1969, Chap. III.1). The theologian recognized that given the rise of democracy across Europe, the rights and security of the Church could only be guaranteed by enshrining the freedom of conscience, of education, of the press, and of association in the constitution – an insight that logically culminated in a call for the separation of church and state.

In the encyclical *Mirari vos* (1832), Gregory XVI expresses his joy and gratitude to God, who, "having overthrown all enemies, snatched Us from the present danger," in an allusion to the restoration movements gaining momentum throughout Europe (cf. Mirari vos: On Liberalism and Religious Indifferentism, 1832, https://www.papalencyclicals.net/greg16/g16mirar.htm). At the same time, the Pope shows great concern about "the insolent and factious men who endeavored to raise the standard of treason." The pontiff is here evidently referring to the teachings of Lamennais, which were now even threatening the Church from within (Gregory XVI's predecessor Leo XII, 1823–1829, held Lamennais in high regard and even wanted to appoint him cardinal; cf. Schmidlin 1933, p. 404.).

"The Restoration of Church Discipline"

The style and the core arguments of the encyclical are similar in many ways to the *Quod aliquantum* brief (cf. Quod aliquantum: The Church in the secular state, 1791, of Pius VI, https://digilander.libero.it/magistero/p6quodal.htm). Like his predecessor Pius VI, Gregory XVI regarded liberal and democratic ideas – in their foundations as well as in the demands they made on politics, culture, and the Church – as completely incompatible with Catholic doctrine. Thus, *Mirari vos* is also primarily concerned with defending Catholic truths, which, it goes without saying, include the religious and moral foundation of the polity. For the pontiff, a *Christian monarchy* is the only appropriate form of organization. His criticism of liberal Catholic ideas is of a piece with his worry about the decline of church-mindedness. *Mirari vos*

calls for the restoration of church discipline, observance of the Church's teachings on the sacraments and morality, respect for Church law, and the tenets of natural law, as well as the subordination to the Church's magisterium, particularly to the Pope. The encyclical describes the approaching conflict as a battle between the "powers of darkness" and the defenders of the true Christian faith, which it is the Pope's God-given responsibility to guard over. "Depravity exults; science is impudent; liberty, dissolute," writes Gregory. He laments the battle against "the divine authority of the Church" and its subjection "to human reason"; the hostility toward the See of Peter, the refusal to obey the bishops, the "tremendous blow [. . .] dealt to religion and the perversion of morals"; and, last but not least, "the heretical societies and sects in which all that is sacrilegious, infamous, and blasphemous has gathered as bilge water in a ship's hold, a congealed mass of all filth" (cf. Mirari vos).

The Condemnation of "Indifferentism"

The innovators' demand for the separation of church and state, argues the Pope, is aimed at the heart of Catholic doctrinal theology and moral teaching. For Gregory, the disregard of these teachings and the breakdown of discipline are logical consequences of the "indifferentism" in matters of faith. He condemns democratic liberties as well as the freedom of religion and of speech as ideas profoundly opposed to the Catholic faith.

A strictly secular polity, the Pope argues, is a contradiction in itself. *Freedom cannot* and should not *claim priority over the truth*, since it is not bound by reason and its interpretation is not guided by Catholic doctrine (this view was maintained as part of the Catholic theory of the state until the end of Pius XII's papacy, 1939–1958). Gregory thus rejects the core demand inherent in Lamennais' liberal Catholic ideas, namely, that of religious freedom, and counters with the notion of the *religious state*, which alone could provide the necessary protection and supportive legal framework to the Church and the papacy. Only in this way, could the *Catholic truth* with its broad societal and political claims and admonitions assert itself on the public stage. Referencing "the admonition of the apostle" Paul, Gregory strongly urges his readers to remember the supreme authority of God and condemns all resistance against the human authorities.

The Ideas of 1789 in the Tradition of the Reformation

Much like the papal brief of 1791, *Mirari vos* associates the ideas it condemns with "the infamous and wild plans of the Waldensians, the Beghards, the Wycliffites, and other such sons of Belial, who were the sores and disgrace of the human race" and who, like Luther, "received a richly deserved anathema from the Holy See" (cf. *Mirari vos*). The encyclical's criticism is clearly aimed at Protestantism, whose doctrine of conscience (the emphasis on the individual person's conscience) encouraged the principle of the autonomy of culture, which in the *absurd demands for freedom* (separation of church and state, freedom of conscience, religion, speech, refusal to obey the rightful rulers, etc.) had found its logical political conclusion.

Gregory XVI was thus advocating a traditionalist foundation for the political order and the law, according to which religion comprises not only the moral but also the political norms for the protection and preservation of the monarchical polity, including lawful obedience to the ruler. *L'Avenir*'s program, on the contrary, with its demand for the freedom of conscience and of religion, left the Christian obedience of faith and of the law up to the individual – thereby, in the eyes of the Pope, striking at the very heart of Christian morality. Because of its basic traditionalist theological premise, the condemnation of *indifferentism* – in the language of *Mirari vos*, the view that "it is possible to obtain the eternal salvation of the soul by the profession of any kind of religion" – was necessarily accompanied by a condemnation of a polity neutral in matters of religion. Although the document does distinguish between religious and natural morality, they

nevertheless are seen as forming an insoluble unity. The historian R. Aubert concludes from the ecclesiastical point of view that a religiously indifferent community would thus negate its own foundations and become an immoral community (cf. Aubert, p. 341 f.).

For the Austrian Chancellor of State Klemens Prince von Metternich, who feared the liberal demands of the French abbot would galvanize the cabinets of the Catholic powers along with the ecclesiastical and secular supporters of the Restoration, *Mirari vos*' condemnation of Lamennais did not go far enough. L. Ahrens edited the correspondence between Metternich and the Roman embassy concerning Lamennais, and she wrote: Metternich "was extremely annoyed and did not neglect to alert Rome on this question and to insist that a new, more clearly worded statement would be appropriate" (cf. Ahrens 1930, pp. 233–273) (HA Kissinger points out the concert of the European monarchies including the Papal State and analyzes the system of Metternich; cf. Kissinger, Chap. XI.). The desire for a more decisive condemnation was due in no small part to Lamennais' influence on the Belgian Catholics. The Belgians found themselves in a difficult situation because their democratic constitution of 1830, which had also been approved by the Belgian bishops, was increasingly serving as a basis for practical and political action. The bishops, nevertheless, showed "no concern whatsoever," since they assumed "that declarations of principles regarding an ideal regime did not affect the constitution, which, after all, was a civil and not a theological agreement" (cf. Aubert 1985, pp. 342ff.). Neither did Gregory XVI, in fact, want *Mirari vos* to come across as a condemnation of the Belgian constitution. He did consider the latter to be incompatible with theological and canonical principles, particularly the Catholic religion's entitlement to special protection; nevertheless, he was prepared to "accept, in certain extraordinary cases, a regime that tolerates the modern liberties, on condition that the basic rights of the Church are not violated." No doubt, the rationale behind this was the moral and theological maxim of the *toleration* of the democratic, denominationally diverse state as a "lesser evil," which Leo XIII would later make into a basic principle of the Catholic theory of the state (cf. *Immortale Dei: On the Christian Constitution of States*, 1885, of Leo XIII, No. 36, http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei.html).

The Condemnation of Lamennais by Name

Gregory XVI was not willing to admit a fundamental and rule-governed separation of church and state as intended by Lamennais, "since he held the view that the call to revolt against the established authorities called into question moral and religious principles." By legitimizing the monarchical order as deriving from the God-given rights of kings, Gregory XVI was unmistakably making use of traditionalist legal theory and thus implicitly denying principles of natural law such as the scholastic doctrine of popular sovereignty.

Although after the appearance of *Mirari vos* Lamennais declared himself prepared to submit to the demands of the Holy See "in questions of faith, morality, and church discipline," in the same breath, he insisted "on the right, even after the encyclical, to exercise complete freedom of judgment and action in the political sphere." The theory of society (a theory of common sense) he lays out in his *Paroles d'un croyant* (1833) is completely devoid of theistic justification. "In 41 apocalyptic visions," the book paints "a picture of the establishment of the Kingdom of God on earth. If Christianity in *L'Avenir* was the motor and principle of humanity's progress into a new future, in the *Paroles* it is the 'principle of social and political revolution' that will bring about the Kingdom of God. This Kingdom of God was to restore the natural equality, freedom, and brotherliness among men," after they had been lost due to being led astray by Satan and by those men who were sons of Satan (cf. Valerius 1983, p. 21). On June 25, 1834, in the encyclical *Singulari Nos*, Gregory XVI explicitly condemned Lamennais' *Paroles* (On the Errors of Lammenais cf. *Singulari Nos*, https://www.papalencyclicals.net/greg16/g16singu.htm).

Conclusion

Lamennais can be credited with being the first Catholic theorist to draw up a body of principles justifying from a Christian perspective a constitutional order that includes basic liberal rights and the separation of church and state. Lamennais' students and comrades-in-arms, Jean Baptiste Henri-Dominique Lacordaire (1802–1861) and Charles Forbes René de Montalembert (1810–1870), took his ideas in a more moderate direction, without adopting all of his political and theological premises.

The Catholic Church continued to look to traditionalism – the theory rooted in historical law (customary law) – as its strongest support in its struggle against liberal principles of order, which it saw as being opposed to traditional Church dogma and moral teachings. Legitimism was justified theologically by appealing to Apostle Paul's letter to the Romans: "Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves" (cf. Romans 13:1–7).

One of the essential reasons the Popes held into traditionalism and that it continued to be upheld by the official Catholic doctrine of the state was the existence of the Papal State (756–1870), whose supporting pillar was *historical law*. Historical law was also the driving force at the Congress of Vienna in 1814–1815 and the basis for the restoration of the European monarchies. But Lamennais subsequently, as writes B. Cook, "applauded the revolutions in Belgium in 1830, where his ideas had gained popularity and where an alliance between Catholics and liberals had been effected," and in Poland and Ireland (cf. Cook 2004).

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Langton, Rae

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Introduction

Rae Langton (b. February 14, 1961–) is Knightbridge Professor of Philosophy at the University of Cambridge and a Fellow of Newnham College. Before moving to Cambridge in 2013,

she held professorships at Edinburgh and MIT. Langton delivered the John Locke Lectures in 2015, the H.L.A. Hart Memorial Lecture in 2019, and a number of other prestigious philosophy lectures. She figures in the *Prospect Magazine's* "Top 50 World Thinkers" of 2014, voted 18th (and 4th woman) among those who most originally and profoundly engaged with the central questions of today's world.

Pornography, Subordination, and Silencing

Langton is best known for her work on pornography and hate speech, especially for her analysis of both in terms of subordinating and silencing speech. In her now classic "Speech Acts and Unspeakable Acts," Langton (1993a) defends the philosophical plausibility of Catharine MacKinnon's (1987) claim that pornography subordinates and silences women. Langton's argument is based on two premises. First, pornography is speech. This is supported by US courts, who have judged it protected by the First Amendment. Second, speech is not only a matter of saying things but of doing things with words. This is the major insight from J.L. Austin's (1962) speech act theory. Put these ideas together and the upshot is that pornographic speech does things. With this in hand, Langton shows that pornography may do what MacKinnon claims it does – subordinate and silence women.

Langton considers a legislator in apartheid-era South Africa who utters, "Blacks are not permitted to vote," in the context of enacting a law. This is, in Austin's parlance, both a *locutionary* act (a meaningful sentence) and a *perlocutionary* act (it will have certain causal consequences). But it is, above all, an *illocutionary* act: it unfairly ranks black South Africans as having inferior social status; legitimates discriminatory conduct against them; and deprives them of voting rights. In one word, it is a subordinating illocutionary act. It doesn't *mirror* nor does it merely *cause* subordination; rather, it *is* (or *constitutes*) the subordination of black South Africans. Pornography, Langton holds, may subordinate in a parallel manner. In depicting women as sex objects and women's abuse in ways that condone and celebrate it, pornography may unjustly rank women as inferior, legitimate gender-based violence, and thus infringe women's equal citizenship (Langton 1993a, 307–308).

Pornography is also said to silence women by violating their free speech right. Langton's way of unpacking this is as telling us that pornography may prevent women from performing certain illocutions, e.g., sexual refusals. Pornography plays an important role in spreading false expectations about women's sexuality, to the effect that its habitual consumers may come to believe that women always want sex or fantasize about rape. Hence, when a woman says "No" in a real-life sexual setting, intending to refuse, her utterance may not be taken by the man as a refusal, but as part of the game. In the Austinian framework Langton endorses, *uptake* (i.e., the hearer's recognition of the speaker's illocutionary intention) is necessary for illocuting. If uptake is not achieved, then the woman's refusal misfires. Pornography may thus bring about women's illocutionary silencing (Langton 1993a, 321).

Free Speech and Illocution

Langton's view has attracted distinguished advocates and critics. (For a full overview of the criticisms to Langton's account, see Mikkola (2019); Langton (2009) collects her major writings on pornography.)

Liberal objections to the silencing claim have prominently been raised by Daniel Jacobson and Ronald Dworkin. Both have maintained, for different reasons, that, even if pornography silenced women in the way Langton suggests, this wouldn't be a free speech issue. According to Jacobson (1995), Langton's conception of free speech captures too much. In many cases it is not morally problematic to preclude people from illocuting; for example, no wrong seems to be done to 12-year-olds by preventing them from marrying. Furthermore, even when restrictions on marriage do wrong people (e.g., same-sex couples), such a wrong doesn't hinge on free speech concerns, but on being denied equal civil rights. From this, Jacobson concludes that free speech is

no more than freedom of locution. Langton and a coauthor, Jennifer Hornsby, reply that the silencing argument does not assume that the speech right protects *any* illocutionary acts, but those which "reveal language use as communicative" (Hornsby and Langton 1998, 33). Communication primarily involves the expression and recognition of intentions. Jacobson considers illocutions, such as marrying or voting, whose success relies on the correct execution of some extra-linguistic procedure, but there are also illocutions which are essentially communicative in that uptake is enough for their success. Refusal is one such illocution, and its performance is covered by free speech, at least insofar as one agrees that free speech protects people's power to communicate.

Dworkin seems to share Jacobson's idea of free speech as free locution, although in his case, it works as a background assumption. The MacKinnon-Langton view, Dworkin argues, appeals to women's *positive* liberty to be heard and sympathetically understood, to a "right that others grasp and respect what one means to say" (Dworkin 1993, 38), but such guarantees are not in the remit of *(negative)* free speech. Langton (1999) rejoins that Dworkin fails to appreciate the distinction between illocutionary and perlocutionary success and consequently the notion of understanding relevant to the silencing claim. Uptake, and thus illocutionary success, involves a *minimal* receptivity – a basic capacity on the hearer's part to understand what a speaker may be trying to do with words. It does not require that one's illocution is agreed to or respected. The silencing argument extends free speech beyond locution, but not as far as to include perlocutionary features, such as "respect" or a "sympathetic hearing," which would be characteristic of a positive liberty.

The Authority of Hate Speech

Subordinating speech requires speaker authority. After all, there is a huge difference between an utterance of "Blacks are not permitted to vote" made by a legislator enacting a law and the same utterance made by a private citizen. This poses a problem to Langton's subordination claim. Leslie Green, for one, takes pornographers to be more like private citizens than legislators. In societies like ours, pornography is "low-status speech" and its sexist messages are overthrown by the egalitarian messages of more "high-status speech," e.g., the speech of the state (Green 1998, 296–297). Langton (1998) retorts that the key question is not whether pornography is universally held in high regard, but whether it is authoritative relative to certain consumers, who form its jurisdiction. Langton (2017) takes there to be compelling evidence for the claim that pornography counts as an "authoritative saying," at least for those young people who admittedly resort to it for guidance on sex.

The so-called Authority Problem (Maitra 2012) also affects Langton's speech act account of hate speech, which is closely intertwined with her account of pornography. Langton (2012) identifies two potentially overlapping classes of hate speech: (i) assault-like hate speech, whose addressees are the targets of hatred, and (ii) propaganda-like hate speech, whose addressees are other haters, or would-be haters. Both may degrade their targets by ranking them as inferior, as well as normalize hatred and hierarchy. Hate speech, that is, may constitute subordination. It can at times be backed up with institutional authority (consider Nazi propaganda), but more often it lacks any formal authority (consider some random subway rider launching into a racist tirade against a fellow rider). The problem boils down to this: How can *ordinary* instances of hate speech subordinate? In recent work, Langton (2018a) has argued that ordinary speakers can gain authority informally via a mechanism akin to presupposition accommodation (Lewis 1979): a speaker acts *as if* they had authority, and they can end up acquiring it if nobody objects. Langton's view has implications for responsibility. If staying silent in the presence of a racist tirade informally confers authority to the racist speaker, then hearers and bystanders might have a moral duty to speak up. Furthermore, and relatedly, there may be "a power in the hands of hearers to do something special" (Langton 2018b, 162): the power to *block* the process of authority acquisition and thus disarm, at least to an extent, ordinary subordinating speech.

Objectification and Objectivity

There's space only for a quick scan of another debate to which Langton has influentially contributed: the debate over objectification. Langton has analyzed the notion both in its moral and epistemological dimensions. The moral dimension to objectification captures the idea of treating *someone as an object.* According to Martha Nussbaum (1995), objectification, at its core, concerns autonomy denial; Langton (2005) claims instead that autonomy attribution is sometimes crucial to the process of objectification, for affirming someone's autonomy may assist and hide its very violation. As to the epistemological side of objectification, the idea is that of treating *something as objective*, when it is not. Drawing on Sally Haslanger's (1993) work on "assumed objectivity," Langton (1993b) develops a detailed argument to the effect that objectification is often covert and "masked" as objectivity.

Conclusion

Langton strongly believes that speech is not just a matter of producing word-like sounds, but of doing things with words. By using the toolkit of speech act theory to elucidate the politics of gendered and racist hate, Langton has remarkably contributed to what might be called the "speech-oriented approach to social injustice" – a view that takes speech to be paramount in enacting and bolstering discriminatory inequality. Her speech act approach to language and social injustice has had, and continues to have, a significant impact on philosophy of language, moral and political philosophy, and philosophy of law.

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Language and Law

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Introduction

The relationship between law and language is complex and multifaceted. At the most general level, it can be understood as the relation between two fundamental human social practices (the social practice we identify as "law" and the everyday use of natural languages, qua semiotic systems, for communicative purposes) and between the disciplines that study them (legal science and linguistics/philosophy of language).

Law, under most accounts in the literature, can be conceived of as an institutional-normative system which purports to guide the conduct of very large numbers of individuals through rules (and rulings) backed up by organized coercive enforcement. This happens primarily through the communication of general standards of behavior (and other normative qualifications, like obligations, statutes, and powers) – that is, through the use of (mainly) prescriptive language expressed via the code constituted by the natural language spoken in the relevant community.

It cannot be denied, therefore, that to deal with law means to deal, together with the relevant forms of behavior as prescribed by those norms, with the use of linguistic signs for communicative purposes (Ferrajoli 2007, vol I: 3–8). This seems confirmed by the fact that if one does not speak English, it is doubtful that she will be able to grasp anything at all about the English legal system. At the same time, even a perfectly competent speaker of ordinary language, without legal training, might struggle to grasp fully the workings of the law as a whole. This is because lawyers and officials often talk in ways that are technical and "difficult" for laypeople. But is not it the case that one can talk in "difficult" ways in ordinary conversations as well? What is the difference when it comes to *legalese*?

A comprehensive discussion of the relationship between law and language would require arguably not one, but several books. As a result, any shorter treatment will have to consider only few and selected aspects of such relationship, leaving much out. This might disappoint some readers.

To avoid, hopefully, such outcome, the first section of this entry will give a brief overview of the many different approaches through which the relationship between law and language has been and can be investigated. The discussion will be, consequently, extremely limited, but the main objective here is to provide the interested reader with a roadmap for further study. Then, in the second section, I will outline the current dominant approach to understanding the relationship between law and language, which sees the former merely as one of the many social practices that are entertained through the latter. In the third section, the underlying premises of this dominant view will be questioned, and an alternative view will be outlined. Some brief conclusive remarks will follow and bring the entry to a close.

A Brief Overview of the Main Approaches to the Relationship

Legal Theory

Is law a language? And if so, what kind of language? Or does law simply "use" the natural languages spoken in each jurisdiction? Moreover, depending on the answer to these – and related – questions, can we gain any insights about the *nature* of law (that is, the kind of "thing" law is)? And, conversely, can we learn anything about the language we speak?

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These are only some of the questions that are routinely addressed, in the literature, as part of the legal-theoretical or philosophical approach to the relationship between law and language. It is, to be sure, a relatively new phenomenon. While Bentham can be considered arguably as its progenitor, a systematic approach that uses philosophy of language tools to gain insight into the nature of law only emerged in the second half of the twentieth century, following the philosophical analysis of language developed by Wittgenstein and the neopositivism put forward by the wider Vienna Circle. These were, respectively, the major influences on the work of (arguably) the two central figures in this Copernican revolution of Western legal thinking: HLA Hart in Anglo-American jurisprudence and Norberto Bobbio in continental Europe (Endicott 2022).

From the mid-1950s, then, a bourgeoning debate progressively made more and more use of advancements in philosophy of language – and particularly of speech-act theory (Amselek 1988; Kurzon 1986) and of the work of Paul Grice and of those who have come to be identified as "neo-Gricean" on pragmatics – to shed new light on a number of topics in legal theory and legal interpretation (see eg MacCormick 2005; Marmor 2008, 2014; Soames 2008; Ekins 2012; Solum 2013; Chiassoni 2019), including:

- Whether law should be understood as a type of communicative enterprise (between the lawmaker and courts, usually).
- What is the relationship, if any, between the communicative content of legal utterances (legislative acts, judicial decisions) and the content of law itself (the set of norms, rights, obligations and so forth existing at any moment in any legal system).
- If law is indeed to be understood as a communicative enterprise between legislatures and courts, what is its nature? Cooperative, like in the case of most instance of ordinary communication, or strategic? And what would be the consequences for our understanding of legal interpretation in either case?
- Lastly, what is the impact of the interpretive maxims and conventions – sometimes referred to as "interpretive codes" – as practiced by the officials of a given legal system on the nature of legal communication itself?

To be sure, there are also those in the literature who reject completely the so-called communicative theory (or model) of law (Dworkin 1986; Greenberg 2011), but this rejection seems hard to square with the reality of how modern legal systems work (Sandro 2022).

Legal Linguistics

Legal linguistics usually refers to all those approaches that investigate the use of language in law from a more empirical perspective. Here the "bottom-up" approach of the research is even more marked than in the other, related, disciplines. That is to say, all sub-fields of legal linguistics start from real problems with the use of language in law – in and outside the courtroom – and apply insights from linguistics in general to diagnose and, often, solve those problems. It is, to be sure, a very vast field, which also evolves rather quickly. Nothing arguably encapsulates this better than the recent explosions of experimental linguistics approaches to legal interpretation, and in particular the use of corpus linguistics methods to address long-standing disputes about the meaning of legal utterance (and particularly constitutional ones in the United States) (Solan 2016; Solum 2018). Corpus linguistics is a data-driven approach which is supposed to be significantly more reliable than both linguistic intuitions of ordinary speakers (including judges) and dictionary definitions at capturing the contextual meanings of words and expressions in ordinary languages. This happens by feeding incredibly large datasets to progressively more sophisticated coding software.

Three more sub-fields of legal linguistics must be at least mentioned. The first two are the related fields of legal translation and the so-called multilingual law. While the former is based on an historical, well-established practice, the latter has seen a rapid expansion as a field of study undoubtedly because of the European Union process of integration: a unique legal system which has now 24 official and working languages and sees

multilingualism as one of its founding principles. As one can imagine, this brings challenges and linguistic issues on a scale that is not comparable even with existing multilingual jurisdictions (like Switzerland or Canada) and has given rise to a bourgeoning literature, particularly in regulatory studies (see eg Leung 2019). Finally, the field of language rights – the rights to language in all aspect of life (and not just within the legal system), with the correlative set of obligations on public authorities and private parties – is another rich field of study which has seen an increasing amount of highly topical interdisciplinary work (see, e.g., Skutnabb-Kangas and Phillipson 2016).

Legal Semiotics

Legal semiotics is used here, following Jackson (2010), as an umbrella term, which includes several approaches that are quite different among themselves (due, in part, to the different approaches to the nature of semiotics itself).[1] A macro-distinction can perhaps be drawn between those approaches to law and legal theory which draw on the resources of semiotics implicitly and those who do so explicitly. Among the former, Jackson (2010: 5–10) includes early and late legal positivism (Bentham, Austin, Hart, and Kelsen), Dworkin's interpretivism, as well as the North-American and Scandinavian legal realist schools. Among the latter, one can find the works of Wróblewski and Kalinowski, the so-called Italian Analytical School – which sees in Bobbio and Scarpelli its precursors and in Jori and Ferrajoli two of its current main representatives as to the explicit use of semiotics in legal theory – the rhetorical and pragmatic approaches to legal semiotics developed, following the seminal work of Perelman, by MacCormick, Amselek, and Kurzon among others, and the sociological approaches to the use of semiotics in law (see, e.g., the work by Arnaud, Carzo, and Manning) (Jackson 2010: 5–17). Another potential classification suggested by Jackson is based on the approach to semiotics applied to law, whether Peircian (following the seminal work of Charles Peirce) or Greimasian (following the structural linguistics framework put forward by Algirdas Greimas).

A further, and again stipulative, distinction could be made between the approaches to legal semiotics briefly listed above and those instead, albeit "inspired" by semiotics, that adopt a much more – and arguably fundamental – *critical* stance vis-à-vis their object of study, law. These approaches might not share many features with one another, but they broadly understand law as a discourse (thus implicitly conceiving of law as a semiotic system) *on* (if not *of*) power which is necessarily always a product of culture and ideology (Wagner and Broekman 2010). Two brief observations are in place here. First, in this respect this "new" strand of legal semiotics seems to "pick up the baton" from the Critical Legal Studies movement, as the "seminal" essay "The Promise of Legal Semiotics" by Jack Balkin (1991) clearly indicates, while also broadening the perspective of analysis to more recent approaches to legal studies: "post-structuralism, legal feminism, and post-modern multiculturalism" (Wagner and Broekman 2010: V). Second, here the distinction between legal semiotics and legal hermeneutics (Botts 2022) – the study of legal texts and legal meaning through a critical, reflexive attitude and based on the work of philosophers like Heidegger, Gadamer, and Derrida, among others – blurs to the extent of becoming almost negligible.

Law and Language: The Standard View

What is the relationship between law and language(s)? Is law a language? And if not, how does law use language? As we said at the beginning of the previous section, these are some of the main questions routinely addressed in the legal-philosophical literature that addresses the relationship. In this section, we will illustrate briefly what can be considered by far the most common approach in the relevant literature – masterfully illustrated in Endicott (2022), from which the

[1] At the most general level, semiotics is the study of signs and their meanings. In a nutshell, it seeks to understands how signs – as well as system of signs – work: that is, how do we pass from the 'signifier' to the 'signified'.

interested reader should start – and its implications for the understanding of the relationship.

In a nutshell, the most common (implicit or explicit) approach in the literature is to consider law as a social practice that "merely" uses language, like many other systems (morality, etiquette, games, and so forth). Law *uses* language in that most legal norms (and other deontic statutes) are produced through a complex web of linguistic utterances, which includes – at least – legislative, executive, administrative, and judicial ones.

As such, the majority of theories of meaning of legal language and of legal interpretation are based on this seemingly unassuming contention. At most, law is a social practice that uses language while exhibiting certain (admittedly peculiar) features – like the technical nature of some of its terms and expressions or the presence of a system for the "authoritative resolution of disputes over the effects of that use of language" (Endicott 2022) – and legal theories of meaning and interpretation discuss how best to account for those (again see Endicott 2022 for an excellent illustration). But the basic premise according to which law merely uses the natural language(s) spoken in the given community remains firm.

This fundamental assumption yields important consequences for the second horn of the relationship, as mentioned in the introduction: that between the disciplines that study law and language (respectively). In particular, it implies that the development of theories and approaches in philosophy of language can be more or less straightforwardly applied to the use of language in law, viz., to legal communication. This is why, as we mentioned above, since the second half of the last century, there has been what can be aptly called the "rise of pragmatics" in legal theory, following the seminal work of Paul Grice and other philosophers of language working in his footsteps (see, e.g., Carston 2013). A very helpful discussion of the rise of Gricean and post-Gricean pragmatics in legal discourse can be found in Skoczeń (2019: chs 1–2).

For our purposes, the rise of pragmatics in legal theory is by far the most consequential aspect of the assumption that law is merely a subspecies (or a specific area of use) of natural language(s). In particular, the relevant thesis is that the "dependence of the effect of legal language on context is an instance of a general feature of communication" (Endicott 2022). This, in turn, is used in the literature (see, e.g., Chiassoni 2019) to argue that even moderate cognitivist theories of legal interpretation – those theories which draw a rough distinction between "easy" and "hard cases," as defended by Hart (2012) and many of those working in the positivist tradition he revitalized – are mistaken, because there can never be legal meaning before contextual interpretation. That is to say, there are never "easy" cases of application of law – where the judge merely *applies* the content of the legislative utterance to the facts before them – and this confirms the needs to embrace legal realism (Poggi 2013). In this respect, the radical pragmatic character of legal communication makes it impossible to put forward a *theory* – as opposed to a mere (descriptive) *account* – of legal interpretation (Guastini 2011; Endicott 2022).

This basic premise does not seem questioned even by those, like Marmor (2008) and Poggi (2020), who hold that the pragmatics of legal language is different from that of general communication in fundamental respects, and particularly in the non-cooperative (or not fully cooperative, at least) nature of the communicative exchange. This, however, does not call for a complete abandonment of the application of speech-act theory to legal theory, but merely for its alteration, in order to account for the strategic nature of legal communication. An attempt to develop such a modified post-Gricean theory of the exchange between legislatures and courts can be found for instance in Skoczeń (2019).

An Alternative Picture of Law and Language

In the last few years, an alternative picture about the relationship between law and language and the nature of legal communication has emerged. This alternative picture rejects two fundamental assumptions of the standard view.

First Objection: Law as an (Administered) Language

The first fundamental assumption is that according to which law is merely one of the many "subspecies" of ordinary language, so "that the pragmatics of legal language is best seen as a deeply integral part of the pragmatics of the use of language in general" (Endicott 2022). From the perspective of macro-pragmatics – that is, the study of the effects/functions not of discrete instances of communication, but of languages, qua systems of communication, overall – legal communication seems a whole different beast from natural languages. This is because when legislators, lawyers, citizens, and judges engage in legal communication, they are using language with an overarching (macro-)pragmatic purpose which differs from that of ordinary communication (Jori 2016: 49). This purpose is the creation and maintenance of a separate "universe of discourse" (Ferrajoli 2007, vol I) where group conflicts as to what "needs to be the case" can be managed so as to reach either agreements or authoritative resolutions (which can be, in turn, peacefully challenged) (Croce 2012). To this end, this different "universe of discourse" is more formalized, in the sense of the precision of its semiotic rules (Ferrajoli 2007, Tiersma 2001) and necessarily less dependent on context than ordinary linguistic conversations. This is due, first, to the relative degree of impersonality of the producers and receivers of legal utterances – particularly legislative and regulatory ones (Slocum 2015a: 52). This contention, once supplemented by the connected observation that it appears impossible to ascribe a shared locutionary (and perlocutionary) intention to legislatures *qua* groups (Matczak 2017; contra Ekins 2012), points to an even more radical objection vis-à-vis the use of Gricean and post-Gricean frameworks to explain legal communication: the necessarily reduced role (if at all) that the so-called speaker's intention plays in legal communication (see for discussion Soames 2008).

Second, looking at legal communication from the perspective of macro-pragmatics allows us to see that, unlike with natural languages, not everything can be said through legal utterances (Ferrajoli 2007, vol I; Endicott 2022): the *artificial* nature of legal language – the fact that it is created and maintained in light of a specific purpose – implies that its rules control not only how to say things but, as Jori (2016: 46) puts it, their "aim is to limit and direct the content of what we (legally) say." For otherwise a legal universe of discourse(s) where anything and its contrary can be ultimately maintained – for instance, that φ-ing is permitted and prohibited by the law at the same time – could not effectively serve the institutional aim to guide conduct through the creation and maintenance of a system of rules. The entire workings of a legal system, and particularly of the basic canons of interpretation, are geared to avoid such an outcome. The contrast with natural languages could not be starker: their persistence as our main semiotic systems is due also to their indifference as to what we say through them. As such, once "law is considered as a set of rules to produce correct legal discourses," then "it seems to consist of both rules about how to speak and rules about what to say" (Jori 2016: 52) and of the individual products of the use of those rules, viz., the discourse(s) created. That is to say, the practice of law is at the same time a *langue* and a *parole*, a tongue and a discourse (Ferrajoli 2007, vol I).

This returns a much more complex picture of the relationship between law and natural language(s) than the one according to which legal practice is merely a subspecies of the general use of language for communicative purposes. Law is instead a pragmatically different type of language, where discrete rules control not just how to say things, but what can be said in the first place. Legal systems adopt the natural language(s) of the territory where they exist as the code through which deontic content can be created and applied to particular situations (Duarte 2011). There is in this respect a process of "semiotic borrowing," in that the legal system "subordinates the construction of norm sentences to the rules that are inherent in (or associated with) the adopted language" (Duarte 2011: 114). But this semiotic borrowing between legal language and natural language(s) is very different than the one between two natural languages. For while the natural language (s) formally adopted by the legal system maintain the autonomy of its semiotic rules, legal authorities –

legislators and other officials – wield the power to modify ad hoc some of those rules, especially at the semantic level. This is, after all, what happens every time a statute or a court's decision explicitly redefines the meaning of a natural language term or expression for legal purposes: just think about the expression "family member" and its more precise meaning(s) in legal discourse vis-à-vis natural languages (Duarte 2011: 115).

An inherent tension should become apparent in what we said in this section so far. On the one hand, because of law's overall guiding function and its "default" semiotic borrowing of the natural language spoken in the given community, if legal authorities do not observe, at least to a relevant extent, the syntactic and semantic rules of the adopted natural language, their "communicative goal" is bound to fail from the outset (Duarte 2011: 115). On the other hand, legal authorities retain the power to modify the rules of legal language (in particular at the semantic level) in their pursuit of a more precise and verifiable intersubjective tool to expose and manage conflicts within the group. To this end, they also establish what can and cannot be said with specific uses of legal language, thus reducing its overall pragmatic scope and underscoring its difference vis-à-vis natural languages. All in all, from the macro-pragmatics point of view, legal language sits somewhere in between natural and artificial languages: it is perhaps the clearest example of the category of "administered languages" (Jori 2016: 56–59).

Second Objection: Taking Texts Seriously

The first objection alone should caution against straightforwardly applying theoretical frameworks developed to explain ordinary communication in the legal realm. But as we have already hinted, there seems to be a further problem with the application of ordinary speech-act theory, and particularly of Gricean and post-Gricean pragmatics, to legal interpretation, even in their modified form. This has to do with the textual nature of legal communication and of legislative (or regulatory) communication in particular.

Endicott, in this capturing the mainstream position in the literature, explicitly denies that a "general distinction" can be drawn between legislative communication and ordinary conversations (Endicott 2022). This is disputable. Already in the *Concept of Law*, Hart – in arguing against Austin – discusses the misleading potential of talking of "addressees" of laws, as if statutes of a legal system were the orders of a sovereign to the public at large (Hart 2012: 22–23). The point is that we should be wary precisely of presupposing a "parallel to face-to-face" situations (ibid). This insight, not developed by Hart himself, resurfaced sporadically in the literature (see, e.g., Tiersma 2001; Cao 2007) until 2015, when three contributions (Matczak 2015; Slocum 2015b; Sandro 2015) in the same edited collection independently insisted on the need to take the text-based nature of legislative communication seriously and, consequently, to reject the application of ordinary speech-act theory (as it is) to law.

In this respect, the kind of textual and non-conversational communication taking place between legislative authorities and their addressees (laypeople primarily, and not just courts: Sandro 2015) has very different features from the ordinary, everyday exchanges on which ordinary speech-act theory and philosophy of language more generally are built (cf Neale 2014). First, text-based communication eliminates the possibility of paralinguistic cues (body movements while speaking) as well as prosody (changes in intonation, rhythm, and other features of speech). In a nutshell, "the entire message must be expressed in [written] words" (Slocum 2015a: 46). This alone reduces the role of pragmatics in the interpretation of legislative utterances. However, even more crucial is the acknowledgement that writing developed not just as a substitute for oral conversations, but as an altogether different semiotic system – one that allows for the storing and exchange of information across time and space (Ong 2002). This is only possible because of the detachment between author and text, which results in the creation of what has been termed the "autoglottic space" in which the text "speaks for itself," so that "writing may be interpreted by those who have no idea of the identity of the author" (Slocum 2015a: 51). In a nutshell, writing might be considered the paradigmatic form of "context-free" communication (Ong 2002). This is because the context(s) of application of the token text/utterance will not typically correspond to that of its creation, as it is instead the norm in ordinary conversational exchanges. Legal utterances are

also "closed" or "unilateral" (Duarte 2011: 113), in the sense that they do not typically presuppose the possibility of interaction between author and receiver. As a result, the meaning of a legislative utterance (qua text) must be encoded in lexico-grammatical structures (so-called sentence or "literal" meaning), unlike ordinary conversations (where shared conversational context and expediency allow for far greater relevance for pragmatic enrichment). Matczak has aptly called the failure by mainstream legal theory to address this crucial difference between ordinary and legislative conversations "the fallacy of synchronicity" (Matczak 2015).

Conclusion

A fuller elaboration of how this alternative "text-act" theory looks like – and of its consequences for the theory of legal interpretation – is beyond the scope of this entry (the interested reader can find it in Sandro 2022: ch 5). What we sought to achieve in the limited space available here was to illustrate the standard view on the relationship between law and language and its alternative, as it emerged (or re-emerged) in a recent wave of literature. Is the difference between the two views qualitative, or merely quantitative? Someone could reasonably think the latter, because many standard approaches recognize certain specific features of law vis-à-vis ordinary language and communication (see, e.g., Endicott 2022) and, as we have seen, there are authors in the literature (like Poggi and Skoczeń and, to a lesser extent, Marmor) which explicitly call for a necessary modification and/or integration of ordinary speech-act and pragmatics theory in order to apply it to law. In this respect, the approach one takes to the applicability of ordinary speech-act theory to law would be a function of the number of "special" or "unique" communicative features one assigns to law itself. But as the discussion in the third section has indicated, there are good reasons to call for a rejection of the standard view, and to build instead a theory of legal meaning and legal interpretation that is qualitatively different, in that it fully embraces – rather than underplays – the different macro-pragmatic functions and the text-based nature of legal communication. That there might be good reasons to do so seems also confirmed by the fact that a positive feedback loop vis-à-vis ordinary philosophy of language might have already started (Borg 2019). Interested readers should track the next phases of the debate closely.

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Laozi (Lao Tzu)

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Introduction

Laozi (active during 6th Century BCE) (老子), translated as "old master/teacher," is the name given to the mythical writer of the *Daodejing* (道德經) or the "Classic of the Way and Virtue" (also sometimes referred to simply as the *Laozi*).

Apart from the bible, the *Daodejing* is the most widely translated text in the world. It is possible that there was a historical "Laozi," but this name would have only been the honorary title for the real individual.

In light of both the recently uncovered *Mawangdui* and the *Guodian* versions of the text, it is more likely that the *Daodejing* was not written by a single author. The passages are often written poetically (over half of them rhyme). Though the prose is aesthetic and poetic in character, the text is a philosophical and political treatise that has exerted substantial influence on Chinese culture.

History of the *Daodejing*

There are (*at least*) three major intellectual traditions in China that draw from the *Daodejing*. These include Lao-Zhuang Daoism (a more philosophical reading of the text that places the text alongside the *Zhuangzi*, a Daoist text of similar themes that even refers to *Daodejing* passages), Huang-Lao Daoism (a reading of the text that incorporates Legalist political themes and places the *Daodejing* alongside the *Huangdi Sijing* (黃帝四經) or "Yellow Emperor's Four Classics"), and *Daojiao* or "religious Daoism" (a religious tradition of China that draws on the mystical, esoteric, and alchemical ideas of the *Daodejing*). Depending on the tradition, Laozi and the teachings of the *Daodejing* are portrayed differently. For example, there are passages in the *Zhuangzi* that refer to Laozi and describe him as being a Daoist sage often wiser than Confucius. In Huang-Lao Daoism, there is a far greater emphasis on the laws that should govern society. In religious Daoism, Laozi is worshipped as a deity.

The different passages of the *Daodejing* espouse philosophical positions ranging from mysticism, relativism, naturalism, and anarchism (amongst others), so it is not surprising that historically, both in China and in modern academia, such divergent interpretations of the *Daodejing* exist. The text also describes what at first might appear to be a preference for a laissez-faire style of government that involves minimal government interference with the everyday activities of its population.

Although the *Daodejing* is a text written as a response to the historical circumstances of the Warring States period (475–221 BCE), understanding the political aspects of the text requires seeing them in relation to the Daoist understanding of the cosmos (depending on the interpretation of the tradition, either a naturalistic metaphysics or a transcendent metaphysics).

The *Daodejing* is also openly anti-war, anti-militarism, and against the unequal distribution of wealth. In light of these philosophical commitments, the form of government that the *Daodejing* espouses can also be understood as a critique of the ideology and culture of militarism around the time of its authors.

Philosophy of the *Daodejing*

Two of the most important terms of the *Daodejing* are contained within the title of the text: *dao* (道) or "way" and *de* (德) or "efficacy/power."

Dao for the Daoist, refers to the "way" in a strong, cosmological sense. *Dao* is the name given to the natural ordering and generative processes of the cosmos. Understanding these processes is how one realizes true efficacy (*de*, 德). This involves becoming attuned and responsive to the always fluctuating natural world. It is through becoming attuned to such processes that humans gain insight into how they should live their lives. *Dao* is often described using natural metaphors. It functions like an empty mountain valley, generates things like a mother, spreads evenly over all nature, and tends toward equilibrium like water. *De* or "efficacy" does not exactly refer to "virtue" as we might understand the term in western philosophy. Real efficacy, for the Daoist, is described in terms of the original particularity and endowment of things.

This particularity is also referred to as *ziran* (自然) or that things are "self-so." In modern Chinese, *ziran* is the term used to denote "nature." In the *Daodejing*, the particularity that *ziran* refers to is one of continuously re-emerging novelty. For the Daoist, each "self-so" aspect of nature can be understood as *caused* by the rest of nature. Things are not "self-so" in the sense that they are "self-caused" but are instead each the result of

interdependence. Each aspect of nature is "self-so" because each "self-so" thing is *internally related* to each other aspect of nature and as such, each "self-so" thing can be understood as a unique coalescence of causal relationships. Realizing true efficacy (*de*) requires cultivation and meditation practices that are phenomenological in nature. Such practices extirpate those habits of experience that obstruct our understanding and awareness of nature in its particularity and flux. In other words, persons cultivate habits such that they recognize how each aspect of nature is *ziran* or "self-so." It is also for this reason that both *dao* and *de* are described using another central metaphor of the *Daodejing*; nature described as an "uncarved block of wood" (*pu*, 樸).

What the metaphor expresses is the idea that nature is primordially an indeterminate continuum (*wu*, 無). It is the human mind that uses "knowledge" (*zhi*, 知) to carve up reality relative to certain desires (*yu*, 欲) and purposes. All "things" (*you*, 有) that are carved out of experience emerge from the indeterminate. Although we end up "naming" (*ming*, 名) said things, they are always originally aspects of the nameless (*wuming*, 無名) and nature understood as an "uncarved block of wood" (*pu*, 樸). Nature forms a continuous whole and the distinctions we create, though clearly of use, are always secondary qualities of experience as a whole. In having returned to the "uncarved block of wood," the Daoist sage can experience the natural world unadulterated by sedimented and ignorant habits of thinking. Both the Daoist sage and the world they experience are then also recognized in their particularity or as "self-so" (*ziran*, 自然).

In the *Daodejing*, the dispositions of the Daoist sage are often described using a negative vocabulary, or what has also been called the "*wu*-forms"; the most famous of them being the description of the Daoist sage as *wuwei* (無為) or (poorly) translated as "without-action." This kind of negation in the text is not meant to signify a complete absence and negation of action but is instead an attempt to signify that the Daoist sage has a transformed relationship to their world. For example, the Daoist sage is *wuwei* not in the sense that they are literally "not acting" or acting in such a way that achieves the "least resistance." They are instead responding to the world in a way that is receptive to its particularity. They can achieve this because they are without those ignorant habits of belief, the Daoist recognizes to be problematic. This particularity that the Daoist sage is attuned to is, again, *ziran* or that all things are "self-so." It is through such cultivated receptiveness and attunement that the Daoist sage can respond efficaciously and effortlessly to problematic situations.

Although *wuwei* is perhaps the most important concept in the *Daodejing*, it is closely related to the other "*wu*-forms" and, in particular, especially related to the Daoist claims that the sage is also *wuzhi* (無知) and *wuyu* (無欲), or "without-knowledge" and "without-desire." Just as how *wuwei* does not involve the literal absence of all action, *wuzhi* and *wuyu* both involve a transformed or what we could call a re-contextualized account of knowledge and desire. It is because of the cultivation of such dispositions that are "without-action," "without-knowledge," and "without-desire" that the Daoist sage can be said to have returned to being like an "uncarved block of wood."

Political Outlook of the *Daodejing*

Regardless of how one interprets the political implications of the *Daodejing*, the text unambiguously imagines the ideal state as one ran by a Daoist sage in light of the Daoist insights into the generative processes of nature. They still assume that society is structured hierarchically where a sage ruler is given the most authority. There are times when the *Daodejing* suggest that the rule of the Daoist sage would barely, if at all, be known to the common people. There are also instances where the Daoist sage is described as intentionally keeping people ignorant and simple-minded (which, at first, would sound quite manipulative). There are also instances of the Daoist ruler being described as caring and assisting all people without abandoning them like a mother taking care of innocent children.

Each of these descriptions of the Daoist ruler's conduct are also described as being in accord with

the *dao* and of the sage ruler having realized *de*. Although the *Daodejing* tends to espouse a kind of anarchism, they also, at times, hold that the state is a naturally occurring (and even a *sacred*) entity. Like the Daoist sage, the state itself needs to emulate and function in accord with the larger patterns and processes of the natural world. In the Daoist state, the common people would also resemble the above metaphor of nature as an "uncarved block of wood."

For the Daoist, many of the problematic desires observed in human society are the by-product of different cultural forms and practices. They are imposed on the common people by ruling elite for political purposes and control. For example, Confucian rituals and moral discourse, the arbitrary way rare materials receive value, and the competition that emerges as a result of these ideologies, each of these cultural forms depart from *dao*. When the Daoist looks at nature, they see interdependent processes that maintain and tend towards equilibrium and balance. The way of life that departs from *dao* is that form of life where nobles and elites can "pile up gold" which further requires soldiers and the use of "sharp instruments." This form of organizing human life, in the Daoist view, is inevitably not sustainable as it creates both resentment in the common people and keeps those in power ever more paranoid and violent. Those in power must inevitably resort to force and coercion to maintain such unequal political relations.

Although the philosophical ideal of *wuwei* and the fact that the *Daodejing* generally endorses non-interference would seem to lend itself most readily to a laissez-faire political outlook, this must be more systematically applied to all aspects of our cultural and political lives. It is not just the state and political institutions that should avoid "adding to" the natural process of life. Any set of practices that encourages or even achieves the amassing of wealth and material possessions is thus to depart from *dao*. The Daoist sage, in leading society, would organize social institutions in such a way that the common people would not be encouraged to depart from a life of thrift and simplicity. In the Daoist view, this can be achieved spontaneously and effortlessly because this is in accord with the particularity and natural endowment of people and nature.

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► Confucius (Kong Qiu)

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Introduction

Karl Larenz was born on 23 April 1903 in Wesel am Rhein. Son of a jurist, he pursued his *Abitur* at the age of 18 and attended the Heinrich von Kleist Realgymnasium in Berlin. During the winter of 1921 he began his law studies in Berlin. But he also studied at Marburg, München and finally in Göttingen where he first met Julius Binder. In 1926 he did the doctoral thesis – with the title

Hegels Zurechnungslehre und der Begriff der objektiven Zurechnung – under Binder's supervision. In 1929 he trained in Göttingen to teach civil law and philosophy of law. His qualifying work was subsequently published under the title *Die Methode des Auslegung des Rechtsgeschäfts*. In 1933 he obtained a position at Privatdozent in Göttingen and as a replacement in Bonn. Since 1933, Larenz taught at the University of Kiel where he enjoyed a *milieu* ideologically oriented to his National Socialist inclinations. Finally, he obtained the position of *ordinarius* in November 1933, where he was part of the so-called *Kieler Schule*. After 1945 Larenz, despite obtaining a contract offer at the University of Prague, remained at the University of Kiel (Frassek 1996: 23–47). Between 1947 and 1950 he was suspended from this employment (Jakobs 1993: 801). In 1960 he obtained an assignment at the University of Munich, where he dealt mainly with issues of civil law and where he published his well-known *Methodenlehre* that has been translated into Portuguese and Spanish language. After his retirement he continued working on his manuals. He died on 24 February 1993 at 89 years of age (Frassek 1996: 47).

Larenz's work is especially extensive; perhaps the time frame that began in the mid-1920s with the publication of his doctoral thesis and concluded in 1945 is the one that philosophically is the most interesting but at the same time the most intoxicated by the National Socialist worldview.

Larenz wrote his doctoral thesis in the "golden years of the Weimar Republic," where there was a significant economic growth due to the Dawes-plan and a certain relaxation of international politics. The economic data was good. Due to the British mining strike, Germany enjoyed a considerable boom in this sector; in 1928–1929 the production levels of 1913 were reached; the index of industrial production rebounded up to 114%, the average real income increased between 1925 and 1929 by 24% (Büttner 2010: 364). However, for the most radical scholars – we can identify the neo-Hegelian authors among them – the climate had changed little.

The Neo-Hegelian Perspective

Das Problem der Rechtsgeltung, published in 1929 and with an epilogue of 1967, is the second paper presented in this supposedly innocuous, scientific and depoliticized era; however, like with its *Zurechnungslehre*, the background is not so clean and free from polluted political interests as it seems to be on a first reading. This work, as Larenz himself confessed (1929: 7), echoed the important discussion that took place in Münster, within the framework of the Congress of the *Vereinigung der Deutschen Staatsrechtslehrer*, on article 109 of the *Reichsverfassung* that guaranteed the principle of equality (Stolleis 2010: 190). The nucleus of the debate was on the concept of equality, which Larenz choose as a field to make a critical review of the fundamental lines of the Weimar era's thought, which he summarizes in four categories, proposing Hegelianism as the final solution.

Authors such as Hüpers (2010: 79), without denying the National Socialist influence of his later writings, describe Larenz's proposals as "a non-blind positivism," which integrated philosophy and law and which would approach *Interessenjurisprudenz*. In my opinion, Larenz's perspective is not only legal, but also, and above all, political: severing parliamentary legislation by referring to the values of "objective idealism" to be applied by the judge was a direct appeal to arbitrariness and, as Kelsen maintained, the Gorgon's head leaves such arguments behind with sharp clarity. We can identify a clear claim to the *Volksgemeinschaft* as an expression of the ethical will of people and consequently of law (Larenz 1929: 41).

The Hegelian tone of the Larenz's discussion about article 109 on the principle of equality in the above-mentioned work is not exceptional; it can be extended to other issues such as, for example, the personality of the State. In 1931, Larenz focused his work on the legal entity that is built on these presuppositions: *Hegels Dialektik des Willens und das Problem der juristischen Persönlichkeit*. The same issue had already been assessed by his teacher, Julius Binder, but in a writing published in 1907, when he was still

under the influence of Neo-Kantianism and, furthermore, he does not deal with the legal person *par excellence*: the State. It is true that Larenz highlights other issues from the Binder's ones, but there are strong similarities. The starting point is the *Grundlinien der Rechtsphilosophie* of Hegel. This text is not a "repetition" of the Hegelian thought, but we can define it "maintenance and overcoming." The gap was there, in the Hegelian philosophy on the State. And the subject was of special interest at that time.

The question is the extent to which it is justified to bestow personality to non-human entities such as associations, corporations, or foundations. The base is the individual subject that is presented as a being without problems (Larenz 1931: 197). However, Larenz dynamized the concept of the individual by stating that, although within the framework of law, there is no doubt that a human being has personality. Philosophically the problem is more complex, because it is necessary to demonstrate the unity of the will in a subject. Finally, he defends the idea of the State as an organism, as the conscience of the individual whose will and action depends on the collective-state will and action (Larenz 1931: 222). In the framework of this detailed construction, taken from the *Grundlinien der Rechtsphilosophie*, he faces, on the one hand, the so-called theories of the legal person as a fiction (Savigny, Puchta and other Romanists of the Historical School) and, on the other hand, the German wing (Beseler, Gierke), which gave the legal entity the same reality as the man. This dialectical duality would, of course, be overcome by means of Hegelian philosophy that joins together ideality and reality. This last category of theories, which employ the use of the organic metaphor frequently (García López 2013), according to Larenz, seems to be closer to the neo-Hegelian positions. As a matter of fact, they involve the idea of "organism," being different from other types of organic theories such as, for example, those defended by Gierke. This is because the former concludes with a hypostasis of the State, while the latter was the intellectual father of the legal pluralism that largely underlay the constitution of the Weimar Republic (Neumann 1943: 26) and that for Larenz, of course, was intolerable.

The National-Socialist Influence

In 1931, and in this work, Larenz presents a theory on the State lacking ethnic elements and discourses on blood, but giving enormous weight to the idea of State. In later texts, objective idealism is supplanted by a distinctly National Socialist discourse supported by the idea of *Blut und Boden*.

To adequately assess this aspect, it has become essential to take into account what has been called the "Ahlmann plan." Ralf Dreier, professor of Philosophy of Law at the University of Göttingen, published a letter that Karl Larenz gave him and in which he makes important confessions about his behavior in the era of National Socialism, trying to justify the apologetic and propaganda tone of his writings. Early Jens Peter Jensen became a member of the National Socialist party and he believed he had could direct its economic policy. After Hitler came to power, he was appointed director of the Kiel Institute of Global Economy. His influence reached the Prussian ministry. On 23 May 1933, he invited Georg Damm and Larenz to a meeting, according to the tenor of that letter to Ernst Rudolf Huber. Wilhelm Ahlmann, who came from a well-known family of bankers in Kiel, would have proposed, due to the imminent and inevitable arrival of National Socialism to power, to influence it rationally through their academic works (Dreier 1993: 454–457; Rüthers 2011: 596–601; Canaris 18/2011: 879–888). The "Ahlmann Plan" advises us to be aware of this point of reflection in Karl Larenz's work. What did it mean on 2 May 1933? What had Larenz written before? What did he write afterward? Was there really a break? How was he suddenly converted to National Socialism after 1993? The strategy is not new (Kokert 1995 and, later, Hüpers 2010).

Larenz's thinking openly ends to endorse National Socialism. From the time of Hitler's rise to power, there is a set of writings in which those aspects of his work that best fit the "National Socialist worldview" are conveniently accentuated. It suffices to modify the way, but the themes

are already there, except in some cases – not a few, in which they are simply annexed. The struggle against positivism, the importance of interpretation to "model" the law, the critique of neo-Kantianism, the hypostasis of the State, the idea of community versus individual, that one of obligation and responsibility versus the subjective right. They were "old" ideas adapted without major difficulties to the "new times." It also happens with the continuous appeals to the *Führer* as the cornerstone of the new National Socialist legal system. An apologetic and almost pamphlet-like style involves all these ideas and works as a sort of catalogue: *Deutsche Rechtserneuerung und Rechtsphilosophie*.

As a proposal of the new philosophy of law, Larenz presented two "legal ideas," which had to be representative of the "German spirit" against the spirit of the French Revolution. First, in place of the idea of coexistence and the principle of equality, he proposed the idea of community and responsibility (Larenz 1934: 38–39). The second legal ideal is race, which has the following consequences in the configuration of the law: changing the idea of the person with that of *Rechtsgenosse*; prevalence of the personal role in society – soldier, farmer, farmer-worker on the idea of person in an abstract sense; modification of family law, maintaining a conservative model excluding the principle of equality between husband and wife; proposal of a criminal law based on the idea of retribution recovering the more conservative approaches of Kant and Hegel and, in addition, contemplating a pedagogical and security purpose in the penalty; in private law, substitution of the idea of subjective right for that of legal relationship, in which the idea of obligation and responsibility prevail before the community (Larenz 1934).

He also claims a privileged place for the judiciary that was joined to recovering customary law, which meant undermining the foundations of the Weimar Republic (Neumann 1943: 38). The law is the "vital will of the legal community" and this will is expressed, in part, in a fixed and stable manner, by way of legislation and custom and, in other cases, by judicial decisions (Larenz 1934: 26) as law seemed too narrow. These statements support the famous thesis of Bernd Rüthers (1994: 103 ff.). And that is what Karl Larenz proposed, as early as 1934, and Philipp Heck would also propose in 1936 (García Salgado 2011).

A "Radical" Approach to Legal Categories

In those times, it was usual to propose a battery of new legal concepts that, from the ideology of National Socialism, confronted the old abstract concepts, coming from individualist rationalism and democratic acquis (Stolleis 1994: 94). The use of such legal concepts as *Führer, Volksgenosse, Rechtsgenosse, Volksgemeinschaft, Gemeinschaft, Sippe, Rechtsstellung*, etc., was not, in any case, peaceful or successful. Either, because – as Stolleis maintains – the younger and politically radicalized generation was the one that urgently demanded the need to use them to reform legal science, against another generation of older jurists, who were more skeptical about it, or because such concepts, on many occasions, were loaded with connotations and liberal, democratic, or religious historical contexts from which it was complex to purify them completely.

No doubt Larenz was one of those radicalized young people (Peukert 2016: 30). As a matter of fact, he uses terms such as *Rechtsgenosse* to replace person; *Rechtsstellung* (legal position) to displace the subjective right either that of *Gemeinschaft* (community) or, sometimes, also *Volksgeist*. In almost all his writings Larenz worked with the duality of individual-collectivity, but, although they are ultimately opposed terms, he always conceived them from a dialectical point of view, converging in a synthesis that does not always work successfully.

The purification and redefinition of the concept of subjective right has special importance, in the light of the dominance of the idea of *Rechtsstellung*, showing the influences of Hegelian philosophy (Hegel 1820: §§ 154 and 155). Larenz distances himself from subjective right as an abstraction of the will (Savigny and Kant), of its conception as interest (Rudolph von Jhering) or of its construction as a center of imputation (Hans Kelsen) (Larenz 1935c: 231). Property, obligation, and family suffered similar transformations.

This change of concepts that affected private law also extended to public law, where there had already been important "renovations" in the National Socialist leadership (Schmitt, Koellreutter or Binder). Larenz's strategy is similar to that one of private law: it is about proposing concepts to reform and emancipate the "cosmovision" of the National Socialist State from the liberal ballasts suffered during the Weimar era. "*Völkischer Staat*" was the chosen concept (Anderbrügge 1978, 19). We can extract some reflections that allow us to sketch our author's reform proposal. Fundamental importance is given to the idea of the Führer (Larenz 1935: 130) and Hegelianism was avoided as it had been previously (Larenz 1933). Gobineau, Chamberlain, Rosenberg were mentioned as those who had revealed "the biological roots of race." And he turned constantly to verbiage and to quackery to assert that the question of race was of a philosophical order because, in the last analysis, it was about the relationship between body and soul, between history and nature (1935: 132). The whole section devoted to the idea of people defines this in a biological way, referring to racist theories based on the concept of blood, romanticism, and its idea of the people as a unity of culture, language, and history, only appearing at the very beginning, as a vague allusion.

Cross-References

- ▶ Gierke, Otto von
- ▶ Hegel, Georg Wilhelm Friedrich
- ▶ Schmitt, Carl

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Laski, Harold Joseph

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Introduction

Harold Joseph Laski (Manchester, 1893 –London, 1950) was an "organic" intellectual – in the Gramscian sense of the term – who linked his

activity of theoretical and scientific thinking to the demands of the labor movement and the political practice of British Labour and of socialist thought more broadly.

He was one of the most eminent and influential intellectuals and political philosophers of his time, swinging from pluralism to opinions closer to critical reformist socialism (at the time heavily influenced by Marxist theory). In this sense, Laski played a dual role in his capacity as a prestigious professor of political science and as éminence grise of the Labour Party (of which he served as chairman between 1945 and 1946).

During his stay in the United States (beginning in 1916), he participated in the foundation of the New School in New York, and within the frame of his collaboration and friendship with Felix Frankfurter, he advised Franklin D. Roosevelt, with whom he shared the ideology of the New Deal and the need to give a prompt answer in beating back the totalitarian and imperialist understanding of Adolf Hitler's German government.

Fabian-Inspired Social Liberalism

Needless to say, Laski was one of the great renovators of philosophy and political science in the first half of the twentieth century, this owing to his deep knowledge of the history of political and legal thought.

He was aware of the role of intellectuals in society; thus, he wrote his books based on his active experience in political life, interpreting changes and suggesting measures to be adopted. This gave meaning to his life of fighting for his ideals, placing all his knowledge at their service. He gradually adopted a more critical understanding of capitalism and its future, rejecting the dogmatic philosophy of individualistic liberalism, based on unsupportive and "possessive individualism." In so doing, he waged a battle in the field of philosophical political ideas and political action, at a later stage without challenging the Marxist vision of capitalism in the search for and defense of a peaceful pathway towards socialism. He made it his own practice to live out Weber's maxim that "one has to get to work and respond, as a man and as a professional, to 'everyday needs.' This is simple and straightforward if each one finds the demon who pulls the strings of his life and pays obedience to him."

He published an important academic work (*The Problem of Sovereignty*, 1917), after which would come additional ones, especially what can be considered the most significant work of political philosophy of his first stage, *A Grammar of Politics* (1925).

Progressively, his studies became increasingly functional to the demands of direct political intervention (which is the case, to a lesser extent, for his work *Communism* [1927], and more so for *Democracy in Crisis* [1929], *The State in Theory and Practice* [1934], and *The American Democracy* [1948]).

His efforts to get democratic socialism to break through in Europe and the United States were not as successful as he had predicted for the postwar world. Hence He was disappointment at the error of his prediction, and he had a certain dose of disenchantment with the possibility of realizing a socialist society through the wide participation of citizens – not converted into a simple ill-organized "mass" – that would overcome unequal capitalism ("liberal socialism").

Laski was a professor of political theory at the London School of Economics, as well as at Harvard, Yale, and other Northern American universities, and did intense teaching and lecturing in various countries. He belonged to the executive of the Labour Party. During his stay in North America, he and his wife, Frida, joined the Boston Group, which was a "platform for the army of the good": he was a suffragist, supporting the Intercollegiate Socialist Society, later renamed League for Industrial Democracy (an organization similar to the London Fabian Society) and the Women's Trade Union League. In the 1920s, he joined the Fabian Society and in 1926 took over Graham Wallas's tenure (mentor to the young Laski, and one of the first members of the Fabian Society) in the School of Economics. It is quite significant that the best work of his early period, *A Grammar of Politics*, was dedicated "to the London School of Economics and Political Science and its founders, Sidney and Beatrice Web."

From 1916 onwards, and for many years, he would maintain a significant correspondence with Oliver Wendell Holmes Jr. (until his death in 1934), a renowned progressive justice of the United States.

He would later join the Labour Party. His position was initially moderate to progressively become more critical and yet closer to non-dogmatic Marxist thought: this is evident after the publication of his work *Communism* in 1927, although he is particularly critical of the doctrine that later came to be called "real socialism," which would emerge out of so-called Soviet Marxism. All of this led him to lead an important dissident trend within the Labour Party.

In May 1936, Laski collaborated with John Strachey on the project the publisher Victor Gollancz initiated to create a Left Book Club, of which Laski and Strachey were cosponsors. This group had great influence among Labour intellectuals until late in the 1930s. Against this backdrop, he actively intervened in favor of women's suffrage and support for a United or Popular Front and solidarity with the Spanish Republic. Many left-wing Fabian socialists had come to the same conclusion of an active response in solidarity, faced with the hesitant position of Labour leaders, paralyzed by the fear of world war.

In the 1940s, he continued to participate in the Labour Party's policy design, beginning with the important resolution on the general orientation policy (*The Old World and the New Society*), which was approved in the conference of 1942. It was a statement of objectives for a socialist world reconstruction through the legal channels of parliamentary democracy. It was deemed to be the most appropriate political formula for solving the inherent plurality of human existence (which extended to all the broad aspects of political, social, economic, and cultural life). Democracy respected such pluralism and provided a shared space for its free expression within an open framework for deliberation (deliberative democracy) and political decision-making (in turn reflecting the necessary unity in the diversity of interests and values). It was based on tolerance (Hans Kelsen) and respect for the adversary and minorities, with rules of the game, kept to a bare minimum, that all political and social actors would play by.

This program maintained a lasting peace based on the agreement between the great powers, public control of the economy, full employment, the universalization of social services (social insurance legislation), and a comprehensive educational policy. The connection among all these elements of the program became even more evident in light of S. W. Beveridge's social liberalism, outlined in his two well-known reports on employment and social security (based on J. M. Keynes's contributions). In those years, the intervention continued to be persistent, given the very close relationship between the Labour Party and the Fabian Society, bearing in mind that the latter sought to reorganize society through a vigorous intervention by the state.

Sovereignty and Pluralism in Laski

To Laski, the state, as a particular association, is the apex of the entire modern social structure, whose special nature lies in its supremacy over all other forms of social grouping. The state is a way of organizing collective life in a given society. It is the cornerstone of social structure: it shapes the form and character of millions of human beings, whose destiny is entrusted to it, and is key to social order, but it is not identical to society. This is the purely realistic understanding of the state, which should not be confused with Laski's supposed attachment to political realism in the narrowest sense, as he always affirmed the primacy of interests over values, as well as of international law over national laws. In the modern world, the state is a territorial community in whose name certain agents exercise sovereignty, the latter understood as the legal power to issue orders without having to submit to a higher authority.

The orders thus issued constitute laws, which bind all those who fall within the state's jurisdiction. In a democratic society, the fact that the law emanates from sovereign power is not enough for it to be accepted, even when it is presented as an effort to achieve a just result ("legitimate power").

Its claim to command obedience is based on human judgment on the legitimacy of such claims. To Laski, citizens have the right to have their wishes taken into consideration, and these conditions must be respected by any state that claims to be worthy of obedience. When these conditions are not respected, those citizens who suffer from such a lack of legitimacy have the right to deny that the state is the guardian of their interests, which gives justification for disobedience. According to Laski, the law can only be considered such when the recipients are willing to cooperate in its application.

In the framework of such a pluralist theory of the state, which the first Laski fully accepted, he stated that its foundation lies in the denial that an association of people within the community inherently enjoys supremacy over any other existing association.

Pluralism is an attempt to recognize the individual conscience as the only and true origin of a law that requests the obedience of its subjects; it means recognizing that there is no jurisprudence worthy of such a name that tries to separate the idea of law from justice. According to pluralistic political and legal philosophy, the state is an organization like any other, to which the performance of certain functions is entrusted; thus, the character of these functions does not imply the right to sovereignty, as realism brings him to admit that this would amount to conferring unlimited authority on ordinary and fallible men.

As to the international perspective, Laski adheres to Kelsen's conception expounded in his well-known work *Das Problem der Souveränität* (second ed., 1923), in *Principles of International Law* (1952), and in the work of I. L. Kunz and Verdross, in which that conception is echoed. He then highlights that the *supremacy of international law over state law* must be affirmed, such that the community of states – what has been called the *civitas maxima* – dictates laws that stand supreme over all other laws. To him, the states would, as it were, be "provinces" of this *civitas maxima*, whose authority stems from the rules that are considered necessary to maintain common international life.

According to Laski, a legal theory that does not start by establishing the purpose of the law cannot give meaning to its claim to obedience, without which the elaboration of legal norms is useless. In his opinion, formalist conceptions have been completely superseded by historical events, despite the fact that the traditional theory of the state has been built under the understanding that it would be definitive. Historical events were putting things in place, and the construction of a new legal-political order was underway. It is necessary to come up with a political philosophy not based on the nation-state but rather aimed at creating a cosmopolitan order in which said national state in the international political situation is gradually reduced to a "province." The age of Grotius was coming to an end. In the future, it would be necessary to build the fundamental notions of international law not based on the relationships between states, but rather on national laws as a system derived from the norms of international law. In such a new order, it will not be possible for any state to have absolute and unappealable powers; rather, they will be much more similar to those of a "province" in a world federation, with authority in a certain area, beyond which there will be strict limits. To Laski, the evolution of the government of states was increasingly dismantling the categories within which the nation-state had tried to enclose it. The "universal state," whatever its structure and degree of decentralization, excludes the separation of multiple and isolated sovereignties, as the functions that influence the life of society have to submit to the collective and concerted decision of men. To Laski, modern science and the current economic organization had made the world a set of interdependent elements: this leads him to theorize "the principle of supremacy of cosmopolitan needs over national requirements."

The first Laski was indeed an extreme pluralist fighting against the Hegelian case for the establishment of an *absorbing state*: "any society," he says, "is essentially federal in nature. The State is, formal law apart, one with other associations, and not over and above them. Its legal imperatives succeed by being in a creative relationship with those which other associations lay down for their

members. What it should largely seek to register as the law is the body of demands it encounters among them which represent the largest total of satisfaction in society."

According to Laski, the monist theory of the state – whereby the modern state is a sovereign one, an independent entity as opposed to other communities, projecting its will over them and excluding any other internal or external will – is at odds with some of the deepest and most common experiences and conditions of humankind. The contemporary state imposed a *pluralist conception of power*, as opposed to the monistic one, thus breaking with the model of formal rationality. Public opinion cannot be assumed to be homogeneous, nor can the will of the state be simply described as its deliberate expression without further ado.

He maintains that the construction of a full international order requires the abandonment of state sovereignty. Furthermore, a good theory of politics must start from the incompatibility of the sovereign state with the world economic order and emphasize that the state is the guardian of class relations that prevent us from achieving a richer civilization. However, it should consider that the sovereignty of the state cannot be abandoned while its power is still available to capital owners. He pointed out that this is precisely why the League of Nations had failed, since for it to have an actual chance to succeed, it would have been necessary to prevent it from deeming war a legitimate instrument of foreign policy. To avoid this, it is crucial *to abandon the idea of sovereignty*, because until this elimination has been achieved, no serious cohesion can take place at the international level.

Due to his excellent theoretical background and his direct political experience, Laski was aware that extreme pluralism was unfeasible for the governance of a society as complex as that of developed capitalism. His conception, as it emerges from his work, is to be understood in the framework of a broader reflection on the modern theory of the state and on the troubled democracy and the parliamentary system crisis in the interwar period, as well as on the growing role that interest organizations play in the policymaking process. Laski denounced the traditional liberal theories' fiction of a unified will for the realization of general interest (the undifferentiated common good), arguing that such an artifice had the serious drawback of neutralizing, blurring, and even making existing plural interests disappear. Hence, a dual mechanism was added to complement parliamentary democracy so that it could overcome its insufficiencies: the recognition of areas of social autonomy for groups, on the one hand, and on the other the establishment of specific professional or corporate representation mechanisms (secondary or tertiary professional or labor chamber, economic councils with members representing social groups, having advisory or decision-making functions on certain issues, etc.).

This represents a dual integration of socioeconomic interest groups both in the political-legislative process and in the governmental and administrative ones. As regards the former, propositions for corporate representation were made, involving functional or professional representation techniques (or representation by interests) of a professional or union nature, aiming to link interest groups with legislative decision-making. Laski himself was highly influenced by two intellectual currents of professional or corporate representation: at the level of political philosophy with its link with Fabian socialism (and to a lesser extent with union socialism) and at the legal-political level through the solidaristic theory of Leon Duguit, who had considerable influence on Laski.

In the first third of the twentieth century, proposals for the establishment of professional or economic chambers proliferated (based on the distinction between a social and a political parliament). This was a political response to the crisis the liberal parliamentary system was undergoing at that time, with the increasing displacement of the single-class state by the plural-class state, as a reflection of the loss of the illusion of the idea of the substantial homogeneity of a supposedly "undifferentiated" population. This is the crisis of the liberal project, which is above all the crisis of parliamentarism, with a critical final act at the end of a period of (apparent) security, before a

period of dizzying transformations. The plural-class state opens up new penetrating interventions and public processes for planning private economic, social, and cultural activities, which led to a politicization of economic life. Therefore, consensus on goals and collective action, due to their heterogeneity, is more difficult to achieve than with homogeneous groups. On the other hand, it is clear that Laski openly rejected any authoritarian (fascist corporatism) or allegedly "democratic" ("guildism") version of integral corporatism, which would involve the replacement of a political parliament, inherent in modern democracy, by social or economic parliaments, or even chambers or union corporations. Laski was more inclined to establish economic parliaments or economic councils, their functions either merely consultative or authoritative only to a limited extent, and serving to complement, rather than replace, classic channels of parliamentary democracy.

A "Gradualist" Socialism

In one of his most important and influential works (written in 1924–1925), *A Grammar of Politics*, he embraced a "gradualist" socialism from a utilitarian perspective, claiming individual rights and autonomy for voluntary social groups (professionals, unions, trade groups, and churches) against the Leviathan state, embodying William James's pluralism. To Laski, the state is an organization aimed at applying the law and maintaining order in society, coordinating the activities of other voluntary associations and organizing relations at the international level. He was very impressed with Otto von Gierke's conception of the legal personality of industrial and religious organizations – as it gave them the ability to defend their rights and independence, as opposed to the situation in the Middle Ages – and at the same time to demonstrate that trade union organizations have a similarly autonomous position in contemporary society. In this work, he came to reject guildist socialism for being unfeasible, as well as the Webb spouses' proposal to create two parliaments: a political one and an economic one. However, he still argued for the political pluralism of groups as a counterweight to the power of the state. Thus, the work carries a clear Fabian undertone, supporting state intervention to carry out economic and social reforms and at the same time the decentralization of political power and the right of producer and patient interest organizations to control and cooperate in the organization and administration of the welfare state or public service. On the legal front, very evident in this work was the influence of Duguit.

Laski intended for there to be "consensual revolution" (a legal reform through a social state as an essential element for a social-democratic transformation) as an alternative that would avert civil war and confrontation on a world scale. Indeed, he hoped for the real possibility of carrying out a peaceful transition to democratic socialism in England. This implies respect for democratic rules and conciliation with a minority disagreeing with radical reform measures. Peaceful change is necessary because revolution, like war, in its violent form, is an infinite tragedy and must be avoided. However, the hope for lasting peace and collaboration between the various powers seemed to disappear to a great extent with the death of the American president Franklin Delano Roosevelt, in whose capacity and goodwill Laski had placed great hopes.

During the Second World War, he would be the actual leader of the left wing of the English Labour Party, even though he was part of the party's executive committee, and in 1945 he even reached the chairmanship. Anyhow, Laski celebrated the Labour government's triumphs in domestic policy (social security, social services, etc.) and maintained a critical position regarding the moderate stance in foreign policy. In 1949, he resigned, refusing to be reelected as a member of the executive committee of the Labour Party.

At the same time, with liberal states governed by the rule of law against the backdrop of the crisis of liberalism, extreme pluralism was overcome; this caused Laski's thought to evolve in interaction with such a climate of social discontent, thus marking a shift to the "second Laski." To a certain extent, the overcoming of "naive" pluralism (for its extremeness and lack of correspondence with internal and external political reality) would have to wait a few more years: in 1938, he expressly declared that he had

abandoned pluralistic principles in the Fabian sense (*Parliamentary Government in England*). At the end of the 1920s, the misconceptions of an optimistic conception of pluralism were revealed, given the primacy of organizations with economic interests over the powers of the democratic state in organized capitalism and their ungovernability and the slippage of corporate pluralistic theories towards authoritarianism. This can be seen not only on the level of doctrinal reflection but also in the political practice represented by the more or less explicit agreements of the great economic organizations with the conservative parties. From that moment onwards, the "Fabian" Laski of 1925 gave way to the Laski of the critical endorsement of Marxism. However, with Marx, he always believed that a socialist society could be built in England without a violent revolution (*Democracy in Crisis* [1934], Chap. 4: "The Revolutionary Aspiration"). In any case, although Laski rejected Fabian socialism, he always retained one of its assumptions: unlike guildist socialism – the kind espoused by those concerned about excessive concentration of power in the hands of the state, who moved towards decentralizing corporatism – he always attached extraordinary importance to state intervention, although he also thought it was important to establish decentralized democratic procedures. Such was the kind of socialism that in the English state, suitably extended and reformed, saw the machinery with which to achieve all the needed reforms. In this respect, the second Laski could still stand behind the *idea of a democratic social state*, enhancing the function of nationalized companies that administrate public services.

Conclusion

Such an inclination towards Marxism had already been expressed before in works such as *The State in Theory and Practice* (1934), and even earlier in *Democracy in Crisis* (1933), which is an expanded version of the Weil Seminars he held in April 1931 (see Laski's preface to the work). However, Laski always maintained that in a democracy, citizens must always be allowed to intervene actively, thereby guaranteeing "the capacity of continuous initiative" (Graham Wallas).

In these works, Laski takes into account the non-neutral character of the state, rejects its idealistic understanding as a servant of the common good, and affirms that the history of law cannot be understood without seeking its roots in the modes of economic production.

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Lassalle, Ferdinand

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Introduction

Ferdinand Lassalle was born in 1825 in Breslau to a well-to-do Jewish family (he died in 1864). Already at 15 he was caught up in the radical intellectual movements of the 1840s. Against his father's will, he insisted on leaving trade school for the university. There he became immersed in the work of Hegel, which remained with him for the rest of his life.

By the late 1840s, he was in contact with Marx, Engels, Moses Hess, and other leading Rhineland radicals. He played a limited role in the Revolution of 1848, but was jailed for a November speech in which he called on the Düsseldorf militia to resist the military coup in Berlin. Since he was in jail, Lassalle was not caught up in the persecution of leftists that resulted in many being exiled. As a result, he was one of the handful of radical leftists with a background in the heady 1840s who was able to organize in the years that followed.

From 1846 to 1854, Lassalle represented Countess Sophie von Hatzfeldt in her quest for a divorce from her husband. When she emerged victorious, she bestowed upon Lassalle a generous pension for life and he was able to pursue his intellectual and political interests.

In the mid-1850s, he flung himself into writing. A two-volume work on Heraclitus appeared in 1858, which was more a defense of Hegel as radical idealist thinker than a treatise on Heraclitus. He then published a historical tragedy about radicalism in the early German Reformation in 1859, and a massive work entitled *The System of Acquired Rights* in 1861, which in its essence argued that the "spirit of the people" – a notion borrowed from Hegel – took precedence over historical rights and privileges. It was a defense of the spirit of 1789, especially the eradication of the rights of the nobility.

The *Spirit of the People* Materialized in Social Relations

Lassalle's most important work in legal and social thought, however, developed in a brief period from 1862 to 1864, in the midst of the Prussian Constitutional Conflict (1862–1866). The Prussian Constitution of 1850 gave the monarch direct control over the military and gave the Prussian assembly the power to approve the military

budget. The right to control the military came into conflict with the right to approve the budget in a dispute over military reforms in 1862. The assembly, according to rules imposed by the Prussian king after 1848, was elected according to an unequal, three-class voting system, which gave, according to Lassalle's reckoning, the wealthiest men 17 times the voting power as the least wealthy. This unequal system produced a strong liberal majority opposed to monarchical caprice during the crisis.

The liberals defended the word of the constitution; the conservatives the power of the monarch. Lassalle broke with both. In his famous 1862 essays on the constitution, he described that document as a "mere scrap of paper." The real constitution of 1850, he argued, lay in the "real power relations" of a given society, and in 1862 the "real power relations" had shifted. The growth of urban populations and the concentration of wealth in the hands of the bourgeoisie meant that real power had shifted away from the nobility and the army. If the written constitution was not the real constitution, then it was time to revise the constitution to reflect the real power of either the monarch and his organized instruments of oppression such as the army – or the people. In Hegelian terms, the *spirit of the people* (which Lassalle saw materialized in social relations) was the real arbiter of what was valid law. Lassalle rejected the liberal fetishization of the written constitution. He pushed for a decisive conflict between the organized power of the monarch and the as yet disorganized power of the people.

The liberals attacked Lassalle for putting power before law, but Lassalle's point was that law was about power. Lassalle argued that the next step should be to demand universal, equal suffrage for the people. In 1863, he founded the "General German Workers' Association," the first significant labor party in Germany, in order to oppose both liberals and old elites.

The revolution, he argued, following Marx, had already occurred through trade, the division of labor, industrialization, and the formation of a mass of working people; now politics had to reflect this change by organizing "the entire class of those not possessing capital" to rise up against a "new, privileged estate" of the bourgeoisie. The "Fourth Estate" now needed to demand its right to control and transform the state from a "night-watchman state" that preserved rights (i.e., inequality) into a state that would act, in accord with popular will, to promote "the education and development of the human race to freedom": to be a real state of the people.

The State as a Free Association of the People and the "Iron Law of Wages"

The argument for the state as a free association of the people implied a new conception of a political party, which Lassalle developed more in his practice than theoretically. Namely, the party should have a clear aim, based on a clear understanding of reality. The reality facing the vast majority of the population, according to Lassalle, was an inability to acquire capital and therefore control over one's work, and inevitable poverty. The "iron law of wages," a phrase that he repeated in his many speeches, dictated that the price of a laborer's time, as a commodity exchanged on the market, was doomed over the long run to be the minimum necessary for the reproduction of labor, an argument that he derived from the classical political economists.

The only alternative was for the state to step in to break the power of capital, by creating state-sponsored workers' associations that would allow workers to accumulate capital; trade unions were doomed to impotence in the face of the market. The people should organize themselves into a party, implicitly under the unifying will of an individual, charismatic leader who grasped the social reality and the way forward – such as Lassalle.

No doubt Lassalle's great faith in his own abilities led him to this authoritarian model of a democratic party, which later would be a point of contention in the workers' movement. It partially explains his willingness to hold secret meetings in 1864 with Bismarck, the conservative chancellor, probably to discuss how universal suffrage could undermine the liberals; in May 1864, he publicly stated as well that the King was more willing to help workers than were liberals. Other radicals from

1848 made a similar move, however: Moses Hess, for example, seems to have seen Emperor Napoleon III in France as a potential source for reform.

In summer 1864, Lassalle withdrew from politics. That summer he fell passionately in love with a young actress and challenged her father, an official in the kingdom of Bavaria, to a duel for his right to marry the woman. He was struck down by a bullet and died three days later, on August 31, 1864, only 39 years old.

Legacy

Lassalle was one of the founders of German social democracy, but his legacy is controversial.

Marx and Engels rejected his primary focus on universal manhood suffrage and his Hegelian notion of a state standing above society; they also rejected his account of the "iron law of wages" (although Lassalle can be forgiven for reading precisely this in Marx's account of the commodification of labor-power).

Not least, he left a legacy of suspicion due to his meetings with Bismarck. But in the end, his focus on the right to vote, the need for an organized political party, and the need to make the state into a people's state to reform society reflected the actual practice of later German social democracy.

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Law

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Introduction

This article tries to give an answer to the question, "What is law?" For this purpose, we will discuss several legal theories to develop a conceptual definition of law. The discussion is based on neither a positivist nor non-positivist conception. Positivism usually encompasses theories that separate law and morality on the basis of anti-metaphysical assumptions. Non-positivists, especially natural lawyers (➔natural law theory), advocate either a strong or weak connection between law and morality. Even considering the mediating position of inclusive positivism (➔Inclusive Legal Positivism), this discussion has been deadlocked for some time now. Therefore, instead of jumping directly to the typical answers, we will pursue a different methodological path here; we will distinguish between two general approaches to determining the concept of law in legal theory, thus allowing us to make further subdivisions. Substantive approaches identify law by its content or function. In contrast, formal approaches distinguish law and other forms of social orders by their origin or their force, irrespective of their substance.

Desirability and Problems of a Concept of Law

Before we can discuss these two approaches and their subdivisions, we must assess whether such a definition of law is desirable and possible.

A concept of law based on its definition will differentiate law from other forms of social order, even normative orders like customs, conventions, or power. Judith Shklar objects to this attempt, contending that this sharp definition would isolate law from the social context from which it emerges (Shklar 1964, 1). However, an analytical distinction does not cut law off from its social influences. It may help though, to better determine law's reaction to such social influences and law's specific impact on them.

It is not surprising that some practitioners consider the explication of a legal concept of law to be superfluous (Viehweg 1974, 53). After all, they rarely come up against the limits of the law. Rather, they are able to find the normative orientation for their decisions from within the law and therefore do not need a criterion to distinguish law from other social norms. In cases of extremely unjust law, however – such as after the collapse of unjust regimes – the question of the limits of law and the admissibility of adopting moral arguments when dealing with such unjust laws arises. In these cases, practical legal argumentation requires a concept of law. Now, as a prerequisite to answering questions of the permissibility of moral arguments in law, jurists need a concept of law to show when they are applying legal arguments and when they are using moral arguments. Furthermore, a concept of law is necessary to distinguish law from (other?) social facts, to demarcate legal philosophy from other branches of philosophy and for understanding the rule of law (➔rule of law) (Waldron 2020 at 9).

However, as desirable as a concept of law may be, it may not be possible (for a discussion of the respective methodological problems cf. ➔Legal Methods of (and about) the Law). *H.L.A. Hart (➔Hart)* relies on a linguistic argument to point out several problems: "Questions such as … 'What is a state?', 'What is law?', 'What is a right?' have great ambiguity. The same form of words may be used to demand a definition or the cause of the purpose or the justification or the origin of the legal or a political institution" (Hart 1954, 37). This ambiguity is due to the fact that the proposed general terms – namely that of "rule" – are often so complex that they have little explanatory value (Hart 1993, 15). Borderline cases of law are then difficult to decide. Finally, the terms can be used in a more analogous form than their normal usage allows. Hart summarizes, "The underlying issues are too different from each other and too fundamental to be capable of this sort of resolution" (Hart 1993, 16). Instead, Hart would like to define an ensemble of elements that characterize law in more detail–including its imperative character, its coercive character, and its embeddedness in hierarchical legal orders in the sense of Wittgenstein's "family resemblances" (Himma 2017, 3). The open texture (in Waismann's and Hart's sense) of the concept of law in ordinary language need not, however, be relevant to the elaboration of a concept in legal theory. Not all of the connotations of ordinary language may be relevant for this purpose. Also, the problem of the openness of everyday *language* is not alien to law. On the contrary, it has to cope because only in this way is it possible to communicate about technically complex problems. Similarly, legal theory can use its own definitions of law, abstracting from ordinary language, which are more precise. Thus, language usage does not hinder definition; rather, ordinary language usage demands it to enable clear identification of the object of knowledge.

Another objection to a definition of law could be made from the structure of law itself. If law is an interpretive practice in Dworkin's sense (➔Dworkin, law as an interpretative practice), then this practice must refer to principles; and finally, if these principles are the same in law and morality, we cannot distinguish law from morality. As he put it: "What is law? [. . .] Law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theater of behavior. Nor by any roster of officials and their powers each over part of our lives. Law's empire is defined by attitude, not territory or power or process [. . .] It is an interpretive, self-reflective attitude addressed to politics in the broadest sense" (Dworkin 1986, 413). *Robert Alexy* has called this an "argument from principles" (Alexy 2004, 68) (➔Alexy's Theory of Rules and Principles). First, he demonstrates that principles, such as fundamental rights, do not have a sufficiently concrete normative program to be directly applicable, but still require

argumentation. Second, he argues that legal systems necessarily contain not only precise rules but also principles ("incorporation thesis"). Third, he further holds that in solving a practical question, principles are also applied which "are always at the same time principles of some morality" ("morality thesis"). Fourth and finally, he assumes that the judge who applies these principles must make a claim to correctness which, while not referring to any particular morality, must somehow be morally justifiable ("correctness thesis") (Alexy 2004, 70 ff.). Interesting for the definition of law are the "morality thesis" and the "correctness thesis": Dworkin and Alexy deny the separability of law and another normative systems, because the application of law is based on reasons that do not stop at the boundaries of law. The normative claim to correctness transcends law because it depends on some appeal to morality in any case. However, we could not say that principles belong to both the realm of law and of morality "at the same time," if we did not distinguish them first. We find principles such as freedom, equality, human dignity, etc. in law as well as in non-legal norms. This does not mean that their meaning is the same in all normative orders. Rather, principles belong to a particular legal system that limits their scope by being systematically related to other norms of this system. The criterion sought for distinguishing law from other social norms is thus not its content, but the form of a norm as law or morality. If there is a general claim to correctness, it has to be fulfilled by legal *or* by moral arguments. The "morality thesis" and the "correctness thesis" thus do not speak against the distinctness of law from other normative systems.

Therefore, a definition of law is both possible and desirable for the understanding of law.

The General Term of Law: Social Practice or Norm

Where should a definition of law begin? Most positivists will claim that law is a social practice. Some others assume that it is a norm. For most exclusive as well as inclusive positivists, all legal arguments have to be derived from social practice (Spaak and Mindus 2021, 8). Legal sociologists like Niklas Luhmann (➔Luhmann) consider law a certain type of social action, namely a form of communication, which produces legal meaning (Luhmann 2004, 72). This assumption has a long tradition. Already *Heraclitus* (ca. 540–483 B.C.) took law *to be a* form of dispute. Others understand rhetorical debates in parliament or in court as the basic element characterizing law (➔Legal Rhetoric). It cannot be denied that these theories cover an important aspect of law, namely that law results from the deliberations of parliament, from arguments in court, and from public discourse (➔Law as discourse). However, social practice *is* not law itself; it may, however, produce law as its meaning. And this meaning distinguishes it from other non-legal social practices. Furthermore, law does not emerge from all forms of social practice. Rather, modern law regulates the social practices, which produce law. Various procedural rules systematize social practices such as rhetorical disputes and other forms of communication. Norms regulate legal discourses, and they are the meaning and goal of these discourses. This justifies taking norms as a general concept of the determination of law. Law is thus a form of norms.

The question remains, however, what distinguishes legal normativity as an understanding of social practice from other forms of normativity. In the history of legal philosophy, there is no shortage of accounts of the respective criteria. Here, they shall be categorized into two major groups: (1) theories that seek to distinguish law from other phenomena on the basis of substantive, material criteria and (2) theories that focus on formal criteria. Substantive theories establish criteria for a content that norms should include or for a function that they must perform in order to be law. Formal theories, on the other hand, take a certain origin of norms or their efficacy through enforcement as decisive criteria for differentiating legal norms from other social norms. There are, of course, also integrative theories combining formal and substantive criteria. Norms, which do not match substantive, formal, or combined criteria, would then not be qualified only as "bad", "flawed" or imperfect and in this sense unjust law, but as something else (following Radbruch 2006, 7(➔Radbruch)). Although a certain conceptual closeness to the division into non-

positivist and positivist theories suggests itself, this more abstract classification of theories allows for a more differentiated classification of the diverse landscape of theories of law, as will be shown shortly.

Substantive Theories of Law

A number of legal theories focus on different aspects of the content of legal regulation as the relevant criterion for determining the concept of law (Waldron 2020 at 5.3). These can be normative criteria or functional ones. While the first normative view argues axiologically, the second group focuses on empirical arguments. Normative arguments would refer to values such as justice (famous chap. 4 of Augustine's City of God, p. 165 (➔Augustine), also Thomas Aquinas, Summa Theologica, I-II, Q. 96, Art. 4. (➔Aquinas)), the common good in classical republican legal philosophy, freedom (for Rousseau, Kant and the idealistic legal philosophers), correctness (Blackstone 1768, 38 ff.; Alexy above), or other values. Value-oriented theories of law can be divided into those that assume a particular value and others that postulate a claim to correctness. Thomas Aquinas would be an example of the first group asserted: "'law' is called that which has, as it were, the lawfulness of justice, precisely that in which the activity of justice finds its conclusion" (Thomas Aquinas, S. Th. II-II, Q. 57, 1). For the "substantive value ethics" of Max Scheler and Nicolai Hartmann, these values even formed a hierarchical order which could be perceived by reason (Scheler 1966, 173 f. u. 282 f.). In contrast, theories emphasizing a claim to correctness are relativistic to a certain degree, since they do not refer to specific values. Gustav Radbruch and other Neo-Kantian Legal Philosophers from the Heidelberg School (➔Neo-Kantianism) belonged to this group, but also Robert Alexy. For them only an extreme offence against morality leads to non-law, while simple offences only render it unjust (Alexy 2004, 48 f.). However, the consequences are similar. If the content of a certain norm falls under a certain threshold of correctness, does not obey certain values, etc., it is no law.

For the substantive, content-based empirical theories of law discussed here, the function, goals, and tasks of law are crucial for determining the concept of law. Empirical theories assume, for example, that the defining content of law arises from social interests (Marx, Engels) and basic needs (anthropological theories) and/or that it is supposed to balance and enforce these and thus fulfills a certain social function. Legal theories grounded in social functions are more prominent though. They define law by the tasks that its regulations have to fulfill. These can in turn be the satisfaction of interests, but also the stabilization of expectations, or the guarantee security (➔Hobbes), international peace (Lauterpacht 1946, 51), or control public authorities. For Niklas Luhman, the function is the stabilization of expectations: "We can . . . define law as structure of a social system which depends upon the congruent generalisation of normative behavioural expectations" (Luhmann 1985, 82). For others, security is at the heart of law (Cass 2004, 131).

Substantive theories of law capture important aspects of it. However, they fail to identify necessary elements of law that distinguish it from other social orders. Certainly, law should be just and, if necessary, also realize other values. In any case, it is difficult to imagine law without a reference to values. It serves not only the protection of freedom, but is also an expression of at least the freedom of the legislator or the contractor, etc. – be it a single person or all who are affected by the law. Frequently, experiences of injustice will be the reason for changing the law. Its form serves specific values like certainty and often equality (Fuller 1978, 33 f., ➔Fuller). The substantive concept of law certainly helps interdisciplinary studies of law. It points at the social function of law, and we generally expect legal norms to express our moral convictions, especially that law should be just. Thus, substantive theories show that the meaning of legal norms is not limited to the legal system but is influenced by and will influence other social systems. They also point to the realization conditions of law in society. It is certainly true that law aims at securing expectations. Moreover, it would be irrational to create meaningless or functionless law. However, a concept according to which every order that

preserves peace and security should be law would be too broad, because it would also encompass also, religious or moral systems that we would not consider to be law as long as they realized certain principles or served certain functions.

Thus, substantive theories are not mistaken, but they are too broad. They lack the criterion necessary to distinguish legal from other norms. Given the numerous conceptions and intuitions of justice, a core function of law is to provide orderly procedures to decide on the one that is to be authoritative. We also speak of religious, moral, perhaps "poetic" justice (➔Nussbaum, law and literature) and do not think these forms would be identical with legal justice. This also applies to other values. The argument from principle cannot lead to any other result. Transformed from moral principles into, for example, constitutional principles or other legal principles with which they are systematically related, these systems limit their meaning and scope. By positivation these principles have been transformed from morality etc. into a different – the legal form. Recourse to the moral principle, which is similar in content, is then only possible insofar as the legal form itself permits it. The claim to correctness is not an unlimited one, but a claim to legal correctness. Moral values qualify law, but do not determine its validity – they are reasons to call it unjust, immoral, etc., but not non-law. On their basis, law can be judged to be better, worse, or completely worthless, but they have no criteria at their disposal to determine law as law. The content-related empirical concepts of law fail to explain how the legal protection of security, peace, and expectations differs from other social forms of their guarantee, for example, through power. Security guaranteed by law differs though from security based purely on power, for example, in that it balances the interests at stake and takes into account the rights affected when enforcing them. Under the rule of law, security should not be achieved by violating fundamental rights. Thus, although the selection of substantive theories of law presented here all emphasize an important aspect of law, they are not specific enough and presuppose what distinguishes law from other forms of social order.

Formal Theories of Law

Formal theories of law define the concept of law on formal criteria regardless of the substantive content of these norms (different notion of formal concepts of law Weinrib 1988, 949). They refer to a specific origin or efficacy of norms as their specific legal characteristic. A first group of genetic concepts of law assumes that legal norms stem from specific procedures that distinguish them from other normative systems. Efficacy-oriented concepts claim that law can be characterized by its specific authority or force. For all formal theories, values or functions are not the primary distinguishing features of law.

Efficacy-oriented legal concepts have been and still are advocated in particular in the sociology of law and sociologically inspired legal theory. These theories distinguish law from other norms by certain social effects achieved not by the persuasiveness of its substantive rules, but by external mechanisms. First of all, theories of law as coercion belong here (➔Law as Coercion). According to these theories, law differs from other norms by the possibility of using coercion against objects or persons to enforce compliance with the norm and to sanction the violation of the norm (Schauer 2015). The means of coercion are broadly defined and include both physical and psychological coercion. Coercion theories support the separation of law and morality, since moral norms cannot be enforced by coercion by a political power. In this respect, general coercion is a necessary feature of law. However, with respect to custom and convention, this criterion is not sufficient, since we would both distinguish from law, although they can be enforced and their violation can be sanctioned, albeit in an informal way. Their enforcement may even be more severe than that of the law, because they are constitutive for traditional communities. Whoever disregards the traditions of such a community attacks its identity. Therefore, Max Weber (➔Weber) specifies the legal authorities imposing coercion, "An order will be called [. . .] law if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a staff of people in order to bring about compliance or

avenge violation" (Weber 1978, 34). First, Weber does not limit coercion to state power as other conceptions would, but by any authority in a formalized procedure. Furthermore, Weber shows that law need not resort to the actual application of coercion. Rather, the actual potential of modern law lies in the threatened application of coercion in the event of a violation of law. Two problems arise, however. First, since law is heteronomously applied to subjects, it provokes resistance or simply unapplied, "dead" law (➔Ehrlich). And, second, not all enforced norms or orders are law. Accordingly, Josef Raz also demands that the authority be legitimate (➔Raz). From the perspective of legal theory, the sanction presupposes the norm and the obligation it contains in the form of a duty, prohibition, or permission, and not the obligation presupposing the sanction. For the concept of law, however, it is necessary that the setting and enforcement, and thus also the sanctioning, of norms take place in normative procedures. This is also true against theories defining law by its force (➔ Schauer).

A conceptual solution to the first problem seems to come from theories of legal recognition. Since *Ernst-Rudolf Bierling* wrote "Law in the legal sense is generally that which people living together in some community mutually recognize as a norm or rule of this coexistence" (Bierling 1894, 19), through the concepts of the Scandinavian realists (➔ Scandinavian realism) scholars have repeatedly suggested that law depends on social recognition. Hart's (➔Hart, Hart 1993, 255 f.) rule of recognition has become perhaps the most influential conception in this tradition (➔Rule of Recognition and Constitution). Theories of recognition correctly point out that acceptance is a necessary condition for the effectiveness of law. Two *objections* remain: First, regarding the subject of recognition, should all citizens or all officials accept and follow the respective laws, legal order, or rule of recognition or is a majority sufficient, and if so, which majority? Usually these are questions answered by constitutions. This, however, makes the factual recognition fictitious. Second, it is part of law as a norm that it demands recognition and compliance. It should serve as a standard *for* action and not be dependent *on* the action subjected to it. This is particularly clear, if we refer to courts as relevant recognizing subjects of recognition as *Holmes* and other American Realists did (➔American Realism), (➔Holmes) (Holmes Jr 1897, 461). Court rulings are "law" because the courts have the competence to decide and because they obey the rules for their decision.

The careful formulation of the criterion of enforcement as a characteristic of law shows a problem of the theories of coercion of law. It has long been the task of law not only to control the behavior of natural persons but to check the use of public authority by officials. For this purpose, constitutions create the institutions which may use public authority, define competences and procedures, and by fundamental rights impose substantive limits to their action. Consequently, coercion and legal behavior presuppose the law. Therefore, law cannot be understood on the basis of its consequences, but must be understood from its origin as law. Law defines the legal preconditions for recognition and coercion necessary for its enforcement. Thus, not recognition or coercion defines law, but conversely, law defines the preconditions of recognition and legitimate force.

Genetic formal theories distinguish law from other systems of norms by the kind of origin distinctive to law. The specific origin of legal norms may be heteronomous, as some evolutionary theories claim, or autonomous. According to the first, the legal form would have developed thereafter because it gives people an advantage over other forms of coexistence in the struggle for survival. Here then evolutionary-biological (Gruter 1991 or anthropological (Post 1884, 20)) justifications are developed to explain law by the biological-genetic endowment of man. In a culturalist form, Friedrich Carl von Savigny (➔Savigny) also held that the legal form was not based on an autonomous decision by a legislator, but was an emergent expression of the "quietly working forces of the spirit of the people" and that its form would be content neutral. For some philosophers like John Austin, the fact that law is a general command is decisive (imperative theory, Austin 1832, 5 f. (➔Austin)). In his theory, form

is the command, the content being the commanded norm. Similarly, others consider any norm which is an expression of authority law (Schmitt 2004, 60 (➔Schmitt)) or take the fact that law is enacted in a generally binding manner (legal positivism) as the core feature of law (Bergbohm 1892, 546). For this group of theories, the authority of the legislator or the enactment constitutes the legal form. Others, like the Viennese Normativist School of Legal Theory (➔Kelsen) (➔Merkl), object and hold that we can only understand a certain expression of will as law if its normative meaning can be traced back to a basic norm as a transcendental-logical prerequisite of law (Kelsen 2008, 199). The normative reconstruction of legal acts by its ultimate source, the basic norm, serves as the form here. However, the scope of their explanation is limited. It can explain why a norm cannot be justified from a fact; however, in this respect it only explains normativity, not specifically legal normativity. If discourse theory regards all results of a certain legal discourse as law, as far as it only observes the rules of discourse and independent of its moral or ethical content, it would also rely on formal procedural criteria for the distinction of law and other norms. Habermas advocates the separation of the legal and the moral discourse (Habermas 1996, 197, 233 (➔Habermas)), whereas Alexy defends the thesis that the legal discourse is only a special case of the general practical moral discourse (Alexy 2022, 307). If we subscribe to Habermas' concept of the legal discourse, moral substantive and legal discourse would then be in a complementary relationship to each other. The form is here the structure of the discourse. Another example of such a genetic formal concept of law would be historical materialism, which regards law as a superstructure phenomenon that emerges from economic relations of production (Marx and Engels 1888, 24, *Vyshinsky* (➔ Russian Legal Realism)). The fact that the content of the legal norm should then also be an expression of class interests is merely a consequence of this.

Approaches in the theory of law defining the concept of law by its form may show that the form of the law is the element which explains its specific character, and on the basis of this, its concept can be determined. The form then has a classifying function. Genetic formal theories point at the origin of modern norms in procedures and decisions. However, they are too narrow with respect to traditional and alternative forms of law and too broad with respect to the formalization of the creation of law. First, they fail to recognize the customary law that arises from a uniform practice of conduct and the conviction of its bindingness. While this may be an increasingly historical problem, there are alternative modern legal forms of law gaining importance. Just think of the (new) lex mercatoria, "lex sportiva internationalis" or the "lex electronica" forming under the auspices of globalization (➔History of Legal Pluralism). This law is enforced by arbitration courts – freely chosen by the parties involved. Overall, one could speak of these social norms becoming reflexive.

Conclusion: Law as a Reflective Normative Structure

Law is understood here as a norm or an order of norms. Within this general term, the main argument is about what the criteria of demarcation are from other norms such as morality. The material concepts of law cannot explain why their demands for justice or security, for example, should be fulfilled precisely by the rule of law and not by the rule of morality or the power of a dictator. They also do not sufficiently consider that the values of law are not simply to be felt, understood as ontological entities, but that they result from deliberative and decision-making processes. This calls for formal theories. However, the empirical criteria invoked for this purpose, such as recognition or coercion, are likewise incapable of explaining the special form of legal recognition and coercion. Thus, they are not sufficiently specific. Nor do they realize that modern law sets substantive, competence, and procedural limits to coercion. Thus, it can be said that neither a specific regulatory content nor its mode of operation determines law, but conversely, law itself determines the values it protects and the enactment and enforcement of its norms. Accordingly,

a normative approach is appropriate, which explains law through its reflexive structure. Legal norms are set and enforced. However, their creation and thus the duration of their "existence" (➔Legal Validity) and their enforcement are themselves regulated by norms. All legal norms and the social practice producing and enforcing them are subject to norms that define the criteria for the formal procedure and, in part, the result in advance. These secondary norms establish and limit the power to produce law. They set limits to the discourses related to law, which delimit them, as well as law itself, from other discourses.

Taking this reflexive structure into account, law signifies norms, the origin and enforcement of which is regulated by norms. It is not *that* the norm is actually set and enforced that makes it a legal norm, but that its setting and enforcement are normatively regulated that establishes its legal character. Based on this reflective structure of norms, law can be distinguished both from other forms of social practice and their norms as from moral, religious, or other norms.

Now these norms are not empty of content. They are an expression of values their authors want to protect. What is decisive, however, is that these substantive principles only become law to the extent that the legal form permits. There are neither legal norms without content nor legal values outside the legal form. In this respect, the substantive approaches also have their significance. Then, the production of law means the transformation of norms (e.g., morality), interests, and other ideas (such as technical rules) into a legal form. Since the content is shaped by the form, moral justice and legal justice – for all their similarities – can be distinguished. Law is therefore an aspect of social practice, namely its normative meaning. It is distinguished from morality in the sense of the separation thesis by its form as a normed norm (reflexivity). Furthermore, law aims at social efficacy. However, it is crucial that its origin from social practice and its efficacy are bindingly structured by norms that organize not only the competence and procedure but also the substantive correctness of these discourses. In this respect, both substantive and formal theories make an important contribution to the understanding of modern law.

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Law and Economics: Methods of

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Introduction

Law and economics have long been intertwined. Indeed, in the nineteenth century, economics was taught in law faculties rather than in distinct departments of economics (Arnold 2017). In the late nineteenth and early twentieth centuries, the economists John Commons, Robert Hale, and James Bonbright studied the economic foundations of central capitalist legal institutions such as property and contract. Bonbright's studies of the regulation of public utilities influenced the New Deal and the Supreme Court rulings that finally upheld the regulation (Kornhauser 2008; Fried 2001).

This first law and economics movement, however, had little impact on legal scholarship. The institutionalization of law and economics, or, as this entry shall call it, economic analysis of law, emerged after the publication of Posner (1973) which both applied the insights of the seminal articles of Coase (1960) and Calabresi (1961) to every doctrinal area of law and asserted first that the common law was (or at least promoted) efficiency and second that judges ought to promote efficiency. Posner (1973) provoked an outpouring of scholarship, some critical, but much of which used economics to broaden and deepen the analyses of virtually every area of law.

Coase (1960), Calabresi (1961), and Posner (1973) launched a movement, not a school. Scholarship in economic analysis of law encompasses a wide of variety of scholars pursuing quite diverse aims. Some of this diversity reflects the ambiguity in Posner's two efficiency claims which provoked an outpouring of critiques, largely of the normative claim that judges ought to pursue efficiency. (See, e.g., Symposium (1980) for the early outcry.) Posner's claims were ambiguous. Kornhauser (2017) identifies eight distinct claims about efficiency. It also identified three distinct projects within economic analysis of law that encompass a significant portion (but not all) of the scholarship: the doctrinal project, the project of policy analysis, and the project of political economy. These projects seek to explain, respectively, existing legal doctrine, the effects of legal rules on behavior, and the causes of the legal rules and institutions that exist. These three projects are best understood as studies *about* law, not studies *of* law though, on one interpretation of Posner's efficiency claims, judges do in fact pursue and achieve efficient legal rules.

The latter two projects within economic analysis deploy microeconomic theory to explain what legal rules and institutions we have and how those legal rules and institutions influence behavior. The analysis, however, generally takes *law* as unproblematically given. Moreover, the economic analysis is not specific to legal norms. The analysis can be applied, with appropriate variations for the different context, to other normative systems. Indeed, a substantial literature on

the economic analysis of social norms has developed (see, e.g., McAdams 1997; Cooter 2000; Posner 2000). Nonetheless, the practice of economic analysis of law poses several challenges to traditional understandings of law. This entry considers three such challenges: instrumentalism, normativity, and the concept of law.

These challenges flow from the methodology of microeconomic theory. Microeconomic theory relies primarily on a theory of individually rational behavior. This theory assumes that agents have both "rational" preferences that are complete and transitive and "rational" beliefs that they update in accordance with Bayes's Rule. Each agent seeks to maximize an expected utility function that represents these preferences and beliefs.

This rational choice framework is, as I shall develop in the discussion of normativity, extremely flexible. Analyses typically assume, however, that agents' preferences are narrowly self-interested. In the political economy project, this assumption strongly supports a view of law that does not attribute any intrinsic value to law. Similarly, the rational preferences assumption strongly suggests that the only reasons for action that law gives are prudential ones. Finally, analytic practice in microeconomics suggests a social-scientific approach to the concept of law.

It is important to note that the literature in economic analysis of law rarely explicitly addresses these issues – Kornhauser (1984, 2000, 2010, 2017) is an exception; thus few, if any scholars in economic analysis of law may endorse all, or even any, of the claim discussed here.

Instrumentalism

An instrumental view of law holds that some (1) *agent* (2) *designed* the (3) *law* to further its objectives. This simple definition conceals the complex structure of instrumental views of law.

A claim that law is instrumental might refer to a legal rule, to a legal institution, or to an entire legal system. Legal culture in the United States is strongly *rule instrumental*: each rule, whether legislative, regulatory, or judicial, promotes some goal. Other legal cultures, however, are not rule instrumental, at least with respect to adjudication. Some of these legal cultures are *institutionally instrumental*: adjudicatory institutions, for example, promote civil peace by resolving disputes. Finally, an entire legal system or structure might be *systemically instrumental.* The entire legal system serves some specific function.

Instrumentalism differs from functionalism. Rules, institutions, or systems might be functional without being designed. On the definition offered above, they would thus not be instrumental. In biology, natural selection substitutes for the designer. A mutation persists because it improves the likelihood of survival of the species. The organism neither intended to mutate nor intended to fulfill the function served by the mutation. Economic analysts of law (Rubin 1977; Priest 1977, but see Cooter and Kornhauser 1980 and Kornhauser 1996 suggesting that the argument is not complete) have offered similar arguments to support Posner's claim that the common law in fact has produced efficient rules. These models rest on the observation that litigants not judges select disputes for resolution and that they systematically and differentially select disputes governed by "bad" – that is, inefficient – rules for resolution. When judges modify rules, they are thus more likely to make them better rather than worse.

Radical political economists (see Kornhauser 2017) advocate a stronger form of non-instrumentalism. They extend the argument of constitutional political economists from legislation to constitution drafting. From a public choice perspective, specific statutes do not exhibit the intent of any legislator; they are compromises not designs. Individual statutes are thus not rule instrumental because they do not promote the interest of any individual or collective agent. Extending the claim to constitutional design implies that constitutions too are compromises not plans; they do not embody a design that is a collective goal. The argument thus undermines both the claim that legislatures are institutionally instrumental and that governance as a whole is instrumental. The force of both arguments, of course, depends on a narrow understanding of

"intentional design." Obviously, judicial, legislative, and constitutional legal rules result from the collective, intentional actions of individuals. The noninstrumentalists contend that no invisible hand transforms these individual intentions into a coherent collective intention. But, in many cases, the resulting legal rule displays a significant degree of coherence.

Legal culture in the United States and in common law jurisdictions more broadly are strongly rule instrumentalist. The policy analysis school of economic analysis reflects this attitude. It typically analyzes the consequences of individual legal rules and, often, asserts that the rules induce "efficient" behavior. Civil law jurisdictions, by contrast, may be better understood as institutionally instrumental, at least with respect to adjudication. The courts resolve disputes; dispute resolution promotes a variety of distinct social goals.

One might reconcile instrumental and moral accounts of private law in this way. As Jimenez (2018) argues, one should understand the institution of contract law instrumentally; contract law serves to promote a variety of values such as autonomy and efficiency. But the institution directs judges not to pursue these values directly but rather indirectly by promoting the morality of promise.

Normativity

A central project of the philosophy of law seeks to determine both the nature of the reasons for action that law provides and the conditions under which those reasons are moral as well as legal reasons. Economic analysis of law focuses primarily on the first inquiry. The methodology of economics predisposes economic analysts to provide a very different response to this inquiry than legal education predisposes lawyers.

Obligations take a variety of legal forms and lawyers typically think that the form the law adopts to regulate given conduct has great significance, not only legally but also expressively and practically. The law distinguishes criminal liability from civil liability. It regulates some behavior through administrative, rather than civil or criminal, fines. Taxes and licenses regulate still other behavior. Criminal and civil liability presumably *prohibit* the proscribed conduct; taxes and licenses *permit* the regulated conduct. Each of these forms thus clearly has a different expressive effect. Do different forms also have different practical and behavioral effects? Do they play different roles in agents' deliberations about what to do?

Unfortunately, it is difficult to isolate the behavioral effects of the expressive features of the forms from the substantive differences that accompany the formal differences. Each of the legal forms differs along a variety of dimensions. Behavior governed by the criminal law is largely monitored through the police and prosecuted by the state; the standard of proof in criminal proceedings is very high; and the sanction is imposed by the state. Behavior governed by civil liability, by contrast, is largely monitored and prosecuted by private individuals; the standard of proof is much lower; and the state is involved in the remedy only as a last resort. In the United States, a plaintiff prevails if the facts that sustain the action are "more probable than not" while the standard in criminal cases is "beyond a reasonable doubt." Similarly, the sanction in civil cases is, in the first instance, left to the plaintiff to collect.

Conduct on which the state levies taxes is monitored and enforced still differently than conduct governed by either civil or criminal liability. Taxes are typically administered by a different state bureaucracy than the police, perhaps supplemented through the enlistment of private bureaucracies. Licenses are typically issued by still another bureaucracy and the licensed conduct monitored by still other government officials.

Economists, unlike lawyers, typically deny that the legal form – or at least its expressive aspects – affects the behavior of agents. A standard economic analysis of the behavior induced by these various forms would assume that the expected price imposed for nonconformity with the legal rule constitutes the agent's only reason for action. Consider, for example, the regulation of emission of small particulate matter into the atmosphere. The state might

impose criminal or civil liability on agents who emit more than some threshold L; violation might incur a fine of F per unit above the threshold. Alternatively, the state might impose a tax of T per unit on emissions above the same threshold L. Or it might require the agent to purchase a license at a fee of P per unit for emissions above the threshold L. Naively, one might believe that if the state fine, tax and price are all equal – that is, $F = T = P$, the behavior induced by these three forms would, on the standard economic account, induce the same behavior. But setting the fine, the tax, and license fee at the same level equilibrates only the nominal, not the expected, prices that the agent faces. The expected price resulting from a form depends not simply on the nominal price but on the probability that a violation is detected and successfully prosecuted. But this probability depends on the monitoring and enforcement institutions associated with the chosen form of legal regulations. When these differ, the expected price for violation differs and the economic analyst would predict different behaviors. Unfortunately, determining the relevant probabilities is very difficult.

Even if the economic analyst accepts that the expressive aspects of legal form influence behavior, she has a number of ways in which to accommodate these in her models. After all, the economic model identifies four distinct channels through which the law might influence behavior: the environment in which the agent acts; the set of options available to the agent, the agent's beliefs, or the agent's "preferences." The standard analysis focuses on how legal rules change the environment in which the agent acts. Typically, changes in the environment alter the agent's incentives; they impose a cost or grant a benefit. Often the cost or benefit is monetary as happens with the imposition of a tax or the grant of a tax credit. At other times, the cost is nonmonetary. A legal rule that prohibits smoking in workplaces requires employees who want to smoke to incur the cost of walking elsewhere. Even switching the default rule for pensions from opting in to opting out changes the relative prices of voluntary pension contributions. A rule that requires airbags in automobiles alters the expected (physical) costs of reckless driving.

Requiring airbags also restricts the set of options available to the agent. Airbags are passive restraints: the agent can neither buy a car that does not include this risk-reducing feature nor easily disable the safety feature. The law also provides a large number of enabling regimes – for instance, contract, property, inheritance law, and corporate law – that offer the agent a wider set of options for accomplishing her aims.

Legal rules may also change the agent's beliefs. Disclosure rules typically identify risks of which the agent may have been unaware or misinformed. A speed limit on mountain curves, for example, indicates that the road ahead is more dangerous. Some legal rules alter the beliefs that an agent has about the behavior of other agents. The legal rule thus coordinates the agents' behavior. A traffic regulation that mandates that agents drive on the right side of the road changes each agent's beliefs about the driving behavior of others; moreover, the rule changes the agent's beliefs about the other agents' beliefs. We might understand, however, other legal rules as operating through changes in beliefs as well. On August 1, 1978, New York City ordinance 161.03 went into effect; it required dog owners to pick up after their dogs. Almost overnight, New York City streets became cleaner. Though the ordinance imposed a fine for failure to clean up, the ordinance was little enforced and easily evaded. Nonetheless, the equilibrium shifted from one in which most agents left dog waste on the sidewalk to one in which dog owners picked up the dog waste.

Of course, the pooper-scooper ordinance might also have operated through the third channel by changing preferences. But an overnight, widespread change in preferences is implausible. It is also difficult to identify the pathway through which a legal effect on preferences works. Part of the difficulty lies in the difficulty in interpreting the preferences underlying any given action.

A simple example may help clarify ideas. As in Kornhauser (2017), consider Liza who, at dinner with friends, must choose between a tofu and a meat dish for herself. Suppose she chooses the vegetarian option. She might do so for a number of different reasons, each of which might reflect a

distinct preference ordering. She might simply prefer tofu to meat. Or she may have a very limited budget, so she chooses the cheaper, tofu dish. Or she might be a vegetarian for a number of different reasons. She might be a vegetarian because she believes it is healthier. Or she might be vegetarian because she things it wrong to cause pain to sentient creatures. Or she might be a vegetarian because she lives in a community that is largely vegetarian and she has a taste for conformity. Finally, she might choose the tofu dish because she cares about her dinner companion Fred who suffers discomfort when his dinner companions eat meat.

The law might influence Liza's behavior through a number of pathways. It might require that the restaurant disclose either the health effects of the agent's choices or the effects of the method of breeding and butchering the source of meat. (In New York City, restaurants must disclose already the health effects of eating undercooked meat and fish.) Alternatively, the state might enact a prohibition on the eating of meat or raise the relative price of meat and tofu through the imposition of a tax on its consumption. Each of these methods might change Liza's choice but none of the clearly change her preferences: that is, how she ranks a meal of meat to a meal of tofu, all things considered. Perhaps a prohibition on meat might, over time, reduce the number of meat eaters so that fewer people develop a taste for meet. Or perhaps it causes Liza (or her children) to internalize a preference for tofu over meat. Finally, it may alter Liza's moral beliefs which enter into her all-things-considered ranking of alternatives; she may come to think it wrong to cause pain to sentient creatures.

Among these pathways, changing Liza's preferences would be the least direct and have the smallest immediate effects. Moreover, the actual mechanism through which the law accomplishes the change in preference remains opaque and mysterious.

The Concept of Law

The nature of law constitutes a, perhaps *the* central question in the philosophy of law. (Murphy (2014) provides an incisive overview.) Yet the economic analysts of law rarely offer an account of the nature of law. (Cooter and Kraus (2014) suggest that efficiency constitutes a part of the rule of recognition.) Rather economic analysis of law largely takes the legal rule as given; it then investigates either the forces that led to the enactment of the rule or the consequences that the rule has. The methodology deployed might equally be used to investigate the origins and effects of nonlegal rules or norms. Indeed, the methodology *has* been deployed in this fashion (see for example Ellickson 1991 or Posner 2000).

Nonetheless, the methodology of economics generally suggests a radical, "eliminativist" approach to the concept of law that has been broached in Kornhauser (2004, 2017, 2019). To understand this approach, one must first clarify the nature of the debate over the concept of law. Specifically, one must clarify *which* concept of law is at issue.

One may identify several distinct concepts of law. The Hart/Dworkin debate has focused on what Dworkin named the "doctrinal" concept of law that identified the grounds of truth for a proposition of law (though a positivist might prefer a characterization as the concept that identified the grounds of validity of a legal rule). Hart (1961), however, appears to focus more centrally on a sociological or taxonomic concept of law. Hart (1961) states that he seeks to distinguish "law" from "morality" and from "coercion." This tasks sounds in taxonomy. But Hart (1961) also characterizes his book as an exercise in "descriptive sociology." If one interprets this exercise expansively, his endeavor attempts to articulate a concept of law that is most useful for social theory.

The doctrinal, sociological, and taxonomic concepts of law do not exhaust the set of concepts of law. Legal philosophy extensively discusses the *value* of legality. These discussions may encompass both rule of law values and more substantive values such as Dworkin's integrity. Finally, there is a folk concept of law. The folk concept of law articulates the concept of law implicit in ordinary usage of the term "law."

The debate over the doctrine of law often conflates these different concepts. Hart's theory, for

example, closely identifies the sociological concept of law with the doctrinal concept through the rule of recognition which both constitutes the legal system and serves as the source of validity for legal norms. Similarly, he offers related grounds for a taxonomic concept. But he carefully distinguishes these three concepts from the evaluative concept of law. Finally he, unlike Raz (2005), does not appear concerned with the folk concept, even after Raz has refined it. Dworkin, by contrast, had little, if any, interest in any concept of law other than the doctrinal concept.

It would be surprising if a single concept could accomplish everything demanded by each of the distinct concepts identified above. The sociological, doctrinal, and folk concepts in principle should have different roots. The folk concept of law derives from the ordinary usage of lay people. The doctrinal concept is in principle embedded in legal practice; one might, at least initially, believe that the grounds of truth of propositions of law might vary quite widely across legal systems. The sociological concept should derive from the requirements of general social theory not from either lay usage or professional practice.

In fact, it is unlikely that "law" plays a central role in social theory. Social theory requires a concept of a "governance structure" as, typically, we think of law as a type of governance. Governance structures identify the decision-making, policing, and enforcement institutions in a society. In simple societies, governance structures are simple, decentralized, and undifferentiated. All decisions, including those concerning resource allocation, reproduction, and public goods provision, are communal or individual. In more complex societies, governance structures become more differentiated and more complex. In modern societies, "law" derives from the political institutions within a society. Moreover, these legal institutions themselves are highly differentiated. In the United States, for example, law-making functions are distributed across Congress, 50 state legislatures, innumerable city councils and other local (substate) jurisdictions as well as across the innumerable state agencies with rule-making authority that these legislative bodies have created. Local and state police monitor compliance with the norms generated by these institutions though monitoring the compliance with private law obligations (and some public law obligations) has been delegated further to individual citizens. A variety of federal and state courts adjudicate alleged violations of norms; and some of these courts have law-making functions as well. A separate set of institutions – prisons, parole boards and offices, sheriffs – enforce the decisions of courts.

To understand governance, it is important to distinguish among governance *structures* (or institutions), *realized* governance institutions, and *functioning* governance institutions. A governance structure partially defines the operational purposes and procedures of an organization; it creates roles and hierarchies. A realized governance institution is a governance structure the roles of which are populated by specific people. As all governance structures are incomplete plans and typically grant discretion to various roles, the character of the individuals who populate these roles is important. An environmental protection agency run by environmentalists will promulgate very different regulations than one run by lobbyists for the fossil fuel and chemical industries. Finally, a functioning governance institution is a realized institution situated in a particular society, operating within a specified environment. How a governance structure performs depends not only on the people who occupy its roles but also on the history and circumstances in which it must operate. A governance structure functioning in a poor society will typically perform differently than one functioning in a wealthy society. Similarly, a governance structure that performs well in "ordinary" circumstances may not perform well in emergency or disaster circumstances.

Discussions of the (sociological) concept of law do not clearly indicate the domain to which the concept applies. Are legal systems a subset of functioning governance institutions or of governance structures? Or does "law" point to some specific features of either a functioning governance institution or governance structure? Dworkin's doctrinal concept of law apparently refers to a set of norms; must a sociological concept point to the same objects? Primary norms presumably result from the functioning

governance system but some basic secondary norms derive from the governance structure.

Given a concept of a governance structure and a functioning governance system, how might a social theorist define "law"? One might first develop an *achievement* concept of law. An achievement concept of law identifies the set of functioning institutions that realize some desired goal or exhibit some virtue. To define a concept of law, then, one must first identify the desired goal or virtue. A number of candidates for this virtue or goal exist; they derive from the evaluative concept of law which characterizes the value of legality.

The value of legality is contested. Dworkin identified the value of legality with integrity. Debates over the rule of law variously identify the value of legality with a narrower or broader set of procedural or formal aspects of governance; some accounts of the rule of law include some substantive values as well. Each of these accounts of the value L of legality gives rise to a corresponding achievement concept of law. A functioning governance system G is "law" if it realizes or exhibits the value of legality L. As the concept of value of legality becomes increasingly thick and substantive, "law" will grow increasingly difficult to achieve. Fewer functioning legal systems will realize the desired value.

Several comments are in order. First, on this account, "law" is a property of functioning governance systems not of the norms, standards, or texts standing alone. Phrased differently, "law" is not a necessary feature of the governance structure or of the functioning governance institution. Very different governance structures may, under appropriate circumstances, realize a specified value L; each of them would be law. Conversely, the same governance structure may realize L in circumstances C (and with personnel P) but not realize L in some different circumstances C′ (or with different personnel P′). Whether some feature of a functioning governance system is causally or constitutively *necessary* to realize L is thus an empirical question. Whether, to realize law, G requires norms of a certain form or personnel of a specified character or some set of procedures cannot be determined from the armchair.

Second, different accounts of the value L may, even fixing circumstances C and personnel P, identify different functioning governance systems G as law. Let S be the set of values L that have been proposed as accounts of the value of legality. There may be no functioning governance system that can simultaneously realize all values L in S. If so, we must choose among the values L we seek to realize. Which subsets of S are simultaneously realizable is an important theoretical and empirical question.

Third, currently, either a society has law or it does not. But the achievement concept articulated here suggested that "law" may come in degrees. A functioning governance system may realize the value L to a greater or lesser extent; it could be more or less "law-like." Moreover, we might be able to identify what features of the circumstances hinder or promote the virtue L at issue.

Fourth, we may ask under what conditions does a citizen have a moral obligation to conform her conduct to that specified in the norms announced by the functioning governance system. This question translates the standard question concerning the existence of a general obligation to obey the law into this context. The answer presumably depends on the extent to which the functioning governance system realizes a core set of virtues or values. One might specify the value of legality to ensure that, when it is (substantially) realized, citizens have a moral obligation to obey its promulgated norms.

Fifth, on this account, the doctrinal concept of law may have little significance. The governance structure specifies a decision protocol for each public official and for citizens. These decision protocols are unlikely to be the same for citizens, legislators, police, prosecutors, judges, and prison wardens. For society to function, the actions of all these agents must be coordinated but coordination does not require that each agent in deciding what action to undertake determine what "the law" is. Each agent needs only to follow the decision protocol specified in the governance structure.

Concluding Remarks

Economic analysis of law primarily employs microeconomic theory to understand legal rules and institutions. The two primary projects, political economy and policy analysis, seek to explain

why we have the legal rules and institutions we have and how individuals will behave in response to legal rules, respectively. These projects have significant policy uses. Political economy may help guide the drafting of constitutions. Policy analysis may facilitate the development of policy within a functioning constitutional system. These two projects are thus projects about law not of law.

The project of doctrinal analysis has a more ambiguous character. Much traditional legal scholarship analyses or rationalizes legal doctrine. One might view this activity as either *of* law or *about* law. For economic analysis of law, however, doctrinal analysis is better characterized as about law since it does not necessarily claim that judges and lawyers consciously strive to achieve the doctrinal structures that result from legal processes.

More importantly, the methods of economic analysis suggest radically different answers to some central questions in the philosophy of law. First, it suggests that law has no intrinsic value. Its value, if any, is instrumental.

Second, though economic analysis of law readily accommodates any prudential reasons for action that law presents, it less readily accommodates non-prudential reasons. Moreover, its account of how individuals behave in response to legal rules reveals the difficulties in disentangling prudential from nonprudential effects.

Finally, economic analysis of law suggests that the theoretically most fruitful sociological concept of law will be an achievement concept. Law exists – is achieved – when a functioning legal system realizes the value of legality. The functioning governance systems that realize the identified value of legality may not share many features. In particular, there may be no reason to isolate or construct a doctrinal concept of law that animates the decision protocols specified for public and private agents in the society.

Cross-References

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- ▶ Hart, Herbert Lionel Adolphus: Influential Ideas
- ▶ Legal Theory: Descriptive
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Law and Efficacy

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Introduction

Some jurisprudential theories take efficacy (or, as it is also called, effectiveness) to be one of the essential elements of their concepts of law. This is evident in those legal positivistic theories which to some extent regard efficacy as a condition of legal validity and even more so in those legal realistic theories that tend to identify legal validity with or reduce it to efficacy. Natural law theories, of course, do not pay much attention to the concept of efficacy since they consider validity of legal norms to be entirely independent of their efficacy (Bulygin 2015: 37; Kelsen 1967: 211; Ross 1958: 18).

Efficacy has different meanings within legal discourse. It may, e.g., refer to the capacity of legal norms to produce legal effects (e.g., rights, duties, liabilities, etc.) or to their capacity to realize the goals for which they were produced or to the fact that their addressees actually behave as they require of them (Pino 2013: 174–177; Hernández Marín 2002: 279–284). The latter sense is a sense that is generally used within jurisprudential discussions of whether efficacy is an essential element of the concept of law and which will be elaborated in more detail in the following section.

Factual questions about the efficacy of particular legal norms or legal systems, or more precisely, the issue of determining, on the basis of empirical research, whether a norm or a legal order is (in)efficacious and to what extent are dealt with within the field of legal sociology (Bryde 1993: 7–12; Bobbio 1993: 25; Navarro 1990: 20; Alexy 2002: 86). However, what is of interest to legal philosophers is "efficacy" as an analytical question. It is the task of jurisprudence to determine the conditions under which one may characterize a norm or a legal system as efficacious or inefficacious or the conditions under which statements of efficacy (e.g., "norm *N* is efficacious" or "legal system *LS* is efficacious") are true (Bulygin 2015: 37; Navarro 1990: 20).

The Concept of Efficacy

Efficacy can be a predicate of both legal norms and legal systems (Greppi 2012: 152). As a predicate of (promulgated or posited) legal norms, efficacy denotes an attribute or quality of the legal norm (*pace* Kelsen (1945: 40), who holds a peculiar view that efficacy is a quality of human behavior). Legal norms are said to be efficacious if their addressees actually behave as norms prescribe. However, views differ as to which addressees should be taken into account. Some claim that only or primarily the behavior of citizens matters (i.e., that a norm is efficacious if and only if citizens comply with it or observe it) (Grabowski 2013: 341–342; Navarro, Moreso 1997: 201). Others claim that the only criterion for assessing the efficacy of legal norms is their application or potential application by law-applying organs (i.e., that a norm is efficacious if and only if it is applied by courts or if there is a reason to assume that a norm will be applied in any future legal decision) (Ross 1958: 35–36, 40–41; Ingram 1983: 496–497). Still others claim that the efficacy of legal norms primarily consists in their being applied by law-applying organs and secondarily also in their being observed by citizens (Kelsen 1945: 61–62). Finally, and this seems to be the prevailing view, it is claimed that a norm is efficacious both if it is

complied with or observed by citizens and, in cases where they fail to do so, if it is applied by law-applying organs (Kelsen 1960: 11, 1991: 3, 2015: 60–63; Bobbio 1993: 25; Alexy 2002: 85; Pino 2013: 174–175). The two levels of efficacy, i.e., one which refers to the observance of norms by citizens and one which refers to the application of norms by law-applying organs, are sometimes called the "primary" and "secondary" efficacy of legal norms (Ferrajoli 2007: 451–452).

The meaning of statements of efficacy thus depends on the senses one ascribes to the notions of compliance with or observance of the norm, on the one hand, and application of the norm, on the other. Compliance with the norm can be understood at least in two different ways. One can say that compliance consists in the mere fact that the actual behavior of the addressees of the norm corresponds to what is required by the norm, i.e., that the actual behavior of the addressees conforms to legal norms (Kelsen 1945: 41, 1967: 15; Hernández Marín 2002: 284–287) or that there exists a simple "mapping of behaviour on to a norm" (Shiner 1992: 24). According to some, it is exactly compliance in this sense which is required by the law from its subjects as sufficient (Hernández Marín 2002: 288–289). Thus, one says that norm *N* is efficacious if the factual state of affairs (the actual behavior of the norm addressees) corresponds to *N*'s normative content or if there exists a relationship of identity between the "required" and "produced" behavior (Navarro 1990: 59). Such compliance constitutes efficacy as a relationship of correspondence or conformity (Kelsen 1934: 31–32, 1945: 39–40, 1967: 10–11; Pino 2013: 174) and is consequently termed the so-called finistic efficacy of legal norms (Grabowski 2013: 335). On the other hand, compliance can also be understood in the sense of addressees obeying legal norms, i.e., in the sense that addressees follow norms and behave as norms prescribe precisely for the reason that norms prescribe such behavior (Hoerster 2006: 48–50). Such compliance can be defined as conscious compliance with a legal norm (Hernández Marín 2002: 287–288), where the existence of a legal norm is a "decisive factor for the norm-conforming behaviour" (Hoerster 2006: 50). Thus, one could say that norm *N* is efficacious if the factual state of affairs (the actual behavior of the norm addressees) corresponds to *N*'s normative content and norm addressees consciously produce the required behavior on the basis of *N*. This form of compliance constitutes efficacy as a relationship of obeying and is consequently termed the so-called motivational or psychological efficacy (Grabowski 2013: 335).

Both these interpretations of efficacy attracted objections. For example, it is objected that finistic efficacy can turn on the mere coincidence of addressees' norm-conforming behavior, that it is a concept capable of being applied from a wholly external point of view, that it is not an evidence that a norm has prescriptive force, that it does not take into account the important idea of following rules (Ingram 1983: 491–493), that it does not capture the way in which officials conform their behavior to law (Ingram 1983: 499; Lagerspetz 1995: 168–169), or that it becomes problematic if used as the criterion for determining or identifying legal norms and legal systems (Navarro 1990: 21–22). On the other hand, motivational or psychological efficacy is criticized on the following grounds: it is said that in most cases it is impossible to determine the actual motives for compliance (Kelsen 1991: 138) and thus also the degree of efficacy understood in psychological terms (Grabowski 2013: 335, n. 386).

Just as compliance, the application of the norm can also be understood at least in several different ways. According to one view, the application of the norm which constitutes its efficacy is claimed to consist in the determination and execution of sanctions by law-applying organs in cases where legal subjects do not conform to law (Kelsen 1945: 62, 1967: 11). Thus, one can say that norm *N* is efficacious if law-applying organs determine and execute sanctions for "violations" of law. According to another view, the application of the norm consists in its being used as a premise in the judicial reasoning of the courts, i.e., as "an integral part of the reasoning underlying the judgment" and "one of the decisive factors determining the conclusion at which the court has arrived" (Ross 1958: 42), "quite apart from whether the process ends with the acquittal or the conviction

of the accused" (Bulygin 2015: 40; similarly Kelsen 1991: 141). Thus, one can say that norm *N* is efficacious if law-applying organs (i.e., courts) use it to ground their decisions. Finally, the notion of the application of the norm may also be extended to the use by norm addressees (both citizens and officials) of permissions and empowerments or legal powers (Kelsen 1967: 16, 2015: 63–64). Thus, a permissory or empowering norm *N* can be said to be efficacious if its norm addressees make use of the permission or power conferred on them by *N*. The difference with regard to prescriptive or proscriptive (i.e., duty-imposing) norms is that, while the latter are inefficacious when not complied with, permissory and empowering norms "cannot be characterized as inefficacious in case no use is made of the empowerment or the permission" (Kelsen 2015: 66). Here it should be noted, however, that, according to some authors, "efficacy is centrally a mark of DI-rules [duty-imposing rules] and is affirmed of PC-rules [power-conferring rules] primarily in virtue of their relation to efficacious DI-rules" (Munzer 1972: 34).

The interpretation of efficacy in the sense of application by law-applying organs has also encountered some objections. It is, for instance, claimed that the expression "is applied" is ambiguous since the proposition which includes it can refer to past, present, or future applications of the norm (Bulygin 2015: 47). According to Bulygin (2015: 47), the proposition "norm *N* is efficacious, i.e., *N* is applied by judges" "clearly cannot refer to the past, for it is possible that a norm that was applied earlier has lost its efficacy in the meantime, and it clearly cannot be exclusively a matter of a present application, for that would overly restrict the range of application of the word 'efficacious,'" and neither can it refer to future applications, for, "in this interpretation, the meaning of the word 'efficacious' departs sharply from its ordinary use in legal discourse."

While all of the above interpretations of efficacy (both in terms of compliance and application) refer to the "factual dimension of the norm," i.e., to the actual behavior of norm addressees, and therefore face some serious difficulties, Bulygin proposed an interpretation of efficacy as a particular disposition of the norm, i.e., a disposition of the norm to be applied when certain conditions obtain (Bulygin 2015: 48). On this interpretation, "the proposition 'norm *N* is efficacious' is tantamount to the proposition 'if certain conditions were to obtain (those necessary to the application), then the courts would apply *N*'" (Bulygin 2015: 48). Thus, one can say that norm *N* is efficacious if and only if it can be judicially invoked (Bulygin 2015: 50). On this view, efficacy does not refer to the facts of compliance or application but to the specific disposition of the norm, i.e., its judicial invokability (for objections to this interpretation of efficacy, see Kelsen 2015: 66–67, n. 14).

Whichever interpretation of efficacy in terms of actual behavior of norm addressees (thus, of course, excluding Bulygin's interpretation) one takes to be the most plausible, the prevailing view is that the efficacy of the legal norm is a matter of degree (Kelsen 1991: 138–139; Pino 2013: 175; Grabowski 2013: 335; Navarro 1990: 22; Alexy 2002: 85). A norm can be more or less efficacious. If a norm is said to be efficacious, it "does not mean that it is always observed and applied without exception; it means only that it is observed and applied *by and large*" (Kelsen 1991: 138). Moreover, it is said that "there must always remain the possibility that it will not be observed or applied, since if this possibility did not exist (i.e., if that which ought to happen has to happen always and without exception, in virtue of the laws of nature), then a norm decreeing this behavior to be obligatory would be superfluous. Just as it is pointless to posit a norm which decrees to be obligatory something one knows beforehand can never occur in virtue of the laws of nature" (Kelsen 1991: 138–139).

With respect to efficacy as a predicate of legal systems, it is the dominant view in jurisprudence that legal system *LS* is efficacious if and only if most of its norms are efficacious (Navarro 1990: 71; Munzer 1972: 32). It follows from this that the efficacy of the legal system is also a matter of degree (Kelsen 1934: 68–69; Navarro 1990: 71–72) and that it depends on which of the above interpretations of the efficacy of the legal norm one endorses. However, given the

prevailing view that the norm is efficacious both if it is complied with or observed by citizens and, where they fail to do so, if it is applied by law-applying organs, the condition of the legal system's efficacy (i.e., that most of *LS*'s norms are efficacious) raised a number of important questions, for example, whether it is even possible to make a simple computation of the efficacy of all legal norms of the system and then work out the ratio of efficacy of the system, whether all violations of all norms are of equal importance, whether all violations of the same norm are of equal importance, whether there is a difference in assessing the efficacy of duty-imposing and power-conferring norms, whether greater importance should be attached to important constitutional norms, whether one should take into account only conformity or also some knowledge of law and how it motivates the norm addressees' behavior, whether nonlegal factors play a role in determining efficacy, and whether one should take into count only the application by law-applying organs as the more objective way of determining efficacy (Raz 2003: 203–208; Ingram 1983: 493–495). Moreover, even if the application of law is taken as the sole criterion for efficacy, there is still the problem of determining the ratio of actual to required application which is necessary for determining efficacy or inefficacy and the problem of determining which areas of application of law are more significant for the efficacy of the legal system as a whole (Ingram 1983: 501).

Efficacy as a Condition of Legal Validity

It is a widespread view of legal positivism that efficacy is in some cases and in certain ways a condition of legal validity. Of course, one has to take into account the fact that the term "validity" is extremely ambiguous (Nino 1996: 116–118) and that its different senses bear differently on the issue of connections between efficacy and validity (Bulygin 2007: 110–111).

There are at least three interesting questions here. First, is there a connection between the efficacy of the legal norm and its legal validity? Secondly, is there a connection between the efficacy of the legal system and the legal validity of the legal norm? Thirdly, is there a connection between the efficacy of the legal system and its validity?

As regards the first issue, it is the prevailing view that the efficacy of the (promulgated or posited) legal norm is not a condition (neither necessary nor sufficient) of its legal validity understood in terms of the norm's membership in the legal system (Kelsen 1967: 11; Munzer 1972: 43; Shiner 1992: 28; Bobbio 1993: 27; Hart 1994: 103; Hoerster 2006: 51; Bulygin 2007: 110; Navarro 2013: 80–81). It is generally accepted that the so-called derivative legal norms (i.e., those whose existence is based on the existence of other legal norms) belong to the legal system (and in this sense are valid) in virtue of the norms regulating their creation and provided they are at least prima facie created in accordance with these norms (what is necessary is at least that they are created by the competent authority) (Guastini 2014: 119). Thus, for example, a newly enacted statute, although still not observed or applied, is nevertheless regarded as a valid legal norm if enacted by the parliament. It is rather, as some claim, the other way around, i.e., the validity of the legal norm (in the sense of the norm's membership in the legal system) is a necessary condition of its efficacy (Hoerster 2006: 51; Aarnio 2011: 128). Of course, this does not apply to customary norms "since their existence and then also their membership consist in their efficacy" (Bulygin 2007: 120). On the other hand, it is claimed that the efficacy of the legal norm is a condition of its legal validity in the sense that the norm loses its validity if it becomes permanently inefficacious (Kelsen 2015: 67). This, it is said (Kelsen 1934: 73, 1945: 119–120, 1967: 213; Alexy 2002: 91), happens in the case of *desuetudo* (i.e., where a norm has not been complied with and applied for a very long period of time). However, the dominant view is that such a way of losing validity is only a contingent matter, depending on whether efficacy is included in a particular legal system among its criteria of validity (Kelsen 1945: 122; Hart 1994: 103, 295; Munzer 1972: 43). Also, at least as far as Kelsen's view is concerned, it is claimed that efficacy is to

be interpreted here as a condition of legal validity in the sense of the norm's existence or "binding force" (which, for Kelsen, means that people ought to behave as required by the norm) (Bulygin 2007: 110). It is in this way that one can also interpret Kelsen's claim that "in order to become valid, it [a norm] must have the *possibility* of being effective, for a norm which decrees something *impossible* to be obligatory [. . .] cannot be valid since it cannot be effective from the very beginning" (Kelsen 1991: 140).

As to the second question, there is the view that the efficacy of the legal system is a necessary condition of legal validity, in terms of the norm's existence or binding force (see Bulygin 2007: 110–111), of all the norms belonging to a system. It is said that the legal norm is considered to be valid (i.e., that it exists) only if (apart from being authoritatively issued or posited) it belongs to a legal system which is by and large efficacious (Kelsen 1945: 42; Alexy 2002: 91) and that it ceases to be valid if the legal order to which the norm belongs loses its efficacy as a whole (Kelsen 1945: 119, 1967: 212; Hoerster 2006: 51). This connection between efficacy and validity is, as Kelsen says, "cognizable [. . .] only from the point of view of a dynamic theory of law dealing with the problem of the reason of validity and the concept of the legal order" (Kelsen 1945: 42). Namely, a norm is valid if created in accordance with the norm regulating its creation or, from the standpoint of the first level of the chain of authorization (or dynamic derivation), in accordance with the first constitution. However, the first constitution is, in virtue of the so-called basic norm, valid only if it, and the legal system to which it belongs, is on the whole efficacious. It is in this way that there exists, at least indirectly, a relationship between efficacy and validity (Celano 1999: 358). However, not everyone endorses this view, claiming instead that the general efficacy of the system is not a criterion of validity but only the context that one normally presupposes when identifying a rule of the system as a valid legal rule, i.e., when making internal statements of validity (Hart 1994: 295).

Finally, legal positivists (but also some non-positivists) commonly hold that the efficacy of the norms of the system is a necessary condition of the validity of the legal system in terms of the existence of the legal system and that it is sufficient that the statement that a legal system is inefficacious be true in order that the statement that a legal system is not valid (i.e., that it does not exist) also be true (Navarro 1990: 15, 71; Kelsen 1945: 120, 1967: 211–212; Alexy 2002: 89–90; Ingram 1983: 484; Shiner 1992: 29; Hart 1994: 103–104). However, even if the difficulties related to the identification of its precise meaning be set aside, efficacy, understood as a condition of the existence of the legal system, helps only to distinguish "between effective and non-effective law and not between legal and non-legal systems" (Raz 2002: 43) and in this way does not contribute much to the explanation of the concept of law.

Reduction of Validity to Efficacy

Some theories of law are said to deny the logical separability of validity from efficacy or to identify legal validity with or reduce it to efficacy (Ingram 1983: 490; Kelsen 1967: 211; Bobbio 1993: 31). These views are usually ascribed to different forms of legal realism (Kelsen 1967: 211; Bobbio 1993: 31; Ingram 1983: 490). It is claimed that "if law is seen in a court-centered way to consist just in what judges do [. . .], if law is seen as psychological fact, as compulsion to certain forms of behaviour in the ordinary citizen and the judge, then it follows straightforwardly that the quality of law as law lies directly in effective action" (Ingram 1983: 490).

According to Alf Ross, one of the leading proponents of Scandinavian legal realism, the concept "valid law" "refers to the effectiveness of the norms as a social fact" (Ross 1958: 19–20). Valid law, according to Ross, means "the abstract set of normative ideas which serve as a scheme of interpretation for the phenomena of law in action, which again means that these norms are effectively followed, and followed because they are experienced and felt to be socially binding" (Ross 1958: 18). Those who follow norms are, according to Ross's theory, judges, since "the real content of a norm of conduct is a directive to the judge, while the instruction to the private individual is a derived and figurative legal norm deduced

from it" (Ross 1958: 33). Therefore, the legal phenomena for which legal norms serve as a scheme of interpretation are the decisions of the courts, so "it is here that we must seek for the effectiveness that is the validity of law" (Ross 1958: 34–35). What constitutes the legal validity of the legal norm is, then, its application by judges. It is in this sense that Ross reduces validity to efficacy. Validity is entirely dependent on efficacy. What makes the norm "valid" is the fact that it is applied by the courts, i.e., that it is efficacious. Citizens' compliance with a legal norm does not play any role in determining its efficacy, which leads to the paradoxical conclusion that the more a norm is complied with by its norm addressees, the more difficult it is to ascertain whether it possesses legal validity (Ross 1958: 35–36). Given his view about validity being entirely dependent on efficacy, Ross considers the case of a recently promulgated but not yet efficacious law and concludes that such law is to be regarded as valid on the condition that "on some basis other than previous practice of the courts there is the reason to assume that the rule will be applied in any future legal decision" (Ross 1958: 40–41). With respect to the legal system as a whole, Ross accordingly defines validity in terms of efficacy of the norms of the system and thus also reduces the validity of the system to its efficacy. However, since, as Ross argues, a legal system consists only of "norms which actually are operative in the mind of the judge, because they are felt by him to be socially binding and therefore obeyed" (Ross 1958: 35), then according to his theory, as opposed to legal positivistic theories of law, efficacy cannot be a matter of degree: "the totality of law is found in the summed effectiveness of each individual law" (Ingram 1983: 490).

Some of the objections addressed to such an account of validity are that "one is unable to grasp the specific meaning in which the law addresses itself to reality and thereby juxtaposes itself to reality, which can be in conformity or in conflict with the law only if reality is not identical with the validity of law" (Kelsen 1967: 213); that this account cannot explain the phenomena of *desuetudo*, the so-called symbolic law (i.e., laws enacted with no real intention to be implemented) and the ideal case of legal validity (i.e., when all citizens conform to a norm in all cases so the courts have no opportunity to apply it); that it leads to the (counterintuitive) gradability of the concept of legal validity (since a norm could then be said to be more or less valid depending on the degree of its application or probability with which it can be predicted that it will be applied); and that it cannot account for the fact that courts sometimes apply law which later turns out to be invalid (e.g., in cases of retroactive annulment of the law) (Grabowski 2013: 316–319).

Conclusion

One of the senses of the term "efficacy" refers to the fact that norm addressees actually behave as is required of them by legal norms. This sense of the term is generally used within jurisprudential discussions about whether efficacy is an essential element of the concept of law. According to legal positivism, efficacy is in some cases and in certain ways a condition of legal validity of both legal norms and legal systems. On the other hand, legal realism tends to identify entirely legal validity with or reduce it to efficacy. Thus, in both jurisprudential approaches, efficacy tends to play a role in shaping their respective concepts of law. However, while the legal positivistic view does not affect the most standard sense of legal validity of the legal norm (i.e., the legal norms' membership in the legal system) and by identifying efficacy as a criterion of the legal system's existence does not add much to the explanation of the concept of law, the legal realistic view is faced with some serious objections regarding its explanatory adequacy.

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Law as an Artifact

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Introduction

On a very broad reading, the idea that law is an artifact can be understood in the sense that law is artificial in character. In this sense it roughly means that law is posited or positive law, law understood as the creation of human beings, the product of human actions, and not something occurring naturally. However, a growing interest in the theories of artifacts within general philosophy (analytic metaphysics in particular) at the end of the twentieth and the beginning of the twenty-first century (Lowe 1983; Hilpinen 1992, 1993, 2011; Dipert 1993; Thomasson 2003, 2007, 2009, 2014; Baker 2004, 2006, 2008, 2010; Elder 2007; Houkes and Vermaas 2009; Preston 2009, among others) and social ontological theories (especially Searle 1995, 2010; Tuomela 2002, 2007, 2013) prompted legal philosophers (both legal positivists and natural law theorists) to inquire into the ontological implications of the thesis that law is an artifact, i.e., to explicate, by using the conceptual apparatus of these theories, what kind of an entity law is and what its specific mode of existence amounts to (Burazin 2018: 112). On this reading, the idea that law is an artifact can be understood in the sense that law is a (social) mind-dependent entity, in the sense that the mental states of its creators (and perhaps users) and the concepts on which these states are based are (at least partly) constitutive of its existence. In other words, in the sense that law not only causally but also existentially or ontologically depends on its "authors'" mental states and concepts (Burazin 2018: 112–113; Marmor 2018: 59).

Although all the inquiries into the ontology of law as an artifact have as their object "law," some of them specify their object as law in the sense of laws or legal norms (Crowe 2014), some as law in the sense of legal institutions (Roversi 2015, 2018), and still others as law in the sense of legal systems (Burazin 2015, 2016, 2018). In addition to this, "law" is in these inquiries usually considered a kind (or a genre) of artifact and "laws," "legal institutions," and "legal systems" its instances or instantiations, i.e., artifacts belonging to the kind law (Gardner 2004: 171; Finnis 2018: 1; Crowe 2014: 751, Ehrenberg 2016: 192).

In what follows, the main attributes usually ascribed to law as an artifact kind through the analyses of the instantiations of law, such as laws, legal institutions, and legal systems, within the contemporary jurisprudential accounts of the artifactual character of law will first be set out, after which some potential payoffs of the artifactual understanding of law will be indicated.

Artifactual Character of Law

According to some, the thesis that law is an artifact kind implies that the instantiations of law have authors and that they are intentionally created (Leiter 2011: 666; Ehrenberg 2016: 17, 122–123; Burazin 2016: 397), meaning that human mental states and concepts are (at least partly) constitutive of what, e.g., a legal system, legal institution, or a legal norm is. These seemingly basic implications of the artifactual character of law also seem to be the most contested ones. Customary law (or laws) and the common law system are usually given as counterexamples of the supposedly unintentionally created instantiations of law that have no authors (Green 2013: 202 in response to Leiter 2011; Crowe 2014: 737, 739–740; Leiter 2018: 10–11, modifying

his earlier view; Priel 2018: 244–254). In view of these objections and the fact that the instantiations of law (in particular, legal systems and customary law) often do not have precisely identifiable authors and that many people with different roles contribute over a long period of time to the emergence and continuous existence of such instantiations of law, some advocate a broader concept of (collective) authorship in order to include as authors a wide range of persons, including those who sustain the instantiation of law in question and its active users (Burazin 2016: 395–399; Burazin 2018: 120–122). Also, they understand the intention condition as implying the authors' collective intentionality in the form of collective recognition or acceptance (that a particular instantiation of law exists) and as allowing that a part (or even the greater part) of the coming into existence of a particular instantiation of law gradually emerges from a standing practice (Burazin 2016: 395–399; Burazin 2018: 114–122, 124–126; for a similar account based on collective intentionality, see Crowe 2014: 743–748, although he counts neither collective acceptance as part of the intention condition nor those who collectively accept as authors). Others circumvent the problems arising from the authorship and intention conditions by seeing the artifactual character of the instantiations of law (in particular, legal institutions) in their, inter alia, being the outcome of a deliberative history tracing back to an intention-rooted (linguistic) creation process, the term "process" capturing the fact that the creation of a legal institution can extend over time and involve several acts of different persons and the term "intention-rooted" referring to a broad variety of phenomena, ranging from a specific creative intention to a simple regularity of behavior recognized afterward as having constituted a legal institution (Roversi 2018: 95–96, 98; Roversi 2015: 219, 233).

A further implication of the thesis that law is an artifact kind is that law has some use or purpose which can be characterized as its function (Ehrenberg 2016: 86, 106, 120; Himma 2018: 136–138; Crowe 2014: 750–752). For some, this is precisely what makes law not only artificial but also artifactual in character (Himma 2018: 137–138). There are, however, different views on what that function is. Himma (2018: 147–154), for example, argues that the conceptual function of law is keeping the peace, Crowe (2014: 752–756) that the characteristic function of the artifact kind "law" is "to serve as a deontic marker by creating a sense of social obligation," and Ehrenberg (2016: 197) that the function of law following from its artifactual and institutional character is "setting a framework for the specification, recognition, and protection of contextually bound rights and duties within the widest possible social setting [. . .], that is, the generation and validation of other institutions."

On the predominant view, law is considered a special type of artifact. Unlike "ordinary" artifacts, such as tables, chairs, and clocks, law is taken to be an institutional artifact kind (Burazin 2016: 397–399; Burazin 2018: 112–135 and Ehrenberg 2016: 32–36; Ehrenberg 2018: 188–189; Crowe 745–748; Roversi 2015: 228; Roversi 2018: 98–99, calling legal institutions rule-based artifacts). This implies that the instantiations of law are norm-based and require collective intentionality for their existence, meaning that the necessary condition for their existence as institutions is the collective recognition or acceptance by members of the relevant community of constitutive norms which confer institutional status accompanied with relevant deontic powers (e.g., rights, duties, powers, liabilities) (Burazin 2018: 113). As an institutional artifact, law is a social arrangement "in which members have defined roles that carry specially created rights and responsibilities [. . .], giving those subject to them new reasons for action" (Ehrenberg 2016: 32–33; see also Ehrenberg 2018: 188–189).

Law is also considered an abstract, immaterial (intangible), or intellectual artifact (Ehrenberg 2016: 11; Ehrenberg 2018: 184; Burazin 2018: 113–114; Roversi 2015: 228–230; Marmor 2018: 45–51, 57–59; Tuzet 2018: 223–226). It is abstract in the sense that it is not ontologically material and not perceivable as material objects are (Tuzet 2018: 223–224). Law has an important semantic aspect in that it "consists of a set of concepts specifically created to organize, define,

empower, and limit human behaviour in a complex social setting" (Roversi 2015: 228). It is "not identical to any specific set of physical entities" (Ehrenberg 2016: 11). For instance, a legal system would not cease to exist if all its original normative texts (sources) were destroyed (Burazin 2018: 113–114).

Moreover, it is said that law is also a public and social artifact. It being a public artifact means that law is intended to be recognizable as law to the intended audience, i.e., law-addressees, and that as such it carries certain norms of recognition, i.e., norms on how it should be recognized or identified (Ehrenberg 2016: 31; Ehrenberg 2018: 184–188, following Thomasson 2014: 50). It being social means that "it only exists in a society and for social purposes" (Tuzet 2018: 227).

Finally, although human mental states (in particular the intentions and beliefs of the members of the relevant community), collectively shared, constitute what law is, the prevailing view is that law cannot (effectively) exist if these mental states are not realized in practice. Some state this view by arguing that law does not (effectively) exist if it is not capable of carrying out its characteristic function (Crowe 2014: 748–753) or its interaction plan, i.e., the way norm-addressees are supposed to interact with law (Roversi 2018: 96–97), to at least some extent. Others argue that law does not really exist if the collective recognition which determined its ("intended") character had not been largely successfully realized, which is manifested precisely in officials and citizens actually using law, i.e., in their social practices which are based on the collective recognition that law exists (Burazin 2018: 129–134).

Theoretical Implications of the Artifactual Character of Law

The inquiry into the artifactual character of law or, as some call it, the artifact theory of law (Burazin 2016; Crowe 2014: 756; Roversi 2018: 89) seems to have some potential payoffs for descriptions and explanations of law and our understanding of it.

The understanding of the artifactual character of law, law's dependence on human mental states and needs can, for example, facilitate jurisprudential explanations of why the concept of law cannot be static in character (Burazin 2016: 388) and why there can be different, culture-dependent concepts of law (Schauer 2018: 35–36). Since human beliefs, intentions, and interests can change over time and can be different at different places, the concept of law is also susceptible to historical and cultural developments and changes. Once it is recognized that our concepts of law are contingent, there is no reason why there could not be different concepts of law, e.g., one treating and the other not treating moral acceptability (or, indeed, something else) as a condition of legal validity (Schauer 2018: 36). Also, there seems to be no reason for holding that law (in the sense of law wherever and whenever it appears) has some essential or necessary properties. These insights might then perhaps direct our descriptive jurisprudential inquiries toward identifying the important but necessarily contingent features of law, instead of attempting to discover the necessary or essential features of law wherever and whenever it appears (Leiter 2011: 669–670; Leiter 2018: 7–15; Schauer 2012: 458; Schauer 2018: 30; Burazin 2015: 73; however, for an opposite view, see Murphy 2015: 124–127; Marmor 2018: 51, arguing that artifacts do have essential features at least at a commonsense level). Also, if, given the artifactual character of law, human concepts play a vital role in determining the "nature" or character of law, this might provide additional support for and justify the use of conceptual analysis when theorizing about the nature of law but at the same time might also call for supplementing conceptual analysis with experimental philosophy, i.e., finding out what people really think about law (Burazin 2016: 387). The recognition that our concepts of law are contingent could also, as some claim, open up the possibility of a different kind of normative jurisprudential enterprise, the project of prescribing conceptual revision, i.e., an "enterprise that would consist of *prescribing* what some revised concept ought to be", where prescriptions could be based on considerations other than the moral ones (Schauer 2018: 38).

A theorist could, for example, "urge that it would be preferable to understand some phenomenon differently from the way it is now understood – to have a different concept from the one we now have" (Schauer 2018: 38).

In addition to this, some point to the epistemic consequences of the artifactual character of law. If law, as an artifact, is created by people, and if its "nature" or character is constituted by our concept of it and our collective recognition of its existence, then we cannot have fundamental errors about its "essential" features (Marmor 2018: 49, 59). This does not imply that people cannot be wrong about the ontology of law, i.e., about what makes something be law (Marmor 2018: 49, 59; Burazin 2018: 126), but it does imply (*contra* Dworkin 1998: 3–6) that there cannot be fundamental "theoretical" disagreements about what law, as a kind, is (Marmor 2018: 59–60).

Furthermore, some claim that if the artifactuality of law implies that law by definition has some purpose or function, then one of the tasks of legal philosophy is to engage in the functional analysis of law, i.e., to explain law's function(s) and to understand law's "nature" or character in terms of those functions (Ehrenberg 2009: 91; Ehrenberg 2016: 1–2, 86, 106, 120). The understanding of the artifactual character of law can, for example, attract much more theoretical attention than before to the question of whether law has a conceptual function and, if it has, what that conceptual function is, thereby staying within the legal positivistic tenets (Himma 2018). However, accounting for law's artifactual nature in terms of its function, e.g., by arguing that something cannot count as law if it is not constitutively capable of performing its purported function of creating a sense of social obligation due to its content, can also be used to vindicate a version of a natural law theory (Crowe 2014).

According to some, the artifact theory of law (or at least a particular version of it) can coherently accommodate some of the seemingly opposed insights of (formalistic) legal positivism (the need for objectivity of law and legal certainty) and (antiformalistic) legal realism (the need for actual acceptance of law and legal effectiveness), which makes it "a crucial link in the chain of explanation of legal ontology" (Roversi 2018: 99). In particular, a deliberative history of the intention-rooted creative process of legal artifacts can, as an objective fact, account for the objectivity of law and legal certainty, and collective acceptance or recognition, which enables a legal artifact to fulfil its function or carry out its interaction plan, can account for legal effectiveness (Roversi 2018: 103–105).

Finally, some emphasize that the understanding of the artifactual character of law and especially its public and institutional aspects can help better explain normativity of law (i.e., law's purported ability to create new reasons for action). Normativity of law is deemed to be explainable by the public aspect of law's artifactual character, i.e., by the fact that law is intended by its "creators" to be recognized as law (Ehrenberg 2018: 184–185), and by the special purpose of institutional artifacts, i.e., that of giving people subject to them "desire-independent reasons for action" by attaching "special statuses to people, events, objects, or states of affairs" which are accompanied by sets of deontic powers "to alter the rights and responsibilities of those within the ambit of the institution" (Ehrenberg 2018: 188–189; see also Ehrenberg 2016: 8).

Conclusion

The thesis that law is an artifact has several implications: that the instantiations of law have authors and are intentionally created, that law has a function, that law is a special type of artifact, i.e., an institutional, abstract, public and social artifact, and that law cannot exist if it is not socially efficacious. The inquires into the artifactual character of law that reveal these implications seem to have some potential payoffs for the understanding of law (e.g., of the dynamic character of law, contingency of the concept of law and law's properties, and normativity of law) and of our epistemic relation to law (e.g., of the immunity from massive error about what law is). They also seem to have an impact on the jurisprudential methodology (e.g., by directing us to non-essentialist ontological inquires into law, emphasizing the

functional explanation of law and the need to combine conceptual analysis and experimental philosophy, and opening up the possibility for the project of prescribing conceptual revision) and to accommodate some of the seemingly opposed insights of the current theories of law (e.g., by accounting in a coherent way for both the objectivity of law and its effectiveness).

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► Ontology of Law

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Law as Discourse

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The expression "law as discourse" is associated with Jürgen Habermas's "discourse theory of law and democracy," first elaborated in his 1992 work, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy.*

Communicative Action and Discourse

Since the early 1970s, Habermas has developed and refined an approach he calls a *universal* or (more recently) *formal pragmatics*. In developing a "pragmatic" rather than "semantic" theory, Habermas focuses on language in use – on utterances or "speech acts." The theory counts as "universal" or "formal" in its ambition to rationally reconstruct the necessary presuppositions of communicative practice – those unreflectively mastered communicative capacities that allow speakers to establish, maintain, or transform social relationships with other persons.

The central idea in Habermas's formal pragmatics is a speech act's "validity." According to Habermas, speech acts raise three claims to validity: propositional truth, normative rightness, and sincerity (see, e.g., Habermas 1984: 75, 99). Typically, just one of these validity claims is thematic in a particular speech act – e.g., the claim to sincerity in a confession. Yet at least in principle, any speech act can be criticized along any of the three dimensions of validity (Habermas 1996: 76–77).

In ordinary communicative action, these validity claims remain uncontroversial. In case of disagreement, however, the parties may continue the interaction but avoid the controversial issue, engage in strategic rather than communicative action, or break off the interaction entirely (ibid: 21). An additional option is most relevant to us here: The parties may switch over to "discourse," where they criticize or defend one or more of the three validity claims.

Habermas introduces the idea of discourse through various "idealizations." Participants must have equal opportunities to raise topics, arguments, and criticisms. The situation must exclude all force "except the force of the better argument" and "all motives except a cooperative search for the truth" (Habermas 1984: 25). While Habermas describes these conditions as "general pragmatic presuppositions" of discourse, he is aware that they are never completely fulfilled. He is willing to speak of "discourse" when the demanding conditions are "sufficiently fulfilled" (Habermas 1996: 178).

Discourses, Habermas says, are exceptional forms of communicative action – "islands in the sea of practice" (Habermas 1993: 56). Yet the institutionalization of discursive practices, in contexts such as scientific research, democratic procedure, and legal procedure, is a characteristic feature of modern societies.

Habermas has identified three types of "practical" (i.e., related to action) discourses on which his theory of law and democracy will rely:

- *Pragmatic discourses* concern either the rational choice of means to "fixed purposes" or the

"rational assessment of goals in the light of existing preferences."

- *Ethical discourses* at an individual level concern "what life one would like to lead," "what kind of person one is and would like to be." At a collective level, ethical reasoning takes the form of "ethical-political discourses," whose goal is "the clarification of a collective identity."
- *Moral discourses*, according to Habermas, employ a strict universalization principle (dubbed "U"). The moral question, in Habermas's Kantian formulation, is whether the maxim of an action – its underlying rule or principle – could be "generalized from the perspective of all affected," thereby "count [ing] as a norm that can command general assent" (Habermas 1993: 2–9).

To this tripartite typology of discourses, Habermas adds a cross-cutting distinction between the *justification* of moral or legal norms and their *application*. Because moral *justification discourses* employ a "decontextualized' universalization test, the norms they validate can be applied "without qualification" only in "standard situations." To consider whether and how these norms apply in "unforeseen individual cases," *application discourses* are required. These discourses are regulated not by a universalization principle but instead by a "principle of appropriateness" that requires consideration of "all the relevant features of the situation conceived as exhaustively as possible" (ibid: 12–13).

This argument for distinguishing between justification and application discourses is tailored to moral norms which, on Habermas's theory, are acontextual, abstract, and justified by a universalization principle. But is that true of legal norms as well? Enacted legal norms of nation-states (or their subunits) are hardly so acontextual and abstract as Habermas's moral norms, and they seem to claim territorial rather than universal validity. So if justification and application discourses have different logics in law, it must be for a reason other than the abstractness of universalistic morality.

Habermas's preliminary answer is functional. Law regulates "communal existence under the pressure of social complexity," with conflict among "parties whose wills and interests clash." For that reason, law, unlike universalistic morality, must be institutionalized, with "procedures and . . . processes of [public] argumentation and negotiation" (ibid: 16). Institutionalizing the rule of law in a democratic constitutional state, Habermas will argue, depends upon the separation of powers among legislature, judiciary, and administration. Legal disputes and their judicial resolution typically focus on *application* of the law rather than on deciding what legal norms are ideally justified.

Facticity and Validity: Habermas's Discourse Theory of Law and Democracy

From a 5-year working group that Habermas convened on legal theory came Habermas's monumental *Faktizität und Geltung*, later translated into English as *Between Facts and Norms*. The book's German title expresses what Habermas considers the basic problematic of modern law: a tension between law's *facticity* and law's *validity*. By "facticity," he means law's operation as a coercive system whose sanctions compel or induce sufficient obedience even among those unconvinced by legal norms' normative claims. By "validity," Habermas means law's claim to be legitimate – that is, to be morally worthy of respect (Habermas 1996: 26, 30, 198, 447–448). A hallmark of modern law, Habermas claims, is that it necessarily and simultaneously claims *both* facticity *and* validity (ibid: 42, 64, 82, 95, 137, 197, 428, 444, 447–448).

The organization of *Between Facts and Norms* tracks this distinction between validity and facticity. The first part of the project (corresponding to the "validity" side of the distinction) is the "discourse theory of law and democracy" proper, which Habermas describes as a "reconstruction" of the "self-understanding of . . . modern legal orders" (ibid: 82). The central theme of this part is that legitimate law and radical democracy mutually presuppose one another (ibid: 82–193). The

second (the "facticity" side) locates this discourse theory in a model of modern complex societies (ibid: 287–387). Here Habermas's considers whether the discourse theory, developed through normative "reconstruction," actually has a purchase on complex contemporary social conditions.

Habermas's Reconstructive Theory of Modern Law

The "System of Rights"

In the "reconstructive" part of *Between Facts and Norms* – the "discourse theory" proper – Habermas first develops an account of the *system of rights* that must be recognized for a legal order to be legitimate. These rights are not concrete legal rights, recognized in some actual legal order or another, but instead, abstract *categories* of rights rooted in *the legal form*, i.e., in the characteristics of modern law that distinguish it from morality:

1. Law is addressed to individual "free choice."
2. Its concern is the "external relations" among persons.
3. It is indifferent whether one is motivated to comply with the law out of respect or because of the law's sanctions (Ibid: 105–106, 112, 118).

These characteristics reflect the weakening in modern societies of traditional forms of authority and shared conceptions of morality (ibid: 25–27, 31–33, 36–38, 42). Under these conditions, law complements morality by partially "unburden[ing]" actors from the high cognitive, motivational, and organizational demands of postconventional morality (ibid: 114–117). Habermas's elucidation of the legal form is "part of a functional explanation and not a normative justification of law. The legal form is in no way a principle one could 'justify', either epistemically or normatively" (ibid: 111–112; see Hedrick 2010: 105–111, 122).

In Habermas's overarching distinction between facticity and validity, the legal form belongs on the "facticity" side. But Habermas's reconstructive account also identifies aspects of modern law that correspond to the "validity" or "legitimacy" side of that distinction – the side that Habermas connects with justification through discourse. And so Habermas's reconstruction of the system of rights brings the idea of the legal form together with the *discourse principle* (Habermas 1996: 122). He dubs this discourse principle "D" and defines it thus:

> D: Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses (ibid: 107).

So defined, Habermas notes, this discourse principle applies to both law and morality. But Habermas neither identifies law with morality nor subordinates law to morality. He recognizes distinct validity claims in legal and moral discourse: *legitimacy* in legal discourse, and (as we have seen) *rightness* in moral discourse (ibid: 156, 232–233). Legal discourse employs not just moral reasons, but also pragmatic and "ethical-political" reasons. And because law regulates a political community divided over matters of both principle and interest, its enactment must sometimes depend on compromise, reached under fair bargaining conditions, rather than agreement in discourse (ibid: 107–108, 230).

For these reasons, Habermas recognizes a distinct principle for justifying legal norms: the *principle of democracy*, which is the "legal institutionalization" of the discourse principle. In turn, the principle of democracy "confers legitimating force on the legislative process" (ibid: 121). Habermas formulates the principle of democracy thus:

> Only those laws may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted (ibid: 110, translation amended).

But *why* does the legitimacy of legal norms depend on their democratic origin? Habermas's search for the legitimating grounds of modern legal orders draws on the social contract theories of Kant and Rousseau. He finds in Kant the idea of equal liberties, understood primarily as the liberties that establish *private autonomy*, or, "the negative freedom to withdraw" – to choose and pursue one's life plans without "giv[ing]

others an account" (ibid: 93, 100–101, 119). From Rousseau, he draws the idea of *public* or *civic* or *political autonomy* that grounds popular sovereignty (ibid: 101–102). The upshot of Habermas's reading is that "human rights and the principle of popular sovereignty still constitute the sole ideas that can justify modern law" (ibid: 99).

In Habermas's account, neither private nor public autonomy ranks above the other. Instead, they presuppose each other – or, in Habermas's terminology, they are "co-original" (ibid: 127). Habermas's "system of rights" arises from the question:

> [W]hat rights must citizens mutually grant one another if they decide to constitute themselves as a voluntary association of legal consociates and legitimately to regulate their living together by means of positive law? (Ibid: 453).

Because at this stage of the analysis, these rights are the precondition of legal legitimacy and not its product, they are, as noted above, not concrete legal rights but abstract "categories of rights" — "unsaturated placeholders," Habermas calls them (ibid: 126).

The first three categories, he asserts, are constitutive of *private autonomy* and are implicit in what we have been calling *the legal form.* According to Habermas, these three categories of rights "generate the legal code itself by defining the status of legal persons" (ibid: 122):

1. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties*.
2. Basic rights that result immediately from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law.
3. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual *legal protection*.

These categories of rights can become "saturated," i.e., developed into concrete legal rights, only through their "politically autonomous elaboration" (ibid: 122, 126–128). Political autonomy is the subject of the fourth category of basic rights:

4. Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law (ibid: 123).

With this fourth category of rights, we see how private and public (or political) autonomy presuppose one another. The first three abstract categories of rights, constitutive of private autonomy, become concrete and effective only through the exercise of citizens' public autonomy. In turn, citizens can "adequately exercise their public autonomy, guaranteed by rights of communication and participation, only insofar as their private autonomy is guaranteed" (ibid: 408).

Neither form of autonomy is subordinate to the other. Private autonomy, Habermas writes, is not "merely instrumentalized for the purposes of popular sovereignty," and citizens' political autonomy "is not limited by natural or moral rights just waiting to be put into effect." According to Habermas, only the discourse principle is prior to citizens' actual practices of self-determination, and that principle, he has said, is "built into the conditions of communicative association in general, and the legal medium as such." (Ibid: 127–128.)

According to Habermas, these first four categories of rights are "absolutely justified." A fifth category is justified only "relatively," i.e., only insofar as necessary for equal exercise of rights in the first four categories. These rights are what have been called "social rights": "basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded" (ibid: 123). These rights are not to be bestowed paternalistically upon passive welfare-state clients. Instead, as preconditions to effective exercise of political autonomy as well as private rights, they must be developed through democratic processes that include influence by all those affected (see, e.g., ibid.: 427–428, 429–430).

The Principles of the Democratic Constitutional State

The second "reconstructive" phase of *Between Facts and Norms* investigates the "principles of the democratic constitutional state" that would secure and develop the system of rights.

The central idea here is *communicative power*, which Habermas presents as a reinterpretation of the traditional notion of popular sovereignty (ibid: 170). Communicative power arises from the discussion of citizens in "undeformed public spheres" (ibid: 148). The idea of democracy, Habermas explains, is the connection between citizens' communicative power and *administrative power* – essentially, the power of command – that arises from, but also structures, the formal political institutions of a state administration. Habermas uses this connection first to explicate the traditional liberal idea of the separation of state and society, then to deepen standard conceptions of the separation of powers (ibid: 169–175, 186–189, 472).

Habermas analyzes the separation of powers through his distinction among kinds of practical discourse. Legislatures alone may legitimately rely upon all three types of discourse – moral, ethical/political, and pragmatic. The executive (or "administration") ideally is confined to pragmatic discourse aimed at realizing legislatively specified goals – though Habermas recognizes that in contemporary political systems administrative bodies must make "value choices" in implementing open-ended statutory schemes (ibid: 190; see also ibid.: 432–433, 440–441). Consistent with his tailoring the discourse principle to fit specifically legal norms, Habermas grants to at least the legislative and executive branches the options of negotiation and bargaining under fair procedures, not just discourse aimed at rational consensus (ibid: 140, 155–156, 158, 162, 164–166, 192).

To sketch the work of the judicial branch, Habermas relies on the distinction between discourses of justification and discourses of application. While legislatures may generate their own norms through discourses of justification, courts ideally are limited to discourses of application, applying given legislative or constitutional norms to individual cases (ibid: 172, 261, 267).

As Habermas ultimately acknowledges, however, this distinction between justification and application blurs in hard cases (ibid: 439–440). Further, if Habermas's theory is to fit Anglo-American practices of adjudication, he would need to face one difficulty to which civil-law systems such as Germany are immune. In England, the USA, and other England-inspired systems, common-law courts have developed large swaths of private law (originally also the entire criminal law) on their own initiative, not by interpreting legislative statutes. It seems doubtful, on Habermas's premises, whether the legislature's power to revise or override common-law norms would be democratically sufficient.

"Testing" the Discourse Concept of Law and Democracy against Contemporary Legal Theory and Judicial Practice

After developing his reconstruction of the system of rights and the principles of the democratic constitutional state, Habermas "test[s] and elaborate[s] the discourse concept of law and democracy" (ibid: 7). He chooses two testing grounds: first, contemporary discussions in legal theory, and second, contemporary controversies in constitutional practice and theory.

Legal Theory as a Theory of Adjudication - Habermas's conception of legal theory in *Between Facts and Norms* coincides with Anglo-American orthodoxy: Legal theory, he writes, is first and foremost a theory of adjudication, to be pursued from the perspective of a judge (ibid: 196–197). *Between Facts and Norms* engages appreciatively with Ronald Dworkin's idea of "constructive interpretation." In *Law's Empire* and elsewhere, Dworkin presents judicial decision-making as like a "chain novel" – a literary work produced by different authors, each of whom seeks to continue the story faithfully but also to produce new chapters that meet evaluative standards (Dworkin 1986: 229–238). In parallel to Dworkin's distinction between "fit" and "justification" (ibid: 239, 255), Habermas refers to a distinction between *certainty* (or *predictability*) and *legitimacy* (Habermas 1996: 197–221). This distinction in turn links to Habermas's overarching

distinction between facticity and validity. The judge must treat past decisions as authoritative ("facticity"), yet the present decision's justifiability ("validity") is not entirely reducible to its degree of fit or its predictability.

In his discussion of "the theory of legal discourse" (ibid. 222–237), Habermas joins a German debate over whether legal discourse is a special case of moral discourse. Against Robert Alexy, a proponent of the "special case" theory, Habermas emphasizes the constraints of discourse in litigation. First, although the ultimate decision maker (whether judge or jury) must be neutral, the parties argue strategically, not in the cooperative search for the truth that ideal discourse presupposes. Second, judicial decisions must take the constitution as given, and legislation is a fixed point of validity unless it can be shown inconsistent with the constitution (Ibid. 229–232, 234–237). Against Klaus Günther (see Gunther 1993), Habermas argues that legal discourse cannot be considered a special case of moral *application* discourses. Courts ordinarily must give effect to "the reasons packaged in, and linked to, statutes" (ibid: 192). Those reasons are not just moral but also "ethical-political" and "pragmatic," and statutes may be a product of compromise and not purely discursive agreement. Legal norms, according to Habermas, have a "more complex validity dimension." than moral norms (Ibid: 232–233).

The Role of Constitutional Courts A second and more specific "testing" of Habermas's discourse theory is against American and German constitutional theory and German constitutional practice. As to the latter, Habermas's conclusions are highly critical.

Habermas targets the German Constitutional Court's practice since its *Lüth* decision in 1958. There the Court announced that the German Basic Law "has established an objective order of values . . . centred on the dignity of the freely developing person within society" (quoted in Alexy 2002: 93). Habermas argues that the Court's "value jurisprudence" reflects a basic conceptual error of confusing norms with values (Habermas 1996: 253–260). Parliaments may incorporate values and preferences into legislation, and framers incorporate values into a constitution. Nonetheless, according to Habermas, a court may not base its decisions upon its own weighing of these various values, lest they overstep the boundary set by the separation of powers and cause "the fire wall erected in legal discourse by a deontological understanding of legal norms and principles [to] collaps[e]." (Ibid: 256, 258–259). Here Habermas aligns himself with German and American constitutional theorists (see, e.g., Ely 1980: 73–104) who reject judicial reliance on "fundamental values" that lack evident connection to constitutional principles (Habermas 1996: 253–261, 264–266). Both "balancing" and "value jurisprudence," Habermas believes, misunderstand both the distinction between justification and application discourses and the corollary idea of judicial competence within a system of separated powers. From all this, one might conclude that Habermas envisions a sharply reduced role for constitutional courts.

Yet Habermas's "proceduralist" model of constitutional adjudication seems also to point in the opposite direction. He criticizes "liberal" theories for protecting private autonomy more strenuously than public autonomy and for seeing basic individual rights only as negative rights against state interference (ibid: 249–251, 263–264, 400–401, 427, 431). According to Habermas, the constitutional court's mission is to "keep watch over just that system of rights that makes citizens' private and public autonomy equally possible," and concentrated "economic and social power" now threaten both forms of autonomy as much as does state encroachment (ibid: 263–264). Habermas seems to accept the German constitutional principle that constitutional norms may have a "radiating effect" and a "third-party effect" (see Alexy 2002: 351–364) that extends their reach beyond the state/individual relation to "affect the relations between citizens" (Habermas 1996: 247, 403). And Habermas's emphasis on constitutional protection for both private and public autonomy leads him toward, as he allows, a "rather bold constitutional adjudication." (Habermas 1996: 279). In his summary:

> [J]udicial review should refer primarily to the conditions for the democratic genesis of laws. More specifically, it must start by examining the communication structures of a public sphere subverted by the power of the mass media; go on to consider the actual chances that divergent and marginal voices will be heard and that formally equal rights of participation will be effectively exercised; and conclude with the equal parliamentary representation of all the currently relevant groups, interest positions, and value orientations (ibid: 265).

And so Habermas's position is not simply one of judicial restraint. While a constitutional court "may not assume the role of a regent" for a passive citizenry, still it must "elaborate[] . . . a system of rights in which private and public autonomy are internally related (and must be simultaneously enhanced)" (ibid: 279, 280).

The "Sociological Translation of the Discourse Theory of Democracy"

An underappreciated side of Habermas's discourse theory is what he calls his "communication theory of society." Here he examines whether the discourse theory, developed through normative "reconstruction," actually has a purchase on the "facticity" of existing social conditions. To conduct that test, he situates his discourse theory in a theoretical model of modern complex societies.

The communication theory of society, Habermas writes, understands the political system as but "one of several subsystems" (ibid: 385, 436) and investigates "whether and how a constitutionally regulated circulation of power might be established." Habermas elaborates his model of the political system topographically, presenting it as structured "along a center-periphery axis" (ibid: 354).

By the *center*, Habermas means the "familiar complexes of administration (including the incumbent Government), judicial system, and democratic opinion- and will-formation (which includes parliamentary bodies, political elections, and party competition)" (ibid: 354–55).

In the *periphery* beyond the political system's decision-making "center" lies what Habermas calls the *political public sphere*. This public sphere, Habermas tells us, is not a system, institution, organization, or "framework of norms." His positive descriptions tend to be highly metaphorical. The public sphere is a "network" of communication about public issues, a "sounding board for problems," a "warning system with sensors that, though unspecialized, are sensitive throughout society." It "filter[s]," "synthesize[s]," and "bundle[s]" "streams of communication." It is detached from physical presence and simple interactions, becoming "extend[ed] to the virtual presence of scattered readers, listeners, or viewers linked by public media" (ibid: 359–362). The political public sphere is, in Habermas's formulation, a circuit of "as it were, 'subjectless' forms of communication" or, in an alternative formulation, an "anonymous circuit of communication" (ibid: 136, 171, 299, 301).

One purpose of these proliferating metaphors is to explain in social-theoretical terms how citizens' communicative power, developed through communicative action and discourse, can influence the sphere of official decision-making, particularly lawmaking. A key concept here is the idea of *public opinion*. Habermas resists the usual idea that public opinion is a statistical average of what people think. Opinion polls, on Habermas's view, reflect public opinion "only if they have been preceded by a focused public debate and a corresponding opinion-formation in a mobilized public sphere." Habermas's idea of public opinion is thus not a purely empirical concept but, instead, a "basis for measuring the *legitimacy*" of influence on the political system (ibid: 362).

A second purpose of Habermas's account of the public sphere – captured in the "sounding board" and "sensors" metaphor – is to explain how problems and issues make it onto the agenda of public discussion. The connection is through the sphere he calls *civil society.*

Habermas presents civil society as a "network" of generally "noneconomic," "informal," and egalitarian voluntary associations (ibid: 366, 352). The problems, concerns, and issues of everyday life are discussed here before they become items of public-sphere discussion. Because participants in public-sphere discussion are "recruited" from civil society's voluntary associations, these associations may "distill and transmit" responses to social problems "in

amplified form to the public sphere" (ibid: 354, 367). Civil society, to the extent that it is autonomous from both the state and political systems, is in this way a source of "counter-knowledge" (ibid: 372).

Thus in Habermas's "sociological translation of the discourse theory of democracy" (ibid: 356), civil society and the political public sphere are the sources of citizens' "communicative power" which, if a political system is to be legitimate, must steer or at least influence official decision-making.

Democracy Beyond the Nation-State?

As Habermas has recognized, the discourse theory of law and democracy developed in *Between Facts and Norms* is tailored to the nation-state (Habermas 2009: 129; Habermas 2015a: 51). In the years since, Habermas has considered whether democracy might be possible beyond the nation-state. After early flirtation with the idea of a "world republic," Habermas has settled on the alternative formulations "constitutionalization of international law" and "global governance without a world government" (see Baynes 2016: 184).

Some of Habermas's arguments for extending governance beyond the nation-state are functional. In writings since 1996, he has identified various "border-crossing" problems that defy and exceed the powers of national regulation, such as environmental problems, technological risks, migration, and international crime and terrorism (Habermas 2001: 66–68; Habermas 2009: 91–93). In addition, Habermas frequently has observed that democracy is connected to the nation-state only contingently and historically, not conceptually, suggesting that specifically *democratic* transnational governance might be possible (Habermas 1996: 494–500; Habermas 1998a: 105–107, 116; Habermas 1998b: 131–133; Habermas 2006: 75–77; Habermas 2015b: 552).

Habermas has relied more specifically on his discourse theory in considering whether the European Union's institutions could better meet standards of democratic legitimacy and whether greater solidarity could be developed among citizens of different European nations. Toward these ends, Habermas develops a "double sovereign theory" of the Union that recasts the analysis in *Between Facts and Norms* of the system of rights.

The motivating question in that earlier discussion was: What basic rights must "citizens .... mutually grant one another if they want to legitimately regulate their life in common by means of positive law?" (Habermas 1996: 118). In that conception, the individual future citizens, taken collectively, were the "sole constituent subject" (Habermas 2012: 39).

The European Union, by contrast, has been formed through a series of treaties among pre-existing, more or less democratic nations. Member states share their sovereignty in some respects, and European law has "priority" or "primacy" over national law (ibid: 24–26, 39–40). But the relation between European and national law is not one of hierarchy – as it is between national and sub-national law in a unitary national state (e.g., France) or a federal state (e.g., the USA). Instead, the priority of European law is a "functionally justified 'primacy' of application" in which the member states retain their monopoly over the legitimate use of force (ibid: 25, 27, 40, 53). Treaty amendments must be unanimous, and member states retain (as Brexit has confirmed) a right of exit (ibid: 40). Most important, for Habermas's analysis, the member states "are more than just embodiments of national cultures worthy of preservation; they vouch for a level of justice and freedom which citizens rightly want to see preserved." And so they must remain as "guarantors of the equal freedom of the citizens" (ibid: 41–42).

All these differences, says Habermas, affect the way we should think of the EU's foundations. Habermas begins his "rational reconstruction" of the Union thus:

> Let us imagine a democratically developed EU as if its constitution had been brought into existence by a double sovereign. The constituting authority is to be composed of the entire citizenry of Europe, on the one hand, and of the different peoples of the participating nation states, on the other. (Habermas 2015b: 554).

One might wonder: Why are the "*peoples* of the participating nation states," not the member states themselves, part of the constituting authority?

Because, Habermas argues, the "EU Constitution, like all modern legal systems, has a strictly individualistic character," ultimately resting "on the subjective rights of the citizens." Habermas further invokes EU law experts who agree as to this "*pouvoir constituant mixte.*" (Habermas 2012: 35–36 and notes 56–57).

The consequence of this "doubling of the constituent powers," according to Habermas, is that when the peoples of the participating nation-states agree to limit and share their sovereignty, they do so only on condition that "the democratic-constitutional substance of 'their' states should continue to exist intact in the future Union" (Habermas 2015b: 554). That condition accounts, Habermas argues, for distinctive EU principles such as the reservation of national constitutional courts that European law should not be applied if it falls below "the level of publicly guaranteed civil liberties at the national level" (Habermas 2012: 39–40). From this perspective of a "'doubled' sovereign," Habermas diagnoses the democratic deficits of the EU as presently constituted and suggests various reforms, including the strengthening of the European Parliament's role and a taming of the European Commission's executive power (ibid: 42–44). Consistent with the "communication theory of society" developed in *Between Facts and Norms,* Habermas links democracy's possibility to a strong civil society and vibrant public sphere – though now "transnationalized" public spheres, more attuned to European and not just national politics (Ibid: 45–49; Habermas 2015a: 37–40; Habermas 2015b: 551–554; Baynes 2016: 183–189).

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Law as Literature

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Introduction

The urge to understand law as a literary-linguistic pursuit started in the early twentieth century. When John Wigmore promoted the study the

literary depictions of law to the legal professional (Wigmore 1908), and Benjamin Cardozo showed that the form of how things are said in law matters as much as the propositional contents (Cardozo 1925) when reading and writing for meaning, they could not have fathomed that their works would later become a source of inspiration of an interdisciplinary field in legal theory that promoted precisely their insights. The current (re)valuation of law as a humanistic discipline started in the 1970s in the United States. It was occasioned by a waning of political consensus, and a critique of both the long dominant legal process school and the renewed interest in legal positivism on the view that a separation of law and ethics, and a tendency to ignore questions of justice were no longer tenable. The study of literature was promoted as both as an inspirational source for a discussion on law's values and as a normative source for legal rhetoric. In other words, literature was brought into the legal arena to provide the qualities law supposedly lacked. The field of *Law and Literature* was therefore initiated as an antidote to the then dominant view of law as an autonomous discipline (Posner 1987). *Law and Literature* soon branched out into the Wigmorean axis of "law in literature" and the Cardozo-inspired "law as literature," supplemented in the 1980s by a third trajectory: the regulation of literature by law (e.g., copyright, defamation, and obscenity) and its socio-ideological aspects. These three strands have been used mainly heuristically because the search for meaning in law is nourished both by examples of portrayals of law in literary works and the development of a feeling for law as a discursive practice, a feeling for language and literary style that benefits any professional jurist, more specifically the judge in writing her decisions. Thus, the jurist's attention was drawn to legal interpretation as a human activity that demands active participation, and to the role of the jurist as interpreter. Since "Words are the lawyers' tools of trade" (Denning 1979, 5), both law and literature as cultural human endeavors involve consideration of common theoretical issues with respect to the constitution of meaning. That law's instrument is an institutional language that imposes its conceptual framework on its users also calls for the development of jurists' linguistic sensibilities.

Origins

In the 1970s and 1980s two prominent scholars revitalized the two challenges provoked by Wigmore and Cardozo. At the cradle of *Law and Literature* first stood James Boyd White with his *The Legal Imagination* (White 1973), the title of which was a provoking oxymoron: it connected two things that from the long prevailing view of law as a science seemed disparate. The claim *that* a lawyer can learn from viewing law as a form of literature broke new ground. That "the activities of law and literature . . . were in a deep sense the same thing" (White 1984, xii) is deeply connected to "One fundamental characteristic of human life [is] that we all tell stories" (White 1985, 169). In *The Failure of the Word* (Weisberg 1984), Richard Weisberg offers analyses of literary works in which the protagonist grounds his actions on "wordiness," a legalistic use of language. Weisberg diagnoses the same sentiment in the ways in which French lawyers dealt with questions of interpretation of the Vichy racial laws during Nazi occupation and created a language that served the oppressor's power structure. Weisberg opposes the dangers of such false rhetoric both in judicial decisions and contemporary societies. In *Poethics*, Weisberg defines a new jurisprudence inspired by Cardozo, i.e., that "literature teaches about law in two discrete if related ways. First, by the *how* of literature – or how literature means . . . – and second, by the *what* of literature – the rationalized rearticulation of its 'lessons' for law" (Weisberg 1992, 4). Both White's and Weisberg's lenses with which to view contemporary law and literature differ in degree rather than in kind.

After this impetus *Law and Literature* thrived. A wide range of views on the homology of law and literature offered suggestions on what the term literature in this conjunction means, from New Critical views to critical legal theory's deconstructive philosophy, with Gramscian neo-marxist hegemony, Peircean semiotics,

Bahktinian *heteroglossia*, and Luhmannian *autopoiesis* in between (Gaakeer 1998). Analyses of Herman Melville's *Billy Budd, Sailor* and William Shakespeare's *The Merchant of Venice* vied with the hermeneutics of constitutional interpretation to take pride of place. With this socio-political, cultural, ideological, and aesthetic diversification, *Law and Literature* started to move beyond the three traditional trajectories in the 1990s. The field became institutionalized as well. Soon any self-respecting American law school offered a course in *Law and Literature* (Gemmette 1995). At the turn of the millennium, the number of websites devoted to the topic began to rise exponentially. Specialized journals such as *Law and Literature* (initially *Cardozo Studies in Law and Literature*, since 1988) and *Yale Journal of Law and the Humanities* (since 1989). In 1990 the *Law and Literature Association of Australia* was established (currently the *Law, Literature and Humanities Association of Australasia*). As *Law and Literature* gained a foothold in Europe, homage was initially paid to Anglo-American scholarship, but the differences between common law and civil law jurisdictions and the fact the canonical literary texts of *Law and Literature* bore witness to a distinctly European heritage occasioned new choices in literature and literary-legal themes (Ost 2001; Olson 2010). The European sources of *Law and Literature* began to be reconsidered from a historical perspective (Biet 2001). By now *Law and Literature* has gone global. The *European Network for Law and Literature* was launched in 2006. In 2007 the UK-based journal *Law and Humanities* began to promote the field. In Italy the *Italian Society for Law and Literature* (ISSL) and the *Associazione Italiana di Diritto e Letteratura* (AIDEL) followed suit in 2008. In South America *ANAMORPHOSIS – Revista Internacional de Direito e Literatura* has thrived since 2015.

Developments and Current Issues

In the twenty-first century the lenses with which to study the interconnections of law and literature proliferated even more. With the development of *Cultural Studies*, the very idea of "literature" was broadened to include a wide range of the humanities beyond literary studies. As the field morphed into *Law and Humanities*, the current umbrella-name, firstly, new topics were introduced by means of which to study law as a literary-linguistic enterprise, e.g., *Law and Popular Culture* (MacNeil 2007; Asimow et al. 2014), and *Law and Film/TV* (Robson and Silbey 2012), and secondly, the interdisciplinarity itself of "Law and" movements began to be critically scrutinized.

As to the latter, the auxiliary, instrumental function and the binarity of the definition *Law and Literature* caused by the conjunction "and" (Binder and Weisberg 2000) met with critique from those who advocated broadening law too as a culture in a broad sense. This comes as no surprise. After all, the cultural study of law had already been initiated in the first part of the twentieth century by the German legal philosopher Gustav Radbruch who claimed that law is unthinkable without the human society from which it originates and in which it functions so that we should focus on the fundamental principles of law such as human dignity and equality, rather than only address issues of positive law (Radbruch 1973). Julie Stone Peters pointed to the dangers inherent in interdisciplinary work that starts from the premise that the one discipline has to fill the other discipline's void: this affirms the boundaries between disciplines rather than their similarities (Stone Peters 2005). Greta Olson criticized the gendered terms of soft literature versus hard law (Olson 2012). The critique resonates the idea of the *res publica litterarum*, where *litterae* stood for the totality of the humanities. The question of defining law returns with a vengeance too. As Paul Kahn pointed out early on, a reflective attitude is needed in law, i.e., ideally cultivating "the practice of simultaneously standing within and without, of articulating beliefs in order to subject them to critical examination" (Kahn 1999, 35).

The critique concerning interdisciplinary form(s) also illuminates the concept of law cherished by those in *Law and Humanities*, namely law as the art of establishing justice and the craft of

actually *doing* law. It returns to the Aristotelian tradition of the intellectual and moral virtues, e.g., to *phronèsis* or practical wisdom (Gaakeer 2019), because, as John Caputo wrote "interpretation is not something we do. Interpretation is what we *are*" (Caputo 2018, 44), emphasizing hermeneutic creativity in law and elsewhere. Here is also an opening to include legal practice in contemporary *Law and Humanities* research. The interdisciplinary critique is mirrored in a number of new themes that have crystallized by now, the most prominent themes being, firstly, narrative and narratology, secondly, empathy and affect, and thirdly, human and cultural rights.

Narrative and Narratology

The impetus for what is called "narrative jurisprudence" (Elkins 1985; Minda 1985) was given by Robert Cover in "Nomos and Narrative" (Cover 1983). According to Cover, the normative world of law not only consists of rules but also of a language and a narrative that forms the backdrop of the rule (Cover 1983). At the macro-level, this implies that "For every constitution there is an epic, for every decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live" (Cover 1983, 4–5). At the micro-level, it means that exposure to a variety of narratives can help us realize that the facts of a case are always to a certain extent the product of our own way of thinking, biases included. What is more, in legal practice it should be acknowledged that "to narrate is already to explain" (Ricoeur 1984, 178). Contemporary research on the concept of narrative aims at developing a legal narratology to answer in the affirmative the question posed by Peter Brooks, i.e., whether law *needs* a narratology (Brooks 2006). To Brooks, "the humanities can perhaps teach people to *read* with a fine and necessary suspicion" (Brooks 2010, 350). This is obviously most necessary in legal surroundings when the question of narrative probability of, say, a defendant's or witness's statement needs to be probed on the view that jurists too read for the plot (Brooks 1984). Narratology studies can help jurists foster "narrative knowledge" aimed at understanding the particularity of any human experience so that it can help integrate interpretation, professional experience and critical reflection. Jurists resemble literary writers in that they too select their materials with an eye to telling convincing stories. In doing so, judges specifically impose order in the sense of imposing a version of truth upon conflicting narratives of events and competing stories of probability by means of their judgments that must have narrative coherence. Ideally, they do so not only with attention to the legal aspects in order to arrive at the right decision, but also with an expression of what the language of law leaves out, so that the parties involved may accept the decision because they feel that they have been given an opportunity to tell their story and be heard. While theoretically, in this process of translation, legal interpretation and the performative aspect of judges' speech can be distinguished, practically, they cannot be separated (Gaakeer 2019). Related to the field of legal narratology is *Applied Legal Storytelling* which explores the role of narrative in law practice and teaching.

Empathy and Affect

Another prominent topic in *Law and Humanities* ever since Martha Nussbaum addressed it in *Poetic Justice* (Nussbaum 1995) is empathy, the ability to imagine what it is like to be in someone's shoes. Jurists need a good head and a good heart as U.S. Supreme Court Justice Stephen Breyer once put it (Gerber n.d.). To ask ourselves what it is like to be in a specific situation on the basis of our own experience, makes it possible for us to empathize with others in similar situations. Translated to the enterprise of viewing law as a literary activity, this means, firstly, the study of how literature appeals to the emotion as well as to the intellect, which cognitive insight is valuable for jurists. Secondly, it emphasizes the need to transform the experience of viewing the world of the text and its inhabitants empathetically into a norm for judging human relations in general. The capacity for empathy, then, is, ideally, the capacity to read well the people and the characters that one encounters, specifically in daily legal practice. To be able to develop this capacity, one has to

develop one's legal imagination, in order to imagine what it means for someone that the law interferes deeply in someone's life. In the sense that empathy requires from the reader the ability to imagine what it is like to be in the other person's shoes, it is both product of and precondition for reading well the narratives of law and of literature. Related to empathy is affect. Suzanne Keen offers a fine overview the historical-philosophical roots of the idea of feeling with someone, and being affected in the body, a complement to cognition based on Spinoza's *affectio* (Keen 2020). She emphasizes the importance of "narrative empathy," "the sharing of feeling and perspective-taking induced by reading, viewing, hearing, or imagining narratives of another's situation and condition" (Keen 2020, 194; cf. Olson 2016). The link to the topic of legal narratology is found in the circumstance that "[T]he narratological categories of imaginative literature share with legal narration actants, narrative situations, pace, duration, and settings" (Keen 2020, 195; cf. Hogan 2011). At the same time it should be recognized that "imaginative accomplishment" has its limits because "the human capacity to injure other people has always been much greater than its ability to imagine other people," as Elaine Scarry notes (1996, 103). Here is a connection to human and cultural rights.

Human Rights and Cultural Rights

From the start of the development of human rights, literary authors, such as Mary Wollstonecraft with *A Vindication of the Rights of Men* and *A Vindication of the Rights of Woman*, immediately joined the debate. In *Law and Humanities* the topic dates back the special issue "Terror in the Modern Age: the vision of literature, the response of law" in 83 *Human Rights Quarterly* 1983, and the special issue "The Humanities in Human Rights: critique, language, politics" in 121 *Modern Language Association* 2006. The topic was given a boost by Kay Schaffer and Sidonie Smith with *Human Rights and Narrated Lives* (2004), Lynn Hunt with *Inventing Human Rights, a History* (2007), and Joseph Slaughter with *Human Rights Inc., The World Novel, Narrative Form, and International Law* (2007), each with a specific literary-linguistic perspective and a focus on narrative, voice and trauma. To them, the humanities as the organized education in the arts and sciences, or *Bildung*, can indeed be used as a "Humanities of Resistance" to stem the tide of legal-political instrumentalism (Douzinas 2010).

When views on human subjectivity conflict, as is often the case in human rights discourse, a remedy can be found in formulating human rights (law) "in terms of narrative genres and narrative voices" (Slaughter 1997, 407). Slaughter proposes the lens of the *Bildungsroman* to view human rights abuse "as an infringement on the modern subject's ability to narrate her story" (Slaughter 1997, 413). Slaughter's premise can be fruitfully connected to other scholarly work in *Law and Humanities* on voice and narrative ever since James Boyd White first emphasized the importance in law of telling one's story and be heard (White 1985). Both the protagonist of the *Bildungsroman* and the individual human rights personality "recognize what one already is by right," and they do so by taking responsibility for the plot of the development of human rights in a local or national context as well as by sticking to narrative rather than violence as a means of self-determination. What matter then are voice and the ability of self-determination. The capability, however, to narrate one's experience and oneself as an individual with a specific identity, i.e., a legal personhood with its rights-and-duties-bearing consequences, can be severely frustrated. Lack of perception and empathy in those who judge others, then, may result in "epistemic injustice" of two kinds. Firstly, "hermeneutical injustice" which occurs when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their own social experiences (Fricker 2007, 7). Secondly, "testimonial injustice" which occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's words. (Fricker 2007, 17). The ideal situation is when "hermeneutically marginalized persons" who are unable to tell their stories to the detriment of being heard and understood are actually recognized in court. Thus, learning "to narrate oneself" (Ricoeur 2005, 101) is highly relevant to human rights discourse

and identity. Narrative identity is obviously crucial in all legal settings, as legal conflicts arise precisely when expectations about what should have happened are thwarted by realities. Elizabeth Anker points out that the definition of human rights offered by Hunt and Slaughter has already been destabilized by Samuel Moyn in his *The Last Utopia* (2010) on the view that the globalisation of human rights arose out of "the collapse of the radical left" (Anker 2020, 486). Anker also mentions the importance of *Critical Legal Studies* and *Critical Race Theory* that look upon rights as "a battleground" (Anker 2020, 489). This, however, is a return to interdisciplinarity as dichotomy rather than foundational collaboration (Anker 2020, 490). Related to human rights studies in *Law and Humanities* are free speech, trauma, immigration, post-colonial and diaspora studies.

Danish cultural historian Helle Porsdam asks us to consider "What happens when the texts discussed are Scandinavian, Dutch or Polish, and what happens when these texts interact, not with the common law but with the civil law?" (Porsdam 2009, 174), and to investigate what the effects on culture are of the choices we make in law. This ties in with William Twining's argument that the challenges of globalization should drive us towards a renewal of the notion of a *ius humanitatis* that deals with "the common heritage of mankind" (Twining 2000, 50–51). To Porsdam who compares American and European rights discourse, the case law of the European Court of Human Rights and the European Court of Justice are important sources of European self-understanding that may help inform other jurisdictions. As "frontiers of human rights research and practice" cultural rights are also "the ultimate law and humanities topic" (Porsdam 2019, 1). Among the next frontiers or futures of viewing law as a literary-linguistic enterprise are cultural heritage and gender.

Futures

Pleas for attention to the metaphorical and the sensory and to local knowledge characterize current *Law and Humanities* (Gaakeer 2019). In addition the influx of digital technologies in law enhance research in law and the humanities when it comes to the range and speed of textual analyses; computational and corpus linguistics are of great value when analyzing judicial decisions, especially those of supra- and international courts. Biotechnology and gender issues demand new answers to the central hermeneutic question: "what does this mean in and for law?" (Wald 2017; Ben-Asher 2020). Performance is a topic dealt with by Julie Stone Peters who sketches the various uses of the umbrella concept of performance, in- and outside law, for example, in "examinations of trials as theater," and anthropology (Stone Peters 2020, 200). The very idea of law-and-performance and law-as-performance also makes her challenge the "and" in interdisciplinary humanistic studies. This goes to show that the Cardozean attention to the how and the what of any "text," to discourse and story remains as valid as it was in 1925. This also goes for "law as a practice grounded in *theater*" for which Marett Leiboff asks us to consider performance "as an ethically grounded practice bound up with and through obligations of response and responsibility" (Leiboff 2020, 317). Leiboff shows how governmental performances may cause societal theatres of protest, an example of how the legal self is challenged through performance. Thus, performance is connected to affect. Law as performance also explores "law as dance." While law is still predominantly text-oriented, this does not mean that an embodied jurisprudence cannot serve as a new methodology, as Sean Mulcahy claims, because body, text, and voice can work together, in- and outside the courtroom, to explore legal questions (Mulcahy 2021). Maksymilian Del Mar explores how artefacts as "forms of language that: first, signal their own artifice . . . and second, call upon us to participate, i.e., do things with them" (Del Mar 2020, 1) and the imagination are deeply interconnected in law. Artefactual language (rhetoric, fictionality, and metaphor among them) signals, alerts and invites the reader epistemically, Del Mar claims, to let the imagination work "as an epistemic frame" as well as a participation "along a spectrum of different degrees of affective, sensory and kinesic involvement" (Del

Mar 2020, 125). From the start in 1973 until well into the twenty-first century, then, it is the imagination that the jurist needs most to deal with the hermeneutic questions of law that crop up in legal research and in legal practice alike in a continuous process of globalization and internationalization of law.

Cross-References

► Hermeneutical Legal Theory

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Law as Reason for Action

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Introduction

One of the main challenges of contemporary legal philosophy is to reconcile practice with theory, human reality with theoretical understanding. The debate about the normativity of law is deeply inspired by this motivation, as the task here is precisely to assimilate abstract propositions and concrete human decisions. Law is to guide our actions; therefore, it has a claim on our decisions. From this approach, in order to make our decisions in line with what the law says, we have to understand how law may give reasons for us to take actions.

At the heart of the classical theory of reason for action, we find the free, deliberative, and purposive human decision, the paradigm of which is intentional action.

Judicial decisions, legislation, and individual legal actions are intentional human actions that are by nature directed towards an end. While these ends imply evaluative considerations, law has to be justified. The explanation of legal normativity from this point of view asserts that we can only direct our free will towards following law (through the engagement of our active self and deliberation) if we acknowledge the goodness and – therefore – the normativity of law in our personal decisions.

In order to unfold the relevance of the concept of reason for action in law, we start with the different theories of law's normativity explained from the point of view of reasons. Then we continue with broadening the conceptual landscape by giving an account of intentional action and the differences between theoretical and practical reason, which lay in the heart of the various approaches to explain legal normativity.

Law's Normativity in Practical Reason

The theory of practical reason aims at explaining the entire field of human decisions. Therefore, it also provides an explanation for how law claims normative force in our personal decisions over other reasons (Scanlon 2014).

According to the twentieth century's philosophical views, the "normative aspect of the world" – as Raz calls it – is recognized in the discipline of speech, human actions, and law. According to the interpretivist turn in legal philosophy, the best way to understand law is to describe the agents' (linguistic and other) actions from an internal point of view. Hart thought that

this description should be objective and impersonal; therefore, the understanding of law and its normativity must belong to the sphere of "theoretical reason," and it must be concerned with the attitudes and actions of the participating agents (Hart 1961, 5–13). However, Hart's concept of law is one of the most powerful in legal philosophy, it was criticized because of its sociological stance not only by natural law theorists (like John Finnis or Michael Moore), but also by those who claim not to belong to the natural law tradition (like Gerald Postema or Stephen Perry).

While Hart explained law's normativity based on social facts about the behavior of officials, natural law theorists keep missing normative reasons and they attribute less importance to facts and observation. Emphasizing the relevance of "practical reason" is precisely to show that however we need to know the factual reality around us, human understanding means something more than just observing, collecting, and organizing data about the world (Finnis 2011a, 2). By acknowledging that law is not only knowledge or theory about the reality, but it is *also* an action, means to admit the practical implications to its normativity.

These implications mean that a (legal) decision starts with the awakening of our awareness about human values, namely, the reasons why we consider certain aspects of human life as valuable. Only through responsiveness (deliberation, reflection, etc.) to why something is *good,* it becomes possible to assert that a certain good (life, friendship, knowledge, etc.) *ought to* be done (Finnis 2011a, 34–38. For more details on human goods see Finnis 2011c, chapters III-IV; see more Haldane 2013). This line of reasoning is what explains the moral nature of practical reason, namely, the normative connection between an end and an action (for more details see the next section).

Rodriguez-Blanco, based on the classical tradition, defends an "ethical-political" account of legal authority. She argues that "authorities create legal rules or authoritative directives based on grounding reasons as good-making characteristics that are transparent to the addressee of the legal rule or authoritative directives so that their will is engaged with it" (Rodriguez-Blanco 2014, 169). In the view of Rodriguez-Blanco, we act under a "presumption of authority," because however we do disagree about whether the law in question is good or not (i.e., whether it has "good-making characteristics"), but we acknowledge the goodness of legal authority as such, in case there is a compliance with the eight desiderata of Rule of Law (Rodriguez-Blanco 2014, 163, 166–167).

Following the classical tradition, both Finnis and Rodriguez-Blanco provide a unified model of reasons for action. This means that there is only one type of reasons, and we have to decide among them by using our deliberative capacities. Contrary to this, Raz argued that reasons are "inherently normative," and legal rules are special kinds of reasons (Raz 1999a, 67–68), i.e., he created different sorts of reasons for action in law, and in the rest of our actions (Raz 1999a, 2009, 22–45; Rodriguez-Blanco 2014, 140).

First, we have to clarify what Raz meant by stating that reasons are normative by nature. He thought that reasons were never justifiable, but they could only be explained, because "every argument to debunk reason would be self-defeating, for it would have to use reason, and thus its own validity depends on the assumption that it seeks to challenge, i.e. that reason is justified." (Raz 1999a, 77–81). In other words, Raz thought that while justificatory reasons necessarily imply practical (moral) reasons, it would be begging the question and therefore ineffective to support a reason's goodness by arguing that it is good. Therefore, instead of asking how to justify a reason, Raz asked "when and why do we use our [rational] capacity correctly" (see more on the inter-relatedness of reason, rationality and normativity in Raz 1999a, 67–75). Reason for action, in the theory of Raz, is rather a certain ability to realize and respond to the different dimensions of our world in a logical and intelligible way.

In order to explain effectively the normative force of legal rules, Raz distinguished between first and second order reasons for action. *First order reasons* are "reasons," "considerations," or "grounds" such as "I am hungry" (so I have to eat) or "it is cold outside" (so I have to wear a coat).

Instead, *second order reasons* are reasons to act for a reason or to refrain from acting for a reason (Raz 1978, 128–132). This distinction serves as a solution for conflicting reasons, as follows. When first order reasons clash ("I am hungry" vs "I don't have enough food for me and my daughter"), the conclusion is drawn by the intuitive model, namely, by deliberation about what one ought to do "all things considered" (I decide to give the food to my daughter). As opposed to this, Raz claims that a conflict between first and second order reasons ("it is cold outside" vs. "I promised to lend my coat to my grandfather") is not resolved from a deliberative stance, but from a theoretical point of view by the rule according to which the second order reasons always prevail (I fulfill my promise about lending my coat to him).

A distinct category of secondary reasons is called *exclusionary reasons* that serve a crucial role for Raz in explaining legal normativity. The point of exclusionary reasons is to overrule first order reasons (Raz 1999b, 73–84) and to secure the normativity of law against other reasons. Promises and orders are typically such exclusionary reasons that require one to disregard first order reasons. Raz uses the analogy between promises and legal rules and argues that law can only fulfill its task to guide our actions if it can override other considerations, namely, if they are treated as exclusionary reasons (Raz 1999b, 72). Legal rules therefore serve as exclusionary reasons for actions, because they were made in order to terminate the deliberation about what shall be done. If this is the case, legal rules prevail over first order reasons, independently from their substance (see "content-independent reasons" in Raz 1978, 137).

By creating the concept of exclusionary reasons, Raz deviated from the classical tradition (where there are no different layers of reasons, see Rodriguez-Blanco 2014, 145) by differentiating between "reasons for actions" in general and "rules for reasons for action" in law. This differentiation is effective in handling clashing reasons, however, by applying a rule to decide practical matters, exclusionary reasons silence the deliberative capacities of the human action (we will elaborate this argument in the next section).

We can argue against this criticism by stressing out that exclusionary reasons in law are precisely to respect and follow a rule once it was adopted without reconsidering its content. One line of arguments against the ethical-political account of reasons is that we have to follow exclusionary reasons, because sometimes one cannot trust his or her own judgment about what is a good decision (Raz 1999b, 35–39). In these cases, we should rely on what the law says, because "all thing considered" we could not make a sound judgment (e.g., in case of lacking proper knowledge in the field). Furthermore, legal rules have to be exclusionary reasons, otherwise law could not fulfill its task to effectively guide our actions (Raz 1999b, 72). However, Raz thinks that not every rule is a reason, but in case they are, one cannot re-examine the first order reasons every time a legal rule applies, because then it will not be a rule any more. This argument is based on the premise that decisions and legal rules work the same way (Raz 1999b, 67). Raz argues that however decisions are made from a deliberative stance, once they are made, they enter into the "executive stage," which means that we do not submit them to revision again (see more about criticisms and possible answers: Rodriguez-Blanco 2014, 146–152).

At the root of the disagreement, we find the debate on intentional human action. From the point of view of the classical tradition, decisions are acts of will and not consequences of a rule (Aquinas, Summa Theologica Ia2æ q13, I. quoted by Rodriguez-Blanco 2014, 149). As such, deliberation and choice are needed not only in the stage of marking, but also executing a decision (Aristotle, Nichomachean Ethics, 1144a20). Rodriguez-Blanco argues that we do not follow rules blindly, without our active self being engaged. In this line of thought, Raz's concept of human decision does not represent an intentional action, because by shutting down the possibility of deliberation, exclusionary reasons are based on a "peripheral agency and not a full agency" (Rodriguez-Blanco 2014, 151, 154).

Other common arguments against the ethical-political theory are that there are no normative truths and values to pursue by our actions

(Dworkin, "Objectivity and Truth: You'd Better Believe It" Philosophy and Public Affairs, 1996. 87) and that instead of "desiring the good," it is an ordinary feature of our life to "desire the bad" (Michael Stocker, "Desiring the Bad: an Essay in Moral Psychology" quoted by Rodriguez-Blanco 2014, 55–58). The answer to this criticism is an argument against skepticism. According to Finnis, reason is a guide to our thinking about the authoritativeness of the ends (goods) that ought to be pursued (Finnis 2011a, 128). Therefore, we are acting along the lines of "basic reasons which identify the basic human goods as ultimate reasons for choice and action" (Finnis 2011a, 214; Grisez 1965), even when we are wrong about them (for critical remarks see: Raz 2013; for the defense against skepticism's self-refutation: Finnis 2011a, 62–91).

Theorists following the classical tradition argue that pure desires do not have an object and they alone are mute on what is good or bad (Rodriguez-Blanco 2014, 52–53). Therefore, pure desires, feelings, or mental states cannot guide our actions towards obeying the law, only something we acknowledge as good, can (see the "modestly objective" epistemology of values in Rodriguez- Blanco 2014, 178, 187–197).

As we have seen, a crucial part of the disagreement in law's normativity is related to the capacities of the human decision and the perspective we use to explain it. In the following, we investigate the features of intentional action and the first-person perspective that is inherent to the practical question of "what should I do and why?"

Intentional Actions

It is a widely shared opinion by legal scholars that law is a human artifact. It follows that human decisions must play a role in how law is made and applied. Many legal philosophers who addressed this issue, arrived to the problem of intentional action. In the following, we will see how the theories of Kelsen, Hart, and Dworkin relates to human reasons, and in what sense these theories are different from the classical tradition of reasons for action.

The legal positivism of Kelsen attempted to give a scientific explanation of law and presented it as a set of pure forms, defined by the objective meaning of valid facts (Kelsen 2008, 39). In order to leave behind subjectivity, he worked out a sophisticated understanding of human intentional action according to which legal norms allow us to objectively identify the will of the authority. Kelsen restricted his explanation to the regulative function of law by leaving out its role to guide our actions. Because of its presupposed subjectivity, he did not acknowledge the deliberative component of human understanding in law's normativity; therefore, he explained law's normativity only in part (Rodriguez-Blanco 2014, 101–121, esp. 119).

Hart's legal positivism grounded law's authority in the practice of officials and elaborated on the internal point of view, as the half-way between empiricist and naturalist theories (Hart 1961). Hart used the internal point of view in order to explain the social normativity of law, i.e., the behavior of practitioners, their belief about law to be obligatory, and their acts of acceptance. Through such acceptance, Hart intended to explain the guiding function of law too, but he did not give a full account of the justificatory dimensions of human actions. He did not ask the question "why" law is accepted by the officials of the legal system, because in his views that would have meant to step on the grounds of morality. The only evaluative component he added about law's purpose, as a genuine human reason, was survival (Hart 1961, 188–189; see also Finnis 2011b, 119; Finnis 2014, Alexy 2013, 97–110).

Dworkin's concept of law as integrity laid a big emphasis on interpretation; however, it is still doubtful if there was a central role for human deliberation to play in his interpretive framework. True, Dworkin's law as integrity includes a certain evaluative component (i.e., an ideal political morality), but this system of values is something that has to be "imposed" by a creative act of interpretation in order to meet the conditions of "fit" and "right" (Dworkin 1986, 52, 256–257; see also Finnis 2011b, 293–296; Rodriguez-Blanco 2014, 176). Dworkin emphasizes that the act of interpretation does not mean to apply our personal

convictions about fairness (Dworkin 1986, 259). In this case, we have to conclude that Dworkin's concept of interpretation does not build on intentional action, because an intentional action implies the full spectrum of human practical capacities such as engaging, deliberating, doubting, reflecting, and choosing freely. As opposed to this, Dworkin eliminates the exercise of practical capacities of human decision (Rodriguez-Blanco 2014, 210–213).

Contrary to Kelsen, Hart, or Dworkin, law's normativity, understood in the framework of reason for action, is best explained by the free and active engagement of the human capacities. The key concept of human decision is intentional action that is directed towards certain ends and is analyzed from the first-person (or deliberative) point of view.

The "persistent question" (Hart 1961, 1) about "what is law?" becomes a question on "why should we have law?" (Webber 2015, 54–57; Raz 1999a, 113). Therefore, in order to understand and explain *what* has been brought about by a human decision, one has to ask *why* that decision was made (see Aristotle's *Posterior Analytics* II.2. 90a5–20; Webber 2015, 55). The same epistemological principle lies in the heart of Aquinas' explanation of human understanding: the *nature* of X is understood by its *capacities* or capabilities, these capacities or capabilities are understood by its *acts,* and these acts are understood by its *objects* (Summa Theologiae I q. 87 a. 3c; Finnis 1998, 29; Finnis 2011a, 26–27).

The methodology of the persistent question of "why?" has been addressed by one of the main authorities on philosophy of mind and intentional action, G.E.M. Anscombe (Anscombe 1957). Anscombe follows closely the classical tradition of Aristotle and Aquinas in explaining the role of intention in human actions.

According to the classical tradition, practical reason and intentional action run parallel. From the point of view of law's normativity, it means that we make, apply, and obey law by directing our intentional actions towards an end. The end of our intentional actions is always either a good or a bad end (Anscombe 1978, 44; Anscombe 1981, 75–82. See more Gormally 2013). In our case an intentional action, to follow the law for instance, is brought about for the reasons why we think that law is a good sort of thing (Aristotle Nichomachean Ethics 1113a, 25–33 quoted by Rodriguez-Blanco 2014, 52, 41–58). Human capacities in the Aristotelian metaphysics can only be grasped in the course of an action, therefore neither through observation, nor by thoughts only. The deliberative capacities (of reasoning, doubting, choosing, reflecting, judging, etc.) we all own and share – says the classical tradition – can be actualized only through our intentional actions; therefore, we need to apply these capacities, otherwise we could not support the idea that law is accepted and followed by free and reasoned decisions of the people.

We can understand an intentional action by describing it through continuously asking and answering the question "why" (Anscombe 1981, 75–82). Following the "why-question methodology," our intentional actions can be perceived as a series of successive steps towards an end that creates an intelligible unity of all the previous actions before, and that has "good-making characteristics" for us (Rodriguez-Blanco 2014, 41–47). According to the classical tradition, we find the grounding reason for our action, when we stop asking "why" and the successive steps of our actions are unified by a grounding reason such as "because knowledge is good" or "because human life is valuable." According to Anscombe, the intention is neither good nor bad in itself, it does not have a content and it is not something that we attach to our actions or to our thoughts. Instead, it is an intelligible response (Finnis 2011a, 33, 38) to the understanding that something is good; therefore, this good ought to be *brought about.* What is brought about by the intentional action is not done because of what we see or hear (observe) about the world. I do not take my umbrella because it is raining, but because I do not want to get wet, because I could catch cold, and I would like to stay healthy, because health is a *good sort of thing.* At the same time, I could be aided by observation (i.e. that it is raining), otherwise I would not know that I should take my umbrella.

In order to emphasize how human agency plays an intelligible role in taking a conscious

decision (Rodriguez-Blanco 2014, 27–28), the concept of intentional action advocates for a more active role for human decision-making. From this point of view, the decision is not reduced to a mere mental state (see more in the fourth section), but it is seen as a series of actions including deliberation, argumentation, doubting, choosing, and finally making a decision.

Theoretical Reason and Practical Reason

Reasons for action is a synonym for practical reason, because they are concerned with reasons for actions, not for thoughts. The distinction between practical knowledge and theoretical knowledge unfolds many important details about the different concepts of law's normativity, as we have seen so far.

Practical reasoning is a type of moral reasoning. This could make the impression that practical reasoning means to apply moral arguments; this however, is mistaken. The ground for calling practical reasoning moral is the normative relationship between the action and its end (as we could see in the section about intentional action), where the end of the action is necessarily a result of evaluation. The moral nature of practical reasoning therefore should not be confused with moral interpretation that refers to interpret the text on basis of a certain moral considerations. This is precisely the task that Dworkin attributes to judges, but while in practical reasoning we deliberate about why the end is good, in moral interpretation we interpret the text in light of a ready-made value-system.

Practical reasoning is to provide explanation, justification, and guidance to an *action,* while theoretical reason is used to provide thoughts for an *inference* or a conclusion. Theoretical knowledge is concerned with hard facts, thoughts, and the logical structure of inferences, while practical knowledge is not a thought, nor an inference derived from thoughts or facts. Practical reasoning aims at bringing about decisions; therefore, it belongs to the field of moral philosophy (Finnis 1998, 20–23). These differences, however, do not mean that theoretical and practical knowledge has nothing to do with each other. Practical reason has to continuously engage with theoretical reason (Rodriguez-Blanco 2014, 173, 179), as the example of taking the umbrella already showed.

In the sphere of theoretical knowledge, there is no room for human deliberation because hard facts and the rules of logic are unchangeable independently from what we think about them. However, in order to apply practical reasoning, one has to use the full capacity of human understanding by deliberating, choosing, reflecting, judging, and in the end, deciding freely. This is why in the sphere of theoretical knowledge, a conclusion can be *correct or incorrect,* while in practical knowledge, a decision is rather *good or bad.* While an intention in itself is neither good nor bad, but it is the aim or purpose of the action that could be evaluated as good or bad. As Anscombe put it, the "goodness of one sort or another is ascribed primarily to the objects, not to the wanting: one wants a good kettle, but has a true idea of a kettle – as opposed to wanting a kettle well or having an idea of a true kettle" (Anscombe 1978, 44).

A further difference between the theoretical and practical knowledge is that in the former, one's personal convictions, beliefs, or opinion do not have an influence on the inference being correct or incorrect. While in practical knowledge, the personal understanding plays a significant role in deliberating, choosing, doubting, and giving an intelligent answer that is represented by our will throughout our actions. This is why the first-person (or deliberative) point of view is crucial for practical reasons. In practical reasoning, only the first-person perspective can provide the viewpoint that is internal to us, so that it can have a normative force on our actions; law's normativity, therefore, has an active, self-reflective character (i.e., internal aspect of law, see Rodriguez-Blanco 2014, 37; Rodriguez-Blanco 2007; Webber 2015; Anscombe 1981, 21–36). This, however, should not be confused with a subjective point of view based on mental states like desires and feelings, but it relies on intelligible, reflected, and responsible human understanding (Postema 1998, 344). Contrary to practical reason's first-person perspective, the theoretical point of view observes the action from a third person perspective, which

deprives the observer the possibility to differentiate between intentional and not intentional actions (Rodriguez-Blanco 2014, 34).

We can illustrate these differences in a table.

	Practical reasoning	**Theoretical reasoning**
Object	Actions	Inferences
Sphere of sciences	Moral philosophy (legal and political philosophy, ethics)	Natural sciences and logic
Its concern	Human action (intentional actions and their ends)	Conclusion (thoughts and inferences)
Result	Good or bad (right or wrong)	Correct or incorrect (true or false)
Will	Needed	Not needed
Role of the person	Relevant	Not relevant
Perspechive	First-person	Third-person

Reason as Justification, Explanation, and Motivation

The predominant view in contemporary jurisprudence is to look at human actions by dividing them in a mental state and the results of the action (Rodriguez-Blanco 2014, 26–27). In this view, *mental state* refers to the acceptance, belief, motive, etc., with which the agent relates to a proposition. The *result of the action* is, for instance, the law that is followed, the fine that was payed, or the judicial decision that was made as a consequence of the mental state. In this two-component model (the denomination comes from Rodriguez-Blanco 2014, 26–27), the answers for law's normativity are related to a mental state of accepting the rules or believing them to be obligatory and the consequence of following them.

Notwithstanding, the two-component model reduces the human practical capacities to mental states, and it does not explain the difference between following a rule blindly or unconsciously and marking an intentional action to obey the law on the basis of freely deliberated and reflected reasons.

Those who follow the two-component model of human actions claim that there are different types of reasons that help us identifying the different mental states and their relation to the outcome. A widespread differentiation in contemporary philosophy is the one that differentiates between justificatory reasons and explanatory reasons. A *justificatory reason* refers to acting in a certain way because of a pressing end (some might call this as normative reasons, see Scanlon 2004; Dancy 2000), while *explanatory reasons* lay emphasis on the agent's reasons to favor a certain action.

Perhaps the most common categorization among reasons is the one between *normative* and *motivating reasons* (Dyevre, Jakab 2013, 983–984). This division could help explaining how normative reasons could publicly support a judicial decision, while motivations are silently influencing decisions in the background. What we call motivations are neither facts or beliefs of the agent like explanatory reasons, nor forceful and impersonal reasons like normative justificatory reasons, but they refer to the (putative) *motivation* of the agent (see more Dancy 1995, 2000; Parfit 1984; Frankena 1958). The case of a student, who wants to go abroad for a summer university, could reason as follows. The justification to her parents would be about why this plan is good for her future career (justificatory reasons). Her motivating reasons are to make new friends and fulfill her dream of being abroad freely during the summer, while the explanatory reason is her belief that participating in a summer university would please both her parents' and her own wishes.

Space limitations preclude us from a detailed explanation of other categories of reasons, still the above-mentioned examples give us an impression about the idea of the two-component model and the different types of reasons in contemporary philosophy.

Conclusions

Giving reasons is present in all types of knowledge and field of sciences, from ethics to arts,

from political and legal philosophy to mathematics (Gardner and Macklem 2002). We dealt with reasons for actions in law, and specifically how reasons as human decisions could claim normative force for legal rules as opposed to other considerations. We have outlined two basic models of answers for the issue of legal normativity, the theories of the classical tradition, and the contemporary approach. At the heart of the classical tradition, we have found that the idea of a free and fully capable intentional action defines law's normativity as a normative human decision reached by deliberation. Contrary to this, the contemporary approach introduces separations between the different kinds of reasons and rules to argue how reasons should be applied.

Our concepts about freedom, choice, deliberation, reason, and intentional action – all make a crucial difference when we face the issues of normativity, disagreement, practice, or interpretation. Practical reasonableness represents a legal school of thought with ancient roots and unbroken relevance, with a continuous potential to offer answers in the discourse of contemporary legal philosophy.

Cross-References

- ▶ Aquinas, Thomas: On Natural Law
- ▶ Authority of Law
- ▶ Finnis, John
- ▶ Jurisprudence as Normative Science
- ▶ Natural Law: Contemporary
- ▶ Raz, Joseph
- ▶ Rule of Law: Historical Perspectives

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Legal and Moral Rights

► Rights: Legal and Moral

Legal and Social Philosophy: Aristotle's Perspective

► Aristotle: Legal and Social Philosophy

Legal Argumentation

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Introduction

The Precursors and the Standard Theory

egal argumentation is nowadays at the center of legal Philosophy and we even speak quite often of an "argumentative turn" that presumably characterizes legal theory as well as legal practice. This *turn* has been, of course, a consequence of some changes that have taken place in the context of our legal systems (above all of the so-called process of constitutionalization of the law), but it has also been closely connected with the development of a theory of legal argumentation since the middle of the twentieth century.

"Theory of legal argumentation" refers to a theoretical corpus which includes, at least, the works of the authors who can be considered as the *precursors* of this theory (in the 1950s) and also to those who have elaborated what is usually called the *standard theory* (from 1970 onward).

Amongst these precursors, the most important names are those of Theodor Viehweg, Chaïm Perelman, Stephen Toulmin, and Luis Recaséns Siches. All of them agree to consider that deductive logic is not appropriate to provide an adequate method for legal (or generally, practical) reasoning, but the alternative methods (to logic) that they propose are not totally homogeneous. In fact, while Viehweg claimed the need to regain the tradition of the topic, Perelman (together with OlbrechtsTyteca) built a "new rhetoric" which in some way included the earlier mentioned topic as well (although there are still differences between one and the other orientation); Toulmin developed a "working logic" which would later be called "informal logic"; and Recaséns Siches spoke, inspired by Ortega y Gasset, about a "logos of the reasonable," a concept which never achieved a great degree of significant theoretic development. They had the merit of showing the need to find a procedure which allows us to confront the problems which fall within the ambit of practical reason and which represented an alternative to both deductivism and decisionism; that is, one which does not see practical questions as matters of pure decision but instead sees them as matters with space for exercise of reason that is not only reduced to formal deductive logic. Nevertheless, we cannot find there any well-developed theory of legal argumentation, capable of giving the jurist an instrument to resolve the argumentative problems they confront in practice, even if some aspects of these works (above all, Perelman's and Toulmin's contributions) continue to be loci of inspiration for many researchers in the realm of argumentation (not only legal).

The role played by the representatives of the standard theory (by authors such as Wróblewski, Peczenick, Aarnio, Alexy, or MacCormick) has been one of integration, in the sense that they did not oppose the logic to practical reason, but, rather, they constructed models of legal argumentation in which they recognized the need (in order to understand legal reasoning) of using some criteria of practical reason (such as coherence or universalization) without leaving aside formal logic. This kind of theoretical approach is based on two consecutive distinctions: first, between the context of discovery and the context of justification (to deal only with justification), and then, between internal and external justification (to stress that internal justification is only a question of logic – of formal logic – while external justification also requires the use of the aforementioned criteria of practical reason).

The two emblematic works of the standard theory are those of Robert Alexy and Neil MacCormick, both published in 1978: *Theory of Legal Argumentation* and *Legal Reasoning and Legal Theory*. These books (that support theses very similar among them) were written pointing to purposes which were normative as well as descriptive and analytical. And this kind of "reconstructive" approach to legal reasoning has been maintained by both of them, even if they introduced some changes in their later works: MacCormick, by abandoning the Hartian positivism which had constituted the basis of his theory, in order to approach Dworkin's or Alexy's post-positivism; and Alexy, by incorporating a theory of principles which led him to add balancing (a kind of reasoning based on the existence of conflicting principles for the resolution of a case) to his initial approach that was centered around the scheme of subsumption: argumentation with rules.

These articulated theories of legal reasoning are nevertheless insufficient in several respects. For instance, they only consider a relatively small portion of legal argumentation, that is, the justificatory reasoning made by supreme courts and constitutional tribunals, leaving out their analysis, argumentation on facts, lawyer's reasoning, or legislative reasoning. The theory does not provide a satisfactory method to represent complex cases of argumentation either. And it presents legal reasoning in an ideological form, in the sense that it idealizes judicial practice. The latter aspect is clearly present in the Alexyian *thesis of the special case* that MacCormick also accepted. What the thesis affirms is that legal argumentation is a special case of general practical argumentation, which means that legal reasoning in all its instances (that is, not only judicial reasoning but also reasoning made by lawyers when they defend the interests of clients) is governed not only by some rules that characterized juridical discourse but also by the rules of rational practical discourse that include, for instance, the obligation of sincerity.

A (Relatively) New Approach

The standard theory of legal argumentation has been both criticized and developed in several respects during the last years. I will not present here a general picture of all the studies concerned. Instead of that, I will focus on an approach to legal argumentation that could probably avoid some of the above mentioned deficits and satisfactorily articulate the different traditions we can distinguish in the study of argumentation.

This kind of approach begins with the consideration of legal argumentation as a legal discipline which goes through all the others (all the other branches of Jurisprudence) and that can also be organized by distinguishing between the general and the special legal argumentation.

General Legal Argumentation

The aim of the general legal argumentation is to clarify the notion of argumentation. To this end, we can start from the distinction between *concept* and *conceptions*, such as has been established in recent times in practical philosophy. What it means is that we can conform a very abstract concept of argumentation, defined with only the properties that we can find every time that it makes sense to say that an argumentation exists. This could be the notion used by logicians, psychologists, linguistics experts, jurists, politicians, or ordinary people. We can then go on to show how all these elements can be interpreted in different ways so that, at the end, we will have a unique *concept* but several *conceptions* of

argumentation. So, an argumentation is always relative to a language; it presupposes a problem, a question, for which the argumentation can be used as an answer; it can also be considered (argumentation has this kind of inevitable ambiguity) as an activity or as the result of this activity, as a product; and finally, this activity or product is something rational in the sense that it can be evaluated according to any criteria. But those same elements can be considered from fundamentally three (or four) perspectives, and that is why we have the following approaches or *conceptions* of argumentation: the formal, the material, and the pragmatic (rhetorical and dialectical). The peculiar aspect of legal argumentation is that within it (as occurs with other "rational enterprises" – in order to use Toulmin's expression) these three or four perspectives must be considered, even though one of them can be predominant, depending on the field of law, the legal institution, or the type of operator (judges, lawyers, etc.) that is taken into consideration.

Now, from a formal perspective (the perspective of formal logic), argumentation consists of a set of uninterpreted statements (in the sense that abstraction is made from the content of truth or correction of the statements); it provides a response to the problem of whether starting from some statements – premises – one can arrive at other statements – conclusions; it privileges argumentation seen as a result; and the criteria of correction are given by the rules of inference. What supplies that perspective are schemes or forms (of a deductive character or not) of the arguments. Three different characteristic forms of judicial reasoning are subsumption, adequacy (means – ends arguments), and weighing and balancing depending on, respectively, whether the premise on which the reasoning is based (in the scheme of "internal justification") is a rule of action, a rule of end, or a principle. Furthermore, in the judicial context (but legal argumentation takes place not only in this realm) many other forms of reasoning are used (in order to proceed to the external justification of a decision) which sometimes have a clear logical structure (the argument a pari, a contrario, a fortiori, ad absurdum, etc.) and sometimes do not (the psychological, historical, teleological, economic and systematic arguments, etc.). And if we consider not only interpretative arguments (arguments to solve problems of interpretation), but also argumentative devices to deal with questions of facts, then we should also add to the previous forms some others based on relationships of causality.

From a material perspective, the core of the argumentation lies not in the form of the statements, instead it is what makes them true or correct which matters; a reasoning responds to the problem of what one must believe or do and is thus resolved, essentially, in a theory of the premises: of the reasons to either believe something or to carry out or have the intention to carrying out an action; the correction criteria cannot therefore be purely formal here: it is essential to determine, for example, in what conditions one sort of reason prevails over another. There are obviously various ways of classifying reasons. Of course, there are theoretical reasons (to believe something) and practical reasons (reasons to act) which combine with each other in various ways. However, one can also speak about reasons of first level, second level, etc. From the point of view of their strength or weight, some of them have a peremptory character (legal rules) and others are nonperemptory (principles). The strength of reasons can be fixed either abstractly or by taking all circumstances of the case into consideration. There can either be definitive or conclusive reasons (they prevail over the others, all things considered) or absolute reasons (they prevail over all others in all circumstances). And the strength reasons is different to their scope: principles, for example, have less strength than rules, and nevertheless have a greater scope. Furthermore, some reasons are content independent (authoritative or formal ones), but there are also reasons that are dependent on content (material or substantive reasons) which can also be usefully further distinguished into reasons of correction or reasons of ends, and institutional reasons.

Finally, the pragmatic perspective considers argumentation to be a type of activity (like the performance of a set of language actions) designed to achieve the persuasion of an audience (rhetoric) or to interact with others in order to arrive at some agreement with respect to any theoretical or practical problem (dialectic); the evaluation criteria of rhetorical reasoning

fundamentally appeal to the efficiency of the speech (to its capacity of persuasion), while dialectic reasoning must follow certain procedural rules, such as those which govern the development of a trial or the rules of rational discourse. The importance of the rhetorical and dialectic components in legal reasoning is undeniable and on some occasions it can be hard to separate one from the other. The dialectical models are useful (even indispensable) in order to build expert systems which help to construct arguments in favor or against a certain thesis and so on. However, in judicial sentences, the dialectic elements (the discussion inside the court) remain more or less erased. And although persuading is not the only purpose of legal argumentation (for a judge, justifying decisions must be more important than persuading), the (classical) rhetorical schemes (based on distinguishing certain parts of the rhetorical activity: *inventio, dispositio, elocutio, memoria, and actio)* are still fundamental for the construction of the various argumentative legal speeches: pleas, sentences, counsels, and so on.

Now, while the formal approach to legal argumentation has been developed by logicians (Klug, Kalinowski, Tammelo, Alchourrón, and Bulygin or Soeteman are relevant names in this theoretical tradition), legal theorists such as Dworkin, Summers, Nino, or Raz have made important contributions to the understanding of the material aspect of legal argumentation; and Toulmin's and Perelman's conceptions of argumentation are, respectively, examples of the dialectical and the rhetorical approaches. An interesting example of the dialectic study nowadays is the so-called pragma-dialectic conception of argumentation, founded by van Eemeren and Grootendorst, that has had a well-known application in legal argumentation through Feteri's work. What all this means is that we need to know these different traditions in the study of reasoning if we seek to successfully clarify and guide the argumentative practice of jurists.

Special Legal Argumentation

Only armed with this complex background, can we achieve an answer to the following three questions which play an essential role in the practice of law and constitute the special part of the theory of legal argumentation: how to analyze a legal argumentation, how to evaluate it, and finally how to produce a piece of legal argumentation. The answers to these questions could be summarized as follows.

Relative to the first question, we need a method for the representation of the arguments which cannot be only that provided by formal logic, simply because legal argumentation cannot be reduced to its formal aspects. In my opinion, an available alternative could consist in using arrow diagrams (we can find a precedent of that in Wigmore's chart-method, later clarified and simplified manly by Twining) in order to account for both the structure and the flow of the argumentation, for the various speech acts that are carried out when reasoning, and finally for the reasons involved in it. We also need an adequate classification of difficult questions (hard cases) that require an argumentative response. Once more, we can find a precedent of that in the *stasis* doctrine of the rhetoric tradition. And my proposal would be to add four more categories to the four distinguished by MacCormick; so that, in the end, we would have questions of procedure, of evidence, of qualification, of applicability (relevance), of validity, of interpretation, of discretionality, and of weight and balance.

In order to evaluate the arguments, we need to examine the question of whether only one correct answer to legal problems exists or not. As we all know, this is a very controversial question which requires a positive response as far as justificatory judicial argumentation is concerned, although this cannot be sustained for either legislative argumentation or that of lawyers. However, the acceptance of this thesis (that is, the thesis that in the great majority of judicial hard cases, if not always, there is only one correct answer) means that we also have to provide the criteria that support the objectivity of legal reasoning, that is, how to recognize the correct answer to a case. We should then go on to compose a very complex test of rationality (of practical rationality) in which the basic criteria of logic have to be supplemented by notions such as universality, coherence, adequacy of the consequences, social morality, justified morality, and reasonability.

Finally, the answer to the question of how to produce a piece of legal argumentation leads us to distinguish a set of stages which can be established in the process of the argumentative resolution of a legal problem. For instance: identification and analysis of the problem, proposal of a solution, checking and revision, writing of a text. And here again the rhetorical tradition helps enormously. In fact, the previous steps correspond to the parts of rhetoric we mentioned before, and for the task of writing a text (an argumentative text) we can also find a useful model in two of these rhetorical activities: the organization of a text (the *dispositio*, where it was usual to follow this order: *exordium*, *narratio*, *divisio*, *argumentatio,* and *peroratio*) and the adequate expression of the ideas incorporated in it (the *elocutio*).

Cross-References

- ▶ Alexy, Robert: Philosophy of Law
- ▶ Consequentialist Argument
- ▶ Constitutionalism
- ▶ Legal Reasoning: Virtues
- ▶ Perelman, Chaïm

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Legal Argumentation: And Truth

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In legal philosophy, it is sometimes difficult to connect jurisprudential issues with larger philosophical themes. While these connections can be made, the work required to do so can be

considerable. The reason, at least in part, is that it is often not easy to simply take a general philosophical perspective and graft it onto a problem in legal theory, thereby achieving progress. Lawrence Solum's efforts to develop an Originalist account of public meaning is an example of the successful use of classic philosophical theory to illuminate an issue in legal philosophy.

The philosophy of language is an obvious source for philosophical inspiration in legal philosophy. While there is no dearth of skeptics, the evidence overwhelmingly supports the notion that philosophy of language is a primary source for enhancement of our understanding of law and legal argument.

This entry will look at the issue of truth in law from the point of view of philosophical conceptions of meaning. The history of philosophy presents two great opposing, metaphysical narratives with respect to meaning. The first school of thought is philosophical hermeneutics. On this account, all understanding is a function of interpretation. Whether it be words, images, or even scientific data, all understanding is interpretation. This school of thought is represented by philosophers such as Dilthey, Heidegger, Gadamer, Charles Taylor and, as we shall see, Ronald Dworkin. Opposed to this view is the philosophical perspective found in the later work of Ludwig Wittgenstein. On this view, meaning is a function of human practices. Interpretation is an aspect of every practice, of course, but it is not fundamental in the way the hermeneutical school takes it to be.

Every philosophical view comes in a variety of forms. Some expressions are radical (think of logical positivism) and others more restrained (varieties of utilitarianism come to mind). The hermeneutical perspective receives radical expression in Nietzschean perspectivism. Consider this quote from *The Will to Power* (Nietzsche and Ludovici 1967):

> 'Everything is subjective,' you say; but even this is interpretation. The 'subject' is not something given, it is something added and invented and projected behind what there is. – Finally, is it necessary to posit an interpreter behind the interpretation? Even this is invention, hypothesis.
>
> In so far as the word 'knowledge' has any meaning, the world is knowable; but it is interpretable otherwise, it has no meaning behind it, but countless meanings. – 'Perspectivism'.
>
> It is our needs that interpret the world; our drives and their For and Against. Every drive is a kind of lust to rule; each one has its perspective that it would like to compel all the other drives and accept as a norm.

The view expressed here by Nietzsche is the basis for the philosophical trilogy of Heidegger, Foucault, and Derrida. For them, the act of interpretation is what connects sense and meaning. When we appropriate a text we take it not on its own terms but from our perspective. For Foucault, the move is one of power. By comparison, Gadamer and Charles Taylor are mild. They share the view that all understanding is the product of interpretation, but they spare us the added octane of politics and power.

The French philosopher Vincent Descombes points out that what is lost in the hermeneutical approach to meaning is the crucial distinction between understanding and interpretation (Descombes 1997). If all understanding is the product of interpretation, then meaning is never directly accessible. Meaning is, one might say, always "inferential." Descombes disputes this notion, arguing that understanding is the exercise of a capacity. We demonstrate our understanding of, say, a sign when we can follow its directive, question its application, and otherwise use it in common with others.

The firmament of Descombes' claim that understanding is possible in an unmediated way is Wittgenstein's later philosophy. In the *Philosophical Investigations*, Wittgenstein motivates his claim about directly accessible meaning through an infinite regress argument. He writes:

> This was our paradox: no course of action could be determined by a rule, because any course of action can be made out to accord with the rule. The answer was: if any action can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.
>
> It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shews is that there is a way of grasping a rule which is not an interpretation, but which is

> exhibited in what we call 'obeying the rule' and 'going against it' in actual cases.
>
> Hence, there is an inclination to say: any action according to the rule is an interpretation. But we ought to restrict the term 'interpretation' to the substitution of one expression of the rule for another. (PI, Sec. 201)

The puzzle here, if there is one, is that it is not clear how a rule determines what counts as following it or acting in accord with it. Wittgenstein takes up "interpretation" as a suggestion but drops it with the observation that anything – any conduct – can be made to accord with a rule. Interpretation is a nonstarter in his view. The answer lies elsewhere.

Wittgenstein's account of meaning as a product of practices is the favored solution. We understand what a word means when we look at the multitude of ways in which the word is used. We learn the meaning of a word by surveying its many uses. What he rejects is the idea that a "theory" of the concept instantiating the word is the key to meaning. Theories, he admonishes, get us nowhere.

Ronald Dworkin's mature jurisprudence – reflected best in *Law's Empire* – is built on two key ideas: integrity and interpretation. Dworkin motivates his account of law as an interpretive practice with two basic ideas: propositions of law and truth. Propositions of law are assertions about what the law permits, requires, or prohibits. They can be as pedestrian as "Smith is entitled to damages from Jones for breach of contract" to "privacy is a fundamental right under the US Constitution." Propositions of law are true in virtue of the grounds of law: The grounds of law make propositions of law true or false.

Dworkin argued that theoretical disagreement – disagreement about the grounds of law – is a pervasive feature of legal practice. He faulted legal positivism for its lack of a theory of theoretical disagreement. Positivists, Dworkin argued, only had – only could have – an "empirical" account of legal disagreement. Theoretical disagreement is a far more important matter, one for which legal positivism is ill equipped.

Dworkin embraces the hermeneutical perspective on meaning and truth with his claim that there are no differences between hard and easy cases. All cases require a three-stage interpretive theory wherein the interpreter chooses the ultimate meaning of law in what Gerald Postema calls a "Protestant Interpretation." Postema (1987) provided a thorough critique of Dworkin's embrace of the hermeneutical view of meaning for legal practice. He demonstrated that the picture Dworkin provides of legal practice is insufficiently social and intersubjective in character and, as such, is an inaccurate and incomplete account of the nature of law.

A rather different approach to law and truth is found on the work of the American constitutional lawyer, Philip Bobbitt. In his first book on constitutional law, *Constitutional Fate* (Bobbitt 1982). Bobbitt argued that the debate over the legitimacy of judicial review proceeded from a false premise. As he saw it, all theories of judicial review judged the legitimacy of the enterprise from a vantage point outside the bounds of constitutional practice. Bobbitt argued that nothing legitimizes judicial review other than employment of the forms of argument (Bobbitt refers to them as "modalities") for constitutional law. These modalities (textual, structural, prudential, doctrinal, historical, and ethical) are the forms of constitutional argument: They are the ways in which propositions of constitutional law are shown to be true or false. The modalities themselves are neither true nor false: They are the ways in which propositions of law are true or false.

Bobbitt's approach to constitutional law was not well-understood when he first made his case in *Constitutional Fate*. An example is found in the pages of the august Harvard Law Review (Gudridge 1983). The reviewer dismissed the book as a defense of "tradition." His conclusion was that "*Constitutional Fate* excludes precisely the aspects of contemporary constitutional law that explain its notably fragmentary and conflicting quality - its status not simply as an environment *for* controversy, but an environment *in* controversy" (Gudridge 1983). What the reviewer missed were the underlying philosophical motivations for Bobbitt's position. The central idea, mentioned earlier, is the idea of a practice, so familiar to readers of Wittgenstein's *Philosophical Investigations*.

Bobbitt's next book on constitutional law was much more explicit about the philosophical inspiration for his position. In the Preface to *Constitutional Interpretation* (Bobbitt 1991), Bobbitt succinctly summarizes the argument of *Constitutional Fate*. With allusions to Cartesian geometry and Gödel numbering, Bobbitt states explicitly that the forms of constitutional argument are "the way in which a proposition is true rather than the reason it is true . . ." (Bobbitt 1991: xiv). It is the operation of the forms of argument that maintains legitimacy, specifically the legitimacy of judicial review. The following paragraph sums up Bobbitt's position:

> Law is something we do, not something we have as a consequence of something we do. Sometimes our activities in law—deciding, proposing, persuading—may link up with specific ideas we have at those moments; but often they do not, and it is never the case that this link must be made for the activities that are law to be law. Therefore the causal accounts of how these inner states come into being, accounts that lose their persuasiveness in contact with the abundance of the world, are really beside the point. If we want to understand the ideological and political commitments in law, we have to study the grammar of law, that system of logical constraints that the practices of legal activities have developed in our particular culture. (Bobbitt 1991: 24)

I once heard an American professor of constitutional law (now the President of a leading university in New Jersey) describe Bobbitt's position as "idiosyncratic." At the time (2002), this view was widely shared. But time has shown that Bobbitt was on to something right from the start: eventually, his big idea caught on. The modalities identified by Bobbitt are now a standard feature of the leading casebooks on American constitutional law.

Another example of the influence of Wittgenstein's thought in legal theory is *Law and Truth* (Patterson 1996). Taking up a single question: "What does it mean to say that a proposition of law is true?" the book surveyed the answers on offer from the principal legal theories at the time and identified shortcomings in each. Like Bobbitt, Patterson argued that propositions of law are shown to be true by the argumentative standards of the practice of law. Integrating Wittgenstein's analysis of truth, practices, rule-following, and the nature of understanding, a fully Wittgensteinian account of law was advanced.

As this entry has noted, debates over the propositional character of law are often focused on the "truthmaker": what makes a proposition of law is true (Dworkin (1986) uses the phrase "the grounds of law" for the truthmaker)? For positivists, the truth of legal propositions is grounded in social facts while philosophical realists (e.g., Dworkin) tie the truth of legal propositions in moral facts. Patterson argued that the truth of propositions of law is a matter of employing forms of legal argument for it is in virtue of these forms of argument (See Bobbitt 1991) that propositions of law are true and false.

Patterson bolstered his account of truth in law with an adaption of the work of Stephen Toulmin, specifically his framework for argumentative assessment (Toulmin 1958). Patterson employed that framework to show both how the forms of argument are used to show the truth of legal propositions and to depict legal argument about the forms of argument themselves. One common form of dispute in law is debate over conflicting forms of argument. *Law and Truth* provides a solution to this problem, one grounded in Quinean holism (Ullian and Quine 1978).

Patterson (2021) uses Quine and Ullian's work to motivate an account of legal interpretation consistent with the main lines of H.L.A. Hart's legal positivism. Once we jettison the idea that all understanding is interpretation, some account of interpretation is needed. Disagreement, while not a pervasive (in Dworkin's sense) feature of legal practice, is a phenomenon that needs to be accounted for. Quine and Ullian argued that the way best to understand interpretation, indeed, persuasion in argument, was to "convince someone of something by appealing to beliefs he already holds and by combining these to induce further beliefs in him, step by step, until the belief we wanted finally to inculcate in him is inculcated" (Ullian, Quine 77). Quine and Ullian provided a three-part methodology for doing just that. Minimal mutilation, coherence, and generality are the three vectors for assessing the success of a legal interpretation. Through the use of these three modes of interpretive argumentation, consensus

is possible with respect to a hard case. While it may not always be successful, their methodology holds out the best hope for a nuanced account of interpretation in law.

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Legal Argumentation: Informal Logic

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Introduction

Legal argumentation can be described through the instruments that it provides for the analysis of legal texts, the development of legal arguments, and the argument structure needed for the field of legal informatics (Ashley 2017; Gordon and Walton 2009; Prakken and Sartor 2009). These tools are currently providing useful solutions to logical problems of argument evaluation, argument invention, interpretation of legal texts, evidential reasoning, and analysis of specific kinds of evidence commonly used in law, such as witness testimony, circumstantial evidence, forensic evidence, and character evidence (for an overview, see Bongiovanni et al. 2018). It is shown in this entry how four basic argumentation tools are being applied to fundamental logical problems of legal reasoning: defeasible argumentation schemes, especially the scheme for abductive reasoning (inference to the best explanation), stories (scripts), and argument diagrams (argument maps). Defeasible argumentation schemes, such as the scheme for argument from expert opinion, are forms of argument that are reasonable, and indeed highly important in law, and in all affairs of life, but they have to be used with caution and attention to the context, for they can also be employed deceptively and lead to errors (Walton 2016).

In this entry, it is made clear how and why the reasoning used to produce, respond to, evaluate and reconstruct legal arguments, and interpret legal texts (such as statutes) is grounded on forms of argument that go beyond the rules of deductive formal logic. Carrying out these tasks requires logical reasoning based on abductive processes that use evidence to choose a best explanation of the meaning or purpose of the law. Thus the context, for example, the practical purpose for which a law was framed to solve a problem, on this approach is often fundamental for judging on how it should be interpreted and what conclusions can be drawn from it. Legal argumentation is often associated with the adversarial trial context, but there are many other procedural contexts in which legal arguments are used.

In addition to studying the forms of inferences used in legal argumentation to draw conclusions, there is another dimension that is important, namely, the context of dialogue, which partially corresponds to the procedural framework. The notion of "legal argumentation" has a twofold nature that is summarized in the term "dialectical." Dialectics is conceived as the traditional precursor of the modern discipline of logic; however, ancient dialectics focused on the types and structure of natural arguments and the way they

are used in a dialogue to shift the burden of proof. This twofold goal is captured by the definition of argument as a dialogical means of contending with a difference (or doubt) between two parties (Ciceronis *Topica*, 4, 26; Walton 1990, p. 411).

Legal dialogues are different in their joint global goal (Macagno and Bigi 2017), but all share an argumentative dimension, namely the individual goal of supporting a reconstruction of a state of affairs, a qualification, or a decision through reasons. An example is the legal activity commonly referred to as "interpretation," consisting in "puzzling over, considering, arguing about and determining the meaning and scope of an object of interpretation" (Twining and Miers 2010). This type of dialogue is commonly analyzed as a kind of decision-making dialogue (Anderson 2013; Chiassoni 2016; Walton and Toniolo 2016; Walton et al. 2016b), characterized by the use of specific arguments and dialectical strategies for addressing problems of ambiguity (Martí and Ramírez-Ludeña 2016), vagueness (Jaszczolt 2017), definitions that may conflict with the ones in ordinary language (Jori 2016, p. 43), defeasibility (generalizations) (Marmor 2016), inconsistency (with other documents; within the same document; with precedent cases), and implicit meaning (Macagno and Walton 2017b, pp. 135–138; Morra 2016; Sbisà 2017).

In this sense, legal argumentation considers the reasoning used in legal discussions both at a micro- and at a macrolevel, namely, taking into account both their "logical" dimension of types of inferences resulting from more or less defeasible principles, and their dialectical one of instruments for shifting the burden of proof and persuading an audience (Macagno and Walton 2012; Walton 2002).

The Structure of Arguments in Argumentation Theory

The structure of arguments and their defeasibility conditions are analyzed in argumentation theory through the analytical instruments called argumentation (or argument) schemes (Grennan 1997; Hastings 1963; Kienpointner 1992; Walton et al. 2008). Argumentation schemes represent the two dimensions of arguments, namely, the logical axioms (such as *modus ponens*, *modus tollens*, etc.) and the semantic relations (*habitudo*) between the concepts involved (Macagno and Walton 2015). This account is rooted in Toulmin's notion of warrant, which he defines as "general, hypothetical statements, which can act as bridges, and authorize the sort of step to which our particular argument commits us" (Toulmin 1958, p. 91). These warrants, modern interpretations of the ancient notion of maxim or topic (Macagno and Walton 2014a), can be different in nature: They can be grounded on laws, principles of classification, statistics, authority causal relations, or ethical principles (Toulmin et al. 1984, p. 199).

In legal argumentation, argumentation schemes provide abstract patterns representing types of arguments that carry probative weight for supporting or attacking a conclusion, and more importantly their defeasibility conditions. Such arguments do not lead to necessarily true conclusions and are not based on necessarily true premises. The reconstruction of an argument structure through these schemes allows the analyst to detect its implicit premises and its weak points, and assess it by critically questioning according to a script of "critical questions" associated with the scheme.

Most of the argumentation schemes listed in (Walton et al. 2008) have a defeasible *modus ponens* structure, grounded on a conditional defeasible generalization. A standard example is the following expanded scheme for argument from expert opinion (Walton et al. 2008: 19):

Minor premise 1	Source *E* is an expert in subject domain *S* containing proposition *A*
Minor premise 2	*E* asserts that proposition *A* (in domain *S*) is true (false)
Conditional premise	If source *E* is an expert in a subject domain *S* containing proposition *A*, and *E* asserts that proposition *A* is true (false), then *A* may plausibly be taken to be true (false)
Conclusion	*A* may plausibly be taken to be true (false)

It is readily visible that version of the scheme for argument from expert opinion has a *modus ponens* structure as an inference. Since experts are generally not omniscient, and since in law it would be a great error to take what an expert says uncritically, this inference must be viewed as being defeasible. For this reason, a set of critical questions is associated with this scheme. The critical questions constitute the dialogical dimension of the scheme as an instrument for assessing the acceptability and the defeasibility of a conclusion, determining how the burden of providing evidence or further arguments shifts.

1. *Expertise Question*: How credible is *E* as an expert source?
2. *Field Question*: Is *E* an expert in the field that *A* is in?
3. *Opinion Question*: What did *E* assert that implies *A*?
4. *Trustworthiness Question*: Is *E* personally reliable as a source?
5. *Consistency Question*: Is *A* consistent with what other experts assert?
6. *Backup Evidence Question*: Is *E*'s assertion based on evidence?

These questions, drawn from the different stages of expert examination (Godden and Walton 2006), provide a blueprint for guiding the assessment of authority-based arguments.

The argument from expert opinion is only one of the possible abstract and general patterns of argument used in legal argumentation. In (Walton et al. 2008), more than 60 schemes have been detected, classified in more general categories (Macagno and Walton 2015; Walton and Sartor 2013; Walton et al. 2016a) that represent the classes of the ancient "loci" of legal arguments (Everardi *Loci Argumentorum legales*).

Argumentation and Interpretation

Interpretation *stricto sensu* presupposes a doubt, namely an implicit or explicit conflict of opinions, concerning the meaning of a word, a sentence, or a text (Dascal and Wróblewski 1988, p. 204; Luhmann 1995; Patterson 2005), which induces the interpreter to question their prima-facie understanding. In this sense, interpretation is inherently argumentative and can be conceived as a decision-making dialogue in which different interpretations of a legal statement are assessed considering various types of reasons. The macrostructure of interpretative argumentation can be represented by the notion of reasoning from the best interpretation (Atlas and Levinson 1981), an instance of the more general pattern of reasoning from the best explanation (Fodor 1983; Harman 1965, 1992; Macagno and Capone 2016; Macagno and Walton 2014b; Walton 2002; Walton et al. 2008, p. 171):

Premise 1	F is a finding or given set of facts
Premise 2	E_1 is a satisfactory explanation of F
Premise 3	No alternative explanations $E_{2...n}$ given so far are as satisfactory as E_1
Conclusion	Therefore, E_1 is plausible, as a hypothesis

In the reasoning from the best explanation, the *explanandum* is the legal statement, and the explanations correspond to the available interpretations. The best interpretation is thus the less defeasible of the possible explanations, namely the one that is supported by the strongest reasons (Atlas 2005, p. 95; Atlas and Levinson 1981, pp. 40–41), or the ones that are more suited to the audience (Perelman 1979).

In support of the "best" interpretation, different types of argument are provided, analyzed in the tradition of legal philosophy as "canons," "maxims," "loci," or arguments of interpretation (Greenawalt 2015; MacCormick and Summers 1991; Miller 1990; Scalia and Garner 2012; Tarello 1980). The most general and shared types of argument can be reduced to a list of 13 interpretive arguments, of which two (the argument from the coherence of the law and the argument from the completeness of the law) are ancillary, in that they exclude a possible explanation and support the need for a different interpretation of a statement of law. The interpretative arguments are translated into argumentation schemes and classified according to their characteristics. Pragmatic arguments, definitional arguments (of different types, including the systemic

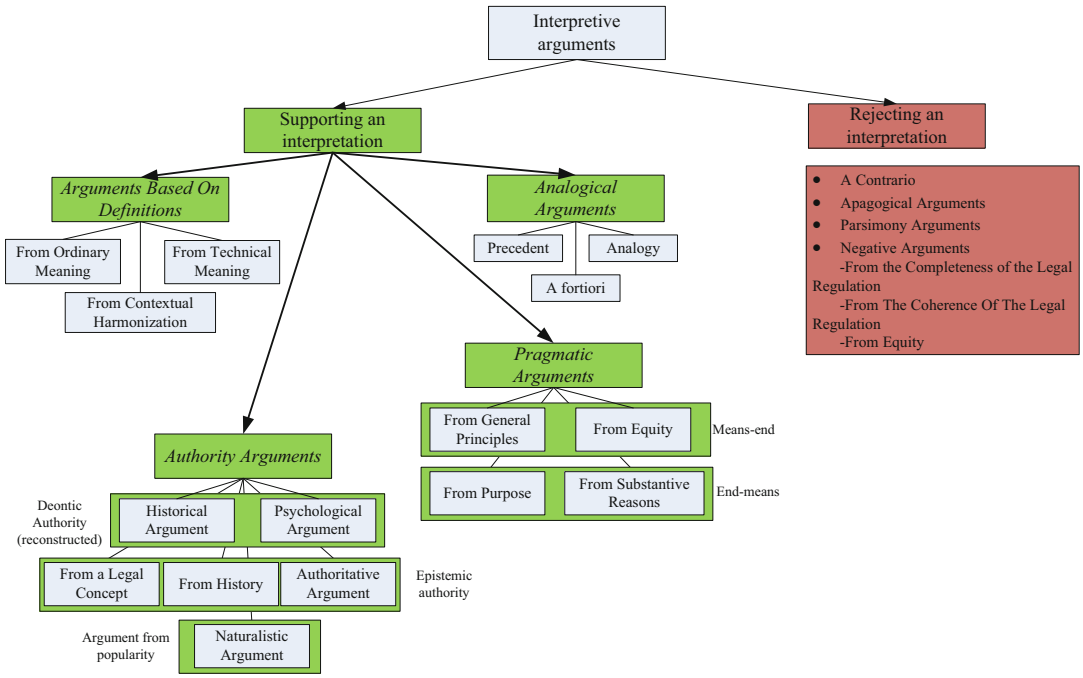
ones), and analogical arguments represent distinct reasoning patterns, which are often merged with authority arguments. Such arguments are intended to back up a specific definition based on previous interpretations (epistemic authority) or on the reconstruction of a possible "intention" of the lawmaker (deontic authority), or on the alleged "nature" of a concept (the commonly shared definition). Such categories often merge with each other, but they can be classified (such as in Fig. 1) based on a distinctive feature, namely their distinctive reasoning pattern.

The translation of these maxims into argumentation schemes and formal types of arguments has been advanced in several works (Macagno and Walton 2017a; Macagno et al. 2018; Walton et al. 2016a; Walton et al. 2021). The summary of this translation is represented below (Table 1).

Evidence and Argumentation

As Twining put it (Twining 2006, p. 193), the "logic of Proof is concerned with the validity, cogency and appropriateness of arguments as the rational basis for persuasion towards making or justifying a decision or conclusion on a question of fact." The analysis of the defeasible arguments provided in questions of fact (Walton 2002, p. xiv; Wigmore 1931) is grounded on the aforementioned macroargumentative structure of "best explanation" (Tuzet 2019). The inferential structure of legal reasoning in questions of fact is commonly conceived as an abductive type of reasoning, in which a conclusion is drawn from a principle (usually causal) and a factual premise that can explain the state of affairs represented in the latter (Pardo and Allen 2008, pp. 225–228). This abductive type of reasoning can only lead to a defeasible conclusion, which can be supported by other argument that can justify its higher acceptability compared to the alternative explanations.

The general approach to modeling evidential reasoning in argumentation in AI and Law typically proceeds by constructing an argument graph, usually called an argument map, that displays the consecutive reasoning steps from



Legal Argumentation: Informal Logic, Fig. 1 Classifying the arguments of interpretation

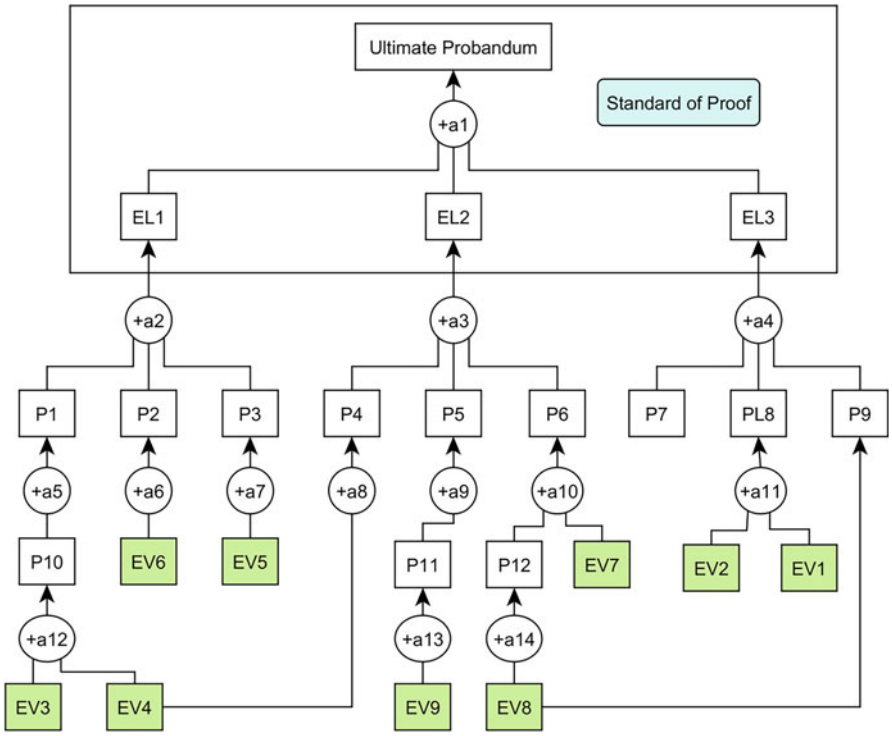
Legal Argumentation: Informal Logic, Table 1 Arguments of interpretation and argumentation schemes

1. *Argumentum a contrario* (from exclusion of what is not stated)	**Argument in lack of evidence**
2. *Argumentum a simili* 2a. Extending a category to a similar case (*Analogia Legis*) 2b. Argument from general principles (*Analogia Iuris*)	**Analogical arguments**
3. *A fortiori* argument	
4. Authoritative arguments • 4a. Argument from the intention of the legislator • 4b. The historical argument • 4c. Authoritative argument (*ab exemplo*) • 4d. The natural meaning argument	**Arguments proceeding from the authority of the source**
5. Reduction to absurdity	**Practical arguments (Arguments from consequences and Argument from practical reasoning)**
6. The equitative argument	
7. The argument from coherence of the law	
8. The purposive argument	
9. The economic argument	**Abductive arguments**
10. The systematic argument	
11. The argument from completeness of the law	

the evidence in a case along inferences drawn from it to the facts in issue. This typically results in the mass of evidence in a case being displayed in a graph that has a tree structure, where the root of the tree is the ultimate *probandum*, the proposition to be proved, according to a standard of proof, from the network of evidence and inferences displayed in the graph. Figure 2 is an abstract example of such an evidential tree.

Figure 2 is the same kind of tree structure that is apparent in a Wigmore chart, also a species of directed graph (Wigmore 1931, 1983). The evidential graph shown in Fig. 2, called the Carneades Light (Gordon 2010; Gordon et al. 2007), models evidentiary reasoning using a bipartite graph, meaning that there are two kinds of nodes. The rectangular nodes represent propositions, and the round (or elliptical) nodes represent arguments that are inferences from a set of premises to a conclusion. A pro argument is indicated by a plus sign in its node. It is also possible to have con arguments indicated by a minus sign in a node, but there are no instances of a con argument in this example.

Also note that some of the rectangular nodes are identified by having a green background in the rectangle. These are the evidentiary nodes, the propositions that are accepted as evidence in a given case. As is normal in informal logic, three kinds of arguments are distinguished. A single argument has only one premise leading to its conclusion. A linked argument has two or more premises, each of which goes together with the other premises to support the conclusion. A convergent argument is essentially two



Legal Argumentation: Informal Logic, Fig. 2 Abstract example of an evidential tree structure in a typical case

(or more) different arguments each of which individually supports the conclusion. In a linked argument, all the lines from the premises to the conclusion go through the same node. In a convergent argument structure, each argument has its own separate node. One can often recognize that an argument is linked because it fits a particular argumentation scheme, such as the scheme for argument from witness testimony or the scheme for argument from evidence to a hypothesis. In a scheme, multiple premises are required to support a conclusion.

One thing to note about Fig. 2 in particular is that the standard of proof, such as the beyond reasonable doubt standard or the preponderance of evidence standard, is set in place at the top of the tree, because it is applied to the ultimate *probandum*, determining how strong the mass of evidence displayed below it in the evidence graph needs to be in order to prove it. But this standard of proof, according to the theory of Allen and Pardo, also applies to the elements, the propositions that have to be proved in order to prove the ultimate *probandum*. The rectangle around the ultimate *probandum* in the elements in Fig. 2 indicates this relationship.

This way of configuring the evidential structure of the argumentation in a trial has implications for the role of conjunction in evidential reasoning in law. According to the structure shown in Fig. 2, the argument from the elements to the ultimate *probandum* is a linked argument because all of the premises flow through the argument a1. This means that each of the three elements has to be proved to the required standard of proof in order for argument a1 to be sufficient to prove the ultimate *probandum*, which itself requires the same standard of proof.

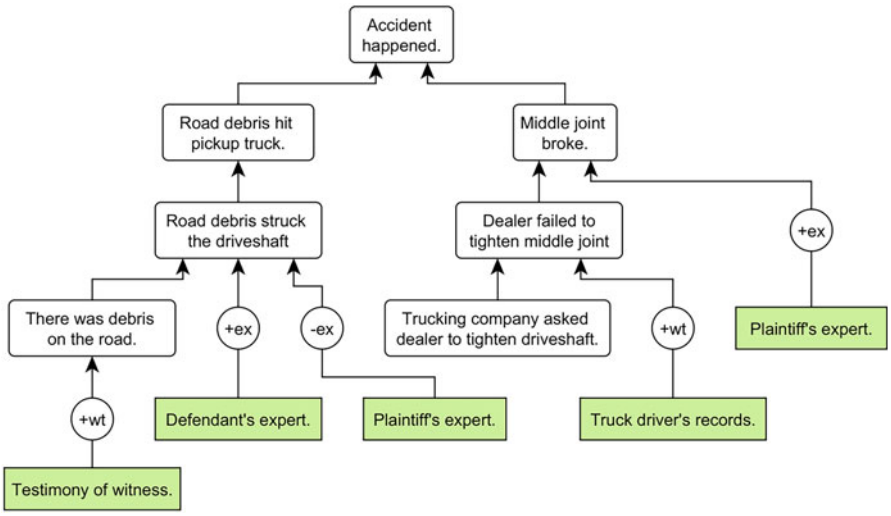
Let us examine the parts of the tree at the bottom to see how the arguments are evaluated. The conclusion of an argument is accepted if it is dialectically valid, meaning that it fits an argumentation scheme, and all its premises are accepted. Such an argument is said to be applicable). Look at the middle sequence of argumentation supporting argument a3. EV9 is accepted,

because it is shown as evidential by its green background, and since it is the only premise required to prove P11, P11 is accepted. Similarly, P12 is accepted because it is based on evidence EV8. Because P 11 is accepted, P5 also has to be accepted but because EV4 (which appears in the left argument supporting a2) is accepted, P4 is also accepted, and because EV8 is accepted P12 must be accepted. Hence P6 must be accepted; therefore, since all three premises of argument a3, P4, P5, and P6, are accepted, so too EL2 is accepted as proved.

So now we have a general idea of how the argumentation propagates forward in a typical AI and Law evidential model of legal reasoning in a trial setting. The evidence propagates upward from the bottom parts of the tree through intervening arguments leading to each of the elements, and the elements in turn form a linked argument supporting the ultimate conclusion. The burden of persuasion is set by the applicable standard of proof, and each of the elements must meet that standard in virtue of the support given to them by the evidence flowing upward through intervening sequences of argumentation. The dialectical effect of the exchange of pro and con arguments put back and forth by both sides in a trial consists in a shifting of an evidential burden, the so-called burden of producing evidence, which is dependent on the initial burden of persuasion set at the opening stage of the trial (Prakken and Sartor 2009).

Explanations and Stories

It is now widely known that explanations in a legal setting can be modeled by scripts or so-called stories, by weighing the plausibility of one story against the plausibility of an alternative story in the case at issue. The argumentative approach to explanations has been developed in some depth and detail in the theory of Bex (2011), where it is illustrated by many legal examples. However, to give some idea of how this model works, we can here offer one relatively simple example from (Bex and Walton 2012). The main thing to take away from this example is that it uses hybrid argument maps that combine argumentation with explanation. The idea is that evidence brought forward in a trial can be used to compose an argument graph such as the one shown in Fig. 3 to support or attack the plausibility of a story. The structure of the story can be represented by a different kind of graph, but the beauty of it is that the one kind of graph can be embedded into the other, resulting in a graph structure that combines arguments and explanations.



Legal Argumentation: Informal Logic, Fig. 3 Evidence supporting (attacking) opposed stories

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The account of this case given below is a summary of the case of *Anderson* versus *Griffin*, described in (Bex and Walton 2012). In this civil case, the driveshaft broke on a tractor-trailer proceeding down an interstate highway disconnecting the brakes. At the same time, debris kicked up from the surface of the highway struck a pickup truck behind a tractor-trailer. The pickup truck crashed into the tractor-trailer, and the collusion injured two people in a car behind the pickup truck. These two people, who were injured, sued the truck dealer who was supposed to be responsible for the maintenance of the trailer. Two competing stories were put forward at the trial. The plaintiffs argued that the dealer had been negligent, because he had failed to tighten the middle joint, which happened to be the one that broke. This story was supported by evidence from the truck dealer's record stating that the repairman did not repair that joint. The defendant gave an alternative explanation, claiming that the cable was broken by debris that struck the driveshaft. He supported his claim that there was debris on the road by testimony of witnesses. Bex and Walton (pp. 120–121), showed how the burden of proof shifted back and forth as these stories were presented in court. They also offer a graph showing how the evidence supports the story of each side, drawn in a style comparable to that of Fig. 3, displaying how argumentation, evidence, and explanation are combined in this case.

The notation "wt" indicates the argumentation scheme for argument from witness testimony. The notation "ex" indicates the argumentation scheme for argument from expert opinion. The green background in a rectangular node indicates an evidential proposition. The propositions represented in the rounded rectangles represent the events in a story as the story unfolds in an upward direction from the evidence shown in green rectangles along the bottom. The left sequence of rounded rectangles moving upward represents the plaintiff story. The right sequence represents the defendant's story. Note that for purposes of simplicity, premises of the arguments have been omitted. For example, the plaintiff's expert argued against the proposition that debris struck the driveshaft on the grounds that the driveshaft rotates at high speed and would therefore deflect road debris without breaking. A more complete hybrid map could be drawn which would represent the argumentation in the case as more complex, but this is not necessary for illustrating the general way in which evidence can support or attack a story by means of pro and con argumentation.

The representation of conflicting explanations is closely connected with their evaluation. What are the criteria that can be used to determine that one explanation is better than another? Allen and Pardo (2019), p. 14) state that general criteria that affect the quality of an explanation include the following factors: "consistency, coherence, fit with background knowledge, simplicity, absence of gaps, then the number of unlikely assumptions that need to be made." Bex (2011, p. 94) formulated six factors that can be applied using his hybrid theory of stories and arguments: (1) the plausibility of the events and generalizations in the story, (2) how well the story fits a plausible story scheme representing how the events in the story fit in with the common knowledge about how such things can usually be expected to go, (3) the consistency of the story, (4) how much of the available evidence supports the story, (5) how much of this evidence contradicts the story, and (6) which events in the explanation are not supported by the evidence. Walton (2016, p. 100) set out eight more general criteria to be applied as part of his dialectical theory of explanation: (1) How well the explanation helps the questioner who asks for it makes sense of what they asked about, (2) the internal consistency of the explanation, (3) how well the alleged inconsistencies can be dealt with by the answerer, (4) how well the explanation is supported by the factual evidence, (5) how plausible the explanation is generally, (6) how comprehensive it is, (7) how well it fills in gaps, and (8) how well it stands up to question it when critically examined.

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Legal Argumentation: Principialism

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Argumentation and Principles

The issue of legal argumentation, and that of principles, has gained momentum in the legal theory of the last decades. They are, besides, two notions – and two realities – clearly connected to each other, in different ways. The most obvious one is probably this: those who give principles a great importance as essential elements of our legal systems tend to stress also the fundamental role that argumentative processes play in the law; and vice versa.

From a first approach, argumentation is a practice that consists in giving reasons in favor of, or against, a thesis. So understood, it becomes obvious that law, at least to a great extent, consists in arguing. That is why it is quite shocking that, until rather recent times, in the catalogue of the so-called fundamental legal concepts that of argumentation was missing. Things have changed though, and quite radically, so that legal argumentation has almost become – especially in the Latin world – a fashionable topic. This is due to a set of factors such as the following: (1) The most salient legal *theories* in the twentieth century – formalism, normativist positivism, legal realism, natural law, and *critical* legal theories) have been prone, for different reasons, to neglect the argumentative dimension of the law – therefore, there existed a sort of theoretical gap ripe to be filled. (2) The *practice* of law, especially in the law of constitutional States, seems to consist, in a very relevant way, in arguing; and the most popular images of the law – for example, the development of a trial before a court of law – also tend to emphasize that argumentative dimension. (3) The ongoing

English translation of Juan Antonio Pérez Lledó.

changes in contemporary legal systems – above all, the constitutionalization of the law – seem to lead to an increase, both in quantitative and in qualitative terms, of the demand for justifying, for arguing for, the decisions taken by public authorities. (4) A more "practice-oriented" legal education – which is an almost universally demanded goal, although it is based on a theory/practice opposition that needs some clarification – should be more inclined toward the – basically argumentative – use of the legal materials, rather than to the mere knowledge of the contents of a legal system. (5) In contemporary societies we have witnessed a loss of importance of authority and tradition as sources of the legitimation of power. They have been replaced by the consent of the governed, that is, democracy. And democracy – especially deliberative democracy, which is far more than the majority rule – requires citizens that are able to argue rationally and competently regarding the actions and decisions in social life.

As it is well known, the debate around principles in contemporary legal theory was raised, to a great extent, by some works of Ronald Dworkin[1] in the late 60s in which he criticized H.L.A. Hart's positivist conception because, among other things, Dworkin held that there was no room for principles in Hart's theory. According to Dworkin, Hartian positivism would have reduced law to a set of rules – primary and secondary rules – that would apply to cases in an *all-or-nothing* way. His – Dworkin's – model, instead, would be a model of rules *and* principles –the latter having a *weight* dimension which rules would be lacking. Within principles, in turn, he distinguished two subcategories: policies that set economic, social, or political goals; and principles in the strict sense that establish requirements of a moral nature, such as that of not to benefit from one's own illicit behavior.[2]

To be sure, Dworkin was not the inventor, nor the discoverer, of a new legal category. In civil law systems the so-called general principles of the law have been commonly considered as a source of the law. And, if Dworkin was right in his critique of Hart, the courts in common-law countries –at least in the United States – would have usually turned to principles when deciding hard cases. Furthermore, the thesis that our legal systems consist of both rules and principles had been already held, not long before Dworkin, by very influential scholars like Roscoe Pound.[3] It is also perfectly possible that Dworkin gave a wrong account of Hart's conception and that, from a certain positivist perspective – which today is usually called "inclusive positivism,"[4] there is no obstacle to consider that our legal systems can include directives for behavior such as the ones Dworkin called "principles" – be they principles in the strict sense or policies. They can indeed, as long as the rule of recognition of the system so allows, that is, as long as they are principles belonging to the positive law, which is precisely the case in the law of constitutional states. Moreover, there are different ways of understanding legal principles, some of them not wholly in accordance with Dworkin's. Alexy, for example, considers principles – all principles – as "optimization commands."[5] Nevertheless, the question that deserves more attention here is that Dworkin's claim that law consists of rules and principles led him also to exclude judicial discretion – "discretion" in the strong sense of the word. Positivists, at least positivists like Hart, hold that when legal rules and legal principles do not direct or limit judicial decisions judges should ground them on reasonable standards, but those standards would not belong to the law; so judges would be acting in a discretionary –although not arbitrary – way. Now, contrary to this positivist view, Dworkin – as well as a good part of current legal theory – contends that legal principles, in the vast majority of cases if not in all, make it possible to solve hard cases by means of argumentation, that

[1] See Dworkin (1977)

[2] Dworkin changed that model of law in other works (see Dworkin 2011). But that's not important here.

[3] See Pound (1959).

[4] As far as I know, the first scholar that held that position – although he did not use that expression – was Genaro Carrió, in a work published in 1970 (Carrió 1970).

[5] See Alexy (1986) A detailed discussion can be found in Atienza and Ruiz Manero (1998).

is to say, to solve them from within the law – with principles that are *legal* – and using a kind of practical reasoning that is not classical subsumption. I will return to this below.

Now it is time to make clear what should be taken by "principialism" in legal theory. Were the word referring to the mere admission that principles, or some principles, belong to the law, this label would have no interest whatsoever, for it would be a rather banal assertion. The expression seems to make sense only if we consider "principialists" in legal theory those scholars who give a special relevance to principles, and who hold – with bigger or lesser intensity – the thesis referred to at the end of the paragraph above. However, it is important to notice that principialism, so understood, does not at all mean to ignore the importance of rules in our legal systems and the need, when dealing with a legal problem of some interest, of using both rules and principles. Furthermore, the division that is often drawn in legal theory between those who conceive of the law as a system of rules and those who conceive of it as a set of principles can only be seen as a division based on a kind of fallacy – that of false oppositions.

Theories of Legal Argumentation: The Forerunners and the Standard Theory

The study – in principle, descriptive as well as normative and conceptual study – of the reasoning produced by lawyers in the different contexts of the law has strongly progressed in the second half of the twentieth century. Two stages can be distinguished[6] in the development of the theory of legal argumentation: the forerunners' years – in the 1950s -, and those of the making of the standard theory, since the late 1970s.

Among the forerunners, probably the most influential scholars have been Theodor Viehweg, Chaïm Perelman, and Stephen Toulmin.

Theodor Viehweg's book *Topik und Jurisprudenz*, published in 1953, was very successful in continental European legal theory, and became ever since one of the centers of interest around the so-called legal method. What Viehweg held in that work can be summarized as follows. The peculiarity of legal reasoning lies in the traditional notion of "topics". Topics would not be an *ars iudicandi*, i.e. a technique about the step from premises to conclusion, but an *ars inveniendi*, devoted to the discovery of the premises – the topics or commonplaces – and focused on the notion of problem, rather than on that of system. The book, it may be said, does not seek to build a theory of legal argumentation, strictly speaking; but it does offer instead a rather historical research that contains very valuable insights with a view to explore, in legal reasoning, some aspects that keep hidden from an exclusively formal-logical approach.

More importance should be attached to the work of Chaïm Perelman, especially to the book written with Lucie Olbrechts-Tyteca *Traité de l'argumentation. La nouvelle Rhétorique* (1958). The starting point here is the Aristotelian distinction between analytic or formal-logical reasoning, on the one hand, and dialectical or rhetorical reasoning, on the other. The theory of argumentation would belong to the latter, that is, to the realm of the just plausible arguments, which is the adequate field for the reasoning of politicians, judges, or lawyers. Rhetorical arguments do not try to establish evident truths, demonstrative proof, but to show the reasonable, plausible quality of some decision or opinion. That is why, in argumentation, the reference to an *audience* that you try to *persuade* becomes fundamental.

In the *Traité*, the study of argumentation is divided into three parts. The first part deals with the preconditions and the limits of argument. To that end, three different elements come to play: discourse, speaker, and audience, a predominant role being attached to the last one. Besides, two notions of great interest appear: the *universal audience* that provides the theory with a criterion of argumentative validity; and *impartiality* that amounts to be, in the argumentation field, the analogous to what objectivity means in demonstrative reasoning. The second part of the *Traité* – on the starting point of argument – is devoted to the study of premises, and it distinguishes three

[6] See Atienza (1991).

dimensions: previous agreements, selection, and presentation of the premises. Finally, in the third part – on the argumentative techniques – the authors offer a general classification of arguments in two groups, depending on whether they work as linking devices – they connect elements that in principle are separate – or as splitting devices – they separate elements that appeared united, as in the legal technique of distinguishing precedents. The arguments in the first group are classified, in turn, in three subgroups: "quasi-logical arguments" – which are close to the strictly logical or mathematical arguments, as *reductio ad absurdum* or *a pari* and *a contrario* arguments; "arguments that are based on the structure of reality" – as pragmatic argument or argument from authority; and "arguments that found the structure of reality" – as example or analogy, the latter understood as similarity of relationships.

In *The Uses of Argument*, also a 1958 book, Stephen Toulmin started from the idea that the conception of argumentation used in logic – formal logic, as it is usually understood, or it was at that time – was inadequate to give account of most arguments made in any field but mathematics. He conceived of argumentation as a type of human interaction between someone who sets forth a claim and someone who opposes it. Toulmin, in short, tried to build not an idealized logic, but a "working" or applied logic. To that end, he furnished a pattern for argumentation analysis that has become very influential and that comes to be a predecessor of what today is usually called "informal logic." That pattern is presented in two models.

The "simple model" consists of four elements: claim, grounds, warrant, and backing. The first element, the *claim*, is both the starting point and the destination of our argumentative behavior process; for example – this is not Toulmin's example – , "X is entitled to receive the inheritance." So, at the outset of argumentation, someone – the proponent – raises an issue to another person – the opponent. If the latter questions or challenges somehow the claim, the proponent will have to give reasons – *grounds*, data – , relevant and sufficient reasons, in favor of her initial claim; for example, "X is the only son of Y, and Y died without leaving his will." The opponent might now challenge the facts, but even if he admits them he can still demand the proponent to justify the step from the premises to the conclusion. The general statements that allow that inference make up the *warrant*, which is not a fact-describing assertion, but a rule that permits or authorizes the transition from some statement to another; in our example: "sons and daughters inherit – shall inherit – their parents' property when they have passed away leaving no will." Finally, sometimes it is necessary to prove that the warrant is valid, relevant, and strong enough. To that end, the proponent will have to show the general field of information or *backing* of the argument; say, "section 930 of the Spanish Civil Code so establishes."

Now, the elements described above suffice to explain why we have a valid or correct argument. However, the *strength* of an argument also depends on two other factors, the *qualifier* and the *rebuttal*, which are necessary to make up the "general model." Thus, on the one hand, the conclusion, that is, the claim of an argument, can be held with a bigger or lesser degree of certainty; unlike in mathematics, in ordinary life the inference to conclusion almost never has a necessary character. And, on the other hand, the support to the claim might be given only under certain conditions, that is, some extraordinary or exceptional circumstances may occur that undermine the strength of an argument. These refuting conditions are called "rebuttals." In our example: "X is not entitled to receive his father's inheritance if he incurs a ground for disinheritance."

As it has been shown, one common feature of these scholars – the "forerunners" – is that they shaped their conception of legal argumentation – and that of argumentation in general – in opposition to formal logic. This reductionism is mended in what I have called the "standard theory of legal argumentation." Under this expression we can include such scholars as Aulis Aarnio, Aleksander Peczenik, Jerzy Wróblewski, Neil MacCormick, or Robert Alexy. We owe Wróblewski the distinction between *internal justification* and *external justification*, which has been widely used since then. It comes to mean what follows: deductive reasoning – the well-known judicial syllogism – is a necessary

element for the justification – that would be the *internal* justification – of any legal decision, particularly judicial decisions; but sometimes, namely in the so-called hard cases, it is necessary to supplement it with the justification of the premises – that is, the *external* justification – , which requires the use of argumentative structures that are not simply deductive. Anyway, the most developed and influential theories are those of Neil MacCormick and Robert Alexy, expounded basically in two books that were published in the same year, 1978. Furthermore, they are two conceptions of legal argumentation that are widely coinciding as regards as the theses they hold, although their respective elaboration methods considerably differ from each other.

In *Legal Reasoning and Legal Theory*, Neil MacCormick started from the distinction between the context of discovery and the context of justification of judicial decisions; that is, the distinction between, on the one hand, the psychological motives, social context, and the like, that causally explain the making of a decision and, on the other hand, the reasons that can be given to show that the decision is right or acceptable, that is, justified. He placed his theory of legal argumentation in this second level. In his view, both practical argumentation in general as well as legal argumentation in particular play a basically justificatory role. Thus he built a model of justification of judicial decisions with the support of many examples drawn from English and Scottish common-law cases, but whose basics could be generalized to any other legal system.

Now, in some cases, the easy ones, the justifications that judges put forward are strictly deductive. However, that kind of justification – to which we referred above as "internal justification," although MacCormick does not use that terminology – has its preconditions and its limits. One of those preconditions is the duty of judges to apply the rules of the valid law, and another one is the ability of judges to identify which are valid legal rules by using shared criteria of recognition. And the limits refer to the existence of hard cases, that is, cases where the establishment of the normative or the factual premise becomes problematic. MacCormick offers a fourfold typology of hard cases, depending on whether the problem is one of relevancy, of interpretation, of proof, or of classification; the former two problems lie in the normative premise, whereas the latter two affect the factual one.

Justification in hard cases – we are now in external justification – requires, first, to meet the requirement of universality – which is not the same as generality; and, secondly, that the decision to be justified makes sense in relation to both the legal system and the social world. Making sense in relation to the legal system means that the decision meets the requirements of consistency and coherence; coherence – or value consistency – can be, in turn, normative or narrative. And making sense in relation to the social world supposes that, for MacCormick, within the limits set by the other criteria, the decisive argument is the consequentialist argument. However, all those criteria are not conclusive, and that is why he disagrees with Dworkin's thesis that there is always one right answer. According to MacCormick, at some stage of legal argumentation one arrives at ultimate choices in favor of which one can give reasons, but those reasons cannot be conclusive, since they entail to put oneself in a pre-rational or extra-rational level. Therefore, those who have to make such decisions should have not only the virtue of practical rationality, but also other qualities such as sound judgment, insight, sense of justice, humaneness, or courage.

Robert Alexy uses a very different method in *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*. His fundamental starting point is Habermas's practical discourse theory, which he systematizes and reinterprets in order to, basically, extend it to the specific field of law.

Discourse theory is a procedural theory; referred to practical discourse this means that a normative affirmation is correct if it can be seen as the result of a particular procedure, one where the rules of rational discourse have been respected. Those rules are not only about the propositional content, but also about the behavior of the speaker – they are both semantic and pragmatic rules. Legal discourse, in Alexy's opinion, is a special case of general practical discourse, so that in the former the rules of the latter must be observed, and some

specific rules of legal discourse must be observed too.

Alexy groups the rules of general practical discourse in several categories. The most important ones are the "fundamental rules" and the "rules of reason." The compliance with the first group is a necessary condition for any linguistic communication regarding truth or correctness; these rules express the principles of non-contradiction, of sincerity, of universality and of shared use of language. The rules of the second group set the most important conditions for the rationality of discourse; Alexy includes here the speakers' obligation to give reasons in favor of his affirmations, unless he can justify his refusal to do so; as well as the requirements of the Habermasian ideal speech situation: universal participation, equal rights among the participants, and absence of coercion.

As to the specific rules – and forms: the types of arguments – of legal discourse, Alexy distinguishes between those of the internal justification and those of the external justification. Synthetically – he says – they express the subjection to statutory law, to case law, and to legal scholarship.

Now, although legal argumentation is required by practical rationality – insofar as, to solve practical questions, it allows going beyond the point where general practical discourse left things unsolved – , however, legal discourse has also its limits. A solution that is reached observing its rules is a rational solution, but legal discourse rules do not guarantee that in every case an only right answer can be found. Here Alexy differs to some extent from Dworkin, but the difference, one may say, is a matter of nuances. Alexy thinks that ultimate values are also subject to rational discussion and they may be changed during the development of discourse; and he actually endorses the one right answer thesis, although in a weakened version: it would be a regulative idea in the Kantian sense, that is, a guiding ideal to work for.

Critiques and Later Developments

The above conceptions of legal argumentation, almost since they were formulated for the first time, have received quite a number of critiques; but they have also been considerably developed.

As for the critiques, they can be classified in three groups, depending on whether they refer to the object, the method, or the function of the criticized theories. Thus, if we focus on the standard theory, it is clear that it neglects very important aspects of legal reasoning. In other words, MacCormick and Alexy were interested, almost exclusively, in the justificatory argumentation of higher courts, leaving aside everything regarding the context of discovery, and almost everything related to argumentation on facts, to argumentation of practicing lawyers – barristers or attorneys, legal counsel, and the like – , to argumentation of legislators, of legal scholarship, etc. As to the method, there are also reasons to think that these two scholars have not developed a model of argumentation that can adequately represent the real process of arguing; and the correctness criteria they offer in order to evaluate arguments have been frequently seen as deficient due to their lack of precision. Finally, regarding the function, that is, the goals of the standard theory, the critiques have questioned its cognoscitive-descriptive potentiality – its contribution to a better knowledge of argumentative practice and of the legal phenomenon in general – as well as its practical utility – its ability to offer useful orientation to lawyers in their argumentative tasks. At the same time, some scholars have pointed out a certain ideological distortion of the theory, for it presents the legal argumentation processes that take place in the context of constitutional states in an idealized, distorted way.

As regards as the development of the theory, since the 1980s the works on legal argumentation are really booming, to such a point that many speak of an "argumentative turn" in current legal theory. In many countries, especially in the Latin world, courses on legal argumentation have been introduced in the academic curriculum, so that the argumentative study of law has come to be considered a relevant aspect of a lawyer's education.

The works of the two scholars I have written about stand out, of course, as a distinguished part of this "argumentative turn." Moreover, both MacCormick and Alexy made some changes in their initial approaches. So, in his late writings MacCormick departed from Hartian positivism,

which was at the foundation of his theory, to move nearer to post-positivist or non-positivist approaches closer to those of Dworkin or Alexy. Alexy himself enriched his theory by adding two important elements: the development of a non-positivist conception of the law –which in his early work was simply "*in nuce*"; and two new argumentative structures: non-monotonic reasoning and balancing. Nevertheless, what today is understood by legal argumentation studies would include, besides the work of the forerunners and of the standard theory, at least the following: (1) logical-formal analysis of arguments, on the line of traditional legal logic; (2) studies on evidential legal reasoning (argumentation on facts), which have considerably developed in the last years; (3) approaches like that of "reasons for action," on the line of Joseph Raz or Robert Summers; (4) philosophical conceptions, like Dworkin's or Nino's, that tend to view the law from the dimension of practical reason; or (5) scholarship inspired by the tradition of dialectics, topics, or rhetoric. Moreover, it should be added that the interest in argumentation in recent times is not confined to law, but it also exists in many other fields of social sciences and philosophy. Precisely one of the most influential conceptions of argumentation in general, the "pragma-dialectic approach" of Van Eemeren and Grootendorst, has inspired the model of analysis and evaluation of legal argument that can be found in the work of Eveline Feteris.

The existence of that voluminous theoretical body makes it possible to raise the issue of the possibility and the convenience of building something like a patchwork theory of legal argumentation, a theory that could integrate all that variety of approaches.[7] The way to carry out this project might consist in following the classical structure of continental legal dogmatics, distinguishing between a general part and a special part. The general part would be devoted to elucidate the notion of argumentation, by distinguishing between a very abstract *concept* of argumentation and different argumentative *conceptions* or perspectives. In this way, reasoning is always relative to a language; it presupposes some problem, some question to which reasoning gives an answer; it can be seen as an activity – the activity of reasoning – or as the result of that activity – for instance, the text of a judicial decision; and it can be evaluated on the basis of different criteria. However, these same elements can be understood in different ways, which leads to the following perspectives: the formal or logical perspective, the material perspective, and the pragmatic perspective – within the last one we should distinguish, in turn, between a rhetorical and a dialectical approach. What is peculiar about legal reasoning would be the need to take into account all those three or four perspectives, although one of them may be predominant over the others depending on the context in which the argumentation is made, the sector of the law, etc. From here, a special part could be built. In that special part the main point would be to try to answer the three big argumentative questions that arise from the practice of law: how to understand and analyze a legal argumentation, how to evaluate it, and how to make an argumentation.

Balancing and Principles

Practically no one questions nowadays the relevance of principles and of the argumentative approach in law. However, many jurists and legal philosophers maintain a very hostile attitude toward what is called – not very clearly – "principialism," "argumentativism" or – an even more obscure expression – "neo-constitutionalism."[8] What these scholars come to show is their distrust toward a conception that weakens the authority of the settled law – the law laid by the legislators or the by the framers of the constitution – and fosters judicial activism by encouraging judges to use an argumentative

[7] See Atienza (2006, 2013)

[8] See Atienza (2017, chap. V-VI).

procedure which, in their opinion, lacks any rationality, namely, balancing principles.

However, although obviously it can be used in a wrong way, balancing is a kind of argument with a structure – a two stages structure – that is perfectly recognizable; to which inevitably we must resort in certain kinds of cases; and in relation to which it is possible to set some criteria of rationality that keep it away from arbitrariness.

In fact, within the balancing process made by a judge two stages or steps can be distinguished. The first stage begins noticing that, in relation to a given case, two – usually-different principles apply, and they yield two solutions, respectively, that are incompatible between them (this would be the first premise); in the second premise one establishes that, given such and such circumstances that are present in the case, one of the principles defeats the other (the well-known "Alexy's weight formula" would amount to the external justification of this second premise); and the conclusion is a general rule – in the sense of logical universality – that ties the *class* of such circumstances to the normative consequence of the prevailing legal principle. In the second step the starting point is the very general rule so created – that is, the conclusion of the first step – , now taken as a major premise, and the particular case to be solved is subsumed in it.

Courts need to resort to this balancing procedure whenever they come across a legal gap in the level of rules, whether it is a normative gap (a case with no solution) or an axiological gap (a case with solution, but that solution is axiologically inadequate, in relation to the ends and values of the legal system itself). In the first situation, balancing is unavoidable, since the court cannot refrain from deciding; and in the second one – when there is an axiological gap – , not to balance would be possible, but at the prize of incurring legal formalism.

Finally, the (right) use of balancing entails to observe the criteria of practical rationality – above all, that of universality when creating the new general rule – , so that balancing should not be seen as a purely casuistic, arbitrary procedure.

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Legal Arguments: A View from a Rational Legislator

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Introduction

In addition to the legislator who historically enacted the law and the legislator at the time of its application, both of which exist in real life, there is a third idealized or fictional type of legislator that plays a central role in the justification of interpretative decisions (Dascal and Wróblewski 1991, 430): the so-called "rational legislator" (Nowak 1969, 80).

The importance of this construct lies in the fact that arguments used to justify interpretative decisions derive most of their strength from this ideal figure of the perfect, rational legislator, who is often identified with the real legislator. Interpretative decisions are justified, arguments used, and meanings chosen or rejected as if the real legislator were eminently rational.

To analyze this figure and its importance for legal interpretation, I will first describe the rational legislator, go on to list his supposed attributes, and finally show how some of the most common legal arguments derive their ability to justify the attribution or rejection of possible meanings from this ideal construct of the rational legislator.

The Fiction of the Legislator's Rationality

In contemporary legal culture, often by constitutional imperative, a judicial decision must be justified in order to show, among other things, that it was arrived at by applying a legal norm enacted by the legislator and not invented by the judge and also to prove that it is rational. In other words, justifiable by "good reasons" (Wróblewski 1990, 107; Dascal and Wróblewski 1991, 429). To achieve this, the solution is always attributed to the will (usually implicit) of the legislator, despite the gaps, shortcomings, or obscurities that may arise in the application of the law: the judicial body acts *as if* legal system were coherent, complete, unambiguous, equitable, and conducive to an only right answer (Ost 1978, 108). That goal requires the author of the legislative product to be endowed with extraordinary qualities impossible to find in a real lawmaker, making it necessary to invent an idealized, fictional figure which, since Leszek Nowak coined the term in 1969, is known as the "rational legislator" (Nowak 1969, 80).

It is important to note that when one appeals to the legislator's rationality, one is not referring to an ideal model, a series of requirements that the real legislator must fulfill in order for his conduct to be considered rational or a hypothesis subject to case-by-case verification (Wróblewski 1979, 196–200; Wronkowska 1987, 148–149; Ziembinski 1978, 175–179; Igartua 1990, 115; Nino 1984, 85). The rationality of the legislator is dogmatically and uncritically accepted, without verification or debate, though not as a *psychological* thesis (jurists know perfectly well that the real legislator is far from rational), but rather as a *methodological* premise: jurists interpret legal texts *as if* they accepted that the real legislator is rational (Nowak 1969, 83; Igartua 1990, 115). Therefore, the legislator whose rationality is assumed is not the same as the legislator who historically made the law or even the current legislator, but a construct used for justificatory and eventually also heuristic purposes (Dascal and Wróblewski 1991, 430).

Thus, in contemporary legal culture, the assumption that the real legislator is rational – in other words, that he acts according to the postulates of rational behavior – has become the fundamental argument for justifying interpretation (Nowak 1969, 81; Calvo 1986, 114).

The legislator's rationality works as follows: the receiver (the interpreter) reconstructs the sender's (the lawmaker's) meaning, by projecting onto the sender (or the text) a notion of rationality ("S/he asks not what the sender *would* have

meant, but what the sender *should* have meant") (Dascal and Wróbleswski 1991, 433).

The Attributes of the Rational Legislator

As we will see later, the presumed attributes or qualities of the legislator lend persuasiveness to the principal tools used to justify interpretative decisions. These attributes are the traits of rational behavior, encompassing every aspect of the various conceptions of rationality: formal and substantive, instrumental and communicative (Wróblewski 1990, 101).

There is a fair degree of consensus among authors in terms of identifying the attributes of the rational legislator and distinguishing between those of a secondary or ancillary nature (correct expression, *travaux préparatoires* as an expression of the legislator's will, and formal rigor), as they have a simple assumption of rationality, and essential attributes, which boast an irrefutable assumption of rationality (Ost 1978, 160–174). This means that if the consideration of a secondary attribute entails questioning an essential one, the former would be sacrificed (Bobbio 1971, 244).

The main characteristics attributed to the rational legislator according to the authors who have written on this subject are as follows (Bobbio 1971, 244; Ost 1978, 160–173; Ziembinski 1978, 179; Nino 1984, 85–86; Ezquiaga 1987; Igartua 1990, 120–124):

1. **Correct expression**: the legislator is precise, uses ordinary language correctly, knows and respects the customs and conventions of legal language, and manages to say what he wants to say in a legislative text.
2. **In documents prepared prior to the enactment of the law, the legislator expresses himself more freely and broadly:** this is why *travaux préparatoires* are considered a suitable means of determining the legislator's will. In this case, in a way the rational legislator relies on the historical legislator, referring to documents drafted by the latter before the law was enacted (Dascal and Wróblewski 1991, 430).
3. **The legislator is rigorous when ordering legislative texts and arranging the titles of laws and their sections:** the structure, order, and titles of legislative texts are not at random but the product of careful planning and therefore reflect the legislator's will.
4. **The legislator does not contradict and respects the constitution:** he knows and is aware of all previously enacted laws and legislates accordingly.
5. **The legislator adopts means suitable to his ends:** Bobbio called this the "rule of reasonableness in accordance with the goal" (Bobbio 1971, 244), an idea based on the purpose-oriented nature of the lawmaker. In this case, the legislator exhibits a "technical" rationality typical of a person who plans and executes a strategy that will efficiently achieve the intended goal (Wróblewski 1979, 190–196).
6. **The legislator does nothing futile:** an economic person by nature, he enforces the rule of non-redundancy, according to which every law must have a clear, specific aim and each of its terms must contribute to achieving that aim without enacting superfluous norms.
7. **The legislator is equitable:** he treats everyone who is in the same situation equally and treats those who are not equal differently.
8. **The legislator is far-sighted:** he provides a norm for every legally relevant situation that may arise.
9. **The legislator has a logical and extra-logical understanding of the relationship between different laws:** for this reason, legal (valid) norms are not only those explicitly formulated in their corresponding documents but also those that, by accepted rules of inference, can be drawn from written norms.
10. **The legislator has epistemological rationality:** he is assumed to have the knowledge (beliefs) of an educated person, particularly those of an average expert on the subject in question. In this respect, the rational legislator is "omniscient" (Nino 1984, 86).
11. **The legislator is axiologically rational:** although her system of values is presented as the result of a deduction or induction

from, for instance, the values expressed in constitutional texts or legislative preambles, the rational legislator becomes a receiver open to different axiological systems.

12. **The legislator is unique, omnipotent, and imperishable:** despite the changes in real legislators, the rational legislator is regarded as if he remained the same over time, meaning that his will is valid until revoked by the expression of an opposite will.

In short, the rational legislator is assumed – regardless of whether or not such traits are found in the real legislator – to use language precisely, express his will better in legislative discussion, be formally rigorous, never contradict himself, suit the means to the desired ends, do nothing in vain, be equitable and far-sighted, have sufficient logical and extra-logical knowledge, and be epistemologically and axiologically rational, unique, omnipotent, and imperishable.

Legal Arguments from the Perspective of a Rational Legislator

The idealized, fictional image of a rational legislator endowed with the aforementioned attributes is maintained because it is an important argument used to support the judge's interpretation, allowing him to justify it while preserving the separation of powers and the judge's neutrality (Ost 1978, 178–180; Lenoble and Ost 1980, 152; Ost and Van de Kerchove 1987, 124). One might say that the arguments most frequently used in our legal culture to justify interpretation are the most common precisely because they stem from the attributes of the rational legislator (Nowak 1969, 80; Igartua 1990, 114; Dascal and Wróblewski 1991, 436; Calvo 1986, 114). To put it another way, that fictional rational legislator is the source of their persuasiveness and ability to justify the attribution of meaning to normative texts. One could even say that the attributes of the rational legislator are what allow us to determine whether or not interpretative arguments and rules are correct. Yet, at the same time, the legislator's rationality is largely maintained because it means his decisions are guided by explicit and deductive justificatory arguments (Dascal and Wróblewski 1991, 427).

The figure of the rational legislator has not been incorporated (at least not explicitly) in the influential reconstruction of interpretative arguments carried out by, for instance, MacCormick and Summers (1991, 1997). However, we can detect its influence in several aspects of their theory of argumentation. Although this theory mainly focuses on which arguments are suitable, how they work, and the conditions in which they apply, the problem of the source of their ability to justify interpretation has an important place (MacCormick and Summers 1991, 516–521). Even so, the "underlying values" that give arguments their justificatory force (their "fire-power") fundamentally the values of legal and constitutional order (MacCormick and Summers 1991, 532–539), explain why *those* arguments are considered good reasons to justify an interpretation, but not how they manage to justify the evaluations and choices it implies.

In any case, the influence of the rational legislator postulate is apparent in the role assigned to the legislator's intention, the "transcategorical" argument from intention (MacCormick and Summers 1991, 515, 522–525). In addition to being ubiquitous in linguistic, systematic, and teleological/deontological arguments, the considered intention may be that of the historical legislator who enacted the text being interpreted or that of an ideal rational legislator (Bengoetxea 2015, 150–153). For example, no one questions the fact that teleological reasoning always entails an evaluation (MacCormick and Summers 1991, 518–521), but the reference to the rational legislator makes it easier is to camouflage these evaluations, for regardless of the value judgment about the positive or negative consequences of an interpretation, the decision will be adjudicated to the legislator, making it possible to maintain a (false) image of the judge as a mere enforcer of the norms provided by that legislator.

It would be impossible to provide a complete list of the ideal legal arguments in our legal culture for justifying interpretation and its connection

with the construct of the rational legislator. However, by simply examining some of the most studied arguments, firmly entrenched in legal practice, we can clearly perceive their reliance on this construct (Tarello 1980, 341–387; Ezquiaga 1987):

1. **The semantic argument** justifies a meaning by assuming that the legislator expressed himself properly, so that the meaning of a statement corresponds to the rules of the language in which it is written, because if the legislator wanted to give it a different meaning he would do so by providing a legislative definition. In addition, as a corollary to rationality, it must be assumed that the same terms are used to say the same thing and different terms are used to signify different things. Finally, as a rational legislator does nothing superfluous, one must also conclude that every word serves some meaningful purpose (Ziembinski 1978, 180; Igartua 1990, 120).
2. **The argument *a contrario*** justifies that the legal consequence contemplated for one case is not extended to other different cases. It is founded on the assumption that the legislator's rationality leads him to expressly indicate the cases he intends to regulate; therefore, his will must have been to exclude other cases which could have been considered included prima facie (Ezquiaga 1987, 165–171; Ezquiaga 1994, 83–84).
3. **The psychological argument** justifies the meaning that reflects the legislator's will as expressed in the *travaux préparatoires* of the legislative document (Ezquiaga 1987, 183). It is also easy to detect the presence of the rational legislator in this argument: his intention is relevant to the attribution of meaning for, even when considering the will of the real legislator, the latter is identified with the rational legislator, whose characteristics are attributed to the real individual (Ezquiaga 1994, 93).
4. **Arguments *sedes materiae* and *a rubrica*** justify meaning based on where the statement is located in the legislative text and/or the title of the document or of its sections or articles (Ezquiaga 1987, 117–118 and 125). Both are predicated on the rationality of the legislator, as he is assumed to have arranged matters logically and correctly conveyed his intentions in the titles and sections of laws (Ost 1978, 162; Igartua 1990, 120–121). Their foundation and persuasiveness lie in the supposed existence of a rational systematization of legal texts, another expression of the legislator's (rational) will (Ezquiaga 1994, 91–92).
5. **The argument *a cohaerentia*** is based on the assumption that the rationality of the legislator does not permit contradiction, so an interpretation can never reveal that two norms have given incompatible regulations to the same case (Ezquiaga 1987, 99; Bobbio 1971, 245). Therefore, the attributed meaning must be compatible with all other laws in the system (Ost 1978, 163), especially the constitution. That goal requires a real effort to achieve regulatory compatibility (e.g., by interpreting laws according to the constitution) or, when applicable, restoring the rationality of the legislator and the coherence of the system with some of the rules designed to select one norm and rule out the other in the case of conflicting norms (hierarchy, chronology, and specialty) (Igartua 1990, 122; Ost 1978, 163). These rules also reflect the legislator's rationality, as the prevalence of the superior norm is justified by the assumption that the superior legislator is more rational than the inferior one; that the more recent law is superior because the legislator knows all laws and intended to repeal the older norm; and that the special norm is superior because it was created to regulate a specific case (Ezquiaga 1994, 90).
6. **The teleological argument** justifies the attribution of meaning by appealing to the purpose of the precept, understanding that the norm is a means to an end. The basis of the argument is undoubtedly the assumption that the legislator sets certain goals for which the norm is the most suitable means, and the text should therefore be interpreted in light of those ends (Ezquiaga 1994, 95–96; Igartua 1990, 122; Bobbio 1971, 245). This entails

the assumption that the norm is suited to the intended purpose (Ost 1978, 171).

7. **The argument of non-redundancy** justifies that the meaning attributed to a statement is one that does not merely repeat something established by another norm, as the legislator does nothing futile and, in his rationality, does not enact redundant laws, as he considers all previously created norms (Ezquiaga 1987, 227–231; Ezquiaga 1994, 94). Therefore, a statement should not be understood as the reiteration of another, ruling out redundant meanings (Bobbio 1971, 245; Igartua 1990, 121; Ost 1978, 172).
8. **The pragmatic argument** justifies that the meaning attributed to a statement is the one that makes it most effective rather than one that would render it useless. The basis is the same trait of rationality underlying the argument of non-redundancy: the legislator does nothing in vain (Ezquiaga 1987, 275–277; Ezquiaga 1994, 95), and all laws must be made in such a way that the observance of some does not entail ignoring others (Ziembinski 1978, 180). Therefore, when a statement has two possible meanings, one must choose the meaning that gives it some practical usefulness and reject the one that renders it ineffective (Ost 1978, 172).
9. **The equitable argument** justifies the attribution of those meanings which allow situations of the same type to be treated the same way (Bobbio 1971, 244). Its basis is that equity is another assumed trait of the legislator's rationality, and every interpretation should uphold that principle (Ost 1978, 173). Therefore, when a statement has two possible meanings, one must choose the meaning that reaffirms the legislator's equity and reject the one that questions it by treating people in the same situation differently.
10. **The analogical argument** justifies applying a solution the law prescribes for one case to another which is not regulated but similar to the first. Its basis is the premise that if the legislator expressly regulated a certain case, he would want all similar cases to be treated the same way, assuming that in regulating one case he has tacitly regulated all other similar cases. The legislator's rationality likewise justifies the obligation to fill potential gaps in the legislation which, as a rational work, must not have any shortcomings (Ezquiaga 1994, 78). Therefore, an interpretation should never reveal the legislator's lack of foresight (Ost 1978, 174).
11. **The argument *a fortiori*** justifies applying a solution the law prescribes for one case to another which is not regulated but has an even stronger reason for deserving it. Once again, the foundation of this argument is the assumed (implicit) will of the legislator, who has not failed to foresee the unregulated case but simply called attention to the most frequent or typical cases while also contemplating all other cases that warrant regulation *with greater reason* than those specifically mentioned (Ezquiaga 1994, 81–82).
12. **The historical argument** justifies attributing a meaning that reflects the way in which different legislators throughout history have regulated the case which the current statement regulates. Its basis is the fact that the legislator is conservative, and although he may make new laws, he does not wish to stray from the "spirit" or "essence" of traditional regulations. Therefore, when in doubt as to a statement's meaning, the solution is justified by arguing that this is how the regulation of such matters has traditionally been understood. In order to understand the justificatory capacity of the argument, it is essential to refer to the rational legislator – not a collective, historically mutable assembly, but a *person* who remains unchanged over time and is the sum of those who have participated in the process of making all the rules which have been in force at some point in time in a legislative system (Ezquiaga 1994, 96–97).
13. **The argument *ad absurdum*** justifies rejecting a meaning because it would entail a solution contrary to one of the rational legislator's attributes which, for this reason alone, must be deemed "absurd" (Ezquiaga 1994, 97; Igartua 1990, 123–124; Bobbio 1971, 245). Although several of the

arguments listed here can be used both positively and negatively, in the sense that they can justify the attribution as well as the rejection of meanings (for instance, a meaning that does not correspond to the legislator's will, that questions his coherence, is contrary to the intended purpose, is redundant, or renders a regulation ineffective), this argument is the one that specifically justifies the rejection of a meaning because it constitutes an affront to the legislator's rationality. Therefore, the construct of the rational legislator can be used positively, when it serves as a support for justifying the best among possible decisions, or negatively, when it is used to eliminate the "wrong" decision (Wróblewski 1990, 113; Dascal and Wróblewski 1991, 436).

Conclusion

Legal doctrine mentions two cases in which a judge would sacrifice the legislator's rationality and the arguments derived from it: when the text is clear enough to leave no room for doubt about its interpretation (Bobbio 1971, 248–249), and when public (and above all legal) opinion is so sensitive about an issue that the judge is forced to take it under consideration, even against the will of the rational legislator (Ost 1978, 175–177; Igartua 1990, 125). In the first case, the legislator's rationality would give way before the clarity or unambiguous meaning of the normative text, and in the second it would be limited by the principle of the separation of powers. However, the superhuman justificatory power derived from the idealized fiction of the legislator's rationality is such that even these cases would benefit from its protection. On the one hand, the contemporary theory of legal interpretation has shown that no text, however clear, is safe from doubts about its meaning being posited in an act of application (Hart 1961, VII.1). On the other hand, the will to adapt interpretation to social changes can be considered another attribute of the legislator's rationality, so that, even when it seems that will is being abandoned, an interpretation adapted to public and legal opinion would be justified.

This entry has attempted to show that the rationality of the legislator is a powerful tool for justifying interpretative decisions, serving a clearly ideological function by concealing the inevitable subjectivity of the judicial authority. Upon invoking it, the decision is invested with the traits of rationality that are attributed to the legislator, making it equally rational. As the legal practitioner knows that the real author of the norm lacks those qualities, the figure of the rational legislator is constructed in order to present the interpretative decision as rational (Peczenik 1969, 42). However, we must remember that, by invoking (the properties of) the rational legislator, the interpreter camouflages his personal preferences (Lenoble and Ost 1980, 157; Ziembinski 1978, 178 and 187). In addition, the legislator's rationality, in becoming a common benchmark of interpretative activity, favors fairly homogeneous and stable decisions, thus serving what has been called a *rarefaction function* (Ost and Van de Kerchove 1987, 123; Lenoble and Ost 1980, 156–157). In this respect, the construct of the rational legislator "is ambivalent with respect to the distinction between static and dynamic ideologies of interpretation. The reason is that the justifications contained in the ideology can use static values, dynamic values, or a combination thereof, without any reference to a historical or actual law-maker treated as a real person" (Dascal and Wróbleswki 1991, 439).

Nevertheless, it is important to note that the rationality which the rational legislator confers upon the judicial decision is always a rationalization a posteriori (Lenoble and Ost 1980, 157), thereby entering a vicious cycle: the judicial decision is rational because it refers to a rational legislator, but the legislator is rational thanks to the fact that the judicial decision is based on the assumption of his rationality.

In conclusion, I must point out that the construct of the rational legislator only appears to justify the rationality of the judicial decision. This is because, on the one hand, as mentioned, invoking this construct hides the interpreter's personal preferences which, whatever they may be, are presented as rational under the magical protective cloak of the legislator's rationality; and, on

the other, because the legislator's rationality justifies the use of arguments that can lead to different and even contradictory solutions. For instance, whether the interpreter argues by analogy or *a contrario*, both the extension of the legal consequence to similar cases and its restrictive application to the expressly indicated cases will be justified by appealing to the attributes of the rational legislator: one who wants to treat similar cases the same way, but who also expressly mentions the cases to which he wants to attribute a legal consequence. Argumentative weakness is exposed because in many cases the interpreter, merely by referring to the rational legislator, fails to justify the legislator's extensive or restrictive intention, the similarities or differences between mentioned and unmentioned cases; in short, the choice between analogy or argument *a contrario*. Whatever solution is adopted will be justified by appealing to the legislator's rational behavior, and thanks to that magical invocation, the decision is rendered rational and even presented as just.

In light of the foregoing, it seems clear that the rationality of the legislator, his supposed attributes, and the interpretative arguments derived from them serve a patently ideological function in justifying the judicial decision and concealing the judge's subjectivity and creativity, thereby upholding, even on such flimsy bases, the separation of powers and the judge's subjection to the law.

Cross-References

- ▶ Consequentialist Argument
- ▶ Interpretation: The Realist View
- ▶ Legal Argumentation
- ▶ Legal Reasoning: Virtues
- ▶ Legal Rhetoric
- ▶ Logic and Law
- ▶ Perelman, Chaïm

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Legal Conventionalism

► Conventionalism

Legal Education

► Education: Legal

Legal Epistemology: Evolutionist Jurisprudence

► Evolutionist Jurisprudence: Legal Epistemology

Legal Gaps

► Gaps: Legal

Legal Institutionalism

► Institutionalism: Legal

Legal Knowledge: The Hermeneutical Point of View

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Introduction

One of the most recurrent discussions in legal-theoretical debates is that concerning the knowledge of law. What do we know when we know the law? What kind of knowledge is legal knowledge?

Legal knowledge denotes an activity, aiming at the representation, reconstruction, systematization, conceptualization, and explanation of phenomena regarding legal experience. This activity can proceed at more than one level. Law can be studied from different disciplines and perspectives. The term "legal knowledge" is used in various senses. It can assume different forms (Viola and Zaccaria 1999: 409–435; Peczenik 2005: 1–2, 8–10; Núñez Vaquero 2013: 53–81).

Among the phenomena which are commonly supposed to constitute a part of legal experience, "there are rules of many kinds, actions performed by judges, officials, lawyers and citizens, certain legal institutions, certain kinds of discourses including arguments produced by judges in resolving legal controversies, speeches and accounts presented by agents as to the intentions, motives, reasons, values, commitments which they advance as explaining or justifying their behaviour or attitude in relation to legal rules" (Villa 1984: 257). These phenomena are rooted in a social practice. They have a meaning and significance, only in so far as they are in themselves meaningful and important in the life of individuals and communities to which they belong. It is impossible to approach these phenomena correctly or to understand their meaning adequately, without standing inside the legal system, without actually or potentially participating in the law game. Legal knowledge is always internal to law as a purposive activity.

The Primacy of Understanding

Knowledge is the result of our dispositions, abilities, skills, and competences. The knowledge of the law is not simply the capacity to describe and to repeat the rules but includes the ability to think about them, to interpret them. Knowledge of the law is like knowledge of a language. This competence consists of being able to use it in different sets of situations. Legal knowledge is a way of doing something with rules and other legal materials (White 2002: 1397–1399). Knowing the law is knowing how to do certain things, namely, detect the sources of law, individuate the rules of a particular legal system, interpret the legal texts, determine the content of

law, give reasons to justify an interpretation, etc. Moreover, one cannot be said to know what the law is if one is not able to give an account of why a certain legal decision is made, a certain inference was drawn, a certain argument was accepted. All these things are instances of *knowing how* and of *knowing that* (Tuzet 2016).

Law is a cultural and historical product. It is a social, interpretive practice (Dworkin 1986). As Gadamer insists, legal practice provides a model of the relationship between past and present that is the cornerstone of human understanding (Mootz 2010: 327). All understanding occurs as the product of the experiences of the interpreter within a given historical and social situation.

Hermeneutics traditionally involved the study of reliable methods for interpreting texts. Gadamer's hermeneutics abandons the focus on methodological rules and instead analyzes the conditions that subtend all human knowledge. The relationship between language and reality, and also the nature and limits of knowledge, is the subject for Gadamer's hermeneutics.

Legal hermeneutics is rooted in philosophical hermeneutics (Smith 2011: 23–24, 30–31). It takes as its object of inquiry the interpretive process itself and seeks interpretive practices designed to respect that process. The law's authority could be preserved only if it were interpreted, that is to say, actualized with respect to a concrete case or a concrete situation. An act of understanding is always interpretive. The integration of application into understanding indicates that knowledge and action are essentially interrelated (Gadamer 1986: 313–321). Understanding belongs to the field of praxis. Cognition is here subjected to praxis. Legal practice is an exemplary instance of the thesis that legal knowledge cannot be separated from legal application. We deal with a "practical knowledge," which designates any knowledge involved in one's deliberations about how to act or what to choose in a given situation. In this sense, "practical" means "with a view to decision and action" (Finnis 1980: 12).

Therefore, hermeneutics points to a constellation of three orienting ideas. These ideas might be called the *priority of interpretation*, the *priority of situation,* and the *primacy of the practical* (Crease 1997: 261–263).

From a hermeneutical point of view, understanding is something that occurs inside of a tradition (Gadamer 1986: 334), which is a framework of assumptions and beliefs: a system of intelligibility. Understanding is always a historical project of rearticulating the tradition in response to the practical demands of the present (Mootz 2010: 10; Pastore 2014: 10–14). Legal hermeneutics denotes a specific conception of the act of understanding phenomena such as law. It stresses that all acts of understanding, interpretation, and cognition are bound to tradition. We always approach the law through a certain pre-understanding, based on tradition, employing the conceptual, normative, and methodological tools which our legal culture has provided us with. Jurists never approach the "object" of their cognition or interpretation with a tabula rasa consciousness. Legal actors derive the conceptual, normative, and methodological resources necessary for their activities from the existing legal-cultural reservoir (Tuori 2011: 46–47, 50).

Understanding is the interplay of the movement of tradition and the movement of the interpreter. It requires an internal point of view, the point of view of the participant. Understanding is based not upon a categorical partition between object and subject but upon the involvement of the scholar, who is not a neutral observer, but whose experience is inextricably linked up with the act of understanding. The perspective of legal scholars is the perspective of participants in the legal practice (Smith 2011: 23–25). The hermeneutical approach highlights the connections between them and a common language. The jurist must acquire a certain familiarity with the legal language spoken by the community; this familiarity, in its turn, is based on having membership of that linguistic community. The determinacy of the meaning is the result of the communicative interaction and the participative actions. Legal practice can be fully understood only by understanding its point, that is to say, its value, its significance or importance, as conceived by the people who performed it, engaged in it (Finnis 1980: 3–4). Legal knowledge consists of socially constituted and approved patterns.

According to Ricoeur (1986: 210–211), the structure of knowledge, when it is applied to "human things," to social phenomena (including law), implies the correlation between understanding and explanation. Knowing phenomena always and necessarily implies formulating them in a language, inserting them in a context of categories and paradigms. Knowledge participates in the work of understanding, which is determined by the constant mutual influence of the part and the whole.

The Influence of Legal Knowledge on Legal Practice

It cannot be ignored that, in the legal domain, ethical values penetrate deeply "inside the law." Certainly, it happens today in constitutional legal systems, through explicit or implicit constitutional principles (which often concern fundamental rights). So there is a presence of ethical value-judgments in legal knowledge. Legal hermeneutics recognizes this idea and criticizes the positions – peculiar to some versions of analytical philosophy – that have fully accepted the value-freedom principle and the value-neutrality thesis. They involve the opposition between descriptive or informative legal discourses on one side, and evaluative discourses on the other side. These descriptive discourses are considered as instances of what may be suitably called "legal knowledge" (Villa 1997: 448–454).

According to traditional legal positivism, legal knowledge represents either a description of facts (psychosocial facts) or a description of normative objects or linguistic entities, which should be performed as if these objects were facts, that is, with the neutrality which supposedly characterizes description in natural sciences. But, in the law game, we deal with statements which put ethical value-judgments firmly inside the domain of legal knowledge. It follows that understanding a given positive law requires an ethical appreciation of its values. Knowing and evaluating (above all, in the light of internal substantive moral arguments) a given positive law are two connected parts of the same cognitive enterprise (Villa 1997: 477).

Legal hermeneutics poses a radical challenge to the model of disinterested, outside observer. This model assumes the idea that the jurist is dealing with a "thing" that exists independent of his/her intervention, in a perspective of a clear separation between "observer" and "observed." There is a legal world which is conceived as a reality beyond the interpreter, an object to examine. Hermeneutics, in line with contemporary epistemology, follows up a different clue. The observer acts inside the observed system and is a part of it. When applied to legal knowledge, this assumption means not only that the jurist's activity defines his/her object but also that the system as a whole frames and shapes his/her activity. The observation determines what is to be observed, because the result of an observation depends on what the observer chooses to observe. When applied to legal knowledge, this means that there is not an objective reality, because the jurist picks and chooses the "legal object" to construct and interpret.

Jurists are a part of the system that they know (Bin 2012: 10–19). Legal knowledge may be conceived as a complex field that includes both the object and the subject of knowledge. The jurist – as part of the "legal system" – works inside a cultural context. How knowledge is advanced relies on the interaction between the observer and his/her community.

Whereas positivist method insists on a sharp distinction between fact and value, description and evaluation, object and subject, hermeneutics asserts the unity of these dualities. Legal hermeneutics aims at freeing jurisprudence from an epistemological model developed elsewhere; it aims at finding and suggesting forms of rationality and objectivity that are different and distinct from those founded on the epistemological model of the natural sciences (Viola and Zaccaria 1999: 422–430).

When we talk about "legal knowledge," we talk about "legal science" (*scientia juris*, *Rechtswissenschaft).* But this word, frequently used in many European countries, is ambiguous. It may refer to any kind of legal research (Peczenik 2005: 2–3).

Legal scholars sometimes present legal knowledge as an explanatory enterprise. "Explanations"

can be the same as conceptual analysis of legal concepts and rules, especially through clarification of their connections with other concepts and rules. However, a scholar who intends to transmit "knowledge of the law" may tend to conceal justification behind the façade of explanation. Legal scholars describe the structure of the law and develop justificatory standpoints for various parts of this structure. So scholars perform both description and valuation.

Jurists draw a distinction between conducting a cognitive inquiry into the law as it is (*de lege lata*) and making justified recommendations for the lawgiver (*de lege ferenda*). But, as every legal scholar knows, the distinction between *de lege lata* and *de lege ferenda* is not clear-cut. Legal science pursues knowledge of existing law, yet in many cases, it leads to a change of the law (Peczenik 2005: 6). It aims to attain knowledge of the law. At the same time, it is a part of the law in the broadest sense. We deal with a fused descriptive and normative modality.

Legal science maintains its influence on legal practice. Legal hermeneutics is aware of legal science's participation in legal discourse. Different legal activities, such as law-making, adjudication, and legal scholarship, fulfil different tasks in the legal system. Yet they all participate in a common discourse which links their contributions together. Law involves the interaction of several subjects. In other words, it includes not only the commands and decisions of the political authority but also the doctrines and the concepts worked out by jurists, and the decisions of judges. Through its work legal science participates in ongoing legal discourse, which deals with the existence, the interpretation, and the application of legal norms (Tuori 2011: 6–7, 11–12).

Conclusion

Legal science is itself a kind of rational reconstruction of the law. Comprehensive classificatory schemes, concepts structuring the normative material and its regulatory object, principles condensing its normative contents have usually originated in legal scholarship. One of legal science's tasks consists of bringing coherence into fragmented legal materials. Legal science embodies *ratio* in face of the *voluntas* of legislation and court decisions. It contributes to pronouncing and safeguarding the law's *ratio*. In such a way, it participates in the continuous development of the legal order and contributes to its production and reproduction (Tuori 2011: 102, 150–151). A legal system evolves within itself and continually has to create order in the jungle of facts and normative acts. One of the main aims for which law exists is guiding social actions and coordinating them so that in society there will be order and justice.

The law is essentially a problem-solving enterprise, which implies the existence of legal rules and principles, procedures, decisions, doctrines, concepts, interpretations, and arguments. Its configuration is closely linked to legal science and to the class of jurists. It is formed by accumulation of a patrimony of practical knowledge. From this point of view, knowing the law is associated with its practicability.

Cross-References

- ▶ Hermeneutical Legal Theory
- ▶ Legal Science
- ▶ Legal Science: Analytical Conceptions
- ▶ Legal Theory: Descriptive
- ▶ Legal Theory: Types of

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Legal Method(s) of (and About) the Law

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Introduction

The idea of methods in the legal domain has typically referred to ways, steps, or forms to provide standard solutions to a legal problem, for example, to identify the purpose of a statutory provision – or defend a conclusion from a set of evidential data in a trial. Most of those notions of legal methods relate to a legal interpretation theory (Tarello 1980; Guastini 2014; Chiassoni 2019) and evidential reasoning (Anderson et al. 2005; Pardo 2013; Finkelstein and Fairley 1970; Haack 2009). However, other theories interested in legal methods deal with the foundations or grounding of those notions of legal methods. For example, any form of legal argument assumes the rational activity of legislators. Another expressions (i.e. "Mandatory", "Forbidden", "Permitted") set of theories interested in grounding legal methods is logical theories dealing with deontic. The thesis is that any method that includes using norms and inferences assumes a deontic logic at its core.

Other logic families, such as informal logic, claim relevancy for grounding sound legal methods. However, with a lesser degree of scope, some theories claim that a particular form of reasoning is horizontally assumed to solve most legal problems. Two examples are abduction theories and theories of inference to the best explanation. In broader terms, a theory of argumentation, legal reasoning, and virtues-based reasoning-justification all try to account for – and sometimes prescribe – the operating conditions of legal methods. In addition to the manifold view on this topic, there is a discussion as to what is (or should be) or if there is a method for constructing legal theories or scientific-like discourses about the Law (Bix 1995; Tamahana 2001; Twining 2009; Bódig 2021). Finally, we should notice that there is another sense of "Legal Methods" encompassing many of the different approaches we have just sketched. In some law schools, mainly in North America, there is a course called "Legal Methods" (Ginsburg and Louk 2020) that introduces the concept of Law, the American legal system, legal terminology, problem-solving, legal reasoning, and even the role of policy.

The picture of many different understandings of methods in the legal domain requires a meta-theory to organize the views and proposals. To approach the meta-analysis of the "Legal Methods," we propose to start from one fundamental underlying assumption (section "Methods in the Legal Domain, a Fundamental Assumption") and two different levels of analysis (section "Levels of Objects, Purposes, and Analysis of Legal Methods").

Methods in the Legal Domain, a Fundamental Assumption

The underlying assumption is that the reference of the concept of "Law" is not an object, a thing in the world, like chairs and rain. Instead, the concept of Law (and its reference) results from a theoretical reconstruction. *Theories* are human products that focus on accounting and

reconstructing a region of reality. In the most balanced fashion, the theory must account for various pretheoretical intuitions: coercion, normativeness, institutions, social grounding, morals, goals and social values, rules, motivations, and a special relationship with natural languages. From the multifarious pretheoretical intuitions, theorists set out to present an organized and coherent view that best depicts the pretheoretical intuitions that they judge relevant: given their interests, ideological orientation, or the explanatory goals that they seek. In that sense, every theory has an assumption as to what is relevant in the world a *relevance assumption.* It is an assumption that will determine the object of explanation (or the theorization enterprise, more broadly speaking).

A Theory About the Nature of Law (or simply a Theory of Law) is a systematic and coherent view that presents and accounts for the relevant pretheoretical intuitions about the legal phenomena. Accepting a particular Theory of Law is to accept the view *that a* theory depicts, the image of the Law that emerges from accepting the relevant pretheoretical intuitions that are key for the theorist. To speak of a legal domain is tantamount to embracing a Theory of Law.

There is a background Theory of Law in any intermediate theory as well (Twining 1984), be it a narrow theorization (i.e., The Foundations of Tort Law) or a theorization with a more ambitious scope (i.e., The Foundations of International Law). There is a particular assumption about how the Law is conceptualized from a given Theory of Law.

Along the same lines, the notions of *Legal Methods*, *Legal Reasoning*, *Legal Argumentation,* and related concepts, strongly depend on a particular Theory of Law. To provide an example, let us assume a Theory of Law along the lines proposed by J. Raz: Law is a set of standards exclusively produced by specific complex social facts, in particular acts of authorities, that function as primary organs (Raz 2009a). Raz's legal theory accepts the distinction between the application versus the creation (or development) of the Law, which implies the distinction between the Law that is known and certain and the Law that is uncertain. From this theoretical point of view, an inquiry into the legal methods as they are practiced in a particular legal system (i.e., an *empirical survey of argumentative practices,* D'Almeida and Michelon 2017) is only relevant if and only if the user of the legal method is a primary organ. Other legal actors, such as lawyers, scholars, or citizens, are irrelevant as sources of theoretical reconstruction: because what counts as Law is what the legal authorities say the Law is. With the same indifference, a theory of reasoning with principles (Atienza 1999; Alexy 2003) ought to be treated: legal principles (or moral principles, for that matter) are irrelevant in reconstructing the Law. Legal authorities are *legal* authorities because of the exclusionary reasons they provide, regardless of the process involved in delivering their decisions and, more importantly, regardless of the moral content of the reasons involved in their decisions (Raz 2009b). Whatever model of legal reasoning we fancy must always include as a theoretical premise the reasoning of the primary organs giving exclusionary reasons in their decisions. The concept of Law provided by a Razian-like Theory of Law determines the relevance and understanding of the Legal Method(s) and other related concepts. The nature of Law in a Razian-like theory circumscribes the *explicandum* of any discourse about Legal Methods.

A completely different scenario is presented if we were to embrace a different Theory of Law as a starting point. If, for example, we adopt a Theory of Law that reconstructs the Law from a particular model of legal adjudication and, in particular, a theory that states that scrutiny into the nature of moral reasoning (Dworkin) is the correct approach to any legal concept, then a completely different approach to the Legal Method(s) is obtained. Under an anti-positivist-like Theory of Law, an empirical survey of the *professional* approach to the notions of *Legal Methods*, *Legal Reasoning*, *Legal Argumentation,* and related concepts, is altogether rejected. Therefore, the presentation of certain argumentative schemes in certain practical contexts should be eschewed. The construction of legal reasoning models that aim to explain, classify, and categorize forms of reasoning within specific legal systems is incorrect – as much as useless – to account for the

notion of *Legal Reasoning.* A pragma-dialectical approach (Grootendorst and Eemeren 2004) or a rhetorical-practical (Perelman and Olbrechts-Tyteca 1973) approach would be stricken down as irrelevant from the anti-positivist-like Theory of Law. The moral point behind the legal cases where the legal arguments appear is the fundamental starting point. It is a starting point that leads to closer scrutiny of the moral question behind legal cases (what Dworkin called *jurisprudential questions;* Dworkin 2008, 228) and the moral arguments that ground any particular answer to the moral question. To approach the Legal Method(s) in this way is, again, to embrace a Dworkinean-like depiction of the Law (i.e., a particular Theory of Law).

From a Dworkinean concept of the Law the central premises of any theoretical enterprise directed toward the Legal Method(s) domain must subscribe to several theoretical grounds of the anti-positivist-like Theory of Law. First of all, Law is an interpretative concept. Second, all Legal Reasoning is a special case of Moral Reasoning. Third, every legal case under dispute has a preexisting and objective right answer. Lastly, there is a fundamental legal method on which all other methods are built: the reasoning that utilizes moral theories to reconstruct past decisions and the particularities of present cases to adjust said past decisions. In a nutshell, the reasoning scheme implied by the concept of *Law as Integrity* is a form of reasoning that, ultimately, is preceded by the concept of *coherence* (Amaya 2015).

In analyzing and classifying the different works on Legal Methods, we always need to inquire about the underlying assumption about the nature of the Law and what Theory of Law is being expressively assumed (or taken for granted).

However, a finer-grained criterion is needed to classify the literature on Legal Method(s).

Levels of Objects, Purposes, and Analysis of Legal Methods

Let us start by noticing that even from within a particular Theory of Law, there could be different *objects* of theorization that, in turn, respond to different theoretical purposes. As a result, there can be works on Legal Methods presenting a radically different account despite sharing the same Theory of Law as background.

For example, within the legal positivism tradition of the Italian Analytical School of Legal Realism (Guastini 2021) (hereafter "ILR"), we can distinguish two main types of theoretical enterprises when it comes to Legal Method(s). The first enterprise aims to register the criteria used by courts law for statutory and case law interpretation, the arguments that accompany the result of the interpretative activity, and the steps of reasoning involved when the legal authorities conduct said activity and arguments. Since all interpretation is both an act of attributing meaning to legal text and the product of said act, the observation and register of the acts of interpretation and their products are the main objects of theorization. There is no *method* to a legal problem in the sense of a series of steps that provides a correct legal solution, *ex ante*. There is only the *ex post* picture:

- The activity displayed by courts when attributing meaning to legal texts
- The arguments presented
- The schemes of reasoning employed when delivering a legal ruling

The example from ILR is an academic enterprise focusing on the Legal Method(s) *in* the Law.

However, a second and different theoretical enterprise takes the first as its starting point. Legal practitioners, but most saliently, legal scholars describe, reconstruct, explain, and often criticize the Legal Method(s) *in* a particular legal practice. ILR has accounted for the theoretical discourses *about* the Legal Method(s) *in* the Law: explaining the metalanguage generated by practitioners and legal scholars and often arguing in favor of a *scientific-like* rationale of that metalinguistic practice (most prominently Bobbio, Abbott 2009). This second theoretical enterprise is focused on the Legal Method(s) *about* the Law. The distinction between these two forms of the theoretical enterprise seems valuable enough to be applied to most (if not all) families of

contemporary legal theories in connection with the general theme of the Legal Method(s).

A remarkable application of these two levels of analysis is exemplified in the French tradition (although mutatis mutandis with the same results for the German tradition) of approaching Legal Method(s). In the literature, we can distinguish between the Legal Method(s) *in* the Law, which means a theorization in the various forms of techniques employed for statutory interpretation, including some forms of argumentation that date back to the French and Belgian *exegetical school* (e.g., the literal interpretation, or the systematic interpretation). This approach toward Legal Method(s) differs from the academic enterprise that is set to explain the methods of the legal scholars when describing, reconstructing, and critiquing legal materials, including the practice of statutory interpretation of the courts. In fact, within the *exegetical school,* we can find different works that tried to explain the interpretative *post-Napoleon* legal practices. In other words, the explanation of the *Science du Droit* and its methods. Therefore, this second level of analysis is focused on the Legal Method(s) *about* the Law rather than the Legal Method(s) *in* the Law.

The same two-level distinction helps illuminate what is often obscured by the title of *a theory of legal reasoning*. One theoretical enterprise is to explain and reconstruct the different forms of reasoning in the various legal contexts we encounter, that is, the forms of reasoning associated with a particular legal task: interpretation, fact-finding, fact-adjudication, norm-creation, systematization, and negotiation. For each legal task, we could theorize the structure of reasoning and their rules of inference (if any); or their way of presenting information to justify standpoints in a rhetorical (not logical) manner. A group of theories focused on those tasks-reasoning pairing would be a theory of Legal Method(s) *in* the Law – or Legal Method(s) in particular legal context by certain legal actors and roles. However, theories of legal reasoning embark (without a fair warning) on a different type of theoretical enterprise, where they theorize about the many different accounts *of* legal reasoning independent of *any* particular legal task (or even a particular legal system). For example, in the literature, there are theories of legal syllogism (Hernandez-Marin Hernández-Marín 2013; Wróblewski 1969), legal abduction, or in a more abstract form, theories of inference applied to the Law (Cohen 1977). With the same theoretical scope, we also find theories that present a single concept (e.g., coherence or incomplete induction, hermeneutics, or probability) as the main fabric of legal reasoning (Laudan 2006; Amaya 2015). These theories aim to bring all those task-reasoning accounts together into a single abstract model (a universal kernel) of legal reasoning (either for every possible legal task or some restrain domain, e.g., evidence, legislation, or precedent). Finally, and without a clear statement of purpose, those abstract theories often pursue an explanatory or normative purpose (either a theory that explains legal reasoning or seeks to prescribe what counts as *correct* legal reasoning). All the theories described before are placed on the second level of analysis, Legal Method(s) *about* the Law (the same scenario presented here for theories of legal reasoning can be extrapolated to theories of *Legal Argumentation*).

The distinction between the two levels of analysis is proven essential to inquire into a central theme of legal philosophy. However, it is seldom associated with Legal Method(s), namely, the vast array of methodologies behind Legal Theories, which is the method for devising, constructing, comparing, and selecting a Legal Theory (be it a general or an intermediate theory, such as theories of comparative Law). All notions of Legal Method(s) and their associated concepts require a theoretical standpoint that defines what counts as "Law," but the question we are posing is on a metatheoretical level: What are the methods of legal philosophers when constructing legal theories? Again, this inquiry could be a descriptive-reconstructive enterprise or a normative metatheoretical enterprise.

In the first form, a descriptive-reconstructive metatheory, the inquiry is tackled by accounting for the different philosophical assumptions made by each Legal Theory. So, for example, we would need to account for the natural language philosophy and Speech Act theories underlying Hart's Concept of Law. Another example would be the

Aristotelian-Thomistic categories that underpin Villey and Finnis' Natural Law theory and the natural reference ontology and language philosophy embraced by Moore's concept of Law as a Functional Class. Nevertheless, there are many other examples just to mention a few more-let us recall the Logic Positivism that inspired much of Alf Ross' legal philosophy. The Neo-Kantian and "as-if" hypothetical construction is much said to have influenced Kelsen's Pure Theory of Law or Rudolf Von Jhering's influence on Karl Llewellyn's concept of "Law Jobs."

A different approach to the metatheoretical question of the method(s) of Legal Theory is a normative approach. Under this view, the relevant issue is determining what form of Legal Theory *correctly* represents the *true* nature of the Law. While there are few examples of legal theories arguing a unique method to build a Legal Theory, the normative claim about a *correct* versus an erroneous Legal Theory is widely assumed among legal theorists (Raz 2009a, 91–92, Shapiro 2011). A Legal Theory assumes that there is a *correct* form of Legal Theory when they invite us to discard its theoretical rivals or when it aims at criticizing the implausibility of other theories of Law. A Legal Theory that defends that there is a *correct* (or even a true) account of the Law adheres to a *Theoretical-Realism*. Theoretical-Realism views the Law as a thing in the world, a phenomenon that, like any other phenomenon, can be explained. True statements of a legal theory correspond to the true nature of the Law. A Legal Theory is correct (a Theoretical-Realist would say) when a theory *accounts* for the *genuinely* relevant features of the legal phenomena and represents them coherently and truthfully.

Examples of this view are the Legal Theories defended by Shapiro, Dworkin, Finnis, Thomas Aquinas, Moore, Hart, Bentham, Greenberg, Frank, and Olivecrona. To be a Theoretical-Realist, one only needs to adhere to the basic proposition that there is a *correct* form of Legal Theory that yields the *correct* representation of the Law, where "correct" could mean logically, morally, ontologically, epistemologically, or methodologically correct. Notice that even a Neo-Kantian approach along the lines of Kelsen adheres to that basic proposition. The same is true for legal theorists that advocate for a less naïve approach to the legal phenomena in favor of the introduction of a political point of view or the analysis of the discourse-ideology behind legal institutions most prominently, almost all of the American Critical Legal Movement (Caputo 1988; Kelman 1987), the French Neo-Marxists (Bandyopadhyay 1972), or the South American Legal Critique (Bergalli and Martyniuk 2003). They all defend their methodological approach to the legal phenomena as the correct approach to identifying the nature of the Law. This is the case even for the extreme movements of French Legal Critique that, paradoxically, claim that there is no unique or correct, privilege, method, for building a correct Theory about the Nature of Law (Martine Kaluszynski 2012).

Conclusion

When analyzing the Legal Method(s), literature is helpful to retain the fundamental assumption that Law is not an object but the product of a theorizing activity. Any analysis of a method in the legal domain (be it reasoning, interpretation, fact-finding, evidence, legal science, or argumentation) is conditioned by an underlying (or accepted) Theory about the Nature of Law. In addition, two forms of theoretical object or explicandum should be distinguished in the literature regarding Legal Method(s). On the one hand, methods relative to legal practice or jurisdiction (Legal Methods in the Law). On the other hand, methods are relative to the discourses about Legal Methods and the Law in general (including legal dogmatics, doctrine, legal science, and jurisprudence). Finally, there is a crucial distinction in the levels of discourse. The most abstract form of Legal Methods about the Law is that of the methods for building a theory about the Nature of the Law (although the same discussion and distinction apply to other forms of intermediate theory, such as the theory of evidence, of legal reasoning, legal argumentation, or of legal interpretation).

The fundamental assumption is that a Theory about the Nature of the Law determines the scope

of any theory of Legal Method(s), its characteristics, and its purpose. However, the fundamental assumption leads us to a wide-open question: which is the correct method (if any) to construct a Theory about the Nature of Law? On the one hand, some authors defend a Theoretical-Realism, a one-way, one-sided form of creating legal theories: a theory is the result of a correct, truthful finding about an entity, called Law, independent of the theorist's activity. On the other hand, there is the opposite view that Law is not an object or an entity independent of the theoretical discourse.

Each view has profound implications for the analysis, understanding, and debates in and about Legal Method(s).

Cross-References

- ▶ Abduction: Legal
- ▶ Comparative Law: Methods of
- ▶ Deontic Logic
- ▶ Interpretation: The Realist View
- ▶ Law and Economics: Methods of
- ▶ Legal Argumentation: And Truth
- ▶ Legal Argumentation: Informal Logic
- ▶ Legal Argumentation: Principialism
- ▶ Legal Arguments: A View from a Rational Legislator
- ▶ Legal Methods: Statutory Interpretation – The Argument from Intention
- ▶ Legal Reasoning: Virtues
- ▶ Legal Science: Methods of (France)
- ▶ Methods of Philosophy of Law: Wittgenstenian Approach
- ▶ Philosophy of Law: The Naturalistic Approach
- ▶ Pragma-Dialectical Approach of Legal Argumentation as Specific Form of Rational Discussion

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Legal Methods: Statutory Interpretation – The Argument from Intention

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Introduction

The intention of lawmakers occupies a dominant place in statutory interpretation. Some authors have even argued that determining the meaning of a statutory provision amounts to determining the lawmaker's intention (Bennion 2001, p. 10). Furthermore, it has been maintained that legislative intention is the "essence" of a statute (Crawford 1940, p. 246) as well as the "polestar" (Cross 2009, p. 58) and "touchstone" of statutory interpretation (Cross 2009, p. 58). Although there may be other elements, legislative intention is an "indispensable part of any approach" to it (Solan 2005, p. 478). This latter remark could be used to ground a more general thesis: since any approach to statutory interpretation must take into account legislative intent, its dominant place is not contingent – i.e., circumscribed to a particular jurisdiction –; rather, it is a universal characteristic of all modern legal systems (Raz 2009, p. 298).

As a result, the interpreter's function consists in making the intention of the lawmaker effective (Crawford 1940, p. 244). In accordance with this conception, the rules of statutory interpretation are to be understood as legal devices that contribute to identifying such an intention (Bishop 1882, p. 57). Admittedly, there are other rules; however they would be mere auxiliary and subsidiary means, which are to be resorted only in cases of doubts and whose value stems from aiding the courts to discern the lawmaker's intent (Black 1911, p. 46).

Nevertheless, whether determining the lawmaker's intention truly is or should be the aim of statutory interpretation – or an important factor – is highly controversial. In this entry, two topics will be addressed: the justification of the prevailing role of intention in statutory interpretation and the problems it exhibits.

The Justification of Legislative Intention

Many reasons have been put forward to justify the claim to primacy of legislative intent. Here the word justification will be employed in a broad sense as comprising both conceptual and normative justifications. Three arguments will be examined: the argument from democracy, the argument from authority, and the argument from communication.

The Argument from Democracy

The roots of the argument from democracy lie in the endless dispute between the natural law and the legal positivist tradition. While for the former the intention or will of the sovereign does not perform a decisive role in legal interpretation, for the latter it does. As Olivecrona has put it:

> The whole problem of so-called interpretation of law underwent a profound change when the law of nature was eliminated. Jurists were denied recourse to a never-failing fountain of justice. Since real law

> was nothing but the will of the supreme authority, the aim of interpretation could only be to ascertain the contents of this will (1971, p. 43)

Call this thesis "the argument from sovereignty."

The argument from democracy is a special case of the argument from sovereignty. For in accord with a democratic conception of the political power, the sovereign is the people. Hence, the content of the law corresponds to the intention or the will of the people and its interpretation must aim to figure out such an intention or will.

The argument from democracy has a normative character. *Legitimate* law is grounded in the intention or will of the people, then the interpreter has to follow it because only in that way his/her interpretive decisions are *legitimate*. In that, judges are constrained by the intention of the lawmaker.

As can be observed, the argument from democracy relates also to principles such as the separation of powers and the rule of law.

The Argument from Authority

The argument from authority has been defended by Joseph Raz. It is composed of the following two theses:

(i) Law necessarily claims to legitimate authority.
(ii) There is a connection between law's claim to legitimate authority and the primacy of intention in statutory interpretation.

The first thesis states that one of the essential features of law is that it raises a claim to legitimate authority (1994, p. 215). For Raz, a person holds authority if his/her utterances as to ways of behavior are reasons for behaving in that way regardless of other relevant reasons applicable to the practical conflict (1986, p. 46). However, not all authorities are legitimate. An authority is legitimate, Raz points out, if and only if "there are sufficient reasons to accept it" (1986, p. 40). Here, "the service conception of authority" arises.

This conception is a theory that provides legitimacy to authorities. It is composed of three theses: the "normal justification thesis," the "dependence thesis," and the "pre-emption thesis" (1986, p. 53; 1994, p. 214). I will focus exclusively on the first one. In a nutshell, the normal justification thesis affirms that an authority is justified as long as people that are subject to it are likely to be better off if they accept and follow the directives issued as authoritatively binding, rather than following the reasons that apply to them directly (1994, p. 214). Let us move now to the second thesis, which in strict sense is the proper interpretive thesis.

The second thesis is called by Raz the "authoritative intention thesis" (2009, p. 275). Entrusting law-making powers to authoritative institutions presupposes that they will intend to do so, that is to say, they will make the law they intend to make (2009, pp. 274, 282). Intentions are necessary "to any act to count as a law-making act" (2009, p. 285). This means that, on the one hand, the content of law *is* that which legislators intended to make, and, on the other hand, the content of law is such, *because* the legislators intended to make it. Therefore, interpreting statutory provisions is to reflect the intentions of their authors, since otherwise the idea of authority turns out to be meaningless (2009, p. 298). This version of the argument can be considered as conceptual, as it stems from the very idea of the authoritative character of law. In other terms, the connection between law's claim to legitimate authority and the primacy of intention in statutory interpretation referred to by (ii) is conceptual.

However, it is possible to sustain that Raz presents a normative argument as well. The primacy of the lawmaker's intentions stems from the concept of legitimate authority. As already discussed, Raz defends the normal justification thesis as a legitimating criterion for authority. If people entrust legal institutions with the power to issue authoritative provisions that replace their own judgment in conflicts of action, then "the *legitimacy* of legislated – that is, authority-based – law depends on it being interpreted in accordance with its authors' intentions" (2009, p. 298 – emphasis added). In this form, the connection mentioned by (ii) is normative.

These two theses shape the argument from authority.

The Argument from Communication

Statutory provisions are linguistically formulated, so what has been argued about the meaning of linguistic texts may shed light on the question of the meaning of statutory provisions.

Recently, Richard Ekins has elaborated an original account of this argument. His starting point is a thesis on ordinary communication. Ekins suggests that ordinary communication is a rational enterprise, for agents utter "some words in some context for some reasons" in pursuing to convey an intended meaning (2017, p. 2). Hence, the interpretation of any communicative act aims to ascertain the language use, and consequently, the speaker's intention (2017, p. 4). Admittedly, words have meanings regardless of the speakers' intentions, yet the most important concern in a particular communicative exchange is how the speaker intended to use these words. In so arguing, Ekins claims to the primacy of utterance meaning over sentence meaning. This can be called "ordinary intentionalism."

Ordinary intentionalism is complemented with a thesis on the nature of lawmaking (2017, p. 6). Lawmaking, as Ekins conceives it, is an activity where an authority deliberates and decides to use certain words to convey an intended meaning (2017, p. 22). "Legislating," Ekins argues, "is an act on an intention" (2014, p. 19). By enacting statutory provisions, legislatures manifest their decision to change the law of a community, what is expressed in the conveyed intended meaning (2012, p. 246; 2014, p. 19). The analogy with an ordinary speaker is apparent and Ekins unfolds its consequences:

> the reasonable interpretation of a statute centers on inference about the intention of the enacting legislature, a process of inference to which the semantic content of the statutory text and the legislature's apparent reasons for acting are highly relevant. Interpreters infer the legislature's intention in the particular context of enactment, which varies somewhat by system and from legislative act to legislative act (2014, p. 23).

This thesis can be named "legal intentionalism."

With this understanding of the nature of lawmaking, Ekins has built a bridge for drawing a structural mirror between a speaker and his/her utterances, and a lawmaker and his/her statutory provisions. Ordinary and legal communications share their rational character, and this leads us to stand out the place of intention in ascertaining the meaning of such communications. Legal intentionalism is grounded on ordinary intentionalism. As Ekins puts it: the "[i]ntended meaning is and should be the object of interpretation in ordinary language and in law" (2017, p. 24).

The Problems to Legislative Intent

The three arguments described above offer solid grounds to justify the predominant role of intention in statutory interpretation. Nevertheless, intention as a legal method faces a series of problems. In fact, their clarification is a condition to evaluate the plausibility of those arguments. The problems can be labeled as follows: (A) the ontological problem, (B) the vagueness problem, and (C) the epistemic problem.

The Ontological Problem

It has been claimed that those who endorse the primacy of legislative intention in statutory interpretation assume that it is the expression of a "thinking," "motivated" (Dickerson 1975, p. 206) or "anthropomorphised" organism (Sullivan 2007, p. 31). This impression, the criticism goes, is false. There is no such a thing as a legislative intention in these terms.

The ontological problem comes in two versions. According to a first version, legislative intention does not exist because groups do not exist as differentiated ontological entities. Paradigmatically, statutes are enacted by institutions which are composed of a large number of people. Then, since a group of individuals do not form a differentiated ontological entity, there cannot be any kind of a legislative intention that is different from the individual intentions of each member of the group (Radin 1930, p. 870).

The second version focuses instead on the intentions, rejecting that group intentions may

exist despite there being groups or collective entities. Put differently, from the existence of collective entities does not follow the existence of collective intentions. These entities are not apt to having intentions because for having intentions having a mind is a condition. In concrete, Parliaments do not have minds, therefore they are not able to bear intentional states. In the diverse stages of the legislative process, we can only single out the individual minds of every member of the Parliament; it is not possible to ascertain a "supermental state of the statute or institution itself" (Dworkin 1998, pp. 335f). Then, there is no such a thing as a legislative intent.

Furthermore, two additional questions need to be addressed: "Whose intentions?" and "Which intentions?".

In regard to the first question, let us assume a democratic framework. From a *general* point of view, the answer to the question "whose intentions?" seems trivial: the intentions of the people. Nonetheless, the people as collective body are always absent; the people act by means of representational acts. So this general answer is not enough. We need to look at the *concrete* ways of representing the people.

Present-day democratic procedures to enact a statute are complex, they involve different bodies, multiple individuals, several stages, and so on. Therefore, the question "whose intentions?" becomes highly convoluted. Are the intentions of those representatives who took part in parliamentary committees relevant? What happens if those who drafted the bill are not representatives? What is the place of intentions as to the bill of members of the executive or judicial branch? In addition, members of parliaments are multiple and transitory. Thus, to begin with, it is difficult to single out one legislative intention since the Parliament, in this sense, expresses a bunch of intentions. Moreover, as long as one of the trademarks of democratic representation is its transitoriness, the composition of parliaments changes. Thus, as has been put by Dworkin: "Which historical people count as the legislators?" (1998, p. 315). Even more: Should we take into account all the members of the Parliament or only the majority that voted in favor of the statute? The more stages the legislative procedure has, the more intricate the identification of the pertinent "historical people" becomes.

In relation to the second question, we observe that there are multiple intentions linked to a statute. This multiplicity stems from two sources. First, as seen above, modern legislatures are composed of multiple members, then, there are consequently multiple intentions. Secondly, the architecture of legislative procedures consists of a series of progressive decisions, thereby the recognition of a concrete decision that expresses the intention of the lawmaker becomes more intricate.

Intention as legal method would not be problematic if all the intentions were convergent. However, this is not always the case. Actually, as for the first source, quite the opposite is true. Parliaments are houses of disagreement. Members of a Parliament most of the time have contradictory intentions. True, it can be argued that we just have to consider the intentions of those who vote in favor of the bill; however it is not that simple, for they may differ greatly regarding the intentions as to *why* they did so. Thus, as Dworkin has said: "When these intentions differ somewhat from one to another, how are they to be combined in the overall, composite institutional intention?" (1998, pp. 315f).

The phenomenon just portrayed is not exclusive of the first source of multiplicity. As to the second source, representatives may change their minds as long as the discussion and the legislative procedure move forward. In such a case, the lack of convergence stems from an inner inconsistency.

In sum, the ontological problem defies seriously, in different forms, the very possibility of talking about legislative intentions.

The Vagueness Objection

There are multiple ways of understanding legislative intention. We refer to the "declared intention," the "historical intention," the "semantic intention," and so on. In this sense, legislative intention is a vague concept. Hence, even though legislative intention is commonly referred to as the object of statutory interpretation, there is deep disagreement regarding its specific content. This

disagreement can be summarized by three questions:

1. What is the nature of legislative intention?
2. Which temporal legislative intention is relevant?
3. Which material legislative intention is relevant?

Let us address these three questions respectively.

The Nature of Legislative Intent

To begin with, legislative intention can be understood *subjectively*. In that, when we talk about the subjective intention of a Parliament, we refer to its actual intent. What can this mean for a collective body as a Parliament? The subjective intention of a Parliament consists in the "mental states" of the legislators. As we talk about the mental states of an individual subject we might do so in relation to a collective subject. Following this subjective conception of legislative intent, the aim of statutory interpretation is the search for what the legislators had in their minds while enacting a statutory provision.

By contrast, it is possible to defend that the aim of statutory interpretation consists rather in constructing an *objective* legislative intent (Barak 2005, p. 28). Accordingly statutory provisions are to be interpreted in light of the intentions of an ideal legislator. In this case, objective legislative intention is dependent on a particular conception of an ideal legislator. For example, an ideal legislator could refer to a fair, reasonable, or constitutional legislator as well as to a rational one.

Finally, a combination of the previous options can be presented. TRS Allan's account can be considered an exemplar of this. He advocates for a complex and holistic theory of statutory interpretation and legislative intention. His first step is defending that the statutory text has to be read as a purposive enactment that expresses "the will of a legislative majority" (2004, p. 688). This aspect of Allan's approach corresponds to the subjective dimension. However, it is a quite thin approach. Allan then incorporates other kinds of considerations to the idea of intention. He believes that "we cannot separate our inquiry about what Parliament has done from our evaluations about what, as a *reasonable legislature*, it ought to have done" (2004, p. 688 – emphasis added). As a result, the process of determining the legislative intention always entails a constructive facet, where the use of critical judgment is unavoidable (2004, pp. 690f). "The legislative endeavour will be itself interpreted," Allan states, "most plausibly, in the light of those fundamental values or commitments that the constitution is normally understood to protect" (2004, p. 688).

This aspect of Allan's conception of legislative intention corresponds to its objective dimension. In consequence, this combination gives rise to a *mixed* account on the nature of legislative intention.

The Temporal Dimension of Legislative Intent

The second question concerns the temporal aspect of legislative intent. We can differentiate between historical and evolutive intent. This variable has to be synchronized with the aforementioned possibilities. Thereby we may distinguish six types of intentionalism:

(i) Historical subjective intentionalism
(ii) Historical objective intentionalism
(iii) Historical mixed intentionalism
(iv) Evolutive subjective intentionalism
(v) Evolutive objective intentionalism
(vi) Evolutive mixed intentionalism

Of course, we might expand the alternatives by unfolding the internal discussions of each of these categories – e.g., fair or rational legislator. For our purposes, however, this scheme will suffice. Let us concentrate on (i) and (iii).

The first possibility corresponds to the classic account of intentionalism. Actually, commonly intentionalism is identified with historical subjective intentionalism. As the scheme shows, this identification is incorrect. Sometimes, this version is called "genetic argument" and, it is said, requires "an investigation into the meaning of legal terms as intended by the historical legislator and/or into the purposes he pursued by enacting

the statute" (Alexy and Dreier 2016, p. 85). Accordingly, it may be understood as a type of historical interpretation (Alexy and Dreier 2016, p. 87).

The third possibility refers to counterfactual intentions. In this scenario, interpreters ask how the legislator would have interpreted the statutory provision in the current case, had it taken the specific circumstances into consideration. Since the case was not foreseen by the legislator, the interpreter cannot make reference to *actual* intentions. However, the intention is inferred from other actual intentions and projected to the circumstances at stake. In this sense, it is an objective reconstruction that takes as starting point the subjective intention of the legislator.

The Material Dimension of Legislative Intent

The third question concerns the substance of legislative intent. Mainly, we can find two possible objects of the legislative intent: meaning and aim. The former refers to the semantic meaning, so we can talk of "semantic-based intent" (Dworkin 1997, p. 117). The latter, in turn, concerns the purposes that the legislators tried to achieve when enacting a statutory provision, so we can name it "aim-based intent" (Bix 2012, pp. 152f).

Meaning and aims can be integrated in a scheme where the nature and time of legislative intention are also taken into account. This leads us to a differentiation of nine types of intentionalism:

(i) Semantic-based historical subjective intentionalism
(ii) Aim-based historical subjective intentionalism
(iii) Semantic-based historical mixed intentionalism
(iv) Aim-based historical mixed intentionalism
(v) Semantic-based historical ideal intentionalism
(vi) Aim-based historical ideal intentionalism
(vii) Semantic-based evolutive mixed intentionalism
(viii) Aim-based evolutive mixed intentionalism
(ix) Semantic-based evolutive ideal intentionalism
(x) Aim-based evolutive ideal intentionalism

As can be seen, one of the main difficulties of intention as canon of statutory interpretation is that its material dimension relates to other traditional canons. In fact, the two options that have been offered as possible objects of legislative intention overlaps with the literal and teleological methods. Based upon this observation, MacCormick has suggested that legislative intention displays a "transcategorical" character (2005, p. 125).

In addition, there exist divergences in the internal structure of both semantic-based and aim-based intent. As we do in relation to the nature of legislative intent, we can distinguish between subjective and objective semantic meaning. While the former refers to what the speaker intended to mean, the latter to the social linguistic conventions or what a reasonable audience would understand.

In turn, taken aims into consideration, the same distinction arises: subjective and objective aims. Similarly, it has distinguished between "subjective-teleological interpretation" and "objective-teleological interpretation" (Alexy and Dreier 2016, p. 88). Whereas the former refers to the actual intention of the legislator, the latter relates to the reasonable goals and/or the social functions of the legal provision. In general, the subjective version of the aims seems to be the dominant. Ekins and Goldsworthy, for instance, have stated that "[t]he courts frequently employ the concept of a statutory 'purpose', possibly because it seems more objective. But a genuine purpose is surely a kind of intention" (Ekins and Goldsworthy 2014, p. 57). Consequently, drawing sharp distinctions between intentionalism and teleological interpretation may be misleading.

On top of that, aim-based intention exhibits a problem regarding its level of generality. To begin with, legislative intention may designate a set of *general* purposes. When enacting a statutory provision, the lawmaker tries to attain certain abstract goals. So we may say enacting a statutory provision is a means to achieve a general end. By contrast, the legislative intention may also refer to *specific* purposes. On the one hand, arguably,

these specific purposes can be understood as a way of unfolding some general purposes. Thereby, the more unfolded a general purpose is, the more specific a purpose becomes. On the other hand, these specific purposes may make reference to concrete applications of a statutory provision. In accord with this alternative, what is to be determined is how a statutory provision should be applied to a particular case. It relates to the extension of the words. This version is highly contested. Dworkin has argued that:

> We are governed by what our lawmakers said—by the principles they laid down—not by any information we might have about how they themselves would have interpreted those principles or *applied them in concrete cases* (1996, p. 10—emphasis added).

The Epistemic Problem

The epistemic problem takes a different shape depending on the nature of legislative intention. If its nature is objective, then the discussion relates to the way of constructing or reconstructing an ideal intention. By contrast, if its nature is subjective the discussion relates to the way of identifying an actual intent. Here just the latter will be addressed.

The identification of actual intentions poses two questions:

1. Where do we find legislative intentions?
2. How are legislative intentions discovered?

Where Do we Find Legislative Intentions?

What is the evidence that can be used to prove a legislative intent? Clearly, the main evidence of subjective legislative intentions is legislative history. To attribute meaning to a statutory provision, the interpreter must inspect the heterogeneous elements that give form to the legislative history of a statutory provision. Accordingly, the interpreter could inquire into the reports of the parliamentary committees, the executive bureaucracy, the opinions held by the drafters of the bill, and so on. Nevertheless, the reliability of legislative history has been called into question. Antonin Scalia, for instance, sarcastically has said that "[i]t is less that the courts refer to legislative history because it exists than that legislative history exists because the courts refer to it" (1997, p. 33).

Be that as it may, interpreters usually resort to legislative history, so that in order to strengthen its reliability, some conditions have been suggested. The most important of them is publicity. Since statutory provisions – and their respective meaning – aim to guide the behavior of their addressees, they have to be easily accessible. This requirement, as can be noticed, connects to the value of the rule of law. Likewise, it has been said that the documents that configure the legislative process must have been available to the very representatives during such a process. Alexy and Dreier have developed a formula to judge the weight of the evidence:

> The more official a commentary statement and the closer its relation to the parliamentary plenum, the greater is its weight. Of the greatest weight is an intention expressed clearly and unanimously by all participants in the plenum (2016, p. 87).

May the text play an epistemic role? An affirmative answer seems counterintuitive, for usually intentionalism is presented as the rival of textualism (Cross 2009, p. 2). A conciliating strategy takes the text as evidence of the legislative intention. In that, the thesis insists that the main aim of statutory interpretation is identifying the intention of the lawmaker, however the interpreter must rely on the form of expression thereof: the text (Bishop 1882, p. 60). We can say, thus, that the text in which the statutory provision is embedded is the "manifest intention" (Dickerson 1975, p. 208), the "objectified intent" (Scalia 1997, p. 17), or the "reservoir of legislative intent" (Crawford 1940, p. 255).

How Are Legislative Intentions Discovered?

"How are the intentions of the people who count as the legislator to be discovered?", asks Dworkin in *Law's Empire* (1998, p. 315). This question concerns the method that can be employed to grasp such materials.

Since we are dealing with a subjective conception of legislative intentions, the method is apparent: the empirical method. The interpreter has to engage in empirical research in using the materials that shape the legislative process.

It can be objected that the method is purely empirical. For statements on legislative intentions would also have a constructive character. On the one hand, as a creative builder, the interpreter will integrate diverse materials to articulate a picture of what should be understood as the legislative intent. On the other hand, as a loyal builder, the interpreter will have to be deferent to the legislator, as it is not his/her work to model an entirely new intent.

Conclusion

In many ways the intention of the lawmaker has be considered important for statutory interpretation. Several compelling arguments have been provided to ground such a relevance. Notwithstanding, legislative intention exhibits a series of problems. Their clarification and solution are crucial to judge the importance of legislative intent. This entry has drawn a picture of this scenario.

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Legal Norms as Hypothetical Imperatives

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Introduction

Framing legal norms as hypothetical imperatives may be understood as two different propositions. On the one hand, it may presuppose a twofold proposition, that of (i) envisaging legal systems

as conjunctions of legal norms (commands or *imperatives* issued by an *imperator*, the correlative of which are *duties* of the *commanded subjects*) and (ii) envisaging such commands as applying *conditionally*, i.e., to certain *hypothetical* behaviors of the commanded subjects, on given *hypothetical* state of affairs. On the other hand, it may presuppose conceiving all legal norms as including statements of practical necessity under a means-ends relation. In the latter sense, the *ought to do* or *ought to be* aspect of the legal commands – now seen as a *technical ought,* rather than the closely related *deontic ought* – is the thing required (the *means*) for the addressee to *legally* pursue some intended goal (the *end*). One should address these two main propositions separately.

The Legal Imperative in Legal Norms as Hypothetical Imperatives

A certain kind of legal positivism attempts to develop a content-independent account of legal normativity by construing legal norms as imperatives. Austin sustained that legal norms in their broadest sense (*law*) were invariably *species* of the *genus* "commands," particularly coercive commands (Austin 1832, 21). Therefore, legal norms as commands are only to be recognized as such when in conjunction with a directive speech in which a certain desire is expressed, the utterer (*imperator, qua* intelligent being) is vested with the "purpose (. . .) to inflict an evil or pain" upon the subjects (*qua* intelligent beings) "in case the desire be disregarded."

Main Features of Imperativism

One may divide Austin's assertions – under the tenets of imperativism – into four distinctive and expanded propositions. Firstly, legal norms are embedded in statements uttered in a directive speech the *direction of fit* of which is word to world. Legal norms are *prescriptions* of normative authorities the compliance with which is contingent: the addressees (*world*) are obligated to respect the commands of the *imperator* (*word*) but might not. This justifies the need – under this specific *political* account of law – for conceptually framing legal norms as coercive commands.

Secondly, the desire underlying the command uttered by the *imperator* is deemed an *ideal ought*. Borrowing a well-known sentence, the function of legal norms is to "urge people to realize the ideal [the desire of the imperator], to make them act in such a way that the description of the real approximates the description of the ideal" [von Wright 2007, 375; on the performance of non-expressive speech acts (e.g., directives) as entailing the successful expression of the mental state determined by the sincerity conditions of such non-expressive speech acts (i.e., the successful expression of a second, expressive speech act, e.g., the *expression of desire*), see Searle and Vanderveken 1985, 18 ff.]. The scope of legal norms may cover an ideal *ought to do* in which a certain generic action is obligatory or an *ideal ought to be* in which a certain state of affairs is to be obtained. In the latter, subjects are commanded – *impliciter* – to obtain this state of affairs by complying with any of the several alternative *ought to dos* that are apt for such under a *means-ends* relation (Von Wright 1997).

Thirdly, the aforementioned *ideal ought* may only be obtained through the issuance of commands – not permissions – as only the former directly pursue the *purpose of law,* that of people (institutionally) prescribing the behavior of people. Therefore, at least under a positivistic account of law, the ideal ought is necessarily an *act of will,* whether it is imputed to the *imperator* (e.g., the legislator) or the *legal community itself* (e.g., in case of customary law).

Fourthly, Austin's classic account for legal norms as commands the disregard of which entails "inflict[ing] an evil or pain" underlies the well-known view of Kelsen (1960). Under the latter, primary norms (i.e., norms that prescribe something) are only to be completely understood when conjoined with secondary norms that foresee the sanction for the non-compliance with the ideal ought. Do note, however, that, unlike Austin, Kelsen held that laws were commands directed to the *officials of the legal system*.

Imperativism and the Expressive Conception of Legal Norms

The imperative theory of norms transcends the Austinian claim about legal norms. It is one

version of the *expressive conception of norms* (Bentham, Austin, Kelsen, Ross), a theory that sustains that norms are language dependent, particularly the result of the prescriptive *use* of language. The expressive conception of norms is opposed to the hyletic conception (Kalinowski, Weinberger), which sustains that norms are conceptual and proposition-like entities – i.e., the *meaning* of certain normative sentences – the existence of which does without any linguistic expression or the pragmatics thereof (for a list of expressivists and hyleticists, see Alchourrón and Bulygin 1981, 95–124). Whereas expressivism focuses on the *function* of norms and the pragmatic aspect of norm formulations, hyleticism focuses on the *semantic aspect* of norm sentences.

The vast majority of expressivists only recognize commands as normative acts since only commands – *qua* speech acts – *pragmatically* intend to bring about changes in the real world. This, however, does not happen with hyleticists, who accept both mandatory and permissory norms. Under the expressive view, as the majority of its followers have it, permissions are purely negative notions equivalent to the negation of prohibitions. It is therefore simply the negation of commands (obligations or prohibitions) which allows for *permitted states of affairs*.

Several remarks have been directed at the imperativist thesis, generally seen as an out-of-date account of law and legal phenomena, particularly to the extent it does not accommodate for the concept of *legal rights.* This will be briefly addressed below in section "In Conclusion: Some Controversies in Framing All Legal Norms as Hypothetical Imperatives."

The Practical Imperative in Legal Norms as Hypothetical Imperatives

The concept of hypothetical imperative stems from Kant's original distinction in Morals between categorical (CI) and hypothetical imperatives (HI). The relevant passage is the following: "All imperatives command either hypothetically or categorically. The former present the practical necessity of a possible action as a means to achieving something else which one desires (or which one may possible desire). The categorical imperative would be one which presented an action as of itself objectively necessary, without regard to any other end. If the action is good only as a means to something else, the imperative is hypothetical; but if it is thought of as of good in itself, and hence as necessary in a will which of itself conforms to reason as the principle of this will, the imperative is categorical." (Kant 1785, 4:414).

Legal imperatives in the sense referred to by Austin structurally resemble moral imperatives in the Kantian sense: both regard *statements about what ought* [legally or morally] *to be done.*

Hypothetical Imperatives in Kant's Morals

It is held in Kant's moral philosophy that a supreme principle of morality – an objective, rationally necessary, and unconditional norm that one must always comply with irrespective of any desires one may have to the contrary (CI) – is the source of all moral requirements. The categorical nature of this command – an *absolute command* – stems from the fact that it applies *unconditionally*, subject to no exceptions: "act only in accordance with that maxim through which you can at the same time will that it become a universal law" (Kant 1785, 4:421). CI therefore applies to *actions* and *state of affairs* of any kind, simply by virtue of the addressees possessing *rational will* (i.e., it applies irrespective of any specific *will, state*, or *desire* of the addressees and subject to no *ends* previously established).

Quite differently, HI is a command of practical rationality uttered in *conditional*, *wenn/dann* form. Conversely, HI is by definition not an *absolute command*. It applies, in addition to the *rational will* of the addressee, only in case a certain goal having been a priori *willed* by her. In view of the above, whereas CI are expressed in sentences of the form "you ought to q," HI are primarily expressed in sentences of the form "if you want p, then you ought to q." If one opts to highlight the underlying *will* of the addressee, one may adopt the secondary form of "because you want p, then you ought to q." HI commands what *ought to be* (or *ought to be done*) in case addressees *want* to

pursue some *end*. In other words, *q* stands for a *means* to morally obtain *p,* which is the *end* of the addressee.

It is important to clarify, for the purpose of HI applying, the necessity of the *goal* set by the addressee deriving from her *will* and not an unwilled emotional/cognitive state of affairs. A qualitative difference is therefore stressed between *actively engaging in a choice regarding an end* and simply being under a certain state of affairs. Conditional commands of the type "if you are sad, put on some music!" do not constitute HI to the extent they do not comprise a *will* or a *goal* set by the addressee (Johnson and Cureton 2017). On the contrary, the properties of HI are predicated to a command of the type "if you drink, do not drive," that is "because you want to drink then you ought not to drive."

Hypothetical Imperatives in Law

Hypotheticity in connection with the law may be viewed under several different perspectives, depending upon what is viewed as hypothetical. For instance, this may depend upon *which* conditions one includes in the antecedent of legal norms: (i) *only* the conditions necessary for the consequent to apply, (ii) *also* the conditions of *validity* of the legal norms, (iii) *also* the conditions regarding the *duty* to obey the law, etc. One account of hypotheticity deals, not directly with the formal structure of legal norms – the specific subject of this article – but with *law itself as a system of hypothetical imperatives*. Some very brief remarks should be made on the subject.

Hypothetical Imperatives and the Duty to Obey the Law

Much like morals, the *duty to obey the law* is frequently envisaged as categorical (perhaps this being taught with a *purpose*), that is, something one must comply with despite any *end* being established by the addressee or any possible *desire* to the contrary (typical features of HI). However, there seems to be no ground for this categorical feature. The subject is closely related to Hart's internal point of view, to the extent it presupposes an *acceptance* of legal norms and its *use* by the addressees as guides to action (Hart 1994, 89–91).

It is claimed that legal norms are *not* autonomous reasons for action and the duty to abide by them should not go unsupported. The same has been affirmed in Morals by those who, claiming CI cannot go unsupported, sustain that Morals is a system of HI not only presupposing an acceptance of such system but also the establishment of some *end* (even if not a *selfish* end) by the addressees (Foot 1972, 305 ff.). Irrespective of one endorsing Hart's internal point of view in law, it is logical to assert that the *duty to obey the law* cannot arise out of the law itself since legal norms do not have *automatic reason-giving force*: such duty cannot be intra-systematic. On the other hand, arguing that law is itself a set of legal norms simply bypasses the problem of whether they can serve as *autonomous reasons for action*. Therefore, it seems a plausible option to sustain that the duty to obey the law is of some moral type. It remains, however, to be known whether such imperative *in itself* is of a categorical or hypothetical nature. It is relevant to stress, however, that if an *end* is set by the addressees of the command to obey the law – and nothing excludes that such end be a *collective end*, that is, an end *common* to several subjects of a community – then the duty to obey the law will be hypothetical under the Kantian conceptual apparatus, even if an HI of the assertoric type [Kant divides HI into (i) problematic (in case the end set by the addressee is contingent) and (ii) assertoric (in case the end is a matter of natural necessity)]. Let us now move on to the formal structure of legal norms.

Hypotheticity in the Formal Structure of Legal Norms and the Technical Ought

The sentence "if you want p, then you ought to q" may be transposed into the sentence "because you want p, then you ought to q." In other words – as seen above regarding Morals – *q* now stands for a *means* to *legally* obtain *p,* which is the *end* of the addressee. This relates to what von Wright (2007, 377) dubbed the *technical ought,* which entails the replacement of "ought to" with "must." Let us clarify some aspects beforehand.

To the exception of the Kelsenian concept – which includes individual norms – legal norms are generally understood as applying to a universal *open class* of subjects (*i.e., for all x,* a class which is subject to logical variations in time) (Ross 1968, 109–110). Within the analytical view, legal norms are individuated deontic units generally broken down into three components: (i) the norm-antecedent (*fattispecies, protasis*), (ii) the deontic operator, and (iii) the norm-consequent (*apodosis*). The antecedent is the descriptive component of norms; it may be further divided into subcomponents *(ia)* addressees, *(ib)* hypothetical action, and *(ic)* hypothetical state of affairs, i.e., the *norm occasion*. The deontic operator conveys the deontic direction of norms; it is invariably one of the three logically possible and interchangeable operators: *permission, obligation*, or *prohibition*. Lastly, insofar it comprises the effects projected upon the addressees under given subjective (*hypothetical action*) and objective conditions (*hypothetical state of affairs*), the consequent is the deontic reduction of the set of possibilities within the opportunities described in the antecedent [e.g., within the opportunities to do q_1, q_2, or q_3 in scenario *p*, the addressee is obligated to do q_2].

von Wright (1963, 73 ff.) drew his own division of categorical (CN) and hypothetical norms (HN) from Kant's theory of imperatives. He claimed that the condition of application of elementary norms is the condition which must be satisfied *if there is to be an opportunity* (Opp) for doing the thing which is the content of a given norm (i.e., the permitted or obligatory action). This is a matter of logical implication. There cannot be a (valid) command obligating *Ø* if, under circumstances *x,* there is no Opp to *Øing* (*impossibilium est nulla obligatio*) (Kelsen 1979).

Notwithstanding the above, even though any antecedent includes, at least, the basic condition of Opp for *Øing,* that logically presupposed condition need not be the *sole condition* of application: the norm *qua* deontic unit need not be elementary. Therefore, it may well be the case that a norm includes additional conditions, though logically uncorrelated to the consequent (i.e., conditions which are not Opp for *Øing*). One can illustrate von Wright's distinction between CN and HN with the following prescriptive sentences (assuming, for the sake of exemplification, that they are *legal*). "Men should take off their hats", however presupposing an Opp for any *Ø, that men be wearing hats* and *that hats not be taken off by themselves,* is a CN. There is no additional condition to the norm-content other than the logically presupposed state of affairs. Differently, "men should take off their hats if they go into a ballroom" is an HN: the condition related to the hypothetical action [if men *go* into a ballroom] is logically uncorrelated to taking off hats, therefore being additional to the state of affairs that constitutes the Opp for *Øing* (i.e., that men be wearing hats).

It is relevant to stress the similarities between von Wright's account of norms and Kant's account of moral imperatives. CN *do* in fact include a basic (implicit) condition for their application. However, it seems that, unlike HN (which include conditions uncorrelated to the norm-content presupposing the *will* of the addressees), the suppression of additional conditions takes away the establishment of the *end* by the addressee in CN. In "men ought to take off their hats if they go into a ballroom" (HN), one can note the *will* of the addressee (i.e., the action *entering* a ballroom). Therefore, in adopting the second Kantian form of the HI, one can describe the norm as "because men *want* to go into a ballroom, they ought to take off their hats." Conversely, HN will not apply if men *do not want* to go into a ballroom. Note that no similar *will* appears in "men ought to take off their hats" (CN). The latter applies simply because of the state of affairs that hats be put on men. Naturally, applying the norm presupposes a *past* will having been exercised, that of having put on a hat. This *will*, however, is not represented in this norm itself but in a *different norm* (e.g., "men may put on hats").

The highlighted aspect now is better explained with von Wright's *technical ought*, closely related to Kant's hypothetical imperative in the sense that it describes *(i)* the thing for which something is required (the *end*) and *(ii)* the thing required (the *means*): "When in this technical sense it is said of something that it ought to be or to be done, this is an elliptical statement the full meaning of which is

that unless this thing is (done), something else will (also) fail to be the case. For example: If I have given a promise, I ought to (must, have to) fulfill it in order to satisfy the obligation constituted by the norm which prohibits breach of the promise given" (von Wright 2007, 377). This *technical ought* – different but intertwined with the *deontic ought* – expresses a *practical necessity* better depicted by the word "must." The legal norm "men should take off their hats in a ballroom" is now understood as "because men want to go into a ballroom, they must [as a requirement of practical necessity] take off their hats."

Some Controversies in Framing All Legal Norms as Hypothetical Imperatives

Many controversies arose out of the doctrine that framed *all* legal norms as *hypothetical.* Some will be summarily indicated below, together with the controversies surrounding the doctrine that frames *all* legal norms as *hypothetical imperatives*.

Legal Imperatives and Strong Permissions

As stated above, it has been said that by focusing solely on commands, imperativism does not account for permissive norms (Kelsen 1960), notably norms that create legal rights. For even if imperativism does reflexively account for rights in very specific situations (e.g., think of modern social rights positively affecting the legal positions of the *reflexive beneficiaries* of constitutional *duties* requiring legislation which are, in turn, correlative to certain constitutional *commands*), it has been said that it very simplistically accounts for the *core* of legal rights.

Several arguments can therefore be brought against imperativism, notably highlighting the omission of the distinction between *weak* and *strong* permissions (and the underlying distinction between norms and normative sentences). In fact, logical analysis has shown that permitted *Øing* is not necessarily the same as the negation of the prohibition of *Øing*. Whereas the *external negation* of prohibited *Øing* (i.e., legal system *x* does not contain the norm "prohibited Øing") simply means that such norm does not pertain to a given legal system, the *internal negation* of prohibited *Øing* means that the norm "*Øing* is not prohibited" pertains to that legal system. Therefore, a *strong* sense of permission (i.e., entitling the addressee to a *claim*) does not seem to derive from any imperative (von Wright 1963, 89 ff.).

Now, if this *claim* of the right holder is fully unconditional (apart from the Opp for *Øing,* that is), one may also conclude that the *means-ends* relation underlying the *hypothetical imperative* is not suited to explain it (e.g., the strong permissions underlying the so-called basic human rights). Therefore, if the *technical ought* applies to strong permissions which are subject to conditions (e.g., "if one *wants* to be entitled to receive social security benefits, one *must* provide for with installments), it seems not to apply to unconditional rights in which no action is required for the end to be met.

Legal Imperatives and Power-Conferring Norms

It is also said that imperativism does not accurately account for norms of competence (Hart 1958, 604 ff.). Specific reference should be made to the Kelsenian account of norms of competence as *fragments* of norms, the complete sense of which is to be sought in indirect obligations to obey the commands issued by the competence holder. By focusing strictly on the *duties* to obey the commands issued by the competence holder, imperativism – or any theory that explains norms of competence through *indirect duties* – is unable to adequately describe norms that *confer* these powers as institutional *conditio sine qua nons* for the compliance with the commands.

The *power-conferring* aspect of norms of competence seems to be better explained by the concept of constitutive norms. The latter differ from obligatory (regulative) norms in several aspects, the most explicit of which being that they do not include a deontic operator. Now, in what concerns norms of competence, the *means-ends* relation is of a wholly different type and does not depend upon any action from the subject. The canonical form may be: for *x* to be able to alter the legal system (and change legal positions of subjects *p*) in subject matter *q*, *x* must be endowed with legal competence. This is an

entirely different proposition of the one addressed above.

Legal Hypotheses and (in)Defeasibility of Legal Norms

It is a widespread (albeit far from unanimous) claim that all legal norms are defeasible. Although several justifications exist, the majority of the supporters of the *defeasibilist view* accept that this is so because *all* norms include positive and, or, negative conditions of application in their antecedent. Naturally, if legal norms were to be seen as CI, defeasibility would be out of the question.

It follows from what was said above about HI in Kant's Morals that if HI applies subject to the condition of *x* being *wanted* by the addressee, then, unlike what happens with CI, HI is not applicable in case the addressees do not *want x* (i.e., if performing *x* is not an *end* of the addressee). Additionally, if HI applies subject to certain conditions (unlike CI), then HI accommodates (explicit or implicit) exceptions. The hypothetical dimension of HI also means that, if the antecedent of two or more HI overlap and a logical contradiction arises, then the two HIs may conflict and one HI be *defeated* conditionally in given circumstances, something which would never happen with CI, at least in the strictest Kantian sense. This too happens with legal norms if HN_1 and HN_2 conflict. It may well be the case that HN_1 states that "if addressees want *x* in conditions *p,* then they must [technical ought] perform *y*" and HN_2 states that "if addressees want x in conditions p, then they must [technical ought] perform z." Even if addressees want *x* in conditions *p,* it could be the case that *y* and *z* are, for some factual reason, mutually excludent (i.e., addressees cannot perform *z* and *y* simultaneously in conditions *p*) and addressees end up being required to perform only *z* or *y.*

Defeasibility is a dispositional property used to describe all norms as context sensitive both factually and legally. The factual context surrounding the application of a given norm may vary, and the relevant properties of the case may instantiate the antecedent of conflicting norms. The *technical ought* in hypothetical norms, therefore, seems to favor the defeasibilist view, although it is unclear that it fully applies to norms the defeasibilist character of which is most frequently stressed in literature: legal principles.

Legal Hypotheses and Legal Principles

The feature of hypotheticity has been largely left out of the account of legal principles, mainly under Dworkin's and Alexy's binomial division of norms between rules and principles. Let us take Alexy's account of principles as *commands to be optimized* as the cornerstone, disregarding for this purpose the famous dimensions of *weigh* and *graduability* under conflict scenarios. It is generally accepted that legal principles are formulated under sentences of the CN type "[ought to q] ought to be optimized" (e.g., "people ought to be treated alike," "freedom of speech ought to be respected") whereas rules are formulated under sentences of the HN-type "if p, then ought to q" (e.g., "if one [wants to] earns income, then one ought to [*must* in the technical sense] pay taxes"). In view of this, legal principles are frequently referred to as CN that apply to the greatest extent (factually and legally) possible.

From the structural point of view, however, acceptance that legal principles are embedded in *ought statements* appears to mean that von Wright's condition of Opp for *Øing* also applies to principles. Therefore, "people ought to be treated alike" *if comparable cases exist*; "freedom of speech ought to be respected" *if citizens wish to express themselves.* It is therefore dubious that the distinction between HN and CN is parallel to the distinction between rules and principles (in itself a subject which gives rise to controversy). For instance, accepting that an ought statement such as "citizens may express political views" is a principle will most likely lead to accepting that a relatively similar norm "citizens may express political views if authorized by the government" is also a principle. The fact that the latter is conditional to obtaining a governmental permit (which is not a logical Opp for *Øing*), while the former is not, does not seem to change the crucial features of the norm for the purpose of the distinction, whichever they are.

The last example, however, highlights that non-hypothetical legal principles formulated under sentences of the CN type do not include a specific *will* of the addressee and therefore seem to be left

out of the *means-ends* relation of the *technical ought*. In fact, in the sentence "citizens may express political views if authorized by the government," one can isolate the thing for which something is required (the *end* = *expressing political views*) and the thing required (the *means* = *the governmental authorization*); in contrast, in the sentence "freedom of speech ought to be respected," one can isolate the *end* (= *freedom of speech*), but the means are left undetermined or, at best, are generically described as *any means necessary* for the *thing for which they are required.*

Conclusion

Framing legal norms as hypothetical imperatives highlights conditionality as a normative property. Two different accounts have been distinguished. Under the *deontic ought*, commands apply to addressees requiring the performance of certain actions under given states of affairs; it was stressed that it is debatable whether, on the one hand, all types of norms – e.g., strong permissions or power-conferring norms – are liable to be structured as *imperatives* and, on the other, whether legal principles may be conceived as *hypothetical* (i.e., whether they include antecedents). Under the *technical ought*, legal norms allow for statements of practical necessity in which a certain behavior (the means) under given states of affairs *must* – rather than *ought to* – be performed for the addressee to legally obtain a previously envisaged end. A parallel was drawn with the Kantian HI regarding the crucial role of the will of the addressee. Finally, it was pointed out that statements of practical necessity in HN are relevant factors for determining normative conflicts. However, it seems that legal principles formulated under sentences of the CN type not only do not allow for the isolation of a specific will of the addressee but also simply provide for an implicit or generic description of the means to achieve the end.

Cross-References

- ► Legal Norms as Hypothetical Imperatives
- ► Normative Conflicts
- ► Principles

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L

Legal Person

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Introduction

Legal personhood is a foundational concept of Western legal thought, yet one which has often been ignored in theorizing. It has recently become

a topical notion, given the increasing scholarly, political, and wider interest in whether, for instance, nonhuman animals, natural objects, and artificial intelligences should be endowed with legal personhood. Legal personhood is most often explained in terms of the Orthodox View, which equates legal personhood with the holding of legal rights and/or duties. However, some scholars have (implicitly or explicitly) departed from this Orthodox View of legal personhood.

This entry will first introduce the central doctrines and terminology surrounding legal personhood; then go through the history of the notion; give an overview of certain contested issues; and conclude.

Doctrine and Terminology

Western legal systems share certain central doctrinal features regarding legal personhood. First, legal persons are normally divided into *natural persons* (human beings) and *artificial persons* (corporations, including business corporations, as well as other types of corporations, such as organizations and foundations). Only children born alive count as natural persons. However, fetuses usually benefit from the *nasciturus* rule, according to which an unborn child can, for instance, inherit the property of her father who passes away before she is born – if she is later born alive. Furthermore, certain jurisdictions have extended some other aspects of legal personhood to unborn children as well, such as counting as victims of crimes. As a matter of contemporary law, depriving any born human being of legal personhood would be an infringement of human rights law. However, humanity has not always been a sufficient condition for full legal personhood; women, slaves, outlaws, life prisoners, as well as monks and nuns have in certain jurisdictions been excluded from some or all of the rights and duties associated with legal personhood.

In civil-law jurisdictions, it is a commonplace to employ "legal person" and "subject of law/right(s)" (*Rechtssubjekt, sujeto de derecho(s), sujet de droit*) synonymously. Anglophone, common-law jurisdictions typically do not speak of "subjects" in this context, though the mixed jurisdiction of South Africa is an exception. However, some scholars with civil-law backgrounds have recently suggested that "person" and "subject" could be distinguished. For instance, Tomasz Pietrzykowski has argued that animals could be declared as "non-personal subjects of law" (Pietrzykowski 2017).

As can be seen from Table 1, the terminology surrounding legal personhood is easily misleading. For instance, in many languages, "legal person" can refer either to artificial persons merely or to both artificial and natural persons. The phrase "legal capacity" more often than not refers to the status that children are endowed with when they are born, but occasionally – such as in disability law – also to its counterpart, "legal competence," i.e., the competence to exercise one's rights and duties. Furthermore, many of the terms and phrases, such as "legal capacity" (explained as the capacity to acquire rights and duties), originate from private-law theory, and it is far from clear that they are suitable for describing legal personhood as a general concept, covering all areas of law. For these reasons, it is clearer to employ the phrases "passive legal personhood" and "active legal personhood" (see MacCormick 2007).

Brief History

The roots of the Western understanding of legal personhood can be found in Roman law and legal scholarship. For instance, the *Institutiones* of Gaius (1904) is often mentioned as the origin of the person/thing/action trifurcation whose significance for modern legal taxonomies can easily be discerned. However, Gaius' purpose with the trifurcation was likely quite different from the taxonomies that he subsequently inspired. He did not present an "inventory of the universe," nor did he claim that everything would be either a person, or a thing, or an action. For instance, slavery is often understood as the treatment of human beings as things rather than persons – but Gaius deals with slaves extensively also under the law of persons. This reflects the fact that *persona* originally meant "status, role," and an individual could have numerous *personae*, rather than referring to the

Legal Person, Table 1 Personhood terminology

	English	German	French	Spanish	Swedish	Finnish
1. Born human being	*Natural person*, *person*	*Natürliche Person*, *physische Person*	*Personne physique*	*Persona física, persona natural*	*Fysisk person*	*Luonnollinen henkilö*
2. Corporations	*Artificial person*, *juridical person*, *juristic person, legal person*	*Juristische Person*	*Personne morale*	*Persona jurídica, persona moral*	*Juridisk person*	*Oikeushenkilö*, *juridinen henkilö*
3. Both 1 and 2	*Legal person*, *person* (in South Africa: *subject of law*)	*Rechtssubjekt*, *Rechtsperson, juristische Person, Person*	*Sujet de droit*	*Sujeto de derecho(s), persona*	*Rättssubjekt*, *rättsperson*, *person*	*Oikeussubjekti*, *henkilö*, (*oikeusitselö*)
4. Passive legal personhood (acquired by a newborn child)	*Legal capacity*, (*legal) personhood*, (*legal) personality*	*Rechtsfähigkeit*; *Rechtspersönligkeit*	*Capacité juridique*, *capacité de jouissance*, *personnalité juridique*	*Capacidad jurídica, capacidad de goce*	*Rättskapacitet, rättspersonlighet*	*Oikeuskelpoisuus*, *oikeussubjektius*, *henkilöys*
5. Active legal personhood (possessed by, e.g., adults of sound mind)	*Legal competence*, *legal personhood* (but, e.g., in disability law also, *legal capacity*)	*Handlungsfähigkeit*, *Geschäftsfähigkeit*	*Capacité d'exercice*	*Capacidad de obrar, capacidad de ejercicio*	*Rättshandlings-förmåga*	*Oikeustoimi-kelpoisuus*, *oikeudellinen kelpoisuus*

kind of "unity" as personhood is most often understood today (see, e.g., Brożek 2017). The origins of the notion of corporation (*universitas*) can also be found in Roman law, which treated *universitates* as legally distinct from individuals. However, the Romans did not use the term *persona* to refer to corporations (Duff 1938).

The Middle Ages saw the introduction of the notion of fictional person (*persona ficta*) in the canon law by Pope Innocent IV (Padovani et al. 2005). This was significant in that the term *persona* was used to refer to corporations. However, corporations were regardless – because of their fictitious nature – deemed to be not excommunicable.

The modern notion of legal persons as rightholders started to develop in the works of Renaissance humanists Hugo Donellus (Hugues Doneau, 1527–1591) and Hermann Vultejus (1555–1634). Vultejus defined a *persona* as a *homo habens caput civile* – a human being with civil standing – and claimed that slaves were not *personae* (Hattenhauer 2011). Donellus and Vultejus would be followed by natural lawyers such as Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–1694). Grotius wrote in his *Jurisprudence of Holland* that "law exists between persons, to whom the right belongs, and between things, over which the right extends" (Grotius 1926). Gottfried Leibniz (1646–1716) and Christian Wolff (1679–1754) would proceed to define persons as "subjects of rights and duties" (Leibniz 1990; Artosi et al. 2013; Hattenhauer 2011). Finally, members of the German Historical School – such as the prominent Friedrich Carl von Savigny (1779–1861) – explained legal personhood in terms of *legal capacity* (*Rechtsfähigkeit*), the capacity for rights and obligations. The German legal scholarship of the time was very influential. For instance, John Austin (1759–1859) – having studied in Bonn, Germany – imported these ideas to his native England and discussed them in his *Lectures on Jurisprudence* (Austin 1885).

Contested Issues

A number of issues regarding legal personhood are highly contested. Topics addressed in this section include the relationship between legal personhood and "real" personhood and the definition of legal personhood. Issues that cannot be addressed here include the question whether legal personhood is a necessary feature of law or rather a contingent feature of Western law, whether persons and things exhaust the "legal space" – i.e., whether everything needs to be either a person or a thing – and the nature of corporations.

Realism and Legalism

Naffine (2009) distinguishes Realists and Legalists. According to Realists, the status of legal personhood ought to track personhood: persons should be recognized as legal persons, and nonpersons should not (see, e.g., Finnis 2011). Legalists, on the other hand, detach legal personhood from personhood, treating the former as a technical legal concept: one's "legal nature [. . .] should not be confused with one's nature beyond the confines of law" (Naffine 2009). When debating the legal personhood of, e.g., corporations or animals, the question whether such entities and creatures "really" are persons is much more pertinent for a Realist than for a Legalist. One can also detect certain connections between Realism and natural law theory on one hand and Legalism and legal positivism on the other.

Definition of Legal Personhood

Yet another point of debate is the definition of legal personhood. Proponents of the Orthodox View associate legal personhood with rights and/or duties. The exact details vary somewhat. Most define "a legal person" as one of the following alternatives:

(1) An entity that holds legal rights and/or duties
(2) An entity that can:
    (a) Hold legal rights and/or duties
    (b) Be a party to legal relations
(3) (A bundle of) rights and/or duties

Accounts falling under (1) and (2) are relatively similar, though they differ somewhat in the order of priority. For (1), rights and duties have priority over legal personhood: if one has

rights or duties, one is a legal person (e.g., Gray 1997; Bilchitz 2009). Under (2), on the other hand, legal personhood has priority: one can hold rights and/or duties only if one is first determined a legal person (e.g., Wise 2010). The definition of legal personhood as the capacity for legal relations is normally understood as synonymous, or nearly synonymous, with the capacity for rights/duties (see, e.g., (Lehmann 2007), even if this equivalence may be contested.

A further complication with regard to (1) and (2) is whether a legal person must (be able to) hold legal rights *or* duties (Bilchitz 2009); rights *and* duties (Lehmann 2007); rights merely (see Austin 1885); or duties merely (Machen 1911).

View (3), represented most prominently by Hans Kelsen, situates the legal person purely in the normative realm. According to Kelsen (2006), *man* (*Mensch*) is a flesh-and-blood entity in the realm of "is," whereas *person* (*Person*) is the bundle of rights and duties situated in the realm of "ought."

Some authors reject the Orthodox View. For instance, Beaudry (2016) takes personhood rights to be a particular, non-exhaustive category of rights. Pietrzykowski (2016) argues that persons and non-personal subjects of law hold different rights. Kurki (2019) claims that legal personhood is a bundle property and that one can hold legal rights without being a legal person.

Conclusion

The traditional doctrines and theories of legal personhood are in flux. In Argentina, a judge granted in 2016 habeas corpus to the chimpanzee Cecilia, thus recognizing her as a "non-human subject of law" (*sujeto de derecho no humano*). In New Zealand, the Whanganui River has been declared a legal person; similar developments have taken place elsewhere. The question of whether AIs could or should be legal persons is also constantly becoming more topical.

Scholars have suggested that the taxonomy that currently only includes natural persons and artificial persons should be amplified to include "animal persons" (*tierliche Personen*, Stucki 2016) or "nonhuman natural persons" (*personnes physique non-humaines*, Regad 2019). Somewhat similarly, the Legal Affairs Committee of the European Parliament has discussed whether "electronic personality" ought to be granted to the "most sophisticated autonomous robots" (2015).

Cross-References

▶ Legal Positivism: Inclusive
▶ Natural Law: Protestant
▶ Rights: General

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Legal Pluralism: History of

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Introduction

This entry will provide a brief history of the *idea* of legal pluralism rather than the *phenomenon* of legal pluralism. Note, however, that this distinction is not as clear-cut as might appear at first. To a certain degree, the two histories are coeval, as it is only when we develop conceptual tools for interpreting social phenomena that the latter appear in the world as such. The entry will highlight some key moments in the development of the idea of legal pluralism while critically singling out some central questions that theories of legal pluralism have addressed and ought to address.

The crux of legal pluralism is that law is not necessarily and exclusively associated with the state (Merry 1988; Melissaris 2009; Twining 2010; Tamanaha 2008; Melissaris and Croce 2016). It follows that we can describe normative orders that develop in other social contexts and govern the lives of people in them, as "law" without committing a conceptual error. In the words of John Griffiths in a seminal article in the field, legal pluralism is "that state of affairs, for any social field, in which behaviour pursuant to more than one legal orders occurs" (Griffiths 1986: 2).

The legal pluralist claim is perhaps best understood in juxtaposition to the dominant trend in post-Enlightenment thought in which law is that which *reduces* pluralism by establishing principles which are capable of binding everyone within a given community. This attitude towards the idea of law runs across classical political philosophy. For example, for Hobbes law is a way of coordinating a plurality of interests (1996) and for Kant a way of reducing the variability of moral motivational dispositions in light of the unenforceability of moral duties (1996). Similarly, recall how, in the twentieth-century legal philosophy, H.L.A. Hart (1997) and Hans Kelsen (1967) think of the law, though each in his own way, as the only normative order that introduces obligations for everyone within the territory which it governs.

Early Legal Pluralism

Legal pluralism can be genealogically traced back to the early sociology of law and legal anthropology at the beginning of the twentieth century. In 1918, the Italian jurist Santi Romano thought of all organized, institutional practices as legal practices (Romano 1917). In 1931, the (Russian-born) French sociologist Georges Gurvitch drew a conceptual separation between law and the state

arguing that judicial monism, that is, the belief that law properly understood necessarily stems from the state, is only a contingent by-product of the formation of states between the sixteenth and nineteenth centuries and the monopolization of governance by norms. He also tried to map the legal world distinguishing between state law, inter-individual or inter-group law, and social law. What distinguishes the latter two is the kind and intensity of the bonds developing between the members of the group. Inter-individual and inter-group law develops in the presence of weak collective values, and social law characterizes communities of shared values and commitments. In Gurvitch's words: "social law is based on confidence while inter-individual and inter-group law is based on distrust. The one is the law of peace [. . .] the other the law of war" (Gurvitch 2001:15). Almost contemporaneously, the Austrian jurist and sociologist Eugen Ehrlich introduced a distinction between the "law of the lawyers" and "living law" (Ehrlich 1936). The former consists of technical rules divorced from their social or moral meaning and relevance and the latter relates to the self-regulating capacities of social formations. The distinction entails more than the simple idea that the application of the law and therefore, at least to some extent, its content are necessarily determined by the social context in which law operates. It emphasizes the law-*producing* capability of social relations independently from the state.

The still young discipline of legal anthropology was also arriving at the conclusion that law can be attributed to non-state-dependent modes of governance on the basis of observation of peoples living in communities lacking a central independent authority such as the state. Early on, Bronisław Malinowski (1926) suggested that law be seen not in terms of its derivation from a central authority but rather in any form in which mutual obligations emerge. In his seminal study of the Nuer people of Southern Sudan, Edward E. Evans-Pritchard observed that, although one cannot speak of a legal system in the narrow sense, the Nuer had developed systems of governance which perform the same functions and can properly be described as legal: "[. . .] there is no constituted and impartial authority who decides on the rights and wrongs of a dispute and there is no external power to enforce such a decision were it given. If a man has right on his side, and, in virtue of that, obtains the support of his kinsmen and they are prepared to use force, he has a good chance of obtaining what is due to him, if the parties live near to one another" (Evans-Pritchard 1940: 293–4).

The literature on legal pluralism either in stateless communities or in colonial and post-colonial contexts, in which the central law of the colonial state co-existed with the legal arrangements of local communities, grew substantially over the decades that followed these earlier attempts at recording and conceptualizing legal pluralism. Indeed, legal anthropology became the field of development of legal pluralism *par excellence*. This empirical work provided substantial evidence to undermine the exclusive conceptual connection between law and the state (Pirie 2013).

What Is "Legal" in Legal Pluralism?

No doubt, some readers will feel there is something amiss in all this. How can one even begin to speak of legal pluralism and to carry out empirical work on non-state legal phenomena if one does not already have a clear concept of law under one's belt? And, if such a concept of law is available, how can it be radically plural? In other words, how can different manifestations of the same concept be so closed and at odds with each other in a way that makes pluralism entirely irreducible?

Some think that empirical work does not require any fixed concept of law. Roger Cotterrell, for example, believes that sociolegal studies need only be guided by rich but only tentative and defeasible specifications of "the legal" (Cotterrell 2010). It is true that any conception of law that guides empirical enquiry has to remain defeasible and open to adjustment in accordance with empirical findings. Nevertheless, even if the aim of enquiry is the sociological recording of legal phenomena, there still needs to be clarity

regarding the concepts the sociolegal researcher imports and potentially imposes onto the contexts, which she studies (von Benda-Beckmann 1988). But the more important philosophical issue is this. If the point of legal pluralism is to question legal monism, then one would need to show that there is something specific about *law* which mounts a challenge to the dominant modern view that the only relevant pluralism is that of beliefs which can be perfectly coordinated by the law of the state. This requires a more fine-tuned, however tentative and constantly defeasible, account of what might count as law.

There have been various attempts at drawing some boundaries to the concept of law. Some take a radically *panlegalist* view: every social normative practice counts as law. As we saw earlier, anthropologists such as Malinowski and Evans-Pritchard tended to think of a wide range of systems of social control as law. Santi Romano singled out three very thin criteria of legality: law displays continuity in time beyond the lifetimes of the members of the groups governed by it; it orders the affairs of the group; it supervenes on some commonality between the members of the group. In a similar panlegalist vein, Gordon Woodman believes that every efficacious and generally accepted normative order can properly be described as law with state law being but one manifestation of the concept (Woodman 1998, 1999).

There are at least two problems with philosophical panlegalism, that is, a panlegalism which sets external criteria, however thin, for the identification of law. The first is that this conceptual indiscrimination is not sufficiently sensitive to distinctions between normative arrangements and the different ways in which they order the social world. The second problem is, in a sense, the reverse of the first. Philosophical panlegalism potentially excludes the participants in various legal orders from the very process of determining the conception of law, which is used to explain their practices. This has a significant practical aspect too, because to label a social practice "law" is never neutral. It imputes certain characteristics to the practice, which are then fed back into it and determine it.

Many scholars have been aware of the importance of taking into account the self-understanding of participants in ostensibly legal practices. Early on, Adamson Hoebel drew the boundaries between legal and nonlegal normative phenomena in terms of the former authorizing legitimate criticism (often in the form of sanctions) in cases of violations of their imperatives (Hoebel 1954). More recently, Brian Tamanaha has proposed a conventionalist tack on the question (Tamanaha 2001). Whenever a sufficient number of people with sufficient conviction refer to a social practice as law, that practice automatically becomes an object of enquiry for the social theory of law. A more radical version of the same approach is offered by Kleinhans and McDonald, who locate the legal in the subjectivity of individual actors rather than in the constitution of groups (Kleinhans and MacDonald 1998). This privileging of the internal point of view eschews the problems of essentialism and reductionism. At the same time, however, if the constitutive conditions of law are exhausted in the internal point of view, it makes it difficult to see both how social enquiry might be possible and how different legal orders might communicate.

This last question has important practical ramifications as well. Recognizing legal pluralism as a fact in the social world has always been partly motivated by the suspicion that neglecting pluralism will mystify and perpetuate power relations developing between stronger and weaker forms of legal governance. However, deferring all normative authority for the resolution of pluralism to the psychological attitudes of participants in legal orders themselves does little to alleviate that fear. In fact, it potentially has exactly the opposite effect, as the danger of social relations being allowed to develop on the terms of the powerful exists within non-state legal orders as well. In the words of Marc Galanter: "[I]ndigenous law . . . is not always the expression of harmonious egalitarianism. [It] often reflects narrow and parochial concerns; it is often based on relations of domination; protections that are available in public forums may be absent" (Galanter 1981: 25). Therefore, the challenge, which seems to be getting harder at every step, is to work out a conception of law that will recognize

the closure of legal orders precisely *because* they are legal and be determined by taking into account the self-understanding of participants in legal orders while maintaining some degree of universalism so as to allow for the possibility of openness and communication between legal orders.

This openness is not only desirable; it is also an observable phenomenon. It is worth quoting at length Sally Falk-Moore in a very important piece on legal pluralism:

> The approach proposed here is that the small field observable to an anthropologist be chosen and studied in terms of its semi-autonomy-the fact that it can generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, some- times at the invitation of persons inside it, sometimes at its own instance. The analytic problem of fields of autonomy exists in tribal society, but it is an even more central analytic issue in the social anthropology of complex societies. All the nation- states of the world, new and old, are complex societies in that sense. The analytic problem is ubiquitous. (Falk Moore 1973: 720)

One way of doing so is by thinking of law in strictly formal terms. Günther Teubner does so in a systems-theoretical vein (Teubner 1992). He sees legal pluralism in terms of diverse communicative processes organized under the binary code "legal/illegal." Although these processes are programmatically closed, their common coding allows for communication between them through what Teubner calls "linkage institutions," that is, vague legal terms such as bona fide, the meaning of which varies depending on their context.

In this picture, however, the subject disappears altogether, and so the problems identified earlier persist. One way of maintaining the subject's perspective is to ask what allows for the "legal/illegal" coding in the first place. This is not a purely philosophical enquiry; it must be carried out in light of the empirical evidence that rich ethnographic research has shed light on. At the same time, its conclusions will have to be sufficiently abstract to make it possible to raise a claim to universality, or at least extensive generality, as well as thin so as not to externally overdetermine the content of legal orders.

One such conception of law focuses on the shared beliefs between people regarding normative possibilities in the world – to put it simply, beliefs about how they can transform the world through their commitment to an alternative vision of it. These beliefs might or might not be transparent; this is a matter of historical contingency. But the very possibility of their being opaque, and subsequently legal orders being invisible from the outside, poses a risk with which every attempt at governing by law will have to reckon. Recognizing the possibility of legal pluralism forces one not only to be prepared to justify legal claims on the basis of reasons but also to ensure that all those potentially affected will have the opportunity from their perspective (since beliefs are the kind of thing that can be communicated and accessed by others) to assess the intelligibility of how they are required to act and to be able to voice their disagreement. Otherwise, one runs the risk of failing to do law altogether, because one would be expecting others to follow rules, which they are not in a position to follow. This risk of legal pluralism therefore necessitates grounding law in a participatory process of public justification (although it does not determine entirely the form that collective norm-determination must take) (Melissaris 2013, 2014).

A Recent Wave of "Legal Pluralism"

An effect of globalization is that law has to a great extent been decoupled from democratic politics, which is possible only within the boundaries of the nation state and coupled with the economy. This is manifested as the proliferation of non-state agencies, which exercise de facto authority in a variety of ways. Many think of this development in terms of legal pluralism. Although such accounts differ on the specifics, their common ground is that they take such de facto authorities to be legal. These authors' main concern is to construct an institutional framework, which will accommodate all these "legal" orders (Berman 2012; Krisch 2010).

It is doubtful that such accounts can be properly described as pluralist, although they are often so fashioned (Croce and Goldoni 2015). They unquestioningly take newly emerged institutions as "legal" without any attempt at constructing a wide and coherent scheme of practices, which fall within the same domain of human activity. As a result, they are potentially just as exclusive of diverse legalities as state-centered conceptions of law. This has a practical upshot too. In discounting pluralism from the process of determining the conditions of legitimacy, many are potentially excluded, while the de facto authorities to which a legal status is imputed are also imputed legitimate authority in the absence of any process of public justification.

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Legal Positivism: Exclusive

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Introduction

After H.L.A. Hart reinvigorated legal positivism in the 1950s and 1960s (1958, 1961), the first major critique of his new and influential theory came

from his student Ronald Dworkin (1967, 1978, 1986). Dworkin argued that legal positivists' claim that law was a system of socially created rules was misplaced. Specifically, their notion that what counted as legally valid within a given legal system reflected a consensus among key legal officials could not stand, given the fact of deep disagreements among those legal officials about which supposed laws are legally valid and what the criteria of legal validity might be. According to Dworkin, those disagreements reflected and were evidence for moral principles at the heart of law. Determining what was legally valid consisted in finding the most moral interpretation of the law (given that it had to justify the potential use of force) in keeping with a system's legal history of previous judicial interpretations and legislative enactments. Legal validity was therefore a moving target, always vulnerable to a better interpretation that might come along. (While there is a best interpretation at any given point in history, it would always be open to debate what that best interpretation might be.)

In attempting to reply to Dworkin, positivists took two divergent paths. Some wished to admit the force of his objections, while maintaining their positivist emphasis on the ultimate social source of all law. They admitted that a given legal system could make legal validity dependent upon some moral principle(s) if it chose to do so. These were called "inclusive legal positivists," although early on they were sometimes also called "soft positivists" or "incorporationists" (for their view that moral principles could be incorporated into the criteria of legal validity). These included Hart himself (1994, 204, 249), his student Wil Waluchow (1985, 1989, 1994), Jules Coleman (1982, 1996, 1998, 2000, 2001, 2009), and Mathew Kramer (1999, 2000, 2004).

Other positivists saw this view as incompatible with the claim that all law is socially sourced since it introduces something (morality) that is either not socially sourced (if it has a truth that is not dependent upon people positing it as such) or isn't a matter of fact at all and therefore cannot contribute to the fact of a law's legal validity. These were called "exclusive legal positivists" or "hard positivists" and included Hart's student Joseph Raz (1980, 1985a, b, 2004), Scott Shapiro (1998a, b, 2000, 2009), Andrei Marmor (2001), Les Green (1996), and Brian Leiter (1998).

Doubling Down on Social Facts

In order to understand exclusive legal positivism, one must first understand the concept of legal validity and the idea that different systems of law will have differing criteria of legal validity. Indeed, it is the differing criteria of legal validity that individuates legal systems. Even if the text of a given law is the same in more than one legal system, the fact that it is a law of each of those systems is determined by the law's conformity with each system's own criteria of legal validity. These are the rules that determine what actions of the government (or private parties) and what decisions by judges will be considered by officials to be normatively binding elements of the legal system. Hart called this set of rules "the rule of recognition," capturing the notion that it determined (and reflected) what officials would recognize to be part of their legal system (Hart 1994, 94–95).

The debate between the inclusive and exclusive legal positivists can then be understood as a debate about whether the rule of recognition of any legal system could contain a requirement that laws must not conflict with some principle of morality in order to be valid members of that legal system. While inclusive legal positivists hold that it is possible for some legal system to include such a criterion within its rule of recognition, exclusive positivists believe this to be misguided. Exclusive positivists hold the belief that, if it were possible to include an actual moral requirement within the rule of recognition, doing so would place legal validity itself beyond the realm of socially determined fact, contravening what to them is a central belief of legal positivism – that law is entirely a matter of social fact. After all, even if morality is a matter of objective fact, it is not one that is determined by social fact, understood as facts about what members of society have done in the past. Random killing and stealing are not wrong because some influential members of society have determined it be so at some point in the past.

Instead, any supposed moral requirement among the criteria of legal validity simply adds to the reasons that a suitably authorized official can cite to invalidate a law. If the criterion of legal validity in a given system is simply whatever the Queen in parliament has assented to, then the only question for a constitutional court to pass upon is whether the Queen and parliament have assented to the law. If, however, there is an additional criterion that any such law must not be immoral, then the constitutional court may invalidate any law it considers to be immoral. The key difference is that inclusive positivists generally must confront the fact that, in systems with a moral requirement among the criteria of legal validity, it is possible for every current official to be mistaken about a given question of legal validity. For exclusive positivists, legal validity itself is merely a question of what the relevant officials have said and done up until the question is considered.

The two most influential arguments in favor of exclusive legal positivism are Joseph Raz's argument that inclusive legal positivism would undermine the ability of the law to serve as a practical authority, and Scott Shapiro's argument that inclusive legal positivism would undermine law's ability to make a practical difference in the reasons that apply to its subjects, which is conceptually required of law.

Raz's argument from authority (expressed early and most prominently in 1985a, b; but also extended and updated many times and places, such as 2004) depends upon an idea about what authority is supposed to do for those subject to it and that law necessarily claims to have legitimate authority. His point is that, if it would be possible for the validity of law in a given system to depend upon robust morality (and not just some official's conception of morality), then, in that system, it would be conceptually impossible for law to be legitimately authoritative. But since law is a paradigmatic instance of practical authority (i.e., authority over actions), it cannot be conceptually impossible for it to be legitimately authoritative. It can be contingently impossible, for example, in fundamentally evil legal systems, but nothing can both be a legal system and have the truth of its claim to practical authority be a conceptual impossibility.

To get to this conclusion, one must start with Raz's understanding of the point of practical authority: to provide those subject to it with the best way to behave (understood as conforming to the best balancing of all correct reasons that apply to the person) in situations where they are unlikely to see (or undertake) the best way forward on their own. Where the authority is well placed to reflect the best balance of reasons better than the subjects themselves, subjects are justified in treating the legal directives as authoritative and acting upon them directly, rather than determining for themselves the best way forward.

But if the validity of law in a given system were to depend upon its conformity with robust moral principles, then each subject would need to consider whether a supposed law was consistent with those moral principles before acting on it. That would undermine the whole point of authority, since it would mean that subjects would be back to considering for themselves the best way forward without the benefit of an authoritative directive to intervene and improve upon their own evaluations of all the reasons that apply to their situation. If in order to be legally valid a law must actually be just, then normally one should simply do the most just thing directly and ignore the law (since it only counts as law if it is correctly reproducing the most just thing to do anyway). Hence, in order for the law to have a chance at legitimate authority (which, remember, must be conceptually open to it), it cannot depend for its validity upon robust morality as doing so undermines its authority. Therefore it is impossible to include an actual principle of morality among the criteria of legal validity.

A similar thought process can be seen lying behind the other main influential argument for exclusive positivism, Scott Shapiro's "practical difference thesis" (1998a, b, 2000). The key here is the idea that law must be holding itself out to be giving reasons to those subject to it. When the law tells you to do or refrain from doing something, it must thereby be providing a reason to behave in that way (even if that reason is sometimes or often outweighed by other considerations). But in order for the law to be capable of giving reasons, it must be capable of making a "practical difference" in what its subjects are supposed to do. That is,

subjects might have one course of action be the best path forward, but the law must be capable of changing that under the right circumstances. (Certainly it won't always, or even often, be capable of changing what the right thing to do is, but it has to be able to do so in some types of conditions. Otherwise, there would be no point in having law at all – people should just always adopt the course of action that seems best to them at the time.)

If, however, there were a robust moral requirement among the legal validity criteria in a given legal system, subjects would just have to decide upon the most moral action directly, and law could not be guiding them in those instances. And if all law in that system were subject to a robust moral validity condition, then they would always simply need to decide for themselves the best thing to do. Law would be incapable of doing its job or in making a practical difference as to what its subjects should do.

Somewhat more recently (2009, 2011), Shapiro has extended this argument in the context of his theory that law is a system of social planning, most thoroughly developed in his book (2011). If the law is a system of social planning, then one of its primary purposes is to avoid those subject to the plans deliberating about what to do directly on the merits of the actions under consideration. "Deliberation on the merits would violate the logic of planning because it would unsettle precisely what the plan aims to settle. Put bluntly, if I must deliberate in order to discover the plan, then I do not have the plan" (Shapiro 2009, 334). But, of course, if one must determine what morality requires in order to determine the law, then one must deliberate on the merits of the actions in question, precisely what having a plan was supposed to prevent in the first place.

Conclusion

In an entry this length on topics this complex, there are naturally going to be points of oversimplification, and a full understanding of the nuances of arguments in favor of exclusive legal positivism really requires a close read of the original texts (or of lengthier summaries). But the main idea behind it is that only exclusive legal positivism fully embraces the positivistic notions that law is a matter of social fact, dependent only upon social sources. The most influential arguments in favor of this idea tend to emphasize that the law is incapable of performing its central social role if it is understood to depend for its validity upon robust moral principles. That central role can be understood as providing an authoritative guide to action, or at least to provide a set of new reasons for acting in conformity with it or to provide a centralized plan to settle certain questions about what is to be done. In all of these closely linked conceptions of law's central role is the idea that, for it to do its job at all, what counts as valid law must be identifiable without dependence upon getting certain moral questions right.

Cross-References

▶ Hart, Herbert Lionel Adolphus: Influential Ideas
▶ Legal Positivism: Inclusive
▶ Legal System and Legal Order
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Legal Positivism: Inclusive

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Introduction

Jurisprudence is the philosophical study of law asking questions like: What constitutes a legally valid rule? Or, what constitutes a legal system? Or, what makes a good legal rule?

In the pursuit to explain the nature of law, to identify the existence conditions of law, general jurisprudence has at its disposal two mother theories: legal positivism and natural law theory. Natural law claims that we can make sense of legal rules as reasons for action, i.e., reasons for doing what the rule demands, *if* such rules are derived from reason and concurrent with principles of justice and rule of law. As such, morality is an existence condition of law. Legal positivism holds that the existence of law is a matter of social fact. This entry will unpack what that means and the claims specific to Inclusive Legal Positivism [ILP], a conception of law that grounds itself in positivist claims about the nature of law while accounting for the core intuition of natural law theory that morality is central to decisions surrounding what is, or is not, law in a given legal system.

The three main tenets of legal positivism are the social thesis, the sources thesis, and the separation thesis. The *separation thesis* is the claim that law and morality are conceptually distinct from one another, that questions of legal validity (is *x* a legally valid rule in legal system *y*?) are fundamentally different from moral questions about law (should *x* be a legally valid rule in legal system *y*, or should legally valid rule x be obeyed?). The *social thesis* is the claim that law is a social fact, and the *sources thesis* is the claim that the legal validity of a rule is dependent on that rule's connection to legal institutions. Conceptually speaking, per legal positivism *social* facts, not moral ones, constitute the *sources* of law.

ILP adopts those principle theses of legal positivism and adds the following qualification: while legal rules in general do not necessarily have to comport with the requirements of morality in order to exist as legal rules, it is nonetheless *possible* for a legal system to give moral principles a role in the identification of its legal rules. In this way, ILP stands in opposition to *Exclusive* Legal Positivism [ELP], which maintains a stronger

separation thesis: it is not possible for the validity of a legal rule to ever depend on its consistency with moral principles.

To explicate ILP and expand on the aforementioned claims, this entry will draw a series of brief distinctions between ILP and other legal schools of thought. Firstly, this entry will explain the distinction between natural law theory and H.L.A. Hart's legal positivism; second, it will explain the distinction between ILP and Ronald Dworkin's interpretive theory of law; finally, it will explain the distinction between ILP and ELP.

Hartian Legal Positivism and Natural Law Theory

The tension between natural law theory and traditional legal positivism originates from a classic interpretation of St. Thomas Aquinas' natural law theory. Human law, according to Aquinas, ought to be derived from Natural Law, which is universal, immanent, and perfectly moral. Furthermore, the authority and normativity (action-guidingness) of human law derives from its rational connection to Natural Law and, as Aquinas writes, a human law that lacks this rational connection is 'no longer a law but a corruption of [natural] law' (Aquinas: *ST I-II.Q95.A2*). Morality, then, is an existence condition of law.

Writing in the 1880s, English jurist John Austin challenged natural law theory, writing the famous positivist mantra: 'The existence of law is one thing; its merit and demerit another' (Austin 2007: 92). Austin was drawing attention to a distinction he claimed natural law theory blurred, between asking whether a rule *is* valid in a given legal system and whether that rule *ought* to be part of that legal system. For Austin, identifying what he called the "law simply and strictly so-called" was solely a matter of identifying the commands that were dictated by a sovereign and backed by coercive sanctions (Austin 2007: 81). Simply stated, Austin's command theory of law claims that the sovereign, not morality, is the source of law.

One of the most widely discussed theories of legal positivism, and the one from which ILP develops, is presented in H.L.A. Hart's *The Concept of Law*. Hart rejects the "Austinian sovereign" as the source of law. In place of Austin's command theory of law, Hart defends the claims that legal rules are fundamentally social rules and legal systems are a collection of those social rules. Legal rules are social in nature because they are rooted in social behavior either as customary rules – taking one's hat off when one goes inside is an example of a non-legal, customary rule – or enacted in accordance with certain social procedures outlined by the legal system. Thus, per Hart, the legal validity of rules can only be determined by appealing to certain social facts within a given community.

A fundamental attribute of Hart's conception of the legal system is the distinction between primary and secondary rules. Primary rules govern conduct through prohibitions and requirements. Secondary rules confer powers onto legal subjects to do things like get married or buy property. Some special secondary rules confer powers exclusively onto legal officials and, in doing so, they replace the "Austinian sovereign" as the source of law.

According to Hart, every legal system has at least the following three types of those special secondary rules: (1) rule(s) of adjudication, which empower(s) certain legal officials (typically, judges) to make determinations of whether legal rules have been broken or complied with, and to determine any remedy; (2) rule(s) of change, which empower(s) certain legal officials to create, alter, or repeal primary rules; and finally (3) rule(s) of recognition, which empower(s) certain legal officials to identify the valid rules of the legal system (while Hart only spoke of the rule of recognition in the singular, he did not rule out their being multiple in a legal system). Together, these secondary rules organize the legal rules of a legal system.

The upshot to Hart's definition of the legal system as a complex union of primary and secondary rules is support for his claim that the law is a social fact. This is because, one can identify a valid legal rule within a legal system by asking whether the rule in question coincides with the socially practised legal procedures identified by the rules of change, adjudication, and recognition. As opposed to natural law legal theory, then,

whether a rule coincides with moral principles in general is irrelevant when discerning its legal validity.

And so, legal positivism originated as an alternative to classic natural law theory, which was interpreted as the claim that only morally valid rules can be legally valid rules. This is no longer an accepted interpretation of natural law theory and, as such, the distinction between natural law and positivism is no longer as straightforward as the separation thesis (which, in itself, is not straightforward). The key to grasping natural law, as it is used today, is to understand that "nature" equates to "reason" (Aquinas *ST I-II. Q95.A2*; Finnis 1980, 2015). According to natural law theory, the point of law and of government is to promote the common good. Furthermore, legal rules that govern how we ought to behave are discovered, not created, when one reasons about how to best protect and promote the common good. Natural law theory, therefore, cannot be blithely summed up by the phrase "legally valid rules equate to moral rules," but even contemporary versions place a condition of moral merit on the existence of law. Likewise, legal positivism is more refined than the parodied claim "law has nothing to do with morality." Legal positivism is a theory about the existence conditions of law so the distinction between natural law and legal positivism, then, could fruitfully be thought of as a difference of theoretical aspiration. It does not necessarily have to be a question of which is the better theory of law full stop, but rather which is the best methodology for the query one is pursuing.

Inclusive Legal Positivism and Ronald Dworkin's Interpretive Theory of Law

According to Ronald Dworkin, "law" is an interpretive concept which, 'serves some interest or purpose or enforces some principle' (Dworkin 1986: 47). By calling law an "interpretive concept," Dworkin means that establishing what is or is not law will always require some level of interpretation. For this reason, Dworkin pays close attention to legal reasoning and explaining how judges ought to best reason about the law in order to best interpret and, therefore, establish what the law is (ibid).

One of Dworkin's claims is that judges are beholden to moral principles when they are deciding so-called hard cases (those cases where the law is either doctrinally unclear or incomplete). Consider a famous example of Hart's:

> A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called "vehicles" for the purpose of the rule or not? (Hart 1958: 607)

This is a hard case because while the rule seems clear, vehicles are prohibited from entering the park, it is not clear how to follow the rule. As Hart points out, "vehicles" is a wide-ranging concept and there are many ways one *could* interpret the rule. According to Dworkin, there is always a right way to interpret every rule, including this one, and, as such, there is always a right answer to every hard case; this is known as his "right answer thesis" (Dworkin 1986: 80–2, 260–4).

The adjudicative procedure to discover the right answer, as defended by Dworkin in *Law's Empire*, is twofold. Firstly, the judge must decide which of the available decisions "fit" with existing law. That is to say, which of the available decisions are consistent with existing law. Second, the judge should select the right decision from those that "fit" by asking which is most in-line with the demands of political morality, such as equality, justice, and fairness. The upshot is that moral principles are deemed binding over judges, as they are required to achieve the "right answer." In this way, Dworkin's conception of law is similar to natural law theory because determinations of legal validity turn on morality.

Stemming from the right answer thesis, Dworkin's interpretive theory of law takes Hart's positivism to task for its treatment of legal reasoning. According to Dworkin, Hart's positivism cannot account for the central role moral principles play in the identification of law without violating the separation thesis, which Dworkin claims, 'promises an ontological separation of laws form morals' (Dworkin 1977: 348–349). By "promises

an ontological separation' Dworkin means that Hart's positivism establishes the claim that law and morality are grounded by fundamentally different things and, as such, are always separate from one another. However, as Hart points out, Dworkin has simply misunderstood his theory: '[Dworkin] ignores my explicit acknowledgement that the rule of recognition *may* incorporate as criteria of legal validity conformity with moral principles or substantive values' (Hart 1994: 250, emphasis added). According to Hart, moral principles *can* operate as tests of legal validity *iff* (if and only if) the rule of recognition explicitly includes moral principles as one of the things legislators and judges ought to consider when exercising the power afforded to them by that rule (the power to conclusively identify the legally valid rules of their legal system). This is the core claim behind ILP.

Consider the moral principle of fairness. The *Canadian Charter of Rights and Freedoms* outlines the rights and freedoms guaranteed to all legal subjects by the Canadian government and, as such, can be thought to constitute the rule(s) of recognition that confer(s) on certain legal officials (e.g., judges) the power to make determinations of legal validity within Canada. The right to procedural fairness safeguards against the arbitrary denial of a person's liberties by the state and, by its very nature, appeals to the moral principle of fairness. The due process clauses found in the Fifth and Fourteenth Amendments of the United States Constitution function in the same way.

The landmark Canadian Charter review case, *R. v. Morgentaler* (Supreme Court Reports, 1985: 30), struck down the abortion ban as contained within the Canadian Criminal Code because it was found to violate that moral right to procedural fairness. The justices involved in that decision concluded the abortion ban was "not law" because the rule of change in Canada does not permit legislators to create legal rules that infringe the right to procedural fairness. As such, the rule of recognition requires that justices strike down such statutes (that infringe the right to procedural fairness). According to ILP, the best way to understand what happened in *R. v. Morgentaler* is to acknowledge and accept that the legal system of Canada includes (hence *inclusive* legal positivism) moral tests for legal validity.

The upshot here is that Dworkin attacks legal positivism as it does not necessarily have to be. Dworkin's claim that legal positivism necessarily promises an ontological separation between law and morality is false. Some legal positivists may take such a line, but it is not necessary that one does so to defend legal positivism. ILP in particular leaves room for the possibility that a society may incorporate moral standards their legal officials must consult when determining what is, or is not, a legal rule in their legal system.

Inclusive and Exclusive Legal Positivism

As sub-varients of Hart's legal positivism, both ILP and ELP maintain the separation, sources, and social theses. The point of tension between ILP and ELP is how they unpack them. ILP, to reprise, acknowledges that *sometimes* questions of legal validity turn on questions of morality but that whether they do is contingent upon certain social facts in a given legal system. ELP argues that questions of legal validity *can never* depend on that rule's concurrence with moral principles. If it did, proponents of ELP claim, the legal system would lack any authority to establish directives and, as such, would lack a fundamental aspect of the nature of law.

The most well-known proponent of ELP is Joseph Raz, one of Hart's students (though Raz never uses the phrase "exclusive legal positivism"). To understand Raz's positivist conception of law and what makes it *exclusive*, it helps to have a basic understanding of his authority argument, which includes (though is not exhausted by) the following declarations: (1) It is an existence condition of law that it *claims* legitimate authority over a population (that it claims to have the right to guide the behavior of that population); (2) law acts as a practical authority by creating directives (for those who live in law's jurisdiction, its directives are reasons for action); and (3) those authoritative directives provide *exclusionary* reasons for actions.

Regarding point (1), Raz only goes as far as saying that law must necessarily *claim* legitimate authority because it could very well be true that a given legal system has no practical authority over a population (Raz 1979: 215). Claim (2) follows from claim (1). Law can only be said to claim legitimate authority over a given population if it is the kind of thing that is capable of being a practical authority. Being a practical authority, for Raz, means providing authoritative directives to which an individual ought to defer their judgment. Significantly, the "reasons for action" the law provides are, in accordance with (3), what Raz calls exclusionary second-order reasons.

When deciding how we should act, we can consult both first- and second-order reasons for action. First-order reasons are reasons for action in themselves, like moral or prudential reasons for action (Raz 1975: 36). For example, a first-order reason to not steal is that stealing is morally wrong. Second-order reasons are 'reason[s] to act, or refrain from acting, on a [first-order] reason' (Raz 1975: 39). A promise is a classic example of a second-order reason: if you promise to attend a friend's performance, then on the night of the performance, your promise acts as a second-order reason to *exclude* all other reasons you may have to not attend from your decision-making. This particular type of second-order reason for action is called an *exclusionary* reason for action.

The law, per Raz, provides both first- and second-order reasons to act. That a legal rule prohibits theft is a first-order reason to not steal. It is also the case, per Raz, that the legal rule, like a promise, is a reason to exclude other first- and second-order reasons for action from our consideration: the existence of a legal rule provides a reason to act (or refrain from acting) that supplants all other reasons we may have to act (or not act) in accordance with that rule. Hence, if the law is to claim legitimate authority, it must be capable of serving as a practical authority, and this can only happen if it is capable of providing second-order exclusionary reasons for action. Wil Waluchow (a lead proponent of ILP and another of Hart's students) responds to Raz's argument from authority by pointing out that there is no reason to necessarily suspect that directives must impede one from ever consulting other first-order reasons for action if they are to be authoritative in nature (Waluchow 1994, 2000). It is, Waluchow argues, entirely possible for authoritative guidance to be partial, that one would need first-order reasoning to determine the content of an authoritative directive.

Questions surrounding Raz's conception of authority aside, proponents of ELP following Raz argue that ILP is inconsistent with the positivist assertion that law is a social fact. The thought goes roughly as follows: if the existence of rules in a normative system turns on their consistency with moral principles (something ILP leaves room for), then that normative system cannot be capable of serving as a practical authority. This is because those subject to that normative system are better off working out for themselves what the most moral way to behave is – there would be no need to consult that normative system for practical guidance at all. Following Raz, a system that is not capable of serving as a practical authority cannot be said to claim any legitimate authority over a population and, as such, has not met the conceptually necessary requirements to be called *legal*.

Scott Shapiro defends ELP on similar grounds. According to Shapiro, if a legal rule is to have authority, its directives must make a *practical difference* in the lives of those it claims authority over (Shapiro 1998). If, for example, an individual would act in accordance with a legal rule without having to *appeal* to that legal rule as a reason for action, then the legal rule has not made a practical difference. The same goes for legal officials: those special secondary rules of adjudication, change, and recognition must make a practical different to how the legal officials conduct their official business. Officials must appeal to those rules as reasons for action when conducting their official business, not to any first-order moral reasons for action.

Consider the due process clauses within the United States Constitution. Due process in the United States Constitution includes the "void for vagueness" doctrine: if a legal statute is too vague to provide guidance, then it is unconstitutional. This is seen in the U.S. Supreme Court case

Coates v. Cincinnati (402 U.S. 611, 1971). An ordinance in Cincinnati sought to prohibit the assembly of three or more persons in public areas who would, "conduct themselves in a manner annoying to persons passing by" (402 U.S. 611, fn. 1, 1971). The U.S. Supreme Court ruled that the expression "annoying" was too vague to provide legal guidance to the average person and, as such, ruled that the ordinance was unconstitutional.

According to Shapiro, when those justices were deliberating, they were consulting the rule of recognition which directs judges to declare any vague rule unconstitutional. At no point, per Shapiro, did the justices need to engage with first-order moral reasoning over whether the Cincinnati ordinance in *Coates* was "fair." Furthermore, if *any* first-order moral reasoning were engaged by the justices, then we must conclude that the rule of recognition failed as an authoritative rule because it did not provide any practical legal guidance. The justices simply deferred to moral principles as the authority on what is, or is not, law. Such a conclusion, claim proponents of ILP, misconstrues how the rule of recognition functions and the claims ILP makes.

Regarding the rule of recognition, ILP maintains that a judge who engages with moral reasoning when answering the question "is *x* a legally valid rule?" does so because sometimes they must to properly satisfy the powers conferred to them by the rule of recognition. Think of a couple who gets two witnesses for their wedding in England: they do so because they must to properly exercise the legal power to marry conferred to them by the English laws that govern matrimony. So, there is no concern about ILP undermining the claim that law is a social fact because, per ILP, whether a legal system includes moral tests of legal validity is, in itself, a social fact.

To return to *Coates*: ILP claims "the void for vagueness doctrine" is best understood as a moral condition of legal validity because due process, of which the doctrine is part, is fundamentally about what is fair. Vagueness sometimes arises in the law by design (think anytime the word "reasonable" is used) and sometimes by accident, importantly however, it is not always problematic. The question in *Coates* was not simply "is this law vague and therefore unconstitutional?", it was, "is this vague law *unfairly* vague and therefore unconstitutional?" The latter being a question that cannot be answered without first-order moral reasoning. And once the justices determined that the ordinance was *unfairly* vague, they had to declare it unconstitutional. There is no concern about the law's authority here, contra Shapiro's claims, because to again quote Hart, 'the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values' (Hart 1994: 250).

Nor was the question in *Coates* about the morality of annoying behavior as such. As both Wil Waluchow (1994: 155–163; 2000: 63–64) and Jules Coleman (1998: 414) point out, the reasoning a judge may use when deliberating the *validity* of a legal rule is not necessarily moral reasoning in general. To return to the Canadian abortion case, *R. v. Morgentaler* (Supreme Court Reports 1985: 30), the ban within the Canadian Criminal Code was *not* struck down for first-order moral reasons pertaining to ethics of abortion. The question the justices faced was not, "is abortion morally permissible?" Rather, the abortion ban was struck down because it violated the Charter right to procedural fairness. But, the decision can reasonably be said to have engaged in moral reasoning, and ILP simply accepts and accounts for that observation.

Conclusion

ILP provides a middle road between natural law theory and ELP. Crucially, it does so without a loss of explanatory value and herein lies its virtue as a legal school of thought. As Waluchow writes, ILP, 'seems better able to explain what appears to be an obvious fact: that moral tests for the validity and content of laws have been explicitly recognized within some legal systems' (Waluchow 1994: 140). ILP accounts for the role moral reasoning sometimes plays in adjudicating hard cases, which Dworkin thinks should be central to investigating a theory of law, and it does so while maintaining the sources thesis that valid legal

rules must have appropriate institutional connections.

Cross-References

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- ▶ Dworkin, Ronald: Legal Philosophy
- ▶ Hart, Herbert Lionel Adolphus: Influential Ideas
- ▶ Legal Positivism: Exclusive
- ▶ Positive Law and Natural Law
- ▶ Raz, Joseph
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Legal Positivism: International

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Introduction

Legal positivism has been the object of prolific discussions in legal theory and jurisprudence. The notion has similarly been the object extensive examination in international legal literature too. Yet, when discussed in relation to international law, the notion of legal positivism and the debates thereon have not always mirrored the contentions debated in legal theory and jurisprudence. The following sections leave aside the elements of the discussion of international legal positivism that strictly reflect the debates on legal positivism

unfolding in legal theory and jurisprudence and, instead, zero in on the very specific ways in which the notion has been approached and debated in international legal thought.

In the international legal literature, legal positivism is commonly presented as a dominant school of thought and is associated with a wide series of grand claims, namely, state-centricism, voluntarism, immanent intelligibility, formalism and source-based argumentation, and the displacement of politics by international law. This entry recalls the various facets of this common representation of international legal positivism (1) before challenging some of these assumptions (2). It concludes that international legal positivism remains a very fluid notion on which international legal scholars conveniently pin a wide variety of ideas with a view to continuing to debate the state of the world's affairs and their mode of intervention therein (3).

Common Assumptions About International Legal Positivism in International Legal Thought

Dominance

International legal positivism is generally held to be the approach to international law that informs most international legal discourses. In other words, the most common patterns of international legal arguments are said to originate in a series of legal positivist postures that are repeatedly taught in the main law schools across the world and the most sold international law textbooks. In this respect, it is no coincidence that the very term of "mainstream" which emerged in international legal discourse in the 1980s has often been synonymous of a discourse grounded in positivistic postures or arguments. This representation of international legal positivism as a dominant school of thought is commonly accompanied by historical narratives whereby international legal positivism is said to have gradually trumped the natural law tradition in the eighteenth and nineteenth century before securing a quasi-monopoly in twentieth- and twenty-first-century international legal thought and practice. According to such a narrative, Emmerich de Vattel (1758) is represented as the beacon having broken away from the dualism of scholastic and early modern scholars (Jouannet 1998; Onuf 1994). He is said to have been followed by Georg Friedrich von Martens who departed more radically from the natural law tradition than Vattel (Dieterich 1785). That common representation is followed by the claim that legal positivism came to outpace natural law as the dominant school of thought in international law only by the late nineteenth century and beginning of the twentieth century. It is true that such a mundane account of the rise of international legal positivism as the dominant school of thought of international law in the twentieth century acknowledges some occasional relapses in international legal positivism's alleged supremacy. For instance, the interwar period is portrayed as having witnessed a return of a rejuvenated natural law with authors like Lauterpacht or Verdross. The Cold War is also said to have brought about a severe attack against legal positivism by virtue of a turn to instrumentalism promoted by the so-called policy-oriented jurisprudence (New Haven) which transposed into international law some of the main paradigms of legal realism but was rebranded with a clear political agenda. More recently, international legal positivism is said to have weathered the challenges of critical thinking spearheaded by scholars like David Kennedy and Martti Koskenniemi who have cast doubts on the Enlightenment project associated with legal positivism (Kennedy 1987; Koskenniemi 2005). And yet, according to such a widespread representation, all those charges are said to have failed to bring the supremacy of international legal positivism in international legal thought and practice to an end.

Main Claims Associated with International Legal Positivism

The abovementioned representation of international legal positivism as a dominant school of thought and the historical narrative that comes with it are both grounded in the presupposition that international lawyers share a common understanding of what legal positivism entails in terms of structure of legal argument or methodology. Yet, the literature bespeaks a much more complex

and multifaceted picture of the semantics at work in the debates on international legal positivism. In the international legal literature, rather than being the object of a consensus, the notion of international legal positivism is associated with an eclectic series of distinct claims. This is why the debate about legal positivism in the international legal literature often proves unintelligible or abstruse. A few of these claims must be distilled here. It is important to highlight that these claims do not correspond to the "theses" traditionally discussed in legal theory and jurisprudence such as the autonomy thesis, the separation thesis, convention thesis, source thesis, social practice thesis, etc. The claims associated with international legal positivism in the international legal literature refer instead to some – often vaguely defined – ideas meant to be of a paradigmatic nature. A few of these claims must be mentioned here. It should be noted that these claims associated with international legal positivism are not cumulative. Many of them overlap while some others contradict one another. This is why the claims listed below should not be construed as anything like cumulative and constitutive elements of international legal positivism.

State-Centricism In international legal discourse, legal positivism is often associated with the idea of sovereignty and the centrality of the state according to which states are said to be the exclusive makers of international law and the only original subjects of international law, with individuals and other actors being bound to be mediated by the state. This claim bears upon the historical narrative about international legal positivism as it posits that the consolidation of international legal positivism as the dominant school of thought reflects the rise of the state as the central actor in the international arena. This is an understanding of international legal positivism that regularly permeates the criticisms raised against it.

Consensualism and Voluntarism The association between state-centricism and international legal positivism is generally continued through another claim associated with international legal positivism, namely the idea that state consent is the (pre-legal) criterion giving law its binding force as well as its legitimacy. This is what is generally called consensualism or voluntarism. According to this construction, the rules of international law binding upon States are said to emanate from their own free will. The judgment of the Permanent Court of International Justice in *Lotus* (1927) is widely construed as the embodiment of this claim that is commonly described as being positivistic. This association has been resilient despite being the object of very severe criticisms by those self-declared positivists and especially the normativists inspired by Hans Kelsen. It is noteworthy, albeit not surprising, that it is this association between international legal positivism and consensualism that has fuelled many of the charges of the contradictory nature of positivist legal argument that necessarily collapses into objectivism and naturalism (see e.g. Koskenniemi 2005; Carty 2005).

Immanent Intelligibility and Mechanical Hermeneutics

International legal positivism is regularly construed as a theory of immanent intelligibility of norms allowing predictability in the behavior of law-applying authorities. Such an association is grounded in the idea that international legal positivism is aimed at providing a theory of hermeneutics that is both content independent and outcome independent and allows the mechanical extractions of legal arguments from legal texts. While there are very few avowed international legal positivists who will actually vindicate such an association between international legal positivism and immanent intelligibility, this claim, like the other claims mentioned above, has nourished many of the contemporary criticisms against international legal positivism, and especially the finding that, as a hermeneutic theory, international legal positivism has failed to provide determinacy and predictability.

Formalism and Sources-Based Argumentation

International legal positivism is often construed as synonymous of formalism. This is not utterly

accidental since those self-declared international legal positivists have commonly bestowed a central role on legal forms, especially in terms of authority and bindingness. Because formalism is itself a multidimensional idea, the association between international legal positivism and formalism can be broken down into several distinct claims. First, the association between formalism and international legal positivism is a variant of the abovementioned claim on immanent intelligibility and mechanical hermeneutics. Second, the idea of formalism which is associated with international legal positivism also refers to the use of legal forms to identify legal rules. In that sense, international legal positivism is presented as postulating a doctrine of law-identification meant to allow the "objective" identification of legal rules. This type of formalism is reminiscent of the so-called *source thesis* that has been extensively discussed in legal theory and jurisprudence whereby legal rules are ascertained by their formal source and that, as a result, identifying law boils down to a pedigree test.

The association between formalism and international legal positivism is often accompanied by another claim whereby international legal positivism is construed as postulating argumentation – especially in terms of the ascertainment of international legal rules – based on the sources of international law. Said differently, the resort to the doctrine of sources of international law to ascertain international legal rules is presented as manifesting a positivist move. Such a claim informs the common historical narrative according to which the adoption of Article 38 of the Statute of the Permanent Court of International Justice in 1920 that lists the main sources of international law brought about sophistication in the ascertainment of international legal rules and consolidated the dominance of international legal positivism.

The Displacement of Politics by International Law

Finally, it is common to construe international legal positivism as an approach to international law that seeks to domesticate power, displace politics, and promote the scientific or pure character of law. In that sense, international legal positivism is often associated with the Enlightenment project and the idea that law is meant to be a technical and determinate tool stripped of any program of governance and geared towards the maintenance of order. A variant thereof is the idea that international legal positivism is a project of de-ideologizing international law. The failure to achieve such displacement of politics – which few would question – has been one of the major criticisms raised against international legal positivism.

Debunking the Common Representation of International Legal Positivism

The previous section has sketched out some of the main claims associated with legal positivism in international legal literature, thereby simultaneously showing the cacophony infusing debates on international legal positivism. The following observations challenge some of the key tenets of the abovementioned representation of international legal positivism and the claims that are associated with it.

The Growing Marginality of International Legal Positivism

While international legal positivism is portrayed as a dominant school of thought in international law, it is noteworthy that very few international lawyers will describe themselves as international legal positivists. What is more, the notion of legal positivism has acquired a rather bad connotation in international legal discourse. Indeed, most of the claims that are associated with international legal positivism and which have been recalled above have themselves been the object of some very severe – and compelling – criticisms. Such criticisms include the failure of international legal positivism to provide determinacy, to provide a useful hermeneutic theory, to distinguish between law and non-law, to displace politics and fulfill the Enlightenment project, etc. Such charges against international legal positivism have resonated very widely in international legal scholarship. Nowadays, many international lawyers have shifted their attention away from hermeneutic theories and have attempted to displace politics. In the

same vein, it is now common to acknowledge the better descriptive virtues that come with approaches focused on processes or informal networks rather than rules focusing on *informal networks*. One also witnesses attempts to reconstruct, challenge, and reform international law from the vantage point of legitimacy. The use of nonformal law-ascertainment criteria is also more mundane among international lawyers. And so is the interest for the empirical study of the conditions under which international law is formed and bears effects on its addressees through the systematic use of qualitative or quantitative methods, through inquiries into the means to ensure accountability in the exercises of power that cannot be apprehended by traditional legal categories, through new modeling of authority at the international level and the structure of global governance, and through sociological insights about the functioning of international law. Thus, in contemporary international legal thought, international lawyers have been developing scholarly projects that are alien to the claims traditionally associated with international legal positivism, thereby questioning the portrayal of the latter as a dominant school of thought.

Some of the Straw Men Associated with International Legal Positivism

It is not only that the representation of international legal positivism as a dominant stream seems overblown. It is also that most claims traditionally associated with international legal positivism are neither specific to international legal positivism nor do they constitute actual argumentative postures of international lawyers, even of those avowed legal positivists. Mention is made here of a few of these straw men.

State-Centricism The idea that the international arena is state-centric has long been contested by most international lawyers. It is widely recognized that a great variety of non-state actors have long been involved in international law-making. It is equally contended that international legal personality as well as rights and duties can be extended to several such actors. Even those self-declared international legal positivists are amenable to the idea that international law can also emanate from non-State entities. Very few international lawyers actually vindicate state-centricism.

Consensualism and Voluntarism By the same token, few international lawyers would advocate that the roots of bindingness or authority are to be found in the consent of states. Even the most avowed international legal positivists would acknowledge that consent is, at best, a material source and that falls short of being a foundational paradigm and that the ultimate source of international law's bindingness and legitimacy. The association of international legal positivism with consensualism or voluntarism is even more paradoxical as consensualism or voluntarism does not seem to differ greatly from the deductive moves on which natural law approaches are built.

Immanent Intelligibility and Mechanical Hermeneutics The possibility that hermeneutics produce a stable and determinate meaning for international legal rules has few supporters among international lawyers. Although most of them would still contend that the doctrine of interpretation generates constraints on interpretive processes, they all acknowledge the wide discretion of law-applying authorities. Indeed, more and more international lawyers have grown skeptical of the ability of the traditional doctrine of interpretation to constrain the creation of meaning and construe it as an empowering mechanism instead. It is now widely recognized that interpretation is primarily creative and performative.

Formalism and Source-Based Argumentation The claim that international legal positivism implies the resort to legal forms for identification purposes and a wide reliance on the doctrine of sources it manifests is probably less contestable. There is little doubt that most international lawyers, including the avowed legal positivists, advocate for some role for legal forms in law-ascertainment processes and resort to the doctrine of sources to distinguish between law and non-

law. Yet, such inclination seems to infuse the whole discipline as these are postures that are well entrenched in the consciousness of the great majority of international lawyers. Even those that have contested the very idea of formalism have found themselves engaged in projects of reinvention of formalism and, incidentally, the doctrine of sources. The best example thereof is probably Martti Koskenniemi's "culture of formalism" (Koskenniemi 2002). International constitutionalism can similarly be construed as an endeavor to rethink the role of legal forms. The same holds for the reconstructions of international law around the paradigm of legitimacy, which have continued to rest on mechanisms of "symbolic validation" which can be read as the perpetuation of formalism in legal reasoning (Franck 1990). Likewise, the role of "authority signals" in the New Haven policy-oriented approach to international law can also be construed as perpetuating, albeit in a covert fashion, the resort to formal modes of reasoning (Reisman 1981; Saberi 2016). The so-called new legal realism in American international legal thought has not necessarily contradicted the need for formal modes of reasoning, especially with respect to law-ascertainment (Shaffer 2008; Erlanger et al. 2005). The foregoing shows that the preservation of formalism and the resort to a doctrine of sources of some sort remain a key tenet of most scholarly projects in international law, thereby questioning whether such a posture can be exclusively traced back to international legal positivism.

The Displacement of Politics by International Law The idea – directly inherited from the Enlightenment – that international law displaces politics remain very much ingrained in international legal thought and practice. Yet, this idea does not seem to be specific to international legal positivism. It seems to constitute an ethos of the whole discipline, which sees the distinction between law and politics a condition of the possibility of the managerial project behind international law. In that sense, it is rather surprising that this claim has been associated exclusively with international legal positivism. Irrespective of its merits, it seems to be a presupposition shared by most international lawyers.

Conclusions

The preceding paragraphs have shed light on some of the common claims associated with international legal positivism and their limits. In particular, it has been shown that international legal positivism is a notion that is commonly constructed through a few simplistic associations which are either ill-founded or the manifestation of an overarching attitude in the discipline as a whole. Given that most of the claims commonly associated with international legal positivism prove to be straw men, most international legal scholars – including those self-declared legal positivists themselves – have very often lost the sense of what international legal positivism really means, the debate on international legal positivism proving a great cacophony. In this context, it would not be unwarranted to question the descriptive or explanatory virtue of the notion of international legal positivism and its overall relevance in international legal thought. What is international legal positivism in the end? In the light of the discussion conducted in the preceding sections, international legal positivism seems to be nothing more than an eclectic and all-encapsulating adversarial reference by opposition to which international lawyers define themselves and their projects. Said differently, international legal positivism boils down to one of these functional notions that allow the discipline to operate in its constitutive adversary mode. This is no modest task.

Cross-References

- ▶ Critical Theory and International Law
- ▶ International Law: Legitimacy of
- ▶ Legal Positivism: Inclusive
- ▶ Legal Realism, American: Theoretical Aspects
- ▶ Legal Theory: Types of
- ▶ Neo-Kantianism
- ▶ Positive Law and Natural Law
- ▶ Pragmatism

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Legal Positivism: Ricardo Guibourg

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How to expose the academic life of a great legal philosopher? Tradition aims to point out the successes of his main works. Following this path, let's start with Ricardo Guibourg's doctoral dissertation (published with minor revisions as Guibourg 1986). But before getting into the matter, a greater development of the ideas that will be exhibited here can be found in Botero (Botero 2021).

The central idea of his dissertation came up when Guibourg born in 1938, but he still alive. For this reason is (1938–) was a young law student at the University of Buenos Aires (UBA), just when he was being immersed in his first readings of the great twentieth-century legal philosopher, Hans Kelsen, widely known in the Argentine academic fields. Since then, and as if he were a kind of analytical detective, Guibourg came to realize that something was not working well in the pure theory of law: the logical distinction between validity and effectiveness left several gaps open, which the Austrian philosopher tried to close by making some concessions to realism or functionalism (in this paper these terms will be treated as synonyms).

Once he earned his lawyer's degree, it was precisely this perception that motivated him to

propose a doctoral dissertation project in that line, a project that was encouraged by his professor Ambrosio Gioja (1912–1971), with the initial title of *La ciencia bifronte del derecho* ("The two-faced science of law"). Gioja, after all, was a great patron of Argentine legal philosophy at that time.

The intellectual meetings of the Gioja group allowed Guibourg to realize that he was not facing a shortcoming peculiar to Kelsen's work, but to positivism in general, so he included in his doctoral thesis an analysis of Karl Olivecrona's, Alf Ross', and H. L. A. Hart's views regarding the problematic relationship between efficacy and validity.

It is worth commenting that, in the legal philosophical groups that celebrated the intellectual legacy of Gioja in the 1960s and 1970s, there was a clear predominance of Kelsenian positivism, which was fueled by a progressive interest in deontic logic, an interest that was sparked by the works of Carlos Alchourrón, Eugenio Bulygin, and Roberto Vernengo, and cultivated by professor Gioja. Obviously, this academic group was in continuous disagreement with the (not only epistemological but also political) Thomist natural law theorists. Some of them supported the conservative regime that prevailed in the country (in general) and at the UBA (in particular). At that time, the academy was among many platforms that could host political discussion. A good part of the positivists in that group were defenders of democracy, although they differed among themselves due to their more particular views.

In this group led by Gioja we can see one of the finest moments, as well as the birth and consolidation of two significant streams within Argentine legal philosophy: analytical and critical. In short, Gioja knew how to capitalize on the fame occasioned by previous contributions by Argentine philosophers such as Carlos Cossio and his egological theory to offer a more robust foundation for analytical positivism and critical theory.

The dissertation was finally defended in 1986, under a democratic government, when the academic and administrative normality of the UBA was largely reinstated. The panel of examiners was more than eminent: Alchourrón, Bulygin, and Vernengo. All recognized analytics who did not hesitate to mark as "outstanding" the dissertation, along with the award recommendation for the best dissertation of the School of Law, which he did not obtain in the end.

Guibourg published his dissertation that same year with the Astrea publishing house, making some minor changes. This book has been reprinted several times, but a second edition that would include a substantial change or even a broader development of the ideas outlined in the original work did not cross Guibourg's mind.

However, in the author's opinion, the book did not have the expected impact, although it appeared cited in his friend's works. But these quotes were more about circumstantial aspects of the book, like Guibourg's good summary of Kelsen's, Olivecrona's, Ross', and Hart's jurisprudential theories.

The 1986 doctoral dissertation had a precise aim: There are two theoretical models within positivism, a structural normativist one that sees law as a system of norms and a functional realist one that sees law as an efficacious social device. Thus, a positivist theory of law can start from either of these two streams, useful for various purposes. However, realism is not helpful in explaining the internal structure of norms, while normativism misses the understanding of the existing relationships between society and norms. So, if a positivist theory seeks to offer a complete view of law from only one of the models, it falls into an internal contradiction by having to make concessions to the other. If positivism intends to analyze the law from both points of view at the same time, it falls into an external contradiction due to the impossibility of plausibly coarticulating these two points of view.

To begin our analysis, the search for possible interactions between structuralist normativism and functionalist realism has already been undertaken by other legal philosophers, but without reaching Guibourg's conclusions. For example, building upon the syncretic approach of the sociologist Talcott Parsons (1902–1979), many legal

philosophers and legal sociologists tried to bring these two views closer together for a better understanding of the legal phenomenon. Among these attempts, we could mention, for example, two: *three-dimensionalism* (of Miguel Reale and Werner Goldschmidt, among others) and *systemic theory* (of Niklas Luhmann, Ernesto Grün, Guibourg himself, and others).

However, the answer to the possible relationships between structure and function would be very different from Guibourg's dissertation. In Guibourg's words (1986: 77, author's translation), "with the interaction between an underlying realism and a vaguely spasmodic formalism, (by which) legal science, double-faced as Janus, can aim to fulfill its commitment to the empirical method and legal practice," legal science will not be able to display internal coherence.

To reach this conclusion, Guibourg argues that the borders between functionalist and structuralist normativism are not entirely clear since neither of them has been able to altogether dispense with the other when explaining the *complexity* of legal systems. To demonstrate this, a good part of the dissertation focuses on exposing how Kelsenian normativism falls short of incorporating the dimension of efficacy into its theory, an issue that occurs, for example, in three cases: (1) *custom* (gradual extra-systematic fact) since only that one which has been effective in a social environment can be a valid custom; (2) *revolution* (abrupt extra-systematic fact), to the extent that only a successful revolution (that is, an effective one) can modify a fundamental norm and, therefore, the valid constitution that grounds an entire legal system; and (3) *desuetude* or negative custom (gradual extra-systematic fact) since if a norm or system is not effective for an extended period and in a generalized way, the former or the latter loses its validity.

Moreover, Guibourg wanted to showcase that the difficulty of a coherent connection between norms and reality not only appeared in Kelsen's work. Hence his interest in exposing the ideas of Olivecrona, Ross, and Hart to the same question, namely, how they tried to coarticulate the concepts of validity and efficacy in a coherent theory of law. In so doing, he reached similar conclusions: that all of them end up making concessions to the antagonistic model. However, his dissertation did not seek to dismiss positivism, much less be a plea for help by natural law theory. Instead, Guibourg just wanted to draw attention to the fact that positivism was not a complete theory (is there any?) because it is impossible to be consistent both with normativism and realism.

Supposing that normativism, realism, and natural law theory are the three jurisprudential theories deemed by their proponents as complete accounts of the legal phenomenon, none works by itself, Guibourg argued. In natural law we do not know for sure what is natural, and it does not offer any reliable method to access what is objective; of normativism we know that although it is useful for legal actors, it does not have a reliable method because it does not start from experience; and of realism, we know that although it has a reliable method, its conclusions are not useful for the normal development of law in society. We can think that the solution would lie in an intermediate theory, but this is not likely since the intermediate views tend to slide to the extremes, seeking a coherence that is not achieved in the gray areas. Moreover, there is the fact that the combination of theoretical systems built against each other leads to unintelligible postulates. So, we must find a way to live with the problem, an issue that Guibourg addresses in his book *Saber Derecho* (Guibourg 2013). However, we repeat, in the doctoral dissertation, Guibourg only came to accept that when both sides or faces of positivism come together, they corrode each other. The book's outcome is somewhat pessimistic, although I prefer to see it as an invitation to critical modesty. Of course, the other nonpositivist theories have even less chance for him. Therefore, Guibourg continued to prefer positivism, with all its faults.

Turning now to his postdoctoral works, Guibourg has said that his books and essays can be classified along five general topics: (1) logic, (2) jurisprudence (general theory of law), (3) general theory of systems, (4) ethics related to ontology and methodology, and (5) labor law, legal informatics, and methodology (Guibourg 2008: 27). The doctoral dissertation as well as most of the works that we will review below –

specifically, *Derecho, sistema y realidad* (2012), *El fenómeno normativo* (1987), *Pensar en las normas* (1999), and *Análisis de criterios de decisión judicial* (Cerdio et al. 2003) – are considered by him to be part of the "jurisprudence" topic in such a way that the continuity of his doctoral ideas was maintained along a specific view, which we will focus on below.

To better understand the connection between his doctoral dissertation and *Saber Derecho* (2013), we must go back to an intermediate work: *La construcción del pensamiento: decisiones metodológicas* (2004). This book is not a legal philosophical work in the strict sense, but a methodological endeavor, as indicated by its subtitle. Here Guibourg highlights the centrality of method (something he calls genetic order). This methodical stand, already visible in *Pensar en las normas* (1999), has a distinctly Humean flavor that led Guibourg to pragmatic-utilitarian conclusions. Simplifying somewhat, Guibourg adopts this genetic order: individuals see, hear, smell, taste, and touch; that is, they experience impressions. These sensory impressions are associated with ideas (the result of other impressions), giving rise to increasingly complex perceptions and images. But these perceptions, or most of them, do not depend on the individual's will since what someone sees is not necessarily what one wants to see. For example, no matter how hard one tries, a vision under the sun's brightness cannot turn dark simply because one wants to. Thus, faced with the impotence of simply desiring a sensory image into existence, the idea (which is constructed of course) of reality arises. Reality is a complex notion created by us from what we feel is independent of our will. But is what someone calls reality something that exists outside of him or her? No one knows what it is, but it is the only thing (s)he has to construct with some sense of certainty. Therefore, if a person denies the reality of which (s)he has impressions, it is pragmatically useless to affirm that (s)he is the only thing that exists, but that (s)he should continue living with others of whom (s)he cannot prove their existence.

Among these models, we find the idea of falsehood and truth, which requires a validating criterion, which in the creative mind of each one can be anything. However, in the mind of someone who wants to have a useful validating criterion, the latter is nothing better or other than the only thing that one really has within one's reach: one's impressions that are the beginning of what they call reality. Subsequently, everything else is formed from these concepts and models. Since, in the meantime, we have created language (with its meanings and signifiers), there becomes visible the significant risk of thinking against the method initially chosen: that if there is a reality and it is knowable insofar as it is conveyable among individuals utilizing language, anything that can be said can *thereby* become a reality, even that of which I have no sensible impression. Thus, some metaphysical ideas appear as regulative devices for constructing some transcendental realms of existence such as God, reason, the hippogriff, consciousness, or other such entities.

What to do in this case? The genetic order is one promising avenue. Making a methodological decision on how to begin to develop one's thinking, Guibourg chooses to believe what he has an impression of, namely, the sensory impressions to which he can ascribe the status of reality insofar as they are not impressions subject to his own will and that, in some way, can be attested by another person. This realist method allows him to distinguish one thing from the other with some reliable criterion, and therein lies the primary utility of his methodological decision.

This last reflection takes us to *Saber derecho* (2013), where he honed in on the ideas of his doctoral dissertation based on his methodological shift in 2004. Comparing the 1986 work with the 2013 book, we can easily conclude that they are not the same. There are differences, such as the greater explanatory section in *Saber derecho*. Likewise, in this last work, instead of proposing that the positivism of the four authors studied is watered down for not being able to offer a satisfactory theory of the relationship between norms and reality (between structure and function), the 2013 book adopts as a field of analysis a much broader spectrum of different theories of law. It thus showcases – with the sharpness of an analytical mind who spends waning years making *distinctions* – their unsatisfactory aspects.

Further, another difference between both books is that, in the 2013 one, he assumes a more proactive stand. Guibourg adopts in *Saber derecho* a methodologically realistic view already outlined in Guibourg (2004). If we want to obtain nonmetaphysical legal knowledge without unnecessary concessions to what we ignore, it is required to start from the most extreme variant of realism, but since this variant does not satisfy the argumentative and pragmatic needs of legislators, judges, lawyers, and citizens, constructing a normative discourse become necessary to avoid arbitrariness. It is precisely because of this that law (Guibourg 2008: 9, author's translation) tells us it is a social practice:

> The law works as a practice that affects, favorably or unfavorably, different groups of people, each of whom expects or desires certain benefits from it. The rulers (position in which I include the executive and legislative powers) want that their decisions be carried out and that the citizens abide by and comply with the legal norms enacted by them to an acceptable degree, which in turn allows the sanctioning of dissident behavior and even makes tolerable a certain degree of inefficiency. Judges expect from the law to be a guide for their decisions, a certain margin of discretion to satisfy their moral conscience, a guarantee for their authority and an instrument to enforce sanctions. Citizens in general expect, at least, some clarity about the behaviors that they should display or omit to avoid confrontation with the authority.

But the empiricism that reminds us that law is a social practice does not allow us to argue about what is legally due or not. The normative system, not grounded in the facts, in the *causal can*, but in the *should of imputation*, requires a hierarchical structure so that the social agents are guided in what they should or should not do, considering the consequences that are stipulated. To understand what should and should not be done, I cannot start from reality, from the descriptions of behaviors that have occurred, but from a structure or pyramid that allows the agent to determine her or his behavior strategically.

In other words, given that neither structuralism nor functionalism gives a complete account of what the law is in society, it is necessary to affirm, starting from a realistic analysis, that law is a social practice that seeks to motivate conduct and hence to further affirm the importance of the norm, on the one hand, and the importance of the pyramid that allows knowing what a valid norm is and what is not, on the other. Moreover, if this is so, a normative system is theoretically justified to the extent that and because it makes pristinely knowable what is or is not legally due. In this way, realism welcomes normativism, based on what social agents expect from the law conceived as a normative system.

However, this methodological match between realism and normativism does not resolve the coherence problems of both theories. Using a widely known architectural metaphor, the pyramid discovered is full of gaps. According to Guibourg (1986), we should recognize that these gaps exist and should be welcomed for the sake of utility. According to Guibourg (2013), we should presuppose the existence of these gaps. But since they are insurmountable, we reach a similar conclusion: positive norms have a high degree of credibility among legislators, judges, lawyers, and citizens. As a deontic structure, the norm continues to have considerable social force, verifiable by others. In this way, due to a pragmatic necessity resulting from the espousal of the realistic method, realism could not keep out normativism, nor vice versa. Thus, the gaps are assumed as a necessary evil, but without entailing the belief that in this way we will solve the problems resulting from the search for coherence in the interaction between these two theoretical models.

At this junction, Guibourg makes a cautionary remark: Everything seems to suggest that, today, positivism is no longer the one that has gaps, but jurisprudence. This is not a result of the problematic relationship between normativism and realism but a consequence of the triumphant arrival of new theories of law with even more significant gaps, such as contemporaneous neoconstitutionalism and natural law theories. Metaphorically speaking, a ship could have holes and continue sailing with the necessary repairs. But it is an entirely different thing when the holes are already so big that the weight of the displaced water is no longer equal to the weight of the ship. What happens then? It sinks. The worst thing is that while the ship loses its balance and

threatens to collapse, the sailors (legal philosophers) and many passengers (social agents) remain in a standing ovation.

Guibourg says that the modern legislator (the focal legal office for the positivist) becomes, for social and political reasons, a more or less overt natural law advocate. In this way, the positivist, especially the soft one, considers that (s)he should act as a natural law theorist to remain faithful to the social thesis (i.e., to remain a positivist). Rational natural law theorists made a similar move at the beginning of the nineteenth century when they actively became commentators and interpreters of the French Civil Code. Thus, to remain natural law theorists, they declared that the code should be curated under the principles of natural law. Therefore, positivism cannot be understood as a complete theory of the normative nature of law, and no theorist can be considered in the strict sense as only positivist.

Guibourg believes that the problem with this twist is that the written norm, vague and imprecise but at least within reach of citizens' eyes, now becomes even more vague and imprecise by including ideas we do not have an impression or a consensus on their content. Consequently, legal duties lose their relative autonomy as explicit authoritative pronouncements, thereby inviting theorists to tread into an immaterial realm of universal norms and values for which consensus can be obtained through of argument or moral intuition. Following Kelsen's axiological relativism, the theorist is faced with a futile task, Guibourg argues, because no matter how hard she tries, these universal values and norms are not knowable as a matter of objective fact.

Consequently, as no one can provide a methodical demonstration of how to invoke the criteria furnished by principles and values reliably, a new room becomes available for any rhetorical sophistry that the future dictatorships will easily use on the theorists' behalf.

In a similar vein, social agents, although they may at the first welcome the breadth of legal sources and their ample interpretation, are likely to change their minds when realizing the risks involved in planning their actions without knowing for sure its legal consequences. Perhaps we will see a social demand to embrace a less ample interpretation of legal materials, and a more limited role of the judiciary, along the lines of the historical exegetical school. It set the motion of the pendulum of history from the now extreme neoconstitutionalism to the exegetical school.

Likewise, the legal philosophers who today applaud this breadth of sources of juridical knowledge and normative concepts are equally likely to chastise the judges for failing to reach an objective verdict on the content of the law and, consequently, for providing an incentive to the political branch to control the judicial branch. As Guibourg says: "We march happily to catastrophe."

Given that, in general, contemporary analytic legal philosophy is less bent on mobilizing structuralist positivism to answer the problem of the normativity of law, Guibourg's two-faced science (*ciencia bifronte*) is no longer an important issue to debate, except among some positivists. This is one of the reasons why in other texts, Guibourg has sought to exit that debate in order to address some more pressing concerns, as evidenced by his texts where he dealt with the second and fifth topics of his research. In the latter topic, we find his proposal against the current model –which he describes as deceitful natural law.

Inquiring into legal systemics and informatics – a concern as old as his doctoral dissertation itself, with works such as *La justicia y la máquina* (1973) *El fenómeno normativo* (1987) and *Bases teóricas de la informática jurídica* (1998) among others – Guibourg proposes that judges can offer more or less objective guidelines on how they legally evaluate the conduct of social agents by making publicly available the criteria that they use in the form of flowcharts or case law manuals which specify the criteria that citizens and academics could use for their analysis and criticism. This amounts to a depiction of judges as programmers who detail, with subhypotheses, the basic program made by the legislators and who keep the master key that determines the result of the program if they consider it necessary. In this way, the basic structure would be provided by the legislator (in a broad sense), but the detail of the programming would be given by the judges who must reach an agreement on the different variables

of each generic case as outlined by the legislator. This is a programming that would always be available to legal actors and in a continuous review by the judges collaborating. Interestingly, this did not remain a mere proposal but materialized in a pilot test (Cerdio et al. 2003). This would be the first facet of introducing artificial intelligence into the field of law and a proposal that would promote social cohesion and peaceful coexistence as it would be all public and preconfigured.

Conclusion

Through this essay, we reviewed some of Guibourg's works. Guibourg has not changed the ideas that he expressed in his doctoral dissertation, although, as expected, he has improved them, something that we can see in his later works, especially *Saber derecho*, where he pressed even more, the points that he had already made in Guibourg (1986). But of course, to understand the "dialogue" between the works of 1986 and 2013, it is necessary to understand the methodological commitment that Guibourg expressed in his 2004 book: *La construcción del pensamiento*.

The central idea of his doctoral dissertation could be summarized as follows: Each of the two sides of positivism, structuralist normativism and functionalist realism, cannot avoid, no matter how hard they have tried, making concessions to one another, given the impossibility of addressing the complexity of law in a single theoretical system. The biggest problem is that these mutual concessions made by both sides end up corroding them, since concessions mean a loss of the internal coherence of each of them. But there is no alternative. This entails that positivism is a theoretical project with many intrinsic gaps. However, being positivist – even analytical – remains the best possible choice:

> I do not claim, by the way, that the analytic school has suitable and final answers to all these problems. But I am sure that it is the best view wherein to find the missing answers, because it is the most practical way of formulating the questions. (Guibourg 2008: 6)

Finally, in this entry, we pointed out that although Guibourg continues to defend the ideas of his dissertation, he understood they were no longer part of the pressing issues of contemporary legal philosophy. This is the joint result of a significant decrease in the expressive power of legal philosophy to model the operation of modern legal systems especially at the transnational level and the sweeping effect of natural law camouflaged as neoconstitutionalism and nonpositivism.

Argentine legal philosophy is no stranger to the above. Although it continues to benefit from of the legacy of the Gioja era, it is clear (or at least we believe so) that Argentine legal philosophy is aging and that the undergoing generational change will not have the same purchase. This is due to many factors, among them, the erratic educational policies that have not allowed a progressive evolution. In addition, the analytic tradition, once mighty, is fading (without disappearing completely) within the context of the new dominant trends.

In this scenario, reflection on a doctoral dissertation from 1986 leads us to leave open the question of the consequences – legal and political – of keeping out the normative analysis of law to focus almost exclusively on a critical stance on how the law is a refined instrument (or a technical hoax) of domination, or on an inquiry into the principles and moral values that only the "enlightened" ones will be able to intuit. We say "political consequences" because, in addition to the legal consequences already mentioned, democracy itself may be in serious trouble, given that – on this point, Guibourg follows Kelsen in his text "Essence and Democracy's Value" – a democratic system can only flourish when we accept pluralism about values. Accordingly, there is no other alternative for coexistence than to agree, among the largest possible number of preferences, which will be legally binding. But, on the contrary, Guibourg thinks, if individuals consider that they have found the objective and universal moral truth, they will not agree on its content but will seek to impose it on the "less fortunate" who have not contemplated it. And this is not proper democratic behavior.

In short, perhaps the answer to the question about the connection between schools or sides (and not only between normativism and realism) should not be so problematic, but this would mean changing the approach. Until now, it has been problematic because we have been occupying a theoretical standpoint that focuses on matters of model coherence. Guibourg looked for this coherence and did not find it, realizing that it does not exist, or at least not in the ideal way that the supporters of each side of positivism (normativism and realism) want.

In practice, there seems to be an alternative avenue: to see the practice of legal philosophy as a *workshop*, to see the concepts that we have constructed for the understanding of law as a *toolbox*, and to see legal philosophers as *actors* who, depending on the task at hand, can use the tools they require regardless of the theoretical system that made them available and without questioning the usefulness of a tool according to who was its designer. Coherence would yield to the need to better understand, within the legal philosophy workshop (system), a specific normative (law) phenomenon (reality). Returning to Guibourg: Let us not sacrifice the structural integrity of the ship we have boarded to guarantee the coherence of a theoretical system.

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Legal Pragmatism

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Legal Realism, American: Development and Critique

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Introduction

The label "American Legal Realism" stands not for a discrete doctrine or single idea but for a movement in American legal thought that flourished in the interwar years and for the general "approach to law, adjudication, and legal education" associated with it (Fisher et al. 1993, xi). American Legal Realist thought has many aspects, but among the most distinctive and influential of these is the Realist perspective on the study of law and in particular the question of what should (and what should *not*) be the principal object and methods of a science of law. The present entry deals with this aspect of American Legal Realism.

The American Legal Realists of the 1920s and 1930s were a diverse group with a range of scholarly outlooks and interests (Kronman 1993, 185–186). In fact, there is not even a canonical, exhaustive list of Realists. (The figures cited herein as American Realists – Felix Cohen, Walter Wheeler Cook, Jerome Frank, Leon Green, Joseph Hutcheson, Karl Llewellyn, Underhill

Moore, Herman Oliphant, Max Radin, and Hessel Yntema – are, however, all commonly regarded as part of the group.) A degree of generalization and philosophical reconstruction is therefore necessary if one is to speak broadly about the American Realist stance on any particular issue, including legal science. Be that as it may, it remains possible to trace through the writings of the major Realists (1) a distinctive critique of the dominant pre-Realist conception of legal science as well as (2) a distinctive, albeit in many ways skeletal, proposal for what to replace it with.

The Pre-realist Orthodoxy

The easiest way to explain the Realist stance on legal science is to contrast it with a certain once-dominant (and still persistent) way of thinking about the law and its study – a pre-Realist "orthodoxy" to which American Realism stands as a reaction or rebellion (Grey 1996, 495; Kronman 1993, 186; Leiter 2007, 87). And just what was the orthodoxy against which the Realists rebelled? As Frederick Schauer notes, "much writing in the Realist tradition. . .has aimed at caricatured and typically nonspecified targets" (Schauer 2013, 753n17), unnamed adherents of a so-called conceptualist or mechanical jurisprudence. But among the most common specific intellectual foils for the Realists were Christopher Columbus Langdell, the Dean of Harvard Law School from 1870 to 1895, and Joseph Henry Beale, "the most self-consciously philosophical exponent of classical orthodoxy" (Grey 1983, 29), also of Harvard Law (Schauer 2013, 753n17; Sebok 1995, 2071, 2077–2078). Langdell, in particular, is an important and useful figure with whom to contrast the Realists, because he was in many ways the father of modern American legal education (Kimball 2004, 277, 2009), and his conception of legal science offers a prominent, concrete example of the outlook the Realists sought to undermine.

Boiled down to its barest essentials, Langdell's basic view on the study of law was as follows. The study of law is a science, and law, "considered as a science, consists of certain principles or doctrines." The mark of a "true lawyer" is to master the principles and doctrines of the law and "to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs" (Langdell 1879, viii). The relevant principles and doctrines of the law have developed slowly over time, and the best way to learn them is to study reports of decided cases. Thus, the library is to legal scientists what the laboratory is to chemists or physicists (Langdell 1887, 124). The Langdellian legal scientist examines the reports of decided cases, abstracts principles and doctrines therefrom, and finally infers how these principles and doctrines are to be applied in new factual scenarios (Cook 1927, 307–308; Wambaugh 1906, 2). Apart from the vaguely grandiose analogy to the natural sciences, this conception of legal study should strike most contemporary graduates of American law schools as relatively familiar, especially as it pertains to traditional common-law subjects like contracts, property, and torts.

At its heart, the Langdellian science of law involves the mastery of a system of *rules*. The relevant rules are not descriptive generalizations (such as the "rule" that what goes up must come down) but standards against which actions or decisions can be compared or evaluated. For example: one venerable doctrine of contract law is that there is, in general, no contract without consideration (Langdell 1880, 58). The fact that this rule is part of the law does not mean, however, that judges will always decide in accordance with it, for judges sometimes fail to follow the law. Depending on one's background philosophical commitments, this may sound a bit mystifying: can we take seriously a science whose object is a body of prescriptive rules, existing in an "extra-experiential" domain of abstract entities (Frank 1930, 54)? Such concerns may have merit, but the metaphysical commitments of Langdellian legal science are not necessarily extravagant by everyday standards. An abstract body of legal rules is not especially more metaphysically queer than, say, abstract bodies of rules governing chess or English grammar, whose existence most of us are inclined to accept. To be sure, the rules of chess and English grammar are, in some manner or another, dependent on convention or social

fact, and they evolve over time. Still, we readily allow that there *are* such rules and that one can, through systematic study, become more proficient in stating and/or applying them.

In many ways, the rules and principles posited by the Langdellian orthodoxy can be understood along these lines (Grey 1983, 27n98). Langdell did not think of the law as static (Langdell 1879, viii) and saw it as rooted in social practice rather than, say, natural law (Sebok 1995, 2082). (The same can also be said of Beale (1916, 143, 149–150).). Common-law rules, though "unwritten" in the sense that they are not authoritatively promulgated once and for all, can be learned by studying legal practice, mainly via the reports of decided cases. While any one data point consulted by the legal scientist can be misleading (some cases are incorrectly decided and/or poorly reasoned, just like some English speakers utter ungrammatical sentences and some chess players break the rules), this is not in principle a bar to successfully abstracting the rules from the overall body of evidence. And the rules are, when properly understood, sufficiently determinate that a learned lawyer can apply them "with constant felicity and certainty" to new scenarios.

The Realist Critique

There are many legitimate sources of philosophical puzzlement about the Langdellian picture outlined above – for example, worries rooted in the metaphysics of rules. But rarefied philosophical considerations were not the primary factor the Realists emphasized in attacking the Langdellian model of legal science. Instead, the Realist critique largely hinged on the following, thoroughly pragmatic question: can the orthodox style of doctrinal study advanced by the likes of Langdell yield the knowledge needed for the successful practice of law (Leiter 2007, 90)? In order to answer this question, of course, one needs some conception of what the successful practice of law involves. On this point, the Realists were pretty clear. Like their spiritual father Oliver Wendell Holmes, Jr., the Realists emphasized that lawyers are hired to achieve *practical* results, not for their ability to expound an abstract body of legal rules per se (Frank 1930, 55; Holmes 1897, 457–462; Llewellyn 1930b, 446n12). As a general matter, clients want to know what will or will not provoke action on the part of courts, so they can plan their business; and if litigation commences, clients want lawyers to persuade judges to decide in their favor. (In strictness, this judiciary-centric formulation should be extended to include other institutional actors like administrative agencies (Llewellyn 1930b, 455–456), but it is simpler to speak mainly in terms of courts, as the Realists themselves tended to do.) As the Realists often observed, therefore, what is really crucial for lawyers is a good understanding of how courts will act under different circumstances (Cook 1927, 308; Frank 1932, 646; Llewellyn 1930a, 2–5; Moore and Hope 1929, 703; Radin 1925, 362), including in response to different arguments and litigation strategies. Knowledge of "legal rules and principles" per se is accordingly beside the point, except (and it is an important exception!) insofar as such knowledge can help lawyers predict and, derivatively, influence official action (Llewellyn 1930a, 4).

These observations do not, however, *alone* reveal any deep inadequacy in an orthodox Langdellian approach to the study of law. Suppose that (1) judges uniformly applied the law in a "rational, honest, competent, and error-free" manner (Leiter 2007, 9) and (2) the legal rules provided a determinate answer for what judges are to do in all relevant circumstances. As a shorthand, we can call these two suppositions "Condition 1" and "Condition 2," respectively. Note that if both Conditions obtained, a lawyer with perfect knowledge of the legal rules could presumably predict judicial decisions quite ably. Of course, nobody has ever believed that both Conditions (especially Condition 1) hold across the board: that is plainly an idealization. But what if reality did not depart *all that much* from the Conditions? If so, there would be no obvious reason to be dissatisfied with the basic Langdellian model of legal science, assuming anyway that the legal rules can reliably be learned by studying the relevant sources, notably reports of decided cases.

A sufficiently systematic failure of either Condition 1 or Condition 2 would, however, justify serious doubts about the adequacy of the Langdellian approach and indeed any approach that placed exclusive focus on the mastery of legal rules or doctrine. Supposing a sufficient degree of irrationality, dishonesty, incompetence, and/or proneness to error on the part of the judiciary – that is, failure of Condition 1 – knowledge of the legal rules would not help much in predicting judicial action, *even if* the rules provided determinate answers to all cases. There simply would not be much reason to expect judges to decide in accordance with the rules at all. And supposing sufficient indeterminacy in the rules – that is, failure of Condition 2 – it would be impossible to predict judges' actions reliably on the basis of those rules, *even if* judges uniformly applied them with perfect fidelity. For the rules would often provide no determinate answer, in which case judges would have to reach a decision on some other basis, whether or not they realized or admitted it.

So one could justify dissatisfaction with the Langdellian model of legal science by emphasizing failures of Condition 1, Condition 2, or both. Failure of Condition 1 alone would, however, justify a considerably less radical critique of Langdellian legal science than would failure of Condition 2 (Leiter 2007, 9–10). To be sure, if judges were sufficiently unreliable appliers of the legal rules, Langdellian training would not be very good preparation for the realities of legal practice. But a defender of Langdellian legal science could simply acknowledge the point and urge that we should appoint more honest and/or legally knowledgeable judges. Failure of Condition 2, however, would cut deeper. To the extent legal rules are indeterminate, judges *cannot* resolve cases solely by applying those rules, regardless of honesty or skill. Remedying the situation would then require, at minimum, altering the legal rules (perhaps radically) in order to realize a sufficient degree of doctrinal determinacy – a goal that, even if theoretically attainable, might well not be worth the cost (Frank 1930, 5–10, 138, 186–193).

Unsurprisingly, then, the Realists gave greater focus to the failure of Condition 2: although they did sometimes speak to failures of Condition 1, such as outright judicial corruption (Frank 1931, 33–35), the more cutting problem of legal indeterminacy was at the heart of their critique of the old orthodoxy. In particular, the Realists famously urged that legal rules and doctrines were sufficiently malleable and open ended to allow alternative outcomes in a wide range of cases. For example, the Realists argued that the legal rules do not provide a determinate answer to how narrowly or broadly to read individual precedents (Llewellyn 1930a, 63–66; Oliphant 1928, 72–73), or what uniting principle(s) to draw from a body of several precedents (Oliphant and Hewitt 1929, xix–xx), and that the rules do not determinately resolve which of many recognized interpretive canons, often leading to very different results, should be applied to a statute's text (Llewellyn 1950; Radin 1930). Of course, judges still tend overwhelmingly to write their opinions *as if* recognized legal principles and doctrines dictate the outcome determinately (Frank 1930, 8–9; Moore and Hope 1929, 704), which might make it seem, to credulous observers, that Condition 2 substantially obtains. But in many cases, this characterization of the relationship between the rules and the decision is simply false and largely serves, consciously or not, as an ex post rationalization of a decision that really was not determinately dictated by the legal rules (Frank 1930, 100–104; Green 1928, 1021–1022; Hutcheson 1929, 279; Llewellyn 1931b, 1238–1239; Yntema 1928, 479–480).

It bears mentioning that this style of Realist critique is not a binary matter: it admits of degrees. One could, for example, take the more moderate stance that the Langdellian model would work well enough for a broad range of clear or "easy" cases, but that it is systematically inadequate for predicting outcomes in the set of cases actually litigated or (more conservatively still) those cases litigated to the appellate level (Cook 1927, 308; Llewellyn 1931b, 1239; Oliphant and Hewitt 1929, x–xi). Alternatively, one could argue that the failure is even more extensive than that (Frank 1930, 151). The Realists' perceptions did seem to vary on this point, and they were not always perfectly clear about where they stood on it. But

they were substantially united in believing that circumstances called for an alternative to a traditional legal science focused on the distillation and application of formal legal rules or doctrine.

Scientific Naturalism and the Realist Alternative

The Realists could have rested content with critiquing the traditional legal science, but in fact they did suggest an alternative – an approach to the study of law that would be more productive and methodologically sound than what came before. Far from being mere iconoclasts or skeptics, they generally shared with Langdell the desire for a genuinely scientific study of law; the crucial difference was that they parted ways with the pre-Realist orthodoxy on what a science of law would look like (Leiter 2007, 92). In order to understand the alternative Realist vision of legal science, one needs to understand something about the intellectual milieu out of which American Legal Realism emerged. As Edward Purcell has chronicled (1973, 74–94) and as Brian Leiter summarizes:

> [T]he Realists. . .came out of the intellectual culture of the 1920s and 1930s in the United States. . .in which natural science was considered the paradigm of all genuine knowledge; in which science was distinguished by its methods (e.g. observation, empirical testing); and in which the social sciences aimed to emulate the methods and successes of the natural sciences. Any plausible account of Realist jurisprudence can not lose sight of this intellectual background. (2007, 18)

The relevant outlook is best captured by the label "scientific naturalism" or just "naturalism" for short. And what is naturalism? In the broadest sense, naturalism simply involves a favorable attitude toward the methods and ethos of natural science, combined with a dimmer view of other modes of inquiry or purported sources of knowledge, such as religious revelation, authority, armchair appeals to intuition or "common sense," and so on. Sometimes naturalism also manifests in more robust substantive or ontological, as opposed to merely methodological or epistemological, views – for example, the physicalist thesis that "all things that exist in this world are bits of matter and structures aggregated out of bits of matter" (Kim 2005, 149–150). This aspect of naturalism, however, is less important for present purposes. The key point is that the Realists were naturalists in the broad, primarily methodological sense.

The most famous aspect of the affirmative Realist project, in which the Realists' methodological naturalism is particularly evident, is their proposal for how to gain a better understanding of how courts actually decide cases: namely, by pursuing an empirical study of judicial behavior modeled on the social sciences (Leiter 2007, 40; Purcell 1973, 86–87). For the Realists, "Langdell's ideal of the legal scholar" was to be replaced, at least in significant measure, by the "social scientist law professor," who was "to set law in the frame of anthropology, economics, political science, psychology, and sociology" (Fisher et al. 1993, 234). This, for the Realists, would help bring the study of law, whose relatively "backward" or "medieval" state they frequently lamented (Cohen 1935, 830; Llewellyn 1931a, 89; Oliphant and Hewitt ix–x; Yntema 1928, 474), into the modern era. But how exactly would this proposal for an empirical, naturalistic science of law move from skeletal theory to concrete practice, and what would a mature Realist science of law look like? Of course, lawyers – at least good ones – already adjust their predictions about how judges will act on the basis of informal psychological and sociological posits, e.g., that a judge who is a conservative former prosecutor is more likely to decide against criminal defendants. This kind of reasoning may be broadly continuous with empirical social science and does represent a kind of inchoate Realism. But such haphazardly developed instincts lack the systematicity or rigor that would characterize a full-fledged Realist science of law (Cohen 1935, 845–846; Leiter 2007, 55–56). How much better than this could a true naturalized science of law be, and what would be the best way of developing it?

Perhaps unsurprisingly given the difficulty of answering such questions from the proverbial armchair, the Realists were not all of one mind on such matters (Leiter 2007, 25–30). At one

extreme, Jerome Frank hypothesized that the decisions of courts were often affected by very particular and, indeed, idiosyncratic aspects of judges' personalities. For example, Frank suggested that a judge might, due to specific past experiences, have strong negative or positive reactions to "blonde women, or men with beards, or Southerners. . .or plumbers" (1930, 106). Such idiosyncratic biases, Frank thought, could often be an outcome-determinative factor in litigation. A different view, to which a larger group of Realists adhered (Leiter 2007, 29), emphasized that there were – *contra* Frank's apparent view – "significant, predictable, social determinants that govern the course of judicial decision" (Cohen 1935, 843). As Felix Cohen put it, echoing a catchphrase of Frank's, "Judges are human"; nonetheless, "they are a peculiar breed of humans, selected to a type and held to service under a potent system of governmental controls" (1935, 843). In support of the view that judicial decisionmaking is a less chaotic phenomenon than Frank's perspective would imply, this latter group could point out that "actual experience does reveal a significant body of predictable uniformity in the behavior of courts" (Cohen 1935, 843). For example, Herman Oliphant observed that promises not to compete seemed generally to be enforced where the seller of a business promised not to compete with the buyer, but not where an employee had promised not to compete with an employer after the employment had ended (1928, 159) – a pattern that might not be determinately dictated by legal doctrine, but which could hardly be expected to arise if judges were commonly influenced in outcome-determinative ways by factors as particular and seemingly random as affective responses to the hair color, accent, or demeanor of parties or counsel.

The stakes of this debate for the future of a naturalistic, predictive science of judicial decisionmaking were (and are) considerable. If Frank was correct that "the ultimately important influences in the decisions of any judge are the most obscure, and are the least easily discoverable – by any one but the judge himself" (1930, 114), and also that these influences vary widely from judge to judge, this would at least appear to present a serious practical difficulty for the would-be scientist of judicial decisionmaking. *Perhaps* the external obscurity of the relevant psychological factors could be overcome if judges willingly underwent psychoanalysis and provided "detailed autobiographies" and/or "opinions annotated. . .with elaborate explorations of the background factors. . .which swayed" their decisions (Frank 1930, 114–115). But even so, the *variability* of the causally important psychological factors would remain a practical impediment to a useful predictive science of judicial decisionmaking: insight into a given judge's psychology might help with the task of predicting *that specific judge's* future decisions, but it would not likely help one understand other judges, whose decisions would be the product of quite different blends of psychological biases and quirks.

On the other hand, insofar as the more optimistic Realists were correct that judges' decisions could be predicted on the basis of externally transparent psychosocial factors common to the judiciary in general (or even to sizeable and identifiable subsets thereof), it would be possible, as Leiter puts it, to formulate "lawful (or at least lawlike) predictive generalizations about patterns of decision" (2007, 26–27). In the end, it is hard to adjudicate this disagreement between Frank and the more mainstream Realist voices; really, it may in significant part be a matter of emphasis. It is, however, important to note that even Frank looked to (then) modern psychology to understand judicial decisionmaking. He, too, was a methodological naturalist; it is just that he played up the chaotic and idiosyncratic aspects of judging, leading him to pessimistic conclusions about the feasibility of rendering adjudication manageably predictable.

Questioning the Realist Program

One of the most well-known critiques of the American Legal Realists is that, for all their insistent advocacy of an empirical, naturalistic science of law, they never truly delivered on the promise: insofar as they tried to practice what they

preached, the results were generally not stellar and did not really lead anywhere (Posner 1995, 393–394). Even if that assessment is correct, however, one cannot conclude that the basic Realist proposal itself was unsound or insufficiently motivated (Leiter 2007, 54–55). Later generations have taken up social-scientific studies of adjudication very much in the spirit of American Legal Realism (Miles and Sunstein 2008), and although it is beyond the scope of the present discussion to evaluate the progress of such research, it is not out of the question that further efforts based on newer and sounder social-scientific frameworks will vindicate the Realists' hope for successful predictive models of judicial decisionmaking based on empirical social-scientific methods.

A more distinctively philosophical worry about the Realists' naturalization project is the following. Would an empirical, predictive inquiry into the causes (or, for that matter, the effects) of judicial or other official action actually constitute a science of *law* at all? It would, to be sure, illuminate important aspects of legal institutions. But generally we think of law itself as consisting, as Morris Cohen put it, of "norms which regulate, rather than. . .uniformities which describe, human conduct" (1931, 358). Whatever else Langdell got wrong, one might argue, he at least seemed on the right track, from a metaphysical or conceptual perspective, when he identified "principles or doctrines" – rules, in short – as the proper object of a science of law. Now it is true that the Realists were famously (or infamously) prone to embracing so-called predictive accounts of law (Cohen 1933, 11–14; Cook 1924, 465; Frank 1930, 46; Llewellyn 1930a, 3), typically variations on Oliver Wendell Holmes, Jr.'s famous dictum, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (Holmes 1897, 461). Given that way of speaking, it is trivially true that an empirical predictive science of judicial decisionmaking is a science of law. The problem, however, is that this usage of "law" is jarringly out of alignment with ordinary linguistic practice, a fact made obvious if we observe that when *judges* ask what the law is, they are not trying to predict their own actions (Dickinson 1931, 843–844; Hart 1959, 237). Are the Realists, then, open to the accusation that they were just changing the subject – in effect urging that it would be useful for legal scholars and law students to study something other than (or in addition to) the law?

A few Realists do seem to have underappreciated how revisionary their favored way of using the word "law" was (notably Walter Wheeler Cook (1924, 475–476) and possibly, though to a lesser extent, Felix Cohen (1933, 12)), but it is important to understand that the Realists were generally not much concerned with adhering to ordinary usage. The Realist literature is, in fact, littered with caveats about the fruitlessness of debating the "correct" definitions of words like "law" (Cohen 1935, 835; Green 1928, 1014; Llewellyn 1930b, 431–433), so the accusation that the Realists used words like "law" in nonstandard ways would seem largely to miss the point. The important thing was that Langdellian legal science purported to teach lawyers-in-training what they would need to know for the practice of law, and the Realists had a proposal for an improved means to that end. In *that* sense, the science they proposed was a science of law, and that was what mattered to the Realists.

Even if one accepts this line of reasoning, however, there is another familiar criticism of the affirmative Realist program, one perhaps more in keeping with the Realists' pragmatic temperament. Although it is important for practicing lawyers to be able to predict official action, is it not also important to know how judges *should* decide cases? Law schools, after all, train future judges, too. Under the (nonstandard) predictive definition of "law," of course, the latter problem would concern what the law should be, not what it is; but whatever one wants to call it, the fact remains that any *full* replacement for Langdellian legal science would have to address this normative problem as well (Kronman 1993, 199). For although Langdellian legal science purported to be a study of what the law (considered as a body of prescriptive rules) *is*, not what it *should* be, it could still claim to provide judges with a reliable normative guide to decisionmaking. After all, supposing the legal rules dictate a determinate outcome in substantially all cases, and given the

hardly unusual supposition that judges should follow the legal rules, all that remains to answer the question of how judges should decide cases is to learn what the legal rules are and how to apply them – precisely the knowledge Langdell's legal science purported to provide.

Now, if we accept the Realist thesis of substantial indeterminacy in legal doctrine, this simply will not do. So long as "ought" implies "can," then insofar as the legal rules are indeterminate, it cannot be that judges ought to (if only because they are unable to) "just follow the rules" when deciding cases. Thus, the Realists' indeterminacy thesis would undermine the utility of doctrinal knowledge not only for purposes of predicting judicial action but also for purposes of providing a normative guide for judges themselves. But while an empirical science of judicial decisionmaking can plausibly replace Langdellian legal science *qua* guide to external prediction of judicial action, it is hard to see how it could fully replace Langdellian legal science *qua* normative guide to adjudication. Certainly, a judge does not figure out how to decide by trying to predict his or her *own* future actions. And although one could credibly argue that trial court judges and intermediate appellate judges ought always to decide in the way most likely to survive further review – in effect trying to predict their *superiors'* reactions – it is more difficult to extend this logic to judges who sit at the peak of a given jurisdiction's appellate hierarchy. (Any effort to do so would, at minimum, put one well outside the mainstream of American legal thought.)

Can the Realists fairly be accused of sidelining normative problems in their zeal to replace "the traditional approach to law in terms of. . .official rules" with "a new approach to law as a social science" (Llewellyn 1931a, 119)? Llewellyn, having detected this accusation in Roscoe Pound's famous 1931 critique of Realism, replied that the Realists advocated only a "*temporary* divorce of Is and Ought" (1931b,1236). One's views on what courts ought to do must not be allowed to distort one's inquiry into what courts will in fact do (Llewellyn 1931a, 98–101, b, 1236–1237), but that does not mean one must not ultimately pass judgment on value questions: "observation material is not enough to *live* by, nor yet to *do* by" (Llewellyn 1931a, 100). And it is plainly true that the Realists themselves, far from being simply disinterested observers of the legal processes they studied, had plenty of normative views regarding the law (Ursin 2012). The Realists were generally political progressives, more or less consequentialist in outlook, and their advocacy of more social science in legal scholarship and education was not unrelated to their hopes for reform (Purcell 1973, 93): a common Realist theme was that in an increasingly complex society, judges and other lawmakers needed more social-scientific training in order to set good policy (Cook 1931, 109n31; Llewellyn 1931b, 1248–1250; Oliphant 1928, 159–161).

Still, there was a detectable discomfort on the part of many Realists toward robust, systematic normative theorizing, at least some of which surely derived from characteristically naturalist concerns about the subjectivity of ethics – as Llewellyn put it, that when "we move into. . .value judgments we desert entirely the solid sphere of objective observation, of possible agreement among all normal trained observers, and enter the airy sphere of individual ideals and subjectivity" (1931a, 100). Be that as it may, it is important not to overindulge the stereotype of the American Legal Realists as obsessed with value-neutral empirical study at the expense of systematic inquiry into questions of value (Fried 1998, 14). Felix Cohen provides a useful counterexample: far from being averse to normative theorizing, he lamented what he saw as a widespread reluctance among legal scholars to consciously engage in systematic ethical inquiry (Cohen 1934, 35) and wrote extensively about both ethical and metaethical theory himself (Cohen 1933).

Conclusion

The American Realist perspective on matters of legal science involved both a critical agenda and a constructive one, both of which have had substantial effects on American legal thought. Most legal thinkers in the United States today accept the Realist critique of the old orthodoxy at least in a moderate-

to-mild form. The constructive Realist proposal for bringing social-scientific methods to bear on the questions that matter most to the legal profession has also had considerable influence, even if the hope for a systematic predictive science of judicial decisionmaking remains largely unfulfilled. But while most contemporary legal thinkers accept some Realist ideas, lawyers and legal scholars continue to differ on many of the subjects addressed above, including the extent of (in)determinacy in legal doctrine, the methods to be used in legal scholarship, and the kind of knowledge that is most useful for legal practice. The American Realists' ideas about the law and its study accordingly remain subjects not only of historical interest but also contemporary relevance and controversy.

Cross-References

- ▶ Frank, Jerome New
- ▶ Legal Realism, American: Theoretical Aspects
- ▶ Legal System and Legal Order
- ▶ Llewellyn, Karl Nickerson

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Legal Realism, American: Theoretical Aspects

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Introduction: Realisms

This entry offers an overview and analysis of American Legal Realism, the school of thought associated with a group of theorists, primarily American, whose most important contributions came in the 1930s. Jerome Frank (1930) and Karl Llewellyn (2011; Twining 2014) are probably the most well-known of the Realists, but the ranks of Realism also include Thurman Arnold, William O. Douglas, Leon Green, Joseph Hutcheson, Underhill Moore, Herman Oliphant, and Hessel Yntema, among others (Llewellyn 1931). Moreover, although American Legal Realism is situated historically with this group of thinkers, its basic claims have both contemporary adherents and continuing relevance.

At the outset, it is important to distinguish American Legal Realism from the various other perspectives and schools of thought that have also described themselves as "Realist." Most significantly, American Legal Realism differs from various manifestations of philosophical Realism; indeed, Legal Realism is in important ways directly opposed to the core claim of most philosophical Realisms. Realism in the philosophy of science and in metaphysics, for example, is the view that there exist mind-independent real entities in the world. For the metaphysical or scientific Realist, water, gravity, and causation, among many others, are phenomena that exist in the world and are not constructions of the human mind. Even more importantly, moral Realism as a position in metaethics maintains that morality exists independently of individual preferences and beliefs (subjectivism, as it is called) and independently of norms created by particular cultures and at particular times (relativism). For the moral Realist, moral rightness – and wrongness – exists in the world as part of a mind-independent and language-independent reality, and moral judgments of the morality or immorality of actions are statements about the consistency or inconsistency of some action with this external reality.

By contrast, American Legal Realism is, preliminarily, a perspective that stresses the human factor in legal decision-making. At the extreme, some Realists maintained that there are no legally correct outcomes apart from the decision of particular judges with reference to particular facts. Less extremely, even those Realists who believe that there are legally correct outcomes not reducible to what some judge has decided on some occasion still insist that there are such frequent gaps between what the law on its face appears to indicate and what legal decision-makers actually do that focus on the former to the exclusion of the latter paints a false picture of the way in which law actually operates. By thus stressing the human role in legal decision-making and at the extreme reducing the idea of law to what judges actually decide, the Realists adopted a perspective that is in important ways the polar opposite of philosophical Realism's focus on that which exists outside of the human mind and outside of human decisions.

American Legal Realism is also to be distinguished from several so-called Realist positions within legal philosophy. Most prominent of these is the Scandinavian Realism associated most

famously with Axel Hägerström, Vilhelm Lundstedt, Karl Olivecrona, and Alf Ross (Bjarup 2005; Mindus 2009). These theorists, in contrast to the American Legal Realists, were largely unconcerned with judicial decisions and directed their interests more to the normative and ontological status of law itself. Because Scandinavian Legal Realism grew out of logical positivism and logical positivism's denial of the reality of the nonempirical world (Achinstein and Barker 1969), the Scandinavian Realists often understood law in terms of its psychological foundations and psychological effects, denying that law had some deeper moral or normative status. Scandinavian Realism is thus best understood as neither opposed to nor supportive of American Realism. It is just that the two schools of thought had almost entirely different agendas.

Somewhat closer to American Realism is the self-described Realism of some number of Italian theorists, especially those who are associated with the University of Genoa (Barberis 2013). Like the American Realists, the Genoese Realists are interested in judicial decisions, but because the Genoese Realists tend to focus on purported realistic readings of judicial opinions and the forms of argumentation they embody and because the American Realists often claimed that judicial opinions were performances or rationalizations largely unrelated to the actual grounds for judicial decisions, at the very least, it appears as if these two Realisms again have different agendas. Indeed, from an American Realist perspective, the Genoese Realists, even though sharing with their American counterparts a belief in the multiplicity of arguments that might be available to a given situation or under a given text, might be understood to be concentrating on what to the American Realists is an unimportant and superficial feature of legal life.

What Legal Realism Is

Having established what American Legal Realism (hereinafter "Realism") is not, it is time to turn to what it is. Unlike most discussions of Realism (Hull 1997; Kalman 1986), however, the description and analysis here will be far more thematic than historical. The history of Legal Realism is interesting and important, but there is a risk that too much historical focus will detract from ideas that remain important and self-sufficient even apart from the time and place in which they arose and even apart from the particular individuals who are most associated with them.

Initially, it should be emphasized that Legal Realism is not a theory of law (Leiter 2007). It is, instead, an account of legal, and in particular judicial, decision-making. As such, it does presuppose a certain kind of legal positivism and perhaps a variety of legal positivism most similar to so-called exclusive legal positivism (Leiter 2007). And that is because the Realists necessarily assumed a distinction between formal legal sources and other bases for decision-making by courts. As we shall see, a central part of the Realist agenda was directed to insisting that the former is less important to legal outcomes than a "traditional" account would have it, and that is a claim that presupposes a distinction between legal and other sources. Yet although the Realist project presupposes a limited domain (Schauer 2004) of traditional or canonical legal sources whose contribution to judicial decision-making is an empirical question and although that presupposition incorporates a view about just what law is, the Realists were nevertheless far less interested in offering a theory of law as such and thus had an agenda quite different from that of, for example, legal positivists such as H.L.A. Hart (2012), Hans Kelsen (1967), and Joseph Raz (1979) and quite different as well from the natural law tradition exemplified by Aquinas, earlier, and John Finnis (2011) in modern times. Indeed, insofar as Kelsen and Raz, explicitly, and Hart, implicitly, insisted on a distinction between law, on the one hand, and what judges do, on the other hand, the Realists are best understood as having resisted that distinction and thus came closer to understanding (even if not quite defining) law as judicial decisions. In this respect (but decidedly not in many others), the Realist position bears at least some more affinity with the perspective of Ronald Dworkin (1977, 1986, 2006) than it does with the views of most of the other prominent figures in twentieth- and twenty-first-century legal philosophy.

In offering an account largely focused on judicial behavior, the Realist perspective is characterized by a sequence of core claims. Perhaps the most important of these is the claim that judges typically (or at least frequently) initially, and prior to determining what is required by law, settle on an outcome based on nonlegal considerations. Only thereafter, the Realists argue, do judges proceed to justify (or "rationalize," as Frank 1930 put it) that outcome on legal grounds. Under this view, the formal law serves as an ex post justification for a result reached on nonlegal grounds, but is not something that produces the result in the first instance.

There is a variation among Realist views with respect to what it is, if not the formal law, that produces the judicial outcome. For some of the Realists, most prominently Joseph Hutcheson (1929) and Jerome Frank (1930), legal decision-making was essentially particularistic. Hutcheson, who was himself a judge, maintained that judges initially have a "hunch" about the proper outcome of a particular dispute, a hunch that is based on a perception of and reaction to all of the facts of some particular situation or at least all of the facts known to the judge. Frank, who later became a judge, was also a particularist, believing that, as a matter of human psychology, judges, as with other human beings, react to specific situations in all of their factual details. For the Realists of this particularist strand of Realism, believing that judicial decisions are made by placing the facts within larger categories is fundamentally inconsistent with the realities of human cognition and judicial behavior. Frank and other particularists maintained that judges react principally to the exact situation that is before them and do not abstract from that situation to some larger class of behaviors or events.

The facts of particular cases were also important to non-particularist Realists, of whom Karl Llewellyn (1931, 2011; Twining 2014) and Leon Green (1931) are especially noteworthy. These Realists also stressed the importance of facts (Leiter 2007), but for them the chief characteristic of judicial decision-making was the act of placing these facts within a larger category. This may seem like the traditional and pre-Realist view, but the Realists differed from the then-received traditional view by arguing that the categories into which judges placed the facts of particular situations are not necessarily, and neither principally nor usually, categories created and defined by the law. Llewellyn, for example, was fond of referring to "types" of situations, but these situation types, Llewellyn believed, are created by prelegal or extralegal commercial and social practices and not by the law. More specifically, Leon Green (1931) believed that legal events are most often categorized in terms of the most nonlegally salient facts about those events. Embodying this position, he produced a casebook – a book of judicial opinions to be used for teaching law students – on tort law that was not divided into such legal categories as negligence, causation, damages, and intentionality. Instead, Green's book was organized around those nonlegal categories that he believed were in fact outcome determinative. Thus, the book contained chapter and section headings referencing the categories of the extralegal world – transportation, animals, games, hotels, and so on – based on Green's view that these were the categories that were most important in describing (and predicting) legal outcomes. The traditionalist might have seen similar issues of causation or negligence in injuries caused by uncontrolled trains and uncontrolled dogs, for example, but for Green and other Realists, the differences between dogs and trains were typically far more important than any similarities in abstract legal categorization.

Although most of the particularist Realists believed that the determination of a legal outcome is largely a matter of hunch or instinct or immediate reaction, a more plausible particularism need not be committed to such a view. One could believe that all of the facts matter and that outcomes are determined by particular situations but that some sense of all-things-considered equity, or act consequentialism, or something of that variety produced the judge's view about the correct outcome. Not much turns on whether such a view is considered particularist or non-particularist, but what is important is the view that judicial decisions were for these and most other Realists largely determined by the facts of particular

cases, even if those facts were then placed into larger normative categories. Thus, even the Realists who recognized that results might not be determined by the judge's views of the all-things-considered equities of *this* case believed that judicial outcomes were typically determined by normative impulses coming from somewhere other than formal legal doctrine. For some Realists (Llewellyn, often), it might be a view about what social policy was best for situations of a certain type, and for other Realists, especially contemporary ones, the normative driver of outcomes might be economic efficiency in the broadest sense (Posner 2008) or politics in a more ideological sense (Kennedy 1986). But the important fact is that what characterizes Realism is the view that something other than legal doctrine not only typically drives the judicial outcome but also determines the initial categorization of the facts of some particular dispute or situation.

Although there is a wide range of views from different Realists about what does (and, for most Realists, should) produce legal outcomes, the core Realist position is that something other than "the law," as traditionally and positivistically understood, is the principal determinant of legal outcomes, especially, as Llewellyn noted, in those cases difficult enough to wind up in court.

Rationalizations

Although the core of Realism maintains that judicial decisions are commonly caused by considerations other than legal doctrine as traditionally understood, most Realists also recognize that judges are expected to justify – rationalize, as Jerome Frank put it – their decisions in terms of legal doctrine. To put it bluntly, the Realist position is that judges routinely mask the real basis for their decisions (assuming they know it) and disingenuously write their opinions or otherwise justify their decisions by reference to factors that did not in fact produce those decisions.

In order for judges to be able to justify in legal doctrinal terms a wide variety of decisions reached on nonlegal doctrinal grounds, legal doctrine must be highly indeterminate, and, indeed, the Realists were committed to a view about the contingent (and not the necessary) indeterminacy of legal doctrine as it actually exists.

This indeterminacy might be the product of any of a range of doctrinal phenomena. First, the specific language of legal rules might be highly flexible. If legal rules contain words as malleable as "reasonable" or "proportional" or terms as loose as "equal protection of the laws" or "restraint of trade," then it would be relatively easy for a judge to interpret such language in a way that supported the predetermined result. More commonly, a judge might be able to choose among a number of applicable legal rules (Dagan 2013; Dagan 2015). Especially but not only on common law systems, judges thus might find themselves with a considerable number of rules, some of which might support one outcome and others a different outcome. And so if a judge says, correctly, that rule *x* demands or supports a particular outcome, it may be true but less obvious that there was another rule, *y*, that supported a different outcome but which the judge chose to ignore in order to reach a particular result.

At one remove, much the same applies to the determination of which rules count as law at all. If the literal language of a plainly legal rule points to one result, and if legal or moral principles point to a different one, than in some legal systems, a judge who justified a decision on the basis of legal or moral principles, as in some number of examples offered by Dworkin (1977, 1986), albeit for a different claim, would still be within the bounds of a proper exercise of judicial power. And when and where this is so, once again the judge has available resources to justify a decision made on less (sociologically) acceptable grounds in terms of sources and authorities and considerations that are more sociologically acceptable, even when the less acceptable grounds are the ones that actually determined the outcome.

Paper Rules

The question of what is to count as an acceptable or legitimate legal rule implicates a somewhat different but even more important insight from

the work of Karl Llewellyn (1931). Although Realists such as Jerome Frank (1930) insisted that legal decision-making was not and should not be largely a rule-based enterprise, Llewellyn suggested that rules did in fact guide most decisions. But it was a mistake, he maintained, to assume that the rules that motivated judicial decisions were the rules that were written down in the law books.

In making this argument, Llewellyn drew a distinction between paper rules and real rules (Schauer 2013). Paper rules were the ones found in the books and might be statutes, regulations, or rules that are stated in (or extracted from) judicial opinions or the rules that the traditional treatise writer would describe as the legal rule emerging from a line of decisions. Paper rules are, to oversimplify, the rules that we think of as representing traditional legal doctrine.

Llewellyn did not deny that rules could, and frequently do, influence or determine the outcome of legal disputes. But he denied that the rules that judges employ to resolve legal disputes are necessarily congruent with the rules that are found in law books. The real rules, as Llewellyn put it, are rarely just the rules of legal doctrine. They may bear some affinity to the paper rules but vary in greater or lesser degree from them. The real rules are thus different from the paper rules, but they are rules nevertheless. For example, a judge (or a police officer) might decide that the appropriate speed limit on some motorway is 120 km/hour. She would acquit defendants who were stopped for driving at a maximum speed below that rate and would convict all those driving above that speed. And she would do this despite the fact that the official posted speed limit – the paper rule – was 100 km/hour.

Obviously this is an extreme example, but Llewellyn's point is that judges can and often do apply rules – they are not being particularist – that diverge from the rules of formal doctrine. They are able to do this, he argued, sometimes because the law is sufficiently indeterminate to allow the substitution of the judge's preferred rule for the written rule. More often, however, the judge's substitution of a different rule for the stated rule could take place because the real rule was sufficiently aligned with public and political opinion to allow the judge's substitution to be accepted by the larger community, the divergence between the substituted rule and the official rule notwithstanding.

Llewellyn's argument is a profound but often underappreciated facet of the Realist program. The particularist strand of Realism is important, but Llewellyn's claim shows that Realism need not be saddled with an arguably unrealistic particularism. Even if judges, like the rest of us, do often make decisions based on rules and categories, the gap between the rules that judges use and the rules that are found in formal law may represent what is perhaps the Realist claim that is most challenging to the traditional picture of law, legal rules, and legal doctrine.

An Empirical Program

It should be apparent that most of the Realists' claims were empirical ones. Although some of the Realists made normative arguments about, for example, judicial candor and about the desirable approach to the drafting of legal rules, even those normative arguments were parasitic on what was an essentially empirical enterprise. The Realists were interested in the actual and not assumed motivations and causes of judicial decisions, and they were interested in trying to determine the actual rules and principles that judges used to decide controversies. And they recognized that determining these actual motivations and actual rules raised fundamentally empirical questions.

Although the Realists recognized that their questions were empirical and that their own challenges relied on largely untested empirical assumptions, the empirical methods they had at their disposal were rudimentary, and their empirical researches were sparse. A few of the Realists, most notably Underhill Moore (Schlegel 1995), attempted to design genuine controlled experiments aimed at isolating the effects of legal rules, and Llewellyn developed an interest in anthropology with the goal of examining, empirically, the growth of law and the relationship between law and the larger makeup of society (Twining 2014). In general, however, the

Realists spent far more time urging empirical research than actually doing it. Still, it remains important to acknowledge both that the Realist position is ultimately empirical and that the Realists fully recognized this.

Although the 1930s Realists were long on empirical claims and short on actual empirical research, their intellectual heirs have taken up the Realist call for empirical inquiry into the actual effects of law on judges and on behavior. Perhaps most prominently, a large number of (primarily American) political scientists have attempted to code the various features of the cases decided by the Supreme Court of the United States (and occasionally other courts) and to code as well the various identifiable attributes, such as their age, residence, pre-judicial political affiliation, and much else. And on the basis of these data and on the basis of performing sophisticated empirical techniques of multiple regression and other methods on these data, the conclusions have largely been supportive of the Realist claim that factors other than formal law, and especially pre-legal ideological attitudes for Supreme Court justices (Segal and Spaeth 2002), have played a larger role in judicial decision-making than the traditional view would maintain.

Even beyond the so-called attitudinal studies of Supreme Court decision-making, various other modern schools of legal inquiry have pursued the empirical programs foreshadowed by the 1930s Realists. Sometimes these inquiries are quantitative, with economists and political scientists using the techniques of statistics, econometrics, and other forms of data analysis to attempt to determine the relative contributions of legal and nonlegal factors in producing legal outcomes and in determining the effects of legal res (Miles and Sunstein 2008). These are not, of course, the only types of research about law done using the methods of political science and economics, but many of them have a less direct connection with the primary claims of Legal Realism. But because those claims are focused on questioning the extent which the traditional sources of law are causal of, or contribute to, judicial and other legal outcomes, it is this branch of contemporary empirical legal studies that is most relevant to thinking about the legacy of Legal Realism.

Following on Llewellyn's interests in legal anthropology, many modern scholars have used qualitative methods, including but not limited to in-depth case studies, to inquire into similar questions (Mertz et al. 2016). Once again, they are interested in the extent of nonlegal influences on judicial and other legal decisions and on the actual effects of different legal rules, and the research is often highly illuminating. But just as it is a mistake to understand Legal Realism as encompassing everything of interest to Llewellyn or other Realists, so too is it a consequent mistake to understand the full range of qualitative investigations of the phenomenon of law as being part of Legal Realism, whether old or new. And so although there are many schools of thought these days that seek to claim the legacy of Legal Realism, there is a risk that too broad a definition will result in the loss of the important core claims of Realism. The Realists of the 1930s were chiefly interested in the factors other than statutes, regulations, judicial opinions, and authoritative secondary legal materials that exercised a causal effect on judicial outcomes. This question is as important today as it was 80 years ago, and it is best to avoid the risk of losing that question, and possible answers to it, by broadening the conception of Legal Realism to encompass any possible empirical examination of the institution of law.

The Selection Effect

Even if we restrict Legal Realism to a focus on judicial behavior, it is important to acknowledge a potentially limiting qualification. In his influential critique of the American Realists, H.L.A. Hart (2012) accused the Realists of being disappointed absolutists who, having discovered that judicial outcomes sometimes departed from the written law, concluded that rule following was largely impossible. Hart argued that hard cases in court were only a small slice of legal life and that it was a mistake to argue from the indeterminacy of some of these hard cases to a conclusion about

the general impossibility or infrequency of rule-governed and thus law-governed behavior.

Hart's imputations about Realist thought are not supported by the writings of the Realists themselves. As early as 1930 and indeed in the very work that Hart cited as an example of Realist rule skepticism (Llewellyn 1930), Karl Llewellyn qualified his claims as ones applicable only to cases worth litigating, observing that "litigated cases. .. bear the same relation [to the operation of law] as does homicidal mania, or sleeping sickness, to our normal life." Nowadays this insight has been further theorized under the rubric of the "selection effect" (Priest and Klein 1984), and the basic idea, as Llewellyn recognized, is that simple and straightforward applications of law tend not to generate disputes, and, when they do, these disputes are disproportionately likely to settle. As a result, the disputes that wind up in court, and even more the disputes that wind up in appellate courts, are disproportionately those in which two opposing parties having mutually exclusive views about the law (or the facts) each believe they have a chance to prevail. And these views will be justified only when the law or the facts are unclear. In other words, only hard cases wind up in court, and it is a mistake to take judicial behavior in this skewed sample of hard cases as in any way representative of the effect of law and legal rules in those easy cases or applications that never find their way into court.

Although much of Legal Realism is thus better understood as an account of judicial behavior in hard cases and not a claim about the indeterminacy of all rules or all law, we should not underestimate the pervasive challenge represented by Llewellyn's distinction between paper rules and real rules. If judges are applying rules other than the rules that are written down in authoritative legal sources, those who are subject to the law will make their decisions about when to go to court and when to settle or concede on the basis of predictions of judicial decisions under the real and not the paper rule. Insofar as there is a divergence between real and paper rules, therefore, this divergence will reverberate throughout the universe of law-influenced behavior. *Contra* Hart, and possibly even *contra* Llewellyn's own earlier statements, Realism is not simply an account of judicial decision in hard cases. If, as Oliver Wendell Holmes (1897) and his Realist successors insisted, the content of the law consists at least in part, and from some standpoints (Twining 1997), as a prediction of what judges are going to do and if accurate prediction must be based on real and not paper rules, then the distinction between real and paper rules is not a challenge to governance by rules, but is instead a challenge to the belief that the content of the rules is largely located in the more or less literal meaning of authoritative legal texts. This challenge is not only one that Hart ignores but is also one that is every much as fundamental as the Realists themselves claimed.

Criticisms

Hart's criticism of Realism may have been ill-informed and mis-targeted, but this is not to say that the Realist challenge is beyond criticism. And just as the Realists argued that their claims were ultimately empirical, so too does the principal critique of Realism lie in the world of empirical fact. And thus although there is ample evidence to support Llewellyn's claim that the canonical official language of a legal rule – the paper rule – is not necessarily the rule applied by judges, there is also evidence that even this phenomenon is more epiphenomenal than typical: that is, most areas of law and rules hew quite closely to the language in their canonical embodiment.

Much the same applies to the sources of judicial decision. Once again, the Realists were correct to point out the way in which a judge's social and political and policy views, a judge's psychology, the personal characteristics of the litigants, the skill of the lawyers, and the judge's sense of the prelegal equities of the situation all contribute to legal outcomes. But one should not make too much of studies such as the attitudinal studies of the Supreme Court of the United States. These studies are about cases in which the constitutional text is especially indeterminate, about a domain in which the precedents are multifarious, and about issues, such as abortion and affirmative action, as to which the judges are especially likely to have prelegal or extralegal political or ideological

attitudes. But when these conditions are different – when the relevant texts and precedents are moderately clear and when the issues are ones with little ideological valance or even interest – there is considerable evidence that the law as traditionally understood is doing most of the work.

It is also crucial to recognize, more by way of qualification than criticism, that Legal Realism is located largely in the standpoint of the client and the advising lawyer. From this standpoint, predicting judicial outcomes is all-important, and good prediction may well involve consulting many sources of illumination other than the formal law. But of course a lawyer arguing before a court cannot argue from a prediction of what the court will do. Rather, the lawyer must argue *from* the law, and this will involve making arguments that appear highly traditional. The good lawyer will understand the possible extralegal influences on judges' decisions and will attempt, subtly, to appeal to these considerations in making her argument. But as long as judges expect to hear arguments couched in law, lawyers will have to make arguments to them couched in law, and the law will remain the dominant form of legal discourse. Legal Realism may not explicitly deny this, but in stressing different considerations, it may be faulted for underestimating the role of formal, written canonical, authoritative law in the environment of legal decision-making. The traditional view can be faulted as well for overestimating this factor, and thus in most legal domains, the empirical truth may lie somewhere between the traditional view and the Legal Realist challenge to it.

Conclusion

Most existing discussions of American Legal Realism are largely historical, seeking to situate the 1930s Legal Realists within contemporaneous issues of legal education and social policy. These discussions are important, but it is equally important to remember that American Legal Realism is a claim about legal and judicial decision-making that can be divorced from its historical roots. Just as Immanuel Kant's philosophical positions in moral philosophy can be evaluated and discussed apart from the historical milieu in which Kant developed them, so too can Legal Realism be understood as a position extracted and isolated from the individuals who first advanced it and from the time and place in which it was developed. And once we do this, and once we recognize the empirical core of the Legal Realist claim, we can proceed to evaluate the soundness of Realist claims, soundness that will vary with time, place, legal system, and the particular area of law within that system.

Cross-References

- ▶ Legal Realism, French
- ▶ Legal Realism, Scandanavian
- ▶ Legal Realism: Bologna
- ▶ Legal Realism: Genovese

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Legal Realism, French

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Among the different schools of "Legal Realism" ("Forms of Legal Realism" by Chiassoni; Tarello 1967), according to which legal norms come to life through the interpretation of legal texts by judges, the school of thought developed by Michel Troper holds a special place. "French Legal Realism" is a trend in theory of law, developed in the *Centre of Theory of Law* created by Michel Troper in 1978 in Nanterre University. It is grounded on epistemological realism in the broad sense because it considers judges not as creators of certain elements in the law, but of the law in its entirety. This specificity led to the development of the theory of "legal constraints."

Epistemological Realism

The French Legal Realism inaugurated by Michel Troper is, from an epistemological perspective, related to all the other forms of Legal Realism: It belongs to the legal science and, as other realist theories, requires an empirical legal research separate from value judgments. Similarly to American legal realism developed in the United States ("American Legal Realism" by Schauer), and other forms of contemporary realism such as the realism that developed in Italy (Genoa – ▶ "Genovese Legal Realism" by Barberis) or in Sweden (Uppsala – "Scandinavian Legal Realism" by Bjarup; Brunet et al. 2014), it is a theory of law that aims merely at describing positive law: following the distinction between law and morals (*the is-ought distinction*) established by D. Hume, *A Treatise on the Human Nature*, book III, part I, section I (or equivalent), it does not prescribe what the law *should* be. In this respect, French realism, like other realist schools, is linked on an epistemological level to legal positivism and empiricism, and requires a clear distinction between law and its object (Troper 2011b: 185). Hence, it is a "meta-science" which does not linger upon Legal Dogmatics but rather focuses on the possibility of creating a Science of Law devoid of metaphysical, essentialist, or formalist conceptions of law (Brunet 2016) that allow a priori definitions of law and its content (Millard 2003).

In this respect, French Legal Realism that was developed by Michel Troper and the Nanterre school consists of a general theory of law which is based on a scientific and empirical

understanding of law, conceiving law as a set of facts. This Science of Law is nothing more than an analysis of "facts" and uses a nondeontic terminology: it resorts merely to descriptive terms because there is plainly "nothing to be discovered" in the texts (Troper 2000). Such an empirical theory of law thus intends to describe the language of the law. The Realist Theory of Interpretation (*RTI*) is therefore a noncognitivist Science of Law which aims solely at knowing its object (Millard 2006a) and at examining conducts ordered by legal norms. Norms being commands that are imperative only to the extent that the authorities that enact them have such a representation. As underlined by Michel Troper, "the Realist Theory of Interpretation is not tarnished with epistemological confusion. On the contrary it clearly shows that a science of law, conceived on the model of empirical sciences, is possible: A science that examines the norm as its object, but a norm conceived as an ought, as a fact, as a statement. This fact remains specific: this Science of Law describes statements that have the purpose of determining the meaning of other statements." (Troper 2002). Therefore, from an epistemological perspective, RTI is a continuation of legal positivism and modern epistemology based on the eradication of value judgments (Bentham 1996; Austin 1879; Kelsen 1992, 1945), while purporting to describe norms as the result of judicial decisions. RTI thus has to formulate factual propositions relating to the interpretation of law by judges. Indeed if its epistemology is similar to that of other forms of Legal Realism, its specificity is defined by the theory of volition/creation that it embraces.

A Theory of Interpretation as Creation

RTI is attached to an *expressive* conception of norms, opposed to a *hyletic* approach to law that perceives norms as ideal entities that judges discover through interpretation and cognition.

According to Michel Troper, interpretation of the law is not a cognitive process: norms are neither true, nor false and therefore legal formal statements cannot be discovered. On the contrary, interpretation is a product and a function of volition that is itself framed by "psychological and social phenomena" (Troper 2011b: 185). Accordingly, "every statement has not one but a plurality of meanings between which one ought to choose. The choice is not based on any objective reality, but is solely the expression of the subjective preferences of the one expressing them. The product of interpretation can be neither true, nor false" (Troper 2015: 99). French Realism is thus a radical or skeptical form of realism, which is neither moderate, nor defends a moderate theory of interpretation (Troper 2011b: 155). According to RTI, any interpretation of the law is a creation. The interpreter is "legally free to give any meaning to any statement" (Troper 2010: 157). The typical example used to demonstrate that point is the argumentation of the French Council of State in the *Dame Lamotte case* (CE 17 février 1950). There, the Council argued that judicial review was available for any administrative decision even "without a text."

By legal interpretation, French realists refer to the attribution of any meaning to a statement or a normative text. Indeed prior to its interpretation by the competent authority – and namely by the authentic interpreter, a legal text has "no discoverable signification" (Troper 2011b: 189): a norm is merely the "prescriptive" meaning of a statement (Troper 2015: 105). Indeed, if "to interpret is to determine the meaning of a text, and if this meaning is nothing more than the norm expressed by the text, than it is the interpreter who determines the norm" (Troper 2015: 109). It is in that respect that French Realism is far more radical and skeptical then other forms of realism. It "hardened" Kelsenian theory of interpretation: (Troper 1975: 133–151) "if law is not the act of will of the legislator, nor the text published in the Official Journal, but rather the norm that is contained in the text," then "it is the judge that enacts the norm and not the legislator" (Troper 1981: 525). In other words, the meaning of the text does not come before its interpretation by a judge or a competent authority, and this interpretation is itself free in the sense that several meanings can be attributed to the text. In this respect, even though the Constitution is supposed to exist as a text, one cannot consider that there is an interpreter of the Constitution. According to Michel

Troper, such conception resembles the idea that "the constitution pre-exists its interpretation" (Troper 2011b: 165). But the specificity of French Realism is in revealing the fact that the real author of the norm is not the author of the text, but its interpreter. A statement is a norm "not because of its conformity with a higher norm, but because it was interpreted by the competent authority as meaning that a certain conduct ought to happen" (Troper 2000: 57–58), which is the same as saying that the meaning of a text depends on its interpretation (Brunet 2013: 397–414). Thus when a constitutional judge interprets the law, he actually re-enacts it (Troper 1994: 101). Judicial interpretation, as the interpretation of any competent authority, creates the norm, and as it creates it, it creates the entire legal system. This is the main thesis of French Realism.

Criticisms

This radical approach distinguishes this theory from what is considered usually as moderate or intermediate realism (see, e.g., the Genoa school of legal realism). According to the Genoese theorists, RTI gives too much freedom to the interpreter and ascribes too much weight to the theory of interpretation as volition. Riccardo Guastini, representative of this latter position, has attacked Michel Troper's idea of law created solely by judges. For him, it is not possible to say that the judge or the interpreter truly "creates" law. For him, the thesis of radical uncertainty of the meaning of law prior to its interpretation would be "*unsustainable*" (Guastini 2003). RTI would require more nuances and distinctions, in particular concerning the analysis of the four types of implicit norms, i.e., norms derived from inductive reasoning and noninductive reasoning. Before one can speak of an authentic interpreter, the epistemological assumptions implied by those norms should be clarified as they have an impact on the creation, the construction and the development of law, and on the possibility to know the law. In response to Troper's theory, Riccardo Guastini elaborated his own theory of the frame of meanings of the text, which sets its multiplicity of possible alternative meanings (Guastini 2011).

Otto Pfersmann, who first labeled this theory as neo-realism, has formulated a similar criticism. To him, it would be a theory that "has the merit of analysing acts that definitely solve conflicts, but which makes their internal legal justifications incomprehensible and impossible to analyse" (Pfersmann 2001, 2002, 2004: 153–181). The Realist Theory of Interpretation is thus not a theory of interpretation at all, because of its highly empirical approach, resting on the normative semantics of volition rather than on a purely semantic analysis. Accordingly, the theory created by Michel Troper would make theory and science of law a "branch of political science" inasmuch as the acts of interpretation are understood only as "elements in the power structure." Moreover, according to Pfersmann, the Realist Theory of Interpretation is "not a Science of Law" but rather an "empirical science of social data" leading to a self-contradicting skepticism leaning on textual indeterminacy. Lastly, more recently Pfersmann has defended his own normativist ontology of norms by adding two criticisms of RTI, which he believes would be overly particular and argumentative. For him, this approach does not include an understanding of the objective relationships existing between organized norms (Pfersmann 2012: 490) and does not acknowledge the objective existence of the object of the interpretation before it has been interpreted (Pfersmann 2015).

Resisting Criticisms

Michel Troper has given several answers to those criticisms, in favor of RTI and the Nanterre school. The point was stressing the lack of consideration for interpretation as a volition process rather than a cognitive process (Troper 2002): for Michel Troper every interpretation of law is a prescription that is neither true, nor false, which means this Science of Law cannot aim at discovering norms and their meaning but can only concentrate on the acts by which the meaning is attributed or the norm created. As such, acts can only be empirical phenomena, and the Science of

Law can itself merely be an empirical descriptive science that refuses to justify anything. This explains that only a skeptical viewpoint is possible, leaving aside any dogmatic conception of the law. In addition, this theory does not aim at explaining acts creating norms through causes that would be external to the system, but rather by "constraints coming from the legal system itself" (Troper 2002).

This argument can be split into a series of subelements. Firstly, this theory of law does not simply describe, but it also explains how interpreters use "certain types of arguments" imposed by the argumentative situation (Troper 2011b) and by the hierarchy existing between the various authorities concerned (Champeil-Desplats and Troper 2005). Troper's realist stance is therefore an explanatory theory of the argumentative justifications. It shows the causality between the arguments used by a given authority to reach a certain goal, that is to legally justify a choice by giving reasons for the decision, "given the circumstances in which they (the authorities) are placed" and according to their own strategies (Troper 2011b: 23–26). This would allow for the discovery of the *raison-d'être* of judicial decisions, that is the interpretation creating them as well as the legal external and internal constraints framing this interpretation (Brunet 2016: 24–25). Contrary to other theories, French Legal Realism does not describe norms, because these are solely facts produced by the interpretation of texts: The goal of RTI is rather to describe and verify empirically statements, the object of which is norms (Troper 1994: 55).

This theory offers tools for analyzing law as a set of external statements, discarding formalistic conceptions of the origin of norms or the notion of validity as "*binding.*" Normativism is set aside in order in favor of direct semantic research about the meaning attributed to norms and in particular to cases of ambiguous legal language. This stance explains the skepticism of this theory "concerning any form of legal objective meaning" (Brunet 2013). French Legal Realism therefore deconstructs the representation of law as construed by legal statements have a meaning on their own before being interpreted, and adopts instead an analysis in terms of power relationships (Millard 2006b: 725–734), signification of acts of volition (Millard 2007), and impact of the legal practice (Millard 2006a: 48). This school conceives the theory of law as a linguistic and strategic fact, necessarily complemented by a theory of legal constraints, which explains why we have coherent judicial decisions rather than a set of arbitrary judgements. Legal norms are thus conceived by RTI as free representations of the appropriate conducts by the actors-interpreters or the recipients of the norms. Such a theory therefore puts emphasis on the "factors related to the structure of the legal system and its understanding by legal actors, that is how and why they were constrained to act or decide in a particular way rather than in another, given the possibilities open to them" (Brunet and Champeil-Desplats 2013: 387–428). In other words, French Legal Realism disentangles the factors that were linguistically bounding in order to reach a given decision. French Legal Realism looks at law by focusing mainly on its creation by the authorities that interpret it, and secondly on law as interpreted by those authorities who could have created law differently had they not been bound by their own representations.

Cross-References

- ▶ Legal Realism, American: Theoretical Aspects
- ▶ Legal Realism, Scandanavian
- ▶ Legal Realism: Genovese

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Legal Realism, Russian

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Introduction

"Russian Legal Realism" has been gaining unprecedented relevance in jurisprudence of Eastern Europe in the last decade, especially among Russian and Polish scholars. As a term, it was introduced into world science in 2012 (see Tonkov 2012) and is still successfully developing in various national non-English and international

English works (see, e.g., Antonov 2018; Brożek et al. 2018; Stanek 2017; Timoshina et al. 2016; Tonkov 2013, 2019; Tonkov and Tonkov 2022).

The concept of Russian Legal Realism implements the ideas of the psychological approach to law by Leon Petrażycki and his followers while analyzing historical patterns and essential features of the judicial, executive and legislative activities that formed on the territories of the former Russian Empire after the October Revolution of 1917. It is based, in particular, on a broad understanding of the sources of law, special attention to legal practices and the concept of the individual normative system of the subject of law.

Russian Legal Realism is inherently connected with the understanding of the whole phenomenon of *"legal realism"* that appeared in the middle of the twentieth century due to legal movements, especially American and Scandinavian, which arose between the two World Wars. Because of multiplicity and diversity of the works of its respectable representatives, the term "legal realism" became associated with numerous movements in law, striving, e.g., for greater empiricism and pragmatism in understanding legal phenomena. Legal realists actualized the role of professional actors of law, primarily judges, sought to explain the realities of law enforcement in the discourse of interpretative skepticism, emphasized the importance of socio-psychological factors, and stood for ideas of reducing the role of theoretical abstractions and metaphysics in law.

Currently, "legal realism" is considered to have multiple meanings: as a third way in law, different from natural law and positivist theories; as a modern version of legal positivism; as a prediction of judicial decisions; as a method of determining the ontological status of law; as an approach to the interpretation of law; as a theory of cognition of the legal order, etc. It is important, that "legal" realism should be distinguished from realism in philosophy and sociology, since the legal interpretation of realism is closer to the literary and artistic meaning of the term, which is used to refer to actual life without idealization and embellishment (see, e.g., Martin 1997, 2; Tonkov 2021, 5). However, Russian "Legal" Realism has resembling cultural and historical foundations with the notion of Russian realism that is used in international relations (see Tsygankov 2022).

A realistic approach recognizes the mutual influence of law and a complex of social and personal values. This interaction leads to the inclusion of traditionally considered "extra-legal" factors in the field of essential legal analysis. Thus, legal realism is a concept of the *theory and philosophy of law* with psychological perception of the factuality of law and denial of excessive metaphysics that contradicts the empirical observations of the researcher. For jurisprudence in the context of legal realism, especially Russian Legal Realism, of particular interest are renowned dichotomies of "law in books" and "law in action" (see Pound 1910), "paper rules" and "real rules" (see Llewellyn 1930).

Global Context

American and Scandinavian movements of legal realism are considered as *two classic examples* of realistic approaches to law, whereas Russian Legal Realism remains less well-known. Though American, Scandinavian and Russian legal realists of the first half of the twentieth century have different national histories, they share a common understanding of their role as an intermediary between "book" law and practical human problems. Representatives of legal realism use the prerequisite that law exists as a practical tool: in this sense, American, Scandinavian, and Soviet law became more of an experience, legal practice, rather than a theoretical construct between the two World Wars. Despite the differences between the abovementioned variants of legal realism in the main theoretical premises (pragmatism in the USA, anti-metaphysical philosophy in Scandinavia, party ideology in the USSR) and in the main areas of research (the activity of courts in the USA, normative texts in Scandinavia, the influence of proletariat, financial and political oligarchy on legal order in the USSR), all these movements are aimed at overcoming the legal formalism that hinders the social development

and the assertion of the understanding of law as a socio-psychological phenomenon.

Referring to the historical background of the origin of legal realism in North American, Scandinavian, and Soviet societies, its intensive development in the first half of the twentieth century should be noted. It is possible to identify similar features of legal cultures of the USA, Scandinavian countries and the Soviet Union during the Interwar Period. At least *three general tendencies* have evolved: the dominant significance of legal doctrine (to varying degrees), the strong dependence of jurisprudence on laymen (non-lawyers), and the pragmatism of legal methods (see Tonkov 2018, 2021, 12–36). The concept of legal realism turned out to be a convenient tool for the establishment not only in Soviet Russia but also in the USA and Sweden. In all three legal cultures during this period, an individual trial with concrete results was ahead of scientific theory, and not vice versa, and the movement of legal realism sought, in particular, to structure the influence of judicial subjectivism, to make the decision-making process more predictable.

American, Scandinavian, Russian, and other variants of legal realism were (and are) a critical reaction to outdated legal dogmas under the changed economic and political order. The long-lasting underestimation of the empirical dimension of law and the variability of the understanding of justice in prevailing legal concepts are compensated by modern heterogeneous approaches of the realistic legal thought, e.g.:

(i) New Legal Realism in two main directions: American – "New (American) Legal Realism" (see, e.g., Erlanger et al. 2005; Nourse and Shaffer 2009; Garth and Mertz 2016), that has been forming since the 2000s (or even since the end of 1980s), and European – "New (European) Legal Realism" (see, e.g., Neergaard and Nielsen 2013; Holtermann and Madsen 2015), the beginning of which is attributed to the 2010s.
(ii) Italian Legal Realism that unites the "Genoese Legal Realism" developing since the 1960s in Italy, led by Riccardo Guastini, Silvana Castignone, and Giovanni Tarello, and "Bologna's Legal Realism," or "normative legal realism," led by Enrico Pattaro.
(iii) French Legal Realism, or realistic (neorealist, voluntarist) theory of interpretation of law, developed since the 1980–1990s in France, led by Michel Troper, Éric Millard, Dominique Rousseau, and Pierre Brunet.
(iv) German Legal Realism, or the current trend of identifying the German realistic approach since the end of the nineteenth century, based on the works of Rudolf von Jhering, Max Weber, Helmut Schelsky, and René Koenig.
(v) Continental (Psychological) Legal Realism with Edoardo Fittipaldi as the leading scholar, whose research has become widely known since the 2010s and unites representatives of Scandinavian Legal Realism, Leon Petrażycki's psychological theory of law and Enrico Pattaro's normative realism.

Nowadays legal realism is not an exclusive product of North America and Scandinavia; its ideas during the difficult Interwar Period of economic development in the twentieth century were simultaneously spread (primarily) in Europe, including Russia. Modern attempts at reconstruction and examples of rethinking of various directions of legal realism are extending, indicating the multidimensional nature of the realistic paradigm in law, its flexibility and ability to be an effective tool for cognition of legal realities (see, e.g., Dagan 2013; Leiter 2007; Tamanaha 2017).

Ontological Foundations

In the twenty-first century, it is necessary to update obsolete ideas about the mechanism of legal functioning as the interaction of people about their rights and obligations in the era of post-truth and over-communication cannot remain the same. Understanding legal realism in Russia requires radical methodological and heuristic approaches. The following 11 historically determined trends in the existence of law have had a significant impact on the formation of Russian Legal Realism (see Tonkov 2016, 2020):

1. *Unity of the three branches of government that are obedient to the executive and party bodies*. It is possible to consider all management methods practiced by the public authority as a united administrative activity. The ideas of its reformation in the evolutionary paradigm, actively developed in the 19th and early 20th centuries, were suppressed by the October Revolution of 1917. The long period of functioning of the Soviet authorities has produced the practice of judiciary and legislative obedience to party leaders and law enforcement patterns.
2. *The continuity of authoritarianism in various historical forms.* Fundamental changes in the state foundations and forms of governance of society (e.g., the October Revolution of 1917 and the collapse of the USSR in 1991) led to the rapid development of legal sources and normative systems. However, the monistic spirit, imperial thinking, the desire for authoritarian methods of management, the justification of the arbitrary actions of the rulers remained the same.
3. *Management of all branches of government manually proceeds from the single center.* The state of law and order is under direct influence of the executive authority leaders of the corresponding level. The modern technical equipment, highest level of professional skills and unlimited funding of law enforcement agencies contribute to the timely exclusion of any possibility of unpredictable changes in established legal practices.
4. *Development of the "good king" idea and belief in his exclusivity.* For decades the functions of the "good king" (in Russian paradigm – "good tsar") have been performed by both intersubjective actors, for example, the "party," "Komsomol" (Communist Youth League), and concrete personalities, such as Lenin, Stalin, Brezhnev, etc. Faith in the "tsar," the "leader of the nation," the "general secretary," etc., was supported by the ideological institutions of the state, imposing on the population the idea of an uncontested leader. The law at any territory is the will of the sovereign or the head of the executive power of the territory with the approval of a higher hierarch.
5. *Paternalism and social slavery.* Over the decades of socialist economic management a significant part of the population has lost active interest not only in business activity but also in the independent organization of their own lives that generated social apathy, absenteeism, external and internal migration, dependent moods, and other destructive generational features. Russian paternalism has a rich history: unfairly murdered "tsar-father" (Nicholas II), charismatic leaders of the proletariat (Lenin, Trotsky, etc.), "iron Felix" (Dzerzhinsky), the unflappable "father of peoples" (Stalin), wise for decades of ruling general secretary (Brezhnev) – these images are rooted in the consciousness of a post-Soviet person. The deification of personified sovereigns corresponds to the disenfranchisement and servility of their subjects, the denial of the freedom of an ordinary person, and negligence to the rights of minorities that support the pattern of permanent leaders of the state. Individual "mistakes and miscalculations" in the actions of any officials are demonstratively corrected by the supreme ruler, which should strengthen the belief of the population in the indispensability of the paternalist.
6. *Dominance of two industries: raw materials (including the energy subindustry) and prison*. Property and non-property rights to objects of the raw materials industry belong to a narrow circle of people who dispose of them both on their own behalf and on behalf of the state. Administrative, logistic, and financial operations on behalf of the state in that industry are carried out by the people directly or indirectly controlled by the executive power. The prison industry, in the broad sense, includes not only facilities and institutions subordinate to the Federal Penitentiary Service, but also the whole law enforcement, fiscal, punitive resources of the state, including legislative and judicial bodies, the defense complex, since the above-mentioned instruments of population

management give the maximum effect of coercive influence on intellectual and the physical conditions of a person.

7. *"Minefield" doctrine.* The legislative body increases the punitive norms of administrative and criminal law. The catalyzation of sanctions is aimed at an indefinite number of individuals. Mass stigmatization has significant legal, economic, and political effects: citizens pay fines and are deprived of their rights; the state, represented by authorized bodies, deprives them of the opportunity to engage in certain types of activities, fully implement political rights, drive vehicles, travel abroad, etc.
8. *Judiciary that is loyal to executive power and promotes accusatory bias*. Administrative and criminal legal proceedings traditionally have accusatory tendency as the vast majority of judges are former investigators, prosecutors, and judicial staff. Almost all of them, as a corporate solidarity, render every possible assistance to the prosecution in correcting the shortcomings of the preliminary investigation.
9. *Selectivity and relativism of judges and law enforcement officers*. Excessive axiological character and variability of the normative system allows judges and law enforcement officers to be selective in choosing the object of influence, qualification of the act, the form and amount of punishment. Current substantive and procedural legislation in the field of criminal and administrative legal relations contains a large number of evaluative categories that allow, depending on their interpretation by the judicial and executive authorities, to initiate or not to initiate further proceedings. Broad discretion limits of material and procedural axiological categories are used by judges and law enforcement officers for corporate purposes. The unpredictability of the interpreter's argumentation, unexplained opposites in decisions on similar cases demonstrate to society extra-legal, including socio-psychological, political, and economic dependencies in jurisprudence.
10. *The inability of civil society to institutionalize the defense of their rights and freedoms.* Civil society is built on the basis of non-commercial mutual assistance, solidarity and humanity. However, modern authoritarian state is not interested in public criticism of the actions of its actors, it gets rid of the public system of checks and balances, seeks to make impossible by legal methods the functioning of civil society institutions that prevent corruption and authoritarian ideology. Since October 1917, the ruling party has united almost all public authorities, and the practical irremovability of state leaders makes it impossible for civil society to systematically control a group of people that manage the rule of law.
11. *Independence of judges and law enforcement officers from the assessment of their activities by the population*. It can be assumed that the well-being of official legal interpreters depends only on the assessment of their activities by respective official supervisors. In the post-Soviet period, there is a growing tendency for public authorities to extract economic benefits and political advantages from their official position. The formation of a hereditary political elite ("neo-nobility") contributes to a return to the estate system, in which actual inequality is accompanied by inequality of rights and duties, the features of feudal (serfdom) law are clearly manifested. The widespread legal nihilism of the official interpreters of the law has turned from a deviation of legal consciousness into a sophisticated variant of its standard.

Thus, Russian Legal Realism is a legal doctrine that has developed in post-revolutionary Russia and continues to operate till present day, the extreme ontological signs of which include: the dependence of the judicial and legislative corps on the executive power; the selectivity of justice; the triumph of accusatory bias; the lack of clear criteria of proof; unpredictability of court decisions; etc. Despite its radical features from the point of traditional legal concepts, Russian Legal Realism emphasizes the need for an empirical

approach to understanding of law and comprehensive inclusion of the methodology of social sciences not only in the study of law but also in its application.

Conclusion

Russian Legal Realism has been rooted since the time of Peter the Great (1700s), took shape in post-revolutionary Russia (after 1917) and continues to operate at present time. The evolution of legal values of the population presupposes a long period. Law is an element of the culture of numerous ethnic groups inhabiting the territory of the state and as a normative system is a product of historical development. The study of the Russian law that has developed over the past hundred years requires a pragmatic approach and a critical assessment of the legal views formed during this period.

The theoretical basis of Petrażycki's psychological theory of law and the whole Saint-Petersburg School of Philosophy of Law provides for Russian Legal Realism, a solid path for further development. A broad understanding of the sources of law, the idea of intuitive law, individual normative system, and other theoretical constructions combined with the practical aspects of legal machinery stimulate a realistic understanding of past, present, and future legal phenomena. A realistic approach to the functioning of all systems of society, including the level of freedom in decision-making among various subjects of law, seems to be the only possible effective way to examine legal realities and evaluate possible legal reforms.

In the twenty-first century, almost a hundred years after its inception in the USA and Scandinavia, the movement of legal realism still attracts the interest of scientific researchers and practicing lawyers. In post-Soviet Russia, legal realism is becoming one of the conceptual trends that are close to practitioners but cause wariness in academic circles. Skeptical attitude of legal realists to the effectiveness of "paper rules," actualization of the significant connection of judicial and executive authorities and other pragmatic patterns in law deserve special attention nowadays.

Jurisprudence as an academic and scientific discipline is intended, in particular, to establish the relationship between practice and theory. Many theoretical concepts of the past are reduced to prescribing what is "ought" in law, avoiding the description of what really exists, critical assessment of legal practice and identifying fundamental regularities immanent in the present legal order. Russian Legal Realism and other "updated" variants of the realistic approach are able to unite supporters of judicial activism, successors of natural law theories and ideologists of inalienable human rights, adherents of the will of the sovereign and supporters of soft positivism, etc., and to be the *deus ex machina* for modern law.

Cross-References

- ▶ Interpretation: The Realist View
- ▶ Legal Realism, American: Development and Critique
- ▶ Legal Realism, American: Theoretical Aspects
- ▶ Legal Realism, French
- ▶ Legal Realism, Scandanavian
- ▶ Legal Realism: Bologna
- ▶ Legal Realism: Contemporary
- ▶ Legal Realism: Genovese
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Legal Realism, Scandanavian

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Introduction

The term "Scandinavian realism" was introduced in the 1940s to refer to a group of philosophers and law professors from Sweden, Denmark, and Norway taking their starting point in the philosophy put forward by the Swedish philosopher Axel Hägerström (1868–1939), hence also the use of the term "the Uppsala school of legal thinking" for the movement that comprises the Swedish lawyers Anders Vilhelm Lundstedt (1882–1955), professor of law in the University of Uppsala, and Karl Olivecrona (1897–1980), professor of law in the University of Lund, and the Danish philosopher and lawyer Alf Ross (1899–1979), professor of law in the University of Copenhagen as the most prominent members that are dealt with in this article. Other members of the movement include Ingemar Hedenius (1908–1982), professor of philosophy in the University of Uppsala; Per Olof Ekelöf (1906–1990), professor of law in the University of Uppsala; Tore Strömberg (1912–1993), professor of law in the University of Lund; and Theodor Geiger (1891–1952), professor of sociology in the University of Aarhus. The movement is characterized by a sustained attack on metaphysical ideas as manifested in the opposition between realism and idealism. Realism or ontological monism holds that there is but one world, the world of reality that is related to empirical cognition, whereas idealism holds that there is also another world of values related to normative cognition. Realism locates the law as part of the world of reality in terms of empirical facts that is

related to legal cognition as empirical knowledge of social facts. By contrast, idealism holds that the law must also be located in the world of values that makes room for normative cognition.

Philosophical Background

Hägerström's philosophical perspective is grounded in reason and concerned with the ontological and epistemological conditions that make empirical knowledge of the world possible which is expressed in his motto "Praeterea censeo metaphysicam esse delendam" (moreover I propose that metaphysics must be destroyed). His anti-metaphysical view rejects the existence of a metaphysical reality or supernatural world beyond the existence of the physical reality or natural world. However, he is committed to a metaphysical or ontological view that maintains the completely logical character of reality, and this implies that reality is intelligible but not in terms of a spiritual reality of ideals and values but in terms of the physical reality of things and their necessary relations that exist apart from the human mind. Hägerström is committed to the realist view that concepts are embedded in the facts of empirical reality that makes an impact upon the minds of human beings through their senses, and this enables them to arrive at knowledge of reality, expressed in meaningful terms. The truth of a judgment is the correspondence to the reality of the thing. The philosophical task is to use a conceptual analysis in order to determine whether words correspond to facts and thus express concepts or rather are words devoid of meaning. Hägerström calls his philosophy rational naturalism since it provides the secure foundation for the pursuit of scientific knowledge based upon the naturalistic approach that everything in nature is what it is. His model for knowledge is botany rather than physics, and this implies that the classification of the quality of things is more important than the quantity of things that is related to measurement and movement that is the concern of physics. It follows that the empirical reality cannot be described and explained in mathematical concepts but only by empirical concepts referring to natural properties and their causal relations. Hägerström's naturalistic approach is followed by Lundstedt, Olivecrona, and Ross, although Ross in his later writings shifts his allegiance to logical positivism, rejecting metaphysics by reference to the principle of verification and his model for knowledge is physics. But they share the commitment to use the method of conceptual analysis to instigate a revolt against the traditional ways of legal thinking that must be replaced by scientific thinking about morality and law.

Morality and Moral Knowledge

Hägerström's rational naturalism holds that the empirical reality is devoid of values that inform his conceptual analysis that there can be no moral reality in terms of moral concepts embedded in things and human beings. This ontology is a version of nominalism that is related to his epistemological view that there can be no moral knowledge. Thus he rejects the appeal to the principle of utility or happiness as the supreme principle of morality since moral concepts cannot be defined in nonmoral terms with reference to empirical facts of sensations of pain and pleasure. He also rejects Kant's appeal to the will as practical reason as the foundation for the supreme principle of morality respecting the equal freedom and dignity of human beings as rational persons and responsible agents since reason is confined to theoretical reason. Thus Hägerström subscribes to noncognitivism in terms of an emotive theory that moral utterances do not express propositional attitudes of beliefs that can be true or false but are used to express emotional and conative attitudes of feelings and emotions in order to regulate human behavior. Hägerström's moral philosophy has been called moral nihilism since it denies the existence of moral goodness, moral obligations, and moral or natural rights. He is, however, at pains to stress that this does not imply that people should behave immorally since the moral vocabulary can be used to regulate human behavior in order to establish peace among people. However, his moral nihilism leads to moral skepticism or the denial of moral knowledge expressed in moral

propositions concerning what is good or bad and right and wrong as reasons for belief and action. It follows that there can be no moral criticism of the positive law. But there is room for science about morality in terms of sociology and psychology based upon a naturalistic approach that is concerned with the description and explanation of the causal relations between the use of the moral vocabulary and human behavior.

Lundstedt follows Hägerström's emotive theory and advances the method of social welfare in terms of social aims as opposed to the method of justice in terms of rights and duties for the critique of the positive law. This meets with critique from Ross since Lundstedt's method is another version of utilitarianism which is false, and besides it presupposes that there is moral knowledge which Ross rejects, endorsing Hägerström's moral skepticism. Lundstedt retorted that his view has the support of Hägerström and Ross's replied that Lundstedt was not a philosopher. The battle between them is in the end about who is to count as leader of the Scandinavian realists. Olivecrona follows Hägerström to hold that that evaluation of the law is not a scientific matter. This is also Ross's view although he shifts his allegiance to Charles Stevenson to support an emotive theory of ethics.

Law and Legal Knowledge

For Hägerström, the law is a necessary condition of organized social life within a state. This implies that it becomes of the utmost importance that legal relations receive a conceptual analysis based upon his rational naturalism. It stands to reason that the law is positive law made by human beings and located within the physical reality in terms of social facts. Thus natural law theories must be rejected as false, if not meaningless, since they locate the law within the metaphysical or spiritual reality of ideals and values that cannot be conceived as alongside the physical reality. This critique also applies to Hans Kelsen's theory of law that locates the positive law in the world of ought in terms of valid norms that must be kept apart from the natural world of is in terms of the effectiveness of legal norms. But Hägerström accepts Kelsen's critique of the positivist theories of law that hold that legal rules are commands or imperatives passed by the will of the sovereign and addressed to his subjects. For Hägerström, it is impossible to identify any unitary will behind the positive laws, and this implies that the will of the sovereign is a metaphysical idea that must be discarded as meaningless. The law cannot be conceptualized as a system of authoritative norms concerning the rights and duties of persons but only as a system of legal rules grounded in interests and feelings that are actually maintained by the legal authorities in order to maintain peace and common social goals. In this way, the positive law is located within the reality of social facts in terms of the various forces which operate within a state to maintain the law. This raises the question of legal knowledge, which Hägerström does not explicitly address, but his rejection of metaphysics implies that there is no room for legal knowledge in terms of normative knowledge about rights and duties. There can, however, be knowledge about the maintenance of legal rules based upon the naturalistic approach.

Hägerström's view of the law is followed by Lundstedt to arrive at the radical conclusion that there are no legal rules in terms of norms, commands, or imperatives. This is a version of legal nihilism that is related to legal skepticism. Thus Lundstedt rejects traditional legal science as unscientific that must be replaced with Lundstedt's legal science where he continues to use the term legal rules. This has caused some confusion, but his use of the term should be seen in relation to his method of social welfare concerning the making and application of law, using the legal vocabulary to cause the appropriate behavior as effect.

Olivecrona also follows Hägerström but presents a more elaborate account of legal rules in his *Law as Fact* where he in the second edition introduces a classification of legal theories into voluntarism and non-voluntarism. Natural law theories and positivist theories belong to voluntarism since both theories claim that law is the expression of the will of the supreme authority and they only

differ with respect to locating the supreme authority in God or the state. This implies that the usual division between legal positivism and natural law cannot be maintained since it is false that the will lays down what is right and wrong in terms of commands. Thus a proper theory must be a non-voluntarist or realistic theory of law that is advanced by Olivecrona, claiming that legal rules must be conceptualized as independent imperatives to be distinguished from commands since the latter are personal relations whereas imperatives are impersonal relations between human beings. The law is expressed in the imperative mood in terms of ideas of human behavior and used by the legal authorities not to communicate knowledge about these ideas but to influence the behavior of human beings. In this way morality depends upon the positive law rather than the other way round, and he rejects the idea of the validity or binding force of positive law as an idealistic element that must be replaced with the realistic element of the efficacy of legal rules in the minds of people. The law consists of rules about the use of force by the legal authorities to cause the appropriate behavior among human beings as the effect. In this way the law is a link in the chain of causes and effects and located as social facts within the physical reality. This constitutes the area for legal science offering information about the ideas expressed in legal rules, and he rejects the view advanced by O. W. Holmes and American realists that the task of legal science is to predict how judges will decide cases, since it rather has the task to offer information about the proper patterns of behavior.

In *On Law and Justice*, Ross accepts Olivecrona's view that legal rules are independent imperatives, but Ross prefers to use the term "directives" which he defines as utterances with no representative meaning but with the intent to exert influence. The implication is that legal rules are devoid of any cognitive meaning, and this is a version of legal nihilism. Ross's concern is rather the meaning of juridical propositions put forward within legal science where he appeals to logical positivism and the principle of verification. In contrast to Olivecrona, Ross arrives at the view that juridical propositions to be scientific propositions are predictions about the behavior of judges deciding cases. This has some similarity with American realism, and in contrast to Olivecrona, Ross also discusses judicial reasoning to arrive at the view that judicial reasoning is not a matter of argumentation but persuasion. This fits with his emotive theory of ethics.

Rights and Duties

Hägerström's conceptual analysis is based upon his view that the meaning of a word depends upon a reference to observable facts in order to express a concept. Considering the words "right" and "duty," it is impossible to find any facts corresponding to the words, and this implies that there are no concepts of right and duty but only the use of meaningless words. This is corroborated by his historical inquiry into Roman law leading to the view that the Roman ideas of right and duty do not express concepts but are only magical words related to the use of commands. Thus the ideas of right and duty are nothing but illusions to be accounted for by his psychological inquiry into the nature of these ideas, claiming that the idea of duty is based upon a feeling of compulsion associated with the idea of the action where the feeling is produced through the suggestive influence of the expression of a command. This corresponds to the analysis of the idea of right that refers to a feeling of power in relation to things or persons which is exalted above any natural power. Although right and duty are illusions, the use of the words has a vital function to cause the appropriate behavior as the effect in order to maintain peace among human beings.

Lundstedt follows Hägerström and abandons the concepts within legal science. This leads to a critique by Ross. To be sure, right and duty are illusions, but the words are not magical words but can be used within legal science as technical tools to represent legal relations between human beings and things. Olivecrona agrees that the concepts are used within legal science but they are not exclusive technical tools for the jurists but are used in everyday life and legislation to regulate human behavior. This leads to his analysis of the

ideas of right and duty in terms of their directive and informative function. He also presents an account of the use of the concept of right by Hugo Grotius and Samuel Pufendorf.

Conclusion

The Scandinavians have had an important impact upon jurisprudential thinking in the Nordic countries, but their claim that the naturalistic approach is the only scientific approach has been criticized for neglecting the normative aspect of law as well as reducing legal knowledge to be empirical knowledge about social-psychological facts.

Cross-References

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- ▶ Lundstedt, Anders Vilhelm: Philosophy of
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Legal Realism: Bologna

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Introduction

As elsewhere, so in Italy it was in the late 1960s that legal positivism fell into crisis – having first developed in a substantially uniform way in the 1950s and 1960s through the intersection of analytic philosophy and Kelsen's pure theory – and it is out of that crisis that legal realism emerged.

It was not so much the American brand of realism as the Scandinavian variety that provided the input for the original conceptions developed in Italy. Two main realist schools took shape, especially through the work of Silvana Castignone and Riccardo Guastini, of the University of Genoa, and Enrico Pattaro, of the University of Bologna.

This activity once prompted Jerzy Wróblewski to say, "Scandinavian legal realism is no longer cultivated in Scandinavian countries but is now being cultivated in Italy," particularly by Enrico Pattaro.

Main Text

It was early on that Pattaro (b. 1941) began to take an interest in Scandinavian legal realism, starting from his dissertation – written under the guidance of Felice Battaglia and devoted to a study that looks at Hans Kelsen and Alf Ross in comparison – as well as in one of his first essays, "Validità o verificabilità del diritto?" (Pattaro 1966), which develops some of the themes in the earlier study and advances the thesis that the normativist and the realist perspective are in fact complementary and can thus be reconciled (Pattaro 1971).

Pattaro subsequently investigated the thinking of Ross and Karl Olivecrona, and especially of Axel Hägerström, the fountainhead of the Uppsala school, to whom he devoted a monograph (Pattaro 1974) offering an organic reading of his work from a socio-psychological angle underscoring the crucial role the idea of norms plays in the law. In fleshing out this view, he (Pattaro 1985) brings out the similarities that Hägerström's theory bears to the one that H. L. A. Hart would expound more than 40 years later in his *Concept of Law* (Hart 1961).

Pattaro has also contributed to giving currency to the Scandinavians' original work, especially through his translation of Olivecrona's seminal *Law as Fact* (Olivecrona 1971), a translation done in close collaboration with the author himself and published under the title *La struttura dell'ordinamento giuridico* (Pattaro 1972b), making it possible for scholars in Italy to become familiar with Olivecrona and study his work almost as soon as the original came out.

In this way, Pattaro moved progressively closer to the basic tenets of Scandinavian legal realism, which he more clearly presented as an approach essentially concerned with bringing to the study of law the insights of analytic philosophy and, more broadly, of logical empiricism.

According to Pattaro, the grafting of analytic philosophy onto Kelsen's legal positivism – a move that initially gave new impetus to this new theory, enabling it to flourish in Italy – turned out over time to be a sort of Trojan horse in Kelsen's stronghold, this by making it possible to see that implicit in legal positivism is a value judgment, and once it is determined that a positivistic theory of law entails an ideological stance, the theory is thereby shown to be inconsistent with a value-neutral approach such as that which informs analytic philosophy (Pattaro 1972a).

In a series of works spanning from the investigations of the 1960s to *The Law and the Right* (Pattaro 2005), a distinctive conception is developed by Pattaro which he terms "normative realism," arguing that on the one hand law needs to be recognized as a reality not unlike that of empirical

facts, but at the same time it cannot be reduced to such facts. In so doing he thus offers an alternative through which to break the longstanding dichotomy between legal positivism and natural law theory.

Conclusion

On this view, law is a complex cultural, social, and empirical reality comprising entities both linguistic and nonlinguistic, the former termed "directives" (in a manner reminiscent of Ross), the latter inclusive of psychical phenomena (such as beliefs) and behaviors. In short, a norm is, for Pattaro, the belief that a scheme of behavior becomes objectively binding when certain circumstances obtain. It follows that in answering the question What is law? we cannot proceed from a formalist theory of law but must instead turn to that range of broadly linguistic-sociological theories that are concerned with language and behavior, from semiotics to the sociology of language, from anthropology to the history and sociology of law.

Proceeding along this line of investigation, the Bologna school has devoted its attention to Hägerström's Romanist works on the origin of legal ideas in the archaic world (Faralli 1992). And for a proper understanding of these ideas, they have been approached from a twofold perspective at once internal and external: From an internal one, they have been set within the overall frame of Hägerström's general philosophy, while from an external perspective they have been brought into connection with the positivist socio-anthropological inquiries of the late 1800s and early 1900s.

Cross-References

- ▶ Legal Realism, American: Theoretical Aspects
- ▶ Legal Realism, Scandanavian
- ▶ Legal Realism: Genovese
- ▶ Olivecrona, Karl Knut Hans: Philosophy of
- ▶ Ross, Alf: Influential Ideas

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Legal Realism: Contemporary

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Introduction

Almost a century after the heydays of American legal realism, its legacy is still unclear. Part of the puzzle – the dispute as to whether the so-called legal realist revolt against formalism indeed transformed American legal discourse or simply emphasized and repackaged preexisting strands of thought – is beyond the scope of this entry (compare, e.g., Kronman 1998 to Tamanaha 2010). Rather than delving into this historical debate, the task here is to identify contemporary legal realist views; in fact, it is even narrower than that. This entry does not discuss the variety of post-realist schools – notably law and economics and critical legal studies – that either claim to be or are portrayed as descendants of legal realism.

Because many contemporary American schools of legal thought are (or should be) indebted to the legal realists, there is little point in trying to cover them all in one short entry.

The focus of this entry is thus on three particularly interesting attempts of reviving the legal realists' vision of law. (They are not the only ones; see, e.g., Green 2005.) The following sections address, in turn, these exercises of reconstruction: the first grew out of the law and society movement; the second was offered by legal philosopher Brian Leiter; and the last was developed by the author of this entry. The mission of each section is to present a succinct and fair summary of these different views. Because they each attempt to offer a reconstruction of American legal realism that is currently valuable, the comparison (or contest) between these approaches, which will not be attempted here, needs to refer both to the (vast) body of realist scholarship they interpret (or follow) and to the usefulness of these accounts for contemporary legal theory (see Dagan 2018, nd).

New Legal Realism

The new legal realism ("NLR") is a movement of empirical legal scholars that took shape in the last quarter of a century. As a species of empirical legal studies, it has five distinctive features:

NLR is law based. The NLR approach is distinguished from "a purely social science approach to law" in being "usually based in law schools, driven primarily by problems that arise in legal practice," and in placing greater emphasis "on doctrine and legal processes to explain legal outcomes" (Klug and Merry 2016, 2). NLR scholars appreciate the significance of doctrine, which they conceive as "an important language or backbone that lies behind the hurly-burly of law on the ground" and thus a necessary part of the "law in action" (Mertz 2016, 20). Similarly, their law-centric perspective leads NLR scholars to "examine how abstract law is translated in different institutional environments in which law is made, interpreted, and applied" and to appreciate the different ways in which legal norms are "mediated in through different institutional processes" (Shaffer 2016, 152).

NLR scholarship demonstrates how law is not reducible to other social phenomena: that "law itself – as language/discourse, as institutional practices, as aspirational ideals, as actual or potential enforcement of state violence, and so on – actually matters." Law plays a "constitutive role," which means that "legal meaning matters, [that] legal actors perform legal practices, [and that] institutional norms and pressures interact with other factors" (McCann 2016, xiv–xv). This is why NLR perceives its relationship with the social sciences as one of "a two-way learning," rather than "the mere adoption of lessons from the social sciences" in a way that "subsume[s] law under the language of another discipline" (Shaffer 2016, 148).

NLR is concerned with translation and synthesis. The core mission of NLR is to facilitate the translation between law and the social sciences. The challenge is twofold: to provide lawyers, judges, and legal academics "better access" to the relevant knowledge generated by social scientists and to translate that knowledge into "the normative, engaged world in which lawyers must act" (Mertz 2016, 2–3, 10–11). Both of these prongs are quite complex.

Thus, "one cannot just pick up the 'findings' generated by a social science method" and "apply it mechanically to legal data" without also "understanding the theories and assumptions behind that method" and appreciating its "limitations and power." This difficulty is exacerbated given NLR's commitment to adapt its methodologies to the pertinent legal question, which implies the use of "diverse, sometimes contradictory methodological traditions of the social sciences" (Mertz and Barnes 2016, 181–182, 184–186, 199; Suchman and Mertz 2010, 562, 573).

The challenge of integrating social science into law is also complicated. Because "law is an explicitly normative endeavor, with its own methods and priorities," social scientists cannot simply "employ their own frames and perspectives without giving some serious thought to the distinctive approaches of those trained in law." And again the difficulty is intensified in a full-

blown NLR approach; this time given is global ambitions (infra) that generate further translation difficulties "between law and legal institutions in different contexts," both local and global (Klug and Merry 2016, II, 5; Mertz 2016, 3; Mertz and Barnes 2016, 181).

Some NLR scholars approach these challenges from a linguistic perspective, which conceptualizes them by reference to the "intertwined differences in purpose, epistemology, and discursive conventions between social science and law." They perceive law as "a very distinctive, normatively charged set of linguistic practices," which "have underlying goals and ethics that diverge sharply from those underlying most (if not all) of the social sciences." They thus conclude that a successful translation into law requires a robust understanding of law's "underlying worldview," its "unspoken assumption," "deeply felt attitudes," and "core mission." This is why at times the social sciences may be able to provide "valuable guidance to lawyers, judges, and lawmakers," whereas "some forms of social science are [simply] not applicable to legal problems" (Ford and Mertz 2016, 2, 9, 18–19).

NLR focuses on the bottom-up perspective. NLR scholars pay particular attention to "the local delivery of law on the ground." They believe that ignoring "the real mess of social life... dooms legal debate to an ever-more obscure and dated (albeit comfortably elite) position increasingly removed from other discussions of law across the academy and in society." They thus insist that our understanding of law must be "grounded in the experiences of those who are ruled by the law rather than just by those who formulate it" and therefore tend "to examine the workings of law in the lives of people in the bottom and middle of the social hierarchy" (Mertz 2016, 7, 13, 19). These propositions explain, the NRL commitment to the analysis, interpretation, and assessment of "complex, contingent, dynamic, multidimensional features of real-life situations" (McCann 2016, xvii).

NLR's constructive legal action. The main reason for NLR's bottom-up emphasis is its commitment to trace and then alert against injustices and thus to help ensure that our legal systems deliver on their promise to do justice for all. Indeed, NLR's empirical work is "catalyzed by normative concerns in light of power asymmetries and distributive conflict." Thus, NLR scholars employ empirical analysis "for purposes of addressing social problems that both transcend and permeate the nation-state" so as to "advance social welfare and distributive justice." Their "critical, reflective, and pragmatic edge" is also attentive to the inequalities and imperfections that typify "all decision-making processes" (Shaffer 2016, 145–146, 150, 152, 156).

NLR is attuned to the proliferation of legal forms in an increasingly globalized environment. NLR scholars are concerned with a "wide range of legal forms – at transnational, regional, supranational, and even global levels" (Twining 2016, 139). For NLR scholars, studying these legal forms is both a challenge and "an opportunity to understand the role law might play in achieving the goals of justice and stability sought by communities across the globe." They realize that while this expansive realm of inquiry helps de-parochializing the project, it adds "layers of complexity." It therefore requires heightened attention to "diversity and pluralism" and to the "relationship between law and culture" given the "radically plural" legal "practices, habits, and meanings" as well as the "different assumptions about the role of the law and the state" that typify "the contemporary era." NLR scholars take this complexity as an opportunity to study both the significant globalizing role of the legal processes of norm diffusion and the continued embeddedness of law and legal institutions in local practices, contexts, histories, and even communal self-definitions. It thus further "open[s] up the relationship between the normative claims of global law and [the] more contextual and social scientific understandings of the role of law as it moves across boundaries of professions, states, and disciplines" (Klug and Merry 2016, 1, 3–8).

Leiter

Brian Leiter, a leading legal philosopher, has devoted a robust body of scholarship, culminating in his book *Naturalizing Jurisprudence*, to defend

the argument that "the real realist legacy in legal philosophy" is "[a] *naturalized* jurisprudence predicated on a pragmatic outlook" (Leiter 2007, 21). Leiter's rich account of legal realism can be restated as three connected theses:

The pragmatic task of legal realism. Leiter argues that legal philosophers mistakenly dismissed legal realism, because they incorrectly assume it to be a theory of law, which it is not. Legal realism, he argues has no inspiration to contribute to legal theory. Rather, its mission is determined by its practical cash value, that is, by its ability to assist attorneys who must advise clients what to do and how it is useful for them to think about law. With this pragmatic mission in view, legal realism for Leiter is a "descriptive theory of adjudication, a theory of what it is that causes courts to decide as they do," which is, as such, conducive to lawyers' task of predicting judicial outcomes (Leiter 2007, 52–53, 60, 65, 71).

The realist legacy of naturalized jurisprudence. Leiter's second thesis and his main substantive claim follow from this first thesis. In order "to predict reliably and effectively what courts will do," he argues one should know "the *causes* of judicial decisions," which are in turn "only available to the sort of empirical inquiry modeled on the natural and social sciences." In other words, "[a] *naturalistic* theory of adjudication is required [in order] to produce a *pragmatically valuable* theory for lawyers" (31). It is helpful to separate out three naturalistic claims that Leiter attributes to legal realism: the first, which is situated at the forefront of his account, refers to the causes of judicial decisions; the others – that are no less important to his position – relate to the sources of legal predictability.

The *first* claim – the "core claim of realism," as Leiter calls it – is that "judges respond primarily to the stimulus of the facts of the case," which means that "the distinctive factual pattern" (or the "situation type") determines the outcome of the case. In other words, instead of relying on "the legal reasons that fill their opinions," judges focus on "the general type of behavior exemplified by the particular facts" of the case and decide based on "what would constitute normal or socio-economically desirable behavior in the relevant [] context" (21, 23–24, 28–29, 53, 62).

Leiter's *second* naturalistic claim, which also clarifies why the view that legal realism stands for judges' unfettered discretion is a caricature, explains how prediction is possible notwithstanding the causal irrelevance of legal reasons. Judges' "choice of decision" is "sufficiently fettered," Leiter argues, *not* due to "idiosyncratic facts about individual judges" but rather due to "facts that are sufficiently common to judges." More specifically, he claims that judges' "'sense' of a particular situation" is shaped by their professional and social history in which they form "certain characteristic assumptions about what is right and fair in such circumstances, based in significant part on [their] familiarity with the local norms of conduct in that trade or practice." This means that "judicial decisions fall into (sociologically) determined patterns," which can thus form the basis for "predictive generalizations" (23, 25–27, 29–30).

From these observations, Leiter deduces the *third* prong of his naturalistic rendition of legal realism, which focuses on legal theorists. In order to perform the crucial task of discovering the real patterns of judicial decision-making, legal theorists, he argues, must approach law "like a behaviorist psychologist, an anthropologist, or an empirical sociologist." A properly naturalized jurisprudence is thus "a type of jurisprudence that eschews armchair conceptual analysis in favor of continuity with a posteriori inquiry in the empirical sciences." Leiter seems ambivalent about what he dubs "a 'folk' social scientific theory of adjudication" that can be found in the corpus of the original legal realists. Some of his statements imply that this folk theory may be a valuable ingredient in, or a stage toward, a more mature empirical inquiry. Other statements, especially in Leiter's more recent scholarship, refer to the realist folk theory and to "sound empirical work on law and the legal system" as two distinct and independently worthy endeavors (55, 63, 90, 134–135; Leiter 2013, 963).

Legal realism as tacit hard positivism. Leiter's third (and most surprising) thesis is that the realist descriptive theory of adjudication, just discussed, necessarily relies on a positivist theory of law, or – more precisely – on hard (or exclusive) positivism, in which "facts about pedigree or sources"

primarily determine legal validity (121–123). This thesis challenges the conventional view, in which legal positivism and legal realism are incompatible given the former's insistence that "prior official acts (like legislative enactments and judicial decisions) constitute 'law'" and the latter's account of the indeterminacy – or more precisely under-determinacy – of these sources (59–60, 69).

Leiter interprets the realist claim of indeterminacy not as a global argument, but rather as one that applies to "many cases" that are typified by an "interpretive latitude," which injects "a considerable degree of indeterminacy." In this (but only this) particular set of cases, legal rules do not determine or constrain decision, and the realist naturalistic thesis kicks in. Positivists treat this set as marginal to the practice of adjudication, whereas realists insist that it is rather typical to cases actually litigated, at least at the stage of appellate review, so that *empirically* adjudication is best explained by reference to the typical judicial response to the stimulus of facts. This implies that the positivist-realist dispute on this front is one of degree, and while positivists may be right, they offer no supporting argument other than "armchair confidence in the correctness" of their view (19–20, 64, 75–79).

This means that positivists have something to learn from realists. It also means that positivists need not refine their conception of law, quite the contrary. To begin with, legal realism in this view concedes that most rules are determinate as applied to most situations. Moreover, the realist position thus conceived assumes that "statutes and precedents largely exhaust the authoritative sources of law," whereas "uncodified norms and policy arguments" are not "part of the law." It thus presupposes a positivist theory of law in which "criteria of legality are exclusively ones of pedigree: a rule...is part of the law in virtue of having a source in a legislative enactment or a prior court decision." This presupposition – in which law is strictly defined by pedigreed sources – implies the tacit *hard* positivism that Leiter attributes to legal realism. Furthermore, legal realism – along with contemporary empirical legal studies – ends up, in Leiter's view, supplying an a posteriori vindication of hard positivism by showing that it gives us "the best going [empirical] account of how the world works" (72–73, 79, 133–135).

Dagan

Finally, in this author's reconstruction, the legacy of legal realism provides a subtle view of law as a set of institutions distinguished by the irreducible cohabitation of power and reason, science and craft, and tradition and progress (Dagan 2013).

Critique of pure doctrinalism. The starting point of the realist view of law is its critique of a purely doctrinalist understanding of law. Equating law with doctrine is wrong because the doctrine qua doctrine (namely, the pedigreed sources just mentioned) is *radically* indeterminate. Realism views legal doctrine as hopelessly indeterminate not because of the indeterminacy of discrete doctrinal sources (as the positivist account of indeterminacy, which Leiter challenges only quantitatively, assumes). Rather, the indeterminacy of legal doctrine derives primarily from the multiplicity of doctrinal materials potentially applicable at each juncture in any given case. Legal doctrines are patchworks of contradictory premises covered by "ill-disguised inconsistency," because, in all of them, "a variety of strands, only partly consistent with one another, exist side by side" (Llewellyn 1933, 45, 51; Llewellyn 1962a, 58).

The inevitable gap between doctrinal materials and judicial outcomes evokes two related concerns. First, what can explain past judicial behavior and predict its future course? Second, how can law constrain judgments made by unelected judges (and thus maintain its distinction from politics)? The second (legitimacy) challenge is particularly formidable given the insidious tendency of the doctrinalist discourse to obscure contestable value judgments made by judges (or other legal actors) and to entrench lawyers' claim to an impenetrable professionalism, improperly shielded from critique by nonlawyers (Rodell 1940).

Legal realism answers this challenge by advancing the view of law as a going institution

(or rather a set of institutions) distinguished by the difficult accommodation of the three constitutive yet irresolvable tensions mentioned above – the tensions between power and reason, science and craft, and tradition and progress.

Power and reason. The realist view of law finds room for both power and reason, although it recognizes the difficulties of their coexistence. The preoccupation with power is justified because, unlike other judgments, those prescribed by law's carriers can recruit the state's monopoly of power to back up their enforcement as well as institutional and discursive means that tend to downplay some dimensions of law's power. These built-in features of law – notably the institutional division of labor between "interpretation specialists" and the actual executors of their judgments, together with our tendency to "thingify" legal constructs and accord them an aura of correctness and acceptability – render the danger of obscuring law's coerciveness particularly troubling (Cohen 1935; Dewey 1924, 24). They justify the realists' wariness of the trap created by the romantization of law.

But legal realism rejects as equally reductive the mirror image of law, which portrays it as sheer power, interest, or politics. Law is also a forum of reason, and reason imposes real – albeit elusive – constraints on the choices of legal decision-makers and thus on the subsequent implementation of state power. Law is never only about interest or power politics; it is also an exercise in reason giving. Law's coercive power can only be justified if it is properly grounded in human values. Realists are thus impatient with attempts to equate normative reasoning with parochial interests or arbitrary power. They also find such exercises morally irresponsible because they undermine both the possibility of criticizing state power and the option of marshaling the law for morally required social change (Llewellyn 1940).

And yet, realists are also wary of the idea that reason can displace interest or that judges can set aside all influences except for the better argument. Because reasoning about law is reasoning about power and interest, the reasons given by law's carriers should always be treated with suspicion. This caution explains the realist endorsement of value pluralism, as well as its conceptualization of law's quest for justification as a perennial process that constantly invites criticism of law's means, ends, and other (particularly distributive) consequences (Holmes 1920, 181; Llewellyn 1962b, 211–212).

Legal realists do not pretend they have solved the mystery of reason or demonstrated how reason can survive in law's potentially coercive environment. Nevertheless, their recognition that power and reason are doomed to coexist in any credible account of the law is significant. Making this tension an inherent characteristic of law requires rejecting reductionist theories employing an overly romantic or too cynical conception of law. This approach also forces us to be aware of the complex interaction between reason and power. It thereby accentuates the responsibility incumbent on the reasoning of and about power, minimizing the corrupting potential of the self-interested pursuit of power, and the perpetuation of what could result as merely group preferences and interests.

Science and craft. Consider now the non-doctrinal reasons that legal realism invites into legal discourse, which are premised on both science and craft. Legal realism acknowledges the differences between lawyers as social engineers who combine empirical knowledge with normative insights, on the one hand, and lawyers as practical reasoners who employ contextual judgment as part of a process of dialogic adjudication, on the other. They nonetheless insist on preserving the difficulty of accommodating science and craft as yet another tension constitutive of law.

Legal realism emphasizes the importance of empirical inquiries, such as investigating the hidden regularities of legal doctrine in order to restore law's predictability or studying the practical consequences of law in order to better guide its evolution and protect its legitimacy (Schlegel 1995, chs. 2 and 4). But the prototypical realists who guide this reconstruction reject any pretense that knowledge of these important social facts can be a substitute for political morality. They realize that value judgments are indispensable not only when evaluating empirical research but also when simply choosing the facts to be investigated.

Moreover, they are always careful not to accept existing normative preferences uncritically. Legal realists insist that neither science nor an ethics that ignores scientific data offers a valid test of law's merits. Legal analysis needs both empirical data and normative judgments (Cohen 1935, 849).

Because law affects people's lives dramatically, social facts and human values must always inform the law's evolution, but the realist view of law also highlights that legal reasoning is a distinct mode of argumentation, different from other forms of practical reasoning. Hence, realists pay attention to the distinctive institutional characteristics of law and study their potential virtues while remaining aware of their possible abuses. The procedural characteristics of the adversary process, as well as the professional norms that bind judicial opinions – notably, the requirement of a universalizable justification – provide a unique social setting for adjudication. These characteristics establish the accountability of law's carriers to law's subjects and encourage judges to develop "a many-perspectived view of the world," or a "synoptic vision" that "can relieve us of the endless anarchy of one-eyed vision" (Cohen 1950, 242).

Moreover, because the judicial drama is always situated in a specific human context, lawyers have constant and unmediated access to human situations and to actual problems of contemporary life. This contextual feature of legal judgments facilitates lawyers' unique ability to capture the subtleties of various types of cases and to adjust the legal treatment of them to the distinct characteristics of each type of case (Llewellyn 1930, 453, 457).

To be sure, realists do not perceive law's resort to both craft and science in attempting to comply with the heavy burden of justifying its prescriptions as an empirical observation or a conceptual requirement. The law can still be law even if its carriers fail – as they often do – to properly investigate its social effects or sufficiently probe into its justice or if lawyers' way of thinking in a certain time and place inhibits, rather than serves, justice. But these propositions do not threaten the realist view of law. The reason for this is that – given their rejection law's romantization – the realists' reference to craft and science should be understood merely as typical means with which law can face up to the challenge of justification, rather than a necessary feature of law.

Tradition and progress. The extended realist treatment of science and craft derives from the conviction that law is profoundly dynamic, which leads to the third constitutive tension identified. Law's inherent dynamism implies that the legal positivist's attempt to understand law by sheer reference to verifiable facts – such as the authoritative commands of a political superior or the rules identified by a rule of recognition – is hopeless.

To clarify, legal realists do *not* contest the felt predictability of the doctrine at a given time and place. Quite the contrary, they recognize that the social practice of law at a given time and place provides insiders to the pertinent legal community determinate answers to doctrinal quandaries. The understandings of such insiders surely converge on many legal questions: they tend to read the pertinent pedigreed sources similarly. But this legal determinacy, which explains why the realist view of law complies with the rule of law requirements of guidance and constraint, does not inhere in the doctrine as such and rests instead on the broader social practice of law. What accounts for law's stability and predictability is not law's pedigreed sources, but rather their prevalent understanding within that community – the implicit sense of obviousness insiders share as per "on-the-wall" interpretations of the doctrine (Dagan 2015, 1900–1902).

Under the realist view, law is "a going institution" that is intrinsically dynamic. At its best, it is portrayed as "a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need," mediating between "the seeming commands of the authorities and the felt demands of justice" (Llewellyn 1960, 37–38).

The realist "big picture." Many contemporary legal theories continue the realist project by refining and elaborating one realist tenet, be it its challenge to pure doctrinalism or its account of one of the features that, according to legal realism, are constitutive of law. But the current debates between law as power and law as reason, law as

science and law as craft, and law as tradition and law as progress are futile and harmful. From the perspective of this reconstruction of legal realism, all these unidimensional accounts of law are hopelessly deficient. Law can be properly understood only if we regain the realist appreciation of law's most distinctive feature: the uneasy but inevitable accommodation of power and reason, science and craft, and tradition and progress.

Conclusion

This entry surveyed three recent attempts to reconstruct or revive American legal realism. The New Legal Realism is a law-centered species of empirical legal studies, which is focused on law on the ground and seeks to translate social science and synthesize its findings into law. NLR scholars are committed to constructive legal action and attuned to the changing faces of law in an increasingly globalized environment. Brian Leiter, by contrast, conceptualizes American legal realism as a naturalized jurisprudence, aimed at assisting lawyers to predict outcomes. His main substantive claim is that realists developed a robust naturalistic account, both concerning how judges decide and regarding the premise of law's predictability for legal insiders. His main jurisprudential point is that legal realism necessarily relies on legal positivism, or more specifically that legal realists are tacitly hard positivists. Finally, the author of this entry argues that the real legacy of American legal realism is the realist view of law as a dynamic institution or, more precisely, a set of institutions, embodying three constitutive tensions: between power and reason, between science and craft, and between tradition and progress. What realists find most distinctive about law, in this view, is the uneasy but inevitable accommodation of these constitutive tensions.

Cross-References

▶ Legal Realism, American: Theoretical Aspects
▶ Legal Realism, Scandanavian
▶ Legal Theory: Types of

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Legal Realism: Genovese

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Introduction

"Genoese legal realism," from now on GLR, refers to a school of jurisprudence, the so-called Genoa School, that has been very active since the sixties of last century in Italy, and since the nineties in the world. GLR can be considered a school, firstly, because all its scholars draw on, and develop the teaching of, founding fathers such as Giovanni Tarello, Silvana Castignone, and Riccardo Guastini. Secondly, and more importantly, it seldom happens that authors so different from each other, for interests, culture, and personal proclivities, do produce such an organic and recognizable body of doctrine.

GLR is an updated form of legal realism, differing from classical Scandinavian and American realisms in two respects. First, GLR adapts the realist idea that courts do produce law, a very trivial one in common law contexts, to civil law's contexts, where legislation, codes, and written constitutions are the only legal sources. Accordingly, GLR provides a skeptical or realist theory of interpretation based on the distinction between the sentences composing a statute, and the plural meanings of each of them, calling norms the latter. According to this theory, therefore, a legislator produces only legal texts, whereas legal norms are produced by courts and other law-applying authorities.

Genoa's School

The GLR concerns itself with European, Continental legal systems, but in the universal perspective of English-speaking general jurisprudence. The Italian legal system is a good starting point for such an enterprise, from at least two standpoints. From the comparative standpoint, the Italian legal system is a mix of the two main variants of civil law's model, the French and the German ones. From the constitutional standpoint, the Italian legal system is a paradigmatical case of Postwar constitutionalization processes, i.e., the irradiation of the law by constitutional principles through such institutions as constitutional rigidity, judicial review, and so forth.

Though Genoese theorists deal with all the typical themes of general jurisprudence, the strategical issue for GLR is interpretation, in the specific sense of ascription of meaning to legal texts. This is a more specific sense of "interpretation" with respect to the generic one, for which the term applies to almost all legal activities. In a Continental context, the adoption of such a specific sense of "interpretation" implies focusing on statutory construction by jurists, that is, judges and legal scholars.

As to methodology, the Genoese treat problems of jurisprudence in the sense of Alf Ross' *On Law and Justice* (1952, 1958) – analysis of legal concepts, and definition of legal terms.

GLR is a realist jurisprudence not just because it explicitly appeals to the legacies of Scandinavian and American realisms, but because it shares their strong criticism both of ancient natural law and of modern legal positivism. The Genoese consider natural law an outdated legal metaphysics, and the very legal realism as the true legal positivism: the only factual, empirical, value-free study of law. If one should list three main theses defining GLR itself, one could perhaps provide the following.

First, the Genoese share the realist view of law as an empirical fact, to be studied both by legal theory and social sciences without evaluating it. This is also the Genoese interpretation of the well-known Hartian Separation Thesis, or Razian Social Sources Thesis – legal positivism, thereby, would be the same value-free approach to the study of law dubbed by Norberto Bobbio methodological positivism. Second, like Scandinavians in their century, Genoese realists often subscribe to an outdated form of ethical emotivism. Third, GLR adopts a sort of interpretive skepticism which is more critical toward the Hartian mixed theory than toward interpretive formalism.

Due to its typical Continental context, GLR can be considered as a third, more updated and sophisticated kind of legal realism, after the Scandinavian and the American ones, suited not just to the civil law's culture but also to all legal cultures in which legislation increasingly erodes the space of the case-law. This is not to deny that GLR originally deals, for the main part of its work, with questions that are typical, though of course not exclusive, of civil law's world: for instance, the theory of legal sources, the methodological status of legal dogmatics, and the so-called constitutional interpretation.

Main Authors

The major founding father of the School was unquestionably Giovanni Tarello (1934–1987). After working in Australia with Julius Stone (see Stone and Tarello 1960), he joined Italian analytical school, which at the times was developing under the direction of Bobbio and Uberto Scarpelli and the influence of authors such as Hans Kelsen, Hart himself, and Richard Hare. GLR, however, received its direct inspirations from David Hume, Scandinavian legal realists (see S. Castignone 1996), and American ones (see Tarello 1962).

Since the very start, Tarello succeeded in mixing eclectically legal theory with history and sociology of law (Tarello 1974b) – and this in a time in which specialization was not yet conceived as an inescapable destiny. The results are documented by three main books published during his lifetime (Tarello 1974, 1976, 1980), by the journal founded and directed by him, *Materiali per una storia della cultura giuridica*, and by the papers collected in the posthumous book Tarello 1988. Without any ambition to build a theoretical system, Tarello argued legal philosophy, as any other branch of philosophy, could be elaborated and developed only by starting from the particular science's problems, like legal dogmatics, problems to be analyzed by such a philosophy.

The core of Tarello's legal theory is statutory interpretation (*interpretazione della legge*, in Italian), opposed to law's interpretation (*interpretazione del diritto*, in Italian; *interpretatio iuris*, in Latin). His main thesis is that in the evolution of Western legal culture, jurists and judges always have taken active part in the production of law. Until the turning point of civil law's codification, in the eighteenth and nineteenth century, such a participation was achieved more through *interpretatio* – the detection of law in order to both study and apply it – than interpretation.

Formally, codification excluded *interpretatio* (legal dogmatics and case law) from the very sources of law, by now reduced to legislation. Substantially, however, courts and jurists continued to produce law, this time by means of interpretation. In Tarello's and Genoese lexicon, in fact, "norm" no longer designates the object of interpretation – for which Genoese speaks of legal sentences or provisions (*disposizioni*, in Italian) – but the product of interpretation itself, i.e., the different meanings ascribed to the same text. Tarello oscillates here between two types of interpretive skepticism: a radical one (norms would be produced exclusively by interpreters), and a more

moderate one (legislators and interpreters would participate, in different roles, to the process of lawmaking).

Guastini (b. 1946) is today the internationally best known and most influential member of the Genoa School. In particular, Guastini determined three important turns in the Genoese theory, all the three marking a rapprochement to the Hans Kelsen's *Reine Rechtslehre* – at least as compared to Tarello's basic anti-Kelsianism. First, Guastini taught also constitutional law, thereby studying European Postwar new constitutionalism – the very subject of the legal philosophy then dubbed by Susanna Pozzolo, Paolo Comanducci, and Mauro Barberis by the term "neo-constitutionalism" (*neocostituzionalismo*, in Italian: see both Pozzolo 1998, 2001).

Guastini 2006, in particular, provided a theory of the processes of constitutionalization – the systematic spreading of new meanings into Western legal systems by way of constitutional interpretation. In the same vein, he analyzed the important, though weak distinction between rules and principles, establishing some distinctive criteria between the two. Finally, Guastini clarified the solution of conflicts among constitutional principles through techniques variously called *balancing* (in English), *ponderación* (in Spanish) or *Abwandlung* (in German), by appealing to the interpretive creation of mobile hierarchies among them.

Second, along with Comanducci, he established a close relationship with Buenos Aires School, especially with Carlos Alchourrón and Eugenio Bulygin. The influence of the Argentinians on GLR was deep enough to explain the title, *Analisi e Diritto*, given both to the yearbook edited by Guastini and Comanducci since 1990, and to a prestigious collection of books publishing, until now, more than 100 titles. One cannot understand recent GLR theoretical attitudes, in fact, without considering Imperia's Seminars, the annual event involving Latin theorist (Latin-Americans, Spanish, French, Italians).

Third, Guastini solved the above-mentioned oscillation in Tarello's theory of interpretation between radical and moderate skepticism by adopting Kelsen's more moderate conception of legal norms as a normative meaning inferred by legal authorities within the framework (*Rahmen*) of a hierarchically superior norm (see Guastini 1994, 1996, 2010, 2011, 2012). According to Guastini, it is not the interpreter herself who makes norms, rather she picks them out from within the *Rahmen* provided by doctunal and Justice construction. Far from exhausting the process of lawmaking, anyway, judicial and scholar interpretation merely contributes to it.

Paolo Comanducci (b. 1951) is perhaps the member of the Genoa's School who is best known in the Spanish-speaking world. Originally a historian of legal ideologies, as Tarello was, he then worked extensively on metaethics and the theory of justice (see Comanducci 1984, 1992, 1998), by adhering to a form of metaethical constructivism more moderate than emotivism shared by Guastini and Pierluigi Chiassoni. In the same vein, Comanducci dealt with theory of interpretation, adopting a stance admittedly closer to the Hartian mixed theory than to original Genoese interpretive skepticism (Comanducci 2011).

His metaethical studies brought in the nineties to the foundation of the journal *Ragion pratica* – the second journal of the School in time, after *Materiali* and before *Analisi e diritto*. Comanducci contributed, along with Pozzolo and the present writer, to the proposal of a new meta-theoretical label, "neoconstitutionalism," that basically applies to European or Latin-American followers of Ronald Dworkin such as Robert Alexy, Manuel Atienza, Neil MacCormick, Carlos Nino, and even, in some respects, Luigi Ferrajoli. In the English-speaking world, the same positions are labelled "post-positivism," "inclusive or soft positivism," and so forth.

The only goal common to such theorists, perhaps, is overcoming both natural law and legal positivism into an alleged third theory in fact focusing on the law of constitutional State – the Postwar State characterized by rigid constitutions, judicial review, and irradiation of constitutional principles. Other themes typical of so-called neoconstitutionalism are connection law-morals, rules/principles distinction, and constitutional interpretation in general, especially balancing and proportionality's control. The legal theory Comanducci 2010 and Comanducci

2016 proposes on his own, in fact, is allegedly positivist or value-free, but focuses on the same issues covered by neoconstitutionalist philosophy of law.

Mauro Barberis (b. 1956), the author of this entry, tried to follow the Tarello's omnivorous intellectual curiosity, working first as a neo-Wittgensteinian analyst of legal language (Barberis 1990) and a theorist of legal evolution (Barberis 1998), then again as the proponent of a pluralist form of metaethics (Barberis 2008a) and an inquirer in European legal culture (Barberis 2008b), finally, and autoironically enough, as a (truly) realist and neoevolutionist legal theorist (Barberis 2014a). He contributed to Genoese theory of interpretation especially criticizing its original skepticism (Barberis 2000, 2014b, 2015, 2016) – a criticism harsh enough to be often misunderstood as external to GLR.

Far from being nearer to the Hartian mixed theory, however, this stance about interpretation became more and more realistic. In his opinion nobody, least of all legislators, does create the law – rather, legislative and constitutional law do supervene on judicial one, in order to limit it. In such an evolutionary view, interpretation, in the yet mentioned specific sense of meaning's ascription to legal texts, loses its central role, now played by adjudication. The core of legal theory is no longer legislation but jurisdiction. The core of law becomes the settlement of disputes, by ensuring the normative expectations of individuals and thereby doing justice to them – in a merely legal sense of "justice."

Pierluigi Chiassoni (b. 1961) is well known as the better advocate of two original tenets of the School – noncognitivism about metaethics, and skepticism on interpretation. In fact, he largely contributed to the GLR's theory of interpretation by opening new directions of inquiry, not yet fully explored until now. One among them is the very idea of interpretive games – a family of interpretive activities performed by a variety of typified legal actors, like academic jurists, law theorists, lawyers, ordinary and constitutional judges, legislators of all levels, administrators, and so on (Chiassoni 2001, 2007).

Interpretive games, in Chiassoni's opinion, are regulated by many interpretative codes, i.e., sets of directives, principles, canons, arguments as well as fixed topics specifying and determining them. Such interpretive codes provide the theory of interpretation with the opportunity of developing analytical taxonomies that could prove them useful to different types of lawyers and law officials in various contexts. As an example of the heuristic potential of this idea, one must notice Chiassoni 2012 has dealt also with the problem of judicial precedents – a topic strangely neglected by GLR, perhaps because it could call into question Genoese original interpretive skepticism.

This is not the right place to speak of the many authors who developed either the historical or sociological features of Tarello's legacy, or who are very near to the school but usually not classified as belonging to GLR, such as Realino Marra and Cristina Redondo, or who have a deep relationship with the school, such as Michelangelo Bovero, Bruno Celano, Jordi Ferrer, Tecla Mazzarese, Daniel Mendonca, Pablo Navarro, Michel Troper, and many others. Nor can we speak about the many pupils of the Doctorate in Genoa or the Master in Imperia, teaching today in many universities of the world. But there are at least three important exceptions to these exclusions.

First exception is Giovanni Battista Ratti (b. 1975), today the Genoese theorist most present in international debate, with his logicolinguistic approach which is perhaps the best example of cross-fertilization between GLR and Buenos Aires School (see Ratti 2008, 2012, 2014). Second one is Francesca Poggi (b. 1974), perhaps the Genoese theorist more committed to update the GLR conceptual tools in the perspective of a pragmatics of legal language (see Poggi 2004, 2013). Third is Giulio Itzcovich (b. 1975), working on the footsteps of Guastini to extend GLR's approach to international and European Union's law (see Itzcovich 2006).

Conclusion: Open Lines of Inquiry

The more promising lines of inquiry are basically four. First, the "pragmatization" of legal semantics, inspired by Tarello's studies

on normative language (like Tarello 1965) – a perspective today cultivated by Muffato 2007 and Poggi 2016. Second, general practical reasoning (Redondo 1999) and ethical particularism (Bouvier 2012). Third, legal system(s), a topic problematized by Tarello 1975, then reproposed by Guastini in terms of a neo-Kelsenian theory of dynamic legal order, and finally dissolved by Ratti 2008 into a theory of law's systematization by jurists. Such a problem is nowadays made more urgent by so-called legal sources' crisis – even hierarchy of sources is by now fixed, in the last instance, by constitutional and international courts (see Pino 2011).

Fourth, the problem of interpretation itself – the very core of GLR. The yet mentioned specific sense of "interpretation" – ascription of meaning to legal texts – is only a part, and a largely overrated part, of generic sense, say legal reasoning. Adjudication, application, argumentation, all deserve more attention than it – the single act of ascribing meaning, in fact, is just a part of wider collective activities like a line of precedents or a *jurisprudence majoritaire* (in French). An integration of all these features is needed, at least, in order to overcome the originally skeptic inspiration of GLR, and achieve a more comprehensive theory of law and interpretation.

Cross-References

- ▶ Civil Law: Roman
- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Legal Positivism: Inclusive
- ▶ Legal Realism, Russian
- ▶ Natural Law: Protestant

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Legal Reasoning: Virtues

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Subjective Traits in Legal Reasoning

Much of the theory of legal reasoning in the last century has been marked by the felt need to respond to the formidable challenge presented, in different shapes and forms, by the claim that legal decision-making was ultimately (and/or should be) a product of a judge's subjectivity. The "Freirecht" movement in Germany and certain trends within American Legal Realism offer articulated expressions of a more inarticulate impression shared by many: the decision-maker's subjectivity plays a pivotal, perhaps a preponderant, role in legal decision-making. As K N Llewellyn once put it, ". . .the unfortunate effects of a particular ill-advised breakfast do alter the advocate's practical problem"(Llewellyn 1940: 592), a point that has recently found some empirical support (Danziger et al. 2011). In our days, this challenge is alive and well and found some additional credence in the blossoming "heuristic and bias" literature in cognitive psychology (e.g., Langevoort 1998).

Against that background, a strategy to carve out a space for legal reasoning as a worthy object of study, not reducible to the study of the psychological make-up of legal decision-makers, was inspired by developments in the philosophy of science. That strategy, famously put forward by Wasserstrom (1961), consists of postulating a sharp distinction between contexts of "discovery" and contexts of "justification" in legal decision-making. In the former, the judge has an insight about the case (or an aspect of the case), a "hunch" whose analysis is not philosophically interesting. Furthering our understanding about this moment of unbridled creativity might be possible, but it would be a job for scientists (psychologists, neuroscientists, etc.), not for philosophers, including legal philosophers. A context of justification takes up that hunch and attempts to vindicate it. While in science that process of vindicating the claim involves the empirical verification of projected results (Schickore 2018), in legal context, justification is produced by means of legal arguments. Thus, legal reasoning was firmly placed in the legal decision's "context of the justification" and, although a legal realist might not feel appeased by this strategy, much of the research on legal argumentation since the 1950s proceeds on the assumption that the study of legal reasoning has little to do with the eureka moments that characterize contexts of discovery and, conversely, is primarily the study of arguments

used to justify legal claims (MacCormick 1994: 15–17).

The distinction between the discovery and the justification of a legal claim has a lot going for it. For starters, it appears to map neatly onto a distinction between the descriptive and the normative. In addition, it also appears to be able to accommodate two deeply seated, and opposing, widespread intuitions. First, it explains the intuition that often, when judges decide, there is more going on than the mere production of sound arguments and counterarguments. Second, it explains the intuition that some legal decisions, and/or the arguments that are put forward to ground them, can be legally correct or incorrect, regardless of the state of mind of the judge. It makes things neat.

And thus, a particular picture of the frontier between the subjectivity of the legal decision-maker and the objectivity of legal argument, familiar to most who work in the fields of legal reasoning and legal theory, became dominant. In such picture, the subjectivity of the decision-maker is not denied a role in the process of legal decision-making but is excised from the set of philosophically interesting legal phenomena.

Within that picture, it is difficult to see how virtues would be of much consequence in the study of legal reasoning. After all, virtues are stable *subjective traits* possessed by an individual. They are inclinations to act (or react) and to feel in certain ways, in certain contexts, that are, in some important sense, good (Annas 2011: 8–9). If it is true that the subjectivity of the legal decision-maker is not a philosophically interesting legal phenomenon, then it appears to follow that a philosophically interesting conception of legal reasoning would have little (perhaps nothing) to say about the way a lawyer's stable subjective traits interact with legal arguments.

This neat depiction of separation between subjectivity and objectivity in legal reasoning and decision-making, however, has come under pressure on different fronts. First, and perhaps less consequentially to matters pertaining to legal reasoning, the discovery/justification divide in the philosophy of science, which inspired legal philosophers such as Wasserstrom, has been subject to further scrutiny over the past few decades and many questions were raised about the usefulness of the distinction (Sucar and Herrán 2017; Schickore 2018). Second, more directly related to legal reasoning, developments in virtue jurisprudence and in the theory of legal argumentation have led to a reappraisal of the role of subjectivity in legal reasoning and decision-making. Importantly, virtue jurisprudence's claim that the possession of certain subjective character traits is an important, or perhaps even a necessary, feature of good legal reasoning is put forward as being compatible with the claim that, in at least some cases, there are objectively correct and incorrect legal conclusions. Virtue jurisprudence's rehabilitation of subjective traits is not meant to lead to relativism and, more specifically, subjectivism. In what follows, I will concentrate in the latter challenge and, in doing so, explain why virtue theorists believe these two claims to be compatible.

The mention to "virtue jurisprudence" in the previous paragraph should not be taken to suggest a wide consensus between legal theorists claiming that an appropriate account of legal reasoning should include an account of the virtues relevant for good legal reasoning. In truth, they do not speak with a single voice and, as we shall see below, disagreement runs deep on many issues. Is the *correctness* of a decision a function of what a virtuous agent would have decided? If possession of a virtue by the decision-maker is not what makes the decision correct, are virtues in any other way *necessary* for correct decision-making (or can they be replaced by an alternative decision-making strategy)? If they are in no way necessary, are they merely useful heuristic shortcuts? Which settled dispositions belong in the list virtues (or constitutive parts of a virtue) of a competent legal arguer? How do virtues interact with legal reasons? These and many other questions have been raised in the past few years by legal theorists working within virtue jurisprudence, broadly conceived. Each has been offered diverse, sometimes opposing, answers.

In what follows, I briefly explain, in section "Sites of Virtue in Legal Reasoning," some of the most prominent contact points between legal

reasoning and the possession of virtues (which I shall refer to as the *sites* of virtue in legal argument). In section "The Way of Virtue in Legal Reasoning," I discuss the three ways in which virtue is said to operate in such sites, and in section "Virtue, Virtues, and Practical Wisdom," I turn to the specific virtues that have been said to be important in legal reasoning, paying particular attention to the intellectual virtue of practical wisdom.

Sites of Virtue in Legal Reasoning

The best starting point for an account of how virtues relate to legal reasoning is to identify the conceptual spaces where virtues might interact productively with legal decision-making: the *sites* of virtue in legal argument. Legal interpretation is one such site: in situations in which the *meaning of legal sources* is unclear, even after the deployment of all the machinery of legal interpretation, the possession of certain moral and intellectual virtues by a legal decision-maker might be necessary (or at least useful) to identify a legally sound solution (Amaya 2019: 87–92). Moreover, it is not entirely clear whether the deployment of this machinery can be successful without reliance on the virtues of the interpreter. Legal application is another: in identifying *the normatively relevant properties* of the situation at hand, legal interpretation and argument are believed by many a virtue theorist to be insufficient (Michelon 2018). Legal interpretation and legal application are often phenomenologically intertwined and, in fact, are frequently treated together in the literature (e.g., Amaya 2019). Nevertheless, in the context of specifying the sites of virtue in legal reasoning, it is worth holding on to the analytical distinction. A third type of site comprises instances of legal argument that rely on comparisons to run, such as legal analogies and the legal version of the *a fortiori* argument. As virtues operate differently in each of those *sites,* it is worth addressing them in turn.

In legal interpretation, the investigation concerns primarily the meaning of legal sources, and although such investigation might be prompted by contexts in which one is called to apply the law to a particular case, there are many other contexts in which it makes perfect good sense to ask about the meaning of, say, a legislative provision or a written judicial opinion, without the need to consider the application of the relevant legal norms to particular cases (take, for instance, the activity of legal scholars). The practice of legal interpretation in most complex legal systems is structured around a series of (more or less controversial) interpretative canons: "take account of the common meaning of the words that feature in the relevant source," "take account of the purpose of the relevant legislative provision," "take account of the normative context in which the normative provision is inserted," and "take account of the consequences of each candidate meaning," among many others. Such canons do not always yield clear-cut results. In fact, they might sometimes point in different directions, and attempts to produce a definite list of canons and to rank such cannons a priori have not been met with enthusiasm in the literature on legal interpretation. They are best understood as pro tanto reasons for or against assigning a certain meaning to a certain legal source.

But handling reasons that pull in opposite directions is tricky business. The right weigh to be assigned to interpretative reason R in interpretative context C is often a matter of judgment, in the sense that (i) the interpreter cannot easily explain the judgment as the application of a (set of) second order reason(s), and (ii) the interpreter might be more confident on her *judgment* than on the second order reason(s) she is be able to present explicitly. According to many virtue theorists, a virtue is (or at least it involves) a "sensitivity to reasons" (McDowell 1997: 132): an ability to perceive the relevant reasons, even in contexts in which it is difficult to articulate them explicitly. Here, where articulated sets of second-order interpretative reasons are not readily available to provide an answer to the interpretative question, it has been argued that, instead of surrendering to the skeptical claim that the first-order reasons about legal interpretation are incommensurable, a subject's virtues should play a role in legal interpretation. In section "The Way of Virtue in Legal

Reasoning," we briefly discuss three conceptions of what such role might be.

As I mentioned above, the endeavor of finding the normative meaning of legal sources cannot always be phenomenologically divorced from the job of using such meanings to guide us in an instant case. This is so because an account of the *legally relevant* properties of the case (the business of the application of legal rules) is what points the interpreter in the direction of certain legal sources (say, this particular statute, or section of the criminal code) and, hence, drives the investigation on legal meaning.

The core business of legal application is the perception of the legally salient properties in a particular situation. Without an adequate prima facie grasp of such properties, the decision-maker's ability to identify the legally relevant reasons would be negatively, and dramatically, affected. Now, legal argument and legal interpretation can, of course, show that what was prima facie a legally salient property turns out to be legally inert. That, of course, does not imply any form of particularlism (as it should become clear in the discussion of practical wisdom in section "Virtue, Virtues, and Practical Wisdom"). The perception of what appear to be prima facie instantiations of legally relevant properties in the particular case by a particular decision-maker might be flawed, and in the phenomenology of legal decision-making, the experience of changing one's mind about this is rather common.

A central trope of virtue theory (and virtue ethics in particular) has always been the capacity of the virtuous agent to *perceive* certain non-obvious normatively relevant (or nonobviously normative) properties within a complex *particular* scenario (McDowell 1979). In law, that claim is further specified as a capacity to perceive *legally* relevant properties (Michelon 2018). It is not surprising, therefore, that virtue theorists have thought that law-application is an especially fertile site for virtue to flourish in legal argument. The finely honed perceptive capacities of a virtuous jurist would allow her to identify the *legally* salient properties of the situation at hand and, as a consequence, allow the arguer to avoid a host of argumentative dangers, like producing an argument for an irrelevant conclusion or failing to account for a property that should have figured in one of the premises. This suggestion, however, raises many additional issues. Is the jurist's perception merely technical in character or is it an aspect of a substantive moral virtue? In either case, how does this ability to perceive legally salient properties relate to (other) moral virtues? In particular, is the possession of this ability predicated on the possession of any substantive moral virtue?

This relates to yet another way in which virtues have been said to relate to legal reasoning when applying legal norms. It has been claimed that virtues are also responsible for identifying properties that call for treating a particular case that is clearly covered by a legal rule as an exception and, as a consequence, for not applying said rule (Amaya 2019).

A third site of virtue in legal reasoning, reducible neither to legal interpretation nor to law application, is the similarity judgments that are, in some accounts, a central part of a number of canonical forms of legal argument, such as legal analogies or the legal *a fortiori*. Take, for instance, legal analogy as conceived in Duarte d'Almeida and Michelon (2017): in a nutshell, according to our account of legal analogies, the argument is predicated on the claim that the different normative questions raised in two particular cases (the case that is already settled in the law and the case that is yet to be decided) call for a uniform answer, as they are both instances of a more general normative question. For them, it is not the case that confidence in this claim is only justified if predicated on confidence in a particular formulation of that more general question. So, in legal analogies, the legal decision-maker *perceives* that the reasons that apply to one case should also apply to the other case, even if she is not able to fully articulate these reasons. It is easy to see here how virtue might be conceived as interacting with legal argument: if the possession of virtues affords a particular sensitivity to reasons (the perceptive aspect of virtues, mentioned above), a virtuous agent might be able to perceive the reasons-based similarity before any comprehensive articulation of those reasons is produced; in

fact, they might be able to perceive it even if they cannot themselves produce a satisfactory version of such comprehensive articulation.

These three sites are not meant to constitute an exhaustive list. They simply provide an analytical scheme to group the most prominent uses of virtue in legal argument discussed in the literature. But the identification of the relevant sites says little about how virtues operate within them and about which stable traits of character are the virtues a legal arguer must strive to possess.

The Way of Virtue in Legal Reasoning

Across these different points of contact between legal argumentation and virtues, the latter has been said to operate in three different, not mutually exclusive, ways. First, the possession of virtues has been said to serve as a *criterion* for the correctness of legal argument and, more generally, of legal decisions; second, and regardless of whether or not the possession of virtue is criterial, it has been said to be a *necessary condition* for the production of good legal arguments; third, and less controversially, the possession of virtue is often seen as an asset that is instrumentally valued because it allows the virtuous agent to choose well without the need to take more onerous (or perhaps unavailable) decision-making pathways. Let us expand on each of those modes of operation in turn.

Some virtue theorists believe that a decision-maker's virtues have a *constitutive* and/or *criterial* role regarding the truth of claims about the law (Amaya 2011: 127–128). According to this approach, the right legal decision is the decision that a virtuous agent (paradigmatically, a virtuous judge) would have made in the current situation. Defenders of this claim take their cue from Aristotle, who addressed the issue in a number of different passages, the most explicit of which is perhaps in the Nichomachean Ethics, at 1106b35–1107a2, where he states that "Excellence, then, is a state concerned with choice, lying in a mean relative to us, *this being determined by reason and in the way in which the man of practical wisdom would determine it*" (my italics).

Now, this claim would not be particularly controversial if it only meant that "if decision *D* would have been made by an ideally virtuous decision-maker, *D* is the right decision." Virtue theorists, utilitarians, and deontologists could all agree on that. So it looks like the virtue theorist's claim must be stronger than the one expressed in the conditional above. Their claim is rather that knowing the decision that would have been taken by the virtuous agent *is not simply sufficient* to conclude that that decision is the right one: It is also *necessary* to reach that conclusion. In this stronger conception of the role of virtue in legal reasoning, no deontologist account, regardless of how detailed the set of norms it manages to produce, would be able to warrant the conclusion that, in a certain particular context of rule application, the right decision would be the one that is in accordance to the rule. Similarly, regardless of how subtle the evaluation of the states of affairs that result from my decision on the basis of a however complex and detailed set of utility-enhancing principles, one could not conclude that the right decision is the one that abides by such utility-enhancing principles. The best criterion to assess the correctness of legal decisions must be *able to take into account unique features that only present themselves in particular cases*. The virtuous decision-maker is the one whose *sensitivity* to the relevant reasons (see section "Virtue, Virtues, and Practical Wisdom" below) is able to account for the rational force of all such properties, while formulated general norms and principles are, by definition, one step removed from the particularities of the contexts in which legal decision-making is called for. As mentioned above, this does not imply any sort of particularism: the properties whose rational force is perceived by the virtuous decision-maker are themselves (normally, if not necessarily) universal properties. Also, these properties might be relevant precisely because they feature on a (defensible) legal norm. It just means that approaching the case *exclusively* from the point of view of preformulated general legal norms would blind the decision-maker to real (and universal) properties that are yet to be explicitly formulated in the form of general norms.

Some virtue theorists make a second claim that is separable from the criterial claim described in the paragraphs above. They claim that the deployment of virtues is a *necessary* condition for reaching the right legal decision in instant cases. For them, regardless of what makes the decision right (accordance to the decision of a virtuous agent, accordance with a certain rule that is justified by independent criteria, and ability to bring about certain valuable states of affairs, inter alia), the necessity to identify the normatively relevant properties in the particular situation requires the appropriate engagement of the subjectivity of the decision-maker in a nontrivial way. Take, for instance, the conception of legal decision-making that takes the correctness of the decision to be solely a function of the relation between the decision and a general legal norm. Under this conception of correct decision-making, there are still problems that cannot be tackled purely by reference to the norm. Three such problems are: (i) whether a certain object/property/event *counts as* an instance of a given general category used in the norm; (ii) whether an additional and unexpected property present in the case warrants a claim that the case should be considered an exception; and (iii) whether a certain norm that is not applicable to the instant case should nevertheless somehow influence the decision in the instant case, given the proximity between the cases the norm intends to regulate and the case at hand (say, in an analogy). Such problems, in particular (i) and (ii), are thought by virtue theorists who make the necessity claim to be both unavoidable and unresolvable without reliance on a decision-maker's virtues.

Finally, there are those who, without necessarily committing to either of the *criterial* or the *necessity* claims, argue that the possession of certain subjective traits is very useful as a shortcut of sorts. This claim is at the fringes of virtue jurisprudence, and in fact, often those who defend it do not place themselves within the field of virtue jurisprudence. Some recent work on heuristics and biases in legal decision-making, for instance, have evidenced that judges have different levels of vulnerability to certain distorting biases in decision-making. To name but one example, empirical research has suggested that many judges (but not all) are vulnerable to rhetorical strategies aimed at altering their attention by introducing contrasting elements that, although irrelevant, have an impact on the judge's ability to correctly assess other relevant features present in the case (Rachlinski et al. 2013). In such cases, the judges that are able to "keep their eyes on the ball" display the possession of the right set of dispositions and, as a result, are more likely to decide well in the instant case. That would be so even if, ultimately, what makes the decision right is either a norm or its conductivity to a valuable state of affairs; it would always be so if there were other ways (say a methodology based on rules) for the judge to reach the same decision, one that is not predicated on their character dispositions. Now, having that keen perception is not tantamount to being a practically wise individual, as there is more to practical wisdom than the ability to avoid certain mistakes that we are (contingently) hardwired to make, but it certainly is part of being practically wise to possess that ability, as we will see in the discussion of practical wisdom in the following section. Be that as it may, both normativists and utilitarians could happily accept one such role to virtue in legal decision-making.

Virtue, Virtues, and Practical Wisdom

One of virtue jurisprudence's main jobs is to identify and discuss particular virtues whose possession is connected to law in some relevant way. Among those virtues, there are some which are more directly connected to legal reasoning. A sense of fairness, justice (as a subjective trait), courage, humility, and lawfulness (Solum 2008), along with many intellectual virtues such as love of knowledge and firmness, have been singled out as particularly relevant for legal reasoning and decision-making. A complete discussion of each such virtues would not be possible within the confines of this entry; instead, we will focus on (i) some general features of virtues and (ii) on the relationship between virtues like the ones mentioned above and the intellectual virtue that, according to most of the relevant literature, is

supposed to work in connection with the moral virtues in concrete processes of decision-making: practical wisdom.

As we saw above, virtues are stable subjective inclinations to act and feel in certain ways that are, is some important sense, good. To have an inclination, in turn, can be further analyzed into a set of heterogeneous subjective properties such as the ability to perceive certain properties of a particular situation as normatively salient and the disposition to be moved to action by such perception. A virtue also includes the ability to have the appropriate emotional response (say, regret for failing to act in a certain way, or contentment at witnessing an act of courage).

It is important to bear in mind that possessing a virtue is not simply a matter of continuing to do more or less the same thing one learned to do in relevantly similar contexts (Russell 2009: 339–348). In that sense, virtues are different from mere habits (although there are obvious similarities, of course). What virtue produces is, instead, an inclination toward performing the action that is required *by the correct appreciation of the reasons* bearing on the situation (Cooper 1998: 272). The correct appreciation of the reasons will sometimes explain that the actions which would be normally performed by habit need to be avoided, as other reasons, learned in different contexts (normally the contexts in which other virtues were developed), should guide action in the instant case (Russell 2009: 341).

If that is correct, the question arises as to how the reasons underlying different virtues, learned in different contexts, should be coordinated in any given set of concrete circumstances. In the Aristotelian model (which is still the dominant model in virtue ethics and jurisprudence), the virtue that allows for this coordination of moral virtues is not itself a moral virtue, but an intellectual one: practical wisdom (*Phronesis*, *Prudentia*).

Practical wisdom is the intellectual virtue that allows one to identify in an instant case the properties that are normatively salient, that is to say, the properties on which reasons supervene (Michelon 2013, 2018). It does so by perceiving the "direction" toward which the actions required by particular virtues (say courage or humility) point. One learns particular virtues by *experience* (Aristotle Nichomachean Ethics, Book II 1103a30–1103b1). "Experience," in turn, refers to a number of relatively heterogeneous forms of social interaction and intellectual activity which includes frequently acting in contexts that are relevant to a particular virtue, while permanently evaluating one's own action, often with the help of others, so as to understand what made the action successful or unsuccessful. It also involves reflecting on the actions of others, who are identified as *exemplars* regarding a particular virtue, including actions by fictional characters in fictional situations.

Practical wisdom, then, comprehends both (i) a sensitivity to the reasons bearing in the instant case and, given that those reasons are learned in particular types of contexts with no visible overarching normative "architecture" unifying them, (ii) the ability to effectively negotiate one's way through potentially conflicting rational demands by means of a number of different strategies.

In legal reasoning, a practically wise individual's sensitivity to reasons would allow her to identify legally relevant properties on instant cases, even if they had never (yet) been explicitly formulated in the form of legal norms stemming from the interpretation of, say, legislative provisions. Perceiving such properties, in turn, has an impact on the reasoner's ability to engage with legislation and authoritative precedent decision by, inter alia, identifying other provisions that are, prima facie, irrelevant to decide the case, but turn out to be crucial, thus widening the scope of the relevant objects of legal interpretation and application in the instant case (Michelon 2018). This sensitivity to reasons would also help identify in an instant case that is *actually not covered* by any legal norms, properties that could be used in building "comparative-type" arguments such as legal analogies, the legal *a fortiori*, and the legal *e contrario*.

An orthodox claim of virtue ethics and of virtue jurisprudence is that this ability cannot be replaced by any rule-structured methodology. Even if ultimately what makes the action correct are the reasons bearing on them, there is no viable (or at least

no effective) alternative to relying on practical wisdom in order to identify and correctly evaluate them. As we saw above, for some, that makes the practically wise person's choice (*Phronimos, Prudens*) the measure by which to judge the right balance of reasons in a concrete situation; for others, although practical wisdom does not offer the criterion by which to judge an action, it is the only (or perhaps just the best) epistemic alternative to identify the right balance of reasons in a concrete situation. In either case, the methodological approach to legal decision-making is anathema to virtue jurisprudence (Michelon 2013).

The Future of Virtues in Legal Argumentation

As it will be apparent from the above, the study of the role(s) of virtue in legal argumentation and its relation to virtue ethics, virtue epistemology, and virtue argumentation is still in its infancy. Much work remains to be done in fleshing out whether and how the particularities of legal argumentation would bear on a virtue-centered approach to decision-making. Are salient legal properties learned by experience? If so, how should legal education be structured? Is the fact that the salient legal properties can be changed at will by law-making authorities compatible with the slow burn of learning virtue? What virtues need to be possessed by the legal decision-maker? Are they in any way special in relation to general moral or intellectual virtues? Is there a particular virtue of "Lawfulness" or "Law-abidingness"?

These and many other questions remain open, and much more work is needed until we gain a satisfactory level of clarity on the ways in which legal reasoning relates to the possession of virtue by the legal decision-maker.

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Legal Relations: Theories of

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Introduction

In physics, philosophy, and biology, a relational theory (or relationism) is a framework within which individuals or objects are ontologically dispensable and relational structure all there *really* is. Accordingly, relationism about space entails that, although ordinary statements about space are literally true, the facts that make them true do not feature any distinctly spatial entities or substances. In other words, space is "nothing over and above" bodies and their relations to one another. It does not exist independently of objects in relation. The structuralist commitment to the ontological primacy of relations is not only a tenet of highly abstract metaphysical theorizing. It can also be witnessed at much lower levels of abstraction in the domain of social sciences. For example, social network theory is now being applied in sociology and political science to better understand the spread of pandemics or rumors as well as the lives of institutions and the emergence of leaders. However, human relations are not simple factual connections where language and symbols are at stake. Human relations are legal relations set for a specific period of time; failing this, they are mere contacts.

Several authors have recently espoused a relationist or relational approach to law: in particular, Falcon y Tella (2010), Nedelsky (2011), Novak (2016), Somek (2017), and Pavlakos (2018). These relationist authors do not constitute a school of legal thought in the familiar sense of being members of a conceptual and theoretical lineage such as the Brussels School of Legal Theory (at one time led by Perelman), which has been established for more than 120 years. Better than talking of a distinct school of thought, we could, at least at the present junction, talk of an emerging theory of legal relations. This theory of legal relations is neither a mere consideration of human relations or social ties in law nor about looking at human relationships from a legal perspective. This theory treats as juridically fundamental the concept of a legal relationship, which is not only the legal form of the human relationship but the most authentic articulation of the social meaning of human bonds. It is important from the outset to avoid any misunderstanding regarding this sweeping statement. In a strong sense, the legal relationship *just is* the human relationship juridically symbolized. Humans are "doomed" learners: they are not born walkers, speakers, or swimmers but must learn everything that essentially accounts for their life in human society. Nor are they born with an intrinsic or naturally accrued membership of a group of congeners. Whereas relationships between non-human animals are radically overdetermined by natural or biological laws, humans must be instructed into acquiring the type of skills necessary to form, sustain, and develop relations of peaceful co-existence with other human beings.

The human bond can only be durable if it is symbolized and therefore legal; in other words, a symbolized and durable human bond constitutes the definition of the legal bond. The social link, as an encompassing concept, therefore does not exist but as a set of legal links. If we renounce this starting point, the legal relationship is a pure factual link, i.e., a social effect of objective law, and, thereby, becomes secondary. If we equate the relationship of law with a right, we also leave the theory of legal relations for Grotius' legal humanism (each human being has individual rights). As soon as we are interested in interactions conceived as objects of observation, we are in a form of realism or pragmatism. These other currents of legal theory have their legitimacy, but do not seem to be able to constitute a theory of legal relations. We can also distinguish three types of legal relationship (a term used here in a generic sense): personal legal relationships (filiation, marital relationship, nationality, procedural relationships), legal relationships featuring the concept of ownership (obligation, contractual relationship), and legal relationships close to factual relationships

(business relations, commercial relations, digital relations).

There are at least two versions of the theory of legal relations that complement each other, one which is dogmatic (von Savigny 1867; Somek 2017) and one which is axiological (Nedelsky 2011). The theory of legal relations might be the simultaneous consideration of those two versions.

Why should this be an appropriate theory today? It may help to think about the complicated encounter between law and information technology while taking into account a certain decline of institutions, the rise of non-legal norms (technical standards), the advances of neuroscience in our understanding of emotions, and even literature as a place of synthesis of emotions and reason. After showing that two distinct currents of legal relations theories have emerged (I), I will argue that a unity is possible (II).

Two Distinct Currents of Legal Relations Theories

Legal theorists can be classified according to the concept of legal relationship (in Roman law, the concept is not unified and may take the form of *vinculus iuris, familias, nexus*, etc.) in four categories:

First category: Those who criticize or ignore the notion of a legal relationship as a legal relationship between people. Duguit (1901) favored objective law over subjective law; Hauriou (1925) gave prevalence to institutions in general; Kelsen dealt with the link between norms (Kelsen 1934) as well as, in a certain way, Ihering (1882) and those authors who, following him, considered that the legal relationship is nothing more than another way of presenting rights. Hohfeld (1920) conceived legal relationships as a logical relationship between rights, obligations, freedoms, and powers. Hart might also have denied the existence of legal relationships, even though his concept of ascription (concerning liability) shows that he considered law as not only a matter of primary and secondary norms.

Paradoxically, in the category of authors who chose to ignore the concept of legal relationships, there are those who refer to interactions. Lon Fuller, in his paper on the formation of law from interactions between people (Fuller 1969), was very close to considering that legal relationships between people logically preceded the existence of a legal norm. However, for Fuller, the interaction was factual and not legal. In the Brussels School too (Frydman and Lewkowicz 2022), the observation of interactions makes it possible to detect binding effects and is part of the law in the overall sense of the term. However, it is a way of subsuming the legal relationship under the factual one. The theory of constraints of the legal-realist approach to interpretation (Nanterre School of Legal Theory, led by Michel Troper, see Troper 2011) carries out the same operation when it interprets the representations made by the courts (especially the superior ones) in light of the future impact of their decisions.

Second category: Those who use the concept of legal relationship without making it the basis of an overall theory. François Gény underlined the importance of the concept of a legal relationship in a footnote (Gény 1914: T III, p. 219). Michel Villey defined *ius* as a legal relationship governing the distribution of property and honors (Villey 2003), but had a general Aristotelian natural law approach and not a purely relational one (according to Aristotle 2009, e.g., in "Nicomachean Ethics," Book 8 Chap. 9, human relations and community are facts which come before law). The concept then becomes part of legal dogmatics without being questioned.

Third category: Those who make it into a theory within a dogmatic approach of law. Such authors may be found in every great tradition. In the German-speaking sphere, Savigny unified the concept of legal relation (influenced by Fichte and Kant, see Guzman Brito 2006); then much more recently, Norbert Achterberg (quoting Blackstone (1765) and Bentham (1789)) has referred to the set of legal relationships as a definition of the legal order (Achterberg 1982), and Alexander Somek stressed the importance of legal relationships (Somek 2017), which allows everyone to put themselves in each other's shoes, particularly during a trial. He has, as George Pavlakos, a Kantian approach (Pavlakos 2018) based on the

reasonable, free, and capable agent (based on Fichte 1797 as well).

In Italy around 1950, Bernardino Cicala stated that the relationship of law was a link between a person and a norm, and that made him a normativist (Cicala 1959). At the same period of time, Alessandro Levi presented a philosophy of law based on the legal relationship referring to German authors since Savigny (Levi 1953). However, Norberto Bobbio declared that this approach atomized society and that the norm preceded logically any legal relationship (Bobbio 1955). In Spain, Joaquín Ferrer Arellano wrote an essay on legal relationships in 1963 in a natural law approach inspired by Thomas Aquinas (Ferrer Arellano 1963). M-J. Falcon y Tella identified three legal perspectives (Falcon y Tella 2010) from Miguel Reale's three-dimensional approach to law (Reale 1968). A Slavic strand of thought also exists, but is difficult to analyze today: for example, Marek Zirk-Sadowski in Poland in the twentieth century (Zirk-Sadowski 2018) and Nikolai Korkunov, who lived in Russia at the end of the nineteenth century, both referred to the concept of legal relationships (Korkunov 1894). Korkunov, in particular, criticized the subjective and voluntarist approach of legal relationships as developed in Germany, which led to the merging of this notion with that of rights. Leon Petrazycki who was born in Poland and taught in Russia advanced an emotivist account of rights and duties taking place in a legal relation (Petrazycki 1955; see, also, Pashukanis 2001). In Portugal, Manuel Domingues de Andrade and Orlando de Carvalho also merit a separate mention (Andrade 1997; De Carvalho 1981). The latter criticizes the disembodied nature of Savigny's theory of legal relationships.

Fourth category: Some philosophers of law insist on the centrality of human relationships for law. In North America, Jennifer Nedelsky has not established a regime of legal relationships (Nedelsky 2011), but rather a three-step approach and method, based on the following three questions: which legal relationships are at stake? Which interests and values are involved? What promotes people's autonomy in their relationships and given their interdependence? Other contemporary philosophers can be mentioned, such as Laurent de Sutter and Jeremy van Meerbeeck in Belgium (de Sutter 2015; van Meerbeeck 2020) and, in an unexpected way, Michel Foucault who actually called for the emergence of a relational law in an interview (Foucault 1982). This meant for him a system of law where all relationships would be recognized.

The Possibility of a Unified Theory

It is possible to trace the ingredients of a unified theory of the legal relationship in the work of philosophers of law such as Jennifer Nedelsky, Martha Nussbaum, and more Continental theorists of law, as, for all these authors, a human relationship is not a purely biological relationship, but is culturally overdetermined by law. It can be argued that, in the context of such theories, we cannot identify the law independently of the existence of a web of legal relationships.

For the sake of approximating a definition of the notion of legal relationship, we need eight elements:

1. Four participants: The legal relationship is created under the aegis of a neutral third party (Ost 2021), be it a State, an arbitrator, a notary solicitor, or another person such as a bailiff; it also requires a fourth agent in a broad function of witness, as an expert, a clerk, etc. This is the usual pattern, but two parties may already constitute a legal relationship if it is symbolized (e.g., Laban and Jacob in the Bible making a pile of stones).

   The two "parties" may not necessarily be human beings; one of them could be a natural being without being a legal person, the theory of the legal person being relatively recent and not having prevented at least ten centuries of litigation against animals.
2. A fair distance: The parties must be autonomous or strive for autonomy in interdependence. The legal relationship is a fair distance between autonomous parties and

other participants, i.e., a space or a gap, which excludes relations without a term or without the possibility of leaving it (e.g., slavery).

3. A symbolization (a solemn or probationary form): In ancient Greece, a piece of wood cut in two pieces could be reunited into one (this is the origin of the word symbol, syn (together) ballo (put, throw)), and was also used as proof of the relationship. In addition, a stone mound served as a symbol for the contract concluded between Laban and Jacob. This symbol made the bond durable. Consequently, the symbolic device of the legal relationship is not the mere form of the human relationship, but what constitutes it. Nowadays, paper contracts have replaced clods of land to symbolize the sale of land, but there are still symbolic vestiges today in real-estate sales, such as the handing over of the keys, the signature before a notary solicitor.
4. A direction given to the relationship (the norm): The symbolic device also implies a direction which the parties can give themselves. It is the rule or norm, what they are going towards, for example, the performance of an obligation. There is always a procedural standard in the legal relationship since it develops over time. This standard is set taking into account values such as autonomy in interdependence, but also the independence of the third party who has authority. Institutionalists, such as Hauriou, might object that man is still in society. If there is a third party, it is because there is an institution. If we consider, from a legal theory perspective, that groups precede legal norms and relationships, we assume a historical but not a logical approach. At some point, human beings have to organize this group and start with a few people. A friendship relationship is often part of a legal network (same school, same profession, etc.) and as such is based on legal relationships. The norm may also come from outside a legal relationship but formed in another legal relationship (e.g., parliamentary procedure leading to a statute). Even from outside, the standard is recreated in the legal relationship to be interpreted (Fuller 1969).
5. Rights, duties, powers: The direction (standard) that the parties give themselves and/or is given to them for their interpretation includes rights allowing them to claim the performance of an action from the other party. The third party having the authority has the power to modify the parties' rights and duties (e.g., jurisdictional power).
6. Purpose: A legal relationship has a purpose: goods in a contractual sales relationship, a service in the provision of a service, education in the filiation relationship, legal proceedings in the litigation relationship, and public service in the citizenship relationship. A legal relationship that has an illegal object (e.g., sale of drugs) is null and void.
7. Cause: The legal relationship has a *raison d'être* that may or may not be lawful. Thus, a feigned marriage to obtain a residence permit may be annulled. A legal claim without a factual or legal basis is, in principle, void.
8. Legal operations between parties: The legal relationship is a dynamic device in motion with operations concerning the parties such as succession, substitution, and representation. These operations are defined in terms of legality criteria, as it is in the essence of the legal relationship for a party to be able to leave it.

These different elements make it possible to identify a legal relationship as a legal-symbolic mechanism with its own regime.

The Legal Relationship Regime

The particularities of any legal theory can be summarized in ten points. Indeed, any theory of law includes a theory of sources, interpretation, legal order, and effectiveness, as well as an approach to the distinction between law and morality, between "Sein" and "Sollen" ("is" and "ought"); it also includes a central principle, a definition of law, a critical aspect, and a favored mode of access to the world (sensation, reason, emotion, or intuition, see Novak 2016).

1. The theory of sources. There is a theory of the sources of law in the relational approach, with a source that might actually be an internal or an external one. Parties can create their standards as in Lon Fuller's interactionism (Fuller 1969). The standard can also be provided by the third party having authority (a judge or an arbitrator) or by more abstract and general external rules applicable to a set of legal relationships (a statute). Even in that case, the standard is the result of a discussion process, such as a parliamentary procedure. There is therefore no rigid hierarchy of norms, but upward and downward circles in the hierarchy of norms. The sources of law are circular in relationism (Somek 2017).
2. The theory of interpretation. Relationism favors the interpretation of a norm between the parties themselves with the help of a third party that has authority. Jennifer Nedelsky's test can be used to interpret a norm: what are the legal relationships involved? What are the interests and values involved? What is the interpretation that maximizes the autonomy of the parties in their interdependence? Interpretation by analogy is also privileged (Jeuland 2016) because it is linked to symbolization. Indeed symbolization allows a representation of an elusive human relationship by something else that can be touched with the finger (the object cut in half called *symbolon* in ancient Greece or, nowadays, the written contract).
3. Legal orders can be seen as a set of legal relationships, legal norms (as they arise from a legal relationship), legal persons or more broadly legal entities as nodes of relationships, and rights (as they imply a relational test of Nedelskian type already mentioned). The State legal order is not closed as it is in relation to other more general orders (EU law, international law), with legal relations transcending legal orders (e.g., a mixed marriage, a group of multinational companies, NGOs, sports federations, etc.). George Pavlakos suggested (2018) that the relationist approach is a monism with a tint of pluralism since legal orders are all connected through legal relationships and eventually form a single global order.
4. The distinction between morality and law. In principle, the ethical question is about the future solution to a current choice: is one in favor of euthanasia or surrogate motherhood? The answer may be social or individual. This becomes law when the solution is chosen within the political legal relationships (especially of Parliament) or when it is part of particular legal relationships (family and medical relationships). Law contrary to ethics operates with a retroactive loop: the rule exists in advance and can be applied to a situation relative to the end of life or procreation. There is therefore a clear distinction between law and morality in the relational approach. However, morality plays a role upstream of law, at the political level.
5. The main principle of relationism. Among legal relationships, there is no real hierarchy (except with Ferrer Arellano 1963) but potential substitutions of parties. We can speak of a substitution principle aimed at refining autonomy in relationships (thus taking into account minimum values), instead of the traditional principle of equality between separate individuals in a liberal model. A new version of equality can be envisaged: relational equality, so that everyone has the same opportunity to empower themselves in interdependence to modify the relationship.
6. The relational approach of law combines emotions, sensations, reason, and intuition (Novak 2016). Relationism requires that the field of reason be somewhat broadened and that other modes of access to the world, the five senses, intuition, and emotions, be taken into consideration without psychologizing the legal relationship (thus, the solution of the dispute does not depend, for the most part, on the judge's personality and mood). Emotions are contained and used by procedural relationships to help, for example, to reach a judicial decision.
7. Relationism's position regarding the distinction between "Sein" and "Sollen" ("is" and

"ought"). In relational theory, the procedural relationship is the place where the fact is transformed into law. The theory of legal relations is at the intersection of fact and law, in this *continuum* where the taking of evidence and the legal characterization of facts constitute the legal moment. This is René Sève's answer to the strict opposition of fact and law (Sève 2017).

8. The definition of law as a set of legal relationships. These relationships are individuated as symbolic spaces between parties under the aegis of a third party (often involving a fourth person). They also involve the interpretation of legal norms and the identification of legal persons, or more broadly legal entities as nodes of various legal relationships. Validity is not a central issue in relationism (contrary to normativism) since, for example, a custom has not to be acknowledged by a court to be valid law; a custom belongs to law as soon as it is acknowledged by the parties in a relationship giving them a direction. The theory of legal relations has been applied in many legal fields such as contract law (Macneil 2001), family law (Wallbank et al. 2010), real estate law (Emerich 2008), procedural law (Kohler 1888), public law (Achterberg 1982; Marinoni 2008; Proto 2017; Wimmer 2019; Utrilla Fernández-Bermejo 2020), or international law (Brunnée and Toope 2010).
9. Efficiency. Relationism is based on the weakness of symbolic mechanisms in enabling people to empower themselves in interdependence without being forced to do so by sanctions and sometimes illusory technical constraints. Enforcement can never be completely forced; it requires the parties' consent.
10. Criticisms. Relationism criticizes the individualistic approach based on non-interdependent atomic entities leading to libertarianism and disrupting inequality. This method also criticizes the collectivist and institutionalist approaches based on the elimination of the individual by groups and the destruction of interindividual ties. It criticizes normativism as reductive.

Conclusion

The relational theory of law has been made the object of inquiry in many countries (Belgium, Canada, England, Spain, Austria, France, etc.) and bases law on symbolically structured human relations and not primarily on the State or the individual. The concept of legal relationship is used to indicate that a relationship falls within the sphere of law in the common law doctrine of intent to create a legal relationship (Ashton and Turner 2022), in the US declaratory judgment procedure, in the French concept of commercial relationship, or in the courtesy relationship in German law (Grigoleit 2018). In the new Chinese Civil Code, it is a concept that structures all chapters, even in family matters. The concept of legal relationship (minshi guanxi) comes from Germany (Savigny-Windscheid) but differs in that it is not only based on rights but on the trilogy of rights-obligations-liabilities (Wei 2016). Moreover, the concept of legal relationship is present in many other codifications (Cuba, Quebec, Romania, etc.) and used as a central concept in public law. It is thus a concept that has become as universal as contract or law. It seems possible to find a common, albeit minimal, content for the concept of legal relationship in comparative law. It would be possible to address new questions such as the possibility of a legal relationship with natural (non-human) entities. It is even possible to support the logical anteriority of the relation in law (to the concepts of person, rights, norms, and legal acts) through a philosophical approach (Marmordoro and Yates 2016; Housset 2017). Finally, the theory of legal relations can be associated on the relational theory of justice (Raines 1989) based on relational autonomy (Nedelsky 2011; Pillsbury 2010; Wallbank et al. 2010; Dagan and Dorfman 2016; Seelmann and Demko 2019).

Cross-References

- ▶ Foucault, Michel
- ▶ Fuller, Lon Luvois
- ▶ Hohfeld, Wesley Newcomb: Fundamental Legal Conceptions

- ▶ "Is" and "Ought" in Hume's and Kant's Philosophy
- ▶ Legal Realism, French
- ▶ Neuroscience and Law
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Legal Rhetoric

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Introduction: The Birth of Rhetoric

One may say that, in Western civilization, rhetoric is a creation of lawyers, not of literati, philosophers, linguists, or poets, even though these are the scholars who have most cultivated the study of rhetoric in the last decades. It is surprising how the study of rhetoric was little by little extirpated from the faculties of law but the various reasons for this cannot be discussed here.

The first mentions to the study of rhetoric, as reported by a tradition kept in the Byzantine culture, refer to a Sicilian from the city of Syracuse called Corax, who became a famous lawyer while supporting property law suits after the fall of Thrasybulus, brother and successor of Hieron. Both tyrannies lasted for decades and, with the advent of democracy and the decision to return confiscated land, there were many doubts about whom they originally belonged to. With the help of his countryman and supposedly student Tisias, Corax wrote some texts containing his doctrines about how a speaker should behave before any kind of deliberative and deciding assemblies (Cole 1991). Other historical narrative states that "Corax" would only be a nickname for Tisias, because "korax" or "korakoc" meant "the crow" in ancient Greek, that is, the creator of rhetoric would have been Tisias, the crow (Ruiz de la Cierva 2007).

Later on, an ambassador sent from Sicilia to Athens, the cultural center of antique Greece, Gorgias of Leontini, started to spread those texts and doctrines and the well-known dialogue from Plato, Gorgias, discussed until today, witnesses the large repercussion of his activities. According to what is said about those first rhetoricians, rhetoric was defined as the art of putting together in discourse a set of arguments, facts, and emotions, devised to persuade an audience.

The sophists soon perceived that arguments, facts, and emotions could also be manipulated by skilled speakers before incautious listeners and started to see rhetoric as the study of human discourse as it really is, refusing its reduction to persuasion and so uniting the skills of lawyers with a philosophy of law. Isocrates, for example, considered himself and was also seen as a philosopher, as it was the case with Protagoras, Calicles and many others, like Gorgias himself. One shall not think that the appropriation of philosophy by the ontologies, even if it was supported by a clear majority, was unanimous.

The Insertion of Ethics and Rhetoric as Philosophy

Plato finds that the sophistic has deleterious effects, among other failures, because it inserts

rhetoric into philosophy and contaminates it, causing ethical confusion and epistemological disorder. He fears eloquence and warns that the rhetorician does not search for truth, but only for ways of persuading the ignorant, a task that may make bad use of linguistical skills (Plato 1993b, p. 459). Moreover, rhetoric and cookery constitute parts of the same profession and both are an "ignoble flattery" (Plato 1993b, pp. 463–464).

Aristotle begins his teachings and philosophical activities inside this sort of opposition between the sophists' rhetoric and Plato's ontology. Although a disciple of Plato in agreeing that philosophy aims at the necessary demonstration of truth, Aristotle sees the importance of matters in which truth can play no role and emphasizes the study of this opinionative ambit of human experience, the doxa, the judging patterns which are generally accepted. Nevertheless, he maintains the platonic distinction and also considers rhetoric inferior to philosophy (Plato 1993d). This seems to have been a very debatable opinion in ancient Greece, however, where some took rhetoric as the citizen's "highest spiritual occupation" (Nietzsche 1922, p. 288).

By that time, when Aristotle writes his *Rhetoric*, the art of the lawyers from Sicily had been enriched with the historicism from Herodotus and Thucydides, and with the humanism and the skepticism of sophistry, and had thus become the rhetorical philosophy; on the other side, the pursuit of truth by the predominantly scientific tendency of the pre-Socratics, combined with the objectivity of the good, pursued by the ethics of Socrates, Plato and Aristotle, had built the ontological philosophy.

Aristotle still thinks that true and false constitute the ontological and privileged criterion of philosophy and science, but when it is not possible to apply them, it is necessary to pay attention to the terrain of the probable, the exemplary, the indicial, which constitutes the environment of rhetoric. This environment does not only exist because of the subject under discussion does not admit truths, but also due to pragmatic motives, like the ignorance or impatience of the audience or the lack of time to prove all the premises, among other examples.

Despite being convinced of the importance of rhetoric, Aristotle did not want to be confused with the sophists and their eristic rhetoric. To this end, he seeks to combine his rhetoric with good ethics, giving it a normative character, and his strategy is to reduce rhetoric to persuasion, a genuine conviction that a speaker could obtain by means of logos, ethos, and pathos, expressed through enthymemes. So, one may only refer to rhetoric when persuasive argumentation is the goal; the other pathways of human discourse, directed to win a debate at any cost, and not necessarily to persuade, turn to be the field of sophistry and eristic, they are no longer rhetoric.

So the paths of persuasion are: logos (what one speaks), perceptible in discourses in which the message is accepted by its own objective content, regardless of the circumstances involved; ethos (who speaks), in cases where the message is accepted by virtue of the person of the speaker, of recognized authority and wisdom; and pathos (how one speaks), which persuades by the emotional way, when the speaker obtains the control of his own and of others' emotions for the success of his discourse.

Rhetoric and the Idea of Truth

Rhetoric can be defined negatively by its opposition to ontology. Ontology means not only to admit some statement: to say that "human beings speak" does not necessarily presuppose an ontological perspective. Ontology means to believe that when there is a discordance about something, one has to literally ask the object (ontos) of the dispute. The answer to a disagreement does not depend on arguments, but on allegedly correct observations and descriptions of the object.

For philosophers who accept an ontological anthropology, evident truths in knowledge and ethics are there to be literally "discovered," "unveiled," and this will merely depend on method, that is, on the competence of the

approach, for which language is nothing but a means, that carries an intrinsic true meaning.

According to the rhetorical perspective, there is no access to objects beyond language, which is the sole conventional environment, arbitrarily built by temporary and unstable agreements. The very etymology of the word "philosophy" points beyond ontology: love (filo) for wisdom (σοφία, sofia) and not for truth (ἀλήθεια, alétheia). And being familiar with rhetoric has certainly always been regarded as a kind of wisdom.

From the foundations of Western culture, therefore, it is no wonder that the ever-present mistrust of truth always appears as morally bad and reprehensible. What is correct is religious and moral truth, and justice is the religious and moral truth reflected in law. So, the matters in which argumentation (eristic, says Plato) and disputation are needed become stigmatized as an eristic or sophistical attitude (Plato 1993a, pp. 271 and 288, 1993c, p. 225; Aristotle 1993a, p. 161a; Aristotle 1993b, p. 164a).

Aristotle seems to be thinking of coherence ("of one subject we must either affirm or deny any one predicate") when he defines truth: "to say of what is that it is, and of what is not that it is not, is true" (Aristotle 1993c, p. 1011b25). The phrase may seem plainly "rhetorical," in the vulgar sense of the word, but it shows admirably the most relevant facets of the dominant theory of truth in Western philosophy, which link it definitely to ontology: language, and therefore rhetoric, must be subordinated to the being.

Different Meanings of Rhetoric

Aristotle presents four important tripartitions in his *Rhetoric*, a proportion that will provide 12 fundamental concepts to understand the meanings of the word.

The first is the one just mentioned for the paths of persuasion: logos, ethos, and pathos.

The second is to observe rhetoric in three different levels and attitudes: as *dýnamis* (δύναμις), *téchne* (τέχνη) and *epistéme* (ἐπιστήμη) (Nietzsche 1922, p. 291; Ballweg 1989).

According to the most present sense of the word, rhetoric is a technic, a set of strategic advices to establish the version of the speaker, the winning narrative. This may occur by means of persuasion and conviction (Aristotle) but also of simulation, irony, threat, and all kinds of fallacies. This practical or strategical rhetoric is a compound of rules, built from the observation and selection of which strategies are more likely to impose themselves in the environment, they are efficacious tools to influence it, enabling success in normative communication. In this sense *rhetoric is methodology*, a discourse about the paths (logos + method, μετά ὁδός) that shall be chosen and applied.

Material rhetoric, dýnamis, designates the strategies that have been successfully applied out of the concurrence between the various rhetorical strategies, the victorious discourse that shaped what is usually called "reality" – from *res*, or *thing*, the *being* of ontology. It is the effectively chosen path, the method. The concept of material rhetoric cannot be identified with that of reality, however, inasmuch as the dominant narrative is eternally threatened by those who have been temporarily defeated and by new narratives, all wanting to be "realized." Material rhetoric is empirical and "natural" in the sense that it is given immediately before any reflection, it is part of the anthropological condition itself. So, it is also normative, for it has established the dominant version in the effectiveness of human relations, in the flow of speeches that constitute the human environment (Gehlen 1978, p. 164). The concept of material rhetoric is the door to *rhetoric as philosophy*, a way of perceiving and understanding the world around.

Analytical rhetoric is descriptive, tentatively neutral before the evaluative preferences of the observer. It is formed from the observation of the two previous rhetorical levels and intends to "analyze" them, to decompose them into their elements and to seek to reconstruct their relations. It is a meta-meta-language (or meta-language of a second level) for observation of the material and strategical rhetoric; it may be studied and used by strategical speakers, but the analytical research is

conducted without the pragmatic goal of influencing reality. In this sense, depending on the conception of science, *rhetoric is also a science*.

Aristotle's *Rhetoric* is said to be the first work to understand rhetoric as epistemic knowledge (von Schlieffen 2006). A previous work, Corax or Tisias' rhetoric manual, now lost, had already inaugurated the rhetoric as techné, in the sense of an exposition of effective strategies to win a debate, especially the forensic.

The third conceptual tripartition is according to the structure of discourses. There is the oldest form, the forensic or judicial rhetoric, which aims to accuse or defend the conduct of someone in a context that has already occurred, focusing mainly the past. Aristotle also describes the epideictic or panegyric rhetoric, whose time horizon is mostly the present, adequate to several kinds of ceremonies, to censor or praise vice and virtue before a given audience. Finally, there is the deliberative or legislative rhetoric, also called political, which has the purpose to establish guidelines for future behavior, in order to bring about the good and avoid the bad.

The fourth tripartition concerns the enthymeme, the rhetorical syllogism. Aristotle also classifies it into three great groups, according to the predominance of their persuasive content: the probable, the indicial, and the paradigmatic.

Rhetorical Methodology: The Enthymeme

The enthymeme is a way of building arguments which originally came from dialectics and was transposed to the nucleus of rhetoric. Dialectics also does not aim at truth, so it cannot be seen as episteme, as science, but rather as an argumentative technique. Rhetoric resembles dialectics, on one side, and the sophistic arguments, on the other, because it takes care not only of what is persuasive, but also of what seems to be persuasive, and it may refer both to the speaker's knowledge of the art or to his moral purpose (Aristotle 1993d, p. 1355b15). So, the problem is ethical, and one has to separate the "good persuasive rhetoric" from the "sophistical competitive cheating." Aristotle expressly says that the enthymeme is the expression form of persuasion and thus the central object of rhetoric.

First group: enthymemes based on probabilities, things that could happen in a different way from that in which they effectively did, that is, events which are neither necessary nor impossible, but are almost always likely to happen. It is the domain of contingency, but not in its absolute sense: The rare and merely casual, which are contingent, do not come up here. The probable happens in most of the cases, it is relatively stable, in a certain way permanent and not arbitrary. The argument based on probability is bound to a certain context, in which it seems verisimilar to all, to most of the people, to the wiser ones: proverbs like "In the land of the blind, the one-eyed is king" or "You cannot judge a book by its cover" result of the wisdom accumulated by the observation of probabilities of past successes.

Second group: The paradigmatic enthymeme receives its persuasive force from exemplary cases that happened in the past, which people believe will be repeated in the future. Those are added to other ones by likeness and then, through induction, to the conclusive general form. The generalized consequent intends to sound as sure for the receiver of the message as the already known and accepted antecedent – the paradigmatic example: Dionysius aims at tyranny because he is forming a bodyguard, for Peisistratus became a despot as soon as he got his bodyguard and this was also the case with Theagenes at Megara (Aristotle 1993d, p. 1357b30). It is concluded that, when he builds a bodyguard, the king is scheming to be a tyrant.

In another passage, curiously enough, Aristotle separates the example from the enthymeme as two different forms of oratorical arguments. In order to be more effective, he advises that the initial example should be a real fact, because people in general are inclined to accept that events from the past will take place

again in the future; but real examples may be difficult to find and this is not a necessary condition anyway. Thus, parables and fables are rhetorically very useful (Aristotle 1993d, p. 1393a25). Of course, it is not enough to contradict a paradigmatic enthymeme by pointing out one contrary concrete case, it is necessary to show that this opposite happens not in all but in most of the cases.

Third group: enthymemes that rest upon signs or indications. If the sign constitutes a definitive and irrefutable demonstration of what it means to attest, there would not rigorously be an enthymeme, but an apodictic syllogism; the reasoning by means of indications is present if a particular sign leads to a general object or if a general sign leads to a particular object. For instance, the association of fire and smoke, that is not always present (Sprute 1982; Wörner 1982; Adeodato 1999).

Conclusion

This entry seeks to show the classical Greek historical and philosophical origins of the deep relations between rhetoric and law, close to their argumentative strategic roots but strange to the dominant metaphysics of truth.

Despite the importance acquired by Aristotle over the centuries, there are other respectable traditions. Arthur Schopenhauer (2014), for example, teaches that rhetoric and dialectics have already been considered synonymous expressions, but still, at some point in Western culture, the word "dialectic" has come to be used as a synonym for "logic." These meanings of words so old and porous could not be unanimous, and Schopenhauer himself associates dialectics with rhetoric and sophistry as "the art of disputing" understanding logic as the a priori rules of pure thought.

A definition that encompasses all meanings of the word "rhetoric" must also include the eristic and not stay bound to Aristotle's normative preferences towards persuasion. Moreover, besides the relativity of judgments, the platonic association of goodness and truth it is not always adequate and eristic ways of arguing, like hypocrisy, dissimulation, flattery or lying may turn out not to be "morally bad."

Cross-References

- ▶ Aristotle: On Justice
- ▶ Irony and Law
- ▶ Law as Discourse

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Legal Science

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Introduction

The notion of a legal science depends on the concepts of science, truth, knowledge, method or law our reasoning is based upon. This article proposes an objective reality and therefore an objective truth, but subjective assignation of relevance to each characteristic and knowledge thought of as a subjective state. So, a true description corresponds to some point of reality, to know a truth is to believe in it through a dependable method and a science is a collection of sentences about a certain segment of the real universe (as in astronomy) or a certain systematic set of concepts or reasoning (as in logic). On the other side, a method is considered dependable if it gets always to the same result and can be reproduced by any subject: this definition excludes the voice of the conscience or the mental intuition. Law, on its side, is defined in different ways, each one leading to a different kind of theory with its own difficulties. Then, before wandering about a legal science we should get a concept of legal knowledge, based upon empirical observation and/or logic calculus. This could be made if we ask the judges how they are willing to consider each relevant condition or fact in order to motivate their decisions in some particular type of conflict. But this is not easy, because the legal thought never had its Copernican Revolution: maybe it is time for rejecting the old confusion between description and preference.

Science

Beyond certain doubts set by recent epistemological tendencies (as in Feyerabend's views), a definition of "science" is not a deep difficulty: a science is a collection of sentences about a certain segment of the real universe (as in descriptive sciences, i.e., astronomy, physics, or biology) or of a certain systematic set of concepts or reasoning (as in formal sciences, i.e., mathematics or logic). Those sentences are not always true, but the aim of any science is to get and gather true sentences. Therefore, the science tends to reject sentences when they are proven false and to conserve sentences which are (still) considered true, or hypotheses which could be probably true.

Truth

Truth is a contaminated concept. It is often used to qualify sentences we try to sustain (like moral or political preferences), or to emphasize metaphysical pretensions (as in religion). From an Aristotelian point of view, a sentence is true if, and only if, it is a description corresponding to some point of reality. Of course, this point of reality is always individuated by a relevance judgment, which depends on the subject's interest. But, in order to use the terms "truth" and "reality" in a useful way, we should accept that the reality, independently of the point we individuate as relevant, does not depend on our interest: it is simply *there*, and the truth or falseness with which we describe it is not affected by our emotions about the descriptive sentence.

There is another kind of truth. In mathematics or logic, a sentence is not true because it describes a material reality, but if and only if it is deductible

from the axioms of the same deductive system. This kind of truth is not related to observation, but to logical inference: we decide first which deductive system we will use (decimal arithmetic, Euclidian geometry, deontic logic) and accept its axioms and inference rules; once that is done, every sentence is deductible from all that becomes absolutely true within the limits of the chosen system.

Knowledge

When we think we have got to a truth, we call that situation *knowledge*. Of course, we could be wrong, and believe that a false sentence is true, and, therefore, say we have some knowledge about it. But our wrong belief does not make true what is false; and, when we discover the mistake, we say: sorry, I said we knew that it was true, but I was wrong – I did not know, I strongly believed a false sentence, but now I say (I strongly believe) that such sentence is false. So, a science is made of knowledge (or hoped knowledge): it grows in the measure of the quantity and quality of such knowledge, and it changes in the measure in which it rejects sentences proven false, incorporates new true sentences, or proposes new relations among the accepted sentences.

Method

In the just proposed nomenclature, reality and truth are objective, but individuation, assignation of relevance, and knowledge are subjective, because they are exercised or experimented by the subject and may differ from a subject to another. In order to arrive to true sentences, a subject needs to try a process. This process is called a *method* (in Greek, a way to go beyond). In order to get a knowledge, the method is not avoidable: if we believe strongly that a sentence is true, but our belief is based upon a dream we had the night before, we do not have a knowledge, even if the sentence is eventually found true – we have but a poorly founded belief (and maybe a bit of luck).

Not all proposed methods are dependable. A method can be considered dependable if (a) it gets always to the same result, in appropriate circumstances; (b) it can be reproduced by any subject, in the same appropriate circumstances; and (c) those circumstances do not depend on particular capacities of the subject, which cannot be scientifically explained (i.e., the condition of mediums or some kind of divine illumination).

It is to be noted that commonly invoked methods, as the voice of the conscience, or the mental intuition, are not dependable in that sense, because they lead different subjects to different results. This is easily explained by an example. We all, or almost all, agree that the human life has to be respected; but this agreement leads some people to reject the death penalty and others to accept it against homicide and encourages some people to forbid abortion and others to permit it in order to respect a woman's reasonable life.

Therefore, it could be said that there are only two dependable methods: the calculus, to obtain true sentences within a deductive system, and the observation (empiric experience) for true sentences which try to describe the real universe. If a science is made of knowledge, and if knowledge is to be obtained by dependable methods, it becomes clear that any science should be founded upon any of those two methods.

Law

If we are considering a legal science, we have to determine what we call science and what do we call law. The first question has been considered, but the second is very controversial. Several conceptions have been proposed, which can be approximately described as follows: (a) a set of rules enacted by the political authority; (b) a set of rules or principles morally valid, depending on God or the nature of mankind, but independent from the political authority, which is obliged to adapt its rules to such natural law, under the penalty of invalidity; (c) the description of probable social consequences of each

behavior, or of some of them; (d) a combination of (a) and (b), or still (c); and (e) an argumentative field, full of fictions, symbols, and rhetorical traps, where people, groups, or classes try to exercise their power upon one another, or defend themselves from the domination by others.

It is evident that the perspective of a legal science depends on the definition of law we choose: each one of them has to find a method able to generate a correspondent legal knowledge and organize it in a legal system.

The first option, the positivist one, requires something similar to calculus: given an axiom (the *Grundnorm*, the rule of recognition, the original set of rules) and a rule of inference (the enacting of norms by legally competent organs), it would be possible to develop a legal system (and its description) by means of a rational method. Nevertheless, this perspective has a failure: the real facts have an influence that cannot be denied, and so it is acknowledged by institutions like custom or *res iudicata*. But these concepts corrode the idea of a hierarchic order and introduce results logically incompatible with the axioms previously accepted.

The second one, iusnaturalist, shows an even worse failure: there is not a method able to construct a real knowledge about moral facts. Studies on metaethics show that different definitions of "good" or "justice" propose references to subjective emotions, or to metaphysical facts: definitely, no method can provide everyone with the same results. The same criticism applies to any conception including a moral element within the core concept of law, unless we define morals as a social, historic fact. But, in such case, the idea is affected by the following comment, as the option (d) does too.

The option (c) has a dependable method, because it turns the law into a sociological phenomenon, observable and describable according to empirical experience. But a legal science based upon this conception of law does not allow us to develop a hierarchical view of the legal system and does not enable a jurist to invoke the law to change the real, present facts: things are as they are, and that is all a realistic legal science can tell us.

The final option, as often selected by the critical legal studies, has none of the previous failures because it does not propose a real legal science, but a description of a permanent struggle; and its aim is not just descriptive, but a compromise with someone of the contenders. Its observation about fictions, symbols, and traps are interesting indeed, but the proposal does not include the use of a method able to reach a scientific knowledge.

A Provisional Conclusion

As the previous analysis indicates, the idea of a legal science seems too hurried up: first, it would be necessary to elaborate a coherent idea of a legal *knowledge*. Most of the practical reasoning on law proposes a mixed conception of legal knowledge: a part of it consists of the knowledge of the legal texts and of the legal decisions made by judges; another part is the moral or political evaluation of the alternative solutions, disguised as "right" interpretations of legal texts, or of different legal decisions, or of the general principles or human rights which are above any other consideration. Authors who do this job with elegance and get some professional approval are considered good scientists, even if other good legal scientists fill with their books and papers an *alternate library* cited by other jurists. At the end, this situation seems to confirm Humpty Dumpty's cynical sentence: "The question is which is to be master – that's all."

Maybe this phenomenon can be explained by a professional condition. Two chemists may disagree about a statement on chemistry, but at the end they can reach a demonstration by means of a method – observation – they both trust. The aim of chemists is to get an advance in chemistry. But two lawyers can maintain their disagreement forever, by means of different, opposed arguments, without a common way to set the discussion (and that is the reason why we have judges). The primary job of lawyers is not to get an advance on law (even if they do so), but to win their cases. Therefore, to construct a useful concept of legal knowledge, or,

eventually, of legal science, could be a very hard task and should overcome serious oppositions.

A Way (Relatively) Out

The discussion about the nature of law or the method appropriate to its apprehension may darken the field of a practical analysis: as a matter of fact, if there is a legal system, we need to know its content in the first place and only then apply it to our conflicts or try to modify it according to our values, preferences, or interests.

This way, it could be not as important to investigate the origin of rules as to know how they may affect our behavior by connecting it to some consequences. Typically, those consequences, in case of conflict, are decided by the judges, who take into consideration the positive norms, the principles, the more or less accepted values, the voice of their conscience, and every other circumstance able to have an influence upon their decision. Let us imagine a metaphor. A town receives water from a local fountain. It is useful to know where that water comes from; but, as long as it pours effectively from the fountain, it is more important to see if it can be drunk safely. The judges are the fountain, and the water is the set of legal decisions, just as they are and not necessarily as we would like them.

If we ask the judges how are they willing to consider each relevant condition or fact in order to motivate their decisions in some particular type of conflict, and if the judges were willing to answer loyally about their general criteria (even after discussing each point among them), the dispositional state of the judiciary, or of a considerable part of it, could count as a kind of legal knowledge; and the systematization of such knowledge could be considered as a (mild) legal science. Certainly, two difficulties arise against this proposal. One of them is the traditional attitude of judges, turned by tradition into a sort of rule: a judge talks only through her decisions and does not decide abstract questions. The other, that to express general criteria, requires to dig, up to a certain limit, into the subconscious level of the mind: this is not impossible, but it could be at least painful, because it might reveal hidden conflicts among personal emotions.

Both difficulties are real, but they can be overcome by a conscious effort and a change of attitude: after all, it is not forbidden for a judge to publish a paper of legal doctrine and to found seriously a decision that requires often a sound examination of the subject's conscience. Anyway, the prize would not be so high if by it we could get a more consistent legal knowledge instead of crossroads of partial opinions. And, of course, this knowledge might raise proposals to change the known reality, as in medicine the knowledge of the real situation of the patient can lead to administrate a treatment to recover her health.

Final Conclusion

In practice, the most commonly used concept of a legal science oscillates between a hope taken for a reality and a political game whose elements are disguised as moral facts or as respected opinions. A real legal science, a real legal knowledge, would be of great benefit to the community in general and would tend to change radically the attitude of people toward the law, the legal obligations, and the judicial way to enforce them. The legal thought is in delay before other fields of human knowledge: it never had its Copernican Revolution, and its fruit has been deemed as unsatisfactory for centuries. The reason is not a lack of intelligence, but, probably, a deviation from the way of intellectual advancement on behalf of particular views about concrete, circumstantial disputes.

Maybe it is time for a reaction which rejects the old confusion between description and preference. The way to be followed may be the one here proposed or another, but no step might be taken in a right direction without considering the need of really dependable methods to construct a useful concept of legal knowledge, able to get, eventually, to something that could be properly called a legal science.

Cross-References

- ▶ Legal Argumentation
- ▶ Legal Knowledge: The Hermeneutical Point of View
- ▶ Legal Science: Analytical Conceptions
- ▶ Metaphysics of Law
- ▶ Ontology of Law

Legal Science: Analytical Conceptions

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Introduction: The Province of Analytical Legal Science Determined

The notion of "legal science" overlaps, at least in part, with those of "legal dogmatics," "legal knowledge," "legal theory," "legal methodology," and "jurisprudence." Furthermore, the expression "legal science" itself suffers from ambiguities (Peczenick 2005, 1–3; Chiassoni 2013, 152–153).

First, "legal science" is affected by the process/product ambiguity. It may denote, on the one hand, the propositions which lawyers derive from certain strings of symbols (the texts) – in this sense, it denotes legal propositions, or, simply, "the law" – and, on the other hand, the processes of the derivation of these propositions, the processes whereby the propositions are obtained; in other words, it "can be used both to refer to the set of activities performed by the person who studies the law and to the result of such activities" (Núñez Vaquero 2013, 56). This ambiguity is further complicated by the fact that, since it is hard to distinguish between "the law" and the product of legal interpretation – the product of the interpretative and constructive activities performed by lawyers – the result is an overlap – at least partial – between the object language and the metalanguage.

Second, "legal science" could be used either to denote *only* the set of disciplines that have, in some sense, the content of positive law as an object of study, or to denote *all* the disciplines dealing with the law. The choice of adopting a narrow or a broad meaning of legal science is not neutral. It is influenced, among other things, by personal epistemological assumptions, the conception of law, and more generally, legal culture. Suppose someone has a normativist attitude about the law. In that case, they will be likely to prefer to narrow the use of the label "legal science" to disciplines studying, in a sense or another, legal norms; on the contrary, if someone supports a realist view of the law, they will lean toward a more liberal use of the label in question.

Third, "legal science" denotes both the studies about positive law (Italian constitutional law, French criminal law, and so on) and the more abstract studies about the nature of law, in general, as well as the analysis of legal concepts (legal norms, legal obligation, and so on) – what it may be called "theory of legal science." Of course, the border between the first type of studies and the latter is not sharply defined as it depends on the degree of generality. Moreover, studies about positive law presuppose, at least implicitly, some assumptions concerning the law in general. That is why I use the expression "legal science" to refer to both the legal dogmatic and the theory of legal science.

The difference between this third source of ambiguity and the previous one is the following. While the second ambiguity regards, on the one hand, a specific approach to the study of law – which it may be dubbed the positivistic approach – and, on the other hand, the study of law in general – either positivistic or not – the third ambiguity regards the study of some specific, technical, aspects of law contrasted with the study of some theoretical, abstract, and then general features of it.

Fourth, "legal science" is more or less inclusive, depending on the epistemological perspective adopted. As we will see below, according to a strict positivistic epistemological background, most of (the so-called) "legal science" does not satisfy the standards to be considered scientific knowledge of the law.

Lastly, the meaning of "legal science" is influenced by the concept of law adopted. Since the subject matter of legal science is law, how the question "what is law?" is answered is an integral part of our understanding of legal science.

Bearing all these complexities in mind, it seems appropriate, to the purpose of the present entry, to define "legal science" as the set of all the conscious aspects of legal practice, which allow people in general, and jurists in particular, to come to know the law before accepting it, complying with it, applying it, teaching it, counseling other people about it, and so forth (Jori 1990; Villa 1984).

Since the 50s of the last century, legal science (particularly the theory of legal science) has been influenced by analytical philosophy in various ways. Very roughly, this philosophical tradition identifies the core of philosophical investigations in language analysis. Philosophy is nothing but a metalanguage of many object languages. The basic assumption of such a "Linguistic turn" was the claim that there is an almost complete coincidence between thought and language (Dummett 1978). The influence of analytical philosophy on legal thought is favored by the fact that the law itself is essentially a discourse (eminently, the discourse of legislators and judges), making a linguistic approach to the study of law particularly suitable.

The following paragraphs will be devoted to a survey of the main analytical conceptions of legal science. The focus will be in particular on (1) Alf Ross' legal realism and his neopositivistic approach to legal science; (2) Norberto Bobbio and the Italian analytical legal philosophical school, which firmly tie legal science to language analysis; (3) Herbert Hart and the analytical philosophy of ordinary language; and, eventually, (4) Ronald Dworkin and the interpretative turn.

Alf Ross and Neopositivistic Legal Science

Ross is one of the leading representatives of Scandinavian legal realism. He supports a radical neopositivist (logical positivist) approach to legal science. This epistemological conception claims that the paradigmatic case of knowledge is constituted by empirical sciences adopting the verification principle. This principle becomes the fundamental methodological principle for all fields of knowledge. As the proposition "this is chalk" implies that if someone places a piece of chalk under a microscope certain structural qualities shall appear, so the proposition "section 62 of the Uniform Negotiable Instruments Act is valid Illinois law" implies that, under certain conditions, the courts of Illinois will act in a certain way (Ross 1958). Neopositivism is therefore a monistic methodological perspective (von Wright 1971). In Ross' (1958, 67) words, "there is only one world and one [type of] cognition. All science is ultimately concerned with the same body of facts and all scientific statements about reality [. . .] are subject to experimental test." Moreover, Ross' conception of legal science is eminently prescriptive inasmuch it claims how legal scholars *should* act, not how they act in the real world.

A peculiar conception of legal validity derives from this model of legal science: A legal norm is "valid" if judges apply it. More precisely, to establish whether a legal norm is valid, one must observe the judges' external behavior or their internal attitude to consider the norm in question socially binding or both. Ross' proposal is a synthesis of psychological and behavioristic realism. Psychological realism claims that a norm is valid if accepted by popular legal consciousness. According to this version of realism, what is valid law depends mainly on the opinions of legal scholars who are the "guardians of the inherited legal tradition." According to Ross, the limit of this version of realism is that it underestimates courts' activity; in so doing, psychological realism ties the validity of legal norms to individual psychology and "converts law into an individual phenomenon on a par with morality" (Ross 1958, 72). Behavioristic realism claims that a norm is valid if the courts apply it. Nevertheless, the mere observation of the external behavior of judges does not allow to predict how judges will act in the future, just as it is not possible to grasp the rules of the game of chess only by observing players' moves.

So, to claim that a legal norm is valid (binding, in force)[1] means to predict that judges, under

[1] According to legal realism "valid" coincides with "binding" and "efficacious." Instead, according to other conceptions "valid" means "belonging to the system" (normativism), or "according to justice" (natural law theories).

certain circumstances, will apply it in their future decision; this prediction is grounded on judges' past behavior plus the knowledge of judges' normative ideology. From this conception of legal validity, it also follows a "realist" definition of law as a set of judges' psychosocial facts (Ross 1958, 70–74). Moreover, Ross' conception of legal validity has important similarities with Hart's analysis of social rules and his practice theory of norms (Ross 1962). Suffice to say in this regard that both Ross' theory of legal validity and Hart's practice theory of norms are at risk of resulting in a vicious circle since both authors claim that we need to observe judges' behavior to know which norms exist; though, to know who are the judges a previous knowledge of legal norms (i.e., the legal norms which identify judges in a legal system) is required. Some authors claim that the circularity is only apparent, insofar as it is possible to individuate judges not only by looking at some norms of a legal system, but also through an empirical analysis aimed at establishing to which subjects a community at large ascribes the function of adjudicating controversies (MacCormick 1994, 53–62). Be that as it may, it is hard to deny that when a conception of law is excessively focused on the role of judges – like Ross and Hart's ones – it is at risk of losing sight of many important features of the law. The circularity argument contributes to, at least, drawing our attention to such risk.

A relevant aspect of Ross' theory of legal science concerns legal concepts. In the path traced by other eminent Scandinavian legal realists, he claims that important legal concepts like ownership, liability, legal capacity, etc. are empty words, denoting nothing. Nevertheless, they play an important role in legal practice to the extent that they allow connecting multiple legal conditioning facts to various legal consequences (Ross 1957).

Ross' skeptical theory of legal interpretation results from his realist approach to law. It is a theory focused on judges' activity. According to Ross, the work of judging is the outcome of a parallelogram of forces whose main vectors are formal legal conscience and material legal conscience: A legal decision is a combination of a cognitive interpretation of the law and an evaluative attitude of judges. So, norms alone cannot determine a legal decision, but they contribute. They can only help legal scholars to predict what the judges will do. Even the knowledge of precedents can help legal science predict how judges will decide cases. In any case, the forecasts of judges' interpretative choices are widely indeterminate because of judges' personal preferences.

In recent years, a realist approach to legal science was proposed by Brian Leiter (2007), which replaced the logical positivistic background with a naturalistic approach in the wake of Quine (Holtermann 2014).

The Italian Analytical School of Legal Philosophy

The birth of the Italian analytical school of legal philosophy and the general theory of law (from now on *IAS*) is conventionally linked to the publication, in 1950, of a paper by Norberto Bobbio on legal science and language analysis (Pintore 1997). The *IAS* abandons the strict positivistic background – espoused by Ross – favoring a more relaxed and broad version of positivism. According to this version of positivism, methodological monism, peculiar to strict positivism, cannot be supported anymore. The methodology of legal science cannot be the same as natural sciences, even if there are some important analogies between them. Legal science imitates natural sciences insofar as it is "research conducted with some rigor" (Bobbio 1997). *IAS* attempts to save the scientificity of traditional "legal science" (legal dogmatics) by making rigor paramount.

The main task of legal science is to analyze the language of law, purify it, complete it, and order it. The purification consists in defining the terms used by the legislator more rigorously; completing the legislator's discourse implies filling the gaps by, e.g., extensive interpretation and analogical reasoning; and ordering the language of law means systematizing this languange – after having purified and completed it ruling out antinomies. In this way, instead of describing the law, legal science cooperates to its improvement and, in so doing, betrays the positivistic principle according

to which knowledge is a value-free activity aiming to describe "reality as it is." Soon, Bobbio and the *IAS* as a whole solve this contradiction with their epistemological background by distinguishing a *genuine* legal science that aims at describing, in value-free terms, the language of law (including discourses in legal dogmatics and doctrine) and a *spurious* legal science (i.e., legal dogmatic and doctrine), which instead of describing the law as it is, contributes to creating it through exercises of interpretative discretion. Be that as it may, *IAS*' trademark consists in applying the tools of linguistic analysis to the study of law defined as a prescriptive language, endorsing in the background a broad version of a logical positivistic epistemological perspective (Bobbio 1997; Villa 1984, 260–264).

The leading proponents of the *IAS* support either a normativist and Kelsenian conception of law (Bobbio and Uberto Scarpelli) or a realist one (Giovanni Tarello and Enrico Pattaro). It is worth noticing that Tarello introduced in the jurists' lexicon the distinction between the norm-formulations, on the one hand, and norms *stricto* sensu, on the other. The first ones are sentences used to formulate statutory provisions or different kinds of legal provisions. When they are understood *stricto* sensu, norms are the meaning of norm-formulations. This distinction is important insofar as it helps to clarify that there is not a one-to-one correspondence between norm-formulations and norms (Guastini 1998).

Over time, the differences between these two strands of the School have become thinner as a result of their mutual convergence toward moderate interpretative skepticism or a middle way among formalism and skepticism on the heels of Hart. On one side, the role of legal principles in contemporary constitutional States suggested to the normativist component of the School the opportunity to recognize the increasing role of the legal interpreters and, in particular, of the judges, in creating law (Scarpelli 1987); on the other side, the realist component progressively shifted from radical skepticism to a moderate one on the heels of a Kelsenian conception of meanings framework of legal dispositions (Barberis 2013, 16).

Another classical topic widely discussed within the IAS is that of the concept of legal positivism. According to Bobbio, it is possible to clearly distinguish three main aspects of legal positivism, which he calls, respectively: methodological, theoretical, and ideological positivism. Methodological positivism claims that the object of legal science is positive law, that is, it is a body of rules produced by certain procedures, followed by individuals and applied by judges. According to methodological positivism, positive law is different from ideal law and can be described through a value-free approach. Bobbio accepts methodological positivism without reservation. Theoretical positivism expresses a kind of command theory of law that fits the modern State's characteristics and not those of constitutional contemporary States. Ideological positivism is a normative moral theory, according to which there is always an obligation to obey the law (strong version) or at least a pro tanto obligation to obey it (weak version). Bobbio refuses the strong version of ideological positivism and supports the weak (Bobbio 1996, 129ss.; Bobbio 1972, 101–126; Redondo 2015, 201–207). Scarpelli convincingly criticizes Bobbio's claim that these positivistic theses are logically independent; he affirms that methodological positivism presupposes an endorsement of positive law and this endorsement strictly links methodological and ideological positivism. Scarpelli works out a normative version of legal positivism that anticipates analogous positivistic conceptions that were theorized by authors like Tom Campbell (1996, 2004) and Jeremy Waldron (2001), among others, decades later.

Herbert Hart and the Analytical Philosophy of Ordinary Language

Hart's *The Concept of Law* (*CL*), published in 1961, is the most influential book on legal philosophy of the second half of the twentieth century. It proposes a version of normativism which makes it possible to reply to some criticisms to Kelsen's theory of law.

Hart (1994, v) considers *CL* an essay of analytical jurisprudence since it tries to clarify "the general framework of legal thought" and to raise questions "about the meanings of words." From *CL*'s preface, he acknowledges his debt toward J. L. Austin's intuition that "a sharpened awareness of words" could improve "our perception of the phenomena."

Hart works out a theory of social rules whose aim is to distinguish social rules from mere habits, and regulated behaviors from merely regular ones. One of the main criticisms that Hart moves to John Austin's imperative theory of law is precisely that of not having perceived the importance of this distinction and, consequently, having overlooked the concept of norm. Social rules, unlike habits, in addition to regularity of convergent behaviors, also present an internal aspect: "what is necessary is a critical reflective attitude to certain patterns of behavior as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'" (Hart 1994, 57). Hart claims that the rule of recognition, the rule of rules which identifies the criterion of validity of other legal norms (as membership deriving from conformity to superior norms – see note 1), is a social rule. A rule of recognition exists when it is possible to identify a group of people who accept it from the "internal point of view." The internal perspective does not necessarily imply the *moral* acceptance of a legal system and its fundamental principles, but only a reflective critical attitude that is empirically verifiable. It might be said that, according to Hart's view, the existence of law depends on two empirically verifiable conditions: the observation of the fact that officials, in particular judges, act in accordance with secondary norms and that, in doing so, they adopt an internal point of view consisting in the use of certain, peculiar, linguistic expression.

The practice theory of norms tells us that a rule of recognition exists when (at least) judges accept it. This ontological thesis on law – that is to say, the thesis that the rule of recognition and, more in general, the law of a community depend on the attitudes and convergent behaviors of the participants, and of judges in particular – has some clear implications at a methodological or meta-theoretical level: The law is a fact that can be described in a nonevaluative way looking at the attitudes and convergent behaviors of the participants (neutrality thesis).

Hart's refusal to assimilate internal point of view and moral point of view is questionable, however. In fact, a weak characterization of the internal point of view reduces the distance between Hart's conception of law and Austin's imperativism. If the nature of the reasons for accepting the law is not what matters – law can be accepted "for any reason whatever" – a rule of recognition may operate in a given society even in the event that all the participants accept the law out of conformism: In this case, the difference between "having an obligation" and "being obliged" ceases to be substantial. Indeed, the "conformist" – who follows the rules because others do – shows many analogies with the "bad man" – who follows the rules to avoid punishment. In fact, social reproof is nothing but an un-institutionalized sanction (Shiner 1992a, 160–183). Moreover, it may be objected that Hart's conception of the acceptance of a legal system presupposes an implausibly stark distinction between officials and citizens (Shiner 1992b, 65–67). Hart puts forward three theses: The first is that if a rule of the legal system imposes an obligation, then that rule is accepted; the second thesis says that in a *minimal* legal system primary rules are not accepted by anyone – since it is enough that only officials accept (from the internal point of view) secondary rules; and according to the third thesis, even in a minimal legal system primary rules impose obligations upon the subjects. The inconsistency between these three theses can be solved by abandoning one of them. If Hart leaves the first, there will be no room for a distinction between "being obliged" and "having an obligation." Abandoning the second thesis implies that the conditions required for the existence of a legal system are more demanding than those established by Hart. If a difference has to be

found between a legal system and the mere use of coercion by a minority against a majority, a necessary condition for the existence of a legal system is that a certain number of citizens must accept primary rules. Finally, waiving the third thesis yields similar effects of waiving the first.

Some disciples of Hart also recognize the need to characterize acceptance of law in a strong sense. Neil MacCormick (1994) and Joseph Raz (1996) identify the weak point in Hart's analysis of social rules precisely in the overweak characterization of law's acceptance. The existence of some legal norms rather than others is because from a moral point of view, at least some members of the community prefer (or, at least, they claim to prefer) the behavior pattern identified by such norms rather than alternative behavior patterns. Maintaining that the existence of a social rule implies that there is someone who deems the behavior prescribed by this rule preferable to alternative behaviors does not mean denying the possibility that some follow the rule out of idleness or hypocrisy, or that others rebel against it. Nevertheless, the latter situations can only be understood by presupposing the existence of a significant group that accepts the norms from a moral point of view. All the attitudes that can be imagined in relation to norms are therefore "parasitical" compared to that of people who deem the norms adequate from a moral point of view.

In the *Postscript* to the second edition of *CL*, Hart grants that the existence of the law presupposes someone who accepts it from a moral point of view. Nevertheless, he still believes that this move does not produce substantial consequences from a methodological point of view. As Hart (1994, 244) puts it: "Description may still be description even when what is described is an evaluation."

Hart's theory of legal interpretation is an attempt to find a middle way between formalism and rule-skepticism. Legal language, as every natural language, has an open texture. It means that there are instances that clearly fall inside the application-area of a legal norm, while others are in a penumbra zone in which the application of a norm is debatable. According to this theory, the activity of interpreting/applying law is either a cognitive activity (in relation to easy cases) or a creative activity (in relation to hard ones). Through the distinction between easy and hard cases, Hart tries to show that the law is able to hold together the value of certainty and that of flexibility; moreover, as far as easy cases are concerned, the interpretative activity is a cognitive and scientific one. The main objection to Hart's theory of legal interpretation puts into question the possibility of *clearly* distinguishing easy and hard cases and, as a consequence, of *clearly* establishing the point in which legal interpretation becomes a creative and discretional activity (Endicott 1997).

With its reference to the pervasiveness of axiological considerations, this objection puts into question the idea of a descriptive and value-free legal science and opens the door to the interpretative turn of analytical legal science headed by Dworkin.

Ronald Dworkin and the Interpretive Turn

Dworkin's adherence to the legal science tradition influenced by analytical philosophy is debatable. He is an eclectic legal philosopher who is difficult to label (Mackie 1977). To the extent that his main critical target is Hart's legal positivism, it is possible to consider Dworkin a member of the analytical jurisprudence tradition, even if he takes a strong critical attitude toward his predecessors.

Although there are no clear turning points in Dworkin's works, it is possible to distinguish at least two periods. A strong antilegal positivistic attitude characterizes the first one, while the second one is shaped by an effort to elaborate an original theory of law that is largely independent of, and alternative to, legal positivism (Waldron 2013). The main outcome of the first period is the collection of essays published under the title *Taking Rights Seriously* (1978); the second period finds expression in (at least) *Law's Empire* (1986) and the subsequent writings, among which *Justice for Hedgehogs* (2011) deserves mention.

In *Taking Rights Seriously*, Dworkin criticizes Hart's "model of rules." According to Dworkin, the law is made up not only of rules but also of principles, whose validity as legal principles is not referable to the rule of recognition but depends, in

the last resort, on their moral correctness. The clear-cut distinction between rules and principles allows one to affirm that the early Dworkin supports the conception of law expressed by the coherence thesis: The law is made up of two sharply different elements, i.e., source-based law and "those standards of political morality which inform the source-based law" (Raz 1995, 223).

In *Law's Empire,* Dworkin develops the model of law as integrity; in *Justice for Hedgehogs,* he proposes a general philosophical system grounded on large-scale integrity of ethical values: "Value is one big thing. The truth about living well and being good and what is wonderful is not only coherent but mutually supporting; what we think about any one of these must stand up, eventually, to any argument we find compelling about the rest" (Dworkin 2011, 1).

Dworkin challenges the central thesis of legal positivism, according to which law is a matter of social conventions. Dworkin maintains that it is impossible to fully determine law just on the basis of the convergent behaviors and attitudes of the participants. This implies that to answer the question "what is law?" – both about a given legal experience and in general – it is not sufficient, even if it is necessary, to look at the convergent behavior and the attitudes of the participants: It is also required to provide an interpretation of the "raw legal material." It means that knowledge has an interpretative nature, at least in the legal domain. The perspective of the legal scholar is therefore necessarily internal as well as that of the participant.

Conclusion

The "interpretative turn" (Kress 1987) proposed by Dworkin implies that the legal scientist can give a complete account of law only by getting into the participant's shoes and committing himself to reconstructing law in the light of an interpretation of the values incorporated in law. In other words, the legal theorist is asked to look at raw legal material with a "protestant attitude" (Postema 1987) and, like the participants, to present the "best interpretation" of this material. As Stephen Guest (2013, 12) puts it, "[Dworkin's] theory of law is that law consists of the best moral interpretation of existing practices of justifying the coercive power of governments against their subjects; law is therefore a subset of politics which is, in turn, a subset of morality."

Dworkin (2006, 150) claims that the characteristic of interpretative concepts like law – concepts that he considers a *tertium genus* with respect to the criterial and natural kinds concepts – is that "their descriptive sense is contested, and the contest turns on which assignment of a descriptive sense best captures or realizes that value."

Whence the idea of a value-free and pure legal science is no longer an indisputable dogma.

Cross-References

- ▶ Bobbio, Norberto
- ▶ Dworkin, Ronald: Constructive Interpretation *aka* Interpretivism
- ▶ Dworkin, Ronald: Legal Philosophy
- ▶ Hart, Herbert Lionel Adolphus
- ▶ Language and Law
- ▶ Legal Realism, Scandanavian

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Legal Science: Methods of (France)

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Introduction

There is no French method of legal science. It is certainly possible to identify dominant methodological orientations characterizing some long historical periods. However, these orientations have been followed by criticism and dissent, in order to renew the legal analysis by adapting it to socio-economic developments or by opening it to other social sciences, or to justify and consolidate the emergence and the autonomy of new legal branches in respect to the hegemony of civil law (administrative law, criminal law, labor law. . .). These critics are in minority in the field of French legal studies, but they contribute to confer it a relative methodological heterogeneity. Nevertheless, the theorization of legal methods ceased around the middle of 1920s. After the Second World War, the legal scholars became less attentive to this question. It is more explored by legal historians, theorists, or sociologists, but the latter two are marginalized in the French academic field.

It is here impossible to be exhaustive on the diverse methodological trends in France (for more explanation, see V.Champeil-Desplats, *Méthodologies du droit et des sciences du droit*, Paris, Dalloz, collection Méthode juridique, 2022; "The French Legal Dogmatic Method and Its

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Critics around the 19th–20th Centuries" (Chap. V), *in* D. Bunikowski (ed.), *Historical and Philosophical Foundations of European Legal Culture*, Cambridge, Cambridge Scholars Publishing, 2016, pp. 137–154). But it is possible to elaborate a historical reconstruction from the beginning of the nineteenth century, a crucial historical moment when, as it is well-known, the Civil Code was drafted and the so-called School of Exegesis flourished. "So-called," because today several specialists of this historical moment are underlining the relativity of the unity, in space and time, of the authors identified within this School (P. Jestaz, C. Jamin, *La doctrine*, Paris, Dalloz, collection Méthode juridique, 2004). Anyway, the "School of exegesis" has been associated with official representations of legal reasoning, legal methods, and legal studies. These methods, whether they are actually used or finally reconstructed, and considered scientific by some, dogmatic by others, appear as one of the more important foundations of contemporary legal sciences in France, either because they are considered as a model or because they work as a repulsion.

The Formalist Structuration of the French Legal Methods from the School of Exegesis

The chronological proximity of the writings of the different French legal codes (civil code, criminal code, commercial code. . .) during the Napoleonic Empire at the beginning of the nineteenth century had, at first, favored a concordance in their methodological approaches. The exegetic method was dominant everywhere.

From a methodological point of view, the aim of the Exegetic School was to find means to transmit at each stage of their enforcement, perfection – that is to say, the coherency and completeness – of legal codes, and particularly, of the civil code. The methodological and scientific program attributed to this School can then be schematically rebuilt in three points.

First, the Exegetic School is based on a reduced conception of the work of legal science. The legal presentations or restitutions of statutes and legal codes are mainly structured on a repetition task. This repetition of codes, in particular the Civil Code, and statutes had the result of representing the legal codes as perfect systems. Jurists don't need to do anything more than repeat, as closely as possible, the codes statements and reproduce their configuration by articles, number by number. The scientific work is supposed to have been exhausted with the act of codification. The simple work is nevertheless to be completed by the formulation of general legal principles, which appears as a first stage of systematization of legal statements. Such a formulation of general principles from the legal statutes or codes presents a deep division with the doctrines of natural law of previous centuries. The aim is no longer to find the legal principle in a natural law located above positive law, but to reason from the statutes and legal codes themselves. The general legal principles are then conceived as inherent in the law and preexisting in legal order, not transcendent (see P. Jestaz, C. Jamin, *op. cit.*, p. 94).

Secondly, the School of Exegesis is also characterized by the importance attributed to the legal text, as the famous Demolombe's formula expressed it: "*the text before all"* (C. Demolombe, *Cours de Code Napoléon*, Paris, Durand et Hachette, 1857). In consequence, the exegetic mind defends that, when the legal text is clear, it is not necessary to interpret it: *interpretatio cessat in claris*. The judge interprets the legal statements only in cases of obscurity. For the School of Exegesis, he or she must look for the intention of the law-maker, referring to the preparatory works. He or she may also, as a second step, propose a literal interpretation which privileges the common meaning of the word. Once their meaning is clarified, the legal statements can become starting points for logical reasoning, mainly deductive, and lead to conclusions deemed true and irrefutable. As Louis Liard perfectly summarized in the late nineteenth century: after having been correctly interpreted, "*the articles of the code are as theorems (. . .) from which consequences can be drawn. The lawyer is a pure mathematician"* (L. Liard, *L'enseignement supérieur en France, 1789–1893*, Paris, Armand Colin, 1893, t. 2,

p. 397; see too, E. Gaudemet, *L'interprétation du Code civil depuis 1804*, Paris, Librairie du Recueil Sirey, 1935).

Thirdly, the exegetical method is also associated with a special deductive reasoning, the syllogism. Since Beccaria, jurists have been convinced that the formal and binding property of syllogism is an efficient weapon against the arbitrariness of judges, particularly in the criminal field. By providing a reasoning which is supposed to disseminate the axiomatic truth contained in codes and statutes, the syllogism is in the exegetical framework, the prototypic figure of the act of judging. Judges, and more generally any authority enforcing a particular statute, are considered – according to the famous words of Montesquieu – as the "*mouth of the law.*" They apply and merely perpetuate the work of law-maker.

During the nineteenth century, a few French civilists, Charles Aubry and Frédéric Charles Rau, especially, tried to improve this methodology, aggregating synthetic, systematic and conceptualizing tools coming from German legal science. Translating the Karl Salomo Zachariae's works into their book of French civil law – also subtitled *According to the German work of C. S. Zachariae* –, both authors immediately announced that they were seduced by the "*powerful and lucid synthesis*" of their German colleagues (C. Aubry, F. C. Rau, *Cours de droit civil français*, Strasbourg, F. Lagier, first ed., 1839; third ed., 1856, p. X). They intended to break mainly with the Scholar's repetition of the articles and the thematic structure of the Civil Code. Aubry and Rau were convinced of the most rigorous classifications proposed by German scholars. They consequently called "*for a logical and rigorous dogmatic approach in order to raise civil law to the level of a science*" (J.-L. Halpérin, *C. Aubry, F. C. Rau*, *in* O. Cayla, J.-L. Halpérin, *Dictionnaire des grandes œuvres juridiques*, Paris, Dalloz, 2008, pp. 11–12). Moreover, they were looking for the methodological conditions to build a legal science that would be valid over the national borders. They thought that even if each nation makes its own domestic civil law, jurists can share a common path for its knowledge, that is to say, a common legal science. The German summed up conceptualization coupled with the synthetic and the systematic methods, sophisticated afterwards by Karl Friedrich von Savigny, the Pandectits or Rudolf von Jhering finally offered a scientific model for France, Europe, and the world. French and German scholars of the nineteenth century have thus built the general methodological backgrounds and frameworks of the contemporary legal dogmatic conceived as science.

Critics of the "Classical Legal Method"

Today everything has been said on the limits of the formalism of exegetical methods. The first critics against the "classical legal method" were expressed in many States in the turn of the nineteenth and twentieth centuries. The new legal approaches proposed by the main French scholars (Gény, Saleilles, Duguit, Hauriou. . .) were very influential all around the world and still contribute to their international reputation, particularly in the United States where their critical potential was perceived as much stronger and longer than in France.

The reasons to move away from the classical legal method were heterogeneous. However, critics converged in the conviction that this method was out of touch with reality. The inability of the traditional legal method to apprehend it returned as a *leitmotif*. The School of free research in France, the school of free law in Germany, the American or Scandinavian realists shared the same general project: root the legal science into – according to the authors – the reality of law or the reality of the social world.

On the one hand, the disconnection of classical legal science and reality was underlined from axiological and ideological preoccupations. At the turn of nineteenth and twentieth centuries, the indifference and the blindness regarding the socio-political effects, produced just as much by the law and by the legal studies, was the main danger pointed out. A first reason is that deductive legal reasoning from abstract principles finally appears disconnected from the scientific progress and from the sense of history. It would stay, in an

August Comte terminology, to a pre-scientific stage (L. Duguit, "Le droit constitutionnel et la sociologie", *Revue Internationale de l'Enseignement*, 1889, pp. 4–5). A second reason is that the formalism of the classical legal method would neglect justice as well as the social dimension of law. The only consideration of logical reasoning, without attention to the moral content of the legal premises or social context, would lead to justify any ideology and politics. At the beginning of the twentieth century, in France as well in the United States, a lot of authors rejected the "Mechanical jurisprudence" to sacrifice justice and social peace at the benefit of the rigidity of the logical reasoning. Numerous opponents to the reduction of the legal science to mathematic or logic claimed to "*correct the spirit of geometry*" by justice (H. Capitant, *Vocabulaire juridique,* Paris, PUF, 1936, p. 6; see also for instance, M. Deslandres, "La crise de la science politique. Le problème de la méthode", *Revue de Droit Public et de Sciences politiques* 1900, p. 460; R. Pound, "Mechanical Jurisprudence", *Columbia Law Review*, 1908, vol. 8, p. 608; B. N. Cardozo, *The Nature of the judicial Process,* Yale, Yale University Press, 1921).

On the other hand, the disconnection with reality was criticized from a heuristic perspective. The conviction is that this reality is not fixed but is moving. For instance, Francois Gény, who was a reference for many American authors in this period, defended "that positive law must remain a living thing. Now, to live is to move and transform. For the law, it is even more: it is fighting for a perfect and constant adaptation to the claims of social life" (F. Gény, *Méthode d'interprétation et sources en droit privé positif*, Paris 1919, second ed., LGDJ, p. 225). The main consequence is the inadequacy of the static formalism assigned to classical legal method to grasp the moving reality. At the very least, such a method provided excessively simplified understanding of the real legal phenomena.

First, the representation of the set of legal norms was discussed as a coherent and non-contradictory system. This representation would be no more than a great product of the imagination, an illusion, particularly generated by the ideals of the codification, that the jurists rebuild more than they can actually observe: the legal orders remain "in reality" deeply incomplete and often contradictory.

Second, the formalism of classical legal science would prove unable at grasping the full complexity of each singular legal norm. It makes a questionable dissociation between form and content of the norms, while giving importance only to the first, and consequently neglecting that the legal norms are a formal expression of social relations. The full knowledge of legal norms supposes then to understand those social relations (R. Saleilles, *Y a –t-il vraiment une crise de la science politique?* (reed.), Paris, Dalloz, 2012, p. 13).

Finally, most importantly, critics had been focused on the reductive conception of judicial reasoning promoted by the School of Exegesis. The more radical critics was formulated at this time by American Scholars against what they named the "Mechanical jurisprudence." By reducing legal reasoning to logical-mathematical figures of syllogism or analogy, "Mechanical jurisprudence" in the United States as well the School of Exegesis in France would deliver a misrepresentation and therefore a non-scientific and obsolete view, of how judges truly decide (R. Pound, "Mechanical Jurisprudence," *Columbia Law Review*, 1908, vol. 8, p. 608). Their great error is to consider the logical part of legal reasoning to be determinant. Now judges deal with many factual, ideological, or axiological considerations that inevitably interfere at the moment of choosing the major premise, qualifying the facts and expressing a specific conclusion. The most deconstructionist of American realists defended more strongly, then, that logical elements appearing in judicial decisions only constitute a *post facto* justification and a mystification of ideological, social, or psychological factors which may be actually determinant. It will also be the conviction of the Scandinavian and French realists (See A. Ross, *On Law and Justice,* Berkeley & Los Angeles, University of California Press, 1959, p. 44; M. Troper, *La théorie du droit, le droit, l'État*, Paris, PUF, 2001).

Alternative Methodological Programs

Those critics engaged new methodological programs, considered suitable to build a true legal science. Beyond their important differences, those programs share at least three common features.

First, whereas the classical legal method had as scientific model the exact, e.g. natural and physical sciences, the new methodological approaches had in mind the introduction of legal science into the field of the social sciences. The turning point of the late nineteenth and early twentieth century is also the time for the emergence or redefinition of social sciences: history, sociology, psychology, economics, political science, history, anthropology, linguistics, statistics, etc. With either a general approach to law or a more focused one on a particular area (civil law, labor law, commercial law, criminal law, constitutional law, administrative law. . .), many jurists had considered the development of the social sciences as the best and strongest basis for renewing legal science and for turning away on the old methods promoted by the civilists of the nineteenth century. One of the fathers of the French commercial law, Edmond Eugene Thaller, opposed for instance "*the spirit of conservation*" of civil law to the "*progressive and consensual*" nature of commercial law, justifying their autonomy (E. E. Thaller Eugène-Edmond, *Annales de droit commercial*, 1892, p. 151, quoted by F. Garnier, *Edmond-Eugène Thaller (1851–1918) et les Annales de droit commercial*, *in* N. Hakim, F. Melleray (eds.), *Le renouveau de la doctrine française,* Paris 2009, p. 181).

Second, the aim to enter into the "reality of the law" had changed the main corpus of observation for legal science. This corpus is no more mainly legislation but the social practices of law and, particularly, judicial activities. In order to know the reality of law, jurists have to observe the daily activity of the judges, and not to focus on the final decisions, but on the supposed real – sociological, ideological, psychological. . . – factors that determine them. For that, jurists have to learn and use the methods of others social sciences and, finally, to produce an interdisciplinary work.

Next, the methodological alternative programs linked to the reform of legal science were based on an inductive process taking model on the experimental sciences. Jurists are supposed to make observations, experimentations, assumptions, generalizations by inductive reasoning, and finally verifications. As expressed by Léon Duguit, "do not hesitate to exclusively follow the method of observation. Let us study social facts as the physicist and chemist are studying the phenomena of nature, as the biologist is studying the phenomena of life; and social sciences will soon be making rapid progress" (L Duguit, *Le droit constitutionnel et la sociologie*, *op. cit.*, p. 6; see too. Gény, *Science et technique en droit privé positif*, Paris, Recueil Sirey, pp. 168–169).

Observation and reasoning by induction is then expected to become the core of activities of scholars in order to constitute legal knowledge as a true science. Henceforth, the task of jurist would be going "*from the concrete to the abstract, from the multiple to the one*" and "*reduce the plurality of solutions given by law or case law to a few formulas that point out their fundamental aspects.*" It would be to "*systematize around a few large simple notions a complex and confusing subject*" (J. Rivero, "Apologie pour les 'faiseurs de systèmes'", recueil *Dalloz*, 1951, chr. XXIII, p. 100).

Applying induction and experimental method to the observation of judicial activity, jurists finally pretend to formulate scientific laws and general theories that "*future judgments should confirm or infirm*" (P. Jestaz, C. Jamin, *op. cit.*, p. 159). A good prediction became for most of the scholars the main proof of the success of the scientific process.

Heterogeneous Fates

Fearing the dilution of their discipline and academic identity but also the nihilistic or anarchical consequences of strong anti-formalistic positions, this wave of scientific reform quickly stopped in France. Francois Gény's turns around is one of the strongest symbols of this reaction. Gény finally considered that the law-making process necessarily supposes a formal stage. In *Science et technique en droit privé*, written 20 years after

Méthode d'interprétation..., he defended that jurists are in fact used to mixing "*by instinct*" both experimentation and logical reasoning. The methodological process appears then "*extremely complex and nuanced*," inevitably including both "casuistry and dialectic, analysis and synthesis, in which post facto elements providing appropriate solutions, assume a priori direction proposed by the reason and will" (F. Gény, *Science et technique en droit privé positif*, *op. cit*., p. 10).

So, contrary to what it could be expected, the experimental method has neither entirely nor durably disconnected the French scholars from a logical-deductive mind. The way in which French lawyers deal with the general methods of the social sciences (sociology, economics, history, etc.) is today extremely variable. The most structured general reflections leading to a construction of elaborated history or – to a lesser degree in France – sociology of law, are in contact with the most intuitive individual uses. In this case, if by opening up to reality, the French legal scholars sometimes integrate into their analysis social, political, or economic data, they usually relegate them to the rank of annex or auxiliary knowledge. They limit most of the time their work to put in order or synthesize judicial decisions. They finally transfer for the knowledge of judicial activities the same method of *"rationalization and systematization used for the code*" (P. Jestaz, C. Jamin, *op. cit.*, p. 109). They classify the mass of the judicial data in order to reduce it to "*some very simple and clear propositions*" (P. Jestaz, C. Jamin, *op. cit.*, p. 159). The scientific legal program is then reduced to train a good expert and connoisseur of the positive law.

Today, excepted in the field of legal theory in which few positivists, as Michel Troper, expressively claim for a neutral axiology and for a strict separation between judgment of value and the propositions of legal science, French scholars often add to their work of rationalization, synthesis, or explanation of positive law, an evaluative discourse. This evaluation could be based on moral, technical, or efficacy judgments, but without strong theorization of the moral, political, social, or economic backgrounds founding such judgments. According to the opinion defended, these kinds of dogmatic discourses mute either as a justification of positive law or on an ideological or technical critical discourse on it.

This orientation of French legal studies is not free of misunderstandings in respect to others social sciences. The proximity of propositions of the dominant legal science and of its object, and the limitation of its critical discourses to a moral, ideological, or technical one, clash with other social sciences placing efforts of distancing, objectification, auto-socio-analysis as well as of the construction of autonomous conceptual apparatus respect to their object, among the first methodological requirements of a scientific discourse.

Conclusion

Defending the need, particularly in France, for a revitalization of legal methodology thinking does not only present internal academic challenges. Such interrogations are also crucial in order not to leave jurists out of, on the one hand, the understanding of the social and epistemological transformations produced by contemporary technical and scientific evolutions, and, on the other hand, (consequently?), the emergence of new objects of study (environment, bioethics, new technologies, globalization, or the reconsideration of relations between individuals and collective level...) that defy the disciplinary divisions generated from previous centuries.

Cross-References

- ▶ Formalism
- ▶ Kelsen, Hans
- ▶ Legal Positivism: Inclusive
- ▶ Pound, Roscoe
- ▶ Ross, Alf: Biographical Perspectives

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Legal Statements: Carlos Eduardo Alchourrón and Eugenio Bulygin's Perspective

► Alchourron, Carlos Eduardo, and Eugenio Bulygin: Types of Legal Statement

Legal Statements: Internal, External, Detached

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Introduction

Lawyers, judges, legal academics, officials, etc. use normative language in a pretty routine fashion. Legal language is, at heart, normative: it uses notions of duty, obligation, rights, permission, authorization, powers (e.g., in the sense of *vires*), etc. A *legal statement* is, then, a subset of normative statements: it is a statement "about" a norm or about some normative state of affairs that the norm entails. Legal statements can then be reduced to statements of the following form: *legally*, one ought to (has a right to, is empowered to, etc.) φ. As a subset of normative statements, legal statements are *about* legal norms or legal normative state of affairs. They ought to be distinguished from statements *of* norms, that is the utterances by which normative authorities aim to "express" or "create" norms (whether successfully or not). Normative statements are about the norms thus "created" and the normative states of affairs which can be derived from them.

Legal statements may have different functions according to the attitude of the speaker. This variety of functions raises a series inter-related (though orthogonal to one another) puzzles, which this entry aims to explore summarily.

Internal and External Statements: An Overview

The distinction between internal and external statements was coined by Hart in his *opus magnum The Concept of Law* (Hart 2012). Although it is related to other concepts (such as Kelsen's propositions of law, see *infra*) and although it was already present to some extent in Alf Ross's work (see Ross 2019, 185), Hart's distinction is the starting point of much of the subsequent

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literature on legal statements and it deserves special attention.

Hart's theory of legal statements is part of his theory of rules. According to Hart, rules are normative social practices made up of two aspects, one internal and one external. The *external aspect* is the behavioral habit of obedience corresponding to what is prescribed by the rule. In any social group, the fact that there is a rule can be observed by pointing out some regularity of behavior. Deviation from this regularity elicits the same kind of response, for example, social pressure, sanctions, out-casting, and so forth. This external aspect of rules is essential to rules, but it is not *all* what rules are about. Rules also have *an internal aspect*, which is key to their normative character. The internal aspect of rules is their ability to guide behavior, which is the result of an attitude of acceptance of what the rule prescribes; members of the group endorse the rule and criticize deviations from it. This internal aspect is essential for there to be a rule rather than a mere external regularity.

The basic distinction between the internal and external aspects of rule explains how rules function in a rather "primitive" kind of social group, in which each rule must have such an internal aspect to exist (think of rules of etiquette, or even rules of social morality). In an "advanced" legal system this attitude of acceptance is not necessarily directed at every rule in such a piecemeal fashion. Rather, officials must accept as guiding their action what Hart calls "the rule of recognition" which picks out the criteria of validity for all the rules of the legal system. Thus, in a legal system, whether someone ought to φ does not necessarily depend on a widespread attitude of acceptance of the rule which prescribes to φ but rather on the fact that this rule is valid under the rule of recognition, which law-applying officials accept as binding.

The distinction between the internal and external aspects of rules is closely related, but quite not identical, to another distinction made by Hart between internal and external *points of view* and between the kinds of statements made from a point of view. The internal point of view is the point of view of someone who accepts the rule as biding and takes it as a reason for his own action. Internal statements (or statements made from the internal point of view) are used to endorse the rule or criticize deviations from it. Internal statements are part and parcel of the internal aspect, since the attitude of acceptance is made explicit by internal statements.

The external point of view is the point of view of someone (e.g., an external observer) who does not accept the rule as binding. External statements are used to give information on the rule, or to describe it, from the point of view of an external observer. As Hart observed there are two different kinds of external statements, depending on which aspect of the rule the speaker aims to describe.

Radical external statements bear on the external aspect of the rule. They describe the behavioral habit corresponding to what the norm prescribes ("in country X, people stop at red lights"). They may also describe the facts that are likely to happen if the norm is violated. The Holmesian "bad man" (Holmes 1997) typically makes radical external statements tracking causal probabilities between acts or omissions and possible negative consequences.

Moderate external statements or, as Neil MacCormick calls them, hermeneutical statements (MacCormick 1994, 288–292; 2008, 53) are statements about the internal aspect of the rule: they describe the fact that members of the group have an attitude of acceptance of the rule as they take them as action-guiding and criticize others for deviating from the rule. In "advanced" legal systems, moderate external statements describe the fact that officials (as well as many citizens) hold the rule to be binding because it is valid according to the criteria set out in the rule of recognition: the statement "you cannot park here" describes either that all members of the group accept the no-parking rule as binding or that (in legal systems) at least a subset of the group accept it as valid because the legislature posited such a rule.

The Describability Problem

Statements About Facts or Statements About Norms?

Hart's notion of external legal statements is closely related to what legal philosophers and deontic logicians call normative propositions

(see on this Bulygin 1982, 137).They distinguish between norms and normative propositions (see notably Von Wright 1963, 104; Alchourrón 1969; Alchourrón and Bulygin 1971, 121; Bulygin 1982; Hilpinen 2006). Norms are ought-propositions, which can be formalized by the use of a deontic operator; normative propositions are descriptive propositions about norms.

Whenever one aims to describe the existence or the content of a given legal norm, one will typically use legal statements to express normative propositions (here, "statement" refers to a linguistic utterance, of which the "proposition" is the semantic content, that is, the truth-bearer). This raises the question whether a mere description of a norm is even possible or whether normative propositions are indeed propositions about facts.

Whenever I utter "you cannot park here" in a *descriptive* way, I do not mean to guide the behavior of my utterance's addressee. I mean to be informative about the existence and content of their obligations. The function of my utterance is to express a truth-apt normative proposition: this proposition will be true iff you cannot park here. The question is: what makes this proposition true? In other words what is (truth-aptly) described by such a proposition?

The main difficulty seems to be that both moderate and radical external statements describe *facts* rather than *norms*. This is obviously true for radical external statements, which merely record behavioral patterns; but it may very well be also the case for moderate external statements, since the internal aspect of rules, on which such statements report, is ultimately a matter of social fact. Here again, what is actually described is a fact, or a set of facts. It is not a norm.

At the end of the day, the answer to that difficulty depends on one's conception of norms and normativity (Raz 2009, 134–135). According to Raz, if one's focus is on "social normativity," one is bound to reduce external statements to statements of fact: if norms are defined as normative social practices (Hart 2012) or as speech acts (Alchourrón and Bulygin 1981), external normative statements in general – and legal statements in particular – are ultimately descriptive statements of facts. But if, with a focus on "justified normativity," norms are defined as objective *ought-propositions*, it appears that one cannot describe such propositions without making ought-propositions oneself. Hans Kelsen's theory of legal statements is a case in point.

Descriptive *Sollen*?

The notion of descriptive *Sollen* (or *ought in a descriptive sense*) is perhaps one of the most elusive and disputed aspects of Kelsen's theory of law (Kelsen 1949, 163; 1967, 73–75). Kelsen distinguishes between *Rechtssätze*, that is, legal statements, which are a subset of *Sollsätze*, *ought*-statements, and *Rechtsnormen*, that is, legal norms. Legal norms are issued by legal authorities (legislatures, judges, etc.), whereas legal statements are typically descriptive statements uttered by legal science. Legal science aims to describe the law; it does not aim to issue legal norms.

Kelsen's theory of legal statements is thus closely linked to his epistemology of law. The statements used by legal science, such as "in system S, in case C, sanction S ought to be applied" are both descriptive (insofar as they are truth-apt) and normative, since they indicate that something *ought* to be the case. This is due to Kelsen's strong notion of legal validity, defined as the norm's specific mode of existence: a non-valid norm simply does not exist. A norm is valid if and only if it is the case that what it prescribes ought to be. A legal statement does not describe a *Sein* (e.g., the fact that the legislature enacted such and such instrument) but a *Sollen*. Hence legal statements are *ought-statements*, albeit in a descriptive way.

This notion of descriptive *Sollen* has puzzled many readers of Kelsen's work (see notably Nino 1978; Bulygin 1982; Guastini 1998; Ross 2019, 18). For instance, Martin Golding surmised that the distinction between norms and normative statements could be made clearer by a reference to the use/mention distinction (Golding 1961). Kelsen's *Sollsätze* would be an instance of what RM Hare called "ought in inverted commas" (Hare 1952, 18). On this reading, legal statements (and normative statements in general) do not *use* normative operators, they merely mention them. According to this "oblique" interpretation (Vernengo 1986, 101) the legal statement "according to Law No X one ought

to φ" is equivalent to "Law No X means the same as 'one ought to φ'."

When he visited Kelsen at Berkeley, Hart submitted this interpretation to Kelsen's approval (Hart 1983, 292), but Kelsen refused to accept it. Legal statements, he insisted, do not mention words; they express *propositions* which describe what these words mean. Hart then proposed another reading of Kelsenian normative statements, according to which normative statements bear with norms the same relation than a translation vis-à-vis the original text (Hart 1983, 293). Suppose a German officer in a stalag gives the following order to American or English prisoners of war "*Stehen sie auf!*" This norm is then translated by a translator: "Stand up!" The translator is not the one giving the order; he is merely reproducing in another language what the officer ordered. This, according to Hart, eschews the use/mention solution, since it is plain that the translator uses the words "stand up" and does not merely mention them. Thus, the translator uses normative words in a descriptive way.

As Bulygin observed, this solution is not quite satisfactory (Bulygin 1982, 135), since the function of a translation is not to *describe* the *interpretandum,* unless we accept that – at least in this context – "stand up" has the same meaning as "the officer said 'stand up'," in which case we fall back onto the very use/mention distinction that Kelsen refused to accept.

Detached Statements

Joseph Raz's theory of "detached statements" aims both to solve this Kelsenian puzzle and to provide a self-standing theory of normative statements (Raz 1980, 234–238; Raz, "Kelsen's Theory of the Basic Norm" in Raz 2009, 122–145; Raz, "Legal Validity" in Raz 2009, 146–159; Raz, "The Purity of the Pure Theory" in Raz 2009, 293–312; Raz 1999, 170–177). Whether it is correct as an exegetical matter has been disputed (for doubts see, e.g., Paulson 2012; Vernengo 1986; Bayón 1991, 28; Vinx 2007, 13–14).

Raz takes from Hart the notion of normative statements as statements *from a point of view.* Normative statements are either *committed*, insofar as they presuppose the validity of the norm they refer to, or *detached,* insofar as they aim to provide reasons for action without endorsing or presupposing the validity of the norm. For instance, the statement directed at a vegetarian person "you ought not eat that dish! It has meat in it!" is not issued from the same point of view, and does not serve the same function, whether it is uttered by a vegetarian person, who presupposes the validity of the norm prohibiting the consumption of meat, or by a meat-eater, who doesn't. In the former case, the statement is committed. In the latter, it is detached. It bears noticing that detached statements are not mere descriptive statements of fact. They have normative valence, and they are to be used in the vegetarian's practical deliberation about what they ought to do. Such statements do not *presuppose* the validity of the norms they describe, but they adopt the *point of view* of someone who does.

According to Raz, the same goes for legal statements. Legal statements are typically statements made from the point of view of the "legal man," that is, the person who shows full commitment to the norm or to the rule of recognition which gives the norm its validity. The lawyer who advises his client to do this or that does not need to be fully committed to the validity of the norms he mentions, that is, to the notion that the client *ought* to follow such norms. However, the lawyer will adopt the point of view of someone who does presuppose the validity of those norms. Therefore, his advice aims to guide the client's behavior by giving him reasons for action. It is both normative, insofar as it aims to give normative reasons, and descriptive, insofar as it intends to be informative of what someone who is committed to this validity would claim what the client *ought to do* according to those norms.

Hence the Holmesian bad man (or the Kelsenian anarchist: see Kelsen 1967, 218; Raz 1999, 148) need not use only descriptive statements of fact. They may use detached statements, as Hart agreed when he somewhat reluctantly endorsed Raz's notion of detached statements (Hart 1982, 153; Hart 1983, 14). This theory of detached statements allows Raz to salvage the strong Kelsenian notion of normative validity as the objective binding force of ought-propositions.

If one adopts a weaker notion of validity, for instance that of membership within a given normative system (see Hart 2012, 100–110; Bulygin 2015, 171–173), the need for a separate category such as detached statements disappears: asserting that a legal norm belongs to a legal system does not need showing any kind of commitment to the notion that what the norm prescribes ought to be done. Raz's strong notion of normative validity equates stating that a norm is valid, or presupposing such validity, with stating or presupposing that what the norm prescribes *ought* to be done. Therefore, while committed statements can be described as a sort of internal statements, detached statements eschew the Hartian internal/external framework altogether (for a rebuttal, see Toh 2007).

Indeed, Raz's anti-reductionist strategy forces him to maintain the normative/descriptive ambiguity, which has elicited the puzzlement of many legal theorists (see Shapiro 2011, 415–416; Duarte d'Almeida 2011; Mullins 2018). Contrary to what Hart himself appears to have thought at some point (Hart 1983, 14; see also MacCormick 2008 p. 204), detached statements are not moderate external statements since they are to some extent normative and not merely descriptive; they do not only aim to describe the internal point of view, but to adopt it (without sharing it) in order to guide behavior (Postema 1987, 84). Nor are detached statements *conditional* statements since they share the syntactic properties of committed statements (Raz 1999, 175); they do not state that "if the norm is valid, then this or that ought to be done," rather they are statements made "on the assumption that" the norm is valid (for a conditional interpretation of detached statements see, however, Bulygin 1981; Duarte d'Almeida 2011; McBride 2017).

Internal Statements and Moral Commitment

The crux of Raz's theory of normative statements is that of *normative commitment*, since the point of viewed adopted, but not necessarily shared, by the utterer of a detached statement is the point of view of someone who considers the norm as valid, that is, as binding. According to Raz, normative commitment is a kind of *moral* acceptance of the norm. This is a hotly debated claim which goes at the heart of two important (and interrelated) jurisprudential issues, to which this entry cannot fully do justice: the normativity of law and legal positivism. However, this raises the question whether Razian committed statements can be seen as an instance of Hartian internal statements, and whether internal statements necessarily presuppose a kind of *moral* acceptance of the rules with regard to which they are uttered.

Can "This Is Valid, yet Morally Iniquitous, Law" Be an Internal Statement?

Hart claimed that deontic terms have different meanings in moral and in legal contexts (Hart 1982, 146–147; see Kramer 1999, 78). Therefore, whenever one uses such terms in a legal statement (be it internal or moderately detached), one refers to *sui generis* rights and obligations; one does not make a claim about the moral reasons that the norm aims to create. This is why in the Postscript to the *Concept of Law*, Hart maintained that the internal point of view does not necessarily entail an attitude of moral acceptance of the norm (Hart 2012, 257; see Hatzistavrou 2007). The reason why one accepts the norm and takes it as a guide for one's own actions need not be one of moral acceptance.

Hart expressed his puzzlement at the Kelsenian claim (Kelsen 1949, 374–376) that one cannot at the same time and without contradiction hold that norm N is both legally valid and morally invalid (Hart 1983, 302). Since, according to Hart, the reasons why someone accepts the rule need not be moral but may very well be the result of either tradition or sheer convention (see *infra*), there is no contradiction in holding both claims, be it from the moderate external point of view or even from the internal point of view. According to Kelsen, "one cannot serve two masters at the same time" (Kelsen 1967, 326): one cannot say at the same time "this is valid and invalid," or "(legally) one ought to φ" and "(morally) one ought not to φ." Either one adopts the point of view of legal science, and one treats the moral claim as a set

of facts or beliefs; or one adopts the point of view of the moralist, and one treats law as a mere set of coercive acts.

Raz's theory of committed and detached statements allows him to solve this Kelsenian puzzle. According to him, internal/committed statements are full-blooded moral statements. The law aims to impose moral obligations, rights, and duties, and deontic operators have exactly the same meaning in all contexts (Raz 2009, 36, 154). Whenever one accepts legal norms as valid (in the strong sense, see *supra*), that is, whenever one accepts that what legal norms prescribe ought to be done, one expresses a moral commitment to the law (for arguments to the same effect see also, MacCormick 1994, 284; Holton 1998). It does not entail that legal obligations *are* moral obligations. Detached statements allow the speaker to assert that a norm is valid, that is, that one ought to do what the norm prescribes, without sharing this kind of moral commitment. Therefore, in a statement such as "N is legally valid but morally invalid," one holds two legal statements at the same time: a detached statement about law and a committed statement about morality. As Raz puts it, the fact that "normative language when used to state the law does not always carry its full normative force . . . does not justify the view that terms like rights and duties are used with a different meaning in legal and moral context" (Raz 2009, 39).

Hart (2012, 203; see also 207–211, 257–258) and many subsequent authors maintain that the statement "N is legally valid but morally iniquitous" can be a non-contradictory internal statement, insofar as internal legal statements do not necessarily show moral commitment to the law (either to the norm itself or to the rule of recognition which gives it its validity), and that one can use "ought," "right," and other normative categories in a non-moral way (see, on Hart, Shapiro 2006). Matthew Kramer (1999) distinguishes between "prescriptions" and "imperatives," and disputes that law necessarily claims moral authority, and that those who accept law's authority necessarily do so for moral reasons. Kevin Toh argues (alongside Alan Gibbard) that moral statements are domain-specific, in that they are concerned with norms governing guilt and impartial anger (Toh 2011, 130–131) and may, but need not, overlap with equally domain-specific legal statements.

Weak and Strong Acceptance

It is undisputed that it is possible at the same time to utter an internal statement and to express some kind of moral acceptance of the norm. The crux of the dispute is whether it is necessarily so.

Raz offered an olive branch by proposing a distinction between weak and strong acceptance (Raz 2009, 155; Raz, "The Purity of Pure Theory" in Raz 2009). Weak acceptance is manifested when someone accepts the norm for their own reasons (because of their own preferences or self-interest); strong acceptance, on the contrary, means moral commitment. According to Raz, weak acceptance amounts to *insincere* commitment. The focal meaning of normative acceptance is sincere commitment (see McBride 2011, 228). It bears noticing that an insincere committed statement does not amount to a detached statement.

In his *Essays on Bentham* (Hart 1982, 265–266), Hart both accepted the distinction between weak and strong acceptance and rejected the charge of insincerity regarding the former. Indeed, if one denies that all committed statements presuppose moral acceptance, weak acceptance claims need not be described as insincere moral statements. As Hart argued, judges are not independent moral agents; they are part of an institutional framework whose functioning is guided by a "settled practice of adjudication according to which any judge of the system is required to apply in the decision of cases the laws identified by specific criteria or sources" (Hart 1982, 168). According to Hart, this institutional form acceptance need not entail a strong moral commitment. It rests on a *shared* institutional practice among officials vis-à-vis the rule of recognition (for a critical take on this move, see notably Toh 2007, 2011). The reasons for upholding this practice need not be purely prudential (pace McBride 2011). They must rest on the postulate that other participants share these reasons, since without this shared acceptance the practice would not exist in the first place. Therefore, Hart's

notion of weak acceptance is stronger than Raz's characterization of it as merely reasons for oneself. Although internal statements *may* presuppose only prudential reasons (Raz's weak acceptance) as well as moral reasons (Raz's strong acceptance), they need not do so. This is because these are additional reasons to the one primarily presupposed by an internal statement, which are non-moral normative reasons, derived from a shared institutional practice. Of course, as Michael S. Green pointed out, Hart's theory does not tell us why officials should justify their decisions by appealing to this institutional practice rather than to prudence or morality (Green 2017).

The Normative/Moral Equation and Legal Positivism

Raz's main tenet is that all internal or committed normative statements are moral claims, even when they are confined to the limited domain of law. This seems somewhat inconsistent with Raz's self-avowed legal positivism (Raz 2009). Indeed, legal positivism holds that a law's validity is independent from its moral merit (Gardner 2001). This seems to entail that not all normative claims are moral claims. Otherwise, one could not sincerely claim that legally one ought to φ without at the same time stating that one morally ought to do φ. This is precisely what Raz seems to think.

The easiest solution to the dilemma is, as we saw *supra*, to break the normative/moral equation, which is Hart maintained was the right strategy. However, there are ways to make the normative/moral equation consistent (at least *prima facie*) with the tenets of legal positivism. Let me briefly explore three different solutions.

The first solution is offered by Raz himself. According to Raz, law necessarily claims to have morally legitimate authority: its legal claims are therefore necessarily moral claims. Law also both enjoys de facto authority, which presupposes that a segment of the population believe that law is morally legitimate. However, an authority necessarily aims to pre-empt the balance of reasons by giving content-independent reasons for action. Therefore, whenever someone states "legally one ought to φ," they use "ought" in a moral sense – insofar as they make a committed statement – but they identify the existence and content of the legal norm which makes it obligatory to φ without any recourse to moral evaluation (Raz 1985, 2009, 27–33). Whether a norm is legally valid depends on the norm having been issued by an authority and not on the moral merit of the norm.

Another solution is provided by Richard Holton (1998). Holton agrees that normative operators (ought, right, etc.) have the same meaning in legal and moral contexts. However, Holton resists the conclusion that saying "legally one ought to φ" one *means* "morally one ought to φ": indeed, if the latter statement is false, then the former is necessarily false too, which seems inconsistent with the tenets of legal positivism. According to Holton, the sentence "legally you ought to φ" only pragmatically *implicates* that "morally you ought to φ," but like all implicatures, this particular one is cancellable. Therefore, an internal statement can be morally committed, without necessarily entailing that the norm thus accepted is morally meritorious.

A last example is provided by Scott Shapiro (2011, 184–188), who agrees with Raz that committed legal statements are moral claims. However, there are two different interpretations of legal statements. Under the *adjectival* interpretation, every statement such as "legally one ought to φ" means that morally one ought to φ. This entails that immoral laws are impossible, since the legal authority to issue the norm is always to be equated with a kind of moral authority. Under another, *perspectival*, interpretation, all one has to assert is that from the *legal point of view* (that is from the point of view of someone who makes committed statements about law) the legislature has the moral authority to issue norm N and one has a moral obligation to do what N prescribes. However, such statements do not *ascribe* moral worth to legal norms. Whereas the adjectival interpretation is incompatible with legal positivism, the perspectival interpretation is not. While Shapiro's theory of statements from a point view is quite close to Raz's, Shapiro denies that perspectival statements have normative valence, and that they are to be analyzed in terms of detached statements: they merely describe the legal point of view, without even pretending to share it.

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Legal System and Legal Order

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Introduction

"Legal system" and "legal order" are expressions that are often used synonymously. However, these terms express two distinct concepts in Carlos Alchourrón and Eugenio Bulygin's theory. Yet in their works, Alchourrón and Bulygin articulate these two concepts in an attempt to account for both the static and dynamic dimensions of the law. Their theory builds upon the contributions of Hans Kelsen, Herbert L. Hart, and Joseph Raz but goes well beyond them. Its contributions to understanding the static and dynamic aspects of the law, and their articulation are the salient virtue of their theory. This advancement can be mainly attributed to their use of formal logic and other tools characteristic of analytic philosophy in understanding problems posed by jurisprudence. Among the most relevant of these tools are the use of Ludwig Wittgenstein's truth tables, Alfred Tarski's conception of deductive systems, and Georg H. von Wright's deontic logic calculus.

Its conceptual precision and clarity, as well as its analytic sophistication make Alchourrón and Bulygin's theory a paradigm in jurisprudence for countries belonging to the civil law tradition. However, their theory of legal systems and legal orders is not without its flaws. In identifying and overcoming such difficulties, analytic jurisprudence would no doubt move toward a new paradigm firmly anchored in Alchourrón and Bulygin's contributions.

Section "Alchourrón and Bulygin's Theory of Legal Systems and Legal Orders' Significant Contributions" will focus on Alchourrón and Bulygin's most significant contributions with respect to other theories. Finally, section "Important Flaws in Alchourrón and Bulygin's Theory of Legal Orders and Legal Systems" will consider some major flaws in their theory.

Alchourrón and Bulygin's Theory of Legal Systems and Legal Orders' Significant Contributions

(a) The definition of the "legal order"

Alchourrón and Bulygin's first significant contribution is employing the term *legal order* "to refer not to a set of norms but instead to a *sequence* of sets of norms" (Alchourrón and Bulygin, 1976: 127). In this way, "[t]he unity of such a sequence, and so the identity of the legal order [. . .] would then be determined by the identity of the criteria used to identify the normative sets that belong to the sequence" (ibid). The criterion used to identify the normative sets are the acts by which legal norms are created ("acts of promulgation") and eliminated ("acts of derogation") according to the norms of empowerment (ibid) or the rules of change in the initial set of norms at the beginning of the sequence. This criterion is labeled as *the legality criterion* by Bulygin in later works (Bulygin 1991: 261). Every act of promulgation and derogation must satisfy the legality criterion for the identity of the legal order to remain the same. An example where the legality criterion is not satisfied and is thus violated regards cases of "replacement by different criteria (for example, as a consequence of a revolution or a declaration of independence)" (Alchourrón and Bulygin 1976: 127). These violations of the legality criterion represent *ruptures* in the legal order, i.e., changes that do not satisfy the legality criterion occurring at a constitutional level.

As a component of the definition of "legal order", the term "legal system" means a *set* of norms. Because the idea of sets is a static one, the concept of legal system accounts for law's static dimension, that is, the content of the law at a given place and time. By contrast, in attempt to explain law's dynamic dimension, i.e., the idea that the content of the law changes across space and time with each act

of promulgation and derogation that satisfies the legality criterion, the term "legal order" is defined as a *sequence* (as opposed to "set") of legal systems. The relevant point here is that these changes in the legal system do not alter the identity of the legal order if the legality criterion is satisfied. However, the identity of legal systems that belong to a legal order is altered with every change (e.g., acts of promulgation or derogation), for the identity of sets is determined by the identity of its elements. Therefore, adding or eliminating any element of the set will alter the set's identity, thus giving rise to a new legal system. Whenever the legality criterion is violated at the level of constitutional lawmaking, there will be a rupture in the legal order.

This way of articulating law's static and dynamic dimensions is a significant improvement with respect to Hans Kelsen's. For one, Kelsen does not clearly distinguish between *legal system* (law's static dimension) and *legal order* (law's dynamic dimension). Instead, he uses these terms interchangeably and as a result fails to provide a satisfactory articulation of the law's dual dimension. He regards static and dynamic as two ways of approaching the study of the law from the perspective of general jurisprudence. He claims that the law is essentially a dynamic system. This same confusion is present in Herbert L.A. Hart's concept of the legal system (Hart 1961) and even in Joseph Raz's more sophisticated theory of legal systems (Raz 1970: 34–35), although the latter recognizes that there is an ambiguity in using the expression "legal system" (Raz 1971: 798). Alchourrón and Bulygin argue that the ambiguity in the expression "legal system" leads Raz to formulate a distinction between momentary and non-momentary legal systems. This distinction is also ambiguous or perhaps even contradictory in Bulygin's view: "[i]t is not clear whether, for Raz, a legal order (a legal system, in his terminology) is a class of momentary legal systems or a class of norms, that is, whether the relation between a momentary legal system and a legal order is that of membership or of inclusion. Thus, he speaks of a momentary legal system as being a subclass of a legal system, but on the same page, he also says that a momentary legal system belongs to a legal system [. . .]. This is, at any rate, a terminological inconsistency" (Bulygin 2015: 172–173, footnote 7).

(b) Legal systems as sets of all logical consequences of a given set of norms

There is a second significant contribution of Alchourrón and Bulygin's theory: the idea that legal systems are comprised of the sentences that make up their axiomatic bases, and the logical consequences of those sentences. Here, they follow Alfred Tarski's notion of axiomatic deductive systems: "a general concept of normative system as a set of sentences that has (some) normative consequences" (Alchourrón and Bulygin 1971: 4). Alchourrón and Bulygin's concept of legal systems is based on the concept of deductive consequence (ibid: 48).

The definition of "legal system" as a set of sentences (among which there is a norm) based on the idea of deductive consequences has significant implications for Alchourrón and Bulygin's concept of the legal order, mainly on acts of promulgation and derogation of norms. More specifically, any change in a system's axiomatic base will create a new system that replaces the former.

To illustrate this idea, consider an initial set α of norms containing the formulated norm, "p is obligatory." In this example, α will not only include "p is obligatory" but also all other norms that can be derived from it. In other words, a normative system is comprised of a set of sentences and all the logical consequences of such sentences. In the previous example, the norm "p is permitted" is a logical consequence of "p is obligatory." If a new norm, n, "q is obligatory," were promulgated, the axiomatic base changes, thus obtaining a new normative system. This new system β is a result of "the combination of the following three sets: (a) the consequences of α, (b) the consequences of {n}, and (c) the consequences of {α + n}, which are derivable

neither from α alone nor from {n} alone" (Bulygin 1976: 128). In this example, the new normative system β has five norms: two formulated ("p is obligatory," and "q is obligatory") and three derived norms: "p is permitted," "q is permitted," and "p and q are permitted."

"The case of derogation is more complex than that of promulgation [. . .] First, derogation of a norm-formulation does not necessarily amount to the elimination of any of the system's norms. Second, we will have to distinguish between derogations of formulated norms and derogations of derived norms" (ibid: 128). There are therefore three possibilities: (1) the elimination of norm-formulations (i.e., redundant norms) leaves the system unchanged; (2) the elimination of formulated norms (i.e., non-redundant norms) "derogate [s] and possibly replace[s] [it] with a different norm, but the scope of derogation is not restricted to the explicitly derogated norm because all the norms that derive from it and all the norms for the derivation of which the explicitly derogated norm is necessary are derogated as well" (ibid: 129); (3) the elimination of derived norms gives rise to two cases: "[. . .] in one case, the derogation of a derived norm leads to a determinate system, and, in the other, what results is not one determinate system, but a number of alternative systems" (ibid: 128–130).

(c) The definition of legal norm and normative matrices

The third significant contribution of Alchourrón and Bulygin's theory is their definition of legal norms as "sentences (i.e., linguistic expressions) that correlate generic cases with normative solutions." A generic case is every property (or circumstance) determining when a given conduct is prohibited, permitted, or obligatory. "Every property of *UP* [Universe of Properties] and every truth-functional compound of such properties (provided that it is not tautological or contradictory) will be said to define the (possible) *case*" (Alchourrón and Bulygin 1971: 12). When the defining property is a conjunction containing every property of a universe of properties or its negation (but not both), the case so defined is an *elementary case*. Cases that are not elementary are *complex cases* (ibid). *A normative solution* is every generic action and every truth-functional compound of actions (*deontic content*) preceded by a deontic character (PH (prohibited), P (permitted), or O (obligatory)). When the solution is such that it determines *all* the deontic contents, it is called a *maximal solution*. Any disjunction of deontic constituents formed by taking one constituent from every deontic disjunctive pair is a *minimal solution* (Alchourrón and Bulygin 1971: 14, 40). Alchourrón and Bulygin use these definitions to introduce the idea of normative matrices for legal systems. Matrices work similarly to truth tables, with a slight difference. Instead of employing truth values, normative matrices record the presence or absence of the property or properties defining generic cases. More specifically, the set of all elementary cases (corresponding to a UP) will be called a universe of cases (UC). The number of all possible elementary cases may be easily determined. Let n be the number of properties of the *UP* and then 2^n will be the number of the elementary cases, i.e., of the elements of the corresponding *UC*. In the formula 2^n, 2 represents the presence or absence of a given relevant property; and n represents the number of relevant properties. The notion of *UC* is, together with the number of elementary cases, *relative* to a *UP* (Alchourrón and Bulygin 1971: 12).

Normative matrices are helpful in identifying the relevant properties that define generic cases and normative solutions correlated with each generic case. In this context, *legal gaps* are defined as generic cases that are not correlated with any solution. Furthermore, *legal inconsistencies* occur whenever two incompatible normative solutions are correlated with the same generic case in a normative matrix. Lastly, when a generic case correlated with a normative solution is contemplated more than once, there is a *legal redundancy*.

Legal gaps, inconsistencies, and redundancies are defects of legal systems. They represent the opposite qualities of an ideally rational legal system, respectively: normative completeness, normative consistency, and normative independence. Only legal gaps and legal inconsistencies produce normative indeterminacies. On the other hand, legal redundancies affect the system's presentation but do not produce a normative indeterminacy. According to Alchourrón and Bulygin, legal systems can be and, in fact, often are incoherent (because they contain inconsistences) and incomplete (because they contain legal gaps). This conception is in direct contradiction with Kelsen's claim that legal systems are necessarily coherent and complete. Put differently, completeness, consistency, and independence are contingent, not necessary traits of legal systems. Similarly, normative matrices are tools that reveal if a particular legal system (or a part of it determined by the UD) possesses any of the three defects. Notice that a normative matrix can be construed by legal materials obtained from different sources, e.g., statutes, precedents, etc.

(d) Logic of norms and logic of normative propositions

A fourth significant contribution of Alchourrón and Bulygin's theory is the distinction between norms and normative propositions, which, at its core, implies a distinction between a logic of norms and a logic of normative propositions. On the one hand, norms are prescriptive sentences, i.e., they impose commands, permissions, or prohibitions. On the other hand, descriptive sentences express normative propositions that convey information about norms and their content (Alchourrón and Bulygin 1971: 121).

The calculus for the logic of normative propositions as distinct from that of a logic of norms was first introduced by Carlos Alchourrón in "Logic of Norms and Logic of Normative Propositions" (Alchourrón 1969). Every deontic sentence (i.e., a sentence that contains a deontic operator) is subject to two different interpretations and hence to two different logics: a logic of norms (when a sentence is interpreted prescriptively, i.e., as a prescription) and a logic of normative propositions (when a sentence is interpreted descriptively, i.e., as a sentence that is either true or false). However, the difference between these two interpretations is partially missed because both logics are isomorphic under certain conditions (e.g., when a normative system is coherent and complete). Difficulties in interpreting the various systems of deontic logic often arise from a failure to distinguish between these two possible interpretations of deontic sentences. A logic of norms aims to reconstruct the rational activity of issuing norms or the activity of a "rational legislator." On the contrary, a logic of normative propositions seeks to reconstruct the logical consequences that follow from a previously legislated set of norms.

How negations operate is one of the main differences between both logics. In prescriptive discourse, negations seem to operate in a form analogous to negations in ordinary language. However, normative propositions are meta-linguistic statements that express that a particular norm belongs to a given normative system. The meta-linguistic nature of normative propositions gives rise to two interpretations of their negation. One interpretation is that the proposition "in a normative system α, the act *p* is forbidden" means that in system α, there is no norm belonging to that system that forbids the realization of act p. According to this first interpretation, a norm's negation is relative to its *belonging* to system α (*external negation*). The second interpretation is that in system α there is, in fact, a norm that establishes that p is not prohibited. According to this second interpretation, a norm's negation is relative to the *content of the norm* (*internal negation*). Thus, in the logic of normative propositions, there are two types of negations: external and internal.

The existence of two different negations gives rise to another difference between a logic of norms and a logic of normative propositions. Within a logic of norms, to say that

an act is not forbidden is equivalent to saying that the act is permitted. However, the same statement is ambiguous if treated within the context of the logic of normative propositions. For example, it could mean that the act has not been subject of any regulation (external negation), or it could mean that a normative authority has issued a norm permitting the act (internal negation). "Permission" in this context is ambiguous and thus gives rise to two concepts: negative or implicit permission and positive or explicit permission; there is no room for this distinction in the logic of norms. As a result, there are three ways in which deontic sentences expressing permissions can be interpreted: in the prescriptive sense (logic of norms) and an implicit and explicit sense (logic of normative propositions).

A final difference between these two systems of logic is that a logic of normative propositions is relative to a particular normative system. In contrast, a logic of norms is not relative to *any* normative system.

The following section will address some flaws in Alchourrón and Bulygin's theory of legal orders and legal systems.

Important Flaws in Alchourrón and Bulygin's Theory of Legal Orders and Legal Systems

The identified flaws relate to some of the significant contributions mentioned in the previous section.

(a) On the definition of legal orders as sequences of legal systems

Despite the significant contribution of Alchourrón and Bulygin's articulation of the law's static and dynamic dimensions, it poses several difficulties. Hugo Zuleta argues that the concept of legal order does not preserve its identity from one legal system to another – presumptively one of the most significant advantages of Alchourrón and Bulygin's theory (Zuleta 2013a, b, 2015). One of Zuleta's main arguments focuses on how we conceive the idea of a sequence of legal systems. One possibility is to conceive the identity of legal orders extensionally. Then, the identity of an extensional sequence is the identity of the elements of the set (i.e., of each legal system). With each legal system, however, the identity of the set would change, and thus the identity of the sequence (i.e., of the legal order) would not be the same with each modification. Another possibility is to conceive the identity of the sequence of legal systems intensionally (as opposed to extensionally). Then, the legality criterion (as suggested by Bulygin) would provide the identity criterion for the legal order.

In consequence, legal orders should be regarded as open sets. According to Bulygin, a legal order would be a sequence of sets open to the future. An open set has members with defined properties; an entity is a set member if it has the membership property. However, open sets are open because it is impossible to identify (or individualize) their members (Bulygin 2013). According to Zuleta, Bulygin's proposal is highly problematic, for on the one hand, if an open set exists (that is, sets that maintain their identity despite the change of their members), the introduction of the concept of "sequence" is unwarranted. And, on the other hand, an open set could have been applied to legal systems to explain the dynamics of law, leaving aside that of sequence (Zuleta 2015: 220).

An additional difficulty can be expressed as follows. For a new legal system to be created within the same legal order, modifications (e.g., acts of promulgation and derogation) must satisfy the legality criterion. Nonetheless, there are different ways of reconstructing the legality criterion. Each reconstruction will depend on the weight placed on:

1. Norm-promulgating and norm-derogating authorities.
2. The established procedure for promulgating or derogating norms.

3. The content of derogated or promulgated norms.

Because there are different ways of reconstructing the legality criterion, there are also different ways of reconstructing the concept of legal order. Therefore, every reconstruction of the legality criterion will yield a distinctive way of identifying a norm as belonging to a given legal system. Discussions on the best way to reconstruct the legality criterion and thus reconstruct the concept of the legal order have identified two possible alternatives: *debugged conceptions of legal orders* and a *non-debugged conception of legal orders* (Orunesu et al. 2000).

(b) On logical closure as a necessary property of legal systems

A second difficulty arises from the requirement that legal systems be closed under the operation of logical consequence. The requirement of logical closure seems to be only one way, among many others, of reconstructing a legal system and is therefore not an essential quality of the static conception of the law. As this requirement is only a methodological choice, it has been argued that it is best not to include the logical consequences of the formulated norms as a defining characteristic of the concept of legal system. However, the logical consequences of formulated norms can still be considered in the norm-creation and norm-application tasks (Rodríguez 2003, 2005).

Additionally, it has been argued that such requirement entails several assumptions about a theory of interpretation, legal authority, and legal sources. However, these assumptions made in defining the concept of a legal system have been questioned by rival theories, even by legal positivist theories (Raz 1994).

(c) On the classification of legal sentences and the definition of the legal norm

Alchourrón and Bulygin's classification of legal sentences, their definition of legal norms (sentences correlating generic cases with normative solutions), and the construction of legal matrices, are significant contributions to the theory of legal systems. In this respect, Alchourrón and Bulygin's contribution does not seem to allow for any reasonable critique. Nonetheless, the good standing of these analytic tools relies on their use by legal practitioners, rather than solely remaining theoretical components to analyze legal orders. Legal matrices must be seen as a powerful tool for legal practitioners and scholars in identifying and analyzing how relevant norms govern particular cases. An advantage of legal matrices is that they allow for any selection whatsoever of available legal material. Thus, norms may be selected and grouped together in the most various ways, whether in analyzing a derogated civil code, or part of a criminal code, or even norms that arise from precedent. This selection will therefore depend on the practitioner's or scholar's needs and purposes. In other words, to use legal matrices, one need not consider the entirety of norms (or legal sentences more generally) that makeup all the systems that are part of the same legal order. Nor does one need to consider the entirety of norms that make up the legal system at the time of the case. In fact, it is unlikely that the entirety of norms of a statute or act be considered to construct a legal matrix, but rather a carefully selected group of norms that are relevant in a particular case.

On the contrary, the notion of the legal system as part of the legal order necessarily includes the entire universe of norms that have been promulgated and that have not been derogated up to a certain point in time. An additional reason to preserve the use of legal systems relative to practical questions of practitioners is that they sometimes include norms that do not belong to any system of their legal order. In other words, some legal cases involve the use of norms applicable to the case (e.g., foreign, international law, or transnational law) because another norm that belongs to the legal order mandates that they be applicable, a situation that Bulygin has reconstructed under the concept of *applicability* (Bulygin 1982; Sucar and Cerdio 2022).

(d) On the distinction between the logic of norms and logic of normative propositions

Lastly, the distinction between a logic of norms and a logic of normative propositions is also an unquestionable leap forward for understanding the nature of law. Nevertheless, let us recall that Alchourrón and Bulygin hold that norms do not have a truth value. Hence, they should provide an escape from Jörgensen's dilemma, as should any proposal for grounding a logic of norms – a difficulty that is not present in the logic of normative propositions because propositions have truth values. Carlos Alchourrón has provided an answer to the grounding of a logic of norms based on an abstract conception of logical consequence (Alchourrón and Martino 1990).

Conclusion

Alchourrón and Bulygin's theory of legal order has the credentials to be deemed a proposal that surpasses the explanatory potency of others, including Kelsen's, Hart's, and Raz's conceptions. However, how they articulate the law's static and dynamic dimensions – as has been explained – is not without its flaws. Nevertheless, Alchourrón and Bulygin's efforts are an unparalleled example of theoretical precision and clarity.

In summary, the conception of legal norms and of normative matrices, as well as the distinction between logic of norms and logic of normative propositions, are among Alchourrón's and Bulygin's most important contributions to analytic jurisprudence.

Cross-References

- ▶ Alchourron, Carlos Eduardo, and Eugenio Bulygin: On Norms
- ▶ Alchourron, Carlos Eduardo, and Eugenio Bulygin: Types of Legal Statement
- ▶ Legal Systems
- ▶ Logic in Law: The Positivist School of Buenos Aires

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Legal Systems

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Introduction

Many legal philosophers have maintained that law is not to be regarded as a haphazard collection of norms (Raz 1974: 95). Indeed, legal norms are grouped in complex systems, i.e., organized sets with a certain internal structure. It is rather paradoxical that Kelsen, who always defended the idea that the difference between law and other normative systems, like morality, was a distinctive characteristic of each of its norms – their coercive nature – has been one of the leading scholars to develop the notion of a legal system (Kelsen 1945: 110ss.; Kelsen 1960: ch. 5). Kelsen's ideas concerning the relations of derivation between legal norms, and regarding the formal aspects of legal systems, like their hierarchical structure, are among the fundamental contributions to the theory of legal systems. Still, the fact that Kelsen's thoughts have been decisive for the development of the theory of legal systems does not mean that they are free from difficulties and shortcomings. One of the most controversial aspects of Kelsen's theory has been the aforementioned aspiration to reduce the structure of all legal norms to a single common pattern: the imputation of coercive sanctions to certain acts.

Ever since Hart's conclusive criticism directed toward any such reductionist view (Hart 1961: ch. 3), it is a commonplace in contemporary legal theory to accept the idea that every legal system is composed of many different kinds of norms, with distinct functions and structures. Thus, the terms of Kelsen's equation should be reversed: given that there is no common feature to all legal norms, a proper characterization of law should focus not on isolated norms, but on the distinctive peculiarities of a legal system as a whole. This idea, implicit in Hart's work, was developed by Joseph Raz, who also proposes distinguishing the problem of identity and the problem of structure of legal systems, as well as two different approaches for their analysis: the static dimension, having to do with momentary legal systems, and the dynamic dimension, bearing on non-momentary legal systems (Raz 1970).

The Structure of Legal Systems: Legality and Deducibility

A system or relational structure can be defined as a set together with one or more relations that have that set as its field: $\langle A, R_1,...R_n\rangle$, where each R_i is a relation whose field is A (Pollock 1990: 35). Thus, an interpretation of the law as a system of norms requires selecting a certain relation or relations among its components. However, the issue in legal theory of which are the relevant relations that give such systematic structure to the law remains controversial (Ratti 2008). Two major candidates have been explored: deductive relations and genetic relations of the regular creation of norms. Each of these relations may be taken as the ground for two different criteria of membership of norms in legal systems: (a) *deducibility* and (b) *legality*. According to the criterion of deducibility, a certain norm N belongs to a legal system S if and only if N belongs to the logical consequences of S, whereas, according to the criterion of legality, a certain norm N belongs to a legal system S if and only if N has been created in accordance with another norm N_1, where N_1 is

a power-conferring norm that is also a member of S. That N has been created by *x* in accordance with N_1 depends at least on the joint satisfaction of two conditions: first, that N_1 empowers *x* to create N and, second, that *x* has indeed created N (of course, the validity of customary norms would require the introduction of qualifications to this formulation of the criterion of legality).

At first sight, four different analytical models of membership in a legal system may be offered on the basis of these two criteria (Caracciolo 1988: 59–60):

M_1:$(N \in S)$ iff $(N \in_D S)$
M_2:$(N \in S)$ iff $(N \in_L S)$
M_3:$(N \in S)$ iff $(N \in_D S) \wedge (N \in_L S)$
M_4:$(N \in S)$ iff $(N \in_D S) \vee (N \in_L S)$

(where $\in_D$ means membership by virtue of the criterion of deducibility and $\in_L$ means membership by virtue of the criterion of legality).

According to M_1, all the norms belonging to a legal system are those that meet the criterion of deducibility; according to M_2, all the norms belonging to a legal system are those that meet the criterion of legality; according to M_3 all the norms belonging to a legal system are those that jointly meet the criteria of legality and deducibility; and according to M_4 all the norms belonging to a legal system are those that meet either the criterion of legality or the criterion of deducibility.

M_1 and M_2 seem to be inadequate as a proper reconstruction of the criteria of membership of norms to a legal system, for both overlook at least one relevant relation between norms. Moreover, M_3 also appears inadequate, because it imposes an excessively strong requirement that would only be appropriate for certain specific classes of legal norms (for instance, judicial decisions). Consequently, M_4 appears to be preferable to the other three models as a thorough reconstruction of the criteria of membership in a legal system (Caracciolo 1988: 66).

However, things are not so simple. First, both legality and deducibility justify the membership of norm N in a legal system by virtue of a certain relation existing between N and other norms of the system. Therefore, they both presuppose the previous existence of at least one norm in the system, and, for this reason, neither M_4 nor any of the other three models can be accepted as an adequate reconstruction of the criteria of membership of *every* norm in a legal system. Hence, if systematic relations among legal norms are not circular, in every legal system, there must be at least one *independent* or *non-derived* legal norm, i.e., a norm whose membership does not depend on the satisfaction of any relations with other norms of the system. Some discussions in legal theory, like certain pages of Kelsen's devoted to justifying the idea of the *Grundnorm* or Shapiro's postulation of the puzzle about the possibility of law, seem to stem from having missed this point (Kelsen 1960: 193–208; Shapiro 2011: 35–40). Of course, this does not mean that M_4 cannot be read as a model regarding the membership to a certain subset of legal norms: the subset of *dependent* norms, taking for granted that in every legal system, dependent and independent norms coexist.

Second, and more important, in so far as deducibility is based on the relation of logical consequence, it can only be a criterion of membership of norms in a set. Now, by virtue of the extensionality principle, the identity of a set depends solely on the identity of its members. Indeed, sets are static entities: if we eliminate an element *x* that belongs to a given set S_1, the result of such an operation will be a new set S_2. By contrast, legality is presented as a way of taking into account the dynamic nature of law, i.e., the idea that the law – i.e., a certain legal system – may change with respect to its content without losing its identity.

Hence, if legal systems are regarded as sets of norms – a static notion – deducibility may be taken as a criterion of membership in such sets, but not legality. On the contrary, if legal systems are conceived of as dynamic systems – what, in turn, requires a more elaborated reconstruction in terms of sequences of sets of norms – then legality (but not deducibility) may be taken as a criterion of membership in such sequences. That being the case, the two criteria we have considered cannot determine the membership of the same kind of elements in a unique entity: deducibility may

determine the membership of norms in a static set; legality, in turn, can only determine the membership of sets of norms in a dynamic sequence (for an exhaustive discussion of the static and dynamic notions of legal systems, see Gianformaggio 1991; for an alternative analysis of the criteria of membership in static and dynamic systems, see Harris 1979).

Static Legal Systems

In many cases, the term "legal system" is used to refer to the entire set of all the norms produced by the accumulation and hierarchical ordering of the various sources of normative production that constitute a system of national law (macrosystem). Sometimes, however, the expression is used to refer to a restricted set of rules (microsystem) integrated by certain elements grouped with a concrete purpose by an external agent (legal scholar, judge, lawyer).

In this latter sense, the basic purpose of the systematic reconstruction of the law is to identify the logical consequences of certain norms with respect to the solution of a legal problem in a specific context. This is the kind of operation performed by legal theorists or adjudicative organs when they derive normative solutions for hypothetical or real cases from the set of valid or applicable legal norms (Alchourrón and Bulygin 1971; Lindahl and Odelstad 2013). The notion of a legal system which is presupposed in the reconstruction of this process is static, and the relation among norms defining the system is that of ~~a~~ logical consequence.

The relevant set of norms regarding a certain case or legal problem, together with their logical consequences, can be reconstructed as a microsystem. But these microsystems can be made of norms in force at different times, or even by norms belonging to other municipal laws, that were never members of the system where the case must be solved (like in private international law cases). In this sense, Raz has argued that legal systems are *open systems* since one of their main functions is to confer mandatory force (applicability) on rules that do not belong to them (Raz 1990: 152–154; Raz 2004: 1–17). Consequently, the microsystem of the relevant legal norms regarding a certain case is not necessarily a proper subset of the entire set of valid legal norms in force at a certain time, not even a selection of the different normative systems that integrate the dynamic sequence of norms valid at different times in a certain jurisdiction.

This static notion of a legal system has been associated by many theorists with the unjustified assumption of two dogmas: the dogma of the necessary *completeness* of legal systems, i.e., the impossibility of legal gaps (Kelsen 1960: 131–132; Raz 1990: 170), and the dogma of the necessary *consistency* of legal systems, i.e., the impossibility of genuine normative conflicts. Unfortunately, the philosophical discussion regarding those two problems has been obscured by a lack of conceptual clarity. Let us elaborate these points in greater detail.

The Dogma of Completeness

The most usual arguments offered to justify the dogma of the necessary completeness of all static legal systems are, on the one hand, the idea of an empty legal space (*rechtsleerer Raum*) and, on the other hand, the existence of a general exclusive (or "negative") norm, also known as "principle of prohibition." The first of these arguments holds that there cannot be legal gaps, for everything that is not normatively qualified by the law is irrelevant from the legal point of view, and lies within an "empty space" not reached by the law (Bobbio 1960: 248–249; Guastini 2004: 228, n. 2). The second argument claims that, with respect to every legal system, everything that is not expressly forbidden is implicitly permitted. According to the first argument, any state of affairs that is not legally qualified is legally irrelevant, and consequently there would be a de facto freedom to perform it, while according to the second, any state of affairs which is not legally qualified is legally indifferent, and thus there would be a de jure freedom to perform it (Conte 1962: 89).

Both arguments have been strongly criticized. In relation to the first one, Bobbio has contended that speaking of an empty legal space is

tantamount to (erroneously) identifying the *legal* with the *obligatory*. But this identification would only be possible if permission were eliminated from the realm of deontic modalities. According to this point of view, permitted acts would be legally irrelevant, but in that case the law would have no gaps by definition (Bobbio 1993: 249). Conte has analogously emphasized that if this allegedly empty legal space lacks any deontic status, this idea cannot be used as an argument to support the impossibility of legal gaps, since legal gaps are *defined* as situations that lack any deontic status. Therefore, "empty legal space" would be just another name for legal gaps (1962: 90).

Concerning the second argument, the most powerful objection against the necessary closure of all legal systems due to the principle "everything that is not forbidden is permitted" was propounded by Alchourrón and Bulygin (1971: ch. 7). Based on the distinction between norms and norm-propositions (i.e., descriptive propositions about the existence of norms), they showed that this argument is saddled by an ambiguity in the expression "permitted." When appearing in norm-propositions, "permitted" may be alternatively read as the mere absence of prohibition (negative permission) or as an explicit authorization granted by a norm (positive permission). In the former case, the principle "everything that is not forbidden is permitted" is analytically true but does not exclude the possibility of legal gaps; in the latter case, it excludes the possibility of legal gaps but is not necessarily true regarding every legal system.

The Dogma of Consistency

The arguments more commonly used to justify the dogma of the necessary consistency of legal systems are the following three. First, a normative authority, as a "rational legislator," cannot create inconsistent systems. Second, though normative authorities may in fact produce prima facie contradictory norms, it would always be possible by means of interpretation to bring about the consistency of the system. Third, legal systems (empirically or logically) always provide the criteria for resolving any possible inconsistency (Raz 1971: 91–93).

The three arguments outlined appear to be undermined by some shortcomings. Concerning the first, it is unlikely that the creation of norms, which is normally the product of collective bodies and oriented to attend variable demands, involves by necessity a rational project, free from normative contradictions. The ideal of a "rational legislator" works as a regulative ideal (of legal interpretation), and not as a reconstructive ideal (of the legal order). The law should be, but not necessarily is, the product of a rational normative authority. Purporting to derive its actual rationality from a normative exigency of rationality is a well-known fallacy.

The second argument is equally unconvincing because, on the one hand, interpretation may not only be used to solve normative conflicts but also to create them and, on the other hand, nothing prevents the possibility of a legal conflict whose suppression can only be achieved through an interpretation that appears entirely inadmissible to the legal community (Ziembinski 1969: 114).

Regarding the third argument, even though different criteria are available in legal scholarship to solve possible conflicts between legal norms, such as *lex superior*, *lex posterior*, or *lex specialis* (Ross 1958; Alchourrón and Makinson 1981; Guastini 1997; Ferrer Beltrán and Rodríguez 2011), they are insufficient to justify the thesis of the necessary consistency of all legal systems. On the one hand, the joint use of such criteria does not guarantee that a complete ordering of all possible conflicting norms will be obtained and indeed it is even possible that, with respect to the same conflict, one can use different criteria, allowing one to reach incompatible solutions or produce different legal effects (Guastini 2011: 116–119). On the other hand, the use of such ordering criteria, far from demonstrating that all legal systems are necessarily consistent, indeed presupposes not only that such conflicts do exist but that they are perceived by legal scholars as intolerable.

Nowadays it is generally recognized that the rational ideals of completeness and consistency are only contingently satisfied by legal systems and that it is usual to find in them both inconsistencies (normative contradictions) and gaps. Interestingly, Royakkers (1998: 167) points out that

the notion of completeness only makes sense with respect to consistent normative systems, since in the case of an inconsistent system, the question of completeness would lose its meaning since anything would be deductible. However, this is true only of systems composed exclusively by categorical norms. Regarding systems containing conditional norms, both properties are independent (Alchourrón and Bulygin 1971: ch. 1).

Dynamic Legal Systems

Though many theorists – Kelsen (1960: 203–204) among them – have differentiated a static from a dynamic kind of legal systems, it was Raz (1970: 34) who explicitly suggested distinguishing between what he called "momentary systems" and "non-momentary systems" or simply "legal systems." The former concept refers to all those norms that are valid at a particular time; the latter is a broader concept that refers to something like the legal history of a particular community.

Nonetheless, Raz' reconstruction of non-momentary legal systems is equivocal (Alchourrón and Bulygin 1976; Bulygin 2015: ch. 7). On the one hand, Raz (1970: 35) claims that momentary legal systems are *subclasses* of (non-momentary) legal systems. On the other hand, Raz (ibid.) also says that momentary systems *belong* to (non-momentary) legal systems (Moreso and Navarro 1993: 40–45; Ferrer Beltrán and Rodríguez 2011: 87–96). According to this latter and more adequate interpretation, momentary legal systems are *members* of a certain non-momentary system; the dynamic unit is not a set of norms, but an ordered set of systems of norms.

Alchourrón and Bulygin further elaborated the analysis of this latter interpretation of the distinction, using the expressions "legal system" for the static notion and "legal order" for the dynamic notion (Alchourrón and Bulygin 1976, 1979; Bulygin 2015: ch. 7). On this view, the dynamic system is a *sequence* of all the static legal systems that result from each valid normative act of promulgation, amendment, or derogation. Legal norms belong not to the dynamic sequence but to the different sets that belong to the sequence, and the legality of the normative acts of promulgation, amendment, or derogation brings about the substitution of one set with another in the same sequence (Moreso and Navarro 1993: 42). The identity of the dynamic system depends on the identity of the criteria of membership of static systems in the sequence. Only when such criteria are replaced (for instance, as a consequence of a revolution) does the dynamic system lose its identity and is substituted by another system (Alchourrón and Bulygin 1976; Bulygin 2015: ch. 7).

Promulgation and Derogation of Legal Norms

The distinction between static and dynamic legal systems makes it possible to offer a rigorous analysis of the consequences generated by the acts of promulgation and derogation of legal norms: an invaluable contribution for an adequate development of legislative drafting.

It is of particular interest to note, in the first place, that the valid promulgation of a legal norm may lead to unforeseen consequences. If α is the set of valid norms at time t, and through a valid normative act at time $t + 1$ the set of norms β is promulgated, this act will produce the replacement of α by a new momentary system in the dynamic sequence that will be an *expansion* of α. But from that system, it will be possible to derive not only all the logical consequences of α plus all the logical consequences of β ($\mathrm{Cn}(\alpha) + \mathrm{Cn}(\beta)$), but all the logical consequences of the previous set α, all the logical consequences of the newly promulgated set β, and all the logical consequences that follow from the union of α with β. Put briefly, ($\mathrm{Cn}(\alpha + \beta)$) may be larger than ($\mathrm{Cn}(\alpha) + \mathrm{Cn}(\beta)$), as shown in relevant literature (Alchourrón and Bulygin 1976; Bulygin 2015: ch. 7; Alchourrón 1982).

Moreover, the derogation of a legal norm or set of norms may produce indeterminacies regarding the new momentary system in the dynamic sequence. Acts of derogation ordinarily affect norms that have been explicitly promulgated, in which case the result of this derogation consists in replacing the original momentary system with another system not containing the derogated norm or set of norms, i.e., a *contraction* of the

original set. However, the goal of an act of derogation may well be to prevent a certain norm from being derivable from the legal system. When such a norm is a consequence of the conjunction of a set of explicitly promulgated norms (rather than of only one norm), the result of this act of derogation will not be a new unique momentary system, but a family of alternative momentary systems. The reason for this is simple. If N is a logical consequence of the conjunction of at least two explicitly promulgated norms N_1 and N_2, there is more than one possible way to achieve the goal of preventing N from being derivable from the legal system: by eliminating N_1, by eliminating N_2, or by eliminating both of them. Rationality imposes the following two criteria of adequacy for derogation: (1) no explicitly derogated norm can be part of the new system, and (2) one should eliminate only those norms that are actually necessary to satisfy the first condition (Alchourrón and Bulygin 1979: 102–103; Alchourrón 1982). These two conditions require the identification of a set S that selects at least one norm of each rejected set, i.e., S must intersect not vacuously every rejected set, and such a selection must be *minimal*, in the sense that the same result cannot be obtained by the selection of a more reduced quantity of norms. Unfortunately, this does not guarantee that the result will always be univocal (Alchourrón and Bulygin 1976; Bulygin 2015: ch. 7; Royyakers 1998: ch. 7; Ferrer Beltrán and Rodríguez 2011: ch. 4).

Conclusion: Legal Dynamics and Specificity of Legal Systems

Finally, the dynamic notion of legal system offers a promising starting point for an appropriate characterization of the law. We have seen that the search for a characteristic common to all legal norms fails because it artificially reduces a rich and complex variety of norms to just one kind (Hart 1961: ch. 3). Consequently, in order to provide a satisfactory characterization of the law, attention should be placed not on the norms themselves, but on the distinctive features of legal systems.

This alternative has been explored, among others, by Raz (1971, 1990) and jointly by Alchourrón and Bulygin (1971). However, none of them has properly emphasized that the static notion of legal system is inadequate to distinguish the law from other normative phenomena. The problem is simply stated. Suppose that, contrary to Kelsen, Bentham, Austin, and other "reductionist" theorists, we abandon the twofold idea of defining "legal system" simply as a set of legal norms and defining "legal norm" as referring to all those norms that share a certain common characteristic. Suppose by contrast that we define "legal norm" as any sentence that belongs to a legal system and "legal system" as a static set of norms that has, qua system, a certain characteristic C (e.g., that it contains some norms prescribing coercive acts). The problem is that on this view, the universal class of norms satisfies condition C whatever it may be (e.g., is a static set that contains some norms prescribing coercive acts) and thus, according to this definition, would be a legal system. But then, if "legal norm" is defined as any sentence that belongs to a legal system, any norm – or, more generally, any sentence – would be a legal norm, and consequently we would lack any criterion for delimiting the field of law from other normative domains (Caffera and Mariño 1996).

This objection is devastating, because in so far as a legal system is regarded as a set of norms, neither coercion nor any other allegedly distinctive feature of static systems is apt to avoid the problem. Take, for example, Hart's idea of regarding a legal system as a complex union of primary and secondary rules. If we take a rule to be legal because of its membership in a legal system and if we take a system to be legal because it is composed of certain primary rules granting rights and obligations to citizens and certain secondary rules that regulate different aspects of the former, it is still the case that the universal class of norms is a legal system.

The dilemma that emerges from this objection is that either we abandon the definition of "legal norm" as any sentence belonging to a legal system, and thus we return to a certain kind of reductionist conception of legal norms, or we abandon the definition of "legal system" as a static set of norms with certain characteristic qua set. The

second horn of this dilemma seems more promising, especially if we consider the distinction between static and dynamic legal systems.

It seems highly preferable to assume the dynamic notion of legal system instead of the static one if we want to provide a proper characterization of law. Recall, first, that many authors – notably Kelsen among them – have indicated as an unavoidable characteristic of law that it regulates its own creation, i.e., its dynamic nature (Kelsen 1960: ch. 2). Moreover, adopting the dynamic stance offers the resources to overcome the objection under consideration. Put briefly, the idea is the following. First, let us define "legal norm" as any sentence that belongs to a legal system. Second, let us regard "legal system" as any static set of norms that belongs to the same dynamic legal system. Third, let us define "dynamic legal system" as a sequence of sets of sentences, where each set of the sequence is the product of a valid normative act of promulgation or derogation according to the antecedent set. Finally, let us assume that such a sequence originates with an initial static system containing at least one power-conferring norm authorizing a certain organ to produce normative acts and wherein at least one of the sets of the sequence contains a coercive norm.

This scheme has the virtue of accounting for the dynamic character as a central feature of law. Moreover, it can be supplemented by many other distinctive notes that are regarded as relevant by many philosophers. Coactivity is present, although it could be given an even stronger role, requiring that each of the static systems in the sequence contains at least one coercive norm. It explicitly incorporates the Hartian idea of the union of primary and secondary rules and can also accommodate three well-known Raz' insights. First, legal systems are *open* systems, in that they may contain norms conferring binding force on norms belonging to other systems. Second, they are *comprehensive* in character, in that they recognize no limitation to the spheres of conduct that they aspire to regulate. Third, they are characterized by a claim to *supremacy*, that is, they purport to have the authority to regulate the application of other institutional systems of a certain community (Raz 1990: 150–154).

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Legal Theory: Descriptive

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Introduction

A tradition of thought in legal theory woven through the work of Jeremy Bentham and John Austin in the nineteenth century, and that of Hans Kelsen and H.L.A. Hart in the twentieth, contends that it is possible to construct successful theories of law which are – in a certain sense discussed more fully below – descriptive in character. According to this approach, it is an important task of legal theory to identify and explain what law is, and this project can be undertaken relatively independently of, and prior to, attempting to morally evaluate or justify law. Bentham, Austin, Kelsen and Hart also share the methodological goal of attempting to explain the nature of law. That is to say, their theories attempt to identify and adequately explain law's essential properties: those features of law which make it into what it is. These theorists, then, are seeking a descriptive account of the nature of law and believe that it is possible to answer questions such as: Is it in the nature of law that it can be identified purely by reference to social facts? Is coercion an essential feature of law? and Do legal systems necessarily claim authority over their subjects? relatively independently of, and prior to, answering questions such as: Does that which we identify as law possess any moral qualities? Can the exercise of coercion via law be justified? and Under what conditions do legal systems possess legitimate authority over their subjects?

Although this methodological position is a long-standing one, a renewal of interest in methodological questions in legal theory in recent times has seen some contemporary jurisprudential scholars attempt to cast doubt upon the possibility and/or usefulness of descriptive accounts of the nature of law. Those harboring such doubts might claim any or all of the following: (i) that it is impossible to delineate those features of law a given theory will focus on without making evaluative judgments concerning which are the most important or significant aspects of law to explain; (ii) that it is impossible adequately to explain certain features of law without making moral value judgments regarding law's moral worth or justifiability; (iii) that it is necessary to resort to moral or political argumentation concerning the consequences of espousing one view of law as opposed to another in order to adjudicate between rival legal theories. The following discussion attempts to throw more light on these doubts,

and to consider possible responses to them, in the service of further illuminating the character and aims of descriptive legal theory.

Descriptive Legal Theory: Challenges and Responses

A simple – although ultimately misleading – account of descriptive legal theory might characterize it as the view that a legal theorist can accurately identify and adequately explain the nature of law without making any value judgments whatsoever, thus simply describing law as it is. This is sometimes – albeit mistakenly – taken to be the view of descriptive legal theory endorsed by H.L.A. Hart in the "Postscript" to the second edition of *The Concept of Law* where Hart contrasts his own, "general and descriptive" legal theory with Ronald Dworkin's, "in part evaluative and justificatory" conception of jurisprudence (Hart 1994, 239–240). In different ways, the three challenges to this simple account discussed below claim that it is impossible for legal theory to be value-free. In considering these challenges, and surveying some contemporary responses to them, a revised and more nuanced account of the character and aims of descriptive legal theory begins to emerge.

The Role of Evaluations of Importance and Significance in Constructing Theories of law

One possible challenge to the simple account of descriptive legal theory claims that to construct a successful theory of law it is necessary to make value judgments regarding the importance and significance of certain features of law and understandings about law. There may be two aspects to this challenge. First, it may be claimed that constructing a theory of *anything* requires one to make evaluative judgments sifting the important from the unimportant, the significant from the banal, in order to present a theoretical account rather than a mere miscellany of information (see e.g., Finnis 1980, Chaps. 1 and 17). Secondly, it may further be claimed that in the case of theories *of law*, legal theorists making evaluations concerning the important and significant features of their subject matter must be guided by, and must be appropriately sensitive to, what is already regarded as important and significant about law by those who create, administer, and are guided by it (see e.g., Finnis 1980, Chaps.1 and 12; Perry 1998; Postema 1998, section I). This second claim is motivated by the idea that law is a concept which is used by people to understand themselves and their practices (on this point see Raz 1994, at 237; Dickson 2001, 39–44; Dickson 2015, section 3) and is hence what Leiter (2003, 40–43) refers to as a hermeneutic concept (this theme also runs throughout Hart 1961, 1994).

Despite these points sometimes being presented as *challenges* to what I have referred to above as the "simple account" of descriptive legal theory, there may in fact be none who would deny them. Contemporary legal theorists who contend that it is an important task of legal theory to identify and explain what law is, and maintain that this project can be undertaken relatively independently of, and prior to, attempting to morally evaluate and justify law, have explicitly endorsed the points outlined above concerning the ways in which certain kinds of evaluative judgments must necessarily enter into an explanatorily adequate theory of law (see e.g., Raz 1994, 235–237, 300–301; Waluchow 1994, 19–30; Green 1996, section IV; Coleman 2001, Chaps. 11 and 12; Dickson 2001, Chaps. 2 and 3, Dickson 2004, section II, Dickson 2015, section 3; Marmor 2001, 153–159). Indeed, Hart himself, although insisting upon the possibility and usefulness of a "general and descriptive" approach to legal theory (Hart 1994, 239–240), also recognizes that a legal theorist's analysis, "...will be guided by judgements, often controversial, of what is important and will therefore reflect such meta-theoretic values and not be neutral between all values" (Hart 1987, 39). Hart elaborates further on this point when he explains that his own approach to legal theory:

> . . . wouldn't be morally evaluative. . . .it's evaluative in a sense that you pick out features of the complex activity, not because it justifies it morally, but because these would be relevant to among other questions what moral questions you ask. But it doesn't give the answer. Whereas Dworkin is saying any worthwhile jurisprudence is a blend of

> description and moral evaluation – it's got to show the law in its best light. Why not show it in the worst light? (Sugarman 2005, at 288)

This begins to reveal the significant inadequacy of the simple account: If no one is claiming that legal theory can be entirely value-free, and if any such claim, were it to be made, would necessarily be false, then there is little point characterizing descriptive legal theory in the way the simple account does.

The Claim that Moral Evaluation is Essential for Explanatorily Adequate Legal Theory

A second challenge to "descriptive" legal theory is the contention that in order to construct an explanatorily adequate account of law, it is necessary for a legal theorist to engage in *moral* evaluation of law, and to reach conclusions regarding its moral worth and the conditions under which it is morally justified. In different forms, this challenge features prominently in the work of both John Finnis (1980, especially Chap. 1; Finnis 2003) and Ronald Dworkin (1986, *passim*; Dworkin 2004).

As was noted in section "The Role of Evaluations of Importance and Significance in Constructing Theories of Law" above, Finnis claims that in order to construct an explanatorily adequate theory of law, a legal theorist must evaluate which are the important and significant features of the subject matter to be explained, and in so doing, must pay appropriate attention to beliefs about and attitudes towards law held by those living under and being guided by it. Finnis further contends that some of those attitudes towards law are more important and significant than others, and that it falls to legal theory to discriminate between them and to characterize law from the "central case" viewpoint from which we can explain why law came into being, and why we strive to maintain its existence. According to Finnis, this point of view – which he also characterizes as the point of view of the practically reasonable man – is the point of view of someone who appreciates the moral value of the law, and the way in which its unique properties facilitate the realization of certain moral goods in our lives, hence creating a presumptive moral obligation to obey it. Legal theorists must thus take a stance on the moral value and purpose of law, and on when and under what conditions it creates a presumptive moral obligation to obey it, in order to characterize law adequately from what Finnis claims is the appropriate legal theoretical point of view (Finnis 1980, especially Chap. 1; Finnis 2003).

Dworkin (1986, *passim*) contends that to understand law we must constructively interpret it, i.e., we must seek to put our community's legal practices in their best light in terms of the value, point, or purpose they are trying to serve. In *Law's Empire*, Dworkin gives this point as being to police and justify the imposition of state collective force (Dworkin 1986, 93. For other of Dworkin's views on methodology, and in particular his discussion of the role of the value of legality in understanding law, see Dworkin 2004, 2006, especially Chaps. 2, 6, 7, and 8). For Dworkin, then, legal theorists and indeed anyone seeking to know what law is must engage in an interpretive process which requires them to make moral and political value judgments in ascertaining which propositions of law are true: such propositions will be true when they flow from interpretive argument putting a given community's legal practices in their best moral and political light in terms of their ability to justify the imposition of collective force.

As was noted in section "The Role of Evaluations of Importance and Significance in Constructing Theories of Law", several contemporary legal theorists who contend that it is an important task of legal theory to identify and explain what law is, and maintain that this project can be undertaken relatively independently of, and prior to, attempts to morally evaluate and justify law, do *not* endorse the further and distinct contention that legal theory can be entirely value-free. However, some of those theorists *do* reject those aspects of Finnis' and Dworkin's methodological standpoints outlined above. This methodological approach – which holds that understanding the nature of law requires us to make evaluative judgments, but not necessarily *morally* evaluative judgments concerning the law's moral worth or justifiability – underpins

some of the most important contributions to contemporary legal positivism: for example, works by Raz (1985, 732–735, 1994, 235–237, 300–301); Coleman (2001, Chaps. 11 and 12); Marmor (2001, 153–159); Waluchow (1994, 19–30). In these works, the theorists concerned draw on an evaluative-but-not-morally evaluative methodological position in order to support and defend their own first-order theories of the nature of law. For example, in laying the groundwork for arguments in favor of his own brand of inclusive legal positivism, Waluchow (1994, 19–30) points out that a legal theorist makes evaluative judgments in establishing that a particular feature of law, such as its use of coercion, is important to explain, and is relevant to any eventual moral evaluation of law, without yet knowing, and without attempting to judge whether, that feature of law is morally good or justified. Waluchow thus argues in favor of the tenability of a methodological position he refers to as "value-relevant, descriptive-explanatory" theory (Waluchow 1994, at 22). As was noted at the close of section "The Role of Evaluations of Importance and Significance in Constructing Theories of Law" above, HLA Hart should also be regarded as a proponent of such a methodological stance.

In works discussing jurisprudential methodology as a topic in its own right, rather than drawing on a particular methodological position in order to support the author's own account of the nature of law, Dickson (2001, 2004, 2015) claims that in order to construct successful theories of law, legal theorists must make value judgments concerning which are the important and significant features of law to explain which are sufficiently sensitive to that which is already considered important and significant about law by those living under and guiding their conduct by it. Dickson terms these "indirectly evaluative" judgments, and contends that legal theorists can make them without taking a stance on the moral value or goodness of that which they are evaluating as important or significant (see Dickson 2001, Chap. 3; 2004, section II. A; 2015, section 3). On this view, a legal theorist's "indirectly evaluative" judgments that a given feature of law – such as law's claim to possess moral authority – is important to explain can be supported by the fact that the feature of law in question plays a central role in the self-understandings and practical concerns of those living under law (e.g., law's claim to possess moral authority may be important to explain because it will result in law applying itself to those living under it, and potentially subjecting them to coercive sanctions as a result, whether or not it is justified in so doing), rather than by a morally or "directly evaluative" judgment such as that this feature of law is important to explain because it allows law to perform a morally valuable function. Dickson does not deny the importance of asking and attempting to answer morally or directly evaluative questions such as whether law is morally valuable or justified, and whether and under what conditions there is a moral obligation to obey it, but, she contends, these questions can and should be tackled once we have a nonmorally evaluative account of the nature of law in respect of which we can address them (Dickson 2001, especially Chaps. 3 and 8). In recent (Dickson 2015) and forthcoming (Dickson, forthcoming 2018) work, Dickson terms this position "indirectly evaluative legal philosophy," and argues that this methodological position rightly approaches law with an "attitude of due wariness" (Dickson 2015, at 227–228), and allows us to understand its nature without inappropriately venerating it, and in a manner which will best facilitate law's eventual accurate moral evaluation (Dickson 2015, especially section 3). Dickson strongly emphasizes the ties that exist between indirectly evaluative legal philosophy, and legal philosophy which engages in moral evaluation and criticism of law, and contends that the former, properly done, can successfully facilitate and enhance the character of the latter (Dickson 2015, section 3; Dickson, forthcoming 2018, *passim*).

Practical-Political or Beneficial Moral Consequences Arguments

A third potential challenge to descriptive legal theory comes from those theorists who contend that in order to adjudicate between rival accounts of law, we should engage in what are variously referred to as "practical-political" (Murphy 2001) or "beneficial moral consequences" arguments

(Dickson 2001, Chap. 5 uses this latter term although she herself rejects the validity of such arguments). Legal theorists advocating this approach contend that practical consequences of a moral and/or political nature flow from adopting one view of law over another and that in arguing in favor of a given theory of law we should evaluate what those consequences might be and should decide upon which view of law to espouse accordingly. For example, Murphy (2001) claims that unless we adopt a view of law which is committed to an exclusive legal positivist interpretation of the social thesis – the contention that the existence and content of the law of a given legal system depends exclusively on matters of social fact – then we risk adverse moral and political consequences in the form of a lack of societal critical evaluation of the law, and an overready acceptance that because something is law it must be morally just. Variations on this kind of argument may also be found in MacCormick 1985 and Guest 1996.

Practical-political or beneficial moral consequences arguments appear to challenge descriptive legal theory's claim that it is possible to identify and explain what law is without engaging in moral value judgments. Some legal theorists (see e.g., Raz 1979, at 41–42; Soper 1987; Waluchow 1994 at 86–98; Dickson 2001, Chap. 5) have further objected to this kind of argument on the ground that it appears to involve an element of wishful thinking, because the central gist of such arguments seems to be that, as beneficial moral and/or political consequences would follow if law had certain properties, therefore we should understand law as having those properties. Murphy (2001, at 389) responds to this objection with the counter-claim that a legal theorist is not indulging in wishful thinking if there is – at least in respect of some features of law – no fact of the matter that the theorist is ignoring in deploying practical-political arguments. This type of argument thus also appears to run counter to the aims of descriptive legal theory in that it seems to deny, at least in respect of some of law's properties, that law has a nature to be identified and explained, thus leaving room for us to choose which view of law to espouse based on the beneficial moral and/or political consequences which might ensue as a result.

Frederick Schauer (2005) takes a slightly different view of the role of practical-political or beneficial moral consequences arguments in legal theory, claiming that they are important and perhaps essential for theorists engaging in *prescriptive* legal theory. Such theorists offer arguments regarding which concept of law ought to be espoused by a given society, and aim to change present understandings of law, based partly on the beneficial moral and political consequences which will ensue as a result. In Schauer's view (as stated in Schauer 2005), this task of prescribing what our concept of law ought to be, is distinct from, but compatible with, descriptive legal theory's aim of characterizing the concept of law as it is presently understood in a given society.

"Descriptive" Legal Theory Revised: Some Conclusions

An important tradition of thought in legal theory contends that it is possible and valuable to identify and explain the nature of law relatively independently of, and prior to, attempting to morally evaluate or justify law. This methodological approach flows through the work of Bentham, Austin, Kelsen, and Hart, and contemporary legal theorists such as Raz, Coleman, Marmor, Waluchow, and Dickson are its present-day intellectual inheritors. However, care must be taken in using the term "descriptive" in characterizing this position, for these theorists recognize and indeed embrace the idea that certain kinds of evaluative judgments are indispensable in constructing successful accounts of the nature of law. This approach is better characterized as recognizing that legal theory cannot and should not be value-free, but as denying that legal theorists need make judgments concerning the moral value and moral justifiability of law in order to understand its nature. According to this evaluative-but-not-morally-evaluative methodological standpoint, questions regarding law's moral value and justifiability are vitally important, and are a central part of jurisprudential inquiry, but they fall to be

considered after we have constructed a non-morally evaluative account of the nature of law.

Cross-References

- ▶ Hermeneutical Legal Theory
- ▶ Legal Positivism: Inclusive
- ▶ Legal Theory: Types of
- ▶ Neo-Systems Theory and Jurisprudence
- ▶ Radbruch, Gustav: His Formula and Concept of Law

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Legal Theory: Types of

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Introduction

One barrier to greater dialogue and understanding within jurisprudence is the inability to appreciate the variety of forms and purposes among the different theories of or about (the nature of) law. Legal theorists are frequently to blame for the confusion about methodological issues, as they are often not as clear as they might be regarding the nature of claims they are making (e.g., descriptive vs. prescriptive, conceptual vs. empirical) or regarding the larger project of which their theories are a part. This entry attempts to offer a rough

overview of the types and purposes of legal theory. The focus is primarily on theories about the nature of law. Other types of theories – e.g., theories of doctrinal areas of law, analysis of legal concepts, or the best approach to legal or judicial reasoning – may warrant a different analysis.

In general, one might divide theories about social practices and institutions roughly into four broad categories: (1) descriptive theories, theories that purport to state what is the case, offering an overview of current practices or understandings; (2) analytical or conceptual theories, theories that make claims about the intrinsic or necessary nature of the practice or institution; (3) theories which contain elements both of description and prescription; and (4) purely prescriptive, normative, or critical theories, theories that argue for how practices or understandings should be reformed. (As will be discussed, the second category, analytical/conceptual theories, can also be seen as a subset of the first category, descriptive theories.) The categories will be discussed, in turn, in the coming sections. Later sections will offer brief discussions of the related questions of whether methodological questions are specific to *legal* theory, the ontology of law, and the purposes of legal theory.

Purely Descriptive Theories

Legal theorists often refer to their theories as "descriptive," but "descriptive" comes in many variations, some of which, like analytical and conceptual theories, are sufficiently distinctive that they will be discussed separately in the next section. There are also interesting types of theories that seem to be neither descriptive nor prescriptive, but to be, in some ways, in-between. These will be discussed separately below.

In general terms, a theory is "descriptive" if it purports to describe what is the case, rather than to make judgments about the (moral or other) value of the current situation or to offer arguments for how things should be done differently. Many types of theories that are about law, but are not "jurisprudential theories" (narrowly understood), are clearly descriptive, e.g., sociological, anthropological, and psychological theories about the way people behave in legal roles or in response to legal regulation, and historical accounts of why particular legal systems developed the way they did.

When one is offering a theory meant to range over a large number of instances of some institution or practice (across jurisdictions, or over time), there is always the problem of how to combine the data. For example, how does one have a "theory of law" when legal systems (however understood) clearly differ from country to country and in any given country over time? To try to offer a purely descriptive theory of a vast social practice like law seems at risk of becoming little "more than a conjunction of lexicography with local history" (Finnis 2011, 4).

One needs some means of organizing the data that is the subject of one's descriptive theory, and there are debates within the literature regarding how such selection can or should be done. For example, John Finnis accused Hans Kelsen of having erred in his construction of a theory of law, in that Kelsen purportedly tried to find a "lowest common denominator" – which was common to all legal systems – rather than doing as Finnis argued should be done in such cases: finding what was characteristic of law in its fullest or most mature instantiation, even if some, or even many, legal systems did not have all of these characteristics (Finnis 2011, 9–11).

Also, though a theory may not be "prescriptive" in the sense of suggesting reforms of current practices, to make some point about nature or purpose, almost all theories will likely emphasize some aspects of the practice and/or downplay others. For this purpose, many writers (e.g., Dickson 2001; Waluchow 1994, 15–29; Raz 1994, 219–221) differentiate forms of nonmoral evaluation needed to construct descriptive, conceptual or analytical theories from any sort of moral prescription.

H. L. A. Hart famously argued for organizing a theory of law by viewing the practice at least in part from the perspective of a participant who "accepts" the legal system as giving him or her reasons for action (Hart 2012, 79–91). Though this "hermeneutic" approach to theory construction is not universally accepted, even Ronald Dworkin and John Finnis, who criticize Hartian legal positivism in particular and the project of purely descriptive legal theory in general, accept

the idea of building a theory around an insider's perspective (though their ideas about how to build on an insider's perspective differ in important ways from Hart's views) (Dworkin 1986; Finnis 2011, 3–18; see generally Bix 1999).

Analytical or Conceptual Theories

Many jurisprudential theories purport to offer true claims about law generally. Such theories are usually making analytical or conceptual claims about law, as opposed to making a claim that applies only to a particular legal system – at a particular moment in time. (Also, there are some theorists for whom it is not clear whether their theories are best understood as conceptual or as "merely" descriptive – e.g., this seems to be a matter of ongoing debate regarding the best characterization of John Austin's work (Cotterrell 2003, 81–83).)

"Analytical" or "conceptual" theories usually purport to be "descriptive," in the sense that they purport to describe the way things are rather than to criticize or prescribe. However, such theories are usually not "merely descriptive," in the sense that the theorists are doing more than merely reporting data or observations.

Conceptual analysis usually involves a philosophically ambitious claim that the theory has captured what is "essential" to some concept of practice, characteristics "necessary" for a practice or institution to warrant the label in question. While such claims about "nature" and "essence" were traditionally associated with Platonic metaphysics, there are less metaphysically ambitious modern versions of such claims (e.g., Bix 2003). For example, Raz (2009, 17–46) defends an understanding of legal theory as conceptual analysis and in doing so argues that such theories try to explain "*our* concept of law," not some universal or timeless (Platonist) concept of law. For Raz, legal theory is an attempt to get a clearer insight into an idea that is central to a community's self-understanding.

Hans Kelsen's "pure theory of law" (*reine Rechtslehre*) (e.g., Kelsen 1992) can also be seen as a special form of analysis, one grounded on a neo-Kantian methodology. At its essence, Kelsen's theory is an effort to determine what follows from the fact that people sometimes treat the actions and words of other people (legal officials) as creating valid norms.

There have been a number of challenges to the value or tenability of purely descriptive or descriptive/conceptual theories in jurisprudence. Some of the challenges have come from various versions of natural law theory (e.g., Finnis 2000), an approach that asserts that moral objectives and moral ideals are inherent to the nature of law and therefore central to its understanding.

John Finnis (2003) has also offered a separate challenge, that if the descriptive/conceptual theory of legal positivism is understood as determining the nature of law, where this "law" is understood as separate from the normative question of how judges should decide cases (see, e.g., Raz 2009, 377) or how citizens should act in the face of government decrees, then this is an uninteresting and unworthy inquiry.

A different sort of challenge has come from those who doubt conceptual analysis either generally or at least in areas where the concepts have normative overtones. The general challenge comes from naturalism (not to be confused with natural law theory, naturalism argues for a more empirical or scientific approach to topics, like epistemology, formerly approached in an a priori or conceptual way) and has been advocated in legal philosophy primarily by Brian Leiter (2003). Leiter, building on the well-known philosophical work of W. V. O. Quine (1951), claims that there are no "conceptual" truths to discover and that theorists about law (or judicial reasoning or other legal phenomena) should confine themselves to empirical investigations of actual practices.

The "normative" challenge to descriptive conceptual analysis asserts that conceptual analysis of a concept like "law" (or "democracy" or "justice") is inevitably contestable and evaluative. Stephen Perry (1998) argues that one must inevitably choose among alternative tenable theories about law, and that this selection must be made on political or moral grounds. Ronald Dworkin's interpretive theory of law (1986) similarly portrays theories about (the nature of) law as theories that attempt to show the value of legality as part of a larger web of political and moral values.

Between Description and Prescription

Despite the commonly accepted distinction between description and prescription, there are a number of approaches and types of theory that seem to lie uneasily somewhere on the spectrum between "purely descriptive" and "purely prescriptive":

1. "Semantic theories." Ronald Dworkin famously characterized H. L. A. Hart's theory of legal positivism as being best understood as a semantic theory – a definition about the meaning of the word "law" (Dworkin 1986, 37–49). However, this characterization was rejected by Hart himself (2012, 244–248), as well as most commentators. (e.g., Endicott 2001). At a minimum, it is worth noting that no theorist proffering a theory of law has characterized his or her own theory as being ("merely") a definition of the word "law."
2. Variations on descriptive theory. Even descriptive theories themselves often seem to deviate from pure description. As was summarized earlier, the construction of a theory about some social institution or practice requires some amount of selection or simplification: (a) to prevent the theory from becoming simply a messy restatement of complex reality, (b) to allow the theory to extract some basic insight about the institution or practice, and/or (c) to allow the theory to focus on the "fullest" or "highest" instantiation of the institution or practice, rather than what appears to be common to all instantiations. These forms of selection within descriptive theory come under various titles: "principles of theory construction" (e.g., Waluchow 1994, 19–21), emphasizing important features, and Max Weber's "ideal types" (Finnis 2011, 9–11).
3. Rational reconstruction. Within doctrinal legal scholarship, it is conventional (in many countries) for advocates and commentators to try to restate court decisions, or whole areas of law, in a way largely consistent with the outcomes of the cases but restating the justifications offered to make them more persuasive. Theories of doctrinal areas of law also commonly use an approach along these lines.
4. Ronald Dworkin's interpretive approach. Dworkin's influential legal theory (e.g., 1986) is grounded on the "constructive interpretation" of official actions. ("Constructive interpretation" is the principle Dworkin would have applied not only for resolving legal disputes but also for constructing theories about the nature of law.) For law, Dworkin would have judges decide cases by first finding the theory of past official actions (legislation, constitutional provisions, judicial decisions, administrative actions, etc.) related to the dispute that would simultaneously adequately fit those past actions while making that area of law the best it can be (morally or politically). Dworkin's interpretive approach, if followed in practice, would likely approximate "rational reconstruction," discussed above.

Prescriptive Theories

Along with descriptive theories, and the variations of descriptive theories, summarized above, theories can of course be prescriptive: not focusing on describing current practices but focusing instead on urging a new or reformed practice. The role of such theories in modern legal theory will be discussed more fully within the overview of purposes of legal theory below.

Are the Questions Specific to Legal Theory?

Many legal theorists seem insufficiently attentive to the work already done elsewhere in social theory regarding the problems of theory construction. For the most part, theories about law will raise the same questions as theories in other social sciences. For example, one way to distinguish theories is to take into account different schools of social theorizing, e.g., whether the focus is on individuals or on structures and whether the basic account of social action is behavioral or hermeneutic (the latter also sometimes called "interpretive" or *Verstehen*) (Bix 2015, 41–45; Lucy 1999, 17–32). This distinction has its greatest force in theories of social action within legal systems – e.g., theories of judicial behavior – but it also has implications for more abstract theories of law. For example, H. L. A. Hart's criticism of John Austin's command theory of law, and

Hart's subsequent development of his own version of legal positivism, is centrally understood in terms of a hermeneutic rejection of a more empirical or more "scientific" approach (Hart 2012, 18–123; Bix 1999).

This is not to claim that there is *nothing* distinctive about law or legal theory. For example, theories of law may be distinctive in that law seems to function both as a kind of social institution *and* as central to our practical reasoning (e.g., Finnis 2000, 1602–1603) and this "double life" may be a key to understanding the difficulty in constructing a theory about the nature of law.

Ontology (Basic Building Blocks)

One type (or topic) of legal theory involves a metaphysical (ontological) explanation of law and legal concepts. The Scandinavian legal realists, in particular, focused on this question, though aspects of such questions can be found in a wide range of other theorists. The Scandinavian realists, building on views that paralleled (though did not equate with) logical positivism, were skeptical of ideas entities that could not be understood in terms of observable, empirical data (e.g., Ross 1957; Olivecrona 1971).

If one rejects the metaphysical/ontological challenge of the Scandinavian legal realists, one is still faced with questions regarding the metaphysical status of concepts and claims used in legal practice. This inquiry is sometimes presented from a different perspective: in terms of the nature of legal truth or even general questions of legal reasoning. For legal truth: when one says that a certain law-related claim is correct ("X has a right to possession of A" or "there is a valid contract between R and S"), *in light of what* is that claim true or false? None of the obvious alternatives seems attractive. On one extreme, already discussed, is the metaphysically skeptical position that demands that legal concepts be reduced to observable, empirical terms. A different sort of skeptical view would argue for reducing legal concepts to descriptions and predictions of official actions. This perspective, sometimes described as a "predictive theory of law," has some initial attractions but also well-known weaknesses (e.g., Hart 2012, 88–91).

At the other extreme would be a kind of Platonism in which legal concepts are thought to correspond with metaphysical entities (one modern theorist whose work sometimes comes close to this sort of Platonism is Michael Moore (e.g., 2000)). Related efforts try to ground the objectivity underlying legal concepts through a kind of "natural kinds" analysis, derived from theories of meaning and reference (Stavropoulos 1996).

Various attempts have been offered to create a middle position – one purportedly more in line with common understandings of terms, without requiring commitment to ambitious or unusual metaphysical claims. Among the more prominent, such theories are institutional fact theories (e.g., MacCormick and Weinberger 1986) and Dworkin's interpretive theory of law (Dworkin 1986). Alternatively, some theorists have simply urged that one can avoid possible ontological issues by equating the meaning of legal terms and concepts with the rules for their use – a response to metaphysical questions similar to that urged by Ludwig Wittgenstein (Hart 1954; Bix 1995).

Purposes of Legal Theory

As earlier mentioned, the topic of the purposes of legal theory is intimately tied up with the topic of the nature(s) of legal theory. A wide variety of purposes are served by theories about law. Some theories, especially those purporting to be analytical or descriptive, can be justified on the narrow basis of seeking truth and knowledge. Here such knowledge can be seen as the straightforward collection of facts that would result from a simple description or the deeper sort of insight or understanding that might result from a quasi-descriptive model. (However, such knowledge, once gained, might also then play a role in an evaluative or prescriptive theory – a point important to the writings of a number of theorists, including H. L. A. Hart (1958)).

In discussing (above) the types of descriptive theories, including analytical and conceptual theories, it was noted that many commentators argue that it is necessary, or at least valuable, for the construction of a theory of law to involve some amount of evaluation and selection. This view entails certain ideas about theories of law that a

certain lack of fit with the data is an acceptable cost for the insight a good theory might offer (Bix 2012). (A comparable point is often made generally about modeling of behavior, both in the physical sciences and the social sciences.)

A related point: jurisprudential theories are often offered as "explaining" a social practice or institution. "Explanation" is a central, but frequently poorly articulated, notion in discussing the point of descriptive and conceptual theories. The reason one might put up with some simplifications, or even distortions, of the empirical reality in a theory is the benefit a good theory can offer by way of "insight" – showing something central to the nature of a social practice or at least something interesting all instances of some category of practices or institutions seem to share (Bix 2012).

Relevant to the earlier discussion of "rational reconstruction," it should be noted that this approach often plays a significant role in the teaching of law and the training of legal advocates. However, the "rational reconstruction" used in teaching legal advocacy might differ in small but significant ways from the one offered for purely scholarly purposes. An advocate must have an eye not only to the best reconstruction of a muddled doctrinal area but also the reconstruction that would seem best for achieving the outcome the advocate wishes to achieve. Thus, an advocate would prefer a reconstruction that favors the interests of the advocate's client, even if it is not the best reconstruction available. Also, if the best reconstruction of the prior cases would justify some right, but the current members of the country's highest court are unlikely to recognize the right, the advocate might be better served by a reconstruction that excludes that right (at least until the membership on the highest court changes).

Critical theories of law aim more toward reform of current laws and practices rather than (mere) increased knowledge of or insight into those laws and practices. Many of the influential American legal theories of the twentieth and twenty-first centuries – from American legal realism to law and economics, and including critical legal studies, critical race theory, and feminist legal theory – are best understood as being essentially criticisms of the current approach to legal regulation and/or judicial decision-making, combined with suggestions for how the system could be improved. (The reform- or justice-centered nature of critical legal studies, critical race theory, and feminist legal theory are relatively self-evident. American legal realism and, especially, law and economics may be harder cases, as both include claims that seem to be descriptive or analytical and claims that seem to be about the basic nature of rules, decision-making, or law generally. However, both schools of thought are grounded on a view that law is instrumental, and the question quickly becomes, for theorists in both schools, either which ends law *should* pursue or how best to achieve the ends already chosen).

Conclusion

Legal theories offer a variety of approaches and serve a range of purposes. Theories that appear to be in conflict may simply be answering different questions or seeking different objectives. At the same time, it is certainly open to commentators to question whether certain methodologies now in use are in fact coherent and valuable.

Cross-References

- ▶ Conventionalism
- ▶ Dworkin, Ronald: Constructive Interpretation *aka* Interpretivism
- ▶ Hermeneutical Legal Theory
- ▶ Institutionalist Theories of Law
- ▶ Legal Theory: Descriptive
- ▶ Metaphysics of Law
- ▶ Ontology of Law

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Legal Translation

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Legal Translation Studies As a Complex Interdiscipline

Legal translation began to affirm itself as a scholarly topic not longer than a few decades ago.

On the one hand, legal language (in the variety of its forms), as well as other sectorial languages, began to be paid attention within the scope of (general) linguistics and translation studies in connection to the theoretical and methodological question as to whether its (alleged) specificity should have been paid attention and properly investigated.

On the other hand, legal language in its legislative, judicial, and legal dogmatical forms began to rise a twofold scholarly interest among legal theorists and jurists. To start with, since the 1950s it began to enjoy an ever increasing interest in the field of analytical legal philosophy by those who were willing to get rid of any metaphysical or ideological commitment in their understanding of law, its forms of application, and modalities of cognition. Furthermore, since the 1970s, in the field of comparative law, it began to be paid attention by those who were debating whether legal systems and institutions of different countries with their own peculiar cultural connotations could have been confronted with each other, or even imported or exported from one country to another, that is to say, whether legal translation could have made possible both the drafting and the circulation of legal models among culturally (not) homogeneous different countries. Hence, from such a manifold interest in legal language by linguists and legal scholars, the first queries and the first inquiries on legal translation and its import, namely, the pioneering influential studies in Canada and in Poland; the publication in 1979 of a monographic issue of "Meta" on *La traduction Juridique*; and not least, the XII International Conference on Comparative Law, held in

Sidney in 1986, devoted to *Problems of Juridical Translations in Legal Science*.

Though (general and applied) linguistics as well as comparative law together with analytical legal philosophy has played an undoubtedly propulsive role in affirming legal translation as a scholarly field of investigation, quite soon it became clear that many insights from other disciplinary areas could not have been ignored in its further developments. It is no surprise then, that Biel (2010, 6) characterizes legal translation studies as an interdiscipline "which is situated on the interface between translation studies, linguistics, terminology, comparative law, and cultural studies." It is no surprise furthermore, that Biel's list might and should be considered incomplete.

Namely, with regard to translation problems based on *language*, the peculiar features distinguishing different forms of legal language would be better acknowledged by paying attention, not only to (general) linguistics, but also to semantics and pragmatics (Section "Semantic and Pragmatic Remarks on Legal Language").

Further, with regard to translation problems based on *law*, the plurality of different (linguistic) forms in which law has found its expression in different spatial-temporal-cultural contexts cannot be confined only within the comparative law range and expertise. At least, preliminarily, it should be clear whether the theoretical background of law refers (i) to the plurality of legal systems with their own respective unity and identity, or (ii) to the plurality of legal systems whose unity and identity in the last decades have been challenged by an ever increasing number of new sources of (inter)national law, or else (iii) whether it contemplates some sort of inter-legal dimension within the domestic law of those countries which are multicultural because of the presence in their territory either of Indigenous populations or of an ever larger number of migrants with their own legal and cultural tradition (Section "Transformations of Contemporary (Inter)national Law and New Challenges for Legal Translation").

Two more introductory remarks follow: First, before focusing on the way different theoretical models correspond to the variety of forms law has found its expression (Section "Transformations of Contemporary (Inter)national Law and New Challenges for Legal Translation"), attention will be paid to a twofold ambiguity of "legal language" (Section "Legal Translation: A Tentative Map of Problems"); second, despite its undoubtful relevance, the double-bind-linking legal translation and legal interpretation – often mentioned along the text – will not be dealt with in a separate dedicated section.

Semantic and Pragmatic Remarks on Legal Language

There is no unanimous consensus with regard to the (eventually) specific features distinguishing *legal* translation.

In general, while scholars with a predominantly linguistic expertise tend to minimize any significant peculiarity of legal language, the other way round, scholars with a preeminent legal education usually stress the peculiarity of legal language which justifies the view of the specificity of legal translation. Evidence of this latter attitude is the recurrent attention among legal scholars for the two main questions on which focused the already mentioned 1986 International Conference on Comparative Law, namely, (i) "Is Legal translation even possible?," and (ii) "What is legal translation"? (Beaupré 1987, 736–739).

Two arguments support such an attitude: (i) the language-dependent character of law; and (ii) the way in which pragmatics of legal language influences its semantics.

Despite any disagreement on what has been termed their "ontological status," there is a widespread consensus among legal (analytical) philosophers on the language-dependent character of (legal) norms and more generally on the language-dependent character of law. Such a view is obviously sound with regard to statutes and different forms of written laws and legal provisions in civil law systems. Similarly, it holds good in common law systems with regard to precedents and customary norms, despite any uneasiness and uncertainty to which the linguistic

formulations of their normative content might give rise.

To be sure, the statement of the language-dependent character of law and legal norms does not necessarily lead to confine law to its linguistic expression. It simply implies that law needs to *have* a language as a necessary means for its communication, cognition and application.

Linguistic formulations of legal norms, as it is with the linguistic formulations of most subject matters in any natural language, may happen to be neither clear nor certain in their meaning because of syntactic and/or semantic reasons. Thus far, nothing would seem to be peculiar to legal language and to the problems it might give rise when its translation is at issue. Nonetheless, the semantic sources of doubts concerning the meaning-content of the linguistic formulations of legal norms are deeply affected by two pragmatic features of legal language, namely, (i) its constitutive nature, and (ii) its prescriptive force or function.

In particular, the first relevant pragmatic feature of legal language concerns its distinguishing creative power in establishing the peculiar legal value of what it regulates and is about. That is to say, it is the very language in which law is formulated to define what counts as legal both in the sense of what counts as lawful or unlawful and in the sense to determine in which terms what counts as legal is to be understood. Namely, the language of law does not reflect any preexisting legal reality but establishes what might count as a piece of *legal* reality. In other words, by the constitutive nature of legal language it is meant, to a large extent, the same as the classic Kelsenian tenet according to which – alike king Midas transforming in gold whatever he was touching – law transforms in a legal matter whatever it might be concerned with (H. Kelsen 1945, 161). It is worth adding that the constitutive nature of legal language is not to be confused with a sharp and unquestionable identification of any allegedly "literal meaning" of norm formulations. To be sure, to assert that, on the ground of what law has established, depriving a person of his life can be taken to be either a "death penalty" or a "murder" does not prevent any interpretative doubt concerning what counts as "death penalty" or as "murder" according to law.

Further, the second relevant pragmatic feature of legal language concerns its prescriptive force or, to be more precise, concerns the terms in which its prescriptive function amounts to a component of its semantics. At a first sight puzzling, most legal scholars would be inclined to ignore such a property of legal language, though it actually captures what is a distinguishing feature in dealing with legal interpretation as well as with legal translation. A significant exception is Tarello's tenet of what he labels the "semantics of neustic" (Tarello 1965). The immediate target of this seemingly semiotic oxymoron is Hare's view according to which, regardless of the different functions it can be made use of (i.e., regardless of its neustic component), any sentence has a descriptive component (i.e., its own phrastic) which is not affected by, nor does change in reason of, the different force it might be given along with its eventually differing uses (R.M. Hare 1952). Now, despite the wide acceptance it enjoys, Tarello claims that the paradigmatic opposition between phrastic and neustic cannot be maintained to hold good when dealing with legal interpretation (and hence with legal translation as well) because: (i) In interpreting a norm formulation, the so-called law-giver intention and/or the end aimed at by the legal norm (i.e., its so-called *ratio*) are to be accounted for as well as it is with its wording; (ii) the variety of forms in which both the law-giver intention and the *ratio* of legal norm can be read and reconstructed lead to a plurality of different ways any norm formulation can be understood, i.e., to a plurality of what any legal norm can be taken to amount to.

Legal Translation: A Tentative Map of Problems

The language-dependent character of law, together with the import that from a pragmatic point of view both the constitutive nature of legal language and its prescriptive force have in determining the meaning-content of any norm formulation, shed light on the peculiarity the

meaning/translation interplay acquires in legal language.

Since there is no legal reality but the one defined through the constitutive nature of legal language, any unavoidable shift of meaning taking place in translating a norm formulation from one natural language to another amounts to a change of the norm the norm formulation can be taken to express. Obvious or counterintuitive as it may sound, such a remark actually explains, e.g., what otherwise might just appear as a bizarre feature of the bilingual Finnish legal system, namely, "The Finnish and Swedish texts of the Bills must be identical, even though the Swedish translations of statutes have no binding force in interpretation" (Aarnio 1991, 16).

Now, in order to map some of the main sorts of its problem, it is worth taking a start from a twofold ambiguity of the expression "legal language."

First, "legal language" is ambiguous because of the term "legal" since "*legal* language" can be used to term (i) the language of law, (ii) the legal dogmatics language, and (iii) the judicial language.

Further, "legal language" is ambiguous because of the term "language" since it is not clear to what kind of language "legal *language*" amounts, namely, whether it is to be conceived of as a form of ordinary language, or as a form of technical/specialized language mastered only by trained experts. Despite any controversy, it is sound to maintain that "legal language" refers to a form of language which comes up to be a peculiar mixture of both ordinary and technical language.

Now, taking into account the terms of either ambiguity, the distinction of six sorts of basic problem affecting legal translation follows as an obvious combinatorial result from the two sorts of problem concerning the ordinary and technical character of each of its three different forms: the language of law, the language of legal dogmatics, and the language of adjudication.

On Translating of the Language of Law

Features characterizing the language of law are of basic relevance since they actually ground the sorts of problem met by legal translation of each of the three different forms of legal language.

Obviously enough, the features characterizing the language of law can vary with regard to the different legal traditions and/or the different legal cultures to which each legal system belongs. Moreover, such features can vary with regard to the differing standards of legal drafting which can be recommended to be followed in the wording of legal texts.

Despite any difference to be taken into account with different legal systems, the language of written law is a complex mixture of ordinary and technical language.

To be sure, the distinction between what is peculiar to the language of written law either as ordinary or technical language cannot be sharply and definitely drawn. First, this is so because of the constitutive nature of legal language, which affects and determines the meaning both of technical and of ordinary language terms in legal texts. Further, because of the dynamic relationship between what counts as a technical and a non-technical legal term. The shift from the technical to the everyday usage, as well as the shift from the everyday to the technical usage, is a rather frequent and common phenomenon which actually originates problems in legal interpretation, and, as an obvious consequence, in legal translation as well.

Now, on the one hand, the main feature characterizing the *language of law as ordinary language*, as well as the main sort of problem affecting its translation, is fuzziness – stemming it by syntactic or properly semantic factors. In particular, insofar as fuzziness of the language of law is concerned, two opposite requirements claim to be met, namely, its reduction and its reproduction. To be sure, translation and linguistic formulation of legal texts meet one and the same difficulty: to grant certainty of law (requirement which should lead to confine fuzziness as much as possible), without preventing law from being flexible enough to cope with the differing forms the piece of reality it regulates can acquire (requirement which on the other side should lead to preserve fuzziness, at least to a certain extent).

Further, on the other hand, the difficulties to be faced in translating the *language of law* do not diminish in virtue of *its technical features*. In fact,

differently from other specialized or scientific languages, the language of law lacks not only an "international jargon" (de Groot 1987, 796), but also a sharply defined national jargon as well. Thus, technical terms used in the language of law originate a second sort of problem of legal translation due to both inter-lingual and intralingual reasons, namely, at an inter-lingual level that is obviously so either because of the different meanings which apparently homologous technical terms can be given in different legal systems (that is the case, e.g., confronting the English and the French term "contract" and "*contract,*" respectively (Sacco 1987, 848, 1992, 30–31), or because of the lack in the target language of a straight and immediate legal notion corresponding to the one to be translated from the source language (that is the case, e.g., with the legal notion of "torts" which has no close analogous counterpart in the Italian legal system). At intralingual level, that is so either because of the different meanings homonymous technical terms may happen to be given in one and the same legal system (that is the case, e.g., in the Italian legal system with "*possesso*" which is given differing meanings in civil and penal law, respectively (Tarello 1980, 112; Sacco 1992, 29–30), or because of the possible differing technical meanings the terms of one and the same natural language acquire along with the different legal systems they are made use of (that is the case, e.g., when comparing the judicial procedure termed "appeal," or else the judicial institution named "Supreme Court" in the British and in the US legal system, respectively). Finally, obviously enough, the difficulties to which technical terms give rise at the inter-lingual and at the intralingual level are to be faced both when legal translation is about a bi- or multilingual legal text addressed to a single community sharing the same legal culture and tradition – that is, what happens, e.g., in a bilingual nation, as Finland – or to a plurality of different communities, each with its own legal culture and tradition – that is, what happens, e.g., in case of international or multinational communities as well as what begins to happen both in postcolonial countries facing the native populations' request to be acknowledged some form of legal autonomy and in multicultural countries attempting to experiment some sort of legal pluralism in order to take into account legal traditions of the (new) minorities of different homogeneous groups of migrants living and working on their territory.

On Translating the Language of Legal Dogmatics

If translation of the language of law has its main concern when the formulation of bi- or multilingual legal texts is at issue, translation of the language of legal dogmatics is the uneasy ground of comparative law analyses.

The uneasiness is obviously affected by the two sorts of problem pertaining to the translation of the language of law, i.e., the two sorts of problem which, following Sacco's approach, are identified as problems stemming from language, and problems stemming from law, respectively (Sacco 1987, 1992, 27–41).

Nonetheless, it is worth noticing that in either case such an uneasiness is strengthened from the fact that the language of legal dogmatics can be viewed as a form of translation on its own. Indeed, legal interpretation is often characterized as a sort of intralingual translation.

Thus, inter-lingual translation of the language of legal dogmatics amounts to a form of multilevel translation, where the interaction between problems peculiar to the language of law with problems peculiar to the language of legal dogmatics might appear as a despairing enterprise, where the best one can do is leaving un-translated as much as one does not want to be misunderstood.

Now, on the one hand, multilevel translation of the *language of legal dogmatics as a form of ordinary language* is mainly concerned with what Sacco would term problems "stemming from language." As it has already been remarked with the language of law, its main concern is the fuzziness of norm formulations – be it originated from vagueness, generality, open-texture, or ambiguity of ordinary terms, rather than from rhetorical figures used in the peculiar style they may be written down.

Further, on the other hand, multilevel translation of the *language of legal dogmatics as* a form of *technical language* is mainly concerned with what Sacco would term problems "stemming from law." That is to say, its main concern is the lack of any one-to-one correspondence among regulations which different legal systems fix for homologous subject matters as well as among the subject matters different legal systems do regulate.

On Translating the Language of Adjudication

Also translating the language of adjudication meets two main sorts of problem: the one related to its features of ordinary language, the other to its features of technical language. These two sorts of problems show their prominent significance: (i) at *national level*, whenever the different nationality of those who happen to be involved makes the use of different natural and legal languages necessary; and (ii) at a *not-national level* whenever the judicial decision is taken by one of the many different supranational or international courts institutionalized after the second world war (mainly competent in fundamental rights protection) and/or by one of the ever increasing number of transnational quasi-judicial organism (mainly devoted to the disputes resolution concerning financial or commercial transactions).

Translation of the language of adjudication – as it is with the language of legal dogmatics – can be viewed as a form of multilevel translation. That is mainly so because of the need to translate in legal jargon whatever concerns the fact-finding procedure.

Now, on the one hand, the most significant feature of the *language of adjudication* affecting its translation *as ordinary language* is that in judicial decision-making ordinary language terms occur both in the linguistic formulations of legal norms and in the statements concerning the reconstruction of the facts at issue.

Furthermore, on the other hand, the *technical dimension of the language of adjudication* is obviously related to the technical terms occurring both in the procedural laws to be followed along all the process of judicial decision-making, and in the material laws to be applied for the solution of the case at issue. Now, the problems concerning the interpretation, and hence the translation of the technical terms occurring in the procedural laws, do not seem to differ from the ones originated when interpretation and, hence, translation of technical terms made use of in the language of law is at issue. Rather, special attention is required by the problems concerning the interpretation, and, hence, the translation, of the technical terms occurring in the laws resorted to for the solution of the case at issue. That is so because of the factual statements concerning the determination of the facts the dispute is about affects, and is affected at the same time by the legal interpretation of the material laws to be resorted to for the case resolution.

Transformations of Contemporary (Inter)national Law and New Challenges for Legal Translation

Thus far, the way in which the six main sorts of problems of legal translation have been distinguished and characterized (Section "Legal Translation: A Tentative Map of Problems") reflects and is deeply affected by the legal theoretical understanding of law as a system with its unity and identity.

In other words, quoting Biel "Legal translation research has traditionally focused on the system bound nature of legal norms" (Biel 2010, 6). To be sure, first, that is the way it is (i) with researches – mainly those concerning comparative law – debating on the legal translation problems related to the differences holding among apparently corresponding legal terms of different legal systems as well as to legal terms occurring in one legal system which lack any (direct) correspondence in other legal system and further (ii) with researches focusing on the legal translation problems concerning the drafting either of a bilingual national legal system or of a multilingual legal text of supranational or international legal text.

Now, in the last 70 years two radically innovative sorts of transformation in (inter)national law

have increasingly been affecting the commonly shared way of understanding law as a system with its own unity and identity, weakening and progressively depleting its explicatory power.

The first one, beginning with the conclusion of the second world war, is the transformation of (inter)national law as a consequence of the progressive affirmation of the basic distinguishing principles of the legal and political project of (inter)national constitutionalism, that is to say, the legal and political project aiming to a new world order based on the claim for an international peace to be constructed by means of the enactment and the protection of universal fundamental rights together with the preservation of democratic institutions. Thus, beginning with 1945 *United Nation Charter* with the institution of the International Court of Justice and 1948 *Universal Declaration of Human Rights*, the legal and political contention of the multilevel – domestic, regional, and international – protection of fundamental rights has given rise to the international human rights law: that is to say, to an unsystematic ever larger and unsettled amount both of legislative and jurisprudential legal provisions on the terms how to understand and/or protect different fundamental rights. Both these new sources of not-national law actually interfere rather than harmonically complement the hierarchically ordered system of domestic legal sources and deeply affect the internal (in)coherence of the domestic legal lexicon with terms whose denotation and connotation seldom match the denotation and connotation of its apparently corresponding terms.

The second sort of transformation in (inter) national law, ever more increasingly pervasive in the global legal space, concerns the plurality of differing forms of *lex mercatoria*; that is the variety of private contracts, legal arrangements, and legal disputes resolution concerning the scope of the largely unregimented global economy and finance. It is no surprise then, for the ever increasing scholarly attention toward the variety of international contracts among holdings, companies, or multinationals because of the distinguishing problems to which they give rise in their drafting and interpretation as a consequence of the plurality of legal languages which they (implicitly) presuppose or to which they (implicitly) refer to. To be sure, arbitrators and legal experts of international law firms taking part in the resolution of disputes concerning the (in) validity or the (non-) fulfillment of a contract have to confront themselves with legal interpretation and translation problems stemming from overlapping differing legal languages, namely, (i) the legal language used in the drafting of the contract; (ii) the domestic legal language imposed as the applicable law; (iii) the legal language – when conceived of as pertinent or relevant – of the Unidroit principles; and (iv) the legal language of the eventually differing legal cultures of both arbitrators and contracting parties.

Last but not least, a further sort of transformation of (domestic) law deserves attention when focusing on the new challenges and/or new frontiers of legal translation. Namely, the legal change of (domestic) law, deserving attention also in the perspective of legal translation, concerns the still hesitating attempts to figure out some sort of legal pluralism in order to guarantee – as (inter)national constitutionalism requires – the right to culture in those countries which are multicultural because of the presence in their territory either of native Indigenous populations or of (new) minorities that have been consolidating from legal and culturally homogeneous groups of migrants. At a legislative level, this sort of (domestic) law transformation finds its first expressions in those countries which pay attention to the so-called "cultural defence" in criminal as well as in civil proceedings and/or in those countries, like England, which have been experimenting a (quasi-) judicial court – the so-called Islamic Courts – (parallel to the national ones) competent in solving dispute concerning family law and financial arrangements. Further, at a judicial level, when no legislative support is available, the necessity to cope with the ever increasing significance of the multicultural dimension of either sorts of country is left to discretional appraisal. Namely, it becomes a matter of judicial decision (i) whether and to what an extent any correspondence might or should be drawn between national and not national legally qualified ways

of behaving and (ii) what relevance might eventually be given to their (lack of) translatability.

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Legal Transplants

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A legal transplant is a legal norm or legal institution (or, indeed, a group of institutions, entire normative act, etc.) that has been transferred to one legal system from another. The system from which the transplant originates is often referred to as the "donor system" or "model system," while the receiving system is sometimes named "donee" or "borrowing system." Transplantation includes anything from a norm being copied *ad verbum*, to extensive modifications being performed by the receiving system, while still keeping some core semblance of the original idea. The term, while older, has been popularized by Alan Watson's theory of legal transplants, which underlines the significance that non-legal factors, including pure chance, often play in the process of transplantation. Many approximate synonyms for the process of transplantation exist (e.g., one can also talk of the reception or borrowing of foreign law), but few provide suitable nouns for the law being transferred, which could partially explain the popularity of the term "transplant."

Origins of the Term

The earliest known use of the term appears in Jeremy Bentham's essay "Of the Influence of Time and Place in Matters of Legislation" (drafted in 1782, published in 1802), where he speaks of "transplanting laws" (Bentham 1962), though he often uses the term "transferring" as well. The purpose of the essay was not purely theoretical: it was also meant as practical advice for the English government of Bengal, and as a call for reform of English law at home (Huxley 2007). Bentham's view is that laws that are perfect in one country would not necessarily be such for another where different circumstances (both natural and social) reign. For a transplanting to succeed, he believes a detailed insight into such circumstances is required, and he provides a number of examples of differences that cause the same act or situation to have different legal implications in various countries. However, Bentham's advice for transplanters is mostly focused on causes, methods, and the advised (gradual) pace of the process, and the essay ends on a quite different note than it began, asserting that the best laws (and that would be those following utilitarian principles) would be the best for any time and place. The main fault with transplantation is, then, the faultiness of the transplanted laws (Bentham 1962).

The term does not seem to have found widespread use in the nineteenth century. Only about a century and a half later, on August 1, 1927,

Frederick P. Walton held a lecture "The Historical School of Jurisprudence and Transplantations of Law" at the International Academy of Comparative Law, which he soon afterwards published as an article (Walton 1927). Walton was a fairly prominent expert of his time: starting as a Scottish advocate, he developed a rich academic career: he had taught at the universities of Glasgow, McGill, and the Khedivial School of Law in Cairo, before being returning to Oxford, where he was admitted as an honorary fellow of Lincoln College in 1933. While his primary field of study was Roman law, he wrote on many other subjects related to civil law (and canon law, in the context of marriage) and legal history. His experience with multiple legal systems gave him an edge in the comparative study of law (Cairns 2013, 688–693; Hanbury 2004).

Walton's lecture focuses on a re-evaluation of Savigny's "Vom Beruf. . ." (Savigny 1840a) in over a century that had passed since its initial publication in 1814, relying also on his later work "System des heutigen Römischen Rechts" (Savigny 1840b). He concludes that Savigny's theory of law developing in accordance with the national spirit does not hold, especially for Germany, which has adopted a large quantity of Roman law (it could, he stresses, be valid for England), but he does give Savigny great credit for starting a wave of the study of legal history. However, Walton (1927: 189) also points out a new phenomenon that, he believes, would "have shocked [Savigny] profoundly": the transplantation of a legal system. Not merely individual rules or pieces of legislation – that have been transplanted before, although with lesser frequency – but of entire systems or large parts of them. He gives the contemporary examples of the Civil Codes of Egypt (1883), Japan (1889), and Turkey (1926), which had transplanted French, German, and Swiss law respectively, despite all having "a system of law of great antiquity, and, moreover, a system of law which is closely bound up with the national religion" (Ibid.). He concludes that the leaders of the Eastern countries have done so to catch up with Western progress, while such radical transformations would be hardly imaginable in the more conservative Western countries.

The term has been subsequently used by a number of other authors, such as Lee (1930, 33) speaking of "a body of laws transplanted from its native land to distant dependencies over-seas," and Mannheim (1937) mentioning "transplantation" of the jury from England to the Continent. In the 1950s, "transplanting" or "transplantation" has been mentioned by British scholars Wortley and Hamson (Cairns 2013, 687–688).

Watson's Theory

The concept gained greater attention with the publication of Watson's "Legal Transplants: An Approach in Comparative Law" in 1974; the book itself was based on a course in Jurisprudence that he held at the University of Virginia in 1970 (Watson 1993, xiii). Beginning with a discussion on the nature of comparative law, Watson concludes that it can only be considered a scholarly discipline in its own right if it concerns the comparison of legal systems between which there exists a (mostly historical) relationship (Watson 1993, 6–9). After outlining the perils and virtues of comparative law as such, Watson proceeds to introduce the concept of legal transplants (Watson 1993, 21):

> "Law shows us many paradoxes. Perhaps the strangest of all is that, on the one hand, a people's law can be regarded as being special to it, indeed a sign of that people's identity, and it is in fact remarkable how different in important detail even two closely related systems might be; on the other hand, legal transplants – the moving of a rule or a system of law from one country to another, or from one people to another – have been common since the earliest recorded history."

Watson (1993, 29–30) divides (voluntary) transplants into three categories: a people moving to a territory with no comparable civilization, bringing its law with it; the same, but where there *is* a comparable civilization; and a people voluntarily accepting a part of another people's legal system. Watson's originality, however, lies in the fact that he emphasized (mainly for the third category, using examples from various systems and periods) the relevance of factors beyond the quality of the law itself for the process of

transplantation: the language in which it is written and general availability of sources, the perceived authority of a legislator, the legal culture and education of people in charge of the legal reform, etc. All is illustrated by a plethora of examples dating from ancient to contemporary history.

Watson (1993, 95–101) sums up the findings of his book in 13 conclusions, which can be summarized as follows: 1. transplanting is extremely common throughout history; 2. transplanting is "the most fertile source of development"; 3. law is rooted in the past "to a truly astounding degree"; 4. transplanting (even from a very different system) is socially easy; 5. voluntary transplants almost always (always if major) involve changes, adaptation of the transplanted law; 6. no area of law is extremely resistant to transplantation; 7. the time of reception is good for reforming the received law, since it is already closely inspected; 8. transplantation to a less advanced society is possible and still easy, but accompanied with great simplification; 9. foreign law can be influential even if totally misunderstood; 10. authority is very important for transplants and for law in general; 11. a nation inventive in law may manage without transplants even when foreign influence is high in other matters in its society; 12. important legal innovations, like technology, are created by few, but soon spread widely due to their utility; 13. a nation's progress and inventiveness in one area of law is no guarantee of the same in others.

Reception and Critique

Initial reaction to "Legal Transplants" was lukewarm, with several reviews being negative (Cairns 2013, 640–642). The most prominent critical (yet not dismissive) review was that by Otto Kahn-Freund (1975), professor of Comparative Law at Oxford, who had recently written and lectured on similar subjects, including transplantation (Kahn-Freund 1974). (The term had also been used by Beckstrom (1973), but neither Watson nor Kahn-Freund refer to him, and were likely unaware of his article (Cairns 2013, 644).) Relying on views stemming from Montesquieu (1851, 7–8), Kahn-Freund (1975, 27) disagreed with Watson's thesis on the ease of transplantation and the idea that laws transplanted without proper understanding could be effective, and claimed that "any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection." Watson (1976) soon replied with a paper delimiting their differences in approach. Stein (1977, 199–204) later summed up the debate by stating that Kahn-Freund approached the subject like a lawyer-sociologist, with a "micro-legal" view, and Watson like a legal historian, with a "macro-legal" one.

In subsequent decades, polemics regarding Watson's theory persisted, while he continued to develop his views in other works, such as "Society and Legal Change" (Watson 2001, first published in 1977), "The Evolution of Law" (Watson 1985) or "Failures of the Legal Imagination" (Watson 1988), which met with mixed (though gradually better) reception (Cairns 2013, 648–675), as well as a number of articles (e.g., Watson 1996). Still, "Legal Transplants" remained the core of his theory. In an afterword to the second edition of the book Watson (1993 107–118), he acknowledged that his work was regarded as subversive, but claimed that there was no simple correlation between a society and its law, and that many factors influence creation and transplantation of law. Furthermore, he claimed that, when writing the book, he seriously underestimated both the extent and impact of legal borrowing, and its usefulness for the understanding of law and society. He remained by his 13 conclusions, adding extra factors such as habit and fashion, and concluding that governments are often not too interested in making law, delegating much of the job to a "subordinate legal elite" (judges, jurists) who "tend to make law according to a legal culture that they create for themselves."

By this time, the theory had gained a number of followers, and the term "legal transplant" had made its way into standard legal vocabulary, with some authors believing Watson to have coined the phrase, but many using it without referencing Watson or any other authority (Cairns 2013, 665–669). Other terms (reception, transfer, circulation, etc.) continued to be used

(e.g., Gaudemet 1976; Wise 1990; Graziadei 2006, 443), but were increasingly seen as synonyms (e.g., Cerruti 1983, 457). The concept was applied to more and more legal systems, historical and modern. It has been noted that "while the reception of Roman law in Europe has been an academic subject at least since the nineteenth century, the treatment of transplants and receptions as general phenomena became a major topic in comparative law only in the last three decades of the twentieth century" (Graziadei 2006, 442). While, naturally, many scholars agree with Watson only partially (e.g., Grossfeld 1990, 41–49; Ewald 1995), or form their own concepts independent of it, such as Glenn's (2000, 21–25) notion of (legal) tradition as "the changing presence of the past," legal transplants undoubtedly became a part of the scholarly mainstream.

However, the theory still has some strong opponents, the most prominent probably being Pierre Legrand, who began his critique with an article uncompromisingly entitled "The Impossibility of 'Legal Transplants'" (Legrand 1997). He criticizes Watson as "providing a most impoverished explanation of interactions across legal systems - the result of a particularly crude apprehension of what law is and of what a rule is" (Ibid., 113). In Legrand's opinion, a legal rule is not fully contained in its text: its interpretation constitutes a part of the core of its meaning (its "ruleness"), and that is always influenced by the (not only legal) culture that shaped the interpreter's views. Thus, for him, a transplant would only be achieved if both the textual *and* the invested, interpretative meaning were transplanted, which he deems virtually impossible. A language barrier makes it even less likely, as no perfect translation from one language to another can be achieved (and thus the translated rule is not the same), but even if the language is the same, he persists that the meaning in its entirety is not. "At best, what can be displaced from one jurisdiction to another is, literally, a *meaningless* form of words. To claim more is to claim too much," he concludes (Ibid., 120). He believes the theory to be conservative and serving to obscure the ideological and political aspects of legal change, and opposes global legal unification that he believes it propagates. Legrand (2001) later published a new version of this text, in which he stated that "[s]ince then, Alan Watson has replied to my argument," but he made no substantial changes to the text and even gave no reference to Watson's (2000) reply. Some authors criticize Legrand's contradictory treatment of empirical claims as if they were logical ones (Nelken and Feest 2001, 3–4), while some choose to interpret his position in a "qualified" manner simply to mean that one should oppose excessive legal unification (Graziadei 2006, 469). Nevertheless, he remains the most direct opponent of the legal transplant theory.

Plants or Organs?

The allusions contained in the word "transplant" evolved over time. Bentham's transplanting was rooted in an agricultural context, spreading to the colonial implications of various things being transplanted to colonies, including law (Huxley 2007, 181–182). Walton used the term "transplantation" matter-of-factly, without giving it particular metaphorical nuance. Kahn-Freund's (1974, 5–6) and Watson's (1993, 27) transplantation, however, is explicitly that of organs: "A successful legal transplant – like that of a human organ – will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system. Subsequent development in the host system should not be confused with rejection." As Cairns (2013, 643) has stated, this is due to organ transplantation being a commonly discussed subject in the period. Teubner (1998, 11–12) has argued that the term was misleading, as transplanting law leads to unpredictable reactions from the system, replacing it with the term "legal irritant" for his purposes; however, one could argue that this does not contradict the medical metaphor, as a transplanted organ also irritates the host body and can, at worst, be rejected by the immune system. Nowadays the word is mostly used either neutrally or as a medical metaphor, though occasional examples of the botanical meaning still appear, like Harding (2001, 218) claiming that not all

"'repotting' of legal ideas will result in instant blooms." It is precisely the allusion to the legal system as a complex, living organism that gives the metaphor its strength (Goldbach 2019, 584).

Legal Transplants in Different Areas of Law

An ongoing debate exists regarding whether all areas of law present equally fertile ground for transplantation. Some authors believe it not to be the case, claiming that family and inheritance law, in particular, have proven to be the most resistant. (Walton 1927, 190–191) Some, like Watson (1993, 98–99), believe this not to be the case, due to a number of existing transplants in family law. While conclusive research remains to be conducted, it can be said that areas of law that are more closely connected to a person's intimate life and the legal culture of a particular community tend to be more resistant to transplantation, or at least to be *perceived* as such. While numerous examples of transplants even in these areas do indeed exist, there is also a sufficient number of examples of slower reform and transplants in these cases, from the Serbian Civil Code of 1844 basing its family and inheritance law on local customs, despite otherwise mostly being a transplant of the ABGB and, to a lesser extent, *Code civile* (Avramović 2017, 441–451, 2018), over Bogišić omitting to codify those two areas in the 1888 General Property Code for Montenegro, envisioned as a classical civil code prior to that decision (Zimmermann 1962, 190–191, 317–322; Meder 2017) and a highly similar struggle with codifying the same areas in Japan (Isono 1988; Matsumoto 2018), to the EU intervening in family law matters much less than in other areas of civil law (Antokolskaia 2003; McGlynn 2006, 152–201).

New Tendencies – Legal Transplants in the Twenty-First Century

In contemporary legal theory, legal transplants play the role of one of the key concepts in the field of comparative law and are featured prominently in major reference works on the subject (Graziadei 2006; Fedtke 2012; Bussani and Mattei 2013), to the point of being deemed "ineradicable anywhere from the dynamism of the law" (Ibid., 7.) Such acceptance and widespread recognition, naturally, lead to new subjects being singled out as focus of research in legal transplants. For Graziadei (2006, 455), those are "imposition of law through violence in one form or another; change produced by the desire to follow prestigious models; and reform for the purpose of improving economic performance," while the study of transplants should be able to reveal better models that explain how the law changes (Graziadei 2009). Fedtke (2012, 552–553) draws our attention to "undercover" transplants – legal borrowing where the origin of a rule or idea is not publicly revealed, in legislation and particularly in case law. Goldbach (2019, 594–596) suggests a more sociologically inclined approach: studying the people involved in legal changes, but also paying attention to the politics and power involved, and building "empirically grounded, detailed accounts of how legal change occurs."

It has been pointed out that transplants have also influenced legal pluralism, showing a multifaceted reality of legal systems of various origins, instead of strict confinement into specific models or legal families (Graziadei 2009, 727). Mixed legal systems, that until a few decades ago "were treated as legal aberrations and were scarcely discussed" (Palmer 2013, 368), are now commonly accepted, and various mixes and degrees of influence are assessed and analyzed (e.g., Örücü 2008) – though it must be noted that Walton (1899) and other legal scholars from his generation had already noticed their existence (Palmer 2013, 368–373). To an increasing number of scholars, "it seems that not a single legal system can evade legal transplants: it is only a matter of quantity" (Avramović 2018, 33), and "pure" legal systems, free of transplants, are seen only as a myth (Palmer 2007).

While Watson's own work and other early studies on legal transplants dominantly concerned comparative legal history, the study of legal transplants in recent decades increasingly focuses on positive law and current legal reforms (Goldbach 2019, 588–589). This, however, has its dark side.

More and more, transplants are being viewed (and literature about them consulted) from an economic and commercial sense, including the lobbying of institutions or private companies for the adoption of a certain foreign model in a particular country, frequently based on superficial analysis – while comparative law research is sometimes required to "prove its worth" by delivering a model suitable for transplantation (Sacco 1991; Bussani and Mattei 2013, 4–6; Garoupa and Ginsburg 2013, 67–68). This is particularly the case when a legal system undergoes major changes, such as the modernization of legal systems of former colonies, transition of former socialist/communist countries toward a market economy, or the "harmonization" of laws of EU member and candidate states (e.g., Harding 2001; Daniels et al. 2011; Goldbach 2019, 585–588). Such a practice is obviously problematic from many angles and proves the necessity of a proper scholarly approach to the subject.

The study of legal transplants is also spreading to new areas beyond the classic state-made law, such as transplants in informal law, alternate means of dispute resolution, or transnational expert networks (Dezalay and Garth 2002, 32–58, 2010; Alkon 2011; Goldbach 2019, 589–590). Watson's (1993, 118) conclusion that "the quality of legal education, including exposure to Comparative Law (where that occurs), plays a powerful role in law reform," due to the reform being performed by lawmaking elites, begins to acquire new meaning in a globalized context of transnationally driven modernization of law, but also influences exerted on legal education (Dezalay and Garth 2021).

There is still no doubt that transplants remain "unsettling topics" for authors who support a positivist attitude, viewing law as an expression of the will of the state, or those who insist on an intrinsic (historical or sociological) link between a society and its law, following in the footsteps of Montesquieu, Savigny, or Durkheim. Nevertheless, those views are not irreconcilable: after all, transplants mostly do happen according to the legislator's will (even if the sovereign is not personally acquainted with all the details and factors), and the culture of a given society will eventually influence the application and development of the transplanted law (Graziadei 2006, 463–467).

Finally, it is worth noting that while earlier scholars used to focus on a single type of transplant, nowadays analyzing the entire breadth of possible influences seems to be becoming the norm. As Huxley (2007, 186–188) has noticed, Bentham had focused on transplants as law imposed by colonial powers, while Watson largely ignored those, believing only voluntary transplants to be "true" transplants. Huxley believes that, when facing a new transplant, one should "mark its position on the Bentham-Watson scale" (Ibid., 187), as the more voluntary the transplant is, the more likely it is to succeed. While the likelihood of success can never be predetermined (voluntary transplants can still fail; some imposed ones succeed), the amount and types of external influence involved in a transplant can say a lot both to a scholar researching transplants and a practitioner involved in the process.

Cross-References

- ▶ Bentham, Jeremy
- ▶ Comparative Law: Methods of
- ▶ Durkheim, Emile
- ▶ Institutionalism: Legal
- ▶ Legal Pluralism: History of
- ▶ Legal Positivism: Inclusive
- ▶ Legal System and Legal Order
- ▶ Legal Systems
- ▶ Montesquieu, Charles Louis de Secondat, Baron de La Brède et de
- ▶ Savigny, Friedrich Carl von

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Legisprudence

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Introduction

What "legisprudence" is or where it belongs within the academic landscape can, of course, be disputed. Yet, in our view, legisprudence is best conceived of as a critical-normative discipline dealing with the rationality and justification of legislation; and we further hold that it should be a key chapter of a general theory of law. In brief, we define legisprudence as that branch of jurisprudence which is in charge of the theory of legislation. This article seeks to ground these claims by providing a short overview of major legisprudential insights and topics, as well as of their implications for the study of law. We start with some brief remarks on the meaning, roots, and development of legisprudence as a *distinctive theoretical project*. Against this backdrop we introduce the core concern of legisprudential thinking: the problem of – and the aspiration to – *rational lawmaking*, along with the overarching principles on which practical reason in legislation can thrive and *legisprudential validity* be assessed. To conclude, we touch upon the *implications* of the legisprudential project on (regular) jurisprudence and suggest some *open questions* for future research.

Legisprudence as a Theoretical Project

The making of laws arouses the interest of a varied group of academics (political scientists, public policy analysts, sociologists, or economists), but one would expect us, legal scholars, to be the ones most interested in it. In the past two centuries, however, we have been largely concerned with applying, interpreting, or systematizing laws, but not with their creation; and still today we are used to treat legislation as a given, as if *law*making fell beyond the scope of *law* studies. Legisprudence seeks to challenge this artificial split between the production of legal norms and their (re)construction and application, and offers a theory of legislation coming from within legal philosophy – though its object inexorably calls for interdisciplinarity (Richli 2000). Unlike other approaches, it addresses the making of laws as a juridical enterprise, trying to discern the potential and the limits of practical reason in legislation. Its major focus is on the justification of laws, in a parallel way as legal methodology focuses on the reasons for interpretative choices – the shared normative assumption is that legally binding decisions imply a claim to justifiability or rational acceptability. In legisprudence this normative drive does not boil down to a sheer moral-ethical judging of laws: as a critical discipline, it sets and relies on normative standards but is not committed to any particular

axiological view or substantial conception of rights or values. The emphasis on legislative reason-giving distinguishes legisprudence from close relatives such as legistics, which concentrates on legislative drafting or technique, and is usually occupied with the formal qualities of laws. While legistics often include legisprudential aspects (Xanthaki 2014; Seidman et al. 2001; Morand 1999), it normally does not purport to give a general theoretical account of the justification of laws or of legislation as a rational process. Also some strands within public policy analysis touch upon the justification of laws, or take on a normative and even "argumentative" stance, but do so from a political perspective, thus largely overlooking the specificity of laws *qua* laws and the role of legislators as actors in a legal system.

Critical reflection on legislation is as old as legislation itself, and the spirit of legisprudence can be traced back long ago in the history of legal and political ideas. The theme of legislative wisdom and discussion of the requisite virtues of laws can be identified, for instance, in the works of Plato, Aristotle, Cicero, Isidore, Aquinas, or Suarez, to name just a few. But surely the crucial and most prolific moment in this tradition was the Enlightenment, with its irresistible faith in human reason pervading all spheres of theoretical and practical knowledge. During the eighteenth century in particular, great many authors elaborated on the attributes of the rational lawmaker and the requirements of *la bonne loi*. The enlightened *nomophiles* vindicated the qualities that laws should have as a rational expression of the will of the sovereign (eventually, the people's will). Laws were seen as general, abstract, nonretroactive, systematic, clear, accurate, concise, and public (bodies of) rules enacted in pursuance of the common good and upon due reflection. In this light, legality acquired a new sense: laws were expected to stem not merely from a supreme political authority but from the dictates of reason. Legislative literature most visibly flourished in France or Italy (Montesquieu, Rousseau, Diderot, Condorcet, Mably, Muratori, Filangieri, Beccaria, etc.), but a similar wave spread in many countries pushing for legislative rationalization – whereby Bentham (1843, 1998) deserves special mention.

The science of legislation developed in this period was more than a speculative effort (cf. Mertens 2004). From the late eighteenth century onward, with some remarkable exceptions including Germany and the common law countries, the theory and practice of legislation merged into the codification movement. Roughly, this movement envisaged the "positivisation" of law through "codes", i.e., pieces of legislation designed after mathematical patterns (*more geometrico*) to cover whole legal areas, initially civil and criminal law. Codes were an attempt to settle (positive) law upon rational foundations and endow it with a logical, systematic structure – the inheritance from iusrationalism cannot be overlooked here. This practical repercussion of the science of legislation was fuelled, inter alia, by states interested in monopolizing all legal sources and by a blooming liberal, capitalist ideology demanding legal certainty and equality before the law. At that time, legislation was not meant to be an instrument to actively mold or steer society but a framework within which society could govern itself; so the chief concern was to achieve a stable legal order and overcome an era of legislative chaos and judicial arbitrariness. A strong link between the rational making of laws and reliability in their application, as a cornerstone of the rule of law, was thus established to preserve liberal values: rational legislation would prevent judges from misusing their power.

Those who carried out the codification knew well that neither lawmakers nor laws can be perfect nor its application be entirely deductive or predetermined, as Portalis famously noted in his defense of the project of the French civil code. Yet, the fact that legislation was supposedly enacted upon the inspiration of reason was seized on to put its legitimacy out of discussion. In a sense, the "positivisation" gave rise to an ideology of legalism which has dominated western legal cultures for a long time. One of its major postulates is the view of legislation as a "given" starting point for juridical work: according to this view, jurisprudence deals with positive law only, i.e., the law once enacted or "posited", and has nothing to say about its production. This neglect of legislation did not end when the

naive, formalistic legalism of the nineteenth century was proven to be grossly mistaken. Advanced iuspositivistic approaches have still clung to the tasks of (allegedly neutral) descriptive analysis, interpretation, and systematization of law as a given, which continued pushing lawmaking out of sight.

The hegemony of the "law-as-a-given" paradigm has always been littered with dissonant voices. In the twentieth century, a handful of leading authors aired their discontent with judge-centered jurisprudence (Cohen 1983), readdressed the issue of legislative rationality (Wróblewski 1979; cf. also Bobbio 1971; Aarnio 1983), or even put the creation of law at the heart of their scholarship (Fuller 1969). Despite the reinvention of legislation theory by Noll (1973) and its ensuing growth in Austria, Germany, and Switzerland (Öhlinger 1982; Rödig 1976; Müller and Uhlmann 2013), jurisprudence nevertheless remained refractory to our topic until the 1990s, when lawmaking was recovered as a fundamental legal-theoretical issue (Atienza 1992; Dörbeck-Jung 1995; Wintgens 1999; Zapatero 2009; cf. Amselek et al. 1988; Tammelo and Mock 1986). Nowadays legisprudence seems to be gaining as much import as it had in the past. Among the many factors contributing to its upswing, one should recall first the irritation caused by the exponential growth, disorder, and accelerated production of laws – often associated with the regulatory state, a situation that a number of institutional initiatives at the EU level, for example, have tried to mitigate (Voermans 2009). In parallel, legal scholars increasingly realize that judges are no longer the central agents of the legal system and concede that the shortcomings of instrumentalism and the steering crisis of legislation in complex societies merit closer theoretical attention. The rise of constitutionalism has furthermore prompted an attempt to restore "the dignity of legislation" vis-à-vis judicial review (Waldron 1999a, b), and legislatures have begun to be studied as a decisive element of the legal systems (Bauman and Kahana 2006; Eskridge et al. 2014). Finally, the argumentative, post-positivistic turn in jurisprudence has brought the topic of reasonableness and the justificatory dimension of legal norms and practices to the foreground; and, albeit timidly, this focus has also stretched to lawmaking.

This is the context where legisprudence emerges as a distinctive project, trying to make sense of legislation as a rational activity belonging to the legal system in its own right, thus overcoming the divide between the (political) making and the (legal) application and interpretation of law. In this task, legisprudence receives the legacy of the Enlightenment, but its foundational question – what does rational lawmaking entail? – demands an updated response.

The Problem of Rational Lawmaking

Although there are serious disagreements about what "rational" as applied to the making of laws means – "evidence-based", "good", or "smart" pose similar difficulties – a *legisprudential* notion of "rationality" must account at least for three general, interrelated traits: plurality (or multidimensionality), gradualism, and boundedness.

Rationality in legislation is a complex attribute comprising several dimensions and must simultaneously be assessed against various criteria. Labels vary depending on schools or authors, but, in the last analysis, legislative rationality stands for some ideal array of linguistic, logical, epistemic, systematic, instrumental, and axiological aspects or "competences" (Ziembinski 1985). One-sided views dwelling on one aspect only (e.g., economic efficiency) or confined to a single standard (e.g., Weberian legal-formal rationality) are inevitably defective in terms of legislative justification. Atienza's (1997) conception of rational lawmaking very well captures this complexity. He singles out five types or levels of rationality, i.e., five dimensions of legislative justification: linguistic (laws as normative messages must successfully be transmitted to their recipients), systematic (laws should fit in with the pre-existing legal order, i.e., must cohere and be logically consistent with it), pragmatic or social (defining the degree to

which statutes are complied with by their addresses or are translated into fact), teleological or purposive (referring to the ability of laws to attain their goals with the least negative impacts), and ethical-moral (content and goals of legislation must be axiologically acceptable). Each of these "rationalities" correlates with ideals that legislators should strive for: intelligibility, systematicity, social realization, instrumentality, and normative correctness. Yet Atienza's model includes an additional level: that of reasonableness. To this cross-dimensional criterion, he accords the role of a meta-rationality defining the achievement of a "balance" or "reasonable adjustment" between all other rationality levels (cf. La Spina 1989; Wintgens 2012). As a consequence, legislative rationality cannot be conceived as a binary property: it is a matter of grade and aspiration. Gradualism implicates, in other words, that there is no such thing as "one right answers" in lawmaking, but rather a leeway for rationally acceptable, reasonable choices. The normative condition upon which lawmakers are given a range of options is that they justify theirs. In this connection, legisprudence is based on the internal point of view of lawmakers who take their job seriously. This is not to assume an idealized picture of legislators. On the contrary, legisprudence recognizes that they are subject to many constraints defining the framework in which policy options are discussed and law is enacted. In spite of the appeal of the term, legislative rationality is necessarily limited and context-dependent. Borrowing from Simon (1983), one may say that it is "bounded", conditioned by the inherent limits of human cognition and information processing, as well as other factors constraining or framing decision-making. Boundedness might even be regarded as the crucial circumstance of legislation. Hence our expectations of rationality on the side of lawmakers must be moderate. If legislative rationality has to play a guiding role, it must be looked at with realistic eyes, accepting that legislators must often settle for less than the best and content themselves with "satisficing" solutions, with trying to achieve a reasonable balance in view of the circumstances (Wintgens 2013; on the "sufficientist" version of reasonableness, Sartor 2009). This prevents a hasty disqualification of "imperfect" and suboptimal legislative choices but should not be used as a pretext: the bounds of rationality cannot excuse lawmakers' justificatory negligence.

To recap, legisprudence approaches rationality in lawmaking as a pluralistic, gradual, and limited quality. It demands a satisficing degree of fulfilment of linguistic, legal-systematic, social, instrumental, and ethical-moral requirements, which further implies that lawmakers publicly state and discuss the reasons for what they decide. In the end, it is only in the offering up of legislative arguments and in deliberating over the degree of satisfaction of the different aspects of legislative rationality that lawmakers can be deemed rational. Drawing on these general ideas, now the issue is whether a theoretical framework can be developed which helps to deploy and assess legislative rationality in practice. In other words, how can we possibly determine the legisprudential validity of laws?

Legisprudential Validity

The notion of legisprudential validity presents a fruitful way to tackle the problem of legislative rationality. To put it simply, it serves to assess whether lawmakers have complied with fundamental tenets and requirements for the rational justification of laws.

Without precluding other conceivable foundations, a normative theory of rational legislation can be grounded on the basis of freedom, i.e., on the ultimate moral value of autonomy (Wintgens 2012). On this account, the outcomes of legislation, most typically statutory norms, are considered as external limitations of individual freedom. As such, these limitations ought to be reasonably justified, for which a principled framework is needed. This framework may be taken to consist of four basic *legisprudential principles* that should be honored whenever an external limitation of freedom through legislation is at stake – for

otherwise it cannot be "legisprudentially valid." Thus, legislators are bound to show, first, that there exists a failure in social interaction and legislative intervention is a better alternative than others suggested to remedy it (*principle of alternativity*); second, that interferences with freedom do not exceed what is really necessary, i.e., that there are no other, less intrusive legislative options available or other regulatory means or techniques like incentives which are likely to correct the failure – in short, a statutory norm must be justified by its normative density by "arguing out" weaker options (*principle of normative density*); third, that the envisaged legislation actually fits well into the pre-existing normative system, so that reasoned support for new laws is provided in view of the legal order as a whole (*principle of coherence*); and fourth, legislators are required to uphold laws over time, i.e., to make sure that the arguments for legislative decisions continue to be valid (*principle of temporality*). All four principles constitute an overall scheme for freedom-respecting legislation, but this scheme must be further specified into a more operative set of justificatory requirements or *legisprudential duties*. Such duties are demands on the production of laws determining how legislators must proceed in order to qualify as rational actors, thus showing that practical reason permeates their work; so the focus is not directly on the content of laws, but rather on how legislative choices are arrived at. Legisprudential duties, that is, amount to a due process (Linde 1976) or due method (Noll 1973) of legislation.

Even though characterizations may vary (cf. Boukema 1982), a due legislative method involves at least six core exigencies (Wintgens 2012): the duty to carry out "relevant fact finding" for the external limitation which the legislator is issuing and to state how legislative facts were gathered and analyzed; the duty of "problem formulation", which presupposes justifying why a given state of affairs is undesirable; the duty of "prospection" or to take future circumstances into consideration (ex ante assessment of legislative impacts); the duty to "weigh and balance alternatives" in search of the legislative option which counterbalances any of the alternatives with a lower normative density than the external limitation proposed; and, finally, the duty of "retrospection" or ex post evaluation and the duty of "correction", since lawmaking does not only require passing well-grounded statutes after careful deliberation but also entails attentiveness to their actual impacts and responsiveness to changing or emerging circumstances (cf. Flückiger 2007). For a normative theory of legislation, these six duties are inherently attached to the exercise of lawmaking powers and operate as a dynamic interactive set, i.e., they are interwoven: the fulfilment of one duty activates a subsequent duty that may in turn reactivate a preceding one. This intertwinement resembles a loop running back and forth: the more often legislators run through the loop, the less adjustments may be needed. If no readjustments are needed any longer, at any given moment in time, legislators will at least temporarily be discharged of their duties – legisprudentially speaking, laws cannot be justified once and forever.

It is important though not to misinterpret the "freedom approach." Laws often limit freedom, but they also promote or enhance it. While legisprudential principles and duties may find a solid basis in the value of autonomy, legisprudence also reaches beyond freedom-limiting rules. As a theory of rational legislation, it must deal with other types of norms and needs not be attached to a liberal or a "neutral" model of law or to a formal conception of legality. Needless to say, living up to the tenets of formal legality remains crucial in many respects, but the current context requires an extended view. As a matter of fact, legislation has long ceased to be the legislation of the liberal state: it now comes under diverse forms and renders a variety of valuable social functions that no scheme of "rules backed with sanctions" could fulfil (cf. Westerman 2007). In order to cope with this transformation and keep pace with increasingly complex social environments, the legisprudential project can benefit from exchange with a wealth of theoretical approaches to legislation and regulation that have been developed in the last decades (Nonet and Selznick's "responsive regulation", Teubner's "reflexive law", Black's "facilitative regulation",

etc.). Consider, for instance, interactive and communicative theories of legislation; they submit that laws are likely to be (more) legitimate and effective when both its formation and application occur through a continued collaborative effort between all relevant actors and stakeholders, whereby standards, principles, or "symbolic" norms play a key part. This account demonstrates that the classic command-and-control, cybernetic model of legislation based on precise rules is no longer, or at least not always, adequate to govern society. A symbolic mode relying on open norms may be more capable to accomplish desired legislative results in certain social settings or with regard to certain regulatory problems. In law production, that is, reflecting on what legislative design strategy is actually best suited in view of the intended goals and the social communities or fields addressed proves crucial (Witteveen 2005, 1999). This requires rethinking the question of symbolic law. Overcoming old negative views, the inclusion of symbolic elements in legislation, when connected to social practices developing and interpreting them, may increase chances of legislative success (van Klink 2016). This is but one single example of how legisprudence as a theoretical field keeps sensible to the current circumstances of lawmaking.

Implications and Open Questions

It looks obvious that legisprudence fosters our understanding of legal norm creation and provides those involved in lawmaking (including elected legislators) with theoretical, critical tools to perform better – which also helps to counterbalance the efficiency bias of some "better" regulation initiatives. But we claimed at the outset that it should form an important chapter of general jurisprudence (cf. Weinberger 1976) and would like to clarify this a bit further by pinpointing three implications of a "jurisprudence of legislation" – to borrow Waldron's phrase.

To start with, a widened focus on lawmaking can enrich the theory of legal interpretation. Take, for example, the "rational legislator" postulate which has been at the heart of this theory in civil law systems. By virtue of this methodological fiction, legal provisions are interpreted as if they had been created by an ideal entity that followed rational criteria, and these turn out to match the hermeneutical canons generally used by jurists. This not only shows a continuum from legislative to dogmatic or judicial reason – when construing the meaning of laws, we "till" in the same workfield as legislators (Cohen 1983). As noted earlier, such criteria are often mutually conflicting, and the pursuit of one of them must be at the expense of other(s), so that a key issue in the theory of rational, viz., reasonable lawmaking reappears in statutory construction. In the study of legal interpretation, watching to the arena of lawmaking also helps to shed light on classical themes like the notion of legislative intent (Duxbury 2013) and even raises new ones: e.g., we still know little about the function of legislators as (pre)interpreters of the laws they pass or the interplay of this (pre)interpretation with ex post forms of statutory construction. So legislative jurisprudence urges us to abandon the familiar, somewhat schizophrenic view of lawmaking widespread among jurists: we discredit actual legislators as irrational political agents but work out our interpretations upon a fictional picture of what rational lawmaking consists of – a due assessment of legislative rationality is waived in either case. An in-between reading must be allowed for, so that we do not judge legislators to be irrational unless there is a well-grounded account of why they violate legisprudential standards (Wintgens 2013). In substituting aprioristic assumptions for empirically justified criticism, this reading enables a gradual qualification of legislative rationality.

Second, this perspective has a bearing on themes pervading jurisprudential discussions in recent years, such as the erosion of the rule of law and, in particular, the struggle as to who – lawmakers or courts – should have the ultimate authority over basic rights. While the rise of constitutionalism has vivified the juristocracy vs. democracy debate, scarce attention is being paid to the actual performance of legislatures and lawmakers as constitutional interpreters.

Delving into a jurisprudence of legislation can play its part in this conflict; at the very least, before taking stance as to how the authority to constitutional interpretation should be distributed in democratic societies, it seems advisable to empirically study how capable the "other party" is to reasonably justify legislation affecting constitutional matters. One possible upshot of such a study might be that we rethink our judge-oriented argumentation standards or develop specific models for constitutional interpretation at the legislative stage. And this especially goes for those approaches adhering to an argumentative paradigm in law, which have often disregarded the theory and practice of legislative reasoning.

A third area of interest has to do with the legally binding dimension to legisprudence. That lawmakers undergo duties of justification can no longer be seen as a mere theoretical claim, for courts are more and more deploying legisprudential standards to review legislation. In modern democracies, lawmaking powers are only constrained by the constitution, and certainly no constitution was laid down to transform the theory of rational lawmaking into positive constitutional law. However, what may or may not be derived from constitutions (or analogously ranked texts) depends on their authoritative interpreters, and judges may well construe them in a way that obligates lawmakers to legislate better, i.e., more rationally. When embarking on such a construal, courts are juridifying tenets or insights that belong to the aspirational realm of legisprudence, and constitutional texts – enriched through judicial doctrines – may turn out to comprise a normative theory of lawmaking. To come to terms with this development, conventional legal scholarship needs a legisprudential twist.

Of course, current topics in legisprudence go beyond these areas (Meßerschmidt 2008; Gomes Canotilho 2009; Karpen and Xanthaki 2017). Although there is no space here to offer an illustrative list, at least some avenues of research are worth mentioning. One essential question is about the relation between (deliberative and representative) democracy and rational lawmaking: legisprudence cannot do without a focus on democratic inclusiveness and authenticity, for these are necessarily anchored in a rational process of legislative justification. Another promising path is the detailed investigation of particular lawmaking contexts or scenarios: some types of parliamentary laws – enacted, e.g., to delegate legislative powers, to (re)codify a legal sector, or to critically shape society in the long run – may require specific attention. And legisprudence must further account for the many faces of contemporary lawmaking. This obviously includes implementation and lawmaking by agencies and administrations – the term "regleprudence" has already been coined (Davidson and Leib 2015) in this connection – but also "regulation by technology" and "behavioral" modes of legislating or "nudging" should be critically considered under legisprudential light. And, having regard to the increasing importance and variety of international lawmaking processes (cf. Boyle and Chinkin 2007), the development of what might be called an international legisprudence poses another big challenge. Finally, in a world society, legal-theoretical reflection on legislation cannot be restricted to western traditions: cultural and legal pluralism must be given a place in the legisprudential project. In a manner, the scope of this project broadens to any institutionalized norm-giving practice or deliberate attempt to regulate social interactions. One might even say that a long-term goal for legisprudence is to evolve into a general theory of rational norm production. For the time being, however, the success of this discipline would lie in (re)conciliating the study of law and the study of its making.

Conclusion

The typical attitude of jurists when contemplating legislation is to complain. Without a thorough account of what a proper justification of legislation entails, one wonders to what extent this attitude is in turn justified. Until recent times, legal theory has concentrated on the interpretation and application of laws, considering judges as the main – if not the only – characters and neglecting

the position of legislators and other agents involved in lawmaking. Legisprudence aims to shift the focus of legal theory to law production as one of its principal topics. Probably, the first enemy of this project is jurists' proverbial, albeit misguided assumption that legislation cannot be subject to rational scrutiny or be studied with legal-theoretical tools, as if it were a subject matter for other social scientists. Such an assumption sounds very much like a self-fulfilling prophecy: we cannot expect to have reasonable lawmaking if we do not deepen into what legislative reasonableness involves. Not only has the neglect of lawmaking a negative impact on legal education but also on the very idea of a general jurisprudence. One can hardly speak of a "general" theory of law while leaving a vital province of its domain – lawmaking – unattended: theorizing law upon an artificial detachment of legislation from adjudication, in other words, is no longer acceptable.

Cross-References

- ▶ Authority of Law
- ▶ Behavioral Economics and Law
- ▶ Certainty: Legal
- ▶ Fuller, Lon Luvois: Influential Ideas
- ▶ Jurisprudence of Interests
- ▶ Legal Realism, French
- ▶ Legal System and Legal Order
- ▶ Waldron, Jeremy: Rule of Law

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Legitimacy of International Law

► International Law: Legitimacy of

Leibniz, Gottfried Wilhelm von: Legal Philosophy

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Biography of a Lawyer

Gottfried Wilhelm Leibniz was born in 1646 in Leipzig and died in 1716 in Hannover. He was a lawyer by profession. Upon completing his bachelor studies of law and philosophy in Leipzig, he became juris doctor at the University of Altdorf (near Nürnberg) in 1667. Many of his early works are devoted to legal issues. His academic dissertation, *Specimen quaestionum philosophicarum ex jure collectarum* (A VI i 69–95); his bachelor's thesis, *Specimen certitudinis seu demonstrationum in jure exhibitum in doctrina conditionum* (A VI i 369 430); and his dissertation, *Disputatio inauguralis de casibus perplexis in jure* (A VI i 231–256), all show that Leibniz was a genius in this field of research. In 1667, in the famous *Nova methodus discendae docendaeque Jurisprudentiae* (A VI i 259–364), he published his new ideas about teaching law.

Leibniz was offered a professorship at Altdorf, but he preferred to work in the legal profession. In the following 4 years, he worked in Mainz as a judge and reformer of the *Corpus Iuris Civilis*. It was his plan to supersede the Roman case collections and develop a modern civil law code, with abstract rules as premises for exact reasoning (*more geometrico*). During this time, in his *Elementa Juris Naturalis*, he developed the first deontic logic ever based on modal logic.

After that, he served as a diplomat in Paris (1672–1676); he visited the Royal Academy in London; and then, having devoted robust study to mathematics under the guidance of Christian Huygens, he invented calculus, the mathematical method for the study of continuous change. Since he could not obtain a permanent position

as a professor of mathematics in Paris, he accepted an offer by the Guelf Duke of Hannover as a legal counsellor. *Nolens volens*, Leibniz stayed in Hannover until his death. In this long period, he worked as a legal counsellor, diplomat, engineer, and historian. Though busier developing metaphysics and mathematics, he went back again and again back to the problem of defining ethical and legal principles and to his plans to reform the law. He left countless fragments dealing with further development of legal and moral philosophy and systematization of the law.

Leibniz's Legal Philosophy as a Combination of Roman Law, Natural Law, Logic, and Metaphysics

Leibniz's legal philosophy is based on a combination of Roman law, natural law, logic, and metaphysics. In his *Doctrina Conditionum*, he showed that the classical Roman jurists applied Stoic propositional logic to law. Leibniz took this as his starting point in developing a new method for dealing with the law on the basis of definitions, theorems, and proofs. Of course, he was not the only person to have embarked on such an endeavor, but probably he alone managed to develop the logical tools necessary for such a project. Unlike most other legal philosophers of his time, he has an appreciation for classical Roman law, and did not seek to put it aside, though he did dislike the way the Byzantine *Corpus Iuris Civilis* was ordered and structured. His legal philosophy is linked to his metaphysics. His idea of a substance or monad and its activities is linked to his idea of a subject in legal contexts and to his idea of liability according to natural law. As he would often say, in his philosophy everything is linked to everything.

Anti-voluntarism, Necessary Truths, and the Definition of Justice

Leibniz held a deep admiration for Hobbes's method and style (see his letter to Hobbes of 1670; A II i 56; L 105), but he rejected the reduction of justice to the arbitrary will of the sovereign (i.e., the idea that "just is whatever pleases the most powerful" [Meditation on the Common Concept of Justice, PW 47]). For Leibniz, on the contrary, "justice follows certain rules of equality and of proportion [which are] no less founded in the immutable nature of things and in the divine ideas, than are the principles of arithmetic and of geometry" (PW 71). Leibniz distinguishes justice (*le droit*) from law (*la loi*). Laws are contingent and can be unjust, because the legislator can do a bad job. Justice, by contrast, cannot be unjust, because this would be a contradiction in terms. Thus, according to Leibniz there is no arbitrariness in justice at all: the reasons for just laws belong to the realm of necessary truths. Especially in his later years, he strenuously fought against the voluntarism of Hobbes and Pufendorf (Armgardt 2015b, Pagallo 2016, Chap. 4). For years Leibniz tried to find an adequate definition of justice and finally arrived at justice as the charity of the wise (*caritas sapientis*) (Goldenbaum 2008). This means that morality and rationality have to be combined. The aspects are meshed in a unique way in his extraordinary contributions to law, coupling the highest standards of morality with rigorous legal logic.

The Three-Step Model: *Jus Strictum*, *Aequitas*, *Pietas*

Leibniz distinguishes three degrees of natural law, corresponding to the three basic principles of Roman law: strict law (*jus strictum*), equity (*aequitas*), and piety (*pietas*).

The first degree, strict law, follows only from legal concepts and has as its precept the principle *neminem laedere* ("injure no one"). Strict law belongs to the lowest form of justice, that is, to the kind of justice which Aristotle called commutative/corrective justice.

The second degree of natural law, equity "that is the ratio or proportion between two or more, consists in harmony or congruence" and takes as its key precept the principle *suum cuique tribuere*

("give everyone his due"), corresponding to Aristotle's distributive justice. Leibniz was always concerned with certainty in law, and for this reason, he developed a precise model of equity, in such a way as to move beyond Roman law. This model is based on degrees of need and on combining the concept of innoxious utility (*innoxia utilitas)* with the idea of caution in Roman Law (Armgardt 2017a): One can be obliged to do for others what is useful to them and not prejudicial to oneself; one may also be obliged to suffer damage for the benefit of others, if one is certain that the damage will be restored. Leibniz wanted to introduce a new action into the legal system based on innoxious utility arguing that all legal institutions should be interpreted in light of this principle.

Finally, the third degree of natural law, piety, takes as its precept the principle *honeste vivere* ("live honorably"). On this level there comes into the legal system the relation between man and God. In fact, these three degrees are ordered in a hierarchy of perfection in which each degree in the hierarchy is more perfect than the previous one, confirms it, and overrides it in the event of conflict. According to Leibniz's *Monadology* (§ 89), God ordered the whole world in a manner that in the end (in the beyond) all good acts will be rewarded and all bad acts punished according to their respective merits. In virtue of God's decree, the laws of grace and the laws of nature are in harmony (Armgardt 2016).

Conditions and Logic

Since his earliest writing (the 1664 *Specimen quaestionum philosophicarum*), Leibniz argued for the need that law engages in an interdisciplinary dialogue with other disciplines, first among them logic and philosophy. This broad methodological toolbox, in combination with the idea that rational natural law could complement any positive law, led Leibniz to assume that the law can provide a nonarbitrary solution for every possible case. This outcome is also ensured by the claim that contradictory propositions are void and so are unsolved circular rankings between incompatible legal dispositions (*Disputatio de casibus perplexis*), while the allocation of the burden of proof, in combination with probability, can provide solutions to cases of uncertainty. An in-depth analysis of the logic of conditional provisions in contracts and other juristic acts is provided in the *Doctrina Conditionum* (**A VI 1 365–430**), including reasoning *a contrario* (the nonrealization of the condition entails the nonrealization of the conditioned legal effect, as in logical biconditionals), retroactivity, and historical necessity (Armgardt 2001, 2014). In the *Dissertatio de arte combinatoria* (Dissertation on Combinatorial Art, A VI i 163–230), the newly discovered combinatory calculus is used to detect gaps in the law.

Deontic Logic

Leibniz provides an analysis of deontic concepts (A VI i 431–485) that, while embedded in the framework of his ethics, anticipates modern deontic logic and in particular what is now referred to as standard deontic logic (see Von Wright 1951, Hilpinen 2001). His point of departure is the notion of the good man (*vir bonus*), which in turn is grounded in the idea of love: A good man is one who "loves everybody." The sphere of what is morally and legally permissible is thus characterized by him as "the capacity of the good man," namely, as the range of possibilities that are available to the good man. Accordingly, whatever a good man will could possibly do, consistently with his goodness, is legitimate or permissible (*justum*). This notion of the permissible leads to the correlative concepts of the prohibited (what is not permissible, i.e., what the good man will necessarily not do), the disobligatory (what it is permissible to omit, i.e., what the good man possibly will omit to do), and the obligatory (what it is not permissible to omit, i.e., what the good man necessarily will do). Leibniz's analysis anticipates the attempts made to reduce deontic logic to alethic modal logic – prefiguring the analyses developed by Kanger (1957/1971) and Anderson (1958) – since his deontic notions are defined according to the alethic ideas of possibility and necessity. This

reduction, however, maintains the normative character of deontic notions, since possibility and necessity are understood by him as relative to a moral/legal ideal, the good man.

Defeasible Reasoning and Presumptions

While Leibniz argued for the application of the "geometrical method" to the law, he also appreciated the peculiarities of legal reasoning and the need to approach different legal problems with different logical methods. In particular, he argued for the need to deploy not only demonstrative (deductive) inferences but also presumptive ones. Presumptive inferences are valid as long as no impediment can be established, such that a case "is to be decided in favor of the party who has the presumption unless the other party proves the contrary" (A VI iv C 2789). Presumptions support defeasible or non-monotonic reasoning because they lead to provisional conclusions that may have to be abandoned should an impediment to a presumption occur. They play a paramount role in the law, this for two reasons: first, because in "moral matters most inferences are indeed presumptive," and "every law contains a presumption, and applies in any given case, unless it is proved that some impediment or contradiction has emerged"; and second, because presumptions are necessary on the level of facts, given that it is difficult to prove contingent facts (Armgardt 2015a).

Leibniz's considerations on presumptive legal reasoning clearly identify those nondeductive patterns of reasoning that only in recent decades have been studied in philosophy (Rescher 2006) and formalized in logic and artificial intelligence (Pollock 1995) and in particular in the logical analysis of legal argument (Prakken and Sartor 2015).

Controversial Legal and Political Issues

Leibniz, while proceeding with the caution one would expect from a professional diplomat such as he was, did not refrain from staking out positions on controversial legal and political issues, such as slavery, the right of resistance, and freedom of conscience. Let us briefly consider these in turn.

Slavery. In his *Meditations about the Common Concept of Justice*, Leibniz argues that slavery as a legal institution cannot be justified, because it violates the principles of equity and piety. Equity demands that we treat everyone else as we want to be treated ourselves. According to piety only God is the owner of souls, and therefore only the individual, and nobody else, can be the owner of his or her own body (Armgardt 2019b).

The right of resistance. Leibniz defends a right to resist against the sovereign in the event of grave danger to the *bonum commune*, e.g., if the sovereign wants to destroy the state or acts willingly against the welfare of his people. But he repeatedly emphasizes that only in such very exceptional cases does a right to resist obtain (Armgardt 2019a).

Freedom of conscience. Leibniz argues that nobody should be punished just for their opinions, even if such opinions are wrong (Priarolo 2017). Mistakes should rather be addressed through teaching (*Errantis poena est doceri*: The punishment of one who is mistaken is to be taught). Only actions (or incitement to action) should be punished, when they are a threat to the state, being evil in themselves and against natural law (A, 6.4 843).

Abbreviations

A

Leibniz GW (1923) Sämtliche Schriften und Briefe. Edited by the Academy of Sciences of Berlin. Series I–VIII. Darmstadt/Leipzig/Berlin. Cited by series, volume, and page

PW

Leibniz GW (1972) Political writings. Translated and edited with an introduction and notes by Patrick Riley. Cambridge University Press, Cambridge

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Introduction

In the history of Marxism, Lenin (1870–1924) was the first to attempt to transform doctrines into

practice. And while the cruel use of law to enforce political interests may have accompanied the history of mankind, Lenin was nevertheless one of the most conscious thinkers to experiment and, so to speak, theorize revolutionary legislation, the application of law to not *par excellence* legal purposes (Varga 1982), as well as ultimate directness by which practical targets should be reached via law – a denaturation that necessarily destroys any moral support to legal action. From the point of view of Bolshevism, Lenin's position brought success, but from the point of view of the development of mankind, it all became an experience of terror, of denial of rights. What is more, from the perspective of the logic of Russia's history, the fact that the tsarist past was continued by Leninist Bolshevism has made it impossible that trust in the law as a precondition for any functioning law and thus any genuinely legal culture may be formed (Varga 2019).

Preludes

In 1917, the revolutionary upheaval in Russia forced Lenin to make numerous reactive decisions.

Unlike Karl Marx and George Lukács, Lenin was not only a law-graduate but practiced law as well. Keeping an expressly hostile attitude towards the legal profession as a result of his failure as a lawyer, he copied Marx, who "appears predisposed simply to ignore the question of law as peripheral [. . .]. Marx's jurisprudential thought is often premised upon a critique of law *per se*, and what he has to say tends to be overwhelmingly negative in character" (Vincent 1993, 371).

In addition, there was also a possible doctrinal grounding which, although it could have initiated a new and truly theoretical – ontological – direction of research, served only to generate devastating consequences in a politically driven environment. For

> Nor did the writings of Marx and Engels seem to offer much beyond a paralyzing legal nihilism. [. . .] The nihilism of this confused vacuum was exacerbated by the view, forcefully insisted to by Engels, that because law was the *world view* of the bourgeoisie it was only the most backward sections of the socialist movement that voiced their demands in legalistic terms. (Beirne 1990, ix–x)

Its message was repeated as a commonplace by Lenin's contemporary Soviet-Russian theorists: "Religion and law are the ideologies of the suppressing classes, the latter gradually replacing the former" (Гойхбарг 1924a, b, 8). By degrading law to mere ideology and transforming it into a political agenda, something more than simple ontological reconstruction has taken place. For thousands of years, law has served as the supreme factor of social integration. Throwing law back into the ethereal realm of illusions annuls its very civilizing power. Or as described by the famous Lukácsian *History and Class Consciousness* (1923) in expectation of a revolutionary revival after the Hungarian Soviet Republic fell, by becoming mentally freed from the bourgeois spell of "the law," revolutionaries will disengage from the law's psychical effect. This is to say that effects conventionalized always come from inside, from consciousness (de)formed for triggering exactly such effect.

The Marxist tradition of seeing a degradation in law has manifested on three levels: one, the law's almost anarchist nihilization; two, its reduction to a simple carrier of communication; and three, its omission from strategic planning perspectives.

Considering that "Lenin's views on law [. . .] appear [. . .] as weapons [. . .] in the service of particular aims [. . .] from different wars and different epochs of combat technology" (Burbank 1995, Abstract), his occasional opinions are not to be treated as parts of an overall theory. Rather, they are *hic et nunc* directives by a leader on duty.

When "class struggle" became a rallying call for Lenin, he anticipated resorting to whatever instrument, illegal or legal (LCW 5, 454–467). Targets may have changed by 1905 from bureaucracy to bourgeois legality. For instance, in 1914 he criticized the opportunists "making a fetish of the necessary utilisation of bourgeois parliamentarianism and bourgeois legality, and forgetting that illegal forms of organisation and propaganda are imperative at times of crises" (LCW 21, 15–19). Fighting Liberals and Social Democrats, he stressed that "law" should not be fetishized. Moreover, Russia had no kind of "law" that was widely accepted by the public as the basis of social cohesion analogous to the law in the

bourgeois world. That is, the western prestige of law is unknown in Russian reality, which stands for the "omnipotence of the bureaucracy." Lenin never reckoned with law's potential for Russia: for him, law remained negative, interventionist, and repressive. When in 1917 he wrote *The State and Revolution*, he promised the "complete destruction of the bureaucracy" (PSS 33, 117) and "direct class struggle" at a time when the Mensheviks and Social Revolutionaries fought legally for the Constituent Assembly to convene and authorize legislation (LCW 25, 196–197). What the proletariat needed was "only a state which is withering away, i.e., a state so constituted that it begins to wither away immediately, and cannot but wither away"; a state "which is 'no longer a state in the proper sense of the word'" (https://www.marxists.org/ebooks/lenin/state-and-revolution.pdf, II/1 and V/4).

What happened from the alleged symbolic moment when the battleship Aurora's gun fired a blank shot, signaling that a new world would be born?

Nearly 50 years old, captivated by the idea of destroying czarism and building a communist society, Lenin prepared for such a moment throughout his life. Anyone in St. Petersburg walking to the Peter and Paul Fortress' Trubeckoy Bastion prison can appreciate the lives of those dreaming day and night, nurturing their singular goal. As early as on December 22, 1917, Lenin echoed what Georgi Plekhanov had declared at the Russian Social-Democrats' Second Party Congress while framing their program in 1903: "*salus populi suprema lex – salus revolutionis suprema lex*." – that is, "the success of the revolution is the highest law. If it were necessary for the success of the revolution to restrict the effect of one or another democratic principle, it would be criminal to stop at such a restriction" (LCW 42, 48). That is, whatever tool that achieves the goal is sanctified.

The Events

On the first four hundred days, 1033 decrees, proclamations, and the like were issued, and 596 more in the following year. Of these, Lenin formulated the decrees on Peace and on Land on the first day of the revolution to "pacify and satisfy" amidst "economic chaos and a peasant revolt." The purpose of those decrees was to draw the peasantry to the revolutionaries' side by overthrowing the old establishment by abolishing land ownership. As recalled in late 1922, this, "unlike any other laws, [. . .] though very imperfect from the technical and perhaps also from the juridical point of view, nevertheless, provided the peasants with all that was vital and essential for them, and ensured their alliance with the workers" (LCW 45, 390–395). Otherwise expressed, by satisfying the most urgent demands of the population, these laws simultaneously legitimized and consolidated the new power, now protecting it by the support of the vast majority of the people, too.

Imitating normative contents, they were drafted in form of declaration, entrusting the selection of subjects and methods (of who and how to act) to arbitrary local initiative, while preacknowledging any final (random) outcome with the seal of law. Thereby part of the overall socio-economic transformation was entrusted to spontaneity, to local devotees' wanton choices. What was important to Lenin was that "the peasants should be firmly assured that there are no more landowners in the countryside, that they themselves must decide all questions, and that they themselves must arrange their own lives." Hence, he had to nurture "the general stream of revolutionary creative work". All in all, according to Lenin, "[w]e must be guided by experience; we must allow complete freedom to the creative faculties of the masses" (LCW 26).

In the course of all this, the duality of issuing decrees (for propaganda, agitation, mobilization) while preserving sheer arbitrariness (whenever it could help the cause) began its career.

"Decrees are instructions which call for practical work on a mass scale." From their practice, enormous experience could be accumulated over time. "If we treat matters in this way we shall acquire a good deal from the sum total of our laws, decrees, and ordinances. We shall not regard them as absolute injunctions which must be put into effect instantly and at all costs" (LCW 29, 209). For "Russia is vast, and local conditions

vary." Therefore, "the local Soviets, depending on time and place, can amend, enlarge and add to the basic provisions worked out by the government" (LCW 26).

Instead of guiding, momentary decree-issuing launched legal processes. The provided legal authority was a mere framework, filled in by the arbitrary practice it generated. Its logic was undefined generality in terms of law and random variations produced in actual practice.

Formal institutional arrangements also had to be made. The first was the reform of courts in January 1918, through which "[w]e transformed the court from an instrument of exploitation into an instrument of education" (LCW 26, 464). With further decrees, they served continuity and revolution at the same time, that is, reorganization favorable to further progress: the old professional staff was taken over and reference to old rules allowed, but the decrees encouraged measures that furthered revolutionary justice. Lenin's target was to "enforce the will of the proletariat, apply its decrees, and in the absence of a suitable decree, or if the relevant decree is inadequate, take guidance from your socialist sense of justice, ignoring the laws of the deposed governments."

Heralding the communist communitarian self-management derived from their Utopianism, the tenet of "every citizen is a judge" became a party program by early 1919: "anybody can act as a judge basing himself on the revolutionary sense of justice of the working class" (LCW 29, 182). The tenet of popular participation applied to public administration as well (LCW 25, 420–421; 27, 272–273).

Pro tem, law-generated dysfunctions also had to be cured: stopping the laws' proliferation; building "uniform legality" out of the chaos of concurrent regulatory bodies; and forcing back the mob-terror produced by the "revolutionary sense of justice" into the bottle of "discipline and observance of the law."

Lenin's actions alternated between the extremes. In 1918, with Bolsheviks fighting for unrestricted legislative power, Lenin refused "bourgeois formalism" (while Trotsky invoked the inadequacy of "conventional parliamentary machinery"). In a very short order, he had to manage the dysfunctions of increased and uncontrolled decree-production and arrange the necessary changes for curing them. As also expressly emphasized, "But be is a poor revolutionary who at a time of acute struggle is halted by the immutability of a law. In a period of transition laws have only a temporary validity; and when a law hinders the development of the revolution, it must be abolished or amended" (LCW 27, 519).

By June 1918, Russia had fallen to pieces. Reminiscent of feudal particularism, dozens of self-standing quasi-governments with competing regimes reminiscent of once small feudal states came into being. Fragmentation was aggravated by a "chaotic pile-up of organs [. . .] with the natural desire of each of them to be higher than all the rest [. . .]. Everyone gives orders, and no one carries any orders out" (Вишняк 1919, 9). The chaos of momentary actions/reactions split the elementary tissues of social cohesion. The urge to force success through destruction ended in a kind of violent lawlessness, with rule of force substituting to any rule by the law.

From a rhetorical point of view, the first of the two stages was a period of revolutionary decrees addressed to the people. In order to mobilize them for purposeful free action, decrees legitimized both the course, and the results, of action – in addition to legitimizing the revolution itself. A couple of months later, their *propaganda* language was replaced by *bureaucratic* language, by March 1918 becoming exclusively bureaucratic, as a return to the prerevolutionary professional style.

By late March in 1922, civil war with strikes, famine, and unemployment was a threat to the very survival of the revolution. Marching through chaos had to end: "'The phase of propaganda by decrees' is over" (LCW 36, 574). Some legality was to be interposed between licentious total anarchy and "bourgeois formalism." Lenin demanded from the judiciary "to ensure the strictest discipline and self-discipline of the working people" (LCW 27, 217) while, as a security check, all counter-productive factors like elements of informality and versatility with ability to directly respond to political changes also had to be built in.

In sum, Lenin merged law with revolutionary expediency, into the changing reactions to changing demands of the day's political constellation.

The never ceasing use of terror resulted in demoralization and growing inefficiency, avoiding responsibility at all levels, with competences abandoning service to the public. For those in charge of managing the legal machinery with state administration and public services involved, the fear of retaliation based on arbitrary criteria became the prime motive of deliberation over whether to act at all.

Shortly they had to decree that law was law so it would be obeyed, but in the end nothing proved effective. For instance, with age-old bureaucratic routine they rediscovered that it is the inspectors' inspector who had also to be inspected but, eventually, no cure-all helped. Indeed, super-controlling super-control remained the final panacea – "departments are shit, decrees are shit. Find people, check up on work – these are everything." (PSS 44, 369) – for "[t]he *essential* is not in institutions, not in reorganizations, not in new decrees, but in the *selection of personnel* and in *checking performance*" (LCW 36, 574).

The greatest problem was how to guarantee the unity of law. Can any sense of law evolve when unrestrained arbitrariness is also encouraged? After all, by May 1922, Lenin expressed frustration experiencing law as "Kaluga or Kazan law" and instituted prosecutorial oversight so that "uniform all-Russian law" could finally rule. At the last minute he had no choice but to discover the ethos of law for himself as well, as "[u]nless we strictly adhere to this most elementary condition for maintaining the uniformity of the law for the whole Federation, it will be utterly impossible to protect the law, or to develop any kind of culture" (LCW 33, 364, 365, 365 & 366).

According to Burbank (1995, 37–44), the first month of "antibureaucratism" (calling for mass actions) passed into "antiformalism" (fearful of losing confrontations within the Constitutional Assembly) from December 1917 on. Accordingly, this time Lenin opined that "[w]e'll tell the people that its interests are higher than the interests of democratic institutions. There's no need to go back to the old prejudices, which subordinated the interests of the people to formal democratism" (PSS 35, 137). General famine ensued within months. At this point – at the last minute indeed – Lenin may have begun to realize how his idea of Utopia was destructive as it made society defenseless. He then returned to the "major real task: administration, organization and supervision," looking for "more exact juridical formulations" and also for "more exact observance of the law" (PSS 36, 165–208).

The Nature of Bolshevik Law

For Lenin, "Laws are political measures" (LCW 23, 48). Such a reduction amounts to denaturation, disowning the law's autonomy. A law entirely politicized is simply dictatorship, unrestricted power founded on sheer violence, void of rules. But this is what Lenin professed from 1906 on: "authority untrammeled by any laws, absolutely unrestricted by any rules whatever, and based directly on force. The term 'dictatorship' *has no other meaning but this*" (LCW 10, 247). And he continued to reassert this in the midst of the revolution, claiming that "Dictatorship is rule based directly upon force and unrestricted by any laws. The revolutionary dictatorship of the proletariat is rule won and maintained by the use of violence by the public against the bourgeoisie, rule that is unrestricted by any laws" (Lenin 1970, 12). Externally, this is revolutionary expediency, and internally, arbitrariness, where revolutionaries' alleged morality substitutes for law, and pure interest, for morality. Or, as stressed, "[o]ur morality stems from the interests of the class struggle of the proletariat" (LCW 31, 291–292).

In a final reduction, state machinery transformed into the Bolshevik party's executive arm. Law became party product. Thereby a given private club transubstantiated into the public entity that ruled without having to account for its actions responsibly.

At the same time, the law remained interwoven with violence and terrorism, and this was to limit any genuinely legal effect. "It seems never to have occurred to Lenin that the root of [. . .] troubles lay in the fact that the whole system was based [. . .] on

force and not on law" (Kolakowski 1978, 489). The unceasing sense of danger it generated must have caused individuals to call upon his/her defensive coping mechanisms. And with the accumulation of effects, public and private action fell prey exactly to this compelling need for defensiveness, by shifting the responsibility onto others.

Brutality and terrorism was a central constituent of Lenin's tactics throughout his life. As early as in 1891, when the Volga famine led his sister to give a helping hand, he turned away by cynically rejoicing that the czarism would at least be unveiled more strikingly (Беляков 1958, 80–82). He opted for mass terror in 1905, because he derided individual terror as not effective enough. So he optimized its potential up to the stage when, as Nikolai Krylenko concluded, "We must execute not only the guilty. Execution of the innocent will impress the masses even more." When contemplating action, terrorism was Lenin's first preference. Violence became his usual procedure: the first, the customary means, when he stepped in, thus ruling out, so to speak, the chance of other, more peaceful and more political ways being considered at all.

Terror and/or discretionary adjudication complemented even regulatory measures. When drafting the Criminal Code, he insisted that

> The courts must not ban terror—to promise that would be deception or self-deception—but must formulate the motives underlying it, legalise it as a principle, plainly, without any make-believe or embellishment. It must be formulated in the broadest possible manner, for only revolutionary law and revolutionary conscience can more or less widely determine the limits within which it should be applied. (LCW 33, 358)

Eventually law and terror could switch places at any time. After all,

> Terror became with [Lenin] an administrative technique, a simple way of solving problems and achieving results when conventional means failed; armed with terror, the Vecheka served as the Party's all-purpose agency, as the short cut to a given end. (Leggett 1981, 169–170)

As Lenin declared by 1917, nothing is exempt from direct subordination to the revolutionary cause, including what the Soviets themselves may have issued.

The irony of the drama closed when the Bolsheviks, having won uncheckable power of decree-issuing, practically arrived back where they departed from 2 weeks ago, a parody of the hated Muscovite patrimonial absolutism's *ukaz*-government. Moreover, even decree-government became privatized in that, instead of the monarch as the state's representative, the Bolshevik party as an entity having no constitutional standing and responsibility but being fully autotelic and self-dependent, moreover, ready to self-reproduction, was to rule. Thereby, within some weeks' time, the style of the revolutionary exercise of power became a simulacrum, or rather a copy, of pre-1905 tsarist times.

All in all, what Lenin built was a law perverted into a complementation of its own denial. In fact, Lenin conspired against his party as well, when he organized his terrorist organization, the Cheka, and then freed it from any responsibility. As to state actions, insensitively to forms or ordered frameworks, he valued revolutionary activism and efficacy exclusively. Lenin issued decrees – himself, unassisted, conspiratorially. For many a time, Lenin drafted and signed them, then made them co-signed and published within hours by Yakov Sverdlov of the Congress of Soviets.

"Legalized Lawlessness"

The revolution generated chaos, and common sense was silenced. Indeed, Utopianism mixed with unrelenting autotelism had to lead to the *idée fixe* of "Dictatorship [that] is a state of intensified war. [. . .] Until the final issue is decided, this awful state of war will continue. And we say: '*À la guerre comme à la guerre*; we do not promise any freedom, or any democracy'" (July 5, 1921, in LCW 32). After all, as initiated by him, a "civil war [was] fought with legalized lawlessness" against the people themselves (Pipes 1986). From the moment of seizing power, revolutionary courts were established annihilating "the enemy" so much indiscriminately that some when before March 1918,

People's Commissar for Justice Isaac Steinberg dared openly ask Lenin why he did not call his office the People's Commissariat for Social Extermination. For, in addition to revolutionary courts, the Cheka's specialized terror machine was established on December 5, 1917 (and institutionalized throughout the country by September 1918), with victims selected according to labels like "enemies of the people," "hidden enemies," or "suspect social origin." As a matter of fact, tribunals were endowed with "a complete liberty of repression [. . .] not bound by anything in selection of punishment [. . .and having. . .] no procedure but shooting," while the Cheka could proceed to reach "final decision [. . .] with no appeal against it [. . .and. . .] with no rule settling either the jurisdiction or the procedure" (Крыленко 1923, 100, 205 & 322–323).

According to data available for 1934–1935, 51.1% of the judges were in want of relevant training, 41.7% had approximately six months' and 1.8% one-year of legal coursework, with only 5.8% being law graduates. Of all, 84.6% of lower court and 62.2% of higher court justices attended at least elementary school.

The end result is breath-taking: 200,000 red terror victims in addition to 2,000,000 executed from 1917 to 1923, in striking comparison to 14,000 victims for the last half-century of czarism.

Personal Features

Lenin's own scholarship shares some common features with Marx in that their "whole approach is one of vindication, not investigation, but it is a vindication of something proclaimed as the perfect truth with the conviction not of the scientist but of the believer" (Jaspers 1950). His personality type is "aggressive, authoritarian, and completely detached from the values of the Western civilization," a "pathological [whose] abnormality is only apparent from a democratic point of view" (Barbu 2000, 262 & 263). This may have been self-reinforcing in that he "disorganized and destroyed in order to *seize power* and, in turn, used power to disorganize and destroy" (Possony 1964).

The End of the Game

In 1921, the Kronstadt rebellion was a denial of the Leninist outcome. Its blood sacrifice stood for a genuine democracy with self-determination but without any ruling party.

By making law a servile companion of politics, it lost its distinctiveness and became an instrument of political manipulation. Thereby "Lenin's idea of law as a manipulable instrument of politics deprived it of the 'majesty' and the aura of 'justice' that could have made law, over time, an effective arm of the socialist state in Russia" (Burbank 1995, 43–44). Such failure was predetermined by the first moments of Lenin's revolution as, ab initio, the overthrow of the parliamentary regime, the call for land seizures, and individual justice all served the rejection of both recourse to law and trust in the law. Everything, and everything else, was dominated by arbitrariness. Thereby law became a potential threat to anyone governed by it.

Even today, international development agencies, either charitable or mentoring, are cautious about advising Russia on anything to be drafted in the form of legal regulation. Three decades after the Soviet Union fell, Russian scholars cannot anticipate much more than progress toward a kind of dual state: prerogative and normative dictatorship in matters of political interest, on the one hand, and classical rule of law wherever the matter is politically irrelevant, on the other. It is worth noting that post-Soviet legal scholarship is mostly silent about the issue. Instead, it is concerned with exploring Christian roots within a new Russian discipline, called "culturology," in the hope of a (new) normalized future.

Conclusion

Lenin's oeuvre was, from the law's viewpoint, its extreme and inexorable instrumentation for power engineering, first in the Russian political theory of

Marxism, based on the antecedent of anarchism, and then as a tragic end in the Bolshevik revolutionary practice of one of the world's largest countries. Forced by state violence, various normative settlements can be effected, but not all of them is able to serve social integration. In terms of the adequacy of purpose and means, Lenin's legal ideal and practice proved to be the next derailment following an ossified tsarism, and at the same time an alarming historical example of the neglect of the law's own needs.

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Lenin, Vladimir Ilyich: On Justice

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The question of justice – as either a jurisprudential, philosophical, or political concept – is central to Lenin's work, even though obscured by a number of historical developments, political inflexions, and inner philosophical and theoretical inconsistencies. First of all, the main difficulty in approaching this theme in Lenin's body of work consists in the particular historical constellation and standpoint from which we approach it. In our times, due to the historical experience of actually existing socialism, and the prevailing critique of communism as a failed revolutionary project, Lenin's work is often read at best as an indication of a specific type of distortion of Marxism (Lewin 1985) and most likely as a preface to the Stalinist era (Kołakowski 1981; Roberts 2005, 181). It is also approached as a blank check for totalitarian terror (Malia 1994) and as a reminder of how political utopias fail (Furet 1994). Even within the ranks of authors who would attempt a caritative interpretation of Lenin (Žižek 2001, 2007), the historical experience of actually existing socialism seems to taint the theoretical

insights that might be gained from analyzing Lenin's work.

But beyond the historiographical, political, and philosophical frames through which we approach Lenin's work and which positively color our understanding of it, there lie difficulties in relation to the nature of his writings. Perhaps even more than in the case of Karl Marx, Lenin's work has been inextricably connected to political action and organization. While in the work of Marx a distinct body of social theory, economic theory, and philosophical analysis can at least theoretically be distinguished from its political activity and analysis, with Lenin, things stand differently. Therefore, a first point in understanding Lenin's theorization of *justice* should be by placing it in an intellectual and historical background that comes *after* Marx and Engels.

Lenin's work is inscribed in an epoch which has already been marked by the openings produced in philosophy and social sciences by Marx and Engels. It draws on them and aims to connect this body of thinking not only to the realities of Tsarist Russia but with the realities of a world in which Marxism was already active as a theoretical and political force (Lukács 2009 [1924]). His work is thus resolutely political, and any moral and legal considerations that it carries are to be understood from within this framework. In fidelity to Marx's position expressed in Thesis 11[1] (Marx 1976 [1845], 26), the main character of Lenin's work is that of thinking through and developing a political program apt to *change* the world. This position is not in itself anti-philosophical, or anti-jurisprudential in and by itself, but it tends to obscure the core of an actual theory of justice as a part of the Leninist project under political and organizational considerations.

It might as well be true that such a theoretical project was not at all part of Lenin's intention in the first place. Therefore, by asking the question of justice in relation to Lenin's work according to the predicaments of a liberal theoretical model such as Rawls' theory of justice (Schedler 1978) risks exercising a level of hermeneutic pressure that distorts Lenin's project of offering a clear historically materialist grounded analysis of specific sociopolitical contexts. And yet it is possible to distinguish a number of foundational features of a conception of justice from Lenin's work (Schedler 1978; Nielsen 1986), despite its lack of a systematic analysis on either justice as a legal philosophical concept or as a social practice. In order to do so, it would be serviceable to distinguish in Lenin's writings between three layers of engagement with the theme of justice which could be subsumed to three essential directions of Marxist philosophy and praxis.

Lenin's Justice

First, it is the question of justice as a normative concept that is for most part criticized as a matter of bourgeois ideology – morality and legality – at the level of its operation in society. In this sense, this level of engagement with justice takes the form of a critique of ideology. This, of course, does not negate the possibility of a normative core of justice within Lenin's work that is by and large tributary to Marx and Engels (Nielsen 1986) and that can be summarized by his rendition of Marx's principle of distributive justice espoused in the *Critique of the Gotha Programme* (Marx 1989 [1875]), "from each according to his abilities, to each according to his needs" (1974 [1917]). Second, there is an engagement with justice as a form of political strategy and praxis that aims to bring about the normative core of what can be termed a Marxist conception of justice. Third, we can find in Lenin's writings a third layer of analysis, dedicated to the organization, operation, and political strategies of administering justice. These layers are somewhat chronologically identifiable in relation to three stages in the trajectory of Lenin's work and political activity as well as influenced by historical developments. They are also deeply intertwined with Lenin's rigorous commitment to historical materialism.

To unpack them, two caveats need to be stated as a matter of clarification. In approaching the matter of justice from within the historical

[1] Philosophers have hitherto only interpreted the world in various ways; the point is to change it.

materialist perspective, a normative theory of justice is necessarily contingent upon historical developments brought about by social forces at the interface between modes of production and the relations of production (Marx 1859, 1867). Furthermore, it is useful to highlight that the main feature of the Leninist perspective is the emphasis on the agency of the political subject – the proletariat – within this tension between relations of production and modes of production. As Georg Lukács has pointed out as early as 1924, the work of Lenin can and should be understood as a ceaseless attempt to reflect on the historical conditions of the revolutionary situation and on its actuality, insofar as "the actuality of the proletarian revolution is no longer a historical horizon arching above the self-liberating working class, *but that revolution is already on its agenda*" (Lukács 2009 [1924], 12).

Against Formal Justice

To understand Lenin's engagement with justice in its own terms, it is necessary to subsume the concept of justice to this presence of the revolution, which "implies study of each individual daily problem in concrete association with the socio-historic whole, as moments in the liberation of the proletariat" (Lukács 2009 [1924], 12). Such a position involves several consequences: Lenin's initial engagement with the concept of justice has essentially a critical character. In his first writings, reminiscent of Marx's initial criticisms of law such as *Explanation of the Law on Fines Imposed on Factory Workers* (1895), *The New Factory Law* (1897), and *On Industrial Courts* (1899), Lenin is engaging with embodiments of bourgeois justice under the guise of legality. However, his critical analysis takes place from the standpoint of a proletariat that is yet to be organized as a revolutionary force. It is the still emerging proletariat of a country that has not fully severed its ties with feudalism and of a world proletariat for which the revolution is not yet to be waged. Justice then is to be achieved under these particular historical circumstances, and it is a matter of gaining the maximum legal protection that the law can offer herein.

As he emphasized: "The workers must show that they consider themselves human beings just as much as the factory owners do, and that they have no intention of allowing themselves to be treated as dumb cattle" (Lenin 1972 [1895], 52). Given the existing relations of production exploiting the proletariat, and the uneven forces at stake, justice for workers is to be achieved both by legal and illegal means, insofar as the former are yet able to increase the power of proletariat (Burbank 1995, 26–27). Law, even bourgeois law, can thus prove an instrument within class struggle. However, it should be noted that Lenin's position remains highly suspicious of any possible *just* outcome within capitalism, insofar as bourgeois justice is already a matter of ideology: "the workers will appreciate, finally, the point that the law does nothing to improve their status, so long as the workers' dependence on the capitalists continues to exist, because the law will always be partial to the capitalist employers, because the latter will always succeed in devising ruses for evading the law" (Lenin 1972 [1895], 72).

Correlative to this criticism of bourgeois legality and its implicit moral standing, we can find also an utterance of a normative core built upon Marx's conception of justice present in the *Critique of the Gotha Programme* (Marx 1989 [1875]) and on Engels' *Anti-Dühring* (Engels 1987 [1878]). The outline of this otherwise sparse theorization is to be found in the *What the Friends of the People Are* (1894). Despite its ostensible simplicity, it is reflection that contains in nuce the amphiboly of justice in Lenin's thought as being a matter of revolutionary praxis, organization, and administration – in short, depending on the historical conditions of the outcome of class struggle (Lenin 1977 [1894], 168–169). From within this framework, we can grasp already the different stages of the development of the goals of the revolution in its attempt to achieve social justice as well as the importance of state and state power for this process. By social justice in this context we can understand justice, following Marx and Engels, as consubstantial to the emergence of a "community of free individuals, carrying on their

work with the means of production in common, in which the labour-power of all the different individuals is consciously applied as the combined labour-power of the community" (Lenin 1977 [1894], 171). This position reveals also the underpinning philosophical commitments of Lenin's thought as well as the role of the historical context. Lenin's fidelity to historical materialism (Lenin 1977 [1894], 140), supported by a grounding in Hegelian dialectics, rejects idealist approaches to morals and does away with legal formalism.

Revolutionary Justice

Moving toward the second strand of analysis, we approach the question of justice as a form of substantive social justice that emerges from and through revolutionary praxis. This position becomes apparent at the dawn of the Great War, and it is articulated fully during the revolutionary years of 1917–1919. Drawing on his work on imperialism, his encounter with Hegel's logic, but also with Clausewitz (Balibar 2007; Aron 1976) and his work on a specific diagnostic of the revolutionary moment, Lenin offers first a reflection on the revolutionary tasks in relation to justice and then an inflexible defense of the Bolshevik position at the wake of the takeover. While dialectics and materialism are the main philosophical ideas infusing Lenin's work as present in his criticism of idealism and empiriocriticism – as well as it transpires from his philosophical notebooks – Clausewitz is arguably another important albeit less known source of inspiration that forges Lenin's thought on political strategy and war (Balibar 2007, 209). By extension, according to Balibar, "there is only one philosophical moment in Lenin, and it is precisely war that determines it" (Balibar 2007, 207). There is to be noted a growing reflection on war that emerges in the time span between 1908 and 1917.

First, as a matter of politics, Lenin supports the belief in the historical necessity of a world war between imperialist states that the Second International should prevent at any cost due to its disastrous total character (Kuvelakis 2007, 166–167). This idea later on matures, in the light of the demise of the Second International and the advancement of the war – the imperialist war becoming an opening, a possibility for bringing about a revolution. Under these conditions, class struggle meant to support and bring about a substantive form of social justice is no longer going to be waged from within the institutions of the state or against them but can be articulated as a form of civil war that would force to a standstill the imperialist war and put an end to its very conditions by changing the social basis determining its existence (Lukács 2009 [1924], 57).

Against this background, the *State and Revolution* (1974 [1917]) presents in an articulated manner the political goals and tasks for achieving the substantial justice projected after the political takeover of the state machinery. Within its pages, Lenin analyzes closely the concept of the dictatorship of proletariat as a transitional stage between the moment of political takeover and the construction of socialism. Devised in many respects against the anarchist position of an immediate abolition of the state and the state apparatus at the wake of revolution, the opuscule emphasizes the state as a necessary mechanism in the hands of the proletariat meant to create the necessary conditions for the transfer of control over the means of production toward the proletariat.

The important point to note is the necessary survival of the law and the state during the dictatorship of the proletariat and Lenin's insistence on its inherent relation to class antagonism. As he writes: "we must not think that, having overthrown capitalism, people will at once learn to work for society without any rules of law. Besides, the abolition of capitalism does not immediately create the economic prerequisites for such a change" (Lenin 1974 [1917], 472). Moreover, as "there are no other rules than those of 'bourgeois law'" (Lenin 1974 [1917], 472), during the dictatorship of the proletariat, there is a survival of the old bourgeois legality, insofar as the class antagonism continues, the fundamental difference being that state repression founds itself in the hand of the proletarian class. To some extent, paradoxically bourgeois law "persists in the capacity of regulator (determining factor) of the distribution of products and the allotment of labor among the members of society" (Lenin 1974

[1917], 472) even after the revolutionary takeover. Yet, this phase is essentially transitional – even if postponed sine die – until the normative core of the principle of communist justice is fulfilled. At the end of the historical process, the law is to be replaced by "rules of social intercourse" (Lenin 1974 [1917], 474), whose observance has otherwise been distorted by the existence of exploitation (Lenin 1974 [1917], 469).

In reaction to Kautsky's criticism of the functioning of the dictatorship of the proletariat after the Bolshevik takeover, Lenin defends the recourse to this form of organization of power, first by pointing out to its necessity as a means of transition toward communism and second as an instrument in the *realpolitik* of civil war and class struggle (1974 [1918b]). By returning to Marx's *Gotha Programme*, the original occurrence of the dictatorship of proletariat in Marxism and to Engels's *Anti-Dühring*, Lenin stresses the correlation between the historical conditions of the revolution and civil war and the ambivalent role of the dictatorship of the proletariat as an instrument of smashing the bourgeois state. Such a defense of the dictatorial nature of the proletarian state offers also a glimpse into the inner understanding of justice as a result of class struggle. In opposing the normative understanding of democracy, equality, and legality leveled by Kautsky against Bolshevik revolutionary practice, Lenin articulates emphatically the necessary inimical relation brought about by class antagonism: "The exploiter and the exploited cannot be equal" (Lenin 1974 [1918b], 252). Questions of formal equality and constitutional rights, as well as expediency, are no longer to be understood through the normative lenses of liberal legality but as concepts and normative statements contingent upon the class character of the new state brought about by the revolution (Lenin 1974 [1918b], 247–248).

Delivering Justice

A third layer of reflection on justice within Lenin's work deals with the organization and administration of justice within the conditions of civil war and after the victory. This stand is certainly less utopian than the voluntarist position of the previous decade but emphasizes nonetheless the materialist conception of justice: there is no need for a theory of justice; rather, justice emerges from the material arrangements and policies that administer it. It is a matter of state, politics, ideology, and legal and party organization. From this point of view, the minute indications in which Lenin took part, either on legal matters or on points of financial policy, offer a rather different image of Lenin than that of the professional revolutionist fermenting chaos that is still a part of the historiography that circulates, for example, in the note *Concerning the Decree on Revolutionary Tribunals* (Lenin 1974 [1918a], 219). Lenin's indications are precise, concise, and consistent to his understanding of the role of the administration of justice during war communism: "Instead of devoting attention to reforms of institutions, to petty or almost verbal reforms (...) attention should be directed to the practical results of the work of the Collegium for Justice in setting up a really revolutionary court that is rapid and mercilessly severe in dealing with counter-revolutionaries, hooligans, idlers and disorganisers" (Lenin 1974 [1918a], 219).

Administering justice under the predicaments of the civil war is in a sense a martial matter insofar as there are no longer any stable normative constraints, the law being under a state of exception (Agamben 1998, 14). In a letter to Dmitry Kursky, the Commissar for Justice, Lenin noted in relations to the references to terror in the Criminal Code: "The courts must not ban terror – to promise that would be deception or self-deception – but must formulate the motives underlying it, legalise it as a principle, plainly, without any make-believe or embellishment. It must be formulated in the broadest possible manner, for only revolutionary law and revolutionary conscience can more or less widely determine the limits within which it should be applied" (Lenin 1973 [1922], 358). Furthermore, Lenin's position on the reform of the Civil Code is also useful in painting an image of the class justice that the Soviet state was meant to administer, insofar as "everything that the literature and experience of the West-European countries contain on the protection of the working people must be used" (Lenin 1973 [1922], 203).

To summarize, in order to approach Lenin's conception of justice and gain an internal perspective – which would be serviceable to legal theoretical or historical investigation – we need to be able to subsume his understanding of justice to his political transformative project. In this way, we need to connect it intellectually to the work of Marx and Engels and to contextualize it further against the background of the experience of World War 1. Furthermore, we need to reflect and delineate the three clusters of analysis of justice in relation to revolutionary praxis, political philosophy, and state organization.

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Lessing, Gotthold Ephraim

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Introduction

The enlightenment critic, philosopher, and poet Gotthold Ephraim Lessing was born on January 22, 1729, in the Saxonian city of Kamenz. From

1746 on, he studied theology in Leipzig. His literary debut as a writer and critic fell in those years. Lessing later switched to medicine and finished his studies in Wittenberg with a thesis on the physician Juan Huarte. The degree was awarded by the philosophical faculty, not – as often claimed – by the faculty of medicine (Multhammer 2013, 45 f.). In 1760, Lessing became an elected member of the "Königliche Akademie der Wissenschaften zu Berlin" at the age of 31. In 1776, he was affiliated to the "Kurpfälzische Akademie der Wissenschaften," Mannheim.

Lessing, whose attempts to live on his writings didn't succeed in the long run, held many occupations during his lifetime: He was a newspaper editor in Berlin (1751–1755), a paid travel companion to the son of a merchant family (1756/1757), a regimental secretary during the Seven Years' War (1760–1764). In 1767, he joined the newly founded National Theatre in Hamburg as a critic. With Johann Joachim Christoph Bode, Lessing started a business venture: a printing press. Both projects had only a short life. From 1770 until his death in 1781, he held the position of a librarian at the "Bibliotheca Augusta" in Wolfenbüttel.

Lessing has time and again touched on legal and political matters, whereby more than once provoking debate. (1) The anthropological concepts of *ius naturale* are important not only for his theological writings but also for his dramaturgy. (2) In his dramatic work, legal issues – ranging from martial law to the rule of law – are embedded within the dramatic conflict. (3) Throughout his life, Lessing was a fierce advocate of (religious) tolerance – in his poetic as well as his theoretical writings. It might be attributed to Lessing's reflexive style of writing as well as his skeptical approach to claims of absolute truth (Strohschneider-Kohrs 1999) that the intellectual contours of Lessing's work are, until today, very much debated.

Anthropology and Natural Law

Lessing's theological critiques – spanning from the early "Gedanken über die Herrnhuter" (Thoughts on the Moravian Brethren, 1750; published posthumously) over the "Rettungen" (Vindications, 1753/1754) as well as the scandalous "Fragmente eines Ungenannten" (Fragments from an Unnamed Author, 1774–1778) to the late "Erziehung des Menschengeschlechts" (The Education of the Human Race, 1780; published anonymously) – make productive use of intellectual positions developed in the borderland of theology, jurisprudence, and philosophy. Lessing weighs in on the debates on revelation, morality, and natural order with a characteristic mixture of skepticism and accuracy – grounded in anthropological reflections on the capacities as well as the limits of human understanding on the one hand, in historical and philological scrutiny on the other hand.

Lessing's "Rettungen," "literary trials" inspired by Pierre Bayle's historic-critical method, venture to vindicate scholarly positions deemed heretical or otherwise immoral. By critically reassessing historic details, Lessing puts the arguments of the accused in new theological and philosophical perspective. In 1777, Lessing caused an uproar leading to publishing constraints for himself by printing excerpts from Hermann Samuel Reimarus' criticism of the revelation as "Fragments from an unnamed author." In his previously unpublished notes, Reimarus had been highlighting the Evangelist's contradicting accounts of the resurrection and had thus been questioning the conveyed miracle.

In Lessing's theory of the drama, as developed in the so-called "Briefwechsel über das Trauerspiel" (Correspondence on Tragedy, 1756/1757; published posthumously) as well as the "Hamburgische Dramaturgie" (Hamburg Dramaturgy, 1767–1769), Lessing takes an original stance on contemporary philosophical debates on the nature of man. Focusing on tragedy rather than comedy, Lessing develops a "socratic" theory of drama evolving around moral education through theatrical experience.

Whereas the history of Lessing's philosophical ideas, especially of his understanding of "Mitleid" (pity, sympathy), is still controversial, the significance of anthropological and moral debates is undisputed: Lessing takes in and adapts philosophical concepts ranging from Christian Wolff to Jean-Jacques Rousseau, from Moses

Mendelssohn to David Hume and Adam Smith (Schauer 2019, 57–120; Riedel 2007) in order to reassess the connection between human nature and the rules of society. His anthropological approach comes into play, when he, in an Anti-Rousseauian move, contours the progressive effects of dramatic spectacles.

Questions of Law in His Dramatic Work

Lessing's plays, seemingly clear-cut at first sight, often reveal a complexity at second glance. Two of his plays are set against the backdrop of the Seven Years' War: "Philotas" (1759; published anonymously) and "Minna von Barnhelm" (1767) – tackling with the laws of war and its aftermath. In "Emilia Galotti" (1772), which premiered before a courtly audience, the rule of law (and its dereliction) is brought up frequently. With his early drama "Die Juden" (The Jews, 1754) and his late "dramatic poem" "Nathan der Weise" (Nathan the Wise, 1779), Lessing has published theatrical appeals for emancipation and tolerance – accompanied by theoretical writings on the matter.

"Philotas," a dramatic parable on the master plot of patriotic self-sacrifice (Ter-Nedden 2016, 185), is contrasting patriotic-heroic and cosmopolitan positions – thereby irritating and challenging a bellicose audience. In "Minna von Barnhelm," the legal part of the storyline is concerned with the post-war ramifications of wartime fiscal politics and its misuse: Tellheim, a major in the Prussian army and engaged to the eponymous heroine Minna von Barnhelm, is confronted with accusations of corruption and fraud in his way of handling the ordered extraction of war contributions from Saxony – a topic of heightened legal relevance at the time.

In "Emilia Galotti," a critique of arbitrary despotism sets the tone at the beginning of the play: Lost in thought, the prince is more than happy to ratify a death sentence without any inquiries. Thus, the play has been interpreted as inherently political: criticizing an abusive absolutism almost 20 years before the beginning of the French Revolution (Nisbet 2013, 500ff.). On the other hand, the problematic sides of the represented bourgeois morality – being rigid and passive at the same time – have been pointed out, partly inspired by Reinhart Koselleck's 1959 theses on "Enlightenment and the Pathogenesis of Modern Thought" (Koselleck 1959/2000).

Tolerance and Cosmopolitanism

Lessing's appeal for tolerance came in different literary and philosophical formats: from the dramatic genre (The Jews; Nathan the Wise) to scathing polemics (Vindications; Fragments Controversy). Lessing's philological examination and philosophical skepticism were accompanied by his interest in Jewish and Islamic historiography: In 1751, Lessing translated Voltaire's historical essays, "On the Koran and Mohammed" and "History of the Crusades"; in 1753/1754, Lessing's translation of "Histoire des Arabes sous le gouvernement des califes" (Abbé Augier de Marigny, 1750) was published.

Lessing's late philosophical works, "The Education of the Human Race" and "Ernst und Falk," his "Dialogue for Freemasons" (1778, published anonymously; 1780/1787) are – though less polemic in tone – replete with rhetorical and stylistic artifice, emphasizing the tentativeness of human insight (Nisbet 2013, 579). "The Education of the Human Race" takes up anew the relation between reason and revelation: linking them by a philosophy of history that makes historical room for religious dogmatism by declaring it a necessary early step in the course of history.

In Lessing's philosophy of history, which has inspired later idealistic accounts of history from Friedrich Schiller to G.W.F. Hegel, mankind is slowly progressing towards a more just future, marked as a cosmopolitan ideal. In "Ernst und Falk," the cosmopolitan perspective is contrasted with disappointment about contemporary undertakings. Thus, Lessing's late philosophical works pose the question of direct political intervention and gradual change, already apparent in his dramatic works.

Conclusion: Public Debate and Censorship

When Hannah Arendt was awarded the Lessing Prize in 1959, she named Lessing as a key figure in her understanding of the public (Arendt 1959/1968). In her address "On Humanity in Dark Times: Thoughts about Lessing," Arendt argues, that Lessing always stayed committed to a world, he couldn't feel at home in. Arendt claims that Lessing's attitude toward the public realm was "completely revolutionary." She thereby refers to Lessing's understanding of critique, his style of thinking, and debate. Lessing's concept of critique and the public were also discussed in two important works on the public sphere: In Jürgen Habermas's "The Structural Transformation of the Public Sphere" (1962/1989) and Reinhart Koselleck's "Enlightenment and the Pathogenesis of Modern Thought." Both especially refer to Lessing's "Dialogue for Freemasons."

Lessing himself has hardly ever written on public debate and the conditions of writers in the eighteenth century. Two outbursts might give an indication of where he stood. In 1769, Lessing wrote in a letter to Friedrich Nicolai: "don't speak to me about your freedom to think and write in Berlin. It amounts quite simply to the freedom to peddle as many anti-religious stupidities as one wishes [...]. But just let someone try in Berlin to write as freely on other matters as Sonnenfels did in Vienna; let him try to tell the noble, courtly rabble the truth in the way that Sonnenfels did; let someone stand up in Berlin and raise his voice in support of citizens' rights and against exploitation and despotism, as is now happening even in France and Denmark, and you will soon discover which country is to this day the most servile country in Europe" (Cited after Nisbet 2013, 333).

In the same year, Lessing discusses the absence of proper copyright provisions and the perils of bootleg printing at the end of the "Hamburg Dramaturgy": "As I already said, I know more than one honest man among the booksellers to whose management I willingly hand over such business. But none of them should think ill of me for showing my disdain and hatred for people in comparison to whom highwaymen and ambushers are truly not the worst among men. For each of these makes his coup de main for himself alone, while Dodsley and Co. want to rob as part of a gang" (Lessing 2019).

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Lex Specialis Principle

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Introduction

Of the numerous regulae iuris adopted from ancient law, the regula iuris "lex specialis derogat (legi) generali" is one of those that has endured the longest and is used in the Western legal tradition and contemporary legal culture throughout the world.

In the eyes of jurists and legal philosophers, the principle of lex specialis, according to which special rules derogate from the general (hereafter "LSP"), has a plain meaning, and it is a historical instrument for making laws and legal systems coherent. In short, it is one of the most typical criteria against legal antinomies, together with the well-known hierarchical and temporal criteria: lex posterior and lex superior (Prakken 1997, 204).

It is generally believed that the criteria just mentioned and their mutual relations took shape and consolidated in the legal experience of continental Europe on the threshold of the modern era in the context of the ideology that law is/should be an ordered and coherent system and an ideal of rationalization (Tarello 1976, 49–52, 144, 1980, 29–31, 314–315, 360–364).

Indeed, the general understanding holds many unanswered questions: the origins and foundations of LSP are disputed, as are the assumptions and ultimately how exactly it works (Zorzetto 2010).

The Common View

In legal practice and in general legal theory, there is a dispute as to whether LSP is an inherent feature of any legal system or a logical principle or rather a positive rule whose existence depends on the normative decisions of judicial authorities (i.e., legislators and/or legal interpreters). In the eyes of jurists and theorists, the LSP is mostly a traditional and implicit rule, regardless of its explicit formulations in legal texts. There is no consensus whether it is a general principle of law belonging to customary law.

In particular, the LSP is seen as a rule that can prevent or resolve conflicts between legal norms within the same legal system, as well as delineate the substantive area between different branches of law (such as IP law; Dinwoodie 2015) or laws belonging to different sources of law or legal systems.

Nowadays, the LSP has a prominent role, e.g., in the context of conflicts between international laws, international humanitarian laws, and human rights (e.g., ICJ, Advisory Opinion 1996; ECtHR case Hassan v. the United Kingdom 2014; ECtHR case Hanan v. Germany 2021; Borelli 2015; Milanovic 2016). For example, it is generally accepted that a treaty as lex specialis displaces customary international law as lex generalis in relations between countries (Iran-US Claims Tribunal, Amoco Int'l Finance Corp. v. Iran 1988). Furthermore, the LSP used as a canon for the interpretation of legal texts (legislation, treaties, etc.) implies that the more specific provision prevails over the more general one (ICC Award Seller (France) v. Buyer (US) 1991).

Most theories focus mainly on the possible interference of the LSP with the other main criteria mentioned above, namely, the lex posterior and the lex superior (Carpentier 2020).

The combination of these criteria traditionally leads to additional meta-norms on applicability (Mazzarese 1999): lex specialis etiamsi prior derogat generali etiamsi posteriori, or lex posterior generalis non derogat legi priori speciali (Peczenik 1971, 24), and lex superior generalis derogat legi inferiori speciali, where the lex superior is essentially considered the stronger criterion and in every case prevails over that of speciality, while the lex specialis seems to resist the principle of lex posterior. However, these are always flawed principles, i.e., they are characterized by innumerable exceptions (Ruiz Manero 2015, 60–63).

In this context, it is well known that the derogation from the lex specialis concerns the effectiveness or applicability of the (special and general) rules and not their validity or force, so

that precisely therein lies the distinguishing feature of derogation from abrogation (the consequence of the lex posterior) and invalidation/declaration of nullity (the consequence of the lex superior).

Two questions in particular arise from the lex specialis: first, the suspension of the general rules in the constant of the special rules, with the consequence of a possible renewed extension of the scope of the former when the latter are ineffective, and second, the revival of the earlier general rule in the event of the revocation of the later special rule.

To illustrate the relationship between special and general rules, it is common to draw circles or circumferences, and special and general rules are considered as entities that relate to each other like logical classes or geometric sets. In this way, the genus-species relationship between rules is reduced to a formal inclusion. The perspective of the analyses is thus merely extensive, without taking into account the intensive dimension of the genus-species relationship.

A Glimpse into Historical Perspective: The Relevance of Legal Concepts

History teaches that the origin of the derogation is independent of the regula iuris "generi per speciem derogatur" as well as a fortiori of the much later brocardo "lex specialis derogat generali," which is only one of the versions that date back to the revival of jurisprudence in the twelfth and thirteenth centuries (Halperin 2012, 353–398; Cortese 2020a [1964], e.g., 329, 2020b [1964], e.g., 91).

According to historical sources and historiography, Roman law did not know the category of lex specialis, at least in the early period and until the Byzantine period, but the categories of ius singulare and privilegium; until antiquity, it knew instead derogatio as a phenomenon affecting the leges publicae generales, consisting in the rogatio of a lex that partially modified an earlier one.

As for the maxim "generi per speciem derogatur," the fragment of the digest De diversis regulis iuris antiqui from which it is taken D. 50.17.80; Papinianus 33 quaest. Seems to have been written in connection with the enactment of the Constitutio Antoniniana, which extended the status of Roman citizen to all free men resident in the Empire (Stein 1966, 1968, 699 f.; Talamanca 1977, 211, 285–288).

Originally, derogatio was, on the one hand, a phenomenon that affected the chronological sequence of laws and influenced their partial modification, independent of any argumentation about a common genus and a specific difference; on the other hand, in the course of the centuries, even before the juridical renaissance, speciality was linked to personal characteristics, and the lex specialis served to regulate the application of individual norms and orders on the basis of characteristics of the addressees or the regulating authorities.

Throughout history as well as today, the LSP and general/special norms have been associated with the following relationships: (a) opposition between a genus and the complementary class or some of its species, (b) inclusion of one or more species in the genus, and (c) interference between species of the same genus.

As for speciality as opposition, think of the custom of reserving a particular discipline for a particular class of subjects (a special right or privilege) in order to regulate all others differently (generally). In history, one can recall the leges speciales of the Germanic rulers and the lex Romana generalis (Besta 1969, 144–147, 389–394, 401–402). This is logically possible because for each species, it is always possible to construct the complementary class by negation and a genus by union. So, for example, if the lex langobardorum (specialis) is not a species of the lex omnium civium romanorum (generalis), just as the Longobardus are not a species of the Romans, we can still say that we are dealing with two species of the genus and that the respective laws apply on a personal basis (Sherwin-White 1973, 32 ff, 108 ff, 320–321, 380–388).

If we now consider particularity as a logical inclusion, i.e., as a correlation between a genus and its species, then the principle of conceptual inheritance applies, according to which, by

definition, all characteristics of the genus are inherited by each species: humans as animals inherit (biologically and conceptually) all their characteristics. In the case of norms, there are no biological characteristics, but the principle of conceptual inheritance applies. Thus, all contracts as acts have the same common characteristics as all acts that are not contracts, as well as their own specific characteristics. This means that speciality as inclusion at the logical-conceptual level necessarily entails normative redundancy, i.e., the possible competition (common applicability) of the two norms, the special and the general, in regulating genus and species (Zorzetto 2013). The LSP serves precisely to avoid this accumulation of norms at the level of application by stating that only the (most specific) norm applies.

Finally, to examine the third case, that of speciality, which corresponds to an interference between logical classes, i.e., between two species, we can cite an example that was discussed among mediaeval doctors and is still relevant today (Cordero 1985, 208). It concerns murder by poisoning. Undoubtedly, one can kill by poisoning (it is a special kind of killing), but not all killing is by the administration of poison, and not all administration of poison is fatal. There is overlap between the class of killing and the class of poisoning, just as in the case of red carpets, because there are carpets that are not red and red things, like flowers and socks, that are not carpets. At present, lawyers and judges see a reciprocal or bilateral feature in these situations of interference. Namely, they assume that there is a higher genus and more specific differences that make it possible to accurately identify the interfering species. In the example, the interfering species are two, murder and poisoning, whose specific difference is to cause the death of a human being and to administer poison respectively; the assumed genus, for example, is that of acts that violate personal integrity. It follows that, on the hypotheses of interference, neither norm is more special than the other nor the LSP cannot be applied unless a hierarchy of meanings is established between the differences inherent in each species (Guastini 2006, 157–158).

As history and the examples show, all the relations of speciality considered here so far – primarily speciality as the inclusion of species in the genus, but also the two cases of "spurious" speciality in the form of the opposition of one species to another and interference between species – are based on the legal concepts of which the norms consist. This means that no norm is special or essential by virtue of inherent properties; rather, specialness/generality is a derived property, i.e., it depends on the identification of a genus (the most general term) and the respective specific difference that characterizes the species (more specific terms) (Zorzetto 2011).

Indeed, the identification of genera and species requires a relevance criterion in terms of the common elements and the differences that matter. The choice of the relevance criterion is based on value assumptions linked to the political ideologies of jurists (Barberis 2013, 321–322, 326–327), so that it determines the application of equal treatment for similar situations (justice as generality/equality of each individual in a class) or different treatment for different assumptions (justice as fairness or differential treatment according to the specific relevant differences).

Suum Cuique Tribuere and Ne Bis In Idem/Double Jeopardy

There is a widespread view that the derogation of the special rule from the general rule is a matter of logic and/or a matter of justice (or fairness). In a sense, they are indeed connected, although on the other hand they are analytically distinct. The connection between logic and justice lies in the formal notion of justice as a generality to which every member of a class belongs indifferently to every other member of the class.

Many believe that the LSP is based on the principle of suum cuique tribuere (Bobbio 1967); in criminal law in particular, it is thought to be based instead on the principle of ne bis in idem: in the common law tradition, the association with the doctrine/principle of double jeopardy is more common (Westen 1980; Kirchheimer 1949).

The question is whether it is just to punish or hold a person accountable once or more than once for the same act, which the criminal law calls by different names: for example, the act of interrupting a telegraphic communication by threat is classified

by the criminal law as, inter alia, unlawful interruption of telegraphic communication, threat, private violence, harm aggravated by threat, etc. Similarly, misleading information about cosmetic products is also fraudulent/misleading advertising, and therefore the relevant standards that can be applied in abstracto are both the general ones protecting against fraudulent/misleading advertising (genus) and the specific ones protecting against misleading information in the case of cosmetic products: on the basis of LSP, only the special ones are applied (ECJ C-99/01 2002). A theory of relevance is crucial for the application of LSP, which counts in any case. For example, the fact that a police officer treated his own colleagues, the deputy police officers in charge of security, as Saracens, dirty Arabs, or melons, like any other person of Maghreb origin, constitutes an "injure publique envers une personne chargée d'un service public" and not "un outrage à personne chargée d'une mission de service public," since the terms used are not aimed at the police officer in the exercise of his function, but attack the ethnic origin of the denigrated person, irrespective of the capacity of the security officer (Cour de Cassation Ch. Crim. no. 02-80.893 2002).

In criminal law, the LSP thus serves to exclude all (more general) norms from the group of norms with which the punishment of the offender is to be justified. That this is justified by the principle ne bis in idem as a principle of justice means that it is considered just or fair that the offender is punished for his own act only according to the special norm, and this depends on the theory of justification of the punishment and the theory of morality one chooses. If the principle ne bis in idem is identified as the basis of justice of the LSP, the criterion of justice is "retributive in distribution," using a formula of H. L. A. Hart (2008 [1968]). That is, the ne bis in idem principle serves to ensure that the question "on whom can you impose punishment?" (a question of distribution) is answered with "only on the offender for a transgression," based on the belief that by excluding the more general rules, the measure of punishment is proportionate to what the offender has done or rather to the reprehensibility or moral culpability of what he has done according to a particular moral theory.

If, on the other hand, one recognizes the basis of the justice of the LSP in the principle of suum cuique tribuere, then one normally recognizes justice in the fact that a category of situations that differs in some respect (specific difference) from that regulated by the general norm is treated differently precisely according to the special norm.

Justice as suum cuique tribuere has two implications. In addition to difference, there is also that of equality. This means that each individual of the species is treated differently from the individuals of the other species (and genus), but everyone who belongs to the same species is treated equally in relation to all individuals of the same species. This means that the special rule also applies to a class of situations (subjects/behaviors) in a general sense. Behind the moral imperative of proportionality (retribution in distribution) lies the same need for justice implied by the principle suum cuique tribuere (taking into account its double face of formal justice and equity/epikeia).

Moreover, the criticism often levelled at the LSP in all areas of law proceeds from the two implications of justice as suum cuique tribuere outlined above: on the one hand, justice as differentiated treatment to the extreme of particularistic or individualized decision-making (equity in the negative sense of unwarranted privileging or ad personam decision-making) and on the other hand, justice as equal, i.e., undifferentiated treatment of equally classified cases (justice as generality in the negative sense of unjustified/unjust homogenization or standardization). The starting point of the criticism of LSP's application in both cases is thus the central common element of the measurement of differences and their legal justification: the question is whether and which differences matter, and how they are justified by judges/officials. Punishments and, more generally, all legal consequences are chosen on the basis of these relevant differences.

Derogation and the So-Called Total-Partial Antinomy

Contrary to what is sometimes claimed, special norms are not per se norms that derogate from the more general norms, because the derogation is

something other than the specialty/generality of the norms. In contrast, derogation is not a logical/conceptual question inherent in the content of norms, but a question of positive law that concerns the choice of norms according to which legal cases are decided. In order to decide a case (concretely sub iudice or abstractly, i.e., imaginarily), it must first be determined/selected which norm is to be used as a basis for argumentation or justification. The alternative for which the LSP offers a solution is whether the most general and/or the most specific norms are to be used for justification.

Derogation is thus a phenomenon that concerns legal justification and, in particular, external justification, i.e., the choice of the rule applicable to the abstract or concrete case to be solved (Wróblewski 1971).

Depending on the laws in force, special norms may or may not diverge from the more general norms and be used together to create a more complete discipline. There is no logical reason why special norms cannot deviate from the more general ones, according to the inverse principle/criterion lex generalis derogat legi speciali (Zorzetto 2016).

In order for a rule A to derogate from another rule B, a third rule C (e.g., LSP) is needed: that is to say, a meta-rule for application that excludes one of the two rules and makes only the other applicable to the case (Navarro et al. 2004, 353–354). The prerequisite for this is that the two norms have a common scope of application. This scope exists both in the case of speciality between norms and in the case of interference between norms (so-called bilateral or reciprocal speciality). In order to avoid the joint application of two or more overlapping norms and thus the cumulation of their consequences – in the case of criminal offences, to prevent ne bis idem and double imputation of penalties – the LSP or its opposite lex generalis derogat legi speciali cannot be invoked, since neither norm is special or general in relation to the other.

The problem of derogation exists both when compatible and therefore competing norms are ideally relevant and could be used to decide a case and when incompatible norms could be applied and therefore a practical dilemma (legal antinomy) arises. In the first case, the LSP settles a competition between norms (i.e., redundancy between compatible norms; Zorzetto 2016; Szczaranski 2022); in the second case, it resolves a conflict between norms (the so-called total-partial antinomy) (Ross 1958, 129–130, 149–159; García Máynez 1963; Burazin 2014).

While the case of redundancy between compatible norms has received only occasional attention, the incompatibility of the special norm with the general norm – commonly referred to as the "total-partial antinomy" – is represented or described by drawing a diagram with concentric circles. Looking at the relationship in the opposite direction, i.e., from the general norm to the special norm, the antinomy would of course be "partial-to-total." In either case, the representation is extensional in nature. It should be noted that such diagrams are purely conventional, as other forms may be used and intentional representation of legal concepts and norms is also permissible.

However, regardless of the representation and direction of this antinomy, it is generally considered to be apparent or not genuine, not in the sense that it is not real, but that it is not in fact immovable at all. It is apparent precisely because it is prevented or resolved by the LSP (Bustamante 2010, 101–103, 107).

LSP and Legal Reasoning

According to legal philosophers, the scope of application of the LSP is controversial. For example, it is debated whether the LSP can be used in relation to principles (Moniz Lopez 2017, 473–476, 485), and in particular, it is usually denied the ability to resolve conflicts between principles (Martinez-Zorrilla 2011, 730). Balancing is widely seen as a tool with a broader scope that can help even when there is no LSP (Duarte 2018, 118–120).

One of the reasons for the success of special regimes is their difference, or assumed difference, from exemptions. The dividing line is not clear-cut, as derogations in many cases refer to a special circumstance for which the legal consequence was not considered appropriate despite the

statutory provisions (Bayón 2002). The construction of legal terms and hierarchies of terms underlying the LSP often reflects the gradual, contestable process of establishing legal qualifications: as has been noted (Sartor 2018), it routinely happens that a general discipline is established for a particular legal genre (e.g., the genus "contract") and then specific exceptions are introduced for species within that genus (e.g., the species "contract of sale"), and again further exceptions may be introduced for certain subspecies (e.g., the sale of immovable property) and so on.

Exceptions or singular rules are considered (for various reasons, including the rule of positive law in some legal systems) not to be applicable by analogy: they cannot therefore be used to fill (technical or axiological) gaps (lacunae). Instead, special rules – as opposed to exceptional/singular rules – are considered to be applicable by analogy. Thus, starting from a special rule, one can – with the argument a simili ad simile – fill a gap. Starting from a special rule, however, one can also argue the opposite, i.e., exclude any analogy and create a gap in the strong sense with the argument a contrario (Carcaterra 1994, 177 ff.). Such an argument can create derogatory permissive norms (Poggi 2004, 165).

Of course, there are many legal arguments that can be used starting from a special rule and/or a general rule to justify or exclude its application beyond its own case (species/genus). Examples include the argumentum a maiori ad minus, the argumentum a minori ad maius, the a fortiori argument (which encapsulate a greater degree of particularity) (Duarte d'Almeida 2017), and the dissociation argument, the argument against over- or under-inclusion, and so on.

Even though the LSP is usually considered as a formal tool that has nothing to do with analogy and all the other arguments mentioned above (Feteris 1999, 152), it is important to emphasize the different styles of argumentation that apply to special/general norms. The above arguments also have a crucial influence on the assumptions of the LSP application itself. Through these arguments – whether they are used to reinterpret norms, fill in gaps, avoid gaps, justify a particular practical solution, etc. – the extensions of the norms in question are actually changed. These arguments can thus serve to prepare the ground for the LSP or to limit its scope and thus have a competing function at the level of legal argumentation.

Conclusion

To sum up, the notion of speciality is logically related to that of generality, in the way that the definition of a genus – the object of the general rule – is a necessary condition for calling a rule "special." In short, C.I. Lewis' close implication relation explains the logic of speciality/generality.

In the statement "Norm X is special," the attribute of specialness is attributed to norm X because what it refers to, that is, what it qualifies, is regarded as a species of a genus (or logical class). In this way, norm X classifies its object as subordinate to a more general object. In terms of reasoning, the derogation of the special rule from the general rule consists in the exclusion of a rule (the general rule) that is necessarily presupposed (in a logical sense) by the special rule. The general rule is prima facie applicable because and in the sense that it logically justifies the special rule, and is therefore – abstractly or virtually, as lawyers are wont to say – a component of the argumentation.

Cross-References

- ▶ Certainty: Legal
- ▶ Deontic Logic
- ▶ Deontic Logic and Legal Rules
- ▶ Hart, Herbert Lionel Adolphus
- ▶ Legal Argumentation
- ▶ Legal Arguments: a View from a Rational Legislator
- ▶ Legal Science
- ▶ Liberty and Equality in Criminal Law
- ▶ Pragmatism

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Liberty and Equality as the Morality of Rule of Law

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Introduction

After presenting a schematic map of the concepts at stake (liberty, equality) in so far as they are relevant for the general topic (their relationship with rule of law – from now on RoL), and after examining different forms of their relationships, this entry focuses on the specificity of the relationship between liberty and equality in the legal context. The title suggests that a combination of liberty and equality is the very basis of every legal system inspired by RoL. This circumstance requires the identification of different versions of the idea of RoL.

Liberty and/Versus Equality?

Liberties

Liberty or freedom (v) – here used as synonymous – is not usually considered to be a value or a good in and of itself but rather a general condition, a tool for obtaining some other goods or guaranteeing their pursuit in a social context. On the contrary, the main assumption of liberalism (v) is that liberty is the main if not the only value. The goods that liberty can obtain are generally associated with human flourishing: well-being, self-respect, self-sufficiency or wealth, or whatever other aim human beings decide to pursue in the social context. The point is not that liberty is

the necessary mean for obtaining these goals, but rather that all these goals have to be pursued and enjoyed with liberty, since liberty is a human prerogative to be protected in the social interaction.

The problematic comparison between the liberty of ancients and that of moderns (Constant 1988) seems to hide the importance of liberty in the public sphere, but Romans considered that *libertas* was strictly linked to *civitas*. What is at stake in the legal and political context in fact is not a sort of natural liberty, but rather its legal and political implications. In other words, whatever liberty is (collective political autonomy or individual private freedom), its protection is an appropriate treatment for human beings in the context of social interaction.

Its instrumental character does not diminish at all its importance. On the contrary, it is intrinsically related to its basic meaning: Whatever the content of liberty in general is, to protect liberty implies to leave results undetermined in order to leave individuals free to decide and act by themselves. Liberty then implies autonomy of judgment and self-determination, features that show the existence of an independent source of action and behavior. In sum, liberty is a crucial character of human agency to be protected in the social context.

In the modern political framework, freedom is not presented only as a desirable condition, but it is affirmed as a right to specific claims: freedom of expression, of conscience, and a wide range of rights to choice and to self-determination. All those and many others are considered manifestations of liberty in the framework of interactions, and they are necessary for the exercise of liberty. Liberties – in the plural – are then due to individuals. It is not a matter of concession.

A distinction between negative and positive freedom (v) – also relevant for understanding RoL – has prospered (Berlin 2002). Negative liberties are generally considered immunities; they require some actors (states, institutions, powers, and agents) to restraint from or to inhibit interference with free people. Traditionally, negative liberties are believed to be self-executing: For the simple fact that it is imperative to protect freedom, such rights seem to exist. On the contrary, positive liberty is the capacity of acting upon one's will without internal constraints. Observing closer, what really distinguishes negative and positive liberties in the legal context is the correlative position of others *vis à vis* the free agent. In the first case, it is required noninterference, in the second one, to contribute to produce conditions for self-mastering. Notoriously, according to Berlin, positive liberty is dangerous because it could justify authoritarianism, or, in other words, interferences and domination. But the distinction is graspable only in a liberal context, where an existent general liberal legislation, together with executive and adjudication powers, makes the simple idea of a negative liberty possible. Budget and resources are requested in both cases, because the two forms of liberty require institutions, policies, and actions. Both kinds of liberties are embedded in relationships. Liberty in a social context depends on others' behaviors and is influenced by them.

These interactions/interferences can be considered against liberty only if they are illegitimate, as any interaction is from the point of view of anarchy (v). On the contrary, the legal and political context must take interactions seriously and think of liberty as within that social framework. Liberty in the legal and political context is conditioned by relationships. This aspect seems to weaken liberty because it justifies interferences, but at the same time it strengthens freedom, because it becomes a common commitment and not only an individual concern. Pushing this argument beyond, Republicanism notices that interactions and interferences, even when supported by coercion, can be subjected to our control, and be in favor of liberty (Pettit 2008) (v Pettit, Philip). In other words, interactions/interferences are not necessarily incompatible with liberty. The point is that interferences are against freedom when they are arbitrary and generate a state of domination. From this point of view, the opposite of liberty is domination as arbitrary interference, not equality. The avoidance of arbitrary interference or domination is the main task of RoL.

Equalities

Even more than liberty, equality (v) fits well with the plural. There are different forms and plural parameters of equality: equality of reciprocity – typical of commutative or corrective justice – equality in distribution or allocation of resources, rights, chances, and opportunities (Perelman and Olbrechts-Tyteca 1973). In addition to the different forms of equality and to the wide range of parameters of equality, there are also different methods for obtaining a possible equality, leveling down or leveling up. All these differences explain the diversity of accounts of equality. What is common to all the versions is the comparative concern: Equality is the quality of a comparison between two or more agents under one respect. The comparison should be said to be equal when it shows a proportionality or equilibrium. Nevertheless, equality is not a starting point but a final achievement. Equality is in fact a normative principle. To say that human beings are equal means then that they must be treated as equals. When individuals are equal under this or that parameter, a proportionality in their relationship is due, even if, as a matter of fact, human beings are unequal. From this point of view, when the first article of the Universal Declaration of Human Rights (1948) says that all human beings are born free and equal in dignity and rights, it means that all human beings must enjoy all those rights connected to their freedom and dignity. The thesis according to which perfectly realized human rights are compatible with inequalities (Moyn 2015, 13) is grounded on the assumption that taking freedom seriously boots equality. But perfectly realized human rights (if there could ever be such a world) would reduce inequalities, as far as equality is served when people's access to desirable conditions of life – like those established in form of rights in the Universal Declaration of Human Rights – is equal within reasonable personal differentiations (Cohen 2008, 181). Unreasonable differentiations or, in other words, unjustified discriminations are, hence, the opposite of equality. Those discriminations open the door to domination in so far as they carry out a status of oppression.

Opposition or Complementarity?

The relationship between liberty and equality is intricate, even if they can hardly be divided. The adoption of this or that concept of freedom and of equality complicates their relationships, but some points can be fixed. First, the postulation of their radical opposition is born in the same tradition of liberalism, famously represented by Hayek's (1976) doctrine, and it is stressed by libertarians, a group of political theorists that emphasize liberty at the cost of intentionally jeopardizing equality. The background of this trend is the anarchical assumption that any interaction is an arbitrary interference and produces a state of domination. But even libertarians must support the same liberty for all individuals.

Second, the balance does not prevent the tension between liberty and equality and the different opinions about which one has to prevail. Notwithstanding his liberalism, Dworkin affirms that liberty will lose any conflict with the best conception of the abstract principle of equality, because governments should show the same concern for the lives and liberty of all citizens (Dworkin 2002, 131). This highlights properly the features of the context in which the balance must be found: a social context of interactions among individuals.

Finally, while the opposite of liberty is domination and not equality, the opposite of equality would be inequality and discrimination, rather than liberty. On the one hand, liberty without equality is incompatible with a (minimal) social order. For this reason, it has been said that the liberal centrality of the RoL is linked to its ability to protect liberty (Tamanaha 2004) and to avoid domination. On the other hand, equality without liberty is incompatible with a respectful human social order. But in so far as unreasonable inequalities and discriminations can produce domination, they are enemy of both, freedom and equality. The question is which is the proper balance between liberty and equality in the legal context.

Liberty, Equality, and RoL

As it is well known, RoL is a contested concept, as well as its role in the concept of law (Waldron

2016). In this entry, these major questions will be assumed as established (v. Rule of Law: Philosophical Perspectives). The purpose is instead to test RoL's relationships with liberty and equality. It will be possible to achieve this goal by identifying progressively more complex readings of the relationships involved in RoL according to a vertical and unidirectional pattern, to a vertical and bidirectional one, or to an interactive reading of RoL.

From the point of view of liberty, the relationship between RoL and human agency, and RoL's ability to exclude arbitrary interferences will be relevant. From the point of view of equality, the correlation between reasonable differentiation and RoL and the opposition between the RoL and discrimination are applicable.

Different Versions of RoL

Even limiting the focus to its most recent developments, and looking at legal institutions and at their mechanisms, more than at the theories of RoL, different readings of RoL can be sketched. The differences among them depend on which institutions or agents must be disciplined by RoL, but also on the way of conceiving subjects of RoL, i.e., those who are protected by it, and their relationships.

A first account sees RoL as a mechanism for controlling public powers through well-established public norms. It is the tradition of the *Rechtsstaat*, a typically domestic and public account widespread in Continental Europe, and promoted originally by the Nineteenth Century German Legal Science. According to this view, RoL requires the separation of legislature, executive power and judiciary, and the legality principle, in its two variants: preserving rights *through* the law and public powers acting *by* the law. The mechanism serves the protection of individual rights: not only negative liberty rights, but also any other rights established through law. Nevertheless, the position of individuals in this historical model is controversial as it was not able to avoid totalitarianism. The reason could have been the predominance of equality before the law over the protection of individual liberty, triggered by an unlimited legislative power. And in fact its (corrective) evolution has led to constitutional systems that introduce limits for legislation, as well as criteria for judicial review.

This tradition is to some extent different from the one built around the common law system, shaped by a different set of powers and legal constraints, mostly derived by *stare decisis* customary law. It is no accident that this second account pays more attention to the way in which adjudication must be performed according to RoL – by public officials subject to the same rules, who apply them impartially, according to the due process of law – and to its role in the system of checks and balances. Obviously, the judiciary is in itself a power, and as such it has to be controlled by RoL. But adjudication is more sensible to individual cases, and it compensates the weight of general categories in favor of particular cases. The relationships between a general law and an individual case and among different cases are built through a process of argumentation in which the burden of proof is inversely proportional to the weight of the individual case differentiation. In other words, it is the justification of differences to equate the different positions.

However, these two versions of RoL focused on public powers seem to suggest that law is a set of authoritative directives identified by their sources and imposed and applied top-down, according to a vertical and unidirectional pattern. But RoL is about guiding free human agents' behavior, and not only about government and public powers, but also about the way in which they must apply equality of treatment. Precisely on this point, the contribution of the contemporary debate in legal philosophy about RoL has been illuminating. Law guides people's behaviors through authoritative-giving reasons for actions (Raz 1979). It necessarily requires the involvement of free human agency. The famous list of RoL's specific features can be explained precisely in light of their human agency: Law must be general, clear, prospective, noncontradictory, practicable, publicly promulgated, relatively stable, and applied impartially by officials subordinated to the same rules (Fuller 1964). All these features exclude domination in so far as they assure that the (inevitable) interference by

government and others do not offend individuals' human agency because it is not arbitrary and because they are necessary for human actions. General rules aim at guaranteeing prima facie equality of treatment and involve human agency in determining the appropriate individual behavior. Clarity makes the process of free deliberation by the individual possible, while prospectivity assures that the act of compliance or defiance corresponds to a free choice, and at the same time represents a limit for the exercise of power, even the legislative. Noncontradictory and practicable rules make compliance possible. Public promulgation in advance assures common knowledge of the law and predictability, promoted also by the stability of rules, facilitating responsible decisions. The principle according to which rules have to be applied by officials impersonally and with impartiality ensures as well equality of treatment.

Even if more persuasive, this account of RoL and its legal characters still seems to undertake that law is a set of directives targeted to individuals that are rational and able to self-determine, though mainly subordinate. The relationship between authorities and dependents is still unidirectional. It is then necessary to distinguish this model from the managerial direction of actions that famously Fuller (v) (1964) opposes to RoL. In the managerial model, authorities are imposing standards, rules, and goals on those subject to their power, from which they must be considered unconnected. Vertical and unidirectional accounts of RoL are in some way incomplete. On the one hand, the vertical relationships within the context of RoL are not unidirectional, since RoL imposes duties on the authorities and establishes criteria for their accountability. The vertical dimension in fact is not explained without a reciprocity between government and individuals addressed by the law. In this view, compliance is the result of government respecting some mandatory requirements, according to a vertical but bidirectional pattern. Reciprocity is the name of equality between authorities and subordinates. It implies a mutuality of constraints between the ruler and the ruled. In other words, reciprocity entails that authorities and subordinates cooperate in shaping their interactions (Postema 1994). Authorities make general, clear, prospective, noncontradictory, practicable, promulgated, and relatively constant rules; those rules apply also to the same authorities, and officials apply those rules with impartiality and consistency, in response to which individuals comply with the rules and, if they defy them, the use of force becomes legitimate.

On the other hand, equality in RoL is also a quality of a set of horizontal relationships. First of all, equality is met if people's standing in the network of interactions is equal within the constraint of reasonable categories proposed by a (limited) legislation (Allan 2001). Second, generality introduces a requirement of justification since all forms of discrimination must be adequately justified. Discrimination is tolerable only if it rests upon a reasonable differentiation and classification. Third, those classifications must be revised by adjudication, whose role is to apply those categories to individuals. Equality is then assured by the equal access to institutions to settle disputes, which is called the procedural part of RoL (Waldron 2016). Authorities, officials, and procedures are the guardians of the system of equal interactions, vertical and horizontal. Those subject to the RoL are all equals, both in relation to authorities (according to reciprocity), and as subordinates (according to generality and equal access to remedies). In sum, RoL is an order of equal interdependent liberties. This is the reason why RoL attracts loyalty, because it is considered not only efficient, but also rather fair (Postema 1994).

Formal Versus Substantive Versions of RoL?

A classic controversy about RoL regards its formal character and its indifference to the content of the law, as well as to liberty and equality (Craig 1997). There are many versions of this contrast. Sometimes it is indicated as the opposition between RoL's thick and thin versions, or regarding the link between RoL and rights (opposing the rights-thesis vs. the no rights-thesis), or it is about the bond between RoL and private property.

The aim of the *formalists* in the debate is to distinguish the ideal of RoL from other political

values like human rights, democracy, or any account of equality. The very point is about the concept of law. The distinction between form and substance depends generally on an idea of law as a set of norms addressed to individual law-subject in which it is possible to distinguish form and content. When law is defined as a social practice and RoL serves to shape the relationships according to liberty and equality as indicated above, the problem of substance must be looked at in a different way. In so far as a social practice is a form of coordination of different agents, RoL is understood as the appropriate legal form for regulating interactions among free and equal individuals. It is not a problem of form and substance, but it concerns the goal of the practice and its appropriate means. As shown above, RoL is able to forge both legislative lawmaking systems and common law adjudication legal orderings, as well as it is compatible with different settings of rights or ownership regulations. But it is not compatible with any system, if liberty and equality are not protected. RoL is not about any model of liberty and equality or about just one of them – for instance, the one that links necessarily liberty and private property (Austin 2014) – but it is about liberty and equality in the legal context, i.e., in a practice of interaction among free and equal human agents. When it is the case, liberty and equality find a balance that it is not due to the prevalence of this or that theory of liberty or justice, but it is *the* proper legal balance.

Cross-References

- ▶ Freedom
- ▶ Fuller, Lon Luvois: Influential Ideas
- ▶ Pettit, Philip
- ▶ Relational Equality
- ▶ Rule of Law: Theoretical Perspectives

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Liberty and Equality in Criminal Law

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Introduction

A decent polity will foster, protect, and respect the liberty and equality, the equal freedom, of all its citizens. Its criminal law, understood as a set of

practices that include criminalization, policing, a criminal process that culminates in trial and verdict, and the imposition and administration of criminal punishment, will in various ways be informed by these values. It will also help to give determinate form to these values, as the civic values by which the polity defines itself. For in its substantive dimension, it articulates the kind of liberty and equality that citizens can expect to have protected and can be expected to respect. In its procedural and penal dimensions – the criminal process, the administration of criminal punishment – it should (although too often it does not) display the kind of concern and respect that the polity has for its citizens as free and equal members of the political community, even when they have committed crimes. This entry will briefly sketch the main ways in which liberty and equality can bear on or figure in the criminal law.

Liberty and Equality as Protected by Substantive Criminal Law

If liberty and equality are among a polity's core self-defining values, it must recognize attacks on or violations of those values as public wrongs – as wrongs that should be publicly marked by the polity, and whose perpetrators should be held to public account. One way, indeed the most obvious way, to do this is by criminalizing violations of those values: for to criminalize a type of conduct is to declare it to be in this sense a public wrong, and to provide for those who commit the wrong to be held to account for it through the criminal process (see Marshall and Duff 1998; Duff 2018: Chap. 1). Although the promotion of liberty and equality is not primarily a task for the criminal law, we can therefore expect at least some kinds of attack on liberty or equality to be defined as crimes. Only some, however, since criminalization is not the only way for a polity to respond to public wrongs. Sometimes no formal response is appropriate, if the wrong is very minor, or adequately dealt with by ordinary, informal social responses; or the wrong might be better dealt with by the kind of mediation that characterizes "restorative justice," or by making it a matter for tort or "civil" law rather than criminal law – a matter for the victim to pursue if he wishes, rather than for the polity to pursue as a crime. Indeed, English law (to take just one example) tends to deal with serious violations of liberty through criminal law, but with many violations of equality through civil, or private, law: obvious attacks on liberty, such as kidnapping or false imprisonment, are criminal offences, but discriminatory conduct, which denies equal consideration to members of a disfavored group, is typically dealt with through noncriminal legal provisions. It is not clear what justifies this distinction: if I am attacked in a way that seriously violates my liberty, I can expect protection from the police and can look to the public prosecutor to pursue a case against my attacker, but if I am denied equal access to a service or benefit on discriminatory grounds, I must pursue the case myself and seek a remedy for myself.

The sketch in the previous paragraph assumed that only some criminal offences consist in violations of liberty or equality, while others reflect different values, different goods, that the law should protect. Some theorists, however, argue that the substantive criminal law should be structured by just one value: that what justifies the criminalization of any kind of conduct is, ultimately, the protection of a single predominant value. Liberty, in its various guises, has sometimes played this role: theorists have argued that criminal law should serve to protect freedom, understood as "dominion" (Braithwaite and Pettit 1990) or "nondomination" (Pettit 2012), or as Kantian "sovereignty" (Ripstein 2009). Others have argued that the kinds of wrong that should be criminalized are those that deny the moral or civic equality of the victim – a denial that the criminal law can correct (Hampton 1992). Such monistic accounts of the grounds of criminalization might not be plausible (see Duff 2018: Chap. 6), but a more pluralist account of the values that substantive criminal law should protect must include such central values as liberty and equality. In protecting those values, the criminal law can also foster them: in defining conduct that violates those values as criminal, the law declares their importance as values by which the polity defines itself.

Liberty and Equality as Constraints on Substantive Criminal Law

The law, and in particular the criminal law, must respect the polity's values, as well as fostering and protecting them: the law should not itself operate in ways that violate those values. Liberty and equality can clearly be infringed by police investigations, by the criminal trial, and by criminal punishment. But the demand that the polity respect its citizens' liberty and equality also has implications for substantive criminal law, since it sets constraints on the kinds of conduct that may be criminalized: criminalization is unjustified if it unreasonably constrains the liberty of those whom it claims to bind, or treats them unequally without good reason.

That criminalization restricts liberty seems obvious enough, and theorists argue that we should therefore operate with a "presumption of liberty," which always constitutes a reason against criminalization: that presumption can be defeated, if the reasons (whether retributive or preventive) in favor of criminalization are strong enough; but it needs to be defeated if we are to justify criminalizing even conduct that clearly constitutes a public wrong (see Moore 1997: Chap. 18). We need to be clear, however, about how criminalization impinges on liberty – and when and why such impingement is problematic. To that end, we should distinguish normative liberty-infringement from material (factual) liberty-infringement.

Criminalization is always normatively liberty-infringing in that it declares that people ought not to (or, less commonly, ought to) engage in the specified type of conduct: it declares a normative constraint on their freedom of action. Whether this is problematic depends in part on whether we should accept the "practical difference" thesis: that the law makes a difference to our reasons for action (Shapiro 1998), in that it provides us with new reasons for action. If all that substantive criminal law does is to define as criminal wrongs certain kinds of conduct that are already wrong (wrong in a way that constitutes them as "public" wrongs that properly concern the whole polity), it could be argued that it does not give us new normative reasons to refrain from such conduct (Duff 2018: Chap. 3.2): rather, it simply reminds us of the reasons, or normative constraints, that already bear on such conduct; and it is not clear that that kind of normative constraint marks a problematic infringement of liberty. If, on the other hand, the criminal law does provide new reasons for action, or can *make* conduct (conduct that was not already wrong) wrong by criminalizing it, then it does create new normative constraints on action – constraints that must be justified.

But criminal law, if and when it is applied and enforced, is also materially or factually liberty-infringing, and talk of a "right to do wrong" (see Waldron 1981) might make more sense here. For to criminalize a type of conduct is to make those who engage in it (and those suspected or accused of engaging in it) liable to certain kinds of legal coercion: others may legitimately use force to prevent them completing the conduct; they may be arrested, and brought to trial; and, of course, they may be punished. If we believe that respect for others' liberty (or respect for others as free and responsible agents) precludes coercing them, we must recognize that criminalization sanctions these problematic kinds of coercion, and should perhaps therefore also recognize that this always constitutes a reason against criminalization. How far that is true might depend on the nature of the coercion: for instance, if the coercion is purely defensive, a matter of preventing someone from successfully completing conduct in which they should not be engaged in the first place, it is justifiable in familiar ways; but other kinds of nondefensive coercion that the enforcement of criminal law involves are not so straightforwardly justified. These will be discussed in later sections; all we need note here is that insofar as criminalization involves or paves the way for infringements of kinds of liberty that citizens should enjoy, it is at least problematic, if not presumptively unjustified.

As for equality, that is most clearly threatened in the enforcement of criminal law, which will be discussed below: but the substantive criminal law's definitions of crimes might also impinge on equality in problematic ways. This impingement can be direct, if the criminal law is used to

enforce an oppressively inegalitarian regime (for instance, criminal laws designed to enforce apartheid), but it can also be indirect or unintended. Of course, almost any criminal law bears unequally on some people: the law of fraud bears in a more liberty-restricting way on those who are tempted to commit fraud than on those who are not; the laws criminalizing drink-driving bear more heavily on those who like to drink and drive. But so long as what the law defines as criminal is indeed a wrong from which we should refrain, such inequalities are not unjust: they do not impose unjustly unequal burdens. More problematic are laws that bear more heavily on those who are in other ways, through no fault of their own, disadvantaged: one objection to laws that criminalize conduct related to homelessness (begging in the street, or sleeping in prohibited places) is that they impose further liberty-limiting burdens on those whose lives are already seriously disadvantaged; an obvious objection to the distinction that US sentencing law drew between crack cocaine and powder cocaine was that it resulted in much heavier sentences for the (typically black) users of crack cocaine than for the (typically white) users of powder cocaine (see ACLU 2006). Even here, however, we might say that the problem often lies not in the law itself, but in the social, political, and economic conditions in which the law operates (see section "Liberty and Equality as Preconditions of Legitimate Criminal Law" below).

Liberty and Equality in the Criminal Process

If we understand "the criminal process" in very broad terms, as running from the initial police investigation of a crime through to the trial and conviction or acquittal of the person accused of committing it, we can see a number of problematic ways in which that process impinges on liberty and equality. (Other dimensions of policing, to do with the prevention of crime, disorder, and other kinds of harm, also raise issues of liberty and equality: how far may police legitimately constrain both normative and factual liberty preemptively, to avert the potential occurrence of disorder that is not yet in train; when do preventive police tactics bear unequally, and unjustly, on particular groups? Similarly, nonpolicing measures aimed at preventing crime by making its commission harder, so-called "situational crime prevention," raise issues about their impact on liberty and equality (see von Hirsch et al. 2000). But these cannot be discussed here.)

Police investigations intrude most obviously on liberty, as when they involve the arrest of a suspect, or detention for questioning; but they also raise questions of equality when they are focused on members of particular groups. The most obvious examples of this involve "racial profiling" (which can be explicit or implicit) and its use in different kinds of "stop and search" strategy that aim both at crime prevention and at crime detection: can the fact that a particular kind of crime is committed predominantly by members of one racial group justify the police in focusing their stop and search activities on members of that group; or does such profiling, even if empirically well-grounded, display a failure to treat the individuals who suffer it with the equal respect due to them as citizens? The general question is this. Citizens are entitled to be treated as free and equal members of the polity and are entitled to the "civic trust" that is expressed in the presumption of innocence (see Nance 1994). If they are proved to have committed a criminal offence, that can justify treating them in ways that infringe their liberty and deny them some aspects of civic equality: these kinds of measure will be discussed in the following section. But the criminal process that leads from crime-commission to punishment also involves infringements of liberty, and treatment that is unequal, imposed on those who have not been proved, and who might never be proved, guilty of an offence: how can such measures be justified? (To talk of what citizens are entitled to might seem unhelpful, since many of those who suffer the coercive attentions of the criminal law are not citizens, but should surely be treated with the same respect as citizens are. The quick answer to this point is that they should be treated as guests, who share many of the rights and responsibilities of citizenship; see Duff 2018: 117–26.)

This question can be vividly illustrated by the provisions that systems of criminal law typically make for the detention of people who are awaiting trial on a criminal charge (and the other kinds of restriction that may be imposed on them). If I am remanded in custody, on the grounds that if left free I might fail to appear for my trial, or interfere with witnesses, or commit other crimes, my liberty is seriously infringed, though I have not been proved guilty of any offence: I am detained in order to prevent the crimes that, it is thought, I might commit if left free; but how can such preemptive interference be consistent with my civic status as a free and equal citizen? That question is exacerbated by the fact that pretrial detention tends to be imposed unequally: an accused person who has no home in which he can be curfewed, or no steady way of life, or no money to pay for sophisticated legal help, is much more likely to be detained than a better-off person with a more stable background.

The disparity in resources between rich and poor defendants (as well as that between the accused person and the state, which leads to demands that, as far as possible, the trial process should ensure "equality of arms" between defendant and prosecutor) also bears on the trial itself, as well as on the plea-bargaining that often preempts a contested trial. A defendant who is rich enough to hire a good lawyer will have more chance of mounting an effective defense, or of securing a more favorable bargain, than a poor defendant, even if the latter can secure free legal aid: for even a decent system of legal aid will always be limited in how much help and support it can provide.

Beyond these particular and material disparities and burdens lies a further issue that bears on the criminal process. Very often, defendants appear at trial as people who are already, in effect, something less than free and equal citizens: they are placed in the dock, perhaps with obvious security measures; they may be dressed in prison clothes and thus already set apart from their fellows; they may or may not be helped to understand what is going on. If we ask what kind of trial process would be apt for free and equal citizens who are called to answer to their fellows for their alleged crimes, our answer will be rather different from what actually goes on in too many of our courts.

Liberty and Equality in Criminal Punishment

Criminal punishment cannot but impinge on the liberty of those who are punished: most obviously and dramatically when they are imprisoned, but also when they are required to pay a fine, or to undertake unpaid community work, or to report regularly to a probation officer. It also impinges on certain kinds of equality: it can deprive them of equal access to many of the opportunities and goods that citizens normally enjoy, and place them in a subordinate position in relation to officials (such as prison officers) who now have authority over them. Equality is also at issue when we compare the punishments imposed on different offenders for different offences: the principle of proportionality (the severity of punishment should be proportionate to the seriousness of the crime) includes a principle of equality – that those who are equally culpable for equally serious offences should receive equally severe punishments.

As far as proportionality is concerned, there are familiar questions about how equality or difference are to be measured: questions both about how we can compare the severity of very different modes of punishment (how many weeks on what kind of probation regime should be treated as equivalent to how many weeks in prison), and about how far what should matter is the objective weight of the punishment, or its subjective impact on the individual offender. For instance, it seems just to try to relate the cash amount of a fine to the offender's financial resources: thus, a system of "unit fines" imposes fines that are initially specified as a number of units, before being translated into a means-tested cash amount; a poor offender and a rich offender can thus receive "the same" fine as specified in units, but will pay very different cash amounts. But how far should this be taken: does justice also require, for instance, that we try to measure the severity of punishment by its relative impact on the offender's life (a 10-year sentence deprives a 70 year old of a larger

proportion of his predictable remaining life than it does a 30 year old); or by its impact on his subjective well-being (see Kolber 2009)?

More important, though, are some larger questions about the impact of punishment on the offenders' liberty and equality (Dzur et al. 2016). As to liberty, we must ask not only what can justify this kind of infringement of liberty (to which the familiar answer is some combination of retrospective penal desert and prospective crime-preventive benefits), but also what kinds of liberty can be justifiably infringed, in what ways. The distinction between normative and factual constraints is again relevant. For many punishments initially involve normative rather than factual constraints on the liberty of the person who is punished: I am required to pay a fine, or to undertake a specified number of hours of unpaid work, and so on. This is also true of some kinds of imprisonment – not only those that consist in home curfews, but also those involving an actual prison. In some countries, those sentenced to a term of imprisonment are released from the court and told when they must report to a prison to serve their term; those sentenced to weekend detention are required to present themselves for detention; and in open prisons there are no physical barriers to escape – the prisoners are required to stay within the specified boundaries. The possibility of factual or physical constraint lies in the background, of course, in all these cases: if I fail to pay a fine the money can be extracted from my wages; if I fail to satisfy the terms of a noncustodial sentence, I might end up back in court facing a prison term; and those who fail to appear for their detention or who abscond from prison are liable to be arrested and brought back. But it is still significant that so many punishments are imposed initially as requirements: for as such they can still be said to treat the offender as a free, responsible agent.

Even when we look at non-open prisons, the demands of liberty and equality have force. As to liberty, prison regimes vary significantly in the ways and the extent to which they limit the prisoners' liberty: within the confines of the prison wall, prisoners can be allowed more or less control over their activities, the constraints placed on them can be more normative or more factual, and their freedom to engage with the world outside the prison (the extent to which the prison walls are porous) can be greater or lesser. As to equality, there are familiar issues about equality between prisoners – about the extent to which prison authorities can and should prevent the development of the kinds of hierarchy that oppress the weak and that can constitute a kind of informal oligarchy of brutal power: but we must also look at the way and the terms in which the prison authorities address the prisoners. Are they still addressed with respect as citizens who, although they have committed wrongs for which they are now being punished, retain their standing as equal members of the polity; or are they addressed as less than full citizens – as outsiders, or enemies, or civic inferiors (see Whitman 2003)? It can be plausibly argued that a polity that takes citizenship seriously, and that sustains a properly inclusionary attitude towards its citizens, will strive to foster and protect liberty and equality in its prisons: although imprisonment inevitably involves – it consists in – a loss of liberty, prison regimes can, within that necessary constraint, still do much to treat their inmates as free and equal citizens. Whether prisoners retain the right to vote has symbolic importance in this context: to retain that right is to be treated still as a full citizen, with an equal voice in the polity's governance; to lose it is to be treated as less than a full citizen (see Tripković 2019).

Another set of important issues connected to criminal punishment concern the "collateral consequences" of criminal conviction – the further burdens or exclusions, formal or informal, that are often imposed on those convicted of criminal offences (see Hoskins 2019). These can also have serious impacts on the liberty of those who suffer them (who might find that they are excluded from access to employment, to public housing or welfare, to education, as well as from voting), and on their effective status as equal citizens.

Conclusion: Liberty and Equality as Preconditions of Legitimate Criminal Law

One more issue should be noted, concerning the connection between criminal law and its political

context (between criminal justice and social justice). A liberal polity should foster and respect the liberty and equality of all its members, but often fails to do so: in particular, some of its members, some groups within it, can suffer a systematic lack of kinds of liberty that their fellow citizens enjoy, or systematically unequal access to opportunities or benefits that others enjoy; and such disadvantages may be laid at the polity's door, on the grounds that even if it did not positively cause or foster them, it has failed to take adequate steps to prevent or remedy them. It is also typically true that many of those who appear in the criminal courts, charged with criminal offences that they did indeed commit, come from such systematically and unjustly disadvantaged groups: we must ask what implications, if any, their background of unjust disadvantage has for their treatment by the criminal law.

This is not a question specifically about liberty and equality, since it is raised by any kind of systematically unjust disadvantage that offenders might have suffered; so it does not merit detailed discussion here (but see Heffernan and Kleinig 2000; Shelby 2016). However, it is worth suggesting that even if such disadvantage should not provide a justification or excuse that the law should recognize, it does undermine the legitimacy of the law's dealings with those who have suffered it: if the criminal law is to have a legitimate claim on the respect of those whom it claims to bind, and if the polity is to have the standing to put on trial (and to punish) those who commit crimes, we must be able to say that they have been treated with the equal respect and concern due to them as citizens; if they have suffered systematic denials of their civic standing (e.g., by not being allowed the kinds of liberty and equality that other citizens enjoy as a matter of right), this undermines the law's right, the polity's standing, to call them to account. The only way to regain that standing is to take serious steps, symbolic and material, to address those background injustices: to recognize that if the polity is to call offenders to answer for the wrongs they have committed, it must answer to them for the injustices they have suffered at its hands, and begin to remedy those injustices (see Duff 2019). The character of the criminal process will be crucial in this context: is the defendant treated and addressed now (even if he has not been before now) as a free and equal citizen, whose voice must be heard?

See also

► Equality and Global Justice
► Liberty and Equality as the Morality of Rule of Law

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Liberty and Justice

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Introduction

Justice and liberty are two of the most central ideals in legal and political philosophy: Justice should be brought about while liberty should be respected and safeguarded. Yet, are these ideals compatible? Or does the pursuit of justice require restrictions of liberty? This entry argues that the relationship between these ideals, in particular whether liberty is compatible or in conflict with justice, depends on whether one is operating with a moralized or a non-moralized conception of liberty, which in turn depends on whether one construes the significance of liberty in deontological or axiological terms.

Liberty Versus Justice?

Nozick famously argued that liberty and justice are in conflict when one adopts a patterned conception of justice, which considers a distribution to be just if it conforms to a pattern, such as equality, need, or merit. Using the Wilt Chamberlain example, Nozick illustrated how liberty upsets patterns (cf. Nozick 1974, pp. 160–164). When one starts out with a just distribution D1 that conforms to a certain pattern and lets individuals freely dispose of the holdings that have been assigned to them, then the actions and interactions of these individuals will lead to a distribution D2 that most likely will not conform to the pattern (for instance, if a large number of individuals decide to pay money to watch Wilt Chamberlain play basketball, then he will end up with far more resources than others at the end of the season).

Since maintaining a pattern requires continual interference, liberty and justice are in conflict when justice is understood in terms of a distributive pattern. Proponents of such patterned theories have two options. They can either respect individual liberty, but then end up with distributions that do not conform to their desired pattern. Or they can restrict individual liberty by prohibiting "capitalist acts between consenting adults" (Nozick 1974, p. 163), where this includes not only market exchanges but also donations and giftgiving, in order to enforce the pattern.

An entitlement theorist, by contrast, is not faced with this unpalatable choice. According to the entitlement theory, a distribution is just if the holdings of the various individuals were acquired and then transferred in a just way. The justice of a distribution is, in this way, reducible to the justice of the various actions and transactions that gave rise to this distribution. Since the entitlement theory considers voluntary transfers to be justice-preserving, the voluntary actions and interactions that transform D1 into D2 preserve the justice of the distribution from which one started. Liberty and justice, accordingly, do not conflict on the entitlement theory.

Although justice is not in conflict with liberty on the entitlement theory, this approach is often criticized on the basis that the freedom ("liberty" and "freedom" will be used interchangeably) that it grants may well be empty. Even though everyone is at liberty to dispose of their holdings, this freedom is merely formal for those who do not have significant holdings. The poor, for example, cannot really enjoy this freedom. Although they have the same freedom as everyone else, namely, the freedom to dispose of their property in the way that they see fit, this freedom lacks significance for them due to the fact that they do not have much property. The action-type that everyone is free to

perform, namely, disposing of their property, encompasses fewer action-tokens in the case of those having fewer resources and is thus of less significance for them.

This critique points out that equal freedom does not imply equal worth of freedom, since the worth of freedom can be compromised by a lack of resources (cf. Rawls 1971, p. 204). Proponents of patterned conceptions of justice can then say that, even though their theory of justice requires restricting freedom to some extent, it distributes resources in a way that makes the freedom that people have significant and worth having. Some go even further and argue that a lack of ability implies a lack of freedom, rejecting the idea that one can be free to ϕ without being able to ϕ. (This can either take the form of a bivalent view that treats a lack of ability as a source of unfreedom or a trivalent view where a lack of freedom renders both freedom and unfreedom inapplicable, such that one is neither free nor unfree to ϕ when one is unable to ϕ.) In that case, a lack of resources compromises not merely the worth of freedom but is inimical to freedom itself. This allows them to say that, although the pursuit of justice requires restricting the freedom of some, it grants freedom to others and thus amounts to a redistribution of liberty.

Moralizing Liberty

A more fundamental critique of Nozick's argument is that enforcing property rights is inimical to freedom and involves coercion. While individuals are free to dispose of their own holdings, others are prevented from using what is not theirs. Property rights thus restrict the freedom of non-owners. More precisely, the enforcement of property rights is detrimental to the freedom of non-owners since they are prevented from performing actions that involve the holdings of other people. From this perspective, even voluntary market exchanges are deemed to be coercive because they involve threats to withhold benefits, where these threats are backed up by the state's enforcement of property rights (cf. Hale 1943; Fried 1998, ch. 2). A person who offers to exchange something for something else can then be understood as someone who threatens to withhold the thing in question unless he is provided with the relevant object of exchange.

The freedom of owners thus comes at the expense of the unfreedom of non-owners, which means that liberty conflicts with justice even when the entitlement theory is accepted. In fact, conflicts between justice and liberty turn out to be inevitable on any theory of justice. This is because the enforcement of any distribution of holdings will restrict the freedom of those not in possession of the relevant holdings.

The reason why Nozick considers the entitlement theory to render justice compatible with liberty is that he is operating with a moralized conception of liberty. Moralized accounts draw a distinction between liberty and license (cf. Locke 1689, §6; Bader 2016). Actions are distinguished into those that the agent has a right to perform, i.e., those that it is permissible for the agent to perform, and those that the agent does not have a right to perform, i.e., those that it is impermissible to perform. Actions that the agent can be free (or unfree) to perform are restricted to the former, while the latter are excluded and belong to mere license. Being prevented from performing an action that belongs to the latter category is not an infringement of liberty. The underlying idea is that if an agent lacks the right to perform a particular action, then preventing the agent from acting accordingly is not a restriction of liberty since the agent is not free to perform that action in the first place.

The contrast between liberty and license is drawn in normative terms on the basis of the rights of an agent. The domain of liberty is constituted by the actions that an agent has a right to perform. Rights are here understood as Hohfeldian liberties/privileges, i.e., an action belongs to the domain if the agent is at liberty to perform this action, which means that he is not under a duty not to do this action. This is a normative fact about the duties the agent is under. Some of these liberties are protected liberties, insofar as the agent has various claim rights against others to the effect that they not interfere. If the agent is at liberty to do something, yet is prevented from doing it,

where the relevant interferences are rights-violating interferences, then he is unfree to do that action. This means that an agent is rendered unfree to ϕ if he is at liberty to ϕ yet is prevented from ϕing in a way that violates his claim-rights. Put differently, if a protected liberty is interfered with in a way that violates a claim of non-interference, then liberty is infringed and the agent is rendered unfree to act in this way.

The moralized account thus leads to a threefold classification of actions:

- x is free to ϕ iff x is normatively at liberty to ϕ, and there is no rights-violating constraint preventing the agent from ϕing.
- x is unfree to ϕ iff x is normatively at liberty to ϕ, yet there is a rights-violating constraint preventing the agent from ϕing.
- x is not-free to ϕ iff x is not normatively at liberty to ϕ.

This means that there are two ways in which obstacles that make it impossible for an agent to, ϕ, nevertheless, do not render the agent unfree to ϕ. First, the agent is normatively at liberty to ϕ, but the constraint preventing the agent from ϕing does not violate any of the agent's rights, where an interference can fail to be rights-violating either because the liberty is not protected at all, or because the interference does not contravene against any of the claims that the agent has. If the interference is not a rights-violating interference, then there is no loss of liberty and no infringement of freedom. This means that the interference results in inability rather than in unfreedom – the agent, while being free to ϕ, is then simply unable to ϕ. Second, the agent is not normatively at liberty to ϕ, in which case ϕing is part of license. An interference with ϕing in that case does not classify as a restriction of liberty since the agent is not free to perform that action in the first place.

The latter possibility is the one that is crucial for Nozick's claim that the entitlement theory does not require restrictions of liberty. This is because the interferences, as well as threats of interference, that protect and enforce the property rights recognized by the entitlement theory will be legitimate and will not infringe liberty. The interferences that non-owners are liable to will not infringe their freedom, on the basis that they do not have the right to use those things. In the same way that people are not free to go on a killing spree, they are not free to take or use things that are not theirs and they are liable to be interfered with if they nonetheless try to do so.

If liberty is moralized, then one can claim that non-owners are not free to do these actions to begin with and hence are not rendered unfree when they are prevented from doing them. Since one is not free to do those things in the first place, preventing someone from using or taking something that is not theirs (i.e., preventing someone from stealing) will not count as an infringement of liberty. Even though a regime of entitlements ensures that people are liable to interference, the interference in question does not constitute an infringement of liberty.

Once justice is built into liberty, liberty and justice are guaranteed not to conflict, no matter which theory of justice one adopts. If the transfers that one is free to perform are restricted to those that do not upset justice, then any theory will render justice compatible with liberty. This means that a pattern theorist can reject the claim that liberty upsets patterns by moralizing liberty in terms of the property rights that are granted by the patterned theory of justice. Only those transfers that preserve the pattern are ones that people have a right to perform and that they are hence free to perform. Since they are not free to upset the pattern in the first place, preventing them from doing so will not classify as an infringement of their liberty.

Considerations pertaining to moralized freedom are, accordingly, dialectically ineffective when it comes to arguing in favor of a particular conception of justice. Since justice will be prior to liberty, one cannot argue from liberty to justice. This means that the Wilt Chamberlain argument is dialectically ineffective, since it presupposes rather than establishes the entitlement theory. In effect, it is a circular argument from entitlements to moralized freedom and back to entitlements. More generally, freedom is no longer capable of doing fundamental justificatory work since the

moralization presupposes more fundamental normative notions (cf. Ryan 1977; Cohen 1995; Waldron 1991). That being said, while it cannot do fundamental justificatory work, it can nevertheless be useful for classificatory purposes and is the only notion of liberty to which one can assign intrinsic normative significance (cf. Bader 2018).

In short, if one moralizes liberty in terms of justice, then liberty and justice are by their very nature compatible, where this holds independently of the conception of justice that one endorses. By contrast, if one does not moralize liberty, then conflicts between liberty and justice are inevitable insofar as establishing and maintaining justice requires restricting liberty.

The Significance of Liberty

The distinction between non-moralized and moralized conceptions of liberty is closely related to the distinction between axiological and deontological accounts of the significance of liberty.

An axiological construal takes liberty to be significant on the basis of the goodness of the actions that one is free to perform: x's being free to ϕ is significant because and to the extent that the opportunity to ϕ is significant. On this approach, real opportunities that are worthwhile are to be promoted.

First, the opportunities need to be real rather than merely formal opportunities, since only the former but not the latter can be realized, and are hence of significance. Since merely formal freedoms are not axiologically important, the worth of freedom can be compromised by a lack of abilities and resources. Lack of interference thus needs to be combined with the requisite resources and abilities in order for the relevant opportunities to be significant and for freedom to be of value.

Second, the significance of the opportunity to ϕ derives from the significance of ϕing. This means that the opportunity to perform an action is important only if performing that action is important. Opportunities have a form of extrinsic significance. Correspondingly, constraints are bad because they prevent various goods, i.e., they have preventative disvalue which is a form of instrumental disvalue. (Some have argued that freedom can have non-specific value (cf. Carter 1999) or content-independent value (cf. Kramer 2003). While the freedom to ϕ can be valuable in certain contexts in a way that is independent of and not derivative from the value of ϕing due to context-dependent facts, such as the fact that having the freedom to ϕ can enhance the autonomy of the agent, the value that the freedom has in the respective context is not a value that applies to the freedom to ϕ as such, which can be seen by the fact that this contextual value varies across contexts, as happens, for instance, when, instead of enhancing the autonomy of the agent, having too many options is detrimental to control and can undermine careful deliberation. Accordingly, while freedom can be significant in a number of different ways, the value that the freedom to ϕ has as such is value that it has due to the significance of ϕing.)

Third, at least when concerned with prudential goodness, the significance for the agent is independent of the permissibility of the relevant actions. Both permissible and impermissible opportunities can be considered to be valuable, since an action can have prudential value even when it is morally impermissible.

This axiological construal is central to the non-moralized approach. All actions, whether permissible or impermissible, are ones that one can be free or unfree to perform. In the case of each action, it is the significance of performing that action that makes the freedom to perform it valuable, as long as the relevant opportunity is a real rather than merely formal opportunity. The value of the various freedoms ensures that liberty is something that is to be promoted, in the sense that individuals are to be provided with valuable opportunities. One can then assess not only which system maximizes freedom, given that one has a suitable way of measuring freedom, but also which system best promotes worthwhile opportunities and thus realizes the worth of liberty to the greatest extent. Both of these questions are by and large empirical questions that depend on the effects that different systems have on the opportunities available to different individuals.

Since liberty is construed as a good that can be justly distributed, or at least as a good that is closely connected to the resources that can be justly distributed, one can assess both how the extent of freedom and the value of freedom are impacted by the justice of a distribution. Different theories of justice will have different effects in terms of how much a just distribution departs from a situation in which freedom is promoted to the greatest extent as well as a situation in which the worth of freedom is maximally realized, which determines the degree to which these ideals conflict at the aggregate level.

A deontological construal, by contrast, focuses in the first place, not on the value of the opportunities, but on the wrongness of infringements of liberty. Liberty is to be understood as something that needs to be respected, rather than as a good that is to be promoted. Liberty, on this approach, is taken to have intrinsic significance in the sense that being rendered unfree is wrongful as such, independently of the abilities and resources of the agent, as well as independently of the significance of performing the action.

Such a deontological construal of the significance of liberty lies at the core of moralized accounts of liberty. (Such accounts can also recognize the axiological significance of various opportunities in a subsidiary role, where this axiological significance need not be restricted to liberty but can also encompass mere license since immoral opportunities can be axiologically significant despite the fact that one has no reason to respect them.) From a deontological perspective, it is clear that some actions are such that it is right to prevent people from performing them. Whenever it is right to prevent someone from ϕing, i.e., from exercising the opportunity to ϕ, it is right to remove the opportunity to ϕ by making it the case that it is not possible for the person to ϕ. From this, it follows that it is not the case that all opportunities need to be respected. Accordingly, it is necessary to distinguish those opportunities that ought to be respected from those where interference, far from being morally problematic, is the appropriate response. Moralized accounts draw this contrast on the basis of the distinction between liberty and mere license. On such accounts, liberty does not encompass all actions but only those that the agent has a right to perform, whereby the liberties that need to be respected are the protected liberties of the agent.

Since interferences only generate unfreedom as opposed to mere inability when the relevant interference is rights-violating, it follows that interferences with liberty are wrongful as such precisely when and because they are rights-violating. Although freedom encompasses all Hohfeldian liberties, the wrongness of interference is restricted to those cases that result in unfreedom and involve the violation of claim-rights and hence only arises in the case of protected liberties. For instance, by impermissibly locking someone into a room one violates some of the person's claimrights and thereby renders various actions impossible in an illegitimate way – such rights-violating interferences ensure that the agent is now unfree to perform these actions. By contrast, when an obstacle is constructed, where the person has no claim against the construction of the obstacle, then various actions are rendered impossible in a legitimate manner – such rights-respecting interferences ensure that the agent is still free but now unable to perform these actions. (Both of these cases need to be distinguished from cases where, rather than the agent's liberty being interfered with, a Hohfeldian liberty is removed such that the agent is no longer at liberty to ϕ rather than unfree to ϕ.)

Interferences that do not violate any rights, most notably interferences with opportunities that the agent does not have a right to perform, do not classify as infringements of liberty and are not deemed to be wrongful as such. Correspondingly, since it is only when someone is rendered unfree to ϕ that the interference is wrongful, a lack of opportunities is not per se problematic from a deontological perspective, even when it can be attributed to the agency of other moral agents, but only when opportunities are lacking as a result of wrongful interference.

The wrongness of interference is thus understood in terms of the interference being rights-violating, which means that it is independent of the significance of the relevant opportunity. Interference can be problematic even when the relevant opportunity is merely formal and the agent

lacks the required abilities and means to realize the opportunity. Unfreedom-generating interferences involve violations of the duty not to render certain actions impossible, where this duty holds independently of the ability of the person being interfered with. Accordingly, one can be rendered unfree to ϕ, even if, independently of the relevant interference, one would be unable to ϕ. For instance, although x is unable to walk, he is nevertheless normatively at liberty to walk on his land, so that if y interferes with x's property rights and impermissibly builds an obstacle on x's land that makes it impossible to walk on the land, then x is rendered unfree to walk on his land, despite the fact that he is unable to do so independently of the interference. In this case, y's interference violates x's rights and renders actions that x is at liberty (though unable) to do impossible, i.e., an action that x was previously unable to perform is now an action that is impossible to perform.

(This argument presupposes that one can understand what it is for an interference to render an action impossible independently of abilities, which has been called into question by Cohen, who argues that whether someone is prevented from ϕing by a certain interference would seem to depend on the abilities of the agent, insofar as the abilities of a given agent determine whether or not that agent is able to overcome the interference, which would enable the agent to ϕ despite the interference (cf. Cohen 2011, p. 195). Cohen's argument, however, is problematic since what an interference does is to render particular ways of ϕing impossible, such that there may be alternative ways of ϕing that can be performed by those having the relevant abilities, such that overcoming an interference does not amount to being able to ϕ in precisely the way that the interference is taken to rule out but to being able to ϕ in a different way. For instance, if a wall is built between points A and B, then x might still be able to get from A to B since x but not y has the ability to climb over the wall. In that case, taking a leisurely stroll from A to B is rendered impossible for both x and y and both are equally rendered unfree in that respect, while getting from A to B by climbing over the wall is not rendered impossible for either but simply happens to be something that only one of them has the ability to perform, such that while both are free to act in this way only x but not y is able to do so.)

Conclusion

Either one takes liberty to be something that is to be promoted and that matters because of the axiological significance of the opportunities that an agent is free to perform. In that case, one operates with a non-moralized construal of liberty that will lead to conflicts between liberty and justice, since the pursuit of justice will require one to restrict all those actions that would upset a just distribution. Or one takes liberty to be something that is primarily of deontological significance, insofar as a protected sphere around each individual needs to be respected. Such a moralized construal of liberty renders liberty and justice compatible, since justice is already built into liberty, given that actions that would upset and undermine justice do not belong to the protected sphere that needs to be respected.

Cross-References

- ▶ Coercion and Law
- ▶ Cohen, Gerald Allen
- ▶ Equality and Global Justice
- ▶ Justice
- ▶ Kant, Immanuel: On Justice
- ▶ Locke, John: On Justice
- ▶ Nozick, Robert
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Lilburne, John

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Introduction

John Lilburne (1615–1657) was one of the leaders of the radical Leveller movement which emerged during the English Revolution of the mid-seventeenth century. He and his colleagues in the movement contributed to developing ideas of religious liberty, natural rights, constitutional legitimacy, popular sovereignty, and political resistance and accountability.

Lilburne was frequently imprisoned by the parliamentarian authorities in the 1640s and was tried for treason twice by the republican regimes of the 1650s, but acquitted by juries: he was self-taught in the law, but doggedly persistent in his assertion of his legal rights as he understood them, demanding habeas corpus and transparent legal procedures, asserting the right to silence (to avoid self-incrimination), and pushing the boundaries of law in his emphasis on equity and on the conscience of the jury.

During the English Revolution (1640–1660) parliament fought and won two wars against their king, Charles I, but continued to negotiate with him with the intention of restoring him to his throne. The Levellers flourished in the second half of the 1640s, when this quest for a settlement was most urgent, and criticized more moderate parliamentarians for their continued deference to the king, arguing instead that kings were unnecessary and dangerous. They grounded their arguments on the political power of the people, which also justified them in challenging a parliament which they represented as increasingly tyrannical. These views were promoted through the use of print, as well as through networks of support in gathered protestant congregations. Lilburne and his Leveller colleagues Richard Overton and William Walwyn wrote political polemic in the form of pamphlets and petitions, rather than formal treatises, embedding their theoretical assumptions and arguments in urgent, topical political texts and discussions of their own victimization by the authorities.

Religion and the Foundations of Government

Lilburne and his Leveller colleagues defended their own and others' right to worship outside the bounds of the national church. The state was free to provide a national church to instruct those who chose to participate in it, but could never have the authority to restrain or compel individuals in their beliefs or their worship.

In Lilburne's case, these doctrines may have come originally from the strict Calvinist "two kingdoms" theory apparent in his earliest works, in which the (true) church and the state were parallel but entirely independent "kingdoms" – one ruled only by Christ, the other by the secular authorities. In later Leveller texts, however, individuals' right to believe but also to worship as their conscience directed appeared as a natural and inalienable right, apparently alongside more secular protections against the power of the state. The Levellers were among a like-minded minority of puritans in sometimes implying that even

Catholics or heretics should be extended this toleration (Coffey 1998). The Levellers' increasingly secular discussion of politics was perhaps enabled by their separation of religious from political life, and this ultimately alienated some supporters, but it may have been their thinking on toleration which originally drove them to develop their constitutional thought.

Like many parliamentarian and some royalist thinkers who drew on the natural law tradition, Lilburne wrote of an original state of liberty and equality and argued that progression from that original state into a state where some governed others was only possible through consent. Lilburne's version of this story emphasized that God was the only "absolute Soveraign. . . limited by no rules"; the men and women created by God (Lilburne specifies both sexes) were "by nature all equall and alike in power, dignity, authority, and majesty, none of them having (by nature) any authority dominion or majesteriall power, one over or above another." Relationships of power among humans could only be created by consent, meaning that they were – unlike human subjection to God – never domains of absolute power. It would be irrational for anyone, in consenting to be ruled, to give away "so much of their power, as shall enable any of their [governors], to destroy and undoe them" (Lilburne, *The Free-mans Freedom Vindicated*. London, 1646, p. 11). Human government was thus a domain of rationality and consent, based on individual equality and instituted for the benefit of political communities, and legitimate political constitutions were founded on those principles.

Early modern theorists of natural law began to conceive of people in the original "state of nature" not just as being free and equal, but as having equal *rights* to be unrestricted in their actions – rights which they bargained away (to some extent) when they consented to be governed. Parliamentarian theorists who offered this kind of account of the origins of government argued (as the Levellers followed them in doing) that the original contract of government would not have allowed governors to destroy the people. This might mean that the people had retained certain rights, and particularly the right of self-preservation; or it might mean that the people who made the original contract had vested certain powers for their protection in institutions, particularly in parliament. When theorists took the second line, this meshed well with the strand of constitutionalist thought in England which expressed faith in an unwritten "ancient constitution" defined and protected by the common law. The Levellers' constitutional thought was in many ways strikingly novel, but they did not repudiate the ancient constitution outright; instead they used the flexibility of the common law tradition to argue that the constitutional arrangements mandated by their theory of consent simply *were* what the ancient constitution prescribed.

Constitutional Proposals

The constitution which the Levellers hoped would emerge from the civil war developed over the course of their writings. Parliamentarians, even as they fought the king or after they had defeated him, continued to propose monarchical settlements in which Charles I would be restored to his throne, but with his prerogatives at least temporarily restricted. Leveller authors, by contrast, rested their constitution on the principle of popular sovereignty and drew on the theory of consent and the idea of inalienable rights in setting out which powers could ever fall within the purview of the government, and on what terms.

Revisionist scholarship has questioned how much input the Leveller leadership had in the first Agreement of the People (an outline constitution, a format which the Levellers did then adopt) and the arguments expressed by radicals in favor of a much expanded electorate at the Putney Debates which took place within the New Model Army in autumn 1647. However, these arguments echoed Lilburne's 1646 assertion that "the poorest that lives, hath as true a right to give a vote, as. . . the richest," and his 1647 argument that no man should be bound to obey the laws without giving his own consent – which was done through voting for his representatives. Because there was to be no power without consent, the only institutions of government which

had legitimacy were those animated by popular consent: the Representative, the Levellers' version of the House of Commons; any other elected officers, magistrates, or ministers (in the Third Agreement of the People of 1649, which democratized local government); and any officers those elected representatives chose to delegate their power to.

Leveller texts were often tactically vague about whether there was a place for the king in their constitutional scheme, but if there was, it would have been as a mere executive officer answerable to the Representative (although Lilburne, particularly, flirted with royalist alliances against what the Levellers saw as an increasingly tyrannical unreformed parliament). The House of Lords was also excluded: the Representative was to be a unicameral body.

By interpreting the vote as the form in which people gave consent to be governed, the Levellers removed the emphasis from an ancient and fictionalized social or political contract and placed it in the consciences of all citizens at the present day.

Consent to government was to be frequently renewed – the Levellers thought elections should be annual – and the Levellers were acutely aware of the deficiencies of the existing Long Parliament, particularly as Lilburne was imprisoned not only on the authority of the House of Lords, but also later on the authority of the supposedly representative House of Commons too. As the 1640s wore on without settlement, the Levellers began to argue that just as parliament had resisted the king in the civil war, so the people could resist their own parliament. In 1647, from prison, Lilburne and Overton issued an "appeal to the people" to rise up against the parliament in their support, and even if the Levellers' desired constitutional forms were implemented, the elected representatives would remain "inferior" in power to their electors.

Conclusion

Lilburne shared much of his core political thinking with the other Leveller leaders, but he also made a distinctive contribution. His prolific pamphleteering, a key Leveller tactic which fostered arguments for freedom of the press, aimed to create an audience of conscientious citizens who would defend their own liberties; when tried for treason in 1649 he successfully appealed to the consciences of the jury and declared that they were judges of law as well as fact – an example of his willingness to elevate equity over the letter of the law.

He made his own sufferings at the hands of the authorities emblematic of the plight of the "free-born Englishman" under unjust government, making a novel argument that all (male) citizens had equal legal but also political rights.

Later radicals in the eighteenth and nineteenth centuries – such as the supporters of John Wilkes, the republican historian Catharine Macaulay, and the satirist and printer William Hone – looked back to Lilburne as a defiant defender of liberties and legal rights.

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Lipsius, Justus

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Introduction

Justus Lipsius (1547–1606) was not, strictly speaking, a political thinker but a professor of law and Latin, humanist editor of Tacitus and Seneca, and mostly renovator of Stoicism which he rehabilitates in his two books (*Manuductio* et *Physiologia Stoicorum*, 1604, Antwerp).

He intervened in the political arena with his six books of the *Politiques* (1589, Leyde) and his *Monita et examples politics* (1595), in response to the misfortunes of Europe torn apart by civil wars, to provide rules of conduct for Principles. But the very blunt thesis of the necessary unity of religion within the State (Politiques IV) gave rise to a lively controversy with Dirck Coornhert, a vigorous defender of tolerance (see his *Synod sur la liberté* 1582).

Lipsius read the Ancients, Salluste and Tacitus, but also Machiavelli from whom he uses the formula: "knowing how to combine the fox with the lion" (*Politiques* IV, 13). To summarize his position, we could say that in his opinion, the political problem is reduced to the question, How to preserve the unity, order, and stability of the state? The answer is by unity of command and unity of religion.

The Unity of Religion Within the State

The thesis is abruptly placed in chapter 3 "*Unam religionem in uno regno servari*, one must observe only one religion in a kingdom," and this is to avoid religious wars because it is religion that maintains the social bond (IV 2), and religious innovations foment the desire for novelties and seditions. Faced with this danger, dealing with public and non-private demonstrations, Lipsius advocates a surgical solution: "cut and burn" a limb to avoid gangrene of the body. This thesis aroused a controversy with Dirck Coornhert who reproached him for supporting the "forcing of consciences" and not caring about the truth. Lipsius answered with a pamphlet *De Una religion liber* where he distinguished between the tolerance of private religious beliefs and the necessary repression of religious innovations which are always a ferment of disorder. The princely *potestas* must be one and whole, while the truth is always partial and builds up gradually. But the people, as Tacitus already argued, must be controlled because they are seditious and liars and crossed by forces of rebellion and dissolution. The *ingenium*, namely, the popular character, is inconstant, excessive, and dangerous and threatens the stability of the State all the time. Therefore, the second political question is, How to last? Through the discipline of obedience, through the constancy of prince, and above all through prudence.

The Mingled Prudence

Prudence, "the dexterity to govern well external things quietly and assuredly," has two sources: the naturalness of people (bold or prudent, timid or angry, always inconstant) and that one of the kingdom, fragile or stabile, recent or old, by election or succession. To maintain and to rule the State well, you must use authority and force but also win the affection of your people. However, a merely moral position is impossible due to the wickedness of men, the fragility of political institutions, and the reversals of fortune. If Lipsius retains from Plutarch the ideal of the prince's mirror, which is "to lead his prince to the temple of virtue and honour," from Machiavelli, he retains political realism and the obligation to combine the fox with the lion.

Hence, in chapter 14, the admission of prudence is mixed with cunning which justifies mistrust and concealment (light fraud) and even deception in political relations but not perfidy and injustice (*magna* fraud). The Stoics who refused it have "ignored this century and the men of today," those wicked and liars who make up the State. The *Honesta fraus* is justified to ensure order and public safety, like poison mixed with medicine is validated. "Those who benefit

from everyone's utility and society always do what they should" (IV, 13).

Influence

Therefore, Lipsius appears as a transition between the moralism of Plutarch and the mirrors of Renaissance's princes and the realism of Machiavelli. Morality that governs politics is the effectiveness of the means of peace and order, namely, political values that prevail over the moral values of justice or freedom. Thus, the figure of the politician, represented from a strictly moral point of view at the beginning of Book IV by "prudence and virtue," becomes, during the analyses that intend to clarify prudence, the figure of one who is able to preserve peace, the order and security of the State through the unity of command, and the command of the unity of religion because if we do not command thoughts, we must always know how to command tongues.

The influence of these arguments, after the debates on civil tolerance they have generated, is remarkable on Grotius's treatise *De summo imperio* circa *sacra*, even if, in Grotius's theory, the prince's right to religious affairs stems from the unity of sovereignty. Guillaume du Vair will add the requirement of political commitment. But the analysis of prudence and the justification of cunning procedures to ensure peace and political order can still be found in *Considérations sur les coups d'État* de G. Naudé (1639) through the mediation of *La sagesse* by P. Charron.

Cross-References

► Charron, Pierre
► Grotius, Hugo
► Machiavelli, Niccolò
► Naudé, Gabriel

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Literature and Law

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Introduction

If jurisprudence is to fulfill its tasks in a complex society, it must have an interdisciplinary orientation in addition to the profound elaboration of its proprium. One of these interdisciplinary bridges to other sciences can connect law with literature. Here, cooperation can explore moral, psychological, and cultural depths of the impact of law on society and vice versa. Literary studies, however, can present structural linguistic analyses of law and thus contribute to a better understanding of law itself.

The topic of "law and literature" is currently being studied from three main perspectives: The closest connection between law and literature exists where law itself is understood as literature and analyzed in literary studies (III. "Law as Literature"). Traditionally, law is studied as an object of artistic treatment in literature (IV. "Law in Literature," "Literature as Law"). Then, the protection of literary-creative activity, for example, through fundamental rights or copyright law, is sometimes dealt with (V. "Literature in Law"). Finally, literature is understood from an ethical perspective as a corrective instrument of a justice that law cannot provide (VI. "Poetic Justice"). While the perspectives of III. and IV. are

descriptive, V. and VI. also raise normative questions. All of these perspectives are part of an interdisciplinary approach that focuses on the connection of law with culture (II.).

The Theory of "Law and Literature" as an Interdisciplinary, Cultural Studies Approach

Approaches to the Study of Law and Literature

The scientific study of law and literature is a good two hundred years old. Jacob Grimm makes his first considerations under the impression of Romanticism and the Historical School of Law in 1815 ("Von der Poesie im Recht"). From the beginning of the International Association for Philosophy of Law and Social Philosophy (IVR) and the Archive for Philosophy of Law and Economics (ARWP), Josef Kohler kept a watchful eye on contemporary developments in law and literature (Kohler 1883). In the USA, Benjamin Cardozo's essay "Law and Literature" marked an important milestone. J. B. White's monograph "The Legal Imagination" represents the beginning of an in-depth examination of this context, the momentum of which is ongoing. In the meantime, the topic was so America-heavy that its "De-Americanizing" was called for (Olson 2010). And indeed, the field is way more diverse, if we look at the international discussion, in which research in Belgium (Ost) Netherlands (Gaakeer), Italy (Faralli), and Brazil in particular stand out ("Rede Brasileira Direito e Literatura," Anamorphosis – Revista Internacional de Direito e Literatura and a Brazilian TV-Program "Direito e Literatura" Trindade/Bernsts) – to name only a few (–> Faralli).

The concept of "literature" has expanded considerably in the present context over the past 40 years. Of course, the cultural studies approach does not only mean a traditional cultural context of law, as the New Kantians (Kelsen, Radbruch) had in mind (Kirste 2015); rather, from a sociological and anthropological perspective, it is also about legal communication in subcultures. These cultural studies approaches are then also dedicated to a media analysis of law (Danziger 2009) and deal with its visualizations in film, but also sculptures and architecture (for example of court buildings, Olson 2015).

"Law and literature" is not a legal-philosophical topic in all facets, nor is it a scientific topic throughout, although these boundaries are often seen as blurred. The educational effect of literature for lawyers' sense of law or as "leisure reading," for example, takes place in the non-scientific realm. Richard Posner, otherwise better known for his positivist approach to "Law and Economics," writes explicitly: "Law and literature scholars need to climb down several rungs from their ivory towers and place greater emphasis on service to the legal profession" (Posner 2009, 550). To be sure, the issue is far from uncontroversial: While Posner advocates a distinction between legal theoretical or doctrinal and literary analysis, the socially critical views (Binder/Weissberg; White; West) argue for their close connection. They understand "law and literature" as an approach that encompasses all forms of social criticism, including legal philosophy (Binder 2001).

Because of his attempts to overcome the boundaries between law and literature, after initial demarcations (Posner), the representatives of law and literature predominantly belong to a large and heterogenous group of nonpositivists. Especially when law is studied as literature, it is also about the moral influences, about semantic similarities, so that neither the separation thesis nor the semantics thesis is maintained. Within the social thesis, reference is made to common practices and the promotion of the efficacy of law through literature. The topic is then widely discussed not only in the Critical Legal Studies (e.g., Dolin 2007; Binder and Weisberg 2000; Douzinas and Warrington 1991) and "Feminist Law and Literature Criticism" (Ward 1994, pp. 133 ff.), but also among positivists (Richard Posner in the tradition of O.W. Holmes, Posner 2009, critical Fish 1988; Binder 2001), liberals in the footsteps of John Rawls (Nussbaum 1995) and beyond (Dworkin 1985, pp. 146 ff.), the culturalists (Kahn 1999), and others. In the meantime, however, the topic is being treated in a scientifically sophisticated

manner in Central Europe, especially in the context of a postmodern theory of literature and law (but cf. Kilcher et al. 2013; Hiebaum et al. 2015). The newer philosophical approaches of existentialism and hermeneutics (Heidegger, Gadamer: Dédeyan 2002; Lüderssen 2002), deconstruction (Hutchinson 1984), esp. Derrida (Balkin 2005), structuralism (Lacan, Barthes, Foucault; Barthes 2000, 185 ff.), poststructuralists (Couzens Hoy 1985) of pragmatism (Kevelson 1992; Patterson 1990), esp. Dewey and Rorty (Sullivan 1998, 263 ff.), and postmodernism (Gibson 1999) have become influential on the movement.

Rarely does the philosophy of law become the object of literary theoretical analysis. However, Robin West has made an attempt to examine philosophies of law themselves as aesthetic objects. Ideally, she distinguishes between comedy (liberal, optimistic conception of a connection between law and morality), romance (natural law, in the spectrum from Blackstone to transcendentalism), tragedy (static, "demonic" [Hobbes] conceptions of a separation of law and morality), and finally irony (positivist-resignative conceptions of the separation of law and morality. Posner's Law and Economics also belongs to the latter (West 1985).

Interdisciplinarity

In order for law and literature scholars to be able to deal with the main subject of the respective discipline, an interdisciplinary approach is required (Kirste 2016). This is both an opportunity and a danger of "law and literature": Opportunities arise from dealing with the topic against the background of a humanities or cultural science. The danger lies in the mutual interdisciplinary dilettante, as Richard Posner puts it (Posner 2009, pp. 6 f.). In this respect, it makes sense to distinguish between the study of law with specifically jurisprudential methods (legal doctrine) and other research that examines law as a research object according to the methods of the most diverse disciplines (Dunlop 1991, p. 68): In "law *in* literature," literature would be examined with jurisprudential methods and research interests, while in the case of "law *as* literature" law would be analyzed with approaches from literary studies.

The central problem is to find a common language that can be understood by literary scholars and lawyers. The application of methods from literary studies in the legal sciences can lead to unfamiliar perspectives and to a deepening of existing perspectives. Points of contact within literary studies are, in particular, narrative theory, hermeneutics, aspects of language theory, and – especially for social criticism – empirical language theory. The attraction and gain in knowledge of "law and literature" lies in the crossing of boundaries. This means, on the one hand, the observation of what happens to law as an object of knowledge in arts, in the perspective of literary studies and in the ethical impulses from the artistic form and what they lead to; and on the other hand, the discovery that outside of the known literary genres in law another or at least a type of text can be found, which can be examined in terms of these genres and problematized in terms of common questions.

Goals and Methods

Legal and literary researches are based on very different epistemological interests. In a normative perspective, for example, it is about the social criticism of law and literature: "literary criticism of law" (Binder and Weisberg 2000, p. 18). Thus, this approach aims to apply the critical tools of literary theory to law and jurisprudence in order to evaluate it as a cultural and political phenomenon.

The treatment of the topic of law and literature is favored by some methodological commonalities (Weitin 2010, 41). F.C. von Savigny was still of the opinion that law and literature were similar in their methodological starting point. Both were concerned with the reconstruction of the original thought of the author. Here as there, however, the question has arisen as to which horizon of understanding is decisive: that of the author (codified law: subjective theory; in the USA: originalists/textualists) or of the recipient or the situation to be regulated (objective theory; in the USA: interpretivists; Hiebaum et al. 2015). In literary studies, too, there are functionalist approaches or approaches that rather start from the individual and understand literature as his or her expression. However, the perspective of the reader and its

importance for the creation of literature came into focus quite late (Binder and Weisberg 2000, 7).

Law as Literature (–> Gaakeer)

The Literary Analysis of the Law

According to Martin Heidegger, language is not only the "house of being" in general, but also of literature and law in particular (Heidegger 2000, p. 5). The approach of "law as literature" understands law as part of the linguistically constituted overarching culture. According to this perspective, language is not merely an instrument of law, but its constituting form. In turn, law is not an objectively fixed medium, but is also shaped by speech (Goodrich 1996, p. 112; Binder 2001, p. 1511).

If law is analyzed as literature, then methods of literary studies are applied to law and both are examined for their common structures. In this perspective, law becomes part of the linguistically and also rhetorically constructed social reality and can be understood from this perspective. Understanding law as literature then constantly reminds us of the artificial character of cultural reality (White 1985, pp. 240 f.). Practice is literary, because it produces new meaning in aesthetic form from social material. Literature itself is said to have the power to produce law (Binder and Weissberg 2000, pp. 19 f.). Trial, judgment, and execution are not only interpretative or performative acts of preexisting norms, but also generate new social realities and have different claims to validity. The criminal sentenced in a spectacular trial acquires a social identity that results from the dispute of the stories about him, their authoritative interpretation by the judge and by the media representation.

Law is then understood not as a kind of norms, but as a kind of language or as narratives (White 1985, p. XIII). It is not a text that is fixed once and for all, but has to be produced anew continuously: It is in the use of words that meaning first reveals itself. With the end of the text as a carrier of meaning, however, the author also dies (Barthes 2000, pp. 185 f.). For postmodern deconstructionists, by this transcending of the law to its linguistic fundament law comes to justice (Hofmann 2007, 25 f.). This language or narrative is then distinguished from other languages, for example, by special stylistic devices.

Understanding law in this way as a literary construction brings it back closer to the other social subsystems. The theoretical interdisciplinarity of legal and literary studies thus corresponds to the de-formalization of the effects of law in society. The administration of law is thus taken out of the hands of lawyers – to the praise of some and the criticism of others. Thus, this perspective also has a democratic, at least participatory function.

The Narrative Turn

With the beginning of the 1980s, a "narrative turn" shifted the paradigms in cultural studies. This new narrative paradigm has an almost universal meaning (Olson 2015, p. 42). Accordingly, law appears either as a kind of narrative itself or as distinct from it but dependent on it. While Posner, for instance, assumes that both worlds are largely divorced, West, Cover, and Dworkin try to prove that law is a form of narrative literature and that the fundamentally same human abilities are required to understand both.

Legal texts – constitutions, but also judgments in spectacular trials – are interpreted as the great meaning-giving narratives of a society. Narration is the form of the creation of meaning and the formation of human identity in the world. This includes in particular that the human being is understood as – male and female – "homo narrans" and that law and literature are understood as narratives (Cover 1983; Baron 1991; West 1993). Law then appears as an imagined, better social world. According to Robert M. Cover, legal institutions cannot be interpreted independently of narratives. These narratives hold up the meaning dimension of any legal hermeneutic. They make clear that law is not just a canon of norms, but part of a cultural world in which we live and from which we have to understand these norms. This becomes particularly clear in constitutions, through which a political community gives itself an orientation and unity. Especially in the preambles, founding myths are told, history is

constructed with legitimizing intentions, and a future is imagined, which the current constitution is supposed to bring about.

The alienating perspective compared to the legal one is obvious: "The Law as Narrative trope is a particularly antiprofessional or anti-theoretical version of the Law as Literature trope" (Binder and Weisberg 2000, p. 204.). An example can be justice: It is not simply present in philosophical texts and laws, but is concretely realized in proceedings. That is why court proceedings are so important. There, law and literature are to be examined in their representation, as "books in action," as one might say of the legal realist distinction between "law in books" and "law in action." Process expresses the rhetorical character of law. Legal forms of discourse are used as a means of representation for the construction of a reality of its own. Here, cultural and identity conflicts are fought out in the courtroom, as in the trial of the "Butcher of Lyon," Klaus Barbie, in France (Golsan 1996). As important as the understanding of law as a narrative is, the normative limitations to the legal narration should also be clear; perhaps different from literary narration, law defines the rules for its own narration.

Law as Text

As little as the mere literary text already has a meaning, so little does the mere norm text already constitute a norm (Müller 1990, p. 133). It has to be elaborated. The text is the central starting point of this production of meaning. Texts of the law are silent. Thus, in effect, the judge gives a voice to the law, not because he speaks out what has already been enshrined in the legal text, but because he brings it up in the first place by his interpretive work. Thereby, he becomes the "constructor of the legal norm" (Müller et al. 1997, pp. 37 ff.).

Just as the identity of the author is constituted in writing and through writing, the interpreter also constructs the author and the norm only in its application in a particular social context. Texts, in turn, are integrated into paratexts and hypertexts. Paratexts are not simply frame texts of law. Rather, they can include film transmissions of legislative and court proceedings. They influence not only the reception of the law, but also its formulation (Collins and Skover 1992, 513 f.). Lawyers not only give voices to parties incapable or inhibited to tell their own story, but they also contextualize their stories into legal texts.

Limits of Law as Literature

Understanding law as literature also means expanding the context of interpretation of law. In doing so, however, it must not be forgotten that law as a norm is precisely a limitation of this context. Law is normed norm: It norms everything that comes within its scope, including its own enactment, enforcement, and sometimes its interpretation (Kirste 2020, pp. 113 f.). If one interprets law as narrative, then it differs from other narratives in that its emergence and content is shaped by higher norms. As a lex, law selects within offers of meaning in context and purposefully excludes others. This does not bind artistic or scientific interpretation; it does, however, threaten to override the meaning – and also the cultural achievement that consists in normative limitation.

This also applies to the selection of authoritative narratives: It is canonized in law, but not in literature. There can be a legal pluralistic competition of legal orders, but the law itself decides which of them can rightly claim validity. A comparable mechanism is missing in literature.

Law in Literature

"Law in Literature" and "Literature as Law"

It is a kind of answer to the approach of "law as literature" when novelist Thomas Bernhard writes: "the world is an entirely, thoroughly juridical one, as you may not know. The world is one monstrous jurisprudence" (Bernhard 1979, p. 162). Writers find coercive legal structures everywhere. If "law as literature" means the analysis of law by literary means, "law in literature" is the representation of law by artistic means in the literary media of writing, music, or film (Collins and Skover 1992). Writers artistically transform legal issues into literature; legal scholars who deal with law in this unfamiliar medium ask themselves whether they cannot take something away

from this transformation for their work. They do not look for the law in the legislator, but in the poet. The question here is: What does literature reveal and what potentials does literature have with regard to law. One is the reminder on the social responsibility of law. In contrast to "law as literature," the criticism here refers to the content of law.

Literati not only write about the form of law as an instrument of coercion and oppression or freedom. They also write legal stories – which legal life does not imagine. Here, lawyers and judges become heroes, as do the accused, the defendants. The excessive length of trials, just and unjust punishments, bureaucracy, spectacular civil trials, discrimination on the grounds of religion, race, gender, etc., are dramatized. Unlawful acts such as crimes, corruption, fraud, conspiracies, and the motives that led to them are the focus of attention in literary narratives. But also the consequences of trials for the victims or the perpetrators (death penalty) are thematized. Law is not challenged by legal means or changed in legal form, but problematized by literary means.

Law has been a fascinating subject for literature since antiquity and, as in this literary form has had an effect on law: Two judges of the U.S. Supreme Court are said to have fought a duel over a question of interpretation of Frost's "Mending Wells" (Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (Scalia, majority opinion); id. at 245, Breyer, concurring opinion). Rudolf von Jhering's "Struggle for Justice" inspired Karl Emil Franzos to write a novel, which in turn was used by Jhering as an illustration in later editions of his book. Accordingly, studies on the literary treatment of law now fill libraries (Sprecher 2011).

But literature itself can also bring other literati to trial (Goltschnigg 1999). Then it is not "law as literature" that is understood, but the other way around: "literature as law" – namely as law freed from strict procedural rules: prosecution, conviction, and execution of other literature. The fact that this informality also has its dark sides can be seen in the media's preliminary condemnations of criminals – presumption of innocence does not apply here. With "courtroom trials," a medium has emerged not only in American popular culture that uses the possibilities of the trial for dramatic intensification of personal conflicts. In contrast to media coverage from the courtroom, where the question of media influence on the trial arises under the heading of "law as literature," here, conversely, an artificial legal stage is created for ultimately extra-legal conflicts in a legal guise.

Literary Justification and Critique of Law

Literary texts refer to law in a condensed form. They document or comment on court proceedings in "court TVs," court reports and highlight the exemplary, problematize the typical, illustrate the exception, or exaggerate the normal. The convictions aroused in this way can be used for a critique or justification of the law, which takes its place alongside the philosophical and sociological argumentation. When legal matters are addressed in literary form, this is sometimes used to justify the law, even those authors who make no philosophical claim.

Ancient dramas (e.g., Antigone) as well as modern literature illustrate the difference between natural law and positive law. Literature then does not serve to give justifications, but replaces them, as if the literati were the better jurists or even philosophers of law – and with respect to substantive justice they could well be. However, literature – and also film – is able to reach people more directly and with respect to emotions more deeply because it is more vivid than philosophical arguments and thus has a factual effect on the understanding of law, the development, and the legitimation it. It is therefore not surprising that in the jurisprudence of American courts, Kafka was cited around 400 times between 1970 and 2005 to criticize bureaucratic structures (Potter 2005, p. 195). This shows the critical potential that rests in narratives, but which has become socially effective through binding decisions.

The Educational Effect of Literary Representations of Law

One of the main concerns of "law and literature" is to improve legal education (Ward 1995, 23; White 1985). For the most part, proponents of "law and literature" see a wider range of skills as critical to

legal practice than is the case with legal positivists, who are particularly skeptical of analyzing law as literature. Whereas positivists insist on the proprium of law and the uniqueness of methods interpreting it, law and literature would argue that advanced hermeneutic, political, aesthetic, rhetorical, and empathic qualities are required, as well as the ability to critique. Learning from legal conflicts in literature can generate practical expertise, insights into the social impact of law, moral improvement, social compassion, and critical thinking skills in aspiring lawyers. Typical and unusual motives can become comprehensible. Objectivity in the application of legal norms can be promoted by changing the perspective of different literary positions and social norms. In this way, the study of literature can generate preliminary understandings, which are known to be indispensable as starting points for legal hermeneutics.

Finally, James Boyd White emphasizes that the examination of law and literature can teach the jurist to use the language of law creatively and imaginatively: As little as speaking is already given with the emergence of the laws of language, so little are the wording and syntax of the text of the law already realized in its written form. Search for a legal language that can also be understood by the addressees of its norms is necessary. Again law and literature has a democratizing function.

Criticism of the Literary Presentation of Law and Limits

Law in literature and literature as law is subject to criticism by both legal theorists and literary scholars. Not infrequently, literary texts are reduced by legal interpreters exclusively to their legal content – for example, in the case of Kafka and Camus – and the integration into the other layers of meaning is neglected. In these debates, it seems to have become necessary to point out that practical lawyers would rather be influenced by legal than by literary texts.

Therefore, it is necessary to emphasize the limits of the scope of literature for law. The legal consideration of literary processing of legal issues is limited. These limits, in turn, result from the normative bindings to which at least legal practitioners are subject. However, the idyll of genius writers does not reflect the real constraints they face. In fact, they seem to suffer unfiltered influences and social constraints, while the law more precisely delineates the position of its officials and – as in the case of judicial independence – precisely creates freedom or structures the legal influences through clear hierarchies.

Presumably, different sorts of texts texts – literary, scientific, and also legal – aim at changing reality. However, legal-practical texts differ from other literary texts in that the reason and scope and procedure of change are normatively determined. Taken together, the boundary between law and literature is given by the formal structure of law: Its "stories" have been created in normative procedures by authors normatively determined to be competent for this purpose and are interpreted and enforced under normatively limited conditions.

Literature in Law

The demand for a regular order of literature was a concern of the Enlightenment philosophy, which wanted to free all human actions from natural and arbitrary elements by means of a lawful order. If the demand of the Enlightenment had been fulfilled and, according to Johann Christoph Gottsched (1700–1766), strict rules could actually have been established according to which literature could be distinguished from other expressions, then legal review and strict censorship of literature would have been the logical consequence of this.

The topic of "literature in law" concerns literature in legal form, and mostly in the form of positive law. In fact, statutes, judgments, and contracts are not essentially about art itself, but about the evaluation of art. This evaluation, however, is carried out according to legal norms and not according to standards of literary studies, but to valid laws and jurisdiction.

This is essentially about the protection of literature and also from literature. Protection *from* literature concerns, for example, the protection of minors and personal rights, esp. privacy. The distribution of literary products can be restricted in the interest of protecting young people from

content or forms of presentation that they cannot process or that inhibit their development. Likewise, reasons of personality protection may delay or prevent the publication of a work that would violate honor or even postmortem personality protection.

Conversely, "literature in law" is also about the protection of artistic performance. In relation to third parties, this performance is protected by copyright law and intellectual property law in general. In relation to the state and indirectly also to other citizens, however, fundamental rights, and here in particular artistic freedom, play a central role. Again, in the background is the theoretical question of whether it is the task of the courts or of the authors themselves or of literary scholarship to determine in a legally binding way what constitutes artistic literature. In any case, it is also important to note here that – as with freedom of speech – freedom of art also protects the interpretation of these works and may not be replaced by the court. Thus, no meaning may be attributed to the work of art that the author himself did not want to give it, in order to attach negative legal consequences to it if necessary (Weitin 2010, p. 12).

In the end, literature in law means a re-entry (Luhmann) of the difference of law and literature into law: Law has to confine its evaluation of literature according to its own normative standards when, let's say, balancing the rights of authors against the personality rights of a person in a roman à clef.

Poetic Justice

Poetic justice is legal ethics in literary form. Literature can promote mutual understanding and the solidarity that arises from it far better than abstract philosophical analyses (Rorty 1989, p. 94). Here, in literary form, a kind of justice is brought up that the law does not achieve in individual cases and often enough is not even able to achieve for structural reasons. Erinyes or strokes of fate here repay the crimes. The hope for an absolute justice, which the positive law with its strict form and its compromise content cannot bring, is redeemed – and stimulates demands for legal change.

Through the sympathy for protagonists, the arc of suspense, or the vicarious suffering of injustice, a kind of cathartic process leads to a confrontation with one's own tendencies toward unjust behavior and to a purification, without it being necessary for these tendencies themselves to have been actualized. This is especially true for tragedies that depict ethical problems of human existence.

Philosopher Martha Nussbaum has developed the concept of a poetic justice in the wake of Walt Whitman and in a critical discussion with Richard Posner. She assumes that law and literature contribute to a sphere of public reasoning and feed their arguments from it. She is not concerned with the judge becoming a poet. Judges should rather make undiminished use of their legal abilities. However, they should also make the extended possibilities of poetry their own. In doing so, the many blind social spots that disciplinary legal thinking entails are to be overcome and jurisprudence is to be helped out of its ivory tower. While courts judge without regard to the person, the poetic judge should imagine and take into account the concrete circumstances of the person concerned – the "human drama" (Nussbaum 1995).

Literary legal ethics can bring about justice and legal consciousness that no legal court has at its disposal. No legal force inhibits its reappraisal of the past. The arm of its standards reaches further into the future than any law. No one can escape their judgment, and their images effect every conscience.

Conclusion

"Law and literature" was not taken to be an antagonism, but rather dialectic unity of symbolic forms. Law and literature are thus part of public culture, which is mostly constituted by language. However, both influence this culture in different ways – law as an expression of the

private or political autonomy of legal persons in more or less formal procedures; literature from the freedom of the author. However, both contribute to culture by the interpretation of norms and their addressee as well as of literary products. This chapter attempts to organize and present this dialectical interplay of differences and similarities between law and literature and jurisprudence and literary studies. The literary analysis of law helps us to better understand linguistic, rhetorical, and other expressive structures of law (law as literature). Law in literature can often better illustrate deeper psychological and social effects of law than legal scholarship or practice can. In this respect, the literary treatment of law is also a suitable extension of legal education. The problems of literature in law are more practical when it comes to the protection of the author's freedom in relation, for example, from personal rights of characters in a narrative. Finally, literature can point to dimensions of justice that law excludes and perhaps must exclude because they exceed its possible responsibility for consequences ("poetic justice"). This dialectic should not blur the distinctions of the two, but improve the understanding for the need for mutual transformation of knowledge from literature and law. Both are therefore interrelated within the analysis of the overall culture, as Jakob Grimm already stated in 1816: They rise from the same bed as an equal couple and in their mutual influence contribute to public culture.

Cross-References

► Behavioral Economics and Law

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Literature and Law: Historical Overview

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I should start out with the premise that the term "literature" in "law and literature" can be used in a narrow sense or a broader one. In a broad sense it includes the humanities at large: law and music, law and cinema, law and art, and so on, even if, strictly speaking, these are all subdisciplines encompassed within the genus "humanities."

The law and literature movement itself can be said to trace its origins to the work of James Boyd White, professor of law and English at the University of Michigan, and in particular to his 1973 book *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (JB White 1973), the first in a trilogy that continues with *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (JB White 1984) and *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (JB White 1985).

But what James Boyd White "inaugurates," as it were, is the most recent phase in the movement, which starts out in the early 1900's in the United States in what Morton G. White, in a famous essay (MG White 1947), describes as "the revolt against formalism."

In 1908, John Henry Wigmore, dean of Northwestern University Law School, published "A List of Legal Novels" (Wigmore 1908), in which he catalogues and classifies numerous novels, especially in modern English literature, dealing with issues of legal import, his explicit aim being to give currency to literary works that convey the core values of American legal culture, while affording an "understanding of human character" (ibid 580), all serving as "an arsenal for the lawyer" (ibid 581). In subsequent years, works of this kind are published that consolidate the idea that literature contributes to forming the moral sensibility of lawyers and jurists.

In 1925, in an essay titled "Law and Literature" – published in the *Yale Law Review* and later republished in *Selected Writings* (Cardozo 1947) – Benjamin N. Cardozo (1870–1938), a justice on the US Supreme Court, prefigures the possibility of reading and interpreting court decisions as examples of literature or, better yet, of literary writing. In a decision, he argues, there cannot be any separation between form and substance: "Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity" (Cardozo 1947, 340), and must be so in pursuing clearness and persuasive force. The judge or lawyer "is expounding a science, or a body of truth which he seeks to assimilate to a science, but in the process of exposition he is practicing an art" (ibid., 356).

In the early 1900s in the United States, in the climate of the revolt against formalism, the movement begins to branch into what are taken to be its two main approaches: law *in* literature and law *as* literature. The former is aimed at analyzing the literary representations of law thought to be useful in providing legal practitioners with a grounding in the humanities. The latter, proceeding from an analogy between law and literature as texts, is aimed at developing a method that draws on the techniques of literary criticism to attack some classic problems in the theory of law, especially the problem of interpreting and analyzing legal reasoning.

An important contribution in this latter respect comes from one of the foremost exponents of American legal realism, Jerome Frank. In two essays – "Words and Music: Some Remarks on Statutory Interpretation" (Frank 1947) and "Say It with Music" (1948) – Frank establishes a comparison with music to develop the thesis that "statutory interpretation is not a science but an art" (Frank 1947, 1259), noting that while the law may be "intellectual" (Frank 1948, 934), "it is not scientific in the sense of a science whose rules are impersonal and beyond the reach of human emotions or behavior. Emotion and behavior are the raw materials from which the law is distilled in one way or another" (ibid., 934–935, quoting Judge Curtis Bok 1946, 319–30). The judges' interpretation of statutes can be compared to the interpretation of musical compositions by musical performers (pianists, violinists, conductors) (Frank 1947, 1260). Even in music, Frank points out, there are those who take the purist view that performers ought to "engage in 'authentic interpretation' which eliminates the interpreter altogether, by 'the actual rendition' of the musical symbols just as they were written, in order to 'serve the true intention of the composer'" (ibid., quoting the composer Ernst Krenek 1944), but this "work-fidelity" view is widely contested: more realistic is the view that interpretation can never be automatic, or mechanical. Indeed, "music does not exist until it is performed" (Frank 1947, 1264, quoting the musicologist Julian Herbage 1946), so the composer "must recognize that he cannot completely control the performer, that he is 'practically helpless,' and becomes a 'passive onlooker,' as 'soon as he has handed his music over to the interpreter'" (Frank 1947, 1261, quoting Krenek 1944).

Like the composer, the legislator needs to hand interpretation over to others, mainly to judges, and even if the "creativeness of the judges should always be limited," it is "within proper limits, [. . .] a boon not an evil" (Frank 1947, 1264). Which is to say that "when judges [. . .] use their imagination in trying to get at and apply what a legislature really meant, but imperfectly said, they cooperate with the legislature" (ibid., 1263). In other words, just as musical performers need to step into the shoes of the composer and try to reconcile their imagination with the principle that they need to stick to the composer's will, so must judges do the same. So, too, "musical interpreters often face a problem much like that which courts sometimes face. When a modern performer plays Bach, it is all but impossible to reproduce the exact mood of that composer (who lived in a period in which the general mood was substantially different from ours), to recreate the 'taste' of that period" (ibid., 1266).

By way of summarizing the parallel, Frank says: "Just as, perforce, the musical composer delegates some subordinate creative activity to musical performers, so, perforce, the legislature delegates some subordinate (judicial) legislation – i.e., creative activity – to the courts" (ibid., 1272).

As mentioned, there is a second phase in the law and literature movement, the one that James Boyd White inaugurates with his 1973 book *The Legal Imagination* (JB White 1973). With this book and the two subsequent ones that complete the trilogy it is part of – namely, *When Words Lose Their Meaning* (JB White 1984) and *Heracles' Bow* (JB White 1985) – White drills deeper into the relation between law and literature: like literature, law is a cultural product, a cultural and social activity subject to critical scrutiny. The law needs to be considered an integral part of a cultural "system" to which jurists must constantly refer in ascribing meanings to the words they use. In this sense, law and literature needs to be part of the lawyer's toolkit. But unlike in the movement's first phase – in which the idea was to draw on literature as a resource with which to educate students into a system of values – White argues that law and literature should rather be made to work together to enable the student to appreciate law as a cultural force, thereby moving beyond the excessive technicalism that became dominant in the United States from the mid-twentieth century onward.

White (1985, xii) states that "the life of the law is [. . .] a life of art, the art of making meaning in language with others," and so even literature and language need to be investigated as tools by which to understand law, and in particular its ethical nature and humanity. Law and literature are inextricably bound up, in that they both depend on language, which is the basic element of our life in common, and they both operate on the basis of similar interpretive practices. Law and literature are a creative art that enriches our self-understanding and our understanding of the world and scales back the forms of means-end and calculating rationality that are so dominant in our culture.

Along with White, the debate has advanced through the work of other scholars, most notably Robert Cover, Richard Weisberg, Martha Nussbaum, Robin West, Guyora Binder, and Richard Posner, who have charted new research pathways taking the movement in different directions. One such example is the research strand that comes under the label of "regulation of literature by law," concerned with copyright and crimes committed through the use of print and digital media, but that will not be our focus here. What instead is particularly interesting for us, in view of the attempt made to investigate the meaning of law in its broader social context, is the strand that looks at law as a narrative construction or practice.

In a famous essay of 1983 titled "Nomos and Narrative," Robert Cover (1943–1986) argues that the world we live in is "a *nomos* – a normative universe" (Cover 1983, 4). Important to this world, he concedes, are "the rules and principles of justice, the formal institutions of the law, and the conventions of a social order" (ibid.). Even so, these are "but a small part of the normative universe that ought to claim our attention" (ibid.). The bulk of the *nomos* consists of "the narratives that are the trajectories plotted upon material reality by our imaginations" (ibid., 5). It is these narratives that make up the context of our experience, building a meaningful order structured in stories through which principles and values are identified. And the same applies to law: "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. [. . .] Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live" (ibid., 4–5). In short, the world of human life is a *nomos*, consisting of the narratives that give meaning to our experience and make up its context and reality.

But Cover's reflections need to be considered in view of the research done in cognitive and cultural psychology, a field pioneered by Jerome Bruner (1915–2016) (in relation to the discussion at hand, see in particular Bruner 1991, 2002). At the risk of oversimplifying, cognitive psychology identifies two basic forms of thinking: one paradigmatic, the other narrative.

Paradigmatic thinking governs scientific reasoning at large: it proceeds by abstraction and generalization, inclining toward the development of abstract models and categories. Narrative thinking, by contrast, finds application in the social world, being concerned with particular facts, persons, and circumstances. Narration can in this sense be defined as the social practice of constructing a story, in a process in which two or

more people weave together a story. It is therefore a practice embedded in a relational context, and the story that comes out serves as a tool by which to talk about and interpret reality. And without this narrative capacity we could not even develop the capacity for abstract thought, the paradigmatic thinking that enables us to approach life with scientific method. Cognitive development, in other words, relies on narrative thinking, and it is through this storytelling activity that we begin to relate to one another and make sense of the world around us, and to experience "our collective life in culture" (Bruner 2002, 16). As Bruner remarks, "I doubt such collective life would be possible were it not for our human capacity to organize and communicate experience in a narrative form" (ibid.). What cultural psychology teaches us, in short, is that the telling of stories about ourselves and others is the most natural way we have of organizing our experience and extracting knowledge from it: in fact such storytelling *precedes* this latter activity, which could not exist but for that capacity.

Where law is concerned, narration comes into play when the lawmaker constructs a legislative provision, for example, or when the lawyer reconstructs the facts of the case, or again when the judge applies the law: reflected in the contents of a statute are representations depicting the historical fabric that is typical of the narrative community the statute itself applies to; likewise, in a judicial opinion, the judges reconstruct a story on the basis of the narrations proffered by counsel and witnesses. In the final analysis, the law as a whole is the outcome of stories and narratives, just as is the case with any other cultural artifact, where the law is understood to encompass not just positive or enacted law but also the whole complex of practices, customs, usages, and values that form the basis of legal institutions.

The narrative process also makes it possible to give a voice to minorities who are excluded from participation in the making of law: it can describe the experience of being discriminated against; it can identify a "different voice" – in a clear nod to Carol Gilligan (1982) – and bring to light the expectations of groups whose presence and role are not taken into account in the law's official narratives.

"Stories, parables, chronicles, and narratives," writes critical race theorist and law and literature scholar Richard Delgado (1989, 2413), "are powerful means for destroying mindset – the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."

There are several functions that narrative is seen to serve. To begin with, it is thought to be capable of recovering forms of knowledge that the official stories either dismiss or cannot detect; it serves as a tool with which to come to know a cultural world and a form of existence that are different from our own – a world and an existence that can only be described by those who experience it, by those who face race or gender discrimination firsthand, for example. At the same time, narrative is found to play an important psychological role for minorities who are subjected to these experiences: victims of discrimination often suffer in silence, and narrative can give voice to their silence, enabling those who suffer to find that voice and join in their commitment to work for change. Narrative, in other words, identifies discrimination and defines it, so that it then becomes possible to fight it. In addition, and no less importantly, narrative has been ascribed a deconstructive function a là Derrida: society constructs itself through a series of tacit agreements or understandings that consolidate by way of images, representations, stories, and writings feeding into a series of prejudices and stereotypes. But then these ideas and conceits meet up against specific personal experiences, not only debunking the stereotypes but also laying bare the hegemonic structures and interests of those who wield power (see Ewick and Silbey 1995, 1998, and 2003).

Feminist and law and literature theorist Robin West has argued that literature is fundamental to the ethical and political construction of community, on the basis that the literary sensibility serves as a tool by which to explore life and bring to light that which rationality cannot see: literature helps us to understand others. "We need to flood the market with our own stories until we get one simple point across," writes West: "men's narrative story and phenomenological description of law is not women's story and phenomenology of law" (West 1988b, 65; cf. West 1985, 1988a).

Less known is the history of law and literature outside the United States. In Italy, in 1927, and so not much later than John Henry Wigmore (1908) or Benjamin N. Cardozo (1925), Ferruccio Pergolesi published an article titled "Il diritto nella letteratura" (Law in literature) (Pergolesi 1927), the first of a series of articles that would ultimately be compiled into a book (Pergolesi 1956), and in 1936 Antonio D'Amato came out with *La letteratura e la vita del diritto* (Literature and the life of the law) (D'Amato 1936), which incidentally is his only known work. Around the same time, in Germany, Hans Fehr was devoting extensive study to the relation between law and art, working on subjects of law not only in literature but also in the visual arts (see Fehr 1923, 1931, and 1936), and through a comparative analysis of works typifying the culture of different European countries, Gustav Radbruch (1938) set out to reconstruct the legal sensibilities of different peoples. From the 1950s onward, scholarship devoted to this research area began to crop up in France and Spain as well (Sansone 2001). And from 2000 onward, interest in this same line of inquiry grew further across Europe, particularly in the northern European countries, and even beyond Europe, particularly in Brazil (Mittica 2015).

Unlike what is the case in the United States, where research in this broad area is markedly interdisciplinary, particularly after its 1970s revival, law and literature on the European continent is very much an endeavor that has interested jurists looking to advance research in their own field. In other words, law and literature is for the most part perceived by scholars in Europe not as an area of investigation in its own right, but as a further avenue that can be pursued in the effort to gain a deeper understanding of the questions that have classically been the concern of legal thought. And even the objective of legal training, so crucial in the American experience, is in no way front and foremost in European research.

The diversity of the two experiences, the American European ones, is to be ascribed not only to the difference between the common law and civil law systems, with which different approaches and problems are associated, but also to the traditions by which the two different legal cultures are marked. In recent years, however, globalization has broken down many of these differences, bringing a common set of problems into focus and leading European scholars to turn to research problems and methods that are typical of the American experience, making for a certain "Americanisation" of research in this area.

In 2008 the Italian Society for Law and Literature was established at the University of Bologna. Its purpose is to promote the study of law and literature, or rather, law and the humanities, to which end the society has created an interdisciplinary network of scholars from around the world, some of whom are well established in the field, while others are new to it, the idea being to bring together different experiences that might otherwise stand in isolation. In this way, with a research hub affording a vantage point through which to follow this movement in Europe and the rest of the world, the conditions can be established for engaging with scholars who are advancing the movement in North America. At the same time, this work can help this research area gain accreditation as part of the higher education curriculum. Also helping toward these goals are the opportunities for thematic reflection which the society promotes through its annual conferences and through the special workshops organized in coordination with the International Association for the Philosophy of Law and Social Philosophy (Internationale Vereinigung für Rechts- und Sozialphilosophie, or IVR).

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Literature and Law: In Brazil

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Introduction

Law and Literature studies have traditionally followed the branches of either European or North-American law. However, the area has significantly expanded over the last decades in different regions of the world, as stated by Carla Faralli and Jeanne Gaakeer.

In this context, research conducted in Brazil has been referred to as *innovative*, *promising*, resulting from a particular environment. This is due to several aspects of the country, granting it a certain singularity in the international scope, with the potential to contribute to the whole research area.

But what exactly makes the Brazilian research in Law and Literature so unique? Are there any truly original traces, deserving of attention by international academia nowadays? What is the contribution of the Brazilian experience to the international debate after all?

In this entry, the intention is to expose how the studies in Law and Literature have been developed in the Brazilian legal tradition. Similarly to the previous entries on the United States (Weisberg 1989), Italy (Mittica 2015), Argentina (Roggero 2016), and also Brazil (Trindade and Bernsts 2017), the idea here is to recall the origins of the research area in the country, as well as its most recent evolution and expansion. But the focus of this entry goes beyond that as well. It is to recognize the development of a truly plural, critical, engaged movement, circling around the idea of a *literary culture of the Law*, an expression by Calvo González (2012, 2018), whose experience over the last few years may be of use to the discussion held in the international scope.

The (Legal and Literary) Letter of Discovery

The relationship between Law and Literature was first registered in Brazilian History within the text of the famous *Letter to el-Rei D. Manoel Concerning the Discovery of Brazil*, written by Pero Vaz de Caminha, in the year 1500, to communicate to the king of Portugal about the finding of new lands.

It is a *historical* document nonetheless, with the comparable value of a birth certificate, reporting on the success of the Portuguese expedition, bringing detailed descriptions of nature and the indigenous people by the view of the European adventurers. However, it is also a *legal text*, since it starts the regime of land possession that would encompass the colonial period. It is also a truly *literary piece*, in the form of *travel narrative*, since it was written by a *chronicler*, reporting the encounter between the European and the Indigenous cultures – thus seen as the very first narrative written as a "literary creation" in Brazil, according to Candido (1981), starting a literary period known as *information literature*.

The Pioneers

It is possible to find incipient Law and Literature reflections written in the nineteenth century – Jacob Grimm (1815) being perhaps the most celebrated example of that. However, in Europe and in the United States, the first research works of great body and visibility in the area date to the twentieth century, with the development of specific approaches.

In Brazil the works of pioneers also date to the twentieth century (Trindade and Bernsts 2017). This adventure of approaching Law and Literature began with Aloysio de Carvalho Filho, a jurist and politician from Bahia, who started his investigations by studying the works of Machado de Assis, with two essays in 1939: *Machado de Assis and the Penal Problem*, and *Crime and Criminals in the Works of Machado de Assis*. Both essays were later added to the book *Criminal Procedure and the Character Capitu*, of 1959. Carvalho Filho also published a different book called *Criminal Procedure and the Character Capitu*, in 1958, discussing the favorable and unfavorable evidence to the narrator's thesis.

Another famous and not less important jurist from Bahia who studied Literature while developing research in Law was José Gabriel Lemos Britto. In 1946, he published *Crime and Criminals in Brazilian Literature*, in which the Lombroso approach is noticeable, due to a movement of intense interest in criminology studies, at the time.

Despite the pioneering investigations by Carvalho Filho and Lemos Britto, the great idealizer and founder of legal interdisciplinary studies, with emphasis on Law and Literature, was undoubtedly Luis Alberto Warat. He was responsible for influencing the education training of many generations of jurists, in addition to contributing to the consolidation of degree courses in Law, which revolutionized the whole Brazilian legal education.

Since the 1970s, when he migrated from Argentina due to the military dictatorship in that country and started living in the Brazilian state of Rio Grande do Sul, Luis Alberto Warat was already an educated thinker. With solid knowledge, he freely moved among Philosophy, Psychoanalysis, Literature, and Theory of Law. Literature was always one of his main choices for critical thinking through transdisciplinarity. His work is marked by the deconstruction of previously imposed and established knowledge. And here, the works of Argentine authors (such as Cortázar and Borges) and Brazilian ones (such as Mário de Andrade and Jorge Amado) – allied with the theoretical contributions of Bakhtin and other thinkers – played an absolutely relevant role in breaking with conventional pedagogical models. This is why his 1985 book *The Legal Science and its Two Husbands* became a classic, now a mandatory reading for all those who study Law and Literature in Brazil. In this work, Warat establishes a dialogue with the novel *Dona Flor and Her Two Husbands*, by Jorge Amado, and metaphorically presents the two facets of the legal science: Cartesianism, enclosed in dogmas of reason; and Marginal Desire, the voice from the underground that is not afraid to playfully reflect its contradictions. Of equal importance is the

publication, in 1988, of his *Manifesto of Legal Surrealism*, whose first sentence reveals the creative and emancipatory potential that literature provides to jurists: "Combining the Law with poetry is itself a surrealist ordeal of the gods of knowledge, the fall of their rigid masks, the death of law's own Manichaeism" (Warat 1988, 13).

With this overview, it is possible to understand that the studies in Law and Literature are not really new in Brazil. Even if the first intellectuals had not known of the international research area and did not develop a specific methodology, it is necessary to acknowledge that the works by Carvalho Filho, Lemos Britto, and, most importantly, Warat traced decisive foundations to the Brazilian Experience in the movement.

Attempts to Systematize and Institutionalize the Movement

Over the last three decades, there was a multiplication of studies on Law and Literature in Latin America (Karam 2020). This *boom* is noticeable in countries such as *Argentina*, with Enrique Marí, Carlos Cárcova, Alicia Ruiz, Jorge Douglas Price, and Jorge Roggero; in *Peru*, with Fernando de Trazegneis and Jaime Coaguila, besides the journal conducted by Miguel Torres Méndez, Carlos Ramos Núñez, and Julián Alberto Navarro; in *Colombia*, due to the production of Andres Botero Bernal and the "literary jurisprudence" of higher courts; in *Puerto Rico*, with Carmelo Delgado Citron; in *Ecuador*, with the group coordinated by Diego Falconí Trávez and Daniela Salazar Marín; in *Chile*, with Joaquín Trujillo Silva, Emilia Jocelyn-Holt Corre, and Camilo Arancibia; and in *Uruguay*, with Luis Meliante Garcé.

Leading this process, even due to the highlighted participation of the country in the continent's community, Brazil has had undeniable protagonism, regarding the incorporation and diffusion of research by European and North-American scientists, and the promotion of unprecedented actions and the incentive toward innovation of practices and approaches.

In the late 1990s, a new stage begins, with the discovery of the Law and Literature developed abroad, especially in the United States, and its dissemination in the Brazilian academic community.

Eliane Botelho Junqueira was the first Brazilian author to, namely, approach Law and Literature, with the work *Literature and the Law: A Different Reading of the World of Laws*, of 1998, containing five articles she had produced, separately, during her postdoctoral fellowship at the University of Wisconsin-Madison.

In 2000, at the Pontifícia Universidade Católica de São Paulo, the first master's thesis defense in the area was held, by Arnaldo Godoy, titled *Law and Literature: The Anatomy of Disenchantment – Legal Disillusionment in Monteiro Lobato*. In the same year, the first doctorate dissertation was also defended, by Hilda Bentes, named *The Greek Theory of Justice in the Interface with the Tragic: from the Pre-Socratics to Plato*. Both projects are the pioneering ones in Law and Literature in formal academia.

Another event with great repercussion was the holding of the *Conferences on Law and Psychoanalysis* – whose first edition, in 2004, addressed the novel *1984*, by George Orwell –, organized by the Nucleus of Law and Psychoanalysis of UFPR, under the coordination of Jacinto Coutinho. This important event took place for over 13 years, regularly, seeking new alternatives for the understanding of Law, from literary works, and the intersection with Psychoanalysis and Philosophy possible.

In the editorial scope, a historic milestone in the evolution of studies in Law and Literature in Brazil was the publication of the Brazilian edition of *Raconter la loi: aux sources de l'imaginaire juridique*, in 2005. The translation of this book was one of the propelling elements of Law and Literature in Brazil, especially in the south of the country, in such a way that it became, in short time, a theoretical reference for Brazilian researchers.

At the same time, the first study and research groups on Law and Literature were developed in universities, bringing together several researchers, professors, and students: *Theory of Law, Democracy and Literature of UFPR*, coordinated by Vera Karam de Chueiri and Katya Kozicki; *Literato – Research Group in Law and Literature of UFSC*,

coordinated by the late Luis Carlos Cancellier de Olivo; the *Law and Literature Research Nucleus of UFMG*, coordinated by Marcelo Galuppo; and the *Novum Organum: Topics between Law and Literature of PUCRS*, coordinated by Clarice Söhngen.

A demonstration of the growing interest in these studies was the inclusion of the entry *Law and Literature*, in 2006, in the *Dictionary of Philosophy of Law*, organized by Vicente Barreto: "Law and Literature is a new field of possibilities for formal and material questions that concern both the Law and Literature. However, in the field of Law Criticism, it incorporates the aesthetic sensibility of literary taste into the political and ethical demands for the reconstruction of a more egalitarian, fairer world" (Chueiri 2006, 235).

Also in 2006, the Institute of Legal Hermeneutics, under the direction of André Karam Trindade, Roberta Gubert, and Alfredo Copetti, created the research entitled *Law and Literature*, which resulted in the publication of three collective works, with the main active Brazilian scientists at the time, as well as some foreign guests (Trindade 2008a, b, 2010). Another initiative was the implementation of the inter-institutional project *Law & Literature: from Fact to Fiction*, coordinated by Dino del Pino and Henriete Karam, which took place from 2006 to 2008, consisting of holding a seminar that lasted all year, with monthly meetings, at Livraria Cultura, in Porto Alegre. The discussions had the participation of Law and Literature professors, providing reflections on legal, political, and social issues, based on classics of the Western literature. This enterprise, promoted by a scientific society in partnership with universities, represented in the country the beginning of the Law and Literature institutionalization, which had so far been developed individually.

From then on, the interest in Law and Literature increased exponentially, with countless experiences throughout Brazil, in postgraduate and undergraduate scopes alike, including the offering of courses, the execution of research projects, the organization of events and, above all, bibliographic production increase.

On the Research Expansion Phase

To a certain extent, the recent expansion of studies and research on Law and Literature is a result of two simultaneous events: (*i*) in 2007, an initiative by Marcelo Galuppo, the creation of the Working Group on *Law and Literature* within the scope of seminars promoted by the National Council for Research and Graduate Studies in Law – which is the largest scientific society of Law in Brazil –; (*ii*) in 2008, the conception of the television show *Direito & Literatura*, whose contribution proved to be extraordinary, mainly due to the visibility impact, and reach that mass media vehicles can still provide. It was, in fact, an unprecedented initiative, even internationally, since there are no similar projects in other countries.

Despite the difficulties faced when attempting to systematize the studies in Law and Literature, hindered by the limitation of contact and dialogue with the North-American and European experiences, especially regarding references, the institutionalization process was successful. This brought the possibility for numerous and diverse initiatives to quickly come up, which showed, however, theoretical inconsistency and methodological fragility. In any case, the expansion phase includes: (1) the increase in curricular and extracurricular educational activities on Law and Literature; (2) the establishment of research nuclei, in different regions of the country, with the regular operation of research groups; (3) the intensification of scientific events. All these factors favored the increase of intellectual production in the area.

The evolution of research groups – highlighting *Kathársis – Center for Studies in Law and Literature of IMED*, which operated from 2011 to 2016, having promoted the first three editions of the *International Colloquium on Law and Literature* – naturally led to the theoretical maturation of researchers, enhancing the qualification of investigations and the scientific production.

To illustrate the extent of topics addressed by its members, individually and collectively, the following stand out: André Karam Trindade (UNIVEL) works with the representation of the judge in literature and the Brazilian constitutionalism of fictions, dealing with the problem of

overinterpretation in law and the notion of constitutional palimpsests, also with issues related to intersubjectivity and intertextuality in the dialogue of courts; Angela Espindola (UFSM) discusses the construction of legal knowledge, based on interdisciplinary reflections involving jurisdiction, hermeneutics, and humanities; Arnaldo Godoy (UNICEUB) ponders the relationship between Law, Literature, History, and Religion, proposing the analysis of narratives and the discussion of theoretical issues; Cristiano Paixão (UNB) studies the history of law, democratic institutions, and transitional justice, encompassing issues such as memory, time, narrative, and fiction; Douglas Pinheiro (UNB) examines the dialogic links between law, history, subalternities, and art, in the hegemonic discourses of the justice system; Henriete Karam (UNIFG) investigates the contribution of literature to legal theory, within the scope of legal hermeneutics and discursive analysis, emphasizing methodological issues; Jacinto Coutinho (PUCRS) explores the intersections between Law and Psychoanalysis, based on literary narratives, to understand the inquisitorial mentality that guides the Brazilian criminal procedural system; Lenio Streck (UNISINOS) researches decision theory, hermeneutics, argumentation, interpretation, constitutional normativity, and judge models based on literature; Luciana Pimenta (PUCMG) brings reflections on Law and Literature, based on deconstructive thinking, analyzing human and social issues through narratives; Marcelo Galuppo (UFMG) focuses on issues of literary theory, especially narratology, applied to law, with repercussions on the legal method, especially on legal interpretation; Marcílio Franca Filho (UFPB) directs investigations in the field of Law and Humanities, based on the notion of transjuridicity, with special emphasis on arts and cultural heritage; Miriam Alves (UFS) proposes legal education through a dialogue between Law, Literature, and Arts, with emphasis on feminism, gender issues, and access to justice; Nelson Camatta (FDV) addresses the critical theory of constitutionalism, based on studies on language, narrative, and human rights; Ricardo Dib Taxi (UFPA) faces problems related to human rights, language, narrative, violence, and social exclusion; Thaísa Faleiros (UNIUBE) deals with the role of literature in the establishment of principles and values that stimulate humanization, citizenship, and education; Vera Karam de Chueiri (UFPR) deals with issues of political philosophy and public law, focusing on constitutionalism, democracy, transitional justice, memory, truth, and narrative. All of them are nationally recognized professors for coordinating consolidated research groups – which bring together undergraduate, master's and doctoral students –, directing investigations, guiding master's theses and/or doctoral dissertations, in addition to having vast scientific production.

It is necessary to acknowledge that this great advance only happened due to the foundation of the *Brazilian Network of Law and Literature* (RDL), in 2014, inspired by the successful project of the *Italian Society for Law and Literature* (ISLL).

From then on, bibliographic production has increased immensely. In a short period of time, there was a boom of hundreds of publications, including scientific articles, book chapters, collections, and books. The initially observed problem, related to the theoretical and methodological foundations – which sometimes hindered the quality of projects, despite the originality – has been overcome, as the dialogue with foreign researchers has intensified, together with the development of partnerships aimed at carrying out inter-institutional research.

Television Show *Direito & Literatura*

The television show featured André Karam Trindade as executive producer and was hosted by Lenio Streck. It aired for 12 years with no interruptions (2008–2020), weekly, nation-wide, on TV Justiça channel. Three hundred and eighty-three videos were produced, all currently available on YouTube. Formal recognition of its importance came in 2013, when it received the *Açorianos Literature Award*, because of its contribution to the development of a social rights recognition culture through literature, as proposed

by Candido in his classic essay *The Right to Literature* (1988).

The show, which was never limited to law students or professionals, sought to combine culture, criticism, and knowledge, with accessible language, thus reaching thousands of spectators from the most diverse sectors of society. Still, the space where it produced the most significant effects was certainly the academic environment, considering its dissemination among researchers of different levels and areas.

Brazilian Network of Law and Literature (RDL)

The Brazilian Network of Law and Literature (RDL) is a nonprofit scientific society whose purpose is the promotion and dissemination of studies on Law and Literature in Brazil, bringing together more than a hundred members and connecting them with foreign researchers.

Among its main activities, there are: (a) the executive production of the television show *Direito & Literatura*, until 2020; (b) holding the *International Colloquium on Law and Literature* (CIDIL) – which held its tenth edition and is currently considered the most important event on Law and Literature in Latin America – uniting hundreds of researchers; (c) the publication of *Anamorphosis – International Journal of Law and Literature*, a multilingual publication, which debuted in 2015 and is indexed in the main databases in the world, offering a specialized collection of over 150 articles, reviews, and interviews, with the participation of François Ost, Greta Olson, Stephan Kirste, Jeanne Gaakeer, Ian Ward, Lenio Streck, Carlos Cárcova, Daniela Carpi, and Peter Brooks.

Since 2021, RDL includes 13 research groups in operation, whose members meet periodically and maintain regular activities, linked to research production of master's and doctorate degrees.

The Literary Culture of Law at School

The greatest challenge, no doubt, is to achieve the promising project led by RDL of putting all the knowledge produced into practice, thus taking the *literary culture of the Law* to school. From 2017 to 2020, inspired by the proposal of Calvo González, *SerTão – Law and Literature Nucleus from Bahia at UNIFG* – practiced two research projects: (1) *The role of literature in the development of a culture of rights*, coordinated by André Karam Trindade; (2) *Law, Literature and Citizenship: pilot project in elementary schools of the Bahia semi-arid region*, coordinated by Henriete Karam.

These research projects fostered the organization *Law, Literature and Citizenship*, by RDL, to develop strategic actions for different levels of basic education schools. The objectives are: (a) to promote the emancipation of subjects; (b) to transmit democratic principles, ideas, and values; (c) to encourage the effective exercise of citizenship; and (d) to favor the construction of a freer, fairer, and more solidary society.

Every stage of the program includes activities guided by the potential of literary narratives for humanization and the development of critical thinking with the constitutional commitment to fundamental rights and the preservation of the democratic State.

In short, it is an action of commitment to citizenship, through the establishment of a literary culture of rights in schools. It so happens that, despite the undeniable social inclusion it could bring, the regular operation of the program, as well as its successive expansion, currently waits for government resources.

The Movement's Development and the Brazilian Experience

Some places in Brazil are closer to Europe than other points in Brazil itself. That is, geographically, Brazil may be closer to Europe than to Brazil itself. Therefore, it would be natural to assume that, in a country of continental dimensions, the Law and Literature movement would hardly reach national coverage.

However, this is not what happens, certainly because of the role played by RDL. Since its foundation, in 2014, there have been a series of efforts to bring together all those who were

dedicated, in some way, to the study of Law and Literature. This strategy was so successful that common purposes and agendas have naturally been established.

Not by chance, there is an expressive amount of research groups throughout the five regions of the country. They bring together researchers with various academic degrees, who invest both in the transmission of knowledge and in the exchange of experiences. These research groups, even when miles away, do not remain isolated. The dialogue between its members is constant: there are publications in co-authorship, joint activities, participation in theses and dissertations, courses, events, and inter-institutional seminars.

Thus, in very few years, the greatness of the movement began to mirror the country's territorial size. The heterogeneity of its members does not prevent the maintenance of an agenda with convergent interests, at the center of which is the opposition to that old Law, formal and traditional, inherited from the still hegemonic liberal-individualist-positivist paradigm, which continues to be taught in colleges and applied in courts. In this way, there is a plural, critical, and engaged movement, marked by a very intense, vibrant performance, growing and developing.

Hence, taking into account that it is dangerous to *analyze one's own present time*, a fractional assessment of the Brazilian experience of Law and Literature proves to be fundamental in this case, mainly because this entry constitutes an important form of registering and, at the same time, disseminating the movement's current status to the international community.

Although the origin of Law and Literature in Brazil can be traced back to the 1930s – a nearly century-old tradition, also in Latin America – it is undeniable that the movement was comparatively late in its maturing. This did not, however, hinder a very authentic experience.

The aspects that reveal the *innovative* and *promising* characters of the Brazilian experience are: (a) the plurality of researchers, who integrate groups linked to universities from different units of the federation, and the multiplicity of academic, curricular, and extracurricular activities, such as courses, subjects, seminars, events, and publications; (b) the diversity of topics and approaches, not limited to traditional intersections (Law *in* Literature, Law *as* Literature, Law *of* Literature), discussing works of art – from foreign, classical, and modern literatures; and, above all, Brazilian literature – to theory of law, involving concepts from literary theory, narratology, semiotics, discourse analysis; (c) the commitment to social inclusion, through a set of projects, ranging from cultural actions in prisons, activities in schools, reading clubs, legal-literary gatherings, artistic interventions in marginalized communities, a television show and podcasts about Law and Literature; (d) the attempt to develop critical thinking and political engagement, aimed at a humanist training of the subjects of law, their emancipation, and the exercise of citizenship, through the production of knowledge to contribute to a freer, fairer, more solidary society, making the constitutional promises come true and, thus, promoting the transformation of the Brazilian reality.

In comparison to the North-American and European experiences – marked by a political component (Minda 1995) and the cultivation of a humanist development, respectively (Mittica 2015) – in Brazil, this dual influence is observed, since studies in Law and Literature encompass the (social) commitment with the issues of the world, of building a free, fair, and solidary society, which, however, has not yet been fulfilled; and the fundamentality of a solid legal culture (humanist, but above all critical), capable of assimilating the political process of learning, considering that the constitutional history of young democracies is marked by social struggles for rights, recognition, citizenship, and political participation, and also for the ability to produce alternative narratives to the hegemonic discourse, to resist violation and claim protection, regarding fundamental rights and guarantees.

Conclusion

In Brazil, the Law and Literature studies suffer the same resistance as in other countries, especially from the more conservative and formalistic sectors of the law community. Even in the academic environment, strangeness and distrust are

common reactions. Despite the undeniable interdisciplinarity of this research area, the universe revealed by Law and Literature is often seen as a passing trend, too little scientific, even as a superfluous academic practice.

This did not, however, stop its diffusion and development, probably due to the high level of most the research carried out in the area of theory and philosophy of law, notably linked to legal hermeneutics, which provided the conditions of possibility for due acceptance, especially by jurists who are linked to critical thinking. So much so that, in the span of less than two decades, the institutionalization and expansion of studies in Law and Literature are visible, also strengthening the field of Law and Humanities. The creation of the Brazilian Network of Law and Literature is the outcome of an entire process. After all, it certainly encouraged the configuration of this movement, being a source of inspiration for several Latin American countries, as suggested by Calvo González (Trindade 2021).

What comes next? Many things. For example, it is still necessary to foster the methodological discussion; to intensify the dialogue with the theorists of literature and the scientists of the text; to assume, once and for all, the challenge of taking all this to the other nations that make up the Community of Portuguese-Speaking Countries, especially due to the possibility of sharing decolonial experiences; to think of a common agenda and expand contacts with researchers from other institutions, movements, and traditions.

Cross-References

► Literature and Law
► Literature and Law: Historical Overview

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Llewellyn, Karl Nickerson

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Introduction

Llewellyn, Karl Nickerson (1893–1962) was an American jurist and the chief reporter of the Uniform Commercial Code.

Born into a Welsh family in Seattle, Llewellyn was raised in Brooklyn, New York. In his teens, he spent 3 years in Mecklenburg, Germany. In 1915, the German government awarded him the Iron Cross (second class) for military service in the First World War. He received LL.B. (1918) and J.D. (1920) degrees, both from Yale. After 2 years of legal practice and part-time teaching (1920–1922), Llewellyn held professorate at the law schools of Yale (1922–1925), Columbia (1925–1951), and Chicago (1951–1962). He was also invited to lecture at the University of Leipzig (1928–1929, 1931). Meanwhile, Llewellyn made an unprecedented contribution to the modernization of American commercial law through his work as a principal drafter of the Uniform Commercial Code (1937–1952).

A Symbolic Figure of the Realist Movement

Llewellyn is widely considered to be the representative theorist of the Realist Movement. Being a matter of debate, the Movement has often been presented as an intellectual wave of eastern academic lawyers in the 1920s–1930s. Attacking an outmoded jurisprudence called "formalism," the Realists generally shared the following views on the nature of law and adjudication (Llewellyn 1931:1235–1250).

(i) Rule-Skepticism. In most cases, legal rules do not accurately correspond with how a judge decides on a case. One cannot foresee court decisions based only on what an applicable rule verbally says. Thus, a lawyer needs to know various factors to expect an outcome of litigation (Frank 1949).
(ii) Scientism. In order to discover the true grounds of a decision, legal study needs to be informed by objective social sciences including psychology, sociology, economics, etc.
(iii) Instrumentalism. Law is a means to an end. A rule is a tool used by lawyers, especially judges, to fulfill a social goal. If a law is found practically useless, it needs to be duly remade. On this score, Pound's idea of "social engineering" was the precursor to this view (Pound 1942).
(iv) Predictivism. A prediction of what courts will do in future cases constitutes an essential part of legal study. On this point, the Realists were under the manifest influence of Holmes (Holmes 1897:460–461).

Llewellyn applied these views to his major works in a conspicuous manner. In *the Bramble Bush*, he adopted a vividly behavioristic approach

in articulating the nature of law. "[The] doing of something about disputes . . . is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*" (Llewellyn 1960a:3).

In *the Common Law Tradition*, Llewellyn transformed his early rule-skepticism into what he finally called "the Grand Style." What actually decides a case on appeal if a rule does not? According to Llewellyn, an experienced judge reaches a just conclusion by identifying "fact-pattern" of the case with her "situation-sense" (Llewellyn 1960b). While sporadically criticized as cryptic, the book has become a classic on the institutional study of appellate judging.

A Pioneer in Legal Anthropology

American law in the twentieth century was marked by the advent of interdisciplinary methods of legal study, the most influential of which might be "law and economics." The Realist Movement is commonly assumed to be an intellectual root of the modern interdisciplinary approaches. *The Cheyenne Way*, which Llewellyn co-authored with anthropologist E. Adamson Hoebel, adopted a meticulous case law approach to investigate how the Cheyenne Indians resolve their conflicts (Llewellyn and Hoebel 1941). The book is still highly regarded as a classic of "law and anthropology."

Realism in Commercial Law

Since the first publication in 1952, the Uniform Commercial Code has been adopted by all 50 American states and promoted the harmonization of laws across the country. The Code has been regarded as the crowning achievement of Llewellyn's career.

The policy of the Code incorporates his ideas about how law is supposed to work in the interest of business practice. From a brief experience in banking law (1920–1922), Llewellyn understood that the drafter's mission was to build a system of standards which would serve an autonomous progress of trade, not hamper it (Twining 2012:303–304, 316). Thus, the statement of a legislative goal reflects a uniquely instrumental understanding. Section 1-102(2) of the 1952 official text specifies that "underlying purposes and policies" of the Code include "(b) to preserve flexibility in commercial transactions and to encourage continued expansion of commercial practices and mechanisms through custom, usage, and agreement of the parties."

Legacy

Llewellyn's interest covered a wide range of subjects. Among others, an institutional analysis of judging, insights about non-state (customary) law, effective lawyering, and the limit of law in society are crucial to the legal study of the twenty-first century. Sixty years from his death, Llewellyn continues to be a rich source of inspiration for legal scholars of later generations.

Cross-References

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► Holmes, Oliver Wendell Jr.
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Locke, John

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Introduction

John Locke (1632–1704) ranges among a handful of the most important philosophers in modern age Europe. This holds true for his epistemology as well as for his political philosophy. His masterpiece concerning the former is *An Essay Concerning Human Understanding*, regarding the latter, his *Two Treatises of Government*. Especially the Second Treatise plays an important role in the history of human rights as basic constitutional rights. With his letters and essays concerning toleration, he is among the pioneers of religious freedom as well.

Main Lines of Reception

As with almost all classic philosophers, Locke's legal and political philosophy provoked quite diverse interpretations. According to standard schemata, Locke belongs to the liberal tradition of political philosophy. However, *one* strand of interpretation regards him as an "ultraliberal," holding the state's task mainly to be the protector of "prestate" private property. This line of influence ranges from the fathers of the US constitution to modern authors. They either defend his conception as the true basis of individual rights against state overbearance (Nozick 1974) or criticize it as early capitalist "Possessive Individualism" (Macpherson 1962).

For the *other* line of interpretation, Locke is the precursor of the conception of a liberal welfare state. Its representatives emphasize that Locke's concept of "property" includes basic rights of liberty and integrity and that charity, welfare, and common goods belong to the ends of government (Laslett 2009, 101–112; Tully 1980; Waldron 2002, chap. 6). Recently even Locke's belonging to the liberal tradition in political philosophy has been called a "fable" (Stanton 2018).

A further subject of controversy is Locke's historical role in English political history. The *Two Treatises*, published anonymously 1689 after the Glorious Revolution (1688), were long regarded as subsequent justification of this bloodless revolution. The critical edition (Locke 1689b) proved that the text had been written – and probably circulated – between 1679 and 1682 (Ashcraft 1987; Laslett 2009). During these years, Locke turned away from his support of the Stuart restoration (1660) and came under the influence of Lord Ashley, the first Earl of Shaftesbury, and his "Whig" circle. Both his treatises on government, especially the First, were directed against Robert Filmer's *Patriarcha*, a most influential pamphlet justifying the divine rights of kings (Filmer 1991). Hence his ideas belonged to the "exclusion crisis," aiming at the parliamentary prohibition of the succession to the throne by a Stuart Catholic. Despite its temporary failure, this movement paved the way to William of Orleans and (protestant) Mary Stuart's accession to the throne in 1688. Locke was not entirely satisfied with the new constitution nor was he part of the official Whig doctrine. His theory of resistance and the covenant conception of state and church became involved in a long-standing dispute.

Although certainly important for the interpretation of Locke's political philosophy, this

background need not be discussed extensively in an encyclopedia entry. The same is true for the many influences on his writings by works of Calvin, Grotius, Pufendorf, Tyrell, Hooker, etc. (cf. Tuck 1979; Tully 1980): Locke is not always original, but he forged a generally understandable "synthesis" of widespread and lasting effect.

Regarding his systematic position, the following aspects are crucial: basic rights, contract (or trust), and the establishment of political power; property, welfare politics, and slavery; constitutional principles, the right to resist, and religious tolerance.

Basic Rights, Contract, and the Establishment of Political Power

In the tradition of natural law, Locke justifies the rights and obligations within a civil state by the necessity to overcome a detrimental state of nature by a common convention. However, his characteristic adoption of this model is marked by the concepts of "property" and "trust". Here, it is crucial to distinguish general and specific meanings of "property". The most general meaning is that of dominium or the authority to dispose over oneself and other persons or things. The only unlimited disposal of this kind is that of God over himself and his creation. His lawgiving will is manifest in natural self-preservation and human self-disposal. Since human self-property is limited by the law of nature, suicide is prohibited and support for the preservation of the species obligatory. Belonging only to God and themselves, human beings are equal "by Nature" (II, §4).

Human property of him/herself according to the law of nature concerns their "life, liberty, health, or possessions" (cf. II, § 6). Although more limited than divine property, this meaning refers to a comprehensive property of basic rights – a "meum juris" as Grotius and later Kant termed it. This wide concept of property designating the basic rights ("liberties") was common in Locke's times (Laslett 2009, 102; Brandt 1988, 683). It contains as an even more restricted component the usual meaning of property, namely rights concerning external objects – land, "mobile" things, and services. Unfortunately, Locke often uses "property" without distinguishing these meanings precisely.

The basic presupposition for his conception of natural law is, of course, the claim to prove the existence of God as creator. This "theological" background of Locke's political philosophy has become controversial in "post-metaphysical" philosophy. However, the first premises of his legal philosophy are not the doctrines of any special religious revelation or sacred texts. The proof of the existence of God, as laid out in *An Essay Concerning Human Understanding*, is based on Cartesian premises. For each individual, his/her own self-consciousness is evident – to doubt it would be a self-conscious activity itself. However, the finiteness of this conscious being, which is not able to create itself (*causa sui*), is equally clear and evident. According to the rule "ex nihilo nihil fit," this being demands an unconditioned or infinite self-conscious cause – his divine creator. It is controversial, however, whether such a proof includes the creation of the species of equal human beings (Waldron 2002, Chap. 3; Siep 2018, 219 f.). Locke needs this thesis against his main "absolutist" opponent Robert Filmer. In Filmer's view, God created a single human being, Adam, equipped with divine authority over his offspring, who passed it on to his special "heirs," the kings.

Another question, more important for recent philosophy, is the plausibility of this proof in an age of evolutionary theories. The emergence of a thinking being (*res cogitans*) from a nonthinking one (*res extensa*), which was unthinkable for Locke in his Cartesian dualism, is certainly not an absurdity today.

Despite the "creational" background, Locke's state of nature is mainly, as in Hobbes, a thought experiment to justify basic rights. Different from Hobbes, however, those natural rights limit the authority of any human commonwealth. Hobbes' infinite natural right to any means of individual self-preservation is replaced by a limited right to self-preservation and a duty to contribute to the preservation of the species. In the first instance it is a right and duty to punish transgressors of

natural law: "everyone has the Executive Power of the Law of Nature" (II, § 13). From the beginning of the Second Treatise, such a transgressor is not only meant to be a "private" individual in the state of nature but also a tyrant or absolute king. By violating the basic rights of his subjects, he transfers them back to the state of nature, a state of justified self-defense.

However, Locke's state of nature is not, as Hobbes', equal to a state of war – it does not entail a permanent disposition to violence, justified by the necessity of self-preservation. In early stages of human development, a peaceful state of nature is possible. Only with its disturbance – mainly by greed and imperiousness incited by a developed economy – a common power to execute the law of nature becomes necessary. Historically, such authorities may arise either by tribal chieftains or by common agreement. Theoretically, only express agreements concerning the involved rights are origins of justified governance. Locke's contract theory concerns the limitation of authority, not the generation of unlimited sovereignty.

Locke rarely uses the term "contract" because of its implicit connotations of irrevocable obligation (*pacta sunt servanda*). The common act to form a political society is termed "compact" or "agreement" (II, § 14, 97, 99, etc.). Locke uses different terms for this society – civil society, political society, political body, commonwealth, etc. Even less "contractarian" is the establishment of a government by such a society, which he terms "trust" (II, 156, 240; cf. Laslett 2009, 113; Dunn 1984; regarding the legal sources cf. Gough 1978, 143). By this traditional legal figure, Locke refers to the delegation of the power to execute the natural law. However, the trustee is not an indivisible and irresistible sovereign but a set of public institutions with different functions. "Government" as used in the title of his *Two Treatises* is misleading for modern readers. It does not refer to an executive body – as in "British government" – but to the constitutional order of a state (cf. section "Property Rights, Welfare Politics, and Slavery"). Such a trust or delegation binds the recipient or trustee to protect the natural rights of the citizens. They renounce their natural self-government only on this condition – and take it back if government fails to "deliver". According to Locke, the compact to found a common political body must be unanimous – any dissenter has to leave the community. But it includes the majority rule for lawgiving within that body necessary for being capable of acting (cf. Laslett 2009, 108: "gravitational logic"). Against the break of the trust, he discusses different constitutional measures, the ultimate consisting in violent resistance (cf. section "Property Rights, Welfare Politics, and Slavery"). Although there are no explicit rights of minorities against majority decisions of parliament, individuals may be justified in forming resistance groups against those decisions.

This provides a rather strong philosophical basis for any theory of limited state sovereignty. However, Locke's natural-theological background impairs this attractiveness for philosophy of law in secular pluralistic states. In addition, the content and cognition of natural law remains problematic even in Locke's own epistemology as laid out in *An Essay Concerning Human Understanding* (cf. Schneewind 1994, 214 f.).

Property Rights, Welfare Politics, and Slavery

Locke's conception of property in the narrow sense of rightful dominion over objects or services has remained controversial to this day. Its essentials derive from the conception of natural law and basic rights outlined above. Although God gave nature to mankind as common property, natural objects have to be appropriated to become useful for the agent and the species. Accountable persons rightfully dispose of their body and its activities. They are entitled to change natural objects by their labor which makes them an extension of their own person. As Locke sometimes puts it in terms of the Aristotelian tradition, they "mix" (§ 27) external substances with their own labor and thereby appropriate them. Since this change increases the value of external objects for human beings in general, it is in accordance with God's will regarding the species.

This conception gained influence in two contrary traditions: *firstly*, within the "labor theory of

value" which became popular in socialist, especially Marxist theories of political economy, and, *secondly*, within radical liberal doctrines claiming that private property as a natural right exists prior to any political community. States have to protect private property, but at the same time they have to refrain from interference. This influence is manifest in liberal politics and economic theories – from Thomas Jefferson to the present.

As to the *first* tradition, Locke indeed holds that labor is the main source of value, not only regarding industrial products but cultivated land as well. This, however, is hardly to be understood as a "labour theory of value in an economic sense" (Vaughn 1980, 85). Locke employs a broad concept of labor, including any profitable idea of an entrepreneur. Arguably even the productivity of invested capital may be called labor in this sense (Vaughn 1980, 84). Above all, Locke regards temporary wage labor based on contracts as compatible with basic liberties (II, § 84).

Regarding the *second* reception line, Locke's state certainly has more tasks than to secure the possessions of those entering into it. In his exposition "Of the Ends of Political Society and Government" (II, Chap. 9), Locke refers to the wide meaning of property: Citizens "unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*" (II, § 123, ed. Laslett, 350). Unfortunately, in the Second Treatise, Locke never made clear, whether the sequence life, liberties, health, and estates was meant to mark an order of (descendent) precedence. If so, the political society would clearly be obliged to restrict private property, if necessary, in order to protect people's life and liberties. In a public order, laws determine the extent of property. They have to prohibit anybody's social status ("meanest man" II, § 94) entailing a dependence on the "arbitration" of his fellow citizens.

There is yet another source for the limitation of property rights within a political community, namely the so-called Lockean proviso (cf. Nozick 1974, 175). In the state of nature, the right to make things useful for mankind allows their personal appropriation without doing harm ("prejudice" II, § 33) to the species. This demands leaving enough for the needs of fellow humans and not spoiling acquired goods or letting them decay – in short, an obligation to use and a prohibition to monopolize. However, in the development of exchange between owners, symbols for the values of things became customary. With money economy, nonperishable goods could be stored and exchanged for any value whatsoever and wherever. Money lending renders surplus possession socially useful (II, § 48). Here, Locke parts ways with the Aristotelian tradition of family and subsistence economy entailing the criticism of profitable money acquisition (*chrematistike*). He insists on the universal, if tacit, consent to the introduction of money. Some interpreters call it a second social contract (Ludwig 2001; Priddat 2012), although it is rather an informal convention. Since money economy enhances the overall productivity of nature and labor, and facilitates the division of work, there are good reasons for such a consent (cf. Ashcraft 1994, 247). On the other hand, money economy is a sort of cultural "fall" of mankind: the limits of appropriation are suspended, human greed unleashed, and the state of nature destabilized.

However, according to Locke "The Obligations of the Law of Nature cease not in society, but only in many cases are drawn closer" (II, § 135). He underlines that the distributive effect of acquisition and trade in its unrestricted form is tolerable only "out of the bounds of Society, and without compact" (II, § 50). Within these bounds, there must be laws regarding the appropriation of land and other goods, their hereditary transmission etc. In the First Treatise, Locke states: "As justice gives every Man a title to the product of his honest industry and the fair Acquisition of his Ancestors descended on him; so Charity gives every Man a title to so much of his others Plenty, as will keep him from extreme want, where he has no means to subsist otherwise" (I, § 42) – in modern terms, to minimum social welfare. The fact that government is obliged to care for common welfare and mutual assistance is clear from passages in the Second Treatise, as well (cf. II, § 130, 131). However, whether charity is a principle with legal consequences on the same footing with justice (Tully

1980, 131 f.; Waldron 2002, 177–187) remains controversial.

Locke's texts on questions of political economy contain both liberal and "strongly antiliberal and mercantilist strands" (Mack 2017, 171; cf. Tully 1980, 170). He grants the magistrate the right to transfer private property (Laslett 2009, 104 f.; Ashcraft 1994, 237) and to impose a poor rate upon approval by the people or its deputies. In his memorandum on the Poor Law (Locke 1697, 182–198), he supports the right of everyone "whether they work or no" to "meat, drink, clothing and firing" (ibid.189). However, the state has to bring the "idle" into work by putting pressure on both employers and unemployed. This includes duties to employ the poor and to establish communal textile workshops where poor children (from the age of 3) are nourished and educated to work (ibid. 190). Locke supports the draconic punishments of Elizabethan Poor Law and the compulsory work in correction houses or the navy (ibid. 186 f.).

Liberal and mercantilist strands are likewise visible in his influential reports regarding questions of interest and currency. He argues against the state's assessing of interest rates but defends a fixed link between the value of money and its metal content (Brandt 1988, 654; Eich 2018). In general, he grants the state an active role in economic policy, but with the end of securing reliable conditions of a mutually advantageous commercial society and to "depoliticize" interventions (Mack 2017, 175; Eich 2018).

Among the most controversial themes of Locke's interpretation is his stand on slavery (cf. Farr 2008). For the critics, it proves not only his support of unlimited exploitation of labor but also of colonialism and even racism. With his mentor Shaftesbury Locke invested in slaveholding American colonies and took part in drafting the *Fundamental Constitutions of Carolina* (Locke 1669, 160–181). However, the concept of slavery in Locke's *Two Treatises of Government* is no justification of slave ownership and slave trade. Recent historical research (Brewer 2017) points to a turn in Locke's economic and political engagement. It accredits him with the authorship of a Trade Board manuscript critical of Virginia's slave laws (1698). For the Board, it claims a short-lived liberalizing effect during the last years of William's reign (Brewer 2017, 1071).

Such a position would be much more in line with Locke's conception of slavery in the Treatises. From the beginning of the First Treatise, Locke attacks slave contracts between a people and an absolute king as well as between individuals – a parallel which Hobbes and Grotius had drawn and approved. By natural law, no man is allowed to "*enslave himself* to any one" (II, § 23). In the chapter on slavery in the Second Treatise (Chap. 4), Locke only accepts Aristotle's justification of taking slaves in a just war of self-defense. The attacked is entitled to kill his enemy or agree to an exchange of the forfeited life against lifelong labor. This, however, is a persisting state of war outside a civil state (II, § 24, cf. § 172). Locke is quite clear in his statement on self-defense against private aggressors ("Thief" II, § 18): the state of emergency ends as soon as the government takes over the protection of the threatened life and the punishment of intruders. (II, §§ 18–20; cf. Siep 2018, 224–232). Only public authority can convert a death sentence into lifelong compulsory labor (cf. Brewer 2017, 1072).

Constitutional Principles, the Right to Resist, and Religious Tolerance

Different from Hobbes, for Locke natural rights are not transferred to a state with indivisible sovereignty but tied to a division of powers. He derives them both from the deficiencies of the state of nature *and* from the legitimate powers of everybody in that state. The *first* way leads to a result close to the trifold division well known since Montesquieu (Montesquieu 1748). The lack of a public order of rules defining the limits of legitimate actions calls for a legislative power. The absence of a respected neutral judge leads to endless violence (cf. II, § 21) and requires a judiciary power; and the sanctioning of court sentences demands an executive power of the commonwealth. The *second* way is based on the

"two powers" (II, § 128) of man in the state of nature. Locke emphasizes that this transfer is asymmetric: the natural right to punish transgressors against the rights and welfare of every species member is transferred completely ("he wholly gives up," II, § 130) to public jurisdiction and execution. There are no safe limits for private punishment. In contrast, the right to secure one's own life and property is delegated to the legislative power under strict conditions. Citizens must participate by their representatives and may withdraw their trust. There is much discussion about Locke's conception of the right to vote. It is graduated according to the contribution of a constituency to the common wealth, as was customary up to the nineteenth century. But everyone with any property – that is except slaves – must somehow be represented (II, §§ 94, 142, 158).

Locke assigns yet other functions to the executive power, which he sometimes calls "powers" (II, §§ 148, 160) as well, namely, the federative and prerogative. Whereas the first one concerns the relation to other states, the second is a complement to the application of the laws in questions of equity and of emergency. On the latter, Locke is very explicit since it served as a justification for absolute monarchy. Its supporters claimed constitutions like the English to be based on a voluntary self-limitation of an originally unbounded (prerogative) power of the king. For Locke instead, the king's prerogative is only a complement to the rule of laws. It is part of a "mixed" constitution with legislation as the highest authority. Only as partaking in this authority ("king in parliament") may the monarch, at the same time the top of the executive, be called "supreme power" (II, § 222). Consequently, his emergency provisions must be approved by parliament as soon as possible. On the other hand, the prerogative enables the "prince" to secure the public good even against a party-dominated parliament (II, § 159) – including fair "measures of representation" for every citizen.

Certainly, the most important limitation of government authority in the *Two Treatises* is the right of the people to resist. It is here that Locke's time-related revolutionary intentions are most manifestly connected with timeless philosophical principles. The discussion covers the whole last third of the Second Treatise. With the tradition, he distinguishes different kinds of dissolution of the political society and of government (here the difference is set out clearly, cf. II, § 211). Regarding the right to resist the government, the key argument is that severe and enduring violations of citizens' rights ("property") constitute a break of the original trust, thereby restoring the state of nature as *status belli*. Thus, the real rebel responsible for this reversal is the government – monarch or parliament – itself.

A reaction of rightful self-defense is not to be confused with the capital crime of insurrection – a distinction necessary for any philosophical defense of the right to resist. Hobbes, as is well known, declared it impossible since there could be no judge in a conflict between sovereign and subordinates. For Locke, however, within a restored state of nature, a legal "appeal" to the highest judge is possible, namely, an "appeal to Heaven" (II, § 168). The voice of the supreme "owner" of all mankind and the origin of every human right can be heard in everybody's conscience. Thus, this appeal is no resignation to prayer but the self-defense against the tyrant – violent, if necessary. There are, however, strict procedural requirements for its justification. Before claiming the right to resist, recourse to legal process, including parliament and the courts, must have been tried in vain. The severity and endurance of the violations of fundamental rights must be confirmed by a considerable part of the population, the upheaval must spare fellow citizens as much damage as possible etc. The final decision about the justification of violent resistance lies with the divine judge on the Day of Judgment.

Despite the recourse to theological arguments at crucial points, Locke figures as an important pioneer of the doctrines of secular state and religious pluralism. In his writings on tolerance (1667, 1689, 1690, 1692), he increasingly liberalized his position. However, three aspects must be distinguished: *First*, since God is not pleased by forced faith and worship (Locke 1689a, 18),

freedom of conscience must be granted by the churches and the state. *Second*, religious convictions express themselves in common rites of congregations. Since the state is only concerned with the "worldly" interests, not the salvation of his citizens, it can leave public religious ceremonies to their own discretion. *Third*, active public rights and functions can be granted to every person abiding by the natural law and public legislation. This freedom, however, has its limits: those who follow a religious leadership outside their states, like Catholics and Muslims, are excluded from state offices. Atheists lack the basis for obedience to the natural law and are unreliable regarding oaths. For some interpreters, Locke's doctrine is even more tolerant (Waldron 2002, Chap. 8). But in any case, he ranges among the most important supporters of religious freedom in the seventeenth century.

Conclusion

The main points of Locke's conception of basic rights and the state's task of securing justice and welfare "survived" despite the criticism of rational theology since Kant. Today, human dignity and autonomy are no more considered as depending on mankind's being the product of a divine will. Except for theses premises, the limitation of state sovereignty and the division of power became a major source of constitutionalism and republicanism. In the age of human rights as basis of international law, the states' "responsibility to protect" is of increasing relevance in legal and philosophical discussions worldwide. However, destroying a tyrannical government from outside can only be justified if it enables the people to immediately form a just, efficient, and independent new government (cf. II, § 211).

Cross-References

► Natural Law: Contemporary
► Sovereignty and Human Rights
► Toleration

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Locke, John: On Justice

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Introduction

Not only is John Locke a central figure within epistemology and metaphysics, his thought has had a vast impact on constitutional affairs and other political and legal matters. Locke's *Two Treatises of Government* and his *Letter Concerning Toleration* are canonical works of political philosophy. However, ideas relevant to the topic of justice can be found throughout Locke's substantial output, not least in the *Essay Concerning Human Understanding*, which includes his best-known writing on the nature of freedom. Locke is typically taken to have played a leading role in the elevation of individual rights within Western liberal conceptions of justice and wider morality (although see Curran 2013, and Bell 2014, for alternative views). His rights-based theory of property has been particularly influential, both to theorists and practitioners.

Locke's Conception of Justice

It is generally assumed that, for Locke, the domain of justice pertains centrally to matters of rights. His thought is typically taken to have shaped the strand of liberalism that depends on rights as the core constituent of theories of both justice and morality. Grant and Tarcov observe that, in *Some Thoughts Concerning Education*, Locke "insists" on the inculcation of societal virtues including "justice as respect for the rights of others" (Grant and Tarcov 1996, p. xiii). In the *Second Treatise*, Locke describes the administration of justice as concerning the "securing" of "men's rights" (II, §219). Therefore, while discussion of Locke's moral and political philosophy sometimes lacks explicit focus on what it is that he takes justice to mean (see Tuckness 2020, for instance, which does not refer to the term "justice" at all), rights offer the obvious starting place.

It should be noted, however, that in the *First Treatise*, Locke discusses charitable obligations in such a way that they seem, on his conception, to be rights-corresponding. He contends that "[a]s Justice gives every man a Title to the product of his honest industry, and the fair Acquisitions of his Ancestors descended to him; so Charity gives every Man a Title to so much out of another's Plenty" (I, §42). This seemingly runs counter to the classic conceptual distinction drawn between the domains of justice and charity, on which obligations of charity are not rights-corresponding, and as such are imperfect obligations. It also therefore weakens the suggestion that, for Locke, the domain of justice is the domain of rights, or of the securing of rights. Nonetheless, one helpful explanation for Locke's seeming elision here between justice and charity focuses on the way in which "titles of justice" can be interpreted as

titles that have been acquired by individuals through acts of labor, whereas "titles of charity" can be interpreted as those afforded to individuals in order to meet their urgent need. To this end, Winfrey interprets "charity" as "need," and "justice" as "desert" (Winfrey 1981; see also relevant discussion in Lamb and Thompson 2009, pp. 231–233). On such an interpretation, this particular justice/charity distinction can be seen as pertaining to the different ways in which different kinds of property rights are generated, rather than serving to blur the boundaries between the domains of justice and charity, themselves. Matters of "charity" aside, however, it is clear that discussion of Lockean justice – which generally concerns considerations much broader than desert, alone – entails discussion of Lockean rights.

Lockean Rights and Natural Law

When thinking about Lockean rights, it is helpful to begin with Locke's conception of natural law – or "the law of nature" – which serves to encapsulate his wider approach to morality, at least in the *Second Treatise*. In the pre-political "state of nature," the non-humanly-conferred law of nature is the only kind of law. It represents moral truth, as something to be uncovered by fallible individuals:

> The state of nature has a law to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions [...] Every one, as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind. (II, §6)

The law of nature holds beyond the state of nature, however. In Lockean political society, natural law continues to govern standards of interpersonal behavior, as well as morally underpinning political power and positive law – acting as even more than what Tully refers to as a moral "guide" (Tully 1980, p. 167). The state of nature can serve as a thought experiment, therefore, to help to determine Lockean moral requirements in non-state-of-nature situations: "to understand political power right, and derive it from its original, we must consider, what state all men are naturally in" (II, §4).

Regarding the source of natural law's power, Locke holds that it reflects God's will, and that, as such, human beings should follow it. He also holds, as above, that properly exercised human reason makes the principles of natural law accessible to us – principles that we should follow as rational creatures. Debate continues as to whether Locke's conception of natural law, alongside other central matters of his philosophy, can be conceived as independent of theological premises. This runs counter to the standard "theological" approach (e.g., Dunn 1982, Part Three; and Waldron 2002). Simmons, for instance, holds that Locke's approach to moral and political philosophy is fundamentally pluralistic, including the way in which Locke's arguments' foundations are both theological and secular (e.g., Simmons 1992, p. 11). Regardless, God plays a constant and important role in Locke's theories, even though Locke typically does offer alternative secular arguments to his theologically grounded approaches.

In terms of its content, Locke's approach to natural law reflects important developments of the medieval jurists, particularly in terms of a growing focus on the rights of the individual. Locke was especially influenced by Grotius, Aquinas, and Suarez (see Tuckness 2020 for a useful overview). Pakaluk claims that Locke "transitioned" from focusing on natural law to focusing on natural rights sometime between writing the *Essays on the Law of Nature* in the mid-1660s, and starting work on the *Second Treatise* in the 1680s (Pakaluk 2017, p. 90). However, while Locke's emphasis and views changed over time – his early views on justice were influenced by Hobbes, for instance (see, e.g., Waldmann 2021) – nonetheless natural law features heavily and coherently in the *Second Treatise.* And as Pakaluk himself goes on to contend, it seems clear that Locke's "main notion of natural right depends upon natural law and is incoherent without it" (Pakaluk 2017, p. 90). Moreover, the common idea that there was a clear shift from

(traditional) natural law to (modern) natural rights, during the period from the thirteenth century to the early seventeenth century, can be seen as overstated. Tierney makes a convincing argument, for instance, that changes in approach are better interpreted as theorists "coming to see that an adequate concept of natural justice had to include a concept of individual rights" (Tierney 2004, p. 6). In any event, the way in which the concept of (natural) rights became central to modern discussion of justice was surely influenced by Locke's approach.

Locke's Set of Rights

Regardless of the ideas that inspired Locke, or his impact on subsequent rights theorists, debate continues about the exact shape and content of the set of rights discussed in his work. This is partly owing to what Simmons describes as Locke's propensity for "arguing in so many different ways" (Simmons 1992, p. 12). But dissensus also relates to inconsistencies within and between Locke's works. As Schneewind states, "[t]hough one or two of Locke's acquaintances knew that he had written extensively on natural law when he was a young Oxford don, suggestions that he revise the early work [in line with his later thought] went unheeded" (Schneewind 1994, p. 199).

Beyond this, as Simmons observes, "the full body of rights with which Locke was so centrally concerned" has been relatively underexamined (Simmons 1992, p. 3). Simmons offers three reasons for this: because Lockean rights have sometimes been reduced into "mere shadows of the duties we owe to God"; because sometimes they have been reduced to property rights; and, sometimes, to political instruments (Simmons 1992, pp. 3–4). There has certainly been a tendency to conflate Locke's "natural rights" with other Lockean concepts: while natural rights and natural law are central identifying features of Locke's approach to matters of justice and wider morality, not all of Locke's rights are natural rights, or at least not in the orthodox sense of persisting regardless of place and time.

Rights in the State of Nature

When considering the set of Locke's rights, it is useful to begin with the moral rights that can be described as "state-of-nature rights." These are the rights that, according to Locke, are held by individuals in the state of nature. As above, the law of nature is non-humanly-conferred moral law, which is determinable through human reason. Its "ends" are the "peace and preservation of all mankind" (II, §6). From these ends derive fundamental Lockean state-of-nature rights to self-preservation and to "preserve all mankind," and also a further related right to certain kinds of resources, such as "food and drink," that are necessary for human subsistence (II, §25). These three rights can be thought of as "general" state-of-nature rights, in that they are held by all human beings (or, if Locke is taken literally, all men) in the state of nature.

Beyond this, two further key state-of-nature rights are associated with its inhabitants' equally-held moral "power" to act unilaterally as executive (II, §74), judge, (II, §87) and even executioner (II, §87). These rights are the right to punish, and the right to "seek reparations"; the former includes the "power to kill a murderer," on the combined grounds of preservation and retribution (II, §11). Again, as these rights are held by every (adult) human being (or again, taken literally, all men) in the state of nature, they are also general state-of-nature rights. Locke states that when these particular rights are exercised, it is not for the good of the individual right-holder, but for the good of all: when individuals rightfully punish others, it is because the wrong-doers have "trespass[ed] against the whole species" by doing wrong (II, §8).

Beyond these central general state-of-nature rights, we come to the matter of property (as in the ownership of external things). Locke contends that God gave the Earth and its resources to humankind in common, but that (at least in the state of nature) when some particular person generates an individual property right to some particular thing, this then "excludes the common right of other men" to it (II, §27). Common-ownership, therefore, involves a Lockean general state-of-

nature "common right" to the Earth and its resources, although it is clear that Locke does not hold that this common right can be exercised individually (and see Mack's argument in favor of assuming that, "in effect," Locke intended "common property" to be understood as "unheld," not "commonly-owned," Mack 2013). Rather, individual property rights – the generation of which Locke presents as necessary to the meeting of urgent needs, as demanded by the rights to preservation and subsistence – must be acquired by particular individuals.

The way in which these property rights (in non-individually-held things) can be acquired in the state of nature, on the Lockean account, standardly involves labor. However, as Ryan notes, Locke "does not discuss what exactly is to count as labour," or certainly not in an exhaustive manner (Ryan 1984, p. 17). Moreover, the legitimacy of the acquisition process is typically interpreted as depending on the right to self-ownership, which is also a generally held state-of-nature right. On Locke's account, self-ownership is the idea that each human being owns their own person and that nobody has any right to anyone else's person (II, §27), although there is much debate about what this entails (see, for instance, extensive discussion about ideas of this kind in Cohen 1995). Crucially, however, from the right to self-ownership is derived the further generally held right to labor-ownership: Locke holds that owning one's body (as a part of one's person) entails that one owns one's labor, and that owning one's labor entails that one owns the products (or at least some of the products) of one's labor.

Continuing a focus on the self, Locke also discusses a generally held state-of-nature right to self-determination or self-governance; he refers specifically to "the right of freedom to [one's] person," according to which individuals are "naturally free from subjection to any government" (II, §190–191). Related to this "freedom" right, on Locke's account, is the right to inherit (one's father's) goods (II, §190–191). And many of these state-of-nature rights are related to, and variously dependent on, general state-of-nature rights to liberty, and to be treated as an equal (II, §4).

Therefore, alongside a "common right" to the Earth and its resources, Locke minimally contends that individuals in the state of nature hold the following general moral rights: to self-preservation, to preserve humankind, to subsistence, to punish, to seek reparations, to self-ownership, to labor-ownership, to self-determination, to inheritance, and to basic freedom and equality. It seems clear that there are other Lockean state-of-nature rights, too, deriving from some of the general rights listed above – such as the "power to kill" in certain circumstances. Moreover, individuals in the state of nature can also acquire particular rights to particular property, and presumably there are other "particular" rights that can be generated, too.

All of these state-of-nature rights reflect the moral requirements that are demanded by reason, and by God's will, and which naturally justify and constrain human behavior in the state of nature. Waldron describes these kinds of rights as "natural," both in the sense of being pre-political (and therefore non-dependent on positive law), and also in the sense of being related, in some morally significant sense, to human nature (Waldron 1988, p. 138). But they are clearly not all "natural rights" in the orthodox sense of being held always by all human beings, regardless of the place and time in which any particular human being exists. Rather, certain state-of-nature rights, such as the right to own particular things (as opposed to any general right to acquire property), are "acquired" rights. And other rights that are generally held in the state of nature, such as the right to punish, do not continue to be generally held in political society (or, at least, are substantially changed, in such a context). Indeed, the legitimacy of Lockean political society is dependent on its members having "quitted" the power to "punish offences" – having "resigned it up into the hands of the community," such that the community "comes to be umpire" (II, §87).

Rights in Political Society

Locke presents the securing of access to justice as a core reason why human beings (should and do) choose to exit the state of nature and enter political

society. While men are equals in the Lockean state of nature, and have the capacity to acquire sufficient knowledge of natural law to understand the demands of morality, they cannot all be unfailingly counted upon to recognize, observe, and enforce these demands. Owing to common failures of reasoning, and a general over-regard for self-interest (II, §124), too many inhabitants of the state of nature either over- or under-punish others (see discussion in Waldron 1999, Chapter 4). Therefore, the formal establishment and enforcement of a fair system of dispute arbitration is required (II, §124–126), to avoid individuals being left "subject to the inconstant, uncertain, unknown, arbitrary will of another man" (II, §22).

Consequently, the opportunity for individuals in Lockean political society to determine and mete out the moral law for themselves is greatly restricted; matters of mutual protection become collectively regulated. However, Locke's kind of collective regulation involves each member of such a society having not only the right, but also the obligation, to be involved in the instituting of positive law – at least in the sense of deliberating what the content of such law should be, and evaluating the moral rectitude of existing laws, both privately and publicly (for useful discussion, see Waldron 1999, Chapter 4). Positive law is not co-extensive with justice, on Locke's account, therefore. He offers examples of bad positive law and the bad administration of legal matters, and he contends that political authority must be limited as well as justified. The rule of law is crucial to Lockean political society, at least in terms of the requirement for "published standing rules and known authorized judges" (II, §136). And everything continues to depend morally on what lies beneath: what is right and good in political society reflects the principles of natural law, and when positive law fails to reflect these principles, then those responsible will be punished, if not on Earth, then by God in the afterlife (again, see discussion in Waldron 1999, Chapter 4).

It is not only new legal rights and obligations – as specifically instituted by collectively determined positive law – that individuals gain, therefore, after having become part of a political society. It seems clear that they also acquire new general moral rights and obligations, including those, as above, relating to the instituting of positive law. These rights and obligations derive directly and indirectly from the mutuality of the agreement into which these individuals have entered, on becoming a member of such a society. This idea is at work in Locke's majoritarianism: "[th]us every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society, to submit to the determination of the majority, and to be concluded by it" (II, §97).

Finally, it should be noted that, on Locke's account, political societies bring advantages for their members beyond improved access to justice and other directly "political" matters – including the possibility for significant increases in general welfare and prosperity (see, e.g., II, §130). This idea underpins a key thread within the over-determined Lockean argument for private property. While that thread, therefore, has sometimes been interpreted as representing a Lockean type of consequentialism (see Waldron 2020, for instance), an alternative interpretation depends on Locke's commitment to the common or "public" good. The common good, on Locke's account, provides legitimate ends for shared action. These ends relate not only to interpersonal private relations, but also the extent of justified political power, which is to be directed only toward the "peace, safety, and public good of the people" (II, §131).

Locke's commitment to the common good is generally underdiscussed and undervalued, however. And the concept is confused, on some interpretations, with the object of the kind of consequentialist reasoning referred to above. Such interpretations are at risk, therefore, of overlooking what is distinctively important, for Locke, about the common good – not least by inaccurately concluding that the common good is simply a summation of individual goods. Forde, for instance, states that "the common good is nothing more than the sum of individual goods" (Forde 2009, p. 446). And Tully claims that, as a "principle of justice governing society," the common good can be seen either in aggregative terms or in

distributional terms – i.e., either as a way to refer to the "total amount of good enjoyed by a particular group," or as a way to refer to the particular "share of that good which different members of the group have for themselves" (Tully 1980, pp. 162–163). More generally, it is often assumed – as per Dworkin – that individual rights must, in some sense, be in "antagonism" with the common good (Dworkin 1977, p. 367). Yet it seems clear that the common good and individual rights are concepts that, on Locke's conception at least, are highly intertwined and even interdependent. And that this is the case not only in political society, when individuals take on new relations of mutuality, but even in the state of nature, when, for instance, the individual right to punish is exercised for the good of all.

Conclusion

Some have interpreted Locke's focus on individual rights as a "stark individualism" or atomism (e.g., Huyler 1997, p. 525): that Locke was, to use Macpherson's famous criticism, a "possessive individualist," who saw the individual as a self-owner who "ow[ed] nothing to society" (Macpherson 1962, p. 3). While it is undeniable that Locke's approach to justice and wider morality is individualistic, such an approach does not necessitate atomism, however. As Rasmussen and Den Uyl observe, the suggestion that liberalism is inherently atomistic seems simply inaccurate when considered in reference to "any recognisable liberal doctrine or thinker" (Rasmussen and Den Uyl 2006, p. 842). It certainly seems at odds with the role that individual rights play within Locke's moral world.

Cross-References

- ▶ Freedom
- ▶ Human Rights and Justice
- ▶ Locke, John
- ▶ Positive Law and Natural Law
- ▶ Rights: Legal and Moral

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Logic and Law

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Introduction: Three Main Attitudes on Law and Logic

Regarding the complex relations between law and logic, three main attitudes have been frequently held by legal philosophers and normative logicians alike. First, there are those who maintain that law is related fundamentally to logic or even founded on it. These authors frequently hold both that legal systems are logically structured and necessarily satisfy some logical conditions, like consistency and completeness. We shall dub them the "believers." Second, there are those who maintain that logic and law bear insignificant relations to each other, if any at all. Indeed, such authors – who can be qualified as "skeptics" – affirm that logic and law occupy two separate domains, which have little, if anything, in common. Consequently, they hold that there is no much logic in the law, and logical analysis cuts hardly some ice in explaining law's functioning. Finally, there are those thinkers – the "searchers" – who, though skeptical about the logical rationality of law, in the sense that legal systems necessarily satisfy certain logical conditions, hold the view that logic is fundamental in analyzing and understanding the law. Let us elaborate each view.

The Believers

Many jurists, and especially legal theorists, tend to think that law is a logically unified whole, that is, a set of sentences that is necessarily consistent and complete. When they argue in favor of such a view, they often refer to logic (broadly and sometimes loosely understood) as the basis of justification. On this view, conflicts between legal norms are regarded as only apparent (consistency), and the law always provides a solution to any question whatsoever (completeness).

According to this stance, law – as any other discourse – is regarded as based on a certain set of rational, indeed, logical principles. In particular, it is held that the principle of noncontradiction applies to norms, so that two conflicting norms cannot both be valid. It is also held that, for any case whatsoever, law provides a definite answer (Dworkin 1978; Donati 1910; Kelsen 1934: 100, 1960: 247–255. It must be observed that, in the last phase of his career, Kelsen 1979: ch. 58 rejected the possibility of logical relations between norms). These bold theses have been justified by resorting to a plethora of arguments: here we shall point to only some of them.

According to a widespread idea, if by "validity" we mean binding force, two conflicting norms

cannot both be valid. "Do smoke" and "Don't smoke" cannot both have binding force: they cannot bind a norm-addressee to do something and its opposite at the same time. So, the argument runs, they cannot belong to the same set of norms simultaneously.

The completeness of law is often based on the principle of closure: "Everything that is not (legally) prohibited is (legally) permitted." By arguing that, owing to the interdefinability of permission and prohibition, any normative system, simply by virtue of being normative, contains such a principle of closure, many thinkers have held that law is necessarily complete.

Such theses can be reframed in more formal terms as follows. If one assumes that any norm entails itself (which is ingrained in the very tenet that normative systems are logically structured), one must accept that the norm Op (Obligatory p) entails itself. Thus, the sentence $Op \supset Op$ is a valid formula of the logic of norms. It is easy to see, owing to the classical definition of the logical connectives, that this sentence can be easily transformed as follows:

[i] $Op \supset Op$	[N-identity]
[ii] $Op \vee {\sim}Op$	[N-excluded middle]
[iii] ${\sim}(Op \wedge {\sim}Op)$	[N-noncontradiction]

These three principles state, for the normative domain, that [i] every norm entails itself (namely, is a consequence of itself), [ii] either a certain norm or its norm-negation is valid (completeness), and [iii] it is not the case that a certain norm and its contradictory norm are both valid (consistency).

Indeed, the principle "Everything that is not (legally) prohibited is (legally) permitted" is just a reformulation of (ii). Let's substitute Op with $O{\sim}p$ (i.e., prohibited that p), and what we obtain is (ii') $O{\sim}p \vee {\sim}O{\sim}p$. Since ${\sim}O{\sim}p$ is equivalent to Pp, that is, p is permitted, (ii') states exactly that any conduct p whatsoever is either prohibited or permitted. By disjunctive syllogism, we can easily derive that if p is not prohibited, then it is indeed permitted.

Such theses, though, are difficult to be reconciled with the empirical observation that actual legal systems – as any lawyer knows – are affected by logical defects (such as gaps and antinomies) and that hardly form a unitary logical whole.

The Skeptics

Those who have embraced a position of skepticism toward the use of logical tools in order to account for some basic features of law have mainly used the three following arguments (Holmes 1881: 1; Frank 1930: 70; Laski 1917: 201; Stone 1946: chs. 6 and 7; Rheinstein 1949: 756–758):

A. The argument from *inutility*
B. The argument from *distortion*
C. The argument from *marginality*

Let us briefly illustrate, in the following sections, each of these arguments.

A. *The Argument from Inutility*

The chief objection to logic in the law is that logical thought processes are rigid and inflexible, whereas legal reasoning is empirical and discretionary: so logic would be useless in the legal domain. This general distrust is supported by three specific arguments (Guest 1961: 177): (i) decisions cannot be reached by simple deduction from existing legal rules, but rather by intuition (*insufficiency*); (ii) legal rules are too fluid and uncertain to support any logical inference (*uncertainty*); (iii) the conception of law as a single, unitary, and consistent set is illusory (*impracticability*).

The manifold *argument from inutility* can be rapidly dismissed. In particular, the fact that decisions are normally not, and cannot be, reached by logical means cuts no ice against the relevance of logic for legal analysis. As Summers (1963: 255) observes, the psychological processes at the basis of legal decisions, which are intuitive, may be precisely the ones most in need of logical scrutiny. In this sense, logical tools may be used to expose inconsistencies and to test logical relations between legal norms.

The circumstance that norms are vague and imprecise is not relevant to logic proper, since such features are questions for a theory of interpretation and do not call for a specific logical treatment.

Finally, as we shall see in a moment, the idea that the view of law as a unitary logical whole is unrealistic, far from being an argument against logic in the law, is the outcome of the use of logic in the analysis of legal systems.

B. *The Argument from Distortion*

The second argument relies on the supposedly disastrous effects that the application of deductive logic would have for law and its explanation (Atienza 1992: 1017–8). According to deductive logic, two contradictory propositions imply any proposition whatsoever. If one imports this principle into the normative domain, one arrives at the notion that from a contradictory normative system, it is possible to derive any norm whatsoever. For instance, from (1) $Pp \wedge \sim Pp$, one can infer both (2) Pp and (3) $\sim Pp$. Norm (2) implies in turn the disjunction of itself with any norm whatsoever (for instance, Oq): (4) $Pp \vee Oq$. From (3) and (4), by disjunctive syllogism, one may derive (4) Oq. In this sense, it has been argued that a whole normative system containing just one contradiction would crumble owing to this very contradiction and thus would be rendered useless. The application of deductive logic to normative systems, especially legal systems, would thus bring about unacceptable results or would fail in explaining the fundamental intuitions of legal operators.

Against the *argument from distortion*, two counterarguments can be proposed.

First, one cannot at the same time accept logic in order to spot systematic defects in the law (such as conflicts) and then reject it when problematic features arise. Giving up logical analysis has the hardly desirable outcome of removing the very concept of conflict from the reconstruction of law, something that no legal agent would in all probability accept.

Second, and more technically, a normative system would indeed collapse only if it were a system consisting solely of categorical norms. But legal systems usually consist of hypothetical norms (i.e., norms which connect key operative facts to legal consequences). It has been demonstrated that the effects of normative conflicts do not reach the combination of operative facts different from those that trigger the solution for a specific case. Let us consider a case defined by properties ($p \wedge q$), and suppose it is connected by a norm of the system to a contradiction. From this contradiction it is not possible, by means of logic, to derive any norm whatsoever regarding cases ($\sim p \wedge q$), ($p \wedge \sim q$), and ($\sim p \wedge \sim q$). Moreover, the pernicious effects would not propagate to different sets of cases characterized by other key operative properties. The effects of the contradiction would only affect cases which are more specific than the one solved in a contradictory way (e.g., ($p \wedge q \wedge r$)). A legal system would thus be useless, at most, only regarding a certain case and the cases which are more specific, but would not be troublesome regarding any case whatsoever.

C. *The Argument from Marginality*

Another argument against the importance of logic in the law elaborates on the supposedly marginal role that logic plays in legal experience. Derivation of logical consequences from norms is just a small piece of legal reasoning, and, even within such a narrow compass, rules of inference to be used with norms are uncertain and manifold. Consequently, logic plays a modest role (if any) in accounting for the main features of legal systems (Tarello 1980: 79–81).

One can object to the argument at hand by reshaping the main operations carried out on raw legal materials in different stages and analyze what role logic plays in accounting for such an explanation. We shall turn our attention to this argument in section "Deductivism" and see that the role played by logic is far from being marginal.

The Searchers

The "searchers" take a middle stance between the believers and the skeptics. Contrary to the believers, they reject logic as a possible

foundation for law's determinacy. However, against the skeptics, they advocate the position that logic is a fundamental tool for accounting for several aspects of law's structure and functioning (von Wright 1963; Ross 1968; Alchourrón and Bulygin 1971; Lindhal 1977; Navarro and Rodríguez 2014).

In particular, from this point of view, logic is seen as an indispensable and unavoidable tool to detect different forms of indeterminacy within the legal domain, such as normative conflicts, normative gaps, and so-called dynamic indeterminacies.

Within this compass, one should note that a distinction must be made between the *logic of norms* and the *logic of norm-propositions* (i.e., descriptive propositions bearing upon norms). While norms aim at guiding human action, norm-propositions aim at informing about, or describing, the deontic status of a certain action within a certain normative system. So, while norms have a logical form like Op (p is obligatory *simpliciter*), norm-propositions have a logical form like $Op \in \mathrm{S}$ (the norm Op belongs to normative system S, what is tantamount to saying that p is obligatory *according to normative system S*).

With such a distinction at hand, we may be able to appreciate that though the principles of N-identity, N-excluded middle, and N-noncontradiction hold in the logic of norms, only the following translations of them hold in the logic of norm-propositions:

[iv] $(Op \in \mathrm{S}) \supset (Op \in \mathrm{S})$
[v] $(Op \in \mathrm{S}) \vee (Op \notin \mathrm{S})$
[vi] $\sim((Op \in \mathrm{S}) \wedge (Op \notin \mathrm{S}))$

By contrast,

[v'] $(Op \in \mathrm{S}) \vee (\sim Op \in \mathrm{S})$
[vi'] $\sim((Op \in \mathrm{S}) \wedge (\sim Op \in \mathrm{S}))$

are not valid in a logic of norm-propositions, because neither entails its conditional equivalent:

[iv'] $(Op \in \mathrm{S}) \supset (\sim Op \notin \mathrm{S})$.

Were [v'] and [vi'] valid for any action p and any legal system S, that would guarantee the necessary consistency and completeness of legal systems, but since they are not, those two logical properties are merely contingent (Alchourrón and Bulygin 1971: 15–21).

Logic is fundamental for establishing whether a certain normative system is consistent or not. A possible candidate for the characterization of consistency is the notion of "doability" (rather than binding force, which we mentioned before and, unlike doability, is not a value-neutral concept). According to von Wright (1999: 35), "The definitions of normative consistency and entailment rely on the notions of doability of norm-contents [i.e. of the action qualified by the relevant norms]." A lawgiver provides a consistent set of regulations if she does not bring about two or more norms that are impossible to satisfy at the same time. For instance, the norms "It is obligatory to express one's beliefs" and "It is forbidden to express one's beliefs," place their addressees in a predicament, for any course of action they choose, will bring about, with certainty, the violation of one of the two norms. The contents of both norms are not simultaneously doable.

Though promising, the concept of doability is not per se sufficient to account for the logical notion of a normative conflict. It may be that the simultaneous undoability of two norms is not due to conceptual matters: it can stem from merely empirical contingencies. For instance, Jones may lack the money to fulfill his obligation to pay both for his car and for his mortgage, even though both obligations are perfectly doable together from a conceptual point of view. Here we have two norms qualifying in the same way different, and logically unrelated, norm-contents. They are, in principle, both satisfiable by a single agent, but it may turn out from an empirical point of view that they are not doable at the same by such an agent.

Accordingly, we shall distinguish *conceptual doability* and *empirical doability*. The former refers to a situation when all the duties of a certain agent A can be abstractly complied with and, at the same time, each permission of A can be abstractly used. The latter refers to the factual possibility of complying with all of one's duties and using each of one's permissions. Empirical doability presupposes conceptual doability, but

clearly not vice versa. Normative conflicts proper are situations of conceptual undoability, ones where it is conceptually impossible to comply with two norms at the same time. This is also problematic, since Pp and $P{\sim}p$ are simultaneously undoable, but perfectly consistent. Thus, it seems that the notion of doability, and the related notion of satisfaction of a norm, works differently regarding mandatory norms and permissive norms. Some authors have proposed to solve this problem by introducing the time of membership of a norm in a legal system as a means to deal with the satisfaction of permissive norms. From this stance, a mandatory norm is satisfied if it is always complied during its time of membership, whereas a permissive norm is satisfied if it is sometimes used during its time of membership.

Logic is also fundamental in determining whether a certain set of norms is complete or not. One of the main results of researches in this field is that it is quite idle to ask whether an entire legal order is complete or not. This is a question that of course can be asked, but that is parasitic on a different issue, which in turn regards the norms which are singled out to analyze a certain normative problem. We use logic to find out whether a certain normative system has gaps. Once we have a means to determine whether there are gaps in the law, we can raise the question whether there are means (e.g., rules of closure) that can be used to close the legal order as a whole, i.e., to make a legal system globally complete. But the global question (are legal orders complete or may legal orders be made complete?) is parasitic on the issue of how we may detect gaps in the law.

Further problems, which can only be analyzed properly by means of logical tools, are logical indeterminacies in legal dynamics. The main question is this: when a norm N_3, which is the logical consequence of a set of at least two promulgated norms N_1 and N_2, is repealed, it is not always the case that the system brought about by such a normative act is determinate. Take, for instance, the normative system NS_1 which comprises the following two norms: N_1 "The President of France ought to reside in the Capital of France" and N_2 "The Capital of France is Paris." The system NS_1 implies the norm N_3, according to which "The President of France ought to reside in Paris." If, at a later stage, normative authorities introduce a new norm N_4, according to which "The President of France ought to reside in Nice," then to restore consistency we certainly do not want N_3 to belong to the new system. But this will not be enough, since N_3 is logically derived from N_1 and N_2; thus we will have to repeal one of them too. The problem is that we cannot determine, by logic alone, whether N_1 is to be deemed to be implicitly repealed, so that the President is now no longer subject to the obligation to reside in the Capital, or N_2 is implicitly repealed, so that the Capital of France is no longer Paris but Nice. As a consequence, the new system is logically indeterminate, since we have to consider as repealed one of the explicit norms in order to restore consistency, but we do not have logical reasons to deem one of them in particular as repealed, and we have no reason to deem both of them as repealed either.

Two Conceptions of Law and Logic

Deductivism

One can be a "searcher" without necessarily embracing deductive logic. However, the results we have referred to in section "The Searchers" count as some of the most important discoveries of authors that embrace what we can dub "deductivism." By this label we understand the view according to which some deductive rules of inference – mainly *modus ponens* and enrichment (i.e., strengthening the antecedent) – are basic in understanding how law is structured and how it works.

Formally, such rules of inference can be represented as follows:

(MPP)	$((p \supset q) \wedge p) \supset q$
(Enrichment)	$(p \supset q) \supset ((p \wedge r) \supset q)$

Deductivism is usually combined with a reconstruction of conditional norms as material or stronger conditionals, in which the antecedent is a sufficient condition of the consequent, and the

consequent is a necessary condition of the antecedent. If we conceive of legal systems as sets (made up at least partially) of conditional norms, rules like *modus ponens* and enrichment carry out a fundamental task in explaining how such norms are applied to individual cases and how logical consequences are derived from norms of this kind.

Modus ponens is fundamental in explaining how individual norms (decisions) are derived from general norms (justifications). Without such a rule of inference, it would be, indeed, impossible to "detach" the normative consequence from the conditional norm, once the antecedent is verified. However, enrichment is even more fundamental, since it plays at least two major roles in the law.

First, it makes it possible for one to determine the scope of normative conflicts and classify different kinds of such conflicts. Understanding by "explicit norm" a norm that is the meaning of a normative provision (i.e., a rule-formulation), we can say that there is a conflict between *two explicit norms* (a total-total inconsistency in Ross' jargon) whenever a certain normative system S contains two conditional norms of the sort of $p \supset Oq$ and $p \supset {\sim}Oq$, since their antecedents *completely overlap*. We have a conflict between *an implicit norm* (derived by enrichment from the more general norm) *and a more specific explicit norm*, whenever the normative system S contains norms like $p \supset Oq$ and $(p \wedge \mathrm{r}) \supset {\sim}Oq$ (a total-partial antinomy), since S is inconsistent only regarding the whole antecedent of the more specific norm (which is totally included in the antecedent of the more generic norm), so that S is partially free from contradictions regarding case p, in the partition $(p \wedge {\sim}r)$. Finally, we have an inconsistency (a partial-partial one) regarding *only implicit norms* (both derived by using enrichment) whenever the normative system S contains two norms like $p \supset Oq$ and $r \supset {\sim}Oq$, since S is only inconsistent with respect to the *intersecting case* $(p \wedge r)$, and is free from contradictions when the antecedents of both norms do not intersect (i.e., in cases $(p \wedge {\sim}r)$, $({\sim}p \wedge r)$, and $({\sim}p \wedge {\sim}r)$).

Second, enrichment also plays a fundamental role in accounting for lawyers' reasoning. Such reasoning may indeed be broken down, for theoretical purposes, into three main phases or operations: (1) *interpretation*, (2) *logical development*, and (3) *ordering*. By means of interpretation, jurists move from legal sources to legal norms, thus forming a normative basis. By means of enrichment and by combining the relevant properties contained in the antecedents of legal norms, jurists derive logical consequences from the normative basis and are so able to detect the possible logical defects, such as gaps and antinomies, which affect the consequences of the normative basis they are handling. It is with the third operation – i.e., ordering – that jurists deal with gaps and inconsistencies, by bridging the former and solving the latter by means of priority criteria.

An example of logical development is the following, which is an adaptation of an example famously provided by Bertrand Russell (2007: 80). "Suppose, at the end of dinner, your host offers you a choice of three different sweets, urging you to have any one or two or all three, as you may wish. How many courses of conduct are open to you? You may refuse all of them. That is one choice. You may take one of them. This is possible in three different ways and therefore gives you three more choices. You may choose two of them. This again is possible in three ways. Or you may choose all three, which gives you one final possibility. The total number of possibilities is thus 8, i.e. 2^3. It is easy to generalize this procedure. Suppose you have n objects before you and you wish to know how many ways there are of choosing none or some or all of the n. You will find that the number of ways is 2^n." Now, let us suppose that there is a norm of dietary prudence that provides that, if you choose at least one sweet, you ought not add sugar to your coffee at the end of the dinner, whereas you are allowed to do so if you take no sweet. The consequences of these two norms are that you ought not add sugar to your coffee in seven cases (whenever you decide to take a sweet), whereas you may add sugar in just one case (when you take no sweet or, what is the same, you refuse all of them).

Defeasibilism

Deductivism has recently been impugned by several theories that develop what we can call "defeasibilism," i.e., the idea that legal norms are

liable to implicit unforeseeable exceptions and accordingly call for a new logic (Nute 1997; Glenn and Smith 2017). This line of criticism is somehow related to the argument of inutility we referred to above, for it is predicated, in some cases, on the ideas that decisions cannot be reached by simple deduction from existing legal rules and also on the idea that legal rules are too fuzzy to support any strictly deductive inference.

For the purposes of what follows, two kinds of defeasibilism must be singled out. Sometimes, defeasibilism (which we propose to call "hard defeasibilism") is characterized as based on the idea that the antecedents of normative conditionals are only contributory (and hence not sufficient) conditions of the normative consequence. At other times, defeasibilism ("soft defeasibilism") is characterized as based on the idea that there are criteria of preference among conflicting norms, which may solve or even rule out such conflicts.

First, one must observe that many systems of hard defeasibilism seem indeed to be incapable of accounting for normative inconsistencies within normative systems, since they reject *modus ponens* and enrichment. On the one hand, it is impossible to derive incompatible solutions for a concrete case, if *modus ponens* is not recognized. On the other hand, as we have already mentioned, it is also impossible to determine whether two antecedents, which are connected to incompatible solutions, completely or partially overlap, if we do not recognize enrichment.

Apart from this, there are also doubts about the explicative powers of soft defeasibilism, especially when applied to the legal domain. In fact, the difficulties of soft defeasibilism in locating the criticism toward standard deontic logic show a bit of conflation of several problems in reconstructing juristic reasoning about or with rules.

It is not clear where defenders of defeasibilism locate defeasibility in the picture of legal reasoning offered by deductivism. By locating it in phase (2), one renounces to fully develop, from a deductive point of view, a normative basis. But this would make it impossible to spot systemic defects, such as gaps and antinomies.

To locate it in phase (3) is tantamount to using the term "logic" in an unusual way, by simply changing the headings under which different juristic operations are accounted for. Development of the logical consequences would be equivalent to drawing retractable inferences from a certain normative basis, and the "real logical task" would consist in ordering, according to some preferential criteria, inconsistent or incomplete retractable conclusions. Note that such inferences are regarded as retractable for they are rejected and changed in favor of other inferences when they bring about gaps and antinomies.

However, as it is easy to see, this is only a change of language, not of subject matter. If this is so, the idea advocated by defeasibilists seems to be capable of being accommodated within a traditional setting of theoretical inquiry, which accepts standard deductive logic. One can affirm, then, that in defeasibilist proposals it is not the logic that has changed; rather, what is being changed is the way of depicting logical tools and locating them in the theoretical reconstruction of jurists' operations. The only option left in our three-step model of juristic reasoning is to locate defeasibilism at the level of the interpretation of legal sources. From this perspective, the "defeasibilist turn" in law and logic may well be read as a suggestion on behalf of a broad reconsideration of the study of legal interpretation and its importance in legal reasoning, but this does not have much to do with logic proper.

Conclusion: The Notion of a Logical Consequence in the Legal Domain

The debate between deductivism and defeasibilism may be reframed as a discussion about the theoretical status of the logical consequences of legal norms and their possible legal status as valid norms.

According to a widespread approach, logic investigates the notion of logical consequence (or entailment among sentences) within truth-functional discourse. In logic, the notion of a logical consequence is traditionally related to that of "truth-preservation": a sentence is a logical

consequence of another sentence whenever the former is derived from the latter by means of a strictly truth-preserving reasoning (Agazzi 2011). Since norms are usually regarded as neither true nor false, we face great difficulties in shaping a corresponding notion of logical consequence within the normative domain. This problem is commonly posed in the form of a dilemma, known as "Jørgensen's dilemma": since norms are not proposition-like entities and, consequently, lack truth-values, either logical notions are defined in terms of truth, and a logic of norms is impossible, or a logic of norms is possible, but then logic has a wider reach than truth (Jørgensen 1937–1938: 288–296). Though this problem is not specific to the domain of law, skeptics may, and some of them actually do, argue against logic in the law on this basis.

If we are to be in a position to resolve the previous problem and somehow justify a notion of logical consequence suitable for the normative domain, we can go on to accept or reject the claim that the logical consequences of the promulgated norms are also valid norms. And we can in turn accept that *all* the logical consequences of issued norms are valid norms or establish certain restrictions at this respect. Let us elaborate this point.

According to a first view, all logically derived norms are valid, since deducibility is taken as a criterion of legal validity of legal norms (Bulygin 2015: ch. 10). According to a second view, which is held among others by defeasibilists, not all the logical consequences following from legal norms are legally valid (Raz 1994: 226–230). A third view, in turn, denies that logical consequences of norms are legally valid, the only criterion of validity being the issuance of a norm by a lawgiver or the effectiveness of a norm within social practice (Green 2003; Ferrer and Rodríguez 2011: 121–130). Finally, a fourth view suggests that the notion of a legally valid logical consequence of a legal norm depends on what the law provides on the matter: law can grant as legally valid inferences that are logically invalid and consider legally invalid inferences which are logically valid (Guastini 2013: 134–135). By elaborating on the legal criterion of logical validity of derived norms, one can further qualify this latter view and identify three sub-conceptions.

According to the first one, law contains the logical consequences of explicit legal rules that are *not in conflict* with the set of their underlying reasons, *plus* the logical consequences of such reasons (Schauer 1998). Explicit rules, thus, are to be considered as possibly defeasible in that they are liable to be defeated by reasons, in the specific sense that underlying reasons can exclude from the set of legally valid norms those logical consequences of the rules that are incompatible with the former. A second sub-conception maintains that legally valid derived norms are those which are derivable in accordance with lawgiver's *actual intentions* (Raz 1994: 213; Marmor 2001: 69). This is possible due to the fact that, according to this thesis, any property, which has not been expressly considered by the lawgiver, has to be regarded ipso facto as irrelevant according to the intention of the lawgiver. Finally, we find a sub-conception of derived norms that has been called "dispositional," since it relies on the notion of a *counterfactual* intention (rather than that of a real intention) and a pragmatic approach to the notion of logical consequence (Alchourrón 2012). What is relevant here in order to determine the legally valid consequences of a legal norm is neither its alleged objective *ratio* nor law's claim to work as an exclusionary reason (as in the authoritative thesis). It is rather the lawgiver's subjective disposition (i.e., attitude) regarding the application of a certain norm to those cases that are characterized by the presence of an element that is not contemplated by such a norm, but is regarded as potentially relevant for other reasons.

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Logic in Law: The Positivist School of Buenos Aires

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Introduction

The use of logic in law is the distinctive feature of the so-called Analytical School of Buenos Aires. The starting point of this line of work can be set in the 1970s with the publication of Alchourrón and Bulygin's *Normative Systems* (Alchourrón and Bulygin 1971). In this seminal book, the authors present a new kind of analysis for legal systems. The originality of their approach is the use of logical tools to elucidate topics such as normative systems, legal gaps, completeness and consistency of legal systems, and legal consequence, among others.

The role of logic in law has been largely discussed. At first sight, logic has not a strict relation to legal philosophy. But if logic is related to rationality and reasoning, it seems to be lying behind activities such as legislation and adjudication, both being object of study of legal theory. Some perplexities on the role of logic in law come from the fact that when speaking about "logic," it is not very clear what it is referred to and what it can be used for.

Logic as it is known nowadays is characteristic of the origins of Analytic Philosophy. All early analytical philosophers shared the idea that logic and language were fundamental to philosophy. Now, there were also different insights on what logic was, what was its relation to science, what could logic be useful to. In the first part of this contribution, an historical/conceptual overview on these issues is exposed. The point is to inquire

about the analytical inheritance and the characteristics of the role of logic in the School of Buenos Aires.

Under the light of that review, a question will be posed. What kind of relation – if any – (theoretical, contextual, or other) can be found between the use of logic and the Analytic School of Buenos Aires' legal positivism?

The Analytical School of Buenos Aires

Before dealing with the questions posed, a brief account of the Analytical School of Buenos Aires is in order.

In the decade of 1960, a working group joined the Philosophy of Law Department of the University of Buenos Aires. Attending to the meetings were prominent Argentine legal scholars such as Carlos Alchourrón, Eugenio Bulygin, Genaro Carrió, Ernesto Garzón Valdés, Ambrosio Gioja, Eduardo Rabossi, and Roberto Vernengo, among others. For Alchourrón and Bulygin, the introduction of "modern logic" meant a new starting point in their approach to law.

Normative Systems (Alchourrón and Bulygin 1971) was published in Vienna, in English language, and had a great impact on the international community. After that, many articles in the legal philosophical debate took the ideas of Alchourrón and Bulygin for theoretical discussion. In the following years, both authors published many papers and books together and individually.

Some of the distinctions drawn by Alchourrón and Bulygin allowed to disambiguate topics that until then had remained obscure. The most fundamental are the distinction between norms and norm propositions, the latter as statements about the existence of a norm and – unlike norms – capable of being true or false; the distinction between the external and internal negation of a norm proposition, showing the ambiguity of "permitted," in order to prove that the principle "What is not legally prohibited is legally permitted" cannot be used as an argument in favor of the necessary completeness of legal systems; the distinction between a normative gap and an axiological gap, the first being a formal defect of a legal system and the latter an interpreter's hypothesis on what the law should be; the distinction between the hyletic and the expressive conceptions of norms having implications on the possibility of developing a logic of norms; and the distinction between generic and individual cases.

Most of Argentine legal philosophers within the analytical tradition, such as Ricardo Guibourg and Carlos Nino, and foreign scholars, such as José Juan Moreso or Ricardo Guastini, made many of these fundamental distinctions their own, even those not interested in logic.

More than 50 years later, the spirit and work of Alchourrón and Bulygin are kept alive by their followers. The meetings at the University of Buenos Aires are now led by Hugo Zuleta and Juan Pablo Alonso. Actually, it would be quite unfair to talk about the Analytical School "of Buenos Aires," since from that time until today, there are many legal scholars in other cities and universities across Argentina working within the analytic tradition in a remarkable role in the academic international debate: the group of legal philosophers at the National University of Córdoba led by Ricardo Caracciolo that once included names as Pablo Navarro and Cristina Redondo, the group at the University of Mar del Plata directed by Jorge Rodríguez and Claudina Orunesu, and others such as the group in the city of Bahía Blanca, just to mention some of them.

Logic in the Origins of Analytic Philosophy

Frege: Logic to Express Meaning

Analytic Philosophy is not itself a theory but a method, a distinctive way of dealing with problems of knowledge and science, taking language as the starting point.

In the analytical frame, language and meaning are considered themselves objects of philosophical reflection. This shift happened in the first decades of the twentieth century with the development of the so-called "modern logic." It is true that "logic" was the name for an important branch of studies since the ages of Aristotle, but it was

something radically different from what it is referred today as "logic."

Gottlob Frege is told to be the father of modern logic; his *Begriffsschrift* (Frege 1879) offered a quantificational form that implied a new way of looking at logic. Frege's point was essentially different from Boole's or de Morgan's (who were his contemporary mathematicians) working with logic as "empty calculus." He wanted logic to express meaning, not just abstract formulae.

Logical symbolism was conceived to show the deep structure of language (of any language). In this sense, logic exhibits the very possibility of meaning. These are key ideas of the origins of Analytic Philosophy. But what do they exactly mean?

Frege conceived two kinds of logical entities, concepts, and objects. Concepts or logical predicates are *what* it can be said *about* somebody or something; objects or logical individuals are people, objects, abstract entities, or whatever *about which* something can be said.

The different nature of both kinds of entities is shown in the logical symbolism: capital letters P, Q, etc. are used for concepts (predicate letters) and a, b, c, etc. for individuals (logical constants). Let's take P being "is a horse" and a being "Pegasus." P alone does not have any meaning ("is a horse" cannot be said to be true or false). Predicates have an unsaturated or incomplete nature. In the symbolism it is shown by an empty place attached to a predicate letter (something like this: "$P\ldots$"). On the contrary, logical individuals are saturated or complete. So, predicates must be combined with logical constants to form an assertion.

When the name for a logical individual (e.g., a) fills the incomplete place of a predicate, meaning happens: Pa means. The formula Pa shows the logical structure of the sentence "Pegasus is a horse."

When something needs to be said not about identified logical individuals, but about all or some individuals of a class, quantifiers are required. $\forall$ (universal quantifier) represents the meaning of "all," and $\exists$ (existential quantifier) represents the meaning of "some" or similar expressions of natural language. Quantifiers bound logical variables like x, y, z, etc. The formula $\forall x(Hx \rightarrow Ax)$ (For all x if x is a horse, then x is an animal) might represent the natural language sentence "All horses are animals." $\exists x(Hx \wedge Wx)$ (For some x, x is a horse and x is white) represents "Some horses are white."

Another important insight is that logical predicates are not the same as grammatical predicates. The sentence "Peter is taller than John," being a Peter, b John, and T the predicate "is taller than," is to be represented in the symbolism as aTb. T is a dyadic predicate with two places for logical individuals. At this point logical analysis differs from grammatical analysis: in the latter, "Peter" just would be the subject and "is taller than John" the grammatical predicate.

For Frege, the distinction between logical concepts and objects had ontological weight: both were different kinds of *entities*. Besides, his point was to ground mathematical knowledge on pure logic ("logicism"). Being as it may, the powerful conceptual apparatus for explaining the very possibility of meaning is itself independent of Frege's ontological assumptions and even of his own goals.

Wittgenstein's *Tractatus*: Logic as Limits of Thought

Historically, the introduction of Frege's writings in Cambridge University and then the publication of Wittgenstein's *Tractatus Logico-Philosophicus* (Wittgenstein 1922) can be considered the birth of Analytic Philosophy.

In the *Tractatus* most of the Fregean analysis of logic as showing the structure of propositions is assumed. The *Tractatus* is an inquiry into the possibility of language. How can signs mean? Unlike Frege, Wittgenstein was not thinking about entities, but about facts. The answer he gave in the *Tractatus* to the question about the possibility of meaning was the so-called picture theory. According to it, the world is ultimately composed of atomic facts ("logical atomism"). Facts can be expressed in language only because logic and reality share the same structure, they are isomorphic. So, logic (or language) pictures the world.

Any descriptive proposition can be told to be the case or not. But that logic and the world are

isomorphic is not a fact happening in the world. That logic and reality share the same logical structure is something that cannot be said, but it is *shown* in the very possibility of language. The idea that there are issues that are not expressible but are shown is known as the Doctrine of Showing. According to this insight, claims about logic, the structure of propositions, the picture theory, etc. cannot be expressed meaningfully.

The Doctrine of Showing combined with the last sentence of the book recommending remaining silent about what cannot be said gave place to different interpretations about Wittgenstein's point in drawing limits to what can be said (or thought) meaningfully.

The "Vienna Circle": Logic as Science

By 1930 philosophy of science had become the dominant branch of philosophy in the analytical tradition. The emergence of logical positivism around the so-called Vienna Circle played a crucial role. M. Schlick, F. Waismann, O. Neurath, R. Carnap, and H. Feigl were some of its prominent members.

The position of the "Vienna Circle," particularly in the beginning, can be characterized as positivism enriched with the instruments created by the new logic and combined with an anti-metaphysical attitude.

Like Russell, the members of the Circle were interested in advances of science. The group was enthusiastic on the ideals of technical progress and trusted in the use of logical tools to expand scientific knowledge, the only kind of knowledge they considered within the limits of rationality. Some of them hoped it would be possible to apply the methods of natural science to the problems of humanity. The realm of values was to be kept completely outside the sphere of knowledge.

Different Insights on the Role of Logic

Although early analytic philosophers shared fundamental ideas on the importance of logic, some differences on the role of logic can be found among them. Two specific topics are important.

A first topic is the relationship between logic and science: there were those who, like Russell and the members of the Vienna Circle, wanted to use logic to make philosophy "scientific" and those who in the spirit of Wittgenstein thought there was a clear and sharp difference between logic and philosophy on the one hand and science on the other. The philosophers of the "scientific" group hoped logic to be the ground for empirical knowledge. Instead, for the "philosophical" group, logic has nothing to do with any specific domain of objects but with the necessary features of language. Wittgenstein's logical atomism had always been unconcerned with epistemology, empiricism, or sense data (von Wright 1993). *Tractatus*' "simple object" was a peculiar category, so that when speaking of "objects," Wittgenstein and Russell were not talking about the same thing.

A second topic can be found in the theoretical disagreement between Carnap's position and the Wittgensteinian Doctrine of Showing. Carnap supported a conception according to which it *was* possible to speak meaningfully about the relation between a proposition and the fact described by it (Carnap 1963). Taking ideas from Alfred Tarski, Carnap proposed to speak about an "object language" (e.g., an axiomatic system) in a "meta-language." The latter was the philosophical language in which formal properties of a system – such as consistency or completeness – could be expressed. This meant the possibility of a "metalogic," later named by Carnap as "logical syntax." Different axiomatic systems (on physics, mathematics, or any other field of knowledge) could be construed as scientific models and then analyzed in the metalanguage with different theoretical goals.

On the contrary, the conception of Frege and Wittgenstein was grounded on the universality of logic (van Heijenoort 1967; Hintikka 1997). Logic shows the very possibility of meaningful thought, we cannot think illogically (3.03 *Tractatus*), so it is impossible – conceptually speaking – "going outside" logic to think or speak about it in a metalanguage. Logic itself cannot be grounded. It is ineffable.

The logical positivists of the Vienna Circle took the idea of limits of thought not in the sense of ineffability of logic – which is rejected by

Carnap – but instead to declare that discourses on morals, ethics, religion, and metaphysics or any other discourse different from describing facts of the world was speaking nonsense. Although some paragraphs extracted from the *Tractatus* fortified this anti-metaphysical spirit, it must be said that Wittgenstein's attitude towards those issues was completely different.

Ordinary Language Philosophy

With the end of the Second World War, a new generation of analytic philosophers grew in Europe, this time at Oxford University. As the name "Ordinary Language Philosophy" indicates, the new variety of analytic thinking was not much dedicated to logic or to philosophy of science. They developed another style of philosophical analysis, not paying attention to the symbolic system, but directly using the daily language to carry out the analysis. Some of the more important were John Austin and G. E. M. Anscombe. They had as inspiration the *Philosophical Investigations* (Wittgenstein 1953) – Wittgenstein's second period work – that meant a crucial shift in conceiving language, not as grounded in logic but in human social practices. There was no formal or systematic support in their methodology. In this respect, it was strikingly unlike the type of thought which Russell and the logical positivists had represented.

The School of Buenos Aires: Logical Analysis and Legal Positivism

Logic in the Analysis of Legal Systems

The introduction featured an inquiry about logic in the analytical inheritance of the School of Buenos Aires. Also, there was a question about the relation between the use of logic and the legal positivism supported by this group.

First, a terminological issue should be made clear. Sometimes, in a careless way of speaking, some of the members of the Analytical School of Buenos Aires are referred to as "logical positivists." After the review in section "Logic in the Origins of Analytic Philosophy," this terminology is revealed as quite wrong. Nowadays the use of logical tools for the study of some aspects of law combined with the defense of legal positivism does not make a scholar a "logical positivist."

The School of Buenos Aires uses logic to reconstruct legal systems as *deductive systems*. This means that norms promulgated by the authority are in the axiomatic base and all their logical consequences belong to the system. In this sense, law can be reconstructed as a set of norms closed under the notion of logical consequence.

Within this frame logic can be used as a methodology. It consists in taking a specific domain (i.e., a set of legal norms) and treating it as a deductive system. Norms are conceived as conditional statements: the antecedent expresses a set of legally relevant properties and the consequent the normative solution given by the authority. For a specific legal topic, it is possible to identify the relevant properties considered by the legislator. Considering the presence or absence of each of these properties, a set of generic cases can be constructed. Then, it is possible to check if every case of that set has a legal solution provided by the system. This procedure allows determining if the system is complete and consistent or – from the other side of the coin – to investigate if it has any formal defect: a normative gap or a normative contradiction.

In this sense, the role of logic is instrumental. The "logical analysis" proposed by the Argentine authors does not imply a philosophical reflection on norms or on the nature of law, but just a procedure to deal with a set of legal rules as an axiomatic system and its logical consequences.

As Alchourrón and Bulygin (1971) say, the methodology presented in *Normative Systems* does not take any position about the origin of the statements of the axiomatic base. In this sense, the analysis is compatible with natural law theories and legal positivism.

The logical reconstruction of legal systems seems to inherit Carnap's instrumental view of logic. This kind of analysis uses logic as a tool; it takes a neutral attitude in relation to the philosophical language or to ontological questions. According to the Carnapian idea of tolerance, anyone is free of using the language in the most efficient way. Logic can be applied to a specific domain to develop a scientific theory of it.

Accordingly, it has been stressed that the approach in *Normative Systems* is not a theory of law in the same sense Kelsen's *Pure Theory of Law* or Hart's *The Concept of Law* are. It is rather a methodology to be used by any theory of law if a legal system is to be conceived as a deductive system (Moreso 2005), that is, as independent of any ontological position.

The Relation Between the Use of Logic and Legal Positivism

Being things that way, the use of logic by the School of Buenos Aires would not lead necessarily to legal positivism as a theoretical consequence. Rather, the positivism supported by the members of the School of Buenos Aires is grounded in classic positivist theories such as Kelsen's and Hart's.

Kelsen was a moral skeptic, and the anti-metaphysical spirit of the Vienna Circle had a great impact on his thought. But Kelsen's legal positivism is clearly distinguishable from the logical positivism propounded by the Vienna Circle**.** Since Kelsen distinguished legal norms not only from moral judgments but also from causal judgments of natural science, his point was to remark the normative dimension of law. Perhaps logical positivists' inheritors can be better found in naturalistic approaches to law.

Hart was aligned with the "Ordinary Language" analytic philosophers at Oxford. As it was said in section "Logic in the Origins of Analytic Philosophy," they did not use logic neither as a formal support nor as methodology.

Now, among the members of the Analytical School of Buenos Aires, there is a general agreement on the social source thesis (i.e., that the existence and content of law do not depend on morals but on social facts). According to Bulygin (2006), what positivism claims is that there is no necessary or conceptual link between law and morality; this does not mean to deny that law and morality have many factual links: historical, social, political, and linguistic. Positivism asserts that identifying a norm or a system as law is a descriptive task that does not require moral evaluation.

Being as it may, there is no theoretical relation between the use of logic in the reconstruction of legal systems as deductive systems and the support of legal positivism in the sense that the latter is not a consequence of the logical analysis.

Now, this conclusion seems quite right regarding just the *identification* of law. This would be a modest positivism, the kind that Carlos Nino has called "methodological positivism" (Nino 1988).

Regarding the *application* of law, things turn out to be more complex. From this point of view, analyzing completeness and consistency of a legal system appears closely related to the justification of judicial decisions, in the following sense: Law should contain one and only one solution for each legal problem; otherwise, the judge will not be able to solve the problem by mere application of the law (Bulygin 2014).

This implies that the identification of a norm as belonging (or not) to a particular legal system is crucial to determine whether a judicial decision applying that norm to an individual case is going to be considered "according to the law."

Logic appears in another insight: the so-called legal syllogism. Roughly: legal reasoning can be modelled in the likeness of a deductive argument, having as its first premise a general legal rule (regimented as a deontic conditional statement linking a set of circumstances with a normative consequence) and as its second premise a statement of the relevant facts. Following *Modus Ponens*, the content of a judicial decision can be deduced as a logical consequence from the premises. For example:

$\forall x(xMy \rightarrow OSx)$ (For all x if x *Murders* y, then it is *Obligatory* that x is *Sent* to prison)
aMb (*Amy Murdered Bob*)
OSa (It is *Obligatory* that *Amy* is *Sent* to prison)

In this sense, for a judicial decision to be in accordance with law, it must be a logical consequence of the norms of the system. This is a strong claim. It has been criticized as a sort of "formalism," on the bases of not giving conceptual room to implicit circumstances that sometimes may defeat the solution provided by general norms of legal systems.

Of course, judicial decision-making is a complex process in which issues of identification, interpretation, proof, and many others are involved, so that the legal syllogism as a schematic reconstruction would only be possible once all the other problems have been solved. The controversial topic regards the role of defeating circumstances in legal reasoning.

For instance, murder may admit of exceptions such as acting in self-defense (D) that are *explicit* in the formulation of other norms of the system. In this case, the first premise can be reconstructed as $\forall x((xMy \wedge \neg Dx) \rightarrow OSx)$ (For all x if x *Murders* y, and x does not act in *Self Defense*, then it is *Obligatory* that x is *Sent* to prison) so that the conclusion is still deductive. Now, what about *implicit* exceptions? Are they to be accepted in law? "Formalism" would answer that *implicit* exceptions are not admitted. Unlike formalism, legal positivism may admit implicit exceptions. What turns to be controversial is when, how, and why an implicit exception is to be identified as such.

The School of Buenos Aires does not support formalism but exclusive legal positivism. What exclusive legal positivism claims is that a certain circumstance is not going to be considered an exception because it is just (i.e., for being a *moral* defeater exceptionally incorporated in law as inclusive legal positivism would say), but because it has been identified as a *legal* defeater.

Now, to identify a *legal* defeater as such is a task that cannot be solved by logic. What logic can do is to help in dealing with exceptions and defeaters in the reconstruction of legal reasoning.

When analyzing the problem of defeasibility of conditional statements, Alchourrón (1993) proposes a methodology to make room for the possibility of exceptions and, at the same time, to keep the antecedent as a sufficient condition for the consequent. It consists of a function of revision on the antecedent of the conditional statement. The set of explicit circumstances in the antecedent is expanded adding the relevant circumstance (C) with a negative sign ($\neg$ C) representing something like "as long as it does not happen that. . .." Having expanded the antecedent in this way, the total content of the conditional is contracted (its scope is reduced), and so the conclusion is preserved, and the deductive character of the reasoning.

How can this work in law? Alchourrón (1996) presents a dispositional approach to defeasibility in law. To apply a norm, implicit circumstances must be identified to determine counterfactually if any of them would have been considered as an exception by the authority, in other words, to investigate if the legislator would have had the disposition to reject the conclusion in case of the occurrence of that circumstance. If that is the case, the circumstance is considered relevant (i.e., an exception), so the "introduction" of the exception by the judge is considered according to law. On his part, Rodríguez (2012, 2021) requires exceptions to be enumerable and exhaustively listed; otherwise, for him, general legal rules would be incapable of justifying any deontic qualification in a particular case.

At this point it is necessary to summarize the role logic plays in the exclusive legal positivism supported by the Analytical School of Buenos Aires.

Regarding the identification of law, in a modest way of understanding "positivism," the reconstruction of legal systems as deductive does not seem to carry with it any substantial commitment at the level of legal theory (for instance, legal positivism or natural law theory).

Regarding the application of law, logic plays a role that is twofold: (i) in the reconstruction of legal systems, logic works as a tool to check the completeness and consistency of the system; (ii) in the reconstruction of legal reasoning, logic is used for the revision of premises by making explicit implicit circumstances in the antecedent of the conditional in order to identify exceptions that could have been considered as such by the legislator and, that being the case, to license the judge to acknowledge them as conformable with the law.

In this line, legal principles do not play a distinctive role within the frame of the School of Buenos Aires. Regarding identification, legal principles are part of the law if they are recognized as such according to the social source thesis as it is understood by exclusive legal

positivism. Regarding adjudication, the use of logical tools becomes relevant as a kind of rational control: balancing does not seem an appropriate way to justify judicial decisions because it is an intellectual task proposed to have effects only for the case at hand. Instead, conflicts between legal principles should be resolved establishing a conditional preference as a sort of "construed" general rule to be applied to all individual cases in which the same circumstances are present. Only under this assumption would it be possible to talk about subsumption and so to justify the application of a principle as the legally right answer to a case.

Conclusions

Being a broad current of thought, Analytic Philosophy included from its very beginning different philosophical assumptions and methodologies regarding logic.

Alchourrón and Bulygin's reconstruction of legal systems as deductive seems to inherit Carnap's instrumental view of logic with a neutral attitude towards the nature of law or the source of the norms belonging to a legal system. The use of logical tools would not have as a theoretical consequence the positivistic approach. The relation between the use of logic and the School of Buenos Aires' legal positivism would be merely contextual, in the same sense in which Kelsen's and Hart's positivistic assumption about the separation of law and morals is a thesis that, although contemporary with the growth and development of Analytic Philosophy, is not grounded in logic.

That being said, regarding the application of law, logic *does* play a twofold role: in the reconstruction of legal systems and in the reconstruction of legal reasoning. In both domains, logic is used to make explicit what is implicit in law: a norm that is a logical consequence of another norm of the axiomatic base or an implicit exception to a norm issued by the authority. The social source thesis, and the justification of the way exclusive legal positivism understands it, is a matter that goes beyond the scope of logic.

Cross-References

▶ Legal Positivism: Exclusive
▶ Legal Positivism: Inclusive

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Louverture, François-Dominique Toussaint

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Introduction

François-Dominique Toussaint Louverture (c. 1743–1803), known popularly as Toussaint Louverture (sometimes written L'Ouverture), was born Toussaint Bréda in the French colony of Saint-Domingue (contemporary Haiti). An enslaved man of African descent, he was forced to work on the Bréda sugar plantation at Haut de Cap. The year of his birth is contested, although many situate this around 1740. This degree of uncertainty is reflected in many (often mythologized) details of Louverture's life before the outbreak of the Haitian Revolution in 1791, but it is generally accepted that he was the descendant of people from Allada in the Kingdom of Dahomey (contemporary Benin). An enslaved person, Louverture did not work in the fields but in a domestic context and appears to have been a coachman on the Bréda plantation (he was known as the "Centaur of the Savannah"). He had specialist knowledge of traditional medicines (earning him another title, "docteur feuilles"), and it is possible that he received education from the Jesuits before their expulsion from the colony in 1763.

Taught to read by his godfather Pierre Baptiste, Louverture was, according to legend, influenced by Guillaume-Thomas Raynal and Denis Diderot's *Histoire philosophique des Deux Indes*, the revolutionary text from the late Enlightenment which denounced colonialism and the transatlantic traffic in enslaved Africans. Louverture was not yet, however, the revolutionary figure, already widely known in his lifetime, who would become a global icon arguably only rivaled in his visibility by Che Guevara. Indeed, around 1775, he was emancipated from slavery and appears for a while in the 1780s to have owned or at least supervised several enslaved Africans (including his future general, Jean-Jacques Dessalines). By the outbreak of the Haitian Revolution in 1791, Louverture had resumed his role as a (now salaried) coachman.

The Emergence of a Revolutionary

Louverture's role in the early years of the Revolution has been widely debated. While it is claimed he was present at the foundational *Bwa Kayiman* (Bois Caïman) ceremony in August 1791, he was not central to the outbreak of revolt and appears to have ensured that this own family and that of his former supervisor Bayon de Libertat were safe before joining the action. Louverture then rallied to George Biassou, one of the early leaders of the Revolution, serving as a doctor to his troops. He seems rapidly to have risen to prominence, taking part in early (ultimately aborted) negotiations with the French authorities over the release of white prisoners and the return of the enslaved to work. Closely allied with the Spanish in the Western part of the island, the black revolutionaries consolidated the extent of their rebellion, with Louverture distinguishing himself as a military tactician. It was at this time that he adopted what is now used as his surname in reflection of his ability to force an opening through enemy lines.

In a dramatic volte-face, Louverture broke with Spain and entered an alliance with the French in 1794, following the French Convention's proclamation of the abolition of slavery. He led a military campaign to defend the gains of the Haitian Revolution on two fronts, against the Spanish but also the British (who had begun a five-year occupation of parts of Saint-Domingue in Autumn 1793). In parallel, he worked to re-establish the colony's economy, building up agriculture and exports. As a reward for defending the French governor Laveaux against attack by the rebel free colored commander Jean-Louis Vilatte, Louverture was appointed Lieutenant Governor of Saint-Domingue in 1796 and, the following year, commander in chief of the colony's army.

Consolidating Power

This period of Louverture's consolidation of power was accompanied by his growing rivalry with representatives of the French state in Saint-Domingue, notably Sonthonax and Hédouville, both of whom he forced to leave the colony.

The revolutionary leader's autonomy became increasingly apparent as in 1798 he signed trade treaties with both the British and the USA. His relationship with the new French agent to the colony Philippe Roume was for a while more constructive, and he resisted any pressure to declare independence as his focus continued to be on defending the abolition of slavery. Conflict continued, however, with a civil war (known of the War of Knives) breaking out in the south of the colony, led by the free colored general André Rigaud. In 1800, countering Roume's wishes, Louverture invaded Santo Domingo, abolished slavery in the Spanish colony and united the island of Hispaniola under French rule.

Rise and Fall

Louverture's power was confirmed and consolidated in 1801 when, in his new constitution, he declared himself governor-general for life. Despite the commitment to the abolition of slavery in perpetuity, the imposition of draconian decrees, confining the formally enslaved to their plantations, led to growing tensions on the ground. A rebellion led by Louverture's nephew Moïse was brutally repressed in October 1801 and its instigator executed, undermining support for the governor-general. At the same time, Napoleon Bonaparte sent an expeditionary force of 20,000 troops to the colony, commanded by his brother-in-law Charles Leclerc, to reassert power over Louverture and reimpose slavery. The French troops arrived in January 1802, and after a brief but brutal campaign, the Haitian generals Dessalines and Christophe (future leaders of Haiti, post-independence) switched allegiance to the French, precipitating Louverture's surrender in May. He withdrew to his plantations at Ennery but was captured by the French the following month and exiled with his family in France. Imprisoned in the Fort de Joux in the Jura, Louverture wrote a memoir in an attempt to exonerate himself, but subject to deliberate neglect by the French state, his health declined rapidly, and he died on 7 April 1803.

On boarding the ship that took him from the colony, Louverture had claimed: "In overthrowing me you have cut down in Saint Domingue only the trunk of the tree of liberty; it will spring up again from the roots, for they are numerous and they are deep."

In Haiti, he is known as the "Precursor," but his leadership of the Revolution, grounded in tactical brilliance combined with diplomatic and political prowess, was central to the proclamation of the county, by Dessalines (the "Liberator") on 1 January 1804, as the first black-led republic and the first independent state of the Caribbean.

Afterlives

Posthumous reputations of Louverture, of which there are many, have explored and often contested his political motivations and the philosophical underpinnings of his actions.

Susan Buck-Morss has suggested that the Haitian Revolution had an impact on Western philosophy, notably in the formulation of Hegel's master-slave dialectic.

Louverture's key contribution, however, was in his practical formulation of the notion of what Nick Nesbitt dubs "universal emancipation," a pushing of the Enlightenment and French revolutionary values of liberty, equality, and fraternity to limits largely unimagined and unimaginable in Europe in the eighteenth and nineteenth centuries. His absolute commitment to maintaining the freedom of the enslaved represents an inclusive application of human rights, universally and unconditionally, including on grounds of race and ethnicity.

Aimé Césaire saw also in Louverture the destruction of the "ontology" of colonialism, with the assumptions of racial superiority (and inferiority) this implied.

The afterlives of Louverture have been numerous and his influence deep. Still powerfully

present in Haiti, where politics often pit "Louverturians" against "Dessalinians," he has also been widely refigured in global literature and the visual arts, in particular in the interwar period when he impacted considerably on both the Harlem Renaissance and Pan-Africanism. The Haitian Revolutionary leader was also a common theme for anticolonial and postcolonial writers and thinkers in the Caribbean, including C.L.R James and Aimé Césaire, Edouard Glissant, and Derek Walcott. He has been widely represented in art, by painters as varied as Jacob Lawrence and Lubaina Himid, and is increasingly visible in popular culture (especially in comics), although a major film is yet to be devoted to his life.

Louverture's commitment to black empowerment and liberation has ensured his adoption as a point of reference in revolutionary movements across the two centuries since his death, including in more recent struggles such as the Cuban Revolution.

His influence has also been evident in the Black Power and Black Lives Matter movements. Louverture is associated with a portability and translatability not evident in engagement with the other two principal leaders of the Haitian Revolution, Dessalines, and Christophe. His biography reveals complexities, ambiguities, and even contradictions that have allowed him to be conscripted to a variety of causes. Historians within Haiti and beyond consequently continue to debate his political and cultural legacies. Cast as the "Black Spartacus," Louverture operates as both warning and inspiration. He remains one of the most significant figures of the Age of Revolutions, whose incendiary defiance of both enslavement and colonial empire continue to resonate in the twenty-first century.

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► Hegel, Georg Wilhelm Friedrich

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Love

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Introduction

Love is among the most valuable things in life. It is also complex, and relates to many moral and social issues. In this entry, we first outline what some of the different kinds of love are, before turning to explore what love actually is: a biological response, an emotion, or a syndrome. We then look at some different accounts of romantic love, considering in particular whether it is best thought of as rational or arational. Finally, we examine

love's relationship to morality, and finish with a brief overview of some of the philosophically interesting issues related to marriage.

Different Kinds of Love

The Ancient Greeks had several different words to describe different kinds of love. The three most commonly referred to today are the following: (1) *agape* – the kind of unconditional love for humankind we often attribute to God, (2) *eros* – sexual or erotic love, and (3) *philia* – the kind of love felt between friends. In the modern English-speaking world, we use the one word "love" in many different ways: I might say that I love my mother, my uncle, my daughter, my friend, my boyfriend, my job, cycling, chocolate, and democracy. My love for each of these people and things shares some similarities but also differs. For example, while I care for my mother's interests in that I want her to be happy, perhaps I find her difficult to be around, and so I do not want to spend a great deal of time with her. Conversely, my love for my boyfriend, for example, might entail a desire to spend a lot of time with him, in addition to caring for his interests. On the other hand, it does not seem to make sense to say that I even care for the interests of chocolate, since chocolate does not really have any interests to care for. We also tend to assume that romantic love will involve a sexual element, while familial and friendship love typically do not; for an account of the relationship between love and sex, see McKeever (2016), and for recent discussion of asexuality, see Brunning and McKeever (2021). In this entry, we are primarily concerned with romantic love, though it is worth noting that even "romantic love" can refer to different kinds of love. There is limerent love, the kind of passionate intense love that one feels at the beginning of a romantic relationship. But there is also long-term companionate romantic love felt between two partners who have been together a long time that might feel neither passionate nor intense. And there is also unrequited romantic love that takes place outside of a romantic relationship but might nonetheless feel akin to the love felt within one; see Prostasi (2014).

What Is Love?

Let us begin by considering what (romantic) love is. One suggestion is that romantic love is merely a biological response to someone: a "fundamental human drive" akin to our drive to eat food, that motivates us to do things which are good for the propagation of the species (Fisher et al. 2006). However, biology cannot provide us with a complete account of love, as it does not address all of the important normative and social elements to love. Biology might be able to tell us about the brain chemistry involved in love, but it is a further question how we respond to these chemical facts. Are there elements we want to embrace, or elements we think we should distance ourselves from? Moreover, biology cannot tell us what it *feels* like to be in love, nor how the way that love is experienced, particularly romantic love, differs between time periods and cultures, which suggests that it is not *merely* a biological response. Carrie Jenkins gives the example of a woman falling in love in Victorian England compared to a woman now: "For the Victorian lady, falling in love is a matter of developing a deep and respectful (but probably rather distant) admiration for a man. Sexual desire is at best irrelevant to this process, at worst a shameful distraction" (Jenkins 2017, p. 43).

Love is often considered to be an emotion, similar to other emotions such as sadness, joy, or anger. This would mean that biology was involved in it, but, just as with other emotions, there would be cultural influences involved too. Love certainly can feel like an emotional response, and it often comes along with many other emotions, such as not only happiness and excitement, but also jealousy, fear, vulnerability, and sadness. However, it differs from other emotions too. One suggested difference is that one does not have to *feel* in love to be in love. If I love my partner, for example, this does not mean that I experience the feeling of love for them 24/7. Love might begin as an emotion, but develop into something more stable (Pismenny and Prinz 2017).

Another way of thinking about what love is is that it is a kind of syndrome, similar to a syndrome like depression, "not a kind of feeling, but an intricate pattern of potential thoughts, behaviors, and emotions that tend to 'run together'" (de Sousa 2014, p. 4). For example, love might involve, for some people at least, thinking that their beloved is a wonderful person, doing kind things for them, and feeling happy when they are together and sad when they are apart. Syndromes can be culturally influenced, manifest in different ways in different people, are context-sensitive, and can be thought of as a rational, rather than rational or irrational (Pismenny and Prinz 2017).

Different Accounts of Romantic Love

Philosophers have proposed several different accounts of what romantic love is. One issue concerns whether love is rational or arational. Rationalist views take different forms, but they all hold that love can be an appropriate or justified response to something about the beloved, or one's relationship with them. Proponents of arationalist view think that love does not work this way; it is not justified or appropriate; and it just is. Let us catalogue these different views.

Some rationalist views hold that love is a response to the qualities of the beloved: Sara loves James because he is kind and handsome. This helps capture some of our intuitions about love, but it also raises some problems. For people's properties change over the course of their lives, yet love often persists. This invites an objection, known as the "trading-up" objection, where if Sara's love for James is justified because he is kind and handsome, then she would be justified (or perhaps even obliged) to trade-up if she found someone else who was kinder or more handsome; see (Nozick (1989, pp. 76–77)) for the classic statement of this objection.

Another set of rationalist views hold that love is not a response to the particular properties of the beloved, but instead something like their essence. On such a view, Sara does not love James because he happens to be kind and handsome, rather she loves James because he is James or just a person; see Velleman (1999) for a powerful articulation of the latter position. This view seems to overcome the trading-up objection; after all, presumably no one else will be more James than James, or more of a person than he is either. In divorcing love from the qualities of the beloved, it also helps to account for how love can persist over time, while people's qualities change. But it raises new problems. It seems to make love mysterious. After all, what does it mean to love just a person, or James with no reference to any of his qualities?

A natural thought at this point is that these accounts have missed out a crucial element of love, namely, a loving *relationship*. After all, love does not typically occur at a distance, with rational agents appropriately responding to each other's qualities or essences. It typically occurs within a loving relationship; for an extended account of such a view, see Kolodny (2003). And perhaps this helps us overcome the above problems. For if what Sara loves is the relationship with James, then this could explain not only why love persists over time and through changes in properties, but also why she should not look to trade up. It could also make sense of some particularity too; after all, they have their own unique relationship and history. But then a version of the above problem with the essence view returns. For what would it mean to love a relationship with someone with no respect to their qualities? It would be odd if Sara disliked everything about James but valued their relationship; that does not sound like healthy love.

In response to these sorts of issues, one might be tempted to adopt arational account of love. According to such a view, love is best thought of not as a response to reasons, but as something that just *is*. Sara might say she loves James because he is kind and handsome, but these are not reasons, they are causes of her love. And love is fundamentally not reason-responsive, but a brute product of human drives. Such a view helps capture some of our intuitions about love, but it also does seem to lose the fact that love seems like it can be justified. If two people find each other to be kind, and sustain a loving relationship, that love does seem appropriate.

The literature thus appears to be at an impasse. And perhaps, this is not surprising. After all, love is one of the most complicated and intriguing aspects of human life, and why should we think there would be an easy conceptual account of it? There are several promising avenues being developed, which we have not discussed here. These include hybrid views, where a loving relationship helps one to see certain qualities in the beloved, as well as providing a space where certain qualities (such as care and intimacy) can develop – see Abramson and Leite (2011); there are also positions that view love as a particularly generous way of seeing someone – see Jollimore (2011); as well as views that conceive love as a response to particular individuals (where the individual is understood as connected to their properties in a wholistic sense) – see Clausen (2019). Finally, McKeever and Saunders (2022) have recently argued that there are important and overlooked irrational elements to love.

The Relationship Between Love and Morality

Is love related to morality, and if so, how? Here we find a similar dialectic to what we saw with love and reason. Some philosophers think that love is essentially a moral emotion, where others think love is amoral.

What would it mean for love to be moral? One basic idea is that love is a good thing, and indeed, a morally good thing; see Velleman (1999). On such accounts, love at its essence involves a combination of intimacy, trust, vulnerability, and care for the beloved, and those are moral qualities.

Other philosophers disagree. They see love as an independent force, something that not only can align with morality, but also can diverge from it. In practice, this is almost certainly true. For love can make people do awful things. But does this hit upon the essence of love, or is it just a possible negative side effect, something love can lead us to do, where love at its essence remains moral? The answer to that question will depend upon what one thinks the essence of love is. Is it some peculiar chemistry or connection one feels for another, some arational bond or link? If so, then there is no reason why that would be essentially moral – one might, for example, love an immoral person. Or does love essentially involve intimacy, trust, and care? If so, perhaps it is moral.

Another option would be to think of love and morality as not necessarily connected in any particular way, but overlapping. That is, one could accept that they are different domains, and different values, that, nevertheless, have some important connections between them.

Love and Marriage

One area of love about which legal and political philosophers might be interested is in the degree to which it ought to be regulated through marriage. Marriage used to be available only to opposite-sex couples. This might have been both a cause and a consequence of a view held by some people that only romantic love felt between opposite-sex couples ought to be legally recognized and supported by the state, or perhaps even that "true" love could not be experienced between same-sex couples. In 2005, civil partnerships became available for same-sex couples in the UK, and in 2014 the first same-sex marriages took place. In 2015 in the USA, same-sex marriages became legal throughout the country.

Another way in which the state regulates marriage is by allowing marriages to be between no more than two people. Furthermore, while the state does not *require* married couples to be in a sexual relationship, the fact that (opposite-sex) marriages can be annulled if they are not consummated certainly implies that the state expects that marriages will be sexual.

Some philosophers have argued that the state should be more pluralistic about marriage. Cheshire Calhoun, for example, argues that: "In a pluralist liberal society, one would expect that there would be a plurality of marriage or relational options rather than a single state form of marriage" (Calhoun 2005, p. 1037). Elizabeth Brake agrees. She proposes a widening of the definition of marriage to allow any caring relationship – not just romantic or sexual relationships – to be recognized

as a "minimal marriage" and to be supported by the state. She summarizes the idea of a minimal marriage as follows: "The central idea is that individuals can have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the sex and number of parties, the type of relationship involved, and which rights and responsibilities to exchange with each" (Brake 2010, p. 303). Thus, the package of rights that is conferred by marriage could be broken up, so a person could have minimal marriages with several different people to whom they conferred *different* rights. For example, John might minimally marry Paul, his friend, and Chloe, his cousin. Paul might be the person for whom John would apply for a spousal visa were he to move abroad, but Chloe might be the person on whom he puts his life insurance and pension plan, and who will have automatic spousal rights to visit him should he be hospitalized.

Conclusion

In this entry, we have given a brief overview of some of the philosophically important and interesting issues relating to love: how to define it, whether it is responsive to reason, how it relates to morality, and how we should think about marriage. If you are interested in exploring these issues further, we encourage you to have a look at some of the articles listed in the Reference List.

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Luban, David

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Introduction

In a career bridging more than three decades, American legal philosopher David Luban (b. 1949–) has made leading contributions in debates about human rights, just war theory, international law, legal ethics, and legality of torture by the US Government. Luban is best known for the way he anchors human rights arguments in a conception of human dignity. Although it emerges gradually in these detached fields of academic discourse, Luban's interpretation of human dignity places his contributions among the most compelling and eloquent platforms so far devised to support of universal human rights.

Human Rights and Human Dignity

The strategies to philosophically defend human rights spring from numerous traditions. Among the notable approaches, "contractarians" emphasize the obvious connections between human rights and personal freedom, while "consequentialists" focus on human rights for provision of basic human needs. Other theorists defend human rights by a strategy of "inference" based on the observation that *all* political entitlements ultimately depend on basic security and subsistence.

The bedrock of Luban's philosophy is the proposition that human rights are best understood as safeguards for human dignity. Like the other proponents, Luban recognizes that human rights are held by human beings individually and held by all. But in contrast to many alternatives, his theory is crafted from a conception of what makes human beings inherently valuable – our status *as* human beings – which according to Luban is the value ultimately at issue in conflicts over human rights.

The advantage of making human dignity foundational is the authority it brings to the human rights position. All defenders of human rights agree up to a point with the view that human dignity is a value worthy of allegiance. When the original drafters of the *Universal Declaration of Human Rights* formulated the text for their monumental document, they too decided to place human dignity at the center of the new global order. They proclaimed in Article 1 that *All human beings are born equal in dignity and rights*.

Even if abstract concepts like human dignity fail to satisfy human rights theorists who support the rational arguments offered by contractarians or the positive outcomes praised by consequentialists, theorizing about human dignity helps to focus attention on one thing we all presumably believe is fundamental about human rights. To the extent that a normative theory of human rights should draw upon and illuminate real-world institutions and controversies, Luban's corpus deserves praise for giving clear expression to this critical thread in the modern human rights tapestry.

Just War Theory

Luban's earliest academic contributions are in "just war theory," the historical discourse dating back to thinkers like Augustine, Aquinas, and Grotius. That discourse was resurrected in 1977 with the publication of Michael Walzer's *Just and Unjust Wars* (1977). Walzer's book offered a new doctrine of just war built from two paradigms: the traditional just war doctrine and the twentieth-century paradigm of human rights. In the eyes of critics, Walzer failed to fully appreciate the significance of human rights; he set out to modernize the ancient tradition and place it on a secure foundation, but Walzer ultimately granted significance to the traditions and territories of sovereign states, a weakness revealed most seriously in his treatment of "humanitarian intervention."

Luban's essay "Just War and Human Rights" (1980a) rejects both what he views as the dominant state-centered framework and Walzer's manner of applying it to humanitarian intervention. He agrees with Walzer's assumption that states must be legitimate in order for moral duties in international affairs to exist. But, in the context at hand, Luban insists that "legitimate" means "nothing other than legitimate as determined by social contract theory" (165).

Two strands in social contract theory must be differentiated. The first, which Luban associates with John Locke, is the "horizontal" social contract, which differs from the "vertical" contract linked to Thomas Hobbes. To be sure, the horizontal social contract helps to reveal the ties that bind a cultural nation; but only a vertical social contract, Luban argues, warrants final authority in our judgments about intervention. Only a vertical contract leads to a convincing argument for the legitimacy of a state. "A state's rights can only be established through a vertical contract, which according to social contract theory means nothing more or less than that the state is legitimate" (168).

Concerning the constraints of *jus ad bellum* (the portion of traditional just war theory concerning when states should commence war), Luban argues that a justified war is one "in defense of socially basic human rights" (175). On this view, a sovereign state is entitled to

wage wars of enforcement if such wars are necessary to secure the twin rights of security and subsistence.

Moreover, as Luban proceeds to explain in his essay "The Romance of the Nation State" (1980b), the entitlement to basic rights is neither limited by nor dependent upon the boundaries of existing states. The entitlement stems from the cosmopolitan foundation of human rights, which are said "to accrue to people no matter what country they live in and regardless of history and traditions" (396). Hence, countries should intervene militarily on the side of socially basic human rights, "for it is these which enable people to enjoy their political rights" (397).

Luban's critique exposes a weakness in Walzer's discussion of intervention, and it draws force from a type of cosmopolitanism that demands respect for individual persons, without regard to their status as citizens of a particular state. Other prominent critiques of *Just and Unjust Wars* seized on the same issue and confronted Walzer using similar forms of cosmopolitanism.[1] They have come to reflect a formidable theoretical challenge, and the exchange between Walzer and his cosmopolitan critics introduced a new generation of theorists to the complexities of war and intervention.[2]

Legal Ethics

Another area where human rights are the focus of contestation is the work of lawyers in the profession of law. What role do theoretical arguments about human rights and human dignity play in legal practice? In what ways do philosophical values diverge from standing institutions? Do standing legal institutions properly restrict lawyers' responsibility to zealously defend clients' rights?

Legal Ethics and Human Dignity (2007a), a collection of Luban's reflections on these and other questions of legal ethics, sets forth an emphatically progressive framework for the field.[3] The book defends a series of controversial proposals in favor of mandatory pro bono work, greater availability of legal services, renewed interest in public interest law, narrowed confidentiality requirements in corporate law, and for a general reaffirmation of the contribution of lawyers to a healthy democracy.

At a basic level, Luban defends what is known as the "advocacy system excuse" – the view that a lawyer's work is insulated from ordinary judgments of ethical obligations. The adversary system excuse explains why a lawyer's work is "governed by a role morality that differs from common morality" (1988: *xx*). Lawyers are not subject to ordinary social standards because of the nature and importance of their work; they perform an essential role advocating for citizens involved in the complexities of the courts, and due to the nature of this work, it is not surprising if lawyers find themselves ethically compromised on a regular basis.

This "role morality" is a contrast with other legal traditions, notably socialist and "inquisitorial" systems of law, where the innocence of accused citizens is not guarded by the presumption that characterizes Anglo-American law and where powers of judges are greatly expanded. There, lawyers are not held to the same standard of zealously defending each client, and according to Luban, the adversary system excuse is endorsed (merely) because it is superior to conceivable

[1] Prominent challenges to Walzer's theory were advanced by Richard Wasserstrom, Gerald Doppelt and Charles Beitz. For the best-known critical essays, see the following: Wasserstrom (1978), Doppelt (1978); and Beitz (1979).

[2] I have neglected to discuss Luban's contributions in the area of *jus in bello* (the portion of just war theory concerning individual soldiers' actions in combat). In this area, Luban has produced pioneering works connecting just war arguments to the emerging area of international criminal law. Arguably the most prominent are the following three: (1) Luban (2011); (2) Luban et al. (2014); and (3) Luban (2004).

[3] *Legal Ethics and Human Dignity* reappraises, expands, and updates arguments originally defended in Luban's earliest work on legal ethics, called *Lawyers and Justice* (1988). Together with a casebook entitled *Legal Ethics* (coauthored with Rhode and Cummings 2013), these three works on the ethics of legal practice represent a significant segment of the field.

alternatives in this important respect. "The adversary system, despite its imperfections, irrationalities, loopholes and perversities, seems to do as good a job as any at finding truth and protecting legal rights" (1988: 92).

More to the point, Anglo-American law is superior to its alternatives because it has evolved effective institutional protections to safeguard the dignity of individual citizens. As Luban tells it, a lawyer's basic task is to convey the "story" of each client – to communicate, in the language of courts of law, the legal interests which best reflect the individual story. A legal system without lawyers is a system where clients' stories are left untold, which is surely a system predisposed to disregard the legitimate claims of its citizens.

Needless to say, both Luban's proposals and his general strategy of defending Anglo-American law brought a mixed reaction in the legal community. To many readers, its arguments issued from noble idealism rather than analysis anchored in legal practice.[4] Less sympathetic reviewers questioned the foundation of Luban's theory, the proposition that human rights are best conceived as tools for protecting the dignity of individuals. After all, in a significant number of cases, one finds the adversary system excuse generating serious tensions with the dignity argument: how are lawyers advancing human dignity when they advocate for clients who are devious or attempting to manipulate the courts?[5]

Notwithstanding the critical discussion they continue to provoke, Luban's books and essays have earned a place among the most highly regarded works on the ethics of legal practice.

Torture

Another area of contestation for human rights is the debate on the practice of torture by the US government. It may seem starkly obvious that torture violates core principles of liberal democracy. Nearly all the world's democracies legally disallow torture, and the US Constitution in particular is known to condemn all forms of the practice. But with torture officially entrenched in the years following 9/11, philosophical arguments about how to characterize human rights became issues of great political importance.

A common theme in debates about torture is the metaphor of the "ticking time bomb."[6] The metaphor's clear purpose is to open a path to a more tolerant point of view; as soon as its premises are endorsed, "even though absolute prohibition remains liberalism's primary teaching [. . .] a more permissive stance remains an unspoken possibility" (2007b: 251).

Seeking to transcend the limitations of this mode of argument, Luban poses a modest question. "What makes torture, the deliberate infliction of suffering and pain, especially abhorrent" (250)? He then fashions persuasive answers from elements of his evolving conception of human dignity. "Torture self-consciously aims to turn its victim into someone who is isolated, overwhelmed, terrorized, and humiliated. [It] aims to strip away from its victim the qualities of human dignity that liberalism prizes" (251). One of its necessary features, a key element of torture's function and character, is that individual victims are "isolated and reduced instead of engaged and enlarged, terrified instead of active, humiliated instead of dignified" (251).

According to Luban, then, the time bomb metaphor is plainly an "intellectual fraud" (253). It is fraudulent on one level for suggesting a degree of epistemic certainty never available in real life. It is fraudulent on another level because it pretends torture is a one-time judgment, when in fact, tolerating official torture would create an apparatus of practices and institutions with disastrous consequences for anyone it impacts. "In the real world

[4] For an example of this challenge, see Kruse (2008) and also Smith (1991).

[5] For critiques of this kind, see Silver (2008).

[6] Luban (2007b). Here is how Luban himself depicts the metaphor. "Suppose the bomb is planted somewhere in the crowded heart of an American city; and you have custody of the man who planted it. He won't talk. Surely, the hypothetical suggests, we should not be too squeamish to torture the information out of him and save hundreds of lives. Consequences count, and abstract moral prohibitions must yield to the calculus of consequences" (252).

of interrogations, decisions are not made one-off. The real world is a world of policies, guidelines, and directives. It is a world of practices, not of ad hoc emergency measures" (255).

To say the least, these lines of argument cast a positive light on values at the very core of liberal democracy. They take us some distance toward explaining why liberalism's strict prohibition deserves continued allegiance. On this issue, Luban seems once again to occupy steady normative ground; for in retrospect, it was absolutely correct to draw attention to the folly of torture and to highlight its potential to undermine human dignity.[7]

Conclusion

One can see in this summary of Luban's writings that the value of human dignity is the cornerstone of a multifaceted theory of human rights. In early contributions, the dignity argument is articulated with less precision, and the strength of the cosmopolitan view of war emanates primarily from premises about the importance of "socially basic rights." Human dignity comes to play a decisive role in Luban's work on legal ethics, deployed there to define and establish socially desirable constraints on the conduct of lawyers. And for reasons easy to understand, Luban's most impassioned and nuanced discussion of human dignity comes to light in debates about torture by the US government. This was a period in which human rights encountered genuine danger and where the project to secure them on a rational foundation had potential to prevent grave harm and injustice.

Viewed as a whole, Luban's body of academic contributions is a prototype of clear reflection on the theory and practice of human rights, a demonstration of the value of legal theorizing and a reminder of the importance of scholarly engagement with vital issues in law and politics.

Cross-References

- ▶ Cosmopolitanism
- ▶ Dignity, Human
- ▶ Ethics: Legal
- ▶ Human Rights and Justice

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Luhmann, Niklas

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Introduction

Niklas Luhmann (1927–1998) is considered one of the most influential German thinkers of the twentieth century. Trained as a lawyer but working as a sociologist at the university of Bielefeld (from 1968 until 1998), he was a prolific writer with more than 600 works to his name, translations into various languages not included. Influenced by American sociologist Talcott Parsons, Luhmann's work is firmly placed in the tradition of systems theory. In the seventies of the last century, the debate with Jürgen Habermas contributed to his rise to fame (Habermas and Luhmann 1971).

Theory of Society

Luhmann was highly productive and influential, but his dense style of writing requires a more than an average effort of his readers. The gain however counterbalances the high entry costs as Luhmann's theoretical edifice offers one of the most advanced and elaborated theories of modern society. That society is, as commented over and again, perceived of as an unparalleled complexity and this, in turn, requires an equally complex theory that provides sophisticated tools for an adequate observation and description. Luhmann's theorizing shows a layered structure. At the most general level, Luhmann developed a framework that was elaborated in "Soziale Systeme – Grundriβ einer allgemeinen Theorie" (Luhmann 1984, 1995). *Social Systems* marks a paradigm shift in systems theory from open to closed systems. Luhmann redefines the system/environment distinction with an emphasis on the self-organization and autonomy of social systems.

"Social Systems" present a categorical framework and as such it also impacts Luhmann's theory of the legal system and of society. Luhmann's point of departure is the improbability of social order. This improbability roots in the combination of contingency and complexity. Combined, contingency and complexity cause at the same time problems and opportunities. To put it briefly: everything could be different and the world is full of options. Social systems are actually geared toward the contribution to the reduction of contingency and complexity.

A social system is a self-reproducing system: it reproduces its own elements and structures by using its own elements and structures. The former refers to the systems' autopoiesis and the latter to its self-referentiality. A social system is operationally closed as well as cognitively open. The systemic elements are communications that are structured by expectations. Here an important theoretical decision is revealed: human beings belong to the environment of social systems, they have no part to play in Luhmann's societal theory. By focusing on communications, it becomes possible to map out (emergent) characteristics and peculiarities of social systems. Luhmann's theory of society can be understood as a *specialis* of his general theory of social systems. His "Die Gesellschaft der Gesellschaft" (Luhmann 1997, 2012) presents the insights of three decades of theorizing on society as the most encompassing social system. Society constitutes, so to speak, the final frontier between communication and the nonsocial, the noncommunicative environment.

Modern Society and Functional Differentiation

Modern society, being the most encompassing social system, is differentiated into other social systems: function systems such as law, politics, economy, art, religion, and so on; formal organizations such as the judiciary, the state, the church; and interactions. All these social systems constitute each other's societal environment, they all interlock and overlap. Since systems are only

autonomous at the level of their operations, they all depend upon each other (interdependence). It is this typical form of differentiation, denoted as functional differentiation that distinguishes contemporary society from previous societies that were primarily characterized by a segmented, stratified hierarchical ordering. The defining type of social system for this kind of differentiation is the function system.

Functional differentiation is the process that has led to the formation of distinct, relatively independent social subdomains specialized in fulfilling a specific and unique societal function like, for example, law. It follows from the conceptualization of social systems as communicative systems that social systems differentiate into specialized communication processes. The pivotal mechanism of functional differentiation, according to Luhmann, is the process of coding. A code is a binary scheme with a positive and negative value, related to the function. A code necessitates a decision concerning the question if information has to be attributed to the negative or the positive value of the code. The set of criteria and guidelines that help making that decision is called a program. It goes without saying that systemic boundaries are an essential feature of systems: without a clear demarcation, system and environment would merge. This essential feature acquires additional sharpness due to Luhmann's axiomatic starting point that "(t)he following considerations assume that there are systems" (Luhmann 1995).

Legal System

Given his education as a jurist, it is no surprise that Luhmann published extensively on the legal system. If one of all those publications needs to be called his major work on law, it likely is "Das Recht der Gesellschaft" (Luhmann 1993). From the outset, Luhmann is clear about the status of his theory of the legal system: it is a subsystem of society, and as a consequence theorizing about law is first and foremost a contribution to societal theory (Luhmann 1993). And as such, Luhmann's theory of the legal system does not formulate normative implications but remains in the domains of facts, and studies what actually is, not what ought to be (Luhmann 1993). As a consequence, the most relevant question does not concern the "nature" or "essence" of law, but is about the boundaries of law. Luhmann argues that law itself determines its demarcation and "what" belongs or not to the legal system (Luhmann 1993). The ensuing question is how the legal system decides what "belongs" or not to the system: how is operational closure brought about? Pivotal in this is the legal code: legal/illegal.

A code brings about a canalization in the flow of communications (Willke 1987). Through coding, the legal system totalizes its realm of relevance: everything can acquire legal relevance – stalking, gaming, a pandemic, a merger of companies, and so on. This is not the same as to say that contemporary society suffers from overregulation or juridification, even if that may be so. It means that the legal perspective, the code, covers the world: everything might appear on the "legal screen." In this sense, the legal code creates the possibility to treat everything – be it an event or a state of affairs – as contingent. This goes for other function systems as well, the legal system does not of course usurp all events, facts, and so on. A marriage not only has legal consequences, but also moral ones, perhaps economic or religious ones and so on. On the other hand, adultery may have legal consequences but not necessarily so.

The legal code effectuates the operational closure of the system, allowing only for legal communications – both positive and negative, excluding other (third) values such as justice or political opportunism. Third values undeniably play a role in law, and they reenter the system at the level of its programs. Programs allow the system to take external data into account, that is, to determine the conditions for the assignment of an event to one of the two values of the code. To put it slightly different, legal programs offer criteria for the decision whether something is legal or not legal. The legal system is, according to Luhmann, programmed by positive law: constitutions, laws, statutes, treaties, and judicial rulings (Luhmann 1986a, 1993). It follows that legal coding and programming complement each other:

whereas the code closes the system operationally, the legal programs open it up and enables a certain "sensitivity" for environmental factors. It is here that law learns and adapts. This cognitive openness is also why operational closure cannot be understood as autarky or isolation. Luhmann distinguishes two different types of legal programs, conditional ones and goal-directed ones. Conditional programs are defined by an if.. then. . .-structure: if x causes damage (event) then x is liable (norm). Goal-directed programs enable evaluation of actions under reference to legal/illegal in view of their (causal) influence upon a future situation. They express a *Sollzustand*, a desirable situation. Goal directed programs can be found in, for example, environmental law.

Resolving conflicts, enabling social change, protection against the state, and so on are traditionally functions attributed to law. And of course law contributes to all this – but so do other systems in their own way. So, what unique function does law fulfill on behalf of society? According to Luhmann, the legal system stabilizes normative expectations. There are two kinds of expectations, cognitive and normative ones. The former might be changed if and when disappointed, the latter are counterfactually maintained. The legal system deals with the (re)production of the latter kind of expectations. This is not to say that law usurps all normativity, parts are left to moral or religion. But law is constituted as second order normativity: it always presupposes preceding normativity. Norms can only acquire legal quality via other norms, legislation connects to previous legislation, rulings root in law, etc. Operational closure is precisely that: only the legal system can produce and reproduce legal quality. This closure appears as a normative closure (Luhmann 1986b). Law is what the legal system considers to be law. This is known as legal positivism (see ▶ "Austin, John", ▶ "Kelsen, Hans" and ▶ "Hart, Herbert Lionel Adolphus: Influential Ideas").

An operationally autonomous function system requires an organizational back-up and this is what the internal differentiation of the legal system provides for. Internally, law is differentiated not into more specialized communication flows such as public and private law, or penal law, labor law, and so on, but into courts and legislation. Courts occupy a central position within the legal system, as an organized decision system the courts represent the "hard core." Courts are under the obligation to decide whenever confronted with a legally relevant problem. The differentiation into a center and periphery does not imply a hierarchy, it is a matter of division of labor. The relationship between courts and legislation is a circular one in terms of mutual limitation: rulings are within the limits given by the legislator, new laws need to fit within or connect with the rulings. Consistency is key.

Debate and Criticism

Luhmann's work triggered a lively academic debate. For example, a more general criticism targets Luhmann's opaque and highly abstract theoretical edifice (cfr Moeller 2011). The very abstract nature of Luhmann's work would impede the *empirical applicability and verifiability* of the theory (Scharpf 1989; Nahamowitz 1987; Von Beyme 1991). More specifically, the operational closure of the legal system proved to be a highly controversial point. The criticism articulated by Anthony Beck is who wonders if the notion of operational closure "has any coherence at all" is illustrative (Beck 1994).

Kargl observes that the major misunderstanding with regard to operational closure is its *limitation* to communication taking place *within the organizations of the legal system*, which boils down to organizational boundaries (Kargl 1990). Instead, it concerns normative communication, in its turn this does not refer to the content of a legal norm (Kennealy 1988). Kargl concludes that the Luhmannian understanding of law substantially stretches the legal boundaries (Kargl 1991). Pieterman also addresses the issue of the "extreme conception of the autonomy of the legal system" and doubts that the theory can address possible social effects of law (Pieterman 1998). Pieterman also deems Luhmann's account of the relation between the law and its environment unsatisfying: since social systems are closed, how do they – if at

all – communicate with each other? (Pieterman 1998 but also Kennealy 1988).

Anthony Beck's observation that operational closure excludes direct instrumentality is in line with this difficulty of "interaction" between social subsystems (Beck 1994, 409). The legal system undeniably affects its environment but not necessarily in an intended way: people may not pay fines and damages, regulations pertaining to ecological problems may or may not improve the quality of the eco-system, laws against terrorism do not necessarily guarantee safety. This state of affairs is in fact the articulation of a consequence of the emphasis on operational closure: since there are no input/output relations between social systems, closure prevents direct causal and mutual influences or interventions between social systems. Consequently, social systems such as politics and law can only influence each other *indirectly* – only according to their own systemic rules (structural coupling).

This operational closure implies full self-production of the law. If this is so, a univocal demarcation between what belongs to the system and what does not, becomes a primary theoretical requirement (Kennealy 1988). The question about the precise nature of legal communications occurs in Kargl's work (Kargl 1990, 1991). Kargl argues that the main source eliciting irritation and criticism with respect to the social systems theoretical understanding of the law (and other social systems) as closed systems is the idea that the legal system consists of communications and communications only. Kargl rightly concludes that communicative closure excludes human beings from social systems. It is this theoretical decision of Luhmann that makes it difficult to understand "what" actually produces "itself" in this operational closure. Beck holds that the theoretical decision to expel people to the environment contributed to the mystification of systems theory: "The absence of subjects from the 'generated' communication system of law leads to commentators under autopoietic theory's influence to say the 'law thinks' and that it 'has a life of its own'"(Beck 1994). Van Twist points out that it is not about a conceptual elimination of human beings but a redirection of its focus, from people to what happens between them and is observable, i.e., communication (Van Twist 1994).

Conclusion

Especially the operational closure and the focus on the self-reproductive autonomy of social systems, and the legal system is exemplary in the discussion, stirred the critics. The concurring cognitive openness has been dramatically underexposed. The importance of this debate lies in the fact that closure and autonomy are deemed pivotal to the demarcation: boundaries constitute a system precisely as that, i.e., a system with an inside and outside.

Luhmann's theory has become an international classic, influencing the work of legal scholars in a variety of (sub)disciplines, most famously the work of Gunther Teubner.

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Lukács, György

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Introduction

György Lukács (Budapest, 1885–1971) had no genuine professional encounter with law, the fact notwithstanding that he received doctorate in *scienciarum politicarum* (1906) under the direction of jurisprudent Felix Somló at Kolozsvár (now Cluj-Napoca, Romania), and while at Heidelberg during the Great War, he befriended Max Weber, Gustav Radbruch, and Hans Kelsen alike (Varga 1981). Being an aesthetician, literary theorist, and social philosopher, legal topics could only serve mostly as substitute subjects to him, as structural exemplifications of abstract philosophical theses.

History and Class Consciousness (1923)

The first major magisterial work of Lukács in Marxism was the philosophy of revolutionary consciousness. Concluding from the study of history in the revolutionary bouleversement coming in the aftermath of the Great War, he saw the rejection of innate respect for anything established as the number one precondition of whatever intent at revolutionarization. For all concepts of order have to be rejected (with a missionary zeal professed as a quasi "Marxist theology," as Béla Kun remarked) for that the prevalent institutional framework can be overthrown. Surpassing the dualism of legality and morality, he could subordinate means to ends. Thereby the conclusion could be reached that nothing but societal acceptance gives violence chance to win, so, in general, not even respect for law can be more than the ephemeral function of expediency ("The Changing Function of Historical Materialism" [1919] in Lukács 1923). Before long he arrived at revealing what he had meant by class consciousness:

> Where the total, communist, fearlessness with regard to the state and the law is present, the law and its calculable consequences are of no greater (if also of no smaller) importance than any other external fact of life with which it is necessary to reckon when deciding upon any definite course of action. The risk of breaking the law should not be regarded any differently than the risk of missing a train connection when on an important journey. ("Legality and Illegality" [1920] in Lukács 1923, 263)

This is to say that only an anti-institutional turn, as well as repudiation and contempt of what has ever been established, can help a revolutionary cause.

In a vision he partly learned from Weber, the outside world is distorted, because rationalization has reified its working. As he explains by reference to the law ("Reification and the Consciousness of the Proletariat" [1923] in Lukács 1922), the breaking of originally unitary complexes into their constituent elements brings about specialization with processes losing their natural-organic unity and becoming calculatively produced

syntheses of rationalized subsystems. As a consequence, man, no longer appearing to be the proper vehicle of such processes, gets reduced to become a mere part incorporated into a mechanical system functioning independently of him, his only achievement being that he merely fits into the movement of a system.

Moreover, this whole complex tends to become almost irrational and alienating, as it will necessarily "diverge qualitatively and in principle from the laws regulating the parts" (Lukács 1923, 102–103). For, as Georg Jellinek, Kelsen, and especially Emil Lask already taught, this is a (both historically and technically) necessary distorting effect of material conditions abstracted into legal regulation. From this point on, he declares now that it is such a reified functioning and socially alienating medium that dominates the social and legal terrain, in which "of the tenets of natural law the only one to survive is the idea of the connection without gaps of the formal system of law" (Lukács 1923, 108[1]).

Especially this period of Lukács' oeuvre frequently inspired, and remains as most thoroughly commented by, representatives of American and partly Western European social and legal thinkers who entered debates on reification/alienation, rationality, or legality/illegality particularly, as part of interwar Marxism thematizing on topics that Weber initiated and cultivated originally.

Works in the Meantime

In addition to Lukács' greeting Stalin's draft constitution in a Soviet weekly in 1936, only two opuses in diverging directions had turned to exemplification upon the pattern of law until the final, ontological synthesis was formulated.

The first is a Cold War annihilating criticism of philosophies held responsible for all those intellectual driving forces, permeated by irrationality, which lead to the Second World War, *The Destruction of Reason* (Lukács 1954), in which Lukács discusses, by touching upon legal problematics, one, economic and state management and the role law plays in them, drawn in analogy through their rationalization, and two, normality as a condition of legal validity opposed to the state of emergency, in order to try (remaining doubtful whether successfully or not) proving irrationalism in the stand of Carl Schmitt and his paper, justificatory of the Hitlerite liquidation of the S.A. in 1934 (Varga 1985, 62–66; 2005).

The second is already done on his path toward the first great objective Lukács set, notably the one to outline *The Specificity of the Aesthetic* (Lukács 1963) in an interim book-size study on *Particularity as an Aesthetic Category* (Lukács 1957), in which – touching upon the legality/morality dilemma as well – based on Hegel's lines in his *Science of Logic*, mainly the dialectics of sublation of generality/particularity in cognition, conceptualization, as well as artistic reflection are described.

From it an outstanding Hungarian Marxist jurisprudent drew the most. After arguing counter the never held idea that law itself could have an own ontology, in paper and book fora with qualifying titles given as given by Lukács to aesthetics, he contextualized law, defining it as reflection of reality, amidst the categories of individual/particular/general, assigning the medium level of conceptualization to it. Thereby he also marked out the place of its theoretical reconstruction within the realm of epistemology by and large, starting searches for the law's parallels and analogies with "mirroring" in cognition and other forms of human activity (Peschka 1985, 1989).

On the Ontology of Social Being (1964–1971)

The last magisterial work by Lukács, published posthumously, intended just to lay foundations to his Ethics which he dreamed about but never accomplished.

According to its basic tenet:

> the social being is a complex of complexes even at its most rudimentary level; a continuous interaction exists between the part-complexes as well as between the total complex and its parts. The reproduction process of the prevailing total complex develops from this, and in such a manner that the part-complexes also reproduce themselves with

[1] The original translation of "unbroken continuity" – standing for "lückenloser Zusammenhang" – is corrected by the author.

> (only relative) autonomy, but the overriding element in this many-sided system of interactions derives from the reproduction of the whole at any time in all of these processes. (Lukács 1976, 140)

In the womb of it all, social practice is realized by way of mediations [*Vermittlung*] even in the elementary acts of labor, and this assumes increasingly complex forms in the course of development in every sphere of social reproduction. In such a sense, mediation is the whole process-like medium in which the interaction of complexes takes place. And, within it, socialization [*Vergesellschaftlichung*] is the increasing domination of purely social determinations in social processes, standing for an irreversibly and unbreakably progressing overall process, capable of erecting, through historical accumulations, networks that are complex in themselves. Socialization stands here for the growing weight by which human artifacts with rationalizing force are built on natural processes, considered in this context – in contrast to Lukács in 1923 – as the sign of an irreversible march of progress.

In mediations taking place between the social total complex and its partial complexes, language and law are the two basic agents of mediation – the one for the very possibility of social interaction and the other for its frameworking regulation – that is, the ones having the sole function to mediate among whatever complexes. This is to mean that language and law are not to assert but to mediate among values and interests which themselves are represented by those complexes to be mediated among themselves. Accordingly, what language and law may still feature up as own values and interests is instrumental in character at the most, intended either to facilitate mediation as such or to enhance its cultural level and demanding character.[2]

As known, it is the ontological perspective that is primordial vis-à-vis the relevance of any purely epistemological approach. Accordingly, everything and anything are an ontic part of the social being that actually exerts an influence in societal processes. In the world of humans, queries into the gist of social being are ontological ones from the very beginning, independently of whether of a mental, institutional, or actioning character, epistemology being closed in cognitive reconstructions, centered around veracity issues (Varga 1999). This means that particularly ideology as such is part of the humans' societal existence, not to be regarded as simply an either true or false form of consciousness (in an epistemological perspective) but as one of the organic and necessary components of the ontology of social existence. To be short: the way we think in is part of what we truly are. Therefore, our working consciousness is also co-actor in our actions. Accordingly, so-called juristic worldview [*juristische Weltanschauung/Weltbild*], taken as the deontology of the legal profession, is not some accidental and/or external complementation to law, but – be it, for instance, the case of European continental normativism or the Anglo-Saxon pragmatic casualism of the case-law method (not to extend exemplification to the world's past and present further legal traditions as well) – it is one of the original components of what can be truly termed as the law's societal existence.

In order to guarantee unequivocality by excluding corruptive questionability, the law formulates the instrumental behavior defined by the legislator as the target itself to be reached and sanctioned. This is by which it stipulates the *Tatsache* – the aggregate of those facts that may constitute a case in law – so that average social attitudes can be foreplanned and also effectively made to be reached through prescribing/proscribing (i.e., sanctioning in a positive/negative manner) well-selected instrumental behaviors.

Therefore in relationship to reality, from the outset, law has a deeply practical and teleological determination. Paradoxically speaking, it is an image that does not portray what it reflects. Its inherent incongruence, as stated by Karl Marx to Ferdinand Lassalle in a letter of July 22, 1861 (Marx and Engels 1964, 614), is not an epistemological distortion but an ontic sine qua non. And the incongruence of legal reflection grows at each and every higher level of the law's own system,

[2] It is to be noted that in respect of such relationship between fundamental and instrumental values, the doctrine of the Church teaches the same as exemplified by the Pope John Paul II's personal philosophy (Varga 2003).

only characterizable as an "abstractly-conceptually homogenizing manipulation" of reality (Lukács 1976, 217–218). The basic heterogeneity of cognition and teleological projection (like the one of epistemology and ontology) in law is best exemplified by the role conceptuality and logic may play in the latter. For:

> [l]ogic [. . .] remains here the mere instrument of conceptual forming: the contents of what, for instance, has to be regarded as identical or non-identical, is not determined by social objectivity in itself, but by how the ruling class (or classes, class compromises) are interested in the regulation and resolution of definite conflicts in a certain manner. In the meantime it can easily happen that elements which belong to each other socially are separated and the heterogeneous ones are reduced to a common denominator. Whether and when this happens and whether and when uniting or separating them is correct are not decided by logical criteria (even though everything appears in a logical form), but by the concrete needs of some concrete socio-historical situation (Lukács 1976, 484) or by the "peculiar socio-historical dialectics" involved. (Lukács 1976, 189)

Otherwise expressed, "an epistemological objective identity or convergence can in no way provide the decisive motive for choice or rejection; this motive consists in an actual applicability in concrete present circumstances, from the standpoint of a resultant in the struggle between concrete social interests" (Lukács 1978, 128). This is to say that the factual and normative components referred to in any legal process are mere means or, more exactly, phenomenal forms of actual working, for "the logical subsumption is based on this only as a phenomenal form" (Lukács 1976, 220).

There is a specific duality in the operation of law from the perspective of the social total complex, because, on the one hand, its autonomy as a part complex one is asserted, while, on the other, there is a pressing need, too, for that this autonomy can and will in fact run by and large tendentially in parallel with the total complex's total move.

As to the first side:

> the more law generally became the normal and prosaic regulator of everyday life, the more the pathos it had acquired in the initial period disappears and the more the manipulatory elements of positivism gain strength in it. It becomes a sphere of social life where the consequences of actions, the changes of success and the risks of losses are calculated in the same way as in the economic world itself. Of course, this happens with the difference that, firstly, the point in questions is mostly a (relatively independent) function of economic activity, where the likely outcome of legally permitted activity and, in case of conflict, lawsuit, are a subject of specific calculation within the main economic target; and, secondly, specialists are needed over and beyond the economic calculation, too, to estimate these additional prospects as exactly as possible. (Lukács 1976, 215)

As to the other side, what is the most sensitive moment of the law's whole life, seen from its objectivation in books to its enforcement in action, is called "concretization of rules" by Carl Schmitt in 1912 (cf. Castrucci 2017) and/or the "two stages of the process by which law is produced" by Kelsen in 1925 (cf. Varga 1994), which was sharply criticized by Lukács earlier (Lukács 1954 [German ed. 1962, 569]). This turn now, it is Lukács himself who will qualify it manipulation simply, moreover, manipulation in a positive sense, as an unavoidable corollary of any such practice. For, as claimed by him:

> the functioning of positive law is based on this method: the mass of contradictions has to be manipulated in such a way that not only a uniform system should develop from it, but one which is able to regulate the contradictory social event practically and optimally and which always moves flexibly along the antinomic poles (for instance, naked force and conviction bordering on the ethical sphere), in order to realize and influence the decisions of social practice (which are currently optimal for society) in the course of shifts of balance that constantly occur within slowly or rapidly changing class rule. Clearly, a wholly specific manipulative technique is necessary for this, and it explains the fact that this complex can reproduce itself only if society always reproduces the "specialists" needed for this purpose (from judges and lawyers to policemen and hangmen). (Lukács 1976, 225–226)

All this induces new contradictions that Lukács sees as ones characterizing the very nature of law. For "The new fetishization lies in the circumstances that the law [. . .] is treated as a solid, coherent, 'logically' unambiguously defined field, and not only in practice, as a subject of pure manipulation, but also theoretically as an immanently closed, in itself closed complex

correctly treatable only with juristic 'logic'." (Lukács 1976, 215–216).

Accordingly, there is a must to have a particular case of double talk inherent in law, necessary if an action pertaining to social heterogeneity is to be performed within, as complying with all the added requirements of a given species of social homogeneity. In such a scheme, actual decision-making can only be modeled by a *logic of problem-solving*, with relatively open chances and within a relatively open referential frame, upon which the law's proper *logic of justification* can only be built as added to and projected onto the former, phase to phase and only posteriorly, as a kind of feedback in test of controlling the genuine fulfillment within the law's own system of fulfillment [*Verfüllungssystem*] (Varga 1992).

Once there is "individual norm" as discretionarily concretized from a "general norm" (Kelsen) where "manipulation" (Lukács) adds "a filling-in of a frame" (Kelsen), provided by the law in books to the law in action, the law's practical operation will necessarily be a kind of reconventionalization, sublating [*aufheben*] its own antecedents in endless processes. This equals to saying that any such operation effects in law (in)novations as well, according – as adapted – to timely changing needs. As Lukács held, "Naturally, at certain primitive stages the deviation might be quite minimal, but it is quite certain that the whole of human development depends on such minimal displacements" (Holz et al. 1967, 18).

It is the judicial process as particular reality-(re)construction from the analysis of which one has to arrive – as Benseler (1987) did in fact – at the ontologizing reformulation of autopoietic theory. As concluded therefrom, that what is alleged to qualify as following (while conforming to) formalized social patterns is reproduction and production at the same time, that is, an individual combination of preservation and (in)novation – up to the point when its standing practice will be recognized as a pattern following pattern, by the given social and/or professional environment. Or, to claim (according to the English-American habit) that a given jurisprudence is "within the canon" is hardly else than the timely outcome of self-reconventionalizing practice itself.

All in all, in such a picture a definite Janus-facedness, that is, the practice of double talk, will become a necessary corollary of lawyers' activity, for, what they do is, according to Lukács, firstly, to transfigure real conflicts of interests into conflicts within the law and then, secondly, to refine even these into apparent or quasi-conflicts, that is, into instances of what application of law truly is – while what they show is nothing but to operate simply with facts and norms within the strict control of logic. Otherwise speaking, what they do in actual practice is manipulation with both the selection and interpretation of both so-called relevant facts and pertinent norms, so that the judicial decision they reach can – as much as possible – eventually imply a responsible and also socially justifiable decision under the facade of mere logics. Or, this is to mean that logic is hardly more than form of expression in this whole operation here and by far not a medium mastering the process in which a due decision can be reached.

Conclusion

Modern formal law is reified a construct, the operation of which is reified and reifying at the same time. It is to be noted, too, that the normativistic deontology of legal practitioners and legal theories alike are all founded upon disanthropomorphic schemes, able to exert disanthropomorphizing effects themselves. This is why the chance of alienation is at the very root of modern formal law (Varga 2013).

Reified law produces just the ideology that best suits the law's operation according to its own postulates, normative and ideological at the same time. One could also add that the reified operation of reified structures needs and simultaneously produces, too, reified consciousness. Well, the juristic worldview, taken as the deontology of the legal profession, can indeed be seen as the adequate reflection of a system turned upside-down. Accordingly, an act of unmasking its sheerly ideological character would both

precondition and result in unmasking the law's aspirations to acquire autonomy.

The impact of Georg Lukács' philosophizing is internationally standing indeed. The share of legal philosophizing in it is, in contrast, mostly reduced to worldwide political philosophizing and to legal thought especially in Hungary and Brazil (cf., e.g., Sartori 2013).

Cross-References

- ▶ Coercion and Law
- ▶ Language and Law
- ▶ Law as an Artifact
- ▶ Law as Discourse
- ▶ Legal System and Legal Order
- ▶ Ontology of Law
- ▶ Positive Law and Natural Law
- ▶ Pragmatism

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Lundstedt, Anders Vilhelm

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Introduction

The juristic ideas of Vilhelm Lundstedt (1882–1955), professor of private law at Uppsala University from 1914 to 1948, exerted great

influence in his native Sweden, and were widely discussed beyond, during the first half of the twentieth century. He was active not only as a legal theorist but as a legislator in the Swedish parliament, a campaigner on social and legal issues, an influential and charismatic teacher, and a prolific contributor to the press (Sundell 2005). All these varied activities were seemingly unified by his highly original ideas about law.

His writings are probably unique in the literature of juristic theory in the ferocity of their unrelenting criticism, and indeed dismissal, of virtually all orthodox legal concepts. In place of such concepts Lundstedt advocated what he saw as an entirely new, rigorously realistic understanding of law as a mechanism of cause and effect to be directed to the maintenance of social peace and human flourishing in a community. This understanding, in turn, required a reimagining of the role of the jurist, and a practice of "constructive" jurisprudence. Judges, legislators, and lawyers should treat law not as a set of abstract concepts to be elaborated and systematized but as a "machinery" of social control to be directed to promote the welfare of the particular community to which it relates.

Lundstedt's Legal Realism

Lundstedt's thought, deeply influenced by the ideas of the philosopher Axel Hägerström, was characterized by hostility to what he termed legal "metaphysics" – that is, reliance on legal concepts not related to observable realities that could be examined scientifically in terms of cause and effect. Metaphysical thinking which, in Lundstedt's view, pervaded all existing jurisprudence, could never be a basis for recognizing the reality of law as a purposive practice and as the fundamental guarantee of social life. He advocated discarding such concepts as "rights," "fault," "guilt," "liability," and even "legal rule" whenever serious attempts to analyze the nature of law were being made, since such concepts lacked grounding in social reality.

Outside Sweden, Lundstedt's proposals for what might take the place of rejected legal metaphysics have generally been poorly understood although he saw them as essential to his work. Like his fellow Swedish legal realist Karl Olivecrona, he has been mainly understood as engaged in philosophical debate about the nature and place of conceptual analysis in legal theory. But while Olivecrona stressed the enduring psychological power of legal ideas and so their necessity despite their "unreality," Lundstedt's aim in abandoning such concepts in legal theory was to pave the way for a clear-eyed understanding and practice of law that would be explicitly directed to pursuing social welfare.

Lundstedt's denial of theoretical value in orthodox juristic ideas, coupled with the often fiercely dismissive style of his critiques of the writings of other legal theorists, contributed to his being characterized as the most "extreme" Scandinavian legal realist. Other varieties of legal realism, in the United States as well as in Scandinavia, similarly criticizing the "unreality" of legal ideas, typically sought not their abandonment but better recognition of their political or psychological significance. Lundstedt's apparent total rejection of these ideas, coupled with the widespread failure of critics, at least outside his own country, to understand the constructive side of his legal theory (strongly colored by its national context), led to his work often being marginalized in international legal theoretical debate.

Like the American legal realists, Lundstedt sought to study law in terms of behavior rather than normative ideas. Up to a point, his thinking seems congruent with the naturalistic claim of the American realist Felix Cohen (1935: 823) that any legal word "that cannot pay up in the currency of fact... is to be declared bankrupt, and we are to have no further dealings with it." But Lundstedt distanced himself from American legal realism which he saw as unable to free itself from legal ideology (that is, from ideas that, in Cohen's phrase, could not "pay up in the currency of fact"). It is typical of Lundstedt's combative style that he gives one of the clearest checklists of his own key concepts to assert this distancing (1956: 393–4). The American realists, he claimed, did not analyze (i) legal ideology (and the use in traditional jurisprudence of an ideological "method of justice"); (ii) the fallacy of "belief in legal rules"; (iii) the need for a "constructive"

jurisprudence; (iv) the importance of "the common sense of justice" in the functioning of "legal machinery"; and (v) the "method of social welfare" to inform a realistic legal science. Each of these ideas, the essential components of Lundstedt's legal theory, requires elaboration.

Justice and the Legal Machinery

Traditional jurisprudence relies on what Lundstedt calls the "method of justice." Law is assumed to aim to do justice by fairly assessing guilt, blame, or just deserts. But if justice were to be seriously sought it would require an infinite range of personal circumstances and contextual conditions to be taken into account, and judgments made about all of them. In practice, only a limited range is considered as a basis for decision. Pursuing justice cannot be the real project of law. That project is ultimately to maintain, as a coherent working system, the machinery of, for example, criminal, tort, and other legal fields which is needed to guarantee social peace and facilitate constructive social interaction in a community. The method of justice, invoking ideas that cannot be grounded in reality, mystifies law's actual social purposes. Law must be reconceptualized around these social purposes. While it will take account of popular beliefs about justice, it cannot be governed by them; it must be guided by realistic evaluations of communal welfare as a whole.

Law must discard all metaphysics. Although legal practice refers to "rules," law cannot be conceptualized even in terms of rules. Legal rules gain significance only to the extent that in practice they are part of the information or technical guidance that aids the working of what Lundstedt terms the "legal machinery" (1956: 316–27). This latter concept envisages law as a vast apparatus of behavior – not only official and institutional mechanisms by which social control is organized and implemented, but also, and crucially, the psychological predispositions established in the regulated population which induce them to play their part in the legal machinery as compliant but free and active citizens. Thus, the idea of legal machinery links legal officials' conduct and citizens' consciousness together in its perspective on law.

Lundstedt thus recognizes the great significance of psychological orientations for the legal machinery. Even if justice is a chimera and so cannot be a foundation of law, a "common sense of justice" present in the community is very important in supporting the legal machinery. The existence of such a communal sense presupposes long experience, across generations, of social stability. For citizens, the common sense of justice informs their belief in "rights" and in the security of contracts and property. The legal machinery's officials (e.g., legislators, judges, administrators) must take full account of this sense of justice, even though it cannot determine the ultimate policies to which law should be professionally directed. Indeed, the common sense of justice is itself typically shaped by the long-term stability of law. It can operate constructively only in the context of an effective, functioning legal machinery in a society.

Hence, when that context is absent, as Lundstedt thought it was in international relations (1925; 1933), nothing exists to direct ideas of justice and rights into channels that serve a community interest, and disastrous consequences can follow. Thus, he insisted that international law was ideological, not grounded in reality. Instead, the reality was of nations locked in competition and conflict that, lacking stabilizing international legal machinery, often led to war, with all combatant states sure of their "justice" and "right," and of their enemies' lack of these.

Social Welfare and Constructive Jurisprudence

The remaining key concepts of Lundstedt's legal theory – the "method of social welfare" and "constructive jurisprudence" have to be understood, at least in part, in the context of the Swedish society in which he wrote. The method of social welfare is, for him, what should guide all legal activity in place of the discredited method of justice. He explains it only in the sketchiest of terms (1956: 136–49). Social welfare is what people generally seek in terms of security and peace, an adequately

cohesive society in which class conflict has been dulled or superseded, productive conditions for economic activity, a strong sense of communal well-being in which every individual can participate, and state policies to promote all this. How could such a sketch be fleshed out? Surely the metaphysics Lundstedt sought to expel from legal theory reenter here with the importing of some ex cathedra philosophy of social evaluation?

But he denies any appeal to metaphysics. Lundstedt's position is that social evaluations to guide law are indeed necessary but they require no appeal to abstract theoretical ideas ungrounded in social reality; they have "no ethical colouring whatever" (Bindreiter 2016: 395). They will be merely pragmatic valuations based on political judgments about the best means to secure, in a particular time and place, the generally sought conditions of social welfare as sketched above. Constructive jurisprudence is the activity of jurists and legal officials organized to contribute to and practically implement such judgments. Lundstedt is explicit that realistically minded jurists and legal officials, who are the people professionally most intimately involved with the legal machinery, are the members of society best fitted to promote social welfare in practice.

International assessments of Lundstedt's work have very rarely related it to its national context. And his two essential English language works (1925; 1956) present his legal theory as in no way tied to this context. But it has been argued that his method of social welfare partly *presupposes* this context and his assertions of its realistic, non-metaphysical character can only be understood in relation to this (Cotterrell 2016). During the period through which he wrote, an idea of national mutuality and solidarity came to dominate Swedish politics and government, as a taken-for-granted basis of policy. As a working idea it could be elaborated and adapted to changing circumstances, as Lundstedt clearly envisaged his idea of social welfare would be. Both Swedish socioeconomic policy and Lundstedt's social welfare method could properly be seen by their adherents as matters of everyday politics and pragmatic evaluation in changing circumstances, rather than applications of a philosophical system. This is not to say that Lundstedt's theory should be explained away as a reflection of its Swedish context. But putting it in historical context may suggest how it should be viewed beyond that context.

Conclusion

Thus, his work might be seen as perhaps the most radical of all efforts in jurisprudence to pursue a legal realist project. It attempts to explain law in entirely nonnormative terms. The concept of legal machinery is a device to downplay consistently the normativity of rules, treating them theoretically as merely technical guidance or information (like the rules in a manual for building or maintaining a machine). In Lundstedt's thought key values of traditional jurisprudence are reinterpreted in functional terms: justice as a range of sentiments to be taken into account in the working out of social welfare; security as the social stability that everyone seeks; communal solidarity as the self-evident precondition of societal advance.

In this context, Lundstedt presents the jurist's role as not centrally to manage, systematize, and order legal doctrine, but to steer law actively with vision, in socially beneficial ways. He provides one model of what an analysis of law understood *entirely* in behavioral terms, decentering orthodox legal conceptualization, might look like. Perhaps, like all such models, it reflects historical conditions that inspired it, and it should be assessed both in relation to those conditions and beyond them.

Cross-References

► Hägerström, Axel
► Olivecrona, Karl Knut Hans: Influential Ideas
► Ross, Alf: Biographical Perspectives

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Lundstedt, Anders Vilhelm: Influential Ideas

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Anders Vilhelm Lundstedt (1882–1955) was a Swedish jurist who, like Karl Olivecrona and Alf Ross, studied under Axel Hägerström, the fountainhead of the Uppsala School of Jurisprudence. He studied law at Lund University, where he earned a doctor of law degree in 1908, and where he taught as associate professor. In 1914 he was appointed professor of private law and Roman law at Uppsala University and kept teaching there until his retirement in 1948. Throughout most of this time span, he was also active in politics as a social democrat, under which banner he served as a councilman in Uppsala (1919–1929) and then in the lower house of the Swedish parliament (1929–1948), often taking positions on the basis of his legal thinking (Sundell 2005, p. 467) and promoting changes to the criminal system and other liberal reforms.

It was by coming into contact with Hägerström that Lundstedt specifically developed an interest in the philosophy of law. Growing dissatisfied with traditional legal thinking, he found himself consequently compelled to revisit his legal studies and his basic understanding of law and came to the view, first developed by Hägerström, that it was a mistake to study law in isolation from the actual functioning of the society in which it is embedded. This reconceived understanding of law he expounded in works such as Lundstedt 1925, 1932, 1936, and 1956.

Drawing on and developing Hägerström's analysis, he highlighted the vestigial elements of natural law that clung to legal positivism, while underscoring the failure of so-called normative science as a legal science, going so far as to deny the possibility of using terms such as *legal norm*, *right*, and *duty*, except within quotes, insofar as they are irremediably contaminated with metaempirical meanings bearing little or no relation to fact. Against natural law and legal positivism alike, Lundstedt charges that they lack an empirical foundation in the study of law. He thus sets out to develop an empirical theory of law (on this characterization see Hierro 2008; see also Bjarup 1978).

Against the traditional tenets of legal positivism – under which a norm is a command that gives rise to an obligation and sets forth a sanction for noncompliance – Lundstedt argues that norms are simply statements or enunciations specifying the kinds of behaviors that the "machinery of the law" decides to impose so as to provide the best guarantee for the existence and welfare of society, and the subject matter of these norms consists of situations or actions that society intends to protect or keep in check through the application of sanctions. If decoupled from the functioning of the machinery

of the law, the rules of law mean nothing, amounting to no more than "vacuous terms and empty labels," in themselves incapable of having the slightest influence on human behavior. They can exert such influence only insofar as the psychophysical makeup of humans, their situation, and their needs make it necessary and possible for the machinery of the law to issue its output so as to regulate associative life through the use of sanctions. The continuous and regular use of organized force, and the protection accorded to certain types of behavior, reinforces certain primal feelings of right and wrong, causing the sense of moral duty to come into play in support of the law. But this does not take away the fact that so-called legal norms are in themselves no more than words: isolate them from the legal machinery, and they will not have any more meaning than they would if written by any random person on a scrap of paper or a chalkboard.

In conclusion, the concept of a norm, such as it is commonly used, is an unreal superstructure relative to what happens in reality: it needs to be unburdened of its unreal normative characteristics or other possible metaphysics, that is, of the characteristics that fashion it into a command capable of giving rise to rights and duties. As long as these conclusions are borne in mind, the term *norm* can still be used, for lack of better options, in common and legal parlance alike.

Lundstedt also takes aim at what he calls the "ideology of justice," by which expression he refers to the idea stipulating the objective, independent existence of positive law, or of the rights and duties that legal norms are designed to protect and enforce. This ideology underpins not only natural law but also legal positivism: even if various legal positivist theories appear to say that rights and duties are brought into being directly by positive law, the constant reference they make to the will of the state or that of the collectivity reveals that some assumptions about substantive or natural justice are always at work, forming a substrate of positive law.

This ideology of justice, Lundstedt argues, is harmful in two ways: *scientifically*, for it is an ideology dressed as science, and *socially*, because the feelings of right and wrong on which it rests tend to favor the interests of the individual over those of society.

It is therefore necessary to go back to facts, to rebuild legal science on the basis of reality, by looking to the actual functioning of the machinery of the law: this is an endeavor that translates into concrete social utility.

What Lundstedt constructs in this way is a theory of social welfare that he puts forward as a solution to the scientific problem as well as to the practical one. The theory, as he presents it, is based on experience, on the observation of facts and their connections: on this theory, facts are understood to consist above all of the consequences that flow from the various legislative provisions that get enacted, and these consequences need to be assessed in view of their social utility. The theory is thus predicated on the actual functioning of the machinery of the law (on this thesis see Castignone 1974).

By observing real life, history, and human behavior, we can clarify the aims that humans intend to pursue through the law. In other words, we can clarify the indispensable conditions for the existence of society.

These aims that Lundstedt is thinking of are security in life and limb and the protection of all the conditions that are necessary to generate wealth and sustain the exchange of goods, that is, the security of property and contracts.

In this way, Lundstedt offers a substantive criterion on which basis to determine the content of the concept of social utility. At this point, however, we need to ask within what limits this content-filling criterion is scientific, assuming that it can be scientific to begin with.

It can be scientific only on condition that, by observation, the aims and values identified by Lundstedt can be determined to be the only ones that could possibly count for human society, but this assumption needs to be substantiated, and Lundstedt does not do that. He confines himself to stating that the aims and values he lists emerge incontrovertibly from an observation of human behavior and from the study of history.

There is reason to doubt that that is actually the case: it may well be that some values are

favored over others through a prior choice more or less consciously made. Lundstedt's theory is subject to two kinds of risk: from a methodological standpoint, it risks sliding from a description of reality to the construction of ideal entities (the very problem he detected in legal positivism); from a practical standpoint, this leap leads to the consequence that certain favored values, subjective and particular though they may be, are presented as objective and general.

This failure to distinguish the descriptive plane from the evaluative one has drawn extensive criticism from Alf Ross: the social welfare principle, Ross points out, is a metaphysical postulate surreptitiously concealing behind reality. As Ross comments, Lundstedt is fully immersed in a practical, utilitarian metaphysic: his battle against the idea of normative objectivity remains a lesson learned from the outside, but it is not organically worked into his thought (see Ross 1932, pp. 341–9). As Bindreiter (2016, p. 397) observes, this did not prevent Lundstedt from "insisting that he, with his Social Welfare theory, merely states what happens in reality," but it is nonetheless difficult to escape the impression that at work in this descriptive endeavor is the classic is/ought fallacy first identified by Hume (ibid., n. 67).

Lundstedt's claim to objectivity in advancing a politics of law based on the social welfare criterion has been analyzed as resting on the idea of "a universal 'social instinct in man'" (Zamboni 2002, p. 58, n. 80). But the point remains that his social welfare theory is itself an ideology of law, and even if it were based on a universal social instinct – that is, even if it were truly scientific and descriptive – it ultimately winds up supporting a specific design, serving to protect the very individualistic values (such as freedom of enterprise and commerce) which the ideology of justice sets out to defend.

And so the freshest and most compelling part of Lundstedt's construction lies not in his theory of social welfare, as he perhaps felt, but in his critical thinking, even if this latter part is not entirely original, being derivative as it is of Hägerström's work.

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Lundstedt, Anders Vilhelm: Philosophy of

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Introduction

Anders Vilhelm Lundstedt (1882–1955) was a Swedish legal theorist and politician and an early proponent of Scandinavian legal realism. Together with Axel Hägerström, Lundstedt

shaped many of the characteristic positions of this school of legal thought.

Lundstedt's early training was in German *Begriffsjurisprudenz*, and his early work reflects a preoccupation with the analysis and classification of legal concepts. He was appointed professor of civil law at Uppsala University in 1914. At Uppsala, he met Axel Hägerström, who had recently been appointed to the chair in Practical Philosophy. Lundstedt was convinced by Hägerström's criticism of conventional legal theory. All his subsequent work – academic and political – was grounded in Hägerström's methodology as well as the radically antimetaphysical epistemology on which it was built (Lundstedt 1942).

Lundstedt held that Hägerström's theory had identified fundamental structural problems in jurisprudence and in the doctrinal analysis of law. Jurisprudence and legal method, he argued, had come to be dominated by unscientific and unsupportable metaphysics. The result was that the law, instead of being built on a solid factual and scientific basis, was grounded in arbitrary and subjective opinions. This had turned legal theory into a mess of contradictions and circular reasoning, which more often than not were a cover for particular ideological agendas.

However, Lundstedt's theory was not primarily critical. It also had an important constructive component, where he attempted to reconstruct jurisprudence and legal method along more scientific lines. He considered the problem to be urgent and took the view that it was causing genuine harm to society. Accordingly, he devoted much of his academic career to demonstrating how a different and more scientifically grounded approach to legal reasoning could be constructed. At the heart of this approach lay the position that the primary purpose of law is to promote *samhällsnyttan* – a phrase which literally means, "social benefit" or "social utility," although it is more frequently (albeit somewhat incorrectly) translated into English as "social welfare." Rather than interpreting legal concepts in the traditional way, he argued that they should be interpreted in the light of the particular form of social need that underpins them. He used this idea to challenge not just jurisprudential concepts such as "rights" and "ownership" but also specific laws which he believed were operating in harmful ways.

Lundstedt's work was wide-ranging, covering areas as diverse as tenancy law, the law of the sale of goods, the law of causation in negligence, criminal law, strict liability for civil wrongs, and public international law. Unfortunately, much of his work remains untranslated, and the work that has been made available in English is not very accessible to the modern reader – partly because he was poorly served by his translators (who mistranslated key phrases, rendering some of his central ideas almost unintelligible), and partly because of his polemic style. Behind his strident rhetoric, however, Lundstedt's thought is surprisingly nuanced and contains much that should be of interest to socio-legally minded theorists today. This entry presents an account of Lundstedt's thought by discussing its three central features: his criticism of "legal ideology" (as he termed the traditional conceptual framework of legal analysis), the role he assigned to the idea of "social benefit" ("social welfare" in the conventional translation), and the manner in which he applied this to the central legal questions of his day. The entry's concluding part explores the extent to which Lundstedt's legal thought remains relevant to the present-day concerns of legal theory.

The Criticism of Legal Ideology

The core of Lundstedt's legal thought is contained in his *Föreläsningar över valda delar av obligationsrätten* ("Lectures on Selected Aspects of the Law of Obligations"), published in eight volumes between 1920 and 1953. In these volumes, Lundstedt sought to draw on Hägerström's criticism of the reality of moral concepts to challenge the basis of contemporary jurisprudence. Hägerström's criticism is discussed elsewhere in this encyclopaedia and will not be repeated here. The point of departure here is the manner in which Lundstedt built on Hägerström to critically analyze the concept of a "right" and the place it occupies in legal thought.

Lundstedt pointed out that a person typically assert rights to claim some form of power over another – typically, the power to compel the other to act in a way that protects the first person's interests. Despite this assertion of power, however, rights are predominantly claimed in situations associated with powerlessness – typically, with a situation where one person feels under threat from the actions of another. The assertion of a right, therefore, is in essence the articulation of an opinion that they *ought* to have power and that they *ought not* to be vulnerable to having their interests disrupted by the actions of another. Such an assertion inherently has its basis in emotion and not reality. To the extent it asserts the actual existence of that power as something independent of the legal system, the statement is necessarily false.

Lundstedt thus distinguished between rights as descriptor of jural relations and rights as an aspect of what he termed "legal ideology." In the former sense, the language of rights is used merely to describe how the law operated, what sort of situations triggered its operation, and what sort of outcomes it tended to produce. In the latter sense, in contrast, the language of rights is used to set out the purported ends of the law. Rights, in this latter sense, are not the *products* of the law, but the *reasons* for its existence. Theorists who seek to ground the law in the protection of rights are, in effect, asserting that rights are exterior to law. They exist objectively, even in the absence of a legal system.

Yet, Lundstedt argued, rights can only have real existence if they produce actual effects that can be felt and measured, and they only derive their ability to produce real effects from their recognition by the legal system. To claim otherwise is to conflate is and ought. If we say that A has a right even though the legal system does not in actuality produce the outcomes that would be associated with the existence of that right, we are actually saying no more than "A ought to have this right."

In making this point, Lundstedt was drawing a distinction between the law's *content* and its *conceptual underpinnings*. It is acceptable to use the language of property rights to *describe* the content of the law of stolen property or the law of trespass to chattels. But it is unsound to state that these areas of law are *about* protecting property rights. Property rights only exist to the extent the legal system lets a person maintain actions against others for a violation of those rights. They are the result of the operation of the law, not its purpose. Further, because rights can only have objective existence if they refer to the products of the legal system's operation, the statement "the purpose of law is to uphold rights" reduces to the formulation "the purpose of law is to uphold the relationships it creates". Such a formulation is obviously circular and incapable of shedding any light on the matters to which legal theory claims to speak. If rights are the product of the legal system, then an individual cannot "have" a property right which prevents the state from expropriating his property: the property right is created by the law, which can fully well define it to exclude the ability to complain about expropriation. When jurists claim to be basing their evaluative judgments in rights, they are in reality basing them on some form of legal ideology, with the language of rights serving to disguise the true character of that ideology.

Lundstedt gave the example of the formulation "legally protected interest", which he said had been used in precisely this way in German jurisprudence (following von Jhering) as well as in Anglo-American jurisprudence. Not all interests are legally protected, and the decision that the law should protect a particular interest is an evaluative one, which must have some evaluative basis. But what is this evaluative basis? It can neither be the right itself nor can it be the protected interest itself, as both the existence of the right and its protection are products of the law rather than its causes. Rather, the question of how far the right should extend, and what interests should be protected, is typically decided with reference to some other evaluative criteria. Without a solid, scientifically grounded account of the basis of law, judges, jurists, legislators, and other legal evaluators base the operation of the law on their own subjective evaluations, rooted in their personal ideological preferences, rather than objective judgments. The deployment of the language of legal ideology – "rights," "interests," "duties,"

"causes," "legal rules" – served primarily to draw a veil over the true character of this underlying evaluative judgment. In reality, however, it was the underlying evaluative judgment – grounded in factual criteria – that was dispositive, rather than the language of rights and rules in which it was clothed (Lundstedt 1929c, 109–118).

Lundstedt compared the accepted position – that rights had an objective reality independent of the legal system – to superstition. Early thinkers described rights as having been granted by the Creator, or as being self-evident, and meant these statements literally. They believed either that the rights had been instituted by divine *fiat* or that there existed a transcendental universal reason to which everyone had access. Not only did these not exist, but modern theorists of rights had no belief in them. The idea that the rights granted by a legal system reflected objective truths, rather than simply being the epiphenomenal result of the pursuit by the legal system of some other ends, thus reflected a near-magical belief in the properties of the utterances and actions of the judges, legislators, and other officials who operated the legal system (Lundstedt 1930).

Lundstedt's work suggests that he had some sympathy for jurists who sought to sustain rights-based approaches to law. The reason for the attachment of jurists to rights, he argued, was the result of the fact that rights had played an important progressive role since the Renaissance. The assertion of a right had a rhetorical role to play, and that rhetoric had played a key role in producing the structures of modern societies – including the end of absolutism and the rise of economic, social, and political freedoms. This had permitted the content of the asserted rights to co-evolve with society, adapting to the changing socio-economic context (Lundstedt 1929). Yet, as the experience of the world with the First World War, and the period after it, had shown, the rhetoric of rights was also capable of being intensely destructive. The victorious powers after the First World War justified their treatment of Germany by asserting that they had a right to demand harsh reparations and that Germany's failure to pay those reparations gave them a right to occupy its territory. Germany, equally, responded to this by asserting that it had a natural right to rearm (notwithstanding the terms of the armistice) and that it had a right to recover the territory that had been unfairly taken from it. The rhetoric of rights, for all the good it had done in the early modern period, had demonstrated how easily it could create conflict, when the purpose of the legal system should be to prevent conflict (Lundstedt 1946a).

Part of what gave the law its destructive potential, and permitted it to command public obedience notwithstanding its destructive potential, was the social role of legal consciousness, and the role of law in shaping legal consciousness (*rättsmedvetande*). In a society where the legal system commands respect, the legal system could reshape the idea of justice held by that society. The result would be that people obeyed the law not just because they were deterred by the consequence that would follow if they disobeyed it (as Holmes suggested with his metaphor of the "bad man"), but because they felt a moral duty to obey it (Lundstedt 1930, 74–91). This legal consciousness, and the resultant confidence placed in the legal system's evaluative judgments, could however mean that the system commanded popular allegiance even if its effects were destructive. It was this destructive potential, clearly seen in international law but also reproduced at the national level in private law and criminal law, which made it imperative to construct a legal theory that could look beyond the forms and conceptual framework of legal ideology to ascertaining the legal realities that actually animated the operation of the legal system and that could put that operation on a sounder footing. It was for this reason that Lundstedt devoted his life to exposing the lack of systematic grounding in the legal concepts that were invoked to justify so many actions which, in the long run, harmed the interests of people and society.

The Method of Social Benefit

The problems that Lundstedt had identified with legal theory arose from its conflation of is and ought, phenomenon and epiphenomenon, and – most fundamentally – fact and opinion. The

solution to the problem, then, lay in undoing this conflation, by formulating a legal theory that was grounded in the "is," that sought to base itself in the actual phenomena underlying the evaluative judgments reflected in the law, and that built on a base that was grounded in facts – and, hence, was scholarly and scientific – rather than the more metaphysically driven opinions that constituted the basis of legal ideology.

Lundstedt argued that it was the absence of such an account that led to rights and other fundamental legal conceptions being deployed in ways that not only had a destructive effect on society generally, but that also won broad public acceptance notwithstanding those destructive effects. The problem, however, could not be resolved by replacing one set of subjective ideas with another. Rather, it was necessary to locate the *actual* basis of the evaluative judgments on which the law was based and to describe it in a way that was objective and could be determined through *factual* judgments rather than subjective ideology-based evaluations. This was the role which his method of *samhällsnyttan*, or social benefit, was intended to fulfill.

Lundstedt suggested that the reason for the existence of law, and the principle animating its content, was to meet some form of social need or social necessity. Laws seek to meet social need by creating new jural relations, or by altering existing jural relations, in ways that serve social purposes or provide some form of social benefit (or "social welfare" in conventional transations). The root of these social benefits was the aims that people in society actually strive to attain – a goal on which Lundstedt believed any society would show a much higher degree of consensus than they would on matters such as rights and which were far more amenable to empirical exploration than ideas such as rights (Lundstedt 1930, 93–114).

Lundstedt elaborated on this with reference to private law. The basis of contract law was often linked to the "will theory" of Pothier, under which contract law was seen as existing for the purpose of recognizing the parties' will. Lundstedt, in contrast, argued that the true reason why contract law existed was because modern societies required a framework within which individuals and legal persons could create instruments for structuring their business and social transactions. Similarly, many types of property existed not because of a metaphysical "right" to property, but because it was necessary to create and uphold incentives to engage in productive work. Lundstedt argued that analyzing the law in this way would help identify the social benefit or social purpose underlying the relevant aspect of the law. This, unlike legal ideology, would provide a sound basis on which issues pertaining to that area of law could be decided and resolved.

Lundstedt argued, further, that the system *in fact* functioned this way. Because claims in relation to rights were incapable of providing an evaluative basis, the underlying phenomenon in each instance was almost invariably an evaluative decision on the desirability of the competing outcomes that the operation of the legal system might pronounce. If, however, the epiphenomenal language of rights was accepted as representing the reality of the process, it created a genuine chance that the law would be shaped in ways that did not in fact further social benefits or social welfare, but only operated to the benefit of a small subsection of society. This was the true danger of legal ideology, and it this made it imperative to restructure jurisprudence to reflect the realities that underlie the actual operation of the legal system.

Law and Politics

Lundstedt's method of social benefit (or social welfare), and his claim that it was objective in a way rights were not, was attacked by a number of his contemporaries, most notably the Danish jurist (and fellow Scandinavian realist) Alf Ross. Ross argued that Lundstedt's theories were every bit as subjective and ideological as those of the jurists he claimed to oppose – and, indeed, amounted to little more than an updated version of Bentham's and Mill's utilitarianism (Ross 1932). Lundstedt strongly refuted this criticism. The analogy he advanced, borrowed from Hägerström, was of

the legal system as a machine. Much as one can objectively describe the purpose of a machine, so too can one objectively describe the purpose of the law.

A second line of attack, originally leveled by the Swedish philosopher Ingermar Hedenius and which came to form part of the accepted reading of Lundstedt, was that Lundstedt's theory, far from being objective, only reflected his own social-democratic political ideology. Lundstedt rejected this criticism, arguing that his theory on the contrary depoliticized law by providing an objective basis for judgment in place of the subjective bases that had previously characterized it. Lundstedt's own political positions substantively bear this out. He was drawn into active politics as a member and future MP of the Social Democratic Party as a result of the "treason trial" of 1916, in which three leading Social Democrats were sentenced to lengthy terms of imprisonment for treason after threatening to call a national strike if Sweden were to enter the First World War. Lundstedt did not support the proposed strike, but he was deeply critical of the use to which criminal law was put in that trial (Lundstedt 1916). Yet he was often at odds with his own party, particularly on issues of private property and the rights of landlords, where he felt his party's demands were excessive (Källström 1991). If he held that there was no inherent right to private property, he also held that there was no inherent right to an equal distribution of resources. All such questions were a matter of finding a route that would further the law's role in promoting social usefulness, without causing disorder in the machinery of society by excessively promoting the interests of one section at the expense of the other.

Lundstedt's views also led him to espouse policies that were radical for the time. He called for the decriminalization of homosexuality as far back as 1932 and argued against prohibition, in both cases on the basis that legal intervention in matters where morality was hotly contested would cause the erosion of the legitimacy of the criminal justice system (Lundstedt 1946). In international affairs, too, he took positions that were deeply unpopular, but which were nevertheless solidly grounded in his theory of law, calling for Sweden to join NATO and for a league of democracies rather than an international system which implicitly accepted democracy and autocracy as having equal status.

Conclusion

Does Lundstedt's theory, then, have any relevance to socio-legal thought today? Two points can be made to suggest that this question should be answered in the affirmative, both related to his "method of social usefulness".

Firstly, Lundstedt's contention that a consideration of "benefit to society" not only ought to be, but already is inherent in the legal system, and forms the basis of much of legal doctrine, is one of the most provocative parts of Lundstedt's theories. Yet it is also the most promising. Judicial reasoning remains largely a black box. Despite considerable advances in legal scholarship, the reasons why judges favor one particular reading of a statute over another remains a mystery. In some jurisdictions, the question tends to be simply ignored; in others (notably the USA) it has led to a sharp politicization of the judiciary to an extent that calls its institutional legitimacy into concern. This is precisely as Lundstedt predicted in stating that legal doctrine could become a cover for legal ideology if the language of rights, duties, and rules was allowed to dominate legal thought. Would a greater and more explicit role for the social purpose of the law, and of the benefits to society it is designed to advance, assist in resolving some of these problems? Lundstedt's work suggests that there is at least some reason to try.

Secondly, Lundstedt's work points towards a way of depoliticizing arguments around the law. The point of his critique of legal ideology was that arguments as to the desirable shape of the law should be constructed on a rational basis with reference to rationally verifiable circumstances. Mere opinion, and mere feeling, would not by themselves provide a sufficient basis for the law to adopt a given evaluative position. Lundstedt's understanding of "social

usefulness," in particular, displays a strong methodological naturalism, making it possible to integrate the insights of the social sciences not only into *normative* analyses of how the law might be reformed (as is currently commonly done), but also into *doctrinal* analyses of what the law currently says, and how it should be applied to the facts of a case. His idea of social welfare or usefulness, with its strongly empirical basis and its necessary link to concepts that constitute legal doctrine, provides a powerful framework to integrate a detailed consideration of the structure of law with a study of its impact on society, within a single conceptual outlook capable of being applied to real practical problems. There is much in this that should commend itself to scholars interested in the interface between the worlds of social and legal thought.

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Luther, Martin

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Introduction

Martin Luther (1483–1546) was the most decisive protagonist of the Reformation, the religious revolution of the early sixteenth century that transformed not only the ecclesiastical but also the political structures of Western Europe. Starting from a critique of the church's penitential system, Luther ended up with questioning ecclesiastical institutions and eventually the papal church as such, until he was no longer willing to recognize its authority in spiritual as well as in secular matters.

In the territories that joined the Reformation, a fundamental transformation of all those areas that had hitherto been under ecclesiastical jurisdiction was the result, provoking reforms that affected not only church and state in general, but also social welfare, penal legislation, and public order (Witte 2017). Luther's theologically motivated Reformation proved thus to be a catalyst for a series of reform tendencies that had marked the politics of the German Empire since the late Middle Ages, and it merged in particular with the claims of the princes and free cities, raised against the emperor and the pope, to govern autonomously in their territories (Heckel 2016).

For Luther himself, these secular concerns were secondary, but he early recognized that his religious reforms could only be implemented with political support, which is why he addressed a wide variety of political actors in numerous writings and letters and also intervened politically himself by writing proposals for the organization of Protestant communities (Estes 2005).

Biography

Born in Eisleben (Saxony) in 1483, Luther grew up in a family operating in the mining industry. Intended by his father to become a lawyer, Luther studied the liberal arts at the University of Erfurt, before enrolling, after graduation in 1505, to the law faculty for a few months. In a personal crisis, however, he abandoned the intended path without the consent of his parents and entered the Augustinian Order. There he was assigned to the priesthood and designated to study theology in Wittenberg, where he received his theological doctor in 1512. In the same year, he accepted the university's chair of biblical studies, and from 1514 on, he also worked as a preacher at the Wittenberg city church.

For both offices, he intensively engaged with Scriptures, through the study of which he arrived at his basic Reformation insight: a person could not contribute to his religious salvation by actions of his own, but rather depended solely on free divine grace (*sola gratia*). This brought him into conflict with the common practice of penance and indulgences, which he considered a form of human participation in salvation, and which he opposed thus in a number of sermons and university disputations (the most famous being the 95 *Theses on Indulgences* of 1517). Since he fell on interested ears in large circles, where his theses were spread and printed, he got into an open conflict with the church hierarchy.

In 1520, after intense debates, the conflict culminated in Luther's excommunication, to which Luther responded, however, by staging a counter-excommunication of the pope whom he now regarded as the incarnate Antichrist. In response, the imperial ban was imposed on Luther at the Diet of Worms in the spring of 1521, but since the Saxon Elector Frederick the Wise continued to support Luther (he had him taken into protective custody at Wartburg Castle in 1521–1522, where Luther began his German translation of the Bible), the Reformation was able to take its course from Wittenberg, and thanks to the political support of other princes and, above all, of urban citizens, it spread farther and farther.

Luther was therefore increasingly preoccupied with questions of how to profile the Reformation, so that he had to confront no longer the Roman Church alone, but also proponents of differing

reforming ideas: Luther broke with the humanist Erasmus, with representatives of a radical Reformation aiming at a far-reaching social restructuring, and with the Swiss center of the Reformation around Huldrych Zwingli. In the peasant revolt of 1524/25, which partly invoked the new evangelical freedom, Luther also clearly backed the princes who brutally suppressed the uprising.

In the face of these conflicts, but also because Luther continued to be an outlaw outside of Saxony, he increasingly left political and practical issues to his colleagues – first and foremost to Philipp Melanchthon – and concentrated on his duties as an exegete and preacher, without ceasing whoever to publish a wide variety of treatises, commentaries, and pamphlets. In addition to his Bible translation, his canticles and catechisms in particular had a broad impact on the shaping of protestant societies. As political tensions increased, so did the apocalyptic undertones in Luther's thinking, leading to some harsh late writings, some of them with antisemitic undertones. Luther died in 1546 in his native town of Eisleben.

The Theology of Grace

Influenced by the Augustinian revival of the late Middle Ages, Luther's thinking was driven by the tension that God grants access to eternal salvation only to those who are found righteous, but that human beings after the Fall always remain entangled in sinful actions. Given the impossibility of achieving good works – that is, morally good actions and deeds of justice – human beings could therefore contribute nothing to their religious salvation; rather, in order to nevertheless be found righteous by God, they were dependent solely on His merciful grace. In the Bible, however, Luther saw the promise that God was ready for this gift of grace, which is why he taught that all that remained for human beings to do was to faithfully trust in this promise (justification by faith alone).

With the rejection of the salvific value of human activity, however, went a radical disavowal of any human institutions and traditions in matters of faith, as long as they were not attested in the Bible as the only warrant of the divine will (principle of *sola scriptura*). While this primarily led to a fundamental critique of the medieval church and theology, it also placed human activity within the secular realm in a new light.

The Two Kingdoms

To map out the relationship between the spiritual and secular spheres, Luther developed – inspired again by Augustine – his doctrine of the two kingdoms: God had ordained two realms or governments, "the spiritual, by which the Holy Spirit produces Christians and righteous people under Christ; and the temporal, which restrains the un-Christian and wicked so that [. . .] they are obliged to keep still and to maintain an outward peace" (*On Temporal Authority* [1523], 91). The temporal kingdom, encompassing all humanity, is governed by secular authorities through law and coercion in order to maintain a basic social and political order. However, its laws "extend no further than to life and property and external affairs on earth, for God cannot and will not permit anyone but himself to rule over the soul" (*ibid*. 105). The soul rather belongs to the spiritual kingdom, the realm of salvation, which is governed by Christ and his word in order to grant mankind access to salvation.

A Christian therefore lives in both realms simultaneously: as a citizen of the spiritual realm, he is called to follow his conscience and to live in the light of God's word, but at the same time, he is bound by the laws of the secular realm and obliged to obey the natural orders and offices that God has ordained for the governance of the earthly kingdom (Witte 2002, 87–118).

The Uses of Law

In order to determine more precisely what was the use of political order, Luther elaborated a doctrine of the "uses of law." For Luther, every law – whether divine, natural, or positive – served to

guide human behavior within the secular realm. On the one hand, he identified thus a "civil" or "political" use, based primarily on the fear of punishment and intended to make possible "a life in which we can dwell together without devouring one another as we would were Law, fear and punishment lacking" (*Church Postil* [1522], 271).

He distinguished from this a "theological use," for it was by means of the laws and the impossibility to completely observe them that human beings were made aware of their inability to do truly righteous works, and thus, "humbled in consequence of such knowledge" they "come to the cross, yearning for Christ, longing for his grace, despairing of themselves and placing all their hope in Christ" (*ibid*. 272). Following St. Paul's theology of the law (Rm 7, Gal 3), legal corpora were therefore meant to bring about an insight into one's own sinfulness and total dependence on God.

In Luther's environment, moreover, a third use was quickly taught, one that Luther himself had never developed, but which he did not reject either: the so-called "pedagogical use," intended for Christians who were already aware of their need for salvation, pointing them the way to a virtuous and godly life. This legal doctrine, and the idea of a "civil use" in particular with its emphasis on the need to "restrain the wicked," was to become one of the foundations for modern theories of legal positivism (Berman 2003, 76; Friedeburg 2016).

Freedom of Conscience

Regarding the spiritual regiment, on the other hand, Luther insisted on its being unaffected by secular laws and instead emphasized the freedom of conscience. In his famous treatise on "the Freedom of a Christian" of 1520, he therefore developed the paradoxical-sounding idea that a Christian is "a perfectly free lord of all, subject to none" and at the same time "a perfectly dutiful servant of all, subject to all" (*Freedom of a Christian* [1520], 344): the servitude referred to the "outward man," which (ultimately in the sense of the pedagogical use of the law) had to obey and be conformed to the inward man with "reasonable discipline," since every Christian as a bodily being remained inscribed in the conditions of a sinful world (*simul iustus et peccator*, *ibid*. 358f. [WA 7, 60]). He remained free, however, with regard to his conscience that was obliged to the divine word alone.

In matters of faith, therefore, all were equal before God, and Luther developed this into the doctrine of universal priesthood that he also presented in political tones in a writing to the German nobility of the same year: given the equality before God, "there is no true, basic difference between laymen and priests, princes and bishops, between religious and secular, except for the sake of office and work, but not for the sake of status" (*To the Christian Nobility* [1520], 129, cf. *Freedom of a Christian* 356; see Serina 2020).

This freedom of conscience, however, should not be taken too quickly as a precursor of modern notions of freedom: however, much Luther removed conscience from the grasp of earthly authorities, he always believed it to be bound by the authority of the divine word. In addition, with regard to the outward man, Luther vehemently rejected a political understanding of this concept of freedom, as would become particularly clear in the peasant war of the mid-1520s. Emphasizing the God-givenness of secular authorities and civil order, Luther insisted on the duty of obedience, and even if, over the years and in face of the growing conflict between his secular protectors and the Emperor, he developed a differentiated position to the question of the duty of obedience of princes in particular, the Lutheran tradition thereafter remained very reserved toward a general right of resistance, which in Germany had an effect even into the theological debates about the toleration of the Nazi regime in the twentieth century.

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Luxemburg, Rosa

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Introduction

Rosa Luxemburg (Rozalia Luxemburg, 1870–1919), born in Zamość (Poland) in a wealthy Jewish family highly committed to children education, was a distinguished figure of the German social democracy, the co-founder of the Spartacus League together with Karl Liebknecht, and eventually killed in Berlin as a result of the repression under the social democratic government following the January Communist Revolt in 1919.

When she was a child, her family moved to Warsaw looking to improve a diminished fortune and to dodge the conflict between Jewish Orthodoxy and the anti-Jewish sentiment in the town (Ettinger 1986, 6). Nevertheless, hostility against Jews was ongoing in Warsaw as well, where she experienced segregation at school and the Christmas Day pogrom of 1881.

Hard worker, arrogant, and even aggressive, continuously controlling her limp, she soon joined illegal socialist groups. Ceaselessly within the framework of an intense political activity in socialist forums, with special influence in Poland, Russia, and Germany, in 1889, Luxemburg left Poland to study in Zurich (her doctoral dissertation concerned *The Industrial Development of Poland*) and a marriage of convenience in 1897 granted her the German nationality, allowing her to settle in Berlin.

The main feature of Rosa Luxemburg is the critical attitude present in her thought and writings, which made her an uncomfortable comrade, at times refused, at times forgotten, and often reinterpreted and mystified (Arendt 1966). Among others, she argued with Lenin, broke with Bernstein and revisionism, and criticized Marx from a Marxist perspective. A defender of the role of the mass against elite prominence in the proletarian revolution, she refused revisionism, inasmuch as to her mind, the postwar legal reforms improving working conditions reflected that the state had been taken over by capitalism and her position against workers' participation in the First World War led to Espartaquisme or Luxemburgism as a split of the Social Democratic Party of Germany in favor of a global socialism (Nye 1994, xviii).

Democracy

Luxemburg maintained a radical concept of democracy against the bureaucratic experience both in Russia and in Germany. According to

the author's thought, socialism represents the best chance for democracy to survive at her time (Luxemburg 1900, 88; Nettl 1966). Democracy for Luxemburg is neither the bourgeois democracy nor can it be expressed in the decision of an enlightened elite, which would mean dictatorship. This is one of the keys to understanding her position against both German social democracy and Lenin.

The role of the vanguard of the proletariat and the meaning of the right to self-determination were two points of discussion with Lenin (Luxemburg 1918). As workers were represented as incapable of developing a political consciousness, Lenin defended the leadership of the party in the organization and the achievement of power. However, Rosa Luxemburg regarded the prominence of the mass as a condition to keep into consideration the needs of the workers and to obtain their emancipation, the aim of the revolution (Mattick 1978, 32). Even acknowledging the intellectual role of the party, spontaneity was seen as an unavoidable ingredient of the revolution.

From Luxemburg's point of view, the right of nation to self-determination, apart from giving it a metaphysical allure, does not shed light on the demand of the abolition of classes and the full legal equality of all citizens before the law nor on linguistic rights and local self-government. Additionally, nationalism hides the antagonism between classes in the society by depicting the nation as a homogeneous entity. According to Luxemburg, from a socialist perspective, the nationality question concerns class interests, and workers' national question is not the same thing as bourgeois nationalism. Her position in relation to nationalism expresses a point of view both on imperialism and in relation to democracy. The defense of the latter includes the rights to free speech, free press, and freedom of association and of assembly but not necessarily "the right of nations to self-determination" (Luxemburg 1909, 1910).

Reform or Revolution

Rosa Luxemburg rejected revisionism as an opportunistic method and warned against labor reforms that could cause troubles inasmuch as they could "stop the collapse of the capitalist system" (Luxemburg 1908, 47). As a matter of fact, Bernstein described trade unions, social reforms, and the political democratization of the state as the tools for a progressive realization of socialism. From Luxemburg's perspective, these instruments were aimed at the interest of capital in a context where the state became capitalist and thus unsuitable for controlling the development of the economy in a socialist way. Furthermore, the improvement in the living conditions of the working class pursued by revisionism implies the attenuation of class antagonisms (Luxemburg 1900, 75).

In the alternative between reform and revolution expressed by revisionism, Luxemburg defended the revolution through democracy, which implies seizing power through a proletarian control over both means of production and the decision on the distribution of wealth, for which mass strike is considered to be a powerful and indispensable device.

The Woman Question

Rosa Luxemburg did not regard woman question as different from socialist struggle (Abrahams 1989, 48–56). The author was not a feminist at all, and she addressed critical commentaries to women from dominant classes; to her mind it was even more conservative and oppressive than men and socially useless except for the reproduction of the dominant classes themselves.

Her defense on women's suffrage is presented as a class concern and as a consequence of the actual participation of socialist women in politics. The right to vote for Luxemburg is the final right but just as part of a broader political participation.

Given the maturity of proletarian women and their active role in society, "disenfranchisement of women," and monarchy, were relics of the past, both still alive inasmuch as "powerful tools of anti-popular interests" with a "place among the most important tools of capitalist class domination." The exclusion of the proletariat is functional to capitalism, seeing that women had always been enemies of militarism, monarchy, and indirect

taxation ("the organized robbery of tariffs and taxes on foodstuffs," Luxemburg 1912) among other institutions.

Imperialism

Luxemburg refused imperialism from the perspective of the defense of universal interests of the workers against an everywhere oppressive capitalism. This argument is also present in her works against the Germanization of Poland (Luxemburg 1900). In the author's opinion, imperialism moves the "source of surplus value" from western workers to foreign lands (Nye 1994, 41; Luxemburg 1913).

To a large extent, imperialism is the response of capitalism that prevents its collapse by improving workers' living conditions in Europe at the cost of workers' exploitation from other parts of the world. The maneuver is doubly regressive from the point of view of the revolution since, in addition to serving as an escape for the crises, it makes the workers identify their interests with those of the bourgeoisie, blurring their class consciousness.

Her position with regard to imperialism, on the other hand, highlighted by the criticism of various German campaigns, acquires clarity by means of her opinion on colonial oppression, in addition to her understanding of nationalism and her rejection of participation in the war that led to the segregation of the Spartacist League. In relation to the national issue, Rosa Luxemburg offers tools to distinguish bourgeois nationalism from nationalism related to democracy. The breakdown of the Socialist International, largely caused by national sentiments – which Rosa Luxemburg, unlike her comrades, had tried to approach from materialism – eventually turned the workers' movement into a nearly entirely national one.

Conclusion

Rosa Luxemburg was a woman concerned with her times. There is no finding a whole system of thought in her work, but there can be found concrete answers to the pitfalls on the road toward the emancipation of the proletariat.

The originality of her thought lies in her freely searching for those answers, without feeling influenced by either of the two major lines of interpretation of Marxism at the times she lived in. Her radical conception of democracy; her firm belief that oppression was a universal condition of all workers in which all other traits such as nationality, sex, or ethnicity were included; and the goal of putting an end to capitalism through revolution place the author at odds with Lenin's dictatorial drift and against German social democracy compliance with the schemes of capitalism.

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M

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Introduction

Mably (1709–1785) was a famous writer in his time. At the end of the Ancien Régime, he was famous for his protest and grew to be considered one of the founding fathers of the Revolution. However, his legacy was claimed at the same time by monarchists, by all sorts of Republicans, and by the most radical egalitarians, such as Babeuf. So is Mably a "utopian communist," as Soviet historiography presented him? Is he a moderate thinker of the Enlightenment? Or even a "classical republican," as some recent historians claim (Wright 1997)? The social idea of the community of goods appears in his work in a way which explains this uncertainty, at the same time as it provides a guideline to try and solve this problem.

The Community of Goods

Mably evokes for the first time the idea of the community of goods in his political treatise Of Rights and Duties of the Citizen, presented in the form of an epistolary narrative. This text is historically relevant: written in 1758, but published posthumously, it sketches 30 years ahead a "scenario for the French Revolution" (Baker 1993, p. 137).

The character of Milord Stanhope, an English commonwealthman, states before his French interlocutor the need of a convocation of the Estates-General, which itself would be the prelude to the establishment of a national assembly, that would have in charge the writing of a new constitution for France. Coming from this reformer, and along with a plea for the rights of the Nation and with a determined condemnation of absolutism, there is also a panegyric of a society without private property. Stanhope thus praises the moral advantages of a community freed from the vices and the misfortunes linked to the reign of individual interest. Standing against the faults of unequal societies, one needs to emphasize the virtues of a shared frugality, of a permanent mutual help, and of the impossibility of making oneself noticed by one's riches.

As fast as it may be, this utopian sounding evocation, placed right in the center of the treatise, plays an ambiguous role. Stanhope thus states that it is too late for societies to go back to this primitive simplicity, because corruption has made irreversible progress among mankind. This said, what purpose could such a dream still have?

The utopia of the community seems to play in the text the role of a regulatory ideal. Even though it is out of reach, nothing however prevents trying to get as close as possible to it. The paradigm of a society in which the only possible

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acknowledgment is that conferred by great virtue, in which there is no personal enrichment, in which fraternity rules, seems to inspire the republican reforms. Stanhope sets forward: limitation of the king's powers, integration of the Third-State into the Nation's decision-making authorities, establishment of a body of Antique-style censors. These censors could be led to oversee the execution of sumptuary laws "to put limits to the scandalous luxury that impoverishes us in the middle of the greatest wealth" (Mably 1972, p. 199). In other words, the gradual leveling of rights and living conditions would be a second-best, derived from the radical pooling model.

Mably Against Physiocracy

The second text evoking the social community ideal is a controversial one: the Doubts proposed to economist philosophers. Here Mably criticizes the thesis of the physiocrat Le Mercier de la Rivière. He presents the community of goods as being overthrown by the corruptive movement of history, but he still defends it vigorously for its intrinsic value. Mably seems to evolve on a strictly anthropological and moral level. Against Le Mercier de la Rivière, he puts forward not only the necessary dissociation, but even the opposition, between on the one hand personal property, with the movable property it includes such as the "right to provide to one's sustenance" (Mably 1768, p. 30), and on the other hand land ownership. Land ownership is stated an "arbitrary institution" (Mably 1768, p. 5), much more clearly here than in the Rights and Duties of the Citizen. It is not necessary to the survival of human beings. To the contrary, men, being naturally sociable, spontaneously develop the qualities of mutual aid and solidarity, which are "the true foundation of society," and which can only be weakened by the irruption of land ownership. The material interest of individuals is therefore not the first foundation of social bond: moral needs come first. Agriculture is in fact a later consequence of social life. This examination thus reveals that the community of goods is considered to be superior, as a model of social organization, as the only framework in which man's "social qualities" can fully develop.

In another text which he wrote in the midst of the "War of flours" against the liberalization of the prices of grains enacted by the Turgot ministry in 1774, Mably's representative opposes a physiocrat who defends the ministry politics, arguing a natural right of property. The author claims the natural right to subsistence. For this reason, he even shows solidarity with the food riots. Not only are they not reprehensible, but they could even make up the "cause and the principle of a happy revolution" (Mably 1774, p. 249).

Mably denounces the policy of price freedom as being a direct threat to the lives of the poor: "Our daily subsistence is something too precious and too important to give it up to the entreprises, the speculations, the hopes and greeds of traders" (Mably 1774, p. 263). That is the reason why "the grain trade must be subject to rules completely different from the rules of the other goods trade": the State must ensure a low price, by withdrawing the class of grain merchants, as unnecessary and parasitic intermediaries, and by the constitution of public granaries, which allow the fulfillment of everyone's needs in case of shortage. It appears that the polemic against the physiocratic theses is not limited to a philosophical opposition between the principle of ownership and the principle of community, but that it leads to concrete political orientations. These choices seem to be inspired by the model of the community, although this function is not made explicit.

An Egalitarian Reform Plan

In a dialog of 1776, Of Legislation, Mably has elaborated a mature style and clarified positions: the social model of the community of the goods works as a "compass" (Mably 1776, p. 159) in the hands of the legislator to guide his projects for reforms. The character who embodies this strategy is a Swedish philosopher, a representant of a nation with a constitution "in which the rights of humanity and of equality are much more respected than what could have been expected in the unfortunate times we are living in" (Mably

1778, p. 258). He presents the idea of a society free of landowners as the original society, the one most adequate to suit the best aspects of human nature. "I think I see the citizens dispatched into different classes: the most robust are destined to cultivate the soil, others work in the gross arts without which a society cannot function; everywhere I see public stores, in which the riches of the republic are inclosed; and the magistrates, being really fathers to the country, have almost no other function than to maintain the manners, and to distribute to each family the things which are necessary to it" (Mably 1776, pp. 75–76). The community of goods, along with the republican principle of the mixed government, also leads him to present ancient Sparta as the best of historical examples. Yet "in any state where private property is once established, it must be regarded as the foundation of order, peace, and public safety" (Mably 1776, p. 109). He thus engages a new reflection based on this perhaps paradoxical observation: how can one imagine reforms which would bring today's property-owners societies as close as possible to the ancient community?

On the basis of this questioning, he tackles one by one the different aspects of social life, together with the necessary changes to bring to them. The philosopher thus declares himself in favor of measures which are however, in the first part of the text, judged to be inferior to the principle of community: the division of land or agrarian law, a law on inheritance, and sumptuary laws, all of which must maintain "a certain equality that is necessary to unite the citizens" (Mably 1776, p. 145). The material equality of all must be coupled with an absence of symbolic privileges, unless these are due to merit, and limited to a legitimate public esteem. Thus the Philosopher imagines "dignitary laws" which restrain the magistrates in their political ambitions: submission to the principle of election, obligation to assume humble responsibilities at first, simplification of functions in order to make it possible for a growing number of citizens to assume them: "the laws will be deemed more or less perfect, depending on whether they establish a more or less complete equality between the different orders" (Mably 1776, p. 227).

Conclusion

Finally, the republic cannot be satisfied by the mere eradication of inequality of living conditions nor by power sharing, it must also take care of uniting the citizens by the customs, by creating common values and points of reference. Such is the aim of a "public and general education" capable of giving "common principles of union, peace and harmony," which give all the children of a given generation "the same spirit," without any "domestic prejudices" (Mably 1776, p. 371). This leads to the assertion that a society needs to practice a religious cult: without a religion there is no common morality and therefore no virtue in the city.

Mably's thinking hence places the paradigm of the community of goods in an unprecedented situation. This paradigm is not considered to be an achievable aim, but it is an inspiration to a reforming thought, for the first time in the history of utopian tradition and of social philosophy. It results in Mably's radical republican egalitarianism, which links a popular participation in public decisions, the limitation of inequalities by the state, and the constitution of a civic morality. Mably's "social republicanism" had strong influence on later social movements in France, with the development of a tradition going from the sans-culottes to the republican socialism of Jean Jaurès and even beyond.

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Macaulay, Catharine

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Introduction

Catharine Macaulay (born Sawbridge, 1731–1791) was celebrated during her lifetime for her *History of England from the Accession of James I* and was one of only a handful of English women, during the eighteenth century, to have published a significant historical work. The first five volumes of this history appeared from 1763 to 1773 and covered the period from the accession of James I up to the restoration of the monarchy. Unlike David Hume and Tobias Smollett, who had also recently published histories of this period, Macaulay did not represent the parliament as having overstepped its legitimate prerogatives, nor did she consider the execution of Charles I to have been an injustice. Rather, she wrote to remind her countrymen of the virtues of the parliamentarians, the debt that they owed them for the defense of their liberties, and the justice of the proposals that had been developed by the Levellers, such as the Assembly of the People, for a broadly representative, democratic republic. These volumes, which appeared at two-year intervals during the lead up to the American Declaration of Independence, were widely read in America, and rehearsed many of the arguments concerning arbitrary taxation and the rights and liberties of the people, which were being replayed as a result of the Stamp Acts and other efforts by the British Crown to extract money from the colonies. The last three volumes, which took her account of British history up to the revolution of 1688, only appeared during 1779–1783, and were not as influential as the first five. They offer a biting condemnation of the duplicitous politics of Charles II, along with a relatively kind assessment of James II, and a largely negative portrait of William III's ambitions, which culminate in an assessment of the 1688 revolution as having ultimately been a missed opportunity for genuine political reform.

As well as this major historical work, Macaulay published a number of polemical political pamphlets and the first volume of a projected *History of England from the Revolution to the Present Time,* which soundly condemned the "system of corruption" that had been developed by the Whig aristocracy since the Glorious Revolution. From the 1780s she turned her attention to more philosophical writing, publishing *A Treatise on the Immutability of Moral Truth* in 1783 and *Letters on Education* in 1790, which was shortly followed by her *Observations on the Reflections of the Right Hon. Edmund Burke on the Revolution in France.* In this work she opposed Burke's nostalgic elitism, saying, "I know of no *rational* objection; nor can I think of any expedient to remove the well-grounded apprehensions of the different interests which compose a commonwealth, than a *fair* and *equal* representation of the *whole* people" (48). Although this last work offers one of the most succinct and clearly argued responses to Burke, it was not particularly

influential. In the long run her *Letters on Education*, which condemned Rousseau's proposals for the limited education of women and proposed an equal, rigorous education for both girls and boys, achieved greater renown. This work, which was positively reviewed by Mary Wollstonecraft and inspired her *A Vindication of the Rights of Woman*, played an important role in the genesis of contemporary feminism, and is currently Macaulay's most widely reproduced and influential work.

Political Principles

Macaulay drew her political principles from the political writings of John Milton, Algernon Sidney's *Discourses on Government*, and John Locke's *Two Treatises*, as well as more popular works such as Charles Rollin's *Roman History* and Joseph Addison's essays, published in the *Spectator*. Her father's library was well stocked with historical works relating to the English Civil War and the neighboring parish library at Crundale also possessed a substantial collection of Civil War pamphlets. She subscribed to the view that government is "a power delegated for the happiness of mankind conducted by wisdom, justice, and mercy," words which can be read on the plinth depicted in the portrait of her, now found in the British Portrait Gallery. Since government is a delegated power, she argues that this power can be rescinded at any time, should the people determine that those who have been delegated fail in their obligations to exercise it with justice. Quoting the political works of Locke and Milton, she argues that this was the case during the English Civil War, when Charles I took up arms against his own people, and so, since he had returned the country to a state of war, the parliament was perfectly justified in trying and then executing him.

Although a social contract theorist, she was a determined critic of Hobbes's attempt to justify absolute monarchy on the basis of contract theory, and of his moral psychology, according to which, in accepting subordination to political authority, people are only motivated by fear and a desire for peace. In her *Loose Remarks on certain positions to be found in Mr Hobbes's "Philosophical rudiments of government and society,"* she criticizes Hobbes's claim that humans are not born fit for society, because they are not born rational, as tantamount to arguing that humans are not born capable of walking, because not born walking. Since humans are born capable of acquiring reason, and since Hobbes himself shows that there are good reasons for contracting with a sovereign power, in order to maintain peace and promote prosperity, she suggests that he has assumed that humans are rational creatures, and so naturally fit for society. Taking the idea of a contract between government and the governed in its ordinary sense, she also argues that if the government fails in its contractual obligation to promote the happiness of society, then the people retain a right to overthrow it.

In the *Short Sketch of a Democratical Form of Government in a letter to Signor Paoli*, which she published along with her *Loose Remarks*, she indicates that what she means by "happiness" is not just material well-being, but is flourishing as a rational, ethical being. For she there claims that "it is only the democratical system, rightly balanced, which can secure the virtue, liberty and happiness of society" explaining that "the very nature of slavish dependence and proud superiority are equally baneful to the virtues inherent in mankind." For, slavish dependence "subdues the innate generous principles of the soul" while a sense of superiority extinguishes benevolence and self-denial (29–30). Thus, she promotes egalitarian democracy as a political system, grounded in natural rights, which will foster the ethical progress of mankind, as promised by the form of rational religion to which she adhered.

Ethical and Educational Ideas

It is important for the optimism that Macaulay maintains with regard to political progress that there is a law of nature that can come to be known, by humans, on the basis of reason and experience. In her *Treatise on the Immutability of Moral Truth* she tackles the difficult problem (for a Christian theist) of the existence of evil, and the general failure of humanity to live up to their

ethical potential. She rejects what she takes to be the views of Mandeville and Hobbes, according to which humanity is not naturally morally motivated, but also criticizes those, like Shaftesbury, who too optimistically postulate an innate love of the good. She proposes instead that God has given humans a capacity for moral amelioration, offering this as the reason for the existence of evil, and she backs this up with an agency theory that allows for both moral responsibility and progress. According to this theory of "moral necessity," we are caused to act by our judgments and passions but are at the same time responsible for those actions, since we can delay acting and reconsider the apparent facts and the reasoning that resulted in judgment. We can also foster the imagination and adopt forms of self-control that prevent the passions from interfering with our acting in accord with our judgment as to what is the best. Thus, she makes moral education central to the progress of humanity that is promised by her proposed solution to the problem of evil.

In her *Letters on Education* Macaulay turns to describing the kind of education that is necessary for this progress to be achieved. She believes that this education ought "to teach virtue on immutable principles, and to avoid that confusion which must arise from confounding the laws and customs of society with those obligations which are founded on correct principle of equity" (201). At the same time, she offers very sensible advice relating to the upbringing of children, suggesting that they have somewhat different characters, so that treatment should be modified in light of their varying dispositions. She nevertheless concentrates on the development of sympathy in all children and the avoidance of cruelty, especially to animals. She is ahead of her time in extending moral consideration to animals, and in calling for the abolition of the morally desensitizing public slaughter of animals and of public executions. As mentioned, she prescribes the same education for both sexes, saying that "there is but one rule of right for the conduct of all rational beings; consequently that true virtue in one sex must be equally so in the other" (201). This observation leads her to conclude that there are no characteristic differences between the sexes. Earlier in the work, in justifying the same curriculum for both boys and girls she had said that "my pride and prejudices lead me to regard my sex in a higher light than as the mere objects of sense" (62) and she consequently rails against the corruption of the virtues and manners of women that result from their thinking that the approval of men is the highest accomplishment that they can obtain.

Influence and Legacy

During the 1760s Macaulay was one of a group of reformist thinkers who coalesced for a time around the defense of John Wilkes, opposing his exclusion from parliament and defending the freedom of the press. Like her brother, John Sawbridge, who was a member of Parliament, she advocated more frequent parliamentary elections, the exclusion of placemen from parliament, and the reform of the franchise. For some years she held weekly "coteries" that were attended by friends such as George Simon, David Steuart Erskine, Horace Walpole, James Burgh, and Richard Price, as well as visiting Americans, including Benjamin Franklin and Benjamin Rush, and the French dukes of La Rochefoucault. She corresponded with John and Abigail Adams, James Otis, Mercy Otis Warren, and other influential American critics of George III's policies, being seen by them as a defender of America's rights and liberties. Later she befriended Jacques-Pierre Brissot de Warville, who encouraged Mirabeau to organize the translation of her history into French. She was an early participant in the movement that ultimately resulted in parliamentary reform in Great Britain, while, through the dissemination of her history, the ideas of the levelers played their part in the lead up to the French and American revolutions. Although she was a major influence on Mary Wollstonecraft, who acknowledged her in her *Vindication of the Rights of Woman*, and she was the subject of a biography published in Mary Hays's *Female Biography*, her influential advocacy of democracy and feminism were only

occasionally recognized until the 1992 publication of Bridget Hill's, *The Republican Virago*.

Conclusion

The exclusion of Macaulay's works from histories of democratic thought has encouraged a distorted understanding of the nature of eighteenth-century republicanism, the influence of Hobbes on the emergence of liberal democracy, and the origins of feminism. Re-integrating her influential works into this history suggests that early democrats did not subscribe to a secular possessive individualism but were, rather, steeped in a tradition of Christian eudaimonism and believed in the rationality of altruism.

Cross-References

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- ▶ Hobbes, Thomas
- ▶ Locke, John
- ▶ Milton, John
- ▶ Wollstonecraft, Mary

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Machiavelli, Niccolò

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Problem

Machiavelli, Niccolò (1469–1527), Florentine humanist, diplomat, and historian, "the greatest political writer of the Renaissance" (Fassò 2001, 28). We know almost nothing about him until 1498, when, 4 years after the exile of the Medici family, the spiritual leader who led the renewal of the Florentine republic, the Dominican friar Girolamo Savonarola, was sentenced to death and a new government was elected in Florence, giving to the young Machiavelli the role of secretary of the second chancery of the republic, in charge of international relations. He served the republic for almost 15 years, undertaking many important diplomatic missions and writing a large number of official reports. In 1512 the Medici family came back to power in Florence, and Machiavelli was dismissed from the chancery, accused of conspiracy, imprisoned, and exiled in the *contado*, where in 1513 he wrote the little book *De principatibus*, i.e., *The Prince* (published only in 1532, after Machiavelli's death). Later, around 1518–1519, he wrote the *Discourses on Livy*. In 1520 he began the composition of a broad treatise on the *Art of War* (*Arte della guerra*), where he proposed the establishment of a citizen army. In the same year, the Florentine cardinal Giulio de' Medici (after 1523 Pope Clement VII) commissioned him to compose an official history of Florence (*Florentine Histories*), which in 1525 Machiavelli presented to the pope. He also wrote poems and plays, such as *Clizia* and *La mandragola*, as well as numerous other historical, literary, and occasional writings, as the fable *Belfagor arcidiavolo*. He died in Florence in 1527, shortly after the sack of Rome by the troops of Emperor Charles V (see Ridolfi 1978).

The latter half of Machiavelli's life fell in the period of the Italian wars. "From 1494 until his death– wrote Myron P. Gilmore –, in a span of a little more than thirty years, Machiavelli saw Italy devastated by the invasions of the French, the Spanish, and the Germans. He was able to look back on the age of Lorenzo de' Medici as a golden age of political stability. He had seen governments rise and fall; he had seen great powers league together to destroy small powers; he had seen examples of the success that attended bad faith and the violation of treaties. It is natural, therefore, that his greatest concern was to find some formula for retrieving a sense of security, for re-establishing a condition in which at least the minimum requirements of civil order would be met" (Gilmore 1962, 131). In order to find the answer to his questions, Machiavelli turned to history, in search of normative values, to use his words to retrieve the sense of history's "taste and flavor" (*Discorsi*, I, Preface, 2, in N. Machiavelli 1997, 198).

It was to Roman history that Machiavelli directed his analysis: arguments drawn from classical precedent were decisive throughout his work, beginning from one of his first writings, *Del modo di trattare i popoli della Valdichiana ribellati* (1502), through his major works as *The Prince* and the *Discorsi*, until the last attempts to regain a role in the administration of the state under the Medicis (see Vivanti 2008). As Myron P. Gilmore has put it, Machiavelli drew on a philosophy of historical change: "This philosophy was primarily based upon a view of the nature of man that was interestingly related to both Christian and classical traditions. Machiavelli accepted a large measure of the Christian tradition on the nature of man. For him, men were evil and corrupt and had to be coerced to do good. Because of the evilness of man the institutions he creates are always bound to decay, no matter how firmly established they seem to be. Thus, a belief about the nature of man which is essentially Christian was combined with a belief about the course of human affairs wich was essentially cyclical and classical [. . .]. Because of the existence of a historical cycle, in which good times are bound to deteriorate and bad times are likely to last for

a considerable period, it is necessary to act in accordance with the morality that prevails at a particular stage of the cycle that has been reached. Machiavelli found himself living in a bad time [. . .]. The only kind of public order that could be achieved in a time when morality was decaying was the public order created by a prince who was feared" (Gilmore 1962, 133–134). It was necessary to act in accordance with the times, just like in one of the most famous passages of *The Prince*, where Machiavelli wrote: "For there is such a distance between how men do live, and how men ought to live; that he who leaves that which is done, for that which ought to be done, learns sooner his ruin than his preservation; for that man who will profess honesty in all his actions, must needs go to ruin among so many that are dishonest. Whereupon it is necessary for a prince, desiring to preserve himself, to be able to make use of that honesty, and to lay it aside again, as need shall require" (*The Prince*, XV, 1, in N. Machiavelli 1997, 159).

Consequently, Machiavelli has been often and conventionally considered the founder of the autonomy of politics since he was thought to have completely ignored ethics, law, and justice in his analysis of the most important princely virtues. It was not uncommon, long ago, to read that Machiavelli was so radically alien to the legal tradition and that the word justice rarely could appear in his writings and never, of course, in *The Prince*, since Machiavelli showed "with extraordinary vigor an evaluation of politics as a power completely independent of any consideration of the law" (Paradisi 1982, XXIII). Even some of the foremost scholars of the past generation specialized in the history of legal philosophy thought that Machiavelli did not manifest any interest in law, since his thought, though very important for the history of political doctrines, was considered to be almost negligible for the history of the philosophy of law: "In his most famous work, *The Prince*, Machiavelli's interest for law is confined to an instrument which the politician uses to achieve his goals: one among many, and one of the least effective" (Fassò 2001, 28). It has been also said that Machiavelli's later political writings were all more leisurely and expansive than *The Prince* and that perhaps for that very reason, *The Prince* has always exercised the greatest hold over the imagination of succeeding generations: "It was there that Machiavelli first presented, with matchless clarity and force, his basic assumption that rulers must always be prepared to do evil if good will come of it. In doing so he threw down a challenge which subsequent writers on statecraft have found it almost impossible to ignore" (Skinner 1988, xxiv).

No doubt *The Prince* is the work that best expresses the crisis in the old concepts of politics and government that emerged in the aftermath of the Italian Wars. The medieval genre known as the *Mirror of Princes*, which idealized the virtues of perfect governments and princes, yielded to the dictates of pragmatism, of which Machiavelli's thought is considered to be an exemplar by conventional historiography (see Quaglioni 1987; Dunbabin 1988, 482–488; De Benedictis 1999). Even the medieval legal tradition was deeply renewed by the Italian humanists of the early Renaissance, who challenged the scholastic approach to Roman law. From this perspective, Machiavelli's thought appears to constitute a provocative overturning of the paradigms inherited from earlier literature on the education of a prince and from the legal doctrines of the fourteenth and fifteenth centuries, but "a balanced interpretation reveals that scholasticism and humanism existed side-by-side in Renaissance Italy" (Canning 1988, 366). While the so-called humanistic revolution seems to have undermined the preeminent role of the law and to have established political thought on a different basis, it strongly contributed to the renewal of legal concepts and methods, especially in the field of public law. In this sense law continues to provide an essential basis of Machiavelli's political thought (see Quaglioni 2007; 2014). There is a close relationship between Machiavelli and both the humanistic and the legal tradition. Argument from classical precedent was decisive, but argument from Roman legal tradition was also decisive, so Machiavelli's political thought cannot be understood without reference to the lexicon of a legal thought tradition (see De Benedictis 2016).

Machiavelli certainly knew the main sources of the legal tradition, beginning with Justinian's *Corpus Iuris Civilis* and the glosses of Accursius. He was not a stranger to legal culture thanks to the formation and teaching of his father Bernardo, a doctor in law and a reader of legal books (Ridolfi 1954, 1978, 5), who was chosen by Bartolomeo Scala as the protagonist of the dialogue *De legibus et iudiciis*, dedicated to Lorenzo de' Medici in 1483. Machiavelli found his first readings in his father's library, among whose books there were not only Cicero and Boethius, the humanistic commentaries on the *Nicomachean Ethics*, the *Stories* of Livy, and the *Decades* of Biondo Flavio. We know from Bernardo Machiavelli's book of memories the magnificence of the collection of legal works owned or borrowed by Bernardo himself: two manuscripts of the *Codex* and of the *Digestum Novum*, a *Decretum* printed in Germany, the *Lectura Codicis* by Bartolomeo of Saliceto, the *Volumen legum* (the last of the five volumes in which the printed vulgate of the *Corpus Iuris Civilis* was articulated, which comprised the *Institutes*, the last three books of the *Code*, the *Authenticae*, the *Usus feudorum*, and the constitutions of Emperor Henry VII), the *Lectura Decretalium* of Panormitanus, the *Novella super Sexto*, and the *Quaestiones mercuriales* by Giovanni d'Andrea. And it sounds almost like a clue of interests directed at public law that "the Justinian's *Codex* and the *New Digest*, both manuscripts on parchment," were lent by Bernardo to a friend who "wanted to look at the matter of rebels," that is at the matter of lese majesty (Machiavelli 1954, 116).

Machiavelli has certainly read the *Institutes*, perhaps precisely on that "volume of civil reason with the *Institutes*, the last three books of *Code*, the *Authenticae*, the *Feudal customs*, and the *Extravagantes* of Henry VII," bought by Bernardo together with the *Deche* of Biondo Flavio on August 26, 1485 (*Libro di ricordi*, 207). Anyway, Machiavelli's familiarity with the legal tradition is revealed by the recurrent use in his works of the straightforwardly Justinianic justice-arms motif. There is no more vulgate place in the whole of the Roman law tradition than what we read in the opening of the constitution "Imperatoriam maiestatem" in *Justinian's Institutes*: "It is expedient that the Imperial Majesty not only be distinguished by arms, but also be protected by laws, so that government may be justly administered in time of both war and peace, and the Roman Sovereign not only may emerge victorious from battle with the enemy, but also by legitimate measures may defeat the evil designs of wicked men and appear as strict in the administration of justice as triumphant over conquered foes" (*Institutiones* 1872, 1). It is a cliché that Machiavelli transforms into a rule in his 1506 writing on the militia: "I will leave to be indiscreet and argue whether it was good or not to order your state to arms: because everyone knows that he who says empire, kingdom, principality, republic, he who says men who command, starting from the first degree and descending to the master of a brigantine, says justice and arms" (*La cagione dell'ordinanza*, 2, in N. Machiavelli 1997, 26). This passage is exemplary one of the main theoretical modules of Machiavelli, so much so that it is repeated several times with the variants force-prudence and arms-wisdom, or good orders-military help, as in the *Art of War*. Machiavelli shows "the close connection between military problems and the ordering of states" (Vivanti 2008, 217–219), that is, the identity of power (*imperium*) with the couple justice and arms ("iustitia et armi") (see Quaglioni 2011). It may be thought that Machiavelli has constantly wanted to remember that "justice and arms," "good arms" and "good laws," are the first and fundamental principle both of the entire Justinian *corpus* and of the science of the state, just as in Chapter 12 of *The Prince*: "I said earlier how necessary it is for a ruler to have firm foundations for his power; otherwise, he will always come to grief. The main foundations of all states whether they are new, old or mixed) are good laws and good armies. Since it is impossible to have good laws if good arms are lacking, and if there are good arms there must also be good laws, I shall leave laws aside and concentrate on arms" (Machiavelli 1997, 150).

That is why Roman jurisprudence is proposed as a model for a state science. The opening of the Book 1 of the *Discorsi* recounts in the imitation of ancient orders the norm of a science of the *res*

publica based on experience, just as in law science, in the legal doctrines with which civil disputes are remedied: "And so much more so than I see in the civil dissents among citizens, or in the diseases in which men incur, they have always resorted to those judgments or those remedies that have been judged or ordered by the ancients. Because the civil law is nothing more than judgments given by the ancient jurists, which, put in order, teach the science of law to the present jurists; nor is medicine any more than experience made by the ancient doctors, on which the present doctors found their judgments. Nevertheless, in ordering the republics, in maintaining the states, in governing the kingdoms, in ordering the army and administering the war, in judging the subjects, in increasing the power, is neither a prince nor a republic nor a captain who uses the example of the ancients" (*Discorsi*, Preface A, 5–6, in N. Machiavelli 1997, 198). Civil laws are here the "written reason," the Justinian law. Machiavelli alludes to the 50 books of "judgments given by the ancient jurists," that is, to the *Digest*, where those judgments (*sententiae*) are "put in order," i.e., ordered in books, titles, and laws. Therefore, it is in the examples of the ancients that the normative source for "ordering the republics," "keeping the states," "ruling the kingdoms," "ordering the army and administering war," "judging the subjects," and, finally, "increasing the power" is to be found.

Historical knowledge had to provide *exempla* or norms of universal validity. Livy was as authoritative for Machiavelli as the *Digest* was for the jurists of his time, who formulated their judgments from the writings of the ancient jurists. The *Discourses on Livy* were the product of a meditation structured in the form of a gloss to Livy's text (Ridolfi 1978, 233; Sasso 1984, 5). In his glosses to Livy, Machiavelli developed his key ideas through the comparison with the ancient Romans over which he had been pondering in a writing of 1503, where he first recognized the existence of a "constant" in politics – a fundamental and unchanging law – according to which "the world has always been inhabited by men who have always had the same passions; and that there were always those who served and those who ruled, and those who served happily and those who served unhappily, and those who rebel and are punished" (*Del modo di trattare i popoli della Valdichiana ribellati*, in N. Machiavelli 1997, 24). This was also one of the major points of discussion (and dissent) with Machiavelli's friend, the jurist and politician Francesco Guicciardini (1483–1540), the author of the first example of modern historiography, the *Storia d'Italia*, published after his death in 1561.

Discussion

Even recently it has been claimed that "after all, Machiavelli is commonly regarded as the quintessential example of an amoral, even immoral proponent of *Realpolitik*, authorizing deception, and violence as legitimate political tools" (Nederman 2009). "His name – as Francesco Borghesi has put it – does not cease to fascinate scholarly, intellectual, and popular imaginations alike. Dubious versions of his thought, mainly based on a decontextualized reading of *The Prince*, are discussed in university handbooks for political science students [. . .]. In English, especially, the term 'Machiavellianism' has come to signify cunning and duplicity" (Borghesi 2014, 79). One may actually say that it has been often given to Machiavelli the characters of the "Machiavellianism" and that therefore it has been difficult "to read Machiavelli not as a Machiavellian" (Sullivan 2010, 575). Just a few years ago, Giulio Ferroni has strongly underlined that "one of the most stubborn and persistent *clichés* that still enjoys currency in present-day political and cultural studies is that Machiavelli had discovered the autonomy of politics, by separating it from ethics. He is said to have been the founder of modern political science for having placed it in a separate sphere with its own laws, which are not commensurable with those of ethics. This notion is in fact an ideological projection, that emerged with the development of modern political thought as a result of some casual and hasty readings of Machiavelli's works without any regard for their historical and cultural context. Nevertheless, even the most convinced and articulate advocates of the

notion of the autonomy of politics can see how even Machiavelli's most audacious maxims, of which it is customary to emphasize his unscrupulous and almost 'ferocious' political art, are rooted in a very subtle and restless observation of human behaviour and are inserted in a moral framework" (Ferroni 2006, XIII).

More recently, other scholars have distanced themselves from such clichés (see Vasoli 1994, 66; Fubini 1998, 119; Fontana 2004; Vivanti 2008; Quaglioni 2007, 2011, 2014, 2016; Borghesi 2014; De Benedictis 2016). Those "exaggerations" and "deviations" originated in the nineteenth-century Romantic literature and in its influence on the political thought of the first decades of the twentieth century (see De Cristofaro 2007; Tabet 2007), when Machiavelli was identified as the author of the idea of the "reason of state" and as a political scientist whose thought was applicable to all times, as the Italian philosopher Antonio Gramsci laments in his *Noterelle su Machiavelli*, which he composed in 1933 while in a fascist prison (see Gramsci 1975, 1579).

Recently, in a very important book about *Machiavelli's Ethics*, Erica Benner has tried to show that, appearances notwithstanding, reasoning about justice is at the very center of Machiavelli's ethics and political thought:

> Indeed – she writes – questions of justice and injustice arguably form *the* main, implicit subject-matter of all Machiavelli's main political works. Although he uses the word "justice" more sparingly than more conventional republican writers, between the lines Machiavelli is always writing about justice and injustice. Even when he does not speak directly of *giustizia* or *iniustizia*, he often uses paraphrases or related words that signal a concern for justice, especially *leggi*, *respetto*, *obligo*, or *termini* (limits). Machiavelli employs these indirect modes of writing to discuss some of the most fundamental questions of political justice: how to define the limits of free action for individuals and sectional groups, how to regulate conflicts that ordinarily arise among free agents, and how to order various civil and judicial procedures under laws that everyone sees as fair. Moreover, Machiavelli does not set out standards for political justice that are separate from, and potentially competitive with, ethical principles [. . .]. He frequently invokes justice even in the *Prince*, though that work assumes that many readers are unlikely to be moved by appeals to justice unless these are concealed within arguments from self-interest. (Benner 2009, 290)

A new reading of *The Prince*, the *Discourses*, and other works of Machiavelli demonstrates that the principle of justice is often invoked according to the traditional forms of legal and political literature. Machiavelli's idea of justice, which is often expressed somewhat ambiguously, is therefore open to different interpretations and also subject to various forms of misunderstanding. "Machiavelli often uses the word 'justice' (*giustizia*, *iustizia*) in his political and historical writings and correspondence. He seldom uses it, however, in the same way as many other Christian theorists and humanists. This leaves the impression that Machiavelli is uninterested in developing a more adequate account of justice in his political theory. The impression is reinforced by the overtly prudential form of his reasoning. He does, of course, frequently discuss topics that classical and humanist authors place under the heading of justice. The distribution of public goods and offices, appropriate punishments for bad conduct or rewards for good, and the value of keeping promises and pacts were among the most prominent themes in all Machiavelli's bestknown writings. But his arguments seem to treat self-interested prudence, not justice, as the touchstone for evaluating distributions, punishments, and rewards, and for deciding when obligations are binding. These appearances explain why so many perceptive and sympathetic readers conclude that Machiavelli wanted to separate judgements grounded in reflective prudence from ethical considerations, especially considerations of justice, and to limit – if not obviate – the role of justice in political deliberations" (Benner 2009, 290).

In the writings of Machiavelli, we still observe elements of a humanistic exaltation of justice, despite the paradoxical justification for the use of evil as a necessary "poison" to medicate the irreparable corruptions of society and human nature. In several passages of Machiavelli's works, the principle of justice is invoked in a way that conforms to the more traditional forms of legal and political literature. This is especially evident in the final chapter of *The Prince*, where

Machiavelli emphasizes the role of the state of necessity in justifying war: "This is a very righteous justice," he says citing Livy, "Qui è iustizia grande: *iustum enim est bellum quibus necessarium*" (Machiavelli 1997, 190). Moreover, in the *Art of War*, Machiavelli states that "among all things with which the captains earn their peoples, are the examples of chastity and justice." He also alludes to military discipline in terms of justice, when discussing ways to quell riots and promote the observance of justice. In his opinion, an army that fails to observe justice ("non [...] osservante di giustizia") cannot escape ruin (Machiavelli 1997, 657). Even in the *Discourses*, the failure to observe justice is frequently invoked as a cause of the ruin of states, which is exemplified in Chapter 28 of Book 2 by Livy's recount of the arrogance of the Fabii (*Ab U. c.*, V, 35–37). The title of the chapter, "How dangerous it is for a republic or for a prince not to avenge a public or private injury," anticipates the teaching contained in the text, about the ruin that "came to the Romans only for non-compliance with justice, because their ambassadors violated the *ius gentium* and when they should have been punished, were instead rewarded and honored" (Machiavelli 1997, 403). This episode is recalled again in Chapter 1 of Book 3, where Machiavelli says that in order for a religious group or a republic to be long-lasting, it is often necessary "to bring it back to its beginnings," that is, they had to take on "new life and new strength and return to the observance of religion and justice, both of which were becoming corrupt" ("nuova vita e nuova virtù, e [...] la osservanza della religione e della giustizia, le quali [...] cominciavano a macularsi") (Machiavelli 1997, 417).

Other examples can be found in the *Istorie fiorentine*, for instance, in Book 7, Chapter 23, where Machiavelli puts in the mouth of Piero, son of Cosimo de' Medici, a tirade against his citizens, who had profaned justice: "You despoil your neighbour of his goods, you sell justice, you flee the civil judgments, you oppress the peaceful men and exalt the insolent" (Machiavelli 2005, 660). Accordingly, it is not surprising to find that in Machiavelli's speech on Justice (*Allocuzione ad un magistrato*), written in 1519–1520, justice is praised in a true humanistic way. It is one of his most surprising writings, where Christian and pagan themes and biblical and classical models are mixed and where the authoritative example of the myth of Astrea, i.e., the personification of Justice as a goddess, is drawn from Virgil's *Georgics* and Ovid's *Metamorphoses*: "I do not think it appropriate – Machiavelli says – to talk at length. Since I have to talk about justice before such just men, this seems more superfluous than necessary. However, in order to perform the rites demanded by ancient custom, I speak about how the ancient poets, who, according to the pagans, gave the world the first laws, relate that at the beginning of the world, men were so good that the gods were not ashamed to come down from heaven to live with them on earth. But then, as the virtues began to disappear and the vices began to rise, he gods gradually returned to heaven, and the last deity to leave was Justice. This fable does not demonstrate anything but the need that men have, to live according to the laws of justice: in fact men, despite being full of all vices, the stench of which forced the gods to leave the earth, remained just. But over time even Justice went, and with Justice so went peace: hence were born the ruins of kingdoms and republics. This Justice, after having gone to heaven, never returned to live amongst every people, but only in a few cities, which, when they have been able to accommodate justice, have become great and powerful. This [Justice] exalted the Greek and Roman states; this [Justice] made many republics and kingdoms happy; this [Justice] also inhabited sometimes our country and saved and increased it. This [Justice] in fact creates union in states and in realms, and union makes states more powerful and longer-lasting; [this Justice] defends the poor and powerless, represses the rich and powerful, humbles the arrogant and impudent, hampers the rapacious and the greedy, punishes the insolent and disperses the violent. Justice generates equity, which is necessary to maintain states. This is the only virtue that among all the others pleases God" (*Allocuzione ad un magistrato*, 2, in N. Machiavelli 1997, 713–714).

Cross-References

- ▶ Ethics of Law
- ▶ Justice
- ▶ Law
- ▶ Sovereignty and Human Rights
- ▶ State of Exception

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MacIntyre, Alasdair

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Introduction

Alasdair MacIntyre was born in Glasgow, Scotland, in 1929. He earned a bachelor's degree in classics from University College London in 1949 before receiving a master's degree in philosophy from the University of Manchester in 1951. Between the years of 1951 and 1970, MacIntyre taught in numerous British universities including the University of Manchester, the University of Leeds, and the University of Oxford. In 1970, MacIntyre relocated to the United States where he has taught in many academic institutions including Boston University, Notre Dame, and Duke University. MacIntyre returned to Notre Dame in 2000 as the Senior Research Professor in the Notre Dame Center for Ethics and Culture until he retired in 2010. In 2010, MacIntyre was awarded the Aquinas medal by the American Catholic Philosophy Association, and in 2012, he was presented with the *Civitas Dei* medal by Villanova University. MacIntyre has published many books and articles on a wide range of subjects and disciplines. He is primarily known for his work in moral philosophy (particularly his contribution to a revival of Aristotelian ethics), politics, and the social sciences.

Moral Philosophy

Moral philosophy begins with the question "how ought we to live?" MacIntyre's response to this question emphasizes three important points. First, that moral philosophy focuses on human *agency* – on the activity of living a human life. Second, that moral philosophy is inherently *teleological* – to ask the question "how ought we to live?" always presupposes some conception of the good or end [*telos*] of a human life. And third, that a key activity in striving for the good life is *practical reasoning* – the ability both to determine the right thing to do in a given situation, and to provide good reasons for our chosen actions. For MacIntyre, therefore, moral philosophy is about how to enable human agency – it is about how to actualize our potential as independent and effective practical reasoners in our pursuit of the good life.

MacIntyre's most influential text is *After Virtue: A Study in Moral Theory*, first published in 1981. This text represents the culmination of MacIntyre's work in moral philosophy over the previous three decades. In it, he argues that our contemporary society is experiencing a crisis of practical rationality. His objective is to diagnose this crisis and to provide a framework for its possible resolution. MacIntyre has since developed some of the central questions and themes of *After Virtue* in three other influential texts: *Whose Justice? Which Rationality?* (1988), *Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy, Tradition* (1990), and *Dependent Rational Animals: Why Human Beings Need the Virtues* (1999).

After Virtue

After Virtue begins with MacIntyre's claim that our contemporary moral and political debates have become interminable and inconclusive. This is due to the fact that our culture has become "emotivist." We lack a shared moral vocabulary and standards of practical rationality, MacIntyre contends, and as a result, people can only appeal to moral concepts and standards of practical reason as a means to express their own emotional preferences. Lacking any shared definition of a term like "justice," for example, people typically appeal to "justice" to mean whatever they want it to mean from moment to moment. As a result, our moral and political debates have become increasingly combative and manipulative, as we all

attempt to impose our own individual preferences on each other.

According to MacIntyre, this has resulted in the emergence of a class of managerial experts – sociologists, political scientists, economists, etc. – whose function is to ensure that the competition of rival wills does not descend into chaos. These managers appeal to "law like generalizations" based on "facts" of human nature to justify and exercise their alleged expertise. But as MacIntyre points out, these "facts" and "generalizations" are themselves instrumental abstractions that these managers – and their corporate or state sponsors – appeal to in order to impose their own will and preferences on others. Expertise and authority are reduced to effective power. Those groups who are best able to wield power over others determine the definitions of moral and political terms and the criteria for what counts as a good reason for action.

This leads MacIntyre to acknowledge that Nietzsche was right in his diagnosis of modern moral philosophy. Nietzsche had argued that while people appeal to allegedly universal and agreed-upon definitions of moral terms and standards of practical rationality, in reality they appeal to these terms and standards instrumentally – as a means to express and satisfy their own will to power. For Nietzsche, the solution to this crisis is to unmask the pretensions of agreement and universality and to resolutely and unapologetically immerse oneself in the battleground of conflicting wills. But while Nietzsche took himself to be diagnosing the failings of moral philosophy *in general*, MacIntyre argues that this diagnosis is only applicable to *modern* moral philosophy.

By "modern" moral philosophy, MacIntyre means the approach to moral philosophy that emerged in the age of modernity – the age of the Enlightenment, the rise of capitalism, and the advent of liberal individualism. MacIntyre characterizes modern moral philosophy in terms of its denial of teleology. In earlier times, the meaning of moral terms and practical rationality were always determined within a teleological framework. But modern philosophers rejected teleology as the metaphysical superstition of a dark and dogmatic age. They did not reject everything that their forebears had achieved, however. These same philosophers typically attempted to justify the moral beliefs and convictions of their ancestors in nonteleological terms. In the earlier chapters of *After Virtue*, MacIntyre engages a number of these modern philosophers and argues that they failed in this endeavor. This failure, MacIntyre contends, was inevitable. All moral philosophy presupposes *some* conception of the end or telos of a human life. Having rejected the teleology of their ancestors, these moral philosophers only succeeded in replacing it with a teleology of individual preference. This is what has led to our contemporary crisis in moral philosophy: a crisis in the quality and coherence of moral and political debate, in our conception of practical rationality, and in our very ability to actualize our potential to realize the good life.

While MacIntyre concurs with Nietzsche's diagnoses of modern moral philosophy, he does not think things have to be this way. This is why he turns to Aristotle as a possible resource to guide us out of our contemporary situation. MacIntyre identifies three important points in Aristotle. First, Aristotle insists that ethics or the moral life is rooted in human action, particularly in the activity of practical reasoning. Second, Aristotle recognizes that human activity is inherently teleological – that it aims at some conception of the good of a human life. Finally, for Aristotle, the moral life is all about enabling human agency. It is all about transitioning man from the state of "man-as-he-happens-to-be" to the state of "man-as-he-could-be-if-he-realized-his-telos." The key to this transition is the acquisition of the *virtues*. Virtues are the habitual dispositions that enable the achievement of a particular end, good, or purpose. The purpose of a knife, for example, is to cut. "Sharpness" is a disposition or "virtue" that enables a knife to cut well. Similarly, for Aristotle, the purpose of human activity is to achieve the good life. The virtues are the habitual dispositions or excellences of activity – courage, wisdom, prudence, etc. – that enable us to live well. In the second half of *After Virtue*, MacIntyre will provide a history of the virtues as well as his own account

of the virtues as the key to enabling human agency and the achievement of the good life.

MacIntyre defines the virtues in three stages: in terms of practices, the unity of an individual life, and traditions. MacIntyre defines a practice as "any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended," (MacIntyre 1984, 187). The game of chess would be an example of a practice for MacIntyre. Chess is a social activity, with its own history, vocabulary, and standards of practical rationality that aims to achieve the goods of chess – becoming a good chess player and developing all the skills and attributes necessary to do so. This is the first stage of MacIntyre's definition of the virtues: by engaging in practices, we acquire the virtues that enable us to achieve the goods specific to those practices.

But practices are specific activities that presuppose the greater activity of living a human life. This is the second stage of MacIntyre's definition of the virtues. The virtues are not just the qualities that enable us to achieve the goods of practices. They are also the necessary dispositions that we require to enable us to achieve the goods of a unified, integrated life. And our own individual lives do not exist in a vacuum. MacIntyre rejects what he takes to be the fiction of the modern liberal subject – a subject denuded of all social and historical particularity. This is also why he rejects the notion of universal "human rights." Rights are only intelligible within determinate contexts and institutions. The right to vote, for example, presupposes citizenship or membership of a determinate country or institution. All attempts to rationally justify universal rights – whether "human rights" "natural rights" or "the rights of man" – that transcend determinate social and historical contexts and institutions have failed. Appealing to such rights, MacIntyre argues, "would be like presenting a check for payment in a social order that lacked the institution of money" (MacIntyre 1984, 67).

The intelligibility and purpose of an individual life, therefore, is always embedded in, and made possible by, social and historical traditions. Our individual stories are always embedded in the greater stories of our traditions. This is the final stage of MacIntyre's definition of the virtues: they are the dispositions that enable us to achieve and sustain the goods of thriving communities and historical traditions. We can enable human agency, therefore, by acquiring the virtues via practices, the integrity of our individual lives, and by participating in social and historical traditions.

In the final chapters of *After Virtue*, MacIntyre traces the historical demise of the virtues from the late Middle Ages to the sixteenth century. By the seventeenth century, the virtues were no longer understood in Aristotelian terms – as the dispositions necessary to enable human action – but in terms of the ability to follow rules. Today, MacIntyre contends, we live in an age "after virtue," and it is this loss of a substantive notion of virtue that MacIntyre believes has led to our contemporary crisis in practical rationality. MacIntyre concludes by highlighting what he takes to be the two most viable options for moral philosophy. Either we follow Nietzsche and embrace our contemporary crisis as a battleground of conflicting wills or we can follow Aristotle and retrieve a teleological conception of the moral life that focuses on the enablement of human agency via an acquisition of the virtues.

Developments

MacIntyre's next three major works all elaborate on the project he established in *After Virtue*. In *Whose Justice? Which Rationality?* MacIntyre argues that all rational enquiry and all conceptions of "justice" presuppose a determinate social and historical tradition. Just as he argued in *After Virtue* that there are no universal rights outside of determinate social and historical contexts and institutions, MacIntyre argues here that there is no universal reason or universal understanding of

justice. All rational enquiry and all appeals to a notion of justice presuppose membership in a determinate social and historical tradition and "since there are a diversity of traditions of enquiry, with histories, there are, so it will turn out, rationalities rather than rationality, just as it will also turn out that there are justices rather than justice" (MacIntyre 1988, 9). In *Whose Justice? Which Rationality?* MacIntyre provides a detailed historical analysis of rival understandings of practical rationality and justice ranging from Homer, Plato and Aristotle, to Augustine and Aquinas, to Hume and the Scottish Enlightenment. While MacIntyre insists that there is no possibility of rational activity outside of a tradition, he also defends his position from the possible charges of relativism and perspectivism. It is possible, he insists, to evaluate the coherence and consistency of any one tradition and to determine the superiority of rival traditions over one another, and in this work, MacIntyre aligns himself with an Aristotelianism inspired by the work of Thomas Aquinas.

Three Rival Versions of Moral Enquiry is based on the Gifford lectures that MacIntyre gave in 1998. In this entry, MacIntyre critiques two specific approaches to moral enquiry – Encyclopedia and Genealogy. By "Encyclopedia," MacIntyre means the modern Enlightenment approach to moral enquiry that was typical of the contributors to the ninth edition of the *Encyclopaedia Britannica*. By "Genealogy," he means the type of approach to moral enquiry embodied in Nietzsche's *Genealogy of Morals*. MacIntyre agrees with Nietzsche's critique of modern moral philosophy – that alleged appeals to universal standards of morality are mere masks for unjustified preferences and prejudices. But MacIntyre argues that genealogy fails on its own terms. While it does a very effective job critiquing the Encyclopedic position, it fails to successfully justify the very intelligibility of its own critique. MacIntyre concludes by arguing for a "Tradition" based approach to moral enquiry. In particular, MacIntyre again points to Thomas Aquinas – who synthesized both the Aristotelian and Augustinian Christian traditions – as a role model for how to engage and work through rival and incommensurable traditions.

In *Dependent Rational Animals*, MacIntyre illuminates our moral condition in terms of our animality, vulnerability, and our dependence on others. In *After Virtue*, MacIntyre made a point of emphasizing a key difference between his and Aristotle's understandings of virtue. While Aristotle grounds his understanding of virtue in our biological nature, in *After Virtue* Macintyre grounds his understanding of virtue in our sociological nature – in human practices. In *Dependent Rational Animals*, MacIntyre concedes that any conception of the good life for humans presupposes some conception of the type of biological animals that we are. It is only by examining our animal natures – and what we have in common with, and can learn from, other animals – that we can conceive of an adequate notion of the good life for humans. MacIntyre also emphasizes our essential vulnerability – that we are all subject to possible disability and affliction – and our essential dependence – that we are always dependent on others. We are always embedded in networks of giving and receiving, which is why MacIntyre emphasizes the necessity of the virtue of "just generosity."

Conclusion

In recent years, MacIntyre has published two collections of essays *The Tasks of Philosophy: Selected Essays, volume 1* (2006) and *Ethics and Politics: Selected Essays, volume 2* (2006); a monograph on the philosopher Edith Stein in *Edith Stein: A Philosophical Prologue, 1912–1922* (2006); and a history of the Catholic intellectual tradition in *God, Philosophy, Universities: A Selective History of the Catholic Philosophical Tradition* (2011). In a lengthy essay in *Intractable Disputes About the Natural Law: Alasdair MacIntyre and his Critics* (2009), MacIntyre defends a Thomist conception of the natural law. While he acknowledges that the natural law cannot be justified by appealing to universal reason, he nonetheless argues that the primary precepts of the natural law as understood by Thomas Aquinas are necessary conditions of all rational enquiry and communal deliberation. Given the length and breadth of his career,

MacIntyre's work has invited many criticisms and controversies. Martha Nussbaum, for example, famously argued that in his turn to the work of Thomas Aquinas, MacIntyre rejects rational enquiry in the name of religious belief. MacIntyre has responded to the arguments of many of his critics in *After MacIntyre: Critical Perspectives on the Work of Alasdair MacIntyre* (1995) and *What happened in and to Moral Philosophy in the Twentieth Century? Philosophical Essays in Honor of Alasdair Macintyre* (2013).

Cross-References

- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Multiculturalism
- ▶ Nussbaum, Martha
- ▶ Taylor, Charles: Ethics

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MacKinnon, Catharine

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Introduction

MacKinnon, Catharine (born October 7, 1946) is a prominent American lawyer, feminist activist, and legal theorist. She has written extensively about topics as diverse as anti-discrimination law, sexual harassment, pornography, Title IX, feminist jurisprudence, human rights law, torture, animal rights, and constitutional law. She is best known for her theory of sexual harassment, her critique of pornography, and her work on human rights law.

The Theory of Sexual Harassment

MacKinnon's first major intervention in legal and political theory came with the publication of her 1979 book *Sexual Harassment of Working Women: A Case off Sex Discrimination*, where she offers an original interpretation of the legal status of sexual harassment. Written at a time when sexual harassment in the American workplace was pervasive but not explicitly banned as a matter of law, this work would exert a strong influence on the subsequent development of anti-harassment legislation in the United States.

Sexual Harassment as Discrimination on the Basis of Sex

American anti-discrimination law bans differential treatment on the basis of social categories deemed of special interest, such as "race," "sex," and "religious affiliation." MacKinnon argues that sexual harassment represents differential treatment on the basis of sex and consequently constitutes a violation of the constitutionally and statutorily guaranteed right to equal treatment much in the same way that the doctrine of "separate but equal" constitutes a violation of it on the basis of race. More specifically, sexual harassment constitutes unlawful discrimination in employment under Title VII of The Civil Rights Act of 1964 and violates women's equal rights under the Equal Protection Clause of the Fourteenth Amendment. The linchpin of this theory is MacKinnon's assertion that sexual harassment is not simply a private dispute between isolated individuals or a natural consequence of men's biology, but a socially sanctioned practice that keeps women as a class in a position of inferiority and inequality relative to men. As such, it is a civil

rights issue that falls within the ambit of anti-discrimination law.

In *Sexual Harassment of Working Women*, MacKinnon offers three arguments to prove that there is a link between the sexual harassment of women in the workplace and women's inequality more generally. These arguments, according to her, demonstrate that sexual harassment harms women *as a group* and dispel the widespread assumption that the only women harmed by this practice are those directly targeted by it.

The first is the argument from tradition. Historically, women have been forced "to exchange sexual services for material survival," which has cemented their "inferior sex status" (1979, 174). By making women's employment, which is their means of material survival, contingent upon their sexual availability to male superiors, sexual harassment replicates and perpetuates the very social dynamic by means of which "women have been kept sexually in thrall to men and at the bottom of the labor market" (ibid).

The second is the argument from sex roles. Sexual harassment contributes to noxious gender stereotypes that alter the relationship between the sexes in all areas of life, not only in employment. These stereotypes – especially the notion that men's essence lies in conquering women while women's lies in submitting themselves to men – are behavior-reinforcing and habit-forming schemas that (i) affect how men and women perceive themselves and each other and (ii) fortify a pervasive "system of social predation" that turns women into second-class citizens.

The third is the argument from sexuality. Sexual harassment reduces women to their sexuality and, in addition, defines the content of this sexuality in terms of passivity and receptivity. In other words, it reduces women to their sexuality and defines this sexuality from the point of view of men. This "reduction" contributes to women's inequality by allowing men (as a group) to have more power over women than women (as a group) have over men. It gives men, in particular, the power to define women's sexuality on men's own terms.

Two Approaches to Sex Discrimination: "Difference" Versus "Inequality"

Philosophically, one of the most important dimensions of MacKinnon's theory of sexual harassment is the distinction she makes between two approaches to anti-discrimination law: the difference approach and the inequality approach. More than different jurisprudential methods or legal doctrines, these approaches represent different lenses for thinking about existing anti-discrimination law and for interpreting the concept of equality that anchors it.

The main difference between them lies in their understanding of equality or, to be more specific, in what they take *the opposite* of equality to be. For the first, the opposite of equality is difference. For the second, it is inequality. While this distinction may seem like a purely verbal squabble, MacKinnon maintains that the choice between these paradigms has concrete legal ramifications.

The Difference Approach

The difference approach maintains that the opposite of equality is difference and holds that any policy, program, or procedure that treats men and women differently amounts to, or at least borders on, discrimination. Rooted in classical liberalism's doctrine of abstract individualism and the Aristotelian principle of "treating likes alike and unlikes unalike" (1991b, 1286), this approach presupposes that social agents begin life on an equal-playing field and that the function of the legal apparatus is to preserve this original equality. MacKinnon avidly rejects this approach as excessively formalistic in its definition of equality and as insufficiently sophisticated in its understanding of power, politics, and gender. The difference approach, she argues, equates "equality" with "equivalence" and assumes that the law cannot take notice of precisely those differences that keep women in a position of economic, social, and political inequality.

Under this approach, victims of sex discrimination are expected to meet one of two legal requirements in order to prove discrimination: the "comparability requirement" or the "sex-specific universality requirement." The first

requires victims to show that there is a certain standard that both sexes share in common and on the basis of which they can be compared and that they have been personally treated unfairly according to this standard. Unfortunately, by making the applicability of anti-discrimination law contingent upon the "similar positioning" of the sexes, the requirement leaves entirely outside the domain of anti-discrimination law some of the most egregious forms of sex-based discrimination, namely, those in which women are treated differently than men precisely for being "dissimilarly positioned" relative to them.

Consider pregnancy. Pregnancy fails to meet the comparability requirement since only women can get pregnant. Men cannot. As such, a woman who is discriminated against for being pregnant (or for being capable of becoming pregnant) can never prove in court that her treatment was unlawfully discriminatory according to a "comparable" standard. Judges using the difference approach, therefore, are unlikely to view as discriminatory any actions, behaviors, and policies on the part of employers that target women by targeting their relationship to pregnancy, such as denying employees maternity leave, refusing to interview pregnant women for new job openings, and excluding coverage for pregnancy-related issues in health insurance packages.

The second requirement works differently. Instead of obliging women to appeal to a "comparable" criterion in discrimination cases, it forces them to show that the criterion on the basis of which they were targeted (such as pregnancy) is "sex-based." Unfortunately, courts have interpreted "sex-based" to mean something akin to *holds true of all and only members of one sex*. But no criterion can ever meet this interpretation as there is no feature, characteristic, or property that all and only women possess solely by virtue of being women. Pregnancy, for example, falls short of this threshold for the obvious reason that not all women are, or even can become, pregnant. Thus, even pregnancy – the sexual difference par excellence, if there was ever one – is not "sex-based" in the legally relevant way.

In general, the difference approach traps victims of discrimination in a vicious legal circle. If they fail to meet the comparability requirement, their cases are tossed out of court as unmeritorious. If they fail to meet the sex-specific universality requirement, their cases are tossed out of court as unmeritorious. Either way, women lose. The catch is, of course, that the first requirement is impossible to meet in many cases, while the second is impossible to meet in all cases.

The Inequality Approach

The inequality approach identifies inequality rather than difference as equality's real enemy. It maintains that what ought to matter in discrimination cases is not whether the differences between the sexes are "comparable" or "sex-based," but how they are mobilized, valorized, and treated in specific social and political contexts. What ought to matter, in other words, are not the differences themselves but the social meanings they carry. Does *this* or *that* difference between the sexes promote gender equality, or does it cumulatively and systematically disenfranchise one sex relative to the other? "[Here] the only question for litigation," to quote MacKinnon, "is whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status" (1979, 117). Notice that under the inequality approach, it does not necessarily follow form the fact that a practice treats the sexes differently that it is discriminatory, but it does necessarily follow that a practice is discriminatory "if it participates in the systemic social deprivation of one sex because of sex."

MacKinnon embraces the inequality approach, arguing that it claims multiple advantages over the difference approach. First, because it focuses on something concrete (power) rather than something abstract (difference), it is better suited to deal with legal controversies involving power imbalances and power asymmetries, such as sexual harassment, affirmative action, LGBTQI rights, and the Equal Rights Amendment (MacKinnon 1979). Second, the difference approach problematically assumes that equality is achieved only when a standard is applied to men and women equally, which overlooks the fact that inequality is not always the effect of the inconsistent application of a standard. Sometimes,

"inequality is buried in the *standard itself*" (1979, 145). Denying pregnancy-related benefits to men and women equally, for instance, is not "equal" because women are harmed by this denial in ways that men never can be. Third and finally, the inequality approach is productively critical of the concept of "difference." It grasps the complex ways in which sexual and gendered differences – even those that appear to be entirely natural – are constructed rather than found. As such, it is compatible with a constructionist interpretation of gender. While the difference approach maintains that it is difference that produces inequality, the inequality approach inverts this operation, holding that the opposite is true: it is inequality that produces difference.

The Theory of Pornography

In 1977, while still working on the manuscript that would become *Sexual Harassment of Working Women*, MacKinnon met feminist author and anti-pornography activist Andrea Dworkin, author of *Woman Hating* (1974) and *Our Blood: Prophecies and Discourses on Sexual Politics* (1976). This meeting marked the beginning of a friendship and collaboration that would prove highly productive and that would propel MacKinnon to work on the subject for which she would become most widely known: pornography.

Dworkin's *Pornography: Men Possessing Women* (1989), in particular, influenced MacKinnon a great deal. In it, MacKinnon found not just a valuable resource for the feminist struggle against women's inequality, but "a sexual theory of gender inequality of which pornography is a core constitutive practice" (1989, 198). This Dworkinian theory helped MacKinnon formulate a global theory of pornography anchored, as her previous work on sexual harassment had been, in anti-discrimination law and women's civil rights. This global theory was codified in a series of coauthored books, such as *The Reasons Why: Essays On The New Civil Rights Law Recognizing Pornography As Sex Discrimination* (1985), *Pornography And Civil Rights: A New Day For Women's Equality* (1988), and *In Harm's Way: The Pornography Civil Rights Hearings* (1997). It was also codified in two key single-authored books published by MacKinnon in the 1980s: *Feminism Unmodified: Discourses on Life and Law* (1987) and *Toward a Feminist Theory of the State* (1989).

Pornography and Civil Rights Law

MacKinnon's interpretation of the legal status of pornography mirrors her interpretation of sexual harassment – both constitute unlawful discrimination on the basis of sex. Pornography "is a practice of sex discrimination, a violation of women's civil rights, the opposite of sexual equality" (MacKinnon 1987, 175). It is "a form of forced sex, a practice of sexual politics, [and] an institution of gender inequality" (148).

Against prevailing legal doctrines that portray pornography as a harmless social product, as a means to women's sexual freedom, or as expressions of the right to free speech, MacKinnon portrays it as a multibillion dollar industry that harms women by institutionalizing male supremacy; by eroticizing the abuse, humiliation, and domination of women; and as patriarchal establishment that structures the relationship between the sexes along a hierarchical axis in which women always occupy the role of subservient subordinates and men that of assertive superordinates (MacKinnon 1985). Pornography, MacKinnon says, "traffics in female flesh, making sex inequality into sex to the tune of eight billion dollars a year" (1989, 41). And it harms all women by defining them in terms of inferiority and penetrability, which prevents women from fully participating in the social, economic, and political scales of public life. On the whole, pornography contributes to women's subjection by eroticizing inequality and reinforcing relations of gender dominance, indeed by construing gender itself *as* dominance.

Pornography, in this reading, is sex discrimination on the grounds that it causes harm to a statutorily protected group. In many of her writings, MacKinnon stresses three ways in which pornography injures women:

1. *By causing injury to the women (and children) in it.* Inspired to the story of Linda Boreman,

best known for her role in the 1972 hardcore film *Deep Throat*, MacKinnon repeatedly emphasizes that whatever happens to a female character in a pornographic movie happens, also, to the real woman that plays her. Women, and not just their characters, are living the realities that pornography depicts. They are dehumanized, beaten, and subordinated. They are hit, violated, and abused.

2. *By causing injury to the women (and children) who are affected by how porn affects men's psychology and behavior.* MacKinnon references social-scientific research that points to a causal (or at least correlational) link between the consumption of pornography and sexual violence. Empirical evidence indicates that men who consume pornography are less likely to treat women as equals, more likely to condone rape committed by other men, and less likely to believe rape victims who are women. They are also more likely to predict engaging in rape themselves.
3. *By causing injury to the women (and children) who are not in it, but who are nonetheless subjected to it against their will.* MacKinnon again cites social-scientific evidence that sexually explicit materials are regularly forced upon women at work (by co-workers and supervisors), at home (by husbands and fathers), and in public spaces (by strangers and businesses such as sex shops). These materials, on her view, impact all women because they make "the world [itself] a pornographic place" (1989, 154). Pornography is to public life what sexual harassment is to work life—namely, a demeaning practice that creates a toxic environment that is forced upon women without their consent.

Mackinnon observes that in spite of strong evidence of pornography's injuriousness, American courts have been reluctant to find the production, consumption, and distribution of pornography actionable. One reason is that courts have broached pornography cases using "an individualistic, atomistic, linear, isolated, tortlike – in a word, positivistic – conception of injury" (MacKinnon 1989, 156) and have required plaintiffs to demonstrate that pornography harms them individually – in the same way that, say, a reckless driver harms the person into whose property she crashes her car. This, however, misses the group reference of the anti-pornography camp whose central argument is that pornography harms women not as individuals but collectively, which is to say, as members of a protected class.

Another reason is that courts repeatedly define pornography as "speech." This has the unfortunate effect of shifting pornography-related lawsuits from the domain of anti-discrimination law to that of obscenity and libel law, where pornographic materials are judged according to whether or not they are "obscene" or "defamatory" rather than according to whether or not they violate women's civil rights (1991a). This shift in legal frameworks brings about what MacKinnon calls the "derealization" of pornography (10). It reduces pornography to "words" that express different points of view. This reduction, in turn, conceals from legal view pornography's real harms: the rapes, the abuses, the beatings, the extortions, the assaults, the humiliations, and the civil rights violations. Historically, then, courts have come to the aid of pornographers in two ways: first, by characterizing pornography as "words" rather than "deeds" (derealization) and second by ruling that these "words" are always "*only* words," which is to say, harmless points of view that have the right to circulate in the marketplace of ideas (de-injurization).

At the root of this jurisprudential strategy, MacKinnon says, lies the jurisprudential ideology of "First Amendment absolutism," which refers to the mistaken belief that the right to free speech under US Constitutional Law is absolute and trumps all other legal norms and political values. What makes this belief problematic, as MacKinnon sees it, is that it is arbitrary and in tension with precedent. First Amendment absolutism is not consistently applied in all free speech. It is only consistently applied in free speech cases involving pornography. Furthermore, it conflicts with the history of constitutional interpretation in the United States, which more than once has recognized the need to curb the right to free speech in

light of competing state interests, such as public safety, natural security, and social equality (1993a, 1979).

Anti-pornography Ordinances and the First Amendment

In 1983, the city government of Minneapolis commissioned MacKinnon and Dworkin to draft a civil rights ordinance to combat pornography. The ordinance made actionable "the production, sale, exhibition, or distribution" of pornographic material within city limits and allowed women affected by said material to seek damages in civil court (MacKinnon 1979, 186). It is noteworthy that the edict relied neither on "prior restraint" nor "prurient interest" and imposed neither a ban on production nor criminal penalties for possession and distribution. It explicitly steered clear of criminal, tort, and obscenity law, situating itself squarely within the domain of civil rights law. Speaking of a version of the Minneapolis ordinance that went into effect in Indianapolis on May 1, 1984, Sandler (1984) remarks:

> The ordinance creates the right for any aggrieved person alleging violation of the ordinance to bring a civil action against a maker, seller, exhibitor, or distributor of objectionable pornography. The ordinance makes unlawful: (1) the trafficking of pornography; (2) coercion of others into pornographic performances; and (3) the forcing of pornography upon another person. Additionally, the ordinance gives victims of any assault or physical attack caused by pornography a civil remedy against the perpetrator and those involved in the production or distribution of the pornography. (913–915)

Within an hour of being signed into law, the Indianapolis law was challenged in court. What followed was a series of court decisions that, according to MacKinnon, exemplify the dangers of "First Amendment absolutism." First, the Federal District Court of Indianapolis found the ordinance unconstitutional under the First Amendment, ruling that it violated pornographers' right to free speech. This finding was subsequently affirmed by the Seventh Circuit, which ruled that the government had a compelling interest in protecting pornography as free speech. Finally, and on direct appeal, the US Supreme Court upheld this ruling via summary affirmance.

At every stage this legal progression, MacKinnon argues, the courts presented the right to free speech as an inviolable axiom of jurisprudential reason, as a legal card that trumps all values. Even the value of women's safety paled in comparison in the courts' decisions. "Interesting enough," Mackinnon writes, "the Seventh Circuit, in an opinion by Judge Frank Easterbrook, conceded the issue of objective causation [i.e., that pornography causes harm]. The only problem was, the harm didn't matter as much as the materials mattered" (1987, 210). For much of the 1980s and 1990s, MacKinnon and Dworkin used these and related court decisions to bring attention to fraught relationship between women, discrimination, and free speech.

International Law

Starting in the 1990s, and without abandoning the overall framework that guided her earlier reflections on sexual harassment and pornography, MacKinnon began writing about international law. This work, as one of her students has noted, began in late 1991 "when she was galvanized by atrocities in Bosnia-Herzegovina and Croatia" (Bennoune 2010, 108). From 1991 onward, MacKinnon would embark on a series of activist and scholarly endeavors that would culminate in the 2007 publication of *Are Women Human? And Other International Dialogues*, where MacKinnon develops the argument that extant international law frameworks are reflections of men's lives, men's interests, and men's realities (MacKinnon 2007).

Human rights law, for example, habitually excludes women's issues from its purview. Even the most egregious and brutal violations of women's dignities tend not to be viewed as "human rights violations" under existing frameworks, especially if they happen in sphered traditionally viewed as "domestic" (MacKinnon 1993a, b, 1994). Consider the case of torture. Whenever men are tortured (say, by being beaten or sexually mutilated), international law springs into action. But when women are tortured and the torture methods accentuate their sex, the

international prohibition on torture is rarely applied. Women's torture, to put it bluntly, is not viewed as torture. If anything, it is characterized as "rape," "battery," or "assault" and relegated to the realm of national law (2006). Other topics she discusses at length in her analysis of international law include genocide, nation-building, and sex-trafficking.

MacKinnon polemically answers the titular question of her book with an unequivocal and resounding "no" – no, women are not human because they are not "human" in the legal and political senses of the term, because they do not register as political subjects under international law. Still, she maintains that current international law can be used to improve women's condition and advocates "harnessing international human rights norms and applying them to violence against women with greater rigour and commitment than has hitherto been the case" (McGlynn 2008, 72). In the chapter of *Are Women Human?* entitled "On Torture," for instance, she argues that the violations women endure in the privacy of the home *should* qualify as "acts of torture" under international law. Quoting reports from victims of domestic abuse, she writes:

> In the accounts by these women, all the same things happen that happen in Amnesty International Reports and accounts of torture – except they happen in homes in Nebraska or in pornography studios in Los Angeles rather than prison cells in Chile or detention centers in Turkey. But the social and legal responses to the experiences are not the same at all [. . .] Never is a victim of torture asked, didn't you really want it? (2006, 21)

What differentiates the torture that happens in detention centers and black sites from the torture that happens in living rooms and bedrooms is not that one is "real" and the other is not. What differentiates them is simply that the first happens primarily to men outside the home and is thus viewed by society as inherently "political," whereas the second happens almost exclusively to women (and children) inside the home and is thus dismissed as "personal" (1993b). In *Are Women Human?* MacKinnon reminds international law scholars of the feminist principle that, in all areas of life, "the personal is political."

Criticisms

Various scholars have criticized both the overall theoretical framework MacKinnon uses to think about gender and violence and the specific legal theories that she generates with the use of this framework.

Framework Criticisms

Some, for instance, object to the presumed objectivity of MacKinnon's theoretical approach, which MacKinnon often portrays as "the" truth of the feminist movement and "the" theory of women's experience (Bartlett 1987). For some, this pretention to universality ignores that not all women's experiences are reducible to the experience of being victimized (Cornell 1991). For others, it betrays a troublesome lack of intersectional analysis in MacKinnon's work (Butler 1991; Nicholson 1989), which fails to appreciate how culture, race, and class shape the experiences of women across the globe (Kline 1989; Harris 1990; Mahoney 1992). Other aspects of her legal philosophy that have generated criticisms include her discussion of the problem of "false consciousness," her attempt to synthesize feminism and Marxism, and her denunciation of postmodern theory and philosophy.

Criticisms of Theories

MacKinnon's theories have influenced a number of fields, including feminist theory, political theory, and the philosophy of law. Even so, they are not universally accepted and have been criticized by experts in these fields from various angles.

Her theory of sexual harassment has been accused of imposing an "immense evidentiary burden on the parties and the courts," of penalizing "benign" sexual expression at work, and of failing to capture the actionable features of male-on-male sexual harassment (Cooper 1981; Schultz 1998).

Her theory of pornography has been criticized as undemocratic by Dworkin (1991) and as puritanical/moralistic by many self-identified "pro-sex" or "sex-positive" feminists. Cossman (1997), for example, says that MacKinnon assumes "that the meaning of pornography can

be objectivity established" (114). "In this view, there is no possibility of a diversity of sexual representations within the pornography industry. Nor is there any room to admit that these sexual representations may be subject to different interpretations" (124). Other pro-sex feminists have accused MacKinnon's interpretation of practices such as prostitution and BDSM of being monolithic and her understanding of nonheterosexual pornography, queer (especially lesbian) relationships, and transwomen' s experiences of the world as problematically reductive (Rubin 1998; Willis 2005).

Finally, some scholars also worry that MacKinnon's late work on human rights and international law overestimates the power of legal norms to actually improve women's lot and underestimates "the costs of invoking state and international power (which often also entails violence) to improve the status of women" (Higgins 2016, 528). MacCormick (1991), for instance, stresses the culturally imperialistic tendencies of her thought.

Conclusion

Catharine MacKinnon's philosophy and activism, as Littleton (1989) puts it, "is hard to forget and easy to misunderstand" (751). This is because MacKinnon's work constantly oscillates between theoretical registers and blends different styles and methods of argument: line-by-line analyses of legal cases, hermeneutical interpretations of political controversies, phenomenological descriptions of women's lived experience, and epistemological reflections on the complex relationships among desire, knowledge, life, and law. In spite of this, or perhaps because of it, her work has had a tremendous impact on the evolution of various branches law and continues to shape ongoing debates in feminist, legal, social, and political theory.

Cross-References

- ▶ Critical Theory and International Law
- ▶ Equality and Global Justice
- ▶ International Law: Legitimacy of
- ▶ Law as Discourse
- ▶ Legal Theory: Descriptive
- ▶ Phenomenology of Law
- ▶ Rule of Recognition and Constitution

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Maimonides, Moses

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Introduction

Moses Maimonides (c. 1138–1204), Mūsā ibn Maymūn ibn 'Ubayd Allāh al-Qurṭubī al-Andalusī al-Isra'ilī in Arabic and Mosheh ben Maimon ha-Sefaradi in Hebrew, was born in what is now Cordoba, Spain (Qurṭuba, Andalusia), to a distinguished family of Jewish scholars and judges.

Called by the Hebrew Acronym RaMBaM or by the epithet, "the Great Eagle" (*Ha-Nesher Ha-Gadol*, after Ezekiel 17:3) by later scholars, Maimonides was the foremost legal and philosophical Jewish thinker of the Middle Ages, probably of all time, as well as a prominent physician.

Maimonides' juridical accomplishments included the reworking and systematization of all of Jewish Law in two major legal compendia, the *Commentary on the Mishnah* and the *Mishneh Torah*.

Maimonides served as the official Head of the Jews (*ra'īs al-yahūd*) in Fusṭāṭ (Old Cairo) and, through his works and letters, fundamentally influenced the development of Jewish Law throughout the world. He apparently mastered all philosophical works that were available to him, including works by Aristotle, Galen, Al-Fārābī, Avicenna, and Avempace, and strove, especially in his *Guide of the Perplexed*, to reconcile them with the religious Law.

Maimonides also served as a court physician to the Ayyubids in Egypt and was associated with al-Qāḍī al-Fāḍil, an important advisor to Saladin.

Maimonides' many accomplishments followed a rather turbulent childhood and early adulthood, spent moving Eastward to avoid oppressive policies against Jews. Maimonides left Cordoba around 1148 after the invasion of the Almohads, a North African Berber tribe that imposed an extremely strict version of shari'a law which included inquisitions and persecutions against Jews, Christians, and even Muslims. He spent the next 12 years in Spain, though it is not clear where, and apparently continued to receive a religious legal and literary education and possibly a medical one as well. Around 1160, Maimonides and his family lived in Fez, Morocco, possibly as outward Muslims, but crypto-Jews, where Maimonides continued his medical and scientific studies. As conditions worsened in Morocco, Maimonides moved to Acre (in 1165) and then to Egypt (in 1166) where he participated in and eventually led Jewish communal life. Much of Maimonides' 38 years in Egypt saw great political change, including regime change and major religious changes. When Maimonides first arrived, Egypt was ruled by the Fatimids, an Isma'ili

branch of Shi'ites, who were relatively open and tolerant rulers and whose religious teachings on esotericism involved Neoplatonic ideas that appealed to Al-Fārābī and were probably influential on Maimonides as well. Later, after some years of hostilities, Saladin and the Sunni Ayyubids took over Egypt (1171). The Ayyubids favored a religious approach known as Asharite Kalam which Maimonides strongly criticizes in the *Guide*. The Ayyubids often dealt harshly with their critics and those they perceived as heretics; in 1191, Saladin's son executed the philosopher-mystic Al-Suhrawardi in Aleppo. Maimonides, though, managed to remain in relative good favor with the regime throughout his life.

Major Works

Moses Maimonides' numerous writings in Arabic and Hebrew include legal treatises and responsa on Jewish religious law, a text on logic, works exploring the connection between philosophy and Judaism, and about eleven medical treatises.

He is best known for three monumental, nearly encyclopedic works, the *Commentary on the Mishnah*, the *Mishneh Torah,* and the *Guide of the Perplexed*.

Commentary on the Mishnah (1168)

Maimonides' first major work sought to give a clear, accessible, and practical explanation of Jewish Law as it is laid out in the *Mishnah*, the first and most authoritative systematization and reorganization of Jewish Law, probably completely around 200 CE.

Maimonides' explanations, written in the vernacular Arabic, were based largely on the interpretations and developments of the *Mishnah* found in the Babylonian and Jerusalem Talmuds and later writings. These works were not clearly organized, were linguistically challenging (much of these writings is in Aramaic), and spread out in numerous disparate volumes that would have been difficult to access outside of a few major cities. In addition to traditional sources, Maimonides also drew on Platonic and Aristotelian philosophical texts in the *Commentary*, though not to the extent he would in the *Mishneh Torah* and *Guide of the Perplexed*.

Beside the legal discussions, Maimonides included three major introductions in the *Commentary.* In the first, an introduction to the entire *Mishnah*, Maimonides argued for the authority of the oral tradition of Jewish Law and of its Rabbinic interpreters as well as for the necessity of esoteric writing. In the second introduction, the introduction to *Pereq Ḥeleq* (Tractate *Sanhedrin,* ch. x), Maimonides laid out his famous thirteen principles of faith as necessary beliefs for inclusion in the community of Israel. In his introduction to Tractate *Aboth*, Maimonides' *Eight Chapters*, Maimonides gave an account of proper human conduct, drawing largely on Aristotle's *De Anima* and *Nicomachean Ethics* as brokered through the Arabic philosophical tradition.

Mishneh Torah (1177)

Mishneh Torah is a 14 volume comprehensive compendium of Jewish Law, giving authoritative legal guidance on virtually every aspect of the Law, e.g., the foundations of the Law, ethical qualities, marriage and divorce law, charity, torts, Temple ritual, and the political laws of messianic times. This compendium does not follow the order of the *Mishnah* but was arranged to be easy to read and to facilitate memorization and answering specific legal questions. To this end, Maimonides developed a simple legal style of Hebrew, a style he considered accessible to Jews throughout the world. Indeed, that the work was originally written in Hebrew allowed for its immediate proliferation throughout Europe, particularly Southern France and Italy. It was these readers who then commissioned translations of Maimonides' other works, including selections from the *Commentary* on the *Mishnah* and the *Guide of the Perplexed*.

While *Mishneh Torah* frequently cites Biblical sources, Maimonides did not cite the Mishnaic, Talmudic, and later rabbinic sources he used, except collectively in a list of authorities in the introduction. Such omissions were a radical departure from all other previous Jewish legal works, but Maimonides says that he did this so that the compendium would lay out the law clearly

and succinctly, such that anyone, even youths, could understand and implement it and would not need to turn to any other legal compilation, including the *Mishnah* and the *Talmud*.

Mishneh Torah is also radically different from previous Jewish legal works in its inclusion of philosophical concepts. For example, Maimonides begins the compendium with an account of God's existence and involvement in the world that follows Aristotelian cosmology, as understood by Al-Fārābī and Avicenna.

Overall, *Mishneh Torah* depicts a world in which philosophy and Jewish Law are in harmony and indeed where perfect adherence to the Law would entail philosophical speculation. Indeed, he envisions the messianic period as one in which the natural order of the world is not altered, but political circumstances are favorable such that Israel can devote itself to the Law and its wisdom and attain an understanding of the Divine to the utmost of human capability.

Guide of the Perplexed (ca. 1191)

While *Mishneh Torah* implies a harmony between philosophy and the Law, the *Guide of the Perplexed* emphasizes the difficulties in any such combination. The *Guide* presents the Law and philosophy as espousing two different, even contradictory views of the world. The perplexity induced by these two different worldviews is Maimonides' main subject in the *Guide*. Scholars disagree as to whether Maimonides guides his readers out of that perplexity by demonstrating the validity of one of the two worldviews or only guides them within the perplexity toward a kind of equanimity in the face of the limitations of human knowledge.

In the introduction, Maimonides asserts that the *Guide* approaches this perplexity in two ways. One is through interpretation of equivocal terms that appear in the Bible, where literal interpretation would contradict philosophical understanding. The other is through explaining Biblical parables that give rise to perplexity. Maimonides especially focuses on two such parables: A. Genesis 1, known in Talmudic literature as the Account of Creation, which he associates with natural science and B. Ezekiel 1 (and forward, and also parts of Isaiah), known as the Account of the Chariot, which he associates with divine science or metaphysics.

In fact, the scope of the *Guide* is quite broad and its structure loosely parallels that of Aristotle's works as understood by the Muslim *falāsifa.*

Part I of the *Guide* corresponds somewhat to Aristotle's logical *organon*; it is largely dedicated to giving Maimonides' lexicon and analysis of terminology, along with rules of hermeneutics, as well as a refutation of the Islamic theologians (*mutakallimūn*), whom Maimonides takes to be the Sophists of his day.

Part II is Maimonides' treatment of among other things the formation of the world and the perfection of the human soul. These subjects can be understood to correspond loosely to Aristotle's *Physics*, *De Caelo*, *De Anima,* and *Parva Naturalia*.

Part III of the *Guide* begins with Maimonides' theology or metaphysics and then turns to human actions, i.e., ethics, in connection with the divine commandments.

The final chapters of the *Guide*, possibly Maimonides' political science, discuss the divine city and the ways and actions of the perfect human individual who is *inter alia* a kind of philosopher-statesman. While loosely reflecting the order of study championed by Al-Fārābī and associated with Andronicus of Rhodes, Maimonides' *Guide* often has the reader study prophetic works, rather than nature and natural science.

Other Works

In addition to his three major works, Maimonides wrote a large number of important short volumes, treatises, legal opinions (responsa), and letters, some of which are either not extant or have not been edited or translated into English.

Noteworthy are Maimonides' *Epistle to Yemen* (1172), urging all Yemenite Jews to take heart in defiance of forced conversions, not to assume that messianic times had arrived and not to follow a false messiah, his *Book of Commandments*, his *Treatise on Resurrection* (1191), his *Letter on*

Astrology (1194), his *Treatise on Logic*, and his at least 11 medical works (in the 1190s).

Maimonides' medical writings demonstrate his masterful ability to bring order and simplicity to complex subjects, making the topics useful and accessible in relatively short volumes.

Legacy

Maimonides' legal and philosophical writings fundamentally redefined how Jewish Law was codified and studied and the place of philosophy and science in Jewish life.

Maimonides' writings were also influential on Christian theologians, such as Alexander of Hales, William of Auvergne, Albertus Magnus, Thomas Aquinas, Meister Eckhart, and Duns Scotus.

Further his legal works influenced the development of British and Dutch jurisprudence in the seventeenth century, especially the works of John Selden and Hugo Grotius.

Maimonides also influenced the philosophical works of Benedict Spinoza and Gottfried Wilhelm von Leibniz.

In the twentieth and twenty-first centuries, scholars have been increasingly interested in understanding Maimonides in the context of Islamic philosophy and law. Often this is framed with a view to how Arabic classifications of law (e.g., into roots, branches, etc.) and philosophy (e.g., the classification of the Aristotelian scientific curriculum) made their way into Maimonides' works. Leo Strauss went so far as to see all of Maimonides' physical and metaphysical philosophy as being dependent on legal and political philosophy. Thus did Strauss locate Maimonides among a tradition he saw as going back to Al-Fārābī and even Plato, according to which political science is the basic underpinning of all other science and philosophy.

Maimonides continues to be studied today throughout the world and continues to be influential on contemporary religious and philosophical thought.

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Maine, Henry Sumner

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Born in 1822, Maine (1822–1888) was raised in England. His father left the family when Maine was young and in his early years he was dependent on his mother. His health was weak, and at school his consolation lay in his academic ability. In 1840 he went to Cambridge, and during his time there he was to prove to be the best classical scholar of his year, winning prizes and achieving excellent results. Such was his reputation that in 1847, at the age of 25, he was appointed Regius Professor of Civil Law. In the years which followed he developed additional interests. He qualified as a barrister and began to visit the courts, but he did not take to professional work: it may have been too demanding for his health. In 1852 he was appointed Reader in Jurisprudence at the Inns of Court in London with a view to giving lectures to those who wished to become barristers. He started to write for the newspapers, and in 1855 he was a founding editor of *The Saturday Review* which was to gain a high reputation for the quality of its articles. In the course of the 1850s, he also began to develop a strong interest in jurisprudence and to combine this with a capacity to speak and write in clear and interesting sentences which were designed to appeal to a broad audience of educated readers, both lawyers and non-lawyers.

His lectures of the 1850s took place in the ancient Hall of the Middle Temple. These lectures did much to influence the content of *Ancient Law*, the book for which he is best known. The evidence for the role of the lectures in the making of his book is based on professional journals of the day and a statement of Maine himself, but, unfortunately, we lack any copy of the notes for the lectures. (There seems to be no copy of the lecture notes in England, but there might be a copy in some library in continental Europe or the United States or some part of what was the British Empire. Those attending the lectures had global connections. It would be wonderful if someone reading this was to know of such notes.)

In *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*, Maine explored the development of law in its historical and social setting. In Maine’s analysis, history was to have a central place in the understanding of laws and already in taking this approach he was finding stages of social development over long periods of time. So, for example, legislation might be appropriate for one place and time, but the application of, say, principles of equity by the courts might be more suited to resolving legal problems in another place and time. The past provided the best way of understanding the present. “If by any means we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of

the earth are to the geologist. They contain, potentially, all the forms in which law has subsequently exhibited itself" (Maine 1861, p. 2). The author was particularly critical of jurists who gave little attention to the past experience of law. He thought that utilitarian theorists such as Bentham and Austin had certain merits (he commended the clarity of their work), but he believed that they failed to give historical understanding of a place in their analysis of law and thereby were unable to account for numerous legal phenomena. For example, when writing about India, he could attack utilitarian jurists for giving a central role to terms such as "sovereign" in their accounts of law. In his words, "There is such widespread dissatisfaction with existing theories of jurisprudence, and so general a conviction that they do not really solve the questions they pretend to dispose of, as to justify the suspicion that some line of enquiry, necessary to a perfect result, has been incompletely followed or altogether omitted by their authors. And indeed there is one remarkable omission with which all these speculations are chargeable, except perhaps those of Montesquieu. They take no account of what law has actually been at epochs remote from the particular period at which they made their appearance" (Maine 1861, pp. 118–119). The result of his lectures was the production in 1861 of the book which was to become famous in Europe, Russia, and America and around what was at that time the British Empire.

Despite the fact that he was lecturing to barristers, he was also critical of conventional professional legal thought in England. In *Ancient Law* and his later works, he consistently believed that the common law was a poor instrument for enabling legal structures to meet the demands for rapid change in an industrial society. The common law was also defective by reason of being based on a system of judicial precedents which produced complicated rules that could hardly be understood by the population at large. "Without any disparagement of the many unquestionable excellences of English law – the eminent good sense frequently exhibited in the results which it finally evolves, and the force and even the beauty of the judicial reasoning by which in many cases they are reached – it assuredly travels to its conclusions by a path more tortuous and more interrupted by fictions and unnecessary distinctions than any system of jurisprudence in the world" (Maine 1871, p. 5). Maine had no emotional attachment to the established laws of his own country.

In the course of his investigations, he used numerous historical examples from a wide variety of sources including India, Ireland, and continental Europe. He took many illustrations from Roman law but was careful to insist that he was not writing a thesis on Roman jurisprudence. The overall result was an evolutionary analysis of law with an emphasis on stages of social and legal change over long periods of time and across numerous social groups. Within this framework Maine arrived at the conclusion that progressive development required a movement from status to contract, although he was cautious about explaining why some societies went through this process and others did not do so. For example, in India the institution of caste had done much to thwart change, but the reasons for its persistence over time were debatable. Writing about status and contract in this way, and searching for themes to legal change, made his ideas of interest to an international audience including Emile Durkheim, Ferdinand Tönnies, and Fustel de Coulanges. The past was being used partly because of its inherent interest, partly because it was the key to an understanding of law and partly because of the way it could be integrated into modern debates about reform relating to topics such as contract. Always, there was a need to question existing laws and to do so from an historical viewpoint. In respect of progressive societies "social necessities and social opinion are always more or less in advance of Law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable: the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed" (Maine 1861, p. 20). Historical analysis provided the justification for reform.

Maine was in India from 1862 to 1869 where he was the most important law-reformer of his

time with a place on the Viceroy's Council. He delegated much of the detailed work of drafting to others, but he had responsibility for ensuring that laws were passed by the colonial legislators of the day. His political judgment, and the clarity of his arguments in debate, further enhanced his public reputation as the author of *Ancient Law*. People noticed that he was a jurist who could respond effectively to the practical demands of legal analysis. It was also noticed that as a legislator, many of his arguments for change were expressed in historical terms. He never lost his interest in India, and when he returned to England, he combined academic posts with membership of the Council of India. The latter was a prestigious body based in London with the duty of advising the Secretary of State for India.

One of the reasons for the popularity of his book was that it accorded with the widespread Victorian interest in evolution whether it was social or legal or biological or political or even geological. But it is noticeable that Darwin's *Origin of Species* (1859) was published too late to have an influence on the content of *Ancient Law*. Another, and more enduring, reason for the interest in the book was his capacity to write memorable and controversial sentences as in, for example: "When primitive law has once been embodied in a Code, there is an end to what may be called its spontaneous development" (Maine 1861, p. 17). Contemporaries were also attracted to some of the theories put to use in his book. In *Ancient Law* Maine made reference to what Victorians called the Comparative Method, and it came to play an important role in his later thought. In broad terms his understanding of the Comparative Method focused on the idea that from Ireland to India there was a shared experience of social evolution, albeit at different rates as between one place and another. Proof of the shared relationship lay in the study of words. It was suggested that there were affinities between Celtic and other European languages with certain ancient Asiatic scripts and in particular with Sanskrit. It followed, for example, that the modern village communities to be found in parts of India could be likened to communities in mediaeval Europe. In some ways, such an analysis could be used to reduce prejudice: all those within the range of the method had a shared historical experience: the east and the west were engaged in the same historical process, albeit with them being at contrasting stages of development. But in other ways it could cause offence. It was condescending to say of an Indian village on the subcontinent with 5000 years of history behind it that it was linked to western developments and that it just happened to be centuries "behind" in respect of its existing social arrangements. In places he was cautious in applying the method to the details of legal change. He thought he would be "making a very idle pretension if [he] held out a prospect of obtaining by the application of the Comparative Method to jurisprudence, any results which, in point of interest or trustworthiness, are to be placed on a level with those which, for example, have been accomplished in Comparative Philology. To give only one reason, the phenomena of human society, laws and legal ideas, opinions and usages, are vastly more affected by external circumstances than language. They are much more at the mercy of individual volition, and consequently much more subject to change effected deliberately from without" (Maine 1871, p. 8).

In the last 20 years of his life, some of Maine's ideas were questioned by others who were writing about both ancient societies and modern social conditions. Maine argued that in many cases, the structure of past societies had been patriarchal. Others, particularly those engaged in anthropological work, expressed forceful doubts about this and pointed to matriarchal and other structures and thereby raised serious issues as to the empirical evidence for Maine's propositions. In public debates Maine was encountering scholars such as J. F. McLennan and L. H. Morgan who were producing work of a quality which had to be taken seriously. Linked to his arguments about patriarchy, he put forward views about the structure of contemporary and ancient village communities. Here, again, his views were challenged as the years went by. Such debates were all the more important for a jurist such as Maine who had spent years arguing that generalizations about law and its development should be grounded in historical fact. Maine sought to strengthen his arguments by

making use of certain German scholars such as Nasse and von Maurer with their analysis of change in medieval Europe. This made for lively lectures, but it also gave an impression that to an increasing extent, Maine was relying on the work of others rather than developing his own thoughts in new directions. It is as if he felt more at home in, say, continuing to question the ideas of utilitarian jurists rather than exploring new lines of enquiry. In the 1870s he could be found saying, once again, that "It is impossible to apply these terms, command, sovereign, obligation, sanction, right, to the customary law under which Indian village communities have lived for centuries, practically knowing no other law civilly obligatory" (Maine 1871, pp. 67–68).

Over the later years Maine's reputation came to be questioned in a further way. He was reluctant to use footnotes, and, inevitably, this could lead to uncertainty as to his sources save in those instances where he referred explicitly in his texts to scholars such as von Maurer. His frequent preference for generalizations without reference to sources placed his work in contrast to other leading authorities writing on the history of law at the time. The English legal historian, Maitland, was particularly critical. But this type of criticism did not lead Maine to change his style of writing. Usually, his objective was to write about law in a way that an educated reader would find attractive. At times it was as if there was a conversational aspect to what he wrote: he was almost engaged in a talk with the reader. Someone who read, say, any of the editions of *Village Communities*, or *Lectures on the Early History of Institutions*, or *Dissertations on Early Law and Custom* could be certain of enjoying good prose and the discussion of ideas of interest to an educated person who might or might not be a lawyer. Who could resist the charm of a sentence such as: "Except the blind forces of Nature, nothing moves in this world which is not Greek in its origin?" (Maine 1876, p. 238).

In his day Maine was capable of working constructively with others engaged in historical work. For example, his friend Whitley Stokes was to combine legislative reforms in India with an interest in ancient Celtic studies, particularly those relating to Ireland. Stokes wrote 30 monographs and over 300 articles, and he is now recognized as a founder of Celtic studies. His capacity to combine legal work with research into ancient Irish history made for a good relationship with Maine from which a wider understanding of law and its history could be given to the public.

Maine achieved international recognition in his life time. On his return to England from India he was given a knighthood for his services in India. In the course of his life, he was made a member of the American Academy, the Dutch Institute, the Accademia dei Lincei, the Madrid Academy, the Royal Irish Academy, the Washington Anthropological Society, and the Juridical Society of Moscow. He was a fellow of the Royal Society and a corresponding member of the Academie des Sciences Morales and Politiques. When at Oxford he was Corpus Professor of Jurisprudence. Later, during his time at Cambridge, he was Master of Trinity Hall and Whewell Professor of International Law. It was the international range of responses to Maine's work that led the Russian Historical Jurist, Sir Paul Vinogradoff, to respond with anger to those who dwelt on Maine's lack of footnotes and his vulnerability to empirical studies. "Those who indulge in such cheap criticisms should rather try to realise what accounts for his having been a force in European thought, a potentate in a realm where parochial patronage and a mere aptitude for vulgarisation are not recognised as titles to eminence" (Vinogradoff 1904, pp. 119–120).

But good prose and the lively discussion of popular topics were not enough to sustain Maine's reputation for the greater part of the twentieth century. Only Vinogradoff followed him as an historical jurist. The revival of interest in Maine's work toward the end of the twentieth century came with increasing international commitment to explaining law with reference to its social and historical context. Now there was praise for Maine's work in areas such as political science, legal history, sociology, and jurisprudence (Feaver 1969; Cocks 2004; Mantena 2010; Diamond 1991; Stein 1980). There was less concern about the fact that he never developed a fully articulated analysis of law: instead his constant

interest in developing new ideas in respect of law's context came to the fore. Always, Maine saw attending to the history of law as a precondition for the understanding of law.

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Introduction

Much has been written about the life and work of Frederic William Maitland (1850–1906) (see, e.g., Bell 1965; Cameron 1961; Elton 1985; Fifoot 1971; Fisher 1910; Hudson 2007; Reynell 1951; Sandberg 2017; Schuyler 1952; Smith and Shotwell 1907; Smith 1908).

The following does not attempt to emulate the biographical treatments available elsewhere or the detailed appraisals of Maitland's particular works. Rather, it reflects upon Maitland's work as a whole, uncovering its philosophical underpinnings and its reception today.

As Kirby (2019) has pointed out, Maitland is renowned for two quite different reasons and by two distinct camps of scholars. He is revered as the founder of modern English legal history but he is also somewhat separately celebrated for his work in political theory on "political pluralism." Yet, Maitland's dual reputations need to be understood in light of one another.

Maitland's Contribution

Although his career was book-ended by more philosophical writings, the main body of Maitland's work was devoted to doctrinal legal history: the examination of the historical development of English law by reference to primary legal materials. This method is often dated back to him, not only because of his works but also given his role in the foundation of the "Selden Society" which continues to epitomize such an approach.

Maitland's reputation as the father of modern legal history rests upon this method and also upon his seminal works: chiefly the book popularly known as "Pollock and Maitland," *The History of English Law* (1895) and a number of posthumously published works based on his lectures (1941, 1965, 1969) but also other lesser known books (1885, 1998), series of lectures (1898b, 1901), and numerous essays (collated in Maitland 1911, 1897, and 1898b) as well as his numerous editions of primary materials for the "Selden Society" and other organizations.

This body of work stands apart from work on political philosophy completed at the start and the end of his career: his 1875 dissertation (reprinted in Maitland 2000), his translation of the work of Otto Von Gierke (1900), and a range of late essays (Maitland 2003).

In these later works in particular, Maitland discussed what is today known as "political pluralism," that is "the school of thought that affirmed the importance of the intermediate groups, such as churches and trade unions, that stood between the individual and the state" (Kirby 2019: 127). Maitland is considered to be the

founder of pluralism in England. It was Maitland who introduced into Britain Gierke's notion of the "real personality of the group" and this "idea of the importance of groups to political liberty inspired all the leading English pluralist thinkers" (Kirby 2019: 129).

Philosophical Underpinning

Kirby (2019) has argued that although Maitland's philosophical works are often seen in isolation to his legal history works, both are actually underpinned by the same liberal, Germanist, and constitutionalist ideas. The direct influence, according to Kirby (2019: 131), was Gierke but this came not when translating Gierke's work but in response to criticisms of the handling of collective groups in the first edition of "Pollock and Maitland" which led Maitland to re-read Gierke and to become more persuaded by his argument.

More generally, Maitland was influenced by the "new" liberalism of the early twentieth century in his emphasis upon associational life (Kirby 2019: 128). He repudiated the individualism of Henry Maine, Herbert Spencer, and the constitutional theorists John Austin and A V Dicey.

The influence of German historical jurisprudence on Maitland was unsurprising given that he was brought up in a Germanophile household (Kirby 2019: 134). Maitland was influenced by Savigny's insistence that law was a great artifact of history.

It was this Germanic influence that made Maitland differ from other English constitutionalists: while they attributed English exceptionalism to the survival of Parliament, Maitland attributed it instead to the rationalization of the English medieval law and its teaching (Kirby 2019: 146). For Maitland, "What is distinctive of medieval England is not parliament, for we may everywhere [in Europe] see assemblies of Estates. .. But the Inns of Court and the Year Books that were read therein, we shall hardly find their like elsewhere" (Maitland 1901: 27).

Maitland was also included by his philosophy professor, Henry Sidgwick. It was via Sidgwick's teaching and mentorship that utilitarian ideas informed Maitland's work. Kirby (2019: 132–133) noted that this gave him a "'historical utilitarian' worldview" which believed in the need for a science of society as the basis for social reform. This historical utilitarianism animated Maitland's interest in the history of law which he saw as necessarily being "a history of ideas. It must represent, not merely what men have done and said, but what men have thought in bygone ages" (Maitland 1897: 356). Maitland's legal history work was envisaged by him as part of the "historical utilitarian" wider social scientific approach. As Kirby (2019: 132) notes, at the time Maitland wrote "the history of law was not a dusty subdiscipline but rather, in the guise of 'historical jurisprudence', a leading branch of humanistic scholarship. Along with fields such as political history, comparative philology, sociology and anthropology, it was seen as a key to understanding the development of human society in its totality."

Yet, today by contrast, legal history is seen as a separate specialism within. Ironically, this has come about in part due to the influence of Maitland. Maitland's reputation as the "neutral scholar" of historical primary legal materials has been so influential that legal history has become for many limited to that Sandberg 2021). This is ironic given that Maitland's work as a whole provides evidence for a much more interdisciplinary approach. As Rose (2010: 114, 115) has argued, "all legal historians, no matter what kind of legal history they pursue" are in Maitland's debt: "Maitland is both the discipline's most important pioneer and one whose work connects with legal history's more recent manifestations."

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► Gierke, Otto von
► Savigny, Friedrich Carl von

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Mandeville, Bernard

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Introduction: Life and Intellectual Context

Born into a family of physicians (father, grandfather, and great-grandfather were physicians), Bernard de Mandeville (1670–1733) attended the Erasmus School of Rotterdam until 1685, before joining Leyden University where he enrolled in Medicine and studied Philosophy.

Related to his medical formation, B. de Mandeville wrote several texts beginning with *De Medicina Oratio Scholastica* (1685) written in Rotterdam. In support of his academic career in Leyden University, he presented two dissertations, one on the animal functions (*Disputatio Philosophica de Brutorum Operationibus*, 1689) and another on digestion troubles (*Disputatio Medica Inauguralis de Chylosi Vitiata*, 1691). His medical practice followed the same path of his father's specialization – nerve and stomach diseases.

Later in his life, he revisited the former medical themes in a *Treatise of the Hypochondriack and Hysterick Passions* (1711) discussing, in a dialogical literary style, some contemporary thesis on the relation between the circulation of the animal spirits, the organic humors, and the states of mind connected to melancholy, hysteria, or hypochondria and assuming a materialist view on the mind–body theme.

The young Mandeville wrote some pamphlets in verse about moral and religious subjects (1690). This juvenile literary interest sheds a light on his literary vocation pursued in England in the satirical vein that reaches its acme in *The Grumbling Hive, or Knaves Turn'd Honest* (1705), satire in verse included in the larger versions of the *Fable of the Bees*. In the 1690s, B. de Mandeville

traveled to England, married in 1698/9, and remained there until the end of his life.

Some aspects of his literary essays are only explainable if one envisages the social and intellectual situation of England after the Glorious Revolution (1688) that put an end to the English Civil War, the Jacobite reaction, and the ideology of virtue that spread in the intellectual *milieus* associated with some moral categories of the "civic humanism" or with the classical moral tradition which includes Benjamin Whichcote's and Ralph Cudworth's ideas on Natural Religion grounded in Human Reason, the group called "the Cambridge Platonists," later Shaftesbury's (Anthony Ashley-Cooper) views on morality and virtue, and Francis Hutcheson's approach to beauty and virtue.

Apart from the social and intellectual situation in England, B. de Mandeville was aware of the main currents of ideas that traversed Europe in the second half of the seventeenth century. The Netherlands were not isolated from the rest of Europe, especially in what concerns the presence of unorthodox doctrines such as Socinianism or Spinozism, and the country was a key platform for the circulation of ideas from both the conservative and the nonconformist currents of the Enlightenment.

The presence of La Rochefoucauld and the skeptical, relativist line of Montaigne's legacy are both easy to trace in Mandeville's essays as well as his acquaintance with the anti-rationalistic French moral literature combined with Augustinian topics in the line of Pierre Nicole's *Essais de Morale*. The libertine doctrines dating back from the Renaissance and neo-Epicureanism were also doctrinal references to the Dutch doctor. Gassendi and the idea of the corporeal functioning of the human passions was another important conception that led Mandeville to the vision of man as a complex machine made of distinct parts and a command unit identified with a soul.

Satire

One of his literary exercises in England was the translation of some La Fontaine's *Fables,* published in 1703. Following the models of la Fontaine's short tales, la Rochefoucauld's maxims, poetry, and the classical dialogue, the literary career of the B. Mandeville in England is characterized by a combination of literary resources from different genera, such as the satiric verse, journalism, and the short essay.

He wrote satiric verses and fables in verse imitating classical authors *v. g.* Aesop, in 1703–1704, before the composition of the *Grumbling Hive*.

Satire as a genre was born from modern written forms of social observation and description of *mores*, manners or characters, similar to the ground-breaking expressions of journalism and the genre of the "journalist essay," conspicuous in the England's context of that epoch. In modern journalism, the use of moral categories and the reference to manners is not only a vehicle to express social criticism. It is a means to represent society according to literary forms and through the mirror of a public. In England, Richard Steele's *Tatler* (1709–1711) was a paradigm of this genre, combining the diffusion of news and gossips caught in London coffeehouses, the description of modes and manners with moral criticism. Conversation and commerce were two joint habits of gentlemen's interaction in coffeehouses that were converted to literary style through the newspapers. Jonathan Swift, the reputed author of satires and of an Essay on Conversation, and Joseph Addison collaborated with R. Steele in the *Tatler*. In 1711, a new project started with *The Spectator* edited by R. Steel and J. Addison.

B. de Mandeville contributed also to parallel journalistic endeavors with some essays published in *The Female Tatler* (1709–1710), a rival of Steel's *Tatler*, as the author engaged in the literary personae "Lucinda" and "Artesia" and under the collective authorship "a Society of Ladies."

The Fable of the Bees

The *Fable of the Bees: or, Private Vices, Publick Benefits* was published in 1714, anonymous,

9 years after the also anonymous poem *The Grumbling Hive* (1705).

In the 1714 edition, the 1705 poem was included and followed by comments entitled *An Enquiry into the Origin of Moral Virtue*. Twenty new *Remarks* were added.

A second edition was issued the same year before the version of 1723, formally known as "the second," came to light. To this new edition, the author provided more supplements: *An Essay on Charity and Charity-Schools* and *A Search into the Nature of Society*. The second edition triggered the public's attention, mainly due to the negative reaction to the contents of the book by the Grand Jury of Middlesex. B. Mandeville came in defense of his work in the issue of the *London Journal* dated from the August 10, 1723. New versions followed in 1725, 1728, and 1729.

In 1728/9, a second part of the *Fable of the Bees* was put into print, by a different publisher, with six new "Dialogues."

The harsh criticism that followed the second edition and the second part of the *Fable*, in the 1720s and 1730s, came from the Moral Philosophers Francis Hutcheson (in Letters to Journals and in his books) and George Berkeley (in his *Alciphron*), from contributors to *Journals* and *Gazettes*, the critic and playwright John Dennis, the lawyer George Bluet, and some others. The target of the criticisms was Mandeville's free-thinking, his libertine attitude toward religion and morality, the rejection of natural religion grounded on reason, and his position regarding the advantages of luxury.

Passions, Virtues, and Vices

The *Fable of the Bees*' account of morality is partially due to Montaigne's views on the differences between passions and reason in the constitution of Man; an outcome of la Rochefoucauld's ideas on the source of moral behavior in the disguise of self-love; a different formulation for Pierre Bayle's distinction between religious convictions and public morals. On the other hand, it is accomplished through the author's critical appraisal of the moral notions of the contemporary Moral Philosophy (*v. g.* Whichcote, Cudworth, or Shaftesbury) fitting into his own pre-sociological views on *mores*.

In *An Enquiry into the Origin of Moral Virtue*, B. Mandeville describes the ancient Roman political glories as historical outcomes of a kind of public virtue and public religion that do not recommend to people a "conquest of passions" or a "way to virtue" but "seemed rather contrived to justify their appetites, and encourage their vices." Instead of endorsing self-denial, Roman popular Religion and the wary Politicians stimulated courage, honorific ceremonials, and all sorts of public means to flatter human pride.

From this picture results that virtue, as conceived by the moralists, has no direct political or social use. The Man of the moralists is an Angel and not a real Man made of passions, interests, and disposed to pride if flattered.

If pride is a strong, universal human passion, the important task of virtue is not to suppress its manifestations but to rule its social use in human actions and conversation.

B. Mandeville seems to believe that it is not possible to infer consequences for the stability of the society from descriptions of the relative instability of the human appetites. From the appetite, nothing stable or unstable follows directly to society. This explains why vices of the appetite or eccentricities of taste produce under appropriate conditions good consequences for the wealth of nations.

The moralists conceived virtue as politeness following the Roman *decorum*, but believing that the social harmony is due to a conformity to the rules of natural reason and natural religion which are innate in humankind.

In his last systematic text entitled *An Enquiry into the Origin of Honour and the Usefullness of Christianity in War*, published in 1732, B. Mandeville defined terms such as moral, "ethic" and virtue from their Latin and Greek etymology, in order to determine the genuine meanings.

His recall of the etymological and semantic sources of the word virtue in Latin and Greek shows how he intended to limit the moralists' account of virtue to particular social and religious effects of the inner force that virtue represents

according to the Latin root *vir* in *virtus*, evoking courage, manliness, or force. The Roman interpretation of the Greek concept of *arete*, through *vir* and *virtus*, saved Homer's use of *arete* as an attribute of heroes.

The proximity to courage in war is emphasized. The struggle that every living creature, including men, should endure in order to tackle adversity, confront enemies and the inner forces that may be in disarray, and reflect a positive notion of the word virtue as a power of self-affirmation.

Honor is a sentiment born from the perception of the situation of the self with regard to the capacity to obtain praise from others. Thus, honor entails the same reflective structure as pride.

The duality of traditional religion and modern honor is openly recognized and affirmed in the *Remarks* of the *Fable*. B. Mandeville established a comparison of humility and religion with pride and honor; the religious command of patience to support injuries with the voice of pride declaring war to offenses; religion that condemns murder and honor that may justify it.

Conclusion: Self-Liking

In the Second Part of the *Fable of the Bees*, the author developed in a more systematic way his concept of the passions that define human nature and incline men to certain actions defined as moral or virtuous, particularly the passion responsible for pride.

But in the comments of *An Enquiry into the Origin of Moral Virtue*, he had already mentioned a "superlative pride" that is remarkable in the personality of "some great men" and explains the well-being they feel in flattery or in being praised by others.

B. Mandeville's connotations of self-liking keep some familiarities with the use of self-love by the French authors (*v. g.* la Rochefoucauld).

In the Introduction to his edition of the *Fable of the Bees*, F. B. Kaye has acknowledged the proximity to Erasmus' *Moriae Encomium* and the tradition of the "inanis Gloria, dulcissima Siren" but the aims of the Dutch doctor are larger. The social, specular dimension of the relation toward oneself is stressed and the connection with honor, politeness, hypocrisy, and "moral virtues" is emphasized through a critical view on the moralists' ideas on virtue as an original self-denial.

Conspicuous signs of personal sacrifice do not necessarily relate to a sincere self-denial. Many times, humility is a cover for entirely different motives. Noble characters revealed in signs of humbleness are disguised forms of the desire to be an object of public applause.

Along the Dialogues of the Second Part of the *Fable of the Bees*, self-liking acquires the value of a central notion in describing what Thomas Hobbes also called Glory – the pleasure one feels in being honored by others.

The main subject of the dialogues in *An Enquiry into the Origin of Honour*... (1732) is honor.

In the beginning of the first dialogue between Horatio and Cleomenes, Cleomenes encourages the conjecture that honor owes its meaning to a passion in human nature that did not yet receive a proper name and considers that this enigmatic passion has a connection to the origin of Politeness. The true name for the passion is self-liking and is defined as the "value that all individuals set upon their own persons." The equilibrium of self-liking is not always the same in a person. From its lack results self-denial or in extreme situations the suicide. An excess of self-liking is a vice which is called pride that can also destroy the subject's capacity to maintain social relations. That is why the Dutch doctor believed that modern societies need "skilful politicians" to rule the social impact of the human condition.

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Marcuse, Herbert

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Introduction

Herbert Marcuse (1898–1979) was born in 1898 as the first child of an assimilated Jewish family in Berlin. He receives a middle-class intellectual education, goes to the Gymnasium, and is member of the "hikers movement" (Wandervogelbewegung). In 1916, he is recruited to the German army (Reichswehr), but soon engages in left politics. In 1917, he becomes member of the Social Democratic Party of Germany (SPD) but leaves it after the assassinations of Karl Liebknecht and Rosa Luxemburg. For a short time in 1918, he is member of the Soldiers' Council in Berlin Reinickendorf. But after 1919, he refrains for the rest of his life from becoming a member in any political party or institution.

In 1919–1920, Marcuse learns German Studies at the Humboldt University in Berlin but switches in 1920 to the Albert Ludwig University in Freiburg. There he makes his doctorate on the German Artist novel (Marcuse 1978b). Besides his political interest, here already his passion for aesthetics can be noticed. Marcuse links between politics and aesthetics without ever advocating the aestheticization of the political. Under the influence of Heidegger, Marcuse's writings become more expressionistic. His habilitation on "Hegel's Ontology and the Theory of Historicity" (originally written in German) is printed by Heidegger's publisher in 1932 (Frankfurt/M 1968), but due to the evolving political events, he does not receive the academic degree.

Emigration to the USA

Marcuse, who married in 1924 Sophie Wertheim and had a son with her, emigrates with his family in 1933, first to Zurich, and then, 1934, to New York.

Since 1934, he participates in the research activity of the Institute for Social Research, which had also emigrated to the USA, and writes in 1936 "Autorität und Familie in der deutschen Soziologie bis 1933," which became part of the *Studien über Autorität und Familie*, Paris 1936.

In 1941, Marcuse's second book on Hegel is published *Reason and Revolution: Hegel and the Rise of Social Theory* (*Vernunft und Revolution, Hegel und die Entstehung der Gesellschaftstheorie*, Ffm. 1962). In this work, he promotes the rehabilitation of Hegel, who has been accused of having established the theoretical foundations for the fascist idea. He sheds light on the relationship between Hegel and Marx, describes the reception of Hegel's philosophy in the history of sociological thought, and develops his own theory of society.

In 1942, Marcuse joins the US Secret Services, the OSS in Washington, DC. Whatever the reasons for accepting this position, it should be noticed that Franz Neumann and Otto Kirchheimer belonged to the same project group; they had their fair share in fighting Nazism and were involved in the denazification program after the war. Since 1949, Marcuse is determined to leave the governmental institution, as indicated by Peter Erwin Jansen (Herbert Marcuse: Nachgelassen Schriften, Bd. 3). During this difficult period of looking for some orientation, he was

thinking about a return to Germany in order to join the Institute for Social Research, which has been reopened in Frankfurt/M by Max Horkheimer in 1950. But he decides to stay in the USA. In 1951, Marcuse works in the Russian Institute at the Columbia University (New York) and in Harvard on studies about Soviet Marxism.

Eros and Civilization

Marcuse's two major works are undoubtedly *Eros and Civilization* (1955) and *The One-Dimensional Man* (1964).

In *Eros and Civilization*, Marcuse elaborates the major influence Freud's thought exerted on classical Critical Theory. In this work, he introduces the aesthetic dimension as an alternative to the performance principle dominating bourgeois society and develops an aesthetically expanded form of rationality, which might enhance free sublimation of reality in opposition to the established repressive one.

The dual character of culture has been a central topic in the thought of the classical Critical Theory. The main protagonists of the Frankfurt School have analyzed and dwelt on the tension between the necessarily sublimating character of culture (which is a prerequisite of any society and civilization) and the fact that it is exactly that, which confirms and stabilizes the affirmative function of culture in regard of society's repressive nature. In Western modernity, which was characterized from its outset by an emancipatory emphasis – at least it claimed so – this dual character assumed ideological forms. It was just in the era, in which new emancipatory perspectives were opened by enlightenment and progressive change of the material living conditions, that the affirmative character of culture attained its repressive climax by capitalistic consumer behavior, incrustation of art trough the culture industry, and the emptying of art's impulse to resist.

Herbert Marcuse was one of those who dedicated quite a lot of theoretical energy to this central moment in cultural modernity. As early as in 1937, he published his essay "The Affirmative Character of Culture" ("Der affirmative Character der Kultur," *Zeitschrift für Sozialforschung*, VI (1), Paris: Libraire Félix Alcan, 1937; translated as "The Affirmative Character of Culture," *Negations*, Boston, 1968; reference is to the version in: Herbert Marcuse, *Art and Liberation*, Douglas Kellner (ed.), London and New York: Routledge, 2007).

This is why he becomes such an important thinker for the New Left in the 1960s. One might even say that his topoi of the "new sensibility" and the diagnosis of the "one-dimensional man" made him the major source of inspiration and mentor par excellence of the revolting generation of 1968. By interpreting the Freudian drive theory in terms of social critique, Marcuse hopes to generate utopian potentials for a theory of emancipation.

In 1965, Marcuse becomes professor of Political science at the University of San Diego in California. But he continues to travel to Europe giving lectures and holding discussions with the revolting students. His *Essay on Liberation* is published in 1969. His major work on the philosophy of art, *The Aesthetic Dimension: Toward a Critique of Marxist Aesthetics*, follows in 1977.

One-Dimensional Man

As all thinkers of the Frankfurt School, Marcuse, too, engaged in many disciplines of humanities, social and cultural sciences. But it is *The One-dimensional Man: Studies in the Ideology of Advanced Industrial Society* that may be considered as his ultimate, conceptually enlarged effort in analyzing the major structural problems of modern society.

In this work, Marcuse describes (Western) society in the phase of late capitalism as being dominated by consumerist and technological structures, which are regarded by him to be no less than a new kind of totalitarianism.

What does "one- dimensionality" mean in this context? Marcuse relies on Hegel's dialectical concept of conflicting dimensions in human epistemology and historiosophy, the dynamics of which and the (temporary) solution of the tensions between them are seen as the motor of historical change. Marx adapted this abstract notion of Hegel as a tool for analyzing society and its transformative historical capacities. A prerequisite for such a (revolutionary) change, though, is the rise of an opposing dimension to the prevalent one in

social reality, a dimension generating the necessary conflict and the dynamics of change.

According to Marcuse, in twentieth century capitalism, these progressive dynamics came to a halt as the conflicting dimensions has been neutralized. But as opposed to the mechanisms of violently fighting oppositions in totalitarian states, the abrogation in capitalism relies on the tempting effects of consumerism and technology – people are willingly participating in a well-orchestrated system numbing their critical social consciousness and distracting their awareness of being "blissful slaves." The system does not aggressively attack the people; it is, quite on the contrary, serving their needs generated and promoted by this very system, which is why Marcuse calls them "false needs" – needs produced in the sake of an ever-growing consumerism. Thus, change is precluded. Why should people strive for change if their "needs" are satisfied? Capitalism is "enslaving us softly" – it can dispense of violent oppression as it offers a rather comfortable temptation. And this is why the system is perpetuating its ideological apparatuses, which promote conformity and prevent resistance.

Fifty Years After the Publication of *One-Dimensional Man*

What can be said now, over 50 years after the publication of "One-Dimensional Man"? May it still be appreciated?

On the one hand, every scientific work of rank is always striving to secure its validity in order to not be wronged. On the other hand, Marcuse's book describes and analyzes a social-civilizatoric situation in modernity, which – according to its constitutive critical logic – should have been overcome. But despite the allegedly pluralization of society and its celebrated heterogeneity, one must admit that the social forces, which were to fight and to negate capitalism, have considerably waned on a world scale. The integrative capacities of capitalism are ever more effective the more invisible they have become. The greatest defeat in this context has suffered the aesthetic dimension, Marcuse's great emancipatory hope. The culture industry has already transgressed by far its original spheres of effectiveness and infiltrated most realms of human being. This is all the more remarkable as with the new digital technology and various practices of distribution, which have been developed along with the emergence of the internet, the accessibility of data, information and knowledge, as well as the structural opportunities for subversive, critical communication have obviously been enhanced and increased immeasurably. But their emancipatory effect still remains to occur. It is a sad anniversary of Marcuse's book, because it is still relevant, even more relevant than 50 years ago (*One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society*, Boston: Beacon Press, 1964).

The Absurd

There is a major philosophical problem pertaining to the "One-Dimensional Man" that should be considered here. Marcuse was a Marxist, emphatically in favor of the revolution as an emancipatory historical action. As a matter of fact, among the leading figures of the Frankfurt School he was the most revolutionary. It is not by chance that he became the most popular and admired philosopher by the rebelling students and the New Left. Marxian philosophy differs from other bodies of philosophy in that it combines the theory of society and the praxis of its change in a genuine way. The well-known "Eleventh Thesis on Feuerbach" – "Philosophers have hitherto only *interpreted* the world in various ways; the point is to *change* it" – has formulated this complex connection in an impressive dense aphoristic way. If we take the diagnosis of the "One-Dimensional Man" to be the way Marcuse *interpreted* the world, and his call for a revolution as his active involvement in promoting its *change*, there is undeniably a contradiction in Marcuse's general approach: If capitalistic society has become one-dimensional, it means that there no negating dimension in sight that would rock the current situation. But if there is no such a force – there is no sense in calling for a rebellion, let alone for a revolution. This exactly was Adorno's

position when saying to the students approaching him that there was no "revolutionary situation" in the Federal Republic of Germany in the late 1960s. Philosophically we deal here with an aporetic vicious circle: If, according to Marx, "it is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness," then only in a free social being free consciousness can prevail; but there cannot be a free social being without an already prevailing free consciousness.

The Israeli philosopher Zvi Tauber has dedicated his book "Befreiung und das Absurde. Studien zur Emanzipation des Menschen bei Herbert Marcuse" (1994) to this problem. He finds the "solution" for the contradiction inherent to Marcuse's combination of the theoretical diagnosis of society and his emphatic calling for resistance in Albert Camus' concept of the absurd: According to the French existentialist, the world has no meaning, but man thrives for meaning, he cannot live without it – an absurd situation, but one that in Camus' view must not be accepted: After having understood and internalized that this cul-de-sac is his fate, man has to revolt against it. This does not keep up with Marx' "Eleventh Thesis on Feuerbach," but it helps to bridge the chasm between theory and praxis in Marcuse's approach to reality in his time.

In 1979, 10 days after his 81st birthday, Herbert Marcuse dies in Stanberg.

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Introduction

Juan de Mariana's biographical accounts depict him as a relentless and critical character whose temperament led him to confront the Society of Jesus, to which he belonged, and to be prosecuted by the Holy Inquisition.

Mariana was born in Talavera de la Reina in 1536 and studied Humanities, Philosophy, and Theology at the University of Alcalá de Henares. He entered the novitiate of the Society of Jesus in Simancas and was elected as professor of the Roman College. After lecturing for 2 years in Rome, he was sent to Sicily to teach Theology in Palermo. He later moved to the University of Paris as professor of the College of the Society of Jesus.

In 1574 he came back to Spain for health reasons and devoted himself to working on his books in Toledo's Professed House. In 1623, he was appointed royal chronicler by King Philip IV. He passed away on February 16, 1623.

Works

Juan de Mariana's *Works* reveal he was a prolific polymath and a multidimensional intellectual who stood out for his theological, historical, economic, legal, and political writings. Within them, the most relevant are his books: *Historia de rebus Hispaniae* (1592), a colossal 25-volume work considered to be the first attempt to lay out a complete history of Spain; and *De Rege et regis institutione* (1599), an essential treatise on legal and political philosophy defending a democratic conception of power.

In his *De monetae mutatione* (1609), he sustained that the real value of currency constitutes an abuse by the ruling power that opposes the interests of the people. In the same year, he published his *De morte et immortalitate*, which was quite revealing of his way of understanding Christian spirituality. In his essay *Discursus de erroribus qui in forma gubernationis societatis Jesu occurrunt*, published posthumously in Bordeaux in 1625, he denounced the errors he thought the Society of Jesus was committing and the possible remedies to avoid them.

Legal-Philosophical and Political Doctrine

His legal-philosophical and political doctrine is mainly contained in his *De Rege et regis institutione*, where he defends the natural sociability of human beings. Society needs an authority in order to pursue its own development and goals, and particularly to obtain the common good of its members.

Among the forms of government (monarchy, aristocracy, and democracy or republic), he prefers monarchy, which he deems more capable than the other two to attain peace and social order. The Monarch must be briefed by a Council composed of the wisest and most virtuous citizens. That way he could rely on proper insights and advice and so perils of tyranny may also be avoided. He is obliged to comply with the fundamental laws of the nation and respect the rights of its members.

When he fails to do so, he falls into tyranny, a scenario in which the king cares only for his own interest and rules arbitrarily, neglecting peace, happiness, freedom, and the common good.

The Types of Tyrants

Mariana describes two types of tyrants: (1) the factual tyrant, also known as original or title-holding tyrant, an enemy of the public that usurps the government of the nation; (2) the legal or established tyrant, a legitimate sovereign who misuses his power, crushes the republic, disregards the laws, despises religion, and misappropriates the property of citizens.

The factual or usurping tyrant, lacking any ruling rights and exerting his power only by the force of arms without the consent of the citizens, may be dethroned and killed by his subjects (tyrannicide).

On the other hand, the legitimate sovereign that becomes a legal tyrant must be respected as long as he publicly respects law and justice in order to avoid the great evil that society would endure in the case of rebellion. However, if this legal tyrant tramples the laws and becomes a threat for peace, justice, and the common good, his subjects must gather in assemblies to calmly ponder the reasons for his destitution as king, and the proper way to proceed.

Drawing from a social consensus, the following measures are to be taken sequentially: (1) the prince will be admonished so that he may amend

his conduct; (2) should he fail to do so, and there being no hope for correction, he will be prosecuted and obedience to his commands will stop if found guilty (passive resistance); (3) the people will be informed of the fair reasons for disobedience and rebellion (active resistance); (4) weapons will be distributed and taxes established to defend the nation; (5) in the end, if the tyrant still does not retract, the right to self-defense and society's own supreme authority enable the declaration of the prince as a public enemy and his very killing "by iron."

Mariana discards self-administration of poison since suicide is against Christian values. Once the ruling is proclaimed, any individual may kill the tyrant, being a criminal sentenced by the legitimate authority of the people. In case the public assembly to deliberate on tyranny cannot be held, Mariana thinks that the person who, interpreting the general will, tries to kill the tyrant tacitly condemned by society cannot be considered unjust.

In Chapter VI, Book I of his *De Rege et regis institutione*, where Mariana addresses tyrannicide, he provides the example of friar Jacques Clément's assassination of Henry III, King of France, on August 10, 1589, seeking vengeance for the murder of the Duke of Guise, Head of the Catholic League. He concludes that Clément was referred to by many as "immortal glory of France."

To avoid the revolutionary connotations of such an expression, Superior General of the Society of Jesus Claudio Aquaviva ordered Mariana to erase the controversial phrase in future editions of his work. Nonetheless, when Henry IV of France was murdered by Ravaillac in 1610, many considered the crime a result of Mariana's influence, even though the regicide had never read *De Rege* nor known his author. The Parliament of Paris, by Decree of July 11, 1610, condemned the book as seditious and ordered that it be publicly burnt.

Defense of Democratic Values and Civil Liberties

Mariana's legal and political philosophy represents an unequivocal defense of democratic values. Popular sovereignty is considered the foundation of political power, and the exercise of power is deemed legitimate when laws and civil liberties are respected. Mariana established specific limitations to the exercise of power and designed the main phases for the right to passive and active resistance against tyranny. That way, he improved and updated the ideas of the Monarchomachs and the democratic thesis defended by the Salamanca School. For these reasons, he could be considered a pioneer of constitutionalism and the rule of law.

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Maritain, Jacques

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Introduction

J. Maritain (1882–1973). Maritain's moral and legal philosophy lies within the natural law tradition. The author formulated a theory of human rights in the context of a philosophical thought inspired by the vision of Aristotle and St. Thomas and applied to modern political life, directly taking part in the proclamation and affirmation of the Universal Declaration of Human Rights.

In his main work, *Les droits de l'homme et la loi naturelle* (1942), Maritain expounds the central elements of his philosophical perspective, which form the basis of his conception of human rights: finalism as theory of nature, cognitivism as theory of knowledge, universalism as ethical theory, and natural law theory as legal theoretical perspective.

Taking up classical realism – Aristotelian, Thomistic, and Neo-Scholastic – this perspective is placed in the horizon of a creationist finalism that recognizes an order in nature that mirrors the divine sapiential plan in the world. Nature is composed of bodies, vegetable, animal, and human, that are intended for an end written in their nature through inclinations. All creatures are ruled by eternal law: inanimate bodies take part in it through physical need, animals through instinct, and finally man, as a being with reason, participates in the divine sapiential plan by means of his intellect and is therefore able on principle to grasp the truth in nature through progressive acquisition (cognitivist vision). Natural law is "part" of eternal law, that part that is "imprinted" in man's reason: it is thus quantitatively inferior but qualitatively identical.

Reason on a practical level stems from the observation of man's natural tendencies: the conservation of being, and hence the conservation of life and physical integrity in common with all living beings; reproduction, in common with animals; the knowledge of the truth and living in society, characteristic of the rational being. Reason translates the description of the natural inclination into an obligation: the inclination is an empirical tendency, the law is a norm. In this sense, one passes from the empirical order of the inclinations to the normative order of the precepts. Reason interprets inclinations, formulates the rules of conduct that establish and make the achievement of aims binding: good is what is in agreement with the ends of nature; evil is what is dissimilar to the ends of nature (*Neuf Leçons sur la loi naturelle* 1950).

The first absolutely general principle – known connaturally by synderesis – is the principle of finality, on the basis of which everybody acts for an end and the end coincides with good; good is what everything is inclined or tends towards, and evil what distances itself and deviates from the end. While good is the first concept of practical reason, deontological judgments or precepts are specific rules that reason deduces from the first principle, applying it to human nature and its activity: respect life or do not kill others or yourself; protect procreation in the family; search for the knowledge of truth or promotion of knowledge and avoidance of mistakes; associate with others, being open to solidarity and interpersonal relationality, avoid individualistic refusal to collaborate. Natural law is progressively known, it is never known completely. This law reflects historical contingenties, but it is objective and binding.

Maritain distinguishes four types of law: the eternal, the natural, the "common law of civilization", and the positive law. The "natural law" is universal and invariable and deals with the rights and duties which follow from the first principle or precept of law (good is to be done and evil to be avoided): this general moral principle is self-evident and rooted in the eternal law, and "written into" human nature by God. The "common law of civilization" is an extension and application of the natural law to the concrete circumstances of life in society: it concerns the human being as a social being or citizen. The "positive law" is the system of regulations which ensures general order within a specific society: it varies according to the socio-economic and cultural development within a

particular community. When a positive law acts against the natural law, it is not a law.

For Maritain, natural law and natural rights are closely correlated: natural law expresses the tendencies of human nature at a moral level; they found law, that is, the possibility to be claimed and demanded (natural law). Neither the positive law nor the *droit des gens* is, however, deducible from the natural law alone. Neither is known connaturally and, therefore, is not part of the natural law. Nevertheless, it is in virtue of their relation to natural law that they have the force of law and impose themselves on conscience (*Les droits de l'homme* 1942). When a positive law acts against the natural law, it is, strictly speaking, not a law. Thus, Maritain clearly rejects legal positivism.

Maritain's account of natural law both presupposes a metaphysical view of the nature of human beings and a realistic epistemology. Some of the principal criticisms are: (i) inconsistency between a naturalistic theory of what is good and bad and the explanation of moral obligation with reference to the supernatural, (ii) ambiguities of connatural knowledge, (iii) the generality and abstractness of the first principle of moral law, and (iv) the fallacy of the fact/value distinction.

In this philosophical stance, the concept of the person understood as the uni-totality of body and spiritual soul in a hylemorphic sense emerges: the person is defined as an "individual substance of rational nature", a subsistent that exists for itself, soul as substantial form of the body. The person tends to open up to others: sociality is a structural need of human nature. It is a vision that has Christian roots behind it: the spirituality of the personhood goes back to the metaphysical and transcendent dimension, and in final analysis to God's creation.

It is the vision of a non-reductionist anthropology, an ontological anthropology, philosophical, and at the same time theological, that lays the foundation of the absolute and intrinsic dignity of the human person, recognized in every human being. Maritain affirms that this vision is not the "monopoly of Christian philosophy": it is common to all the philosophies recognizing the existence of an Absolute in the order of the universe as "supertemporal value of the human soul". In this sense, according to Maritain, even those who are not Christian or Catholic or who have no religious beliefs at all, regardless of the founding justification of human dignity, can recognize values and rights and collaborate in their realization (Maritain 1947). The person is a "whole", and "must be treated as an end", having a transcendent destiny. Maritain's theory of the value of the human person has been recognized as a theorization of *personalism*, which he saw as an intermediate *perspective* between individualism and socialism.

In his opinion, the rights of man must be defended, at the temporal level, without preferences for the single religious groups; the good of the person and the common sociopolitical good may be recognized irrespective of religious belonging. Human rights constitute the "horizontal movement" of natural law, which in the Christian perspective has a "vertical dimension" too. As the expression of natural law, human rights refer to human nature, considered one and the same in all human beings. Maritain described his view as "integral Christian Humanism": "integral" because it considers the human being, in both material and spiritual dimensions, as a unified whole participating in a common good.

Maritain held that certain basic natural rights can be recognized by all, without there having to be agreed on their foundation. Maritain held that natural rights are fundamental and inalienable, and antecedent in nature, and superior to society. One consequence of his natural law and natural rights theory is that Maritain favored a democratic and liberal view of the state, and argued for a political society that is both personalist, pluralist, and Christianly inspired. He held that the authority to rule derives from the people-for people have a natural right to govern themselves.

In his address at the first plenary sitting of the second session of the General UNESCO Conference of November 1947, less than one year before the Universal Declaration in December 1948, while highlighting the pluralism of the current trends of thought and spiritual traditions, and the difficulty of finding common elements among these, Maritain explicitly announces the principle

according to which, if a "theoretical assent" at speculative level is not possible, a "practical agreement" is. It is not possible to recognize the same concept of the world, of knowledge or of man, but it is possible to agree on elements and convictions that guide the action of all men, so as to guarantee the coexistence of everyone and social peace. Maritain differentiates the "what" and the "why" of human rights. The strength of human rights is the possible agreement on the "what", even if there is a dispute on the "why". Maritain is convinced that his Christian and philosophical justification of the rights of man is firmly based on truth, but that does not stop him from agreeing on the practical convictions with those who are certain that their way of justifying them – totally different in the theoretical dynamics – is equally the only one to be founded on truth. Even if the justifications between Christians and non-Christians are different or incompatible, it is possible to find a common dialogue.

The core of his thought may be found in his speech at UNESCO: "Since the aim of UNESCO is a practical aim, agreement among its members can be spontaneously achieved, not on common speculative notions, but on common practical notions, not on the affirmation of the same conception of the world, man, and knowledge, but on the affirmation of the same set of convictions concerning action. This is doubtless very little, it is the last refuge of intellectual agreement among men. It is, however, enough to undertake a great work; and it would mean a great deal to become aware of this body of common practical convictions".

Conclusion

Different cultural, spiritual, and philosophical or ideological contexts do not allow any agreement on the rights of man at a theoretical level in the order of justifications and interpretations but only a common conviction at a practical level of action. The objective of human rights is not that of expressing a common theoretical consensus but only a practical consensus for immediate operational ends to a limited extent (Maritain 1951). And yet Maritain himself is aware of the limitations, alongside the relevance of human rights: the material agreement on man's rights is not sufficient. A common scale of values is indispensable for hierarchy, interpretation, and application in the case of conflict. The same rights can be interpreted, hierarchized, and applied differently in various cultural contexts.

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- ▶ Human Rights and Justice
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- ▶ Natural Law: Contemporary
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Marsilius of Padua

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The Context: Christianity as a Unitary Structure

While during Christian antiquity earthly and spiritual powers were two autonomous spheres, in the Middle Ages, such a situation evolves:

on the basis of Saint Augustine's theory of the two cities, the concept of *christianitas* ends up becoming a unitary idea involving both. Indeed, in his political theory, Saint Augustine conceives a bipartite structure, even though he does not consider the *civitas terrena* to have the same value as *civitas Dei*. The features of the former, which is characterized by sin and instability, can be overridden only by their being integrated into Christian schemes. The political society is successful in that it is structured in a way consistent with the Christian order. Such required integration of the political into the religious is destined to prevail during the Middle Ages, giving shape to a doctrine, political Augustinianism, which in place of integration supports the absorption and submission of the earthly to the religious. This results in a society "oriented toward salvation" (García Pelayo 1981: 223), whereby no official secular structure is possible.

Since Charlemagne's age, the Church has been the "only guardian of intellectual and cultural values in the Western world, the only organized power maintaining a notion of public affairs, *res publica*, and of political knowledge" (Lecler 1994: 94). The Church-State dualism disappears, replaced by a unitary structure within "Christian civility." As J. N. Figgis stated, "in the Middle Ages the Church was not *a* State, it was *the* State" (Figgis 1916: 5).

The concept of Christianity as a unitary structure within which the two powers come to be blended constitutes a differentiating feature between Christian antiquity and the modern world. The predominant political theory in the Middle Ages is based on the *Doctrine of the Two Swords*, according to which, albeit the Church and the Empire were to be identified as two separate, autonomous, and independent powers, actually, owing to the fact that human beings have a predominant supernatural ultimate end of their own, "the Church must be considered superior to the State in point of value and dignity" (Copleston 1963: 168; Ullmann 1961: 9–26). Pope Gelasius I (492–496) was the first supporter of such a thesis, whereupon the Papacy was to be attributed political functions. Although each of the powers has a field of its own, the authority of the Church rises up over civil authority, since what is the competence of the Church (the salvation of mankind) implies a greater responsibility. In 1302, Pope Boniface VIII issues his Bull *Unam Sanctam*, maintaining that every authority wielded on Earth in the end has its origin in the Church itself. Two swords exist in the world, yet both the spiritual sword and the material one are in the hands of the Church, which is a *corpus mysticum*.

Therefore, in the Middle Ages, the Church does not restrain itself to being just a part of the political structure, but rather it identifies with it. Civil power is subordinated to the papal *plenitudo potestatis* (Passerin d'Entreves 1969: 97; Carlyle 1971: 374–393). All the institutions have the same point of reference. The Church "had assumed in its spiritual hierarchy the powers which might be called otherwise political, even though it delegated them, or a part of them, to temporal agencies" (Dumont 1986: 67). It follows that the political organization of power is destined to achieve the goals and the interests of the Church. This, in a dual sense, on the one hand, taking into consideration the negative and sinful conception of the purely earthly life, the activity of political power is to be aimed at the creation of structures facilitating and ensuring the salvation of mankind; on the other hand, it has to be aimed to fulfil the religious model of peace and justice, so that all those manifestations which question such a conception are to be repressed. Needless to say, filling this framework with the new individualist and rationalist ideas will be controversial.

The *Defensor Pacis*

Over the first half of the thirteenth century, new issues emerge, among which stands out the independence of the Empire from the Papacy. Indeed, the two come to be addressed in a different way, above all a greater density of argument, which makes it possible to overcome the classical descriptions set forth in the *specula principum*. This creates a whole new conception of political theory, which comes to be thought of as "a

reflection on the natural aims of men in the community and on the determination of the powers responsible of conducing mankind to those natural goals" (Bertelloni 2013: 241).

Marsilius of Padua's (1274–1343) *Defensor Pacis* (DP, 1324 see Marsilius of Padua 2005) represents a break with the tradition by means of a series of treatises – one of the most significant is Thomas Aquinas' *De Regno* (1267) – whereby a dualism of powers, temporal and spiritual, is set forth. As opposed to this, Marsilius builds his work on the assumption that sovereignty is unique and indivisible and resides in the people. Marsilius of Padua's political treatise has been deemed to be the most important and original of the Middle Ages (Figgis 1916: 33) and possibly the greatest display of the reaction against the theocentric medieval structures, albeit still within this framework.

The setting in which political (and legal) science unfolds up until Marsilius of Padua's theories is predominantly theocentric and has at its forefront the aspirations of several Popes such as Gregory VII, Innocent III, or Boniface VIII. The activity of ecclesiastical power is mainly aimed at achieving and strengthening a universal order, on the basis of the establishment of papal primacy over the Empire. In this context, Marsilius of Padua's relevance stems from his critique of medieval structures, being able to distinguish between various aspects that had not ever been set apart, as well as laying the foundations upon which modern structures will come to be based. Therefore, Marsilius can be described as a "transit" figure, above all in respect of the transition from a theological to a secular conception of law. G. Capograssi, referring to Marsilius, points to his "typical originality of the rebel, refuter and pioneer," so that "it seems that all the following denials of the tradition have been anticipated by him" (Capograssi 1930: 578).

Defensor Pacis is Marsilius' most important work and cannot be understood in its widest significance without taking into consideration the historical-political context in which it was written. The author is immersed in all the philosophical-political disputes of his era, of which his work is a direct outcome, since he writes it in the context of the struggle between Ludwig the Bavarian and Frederick of Habsburg (who counted on the Pope's support), in the succession of Henry VII of Luxembourg, 1313. Marsilius' theses support Ludwig the Bavarian denial of the Pope's *plenitudo potestatis*.

The theses in *Defensor Pacis* were continued in *Defensor Minor* (1341, see Marsilius of Padua 1993), in which Marsilius replies to Ockham's criticism of the denial of the Pope's judicial power proposed in *Defensor Pacis*. In 1341, he wrote the *Tractatus de iurisdictione imperatoris in causis matrimonialibus*, whereby he defended Ludwig the Bavarian stance in requesting Pope Benedict XII the annulment of Margaret Maultasch's marriage, which would permit the following wedding with her son. His work was completed with the *Tractatus de traslatione imperii* (1343).

Defensor Pacis is structured around three parts (each named "Dictio"), each one of different importance. The first constitutes the first step toward a theory of law (Tierney 1991; Bobbio 1979: 162–163) and of the State. The second "Dictio" shifts to other issues (albeit resting on conclusions derived from the third), in as much as it analyzes ecclesiastical power. Lastly, the third, divided into three chapters, is a collection of all the foregoing, and it ends with a brief explanation of the meaning of the title of the work. Without a doubt, it is a new claim for its time. Marsilius interprets political events in terms of cause and effect relations, on the one hand, and on the other, politics is deemed to be rationally analyzed. In parallel, it attempts to give an answer to the basic question of political philosophy: that of the legitimacy of government and the coercive force of power (Bayona 2007: 202).

The *Communitas Perfecta*

In his work, Marsilius tries to carry out a secular justification of political power, which finds its rationale in its constituents own will and in their need to meet the basics of survival in community. This is a good example of a rising explanation of power with all that this implies, namely, the

acknowledgment of the self-sustaining capability of individuals to conduct their lives on their own. Political power in Marsilius' model is an end in itself. It is set up so that it can constitute a framework in which all the tools required to achieve self-sufficiency are laid down. Only then will emerge the account of *civitas*, the State, as a *communitas perfecta*, understood as a community able to include all that one needs for a good life, which is not in need of a transcendent foundation. This implies reconsideration of ecclesiastical power in favor of self-sufficiency and autarchy of civil power. Indeed, Marsilius aims to claim the autonomy of political power from the Church, with supremacy and self-sufficiency. From this point of view, Marsilius contributes to the secularization of philosophy in general and, in particular, of philosophy of law and the State.

In *Defensor Pacis*, he analyzes the cause of the breakdown of civil peace, namely, the struggle between spiritual and political powers. Peace is the necessary condition for the good life, the *bene vivere*, to be implemented. Such peace is possible only through the right *dispositio* between the parties that form the society, which work as a body, whose health is strictly dependent on the correct relationships between the parts. The origin of contention, the breakdown of civil peace, is to be found in the doctrine of *plenitudo potestatis*, which affirms the plenitude of power and the universal jurisdiction of the Pope.

For Marsilius, once a model of self-sufficient society is established, any departure from it contributes to its breakdown. Traditional explanations, on canonical grounds, precisely lead to this consequence. The arguments based on them, which attribute power to the ecclesiastical part, and its materializations, disrupt the normal development of social life. Therefore, what Marsilius searches for is a theoretical solution to halt the interference of the Church in the structures of power, which are to hold only a civil status. Hence in all that concerns temporal issues, the Church has to be subordinated to civil power.

The achievement of peace, or the framing of legal-political components of the city in such a way as to ensure its peace and tranquility, is the main point in Marsilius' work. His proposal consists in the materialization of what he deems to be the ideal structure of the city. Highly influenced by Aristotle, Marsilius believes the right configuration of the city to be a whole divided into parts or components: of these, each has a particular function or role. Such partitioning of the city is not something whimsical, but rather it is motivated on the grounds of the insufficiency of the isolated consideration of the different parts as regards their livelihood: "For since people who want to live the sufficient life have needs of different kinds, which cannot be supplied through men of one order or office alone, it was necessary that this community contain different orders or offices, practising or providing the different things that men need for the sufficiency of life. These different orders or offices of men are nothing other than the several and distinct parts of the city" (DP I, IV, 5). As the health of an animal is identified with the right functioning of all its parts or organs in accordance with its nature, the city will find its peace and tranquility when each of its parts fulfils its task without interfering with that of the others: "[T]he city which is in a good condition and established in accordance with reason is made up of certain such parts. [...] [T]ranquillity will then be that good condition of a city or realm, in which each of its parts is enabled perfectly to perform the operations appropriate to it according to reason and the way it has been established" (DP I, II 3). Taking this into account, "intranquillity will thus be that bad condition of a city or realm (just like the sickness of an animal) in which all or some of its parts are prevented from performing the operations appropriate to them, either in absolute terms or at least to their full extent" (DP, I, II, 3). Only such a city will be deemed to be a *communitas perfecta*, i.e., a human aggregation able to provide for all the needs of human beings and create the necessary conditions in order to achieve a fortunate and peaceful human existence.

According to Marsilius, several are the parts of the city: agriculture, manufacture, the military, the financial, the priesthood, and the judicial or counsellor. The priesthood is the only one "concerning which there has been no such general agreement among men as upon the necessity of

the other parts of the city," since "its true and primary necessity could not be understood through demonstration" (DP, II, V, 10). To his mind, the final cause of the priesthood "is the tempering of those human acts that result from an imperative of cognition or desire, both immanent and transitive, inasmuch as it is on the basis of them that the human race is ordered toward the best life of the world to come" (DP, I, VI, 1).

Taking into account such setting of *civitas* or *regnum*, Marsilius studies the origin of power in the city. While in Cchapter XI of *Dictio I* he demonstrates the necessity and goodness of the existence of laws in the city, it logically follows that the next step shall be to enquire about the origin of the legislator's competence to issue such laws, in what can be demonstrated through reason, all this in the framework of a voluntarist conception of law. For Marsilius, the authority and competence to issue laws can only arise from all of the citizens, or their prevailing part: "because that practical matter in the correct institution of which the common sufficiency of citizens in this life primarily consists – and in the incorrect institution of which the common detriment threatens – ought to be laid down solely by the universal body of the citizens; but that thing is law; therefore its institution belongs to the universal body of the citizens" (DP, I, XII, 7); so that the authority to issue law "belongs, therefore, to the universal body of the citizens or its prevailing part [...]. For because all the citizens must be measured by law in due proportion, and no one willingly harms or wants what is unjust for himself, therefore all or most of them want a law that is adapted to the common advantage of the citizens" (DP, I, XII, 8). The legislator, that is, all of the citizens or the majority, will designate the governor through elections: "Therefore since it belongs to the universal body of the citizens to generate the form according to which all civil acts must be regulated, sc. the law, it will be evident that it belongs to the same body to determine the matter or subject of this form, to which it belongs to settle the civil actions of men in accordance with this form: viz., the princely part" (DP, I, XV, 3).

The governor must distribute and allocate the various tasks to citizens within the city, since he is the executive arm of the legislator "in accordance with the form given him by the same legislator, viz. the law (according to which the prince ought always to act and to settle civil actions insofar as he can" (DP, I, XV, 4). Disobedience to orders of the governor implies infringement of the various functions that the citizen has to carry out in the city, what contributes to provoking unease and a lack of peace. Thus, at the same time, that would constitute a breach of the law: "Since, then, it is the due action of the prince which is the efficient and preservative cause of all the said civil benefits [...], that action will itself be the productive cause of tranquillity. And if there is anything that of itself impedes the action of this part, intranquillity and discord will arise from it as from their productive cause viewed in a generic sense" (DP, I, XIX, 3).

Classification of Human Acts: Natural Law and Human Law

Therefore, the generic causes of unease are identifiable with disobedience to the governor in relation to the distribution of tasks and functions. Yet, there is a fundamental cause of contention which is in itself the core of *Defensor Pacis*. Broadly speaking, it is the self-attribution of an excess of authority by the priesthood. For Marsilius, this is the greatest problem, so that the second "Dictio" is aimed to explain and demonstrate the theoretical arguments of the Church in defense of its position. The authority of the ecclesiastical hierarchy, whose initial explanation Marsilius traces back to Christianism, is to be exerted in a specific field, otherwise the organization of the city is disrupted and the law is breached. The *plenitudo potestatis* assumed by the Church "is the singular cause that we have said is productive of intranquillity or discord in a city or realm [...]," since "the office of coercive principate over any individual person, of whatever rank, or any community or collective body, does not belong to the Roman or to any other bishop, priest or spiritual minister in his capacity as such" (DP, I, XIX, 12).

Marsilius takes as a starting point the classification of human acts in order to establish

a delimitation of the various jurisdictions over them. In Cchapter VIII of *Dictio II* (*On the division of human acts and their relation to human law and the judge of this world*), Marsilius draws a first distinction between commanded acts and non-commanded acts. The former are those which can be determined by the subject who carries them out: the individual acts by use of his freedom. As for the latter, there is no free decision-making concerning their being done or not. Taking into consideration this first split, Marsilius distinguishes, within commanded acts, between immanent acts and transitive acts. While the former do not transcend the active subject, in the latter there exists a reflection and a consequence: "Of these commanded acts, some are and are called 'immanent', others 'transitive'. Commanded thoughts and affections, together with the dispositions for there that are produced by the human mind, and are called 'immanent' insofar as they do not cross over into a subject other than the one producing them. All pursuits of things we desire, on the other hand, and all omissions of these (as their privations), and all movements produced by some exterior organ of the body (especially if it is moved in respect of place), are and are called 'transitive'" (DP, II, VIII, 3).

Human actions are regulated by given norms. Some of them do not involve coercive power in themselves, yet some others imply penalties or rewards as a result of their realization or omission. In turn, the penalties resulting from such coercive rules can be twofold: the ones for present life and the ones for future life. Thus, on the one hand, "for the life or sufficient living of this world [...] a rule has been laid down for those transitive and commanded human acts which can take place to the convenience or inconvenience, right or injury of someone other than the doer: a rule which commands and coerces its transgressors with punishment or penalty for the status of the present world alone. Ant this is what we called by the common name of 'human law'" (DP, II, VIII, 5; DM, I, 4). Hence human law will be the expression of the will of the people as regards the self-direction of their life. Moreover, "[n]ow for the life or living of this world, but for the status of the world to come, a law was handed down and set in place by Christ. This law is a rule of commanded human acts which are in the active power of our mind, both immanent and transitive, insofar as they can be done or omitted in due or undue fashion in this world; but it nevertheless coerces and metes out penalty or reward for the status or end of the future world. And it will impose these penalties or rewards in the future world, not in this one, according to the merits or demerits of those who observe or transgress it in the present life" (DP, II, VIII, 5; DM, I, 4). Such is the *divine law*.

However, both types of law (human and divine) have no executive capacity of their own; therefore someone is needed to hold executive and coercive power in order to enforce them. That being will be in charge of observing human actions in the light of such rules, so as to apply the consequences arising from their non-compliance. This person will be considered to be a *judge*, as in one of the most common definitions of the word which means the authority whose power "is just and beneficial in accordance with the laws or customs and to command and execute the sentences he has passed with coercive power" (DP, II, II, 8). The coercive authority of the judge will extend to all citizens. It can be assumed that the clergy is also to be placed under the authority of the judge who applies human law (see DP, II, VIII, 7).

With regard to divine law, Marsilius distinguishes between two types of authority. One of them, the supreme one, is that of Christ, and it is not exerted in this world. The other one, which in turn is exerted in the human world, is that of the clergyman. Yet, when the latter is seen as the "judge," this term shall not be understood as meaning the same as in the case of the judge on human law. The judge here is a counsellor, deprived of coercive power. Marsilius offers a comparison with the doctor, whose authority lies in his knowledge, in accordance to which he advises and suggests measures to preserve health and prevent illnesses. The clergyman, as a counsellor-judge, will apply evangelical law, which can be looked at from two points of view: both what regards the individual over the

course of his life on Earth and his future life. In his future life, men will be judged in accordance with the evangelical or divine law, which only then will acquire a coercive character. But the same does not hold true over the course of earthly life, since the clergyman "has not been granted to him by the immediate legislator of this law, viz. Christ, to constrain anyone in this world in accordance with it; therefore he is not properly called a judge [...] with coercive power, and he neither can nor should constrain anyone by such judgement in this world with a penalty in goods or in person" (DP, II, IX, 3). Here the evangelic law is to be considered under one of the meanings of the term, i.e., as a "rule containing admonitions for those human acts that result from an imperative, insofar as they are ordered towards glory or punishment in the world to come" (DP, I, X, 3). From this point of view, it should also be taken into consideration that such conception of law is not given coerciveness, which pertains only to human law and the judge who applies it, so that the evangelic law, in the aforementioned sense, would equate to a piece of advice, or a doctrine. Furthermore, Marsilius undermines the idea of the earthly jurisdiction of the Church, denouncing mistaken interpretations of the Bible.

The right social order implies an adequate distinction of competences between the clergyman and the judge. The first exerts his jurisdiction over immanent and transitive acts, with a view to guaranteeing the *bene vivere* and the eternal life, whereas the second is competent to judge transitive acts, with great impact on the *bene vivere* in the earthly world. Without such power, civil society cannot survive. For this reason, it is the main part, the *pars principans* (I, XV, 5–7). The function of the judge is that of regulating transitive acts in accordance with the law. Thus, Marsilius develops a theory on the nature and origin of law.

Marsilius draws a distinction between divine law and human law, on which it does not seem too daring to claim a certain resemblance with the more classical theories of the XVI and XVII centuries on the separation between law and morality: "For a person is not punished by the prince just because he sins against divine law. For there are many mortal sins and sins against divine law, like fornication, which the human legislator permits even knowingly, and which a bishop or priest neither can nor should forbid by coercive power. But if a person, sc. a heretic, sins against divine law and that sin is also prohibited by human law, then he is punished in this world as a sinner against human law" (DP, II, X, 7). This is a clear distinction between the legal and the religious. Human law is not to regulate spiritual and religious offenses, which are specific to divine law. Moreover, a relation is established between the nature of the offense and the corresponding punishment. Only acts in breach of human law will deserve earthly penalties.

In conclusion, by means of his theory of law, Marsilius contributes to defining the fields of civil and ecclesiastical power (see Bayona 2005). The characterization of the law is a prerequisite for extinguishing civil contention, which emerges as a result of a confusion between the two powers. Only through coercive law, public and enacted, as an expression of the will of all the citizens standing as the legislator, suppressing all the parts of the city, it is possible to achieve peace.

On Marsilius of Padua's Contribution

Marsilius' importance ultimately lies in his establishing a structural model whose main features are to arouse the development of what much later in time will be specific to modernity. Albeit despite how modern and advanced some of his contributions are, his thoughts still come from and develop within medieval structures. In his work, men are still members of communities (the Church and the State), although the former has already lost all authority but the supernatural. According to G. Sabine, "no other writer in the Middle Ages went so far as Marsilius in thus setting apart the spiritual and religious from the legal" (Sabine 1958: 299), and this allows to deem him as a "bridge" figure between the Middle Ages and modernity. Just as medieval traces can be found in Marsilius, yet there are features which allow us to consider him as a prelude to the Renaissance or as a forerunner to the Reform.

The rational origins of the State, the distinction between jurisdictions, the critique of the papal *plenitudo potestatis*, the claim of consent as a legitimacy criterion, or the distinction between natural and human law, whereby a coercive character is to be assigned only to the latter, confirm the previous considerations. Perhaps it was this innovating and controversial character that sparked acrimonious opposition to Marsilius in his own era.

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Marx, Karl

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Introduction

Marx's (1818–1883) contribution to the disciplines of law and social philosophy will be considered. Marx's work was very popular in the period after the Second World War, especially from the 1960s to the mid-1980s. Marxist philosophy, in both its structuralist and Hegelian manifestations, flourished in universities in this period, with the work of the structural Marxist Althusser (1969), the translation of Gramsci's (1971) work on the state and hegemony and the contributions of Lukács (1971) and writers from the Frankfurt School influenced by Hegel (Habermas 1974). Marx's work was very influential in sociology, economics, and cultural studies. Socio-legal studies and radical criminology also drew from Marx's work in analyzing crime and punishment, while Marxian analyses of ideology, inequality, and oppression were extended to new areas beyond class oppression, principally race and gender.

However, Marxism's popularity declined in the late 1980s and 1990s, during the period of the rise of neo-classical economics and later the fall of communism, but interest in Marx's work has increased since the millennium. Marx's work is still seen as relevant to the social sciences because of his interest in class, although this has been broadened to a wider focus on intersectionality and Marxism has been applied to new areas including ecology. Moreover, as it has become clear that the fundamental inequalities

of modern capitalism have not disappeared, Marx's work has enjoyed a revival of interest. While his often vitriolic polemical writings contrast with the measured tone of modern scholarship, Marx's corpus of work includes more systematic rigorous analysis. Modern writers, including Carver (1998) and Wolff (2003), have stressed the continuing relevance of Marx's work.

Marx and Law

Marx initially studied law in Bonn and Berlin in the 1830s, before moving into the disciplines of philosophy and economics and brought insights from these disciplines to his analysis of law, and retained a life-long interest in law. Marx was much more interested in the functions of law than the nature of law, in contrast to much nineteenth-century jurisprudence. Marx's approach offered an alternative to metaphysical jurisprudence and to positivist approaches to law, which focus on sources of law and legal rules, rather than the context in which legal decisions are made. For Marx the study of law entails a consideration of its social and economic context, rather than simply exegesis.

Marx writings on law are spread across his corpus of work, which spans four decades from the 1840s to 1880s and comprises 50 volumes in the English language edition of Marx and Engels' collected works. In his discussion of the law on the theft of wood he defended the customary rights of the poor (Marx 1842). This approach was later developed by social historians including Douglas Hay et al. (1975), E. P. Thompson (1977), and Alun Howkins (1985). In his *Contribution to the Critique of Hegel's Philosophy of Law* published in 1843, Marx examined the relationship between the law, state, and civil society (Marx 1843a). Marx considered the role of law as part of the superstructure of society in *The German Ideology* in 1845, while in *Capital*, published in 1867, he focused on specific statutes.

Marxism is not a fixed set of ideas and Marx's ideas developed over time. However, references by Althusser (1969) to an epistemological break between the early Hegelian influenced works and later more scientific work, over-state this shift as Marx began work on *Capital* in the 1840s although it was not published until 1867. Moreover, Marx's focus on economic determinism existed, albeit uneasily, alongside his focus on class struggle and agency.

Marx's work on law is predicated on the links between law and the economic and class structure and explored in key texts, including *The German Ideology* (1845a) and *Capital* (1867). Marx illuminates our understanding of the relationship between law and the state and economic interests, and also examines the mystifying functions of law in concealing fundamental divisions in society.

In his *Preface to Contribution to Critique of Political Economy* published in 1859, Marx sets out the key elements of his historical materialist approach:

> In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production which correspond to a given stage in the development of their material productive forces, The totality of these relations of production constitutes the economic structure of society, the real foundation, upon which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life process. It is not the consciousness of men that determines their existence but their social existence that determines their consciousness.
> At a certain stage of their development, the material forces of production in society come in conflict with the existing relations of production, or – what is but a legal expression for the same thing – with the property relations within the framework of which they have operated hitherto. From the forms of the development of the productive forces these relations turn into their fetters. Then begins an epoch of social revolution. (Marx 1859: 181–2)

In *The German Ideology*, published in 1845, Marx elucidated his instrumentalist approach to law: "The ideas of the ruling class are in every epoch the ruling ideas: i.e., the class which is the ruling *material* force of society is at the same time its ruling intellectual force. The class which has the means of material production at its disposal,

consequently also controls the means of mental production so that the ideas of those who lack the means of mental production are on the whole subject to it" (Marx 1845a: 59).

Marx famously compared religion to a drug which sedates the masses, but also recognized its importance as a way of expressing discontent with existing conditions. The subordinate and dehumanized class finds comfort in religious ideologies: "Religion is the sigh of the oppressed creature, the heart of a heartless world, just as it is the spirit of spiritless conditions. It is the *opium* of the people" (Marx 1843b: 175). While Marx sees Protestantism as the appropriate religion for capitalism because of its individualism, as the individual confronts God directly without mediation by the priesthood, this argument that dispossessed groups may take refuge in religions may also offer insights into modern debates on the role of religion in shaping political movements.

For Marx specific modes of production generate specific ideas and principles. But ideologies are effective only because they make sense of the world and make social reality understandable, but are not mere illusions. Legal relations must be understood within the context of the mode of production: "This juridical relation which thus expresses itself in a contract, whether such contract be part of a developed legal system or not is a relation between two wills, and is but the reflex of the real economic relation between the two. It is this economic relation that determines the subject-matter comprised in each such juridical act" (Marx 1867: 84).

Despite the rejection of reformist measures by radical groups and communist parties of his era, Marx supported campaigns, such as those on the length of the working day, which render life more tolerable and ameliorate the plight of the subordinate class in the short term, as made clear in his discussion of the Factory Acts in *Capital.* However, in the longer term, he recognized that fundamental change was needed to radically improve the position of the working class.

Law's potential to improve the conditions of the English working class and weaker groups in society exemplified by the Factory Acts was also borne out by later advances in employment law, discrimination law, and welfare law. These developments may appear to challenge the crude instrumentalist view of law and the state as merely protecting the interests of the dominant class. But, at the same time, legislation constraining the right to strike and industrial action, attacks on workers' pensions and health care rights, undermine the liberal notion of law's neutrality.

The question of the role of law in communist society has also been explored by Marxist theorists to discuss whether law will wither away in a classless society or whether there is a potential role for legal institutions in the new society. Marx avoided making predictions about the future structure of communist society. His attention was mostly on the existing society. While Marx thought a new mode of production brings with it new juridical institutions; he also recognized the impact of Roman law in shaping modern civil law systems which indicated the durability of some systems of law.

For Marx, history is crucial to an understanding of society. As he says in the *Eighteenth Brumaire of Louis Bonaparte*: "Men make their own history, but they do not make it just as they please; they do not make it under circumstances chose by themselves, but under circumstances directly encountered, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living" (Marx 1852: 10). For Marx, history is analyzed through class struggle, as made clear in *The Communist Manifesto*: "The history of all hitherto existing society is the history of class struggles" (Marx and Engels 1848: 483).

Marx's historical materialism has been subject to criticism from within and outside Marxism. His work has also stimulated discussion of the rule of law by social historians. Crude instrumentalist theories of law which reduce law to its economic role as furthering and legitimating the interests of the dominant class have been decisively challenged by social historians such as Thompson (1977), who have considered how a commitment to the rule of law may constrain the dominant class and limit capital accumulation.

Marx's work on inequality also has implications for modern debates on egalitarianism and

distributive justice (see, e.g., Cohen 2000). Marx's work is also relevant to modern debates on human rights. Marx was skeptical regarding the value of individual political rights and parodied "rights-fetishism," reflecting his rejection of political individualism and his awareness of the emptiness of rights without fundamental social and economic change. There has now been some recognition of the importance of economic and social rights including, for example, water and education, in treaties and constitutions such as the South African Constitution.[1]

Marx was skeptical of formal legal equality and formal rights in achieving substantive equality, as legal equality can mask underlying inequalities and serve to mystify and legitimate exploitative economic relations at the heart of capitalism. By atomizing social relations and seeing individuals as holders of rights to be protected and litigated individually, the legal order can play a crucial ideological role. As Marx observed in his discussion of the rights discourse of the French revolution:

> None of the so-called rights of man, therefore, go beyond egoistic man, beyond man as a member of civil society, that is, an individual withdraw into himself, into the confines of his private interests and private caprice, and separated from the community. In the rights of man, he is far from being conceived as a species-being; on the contrary, species-life itself, society, appears as a framework external to the individuals, as a restriction of their original independence. The sole bond holding them together is natural necessity, need and private (interest, the preservation of their property and their egoistic selves. (Marx 1843b: 164)

Marx recognized the limits of rights in practice for those in marginal positions, political rights may be of little significance and when these rights are infringed, they may lack the resources to challenge this. Even where formal rights are won, enforcing those rights may be problematic without adequate resources to pursue right claims. We now have an array of rights protection instruments and an established human rights jurisprudence undreamt of by Marx, for example, the incorporation of the European Convention on Human Rights into domestic law in the UK, but rights-holders may lack the knowledge, expertise, skills, resources, or awareness to bring an action to enforce those rights.

For example, prisoners' rights have now developed to a level Marx could not have imagined. But when those rights are breached, prisoners may lack the resources to bring an action and governments in both the USA and the UK have raised barriers to litigation. The UK has cut legal aid for prisoners' rights claims while the Prison Litigation Reform Act 1995 in the USA was enacted because it was thought that prisoners' rights legislation was being "over-used" and the indications are that the number of petitions has fallen after the Act.[2] Despite the barriers to bringing actions, the use of class actions by prisoners has been successfully deployed in several cases.[3]

Moreover, rights theory has advanced considerably since Marx was writing and there is much scope now for communitarian approaches to rights and justice than in the nineteenth century, at the height of laissez-faire liberalism and unrestrained capitalism. Roth (2004), for example, argues that Marx's goals of promoting human flourishing, autonomy and dignity and a society based on the principle of each according to his needs, are consistent with the modern human rights project. For Marx a communist society which ensures the satisfaction of basic needs is one where a dignified existence is possible. Within modern liberal theory, there is now a greater emphasis on social rights and positive freedom rather than on individual rights and negative freedom, and on perfectionism which focuses on human flourishing, just as Marx emphasized the centrality of human labor and productive capacity to self-fulfillment. A concern with distributive justice and egalitarianism has shaped modern political philosophy and communitarian approaches to justice have challenged libertarian approaches. The liberal philosophy which was the object of Marx's

[1] See Ssenyonjo (2016).

[2] See Scalia (2002).

[3] See, for example, *Neal v MDOC*, Case No. 96–6986 Cz. which was settled in 2009 *and Salem v MDOC*, Case No. 13–14,567 (1 May 2015) and Easton (2011).

critique has evolved to a number of different strands, including a focus on the right to equal concern and respect and positive discrimination, which are potentially more sympathetic to the aims of the Marxist approach.[4]

Marx and Philosophy

Marx was critical of speculative philosophers for separating ideas from practical life, and of philosophers who simply interpret the world without any effort to transform it and scholasticism, empiricism, materialism, and idealism were all subjected to his critical comments. Philosophy is seen by Marx as valuable in subverting the status quo and reflects a human striving for knowledge. For Marx philosophy is a weapon of the working class: "As philosophy finds its *material* weapon in the proletariat, so the proletariat finds its *spiritual* weapon in philosophy" (Marx 1843a: 187). While Marx saw his own work as philosophical, he stressed that we cannot rely on theory alone to change society. Emancipation is achieved through the self-reflection of the working class but philosophy must be replaced by revolutionary practice. Praxis is the unity of theory and practice. His 11th Thesis on Feuerbach stated that: "the philosophers have only *interpreted* the world; the point, however, is to *change* it" (Marx 1845b: 8).

Attempts have been made to apply the methods of analytical philosophy to Marxism, in a shift away from the focus on the Hegelian foundations of Marx's work. For example, Elster (1985, 2008) and Cohen (2000, 2001) have applied rigorous philosophical analysis to key issues in Marxism, including distributive justice. Marxian ideas have also been applied to Wittgensteinian social philosophy (see Easton (1983), Kitching and Pleasants (eds) (2002). Like Wittgenstein, Marx in the *Grundrisse* describes "the development of language without individuals living together and talking to each other" as absurd, as language cannot be separated from activity (Marx 1857–58: 83). There he criticizes the notion of the abstract individual with unchanging needs and wants, and argues that it is impossible to understand the individual without considering the individual's social and historical context.

Marx's conception of the individual is *homo faber*, "man the producer," but in the capitalist mode of production: "The worker puts his life into the object; but now his life no longer belongs to him but to the object... The *alienation* of the worker in his product means not only that his labour becomes an object, an *external* existence, but that it exists *outside him*, independently, as something alien to him, and that it becomes a power on its own confronting him" (Marx 1844: 272). Relations between individuals appear as relations between things. Individuals are alienated and dehumanized by the capitalist mode of production, but communism with its classless society, he argues, can satisfy basic human needs and reconcile man to his species-being.

Marx's work is interesting as he does not offer an ethical theory in his analysis of capitalism. For modern observers injustice is rooted in the exploitation of the worker and the expropriation of surplus value, but for Marx this is intrinsic to the economic and social relations of the capitalist mode of production. But Marx's work transcends the fact-value distinction, offering neither a purely scientific theory nor an ethical theory, but rather his analysis is based on the essential workings of capitalism. Marx thought it sufficient to give an account of the workings of capitalism and its impact without engaging in a moral critique, to let the facts speak for themselves. Marx thought his description was sufficient to condemn it, so he does not need to appeal to ethical grounds. Exploitation and servitude, for Marx, are intrinsic elements of the capitalist mode of production, and it is hard to defend them on moral or ethical principles. The problems he identifies are solved through economic and social change rather than through moral critique. Communism is superior for Marx because it is able to develop the productive forces to satisfy needs and to deal with the problems generated by the irrational nature of capitalism.

[4] See for example, Dworkin (1976, 1986).

Marx's Legacy

Marx's legacy is evident across a range of areas. Modern concerns with difference, discrimination, and inequality have drawn from Marxism. Marx's work has influenced modern approaches such as Critical Legal Studies, although critical legal scholars have distanced themselves from what they see as Marx's determinism, focusing instead on the indeterminacy of and contradictions within legal doctrine.[5] Critical Legal Studies has itself spawned new developments notably Critical Race Theory, which includes the work of Derrick Bell (1989) and which has highlighted the limitations and potential of legal solutions to race inequality. The radical potential of law has also been recognized by feminist lawyers who have reinterpreted the law from feminist perspectives and sought to use legal strategies and criminal sanctions to challenge patriarchy (MacKinnon 2006). Marxist strands within feminism have applied Marx's ideas to gender inequality (Delphy 1984).

But while Marx's ideas have been applied to a range of dimensions of inequality, we should not lose sight of the continuing significance in class inequality which underpins Marx's work. Class remains a major determinant of the individual's life chances, educational success, and health status.[6] It also has implications for the prospect of a criminal conviction and imprisonment. Marx's focus on class inequality is still relevant as class inequality persists and social exclusion remains a key concern for modern social scientists. The immiseration of sectors of the working class has persisted, as the labor market has changed with deskilling, new insecure modes of working and attacks on welfare and a weakening of trade union rights. Thomas Piketty (2014) has argued that relative inequality will persist in capitalism even if wages increase and challenges the assumption of growing equality in advanced capitalist societies and shows the growth of wealth is unrelated to work productivity.

We also see the impact of Marxism on new areas of study, principally on the work of environmentalists who have focused on the despoiling of the planet for economic gain. Eco-socialists have used Marxian ideas to understand the violation of nature and the need for communitarian solutions to address problems of climate change. Burkett (2014), Saito (2017), Magdoff and Williams (2017) and Bellamy Foster (2017), for example, see capitalism's drive for profitability damaging the earth's climate, responsible for the ecological crisis, and argue that replacing capitalism with an eco-socialist society which is ecologically sustainable as well as delivering social justice, which can fulfil human needs and address the environmental crisis.

Marx's method of historical materialism and his analysis of capitalism's search for new markets and the reduction of labor costs is still relevant to understanding the functioning of modern global capitalism and the exploitation of the workforce in developing economies, as multi-national companies seek to drive down labor costs to maximize profits. The role of these companies has further expanded, with the outsourcing of key state functions, including punishment. The role of law in facilitating capital accumulation has been a key element of Marxism, and in recent years, the focus has been on the role of international law in facilitating the rights of capital through the removal of barriers to capital accumulation and the imposition of global standards. The power of multi-national corporations is enhanced with the promotion of free trade and law in the form of treaties and organizations such as the World Trade Organization to facilitate this. Marxian analysis of law is valuable in understanding the role of both international law and international human rights law in these areas, as Chimni (2004, 2017) and Koskenniemi (2017) have shown.

The causes of crime and the role of punishment have also been interpreted from a Marxian perspective. For Marxist criminologists, the explanations of crime have to be understood as lying within the structure and constraints of capitalism and class inequality, but the precise interpretation of criminogenic forces and the selective nature of punishment have been subject to much discussion

[5] For a reflection on the relationship between CLS and Marxism see Rasulov (2014).

[6] See Wilkinson and Pickett (2009).

within Marxist criminology and penology. The question of whether only crimes of the powerless are punished and the role of social deprivation in criminal behavior have been debated, as well as its implications for sentence mitigation.[7]

Conclusion

Marx's work remains valuable as a description of nineteenth century capitalism and it has also had a lasting influence on the social sciences. Marx's contribution should not be underestimated. Given that Marx was writing in a different era and different social and historical context, it is impressive that his works have stood the test of time and Marxism has adapted to new challenges. Marx's concern with structure and the constraints of history offer an alternative to the current preoccupation with indeterminacy and his analysis of rights has been used to develop a critique of international law.

Cross-References

- ▶ Critical Theory and International Law
- ▶ Hegel, Georg Wilhelm Friedrich: On Justice
- ▶ Human Rights and Justice
- ▶ Rights: Social Rights

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Introduction

Larry May (b. 1952–) is an American professor of legal and moral philosophy. He has spent most of his career at Purdue University (1979–1991), Washington University in St. Louis (1991–2009), and most recently as the W. Alton Jones Professor of Philosophy, Law, and Political Science at Vanderbilt University (2009–2017). He has authored or coauthored 16 books and more than 120 articles, and edited or coedited 18 books, on a wide range of topics, including the philosophy of international criminal law, collective and shared responsibility, just war theory, and Thomas Hobbes's legal and political thought. His pioneering work on the philosophy of international criminal law has helped to usher in a wave of attention to the conceptual and normative questions underlying these relatively new and developing institutions.

A central concern running through much of May's work is with the issue of wrongdoing committed by groups and against groups: how to conceptualize it, how to assign responsibility for it, how to respond to it. In his early writing, especially his books *The Morality of Groups* (1987b) and *Sharing Responsibility* (1992c), he departs from traditional, purely individualistic conceptions of moral agency and responsibility to develop a more nuanced conception according to which groups as well as individuals can bear responsibility.

In *The Morality of Groups*, May contends that actions may properly be attributed to groups when group members are related in ways that allow them to do things acting together that they could not do acting individually. Importantly, May's account aims to find middle ground between strong individualistic and strong collectivist views. He conceives of groups as individuals *in relationships* and contends that although groups themselves, *qua* groups, do not have reality independently of the members who compose them, the relationships among individual group members do have an ontological status distinct from the individuals themselves (1987b: 23). Group intentions, on his view, are a product of these relationships, and so although group intentions are distinguishable from individuals' intentions, they are not collective in the strong sense of being above or separate from individuals.

In *Sharing Responsibility*, May draws on the work of Sartre, Jaspers, and Arendt to develop a social existentialist account of responsibility among members of groups. He contends that individuals'

identities are grounded in their memberships in social groups, and that individuals are implicated in their groups' actions. Group members are responsible, he argues, not just for what they individually do but also for their social identity, their shared attitudes, and importantly, their failure to work to prevent harmful activities perpetrated by their group. He writes that "each member of a community shares in what each member does, and each member should feel responsible for what the other members do" (1992c: 11).

In many of his early writings, May focused on these issues of collective responsibility in the context of corporate wrongdoing (see also, e.g., 1982, 1983, 1986). But his interest in how to conceptualize and assign responsibility for group wrongdoing informed the subsequent work for which he is perhaps best known, in the philosophy of international criminal law. May's four-volume series on the moral foundations of international criminal law has helped to set the conversation about moral, legal, and political questions underlying prosecutions of the four classes of international crime identified by the 1998 Rome Statute: crimes against humanity, war crimes, crimes of aggression, and genocide. Two notable commitments running through each of these volumes are, first, a commitment to a moral minimalist approach intended to make his conclusions plausible to a wide range of readers with different philosophical or legal commitments, and, second, a belief that defendants' rights and fidelity to legal due process are at least as important in international prosecutions as is the vindication of victims' rights.

In the series' first volume, *Crimes Against Humanity: A Normative Account* (2005), May focuses on the apparent tension between prosecuting these crimes and respecting the sovereignty of states. Unlike war crimes or crimes of aggression, which are perpetrated by one state or its members against another state or its members, crimes against humanity are perpetrated or allowed to occur by a state against its own citizens. Thus crimes against humanity are *intra*national rather than international, and it might appear that respect for state sovereignty is inconsistent with international prosecution of crimes that occur entirely within a state's borders and against its own members. Drawing on the work of Grotius and Hobbes, May argues for a presumption in favor of state sovereignty. This presumption, however, can be defeated when a state attacks its members' subsistence or security or is unable or unwilling to protect its members from harm. He terms this the "security principle." But although a state that attacks or fails to protect its members may forfeit its sovereignty and thus its right to exclusive control over its affairs, May believes international prosecutions are only fully justified if another condition is met: namely that the crime involves some serious harm to the international community. This second condition, which he terms the "international-harm principle," is met when the crime is group-based in terms of its victims or its perpetrators. More specifically, the principle requires that the crime either causes "harm to the victims that is based on non-individualized characteristics of the individual, such as the individual's group membership, *or* is perpetrated by, or involves, a State or other collective entity" (2005: 83). When one of these conditions is met, he contends, the crime harms humanity itself and is subject to international prosecution (2005: 100).

May's two principles have been influential as well as (especially the international-harm principle) controversial in subsequent debate about the grounds for justified international prosecution. Some have objected that many crimes against humanity do not in fact harm all of the international community – they do not constitute harms to humanity in the sense May suggests (e.g., Altman 2006; Chehtman 2010: 100). Others have objected that the relevant consideration for assessing whether a crime is properly prosecuted by the international community is not whether it harms the international community but whether it properly concerns the international community, thus whether the perpetrators are accountable to the international community as a whole, rather than merely to their victims or even their fellow citizens (Renzo 2010). Some scholars have suggested that something like the security principle is sufficient to render certain crimes liable to international prosecution (Altman and Wellman 2004).

The second volume in the series, *War Crimes and Just War* (2007), focuses on the moral foundations of international humanitarian law, which

concerns the rules of war. Drawing on the work of seventeenth century just war theorists, especially Grotius, May reconsiders traditional moral principles governing how wars are fought – the principles of discrimination, necessity, and proportionality – in light of a new, more fundamental principle, which he terms the principle of humane treatment. Essentially, this principle requires that soldiers act with mercy and compassion, grounded in a sense of honor, toward those who are in various respects vulnerable. May's account reframes the principle of discrimination's traditional distinction between soldiers and civilians (or combatants and noncombatants); for him, the principle of humaneness requires compassionate treatment of the vulnerable, or defenseless, whether they are civilians or soldiers. The humaneness principle has a broad range of implications, from what sorts of weapons may be used in war to how prisoners of war, and even defendants in subsequent war crimes trials, may be treated. One theme that emerges in this work and continues in the next volume, but gets fuller expression in his later book *Contingent Pacifism: Revisiting Just War Theory* (2015), is the sense of deep tension between fighting wars humanely and fighting them effectively.

In the series' third volume, *Aggression and Crimes Against Peace* (2008), May sets out to rethink the notion of *aggression* as a basis for international prosecutions. Instead of focusing, as traditional international law has done, on a state's violation of another state's sovereignty or territorial integrity, May reconceptualizes aggression in terms of human rights violations. Rather than a state's first strike against another state, aggression is a "first wrong that violates or undermines human rights" (2008: 4). This revised notion of aggression has several key implications. Most notably, it suggests that the traditional conception of aggression in international law is both too narrow and too broad: It is too narrow in that aggression is not limited to state aggression; nonstate entities (such as terrorist groups) may also be guilty of aggression. It is too broad in that states' first strikes against other states may in some cases not count as aggression, if these are humanitarian interventions against states perpetuating human rights violations against their members.

The fourth volume, *Genocide: A Normative Account* (2010), examines what has been described as the most serious of all international crimes. The 1948 UN Genocide Convention defines genocide as an act committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." A central concern in this volume is with the ostensible significance of destroying a group. Some have regarded genocides as morally unique, and as the worst of all crimes, because they constitute the destruction of a group. If this is true, May contends, then groups must be something over and above their members, and they must also be morally significant in a way that renders their destruction worse than the killing of their members. Drawing on his earlier work on collective responsibility, May contends that groups do not have objective reality independently of their members, and thus that genocide is neither morally unique nor significantly worse legally than other serious international crimes (2010: 78). But groups can be said to exist in an intersubjective sense, as individuals in social relationships who find meaning in group identity. This has important implications for how we define groups for purposes of genocide prosecutions: Rather than limit the list to national, ethnic, racial, or religious groups, or indeed any objective list of groups, May suggests we include any "publicly recognized group that is relatively stable and significant for the identity of its members," such as, but not limited to, the four listed in the 1948 convention (2010: 58).

Beyond these four books, May's has written prolifically on questions of international law and justice, authoring or coauthoring books about due process (2011), proportionality (2014), and necessity (2016) in international law; contingent pacifism (2015); and justice after war ends (2012).

Conclusion

In addition to his work on international criminal law, just war theory, and collective responsibility, May has written about a range of issues in moral and social philosophy, including ethical issues surrounding masculinity and men's social and familial relationships (1980b, 1991, 1992b,

1994, 1998); conflicts in religious and medical ethics (1999); and Hobbes's legal and political thought (e.g., 1980a, 1987a, 1992a, 2013).

Cross-References

- ▶ Crime
- ▶ International Law
- ▶ International Law: Legitimacy of
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Life and Action

Giuseppe Mazzini (Genova, 1805–Pisa, 1872), Italian politician and patriot, was one of the main protagonists of the nineteenth-century Risorgimento movement that led to Italy's national independence and unification. Brought up in a familial environment marked with the Jacobin sympathies

of his father Giacomo, who was a doctor and university professor, and the Jansenist religious rigor of his mother, Maria Drago, Mazzini developed from an early age the conviction that his life had to be dedicated to the Italian national cause. The unity of "thought and action," one of his main maxims, was thus the guiding idea of his tumultuous life, which he spent largely in exile in France, in Switzerland, and above all in England, where he interacted and formed friendships with important intellectuals of the era, such as Thomas Carlyle and John Stuart Mill. From exile, he organized and agitated tirelessly for Italians to free themselves from foreign domination, and to establish themselves as a nation, as other European countries had already done. After participating briefly in the activities of the secret society of the Carbonari, he founded associations such as *Young Italy* and *Young Europe*, whose scope was to prepare young Italians and Europeans to act in their respective countries to secure the ideals of "Liberty, Equality, and Humanity." In 1849, he was one of the triumvirs of the Roman Republic – a historical and constitutional experience that was short-lived but which left lasting traces in the memory of Italian patriotism.

Although the history of Italian unification did not follow the path that Mazzini advocated and fought for – his political work was thus in some respects a failure – it is undeniable that his idea of creating a unified nation fared better than other notions, such as Carlo Cattaneo's federalism. Moreover, for however much Mazzini's thought has been accused of abstraction and ambiguity, his concepts remain one of the most important points of reference in the Italian and international republican traditions (Mazzini's ideas had a significant influence on thinkers such as Tolstoy and Gandhi).

Republicanism and Patriotism

Indeed, Mazzini's ideas can be introduced beginning with republicanism itself. His first and firmest conviction was that the struggle for the liberation of Italy had to be conducted by eliminating the presence of the monarchy. This was true not only of the Savoy monarchy, whose influence was spreading throughout the entire peninsula, but also of every monarchical institution, for monarchy itself, Mazzini held, was the institution that most corrupted the citizens' political life. To form a nation, in fact, people needed not only to achieve unity and independence from foreign powers but also had to be based upon *liberty* and *equality*, neither of which can be established and maintained where power is hereditary and where the constitution of the state is based on the privileges accruing to certain classes and individuals.

The law of *progress* – which Mazzini sees guiding human events and history and therefore political institutions – dooms monarchy as an institution of the past that must give way to a republic. For Mazzini, thus, a republic was more consistent with the spirit of the age, a period in which peoples and individuals had taken center stage as the new protagonists of history.

A nation founded on liberty and equality, therefore, cannot be thought of as an organism formed by heterogeneous parts and organized hierarchically, along the lines of organicist and nationalist thought. For Mazzini, as Maurizio Viroli has stressed, the nation is a "democratic association of free and equal individuals" who see the fatherland (*patria*) not merely as a geographical place but as the concrete terrain upon which freedom and sociability are achieved. To be sure, this is an idea that has nothing to do with the tradition of political nationalism, insofar as Mazzini's is a moral and ethical-political concept, not a naturalistic one. Although there has been no lack of nationalistic interpretations (e.g., Giovanni Gentile's and fascist culture in general), Mazzini's *patria* is the site of freedom, not of ethnic and cultural homogeneity. This explains the complete harmony that the concepts of nation and *patria* have with the concept of humanity in Mazzini's thought; those who work for the greatness of their own nation do not place themselves in opposition to other nations and other men, but work toward realizing the idea of Humanity, which is the ultimate aim of historical development.

Free and equal people are the true foundation of authority, which is never something that is imposed from above but is based only and

exclusively on popular consent. The people are therefore at the center of Mazzini's political thought and always in an active role; the people are called to intervene directly in history's events and to decide autonomously with regard to its own destiny. Every paternalistic inclination is debarred in a conception according to which everything must be done not only "for the people" but also "by the people."

In Mazzini, these principled convictions also supply clues with regard to method. As Mazzini never tired of repeating, since means and objectives are inextricably linked, a politics by the people for the people must inevitably emerge from the actions of the people themselves, who are recognized as having full political capacity and which moreover must be developed through education and the experience of political participation.

Mazzini's concepts thus form a chain that holds them all together, with one link deriving from another. The agitated and persistent style, at once impassioned and impatient, that characterizes not only his action but his writings gives rise to a multiplicity of ideas that are tightly interrelated. The linearity of the connections, however, does not always translate into clear concepts. In fact, the illustrious historian of Risorgimento political thought, Luigi Salvatorelli, spoke of Mazzini's "mystical penumbras" and his sometimes "magical" use of words. Mazzini's concepts are indeed connected, but not always entirely clear in their theoretical contours or practical implications. Francesco De Sanctis, the father of Italian literary history and criticism, observed that "Mazzini and his school are noteworthy more for religiously-inspired fervor than for the clarity of concrete ideas." Gaetano Salvemini, the antifascist historian who is one of the heirs of the Mazzinian tradition and one of the main Italian theorists of democracy, warned of Mazzini's "very dangerous maxims."

The Critique of Individualism and Rights: Toward a Theory of Association and Duties

To be sure, Mazzini's thought is brimming with strongly inspired accents that have often been compared to religious discourse – accents discernable, for example, in the role that individuals play in society and history. The centrality of the people should not be viewed in the contractualist sense common among seventeenth- and eighteenth-century writers. The key category in Mazzini's thought is *association*. But for Mazzini, association is not the product of a calculation of interests and the sum of individual rights; it is an innate spirit of cooperation of individuals who feel bound to each other. As Galasso noted, Mazzini's association appears as an almost "mystical sense of popular community" into which flow both the idea of independence and unity, but also that of an "individual mission" of each people in the achievement of common humanity.

The political battle against the monarchy in favor of a republican and cooperative association is premised on the firm conviction that the principle of association – a real novelty in the nineteenth century – is morally and politically superior to the individualistic principle that characterized the two preceding centuries. From this point of view, Mazzini's thought appears consonant with the work of others of the era – such as Auguste Comte and Félicité Lamennais – that pointed to the limits and defects of individualism as a foundation for the civil and political community.

The critique of individualism, its assumptions, and its consequences constitutes the main argument of Mazzini's most important writings: *Fede e avvenire* (1835), *Interessi e principi* (1836), and *I doveri dell'uomo* (1860). The main defects that the revolutionary and patriotic Mazzini imputed to individualism are utilitarianism (he criticizes Bentham often) and materialism, both of which were unable, in his estimation, to ground both sociability and political obligation. An individual concerned entirely with his own interests was imbued with an "egoism of the soul"; he was not only arrayed in a "continuous struggle" against others but would destabilize the political structure, for in the process of tending only with his own interests, he would become unable to think and work for the common good.

Mazzini identified rights, therefore, as the essential feature in a society designed with the individual in mind, and it is in his critique of rights that his most significant contribution to

philosophical and legal thought can be found – a critique distilled in his 1860 work *I doveri dell'uomo* (The Duties of Man). Rights are considered the legal-political expression of a society in which individuals are separated and withdrawn into themselves, compelled to try to prevail over each other (in a manner akin to Hobbes' state of nature), which gives rise in turn to ever-new forms of inequality produced in the clash between individual forces (*Interessi e principi*).

If these are the defects of the paradigm of rights, it is necessary to develop thus a paradigm of obligations, for only duties are able to draw the individual out from the circle of his own interests and bind him in solidarity with others, the product of which will be a stable association guided by human sentiments. There is a perfect symmetry in Mazzini's framework; as Pietro Costa observed, "interest, rights, and individualism are connected and juxtaposed to sacrifice, duties, and associational life."

Mazzini's critique of the insufficiencies of rights does not lead him, however, to call for their transcendence. In general, Mazzini views history as a progressive accumulation, in which new values incorporate old ones without negating them. Thus, even an era of duties would not imply the negation of rights, but rather a fuller realization of them, once the efficacy of rights could be guaranteed by a broad and common fulfillment of duties. In fact, rights "are but the consequence of fulfilled duties." Nevertheless, there remains a decisive contradiction between the logic of rights and the logic of duties. It is necessary, therefore, to see the duties Mazzini recommended not as a simple practical instrument to resolve the problem of the efficacy of rights, but rather as the moral and legal category most suitable for an epoch in which the associative principle – which for Mazzini is the principle of progress and the natural principle of republicanism – has taken the place of individualism. If rights risk leaving man "mollified in his own solitary freedom," the theory of obligations is the "mother of sacrifice"; and if rights have at best a critical and destructive quality, duties instead have the capacity to build a new society based on the foundations of a common faith (*Fede e avvenire*, § VII).

Education and the Basis for a New Order

A "revolution" of mind and spirit, such as that Mazzini hoped for – a revolution that would "modify, reform, and transform" man as such (*Interessi e principi*) – could only come about through an intense and lengthy educational endeavor. Mazzini dedicated himself to this important and urgent project not only in his writings but also in his efforts to establish schools to educate Italian emigrants.

If the goal of education is to shape man in his entirety, an ensemble of instruments suited to the task must be identified as well. Mazzini applied the same practical method to his educational mission that he did with regard to life in general. "Unity and consistency in all aspects of life" ensure that, for Mazzini, "the philosopher, the religious man, the politician, and the critic are always nearby" (De Sanctis). Thus, even the education of the people must happen through all of these instruments, and no sphere can be left out of this fundamental mission. Literature and art, to which the young Mazzini dedicated many essays, must abandon the "false doctrine of *art for art's sake*," and take up the prophetic function of envisioning the future and collaborating in its realization; in this way, literature and art would perform consciously and responsibly their great social function.

For Mazzini, moreover, the question of education constitutes, as it did for other republican thinkers such as John Stuart Mill, the centerpiece of real democratic government, whose rules and institutions are nothing more than the instruments or results of the fundamental principle of autonomy and the free development of each person.

This is consistent with the vision, not only moral but profoundly religious, within which Mazzini gathers his entire view of reality and his political and intellectual conceptions. It is consistent, moreover, with the critique of socialism and class conflict in favor of a people that educates itself and develops together.

The critique of socialism is in line with his more general criticism of individualism and utilitarianism, but it goes beyond both. What divides Mazzini profoundly from Marx and Bakunin is the question of class struggle and the call to

abolish private property. Precisely by virtue of the importance accorded to education, Mazzini believed in the concrete possibility of cooperation between the classes, which was the chief issue that separated him from Marx within the nascent Socialist International. Similarly, the idea of transcending private property entirely seemed to Mazzini an assured "route to slavery," to the extent that social organization would become dependent upon an "arbitrary hierarchy of leaders" (*Pensieri sulla democrazia in Europa*).

The leaders of the nascent international workers' movement certainly could not share the profoundly religious inspiration that suffused Mazzini's politics. In sharp contrast to socialist doctrines, religion constitutes the very foundation of all of Mazzini's thought. It is not, however, a religion in a traditional sense; it is a new religion, one without the Church, in which each individual has a direct relationship with God, who is placed at the origin of all the concepts hitherto discussed. For Mazzini, without faith in God, there cannot be a society that does not disintegrate into anarchy or into rule by the strongest. A close relationship thus emerges between religion and politics. Against the modern distinction between religion and politics, Mazzini maintained that only a religious dimension can provide man the faith in himself and the passion for duties needed to achieve the highest qualities of man and citizen in service of humanity. Human law itself is conceived as the application of God's laws; law is legitimate only insofar as it is a manifestation of the Truth, which can be known, thanks to the convergence between individual conscience and the agreement of humanity.

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Introduction

In his moral and social philosophy, Jeff McMahan (b. 1954–) has focused on issues surrounding rights to life and the ethics of killing. He is the leading figure in a group of scholars seeking to significantly revise the received moral and legal norms that govern the ethics of war. He has also written extensively in the field of biomedical ethics, particularly on abortion, infanticide, euthanasia, and related issues. Taken as a whole, his work provides normative arguments on the nature and boundaries of moral status across a range of topics in applied ethics, probing the entailments for both policy and personal conduct.

Killing in War

In the philosophy of law, McMahan's most influential writings concentrate on the moral bases for killing in war. His account of permissible killing contains both critical and constructive elements. As the foremost member of the so-called "revisionist school" of thought on the ethics of war, McMahan has offered forceful critiques of the standard account of just war theory, a paradigm that has dominated the philosophical literature and is reflected in international law.

The standard account of just war theory (hereafter SA) is framed by two principles, the *independence thesis* and the *symmetry thesis*. According to the independence thesis, the rules that govern when it is permissible to enter war, the *jus ad bellum*, are disconnected from the norms that apply to permissible fighting within war, the *jus in bello*. The criteria for determining when a state can legitimately declare war are independent of those that dictate how combatants may behave once war has begun. Thus, morally and legally speaking, it is possible to fight a just war badly and an unjust war well. The adjectival and adverbial descriptions are discrete. If we accept, for instance, that the United States had sound justification for entering World War II, this does not impact the analysis of the bombing of Hiroshima and Nagasaki. So, too, if Nazi Germany engaged in an unjust war, this does not entail that any member of Germany's fighting forces acted unjustly. It is in keeping with this that most individual German combatants were not charged with war crimes at Nuremberg. If the restrictions of the jus in bello are met, such that civilians are never directly targeted and any unintended harms to civilians are proportionate to compelling military aims, combatants have fought well whether or not their cause is just.

The symmetry claim is a corollary of the independence thesis. If one accepts SA, then we are committed to the view that combatants of both sides of a conflict are entitled to lethal self-defense against each other, irrespective of the justice of their cause. Following Michael Walzer, this is commonly understood as the *moral equality of soldiers*. By taking up arms, combatants have become threats, and therefore no crimes, moral or legal, occur when one kills another under normal battle conditions. To continue the previous example, this means that the German and the American soldiers are equally permitted to kill and equally liable to be killed.

According to McMahan, the underlying logic of SA is the claim that as a moral domain, war is sui generis and therefore discontinuous with the moral norms that obtain for everyday civil life. McMahan rejects both the claims for discontinuity and the independence and symmetry theses that follow from it. His sophisticated arguments, which cannot be fully explored here, aim to show that once we have accepted a theory of individual rights to life, we must explain how anyone becomes morally *liable* to defensive and

potentially lethal force by virtue of some act or intention. Tort and criminal law testify to the difficulty of clearly establishing legal (let alone moral) liability, but a paradigm case is enough to get McMahan's argument off the ground. We assume, for instance, that a police officer who utilizes lethal force to stop a villainous murderer is justified because the villainous attacker has forfeited certain rights not to be harmed. We further assume that in light of this forfeiture, the villainous attacker lacks a right of defensive attack against the police officer. Accordingly, the police officer qualifies as a justified defender against the illicit actions of the murderer's unjust attack.

Mutatis mutandis, the same applies for killing in war, according to McMahan. Given that combatants fighting in a just war are sufficiently similar to the police officer and that combatants fighting in an unjust war are like the villainous attacker, the combatants on the side of a just war are not liable to being killed. So, too, those fighting in an unjust war have forfeited their rights of self-defense and have no license to kill. To claim otherwise would lead to a number of absurdities. As McMahan notes, SA entails that all of the individual *acts* of war might be just, but that the war as a whole is unjust. It would also entail that the conditions for *justified* killing can be created by *unjustified* killing. If we examine the bombing of Pearl Harbor, we observe that prior to the attack by the Japanese, there was no state of war and the US service members were not liable to lethal threat. The SA implies that it is by virtue of being attacked that the US naval forces become liable to attack, thereby entering into the status of "equality."

If accepted, McMahan's arguments suggest a number of ways in which personal responsibility for and international law regarding war ought to be reconsidered. At the most basic level, his analysis leads to the conclusion that combatants fighting in an unjust war kill impermissibly and should be judged in light of this. Furthermore, combatants should refuse to fight in wars that are unjust. Drawing on the Model Penal Code, McMahan recognizes a number of *excusing* factors that impact combatants' decisions and that should constrain punishment accordingly. Epistemic limitations, coercion, and diminished responsibility all work against notions that combatants are fully autonomous and thus subject to the penalties that would apply under conditions of ideal agency. The goal, according to McMahan and others who embrace this line of thought, should be to create the necessary, if not sufficient, conditions for proper moral agency, which among other things would include the creation of international bodies capable of evaluating the relative justice of wars and legal mechanisms that better enable conscientious objection to fighting.

Life at the Margins

In the realm of biomedical ethics, McMahan has attempted to reconcile widely held intuitive judgments with a metaphysical account of moral status. In this light, he has posited a two-tier model for establishing moral concern that distinguishes the *morality of respect* from the *morality of interests*. Respect is demanded when dealing with persons, where individuals "like ourselves" possess functional minds and have a sense of identity over time. At this level, the received notions of human dignity and rights to obtain life and considerations of utility are generally inadmissible. For those outside this realm, however, McMahan's argues that we ought to focus on their *time-relative interests*. This account stands in opposition to those who argue that legal rights and moral demands should track biological identity or human potentiality. Put somewhat simply, McMahan claims that the badness of death for those who do not meet the threshold for personhood is to be measured by the level of egoistic concern that being has for a lost future. Fetuses, for instance, have very limited time-relative interests, because a fetus cannot meaningfully embrace a future (or past) self that would be negated. This extends as well to newborns and infants, who have yet to realize a meaningful sense of self. The fact that we lament the death of newborn or the spontaneous abortion of a fetus less than the death of an adolescent serves as evidence. Accordingly, while members within the field of moral interest have recognizable claims against harm, they are not worthy of respect, and their interests in avoiding pain and death may be overridden by

sufficiently compelling goods. Similar (but not identical) to the killing of animals, then, we ought to construe the ending of fetal, infantile, and other "marginal" forms of human life proportionally, weighing the time-relative interests against the interests of persons. With Peter Singer and others, then, McMahan is committed to the view that under certain (if perhaps rare) circumstances, infanticide is warranted, and abortions before the development of the capacity for consciousness – before time-relative interests arise – are unproblematic, no different than contraception and in fact less morally concerning than killing sentient animals. If this account is right, then modifications to the dominant moral and legal norms are needed, changes which McMahan openly embraces while acknowledging prudential reasons for caution and concerns about slippery slopes.

Conclusion

Combined, Jeff McMahan's analyses of moral status lead to plausible and controversial conclusions that invite radical revisions of current international and US domestic law. Those who would defend the status quo are forced, given McMahan's arguments, to reject his account of intuitions and/or provide a more compelling metaphysics. The scholarship in response to McMahan has largely followed one or both of these paths.

Cross-References

- ▶ Abelard, Peter
- ▶ Bioethics: Experimental Approaches
- ▶ Rights: General
- ▶ Walzer, Michael: Just War

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Meek Law

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"Meek Law" is the English translation of "diritto mite," the title of a book published in 1992 by the constitutional law teacher Gustavo Zagrebelsky, who was from 1995 to 2004 a judge and in 2004 the president of the Italian Constitutional Court. Following an encyclopedic approach, the book outlines the idea and the essence of the law in the so-called "Constitutional State" at the end of the twentieth century. It supports a sovereignty of the constitution and criticizes the traditional positivism insofar as the constitution opens the law to a social dimension in a pluralism of principles separated from votes (Zagrebelsky 2009, 102). Meek law theory is considered a variation of "neo-constitutionalism" (La Torre 2010).

Meekness in law is not just sweet mildness or leniency opposed to the harshness of criminal law (in the principle of *lex mitior*), but an aspiration or ideal of the entire legal order of a society grounded on a pluralism of principles that characterizes the spirit of the time. It serves as a picture taken from the world of virtues and beatitudes for the purpose to illustrate the world of the constitutional state where the constitution ideally builds unity and integrates law and politics. Meekness is a normative ideal of the Constitution that demands the maintenance of a pluralism of fundamental principles and values and a loyal confrontation among them in order to avoid any sort of

J. Luther: deceased.

absolutism. Constitutional meekness means for law and politics a general moral duty to promote coexistence, compromise, inclusiveness, moderation, interdependence, reasonableness, etc. This does not mean weakness but supports a "sovereignty of the Constitution" with full submission of all political parties and leaders and a duty to oppose all kinds of dictatorship, a convergence of all forces to a mobile center where balanced equilibria shall be realized.

The theory of meek law has been argued with a view to legal and constitutional history. The constitutional state of the twentieth century has taken the place of the liberal ideal of legality and *Rechtsstaat* of the nineteenth century (Zagrebelsky 1992, Chap. II). Legal positivism is no longer adequate for the understanding of a market of special and ad hoc laws that tend to disorder and instability. European constitutions with their fundamental rights catalogues and models of "constitutional court review" separated *jura* from *lex* and developed an intermediate model between the French idea of more objective rights that are artificially framed within the State through legislation and the US-American idea of more subjective rights that are naturally framed within society and recognized by judges (Chap. III). Europe's constitutional rights combine rights to freedom and rights to justice, with liberal and social humanism, subjective and objective dimensions, instauration of new orders, and restauration of traditional orders (Chap. IV). The constitutions of the twentieth century shaped fundamental principles of substantial justice separated from the will of legislation, a constitutional order that domesticates the potentially aggressive and disintegrating rights individualism, socializes economic powers, and saves nature and humanity from a "lordship of the will" (Chap. V). The constitutional law has become mainly a "law for principles," principles that act in a reality of values that ask to be supported ethically and that are able to dominate the interpretation of all rules "as if there would be a natural law." Legal science has to become a more practical science, and constitutional interpretation has to take into consideration the reality of an open pluralism of fundamental principles and the practical consequences of the law in action. The lawyer has to respect reasonableness as the main source of *juris prudentiae* (Chap. VI). Since the comprehension of the case is necessary for any good judicial interpretation, judges will find themselves in an independent intermediate position between *lex* and *jura*, state and society. But they should not become the new chiefs of the law, because meekness includes a duty of respect for political forms of lawmaking and of the openness of the principles (Chap. VII).

The theory of meek law has been defended and developed through discussion with other scholars such as Peter Häberle, Aharon Barack, Robert Alexy, and Ronald Dworkin (Zagrebelsky 2003, 621). It claims to be not a new version of natural law, because it refuses the abuse of nature as a masque for cultural oppression and does not define justice through nature. The concept of justice in meek law theory is opposed to the idea of a government through legislation. It is founded on a constitution that is not a rational system of the ideas of power holders, but generated by a common passion and sentiment for absolute injustice to be shared with all those who experience evident oppression and harm on dignity and rights (Zagrebelsky 2009, 50).

Meek law is a law that does not deny the discretionary power of judges. This power cannot be imprisoned in a positivism restricted to rules. It is not privileged, but limited by the constitutional principles of rights and justice that aim to render possible coexistence and political compromise. Meek law is a law made by inclusive politics that integrate potentially aggressive values and communicative procedures (Zagrebelsky 1992, 13), with constitutional principles that cannot be voted neither by lawmakers nor by the judges themselves (Zagrebelsky 2005, 25) and with rules that need to be always justifiable by reasonable principles. The constitutional principles of the meek law perform neither a moralization of law, nor a legalization of morals, but they help to bridge law and culture and to avoid the tyranny of majority in a democracy based on relativism, not on nihilism.

Meek law has been criticized to be an anti-formalist theory of neoconstitutionalism that produces uncertainty (Guastini 1996), tends more to idealism than to realism, and recycles natural law ideas in excessive moralism. It has been perceived

as an apology of the judicial activism and "free law" of ordinary and constitutional judges in Italy during *tangentopoli*. In the context of the collapse of the political system in Italy after 1989, this activism was considered detrimental both for judicial modesty and for political sovereignty. Nevertheless, meek law has also been defended as a deconstruction of surviving legal myths and as a realist theory of what law has become under the contemporary constitutionalism with judges and their ethics. The meek law theory helps to understand even the cosmopolitism of the growing worldwide community of constitutional judges as part of a process of universalization of the law (Zagrebelsky 2009, 318). Meekness allows republican dialogues and a comparative look at foreign experiences, not to sacrifice to globalization the sense of cultural pluralism and the consensus for the existing constitutional equilibria.

The Spanish (derecho dúctil) and the French translations (droit en douceur) confirm that meekness is not just the virtue of a judge or political lawmaker. As Norberto Bobbio observed, it is more the social virtue of the lamb than the political virtue of a lion or fox, the opposite of arrogance and despotism (Bobbio 2014, 39). Meek is a law that pays attention more to losers than to winners, praising compassion with victims and resilience against oppressors. Zagrebelsky recognized that the virtue of meekness, unlike toleration, does not demand reciprocity, but it is not an unlimited habit of donation (Zagrebelsky 2014, 219). If politics destroy the social virtues and the gentleness of a society, meekness should not be unlimited but could allow nonviolent active resistance and justify "constitutional reluctance" (Giorgis et al. 2016, XII). In the most recent book on "right by force," he pleads for a defense of fundamental duties against any hegemonic perversion of human rights rhetoric (Zagrebelsky 2017). Meekness could be the first fundamental moral duty of a neither cynical nor hypocritical constitutionalism.

Cross-References

► Constitutionalism
► Legal Pluralism: History of

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Meinecke, Friedrich

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Introduction

Friedrich Meinecke was one of the leading representatives of German Historicism, and his thought has had a great influence in different fields of historical and philosophical research.

He was born in 1862 in Salzwedel and died in 1954 in Berlin. His long life crossed the whole history of modern Germany, beginning before the Reich's unification and ending in the again divided Germany of the aftermath of World War II, after the collapse of the Third Reich. His historical thought was marked by the events of the

German National State and the destiny of the European State System, until the final downfall, he dealt with in *The German Catastrophe* (1946): in this essay, the final acknowledgement of the insuperable tragic character of history is somehow the thinker's intellectual testament.

Meinecke's work is mainly contained in his great trilogy, *Cosmopolitanism and National State* (1908; transl. 1970), *Machiavellism. The Doctrine of Raison d'Etat and its Place in Modern History* (1924; transl. 1962[2]) and *Historism: The Rise of a New Historical Outlook* (1936; transl. 1972) (we will use however the more common term "Historicism").

The origins of his historical thought are to be found in the genesis of German Historicism, on the one hand, laid down by Dilthey in his *Introduction to the Human Sciences* (1883), and in the acknowledging of the concrete historical reality of the modern national State, on the other hand. Dilthey intended to recollect the heritage of the historical school (in a wide sense, from Herder to Savigny), and it was this tradition that oriented Meinecke to a recognition of the historicity of the whole spiritual life. The "organic" individuality of the State inclined however Meinecke not only to a rejection of universalistic ideas of the natural law tradition, but also to a reception of Hegel's and Ranke's lesson about the nature of the State and its necessary relation to power. This way, the idea of a "spontaneous" development, as regarded by the historical school (the "silently operating forces" of Savigny), was reconducted to the concrete historical will, necessary to political action, exemplified by the process that led to German unification and the role played in it by the historical great individuality of Bismarck.

From Natural Law to the Raison d'état

It was at the turn of the eighteenth and the nineteenth century that, according to Meinecke, the decisive break with "the old traditions of a Natural Law that was Stoic and Christian, and then once more secularised by the Enlightenment" occurred in the German mind (1962: 361). From those old traditions stemmed the idea of the best form of the State, necessarily subordinated to a universal moral law, against which the historical thought revindicated the individuality and multiplicity of the forces of life. This was, according to Meinecke (echoing Troeltsch), the greatest revolution in Western thought: the universal validity of reason (as declined in the varieties of rationalism, positivism, utilitarianism) was superseded by the recognition that reason reveals itself in many ways, in individual and not general laws of life.

This new sense of individuality, created by the German Historicism, extended to all forms of life and then also to the super-individual essence of the State. Not by chance, together with ideas of individual freedom, ideas of national self-determination grew, remarked Meinecke in *Cosmopolitanism and National State* (1908; Poscript to the third edition 1915; Appendix to the sixth edition 1922).

In that book, the analysis of the intellectual premises of the process of German unification culminated in the figures of Hegel, Ranke, and Bismarck, indicated by Meinecke as the great nation's states "liberators." The core of the book is the transformation of Germany from a *Kulturnation*, a national culture, to a national State: its concrete individuality (like the individuality of any other State) is however the realization of a timeless, universal idea, so that ideas play a decisive role in history, and the State's power serves the values of a national culture.

At the basis of this view of modern historical development there was however the trust, inspired by Ranke, that free development of national States, in their diversity, would have produced a general harmony.

Disillusion with this confidence began after World War I, the "seminal catastrophe" of modernity, where European self-destruction originated totalitarian regimes and the end of Europe's world prominence. As Meinecke retrospectively remarked, the sweet dream to conjugate mind and power, "the heritage of Goethe with that of Bismarck," was already over with World War I.

The end of this faith in an "objective idealism" and the understanding of the ambiguous nature of power made it even more necessary for Meinecke to investigate the nature of the modern State:

together with the emergence of it, with its unquestionable central role, the sphere of the State's interests was recognized, defined as "raison d'état" and the primacy of its Right over any other. Meinecke dedicated to the history of the raison d'état his great book of 1924, *Die Idee der Staatsräson in der neueren Geschichte* (translated into English as: *Machiavellism. The Doctrine of Raison d'Etat and its Place in Modern History*, 1962[2]).

Starting from Machiavelli, the book investigates the development of this central concept of modern history, within a contemplation of the deep tension that crosses the life of the State between the two opposite forces of power and morality or kratos and ethos. The struggle between these forces, and therefore between nature and mind, no longer appears capable of a definitive solution to Meinecke. The earlier objective idealism was now overcome by a radical dualistic view of history: "Kratos and Ethos together build the State and fashion history," but they express a permanent tension. However, raison d'état was the principle that could mediate between them, avoiding the reduction of the State's politics to pure power politics. Raison d'état is the bridge, having "a middle aspect, in which what pertains to nature mingles with what pertains to the mind" (Meinecke 1962: 5). The State's interest cannot consist in a pure affirmation of power: also in order to maintain itself, the State needs law and morality, being thus an instrument of man's spiritualization of nature.

The relationship between ethos and kratos, although mediated by raison d'etat, remains nonetheless permanently exposed to ambiguity: The most dramatic example of this is war, in which the state of nature bursts in demolishing the juridical forms of civilization. And the most terrible fact of world history is that "there is no hope of making radically moral the human community itself which encloses and comprehends all other communities" (Meinecke 1962: 12). Power is indispensable to the life of the State and cannot be said "evil in itself," as Burckhardt said. Nonetheless, the coexistence of power and law is possible within a State, but in the international arena dominates the state of nature that in vain the law of the people and international organizations try to contain. The State is thus irreducibly an amphibious creature, inhabiting both the ethical and the natural world. The deep forces of modern development, capitalism, militarism, and nationalism have determined a progressive rationalization and technicalization of life (as Meinecke says, with an evident influence of Weber), transforming the nature of politics and war, favoring an overcoming of the traditional ethical restraints to the power politics of the State: the forces of civilization (*Zivilisation*) were set against the forces of culture (*Kultur*). This explains the degeneration of Machiavellism in aggressive, mass nationalism which caused the catastrophe of the World Wars. As Meinecke says in the retrospective conclusion of *Die Idee der Staatsräson*, this forces historicism to a critical self-examination, started by Troeltsch (to whose memory the book is dedicated), acknowledging that the idea of raison d'état, as many others of the western culture, has entered a serious crisis. In the idea of raison d'état "God and the devil are entwined together," revealing that *Dämonie der Macht*, to which Ritter (influenced by Meinecke) dedicated his book in 1940.

Historicism and Universalism

Nonetheless, the dualistic outcome (nature and mind) and the reality of historical individuality (States as "organic" structures) are the insuperable horizon of modern thought.

Already in *Die Idee der Staatsräson* Meinecke had indicated the connection between raison d'état and historicism in the rejection of natural law and the affirmation of the concrete reality of the individual State. The third fundamental book of Meinecke (never completed) is then dedicated to the genesis of historicism, *Die Entstehung des Historismus* (1936). Operating now in the pure unpolitical field of the history of ideas, Meinecke indicates the most important achievement of German philosophical culture after the Reformation in historicism. The essence of historicism consists in substituting a generalizing view of human forces in history with an individualizing account

of them. Natural law's faith, both ancient and Christian, in the stability of human nature and of human reason, despite its value, is incapable of understanding changes and variety of forms of spiritual life of individual men and human communities. Danger of relativism is avoided here by distinguishing relativity of values to an individual (*Wertrelativität*) and relativism (*Relativismus*), pointing to the common divine origin of each historical individuality.

As Isaiah Berlin remarked (in the foreword of the English translation), it cannot be denied that the great and violent movements of the last two centuries "all stem in varying degrees from this vast revolt against what Meinecke calls 'the generalizing view'." Denying any uniform law of history and any idea of a linear progress in the *Weltgeschichte*, Meinecke set against it the idea of a *Universalgeschichte*, without Providence, but surrounded by the alterity of a divine element, however always interwoven with the demonic.

Meinecke and the Philosophy of Law

This was the great theme of *Die Idee der Staatsräson*: the irreducible clash between power and spirit, the State's individuality and natural law universalism. Meinecke's reflection, in the dramatic period of the interwar, was not isolated in the European philosophy of law. In the same years, Kelsen, facing the attacks on positivism in the name of a return to natural law, famously said that behind the positive law is not to be found the order of natural law but "das Gorgonenhaupt der Macht," the Gorgon's face of power (Kelsen 1927: 55). But while Kelsen aimed to reduce power to the pure law of the State, Meinecke saw instead the State, since it is bound to the raison d'etat, fluctuating continuously between power and law, whereas the element of power could not be reduced to pure negativity, being an indispensable force of historical development.

This polarity, spelt out by Meinecke, appeared to Carl Schmitt abstract and incapable to conduct towards any concrete decision. In a critical review of *Die Idee der Staatsräson*, he remarked that whereas all major modern writings on State and philosophy emphasized the question: who decides? – Meinecke ignores the problem completely. Pointing to the "tragic" element of power, moreover, seemed to Schmitt just "a move to aesthetics" (Schmitt 1926, 2017: 61).

Schmitt's criticism influenced also one of the most important projects in the field of intellectual history after Meinecke, the *Begriffsgeschichte* inspired by Koselleck, who criticized *Die Idee der Staatsräson* as a-historical in its approach. The entire project of the *Geschichtliche Grundbegriffe*, he wrote, "was aimed implicitly against Meinecke's version of the history of ideas" (Koselleck 1996: 61).

Cross-References

▶ Constitutionalism: Cosmopolitanism
▶ Constitutionalism: Political
▶ Natural Law: Contemporary
▶ Positive Law and Natural Law

Conclusion

Meinecke's long intellectual path originated a debate about the coherence of its development. The break represented by World War I has been stressed by Hofer (1956) (with an explicit approval by Meinecke himself), whereas elements of continuity have been underlined by Sterling (1958).

Despite criticisms, Meinecke's achievements in intellectual history appear to still be indispensable and also the tragical difficulty to reconduct power politics under international law entails probably a lesson still worth considering.

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Introduction

Philipp Melanchthon (actually Schwarzerdt; (1497–1560)) was a humanist, professor of Greek at the university of Wittenberg, religious reformer associated with Martin Luther, and known as *praeceptor Germaniae* (instructor of Germany) in the Holy Roman Empire and beyond its borders for his program of academic reform.

Born as the son of Georg Schwarzerdt (1459–1508), armorer of Elector Palatine Philipp, and Barbara Reuter (1476/1777–1529), related by marriage to the humanist Johannes Reuchlin (1455–1522), Melanchthon enjoyed a thorough education, which he initially received at the municipal school of Bretten, later at his grandfather's home by private tutor Johann Unger from Pforzheim. After the deaths of his father and grandfather, who both died in rapid succession in October 1508, Melanchthon and his brother Georg went to Pforzheim, where Melanchthon studied Greek with Georg Simler and Johann Hiltebrant. Reuchlin supported the child prodigy and in 1509 honored his linguistic talents by awarding him the humanist name Melanchthon, the Greek translation of his last name Schwarzerdt (= black earth).

From 1509 until 1512, Melanchthon was a student at the University of Heidelberg, where he received the degree of *Baccalaureus artium*. He continued his studies in Tübingen from 1512, where he obtained a master's degree on 25 January 1514. Supported by his friend Oekolampad, he started to work on the Greek original text of Aristotle's works, planning a new complete edition of his writings according to humanist principles. He was also learning Hebrew and sided with Reuchlin in the controversy about Jewish books ("Judenbücherstreit"), arguing against the proponents of late scholasticism for tolerance towards the Jews. Jointly with his teacher Hiltebrant, he published in 1514 a number of letters of renowned humanists of his day, who expressed their sympathies for Reuchlin. The letters of support and encouragement formed a volume entitled *Clarorum virorum epistolae*. In satirical reference to this title, the anonymous publication of the *Epistolae obscurorum virorum* ("Dunkelmännerbriefe," "Letters of obscure men"), appearing between 1515 and 1517, offered a collection of imagined letters in mock-medieval Latin which ridiculed the opponents of new humanist learning.

Working as a proofreader for the printer Thomas Anselm, Melanchthon was involved in the 1516 publication of the world chronicle of Johannes Nauclerus, which made him increasingly aware of the importance of history. During his stay in Tübingen, his first academic works appeared in print: his successful edition of the Roman playwright Terence in 1516, a Greek

grammar in 1518, and his speech *De artibus liberalibus*, in which he presented his humanist educational program.

Arrival in Wittenberg

On Reuchlin's recommendation, Melanchthon was appointed as professor of Greek at the faculty of arts at the university of Wittenberg in 1518 by the Saxon elector Frederic the Wise (1463–1525). When he delivered his famous inaugural address, *De corrigendis adulescentiae studiis*, on 28 August 1518, he presented the principles of his educational program in a spectacular manner that deeply impressed his audience, among them Martin Luther. He and Melanchthon maintained a rewarding friendship until the former's death in 1546.

In addition to his lectures on Greek authors, Melanchthon was also teaching Hebrew as a substitute professor. The theological faculty awarded Melanchthon a degree of *Baccalaureus biblicus* in 1519, which added biblical lectures to his demanding teaching load. Moreover, Melanchthon gave private lessons for students who resided at his home. In 1521, he published a lecture about St. Paul's Epistle to the Romans as *Loci communes*, offering the first systematic presentation of Reformation doctrine. With these "commonplaces," Melanchthon adapted a literary genre of Antiquity, which Erasmus had revived as a method of academic teaching. Melanchthon also reformed the curriculum as rector of Wittenberg's university in the winter semester of 1523/1524. In Melanchthon's eyes, solid linguistic knowledge was a necessary prerequisite of academic studies. He therefore promoted Latin grammar as well as rhetoric, for the teaching of which he introduced a new format of speech exercises, the *declamationes*. His dedication to the university of Wittenberg is evident in the new statutes which he authored in 1533 and 1545 for the theological and philosophical faculties as well as the university as a whole while he was dean for the faculty of arts. He declined all offers by other universities and would remain at Wittenberg until his death.

Religious Reformer and *Praeceptor Germaniae*

Since the first encounter of Luther and Melanchthon, a relationship of "friendly collegiality" (H. Scheible) had developed between them. Fourteen years his senior, Luther won Melanchthon for the Protestant faith. Melanchthon was already present at the Disputation of Leipzig in 1519, the first major confrontation between Luther and the Roman-Catholic church. When Luther was brought to the Wartburg near Eisenach in 1521/1522 by elector Frederic the Wise in order to protect him from the imperial ban of Charles V, Melanchthon turned into one of his closest associates in Wittenberg, promoting religious reforms as advocated by Luther. On 29 September 1521, he celebrated the first evangelical Lord's Supper with a few students. After Luther's return to Wittenberg, Melanchthon assisted him in translating the bible into German, building on his profound knowledge of Greek.

C-onfronted with radical proponents of the reformation and "enthusiasts" before and during the Peasants' War (among others with the "Zwickau prophet," Anabaptists, Andreas Bodenstein von Karlstadt, and Thomas Müntzer), Melanchthon became convinced of the importance of a solid education for preachers. When elector John of Saxony (1525–1532) decreed visitations in his territories, Melanchthon was closely involved.

Melanchthon acted as an advisor for the Protestation of the reformist imperial estates at Speyer in 1529 and at the 1530 imperial diet in Augsburg. Drawing on Luther and other reformers' writings, Melanchthon authored the *Confessio Augustana*, the foundational document of the Lutheran church, which was to become imperial law by the 1555 religious peace of Augsburg. Likewise, Melanchthon was a member of a commission striving for religious peace and he participated in religious disputations in Worms and Regensburg (1540/41) as well as in Worms (1557). For the imperial diet of Worms in 1545, he prepared a comprehensive account of the reforming principles of the Wittenberg theologians, known as the "Wittenberger Reformation."

His advisory activities spread his fame beyond the borders of Saxony into all of Europe. Elector Joachim II of Brandenburg enquired for his advice and in 1538, Melanchthon received an invitation by king Francis I of France, but was ordered to decline it. In the course of negotiations about an alliance between England and Electoral Saxony, Melanchthon was even in contact with Henry VIII. In 1543, he participated in the reformational attempt of Archbishop Hermann of Cologne in Bonn.

At all times, Melanchthon aimed for peaceful resolutions to the problematic issues of his time, which, however, did not come about due to the escalation of the theological and religious-political antagonisms in the empire.

Melanchthon's dedication to Protestant doctrine becomes particularly evident in his untiring drive for improvement in educational matters. As he participated in the founding of schools and reforming of universities besides authoring teaching manuals for almost any contemporary academic discipline, Melanchthon's ideas were regarded as exemplary throughout Europe.

Melanchthon's indefatigable pedagogical activities caused him to be known by the honorable title of a "teacher of Germany" (*Praeceptor Germaniae*) during his lifetime. In the latest research works, he is sometimes even called *Praeceptor Europae*, in order to underline the extensive influence of his teaching manuals throughout the continent.

Melanchthon's Legal Conceptions

Although Melanchthon was no legal scholar, his juridical knowledge was quite extensive. Soon after his arrival at Wittenberg, he began to attend the lectures of law professor Hieronymus Schürpf (1481–1554) about Roman and Canon Law and to reflect on the role of equity (*aequitas*) in adjudication. He likewise covered secular legal institutions, such as marriage and family, proprietary, contract, and criminal law, which Melanchthon regarded as foundations of societal order. He was therefore frequently consulted for advice, among other things in matters of marriage law.

After the conflict of the Wittenberg reformers with the "enthusiasts" and the Peasants' War of 1525, Melanchthon began to plead for unified legislation set out in writing. Idealizing the Roman legal system of Antiquity, which he regarded as a particularly wise arrangement, especially suited for peacebuilding, he advocated contemporary reception of Roman Law.

Melanchthon also worked intensively on the laws' scope of application, which embraces questions of political order ("ordo politicus"). In the course of his critical reception of Aristotle's Politics, Melanchthon treated, among other things, the meaning and role of political authority ("Obrigkeit") as a guardian of social order. With his theory of authority ("Obrigkeitslehre"), Melanchthon created a new justificatory foundation for secular government, ascribing to subjects more demanding duties of obedience and strictly limiting the right to resist. In the development of Natural Law, Melanchthon held a key position, linking medieval views of Natural Law with rationalist conceptions of natural rights in the seventeenth century.

Melanchthon's Conception of Natural Law

Melanchthon's legal conception is peculiar in its inextricable unity of the areas of law and morals. Based on this, he presents a hierarchy of the sources of law, attributing different weight to particular norms. At the top of this hierarchy, there is divine right ("ius divinum"), from which natural right ("ius naturale") is derived. From their respective levels, both determine the "ius humanum," which finds its practical expression in civic order. Melanchthon accentuates natural law; "societas civilis," civil society, receives its very existence, form, and order from "lex naturae." Building on ancient and medieval traditions of natural law, Melanchthon accepts that the origin of "leges" lies in human rationality; yet, this "ratio humana" is much too biased and blind ("capta occaecataque") for being able with natural

instinct alone to securely discern the good and just rules which conform to Natural Law.

Melanchthon's doctrine of Natural Law is characterized by the definition of three principles of nature derived from the biblical Ten Commandments, which regard man as a sinner, whose weaknesses always have to be taken into account. This illustrates the core of Melanchthon's conceptions, deriving the general principle of ethics from God. According to Melanchthon, the laws of nature were not just found in biblical Scripture, but also within the hearts of humans. After the fall of mankind, however, men were bewilderen in their knowledge about the laws of nature. Mere introspection was therefore insufficient to specify these laws because individuals were drawing diverging conclusions from their hearts' knowledge. Hence, the natural fundamental laws had been written down in the Ten Commandments. True and real natural law was expressed there because human rationality could only perceive the right distinction between Good and Evil as well as the laws of nature applicable to all men by means of God's revelation. Thus, the Ten Commandments represented the core of moral and legal fundamental rules, based on which men and nations could live together in peace. Because Melanchthon regarded Natural Law as specified by the Ten Commandments as the very foundation of state and society, his doctrine has been called "biblical." For him, "societas civilis" rests on the Bible, while it finds its expression in institutions of the secular legal order, the so-called "ordo politicus." All juridical fields of social life, such as, among others, contract law, family law, criminal and property law, are therefore derived from this superordinate norm.

In the course of his life, Melanchthon treated all of these topics in great detail. In these matters, he advanced opinions which often did not accord with those of Luther, but derived from his far-reaching legal interests and his personal relation with his law tutor Hieronymus Schürpf. This in turn helps to explain Melanchthon's influence among his students in Wittenberg with respect to questions of Roman and natural law.

Concluding Remark: Reception of Melanchthon's Writings

With his *Loci communes*, Melanchthon introduced a new type of science into academic thinking, which from then on was regarded as an example of an indispensable compendium. Melanchthon's importance as a humanist and educator turned his programmatic writings into highly influential models. Among legal scholars, who had been searching for a systematization of Roman law for some time, this systematic representation of fundamental principles was regarded as pathbreaking. Yet, the main impact of Melanchthon's legal conception can be found with the Protestant legal scholars who were working on Natural Law. They range from Melanchthon's contemporary, the northern German lawyer and reformer of Marburg university, Johannes Oldendorp (1480/1487–1567), to the subsequent founder of modern natural law doctrine, Hugo Grotius (1583–1645). Emanating from Wittenberg, legal scholars all over Europe were spreading a new systematization or a natural law doctrine shaped by Melanchthon's definition.

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► Aristotle: On Justice
► Grotius, Hugo
► Luther, Martin

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Menchaca, Fernando Vázquez de

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Introduction

Fernando Vázquez de Menchaca (1512–1569) was a Spanish jurist. He studied at the Universities of Valladolid and Salamanca and was a full professor of Law, although he did not pursue a career in teaching. He held different positions within public administrations such as his time as a judge in Seville and a judge of the General Accounting Office of Castile. He was sent by Felipe II to the Council of Trent owing to his well-known legal talent. His natural law theory beliefs are manifested in his major work entitled *Controversiarum illustrium aliarumque usu frequentium libri tres*, with the main edition being published in Venice in 1564. Before he died, he wrote a paper entitled *De vero iure naturali*, "but it was never published and no one knows the whereabouts of the manuscript." (Hervada 1987:246).

Main Contributions

I will highlight three areas of study undertaken by Vázquez de Menchaca, due to their philosophical, legal, and political importance: the concept of natural law, the defence of political individualism, and his perspective on conflicts occurring within an international context.

He combined the voluntary basis of natural law theory, affirming that its content depends on the will of God, with a rationalist basis, which posits

that *recta ratio* is possessed by all humans, and thus allows the content of this right to be understood. Vázquez de Menchaca is usually classified as an author who contributed to the secularization of natural law theory, insofar as that he did not approach the contents relating to Law and Justice, as seen by theologians, in the same way as, for example, Francisco de Vitoria or Domingo de Soto, had previously done. Nevertheless, in light of the comments made by Reibstein, Verdross, and Welzel on the work of Vázquez de Menchaca, who affirmed the secular imprint of his natural law and described him as the initiator of this new trend at the end of the sixteenth century, these opinions that were placed into context by Carpintero. He defends that Menchaca "presents his theories outside of Moral Theology," in a similar way as "medieval jurists had already done in approaching natural law outside Metaphysics" concluding, moreover, that our jurist's greatest contribution was to "make the medieval concepts of natural law useful elements in legal argumentation." (Carpintero 1975:83, 82 y 287).

The elaboration of his philosophical and political thought begins by defending the existence of a fundamental principle: "All legitimate power. . .had been instituted, created, received or simply admitted solely and exclusively for the good of citizens." (Vázquez 1564:100, vol. 1.). On the basis of this principle, he gathers many conclusions in which he goes on to defend, including that political power seeks to make individual freedom possible prior to the creation of the political community that has been generated. In turn, thanks to the exercise of the will of the subjects, the basis of the prince's power is formalized through a contract of mandate with the citizens, who also have a right to resist against the tyrant. In contrast to the opinion of other thinkers, such as Domingo de Soto, he rejects the idea that the political community represents a whole entity to which the parts must sacrifice themselves, understood as individual beings, and affirms that "well-ordered charity must begin with oneself"(Vázquez 1931–1934:267, vol. 1).

Vázquez de Menchaca's contributions concerning the problems of the *ius gentium* constitute his most well-known legacy, as demonstrated by the many references Grotius made to the ideas of our author in his book *Mare liberum* (1609). Following, in part, the doctrines of Vitoria and Soto, Vázquez argues against those who asserted the universal power of the Emperor or the Pope. Additionally, he refutes that no one has been, nor will be, "lord of the whole world" and affirms that, according to natural law, "all men are equal." (Vázquez 1931–1934:6, vol. 2); all people should be considered free and equal among themselves. He reiterates the principle that only consent is the basis of legitimate power (Vázquez 1931–1934:74, vol. 3). Thus, the idea that oceans belong to no one who can legitimately restrict or prohibit navigation is derived from his arguments.

Related Topics

Modern natural law theory and secularization, origin, nature and limits of political power, consent, individualism, right of resistance, freedom of the seas and *ius gentium*.

Cross-References

▶ International Law: Legitimacy of
▶ Positive Law and Natural Law

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Mercy and Clemency

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Introduction

Mercy and clemency have long accompanied the practices and institutions of law, justice, and power. While it is hard to conceive of a legal system that could be directly founded on or defined in terms of mercy and clemency, nonetheless they – or, at least, calls for them – will almost certainly make themselves felt in any real-world legal system. This entry does not attempt a summary of the rich history of the jurisprudence of mercy and clemency since Seneca counseled Emperor Nero on the virtue of *clementia* 2000 years ago. Instead, it provides a sketch map of some of the main contemporary jurisprudential issues raised by mercy and clemency, in particular the question of whether they can be accommodated within the domains of law and justice, and, if so, how.

Defining Mercy and Clemency

First, it will help to have some definitions in view. "Mercy" and "clemency" are not technical legal terms, and so we can turn to standard dictionaries for initial guidance to their ordinary meanings. The *New Shorter Oxford English Dictionary*, for example, tells us that "mercy" is "forbearance and compassion shown to a powerless person, esp. an offender, or to one with no claim to receive kindness; kind and compassionate treatment in a case where severity is merited or expected" and that "clemency" is "mildness or gentleness of temper in the exercise of authority or power; mercy, leniency." Thus, in contemporary English, the two concepts overlap to a large degree, though it seems fair to suggest that "clemency" can be seen as the broader term, more readily covering simple leniency in punishment as well as the forbearance that pulls up short of what justice requires, whereas "mercy" tends to be used more for the latter cases and not mere leniency. However, "clemency" can also be used more readily in a narrow sense to cover lenient acts that are not motivated by kindness or compassion, whereas such motivation is integral to mercy. Nonetheless, the terms are sufficiently closely related in meaning to allow us to focus on the term "mercy" to cover both phenomena for most of this entry. It should be noted, though, that in legal discourse "clemency" is used as the primary term in the context of "executive clemency," at least in republics.

An expanded, and more philosophically delineated, definition of mercy in specifically legal contexts can be drawn from the OED definition. Almost any such attempt to further define mercy will be contestable, but the following five elements seek to be true to the gist of the OED definition. First, the person (A) who does a merciful act (or performs an act of mercy) with regard to another person (B) must, by law, have some sort of legitimate power over B, which enables A to impose some significant form of suffering or burden on B, such as a loss of liberty or property. Second, within the context of that legally defined relationship between A and B, A has a good reason to impose that suffering or burden on B ("good" in the sense of a reason that legitimates or justifies A imposing the suffering or burden on B), e.g., the loss of liberty is B's just deserts or A has a right to take

possession of B's property. Third, A intentionally refrains from imposing the suffering or burden on B. That refraining may be an omission or some positive act, which involves imposing a lesser burden on B. Fourth, within the relevant legal context, B has no claim or right that A refrain from imposing the suffering or burden on them. Fifth and finally, A so refrains out of a compassionate or benevolent desire to avoid imposing the suffering or burden on B. From the perspective of mercy (or of the merciful agent), such a compassionate or benevolent motive serves to legitimate or justify that act of mercy. Whether that legitimation or justification is compatible with the original reason for imposing the suffering or burden – or indeed compatible with the values of the legal system that contextualizes and grounds that reason – is one of the key issues in the debates about mercy. (Note that Hurd (2007) regards "clemency" as the act, such that mercy is clemency plus a particular motivational element.)

Someone might refrain from imposing the relevant suffering or burden not out of compassion or benevolence for the person whose suffering is in prospect, but in order to demonstrate their own power by its ostentatious restraint, or to reveal their stoicism in the face of an expected display of vengeance, or to please the crowd, or because they simply lack confidence in knowing what justice demands, and so on (see Tudor 2003; Markel 2004). These various alternative motivations for leniency (which may or may not have their own justification) are not part of mercy proper or, at least, they are at a notable remove from the central cases of mercy. That is not to say that an act of mercy cannot have further aims, beyond the immediate compassion or benevolence, such as expressing forgiveness or seeking to engender gratitude and efforts to reform in an offender. But these will be distinct matters.

Note that mercy is not defined simply as being opposed to justice. Mercy does not primarily aim to avoid justice as such; rather, it is motivated by a compassionate desire to avoid causing suffering, especially suffering that would be severe, harsh, or cruel. As Seneca (2007) noted, mercy is set in opposition to cruelty, not strictness. However, where the original reason for imposing the suffering in question is that it would be just to do so, or what justice requires or simply permits, then mercy as the compassionate withholding of that suffering is prepared to override, avoid, or abandon justice.

Note also that the above definition of mercy in legal contexts does not cover all the things we might want to describe as acts of mercy. "Works of mercy," such as feeding the hungry and visiting the sick, and "mercy killing" (euthanasia or assisting suicide) are the most obvious kinds of mercy not covered here, as they take place outside the legal context. They are also less a matter of refraining from exercising a legally granted power to impose suffering and more a matter of intervening, out of compassion, to end or reduce existing suffering or to prevent its arrival. The above definition of mercy in legal contexts also does not capture, at least not readily, the archetypal case of the merciful victor on the battlefield who has the brute power of life and death (or freedom and slavery) over the vanquished but, out of compassion, spares their life (or freedom). The victor's power is not granted to them by a legal system; it is a simple brute fact that they have it and, depending on their mood, they may well exercise it. Of course, there can be military conflicts (and similar) in which laws or honor codes do grant or acknowledge such power to victors, perhaps as part of the "spoils of war." Depending on how juridified such conflicts have become, victors with such power can be seen as analogous to the successful plaintiff to whom the law has given the right to enforce an order for damages against the defendant.

The Agents of Mercy

Who, in legal contexts, is able to exercise mercy? Judges, especially sentencing judges, are usually, and quite reasonably, seen as the primary agents of mercy in jurisprudential discussions. But it is also important to note that other merciful agents are found within the legal system, broadly understood, including the head of the executive, jurors, victims, and plaintiffs,

as well as police, prosecutors, witnesses, and gaolers. All of these are given some sort of power over defendants by the legal system, and this gives them the capacity to exercise that power mercifully. Moreover, the permissibility or legitimacy of mercy will often be dependent on whose mercy is being considered. For the sake of brevity, we shall mostly be concerned here with the mercy of judges, the head of the executive, and victims/plaintiffs.

Occasions for Mercy

It also helps to focus the discussion to have in view some of the more common occasions or grounds for mercy, that is the more common contexts of suffering or cruelty, which tend to attract mercy within the legal system. While the range of situations in which a merciful compassion can be engaged is open-ended, in legal practice, mercy is perhaps most commonly seen as called for in four types of situation: (i) where the offender is already experiencing some significant and exceptional suffering, such as grave ill-health or a tragic personal misfortune, especially where this suffering is unconnected to their original offending, (ii) where the punishment (e.g., imprisonment) would lead to severe hardship on their dependents, (iii) where the offender is facing the death penalty, and (iv) where the offender is sincerely and deeply repentant and remorseful. In these sorts of cases, the merciful agent sees it as intolerably cruel or harsh to subject the offender to what they deserve according to law.

Health grounds are usually the less controversial ones, particularly if the offender is close to death or severely incapacitated. Releasing a long-serving prisoner so that they may die from their advanced cancer at home is a typical such case. Cases of personal misfortune, such as the death of a child, whereby the offender is seen to be already "suffering enough" and so is exempted from further suffering in the form of punishment, can be more controversial because of the variations in what counts as a misfortune and in how its gravity is to be assessed. The cases of hardship to dependents provide for a complex problem: the merciful act here is effectively aimed at protecting the offender's dependents, rather than the offender, from a cruel fate, with the offender being almost like a side-beneficiary of the mercy shown to their dependents (see Smart 1968). Mercy in the context of the death penalty is often caught up in the general debates about the very justifiability of death as a penalty, and so the reasons for mercy here will often be less focused on the individual offender, unless there is something especially cruel about putting a particular offender to death, e.g., because of their youth or mental disability (see Garvey 1996). The case of mercy to the repentant and remorseful is a particularly controversial issue. Some commentators reject the idea that repentance provides any reason (whether as matter of justice or mercy) to mitigate state-imposed punishments (e.g., Duff 2007), while those who say repentance should or may have an effect divide between those who say that justice requires it to be treated as a mitigating factor (e.g., Proeve and Tudor 2010; Maslen 2015) and those who say it is a matter of mercy to lessen the penalty imposed on the already repentant offender (e.g., Tasioulas 2003, 2011).

The notion of "grounds" for mercy raises the issue of consistency in decision-making: if any of these matters ground or legitimate mercy in one case, it would seem that they should do so in like cases in future – and this, of course, begins to sound like there could be a legitimate expectation of, or even a right to, mercy, and injustice where it is not forthcoming. In contrast, some maintain that mercy as such cannot be constrained by such things as grounds and does indeed have an element of caprice (see Rainbolt 1997; Markel 2004). On a strong version of this view, any aversion to cruelty or harshness could legitimately found a merciful intervention, no matter how capricious, personal, or even whimsical that aversion might be, so long as it was a genuinely compassionate and benevolent act (though Markel denies that even such a motive is necessary). However, it is relatively rare for judicial mercy to arise in cases other than those identified above. In contrast, the problem of caprice – and, worse, bias, and personal favoritism – arises much more readily in cases of executive clemency (see further below).

Mercy As Equitable Justice

We now turn to the question of how mercy stands in relation to justice and the values and purposes of the legal system. Is mercy in the legal context ever justified or legitimate? One response to this question is to deflect it by saying that in fact much of what advocates of mercy want to allow can already be accommodated – and better legitimated – under the name of equity, an approach to justice that is not bound by rigid and narrowly construed legal rules (see, e.g., Sigler 2016; see also Nussbaum 1993 and Aristotle 2004). On this approach, if a given punishment that is legally required or strictly deserved would nonetheless also be cruel or humiliating, then on a broader, more compassionate and humane view of what justice means, it would be unjust. A judge committed to justice in the broader, equitable sense would then make an exception to the strict legal rule that required that outcome. That can be thought of as a merciful intervention, but, on this approach, such an intervention is primarily an equitable bending of the law to make sure that justice is done. Moreover, it could then provide a precedent for future similar cases, and so serve as a longer-term corrective of the law.

Even if equity can do much of the work of mercy in avoiding cruel excesses of power, cases will still arise where a merciful act really is not an equitable corrective of legal justice gone wrong but is purely and simply a special dispensation to an individual that pulls up short of what justice – however equitably construed – requires. In such cases, the question is whether these instances of non-equitable mercy are a tolerable or intolerable departure from justice. That is, the mercy-as-equity approach does not ultimately solve the problem but postpones it, though in the postponing it may well manage to accommodate a wide swathe of what many would regard as merciful acts.

Mercy As Distinct Value, with a Place in the Legal System

Where mercy is not simply justice in the guise of equity, but is a distinct value that can conflict with justice, the question arises whether this value nonetheless has a place within the legal system, particularly in relation to the institutions and process of criminal justice. Those who argue that mercy does have such a place can be divided roughly into those who see mercy as having a proper place internal to the values of the legal system and those who see mercy as ultimately an alien intrusion into the law but in a way that is or can be an acceptable compromise. Tasioulas advocates for the former approach, arguing that "the perspective of charity or love to which mercy gives expression is accorded room alongside that of justice in our understanding of the values integral to the institution of criminal punishment, even if retributive justice occupies a more fundamental place" (2011: 39, see also Tasioulas 2003, 2007). On this approach, the liberal state should honor both justice and mercy; they are both legitimate public values and both are internal to the liberal state's approach to responding to crime, even if they may conflict. Though justice is the greater part of the story, that does not mean that it trumps mercy in every case where they conflict.

In contrast, Duff views mercy as a value distinct from and external to those at the core of the criminal justice system, but thinks this distinctive value is to be cautiously welcomed, on the basis that this value is a worthwhile supplement to – or even an appropriate departure from – the judicial role. "[M]ercy," he says, "as something distinct from (indeed, opposed to) retributive justice, can play a proper but limited role in a system of criminal justice. . . . However, its role is not that of a factor whose relevance is grounded in the proper aims or values of the criminal law itself: it rather intrudes into the criminal law, as a voice that speaks from outside the law in tones that belong to distinct normative perspectives" (2007: 387). Mercy intrudes, on Duff's view, through the fact that the judge, though fulfilling a public role, is also a human being and a citizen. Mercy is "not a virtue internal to the role of sentencer within a system of criminal law. It is, rather, a virtue of the human beings who fill that role" (2007: 373). While the judge should be guided by her public role, "as a human being (and citizen) she should also be able to put the

criminal law and criminal punishment in its place, and to recognise that in some cases . . . it is not appropriate for her to think and act purely from within the perspective of the criminal law — purely within the confines of her role" (2007: 373).

Mercy as Incompatible with Criminal Justice

Many other theorists, in contrast, reject the legitimacy of mercy in the penal context, viewing it as having no proper place in criminal justice (see, e.g., Twambley 1976; Murphy 1988; Harrison 1992; Markel 2004; Hurd 2007). There are different, though complementary, objections to mercy in this context. First, mercy might be seen as simply absent from the proper description of the judicial role (and that of other state officials) – there is no place for mercy here. If you are being merciful, then to that extent you are not being a judge. As Murphy pointedly observed, "[j]udges in criminal cases are obligated to do justice. So, too, I would argue, are prosecutors and parole boards in their exercise of discretion. There thus simply is no room for mercy as an autonomous virtue with which their justice should be tempered. Let them keep their sentimentality to themselves for use in their private lives with their families and pets" (1988: 173–4).

Second, mercy might be seen as something which one needs a certain authority or standing to exercise – and this belongs only to victims, those wronged by the offender, not state officials who are not parties to the original offending. On this approach, not only is mercy not part of the judicial job description, "being a judge" positively excludes one from having the standing to be merciful. "[T]hose who would seek to forgive our wrongdoers in our stead," says Hurd, "to waive obligations of repair owed to us, or to suspend the burdens of retribution that are due those who injure us, seem to lack any moral standing to be merciful" (2007: 398).

Third, mercy might be seen as something that would actually undermine the performance of the judicial function (and other allied official functions). Merciful decisions would, on this view, produce inconsistency and unaccountable arbitrariness, and sometimes outright injustices. This would, in turn, more generally weaken the capacity of judges to fulfill their role and, ultimately, the authority of the judicial role itself. Thus, in order to have a properly functioning judiciary (and other state authorities), mercy must be excluded. As Harrison notes, "[o]nly by forgoing mercy can we enable the state (or other authority) to behave like a fully rational entity, accountable for all its actions to the people over whom it has power. Otherwise we have mere power without accountability" (1992: 118).

Private Mercy

Most writers on mercy, whatever their stance on mercy in public roles such as judging, are content or even eager to affirm that mercy is legitimate and indeed a virtue when exercised by individuals in their private capacity. This acceptable domain of mercy is what Murphy called the "private law paradigm" of mercy (Murphy 1988: 175). Civil plaintiffs have some power, legitimated within the legal system, to cause the defendant to suffer by suing them and, if successful, seeking enforcement of the court order against the defendant. If a plaintiff chooses not to bring about that suffering, by refraining from going to court in the first place or from seeking enforcement of the court's order, and they do so out of compassion for the defendant, then that will be a case of mercy. Victims of crime have a similar but more limited power, in that they may refrain from making a complaint to the police in the first place. And, of course, in the personal, nonlegal sphere there is much scope for mercy and forgiveness (see Hurd 2007 on the importance of mercy in personal relationships).

Such private mercy is generally regarded as readily permissible because it is seen as the victim's or plaintiff's *right* to make their complaint or not. It is a matter for them to decide, and such mercy as they choose to exercise by waiving that right is properly in their gift. The question does arise, however, whether the victim/plaintiff can

sometimes not merely have the right to act mercifully but in fact be *obligated* to show mercy to the defendant as a charitable duty to "forgive those who trespass against us." Or perhaps such mercy on the victim/plaintiff's part would at least be a supererogatory act, something to their moral credit without being obligatory. Alternatively, from a virtue ethics perspective, it might be thought that such mercy or forgiveness could sometimes amount to an admirable display of the virtue of magnanimity, in contrast to the vice of pettiness, in response to the defendant's behavior.

There might, however, be cases where a victim or plaintiff *is* under some sort of obligation to press their complaint or collect their damages. This would most likely be in situations in which the interests of others are at stake and the victim/plaintiff has some sort of obligation to protect those interests. There might also be cases where some say that a victim/plaintiff "owes it to themselves" to make their complaint, that their duty of self-respect means that they should indeed use their power to make their complaint or assert their claim (see Murphy 2003; Hurd 2007). This might especially be the case where the defendant originally occupied a position of dominance over the victim/plaintiff such that mercy from the victim/plaintiff would not really be an exercise in restraint in the use of power but rather a further episode of their disempowerment vis-à-vis the defendant. Mindful of that preexisting disadvantage, some observers might not want to impose a "duty" to complain on such a victim/plaintiff (and so further compound their plight should they fail to perform such a duty) but simply say that it would be good for them if they found the strength to do so and thereby stand up to the defendant.

The Problem of Executive Clemency

The contrast between the different appraisals of public and private mercy comes to a head in executive clemency (and the royal prerogative of mercy). In most jurisdictions around the world, the head of the executive has a constitutional power to grant pardons or commute sentences (see Novak 2016; Moore 1989). Much of the controversy accompanying acts of executive clemency arises when the head of the executive is expected to represent the state – and so be subject to norms such as impartiality, consistency, and rationality – but ends up exercising the clemency power in ways that resemble the capriciousness of private mercy. There is also usually no guarantee that a properly merciful motive (grounded in an altruistic compassion or benevolence) is actually what guides executive clemency decisions. It is not uncommon, certainly in the United States, for clemency decisions of the federal president or the state governors to be very controversial, whether as being supposedly "too soft" on wicked criminals (as in death penalty commutations) or as being exercises in personal or political favoritism.

While the exercise of executive power need not be constrained in quite the same way that judicial power should be constrained (for example, it could well be argued that compassion and flexibility properly have a freer rein here), nonetheless, many would argue that it is not simply a personal prerogative of the individual occupant of the office, despite its historical origins (and the continued use of the phrase "royal prerogative"). This is because, unlike the private victim/plaintiff, the head of the executive has basic responsibilities to the legal system as a whole, complementary to – though not identical with – those of the judiciary. This responsibility makes executive clemency more like a mechanism to correct the mistakes and excesses of the legal system and much less like a personal perk of executive office. What constraints or systems of review could be made to work in the context of executive clemency is an open question.

Conclusion

Law involves, among other things, the exercise of power and, often enough, the imposition of suffering. Justice is perhaps the most important value at work in the effort to prevent law abusing its power and creating needless suffering. Mercy steps in also to try to prevent abuse and cruelty on the part of the law. In this sense it is an

alternative, perhaps rival, attempted solution to the same general problem that justice addresses (see Bull 2019 for an attempt to give mercy this sort of augmented and elevated role in political philosophy). Justice, though, seems more at home in the language of the law, with its concern for consistency, impartiality, and equality. Mercy, in contrast, resists complete legal domestication, partly because it uses a different vocabulary and speaks in a different voice. Nonetheless, it seems to be a beguiling voice, one to which the law is repeatedly drawn, whether for good or ill.

Cross-References

► Destituent Power
► Justice: Retributive

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Merit Goods

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Introduction

The German-born Harvard economist Richard A. Musgrave (1910–2007) introduced the twin concept of merit wants and merit goods to the economic analysis of the public sector. When he coined the name "merit goods" in 1957, he pointed out that certain goods such as free school lunches or subsidies to low-cost housing did not have the characteristics of a pure public or private good. If a government is dissatisfied with the level of consumption of such goods in the free market, it may intervene to increase consumption, even against the wishes of consumers, to promote their private as well as some social interests. Musgrave noticed that a term was missing for this domain which could not be described in terms of either private or public goods, although he

acknowledged that, e.g., in education, there was an overlap between public (what he called social) and merit wants.

The topic of merit goods is relatively marginal in economics; most of the relevant literature produced in the first 60 years is available in a sizable anthology (Ver Eecke 2007). This collection, however, has arguably generated further interest in the topic. The last 10 years saw important new contributions, linking the discussion on merit goods not only to behavioral economics and nudges but also to historical and heterodox schools of economic, political, and social thought. One of the founding fathers of the Law and Economics movement, Guido Calabresi, has recently suggested integrating merit goods into legal-economic analysis (Calabresi 2016, see also Desmarais-Tremblay 2019b).

The Concept of Merit Goods in Musgrave's Work

In the 1950s, Richard A. Musgrave (1957, 1959) introduced the concept of *merit wants* in the theory of public finance to refer to individual needs for which the government often provides goods and services beyond what the market provides because these needs are of high social importance (Desmarais-Tremblay 2017). In the 1960s, such goods and services came to be known as *merit goods*. Musgrave argued that these goods, while not genuine public goods, are (and should be) produced or provided publicly and consumed mandatorily, irrespective of individual preferences. The twin concepts serve to formalize the welfarist idea of paternalism with regard to certain publicly provided or publicly subsidized goods.

The list of merit goods discussed or suggested by Musgrave is rather long and diverse (see Ver Eecke 2013, p. 36, n. 4), including social housing for the poor, school milk, health services, funding for the arts, and provisions for the protection of natural and cultural heritage. Musgrave (1959, p. 178) also raised the possibility that governments have a responsibility to regulate the consumption of *demerit* goods such as alcohol, tobacco, or prostitution.

Some of Musgrave's broader formulations of the idea include cases of regulation or public expenditure which are now covered by mainstream economic categories of market failure. Thus, merit goods often have some public good characteristics (non-rivalry and non-excludability). Their provision can sometimes be justified by externalities or asymmetric information. Sometimes, they coincide with or are driven by redistributive concerns. However, Musgrave (1987) insisted that there can be a number of further reasons, independent of standard economic arguments for overriding individual preferences.

Although Musgrave occasionally referred to ideas of political philosophy, including Rawls (1971), he failed to clearly explain the normative theory underpinning merit goods as a distinct kind of goods to be provided through collective decision (Desmarais-Tremblay 2021a). His main ideas are sufficiently clear though, at least in the context of modern democracies and mixed economies. For Musgrave, considerations of social welfare can legitimately override "autonomy" only if they are (directly or indirectly) supported by the people. At least in part, their normative justification is political: the legitimacy of public provision of merit goods relies on some implicit conception of collective sovereignty. Musgrave rejects the idea of a benevolent despot implementing the provision of merit goods. Even if people might not always know in detail what is good for them, policies have to be framed in a way that they could be accepted by the population under ideal conditions of deliberation (Desmarais-Tremblay 2019a).

Merit Goods in Economics: Between "Consumer Sovereignty" and Paternalism

The idea of merit goods proved both enigmatic and controversial in economics. The most influential criticism was put forward by McLure (1968), a prominent scholar of public finance and former student of Musgrave. McLure contended that merit goods had no place in Musgrave's framework. Even if the concept could capture existing public expenditures, it

could not be justified in a normative economic theory of the public sector. Indeed, it is far from obvious how merit goods fit into the normative assumptions and the conceptual framework of mainstream economic thinking and how they can be represented in mathematical models.

As for substantive issues, mainstream economics is based on the ideal of consumer sovereignty and freedom of choice. For markets to function as a domain of free interaction and to bring about social welfare, an institutional framework is required (roughly, property rights should be well defined, contract enforceable, anticompetitive behavior prohibited), and various market failures may require further intervention. These include negative externalities (uncompensated harm to third parties), cases where individual decisions lack rationality and/or autonomy, and public goods which cannot be produced or provided through private market transactions. Yet, any government intervention in response to market failures may end up in a government failure, thus making nonintervention superior overall.

In the British line of utilitarian economic thought, as formulated or inspired by JS Mill and H Sidgwick, social welfare maximization does not categorically rule out overriding individual preferences. Mill explicitly argues for paternalistic interventions (i) when the individual is not the best judge of his interest and (ii) when unorganized self-interested behavior does not lead to the greatest social welfare (Mill 2006 [1848] V.11; see also Medema 2009, Chapter 2).

In the USA, both early twentieth-century progressive institutionalist economists and left liberals of the 1960s argued for policies that, through collective provision of or subsidies for education, infrastructure, and community services, would aim to increase the level of consumption. In this view, government intervention is justified by the unfulfilled wants of the people (Hansen 1947, p. 167, see also Galbraith 1958).

Other economists such as Head (1969) tended to move merit goods analysis toward a version of soft paternalism which in turn can be formalized in mainstream or behavioral economics as a regulatory intervention responding to information failures or cognitive and emotional biases of individuals. Head argued that, properly understood, the provision of merit goods does not actually interfere with consumer sovereignty.

Some economists have suggested broadening the concept of individual preferences to explain how nonoptimal choices or inconsistent choices might in fact reflect an internal tension between lower-level preferences and higher-order preferences. Merit goods could be goods demanded by individuals when they are given the opportunity to reveal their higher-order preferences (for a concise summary of this perspective, see Clément and Moureau 2018).

Recently, Sunstein and Thaler (2003) initiated a normative or ideological project of libertarian paternalism and suggested regulatory tools for designing choice architectures (nudges) to promote individual interests while maintaining freedom of choice. This has generated a fast-growing body of literature which occasionally refers to Musgrave's concerns and concepts as well (Munro 2009; Mann and Gairing 2012; Sturn 2015; Kirchgässner 2017). In fact, White (2019) argues that "nudges can be considered delivery mechanisms for merit goods" which in turn can be justified by objective rather than subjective interests.

As far as formal modeling is concerned, at first sight it seems that merit wants and merit goods cannot be represented by individual utility functions. Some suggested that they should be modeled as a special type of externality. Yet, as a conceptual matter, to talk about merit goods only makes sense if a government (some decision-making body "representing" society) exists. The Bergson-Samuelson social welfare is a typical way to formalize such a social perspective. In line with economists' concern for individual autonomy, Paul Samuelson posited that social welfare functions would generally be individualistic, that is, they would value social welfare only through the individuals' own valuation (utility function). Departing from this assumption, Pazner (1972) suggested representing merit goods by nonindividualistic social welfare functions. Formally, merit goods would be goods that enter as direct arguments in the social welfare function,

independently of how they are valued in the individual utility functions.

In other words, "in the case of merit wants or goods, the welfare function that the policymaker is supposed to maximize on behalf of the individuals is modeled in a way that it is formally different from how the individuals in question themselves are modeled to perceive and reveal their preferences. In this approach, consumer sovereignty is openly questioned and abandoned in favor of a policymaker's supra-individual assessment as to how much of certain 'merit goods' should be provided to and consumed by individuals" (Cserne 2012, pp. 36–37).

In brief, merit goods can be rationalized in terms of social choice theory where individual market choices are overridden in the name of what a particular (political) community considers worthwhile for individuals to do (consume). This formulation, however, is ambivalent.

In one interpretation, social choice is taken to represent collective decisions. The introduction of merit goods in a social welfare function brings the analysis close to a paternalistic justification for deviating from consumer sovereignty. In another formulation, individuals' *political* preferences (as expressed through voting) conceptually differ from and may legitimately override their *market* preferences as expressed through consumer decisions (Brennan and Lomasky 1983). The broad idea is that "individuals work with different preference maps depending upon the context in which they exercise their preferences." As voting citizens or paying customers, "individuals prefer different things in different institutional settings" (Ver Eecke 2007, p. 2). In this way, social choice represents (aggregates) individual political preferences. These political preferences, in turn, may be seen as the higher-order preferences overriding the first-order (market) preferences.

Merit goods suggest refining the analytical tools of normative economics and redefining the concept of paternalism in order to fit the latter in the methodological framework of the discipline. Yet the concept of merit goods is difficult for economic theory to absorb because it suggests that there are values over and above individual preferences and that such values may actually supersede consumer choice. The substantive tension remains, and the concept of merit goods clearly and almost openly demonstrates the fundamental conflict between autonomy and welfare and solves it in favor of welfare, broadly understood.

Merit Goods Within and Beyond Normative Individualism: Connections to Social and Political Philosophy

Both Musgrave's hesitancy to adopt and justify a supra-individual metric of welfare and the ambivalent reception of the idea in economic literature reflect the unresolved tension between a libertarian and a utilitarian normative stance in economics. As such, it is not surprising that economics is ill-equipped to handle the problems which arise when these two principles collide. Merit goods, in turn, can be interpreted in both ethical-political frameworks.

The traditional normative stance of economic approach is a nonreflexive mixture of liberalism and utilitarianism. The starting point of both stances is normative individualism, the idea that collective decisions should, as a rule, be based on individual preferences. Yet, on occasions there is good reason to overrule these preferences or at least not to give them effect in public decisions. Economics has striven to justify instances of reasonable, seemingly paternalistic regulations in several ways, often deliberately avoiding the term "paternalism." Policies where individual preferences are overruled in the name of or with reference to some moralistic paternalism or communal idea of the good can be analyzed through this conceptual route.

In fact, the idea of collective decisions overriding individual preferences, as expressed in market decisions, resonates with several nonmainstream traditions in economic and social thought. Thus, the concept of merit goods provides an analytical tool for integrating economics with heterodox, in particular nonindividualistic, or philosophical, in particular aretaic (virtue-based) approaches (Ver Eecke 1998; Cooter and Gordley 1995).

The idea of a welfare state, in its Bismarckian version in late nineteenth-century Germany, could accommodate certain "communal wants and obligations" even more easily. Some collectivist and even organic notions of the State would underpin the moralistic and paternalistic role of the government in providing education and social welfare to those unable to work. German-writing economists were usually critical of the fiction of the selfish Economic Man which led them to conceptualize that an ethical state could spring from the interaction of other-regarding community-driven individuals. German scholars such as Adolf Wagner had a profound influence on early twentieth-century public finance theory and especially on Musgrave. Wagner observed that public expenditures were increasing in Western countries and rationalized this trend as a civilizing mission of the State. This was part of the intellectual background against which Musgrave coined the concept of merit wants (Desmarais-Tremblay 2017, 2021b).

Thus, when looking for solid philosophical foundations to merit goods, Ver Eecke (1998) tried to rationalize them in terms of Kantian and Hegelian practical philosophy, arguing that "[t]he necessity of politically imposed institutional arrangements for the economy to function well and humanely demonstrates the validity of Hegel's claim that the economic domain is an ethical arrangement" (1998, p. 133).

Others reconstructed the idea of merit goods in broadly (neo-)Aristotelian terms, linking them to "irreducibly social goods" (Taylor 1990). This, in turn, usefully links merit goods to the powerful ancient idea of the common good (Mastromatteo and Solari 2014). The common good is a regulative force applying both to individual and governmental action. It concerns the political order of society. This approach conflicts with the normative primacy of fixed individual preferences, dominant in economics, to the extent that it recognizes the collective construction of individual aspirations and the resulting need for ethical deliberation in order to elaborate social policy. Note that "the collective construction of individual aspirations" goes beyond the aggregation of individual preferences, referring to bringing together different hopes, dreams, and visions of the collective.

Putting aside the market failure approach to government intervention, "the reference is not the perfect market allocation but is the political conception of good life. The consequence is that the government of a community has the duty to identify what merit good is needed to improve the socio-economic conditions of the community according to what is good for man" (Mastromatteo and Solari 2014, p. 97).

Furthermore, the concept of primary goods in Rawlsian political philosophy (Rawls 1971) and capabilities in Amartya Sen's (1980) theory seem to resonate with Musgrave's intuitive and underdeveloped philosophical ideas behind merit goods as well.

By elaborating these philosophical connections, merit goods could provide entry points for normative arguments into welfare economics which would enrich the discourse that seems to be stuck between rigid extreme positions yet lack the analytical tools for moving beyond them. The affinities of Musgrave's analysis with these various schools of thought suggest potential overlaps and opportunities for a fruitful dialogue with legal and political philosophy.

Conclusion

Musgrave coined the terminology of merit wants and merit goods in the context of public finance or public decision-making, i.e., with reference to a domain that, for both laymen and the philosophically minded, seems to be logically linked to the public (common) good. The intuitive plausibility of this link rests on normative ideas that, however, can only be clumsily grasped by mainstream economic theory which tends to reduce all normative concerns to individual preferences. In fact, within mainstream economics, the domain of public finance is necessarily approached with the same methods as any other domain of the economy or perhaps of social life. This methodological stance implies some tension between the normative ideas and the standard conceptual tools of economic

thinking about public finance as well as a need for interaction between economic and philosophical discourses on the public good. While the concept of merit goods has played a minor role in modern economics, it has the potential to both reveal the continuity with earlier collectivist conceptions of economic and political life and open the stage for ethical discourses which go beyond rigid versions of libertarianism and welfarism, hence the continuing relevance of Musgrave's conceptual innovation for social and political theorizing.

Cross-References

► Capability
► Rawls, John

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Merkl, Adolf Julius

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Introduction

Adolf Julius Merkl (1890–1970) was one of the main members of the Vienna School of Legal Theory founded by Hans Kelsen (Metall 1974 1969).

Merkl began his studies in Law in the University of Vienna in 1908, taking courses in Public Law together with Kelsen. Merkl achieved the doctor's degree in 1913 and during the course 1914–1915, with Alfred Verdross and Leonid Pitamic, participated in Kelsen's seminar on Philosophy of Law, the origin of the Vienna School.

From 1915 to 1918, he held several positions in the High Imperial Austrian Administration. After the fall of the Austro-Hungarian Monarchy, from 1918 to 1920, Merkl worked in the Chancellery of the Austrian Government playing an important role in the framing of the Federal Constitution of 1920. In 1919, he achieved his teaching habilitation in the University of Vienna. After the National Socialists came to power in Austria in 1938, Merkl was removed from his post. In 1941, he was allowed to accept a professorship in the University of Tübingen, and in 1950, he returned to the University of Vienna where he continued his academic work until 1965 (Grussman 1987; Fuertes 1998; Robles 2004).

Merkl developed innumerable contributions on several fields of law collected in a *Complete Works* edition (Merkl 1993–2009). In administrative law, his book *Allgemeines Verwaltungsrecht* published in 1927 is worth mentioning. However, if only one key aspect of Merkl's life and work had to be chosen, it would have to be his fundamental contribution to the Pure Theory of Law.

On the Theory of the Hierarchical Structure

The theory of the hierarchical structure of the legal order *Stufenbaulehre* is an essential part of the Pure Theory even accepted by those who do not follow this doctrine. As Kelsen remarked in the Preface of the second edition of *Hauptprobleme der Staatsrechtslehre* (1923), this thesis was introduced by Merkl. Although Merkl had advanced some aspects in previous works (Merkl 1918a, 1919; Mayer 2005), the most complete development of this theory can be found in his work from 1931 *Prolegomena einer Theorie des rechtlichen Stufenbaues* (Walter 1964, 1970).

In the *Prolegomena*, Merkl rejects the monistic theory of the sources of Law, dominant at that time and assumed by Kelsen in his first contributions (Kelsen 1923), that reduces Law to general norms made by the legislative power. Faced with this simplifying theory, Merkl considers that Law has its genesis in a plurality of forms of production. From this perspective, the study of the relationships between legal norms of different origins becomes a central problem in the Pure Theory of Law.

As the title *Prolegomena* indicates, the conclusion of this analysis can be expressed as follows: the plurality of forms of legal production may be presented as a hierarchical construction of norms, and this structure constitutes the unity of the legal order. Actually, Merkl distinguishes two hierarchical constructions: one understood in terms of legal conditionality, well-known and assumed by the Pure Theory, and another one understood in terms of derogatory power.

With respect to the first, a norm is valid, because it is created according to another norm. It therefore exists only in relation to these determining norms.

As Merkl explains, the relation between these norms is not only a relation of temporal priority but is also a logic relation that shows a difference of levels and presents the law as a sequence of stages or a hierarchy of acts.

The image of the hierarchical structure emerges, thus, from the dynamic process of creation of law and reveals a very relevant peculiarity: Law regulates its own creation. Then, the relation between legal rules is a relation of the regulation of production, which includes formal and substantive dimensions, entailing that the norm regulating the creation of another norm is the superior and the norm created according to this regulation the inferior norm.

In Merkl's approach, this hierarchical construction is a formal scheme useful to describe the structure of every legal order, although the diversity of forms or production and its concrete articulation depend on positive law. In any case, the *Prolegomena* provides an explanation of a typical hierarchical structure, which may be found in all legal systems: Constitutions, as the highest level of positive law; statutes; ordinances; court decisions and administrative acts, as individual norms; and acts of factual execution, as the lowest level of the pyramid. This explanation does not include, as in Kelsen's version, any mention to the basic norm (*Grundnorm*).

As said above, Merkl maintains that the hierarchical relationship between legal norms also derives from their normative capacity in such a way that a legal norm that possesses force to derogate another one should be considered a superior norm.

On the Creation, Application, and Interpretation of Law

Merkl original contribution to the Pure Theory of Law has some relevant implications on legal theory.

One of the most prominent assumptions consists on relativizing the seemingly absolute opposition between legal production and application. Setting aside two borderline cases (the highest level as absolute production of law and the lowest as purely determined legal application), every level is, at the same time, a law-creating act and a law-applying act (Merkl 1931, 1918a, 1918b).

In Merkl's view – a position not assumed by the first formulation of the Pure Theory of Law but crucial in the following versions – the intermediate levels of the legal system involve legal production because, due to the open nature of legal language and to the view of every act from one level to the next as a gradual individualization and concretion, the superior norms cannot fully determine the content of inferior norms (Merkl 1918a, b). Following from this, legal interpretation is central for the application of law.

Merkl considers legal interpretation as a task always required in the process of legal application implying creation of law in every case (Patrono 1987). The interpretation developed by legal organs, by Merkl called "authentic interpretation," combines both, cognitive/objective and volitive/subjective elements: the identification of the frame of possible meanings provided by the higher-level law, an act of thinking, and the discretionary decision of one of the alternatives, a value-oriented act of will (Merkl 1916, 1918a, b). However, the interpretation developed by legal science includes only the cognitive element. Legal science should not choose among the different meanings, since it involves a political decision.

Therefore, Merkl defends a moderate skeptical theory on legal interpretation from which Kelsen was later inspired (1934, 1960a). A different issue is the question about what happens when the legal organs produce a norm exceeding the frame defined by the higher-level norms.

On Irregular Norms

Merkl admits the possibility of irregular norms created without respecting the requirements of the norms that determine their production (Merkl 1925, 1927). Following the position defended by Kelsen in 1914 and abandoned later, Merkl maintains that these norms are invalid norms. Furthermore, since it would be very disturbing that

whatever defect turned an act of creation into a "legal nothing," positive law can avoid this radical consequence by declaring these acts simply voidable (Merkl 1927).

Regarding this issue, Merkl proposes the "calculation of vices." This reminds in some aspects on Kelsen's tacit alternative clause doctrine (Kelsen 1945, 1960a). "Calculation of vices" includes previsions, like the impugnment, that although allow the definitive correction of the irregular acts, declaring them null, also permit their provisional correction integrating them in the legal system, with limited validity (Merkl 1925). These measures along with the principle of res judicata mean the existence of a tacit authorization allowing the production of legal acts in contradiction with the norms that regulate their creation (Merkl 1925, 1931).

Nevertheless, unlike the view implicit in Kelsen's approach, Merkl's theory of the principle of res judicata does not allow legal decisions, in particular those made by authorities of last resort, violating the requirements of higher-level norms to be considered decisions in conformity to law. This view would imply to turn these organs into mere applicators of their own law and would prevent them from considering the legal order as a hierarchical system. The principle of res judicata works a posteriori validating irregular norms and revealing – to quote Merkl's (1918a) famous dictum – the "two faces" on Law. In cases of anomalous functioning, law appears in a different way from the point of view of the decision-making organs (the face of application) and from the point of view of the objective observer (the face of cognition). This Janus face shows a conflict between valid law, according to the hierarchical theory, and effective law that is applied and obeyed.

Conclusion

Merkl's contribution to the development of the Pure Theory was substantial, and Kelsen always acknowledged it and considered him as co-founder of this doctrine and a genius of legal thought (Kelsen 1960b).

Nevertheless, Merkl's approach has a very high value in itself since it is able to illuminate – sometimes better than Kelsen – solutions of central issues still controversial in Pure Theory of Law, for example, regarding the limits of the validity of legal interpretation and the dilemma of irregular norms (Cuenca 2014).

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Metaphysics of Law

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Introduction

Appeals to metaphysics have lately come to ascendancy in analytic legal philosophy. Whereas the source of this renewed interest in the metaphysical underpinnings of law can be traced as early as in Ronald Dworkin's preoccupation in *Law's Empire* (Dworkin 1986) with what makes propositions of law true, his avowed aversion to metatheoretical arguments in questions of political morality was influential enough to slow down the progress of metaphysical debates in analytic jurisprudence. A decade after the publication of *Law's Empire* Nicos Stavropoulos, a student himself of Dworkin, wrote *Objectivity in Law* (Stavropoulos 1996), a monograph that, despite its charitable endorsement of Dworkin's main concerns about the substantive nature of legal argumentation, became a platform of rigorous metaphysical dialogue with earlier advocates of realism about legal properties (Brink 1988; Moore 1985). In the following decades, appeals to the relevance of metaphysics for jurisprudential inquiry have acquired the shell of a mainstream approach to questions regarding the determinants of legal content (Greenberg 2014), the nature of legal institutions (Shapiro 2011), and the artifactual function of legal norms (Ehrenberg 2016).

In the last century, any lofty conception of metaphysics in law was subject to sweeping criticism by legal theorists working in the analytic tradition. Often the very term "metaphysics" was used in its literal sense as whatever does not belong to the world of physics, the naturalistic and/or empirical world of *Sein*. During the 1930s–1950s, under the influence of logical positivism and ordinary language philosophy, metaphysics as a general philosophical project was in demise. It was in this context that the claim that, *necessarily* or *contingently*, legal facts are connected to normative facts acquired the conceptual flavor it still enjoys in analytic legal theory. What was thought to qualify as a winning argument "against metaphysics" was framed as a rebuttal of the proposition that, *necessarily*, legal facts are connected to normative facts in this or that respect. This was perhaps the peak of the conceptual turn in analytic jurisprudence that culminated in H.L.A. Hart's notoriously contested *Separation Thesis*. However, over the last 30 years or so, a different discourse framework has emerged in analytical philosophy. It is generally known as "analytic metaphysics" and this entry provides a map of theories of law with reference to this latter context.

This entry is taxonomical: it provides a template which regiments rather than adjudicates metaphysical disputes about the nature and grounds of law. It is neutral towards the strengths and weaknesses of positivist, nonpositivist, critical, and realist theories of law. Four exemplary avenues for describing the jurisgenerative capacity of legal practices are singled out. The first three – *productionism*, *normativism,* and *constitutivism* – converge in their treatment of legal practices as making an ontologically or normatively distinct contribution to what there is or what we owe to each other, whereas the fourth avenue –*substitutionism* – classifies the output of lawmaking activity under non-essentially legal categories.

Making Law

The classification suggested by this entry serves to single out the metaphysically impactful features of lawmaking[1] activity. Features in the sense relevant here convey more than what terms like intrinsic or essential properties stand for. For instance, substitutionist approaches to lawmaking take the relevant features to be extrinsic in the sense that they regard the way in which descriptive facts about the sayings, doings, and mental states of legal officials are contextually related to extra-legal facts about, say, the counterfactual stability of social rules, the obtaining of moral duties and rights or the instrumental requirements of social planning.

[1] Standard uses of the terms "lawmaking" and "lawmaking facts" reflect a fairly established convention for inclusive reference to legislative and judicial avenues for generating legal content. This can be confusing: there is ambiguity between (1) institutional facts about the jurisgenerative operations of legally designated bodies or agents (courts, legislatures and delegated administrative entities) and (2) the set of descriptive facts about the sayings, doings and attitudes of actual persons that figure in the constitutive explanation of what, how and why law is made. The former cannot explain which facts make law because their individuation depends on stipulations about what counts as "legal." This entry will employ the terms "lawmaking" and "lawmaking facts" in the second sense.

Productionist Theories

Productionist accounts of lawmaking promote an understanding of lawmaking as an activity whose metaphysical contribution consists in the production of institutionalized artifacts. On this approach, lawmaking is a legal-artifact-producing activity whereby legal norms are treated as the creative output of a process governed by collective intentionality. Legal norms *qua* artifacts are crafted to serve specific purposes and, more than that, they are designed in order to be recognized as such. It is precisely the representational or intentional nature of legal norms as artifactual entities fashioned to serve various functions which productionist theories of lawmaking single out as the most distinctive contribution of lawmaking practices.

The productionist understanding of legal norms can be premised on a variety of metaphysical commitments. The most prominent view (Ehrenberg 2016; Marmor 2009; Raz 1999) treats legal norms as a type of directives or exhortatives, namely, as the product of communicative speech acts whose force consists in their capacity to guide action. Legal directives have a distinctly communicative aspect insofar as they purport to impact the practical reasoning of their addresses by virtue of their being *recognized* as authoritative reasons for action. An alternative approach (Allott and Shaer 2013; Emerton 2010) focuses on the declarative rather than action-guiding force of legal enactments. Legal norms *qua* declarations are stipulative or effective in the sense that they make it the case that their promulgation produces normative effects irrespective of its uptake by norm-addressees.

This rather general description can accommodate radically opposed views on the role of normative facts in determining the creation and function of legal artifacts. One productionist variant prominently associated with Joseph Raz's (1999) prolific authorship on the exclusively social foundations of law confines the moral evaluation of legal artifacts as a task extrinsic to the understanding of the very process that produces them. On this particular view, legal norms are contingently or extrinsically reason-giving in the

sense that their status as legal artifacts is not affected by their occasional incapacity to provide normative guidance all things considered. By sharp contrast, one can be a productionist about lawmaking while preserving a filtering and/or gap-filling role for moral facts. On this approach, whereas it remains the case that lawmaking consists in producing institutionalized artifacts, morality can play an auxiliary role by way of supplementing legal content with moral content in hard cases where legal norms alone yield no determinate results or by way of operating as a, so to speak, safety valve that weeds out morally egregious legal norms. Examples of the latter approach can be found in some variants of the natural law tradition including John Finnis' (2011) understanding of moral filtering not as a constraint of the validity of positive laws but as an evaluative compass for seeing law in its loftiest or focal version, namely, when it actually promotes the common good. In a somewhat similar vein, Mark Murphy (2013) defends a "weak" understanding of the natural law thesis. On this construal the property of being a rational standard of conduct is not part of what it is to be a legal artifact but part of what it is to be non-defective or good *qua* legal artifact. A "continental" counterpart of the same piece of reasoning can be found in the work of Robert Alexy (1994, 1999), especially his influential incorporation of the so-called "Radbruch's Formula" which reads as a thesis about the ab initio invalidity of extremely unjust laws.

Normativist Theories

*Normativis*t accounts seek to individuate actions or events as jurisgenerative by virtue of the ways in which they (re)shape the normative landscape. The general idea is that the actions of legal institutions are such that, under jurisprudentially defined felicitous circumstances, they change what morality required prior to these actions. The modality of these changes varies significantly and different theories treat different modes of changing the normative landscape as legally relevant. Paradigmatic cases of legally induced normative changes include the creation of new moral duties or rights, the determination of previously indeterminate moral requirements, the resolution of coordination problems, as well as the direct shaping of the right-making features of a situation. To make this schematic description a bit thicker, we may use the notion of legal authority as a further criterion for introducing a subdivision within the normativist camp.

One normativist variant (more like a cluster of views rather than a particular tradition of thought) tracks the normative changes on the basis of whether they have been brought about as the result of a proper exercise of legal authority. Relevant authoritative changes can be further individuated by reference to how legal authority is conceptualized by a particular theory of law. For instance, on an understanding of legal authority as the normative power to impose moral duties that are conditional on there being a sufficient level of general compliance among members of a political community (Edmundson 2002), lawmaking actions change the normative landscape if and when, through, say, the stipulation of legal sanctions or the symbolic manipulation of the entrenched social context in which a regulation becomes salient or other actions of legal institutions (e.g., actual enforcement) they change in their preferred direction or piggyback on an already existing favorable landscape of public dispositions. This landscape will include the conditions under which citizens display a disposition to comply with a legally enacted pattern of action. By sharp contrast, on a broadly Kantian conception of legal authority (Ripstein 2010) as the constitutive power to coercively determine who is in charge of what, positive lawmaking is thought to change the normative landscape by making normatively possible rather than simply enforceable a fundamental part of morality, namely, those aspects of morality that regulate the external freedom of persons.

Normativist variants that do not assign explanatory priority to the notion of legal authority can be found in the work of nonpositivist theorists such as Ronald Dworkin (1986, 2006, 2011) and, most recently, Mark Greenberg (2014). Notwithstanding the conflicting interpretations of

Dworkin's jurisprudential legacy including his own fluctuation between the flagship statement of his account of law as integrity in *Law's Empire* and his latest unified theory of value in *Justice for Hedgehogs*, an enduring idea in his work is that the actions of legal institutions are relevant insofar as they serve to limit the enforceable aspects of morality in a principled way. It is precisely this limiting role that justifies the inclusion of Dworkin in the normativist theories. A more metaphysically robust yet similar position can be attributed to Mark Greenberg's "Moral Impact Theory of Law" (Greenberg 2014). On his account the actions of legal institutions change the normatively relevant circumstances much in the same way that changes in the morally relevant features of actions or their context track changes in what is right or wrong to do. This is important: it accounts for the generation of legal content that is normatively compelling without relying on widely criticized accounts of legal normativity including the understanding of law as a source of primarily prudential reasons for compliance or the postulation of a general moral obligation to the obey the law. Greenberg believes that the actions of legal institutions are supposed to ensure all things considered, nonauthority-based bindingness insofar as they change the morally relevant circumstances in the "legally proper way."

Constitutivist Theories

Constitutivist theories of lawmaking challenge a premise shared by productionist and normativist accounts, namely, the idea that an exploration of the metaphysical underpinnings of lawmaking must focus on the effects, artifactual, or normative, of the actions of *legal institutions*. By sharp contrast, constitutivist theories emphasize the *extra-legal* (psychological, action-theoretic, or normative) features of human agency that constitute the lawmaker as a role. It is precisely these features that drive the individuation of actions as felicitous instances of lawmaking.

Irrespective of whether they attempt to cash out their basic intuition by parallel appeals to jurisprudential concepts such as authority, enforcement, or obligation, constitutivist theories give priority to a prelegal conception of agency in explaining lawmaking. For instance, even though it may be the case that a constitutivist account prefers to spell out the role of the lawmaker in authority-based terms, this will not amount to saying that a lawmaker is capable of authoritatively producing legal artifacts or altering the normative landscape in legally relevant ways. A genuinely constitutivist theorist will insist that what endows a person or collectivity with the capacity to generate legal content is the structural features of lawmaking agency. These structural features of lawmaking agency are extra-legal norms. These extra-legal norms are partly descriptive and partly normative and enable us to distinguish lawmaking from similar social practices (e.g., etiquette, religion, military).

Competing variants of jurisprudential constitutivism rely on different structural features. A schematic subdivision can be offered on the basis of which agential perspective a given theory takes as jurisprudentially dominant. Among the most common perspectives, we find that of a rational agent whose conduct can be guided by the law, that of a participant in a conventional practice, that of a jointly committed group of institutional actors or the perspective of a democratic legislature. Nothing in the notion of constitutive perspective entails a positivist or a nonpositivist constitutivist theory of law. What ultimately determines a theory's adoption or rejection of a constitutive role for morality is the constitutive effect of a chosen perspective, namely, whether the acceptance of a particular perspective imposes normative constraints on what counts as a felicitous exercise of legal agency. This latter effect can only be determined by nonperspectival factors, namely, by facts that determine the relevance of social facts for making law.

A prominent nonpositivist application of jurisprudential constitutivism can be associated with Lon Fuller's theory of the "Inner Morality of Law" (Fuller 1969). On Fuller's view, the jurisprudentially relevant perspective is that of a practically accountable individual. For Fuller, the individuation of lawmaking actions is governed by formal standards of individual agency and, more precisely, by those rational principles that

make an individual's guidance by law practically intelligible to her *qua* rational agent. A less robust and thus focally positivist appeal to the individual perspective can be found in Neil MacCormick's institutional theory of law (MacCormick 2008). According to this theory, the relevant perspective is not that of autonomous agency conceived prior to its interaction with authoritative legal guidance but rather the perspective of heteronomous agency, namely, of an agent whose actions are subject to the potential of coercive direction by an authoritative normative order. This is also a normative perspective but the constitutive norms of lawmaking it provides are not those that instantiate the functional properties of law rigidly enumerated in Fuller's theory, but those that would have obtained under the ideal condition of a legal order operating as a normative order.

A positivist counterpart of the same adherence to the jurisprudential relevance of individual agency has been traditionally advocated by a group of theories schematically labeled as legal conventionalist, which more or less claim descendancy from H.LA. Hart's elaboration of the concept of a rule of recognition (Hart 1961, 1994). Conventionalist theories of law depart from the reductionist framework of the Hartian project: they distinguish between the social-descriptive grounds of legal facts and the moral grounds of the normativity of legal facts. In other words, they do not treat the normativity of law as a kind of social normativity, but as a derivative normativity which depends on the availability and strength of extra-conventional reasons to abide by the rules of legal conventions. On the conventionalist picture, the metaphysically relevant perspective of agency features a practice participant (a legal official and/or citizen) who *actually* follows the rules produced by legal conventions. Besides their treatment of legal conventional norms as inherently allowing for counterfactual, alternative ways of achieving the same result or purpose conventionalist theories diverge with regard to which conventional pattern best explains the constitutive norms of lawmaking. Competing conventionalist explanations include coordinative (Coleman 1996; Postema 1982), formalist (Marmor 2009) and hybrid accounts (Giudice 2015; Sciaraffa 2012) of how conventions provide constitutive norms of lawmaking.

Other constitutivist theories suppress the jurisprudential relevance of individual (official or civilian) agency in favor of the perspective of collective or joint agency. On the latter perspective, lawmaking cannot be theorized independently of its contribution to the broader institutional enterprise of governance by law which crucially includes the executive and judiciary branches of government. In this regard, the actions of lawmaking institutions can be individuated by recourse to systemic, rather than individual or interpersonal, principles of institutional morality (Kyritsis 2015) or rationality (Sunstein 1997; Posner 2002) which determine how these actions generate particular, context-specific institutional arrangements. Finally, another constitutivist approach focuses on the perspective of the lawmaker, rather than the perspective of the law-subject or an authority-sharing collectivity. The guiding idea is that lawmaking agency partakes in the instrumental structure of other types of intentional action such that the metaphysical contribution of particular statutory enactments or other lawmaking actions cannot be theorized in isolation from the cross-temporal processes which they compose or facilitate. For instance, a standard version of what has come to be known as normative or ethical positivism (Campbell 2004; Waldron 2001) can be formally regimented as deriving the individuating purpose of representative lawmaking from the value of the broader, ongoing practice of upholding institutional commitments that jointly bind citizens and their governments.

Substitutionist Theories

The last and most unevenly configured set of views on how facts make law includes theories that see the project of theorizing about the activity of making law as an exercise in substituting non-legal explanatory properties, principles, or concepts for their jurisprudential counterparts. The scope of substitutionist strategies can vary on the basis of whether a given theory takes a reductionist or eliminative stance on the dispensability of

appeals to the distinct metaphysical contribution of lawmaking practices.

H.L.A. Hart's practice-based positivism can be informatively identified as a substantive refinement of Austin's imperatival theory of law (Austin 1832, 1995) in the sense that it sought to account for the practice of making legal rules in terms of a more foundational, attitudinal practice of recognizing (namely, accepting) particular actions as capable of conferring normative significance on acts and events. A more recent reductionist variant can be deduced from Scott Shapiro's jurisprudential project of plan positivism (Shapiro 2011). By building on a critical assessment of Austin's and Hart's reductionism, Shapiro treats legality as a second-order property of the activities of planning organizations. On the "continental" side, the scope of reductionism about the legal domain is significantly obfuscated by the ostensive use of transcendental arguments in defending the normative autonomy of law. Hans Kelsen's "Pure Theory of Law" (Kelsen 1934, 1960) is perhaps the most instructive instance of this unpronounced reductionism about law. This is evidenced by his concurrent treatment of the efficacy of a legal system as a condition of legal validity and the transcendental postulation of a basic norm as a necessary condition for the possibility of a distinctly legal domain of "ought" (*Sollen*). It is fair to assume that Kelsen's project is, formally speaking, reductionist, albeit not in the likeness of its analytic counterparts in the sense that it takes the reduction base of law to be purely normative whilst allowing for conditions of efficacy to indirectly affect the validity of legal norms by targeting our attitudes towards their validity.

Eliminative variants of substitutionism are motivated by a (quasi)natural law, (quasi)positivist, or broadly naturalistic vision of jurisprudence. An example of the first variant can be found in Heidi Hurd's epistemic treatment of legal authority (Hurd 1991). On Hurd's view, the actions of lawmaking institutions are individuated by their capacity to provide authoritative guidance, not in a legal-practical sense but in an epistemic sense. This is to say that lawmaking actions provide compelling reasons to *believe* that an enacted pattern of action is morally mandatory or permissible. An example of the second variant of substitutionism is Scott Hershovitz's quasi-positivist approach (Hershovitz 2015). He defends a radical disassociation of legal practices from the normative domain they affect by dispensing with talk of legal obligations and rights and replacing it with a discourse about the moral obligations and rights that has no bearing whatsoever on the question of what individuates these practices as legal. Finally, the third variant of substitutionism can take the form of moralist or legal-realist routes to explaining how legal reality is just an aspect of the natural world broadly construed as including facts about human nature. Moralist naturalism about law has been mainly associated with the work of Michael S. Moore (1985) and David O. Brink (1988). Their naturalist methodology frequently bifurcates into a semantic variant defending the referential properties of legal predicates and a substantive variant which aspires to locate the futility of the traditional opposition between legal positivism and nonpositivism by way of refuting their shared treatment of moral properties as inherently nonnatural. Although the American, Scandinavian, and Italian schools of legal realism were primarily concerned with adjudication and fundamental legal concepts, their naturalism can be securely elicited from their radical suspicion towards nomological models of explaining lawmaking. In legal realism, the metaphysically relevant leitmotiv is that the actions of lawmaking institutions do not affect the explanation of instances of following, applying and enforcing the law by way of *governing* (morally justifying or rationalizing) these instances, but rather by way of *contributing* (more often than not decisively) to the causal explanation of judgments about what counts as an instance of being guided or coercively compelled by the law.

Conclusion

Lawmaking is frequently described as a distinctively creative process whereby otherwise utterly contingent facts about the sayings, doings, and mental states of some actual individuals or groups

convening in solemnity-exuding halls are treated as endowing a particular political community with statuses and reasons which are internal to it. For instance, whatever one's action looks like, it cannot be an affidavit unless some actions of some institutional actors make it the case that acting thus and so counts as a legally enforceable sworn statement of fact. Likewise, other actions of legal officials are thought to generate instrumental and/or categorical reasons for action whose applicability rests on their having been generated in a legally proper way whatever that means. Despite the proliferation of the use of metaphysical terms, the current state of the dialectic is evidently transitional mainly because there are still few occasions where analytic legal philosophers engage in broadly intelligible disagreement about the metaphysics of law. Competing accounts of the nature of lawmaking facts differ in what they take to be their impact on doctrinal debates about the role of canons of construction and interpretation in legal reasoning.

General jurisprudence has recently been experiencing an unprecedented cross-pollination by the re-emerging field of analytic metaphysics. The taxonomy offered in this entry provides a map of different theories of law based on their metaphysical commitments. It is not meant to subvert the diagnostic utility of our most familiar terms (such as "exclusive or inclusive positivism," "natural law") but to supplement it by enlarging the domain of informative contrasts and affinities between theories of law whose metaphysical commitments cast in the familiar language of general jurisprudence would not allow any "rapprochement." Without downplaying the contribution of familiar modal arguments about the relationship between law and morality, the present entry has sought to alert us of the possibility that the conceptual peak in jurisprudential inquiry is already part of its history. Perhaps, now is the time to say that we are nearing a second peak, that of the metaphysical turn in legal philosophy.

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Methodological Clarity

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Introduction

In the Foreword to the second edition of *Hauptprobleme der Staatsrechtslehre* (*Main Problems in the Theory of Public Law*), Hans Kelsen (1881–1973) writes that the Pure Theory of Law is "the concerted work of a continually growing circle of theoretically like-minded men" (Kelsen 1923, XXIII. The English quotation is taken from Paulson, Litschewski Paulson 1998, 22). One person who joined this circle was Leonid Pitamic (1885–1971). Kelsen recognized his valuable contribution to the project of defining the basic norm as the presupposition of legal cognition (Kelsen 1923, XV. The following articles by Pitamic are quoted in the cited work: Pitamic 1917, Pitamic 1918, Pitamic 1921b, and Pitamic 1922a).

In the following, I will first briefly touch upon one of the starting points of the Pure Theory of Law: cognitive economy. It was certainly the question of the basic norm which divided Kelsen and Pitamic most incisively. Pitamic transcended the Pure Theory of Law and set out to find a common substantial denominator between positive and natural law. He sought this common denominator in the nature of law. However, the conclusion from this is not that Kelsen's and Pitamic's conceptions are irreconcilable. Their views certainly differ, but they can complement each other if linked in an appropriate way. The core contribution of the Pure Theory of Law is that

Methodological Clarity or the Substantial Purity of Law? Notes on the Discussion between Kelsen and Pitamic. This article is an English summary of the plenary paper *Methodologische Klarheit oder gegenständliche Reinheit des Rechts. Anmerkungen zur Diskussion Kelsen – Pitamic* presented at the 25th Congress of the IVR, which was held in Frankfurt am Main in August 2011. In: Ratio Juris, 27 (2014) 2, 176–178.

it erects a formal legal frame (structure), allowing substantial creativity within it.

The Quest for a Basic Legal Norm (the Starting Point of the Pure Theory of Law)

"Cognitive Economy as a Precondition of Legal Science"

Law understood as a system of norms would be utopian without some foundation (Cf. the earlier W. Jellinek 1913, 28). Kelsen (1914) and his circle (see especially Verdross 1915, 11–2, 121–3, and 134–7) were searching for this foundation (see Walter 1992, 47–59, Walter 1993, 85–99, and Paulson 1993, 53–74).

In 1917, Pitamic published the article *Denkökonomische Voraussetzungen der Rechtswissenschaft* (*Cognitive Economy as a Precondition of Legal Science*), which played a key role in this quest. Pitamic was particularly interested in the question of whether and how Kelsen's purity could be justified. He advocated the scientific principle that an investigation of the process of normative deduction must take into account the development of events as it occurs according to another (causal) method. As he himself states,

> in this choice concerning past as well as present law, a certain *principle of economy* has to be considered; this principle does not consider the *subjective political* conviction in any way and amounts to nothing more than *objectively* establishing the material conditions for constructing such legal norms that will conform in the highest possible manner with effective preconditions for what ought to be done, i.e. with those ideas about what ought to be done that really motivate the people in the territory and time period whose law we want to know. (Pitamic 1917, 366. See also Pitamic 1934, 414)

Regarding the nature of this principle, he quotes the philosopher and physicist Ernst Mach:

> This tendency to obtain a survey of a given province with the least expenditure of thought, and to represent its facts with *one* single mental process, may be justly termed an economical one. (Mach 1882, 302; see also Mach 1905, 232)

Pitamic proposed *methodological* clarity in legal theory, without altogether reducing the object *law* as a priori to its normativity and without completely divesting the concept of all its non-normative elements. Pitamic sharply distinguishes between the deductive-normative and the inductive-causal methods. The first only provides a way of thinking which enables us "to identify without contradiction the norms of a *given* legal material in their relations to one another, as well as to apply them in the face of factual events" (Pitamic 1917, 365–6). The core of this method is normative imputation (Germ. *Zurechnung*), which is nothing but "the conjunction of normative constituent elements with relevant factual elements on the basis of a norm" (Pitamic 1917, 342). It is a characteristic feature that a user of the deductive-normative method presupposes the starting point of his research, whereas the starting point itself (i.e., legal material as the object of research) can only be defined by the inductive-causal method. The latter looks for a concrete starting point, i.e., such legal order that can be found "in its concrete *contents* determined by time and place" (Pitamic 1917, 344).

This methodological dualism, which legal science is unable to avoid, is illustrated by Pitamic in a metaphorical way:

> When *Kelsen* starts from a standpoint he presupposes as a given – a complex of norms, and from this formal condition (which permits any contents) derives consequences in a purely deductive manner, he is, so to speak, on the top of a mountain from which he descends normatively fighting his way down; yet Kelsen does not ask himself *how* to reach the top. 'Others' who try first to achieve the material conditions, the starting point of the norms, look first for the top of a certain mountain; they fight their way to it, which is only possible by the method of induction and causality because this means [. . .] establishing the psychological effects of ideas about 'ought' (Germ. *Sollen*), which belong to the area of the knowledge of 'is' (Germ. *Sein*). (Pitamic 1917, 344)

Pitamic convincingly explains that in a series of ideas produced according to a certain method, one can never escape from an infinite series unless one commands a halt by means of ideas produced according to another method (Pitamic 1917, 355). Pitamic calls this "a *jump* (italics added my M. P.) over an abyss, whose endless depth *logically* separates the world of 'is' (Germ. *Sein*) from the world of 'ought' (Germ. *Sollen*)" (Pitamic

1917, 356). In short: It is an unsolved, possibly even an insoluble epistemological problem that can be bridged by man's value jump (the word "value" added by M. P.) in such a way that "the normatively running deduction is interrupted by the fact of 'is' (Germ. *Seinstatsache*)" (Pitamic 1917, 356).

The Object and the Method of Enquiry

The central question revolves around the relation between the object and the method or between the method and the object of enquiry (Cf. especially Winkler 1990, 175ff). For Pitamic, Kelsen's standpoint that "a specific method determines a specific object" (Kelsen 1922, 106) is unacceptable, and he dismisses it with the moderated counter-statement that a specific object also shapes the specific method which is to be used in its exploration. Pitamic expressly states that "something must be decisive for the choice of the method" (Pitamic 1922a, 535). The fact that the deductive-normative method is used means that the norm already exists. The object to be researched somehow offers itself to the researcher and he is not the one creating this object.

For Pitamic, the use of the inductive-causal method is justified and completely "legitimate." Kelsen and Weyr were of a different opinion and objected to Pitamic that the use of the inductive-causal method implies a "complete *denaturation of legal cognition*" (Kelsen 1915–1916, 258. See also Weyr 1916, 346). Pitamic's research illustrates that the inductive-causal method is generally necessary when the "normative world of the law" [i.e., law as an *ought* (Germ. *Sollen*)] depends and is based on correspondent acts of being (Germ. *Seinstatsachen*) and is founded on them.

In this sense, the dispute over the method is an "entirely sterile dispute" (italics added by M. P.) already because it fails to distinguish between the starting points of the enquiry and the normative (legal) enquiry itself (Pitamic 1917, 354). The key question is not whether the additional application of the inductive-causal method is "allowed," but whether the two methods are "confounded" (Pitamic 1917, 367). The goal is methodological clarity and purity, not a purity of the object, which could only be attained by using the deductive-normative method. Banishing the inductive-causal method would be to ignore, at least to a certain extent, the whole of temporally and spatially given law.

Kelsen's Reaction

Kelsen partly took Pitamic's criticism into account (Kelsen 1923, XV. Four articles by Pitamic are quoted in the cited work.). After all, he took it for granted that we can only speak of positive law when its norms are, at least on average, effective in society and tried to find an adequate theoretical solution. By the time of the publication of Pitamic's *Denkökonomische Voraussetzungen der Rechtswissenschaft* (*Cognitive Economy as a Precondition of Legal Science*, 1917), Kelsen had not been successful in defining such a solution which would remain within the boundaries of the *Pure* Theory of Law. Kelsen had addressed the problem of the basic norm (Walter 1992, 49). In his article *Reichsgesetz und Landesgesetz nach österreichischer Verfassung* (*Imperial Law and State Law According to the Austrian Constitution*, Kelsen 1914), he explicitly states that any legal construction must "presuppose certain norms as valid legal rules" (Kelsen 1914, 216). It is typical for Kelsen that the choice of this starting point is understood not as a legal question, but as a *political* one, and therefore "must always seem arbitrary from the perspective of legal understanding" (Kelsen 1914, 217. See also 413–4).

Pitamic is convinced that Kelsen took up his idea about the effectiveness of law and expressed it in an altered normativized form: first through the norm of international law and then as the content of the basic norm. Pitamic says that Kelsen "supplemented the mentioned idea because he entered into international law as a *norm* that which I suggested as just a cognitive principle for concrete (state) laws" [Pitamic 1921a, 18. Cf. also the review (Pitamic 1928, 641–2) of the works of Kelsen: Das Problem der Souveränität und die Theorie des Völkerrechts (Tübingen 1928) and Der soziologische und der juristische Staatsbegriff (Tübingen 1928)]. Kelsen's epistemological principle became "the content of a *legal* norm" and is therefore supposed

to function as a *legal* principle. "By becoming the content of a norm," Kelsen writes, "the *factual* undergoes a very peculiar change in meaning, it is in a way denaturised, it makes a *volte-face* and becomes normative itself" (See Kelsen 1920, 99, and 240–1). Pitamic is not satisfied with this solution, because in this way "the *basic* epistemological problem [. . .] is only posed back and must appear again in international law" (See Kelsen 1920, 99, and 240–1).

He expresses the same concerns with regard to the basic norm as it is formulated by Kelsen in the first edition of *Pure Theory of Law* (1934, 65ff.).

Methodological Clarity Instead of Substantial Purity of Law

The Creative Force of Normative Purism

Pitamic's assumption was that the method used in researching law is not independent from the object of the enquiry. The object (i.e., the nature of this object, and thus the nature of law) affects the choice of the method(s) by which legal science understands law. The article *O ideji prava* (*On the Idea of Law)* includes this interesting passage:

> As a model should in general be shaped after the object it is made to represent, law as a form must equally, at least in general, be shaped after its object. If a model considerably damages the object rather than harmonizes with it, then it is not a model of this object. (Pitamic 1943, 198)

Pitamic's language is symbolic. The model referred to is obviously Kelsen's method which creates the purity of the legal content. Pitamic objects that the ideal of methodological purity overlooks the structure of the legal content, which lends itself to scientific enquiry. This objection does not imply that a partial understanding of law has no creative force. The strength of a partial approach can lie in a clearer image of the points of view which are highlighted with equal strength, for example, by an integrative or integral (synthetic) understanding of law. On the other hand, however, we also face the substantial danger that a partial approach might exaggerate one aspect of the law, or even distort it in comparison with other aspects.

Kelsen's normative purism has a creative effect wherever it unveils a problem area which deserves attention. Kelsen reveals the problem, but his theory does not provide the means required to genuinely tackle it. Especially distinctive *revelations* of this kind in Kelsen's work can be found, inter alia, in his comparison of laws of nature (Germ. *Naturgesetz*) with positive laws (Germ. *Rechtsgesetz*), in his discussion of the legal subjects, gaps in the law, the interpretation of legal acts (combined with the hierarchical structure of the legal system), and the nature of international law.

Kelsen, Pitamic, and Radbruch

The question of normative justification is the thread which links Kelsen and Pitamic, even if their points of view were different. Kelsen supported the methodologically pure approach, which creates a pure object of enquiry. Its methodological purity is so pronounced that the object of enquiry does not influence the method. The contrary applies: the object interrogated by science depends on the method and its scientific orientation (see sections "Cognitive Economy as a Precondition of Legal Science" and "The Object and the Method of Enquiry"). Pitamic, from the very beginning, struck out on a new path: he was convinced that law could not be understood and explored by a single method aiming at a pure object of enquiry. He argued that it is necessary to employ other methods besides the normative method (especially the sociological and the axiological methods), which, however, should not be confounded. Methodological syncretism can be avoided by distinguishing clearly between different aspects of law and by allowing the methods to support each other.

Step by step, these results prompted Pitamic to combine the positive-law and the natural-law-conception of the nature of law. For Pitamic, to sum up once again, the essential elements of law are order and human behavior. These elements are interdependent. The order is associated with legal norms regulating external human behavior. It is so essential that law ceases to be law when its norms cease to be at least *grosso modo* effective (Pitamic 1956, 192–3). However, not any order can

function as an element of law; the condition is that it is an order which prescribes "only external human behaviour and does not prescribe or allow its contrary, 'inhumane behaviour', otherwise it loses its legal quality" (Pitamic 1956, 194).

However, the legal norm "ceases to be law when its content seriously threatens the existence and social interaction of the people subject to it" (Pitamic 1956, 199). For this it is not sufficient that there is some kind of inhumanity in the content of the legal norm (e.g., high taxes which are unjust); there has to be "a conspicuous, obvious, severe case of inhumanity" [such as the mass slaughter of helpless people (Pitamic 1960, 214)]. There has to be a "crude disturbance" (for instance, the extermination of the members of another race) which interferes so intensely with law that its nature is negated (Pitamic 1956, 199. See also Pitamic 1960, 215: "Es kann ja auch nach positivem Recht sogar eine rechtskräftige Entscheidung aus gewissen schwerwiegenden Gründen wegen krasser Verletzungen des positiven Rechtes angefochten und außer Kraft gesetzt werden.").

Ulfrid Neumann convincingly observes that Pitamic "does not invoke ethical criteria beyond law, but appeals to elements of the legal concept itself" (Neumann 2011, 281). This form of justification is to some extent in accordance with Radbruch and his formula. The similarities between Radbruch and Pitamic consist predominantly in the fact that their projects both aim at the justification of the legal concept and that they both, in a similar way, explore the boundary which may not be transgressed by a conflict between single elements of law in order to remain within lawfulness. The Rubicon is crossed once the order is "blatantly inhumane" (Germ. *krass unmenschlich*). We are here faced with an obvious parallel to Radbruch's "formula of intolerability" (Germ. *Unerträglichkeitsformel*. See Neumann 2011, 281.).

It cannot be concluded from Pitamic's oeuvre that he drew on Radbruch's theories. In the work *An den Grenzen der Reinen Rechtslehre* (*On the Edges of the Pure Theory of Law*), Radbruch's name is only mentioned once in association with heteronomous obligations (Pitamic 1918, 750). In Pitamic's central book, *Država* (The State, 1927), Radbruch is not quoted at all. The majority of reasons for their affinity lie in the fact that Radbruch and Pitamic underwent a similar development, which ultimately led to similar results. Radbruch as a Neo-Kantian endorsed value-theoretical relativism and held the view that legal values cannot be "identified" (Germ. *erkennen*) but only "acknowledged" (Germ. *bekennen*) [Radbruch 1914. Quoted from the reprint in Gustav Radbruch Gesamtausgabe II, 1993, 22, and 162. (The English quotation is taken from Paulson 2006b, 31). See also Radbruch 1973, 96, and Radbruch 1934.]. Given the fact that the supreme value of law cannot be known, it is necessary, for the sake of legal security, that this content be defined by the state authority (Radbruch 1973, 164–5). His experiences with Nazism motivated Radbruch to make his points of view complete and partly also to complement them in the light of the condition of legal values. This was done after the Second World War. The definitive derivation states that when the conflict between positive statute and justice reaches an "intolerable degree," "the statute as 'flawed law' (Germ. *unrichtiges Recht*) must yield to justice" (the formula of intolerability). Besides this formula, there is also the formula of deniability (Germ. *Verleugnungsformel*); this formula applies when the law deliberately betrays equality. In this case, the law is not "merely 'flawed law', it completely lacks the very nature of law. [(Radbruch 1946. Quoted from the reprint in Radbruch 1973, 345–6. The English quotation is taken from Paulson 2006b, 26.).

Pitamic's development was similar. He first encountered theory and philosophy of law as Kelsen's disciple and was impassioned by normative purism as a form. He was not very deeply affected by the sharp distinction between the *is* (Germ. *Sein*) and the *ought* (Germ. *Sollen*), as he also contemplated law sociologically and axiologically. From the very beginning, he was perturbed by the self-sufficiency of law as a normative system. In the face of the assertion that an ought can only be derived from an ought, he advanced the thesis, inspired by Aristotle, that man is by his very nature implanted into normative relations

(see Pitamic 1960, 212. See also Pavčnik 2010, 93–94.). His experiences with the barbarism of the twentieth century certainly had an influence on Pitamic, who, just like Radbruch, placed law in relation to values. Radbruch argues that law strives for justice, while Pitamic seeks the solution in a concept of law which also has to be humane. Radbruch's formula is articulated more thoroughly than Pitamic's legal concept. However, Pitamic can also be understood as saying that conscious disavowal of equality is inhumane and that an inequality which is intolerably inhumane lacks legal character.

An exhaustive comparison of Radbruch and Pitamic is not the object of this enquiry. Yet a comparison was necessary because it highlighted a parallel with Kelsen's normativity thesis. Kelsen stuck to this thesis until the very end, and thus, from the point of view of his theory, he was indifferent to the content of positive law. This content simply was not an object of his formal, normative analysis of law. Radbruch and Pitamic included the content into their arguments and, in their respective way, made it a yardstick for their concepts of law. This enabled them to posit that their respective investigative methods were outside of natural law and legal positivism. More precisely, in the words of Robert Alexy (Alexy 2009, 151–166, and Alexy 2010, 167–182. See also Koller 2006, 180–196, and Koller 2008, 157–180.), their investigative methods can be described as dual.

The discovery that the nature of law is dual also opens up the possibility of a dialogue – in such a manner as by Peter Koller as well – between all those who are not radical positivists or moralists (see Koller 2008, 160ff., 175ff.). Radical positivists accept any imaginable content of law, while radical moralists grant only a law which conforms to their moral ideal. The Pure Theory of Law is not an example of radical positivism; it only assumes arbitrariness (Germ. *Beliebigkeit*) of content in order to make possible an analysis of law irrespective of its content. Kelsen's thesis of normativity is dialogical for all those interested in the content of a normative legal structure. Kelsen's theory (and especially the theory of the hierarchical structure of the legal order) reveals (even provokingly, in its own way) where the questions about the legal content are situated.

Kelsen, at least in a certain sense, refused to accept this dialogue, because for him law was only a closed system of legal norms. Kelsen's thesis was that a relation is only possible "between elements of one and the same system" (Kelsen 1928. Quoted from the reprint in Klecatsky et al., I, 305). The one-sidedness of Kelsen's approach is illustrated very aptly by the already mentioned mountain allegory.

Pitamic contributed to the improvement of the contents of the Pure Theory of Law. The key argument is that the methods used in investigating and understanding law have to be in accordance with the nature of law. The understanding of the nature of law is a peculiar prior knowledge guiding the scholar in his choice of the method with which he approaches his field of study. By following this guideline, and by arguing according to a clear method, we can also open up a space for dialogue and for the juxtaposition of contrasting points of view. "Then," according to Pitamic, we can "approach the aim which we have to strive for by all – with the best intentions *all* – means: *cognition*" (Pitamic 1917, 367).

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Methods of Philosophy of Law: Wittgenstenian Approach

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Introduction

Ludwig Wittgenstein (1889–1951) was an Austrian philosopher who spent much of his adult life in Britain; his work has been enormously influential in the philosophy of language and other areas. His writings are traditionally divided between his early work (in particular, his *Tractatus Logico-Philosophicus* (Wittgenstein 1922)) and his later work, focusing on his *Philosophical Investigations* (Wittgenstein 2009). When legal theorists describe their approaches as Wittgensteinian, they almost always are referring to the later work.

There is no established "Wittgensteinian" approach to law or legal reasoning. However, a number of different scholars have offered approaches that are broadly grounded on the later works of Ludwig Wittgenstein, though the "grounding" can vary from the (purported) direct application of Wittgenstein's texts to a more general working in the "spirit" of the philosopher's ideas. While noting the cautions I have earlier prescribed in applying Wittgenstein to legal theory and legal reasoning (Bix 1993: 36–62; Bix 2005), this entry will offer a brief overview of such Wittgensteinian writings. The entry will be organized according to topics and themes in Wittgenstein's works.

Wittgenstein's Rule-Following Considerations

In the *Philosophical Investigations*, Wittgenstein offers a series of remarks that are known collectively as "the rule-following considerations" (Wittgenstein 2009: §§143–242, at 62–95). In that discussion, Wittgenstein considers simple addition problems, mathematical series (e.g.,

"plus two"), and color terms – and how we come to understand and apply them. What Wittgenstein intended to show by this discussion remains a matter of controversy (e.g., Holtzman and Leich 1981). What is clear is that Wittgenstein emphasizes our consensus in application, while showing that it is not easy to show *what it is* that makes correct applications correct. Efforts to ground our applications (our actions in purporting to follow the rule of how the terms or processes should be applied) based on intentions, mental pictures, or dispositions do not work. We are cryptically informed:

> "So you are saying that human agreement decides what is true and what is false?" – What is true or false is what human beings *say*; and it is in their *language* that human beings agree. This is agreement not in opinions, but rather in form of life. (Wittgenstein 2009: §241, at 94)

Saul Kripke famously offered a "skeptical" reading of Wittgenstein's rule-following considerations, under which only community agreement could make one response to the application of a rule correct and another incorrect (Kripke 1982). Most commentators have rejected Kripke's view *as a reading of Wittgenstein* (putting aside its independent value as a theory about language and rule following generally) – labeling the (mis)reading, "Kripkenstein." However, at least one legal theorist adapted Kripke (on Wittgenstein on rule following) to the problem of legal interpretation. Charles Yablon argued that Kripke could illuminate certain problems in debates about legal (in)determinacy: showing the compatibility of the observation that right answers to legal disputes *cannot be proven*, with the legitimacy of legal decision-making. Yablon argued that Kripke could also help explain how lawyers and judges "can use legal argument to change the response that actors within the legal system deem 'appropriate' in connection with certain legal formulations" (Yablon 1987: 635).

Leaving Things as They Are, Social Practices

There is a theme of "quietism" in Wittgenstein. For example:

> Philosophy must not interfere in any way with the actual use of language, so it can in the end only describe it.
> For it cannot justify it either.
> Philosophy just puts everything before us, and neither explains nor deduces anything. – Since everything lies open to view, there is nothing to explain. For whatever may be hidden is of no interest to us. (Wittgenstein 2009: §126, at 55)
> It leaves everything as it is. (Wittgenstein 2009: §124, at 55)

A number of theorists have combined quietism, an *anti*-skeptical reading of the rule-following considerations, and Wittgensteinian terminology. The favored Wittgensteinian touchstones being "grammar" (e.g., Wittgenstein 2009: §§497–500, at 146–147), "language-game" (e.g., Wittgenstein 2009: §§ 83, 86, at 43–45), and "form of life" (e.g., Wittgenstein 2009: § 241, at 94).

Brian Langille (1988, 1989) uses Wittgensteinian ideas to argue against challenges to law, legal interpretation, and constitutional interpretation, challenges based on skeptical views of language and meaning (with some of those skeptical views having been based on misreadings of Wittgenstein). Langille writes: "What Wittgenstein suggest for those interested in constitutional adjudication is that our practices here are public and social, and our practices here constitute a language game, or set of language games, which have a point. Thus, the first task of constitutional theories is to explicate the grammar of that practice . . ." (Langille 1989: 561).

Philip Bobbitt's work (Bobbitt 1982, 1991, 1994) does not purport to apply Wittgenstein's text directly. For example, in *Constitutional Fate* (Bobbitt 1982), there is a lone suggestive reference – "*See generally* L. Wittgenstein, *Philosophical Investigations* (1958)" – appended to the critique that commentators cannot come to questions of judicial review from "outside" the process of legal argument (Bobbitt 1982: 123, 266 n. 1). However, there is a clear connection, even beyond that lone reference, to Wittgenstein's analysis focused on social practices. For Bobbitt, the connection between (American) constitutional theory and constitutional practice had, prior to his work, been radically misthought. Theorists were constantly

looking to justify the practice by some value or objective *outside the practice*, when in fact, the only question of legitimacy was, and could only be, whether constitutional decisions followed the rules and standards internal to the practice (e.g., Bobbitt 1994: 1869). For Bobbitt, these standards involved the use of six "modalities" (argument types): historical, textual, doctrinal, prudential, structural, and ethical arguments (Bobbitt 1982: 3–119).

As Dennis Patterson observed, this is a distinctly Wittgensteinian approach: focusing on the "grammar" of this particular "game" (Patterson 1994). However, one might question whether reference to "language games," which cannot sensibly be questioned from "outside," applies equally well to highly contested practices like legal and constitutional interpretation as it does to simple mathematics (Bix 1993: 45–53; Bix 2005: 221–222).

Patterson generalized Bobbitt's approach in his own work, arguing that "truth in law is a matter of the forms of legal argument, not that conditions that make propositions of law true" (Patterson 1996: 150). Patterson also uses Wittgenstein's later works to advocate a certain approach to the meaning ("semantic content") of legal concepts, an approach that generally equates meaning with use (Patterson 2005; cf. Wittgenstein 2009:§ 43, at 25; see also §§ 30, 556, at 18, 156–157). Under this approach, the focus needs to return to legal practices and what counts as appropriate and successful within the activity: "we master concepts when we master techniques for their application" (Patterson 2005: 233). In law, that means competent application of legal concepts and legal rules, the ability to apply rules and concepts in novel ways or to new situations, and the ability to speak in broad terms about the purpose and structure of different areas of the law (Patterson 2005: 233–234).

Philosophical Therapy and Changing the Subject

For the later Wittgenstein, philosophy is a kind of therapy (Wittgenstein 2009: §133d, at 57), showing "the fly the way out of the fly-bottle" (Wittgenstein 2009: §309, at 110). Sometimes the problem causing our confusion comes from misleading language: "Philosophy is a struggle against the bewitchment of our understanding by the resources of our language" (Wittgenstein 2009: §109, at 52). As already discussed, Wittgenstein tended to move the focus of analysis from inquiries about metaphysics/ontology to a clear overview of our current practices. As I wrote in an earlier work (Bix 1995), the first chapter of the central work of modern legal philosophy, H. L. A. Hart's *The Concept of Law* (Hart 2012), can be seen as taking a similar approach. While the initial question of legal theory had been, "what is law?", Hart did not try to answer that question directly, but instead to look to the concerns that motivated it: the connection between law and commands, law and rules, law and morality (Hart 2012: 1017). In that transformation, we are no longer "bewitched" by the metaphysical-sounding question, "what is law?", and can instead focus on more mundane and manageable (if still very difficult) inquiries about rules, coercion, and morality.

Conclusion

Patterson writes: "One cannot 'apply' Wittgenstein to the law, for there is . . . nothing to apply. The lessons of Wittgenstein is that philosophizing about a subject is an *ersatz* endeavor. It is better to clarify an enterprise such as law than to theorize about it" (Patterson 1994: 1855). He is generally correct. There is less a distinct Wittgensteinian method than there is a general Wittgensteinian attitude, and a series of Wittgensteinian lessons, e.g., focus on actual practices and seek a clear overview and avoid the temptations of unnecessary metaphysical speculation and too-hasty skeptical views (e.g., about language, meaning, and justification).

Cross-References

► Wittgenstein, Ludwig

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Michels, Robert

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Introduction

Robert Michels (Cologne 1876 – Rome 1936) was a German-born scholar most famously known for his work *Political Parties*: *A Sociological Study of the Oligarchical Tendencies of Modern Democracy*, in which he posited an "iron law of oligarchy" whereby large democratically structured organizations contain a tendency toward bureaucratic consolidation of elite power and rule. The core of Michels' works contains a very serious questioning and analysis of modern democracy and its viability, as well as the nature of a revolutionary party once it commits to parliamentarism. He is seen as an important founding figure in the field of political sociology, and his theses have influenced generations of social scientists and political thinkers. Recent scholarship has questioned the categorization of Robert Michels with Gaetano Mosca and Vilfredo Pareto (the so-called Italian School of Elitism) and has reemphasized him as a strident, if pessimistic, democrat and syndicalist (see Drochon 2020; LaVenia 2019; Piano 2019).

Robert Michels was born to a bourgeois family with a German-French-Belgian background in Cologne on January 9, 1876. He attended Gymnasium in Berlin, spent time in the army, and then studied in England, at the Sorbonne, Munich, Leipzig, and finally at the University of Halle where in 1900 he completed his dissertation in history and later married his advisor Theodor Lindner's daughter Gisela, who would become a scholar in her own right. After a short time in Italy, Michels returned to Germany and settled in Marburg in 1902, where he became a young *Dozent* at the University of Marburg (Linz 2006).

He became active as a member of the German Social-Democratic Party (SPD), running as a candidate for the Reichstag in the election of 1903 and attending party congresses from 1903 to 1905 as a delegate. Michels developed his political theories as a member of the German Social-Democratic (SPD) and Italian Socialist (PSI) parties in the decade before the First World War, writing extensively in the socialist and syndicalist press. Like many socialists of the era, he was frustrated by the SPD's parliamentary gradualism and what he saw as an abandonment of revolutionary ideals. He became a syndicalist in 1904, befriending Hubert Lagardelle and publishing in his French syndicalist journal *Le Mouvement*

socialiste, and whose circle included Édouard Berth, Georges Sorel, and Victor Griffuelhes (Cours-Salies and Vincent 1992).

Syndicalists championed revolutionary mass action to overturn capitalism, via a general strike, and viewed the principle of representation and parliamentarism with skepticism. In his writings in the socialist and syndicalist press, he began to develop consistent themes: The rise of the parliamentary mass party had required the development of an expansive and permanent bureaucratic apparatus; party administrators, elected officials, and officers wielded that apparatus in a fashion that was largely conservative and often antidemocratic; and the rank and file were either obedient to party leadership or too weak to enact long-standing democratic changes.

Michels' work attracted the attention of Max Weber, who befriended the young scholar, encouraged his academic writings on the sociology of parties, and published his essays in the *Archiv für Sozialwissenschaft und Sozialpolitik* (Scaff 1981). His academic and political writings of the era further developed his analysis of the mass political party. Because of his socialism, he was denied a permanent position in Marburg; Weber eventually secured him a professorship in 1907 at the University of Turin where he befriended Gaetano Mosca. Although he left the SPD and PSI in 1907 when both expelled their syndicalist factions, he remained in the European socialist milieu and continued to publish in their press until the outbreak of WWI.

His first major work of political sociology, a study of the Italian socialist movement, was published in 1908, followed by *Political Parties* in 1911 (Michels 1959), *Sexual Ethics* (1911) (Michels 2017), and later works like *First Lectures in Political Sociology* (1927) (Michels 1949). Weber made him a coeditor of the *Archiv* in 1913, but the war caused a painful split between the men as Michels refused to support Germany. He became a professor of economics at the University of Basel in 1914; by the 1920s, his growing acceptance of fascism led him to take an offer extended in 1928 by Mussolini to teach in Perugia. He died in Rome on May 3, 1936.

Democracy, Oligarchy, and the Mass Party

The core of Robert Michels' writings concerned the early twentieth century rise of the mass political party and its impact on politics, which placed him in a milieu alongside thinkers such as James Bryce, Moisei Ostrogorski, Rosa Luxemburg, and Max Weber. His works on the subject, especially *Political Parties*, examine what he described as the oligarchical tendencies of mass organization: the structural factors behind the rise of a party leadership clique, psychological factors within party leaders and the rank and file that contribute to antidemocratic practices, autocratic tendencies of those leaders, and the inadequacies of democratic attempts to combat oligarchy.

Michels focused on the SPD in his academic and political writings because, as he states in *Political Parties*, "the appearance of oligarchical phenomena in the very bosom of revolutionary parties is a conclusive proof of immanent oligarchical tendencies in every kind of human organization which strives for the attainment of definite ends" (Michels 1959, 11). German Social Democracy had adopted a strategy that equated parliamentary electoral success with the class struggle and that revolution would eventually follow victory at the polls and control of the state through parliament, but Michels saw the party as dominated by a conservative, bureaucratic elite more interested in vote-getting than revolution, and all too willing to quash attempts at internal-democratic reform.

The essential contradiction that Michels identified was that even though parties were the essential part of democracy, they were permeated with oligarchic elements and the external appearance of democracy veiled an internal tendency toward oligarchy. The technical capabilities necessary to run the organization successfully became a specialized skill, which created a small elite of capable party leaders; rank-and-file members supported this administrative elite out of necessity. Parliamentarians also rejected rank-and-file directives by leveraging their position against democratic demands.

Rank-and-file members began supporting the administrative elite in the party out of necessity as they did not have the ability or knowledge to replace party bureaucrats, and eventually no desire to do so. Elected office conferred power as well; parliamentarians often rejected democratically derived party directives as they quickly learned the party was dependent on them to maintain their seat. Party elites became fundamentally conservative, unwilling to risk any radical activities that would threaten the apparatus and, with it, their power, but willing to use their accumulated power to consolidate their rule and to quash any grassroots rebellion.

Leaders develop a psychological attachment to their offices after election, coming to regard them and the party as their property. The party masses first develop a sense of gratitude for the efforts of the leadership to build the organization, which turns over time into adulation. The masses, who tend to be younger than and less sure of themselves than party leaders, are thus simultaneously psychologically manipulated and willingly acquiesce to being controlled by a leadership clique. Whatever conflict exists tends to be between groups of party leaders, who come to identify the party with their personal rule and jealously guard their power; true grassroots revolts against the oligarchy are rare and even if successful lead to the selection of a new group of leaders, not democratization.

In *Political Parties*, Michels examined potential antidotes to oligarchic leadership within mass organizations: referendum, renunciation (proletarianization of bourgeois leaders), syndicalism, and anarchism. Finding each of them wanting, he believed none of them could fully address the psychological and structural tendencies toward oligarchy.

From all this, Michels formulated what he called the "iron law of oligarchy": "Who says organization, says oligarchy" (Michels 1959, 401). The structural and psychological factors produced within a mass parliamentary political party create the need for professionalization and hierarchical leadership and result in an oligarchic elite and compliant party base. Conservatism arises naturally from the desire to expand the voting base into a less ideologically committed electorate and maintain party strength; even revolutionary parties face severe pressure to abandon antisystemic actions once they accept the dictates of the electoral process. As noted above, Michels did see the value of democratic countermeasures to this process but did not believe it could be avoided. As such, he concluded that "every party organization represents an oligarchical power grounded upon a democratic basis," (Michels 1959, 401) and that modern representative government as such was oligarchy cloaked in a veneer of democracy.

Conclusions

Mainstream scholarship on Michels has historically regarded his work as a foundational document of elite democratic thought alongside that of Mosca and Pareto (Beetham 1977).

Other scholars have focused on Michels and his importance to the field of political sociology, connecting his work with that of James Bryce, Moisei Ostrogorski, and Max Weber (Mommsen 1987; Lipset 1968; Mitzman 1971).

Still others have seen an important through line in his analysis of organizational bureaucracy, oligarchic control, and elite party competition to later scholarship within party and organizational studies, as well as democratic thought (Linz 2006).

Finally, as noted above, there is a small but growing group of scholars that has reassessed his legacy, arguing that his academic writings contain a distillation of his syndicalist theorizing from the same period, that he belongs within a larger tradition of political pessimism rather than elite theory, and that Michels was a democrat but committed to a syndicalist or "dynamic" vision of democracy (Drochon 2020; LaVenia 2019; Piano 2019).

Cross-References

▶ Mosca, Gaetano
▶ Pareto, Vilfredo
▶ Weber, Max

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Microaggressions

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Introduction

Broadly, microaggressions are subtle behaviors, social practices, and environmental features that express disrespectful or derogatory attitudes towards members of structurally oppressed groups. They tend to be attributionally ambiguous, leaving some targets to second-guess their own perception as to whether one occurred. Microaggressions can be verbal (e.g., expressing surprise that a woman is mathematically gifted), non-verbal (e.g., a white woman visibility tensing up as a Black man walks onto the elevator), and environmental (e.g., a philosophy department that only displays images of white, European male philosophers). Since people repeatedly encounter them throughout all areas of their lives, research focuses on the problem of cumulative harm and the relationship between microaggressions and structural oppression. For both individuals and social groups, harms can be psychological, physiological, social, political, and economic in nature (see, e.g., Sue 2010).

Most microaggression research comes from the social sciences, psychology in particular. Microaggressions are often unintentional and below the awareness of the offender, and implicit bias is taken to be one causal precursor to their occurrence. The lack of intentionally makes ethical assessment more complicated because it is less straightforward how to blame or otherwise hold people accountable. Similarly, there is growing debate about what methodologies and/or methods are appropriate for determining exactly what microaggressions are, what causes them, how frequently they occur, and what kinds of harm they produce. Since solutions hinge on these answers, determining what preventative measures work is similarly complex.

Research on racial microaggressions is the bedrock of this literature because the concept is rooted in the tradition of critical race theory. More recently, researchers have started to address the role of microaggressions in other forms of oppression, e.g., sexism, transphobia, heterosexism, anti-fatness, ableism, classism, anti-indigeneity, xenophobia, and so forth (see, e.g., Freeman and Schroer 2020). The scope of research is quite wide and frequently interdisciplinary, but there a handful of core features that best capture the ethical, social, political, and legal dimensions of it. These features are (1) the context in which the concept arose and evolved, (2) definitional and methodological debates, (3) ethical assessments, and (4) their political and legal status.

Conceptual Genealogy

In "Offensive Mechanisms," Harvard psychiatrist Chester Pierce introduced the term "microaggression" (1970). *Offensive mechanisms* are the processes and practices that reinforce or contribute to structural oppression, and microaggressions are one such mechanism (Ibid., 260–261). Likening racial relations to a football game, Pierce argues that the white supremacist and specifically anti-Black racial hierarchy in the USA is maintained through offensive mechanisms, namely, the offensive plays by white Americans that put Black Americans into a constant state of defense.

Pierce takes microaggression to be a social practice stemming from the violent history of European imperialism and American settler-colonialism, presenting as aggressive and learned behaviors (1992, see also: 1995). Microaggression is a part of critical race theory (see e.g., Solórzano et al. 2000; Huber and Solórzano 2015). Critical race theory follows in the tradition of critical legal studies. It concerns the role of anti-Black racism in American nation-building and, in particular, the political and legal failures of anti-discrimination legislation. Microaggressions became more salient after the end of legal segregation because they function sub-legally, even though offenders are not necessarily aware of their actions (Pierce 1970, 1989, 1992; Davis 1989). Pierce refers to this ignorance by describing white American racism as a "perceptual illness" (1970, pp. 267), linking it to contemporary work on implicit bias. Microaggressions create a hostile environment to those gaining access to or more power within white institutions but do not themselves constitute violations of anti-discrimination legislation (Pierce 1970, 1989; Davis 1988; Lukes and Bangs 2014). To this end, Peggy Davis argues that law functions as microaggression (1988).

While much of the current research addresses racial, transphobic, or other forms of microaggression as separate, this notably breaks from the methodologies and other analytical tools offered by critical race theory. For instance, Kimberlé Crenshaw introduced the term "intersectionality" to explain how anti-discrimination legislation fails Black women (1989). Crenshaw argues that such legislation can only address discrimination as either sexist or racist, failing to capture the specific damages that occur at the intersection of the two. Due to its conceptual roots in critical race theory, there is reason to ground research within the methodological and epistemological practices of this field (see, e.g., Yep and Lescure 2019). However, the misuse of intersectionality in research can itself constitute a *racist methodological microaggression* (Henning 2020).

Definitional Debates

Nearly 40 years after Pierce's founding article, psychologists Derald Wing Sue et al. published an article on racial microaggressions, which lead to an explosion of research across multiple fields (2007). Post 2007, Sue is the most prominent scholar of microaggression today. Both his definition and taxonomy have been widely adopted. Microaggressions are "the brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative. . . slights and insults to the target person or group" (Sue et al. 2007, 273). Sue's taxonomy offers three types of microaggression: *microassaults*, *microinsults*, and *microinvalidations* (2010, 21–41). *Microassaults* are conscious, overt, and deliberate, such as displaying the Confederate Flag. By contrast, microinsults and microinvalidations are defined as largely unintentional. *Microinsults* are verbal and often interpersonal, such as saying, "You are pretty good at math for a woman." Similarly, *microinvalidations* ignore, downplay, or express unwarranted skepticism toward the experiences of those in the targeted group, e.g., telling a sexual assault survivor they are "being too sensitive" when they argue that people should not tell rape jokes.

Despite wide adoption, there is increasing criticism of his account. First, there is growing consensus that micro-assaults are not

microaggressions (see, e.g., Freeman and Schroer 2020). They are neither subtle nor ambiguous. Microaggressions can be intentional or unintentional, but forms of behavior that are always intentional and overt are generally excluded. Second, Sue centers the behavior of offenders which may not be sufficiently productive for research (including what types of microaggressions there are) and prevention (Freeman and Stewart 2018).

A significant debate in psychological research concerns methodology. Scott O. Lilienfeld, a prominent critic of microaggression research, argues that aggression is necessarily intentional and the concept is too vague for research purposes (2017). Target self-reports are frequently used as a method, and Lilienfeld argues that subjective experience is both insufficient and unreliable for identification, harm assessment, and establishing the veracity of causal connections between microaggressions and structural harms. Critical of this method, Lilienfeld argues there are no clear success conditions to determine when one as occurred, making the theories unfalsifiable.

In response, philosophers appeal to feminist epistemologies, particularly standpoint theory, and argue that self-reporting does provide sufficient evidence (see, e.g., Tschaepe 2016; de la Garza 2019; Freeman and Stewart 2020; Rini 2020). The direct experience of oppression is a source of knowledge about it. Because targets are relevant knowers, they are in the best position to produce collective knowledge about this phenomenon. However, forms of epistemic injustice and gaslighting are cause for concern because they can undermine the viability of this method. Similar to microinvalidations, *epistemic microaggressions* capture the ways in which the testimony of targets is downplayed or ignored, and this testimonial discounting constitutes an epistemic injustice (Freeman and Stewart 2018). Since microaggressions can be attributionally ambiguous, offenders and/or bystanders can exploit this feature to gaslight people and cause some to doubt their own experiences (see, e.g., Fatima 2017; Friedlaender 2018, 2021; Friedlaender and Ivy 2020). Gaslighting can harm the *cumulative epistemic resources* needed for and produced by target self-reporting, harming targets' own understanding of their experiences (Fatima 2020).

In the philosophical literature, Emma McClure and Regina Rini have proposed three categories under which particular definitions tend to fall: *psychological*, *structural*, and *experiential* (2020). They also note two possible hybrid approaches: *structural-experiential* and *psychological-structural* (Ibid). Due to these definitional debates, there is also an alternative approach that defines microaggressions in virtue of their family relations (i.e., a handful of overlapping features), not necessary and/or sufficient conditions (Stewart 2021).

First, *the psychological account* defines microaggression in terms of the causal relationship between the offender's mental states and the ensuring behavior. For example, if a white woman tenses up when Black man walks into the elevator, then it is a microaggression if her tensioning up was caused by implicit bias (i.e., it was neither intentional nor conscious). One critique is that it is unclear how to determine whether this success condition has been met in a particular case (see, e.g., Lilienfeld 2017; McClure and Rini 2020).

Second, *the structural account* defines microaggressions in virtue of how they function within oppressive social structures, usually by appeal to a pattern of similar actions (see e.g., Friedlaender 2018; McTernan 2017). This establishes types of microaggressions, such as the white woman's behavior in the elevator, to identify particular tokens (Rini 2020). On this account, microaggressions occur independent of the offender's mental states and the target's perception. However, this discounts the testimony of individual target about their experience by establishing types through collective testimony (i.e., a group standpoint), raising concerns about epistemic injustice towards those individuals (Ibid).

Third, *the phenomenological account* defines microaggressions in virtue of targets' experiences. Regina Rini, one of the prominent scholars in the philosophical literature, offers an Ambiguous Experience Account: "What makes an act or event count as a microaggression is that it is perceived by a member of an oppressed group as

possibility but not certainly instantiating oppression" (2020, 59). Most accounts, however, include target certainty in identification as well (see e.g., Freeman and Schroer 2020; Fatima 2020).

Social Justice and Ethics

The ethics of microaggression concerns the social nature of this injustice within an oppressive society. Since microaggressions are often unintentional, ethical accounts grapple with how to assign responsibly and blame and whether responsibility is backward and/or forward-looking. The literature addresses three levels of responsibility: individual, shared or collective, and institutional.

Individual responsibility captures interpersonal harms and generally requires that individuals take preventative steps to address forms of ignorance that result in such harms. Shared and collective accounts require us to work together to point out each other's behaviors or areas of ignorance as well as assess how we each individually contribute to collectively harmful outcomes (see, e.g., Friedlaender 2018; Rini 2020). Institutional accountability captures what duties institutions have to address and prevent microaggressions that create a hostile environment, negatively impact institutional decisions, and/or harm those who are not members of the institution. Literature focuses largely on education, the workplace, clinical medicine, and mental health services (see, e.g., Sue et al. 2007; Sue 2010; Brennan 2016).

As it stands, there are three major ethical approaches. First, consequentialism side-steps criticisms of the psychological definition by focusing on outcome, not intent. By and large, most accounts concerned with responsibility for cumulative harm take up this approach in some capacity. It can accommodate both the structural and experiential definitions and capture all three levels of responsibility.

Second, a deontological approach addresses how microaggressions undermine targets' self-respect and rational agency (O'Dowd 2018). As individuals, we have a duty to not violate a respect for persons principle, and microaggressions do just that (Ibid). In this case, violations would likely include relevant forms of epistemic injustice and gaslighting.

Third, an Aristotelian account frames microaggressions in terms of habits that we must continually work to change (Rini 2020). If implicit bias is one cause, then avoiding media that reinforces negative stereotypes about particular racial groups would be a preventative step. This type of character building need not be individual and likely requires the help of others to hold us accountable to changing our behaviors (Ibid.). This account captures individual, shared, and collective responsibility well and could likely extend to institutional responsibility.

Political and Legal Justice

There is a breadth of work concerning the ethics of microaggressions but less so on their legal status and political forms of redress. While Pierce frames microaggressions in terms of political and legal shifts, they still function as a social phenomenon. Emily McTernan, however, argues that microaggressions are a social practice that harm relations between citizens and undermine egalitarian goals (2017). However, forms of egalitarianism that focus on just principles and individual choices do not have the resources to address the social inequalities that microaggressions produce, as they cannot capture the internalized norms that result in unintentional behaviors. As McTernan argues further, "They cannot instead rely on general appeals to the side effects of having the right institutions or a sense of justice to do the work: these institutional strategies may well leave the phenomenon of microaggressions largely intact" (Ibid. 280). She argues that social or relational egalitarians do, however, have the capacity to address these background harms.

It is less clear how to legally respond to microaggressions, in part because it hinges on the particulars of a specific legal system. For example, the 1st Amendment of the US Constitution would include microaggressions as protected speech

(Lukes and Bangs 2014). In the USA, there are two additional obstacles for legal readdress. First, Peggy Davis argues that the legal system itself functions in microaggressive ways due to its white supremacist legacy (1989), which is consistent Pierce's own understanding. Following critical race theory more broadly, the problem here is that the US legal system cannot address these discriminatory social practices that undermine faith peoples' faith in the legal system itself and, similar to McTernan, shape relations between citizens for the worse.

Second, in the USA, discrimination requires intent and must target a specific person, making it impossible to include unintentional cases, environmental microaggressions, or any behaviors for which there is not a clear target (Lukes and Bangs 2014). Proving legal intent runs into the same problems as the psychological definition does in terms of identification. Additionally, anti-discrimination legislation excludes behaviors like microaggressions, even if they contribute to a hostile environment (Ibid).

Conclusion

Philosophical literature on microaggression is still in its infancy. So far, a significant portion is dedicated to methodological analysis, particularly in response to critics, and the value of social epistemological practices. Appeals to standpoint theory engage directly with questions about how we arrive at knowledge of this phenomenon and how epistemic injustice can impede this process. Much of the psychological research still focuses on institutional settings, primarily higher education, the work place, and clinical work, but, in philosophy, researchers have started to broaden this scope by focusing on their presence in non-institutional settings.

Ethical forms of readdress and preventative measures require further clarity about the causal role of implicit bias and/or the causal relationship between how these social practices come about and the broader offensive mechanisms in which they appear. This is especially true if the majority of cases are neither intentional nor conscious. There is still no clear consensus about how to identify whether a particular event was, in fact, a microaggression, which impedes ethical redress, although notably many philosophers take targets' experiences as playing a significant role.

Microaggressions are intimately connected to our moral, social, political, and legal lives. As the conceptual history and ethical debates suggest, microaggression is a complex phenomenon that requires a multilayered approach to capturing different forms of accountability and finding viable forms of prevention.

Cross-References

▶ Crenshaw, Kimberlé Williams
▶ Critical Theory and International Law
▶ Discrimination
▶ Justice: Structural Injustice
▶ Racism
▶ Social Epistemology

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Mill, John Stuart

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M

Introduction

It is difficult to synthesize the aspects of the work of John Stuart Mill (1806–1873) referred to Philosophy of Law. These connect with crucial issues of political philosophy and, strictly speaking, are apparently relatively insignificant compared to other writings that have greater depth and development in other fields such as *Principles of Political Economy* (1848) on economics or *A System of Logic* (1843) in relation to logic. In this sense, it would indicate only three works: On Liberty (1859), *Utilitarianism* (1863), and *The Subjection of Women* (1869). All of them are compiled in the 33 volumes of the *Collected Works* edited by the University of Toronto Press, Routledge & Kegan Paul.

Mill "has secured a place in British jurisprudence" (Curzon 1993: 63) and therefore in the history of legal ideas. First, although not well known, for his study and discussion on the work of the legal positivist, John Austin (1790–1859) in

relation to the concept of law and rights. Second, modifying the "utilitarian fundamentalism" of Jeremy Bentham (1748–1832), and the construction of a utilitarian theory of rights. And finally, building a utilitarian theory of justice based on moral rights, which gives an explanation of the connection between Morality, Justice, and Law.

From the perspective of rights, his philosophical roots do not sink into rationalist or Natural Law ideas, nor in the defence of liberal revolutions, nor in social contract theories . . . but as part of the radical philosophical movement. In the previous century Radicalism had influenced Benthamism in its fight against corrupt aristocratic institutions, social injustices and the "sinister interests of powers" . . . Bentham, from a methodological and ideological perspective, had made a very harsh critique of bourgeois natural rights. However, Mill tries to recover the perspective of rights and incorporate them into his version of a utilitarian theory. Mill's utilitarianism sometimes uses consequentialist arguments, but distant from a hedonistic calculus. Mill faithfully followed the utilitarian doctrine in his youth, abandoned it in a period of personal crisis and rejection of Bentham's ideas, and in the last stage, he re-identified with the Benthamite tradition in which he had grown up, trying to correct the defects and criticisms he had received (Britton 1953:45; García-Añón:1997).

In what follows, I will begin by explaining his reflection on the issues of the Philosophy of Law through his relationship with John Austin, his concept of rights, with reference to moral rights and his criticism of natural rights. Then, I will explain the justification of rights and justice in the principle of utility.

His Legal Philosophy: The Dialogue with John Austin About the Concept of Legal and Moral Rights

Mill's legal training in his early years and the intention of his father James Mill (1773–1836) contrast with the surprising little importance he gave to Law in his mature years, in which he was more concerned with political and legal reform than with legal-formal analysis. Neither his main works focused on issues related to Jurisprudence or Legal Theory nor in his works on social or political theory did legal categories prevail. Even Jurisprudence did not have its place in its scheme of moral sciences described in the sixth book of its *System of Logic* (Collini, CW, vol. XXI, p. xxxix). However, elements of a utilitarian theory of law can be found in various texts, such as *Utilitarianism*, and in the relationship with the analytical jurisprudence of John Austin.

Mill attended between 1829 and 1830, and sporadically thereafter, in the course of John Austin jurisprudence at the newly founded University College of London. The course was the opposite to the practical and casuistic character that had consisted hitherto legal education in Britain, and gave a new approach to analytical jurisprudence influenced by the European method searching of general principles scientifically grounded.

Austin's lectures were not very successful at that time, nor when were published in 1832, of which Mill made a review (CW, vol. XXI: 51–60). Both had ceased to accept as dogma the radical individualism of the Benthamite utilitarianism and accepted the need to rely on the authority of a scientific elite against the growing devaluation of democratic culture (Austin 1832: 61–64). While facing the conservatism of Austin, Mill introduced relevant democratic elements. They distanced later because Austin developed a more conservative thought *(Autobiography*, chapt. v, CW, vol. I: 185).

Sarah, wife of John Austin, published in 1863 a compilation with the title *Lectures on Jurisprudence and the Philosophy of Positive Law* [1861–1863], with the intention that they were a complement to *The Province of Jurisprudence Determined (1832)*. Mill collaborated contributing with his annotations and making a review (CW, vol. XXI, pp. 165–205). Here he described the Austin project as an investigation into the "logic of Law," and showed his coincidence with him except in his definition of the concept of right. He also shows Benthamite's concern about the modification of the legal system to avoid its defects and achieve its approach to a system

similar to Roman law, as Austin had learned from German pandectists.

Jurisprudence, both in Austin and Mill, is an empirical science that develops concepts and classifications from legal experience. Jurisprudence assumes the existence of legal norms "as a fact and treats its nature and properties as a naturalist treats any natural phenomenon" (CW, vol. XXI: 55).

Mill's main contribution to the clarification and determination of legal concepts is his analysis of the concept of "subjective right." Mill's concept of right, facing Austin and his disciples, implies its existence independently of their guarantees and their scope of validity. A right is not a mere logical corollary of an obligation but the foundation of it. This implies that the concept of right can be properly used in a nonlegal context as a claim based on considerations of Justice.

Mill maintains, as Bentham, its critical position against natural rights but recognizes the existence of human rights through the concept of "moral rights." Its position is consistent with a consequentialist approach in which good governance is judged in terms of contributing to the progress of civilization (Thomas 1988:110).

Moral rights are the content of justice. Justice differs from morality by the existence of rights that come from mandatory rules that protect interests essential to human well-being. It is this part of the Moral that he calls Justice and that is characterized because it protects those moral principles in a special way through (moral) rights. When they are also recognized in the legal system as legal rights, it can be said that they are also part of the Law: "Justice is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life; and the notion which we have found to be of the essence of the idea of justice, that of a right residing in an individual, implies and testifies to this more binding obligation." (*Utilitarianism*, capt. v, CW, vol. X:255).

Moral rights cannot be understood as natural rights because Mill explicitly criticizes the metaphysical philosophical conception on which they are based. Criticisms of natural rights use the naturalistic fallacy argument and the fiction of contract theories. Mill follows the arguments of Hume's criticism to Natural Law that attributes to moral principles the character of nature: its immutability and universality. Therefore, it denies nature as a duty to be moral, since morality does not come from nature ("Nature", CW, X, 376–7, 380; 384; Skorupski 1989:28).

At the same time, this is connected to Locke, Bentham and Austin criticism to poor formulation of the theories of the social contract and the rights of man, although they have the merit of pointing out that the power of the sovereign has any limiting moral.

The Foundation of Justice and Rights in the Principle of Utility: Rights and Basic Needs

For Mill, the ultimate foundation of justice and, therefore of rights, is utility. Or put in another way, the principle of utility is the only one that can give a correct version of the notion of Justice: "If the preceding analysis, or something resembling it, be not the correct account of the notion of justice; if justice be totally independent of utility, and be a standard per se, which the mind can recognise by simple introspection of itself; it is hard to understand why that internal oracle is so ambiguous, and why so many things appear either just or unjust, according to the light in which they are regarded." (Utilitarianism 1861, chapt. v, CW, vol. X:251).

Utility is the benchmark of the whole "practical life"; but in each area, it is connected differently (convenience, moral, justice . . .). The feeling of justice must be controlled by general utility because justice based on utility is "the most important, and incomparably most sacred and binding part of all morality.": "Justice is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life; and the notion which we have found to be of the essence of the idea of justice, that of a right residing in an individual, implies and testifies to this more

binding obligation." (Utilitarianism 1861, chapt. v, CW, vol. X: 255).

According to Berger, Mill did not explicitly address the issue of the connection of rights to human dignity (Berger 1984:291). Although in utilitarianism, rights appear as an instrument for the protection of crucial interests and connect the concept of dignity with that of developed and higher faculties, especially those associated with an autonomous life: "...its most appropriate appellation is a sense of dignity, which all human beings possess in one form or other, and in some, though by no means in exact, proportion to their higher faculties, and which is so essential a part of the happiness of those in whom it is strong, that nothing which conflicts with it could be, otherwise than momentarily, an object of desire to them." (Utilitarianism 1861, chapt. ii, CW, vol. X: 212).

However, the problem is that is not explained how a utilitarian theory can use notions such as treating others as ends in themselves, or develop this conception of basic rights or the idea of dignity... Even so, it can be reconstructed from the characteristics attributed to the needs or "what is essential for the well-being" of the individuals that give rise to the obligations of justice. (Skorupski 1989:18).

The permanent and progressive interests of humanity are based on the principle of utility or greater happiness:

> It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions: but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being. Those interests, I contend, authorize the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people. (On Liberty 1859, chapt. i, CW vol. XVIII:224–5)

When Mill uses the term "interests" protected by rights, it refers to "essential interests" (Auguste Comte and Positivism 1865, CW, vol. X: 337); "vital interests" (Utilitarianism 1861, chapt. v, CW vol. X:250–251); "collective interests of humanity" (Utilitarianism 1861, chapt. v, CW vol. X:249); or "permanent interests of man as a progressive being" (On Liberty 1859, chapt. i, CW, vol. XVIII:224).

Why Are These Interests So Essential That They Require Rights Protection?

Rights are like an instrument for the protection of these crucial and indispensable interests, which basically respond to the idea of human dignity, or as he develops further, to the idea of "individuality" or of respect and promotion of "higher faculties" of the person and all that this entails: "It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to. In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others." (On Liberty 1859, chapt. Iii, CW vol. XVIII:266).

For Mill, the free development of individuality is one of the principles of well-being, it is a necessary part and condition for the elements that make up the world: education, instruction, culture... and by itself has intrinsic value (On Liberty 1859, chapt. Iii, CW vol. XVIII:261). Therefore, although it did not expressly develop the idea of dignity, we can appreciate its importance through the idea of individuality and the importance it gave to the moral principles that came from these needs and that pointed to the connection between Law and Moral. The interests that protect the rights are those that refer to the most important needs of the human being that represent a benefit for his personal development and that in the case that they are not respected imply the violation of important expectations.

The Conflict of Rights and the Principle of Utility

One of the problems that a utilitarian theory of rights may pose is the relation of rights to the principle of utility, if we take it as an aggregate end. There are authors who interpret that Mill subordinates individual rights to general utility, since they have an instrumental role because the important thing is welfare based on the criterion of maximum utility (Gewirth 1982:158).

Instead, we understand that there is no subordination of rights to the principle of utility taken as an aggregate since Mill expressly criticizes submission to collective ends, fostering individuality and diversity. In fact, it understands that rights function as limits to actions or decisions whose purpose is aggregative, and are even limits to behaviors that foster or benefit some secondary principles of the utility principle, such as individuality (Coralluzzo 1985:73–74). In fact, for example, Mill criticizes Comte's position that society be directed towards a general or collective goal, and defends the diversity of ideas and individuality of society's members. (Auguste Comte and Positivism 1865, CW vol. X: 337).

How Should the Reference to the Principle of Utility be Understood?

There is a normative recommendation that comes from the principle of utility: that of promoting the most favorable conditions in which persons can enjoy maximum individual freedom in relation to their own interests (Frongia 1984:169).

The rules of justice occupy a privileged position because they are safeguarding and promoting more effectively the constituent elements of human welfare. These elements can be conceived as a kind of limit of individual and collective utility, as almost inalienable goods, since it has been demonstrated through uninterrupted experience that they are more useful than others. Therefore, it seems that Mill exceeds the position of mere aggregation of classical utilitarianism and has justice criteria in mind in the composition of his utilitarian moral theory, which are not strictly utilitarian (Maffetone 1982: 60–61, 65).

The problem would arise if we take the principle of "aggregate" utility as the last criterion, so that we have to sacrifice the "primary utilities" of some people if it is justified for the benefit or protection of the "primary utilities" of a greater number (Rawls 1971:260).

In cases of conflict of rights with the principle of utility (as aggregate), we can find three different interpretations: (a) they are different principles, so when they come into conflict the solution is complex; (b) the utility principle prevails in any case; (c) this type of conflict is not possible. We will examine each of them:

(a) The existence of different principles: According to this approach presented by Gray, the position of Mill in *On Liberty* faces the principle of freedom and utility in an impossible way. The reasons given are the following: First, it is a foundation on two different principles, freedom and utility. In this way, utilitarian arguments should not support liberal foundations. And equally, it would be difficult to think that a utilitarian would renounce the maximization of utility for the benefit of freedom. (Gray 1981:80–82) And secondly, since freedom and utility are incompatible, it seems that Mill preferred freedom (Gray 1981:81–83).

(b) A second interpretation argues that the principle of utility prevails over that of freedom, at least in some cases: such as those in countries that prohibit marriage unless there were means to support the family (On Liberty 1859,chapt. v, CW, vol. XVIII:304; Thomas 1988*: 96–99*).

(c) The third view says that this incompatibility never occurs because there is no possible conflict at all (Skorupski 1989:20–21). As we have seen, the secondary principles of the principle of greatest happiness are at the same time means and parts of the end, so in that structure it is difficult for a situation of conflict or incompatibility to occur (Garcia-Añón, 1997: 69 and ff). This interpretation clarifies the relationship between the principle of utility and the secondary ends; but it postpones the problem of the relationship between "primary utilities" and their conflicts. That is, if there is no conflict between rights or "primary utilities" with the principle of utility, the

only conflict that will exist will be between "primary utilities," according to their position and importance in relation to the principle of utility and circumstances that surround them.

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Mill, John Stuart: On Justice

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Mill comes to the concept of justice with an axe to grind. His agenda is to show that justice is not

fundamentally distinct from the rest of morality, and to show that utilitarians can explain common intuitions about justice. He is widely thought to have failed in his attempt to reconcile justice and utility. However, his analysis of the concept of justice has nevertheless been hugely influential, and in particular, his claim that justice consists in respect for moral rights has garnered many contemporary advocates.

Mill begins the final chapter of *Utilitarianism* by looking for qualities which all concrete judgments of injustice share. It is commonly thought to be unjust, Mill says: to violate a person's legal rights, to violate a person's moral rights, to fail to give someone what they deserve, to disappoint expectations we have voluntarily given someone, to be partial where impartiality is due, and to treat people unequally where equal treatment is due. What ties together all of these senses of injustice, argues Mill, is that we think persons committing injustices ought to be punished because they have violated their obligations to some other specific "assignable" persons. The distinctive feature of a wrong act is that it warrants a punishment; by contrast, the distinctive feature of an unjust act is that it warrants a punishment for the specific reason that someone's moral rights have been violated.

The sentiment of justice is thus composed, first, of the desire to punish a wrongdoer, and second, of the knowledge or belief that specific persons have been wronged.

The desire to punish, Mill claims, is an outgrowth from the impulse of self-defense and from the feeling of sympathy. This origin story helps Mill to explain both the "morality" and the "peculiar impressiveness and energy of self-assertion" of the sentiment of justice in naturalistic terms: though the desire to punish is not itself a moral desire, when it is aroused by concern with interests common to all mankind, then it serves a moral function; the peculiar energy of self-assertion associated with that desire comes from its derivation in the basic instinct to avenge harms done to people with whom one sympathizes. So, Mill argues, because the desire to punish people for injustices can be fully explained simply by reference to human psychology and the common good, that desire is capable of being explained in utilitarian terms, without having to resort to inventing any special inherent quality of justice distinct from the rest of morality.

What remains is for Mill to show that the other element in the sentiment of justice – i.e., the knowledge that a moral right has been violated – is not distinct from the rest of morality and can also be explained in utilitarian terms. This he seeks to do by identifying a right as "something which society ought to defend me in the possession of." Rights, according to Mill, stand higher on the scale of social utility and give rise to more absolute obligations, than any other class of moral requirements. Even if they are not absolute, they are very weighty, especially stringent requirements. Mill argues that it is justifiable for the utilitarian to give rights this kind of special weight or stringency because they protect an especially important interest, namely, security. And for Mill, humans cannot do without security – it is the most indispensable necessity after "physical nutriment," because it protects "the very groundwork of our existence." Since rights protect this essential source of utility, Mill holds, there is good reason for the utilitarian to give rights a near-absolute status – again, without any need to appeal to a justification outside utilitarianism.

However, Mill goes beyond the argument that utility and justice can be reconciled. He argues also that utility is in fact the *only* rational standard by reference to which we can choose between competing conceptions of justice. There are many cases in which people have conflicting intuitions about justice – for example, some think a punishment just only if its purpose is the good of the sufferer, while others think it just only if it is intended as a deterrence, and some think it just to award remuneration in proportion to natural skill, while others think it just to award remuneration only in proportion to effort. Mill argues that a rational choice between these conceptions can be made only by reference to utility. And this, in Mill's view, provides a further proof that justice must be derived from considerations of utility and is not fundamentally distinct from the rest of morality.

The many controversial features of Mill's theory of justice become more apparent when one considers his theory in the context of contemporary debates about justice.

The first and most obvious difference between Mill's theory and most contemporary theories of justice is that contemporary thinkers typically operate with a wider notion of justice than Mill. Indeed, many contemporary thinkers can be seen as attempting to elucidate a "universal" sense of justice – as fairness, as desert, or as equality – and hence to be giving an account of almost all other-regarding duties (see Rawls 1971; Dworkin 2000; Cohen 1989; Sen 1980). Though this wide sense of justice still leaves room for self-regarding virtues such as temperance or humility, it makes justice worryingly indistinguishable from the external aspects of morality. In contrast, Mill is trying to elucidate the "narrow" sense of justice encapsulated in the Justinian maxim "to render to each his due" and restricts himself to considering what is shared by the different forms of such "particular" justice – e.g., distributive, corrective, retributive, or procedural. His conception of justice is therefore wholly distinct from the aspects of morality that involve moral norms or other-regarding virtues such as charity, generosity, and beneficence.

One possible conclusion is that the differences between Mill and many contemporary thinkers are merely verbal, that they are talking about different notions of justice entirely, and that there is no reason to prefer talk of either notion of justice over the other. Another possible conclusion is that the disputes are in fact genuine, and that there are substantive reasons to prefer one conception over another. A final possible conclusion is that although the differences between Mill and many contemporary thinkers may be merely verbal, there are nonetheless good definitional reasons for preferring the use of one notion of justice over the other; so, for example, one might think it preferable to use the term "justice" only in its narrow sense, so as to avoid blurring the boundaries between duties of justice and other moral duties, and so as to avoid devaluing the currency of justice or depriving allegations of injustice of their special condemnatory force.

Second, even among those thinkers concerned with the narrow notion of justice, Mill's theory is far from universally accepted. So, for example, for Hart, justice is encapsulated by the maxim "treat like cases alike, and different cases differently," combined with a variable criterion used to determine when two cases are relevantly alike (normally, a criterion derived from the specific moral outlook one adopts) (Hart 2012: Chap. 8). To take another example, for Miller, there are no universal principles of justice available. Instead, principles of justice are seen as context specific and freestanding, such that there are no substantive relations between the principles applicable to different contexts, apart from the fact that they are all principles of justice, rather than some other moral value (Miller 2013: Chap. 2).

However, even these rival theories seem to display some recognition of the force of Mill's ideas about justice (or at least, something very like those ideas). Hart implicitly recognizes the force of the idea that justice consists in respect for rights, when he holds that justice consists in an "entitlement" people have, to have like cases treated alike. He recognizes the force of the idea even more explicitly, when he asserts that, sometimes, injustice can arise even where like cases are treated alike: where the law fails to provide a remedy for certain kinds of particularly egregious wrong, this will be unjust per se, because people "have a right to mutual forbearance from certain kinds of harmful conduct" (Hart 2012: 164). Miller too recognizes the force of the idea that justice consists in respect for rights – and explicitly recognizes that in some contexts and domains, justice may be appropriately thought of as respect for rights. At the more general level, he recognizes that the Justinian maxim "render each their due" may tie together the different senses of justice applicable in different contexts – and there is at least a plausible argument in favor of the view that the only way of rendering that maxim intelligible is by reference to the concept of a right.

Third, Mill's analysis of rights, as "something which society ought to defend me in the possession of," is also somewhat controversial. For one thing, Mill's analysis of rights in terms of the duties they justify fails to recognize the other Hohfeldian elements of a right, i.e., privileges, powers, and immunities (Hohfeld 1913). Moreover, the idea that a norm is only a right if *society* ought to defend me in the possession of it, is more

restrictive than many modern conceptions of rights. Raz, for example, holds that a right exists where something provides "a sufficient reason for holding some other person to be under a duty" (Raz 1986: 166). Rather than it being necessary for society as a whole to bear a duty, a right can exist for Raz where the class of persons who bear the correlative duties is much smaller. Mill's narrow conception of rights leads to what may be an unduly short list of rights: he cannot explain, for example, the existence of the rights family members, friends, or members of associations may have against one another, and thus cannot explain the extent to which principles of justice are applicable to such areas of life (see Liao 2015; Okin 1989).

Fourth, there might be reason to doubt both Mill's claim that every injustice is a rights violation, and his claim that every rights violation is an injustice. Injustice might sometimes exist in the absence of a rights violation – for example, one might think it unjust to fail to make provision in your will for a child who has nursed you in your old age, even though one might not think the child has a right to that inheritance. Similarly, a rights violation might sometimes exist without injustice – a rapist clearly grossly violates the rights of their victim, but there is at least a plausible argument for thinking rape is a grave moral wrong of a different kind rather than being, in itself, a case of injustice (see Crisp 1997: Chap. 7).

Fifth, Mill's analysis of justice in terms of rights only gives substantive content to justice when combined with a theory about the justification for, and content of, rights. For those skeptical about the existence of any moral rights at all, accepting Mill's analysis of justice would imply that there were no duties of justice, and no unjust acts. Correspondingly, and perhaps equally implausibly, for those who think that the whole of morality is rights-based, accepting Mill's analysis of justice would imply that all moral duties whatsoever were also duties of justice.

Mill does, of course, combine his analysis of justice with a theory about the justification for rights. Rights, for Mill, are grounded in utility, and so the content of justice is determined by reference to those rights which are justified on utilitarian grounds. This leads us to the biggest issue with Mill's theory of justice. The problem is that it is doubtful whether the form of utilitarianism adopted by Mill is capable of giving moral rights the kind of status, weight, or resistance to trade-offs which they are normally thought to have. It is for this reason that Mill is widely thought to have failed in his attempt to reconcile justice and utility. If it is true that moral rights cannot be grounded in Mill's utilitarianism, then Mill's theory of justice is flawed.

There are two aspects of Mill's account of utilitarianism that might be able to act as a grounding for moral rights.

First, there is Mill's concept of higher pleasures. If moral rights protect certain important higher pleasures, and if those higher pleasures are so valuable that no amount of certain lower pleasures can ever trump their value, then some part of the stringency of moral rights might be explained by reference to this "discontinuity" of value.

One way of looking at this is that Mill might be endorsing a "robust discontinuity thesis," according to which higher pleasures have "lexical dominance" over certain lower pleasures. On this account, higher pleasures are so much more valuable than certain lower pleasures that no amount of the lower pleasure could ever, in any possible world, outweigh the higher pleasure. Another way of looking at this is that Mill might be endorsing a "weak discontinuity thesis," according to which some kinds of good tend to bring so much welfare, and some other kinds of good tend to bring so little welfare, that no quantity of the low-welfare good can, at least in the world as it is, ever outweigh the high-welfare good.

However, there seem to be problems with both approaches. On the one hand, although endorsing the robust discontinuity thesis would allow Mill to explain the stringency of rights by reference to the lexical superiority of certain classes of rights over certain classes of interests, it is hard to find a sound utilitarian motivation for endorsing the robust discontinuity thesis. In short, it seems either to involve adopting a form of axiological pluralism which is incompatible with the value monism of utilitarianism, or it involves

contending that higher pleasures have infinite value compared to lower pleasures, which is a proposition that seems very difficult to justify empirically (see Brink 2013: 60–73; Sen 1980–81; Riley 1993; Scarre 1997). On the other hand, endorsing a weak discontinuity thesis does not seem to allow Mill to explain the stringency of rights. If the duration and intensity of a pleasure are the only things which determine the value of that pleasure, it does not seem to follow that the pleasure or welfare brought by respecting a single individual's right will always (in the world as it is) be discontinuous with the welfare generated by any other interest.

If we think that Mill's concept of higher pleasures does not allow him to find a utilitarian grounding for moral rights, we might turn instead to his concept of "secondary principles" (see Mill 2003: 82–83). If moral rights protect important interests which justify those rights having the status of secondary principles, and if such secondary principles ought sometimes to be followed even when doing so seems non-optimific, then this might explain at least some part of the stringency of rights.

There are, again, two ways of looking at Mill's idea here. Mill might be endorsing a "rule utilitarian rights thesis." According to this thesis, acts are right *iff* they are prescribed by the system of rules whose general acceptance would maximize happiness. Acts which do not, taken alone, maximize happiness can therefore nonetheless have the deontic status of being right. If the system of rules whose general acceptance would maximize happiness includes moral rights, then it would be wrong to violate those rights even where their violation might, taken alone, maximize happiness. Alternatively, Mill might be endorsing an "indirect utilitarian rights thesis." According to this thesis, acts are right *iff* they maximize happiness. Acts which do not, taken alone, maximize happiness, cannot have the deontic status of being right. However, when deciding what to do, one should not ordinarily think about maximizing happiness. Instead one ought to determine the set of principles whose general acceptance would maximize happiness, and ought to act accordingly, even when one thinks one could maximize happiness by violating those principles. If the set of practical operating principles whose acceptance would maximize happiness includes moral rights, then – as a matter of practical operation – those rights ought not to be violated even where their violation might, taken alone, maximize happiness.

However, there again seem to be problems with both approaches. On the one hand, if Mill is endorsing the rule utilitarian rights thesis, it is not clear that his theory can avoid the charge of being a superstitious form of "rule worship," which is at odds with Mill's own justification for adopting utilitarianism in the first place (see Smart 1956: 349; Lyons 1965; Hooker 2000: Chap. 4). On the other hand, if Mill is endorsing the indirect utilitarian rights thesis, it is not clear whether his theory can generate a sufficiently stringent conception of rights: if acts are right *iff* they maximize happiness, then – regardless of what decision procedure we ought to adopt – the objection remains that we should forsake moral rights wherever we are sure that it is optimific to do so, and prima facie this might seem to leave us with an insufficiently stringent version of rights (Lyons 1982). Nonetheless, this final approach has many contemporary advocates, who have developed theories to rebut this remaining objection, and it represents perhaps the most plausible approach to grounding rights in Mill's utilitarianism.

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Mills, Charles: The Racial Contract

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Introduction

Charles Mills is unquestionably one of the most influential social and political philosophers of the late twentieth and early twenty-first centuries. Born in Jamaica, he attended the University of the West Indies for a BS in Physics before pursuing his PhD in Philosophy at the University of Toronto, which he completed in 1985. Following this, he held appointments in philosophy at the University of Oklahoma, University of Illinois – Chicago, and Northwestern University. At the time of his death in 2021, he was Distinguished Professor at the Graduate Center of CUNY. His research was primarily on oppositional political theory, with a narrower focus on race. Among his many notable publications are *The Racial Contract* (1997), *Blackness Visible: Essays on Philosophy and Race* (1998), *From Class to Race: Essays in White Marxism and Black Radicalism* (2003), *Contract and Domination* with Carole Pateman (2007), *Radical Theory, Caribbean Reality: Race, Class and Social Domination* (2010), and most recently *Black Rights/White Wrongs: The Critique of Racial Liberalism* (2017).

Here I focus on the first of these works, *The Racial Contract*, the ideas of which pervade each of his later works. While *Blackness Visible* granted the presence of the Racial Contract from the outset and considered the upshot of seriously considering race in each field of philosophy, *From Class to Race* reflected on how he arrived at the conclusions of *The Racial Contract* after first being a Marxist. In *Contract and Domination*, Mills and Pateman collaboratively explored how the Racial and Sexual Contract have been "intimately connected" (2007, 3), and in *Radical Theory, Caribbean Reality*, Mills examined the roles that race and class have played in the Caribbean context. Finally, in *Black Rights/White Wrongs*, Mills offered a critique of racial liberalism, where approaches to liberalism have been dominated by racial contractarian thought. It should be noted that this work concludes on the discouraging note that *The Racial Contract* has had "close to zero" impact "on mainstream political philosophy in general and social contract theory in particular," raising the question: If *The Racial Contract* "cannot affect the direction of white political philosophy, what can?" (2017, 191).

In *The Racial Contract*, Mills offered a "global theoretical framework" that allows one to understand how racism is a political system. This framework takes as its basis the work of four classical contractarians: Hobbes, Locke, Rousseau, and Kant. Mills was motivated to base his account on these figures because he saw contract theory as "the political lingua franca of our times" (1997, 3). Despite a focus on contractarian accounts that are situated in western political thought, the theses Mills advanced about the Racial Contract are global, drawing attention to

"a tectonic shift of the ethicojuridical basis of the planet as a whole, the division of the world... between 'men' and 'natives'" (1997, 20). Notably, Mills cited Carol Pateman's *The Sexual Contract* (1988) as the inspiration for this work – which less than a decade earlier – illustrated how patriarchal domination is a political system (1997, 8). *The Racial Contract* is unique in that it exposes a way in which white supremacy underlies and informs contemporary mainstream political philosophy. Mills' goal, in revealing this, was to bring together the disparate work of those concerned with abstract discussion of rights and justice and those focused on "Native American, African American, and Third and Fourth World political thought" (1997, 4). The need to bridge this gap in work – drawing attention to how mainstream political philosophy is problematic – is exemplified by a black American folk aphorism Mills referred to throughout his book: "When white people say 'Justice,' they mean 'Just us'" (1997, xiv).

The Racial Contract

For the classical contractarians, the social contract is used both descriptively and normatively. Here one must distinguish between the ideal and nonideal social contract: The ideal contract is concerned with how a just society develops, while the nonideal contract is concerned with how an unjust society "comes into existence" (Mills 1997, 5). *The Racial Contract* focused on examining the nonideal social contract in an effort to reveal actual inequities and the justifications offered for them – this was the descriptive aspect of Mills' project. The normative aspect arose out of learning how to reform those "values and concepts" that justify the inequities brought about by the nonideal social contract (Mills 1997, 6).

From this basis, Mills argued for ten distinct theses, resting on the following three claims: "the existential claim – white supremacy, both local and global, exists and has existed for many years; the conceptual claim – white supremacy should be thought of as itself a political system; [and the] methodological claim – as a political system, white supremacy can illuminatingly be theorized as based on a 'contract' between whites, a Racial Contract" (1997, 7).

Mills' Ten Theses

The first thesis that Mills put forward was that the Racial Contract is political, moral, and epistemological. While contemporary contract theorists distinguish between political and moral contracts, Mills also called attention to epistemological contracts, designating the Racial Contract as having features of all three types of contract. A political contract provides an explanation of one's obligations to one's government and how that government originated. A moral contract serves as the basis for the moral code that members of a society are supposed to abide by, and the epistemological contract prescribes norms that those consenting to the contract must observe. The Racial Contract is political, moral, and epistemological in that it "...establishes a racial polity, a racial state, and a racial juridical system, where the status of whites and nonwhites is clearly demarcated, whether by law or custom. And the purpose of this state... [is] specifically to maintain and reproduce this racial order, securing the privileges and advantages of the full white citizens and maintaining the subordination of nonwhites... the color-coded morality of the Racial Contract restricts the possession of... natural freedom and equality to *white* men... [where] one has to learn to see the world wrongly, but with the assurance that this set of mistaken perceptions will be validated by white epistemic authority," to maintain the white polity (1997, 9–18). Notably, Mills took all white persons to benefit from this contract and allowed that some may not consent to it, while nonwhite persons cannot consent to this contract. Why nonwhite persons cannot consent becomes apparent in Mills' justification for his fourth, fifth, sixth, and seventh theses.

The second thesis Mills defended was that "the Racial Contract is a historical actuality," unlike the social contract (1997, 19). This claim was supported by looking at how the world as it is

today has been formed by European colonialism, through oppression and exploitation that drew a line between appropriate treatment of "higher" and "lower" persons. The failure of contemporary political philosophy to acknowledge the examination of this history as a reasonable research project is, argued Mills, an ahistorical orientation that is "profoundly at odds with the radically foundational questioning on which philosophy prides itself and, at worst, a complicity with the terms of the Racial Contract itself" (1997, 31). The third thesis is closely related to the second; it claimed that European economic domination and national white racial supremacy are created by the Racial Contract, as an exploitation contract. It pointed to colonialism as the reason that Europe was able to become an economic powerhouse, establishing economic structures that continue to efficiently move money and resources from those areas inhabited by "lower" persons to those inhabited by "higher" persons.

The fourth and fifth theses Mills advanced are that there is norming of spaces and individuals arising from the Racial Contract in such a way that the distinction between personhood and subpersonhood is established. There are two ways that the norming of spaces and individuals occurs. The first is epistemological, which claims "real knowledge" – knowledge of science and universals – is only held by Europeans that have achieved cultural and intellectual progress. This "real knowledge" cannot be found among "uncivilized" men – those that are superstitious and ignorant, and will continue to be without European intervention. The second way of norming is moral, which holds that civilized Europe and its citizens are virtuous while non-Europeans and the areas they inhabit are vicious. With this norming, space is interconnected with race – which in turn is interconnected with personhood – such that "the white [(i.e. European)] raced space of the polity is in a sense the geographical locus of the polity proper… [and] will also mark the geographic boundary of the state's full obligations" (Mills 1997, 50). Nonwhite individuals falling beyond the boundary are deemed subpersons, not party to the Racial Contract.

Mills' sixth thesis proposed was that the current social contract is underwritten by the Racial Contract. This is because the Racial Contract created "*race itself* as a group identity" which racial exploitation is predicated upon, denying personhood to the exploited and permitting whites alone to participate in the social contract (Mills 1997, 63). Since the Racial Contract mandates that subpersons fall beyond the scope of the social contract, "the *Racial* Contract is thus the truth of the *social* contract" (Mills 1997, 64). That the social contract is limited solely to persons – excluding subpersons – is a prevalent feature in the social contracts of Hobbes, Locke, Rousseau, and Kant. The groups that can claim personhood, and as a result participation in the social contract, shift over time based upon whether the group is considered white. Mills surveyed a number of cases to demonstrate that whiteness and nonwhiteness are socially constructed rather than biologically based and that this division persists today in those that are permitted to benefit from the current social contract.

The seventh thesis Mills offered is that violence and ideological conditioning, "the two traditional weapons of coercion," are required to enforce the Racial Contract (1997, 83). It needs to be acknowledged that the state, qua coercer, plays a major role in ensuring that the racial hierarchy is maintained. Mills provided the examples of the violence of police brutality toward blacks and disproportionate incarceration rates to illustrate this point. The ideological conditioning takes place through "…the development of a depersonizing conceptual apparatus through which whites must learn to see nonwhites and also, crucially, through which nonwhites must learn to see themselves" (Mills 1997, 87–88). The use of educational texts that depict nonwhites as having barbarous cultural practices while simultaneously aspiring to be white is an example of this ideological conditioning. Without these coercive measures, the Racial Contract could not be maintained because it would be strongly and effectively resisted by nonwhites.

The eighth thesis Mills defended was that "the Racial Contract historically tracks the actual moral/political consciousness of (most) white

moral agents" (1997, 91). To support this claim, he looked to ways in which canonical philosophers – including Hume, Mill, and Hegel – made claims suggesting that nonwhites are inferior. In addition, Mills took the silence of other theorists on the issue of race to suggest it is not of interest to them as a subject worth pursuing. The hope is that, by recognizing both these features of prominent moral and political theorizing and their source, steps can be taken to make corrections that invalidate the Racial Contract.

The ninth thesis Mills presented is that nonwhites have always recognized the Racial Contract as the "real determinant of (most) white moral/political practice" and, in turn, recognize the Racial Contract as the moral/political agreement that must be challenged (1997, 109). He argued for this by pointing to the epistemic advantages that the victims/objects of the Racial Contract gain from exposure to the "phenomenological experience of the disjuncture between official (white) reality and actual (nonwhite) experience" (1997, 109). The experience of nonwhites gives rise to a perspective of social reality that departs from that of whites. As a result, the way that nonwhites pursue justice is strikingly different from that of whites. Personhood plays a central role in the pursuit of justice for nonwhites (since their status is bound up with being deemed subpersons), while whites take personhood for granted. Furthermore, the recognition by nonwhites of the pursuit of personhood provides a sense of a shared and unified project in opposition to the Racial Contract.

Mills concluded his work by claiming the Racial Contract is far more adept at explaining why the world is the way it is, morally and politically, when compared to standard social contract theory. It is superior in a number of ways: by capturing that race and racism are central to history, by permitting one to recognize how the social structure affects moral and political theorizing, by both recognizing and demystifying race, and by locating itself within black oppositional theory – a tradition that celebrates the work of individuals that were able to insightfully theorize about their oppression in defiance of "the massive weight of a white scholarship that either morally justified this oppression or denied its existence" (Mills 1997, 131).

Objections

A number of objections have been raised against *The Racial Contract* over the past two decades. In 2002, Mills responded to what he took to be the most serious criticism, leveraged by J. L. A. Garcia in his "The Racial Contract Hypothesis." Garcia argued that "there is little reason to think Mills's Racial Contract is real, an actual historical fact, little reason to believe it can explain the sociological, historical, and psychological phenomena Mills explores" (2001, 37). This criticism is predicated upon understanding the Racial Contract as a testable hypothesis that serves as a "social-scientific explanation of white racism" (Mills 2002, 76). But, Mills quickly pointed out, "The Racial Contract was not intended by me to be taken literally; I am not offering a social-scientific explanation of anything; and to the extent that I am offering an explanation of, or a way of thinking about something, it is white supremacy, not white racism" (Mills 2002, 76). Here it becomes clear that Mills' Racial Contract is "not meant as a detailed, nuts-and-bolts account of the origins of white racism/white supremacy any more than social contract theory (as used today anyway) is meant as a detailed, nuts-and-bolts account of the origins of society" (Mills 2002, 76).

In 2015, Mills responded to two other substantive criticisms. The first is Anna Marie Smith's criticism that he undertheorized the duties of individual moral agents within the Racial Contract, which Mills simply "plead[s] guilty" to. He granted that this is a limitation of *The Racial Contract* but pointed to his 2011 "Vice's Vicious Virtues" as a place where he more thoroughly developed an account of substantive white resistance (Mills 2015, 544). The second criticism came from Keisha Lindsay that he ought to have considered gender and the issues that lie at its intersection with race. Again, Mills' response was conciliatory, granting that this was an oversight but noting that there were external

limitations introduced by the general lack of literature on the matter (Mills 2015, 552).

Conclusion

In short, Mills' *The Racial Contract* is a unique contribution to social philosophy. It offers a realist interpretation of the social contract, focusing on the prevalent role that race and racism have played in the development of the world as it is, as well as contemporary moral and political theorizing. Through his defense of ten distinct theses, he demonstrated not only that the Racial Contract is alive and well, contributing to the global persistence of white privilege, but also that there is a need to bridge the divide between mainstream political philosophy and those working on Native American, African American, and Third and Fourth World political thought. The failure to bridge this gap only further delays the much needed and long overdue tectonic shift our legal systems must make toward global racial justice (Mills 2017, 192).

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- ▶ Justice: And Social Contract
- ▶ Kant, Immanuel: On Justice
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Introduction

John Milton (1608–1674) is better known for his poetry than his political prose, *Paradise Lost*, overshadowing *Areopagitica*. Yet living through the English Revolution of the mid-seventeenth century and as an employee of the "Commonwealth and Free State" established in 1649, Milton made a significant contribution to the legal and political thought of that turbulent period of English history. Central to Milton's understanding of politics was the concept of liberty. He was committed to the liberty of the individual in private as well as to wider religious and political freedoms.

Individual Liberties

Some of Milton's earliest prose writings were concerned with personal freedoms: the right of couples to release themselves from an unhappy marriage, the right to free speech, and freedom of religious belief. In the summer of 1643, Milton published *The Doctrine and Discipline of*

Divorce. An expanded second edition soon appeared, and three further "divorce tracts" followed. Inspired by his own personal experience, Milton argued for what is now known as a no-fault divorce, for the legitimacy of divorce simply on the grounds of incompatibility between the two parties. The storm prompted by Milton's divorce tracts brought him into contact with the English state's licensing laws and in particular the 1643 Ordinance for the Regulating of Printing, which required authors to have a license before their work could be published. This experience led Milton to examine the Ordinance and the wider issue of the liberty of the press. In *Areopagitica* (1644) he argued not only that the Ordinance would fail to fulfil its goal of suppressing "scandalous, seditious, and libellous Books" but also that it would have a wider negative impact: discouraging learning and hindering the pursuit of truth (Milton 1974, p. 200).

Just as Milton argued for freedom of speech and the press, so in religious matters, he had strong sympathies with the Independents who insisted on the right of congregations to choose their own ministers and favored religious toleration for Protestants. As he explained:

> The whole freedom of man consists either in spiritual or civil libertie. As for spiritual, who can be at rest, who can enjoy any thing in this world with contentment, who hath not libertie to serve God and to save his own soul, according to the best light which God hath planted in him to that purpose, by the reading of his reveal'd will and the guidance of his holy spirit?' (Milton 1974, p.352)

Political Liberties: Regicide and Republicanism

The execution of Charles I on 30 January 1649 prompted new thinking about liberty and government. By mid-February Milton had published *The Tenure of Kings and Magistrates* in which he vindicated the regicide. The work was directed against those Presbyterians who had opposed the King during the Civil War but who now condemned Charles's execution. Drawing on John Calvin's argument that inferior magistrates had a right of resistance against tyrannical rule but that private persons did not, the Presbyterians insisted that the army, which had instigated the regicide, was a collection of private persons and so could not legally exercise the right of resistance. Milton responded that since Parliament, as the inferior magistrate, had not deposed and punished Charles, the army had the right to do so (Milton 1991, p. 1). Milton's argument was grounded in his insistence that power originally lay with the people. Rulers were the people's deputies, rather than their masters, appointed for their common defense. The relationship between rulers and subjects was, therefore, grounded in trust: "if the King or Magistrate prov'd unfaithfull to his trust, the people would be disengag'd" (Milton 1991, pp. 9–10). Charles had broken his trust by behaving tyrannically and reigning "onely for himself and his faction" (Milton 1991, p. 16). But Milton also pushed the consequences of his contractual understanding of political power further, arguing that the people even had the right to depose a king who was not behaving tyrannically: "then may the people as oft as they shall judge it for the best, either choose him or reject him, retaine him or depose him though no Tyrant, meerly by the liberty and right of free born Men, to be govern'd as seems to them best" (Milton 1991, p. 13). Milton's argument was based on his endorsement of what Quentin Skinner has called the neo-Roman understanding of liberty, according to which being free requires not simply being physically unconstrained, but not being dependent on the will of anyone else (Skinner 1998). As Milton explained, being free meant having the ability to remove any supreme or subordinate governor. Without this, people would be:

> Under tyranny and servitude; as wanting that power, which is the root and sourse of all liberty, to dispose and *oeconomize* in the Land which God hath giv'n them, as Maisters of Family in thir own house and free inheritance. Without which natural and essential power of a free Nation, though bearing high thir heads, they can in due esteem be thought no better then slaves and vassals born, in the tenure and occupation of another inheriting Lord. Whose government, though not illegal, or intolerable, hangs over them as a Lordly scourge, not as a free government. (Milton 1991, p. 32)

The Tenure brought Milton government employment. In March he was appointed Secretary for Foreign Tongues by the Council of State. In this

role he answered diplomatic correspondence and acted as a propagandist for the new regime in works such as *Eikonoklastes* (1649) and *Pro populo Anglicano Defensio* (1651).

Eric Nelson has stressed the significance of the *Defensio* with regard to the republican tradition, suggesting that it was the first English work to present republican government as the antonym of monarchy and to dismiss the latter as illegitimate (Nelson 2014, p. 114). It is true that in the *Defensio*, Milton presented God as a republican: "God has decided then that the form of a commonwealth is more perfect than that of a monarchy as human conditions go, and of greater benefit to his own people: since he himself set up this form of government. He granted a monarchy only later at their request and then not willingly" (Milton 1991, p. 80). Yet, as in *The Tenure*, Milton was more concerned to defend the regicide than the regime resulting from it. Indeed, later in that work, he appears to suggest that a king could be an acceptable ruler if properly constrained: "If those kings who are undecided about this matter will listen to me and let themselves be bounded by the laws, then instead of the uncertain, weak and violent power which they now possess, full of cares and fears, they will preserve for themselves a completely stable peaceful and long-lasting one" (Milton 1991, pp. 129–30).

It was only in the final work he published before the Restoration, *The Readie and Easy Way to Establish a Free Commonwealth* (1660), that Milton fully developed his justification of republican rule. At this desperate juncture, Milton put aside his ambiguity and boldly stated the case for a commonwealth as the best – if not the only – means of securing political and religious liberty: "If on the other side we preferr a free government" we "shall retain the best part of our libertie, which is our religion, and the civil part will be from these who deferr us, much more easily recovered" (Milton 1974, pp. 331–2). He went on to enunciate the financial and moral disadvantages of having a king, concluding: "I doubt not but all ingenuous and knowing men will easily agree with me, that a free Commonwealth without single person or house of lords, is by far the best government if it can be had" (Milton 1974, p. 338). He then sketched his preferred republican model which consisted of a Grand Council of the "ablest men" chosen by the people to consult on public affairs assisted by a Council of State chosen from among their number.

Conclusion

Milton's conviction that his proposed system would secure personal and religious as well as political liberties was never put to the test. Within weeks of the publication of the second edition of *The Readie and Easy Way to Establish a Free Commonwealth*, Charles II had been restored to the throne and the commonwealth replaced by monarchy. Under Charles's reign the rights of religious minorities and the freedom of the press would be curtailed once more.

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- ▶ Calvin, John (Jehan)
- ▶ Constitution
- ▶ Constitutionalism
- ▶ Freedom
- ▶ Freedom of Conscience
- ▶ Freedom of Expression
- ▶ Freedom of Religion
- ▶ Freedom of Speech
- ▶ Freedom: Academic
- ▶ Governmentality and Law
- ▶ Harrington, James
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Introduction

Originally, the oration "on the dignity of man" (1496) was part of a comprehensive account of philosophical and theological wisdom. Pico (1463–1494) planned to use the oration as a prelude for an in-depth analysis of all the fundamental questions related to God. His plan was to invite the crème de la crème of contemporary academia to discuss his theses, for which he wanted to organize – what would be called today – a first international congress of philosophy and religion (1486). However, this plan backfired, because Pope Innocence VIII banned Pico's ideas and condemned him as a heretic.

Pico was convinced that the highest aim an individual human being can strive for is the search for truth. Searching for the truth, he thought, paves the way to God who is hidden in a complex world of many-fold phenomena with no direct access possible. To approach this *deus absconditus* requires patience and wisdom to interpret the various and sometimes contradicting signs and ciphers of God's existence and to discover the underlying reason that all of these different doctrines have in common. Pico was an eclecticist collecting every bits and pieces of academic insights and knowledge (Kristeller 1965), but this particular form of method served his philosophical aspiration that was to bring peace (*pax philosophica*) in a realm of heated conflicts. Pico tried to achieve this purpose by demonstrating the truth of the one God and by reconciling the diversity of ideas and opinions under the guidance of reason.

Pico's oration was published posthumously, initiated by his nephew Gianfranco who also titled the piece "De hominis dignitate." The notion of dignity may not really reflect the project's spirit appropriately; it does, however, capture the innovative power of Pico's view of man (Dougherty 2014).

Adam's Freedom

Traditionally, human beings have been ascribed an exceptional position in the world due to their creation in the image of God and their capacity of reason. Pico agrees with the tradition but adds another aspect to it: the individual's freedom to decide on his or her own fate. What makes humans special is this freedom of choice, and Pico underlines this insight rhetorically in a key scene of the oration when God addresses Adam directly explaining to him the cosmological position of humankind in the center of the universe. Pico leaves no doubt that this center-position symbolizes Adam's freedom to become whatever he wants to be. It may sound like a nuance compared to the traditional view of man, but at a closer look at Pico's concept of dignity has a revolutionary effect on the anthropology of his time. It breaks with the supremacy of "the being" over "the becoming," a position which was still dominant in the scholastics. Instead it opens up a horizon of human life and development in new context of a rather uncertain future. Whatever the decisions may be, Adam's life will be his own creation, and he will be the "maker and molder" ("plastes et fictor") of his own fate (Pico 1998: 5).

Concept of Dignity

Pico's strong tie between the human dignity and the individual's freedom of choice raises some questions: Is the dignity based on the capacity to make choices or on the actual performance of each individual? Does every individual have the same dignity no matter of the choices made? Or does the notion of dignity distinguish between the individual concepts of life? It seems that Pico uses two different concepts of dignity (Lembcke 2008): The first concept refers to the exceptional cosmological position of man and the capacity to be his or her own creator. It is a dignity that belongs the

humankind with no exceptions ("dignity of genus"). In contrast, the second concept of dignity refers to the human life as a result of the individual choices and decisions. According to Pico, every human being has a free choice to either ascend to an angel-like life of devoutness or descend to an animal-like life driven by appetite and lust. This notion of dignity is closely linked with the "dignified" search for truth – a search, of course, that depends on the individual's aspiration and talent of living a good life. To be sure, for Pico, a good life means in essence a life that is dedicated to philosophy; in this sense, this second notion of dignity reflects the capacity of realizing the philosophical potential which is not equally distributed among human being but reserved only for a few individuals ("dignity of individuals").

The philosophy's power to give ethical orientation, which Pico strongly believed in, has come and gone in modern societies. The sources of meaningful answers to basic questions of how to live a good life have become pluralized and so have the different forms of life style. Yet it seems that Pico has, at least in part, foreseen the ambivalence that accompanies this process of pluralization, since his twofold concept of dignity reflects the structural tension between the individuals' autonomy in conducting their own life based on their decisions, for which they are in any case responsible, and their competence of such a conduct and its consequences. But do these two concepts fit together? Does the individual human being, according to Pico, lose his or her dignity as a consequence of a wrong life?

The strong interrelation between freedom and dignity constitutes in Pico's view the exceptional cosmological position of man, and this holds true for him even after the fall of man. Consequently, the expulsion from paradise was not the end of human freedom, instead it was a manifestation of it. Moreover, the fall of man did not result in a loss of the dignity of mankind. Against this background, it may be appropriate to understand dignity with Pico as a normative qualification of freedom in which the individual appears as a reasonable author of his action with the capacity to justify his actions before himself and as a representative of humankind. Taken together, the agency as much as the accountability are the elements that Pico's concept of dignity is made of – and that has become influential until nowadays under the heading of subjectivity.

At first glance, this interpretation seems to portray Pico as typical thinker of the renaissance, but this is only half true (Cassirer 1942). To be sure, Adam's cosmological center position fits perfectly into an era of human genius, creativity, and innovation. But Pico was, at least, also concerned with the contingency and fragility of human existence, something he himself has experienced due to the papal ban as a heretic, his flight and imprisonment, and his mysterious sudden death at young age. The notion of subjectivity is therefore not only informed by his belief in man's power but also and presumably even more so from the uncertainty of the future and instability of every man-made order. In some ways, Pico's notion of subjectivity resembles Sartre's dictum that "man is condemned to be free."

Conclusion

Pico's somewhat idiosyncratic method of eclecticism in his search for truth was driven by his attempt to find a reliable order or, at least, a common ground for philosophy in times of a growing Babylonian confusion. Hence his idea of a *pax philosophica* that was certainly inspired by Plato's theory of forms and that was transformed into a concept of cosmological conformism. It would be misleading, however, to underestimate the rupture following from his concept of subjectivity. If man is his own maker and molder, he creates himself in his own image (and not in God's image) for which he needs to make use of his own power of judgment to find the proper images for his own life. To be sure, this empowerment of the individual judgment does not necessarily mean the erosion of authority, but it does put authorities under the reserve of the individual's autonomy.

Pico's phrase "plastes et factor" expressed an idea of freedom that moved beyond an

understanding of normativity that is based on tradition, despite (or even because of) his eclectic concern with ancient sources of wisdom and knowledge (Dougherty 2014). He anticipated like very few others that normativity cannot do without subjectivity in a world in which every individual has the choice to make a difference.

Cross-References

▶ Dignity, Human
▶ Freedom

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Modus Vivendi

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Introduction

Modus vivendi is "[a] way of living; esp. a working arrangement between contending parties, which enables them to coexist peacefully pending the settlement of those matters in dispute" (OED online, accessed November 8, 2016). According to J. Gray (1993), one of the key features of a civil society is that it fosters tolerance of diverse religious and political views. In a civil society, the state does not try to impose any comprehensive doctrine on its citizens. It then becomes possible for diverse, incompatible, and incommensurable conceptions of the world and the good to coexist in a peaceful modus vivendi (Gray 1993, 314–315).

John Rawls explains modus vivendi by considering state treaties. He reminds us that "a typical use of the phrase 'modus vivendi' is to characterize a treaty between two states whose national aims and interests put them at odds" (Rawls 1996, 147). The disputing states enter treaty negotiations to prevent a situation from escalating.

In what follows, we will examine modus vivendi not between two states but within a state. In contemporary pluralist society, there are many competing religious, philosophical, and moral ideologies (Rawls 1996, 36). Is it possible for a modus vivendi to resolve conflicts between different doctrines?

In Defense of Modus Vivendi

Isaiah Berlin does not use the phrase modus vivendi, but we can take Berlin as an advocate of a modus vivendi agreement. According to Berlin's value-pluralism, in the reality we encounter, there are many incomparable and incommensurable values. There is no common measure for comparison, and so we are faced with choices between values which are equally ultimate. When we choose one value, we are choosing against others. We cannot escape this possibility of conflict – and tragedy – between ultimate values (Berlin 2002, 214).

We can merely mitigate the conflict. The first civic obligation, therefore, is to avoid the extremes of suffering. "A little dull as a solution, you will say? Not the stuff of which calls to heroic action by inspired leaders are made? Yet if there is some truth in this view, perhaps that is sufficient" (Berlin 1991, 17, 19).

Charles Larmore advocates the political neutrality principle for modus vivendi. In a pluralist

society, it is difficult to reach consensus on what is the good life. Larmore emphasizes the priority of the right over the good. In the public sphere, we must be neutral between the goods, and we have to come to agreement on the right. The principle of neutrality sets aside the good in the public sphere. This does not mean that we favor the right over the good. In the public sphere, we aim to find agreement on the right, and we are required to be neutral between competing goods. In the private sphere, we are permitted to choose and pursue autonomously our idea of the good way of life. Larmore's neutrality principle allows for autonomous choice of a good way of life, so his principle presents a liberal project (Larmore 1987, 70–77).

John Gray also emphasizes the significance of modus vivendi. However, he does not support Larmore's liberal neutrality principle. Gray (2000) suggests that if a regime can avoid the collision of incompatible and incommensurable values, then the regime does not necessarily have to be liberal.

Gray's political theory of modus vivendi corresponds to the historical fact of pluralism. According to him, the ethical theory of modus vivendi is value pluralism. The most fundamental claim of value pluralism is that there are many conflicting ways of flourishing in life, and it is impossible to compare them. We cannot say which way of life is better than others, although many ways of life are not equal. They are incommensurable (Gray 2000, 6).

According to Gray, the most important thing is to avoid conflict. If a regime can avoid conflicts between values (including ideals of justice), then the regime is legitimate. This neo-Hobbesian view suggests that if a regime can forge compromise, then it is more legitimate than other regimes. The regime may be legitimate even if it is not liberal (Gray 2000, 133–134).

Overlapping Consensus and Modus Vivendi

The Idea of Overlapping Consensus

Rawls shares the recognition of the plurality of values with Berlin, but he does not inherit Berlin's value-pluralism. As we saw, according to value-pluralism, we cannot escape the possibility of conflict – and tragedy – between ultimate values (Berlin 2002, 214). We can only try to soften the conflict (Berlin 1991, 17). By contrast, regarding the premise of the *reasonable* fact of pluralism, Rawls suggests that it is possible to construct an overlapping consensus between people who hold different religious, philosophical, and moral comprehensive doctrines and to defuse conflicts between them (Rawls 1996, Lecture IV). Here Rawls explains why an overlapping consensus is not merely a modus vivendi (Rawls 1996, 147).

As noted, Rawls describes modus vivendi in terms of a treaty between two states. A modus vivendi cannot ensure enduring stability. As long as two states are evenly matched in power, they will adhere to modus vivendi. However, if one state becomes stronger, then it invades the other (Rawls 1996, 147). Rawls writes:

> A typical use of the phrase 'modus vivendi' is to characterize a treaty between two states whose national aims and interests put them at odds. In negotiating a treaty each state would be wise and prudent to make sure that the agreement proposed represents an equilibrium point: that is, that the terms and conditions of the treaty are drawn up in such a way that it is public knowledge that it is not advantageous for either state to violate it . . . . But in general both states are ready to pursue their goals at the expense of the other, and should conditions change they may do so. This background highlights the way in which such a treaty is a mere modus vivendi. (Rawls 1996, 147)

In the same way, as long as groups in a state are evenly matched in influence and power, they adhere to a modus vivendi. However, if one group acquires overwhelming force, then it sets aside the modus vivendi and suppresses the other groups.

In Rawls's view, in a pluralist society, there are many reasonable religious, philosophical, and moral doctrines. Thus, one reasonable comprehensive doctrine cannot comprise the basis of social unity. Rawls introduces the idea of a political conception of justice, namely, the idea of an overlapping consensus, which everyone with their own comprehensive doctrines can endorse (Rawls 1996, 134, 147), writing: "[s]ocial unity is based

on a consensus on the political conception; and stability is possible when the doctrines making up the consensus are affirmed by society's politically active citizens and the requirements of justice are not too much in conflict with citizens' essential interests" (Rawls 1996, 134).

According to Rawls, an overlapping consensus is quite different from a modus vivendi, the stability of which depends on happenstance and a balance of relative forces (Rawls 1996, 148).

Institutional Frameworks for a Modus Vivendi

While Rawls denies the significance of a modus vivendi, Scott Hershovitz suggests the possibility of transforming a mere modus vivendi into a suitable one based on institutional frameworks. Remember, Rawls describes a modus vivendi as a treaty between two states (Rawls 1996, 147). History tells us that if one of the two states is more powerful, then the treaty is often broken, because there is no independent enforcing mechanism. However, according to Hershovitz, there are two reasons not to use a treaty between two states as exemplary of a modus vivendi (Hershovitz 2000, 224).

First, it is not suitable because Hershovitz is suggesting stability not between two states but within a state. He considers a modus vivendi effective for securing domestic stability within a state. Second, a treaty is usually based on consensus and there is no enforcing mechanism. Yet, there are more complex types of modus vivendi arrangements within a state, which may provide for considerably more enduring stability than treaties offer. Hershovitz, pointing to the U.-S. system of government, presents the conditions under which a suitably complex modus vivendi can provide for enduring stability (Hershovitz 2000, 224).

Hershovitz quotes the *Federalist 51* by James Madison, and suggests that Madison takes the creation of a constitution as the formulation of a modus vivendi.

> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. (Madison 1961, 356)

For Rawls, stability is based on citizens' endorsing the same political conception of justice and acting accordingly. By contrast, Madison does not rely on the good intentions of citizens. His view of human nature is cynical, but it tries to construct a system of government, which defends against the abuse of power. Rawls depends on an overlapping consensus for stability, whereas Madison focuses on ambition. His view is more pragmatic than Rawls's. Hershovitz suggests that Madison's idea that stability is borne out of a well-organized modus vivendi is more realistic, and is superior to Rawls's attempt to provide for stability (Hershovitz 2000, 226).

In the United States, it is very difficult for one group to have outsized power and thus weaken the liberal regime. Many complain about the rigorousness of the U.S. governing structure with its checks and balances, but it is intentionally designed in that manner. In Hershovitz's understanding, the founding fathers of the United States entered into a modus vivendi so well constructed that it is self-perpetuating (Hershovitz 2000, 226–227).

Hershovitz also suggests that Rawls's view of pluralism is different from Madison's. Rawls tries to find a way to make a pluralist society stable. By contrast, for Madison, pluralism is just another safeguard against the abuse of power by the government. If society is sufficiently diverse, then an unjust majority will not last long. That is, diversity enhances the effects of the checks and balances; homogeneity is to be feared (Hershovitz 2000, 227).

Conclusion

Madison's notion of achieving stability through a well-organized modus vivendi is a bit dull as a solution, is it not? Allow me to quote Berlin again: "[I]f there is some truth in this view, perhaps that is sufficient. An eminent American philosopher of our day once said, 'There is no *a priori* reason for supposing that the truth, when it is discovered, will necessarily prove interesting.' It may be enough if it is truth" (Berlin 1991, 19).

As we saw, for Rawls, an overlapping consensus is different from a mere modus vivendi, in which stability depends on happenstance and a balance of relative forces. However, if we take into consideration Madison's idea of institutional frameworks for a modus vivendi, then perhaps we can situate the well-organized modus vivendi midway between an overlapping consensus and a mere modus vivendi.

Indeed, Rawls himself argues that until the wars of religion in the sixteenth and seventeenth centuries, social cooperation on the basis of mutual respect was regarded as impossible with those of different faiths or (in his terms) with those who affirm a fundamentally different conception of the good (Rawls 1996, 303). He further suggests that "[a]s a philosophical doctrine, liberalism has its origin in those centuries with the development of the various arguments for religious toleration. . .. A crucial assumption of liberalism is that equal citizens have different and indeed incommensurable and irreconcilable conceptions of the good" (Rawls 1996, 303). He affirms, "[t]his assumption is central to liberalism as stated by Berlin" (Rawls 1996, note 19 at 303). Therefore, if a modus vivendi is based on this assumption, then Rawls can vindicate modus vivendi as a basis of his political conception of justice.

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Mohist School

▶ Chinese Legal Thought: Mohist School

M

Mohl, Robert von

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1. Robert von Mohl (1799–1875) was a jurist, politician, and scholar of "doctrine of the State," whose influence was decisive for the theory and history of public law in Europe.

Born in Stuttgart on 17 August 1799 into an upper middle-class family (his great-grandfather was the famous jurist Johann Jacob Moser), he studied law in Tübingen and then in Heidelberg. After obtaining his doctorate in 1821, Mohl spent a long period of time studying in Wetzlar,

Regensburg, Vienna, Frankfurt, Göttingen, and Paris, before being appointed in 1824 as an extraordinary professor at the Faculty of State Sciences at the University of Tübingen.

During his first years in Tübingen, Mohl not only dealt with issues such as the representative constitution and the administration of justice in the German Confederation, but also with the US federal model, as evidenced by the volume *Das Bundesstaatsrecht der Vereinigten Staaten von Nordamerika* (1824).

Mohl became a full professor in 1827, and developed a comprehensive theoretical reconstruction of public law in force in Württemberg, in a very successful work published between 1829 and 1831 (*Das Staatsrecht des Königsreiches Württemberg*).

Until then, the German literature on public law succeeding the collapse of the Holy Roman Empire (1806) lacked a complete overview of the public law of a single state. Mohl's text filled that gap and quickly became the point of reference for all subsequent discussions of territorial public law.

He formulated in a very precise manner his objections to the widespread belief in the existence and scientific validity of a "common German public law" (*gemeine deutsche Staatsrecht*). Almost all of the works dedicated in those years to the public law of the German Confederation were based on a common working hypothesis: in addition to the "positive law" of the Confederation, there was also a "public law" of the confederate states which was more than the sum of the special rights of the individual states.

The reasons for defending a "common German public law" are to be found in the nationalistic aspirations, in the *Turnbewegung*, and in other movements led by student associations. From a legal point of view, that concept could represent the connective tissue of national unity, allowing to overcome particularisms and to keep alive, at least on an ideal level, what seemed unattainable in reality. The common German public law was also suitable for filling the gaps in territorial states' legal orders. Finally, from a scientific point of view, it offered the opportunity for a comparison between the internal state legal systems of Germany.

Mohl led a fierce criticism of this vision. First of all, the foundations on which many authors claimed to reconstruct such a law had been erased by the radical changes that took place between the French Revolution and the Restoration. The differences between the different local systems were made more profound every day by the incessant legislative activity of territorial sovereigns. What the scholars of public law described in their manuals was a bunch of nonexistent rules, without any reference to the concrete reality, an unsuccessful effort of the publicist's pen. In any case, they were certainly not rules of law in force, and this despite the strenuous attempts to find some basis of validity by using concepts such as "tradition," "reason," or the "spirit of the people" (*Volksgeist*) developed by Savigny's historical school of law (which, however, was ill-suited to give an account of relationships entirely new as they originated from the political compromise following the French Revolution).

The mere juxtaposition of legal systems which referred to the different local orders was certainly not an operation which made it possible to support in itself the existence of a common German public law. With the *recessus imperii* of the Imperial Diet (*Reichsdeputationshauptschluss*) of 1803, the founding of the Confederation of the Rhine, the dissolution of the German Empire, and the defeat of Prussia in 1806, up to the Congress of Vienna in 1814–1815, any reference to the concept of "Empire" was impossible from a historical and theoretical point of view. Who really wanted to grasp the features of a common German public law, he had to go down a path that went from identifying the concordances between the different local laws, so that the historical or dogmatic visions on which these concordances were based could be interpreted as rules common to all the German states that had not explicitly given themselves a different discipline.

This "bottom-up" reconstruction was the only one that could give some scientifically founded result. In the end, Mohl came to a very limited, substantially fragmentary recognition of German common public law. This result was in line with the expectations of the majority of scholars (from Johann Ludwig Klüber to August Brunnquell,

from Heinrich Albert Zachariä to Heinrich Zöpfl) who, while admitting the fragmentary nature of particular state rights, continued to support the existence of a certain unity of the fundamental ideas that inspired them.

2. If Mohl's intellectual performance did not affect the question of the common German public law as he would have liked, his reflection on the "rule of law" and, even more, on the clear demarcation drawn by him for the first time between "constitutional law" and "administrative law" (*Verwaltungs-Recht*) was quite different. In Mohl's view, administrative law takes on the appearance of a concrete constitutional law, translated into daily practice, autonomous on a scientific level, even though it can be traced back to the course of law dependent on the constitution.

As another fundamental work published in 1832 (*Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*) shows, Mohl considers administrative law as the evolution of the eighteenth-century "police" in the framework of the new constitutional movement. The title of this text definitively sanctioned the use of the term "rule of law" in Germany. For Mohl, the administration represented the concrete application of the fundamental principles determined at the constitutional level. Without this practical dimension, the constitutional principles were destined to remain empty declarations. The State could not limit itself to the maintenance of the legal order, but had – through the administration – both to fight illegal actions and to support the reasonable aims that guide the action of the citizens.

This is – and it is the key passage – the attempt to "juridifying" the police, transferring some police tasks to the judiciary, in a certainly liberal perspective that also preserves some traces of the old spirit of enlightened absolutism: Mohl speaks expressly of "juridical police."

The administration became the fundamental instrument of the State for the promotion of collective well-being (and therefore also for the control of potentially disruptive social issues). For Mohl, moreover, it is only possible to speak of the rule of law if there is an effective limitation of political power on the part of popular representation. The law can only find its legitimacy as a result of a public process in which individuals can participate through a truly representative system.

3. Mohl quickly established himself on a scientific level and established important links with some of the most important players on the German political scene. As rector of the University of Tübingen (in the 2-year periods 1835–1836 and 1840–1841), he had an incisive influence on the German academic policy of those years.

He was also director of the University Library of Tübingen (from 1834 to 1844). This experience, in addition to revealing Mohl's encyclopedic interest (he was a collector as well as an extraordinary connoisseur of books), has left important and lasting traces both of factual (as evidenced by the construction of the "Neue Aula" in the architectural heart of the Swabian university) and of ideals: Mohl was convinced that the library heritage of a university is the most important support for research and teaching, and consistently committed himself to strengthening the funds, personnel, spaces, and collections of the Tübingen library.

In 1844, he founded the "Zeitschrift für die gesamte Staatswissenschaft," which quickly established itself as a point of reference for scholars of the most important public law issues, and which expressly aimed to give scientific dignity to administrative law (of which in the same year a special chair was created in Tübingen).

Although Mohl had a deep political passion for markedly liberal positions, he could not play any institutional role until his father's death. Under the so-called incompatibility laws, the son of a lifelong member of the First Chamber of Württemberg could not occupy a seat in the elected Second Chamber. It was only after his father's death in August 1845 that Mohl was able to take part in the elections. He thus applied for the electoral district of Balingen but, because of a document considered excessively critical of

the government and made public without its consent, was removed from teaching and transferred to Ulm with the post of government adviser.

In 1847, he was called to teach, thanks to the interest of Minister Karl Friedrich Nebenius, this time at the University of Heidelberg, where he was assigned the chair of public law that had been held by Karl Salomo Zachariä.

During the revolutionary experience of 1848–1849, Mohl was a member of the National Assembly in Frankfurt. One of the main protagonists of the *Paulskirche*'s activities, on 9 August 1848, he was appointed Minister of Justice of the German Confederation.

After the failure of the revolution, the (monarchical) state and (liberal) society were seen as separate realities even from legal theory. In this perspective, we should read Mohl's attempt (strongly criticized by Heinrich von Treitschke) to separate the state sciences from the social sciences. In legal theory, the most important consequence of this approach is that a clear distinction can be made between subjective rights *under private law* and subjective *public* rights.

After a phase of forced departure from active politics, Mohl became a member (1857–1873) and then president (from 1867) of the First Chamber of the Baden-Württemberg Landtag, as well as his representative in the Bundestag (1861–1866). After the foundation of the Empire, he was first president of the Oberrechnungskammer (1871–1874) and then deputy of the Reichstag (1874–1875, elected as independent, joined the national-liberal faction). He died in Berlin on 4 November 1875.

In his youthful writings, Mohl argued that the government was essentially a prosthesis of the monarch and therefore not responsible to the parliament (which therefore did not have the power to challenge him). Subsequently, also on the basis of the study of the dynamics of English parliamentarianism, Mohl changed his mind, going so far as to affirm that parliaments had to free themselves from subjection to the executive and actively participate in the formation of the political direction of the government.

Opposing to the introduction of universal suffrage (the reason for future criticism of Bismarck) but also critical of the old "corporate" representation, Mohl proposed a combination of "special corporate representations" (*Sondervertretungen*), "partial parliaments" (*zusammengesetzte Vertretungen*), and a "general parliament responsible for central issues," which was to be elected by census in order to favor the middle class and the educated bourgeoisie.

Also from this proposal, Mohl is a figure of mediation between the old corporate State (*Ständestaat*) and the democratic State still in formation. Aware of the social challenges posed by industrial change, Mohl advocated a liberal vision that recovered the *Kameralistik* tradition of "good police" with the principles of *Frühkonstitutionalismus* of southern Germany and the rule of law.

Before and better than many of his contemporaries, Mohl understood the decisive importance of the "social question" and the consequent need for the State to take on problems such as mass rural unemployment, the very harsh conditions of workers' work, the absence of forms of social security and assistance, and the emerging class antagonisms. Although he did not share the socialist perspective, he was sensitive to the desire for far-reaching social reforms, to the recognition of the right of assembly, and to the possibility of introducing forms of profit sharing for workers.

His work on German public law is the first successful attempt to build a clear and coherent system capable of distinguishing between constitutional and administrative law. His encyclopedic knowledge, as evidenced in particular by the three-volume work *Geschichte und Literatur der Staatswissenschaften* (1855–1858), is still today an extremely interesting resource for the history of modern legal thought.

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Molina, Luis de

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Introduction

Luis de Molina (1535–1600) was a Spanish Jesuit theologian. He studied at the Universities of Salamanca and Alcalá de Henares, and carried out his novitiate in Coimbra, where he studied Philosophy and Theology. It is here that he initiated his work as an educator, continuing on for 15 years at the University of Evora and ending his career as a teacher in Madrid. His influential theological works are mostly included in *Concordia liberi arbitrii* (1588), in which he denies predestination and affirms free will. The main work in which he exposes his philosophical, legal, and political reflections is entitled *De iustitia et iure* that consists of six books, with its first complete edition being published in Venice in 1614. Along with Gabriel Vázquez, Juan de Mariana, and Francisco Suárez, Luis de Molina is one of the most prominent post-Tridentine thinkers of the Society of Jesus. He is considered a member of the School of Salamanca (Belda Plans 1999: 372–374).

Main Contributions

Following the general thematic structure of Saint Thomas in addressing Justice and Law, but also dealing with other subjects in an extremely original manner, the most outstanding contributions of Molina to the philosophical, legal, and political fields are his reflections on Natural Law, on the "just" war doctrine, framed in his study on *ius gentium*, on the justification of slavery and on several economic morality questions.

Molina distinguishes the obligatory nature of Natural Law, which "arises from the very nature of the object," from the obligatory nature of Positive Law, which "arises from the precept and the will of those who command it" (Molina 1941: Tratado. I, disputación 4, no. 2). He also highlighted the difficulties of precisely understanding the principles and conclusions of Natural Law and the possibility of admitting, in some cases, its mutability due to the appearance of special circumstances (Molina 1941: Ibid.).

The nature of *ius gentium* is another classical topic studied by Molina, which he defines as a Positive Human Law. This conception contradicts some of the theories previously defended by Francisco de Vitoria, because our author "affirms, above all, the sovereignty of states, which cannot be bound by positive international rules that have not intervened in their design" (Fraga Iribarne 1947: 67). He also dedicated most of his writings to assessing the Law of war, types of war, "just" causes, authority that declares it, correct behavior in combat or the lawfulness of killing innocents, which he justifies by stating that otherwise "no just war could be waged against the guilty" (Molina 1941. Tratado II, disputación 119, no. 7).

Like other writers of treatises of his time, he broached the question of slavery, not outright rejecting it, since it was an accepted and generalized practice at the time, but denouncing the abuse committed in those cases in which there were no rightful title deeds legitimizing the slavery. He was referring to those derived from the commission of crimes or the capture of enemy soldiers in a "just" war, among others. However, it is also said that he recommended "putting an end, in general, to the slavery of black people, freeing them, abolishing the slave trade" (García Añoveros 2000: 328–329).

The importance of Molina's theories in the field of Economics was highlighted when it was declared that "he had a remarkable knowledge of the contemporary economic life"; he was "consulted by judges, lawmakers and merchants"; and "his treatment of usury produced a work that was to be relied on by men of law and business throughout Catholic Europe" (Noonan 1957: 222). His study on value-based pricing and currency exchange is noteworthy, among many of the other economic practices he addressed. Regarding all of these issues, he seeks to guarantee the equality of the parties involved in contracts in accordance with the requirements of commutative justice. This idea led him to claim, for example, that the services provided by the money-changer should be valued and paid for, and that they should also be compensated for the usefulness and benefits derived from the so-called exchange by bills (*cambium per litteras*).

Cross-References

► Political Economy and Law
► Positive Law and Natural Law

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Monism in International Law

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Introduction

Legal monism is a philosophical theory according to which international law and national legal systems constitute a single normative order.

There are two possible monistic constructions of the relationship between national law and international law. If one supposes a priority of national legal systems, states are regarded as sovereigns and national law constitutes the reason of the validity of international law. If one assumes a priority of international law, national law is a "partial" order of international law.[1] These alternatives are of great theoretical interest but will not be analyzed here, since my aim is to discuss in a more general level the arguments for and against monism.

Kelsen presents two arguments for the doctrine of the unity of law: a *weak* argument that holds that it is a *fact* that all national laws form a single system with international law at the apex and a *strong* argument that it is logically impossible to assume that "simultaneously valid norms belong to different, mutually independent systems" (Kelsen 1945: 363).

This entry is an attempt to make sense of the most important elements of these ideas, and how they relate to one another. Section "The Weak Argument for Legal Monism" describes Hart's argument against the weak version of Kelsen's argument. Section "The Strong Argument for Legal Monism" presents some arguments for the strong version. Section "Kelsen and Dworkin on Normative Conflicts", finally, discusses the implications of the doctrine for law and morality, comparing Kelsen and Dworkin.

The Weak Argument for Legal Monism

According to Kelsen, there is a two-way relationship between states and international law. "All the 'elements' of the State are determined by international law," since international law fixes the principles of recognition by means of which a state acquires its personality and is accepted as an equal subject in the international community (Kelsen 1945: 341–342). In a similar way, the norms created by international law are *incomplete norms*, which are intrinsically dependent on a "supplementation by the norms of national law." According to Kelsen, the norms of international law regulate the behavior of individuals indirectly, "mediated by the state legal system" (Kelsen 1992: 110), because international law typically *delegates* further normative powers to the state, which acts as an *organ* in charge of interpreting and applying its general norms.

Given these connections, Kelsen believes legal pluralism, which conceives national law and international law as independent and autonomous orders, is wrong because it *contradicts the content* of positive law: "International law establishes a relation between its norms and the norms of the different national legal orders. The pluralistic theory is in contradiction to positive law, provided international law is considered to be a valid legal order" (Kelsen 1945: 363).

The most powerful objection to Kelsen's monism is that it ignores the social circumstances that establish the normative character of a legal

[1] Nonetheless, Kelsen believes that "neither the hypothesis of the primacy of international law, nor that of the primacy of national law is in any way concerned with the material contents of positive law" (Kelsen 1945: 387).

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provision. If I receive from my boss an instruction to "write a paper on Kelsen's Doctrine of the Unity of Law," Hart argues, the fact that I write an essay on the topic is not enough to establish that I wrote it "in obedience to this order," because for this conclusion to follow it is necessary to show not merely the "correspondence between the content of the order and the description of my conduct" but also the "circumstances surrounding the issue and reception of the order," including the fact that I *recognize* it as valid and "*comply* with it" (Hart 1983: 312–313).

Consider the principle of effectiveness, a *positive norm* of general international law that regulates the creation, transformation, and succession of states. According to Kelsen, it is the principle of effectiveness that "determines both the reason for the validity and the territorial, personal, and temporal sphere of validity of national legal orders," regulating the "coexistence of the national legal orders in space and their succession in time" (Kelsen 1967: 336). But what if the fact that international law *purports* to establish the validity of national legal systems is not enough?

According to Hart, even if an Act of the British parliament explicitly purported to "validate the law" of Russia, it would be silly to think that the norms of the Russian legal system "derive their validity" from British law (Hart 1983: 319–321). However, Kelsen's analysis is committed to this conclusion because it is erected on the assumption that we should look to the content of valid norms in order to understand the relations between these norms. The focus on content blurs the distinction between saying that English law *treats* Russian law "as forming part of a single system with itself" and saying that Russian law *is valid in reason* of English law. According to Hart, Kelsen focuses exclusively "on what laws of validating purport *say* about other laws, and pays too little attention on matters that do not concern the content of law but their mode of recognition" (Hart 1983: 320–321).

The most obvious problem in Hart's objection to Kelsen is that there is a *non-sequitur* between Hart's premise (that a relationship of validation purport is not sufficient to demonstrate that a norm in a given system constitutes the reason for the validity of another system) and his conclusion (that they "cannot form part of one and the same legal system") (Vinx 2016: 64). Even if Hart's premise is correct, it is possible to defend a monist description of law, either for those who believe in a national legal monism (where national law is the reason of validity for international law), or for an analyst who adopts an international legal monism (the view that assumes that every national legal system is just a partial order of international law).

According to Vinx, the correctness of the pluralistic description of the relationship between legal systems is historically contingent and dependent on actual legal practices. Although the monistic description would fail if a legal historian attempted to describe legal systems in late antiquity, like the relationship between the Roman Empire and the Chinese Empire, it remains possible that in the "current historical situation," in which there is a higher degree of "global legal interconnection," a monistic description will do a better job (Vinx 2016: 69).

Hart failed to contemplate this possibility because his arguments against Kelsen are question-begging (Vinx 2016, 71). He presupposes a legal pluralism in his description of the relationship between British and Russian laws because his argument replicates what he said in his own general theory of national law (Hart 1994). It is the *recognition* of states, manifested by their *officials*, that is presented as an answer to the question of the normativity of law.

However, it is hard to see how Hart's reasoning refutes legal monism. The dualistic picture is not the only description available for the relationship between national and international laws. If states and officials in most nations, at the current point in global history, recognize that the principle of effectiveness provides a general legal standard that allows lawyers to determine the status of national legal orders and the validity of any particular legal rule, international legal monism becomes a perfectly acceptable construction to describe the structure of law, which can be used by legal scientists regardless of their endorsement of Kelsen's epistemological principle of unity and of the controversial assumption of the basic norm.

The choice between weak monism and pluralism is, therefore, a contestable empirical matter, without conclusive reasons to determine which description is best.

The Strong Argument for Legal Monism

The strong defense of legal monism is based on an epistemological principle that Kelsen employs in all intellectual endeavors. It is unfortunate that Hart does not give much attention to this principle, since he discussed it with Mackie, who (as acknowledged in a footnote) pointed out to Hart "that Kelsen's claim that there can only be one system of valid laws resembles Kant's claim that there is only one space" (Hart 1983: 322 footnote 32). After quoting an excerpt from the *Critique of Pure Reason* that holds that "we can represent to ourselves only one space; and if we speak of diverse spaces, we mean only parts of one and the same unique space" (Kant 1781/1999: A 25), Hart adds that he has "the impression that underlying Kelsen's theory of law there is the *assumption* that there is a single 'normative space' which must be describable by a consistent set of 'rules in a descriptive sense'" (Hart 1983: 322 footnote 32).

When Hart adduces to "rules in a descriptive sentence," he refers to the German expression *Rechtssatz*, which Paulson more recently translated as "reconstructed legal norm" (Paulson 1992a: 132). As this vocabulary indicates, Kelsen assumes that the law is not a brute fact that can be grasped through our senses or an unreflective psychological mechanism. He distinguishes between a legislative event as an "act perceptible to the senses" and the *objective meaning* that constitutes the "specifically legal sense" of a legal provision (which comes "by way of a norm whose content refers to the event and confers legal meaning on it") (Kelsen 1992: 10). To grasp the law's objective meaning, it is required an act of *cognition,* which is an active intellectual process. As Lauterparcht observed, Kelsen "fully accepts and transplants to the domain of law the basis of Kant's method, namely, the view that knowledge is not merely a passive picture of the objective world, but that it creates its object according to its inherent law from the material given by the senses" (Lauterpacht 1975: 405).

If we turn to the first paragraph of the "General Theory of Law and State," we notice this principle as the point of departure of Kelsen's jurisprudence, since he defines *law* as "an order of human behavior" and an *order* as "a system of rules having the kind of unity we understand by a system." It is "impossible to grasp the nature of law if we limit our attention to the single isolated rule," Kelsen argues, because "only on the basis of a clear comprehension of those *relations* constituting the legal order can the nature of law be fully understood" (Kelsen 1945: 1).

Kelsen presupposes the basic norm because he believes only with that rational construct it is possible to account for the unity that distinguishes a *system* from a *mere set* of norms. "A plurality of norms forms a unity, a system, an order, if the validity of the norms can be traced back to a single norm as the ultimate basis of validity" (Kelsen 1992: 55). The unity of law is not merely a *datum* given to our perception, for it must be constructed in the same way that we construct the meaning of a norm by *interpreting* a legislative event and its relationships with the other norms of the legal system.

It is in this contention that we can find the main difference between Kelsen's jurisprudence and Austin's command theory of law. While Austinian jurisprudence is a static theory that "regards law as a system of rules complete and ready for application, without regard to the process of their creation," the pure theory of law "recognizes that a study of the statics of law must be supplemented by a study of its dynamics, the process of its creation" (Kelsen 1957: 277–278). A dynamic theory of law is required precisely because we need to grasp how the law is developed in its acts of creation and application. For Kelsen believes the hierarchical structure of law is also an *interpretive structure*. "Interpretation is an intellectual activity that accompanies the law-creating process as it moves from a higher level of the hierarchical structure to the lower level governed by this higher level" (Kelsen 1992: 77).

It is difficult to overstate the importance of this structure for the pure theory of law, because what

establishes the *unity* of the law is this *relation* between a higher-level norm and the lower-level norms in the same hierarchical structure. "The unity of the legal order is achieved by this connection," and the basic norm "is responsible for the unity of the legal order" (Kelsen 1957: 280).

It should not come as a surprise that Kelsen's jurisprudence eschews the empirical-positivist jurisprudence that provides a *reductive* account of law and explains its normativity "ultimately in factual terms" (Paulson 1992b: xxv). Unlike sociological positivism, Kelsen's jurisprudence is a *critical* positivism (Kelsen 1945: 438).

The link between norms in Kelsen's hierarchical structure establishes not merely a pure "delegation" of normative authority. The legal system constituted through the common ordering of all laws in a single structure "is to be a meaningful whole, a comprehensive pattern, a possible object of cognition in any sense", and the basic norm "must make provision for it" (Kelsen 1945: 402). The principle of non-contradiction is considered, thus, not merely in a static dimension, but also in its *dynamic* aspect, that makes it an *interpretive norm* that works as a standard for legal cognition. "Juridical cognition starts, in the interpretation of its object, with the self-evident assumption that . . . contradictions are solvable" (Kelsen 1945: 402).

The question of how the unity of law is achieved only can be interpreted "in connection with the relation in which national law stands to international law" (Kelsen 1957: 280). Nonetheless, this is not a special point about connections between two particular normative systems but rather a more general point about the intelligibility of norms. The idea of a "collision of duties" is inadmissible because what we usually perceive as a case of conflict of norms is better described as a "psychological fact" or a "belief" that an individual has about the duties that apply to him (Kelsen 1945: 375).

When we consider the legal order in its dynamic aspect, we realize that the basic norm is different from all other legal norms because its validity is "assumed by virtue of its content" (Kelsen 1945: 401). Nonetheless, its content not merely authorizes norms like the principle of effectiveness, in international law, or the rule of law's exigency of fidelity to a constitution, in national law, but also contains "principles of interpretation" like the principle of non-contradiction, "the principle of *lex posterior derogate priori*, the principle that the lower norm must give way to the higher, . . . etc.," which are principles that "have no other purpose than to give a meaningful interpretation to the material of positive law" (Kelsen 1945: 406). In Kelsen's dynamic system, when a collision of norms emerges, the law requires that the analyst provides an "*interpretive way out*" of the problem of apparent conflicts among different laws (Dyzenhaus 2022: 262).

The same problem emerges when it comes to a conflict between law and morality, which requires the interpreter to solve it by taking up, again, the perspective of a *single system*, without asserting that two different systems are valid: "From the point of view of law as a system, morality does not exist as such; or, in other words, morality does not count at all as a system of valid norms if positive law is considered as such a system" (Kelsen 1945: 374). When Kelsen famously affirmed that "no one can serve two masters" (Kelsen 1967: 329), to describe the impossibility of conflicts between law and morality, he was, of course, not imagining conflicts between static normative systems, but conflicts of systems with a dynamic structure and a set of implicit interpretive principles that provide a way to *make the system consistent* through an intelligent act of cognition.

The central point in this argument is not the uncontroversial assumption, which even Hart (1983: 306) accepted, that one cannot understand the law by taking up two different points of view. It is rather that on Kelsen's reasoning "there is no third point of view" from which we can understand the two systems at once (Kelsen 1945: 374). This is where the disagreement between Hart and Kelsen resides. Kelsen is assuming that we need *rational principles* to interpret any system of norms, and he follows Kant to unpack where these principles come from and what these principles are. The basic norm is presupposed to respond both questions, since it performs the theoretical function of providing the foundation of

the legal system and the practical function of giving interpreters principles of interpretation, presupposed in its content, that instruct them how to cognize the law.

Nevertheless, Hart believes "there is no reason to accept" the impossibility of a third point of view to assess law and morality. "No human being is *just* a lawyer or *just* a moralist," Hart argues, and "some at least think about both legal and moral norms and consider their meaning as norms and find that they conflict" (Hart 1983: 306). We sometimes are, for Hart, under the authority of multiple normative systems.

The problem of this answer, however, is that it is unacceptable from the point of view of law, because it *fails to justify* any particular decision from the legal point of view. As Raz observed, Kelsen and Hart are operating with different concepts of normativity. Kelsen is using a concept of *justified normativity*, according to which "legal standards of behaviour are norms only if and in so far as they are justified," while Hart is using a concept of *social normativity*, which assumes that "standards of behaviour . . . are *social norms* in so far as they are socially upheld as binding standards and in so far as the society involved exerts pressure on people to whom the standards apply to conform to them" (Raz 2009: 134).

While Hart thinks that a social fact – the recognition of officials – explains the foundations of a legal system, Kelsen treats the gap between is and ought as an *axiom* of his legal theory and assumes that only a higher norm in a hierarchical structure can account for the validity of any given positive norm. Like natural law jurisprudence, Kelsen assumes that only a nonpositive norm can provide the foundation of a given system of positive legal norms. Nonetheless, Kelsen is skeptical about the existence of any form of absolute morality or natural law (Kelsen 1957: 140).

The point of view of legal science is thus a *hypothetical* point of view. The validity of law has some limitations because it is a "merely hypothetical validity" (Kelsen 1945: 401), which is the kind of validity an interpreter accepts to make sense of the distinction between "legitimate and illegitimate use of force" (Kelsen 1957: 262). Let us turn to this question in the next section.

Kelsen and Dworkin on Normative Conflicts

Probably the most persistent criticism to Kelsen's jurisprudence is the objection that he uses the concept of "validity" with different meanings (Bulygin 1995:18). This ambiguity, according to Dworkin, leads Hart to "overlook a complexity in Kelsen's writings." When Kelsen makes reconstructed legal statements in the science of law, he is making "descriptive-ought statements" to answer the question "whether norms are valid as distinguished from the question of whether they are effective or what their effects are" (Dworkin 1968: 200–201). The grammatical form of these statements is: "*according to* the legal system X, one must perform action Y."

But at other times Kelsen uses the concept of validity in a different sense, which is concerned "with the dynamics of legal reasoning, and in particular with the structure of an argument that ends in the decision that some man or some official ought to do something," all things considered (Dworkin 1968: 201). Kelsen is now making a statement that a norm is *binding* upon a legal subject or official, and the grammatical form of the statement is: "*because* the legal system says X, one must perform action Y".

As Dworkin explains, the problem of Hart's argument against Kelsen's doctrine of unity is that it "confuses these two contexts, by applying an analysis of validity Kelsen gives in one context to a problem he raises in another" (Dworkin 1968: 201).

It is puzzling that this insightful distinction disappeared from Dworkin's works for almost four decades and was not mentioned in Dworkin's most important exchanges with Hart, including prominent works like "The Model of Rules," "Hard Cases," and "Law's Empire" (Dworkin 1978: 14–45, 81–130; 1986). Nevertheless, the distinction reappears in "Justice in Robes," where Dworkin distinguishes between a "sociological" and a "doctrinal" concept of law. Although the ambiguity shifts from the concept of "validity" to the concept of "law," the interpretive difficulty remains.

Language users employ a sociological concept of law to "name a particular type of institutional

social structure," which a historian might need to describe, for instance, "when law first appeared in primitive tribal societies, or whether commerce is possible without law" (Dworkin 2006: 3). A sociological concept of law can be a *criterial* concept because what makes an application of that concept correct is a set of shared criteria accepted by the participants in the linguistic practice where that concept applies. The adequacy conditions of the use of the concept are defined by a "convergent linguistic practice" (Dworkin 2006: 11).

A different use is at stake when we use a doctrinal concept of law. When using a "doctrinal" concept of law, we are looking to a particular effect: "we use that doctrinal concept" when we claim that "a contract signed by someone under the age of twelve is invalid" (Dworkin 2006: 2) or, in harder cases, that "the US constitution forbids authorities to impose torture in Guantánamo Bay." Our purpose is *justificatory* and our use of the concept is *interpretive*, because "we all make claims," as participants in an argumentative practice, "about what the law requires or prohibits or permits or creates, and we share a great many [normative] assumptions about the kinds of arguments that are relevant in defending such claims and also about the consequences that follow when such claims are true" (Dworkin 2006: 2).

The similarity between Kelsen and Dworkin in this construction is remarkable, in three crucial matters. First, they are suspicious against normative conflicts because both are convinced that the legal system provides the *resources* to eliminate these conflicts and that there are principles of interpretation *embedded in the structure* of law, instead of extracted from a transcendental morality. Second, they avoid the assumption that it is just a "brute fact" that there are no conflicts between laws or legal systems, for both grant that interpretation is a constructive intellectual activity by means of which legal systems are *rendered* rational, meaningful, and capable of practical guidance. Third, they reject Hart's assumption that there can be a "third point of view" (an Archimedean point from which one can adjudicate on normative conflicts) when we are trying to make sense of the relationship between law and morality, or between international law and national law.

There is, of course, an important difference between Kelsen and Dworkin. Dworkin believes we should treat law and morality as a *single system*, in which law is only a partial order that refers to the "institutionalized morality" members of a political community employ to justify coercive enforcement (Dworkin 2011: 405), whereas Kelsen believes that to understand the law we must *ignore morality*, to avoid the conclusion that we are bound by duties that are contrary to one another. Nevertheless, they share the most important and challenging epistemic assumption, which is the claim that "to consider law and morality from one and the same point of view as valid orders, or what amounts to the same thing, to accept law and morality as simultaneously valid systems, means to assume the existence of a single system comprehending both" (Kelsen 1945: 374).

Kelsen and Dworkin converge in the claim that international law and national law form a single system, with international law above national law because it is international law that fixes the forms of acquisition and limits of sovereignty (Kelsen 1992: 116; 1945: 383–384; Dworkin 2013: 10; Bustamante 2017: 262). They define sovereignty as a *legal* concept, constituted and regulated by international law. They differ in their descriptions of the relationship between law and morality because Dworkin thinks the law is a part of morality, whereas Kelsen believes that the law excludes morality. However, this difference is less radical than it may seem. Kelsen rejects the one-system view, with morality above the law, because he adopts an *external skepticism* about morality and practical reason. Nonetheless, like the advocates of metaethical projectivism and quasi-realism (Blackburn 2006), Kelsen believes it is still possible to make reliable value judgments to provide valid descriptions of *positive* normative systems.

Kelsen believes there are values *internal to the law*, which can be generally designated as "values of law" because they are "values involved in judgments to the effect that something is lawful or unlawful" (Kelsen 1957: 209). "Juristic value judgments," for Kelsen, are value-judgments lawyers make to determine the content of law by

showing that certain actions are "lawful" or "unlawful" (Kelsen 1957: 210), applying positive norms which cannot be confused either with the text or verbal expression of a given ought, or with the subjective state of mind of the author of an authoritative pronouncement.

Juristic judgments are *relational* value-judgments because they are judgments *relative* to the law. They apply the "values of law" to *critically* understand and interpret the law. The values of law – as Kelsen and Dworkin agree – are values *embedded* in the law, and it is these values that determine the *point of law*. However, what is the point of law? What is the most general value one must accept to make sense of the normativity to law and thus justify the enforcement of a legal provision?

Here, again, Kelsen and Dworkin coincide. According to Dworkin, the "point of a legal practice" can be described thus: "Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble those ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified" (Dworkin 1986: 93).

Is Kelsen's description of the point of law any different? On Kelsen's story, the law is "an ordering for the promotion of peace, in that it forbids the use of force in relations among the members of the community," except under certain circumstances that are authorized and regulated by the law itself. Law is, for Kelsen, "an organization of force," because it "makes the use of force a monopoly of the community," with a view to pacify the community (Kelsen 1957: 237). Although the peace of the law is only a relative peace, since it is "not a condition of absolute absence of force," but only "a condition of a force monopoly of the community" (Kelsen 1957: 238), the value of peace – which informs everything Kelsen says about law – is still a moral value, albeit a moral value transformed into a legal value because it is *incorporated* in the structure of law. "There are truths which are so self-evident that they must be proclaimed again and again in order not to be doomed to oblivion," says Kelsen. "Such a truth is: that war is mass murder, the greatest disgrace of our culture, and that to secure world peace is our foremost political task" (Kelsen 1944: vii–viii).

This kind of statement led scholars (Vinx 2011, 2016; Dyzenhaus 2022) to adopt a revisionist reading of Kelsen, reading his theory "as a normative theory concerned with the value of the rule of law" (Vinx 2011: 473), and to acknowledge that there may be points where "Kelsen's commitment to a value-neutral legal science and his commitment to monism come to pull apart." Sometimes, they argue, it might be preferable "to stick to monism and to work out . . . its implicit moral content" (Vinx 2016: 74–75).

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Montaigne, Michel de

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Introduction

Michel Eychem de Montaigne (Château de Montaigne, Saint Michel de Montaigne, 1533–1592) was a free-thinking French philosopher, moralist, and humanist who has traditionally been credited with creating a new literary genre: the essay.

From his earliest childhood, Montaigne received the teachings of humanist scholars invited to the *maison noble* by his father, Pierre Eychem (sieur de Montaigne), among them a wise German preceptor with whom he learned to speak, write, and read perfectly in Latin even before his vernacular language (*Essais* I, 25; III, 2). At the age of six, he was sent by his father to the *Collège de Guyenne* in Bordeaux, considered "the best in France" – in the words of Montaigne himself (*Essais* I, 25). In this institution, he continued his education in humanities that culminated with a Law degree by the University of Toulouse.

Michel de Montaigne began his professional career as a public servant in 1556 as an advisor to the *Cour des Aides de Périgueux* (a court that dealt with taxes and excise duties). In 1557, he became a member of the *Chambre des Enquêtes* (the chamber of the Bordeaux Parliament in charge of providing a written resolution for first instance trials), and it was there that he met the jurist Étienne de la Boétie, with whom he developed a solid friendship until the latter's early death in 1563 (Essais I, 28).

In 1569, Montaigne published a translation by Raymond of Sabunde (Barcelona, c. 1385–1436) entitled *Theologia naturalis sive Liber creaturarum*; the same year he unsuccessfully ran for the *Grande Chambre* [Great Chamber]. This setback in his career as a magistrate was beneficial to him in the long run, since it served as a pretext for him to resign from his post 2 years later and, from that moment on, lock himself up in the tower of his castle to devote himself to the administration of his estate, reading his vast library of classical authors, and writing his essays. In 1577, Henry of Navarre named him *gentilhomme de la Chambre*.

Three years later, in 1580, he published the first two volumes of his *Essais* and began a journey that would take him through Switzerland, Germany, Austria, and Italy, and he wrote a diary that would be published posthumously two centuries later under the title *Journal de voyage de Montaigne* (1774). In 1581, he was appointed mayor of Bordeaux, a position he was re-elected to in 1583 and held until 1585. In 1583, he received the first of several commissions to mediate between King Henry III and the leader of the Protestants, Henry of Navarre. In 1588, he published a new edition of the *Essais*, including the third volume, and met his *fille d'aliance* Marie de Gournay, who, in 1595, was to be in charge of the posthumous re-edition of his *Essais* that included the notes prepared by Montaigne himself from 1588 until the very day of his death. In July 1588, he was imprisoned in the Bastille by a radical faction of the Ligueurs, but a few days later, was released thanks to the intercession of the Queen Mother, Catherine de Medici. He died in his castle 4 years later, on September 13, 1592. The death of Michel de Montaigne did not only represent the extinction of the Eyquem family lineage but also the disappearance of French humanism's most sublime voice (Zweig 2015, p. 153).

Some of the ancient classics used their most personal and intimate writings as a stylistic resource to put forward their own doctrines,

ideas, and beliefs in a disguised way. This may be observed, for instance, in the letters addressed by Marcus Tullius Cicero to his friend Atticus or his brother Quintus, or in the epistles of Lucius Annaeus Seneca to Lucilius, and even in the *Meditations* of Emperor Marcus Aurelius and the *Confessions* of St. Augustine. In contrast, what characterizes Montaigne's *Essais* is a genuinely introspective method with which he managed to reflect his inner *moi* [self], that is, his essence, the for*um internum* (Goethe's inner citadel) where the author finds his true identity, and his moral and intellectual freedom (*Essais* II, 6; III, 3).

The concept of *liberté volontaire* [voluntary freedom] is understood by Montaigne-in complete harmony with his friend Étienne de la Boétie (1530–1563; jurist, magistrate in Bordeaux, and author of the *Discours de la servitude volontaire*, written in 1548 and published thanks to his friend Montaigne in 1572, later re-titled *Le Contre Un*) – as the autonomy of the individual's will and as the absence of servitude or personal subjection to the dictates of another external and heteronomous will (*Essais* I, 27).

Moreover, this concept of freedom understood as self-control and the moral self-government of the sovereign subject of his own will constitutes an essential point of reference in the evolution of free thought from the seventeenth century onwards and a valuable historical precedent in the subsequent development of modern subjectivity (Green 2012, pp. 1–7).

Antoine Compagnon has identified three distinct stages in Montaigne's thought that, rather than succeeding each other, overlapped throughout the three volumes that constitute the *Essais*: Stoicism, Skepticism, and Epicureanism (Compagnon 2007, p. xix; 2013). However, as a real free thinker and citizen of the world, Montaigne had no intention of associating himself with any particular philosophical school, nor did he wish to indoctrinate his readers in the manner of those who feel themselves to be in possession of absolute truth. Neither did he conceive the exercise of philosophy in a scholastic sense, but rather as an intellectual activity carried out with a critical and dialogical sense, worthy of a humanist, free, and tolerant spirit like that of the *gentilhomme* [gentle man] and Perigordian essayist (*Essais* III, 2).

In short, Montaigne's eclectic thought – in which his Neo-Pyrrhonic skepticism is intertwined with his unwavering faith in reason, and his moderately relativistic view of reality with his regular and normative approach to nature – could be summed up in a simple question rhetorically formulated with apparent naivety: "*Que sais-je?*" [What do I know?] (*Essais* II, 12).

The Humanist Ethics of Montaigne

The period in which Montaigne lived was very turbulent and violent. The unbreathable climate of fanaticism and religious intolerance that reigned in the decade when Montaigne was born had begun to suffocate the humanistic spirit of the Renaissance. While the bloody wars of religion between Christian princes and kings ravaged Europe, in France this confrontation was between Catholics and Huguenots (followers of Calvin) and reached its highest degree of brutality during the night of Saint Bartholomew, between August 23rd and 24th, 1572, when thousands of Huguenots were slaughtered in Paris, a merciless massacre that had replicas in other French cities in the following months. This situation of open civil war among Frenchmen who used religion as an excuse to start a power struggle between factions that hated and desired to annihilate each other was present in Montaigne's mind while writing the three books of the *Essais*.

Given the turbulent times he lived through, Montaigne claimed that the world was nothing but perennial agitation (*Essais* III, 2), *perpetuum mobile*, and adding, with a flair of skepticism and moderate relativism: "Certes, c'est un sujet merveilleusement vain, divers et ondoyant, que l'homme. Il est malaisé d'y fonder jugement constant et uniforme" [Truly man is a marvellously vain, diverse, and undulating object. It is hard to make any constant and uniform judgment on him] (*Essais* I, 1). However, Montaigne manifested an unquestionable commitment to the ideals of humanism shared by freethinkers such as Erasmus of Rotterdam or Castelio: the empire of reason,

fraternity, freedom of conscience, tolerance, peace, justice, and equity (Hankins 2007, p. 342).

In line with the humanist, universal, and cosmopolitan spirit that characterized the great free thinkers of the sixteenth century, Montaigne confessed that he felt like a *citizen of the world*: "N'étant bourgeois d'aucune ville" [burgess of no city at all], because he was first of all pleased to be part of the human race (*Essais* III, 9).

In contrast with the religious fanaticism and the dogmatic and intransigent mentality of thee sponsors of the persecution of heterodox Protestants or Catholics by fire and sword (like Servetus and Giordano Bruno, burned at the stake by order of the Inquisition of Rome and the *Petit Conseil* of Geneva at the instigation of Calvin, respectively), Montaigne proposed the understanding of those with opposite thinking, peaceful coexistence, and tolerance towards those who profess a different faith.

In his opinion, justice, peaceful dialogue, and public reason must replace hatred of difference, the indiscriminate use of violence, and the arbitrariness of those who exercise power in a sectarian manner (*Essais* III, 10). The purpose of religion is to extirpate vices, not to cover them up, feed them and incite them; that is why, Montaigne warned, before putting our devotions and beliefs at the service of a circumstantial cause, we must take into account that what is human is essentially invariable, while our adhesions and loyalties are conditional, changeable, and circumstantial. In this sense, he affirmed: "Nous sommes chrétiens à même titre que nous sommes ou Périgourdins ou Allemands" [We are Christians by the same title that we are Perigordians or Germans] *(Essais* II, 12).

Law and Justice in Montaigne

Montaigne was a faithful subject of the king of France, so, unlike his friend Étienne de la Boétie, he did not question the legitimacy of the established power. Moreover, as a member of the ruling class, he could be classified as a conservative *avant la lettre* for his defense of legal security and political stability in times of conflict (Langer 2005, p. 22).

Suppose one considers his legislative and judicial experience as a magistrate of the *Chambre des Enquêtes*, the fulfilment of important diplomatic missions entrusted to him, the performance of the office of mayor of Bordeaux during two mandates (1581–1585), and the administration of his properties. In that case, one could conclude that Montaigne was interested in maintaining order and the status quo within the monarchical government system in which his family occupied a privileged position (Hoffmann 1998, pp. 8–38). However, once he retired from his legal and judicial activities in February 1571, Montaigne felt freed from the burden of the magistracy and took advantage of all the knowledge acquired and the experience he had accumulated in the *Chambre des Enquêtes* to express 2005, p. 107).

As noted above, Montaigne regarded himself as the master of his moral freedom and the sovereign of his will. Because he recognized the rationality and the individual autonomy that each individual enjoys in his own inner self, Montaigne can be considered a precursor of the liberal doctrine that would later be defended by authors such as John Locke, Immanuel Kant, or John Stuart Mill. Concerning the autonomy of the individual's will, Montaigne showed greater confidence in his internal jurisdiction than in the heteronomous laws or norms that regulate human behavior. It is precisely in this sense that one should understand his statement: "J'ai mes lois et ma cour pour juger de moi" [I have my own laws and my own court to judge me] (*Essais* III, 2; III, 10).

According to Montaigne, two leading causes explain the endemic crisis of legal certainty in the kingdom of France: legislative hypertrophy and the discretionary power of judges as interpreters of the law. But the multiplication of laws is not enough to make the legal system more dynamic and adapt it to the changes in the society of its time; on the contrary, it only serves to entangle jurisprudence and doctrine in an inextricable skein of legal sources that are impossible to fathom. On the other hand, the lack of clarity in the enunciation of the laws and the profusion of legal institutions inevitably produce situations as paradoxical as judges interpreting the same rule in a diametrically opposed way, or applying

contradictory sentences to similar cases, or even jurists entering into a hermeneutic loop in which they end up glossing each other *ad infinitum* (*Essais* III, 13).

The distance that separates legislators and magistrates from the socio-legal reality of the French people seemed so unacceptable to Montaigne that he even asked himself if it would not be better for them to disappear: "Il y a peu de relation de nos actions, qui sont en perpétuelle mutation, avec les lois fixes et immobiles. Les plus désirables, ce sont les plus rares, plus simple et générales; et encore crois-je qu'il vaudrait mieux n'en avoir point du tout que de les avoir en tel nombre que nous avons" [There is little relation between our actions, which are perpetually changing and fixed, immutable laws. The most desirable laws are those that are fewest, simplest, and most general; and I even think that it would be better to be without them altogether than to have them in such numbers as we have at present.] (*Essais* III, 13).

Montaigne dissociated himself from the Thomistic conception of law as justice and showed his most skeptical side by stating that laws are in force not because they are just, but because they are laws imposed by the authorities. However, the instability of authority in an era of such political turmoil as Montaigne's, made him pessimistic about its efficacy, even to the extent that instability and precariousness seemed to undermine the foundations of authority by inciting disorder and disobedience.

Montaigne's harsh judgment of law and justice can only be justified by the problematic historical situation he had to face with his contemporaries and his skeptical and disbelieving view of public life. However, it should be noted that some recent historical-legal studies on the operation of French legal institutions of that period (including the *Cour des Aides de Périgueux* and the *Chambre des Enquêtes* of the Bordeaux Parliament where Montaigne served as a justice official between 1557 and 1571) cast doubt on the veracity of some of the information revealed by the author of the *Essais* (Almquist 1998a, pp. 13–38; Almquist 1998b, pp. 213–228; Tournon 2005, pp. 96–97).

The Cultural and Philosophical Legacy of Montaigne

André Gide said in his *Essai sur Montaigne* (1929), in a clear allusion to the Perigordian writer, that an author's importance was not only measured by the value of his ideas, but also by the timeliness of the message he transmits through his work. In fact, Montaigne represents the model of the *honnête homme* [honest man] and, clearly, he also happens to be – perhaps except for Pierre Charron – the last great representative of an illustrious saga of thinkers who championed the humanist-cosmopolitan values of the Renaissance, namely, Marsilio Ficino, Giovanni Pico della Mirandola, Thomas More, Erasmus of Rotterdam, Justus Lipsius, Francisco de Vitoria, Juan Luis Vives, and Francisco Suárez (Copenhaver and Schmitt 1992, p. 38).

In his time, Montaigne's influence acted in a way as a kind of counterweight to the hate speech and the dynamics of barbarism, violence, and religious fanaticism that, with the course of the sixteenth century, was detracting from Renaissance culture and cornering the humanist ethic.

In the following centuries, Montaigne dedicated his philosophical and intellectual efforts to several goals. Firstly, he pursued the development of the process of secularization of the modern State. Furthermore, Montaigne worked towards the separation between public ethics, morals, and religion. He strived to consolidate the principles of the rationality of the law and the primacy of law as limits to the discretion of the judiciary and the public administration. Montaigne also prioritized the protection of individual freedom, the autonomy of will, and the integrity of the person as a moral subject against any attempt of intrusion in his sphere of privacy. Finally, he devoted himself to the defense of three fundamental principles of political liberalism: tolerance, security, and freedom of thought (which also places Montaigne among the precursors of human rights).

As a moderate moral relativist and a Pyrrhonean skeptic, Montaigne's intellectual ascendancy in the French philosophy of the seventeenth and eighteenth centuries can be clearly seen in the works of Pierre Charron, René

Descartes, Blaise Pascal, Denis Diderot, and Jean-Jacques Rousseau. Beyond the French-speaking culture of those two centuries, David Hume echoed the moral relativist and skeptical message of the *Essais* in his Treatise of Human Nature (1739/40). Similarly, a century later, Ralph Waldo Emerson also praised the search for the inner self that characterized Montaigne's philosophy, just as Friedrich Nietzsche confessed his admiration for the honesty and sincerity that emanates from the French essayist's statements. At the end of the twentieth century, Richard Rorty mentioned Montaigne connected with the liberalism and skepticism that converged in his own works. Finally, regarding the history of the modern conceptions of the self, Charles Taylor placed Montaigne in a pre-eminent position (Popkin 1960, p. xii; Edelman 2011, pp. 181–203).

Some scholars of Montesquieu's thought have highlighted the relevance of Montaigne and Hobbes's philosophical similarities in terms of the evolution of modern politics (Paganini 2008; Ferrari and Gontier 2016). Both authors share a skeptical attitude towards life and an anthropological pessimism due to the havoc wrought by the civil wars that were fought in their respective countries (in the case of France, the religious-political conflict between Catholics and Huguenots which lasted from 1562 until the edict of Nantes in 1598; in the case of England, the power struggle between King Charles I and the Parliament that triggered the English Civil War from 1642 to 1651). For Montaigne, human life is changeable and unstable, so that fear, desire, and hope drive men towards the future and uproot them from their present reality (*Essais* I, 3). In a similar sense, Hobbes referred in *Leviathan* (1651) to the perpetual and incessant desire for power to which all humanity tends and only ends with death (*Leviathan* I, 11). In order to contain this unrestrained appetite for power, which, once it is overflowing, becomes the trigger for the outbreak of violence, men are forced to create laws that they must obey. Thus, for Montaigne and Hobbes, civil laws had no moral, natural, or metaphysical foundation, but rather a rational and practical one, since their normative force comes from the need to preserve social life (*Essais* II, 12; *Leviathan* I, 26).

Finally, in Montaigne's nuanced plea for tolerance and religious freedom in the chapter on cannibals and the apology Raymond of Sabunde (*Essais* I, 31; II, 12), one can glimpse proto-liberal ideals which, in the seventeenth and eighteenth centuries, inspired some of the most significant figures of the philosophy of rationalism and the Enlightenment such as Baruch Spinoza, John Locke, Pierre Bayle, Voltaire, and Immanuel Kant. From the nineteenth century onwards, this doctrinal trend opened up, through John Stuart Mill, to other forms of tolerance and freedom, which go beyond the strict issue of religion and occupy the center of the cultural and political debate on civil rights and freedoms in modern societies.

Conclusion

Harold Bloom described Montaigne as the most modern of the classics and the most classic of the moderns, and placed him in the aristocratic phase of the literary canon of the high Western culture (1321–1832), on a par with four other great writers who also lived in the sixteenth century: Miguel de Cervantes, William Shakespeare, Luís de Camões, and Niccolò Machiavelli (Bloom 1995, pp. 501–507).

However, if today the huge significance of Montaigne as a writer and inventor of a new literary genre is remarkable, no less relevant is his figure and his work from a philosophical point of view. In this sense, the critical and skeptical attitude of the *gentilhomme* from Perigord, and his essential condition of a man of doubt (characteristic of a genuine freethinker like Montaigne), prompted him to search for the self-conscious self. This subjectivation of philosophical activity is projected from each individual's inner self (where his autonomy of will resides) towards the unstable outer world to discover man from a Renaissance approach (Frame 1955b). This stance explains the power of seduction the *Essais* de Montaigne have exercised on all those who, throughout generations, have had the desire

to know, the capacity to think critically, and the opportunity to read freely (Bloom 1995, p. 142).

Cross-References

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Introduction

Leading figure of the Enlightenment, Montesquieu (1689–1755) was a major influence for Rousseau, Adam Smith and the Founding Fathers of the Constitution of the United States such as Madison. Already a celebrity thanks to the *Persian Letters* and to the *Considerations on the Causes of the Greatness of the Romans and of their Decline*, Montesquieu took twenty years to complete the *Spirit of the Laws,* published in 1748, which was immediately a tremendous success all over Europe. Yet the controversy around his work was intense: the *SL* was put on trial by the theologians of the Sorbonne and on the Index of forbidden books in 1751.

Montesquieu's intention is first to explain how laws and customs come about. His goal in the *Spirit of the Laws* is to understand the social and political institutions all over the world, referring to both natural and social causes. Book I opens with a famous and paradoxical definition of laws: "Laws, taken in the broadest meaning, are the necessary relations deriving from the nature of

things" (I, 1). Law is not a pure act of the will. Rather, it must be understood in relation to a set of factors (natural, political, social, economic, religious). Searching for the spirit of laws, Montesquieu seeks to understand the laws in terms of nonlegal phenomena, political as well as nonpolitical. The laws must first relate to the nature and the principle of government (Books II to VIII). But the *Spirit of the Laws* also considers more specific relations: laws must relate to the size of the state (end of book VIII, books IX and X), to liberty (Books XI to XIII), to climate (Books XIV to XVII), to the nature of the terrain and the different ways of life (Book XVIII), to customs, manners and the "general spirit" of peoples (Book XIX), to economics and demography (Books XX to XXIII), to religion (Books XXIV and XXV). Finally, laws must have relations between themselves, with their origin, and with the purpose of the legislator (Books XXVI, XXIX). This is the true meaning of the "spirit" of the laws: laws must be proper to the people for which they are framed; they should differ in different places and times according to the differences of climate, commerce, religion, and so on. But Montesquieu is not only a sociologist. His intention is normative: he is concerned with *good* laws and teaches the importance of political freedom considered as a rare good, to be preserved against many perils. Powers ought to be limited – even in Europe and foremost in France.

Forms of Government

Laws are primarily related to the form of the state. The *Spirit of the laws* breaks with modern ideas on sovereignty. Political science must be comparative: instead of highlighting the universal conditions of political legitimacy (like Hobbes or Locke), it should specify why laws and customs are what they are in each regime.

According to Montesquieu, there are three archetypes of governments: republican governments, either democratic or aristocratic, monarchies and despotisms. Whereas the nature of a regime is its institutional structure ("what makes it what it is"), its principle resides in the human passions or political emotions that sustain it ("that which makes it act", III, 1). To ensure that a government be preserved against its natural tendency to corruption, its spring should sustain its laws, and its laws support its spring.

First, the republican government is the one where the people, or only part of the people, exercise the sovereign power. Democracy is not characterized by the advantage granted to the "immediate participation of the people" or the fierce dispute over common affairs; it is not even defined by self-government. According to Montesquieu, it is up to the Senate to elaborate the laws before to have them ratified by the people. Democracy, like all the other regimes, also has to fear corruption, due to the abuse of power of the people who holds the sovereign power. In a democracy, the attribution and the communication of the power are governed according to certain fixed rules, as well as in the monarchy: the fundamental laws fix the extension and the organization of the right of suffrage. If the people are unable to govern by themselves, they are able to choose their magistrates depending on their reputation. In order to safeguard democracy, it is thus necessary to introduce selection procedures which break up with strict equality: the prosperity of the democratic system depends on its ability to correct, through aristocratic procedures, the pure exercise of democracy.

Popular governments are mostly Greek or Roman. Montesquieu refers to ancient philosophers and historians: Plato and Aristotle, Thucydides, Polybius, Livy, Tacitus, Cicero… To be sure, the modern dimension of the republic is not absent – references are made to the United Provinces, Switzerland, Germany or to the republican episode in England. But democracy suits better Antiquity, because heroic virtue was stronger then: "One can define this virtue as love of the laws and the homeland. This love, requiring a continual preference of the public interest over one's own, produces all the individual virtues; they are only that preference" (IV, 5). Even if political virtue is not Christian nor moral virtue, civic devotion is very demanding. Self-government requires self-restraint. As complete dedication to the common good, patriotism has

to supersede personal ambition and greed. This is why virtue and commerce usually cannot stand together: "The political men of Greece who lived under popular government recognized no other force to sustain it than virtue. Those of today only speak to us only of manufacturing, commerce, finance, wealth, and even luxury" (III, 3). Republics seem to belong to classical Antiquity. This antinomy will be repeated by Rousseau in the *Discourse on the Sciences and the Arts*: in the modern world where the preoccupation of men is wealth, luxury undermines the foundations of the love of the country. But republics are not totally excluded from modern times: besides the system of confederations, which allows the modern republics to ally themselves and ensure their defense, *The Spirit of the Laws* considers the case of trading republics, like the Low Countries or Switzerland. In these republics where men are dedicated to trade and not to war, a strict policy allows commerce not to corrupt virtue. By compelling citizens to live off their work, and by preventing them from accumulating too much wealth, the lawgiver may use the spirit of commerce to nourish sobriety and thrift (V, 6). In any case, the spring of democracy works to preserve the political structure, and all of the laws must support this spring: equality, frugality and good mores should be preserved thanks to different institutions of social control (Roman censors for instance) which preclude virtue from corruption and check the vitality of public zeal.

Aristocracies (like in Venice) provide a second model of republic. In aristocracies, the sovereign power is in the hands of the noble, who make the laws and execute them. Just as democracy must counter the tendency of the people to abuse their power and to oppress the great, aristocracy must constantly fight against the tendency to restrict its ruling caste, against the will of the nobles to oppress the people. Therefore, its preservation requires conditions quite unlike those required by democracy. While in a democracy it is necessary to strengthen the aristocratic election procedures, an aristocracy must, in order to maintain itself, move closer to democracy. Moderation, the principle of the aristocracy, is a softer version of political virtue: nobles have to restrict themselves in order to prevent their domineering inclinations.

In monarchies, the King rules by fixed and established laws. Monarchies, where the prince is "source of the military and civil power" are preserved against the risks of abuse of power by integrating "intermediary, subordinate and dependent powers", namely political and legal bodies (Parliaments, cities, feudal and ecclesiastical jurisdictions) or social orders (nobility, clergy). Their role is key: because these bodies exist by their own right and not merely by delegation of power on the part of the king, they avoid the despotic shift. As links between the king and the people, intermediary powers are supposed to check that obedience goes only to a monarch who is respectful of the "fundamental laws" of the kingdom. The modern danger is indeed absolutism. Primarily concerned with the French regime, Montesquieu deems intermediary bodies to be necessary to avoid concentration of power in the hand of the King: thanks to Parliaments and townships in particular, the risk of arbitrary power is contained. Monarchy properly understood is a regime with "a depository of laws", essentially an independent judiciary.

Yet this regime also has its own principle. Honor, defined as "the prejudice of each person and each condition" (III, 6), is the soul of monarchy. In this case, there is no need for virtue to animate the state machine: "In monarchies, politics accomplishes great things with as little virtue as it can, just as, in the finest machines art employs as few motions, forces, and wheels as possible. The state continues to exist independently of love of the homeland, desire for true glory, self-renunciation, sacrifice of one's dearest interests, and all those heroic virtues which we find in the ancients and know only by hearsay" (III, 5). Honor is the dominant passion of these regimes: this aristocratic *ethos* is associated with a desire for reputation, yet it is useful for the common good (III, 7; IV, 2). The laws of honor triumph over all other laws (religious, moral or civil). Publicly defending their status and living up to their rank, noblemen tend to oppose their resistance to arbitrary acts and abuses of power.

Finally, despotism is for Montesquieu a political regime in its own right: it is not a simple

corruption of the monarchy, but the regime where one single individual "draws everything along by his will and his caprices" (II, 1). Oriental despotism, which flourishes in the large empires of Asia (Turkey, Persia, China) and the warm countries were climate affect customs, cannot be considered only as a specific form of government: it is the perpetual threat to all forms of government, even in Europe and moderate climates. Despotic states present a minimal organization of power, where stable institutions are non-existent (II, 5). The "fundamental law" in these regimes is that of the communication of power from one to one, so that the despot may indulge in idleness and voluptuousness. In despotic states, there is no fixed institution nor constitutional law: religion serves as the only check on political power. The fundamental law of this regime without laws is therefore that the despot delegates all his power to another man (the "grand vizier"); the despot is inclined to make use of all the pleasures, especially in the seraglio, which distracts him from the state government. In the despotic regime, power remains personal, non-institutionalized, undistributed between different political and social forces (V, 16). Montesquieu draws on a paradox: absolute power is never exercised. At the same time, in despotic regimes, fear (the principle of this regime) reduces man to pure animality, and necessarily regulates his conduct, as the laws of motion govern bodies. Men governed by fear are like animals. Not only does terror prevent disobedience, it removes the very possibility of reasoning and deliberation. In these regimes without public space, the individual is dispossessed of his own temporality: "There, men's portion, like beasts', is instinct, obedience, and chastisement" (III, 10). Montesquieu may not have a "best regime" in mind; yet he certainly holds despotism as the worst one. To prevent oppression of the people, institutional design has to be done.

Moderation and Political Freedom

If Montesquieu uses the concept of despotism as a powerful foil, his philosophy is directed to another concept, namely moderation: "I say it, and it seems to me that I have written this work only to prove it: the spirit of moderation must be that of the legislator; the political good, like the moral good, is always found between two limits" (XXIX, 1). The concept of moderation has several different meanings: it refers to the virtue of the legislator but above all to the common character to all regimes other than despotism, where power is distributed and authority, balanced. Moderate governments are complex machines: "In order to form a moderate government, one must combine powers, regulate them, temper them, make them act; one must give one power a ballast, so to speak, to put it in a position to resist another; this is a masterpiece of legislation that chance rarely produces and prudence is rarely allowed to produce" (V, 14).

Consequently, the conditions of freedom are first and foremost conditions of moderation. Books IX and X deal with the conditions of external security related to the size of the State, before books XI and XII examine internal security. Later, Montesquieu will also highlight the natural conditions of freedom: the southern nations (in Asia for instance, but also in the south of Europe) are not considered as fit for freedom as the northern ones. The northern climate is the best climate for development of courage and energy, best fit for defending liberty. Instead, a warm climate makes people more lazy. For sure, moral causes may assume the ascendancy over physical causes. The wise lawgiver can rely on his understanding of physical causes to win over certain vices (such as laziness). This means that civil slavery may have natural roots. In Book XV, Montesquieu starts with a general condemnation of absolute mastery over another's life and goods as "contrary to the fundamental principle of all societies", harmful to both master and slave (XV, 2). But a distinction should be made: in excessively hot countries and under despotism, where slave and subject are alike, slavery is not as intolerable; it "runs less contrary to reason" (XV, 7). In the same way, political freedom may be the privilege of certain peoples: in spite of man's love for liberty, in the largest part of the globe despotism is unavoidable.

Even in Europe, political freedom is constantly threatened by the "eternal experience" of abuse of power. Without relying on political or moral

virtue, Montesquieu thus advocates checks and balances. Power versus power: the distribution of the three powers of the state is the condition that allows moderate governments, where at least two of the powers of the state are distributed, to be free. Political freedom is first associated with the absence of constraint external to that of the laws. Freedom is not defined as independence, but as freedom under the law: "Liberty is the right to do everything the laws permit" (XI, 3); citizens are truly free when they are subject only to the power of the law. Such a definition is opposed to the republican tradition which founds political freedom in self-government: in the *Spirit of the Laws*, the power of the people is not the freedom of the people. No doubt Montesquieu occasionally invokes this freedom conceived as obedience to the law that we have given ourselves, not in reference to the ancient popular regimes or the Italian cities of the Renaissance, but rather of contemporary England: "As, in a free state, every man, considered to have a free soul, should be governed by himself, the people as a body should have legislative power" (XI, 6). However, political participation is now a means and not an end; it is the instrument of security. Liberty depends on the protection of the individual against the arbitrary power of the State: "Political liberty in a citizen is that tranquility of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen" (XI, 6; see XII, 2).

Montesquieu seeks the principles of political freedom in the English Constitution. If each Constitution has a specific purpose that directs its institutions and laws in addition to conservation (war, trade, religion . . .), "there is also one nation in the world whose constitution has political liberty for its direct purpose. We are going to examine the principles on which this nations founds political liberty. If these principles are good, liberty will appear there as in a mirror" (XI, 5). In this chapter, Montesquieu highlights the principles of political freedom while describing the main institutions of England after the Glorious Revolution. Eighteenth Century England is a peculiar regime: not a feudal monarchy any more, but rather a kind of modern Republic with a king, which does not fit in the previous classification of governments. Montesquieu considers the representative republic as by far superior to the ancient direct democracy. Moreover, he makes the case that fragmentation of power is instrumental to freedom.

Yet a strict separation of powers is untenable: for instance, Montesquieu does not hand over the legislative power to Parliament alone, but to Parliament and the monarch. If Parliament formulates and votes the laws of which its members have taken the initiative, these laws come into force only if the monarch agrees. The monarch takes part in the legislation by his faculty of vetoing; the executing power, from this point of view, "must take part in legislation". Consequently, the idea of separation of powers is a myth. Montesquieu says so explicitly: in the monarchies he knew (like in France), "the three powers are not distributed and cast on the model of the constitution which we have mentioned", namely the Constitution of England (XI, 7). For the safety of the citizen to be preserved, a single power must in general be "separated" from the other two, namely the judicial power attributed, in England, to temporary juries rather than a corps of magistrates. So that the feeling of freedom is preserved and the citizen does not experience the fear of the magistrates that characterizes the despotic states, it is necessary to somehow neutralize the power to judge: it must become, "in some fashion, null" - the judge being in a way only the "mouth that pronounces the words of the law". A decent penal law, establishing proportion between crime and punishment, is also required: "The knowledge already acquired in some countries and yet to be acquired in others, concerning the surest rules one can observe in criminal judgments, is of more concern to mankind than anything else in the world" (XII, 1).

In England, political freedom is not moderate, but extreme: "I do not claim hereby to disparage other governments, or to say that this extreme political liberty should humble those who have only a moderate one. How could I say that, I who believe that the excess even of reason is not always desirable, and that men almost always accommodate themselves better to middles than to extremities?" (XI, 6) Before being corrupted,

the French monarchy could appear as a happy medium between the concentration of the powers of despotism and the extreme distribution of powers in England: the executive and the legislative in the hands of the monarch, the power to judge in the subjects. In France, the aim of the state is not freedom, but glory; now "this glory results in a spirit of liberty that can, in these states, produce equally great things, and can perhaps contribute as much to happiness as liberty itself" (XI, 7). The English Constitution thus serves as a yardstick against which to judge the liberty of other constitutions, and more specifically of the French Constitution; it does not constitute a political regime to universalize.

Commerce and Religion

More than any other nation, England embodies the principles of *doux commerce*: "That nation, made comfortable by peace and liberty, freed from destructive prejudices, would be inclined to become commercial" (XIX, 27). The finest praise in book XX goes to it: "this is the people in the world who have best known how to advantage of each of these three great things at the same time: religion, commerce, and liberty" (XX, 7). As a commercial society, England was able to discover the true relationship that binds wealth and power among modern nations: commerce is no longer merely the instrument of its power, but its very substance. Nevertheless, Montesquieu is far from neglecting English commercial jealousy, and its aspiration to Empire. If commerce – replacing conquest – leads to peace and has beneficial effects on government (giving incentives for a good policy), commercial empire may still be fed by slave trade (XXI, 21).

Montesquieu also conceives of reciprocal relations between religions and laws: the legislator must ensure that the civil laws "correct" religions if necessary, as well as the laws of religion can correct the disadvantages of the political Constitution and have the effect of civil laws (XXIV, 25-28). Montesquieu underscores the social utility of religion, when used by a wise legislator. He dares to maintain that it is less the truth or the falsity of a dogma that makes it useful or pernicious to men in the civil state, than the use or the abuse that one makes of it. Deprived of any normative privilege, religion is useful not to enforce obedience from the subjects but rather moderation of the kings. The praise of Christianity is based on its softening power, moderating the desire for domination and the risks of abuse of power in conquest. Its function, as such, is analogous to that of commerce; but where commerce softens manners and contributes to political liberty by virtue of its mobility, the utility of religion lies in its fixity (XXVI, 2).

Conclusion

Finally, the legislator has to be aware of the general spirit of the nation, and impulse legal change within a given natural and social framework: "Many things govern men: climate, religion, laws, the maxims of the government, examples of past things, mores, and manners; a general spirit is formed as a result" (XIX, 4). When the general spirit is not harmful to the principle of government, the prince or the lawgiver must preserve it as part of the liberty of the people. According to Montesquieu, this is the case in France, a sociable nation which does not need any religious or ascetic reform.

Cross-References

► Citizenship
► Legal System and Legal Order
► Natural Law: Contemporary
► Rights: General

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Moody-Adams, Michele

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Introduction

Michele Moody-Adams (b. 1956–) is a moral philosopher whose works characteristically involve nuanced and multidimensional accounts of human cultures, societies, and institutions. Central to her work is an understanding of social dynamics regarding consensus-building, dissent and disagreement, the limits of permissibility, and conditions for the transformation and progression of political and educational institutions. Moody-Adams views moral philosophy as one desirable mode of moral inquiry among many whose primary task is to stimulate and improve the self-reflection of moral agents through close attention to the meaning of norms, values, and ideals faced in lived human contexts. While Moody-Adams's work can be characterized primarily as moral philosophy, her approach has engendered important contributions in fields such as philosophy of culture, political philosophy, democratic theory, law, education, philosophy of race, feminist philosophy, and Africana philosophy.

Biographical Information

Michele M. Moody-Adams was born in Chicago, IL, the daughter of two schoolteachers. She was introduced to philosophy as a student at Kenwood High School on Chicago's South Side. She attended Wellesley College, at first intent on becoming a Unitarian Universalist minister. She was discouraged in this pursuit, though, on the grounds that the church was not yet ready for Black female clergy Yancy (1998). Finding herself moved and inspired by texts from Plato, Ludwig Wittegenstein, and John Rawls, and receiving strong encouragement from her philosophy professors – who included Ruth Anna Putnam and Ifeanyi Menkiti – Moody-Adams instead pursued a vocation as philosopher.

After earning an MA at Oxford University's Somerville College, she attended Harvard University, earning a PhD in Philosophy in 1986. She began her professorial career at Wellesley, later teaching at University of Rochester and Indiana University before becoming the Hutchinson Professor of Ethics and Public Life at Cornell University in 2000. She directed Cornell's Program on Ethics and the Public Life and in 2005 began serving as its Vice Provost for Undergraduate

Education. In 2009, she was appointed Dean of Columbia College (serving until 2011) and the Joseph Straus Professor of Political Philosophy and Legal Theory at Columbia University.

Fieldwork in Familiar Places

Fieldwork in Familiar Places: Morality, Culture, & Philosophy (1997) stands as perhaps Moody-Adams's most complete statement of intent as a philosopher. In this text, Moody-Adams offers a tour-de-force account of the limitations of modern moral skeptics, whose dubiety regarding the prospects for moral inquiry, Moody-Adams shows, is often grounded in a fundamental misapprehension of the functioning of human cultures and a misguided fetishization of natural science as the model for what moral philosophy should be.

In the first part of the text, Moody-Adams offers a scintillating reading of the twentieth century cultural anthropology that informed a now-commonplace subscription to belief in descriptive cultural relativism. "Descriptive cultural relativism," Moody-Adams writes, "is the claim that differences in the moral practices of diverse social groups generate 'ultimate' or 'fundamental' moral disputes, disputes that are neither reducible to non-moral disagreement nor susceptible of rational resolution" (1997: 15). In a sustained critique of anthropological theory and findings from figures including Margaret Mead, Melville Herskovits, Ruth Benedict, and E. E. Evans-Pritchard, Moody-Adams demonstrates this data rests on deeply flawed methodological presumptions. The findings that motivated twentieth century moral philosophers to assert the truth of descriptive cultural relativism rested on dismissal or disavowal of disagreements internal to cultures and a tendency to take data from a single point in a culture's history as representative of its timeless views, reflecting what Johannes Fabian (1983) termed the "denial of coevalness."

Moody-Adams contends that the refutation of this data, and the more rigorous view of the dynamic functioning of human cultures that it reveals, undermines the case for what she terms "meta-ethical relativism," a position that rejects most or all claims to moral objectivity and for which, in typical variants, moral truth is only intelligible in relation to particular cultural conventions. Hence, the assault on moral objectivity takes the purported absence of transcultural moral truths as generally undermining, or at least relativizing, the notion of moral truth altogether. Against this view, Moody-Adams argues that the essential components of morality can be found across time and place. The issue, she contends, is the question of the degree to which social practices and individual self-reflection adequately and rigorously interpret these moral fundaments. As such, she rejects what she terms "the relativism of historical distance" (62), for which moral judgments across historical epochs tend toward invalidity owing to the different moral conventions that historical distance brings. Such accounts, Moody-Adams shows, rest on uncritical acceptance of the unthinkability of moral alternatives in different cultural contexts. Internal dissent in bygone eras is often occluded and the "affected ignorance" of those affirming immoral practices treated as if simply an authentic expression of a cultural way of life. Moody-Adams's account thus complements theorists such as Michel-Rolph Trouillot (2015) and Sibylle Fischer (2004) working through the problem of how historical actors structure discursive accounts so as to yield exculpatory views of their acts in spite of the contemporary disapprobation and resistance those acts generate.

For Moody-Adams, moral developments like the abolition of slavery do not rest on discovery of novel moral ideas. Rather, they require moral agents to take seriously universal moral foundations, which further demands that they undertake the project of interpreting these contextually and self-reflectively. Against critics who regard moral conflicts as fundamentally irresolvable, she argues they conflate the *difficulty* of moral resolution with its *impossibility*. Hence, for Moody-Adams, moral philosophy needs to take seriously its function as bringing clarity to the plurality of modes of moral inquiry that together constitute the healthy moral and cultural functioning of a society. Central to all such moral inquiry, Moody-Adams contends, is attenuation to the demands of *thick description* or *semantic depth*. Because moral action occurs within a significative

context laden with meanings and value representations, no judgment of moral agency is viable without understanding of its meaning to local actors. But this does not excuse local agents from global scrutiny, nor does it ensure the tidiness and predictability of moral contestation at the local level. Hence, Moody-Adams views moral philosophy's task as neither a quest for more rational formulations of moral law nor an elucidation of the impossibility of robust moral judgment and agreement but instead as an effort to intervene in discursive communities through nuanced attention to the meaning of local norms and values in light of the philosopher's critical attention to norms of evidential and argumentative rigor. Moral progress, then, stems not from the discovery of new moral ideas but rather from the concerted effort to couple thick descriptions of social life with the self-reflection of agents such that the dissemination of moral interpretations improves social practices.

Applications

Moody-Adams' provocative articles and essays stand on their own, but many of her interventions can fruitfully be interpreted in light of the ambits laid out in *Fieldwork in Familiar Places*. Her oft-reprinted "Race, Class, and the Social Construction of Self-Respect" (1992) contends that the self-respect of the individual can be heavily influenced by social practices, such that, for instance, poor Black students in a racist society may affirm from a young age that they are "nobodies" and hence disdain development of their talents and abilities. As antidote to such tendencies, Moody-Adams avows the importance of "membership in various communities and associations that constructively affirm their worth as persons" (264), but argues that such efforts can only go so far where the dominant social fabric remains committed to undermining the self-respect of particular persons and communities. Hence, finding discursive communities in which thick description of the person's capabilities can engender the person's self-reflection may help to overcome socially constructed self-disrespect, but the general success of such an approach nonetheless relies on the achievement of moral progress that entails the responsibility of all agents for building a better society.

In analyzing the philosophy of Martin Luther King, Jr., Moody-Adams (2018b) defends his view of conscientious citizenship, for which the citizen faces an absolute responsibility for the injustices wrought by one's society and hence a duty to consistent and conscientious efforts to identify and oppose social failings. Moody-Adams calls attention to the ways in which King's commitment to nonviolence is misunderstood if narrowly read as an ethics for protest, demanding instead that it be read as a broader philosophical reflection on citizenship. Thus, the duties of the citizen to take responsibility for not only injustice internal to one's society but injustice visited upon other societies – as in King's decrying of the US's violence in Vietnam – come to the fore.

Moody-Adams elsewhere (2018a) draws upon King in working through the complex dynamics of compromise in democratic life. Moody-Adams argues the practice of democracy is impossible without an ethos commensurable with compromise of some sort. However, this faces the danger of collapsing into a commitment to compromise that colonizes other moral concerns. Thus, democratic life requires the sort of moral "fieldwork" Moody-Adams advocates in which persistent efforts at more rigorous moral inquiry are wedded to participatory discursive efforts. Democracy, then, demands communicative projects of improving the moral reflection of the polity aimed at yielding tangible social progress. Nonetheless, such efforts cannot presuppose the achievement of a full-throated and universal consensus, and so the execution of social progress must, because of the ongoing value of discursive plurality, rest on affirming the value of compromise of some sort. Democracy thus necessitates a commitment to principled compromise without crowding out recognition of the importance of conscientious objection.

Similar themes emerge in Moody-Adams's contributions to debates on academic freedom and educational safe spaces. Moody-Adams

(2015) distinguishes between the normative grounds of free speech in democratic values and the normative grounds of academic freedom in the authority of disciplines. The latter call for a right of nonneutrality, which means the academic is charged with sometimes excluding certain beliefs and advocating others, as well as risking giving offense to those who do not agree. University professors must make certain controversial claims in order for the pedagogical and knowledge-producing functions of their role to be fulfilled. Academic freedom is thus irreducible to a basic right of free speech and hence calls for a broader understanding of institutional function and social context. Academic freedom thus arises not as an expansion of the free speech rights of professors – such that their special rights would trump those of their students and broader communities – but as an expansion of their duties to truth, education, and social progress.

Influence and Criticism

Moody-Adams's work is often invoked in debates about the blameworthiness of historical agents in perpetuating moral harms conventional in their societies (Eriksen 2019; Isaacs 1997; Levy 2003; Peacock 2011; Tunick 2004). Critics have generally considered Moody-Adams's contributions important, but often find her position to go too far in the direction of presuming moral agency to transcend the strictures of social convention. A limitation of these debates has been a relatively narrow focus on a few of Moody-Adams's contributions without reading these in the broader context of her metaethics and metaphilosophy and contributions to philosophy of culture and democratic ethics. A revisiting of these debates in light of Moody-Adams's more recent contributions on citizenship, forgiveness, and democratic life would be a welcome advancement.

April Flakne (2005) has taken up Moody-Adams's work on thick description generatively in engagement with Hannah Arendt on the means and ends of reflective judgment. Development of the affinity between Arendt and Moody-Adams, particularly in light of the latter's recent work on forgiveness, merits further scholarly attention. The implication of this direction in Moody-Adams's work is further developed by Terrence Johnson (2015), who takes up the limitations of a Rawlsian conception of public reason in light of the problem of antiblack racism in public culture. Johnson calls for a model of public deliberation grounded in pairing W.E.B. Du Bois's notion of "double consciousness" with Moody-Adams's "reflective confrontation." Jane Gordon (2014) likewise draws on Moody-Adams's account of culture in her efforts to develop a notion of political theory open to processes of creolization, through which a more desirable conception of the public good and the discursive contexts for public deliberation can emerge.

Cross-References

- ▶ Arendt, Hannah
- ▶ Citizenship
- ▶ Freedom: Academic
- ▶ Held, Virginia
- ▶ Justice: Thick Versus Thin
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Moral Luck

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Introduction

Luck is undoubtedly a factor in our lives. But whether luck can make a *moral* difference – impacting what we are responsible for, whether we are blameworthy for some action, or the characters we have – is a contested issue. Ancient discussions on the topic concerned whether living well was impervious to luck (see Nussbaum 1986). Aristotle held that *eudaimonia* requires some degree of external goods, like friends and money, in addition to virtue. No matter how virtuous one is, one's life can't go well if it is deprived of these necessary goods. Since procuring these goods is often a matter of luck, *eudaimonia* is to this extent dependent on luck. Yet others deny that luck makes any difference in living well, most extremely the Stoics. On this view, virtue is necessary and sufficient for living well, so that even those who suffer misfortunes can be virtuous and live a good life.

Contemporary discussions focus on whether luck alters moral responsibility. *Moral luck* concerns cases in which factors outside of one's control make a moral difference. The traditional problem of moral luck introduced by Williams (1976) and expanded by Nagel (1976) involves a tension between an intuitive principle – that we can only be held morally responsible for what is under our control – and the fact that much of what we do is *not* under our control (see also Feinberg 1970, pp. 34–37). If we accept both of these claims, then many of our moral judgments are undermined. Moral luck thus refers to a moral judgment of a person (e.g., blame or praise) even though luck plays a part in that judgment.

This entry will canvas the problem of moral luck as Williams and Nagel present it, outline different strands of responses to the problem, and then briefly turn to implications of moral luck in social philosophy.

Moral Luck: The Problem

Williams and Nagel

Williams starts by noting that on the traditional Kantian picture, *morality* is independent of contingency. On this view, anyone can become moral and our assessments of the moral do not depend on anything but the agent's (relevant) choice (Williams 1976, p. 115). This is why "moral luck" is an oxymoron for Williams (1993, p. 251). Additionally, morality is supposed to be the supreme value to which other values are subordinate (1976, p. 116). Williams is skeptical about this portrait of morality. He introduces a fictionalized case of Gauguin, who abandons his responsibilities to his family in order to pursue his artistic career. Williams claims that the justification for Gauguin's choice can only be made retrospectively since it depends on whether he actually becomes a successful painter. If he does, then he was justified in his choice; if he fails, he is not. But this will only be determined once the fact

of success or failure is known (though Andre 1983 notes that we can judge the riskiness of Gauguin's choice irrespective of its consequences. Similarly, Rosebury 1995 holds that Gauguin's choice is blameless so long as it was based on the knowledge of likely outcomes available to him at the time). Crucially, Gauguin's success yields "a good for the world," and many of us would think this good exists even though Gauguin's decision has hurt his family (1976, p. 133). And this shows, for Williams, that morality is not the supreme value. The spectator "has reason to be glad that Gauguin succeeded" even if it means he did the wrong thing by his family (1976, p. 133). And this judgment is, of course, dependent on Gauguin's success. Since morality as a value is eclipsed in this case (and eclipsed by luck-dependent justifiability), morality cannot be the supreme, unconditioned value we take it to be. Put another way, the moral justification of the choice cannot be made ahead of knowledge of the outcome, and since the outcome depends on luck, morality is not immune to luck.

Williams' treatment of regret in this case adds another dimension to this argument. Any spectator can feel regret over a state of affairs in wishing that it had not happened. But as agents, we feel a special type of regret for the results of our actions, whether those actions are voluntary or involuntary. This *agent-regret* concerns our past actions and how we could have acted differently. The safe driver who hits a child through no fault of his own still feels agent-regret, and we would think him morally impoverished if he didn't. Agent-regret is part of our actual experience of agency, and any view of rationality that suggests we should never feel regret over the uncontrolled outcomes of our actions would be unpalatable.

Often, when we regret our choices, what we regret is the rational decision-making process behind them rather than their outcomes. We learn from our bad decision-making even when we get lucky and the outcome turns out better than it should have. But other choices, like Gauguin's, are not like this because the outcome of these choices will impact the agent's "standpoint of assessment" *for that very choice* (1976, p. 132). With the success of the outcome, the agent will look favorably on the result and thus cannot regret their decision; with failure, "his most basic regrets will attach to his decision" (1976, p. 132). In these cases, the assessment of one's choice does not attach to one's deliberative process at all but is completely shaped by the luck of the outcome. This means that Gauguin's regrets at abandoning his family – his moral regrets – are only present if the project fails, since there is nothing to regret if it succeeds. And this flies in the face of appropriate agent-regret, in which the outcome of one's actions is not as important as one's agential relationship to it. For Williams, this shows, again, that morality is not immune to luck.

Building upon Williams, Nagel articulates the problem of moral luck as the contemporary literature understands it: as a tension between an intuitively correct practice of assigning judgments of moral responsibility and a fact about our moral lives. On the one hand, there is a strong moral intuition that we cannot be responsible (and thus blameworthy or praiseworthy) for things that are not under our control (call this the control condition). On the other hand, a good deal that we do is not under our control – the results of our actions, the options available to us, the circumstances we find ourselves in, and our characteristic tendencies to act. And still, these factors of luck can make a moral difference. We morally judge someone for how they did or did not act in the circumstances they find themselves in; we hold different assessments of blame when one person's action results in harm while another's identical action does not; we judge those with congenitally bad characters.

Nagel identifies four types of moral luck. These are resultant luck (luck in how actions turn out); circumstantial luck (luck in the circumstances one finds themselves in); constitutive luck (luck in who one is, which Williams identifies); and antecedent luck (luck in the causes of actions). If we agree that factors outside of our control *do* seem to make a moral difference, and if we accept the control condition along with this fact, then it turns out that we cannot be morally responsible for very much at all. As Nagel warns, the reality of moral luck shrinks our locus of control so as to be basically "extensionless" (1976, p. 146), leaving us with "no one to be"

(p. 150). Attempting to restrict moral judgments to what an agent actually does, even if this is based on what they do not control, does not avoid the problem since the paradox falls out of the very "nature of moral judgment itself" (1976, p. 148). A Kantian attempt to isolate moral judgments only to the will won't work since that which conditions our wills is also not up to us. Additionally, this move does not reflect our actual moral judgments, in which we judge people "for what they are *like*" (1976, p. 145), even when it is not an expression of their will.

For Nagel, the problem of moral luck leaves us on unsteady ground, for it shrinks our locus of responsible agency, yet it is impossible for us to give up thinking of ourselves and others as agents. The responses to moral luck range from embracing this unsteadiness to reducing it to the merely apparent. Walker (1991) identifies three strands of response to moral luck: moral luck is a legitimate paradox (the approach Williams and Nagel endorse); moral luck is not a real phenomenon; and moral luck is real but not a problem (p. 14). (An alternative form of response involves arguing that only certain forms of moral luck exist; see Hartman (2018) for a rejection of these "intermediary" approaches.)

Responses to Moral Luck

Consider first the strategy of explaining away the appearance of moral luck. The general move here is to argue that luck does impact our judgments in some way, but that this is not a moral impact.

One tactic involves appealing to a distinction between blameworthiness and practices of blame and arguing that luck only makes a difference to the latter. For instance, Jensen (1984) argues that we equally blame the lucky and unlucky agents just for the risks they create since agents can create a risk without controlling whether that risk results in harm. So, one can be subject to blame for creating that risk whether or not the harmful outcome occurs (1984, p. 327). Similarly, Zimmerman (1987) claims that the unlucky driver is responsible for *more events* than the lucky driver – namely, reckless driving and murder (instead of just recklessness) – but this does not mean he is *more* blameworthy than the lucky driver.

Alternatively, the appearance of moral luck may be due to the difference luck makes in epistemic justification. Since there are epistemic limitations in judging what an agent deserves, luck can impact our epistemic grounds for a moral judgment (Richards 1986, Rescher 1993). If an agent's action results in harm, we have grounds to morally judge her as reckless – grounds that are absent for the lucky reckless agent even though the latter may *actually* deserve criticism equal to the former (Richards 1986; though see Adler 1987). Instead, our moral judgments track an agent's character (like the trait of recklessness). Being in a position to perform some particular action (or not) does not change the treatment one deserves in terms of their character, for this treatment will be justified by relevantly in-character actions (or omissions) that the agent actually does perform; luck merely changes which actions justify that treatment (Richards 1986, p. 204). Blameworthy defects of character will be easier to identify in circumstances in which they are overtly on display (e.g., the concentration camp officer), but these defects are no less blameworthy in one who causes comparatively less harm (see Rescher 1993 for a similar argument that unexercised dispositions are still blameworthy or praiseworthy).

Another version of the epistemic argument claims that part of moral responsibility is being a responsible epistemic agent: taking steps to determine the circumstances of your decision and the effects of your actions (Rosebury 1995). A failure to do this is a moral as well as epistemic failure and thus makes its way into moral judgments. We judge acts in light of the information available to the agent at the time, and in this light, negligence (for instance) is just negligence – not lucky or unlucky negligence – and just as blameworthy. Luck is no excuse when the outcome of our action is a result of preventable ignorance or lazy investigation.

These various ways of denying the reality of moral luck seek to push our criterion for moral deserts away from contingencies. But as Wolf (2000) argues, these positions, while plausible, miss out on the "grain of truth" evinced by moral luck (p. 6). They should thus be

supplemented with the "nameless virtue" (2000, p. 13) of taking responsibility for the effects of our actions in the world, even those we might not intend. Wolf argues that we think it appropriate that the driver who kills a child blames himself more than the driver who fortunately does not, yet we also think it appropriate to console the first driver by pointing out the role of luck in mitigating his blameworthiness. What explains this apparent inconsistency is that each driver is equally blameworthy, yet the unlucky driver ought to exhibit the nameless virtue of taking responsibility for what his actions have caused and so ought to blame himself in a way that third parties shouldn't.

Wolf's is a hybrid view between denial and acceptance of moral luck. The latter strategy holds that moral luck is real but not a problem for our moral lives. For instance, Andre (1983) distinguishes the Kantian sense of "moral," which Williams and Nagel implicitly draw on to make the case for moral luck, and the Aristotelian sense of "moral." The former concerns punishment and reward, while the latter focuses on a person's admirability in terms of their character. Andre notes that both senses are present in our moral thinking but claims morality is fundamentally concerned with the Aristotelian sense and its focused on "praise and emulation" (1983, p. 205). It is this sense that we evoke when we morally judge someone who is an ostensible victim of moral luck: we are reflecting on their character. The agent who is naturally greedy or for whom generosity comes easily can be good or poor models for moral excellence, but they need not be blameworthy for the characters that make them so. Additionally, we can judge someone responsible for the outcome of their actions in the sense of needing to right their wrongs, but not in the (Kantian) sense of punishment. Together, this explains the different judgments of lucky and unlucky agents.

Another way to argue that moral luck is unproblematic is to contest the control condition that supposedly renders moral luck paradoxical (see also Browne (1992); Adams (1985) provides a different objection to the control condition with the argument that non-voluntary "states of mind" can be blameworthy (p. 6)). Walker (1991) argues that the control condition reveals deeply problematic assumptions about moral agency. It posits responsible agency as "pure" agency independent of the causal world and "pure" agents that are disconnected from other people (1991, p. 22). But Walker points out that much of our moral lives involves taking up responsibilities that we do not control, including caring for others and bearing burdens. Indeed, we couldn't make sense of central aspects of our moral experience, like the virtue of integrity, when an agent maintains their moral commitments in the face of misfortune and trial, without moral luck (pp. 20–21). Rather than a worrying paradox to be explained away, Walker holds that moral luck already is an unproblematic part of our moral lives. Similarly, Card (1996) argues that the fact of constitutive luck should not uproot our sense of moral responsibility. A normal feature of our moral lives is taking responsibility for the characters we have and the circumstances we find ourselves in even if these were not up to us. This is a forward-looking sense of responsibility that Card contrasts with the backward-looking ascriptions of blame and praise that Williams and Nagel are primarily concerned with (pp. 25–27). From a forward-looking perspective, luck is an unproblematic feature of morality.

Implications for Social Philosophy

Moral luck has a clear counterpart in the legal realm. Legal luck does seem to exist; attempted crimes and "lucky" negligence are punished less harshly (if at all) than completed crimes and tragic negligence (Enoch 2010). The interesting question about legal luck, as Enoch puts it, is "whether it *should* exist" (2008, p. 28). Rosebury notes that this difference in moral and legal intuitions should not embarrass moral philosophers since our legal practices need not map exactly onto our moral ones so long as there is enough overlap (1995). Legal punishment partly aims to deter crimes, and since legal monitoring of attempts and intentions (regardless of outcome) would be undesirable, we ought to punish successful and more severe

crimes (1995, p. 522). In agreement, Davis argues that punishing completed crimes proportionally more harshly than attempts is justified since completed crimes take greater advantage of disobeying the law than attempted crimes do (1986). Others hold that law should be free from luck and endorse their own version of control conditions (Enoch 2008).

Various strands of social philosophy take seriously the fact that luck can have implications for how well our lives go and that this, in turn, impacts the demands of justice. The most obvious is luck egalitarianism, which distinguishes inequalities that result from (responsible) choice and those that result from luck. On this view, only inequalities of luck should be mitigated through means of distributive justice (see, for instance, Arneson 1989, Cohen 1989). The outcomes of responsible choice do not call for distributive correction *because* they were chosen. One strand of criticism notices the problematic result that luck egalitarianism seems to countenance oppression that is the result of responsible choice (see Anderson 1999 and Navin 2011 for some responses to this objection).

An alternative take on oppression holds that it is itself a source of luck. Card argues that oppression is a pernicious form of constitutive luck that causes "moral damage" in agents (1990, p. 80). Tessman expands this idea under an Aristotelian framework: oppression creates "burdened virtues" in agents which impede flourishing (2001). Oppression thus poses an obstacle to the good life that Aristotle did not consider in noting that *eudaimonia* requires some amount of external goods. Drawing on Card, Tessman holds that while oppressed agents are not responsible for the systemic oppression that caused moral damage in them, they can still take responsibility for their characters (2001, p. 85).

Conclusion

The range of philosophical areas in which considerations of luck arise and the continued debates about its moral implications speak to the inevitable and important role of luck in our lives. As Williams identified in his initial discussion of the topic, the considerations of luck *matter*–to our agencies, our responsibilities, and our relationships. Whichever way one might determine the moral role of luck, Williams' conviction about its relevance has proven itself in contemporary work.

Cross-References

► Williams, Bernard

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More, Thomas

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Thomas More was born in London on February 7, 1478. An English jurist, he was a student at the University of Oxford, studied Law at New Inn, was a professor at Lincoln's Inn, served as a lawyer and judge, was elected a member of Parliament, and appointed undersheriff of the City of London and Lord Chancellor during the reign of Henry VIII (Ackroyd 1998).

A prolific author, his works cover literature (*The Latin Poems*), laws (*Utopia*), history (*The History of King Richard III*), philosophy (*In Defense of Humanism*), and biblical studies (*Responsio ad Lutherum*). His participation in the controversy over the legitimacy of the divorce of Henry VIII and Catherine of Aragon is famous and the reason why he fell into disgrace in the eyes of the King and was executed at the Tower of London on July 6, 1535.

In that controversy, Thomas More highlighted the dangers of a clash between law and conscience, but not from a personal perspective but an institutional one. In the account his son-in-law, William Roper, made of one of the interrogations, Thomas More argued that no one could be forced to swear that all acts were well done because there were matters that were outside the competence of Parliament, and during his trial, once Richard Rich had testified to his committing perjury, Thomas More's final argument in his defense was that the act of Parliament, by which it was intended to legitimize the royal divorce and appoint the king as head of the Church in England, was anathema to the laws of God because no man-made legal rule could contradict them (Roper 2009).

This confrontation with the power of the king shows how Thomas More understood a philosopher should serve a Prince (*philosophia civilior*), thus continuing the debate opened by Plato, which he dramatized in the discussion between his *alter ego*, Raphael Hythlodaeus, and the Thomas More character in Book I of *Utopia*, also known as the book "Of Counsel." At the same time, in this contest between law and conscience, Thomas More reveals both a natural law tick in subordinating the laws created by Parliament to the Law of God and his iron opposition to a power without limits, which became tyrannical when there was no rule of law.

His most famous legal political work is known as *Utopia*, although its full title, written in Latin like the rest of the work, is *The best state of Commonwealth and the new island of Utopia. A truly golden handbook, no less so entertaining than beneficial, by the distinguished and eloquent author Thomas More citizen and sheriff of the famous city of London*. As the title suggests, the book's purpose is none other than to determinate the optimal form of government or of a true *respublica*. Although he does not follow closely any particular classical work, Thomas More aligns himself with authors such as the aforementioned Plato, Cicero, Seneca, Plutarch, and Pico della Mirandola. Thomas More dreamed of the Platonic and Ciceronian ideals of a universal political community developing under a just political order that steered the action of government

toward not the benefit of the ruling class but to the welfare of the entire community. Under the influence of the Ciceronian *humanitas*, society would be composed of persons who all possessed the dignity and faculties that would only flourish in a true republic or commonwealth.

Thomas More defended the need for a civic humanism in a more attractive and accessible language because his stylistic prowess was in the best classical tradition, quite removed from the functionality of medieval scholastics. His humanistic eloquence aspired to combine the intellectual rigor of philosophy and the persuasive power of rhetoric. That said, Thomas More viewed eloquence with a certain skepticism, which explains his predilection for the dialogue and the essay. In this regard, he finished his *Utopia* with the words, "Meanwhile, though in other respects he is a man of the most undoubted learning as well as of the greatest knowledge of human affairs, I can not agree with all that he said. But I readily admit that there are many features in the Utopian commonwealth which is easier for me to wish for in our countries than to have any hope of seeing realized" (More 1965).

Thomas More is an author who, like many others of the time, intermingles politics, morals, and law. Thus, his rejection of Augustinian anthropological pessimism and sympathy for Ciceronian republicanism meant that he considered that the threat to the political order posed by human fallibility could be corrected with by means of constitutionalism, understood as the establishment of institutional mechanisms that allow governments to act without depending on the goodness of the rulers. The danger was not in the governed but in those who ruled them. It is this which marks the great difference between Thomas More's proposal and the other great work of the early sixteenth century, *The Prince* by Niccolò Machiavelli. For the latter, the interest of the ruler – the maintenance of the State – constitutes the criterion of political correctness, whereas for the former, that criterion is the interest of the republic. More's message is that the goal of the republic can be achieved even in the amoral world of *realpolitik*.

Influenced also by the mixture of wit and sympathy present in the works of Lucian, Thomas More's discourse has often given the impression of superficiality (Hexter 1952). Thomas More's *Utopia* shows his extraordinary literary talent when describing with a fine sense of humor (Prince Ademo is a prince "without a people," Raphael Hythlodaeus is the "messenger of false news," the island of Utopia has surpassed the imagined republic by Plato) and with a tissue of verisimilar fictions ("I shall take great pains to have nothing incorrect in the book, so, if there is doubt about anything, I will rather tell an objective falsehood so an intentional lie") what legal and institutional reforms (regarding private property, limits to power, religious diversity) were necessary to achieve a good social order, a *respublica* or commonwealth, in which the government of reason guided by the Holy Spirit and the Holy Scriptures prevailed. His sense of social justice was fueled by his aspiration for the emancipation of the common people from poverty and social oppression. Thus, the abolition of private property on the island of Utopia resembles the Christian community of goods, "wherever you have private property and all men measure all things by cash values, there is scarcely possible for a commonwealth to have justice or prosperity – Unless you think justice exists where all the best things flow into the hands of the worst citizens or prosperity prevails where is divided among very few (...) I am fully persuaded that no just and even distribution of goods can be made and that no happiness can be found in human affairs unless private property is utterly abolished" (More 1965).

Unlike the rest of the Northern humanists who, like Erasmus of Rotterdam, More's dearest friend, entrusted the solution of social problems to personal elements (as shown in his work *Institutio Principis Christiani*), Thomas More's neostoicism inaugurated in *Utopia* a new model of utopian literature to show how the institutional framework and the legal system are key pieces in the reformation of society (Logan 1983). That is why the nomogenesis of "utopia" must be taken into account, since Thomas More not only invented the word by joining a prefix (ou) with a

noun (topos), but he also endowed it with a certain content by basing the construction of the ideal society on the legal and institutional framework (Trousson 1975). Thomas More did not want to build an unattainable city of heavenly justice, as Augustine had in *The City of God*, but he dreamed of a truly just earthly city that was realizable with the effort and ingenuity of the people. *Utopia* thus became an investigation into what social justice is and how it can be achieved using legal norms and formal governmental institutions. *Utopia* does not describe a Garden of Eden, but rather a political society – a place where between its founding by King Utopos and the arrival of Raphael Hythlodaeus, the life of the Utopians is governed by a range of laws and institutions imposed and administered by a centralized authority (Tower Sargent 1982). These laws and institutions control many aspects of people's lives (how they can dress, the work they can do, whether they can travel, the length of their working day) and are able to inflict punishments for breaches of these codes, including the death penalty (Tasso 1999).

Book II of *Utopi*a maps a true commonwealth built around laws and institutions to overcome all the defects of human nature and society. For that reason, Thomas More submits the man-made law to a critique and reformation that addresses both formal and material aspects (Zucchini 1986). The extension, complexity, ambiguity, vagueness, and lack of effectiveness are the formal problems that stand out as fundamental in the structure of the law that is in force. These problems hamstring the basic purpose of every enacted law which, according to Thomas More, must be that all people know their duty so that they can adapt their behavior to the mandate of the norm. They also entail that the law is viewed as generating social injustices. For this reason, the first task that Thomas More proposes is to create a legal system with no need of lawyers, with few laws known by all, easy to interpret, and written in a common and plain language: "They have very few laws because very few are needed for persons so educated. The chief fault they find with other peoples is that almost innumerable books of laws and commentaries are not sufficient. They themselves think it most unfair that any group of men should be bound by laws which are either too numerous to be read through or too obscure to be understood by anyone. Moreover, they absolutely banish from their country all lawyers, who cleverly manipulate cases and cunningly argue legal points. They consider it a good thing that every man should plead his own cause and say the same to the judge as he would tell his counsel. Thus, there is a less ambiguity and the truth is more easily elicited when a man, uncoached in deception by a lawyer, conducts his own case and the judge skillfully weighs each statement and helps untutored minds to defeat the false accusations of the crafty. To secure these advantages in other countries is difficult, owing to the immense mass of extremely complicated laws. But with the Utopians each man is expert in law. First, they have, as I said, very few laws and, secondly, they regard the most obvious interpretation of the law as the more fair interpretation. This policy follows from their reasoning that, since all laws are promulgated to remind every man of his duty, the more recondite interpretation reminds only very few (for there are few who can arrive at it) whereas the more simple and obvious sense of the laws is open to all" (More 1965).

On the other hand, the separation between the law and the idea of justice is the material problem that affects the legal system. Thomas More criticizes the law for being the instrument of injustice since the rich plunder the poor under its protection. More believes that the law should be the means through which the idea of justice – which is identified with Christian morality – is realized. The fact that positive norms have distorted the content and meaning of the idea of justice and that leads to Thomas More's categorial assertion that the value of human convention, of the norms agreed between human beings, can never run counter to God's commandments, which stipulate when and how human laws should be dictated. For there is a hierarchy that must be respected, the legal norms created by agreement must be subjected in all cases and at all times to the content of other norms that are hierarchically superior to them because they emanate from a supreme authority. Thus, in *Utopia*, we read: "But if the divine command against killing be held not to

apply where human law justifies killing, what prevents men equally from arranging with one another how far rape, adultery, and perjury are admissible? God has withdrawn from man the right to take not only another's life but his own. Now men by mutual consent agree on definite cases where they may take the life of one another. But if this agreement among men is to have such force as to exempt their henchmen from the obligation of the commandment, although without any precedent set by God they take the life of those who have been ordered by human enactment to be put to death, will not the law of God then be valid only so far as the law of man permits? The result will be that in the same way men will determine in everything how far it suits them that God's commandments should be obeyed" (More 1965).

However, it is impossible to find in Thomas More's works a theory of natural rights, mainly because the first humanists did not turn for a solution to social problems to the recovery of primeval rights of an individual character but in new civil remedies of an institutional nature (Skinner 1987). Even when Thomas More defends a certain freedom of conscience, the ultimate reason has nothing to do with individual rights but with the achievement of social peace: "Utopus had heard that before his arrival the inhabitants had been continually quarreling among themselves about religion. He had observed that the universal dissensions between individual sects who were fighting for their country had given him the opportunity of overcoming them all. From the very beginning, therefore, after he had gained the victory, he especially ordained that it should be lawful for every man to follow the religion of his choice (. . .) Utopus laid down these regulations not merely from regard for peace (. . .)" (More 1965). It is not until the Enlightenment when descriptions of ideal societies with the language of rights can be found. The European Enlightenment was the turning point in that respect, but given the originality of Thomas More's work, which was the first description of an ideal society in which the State and the Law are the cornerstones of its construction, *Utopia* contains the prerequisites necessary for a rights-based society: the existence of laws and judgment based on authority and some sort of coercive sanction (Davis 2010).

Conclusion

In short, Thomas More's legal theory was based on the defense of the rule of law as civic remedy for the institutional flaws. He also defended the congruence between freedom and law because the former is achieved not only by living with no interference but also by living under known rules in society enabling people to enjoy their rights and freedoms and protecting them from tyranny. The struggle for the rule of law is his main concern since in the ideal society visualized by Thomas More, the power of the ruler had limits. *Utopia* is an example of a well-ordered government because it is governed by laws and not by arms. Government is not a personal matter, but instead an institutional one, and the rulers are not above the law because they are fallible human. Tyranny is outlawed, and Thomas More equates it with government by the force of arms. The morality and personality of the ruler is therefore not the most important factor in attaining the best form for the commonwealth; the effectiveness of the institutional framework is vital.

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Morelly, Etienne-Gabriel

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Introduction

Etienne-Gabriel Morelly (1717–c. 1778), utopian of the Enlightenment, has now been forgotten. Nevertheless, his work holds a not so unimportant place in the genealogy of modern socialism.

Retrospective readings held him trapped into the figure sometimes of a distant founding father, others of a forerunner of totalitarianism, but he can now be the subject of a contextualized reading of his work, thus giving him his place back in the history of the utopian tradition and of social philosophy.

Morelly's biography has been painstakingly reconstructed in its main lines: it has been established that he led a secret career as the man of confidence of the Prince de Conti (Antonetti 1983). In particular, he performed several diplomatic embassies for this noble employer. Thus Morelly was discreetly part of the opposition to Louis XV. His work begins with fairly settled pedagogical texts, which overall show that he had absorbed the spirit of his age. From these first works to the intense work of the *Code de la Nature*, there is a shift toward the idea of a collective and democratic management of all economic and political institutions. His suggestions are radical enough to even exceed in boldness the utopia of More, founder of the tradition. But the relatively important posterity of this work in the eighteenth century has probably more fortuitous causes: when it was published in 1755, it was completely overshadowed by Rousseau's *Discours sur l'origine et les fondements de l'inégalité parmi les hommes*, and the *Code de la Nature* was mistakenly included by the publisher Rey in one of the volumes of his edition of the *Œuvres* de Diderot in 1772. While giving credit to the rumor that Diderot was the real author of this work, which was first published anonymously, this error probably helped spreading Morelly's theses.

Only the last two of his works, the novel *La Basiliade* (1753) and the essay *Le Code de la Nature*, hold a real social philosophy reflection. Moreover, from one text to the other, an undeniable gap appears between the previously defended theses and the central concepts, which reveals the deepening of the author's reflection on certain important aspects.

La Basiliade, an epic in several songs, sketches with much allegorical support the main features of a society depicted as original, and which has no knowledge of any form of property. Morelly writes about its members: "... ruthless Property, mother of all crimes flooding the rest of the world, was unknown to them: they looked upon the Earth as a common nanny who indistinctly presents her breast to the one of her children who is feels too hungry ..." (Morelly 1753, I, 5–6). The main details of the economic organization are briefly described: the dwellings, the meals, and the harvests on the collective ground are common, as "among the Peruvians" (Morelly 1753, I, 105). In the intervals between each harvest, which are carried out by the whole social body, each member of the community practices a particular craft trade, the produce of which is also brought to the common store. This professional distribution is necessary and sufficient to provide the community with all the desired products without anyone being excessively tired. Work can thus become a common pleasure, in the same way as meals and regular rejoicing. "Reciprocal relief" between the production units is the rule, as is the moderation of work. As in Thomas More's work, the different provinces are materially interdependent: the excessive products of one province are

immediately brought to another, as soon as it feels the need for it.

Such details, however, hold a negligible place in this long novel, the purpose of which, according to the author's acknowledgement, is above all moral. He wants to illustrate the idea that without private property, there is no vice in mankind. Thus, members of the nonowner society are spontaneously good and therefore happy. They simply form a vast brotherhood. Material solidarity and mutual help generate universal love: "If [two people] happen to meet, they love each other because they know that they have provided services to one other without knowing each other . . ." (Morelly 1753, II, p.17). As in a united family, the community of goods and of lifestyle leads to a total emotional and moral community. The members of the blessed society share the same joys and the same sorrows. And that is why nothing is hidden away from anyone: an astonishing scene even shows the community enthusiastically attending to the first frolics of young couples.

In such a framework, even political institutions are superfluous. They come down to a king, unanimously chosen for his virtues, arranging collective life as a good father would: the community is a "wild Republic" (Funke 1986). The absence of written laws, of prisons and of sanctions, gives this society an anarchistic dimension. The refusal of the inhabitants of this ideal continent to eat animal flesh, the rustic character of their agriculture, and the absence of cities reinforce their harmony with nature. With the community of goods, one fundamentally seeks a communion with the universal order itself. In this sense, *la Basiliade* is at the crossroads between the original myth of human brotherhood, the metaphysical fantasy of radical dispossession, and a modern utopia, critical of the society of property.

With respect to the novel, the 1755 essay represents a clear breakpoint. In a general manner, the historian of the French Revolution Albert Soboul describes the formal and conceptual innovation of the *Code* as "revolutionary." This work stands out as a major transformation in the history of utopia, since it abandons the pure novel form, which had been characteristic of the genre since Thomas More, and takes the shape of a small treaty, the last part of which presents the "plan of ideal legislation" for a society rid of what's yours and what's mine. Three parts or dissertations precede this plan: they work toward showing a link of convenience between the nature of man himself and the "collectivist" form of social organization. With the *Code de la Nature*, the utopia is thus oriented toward a political theory and even toward a future orientation: as it is based on reason, the society rid of private property is the subject of a legislative model which will appear as "ready to use" to the Babouvists, 30 years after its publication.

In the parts devoted to human nature, there is a constant line compared to the *Basiliade*: the principle of property is at the origin of all vices. To suppress it is to suppress both its material and moral disastrous effects. The community asserts itself as the solution to most human ills. The novelty brought out by the *Code de la Nature* lies in the anthropological justification that underlies this thesis: from then on, man is naturally brought to the community by the love he bears himself. The principle of individual interest is re-established as coming before the love of others, which came first in the *Basiliade*. "The moral attraction" that brings people together is due to a slight providential gap between the needs of man and his own forces: no one can provide for all of one's needs alone. Getting together and cooperating are therefore vital necessities, and they produce a "beneficent affection" for our fellows.

This greater concern for realism is also to be found in the "constructive" part of the *Code*. The large number and the accuracy of the written laws which must frame the life of the republic strongly contrast with the total absence of laws in the *Basiliade* but also with the utopias of More and Campanella. The fundamental principles are three "fundamental and sacred laws." The first one deletes all private property except for the objects of immediate purpose, "needs," "pleasure," and "daily work." The second law ensures the citizen a right to live since he will be "nourished (. . .) at public expense" but also the right to work since it is the responsibility of society to "keep him busy." Finally, the last law is the counterpart to the duties of society toward the

individual; the latter must respect the principle of reciprocity and, to that purpose, "contribute for his part to public use" according to his means.

Morelly's legislation therefore gathers the concerns of the ideal community around the satisfaction of everybody's needs and around the synthesis of the individual interest with the collective interest. It expresses the reciprocity of the rights and duties of the citizen and of the community. By generalizing and formalizing in these three introductory rules, what the other utopians had always described in a particular and imaginary form, by indicating that these "would cut root to vices and to all the ills of a society," he certainly intends to give these rules a universal and timeless significance.

All the other laws are supposed to logically flow from these basic statements, by applying them to the different aspects of social life. The first field in question is the one of economic production and distribution, which reveals, unlike in the *Basiliade*, a very precise territorial organization. The basic economic unit is the city, which gets all its members involved in agricultural and craft work. As in More, agriculture is compulsory work for the younger generation. In the city, however, the citizens are divided into different working classes, with a hierarchy between them, and this is an originality of this utopia. At the age of 10, each child starts an apprenticeship in a trade: education is therefore mainly professional and always done in common. Masters organize the work of the workers and report to the head of the entity, who changes every year. When they turn 40, citizens are freed from all work subject to corporate regulations and can do the work they please. As in any utopian organization, including the *Basiliade*, the product of the work is brought to the common shop, and its distribution is supervised when needed by the "tribal" heads. The State provides for the needs of the poor, the infirm, and the aged, whose public houses are integrated into the architecture of the cities. The very strict aspect of the division of tasks is combined with the principle of turnover for the management roles of the works, so as to prevent any differentiation of the individual conditions.

The most original part of this legislation model is its state organization plan: it does not take over the idea of an election of the civil servants, which had been retained in the utopian tradition since More. Political rights belong exclusively, but entirely, to the family patriarchs. When they turn 50, they become part of their tribe's senate, before which they are only consulted on questions concerning their occupation. All the members of the superior bodies of the state, the heads of tribes, heads of cities and of provinces, and heads of the state are chosen in rotation among the heads of families. The central government or supreme senate has a relatively restricted function, its task being to register the decisions of the lower political units, the tribe senates, or to veto them should their decisions contradict the state laws.

The self-governance of the founding political communities, combined with their small size, corresponds to the search of the knowledge of each and everyone's will. Refusing election and a delegate authority is a way of settling the problem of social distinctions once and for all, be they justified by personal merit or competence. The central government has only an outward appearance of power, since it is only the observer of the decisions taken in the tribal senates, and the head of the nation itself is subordinate to it. The prohibition of any renewal of a legal authority, even if it is due to the virtue of the one exercising it, shows in its way the fear of seeing the ability of a few becoming the prelude to the resurgence of new privileges.

After cutting out all economical hierarchy, Morelly comes to the elimination of political hierarchy. Here we find in a paroxysmal form, the paradox specific to classical utopia since More: the community of material goods, which goes hand in hand with the radical sharing of the exercise of political power, is supposed to generate emancipation by abolishing all hierarchy and common happiness by leveling the situations of all; but it remains inseparable from pernickety rules, which one cannot transgress without severe reprimand.

Conclusion

The utopia of a radical community, by being institutionalized and formalized from the *Basiliade* to the *Code de la Nature*, has therefore

become very authoritarian-looking. Yet, instead of seeing it as an announcement of future disasters, Pierre-François Moreau is probably right in finding in it above all the ideology of the state reformer at the end of the ancien régime: a rational dream of organized human equality, under the aegis of political power, which is much more closely related to the Enlightenment movement than to the Moscow trials.

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Mosca, Gaetano

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Introduction

Gaetano Mosca (1858–1941) was born in Italy. In 1908, he was elected a member of the Italian Parliament, actively participating in politics, which contributed to making his theory of elites more flexible than Pareto's. He devoted his work to refute prevailing democratic and collectivistic theories, particularly Marxism. He questioned the ideas of Rousseau and Marx, for whom the establishment of collectivism would mark the beginning of an era of universal equality and justice, an era also in which the State would no longer be an organism for stabilizing class interests and exploitation would have died out. All of Mosca's intellectual production was a rebuttal of this utopia, against which he laid out his own more realistic theory, arguing that there will always be a ruling class.

As Pareto, Mosca rejected the logic, theory, and philosophy of socialism in its radical and Marxist version, because of its abstractionism and for what he considered as its little practical utility. He developed his analysis of the political class using the historical-comparative method applied in the field of the political-institutional.

For Mosca, the political class or elite monopolize power and enjoy all the advantages that it offers. Its members use all available methods, both legal and extralegal, to retain control of society. The political class is legitimized only through the adequate and effective use of power.

Elite theory states that in all societies political, administrative, military, religious, economic, and moral leadership is exercised by an organized minority, as opposed to a disorganized majority. Its three main exponents Vilfredo Pareto (1980), Gaetano Mosca, (1994) and Robert Michels (1991a & 1991b) have interpreted political sociology of the late nineteenth and early twentieth centuries in a new way, because their contributions modified the traditional conceptions of liberal democracy. It is important to note that there are elements shared by these three thinkers, namely that the theory of elites can encompass the concepts of circulation of Pareto's elites, Mosca's political class and Michels iron law of oligarchy.

The three of them consider that in all societies, developed or not, there are two groups of people: the ruling elite and the governed masses. The first, always the less extensive, performs all political functions, monopolizes power, and enjoys the advantages that this entails, while the other, the

more numerous, is directly controlled by the former. Those who are qualified to belong to the ruling elite are those who possess the qualities to exercise the functions of government.

The Political Class

In elaborating a theory of a two-class system with a dominant minority and a directed majority and where, once a certain society reaches a certain stage of development, political control, in the broadest sense of expression – administrative, military, religious, economic, and moral leadership – is always exercised by a special class or by an organized minority, Mosca ties in with Saint Simon (Meisel 1962). Mosca argues that even in democracies, the need for an organized minority remains and that, despite appearances to the contrary and for all the legal principles on which the government is based, it is the one that retains real and effective control of the State.

He considers liberalism as the middle between aristocracy and democracy. The system causes officials to be elected directly or indirectly by subordinates. They are chosen from a limited set of wise, experienced, responsible, and devoted men who are the most capable of governing: the aristocratic minority, characterized by having authority, but not unrestricted power. These limitations of power constitute for Mosca the essence of liberalism.

The Elite as an Organized Minority

Every human grouping requires hierarchy, a division between rulers and the ruled. The rulers perform all political functions, monopolize power, and enjoy the advantages that come together with it. The ones who need to be ruled, more numerous, are directed and regulated by the rulers, either by legal methods or by arbitrary and violent mechanisms. Thus, the history of humanity has been nothing more than the struggle between the dominant elements which permanently monopolize political forces, bequeath it to their children, and powers of revolution and change aiming to establish new forces (Mosca 1994).

The dominance of the organized minority is evident over the disorganized majority. In addition to its structure, the ruling elites have the means to attain intellectual and moral superiority or are heirs to those who possess them. Therefore, Mosca points out that all political classes tend to become hereditary, if not law, at least as a fact.

The Justification of Power

According to Mosca, the political class does not exclusively justify its power, just by having it as a fact, but seeks to give it a moral basis and even legal basis, emerging it as a necessary consequence of doctrines and beliefs generally recognized and accepted in society governed by that class.

A political class endures and transcends in time and power when it has been able to take the initiative of a timely reform of the ruling classes, where the main merit of the popular classes has been its congenital ability to extract new elements suitable to conduct them.

When political forces change, original attitudes must be affirmed in the conduct of the State. On the contrary, if the old political forces do not retain their attitudes, the composition of political classes is transformed. Decline is inevitable when the elites can no longer exercise the original qualities, or when they lose importance in the social environment in which elites have developed.

In every political body, there is always a person who is above the hierarchy of the entire political class and who leads the State. This head of State cannot govern without the support of a ruling class that enforces and respects his orders.

Elite-Mass Relationship

When a marginalized fraction of the political class renews its attempts to topple government, it always tries to rely on a majority that follows it easily. The opposite can happen when the

powerful are opposed to new movements and, at the same time to lower classes, loyal to the outdated ideas (Mosca 1955, 1994).

In the lower classes, there is a ruling minority opposed to those who exercise power. It gains a lot of influence over the masses, even above that of the ruling group. It may happen that within the masses another ruling class is formed, often antagonistic of the ones who remain in power. When this commoner is well organized, it can create serious problems for those who govern.

The dominated masses exert pressure on their oppressors, that is, on the political class. Even popular discontent is capable of causing their overthrow. Similarly, targeted classes follow leaders as long as they share opinions and beliefs. The pressure of the masses stoked by their discontent can generate some influence on the political class. When discontent rises to the point where it can overwhelm the ruling class, another organized minority necessarily forms from the masses to replace the ruling class.

Therefore, like Pareto, Gaetano Mosca considers that every political class must be renewed by elements of the lower classes, who keep awake the ancestral instincts of struggle. Isolation leads to the degeneration of the class, because it loses the ability to pursue its own affairs as well as those of society. If this happens, the political regime collapses at the first clash with the external or internal enemy (Zeitlin 1970; Mosca 1994).

Conclusion

By developing his analysis of the politic class, Gaetano Mosca used the historical-comparative method applied on the political-institutional field. He assumed two groups of people in all societies: the ruling elite and the masses which are governed. Although the leaders of the masses are part of the ruling elite, they must not ignore the feelings and wishes of the masses.

The masses would never rebel in a spontaneous way without leaders. They, in turn, transform themselves into a group relatively closed off from society after they seize power, although they emerge from it.

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- ▶ Pareto, Vilfredo
- ▶ Saint-Simon (Claude Henri de Rouvroy, comte de Saint-Simon)

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Mott, Lucretia

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Introduction

Lucretia Mott (born Coffin, 1793–1880) was an influential American abolitionist, early women's rights advocate, and Quaker preacher (Faulkner 2011). She did not develop a comprehensive theory of law or constitutional theory. However, Mott's far-reaching view of social reform would

necessarily include constitutional and legal change. A better understanding of Mott's views on law and constitutionalism requires a deeper examination of the influence of Quakerism, specifically her adherence to Hicksite Quakerism, on her thought. Mott's support for abolitionism and early women's rights reveal important aspects of her constitutionalism and calls for legal reform.

In the popular imagination, Quakers are best known for their pacifism, seeking to influence politics indirectly through moral suasion rather than directly through political involvement. Indeed, Mott is not seen as a political activist or radical reformer along the lines of contemporaries such as Elizabeth Cady Stanton or Susan B. Anthony. Instead, Mott is often characterized as a figurehead, a spiritual and moral leader who inspired subsequent women's rights activists to struggle for change. Unlike Stanton, Mott did not write any treatises or theoretical works, so her ideas must be gleaned from transcribed versions of her sermons and a voluminous collection of letters written to family, friends, and colleagues. Although Mott and Stanton together planned the 1848 Seneca Falls Women's Rights Convention in New York, the first of its kind in America dedicated specifically to women's rights, Mott did not support Stanton's revolutionary call for suffrage. Mott's alliance with abolitionist William Lloyd Garrison (1805–1879) further reinforces her apolitical reputation. Famous for burning a copy of the US Constitution in public because he viewed it as a pro-slavery document, Garrison rejected all human institutions as hopelessly corrupt, and instead focused his efforts on preparing for the millennium when God would rule the earth directly. A closer look at Mott's sermons and writings, however, reveals the outlines of a Quaker constitutionalism and theory of law.

The first part of this entry examines the context surrounding Mott's life and works, and the early influences on her thought.

The second part analyzes Mott's views on early women's rights and abolitionism through the lens of Quaker constitutionalism and theory of law.

Mott's Early Encounters: Elias Hicks, Sarah M. Grimké, and Quaker Constitutionalism

Mott was born on Nantucket Island, Massachusetts, within an influential community of Quakers who prospered from the thriving whaling industry. She was raised a Quaker, attending and then teaching at a Quaker boarding school in New York. Mott became an official Quaker minister and traveled extensively with her husband James to deliver sermons. Mott was deeply influenced by her encounter with Elias Hicks, whose efforts ultimately led to the 1827 Schism of the Society of Friends. Hicks opposed what he perceived as an overreliance by worshippers on the Scriptural interpretations of Quaker elites and an undue reverence for the written word at the expense of good works. Instead, Hicks sought to reassert the importance of direct, individual encounters with Scriptural teachings and the necessity of actively applying religious principles to everyday life. Concurrent with the Hicksite emphasis on practice over principle is a downplaying, and in more radical circles an outright denial, of the divinity of Christ. Hicks also strove to reestablish the prominence of the "inner light" in Quaker practice, also known as "synteresis," a kind of internal voice possessed by all human beings regardless of religious persuasion, which nevertheless provides a direct connection to the divine. The Hicksite understanding required active engagement and reasoning, not passive obedience to the word of God. Hicksites discouraged formal worship of the Sabbath in favor of encouraging, as Jesus did, good works at every opportunity, not just on high days and holy days. In this regard, Hicksite Quakerism saw itself as largely nondenominational.

Quakerism is also the basis for a theory of American constitutionalism, according to recent examinations that explore the influence of the prominent Quaker John Dickinson (1732–1808) on the American Founding (Calvert 2006). "Quaker constitutionalism" posits an eternal or fundamental constitution apprehended through "synteresis" or the "inner voice" that is spiritual but also guided by human reason. This

constitutionalism in turn informs the creation of political institutions as well as social and cultural practices. Properly understood, the fundamental or civil constitution is created by God, discerned through synteresis, and ultimately transcribed by human beings into law (Calvert 2009: 77). Social ills arise when the fundamental or civil constitution is misinterpreted or forgotten. Reason is a double-edged sword: when correctly applied, it can be used to discern the "inner voice" and "transcribe" the will of God, but human beings are fallible, and selfishness often disrupts rational thinking.

Political and legal reform is made possible by a return to first principles reflected in the fundamental or civil constitution through the application of synteresis. To counteract the human tendency toward individual selfishness, Quakers rely on another important concept, collective discernment. The "inner voice" is far more likely to be accurately understood within a group than among isolated individuals. Through "corporate witness," members of the deliberative body are unified not by sharing the same ideas but rather by fundamentally committing themselves to the good of the community and, ultimately, to the will of God. Quaker constitutionalism is fundamentally rooted in the will of God, but it is also flexible and open to reform and change. As Hicks rejected passive obedience to Scriptural doctrine, so too did Quaker constitutionalism reject passive obedience to law. Thus Quaker constitutionalism requires constant vigilance by all members of the community. Because it is also nondenominational, Quaker constitutionalism could be applied on a broader scale to the American Constitution and the Declaration of Independence. This is precisely what Quaker abolitionists and early women's rights advocates like Mott effectively sought to do.

Sarah M. Grimké (1792–1873) further develops the concept of Quaker constitutionalism in her *Epistle to the Clergy of the Southern States* (1836) and *Letters on the Equality of the Sexes* (1838) (Vetter 2017). Grimké systematically refutes Scriptural arguments used to oppress women and offers a comprehensive critique of the "legal disabilities" of women in America. Like Dickinson, Grimké believes that the word of God is accessible directly through individual synteresis, rather than through Scripture or religious doctrine. Grimké's theory is clearly grounded in religious conviction and yet emphasizes the importance of human reason in realizing and achieving equality. By applying synteresis in her own work, Grimké' methodically demonstrates how scriptural teachings about women and slavery and the laws based on those teachings contradict the fundamental Christian belief that all are created equal in God's image, and that the life and works of Jesus should serve as models for human behavior. By demonstrating the process of synteresis in her own writing activity, Grimké provides a model of behavior that her audience and others can emulate, thereby continuing the process of reform of the legal, social, and cultural prescriptions for women.

Mott was deeply influenced by Grimké's work, frequently recommending the *Letters* to friends and colleagues, especially Stanton. Indeed, Mott insisted that Stanton rely on Grimké's Scriptural interpretations in writing the history of the early women's rights movement, which would become the multivolume account *History of Woman Suffrage* (1881–1922) (Vetter 2019). Mott also declared that Grimke's *Letters* was "the best [w] ork" on women's rights, along with Mary Wollstonecraft's *A Vindication of the Rights of Woman* (Palmer 2002: 172–173).

Mott's Quaker Constitutionalism

A devout Quaker, Mott embraced pacifism, but she did not reject political engagement (Vetter 2017). Whereas fellow abolitionist Garrison's "no-governmentalism" rejected any form of direct political participation in a government that permitted enslavement, Mott did not believe that human beings should cease pursuing political and legal reform altogether. For Mott, "true republicanism is true Christian democracy," in which every individual is responsible for abiding by the inner light and living according to reason and reflection (Densmore et al. 2017: 13). To be sure, Mott does not go as far as abolitionists Frederick Douglass and Gerrit Smith, who supported

constitutional and legal reform through direct political participation, in the Liberty Party or otherwise. Rather, Mott believes that human government should be reordered according to the will of God (through synteresis and collective discernment) and rely primarily on localized, voluntary, informal communities.

Consistent with Hicksite Quakerism and Quaker constitutionalism, Mott insists that passive obedience to any doctrine, whether Scriptural or legal, caused human beings to lapse into complacency and lose sight of great injustices such as slavery and the oppression of women. Examination of "the causes of . . . great evils" would place "the axe at the root of the corrupt tree of arbitrary power which has been produced by the assumption of false claims of man over his fellow-man" (Densmore et al. 2017: 84). When people defer responsibility for injustice, they leave it to others, especially politicians, to resort to coercion in order to enact change: "We let the destroying sword go unsheathed without the exertions we might use to enlighten the people" (Greene 1980: 118). Mott repeatedly implores her audience to work toward eliminating slavery, embracing pacifism, and alleviating poverty. Yet political and legal reform is not an end in itself. It "can only bring about a temporary relief" and "afford no permanent good" unless "the morals of the people are changed" and "we bring our christianity to our everyday life" (Densmore et al. 2017: 25). Thus, rather than abandoning political life, Mott interprets political power as something that is shared among equals, not imposed by authorities on passive followers. Constitutional and legal reform is a necessary part of a much larger transformation of society. In light of these observations, Mott's statements on a vital source of political reform, namely, suffrage, should be examined.

Mott expresses mixed views on woman suffrage. While she believes that women should not be prevented from voting, she is less direct than others such as Stanton who demand that women positively be granted the right of suffrage. Moreover, she conveys these mixed messages about the political right of suffrage while at the same time deploring politics in general as fundamentally corrupt. For Mott, voting in a corrupt society does not represent the true interests of individual citizens and fails to deal adequately with deeply entrenched injustices and oppression. If the right of suffrage is granted to women, Mott is convinced that it will emerge in a deeply hostile and dangerous environment.

In her best-known speech, "Discourse on Woman," delivered 1 year after the Seneca Falls Convention, Mott reveals her conviction that suffrage is a right that should be granted to all citizens regardless of race or gender for them to use as they see fit, yet suffrage alone is insufficient. No one, especially women, should be compelled to obey laws that were made for them by (white) men without their consent. Nor should women be compelled to vote if they do not wish to do so. Mott insists that woman's "right to the elective franchise . . . should be yielded to her, whether she exercise that right or not" (Densmore et al. 2017: 76). Voting should take place within a larger context of reform efforts in religion, philosophy, economics, and culture. Suffrage in particular and political involvement in general are means toward a greater end, namely, the reformation of society. Active participation by women would be critical to this transformation. For Mott claims that "if woman acted her part in governmental affairs, there might be an entire change in the turmoil of political life" (Densmore et al. 2017: 76).

Mott carves out a critical role for women in the process of constitutional and legal reform. "When . . . a convention shall be called to make regulations for self-government on Christian, non-resistant principles," Mott explains, "I can see no good reason, why woman should not participate in such an assemblage, taking part equally with man" (Densmore et al. 2017: 76). Mott is vague about the structure and implementation of such a gathering. Nevertheless, she does not turn away from political involvement for women in constitutional and legal reform, but rather expands it.

Conclusion

Mott's work constitutes an important expansion of Quaker constitutionalism at a critical point in American history.

She seeks to fundamentally transform American political life so that every individual can actively participate in shaping the laws they are asked to obey. For Mott, the American Constitution is most certainly a "living" document, continually scrutinized by reflective citizens within a "true Christian democracy."

The power of law will not be wielded "arbitrarily" or coercively among unequal parties, but rather shared voluntarily among equals.

Laws will be founded on informed consent, and authentic representation of universal human concerns will replace narrow-minded political factions.

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Multiculturalism

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Introduction

The term "multiculturalism" is used in at least three distinctive yet interrelated ways. It may refer to

(a) A diagnosis of *cultural diversity*
(b) *Policies* that consider cultural diversity a positive value and seek to manage it in a normatively desirable way; or to that very policy aim itself
(c) To any set of *theoretical assumptions* that *justify and elaborate on* the positive value of cultural diversity and/or multicultural policies

In what follows, these three proposed distinct meanings of multiculturalism will be discussed more in detail (section "Meanings of "Multiculturalism": Diagnostic, Political, Philosophical") before the historical development of the political discourse (section "History of Political Multiculturalism") and dominant philosophical justifications and criticisms of multiculturalism (section "Controversies About Multiculturalism") will be sketched out briefly. The entry concludes with some general thoughts on present challenges to multiculturalism (section "Conclusion") and references for further reading.

Meanings of "Multiculturalism": Diagnostic, Political, Philosophical

Multiculturalism as a Diagnostic Term

In everyday language, the term multiculturalism is mostly used in a descriptive sense. Here, it refers to a perceived diversity of "cultures" in a given society and is thus a placeholder for the more accurate term "cultural plurality." It is noteworthy that the term "culture" implied here is notoriously vague, but tends to be identified with language, ethnicity,

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religion, and, more recently, race (cf. section "Controversies About Multiculturalism").

Multiculturalism as a Policy Goal

When used in legal documents and political speech acts, the term "multiculturalism" usually refers not just to the fact of cultural diversity within a given society, but to (a) policies which rest on the presumption of a *positive value* of cultural diversity and seek to manage it in a normatively favorable way, or (b) to the very *normative aim* of a good management of cultural diversity itself.

While concrete formulations of political multiculturalism differ across time and space, the above definition reserves the label "multiculturalism" for policies that ascribe a *positive value* to cultural diversity and therefore actively pursue its *sustainment*. That specification allows to distinguish multicultural policies from those operating within a paradigm of *assimilation*, where cultural diversity is regarded as a challenge to the primary goal of ensuring social cohesion. Politically, this policy aim of *recognizing diversity* is realized through granting of *group-differentiated rights*. These may either be rights to *partial self-administration* (as is often the case in multicultural policies that accommodate indigenous minorities), *exemption rights* (with regard to dress code, holidays, etc.), or funding and other support of *culture-specific activities* and mother-tongue instruction. (cf. entry on the ▶ "Rule of Recognition and Constitution" in this Encyclopedia).

However, multicultural policies also differ from strategies of laissez-faire with regard to cultural diversity, or strategies of latent or manifest *cultural segregation*. Against these, multiculturalism stresses the importance of e*qual participation and representation of individuals*, independent of their respective cultural identity, in national political and social institutions. Consequently, consideration under multicultural policies is typically reserved for individuals who are full national citizens and may for example not be claimed by illegal immigrants (cf. section "Conclusion"; cf. entry on ▶ "Citizenship" in this Encyclopedia). Far from signaling a move towards *postnational politics*, multiculturalism should therefore properly be understood as a *policy of national integration* that responds to the increasing cultural diversity of national populations (cf. Modood 2007). This *aim of national integration* is pursued through measures of *nondiscrimination* and *affirmative action*, assistance for minorities in acquiring the national *official language(s)*, as well as inclusion of *ethnic representation* in public media and education (cf. Kymlicka 2012: 7). Rights of that category are not conferred to groups directly, but to individuals who in virtue of their (self-)identification with these groups are likely to face social disadvantages. (cf. entry on ▶ "Integration: Civic and Social" in this Encyclopedia).

Overall, then, multicultural policies operate in a tension between the two goals of ensuring *recognition of cultural diversity* and thus, taking seriously groups' claims to *differential treatment*, and *attaining social cohesion* and general identification with the nation state. While multicultural policies seek to establish a "balance" between those goals (cf. Dewing 2009: 5), they may come into conflict with regard to specific groups or cases. For instance, whereas the goal of *recognition* may suggest promotion of school education in diverse languages and in accordance with the needs of different religious communities, the goal of *integration* may command that society members learn the same language(s) and refrain from following some religious duties in order to participate fully in the institutional set-up of the nation-state. Likewise, whereas a commitment to cultural diversity might suggest the establishment of partially distinct administrative structures for cultural groups, securing equal participation on all levels of political decision-making might demand a greater integration of communities into general administrative structures.

Multiculturalism as a Philosophical Concept

Multiculturalism as a philosophical concept, finally, refers to any set of arguments that elaborates on or justifies the *normative value of cultural diversity* and the *adoption of a policy of multiculturalism*. Thus, in its philosophical meaning, multiculturalism is best understood as a *theoretical*

reflection of multicultural politics. This reflection may either concern the *general* value of multicultural politics or a specific *actual* political practice. In the former case, philosophical multiculturalism may take on a more visionary, in the latter, a more corrective or critical character.

In actual fact, philosophical and political discourses of multiculturalism have evolved in close exchange. In some cases, this exchange is mirrored in an overlap in the composition of both discourse arenas. Charles Taylor, for instance, one of the most renown scholars of multiculturalism, also served as co-chair on the Quebec government's Consultation Commission on Accommodation Practices Related to Cultural Differences.

As can be inferred from this short overview, the three notions of multiculturalism presented so far should be considered as analytically independent but interrelated. While the focus of this article will be on political and philosophical discourses on multiculturalism, its sociological meaning is thus necessarily implied.

History of Political Multiculturalism

Origins of Multiculturalism in Canada

The term multiculturalism first came into use in Canada in the late 1960s in reaction to what initially was in fact a public debate about Canada's purported *bi*-, rather than its *multi*culturalism. That debate started when the federal government, particularly in the course of constructing the Canadian welfare state, increasingly took over competencies from the Provinces. Objection to that development became especially great in the Province of Quebec: Due to what they perceived to be the dominance of Anglo-Canadian culture and the English language in federal institutions, the Franco-Canadian majority of the Quebecois population feared a double deprivation of power through this process of centralization. A Quebecois nationalist movement began to replace the attitude of French-Canadian nationalism previously prevalent among Quebecois.

To avoid Quebecois secession, the government set up the *Royal Commission on Bilingualism and Biculturalism* in 1963 "to inquire into and report upon the existing state of bilingualism and biculturalism in Canada and to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between the two founding races [i.e., Anglo- and Franco-Canadians, JM]" (cf. Royal Commission 1967: xxi). The results of these inquiries were published in the following years in successive reports.

While the commission was also supposed to take into account "the contribution made by the other ethnic groups to the cultural enrichment of Canada and the measures that should be taken to safeguard that contribution" (ibid.), it gave explicit priority to "the problem of the status of the official languages" (Royal Commission 1967: xviii) and justified this by reference to the "basically bicultural character of our country" (ibid.). Its final recommendation of adopting a policy of official bilingualism was realized in 1969 in the *Official Languages Act*.

The commission's reports were much discussed in politics and the media alike, both for going too far and not far enough in its accommodation of cultural plurality in Canada. Non-English or French-speaking immigrants, in particular, claimed that prioritizing the issue of bilingualism was discriminating against other cultural groups. In reaction to that critique, Prime Minister Pierre Trudeau who had been appointed to office in 1968 attempted a compromise solution. Disentangling the previously delicately joined issues of language and identity politics, he opted for what he called, in a now famous speech in 1971, a "policy of multiculturalism within a bilingual framework." The four objectives of that policy were stated as follows (Trudeau 1971):

> (1) First, [. . .] to assist all Canadian cultural groups that have demonstrated a desire and effort to continue to develop a capacity to grow and contribute to Canada [. . .].
> (2) Second, the government will assist members of all cultural groups to overcome cultural barriers to full participation in Canadian society.
> (3) Third, the government will promote creative encounters and interchange among all Canadian cultural groups in the interest of national unity.
> (4) Fourth, the government will continue to assist immigrants to acquire at least one of Canada's

official languages in order to become full participants in Canadian society.

In the aftermath of 1971, legal and political acts solidified multiculturalism in Canada. In 1973, the *Ministry of Multiculturalism* was created which monitored the implementation of multicultural initiatives within government departments. Communication between government institutions and organizations of different ethnic communities was formalized and institutionalized. The *Canadian Charter of Rights and Freedoms* that was amended to the constitution in 1982 put multiculturalism under constitutional protection, stating in its section 27: "This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

In the following years, institutional responsibility for multiculturalism in Canada was shifted, through various steps, from the initial *Department of Multiculturalism* to the *Department of Citizenship and Immigration* in 2009. This institutional change may be seen to signal a policy shift, with multiculturalism being increasingly interpreted as a policy of social integration, rather than just recognition: "Where early multicultural policies concentrated on cultural preservation and intercultural sharing through promotion of ethnic presses and festivals, the rejuvenated multiculturalism program emphasized cross-cultural understanding and the attainment of social and economic integration through institutional change, affirmative action to equalize opportunity, and the removal of discriminating barriers" (Dewing 2009: 5).

Global Spread of Multiculturalism

Since its introduction in Canada in the 1960s, governments worldwide have participated in the global discourse on multiculturalism. Countries that have adopted an official national multicultural policy include Australia, Great Britain, and the Netherlands. It is no coincidence that these countries share commonalities with Canada in that they, too, have a history of colonization, resulting in the presence of Indigenous People within the national territory, and/or a constantly high rate of immigration, not least from the former colonies. However, while they may not have adopted the rhetoric of multiculturalism, other countries have also engaged in policies that may be characterized as multicultural. Typically, these policies feature terms like integration, inclusion, diversity, etc., rather than multiculturalism.

The current global state of multicultural politics is somewhat ambivalent.

On the one hand, social scientists have diagnosed a modest success of multiculturalism. In an attempt to compare the diverse multicultural regimes internationally and identify tendencies of its global development, Banting and Kymlicka (2006) have proposed the *Multiculturalism Policy Index* as a measure of the level of national implementation of multicultural policies. In a study across 21 OECD countries that applied that index specifically to multicultural policies aimed at immigrants, they found that the past three decades have indeed seen an *extension* of multicultural policies and that "[o]verall, the record of multicultural policies in Europe is one of modest strengthening" (Kymlicka 2012: 14).

On the other hand, multiculturalism has increasingly come under attack in recent years. Many political leaders and public intellectuals have rejected the desirability or feasibility of multiculturalism, arguing that it has been falling short of its goal to ensure social cohesion. Among those diagnosing a "failure" of multiculturalism rank prominently German chancellor Angela Merkel, former French President Nicolas Sarkozy, and former British Prime Minister David Cameron (all in 2011). Some countries that had previously adopted multicultural policies have reversed that trend and shifted to a more nationalist discourse on cultural diversity, as is the case most notably in Australia, Denmark, and the Netherlands. In many countries, this apparent loss of faith in multiculturalism has resulted in the adoption of more restrictive immigration policies, the implementation of more demanding access criteria, and the imposition of more obligations on immigrants, such as mandatory acquisition of the official language of their host country. Also, many critics of multiculturalism have proposed the re-strengthening of common national cultural values and demanded that immigrants be obliged to commit to these values, for instance, through a mandatory test of moral attitudes.

Typically, in many of these countries, that backlash on multiculturalism correlates with an increasing resentment towards (immigrant) *Muslim minorities* (cf. Kymlicka 2007: 52f.). Also, while the notion of multiculturalism (or its failure) does not figure prominently in current national discourses on (irregular) *migration and refugees*, it seems clear that growing public resentment of irregular immigration will also have an impact on national perceptions of immigrant minorities in general, and therefore, on multicultural policies.

However, as Kymlicka (2012) and Uberoi and Modood (2013) emphasize, this *rhetoric* backlash against multiculturalism has indeed not led to an actual decrease in multicultural policies – as the above-cited study demonstrates – but rather to the introduction and subsequent *co-existence* of multicultural policies on the one hand, and restrictive immigration and naturalization policies on the other hand. This is made possible by the fact that multicultural policies typically do not accommodate *immigrants*, but rather *national citizens* with an *immigrant background*, or immigrants on their way to naturalization. Due to this traditionally strong link of multiculturalism and national citizenship, multiculturalism is in fact compatible with selective or restrictive immigration policies. Taking this into account, it seems that the current critique of (immigrant) multiculturalism is not motivated by a rejection of migration *tout court*, but rather by the introduction of a *new distinction* in the public perception of migration that crosses the "native"/"migrant" divide. Arguably, namely, what the resentment of irregular migration exposes is a hierarchization of "good" (skilled, wealthy, mobile) over "bad" or unwanted (unskilled, poor, stateless) migrants, where it seems that the former may still in fact be accommodated by multiculturalism, while the latter remain an object of (restrictive) immigration and security politics. (cf. entries on ▶ "Immigration", ▶ "Refugee" and ▶ "Racism" in this Encyclopedia).

Controversies About Multiculturalism

The notorious ambiguity of the concept of multiculturalism, the diversity of its political manifestations, as well as the recent backlash against multiculturalism all seem to call for a more detailed investigation of the core of that concept: What is at stake in the debate about multiculturalism; which empirical and normative assumptions are invested in it? How do supporters justify their allegiance to it, what are the arguments of its critics? In this section, some dominant lines of justification and of critique of multiculturalism will be sketched out.

Arguments for Multiculturalism

While proponents of multiculturalism agree that accommodating for cultural pluralism is a *good* political end, they differ in their *justification* of that end.

An influential *liberal* argument for multiculturalism has been proposed by Will Kymlicka. He argues that the normative requirement of multiculturalism results from the instrumental value cultural membership has for *individual autonomy*, the core value of liberal politics. Being a member of a specific culture, Kymlicka argues, is important for individuals because cultures constitute "contexts of choice" which provide them with "meaningful ways of life across the full range of human activities, including social, educational, religious, recreational and economic life" (Kymlicka 1995: 76). In other words, while individuals can make choices, the range of options from which they choose is culturally predefined, and it is always against this cultural background that individuals assess the value of options. Marginalization of a culture means, in turn, that members of that culture are restricted in their access to the meaningful options their culture provides them with; for instance, they have less possibilities to be socially successful if they communicate in their language and less possibilities to follow their religious duties. This inequality, Kymlicka argues, constitutes a factual disadvantage for the respective individuals, which must be compensated for by granting special protection to the cultural groups in question. To sum up, then, in Kymlicka's liberal justification of multiculturalism, multiculturalism is normatively required by the commitment to protecting individual autonomy, as well as the acknowledgment of factual cultural pluralism and the existence of cultural minorities.

Another seminal justification for multiculturalism has been developed by the Canadian philosopher Charles Taylor in his 1992' essay *The Politics of Recognition*. While agreeing with Kymlicka's emphasis on the link between individual identity and culture, Taylor does not seek to justify multiculturalism within a liberal theory, but rather asserts that the political demand for recognizing cultural difference emerged in fact, historically, out of a (communitarian) *critique* of liberal universalism. While the latter aims at the "equalization of rights and entitlements" (Taylor 1994: 37), a "politics of difference" focuses not on that which is or ought to be equal between citizens, but seeks to recognize "the unique identity of this individual or group, their distinctness from everyone else" (Taylor 1994: 38). Its main worry is that without recognition of these differences, what is established under the guise of "universal" political principles are in fact the principles of one hegemonic culture which is being imposed onto minorities. The difference-blindness of universalist politics, then, may prove to be a blindness for the way in which difference between individuals or groups is being *suppressed* by powerful groups. Proponents of a politics of difference thus favor "distinctions the basis of differential treatment. So [for example, JM] members of aboriginal bands will get certain rights and powers not enjoyed by other Canadians" (Taylor 1994: 40f.). The central political task in the face of these conflicting goals, then, is to determine the "reasonable bounds" within which cultures are allowed "to defend themselves" (Taylor 1994: 64). Taylor's own proposal with regard to this task is to start from the presumption of the equal worth of every culture and then test the validity of that claim "concretely in the actual study of that culture" (Taylor 1994: 67). Importantly, then, in contrast to Kymlicka, Taylor's *communitarian* account it is not individual autonomy that provides the normative basis for of multiculturalism, but rather the (though always contestable) intrinsic value of diverse cultures themselves (cf. entry on the ► "Rule of Recognition and Constitution" in this Encyclopedia).

For lack of space, not all lines of justification of multiculturalism may be described here in detail (for an overview, see Song 2016). However, the following more specified debates among proponents of multiculturalism should at least be mentioned:

(1) Historical injustice: Some theorists regard multiculturalism as a means of correcting historical injustice committed through processes of colonization. Acknowledgment of the historical wrong done to Aboriginal People by ruthless settlement politics may be a justification for granting at least partial political autonomy to Aboriginal People.
(2) Subjects of multiculturalism: Some proponents of multiculturalism have suggested that consideration of cultural groups should differ according to their status. Kymlicka, for instance, suggests to grant "national minorities" (such as the aboriginal First People and the Quebecois in Canada), which have already been present at the founding moment of the nation state, more group-differentiated rights than "ethnic minorities," that is, immigrants and their descendants. He assumes that immigrants have voluntarily entered the state and thus have a duty to integrate. (cf. Kymlicka 1995: 11f.; critically Young 1997).
(3) "Core values": Many proponents suggest that multicultural politics need to be backed up by "core values" that must be accepted by all members of a multicultural community. Typically, these values are not considered as external normative restrictions to multiculturalism, but as conditions for its very own sustainability. Often-named candidates for this lowest common denominator are human rights, the national constitution (cf. Habermas 1994), and the idea of multiculturalism itself.

Criticisms

Diverse criticisms of multiculturalism have been raised both from the political right and left.

Putting aside extremist arguments which assert the general supremacy of one particular culture or group over others, the most common objection to multiculturalism from the right has been that social cohesion requires, while not the *general*,

yet at least the national or regional dominance of one culture (cf. entry on ▶ "National Identity" in this Encyclopedia). Typically evoked in current debates about immigration into Western countries, this argument assumes that "too extensive" accommodation of immigrants will result in a dismantling of established values and social peace within the country of immigration. In order for the established culture to "defend" itself, then, it must assert its local supremacy. Such a conservative objection to the multicultural premise of "equal recognition" of cultures underlies, for example, Prime Minister Cameron's pledge for a "muscular liberalism," or German-Iranian professor Bassam Tibi's argument for a "European leading culture" (*Europäische Leitkultur*) that should be accepted by immigrants (cf. Tibi 1998).

The general focus of leftist critiques of multiculturalism may be said to lie on the link between the concept of "culture" and social power relations. This credits the fact that, in political discourses of multiculturalism, defining "culture" amounts to no less than identifying the very groups that are to be the *subject of multicultural policies*, that is, bearers of group-differentiated rights, recipients of protection under anti-discrimination law, financial support, representation in public institutions, education, and the media, etc.

A dominant line of leftist critique is that this process of identification is in fact never neutral – starting, as Taylor demanded, from the presumption of "the equal value of other cultures" – but oriented instead by dominant social perceptions, held by established groups, of whichever "others" present a challenge to the *status quo* and therefore need to be made politically "manageable": Labeling a group "culture" marks them as a social unit whose social integration is not a given, but must be actively pursued. "Culture," then, appears to be a retrospective terminological placeholder for any perception of possibly problematic *difference*.

This negative core meaning of the term "culture" – as that which is supposedly *different* from the nationally established social order – is mirrored by the fact that throughout the political rise of multiculturalism it has remained *notoriously unclear*. Even official declarations of multiculturalism almost never offer a clear definition of "culture," but contend themselves with identifying it, depending on the context, with *ethnicity*, *language*, *confession*, or *race* (cf. Song 2008). These labels in turn correlate strongly with the following demographic phenomena:

(a) The presence of Indigenous People in nation-states that emerged out of processes of *colonization.*
(b) The presence of so-called *regional or local cultures* who, while sharing a common historical legacy with other groups within a national territory, still differ from these groups for instance with respect to religion or language and may occupy different regions within the national territory (typical examples include Canada, Belgium, and Switzerland).
(c) The presence of immigrants and so-called *visible minorities*, that is, of nonwhite persons in still white-dominated Western societies.

Granting groups rights, then, should (or so many leftist critics of multiculturalism argue) not be understood as an act of benevolent recognition on the part of a social majority, but rather as result of an implicit social contract that is meant to appease possible tensions between groups that perceive each other as different yet must coexist in the same political territory. However, rather than changing social relations in order to improve the position of the weakest, social contracts carry with them the tendency to conserve existing power relations so that each of the involved parties can ensure the continuity of its established position.

Against this general background, leftist critics have been pointing to the following problematic power effects of multiculturalism, in particular:

(1) "Othering"/Essentializing/Simplification: Treating individuals continually as members of a distinct "culture" may enforce a social image of them as essentially "Others." When "culture" is portrayed as fixed in time and homogenous, it is reduced, in a wrongful simplification, to an "essence" by the labeling

institution or actor (cf. Fraser 2001; Phillips 2007). Practically, this simplification may result in an overemphasis of cultural difference and "exotization" of others, making them appear inherently incompatible to "us," thereby in fact impeding real exchange between individuals that identify with different groups.

(2) Blindness towards group-internal differences: "Cultures" or "identities," many critics argue, are neither fixed in time nor internally homogenous. Rather, they are constantly challenged both from inside and outside (cf. Benhabib 2002; Appiah 2005). Traditional role models are contested, values weighed, beliefs compared and transformed in that process. When a "politics of difference" is not sensitive to this hybridity of cultures, it may impose an overly general notion of identity on them and thereby repeat the very mistake which, according to Taylor, the politics of difference is criticizing the politics of universalism for. Politically, this misrecognition may mean that politicians fail to involve diverse members of social groups, but rather focus on accommodating the most dominant and visible group members or group leaders. Particularly in groups where power is extremely unevenly distributed this may lead to a latent support of the hierarchical collective *status quo* and impede the realization of individual political equality. In that vein, it has been argued, for instance, that an uncritical multicultural protection of groups that fails to problematize group-internal gender hierarchies may reinforce these hierarchies and therefore be "bad for women" (cf. Okin 1999: 23f.).

(3) Cultural conservatism and nostalgia: In a similar vein, it has been argued by critics that multicultural policies have a tendency to conserve cultures in what is supposed to be their "authentic" or "original" form (cf. Benhabib 2002: 68). When, in this way, only those expressions of "culture" are supported and encouraged that meet dominant prejudices about the "essence" of that culture, dissonant voices from within this cultural group are silenced and rejected as "unauthentic." This may, again, play down the actual hybridity and flexibility of cultures and suppress any further developments that are a manifestation thereof. (cf. Alibhai-Brown 2000).

(4) Finally, some criticisms have centered on the relationship between multiculturalism and political economy. Nancy Fraser, for instance, has argued that focusing too much on making privileged positions within existing social hierarchies accessible to minorities diverts attention from the importance of overcoming those hierarchies themselves (cf. Fraser and Honneth 2003). She maintains that without a generally more equitable distribution of resources, a multicultural politics of recognition will only increase societal justice superficially.

Conclusion

As is usually the case with contested concepts, it seems just as important to look at what any reference to "multiculturalism" *positively* entails as to identify what it remains *quiet* about. In other words, a critical engagement with multiculturalism should never take (self-)ascriptions of that term at face value, but always take the socio-political *context* of these ascriptions into account. In particular, before prematurely attributing multiculturalism to one particular political camp, it should be acknowledged that multiculturalism may both be wielded as a normative trump against strategies of cultural assimilation, *and* serve an agenda of national unification and immigration restrictions. For instance, while multiculturalism may aim at increasing the participation of hitherto marginalized groups already living *within* the national society, it may do so at the cost of restricting the *admission* of likely candidates of future marginalization by attaching (for instance) highly exclusive conditions to immigration.

This latter circumstance is likely to become more problematic in the near future, seeing as many Western countries with exclusive standards for legal immigration and naturalization are currently confronted with a high influx of refugees who mostly do not meet these standards. If, under

these conditions, protection and promotion under multiculturalism is still reserved to (prospective) national citizens, whereas refugees are merely tolerated as receivers of benevolent hospitality, this is likely to produce new divisions within the national society, notably that between well-integrated immigrants and "guests" whose long-term presence is not socially desired. If, however, consideration under multiculturalism is extended to legal refugees, but only at the cost of more restrictive admission criteria, then that extension of multiculturalism *within* the nation state will go hand in hand with the continuity of marginalization *outside* of the nation-state. Far from serving the promotion of a generally more inclusive global order, then, in these two cases multiculturalism will in fact increase the asymmetry between the global economical and political hegemony, and the periphery. Whether multiculturalism will prove to be a tool of political improvement in the third millennium will not least be determined by its answer to this challenge.

Cross-References

- ▶ Citizenship
- ▶ Immigration
- ▶ Integration: Civic and Social
- ▶ National Identity
- ▶ Racism
- ▶ Refugee
- ▶ Rule of Recognition and Constitution

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Introduction

Lodovico Antonio Muratori (1672–1750) was born in Vignola (Italy), a town of the Estense Duchy, in 1672. M. graduated in Philosophy and Canon and Civil Law (*utroque iure*) in Modena, at that time capital of the Duchy, where he undertook while still young the study of paleography and diplomatics, under the direction of the Benedictine monk Benedetto Bacchini. After being ordained priest, in 1685, he was appointed *Dottore* [Doctor] at the Biblioteca Ambrosiana in Milan, where he came into contact with the noble family of Borromeo. In 1700, M. came back to Modena as he was called upon to lead and reorganize the library of the Duke Rinaldo I. In the city, where he stayed almost permanently until the end of his life (he died in 1750), he conducted his priestly ministry in the parish of *Santa Maria della Pomposa* and he carried out his indefatigable work of historian and erudite, whose results were gathered in the works *Rerum italicarum scriptores* (1723–1738), *Antiquitates italicae Medii Aevi* (1738–1742), and *Annali d'Italia* [Annals of Italy] (1744–1749). Inspired by an encyclopedic attitude as well as a flair of polemics (as proved by the controversy with the cardinal Angelo Maria Querini concerning the reduction in the number of catholic holy days), he addressed issues relating to poetry, linguistics, and ecclesiastic history. His writings testify not only a quite remarkable knowledge of the past but also his efforts to renovate the methodology of historical research, in which the philological analysis of texts and sources is matched with an ethical and religious impulse. For those reasons, contemporary historiography has recognized M. as one of the leading figures of the Italian and even the European political and religious culture of the first half of the eighteenth century so that this period is often called the *età muratoriana* [the Age of Muratori] (Rosa 1969; Rosa and Al Kalak 2018).

The Need for Legal Reform

The strong commitment of M. in the field of justice dates back to 1726, when he wrote *De Codice Carolino*, a letter in Latin addressed to the Emperor Charles VI. In this missive –which was never sent to Vienna and remained unpublished until the mid-thirties of the twentieth century –M. claimed the necessity to introduce a collection of laws compiled by a commission of wise men designated by territorial princes. The task of the commission was to solve in an authoritative way the most controversial juridical issues, taking into account the local statues as well. Nevertheless, the attempt failed because of the death of the sovereign. At that moment, M. shifted to the pope as his main interlocutor. Indeed, the work *I difetti della giurisprudenza* [*The Defects of Jurisprudence*], printed in Venice in 1742, was dedicated to Benedetto XIV (born Prospero Lambertini), who according to M. should have led the reform movement of the judicial system of the other States of the Italian peninsula. The purpose of *I difetti* was twofold. On the one hand, to identify the fallacies which plagued the civil jurisprudence, as the sphere of criminal law was excluded from the discussion. On the other hand, to propose, wherever possible, remedies able "to depurate and to free it [the jurisprudence] from its many defects, make it better looking, and more useful to the Public" (Muratori 2001, p. 11). The dedication was particularly revealing because, before becoming pope, Prospero Lambertini had tried to simplify the post-Tridentine legislation at the diocesan level, taking inspiration from the values of temperance and equity. When he was elected pope in 1740, he appointed M. to be part of reform commissions on ecclesiastic affairs. Nevertheless, the most important inspiration for *I difetti* derived from two treatises. The first influent source, recently detected at the Muratori Archive, is the

Contra la sofistica disciplina de' giureconsulti [*Against the Sophistical Discipline of Jurisconsults*] composed by the bishop of Capodistria Giovanni Ingegneri at the end of the seventeenth century. Impressed by the sharp criticism expressed by Ingegneri to the Roman legal tradition, responsible for having corrupted the Code of Justinian, M. transcribed extensive sections of the manuscript, kept by the Biblioteca Ambrosiana (Bragagnolo 2014). Another source, continuously cited in all chapters of *I difetti*, is the *Dottor volgare* [Vulgar Doctor] (Rome 1673) of the cardinal Giovanni Battista De Luca, eminent jurist and collaborator of the pope Innocent XI. In this text, De Luca recognized the principal flaws of the modern juridical culture in the excess of interpretations and in the dramatic contrast between the legal thought and the judicial practice. M. shared these ideas and adapted them to the changed context in which he lived.

The Jurisprudence as Science

In *I difetti*, the jurisprudence is intended as the knowledge or cognition of right and wrong, in direct disagreement with Ulpian's definition, according to which law is the "science of human and divine things" (*divinarum atque humanarum rerum notitia*). M. do not hesitate to stigmatize Ulpian's statement as an "outcrying story" (Muratori 2001, p. 1), because it is too extensive and ambitious. In M.'s encyclopedia of knowledge, the law occupies a very important place, although different and inferior as compared to that of the theologian speculation, from which the mundane order depends. The starting point of M.'s argument is the idea that there are three categories of men who exercise their authority on the government of the world. Firstly, the theologians, who concentrate on human soul and determine which actions can eventually lead to eternal bliss or damnation, and which ones are indifferent to its fate. Secondly, the physicians, who take care of human body, teaching to keep it sound and providing to heal it in the event of sickness. Finally, the experts in law, who deal with the "wealth" of men in the civil causes and with their "lives" in the case of specific crimes that belong to the criminal sphere. In all these fields, the most severe danger is represented by the diffusion of "infinite discords and disapprovals" due to the "opinion," defined the "great queen of the world" (Muratori 2001, p. 6). Nevertheless, between the first two categories and the third one there is a substantial difference. For theologians and physicians, the resolution of controversies between conflicting opinions is only desirable, but it is not negative per se. On the contrary, the comparison between different views on medical practice can help to solve an uncertain subject, as the origin and the development of a disease. The same is true for theology. According to M., popes and councils have avoided to interfere in professions of faith because religious beliefs cannot be condemned without clear and rational justifications. For law, instead, the resolution of disagreements is necessary in order to avoid a "highest prejudice" against the administration of justice itself and the government of public affairs. Indeed, the persistence of these conflicts fosters the proliferation of the "defects" of jurisprudence, which endangers its status of "science," and above all undermines the stability of the civil order. In the framework of such a negative anthropology, according to which human beings are naturally disposed towards evil, M. states that without the proper functioning of justice, the world would become "a wood, a chaos of iniquity, tyrannies, murders, and dissensions" (Muratori 2016, p. 50). As a result, the supreme task of law is to reduce the harmful effects arising from the conflicts which lacerate civil society. Otherwise, there would be the serious risk to fall once more in a violent Hobbesian state of nature.

The Defects of Jurisprudence and Their Remedies

M. distinguishes two categories of defects from which the juridical system suffers: the internal and the external defects. In their turn, the internal defects are divided into four groups. First, the lack of clarity in the law, which in many cases prevents the reader from appreciating the original

purpose of lawmakers. If the rules are unclear and ambiguous, lawyers and jurists have the opportunity to cavil "every word, syllable, comma and full stop" (Muratori 2001, p. 11). Second, the existence of a number of potentially infinite cases, which cannot be provided by laws in detail. Even if a rule was written as clearly and precisely as possible, the decisions of judges should take into account a set of circumstances which cannot be identified a priori. Third, the difficulty in interpreting the intentions of the authors of contracts and testaments because these documents are often written by notaries in a twisted and cumbersome way. Finally, and it is a point on which M. deeply concentrates, one must consider the decisions of judges (the "heads," as they are defined), unduly influenced by "weaknesses" and "whims" (Muratori, pp. 13–16). At times, judges are influenced by the opinions and the oratory abilities of the lawyers; other times they decided the right and the wrong even before the start of the trial and no subject could persuade them of the contrary. In order to limit the discretionary power of judges, attention should be given to the skills and the virtues that are required in this profession. For M., the ideal judge is expected to possess fear of God, love of truth, "indifference," i.e., ability to avoid the "passions of the heart," knowledge of the law, and capacity to change his own decisions, when necessary. Moreover, the judge must have a "discerning mind" able to gain an in-depth understanding of the questions, to assess the reliability of witnesses, and to unravel complex situations. The guiding principle of his actions should be always the devotion to God and the common good of *res publica*. As the internal defects are in most cases incorrigible, they make the justice "a lotto, a biribissi, a hazard" (Muratori 2001, p. 18). As a result, its status of science succumbs to the tyranny of opinion. The most relevant of the external defects of jurisprudence, actually the only one that M. quotes as such, is represented by the excessive spread of glosses, treaties, and commentaries on the *Corpus iuris civilis*. From the eleventh century on, with the school of glossators of Bologna, these interpretations have accompanied or even in many cases replaced the *auctoritas* of law. By establishing restrictions and exceptions, these texts have generated conflicting verdicts and opinions: the jurisprudence has thereby become "more difficult, complicated, and thorny" and the judgments "more uncertain and doubtful." According to a vegetable metaphor, the "garden" of the Code of Justinian not only filled up with "thorns and brambles" but it also turned into "an over dense wood," where it is easy to lose the sense of orientation and to get lost. To counteract the effects of this situation, M. does not wish for a mere reintroduction of the Code of Justinian. For M., the Code should not be regarded neither as a "masterpiece of nature and art" nor as "a book fallen out of the sky" nor as "the most perfect model of human jurisprudence that can be imagined" (Muratori 2001, p. 31, 66). Although this collection is undoubtedly "nobler and more excellent" than the Lombard, Salic, and Burgundy law, it comprises unclear rules and even redundant and anachronistic sections. Instead of diminishing or avoiding controversies, the *Corpus* has provided material to increase the number of quarrels; rather than shortening the duration of trials, it has contributed to lengthen them out of proportions. For M., the only practicable solution is to arrange a collection of laws which should be based on the principles of rationalization and simplification and whose model is represented by the Constitutions published by the King of Sardinia and Duke of Savoy Viktor Amadeus II in 1723 and revised in 1729.

The Justice and the Public Felicity

Concerning the role and on the reform of justice, M. insists in a more concise way in its last published work, the political treatise *Della pubblica felicità* [*On Public Happiness*] (Lucca 1749), which is part of the rich tradition of the *speculum principis* of the Modern Age. Here M. suggests a comprehensive program of reforms, which include all fields of human knowledge and productive activities, from agriculture to commerce, from literature to medicine, and from the composition of the army to the collection of duties by the State. The ninth and the tenth chapters are specifically dedicated to justice and law. The antiquary takes as object of its rebuke

the limits of the law of his time, focusing on the interpretations produced by jurisconsults of XI and XII centuries, along with the lack of discernment, impartiality, and experience of judges. In addition to quoting once more the initiative of Viktor Amadeus II, M. mentions as an example of reform of the justice the constitution on fidei-commissum and birthrights issued by the Grand Duke of Tuscany Francis I in 1747. M. emphasizes two aspects. On the one hand, as already stated in *I difetti*, he establishes a direct relationship between the birth of the law and the institution of the private property, since the laws result from the need to settle disputes that have arisen from the division between "what is mine and what is yours" (Muratori 2016, p. 50). On the other hand, M. underlines that the exercise of justice should contribute to guarantee what he calls the "public happiness." The justice is a necessary condition for the tranquility of soul and body that the prince must promote among his subjects, by preventing the outbreak of unrests, mending the conflicts and safeguarding the life, the honor, and the wealth of each of them. In particular, compared to *I difetti*, M. broaden his discourse also to the customary and criminal law, by invoking the clemency and magnanimity of the prince as a practice of government and as a useful instrument for the achievement of the obedience and the respect of the subjects. It is essential that the prince punish with severity "those who violate the public order with qualified robberies, cool head homicides, murders, forgeries, etc." (Muratori 2016, p. 65), but at the same time it is equally important that he shows himself "indulgent and merciful" towards those who act impulsively or without malice. The virtues of moderation and prudence should accompany the government of prince (Continisio 1999), as well as the activity of the judge. In any case, for M. as the prince is the supreme administrator of the justice, he is subject to the laws.

Conclusion

In sum, it can be stated that, as a merely human activity, justice cannot be completely amended: as M. states in *Della pubblica felicità*, almost with resignation, "perhaps no efficient manner to free this important faculty [the justice] from many uncertainties and from many expenses which occurred because of the disputes [. . .] will never be found" (Muratori 2016, p. 53). The measures advocated by M. himself could help to improve the status of jurisprudence, but they could not make it perfect. In the end, the partiality of the law is strictly bound to the limits of the human reason and nature, incapable of clearly distinguishing the right and the wrong, although they are "innate ideas" fixed by God in the human soul and "universal rules" recognizable by every "honest and intelligent person" (Muratori 2001, pp. 41–42). The problem lies in the divide that exists between the reason and the experience, as M. makes clear with a set of examples which he lists in the sixth chapter of *I difetti*. Giving help to the poor people is a praiseworthy action, but could become an illegal act, if perpetrated for a dishonest end. Moreover, taking the life of a man is a criminal action, but if the homicide is committed to safeguard his own safety is no longer a serious offense. In the same way, according to M., neither the princes who sentence to death the evildoers of their states nor the executioners who have the task to carry out these sentences commit a crime. The difficulty is to properly assess the situations in which, because of the human weakness, the true, the good, and the certain are replaced by the questionable and the doubtful. As can be seen, we are still far from the demands formulated by Cesare Beccaria in *Dei delitti e delle pene* [On Crimes and Punishments] (Livorno 1764; cf. Venturi 1972). Nevertheless, the need for the reform of law promoted by M. will have a determining influence on the European political experience of the so-called "Enlighted despotism."

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Murphy, Jeffrie

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Introduction

In his most recent book, *Punishment and the Moral Emotions*, Jeffrie Murphy (1940–2020) describes his own work this way:

> I am essentially an *essayist* with, at any given time, a forty-page attention span. . .I think mainly in terms of the big picture, not of details, and I generally paint impressionistically in rather broad strokes. In each essay I conduct a conversation with myself and share that conversation with others in the hope that they might find their own thinking stimulates by mine. (2012, 222, emphasis original)

Murphy's works reflects the "big picture" style of philosophy. He thoughtfully and fearlessly tackles large, rich topics without too much concern for neat boundaries and fine distinctions. His writing is conversational, humorous, often passionate, and always entertaining. He much prefers to think of philosophy as, quoting Richard Rorty, "advancing the conversation" (2012, 222). The result is less systematic but important and interesting work that has influenced the thinking of many scholars both in and out of philosophy.

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Topics

Murphy is a prolific writer and has authored many works in moral philosophy, political philosophy, and philosophy of law. He has edited and contributed to a wide range of essay collections. As such, his influence is best captured by grouping his work into broad themes. The themes we will explore here are forgiveness, retributivism, and moral psychology.

Forgiveness

Murphy's work on forgiveness is arguably his most influential. It's the primary subject of two of his major works: *Forgiveness and Mercy* (coauthored with Jean Hampton) and *Getting Even: Forgiveness and Its Limits* (1988, 2003). In both works, Murphy seeks to resist what he calls "boosterism" around forgiveness (2012, x). In Murphy's estimation, forgiveness is too often uncritically praised as an unqualified good. As such, he defends the value of vindictiveness, hatred, and resentment, which are the passions that we must choose to get over if we are to forgive (2003, 16). Murphy's defense of the vindictive passions has two steps. First, he tries to show what is valuable about them, and second he argues that forgiveness may not always be an unqualified good.

Murphy argues that we wrongly condemn the vindictive passions because we fail to understand them. Passions are tied to values and on Murphy's view vindictive passions are tied to "self-respect and self-defense" (2003, 18). Since self-respect and self-defense are themselves valuable, then we ought not be so quick to condemn vindictive passions. The vindictive passions track what Murphy calls the "values of the self" (1988, 16). Emotions like resentment arise because the wrongs done to us violate our sense of our own self-respect or self-worth. Murphy of course acknowledges that vindictive passions can be excessive and perverse in certain cases, but he argues that they are not inherently morally problematic – contrary to popular imagination they can be attributed to "sane and virtuous people" (2003, 22–25). Our desires to see our wrongdoers punished are not immoral or irrational but rather forms of "emotional allegiance" to our own self-respect (2003, 19).

Further, forgiveness may not be the unqualified good it seems to be. If the vindictive passions are forms of emotional self-defense, the person who forgives too readily may not be a saint, but instead a person "lacking in respect for himself and respect for his rights and status as a free and equal being" (2003, 19). Since forgiving those who wrong us requires us to forswear the very emotions that reflect or protect our self-respect, to forgive without some assurance that the offender acknowledges our equal standing may be a failure of proper self-regard. On Murphy's view, the offender's repentance can serve as that assurance. By repenting, the offender withdraws "his endorsement from his own immoral past behavior" (1988, 26). The offender's repentance acknowledges that he had no right to commit the offense and that his offense was not in keeping with the moral worth of his victim. As such, one can forgive one's offender without acquiescing one's self-respect. Some subsequent accounts of forgiveness challenge Murphy's claim about forgiveness revealing a lack of self-respect (Holmgren 2012; Pettigrove 2012). For those who accept the claim that vindictive emotions can be valuable, however, Murphy's account of forgiveness has been one of the most influential.

Retributivism

Much of Murphy's work is in philosophy of law, and one of his major contributions is his writing on retributivism. Murphy began his work on punishment in the sixties and his views about retributivism changed over his career (2012, 67).

In his early work, reflected in essays such as "Three Mistakes about Retributivism" and "Marxism and Retribution," Murphy defends a "moral balance" version of retributivism (2012, 78). On this reading, retributivism is a "theorem"

within a "general theory of political obligation" (1971, 166). While the theory of political obligation might take different forms, Murphy offers a reciprocal model (which he attributes to Kant and Rawls): "In order to enjoy the benefits that a legal system makes possible, each man must be prepared to make an important sacrifice – namely obeying the law even when he does not desire to do so" (1971, 166). Criminal punishment, on this view, is a way of maintaining the "proper balance between benefit and obedience by insuring that there is no profit in criminal wrongdoing" (1971, 166). Retributivism is justified on the grounds that the criminal authorizes his own punishment because he has agreed to abide by the laws of land. He writes, "The criminal himself has no complaint because he has rationally consented to or willed his own punishment. [T]hose very rules which he has broken work, when they are obeyed by others, to his advantage as a citizen" (1973, 228). Punishment is justified because it ensures that criminals don't gain an unfair advantage over law-abiding citizens. Retributivism is justified because, unlike utilitarian justifications for punishment, it respects the autonomy and dignity of offenders by treating them in ways that are consistent with their own rational willing (1973, 229–230).

Murphy later rejects the moral balance view because he rejects the claim that crimes confer an undeserved benefit on offenders. As he explains, "If someone asks me why a murderer deserves to be punished, I would be far more inclined to answer this question by saying with emphasis 'because he is a *murderer*,' rather than by saying 'because he is a free rider'" (2012, 81, emphasis original). Murphy still accepts that retributivism respects the "dignity of human beings as free and responsible agents" and that it is preferable to other justifications of punishment (2012, 86). Murphy's views about retributivism have always been clear-eyed: one of the important parts of his work has been answering the main objections to it. Early in his career, he recognized that even if retributivism is justified in theory, material conditions (of the kind that concerned Marx) of society may prevent it from being justified in practice (1973, 232). As such, retributivists who care to make punishment rightful in practice "had better first make sure that we have restructured society in such a way that criminals genuinely do correspond to the only model that will render punishment permissible" (1973, 243). In addition, Murphy argues that retributivism is beholden to recognize the dignity of offenders, which is a position that should lead us to care deeply about prison conditions. As he writes, we need to "remind ourselves that the people in those facilities are our fellow human beings. . .As such they simply do not *deserve* to be treated in such inhumane ways" (2012, 86 emphasis original).

Murphy's retributivist commitments are also behind his critique of criminal rehabilitation. Murphy was writing about the movement toward therapeutic responses to punishment as early as the late sixties, and several of his arguments are just as applicable to punishment reform today. Murphy argues in several works that therapeutic approaches to punishment are in competition with commitments to justice. In *Retribution, Justice, and Therapy*, he argues against Karl Menninger's *The Crime of Punishment*. As Murphy sees it, Menninger seeks to overhaul the criminal justice system – what Menninger characterizes as an "unscientific jumble" – because of its outdated science (1979, 147). Instead, Menninger argues that psychiatrists and health workers should play a larger role not just in determining *mens rea*, but also in preventing crime with psychological profiling. Menninger's recommendations might be far-fetched, but Murphy shows that they betray both confused and dangerous assumptions about the nature of punishment and criminal law. As Murphy argues, although social science is poised to study the "mores" that people hold, they are ill-suited qua scientists to say what moral positions people ought to hold – as he puts it colorfully and presciently: "Efficiency is not to be identified with morality" (1979, 149). Unfortunately in Murphy's view, "These points are often forgotten when important social policy is being made" (ibid).

Of course, as Murphy notes, recommendations that psychiatrists and health workers should take on a central role in punishment is not itself a scientific finding. Scientists and social scientists, as Murphy sees it, are guilty of cloaking moral

arguments in scientific clothing – these are "recommendations and not findings" (1979, 150). Further, the view that Menninger argues for presupposes that decisions about whom and how to punish are answerable with scientific data. But, as Murphy argues, many of these decisions are moral and political: "Should a man who compulsively writes bad checks be sent to a mental institution for an indeterminate period because he is hopeless?" (1979, 155). Determining what sorts of punishments are appropriate intimately involves questions about what is morally right and just and not questions about probability of improvement or public safety. What is more, Menninger and those who accept his arguments assume that rehabilitation is an ideology-free pursuit. But as Murphy points out, "Psychiatrists are not immune from their tendency to project their own fears and hostilities onto the man they are evaluating" (1979, 162). As he asks rhetorically, "How would Martin Luther King Jr. have fared at the hands of Southern state psychiatrists? How would the Black Panthers fare at the hands of some Northern state psychiatrists?" (ibid). Murphy's point is that we see a rehabilitation-focused criminal justice system as a promising alternative to what looks like an outdated and blood-soaked retributivist penal system. But rehabilitation ought to be subject to the same kinds of justification questions as all theories of punishment. Once we start asking these questions, Murphy thinks we will find it at odds with the claims of justice: "Beware of psychiatrists bearing gifts" (1979, 155).

Moral Psychology

Finally, one of the recurring though perhaps understated themes of Murphy's work is moral emotions. As Neu notes, Murphy employs a "rehabilitative strategy" with regard to "much maligned emotions" (2008, 31). Murphy's defenses of the vindictive passions in his discussions of forgiveness make up much of this work, but he has also written extensively about love. As Murphy puts it, his work is often inspired by his "lifelong back-and-forth struggle between the gospel of love in my Christian upbringing and my not-always-loving personality" (2012, 88). Murphy defends the not-always-loving vindictive passions because he sees them at the heart of self-respect and allegiance to justice. But he also defends Christian love, which is at the heart of humility and intimately tied to one's own and others' spiritual and moral growth (2012, 49).

On Murphy's few, the mistakes of forgiveness boosterism arise from a misconception of the demands of love (*agape*). He argues that it is mistake to think of the demands of love as "nice and cuddly" (2012, 49). Indeed, love of the sort that Murphy defends is to be found in "the grim stories of Flannery O'Connor and in the hard and demanding theologies of Augustine and Kierkegaard" (ibid). The demands of love are challenging and they include demands to love people who may seem unlovable. In this way, love serves as a counterweight to the demands of the vindictive passions. Anger, hatred, and resentment are part of our concerns for ourselves as both individuals and as moral agents. Unfortunately, they produce the psychological tendency to move from "you deserve punishment" to "you deserve whatever cruel indignity I choose to inflict on you" (2012, 88–89). The demands of love help to keep that tendency in check. Love demands that we try to see the "capacity for redemption, no matter how vile the wrongdoer's past" or the "decent core of a person through all the layers of corruption" (2012, 267). The demands of love are challenging precisely because we must look for the good in others even when that good is "invisible" (ibid). On Murphy's view, the demands of love arise out of a commitment to moral humility. As Murphy writes, "If we can overcome our comfortable self-deceptions about our own wisdom and goodness, we will surely realize how limited our cognitive powers to read the heart of another are" (2012, 269). Lest we think Murphy gives up on the darker parts of psychology in his discussion of love, he ends with a line from Auden: "love your crooked neighbor/With your crooked heart" (ibid).

It is no accident that Murphy is keen to cite Nietzsche in several of his works. Murphy shares with Nietzsche an ability to see the complexities of human moral psychological and emotional life. On Murphy's view, our moral emotional lives are

in many ways like spider webs. Emotions that seem distinct are connected to each other and to the larger structure. There is a pattern and an order to it, but it can easily become tangled. Like Nietzsche, Murphy's insight sometimes seems to come from his awareness of his own moral and emotional shortcomings. Human emotional life has a way of turning back on itself in complicated perversions. Murphy realizes that his defense of vindictive passions, again quoting Nietzsche, might turn out to be "a scorpion stinging itself with its own tail" (2012, 14). Nonetheless, Murphy's work in moral psychology has no doubt advanced the conversation in important ways.

Conclusion

Jeffrie Murphy's contribution to philosophy of law and social philosophy is both lasting and wide-reaching. His defenses of vindictive passions and retributivism continue to challenge us to reconsider our assumptions even when those assumptions seem morally progressive. Any philosopher or legal scholar working on punishment, revenge, and forgiveness will find important insights in Murphy's work.

Cross-References

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National Identity

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Introduction

National identity refers to a specific kind of collective feeling, i.e., a self-image or an understanding. As such, it can become part of peoples' personal identities, too (their "sense of belonging"). An examination of "national identity" faces three challenges. Firstly, on an analytical level, its two constituent terms (nation, identity) are both broad, transdisciplinary, and controversial concepts, which are associated with additional concepts no less complex (e.g., nationalism, ethnicity, culture). Secondly, "national identity" is an expression not only in use in academic discourse but also in the political arena and in everyday discourse as well. Every academic enquiry has to keep this interplay in mind. Thirdly, nationalistic ideas have displayed chameleon-like qualities, and, over the course of time, found support among liberals, conservatives, Marxists, fascists, racists, imperialists, secessionists, anti-imperialists, and anti-colonialists, etc.

This entry looks both at the more descriptive level of social and cultural theory, and at the normative philosophical level.

A Historical Sketch of Nationalism

Nationalism, *as a phenomenon*, is predominantly held to be something modern. It first arose in the eighteenth century and proliferated in the nineteenth century. It served, mostly violently, to reintegrate states (e.g., France) or to create new ones either by unification (e.g., Italy, Germany) or by secession (e.g., most states of the Americas, Balkan states). It was a decisive factor in doing away with the *ancien régime* in France and in the dissolution of empires (e.g., Austria-Hungary, the Ottoman Empire). After the end of World War I, nationalism had reached its apogee: it was almost universally recognized as a principle of international relations. It contributed to the atrocities committed by the fascists, and especially by the Nazis. After the end of World War II, racism and nationalism were severely criticized but only the former was officially rejected by the world community. Nationalism, in contrast, has remained a cornerstone of international politics. It spurred the self-emancipation of many former colonies in Africa. When the Soviet Union collapsed in 1991, many observers believed a post-national era would ensue. Quite to contrary, nationalism spread across the states of the former Soviet Union and in Eastern Europe. Throughout the last years, nationalism has been "resurrected" in many Western European countries, and, in the USA too, it has been revived by right-wing movements and parties.

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"Nationalism," *as a term*, came into use around the beginning of the twentieth century. Its use by academics began even later. In the nineteenth century, many academic disciplines were established within the political framework of nationalism and to some degree served its interest in fostering national identities (e.g., history, philology). Reflections on nationalism by philosophers (e.g., Herder, Fichte, and Mill) were guided by political concerns, too, and were to some extent overtly nationalistic. In contrast, early social theorists (e.g., Tönnies) dealt with the effects of modern mass society rather than with nationalism. Academic discourse on nationalism started after World War I. It included works by Hayes (1931) and Kohn (1944), but in a broader sense, serious academic enquiry did not take place until the 1980s when seminal works were published, e.g., by Armstrong (1982), Breuilly (1982), Anderson (1991 [1983]), Gellner (1983), Hobsbawm and Ranger (1983), Smith (1986) and Chatterjee (1986). Since then, nationalism has become a major field of research.

Concepts, Models, Theories: Nation, Nationalism, National Identity

Nation, nationalism, and national identity are closely related, conceptually and phenomenally. Still, how they are related is a contentious issue. It is conceivable, on the one hand, to separate them. "*Nation*" would be an "objective" collective, designating its people and institutions; "*national identity*" would then be the subjective aspect of the nation, the self-image shared and reproduced by (many or most of) its members, and "*nationalism*" would be the ideology employed to propagate the qualities of the former two (cf. Smith 2010). On the other hand, it could be argued that all three notions eventually mean the same thing. If "nation" is subjectively defined as an "imagined community" (Anderson 1991 [1983]), it amounts to "national identity." If, moreover, this conception is understood as an ideological construction in flux, it can hardly be severed from nationalism. Accordingly, some argue that national identity should to be dispensed with altogether and replaced by a refined concept of "ideology" (e.g., Maleševic 2006). All in all, it also has to be said that many scholars are skeptical of general definitions (and grand theories) (e.g., Breuilly 1982; Calhoun 1997).

In what follows, a rough overview will be given of the main lines of discussion currently running on the concepts of nationalism, nation, and national identity.

Nationalism

Nationalism has been referred to as an ideology, as a sense of belonging, as symbols (including language), and as sociopolitical movement (cf. Smith 2010: 6 p. et seq.). As an ideology, it conveys a certain image of the world and is usually organized around four core ideas: (1) the world is organized into nations; (2) a nation must be autonomous (national self-determination); (3) a nation must be internally and externally unified (though to quite different degrees and according to varying criteria); (4) nationality must be the most important affiliation of a person. Still, these ideas allow a broad scope for interpretation. Thus empirically, and given the time and effort, an almost innumerable number of different kinds of nationalism could be established. For the sake of order, scholars have produced a variety of typologies. Despite its oversimplifying character, the dichotomy between civic and ethnic nationalism has proved most long-lasting.

Nation

Etymologically "nation" was derived from the Latin *natio* (*nasci* = to be born) and thus means "origin" or "place of birth." It can be traced back to the fourteenth century, when it was used in the sense of "kin" but, generally, without political implications. Modern understandings of "nation" can be grouped into primordialist, voluntarist, modernist, ethno-symbolist, and (neo)perennialist types.

Primordialist understandings of the nation are objectivist. For them, nationality is a matter of fate. It is based upon "actual" biologically or culturally inherited commonalities like ancestry, race, language, religion, history, tradition, "mentality" ("national character"), etc. Nations are seen

as extended families and a result of a (quasi)natural order that has divided mankind into groups with different and unique cultural features adopted by each individual. National identity thus becomes as natural a feature of human beings as having "a nose and two ears" (Gellner 1983, p. 6). Primordialism is a traditional nationalist's ideology and can nowadays hardly be found in academic discourse. Philosophically Herder is supposed to be its founding father, and, more generally, the father of "ethnic nationalisms" as well.

Voluntarist definitions of the nation are subjectivist. They understand nations as constituted by people who have consented to membership. Nationality, then, is nothing given or ascribed. Philosophically, this position is said have its roots in Rousseau's *Contrat Social* (1762). Eventually, it means, that a nation is a "daily plebiscite" (Renan 1990 [1887]). A modernized understanding of this position would claim that national citizenship does not depend on any "ethnic" or "cultural" premises (like ancestry, language, religion, etc.) but only on compliance with constitutional and legal rules. This is the core of so-called "civic nationalisms." Some argue that for the sake of conceptual clarity, they should not even be called nationalism because ultimately they link loyalty to state institutions (cf. Connor 1994, p. 91 et seq.).

The mainstream approach to nation and nationalism is still the modernist one. *Modernism* rose in the 1980s and is usually associated with names like Breuilly, Gellner, Anderson, and Hobsbawm. These approaches deconstruct objectivist accounts of nation and national identity. According to Anderson's paradigmatic Weberian catch phrase "imagined community," nations are nothing but a belief in meaningful particularistic commonalities (which may be fictional or "invented," Hobsbawm and Ranger 1983) shared by a vast number of people. Modernists dwell on how these national views evolved or were constructed, spread among and imposed upon people in the eighteenth and nineteenth centuries. They explain nationalism as a result of industrialization (e.g., Gellner 1983), made possible by new means of mass communication, (Deutsch 1953; Anderson 1991 [1983]) and/or by fundamental political transformations (e.g., Breuilly 1982). Common to most modernist positions is a combination of two elements: (1) nationalism is an instrument employed by elites in order to legitimize their political project; (2) it is a mass phenomenon (which is supposed to depend on the availability of certain kinds of infrastructure and certain technologies – such as the printing press – typical of modernity).

Postmodernists criticize modernists for an overemphasis on the sociocultural homogenization which nationalism has exacted, for Eurocentrism, for neglect of the role and influence of marginalized groups (women, minorities, etc.), and for a lack of understanding (or concern) for contemporary kinds of nationalism and post-nationalism. Employing theoretical approaches such as discourse theory (e.g., Calhoun 1997) or praxeology, some seek to demonstrate the everyday reproduction of hegemonic nationalism (e.g., Billig 1995), while others focus on the heterogeneity of national societies and the contentiousness of national agendas. Moreover, postmodernist scholars address postcolonial questions and gender questions (e.g., Chatterjee 1986; Yuval-Davis 1997) as well as the entanglement of nationalism and racism (e.g., Balibar and Wallerstein 1991).

Ethnosymbolism is the contemporary counterpart to (post-)modernist approaches. Many ethnosymbolists agree that nationalism is a largely modern phenomenon. But they argue that its success is not conceivable without resort to ethnic identities organized around actually existing, longstanding (i.e., premodern) myths, symbols, traditions, and rituals. In this sense, it could be regarded as slightly more objectivist. According to A. D. Smith, a nation then is "a named community possessing an historic territory, sharing common myths and memories, a distinctive public culture, a common economy and common laws and customs" (e.g., Smith 2010, p. 13).

(Neo)perennialists hold that ethnicism – and thus nationalism – is considerably older than modernists and ethno-symbolists hold it to be. "Continuous perennialists" argue that in certain historical cases, nationalism could be traced back to the Middle Ages, or even further back to

antiquity. "Recurrent perennialists" put less emphasis on the continuity of particular nations. They rather see nations emerge and perish but stress that there have always been nations as nationalism is said to be a basic principle of human social organization (cf. Smith 2010: 53 et seq., 100 et seq.; Özkırımlı 2017: 60 et seq., 69 et seq. with further references). This position at least partly corresponds to primordialism.

Nations are, according to most scholars, conceived of as political communities. National self-determination means the absence of "foreign" governmental control (cf. Gellner 1983: p. 1). But whether it means ethnic representation or consent by the population is an unsettled question – as is the relationship between nationalism and specific political constitutions. Thus the relationship between "nation" and "state" is not defined. Definitions from the area of "civic nationalism" conceive of nations in terms of state institutions; national identity is then loyalty to these institutions. Some scholars have found such definitions conflating (e.g., Connor 1994, 91 et seq.). States depend for their existence on a monopoly on legitimate violence, and existed before the birth of nationalism. Rather, the latter has to do with sources of legitimatization. Confusion of state and nation is often times attributed to the historical coincidence between the quest for popular sovereignty and nationalist rhetoric during the American and French revolutions (e.g., Tamir 1993, 60 et seq.).

Alternatively, "nation" could be defined in ethnic terms as a group having presumed common descent. This again raises the question of how to demarcate "nation" from "ethnicity." Many scholars understand these concepts as overlapping to a considerable degree (e.g., Smith 2010, 12). Others argue that (national) culture is the superordinate concept (e.g., Kymlicka 1999), which can either be state-oriented (civic) or ethnic, liberal or authoritarian.

As a compromise, nationalism can be regarded as constituted by the specific entanglement of culture and politics (e.g., Özkırımlı 2005). This corresponds, for example, to the practical requirements of national citizenship. Citizenship is usually descent-based (ethnic) but provides civic criteria as well (length of stay, ability to economically sustain oneself, compliance with the law) which again are supplemented by cultural (or ethnic) requirements like language proficiency and, for example, tests on national history.

National Identity

Smith defines national identity as "[. . .] the continuous reproduction and reinterpretation by the members of a national community of the pattern of symbols, values, myths, memories and traditions that compose the distinctive heritage of nations, and the variable identification of individual members of that community with that heritage and its cultural elements." (Smith 2010: p. 20). This definition includes critical elements which will be discussed below: constructedness, continuity, difference, and its individual relevancy. It also indicates contingency ("*re*interpretation"). Further to be added are the normativity and contestedness of national identity, and to what extent it is influenced by power relations.

(Means of) Construction: Collective identity needs for its construction narrations, rituals, and symbols which address the collective element and make its members aware of it. As to nations, many scholars have pointed out the significance both of mass communication and state institutions for the emergence and reproduction of national identities (e.g., Deutsch 1953; Anderson [1991] 1983). Others emphasize that everyday life furnishes "reminders" of national identity, too (Billig 1995). There are a wide variety of institutions, practices, and artifacts which help create and "reinforce" a national self-image: flags, coins, maps, songs, poems, monumental buildings, parliaments, courts, schools and school books, museums, street and square names, heroes, festivities, parades, speeches, memorials, sports events, laws, passports, statistics, official websites or linguistic usages like talking of a nation as "we"/ "our" and everyday knowledge like national stereotypes, etc. School education is among the most prominent means to transmitting, for example, national language and history. Among the most important entities, to which the construction

"national identity" refers, is a certain territory which nationalists regard as "the homeland."

Continuity: Memory is fundamental to collective identity. National historiography shapes national memory, and creates continuity. Nationalists ascribe to nations, via historical narration, substantial and perennial qualities thus providing individuals with something to identify with which has transcendental, quasi-religious qualities. National history constructs the past, from a present perspective, with a view towards the future (cf., e.g., Bourchard 2013). History is selective, sometimes falsified, and normative; thus it provides a source of political legitimation. They "remember" what fits desired self-images and "forget" what does not (already in Renan 1990 [1887], p. 11). Today the "fictiveness" of nationalist historiography is uncontested in academia. In contrast, the question "When is a nation?" (Connor 1994) is intensely debated among modernists, on the one side, and ethnosymbolists, on the other.

Difference: Constructing a self-image – from a (post-)structuralist point of view – necessarily includes the construction of otherness or differences (e.g., Hall 1996). National identities define national qualities and criteria of belonging which are applied by nationalists to set their nation aside from other nations and claim its superiority, to keep "external foreigners" outside and to assimilate, annihilate or expel "internal foreigners" (minorities). Accordingly, the history of nation-states is to a considerable extent a history of – often violent – inclusion and exclusion. Identity criteria can refer to very different attributes (race, ancestry, language, religion, etc.) and vary with regard to the strictness of application, i.e., the claimed national homogeneity. Functionally, sociologists have debated the question of how much homogeneity is needed for a collective to preserve a minimum necessary stability. Nationalists twist this question normatively. Especially in periods of crisis, they warn that the nation might fall apart in order to evoke a sense of unity.

Self-determination, self-image, power: Collective and individual self-determination differ categorically from each other. Even within small groups, unity requires consent, compromise, or force. Within vast and heterogeneous collective groups like nations, it is, furthermore, only conceivable via representation. As debates on the *demos* in political theory show, representation never corresponds to the actual will of all members. Neither does a certain self-image. Consequently, with regard to one nation, there are diachronically and synchronically *various* national identities held by different (individual and collective) actors. These self-images may overlap. But with regard to an entire population, any conceivable common basis must be small and abstract. Even if temporarily, a widely shared self-image did exist, it would owe its strength to the social and political power of the agents and institutions which promoted it, while other self-images were at the same time being repressed.

Contingency: Collective mass identity, then, and thus national identity, is contingent, i.e., an ever controversial and elusive "provisional result" of processes imbued with the struggle for power.

Individual national identity: Nationality can be one of a multiplicity of collective ways of belonging and thus part of the social identity of individuals (besides class, gender, religion, race, family, etc.). Nationalists claim it ought to be the most important, and nation-states invest a lot of resources (e.g., money spent on education) to ensure that the population identifies with the nation.

Normative Debates on Nationalism and National Identity

Until the 1990s, philosophy only sporadically dealt with nationalism. Among the range of possible questions (e.g., Beiner 1999), two will be sketched out here: (1) the philosophical foundation of national self-determination and (2) the normative status of national identity.

The best-known attempt to situate national self-determination within the history of thought was by Kedourie (2002 [1960]). He derived it from three developments in philosophy: (A) the Kantian revolutionary philosophy of (individual) ethical self-determination as applied to politics – devised by Kant himself, but more vigorously

propagated by his idealistic successors, especially Fichte. Critics do not accept this emphasis on Kant (e.g., Gellner 1983, p. 130); (B) a reversal of the traditional individual-state relationship (as an application of epistemology to state philosophy): the whole exists prior to its parts, thus the State exists prior to its citizens. To be truly individually self-determined then means to act and think in accordance with the self-determined will of the State; (C) the praise of cultural diversity famously articulated by Herder, who opposed Enlightenment universalism by locating God's wisdom in particularity. Herder and, after him, Fichte (and others) stressed the importance of language for a nation, attaching to it two decisive meanings: firstly, language contains an entire universe of unique (i.e., as such only expressible in this particular language) ideas and values, and secondly, the idea that every human being has one (and only one) native language, which it is not only pointless but, possibly even morally reprehensible to reject. In summary, the highest ethical aim is to comply with a (collective) national self-determination which preserves its unique, distinctive culture.

Kedourie furthermore adds the idea of struggle which he derives from the Kantian quest for moral perfection, but which might also have been deduced from the rising evolutionary conceptions of "history." Thus, according to most nineteenth century nationalists, nations strive for self-determination in a competitive struggle with one another; this is a historical quest for survival through superiority.

Debates on the normative status of national identity mostly see it as deriving value from being a means to a valuable end. Thus, in contrast to Kedourie's account in which the collective absorbs the individual, some scholars stress that national belonging promotes individual ends like identity and autonomy. Others see national identity as a prerequisite for realizing purportedly collective values like emancipation from (e.g., colonial) oppression, democracy, and social justice.

Individual identity and autonomy: Philosophical debates on nationalism overlap with liberalism versus communitarianism discourse. An example of this is so-called "liberal nationalism" (e.g., Tamir 1993). Scholars, "defending" the idea of a possibly "good" nationalism, draw on communitarian anthropology which intertwines the concepts of autonomy, identity, and culture (or respectively, community). Cultural belonging furnishes individuals with a "moral topography" that enables them to make "strong judgments" without which action would not be possible (and, consequently, neither identity nor the world) (Taylor 1989). Moreover, culture is the prerequisite for autonomy as it offers a range of options to choose from, and it provides a secure minimum of social recognition which is needed for the development of stable personal identity (e.g., Margalit and Raz 1990). Therefore, communities which provide such culture ought to be protected. Transferred to the debate on national identity, then, nation is related to culture and held to benefit individual identity and autonomy.

Critics argue that this linkage of nation, community, and culture presupposes an antiquated holistic concept of (national) culture which holds it to be stable, closed, and homogeneous. Moreover, the protection of cultural communities easily conflicts with the protection of individuals against pressures exercised upon them by "their" collective communities. Defenders of "liberal nationalism" therefore stress that individuals are free not to comply with national cultural demands. Critics reply that this argument is not possible without contradiction (cf., e.g., Kymlicka 1999). Furthermore, scholars have particularly doubted that there is any philosophically sound argument why an identity-promoting culture or community must be specifically national and cannot be regional, racial, religious, etc. This applies to attempts to justify particularistic exemptions (e.g., privileging nationals or groups) from the morally universalist demands of the places where they reside.

Collective values: Nationalism has been justified as a means to "collective values." Some scholars have highlighted that the nationalist idea of self-determination and nationalism's mass-mobilizing quality have fueled the emancipation of colonies. Critics (e.g., Özkırımlı 2005,

65 et seq.) reply, firstly, that nationalism frequently became an ideological instrument of exclusion among nationalist movements' subcollectives in their post-emancipative struggles for power. Nationalism accordingly has to be judged not only by what preceded liberation but also by what followed it. Secondly, the values corresponding to the aims of resistance can be expressed in universalist terms, too (e.g., equality, freedom from oppression).

Moreover, some scholars argue that, given certain prerequisites, nationalism fosters democracy and social justice (e.g., Tamir 1993, Miller 1995). Nationalism, regarded as source of identification and mass solidarity, gets the population to accept certain burdens (e.g., taxes, military service), facilitates dialogue with state representatives, and promotes social welfare. Critics (e.g., Parekh 1999) point to a lack of empirical data to support these claims and draw attention, for example, to a positive correlation between strong nationalist patriotism and weak social welfare systems (e.g., the USA). They argue that nationalism supports democracy and social justice only if it is combined with specific arguments pro-democracy and pro-social justice. But then it is not nationalism as such which promotes these values. Moreover, nationalism might justify privileging co-nationals over non-nationals. But social welfare needs an argument to privilege other co-nationals over one's own egoistic needs.

Conclusion

Nationalism continues to be politically powerful and has only recently made its way onto the academic agenda. The debates sketched out above are on-going – with the exception of traditional primordialism. In contrast, the reconstruction of "participant primordialism" (i.e., primordial accounts of national identities among the population) is, of course, part of the academic agenda which develops more and more refined theories in order to grasp ethnic and/or national boundary making (e.g., Wimmer 2013). On the other hand, the specific impact of globalization on national identities raises further questions which have not been addressed here. Here are two examples: (1) Discussion is ongoing about which alternatives might exist to identifying with the nation. Cosmopolitanism is one option considered but also criticized for not taking seriously the alleged human need for particularism and for being implicitly neoliberal and elitist. Overall, there is a tendency not to discard national affiliation altogether but rather to strongly relativize its importance by pointing to the multi-collectivity (see Hansen and Marschelke 2017) of all human beings and the corresponding multi-dimensionality of their identities (see, e.g., Özkırımlı 2005); (2) Sovereignty, on the one hand, and the concepts of "a people," citizenship, culture, and nationalism, on the other hand, are intertwined. Reconceptualizing the latter may affect the former. It remains to be seen whether post-nationalism is possible, if it means post-sovereignty, and whether this leads to post-democracy or brings forward the realization of universalist kinds of dreams.

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Cross-References

- ▶ Citizenship
- ▶ Claim Rights (Subjective Rights)
- ▶ Cosmopolitanism
- ▶ Discrimination
- ▶ Fichte, Johann Gottlieb
- ▶ Habermas, Jürgen: Legal and Social Theory
- ▶ Herder, Johann Gottfried
- ▶ Immigration
- ▶ Integration: Civic and Social
- ▶ Multiculturalism
- ▶ Racism
- ▶ Representation
- ▶ Responsibility: Collective
- ▶ Rights: Cultural
- ▶ Rights: Social Rights and Welfare
- ▶ Rousseau, Jean-Jacques: Theory of Law
- ▶ Secession
- ▶ Solidarity
- ▶ Sovereignty and Human Rights
- ▶ Taylor, Charles: Secularity

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Natural Law: Contemporary

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Introduction

Under the heading "contemporary theories of natural law," we refer to a number of theories of law inspired by the traditional theory of natural law, and especially by Aquinas' thought, but that substantially diverge from the neo-Thomist reading. The latter, which is nowadays represented by updated (McInerny 1997) or deeply renovated versions (Rhonheimer 2000), was characterized by a metaphysical foundation and by an account of the natural law as a theory of morals, which did not have any substantial impact on the field of jurisprudence, with few exceptions (for instance, Massini 2005). By contrast, not only the new theories of natural law relate themselves to contemporary moral and political philosophical debates (George 1992, 1996a), but most importantly they pretend to compete with the theories of legal positivism, claiming to provide a much better grasp of positive law, compared to the latter ones. In fact, they can be labeled as natural law theories of positive law or as natural law jurisprudence.

These new theories of natural law state – by so doing paying respect to their tradition – that the

issue of the obligatoriness of positive law and the one of the justification for obeying the law both constitute full and integral part of any theory of law. As it is well known, legal positivism has either undervalued the theoretical relevance of these issues, insofar as these would imply moral and political considerations, or it has not done anything else than addressing them just in terms of the coercive power of law, which stems from a legitimate authority. HLA Hart wrote: "laws may be law but too evil to be obeyed" (Hart 1957–1958: 620). But if a valid norm must not to be obeyed, then it is normatively inert. It is indeed bizarre for a theory of law not to address legal normativity in its fullest meaning. If we acknowledge that legal positivism is not a whole theory of law's nature (Gardner 2001: 210), then we also acknowledge the existence of a space, which can only be filled by theories that somehow explain normativity in terms of considerations of merit and, as a consequence, claim that all definitions of law cannot but take into account, at least in part, its content.

This widened spectrum of the theory of law as a whole implies a rejection of the Kelsenian ideal of a legal science which is independent from moral and political philosophy – feature which is mistakenly considered the essence of its scientific status. The law is clearly aimed at providing continuity, stability and regularity to the life of a community (Finnis 2012: 67–69).

Whether the research goals of the new theories of natural law are plausible or not, must be assessed both on the grounds of the wide recognition of the priority given to human beings and their dignity, and on the current evolutionary trends of positive law, which is in fact more and more entrenched with value judgments – due to the advent of human rights, as well as the constitutionalization of the law – phenomena which have both triggered a process of internal critique in the legal positivist debate (Viola 2016: 75–90). Two theses, in particular, originated from legal positivism, have unintentionally made a contribution to these new versions of natural law theories.

The first contribution derives from HLA Hart's accent on the "internal point of view" in order to identify any legal rule. Independently from HLA Hart's intentions, the internal point of view spotlights the role of the participants, with their intentions and reasons in the process of using those rules, allowing for an explanation of the guiding role of the law, which is more convincing than the one offered by the empirical account of action (Rodríguez-Blanco 2017: 161). By endorsing the point of view of the participant, and not the third-person perspective, one is led to abandoning a mere descriptivist approach to the theory of law.

The second influential thesis is Dworkin's well-known distinction between rules and principles. Leaving aside Dworkin's intentions – his theory still being of uncertain theoretical location (See, for instance, Himma 2003) – the above mentioned distinction has displaced what was the theoretical centrality of the formal validity of the norm. Principles not only require identification criteria that are not merely formal, but also most importantly, constituting an ideal drive, request us to make use of practical reason. As a result of it, the law is understood more like a generative process rather than a ready-made product. When facing a product, one must deal with its source or pedigree (source thesis), while if one has to do with a process, then one will end up interrogating what are the criteria of correctness in the making of it. Under this approach, the same theory of law is normative in its own character.

The minimal conditions required for bringing forward, in the current times, a renewal of the natural law tradition are: a rational justification of the obligatoriness of the law, the point of view of the participant – i.e., the relevance of the practical reason – and the normative character of the theory of law.

This is the thesis which the new theories of natural law have in common: "necessarily, law is a rational standard for conduct" (Murphy 2003: 244; Crowe 2017: 114). This thesis, although able to mark the distance with legal positivism and voluntarism, is not sufficient for characterizing a theory as a natural law theory and, even less, as a theory concerning positive law. A few fundamental specifications are required. First of all, reference to reason must be understood in terms of reference to the area of practical reason, i.e., those reasons which regulate choices and

actions. Second, these reasons are ultimately rooted in the good, which is the intrinsic aim of human action.

These new theories of natural law, which operate under this frame, do not elaborate on the traditional idea of natural law understood as a collection of precepts coming from the will of God and inscribed in human nature. These theories can be grouped under three different families: the epistemological, the ontological, and the aspirational trends. Clearly this categorization is only meant to have an explanatory function, but at the same time this may end up offering a simplistic account of the complex and rich interconnections among these theories.

The Epistemological Trend

This new wave of natural law studies starts with the pioneering work of John Finnis, *Natural Law and Natural Rights*, published in 1980 (Finnis 2011), which can be taken as a paradigmatic example of a new theory of natural law, insofar as it highlights each and everyone of the most relevant subjects that are still currently debated. In accordance to Finnis, a theory of positive law presupposes a theory of ethics and implies a certain stance in political philosophy.

This new theory of natural law – which is often referred to as "new classical theory of natural law" – is in reality the outcome of the research undertaken by a number of philosophers who have reinterpreted Aquinas and his philosophical and theological work as a whole, but which, *stricto* sensu as a theory of law, has been developed initially by Finnis, followed by Robert P. George (1996b). Apart from some theorists who endorse this stance, even though sometimes distancing themselves quite substantially from it (see for instance Grisez and Boyle 1998), there are also others who endorse its general targets, but with very substantial variations in terms of its moral, legal, and political theory background. Therefore, an overview of the new theories of natural law, which are currently brought forward, ends up being a very articulated one. We will only examine those fundamental elements of the mentioned common debate, which are the most controversial ones.

At the roots of Finnis' moral theory we find an overturn of the traditional approach, which states that the principles of natural law are deduced from human nature. By contrast, the fundamental goods of human beings show us their nature (Finnis 2011: 34). We have knowledge of these goods insofar as they are self-evident principles of practical reason – principles which allow us to make human actions intelligible. The plurality of goods, the principles of practical reason, and the priority of the good on the right require us to reject both consequentialist and deontological theories.

Two main questions arise from the issue of the fundamental goods: which goods are fundamental ones, and how we get to know them? As far as the list of fundamental goods is concerned – roughly speaking and not taking into account the diversity of their formulations (for instance, with regard to the good of life) –, there is a general agreement, which leaves room to some differences, for instance with regard to whether pleasure is a fundamental good (something which is excluded by Finnis 2011: 96, while endorsed by Crowe 2019: 43). The most controversial issue is regarding how we get to know them: whether they are self-evident principles, insofar as they are a necessary implication for us to make our actions intelligible (Finnis 2011: 64–69), or still whether they are principles based on the correspondence between the theoretical understanding of what the human flourishing is and the practical knowledge that this is the good we must pursue ("real identity thesis," defended by Murphy 2001: 40–45, 137), or finally whether they can be grasped by normative inclinations as human dispositions to act in certain ways and to believe that these actions are worthwhile or required (Crowe 2019: ch 1, which takes inspiration from Lisska 1996). As it is clear, the traditional theory of natural inclinations is still quite influential (Jensen 2015).

A further controversy concerns the immutable and incommensurable character of the fundamental goods. It can clearly be the case that their formulations change in consideration of the historic consciousness, while the fundamental goods

themselves do not change over the time. But the crucial philosophical question at stake is whether these goods have such a characterization insofar as they are characteristically owned by human beings or whether they are goods in themselves. Some state that their objective normativity is compatible with their being "socially embodied, historically extended and dependent on contingent facts about human nature" (Crowe 2019: 5) and that their incommensurability must be understood in terms of them being unable to be reduced to one another, and not in terms of them being non-comparable among them. Comparing them, in order to find out which one must prevail in any given case, seems to be necessary in order to make a moral choice (Crowe 2019: 65–68). As a result of this stance, the theory of moral absolutes – notoriously defended by Finnis (1991), goes under review and criticism.

The following step taken in the frame of a moral theory consists in extracting from the elaboration of the moral goods those moral rules which allow us to participate in them. To this extent, Finnis' distinction between the practical or premoral dimension of an action and its reasonableness, which makes it obligatory in moral terms, is particularly relevant (Finnis 2017a: 20). Not everything that is identified as worthy of being pursued by our intellect is, just for that reason, a moral good. While fundamental goods make an action intelligible, practical reasoning requires guidelines for choice or requirements of practical reason itself in order to find out the moral norms of action, which are aimed at enabling human realization as a whole (Finnis 2011: ch 5; Murphy 2001: 157). Natural law theorists debate whether to affirm an agent-relativist or an agent-neutralist conception of the fundamental reasons for action. Nonetheless, even those supporting an agent-relativist conception accept that this view can provide real moral reasons for action in virtue of their fitting an agent-neutral perspective (Murphy 2001: 174–182). However, it must be acknowledged that the traditional appeal to the Golden Rule is still the most harmonious escape route from the clash between agent-relativist and agent-neutralist conceptions (Finnis 2011: 107).

Arguments taken from a moral theory make their way into the theory of law through the issue of how the concept of law is formed. In accordance to Finnis, the theorist should identify the central instance of the law, or its focal meaning, on the basis of what is expected by practical reasonableness, all things considered (Finnis 2011: 9). This will set a benchmark against which one can identify faulty, defective, or deviant instances of law. Therefore, the law is an analogical concept in the proper tradition of Aristotle and Aquinas, which contrasts with the univocal and essentialist rationale set by analytical jurisprudence. In the process of examining the features of this benchmark, we shed light on those principles of natural law and practical reasonableness, which are necessary in order to justify the authority and its exercise in accordance to human rights and common good, and more generally with the Rule of Law (Finnis 2011: 270–290). As we already observed, these principles are derived from human goods, and are then developed and elaborated by practical reasoning. In such a way, the ethical theory of natural law, which is in itself compatible with legal positivism, transform itself into a legal theory of natural law, which is not compatible with it anymore (Murphy 2005: 22–23).

Such a thick concept of law – other natural law theorists argue – would lead to a moral reading of law, which is a feature of a fully normative theory (Murphy 2006: 21, 27). On the contrary, a descriptive theory of law must acknowledge that the positive law has the expectation of being, by itself, a decisive reason for compliance. However, we have to acknowledge that a full-fledged descriptive theory is not complete without an understanding of the requirements of practical reasonableness (Murphy 2006: 23). Decisive legal reasons are not only those based on the authority, but also those which delve into the merit of the law (Murphy 2006: 54).

On that basis, the new natural law theory distances itself from the traditional formula *lex iniusta non est lex* (Kretzmann 1988). Broadly speaking, the weak version of natural law is going to be endorsed, the one which acknowledges the validity of unjust laws, even though

these may be legally defective. However, the strong version of natural law, which is normally attributed – sometimes wrongly (George 2000: 1641) – to the tradition of natural law, has not been fully overtaken. This is still part of Radbruch's formula, insofar as it states that laws which are extremely unjust cannot be counted as laws at all (Alexy 1999; Soper 2007).

Such a weak version must face the issue of the identification of the threshold which, once passed beyond, would make the law no law at all. This process of weakening of the full-fledged concept of law can be understood imagining the law as a degreed property or in terms of some non-defectiveness conditions of law (Murphy 2017: 358). In accordance with the first view, the law is to be seen as a matter of varying degrees and, as a consequence, there are different levels of obligatoriness under the general flow of practical reason. Therefore, we also need a minimal concept of law, the one the law creates legal obligations only (Finnis 2011: 354) and which is very proximate to the concept of law endorsed by legal positivists. In accordance with the other approach, norms are defective – although valid – if they do not constitute decisive reasons in support of their own obligatoriness. However, this implies an endorsement of the strong version of natural law, insofar as in case of serious profiles of defectiveness, it will be very difficult to maintain that the law is valid anyway (Murphy 2006: 57). Finally, one should mention the argument, inspired by HLA Hart, which states that the law is a deontic marker by creating a sense of social obligation (Crowe 2019: ch 9), although with the proviso that this obligation must be backed by reasons for compliance. In conclusion, the weak version locates itself somewhere in between the strong version and legal positivism, and cannot be so thin that it becomes then undistinguishable from the latter (MacCormick 1992).

The political theory implied by new natural law theories is itself integrally part of the theory of law, insofar as it takes the common good as the general aim of the law. The contribution given by the law to the pursuit of the common good is to be found mainly in the social coordination and in the task of giving stability to society. However, how the common good has to be understood is quite controversial. We refer to three different conceptions: the instrumentalist one, the one of the distinctive good, and the aggregative one (Murphy 2006: 62). Murphy ascribes the first one to Finnis (2011: 155), as well as arguing for the third one, which can be described as the state of affairs in which all members of a political community are fully flourishing (Murphy 2006: 64), but this clearly works as a regulative ideal. The distinctive good conception, although rooted in the tradition of natural law, is underdetermined. These authors share the willingness to avoid communitarianism and its relativism. However, a full conception of the common good cannot but include each one of these three elements (Duke 2017).

The aim of the common good requires that, where there is no unanimity, an authority will decide on it. However, for a theory that takes the law to be a rational standard of conduct, it cannot be accepted that the obligatoriness of the law derives from the simple fact that this is a law. As a consequence, one of these two lines of arguments comes in support: either we aim at qualifying the authority and its exercise, or we underdetermine its role. The first argues for justifying the legitimacy of the authority on grounds of the good that is produced by it, as a matter of fact. This good is expressed in terms of the achievement of social coordination, as a result of the consensus manifested by citizens, and the provision of a system of norms that are obligatory under the law (Finnis 2017 and, for a specific theory of consensus, Murphy 2006: ch 5). The second line of arguments does not support the view that a legal norm, if part of the machinery of a political community, would on that simple basis be relevant for the identification of the common good, or in other terms does not derive any presumption of justice from the mere legal validity. All active and responsible citizens are always entitled to judge autonomously whether any law fulfills the requirements of justice or not (Crowe 2019: 192). Moreover, it must be acknowledged that not every law is decided by an authority. If one takes into account the evolution of international law, there are more and more areas of law populated by legal norms of a different nature:

consensual law, emergent law, and natural law can all operate independently of the state (Crowe 2019: ch 6). At this stage, one can question whether the central instance of law put forward by Finnis, which is too much reliant on the state (Finnis 2017), should not be rephrased or updated.

In conclusion, we must observe that the debate which is internal to the new natural law theories is diametrically opposed to the one that is currently animating legal positivism. Inclusive legal positivism, which makes space for moral consideration, finds a match in weak natural law theories that include considerations of mere legality, in exactly the same way in which exclusive legal positivism – which does not account for moral considerations – finds its own match in strong natural law theories, which exclude considerations of mere legality.

The Ontological Trend

Also with regard to the issue of the nature of law, i.e., its essence or its typical features, we can track new kinds of natural law theories.

The central issue is whether the nature of law must be found in the realm of nature or in the realm of nonnatural entities. Michael Moore defends a version of moral realism that asserts the existence of moral kinds, which are mind- and convention-independent as the natural kinds (Moore 1992: 190). The nature (and not the concept) of law is determined not through its structure, but on the basis of functions attributed to each feature of the law (Moore 1992: 208). These typical functions of the law are those which allow the achievement of the general moral aims of the law, which Moore, in line with Finnis, spots in the social coordination and the common good. Therefore, there is a necessary connection between law and morals, understood in an ontological and metaphysical fashion, in accordance with a strong version of natural law. Moore's theory is deliberately lacking an anthropology able to provide a justification for the aims of the law and, consequently, to provide a justification in support of its aims. One may legitimately question whether this can be adequately qualified as a theory of natural law, as Moore pretends to do, or rather as a "moral law theory of law" (Moore 1992: 192).

By contrast, if we qualify the law as an artificial kind (Burazin 2016) – as it is more obvious, therefore we cannot envisage it as independent from human intellect and conventions. The nature of law will necessarily require to be explained in terms of its authors' intentions and, even more in case of non-intentional norms, through the factual acceptance of its recipients. Among the theories of law as an artificial kind, we can find some versions that are inspired by natural law theories as well. For them, intentions and acceptance are not sufficient by themselves, but insofar as they are aimed at giving shape to what has the typical function of the law (intention and acceptance conditions), in the same way in which the intention of creating a chair is not enough, if then the end product cannot be considered a chair and is unable to meet its typical functions (success conditions) (Crowe 2019: chs 8, 9). Generally, the typical function of the law is to guide human action. This requires that certain formal or procedural conditions are met, such as those of the Rule of Law, and the reasonableness of the contents of the law. On that basis one can test how successful the law is, assessing it by different degrees of success. Such an artifact will be legally defective if it does not perform well its typical functions and legally invalid if it is not minimally adapted to performing its function (Crowe 2019: 177). From this point of view, it is clear that an artifact theory of law implies a concept of the functions of law, able to take into account the intentions of the authors and the acceptance of the recipients of the law. Therefore, it cannot be taken as a self-standing theory.

The artificial character of the law is very peculiar, in that it is a normative output which derives from actions that are interpreted as sources of the law and accepted as such. Different kinds of artifacts contribute to the creation of the law, which make us talk of an artifact of artifacts (Finnis 2017). Natural law theorists debate on what is the prevailing or distinctive artificial feature. It does not seem to be correct for us to give prevalence to the external works, which are the result of certain operations. A reference to performances seems more appropriate, characterized by certain

correct procedures, through which they can achieve their own goals (MacIntyre 2007: 187). The end goal of dance is not dancing in itself, but dancing well, as well as for swimming the goal is swimming well. Also language and reasoning are artifacts made out of a number of cooperative performances, governed by the rules of good performance set by grammar or logic, in such a way that we can then differentiate a proper from an improper way of speaking and reasoning. The same can be said with regard to the law, if we take it as a social practice (Viola 1990). The law as well has got its own grammar, which directs us in deriving or determining positive laws, in their continuous change, from a number of immutable principles (Finnis 2011: 351). In such a perspective, the law itself is an art (*ars boni et aequi*).

The artistic practice of law requires abilities in the fields of argumentation, deliberation, decision, and rules implementation. If the law is understood as the result of human will, therefore the mentioned abilities will be those requested by the legal operators' own technique. However, if the law is an output of human reasoning, then these abilities will take the moral shape of a virtue. Indeed, in the natural law tradition we find the study of the legal practitioners' own virtues, with a specific focus on judges and jurists. The fundamental legal virtue – as everybody knows – is the prudence (*recta ratio*), while the main art is the rhetoric, which is nowadays reassessed by the studies on legal interpretation, where this is understood as the art of interpretation and argumentation (Viola and Zaccaria 2007). A specific interest for this practical perspective is also shared by those traditional natural law theories, which elaborate on metaphysical realism (Vigo 2016), and which in this regard are fully compatible with the new theories of natural law. Practice unites what theory divides.

The Aspirational Trend

One last form of natural law theory can be drawn around the lines of Lon Fuller's thought – and still connected to Aquinas, even though more loosely. As it is well known, Fuller characterizes the Rule of Law as the essence of the law and sees the purposive character of the human action as its basic anthropological feature. As a result of it, we do not look anymore at a wide concept of law (as Finnis does), but rather at a narrow concept of law, i.e., the identification of the most elementary instance of law. Such a concept of law is understood as an idea, an "intellectual archetype" to which actual instances of law approximate to various degrees (Simmonds 2007: 52). Such a minimal concept of law is already a moral ideal, insofar as it corresponds to a form of human community characterized by reference to legality and trust in the law. When a social practice as a whole is in accordance with the principles of the Rule of Law, as codified by Fuller – even if in a contingent fashion and liable to be reviewed – then it will have the right credentials for being acknowledged as an instance of law. The issue of the validity of the norm is addressed only once it is ascertained that we are in front of a set of rules, which is embodied in the Rule of Law, or, more general, a social entity ruled by the law. The validity comes from the law, and not the other way around. A norm can well derive its validity from a basic rule of recognition – as suggested by HLA Hart – but its legal character is derived by the way in which the normative system – which includes the rule of recognition – approximates itself to the idea of law (Simmonds 2017: 256). These are exactly the grounds of the judges' duty of fidelity to law and, more generally, of all legal professionals (Postema 2014).

Legal doctrine highlights that such an archetype has got a potential in terms of legal production, on the basis of varying historical conditions and specific contexts, which contribute to define the concepts of justice and common good of a certain community. To the extent that law governs, citizens will enjoy juridical liberties, i.e., autonomy from the powers of others, and juridical protection. This will open the doors to the enjoyment of other fundamental goods. At any rate, the institution of law as such can be rendered intelligible only when we discern its relationship to certain moral value (Simmonds 2007: 63).

One of the advantages – pointed out by those who argue for this line of arguments – is that here we have a concept of law that can be acknowledged by everybody, i.e., legal positivists included, insofar as it does not rely on a specific

moral conception (as it is the case for the wide concept of law). The assumption is that, once this archetypical concept of law is admitted, one could not but accept that moral considerations are part of the law, with all their implications. Legal positivists will have to change their mind. But in fact things have not gone this way, as it was already the case in the well-known Hart-Fuller debate – today reconsidered more in favor of Fuller (Rundle 2012). Indeed, the real obstacle is not whether this minimal concept of law is plausible, but whether it can be taken as a real self-standing moral ideal, able to ensure – even to a minimum degree – that the legal order is in accordance with justice. It is true – as pointed out by HLA Hart – that the rule of law, taken as a strictly formal requirement, is perfectly compatible with a very great iniquity (Hart 1994: 207), even though it is also true that legal justice is incompatible with a serious breach of the requirements of the Rule of Law. By contrast, if we take the Rule of Law as a widened ideal for society, then it must also embody a claim to correctness. However, in such a way, it ends up becoming a much thicker concept, more proximate to Alexy's non-positivism, if not to Finnis' account of focal meaning.

Conclusions

The new natural law theories are different from those of the neo-scholastic approach, insofar as they do not move from an account of the human nature, but rather from practical reason – which is anyway going to be governed by a specific conception of human action (Rodriguez-Blanco 2014). From this perspective, they oppose legal positivism, but their focus shifts from the one taken in the past. The common spotlight has been for a long time the issue of the validity of the law and the connection or separation of law and morals. However, as these theories now admit that there might be a separation between the validity and the justice of the law, and inclusive legal positivism now admits that there might be a connection between law and morals – although a contingent one – the opposition has now shifted toward the issues of the relations between law and practical reason, of how to justify the obligatoriness of the law and of its role internal to a theory of law. As a consequence, the current debate between natural law theories and legal positivism focuses on how to conceptualize a theory of positive law. On their own turn, in consideration of the different theoretical approaches characterizing the new theories of natural law, these can be drawn as a whole in terms of a trend of contemporary legal thinking, more than as a proper school of thought (Crowe 2014).

Cross-References

- ▶ Aquinas, Thomas: On Natural Law
- ▶ Authority of Law
- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Finnis, John
- ▶ Fuller, Lon Luvois: Influential Ideas
- ▶ Law as an Artifact
- ▶ Law As Reason for Action
- ▶ Legal Positivism: Inclusive
- ▶ Ontology of Law
- ▶ Positive Law and Natural Law
- ▶ Radbruch, Gustav: His Formula and Concept of Law
- ▶ Rule of Law: Theoretical Perspectives

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Natural Law: Middle Ages

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Introduction

The concept of law in the Middle Ages. In the Middle Ages, laymen and experts more or less consciously shared the view that human law contained a reflection of the very nature of social

life. The law in which medieval institutions were actually enmeshed was largely customary. The modern idea of law as the command of a sovereign was alien to medieval thought, and legislation was admitted only as a surreptitious incident of *ius dicere*. Medieval obedience was founded on the sentiment that laws were respectable insofar as they were not made by man (Lewis 1954, 1). This may leave us with the conclusion that all medieval political and legal thinkers were natural law (NL) theorists, according to contemporary NL theories. However, the claim of the natural basis of law had in the Middle Ages a variety of senses, sometimes different from later views.

Medieval theories of NL differ from contemporary NL approaches under three aspects. First, metaphysics more than morality is the core interest of medieval NL thinkers. Since metaphysics was mostly framed by Christian theology, NL theories of the Middle Age addressed issues foreign to most of contemporary NL theorists, such as the intelligibility of God's law, man's free will, and the role of grace in modifying human nature. Second, medieval thinkers did not clearly distinguish between NL and natural right. *Ius naturale* and *lex naturalis* were used interchangeably, and the predominant concept of NL was that of a cosmic order. There is no agreement among contemporary commentators on whether a theory of natural right may be traced back in the Middle Ages (see Strauss 1953, contra Lottin 1926; Villey 1986; Tierney 1997). Third, NL was not always addressed with the normative intent of establishing the moral standard that positive law could not violate. On the contrary, NL had a plurality of meanings, often in contradiction one with the other. Not all authors agreed on the conclusion that in case of contrast with positive law, NL should prevail. Some thought that moral principles were to be found in civil law or in the Bible rather than in NL. NL was above all a conceptual tool to deal with legal pluralism (Grossi 2006).

Although early medieval thinkers such as St. Augustine or Isidore of Seville had offered some analyses, NL theories did not flourish until the turn of the millennium, with its revival in education and philosophy, prompted by the rediscovery of Iustinian's Digest, the translations into Latin of the works of Aristotle and the institutional reforms of Pope Gregory VII (Berman 1985). NL theories were approached mainly by three angles: civil law, canon law, and theology.

NL of Civil Lawyers. The school of glossators, initiated in Bologna by the jurist Irnerius (1060–1130), provided some definitions of NL based on Justinian's legal texts. The Corpus Iuris contained two distinct traditions. The first one was of the jurists Gaius and Paulus, who identified *ius naturale* with *ius gentium*, and therefore with the work of natural reason getting its name from the fact that all people observed it (Gaius, Dig. I,1,9). The second tradition was Ulpian's where *ius naturale* is *quod natura omnia animalia docuit*, what nature has taught to all animals. Here, the classification of the laws is tripartite: next to *ius civile* and *ius gentium*, *ius naturale* holds an autonomous position.

Medieval legists preferred Ulpian's definition (Kilcullen 2011), so that Irnerius' pupil Bulgarus (XIth c.–1166) defines NL as the condition imposed on created things by divine disposition or instinct of nature and not by any human agency. However, later commentators abstained from formulating a unique conception of NL. Rogerius (1150 c.–1195) held that also civil law may be seen, in its way, as natural when, for instance, it protects minors from injury caused by error and fraud. In the thirteenth century, the new generation of glossators insisted on the plural definition of NL. Azo (1150 c. 1225) distinguished among a NL common to all animals, one common to men, a NL contained in the Mosaic Law and the gospel, and he gave also another sense where NL meant what is most in accordance with equity. Accursio (1184–1263) is the author of the *Glossa ordinaria* which introduced new definitions of NL, such as the law of keeping pacts, or the contrary requirement of breaking pacts when equity demands it (Crowe 1977). It is doubtful that medieval jurists followed Cicero in holding the NL as the highest and most authoritative. Consider the practice of slavery. For the jurists, in many circumstances *ius civile* prevails over *ius naturale* (Atkins 2013, 225).

NL of the Canonists. In the twelfth-century Bologna, next to the *ius civile*, another body of jurisprudence was coming into being. The monk

Gratian (XIth c.–1159c.) published between the years 1139 and 1142 a book which he called *Concordia discordantium canonum*, soon become to be known as the *Decretum Gratiani.* In the *Decretum* NL is defined twice. One of the definition contains a quotation from the fifth book of the *Etymologies* of Isidore of Seville: "NL is common to all nations by reason of its universal origin in natural instinct and not in any positive constitution" (*D,* I,7). But Gratian went further in adapting the NL to the basic precept of divine law regarding neighboring love: "NL is what is contained in the law and the gospel, in virtue of which each is commanded to do to others as he would wish to be done to himself and is forbidden to do to another what he would not have done to himself" (Ibidem). Divine law therefore contains some immutable principles. Gratian offers the examples of the Golden Rule from the Gospel (*Matthew,* 7:12; *Luke,* 6:31) and from the Old Testament (*Tobit,* 4:15). In the *Decretum* nature's authority is restored. In case of conflict with positive law, "NL without qualification prevails in status". The consequence is that "whatever provisions have been either established in custom or provided for in written legislation are to be held null and void if they are contrary to NL" (*D,* I,8).

The *Decretum*, like the *Corpus Iuris Civilis*, soon began to be encrusted with glosses. For example, Gratian had written that by NL all property was common but also that any human law contrary to NL was vain and void. So how could the existence of property in the real world, held according to human law, be justified? One solution was offered by Rufinus (1150–1191c.) who pointed out that NL includes commands, prohibition and *demonstrations.* By *demonstration* NL indicates what is fitting or shows what is good. Unlike commands and prohibitions, demonstrations can be set aside for a good reason. Others introduced the idea of permission. They suggested that property and slavery exist by the permission of NL (Tierney 1997).

Commentators do not agree on the impact of canonists' opinions on the later notions of NL. Ullmann (1967), for example, blames canon lawyers to have supported what he defines a descending concept of political authority, whereby normative authority resides in God and descends top-down from God to its ministers and delegates. More recently, other authors have reached the opposite conclusion. According to Tierney (1997), the modern idea of natural rights has its root in the canonists' intuition that NL has also a subjective dimension. Tierney mentions Huguccio's (1130c.–1210) idea that NL is a *facultas*, a faculty which enables man to distinguish good and evil and to select the good as the basis of his action.

NL of the Theologians. Unlike civilians and decretists, theologians gave a full account of NL, analyzing its metaphysical dimension over and above the moral and legal. The theme of NL presented by the early scholastic theology is substantially a terse summary of Augustinian's view. According to Augustine, nature signifies the original and uncontaminated state which a thing has through divine creation. Vices corrupt nature. What seems natural in man, his growth, decay, death, and cupidity, is, when measured by the divine *ordo rerum*, against his nature (Ullmann 1967, 240). From this point of view, the apparent natural man is unnatural. This explains Peter Lombard's (1100c.–1161c.) insistence on the idea that vice is *contra naturam* and that only grace can restore true nature (*Sententiae,* 4.3.1). This explains also the frequent juxtaposition of divine law and NL, the view that the Bible contained NL and the interminable discussions on the possible dispensation from NL. NL was not intended as the main source of moral absolutes. The Bible was. Discussions on the prohibition of fornication provide a good example. Simon of Tournai (1130c.–1201) holds that sexual intercourse of man and a woman, whether they are married to each other or fornicators, is always in accord with NL. However, in marriage the intercourse is good; outside of marriage it is bad (*Disputationes,* d. 98, q. 2).

It is solely after the circulation of Aristotle's works that the concept of nature of Christian theologians started to change. Nature is not any more an inert principle which lacks any moral force. Nature is being modified under three aspects. First, the speculative Augustine's view is replaced by the more realistic view of nature connected to

idea of movement. Thomas Aquinas (1225–1274) refers to the principle of growth in nature for *nomen natura a nascendo est dictum* (*S. Theol.* III, q.2, art.1). Second, when the natural man is rescued from the oblivion, human nature works on its own laws through the employment of man's reasoning capacities. Thomas can now say that grace does not do away with nature but will bring it to perfection. *Gratia non tollit naturam, sed perficit.* Third, in accordance with the teleological principle, the nature of man and the nature of animals depart from each other, because different are the aims of the living creatures.

These three modifications massively impact on the idea of NL. First, Ulpian's formula is rejected. Albert the Great (1200–1280), the teacher of Thomas, argues that it is an absurdity to imagine the same law for the man and the brute. On the contrary NL and natural justice, Albert explains, belong to the specific nature of man, namely, reason (*Summa de creature's: de bono*, I, 1, 1; see also Fassò 1999, 268). Second, NL becomes a normative principle. William of Auxerre (1150c.–1231) can say that NL can serve as the *origo et principium omnium virtutum*. Third, NL is perceived as innately impressed upon the human rational soul. Cicero's idea of NL as *quaedam innata vis* is restored. Albert clarifies that *habitus* is a knowledge in *potency* and therefore indeterminate. Though one may intuitively know through the *habitus* of the NL that theft or murder are wrong, one must acquire knowledge as to what the terms theft and murder are. Fourth, NL becomes a dynamic principle. Alexander of Hales (1183–1245), Bonaventure (1217c–1274), and other Franciscan theologians maintain that NL gives different directions for different stages of human history, so that slavery and property were contrary to nature before the fall from innocence but not afterward (Tarello 1964).

Thomas represents the highest synthesis of Aristotelism, byzantine legal thought, Arabic philosophy, and Christian theology. Thomas emphasizes the link between law and reason (*Summa Theol.* I–II, Q. 90, A. 1, ad 2.). NL is "nothing else than the rational creature's participation of the Eternal Law" (Q. 91, a.2). NL, according to Aquinas, has self-evident precepts, knowable to any human with intellect and some experience of the world, independently of divine supernatural revelation. Fundamental is the precept that "anything good is to be pursued, and the opposite of this good, evil, is to be avoided in all human acts" (Q. 94, a.2). However, some portion of the Eternal Law is not fully graspable by the human intellect. This is why humans must make their own laws. In all cases true law comprises rational requirements for right human action. Any human law that directly contravenes a dictate of NL *ipso facto* fails as a law and has the status of an irrational command instead. Such commands ought only be observed for prudential reasons (Viola 2011, 18).

The link between law and reason persists also in later thinkers, as well as the idea of different degrees of NL. John Duns Scotus (c.1266–1308) makes a distinction between NL in a strict sense and NL in a weaker sense. The first contains only those moral propositions that are per se *notae ex terminis*, that is self-evident, along with whatever propositions can be derived from them deductively (*Ordinatio* 3, d. 37). God himself can't make them false. Scotus equates NL in a strict sense with the first three rules of the Decalogue. Everything else in the Decalogue belongs to the NL in a weaker sense. In Scotus' view, rules providing obligations toward others (honor your father and mother, you shall not kill, you shall not steal) are not apprehensible through intuitive cognition and are not deduced from propositions per se *notae*. However they are highly consonant with such propositions.

William of Ockham (1285–1347) maintains that there are three kinds of NL. The first are laws that hold everywhere and always, as in the case of "thou shalt not deceive." The second hold for the state of innocence. Ockham explains that in the second sense and not in the first all things are common by NL. Property was introduced on account of sin. The third hold for other states, contingently upon decisions by the persons concerned. In this third sense, NL is by supposition. For example, the restitution of a thing which has been deposited or of money which have been lent, are in accordance with NL just in this third sense (*Dialogue* pt.3, tr.2, bk. 3, ch.6, 393–395). The obligations generated

by NL by supposition vary according to contingent circumstances.

Ockham's figure is usually associated to nominalism, i.e., the denial of metaphysical universals, and voluntarism, i.e., the theory that God is to be conceived as some form of will (or conation). On the basis of these two associations, Ockham's conception of NL has been contrasted with Thomas'. Gierke (1927) has argued that unlike Thomas, where NL was conceived as an intellectual act, unalterable even by God, Ockham saw NL as a mere divine command. More recently, Oakley has drawn some further implications, alleging that the nominalist conception has opened up the way to legal positivism (Oakley 1961).

Conclusion

Despite Ockham's alleged voluntarism, the idea of an arbitrary and unintelligible God was alien to medieval spirit (Gilson 1932). Medieval thinkers detected different degrees of accessibility of NL to human intellect (intuitive cognition, logical inference, quasi conclusions, consonance, supposition), addressed the slippery issue of mutability of NL, and some went as far as to hold that the community affected by the law should be involved in the decision left to men by NL. However, for the concept of law as a deliberate act of will, lacking any restraint, we have to wait the modern era.

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Natural Law: Protestant

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Introduction

In the contemporary context, scholars often distinguish between natural law as a theory of law in the narrow sense, which is opposed to legal positivism, and as a broader and more foundational theory in the sense of a moral, political, and legal philosophy. Protestant natural law theories belong to the latter kind of theory. Indeed, when these theories took shape in the seventeenth century, natural law came often to be identified with moral philosophy, which served as basis for theories of contract and property, of the family (or household), and of the civil society (or state). It was also applied to the conduct and affairs of states, and then called the law of nations.

Natural law became the dominant form of moral and political philosophy in the Enlightenment. The prevailing model for developing natural law was shaped by deductive reasoning. The basic idea was to derive universal natural laws from one or several principles, sometimes *more geometrico* or according to the mathematical method, in order to establish natural jurisprudence as a science. Among the best-known features of Protestant natural law is the contractual theory of the state, which could variously be put in the service of absolutist rule or serve as a basis for defending individual rights or liberties against arbitrary government.

The idea of natural as opposed to customary or conventional law goes back to ancient philosophy (Plato, Aristotle, the Stoics). It was taken up by Christian philosophers who maintained, referring to St. Paul (Romans 2:14–15), that natural law was written in the hearts of those who did not have the benefit of revelation. Thomas Aquinas provided the most complete and highly influential account of classical (as opposed to modern) natural law theory (*Summa theologiae* II. 1, qq. 90–108). Distinguishing four types of law (eternal, natural, human, and divine), he described the law of nature as participation of the rational creature in eternal law, the latter representing the intrinsic order of things as it is known and intended by God (Haakonssen and Seidler 2015, 381–382). The Spanish late Scholastics still operated within the same framework (Schröder 2008, 60–61). Early modern Protestant thinkers were aware of earlier natural law theories and frequently referred to the classical sources, mainly to Cicero and the Stoics, but in their view, natural law acquired a new role with the religious crisis of the sixteenth and seventeenth century and the emergence of modern statehood. Reflecting on a common moral foundation of the social world, they turned away from confessional divide and separated natural law from moral theology (or revealed religion), claiming that the former could be accessed by reason alone with reference to the nature of man. Despite Hugo Grotius' controversial statement that natural law would have a degree of validity even if God did not exist (*De iure belli ac pacis*, 1625, Prolegomena, §11), this move was, however, not tantamount to secularization, for Grotius and many of his followers held natural law to be founded in natural religion and thus relied on God's reason or will for establishing the authority of natural law. From the seventeenth century onwards, Grotius, Thomas Hobbes, and Samuel Pufendorf were considered as founding fathers of a new tradition of natural law, Pufendorf being often commended as mediator of Grotius's and Hobbes's concepts of sociability, and as pioneering the first methodological account of natural law.

Intellectual Divides

Despite the numerous references to common ancestry, it would be wrong to consider Protestant natural law as a clearly defined doctrine. It has variously been described as a "loosely structured genre" (Haakonssen 2006, 258), or as a "framework" characterized by a "diversity of intellectual content and practical function" (Haakonssen and Seidler 2015, 383). The opposition between voluntarism and rationalism, or realism, concerned

the philosophical foundation of natural law. The main representatives of the voluntarist tradition were Hobbes, Pufendorf, and his German disciple Christian Thomasius. They maintained that human reason does not have access to the divine mind and the order of the world intended by God, except through experience. In their view, the natural world had to be distinguished from the realm of culture and morality, the latter being superimposed upon nature by divine or human willing (Haakonssen 2004, 95–96). Beginning with an empirical account of human nature (represented in the fictitious state of nature), they inquired which basic rules humans needed to respect in order to preserve themselves. Pufendorf established the rule "be social" as principle from where he derived general natural laws imposing duties on man against others. He also dealt with the individual rights corresponding to these duties, which were further divided into perfect duties of justice, and imperfect duties of beneficence, or humanity. In response to his orthodox Lutheran critics, Pufendorf distanced himself from Hobbes's Epicureanism and attempted to align himself with the Stoics (Palladini 2008). This led him to include in his theory the duties of man against God and against himself. Unlike Hobbes, who deployed a more radical conventionalist theory, Pufendorf assumed that natural laws were imposed on man by God's will, and he therefore acknowledged the obligatory force of these laws already in the state of nature. After dealing with the duties and rights of man in the state of nature, he proceeded to consider the duties (or offices) incumbent on men in virtue of the various roles they adopted in their lives, first as members of the family (husband and wife, parents and children, master and slave), then as members of the civil society, or state, i.e., as citizens. These latter duties originated in contractual agreements and were thus imposed by human will.

Pufendorf's account of the laws of nature was fiercely attacked by Gottfried Wilhelm Leibniz, who, together with Christian Wolff, represents the rationalist strand of Protestant natural law. Leibniz contested Pufendorf's recourse to God's will, arguing that the obligatory force of natural law rests on the nature of things and on human reason (Zurbuchen 2004; Hochstrasser 2000, 72–110). Drawing either on Platonist or on Thomist sources, rationalists developed a metaphysical account of natural law, based on the idea that moral values are part of the order inherent in reality, which is accessible by reason. Wolff and his disciples founded the principle of natural law on the desire of happiness, which drives human individuals to seek their own preservation and happiness, the latter being conceived as *telos* inherent in human nature. Yet other varieties of this rationalist or realist tradition were deployed in England (by the Cambridge Platonists) and in Scotland, where philosophers ranging from Francis Hutcheson to Thomas Reid and Dugald Stewart attempted to make realism in morals compatible with new theories of moral sentiments (Haakonssen 2004, 94–95, 1996).

Yet another opposition within Protestant natural law concerns the way in which various thinkers accounted for natural rights. Some of them posited, in the manner of Grotius, individual natural rights – understood as moral powers to claim something as one's own – and considered natural law as resource for adjusting conflicting rights claims, and for specifying which of these rights were essential for social life or rather depended on convenience and choice (Haakonssen and Seidler 2015, 384–385). In contradistinction, Pufendorf and his followers first established the duties imposed on men by natural law against each other and considered natural rights as claims corresponding to these duties. The different manners of accounting for natural rights had, however, no direct influence on the political philosophies developed within the framework of natural law. Hence, as Jean-Jacques Rousseau observed in the *Social Contract* (I, 4), Grotius's conception of rights proved to be compatible with the justification of slavery and of arbitrary government, while John Locke, who held natural rights to be derivative from duties, contested the legitimacy of perpetual slavery (as opposed to servitude) and considered the right to life, liberty, and estate as inalienable natural right.

Natural Law as an Academic Discipline

Although modern natural law did not consist of a coherent body of doctrine, it became a well-defined field of study, since it was introduced as a subject in most universities, either in the philosophy or in the law faculties, and in other educational institutions in Protestant Europe. Pufendorf was appointed – as he claimed – to the very first chair of the law of nature and nations in 1661 at the University of Heidelberg (actually a professorship in philology and the law of nations). With some delay, natural law also had considerable impact in Catholic Europe. As an academic discipline, natural law gained visibility thanks to "the production of textbooks, often based on lectures, compendia, commentaries on and translations of the major works (especially those of Grotius and Pufendorf), bibliographies, dissertations, etc." (Haakonssen 2006, 258). Natural law also became the subject of historiography, a literary genre often used for justifying one's own controversial standpoint or as introduction to natural law courses (Hochstrasser 2000). The most influential works were Hugo Grotius' *De iure belli ac pacis* (1625), which remained the classical reference for the law of nations during the Enlightenment, and Samuel Pufendorf's *De iure naturae et gentium* (1672), and the manual *De officio hominis et civis* (1673). The latter was mainly used for teaching purposes.

In Germany, Christian Thomasius defended, using eclecticism as a method, the main principles of Pufendorf's natural law theory against his orthodox Lutheran detractors and further developed the new science in his *Institutiones iurisprudentiae divinae* (1688) and, with important modifications marked by a turn to the passions and sentiment, in his *Fundamenta iuris naturae et gentium* (1705) (Hunter 2001, 234–254). He participated in the foundation of the University of Halle, where he became a leading professor and the founder of a school of jurisprudence whose members taught at various German universities. In Halle and elsewhere, Thomasius and his scholars were eclipsed by Christian Wolff, who dealt with the law of nature and nations as part of the comprehensive philosophical system he developed according to the mathematical method. He published on all philosophical disciplines in Latin and in German. In line with this publishing strategy, he edited the *Institutiones iuris naturae et gentium* (1750), an abridged version of his earlier treatises on the law of nature (*Ius naturae methodo scientifica pertractatum*, 8 vols., 1740–1748) and on the law of nations (*Ius gentium method scientifica pertractatum*, 1749), also in the German translation he had commissioned (1754). Wolff and his numerous disciples were a major influence in the German Universities until Kant, whose new foundation of morality and law (*Groundwork of the Metaphysics of Morals*, 1785; *Metaphysics of Morals*, 1797) gave rise to a new string of natural law writings and of more independent works within the genre (Haakonssen and Seidler 2015, 396–397).

Wolff's law of nations got to prominence via Emer de Vattel's treatise *Le droit des gens* (1758), which became especially influential in the United States. Vattel renounced the mathematical method and developed the subject in a more elegant way than Wolff, taking examples from modern history for illustrating the doctrine. Like Grotius and Wolff and in contradistinction to Pufendorf and his followers, Vattel distinguished the (voluntary) law of nations from the law of nature and treated the former as distinct science. Since he rejected Wolff's proposal to found the law of nations on the idea of a great republic (*civitas maxima*) and emphasized the sovereignty and independence of nations, the *Droit des gens* has variously been considered as a transformation of the universal law of nations into the public law of Europe (*ius publicum Europaeum*) or as inaugurating positivism. Vattel's concept of the law of nations remained, however, firmly anchored in modern natural law. Kant famously criticized this account of the law of nations in his essay *Perpetual peace*, where he suggested that Grotius, Pufendorf, and Vattel were "miserable comforters," whose codes could not have the force of law since states were not under common external authority (Zurbuchen 2017; Neff 2014, 194–198).

Vattel was a representative of the Swiss-Romande "school" of natural law (*école romande du droit naturel*), which originated in Jean

Barbeyrac's natural law teaching at the Protestant Academy of Lausanne (1711–1717). Barbeyrac was a leading member of the Huguenot refugee community, whose extensively annotated French translations of Pufendorf's works (*Le droit de la nature et des gens,* 1706; *Les devoirs de l'homme et du citoyen*, 1707) were widely circulated and translated into several other languages. He also translated the writings of Grotius and Richard Cumberland, and he inspired a number of natural law thinkers in Holland and in Switzerland, notably Jean-Jacques Burlamaqui of Geneva, whose courses on natural and politic law (*Principes du droit naturel*, 1747; *Principes du droit politique*, 1751) constituted, together with Barbeyrac's translations of Pufendorf, a source of inspiration and an object of polemics for Jean-Jacques Rousseau (Derathé 1970; Silvestrini 2010). Barbeyrac considered the Protestant natural law tradition as an antidote against skepticism in morals and politics. One of his major concerns was to challenge the French king's politics of religious unification and to develop an argument, based on natural law, for defending the free use of conscience, toleration, and a right to resistance. Based on Locke's *Second treatise of government*, he defended the right to free conscience as an inalienable right. On the other hand, he relied on God's presence for guiding man's moral judgment and imposing on him the obligation to act morally (Hochstrasser 1993). He also supported Locke's theory of property against Pufendorf (Fitzmaurice 2014, 126–134).

Barbeyrac's natural law theory was a major influence in Scotland. Gershom Carmichael, the first professor of moral philosophy at Glasgow, introduced the natural law theories of Grotius, Pufendorf and Locke to the Scottish universities. He taught moral philosophy on the basis of Pufendorf's manual and published his *Supplements and Observations* on this work (2nd ed., 1724). Inspired by Reformed or Presbyterian theology, Carmichael considered reverence for God as the first, self-respect and respect for others as the second and third laws of nature. In his view, the main task of moral philosophy was to specify the natural rights individuals ought to enjoy and to indicate how they applied in various conditions of life. He argued against Pufendorf that these rights limited the exercise of power in the family as well as in the state. Carmichael was succeeded as professor of moral philosophy by Francis Hutcheson, who aimed at reconciling the former's theory of natural rights with a theory of virtue and moral sense. He deployed this difficult synthesis in several of his writings, for instance, in his pedagogical system *Philosophiae moralis institutio compendiaria* (1742) and in the posthumously published *A System of Moral Philosophy* (1755). This attempt led him to reconceptualize the distinction between perfect and imperfect rights he found in the natural law theories of his predecessors, who had established a clear distinction between the perfect duties of justice, and the imperfect duties of beneficence, or humanity (Moore 2006, 297–299).

The natural rights theories of Carmichael and Hutcheson had a major impact on Scottish moral philosophy in the Enlightenment. While David Hume criticized the idea of natural justice and argued that the rules of justice as well as the obligations and rights that follow from these rules are artificial in origin, Adam Smith developed the lectures on jurisprudence, which he delivered in 1762–1764 at the University of Glasgow, in the framework of the earlier theories. Unlike his predecessors, he accounted for a wide range of natural rights such as the rights to life, body, reputation, and property, as self-evident rights, which could be explained without having recourse to the law of nature. This major change is most likely due to the new account of justice and the resentment occasioned by injustice Smith had developed in the *Theory of moral sentiments* (1759). In the lectures, he combined his reflections on the sense of injustice with the speculations about the four stages or conditions of society, which Dugald Stewart, professor of moral philosophy at Edinburgh (1785–1810) termed "theoretical or conjectural history." Stewart's teaching and writings marked the end of the Scottish natural law tradition. For a number of reasons, not least the use that was made of Locke's natural rights theory by adherents of the French Revolution in America, France, and England, Stewart thought that natural law should no longer be taught to students of moral and political philosophy (Moore 2006, 314–315).

Conclusion

Protestant natural law was the dominant form of moral and political philosophy in the Enlightenment. In the post-Reformation world, which was marked by political-theological struggles, natural law lost its former intellectual unity. It rather served as a general framework compatible with various philosophies and serving different political ends, according to the manifold contexts in which it was deployed. As an academic discipline, which was taught at most of the Protestant as well as a number of Catholic universities and other educational institutions, natural law profoundly shaped reflection on the process of political modernization in Europe. Its most important legacy can be seen in theories of the rights of man, which emerged at the time of the American and French Revolutions. While natural rights figured prominently in the first declarations of the rights of man, they were increasingly detached from the natural law background and adopted a new role in the context of revolutionary politics. The question how contemporary human rights theories and human rights law are connected to the tradition of modern natural law remains a contested issue.

Cross-References

- ▶ Aquinas, Thomas: On Natural Law
- ▶ Natural Law: Contemporary
- ▶ Positive Law and Natural Law

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Natural Law: Sheffield School

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Introduction

"The Sheffield Natural Law School" (SNLS) designates the work of a group of scholars influenced by Beyleveld and Brownsword (1986), who use the moral theory of Gewirth (1978), according to which the Principle of Generic Consistency

(PGC) (see below) is the categorical imperative, to conceptualize legal validity and to evaluate the normative status of practical precepts and social institutions. The SNLS has paid particular attention to issues of bioethics and the regulation of technology (especially biotechnology) (e.g., Beyleveld and Brownsword 2001; Pattinson 2002; Bielby 2008; Brownsword 2008). Capps and Pattinson (2016) provides samples and an overview of work of the SNLS. The main protagonists have left the University of Sheffield.

The SNLS is built upon Gewirth's justification of morality (defined as a system of impartial normative rules governed by a categorical imperative). Gewirth contends that the PGC is categorically binding because it is dialectically necessary, i.e., because agents (those able and disposed to adopt and act in accord with practical precepts about the permissibility of their chosen purposes) implicitly deny that they are agents if they deny that their actions unconditionally ought to be guided only by practical precepts (rules, norms, or principles) consistent with the PGC. According to Beyleveld and Brownsword (2001) and Beyleveld (2016), because of its justification, the SNLS is a secular theory of natural law in requiring radical agnosticism (non-theism as well as non-atheism).

Like normative legal positivists, the SNLS holds that legal validity must be analyzed in terms of obligation but maintains that normative permissibility (validity, legitimacy) requires moral permissibility. Defining positive laws as rules validated by the constitutional rule (rule of recognition) of a by and large effective system of practical rules within a territory cannot render them normatively valid (rules that may or ought to be applied) if this constitutional rule is contrary to the PGC and so categorically ought not to be applied. They can only be normatively valid if validated by the PGC.

This has conceptual implications (Beyleveld and Brownsword 1986; Olsen and Toddington 2000; and, with special reference to the domain of international law, Capps 2009). Legal positivism rests on supposing that no categorical imperative exists, that there is no imperative that reason unconditionally requires agents to adopt, so that obligations and rights can only exist relatively, in their validation by a designated rule of recognition. In the case of obligations and rights of positive law, this is whatever rule of recognition is applied by those who successfully impose and administer social rules in a territory (legal officials). Thus, holding rule L to be legally valid is not to prescribe that L ought to be obeyed, but to assert the fact that L ought to be obeyed *according to the rule of recognition of the officials*. On the other hand, for rule M to be a moral obligation is for M to be validated by a rule of recognition other than that adopted by the legal officials.

So conceived, it is unquestionable that immoral laws can exist. But, if the PGC is dialectically necessary, the SNLS maintains that it is not only unnecessary to resort to a descriptive concept of legal validity to render legal judgments objective, it is also incoherent. Any agent who considers a practical precept to be normatively valid *on the ground that* it is validated by a rule of recognition contrary to the PGC claims to be an agent (by adopting a practical precept) while implicitly renouncing being an agent. The agent is guilty of "false consciousness," using the agent's power of understanding in an abnegating way or (to borrow a phrase from Kant 2000, 175) thinking in a way that is not in accord with itself.

The argument for the dialectical necessity of the PGC, which must be understood to portray the tenets of the SNLS correctly, is outlined here in accord with refinements made by Beyleveld and Bos (2009) and Beyleveld (2013, 2015) to the analysis and defense of Beyleveld (1991). Dialectically contingent arguments for the PGC (which rely on premises not already shown to be categorically binding), including arguments from a presumption of categorically required impartiality, have also been offered (e.g., Beyleveld 1996), one of which – from the presumption of human rights per the United Nations Universal Declaration of Human Rights 1948 (Beyleveld 2011) – is also outlined. How to apply the PGC is explained, and comments are made on allegations that the dialectically necessary argument illicitly derives "ought" from "is," that the doctrines of the SNLS are ethnocentric, incompatible with pluralism, or treat human agents as purely rational machines

(ignoring that they are fallible emotional creatures constituted by their social relations with other human agents).

The PGC

The PGC requires agents to act in accord with the generic rights (GRs) of all agents affected by their actions. The GRs are rights to generic conditions of agency (GCAs), which are necessary means to the pursuit/achievement of an agent's chosen purposes in the sense that lacking a GCA has at least some negative effect on the agent's ability to act at all or to achieve the agent's purposes, *regardless of who the agent is or what the agent's purposes are.* GCAs are categorical instrumental needs for action. As such, they are universal, necessarily the same for all agents. The GRs are negative (rights to noninterference with possessing the GCAs) *and*, when an agent (call her "Agnes") cannot defend her possession of the GCAs, also positive (rights to assistance for her to secure the GCAs), *under the will-conception of rights* (meaning that Agnes may release another agent, e.g., Brian, from his duty to act out of respect for her need for the GCAs).

Gewirth (1978, 54–57) divides GCAs into basic GCAs (needed to act at all) and GCAs needed only for successful action. GCAs are substantive (needed for well-being) or procedural (needed for freedom of action), examples of which include life, mental (including emotional) equilibrium, freedom to move, and necessary means to these (basic), knowledge concerning means and obstacles to achieving one's purposes, and provision of means to acquire such knowledge (nonbasic). A detailed specification is unnecessary *in the argument for* the PGC but is needed to apply the PGC.

Justifying the PGC

The Dialectically Necessary Method

The foundational argument rests on the claim that the question as to what practical precepts they must or may be guided by can only arise for agents. Practical precepts are only imputable to agents because only agents are intelligible addressees or addressors of practical precepts.

Because it is incoherent to think that an agent may adopt a practical precept (P) if P is contrary to the agent's categorically binding commitments, if an agent's dialectically necessary commitments are categorically binding on that agent, then it is dialectically necessary to for that agent, e.g., Agnes, to accept the following: a criterion for *rationally permissible practical precepts*, "Agnes, *may* adopt P (take P as a reason for Agnes to act) only if it is not dialectically necessary for Agnes to reject P"; a criterion for *intelligible other-directed practical precepts*, "Agnes *may* hold that another agent, e.g., Brian, ought to adopt P only if Brian *can* adopt P *without violating his own dialectically necessary commitments*"; and a criterion for discerning *Agnes' dialectically necessary commitments* in the foundational argument (which is conducted from Agnes' internal viewpoint as an agent), "Agnes *must*, *and may only*, adopt propositions and practical precepts that are dialectically necessary for her to adopt or which follow purely logically/conceptually from such commitments".

Enoch (2006, 189) claims that dialectical necessity cannot by itself render practical precepts categorically binding. However, Enoch construes the claim that P is dialectically necessary as the claim that Agnes is only an agent if she adopts P. But dialectical necessity is a construction of agential self-understanding, not of agency, and Agnes does not cease to be an agent by implying that she is not an agent.

The Dialectically Necessary Argument

This has three stages (Beyleveld 1991).

According to stage one, it is dialectically necessary for Agnes to adopt: "Agnes categorically instrumentally ought to defend her possession of the GCAs" (≡ "Agnes unconditionally ought to defend her possession of the GCAs unless she is willing to accept generic damage to her ability to act") ≡ $\{AoGa^{A}\}_{A}$ (where "Ao" = "Agnes unconditionally ought to defend"; "Ga" = "Agnes" possession of the GCAs; "^{A}" designates that AoGa is qualified by "unless Agnes is willing

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to accept generic damage to her ability to act"; and placing $AoGa^A$ within face brackets followed by the subscript "$_A$" signifies that it is dialectically necessary for Agnes to adopt $AoGa^A$).

$\{AoGa^A\}_A$ rests only on

1. It is dialectically necessary for Agnes to adopt the principle of hypothetical imperatives (PHI): "If having X (or doing Y) is necessary for Agnes to achieve her chosen purpose E (or to act in accord with her chosen practical precept P), then Agnes unconditionally ought to act to secure X (or do Y), or abandon her pursuit of E (or her commitment to P)."
2. It is dialectically necessary for Agnes to recognize that there are GCAs (which is true if there are GCAs).

According to stage two, $\{AoGa^A\}_A$ entails.

3. It is dialectically necessary for Agnes to consider that she has the GRs $\equiv \{AGR\}_A$ ($\equiv$ It is dialectically necessary for Agnes to hold that Brian unconditionally ought (Bo) to act in accord with Agnes' categorical instrumental need for the GCAs $\equiv \{BoGa^A\}_A$).

Gewirth (1978, 78–82) maintains that this is because Agnes cannot comply with $AoGa^A$ if Brian prevents her having the GCAs, to which, e.g., Bond (1980, 49–50), objects that Agnes' generic needs do not *necessarily* give *Brian* any reason to act.

But this is irrelevant. The argument operates strictly within *Agnes'* dialectically necessary viewpoint, from which *Agnes* must impute $BoGa^A$ *when* Brian's adoption of $BoGa^A$ is necessary for Agnes to honor her dialectically necessary commitment to $AoGa^A$, *provided only* that it is intelligible for *her* to do (i.e., *provided only* that Brian *can* adopt $BoGa^A$ without acting contrary to his own dialectically necessary commitment to $BoGb^B$, which he can do because BoGb is a categorical *instrumental* "ought"). To insist on a stronger condition (specifically, $\{BoGa^A\}_B$) for $BoGa^A$ to be imputable *by Agnes* presupposes *by itself* the very impartiality that the argument ultimately purports to establish, which renders the objection self-defeating.

In any event, other arguments are available for stage two, one of which is the following.

Given $\{AoGa^A\}_A$, suppose that Agnes holds

4. Dialectically necessary commitments of agents are necessarily impartial (meaning that it is dialectically necessary for Agnes to accept that she unconditionally ought to act in accord with Brian's dialectically necessary commitments as well as her own (which is to say that it is dialectically necessary for Agnes to attach the same significance to Brian's dialectically necessary commitments as she must attach to her own *in judging the permissibility of her own actions*)).

Whether or not (4) is true, by presuming (4), Agnes must accept $\{AoGb^B\}_A$ ($\equiv \{BGR\}_A$). But conjoining (4) with $\{AoGa^A\}_A$ can require $\{BGR\}_A$ only if $\{AoGa^A\}_A \equiv \{AGR\}_A$ (see Beyleveld 2011, 7–8).

According to stage three, (3) ($= \{AGR\}_A$) entails

5. It is dialectically necessary for Agnes to consider that Brian also has the GRs ($\equiv \{AGR \& BGR\}_A$), which entails that (4) is true.

According to Gewirth's "Argument from the Sufficiency of Agency" (ASA) (Gewirth 1978, 110; Beyleveld 1991, Chap. 8), this is because (3) entails

6. {"Agnes is an agent" entails "AGR"}$_A$.

Gewirth reasons that for Agnes to deny "Agnes is an agent" entails 'AGR'" is for her to hold that to have GRs she must possesses some property D not necessarily possessed by agents. But she may not hold this because (3) unconditionally requires her to hold that she has the GRs. Therefore, she must deny that she must have D to have the GRs. Thus, (3) entails (6). Then, because

7. {"Agnes is an agent" entails "AGR"}$_A$ entails {"Brian is an agent" entails "BGR"}$_A$, (6) entails (5). Therefore, (3) entails (5).

This has been questioned by Chitty 2006 (to which Beyleveld and Bos 2009 responds).

In any event, it is uncontroversial that

8. $\{AoGa^A\}_A$ entails $\{BoGb^B\}_B$ ($\equiv \{AGR\}_A$ entails $\{BGR\}_B$), which entails $\{\{BoGb^B\}_B\}_A$ ($\equiv \{\{BGR\}_B\}_A$).

However, coupling this with Agnes' dialectically necessary criterion for intelligible other-directed practical precepting, entails

9. It is dialectically necessary for Agnes to accept that she may hold AGR ($\equiv$ BoGa^{A}) only if it is not dialectically necessary for Brian to reject BoGa^{A}.

But this means that it is dialectically necessary for Agnes to accept that she may hold AGR only if she does not thereby require Brian to act contrary to BoGb^{B} ($\equiv$ BGR). Therefore, $\{$AGR only if also BGR$\}_{A}$. Therefore, (3) entails (5).

Stage three is routinely rejected (e.g., Alexy 2006 in a special issue of *Ratio Juris* devoted to a debate between the SNLS and proponents of Alexy's version of legal idealism) on the grounds that Agnes is not categorically bound to hold BGR, since she must hold AGR only because she categorically instrumentally (i.e., prudentially) needs the GCAs for her purposes, on which basis she must hold BGR only when this serves her chosen purposes, which is not necessarily the case.

But this misrepresents the argument (Beyleveld and Bos 2009; Beyleveld 2015). A practical precept is not dialectically necessary for Agnes because she has a categorical instrumental reason to adopt it. Dialectical necessity is the reason why Agnes *must* reason practically in terms of her categorical instrumental needs: it is not offered as something that Agnes necessarily has an incentive to comply with, but as something she must care about in order to understand anything as an incentive *for her* to act. The categorical instrumentality of the GCAs only gives AGR a prudential content, and Agnes is not categorically bound to accept BGR because of AGR's prudential content, but because of what is entailed by AGR being dialectically necessary for her.

An Alternative Justification

Beyleveld (1996) provides dialectically contingent arguments, which do not try to show that the PGC is categorically binding, only that anyone who holds specific normative commitments must adopt the PGC. A significant argument for legal theory is that from *the mere presumption* of human rights as defined by the Universal Declaration of Human Rights 1948 given in Beyleveld (2011).

Article 1 of the Declaration states:

"All human beings are born free and equal in dignity and rights . . . and should act towards one another in a spirit of brotherhood," and Article 2 specifies, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind. . .." Taken together, these provide that human beings possess human rights simply because they are human, hence equally and inalienably, and that human *agents* unconditionally ought to act in accord with these rights. So, human rights are moral rights understood as rights governed by a categorical impartial imperative.

If all human *beings* have human rights, then all human *agents* have human rights. Since it is insincere to grant Agnes a right, but not grant her a right to the necessary means to exercise it, Agnes must be granted human rights to possess the GCAs. Given $\{$AoGa$^{A}\}_{A}$, these must be under the will-conception.

Consequently, all legal systems that sincerely recognize human rights must adopt the PGC as the supreme principle of legal validity in relation to rights and duties of human *agents*, and (because all human beings have human rights equally) human rights of other human beings (see further below) must be consistent with the GRs of human agents.

This argument does not support the SNLS view that agents cannot coherently accept legal positivism's conception of legal validity. Nevertheless, *if a categorically binding commitment is a dialectically necessary one*, it does purport to show that anyone who holds that there are human rights cannot consistently claim to be a legal positivist, because to hold that there are human rights is, by implication, to hold that it dialectically necessary to accept the PGC. If so, arguments for the moral superiority of legal positivism are incoherent if they conceive of moral requirements as the requirements of a categorically binding principle.

Applying the PGC

Direct Application

The PGC permits Agnes to adopt *any* practical precepts, provided that these respect the GRs of all subjected to them. Although being deprived of any GCA has some generic negative effect on Agnes' ability to act, the degree (as measured by the level, immediacy, avoidability, probability, and reversibility) of the negative effect can vary. In case of conflict, a criterion of necessity (or needfulness) for agency applies (Gewirth 1978, 338–354), according to which protection of one of Agnes' GCAs overrides protection of one of Brian's if depriving Agnes of her GCA has a greater negative effect on her ability to act than depriving Brian of his GCA has on his ability to act, *unless Agnes freely waives this precedence.* Such conflicts are primarily to be adjudicated distributively.

Actions needed to protect or interfere with a GCA vary according to contingent factors, such as the biology of an agent, and available resources. For example, air of a certain composition is necessary for the life of human agents but might not be for agents with a different biology. Also, eating peanuts can kill a human agent allergic to them but is safe for other human agents and might even save their lives when no other food is available. However, such variability does not affect the universality of the PGC, which grants Agnes a right to the necessary means to her life, and Brian a right to the necessary means to his life, even if these means are different, because life is a generic need of *any* agent.

Indirect Application

Direct application of the PGC might not be straightforward because it requires empirical knowledge of the manner in which GCAs can be protected or interfered with and might also require intrinsically personal judgments because there is no clear PGC-grounded formula for deciding how to measure the degree of immediacy against the degree of avoidability. Consequently, reasonable agents can disagree about what direct application of the PGC permits or requires. In addition, disputes between agents can arise over rules that are neutral with respect to their intrinsic effect on the GCAs (e.g., whether to require driving on the left vs. the right-hand side of the road), but which cannot, without negatively affecting the GCAs of agents against their will, be left to agents' individual choices.

In such cases, the PGC requires regulation to be grounded in appropriate procedures (which depend on the reason why the criterion of needfulness for agency alone will not suffice).

Ideally, procedures will be freely consented to by all to be affected by the rules produced, which will not always be possible. Nevertheless, procedures are acceptable if all have the opportunity to consent to them, provided that no procedures or outcomes of procedures are allowed that are clearly incompatible with the direct application of the PGC. In effect, the PGC requires its indirect application to involve legislative, adjudicative, and administrative procedures that are products of majoritarian consent carried out revisably, transparently, and in good faith, conditioned and constrained by clear direct application of the PGC as the supreme constitutional principle (features and complexities of which are discussed in Beyleveld and Brownsword 2007, Chap. 10; Brownsword 2008; and Olsen and Toddington 2016). This means that Agnes' consent is not always necessary to justify actions of others that negatively affect her possession of the GCAs, nor is the consent of a majority necessarily sufficient to justify a rule affecting Agnes' GCAs (see Beyleveld and Brownsword 2007).

Application to Apparent Non-agents

The PGC only grants GRs to agents and protects non-agents only when necessary to protect the GRs of agents. However, this does not mean that it does not protect unborn humans, born humans who do not display the capacities of agency in full (or nonhuman creatures that do not display the capacities of agency in full) directly. It imposes duties on agents to respect any interests displayed by *apparent* non-agents to which *apparent* agents must be granted GRs *so far as it is intelligible for agents to do so* (Beyleveld and Pattinson 2000). The reference to "*apparent* non-agents and agents" reflects the fact that agency involves

self-consciousness and awareness, so entails that Agnes cannot know for certain that there are any agents other than herself. She can only know that Brian behaves like an agent, so appears to be one. But since he is an apparent agent, she *can* treat him as one, and this is enough for the PGC to *require* Agnes to treat him as an agent, whether or not he is, because if she fails to do so and he is an agent, she violates the PGC but does not violate the PGC if she treats him as an agent and he is not. On the other hand, because apparent non-agents cannot be treated as agents, they cannot be granted GRs. But they *could* still be agents. Hence, the PGC requires Agnes to guard against not protecting the GCAs of an agent who is an apparent non-agent *to the extent that she can* without disproportionately compromising her GRs and those of apparent agents. And she can do this to some extent when, *and only when*, apparent non-agents display interests (such as to life, health, freedom from pain) to which apparent agents must be granted GRs.

This is disputed by Holm and Coggon (2006) (to which Beyleveld and Pattinson 2010 responds).

On this basis, recognition of human rights requires human apparent non-agents to be granted human rights under the interest-conception of rights to interests that correspond to GCAs of human agents, and this reasoning enables the PGC to be regarded as the supreme principle of *human* rights not merely of *agent* rights (Beyleveld 2011, 9–13).

Conclusion

The tenets of the SNLS have met with widespread skepticism. A useful selection of objections is contained in Regis (1984) and Beyleveld (1991) that offers a comprehensive defense.

Unfortunately, criticism routinely misrepresents the PGC and its justification. Not only must dialectically necessary requirements not be confused with categorical instrumental ones, the following points should also be appreciated.

Enoch's 2006 critique of dialectical necessity (see above) implies that the justification of the PGC commits the "naturalistic fallacy." But the claim is not that Agnes *has* the GR because she is an agent, but that Agnes *ought to hold* "Agnes *has* the GR because she is an agent." Here, "ought" is not derived from an evaluatively neutral "is." That *Agnes ought to hold*, "Agnes has the GR because she is an agent," is *constituted* by the "fact" that it is *dialectically necessary for Agnes to adopt* a practical precept prescribing "Agnes has the GR because she is an agent" (Beyleveld 1991, 121–146; Toddington 2016). This implies that there are ways in which fact and value cannot be distinguished and that sciences of action cannot be value-free (Toddington 1993; Brown 2016).

According to, e.g., Pollis (1984), the PGC's justification and content reflect ethnocentric prejudices. But if the PGC is dialectically necessary, it cannot be ethnocentric as it then rests only on what is universally, because necessarily, shared by all intelligible addressors and addressees of practical precepts. Its adoption is imposed on Agnes (*whoever she is*) only by herself in being required for her to understand what it is for her and any other agent to be *an* agent.

Pollis (and others, like Alexy 2006) thinks that the price of this reply is that the PGC only binds an unreal abstraction. This is not the case. The PGC binds Agnes (see Beyleveld 2013) as the unique empirically and socially constituted and situated particular agent that she is because she cannot be this particular agent without having the universal capacities and needs that make her *an* agent in full recognition of the fact that *she* can only be *an* agent by being the particular agent that she is. The PGC is generated by a dialogue between Agnes' understanding these two aspects of *her* existence as an intelligible addressee and addressor of practical precepts.

So, while the foundational argument for the PGC is monological in being conducted *for Agnes* from within Agnes' internal viewpoint as an agent, it is dialogical in requiring consistency between her view of herself as the particular agent she is and her view of herself as *an* agent *(as which* she and Brian are the same).

It is also this dialogue that renders the PHI dialectically necessary, thereby making the GR rights under the will-conception, in consequence

of which the PGC permits pluralistic individual and societal choices on the sole condition that such choices do not disproportionately harm the GCAs of agents against their will.

This dialogue also means that Pollis is wrong to think that the justification of the PGC privileges Agnes' capacity for logical and instrumental reasoning over her emotional capacities. Being required by agential self-understanding and the logical and conceptual entailments of this, the PGC is derived from self-recognition and self-understanding of *everything* that make Agnes *an* agent. In essence, the PGC is required by a coherent cognitive synthesis of the requirements of what Kant (2000, 82–83; 173–175) designates as the faculties of cognition, feeling, and desire.

However, while the PGC and Kant's moral law arguably share their methodology of justification, they are different principles due to the role of the PHI in Gewirth's argument, which entails a philosophical anthropology that (unlike Kant's) does not rest on attribution of metaphysical free-will (Beyleveld 2016).

In short, the keystone of the SNLS, the dialectical necessity of the PGC, rests on the dialectical necessity of the PHI *(not on the PHI itself)*, the existence of GCAs, and the foundational argument's criterion for intelligible other-directed practical precepts. A genuine evaluation of the SNLS needs to address it on this basis and not on misrepresentations of its grounding.

Cross-References

- ▶ Bioethics: Experimental Approaches
- ▶ Normative Individualism
- ▶ Positive Law and Natural Law

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Natural Law: Thomas Aquinas' Perspective

► Aquinas, Thomas: On Natural Law

Natural Resources

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Introduction

In contrast to a broader category of nature which had been in the center of philosophical inquiry since the classical age, natural resources are to be understood as naturally occurring materials used for the satisfaction of various human needs. Water, air, soil, forests, flora and fauna, oil, gas, minerals, and gemstones count as examples. They also represent the variety of morally significant values resources provide to human life – securing survival, economic value, and environmental and symbolic values. Defined in relation to human use, natural resources have other important features – they are scarce, depletable, and unevenly distributed on earth. Turning original natural resources into valuable goods also requires human activity which gives rise to justifiable ownership claims and distributive entitlements. Due to all these features, natural resources are subject to various and often conflicting claims by groups or individuals – ownership rights, access and use claims, attempts at exclusive control, and distributive demands. Natural resources, in other words, raise fundamental questions of justice.

Natural Resources in an Ideal World

The fact that natural resources raise fundamental questions of justice went unnoticed by philosophy until recently. The terms of the debate were set by Charles Beitz who introduced the topic of natural resources into political theory and philosophy of justice. Beitz started with an observation that resources are distributed unevenly on earth and that political borders which determine the collective entitlements to resources are a result of contingent and sometimes unjust historical forces – war, conquest, colonization, etc. Moreover, due to their uneven occurrence, resources create undeserved advantage for societies. To correct these morally arbitrary positions of individuals and collectives vis-à-vis natural resources, redistribution of resources is required. Invoking Rawls's theory of justice, Beitz argued that in a hypothetical international social contract, the collectives would agree on a global resource redistribution principle which would give each society a fair chance to develop just political institutions and an economy capable of satisfying its members' basic needs (Beitz 1979).

A few conceptions of natural resource justice have been developed since Beitz's *global luck egalitarian* position. Hillel Steiner whose position has been labeled as *left libertarianism* started with the ultimate libertarian moral principle of self-ownership. Self-ownership implies not only a demand for a full control of one's person but also a right to appropriate external objects such as natural resources. Since self-ownership

belongs equally and universally to each person, each person has also an equal share entitlement to natural resources. Everyone everywhere has essentially a right to an equal share of the value of all land and natural resources on earth, and this moral right generates global distributive justice duties. To fulfill these duties, states are required to pay rates based on the value of natural resources they territorially occupy into a *Global Fund*. Each nation then has an equal per capita claim on this fund which is to be equally disbursed among its citizens (Steiner 2009, 2011).

Invoking early modern natural law thesis of the original common ownership of the earth, Mathias Risse proposed we see the earth and its natural resources which exist independently of human activities and thus prior to moral claims individuals or groups might have to them as belonging to humankind collectively. Common ownership of the earth is the form of ownership of resources which best reflects the moral significance of natural resources for human life. It requires that all co-owners have an equal moral status and hence an equal opportunity to use resources for the satisfaction of their basic needs. In practical terms, it implies that states have to protect the fundamental right of all co-owners to use collectively owned resources, for example, by allowing migrants to enter into countries which are underusing their territories. It also implies that burdens arising from the mitigation of the climate change have to be shared fairly (Risse 2012).

Cara Nine (2012) and Margaret Moore (2015) have both defended conceptions of collective rights to natural resources derived from normative theories of territorial rights. While Moore argued that territorial right holders are groups with distinct political identity and a history of political organization and social cooperation, Nine held that any collective with the capacity to be politically self-determining and to establish justice within a particular geographical space is the legitimate territorial right holder. Both thinkers suggested that territorial rights involve not only rights to establish political institutions but also rights over resources. For Moore, the main reason why self-determination implies control over resources is that the use of resources impinges on many different aspects of the collective life of the community. Self-determining collectives thus ought to have control rights over resources. Nine, on the other hand, proposed a natural law conception of justice emphasizing not merely peace, security, and the protection of property but also human well-being and material welfare and argued for ownership rights of resources by collectives with territorial rights. Both thinkers agreed that rights to resources are not in themselves up for a global redistribution. At the same time, they cannot justify an absolutely exclusive and unlimited use by those who hold them.

Differences notwithstanding, these conceptions are based on one or more of the following assumptions and views. The first reflects the dominant preoccupation of contemporary philosophy with developing and defending general and universal principles of morality or justice. To elaborate on such principles which are normatively superior and ontologically independent from any existing or otherwise historically contingent institutions or relations is unambiguously seen as an ultimate task of normative philosophical inquiry. Self-ownership, common ownership of the earth, and moral territorial rights are all examples of such universal moral principles. The second and correlative assumption is that existing social, political, and economic institutions and practices – for example, the existing system of sovereign territorial rights of states to their natural wealth and resources – are to be judged in light of these moral principles, not according to their own moral underpinnings. Finally, most conceptions consider natural resources to be a special category of beneficial goods and believe that mere having them contributes positively to the realization of justice. This narrow view of resources explains why most approaches to natural resource justice focus on the permissibility of global redistribution and distributive principles.

Resources as Sources of Benefits and Burdens

Some of the problematic premises upon which the most influential conceptions of natural resource

justice rest have already been subjected to a critical reflection. One such reflection concerns the very category of natural resources. In his book *Justice and Natural Resources* (2017), Chris Armstrong provided a much needed discussion about the very category of natural resources which refuses simplistic assumptions about their physical features and the role they play in the fulfillment of human needs.

Following Susan Buck and her work on global commons (1998), Armstrong suggests that natural resources deliver benefits in different ways. Some resource benefits are excludable, whereas others are non-excludable, meaning that it is impossible to prevent people from benefiting from a resource. Moreover, some resource benefits are subtractive but others are non-subtractive. Subtractiveness denotes the extent to which the use of a resource diminishes available benefits for others. Based on these dimensions, it is then possible to distinguish the following categories of goods: public goods (non-excludable and non-subtractive like air or sunshine), collective goods (non-excludable but subtractive like oceans), and private goods (excludable and subtractive). Theories of natural resource justice to date overwhelmingly focused on the challenges related to sharing natural resource benefits qua private goods and neglected other categories of resources (Armstrong 2017, 13).

Secondly, natural resources have to be differentiated in terms of distinct human needs. Water, air, and land represent a special category of natural resources which provide non-substitutable supports for human survival and the most basic human rights. Any account of natural resource justice ought to defend sufficient shares of these resources for everyone and address injustice of the exclusion or the lack of access to such resources (Armstrong 2017, 15). Resources which are not non-substitutable supports for survival have to be seen not only in terms of economic benefits but also possible burdens that may arise in the process of their exploitation. Oil or gemstones and the ways they fuel conflict and help to sustain authoritarianism and are appropriated by corrupt elites are a case in point. Obviously, these resources might be subject to different redistributive principles and other principles of justice.

The necessity to see natural resources both in terms of benefits and burdens is meant to overcome what Armstrong called a "natural resource exceptionalism" which assumes that natural resources are a special and unambiguously beneficial good which ought to be divided equally or according to other substantive principles of distributive justice among individuals or collectives. According to Armstrong, people have different capacities to convert resources into well-being. Natural resources are one important source of advantage among many which drives human access to well-being. The way we think about the distribution of natural resources must take this into consideration (Armstrong 2017, 64–68). The assumption about natural resources and their universal benefits is further questionable in light of the fact that for much of modern history, the use and the exploitation of natural resources have been fraught with violence, dispossession, inequality, and exclusion. Questions of legitimate origins of rights to resources and political legitimacy of decisions made about resources and their appropriation thus ought to have an important place in a conception of natural resource justice.

Despite contributing a great deal to the development of the debate about natural resources and justice, Armstrong pursues the same philosophical method of practice-independent moral theorizing which elaborates on moral rights individuals or collectives have as an implication of a general moral principle or a principle of justice and which are to be justified independently of existing institutions, relations, or legal structures. In Armstrong's case it is the moral principle of equal access to well-being. Similarly to the abovementioned approaches, he refuses to take the existing international legal system of sovereign rights of states to resources on their territories as a starting point of moral inquiry and subject it to a systematic reconstruction from the perspective of justice.

Sovereignty Over Natural Resources

The international law system of the "Permanent Sovereignty over Natural Resources" (PSONR)

which determines the distribution of rights to natural resources in our world gives states and their people a very broad range of rights to natural wealth and resources within the territorial boundaries. They include the right to determine property rights to resources, nationalize foreign property, sell resources as commodities, and also freely decide on the allocation of the revenues. Nature and its resources are essentially considered the sovereign's property, and the key feature of the practice is that states use this natural property of theirs with a considerable degree of discretion and for their exclusive benefit. For this reason, sovereignty over resources and its scope has been linked to many pressing issues – a highly unsustainable exploitation of nature, the use of resources to sustain authoritarian rule, the depletion of ecosystems trapped within sovereign territories (rainforests, biodiversity), climate change, or the continuous violation of indigenous rights.

One has to agree with the critics that the territorially exclusive and extensive scope of PSONR is indefensible and that it is at the heart of many urgent problems. The challenge, however, is not to dismiss sovereignty over natural resources as both morally unjustifiable and fundamentally ill-placed to respond to the demands of effectively managing the world's resources but to show how it ought to be changed or reformed in ways that enhance justice. Reconstructing moral underpinnings of international law, we might attempt to develop a conception of just uses of natural resources by states and propose institutional reforms facilitating its implementation.

Accountability Reforms

There are two proposals in current philosophy which adopt this methodological approach. Both start with a view that if we want to make natural resources benefit all, especially poor and marginalized who were for centuries excluded from access to most resource benefits, the priority should be to prevent illegitimate governments from selling their country's natural resources and use the revenues to sustain oppression and corrupt rule.

On Thomas Pogge's proposal, the developing countries should pass constitutional amendments stating that resources can only be sold by democratic governments, thus sending a clear message to the buyers to cease to trade with nondemocratic governments (Pogge 2002). Pogge also proposes to use resource benefits to eradicate global poverty. Countries making use of their natural resources ought to be required to share a small part of the value of any resources they decide to use or sell. The payment is called *Global Resources Dividend* (GRD). It is a dividend because it is based on the idea that the global poor own an inalienable stake in all limited natural resources. Proceeds from the GRD are to be used toward ensuring that all human beings are able to meet their own basic needs with dignity.

On Leif Wenar's version, the key to correcting the injustice of the abuse of natural resources for the perpetration of injustice is to recognize the principle of "popular resource sovereignty" which in his view lies at the very core of the international legal system of sovereign right to resources and follows from its historical co-originality with the right to self-determination and human rights. Self-determination and human rights give moral content to popular sovereignty over natural resources and its two key principles – the ownership and the authorization. Whereas the ownership means that all of territory's natural resources are the property originally vested in the people, the authorization then implies the right of the people to collectively authorize property laws and other decisions over resources. These norms determine the permissible scope of sovereign rights of states to manage natural resources within their territories. They require that citizens must have basic civil liberties and political rights. The absence of civil liberties and political rights means no authorization is given by the people, and hence resource sovereignty is exercised illegitimately by a state (Wenar 2016).

Based on commonly accepted global standards concerning the rule of law and human rights (e.g., Freedom House index), countries can be assessed in terms of the legitimacy of their governments and hence the legitimacy of the exercise of the resource rights. Toward resource-rich exporting countries which persistently violate human rights, clean trade policies ought to be adopted. An

exemplary *Clean Trade Act* Wenar proposes prohibits commercial trade with vendors in countries which do not meet the minimal accountability criteria and where citizens have no civil liberties and basic political rights, for example, by making it illegal to purchase resource from disqualified countries or by denying financial, commercial, and judicial facilities to vendors of a disqualified country's resources. Clean trade legislations can be complemented by anti-corruption and transparency measures, resource validation schemes, embargoes and sanctions, or revenue distribution schemes many of which are currently debated in international and domestic policy circles (Wenar 2016, 281–334).

Human Rights

While Wenar's specific proposals are yet to be adopted more extensively in practice, it could be argued that linking resource rights and human rights appears to be the most fruitful approach to natural resource justice provided feasible international reforms are the goal. Human rights-based conception of natural resource justice has several advantages over existing moral conceptions of natural resource justice discussed above. First, international human rights law is based on a robustly egalitarian and welfarist conception of human well-being which trumps the minimal well-being or basic needs approaches in being far more ambitious, concrete, and comprehensive. Second, the appeal to international law of human rights has a great practical advantage as it represents a politically negotiated conception of justice accepted by the majority of diverse actors and realizable and attainable by reformist means. Lastly, the international legal system human rights has developed into a set of global and regional institutions which are actively involved in rule making, monitoring, and enforcement of human rights norms and which influence the behavior of states (Buchanan 2014; Gümplová 2017).

Human rights are also uniquely positioned to thematize the issue of domestic distributive justice which has so far remained largely unaddressed despite representing another urgent problem of natural resource justice. Many states pursue large-scale extractive or development projects which often create environmental and social harms and involve unjust allocation of benefits and burdens to multiple constituencies within the state, especially historically marginalized groups such as indigenous people, rural poor, or subsistence farmers. Clearly, human rights lend themselves to identification of a set of duties both states and corporations have with regard to natural resource exploitation and benefits allocation. As Jérémie Gilbert shows in his very recent book *Natural Resources and Human Rights* (2018), human rights-based normative framework can be directly instrumental for reforms concerning the redistribution of land rights and creating community property systems (e.g., for fishing and forest management), the development aimed at fair and equitable intrastate and interstate benefit sharing, taxation schemes, foreign investment regulation, indigenous rights protection, biodiversity conservation, water rights, and climate justice.

Conclusion

The dominant philosophical conceptions of natural resource justice which focus on global redistribution of natural resources have not been particularly successful in addressing the most endemic conflicts over natural resources. These conflicts arise most often in intrastate contexts and concern abuses of resources by politically illegitimate or illegal powers (e.g., repressive governments or militias) and the failures of states to allocate both resource extraction benefits and burdens fairly among individuals and groups within their jurisdictions. This deficiency is due to three aspects of contemporary philosophical theorizing about natural resources: (1) the preference for practice-independent moral rights to natural resources, (2) the narrow view of natural resources and their multiple roles for humans, and (3) the skepticism about the system of sovereign territorial rights to natural resources.

A viable alternative to global distributive conceptions is an emerging rights-based approach which has recently started gaining traction in the debate about natural resources. This approach

does not begin with assumptions about one dominant substantive value of natural resources or the idea that resources are universally beneficial to all humans in one particular way and hence ought to be distributed according to an egalitarian or other principle of global distributive justice. Rights-based view links natural resources to several compelling and overlapping human interests – e.g., security, health, material welfare, freedom, participation, cultural identity, collective autonomy, and self-determination – which are articulated in domestic and international systems of human rights. Appealing to legally entrenched rights enables individuals and collectives to articulate their demands to natural resources in dynamically changing historical and socioeconomic contexts and offers a universal language to articulate and seek remedies for various kinds of harms arising in connection with natural resources – the exclusion; the lack of access, control, or participation in decision-making; dispossession; or violence.

Cross-References

► Human Rights and Justice
► Justice
► Sovereignty and Human Rights

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Naturalism in Jurisprudence

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Introduction

What is naturalism in jurisprudence? Perhaps the best way to describe it is to start with Brian Leiter's proposal and arguments for naturalized jurisprudence because he is an iconic figure who introduced "naturalism" into legal scholarship. However, we might still be tempted to go beyond his version of naturalized jurisprudence and further elaborate or expand it by exploring its potential variations in either the methodological or substantive dimension. Thus the following themes will be sketched in turn:

1. Leiter's naturalized jurisprudence, an exemplary application of philosophical naturalism into law and jurisprudence.
2. The program of so-called New Legal Realism, arguably an extension of Leiter's naturalized jurisprudence, which has explored various sophisticated qualitative or quantitative methodologies.
3. The alternative paths to naturalized jurisprudence, including the attempts to frame its substantive version about which Leiter has been skeptical.

Brian Leiter's Naturalized Jurisprudence: From Naturalism in Philosophy to Naturalism in Jurisprudence

Today, owing to the enormous success of science, naturalism is enjoying its heyday across almost all areas of philosophy. This situation, sometimes called the "naturalistic turn" in philosophy, is manifested by the rise of naturalism in the diverse areas of philosophy, including the philosophies of language, morality, knowledge, mind, action, values, and science. The central theme of naturalism involves a claim about the continuity between philosophy and science. The claim holds that successful empirical science can offer the best answers not only to what can and should be done by philosophy but also to what counts as a desirable methodology for philosophy. According to naturalism, therefore, we must "just look at science, what the best science tells [us], if [we] want to know the answers to those questions" (De Caro and Macarthur 2004; Kim 2016; Papineau 2015).

Law and jurisprudence are no exceptions to this sweeping trend. The idea of naturalism has developed into "naturalized jurisprudence," with the idea being applied comprehensively into law and jurisprudence. The most ardent and leading champion of naturalized jurisprudence in the Anglophone scholarship of legal philosophy is American legal philosopher Brian Leiter. Indeed, his project of naturalizing jurisprudence was prompted mostly as a solution to what he took to be the fundamental limitations of the Hartian analytic jurisprudence. The prominent methodology of the Hartian jurisprudence was "analytic" in that it aimed to analyze and elucidate, if not to define, the highly contested concepts of law by examining their usage in our ordinary language. In a series of writings since the 1990s, however, Leiter has pointed out the poverty of this methodology and instead defended a "naturalistic" (i.e., scientific, in a sense) account of law. On this account, the features of law that the analytic methodology uncovers ought to be replaced by the "contingent findings" that the current best empirical sciences have obtained (Kim 2016; Leiter 2007, 2017).

Leiter states that his naturalized jurisprudence has a threefold intellectual background: "philosophical naturalism," "philosophical pragmatism," and "American Legal Realism." First, Leiter's naturalized jurisprudence employs American analytic philosopher W. V. O. Quine's naturalism. Quinean naturalism recognized that "it is within science itself, and not in some prior philosophy, that reality is to be identified and described" (Quine 1981). Thus Leiter claims to embrace what current successful science tells us about law as a scientific and thereby "naturalistic" understanding of law. Second, Leiter's naturalized jurisprudence is based upon pragmatism in philosophy. According to philosophical pragmatism, the acceptability of a particular epistemic norm is a function of whether it is useful for humans, for example, for the prediction of future experience. Likewise, according to the pragmatism in jurisprudence, the acceptability of a theory of adjudication is a function of whether it is useful for lawyers in advising clients and predicting judicial decisions (Leiter 2007, 2017). Third, Leiter's naturalized jurisprudence tries to revive and develop American Legal Realism – perhaps the most influential movement in the legal scholarship of the United States in the early twentieth century. Its proponents made efforts to offer a descriptive and causal-explanatory account of adjudication, where they aimed to identify and describe rather than justify the patterns of the decisions made by the court (Kim 2016; Leiter 2007, 2017).

Against this diverse intellectual background, Leiter considers three particular, arguably fruitful candidates for his methodological program: social sciences of adjudication, experimental philosophy, and American Legal Realism. First of all, Leiter considers the social-scientific theories of adjudication such as Segal and Spaeth's Attitudinal Model, a typical behavioral model of judicial decision-making in political science. According to the Attitudinal Model, the association of "the facts of the case" with "the ideological attitudes and values of the justices" can best explain the judicial decision-making. Changing his initial affirmative position about the prospect for this model, however, Leiter later concluded that it turned out unsuccessful because it failed to predict

what decisions a court would make (Leiter 2007, 2009).

Second, Leiter highlights experimental philosophy as a more promising candidate for his naturalism than the social sciences of adjudication mentioned above. The core idea of experimental philosophy is that philosophical inquiry should draw upon the way ordinary people use and understand the concepts that the inquiry involves (Knobe and Nichols 2008). Thus the task for jurisprudence is not to carry out any a priori analysis or normative theorization of those concepts but to collect and generalize the data of how ordinary people think what they are. Putting his hope on this methodology, Leiter writes that "general jurisprudence awaits, and stands in need of, colonization by experimental philosophy" (Leiter 2007, 2009).

Third, albeit relatively modest, still the most promising among the empirical-methodological programs for Leiter is American Legal Realism's descriptive methodology. This program aims to offer "descriptive" accounts of adjudication through social sciences – to see "the law in action instead of law in books." Thus, according to Leiter, we must try to look to other factors than the legal rules and reasons in order to explain why courts decided as they did (Leiter 2007, 2009). We might call this program "Old Legal Realism" (Kim 2016).

Expansion of Naturalization: From Old Legal Realism to New Legal Realism

Indeed, it is mostly in its "methodological" dimension that Leiter has explored his project for naturalized jurisprudence. In doing so, he has restricted his concern to the three methodological programs stated above without comprehensively considering the possibilities for alternative ones. As an example of the alternative "scientific" methodologies, the so-called law and economics movement is worth noting. Based on the neoclassical microeconomic theory, this movement claims that economics provides a "scientific" framework to predict the effects of legal sanctions on the agents' behavior. According to this movement, agents are presumed to respond to sanctions in a legal system just as they respond to prices in a market. "Economics has mathematically precise theories (price theory and game theory) and empirically sound methods (statistics and econometrics) for analyzing the effects of the implicit prices that laws attach to behavior" (Cooter and Ulen 2011).

Note that neoclassical law and economics makes a theoretical assumption on the nature of human agents and their behavior, i.e., an assumption that individual agents behave as rational preference maximizers. Moreover, this approach deploys axiomatic reasoning and favors market mechanisms, while typically ignoring empirical findings of human psychology and behavior as well as social, historical, and institutional contexts of law (Nourse and Shaffer 2009).

As a reaction to these limitations, a new type of Legal Realism has emerged and mushroomed in the name of "New Legal Realism." New Legal Realism proclaims itself to be an inquiry "[s]eeking to develop a rigorous, genuinely interdisciplinary approach to the empirical study of law." (New Legal Realism Project 2018) So, as Nourse and Shaffer explain, New Legal Realism "takes from the spirit of the old-legal-realist movement, builds from new methods and insights that have since been developed, and applies these methods and insights to the historic context that confronts us" (Nourse and Shaffer 2009). In other words, New Legal Realism goes beyond the previous emphasis on courts, judges, and formal legal systems. It instead aims to build a social science research program on law in such a manner that combines the major methods of the current social sciences, including qualitative, quantitative, and experimental ones (Miles and Sunstein 2008).

New Legal Realism has advanced with different empirical tools and emphases. It involves three main approaches as its methodology: "behavioral," "contextual," and "institutional." First, behavioral approaches typically draw upon the Attitudinal Model, as taken seriously by Leiter above, and behavioral economics that challenges the rational-agent model as deployed in the law and economics movement. Second, contextual

approaches often involve the scholarly trend, "the Law and Society Movement" or "Law in Action." The approaches focus on studying behavior in its social context. In particular, they tend to put more emphasis on qualitative empirical methodologies of anthropology or sociology, including participatory observation, survey, interview, and critical reflection than on any quantitative or statistical ones. Third, institutional approaches, which are often depicted by the trend of "institutional turn," focus on the institutional forces on law and society. The approaches typically draw upon comparative or microanalysis of the structure and processes of institutions studied. For a survey of the further specific variations of the approaches, one can consult the relevant literature (Nourse and Shaffer 2009).

Notably, New Legal Realism has made the apparent advancements in terms of "quantitative" analysis, to which New Legal Realists themselves have often given much attention. These advancements involve a variety of quantitative methods, both traditional and newly developed: the conventional statistical methods such as statistical package Stata; other conventional developments in computing and data sharing; the traditional sources and methods for empirical studies such as libraries and books; and newly developed ones such as blogs and other commentaries. These days these unconventional new methods are gaining increasing interest among the New Legal Realists. Particularly remarkable are data mining, lie detector tests, and artificial intelligence (AI), to mention a few (Lindgren 2006). These tools of inquiry open new horizons for jurisprudence and make it more fertile than Leiter has explicitly defended (Kim 2016).

Also noteworthy is the variety of the topics of law and jurisprudence that New Legal Realism has attempted to address. They range over the traditional ones such as discrimination and minority issues in race, ethnicity and gender, legal profession and judicial decision-making, and other new ones. Among them, the central and most exciting is perhaps judicial decision-making. For example, some New Legal Realists focus on the personality of the judges and their judicial behavior, suggesting a so-called "standard" model of them. They also held that race, sex, and other personal or demographic characteristics sometimes have effects on judicial decisions. Why, then, are judicial judgments central to empirical or realist legal research? An answer to this question might be that they work as essential sources of both legal theories and practice, as well as of legal education at law schools (Miles and Sunstein 2008).

Alternative Paths to Naturalized Jurisprudence: Toward a Substantive Naturalism in Jurisprudence

Are there any alternative routes to naturalized jurisprudence other than the ones mentioned above? At this point, one might be tempted to adhere to the ideal of the "neutrality" and "objectivity" that are especially characteristic of scientific knowledge and methodologies. With such a temptation, one might pursue a particular "detached" and "value-free" account of law and legal practice. The basic assumption underlying this account then must be that all legal phenomena involve universal characteristics which are subject to the analysis of any legal system. On this account, "the main task of [legal philosophy] is to disclose and understand such characteristics, which are thought to be established independently of any moral or political values, [. . .] and of any other context-dependent features of legal systems. In this sense, the term 'legal science' has been used to describe a view of legal theory as separable from the facts of legal practice" (Coyle and Pavlakos 2005).

By the term "legal science," one might easily recall the eminent Austrian legal philosopher Hans Kelsen's account of law, namely, "pure theory of law." Unlike other traditional legal philosophers, Kelsen refused to reduce law to either political/moral ideologies or natural/social entities. Instead, he embraced law as a system of norms, where the norms are nonnatural entities that reside in a third realm of being (i.e., the world of "ought"). According to his account, "legal science" implies the construction of an axiomatic system of norms with neither political/

moral nor empirical basis. It addresses as its subject matter only positive laws as opposed to natural laws and refuses any political or moral evaluation of the positive laws. In a word, Kelsen's approach analogizes law to particular, mostly formal aspects of science but refuses the empiricist methods or physicalist ontology that are allegedly salient in the contemporary sciences (Kelsen 1960/1967; Coyle and Pavlakos 2005). Thus it differs vastly from Leiter's naturalized jurisprudence or New Legal Realism, as well as from Scandinavian Legal Realism, in that it is far from any empiricist approach to law. Despite such an attempt to establish a legal theory as a legal "science," therefore, Kelsen's approach hardly seems to wear any "naturalism" on its sleeve.

Is there, then, no way toward naturalized jurisprudence *tout court* that is distinct both from Leiter's way or New Legal Realism and from the Kelsenian one? Recall Leiter's project for naturalized jurisprudence. As noted above, Leiter orients it toward a "methodological" naturalism. Why merely methodological but not substantive? This orientation is due to the little promise he found for the "substantive" version of the project, in comparison with the "methodological" one. In part, one can explain the orientation by his acceptance of Hart's argument against Scandinavian Legal Realism. Indeed, Scandinavian Legal Realism was mostly a substantive version of legal realism. Alf Ross, among others, defended a reductionist program that seeks to eliminate legal or normative properties from the world of time and space by reducing them to the supposedly essential natural properties. However, Hart asserted that this program eventually failed because it mistakenly explained the concept of legal validity. It explained the concept in terms of "external" statements about the expectation of the judges' behavior, rather than in terms of any "internal" normative statements that they usually embrace. Leiter agreed on this line of evaluation made by Hart.

Regardless of whether this evaluation was correct or not, however, it might be too hasty to give up on our journey for substantive naturalism about law. One might go on to point out that Leiter makes an underlying, crucial but unjustified presupposition about the relationship between the methodological and substantive dimensions of a philosophical inquiry – the presupposition that naturalization in its methodological dimension is one thing and naturalization in its substantive dimension is another. How is it possible that one accepts specific scientific methodologies to be successful for explicating a subject matter (e.g., law *tout court* or the relevant legal experiences) unless one is committed to their "substantive" implications? It would be fair to say that naturalization in the two dimensions of law and jurisprudence cannot go independently from each other. That is, any philosophical impetus for the naturalization in one dimension will carry us to the naturalization in the other.

Indeed, Leiter's skepticism about substantive naturalism in jurisprudence does not come from his recognition of the limitations of Scandinavian Legal Realism alone. It also stems from his belief that in general we have yet no reliable scientific ontology of the legal or normative concepts – even in this era of high-end sciences and technologies (Leiter 2007, 2009, 2017). What does the current successful science tell us about the ontological status of the legal or normative entities? It might be the case that as Leiter maintains, we do not yet have any determinate or utterly reliable answer to this question. Thus according to a future successful scientific ontology, those entities might turn out to be unreal. Or more modestly, as seen from the doubt cast on Scandinavian Legal Realism, it might turn out that there are no corresponding physical entities from which those non-physical, normative ones can be reduced. If either is the case, substantive naturalism in jurisprudence might not be viable at all.

Still, the current indeterminacy of the ontology of the normative entities at issue does not entail that this pessimism is correct. Arguably, the ontology might suggest that such normative entities are nevertheless "real" in that they can be accounted for or interpreted in specific "empirical" terms. Indeed, such an ontology, if any, would be feasible only by virtue of across-the-board philosophical scrutiny. However, one might at least hold hope for substantive naturalism in jurisprudence as far as its antithesis has not yet proven to be true. One

might be tempted to think, for example, that there is a specific "natural" (mostly "evolutionary") basis for the nonnatural, normative entities (Kim 2016). Given this idea, one might propose that jurisprudence be naturalized in a "non-reductive and non-eliminative but still somehow substantive" manner. Specifically, the proposal might go as follows.

Consider the entities involved in the conceptual or categorical framework ("theory" in Quine's term) of law and jurisprudence. Law and jurisprudence typically involve the concepts and properties such as "norm," "right," "duty," "obligation," "binding force," and "legal validity." Law and jurisprudence also involve principles such as the ones of "universal human rights," "due process," "equal protection," and "good faith." In addition, one might hold that law and jurisprudence draw upon the facts that concern such concepts and principles. For example, "You have a duty to pay the bill." All these entities are "normative" ones. The thing is that these normative entities are likely to be explicated, understood, or interpreted in terms of the allegedly "natural (evolutionary, in particular)" ones, i.e., in terms of the concepts, properties, principles, or facts of "human nature." The relationship between these two distinct groups of entities might be "causal" or "nomological" in a sense. Otherwise, perhaps more plausibly, the relationship might be a "supervenience" as distinct from any logical or metaphysical derivation. Note that the relation of supervenience is neither reductive nor eliminative. Thus one might suggest that legal properties supervene upon nonlegal (natural or social) properties and that legal facts supervene upon nonlegal (natural or social) facts. For example, "legal validity" might somehow supervene upon the coercive (empirically so) power of the law to which everyone in the legal system at issue is subject. Of course, the concept of supervenience then would need further sophistication and clarification as such since it has often been portrayed in various metaphysical terms (McLaughlin and Bennett 2018). For the present purposes, however, it would suffice to say that the relationship counts as a substantive one that might be realized, identified, and accounted for by today's most reliable sciences of human nature (human behavior) such as cognitive neuroscience and evolutionary biology.

The idea of naturalizing jurisprudence this way is not new. Dan Priel has proposed similar ideas and arguments for it. He argued that either of the two major legal theories about the nature of law – natural law theory or legal positivism – can be restated in terms of naturalistic (mostly, evolutionary) ideas and stories of human nature. (So he dubs each of the theories as "naturalistic natural law theory" and "naturalistic legal positivism," respectively.) Although not referring to any specific term "substantive naturalism" or even "supervenience," this argument seems to succeed at least in offering a plausible theoretical framework for substantive naturalism in jurisprudence (Priel 2017).

In sum, the alternative paths to naturalism in jurisprudence sought above are worth attempting although they are subject to a close philosophical examination.

Conclusion

"Naturalism in jurisprudence" is likely to remind us of Brian Leiter's naturalized jurisprudence. In short, his naturalized jurisprudence is a project for a jurisprudence that purports to rely upon the epistemology and ontology of law informed by the current, most successful science. Indeed, Leiter's leading endeavors in this project have illuminated the role and significance of the scientific methodologies for analyzing and accounting for law and adjudication.

As seen above, however, there might remain room for seeking to naturalize jurisprudence more comprehensively than he has sought. At least two alternative paths might be worth exploring. On the one hand, one might try to employ the existing and emerging empirical methodologies of social sciences in association with the popular slogan of the so-called New Legal Realism. On the other hand, one might search for naturalization in some substantive dimension, say, by identifying the way the conceptual framework of the legal or normative entities is associated with that of the natural ones.

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Naudé, Gabriel

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Introduction

Born in 1600 in Paris, Gabriel Naudé showed a great interest in erudition very early on. He attended the famous University of Padua between 1626 and 1627, where he met several of his professors, including the famous Cesare Cremonini. Upon his return, he was better known as a pioneering librarian (*Avis pour construire une bibliothèque*, 1627). In Paris, he spent time with François de La Mothe Le Vayer, Pierre Gassendi, and Élie Diodati, a group that was later recognized by historiography as the "libertine" cenacle. He entered the service of the Cardinal of Bagni in 1630, becoming his secretary, and to whom he addressed the most famous and important of his works: the *Considérations politiques sur les coups d'État* (1632). Back in France, Naudé became Mazarin's librarian, for whom he created a vast library, which was broken up at the time of

the Fronde. He finally put his librarian skills to the service of Queen Christine of Sweden, dying on the way back to Abbeville in 1653.

Naudé shows great curiosity in a series of works that are among the most representative of the "scholarly libertine": pamphlets against the libertines (Marfore, 1620), against rose-crucians (1623), the *Apologie pour tous les grands personnages qui ont esté faussement soupçonnez de magie* (1625), iatrophilological questions, a book in defense of Mazarin (*Mascurat*, 1649), annotated bibliographies, scholarly controversial works on the Imitation of Christ, etc.

The Theory of the Coup d'État

Naudé never studied law in depth, but as a great reader and analyst of political works, he radicalized modern conceptions of sovereignty and reason (Bodin, Lipse, Charron. . .), in the sense of a theory of the state of emergency. Rather than focusing on the notion of "reason or maxims of State," Naudé prefers to examine what he calls the "coup d'état." This should be understood in accordance with seventeenth-century practice, as exceptional political actions that transgress laws and rules to ensure the salvation of the State. Following the logic of Naudé's vocabulary, this is the "bold and extraordinary actions that the Princes are forced to take in difficult and desperate cases, against common law, without even keeping any order or form of justice, risking the interest of the individual, for the good of the public" (*Considérations*, Chap. 2).

Based on this definition, Naudé is most often considered to be a theorist of absolutism, therefore distinguishing most clearly between a good use of the coup d'état, which is exercised by the legitimate prince or his ministers in the service of the public good, and a tyrannical misuse of coup, intended only to achieve the pursuit of personal interests. This distinction is indeed identifiable in Naudé, as it is in the work of his contemporaries. Yet, if one reads his work carefully, it can be perceived as being entirely perverted.

Compared to his predecessors (especially Lipsius and Charron, to whom he makes constant reference), Naudé distinguished three levels of policy, considered both as knowledge and practice. The first concentrates on "the general science of the establishment and conservation of States and empire," which "consists of certain rules approved and universally accepted by everyone." But these rules imply an instrumentalization of religion: thus, political actors have an interest in making people believe in the existence of a paradise and a hell, intended in fact to keep people obedient. The second level is "strictly what the French call *maximes de l'État*, and the Italians, *ragion di stato*," understood as "excess of common law because of the public good." The *maximes d'État* [. . .] cannot be legitimate by the law of nations, civil or natural, but only by the consideration of the good, and of the public utility, which quite often passes over those of the individual." Naudé lists some of his acts of reason or state maxims, such as aggression towards a peaceful country, the massacre of prisoners of war, or political incest. In this, Naudé already goes beyond his principal sources, Lipsius and Charron. But, above all, there is for him a third level in political action, that of the coup d'état. We have seen which definition Naudé proposed, but this is a definition that corresponds as well, he says, to the state maxims, except that in the maxims, justice and equity are published before action, whereas in the coups these must "remain hidden until the end." The main difference between coup and maxims therefore lies in the management of secrecy: ". . . "what is done by maxims, causes, reasons, manifestos, declarations, and all forms and ways of legitimizing an action, precede effects and operations, where on the contrary in coups d'état, one sees thunder falling rather than hears it growling in the clouds, ante *ferit quam flamma micet* [It strikes before bursting], the early mass is told before the bells chime, execution precedes sentence. . ." (ibid.). The "extraordinary prudence" of the coup d'état, in Naudé's sense, lies mainly in this ability to prepare and carry out "violent" actions, i.e., actions which, in the greatest secrecy, violate all forms of law: the law of nations, civil law, and natural law itself.

Tyrannical and Legitimate Coups d'État

For Naudé, the main "division" that must be established in coups d'état is therefore the one that separates "just and unjust state secrets" or "royal and tyrannical" ones. "But it can be shown, however, that political justification of the coup, even the most tyrannical – which, in any case, never takes place until after the fact – is always possible and, therefore, always suspect. But, above all, this "division" makes Naudé's definition of the "coup" problematic, if it is true that the coup d'état in the explicit definition aims at the common good and can therefore only be just. It actually seems that the coup d'état is for Naudé axiologically indeterminate and can be both "just" and "unjust," or rather, as he also says, that it tends towards "injustice," or in the end that it can very well be both. Whether it is just or unjust, it certainly calls for the same admirable caution, and that is where the scandal of Naudé's text seems to me to reside, much more so than in its alleged statism (e.g., the famous scandal of the justification of the Saint-Bartholemew massacre as a coup d'état).

Naudé is in fact trying to blur the distinction between a tyrannical and a legitimate coup d'état, and it is only at this price that his theory can be defended and can pretend to be subject to political advice. He blurs this distinction first on an ethical level through a rehabilitation or rather an authorization of fraud as a search for the biases most likely to "succeed in the business that man proposes to himself" (Chap. 2); and second, turning to the extraordinary caution of the coup d'état, his claim to want to start from "above," i.e., upstream of state government, with these two "pivots" of politics, which are "the monastic, or government of only one" and "the economy or administration of a family." It is a question of showing the presence of these two levels as closely linked to the third (politics, "government of peoples"), "of certain tricks, detours and stratagems, which many have used, and still use every day to overcome their claims" (ibid.). Naudé has in mind here the "coups d'état" themselves, so much so that he writes that these can be linked to "the three differences in life" that he has already indicated. And we see then that the extraordinary caution of the coup d'état is immediately engaged in this triple examination of the "monastic", the economic, and the political.

Naudé bases his theory of the coup d'état not on considerations of the state entity itself, but on the capacities of exceptional individuals to act. These actions take place within the framework and the carrying out of "coups d'état," in a sense that necessarily goes beyond Naudé's restrictive definition. The "strong spirit" that exercises extraordinary prudence in the coup d'état is certainly can also save the state in peril, introducing a radical break in the state of political affairs, whatever that may be.

Naudé and Machiavelli

In his analysis, then, Naudé starts from the individual actors and gives great importance to the monastic and to self-government. This, together with the economic (administration of the family), is certainly not, as it might seem, the domain of the private, distinct and separated from the public. Moreover, the claims that interest Naudé, among those which imply a resort to fraud in the context of the "monastic", are mainly political. With his *Discourses* and *The Prince*, Machiavelli is presented as the one who "took the first step; broke the ice, and desecrated, if it must be said by his writings, what the most judicious used as very hidden and powerful means to make their enterprises more successful." Machiavelli is therefore solicited not primarily as a theorist of reason of state (which in fact he is not), but as having written about the "monastic," namely, about the secret tricks and stratagems by which "the most judicious" make their political undertakings succeed. Indeed, Machiavelli is for Naudé, as for most of his contemporaries, the one who describes (if he does not promote them) the stratagems and tricks of private individuals who want to usurp power, and of tyrannical princes who want to keep it or increase it to satisfy their own ambitions and private interests. However, in fact, this type of act, which is totally reprehensible within the

framework of, let us say, orthodox and ideologically correct doctrines of the reason of state, falls within Naudé's general definition of prudence, which is quite consistent with the way Machiavelli himself talks about the "prudence" of the best (*virtuosi*) political actors.

Criticism and Reception

Naudé is best known as an "extremist" theorist of the state, a political reason capable of justifying the transgressions of all forms of law. However, some authors, such as Julien Freund, have rightly stressed the fact that the notion of a coup d'état is inseparable from a theory of the situation of exception in Naudé's case. This is not false, as long as we remember that Naudé first puts forward a theory of the exceptional nature of the political actor, capable of responding to an exceptional situation with the coup d'état, but capable first of all, also as a simple particular, of carrying out coups by which an exceptional situation is created and resolved in the affirmation or reassertion of a personal power transferred into State power.

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Necessary Features of Law

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Introduction

Theorizing about law covers a range of topics. Most law review articles, for example, are concerned with making an argument for what the law is on a certain difficult issue in which the relevant reasons fall fairly evenly on both sides of the issue; such articles strive for results that can be used by both lawyers and judges to guide their deliberations. Some law review articles are concerned with defending a claim about what the law should, for nonmoral practical or moral reasons, be on a particular issue. Others are concerned with justifying certain areas of law, with identifying the foundational principles that purport to determine the content of more specific norms, or, perhaps, with clarifying the meaning of certain terms.

Three Categories of Legal Theory

Despite this wide variety of interests on matters related to law, theorizing about law can usefully be divided into three rough categories. Empirical legal theory is usually concerned with identifying or explaining certain features or properties of some existing legal system or systems; such theory is, at least, descriptive in character and focuses on contingent properties (i.e. properties that something does, in fact, possess but might not have possessed) of the legal system under study. An empirical legal theorist, for example, might be concerned with explaining the content of legal

norms that purport to govern information privacy in the USA. Similarly, an empirical legal theorist might be concerned with explaining the function that some set of legal practices in Colombia purports to serve.

In contrast, normative legal theory is largely concerned with determining the properties that legal norms or institutions, as a matter of political morality, ought to have or, otherwise put, must have to be morally legitimate. A normative legal theorist, for example, might argue that law, as a matter of substantive moral theory, should protect information privacy in a number of specified ways or that only certain specified protections of information privacy are justifiably enforced by the police power of the state.

General, or conceptual, jurisprudence is concerned with giving what is called a "conceptual analysis" of core legal concepts; that is, conceptual jurisprudence is concerned with explicating the core concepts of our legal practices, including the interrelations among them. In particular, conceptual jurisprudence seeks to explicate the concepts of law, validity, and legal system and thereby seeks to clarify the logical relationships between these concepts and other concepts potentially related to them, such as the concepts of morality, authority, legal and social obligation, etc. A theory in conceptual jurisprudence will explicate the content of each concept and locate them among a general conceptual framework that guides both our linguistic practices regarding the relevant concept words and our legal practices themselves.

Conceptual Jurisprudence and Necessary Features of Law

Traditionally, it has been thought that conceptual jurisprudence is concerned with identifying the nature of the thing picked out by the relevant legal concept. The nature of say, an *X*, on the common view, is defined by those conditions that define necessary and sufficient criteria that something must satisfy in order to count as an *X*, according to the relevant theory. Each of these conditions picks out some necessary feature of *X* in the sense that something could not be an *X* if it lacks this feature.

Otherwise put in the language of possible worlds associated with modal operators like "necessarily" and "possibly," a feature *f* is a necessary feature of some kind of thing, *X*, picked out by a concept if and only if, for every conceptually possible world, and every *z* that is an *X* has *f* in that world. If this is the case, then something could not count as an *X* without exhibiting, instantiating, or possessing feature *f*.

An example will help to illustrate the point. Consider the concept of a law (i.e. a legal norm, as opposed to a legal system). An analysis of the concept of *a* law, then, would be concerned with explicating the nature of a law. On the standard account described above, explicating the nature of a law requires identifying (conceptually) necessary features a thing must have to count as law. For example, being a norm would be a conceptually necessary feature of a law in the following sense: nothing can be a law unless it is also a norm of some kind, whether it is a rule or a principle. Otherwise put, in every conceptually possible world, if *x* is a law, then it is either a rule or a principle. On this view, then, the descriptive preamble to a law might have some legal effect in some circumstances, but it would not count as law.

Accordingly, conceptual jurisprudence seeks to identify those properties that hold of every thing that counts as a law in every (conceptually) possible world with a legal system. These properties (or, at least, some proper subset that is considered paradigmatic to law) would provide necessary and sufficient conditions for something counting as a law in the sense that the following biconditional is true:

For all x, x is a law if and only if x satisfies properties $P1, P2, \ldots, Pn$.

Each of these properties would be, under this schema, a conceptually necessary condition for something to count as a law. Thus, each such property would be a necessary feature of law, while the instantiation of all of them would be sufficient for something to count as law.

At this point, it is worth noting that not every claim that is necessarily true is a conceptually necessary claim. For example, the claim expressed by the sentence "If *p*, then *p*" is true, for any sentence *p*, in every possible world, but it does not express a conceptual truth. The necessity of the claim expressed by "if *p*, then *p*" does not turn on just the content of the relevant concepts. It does not matter how *p* is interpreted or what concept words are used in the sentence; that sentence is true, come what may. What explains the necessary truth of the sentence is the behavior of "if-then" connective, which is defined by its truth conditions. Such a sentence is logically necessary without being conceptually necessary. In contrast, the truth of the proposition expressed by "every bachelor is unmarried" turns on the meanings of the concept terms beyond the semantics associated with the universal quantifier "every." While the distinction has yet to be fully and rigorously explained, it is reasonable to think that there is a difference between the two – and the relevant form of necessity, for our purposes, is conceptual.

It is sometimes thought that there is a third modality distinct from both conceptual and logical modalities, but this is controversial. Consider, for example, the claim that nothing can simultaneously be red all over and green all over. This appears to be true neither just in virtue of the behavior of the quantifier "nothing" nor just in virtue of the content of the concepts, as the truth of this seems to depend on metaphysical truths about the universe that go beyond the content of the concepts. Such truths are sometimes referred to as "metaphysically necessary." It remains controversial, however, as to whether metaphysical necessity can be distinguished from logical necessity.

Conceptual necessity should also be distinguished from nomological (or causal) necessity. A claim is nomologically necessary if and only if it is true in every logically possible world with the same laws of nature (e.g., laws of physics) as are true in this world (i.e. physical universe). The truth of the claim that being a norm is a necessary feature of a law does not depend on any physical laws that are true in this world; the truth of that claim depends entirely on the content of the relevant concepts, along with certain logical relationships that obtain among them.

Consider, for example, the claim that every bachelor is an unmarried male. The property of being a bachelor does not cause one to be unmarried; a causal explanation for why one is unmarried – or, more perspicuously, why one is a male – will involve reference to very different features that just the content of concepts. Nor does being an unmarried male cause one to be a bachelor. Being an unmarried male is what *constitutes* one as a bachelor, and this is in virtue of the content of the concepts. Conceptual necessity is distinct from nomological necessity.

Conceptual theories of law disagree with one another with respect to which properties count as conceptually necessary features of law – although such disagreements almost always involve the conceptual relationship between law and morality. For example, classical natural law theory disagrees with legal positivism on the issue of whether conformity with certain moral requirements is a necessary condition for something to count as law. According to classical natural law theories, conformity with the relevant moral standards is a conceptually necessary feature of a law (Finnis 2011). In contrast, positivists deny this claim, instead holding the Separability Thesis, according to which it is *not* a necessary truth that laws conform to any moral requirement (Hart 1994). For his part, Dworkin has claimed to accept the separation of law and morality but holds that the conceptual function of law is to provide a moral justification for the state's use of its police power (Dworkin 1986).

Skepticism About Necessary Features of Law

It is important to note that the traditional view of the task of conceptual jurisprudence is not universally accepted. Some theorists take a Wittgensteinian view, holding that there is no unique set of properties that define necessary and sufficient conditions for counting as law. On this view, whether something counts as law depends on whether it possesses a certain number of candidate properties that constitutes it as having a "family

resemblance" to other paradigmatic instances of law. On this view, many family resemblance properties that count toward qualifying something as law are not conceptually necessary features of law, insofar as something might qualify as law in virtue of having, say, any three of five features associated with counting as law. On such a view, law would count as a cluster concept.

How one identifies such features, assuming that there are such features, is somewhat controversial. Traditionally, it was thought that ordinary intuition was a reliable guide for identifying conceptually necessary features of law – although such intuitions have to be informed by certain observations of the social practices we associate with our pre-theoretic understanding of law. Some theorists have challenged the traditional methodology. Leiter (2007) argues that conceptual methodology is illegitimate insofar as (1) intuitions are culturally conditioned, rather than universal, and (2) conceptual methodology rests on a problematic distinction between analytic and synthetic sentences that falsely implies that conceptual claims are necessarily true. On such a view, then, there are no conceptually necessary features of law.

Conclusion

Conceptual jurisprudence purports to provide an analysis of the nature of law. Traditionally, this analysis is taken to require specification of a set of necessary and sufficient conditions that something must satisfy to count as an instance of law. These necessary conditions define necessary features of law in the sense that nothing can count as an instance of law if it lacks one of these necessary features. Thus, the necessary features of law are those features that law has in every conceptually possible world in which there is a system of law.

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Neoconstitutionalism

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Origin of the Term

The word "neoconstitutionalism" was used for the first time at the 18th IVR World Congress, which took place in La Plata and Buenos Aires (AR) in August 1997. It was coined to identify a legal-philosophical doctrine emerging from a set of theoretical positions defended by some representative legal scholars that were insisting on the need to change the traditional positivistic approach to the law. Such a perspective was gradually taking shape and spreading, but there was no unitary movement supporting it. Actually, the various theses were defended by legal scholars even though they had remarkably distant perspectives. However, through the unitary reconstruction of such different theses, an account of a new doctrine or a legal philosophical perspective that was explicitly opposed to legal positivism was given, but at the same time tried to depart from the more traditional natural law doctrine.

Main Theses

The neoconstitutional doctrine is characterized by three theses in particular, which are construed by opposing: (i) principles vs. rules, (ii) balancing vs. subsuming, and (iii) constitutionalization vs. political independence of the legislature.

(i) Principles and rules are distinguished by two main characteristics: the dimension of weight (or of importance), which characterizes principles, and the applicability according in an "all or nothing" fashion, which is appropriate for rules (but not for the principles). Such characteristics would entail diversity of interpretive methods.

There is currently a considerable amount of literature about these differences between rules and principles, but a sharp distinction is rarely defended. However, to distinguish: while rules regulate cases, principles are taken to be sources of rules. Instead of deducing individual prescriptions directly from principles, principles need to be concretized or, in other words, transformed into rules. Neoconstitutionalists call the intellectual process by which the principle obtains its applicable shape *balancing*.

(ii) Balancing and subsuming would be suitable, respectively, for principles and rules. In spite of some reconstructive differences between the various authors, the balancing method can be briefly summarized as follows, deferring for more details and clarifications to the specific matter being considered. Faced with a suitable judicial case, the interpreter: (a) first, identifies the principles applicable to that concrete case; in most cases, two (or more) conflicting principles are equally applicable. (b) Second, the principles so identified are weighed by the interpreter and ordered in an axiological hierarchical relationship: the principle with the greatest weight will prevail over the principle with the least weight, which will be shelved for the case at hand. (c) The relative weight of the two (or more) principles involved is not appreciated *in abstracto*, but with reference to the case submitted to the court. The hierarchy between the principles is conditioned and quite unstable, depending on the particular characteristics of each individual case.

As a consequence, the hierarchical relations may change in different institutional contexts. Therefore, the principle that prevails in case A may later succumb in the trial of another case B. When a constitutional court judges on the constitutionality of a given norm, its judgment holds for a class of cases. In contrast, when the judgment is directed at settling a concrete case, the solution will hold only for that case. However, the intellectual process is practically the same: judges establish a momentary evaluative hierarchy between the involved principles, which in the broader legal system are equal in rank. Moreover, that means that the validity of such a hierarchy is confined to the present case or class of cases with the same characteristics. However, in some circumstances the stated preference becomes a stable rule (for instance, this is the case for the set of criteria to decide which principle prevails when there is a conflict between freedom of speech and protection of privacy), though the hierarchy between the principles is conditioned and quite unstable, depending on the particular characteristics of each specific case.

(iii) Clearly this method emphasizes the role of the constitution within the legal order. Modern constitutional democracies recognize the supreme law (or constitution) as the core of the legal system and the activity of the legislature is subordinate to it, inasmuch as the law must not only be conformed to the constitution but, according to some legal scholars, should even be limited to the implementation or development of constitutional rules. The legislator ought to produce laws that realize the *soul* or the doctrine of the constitution conveyed by the extensive number of quite abstract legal principles. In a legal order with a constitution enriched by a number of principles and fundamental rights, the legislator is no longer free to legislate on the basis of mere political reasons: there is a higher source of valid legal norms that the legislator ought to obey. Plainly, as mentioned above, principles have to be concretized to be applied and to produce their transformation into rules it is essential to have a substantive theory or doctrine of the constitution; unfortunately, more than one reasonable doctrine is conceivable. The

choice among competing doctrines will depend on the interpreter.

A modern legal order, characterized and limited by a constitution and by the general subordination of political power to the law, seems not to be able to work properly without a judge of the laws (namely, by ordinary legislation): the superordination of the constitution needs to be constantly maintained by examining the legislator's activity. Therefore, once inserted in a legal order characterized by a constitution filled with and substantiated by many principles and fundamental rights, the decisions of the constitutional or supreme court become integral to the so-called *constitutionalization process*. This last phrase identifies the process of transformation of a legal order, after which the order is wholly "impregnated" or "permeated" by constitutional standards. A constitutionalized legal order is characterized by an extremely pervasive constitution, where the fundamental law has invaded all areas of the law, almost eliminating the free political choice of the legislature, because nearly every issue has become justiciable. This implies a widespread turn to judicial power by all social actors, resulting in greater "visibility" of the judiciary and gradually increasing its politicization at all levels.

Morals and Law

Neoconstitutionalism tries to mitigate the problems of definition of law that divided legal positivism and natural law theory. The question is: which kind of role, and to what effect, does morality have in the law? Since many (moral) principles are expressed in a constitution, do such moral principles play a role in identifying the law?

Neoconstitutionalism sees the constitution as a chart of the values of the community. In opposition to the separation thesis – justice and law are conceptually distinguishable – typically defended by legal positivists, neoconstitutionalists affirm different kinds of connections between law and justice.

Primarily, the connection between law and morality can be a contingent one. Many neoconstitutionalists insist on this first sort of connection, starting from the argument of the constitutionalization of moral principles, which would have incorporated moral values into the law and, due to their nature, they would need to be interpreted through a moral lens. Although that connection is said to be "contingent," it could drive the theory in two different directions: (a) moral values are objective and cognizable, somehow as natural law: morals are unchangeable and universal, and when the law conflicts with morality the law is wrong. In the second direction, conversely; (b) the content of moral values fits with social morality or, maybe, with a morals upon which the intelligentsia has agreed (something as a regulative ideal to work toward): moral prescriptions are changeable and historically determined. In both cases, however, the content of constitutional clauses will depend on the (moral) beliefs of interpreters.

A second kind of connection is that according to which the law would express an intrinsic and implicit claim *to correctness* or *to justice*. That does not necessarily mean that unjust law is not law; rather, it indicates that the label "law," assigned to a set of circumstances (a case, a norm), suggests the goodness or the justice of that legislation, at least *prima facie*: the label conveys an opacity of the reasons that justify the norm, that is to say it carries a positive presumption of its moral worth. Thirdly, another kind of connection between law and morals can be observed in the neoconstitutionalist discourse when it states that the unjust law should not be obeyed. Instead of adopting the traditional principle of the natural law theorists, *Lex iniusta non est lex* (*An unjust law is no law at all*), neoconstitutionalism suggests assuming a strong moral (or maybe political) attitude against the unjust provisions issued by the legislator.

The Wide Diffusion of the Term

The term "neoconstitutionalism" has obtained immediate success. Unfortunately, its adoption

by many legal scholars has meant an increase in its denotative capacity, but a decline in its connotative potentiality. It has started to be used to name different "things," becoming an umbrella word for many antipositivist attitudes. The first slip in the meaning has been in using it as a generic name for modern constitutionalism. This has caused confusion because it has equalted all sorts of constitutionalism with the neoconstitutionalistic kind, despite the previously identified peculiar characteristics of neoconstitutionalism. This shift has been immediately followed by another slightly different use: neoconstitutionalism has begun to be used to identify a kind of legal order (or its constitution) characterized by a large list of fundamental rights that pervade and model a whole system. In its proper use, neoconstitutionalism names a particular doctrine or a reflection on a type of constitutional legal order, it now names the legal order itself. The next step, echoing Norberto Bobbio's tripartition of the meaning of legal positivism, tries to clarify the confusion by distinguishing three ways in which the term "neoconstitutionalism" is or could be used: (i) to name a kind of legal order, (ii) to identify a sort of paradigm of the law, and (iii) to indicate an ideology about the law which determines how the infraconstitutional law should be because of the sort of constitution it is: the constitution has explicitly established the principles and values and fundamental rights, which are now internal to the law.

Latin American Diffusion

Although the diffusion of the constitutional model has been a good thing, including the global adoption of a large list of fundamental rights, it has been mostly in Latin America where there has been a considerable diffusion of the neoconstitutionalist doctrine. Among the various reasons for, and causes of, that success is the existence of an already strong constitutional tradition, demonstrated by the huge recognition of fundamental rights in the Latin constitutions. Neoconstitutionalist discourse has replaced the need for real implementation of the recognized rights and for their guarantee. In fact, while the rich constitutions of South American states declare a great deal of rights, such rights are rarely effectively guaranteed. Neoconstitutionalism has imbued legal orders with social and human values, offering a new theoretical and political platform from which the people may embark upon a deep social and democratic transformation. Attributing a stronger ability to the courts to address the power of the lawmaker – which, in the new legal constitutional order, is put under constitutional control – fostering greater political stability and pushing toward a more substantive democratic order.

Cross-References

- ▶ Constitutionalism
- ▶ Legal Positivism: Inclusive
- ▶ Natural Law: Protestant

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Neo-Kantianism

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Introduction

The term "neo-Kantianism" may be used in two different ways. First, it is to denote any philosophical theory which, in some fundamental aspect, follows in the footsteps of Kant's critique of reason either in fact or in intention. The theories of Peter F. Strawson or John Rawls can be regarded as being neo-Kantian in this sense. Second, it may be used in a narrower historical sense for a philosophical movement which dominated German universities between approximately 1870 and 1920. It will be used in the latter sense here.

Historical neo-Kantianism is not merely of interest for the historian of philosophy. In its time, neo-Kantianism permeated academic discourse so that scarcely any scholar remained unaffected by it, and it is of continuing influence in later philosophy. Husserl and Heidegger developed their theories partly in contrast to it. The cradle of modern analytic philosophy is neo-Kantianism; its progenitor, Gottlob Frege, arguably started as a neo-Kantian – and maybe remained one (see Sluga 1980). Logical positivism and the early Wittgenstein were influenced by it, and even the rule-following considerations of Wittgenstein's late theory can be regarded as a distant scion of neo-Kantianism.

In the first section of this article, the genesis of neo-Kantianism will be depicted. A description of the main schools of neo-Kantianism and their central tenets follows. The final section is devoted to a cursory overview of neo-Kantian traces that can be found in later philosophical and jurisprudential texts.

The Genesis of Neo-Kantianism

Immanuel Kant's philosophy was deemed, by his German-speaking contemporaries, to be a turning point in philosophy – his fellow philosopher Moses Mendelssohn called Kant the "all-demolishing" one (Mendelssohn 1929: 2). Seen in the more general context of Western philosophy, David Hume's skepticism, which aroused Kant from his "dogmatic slumber," is probably more entitled to be so called, but German academic philosophy at that time was dominated by rationalism. Christian Wolff, in particular, was regarded as a leading philosopher. His "dogmatic" kind of metaphysics was indeed "demolished" by Kant.

Kant tried to steer a middle way between rationalism and empiricism while avoiding skepticism. He starts from the premise that it is impossible to compare a cognition of an object with this object "in itself"; it is only possible to compare one cognition of an object with another cognition of this object. For Kant, it follows that cognition can only be the result of an interaction of two very different "faculties": Intuition yields sensory material which has not yet the quality of being an object; understanding yields the concepts which are necessary to synthesize this material into an object. While there are "metaphysical" concepts, synthetic concepts a priori, they make sense only as far as they are necessary conditions of the possibility of cognition of empirical objects at all, like the category of causality. Kant also acknowledges "pure" abstract concepts, namely, "transcendental ideas" like God, world, or soul, but they are allowed only for a regulative or heuristic use. There are no objects corresponding to

them. Metaphysics is more or less consumed by epistemology. Accordingly, "the proud name of an ontology . . . must give way to the modest one of a mere analytic of the pure understanding" (Kant 1998: 57–8 [A 247/B 303–4]). The core of Kant's theoretical philosophy is the thesis that subject and object, or the transcendental unity of perception – the "I" which is necessarily a possible counterpart of all perceptions – and the totality of our valid judgments about objects are in a delicate balance of equiprimordiality: Neither can be derived from anything else, and each conditions the other.

However, the philosophers of "German idealism" succeeding Kant and engaging with his critique of reason – Johann Gottlieb Fichte, Friedrich Wilhelm Joseph Schelling, and Georg Wilhelm Friedrich Hegel – soon destroyed this delicate relation of equiprimordiality. Fichte absolutized the "I" as the starting point of philosophy; Hegel hypostatized the "absolute spirit"; Schelling's theory oscillates between a "philosophy of nature" and a position which is similar to Fichte's. They employed, in complex structures, philosophical concepts which did not satisfy Kant's demand any longer that metaphysical concepts must either be necessary conditions of the possibility of experience or heuristic devices. Hegel in particular became infamous for constructing a philosophical system of abstract concepts without any relation to quotidian or scientific knowledge. His aloof way of theorizing was a trigger for Søren Kierkegaard's existentialism. With an obvious barb against Hegel, Kierkegaard polemicized in 1849:

> A thinker erects a huge building, a system, a system embracing the whole of existence, world history, etc., and if his personal life is considered, to our amazement the appalling and ludicrous discovery is made that he himself does not personally live in this huge, domed palace but in a shed alongside it, or in a doghouse, or at best in the janitor's quarters. (Kierkegaard 1980: 43–4)

But German idealism was obsolete even before his polemic. After the death of Hegel in 1831, there was no longer a philosophical "mainstream" in German-speaking countries. Academic philosophy was fragmented, and there seems to have been a general sense of philosophical disillusionment. The natural sciences made enormous progress and enlarged their range; materialism was a widespread view. Psychology was established as a science, with matters as objects of inquiry which before had been thought to belong to the sphere of philosophy. Philosophy seemed to have both disgraced itself and lost its specific area of operation.

Still, there were some philosophers at this time, who, although they did not succeed in founding a new school of thought, paved the way which philosophy might take. Of special importance are the theories of Friedrich Adolf Trendelenburg (1802–1872) and Hermann Lotze (1817–1881) (on both see Beiser 2013).

Trendelenburg, on the one hand, advised philosophy to enter into a symbiosis with the sciences:

> The sciences happily try their peculiar ways, but they partly do so without any closer account of their method, since they are directed to their object and not to their own procedure. Here, logic [i.e. epistemological philosophy] would have the task of observing and comparing, raising the unconscious to consciousness, and of comprehending the common origin of different matters. . . . Without careful consideration of the method of the particular sciences, it is bound to miss its mark, because then it has no distinct object on which to orientate its theories. (Trendelenburg 1840: IV, my translation)

In short: In order to preserve its autonomy, philosophy should redesign itself as a critical (meta-) theory of the successfully operating exact sciences.

Lotze, on the other hand, exploited the concept of "validity," understood as a normative concept, to demarcate a sphere which is not subject to natural laws. Although being among the founding fathers of scientific psychology, Lotze writes, in a passage which might well be seen as the nucleus of the anti-psychologist movement and of normativism (see section "Impact 1: General Philosophy"):

> What particular tone of mind is required for successful thinking, how the attention is to be kept up, distraction avoided, torpidity stimulated, precipitation checked, all these are questions which no more belong to the field of logic than do enquiries about the origin of our sense impressions and the

> conditions under which consciousness in general and conscious activity is possible. . . . [L]ogic only begins with the conviction that the matter cannot end here; the conviction that between the combination of ideas, however they may have originated, there is a difference between truth and untruth, and that there are forms to which these combinations *ought* to answer and laws which they *ought* to obey. It is true that we may attempt by a psychological investigation to explain the origin of this authoritative consciousness itself; but the only standard by which the correctness of our results could be measured would be one set up by the very consciousness to be investigated. The first thing, then, that has to be ascertained is, *what* the contents of this authoritative conviction are; the history of its growth can only have the second place, and even then must conform to requirements of its own imposing. (Lotze 1884: 7–8, emphasis in the original)

Again in short: Judgments and the logical relations between them are not simply subjected to natural laws; rather, they presuppose the difference between true and untrue which goes along with norms for thinking correctly. Therefore, any comprehensive psychologistic theory of cognition is self-refuting, because, as a theory, it relies on this difference between true and untrue which can only be explained in normative terms. Lotze dubs the special mode of being of values like truth and of true judgments "validity." Validity is an undefinable, fundamental normative concept which has to be distinguished from the existence of (natural) objects. Thus, Lotze came to be the "grandfather of the concept of normativity, which has become such a mantra in contemporary philosophy" (Beiser 2013: 127).

Lotze wrote the first edition of his *Logik*, and Trendelenburg his *Logische Untersuchungen*, in the 1840s. Some 20 years later, a general philosophical movement came into being which pointed to Kant in order to instigate a "reset" of philosophy and which would later be called "neo-Kantianism." Seminal texts were Otto Liebmann's *Kant und die Epigonen* (1865) and Friedrich Albert Lange's *Geschichte des Materialismus* (1866).

Neo-Kantianism gained its impetus from the same problems that Trendelenburg and Lotze dealt with: the downfall of speculative idealism and the success of the natural sciences which widened their scope ever more. A third, related motive, emphasized by Beiser (2014: 356–97), is the reaction to materialism which accompanied the scientific worldview. On the one hand, Lange approved of materialism, because of its anticlerical drive and its ethical agenda. On the other hand, he found its implicit metaphysics, naive realism, highly unconvincing, and he held that some undogmatic version of Kantianism might preserve the advantages of materialism while avoiding its flaws.

Cum *grano salis*, it can be said that mainstream neo-Kantianism embedded the insights of Trendelenburg and Lotze into an interpretation of Kant's philosophy: it amalgamated them and "passed the legacy on." The movement was in no way organized and had no fixed agenda. The lowest common denominator of neo-Kantianism is captured by two slogans: Liebmann's parole "Back to Kant!" and Windelband's dictum "To understand Kant, one has to go beyond him." Two main schools can be discerned: the Marburg school, with Hermann Cohen and Paul Natorp, and the Baden school, with Wilhelm Windelband, Heinrich Rickert, and Emil Lask as their main representatives. Both schools adhered to transcendental idealism, dissolving ontology into cognitive theory and taking the logical judgment to be the most basic unit for constituting a world of objects. Ethics played only a minor part for them.

The Marburg School

While a student, Hermann Cohen (1842–1918) heard Trendelenburg's lectures (on Trendelenburg's influence on Cohen see Köhnke 1991: 274). At the age of 29, he published a book on Kant's theory of experience; two more Kant books were to follow. They were foremost exegetical enterprises, but they contain the seeds to Cohen's own philosophy. He shares and radicalises the Kantian thesis that reference to objects is something that takes place inside cognition: "no object other than in and from thoughts" (Cohen 1968: 126). Starting as a psychologist in regard to cognitive theory, he developed into an anti-psychologist:

> If knowledge [*Erkenntnis*] is taken not as a form of consciousness, but as a factum which has constituted itself in science and continues to constitute

> itself on a given basis, then the object of our examination is not any subjective reality but a fact that, though still changing and increasing, is objectively given and grounded in principles, it is not our cognitive apparatus or the process of cognition, but science as its result. At this point an apparent question arises: Which are the presuppositions responsible for the certainty of the scientific fact? (Cohen 1968: 47–8; my translation)

And these presuppositions (which are not fixed but may change with scientific progress) are uncovered by the transcendental method, "whose principle and rule is the simple thought: Those elements of consciousness are elements of cognition which are sufficient and necessary to ground and consolidate the fact of science" (Cohen 1885: 77; my translation). Thus, Cohen combines Trendelenburg's approach with a special interpretation of the task of Kant's transcendental analysis. Metaphysics is reduced to a critical presuppositional analysis of the fact of science. But there are also central elements of Cohen's philosophy which cannot be traced back to the influence of Kant or Trendelenburg. First, Cohen wants to do away with the role of intuition in cognitive acts. For this end, he employs the mathematical infinitesimal principle that allows for transforming sensory material into something which can be measured and is, insofar as it can be measured, rational (Cohen 1968). That is a fanciful idea; even Cohen's supporters had difficulties in following him in this point. Second, Cohen dissolves the object of cognition into something dynamic while at the same time merging it with the cognitional judgment. Phrased in typical Cohen-style: "The unity of the judgment is the creation of the unity of the object in the unity of cognition" (Cohen 1922: 68; my translation). Third, he holds that all cognition must start from some source (*Ursprung*) which is posited by cognition itself. He calls this foundation a "hypothesis"; it plays the role of a Platonic idea (Cohen 1904: 92–3). It is not comparable to a scientific hypothesis; rather, it is an axiomatic judgment constituted by pure thought, merging thinking and being.

In later writings, Cohen extended the *factum* as starting point of the transcendental method to encompass further cultural practices, such as "art" – this signals an approximation to the position of the Baden school.

Paul Natorp (1854–1924) wrote his *Habilitation* under the supervision of Hermann Cohen. His philosophy is not as original as that of his teacher, but he expresses the theses of the Marburg school in a more lucid way. He stresses the procedural character of science, maintaining that scientific knowledge is less a *factum* than a *fieri* or process (Natorp 1910: 14). In the years after the death of Cohen, Natorp's philosophy took a more ontological turn, thus distancing itself somewhat from the main schools of neo-Kantianism.

Ernst Cassirer (1874–1945), finally, started as a Marburg neo-Kantian but later developed a distinct philosophy of culture and anthropology which still contained some neo-Kantian seeds, though.

Notably, both Cohen and Natorp were ethical socialists, and they wrote extensively on pedagogical (Natorp) and religious (Cohen) topics.

The Baden School

Wilhelm Windelband (1848–1915), the founder of the Baden school, wrote his thesis supervised by Lotze. The philosophical theory which he consequently developed is heavily indebted to that of his teacher.

Windelband shares the Kantian thesis that there is no access to a world that is independent of cognition. Accordingly, metaphysics must dissolve into theory of cognition. The object of cognition cannot be an unaccessible thing-in-itself but something that offers "resistance" to cognition – it must be an ought which is recognized in any cognitive act of judging and which is contained in the rules guiding cognition. For Windelband, Kant replaced the concept of an object by that of a rule (Windelband 1907: 157, 160). Such rules are not free-floating; rather, they are derived from basic values – in the case of theoretical philosophy, from the value of truth. The special mode of being of both of these rules or norms and of the values from which they emanate is "validity." One of the main problems of Windelband's philosophy is the question how

cognition might grasp these basic values: Not to be idle, they must on the one hand yield the rules which guide factual acts of cognition and thus be part of the cognitive sphere; on the other hand, they must transcend any factual acts of judgment in order to constitute a firm standard. Windelband considers several possibilities but never really solves this problem (cf. Heidemann 2022: 16). Accordingly, throughout his career, Windelband never got rid of an inclination toward relativism, and, in the end, he tended toward a combination of historicism and Hegelianism (see Beiser 2009: 17–18).

This value theory is at the core of Windelband's philosophy. There are, however, several other central aspects of his theory. First, like the Marburgians and Lotze, he was an anti-psychologist. Second, as a consequence of the anti-psychologist stance, he distinguishes a critical from a genetic method. This important distinction can be traced back to Kant's differentiation between *quaestiones facti* and *quaestiones iuris* (and to Lotze's position). The genetic method looks into the factual origins of basic normative axioms by employing the tools of empirical sciences. The critical method is the true philosophical method; it takes these axioms, "no matter how far they are factually recognized, to be norms which are valid under the presuppositions that thinking aims at being true, willing aims at being good, and feeling aims at appreciating beauty" (Windelband 1907: 328, my translation). Third, he distinguishes "nomothetic" disciplines, which explain facts according to general laws (the natural sciences), from "idiographic" disciplines, which interpret particular events in the light of certain values (the cultural sciences).

Heinrich Rickert (1863–1936) wrote his thesis under the supervision of Windelband, and his theory can be seen as a more or less systematic development of the rhapsodic thoughts of his teacher. He is important for stressing and elaborating the difference between natural sciences and cultural sciences. Besides, he points to the fundamental metaphysical role of the valid cognitive judgment, understood as a "transcendent" objective meaning-content, for constituting the world of objects: "[The objective judgment] lies 'above' and 'before' everything that is existing and cannot be captured by any ontology. This simply follows from the fact that any recognition 'that something exists', presupposes the meaning inherent to the sentence, that something exists" (Rickert 1921: 229, my translation). Another notable feature of his theory is the effort he makes to explain how the transcendent normative meaning-content may be grasped by a factually judging subject. He distinguishes a "transcendental-psychological way" of cognitive theory, starting from the concrete act of judging, from a "transcendental-logical" way, starting from the transcendent value or meaning-content (Rickert 1909). But he does not succeed in finding a point where these two ways might meet – where it might be possible, as it were, to leave the "fly-glass" of immanence in order to achieve subjectless objectivity, or transcendence. In his late phase, Rickert showed affinities to hermeneutics and *Lebensphilosophie* (see Kinzel 2020).

Emil Lask (1875–1915), a disciple of Rickert, is usually grouped with the Baden school, but that does hardly justice to his complex and independent theory. Lask had, from the beginning, a less judgment-oriented approach. He distinguished a "grammatical" predication, which is an achievement of the logical judgment, from a "meta-grammatical" predication, which takes place on a more fundamental level (even though it is still part of the cognitive sphere). Especially in his later writings, he leans toward a more ontological approach, and his theory has affinities with the philosophies of Husserl and Heidegger. Notably, he is the only one of the "big five" neo-Kantians who has written a slender "legal philosophy" (Lask 1923). It is a "critical theory of legal values," placed – in a manner which is typical for the Baden school – "between natural law theory and historicism" (Nachtsheim 2002).

While the Marburg school tended politically toward socialism, it is remarkable that the Baden school had a tendency toward right-wing politics. Rickert, in 1933, publicly sympathized with the takeover of the national socialists (Fulda 1999). Bruno Bauch, a lesser member of the school, was active in the *Deutschbund* – a nationalist, racist, and anti-Semitic organization – even since the 1920s (Köck 2015: 367).

Outliers: Hans Vaihinger and Leonard Nelson

Two neo-Kantian philosophers who cannot be attributed to the mainstream deserve to be mentioned. Hans Vaihinger (1852–1933) wrote his theory of fictions, *Die Philosophie des Als Ob* (Vaihinger 1922), over several decades. The book was a success. It is slightly quixotic, combining pragmatism, positivism, and idealism. Vaihinger tries to show that practically everything that is not pure sensation is a fiction. Leonard Nelson (1882–1927) is usually affiliated with the neo-Friesian school which strove for a psychologistic interpretation of Kant's philosophy. Nelson is famous for his denial of the possibility of practicing cognitive theory as a theory of validity and for his doubts concerning the inductive foundation of general laws. Like Natorp, Nelson had a strong pedagogical interest.

Impact 1: General Philosophy

Neo-Kantianism more or less perished with the death of Rickert in 1936. This is partly due to internal theoretical problems, partly due to the new trends of phenomenology, existentialism, and *Lebensphilosophie.* Neo-Kantianism had a smack of pre-First World War culture – the famous debate between Cohen's disciple Cassirer and Heidegger in Davos in 1929 seemed, for observers, to be a competition between "old times" and "modernity." And the reign of the national socialists in Germany finally demolished its factual academic substructure. There were no direct descendants, and neo-Kantianism was not resuscitated after the Second World War.

Assessing the impact neo-Kantianism had (and still has) on the further development of philosophy is not easy. Often it is not clear whether philosophical theories are influenced directly by Kant, by Lotze or Trendelenburg, by the neo-Kantians, or by Kant or Lotze or Trendelenburg mediated by the neo-Kantians. Here is a tentative list of prominent examples:

Bruno Bauch from the Baden school was a colleague of Gottlob Frege at Jena, and they influenced each other. However, Frege had neo-Kantian tendencies, which can be traced back to Lotze and Windelband, from the beginning (see Gabriel 2002). In early writings, he opposes a psychologistic conception of logic with normativist arguments (Frege 2001: 61–5) and puts forward such vivid (neo-)Kantian theses like "Observing involves a logical activity," or "To answer the question what things independent from reason are would be as much as to judge without judging, or to wash the fur without wetting it" (both from *Die Grundlagen der Arithmetik*).

Rudolf Carnap wrote his thesis supervised by Bauch, and his early theory (*Der logische Aufbau der Welt*) is based on a value theory in the wake of the Baden school (see Mormann 2010). So both analytic philosophy and logical positivism might owe part of their roots to Baden neo-Kantianism. As far as he regards philosophy as a theory of science, Carnap's theory seems to be affected by the Marburg school, as well (see Ferrari 2018). Thomas Kuhn's theory of "shifts in paradigm" in science was influenced by Cassirer and Cohen (see Edgar 2020), and Nelson Goodman's writings were also partly based on Cassirer's theory.

Max Weber's *verstehende Soziologie* (interpretive sociology), which aims at reconstructing the subjective meaning of social acts, is heavily indebted to Rickert's theory. Weber and Rickert were colleagues at the University of Heidelberg.

Generally, modern normativism, the view that there are several domains which can only be reconstructed by relying on the notion of objective normative validity, would be impossible without Lotze and the Baden school. Jürgen Habermas's discourse theory is, on the one hand, strongly influenced by Weber, and, in this regard, it has a hermeneutical-sociological touch. As far as it is conceived as a theory of normative validity, it seems to move directly in the wake of the Baden school. Although there are no traces of a direct influence, Hilary Putnam's philosophy of "internal realism" is so strong a mixture of transcendental idealism and normativism that it is hard to

believe that it was not in some way affected by the Baden school.

The "early Wittgenstein" was influenced by Frege and, via Frege, by the neo-Kantians. The famous thesis 1.1 from the *Tractatus*, "The world is the totality of facts, not of things," corresponds to the neo-Kantian thesis of a primacy of the objectively valid judgment over the sphere of existing objects. Its scientific approach might be due to the Marburg influence. Wittgenstein's later conceptions of rule-following, language-games, and *Lebensform* have affinities with the neo-Kantian theses that normativity is central and that it is philosophy's task to analyze the presuppositions of a fundamental practice.

Karl Popper's philosophy is, by his own admission, strongly influenced by Leonard Nelson's theory. The falsification principle, for which he is famous, is derived from Nelson's critique of the standard notion of a general law.

Impact 2: Legal Philosophy

As mentioned, Lask wrote a book on legal philosophy. Rudolf Stammler developed a legal philosophy with explicit reference to the Marburg school (Stammler 1896), although Cohen apparently had doubts whether it really belonged to the Marburg tradition. Cohen himself wrote an ethics which starts from the *factum* of legal science, which Cohen regarded as the "mathematics of the humanities" (Cohen 1904). Gustav Radbruch's legal philosophy seems to be a direct consequence of the theories of value and cultural science of the Baden school, and it exhibits the typical Baden wavering concerning the problem of cultural value relativism.

But the most prominent example of a legal theory in a neo-Kantian vein is Hans Kelsen's Pure Theory of law. It is, on the one hand, in the wake of the Baden school, a theory of normative validity; on the other hand, it adopts the Marburg approach of starting from the fact of (legal) science, i.e., legal dogmatics. Likewise of neo-Kantian origin is Kelsen's identification, in the 1920s, of the legal norm with the cognitive judgment of legal science. The basic norm is, according to one of Kelsen's numerous explanations, a "transcendental-logical condition" of legal cognition, a *hypothesis* in the sense of Cohen's philosophy. In his last texts, he explains the basic norm with the help of Vaihinger's philosophy of fictions.

Fuller, in his text on "Legal fictions," explicitly refers to Vaihinger (Fuller 1967: VIII). While H.L.A. Hart's theory is arguably influenced by Weber's, the depiction of the "internal" normativist view also seems to be a result of engaging with Kelsen's theory; so, he is in a mediated way doubly influenced by the Baden school. Joseph Raz's objectivist conception of norms seems to be derived from Kelsen's Pure Theory (see especially Raz 1979: ch.8, on legal validity).

Conclusion

Neo-Kantianism arose at a time when there was a general disillusionment with the philosophy of "speculative idealism," natural sciences made rapid progress, and psychology was established as a science. There were two main schools. Both adhered to transcendental idealism, replacing ontology by cognitive theory and taking the cognitive judgment to be the basic unit in constituting a world of objects. The Marburg school secured the autonomy of philosophy vis-à-vis the natural sciences by transferring it, in the wake of Trendelenburg, onto a meta-level regarding the natural sciences: Theoretical philosophy is theory of science. The Baden school secured the autonomy of philosophy and nonnatural sciences, in the wake of Lotze, by demarcating a region of normative validity which cannot be reduced to nature and which is presupposed in any scientific judgment.

While the philosophical movement of neo-Kantianism perished, its influences are still present, both in general philosophy and in jurisprudence, especially in diverse theories of normative validity and in theories which take the task of (theoretical) philosophy to perform a presuppositional analysis of fundamental practices which raise a claim to objectivity.

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Neo-Systems Theory and Jurisprudence

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Neo-systems theory, as developed by the prolific German twentieth-century sociologist and thinker Niklas Luhmann, has a great deal to say about jurisprudence or, more particularly, jurisprudence as represented by those writings and ideas that attempt to understand how the legal system understands itself. This version of systems theory (Luhmann 2013) explains how communications work not only as a means of stating what is social but also as a means of understanding society. From this theoretical perspective, law's existence as a system operates as a subsystem of communication within society, and society consists of the sum total of its communications.

In the modern world, communications, not reduced to their background thoughts, motivations, or attitudes, but their meaningful content, are organized into self-referential, autopoietic, functionally differentiated systems of communication. Each system (the legal, economic, political, religious, scientific, mass media, etc.) creates a boundary to other systems through its reliance on a focal binary code that enables it to distinguish its meaningful communications from those of other systems (in the case of law, the binary code of legal/illegal). To appreciate how significant this approach is to jurisprudence, we will concentrate on Luhmann's analysis of "The Self-Description of the Legal System" in Chapter 11 of his second major book on law, *Law as a Social System*.

There are, of course, many different approaches to writing jurisprudence and many different theories. For systems theory, a crucial distinction that organizes different theories is that between external description of law and how law understands itself. The latter involves self-description, how the unity of law's communications is plausibly represented in legal decisions, in legal reasoning, and at its most abstract or general level in jurisprudence and legal theories, as we will demonstrate. However, it is also important to understand how external description of law (communications about law that are meaningful as political, economic, or scientific communications, etc.) is always possible. Such external description can be articulated as jurisprudence (with many potential external references to such as politics, economics, society, linguistics, semiotics, etc.), an example being that of much of the writing and analysis of critical legal scholars. They demonstrate how legal decisions can always be understood as both camouflaging their *real* grounding and often prioritizing some interests rather than others with which they are potentially irreconcilable. But what they do not do is provide internal unification for those decisions, whether in terms of consistently organized rules or established principles or forms of reasoning that can be offered as giving unity to law and its communications (see Nobles and Schiff 2006, Chap. 6).

Luhmann expresses this internal/external distinction in the following terms: "Either it must opt for a law-external mode of description and in doing so must answer the question of its own theoretical foundations, or it must see itself as a self-description of the legal system . . . the presentation of the unity of the system in the system . . . which reflects itself" (2004, p. 424). This idea of unity within its communications should not be interpreted as necessarily involving a unitary approach, namely, it can and in some theories does accommodate plural, interactive, or open-textured solutions (e.g., even in positivist theories concerning the sources of law, some modern examples include not just one but a range of sources without a necessary hierarchy).

The key to jurisprudence as self-description is "respect for limitations that stem from being part of the system they describe" (Luhmann 2004, p. 424). This key is not the same as expecting

jurisprudence to drive the practice of law, but rather to anticipate the assumptions or presuppositions on which the operations (communications and actions given meaning through communications) of the legal system rely. That such operations could always be different, that they are contingent, does not exclude the reflexive nature of such theories. So, for example, there are natural law theories that suggest that legal solutions, namely, those that respond to legal questions, are necessarily just, fair, or in some other way conform to standards that can be expressed as moral, natural, or reasonable, or perhaps positivist theories that rely on source-based analyses (whether the sovereign, a fundamental rule or rules, a scientific hypothesis, or some more complex mixture, etc.).

Each of these theories with their well-known classic forms in the modern era (whether those of Austin and Bentham, Hart, Kelsen, Fuller, Finnis, or Dworkin) has been both crucial to the development of jurisprudential writing but also played their part in allowing the legal system to evolve. In each case, that evolution is a response to a particular problem or need that the legal system has to respond to. What each theory reflects is the background reason for the need for decisions that the legal system expresses: "the *real* problem of self-description, namely of finding out *what is implied when a system promises to give an answer to every question and forces all the operations of the system to presuppose that there is such an answer*" (Emphasis in the original, Luhmann 2004, p. 429). Compulsory decision-making is what forces the law to represent itself in its internally constructed communications, which communications operate at different levels of abstraction: from those of self-observation (why what has been interpreted as legal or illegal in the past should continue to be so interpreted or not in the future) to those of self-description (what unity is represented by which assumptions that produce such outcomes). Self-description is a necessary part of systems theory because it involves some understanding of the internal dynamics of communications that operate within systems, with boundaries and distinctions that only the internal dynamics of that system entail.

Viewing jurisprudence as self-description allows for an understanding of its role within the evolution of law. The contestation of jurisprudential theories is often understood as the replacement of worse theorization by better theorization in many forms (more logical, more rational, more coherent, more grounded, less speculative, etc.). With systems theory, one is looking for an alternative way of understanding this contestation. Operative communications within the legal system conglomerate into structures which, for a period of time, seem to answer law's internal demand for consistency with a discourse that allows it to be both stable and changed.

However, for systems theory, these structures and their theoretical supports cannot exclude the failure of reason to give reasons (which applies in many forms, such as the clear example of the gap problem illustrated in interpreting law), or the impossibility of providing logical closure for reasoning when decisions become imperative and, hence, anticipate the continuing contestation of jurisprudential theories. Luhmann suggests that, in relation to prevailing jurisprudential theories (mainly the many varieties of natural law and positivist theories): "The defect of one approach is the absence of a reason for validity in a decision about conflicting principles. The defect of the other is the absence of an ultimate justification for what is practiced as valid law. Neither of these approaches to the self-description of the system can account for the unity of the system in the system" (Luhmann 2004, p. 448). Jurisprudential theories, he argues, are ultimately forced to opt for one or other approaches, but in so doing, they end up in circular communication loops and endless contestation.

With this underlying problem for jurisprudence as self-description (internal rather than external description), what is necessary is what Luhmann described as the third question: what is legal about the distinction of legal and illegal that forms the operative coding for making legal decisions? Or to put this in another way: what is valid about the validity of the relationship between the norms or rules that comprise the substance of law? That said, self-descriptions (jurisprudence) will not themselves address this third question but

rather use the variety of conceptual apparatuses available to put a stop to such self-reflection at which point external references will come into play.

Not only is this third question stopped in various jurisprudential self-descriptions, but also it is not actually answered within systems theory itself; rather it is systems theory's response to the contestation of jurisprudential theories (as it is its response to the contestation of other theories that apply to other of society's subsystems such as the political, economic, scientific, mass media, etc.). From an evolutionary perspective, one can see that some theories appear to be more plausible, more consistent with the prevailing forms of reasoning and operative communications of legal systems at different times, rather than others. But when their plausibility wanes and other theories seem more plausible, the earlier theories retain a certain significance or importance, even though their components may seem to be at odds with later theories. (Such an analysis can easily be applied to the long and continuing history of contestation between the schools of natural law and legal positivism.)

The foundational questions that are being addressed are never resolved but only postponed as new theory emerges. However, when such new theory does emerge, one arrives at genuine paradox and tautology, because those new theories cannot overcome the continuing need for an answer to the third question and, in communicative practice, neither paradox nor tautology is potentially legal arguments. This approach incorporates the communication theory model that systems theory relies on, with plausible distinctions never eradicating previous distinctions (simply marking one side of those distinctions) or resolving the need for foundation to a system's communications without the possibility for such foundation, except that offered through the continuing contestation of jurisprudential theories (see Luhmann 1988).

Whether self-description utilizes, to adopt the general symbolic expression of the major jurisprudential schools, the concepts of justice or sources, what these concepts do is "transform[s] a tautology into a sequence of arguments and make[s] something that is seen as highly artificial and contingent from outside appear quite natural and necessary from the inside" (Luhmann 2004, p. 445). Paradox and tautology here are productive of the search for more plausible expressions of the unity of the system which themselves represent "directives for the observing of observers" and which, at the same time, redirect ultimate questions "from the form of 'what' to the form of 'how' . . . how does the system do what it does? How does it link operation to operation . . ." (Luhmann 2004, p. 450).

When this approach to paradox and tautology is applied to the forms of law in texts in the modern era, it asks how do those texts link together (whether constitutional texts, codes, statutes, regulations, directives, case law, commentaries, or the many other texts that have proliferated as potential sources of law)? Even consequential reasoning that has merged into legal reasoning in the recent past cannot ignore the linking of text to text, which creates a larger role for redundancy (reliance on what is there as law, which texts need to be interpreted and cannot be passed by or subsumed into non-textual reasoning). It also creates the need for "a consistent approach to second-order observations" (Luhmann 2004, p. 450) which need will be represented in observing the operations of self-referential closed systems, rather than open ones.

Systems theory is not a theory of law itself (although whether it could be will be addressed below) but from its vantage point has a lot to say about jurisprudential theories as they have evolved throughout history. The vantage point is a sociological one that observes the way in which communications in society, including society's subsystems, link together self-referentially. In its description of these processes in the modern era, systems theory observes closure, not closure at the level of factual indifference, since each and every event in the world may have consequences not only in the natural world but also in the social world.

However, with regard to the latter, those consequences are internally constructed and to appreciate them may well now involve considerable complexity: to what extent do they or do they

not impinge upon that system's scheme of meaning; how are they legally relevant? So, for example, whether an event has any legal consequences depends on the construction both of that event and of consequences through what is usually described as normative closure, in which many procedural operations (what might be thought of as the system's methodology) will be significant. Which events have legal significance depends on law's response to what it *sees* as the event in question and its determination of legal meaning and legal consequence. This can be represented by the phrase normative closure. And part of that closure relates to jurisprudence as self-description.

We all know that jurisprudential theories have been endlessly contested throughout history. That said, versions of natural law and positivist theories consistently seem to have held the greatest attention at different times. If, however, as systems theory suggests, the modern era is gravitating toward an ever greater complexity (not only with its knowledge base and technologies but also in its social subsystems), then one can question whether versions of natural law and positivist legal theories, even those recent ones that may appear more complex than their earlier forms (and will often attempt to intertwine some elements of each tradition), are adequate for the task. Is complexity mirrored in these classic forms of jurisprudence; can they still offer the self-description that can plausibly supply unity to the range of sources, practices, and procedures that have proliferated in the modern era, in arenas way beyond a simple Westphalian model of dualism of national and international law?

At this point we can attempt to address the question of whether Luhmann's version of systems theory with its insights into society and social subsystems could itself operate in communication as a jurisprudence, a self-description of law in the modern era. There appear to be three possible answers. No it cannot, perhaps it could, or yes it can (and even perhaps has already started to do so). Before these three possible answers can be considered, a few preliminary issues need to be addressed.

Sociological analyses will tend to be external to law's self-construction (often described colloquially as thinking like a lawyer) leaving little possibility to be part of that construction's self-description. For example, for judges to admit that they have prejudices that influence their judgments might well be honest and potentially supported by all sorts of sociopsychological evidence, and those admissions may even figure in judges' autobiographies, but they simply do not figure in their judgments, their communications in their roles as judges (see Nobles and Schiff 2009), and it is difficult to see how they could; and systems theory is a sociological theory engaging in sociological, if not scientific, analysis. However, it is not only a theory of the system of society as reflected in its wide-ranging "communication media" (Luhmann 2012, Chap. 2) but also one of second-order cybernetics in which observers of systems are affected by those systems and potentially affect them at the same time; "Second-order observation paradoxically or 'autologically' includes itself in its theory" (Moeller 2006, p. 71).

The complexities of this are legion, and those who research into the many different forms of second-order cybernetics (of observing systems observing systems) delve into the serious epistemological issues involved. That said, for the purposes of the questions asked here, it becomes clear that any potential for systems theory to operate as law's self-description, as being discussed here, is dependent on its second-order cybernetic character. A final preliminary point: Luhmann himself suggested that, for him (remember that he died some 20 years ago in 1998, and current social change may be, or is commonly observed to be, rapid), it was too early to reflect adequately about this.

It is demonstrably the case that those who are close to the center of legal communication (those who sit in Supreme Courts, or appellate courts, rather than those who regularly operate with legal communications in economic organizations such as the legal departments of banks, or in the legal departments of local political authorities) will adopt and be very concerned with characteristic legal communications, such as *validity*, which link the assumed sources of law often in some hierarchical form, and acutely concerned with potential contradiction or incoherence. However, the

question being asked here is: can such actors, close to the center of legal communications, with the help of systems theory observations, recognize their constructivist role in utilizing even such key linking terms like validity, enabling them to reconstruct their use of such terms and the consequent self-description that allows them to presuppose or assume some unity to their communications?

This way of stating the issues involved is rather crude, but it is at least to the point. One does not expect, as Luhmann explicitly stated in relation to other jurisprudence, such actors to spend their time reading books like Luhmann's *Law as a Social System* or its precursor *Rechtssoziologie*. But with all the modern variety of sources of law, and sources of sources of law, extensive procedural requirements, and the range of texts potentially to be considered, how can the unity of the system within the system be expressed without a more sensitive understanding of self-referential reasoning (consistent self-observation) if not normative closure.

Utilizing systems theory, Gunther Teubner (2012) has recently proposed a sophisticated model that could be adapted to form a systems theory version of jurisprudential self-description. He extrapolates his thesis about the possibility for social subsystems restraining themselves by their construction of constitutional fragments, what he calls societal constitutionalism. The background to this is the observation that the increasingly complex subsystems of modern global society gravitate toward colonization of the world (that modern social subsystems are expansionist in ways similar to how modern laws can be understood critically to extend juridification – more and more laws somehow or other engaging more and more parts of the world which has a critical dimension not only for those parts of the world directly affected but also for law itself as it may challenge itself through its own expansion and damning complexity). Participants' self-observation of these developments might, with the benefit of theorists or others who think within the system about its unity and rationale, lead them to propose (communicate) assumptions or presuppositions that express self-description as including those that may constrain that system's otherwise imperialistic tendencies.

The model that Teubner engages is that of participants *reading* constitutional restraint (as articulated principally in legal and political communications) and adapting that set of communications to their social sphere (the economic, scientific, mass media, etc.). He seems to think that this is plausible, particularly under the conditions of "public shock" when crises seem to be the result of the logistics of particular systems, "the centrifugal dynamics of subsystems in global society" (Teubner 2012, p. 4), such as the 2008 financial crisis precipitated by self-induced global economic priorities (see Kjaer et al. 2011).

Whether or not he is right about the potential for the development of societal constitutionalism in global society, what he is proposing is the possibility that a deep understanding of the self-referential character of closed subsystems can generate self-limiting communications. If those communications become structured into system communications, they will gradually engender self-description that might be better tuned to the conditions that closed systems operate with. Of course, no ultimate foundations can be found (no enduring answer to the third question), as whatever distinctions are formulated will only serve as more or less plausible accounts of the unity of systems but without the possibility of avoiding paradox or tautology.

Obviously law already operates with sophisticated constitutional, rule of law and due process, self-limiting communications. Nevertheless, applying Teubner's analysis to the plausibility of alternative communications that might engender alternative self-description, one can ask what responses may occur (what new communications) when participants within the legal system become aware of the dangers of what might be called the system's inexorable logic, its inescapable drive toward juridification and complexity? Luhmann recognized definite signs of ambiguity that might trigger alternative self-description beyond the well-trodden existing ones, such as the difficulty of reliance on the attribution of rights to subjects and their consequent individualization, when so many interests are now collective or better

attributed to organizations. He also saw the integration of consequential reasoning into legal reasoning as an unsettling challenge to much doctrine or *valid* law.

What then becomes important is whether the assumptions about law's unity that may lie behind legal reasoning or legal decisions or the relationship between procedural and substantive law can be addressed self-referentially not only in the form of consistent self-observation but also in the form of self-description. Are actors, principally judges, cognizant of such ambiguities or likely to be so (as example of such emerging cognizance, see Nobles and Schiff 2013, Chap. 5 "A Complex Example," at pp. 147–163), and, even more, if cognizant, are they also aware of what systems theory observation on such system dynamics may offer to their future communications? The straightforward answer to the latter part of this question is likely to be a resounding no, if that question implies that they have done some reading of systems theory prior to engaging with these issues. But, in a similar way to the statement, quoted by Luhmann, that one would not expect magistrates to be reading St. Thomas Aquinas' *Summa Theologica* "after a hard day as the sessions" (2004, p. 425), since that did not exclude them from anticipating or assuming the influence of natural law as a unifying theory to help them make sense of their practices, nor would it do so here.

So, the only evidence that is needed is communication recognizing an ever-increasing juridification, the difficulties and complexities of matching constant change to practical decision-making, the overwhelming number of sources to be considered (or, as is happening regularly in practice, the constant attempts to place procedural limits on those sources), and all of this in an environment in which system expansion threatens other systems which, in systems theory terms, is described as dedifferentiation. As an example of dedifferentiation, de-juridification occurs when law's unity is challenged by the expansionist tendencies of economic, political, scientific, or other forms of systemic reasoning penetrating within its own discourse; some equivalent phrases can be used to describe that situation in reverse, namely, with law's logic penetrating other systems. Awareness of these or other characteristics of modern legal and social development may anticipate a systems theory of jurisprudential self-description. Indeed, that is hardly surprising, since it seems so obvious to many observers at this time how much traditional jurisprudence seems to be out of touch with modern legal practice (e.g., see Douglas-Scott 2013).

The reference given at the end of the preceding paragraph has some significance. Whereas Douglas-Scott's book bewails the inability of so much traditional jurisprudence to account for the current condition of law – pluralistic, complex, historically embedded, and culturally contingent – it also challenges postmodern theories, including Luhmann's, to offer any useful alternatives: "the almost incomprehensible 'productive paradoxes' of autopoiesis take us little or no further than the 'fiction' (or Kierkegaardian glorification of the absurd) of Kelsen's basic norm" (Douglas-Scott 2013, pp. 48–49). In other words, Douglas-Scott's critique is of both much traditional jurisprudence and much so-called postmodern jurisprudence, as too concerned with law as autonomous (or at least exhibiting relative autonomy) or closed and systematic (or at least fairly orderly and separate).

In response, and as a way of bringing this entry to a finish, the possibility of a systems theory self-description of law, as jurisprudence, can be suggested. Luhmann certainly discounted the discontinuity between the modern and postmodern (which is important for what is written here, but is not meant as criticism of Douglas-Scott or others who use the phrase postmodern with considerable critical questioning). That continuity is, according to systems theory, indeed systematic, in the sense that society has become ever more functionally differentiated into autopoietic systems of communication (despite all of the attendant contingencies). But, rather than respond to pluralism, globalization, juridification, complexity, and cultural and historical contingencies by doubting law's autonomy, it suggests that all legal practices, including its substantive and procedural programs, its self-observations, and even its self-

description, reinforce its focal autonomy. Indeed, this is its observation for what might become an available and plausible self-description.

Luhmann wrote the following in the Preface of *Law as a Social System*: "... a theory of society needs to occupy itself with society's law. This applies to the most intricate refinements of judicial semantics as well as to each decision made within law ... even the most detailed legal propositions happen to emerge in society and society alone" (p. vii). Now, perhaps even more than before, with the expansion of legal systems throughout society, these detailed propositions of law together with their linking through even the most general and abstract articulation of the unity of law emerge in an autonomous system of communication for which some self-description, or jurisprudence, is both necessary and inevitable: how else can such a society exist? Rather than avoiding autonomy, systems theory makes it particularly relevant to understanding the modern world and suggests the need for a new, sociologically informed, jurisprudence of law as autonomous.

Cross-References

- ▶ Evolutionary Theories of Law
- ▶ Legal Theory: Descriptive
- ▶ Legal Theory: Types of
- ▶ Phenomenology of Law
- ▶ Positive Law and Natural Law
- ▶ Postmodern Theory of Law

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Neumann, Franz Leopold

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Introduction

For lawyers and legal philosophers, Franz Leopold Neumann (1900–1954) is probably one of the most interesting Frankfurt School's authors. Because of his early death, at the age of 54, his work was not as extensive as his extraordinary analytical skills would have made possible. *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (1944, second ed.) made him well known among the American social scientists community. The success of *Behemoth* allowed him to get an academic position in Columbia University, as well as to carry out several consulting works for the US Government. Neumann's unique insight is valuable not only because it permits an adequate understanding of the tragical collapse of the Weimar Republic and the rise of the national-socialist horror but also because it provides fundamental theoretical clues to avoid repeating past mistakes in the democratic society of the future. The defense of the idea of the Rule of Law, which he considered to be deeply rooted in human reason, is among his most important research interests.

Biography

Born in 1900 into a lower-middle class Jewish family in Kattowicz, in the eastern Germany (today in Poland), Neumann studied Law in Breslau, Leipzig, Rostock, and Frankfurt. Very soon, he began to get involved into political causes: he joined the Social Democratic Party (SPD) and participated as student in actions against the increasing antisemitism of the German university (Neumann 1963, p. 16). Notwithstanding his inclination for legal philosophy and criminal law – topic of his first doctoral thesis, held in 1923 – his early career was centered in labor law. Under the powerful influence of Hugo Sinzheimer, one of the leading socialists lawyers of the Weimar Republic, Neumann opened in 1927, together with Ernst Fraenkel, a legal practice in Berlin. The main aim of his work was to defend the institutionalization of trade unions rights and to make real the economic democracy proclaimed in the Weimar Constitution of 1919 (Jay 1986, p. x). But Weimarian labor law was for Neumann mainly a laboratory (Vardaro 1983, p. 44), a testing ground to explore the transforming potential of law in society. Economics, politics, sociology, and history are essential elements of the concept of law that Neumann will develop in the following years, far away from the mirage of Weimar.

After the seize of power by the National-Socialist Party in 1933, the then lead attorney of the SPD and professor at the prestigious *Deutsche Hochschule für Politik* had to emigrate to England. There he wrote his second doctoral dissertation at the London School of Economics under the direction of Harold Laski. The change of academic context led Neumann to choose broader research topics, like legal philosophy and political theory. Hence, this second dissertation, completed in 1936 – but only published in 1986 (in German, with afterword of Alfons Söllner, in 1980) – is an outstanding reflection on the Rule of Law. At the same time that Hitler and the national-socialists lawyers were breaking down the legality of Weimar creating a so called "dynamic law", Neumann put all his theoretical effort in giving serious reasons to defend the Rule of Law. Here Carl Schmitt and his *decisionist* doctrine will become the center of Neumann's criticism (Scheuerman 1994, p. 39).

After his brief stay in England, he arrived to the United States in 1936. In a similar way to Arendt (1994, p. 110), as some other émigrés did, Neumann described this exile as "infinitely more painful than ever before" (1963, p. 12). He had to face the challenge of adapting to a completely different academic and social environment, but thanks to Laski's recommendation, he soon joined the New School for Social Research in exile, led at that time by Max Horkheimer. Some of Neumann's firsts American publications laid in the field of legal philosophy: *The Change in the Function of Law in Modern Society* (1937) and *Types of Natural Law* (1940), both of them compiled by Herbert Marcuse in the fundamental volume *The Democratic and the Authoritarian State* (1957). In these two writings, Neumann exposes his own vision of law, influenced by his Marxist structural background, but also by Kelsen's Positivism. The result is what Matthias Ruete has labeled as "sociologically informed Legal Positivism" (1986, p. xix). Besides providing stability and predictability to the economic system, the generality of law is identified by Neumann as a tool for the dominance of the bourgeoisie, but at the same time it plays an ethical role: that of guaranteeing a minimum of freedom and equality to people. This latter role is what makes the idea of the Rule of Law nonnegotiable for the dispossessed classes. Without the coverage offered by a rational law, arises a scenario of uncertainty in which the main victims would be the poor and the workers. Hence, the prevention of Neumann against the deformalizing trends proclaimed – still today – both from the right and from the left wings of legal thinking.

Neumann implemented this philosophical-legal approach in his *Behemoth* with the aim of showing a great truth: the national-socialist state was not – could not be – a Rule of Law. The thorough analysis of the legal processes that made possible the transformation of the democratic Weimar Republic into an authoritarian state reveals a total degradation of the idea of general Law. If the Rule of Law demands from

legal norms not only *voluntas*, but also *ratio*, the mere will of the Führer could not be law but just a degradation of the idea of law. This implied, in turn, that within the national-socialist state the liberal economic form is diluted to create a type of economy that Neumann defines as "totalitarian monopoly capitalism." To that extent, National-socialism in no way implies a contradiction with capitalism, although it does with Liberalism, which needs the Rule of Law to survive. National-socialism, in turn, not only collapses the Rule of Law inside the state but also does so to the outside: overflowing the boundaries of international law with a rhetoric based on the *Lebensraum* and the *Volksgruppen*. Against this, Neumann strongly defended the rights of minorities and general human rights as logical extensions of the Rule of Law (2009, p. 162).

The American accusation in the judgments of Nuremberg was notoriously influenced by the insights developed in *Behemoth*. Indeed, Neumann, together with other members of the Frankfurt School such as Marcuse or Kirchheimer (*see* 2013), played a major role in the preparation of the judgements. As Salter (2000, p. 197) has noted, Neumann's wartime service with US military intelligence has received little attention from legal theorists. However, participating in the prosecution of war crimes was a new opportunity to test his own concept of law, to connect theory and praxis. In Neumann's critical and sociological approach, the war crime trials were necessary but insufficient: judgements have to be thought as a part of a broader plan for social and economic restructuring the Post-war Germany in order to avoid repeating the causes of the disaster. This task, which Neumann called *denazification*, unfortunately was never assumed by the United States.

Conclusion

In the following years, and until his death, Neumann continued with his studies in political theory. From this field, he worked on the problems of freedom and dictatorship. The writings posthumously compiled in *The Democratic and the Authoritarian State* (1957) show that he never left the philosophical-legal reflection. If an idea structures the hole Neumann's work, it is the narrow – though not necessarily harmonious – relationship between law and democracy: individual and collective freedom, as well as equality, need the Rule of Law. As a result of these considerations, Neumann could be considered a legal positivist, as he did himself (2009, p. 153). But, he would be an inclusive positivist, who defends the connection of the proper formal structures of the law with the substantial values of ethics.

Cross-References

- ▶ Critical Theory and International Law
- ▶ Laski, Harold Joseph
- ▶ Legal Positivism: Inclusive
- ▶ Marcuse, Herbert
- ▶ Rule of Law: Theoretical Perspectives
- ▶ Schmitt, Carl

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Neuroscience and Law

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Introduction

This entry will be structured into five sections. In the first section, an overview of what the field of law and neuroscience (henceforth L&N) is about will be outlined. The second section will explain how cognitive neuroscience has a greater relevance for L&N debates than other neuroscientific domains which, as will be shown in the third section, has been pivotal to the original activity of neuro-lawyers. A short presentation of the set of technologies used to obtain images from the brain and sustaining L&N literature will follow. In the fifth section, a few examples of the impact of neuroscientific outcomes on some legal concepts and practices will be presented. Some of the arguments advanced by those authors that call upon a revolutionary impact of neuroscience on law and by those who predicts its irrelevance, if not its dangers, will be also outlined throughout the presentation.

What Is Law and Neuroscience?

L&N is an ongoing discussion about to what extent it is possible or suitable to *translate* (Morse 2011: 597) neuroscientific knowledge into legal categories. It deals with the adaptations, if any, which could be necessary to accommodate legal concepts and practices to neuroscientific findings. L&N also studies the impact in public and legal operator's opinion that the very release of neuroscientific information has. As a lively and growing field of inquiry, it brings together experts from different backgrounds – legal sciences, behavioral sciences, technology, and philosophy, among many others – who interact through joint research, collective editing, international conferences, and specialized journals. On the one hand, they underline the opportunities that neuroscientific findings may offer to legal theorists and practitioners as a way to achieve a better understanding of human cognition and behavior. On the other hand, they also emphasize the limitations of those findings as well as they urge to be aware of the possible dangers.

The novelty and diversity of issues addressed by L&N is reflected in the many different positions of those involved in the field. Some authors advocate for a deep transformation, in many or at least in some aspects of law. For example, they predict major changes in our conception of human agency "transforming people's moral intuitions about free will and responsibility" (Green and Cohen 2004: 1775), or in current ways of justifying punishment leaving behind retributivist models and giving "way to consequentialist ones, thus radically transforming our approach to criminal justice" (Zeki and Goodenough 2006: 231). More cautious authors leave a door open for future modifications as the techniques improve. However, they think that neuroscience could alter "the way we think about ourselves as persons and about the nature of human existence [. . .]" (Morse 2004: 198). Others discuss the possible role of brain scanning as a way to measure the effects of addiction and age in one's capacity to self-control, as well as to ascertain memory's accuracy or pain's intensity. The validity of brain scans for detecting lies and deception is also pondered and controversially discussed. Yet some researchers contemplate this side of the project as highly defective for conceptual reasons (Pardo and Patterson 2013).

By way of generalization, it can be said that L&N thinkers holding a naturalistic position see the impact of neuroscience on legal ways of thinking and doing as inevitable, at least in a long-term perspective. But at the same time, anyone can notice that normative reasons modifying legal

conceptions are safe from empirical discoveries (Morse 2008). Along that path, the stronger is the conviction of an author about the impact of scientific developments on normative issues, the easier for that author to predict unavoidable transformations in legal theory and legal practices and to embrace the neuroscience's revolution. More in details, the position of an author also depends of the degree of validity s/he gives to a specific interpretation of neuroscientific findings, combined to her philosophical or theoretical position. Almost every suggestion about the topics treated by L&N is contested by now.

Naming the Field I: Law and Cognitive Neurosciences

It would be more accurate to talk about law and *cognitive* neuroscience than to talk about law and plain neuroscience, due to the pivotal role of behavior and cognition among the issues typically addressed by L&N. During the 1980s, G.A. Miller and M.S. Gazzaniga coined the expression "cognitive neuroscience" to refer to the study of how the brain underlies the mind. They pioneered the empirical research of the relationship between brain processes and cognition. In fact the explosion of research that brought on the birth of L&N came from the consolidation of cognitive neuroscience, gaining momentum when neuroimaging technologies enabled "the scientific study of how neural activity explains cognition and the behavior it gives rise to" (Boone and Piccinini 2016: 1515).

To ensure against any unnecessary confusion, neuroscientific research is the empirical interdisciplinary study of the brain and the nervous system having thus a broader scope of study than cognitive neuroscience. For example, reestablishing a motor function impaired due to damage to the spinal cord can involve neuroscientists that are by no means cognitive neuroscientists. The fusion of cognitive science, which studied cognition (the mind), and neuroscience, which studied the nervous system (the brain), was not possible due to the theory of "multiple realizability," a theoretical principle of cognitive sciences, which was well accepted among functionalists but not reductionists.

In the early 1970s, philosophers Putnam and Fodor deployed a series of arguments to defend the principle of multiple realizability. The principle of multiple realizability was thought of as ammunition against reductionism. According to the principle, for theorizing about the mind to attain relevant explanations of cognitive functions, no involvement of a neural substrate updating each function is required. Mental states are dependent on brain states, but these are not identical, nor reducible to each other. The purpose of an appropriate reduction, from this perspective, was to explain the brain mechanisms by which mental activity follows the laws of psychology, but brain state predicates are not coextensive with psychological predicates.

The inability at that point to reduce mental attributes to brain states was not interpreted as ignorance or incompetence but as the existence of important nonphysical relationships incorporated into the world structure. Cognition and the variety of ways of processing information that it involves can be understood, it was claimed, without resorting to a specific physical element in which such processes have to be performed. Artificial intelligence studies were fully embedded in cognitive science, since both shared a core idea: cognition can be performed by neural circuits, but not only neural circuits, thus explaining human cognition can be achieved without resorting to the brain. It could be said that the abandonment of that principle is apparent, and things are now just the opposite: computation relies on neural networks models.

Current neurocognitive explanations (Boone and Piccinini 2016) aim to integrate computational and representational functions and structures in our explanations of cognition. To argue that mental phenomena could be better understood by improving neuroscientific technologies was largely possible, because theorizing about those phenomena lost its independence from mechanistic explanations. In the core of the discussions regarding L&N, where it is assumed that "current neuroscience is empirically well grounded and should constrain our cognitive

explanations" (Boone and Piccinini 2016: 1510), those explanations are essential to fully understanding human behavior and how the law regulates and judges that behavior. The link between both elements of L&N produces debates over what extent the production and application of legal rules will/won't and should/shouldn't be guided by neurocognitive insights.

Naming the Field II: Neurolaw

Probably the emergence of the term "neurolaw" would be a suitable label for the field, as the exploration of "whether, when, and how brain science should be, and will be, incorporated into legal proceedings" (Shen and Gromet 2015: 87) seems to have a more specific scope than the aforementioned one of law and cognitive neuroscience.

Neurolaw started as a network of joint activities of legal practitioners and neuroscientists whose aims and needs were pointed out by Taylor (1991: 294), who coined the term "neurolaw" to refer those activities. Neurolaw was "[. . .] a synthesis of law, medicine, and rehabilitation that dealt with the medicolegal implications of neurological injury" (Taylor 2015: 397). Neurolaw originally aimed at increasing mutual understanding between legal practitioners and forensic medical professionals. The goal was to attain common vocabularies and coordinate professional joint actions and protocols when persons suffering neurological damage were involved in legal proceedings. In this context, special attention is paid to the way neuropsychologists were testifying during court hearings about brain damages. Since then, that branch of neurolaw has focused on how to adequately inform lawyers, juries, and judges of complex medical issues.

But knowledge obtained through increasingly better techniques is claimed to be relevant to our understanding of cognitive processes, and not just our understanding of sensorimotor processes. Thus, questions in court about changes in behavior and skills has expanded to include explanations about more "intentional" and "conscious" behavior of accusers, witnesses, defendants, and applicants along with the original data about sensorimotor limitations and capabilities. Of course, both legal medicine and clinical neuropsychology continue with their distinctive disciplinary foci; but, in relation to L&N, interest in brain, mind, and behavior keep expanding.

Although some disagreement over the birth of L&N exists, the biennium 2004–2006 marked a turning point with Brent Garland's publication of *Neuroscience and the Law* and the book by Zeki & Goodenough, *Law and the Brain*. Since then, the path has been to analyze the changes that legal theories may have to make in light of such neuroscientific findings, as well as to understand the consequent practical implications of those changes. The word "neurolaw" was not yet used in the titles of these seminal works of L&N, but after the appearance of the journal *Neuroethics* (Tovino 2008), neurolaw started to be understood as equivalent to L&N, as the title of the book edited by Spranger (2012) exemplifies, *International Neurolaw.* Now both expressions are easily exchanged. In any case, the reflection over how and to what extent multiple aspects of understanding, production, and application of law will be affected by the empirical study of the brain is placed in either with one designation or the other, producing significant literature, like the casebook edited by Jones et al. (2014) *Law and Neuroscience*.

Neuroimaging

Among the technological advances, neuroimaging has been the most significant for the upswing of L&N. Neuroimaging is the combination of techniques to produce images that represent (anatomical or functional) states of the brain. The idea of *imaging* parts of the body to diagnosis diseases is not new. Since at least the accidental discovery of X-rays in 1895 by W. C. Röntgen to the implementation of current sophisticated applications, the assembling of visual data for medical practice has been an ongoing endeavor. Regarding the scope of brain imaging, an initial treatment was carried out by W. H. Oldendorf, who, in 1961, proposed moving the rationale

underlying the use of x-rays into the examination of the cortex. Non-invasive methods arrived in 1979 with the winners os the Nobel Prize in Medicine Allan MacLeod Cormack and Sir Godfrey Hounsfield. The latter, following the calculations made by Cormack, built the first scanner, a device with a radiation system, capable of delivering an image through a computing system, which revolves around the body being scrutinized. The general principle is to detect, digitalize, and translate one type of information into a different, more useful, type.

Thus, the positron emission tomography (PET) detects gamma rays in certain areas of the brain after radioactive material has been placed in the bloodstream. Such material includes elements like oxygen, carbon, or nitrogen. These circulating blood substances (tracers) are deposited in areas that have higher levels of chemical activity. At that point, neutrons and positrons are generated. When the positron joins an electron, both are destroyed and an emission of gamma rays is produced and then detected. The data gathered by the detectors are processed by computer to produce an image showing the distribution of the tracer in the brain. The computed tomography (CT) scanner allows imaging in sections showing the structural state of the brain. On its part, the magnetic resonance imaging (MRI) technique provides anatomic data by detecting radio frequency signals produced by the displacement of radio waves in a magnetic field. MRI measures hydrogen nuclei.

Due to their medical use, the rationale underlying these techniques has been the way to establish correlations between states of the brain, brain images representing those states, and specific diseases independently diagnosed. Once the mapping is validated, the image produced by the technique becomes a reliable tool to help physicians locate what they are looking for. They can track down a clogged capillary, a widespread atrophied area, among a myriad of different elements to confirm or discard a diagnosis. Accuracy of that diagnostic tool leads to better therapy.

We move to the domain of functional imaging when it is not only possible to obtain images of the brain's anatomy, but also dynamic images reflecting patterns of the brain's activity. To possess information of what is happening to the brain while the subject is performing one task or function has been fundamental to equating *seeing the brain performance* with *seeing what is performed*, or even with *reading thoughts*.

Functional magnetic resonance imaging (fMRI) is a technique that allows researchers to obtain images of brain activity while performing a certain task. It requires the subject to be placed in a tube-shaped machine that uses a powerful magnet to measure changes in the distribution of oxygenated blood during and after the subject performs certain tasks. FMRI measures the amount of oxygen in the blood (BOLD, blood oxygenation level-dependent) of specific areas of the brain. How does blood flow change in the brain? Neurons, like any other cell, require energy to work. Some of that energy is supplied in the form of oxygen carried in hemoglobin. The flow of blood in the brain is dynamically regulated to give to active neural assemblies more energy and less to inactive assemblies. Thus, an increase of oxygen is related to an increase in neural activity.

The fMRI offers an excellent spatial resolution (up to 1–3 mm resolution) but it takes longer to get the images (about 5–8 s) than other techniques like the electroencephalogram. Using fMRI allows medical professionals and researchers to obtain measurements of the innermost parts of the brain. Although fMRI has been considered one of the most accurate and reliable imaging techniques applied to the brain, and enjoys great reputation in L&N discussions, its validity has been recently questioned. An in-depth review of data about fMRI (Eklund et al. 2016) has revealed poor practices and programming errors in a substantial part of the research carried out for the consolidation of this technique.

Issues in the Law and Neurosciences Field

As noted, the emergence of L&N took place when (1) knowledge about brain states expanded beyond the study of damaged brains to the study of any brain; and (2) the images of the brain obtained by neuroimaging not only offered

structural or anatomical but also functional information. Both changes made it possible to conclude – with more or less caution – that choices, intentions, deceptions, and, in short, our whole battery of mental attributes had their brain correlations waiting to be discovered. For that very reason, the listing of questions discussed in L&N includes all sorts of issues involving human action to which legal theorists and practitioners paid attention: from when testimony can be reliable, criminal responsibility ascertained, and juror's decisions biased, to what extent adolescent conduct shows loss of control, among many others.

The most cited example of how specific brain zones relate to specific behavior patterns is that of Phineas Gage (1823–1860). In 1948, at the age of 25, Gage suffered an accident while working on the construction of a railway. After an explosion, a crowbar (the size of a broomstick) pierced his face and head, entering through his left cheek and going out through his skull. The frontal lobe was completely traversed. The extension of the injured area was so large that the fact the he survived and was "cured" after 2 months was considered worthy of study.

Gage, however, soon began to show changes in personality becoming rude and ruthless, falling into disfavor with his fellow citizens, who claimed that "he was no longer himself." It was not until the use of modern methods of neuroimaging, it is argued, that it was possible to link a more accurate location of brain (and brain injury) to personality traits. In particular, deterioration (due to injury or imbalance) in a specific area of the prefrontal cortex correlates to a loss in the capacity of planning the future, following social rules which have previously been used, and deciding on courses of action advantageous for the survival. So could be Gage blamed for what he did after the accident? As soon as the answer is not that he couldn't, the kind of reasoning underneath L&N becomes apparent.

Thus, one frequent debate among L&N practitioners deals with the possibility of reshaping the concept of responsibility. Part of the background of those debates was that they rescued another provocative finding from what was known as the Libet experiments, which sought to question the folk psychological attribute of free will. Benjamin Libet's research has been accepted as evidence that the detection of brain activity correlated with the fact that a person reaches a decision before the subject is aware of their decision.

Libet's results raised a major challenge to free will. If the brain starts a kind of activation necessary to execute a decision before the intention to take that decision has been formed, then the idea that humans are free agents is somehow forced. Accordingly, it was claimed that there is no separate and autonomous agent having control when someone makes a decision. That conclusion has been strongly criticized, but it has opened the door to a deterministic interpretation of behavior.

As a consequence, it has been held by some that the only way to understand the moral justification for punishment is by eliminating the retributionist point of view being based on the proposition that a person is fairly punished and deserves a sanction if the offending action was freely performed. From this, some have concluded that consequentialism has proven to be a better way to improve social life, arguing that treatment for those who broke the law, since they don't deserve sanctions, is a better response to crime. All that was used to discuss subjective responsibility, but law includes other more objective concepts of responsibility that won't be affected by those considerations.

Another example of reasoning in L&N is to be found in the findings about adolescents' brain development. Neuroscience confirms that the adolescent brain is still developing. Besides the fact that some of the disorders that are invoked to argue for a reduction of responsibility are defined, in turn with criteria for antisocial and criminal behavior, so depending on circular reasoning, it is important not to get confused by the possible conflation of diminished capacity with diminished responsibility. Brooks (2014) warns that judges should not automatically translate the presence of a neurobiological abnormality – which is a proof of diminished capacity – into a proof of diminished responsibility. However, there is a correlation between brain development and maturity of behavior, to argue that the differences observed in the adolescent brain cause certain

misbehaviors is a symptom of what Morse called "brain over claim syndrome" (Morse 2006: 403–405). The neuroscientist slides in the language of causality when s/he in fact does not know the causes, "always using language that suggests causality, they do not know causality."

But holding that mental causation is a crucial element to account for legal responsibility has been challenge by Pardo and Patterson (2014), whose model for ascribing responsibility relies on reasons, something that jurists are familiar with regarding some of the common functions of law. If legal norms have to play a role in guiding behavior, and they can function as reasons to act, those reasons have to make a difference in explaining behavior that cannot collapse into brain causation. A rational explanation with a teleological structure, according to them, cannot be satisfactorily explained in a model that is simultaneously materialistic and nonreductionist.

Studies also show that to be a responsible, subject is to respond to reasons. Responsiveness is at the center of legal responsibility, so neuroscience can contribute to determining the capacity for reasoning and impulse control of someone, but never in isolation from other sciences. Along with neuroscientific evidence, a great number of different pieces of scientific evidence are included in the ascertainment of facts in court hearings. Any sort of brain scan available, when the evidence is appraised in court, cannot show mental states which occurred in the past. This is not to say, according to the enthusiasts L&N practitioners, that brain-based techniques will not one day contribute uniquely to establish the facts of a case. It also highlights that people with different brain abnormalities can be law-abiding, and conversely that individuals with severe behavioral problems often display no brain abnormalities.

The idea that methods, tools, and techniques from neurocognitive research will help to discern what someone did brought M. Bunge (2010: 117) to provocatively define neurolaw as "the neuroscientific study of what jurists call *mens rea*, the criminal mind." This kind of definition fuels the proposals of the most enthusiastic "translators" of neurocognitive results into normative legal concepts. Following the path of the Wittgensteinian tradition, and based upon the philosophical work of Bennett and Hacker (2003), Pardo and Patterson highlight a fatal error in L&N: confusing empirical evidence that gives support to inductive hypotheses with conceptual criteria defining action and intention. Although they do not reject the use of neuroimaging to collect evidence supporting an empirical hypothesis – as it happens with any empirical scientific evidence – they adopt a confusing interpretation offered by committed neuro-lawyers.

The mistake identified by Pardo and Patterson has a major manifestation known as the *mereological fallacy* and has been further explained by Hacker and Bennet (2003). The fallacy consists in treating brain states as the subject of intentional activity. They insist that it does not make sense to assert that "the brain – its parts, connections, activations, or any of its states – did something." Psychological attributes are not used, so they cannot be recognized at any instance of neuronal activity of the brain.

A subject is not a brain, a brain function is not human behavior, and a pattern of activation is not an intention. Psychological attributes are seen in behavior, in a network of interactions where subjects mutually react. Criteria to correctly identify actions and intentions are publicly recognizable conduct. In a context of litigation, such conduct also includes what took place before and after the action observed. This view has led to the fact that they have been accused of trying to keep alive the dualistic folk psychology already debunked by neurosciences.

Accepting that better knowledge of brain functioning acquired through brain imaging helps to explain defendants behavior does not commit one per se to being more or less punitive in trials. Those scans could equally be used to exculpate (the defendant had no control over her actions) or to inculpate (the defendant had a normal brain functioning). But public opinion filters neuroscientific information in certain ways in which L&N is also interested.

A study (Weisberg et al. 2008) showed that, when framed by the vocabularies of neurosciences, irrelevant information for the explanation of psychological phenomenon was taken to be

relevant by nonexperts. That type of findings fuels the concerns for juries and over witness manipulation. However, when it comes to assessing other peoples' behavior in order to ascribe responsibility, framing the narrative of those peoples' behavior in neurological terms does not produce more exculpatory results (DeBrigard et al. 2009).

In spite of the incorporation of ethical (Neuroethics) debates into L&N, a major part of its literature is devoted to scrutinizing the weight and value that neuroscientific evidence could have for legal theory and practice.

L&N discourse should carefully distinguish between interesting "neuro" outcomes – perhaps framed by commercial aims – and relevant "neuro" outcomes that can count as evidence in litigation. There is a huge difference. Nevertheless the "neuro" fashion seems to be unescapable. The appeal of being able to read thoughts was amplified when two companies in the USA commercialized fMRI-based lie detection. Although a few court cases around the world have considered using it as evidence, the superficial treatment of detecting lies has received much opposition from the L&N community. But leaving apart any simplistic idea of reading thoughts, the kernel of that sort of project has been accounted for in several ways. It has been argued (Schauer 2010) that the standards by which commercially motivated science can be judged are not the legal standards for a technological result to be used as evidence. For example, if jurors evaluate the veracity of witnesses in a very unreliable manner, the contribution of fMRI-based lie detection can increase the rate of successful matching. Farahany (2009) has worked on the type of information that brains can reveal: for example, whether a person is familiar with someone else or whether s/he has previously seen an object. In a legal process to check and verify that kind of information, it does not count as detecting lies, but it can help to do it. Thus, the better lie detection available is based in memory. It is worth noting that brain processes in memory and learning are well known by neuroscientists, being a part of medical research. Advantage of that fact can be taken (Monteleone et al. 2009) when considering whether a new type of scientific evidence to address the needs of litigation ought to be accepted; it is not perfection but something better than chance that matters.

The better way to address those questions – which for reasons of space can't be developed here – is by becoming familiar with the specialized literature. Actualized references are available in the most influential web pages devoted to L&N. Among them the Law and Neuroscience project and the Research Network of Law and Neuroscience (lawneuro.org) which are supported by the MacArthur Foundation. The exponential growth of research and discussion on L&N, particularly in Italy, the Netherlands, and Germany, but all over generates more accessible information every day.

Cross-References

- ▶ Behavioral Economics and Law
- ▶ Legal Reasoning: Virtues
- ▶ Naturalism in Jurisprudence
- ▶ Psychology and Law

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Neville, Henry

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Introduction

A descendant of a noble English family, Henry Neville (1620–1694) was an influential political figure and a prominent intellectual in the tumultuous phase from the execution of Charles I in 1649 to the Glorious Revolution of 1688, that is to say, the period when England went through the crucial stages of the civil war by ending royal absolutism, followed by the republican interlude and the Restoration, and the laying of the foundations of European constitutionalism. Writer of political pamphlets and contributor to a widely circulated satire at the time *The Parliament of Ladies* (1647), author of a famous utopia *The Isle of Pines* (1668), and translator of Machiavelli's *Opera omnia* (the idol of the Commonwealth), it was with the *Plato Redivivus*, published in 1680, that Neville established himself as a republican political thinker. However, his fame is due to his friendship with James Harrington and the well-known suggestion by Thomas Hobbes, reported by John Aubrey in his *Brief Lives*, that Neville had "a finger" in the composition of *Oceana*. Whether this is true or not, the allusion can only evoke an illustrious precedent Reginald Pole's claim that

Machiavelli's *The Prince* was written by "the finger" of Satan. Hobbes's malevolent assumption remains in any case in the tradition of Machiavellianism, since for Harrington the latter was the greatest modern political writer, defined by Neville even as divine, overturning the black legend that had taken hold in England precisely with Cardinal Pole.

It is important to look at Neville's life in order to consider his intellectual profile (Mahlberg 2009). Before graduating from Oxford, he took the traditional *grand tour* of Italy, establishing a friendship with Cosimo, the Grand Duke of Tuscany. He returned to England in 1645, when the conflict between the Crown and Parliament reached its climax, and sided with the Republicans. After the king's death, his public career seems to become noteworthy. As a Member of Parliament and Secretary of the Council of State, he was among the most intransigent figures who opposed Cromwell's personal power, until he was expelled in 1653 by the Rump Parliament and forced to leave London. Defeated in the election by Cromwellian candidates, he remained in the shadows during the period of the Protectorate, returning to the stage at Cromwell's death in 1658. The following year, Neville was reelected to Parliament, opposing the notion of a hereditary Protectorate. He was for "a single person and two houses," but if the Cromwells aspired to be kings, as Neville himself seems to have told Cromwell, then the Stuarts had a better title to be kings. Neville essentially feared the concentration of power in the hands of the Protector, who dangerously had control of the armed forces. As he claimed then, and as he later wrote in the *Plato redivivus*, nations lose their freedom when their rulers hold military power without any control. John Lambert's coup forced Cromwell to abdicate, Parliament was dissolved, and the Council of State, where Neville sat, became illegal. A Committee of Safety was born at the behest of the Army, which included James Harrington as one of its members sits. The two friends thus found themselves, at a chaotic moment, on opposite sides, serving two alternative organs that both claiming legitimacy and exclusive authority. This was the moment at which James Harrington organized the Rota Club, also attended by Neville. The Club would become a popular meeting place where Republicans would discuss the country's political issues, devising a model of Republican constitution. The Rota Club was the only association of the time to publish the political discussions that took place during the sessions, thus becoming the subject of attack by the monarchists. As John Aubrey (who also attends the meetings) would say: at the Rota Club, the best debates of the century were staged. With the restoration of Charles II (1660), the Republicans were persecuted, but Neville's fate remains unclear. From some sources it seems likely that he was arrested, while it is certain that in 1664 he emigrated to Italy. He returned to England in 1668, when *The Isle of Pines* was published (Nicastro 1988). With the crisis that set Charles II against the Whigs, the latter opposing the succession of the King's Catholic brother, civil war seemed like a real possibility. It was at this time that Neville published his most important political work.

Plato Redivivus

The title of the work in full exemplifies the subject matter and the method: *Plato redivivus: or, A dialogue concerning government: wherein, by observations drawn from other kingdoms and states both ancient and modern, an endeavour is used to discover the present politick distemper of our own, with the causes, and remedies* (Robbins 1969). In particular, the work pays tribute to the humanistic tradition in various ways: (a) the dialogic form of the Treaty; (b) the comparison between ancient and modern forms of the state; (c) the organic analogy between the human body and political society; and (d) the political proposal to lead England out of the present disease, a metaphor for the civil war well understood by Neville's readers.

The work is divided into three dialogues that correspond to 3 days marked by the debate between three interlocutors: an English Gentleman (essentially the author) who hosts a Venetian Noble, who becomes ill and for whose treatment a

Doctor is called. The cue of the disease allows us to talk about the British political body, which is in serious condition. The title betrays a formal tribute to tradition, but the very lesson of the "incomparable Machiavelli" from which so many ideas descend must not obscure the originality of the author. In the new climate of uncertainty, Neville expressly recalls the Hobbesian paradigm: the precariousness of the state of nature, which results in the war of all against all for the right of everyone to all things, and individual consent to escape from such a condition, introducing Republican elements that will find acceptance in the Glorious Revolution, when Republicanism itself is superseded by the winning liberal ideology.

Moreover, already in the preface of the work, the principles of Oceana are referred to, and in fact it is stated that "the empire was founded in property" (Robbins 1969: 68), a cornerstone of Harrington's theory. According to Neville, England's problems are due to the inability to adapt the constitution to changes in ownership over time. This is, according to John Pocock, the crucial thesis of Neville, that "the decay of the baronage has left the royal executive and its prerogatives face to face with a parliamentary commonalty over whom it has no control; and until a constitutional solution, like that he is concerned to propose, has redistributed power, the relations of Crown and commons are doomed to instability" (Pocock 1975: 419).

Neville therefore deplores the fact that, while the prudence of the ancients permitted an understanding in time of the evils of the State in such a way as to provide for it effectively, in the present time evil is allowed to proceed because the patient is incurable. The disease of which the State suffers arises from the fact that the monarch has become a tyrant by putting his own interests before those of the people. In fact, the government was originally established "for the good and preservation of the Governed, and not for the Exaltation of the Person or Persons appointed to Govern" (Robbins 1969: 85).

In the wake of Harrington, among the merits of good government there is stability and durability (precisely the model of the Venetian republic). But it would be England that has the best form of government, as it has a mixed constitution. However, the king has destroyed "the balance": he has the prerogative to summon and dissolve Parliament and pass the laws he prefers, while only the laws voted by the people ensure the autonomy of Parliament over the abuse of royal prerogatives. For Neville, there are four powers of the Crown that prevent the enforcement of laws: war, taxation, appointment in offices, and management of public revenue. The remedy will be to limit the king through a Parliament elected by the people: "His Majesty [should] exercise these four great *Magnalia* of Government, with the consent of four several councils [. . .] named in Parliament [. . .] and every year afterwards a third part: so each year a third part shall go out [. . .] and in three years they shall be all new" (Robbins 1969: 187). The central argument was clearly Republican and renews the political legacy that had led to the condemnation of Charles I: "the King having the Supreme execution of the laws in his hand, cannot be reasonably supposed to be willing to execute them whenever he can choose whether he will do it or no; it being natural for every man not to do anything against his own interest when he can help it. Now when you have thought well what it should be that gives the King a liberty to choose whether any part of the law shall currant or no; you will find that it is the great power the King enjoys in the Government" (Robbins 1969: 184). Neville repeats Oceana's attack on the Hobbesian thesis that tends to equate a responsible power (the Republic of Lucca) with an arbitrary one (the Sultan of Constantinople). The discretion of the king prevents the enjoyment of natural freedoms to individuals. All of this must be included in the debate on the Exclusion Crisis which is openly addressed in the Treaty. This is why Neville does not support any of the candidates of the opposing factions to the king's succession, whether he is his illegitimate brother or his son. While professing loyalty "to one of the best monarchies in the world", *Plato redivivus* urged Charles II to reduce his powers, but it can be asserted that, in a "Machiavellian" way, the appeal was mainly directed to Parliament to demand its own prerogatives to protect the freedom of the people: "When the Parliament

discovered this, they will no doubt demand of his majesty an abatement of his Royal Prerogative in those matters *only* which concern our enjoyment of our all, that is our Lives, Liberties and Estates, and leave his Royal Power entire and untouched, in all the other branches of it" (Robbins 1969: 184, 185).

Zera Fink (Fink 1962) ironically remarked that Charles II may very well have wondered why Neville inserted the word *only*, since *Plato Redivivus* left to the king a residual power, even though integral and intact, on everything else, once his prerogatives on lives, freedoms, and property were undone.

Conclusions

The trinomial Lives, Liberties, and Estates that the old Republican wanted to protect from the monarch's arbitrary power would become just a few years later the enduring core of John Locke's political theory; while at the same time these principles would be proclaimed in the Bill of Rights, which limited the power of the new rulers in accordance with the wishes of the Parliament that had deposed James II, exactly as those "supreme goods" already identified by Neville as the legitimate basis of a desired constitutional monarchy. This allows us to consider Neville's political and cultural role not just as a brief flicker among generations of English republicans who have supported a certain theory of freedom, in the ideological and historical context ranging from civil war to the reign of William of Orange, a theory of self-government that guarantees political societies against the impositions of an arbitrary will that enslaves citizens. But this also identifies Neville as a political thinker who could assemble different elements of that complex and fluid debate, from the Hobbesian notion of the state of nature, to the relationship between freedom and property emphasized by Harrington, to aspects that would later characterize the liberal theory of freedom. In this last sense, the author of *Plato redivivus* and the admirer of Machiavelli adapts classical Republican precepts to the new context of the Glorious Revolution and constitutes an ideological "bridge" between the two theories, apparently so contradictory, proposing a sort of liberal republicanism of which he can be considered the founder.

Cross-References

▶ Harrington, James
▶ Hobbes, Thomas
▶ Locke, John

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N

Nietzsche, Friedrich

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Introduction

Nietzsche was born on 15 October 1844 in Röcken, in what is today Saxony-Anhalt. His father, a Lutheran priest, died in 1849, and Nietzsche grew up with his mother, his sister, his grandmother, and two paternal aunts. He stayed with them until he was accepted at the elite Landesschule Pforta in 1858. Later he studied classical philology in Bonn and Leipzig and at 24 years of age became professor of classical philology at the University of Basel in 1869. He held this position for 10 years, before his declining health forced him to relinquish it. He spent much of the next 10 years travelling through

Germany, Switzerland, Italy, and France, with frequent stays in Sils Maria. While staying in Turin in 1889, he suffered a mental breakdown and remained mentally ill until his death on 25 August 1900 in Weimar, where he was cared for by his mother and later by his sister Elisabeth.

Nietzsche had a number of friendships, some of which lasted until he fell ill. Three particular relationships were of pivotal importance. The first was with Richard Wagner, whose genius found Nietzsche's admiration until he broke with him in the middle of the 1870s for several reasons.

A second decisive figure in Nietzsche's life was his sister, Elisabeth (1846–1935). Friedrich had extremely ambivalent feelings toward her, everything from tender affection to open hatred and contempt. When she returned from Paraguay after her husband Bernhard Förster – an early nationalist and anti-Semite – had committed suicide in 1893, she quickly took control of her brother's work and later manipulated the editions in a way that made them useful for the Nazis. Since she had control of the Nietzsche-Archive, her forgeries were not uncovered until her death, many of them even much later.

A third significant relationship was with Lou Salomé (1861–1937). She met Nietzsche in Rome in 1882, and he was immediately enthusiastic about the "young Russian." Whether he really wanted to live in concubinage with her, as she claimed later and in several letters to Elisabeth, remains unclear. Although the relationship to Lou Salomé, who went on to become an important author and psychoanalyst, only lasted a few months, it nevertheless made a deep and lasting impression on Nietzsche.

Nietzsche's "Method"

If there is something like a specific method in Nietzsche's writings, then it is closely linked to his aphoristic and metaphoric style of writing, obliterating the frontiers between philosophy and poetry, causing enthusiastic as well as extremely critical reactions (cf. e.g., Nehamas, chap. 1). Commentators insist that there are many Nietzsches or, at the very least, that there is a gap between "Wagner's Nietzsche" and "Nietzsche's Nietzsche". The former – expressed in works like *The Birth of Tragedy* – emphasizes the role of myth and its revitalization via art and music, in which the Dionysian, holistically unifying experience, "the eternal joy of existence" (sec. 17), overcomes the Apollonian individualization that stands for order and limitation. For instance, the *rebirth of German myth* (sec. 23), brought about by the musical genius of German composition, Richard Wagner, could end the crisis of rationalist civilization caused by the Socratic and Semitic traditions.

The other Nietzsche emerges in the wake of his break with Wagner, whom he had previously adored, and is first visible in *Human and All Too Human* (HATH). This period is particularly characterized by an aphoristic style. Walter Kaufmann insists that Nietzsche's aphorisms are not isolated "monades," but are instead thematically interconnected. Karl Löwith holds a similar position and speaks of "a system of aphorisms" (Löwith 15). Derrida, on the other hand, claims that every sentence stands for itself and refuses a unique and singular interpretation (Derrida 123–133). Nietzsche's style, according to Georg Picht, shows that he able to accept the different perspectives connected with how different people interpret the world as well as to see the philosopher as a friend of riddles (Picht 33–38, 56–61). While his interpreters are not in complete agreement regarding a number of points, there is a consensus that Nietzsche did not create a system in the strict sense (Kaufmann 80). With this method, in which form and content cannot easily be distinguished, he questions the old dogmas of eternal truths and eternal moral principles.

He challenges the various presuppositions that have been commonly accepted by philologists, philosophers, theologians and others both on theoretical and normative levels. However, he goes about this with a systematic intention and with an enduring philosophical problem (Löwith 18–21, 25). By tracing back, the history of central philosophical concepts and presuppositions, Nietzsche lays open their genealogy with reference to the

historical, psychological, generally contingent conditions of their development. In a certain sense he replaces the reputed *reasons* for "eternal" theoretical truths and absolute norms with their contingent historical, psychological, and other *causes*.

Another methodological and philosophical turn could be said to exist in the shift from this primarily critical or even "destructive" style to the last period, in which Zarathustra wants to share his overflowing wisdom with the humans, as announced in § 342 of the *Gay Science*. There he speaks about the 'eternal recurrence' and about the '*Übermensch*' (A.C. Danto prefers to keep the German term untranslated, instead of terms like 'superman' or 'overman' that are frequently used) as something man has to long for – instead of falling back into the state of beasts. "Man is a rope, tied between beast and *Übermensch*—a rope across an abyss" (Z, Prologue 4.; quoted according to Danto 180). The eternal recurrence refers to man's embeddedness in the circuits of nature, but more than this, it also talks about the rebirth and return of exactly the same life. When Zarathustra returns, he will again teach the *Übermensch* (Z. Part IIIsec. LVII The convalescent). The idea of eternal recurrence is seen as Nietzsche's central philosophical hypothesis, saving him from the threat of nihilism (Löwith 68–79). In Nietzsche's philosophy, we find a method that shows us "how to become what one is," as proclaimed by the subtitle of *Ecce homo*.

One continuous thread running through Nietzsche's life and works – and neglected by the majority of his interpreters – is his dedication to the writings of Ralph Waldo Emerson. The debates continue about how closely Nietzsche actually followed Emerson and the extent to which he found in his works thoughts that were foreign to German and European intellectual traditions (Ratner-Rosenhagen 5–20).

Elements of Nietzsche's Philosophy

Because there are so many different and even contradictory positions identified with Nietzsche's philosophy, providing a survey of his philosophy is rather difficult. I will nevertheless try to sketch out some of the more important elements, concentrating on three aspects: first, the discovery of a certain variability of theoretical and moral truths previously considered immutable, using history and science to explain, for instance, the genesis of morality; second, his fierce attacks on egalitarian conceptions of justice and on the notion of law as such, both of which are considered illegitimate restraints of human activity and the destruction of serenity; third, and somehow a corollary to the second element, shows Nietzsche's deep devotion to the European idea and his passionate repudiation of nationalism, especially of German nationalism.

Destroying the Myths of Eternal Truth and Values

Right at the beginning of *HATH,* in a chapter titled "On the first and the last things," Nietzsche explains the inherited mistake of philosophers who believe in eternal truths about "the man," whereas in reality human beings can only have knowledge of a rather limited period in time (§2). Much more important than those alleged eternal truths of metaphysics are the many "unimpressive" truths of science. Neither metaphysics nor language mirror reality as such. And logic and mathematics are also unable to provide us with knowledge of the world as it is (§§ 3,6,7,9,11). There is no distinction between an inner and outer world, between body and soul, between appearance and thing as it is; even the most basic theorems of logic are the products of human invention, of believe that is in itself based on sensations of pleasure and pain and susceptible to the perspectives of those who are engaged in the interpretation of the world (§§ 15,16,18).

This genealogy of thinking has to be applied to morality as well. This idea of rejecting "eternal" metaphysical truths in favor of a historical and causal description of their genesis, generally of the genesis of human beliefs and convictions, is a persistent pattern in Nietzsche's philosophy, at least from *HATH* onward. One of the fundamental errors with which man was raised is the belief in an eternal "tables of values" (*Gay Science* § 115).

§ 335 of the fourth book of *Gay Science* has the title "Long live physics!" (Hoch die Physik!). We have to become physicists (in other passages, he seems to be more partial to biology or psychology) to understand the "mechanism" of our actions, i.e., the causal explanation, and in order "to become those who we are" in our uniqueness, to become those who create themselves.

The well-known spectacular and provoking thesis from the Zarathustra proclaiming that "God is dead" is just part of a more general conception that denies the existence of eternal moral values and truths, giving a historical and psychological explanation for the genesis of our universal humanitarian morality that is not really flattering for the human genus, at least not for our civilization. The second chapter of his "book for free spirit," i.e., *HATH*, contains a "history of moral sentiments" based on psychological observation. The main phases of this history are the transfer of the terms good and bad as labels for (helpful or damaging) actions to their motives and then "the predication good or bad is no longer made of the particular motives but of the entire nature of a man.... Thus man is successively made responsible for his [particular] acts, then for his [course of] conduct, then for his motives and finally for his nature" (HATH § 39). This is connected to a kind of reification of good and bad, so they are not understood as labels applied by humans but instead are grasped as properties of motives and men themselves. But now that we have come to see that everything necessarily follows from past and present circumstances (on determinism see also § 107), it was recognized that the history of moral feelings is the history of the error of responsibility – one based on the error of human free will (ib.). Nevertheless, morality has its role in human development: "The beast in us must be wheedled: ethic is necessary, that we may not be torn to pieces. Without the errors involved in the assumptions of ethics, man would have remained an animal" (§ 40).

As Nietzsche explains, there is a "twofold historical origin of good and evil" (§ 45): One is connected to "ruling races and castes." Those belonging to the ruling class, who have the power to be "grateful and revengeful," are good; "whoever is powerless and cannot requite is called bad." In this sense a slave is bad, but an enemy is not. "The Trojan and the Greek are in Homer both good." For the oppressed and powerless, on the other hand, every other man is seen as an enemy, so feelings in common can arise only in the rudest way.

This idea is pursued further and expanded in later writings. In *The Dawn* (Morgenröte), we find a "natural history of duty and right," where both terms are reduced to kinds and measures of power (§ 112). The most precise and extensive description of the kinds of good and evil is given in *The Genealogy of Morals*. The pivotal question is "Under what conditions did men invent for themselves these value judgments good and evil?" (Prol. § 3). Here we find, once again, that "good" is identified with the nobility, and these individuals are not only characterized by their power, but also by "spiritual nobility" (§ 5). The idea that political superiority is due to spiritual superiority is still valid when the original caste of warriors becomes a caste of priests simultaneously (§6). Things change as soon as warriors and priests run into conflicts and the priests with their spiritual supremacy succeed in the revaluation of values: The former masters are condemned in favor of a morality of slaves who want their revenge for millennia of oppression. "The slave revolt in morality begins when the resentment itself becomes creative and gives birth to values" (§ 10). While the noble man honors his enemy, the man of resentment conceives the "evil" enemy and creates as his counterpart another sense of "good." By using the resentment, the weak people become the strong and create their own kind of kingdom, the "kingdom of God" (§ 15). While Christianity is, in this sense, just one example among others for the victory of resentment, of the slave morality and the superiority of the weak over the strong, it is nevertheless the most striking in a number of societies. In any case, if we follow Nietzsche's line of thought all the way through, then humanitarian universal morality is exposed as nothing more than a product of resentment and envy.

Nietzsche does not accept the foundation of good on the basis of utility either; he generally

denies the relevance of happiness for human flourishing, praising instead the importance and the formative effects of "great suffering." Walter Kaufmann individuates a terminological shortcoming in Nietzsche's approach; he seems to identify happiness with (physical) well-being, whereas a person's concept of a successful, felicitous life might very well include the acceptance of suffering as an integral feature of personal development. According to Ursula Schneider, however, Nietzsche's concept of happiness includes precisely this element. Indeed, this interpretation resonates with a passage in the *Gay Science* where Nietzsche contrasts two kinds of happy people: one who is always successful, and the other who always fails but sees "value and result of life" elsewhere and says that he knows "more about life because I have so often been on the verge of losing it" (*Gay Science* IV 303). He attacks those who cling to the "religion of comfortableness": "How little you know of human happiness, you comfortable and benevolent people, for happiness and unhappiness are sisters and even twins that either grow up together or, as in your case, remain small together" (IV 338).

Nietzsche on the State, Law, and Justice

Some elements in Nietzsche's social, political, and legal philosophy are quite well known, such as his aggressive aristocratic perfectionism and his aversion towards law and an understanding of justice that is connected to punishment. He sees this kind of law and justice as a burden and compulsion of human life – one that destroys serenity and creativity. Third, he utters harsh words about women in the *Zarathustra*. And finally, his portrayal of justice in some of his aphorisms is quite close to what was traditionally labelled magnanimity.

With regards to the first topic, Nietzsche's concept of moral values is ordered in terms of superiority and inferiority, be it superiority of races and castes or spiritual and therefore political nobility. His direct statements about the state, whether in chapter eight of *HATH*, titled *A Glance at the State*, or when he writes about *The New Idol* in *Zarathustra*, only seem to confirm this attitude. Nietzsche explains that "a higher culture can only originate where there are two distinct castes of society: that of the working class and that of the leisured class" (HATH § 439) and accepts justice as equality "only within the ranks of the ruling class" (§ 451). Socialism is "the fantastic younger brother of ... despotism, ... it aims at the complete annihilation of the individual, whom it deems as an unauthorized luxury of nature" (473). Living together, the mutual avoidance of violence, identifying with the will of another person, and a reciprocal giving and taking might be possible for a limited number of individuals. Taken as the founding principle of society, however, it would mean the negation of life, because life is essentially appropriation, violation, oppression (BGE § 259). The utterances in (11) *Zarathustra* are even more drastic: "State is the name of the coldest of all cold monsters. Coldly lies it also; and this lie creeps from its mouth: 'I, the state, am the people'." Among its servants are "the superfluous ones" who "vomit their bile and call it newspaper." Where "the state ceases" we see the "rainbow and the bridges of the overman." In contrast, the "poison flies" in the market want "to punish you for all your virtues" (12). In the section *The Tarantulas* he lets us know what he thinks of the preachers of equality: "Tarantulas are you to me, and secretly revengeful ones!" The revenge of those tarantulas is directed "against all that has power," they are driven by a desire to judge and to punish (Z II 81–82). But it also becomes clear just how much he fears this "old enemy": "Divinely, steadfast and beautiful, it has bit me on the finger!"

This metaphor of the beautiful enemy whose bite makes him "dizzy with revenge," so much so that Zarathustra has to ask his friends to bind him to a pillar to keep him from becoming "a whirl of vengeance" (83), shows he truly identifies socialist ideas with the enemy.

Still it is an open question whether Nietzsche's radical aristocratic perfectionism is a literary, exaggerated version of intellectual elitism or a political program *in nuce*. If the latter, then the question arises: what are the criteria for belonging to the ruling class? The European nobility of his time would certainly have been a poor choice, a

point confirmed when he states that the "brothers in war" (Z 10) will not necessarily lead to higher culture. In BGE 251, he says that Jews could rule Europe if they wanted, showing simultaneously a certain admiration for Prussian officers. With clear sense of exhilaration, he mentions the idea of combining these two traits, thereby conferring upon the military officers the spirit and intellect they so sorely lack, before claiming that his real project is to breed the new race that could rule Europe (BGE 258).

Nietzsche's aristocratism, however, is not connected with any praise of the authoritarian regimes of his age. If it were, then he could not confirm that "In all institutions in which the sharp breeze of public criticism does not penetrate an innocent corruption grows up like a fungus" (HATH 468). In societies where there are ruling and serving classes, Nietzsche feels that ascend and descend from one class to another should be possible (HATH § 439), which obviously excludes something like a hereditary aristocracy. There is a witty remark in a chapter of *HATH* titled *The Wanderer and his Shadow* about how democracy makes monarchy hollow through constant legal pressure, so kings and emperors "remain a gorgeous ornament upon the simple and appropriate dress of democracy" (§ 281).

Attempts to give particular persons the aura of the "superhuman" include a "tendency to regard whole grades of the population coarser and baser as they really are" (!) (HATH §461). Nietzsche defending the ordinary man might seem quite unexpected. He describes and comments the victory of democracy as a matter of fact, even if he is, to put it mildly, not in favor of it. Moreover, he tries to defend his way of life against the demands of the vast majority, which to an extent resembles Mill's defense of individual liberty, though using a dramatically different vocabulary. Apart from his extremely powerful language, constantly playing with paradoxes, what we find is a serious challenge to our familiar views and presuppositions: Do we really have good reasons for considering human beings as equal, to think that pity is better than cruelty, that peace is better than war?

Nietzsche's views on law and justice are also driven by the fear of constraints, of being "wedged in" by more or less mechanical general rules hindering those who are of noble and free character from creating and dancing: "constraint, law, necessity and consequence and purpose and will and good and evil" are creations of Zarathustra's "old devil and arch-enemy, the spirit of gravity." In distant futures, with dancing gods, "self-fleeing and re-seeking," all those hindrances will be danced over and thus paving the way for the "overman" (Z 3, *Old and New Tables*, 3; 157). Nietzsche pleas for a world full of serenity and creativity; a world without constrains for the creative souls. But he generally distrusts "all those who talk much of their justice! Truly, in their souls not only honey is lacking" (Z. II, 82). In the first part of the work, under the heading *The Bite of the Adder*, he is even more explicit: "I do not like your cold justice; out of the eye of your judges there always glances the executioner and his cold steel. Tell me: where find we justice, which is love with seeing eyes?"

Among the "many Nietzsches" often discussed, there are two that really stand out: One is the Nietzsche who seemingly awaits for his sister to adapt his works to right wing ideologies, and the other Nietzsche who opens up these same works for anarchist interpretations.

A similar variation can be found in Nietzsche's utterances about women. The best known is certainly the "little truth" given to Zarathustra by the old woman: "You go to women? Do not forget your whip!" (Z *Old and Young Women,* 57). A completely different view is presented by the sage in § 68 in the second book of the *Gay Science*. There it is declared that the apparent failings of women are in reality the failings of men; moreover, the law of the sexes is "a hard law for women," who are actually "doubly innocent." In aphorism 71 he explains the paradox involving women's education and chastity, for women are "supposed to remain ignorant, even in their heart." Once they marry, however, the situation changes and he concludes: "In sum, one cannot be too kind about women" (p. 128). While these positions represent the two extremes within which the other statements about women fall, it should be admitted that a majority of Nietzsche's statements (e.g., in

Beyond Good and Evil Part 7) lean more in the direction of the first position. In the end, it is not clear whether the embarrassing utterances about women should be seen as important or even as representative parts of his philosophy.

Nietzsche the "Good European"

While perhaps somewhat astonishing, at least the later Nietzsche was decidedly anti-nationalist. Perhaps the most succinct presentation of this view can be found in Part 8 of *BGE*, entitled *Peoples and Fatherlands*. He admits that even "good Europeans," among whom he repeatedly counts himself, may sometimes allow themselves "a robust fatherlandishness, a slip and backslide into old loves and confines" (BGE § 241 e.a.). After a number of insults to Germans, French and Englishmen, he declares: "Thanks to the pathological manner in which nationalist nonsense has alienated and continues to alienate the peoples of Europe from each other . . . the most unambiguous signs declaring that *Europe wants to be one* are either overlooked or mendaciously reinterpreted" (§ 256, italics original). Nietzsche shows a particular aversion to Germans in the sense the word was used in his time. Having explained in the *Gay Science* that he, and those who think like him, are neither liberal nor proponents of a free society and prefer adventure and war to global justice and harmony ("we do not love humanity"), he insists that "we are not nearly German enough . . . to advocate nationalism and race hatred" (GS § 377 p. 338–339). With regards to European unification, his belief that even dull people will overcome nationalism within half a century was overoptimistic (BGE § 241). He clearly does not have in mind a notion of Europe akin to the current European Union with values such as democracy and human rights at its core. Whether his understanding of pan-European meant the enslavement of the rest of the world is mere speculation.

Nietzsche's Influence

Nietzsche's influence can be divided into those early reactions by leftist, anarchist and even right-wing authors from the late nineteenth century until the Weimar Republic, followed by the appropriation and abuse by the Nazis, as his sister had intended.

After 1945, there is a slow and hesitant re-discovery of Nietzsche, which eventually culminated in an intense discussion of him and his work. Another way of "organizing" these reactions may be a thematical separation of medial, ideological, political, artistic, and philosophical approaches (Sommer 98–165).

Among the initial and enchanted adaptions of Nietzsche's writings is the work of anarchist Gustav Landauer, a leading figure of the revolutionary Räterepublik in Munich after the First World War (Riedel 1997, 54–68). Young people in particular were fascinated by Nietzsche's criticism of Christianity as well as the fossilized and anemic systems of education. Such critical positions can be found in the works of authors like Wedekind, Hesse, Musil, Heinrich Mann, and Franziska von Reventlow. Equally fierce were the rejections formulated by clerical and other authorities.

Another major strand of reception was offered by Freud and other psychoanalysts, even though the extent of Nietzsche's influence on Freud remains unclear (Azizi 2017). His scintillating and provocative aphorisms are unique in European intellectual history. This, combined with his style of writing, made him and his ideas the perfect canvas or screen for the projection of one's own ideas – be it those of his commentators, his adorers, as well as those who condemn him. World War I presents a good example of this kind of projection: Germans portrayed Nietzsche as a representative of heroism, while English authors, repudiated him as a warmonger (Sommer 131–132).

How important Nietzsche was for the Nazi-regime and its politics is still unclear. Although Hitler's knowledge of Nietzsche and his writings seems to have been rather moderate (Niemeyer 135), Goebbels' diary paints a very different picture. He noted that Hitler spoke about Nietzsche as the philosopher who most closely approximated national-socialist thinking and feeling—statements very similar to Mussolini's claim that

without Nietzsche he could not have created fascism (Sommer 2019, 125–126). Great efforts were taken to "Nazify" Nietzsche, mainly by his sister Elisabeth Förster-Nietzsche, who hid all the letters that were unambiguous testimonies for the insurmountable gap between Nietzsche's thoughts and Anti-Semite racial ideology. Other participants in this "Nazification" were authors such as Alfred Baeumler and Rosenberg's secretary, Heinrich Härtle. Since the edition of *Wille zur Macht*, published by Elisabeth Förster-Nietzsche and Heinrich Köselitz in 1906, was seen as his masterpiece by right-wing "followers" and by left-wing critics alike, it should be made clear that the original manuscript was heavily manipulated and that Nietzsche himself had given up the idea of publishing this work at all (Niemeyer 2013). Whether Nietzsche is read as a fascist or not depends on how those aristocratic, pity-despising and war-glorifying statements, a few of which were quoted above, are weighed and whether they are interpreted as a kind of aesthetical elitism, as Thomas Mann saw them, or as a political program, as Marxist and other critics insist. As I have suggested, the aesthetic reading seems more plausible.

After the Second World War Nietzsche's work did not receive much attention. One of the most important exceptions, however, was Walter Kaufmann's book *Nietzsche. Philosopher, Psychologist, Antichrist*. Contrary to the more mainstream treatments of that time condemning the "dangerous," "nihilist" author, Kaufmann gave a sober, benevolent interpretation of Nietzsche's life and works. Likewise, Theodor W. Adorno took a more diversified position toward the controversial thinker.

Starting in the 1980s, new interpretations portraying Nietzsche as a precursor of postmodernism emerged. An important recipient of Nietzsche's method is Michel Foucault (Westfall and Rosenberg 2018). It is sometimes claimed that he read Nietzsche in much the same way Heidegger interpreted him, while others see Foucault's turn to Nietzsche as an attempt to leave phenomenology behind (Ansell-Pearson 441).

It has recently been shown that the American reception of Nietzsche is of particular interest for several reasons: Among the first – and extremely rare – positive reactions to Nietzsche's writings are enthusiastic letters he received from Americans of German origin. Meanwhile there has been a long and intense discussion on Nietzsche in the United States with a "multitude of 'American Nietzsches'." A recent study "argues that confrontations with Nietzsche laid bare a fundamental concern driving modern American thought: namely, the question for the *grounds,* or foundations, for American thought and culture itself" (Ratner-Rosenhagen 23). Of particular interest might be the adaption of Nietzsche by African American authors, starting with the Black Panther movement (Ratner-Rosenhagen 257–260). Another important strand is the anti-foundationalist interpretation by authors such as Allan Bloom, Richard Rorty and Stanley Cavell, which followed the intrusion of the "French" Nietzsche, introduced to America by philosophers like Derrida and Deleuze (Ratner-Rosenhagen, chap. 6). Cavell in particular has done a great deal to emphasize Nietzsche's relevance for analytic philosophy. This emerged in connection with a rediscovery of Emerson, who for a long time was not accepted as a "real" philosopher, neither in America nor in Europe (Ratner-Rosenhagen 299–304). In some sense, we have come full circle and perhaps to a fitting end.

Conclusion

Obviously, an adequate approach to Nietzsche and his philosophy will neither end in condemnation note in adoration. Instead, a clear and sober look on his insights as well as on his shortcomings opens important perspectives for a present-day world view.

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Life

Carlos Nino was born in Buenos Aires, Argentina, on November 3, 1943, and died in La Paz, Bolivia, on August 29, 1993. He received his law degree at the University of Buenos Aires (UBA) in 1967 with honors and his DPhil at Oxford in 1977. Professors Finnis and Honoré were his supervisors and Hart and Skegg his examiners. Nino held a Philosophy of Law Chair at UBA and taught at New York, Yale, and Pompeu Fabra law schools; he was a visiting scholar in Harvard, UCLA, and Freiburg; and a speaker in conferences around the world.

He was also a public intellectual. After finishing his time at Oxford, he returned to Buenos Aires where the bloodiest dictatorship in the history of Argentina was kidnapping, torturing, disappearing, and killing thousands of people. Nino resumed teaching at UBA, became a researcher, and worked as a lawyer. Eventually, he will become together with Malamud Goti and Farrell one of the main legal minds behind Argentina's transition to democracy in 1983.

He worked for President Alfonsín designing the human rights policies of the transition, providing the arguments to support the historical prosecution of those responsible for the atrocities, and later proposing a constitutional reform from a multiparty advisory body to the President, the Council for the Consolidation of Democracy.

Nino was part of a remarkable group of legal philosophers who gathered at SADAF, an association created to study and produce works from the

perspective of analytic philosophy. Some of them had also studied at Oxford: Eugenio Bulygin, Eduardo Rabossi, and Genaro Carrió, who translated Hart's *The Concept of Law* to Spanish. All of them, with very few exceptions, were legal positivists and discussed strongly with the authoritarian natural lawyers who supported military dictatorships.

As a professor, he was inexhaustible, staying long after classes or conferences to keep conversations going, no matter the quality of the questions or the age of the interlocutor. He helped many students to become professors of law creating for them jobs, institutions, and international networks.

Work

Carlos Nino's overall theory of law was expounded in the remarkable number of essays, conferences, articles, and books he was able to publish during his short life. The theory has an architectural design and it starts from a metaethical foundation moving on to normative ethics, political philosophy, constitutional law, legal theory, and legal adjudication. His writing style tended toward the dialogic and polemic, taking the arguments of other authors under their best light to better explain or further expand his own. Thinkers such as Hart, Warnock, Dworkin, Habermas, Alexy, Carrió, Alchourrón, Bulygin, Farrell, Nagle, Fiss, Ackerman, Taylor, and Walzer were some of his counterparts, and some of them were his friends.

The theory starts from Warnock's notion of *the human predicament*.[1] The combination of scarce resources and infinite human needs coupled with somewhat equal capabilities makes conflict inevitable. Hope lies on empathy, the capacity to put oneself in the place of the other, thus being able to find common ground to coordinate efforts. Ethics is the device we create in order to decrease conflict and increase coordination among people. It works developing discourses that regulate the way conversations administer our conflicts. Nino was a *moral constructivist*, a term that shows his debt to John Rawls.[2]

According to Nino, moral discourses are like scientific paradigms in the sense that they are created to solve problems, they expand if successful, and they decline as anomalies grow. The premodern moral discourse, for example, was organized around the authority principle: a person or a group held the capacity to end conflicts by uttering the last word. It prevailed until the world it governed became too complex, giving way eventually to the modern moral discourse (MMD).[3]

Discourses are incommensurable, there is no higher evaluative standing to choose among them, and they set the normative standard; thus, Nino's theory is at this level an example of *conceptual relativism*. Moral evaluation happens within each discourse, and there is nothing to be done when differences arise among people who do not share the same one. Since by necessity moral discourses tend to expand in order to solve conflicts in wider communities, this imperialist drive creates tension on the borders.

The arguments used in MMD have some specific features. These features include generality (in the sense that I cannot say, for instance, that something is right because it is convenient for a certain person), universalizability (in the sense that I have to be willing to make my judgment universal, including against myself), a certain agreement on evidence (the idea about how we understand that a fact takes or does not take place and, correspondingly, the need for some procedural or intersubjective verification of this fact), and publicity (I cannot say something is right in accordance with a principle I cannot make explicit). According to Nino in MMD, we ideally assume that the best decision is the one in which all those affected by the outcome are present; every participant has the same amount of

[1] Warnock GJ (1971), The object of morality. Methuen & Co., London.

[2] Rawls J (1971) A theory of justice. Harvard University Press. Cambridge, Mass.

[3] Nino CS (1991) The ethics of human rights. Clarendon Press, Oxford.

information, the same level of rationality, and the same persuasion skills; and it is reached unanimously.

Assuming those are the regulating principles we should all obey when entering into moral discussions, there are things we cannot say unless we violate the very practice we share. This is what Nino calls a *pragmatic inconsistency*. In a moral discussion, people assume some common principles. Otherwise, they would not be discussing or at least not discussing in this particular way. And if what is said is in conflict with the premises of the practice, their discourse becomes pragmatically inconsistent.

Thus, once we agree to belong to a community that shares MMD to diminish conflicts and increase coordination, we should accept, if we do not want to be considered pragmatically inconsistent, that some moral principles arise from the premises of the ideal discussion. First, the principle of personal autonomy: each individual should freely decide how to develop his or her life. If I deliberate with somebody else in order to persuade and be persuaded, I cannot force my arguments upon her. Perfectionism is not an option.

Second, the principle of personal inviolability: no one should increase her autonomy diminishing the autonomy of others. I cannot turn my partner into an instrument of my will. This is no other than the harm principle and a Kantian, antiholistic stance.

Third, the principle of personal dignity: the will of others should be respected even if this implies a decrease in her own autonomy. We can only increase our autonomy by diminishing the autonomy of others if they consent. If I do not take seriously what the other person tells me, why would I be speaking with her? It is in this way that we can agree on a contract, for example.

However, this conception of moral deliberation is ideal in at least two senses. Firstly, in the ideal deliberation, all those affected by the result of the discussion are present, which most of the time becomes impossible when the subject is relevant enough and affects a large number of people. Secondly, ideal deliberation requires unanimity, that is, it requires that we have enough time so that all of us who are interested in the outcome try to persuade one another until an agreement is reached, at least temporarily. Not to mention asymmetry of access to relevant information or the rhetorical inequality of the participants.

Are these flaws of real deliberation reason enough to reject it? Let us remember that the deliberative ideal is a critical one; its purpose is not to describe reality but to reveal the normative principles of a social practice. This is why it constitutes a *legitimate utopianism* with the capacity to suggest and evaluate courses of action.[4]

The political proposal consists in a deliberative justification of constitutional democracy. In other words, in the level of reality, democracy is the best option to make this ideal effective; it is the imperfect political substitute of the modern ideal of moral deliberation. Thus, we rely on democracy because it reproduces certain conditions of impartiality to help us take better decisions than any other process of collective decision-making. It has epistemic, not ontological, value.

In Nino's account, democracy approaches ideal deliberation by creating the best political arrangements so that as many opinions as possible are expressed, and the best arguments are heard. Thus, decisions are made with the highest level of agreement available, taking into consideration as much relevant information as possible.

Nevertheless, since democracy is only a substitute to ideal moral deliberation, what makes it imperfect generates several problems. In the first place, not all of us can be present in the process of deliberation. Secondly, since we do not have enough time for unanimity, or are not willing to give minorities too much veto power, we settle for majority rule.

Democratic representation requires the creation of adequate political party systems, electoral mechanisms, mechanisms of parliamentary design, freedom of expression, and access to information. In all these fields, Nino proposed institutional reforms for Argentina and other countries, prominently the replacement of

[4]Nino CS (1996) The constitution of deliberative democracy. Yale University Press, New Haven.

hyperpresidential constitutions in Latin America to parliamentary ones to promote deliberation a more flexible way of dealing with recurrent legitimacy crisis. The proposals he designed were the basis of many of the reforms introduced in the Argentine Constitution in 1994.

Nevertheless, no matter how well designed these mechanisms could be, they do not remove the threats of majority rule, like the possibility that decisions taken by those who win the democratic game violate rights, i.e., the premises on which we justify the democratic system as a whole (the moral principles assumed in the ideal deliberation). Therefore, it is necessary to create an agency that defends democratic deliberative procedures and the substantive principles of the system even against the will of the majority without risking political retaliation. The most important of these mechanisms is the judiciary, specifically its judicial review capacity.

However, this instrument seems at first sight contrary to the principles of deliberative democracy. The elitist idea that only one person (or a few) understands the principles of a constitution better than the people's representatives is far from the deliberative ideal. Nino proposes three exceptions to the unrestricted respect of the popular will. First, its decisions evidently violate the principles assumed by ideal moral deliberation, and second, judicial review is also justified to control the rules that allow democracy to produce legislation justified by deliberation. Thus, judicial interference is justified according to Nino if it preserves a justified (by the principles) game (the deliberative processes).

There is, however, a third problem. Legal adjudication can change both in time and space, thus threatening the consistency of the language and confusing the expectations of the people about what their rights and duties are. Nino, who was specially worried about the lack of respect for rules in Argentina (what he called the tendency toward anomie) allowed for a third exception, given that they must maintain and protect the consistency of the language of law. Thus, for him to honor a constitution means preserving the social hermeneutical practice it consists of while improving it in accordance with the values that each generation understands are expressed in society's basic institutional agreement.

Nino was thus able to take a stand in the classic discussion of legal theory between positivism, natural law, and legal realism. Against natural lawyers, he agreed with analytic positivists that the term "law" could be defined in neutral, empirical terms. But if law is a set of rules, it opens up to the realist paradox (what he called *radical indeterminacy*): if the language of law is ambiguous, vague, its rules are contradictory, and the systems filled with gaps it cannot exercise social control. Nino solved the paradox bringing back ethics into law, showing how law is a province of the moral discourse, how in order to create justified legal decisions lawyers need to resort to moral principles.

The reaction to this solution poses another paradox (what he called the moral superfluousness of law): if ethics is the final arbiter, why do we need law? His answer brings back politics to ethics and law: in modern ethical discussions, the best solution is deliberation, and since the best deliberation we can achieve is through constitutional democracy, law is relevant if it is a product of morally justified, epistemically valuable democratic deliberations.

The three schools of legal thought were bitterly embattled in Latin America not only in academic circles but also politically. Nino's theory of law, ethics, and politics shows the new generations a way forward that stresses the importance of law as a complex social practice necessarily connected to democracy and the best aspirations of modernity.

Impact

The productivity of Nino's theory is apparent in the way it helped him tackle recurrent and pressing problems of his time and place, mainly the emergence of radical evil in Argentina, incarnated in the 1976 coup d'état and the terrorist dictatorship that ensued. To explain it and to exorcise its demons were Nino's main task.

The 1976 coup was the sixth in Argentine history. Since 1930, military interventions were welcomed or at least tolerated not only by the

people but also by the judiciary. The Supreme Court created the de facto doctrine to provide the military regimes with legitimacy enough to function and their rules validity enough to be enforced. Before stepping down, the last dictatorship established a self-amnesty decree in order to avoid prosecutions. Nino's theory of democracy as a more legitimate deliberate process allowed President Alfonsín and the democratic judiciary to overrule the decree and the de facto doctrine. His theory of criminal punishment justified the prosecution of those responsible for the atrocities. Nino was thus a key actor in the historical set of trials that started what later would be called transitional justice and the first scholar to produce a theory to explain and justify it, as early as 1983.[5]

Nino was adamant in pushing for institutional change in order to consolidate the transitions from dictatorships to democratic systems. The need to increase the epistemic quality of politics clashed with old Latin-American traditions of concentration of powers, hyperpresidentialism, corporatism, and antiliberalism. His efforts at institutional change such as his advocacy for a more parliamentary system, an increase in participatory mechanisms, and the democratization of the media are some of his proposals that eventually bore fruit in Argentine law.

Another feature of Latin-American culture is its tendency toward anomie, and Nino was a path breaker in bringing this issue into the conversation, both among scholars (disregard of rules as an obstacle for development and democracy, the relevance of game theory to explain problems of coordination, and the need to increase the legitimacy of the system in order to create enforceable rules) and the public in general (showing the impact of anomic behavior in road safety, the problems that conflicts of interests create in legal scholarship, or the weight of corruption on public policy).

August 29 is lawyers' day in Argentina to commemorate the passing of Alberdi, the father of the first Argentine Constitution. Nino died on the same day. Alberdi had said that the 1853 Constitution was a transient one. It created a restricted republic to set the stage for a future true one once the conditions allowed. It took more than a hundred years, and Nino was a key player in that transition, no wonder he was celebrated as a public intellectual.[6]

[5] Nino CS (1996) Radical evil on trial. Yale University Press, New Haven.

[6] Fiss O (1995) The Death of a Public Intellectual, *Yale Law Journal* 104:1187–1200. It contains a selected bibliography of Nino's work.

Nino, Carlos Santiago: Law, Morality, and Politics

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Introduction

Carlos Santiago Nino (1943–1993) was born in Buenos Aires, Argentina. He obtained his law degree from the University of Buenos Aires and received a doctorate from Oxford with a thesis on the foundations of criminal responsibility in the 1970s. Since his return to Argentina and until his death, he taught legal, moral, and political theory in Argentina, Spain, and the United States. In addition, he was a prominent member of the group of Argentine analytical philosophers gathered at the Argentine Society of Philosophical Analysis (SADAF) and other academic institutions.

During the 1980s, after the criminal military dictatorship, he served as a presidential advisor for human rights policy in the first democratic government, and he coordinated the Council for the Consolidation of Democracy, dedicated to the study and promotion of structural reforms in the Argentine institutional system – many of them were incorporated to the Argentine Constitution in a reform enacted in the year after his death.

He died in La Paz, Bolivia, where he collaborated with the constitutional reform process. At

his death, he left three books practically finished – published in the following years – which were added to the ten that he had already published, and more than a hundred articles written since the end of the 1960s.

Nino taught, accompanied, and promoted a recognizable group of young disciples (the "Nino Boys") who worked with him on several academic and institutional projects and initiatives. They secured, expanded, and enriched his intellectual legacy.

In his short but intense intellectual career, he produced a monumental theoretical work in which he wrote a series of novel and influential foundational treatises on legal theory with topics as diverse as the problem of the normativity of law (Nino 1985), metaethics and the status of moral truth (Nino 1989b), moral theory and the foundations of a liberal conception of human rights (Nino 1989a), democratic and constitutional theory (Nino 1992), political philosophy and the justification and scope of democratic legitimacy and political authority (Nino 1996a), and the connections between law, morality, and politics (Nino 1994).

His more abstract and ambitious foundational works (Nino 1984-1989a-1991 and 1996a) were always guided by an avid intellectual curiosity, enriched by the influence he received in his interactions with the centers of global academic production, his academic groups, and his intense participation in the public debates of his country. His work was always engaged with –and committed to – the institutional, political, cultural, and legal challenges of his community.

By the time of his death, he had articulated a comprehensive philosophical system – which he indeed considered provisional. Nevertheless, Nino's philosophy clarified and resolved the conceptual, justificatory, and interpretative connections between law and morality, the direct connection between law and politics, and, finally, the connection between politics and morality, based on considering law as a social, collective, and recognizable practice endowed with normative value in which a set of ideals, processes, and conventions converged (Nino 1994).

His theory on the normativity of law, his epistemic-deliberative conception of constitutional democracy, and his liberal-egalitarian foundation of human rights based on the principle of personal autonomy are still a fundamental point of reference in academic debates throughout the Spanish-speaking countries.

Nino's Path: A Brief Synthesis

In the following sections, we will go over the critical elements of the formidable work that Nino elaborated on in little more than a decade of tireless intellectual work and committed participation in the public life of his country.

We will focus on their fundamental contribution in each area of his work, the main steps in the evolution of his system, and the adjustments he made in different elements to ensure their internal consistency after each refinement. His intellectual production always had a sincere and explicit exploratory character. Nino reconsidered, improved, and abandoned his theses and arguments as he evolved and explored the possibilities and implications of every new idea he incorporated into his work.

He began his journey in legal theory in the late 1960s at the Instituto de Filosofía del Derecho of the University of Buenos Aires directed by Ambrosio Gioja. In the 1970s, he explored typical discussions about positivism, natural law, and legal systems (Nino 1980a).

At the beginning of the 1980s, the findings of his work in legal theory – and probably his determination to contribute to the effective realization of human rights in the post-dictatorship period in Argentina – led him to delve into several topics of moral and political theory (Nino 1984-1989a).

In the encouraging environment of the Argentine Society of Philosophical Analysis (SADAF), he immersed himself in discussions about metaethics. While endorsing a constructivist metaethical conception, during the 1980s, Nino developed a philosophical justification for the principles of egalitarian liberalism and a persuasive moral foundation for the content and scope of individual rights (Nino 1984-1989a).

He came to realize that an unreserved reliance in moral reasoning to find true answers to questions of political morality would minimize the significance of political authority and the law (he called this "the paradox of the moral irrelevance of government and laws"). After refining his constructivism, and probably influenced by his commitment to strengthening the justification and legitimacy of the nascent democracy in his country, he began to explore the possible normative connections between politics, morality, and the law.

At the beginning of the 1990s, he presented his epistemic-deliberative theory of democracy that would try to solve that paradox. The successful establishment of a moralized democratic policy, as the one endorsed by its epistemic-deliberative conception – grounded in the respect for certain a priori rights and inclusive decision-making procedures oriented to impartiality – was the final argument proposed to overcome the paradox of the moral irrelevance of government and to reconcile law, morality, and politics (Nino 1994, 1996a).

Accordingly, in his last works, he claimed that law should be understood as a social, cooperative, collective practice that can only fulfill its function of promoting cooperation and reducing conflicts when it is properly recognized as morally legitimate by the relevant legal actors of a political community (Nino 1994).

Law and Legal Theory

Educated in the canon of analytical philosophy, Nino was an acute critic of the foundations and functioning of the traditional legal science model in the civil law tradition countries, known as "legal dogmatics." One of his first publications, in 1970, was called "Dogmática Juridica. Sus Aspectos científicos y acientíficos (con especial referencia al derecho penal" *[Legal dogmatics. Its scientific and non-scientific aspects (with special reference to criminal Law*] (published with corrections as Nino 1974), and in 1979, he produced the influential work "Algunos modelos metodológicos de 'ciencia jurídica" *[Some methodological models of "legal science"]* (Nino 1979) where he elaborated his most complete critique.

Consequently, he was attracted by the topics and methods of what he would characterize *as "conceptual positivism,"* guided by a descriptive and morally neutral approach to law and legal systems (Nino 1989b). In this regard, he singled out the works of Hart and Kelsen as the most influential ones. In Latin America, conceptual positivism – Nino cared to differentiate it from "ideological positivism" that postulated the obligation to obey any norm enacted by those in power, including, for example, a de facto government – represented a fresh rejection of conservative and traditionalist theories of religious natural law and the possibility of a rational and scientific approach to the problems of legal theory.

The main subject Nino dedicated himself to in depth was the normativity of law and legal systems. In his first decade of intellectual production, he produced several works on "the concept of legal validity" (Nino 1985). He critically evaluated Hans Kelsen's approach to that topic and wrote about the insufficiency of Hart's theory of norms and legal systems to adequately explain the normativity of law from an internal point of view.

At the same time, he found Dworkin's radical critique of positivism at that time unsatisfactory. So, he delved into that controversy and proposed an argument through which he would "overcome" *the* dispute between positivism and natural law theory and the Hart-Dworkin debate. His central argument (Nino 1980b) consisted in affirming that both authors employed different concepts of law; the former was using a descriptive one, in which moral considerations were only considered from an external and descriptive point of view, and the latter a normative one, in which moral considerations were brought to bear on official or individual justificatory reasoning about what to decide or do.

Based on the idea of different concepts – descriptive and normative – of law, operative in different contexts and with diverse purposes, Nino would always reject the existence of a necessary conceptual connection between law and morality (Nino 1980a, 1994).

Nevertheless, based on his analysis of the validity of legal norms, the exploration of the possibilities and functioning of normative concepts of legal validity, and the conditions under which the norms provide reasons to act, Nino formulated his "fundamental theorem of legal theory" (Nino 1994). The theorem demonstrated that legal norms could only justify actions or decisions as long as they are a kind of moral judgment (public, general, supervenient, universal, autonomous, and final) that legitimizes certain authorities.

Accordingly, Nino stated, law has an essential justificatory connection with morality. He argued that in the field of the normative concepts of law, an insular legal discourse is not possible because law belongs to a broader justificatory system and legal discourse is a particular type of moral discourse; a "sonderfall," he said, borrowing explicitly from Robert Alexy's terminology (Nino 1994).

Analyzing the validity of law and the moral dimensions of legal obligations was fundamental to addressing the constitutional and political discussion in post-dictatorship Argentina about the validity of norms enacted by the dictatorship once democracy was reestablished. Before the dictatorship ended, Nino wrote that its norms were not valid prima facie, and the Supreme Court of Argentina followed his thesis during the first democratic years.

Even though moral and political philosophy would be the focus of his work in the following years, Nino would continue to address diverse legal and constitutional issues relevant to his country, in which he would project and test the scope of his more abstract theories: the limits of criminal punishment, the constitutional protection of the private sphere of action, conscientious objection, the justification and scope of judicial review, the attenuation of what he *called* "hyper-presidentialism," and the avenues for legitimate democratic responses to massive violations of human rights. One of the books published after his death, "Radical Evil on Trial" (Nino 1996b) presented his theoretical foundation on this subject and a reconstruction of Argentina's policies to deal with those crimes, in which he had relevant personal participation.

His interest in – and dedication to – the debate of concrete constitutional and legal issues in his country cannot be explained only by his civic engagement as a public intellectual. In theoretical terms, Nino not only defended a justificatory connection between law and morality but also supported the existence of an interpretative connection. In different works (Nino 1995, 1996a), he claimed that every act of legal interpretation involved a series of steps in which moral decisions were adopted (e.g., selecting authoritative legal materials or defining the criterion to attach meaning to a selected legal text).

Consequently, his efforts dedicated to improving the interpretative practice in his country were also part of his exploration of the moral contours of the law in his community, contributing to achieving a morally refined legal practice. By the same token, the year before his death, he would publish the comprehensive book "Fundamentos de Derecho Constitucional" *[Foundations of Constitutional Law]* (Nino 1992), in which he presented an interpretative reconstruction of the Argentine constitutional practice based on his philosophical foundations of egalitarian liberalism and the principles of deliberative democracy.

Morality and Human Rights

As he explored the central themes of legal theory and established the essential justifying connection between law and morality, Nino developed an interest in metaethics, addressing the problem of the status of truth in moral judgments.

In his works from the beginning of the 1980s (Nino, 1984-1989a, 2013a), he elaborated a critique of moral skepticism, relativism, and moral realism. In general terms, he rejected both *the* "descriptivist" (naturalists and non-naturalists, subjectivists, and objectivists) as well as *the* "non-descriptivist" (prescriptivism and emotivism) theories and adhered to Kantian constructivism, initially influenced by John Rawls, R.M. Hare, and Thomas Nagel among others. A few years later, the work of Karl-Otto Apel and Jürgen Habermas took him away from Rawlsian constructivism, which he considered

wrongly committed to epistemic individualism, to ascribe a fundamental epistemic value to intersubjective moral deliberation.

In his book "El Constructivismo Etico" *[Ethical Constructivism]* (Nino 1989b: 14), he summarizes the conclusions of his meta-ethical research as follows:

> The moral truth seems to be constituted not by the result but by the presuppositions assumed in the intersubjective practice of the moral discourse. Given that those presuppositions demand impartiality and it is extremely difficult to take into account the interests of others if not through their participation in collective discussion, this seems to be a much more reliable method than individual reflection to reach morally correct solutions, even though that reflection is not completely irrelevant (as those individual contributions to the discussion show it). This position is what I call "epistemological constructivism [author's translation]".

The "*epistemological constructivism*" will provide Nino with a bridge to the moral justification of democracy and political authority, based on a conception of democracy that he initially called *"epistemic"* and then *"deliberative*." We will consider it in the next section.

Political philosophy always attracted Nino's interest as much as moral philosophy. At the end of the 1970s, while Argentina was still subject to a criminal dictatorship, he wrote his first papers committed to the foundations of political liberalism ("Las concepciones fundamentales del liberalismo" [The Fundamental Conceptions of Liberalism], Maurino 2007 v. II).

In that early work, Nino proposed that liberalism was based on two central concepts, *individualism* and *anti-perfectionism*. He argued that a liberal society was based on the principles of inviolability (which affirms the *separability* of persons and rejects their instrumentalization for collective or utilitarian ends) and *autonomy* (which endorses the value of free choice of individual plans of life and personal ideals, demands to maximize the possibilities for choosing and realizing them and rejects perfectionism). His liberal conception of society was completed later with a third fundamental principle that would combine with those of autonomy and inviolability. He called it the principle *of dignity* (which confers value on the will and decisions of the person, ascribes responsibility for its exercise, and rejects deterministic approaches).

Based on the constructivist metaethics and its thesis of moral truth as constituted by the presuppositions of the intersubjective practice of modern moral discourse, he proposed and argued that the three central principles of the liberal conception were consistent with and could be considered as presupposed in the meaning and function of that practice.

Nino provided a quasi-transcendental justification, where he considered that by participating in the very practice of moral discourse, we were pragmatically committed to endorsing the principles of autonomy, inviolability, and dignity. He affirmed that from the combination of those three principles, "derive fundamental individual rights" (Nino 1991: 129).

Nino defended the superiority of political liberalism against collectivist, holistic, utilitarian, perfectionist, and totalitarian conceptions. He also thought that liberalism implied a strong thesis about rights as limits to majoritarian preferences and interests. Later, he also rejected the core of the communitarian challenge against liberalism, although he considered that liberalism needed to refine some of its assumptions to overcome its critics.

His confidence in moral argumentation led Nino initially to defend the existence of correct answers about the identification, content, and scope of basic rights, principles, and means to correctly adjudicate rights conflicts, regardless of the answers and decisions provided by political institutions about them. In the first edition of his great book **Ética y Derechos Humanos (E&DH)**, published in 1984 *["The Ethics of human rights" was the title chosen for the third edition, published in English in 1991*], when he was still significantly influenced by the liberal Rawlsian constructivism, the space of relevance for democratic authority in the realm of rights was relatively small. It operated only in the field of indeterminacy or moral irrelevance, and it *was conceived as a case of pure procedural justice*, with no epistemic authority to define relevant issues about fundamental rights. Nevertheless, at

that time, Nino affirmed that the existence of moral rights implied "*logically*," in this same field, a limit to democratic decisions.

Nevertheless, as Nino refined his epistemological constructivism – moving away from Rawls towards Habermas – he revised and significantly adjusted his position about rights as limits to democratic decisions. In the second edition of E&DH (Nino 1989a), he considered democratic decision-making – under certain procedural assumptions – as a *case of imperfect procedural justice*, epistemically superior to an individual decision concerning the content, scope, and conflict of rights. Moreover, he went even further towards the end of his work. In his posthumous book *The Constitution of Deliberative Democracy (CDD)* (Nino 1996a: 197), he said:

> I think, however, that this vision of rights as limiting democracy – as a logical matter – is not plausible. Rights admittedly protect individual interests...but from this proposition, we cannot infer that rights are barriers to all majoritarian decisions. There is no logical inconsistency in stating that the only authority competent to recognize and enforce rights is a majoritarian one.

Interestingly, Nino never defended a direct and essential connection between political liberalism and what he called *liberal economic doctrine*. In his earlier writings on the fundamental conceptions of liberalism, he affirmed that "the freedom to conform each person's life to the preferred life plan is a mere chimera if it is not accompanied by a practical power to exercise such freedom, which requires a wide distribution of economic resources that are not guaranteed by the transfer of goods through the market" *("Las concepciones fundamentales del liberalismo"* [The Fundamental Conceptions of Liberalism], Maurino 2007 v. II: 26, author's translation). Furthermore, his thesis on individual rights in a liberal conception of society included typically liberal civil and political rights and social rights, which he considered instrumental to autonomy. He consistently rejected the plausibility of conservative liberalism that defended only negative liberties while being disinterested in the material conditions for the exercise of autonomy or the existence of positive duties to human rights.

Politics and Deliberative Democracy

Nino was a passionate and committed democrat. However, he knew that establishing, consolidating, and strengthening an effective democracy in countries lacking that tradition demanded an immense intergenerational collective effort. In the 1980s, when the Argentinian democratic experiment had just begun, Nino was already concerned about the so-called *"crisis of democracy"* over Europe and postulated that the best remedy for it was to strengthen participatory dynamics. At the same time, he considered that institutional designs and practices were critical to that endeavor, as they could create opportunities for the people to develop institutional identification or alienation, for political actors to advance towards stability and coordination or to be caught on zero-sum games, instability, and delegitimization.

Through his work at the Council for the Consolidation of Democracy and the research carried out with his disciples at the Center for Institutional Studies, Nino produced and directed an enormous amount of work related to institutional reforms that could strengthen the stability and legitimacy of Argentine democracy (Consejo para la Consolidación de la Democracia 1986, 1987, 1988). The shortcomings of "hyper-presidentialism" and the superiority of hybrid systems, the electoral system and the justification of mandatory voting practices to deal with political apathy, the media ecosystem and its implications for strengthening the quality of public debate, the economic and tax system, decentralization, access to justice, and the design of institutions of direct and semi-direct democracy were some of the topics to which he dedicated his interest. His work strongly influenced the constitutional interpretation of some political institutions and was incorporated into the Argentine constitution, reformed in 1994.

However, his political involvement was not only pragmatic, but it also had a profoundly moral dimension. Nino believed that democracy was a normative concept (as law) and that the typical hyper-realistic approaches of political actors and scientists omitted an essential and

fundamental dimension. From his perspective, the preoccupations with the "subjective legitimacy" of the political systems leave a vacuum concerning the consideration of their "objective legitimacy." In his own words: "[m]y concern is not the belief of the community about what makes a political regime morally justified but what really makes it morally justified" (Nino 1996a: 8).

In his view, the question of the objective legitimacy of democracy demanded the *search for the complete articulation of an evaluative conception that justifies its distinctive institutions*. He embraced that agenda at the beginning of the 1990s when he expanded and refined his initial approach to the epistemic justification of democracy on the grounds of epistemological constructivism. In **CDD,** Nino unfolded the comprehensive presentation of his theory.

He argued in favor of the moral superiority of the deliberative conception versus elitist, pluralistic, utilitarian, majoritarian, and populist conceptions of democracy and the consistency of diverse institutional arrangements with the deliberative ideal. **CDD** reconciled its ambitious theory of fundamental rights, based on the three principles of egalitarian liberalism (he called it *the ideal constitution of rights*), with the relevance of the conventions of the political community that constitute a successful – recognizable and functional – past social practice (he called it, *the historical constitution*) and the establishment and development of a deliberative process of making public decisions, oriented to impartiality, capable of self-improving through its evolution.

In his view, deliberative democracy is the best institutional surrogate for the practice of moral discourse. Accordingly, it is the best epistemic authority for defining the content and scope of individual rights and adjudicating intersubjective moral conflicts between them.

One of the topics to which he most intensively dedicated himself in the last years of his life was the foundation and scope of judicial review in a deliberative democratic community (Nino 1992, 1996a).

Nino used this topic, a fundamental issue in constitutional and political theory at that time, to test the reach and the implications of his deliberative conception, and he produced original and provocative proposals. He stated that, as a general matter, the epistemic theory of democracy called judicial review into question.

Even in a democracy that recognizes and is committed to a robust conception of fundamental rights (as the one he defended), democratic authority is in a better epistemic condition than judges to make decisions about their content and scope. According to this theory, judicial review could only be justified exceptionally, around three very specific circumstances:

1. Judicial review was justified to assess and evaluate the degree of satisfaction of the preconditions that provide epistemic authority to the democratic process – an evaluation over which that process could not claim superiority since it is precisely under evaluation. Among these preconditions, Nino included a series of a priori *rights* (civil, political, and social ones) thus acquiring a moral and politically privileged status.
2. The second justificatory exception for judicial review is related to the protection of the value of personal autonomy against moral perfectionism. Judicial power had the legitimacy to conduct an argumentative evaluation and to disqualify democratic norms based on perfectionist reasons because the deliberative process does not have epistemic credentials against individuals for evaluating and deciding on the value of ideals and personal life plans.
3. Finally, judicial review was justified as a mechanism to preserve the effectiveness of the established constitutional practice against decisions that could hinder it and deprive it of intelligibility or consistency.

In this way, the three exceptions provided a deliberative and procedural foundation for judicial review, consistent with the philosophical foundations of the constitutional theory of deliberative democracy that Nino presented with grace, sophistication, and elegance.

Conclusion: The Legacy of a Tireless Pursuer of Law

Carlos Nino was a consummate public intellectual, a bright mind, and a generous and dedicated master, teacher, and comrade. His work is a committed and dedicated contribution to finding better answers to fundamental philosophical and political questions.

He lived in a country tormented by dictatorships, massive violations of human rights, and a wrecked political practice, and he dedicated his life to building a foundation for a democratic community that could produce legitimate law. He thought law was an essentially political phenomenon and moralized democratic politics was the path towards legitimacy. A view that Nino tried to argue in his posthumous monography "Derecho, Moral y Política" [Law, morality, and politics] (Nino 1994), which he considered a work of *synthesis and advance*.

One day before the trip where he would find his death, he had spent the morning in a public debate about the constitutional reform being promoted in Argentina. The last book he published in his life was an influential essay about what he identified as a systemic feature of Argentina's social and political life: the lack of effectiveness of the law. He labeled that phenomenon "anomia boba" [dumb anomie] and his book was called "Un País al Margen de la Ley" [A country outside the Law] (Nino 1993). Thirty years after his passing, his intellectual legacy still provides a light of hope for law and democracy in the region.

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Normative Conflicts

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Introduction

The legal systems abound in various kinds of normative provisions that can be in competition, and then in conflict, when a case is to be decided: individual freedoms challenge the requirements for public order or public health, freedom of speech or the obligation of patrimonial transparency challenges the respect of privacy, etc. We will as follows consider the emergence of normative conflicts (1), the forms of normative conflicts (2), meta-principles of resolution of normative conflicts (3), and, last, models of resolution of normative conflicts (4).

Emergence of Normative Conflicts

A normative conflict can emerge mainly in two different circumstances.

The first is coming from the basic deontic structure of the norms, that is to say, regarding what it is precisely prescribing. The valid norm N1 prescribes to do "A," while the valid norm N2 prohibits to do "A": "it is obligatory to smoke" versus "it is forbidden to smoke." We are then facing a logical antinomy between an obligation to do concomitantly "A" and "not A," at least if we assume that to be prohibited to do "A" is equivalent to having the obligation to do "not A."

The second is produced by interpretation of legal statements. On the one hand, the emergence of a normative conflict presupposes to widely interpret legal statements supposed solving a case and in a way that they enter one another into contradictions. On the other hand, it must consider too that the individual or general norm produced in order to solve the case or to regulate behaviors is justifiable by a superior legal norm but, in the same time, in contradiction to another superior norm. It could be considered, for instance, that the norm "it is forbidden to smoke" is justified by the requirement for public health, but incompatible with individual freedom. It's true if it is believed that smoking is dangerous for health or that smoking is the expression of an individual will. This kind of normative conflicts can emerge in *abstracto* (*supra*), but it is most often produced *in concreto*, that is to say while normative authorities are adjudicating a case. As Riccardo Guastini explained, whereas the *in abstracto* antinomies depend on the structure of the language, the *in concreto* conflicts depend on the structure of the world and of its interpretation by the lawyer (Guastini 2001, p. 143).

Forms of Normative Conflicts

From the analysis of the deontic structure of norms, the Danish legal theorist Alf Ross singles out three types of antinomies (Ross 1959, pp. 128–129).

The antinomy can be "total-total" when the temporal, spatial, individual, and material circumstances of legal provisions fully coincide. In such a case, either a norm imposes exactly what the other prohibits, it imposes exactly what the other allows not to do, or finally it prohibits exactly what the other allows (Bobbio 1993, pp. 209–217). For example, N1 prescribes "it is forbidden to smoke," while N2 states "it is allowed to smoke."

The antinomy is partial-partial when the two incompatible norms have a scope of application partly overlapping and not overlapping: "Citizens ought to pay taxes" versus "Unemployed people ought not to pay taxes."

The antinomy finally is of the total-partial sort when two incompatible norms have a partly identical application scope but that one is more restricted than the other: "Adults are forbidden to smoke in cinemas from 5 pm to 7 pm" versus "Adults are allowed to smoke cigarettes in cinemas from 5 pm to 7 pm."

Such antinomies do not appear so clear in legal orders. On the one hand, it is not so common that

legal provisions oblige and forbid the behavior A (i.e., A and not A) at the same time. Generally, a legal provision prescribes to do A but not to do other actions B, C, or D, that entry in collision with A, *in concreto*, regarding a specific context, for instance, "It is forbidden to kill people" and "the war is declared." The antinomy runs with a derived norm like "it is permitted to kill enemy soldiers." On the other hand, not every legal provision is directly expressed with the simple deontic form such as "it is allowed to…," "it is prohibited to…," or "it is obligatory to…," and it could be difficult to determine if their meaning is a permission, a prohibition, or an obligation. An illustration is given by the problematic meaning of indicative present in constitutional or legal act. The President of the French Republic "shall sign the Ordinances and Decrees deliberated upon in the Council of Ministers" (art 13) means that he has the faculty to do it (or not) or the obligation to sign (Troper, 1987, pp. 75–91). "It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health…" means "it is allowed" or "it is a duty to protect health." The importance of the question is that, depending on the normative meaning conferred to this kind of statements, they will be regarded as being or not being in normative conflict with one another.

Meta-Principles of Resolution and Outcome of Normative Conflicts

Several meta-principles are usually used by jurists to solve antinomies or normative conflicts, mainly, in function of the type of norms in struggle: the hierarchical criterion (*lex superior derogat legi inferiori*), the chronological criterion (*lex posterior derogat legi priori*), and the criterion of speciality (*lex specialis derogat legi generali*). But in certain contexts, such criteria turn out to be inefficient at solving the conflict. It is specially the case when the legal statements in conflict are formulated in the same types of legal sources – both are enacted in constitutional texts or in international agreements or legal act – when they were enacted at the same time (same constitutional text, for instance), or when to determine which is the more general legal statement is no easy (for instance, individual freedom versus public health, freedom of circulation versus public interest, public order, security, etc.).

In such situations, the conflict does not necessarily conduce to the invalidation or the abrogation of one of conflictual norms. Both conflictual norms remain valid and keep their normative authority and function for other and future cases. Two explanations from different epistemological premises can be put forward. The first, coming from a natural law or moral posture, recommends the maintenance of the normative propositions expressing certain values in the legal order, precisely because of their specific moral weight. This is corresponding to the model of "principles" promoted by Dworkin since the 1970s (see Dworkin 1977, p. 23). The second explanation, on the contrary, comes from a positivist posture. It observes that the common functioning of the hierarchy of norms requires that a norm can be only invalidated by a norm of higher level. In the particular case of the constitutional norms, only the reference to a supra-constitutional norm can lead to their invalidation. However, the positivists do not recognize supra-constitutional norms, except if legal order recognized them or recognized different levels of constitutional norms (for instance, supreme constitutional principles and ordinary constitutional principles) or if – as suggested – constitutional courts initiate and create them, which is today very uncommon.

Anyway, if this kind of normative conflicts does not lead to the invalidation of one of the norms in conflict, it can result in the invalidity of the norm that each of them could justify. For example, while individual freedom justifies the norm according to which it is allowed to smoke in any circumstance, the requirement for public health justifies the norm according to which it is completely forbidden to smoke. One can consider a legal order which privileges individual freedom involving the invalidation of the norm which prohibits smoking or, on the contrary, a legal order which privileges public health involving the invalidation of the norm which allows smoking. It is also possible to reconcile the two conflictual norms introducing exceptions to each norm that they justify. The result is then the production of a third norm, for instance, "it is forbidden to smoke

(only) in public places." In all these cases, both constitutional norms which are used as normative bases, individual freedom and the requirement for public health, remain as valid norms into the legal system.

Models of Resolution of Normative Conflicts

The previous examples suggest that normative conflicts can have two kinds of outcome depending on whether the normative authorities choose to base their decision on only one of the conflictual norms or propose a conciliation, proceeding to a judgment of proportionality as it is today hackneyed in the legal reasoning of constitutional or international courts. The first case defines an "exclusive normative base model" and the second, a "plurality of normative bases model." The choice of a model depends strongly on the evaluation of normative authorities, especially the judges. They can stand for a model or the other depending on the circumstances and their general conception of how normative conflicts have to be solved but also on the margin of appreciation that they want to preserve.

(a) The choice for an *exclusive normative base model* corresponds to situations in which normative authorities choose only one of conflictual norms. They can proceed it on the basis of classical meta-principles or resolution of normative conflicts (*supra*). After the final choice, one of the two norms, either, becomes invalid and is excluded from the legal order or is maintained in the legal order but private of normative effects. This case is mainly corresponding with the model of "rules" – norm formulating precise deontic prescriptions – proposed by Ronald Dworkin (1977, pp. 23 et s.). The outcome of a conflict between rules is "all-or-nothing": if two rules prescribe contradictory answers, this means that one is valid; meanwhile the other must be invalidated. But the exclusive normative base model can also work what Dworkin named "principles," that is to say, conflicts between legal statements providing objectives, general orientations, and expressing requirements of justice, equity, or morals. If, in this model, the specific moral weight of principles excludes to consider one of them as invalid, it is nevertheless possible to solve a case only on the base of one of them. In Kelsen's words, the consequence is that, while remaining both valid, "one of the two norms in conflict is respected and the other violated" (Kelsen 1991, ch. 29). Let us take the case of the smoking prohibition again: if the legal authorities choose to allow smoking, the individual freedom will be respected, but the requirement of public health will be violated. Conversely if the actors prefer to prohibit smoking, the requirement of public health is respected, but individual freedom is violated. But in any case, requirement of public health and individual freedom remains valid in the legal order.

The selection of an exclusive normative base can be carried out according to a fixed and predetermined criterion or, on a contrary, in a casuistic way. In the first case, the normative authority predetermines a specific criterion which enables it to solve any cases. It engages itself in a "fixed axiological hierarchy" (Guastini 2001, p. 164), for example, it can for all cases set precedence for social rights against individual freedom. In the second case, it sometimes gives precedence to a kind of norm and sometimes to another, depending on circumstances. If a case ends by the application of only one of the normative bases in conflict, this solution is not established once for all, but only for the case debated. The normative authority chooses the normative base it estimates to be the most adequate to justify a desired solution or which offers a fairer or more effective solution. This mode of conflict resolution can be called "conditioned precedence" (Alexy 1993, pp. 160 et s.) or "variable axiological hierarchy" (Guastini 2001).

(b) In the *plurality of the normative bases model*, which is predominant in contemporaneous constitutionalism, particularly regarding fundamental rights, the aim is

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not to sacrifice one of the norms in conflict but to conciliate or balance them (see, for instance, Dworkin 1985; Alexy 2002; Guastini 2001). The outcome is then the partial application of the two norms in collision. The conflict is then solved by a conciliation, aiming a proportional application of norms in conflict as the constitutional or continental courts provide a lot of examples of it every day. Several courts produce a proportionality test that requires, briefly, the evaluation of the necessity of the measure, the adequacy of it, and the legality of the aim. For instance, when a fundamental right is at stake, the necessity judgment means making sure that the restriction of the right or freedom cannot be avoided or lowered, using other means.

Conclusion

This kind of resolution can only be carried out in a very casuistic way. The specific circumstances of each conflict are decisive for their resolution and, in consequence, give a broad power of appreciation to the authority in charge of deciding the case. Judges operate a balance in which subjectivity cannot obviously disappear. As certain judges recognized it themselves, to balance is rather "in a world of spirit more than in a world of geometry" (Vedel 1989, p. 59).

Cross-References

- ▶ Alexy, Robert: On Rules and Principles
- ▶ Dworkin, Ronald: On Justice
- ▶ Kelsen, Hans
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Normative Individualism

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Normative Individualism is a theory mainly analyzed and advocated by Dietmar von der Pfordten. Its core thesis is that the source and justificatory reason of a norm must ultimately relate to individuals. Normative individualistic positions, thus, ground their normative claims in the concerns of individuals.

This idea can best be clarified by distinguishing it from other positions with regard to its semantic parts: First, *individualism* establishes a border with regard to collectives. A normative collectivism would hold that also (or even exclusively) collectives like the state, family, race, or the ecosystem possess an irreducible normative value (or claim to consideration or justificatory power). This value cannot be reduced to individual values or be derived from them. Normative individualism, on the other hand, excludes such ultimately collective values. Collectives obtain their claim to normative consideration only by underlying individual interests. Secondly, *normative* individualism is to be distinguished from other forms of individualism, especially from methodological individualism. Methodological individualism reduces the

description of social phenomena to the description of individual actions (cf. Weber 1922, 13; Schumpeter 1908, 90–91). Normative individualism, on the other hand, does not make explicit descriptive claims, but is a classification of normative justifications.

Normative individualism describes a class of theories that share the reference to the same basic and ultimately morally relevant entity. Most modern theories are to some degree normative individualistic, e.g., Hobbes's and Locke's contractarian rationale for forming a state as well as the basic utilitarian reference to individual pleasure or Kant's strictly individualistic moral and legal philosophy. Normative individualism as a classification, hence, encompasses other classifications of theories like liberalism or utilitarianism. It is a more abstract classification regarding one specific, fundamental characteristic of them, i.e., their reference to the individual as the ultimate justificatory source. This basic claim is inherently or even explicitly comprised by many theories, although mostly without reference to the term "normative individualism". It is not possible to give a comprehensive list here, but such a form of individualism is not uncommon to many debates, e.g., Lazar (2018, 33) uses the term "evaluative individualism" synonymously in the context of the ethics of war.

According to von der Pfordten, normative individualism can be specified by three different principles: (1) the *principle of individuality* that only individuals are ultimately to be considered, (2) the *all-principle* that all affected individuals are to be considered, (3) and the *equality-principle* that all affected individuals ought to be considered equally (2010, 23–27).

Moreover, von der Pfordten seems to suggest that his own ethical theory is deducible from the basic normative individualistic proposition. According to him, the morally relevant property which must be considered within every individual must (as a consequence of the normative individualistic principles) be as much as possible in the hands of the affected individuals themselves. Therefore, every restriction to special concerns (like preferences, pleasure, capabilities, rights, etc.) should be avoided. All concerns or interests in a broad sense are morally relevant, i.e., all aims, desires, needs, and strivings (2010, 56–69). But of course they must be weighed in some way to make an aggregation possible. Von der Pfordten argues that the known principles of aggregation are either to abstract to offer a clear solution for the aggregation problem (e.g., contractarianism) or to concrete, i.e., they only apply to certain cases, failing to give a convincing answer to every aggregation problem (e.g., maximization, equality). Therefore, he introduces another aggregation principle which considers the degree of social relativity of individual concerns (2010, Chap. 5; 2011, Chap. 8). The more an individual concern depends on others or a community, the more the respective concern can be weighed against and outweighed by other concerns. Roughly speaking, concerns can be classified in three groups: (1) a strictly individual sphere (body, life, human dignity) which prevails in conflict with other zones, (2) a relative sphere (freedom of action, of speech, of religion, etc.) which usually still outweighs concerns from (3) the social sphere (e.g., interests in shared activities in public or private or economic infrastructure). Depending on the spheres of conflicting concerns, different aggregation principles apply, e.g., the maximization principle in the social sphere, equality within the individual zone, and an absolute priority of the individual sphere over the others.

This is a detailed moral theory and it raises the question of its relation to the abstract classification of normative individualism. One might criticize that either the abstract classification already contains the reasons for the concrete moral theory in which case all other theories are not normative individualistic after all, or the principle allows for different moral theories to concretize it. This would mean that there are other reasons (beyond normative individualistic ones) that come into play in every theory and thereby contradict the basic principle of normative individualism itself (Karageorgoudis 2014, 126–127). But this putative dilemma can be solved. Like with many other classifications (liberalism, utilitarianism, etc.), normative individualism in its abstract meaning states a normative element which many theories have as their basis. They all are normative individualistic,

just like there are many liberal theories. But this does not conflict with the idea that one interpretation of this common element can be the best, just like there might be one best understanding of liberty. In this sense normative individualism is a class of theories, and Dietmar von der Pfordten's theory claims to be the most coherent understanding of its basic normative element: the ultimate justificatory priority of individuals.

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Norms: Carlos Eduardo Alchourrón and Eugenio Bulygin's Perspective

► Alchourron, Carlos Eduardo, and Eugenio Bulygin: On Norms

Norms: Faulty

► Faulty Norms (*Fehlerkalkül*)

Nozick, Robert

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Introduction

Robert Nozick (1938–2002) was a prominent American philosopher who made significant contributions to several fields within the discipline. He is most widely known for his first book *Anarchy, State, and Utopia* (1974) in which he defended a libertarian view of the minimal state where the government's remit is confined to the protection of people's individual rights to life, personal freedom, and property ownership and so refrains from pursuing any more general societal or moral goals and from the redistribution of income. Nozick's subsequent book, *Philosophical Explanations* (1981), was also highly influential in the areas of epistemology and metaphysics and has generated much academic comment. His later work discussed topics as diverse as the meaning of life (Nozick 1989), rationality (1993), and objective reality (Nozick 2001). This entry focuses on Nozick's political philosophy.

Anarchy, State, and Utopia

The impact of *Anarchy, State, and Utopia* was immediate. Its publication came at a time of renewed public and political interest in the ideas and principles of the free market and laissez-faire capitalism especially in the United States. The book was also written shortly after, and in many ways, in response to John Rawls's *A Theory of Justice* (1971). Rawls's book is often regarded as having revived political theory as a subject within the analytic tradition although Nozick deserves considerable credit for the role his work has played. Both thinkers wrote within the classical liberal social contract tradition that is associated variously with figures such as Thomas Hobbes, John Locke, Jean-Jacques Rousseau, and Immanuel Kant, although where Rawls set out a model of an egalitarian liberalism with a strong emphasis

on the welfare-state that appealed to those in the center left of the political spectrum while Nozick's libertarianism had an energizing effect on elements of the political right attracted by fiscal conservatism and limited government.

Rawls's and Nozick's respective positions have served as key landmarks in the field of academic political theory and helped define its landscape. For the last 40 years, for example, both Rawls and Nozick have featured prominently in many university programs in political and legal philosophy, being taught side by side and in opposition to each other. Unlike for Rawls, however, political questions were not central to Nozick's philosophical concerns. After the publication of *Anarchy, State, and Utopia*, he never returned to political philosophy, and neither did he respond to the enormous amount of critical comment that the book provoked. In later years Nozick did appear to draw back somewhat from some of his earlier conclusions (1989, pp. 286–287) but only to a limited extent (2001, Chap. 5).

Perhaps because he did not build on the libertarian position he outlined, Nozick is principally studied today for the direction his arguments pushed political debate rather than because they have attracted a body of adherents. Nozick represents a reference point for many within the field of libertarianism which has grown steadily since the 1970s and which includes both left-wing and right-wing versions, but he does not have many academic followers. This does not in any way diminish the value or importance of Nozick's contribution, a point which he himself anticipates in the preface saying that "there is room for words on subjects other than last words" (p *xii*). While he defends the integrity of his arguments, at least part of his purpose is to stimulate others to take them further, a task he certainly accomplished.

Anarchy, State, and Utopia opens with a very simple, but "strong and far-reaching," claim that "individuals have rights, and there are things that no person or group may do to them (without violating their rights)" (p. *ix*). All subsequent references in brackets are to this book. Nozick then proceeds in three parts that reflect the book's title. He first provides a refutation of the anarchist position that regards the state as being incompatible with these rights arguing also for the inevitability of a minimal or nightwatchman state. He then responds to liberal theorists, in particular, who he thinks would or should share his position on rights, showing that we cannot consistently go beyond the minimal state, because any attempt to redistribute property or income will violate those rights. Finally, in answer to those who find this result bleak or frightening, he argues that on the contrary, this represents an exciting and inspiring prospect in which diverse communities can flourish alongside each other with the consent of their members.

Individuals Are Inviolable

Nozick's justification of the state starts from a state of nature position that resembles Locke's famous account in the *Second Treatise of Government* in which individuals are said to be free and equal. They are free to act and dispose of their possessions as they see fit (subject to the moral restriction against harming other people's life, liberty, or property), and they are equal to the extent that they do not have to ask anyone else's permission (p. 10).

Although Nozick is aware of the fundamental importance of fully justifying and articulating these core moral principles, he recognizes the enormity of the task and sets it aside for later (pp. *xiv*, 9). He never did come back to this question. Whereas for Locke these principles can be explained theologically, this route is not available to Nozick. Instead Nozick makes an appeal to a Kantian underpinning, expressed in the second formulation of Kant's Categorical Imperative that you should "act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only" (pp. 30–32). Accepting this principle, Nozick says, means that "individuals are inviolable" (p. 31). More fundamentally, it means that people are individuals. There is no "social entity," he argues, only "individual people with their own individual" and separate lives (pp. 31–32). Nozick rejects the utilitarian position that allows the interests or happiness of an individual to be sacrificed for the increased happiness or welfare of others.

The term "libertarian" may seem to be primarily about liberty. Nevertheless, as Nozick develops his account, it is the prior idea of rights, and in particular of a form of property rights, which provides the grounds for that freedom. It follows from the moral premises given above that individuals are self-owners (although Nozick does not himself use this term in the presentation of the argument). Our bodies, our talents, our labor, and the fruits of our labor are all our own and cannot be appropriated by others against our will. The moral rights we have set limits on what can legitimately be done to us. Rights serve as what Nozick calls side constraints on people's behavior, not telling them what to do but preventing them from violating the self-ownership of others. So strong are these constraints that they take precedence over other concerns including helping those in need.

Backing into the State

Although Nozick draws on many of the concepts and resources of the social contract tradition in political theory, he does not appeal to the notion of a social contract itself. Instead he offers an invisible hand explanation and justification of the minimal state based on the principles of free market competition. While Nozick's approach shares with the contract model the idea that the state arises from the voluntary actions of individuals, it differs in that there is no intention in the citizens' minds to come together to form a central agency. Instead, the minimal state is the outcome of a series of separate, rational, and uncoordinated decisions by individuals. People do not so much create the state as "back into it without really trying."

A corollary of Nozick's thesis on rights is the right to protect oneself and one's property against aggressors and to punish violators including by extracting compensation for any damage or loss suffered. This is an important right but one that is very difficult and dangerous to enforce. Since few individuals would have the time or resources to successfully defend their rights acting alone, it makes sense for people to band together to form voluntary associations to share the work involved and to take advantage of each other's abilities. Eventually, specialists would arise forming private firms dedicated to providing professional protection services in exchange for a fee. As rival firms compete for business, a dominant provider eventually emerges, whether as an individual firm or a consortium. This entity would become a monopoly since in the high-stakes business of protection, people will not accept less than the best services.

Following Max Weber, a defining feature of the state is often seen as that it has a monopoly on the legitimate use of violent force in a geographical area. The dominant provider is not yet in that position. This is because there will inevitably be people who hold out against paying for its services. Since these independents represent a potential threat to the protection provider's paying clients – even if no actual rights violation has taken place – the agency has a legitimate reason to forcibly bring all holdouts under its rules. While this may seem like a violation of the independents' rights, Nozick argues that this can be avoided so long as they are compensated by receiving the firm's protection services, subject to the condition that they are charged no more than they would have paid anyway.

The outcome is what Nozick calls the nightwatchman state, a corporate entity with the sole right to administer the functions that uphold people's rights by defending them against aggression, resolving disputes, and protecting their property rights. Other functions normally associated with government, such as the provision of services such as education, the development of infrastructure systems, or the creation of a safety net for those who find themselves in need, are beyond the state's remit. The state cannot force these functions on people without infringing their rights, and neither can it tax them to raise the necessary funds. Whereas the state is justified in imposing a fee for its role as protector, taxation for any other reason violates our self-ownership. According to Nozick, taxing what we earn from working is "on a par with forced labor" because it means that we are compelled to work a certain number of extra hours just for the benefit of others

(p. 169). Going further, he argues that this gives those for whom we are required to work a property right in us that makes them our part owners (p. 172).

Liberty and Patterns

Nozick's arguments on the impermissibility of redistribution through taxation place him in opposition to the prominent idea of "distributive justice," according to which the state has a moral obligation to reallocate portions of people's wealth to others who are more deserving or in greater need. Nozick suggests (with special reference to Rawls's "difference principle") that such a concept of justice treats the resources to be distributed as falling like "manna from heaven," unattached to anyone (p. 198). In reality, he responds, these resources come with a long history. Everything of value has first to be variously made, found, developed, created, enhanced, and invested in. These kinds of activities, Nozick maintains, give the people involved special attachments to their resources.

Nozick argues instead for an "entitlement theory" of justice in holdings that recognizes this relationship. His version has three principles, addressing questions of justice in acquisition, in transfer, and in the rectification of previous injustices in acquisition and transfer. The acquisition principle governs the initial appropriation of the presumptively unowned natural resources involved. Here Nozick proceeds in a Lockean fashion, albeit with significant modifications. An important difference with Locke is in how he understands the latter's proviso that when we appropriate natural resources, we must leave "enough and as good in common for others" (p. 175), which Nozick reinterprets as meaning that we must not leave others worse off than they were before, a condition that he regards as having been fulfilled in a free market society. From the initial acquisition, transfers are just so long as they are voluntary.

Nozick's entitlement theory only reflects the history of transactions behind the current level of holdings without requiring that these holdings conform to any "pattern" such as equality, desert, or prioritizing the worst off in society. The attempt to maintain a particular pattern of distribution that reflects a given conception of justice, he argues, is incompatible with people's fundamental freedom to do whatever they want with their income and assets. In his famous phrase, Nozick declares that "liberty upsets patterns," a claim he demonstrates using a thought experiment in which paying customers willingly pay an additional fee on top of the normal entrance price for the opportunity to watch the basketball player Wilt Chamberlain who ends up considerably richer as a result (pp. 160–164). Assuming that the initial holdings were considered just according to a given pattern, then people's freely made choices will end up distorting that pattern, meaning that if the pattern is to be maintained, our free actions will have to be curtailed.

Conclusion - A Framework for Utopia

If the libertarian state appears cruel or barren, Nozick aims to dispel that impression. Although welfare provision out of taxation is not morally permitted, that does not mean that Nozick believes that we should be indifferent to people's sufferings. It only means that we cannot force others to contribute toward helping them. More generally, the libertarian structure does not require anyone to live like buccaneering free-market capitalists. Individuals are free to come together to form communities, societies, and communes that operate under whatever principles and ideals they believe in, and they are free to leave them and to join others. Rather than offering a single ideal of utopia that only appeals to certain kinds of people, the framework model offers a potentially unlimited number of coexisting utopias as people wish to create them.

An additional advantage of the libertarian framework – which he says serves as an independent argument in its favor – is that it acts as a "filtering" device through which we can observe real communities being lived in and tried out, discovering both how well they work and which

ones suit us best personally (pp. 312–317). Given the complexity of human beings and the societies they create, Nozick argues, there is no a priori method by which we can arrive at this knowledge. What we should do instead is allow individuals to experiment for themselves and learn from their experiences.

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- ▶ Freedom
- ▶ Rawls, John
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Nozick, Robert: On Justice

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Introduction

This entry focuses on the views about economic justice offered by Robert Nozick in *Anarchy, State, and Utopia*. To a considerable extent Nozick's argument for his own position on justice in holdings is an argument by way of elimination. Nozick offers a barrage of criticisms against alternative views of economic justice. If these criticisms are sound, only his "historical entitlement" view survives and its plausibility is bolstered precisely because it does not share the defects of those alternative doctrines.

End-State and Patterned Theories Versus the Historical Entitlement Theory

Nozick identifies and rejects two types of theories of justice in holdings. These are end-state theories and patterned theories. Theories of either type presume that justice in holdings is a matter of *distributive* justice. For all end-state and pattered theories maintain that justice in holdings is to be achieved by identifying and instituting the best available distribution of whatever is to be distributed. Let us assume that it is income (i.e., purchasing power). End-state theories specify a certain arithmetical feature of distributions on the basis of which alternative available distributions income are to be ranked. For instance, an egalitarian end-state advocate will rank available distributions on the basis of their degree of equality while a fan of maximizing aggregate income will rank distributions on the basis of the total

income realized in the distributions. An advocate of Rawls' difference principle will rank alternative available distributions on the basis of the level of the income received by the individuals in the lowest income group. Indeed, Rawls presumes that *all* justice is a matter of distributive justice. According to the concept of justice "institutions are just when no arbitrary distinctions are made between persons in *assigning* basic rights and duties and when the rules determine *a proper balance* between competing claims to the advantages of social life" (Rawls 1971, 5 emphasis added).

Patterned theorists hold that whatever should be distributed should track the pattern in which some estimable feature is present in the individuals who will be subject to that distribution. Suppose the crucial feature is taken to be aesthetic sensibility. We would then need to ascertain what the distribution of aesthetic sensibility is among the members of the relevant society; and the most highly ranked distribution will be the available distribution that most distributes income to individuals in proportion to their degree of aesthetic sensibility. Other patterned theorists will favor different features – e.g., moral sensitivity or moral merit.

Nozick notes that end-state and patterned theories presuppose that what people have done to solve the problem of production, i.e., engaging in various particular unilateral or cooperative productive activities, is not morally relevant to determining who has just claims on the goods that have been produced. For, according to advocates of distributive justice, whether the pleasing array of economic goods has simply fallen as manna from heaven or has been created by the diverse productive activities of particular individuals, the very same distributive task remains to be carried out. We must conduct a survey of the different ways in which these goods – or the income needed to purchase these goods – can be divided among us, rank those alternative distributions, and institute the most highly ranked of those distributions.

Nozick contrasts this with his own "historical entitlement" according to which "production and distribution" are not "two separate and independent issues."

> The situation is not one of something's getting made, and there being an open question of who is to get it. Things [that are made] come into the world already attached to people having entitlements over them. From the point of view of the historical entitlement conception of justice in holdings, those who start afresh to complete "to each according to his ____" treat [made] objects as if they appeared from nowhere, out of nothing. (Nozick 1974, 160)

Moreover, the thought that who has engaged in which productive actions is relevant to who has just claims to which economic goods is intuitively plausible. Theories of distributive justice may not blithely presume it is false.

Nozick notes that Rawls' advocacy of the difference principle arises from the realization that allowing inequalities in income may well substantially increase the total social product – which enables those pulling the levers of the basic structure to bestow more income on the lowest income class than could be bestowed upon them under a strictly egalitarian regime.

> But . . . wouldn't this realization reveal something about differential claims on parts of the pie? Who is it that could make the pie larger, and would do it if given a larger share, but not if given an equal share under the scheme of equal distribution? Why doesn't this identifiable differential contribution lead to some differential entitlement? (Nozick 1974, 198)

As Rawls' view illustrates, distributionist theories need not be totally oblivious to the production side of things. Such a theory can take account of how the adoption of certain distributive policies will enhance people's incentives to produce and, hence, on most distributivist views will make more highly ranked distributions of income available. Incentives in the form of higher incomes for greater productive contributions may have to be maintained for the *forward-looking* reason that these incentives are needed if those more highly ranked distributions are to be available. Nevertheless, no distributivist regime ever takes the fact that someone has created certain valuable products or has contributed strikingly more than others to the total "social"

production itself to be a reason to ascribe an entitlement to that individual to the created products or to a larger than average share of the total production. For that reason would be a backward-looking ("historical") consideration and all distributivist views are entirely forward-looking.

The patterned view that income should be distributed among individuals in proportion to their economic productivity may appear to be similar to the historical entitlement stance that an individual's production of a given economic good itself creates a right of that person to that good. Yet this appearance is misleading. For this patterned view is not at all the historical doctrine that "Things [that are made] come into the world already attached to people having entitlements over them" (Nozick 1974, 160) and that, through just transfers, other people can acquire entitlements to those things. Rather, this patterned view is that people's diverse levels of productivity can be measured and that whatever the details about who made what and what just transfers have taken place, society has the distributive task of insuring that each individual receives income (purchasing power) simply in proportion to the extent of her measured productivity.

Moreover, within such a patterned view it is not at all clear how productivity is to be measured. Most people who are attracted to the idea of distribution in accord with productivity will not be happy if a person's productivity is determined by the market value of the goods or services she supplies. They will favor gauging productivity on the basis of the (supposed) true social importance of what is supplied rather than on the basis of the flaky whims of consumers.

Critique of End-State and Patterned Theories

Nozick's best known critique of end-state and patterned doctrines is the one that appears in the section on "How Liberty Upsets Patterns" (Nozick 1974, 160–4). Here the term "patterned" covers both end-state and patterned doctrines. Nozick begins by asking the advocate of any patterned doctrine to imagine a situation in which distribution D_1 which ranks highest on her own doctrine obtains. For the purpose of illustration, let us assume that the advocate is a fan of Rawls' difference principle. Nozick points out that that once this D_1 is instituted it is almost certain that unanticipated, voluntary, and mutually beneficial interactions among individuals employing their just holdings will bring about a distribution D_2 which will be unjust according the patterned doctrine that is in play. "Patterned principles of distributive justice necessitate redistributive activities. The likelihood is small that any actually freely-arrived at set of holdings fits a given pattern; and the likelihood is nil that it will continue to fit the pattern as people exchange and give" (Nozick 1974, 168).

In our illustration, D_2 will be unjust because once it is brought about it can be transformed into D_3 which, according to the fan of the difference principle, ranks higher than D_2 since the smallest income package in D_3 is larger than the smallest package in D_2.

	Individual A	Individual B	Individual C
D_1: Just distribution at t_1	9	12	18
D_2: Distribution at t_2 after voluntary inter action of A and C	16	12	26
D_3: Best available distribution at t_2	14	13	21

It is often thought that Nozick's criticism is that patterned views – in this case, the difference principle – demand the prohibition of the voluntary and mutually advantageous interactions between A and C which would result in D_2. This is mistaken. Rather, Nozick offers two related criticisms of patterned views each of which presumes that the patterned theorist will *allow* those interactions as long as the conversion of just D_1 to unjust D_2 is

followed by a redistribution that converts of D_2 to the just D_3.

The first of these criticisms begins by noting that, if D_1 was just and D_2 arises out of D_1 through individuals voluntarily employing their just holdings in mutually beneficial ways that do not deprive any third party of her just holdings, one would expect that D_2 would also be just. Thus, the fan of any distributivist view that first endorses D_1 as just and then judges D_2 to be unjust (because it can be converted into the higher ranking D_3) must adequately explain how the innocuous and indeed beneficial interactions that converted D_1 into D_2 introduce injustice into the world. But no such explanation is available. It will not suffice to say that injustice enters the world with D_2 because D_2 has a lower ranking than D_3 into which D_2 can be converted. For, to say this is merely to repeat the distributionist's assertion that economic justice is always a matter of the most highly ranked distribution obtaining. Yet that is exactly what is being challenged through the contention that, if D_1 is just and D_2 arises out of D_1 through innocuous productive activity, D_2 will also be just.

The second of Nozick's criticisms is that the ongoing demand for at least partial redistribution of the holdings that arise through individuals peacefully and beneficially employing what has been declared to be their own just holdings shows that what people get through the institution of a patterned principle is not what it is advertised to be. "Patterned distributional principles do not give people what entitlement principles do, only better distributed" (Nozick 1974, 169). More specifically, they do not give people claims on the fruits of their peaceful and voluntary use of what they have been told are their just holdings.

On such principles, if my just holdings include a potato plant and a batch of soil and I save the five potatoes I grow in the first year, split them up, plant the potato segments, and reap 50 potatoes in the second year, it is an entirely open question whether I will have a just claim in the second year on those fifty potatoes, or on five of them, or on any of them. For my just claim to holdings in the second year will not be tied to my just claims in year one or to what I did with what was assigned to me in the name of justice in year one. Rather, it will be entirely tied to what is judged to be the best available overall distribution of holdings in year two. Similarly, my just claim to holdings in year three will not be tied to my just claim in year two or to what I did with what was assigned to me in the name of justice in year two. In a world in which people utilize what is assigned to them in the name of justice in peaceful and beneficial – *albeit unanticipated* – ways, the ongoing enforcement of a distributive pattern requires the ongoing defeat of many of the expectations created by the prior assignments of just holdings.

This criticism does not depend upon the assumption that the basic distributional structure will revise its judgments about what is the just distribution of holdings on a daily or annual basis. The experts who direct the basic structure dedicated to distributive justice may well issue and loyally enforce their 5 year distributive plans. However, as Rawls himself came to insist, the basic distributive plan will have to be revised periodically in order to redirect holdings back into (what is then taken to be) their just channel. "... even in a well-ordered society, adjustments in the basic structure are always necessary." "Even with strict compliance with all reasonable and practical rules, such adjustments are *continually required*" (Rawls 1993, 284 emphasis added).

The "Liberty Upsets Patterns" criticisms turn on difficulties internal to the distributivist program. In contrast, Nozick offers another criticism that turns on a clash between the institution of any such program and respect for the liberal ideal of self-ownership. Individuals do all sorts of voluntary things that contribute to the total wealth of the societies they inhabit. They labor for wages, work for salaries, invest portions of their savings, and organize and reorganize production. They patronize all sorts of businesses, invent new ways of satisfying their own needs and those of others. They enhance their human capital and that of their children. They serve as helpful role models for others seeking to find productive roles for themselves. The result of these individual and joint decisions, actions, efforts, and endeavors is a certain "total social product." End-state and patterned principles call

for a redistribution of a portion of this total product. Therefore, the institution of such a principle gives "each individual an enforceable claim" on at least some portion of the decisions, actions, efforts, and endeavors of the individuals who have contributed to this aggregate product. However,

> Whether it is done through taxation on wages or on wages over a certain amount, or through seizure of profits, or through there being a big social pot so that it's not clear what's coming from where and what's going where, patterned principles of distributive justice involve appropriating the actions of other persons. . . . This process whereby they take this decision from you makes them a part-owner of you; it gives them a property right in you. Just as having such partial control and power of decision, by right, over an animal or inanimate object would be to have a property right in it.
>
> End-state and most patterned principles of distributive justice institute (partial) ownership by others of people and their actions and labor. (Nozick 1974, 172)

Why, according to Nozick, is this unacceptable? Nozick's answer is a somewhat muted, arms-length invocation of self-ownership. "These [end-state and patterned principles] involve a shift from the classical liberals' notion of self-ownership to a notion of (partial) property rights in *other* people" (Nozick 1974, 172). The unspoken next Lockean step of the argument has to be: Since people are self-owners, principles that involve a shift to (partial) property rights in others must be mistaken.

In this argument, Nozick appeals to a natural right of self-ownership. However, unlike Locke, self-ownership is not invoked to establish an individual's property right to this or that particular initial holding. Rather, Nozick appeals to the more capacious idea that people have moral claims over their time, efforts, decisions, and mental and physical talents and that the general operation of a redistributive system that seizes potions of the products of the time, efforts, decisions, and talents of people is sure to infringe upon this broadly conceived self-ownership. Such a system of seizures must to some degree treat the productive activities of people as one treats the workings of a machine one owns that is stamping out widgets or a chicken one owns that is laying eggs. The operators of such a system treat those decision-making, effort-expending, purposively productive people as if they are owned – at least in part – by those operators. This manner of treatment of people is unacceptable because, unlike machines and chickens, people are self-owners.

Key Features of the Historical Entitlement Theory

If there are deep problems with end-state and patterned theories, then the correct theory about just holdings must be of a deeply different sort. Most of what is objectionable about end-state and patterned theories of justice arises because they are outcome-oriented. Some principle is employed to identify which of a range of possible distributions is to be ranked highest. Then people are to be subjected to policies and commands aimed at bringing about that highest ranked outcome. *Since this outcome-orientation is the source of deep problems, the correct theory about justice in holdings must not be outcome-oriented.* What would a not outcome-oriented theory be? *It would be a process-oriented theory.* Such a theory would maintain that an individual's holding is just if and only if she has acquired it in an entitlement-conferring way.

Nozick distinguishes between three phases of acquisition. One can acquire previously unowned material. One can acquire owned things by way of transfer from others. And one can acquire things as restitution for having been deprived of just holdings. However, within each of these phases, an acquisition can be just and result in an entitlement, or unjust and not result in an entitlement. For instance, if I get you to transfer a silver dollar to me by putting a gun to your head and explaining that I will pull the trigger unless you hand over the coin, my acquisition through transfer does not engender a right to what I have acquired. But, if I duly bargain with you to elicit a voluntary transfer of that coin (perhaps in exchange for a shiny lecture on justice in holdings), then the transfer does engender a right to what I have acquired.

Nozick says that a worked out historical entitlement theory would spell out a principle of just initial acquisition, a principle of just transfer, and a principle of just restitution. He says that each of these principles will be complicated and embody "particular conventional details fixed upon in a given society" (Nozick 1974, 150). Nozick tells us little else about these complicated principles probably because he is primarily interested in pointing out that there is an alternative to outcome-oriented, distributionist theories of justice in holdings. Unfortunately, Nozick does not address the important issue of why actions in accordance with the particular conventional forms which these principles take in a given society have entitlement-conferring force (Mack 2010; Bryan 2017).

Conclusion

Still, the basic message of the historical entitlement view is clear. A just distribution among a given set of people is simply the distribution that has arisen through particular individuals acquiring holdings in accord with entitlement-generating processes. There is no pre-determined arithmetical formula or pattern that the resulting array of holdings has to match or satisfy. If all individual holdings have been acquired in accordance with the rules defining just acquisition, any imposed redistribution of those holdings will violate at least some people's just property rights. The appropriate response to some holdings arising through rights-violating processes is to follow the processes that define just restitution. The aim of just restitution is to nullify the effects of unjust actions insofar as this can be done without further injustice. The goal is not to make the overall array of holdings compliant with some end-state or patterned program.

Cross-References

► Kant, Immanuel: On Justice
► Liberty and Justice
► Locke, John: On Justice

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Nussbaum, Martha

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Introduction

Martha Nussbaum (b. 1947–) is the Ernst Freund Distinguished Service Professor of Law and Ethics at University of Chicago. She holds appointments in the Law School and the Philosophy Department and she is an Associate in the Classics Department, the Divinity School, and the Political Science Department. She received her Bachelor of Arts degree from New York University and her Master of Arts and Doctor of Philosophy from Harvard. Before moving to University of Chicago, she taught at Harvard University, Brown University, and Oxford University.

Nussbaum has received a large number of honors and awards. For example, she won the Brandeis Creative Arts Award in Nonfiction in 1990, the Ness Book award from the Association of American Colleges and Universities in 1991, the PEN Spielvogel-Diamondstein Award for the best collection of essays also in 1991, the Grawemeyer Award in Education in 2002, Association of American University Publishers Professional and Scholarly Book Award for Law in 2004, the A.SK Social Science Award from the German Social Science Research Council for her contributions to social system reform in 2009, the American Philosophical Association Henry

M. Phillips Prize in Jurisprudence in 2009 as well as the Centennial Medal of the Graduate School of Arts and Sciences at Harvard University in 2010, the American Philosophical Association Quinn Prize in 2015, the Inamori Ethics Prize in 2015, and the Kyoto Prize in Philosophy a year later in 2016. She was also the president of the Central Division of the American Philosophical Association from 1999 to 2000. She has been invited to give a number of very prestigious lectures. In 2017, for example, the National Endowment for the Humanities selected Nussbaum to deliver the Jefferson Lectures, the highest honor for distinguished intellectual achievement in the humanities given by the federal government of the United States.

Furthermore, Nussbaum has a high profile as a public intellectual, appearing on lists such as "The Foreign Policy Magazine: 100 Top Global Thinkers 2012." She has also received honorary degrees from over 50 colleges and universities in the United States, Canada, Latin America, Asia, Africa, and Europe. Her work has demanded the respect and attention of philosophers, economists, feminist theorists and activists, law and public policy makers, advocates for global justice, and constitutional studies scholars.

Summary and Major Themes

Nussbaum's prolific and diverse body of work includes 20 monographs and 21 edited collections, as well as large number of academic and popular articles on a wide variety of topics, including law, emotions, political theory, literature, ancient philosophy, well-being, feminism, LGBTQ rights, animal rights, disability, and the value of a liberal arts education.

Nussbaum's interest in these topics is not limited to writing books and articles. From 1986 to 1993, she was a research advisor at the World Institute for Development Economics Research, Helsinki, which is part of the United Nations University. She chaired the Committee on International Cooperation and the Committee on the Status of Women of the American Philosophical Association. She also testified as an expert witness in the Colorado bench trial for *Romer v. Evans*, a landmark United States Supreme Court case dealing with sexual orientation and state laws. She also writes articles for popular magazines and newspapers, such as the *New York Times* and *The New Republic*, and appears on TV and in popular media all over the world.

No summary could do justice to a public intellectual and prolific writer like Nussbaum in such a short space. Thus, this entry will focus on a subset of her books that are focused on the themes most relevant to this encyclopedia: the capabilities approach, the connection between literature and law, the role of shame and disgust in the law, religious freedom, and feminism.

When tackling these topics, Nussbaum draws inspiration from Aristotle, the Stoics, Immanuel Kant, John Stuart Mill, and John Rawls. Yet, her work marks a departure from all of these as well as a rejection of utilitarianism, rights theories, and social contract theories. Although Nussbaum seems to cover a wide range of topics that seem unrelated to each other at first sight, some patterns clearly emerge. Nussbaum believes in the power of philosophy to make a difference in the world. She argues that the well-being of every individual – including women, people with disabilities, LGBTQ individuals, and even animals – is important. She also stresses the importance of emotions – which is unusual in both philosophy and legal scholarship – and she advocates for deep engagement with and consideration of issues of justice, equality, oppression, distribution, autonomy, and dignity.

The Capabilities Approach

Nussbaum is a past president of the Human Development and Capability Association. She has written three books (as well as numerous articles) about the capabilities approach: *Women and Human Development: The Capabilities Approach* (2001), *Frontiers of Justice: Disability, Nationality and Species Membership* (2007), and *Creating Capabilities: The Human Development Approach* (2013).

According to Nussbaum's capabilities approach, people have certain capabilities that are necessary for human flourishing: (1) life, (2) bodily health, (3) bodily integrity, (4) senses, imagination, and thought, (5) emotions, (6) practical reason, (7) affiliation, (8) other species, (9) play, and (10) control over one's environment. The capabilities approach is the view that political structures need to ensure that everyone will have these capabilities supported and protected up to a certain threshold.

Nussbaum says that this list is open-ended, humbly made, subject to revision and meant for the modern world (2001, 81). She also argues that the capabilities approach appeals to a Rawlsian overlapping consensus; people with different comprehensive normative doctrines can agree on this list. The capabilities approach is an objective approach to ethical and political theorizing; while it incorporates varying perspectives, it also constitutes a rejection of cultural relativism. For example, although in some cultures it is acceptable to educate boys but not girls, the capabilities approach shows this practice is not morally acceptable.

In Nussbaum's version of the capabilities approach, the ten capabilities listed above are all equally important. The absence of any capability is a tragedy; each capability is equally important and each should be protected. One capability should not be traded for another, and the capabilities of one being may not be traded for an increase in the capabilities of another being or for the greater good. This stands in stark contrast with some economic measures of well-being, such as Gross Domestic Product (GDP), and some theories of well-being, such as utilitarian theories.

While Nobel Prize winner Amartya Sen has played a key role in developing the capabilities approach, Nussbaum has her own version which can be understood independently of Sen's version. Like Sen, Nussbaum offers poignant objections to using a country's GDP to evaluate the well-being of its citizens. Nussbaum argues that because GDP is an average, a country with a fairly high GDP may not be a just society; GDP "doesn't tell us where the wealth is located, who controls it, and what happens to the people who don't" (49). Furthermore, GDP does not look at some factors that are important when evaluating the quality of people's lives: their health, education level, and living conditions, for example.

Rather than measuring well-being in terms of GDP, a better approach is to ask the questions that are central to the capabilities approach: What capabilities do people actually have? What can they actually do and what can they be (2013, x)? Which capabilities are the most valuable? Which ones are "the ones that a minimally just society will endeavor to nurture and support?" (2013, 28). Unlike GDP, which measures the quality of life of a nation in narrow monetary terms, the capabilities approach is attentive to issues of justice, equality, oppression, distribution, and freedom.

In her canon, Nussbaum consistently argues that traditional ethical theories – such as utilitarian and social contract theories – have failed to recognize and address the pervasive injustices that affect oppressed populations, such as those against women, children, differently abled people, and nonhuman animals. Unlike Kantian theories, the capabilities approach has no trouble seeing disabled people and nonhuman animals as subjects worthy of moral consideration and as beings towards which we have direct duties. And unlike utilitarian theories, the capabilities approach cares about each individual, not the aggregate. The capabilities approach also has a distinct advantage over preference-based accounts in that it does not have difficulties dealing with adaptive preferences.

In spite of its increasing popularity, Nussbaum's capabilities approach is not without its detractors; they have criticized it for having a list of specific capabilities, for having the wrong items on her list of ten capabilities, for her reliance on overlapping consensus, for giving too much or too little attention to different nationalities and species, for not dealing well with unavoidable conflicts and real-life dilemmas, for not giving enough credit to subjective measures of well-being, and for not adequately distinguishing enough between capabilities and functioning. However, the capabilities approach is relatively new and exciting, offering many opportunities for rigorous and stimulating work including

responses to these critics. Furthermore, because of the attention that it has received – from a wide variety of scholars, the United Nations, and various governments – the capabilities approach has the potential to make a meaningful difference in American and international public policy.

Literature and the Law

Poetic Justice: The Literary Imagination and Public Life (1995) is a revision of lectures Nussbaum gave in 1991 and a follow-up to her book *Love's Knowledge: Essays on Philosophy and Literature* (1990). In *Poetic Justice*, Nussbaum uses multicultural, feminist, and liberal lenses as well as references to a wide variety of authors, including Aristotle, the Stoics, Adam Smith, and Walt Whitman. A central role in her argument is played by three "realistic social novels" (87): Charles Dickens' *Hard Times*, Richard Wright's *Native Son*, and E. M. Forster's *Maurice*. She argues good novels like these enable us to feel empathy for those who are different from ourselves. This imaginative empathy is essential when dealing with issues of race, class, and gender in a diverse world where people might have very different experiences from ours.

It is important for everyone to develop this imaginative empathy, but it is perhaps especially important for anyone who is in a position of power in the legal system. The latter can learn from great works of literature that are particularly effective at portraying people not as abstract persons, but as particular people with a wide variety of experiences and emotions. Nussbaum compares literature and law, especially contemporary American case law. Both of these rely on imagining what the lives of others are like. Nussbaum refutes the idea of judicial objectivity (82) and argues that a fair and just application of the law requires the kind of sympathy and understanding that novels teach. As she puts it, "storytelling and literary imagining are not opposed to rational argument, but can provide essential ingredients in a rational argument" (xiii). Both judges and ordinary citizens "must...be capable of fancy and sympathy. They must educate not only their technical capacities but also their capacity for humanity" (121). This "fancy" is a type of imagination, "a morally crucial ability, without which both personal and social relations are impoverished" (37). As she explains in chapter 4, this fancy allows us to become the poet-judge that Whitman recommended. The poet-judge "presents equitable judgements, judgements that fit the historical and human complexities of the particular case" (81).

Nussbaum argues that it would be "extremely dangerous to suggest substituting empathetic imagining for rule-governed moral reasoning" (xvi); literary imagination is only one "part of public rationality, and not the whole" (xvi). Our literary imagination needs the "continued scrutiny of moral and political thought, of our own moral and political intuitions, and of the judgements of others" (76). Nevertheless, in *Poetic Justice*, she shows that literature can indeed improve judicial and social policy; literary imagination thus plays an important role in public discourse and in a democratic society.

Poetic Justice has been both praised and criticized for its short length, use of literary texts (the particular examples she chooses and her matter of fact interpretation of them), portrayal of opposing views, and overlap with lengthier books in which Nussbaum explores similar topics. Some have also criticized Nussbaum's arguments about the power of literature for not being based on empirical evidence, while others have charged that emotions may not function in the way Nussbaum thinks they do. It is also not clear whether literature really makes us understand others or sympathize with the disadvantaged. Sometimes, it clearly does. But at other times, literature makes us see others as objects of satire or even hatred. And at other times, literature seduces us into exploring fantasies that are best left alone or motivates us to seek more wealth or power over others. Some critics focus on Nussbaum's approbation of empathy. Empathy has a number of drawbacks; it makes us more likely to pay attention to individual problems rather than systemic ones, to suffering that affects one individual rather than large groups, to concrete problems rather than abstract ones (e.g., it is much easier to feel for a victim of a

car accident than for the problems caused by climate change), and to issues that affect people in the present rather than the future. However, even those scholars that present these objections to Nussbaum's arguments often go on to praise *Poetic Justice* and *Love's Knowledge* for drawing our attention to the crucial role played by emotions, to the transformative power of literature, and to the importance of empathetic imagination and its impact on law and public life.

Disgust and Humanity in the Law

In addition to her work on the capabilities approach, Nussbaum has written fairly extensively on other topics related to legal issues. In *Hiding from Humanity: Disgust, Shame, and the Law* (2004) and *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (2010), Nussbaum offers a rigorous critique of the role played by shame and disgust in society in general and in law in particular. She draws on a wide range of examples – from philosophy, history, legal cases, and popular culture – to show that reactions to gay marriage, disability, nudity, pornography, and stem cell research are often based on our sense of shame or disgust. These emotions have frequently been used to justify prosecution of minorities. Through the use of numerous examples, Nussbaum shows that shame and disgust allow us to hide from our humanity and are rooted in an irrational fear and denial of our animality, of bodily imperfections, and of contamination. But we cannot escape our animality. Instead, as she has pointed out in her earlier book, *Upheavals of Thought: The Intelligence of Emotions* (2003), emotions reveal deep and important thoughts and give us a moral compass. They provide us with a means of surviving and even flourishing in a world that we cannot control by offering us a form of intense engagement and discernment.

Nussbaum criticizes those who favor using shame to deal with undesirable behavior in part because shame is overly intrusive and overly restrictive. Neither is disgust an appropriate response; Nussbaum condemns those – like Lord Patrick Devlin in Britain or Leon Kass and the Christian Right in the United States – who "believe disgust is a reliable guide to lawmaking" (2010, xiii) and who appeal to it in order to restrict the legal rights of same-sex couples. She argues that we should be suspicious of the role disgust and shame play in our society, especially in the context of law and public policy, such as legal restrictions against gays and lesbians. Ultimately, Nussbaum argues, shame and disgust are incompatible with a liberal society in which we are all entitled to equal protections under the law.

In *From Disgust to Humanity*, Nussbaum continues to do the work started in *Hiding from Humanity* by extending her analysis not just to well-known constitutional cases involving sodomy, nondiscrimination laws, antisemitism, and same-sex marriage, but also to topics that continue to trigger disgust even among some liberals: public sex, bathhouses, sex clubs, sex without a condom when there is a risk of HIV-infection, polygamy, and marriage between brothers and sisters. She maintains that even in these cases, we must resist the temptation to give in to a politics of disgust, opting instead for a politics of humanity.

Nussbaum sides with John Stuart Mill and argues that the harm principle provides a good guiding principle for public policies and laws. The harm principle tells us that we can only restrict people's rights and opportunities when there is harm done to others, not when we find their behavior disgusting. Instead of a "politics of disgust," Nussbaum argues for a politics of humanity, based on respect and sympathy (2010, xxv). A politics of humanity involves "sympathetic imagination and responsiveness to the complexities of another's situation" (2010, xxi). Nussbaum argues that sympathy and imagination should even "inform the lofty process of constitutional adjudication" (2010, xxii). But in order to recognize others as beings who are entitled to equal rights and responsibilities, even judges need to see others – especially others who are very different than them – with respect, openness, sympathy, and a willingness to understand the complexity of their situation.

Some scholars have criticized Nussbaum for not seeing her opposition in a more sympathetic

light and for not considering counterarguments more seriously. Others have argued that she needs to provide more proof that the politics of disgust is as common as she claims it is, and that disgust is really the main cause of the types of reactions that Nussbaum describes. "Disgust" also seems to be an imprecise term; the meaning seems to keep shifting depending on the particular example Nussbaum gives or the particular point she is trying to establish. In spite of these criticisms, both *Hiding from Humanity* and *From Disgust to Humanity* have been praised as groundbreaking books that deal with difficult and timely moral and legal issues in a way that is both meticulous and engaging, and as required reading for everyone – especially legal scholars, lawyers, and judges.

Religious Intolerance and Liberty of Conscience

In *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (2009) Martha Nussbaum uses examples from history, law, literature, and philosophy to argue that America has been, and should continue to be, dedicated to religious freedom. Yet, she points out that although "religious liberty is very important to people, [. . .] it is often very unequally distributed" (1). She draws attention to historical and modern examples to demonstrate that "[p]rinciples lose their grip in times of fear. Ever since the founding of the first colonies, our country has known an uneasy oscillation between a commitment to equal respect and a fear of strangers that at times undermines that commitment" (176). To illustrate her analysis, she draws on a wide range of concrete examples, from religion in public schools to gay marriage to fear of Muslims. In *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (2012), she continues to analyze these examples, focusing more on fear, anxiety, and Islamophobia after 9/11 in particular. But in both books, she also offers reason to have hope for the future. She draws on John Rawls' idea of overlapping consensus to argue that citizens who have widely different metaphysical and religious ideas can still agree to respect each other's liberty of conscience and religious freedom. This consensus, as well as the development of our sympathetic moral imagination, can ground a respect for equality and freedom that honors our differences and our human dignity. The ability to practice one's religion free from oppression or discrimination is important to people's well-being.

Feminism

Any discussion of Nussbaum's work that did not mention feminism would be incomplete. Her work on the capabilities approach as well as her work on shame and disgust, described above, is deeply connected and even rooted in her feminist commitments. Her first book about the capabilities approach was titled *Women and Human Development*, and the plight of women, especially those in the developing world, is a reoccurring theme in her other books.

In *Sex and Social Justice* (2000a), as well as in numerous essays, Nussbaum explores the oppression of women and sexual minorities. Nussbaum tackles a number of specific issues, such as pornography – which she argues against – and the legalization of prostitution – which she argues in favor of. She also redefines the concept of objectification based on seven properties: (1) instrumentality (treating a person as a tool), (2) denial of autonomy, (3) inertness (treating a person as if she is lacking agency), (4) fungibility (treating a person as interchangeable with other objects), (5) violability (treating a person if she is lacking in boundary-integrity), (6) ownership, and (7) denial of subjectivity. While most feminists argue that objectification is always negative, Nussbaum allows for the possibility of neutral and even positive objectification.

In both *Women and Human Development* and *Sex and Social Justice*, Nussbaum often grounds her philosophical arguments in the experiences of women in developing countries, describing these in vivid and engaging detail. Nussbaum urges feminists to reject cultural relativism and pay more attention to global issues. For example, she condemns female genital mutilation because it violates bodily integrity and health, diminishes

human dignity and autonomy (since it is usually not a procedure the women have consented to), and it enforces male domination. Once again, she urges readers to pay attention to the complexities of others' lives and to respond to these lives with sympathy and respect for their dignity.

Conclusion

Nussbaum believes in the power of philosophy to make a difference in the world. In her work, she combines a keen interest in ancient and modern philosophy, literature, and the law with a deep engagement with contemporary social issues that often affect the most disadvantaged: LGBTQ individuals, women, people with disabilities, and even animals. As a prolific writer and a prominent public intellectual, Martha Nussbaum has made, and continues to make, a significant impact on philosophy, law, and public policy.

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- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Rawls, John
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O'Neill, Onora

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Onora Sylvia O'Neill (b. 1941–), Baroness O'Neill of Bengarve CH CBE FBA is Emeritus Professor of Philosophy at Cambridge University and a crossbench member of the House of Lords in the United Kingdom. O'Neill is a leading political philosopher in the Kantian tradition. She has lectured and published on a wide range of topics over four decades from justice, virtue, and ethics to trust, consent, and bioethics. O'Neill has also combined her academic research with a life-time of service in public activity in the UK which was recognized with the award of CBE Commander of the Most Excellent Order of the British Empire) and a life peer in the UK House of Lords.

Life and Work

Onora O'Neill is widely recognized as a leading contemporary political philosopher and public intellectual (see, for example, Archard et al. 2013; Chapman 2001/2). Born in Northern Ireland in 1941, daughter of a diplomat, Sir Con Douglas Walter O'Neill, her early years in education were spent in schools in Germany and the UK. O'Neill initially intended to read History with French and Latin at Oxford University; however, she quickly discovered a love of philosophy and went on to complete her undergraduate studies in philosophy, psychology, and physiology at Somerville College, Oxford. O'Neill was then awarded a scholarship to support her graduate studies at Harvard University where she completed her doctorate training under the supervision of John Rawls. Her award winning doctoral dissertation on *Universalisability* formed the basis of her first monograph, *Acting on Principle*, published by Columbia University Press, 1975.

As a student at Oxford, O'Neill studied under a range of leading feminist philosophers including G.E.M. Anscombe and Philippa Foot who each influenced her work in different ways. She first read Immanuel Kant's *Groundwork of the Metaphysics of Morals* under the guidance of Foot, and examined, and indeed systematically rejected, Anscombe's critiques of Kantianism and Utilitarianism. As a graduate student at Harvard, she attributes her decision to immerse herself in the works of Kant to a seminar on models of rational choice conducted by Robert Nozick (Hutchings 2001/2, 8). She read *the Critique of Pure Reason* as a Graduate student with Charles Parson who also ignited her interest in *The Doctrine of Method.* Her role as a teaching

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assistant for Stanley Cavell saw her engage with *Religion within the Limits of Mere Reason* with care (O'Neill 2013, introduction to the second edition of *Acting on Principle*). Amartya Sen's work on poverty and global justice had a deeply influential effect on O'Neill's thinking around development, hunger, and international justice. Of course, as her dissertation supervisor, the work of John Rawls has also played a significant role in O'Neill's contributions.

Following her doctoral studies, O'Neill began her academic career at Barnard College, the women's college at Columbia University in New York, before returning to the UK in 1977 to take up a post at the University of Essex. O'Neill held the Chair of Philosophy at Essex University and became Principal of Newnham College, Cambridge, in 1992, a position which she held until 2006. Since 2003, O'Neill has held the position of Honorary Professor of Ethics and Political Philosophy, Faculty of Philosophy University of Cambridge (British Academy Biography, 2016).

Through her long and distinguished career, Onora O'Neill has held a wide range of leadership positions both inside the world of academia and beyond as a member of numerous public committees and bodies. She is the former President of the British Academy (2005–2009) and Member of Council (1997–1999); past Chair of the Nuffield Foundation (1998–2010); founding President (2003) of the British Philosophical Association (BPA). From 2012 to 2016, she chaired the UK's Equality and Human Rights Commission. In 1999, she was made a life peer, taking the title Baroness O'Neill of Bengarve, and sits as a crossbench member of the British House of Lords. She is an active participant in a range of parliamentary committees and sits on the boards of the Medical Research Council and the Banking Standards Review.

O'Neill's philosophical work is firmly rooted in a Kantian tradition although she sees her work as standing on the shoulders of Kant rather than lying at his feet (Hutchings 2001/2, 12) in that her philosophical endeavor is not to reconstruct Kant but to utilize Kant's conceptual tools and methodological constructivism to critically engage with real-world ethical problems. In her research, O'Neill has combined interpretations of Kant and elaborations of Kant's theory to examine the connections between reason and action. For O'Neill, Kant's constructivism about practical reasoning, principles, and duties provides a plausible and coherent pathway for critically engaging with a range of ethical problems. She has written and published widely on political philosophy, global and international justice, agency and autonomy, duties and rights, justice and virtue, trust and coercion, and informed consent.

On Global Justice

A recurring question in O'Neill's work is concerned with "who ought to do what for whom if global justice is to progress?" (1986, 1994, 1996, 2000, 2016). As Simon Caney notes, a central theme across this work has been an emphasis on the foundational role of obligations (Caney 2013, 133). This emphasis directly informs O'Neill's rigorous and consistent criticism of contemporary liberal contractualist deontological and consequentialist accounts of justice and virtue in the modern state-based context of international ethics. Using her distinctive constructivist methodological approach, O'Neill develops her own account of the most appropriate principles of justice and virtue for the modern context, marked by conditions of deep pluralism, continuous, and widening networks of connection, and mutual interdependence. O'Neill is particularly vocal in her criticism of accounts that focus on institutions over agents and rights over duties (1989, 1996, 2000, 2016).

O'Neill's contributions to the debates on Global Justice has influenced contemporary debates across a range of topics, including Iris Marion Young's work on responsibility and global labor justice (2010); Caney (2005) and Brock (2009) on theories of global justice; and the climate justice debates (Caney 2014; Bell 2013).

Institutions and Agents

O'Neill has consistently argued (1989, 1996) that modern liberalism, in particular Rawlsian liberalism (Rawls 1993, 1999), which focuses exclusively on institutions and perfect duties of justice, is not only lamentable but theoretically unstable and practically unhelpful. The relegation of duties of virtue, and matters concerned with character and behavior to the private sphere, beyond the reach of scrutiny, and the exclusive focus on the establishment of just institutions, is for O'Neill deeply problematical, and something which her work directly seeks to address (Murphy 2016).

O'Neill offers many reasons in defense of this criticism. Duties of virtue are not, she argues, limited in their reach to private individual agents and matters of private reasoning. They are also concerned with matters of social virtue and the ethos and character of human-made (and managed) institutions, and are therefore matters of public reasoning. These are duties of *social* virtue and are required because "without some underlying orienting stance, without certain attitudes and responses to others and to differing aspects of life, in short without a character, action would be unstable and erratic; the basis for sustaining relationships and ways of life would be weakened" (O'Neill 1996, 186).

In *Constructions of Reason* (1989), O'Neill highlights the tension that this exclusive focus on justice leads to within contemporary deontological and consequentialist accounts. She argues that in marginalizing matters of social virtue, some accounts attempt to squeeze matters traditionally associated with virtue into an account of justice. Those that do not fit into such an account are marginalized and hidden. O'Neill argues that both deontological and consequentialist welfare liberals have devalued duties of virtue, such as assistance and charity, to no more than personal preference: "If charity is no more that personal preference, then callous and kindly actions to others in need are equally permissible, provided justice is not breached. It is not surprising that liberals who think they face this dilemma often try to show that much that used to be thought charity is really a matter of justice" (O'Neill 1989, 225). Rather than blurring the distinction between duties of virtue and justice, O'Neill's account seeks to maximize the potential of a richer and wider account of moral duty.

In *Towards Justice and Virtue* (1996) O'Neill argues that contemporary theories of justice which exclude consideration of social virtues are particularly practically inadequate in the modern world marked by deep pluralism, continuous and widening networks of connection, and mutual interdependence. Pluralism and connection form the background assumptions upon which O'Neill bases her account. It is against these background assumptions that O'Neill develops duties of justice and virtue which, she argues, are necessary for social cooperation at all levels. Building upon Kant's division of duties, O'Neill identifies four types of duty – perfect universal, imperfect universal, perfect special, and imperfect special (O'Neill 1996, 152). The method of justification of these duties also follows a Kantian methodological approach whereby a procedure is invoked to enable an agent test their maxims of action and deliberate between specific courses of action.

In the process of deliberation, agents test their reasons and courses of action against a simple, yet demanding set of criteria, to establish if the reasons and courses of action can be justified and ones the agents would have reasons to accept. The criteria for justification require courses of action to be adoptable, followable, and intelligible by those who fall into the domain of ethical consideration. This form of practical reasoning is public and inclusive and requires an agent (individual and collective) to justify their actions to *any* others affected by these.

Duties and Rights

A second key theme consistency explored by O'Neill in several monographs is what she takes to be the problem of contemporary theories which hold rights to be the basic deontic category over duties. In various contributions, O'Neill identifies

at least three problems related to the implications of such a theoretical construction. Firstly, if rights are taken to be the basic deontic category, then recipience (and the subject as passive right-holder) is attributed prior consideration over the agent and activity. Secondly, duties that do not have rights can become marginalized and invisible; they can remain in the status of "unacknowledged" unless institutions can be established to deliver upon them. Thirdly, institutions and agents that are ascribed particular sets of obligations must have the capacities to fulfil these obligations. Yet, within the contemporary human rights regime, states are identified as the primary duty bearer, regardless of their will or capacity to meet the corresponding obligations. In *Justice and Boundaries* (2016), O'Neill identifies this as a key barrier to progressing global justice and argues for a wider conception of global justice in which obligations and duty are taken to be the primary deontic category and where both state and non-state actors can be ascribed the role as duty-bearer is necessary for the progression of global justice in the contemporary interconnected context.

Of course O'Neill's account of rights is not without its critics. Amartya Sen, for example, has argued that such an account aligns human rights too closely to legal rights thereby restricting and weakening the status and power of moral rights and duties (Sen 2000, 2004, 2009).

Public Intellectual

In her work as a public intellectual, O'Neill has contributed explanations and deeper understandings on a range of pressing contemporary moral, political, social, and ethical issues including trust (Reith Lectures, culminating in *A Question of Trust*, Cambridge University Press, 2002b); autonomy and trust in bioethics (Gifford Lectures 2001, culminating in *Autonomy and Trust in bioethics* 2002) (O'Neill 2002a, 2007); and the ethical importance of consent in medical and bioethics (*Rethinking Informed Consent,* 2007, co-authored with Neil C. Manson). Over the course of four decades, O'Neill has published 10 books and over 130 articles.

Conclusion

O'Neill's work has consistently been to the vanguard of a generation of scholars, researchers, and activists. In her most cited article, 'Lifeboat Earth' (1975a), O'Neill points to the moral and ethical problem of intergenerational justice, far in advance of the recent emergence of literature on the subject of Climate Justice. Through her public activity, and focus on matters of pressing public concern, O'Neill continues to significantly broaden the audience of traditional political philosophy beyond the academy. As O'Neill herself notes "practical reasoning, including ethical reasoning, is not a spectator sport" (O'Neill 2013, 11). As one of the most distinguished Political Philosophers in the Anglo-American tradition, O'Neill's contribution demonstrates the practical and active role that philosophy can play in understanding and addressing pressing and complex social, ethical, legal, and political issues.

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Oakeshott, Michael

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Michael Oakeshott (1901–1990) studied history as an undergraduate in Gonville & Caius College at Cambridge University where he began his interest in the history of political thought. His idea of the historian's task was influenced by such eminent historians as Frederic Maitland, and by F. H. Bradley's *The Critical Presuppositions of History*, and the early essays on history of R. G. Collingwood. Philosophically, he acknowledged Hegel's *Phenomenology of Spirit* and Bradley's *Appearance and Reality* as important to him. He kept notebooks on his reading which show that he did careful reading of Plato, Aristotle, Spinoza in the 1920s. His grasp of ancient and modern political thought was profound. He became a noted lecturer on the history of political thought at Cambridge in the 1930s and later at The London School of Economics in the 1950s and 1960s. In 1933, he published *Experience and Its Modes* which established him as a major and original thinker in the tradition of British idealism. In 1946, he produced an important edition of Hobbes's *Leviathan*, his introduction to which has remained a celebrated account of Hobbes's political philosophy. After a brief period at Oxford, Oakeshott was appointed to the chair of political science at The London School of Economics in 1951. The publication of a collection of his essays in 1962, *Rationalism in Politics and other essays*, expanded his reputation especially in the United States. The publication in 1975 of *On Human Conduct* was the summation of his thinking on modern politics where he expounded the distinction between "civil association" and "enterprise association," a distinction which has been widely employed in contemporary debates among political philosophers, and has increasingly been influential in conservative thought. He expressed a conservative "disposition" which is not easily translated into policy terms except for his strong emphasis on the fundamental importance of individual liberty. The influence of his thought has now spread globally. His works have been translated into many languages and works about him are published in many countries. His place among the most important political philosophers of the twentieth century is clear.

A central theme of Oakeshott's thought was the emergence in Europe (and North America) over the past 500 years of several extraordinary ideas: "civil association," "individualism," and the "rule

of law." Civil association is an arrangement of individuals brought together by chance and choice, not by a common teleological goal but by procedural rules in support of their capacity for self-regulation primarily through voluntary transactions. Individualism indicates the growing sense of taking responsibility for oneself through self-chosen pursuits (a sense that we all are free). Rule of Law adds formality and predictability to evolving customary practices and procedures among largely self-regulating individuals. The state is not to define the destiny of such individuals but to provide the background safeguards which allow individuals to flourish in their own terms, believing that they can show self-restraint as well as self-assertion in continual adjustment to each other.

To the extent that human beings have come to such understanding, the state is accepted as necessary but the scope of its power is to be limited, and arguments as to the extent of its powers – what governments should or should not be doing – are inherent to societies of this kind. Oakeshott called the state a "superficial order" in the sense that it presides over a complex, continually altering array of arrangements as people pursue their self-chosen wants and satisfactions. The character of such order constantly pushes whatever boundaries may formally be in place. The state provides a certain equilibrium in the face of constant change without seeking to control change according to some independently imagined and designed concept of what proper order would be. The order maintained by the state primarily is to preserve the conditions of civil association which, for Oakeshott, is of higher importance than the state.

Commitment to the rule of law means not merely abiding by noninstrumental current rules. More importantly, it means commitment to the *idea* of rule of law which allows for alteration in the specific rules as experience alters our assessment of the adequacy of existing rules but resists developing rule by decree or administrative regulation. Oakeshott expressed this by distinguishing between "nomocracy" and "telocracy" in his lecture course on the history of political thought at The London School of Economics: "By *telocracy* I mean the proper business of governing understood as the organization of energies and activities of its subjects, and the resources of its territory, for the achievement of a single, premeditated end. . .the 'rule of law' is recognized to have no independent virtue, but to be valuable only in relation to the pursuit of the chosen end." By contrast, nomocracy acknowledges varying interests of all sorts among individuals who expect to make choices for themselves, and who have learned to live in continually altering circumstances. The difference is between an order abstractly designed and imposed, and a relatively spontaneous order tolerant of indeterminacy.

The inspiration for telocracy stems from the idea of government as a managerial enterprise in which all play specific roles in a corporate endeavor. Oakeshott called this "enterprise association" in contrast to "civil association." Of course, people enter into all sorts of "enterprises" but they are in principle voluntary, allowing for withdrawal, whereas the state as enterprise is a compulsory association withdrawal from which is very difficult and for most impossible. There is considerable difference between relations solely in terms of common recognition of rules of conduct and relations determined independently of the self-chosen activities of individuals who understand themselves as self-regulating individuals.

Yet there is no fixed definition of the scope of governmental power. The issue itself is an inevitable feature of life in civil association, depending on which of the alternative ideals – civil or enterprise association – guides one's response. There is likely to be some appeal in both alternatives. The desire for independence and the desire for community are both present in our politics (we are *homo inter homines*); neither has been able to dominate permanently the other, although Oakeshott thought the attraction to civil association by and large characterized modern European history. The rise of collectivism and totalitarianism posed the greatest challenge to that preference; their defeat shows the persisting power of the idea of civil association, no matter how vaguely its character is understood. The

totalitarian temptation has not, however, disappeared. Millennialist and utopian aspirations remain seductive. Oakeshott pointed to the significance of war, and preparation for war, that demand corporate organization based on command as opposed to procedural rules. Appeals to necessity threaten commitment to the rule of law.

The rule of law resists independently premediated designs which, coupled with the concentration of power in modern governments, foster the illusion that the contingencies of life can be overcome. Modern governments operate in tension between a constrained vision of what is possible and an unconstrained quest for perfection.

What, then, is the rule of law? Oakeshott considers what it is not: Rules are not commands. A command is addressed to specific agents to do or not do something in particular situations, increasingly evident in the growth of bureaucratic regulations commanding specific behaviors as opposed to conduct in accord with general rules. A rule is, in Oakeshott's terms, "adverbial": There is no rule not to light fires; there is a rule not to light fires arsonically. Such a rule does not command specific performances but rather a guide to which one subscribes in deciding what sort of fire to light. Thus, Oakeshott emphasizes citizens' ability to participate actively in implementing the law, exercising discretionary judgment wherein one commits, not only to following laws but also to law-abidingness itself. "Rule of law" precisely stands for a particular mode of moral association where one recognizes the authority of known, noninstrumental rules as one decides on particular actions. This is the style of moral deliberation appropriate to individuals in civil association.

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Oakeshott, Michael: Influential Ideas

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Michael Oakeshott (1901–1990), among the most important British political philosophers of the twentieth century, made central to his thought the idea of "civil association" and the idea of the rule of law. He made significant and original contributions to understanding these as achievements in modern European history. They express in the modern European consciousness a coherent sense of individual liberty among people who came increasingly to think of themselves as self-regulating individuals, in need of limited government but not needing minute bureaucratic management to tell them how they ought to live. As the experience of individuality grew, numerous theoretical expositions of that experience, explaining what sort of political order is appropriate to human beings who increasingly understand themselves as free, equal, and independent, came to sight. Thomas Hobbes, John Locke, David Hume, Immanuel Kant, Georg Friedrich Hegel, Benjamin Constant, and John Stuart Mill offered compelling accounts of how we have come to understand the modern state as serving the association of individuals through the promulgation of a system of procedural rules which guide the manner of our conduct toward each other without specifying the ends or goals that we choose to pursue or privileging some goals at the expense of others.

Law as Oakeshott understood it provides the background conditions for making our exercise of freedom equitable, unpretentious, and orderly. He elaborated on this most notably in his magnum opus, *On Human Conduct* (1975), where one finds an extended discussion of "civil association," in his lectures on the history of political thought to students at The London School of Economics (posthumously published), and in a remarkable essay, "The Rule of Law" (1983). He distinguished "telocracy" from "nomocracy." Telocracy expresses the view that the central task of governing is to organize the energies and resources of society as a collective project for reaching a unified goal or end; law is thus to serve a trans-legal end, and the rule of law, while recognized, is subordinated to the historic task of realizing the project. Nomocracy was his term for the procedural rule of law which, in one of his locutions, refers to the task of keeping the ship of state afloat in the absence of a single destination. This corresponds to another distinction he made between "civil association" and "enterprise association" where the latter signifies a managerial engagement of government to direct individuals as role players in a joint enterprise rather than responding to them as self-regulating individuals who obey the law so as to be otherwise free to do as they think best. Individuals associated with civil association are related in terms of a common recognition of rules which establish a practice of civility. The tension between telocracy and nomocracy or between civil and enterprise association is unresolved in modern history; rather, identifying the tensions explains a good deal about how we argue about politics and how we tend to divide in our view of the scope and purpose of government.

Oakeshott referred to procedural rules as "adverbial considerations," because they do not dictate our goals but rather advise us that, in pursuing our various goals, we should pursue them in ways that preserve the common commitment to the rules while facilitating our various pursuits. The rules thus understood are advisory without prescribing what transactions to enter into or to refuse. The division is between the view that governing involves improving or perfecting social life and the view that these are the responsibility of individuals to work out for themselves in civil conduct.

In this understanding one acknowledges the need of someone in authority to take on the task of defining and maintaining the rules on behalf of the civil associates who are to benefit from them. The rules need to be impartial and universal for the set of people who subscribe to them; they are not to privilege some interests at the expense of others. They are limited because there is no single ideal form of life for civil associates which the laws are to promote. In a sense, we do not so much obey the rules but take them as guides in working out the implications for our conduct in subscribing to them as individuals in the company of each other. Such a world involves endless adjustment and readjustment as we seek to maintain a coherent relationship between the way we live and what the rules prescribe. We can thus argue about the coherency of the rules themselves even while we continue to abide by them.

In pursuing various interests, civil associates logically must intend to maintain the rule of law. This means that we need a commitment to the *idea* of the rule of law as well as to the specific laws we happen to have at any given moment in our history. This commitment does not provide a precise answer to the question of what the scope of governmental power in legislative enactment should be beyond the positive duty to maintain the rule of law itself. What it does offer is a way of thinking in arguing about the scope of governmental power. The point is neither to eliminate nor to maximize that scope but in all debates to remember the reason for political authority in the first place. The test of relationships of this kind is the capacity of citizens for self-regulation, on the one hand, and for those governing to constrain themselves to what they have been authorized to do. This in turn requires one to recognize that the rule of law is central to what is in one's interest properly understood, corresponding to a similar understanding of other citizens. Even though specific rules may change, the commitment to be law-abiding persists.

Thus Oakeshott offers a vision of order appropriate to people who understand themselves as, to use Locke's formulation, "free, equal, and independent." He was describing what he understood

to be the animating principle distinguishing modern politics from its ancient antecedents. He was aware of the tension in modern politics between the vision of civil association coupled with the rule of law – a vision which is skeptical of political programs and pretentions – and the utopian vision of perpetual peace and prosperity which, when connected to the growth of power at the disposal of modern states, appears to justify superseding the rule of law since, in this vision, the rule of law at most maintains stability only as a way station on the road to an imagined and wished-for post-political world. Here the idea is that the rule of law is a convenience until it becomes a barrier to resolving the predicaments of our common life.

Along with the concepts of "nomocracy" and "telocracy," and the concepts of "civil association" and "enterprise association," Oakeshott spoke of the tension between the "politics of skepticism" and the "politics of faith." He identified these "styles of politics" as dialectically engaged, coming to sight more or less in tandem at the beginning of modern European history which Oakeshott dated to about five centuries ago. A new idea of order, the "modern state," was beginning to emerge. The attempt to theorize this new form of order encouraged, on the one hand, skepticism in the sense of seeking to limit increasingly centralized governmental power; on the other hand, that same aggregation of power encouraged the faith that human beings could do what had never been done before by eliminating, if not immediately then gradually, all limits to perfecting the human condition. He thought that these ideas in tension created a kind of stability insofar as neither could eliminate its opposing alternative. He called this a discordant harmony.

Oakeshott also thought that the emergence of individualism was a true insight into the human condition that we really are individuals with no independent collective identity. Thus the politics of skepticism is in a way the more appropriate response to our condition, while the politics of faith sees the world of individualism as a mere way station on the road to something far grander. However, he also saw that political skepticism could fail to respond adequately to the emergency situation (tending always to underestimate it); and the utopianism of the politics of faith would be enticed to see a crisis in every moment as the decisive moment which would appear to justify endlessly mobilizing the resources of society for the final ascent to a putative end of history. For him the rule of law is one of our greatest achievements but, as a philosophic student of politics, Oakeshott wanted to understand why it has always been accompanied by an antithetical attitude which finds a society of free and self-regulating individuals an ordeal to be borne with impatiently until we can find the means to escape it or transcend it. In part, this is because, even if the historical tendency is to welcome modern liberty as a liberating experience, we do not forget the ancient idea of liberty as participation in a community sharing a way of life. The advocates of modern liberty encounter those who doubt the virtue of individualism either seeking what they take to be the superior virtue of a community devoted to seeking an end or goal which pertains to all or those who find the exercise of individual liberty an ordeal from which they seek relief. Both alternatives are, for Oakeshott, distinctively modern, and, in the polarity from which neither alternative can escape, they reveal the underlying contours of the morality and politics of modern Europe which persist through all the surface changes and debates of ordinary political life.

Oakeshott also spoke of the "ideological style" of politics. This style is embarrassed and annoyed by what appears to be the disorderly, unplanned, endlessly variable character of social life. The solution is to develop an "independently premeditated" plan for reconstructing social life, eliminating the supposed lack of order. This outlook does not imagine that there is something like a spontaneous order which maintains itself without centralized direction. Or it is thought that such order as may have evolved can be dramatically improved through bureaucratic administration, the purpose of which is to achieve uniformity not only of ultimate purpose but also in daily conduct. Regulatory structures, administered by officials with discretionary power to assess and "correct" departures from defined norms, compete with or supersede the rule of law. The difficulty of achieving planned goals, instead of causing second thoughts, encourages continued expansion of bureaucratic management. The limits of this

rationalist approach to politics, which may invigorate for many political skepticism, lead its proponents to redouble efforts to implement the plan, to overcome what they see as misguided resistance to minute regulation.

The rule of law depends on patience with the life of society and skepticism about the use of power. The ideological style is impatient and tends to divide citizens into the "righteous" and "unrighteous" or between the "intelligent" and the "backward," the "progressive" and the "reactionary," and so on. In short, modern liberal democracies exhibit the persistent discord of tension between the telocratic and the nomocratic dispositions or the polarity established in the dialectical relation between the "politics of faith" and the "politics of skepticism." We human beings are both rational and passionate. Insofar as we are intelligent agents, we may pursue the civic relationship by adhering to rules which are authoritative for us because we have authorized someone to make rules of a certain kind. The apparatus of the modern state, in this way of thinking, exists to preserve civil association; civil association does not exist to serve ends extrinsic to its life. This is an artificial relationship in the sense that we have made it for ourselves. The idea of the rule of law clarifies what a lawlike relationship strictly speaking can be as it also clarifies its difference from other kinds of relationships which may be perfectly natural but are not relationships of law.

Oakeshott saw that the emergence of the modern idea of the rule of law did not eliminate its connection to older ideas of a higher law. Appeals to a higher law may suggest a substantive set of social arrangements prescribed by that higher law which it is the duty of humanly made laws to implement. Alternatively, the higher law might be understood as composing maxims or precepts expressing background conditions for making laws for ourselves but not prescribing specific arrangements; in that view, the higher law does not tell us what laws to make but it does specify the formal character of laws that distinguish laws from commands. Thus appeals to natural law might be for the purpose of describing the formal character of law or to a substantive prescription for how we ought to live. This ambiguity appears in the ambivalence we experience as to the function of law or the purpose of the modern state. Our historical inheritance may be to pursue a coherent system of non-instrumental rules but alternatively to perfect the social order according to a good or end which transcends and collates the individual goods of citizens.

Oakeshott's analysis tells us that, in the fluidity of human experience, the rule of law is indispensable to defending human freedom understood in terms of being intelligent agents of our own lives, able both to assert our interests and to moderate our pursuit of those interests in light of the common condition we share in civil association.

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Objectivity and Law

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Introduction

According to standard approaches, there are two main notions of objectivity: (1) objectivity as absence of elements that can distort somebody's judgment; (2) objectivity as accurate representation

of something (Gaukroger 2012, Ch. 1.). Obviously, the first notion is relevant to law, since nobody would doubt that a judge should be free from personal bias or prejudice. The same, however, cannot be probably said, at least prima facie, for the second notion, which seems more appropriate for an inquiry concerning the meaning of objectivity in the domain of science. How to characterize, then, the problem of the objectivity of law?

My assumption will be that the problem of the objectivity of law is a problem concerning *correctness*: a given judge can be said to have applied the law in an objective way if she/he acted correctly, that is, if she/he applied the right norms in the right way (compare Stavropoulos 2005, 317). If we see the issue in this way, the predicament will be more similar to that of language than of science: after all, we can use language correctly – for example, by exclaiming: "Look! That's an oak!" when an oak is in view – or incorrectly – for example, by exclaiming: "Look! That's an oak!" when an elm is in view. True, this is not entirely accurate, for we can use the language incorrectly in a number of ways. However, the general idea is clear: one is using language correctly – in an objective manner – when she/he is doing *what language requires*, that is, when one is complying with the rules of language. In the same way, one is applying the law correctly – in an objective manner – when she/he is doing *what law actually requires*, that is, when one is complying with the norms of law. Therefore, the problem of the objectivity of law is the problem of establishing in which cases, if any, the law prescribes univocally what ought to be done. This is the *hard problem of the objectivity of law.*

It is worth noticing that, in so far as I think of objectivity in this way, I can recover, at least partly, the core of the second account, that is, objectivity as accurate representation, because the correctness of application can be seen as a warrant of an accurate representation of the legal world.

Natural Law and Legal Realism

From the point of view of natural law theorists, there is no problem about the objectivity of law. The very basis of natural law theories lies in the assumption that positive law draws its validity from another kind of law, which is invariant in relation to time and space, is knowable by human minds, and provides a complete guidance to human conduct (Aquinas, *Summa Theologiae*, I-II, qq. 93–95. On Aquinas's theory of natural law, see Lisska 1996 and Finnis 1998). Assuming that there is a natural law, founded on right reason, implies that there is also a method for obtaining correct answers to practical problems (Finnis 2011). Human lawyers may fail to detect what natural law demands. However, the right answer is always there to be discovered.

Things stand differently from the vantage point of legal realism. This is especially clear in the case of American realists. Indeed, since American realists are committed to the thesis according to which law is rationally indeterminate in relation (at least) to some cases – that is, the set of legal reasons is insufficient to justify a unique outcome for those cases –, there is no room for thinking that law always dictates the correct answer (see Leiter 2010). Nor could Scandinavian legal realism be credited with a different position. Think for example at the well-known dissolution by Karl Olivecrona of the concept of the binding force of law (see Olivecrona 1971).

More generally, it seems fair to say that realist of different stripes share the belief that law is, in some sense, not objective. For example, Eugenio Bulygin (2004, 308) credits the so-called "skeptical school of Genoa" with the thesis that legal interpretation is always indeterminate and so the law is never objective. (To be honest, this last notion of objectivity is different from the one – objectivity as correctness – I proposed. However, the difference quickly disappears as soon as it is recognized that skepticism about interpretation entails the impossibility of finding what law actually requires.)

Kelsen

The problem of the objectivity of law is surely more pressing for legal positivists and it is no coincidence that, especially in recent years,

many of them have been engaged in this debate. However, some distinctions are to be made. In fact, for early positivists, such as Jeremy Bentham and John Austin, who espouse an imperatival theory of law – that is, equate law with sovereign's commands backed by the menace of sanctions – one of the advantages of statute law over common law is that of increasing the objectivity of law (Chiassoni 2016, Chs. 1–2).

Other contemporary legal positivists distinguish between statements about the law and statements about the legal status of an action according to the law, and argue that, even if the latter can be indeterminate, the former cannot. Therefore, we can speak of the objectivity of law (Bulygin 2004, 307).

However, this simple solution does not work. Indeed, if we concede that in some cases the legal status of an action according to the law may be indeterminate, we must conclude that the objectivity of the corresponding statements about the law are is "compatible" with the ensuing indeterminacy. But if this is so, the notion of objectivity that we can actually attain is very thin, after all: it is a notion of objectivity that, as it were, coexists with indeterminacy.

If we look at Hans Kelsen's views about interpretation, we find a completely different attitude. Kelsen says that law is always indeterminate, in the sense that higher-level norms cannot determine beyond a given extent the form and the content of lower-level norms. For these reasons, "the law to be applied constitutes only a frame within which several applications are possible, whereby every act is legal that stays within the frame" (Kelsen 1960, 351). As a consequence, judges create new law – they create individual norms within the frame of general norms – through their interpretations, which are acts of will, not of cognition (see Kelsen 1949, 133–136; Kelsen 1960, 353–354). Therefore, according to Kelsen, the problem of the indeterminacy of law is a global characteristic, concerning the generality of norms, not a problem pertaining to some special cases. The norms created by judges are perfectly valid unless they depart from the framework defined by higher norms. Within the extent of such a frame, they are completely correct, as for what concerns their legal status. This means also that a choice between them can be made only by recourse to extra-legal – moral, political, etc. – criteria. But if this is so, the fact that higher norms cannot completely determine lower ones is connected to the relevance of extra-legal criteria inside the law.

Hart

Hart shares with Kelsen the idea that law may be indeterminate. His distinctive thesis, however, is that such indeterminacy is not global as Kelsen seemed to have thought, but can be circumscribed. In most cases the application of law seems to be straightforward and, consequently, there seems to be no problem about its objectivity. The goal of discriminating between easy and hard cases can be pursued through a proper analysis of the causes of indeterminacy. There are, Hart says, two general tools used in order to communicate general standards of conduct: legislation and precedent. The shortcomings of the first device depend on the semantic limitations of the general terms employed in it, since general terms cannot accommodate the infinite complexity of facts, nor the indeterminacy of our aims (Hart 1994, 128–129). The drawbacks of precedent, instead, are related to the impossibility of extracting from the previous examples one and only one definite rule that may constrain the subsequent decisions by courts (Hart 1994, 134–135). When not previously envisaged cases arise, judges must perform a creative role, issuing new law, which can settle the questions still unanswered. Hart, however, says also that such a predicament is not ubiquitous, because in the majority of situations law offers determinate rules, which do *not* require from officials and private individuals "a fresh judgment from case to case" (Hart 1994, 135).

It is important to understand the exact reasons behind the failure of determinacy. As I said Hart thinks that in most situations general terms work pretty well. In these cases, there is no doubt whether they apply or not. They are "plain cases," that is, cases that do not need any interpretive effort, in which "the recognition of instances

seems unproblematic or 'automatic'" (Hart 1994, 126). However, there are also hard cases, in which the "agreement in judgments as to the applicability of the classifying terms" (Ibid.) breaks down. In such cases, hermeneutical canons offer no guidance, since "these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation" (Ibid.). As a consequence, we must relinquish the comfort of general terms and entrust ourselves to the second device listed above, namely precedent. Facing a situation in which a previous agreement about the applicability of a general term does not exist, the interpreter of the law can only use the plain case as an authoritative example. But the recourse to this strategy involves the attribution of a discretionary power (Hart 1994, 127). Such a power is discretionary because there cannot be a general agreement on the proper way of completing the list of items subsumed under the relevant general term. Otherwise, we would fall back in some plain case. But this also means that there is no common practice, since the latter seems to presuppose a wide agreement between practitioners.

The previous discussion should serve the purpose of making clear that Hart connects situations of law indeterminacy to the absence of a converging common practice. But, as we have seen, the perceived indeterminacy of law opens a discretionary space to interpreters, because in such cases there is no law that can constrain their evaluations. Therefore, we end up with the following causal chain: the lack of a converging common practice results in the indeterminacy of legal regulation, which in turn corresponds to the absence of objective legal standards as to some case at hand (failure of objectivity). Thus, for the transitivity of implication, lack of common practice implies failure of objectivity. Finally, by contraposition, objectivity implies common practice.

The overall upshot is that Hart's brand of positivism, as far as it advances a practice theory of law, connects – unlike Kelsen's conception – failures of determinacy to failures of objectivity. Kelsen could admit that higher law cannot determine the content of judicial decisions, without that fact entailing a lack of objectivity, since every judicial decision, in so far as it stands within the frame provided by higher norms, is perfectly legal. Hart, on the other hand, links the need for judicial discretion to the absence of an agreement. The creative intervention of judges is required precisely because it is not clear what the law dictates and according to Hart there is no law where the meaning of the legal rules is not univocal and undisputed.

This move, however, appears to undermine the objectivity of the law. In turn, such qualms require criteria that separate cases where the law dictates what should be done from cases where the law is silent. Hart fulfills this task through his distinction between plain cases and hard cases, that is, between cases where there is a broad agreement as to the existing rule and its scope, and cases where there is no such agreement.

Dworkin

The idea according to which we can provide a general criterion about failures of objectivity is problematic, and is the source of the subsequent attempts to rethink Hart's distinction between plain cases and hard cases by revising one or more of the elements of his conception.

Ronald Dworkin maintains that the same distinction between plain and hard cases is the consequence of a misconception of the nature of law. In turn, such a misconception is rooted in a "semantic view" according to which what the law is depends on some set of specific criteria (Dworkin 1986, 31ff.). To semantic theories of law Dworkin opposes his "interpretivist" conception, which is based on a couple of assumptions: *a*) that the practice of law has some point "that can be stated independently of just describing the rules that make up the practice" (Dworkin 1986, 47) and *b*) that the requirements of the practice are sensitive to its "point."

Once one embraces the interpretivist conception, the possibility of distinguishing between cases in which judges apply the existing law and cases in which judges create new law out of their discretionary power disappears, because the

activity of judges is always a kind of constructive interpretation aimed at finding the best solution to the cases they have to decide. Obviously, all this casts its shadow on the way one conceives of the objectivity of law. Indeed, while Hart thought that in the majority of cases there is no problem about objectivity because it is clear what the law requires and that only in some cases objectivity is at risk because the law is silent or indeterminate, Dworkin thinks that the difference is only a matter of degree. Indeed, what Dworkin considers the best interpretation of the law, that is, law as integrity, maintains that each case demands an appraisal of the juridical system as a whole. For this reason, judges are required to perform a holistic interpretation of previous law and to extend that body in a way that is sensitive to *their* understanding of its point – actually, to their understanding of the understanding of its point entertained by the *community* to which they belong –, in relation to the content of the case they are to decide.

A momentous consequence is that there is no real problem about the indeterminacy of law. Indeed, as Dworkin explains (Dworkin 2011, 90ff.), indeterminacy must be kept distinct from uncertainty. Certainly, there may be different opinions about the proper legal qualification of a given case. From this does not follow, however, that the law is indeterminate. Such a conclusion would need an ad hoc argument. But judges try instead to find the best interpretation of the existing law, that is, that interpretation that answers correctly the questions posed by the case. So, their activity is, in some sense, incompatible with the very idea of arguing for the indeterminacy of law.

Moreover, the best interpretation is *objective*. Objectivity, however, is not a metaphysical property: it does not follow from the fact that there is, after all, something inside the law that dictates what must be done. Rather, it becomes an *interpretive* property – in the sense of a property required by the normative and social conception of interpretation Dworkin calls for. Such a normative conception should replace the project of descriptive meta-ethics and jurisprudence (see Dworkin 1996; Dworkin 2011) and should countenance the (internal) skeptical attitude according to which "there are no uniquely right answers in hard cases at law" (see Dworkin 1986, 266).

Semantic Objectivity

As we have seen, Dworkin locates Hart's misunderstanding in the very distinction between plain cases and hard ones. Other authors, however, think Hart's conception of general terms to be the troublesome point. According to David Brink, for example, Hart espouses a semantic theory – derived from such authors as Frege, Russell, and Carnap – centered on two principles, *a*) "the meaning of a word or phrase is the set of (identifying) descriptions or properties that speakers associate with it"; *b*) "the extension of the word or phrase is all and only those things that satisfy the descriptions speakers associate with the term(s)" (Brink 2001, 21). According to Hart, meaning is defined by social conventions, therefore, when such conventions are not sufficiently shared and widespread, reference gets indeterminate. On this view, judges in hard cases are not bound by determinate legal standards and must decide the out of their discretion.

Brink suggests replacing Hart's semantic theory with a direct reference theory, such as those developed by Saul Kripke and Hilary Putnam. As it is well known, Kripke and Putnam abandon the idea that reference is fixed by recourse to social criteria for the idea that it is determined through some causal mechanism. Causal theories of reference typically embrace a couple of qualifying assumptions: (*a*) extensions do not depend on the speakers' beliefs; (*b*) extensions are determined by "theoretical considerations that may outstrip knowledge possessed by ordinary speakers" (Brink 2001, 24. On causal theory of reference, see Kripke 1980; Putnam 1975).

Brink's view entails that law is objective in a measure that far exceeds what Hart thought. Indeed, even if there can be no a priori guarantee that all legal disputes are resolvable in principle, the lack of such a guarantee provides no reason to doubt that most legal issues are. The assumption

of objectivity "appears to be a sort of regulative ideal that guides interpretive practice" (Brink 2001, 49). Brink's conception of law is *strongly objective* also in the sense that Brink adheres to a version of moral realism (Brink 1989). According to him, since normative facts supervene upon natural facts, once semantic issues are properly handled, there is always a right answer – at least in a metaphysical sense, even if such answer is epistemologically inaccessible. Ultimately, Brink's conception locates the status of objectivity in a metaphysical realm. Such solution may appear unsatisfying because it seems to sever law from human practices. It stands or falls with the strongly realist view to which Brink adheres and which requires a preexisting faith in a comprehensive view not so different from that of natural law theorists.

Modest Objectivity

In their influential contributions, Jules Coleman and Brian Leiter (Coleman and Leiter 1995; Coleman 1995; Leiter 2001) have stressed that the problem of the objectivity of law concerns the metaphysical independence of legal facts. If we think that judges have a duty to decide cases according to what the law *really* prescribes, we are posing the problem of the metaphysical independence of the legal facts that decide the cases. Such independence guarantees that legal questions have right answers (i.e., those answers that correspond to true legal facts). However, Coleman and Leiter reject both *strong objectivity*, that is, the thesis according to which what *seems* right to cognizers never determines what is right – because what is right depends on facts that are independent of people's beliefs –, and *minimal objectivity*, according to which what seems right to the community of cognizers determines what is right. They instead embrace *modest objectivity* (*MO* for short), according to which what seems right to cognizers under appropriate or ideal conditions – for example, conditions concerning full information, rationality, absence of personal bias, sensitivity to affected values, and so on – determines what is objectively right.

The turn from strong objectivity to modest objectivity seems to mimic the transition from realist theories of truth to anti-realist ones (see Künne 2003). In the same way in which the debate about the nature of truth has undergone a shift from realist theories to pragmatist theories, Coleman and Leiter reject the approaches centered on semantic objectivity and moral realism in order to stress the importance of legal practices.

Without entering the much discussed field of the realism/anti-realism debate about truth – for example, doubts could be raised about the possibility of providing non-question-begging specifications of the "appropriate or ideal conditions" (see Künne 2003, 404–453) –, one may note that the recourse to ideal conditions approaches within the legal realm seem marred by a fundamental flaw. Indeed, if objectivity is linked to the obtaining of appropriate conditions, it becomes something that may or may not be there, depending on the surrounding context. However, this does not seem the right way of connecting objectivity to legal practices because objectivity becomes the by-product of conditions that may not be under human control – it is not up to judges deciding whether they are fully informed, fully rational, . . . and so on.

Moreover, there is another problem. *MO* approaches exhibit a *monotonic* structure, in the sense that, being committed to the obtaining of ideal conditions, they do not admit that the conclusions reached at a certain time could be revoked into doubt at the following stage. On the contrary, if a certain assumption holds true in a given moment, it will be true in the future, however far. This feature mirrors the structure of pragmatist theories of truth that employ the notion of "ideal conditions" or "warranted assertibility" (see Künne 2003, Ch. 7). But judgments on the correctness of the application of law, in general, display a *non-monotonic* structure, in the sense that every judgement can turn from valid to invalid, as new evidence comes out and new judges choose not to conform to previous decisions, which suddenly become "incorrect" with respect to the "true" law. As a consequence, the very notion of ideal conditions turns out to be incapable of defining what correctness in legal practice

consists of, and therefore useless in conveying the meaning of legal objectivity.

Conclusion: Weak Objectivity

I have introduced two notions of objectivity: (1) objectivity as absence of elements that can distort somebody's judgment; (2) objectivity as accurate representation of something, and I have argued that, as law requires the correct application of rules, for our purposes the first notion is the most relevant. After briefly reviewing the attitude of natural law theorists and legal realists with regard to the problem of the objectivity of law, the starting point of the subsequent discussion has been Kelsen's conception of judicial activity. In Kelsen's view judges creates new law by issuing individual norms that fall within the frame of higher norms. The dissatisfaction with this solution prompted Hart's distinction between plain cases and hard ones. According to Hart, though law is mostly objective, there are some hard cases in which judges must decide out of their discretionary power. However, the distinction between plain cases and hard cases is problematic because it is not easy to state precisely where the boundary between them lies.

We have seen three ways to fix Hart's proposal: Dworkin's, Brink's, and Coleman and Leiter's. Now, while semantic approaches seem too strong, Coleman and Leiter's *MO* proposes an account in which objectivity is seen as linked to the obtaining of appropriate conditions that should therefore bear on themselves all the normative content that the reference to the concept of objectivity should convey. Things would stand differently with Dworkin's approach. However, Dworkin's notion of objectivity is not so sharp: I maintained that there are reasons to consider it an interpretive property; that is, a property that *must* be attributed to law in order to pursue our hermeneutical enterprise. However, there are pages in Dworkin's most recent works in which the objectivity of morals is seen as a kind of – not metaphysical but – *sui generis* independence, offering a comprehensive picture not so far from moral realism (see, e.g., Dworkin 2011, 7–11).

In order to build up a conception more suitable to the needs of law, it seems necessary to weaken the notion of objectivity, so as to establish more clearly the link between objectivity and human practices. A useful clue in this direction may be found in Robert Brandom's conception of objectivity. In this last section, I will try to sketch out the main lines of a *weak* theory of objectivity inspired to Brandom's pragmatist semantics. Brandom regards the objectivity of conceptual content as "the way in which its proper applicability is determined by how things are in such a way that anybody and everybody might be wrong in taking such a content to apply in particular circumstances" (Brandom 1994, 529). Whereas within the traditional approach, the issue of semantical objectivity is analyzed regardless of practice – objectivity as metaphysical independence –, Brandom suggests an approach in which it is connected to the authority structure implicit in the social practice of claiming. What is objective, therefore, does not only depend on "the way the world is" but also depends on the articulation of our discursive practices, on who are the authorities who can declare somebody wrong in applying a given conceptual content (see Marchettoni 2018).

Brandom's approach can be fruitfully applied to law, producing a kind of reinterpretation of Dworkin's chain novel model (Brandom 2014). The upshot of such endeavor is that every judge in her/his activity must perform a holistic reinterpretation of previous law and put forward a new definition of the boundaries of law that in turn will be taken as reference for future assessments. Within this picture, objectivity becomes a structural feature of the practice that ground our talk of it: we are entitled to speak of the objectivity of law because the perspectival structure that forms the background of each act of adjudication allows each latecomer to reassess early judgments. Objectivity does not only depend on the way law is but also on the authority of current judges, who with their reinterpretation of past decisions state what law requires and in this way set the boundaries for future judges (see also Marchettoni 2022).

It is worth noting that this view has a pronounced realistic flavor, because, since there is

no law that is independent of judicial and juristic constructions, law's objective content can be seen as a function of contingent institutional and social constraints on what legal officials decide.

Such a conception is also more in tune with the characters of contemporary law. In our globalized world, the old conception based on the coexistence of a plurality of state legal orders claiming exclusive jurisdiction within their territorially defined social space, and international law, which regulates external relations between states, no longer appears sustainable. Indeed, the emergence of new formats of legality, such as transnational networks devoted to the regulation of specific matters – like the so-called *lex mercatoria*, *lex sportiva* or *lex digitalis* –, or legal orders stemming from supranational organizations and developed mostly by courts or judiciary bodies – like EU law or WTO law –, entails the obsolescence of the traditional categories of legal thinking.

The clashes between the new transnational legal orders and the old municipal ones require the development of all-encompassing perspectives, which in some sense unify the lower-level views. Such perspectives, however, are not objective in the strong sense of being independent of what the relevant actors think, nor in the "modest" sense of corresponding to the instantiation of some ideal conditions. The problem is that judges of international courts must "commute" between the perspectives of several legal orders. The only sense of objectivity suited to this predicament is a weak one: objectivity as a property of the structure of the whole practice, in which each judgment can be put under scrutiny. In a setting where independent legal standards are lacking and where the very same actors that are to follow the rules institute them, the sole sense in which the rules can be said to be objective is linked to the fact that the way of reconstructing the relation between legal orders put forward by a given court may be revoked into doubt by a subsequent judge, which in turn will settle the matter on the basis of his particularistic understanding – which can be influenced by jurists and other social actors – of what the law objectively requires.

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Ockham, William

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Introduction

One of the most important later medieval thinkers, the Franciscan theologian and philosopher William of Ockham (c. 1285–c. 1349) was also the main political theorist in fourteenth-century England. His main political works are: *Opus nonaginta dierum* (c. 1333), *Dialogus de potestate papae et imperatoris* (1334–1341), *Octo quaestiones de potestate pape* (1340–1341), and *Breviloquium de principatu tyrannico* (1342).

Ockham's Natural Right Theory

Ockham did not specifically devote any treatise to law and his remarks on this subject are scattered throughout his many theological, political, and polemical writings. The most interesting (and challenging) pages on the topic are those of the section of III *Dialogus* (2.3) where he distinguishes three varieties of natural law. In one sense, that is called natural right which conforms with a natural reason that it is not subject to error: it contains all the precepts of the infallible natural reason that man was endowed within the state of innocence. This first, absolute kind of natural right does not allow exceptions; it is invariable, unchangeable, and common to all nations, as composed of normative principles (such as "do not lie") that are evident in themselves or can be deduced by way of demonstration from such self-evident principles. The second kind of *ius naturale* is the one which ought to be observed by those who apply natural equity alone, without positive law, that is before any human custom or legislation intervenes to derogate from that original *aequitas*, conceived by Ockham as a product of human reason committed to restoring the conditions of the state of innocence as far as possible. This second mode of natural law is the one which rational men would observe if they were not subject to other pressure because of their fallen state. As such, it constitutes a hypothetical, ideal state of natural equity, which, however, is never entirely achievable owing to the loss of the original human condition; at the same time, it would be unnecessary if all men lived rationally after the Fall. Unlike the previous kind of *ius,* this natural right – which includes universal freedom and communal ownership (whereas in the state of innocence there was no form of property at all) – may be modified by positive law, but only following a reasonable agreement between men, that is only in the presence of valid justifications: after original sin, reason grasps the need for a readjustment of natural law, to ensure a kind of artificial justice in place of the original natural condition, also introducing private property and servitude. Finally, the third mode of natural right is the one inferred by evident reasoning from the law of nations or some human deed or decision as a rational response to contingent circumstances. Such right remains in force until the people concerned decide to waive it. This last mode, therefore, has a contractual origin and can be called "suppositional natural right," in the sense that it presupposes a people's choice to establish it, the consent of a community to accept reasonable rules to remedy the consequences of the Fall, as far as this is possible. For example, this is how the obligation to pay back loans was established, once property ownership was introduced by human law.

Voluntarism and Rationalism in Ockham's Concept of Natural Law

Now, it has been observed that Ockham, in the final analysis, brings natural right back to God,

as the supreme creator of nature, who sometimes, by virtue of His unlimited omnipotence and freedom, could even dispense from the obligation to observe certain immutable principles of the first, absolute form of natural law. However, although it has been argued by some scholars that Ockham has a wholly voluntarist conception of natural right, which according to him would be grounded solely in the commands of an inscrutable divine sovereign, all three varieties of natural right are ultimately based on their rationality and have right reason (*recta ratio*) as their source. Indeed, Ockham distinguishes between the ordained power of God *(potentia ordinata),* by which He has established a natural law and a moral order admitting of no dispensation, and His absolute power *(absoluta),* by which the supreme Lord could have established completely different absolute natural precepts. That distinction, however, does not refer to two different powers in God but rather to two ways of speaking about his one and only *potestas*, depending on whether one considers the power of God in itself, in the abstract, without regard for the choices made by His will, or divine power in terms of God's concrete decrees, of what He has actually chosen to do, of the pure theoretical possibilities that He has decided to realize. Therefore, since, once the World order is established, God never acts in an absolute way, Ockham can affirm that "in the present order" chosen by Him, correct ethical and social norms can be determined by verifying their conformity with the dictate of right reason, that is to say on the basis of a rationally ascertainable natural law.

The Gospel's Law as "A Law of Freedom"

Ockham's appeal to the Gospel as a law of liberty is his most important argument against the curialist theory of papal fullness of power *(plenitudo potestatis),* i.e., the extreme doctrine according to which, as Christ's vicar and Saint Peter's heir, the pope has unrestricted power over all Christianity, in both temporal and spiritual matters. Ockham appeals to evangelical liberty in order to deny such hierocratic claims. If the pope really received from Christ power to do anything that is not contrary to divine and natural laws, then the Gospel would involve – by Christ's institution – "a form of unbearable servitude, much greater than that of the Old Law" (III *Dialogus,* 1.1). It follows that Christ did not assign Saint Peter such absolute power over spiritual and temporal matters. Otherwise, it would be impossible to account for the joy expressed by the converted Gentiles mentioned in the Acts of the Apostles (Chap. 15): had they been freed from the "slavery" of Mosaic law only to be subjected to an even harsher servitude, their reaction would have been quite different. Moreover, Christ's sacrifice would have been in vain if, instead of freeing man from the heavy yoke of Mosaic law, He had caused the establishment of an even more absolute authority. On the other hand, the idea that evangelical law is founded on the principle of freedom does not imply the need to eliminate any difference in authority and degree within the ecclesiastical body, since the kind of freedom it guarantees cannot be as perfect as that which man will enjoy in the life to come. In Ockham's view, however, it is still essential to reduce the exercise of coercive power in the Church to a minimum, insofar as this is only lawful when it serves to protect the Christian faith. The Gospel states that all Christians must obey the pope, as Peter's heir, but the pontiff can resort to an act of force only when the salvation of the Church is at stake. The rights and freedoms "granted by God and nature" cannot be questioned or ignored. Therefore, the pope cannot command his subjects against their will unless this is truly necessary for the good of the Church, and he is not allowed to oppress the innocent and the just "beyond what must be done out of extreme necessity" (*Breviloquium,* 5).

A Theory of Individual Rights

If Christ had bestowed unlimited power on the pope, the latter could render Christians servants or deprive them of all possessions without any valid reason and they would not be allowed to resist him, whereas "rights and freedoms must never be taken away without a fault" (*Octo quaestiones,* 1.7). While admitting that in some circumstances there could be reasonable cause for

imposing the yoke of servitude on men who are free by nature, Ockham undoubtedly accords great value to personal freedom, to the power of individuals to enjoy "the liberties and rights" granted to all men "by God and nature", in both ecclesiastical and secular political contexts. He affirms the persistence of inalienable natural rights even after the institution of government and maintains that the power of rulers is limited by their subjects' rights. In this respect, Ockham's political writings are an important contribution to Western thought as regards the dignity of individuals and human rights – rights whose universal validity he explicitly upholds. In particular, God has given all human beings two specific rights which they have by nature, regardless of whether they are Christian believers or not: freedom and the right to acquire *dominium,* a term which encompasses true ownership and licit jurisdiction. According to Ockham, the words "Render to Caesar the things that are Caesar's" must be understood as referring to "everything that belongs to each individual", which implies the duty to recognize a true and legitimate dominion even to infidels (*Octo quaestiones,* 1.7–10).

Finally, Ockham has played a significant role (albeit one not as revolutionary as some scholars believe) in the development of the concept of individual subjective rights. In contributing to the dispute over evangelical poverty, with the aim of defending the Franciscan doctrine of apostolic poverty, Ockham defines the right of use in exterior things (*ius utendi*) – one of the cruxes of the controversy – as the "licit power" of using them. In line with the definition put forward by certain twelfth-century canonistic sources, in texts like the *Opus nonaginta dierum* Ockham describes right in terms of individual entitlement: as something that is inherent in a person, a rightful faculty of the subject. At the same time, he distinguishes the legal right of using, which belongs to the sphere of civil rights, from mere licit use (without any power), that is the natural right to make actual use of things necessary to sustain life which is common to all men and inalienable: while friars had renounced all positive right (*ius fori,* every power originating in an agreement and enforceable, as such, in civil courts) to use external things, they still retained a natural right (*ius poli,* the superior right of heaven) to simple, factual use in cases of extreme need. These cases were the only ones in which someone could use things belonging to another, by virtue of a natural equity consonant with right reason, since the original natural right of using available material resources had been limited by the positive law that had instituted private property and introduced the (waivable) right to ownership, as a fitting, rational arrangement for fallen humanity.

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Introduction

Some credit Susan Moller Okin (1946–2004) with having "invented the study of feminist political

theory" (Squires 2004). This is perhaps an exaggeration, since pioneering political theorists before her had critically explored the place of sex and gender in political theory,[1] and others played similarly significant roles in the creation of the discipline of Western academic feminist political theory in the last quarter of the twentieth century.[2] But Okin's work is certainly among the most important and influential. Her two books and many scholarly articles played an outsized role in setting the agenda for the emerging discipline of feminist political philosophy. At the same time, Okin's careful documentation of the sexism in Western political theory, and her prescriptions for a humanist, gender-egalitarian society have had a profound effect on political theory generally. For these reasons, we must count Susan Okin as among the most important and influential political theorists of our time. Okin's main contribution is her relentless feminist criticism, but also fierce feminist defense, of liberalism, with a particular focus on the liberal political philosophy of John Rawls. Okin argues that liberal political theory, like Western political theory generally, is insufficiently critical of sex inequality, but "properly understood" liberalism is an important ally of the women's movement (Okin 2004, 1546). It promises a society in which women are not "disadvantaged by their sex," in which women are "recognized as having human dignity equal to that of men," and have "the opportunity to live as fulfilling and as freely chosen lives as men" do (Okin 1999, 10).

Okin's first book, *Women in Western Political Thought*, was among the earliest feminist efforts to systematically explore the place of sex and gender in the political philosophy canon. Okin focuses on the influential works of Plato, Aristotle, Rousseau, and J.S. Mill. She shows that "the works of our philosophical heritage are to a very great extent built on the assumption of the inequality of the sexes" (Okin 1979, 10). With the exception of Plato's *Republic* – which argues for "total equality, in education and role" in at least the political leadership (Okin 1979, 234) – Okin finds in these works a pattern of viewing women "entirely in terms of their sexual and procreative functions. Women's interests are not perceived as discrete but as subsumed within those of the family . . . and their nature is prescriptively defined in terms of the optimal characteristics for the performance of these functions" (Okin 1979, 235). This is to some degree true even of the early feminist John Stuart Mill who, despite prescient support for women's "equal civil and political rights, and the same education and opportunities to earn their own livings as men," still "never questioned or objected to the maintenance of traditional sex roles within the family, but expressly considered them to be suitable and desirable" (Okin 1979, 235). In response, Okin argues that political theory errs when it focuses on the family as the "primary unit of political analysis" (Okin 1979, 10). Doing so conceals the interests of women that diverge from those of other family members and masks the political nature of the internal workings of the family itself. When political theory shifts focus to the individual, the internal workings of the family become a proper concern of political theory. We are then also in a position to recognize how crucial family arrangements are to the justice of society generally. Indeed, Okin argues, "if our aim is a truly democratic society" – and she assumes that is our aim – families must be egalitarian, characterized by "complete equality and mutual interdependence between the sexes" (Okin 1979, 289).

In her second book, *Justice, Gender and the Family*, Okin takes up contemporary political theory, focusing on the work of Alasdair MacIntyre, Robert Nozick, John Rawls, and Michael Walzer. By far the most influential discussion in *Justice, Gender and the Family* concerns John Rawls' *A Theory of Justice*. Okin argues that Rawls' theory, particularly its "central, brilliant idea, the original position," can be an important feminist tool (Okin 1989, 101). Not only does the original position provide an argument for women's equal civil and

[1] See, for example, Mary Astelle (1666–1731), Mary Wollstonecraft (1759–1797), Robert Owen (1771–1858), Harriet Taylor Mill (1807–1858), John Stuart Mill (1806–1873), Friedrich Engels (1820–1895), Emma Goldman (1869–1940), Simone de Beauvoir (1908–1986), and Betty Friedan (1921–2006).

[2] See, for example, Alison Jaggar, Marilyn Frye, Angela Davis, Shulamith Firestone, Virginia Held, Catharine MacKinnon, bell hooks, Monique Wittig, and Judith Butler.

political rights, but, Okin argues, it also provides an argument for the egalitarian family. The original position is Rawls' redesign of the traditional contractarian idea of the state of nature. It is a hypothetical situation in which parties behind a veil of ignorance – which keeps from them all knowledge about their particular social positions – are charged with choosing principles for the basic structure of society. To be sure, Rawls does not argue, in *A Theory of Justice*, that the original position is a tool for feminist political criticism. He makes heads of households, rather than individuals, the focus of his analysis (Rawls 1971, 128, 292; Okin 1989, 92–93), and rather than subjecting arrangements within families to political scrutiny, he simply assumes that families are just (Rawls 1971, 463, 490; Okin 1989, 94). But Rawls stipulates – in a later work – that parties behind the veil of ignorance do not know their sex. And he counts the family among the institutions of society's basic structure. Okin proposes that we "take seriously . . . the notion that those behind the veil of ignorance do not know what sex they are," and take seriously "the requirement that the family and the gender system," that is, the ascriptions of "positions and expectations of behavior in accordance with the inborn characteristic of sex" (Okin 1989, 103) are "basic social institutions" and as such are "subject to scrutiny" (Okin 1989, 101).

Rawls argues that the original position's parties would choose a liberty principle providing for the "most extensive total system of equal basic liberties compatible with a similar system of liberty for all," and a principle of equality requiring equality of opportunity, and permitting inequalities only if they are to the benefit of the least well off (Rawls 1971, 302–303). Okin responds that the "gender system" violates both the liberty and equality of opportunity principles. The gender system effectively assigns roles to citizens according to sex and thus circumvents citizens' "free choice of occupation." Okin concludes that in a just society, "gender could no longer form a legitimate part of the social structure, whether inside or outside the family" (Okin 1989, 103).

Rawls' focus is on the possibility of a just society that, because it is embraced by those who inhabit it, is not fleeting but endures from one generation to the next; such a society is, in Rawls' words, "stable." He argues that a society based on his two principles of justice would be stable because its arrangements would facilitate the development of a sense of justice, that is, "an effective desire to apply and to act from the principles of justice" (Rawls 1971, 567). Okin responds that the development of a sense of justice is unlikely when children are raised in inegalitarian families, that is, in families lacking "equality and reciprocity" and characterized by "dependence and domination" (Okin 1989, 99–100). On this point, Okin echoes John Stuart Mill who was worried that inegalitarian families are "schools of despotism," not suitable training grounds for citizens of a liberal democracy (Mill 1869; cited in Okin 1989, 20).

Okin endorses policies to compensate women who are disadvantaged by traditional gender roles, for example, a legal entitlement of homemaking women to half of their husband's paycheck (Okin 1989, 181); policies that make it easier for women and men to choose against traditional roles, for example, flextime at work and subsidized daycare (Okin 1989, 176, 186); and policies that support the development of independence and self-sufficiency in women, for example, autonomy-promoting public education, especially for girls (Okin 1989, 177). Such policies are justified, Okin argues, because the egalitarian family is necessary for a just society. Indeed, on Okin's view, the state should "encourage and facilitate the equal sharing by men and women of paid and unpaid work, or productive and reproductive labor." To be sure, Okin argues that what is desired is a "future in which all will be likely to choose" egalitarian family life (Okin 1989, 171). But the fact that many people currently do not choose it does not mean, for Okin, that it is not an appropriate goal of state action.

Rawls later modified his view. The new view, called political liberalism, is that the role of a theory of justice is to articulate fundamental political values governing a just society's basic structure; these values are then to form the basis of what Rawls calls "an overlapping consensus" of the many reasonable comprehensive doctrines held by citizens in society (Rawls 1993, 144). In *Political Liberalism*, "Justice and Gender," Okin recognizes that her feminist interpretation of Rawls'

original theory of justice, with its implication that families must be egalitarian and that gender may not "form a legitimate part of the social structure," (Okin 1989, 103) is an unlikely basis of such an overlapping consensus. This is clear because Rawls asserts that among the reasonable comprehensive doctrines in an overlapping consensus are "all the main historical religions" (Rawls 1993, 170) many of which, Okin points out, endorse gender roles in the family and elsewhere that limit and disadvantage women. An overlapping consensus that includes such doctrines is possible only if gender roles and the family are removed from political scrutiny (Okin 1994, 28) as Okin argues Rawls does in *Political Liberalism* when he clarifies that principles of justice apply to what is political, and "the political is distinct . . . from the personal and the familial, which are affectional . . . in ways the political" is not (Rawls 1993, 137; see also Okin 1994, 26). So, on Okin's view, *Political Liberalism* represents a step backwards, away from the gender egalitarianism she believes is entailed by her feminist interpretation of *A Theory of Justice*.

In *Is Multiculturalism Bad for Women?*, Okin directs our attention to the recent erosion of the expectation that "immigrants as well as indigenous peoples" will assimilate to majority cultures (Okin 1999, 9) and to the recent demand that some minority groups ought to enjoy special rights or exemptions from legal rules in order to preserve their culture (Okin 1999, 11). Okin argues that "a central focus of most cultures . . . is the sphere of personal, sexual, and reproductive life" and that "most cultures have as one of their principal aims the control of women by men" (Okin 1999, 13). "In the case of a more patriarchal minority culture in the context of a less patriarchal majority culture," Okin argues, it may not be in the interest of minority women to preserve the minority culture (Okin 1999, 22). Doing so might create "subcultures of oppression" (Okin 1999, 21). Indeed, Okin writes, minority women "might be much better off if the culture into which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women" (Okin 1999, 22–23).

Okin's last works concern the situation of women globally, with special focus on women's poverty and women's human rights, and the failure of development policy and the global human rights agenda to materially improve the lives of women in the developing world. This work draws on the insights of activists and scholars of women's human rights and global development and emphasizes the importance of listening to the voices of those oppressed around the globe. Traditional approaches to human rights often take the rights bearer to be the head of household, and thus fail to recognize human rights abuses against women, which often take place within families. For example, while "slavery is generally recognized as a fundamental violation of human rights," "parents giving their daughter in marriage in exchange for money or even selling her to a pimp has not typically been seen as an instance of slavery" (Okin 1998, 35). Such abuses are also likely to be overlooked because deference is given to traditional cultural practices. Concerned to avoid cultural imperialism, even feminists may fail to highlight such abuses. Okin is sharply critical of this tendency in Western feminism. Development theory misunderstands women's poverty in part because – taking men's economic activity in a public marketplace as the subject of analysis – it fails to recognize both women's economic contributions within the family and the particular, gendered, sources of women's poverty.

Okin's criticisms of liberalism, as well as her fierce defense of a feminist version of liberalism, are the focus of a large secondary literature.[3] Commentators focus, for example, on Okin's claim that Rawls' original position can be a tool for feminist critique,[4] her claim that a just society must be genderless[5] and that families must be

[3] For a helpful overview of critical discussion of Okin's work, see Abbey (2011, especially 61–82). See also Satz and Reich (2009).

[4] For Rawls' response, see Rawls (2001, 162–168), and Rawls (1999, 595–601). For Okin's response to feminist criticisms, see Okin (1989).

[5] See, for example, Cohen (2009), Shanley (2009), and Rosenblum (2009).

egalitarian,[6] and that liberals and feminists alike should be wary of measures aiming to preserve patriarchal minority cultures.[7]

Conclusion

As the large secondary literature attests, Okin's feminist appraisal of key works in the history of political philosophy, her defense of the feminist potential of liberalism, and her challenge to multiculturalism were, and remain, agenda setting not only for the emerging discipline of feminist political philosophy, but for political philosophy generally.

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Introduction

Karl Olivecrona (1897–1980) was born in Uppsala (Sweden) on October 25, 1897, the fifth of six children, into a family with a long tradition of legal and public service. From 1915 to 1920, he studied law at Uppsala University. There he was especially interested in the teaching of Vilhelm Lundstedt, professor of private and Roman law, who was his lecturer from 1918 to 1919. Lundstedt introduced him to the Philosophy of Law of Axel Hägerström, who was then teaching practical philosophy at the same university. From 1920, he began to attend Hägerström's seminars on criminal law, which were decisive in his choice of an academic life, since they led him to question legal positivism early on, considered at the time to be the scientific theory of law.

Since there was no specific teaching of the Philosophy of Law, Olivecrona specialized in civil procedural law, following the advice of Lundstedt, who was his doctoral thesis advisor (defended in 1928), in which he studied the legal person from a conceptual, historical, and critical perspective. In 1933, he won the chair of Civil Procedural Law at Lund University with a paper on the burden of proof, in which he criticized the prevailing view according to which a civil judgment consisted of a decision on the existence or nonexistence of a subjective right (his point of view was that sentences help guide human behavior).

He remained in Lund until his retirement, in 1964, and while there produced a significant body of scholarly work, in the fields of both Philosophy of Law and Procedural Law. Aware of the impact that his legal-philosophical thinking might have, Olivecrona almost always made sure, with just a few rare exceptions, to publish his work in English and German.

To properly understand Olivecrona's thought, it is useful to see it from the perspective of his teachers. Hägerström had developed a strong criticism of the old conceptual structure of law but had done little to provide an alternative answer. Lundstedt had done so, through his method of social welfare, but Olivecrona was not persuaded by this. Therefore, he decided to undertake an in-depth analysis of the fundamental legal concepts, the fruit of which was his 1939 book *Law as Fact*. One of his most original contributions to the Theory of law was in the theory of independent imperatives. He would later publish a small book on this subject entitled *Lagens imperativ* (1942), of which there are German, English, and Italian versions. Meanwhile, in 1940, as the events of World War II unfolded, he published his *Om lagen och staten* and its German version *Gesetz und Staat,* in which he puts special emphasis on the aspect of force that, essentially, in his opinion, characterizes law. Following on from these ideas (although not as a consequence of them), he soon published two other small books and their corresponding German versions *(England oder Deutschland?* in 1941, and *Europe und Amerika,* in 1943), in which he advocated (for fundamentally economic reasons) German hegemony over the European continent, a position he would soon retract (1944).

Following in the footsteps of Hägerström, Olivecrona, throughout his academic life, carried out some historical-legal-anthropological studies through which he intended to prove his psychosocial hypotheses about law, such as *Das Werden eines Königs nach altschwedischem Recht* (1947) or *Three Essays in Roman Law* (1949), to

which the economic argument, in *The Problem of the Monetary Unit* (1957), should be added. In a certain sense continuing on from the ideas contained in these studies, in 1962, he published an important article on legal language, "Legal Language and Reality," with ideas that he would later develop in the second edition of *Law as Fact* (1971). Although in this book he remained faithful to the foundations laid out in 1939, rather than a second edition, it should properly be considered a completely new book. A first version of this work appeared in Swedish in 1966, entitled *Rättsordingen* (there was a second edition in 1976). In keeping with this title, the Italian edition, translated by Enrico Pattaro, is entitled *La struttura dell'ordinamento giuridico*. Olivecrona made many other contributions to the Philosophy of Law, including "Realism and Idealism" (1951) and "The Imperative Element in the Law" (1963–1964).

In the last stage of his work, he devoted special attention to the history of the Philosophy of Law, with works on Grotius, Pufendorf, Jhering, Locke, and Bentham, among others.

Scandinavian Legal Realism as an Alternative to Legal Positivism

Olivecrona did not consider that his thinking could be placed purely within legal positivism. Although its characterization is the subject of debate, Olivecrona considered that the most reasonable position was to use the expression "legal positivism" in accordance with the original meaning of the notion of *Rechtspositivismus,* that is, as the idea of the Law as an expression of the will of a supreme authority. From this point of view, the Natural Law Theory/Legal Positivism dichotomy ceases to be exclusive, so that it is not necessary to consider every theory that rejects Natural Law as being positivist. This is the case, notably, for those theories, such as those of Leon Petrażycki, Hägerström, and Olivecrona himself, which reject the idea that the law is the expression of a will. Thus, Scandinavian realism, as understood by Olivecrona (the Scandinavian realist Alf Ross does not share this opinion), came to be configured as an alternative to the traditional Natural Law Theory/Legal Positivism dichotomy.

In his opinion, legal positivism had not managed to eliminate certain metaphysical elements which have their earliest origin in primitive magical beliefs, according to which the will can have certain effects, through formulaic language, on the assumed suprasensible world of the law. Although he did not develop his own ontology, Olivecrona assumed the justification given by his teacher Hägerström, particularly in his book *Das Prinzip der Wissenschaft,* in which he tries to show, from the principle of non-contradiction, that reality is ultimately determined by the space-time context. Thus, while the scientific picture of the world is built up in agreement with this context, so that it can be said to be true, the metaphysical worldview can only be considered void, because it is based on a set of meaningless feelings and representations. The only thing that it is possible to build on the basis of these are combinations of words that only appear to have meaning. Eloquently enough, Hägerström adopts the following motto for his "Selbstdarstellung" or self-exposure (translated as "A Summary of My Philosophy" in one of the English anthologies of Hägerström's works: *Philosophy and Religion,* 1964): "praeterea censeo metaphysicam esse delendam."

The Uppsala School, founded by Hägerström, is situated in an international context of an anti-metaphysical reaction (mainly against German idealism), in which it agrees with other movements, without prejudicing their specificities, such as the neorealism of G.E. Moore, the logical positivism of the Vienna Circle, or the Russian sociological positivism of V.I. Sergueyevich. There is a very specific parallel between the legal thought of Hägerström (also considered to be the founder of Scandinavian legal realism) and the psychological theory of law of L. Petrazhitsky. Their respective figures also have interesting affinities, due to the fascination and influence that both exerted on the theory of law of their respective countries, and even beyond them.

As Enrico Pattaro has pointed out, Scandinavian realism is the only school of the Philosophy of Law that is directly and immediately affiliated with one of the philosophical movements that

form part of contemporary neo-empiricism (the Uppsala School). This is what could justify Olivecrona's attempt to distinguish his "legal realism" from legal positivism. For Olivecrona, "realism" means taking all legal phenomena as part of the existing social order, that is, as purely factual. When concepts such as the "binding force of Law," "subjective rights," or "legal duties" are correctly analyzed, their exclusively factual or psychological referent emerges and the problems in Philosophy of Law dissipate into thin air, according to Olivecrona.

Legal Language and Reality

Olivecrona was one of the first philosophers of Law to turn legal language into one of the central tenets of the theory and philosophy of Law. For this reason, his attention was immediately drawn to what John L. Austin called "performative utterances," echoing them in his essay "Legal Language and Reality" (1962). According to Austin, it is a fallacy to claim that an utterance can only be used to describe or determine a certain state of affairs, which means the utterance may be true or false. In his opinion, an utterance can also be used to *do* things, such as naming a ship, getting married, donating a watch, etc. Austin calls this dimension of language "illocutionary," which is complemented by the locutionary dimension, whose purpose is to *say* things, and the perlocutionary, whose purpose is to *cause* things. Now, for the expressions to be happy in an illocutionary sense, a series of assumptions must be met, both formal and effective.

Olivecrona maintains something similar when he affirms that, in the legal field, performative utterances are used to *create* rights and duties, legal relationships and properties. This requires the observance of certain formal requirements that must be met if those expressions are to be effective. But this effectiveness, for Olivecrona, is purely psychosocial, in Austinian terms we would say perlocutionary. For Olivecrona, to think that it is possible to create something with words belongs to the patterns of magical thinking.

Indeed, following Hägerström, Olivecrona draws attention to the ancient connection between the law and magic. This explains, in his opinion, the need to comply with certain formalities and ceremonies, such as (these are cases that he analyses) sales under Roman law, the election of a king under ancient Swedish law, the marriage ceremony in force in Sweden during the Middle Ages, the appropriation of land in Iceland by the Norwegians, certain legal acquisitions among the Kikuyu Kenyans, etc. For Olivecrona, the purpose of performative language is not to confirm something, but to make something happen in the supposed suprasensible sphere of the law. That is why it is not addressed to anyone, but is impersonal.

Despite the fact that belief in magic has fallen aside, legal language, according to Olivecrona, has continued to maintain its effectiveness on human behavior, since it has not lost its original suggestive character. In reality, the primary function of legal language is not to reflect reality – as in his opinion natural law intended – but to shape it. Legal language is, therefore, the most appropriate tool to set the signals (he uses the traffic light metaphor) that are necessary to guide human behavior in a complex society. Although there is some hesitation on this point in relation to his early writings, Olivecrona asserts that words like "right" or "duty" are "hollow words" that have no meaning at all, not even an imaginary entity. Hence, the utterances that contain them can be neither true nor false. But this does not prevent such words from being absolutely functional in law, so they are difficult to replace. Two assumptions are required for this: that the utterance that shapes a right or a duty be perceived as formally correct (in this sense, it also fulfils a related informative function) and the existence of some type of conditioned response in the recipient of the legal language.

Following Austin, John R. Searle — and, after him, Neil MacCormick and Ota Weinberger — have affirmed that there are acts that cannot be explained in merely perlocutionary terms, since not all facts can be reduced to facts in the empirical world. In his view, there are equally objective facts that presuppose the existence of certain human institutions: they are "institutional facts."

However, Olivecrona does not share this opinion, which came to his notice shortly before the publication of the second edition of *Law as Fact* without being able to submit it for discussion, and maintains the need for a purely empirical explanation of legal language that reduces its effectiveness to its perlocutionary, or psychosocial, effects.

Legal Rules

One of Olivecrona's most original contributions to the Theory of Law is his idea of legal rules as independent imperatives. He calls them that because he conceives of them as independent of the personal context that characterizes individual orders or mandates, which he considers his prototype.

Olivecrona criticizes the idea that legal rules constitute a supposed will of the State, which cannot be detected empirically if one seriously analyzes the legislative process. A legal rule has two elements: one representative *(ideatum)* and another imperative *(imperantum)*. The latter is designed to produce a feeling of respect for the law in its recipients. The traditional formalism involved in enacting a law is at its service. In his opinion, the way in which a rule is promulgated functions as an imperative signal, and it is essential, given the absence of a personal suggestion context, as happens with individual mandates.

Both legal rules and moral rules are, for Olivecrona, independent imperatives. What, then, is the difference between them? He does not believe that it lies in their content, which often overlaps. In fact, and without this implying an ethical objectivism, he considers that legal rules are largely a concretion of the moral principles in force within a given political community, although not all moral rules are legally relevant or significant. Therefore, there is a general moral commandment that requires the law to be followed. The main difference between the two types of rules lies in the fact that while moral rules appeal directly to the conscience (psychologically), legal rules are primarily rules related to the organization of state coercion, that is, rules that are largely directed to the regulation of the activity of public officials.

Olivecrona links the question of the legal validity of rules with that of its obligatoriness or binding force. It is not, in his opinion, an empirical determination, but a value judgment, which amounts to stating that they ought to be followed. But justifying this value judgment can only be done by resorting to a supposed right to dictate rules that, ultimately, needs to be based on Natural Law. However, for Olivecrona, the only scientifically relevant property is that relating to the effectiveness of the legal rules. From this point of view, which is purely external, enacting and proclaiming a text as law in accordance with the constitution is nothing more than a means of influencing people's minds and, through them, their behavior.

Olivecrona compares the legislative apparatus to a hydroelectric power station that transforms the current of respect enjoyed by the Constitution into new power lines, or laws. Thus, the political struggle is nothing more than the struggle for those positions from which the control panel is activated. It is a complex piece of machinery that goes through various phases and in which many people are involved. It is not possible to verify an authentic will behind it other than standardized formulas of the type "le Roy (la Reyne) le veult."

In order for the Constitution's power of suggestion to pass into law, it must enjoy social legitimacy. In a material sense, all political communities have a constitution, which for Olivecrona consists of an organization and distribution of public power. Formerly, as was the case in the Roman Republic, the respect accorded it was based on magical-religious beliefs. Consequently, the drafting of laws had to have favorable auspices, since otherwise it was understood that the people did not need to observe the law. For Olivecrona, religion and law developed together from their earliest beginnings, which are unknown, since the known points of the legal phenomenon always constitute modifications of a previous regime. Over time, this link between the legislative process and religion gradually disappeared, until only the form remained, which, thanks to acquired (psychological) habits and various control mechanisms, outstanding among which is the systematic application of force, has managed to maintain its effectiveness.

Rights and Duties as Imperative Signals

Olivecrona rejects both the natural law doctrine and the various positivist theories on subjective law, which he intends to overturn. For Olivecrona, natural law confuses the natural feeling of power that the supposed ownership of a right entails with an objective reality. However, he does not find the various proposed legal positivism theories satisfactory either, such as the will theory (in the Friedrich Carl von Savigny and Bernhard Winscheid versions); the interest theory (Jhering); the theory that understands the law to be the obverse of a duty (in the versions of Jeremy Bentham and John Austin) or Ernst Zitelmann's representation theory.

Olivecrona's work is more in line with the approaches of Petrazhitsky and Hägerström, who deny the reality of the notion of subjective right on the basis of a psychological explanation. However, the approaches of Lundstedt and Ross seem insufficient to him. In his opinion, it is not possible to determine any fact to which the notion of subjective right can refer. But this is not necessary, because words not only serve to describe reality but also to guide behavior. Specifically, the word "right," although it does not have any meaning (at least for the later Olivecrona), has a mainly directive function that is analogous to that of a red traffic light or that of a fence that delimits a piece of land. If, on seeing them, I refrain from continuing to drive or from going on to the land, when faced with a subjective right, I refrain from interfering with it. Rights, in short, are above all (and without prejudice to other functions) easily understandable imperative linguistic signals that serve to guide human behavior.

For this, two conditions are necessary: that the statement containing the word "law" be correct (in the sense that it is thought to be correct) and that the legal machinery works effectively by regularly applying coercion. The pressure from the regular exercise of force makes it possible to sustain the effectiveness of the legal system, as magical thinking did in its day, with which it was closely linked. Although buying a pack of cigarettes, says Olivecrona, is something quite different from a Roman *mancipiato*, both acts basically share the same belief in nonexistent ties and imaginary powers.

The above is applicable mutatis mutandis, to the notion of legal duty. Indeed, if "subjective right" is a hollow phrase that, therefore, lacks meaning but that generates in its holder and in others the belief in a certain power (which is merely illusory and responds only to a psychological feeling of power in the subject), the phrase "legal duty" inversely produces the belief in the existence of a subjection that is equally illusory and that arises from a psychological feeling of subjection. Olivecrona rejects any other explanation of this notion.

Law as an Organized Force

Olivecrona's demystifying analysis also touches on another central notion of law: that of the binding force of law. In accordance with his ontological postulates, he can in no way share Hans Kelsen's opinion according to which legal rules are capable of producing "ought to be" connections between two facts of any nature other than purely causal ones. But he does not accept other opinions more similar to his point of view either. Thus, he refuses to identify the binding force of law with the threat of harm in the event of noncompliance, since this would be like affirming that there is a binding rule that prohibits one putting one's hands in the fire. He also criticizes confusing the binding nature of legal rules with the fact of feeling bound by them, since this is equivalent to saying that they do not bind those criminals who do not feel themselves affected by them. Lastly, he does not accept (unlike Ross) the explanation of the binding force of legal rules in terms of what judges are likely to do, because, if it is possible to foresee it, this is because the judge understands that they have an obligation to stay within the rules.

In reality, Olivecrona believes, the "binding force" of the Law is nothing more than a hollow expression, like the expression "squared circle," which cannot be represented mentally. Those words that are derived from "obligation," "obligatory," "obligatoriness," etc., are imperative expressions similar to "subjective right," "law," etc., and are aimed at provoking certain behaviors in their recipients. There are several factors that contribute

to this effect: education, morality, propaganda, and fear of sanctions, although all of them (including morality) are based on the regular exercise of coercion through the law. Coercion is the energy that, properly channeled and monopolized by the Law, keeps the entire machinery of social control running. The law is nothing other, for Olivecrona, than organized force, rules about the use of force addressed to judges and officials. This, although the originality of this thesis is disputed, is one of the most distinctive points of Olivecrona's theory of law.

Conclusion

Olivecrona's theory of law constitutes one of the most solid and coherent attempts to take the empirical analysis of law to its final consequences, as a consequence of its direct connection, through the Uppsala School, with philosophical positivism, so that, if these presuppositions are accepted, it could be affirmed that the Olivecronian theory constitutes a true overturning of the traditional formalist legal positivism.

In any case, his conception of legal rules as independent imperatives, the denial of their binding force, and his conception of law as an organized force constitute unique contributions to the theory of law of the twentieth century. On the other hand, where the aforementioned assumptions are not accepted and the program of reducing all law to mere empirical facts is not shared, his theory becomes biased and thus constitutes no more than the absolutization of one of its facets, taking the part as the whole, leading to an empiricist form of legal positivism.

Cross-References

- ▶ Hägerström, Axel
- ▶ Lundstedt, Anders Vilhelm: Influential Ideas
- ▶ Petrażycki, Leon
- ▶ Ross, Alf: Biographical Perspectives

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Olivecrona, Karl Knut Hans: Influential Ideas

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Karl Olivecrona (1897–1980) is recognized, next to Alf Ross, to be among the leading exponents of

Scandinavian legal realism (Bjarup 1978; Castignone 1974; Hierro 2008; Strömholm and Vogel 1975; Vogel 1972). He was a pupil of Axel Hägerström, describing the latter as his "beloved and venerable teacher" and remarking that his own inquiry into law "would not have been possible but for the foundation provided by Hägerström's speculation."

In fact, Olivecrona works Hägerström's novel conclusions into what is properly a general theory of law developed from a realist point of view, a theory that finds completion in the second edition of *Law as Fact* (Olivecrona 1971). This second edition is described by Olivecrona as an "entirely new book," even as he retains the same title as the first edition (Olivecrona 1939), signaling that his basic approach to the study of law remains the same.

Olivecrona also embarks on historical inquiries along the lines suggested by Hägerström, seeking to trace the origins of the concepts of Roman law (-Olivecrona 1949), at the same time as he takes up other investigations, looking into natural law thinking (Olivecrona 1969) and ancient Swedish law.

From a critical standpoint, Olivecrona's theory takes aim at both natural law theory and legal positivism. The latter is found to be at fault for continuing to rely on metaphysical notions, foremost among them that of will, for which reason its theory of law, despite its pretenses, fails to be scientific (Pattaro 1972).

In the positive, or constructive part, he connects some brilliant but otherwise disconnected insights offered by Hägerström and Anders Vilhelm Lundstedt, weaving them into a theory based on an analytical method applied to the language of law (Spaak 2014, 2016).

The language of law, according to Olivecrona, is a directive language: it uses terms, such as *right* or *duty*, that have no semantic referent, in the sense that nowhere in the spatiotemporal world is there a phenomenon that can be pointed out as corresponding to them. Thus there is no objective reality corresponding to the concept of a right, and yet this is an operative concept, for on its basis changes are made affecting the behavior and concrete situations of those who are subject to the law.

Hägerström explained this phenomenon by pointing to the magical and psychological origins of the concepts of rights and duties, understood as real powers and constraints. Lundstedt, the most radical among the authors who have denied that there is any objectivity to rights and duties, did not manage to do away with the corresponding terms and settled for a solution that would have us use them in quotation marks.

Olivecrona clarifies that – whatever origin these concepts may have: be it magical or psychological or both – they are so ingrained in our common way of thinking, and so entrenched in the machinery of the law, that we can no longer do without them.

Their function is not descriptive – in a manner that even such natural lawyers as Hugo Grotius and Samuel von Pufendorf might have thought conceivable, for they explicitly believed in the reality of powers and constraints of a spiritual kind created by the will – but is rather directive, in that they tend to influence behavior. The term *right*, for example, functions as a *sign* and is almost unreplaceable in that respect, for it signals a *permission* to the rightholder, while signaling a *prohibition* to everybody else. The rightholder, in other words, can behave in relation to a good in ways that all other legal subjects may not.

Even so, the terms *right* and *duty* cannot simply be considered as signs serving to replace a set concrete facts or reduce it to a condensed form, for they also contain an imperative element that acts psychologically to drive or *rein* in the behavior of legal subjects.

It is a function entirely similar to the one performed by the red and green of a stoplight.

Olivecrona revisits legal concepts born in social and cultural concepts quite different from ours, and pregnant with meanings that now appear unacceptable from a scientific standpoint, in what seems like an effort to reuse and justify these concepts on a realist approach.

In order for these terms to serve a directive function as signs, they need not have any specific semantic referent: what matters is that we are accustomed to receiving a certain sign in a constant and uniform way in keeping with commonly accepted rules.

After all, examples of this kind abound in ordinary language, where words are legion that

no longer have a semantic referent and yet have practical effects of great consequence.

A case in point is the word for currency such as the pound sterling or the US dollar (Olivecrona 1957): certainly it does not correspond to the piece of metal or paper bearing a pound sterling or US dollar design and denomination. In times past, when gold coins were in use, one might have thought that the word *currency* stood for a certain amount of gold as its semantic referent, but today it works as an ordinary word used in accordance with well-established conventions, and it is in this way that it can carry out the essential function it serves in economic and social life.

Norms are not commands but "independent imperatives," that is, representations of models of behavior expressed in the imperative form. Indeed, in contrast to an actual command – which implies a face-to-face interaction between a command issuer and an obeyer, as well as a relation of subordination between the two, and which is episodic – a norm is a "depersonalized" command, in that the commanding is done by an abstract entity (a legislative body) and the recipients consist of the whole of the citizenry, and its validity lasts indefinitely, until the norm is amended. The coercive impulse to do what a norm requires is not directed at any single subject but takes shape as an awareness of an objectively existing duty.

Next to the norms prescribing that we do or not do something, there are others that govern the way in which we may gain, transfer, or lose rights or have a certain status conferred on us (as when someone enters into marriage, is appointed judge, or is elected as a member of parliament). These norms can take a declarative form without naming any addressees, and in order to account for what they do, Olivecrona draws on the work of J. L. Austin (1975), characterizing them as *performatory imperatives*, examples of which are the words uttered in christening a ship or marrying a couple. Even though these performatives are expressed in the indicative mood, they do not *describe* a situation but either *prescribe* or *bring it into being*: their effect is not to create real qualities or relations but to change the standing of certain persons in relation to others. Outside the legal and social context in which performatives are used, they are no more than meaningless words.

The language of performatives, according to Olivecrona, traces its origins to the magico-religious sphere: it was once thought that words could change reality and that by describing events yet to take place, they could turn these into reality proper through the power exerted by the utterance of magical formulas. On a realist approach, words are tools suited, not to modifying reality in virtue of an inherent power they supposedly possess, but to carrying out functions of social control.

The theory of law outlined by Olivecrona can be qualified as realist-normativist (Pattaro 1980): the law is conceived as a fact, that is, as a social mechanism, a psychosociological reality. Norms are not the expression of a higher will but the resultant of a complex play of social forces, meaning that no de facto power creates norms, but, on the contrary, norms create powers. In the norms that govern the exercise of power lies the foundation of the power exercised by certain people: if lawmakers enact laws that are observed and judges issue rulings that are enforced, it is because they are lawmakers and judges according to the constitution, which in turn is observed for historical, psychological, and social reasons.

A valid norm is one that is felt to be binding and is observed by a given social group, especially judges, but norms cannot be equated with the behavior through which they are enacted: a legal norm is the cause; the behavior of its addressees is the effect. No norm can be valid if it is inefficacious (i.e., if it does not cause its addressees to comply), but in order to be efficacious, it needs to be perceived as socially binding. This psychological element (the sense of a norm's bindingness) is what makes it possible to recover the normative element, the distinctive trait of Scandinavian realism.

Having shown that the legal concepts currently in use are not scientific, Olivecrona applies to directive language the theory by which analytical

philosophy explains the functions of language. Concepts such as "norm," "rights," and "duty" do not belong to a reality of their own distinct from the social, empirical reality in which they perform their directive function as signs. Olivecrona accordingly concludes that the language of law is not descriptive but rather serves a directive function: it is a language capable of influencing behavior, and it functions as a tool of social control.

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Olivecrona, Karl Knut Hans: Philosophy of

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Introduction

Karl Olivecrona and Alf Ross were the most prominent of the Scandinavian Realists, who were active from the late 1920s into the 1970s. In this entry, I shall give an overview of Olivecrona's legal philosophy, focusing on (i) Olivecrona's critique of the view that law has binding force, and the claims (ii) that legal rules are so-called independent imperatives and that their function is to cause human behavior, and (iii) that law is a matter of organized force. I begin with a few words about Olivecrona's main publications (section "Olivecrona's Main Publications") and proceed to consider in turn the three abovementioned points (sections "The Binding Force of Law," "Legal Rules as Independent Imperatives," and "Law as Organized Force").

Olivecrona's Main Publications

Olivecrona was born in Uppsala, Sweden, in 1897, and died in Lund, also Sweden, in 1980. Although he had already published a few short articles in legal philosophy, notably a piece on legal concepts (Olivecrona 1928), his first major publication in the field of legal philosophy was the First Edition of *Law as Fact* (Olivecrona 1939), which saw the light of day in 1939 – the year in which World War II broke out and in which Olivecrona's mentor and philosophical hero, Axel Hägerström, passed away.

After the publication of the First Edition of *Law as Fact*, Olivecrona began devoting himself to legal philosophy in earnest. His most important publications include *Om lagen och staten* (Olivecrona 1940) [*On Law and the State*],

which is a slightly expanded Swedish version of the First Edition of *Law as Fact* (Olivecrona 1939); *Lagens imperativ* (Olivecrona 1942) [*The Imperative of the Law*]; "Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy" (Olivecrona 1951); *The Problem of the Monetary Unit* (Olivecrona 1957); *Rätt och dom* (Olivecrona 1960) [*Law and Judgment*]; "Legal Language and Legal Reality" (Olivecrona 1962); "The Imperative Element in the Law" (Olivecrona 1963–64); *Grundtankar hos Hägerström och Lundstedt* (Olivecrona 1964) [*Fundamental Ideas of Hägerström and Lundstedt*]; the Second Edition of *Law as Fact* (Olivecrona 1971); and *Rättsordningen* [*The Legal Order*] (Olivecrona 1976), which is a Swedish version of the Second Edition of *Law as Fact*, where the latter is a slightly expanded version of the former. His last legal-philosophical publication was an article on Axel Hägerström and natural law theory, which was published in a collection of essays on the legacy of the Uppsala School of philosophy (Olivecrona 1978).

I shall base my overview of Olivecrona's legal philosophy mainly on Olivecrona's two monographs, viz. Olivecrona (1939, 1940) and Olivecrona (1971, 1976).

The Binding Force of Law

Olivecrona begins the First Edition of *Law as Fact* with a consideration and rejection of the view that law has binding force. While he does not explain what, exactly, he takes the binding force of law to be, the core idea must surely be that a binding legal rule "binds" the subjects of the law in the sense that it *obligates* them (see Olivecrona 1951, 125, 1971, 10). Having rejected several attempts to define the concept of binding force by reference to social facts, such as feelings of being bound, or inability to break the law with impunity, Olivecrona concludes that binding legal rules have no place in the world of time and space, but must be located in some sort of supernatural realm, where the property of bindingness can make sense (1939, 14). But, he objects, law cannot be located in a world beyond the world of time and space, because there can be no *connection* between such a world and the world of time and space (ibid., 15–16). Although he does not develop this argument, it is clear that he follows Hägerström (1953, 267) here (on this, see Spaak 2014, 113).

As Olivecrona sees it, we have here the dividing line between realism and metaphysics, between scientific method and mysticism in legal thinking. To believe that law has binding force and that therefore it must belong in a supernatural world is to give up any attempt at a scientific explanation of law and legal phenomena and to indulge in metaphysics (ibid., 17): "The binding force of the law is a reality merely as an idea in human minds. There is nothing in the outside world which corresponds to this idea." We see that Olivecrona is here thinking of the binding force in error-theoretical terms, that he takes the term "binding force" to refer to a nonnatural property of some sort, which does not and cannot exist in the world of time and space.

Although Olivecrona does not say so in the First Edition of *Law as Fact*, it is clear from his analysis in the Second Edition of *Law as Fact* that he takes the absence of binding force to imply, or to be equivalent to, the absence of legal entities and properties, that is, the *absence of legal relations*: Since legal rules do not and cannot have binding force, they cannot establish legal relations. Olivecrona introduces in the Second Edition of *Law as Fact* the concept of a performatory imperative, in order to account for those legal rules that do not immediately concern human behavior (1971, Chaps. 5, 8). The introduction of this concept is of interest in this context, because Olivecrona adds to it a consideration of the nature of the *legal effect* that is commonly supposed to follow from the utterance of a performatory imperative (ibid., 221–226. But see also 1940, 40–41). Such legal effects, he points out, are clearly *supersensible* (1971, 223). And he adds that in the world of time and space, there is only the psychological fact that people tend to *believe* that there is a legal effect, and, of course, the (sociological) fact that they tend to *act* accordingly (ibid., 224–226).

Olivecrona turns to consider Kelsen's theory of law in this connection, because he believes that this theory illustrates the necessity for believers in the binding force of law to make a distinction between the "world of the ought" and the world of time and space and to locate law in the "world of the ought" (1939, 17–18). He seizes on the fact that on Kelsen's analysis, there is a connection between operative facts and legal consequence in legal norms that is as *unshakeable* as the connection between cause and effect in nature. And this connection, he points out, is such that the legal consequence *ought* to ensue when the operative facts are at hand (ibid., 18). But, Olivecrona objects, it is simply impossible to explain in a rational way how facts in the world of time and space, such as the activity of the legislature, can produce effects in the "world of the ought." As he puts it (ibid., 21), "[a]t one time Kelsen bluntly declared that this is 'the Great Mystery.' That is to state the matter plainly. A mystery it is and a mystery it will remain forever" (See Kelsen 1984 (1923), 411).

Legal Rules as Independent Imperatives

Olivecrona makes a distinction between the form and the content of a legal rule. The *content* of a legal rule, he explains, is an idea of an action by a person in an imaginary situation (1939, 28–29). And the *form* of legal rules, he continues, is *imperative*, because the lawmakers aim to impress a certain behavior on us (ibid., 31). On his analysis, what is important is that an utterance (or a gesture) *functions* as an imperative, and while he is not explicit about it, he appears to believe that an utterance functions as an imperative if it is *intended* to be an imperative (1942, 16–17).

Pointing out that the *command* is the prototype of the imperative, he explains that a command *works directly on the will* of the recipient of the command, and that this means that it must have a *suggestive character* (1939, 33–34). He maintains, more specifically, that if a command takes effect there arises in the addressee's mind a *value-neutral intention* to perform the commanded action, that is, an intention that is not motivated by the addressee's own wishes, and he adds that in some cases a command may actually trigger an action without the addressee's having had any intervening value-neutral intention (1942, 7, 10–11).

Olivecrona proceeds to explain that legal rules are *not* commands (1939, 35–40). Pointing out that the imperative theory, or, as I would say, the command theory, presupposes that there is a commander, he objects that there simply is no one person or group of persons who could be the commander. But if legal rules are not commands, although they have imperative form, what are they? Olivecrona explains that in addition to commands, there is a class of imperatives that we may refer to as *independent imperatives*. And he maintains that legal rules are precisely such independent imperatives (ibid., 42–49).

On Olivecrona's analysis, there are three important differences between commands and independent imperatives. First, whereas a command is always *issued* by a certain person, an independent imperative is not issued by anyone in particular (ibid., 43). Second, whereas a command is always *addressed* to a certain person or persons and concerns a particular action or actions, an independent imperative, although it concerns a *kind* of action, is not addressed to anyone in particular (ibid., 44–45). Olivecrona's idea, then, is that an independent imperative concerns a class of persons (the norm-subjects) and a class of actions (the action-theme), not particular persons and actions. This is, of course, the usual way of characterizing rules, including legal rules (or norms) (see, e.g., Frändberg 1984, 33–42; Hart 1961, 21–23).

Third, whereas a command is in no way equivalent to a judgment, an independent imperative *can sometimes be replaced by a sentence that expresses a judgment*: "In the Decalogue we have e.g., the imperative statement: 'Thou shalt not steal!' It does not in the least appear to us as intellectually absurd to replace this expression by saying: 'It is really so that you shall not steal', or 'It is your duty not to steal'. Formally, these sentences give expression to judgments. And we believe that real judgments lie behind them" (1939, 45–46). Olivecrona objects, however, that

there are no real judgments behind the sentences that (appear to) express such judgments, but only a *psychological connection*, viz. a connection in a person's mind between the imperative expression and the idea of an action (ibid., 46).

Olivecrona's central claim about legal rules, then, is that they can influence human beings because they have a suggestive character, and that this in turn means that they can cause human behavior. This claim is, of course, very important to Olivecrona's analysis – if legal rules were not psychologically effective in this way, the analysis would be incomplete, since on Olivecrona's analysis, as we have seen, there are no legal relations the knowledge of which could motivate the citizens to act accordingly.

Olivecrona points out, however, that the way the individual mind works is a matter for the science of psychology, and that for the purposes of his investigation into the nature of law, he need only point to the general conditions that must be satisfied for legal rules to be effective in society (ibid., 52). Taking the example of *legislation*, he explains that its efficacy depends on an attitude of *reverence for the constitution* on the part of the citizens (ibid., 52–53). This attitude is not self-supporting, however, he explains, but must be sustained by means of an incessant psychological pressure on the citizens (ibid., 53–54). Hence a second condition for the efficacy of legislation in society must be satisfied, viz. that there be an *organization* – the state organization – that handles the application and enforcement of the law (ibid., 55–56).

Olivecrona concludes that the real significance of the act of legislating is to be found in the *formalities* that are attached to it, because these formalities confer on the legal rules a special nimbus that makes people take them as a pattern of conduct: "The draft is not lifted into another sphere of reality but is simply made the object of some formalities which have a peculiar effect of a psychological nature. The formalities are the essential thing. The legislative act consists in nothing but these" (Ibid., 56. See also ibid., 60).

Olivecrona's view of the concept of a legal rule is essentially the same in the Second Edition of *Law as Fact* as it was in the First Edition, except that here he introduces the concept of a performatory imperative, in order to account for those legal rules that do not concern human behavior (1971, Chaps. 5, 8. But see also 1940, 39–41). The introduction of this concept is of interest, inter alia, because it amounts to a connection with (then) contemporary philosophy of language. As J. L. Austin (1975, 4–7) explains, a performative utterance, such as "I promise to lend you $100" or "I hereby invite you to dinner on Saturday night," has its main verb in the first person present, indicative, active (singular or plural), or is equivalent to such an utterance. It differs from an ordinary statement of fact in that he who utters it (i) does not describe or report anything, which means that it cannot be true or false, and (ii) is usually thought to *do* something rather than to (merely) say something. Olivecrona (1971, 133–134) explains, in keeping with this, that a performatory imperative is an imperative whose meaning is that something shall be the case or come to pass, and that the assumption among lawyers, judges, and legal scholars is that legal effects are brought about through such imperatives. He offers the example (drawn from Roman law) of a young man who has been sold three times by his father, and who therefore, according to the law of the twelve tables, "shall be free from the father." This, he explains, is clearly an imperative, though it is addressed neither to the father nor to the son or to anyone else, but "is directed toward a change in the status of the son" (Ibid., 220).

Olivecrona points out in conclusion that belief in performative imperatives is connected with a belief in *magic* – the idea in ancient Rome being that the effect in question could be commanded into being – and that we can gain a better understanding of the workings of performatory imperatives if we keep this connection in mind (ibid., 230–231). He adds that he is not suggesting that contemporary judges and lawyers believe in magic in the same way that people did in ancient Rome, only that there are important similarities (ibid., 230–231). The main difference between then and now, he explains, is that whereas the Romans imagined that *words* alone could bring about the relevant effects, we now believe that it is the acting person's *will* that brings about the effects (ibid., 230–231).

Law as Organized Force

Olivecrona observes in the fourth and final chapter of the First Edition of *Law as Fact* (1939, 126) that the reader will now have arrived at the conclusion that, on his (Olivecrona's) analysis, law is essentially organized force. For, he points out, the reader will have realized that if law is not binding in the traditional sense, if there are no rights and duties, if it is only a question of the psychological effects of some independent imperatives, then law must be essentially organized force (ibid., 123). And, he adds, the reader is right.

Olivecrona, who takes the term "force" to cover not only "actual violence," but also "the influence exercised by the concentration of superior strength" (ibid., 126), makes a number of claims about the relation between law and force (on this, see Spaak 2014, Chap. 10). He maintains, inter alia, (i) that (organized) force is necessary to the existence of law, (ii) that the force of law exerts its influence on social life chiefly indirectly, and (iii) that the law causes us to internalize the moral values and standards that make up the content of the legal rules. Let us briefly consider these claims.

The first claim, then, is that organized force is necessary to the existence of law, in the sense that law depends necessarily on the use of force by state organs, inter alia, in the case of police measures against disturbances, the infliction of punishment, and the execution of civil judgments (1939, 124–125). The idea appears to be that law could not fulfill its function – to secure peaceful coexistence among human beings – if it did not make use of force.

Olivecrona observes that we tend to believe that force is alien to law, because the actual use of force is very much kept in the background in the day-to-day workings of the legal machinery. But, he points out, the reason why the use of force can be reduced so much in the modern state as to lead us to believe that force is alien to law, is that organized force of overwhelming strength is at every moment available, and that therefore resistance would be futile (ibid., 126). The ultimate reason why Olivecrona believes that organized force is necessary to the existence of law is that he believes that human beings tend to behave in such a way that disaster and ruin would follow if they were left free to behave as they pleased (ibid., 136).

Although Olivecrona does not elaborate on his thoughts on this topic, it is clear that his view of human nature, or at least the tendency of humans to resort to violence, etc. echoes that of Thomas Hobbes, who said that life in the state of nature would be "solitary, poore, nasty, brutish, and short" (1991[1651], Chap. 13, § 9, p. 89). We might say that Olivecrona's legal philosophy can in this limited sense be seen as an attempt to apply a Hobbesian approach to law and politics to the field of jurisprudence.

Olivecrona thus rejects (what he calls) the traditional view, according to which law and force are two distinct and, indeed, antithetical, entities. This view, he explains, is based on the metaphysical view of law, according to which law is a set or a system of rules that have binding force and can impose duties and confer rights on persons (1939, 127). But, he points out, as soon as we see through the metaphysical view of law and understand that there is no such thing as binding force, the whole distinction between law and force crumbles.

He emphasizes that the traditional view has it not only that law and force are two distinct entities, but that the law is *guaranteed* by force, or, perhaps, that rights are guaranteed by force. He objects, however, that the only thing that can be guaranteed by force is an actual state of affairs in the community, such as peace and order (ibid., 129).

It is worth noting that Olivecrona's claim does not seem to be a claim about the nature of law, as that topic is understood by contemporary legal philosophers. For the claim is plausible only if we take it to concern natural necessity or, perhaps, contingent facts, whereas the problem about the nature of law concerns logical, or conceptual, necessity. As Hans Oberdiek (1976) and Joseph Raz (1990, 157–161) point out, it seems to be logically or conceptually possible for there to be a legal system that does not make use of force. Thus Raz suggests that we can imagine rational beings other than humans who are subject to a system of norms, and who have reason to obey

these norms, whether or not there are any sanctions (ibid., 159). And while this thought-experiment seems rather far-fetched, I agree with Raz that a legal system that does not make use of force is a logical, or conceptual, though not a "natural," possibility.

The relevance of the distinction between logical and natural necessity in this context is that it makes Olivecrona's line of reasoning problematic. For a claim about *conceptual* necessity simply could not be based on a claim about *natural* necessity, still less on a claim about contingent facts. That this is so should be clear upon reflection. Just as a factual claim cannot entail a normative claim or a value judgment, it cannot entail a claim about any kind of necessity. Factual truth and necessary truth (of whatever kind) are simply different, and whereas a necessary truth entails the corresponding factual truth, the reverse does *not* hold. Similarly, a claim about natural necessity cannot entail a claim about conceptual necessity.

Olivecrona's second claim is that the force of law exerts its influence on social life chiefly *indirectly*. The truth of the matter, he explains, is that organized force consistently applied by the state organs is much more important to the influence of the law on social life than the immediate effects, say, of punishing some criminals or transferring property from debtors to creditors in a few cases (1939, 141–142): "The sufferings of some thousands of criminals, the transfer of property in a number of cases from debtors to creditors, is a small matter in comparison with the fact that people in general abstain from the actions labeled as crimes, pay their debts, etc."

I am not, however, convinced that the influence of the force of law on people is *indirect* as opposed to immediate. The problem is that the very distinction between (a) organized force consistently applied and (b) the immediate effects, say, of punishing some criminals or transferring property from debtors to creditors in a few cases, seem difficult to uphold. Thus it seems that on Olivecrona's analysis, the crucial fact is that the vast majority of the citizens obey the law, not that organized force is consistently applied, though on this analysis the former depends on the latter. But assuming that the former does depend on the latter, while the legal system could certainly strike out in a capricious manner and punish a criminal here and there, or transfer property from some debtors to some creditors, it does not seem possible for the legal system to apply organized force consistently *without* punishing some criminals and transferring property from debtors to creditors in a few cases.

In any case, Olivecrona maintains that we tend to overlook the indirect influence of the force of law, because we do not like to acknowledge that *fear of sanctions* is what motivates us to obey the law. But, he explains, the introspection on which we base our denial of the role played by fear does not go deep enough. As a matter of fact, the knowledge that sanctions are regularly inflicted on law-breakers has a most profound effect on our attitude toward the legal rules, and this effect is not necessarily limited to inspiring fear in us (ibid., 146): "It would be astonishing if this were not the case. How could we escape from the influence of the relentless machinery of force, which was functioning when we were born and surrounds us during our whole life? Surely, it must leave deep impressions on our mind."

Olivecrona is, however, quick to point out that this does not mean that we live under an ever-present fear of being subjected to the force of law. Since it is intolerable to live in constant fear, we adapt to the circumstances and do not even consider the possibility of committing a crime (ibid., 147–148).

I believe the claim about the fear of sanctions as the basis of social morality is plausible, if somewhat exaggerated. For while I believe that the pressure generated by an effective legal system does influence us, I can see no sign that the criminals adapt to the circumstances, as Olivecrona suggests we all do. And I assume that Olivecrona would not wish to explain the existence of more than just a few criminals, such as organized crime in the United States and elsewhere, by reference to the breakdown of the legal system. Hence Olivecrona's claim about the role of fear cannot be accepted as it stands, but must be qualified in some way. But the more we qualify it, the less interesting it becomes.

Olivecrona's third claim is that the law causes us to internalize the moral values and standards that make up the content of the legal rules. And, as Olivecrona sees it, we can say that the law is firmly established only when the main independent imperatives have been thus internalized (ibid., 154–155). The main reason why we internalize the independent imperatives so readily, he explains, is that the *suggestive character* of imperatives is enormous, especially when the power of the state, surrounded by august ceremonies, is behind the imperatives (ibid., 155): "All this combines to make a profound impression on the mind, causing us to take the fundamental 'command' of the law to heart as objectively binding."

We see that Olivecrona's claim that the law causes us to internalize the moral values and standards that make up the content of the legal rules is distinct from, but depends on, the above-mentioned claim, discussed above in section "The Binding Force of Law," that independent imperatives have a suggestive character, which can be traced back to our reverence for the constitution. Olivecrona's idea, as the reader will remember, is that imperatives work directly on the will of the recipient of the imperative, and that if a command takes effect, there arises in the addressee's mind a value-neutral intention to perform the commanded action, that is, an intention that is not motivated by the addressee's own wishes.

Although I find Olivecrona's thoughts on the influence on the citizens of the organized force of the law congenial to my own way of thinking, I also find the analysis rather problematic. If, as Olivecrona believes, we internalize the moral values and standards that make up the content of the legal rules, how could anyone endorse a political agenda at odds with the agenda set by the dominating party, if there is one? One may, for example, wonder how there could be any political opposition in Olivecrona's own country, Sweden, where one political party dominated the political scene for a long time, including Olivecrona's years as an adult. One may also wonder how Olivecrona can square his claim that Marxists view law as an instrument of oppression and exploitation (on this, see ibid., 181–192) with the claim that the force of law influences our moral values and standards. Does it not influence Marxists?

Olivecrona might, of course, respond that even though the citizens will internalize the values and standards that make up the content of the legal rules, this does not mean that these values and standards will always trump, in case of a conflict, other values and standards that the citizens may also have internalized. Whether they will in fact trump such other values and standards is a contingent matter about which we can say very little on a general level. I can accept this. We should, however, note that to the extent that this is true, the claim that the law causes human beings to internalize the values and standards that make up the content of the legal rules also becomes less interesting.

Conclusion

In this entry, I have given an overview of Olivecrona's legal philosophy, focusing on (i) Olivecrona's critique of the view that law has binding force in the sense of being necessarily morally binding, and the claims (ii) that legal rules are independent imperatives and that their function is to cause human behavior, and (iii) that law is a matter of organized force. I have argued that Olivecrona rejects the view that law has binding force, on the grounds that it is impossible to analyze the concept of binding force in terms of social facts, and that he views legal rules as independent imperatives, which work directly on the will of the law subjects because they possess a suggestive character that ultimately depends on the respect for the constitution on the part of the law subjects. In addition, I have argued that Olivecrona maintains that law is a matter of organized force, and that this means that such force is necessary to the existence of law, that the force of law exerts its influence on social life indirectly, and that the law causes us to internalize the moral values and standards that make up the content of legal rules.

Cross-References

- ▶ Hägerström, Axel
- ▶ Legal Realism, Scandanavian
- ▶ Naturalism in Jurisprudence
- ▶ Ross, Alf: Biographical Perspectives
- ▶ Transnational Legal Normativity

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Ontology of Law

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Introduction

The ontological problem in legal philosophy is captured in the question What is law? – a question about the *nature* of law. Simple though this question may seem, it is in fact very puzzling, to the point that several authors have doubted it can find an answer, at least one cast in terms of law's essential properties (see Leiter 2011; Schauer 2012; Tamanaha 2017) and on descriptive, non-normative grounds (Dworkin 2006, Chap. 6; Priel 2013). However, the centrality of this question for legal theory has been underscored, among others, by Hart (1994, 1), Bobbio (2011, Chap. 3), Raz (2010, Chap. 1), Alexy (2008, 281–284), and Shapiro (2011, Chap. 1). A good overview of the criticisms that may be raised about the framing of this question, as well as a peculiar and interesting solution to it, can also be found in Giudice (2015).

One of the main reasons why from the start the question What is law? proves so perplexing is that it is inherently ambiguous. For, on the one hand, its stress seems to fall on the word *what*, suggesting that the problem is what the legal domain *encompasses*: the problem of what sorts of things or facts ought to be considered law and

what their makeup or structure is. But, on the other hand, the stress seems to fall on the word *is*, suggesting that at issue is the strictly ontological problem of what is *distinctive* about law, or what marks it out as specifically legal. In what follows, I will present the main arguments in contemporary legal ontology by exploiting this ambiguity, thus gradually moving from the first problem to the second one.

A Rule-Constituted Reality

Contemporary social ontology links the existence of social facts to acceptance, and in particular to collective acceptance (for some alternative views, however, see Smit et al. 2011, 2014; Epstein 2015; Hindriks and Guala 2015; Guala 2016; on collective acceptance theories as directly applicable to legal ontology, see Sánchez Brigido 2010; Bernal 2013; Canale 2014). There are several different theories about how this collective acceptance is to be understood, the main difference among them being that according to some authors (see Tuomela 1995, 2013; Gilbert 1989, 2014; Searle 1995, 2010), this is the outcome of intentional states that individuals have in an irreducibly plural form, whereas according to others (see Bratman 1992, 2014; Kutz 2000; Lagerspetz 1995; Ludwig 2016; Miller 2001), collective acceptance should be reduced to a web of simple individual instances of acceptance.

However, it seems peculiarly contrived to say that, for example, the fact of my having legal capacity depends on the fact that people in my community accept that I have legal capacity. After all, most people in my community – say, the community making up the Italian Republic – don't even know I exist. If there is any acceptance involved here, it has nothing to do with *me* in particular but with the fact that when we come of age we acquire legal capacity. This is a rule that includes a universal quantifier and thus regulates *classes* of cases: I fall under that rule; therefore, the relevant qualification applies to me. Hence, there is a distinction to be made between (1) cases in which what is collectively accepted is directly a *social fact*, and consequently a rule derived from that fact, and (2) cases in which what is collectively accepted is instead a universal *rule* or set of rules encompassing an indefinite number of social facts, which consequently are only *indirectly* accepted via that rule or set of rules.

This distinction is expressed by John R. Searle (2010, 93ff.) as one between (1) institutional facts *without* an institution and (2) institutional facts *within* an institution. In the case of law, facts of the second kind are particularly important. According to Searle, these facts involve *standing declarations*, namely, collective intentional states (actual or dispositional) in virtue of which the relevant status can be attributed on a permanent basis to any instance that may come up. In previous statements of this theory, Searle called these standing declarations *constitutive rules*, by which he meant rules that "do not merely regulate, [but] also create the very possibility of certain activities" (Searle 1995, 27). He also set out a specific structure of constitutive rules, where an element X is taken to *count as* another, institutional element Y (consisting of a "status function" and a set of "deontic powers") within a given context C: Hence, "X counts as Y in context C." This description of legal ontology in terms of facts dependent on constitutive rules was previously introduced by the Polish legal philosopher Czesław Znamierowski (see Znamierowski 1921, 1924; Czepita 1990; Lorini and Zełaniec 2016).

The concept of constitutive rules and its role in legal and social ontology has raised several problems, particularly if these rules are conceived as rules of a specific (constitutive) kind in distinction to rules in the "usual," regulative sense. First, since any rule we follow brings about precisely the behavior that consists in following that rule, all rules can to that extent be conceived as constitutive (Ruben 1997, 444; see also Amselek 2012, 398–404; Zełaniec 2013, 95ff. 125ff.). Second, rules can be constitutive in several different ways. In the case of repealing statutes, for example, what they state they bring into being *immediately*, in virtue of their stating it, whereas other times, as in the case of definitions, the rule does this *mediately*, by creating an institutional type or concept: In the former case we are looking at *thetic*-constitutive rules acting as *sufficient*

conditions of what they regulate, whereas in the latter we are looking at *eidetic*-constitutive rules acting as *necessary* conditions (Conte 1981, 1995a; several further distinctions along these lines can be found in Azzoni (1988) and Mazzarese (1985)). Third, constitutive rules, at least in their just-defined "eidetic" sense, can be said to come down to stipulative definitions which call into question the need for a new theoretical concept for this kind of phenomenon (Guastini 1983; in a different but related way, see Hindriks 2009; Hindriks and Guala 2015). Fourth, the form "X counts as Y in context C," which is meant to account for constitutive rules, is overly restrictive, for it can be shown that some constitutive rules include deontic operators (Conte 1995b, 279–280), and also that their form, "X counts as Y in C," is too focused on the status-conferring function of institutions, which by contrast also include "consequential rules" specifying the normative import connected with Y, as well as "terminative rules" specifying the conditions under which Ys fall out of existence (MacCormick 1986, 52ff.; see also Ransdell 1971; Hindriks 2005, 123ff.).

These considerations show that it is difficult to conceive constitutive rules as a distinctive, homogeneous class of rules set in contrast to "ordinary" regulative rules. Even so, one would be hard pressed to deny that rules can have a constitutive role in creating new institutional concepts, and that this constitutive role can be explained by pointing to their pragmatic or illocutionary force, just as Searle does with the aforementioned idea of standing declarations. So, instead of speaking of a specific kind of rule identified as "constitutive," it is perhaps better to speak of a possible constitutive *force* of rules (whether the rule is stated in a "count as" formulation or through standard deontic operators), so as to then proceed to pragmatically analyze the features of this constitutive force (see also in this regard Carcaterra 1979; Roversi 2007; Zełaniec 2013, 125–134).

Moreover, the whole discussion about constitutive rules shows that an ontology of legal facts requires and presupposes an ontology of rules: we cannot properly answer the question What is law? without asking What is a rule? A good example of how the two questions are related is, of course, H. L. A. Hart's practice theory of rules, where the existence of law is made to depend on a specific conception of social rules (see Gilbert 2000; Postema 2011, 285ff.).

The Three-Dimensionality of Law

On closer inspection, the characterization so far given needs to be complemented by bringing in three additional features of constitutive rules.

First, constitutive rules operate against a conceptual background that is taken for granted. Consider the example of chess. The constitutive rules of chess define all the pieces and possible moves that can be made in that game as well as the conditions of victory for that game, but they do not state *why* victory matters in a competitive game or what a competitive game is: These things are taken for granted. If chess were a religious ritual and not a game, the concept of victory in chess would have an entirely different social meaning. This background social meaning of the practice of game-playing is not defined by the constitutive rules of chess but is rather shaped by deeper conventions in which those rules are embedded and with which they must be compatible (see Schwyzer 1969; Lorini 2000, 263ff.; Marmor 2009). This is to say that not all the concepts that have a role in chess are institutional, rule-constituted concepts: Also at work are what can be described as *meta*-institutional concepts forming the deeper conceptual background in which the institution in question is embedded – concepts like that of victory in chess (Miller 1981; Lorini 2014). The same also holds for the legal domain. So, for example, the law will contain constitutive rules conferring on us a capacity to act: It will do so by stating that we can make valid legal transactions giving rise to specific legal rights and duties that will change our situation (the scope and mechanics of our action) relative to others. But in order for this whole conceptual structure to work, we will at least need a rough understanding of the concepts of legal rights, duties, and validity. Now, these concepts are *not* defined by legal systems: They form the

conceptual background against which legal systems are framed (Roversi 2014). They are in this sense *meta*-institutional legal concepts.

Second, the deeper conceptual background against which constitutive rules are set is in a crucial respect axiological: It defines the basic values and norms in which institutions are ultimately grounded. There is no rule of chess stating that cheating is disallowed in the game: This is part of the cooperative commitment in virtue of which competitive games are made possible. In this case the background has an axiology and deontology embedded into it, and it takes precedence over the construction of constitutive rules. In the case of law, this aspect of the conceptual background is particularly relevant: It is a presupposition of contemporary constitutional systems that the framework they provide should not only be functional but also just – a constitutional provision stating its own injustice would be a self-defeating speech act (Alexy 2002, 35ff.). In this sense, "cheating" and "justice" are both axiological meta-institutional concepts, the former signifying a *disvalue* (for game-playing), the latter a *value* (for law).

Third, institutions generate several kinds of phenomena and related concepts that are neither constituted by the institutions' rules nor do they depend on the institutions' conceptual or axiological background, but rather emerge in the actual institutional practice. Sticking to the example of chess, we can say that a player is carrying out a "King's Indian attack" or "Damiano's defense," or that in chess there is a slight "first-move advantage." These concepts are not constituted by the rules of chess: They rather denote strategies and typical "systematic fallouts" (Searle 2010, 117) that can be observed only when the game is actually being played. These concepts we can call *para*-institutional, because they are in a sense "parasitic" on more fundamental institutional concepts but capture strategic and sociological considerations that cannot be made through a mere focus on institutional structure (Roversi 2014, 210ff.). In law, para-institutional concepts abound. If, for example, I say that the norm-enacting procedures in the Italian Constitutional system encourage *filibustering* by parliamentary minorities and lead to *legislative gridlocks*, I am using para-institutional concepts, for I am not describing the institutional structure of norm-enactment as set forth in the Italian constitution but am rather pointing out how that institutional structure "plays out" when concretely practiced.

The triad consisting of (A) *meta*-institutional, (B) institutional, and (C) *para*-institutional concepts shows that legal ontology must include, next to a rule-constituted institutional *structure*, the conceptual and axiological *background* to that structure and the accompanying concrete *practice*: Legal ontology is thus distinctively *three-dimensional*. This three-dimensionality of legal ontology has been noted by several legal philosophers: among others, Gustav Radbruch (2003, 8ff), Luis Recaséns Siches (1965, 159), Miguel Reale (1968) (see also Falcón Y Tella 2010; Novak 2016). Moreover, this three-dimensional ontological perspective must be connected with the methodological view that legal norms can be evaluated from three angles – those of their formal validity, ideal justice, and actual effectiveness (see García Máynez 1960, Chap. 4; Bobbio 1993, Chap. 2).

Different approaches in legal philosophy can be interpreted "ontologically" according to the element of the three-dimensional formula they focus on: Kelsenian and Hartian normativism focuses on the structural normative element, natural-law theory (as one would expect) on the axiological background, and legal realism (especially the American variety) on the actual practice of law. Some phenomenological approaches focus on the conceptual, meta-institutional boundaries of the legal domain (its "essential laws"): Adolf Reinach (1913) and Paul Amselek (2012, 273–414), for example, investigate the speech acts underlying different kinds of legal transactions, Gerhart Husserl (1955) addresses these fundamental conceptual elements in light of their specific temporality, and Mark Greenberg (2004) describes in terms of rational determination the relation that holds between legal practices and legal contents. Of course, these approaches can all be interpreted as being more or less reductionists, to the extent that they are understood to consider the specific element of

the three-dimensional formula they focus on to be the only relevant element of legal ontology. Thus, on an extreme interpretation, for example, Kelsen can be construed as a structural reductionist, natural law theorists as idealists having no concern for concrete norm-enacting, and American legal realists as conceptual rule-skeptics.

Legality

We can now turn to question of legality: What distinctive feature or set of features identifies legal facts as distinctly legal? There are several possible answers to this question in the current literature, and given its foundational nature, the range of competing views winds up encompassing most of the contemporary debate in legal philosophy. With that caveat in mind, we can group these alternatives under a single relation – that between law and morality – and five headings: (1) mind, (2) reason, (3) function, (4) organization, and (5) power.

First the relation. The problem of the relation between law and morality carries an ontological implication. This is particularly apparent with inclusive legal positivism, where the discussion between Hart and Dworkin on legal normativity eventually led to several different theories about law's conventional nature (be they inclusivist, as in Coleman 2001, 90–102, or exclusivist, as in Marmor 2009; but first see Postema 1982; cf. also the entry ▶ "Conventionalism" in this encyclopedia).

Next the five headings. On the "mind" approach, legality can be accounted for in terms of the *mental states* having legal facts as their content: This is the main thrust of legal psychologism, both Scandinavian and Slavic (see, in this encyclopedia, the entries ▶ "Legal Realism, Scandanavian," and ▶ "Legal Realism: Bologna").

On the "reason" or reason-giving approach, what is distinctive about law is that it is inherently rational or at least provides us with specific kinds of reasons for action. In this approach we typically find natural law theory, and here we need to recall Finnis's theory as well as connectionist theories such as that of Alexy, but also legal-positivist approaches such as Raz's theory of exclusionary reasons and his service conception of authority (see, in this encyclopedia, the entries ▶ "Alexy, Robert: Philosophy of Law," ▶ "Finnis, John," and ▶ "Raz, Joseph").

On the "function" or functional approach, law is conceived as a social technology serving a given function, but the nature of this function depends on the perspective we assume (note that, giving that functional considerations can provide prudential reasons, this approach can also be conceived as a subset of the "reason" approach). From a natural law perspective, law as a functional kind is essentially aimed at realizing moral goods (Moore 1992; Murphy 2006; but see also Miller 2010). From a legal positivistic perspective, law has a function in the sense of being primarily a tool for social organization, independently of its moral merits: Examples are Adolfo Ravà's (1911) theory of law as a technical norm, Kelsen's theory of law as social technique (Kelsen 1945, Chap. 1, § B), the later Bobbio's functionalistic turn (Bobbio 2007), and more recently Scott Shapiro's (2011) planning theory of law. From an antiformalistic perspective, the functional approach stresses the connection between law and society by underlining the role that legal systems play in serving the *interests* of the communities they emerge out of: Classic antiformalistic theories and the Law and Economics movement are typical examples (but see on this Tamanaha 2006, pt. 2). Finally, akin to the functional approach is the recent artifactual conception of law, which proceeds from the idea that the ontology of law can insightfully be explained by investigating the ontology of artifacts (on this conception, see Crowe 2014; Burazin 2016; Ehrenberg 2016; Roversi 2016).

Connected to the functional approach is the "organization" approach, which underscores that functional structures can sometimes emerge spontaneously, so to speak, as forms of bottom-up organization rather than top-down planning. This is the domain of institutionalism, whose origins trace to Maurice Hauriou, Santi Romano, and Carl Schmitt, and whose contemporary development is owed to authors like Ota Weinberger and Neil MacCormick (see La Torre 2010 and, in this

encyclopedia, the entry ▶ "Institutionalist Theories of Law").

Finally, the "power" approach conceives law as inextricably bound up with mechanisms of coercion, whether these consist of physical coercion or of tacit, anonymous influences capable of shaping actions and intentions in a hegemonic way. Here, on one end of the spectrum, we have those conceptions on which power understood as force and coercion is conceived as a necessary element of law: Hence the whole debate about coercion in law from Austin to Kelsen to Hart can be interpreted as an ontological debate (but for a nonessentialist understanding of coercion in law, see Schauer 2015; see, in this encyclopedia, the entry ▶ "Coercion and Law"). On the other end of the spectrum, the ontology of law as a form of power can be viewed through the lens of the so-called Critical Legal Studies, thus conceiving law as an outcome of social conflict reflecting social power struggles.

Cross-References

▶ Conventionalism
▶ Institutional Facts
▶ Institutionalism: Legal
▶ Institutionalist Theories of law
▶ Law as an Artifact
▶ Legal System and Legal Order
▶ Metaphysics of Law

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Owen, Robert

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Introduction

Robert Owen (1771–1858), born in Newtown (Wales), was a philanthropist who turned into a reformer after having developed an impressive career as an industrialist. This evolution is described by himself in his autobiography (1857) and by his son in a memoir (Owen 1874). According to Harrison (1969), his life falls into six main periods.

From 1771 to 1799, Owen moved from his native town to London and Manchester. There, he formed a partnership with borrowed capital in the cotton industry. At 20 years old, he became the manager of a company of 500 employees. In 1799, he and his partners acquired the New Lanark Mills in Scotland. New Lanark consisted of an entire village with a cotton industry that used Richard Arkwright's machines (the spinning frame) based on waterpower. The town had 2300 inhabitants, out of which 1700 were factory workers, so it actually was a company town. In the period from 1800 to 1824, Owen made New Lanark into a model factory (and raised a family of seven children). New Lanark became a more humanitarian establishment than the average. Its better laboring conditions not only did not diminish but increased profitability. But the conditions of work of the children, who had working days of up to 16 h and no physical safety, made Owen devote himself to schemes of education and social welfare for the employees. A committee formed in June 1819 tried to put into practice Owen's ideas by means of a factory bill. After much modification, and with the opposition of political economists such as David Ricardo, the bill introduced improvements for factory children and was the basis of more comprehensive legislation on working conditions passed in 1825 and 1833 (Donnachie 2000, 129–131). Owen's publications caught the attention of men of wealth who were interested in social reform. That is the case of Jeremy Bentham, who invested in New Lanark's cotton mills along with other philanthropists interested in education schemes (Trincado and Santos 2017). Nevertheless, when Owen went on to attack basic institutions of society such as private property, religion, and marriage, he was felt as an antiestablishment rebellious, and he had to resign his post at New Lanark.

An American and communitarian phase of his life goes from 1824 to 1829. Owen went to America to start a new colony at New Harmony, Indiana, based on absolute equality. But the experiment showed to be unsuccessful and came to an end in 1827. He made attempts to form new communities in the United States, England, and Ireland. After considering the idea of a community in Mexico, he returned to England in 1929, having lost his fortune but not his beliefs and enthusiasm (Morton 1962, 30).

From 1829 to 1834, the British working-class movement was dominated by Owenite theories. Owen's plans amounted to a kind of guild socialism and called for the establishment of producer's cooperatives under the control of trade unions. In 1831, he found a stock exchange in London. A climax was reached in 1834 when he was for a few months at the head of a Grand National Consolidated Trade Union of Great Britain and Ireland. The sudden collapse of this federation ended the fourth period of Owen's life.

The period from 1835 to 1845 was marked by the development in Britain of a sectarian organization of Owenites in which Owen played the role of a patriarch. He wrote and lectured and supported another community building attempt

at Tytherly in Hampshire. The closing of this community and the ending of the chief Owenite journal, the *New Moral World*, brought to an end this phase of his career. Besides, Owen was the inspirer of secularism and other social reform movements of the 1860s and 1870s.

From 1845 to 1858, he revisited the United States and was in Paris to witness the events of the 1848 Revolution. He wrote a lot, including his autobiography (Owen 1857), and he took up spiritualism. He died in Newton, his birthplace that he had not visited for over 70 years (see Davis and O'Hagan 2014).

Labor Movement

New Lanark was known worldwide as one of the first experiments in the accomplishment of acceptable working conditions for the workforce without avoiding the industrial process of large-scale mechanization. Owenism was based on paternalism, the action of a boss of whom all the workers know the face and name, whom they love and admire (Morton 1962, 77; Col 1969, 58). Owen also introduced the methodical layout of the factory, a policy of technical modernization, and a careful selection and training of the assistant managers. Robert Owen's parallelogram housing scheme proposed in 1820 implied moral regeneration through collective visibility (Owen 1821).

In his activity as a businessperson, the main proposal of Owen was to focus on human relations within the factory, as afterward would be taken up by Taylor, Fayol, and Elton Mayo. Owen insisted not on capital gains but on long-term profitability. He dealt with power inside the firm, opening up the black box. For Owen, full employment, inclusion of all the potential workers, and distribution were more important outcomes than the sum of individual happiness (Trincado and Santos 2017).

Socialism

Owen condemned laissez-faire and competition, and, as time passed, he became more and more socialist (Wilson 1940, 93). Marxists popularized the epithet utopian as a derogatory label for Owenite socialism, as, according to Marx, Owen appealed to the good feelings of the rich people. But after 1812, when he published a pamphlet entitled *A Statement Regarding the New Lanark Establishment* (Owen 1812), Owen began to look, not only inside the firm, but also outside the firm. He began to realize that capitalists and unions were interested in maintaining the capitalist system and acting for organized workers, not for the non-organized. Owen hoped to achieve a complete reorganization of society that could avoid competition and the fluctuations of trade so that the working man might be supplied at little above wholesale prices.

Owen proposed an exchange of commodities based on embodied labor. Then, technological unemployment will be prevented, as supply and demand for goods grow pari passu, and overproduction is avoided. In 1831, he established a stock exchange to put the cooperative societies in contact with one another, and he issued labor vouchers that represented the value of goods in hours. In 1834, the Great National Consolidated Union was created based on Owen's hope to unite all the unions of any trade. However, the success of affiliation made it collapse as it began to lack financing. It was suppressed by the government and factory owners, who imposed on workers the signature of a document in which they promised not to become members of the union. The stock exchange and Owen's newspaper also collapsed.

In the early nineteenth century, Owenism had an important role in two highly different national communities such as Great Britain and America. In the twentieth century, it influenced France and many European countries, especially after the protests of May 1968 (Claeys 2005).

Education

In 1813, Owen published *A New View of Society: Or, Essays on the Principle of the Formation of the Human Character*, probably edited by James Mill (and Francis Place) (Donnachie and Hewitt 1993, 115). In this work, Owen put forward the principles on which his new system of educational

philanthropy was based. The non-responsibility of man and the effect of early influences were the attributes of Owen's entire system of education and social amelioration. Owen firmly believed that people were the product of their environment, something that increased his support for labor reform (Owen 1813, 1816). In 1816, he opened the first infant school at New Lanark, the Institute for the Formation of Character.

Robert Owen had very advanced ideas on education for his time. He thought that education should be natural and spontaneous but in particular enjoyable. The New Institution and the School for Children were erected on Lancasterian principles. It was mass production applied to education, where specially knowledge selected senior pupils passed on learning by heart to their juniors, sometimes in large numbers, in what became known as "mutual instruction." Owen stressed the importance of character formation. Pupils were encouraged to develop their character, thanks to the interpersonal stimulus. Besides this, the most notable feature of Owen's educational system in the institute was instruction by lecture, discussion, and debate. Owen was opposed to corporal punishment for encouraging work or education, and he believed in positive reinforcement and the play principle (Trincado and Santos 2017), no child being coerced in any way (Donnachie 2003). He was also a forerunner of constructivism theories. In fact, Owen's educational methods were based on the theories of the reformer Pestalozzi, whose motto was "Learning by head, hand and heart."

Conclusion

Robert Owen tried to listen to the feelings of people who were suffering from the pains of the birth of a new society. In this sense, he acted as the voice of workers, whereas politicians and the economists of the time defended the manufacturers' interests. Robert Owen broke with the *homo oeconomicus* definition of human action. He based his thinking on the notion of *homo reciprocans*, moved by intrinsic motivation. He proposed a "horizontal" utopia, utopia being the contrast between reality and the ethical ideal renewed at every instant. But one of the most important lessons of his teachings is that Owen tried to show in his action that this utopia was possible.

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► Marx, Karl

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Pacifism: Theories of

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Etymologically, "pacifism," from the Latin *pax, pacis,* "peace," (originally "compact") + *facere,* "to make," literally means "peacemaking." Pacifism is moral opposition to war and other forms of violence. Pacifism is not a single position that one either assents to or rejects. There are many forms of pacifism. Adding to the complexity of understanding the variety of pacifisms is the fact that pacifism rarely gets taken seriously. This is due to a widespread cultural bias: "everybody knows" pacifism is hopelessly naïve and idealistic. At the same time, war is accepted as normal, practical, and realistic. Many take war for granted that war can be – and often is – moral.

Pacifists, like Mohandas Gandhi and Martin Luther King, Jr., are respected for their moral strength, yet they are usually dismissed by dominant culture as unrealistic. *Warism* is the prejudice of taking war for granted as morally acceptable, even morally required. Like racism and sexism, warism distorts our better judgment. We must consciously set this common bias aside in order to consider varieties of pacifism openly.

Often "pacifism" is confused with "passivism," which means not resisting evil, being passive, and suffering acceptance. Because "pacifism" and "passivism" sound alike, many people confuse one for the other. In fact, pacifists rarely are passivists; more often than not, they are activists working for peace. All versions of pacifism oppose war and other forms of violence, but beyond this negative, antiwar position, pacifism involves various positive strategies for making peace. So, there are two sides to pacifism: the negative, antiwar, antiviolence side; and the positive, peaceful alternative, nonviolence side.

To consider antiwar pacifism, one must first consider relationships between morality and war. Most people believe that war can be morally acceptable, even morally required, depending on the situation. Over the past 2500 years, a just-war tradition has been developed. Those who believe just war is possible do not say "all's fair in war" or "anything goes." Rather, they have moral standards that guide their decisions about war. These amount to guidelines for answering two basic questions: When is it just to go to war? And what moral restraints are required in a just war?

Regarding the first question, for those who believe in just war, going to war requires meeting six conditions: (1) The war must be made on behalf of a just cause, (2) whether to go to war must be decided by proper authority, (3) participants must have a good intention rather than revenge or greed as their goal, (4) it must be likely that peace will emerge as a result of the war, (5) going to war must be a last resort, and (6) the total evil of making war must be offset by the good likely to come of it.

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Once all six conditions for going to war are satisfied, those who believe in just war must turn to the second question: What moral restraints are required to fight a war justly? There are two principles to satisfy: discrimination and proportionality. A war is justly fought only if those making war discriminate between legitimate and illegitimate targets. Children, the elderly, those hospitalized and in nursing homes, and those innocent of involvement in the war, all are illegitimate targets; only soldiers and citizens working to advance war-making capabilities can be targeted. The second standard, proportionality, requires that the evil of each individual act in the war in question will be offset by the good it brings about. Those supporting just war allow for "spillage," where bombs may target weapons factories or enemy soldiers and accidentally injure or kill noncombatants, but, again, such "collateral damage" must be offset by the good accomplished. For a war to be just, it must meet all of these conditions, and answer both questions. Meeting only a few of the just war conditions is not good enough. We must be justified in going to war *and* we must exercise moral restraint in making war once we go.

Why begin an account of pacifism with a delineation of the just war tradition? Because the two are linked along a single moral continuum. Pacifism and just war are variations of moral restraint. Both reject war realism, which says that morality is irrelevant to war, that in war one must do whatever might be necessary to prevail. War realists claim that morality arises only after wars are won, not within them. While pacifism and just war both take morality to be relevant to war, they differ by the degree to which morality has a role in war. Pacifism and just war do not differ in kind. Pacifism emerges from the just war tradition as moral restraints on war are taken ever more seriously.

The weakest form of pacifism, alongside versions of just war thinking, is *pragmatic pacifism*, where war is opposed not in principle but because violence is not likely to work in the situation at hand. Pragmatic pacifists grant that war can be justified in some cases but hold that, as a matter of practical utility, avoiding war is more likely to be effective in achieving the goals of a given conflict, that resorting to violence would only make matters worse. Pragmatic pacifists sometimes oppose and other times support war, depending on their judgment concerning the most practical solution to the problems at hand. For example, one might find slavery sufficiently evil to warrant war to free the enslaved, or one might think the violence intended to end slavery would only give slave owners an excuse to use violence in putting down any resistance movement for freedom and thus make matters worse. Whether to wage war is decided by practical considerations. Which is more likely to work, waging war or not?

A stronger view along the moral restraint scale is *nuclear pacifism*, where nuclear war is prohibited because it cannot meet the just war conditions for discrimination and proportionality: It is impossible to hit only legitimate military targets with nuclear weapons. Such weapons are inherently indiscriminate because they kill and injure children, the elderly, and other innocents as well as destroy schools, hospitals, and homes as readily as military installations and weapons factories. Nuclear war is never a pragmatic solution. Of course nuclear pacifists often reject the nuclear option on moral grounds yet cling to conventional warfare as justifiable.

Reflecting on nuclear pacifism leads to thinking about *technological pacifism*, the view that the technology of modern war has made conventional war nearly as indiscriminate as nuclear. The just war tradition may look good in theory, but in practice it breaks down due to the inevitable collateral damage of modern war. Perhaps war was justifiable many years ago when armies of volunteers met on remote battlefields, but war as we know it today is simply too big and too hard to control. Modern war cannot be contained to satisfy just war conditions; it spills over to harm more innocent bystanders than legitimate military targets. At the beginning of the twentieth century, most casualties of war were military, but by the end of the twentieth century most war casualties were civilian. The methods of modern war have made just war obsolete. If just war guidelines are rigorously enforced, then modern war does not qualify as just. War inevitably

violates the principles of discrimination and proportionality.

Increasing awareness of the fragility of our environment has resulted in *ecological pacifism*, a version of technological pacifism where moral concern goes beyond the impact of war on people, society, and culture, to focus on the implications of war for our planet, its ecosystems, and the host of species they support, as well as the sustainability of air and water quality for current and future generations of all living things. Ecological pacifists point out that the single largest threat to the environment of Earth is military because military systems of Earth are the greatest source of environmental contamination and they consume the most fossil fuels, the dominant source of environmental degradation. While individuals may worry about their personal carbon footprints, their taxes support carbon footprints powers of ten beyond the impact of individuals. If restoring or preserving our environment is a concern, then curbing the pollution and consumption of the world's military organizations must be paramount. Such concern entails ecological pacifism.

Fallibility pacifism, sometimes called "epistemological pacifism," is the view that even if war could meet just war conditions in principle, our knowledge is too limited to justify it in fact. Due to the sheer scale of war, we cannot know relevant factors with sufficient confidence to warrant irrevocable violent actions between nations. Given the subtlety and complexity of issues, the history of tensions, the biases of involved parties, propaganda, vested interests, the manipulation of news media, and the various inequalities among nations – economic, political, and geographical – our knowledge cannot be sufficiently secure to justify war even if war is theoretically justifiable.

Moving along the scale we reach *collectivist pacifism*, the position that violence may be morally justified in particular small-scale situations – executing a convicted murderer or fending off a violent attacker by force – but that war cannot be justified due to its sheer magnitude. Collectivist pacifists always object to the mass killing that characterizes war but may allow interpersonal violence, presumably because a single person can do something so evil that in doing so the individual thereby forgoes any legitimate expectation to be treated as human. There is no inconsistency in the collectivist pacifist allowing interpersonal violence while rejecting war. Using personal weapons to defend one's family from attack is sufficiently different from participating in war with its mass violence and the anonymity of the enemy.

Finally, as we describe the range of antiwar pacifist positions, we approach *absolute pacifism*, where it is wrong always, everywhere, for anyone to use violence against another human being. We can imagine an even more absolute pacifism where all violence is prohibited, including violence against nonhuman living things or against everything, living or not. Few if any pacifists hold such extreme views – Gandhi himself says that if the choice is between violence and cowardice he would choose violence. The point is that pacifism admits to degrees along a spectrum of views where pragmatic pacifism is the weakest form, absolute pacifism the strongest, and several sorts of pacifism lie along a scale of increasing moral restraint between the two. Most of us find our moral beliefs regarding war to be somewhere between the extremes on the continuum.

Having described the range of antiwar pacifism, we can now turn to the other aspect of pacifism, the commitment to positive peace. Pacifists do not merely oppose war and violence to varying degrees; pacifists promote a range of alternatives to violence, a range of practices that contribute to peace. By peace, we mean not merely the absence of war and violence; we mean the presence of harmonious and cooperative social order that arises from within the assembled group rather than order forced on the group from the outside. The Cold War was well named: "cold" because overt violence (i.e., bombing and killing) was avoided yet "war" because relations were deeply strained. Overt violence seemed to be held at bay due to each side threatening the other with annihilation. The uneasy lack of overt violence in Eastern Europe from the close of World War II in 1945 until the collapse of the USSR in 1989 was negative peace at best. Positive peace involves no threats, no massing of weapons or

troops, and no coercive force. Positive peace is characterized by cooperation from within groups.

When human groups are at odds with one another, whether they are as large as nations or as small as nuclear families, tension and conflict inevitably arise. Peace, literally "agreement making," happens when the sense of community, shared purpose, and mutual interest, all prevail over divisiveness, opposing purposes, and disunity. This is why people of common heritage, shared values, and familiar experience usually find it easier to be at peace with one another than with those of different traditions, religions, cultures, and ethnicities. Getting along by self-control from within groups rather than by force from outside comes more naturally when groups are, or seem to be, more alike than different. For pacifists, the better people understand one another the less likely their conflicts will result in violence.

The pacifist ideal of a positive vision of peace takes its lead from the complex interrelatedness of individuals and groups. The challenge is to foster a sense of community, of participation, sufficiently strong to overcome divisiveness, differences, and misunderstanding. This harmonious ideal is anchored by a spirit of tolerance and respect. Differences are seen to enhance possibilities for human flourishing rather than as threats that must be dominated or destroyed.

One of the fascinating features of positive peace, when it happens, is that it rarely occurs to those living peacefully and that it is peace they are making. It is simply how they live and interact; it is habitual and taken for granted. Positive peace is nearly invisible. All of us succeed at living peacefully to some extent, perhaps with immediate family, close friends, coworkers, team members, neighbors, customers, or even with drivers with whom we share the roadways, that is, in any context dependent on cooperative behavior.

Unfortunately, there are limits to our peacefulness and few of us take it for granted as the way to interact with everyone. Ignorance, fear, impatience, and intolerance all get the upper hand at times, and some individuals are overly self-interested and even bigoted and disrespectful, putting themselves above others. In the extreme, this becomes criminal behavior, and those who rupture the peace must be dealt with. The mark of truly peaceful people is whether their methods of dealing with peace breakers are consistent with their visions of peace.

While cooperative community is an ideal, pacifists try to internalize practices to foster it, within themselves and within their communities. Such practices are nonviolent because violence always ruptures relationships – the bases of community – and because violence is incompatible with an internally ordered whole. The most obvious method to resolve conflict and achieve agreement is conversation, open and honest discussion. Where individuals and groups cannot work out agreement by discussion, resolution may be achieved by appeal to an impartial third party. When arbitration fails, courts may be used to settle disputes. But some conflicts do not get resolution by various legal means.

Methods of nonviolent peace building cannot get complete delineation here due to the limits of space. In *The Politics of Nonviolent Action,* Gene Sharp cites nearly 200 techniques. All are ways to confront power nonviolently by appealing to the vulnerability of power: the consent of the ruled to be ruled. A brief sketch of the range of nonviolent means of struggle will fill out a vision of positive peace by showing how it is implemented.

Beyond discussion, arbitration, and resolution in the courts, positive peace techniques include political protest and persuasion, symbolic acts demonstrating support or opposition. Personal and group letters, lobbying, petitioning, picketing, wearing symbols, marching, singing, and teach-ins are all examples of this level of struggle. Beyond protest and persuasion are methods of noncooperation: strikes, boycotts, slow-downs, withholding funds, reporting "sick," walk-outs, and embargos. Moving beyond noncooperation are methods of nonviolent intervention: sit-ins, fasting, forming shadow governments, underground newspapers, electronic media, and acts of civil disobedience. All of these methods of nonviolent direct action can be seen as acts

along a spectrum from cooperative discussion to nonviolent intervention, expressing increasing degrees of physical confrontation. The next step would be violent intervention, leaving the pacifist range of peace-building options.

Just as pacifists may be situated at any point along the spectrum of an antiwar continuum, they may fall at any point on the positive peace-building spectrum. There seems to be no necessary link between positions taken on the two scales. For pacifists, leaving the nonviolent range of peace-building options is tantamount to surrender because it amounts to betraying one's ideals in pursuit of them. But perhaps this is too quick. After all, there are legitimate versions of pacifism where a small-scale resort to personal violence, while never desired, can be warranted – like force used by the police to apprehend a criminal for trial. Still, no pacifist can resort to war.

When warism is recognized and taking war for granted is challenged, a variety of pacifist positions regarding both antiwar and positive peace aspects can be seen. As it turns out, pacifism is not naïve and unrealistic at all. In fact, all of us are pacifists to some degree since all of us oppose violence as a means of interaction in many parts of our lives. Building on this, active nonviolence can expand our capacity for peace building and make us increasingly wary of war and violence as solutions to conflict.

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Pagano, Francesco Mario

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It is difficult to address Mario Pagano (1748–1799) without immediately making reference to his personal destiny and without having in mind his tragic end, hanged by order of the Bourbons of Naples after the failure of the Parthenopean Republic in 1799. Despite the failure of the Masaniello Revolution of 1647, because it started from the lowest levels of the population, it does not find any echo in the *ceto civile*, still at the embryonic stage and terrorized by the violent expression of political freedom. Conversely, the revolution of 1799 failed because it was imposed from above and was unable to find anchorage in the Neapolitan plebs, who finally supported the reactionary policy of the Bourbons of Naples. The tragic fate of Pagano is marked by the republican revolutionary commitment, which did not find in the Neapolitan people the reins for effective enlightened policy. But the outcome of the Parthenopean Republic should not hide the long gestation period of Mario Pagano's political and legal work, some of the most remarkable of the southern Italian Enlightenment, at the intersection between political philosophy and philosophy of law.

Born in Brienza, near Potenza, Pagano moved to Naples early on to study law. In Naples, he benefitted from the dual influence of Giambattista Vico, as well as the teachings of Antonio Genovesi. This dual influence gave Pagano the very structure of his political thought. From Vico, he inherited the framework of his future conception of history and law, while from Genovesi he inherited the requirement of an effective and practical civil philosophy, capable of uniting the political community. Having completed his law studies, Pagano obtained a position as lecturer at the University of Naples and began

to practice as a criminal lawyer. His specialization in the field of law allowed him to frequent Gaetano Filangieri, to which he dedicated a play, *Gli esuli tebani* (1782). He obtained the Chair of Criminal Law in 1785 while continuing his occupation as a lawyer.

In parallel with these activities, Pagano developed his great work, the *Saggi politici*, of which there are two editions, the first published between 1783 and 1785 and the second, exhibiting a more radical tone, between 1791 and 1792. This work of premier importance to the Neapolitan Enlightenment, soon after blacklisted (1795), appears as the sedimentation of Pagano's political and legal experience, but also as the influence of the illuminated Neapolitan (Vico, Genovesi, Filangieri) and European (Montesquieu, Rousseau) tradition. For Pagano, there is an analogous relationship between ontogenesis and phylogenesis; in its development, humanity follows the same laws presiding over the development of a particular individual. Likewise, the natural world and history have analogous processes and follow cycles that govern the birth, development, and decline of all human society, thus taking up Vico's theory of "corso." In this rather deterministic scheme, the role of political action remains rather limited. Only great physical catastrophes can change the course of history, for example, by annihilating an entire civilization. There is no doubt that the peculiarity of the natural situation of Naples, a city subject to the constant risk of Vesuvius' eruption, terrible epidemics, and horrible events like the many earthquakes in Calabria, may have influenced this conception of history.

This general structure of history, however, does not prevent Pagano from proposing a true typology of political regimes based on the role of civil liberty, a clear echo of the Neapolitan Enlightenment. In this typology, the republican model, conceived as a voluntarist enterprise, notably through the action of the state, is the most capable, unlike the monarchy and the aristocracy, of promoting civil liberty as a long apprenticeship and construction process. The prominence of the republican model brings Pagano into a lively Neapolitan tradition from the moment of the Masaniello Revolution, especially in Giuseppe Donzelli's *Partenope liberata* (1647), which already evoked "the beautiful and sweet sound of the word Republic."

Alongside this masterpiece of political philosophy, Pagano devotes many texts to the criminal question, in line with the thought of Montesquieu and Beccaria, among which his *Considerazioni sul processo criminale* (1787), *Principi del penice penale* (1803), and the *Logica de' probabili applicata a' giudizi criminali* (1806), published after his death. Pagano's thought here is very complex and follows several lines of reflection. The principle is to guarantee equity while developing a criminal guarantee mechanism. From this point of view, Pagano rejects any form of punitive justice, which is both useless and illegitimate. His thinking, however, is not content with being critical but explores the conditions of possibility of the inquisitorial procedure and more generally focuses on the issue of establishing judicial evidence.

Already denounced for his revolutionary and republican ideas and forced into exile, Pagano returned to Naples following the conquest of the city by French revolutionary troops. He occupied several positions in the provisional government, notably as Chairman of the Legislative Committee. His participation in the Revolution of 1799, although short, was intense and an opportunity for him to implement many reforms, aimed in particular at reforming a kingdom still based on neofeudal structures and to write a "Project of Constitution" (April, 1799). The departure of the French and the return of the Bourbons saw Pagano placed at the mercy of his political opponents. He was taken prisoner and publicly hanged in the autumn of 1799.

The thought and figure of Mario Pagano had an unequal posterity. Pagano remains little known outside Italy, and his posterity is linked to the rediscovery of Vico in the nineteenth century; he was indeed one of his best-known heirs, like Vincenzo Cuoco. On the other hand, even if his fame is not that of Beccaria, for instance, Pagano had a real influence in the reflection on criminal law in nineteenth-century Italy.

Cross-References

▶ Constitution
▶ Constitutionalism

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Paine, Thomas

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Introduction

Paine (1737–1809) was born in Thetford, England, on February 9, 1737. Son of a Quaker craftsman, he embodied a "man of the people" and he always thought of the people (feeling fully part of it), aiming at a liberation that he conceived as his own and a collective claiming.

After years filled with hardships and misfortunes, which, however, brought out his extraordinary political ability and his inclination for ideal thought, he migrated to America where he took a leading role in revolutionary events.

He felt he was a living part of the people, made up of *common men*, whose potentials and virtues he enthusiastically and warm-heartedly exalted – at times almost prophetically – sanctioning the legitimacy and the absolutely positive value of sovereignty: as a matter of fact "popular sovereignty" is one of the core issues of his theoretical-practical analysis.

By appealing to *common sense*, he intended to make the people conscious of their capacity for autonomous political initiative, and this implied dropping the veil of abstraction that covered the bases, i.e., the historical and concrete origins of political theory. *Common Sense* was precisely the title of his work, published in Philadelphia in January 1776: within a few weeks, almost half a million readers bought it, becoming in this way the first bestseller in American history, as well as a catalyst for change in the course of history.

In the same spirit – namely, beginning from factual reality and empirical evidence, intended as both as a starting point for the research and a posteriori control of its validity and effectiveness (an attitude strengthened by his interest in Newtonian science) – he moved to France (also as he was threatened with prison in Britain) to take part. Here, on August 26, 1792, he was one of the

foreigners declared French citizens as a recognition for their contribution to the cause of freedom and a few days later he was elected to the National Convention in four departments.

Paine thus tested his own ideas while, at the same time, revising some of his hypotheses, showing his tendency to prioritize the adaptation of the available theoretical tools to the urgencies of the political battle, even to the detriment of the internal consistency of the discourse. In his view, action always came first, which was, however, always ineluctably accompanied by intense reflection.

The question of rights, driven by revolutionary events, became the core of his commitment. Without ever severing the ties with his homeland (he always tried to start an authentic process of political and social transformation in England too), he represented a sort of "eclectic 'political' hybrid," capable of bringing together within himself, and in his thought, the tensions of an entire era: those of democratic revolutions.

The audacity of his theses, argued through reason and sustained with intense passion also from his Quaker faith and training, is, for the era in which they developed, undoubted. They covered: the abolition of hereditary monarchy and primogeniture; the abolition of slavery and the death penalty; the introduction of the inheritance tax and elaboration of measures – a real program – of social assistance; and naval disarmament and the proposal of an International Association for the Rights and Trade of Nations.

After narrowly escaping execution by Robespierre's followers – he had declared his opposition to the death penalty for Louis XVI because of his Quaker faith – he returned to America in 1802, where he realized how the revolutionary ideals had come up against major obstacles to their vitality and where he died in poverty in 1809.

Rights

Rights, as well as the decisive thrust for his political battles, are overwhelmingly prominent in Paine's conceptual horizon: his theory of society and government is entirely elaborated in terms of rights. It has justly been observed that Paine can be defined as a rights theorist who stands on the border between the natural rights tradition and the human rights one. This location is, in many ways, original, as well as full of fertile tensions, within the framework of eighteenth-century legal-political philosophy and, more broadly, of modernity.

One can schematically identify three key steps in his elaboration: (a) the distinction/connection between *natural rights* and *civil rights*; (b) the "evolution" from natural rights to *human rights*; and (c) the extension of natural rights (understood as human rights) to the economic and social dimension, which lays the foundations for the theorization of *social rights*.

Preceded by a parliamentary speech on February 9, 1790, Edmund Burke's *Reflections on The Revolution in France* was published in England on November 1, 1790. Destined to radically transform the public's opinion regarding this author, this work sparked an ideological debate of hitherto unseen proportions: at least six hundred pamphlets contributed to this debate, very few of which sided with Burke, who had previously declared himself in favor of the American Revolution.

Of the many responses to *Burke's Reflections*, the one that had the greatest public success was undoubtedly Paine's *Rights of Man*, published in two parts: the first part – dedicated to George Washington, commander-in-chief of the American army in 1775, president of the Constitutional Convention of Philadelphia (1787) and later first president of the United States of America (1789) – in 1791, while the second, devoted to Marie-Joseph Paul Yves Roch Gilbert du Motier, Marquis de Lafayette, a French general and politician with US citizenship, protagonist of both the American Revolution and the French Revolution, in 1792.

This was an extensive, historically documented and philosophically argued defense of the *French Declaration of the Rights of Man and of the Citizen*, seen as a continuation of the paths opened up by the US *Bills of Rights*.

The entire project of the *Rights of Man* consists of an attempt to reconcile the ideas of the

American and French revolutions and, secondarily, to spread them to Great Britain, so that even here the fuse of the revolutionary event could be lit.

Firstly, the starting point of Paine's reasoning is the reference to nature. Before man has civil rights, which are the product of history, he has natural rights that precede them, and these natural rights – within a justification of a purely normative nature – are the foundation of all civil rights.

The Burkean reasons of heredity and history are contrasted with those of nature and the – "practical" – reason that is expressed in it.

The shift from natural rights to civil rights is characteristically carried out through the recourse to the category of power: since men are unable to preserve all the rights they have in nature as they do not have the power, they renounce those rights that only the constitution of a "common power" allows them to keep. Thus man enters society so that his rights can be better protected.

In *Rights of Man*, Paine paradigmatically writes: "Human natural rights are the foundation of all civil rights."

This crucial passage may be even clearer if read it in connection with a page from a few years earlier in a letter to Jefferson in which the distinction between "natural rights" and "civil rights" is already prefigured, following the Lockean inspiration:

> For every civil right, there is a natural one that underlies it, and this includes a principle of mutual guarantee of those human rights. (T. Paine, *On First Principles Government*, in *Thomas Paine reader*, ed. By M. Foot, I. Kramnick, Harmondsworth, Penguin Books, 1987, p. 464)

Thus, two salient questions emerge, which are still crucial for the legal philosophical theory of fundamental and human rights: the issue of the foundation of rights and that of their exercise, specifically connected to the idea of society prefigured by Paine's theory of rights.

Secondly, Paine's reflection is also characterized by a fundamental shift from natural rights to human rights, in which one can indeed trace a common inspiration in the various US *Bills of Rights* and the French Declaration of 1789.

With his action and his work, Paine represents the continuity, "the bridge," between the two revolutions that had the first constitutional charters as their legal result.

He had no doubt that the one was the unfolding of the other and that, in general, the American Revolution had opened the door to European revolutions: the inspiring principles were identical as well their foundation, namely, natural law; their outcome was identical, *government* founded *on the social contract*, that is the *republic*, which forever rejects the law of inheritance, and *democracy*, as the full expression of the will of the people.

Thirdly, the originality of his thought also consists of the presentation of another fundamental topic which is inherent to the question of the effective protection of human rights and, therefore, to their concrete rooting in history and in its upheavals.

This is a process that undergoes an emblematic evolution in Paine: it refers to the emergence of a different idea and theory of the state, which is intertwined with the articulation of the theory of rights and brings out the question of the effectiveness of the principle of equality, in the context of its relationship with freedom.

The idea of equality had already moved and oriented 'his' [se erano di Paine] first writings in "The Pennsylvania Journal," from those *condemning black slavery* (African slavery in America in 1774) to those against *female discrimination* (An Occational Letter on the Female Sex of 1776): these texts anticipated fundamental civil battles that marked American history as a "story of the expansion of freedom," well beyond the War of Independence and Paine's time.

Paine develops the idea that there are natural rights whose exercise implies a particular *positive* intervention by the State: the law is consequently used in what in today's terms would be called a promotional function, providing for the action of public authorities to satisfy the needs of individuals through law, thus establishing a new dimension in the relationship between law and freedom as well.

Therefore, freedom is not given only *against* the state, as in the first liberal theorizations, but

also *through* its institutions. Paine becomes fully aware of this on French soil, redefining some arguments already contained in *Common Sense*.

The "language of rights" becomes the "language of politics," which everyone, starting with the *common people*, can use: in his work, Paine seems to summarize the possibility of coexistence, and mutual support, between the *different forms of rights*, usually divided into the categories of – in temporal succession – civil rights, political rights, and social rights.

Rights do not constitute an exclusive defense of the individual, a "screen" behind which to entrench selfish personal assertion. The rights of "the others" must be respected and indeed placed above any other action.

The correlation between rights and duties leads also to a revision of the image of the theory of rights as a proposal – typically liberal, individualistic, and bourgeois – of indiscriminate enjoyment of rights by distinct and strictly separated citizens, where only individual interest acts as a cement of the social order.

This approach directly affects the conception of property that emerges, although not always in a linear manner in Paine's work.

In his thought, property is placed in a context of expansion of equality, within a political program that makes it possible, starting from defined *ethical claims*, their universal "propagation," and, at the same time, their "limitation" precisely for reasons of social justice and, therefore, of protection and enhancement of sociability, solidarity, and mutuality among the citizens of the republic.

Paine, together with other Enlightenment thinkers engaged in the French Revolution (emblematic, in this regard, is the figure of Condorcet), thus stands in defense of social security and compulsory education, concretely prefiguring the idea of social rights and – according to some interpreters, who dwell above all on the theses contained in *Agrarian Justice* (an essay written in 1795, but published in 1797) – of a basic income.

As Gregorio Peces-Barba Martínez has suggested, he can therefore be counted as both a "theorist of human rights" and a "theorist of modern solidarity" (G. Peces-Barba, Theory of fundamental rights [1991], edited by V. Ferrari, tr. it. by L. Mancini, Milan, Giuffrè, 1993, p. 248).

Constitutions

Within the literature on constitutionalism and models of constitution, there are frequent references to Paine's thought, often considered a central pivotal figure in focusing on the very idea of a constitution.

What can be defined as the *Painian paradigm* contains the principles of modern revolutionary constitutionalism and specifies its contours especially when read against another fundamental paradigm: the one proposed by Burke.

The analysis of three structural characteristics of Paine's constitutionalism – the meaning attributed to the *constitution*; the *distinction between fundamental laws and ordinary laws*; and the question of *generations* – shows how the underlying idea of sovereignty has its own particular significance.

The meaning that the constitution has in Paine's conceptual universe and, consequently, the relationship between it and government, is clearly indicated by the following passage, which will acquire a truly paradigmatic value:

> A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government. (T. Paine, Rights of Man (1791) in T. Paine, Rights of Man, Common Sense and Other Political Writings, ed. by M. Philp, Oxford, Oxford University Press, 1998, p. 122)

The constitution contains the principles on which the government is to be based, the way in which it is to be organized; it is therefore paradigmatically understood as a "grammar" (ibid., p. 171). The constitution is the rule of politics, the fundamental and original contract that enshrines the supremacy of law and ensures the guarantee of rights in a society, and through which, at the same time, government is established.

This is where the *popular* dimension of sovereignty comes into play, bringing out the second

cornerstone of revolutionary constitutionalism: the structural distinction between fundamental and ordinary laws. Drawing on the criticism of the *levellers*, Paine conceives of the *Constitution as a* higher *law*. The constitutional text is the fundamental law of a country, and on the basis of its principles, it will constitute the government at a later stage.

The two moments are clearly separated, and in this way they become autonomous: the constitutive one in which the will of the people intervenes directly and through which fundamental rules and principles are given and that of the formation of the government that is to be established in compliance with the constitutive law.

Well-known in this regard is the formulation Paine proposes: "A Constitution is not the act of a government, but of the people constituting a government; and the government without a Constitution is power without right" (T. Paine, *I diritti dell'uomo*, II, p. 256).

The importance of the will of the people is enshrined in the hierarchy prefigured by Paine: the highest level is represented by the constitution, the people are the primary root of power and its justification, and its *fons et origo*.

The central assumption thus becomes the distinction between *constituent power* and *constituted* power, which is already mentioned in *Common Sense* but which finds its complete structuring in the second part of the *Rights of Man*. The distinction between constituent power and constituted power is related to the distinction between the original character and the organized character of the people that becomes a "nation."

The unity and will of the nation is the premise, the dynamic basis of Paine's constitutionalism, which is thus linked to the famous theses developed by Emmanuel Joseph Sieyès and indebted, in many ways, to Jean-Jacques Rousseau; in this respect, the cosmopolitan inspiration of the author of works such as *The Age of Reason* (1794) or *Letter to Abbé Raynal* (1782) must grapple with an effort of reconciliation that is by no means simple.

The third element that deserves to be examined is what could be defined as the "knot of generations," a knot that Paine untangles in a different way from Burke, manifesting an opposing perception of temporality that has important effects on the sphere of sovereign power and of its limitation, as well as more generally on the very idea of law and its meanings.

In Paine's view, the revolution that leads to the writing of the constitution becomes an opportunity to start a time that is completely different from the past, a time that can be freely constituted by those who are destined to live it. Thus, the web of relationships bound to tradition is torn apart and the authority of the *people* – the normative source of every sovereign power – can be consciously and voluntarily opposed to that of the *crown*: hence the opposition between the republican and democratic form of government and the monarchical form of government.

Such a perspective, constitutively open to the future, outlines a specific interpretation that brings into play the relationship between the scanning of temporality and the relationship between generations and the constitution. According to Paine, generations change, and with them, conditions, opinions, and judgment criteria: the arbiters of the decision are not the dead, but the living people. Paine expresses a forceful idea recurrent in the work of the French Constituent Assembly and that Condorcet also makes his own to avoid attributing a character of "sacred" fixity to the constitution and the declaration of rights, supporting its "open" character: the idea that each generation is free and sovereign in the face of the past.

From this point of view, the republic is the best form of government: it accords with nature and reason and allows for a change of rulers through the instrument of the vote, whereas kings can only changed "by arms"; this, in his opinion, is also the demonstration of how the republic is a form of power organization based on non-violence and on the potential of the public and political sphere.

Where there is a republic there is no slavery, there is reason and not ignorance, there are principles – which underpin the authority of rights – and not mere will.

The republican form of government is therefore linked, in Paine's perspective, to a precise theory of progressive civilization, that is, of actual progress.

A crucial issue – in the wake of constitutionalism – is that of the limitation of power. The draft of a new Constitution – a collective text, drafted by Condorcet and to which Paine contributed as a member of the Committee for the Constitution (established in October 1792) – proves that the problem of the limitation of power, in order to avoid the despotic degeneration on the part of the people and their representatives, was the subject of discussions by the group in which Paine participated even before the Terror.

He probably did not participate in the material drafting of the Girondin constitutional project due to his lack of knowledge of French: however, he sent to the Constitution Committee of which he was a member (together with Condorcet, Barère, Brissot, Danton, Gensonné, Sieyès, Vergniaud, and Petiòn) some reflections on the distribution of powers delegated by the nation.

Many Relationships and Different Legacies

Paine, described as "the first great internationalist of liberty" and a "citizen of the world" ante litteram, was able to create an extraordinary network of relationships over the course of his life: the English radicals, among whom John Priestley and Richard Price, William Godwin, and Mary Wollstonecraft stand out; the constituents of Pennsylvania (with whom he drafted one of the first constitutions) and the Founding Fathers of the United States such as Thomas Jefferson and Benjamin Franklin; the federalists (with whom he engaged in close discussions on institutional arrangements); Condorcet and the other exponents of the Girondist circles; and figures such as Lafayette – like him a major protagonist of both revolutions, the American and the French – and the deist Nicolas de Bonneville are just some of the figures that make up the mosaic of relationships (of friendship and collaboration, but also of clashes and controversies) that Paine's life offers to the gaze of "posterity" (an expression particularly dear to him, as a revolutionary as he always remained).

For this reason he was called "the first great internationalist of freedom," a "citizen of the world" *ante litteram.*

Even after his death he did not cease to be "present" – he who hated the idea that the dead in some way influenced the behavior of the living and who untied the "knot of generations" in favor of the future – in disputes and controversies, as a reference figure for some political cultures (such as the radical and the rising socialist culture) or a polemical target for others, to the point of becoming a sort of *political saint*, a "prophet" (and a "martyr") wrapped in a legendary aura.

It even became fashionable among some people on the right in Britain to have the name of Thomas Paine's name printed on the soles of their shoes, in the hope of crushing his "pernicious influence." But his work remains etched in the collective and popular memory: he is depicted, for example, on a postage stamp in the United States and in an imposing statue in Paris.

On the level of the history of ideas, albeit with different nuances, eminent twentieth-century philosophers of politics and law such as Carl Schmitt and Jürgen Habermas, Norberto Bobbio and Isaiah Berlin, Michel Foucault and Luigi Ferrajoli, but also analytical scholars of Paine's work have centered their interpretations on a passage considered emblematic of *Common Sense*: "Society is produced by our needs and the government by our wickedness; the former promotes our happiness positively by uniting our affections together, the latter negatively by curbing our vices. One encourages relationships, the other creates distinctions. The first protects, the second punishes. Society is a blessing under any conditions; government, even in its best form, is but a necessary evil."

Giving absolute centrality to this expression, which is questionable if one thinks of his other writings subsequent to the 1776 masterpiece in which the positive function of institutions and the state is emphasized, Paine has become one of the icons – a "type-formulator" – of a certain way of understanding liberalism, a "pure" liberalism, in which government is paradigmatically considered exclusively as a "necessary evil."

The idea of rights and constitutions that emerges from Paine's pages makes another and different interpretation possible, rooted in the results of the eighteenth-century revolutions, in the perspective of equality becoming practice, well beyond the canons of liberalism.

The persistence and impact of his works, as well as the ambivalence of their interpretations, went far beyond his time, as witnessed by the direct references in official speeches, certainly not devoid of a certain ideological instrumentality, on the part of US Presidents such as Theodore and Franklin Delano Roosevelt, Woodrow Wilson, and Ronald Reagan up to Barack Obama, but also references in famous texts of American popular culture such as the *musical* "1776" and Bob Dylan's song, *As I Went Out One Morning*. The inspiration of the song almost certainly dates back to 1963 when Dylan received the "Tom Paine Award" from the *National Emergency Civil Liberties Committee* for his contribution to the cause of civil rights; on the more strictly juridical level, this is attested by the numerous references to his theses by the supporters of the *basic income*, of which he is seen by some interpreters as the first theorist or in any case a forerunner.

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Pareto, Vilfredo

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Introduction

Vilfredo Pareto (1848–1923) was a Franco-Italian intellectual who had originally studied Mathematical Sciences and Engineering. He was a professor of Political Economy at the University of Losanna, filling the chair left by Léon Walras, and taught Political Economy and Sociology at the Faculty of Law at the University of Vaud, both in Switzerland. Among his important contributions to Economics are the refinement of the statistical method and collaboration in the development of the modern approach to the economic theory of rational choice (cf. Ranchetti 2000).

In the fields of Sociology and Political Science, along with Gaetano Mosca, he worked in particular on refining the theory of elites, fundamental for the autonomy and institutionalization of Political Science as an academic discipline in Italy in the late nineteenth and early twentieth centuries (cf. Bobbio 2005).

Among his main works are *Cours d'économie politique* (1896), *Systèmes Socialistes* (1902–1903), *Manuale di economia política* (1906), and his masterpiece *Trattato di Sociologia Generale* (1916), in which the author developed a series of conceptual and methodological reflections in a general theory of society.

The Logical-Experimental Method and Social Analysis

Under the paradigm of natural sciences, the search for scientific objectivity in social analysis led Pareto to the conception of a new method capable of overcoming a priori concepts and values, which he considered limits of the sociology as it had been formulated until then, especially by Comte, Durkheim, and Spencer.

Based on this reworked positivism, Pareto proposed the logical-experimental method, developed from the French physiologist Claude Bernard's methodological notes (Cf. Pareto 1980). According to Pareto, reason determines social conduct only to a small degree, above all, in the economic sphere. Nonrational motivations play a more important role in human conduct. However, individuals tend to give a logical veneer to their actions and for this reason, it is essential to consider feelings, values, and customs in social analysis (Cf. Pareto 1923).

In view of this, Pareto proposed two concepts for the analysis of non-logical actions: residues and derivations. Residues were elements related to non-logical psychic structures, that is, instincts. Pareto classified residues into six types, whose combination and individual distribution in the collectivity would determine heterogeneity and social balance. Derivations, on the other hand, consisted of different verbal means through which individuals provided a posteriori logic for what, in fact, had no factual correspondence.

Residues, Derivations, Law, and Policy

Guided by the logical-experimental method, Pareto worked in different fields of social analysis. In addition to economics, sociology, and politics, it is undeniable that legal principles and discourses were part of his reflections on human actions, state, and social balance. For Pareto, while legal norms were generated by the manifestations of the latent feelings in society, legal discourse would be constituted from the derivations. Based on the analysis of Roman law, he criticized, for example, Henry Summer Maine, whose conception of law suffered from intellectualism because it was defined as a set of "thought" norms. For Pareto, on the contrary, the legal principles that guide legislators resulted from a set of historical processes that spontaneously reproduce themselves over time and that are permeated with feelings and values, expressed by the residues, and, therefore, neither objectively nor abstractly thought. Law was thus be "a system that adapts to an environment (or to a state of affairs)" (Aqueci

2000). In this way, only later would the residues that give rise to standards be rationalized and presented as logical, in the form of derivations.

In the realm of politics, the realistic perspective inherited from Machiavelli, connected to the theory of residues and derivations, was central to the definition of the theory and circulation of elites. In the Paretian system, the elites are made up of all those individuals who managed to reach the highest rates in their specific area of activity, thus assuming privileged places in the social hierarchy (Cf. Pareto 1923). The distinction between governing elites and the governed mass is based on individual capacities, determined by different combinations of residues, which remain more or less stable over time. Thus, although the classes in power change, the *realtà effettuale* in substance remains the same, that is, "in reality there is no more than the men who govern and those who are governed" (Pareto 1987). The realistic basis of politics, in this sense, can be found not be in the legal constitution of the State, a mere abstraction, but in the perennial division between rulers and ruled. The disruptive replacement of the ruling elite occurs when the residue responsible for the necessary energy and courage for the command decreases among its components. Therefore, the ruling elite falls at the emergence of a new elite capable of the repeated use of force and weapons. This disturbance in the social balance can be avoided, however, insofar as the ruling class becomes able to assimilate active elements among the governed mass, or, in other words, in the event of a gradual "circulation of elites" (Cf. Pareto 1923).

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Partnership Conception of Democracy

► Dworkin, Ronald: Partnership Conception of Democracy

P

Pascal, Blaise

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Introduction

Blaise Pascal (1623–1662) was born on 19 June 1623 in Clermont-Ferrand. His father Etienne looked after his scientific and religious education. The former was highly empirical in its inspiration, while the second was influenced by the thinking of Saint-Cyran and increasingly came to feature strict Jansenist traits, developing first in Paris and then in Rouen, where his father had been appointed king's commissioner in 1639. His so-called "first conversion" dates from 1646.

However, it did not have a profound influence on Blaise, who was involved above all in his scientific research at this time, most noteworthily the work relating to vacuums, carried out in the footsteps of Torricelli. He published *New Experiments Concerning the Vacuum* (1647). It was a period of intense engagement, with serious consequences on his fragile physique, and Pascal had to accept the doctors' advice to curb his activities. In this period, he met Descartes, but the pair did not agree over scientific matters. What has been defined as the "worldly" period of his life took place between 1647 and 1654 when he frequented milieus close to libertinism and skepticism. He devoted himself to calculating probabilities and infinitesimal calculus. However, this did not mean that his thinking was lacking a religious component, as shown by his correspondence to his sister Gilberte and brother-in-law Monsieur Périer (letters of 26.1., 1. 4., 5. 11. 1648 and 17.10. 1651 on occasion of his father's death). He wrote to Christina, queen of Sweden, praising her union of "sovereign authority and solid science" (June 1652).

But it was the night of 23 November 1654 that marked the direction his life would take from then on. Pascal left his recollection of this in *The Memorial*, whose fragmented language seeks to say the unsayable in describing the mysterious caress of Grace at work in him, as he decides to take his leave from the world once and for all: "Forgetting the world and everything except God". But he also feels the fear and trepidation that God, owing to the sins that Blaise feels he has committed, will forsake him: "My God, will you abandon me? [. . .] I became separated from him. I fled from him, denied him, crucified him. May I never again be separated from him."

From then on, his whole existence would be devoted to religious meditation, which he outpoured into the fragments of the *Pensées*, that is, what remains of the apologetic work he had planned to assemble. In 1656 he retired to Port-Royal, where he stayed for 3 weeks, meeting and conversing on several occasions with its director, Monsieur de Saci. Of these meetings, we have been left with the report drawn up by de Saci's secretary, Nicolas Fontaine. In this exchange, Pascal compares three great conceptions of the world, or should we say, three ways of living: Epictetus's stoicism, Montaigne's skepticism, and Christianity. Epictetus knew "a person's duties," making them depend on God, whom he saw as our "principal aim." People had to "sincerely" obey him while seeking "wisdom" but not fearing death or possible hurtful events. Nonetheless, he did not know human beings' "powerlessness" and believed that God gave people "the means to satisfy all their obligations through their own strength," from which it can be deduced that "we can become perfect" (Pensées, 312–316). Montaigne instead wanted to "discover what morality reason should suggest without the enlightenment of faith" and highlighted that, as such, reason is bound to be lost; it is only by resorting to faith that reason can find its way and morality have a basis (also 323–324, 327). The deduction is that theology "is the centre of all these truths" (329).

In sum, neither knew the truth. But in both there are elements and aspects that only the Christian vision may and can reconcile: We are great – here Epictetus is right – because we are able to know God; but, at the same time, we are wretched because, since the original sin, we have lost the initial uprightness of our faculties, reason and will, and replaced the love of God with a love for worldly property, letting ourselves be guided by concupiscence. And Montaigne, with his disenchanted skepticism and crude realism, has grasped this aspect, even though he did not manage to understand what in the *Pensées* Pascal would call the *reason of the effects*, namely, the reason why we suffer indigence and cannot exit this state without the help of Grace. Only through Christianity can the "opposites" be embraced, not by placing them in "the same subject," but in two different subjects, with "weakness" assigned to "nature" and "greatness" to "grace" (326–327).

The Clash with the Jesuits

Between 1756 and 1757, encouraged by Arnauld and Nicole, two of the biggest exponents of Jansenism, Pascal wrote *The Provincial Letters*. These 18 letters (plus the fragment of a nineteenth) contain a firm and often ironic attack

against the Jesuits. There are three main reasons for Pascal's fierce criticism.

First: The Jesuits reason as if original sin had not gravely degraded human nature. Hence, in their opinion, it is still capable of good almost in its own right: In this case, Molina is a central author, because he sets out a moral, juridical, and political thought that is substantially in line with the idea that all people always have "enough grace to lead a pious life." As such, the Jesuits' morality "is entirely pagan," since, to be observed, "nature suffices" and "the law and reason are sufficient graces" for "virtue" (p. 707, V).

The second reason is that, given these presuppositions, they foster permissive morals: "since Evangelical or severe maxims are suitable to govern a certain kind of people, they make use of them on those occasions when it is to their benefit. But as these maxims do not fit the intents of the majority, in the face of this majority they abandon them, in order to keep everyone satisfied. This is why, having to deal with persons of all sorts of situations and belonging to such different nations, they need to have casuists suited to all these diversities."

The third reason is that they aim to influence political power, using religion as a means to this end: they have become the confessors of kings, and the noblemen and women of high society. Hence, the Christian religion has become an ethic that can adapt to all occasions (this is what the casuist art consists of: being able to bend the Christian principles to whatever the circumstance, justifying behavior that cannot be deemed to follow the genuine Christian word).

Between 1657 and 1658 he drafted the two fragments *Of the Geometrical Spirit* and *The Art of Persuasion*.

The Pensées

Around 1656–1658 he began to gather and assemble materials for the apology. It is probable that he presented a first project in Port-Royal between October and November 1658, of which we possess the report by Filleau de la Chaise, only drawn up 10 years later, however.

When Pascal died on 19 August 1661, what remained of the apology were scattered fragments with no order, partially tied in bundles. Here, it is impossible to reconstruct – it has indeed not yet been clarified and perhaps never will be – how this material was to be arranged once collated in a coherent and definitive manner. The state in which they were found and the many manipulations that they have undergone do not allow a sufficiently certain reconstruction, even though many and convincing interpretations have been proposed over time. As Jacques Chevalier has authoritatively put it, while we may be able to understand the *dessein* (design) of the *Pensées*, the plan of the work will remain eternally obscure or nevertheless not very clear. Therefore, it is worth dwelling on the first element, seeking to sum up the fundamental contents and the objective guiding the fragments by drawing from the edition by Chevalier based on the report by Filleau de la Chaise (Gallimard, Paris 1954).

As in every apology, the aim is to demonstrate the truth of Christianity and convince nonbelievers to recognize this truth. But the route that Pascal follows is completely different from traditional apologies. Indeed, the work planned by Pascal begins with the invitation for us to observe and understand our own "corruption," through our very "nature": We could almost say that Pascal adopts the empirical methodology used in his scientific experiments. We can hide this corruption from ourselves, but this does not change anything. The reality is that we are prey to "self-love," which brings us to place ourselves before the others and drives us to consider them means for our own selfish ends; but, since others operate in the same way too, conflict is inevitable. Furthermore, the contrast between being and appearing is inevitable too, because all people tend to hide their defects in order to come out best in the fight (*Letter upon the death of his father*, 24.9.1651 and *Pensées*, fr. 130–139). "We are not content with the life we have in ourselves and in our own being: we want to lead an imaginary life in the minds of other people, and so we strive to come across in a certain way. We constantly seek to embellish and preserve our imaginary being, and neglect the real one." We

would "willingly" become "cowards if we could thus gain the reputation of being brave" (fr. 145). We would also be happy to "joyfully" lose our lives "so long as people talk about it" (fr. 159).

"Pride" and "vanity" are the inevitable consequences (fr. 140–197). But that is not all: Human life is dominated by "imagination," which distorts the reality of things and is, by its very essence, mostly at least, a "deceptive" faculty, "mistress of error and falsehood" (fr. 104), since it builds fantastic worlds in which we remain imprisoned. And as we ceaselessly chase worldly property, we end up being constantly outside ourselves, concerned with the future or the past, and never the present, which is instead the only time when we are called upon to live (fr. 168). Pascal writes: "our desires make us imagine a happy state, because they add to the state in which we are the pleasures of the state in which we are not; and when we were to achieve those pleasures, this would make us no happier, because we would have other desires to match this new state" (fr. 167).

So, we become prey to a perennial, never-ending flight ahead in time, because once one goal has been achieved, another materializes to attract us: "We never keep ourselves to the present moment. We look forward to the future as if it were too slow in coming, as if to speed up its course, or we remember the past, to hold it down, as if it were too short-lived [. . .]. If everyone examined their own thoughts, they would find them all tied up in the past or the future. We hardly ever think of the present [. . .]. The present is never our goal." Indeed, future is the only aim, past and present are just "means" to get there. And so "we never live, though we hope to, and in constantly preparing ourselves to be happy, it is inevitable that we will never be so" (fr. 168).

We could stop to meditate over this condition of ours, but most of us do not and let ourselves go to "*divertissement*," which is not only play, but all activities that distract us and strip us of our self-consciousness. We are wrong to think that the essence of "*divertissement*" is what is at stake; in reality, it is the activity in itself, which causes stupefaction, makes us live on the surface, distances us from the truth (fr. 198–227). "We like nothing more than the fight, not the victory: we like to watch animals fighting, not the victor tormenting the loser; what did we want to see, if not the victory itself? And when it comes, we have had enough. It is the same in play, the same in the search for truth. We like to see the clash of opinions in a dispute; but not to contemplate the truth at all when it is found [. . .]. Likewise, in the passions there is pleasure in seeing two opposites collide; but when one dominates, it is nothing more than brutality. We never seek things, but the search for things" (fr. 203).

Therefore, since the original sin, we have been living in a "second nature" which dominates the "first," the one given to Adam and Eve by God and now lost, its place taken by "custom" and "habit." It is the same in law and politics too, where the systems vary from country to country: "A meridian decides the truth; fundamental laws change after a few years of rule; law has its time" (fr. 228). Moreover, differences in norms must not hide the fact that everywhere the political order is based on the same motives. Pascal left us few fragments on this subject, sufficient, nevertheless, to clarify how he sees the birth and development of the relations that distinguish this order.

Politics and the Order of Appearance

We have seen that the dominant trend among men is self-love; but if each of us followed it through, no form of coexistence would be possible: permanent conflict would be the order of the day. This is why, since everyone fears death and desires peace, egoism is limited and disguised, so that it is possible, on the outside at least, to create some order, which the authority of the state makes stable. Unlike Hobbes, it is not ultimately "fear of the sword" that keeps society united, but the capacity to self-regulate egoisms and particular interests. On the inside, *interiore homine*, concupiscence still dominates, but on the outside, peace somehow reigns. Thus, political order can be depicted as the *order of appearance*, an order in which *outside* and *inside* remain divided. So, from egoism made reasonable, "commerce" arises among citizens. Christians live in this order and obey the laws, but avoid the split that triumphs in other

members of society; indeed, they have no need to fake altruism, benevolence, charity, or care for the general interest, because they believe deeply in all these things and collaborate honestly with their neighbors. There is a fundamental difference, however, in that Christians know that this order is not just. In their faith, they await the order which will come after life, in which love, truly uniting the members in a sole "body," will provide the motive for the community of the saved: "To be a member is to have no life, substance or movement except through the spirit of the body and owing to the body. The member which is separated, no longer seeing the body to which it belongs, has nothing more than a being that is about to die and disappear. Yet it thinks it is a whole, and not seeing itself as part of the body on which it depends, it thinks it depends only on itself and wants to become the centre and body itself. [. . .]. Eventually, when it comes to know itself, it is as if it came back into itself, and no longer loves itself except as part of the body. It pities its past failings. [. . .]. By its own nature it could not love anything else but to achieve its own purpose and to subjugate that thing to it, because all things love themselves more than anything else. But, by loving the body, it loves itself, because it has no being except in itself, through itself and for itself: *Qui adhaeret Deo unus spiritus est*. [Those who are joined unto the Lord are but one spirit] (1 Cor. 6, 17) The body loves the hand; and the hand, if it had a will, should love itself in the same way that the soul loves it. Any love that goes further than this is unjust. [. . .]. We love Jesus Christ because he is the body of which we are members. All is one, one is in the other, like the three Persons" (fr. 710). It is Augustine's *Civitas Dei*.

In awaiting for the "celestial Jerusalem," where possible, Christians work to make those spaces of society conform to charity: Port-Royal itself, the common home of the Jansenists, was a demonstration of this, seeing as they did not only meditate and pray within its walls, but held schools for children there (resulting in *Logique de Port-Royal*, a work mainly by Arnauld and Nicole, which Pascal also collaborated in) and gave aid to the needy on a daily basis. Christian ethics have perhaps never been expressed better than by Pascal in this fragment "<I love all people as if they were my kin, because they are all redeemed. I love poverty because he loved it. I love property, because it gives me the means to assist the poor. I am faithful to everyone. I [do not] repay the wrong people do to me; but wish for them a condition like mine, in which you receive neither good nor wrong from no one. I try to be just, truthful, sincere and faithful to all; and in my heart I feel tenderness for those to whom God has joined me more closely; and whether I am alone or before others, I consider God's sight in all my actions, since he must judge them, and I have consecrated them all to him [. . .]>" (fr. 732) [The signs < > indicate that the fragment was then cancelled by Pascal himself].

Conclusion

Having said all this, now it needs to be highlighted that human nature is not all "meanness"; alongside this there is "greatness," which first of all consists of the ability to recognize that same meanness: "Human greatness is such because we recognize our meanness. A tree does not recognize its meanness" (fr. 255). And human greatness, its dignity, lies in "thought" (fr. 257–258, 264, 265). To think well is not only to reason correctly, but to make good use of the faculties that God gave us, fundamentally the "heart." Of course, reason is important but, as Descartes shows, it is the faculty to calculate, to establish coherence between ends and means. The ends, man's true and most important ends, instead reside inside us, in the "*coeur*": "We know the truth not only through reason but also through the heart" (fr. 479). We approach God gradually: "reasoning" has its role and makes us understand, for example, that it is more reasonable to wager on the existence of God than on his inexistence: "You have two things to lose: truth and good, and two things to engage, your knowledge and your beatitude; and your nature has two things to avoid: error and meanness. Your reason is not harmed more by choosing one thing or another, since a choice has to be made. That is one point resolved.

But your beatitude? Let us weigh up the gain and the loss by calling heads that God exists. Let us assess these two cases: if you win, you win everything; if you lose, you lose nothing. So, wager that he exists, let there be no hesitation!" (fr. 451). Reasoning also serves to bring man closer to God through reflection on our condition. But reason has insuperable limits, which only the heart can go beyond. Those who have received belief from God "par sentiment du coeur" are happy and convinced. Those who have not received this gift, can be given it "par raisonnement," while waiting for God to give it by delving into the innermost depths of human beings and touching that *organ of transcendence*: the heart. Not only is it impossible to get to God through reason alone (hence Pascal's criticism of the traditional metaphysical proof of God's existence [fr. . ..], but it does not serve for our salvation (fr. 481), because it does not involve man's profundity, that which, in himself, is more *intimate than himself*, as Augustine had written: "What a distance there is between knowing God and loving him" (fr. 476). And it would also be misleading to believe that we can give ourselves faith (remember the Jesuits), that we have the strength to deserve it through our actions and prayers; we have fallen and only divine mercy can pick us back up: "Faith is a gift of God" (fr. 480). Prayer itself is a gift of Grace: The law commanded what it did not give. Grace gives what it commands" (fr. 667).

But there is more and it is perhaps the aspect that distinguishes "grandeur" more than all the others: We can do what we want, distance ourselves from God and truth, live in concupiscence, but we will never manage to free ourselves from the desire for truth and true happiness: "We search for happiness and find only meanness and death. *We are unable not to want truth* and happiness, and are incapable of certainty and happiness." And this "desire" has been left to punish us and make us realize "where we have fallen from" (fr. 270: my italic). We are like fallen kings, because only a fallen king, as he experiences his condition of wretchedness, cannot forget that he was great.

In short, we should read the Bible as a book in which God speaks to us and in which we can find explanations for those "contradictions" that we live every day: We endlessly run around in search of rest, of a condition in which we could find peace, but, if by chance we find it, we are overwhelmed by boredom, restlessness, and desperation: here we are, before our nothingness (fr. 201). The exit is there, in front of us: We just have to listen to the word of God, but our hardened heart hinders this gesture of humility. We should be ready to listen, start to practice the deeds of religion, accustom ourselves little by little so that, with the help of God and the essential mediation of Jesus Christ, habit becomes belief (fr. 470).

The truth of religion definitely lies, as the Scriptures teach, in the miracles (fr. 620, 623–627 and fr. 745–768), prophecies (fr. 522–599), and, Pascal adds, in the perpetuity of the Jewish-Cristian tradition in history (fr. 776 *passim*). And yet those who read the *Pensées* realize that the journey they are invited to take up is, first of all, an existential journey, in which the dogmas are given their legitimate space, but what counts is the invitation for each of us to meditate on our condition and to reflect on the fact that Christianity is the only religion to have understood us and to have indicated the path to salvation: "There is enough light for those who desire to see him, and enough darkness for those of a contrary disposition" (fr. 1228). We must be touched and involved in the itinerary that Pascal indicates, we have to understand that the journey is a very real question of ourselves, that life is the object of the meditation proposed and that the most proper sense of thinking, the key to understanding and acting in the world, is openness to transcendence: "[. . .] Jesus Christ comes to tell us that we have no other enemies but ourselves" (fr. 651).

It is the start of the long journey of Christian existentialism.

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Introduction

Evgeny Bronislavovich Pashukanis (1891–1937) – in Russian, Евгений Бронславович Пашуканис – and his theoretical writings have gained an important place in the history of legal philosophy, the critical theory of law, and the Marxist philosophy of law. His emblematic book, *The General Theory of Law and Marxism. Attempt of a Critique of the Basic Legal Concepts* (1st edition 1924, 2nd 1926, 3rd 1927, and German translation/adaptation in 1929), continues to spark admiration and praise as well as debates and controversies to this day.

Pashukanis was born on February 11, 1891, in the town of Staritsa, Tver province, in a bourgeois family. His father, Bronislav Frantsevich, was a practicing medical doctor, born in Lithuania, and his mother, Sofiya Pavlovna, was a Russian from Saint Petersburg. In 1906, the Pashukanis family moved to St. Petersburg where his father became professor of medicine at the State University of Saint Petersburg. His mother became a member of the Russian Social Democratic Labour Party (RSDLP) in 1903. The mother's brother was Martyn Lyadov, a professional revolutionary who also became a member of RSDLP in 1903 and was said to have been a close collaborator to Lenin.

At the age of 17, Pashukanis became a member of RSDLP too and was soon elected as a delegate to the Central Committee of the Social-Democratic Workers' and Students' Youth in Saint Petersburg. After graduating from the Lentovsky Gymnasium, in 1909, Pashukanis entered the Faculty of Law (Jurisprudence) of Saint Petersburg State University. But he soon had to emigrate to Germany, as he came under police supervision as a participant in the anti-tsarist student movement. He continued his studies in 1910 at the Ludwig Maximilian University of Munich where he devoted his time to study law and political economy. More importantly, he studied Marx and Western-Marxism away from what Marxism had become in Russia. The years spend in Germany had a profound influence on the intellectual development of Pashukanis, as he became acquainted with Western legal philosophy. In 1914, he defended his doctoral dissertation, "Statistics of Law Violations Related to Labour Protection."

Pashukanis then returned to Russia and worked until 1918 as a freelance translator of books from German to Russian, at the same time as he was publishing his own articles. He is said to have joined the Russian Communist Party (founded 1912) Bolshevik faction of the Douma in a protest in 1914 against World War I. From 1914 to 1918, however, Pashukanis was closer to the Mensheviks, and, in 1917, more specifically to the Menshevik-Internationalists. He only joined the Russian Communist Party (Bolshevik) – RKP (B) – in 1918. He then began working as a "popular judge" in Moscow, and he was a member of the Cassation Tribunal at the All-Russian Central Executive Committee. In 1919–1920, he was the head of the department of justice of the Donispolkom.

From 1920 to 1923, Pashukanis worked in the People's Commissariat for Foreign Affairs as deputy head of the economic and legal department. He was there Chairman of the Commission on the Deprivation of Russian Citizenship of Persons Living Abroad, which oversaw a mass deprivation of citizenship. According to some estimates, about two million people were deprived of their citizenship based on their political activity against the regime. Pashukanis was also sent as an adviser to the Soviet embassy in Berlin and participated in the preparation of the Rapallo Treaty, concluded

between the RSFSR and Germany in April 1922. In 1922, along with the well-known lawyer, legal theoretician, and professor, Peter Stuchka (Pyotr Ivanovich Stučka; 1865–1932), Pashukanis organized a section of the general theory of law and the state of the Communist Academy. In collaboration with Stuchka and Vladimir Adoratsky, he edited the first Marxist "Encyclopedia of State and Law" in three volumes in 1925–1927.

Afterward, his career could be said to be more political, though Pashukanis never left the academic world. He was a member of the editorial boards of many legal and political journals, such as "Revolution of Law," "Soviet Law," "Bulletin of the Communist Academy," "World Economy and World Politics," and he was the editor of the review, "The Soviet State." He authored more than 100 intellectuals works on the general theory of law, state, and international law, history of law, and political doctrines.

In 1927, Pashukanis became a full member of the Communist Academy and a member of its presidium – later one its vice-president. In 1936, he was appointed Deputy People's Commissar of Justice (vice-minister) of the USSR, and he headed the scientific and methodological council under the People's Commissariat of the USSR. He was also a very influential member of the group of editors writing the Soviet Constitution of December 5, 1936 – also called the "Stalinist Constitution," which reinforced the repression and the despotism in the USSR.

Pashukanis was arrested on January 20, 1937 by The People's Commissariat for Internal Affairs (NKVD) and held in jail for 7 and a half months. On September 4, 1937, when he was 46 years old, he was sentenced to death by The Military Collegium of the Supreme Court of the USSR (VKVS) on invented charges of "participating in a counter-revolutionary terrorist organization." The verdict was carried out on the same day, and he was reportedly shot in the neck in the cellar of the NKVD headquarters, Lubyanka (Moscow). His remains were transported to the New Donskoy cemetery the same day. On March 31, 1956, Pashukanis was officially rehabilitated by the VKVS, the same institution that sentenced him in 1937.

1924 and "The General Theory of Law and Marxism"

Pashukanis's main work, *The General Theory of Law and Marxism*, published in 1924, is a masterpiece of legal philosophy. Pashukanis began the drafting of this work in 1920 and 1921 in Berlin. This book can be situated inside Western Marxism, as Party-Marxism and State-Marxism are totally absent.

In this book, Pashukanis announces that he wants to do for "law" what Karl Marx has done for political economy in writing *The Capital*. As Marx criticized the basic concepts of political economy, Pashukanis criticizes basic legal concepts like "legal subjects," "legal norms," or "legal relations." In the same way as Marx with his analysis of political economy pretended to say something about society and social reality, Pashukanis intends to say something about law as social relations and the material reality of law. In Marxian terms, the mentioned legal concepts belong to the material reality of society and are attached to the "production" and "reproduction" of society. Where Marx writes about "commodity fetishism," Pashukanis writes about "legal fetishism." In other words, as political economy fetishizes "the commodity," legal theory (and any ideological or political conception of the law) fetishizes "the law." The signification is that the "law" as an element of the material reality of society presents itself as independent and autonomous in necessary social relations. To believe that law is or relates primarily to ideology (F. Engels) or form an object of political will (Lenin) is thus a form of "fetishism," argues Pashukanis.

There is for Pashukanis no doubt that political economy studies something which really exists, and that the Marxist theory of law should equally study law as something existing. Therefore, his theory defends that all abstractions of the law should be studies to expose the real social forces taken place by them. He understands the study of law as an examination of what is happening in the existing social relations and in the social conditions of ordinary people. Pashukanis also defends that if you really want to change anything in a society, you can only do so by letting the people themselves change their social

relations and their social conditions. Nobody else can do it for them.

Pashukanis uses the term "legal form" as an expression of how social actors themselves create their "equality" and how other actors cannot intervene to create "equality" for them. The "legal form" is created as a social relation, analogue to commodity exchange, and located in the relationships between commodity owners. It is a form of equivalence that reflects the historical, economic, and political conditions where exchanges of legal positions take place. "Once the form of equivalent relationship exists, this means that the form of law exists, that the form of the public, i.e. state authority exists, which therefore remains for a period even when classes no longer exists" (1924: p. 47). In this way, Pashukanis identifies the "legal form" as built on equality between free and autonomous actors, and if the principle of equivalence is not respected, there is no law anymore. The withering away of state and law, as defended by Marx, can only take place "in reality" and is not object for political volition. If Pashukanis rebuts the view that law is capable of being manipulated by some dominant social classes, like the Bolsheviks, he also believes that planification and economic policy is more an economic strategy than a legal relation.

The Shift of Pashukanis's Theory and the Development of Stalinism

To "do as Marx did" has nothing to do with what Marxism became after the death of Marx (1883). Party-Marxism and State-Marxism had nothing to do with what Marx defended. Pashukanis introduced himself in 1924 as a Marxian troubleshooter. We do not have any proof that he had read György Lukács's (1885–1971) "History and Class Consciousness" (1923), nor Karl Korsch's (1886–1961) "Marxism and Philosophy" (1923). But the philosophy of Pashukanis quickly took a different path. From 1925 to 1929, he repeatedly retracted from his 1924 position, and from 1929 to his death in 1937 he showed his fidelity to an orthodox Stalinist conception of party control of the law.

The second edition of *The General Theory of Law and Marxism* (1926), without the original subtitle, and the article "Lenin and Problems of Law" (1925), are good examples of this change. In the book, Pashukanis added a preface and changed many parts of the text to praise Party-Marxism and its ideological approach to law. In the Lenin article, he argued for an approach to law loyal to the Party.

The ways that Pashukanis characterized the Party-takeover of Russia is a good illustration of his growing adherence to an ideology-conception of law. In 1924, Pashukanis writes that Russia is a non-capitalist society and that the Bolsheviks agents are working to change it into a capitalist one. In 1925, he says that Russia is a society under "cultural re-education." In 1926, Russia is rather a society trying to develop a new type of society. In 1927, he defends that Russia is constructing a "socialist ideology," and, the same year, that Russia is engaged in a "revolutionary ideological period." Gradually, Pashukanis abandoned his materialistic understanding of law for an ideology-conception where the outcome is the rise of a "proletarian law" in the hand of the new oligarchy.

Joseph Stalin took power in the USSR after the death of Lenin in 1924. In 1928 and 1929, all powers were in his hands. The political and legal conditions then changed radically and Pashukanis followed the stream. He was an active promoter for cleaning universities of unwanted professors. For legal philosophy and for legal theory, the consequence of the Stalin period was submission. Pashukanis was one of those theorizing this submission under two central concepts: *zakonnost* (fidelity to State-law) and *partijnost* (fidelity to the Party). Legal theories, including his own, he argued, should be understood and promoted within the scope of these two concepts.

Pashukanis became a champion of planning legislation and State-law – in other words, he defended a *zakonnost* philosophy of law. The requirement of *partijnost* in legal philosophical matters became particularly important to him. The fidelity to the Party (and to Stalin and the Stalinist autocracy) was a political and moral obligation, and no writing on legal philosophical matter divergent from this could or should be

permitted. All of Pashukanis's writings from this time mirror this submission.

Conclusion: After Pashukanis

Nobody cried when Pashukanis disappeared in 1937. Many legal scholars in the USSR even felt a huge relief. His books disappeared from the bookshelf and the libraries in the USSR, and his name was forgotten. It is in the West, beginning in the 1960s, that Pashukanis made his comeback. The third edition of his main book was translated in many languages, and later the original edition was also translated to English.

Pashukanis became a precursor to critical legal theory. Many contributions to critical legal theory from that time made a reference to Pashukanis. Between 1970 and 1990, in the effort to renew the Marxists theory of law, Pashukanis and P. Stuchka became philosophical pioneers of that movement.

Today, Russian legal philosophers are reclaiming the history of legal philosophy of their country and are revaluating Pashukanis as one of their "great legal philosophers."

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Pateman, Carole

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Introduction

Carole Pateman (b. 1940–) is an English feminist political theorist who works in the areas of contract theory, participation and democratic theory, and feminist political theory as it relates to public and private organizing principles and practices. Her influence has been unmistakably wide, reaching throughout disciplines and subdisciplines in the humanities and social sciences, impressing upon scholars across the world. Additionally, Pateman's work is characterized by its depth and breadth as she has written about the gendered contractual framework of marriage as a legal institution and its effects on contemporary marriage, sex and sex work, the economy, the state, colonialism, and the conditions of democratic citizenship.

While Pateman has made contributions to contemporary political theory and to the history of modern political thought, she does not approach

political theory as a mere exercise in philosophical analysis. Famously, she writes "I resisted becoming a philosopher (a path I was urged to follow) because I realized that my interests did not lie in purely philosophical problems [. . .] I have always been keen on bringing together empirical evidence and theoretical argument" (Pateman and Mills 2007, 16). Throughout her work we see this methodology in practice, whether in her most famous texts *The Sexual Contract* (1988) and *Democracy and Participation Theory* (1970), or in more recent and markedly intersectional feminist analyses in her book co-authored with Charles Mills *Contract and Domination* (2007) and in essays such as "Democratizing Citizenship: Some Advantages of a Basic Income" (2004). Most notably perhaps Pateman readers cannot escape the challenges of her questions about the basic conceptions of liberalism and early modern democratic theory. Pateman asks whether liberal democratic practices of voting are enough to legitimate the social contract and citizens' obligation to obey the sovereign, whether the marriage contract rooted in histories of coverture can ever serve women, and what sorts of institutions are necessary to create and maintain liberation for historically marginalized groups, like people of color, women and other gender marginalized people, and persons experiencing low-income and low-wealth.

The Disorder of Women

The title of the collection of essays comprising, *The Disorder of Women,* is drawn from an assertion by the modern social contract theorist Rousseau in his "Letter to D'Alembert on the Theatre" (1758/1960). Rousseau here proclaims that "never has a people perished from the excess of wine; all perish from the disorder of women" (1960, 109). Following this claim, Rousseau explains, drunkenness only makes men stupid not evil, and wine can even turn men away from other more dangerous and disruptive vices and thus poses no threat to the political order. Women by contrast, and their natural "disorder" can bring ruin to the state in that they engender, encourage, and make men weak to all vices. Rousseau, Pateman notes, is far from the only modern political theorist to liken women and femininity to disorder, Hegel, Freud, Locke, and others define woman as "in opposition to civilization," incapable of developing the skills necessary for participation in civil, and as representing the "jeopardy" of the state if at the helm (1980a, 22).

To understand how framing women as "disordered" contributes to the oppression of women in contemporary democracies where women are named as citizens, one must explore, according to Pateman, the patriarchal conviction that women lack and cannot develop a sense of justice. The idea of the subversiveness of woman might be an ancient one, with mythological and religious roots, but its effects today constitute a palpable social and political situation.

In premodern conceptions of the world, non-human animals and human beings were all understood to be part of a divinely or "naturally" ordered hierarchy of creation both in terms of the human/non-human animal hierarchy and the stratification among human classes. On this model, rulers were those whose "natural" characteristics fitted them for the task of ruling (1980a). Beginning in the seventeenth century a novel and historically revolutionary conception of social life developed, where society came to be defined by conventions agreed to by free individuals. However, with the new conception of society as something other than mere nature, the relationship between women and society became inherently problematic.

According to both classical and contemporary social contract theories, individuals will be more likely and willing to uphold the rules of civil society if they develop a sense of justice that is internal. Individuals, on this model, "must 'internalize' the universal rules of the sociopolitical order, understand that they ought to be observed, and wish to act accordingly" (Pateman 1980a, 24). If this occurs, public order becomes possible, but if individuals do not, then public disorder becomes all the more likely. For classic contract theorists like Rousseau and Freud, women are naturally incapable of developing a sense of

justice and thus threaten the basis of civil association from within as a permanent source of menace. The deficiency in moral capacity as Pateman shows here and in her subsequent works renders women according to dominant patriarchal discourses and practice as fit only for the "natural society" of domestic life, thus solidifying a central aspect of their oppression.

The Sexual Contract

The Sexual Contract (1988) is considered today to be a seminal work in contract theory, political philosophy, and second-wave feminist theory. Pateman begins her analysis noting that while contract theory has experienced a revival since the early 1970s, standard accounts of the body of classic contract theory (Hobbes, Kant, Locke, Rousseau) and contemporary additions (Rawls, Gauthier) have all failed to theorize the sexual-social pact of the original formative social contract. Pateman writes "The story of the sexual contract is also about the genesis of political right, and explains why exercise of that right is legitimate—but this story is about political right as patriarchal right or sex-right, the power that men exercise over women" (1988, 1). This is despite contract theory representing itself as being opposed to patriarchy and patriarchal right.

In reality, one form of patriarchy (paternalism) was not overthrown, but rather replaced with a different form (contemporary patriarchy), in which men's power was distributed among men as brothers, rather than held by one man, the father. For example, according to Freud's origin story of civil society recounted in *Civilization and its Discontents* (1930) and "Totem and Taboo" (1913), a band of brothers, were ruled by a father-figure who maintained exclusive sexual access to the women of society. Together, the brothers unite to overthrow the father and then thereby establish a contract among themselves to be civil equals and to share the women. Notably, like other origin stories of contemporary societal constitutions the historical accuracy is not important, rather it is the story of freedom, equality, and the establishment of modern patriarchy with its deep dependence on contract as the means by which men control and dominate women that concerns Pateman. For even in Freud's evident centering and naming of sex, the role of sexual access to women by men is undertheorized and even obscured after the fact. Furthermore, the change from "classical patriarchalism" (Pateman 1988, 24) to modern patriarchy is a shift in terms of who gains and retains power over women. In other words, it is change in men's relationships of power to one another but does not fundamentally alter women's relationship to men's power. Contemporary patriarchal states come into being for Pateman through men contracting together with part of their power deriving from their right to power over women (Pateman 1988; Pateman and Puwar 2002). Put differently, Pateman in *The Sexual Contract* is actively disputing the common claim that patriarchy is universal, ahistorical, and timeless. By showing the genealogy of contemporary patriarchy she reveals the historical and particular nuances of self-described western democracies that exclude women from the social contract.

Importantly, Pateman's goal in *The Sexual Contract* is not to merely offer interpretations of classic and contemporary canonical contract theory texts, but rather to illuminate the ways in which the present-day social and political institutions of contemporary democracy function to maintain the sexual contract and the oppression of women and other gender marginalized people as integral to the social contract. The sexual contract has shaped our major institutions (law/criminal justice, work, family) as well as the relationships between men and women in marriage, in sex work, in employment, and in surrogacy contracts. Through her analysis of the patriarchal coding of the social contract Pateman concomitantly considers the creation of the individual as the primary unit of political life by means of the overthrow of the father/family. Under classical patriarchy, the father or family unit functioned as the primary unit of political life and the will of the father was the source of consent (or was the king or a kind of king himself). But, with the overthrow of the father, a new

understanding of the primary unit is born, namely that of the individual citizen.

In terms of contemporary linguistics, individual and citizen function as apparently gender-neutral terms; however, as Pateman aptly shows, individual and citizen are both coded as masculine, as man, under the patriarchal social contracts that ground modern and contemporary western democracies. The implications of the masculine framing of individual and citizen are multiple. For one, logically, the individual is masculine, women aren't individuals. Second, if citizen and individual are masculine concepts at their constitutive roots, then women (and other gender marginalized people) will not be able to access freedom through amendments to the social contract conferring upon them citizenship. Finally, consider the idea of individual bodily autonomy. On the one hand, this allows for the criticism of sexual assault, construction of consent as active, reproductive justice, etc. But, on the other hand, the conception of bodily autonomy rests on a notion of the individual that is still very much tied to these masculine roots of ownership (in this case of self/body). Thus, the sexual contract begins with the construction of whom stands as (masculine) individual with ownership over themselves and potentially those who do not own themselves.

Unlike other contemporary philosophers and political theorists who deconstruct contract theory as functioning to codify sexual and racialized right, yet see the value of contract theory if modified (e.g., Charles Mills), Pateman argues there are internal limitations to the applications of contracts and rights as the foundations for free and equal societies. Contract theory and contracting are not the path to freedom and equality for gender marginalized people. Rather, it is one way, if not the fundamental way, by which patriarchal power is maintained. In opposition to a contractual model of citizenship, Pateman proposes more participative institutional structures and a universal basic income as methods for correcting some inequities women encounter in contemporary nation-states. Furthermore, she criticizes prevailing elitist understandings of democratic systems that insist that rule by the people is impossible and that participation by the ignorant masses consists primarily of periodic acts of voting. For Pateman popular self-rule is both protective and educative in that it simultaneously requires and allows for peoples to regularly and collectively consider what is and what ought to be available to them within a social and political order (Gordon 2015). While beneficial for all human beings, radical participatory self-governance is especially central to the production of liberation and freedom of historically oppressed and marginalized groups, such as women and racial minorities.

Consent

Part of the lasting and transformative effects of Pateman's work have been her ability to philosophically reveal and deconstruct gendered ideals that guide legal, juridical, and commonplace practices in self-proclaimed democratic states. Contemporary feminist philosophers, legal scholars, and activists today are still seeking to codify juridically a meaning of consent that functions to provide women and other gender marginalized peoples with the meaningful practice of consent. In her 1980 essay "Women and Consent," Pateman interjects a very different set of considerations into the centuries-long debates over the concept and viability of practices of consent. Prior to Pateman's analysis, consent within the tradition of contract theory had typically centered upon (1) whether there were meaningful opportunities to endorse or withhold endorsement of a particular policy or practice and (2) what it means for the liberal legitimating ground of political obligation if there were not these opportunities (Gordon 2015). Pateman brings forth considerations of the illusory nature of consent in contemporary social relationships and enables a rethinking of the relationship between contract and freedom as it pertains not just to public contracting but also as it applies in interpersonal relationships, such as in sex.

Constraining the breadth of consent, Pateman notes, was achieved in two foundational ways. The first was to make what counts as demonstration of consent so minimal as to reduce it to

nothing. Hobbes, for example, states that one could give "consent" by acquiescing to another who holds a knife to one's throat (Hobbes 2000). Even the vanquished, those with no meaningful options, according to Hobbes, are capable of giving their consent and the absence of opportunities refuse or withdraw consent is not framed as nullifying the "yes" uttered with resignation or out of preservation of life. The other way through which consent was manifestly limited from the outstart was by radically narrowing who was capable of its giving and withholding. Take the writing of Jean-Jacques Rousseau where a woman was not thought really ever to say "no," since any act of refusal required a man's interpretation. "No" in this view was often actually "yes," since eighteenth-century European conventions of femininity made it impossible for a woman to state straightforwardly what she wanted. Neither a "yes" nor a "no" from her could have independent standing, it needed confirmation and interpretation by a man, effectually rendering the individualism of woman to consent basically null (Pateman 1980b).

Contemporarily around the world we may recognize the many ways in which Pateman's considerations of consent play out today. Whether in court cases concerning intimate partner violence and/or sexual assault, or in feminist debates about sex work and whether women under patriarchy can freely consent to sex work, we can see and apply Pateman's arguments. Regarding sex work, Pateman maintains the feminist debates about sex work are asking the wrong questions and thus deriving responses that do not treat the root of the problem, patriarchal entitlement and the requirement of access to women's bodies. Rather than centering the morality of sex work as a kind of work, or sex workers as individuals capable of moral decisions and consenting to specific forms of exchanges, Pateman argues we should ask, what norms and values create a world where the need for sex work as it exists today – primarily with cisgender men as purchasers and women and other gender and sexual marginalized people as sellers – emerges. In other words, what normative assumptions about women and men's access to feminized persons creates an economic and social system where men have the right to purchase that access?

The Private and the Public

As Pateman argues in *The Sexual Contract* the story of the social contract is treated as an account of the public sphere wherein which individual citizens are free to exercise civil rights (1988). By framing the public as that alone which requires political attention, the realm of the private, and all that is included under the guise of the private such as marriage and sex, is deemed politically irrelevant. Yet, to ignore the contracts of marriage and sex as they operate in the private realm is to ignore half of the original contract. In tracing the language of the classic social contract theorists, Pateman shows that women occupy a strange and often times contradictory position in relation to the contract itself. They have no part in the original contract as they don't participate in its creation, but they aren't left behind in the state of nature, i.e., the state prior to the consent to the social contract and the transfer of the right of nature to the Sovereign body. Rather, they are incorporated into the private sphere which is both in and is not in civil society, further enabling the binary expression of natural/civil and woman/man.

For many classical social contract theorists such as Locke and Rousseau, the state of nature is inhabited not by individuals but by families. "The family precedes," Pateman writes, "or can exist in the absence of, wider social institutions or 'civil society'; it exists in the natural condition" (1980a, 23). The family is also grounded in the natural ties of love and affection, and it has its origin what is described as the biological process of procreation and the natural difference between the sexes. Rousseau, for example, argues that the family is an example of a social institution that follows the hierarchy and order of nature because, in the family, age stands over and against youth and men are naturally positioned as authoritative over women. Like for Freud, anatomy really is destiny and the family is naturally and necessarily patriarchal and paternalistic.

Significantly, the family spans the divide between a condition grounded in nature and the conventional bonds of civil life in that it exists in both the state of nature and civil society, as do those human beings that represent nature, women. Thus, for Rousseau men are tasked with ensuring they maintain justice in civil society with their brothers and with controlling their wives. Part of the educative responsibilities of the state is ensuring different educational experiences for boys/men and girls/women. Men have to learn to have control over their wives, and in fact learning to control their wives, prepares them for citizenship. (Thus, again showing that control of women as wives precedes fraternal shared political power.) Women by contrast must learn to be obedient and subservient to their husbands, for according to Rousseau Women by contrast must learn to be obedient and subservient to their husbands for, according to Rousseau, women unlike men cannot control their unlimited desires. Thus, to prevent the destruction of all of society, men must control women (Rousseau 1979).

Nevertheless, Pateman shows that women have been allotted the contradictory political task of bearing and rearing the next generation of citizens while being excluded from citizenship as they perform the tasks associated with mothering. Historically and contemporarily motherhood has been central to the task of raising citizens even as the folks who predominantly perform the work of mothering have been excluded (bio-mothers, caretakers of color who were enslaved, immigrant caretakers who immigrate for work and leave their own children to do so). Feminists across the world have emphasized motherhood as something of particular value that women generally contribute as citizens that should be recognized as both a form of citizen-being and necessary to the maintaining of the social contract. Pateman draws our attention to the theoretical and practical ways in which women's work as mothers is written out of the concerns of civil society and the state, and is relegated to the realm of the private family. The solution for Pateman is not merely to understand mothers citizenship as inherently tied to their being as mothers (as this would set up and has set up a whole other set of trappings for women), but rather to begin to incorporate multiple understandings of the work of citizens.

Conclusion

Pateman's influence on feminist theory, democratic and participation theory, and political theory cannot be overstated. Even as the mainstream of academic political theory has turned away from the project of participatory democracy and marginalized feminist political theory, Pateman reveals throughout her work that freedom and equality are precarious political achievements (if they exist at all) requiring the machinations of artificial structures like states to create and maintain that which is not the natural condition of human collectives.

Cross-References

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Paternalism

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Introduction

What is paternalism? Paternalistic actions seek to change someone's behavior from what it would otherwise be, and for the sake of that person. However, there is some controversy about how paternalism should be defined. Some have preferred to define paternalism in accordance with its intended effect, in particular the effect of preventing some sorts of action. Thus, it's been held that to be paternalistic, a policy must not only be intended to benefit the person to whom it applies, but that must also diminish that person's freedom (Kleinig 1984, 18). It has similarly been said that a paternalistic policy must limit choice, and must do when the individual would have preferred that his choices not be limited (de Marneffe 2006, 73–74).

However, many contemporary accounts have taken a broader definition, where a policy can be paternalistic without restricting one's liberty of action or one's choices, at least in the sense of taking them way or making them prohibitively costly. For example, Gerald Dworkin has said that for an act to be paternalistic,

> "There must be a violation of a person's autonomy (which I conceive as a distinct notion from that of liberty) for one to treat another paternalistically. There must be a usurpation of decision-making, either by preventing people from doing what they have decided or by interfering in the way in which they arrive at their decision. . . What we must ascertain in each case is whether the act in question constitutes an attempt to substitute one person's judgment for another's, to promote the latter's benefit. It is because of the violation of the autonomy of others that questions about the justification of paternalism arise."

(Dworkin 1988, p. 123) Here the stress is on the intent behind the act or policy: that it is based on (1) in the belief that the individual who is the subject of the paternalistic policy is likely to make an error in judgment, and (2) in the belief that the paternalist can do better than the individual in deciding what is good for that individual. Such a policy might take away a liberty or choice (as when we ban carcinogens) but might also be paternalistic in simply making the desired action more attractive than it would otherwise be. For example, a paternalistic policy could make people choose to visit museums when they otherwise wouldn't by making museums free on a given day, or even by an advertising campaign touting the advantages of a visit to a museum. Julian Le Grand and Bill New have written similarly in support a definition that includes the belief of the paternalist that she needs to intervene in order to override the individual's poor judgment, saying "It therefore seems preferable to define paternalism, not in terms of the intervention itself or of its consequences, but in terms of (a failure of) individual judgment; and so we propose a definition of our own that does not refer to coercion but instead incorporates this view of the government's intention. In brief, we conclude that government intervention is paternalistic with respect to an individual if it is intended (a) to address a failure of judgment by that individual and (b) to further the individual's own good." (Le Grand and New 2015, p. 2) Thus,

It seems to me that the broader definition of paternalism accords best with contemporary usage, and I will use that here. The most influential current movement in support of paternalism is what is termed "libertarian paternalism." Libertarian paternalists do not aim to remove choices nor, typically, to restrict liberty of choice. They avoid coercion. Instead, they "nudge" people toward the actions that will be most beneficial to those individuals, in the judgement of the paternalist. While there are certainly still paternalists who endorse coercion, these also endorse the idea that paternalism may include "softer" methods of influence, such as providing positive incentives for doing the thing which is most beneficial to the individual to whom the policy is intended to apply. Dworkin's 1984 definition, then, seems to encapsulate best what is typically meant today by the term 'paternalism.'

Types of Paternalism

This still allows for significant variation in types of paternalism. These differentiations have been used by many to delineate varying forms of paternalism, although as we see below, strict differentiations are sometimes difficult to maintain. And, since there is no one in charge of philosophical terminology, some of these phrases may be used differently by some authors. I will give what appears to be the current dominant use.

1. *What Constitutes Welfare:*

   All paternalist policies are intended to make the individual to whom they are applied better off. However, there are two ways of conceptualizing what it is for a person to be better off:

   Objective accounts of welfare: An objective account of welfare says that to make a person better off is to have him achieve a certain status or act in a certain way that makes him better, where what it is to be better off is not entirely a function of what that person desires, enjoys, values, or holds as an end.

   Subjective accounts of welfare: Subjectivists hold that what benefits a person is entirely a function of that person's attitude toward it. Something can benefit a person if and only if that person wants it, likes it, cares about it, or it otherwise connects up in some important way with some desire or positive attitude of that person.

   For example, a religious paternalistic policy might hold that it makes a person better off to be Christian, whether or not that individual has any interest in being Christian, following Christian precepts, or gaining anything that Christianity might provide. That person would have an objective theory of welfare: there are some things that make you better off, regardless of how you feel or what you think about them. Others who believe in a theory of objective welfare might argue that a person is better off if she has a social life, or if she is educated, even if these things do not appeal to her in any way. A subjectivist, on the other hand, might well say that having a social life makes a person better off, but only if that person has a desire for a social life or for things that the social life will enhance. The subjectivist would argue similarly that while education may frequently make a person better off, that is only because the person herself enjoys it or because it furthers goals that the person already has. For the subjectivist, having a social life or being educated don't necessarily enhance well-being; that depends on the wishes, values, or feelings of the particular person.

2. *Means* vs. *Ends:*

   Similarly, people vary as to whether they want to change the particular individual's ends, or only the means the particular individual uses to achieve those ends:

   Strong: A strong paternalist policy seeks to change the ends the particular individual has: what he seeks to achieve, his values, his tastes, and so forth.

   Weak: A weak paternalist does not try to influence the individual's ends, but rather tries to interfere only with the means the person is inclined to use to achieve those goals.

   For example, a strong paternalist might try to convince people that acquiring lots of money is not a desirable goal, even if they are people for whom that is a primary focus. Similarly, a strong paternalist might seek to persuade a person that good health is to be desired, even if the person expresses an informed preference for the short life of a drug addict. A weak paternalist, however, would take the individual's own ends as a given, and would seek to interfere only when the person chooses actions that are not compatible with reaching those goals. If a person wants to amass money, a weak paternalist might take steps to prevent him from buying goods that will result in very large debts, if that is not conducive to accruing wealth. If the person is indifferent to good health, and is informed as to what poor healthy will entail, then the weak paternalist will allow that person to pursue the unhealthy lifestyle he chooses, without trying to influence him to prefer a healthy life.

3. *Who the policy should be applied to:*

   Soft: a soft paternalist interferes with an individual's action only if that action is nonvoluntary. In such a case, the individual

typically is either ignorant of relevant facts or is unable to fully understand them, because, for example, she is a child, or incompetent in some way to make a well-informed judgment. The individual's act isn't fully voluntary in this case because she doesn't know the full ramifications of what she is doing, and thus interference is justifiable. For the soft paternalist, interfering for paternalistic reasons with the voluntary decision of a fully-informed, competent person reasons is not morally justifiable.

Hard: a hard paternalist approves of interference even when the individual is well aware of all the pertinent facts and competent to judge their importance. Thus, the hard paternalist allows interference where the soft paternalist allows it, but furthermore allows it in cases of fully voluntary action.

For example, a soft paternalist could approve of interfering with a person's smoking if that person were unaware of the bad health effects of smoking, or incompetent to adequately weigh those consequences, but not if the person's choice to smoke is well-informed and entirely voluntary. A hard paternalist, on the other hand, could approve of banning cigarettes even if those who smoke them are fully aware of all the relevant facts and are competent judges, as long as banning cigarettes makes the individual better off.

Pure: A pure paternalist policy directly affects only the person whose welfare the paternalist intends to improve.

Impure: An impure paternalist policy may be applied to third parties with the idea of indirectly affecting the choices of the person whose welfare the paternalist intends to improve.

For example, an impure paternalist policy could make it illegal for any company to produce cigarettes, where the goal is not to improve the welfare of the company but to improve the welfare of the individual who then would be unable to obtain cigarettes.

Contemporary Views

While these distinctions are real, there are often indeterminate cases. Contemporary paternalist theories tend to endorse the subjective view of welfare: they accept that to be well off is to achieve what the individual wants or values. They tend, similarly, to be weak paternalists, accepting the individual's ends as given and interfering only when the individual chooses poor means to advance his ends. Their goal is not to change the values or ends of the individual, but to take those as given. For example, a person may want to be healthy as an end in itself, but instead of taking the requisite steps of healthy diet and exercise, that person eats food high in fat and cholesterol and lives a sedentary life. In such a case the paternalist may intervene (where that can be accomplished efficiently) to influence them to eat healthier food and provide incentives for at least some exercise.

Thus, the best known of contemporary paternalist views, libertarian paternalism, endorses policies that seek to influence people to take those actions which will best promote the individual's own ends (Thaler and Sunstein 2008). Thus, they endorse a subjective view of welfare, rather than an objective view of welfare. Given this, they also argue for paternalistic policies aimed toward a person's means, rather than that person's ends. The subjective view of welfare is also endorsed contemporary paternalist views which are not libertarian (Conly 2013; Le Grand and New 2015). However, it is not always clear when a person is choosing something as a mere means or when he is choosing it as an end in itself. It is furthermore true that interfering sufficiently with actions taken as means could affect a person's evaluation of the end those means were meant to advance: one may come to disvalue fast driving, for example, if one is constantly frustrated by measures designed to prevent speeding. Instead of enjoying it as an end in itself the person may come to regard it with fear. Lastly, ends themselves may conflict, and while one may say the goal is to advance the end a person most cares about, that is not always easy to know. These difficulties could make it harder to determine whether a view really endorses only subjective theories of welfare.

There is a similar difficulty in categorizing libertarian paternalism and other contemporary

views as to whether they are hard or soft. In Sunstein and Thaler's groundbreaking work, the rationale for interference is the fact that we all suffer to some degree from cognitive bias, which prevents us from reasoning well in certain circumstances as to what means will best advance our goals. Sunstein and Thaler stress the significance of studies done by Amos Tversky and Daniel Kahnemann (2000a, b, c, d) which show the extent to which we suffer from cognitive bias, errors in reasoning that too often have a deleterious effect on our ability to choose effective means to our ends. Again, this rationale for paternalism is used by other contemporary paternalists (Conly 2013; Le Grand and New 2015). Given the existence of cognitive bias, it is a question for debate whether a person who chooses poor means to his own ends truly understands his choice. While this person may not be entirely ignorant of the relevant facts, bias in many cases prevents the person from reasoning correctly as to what means will best lead to his desired end. It is thus not clear whether this view should be categorized as hard or soft, since it may be argued that there is a sense in which the person remains ignorant of what he is choosing, and thus that his choice is not really voluntary; that is, he may know what he is choosing but not that it does not promote the end he wants to promote. Whether these paternalist views are categorized as hard or soft may depend on a person's view of what it is to know a fact and what it is to judge competently.

Objections

There are two major sorts of objection to paternalism. The first is that paternalist policies will be ineffective in promoting individual welfare. The second is that paternalist policies disrespect individual autonomy.

1. *Failure to Promote Welfare:*
   This objection was most convincingly articulated by John Stuart Mill in *On Liberty* (1859). There, Mill argued that paternalistic policies would be ineffective in promoting human welfare. Only the individual knows what will promote his own welfare, and the individual furthermore cares most about his own welfare. Others who wish to interfere with a person's behavior are liable to foist their own preferred style of living or their own moral prejudices onto a person in a way that will prevent stunt his personal development and prevent his being as happy as he might be if left to his own devices. Interfering in the personal life of the individual withers and starves his human capacities, rendering him incapable of happiness. Mill is a committed utilitarian, believing that the right action is the action that most promotes utility, and for Mill utility consists in pleasure or happiness. Thus, paternalist policies do not maximize utility. Given this, Mill articulated a "Harm Principle," writing that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." (Mill 2003, 94–95)
2. *Respect for Autonomy:* A very different objection to paternalism is that it fails to respect the autonomy of the person toward whom the paternalist policy is aimed. The complaint is that those who formulate paternalist policies do so because they do not trust individuals to choose for themselves. The paternalist attempts to substitute her own judgment for the judgment of the person who is to be subject of the policy. The paternalist does not think the individual she wishes to affect is fit, in every case, to make decisions as to how she should live. Thus, it may be argued, the paternalist fails to respect the agency of the person whose judgement and action she wishes to influence: "The objectionable character of paternalism of this sort is not that those who seek to benefit us against our wishes are likely to be wrong about what really benefits us. . .It is, rather, primarily a failure of respect, a failure to recognize the authority that persons have to demand, within certain limits, that they be

allowed to make their own choices for themselves" (Darwall 2006). Such a substitution of judgment may imply, too, that the paternalist thinks her judgment is superior to that of the person who is the subject of the paternalist policy, and thus suggests to some that the paternalist fails to respect the equality of all moral agents (Shiffrin 2000). Thus, paternalism may be described as infantilizing its subjects: "Presumptively blameable paternalism . . . consists in treating adults as if they were children. . ." (Feinberg 1986, p. 5). Worse, perhaps, treating the subject of paternalism in a way that disrespects his autonomy may actually result in that person's losing his ability to make rational choices. John Stuart Mill wrote in *On Liberty* that "He who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself uses all his faculties" (Mill 2003, p. 134). In the language of autonomy, one might argue that limiting people's autonomous decisions lessens their ability to make autonomous decisions: "If adults are treated as children they will come in time to be like children. Deprived of the right to choose for themselves, they will soon lose the power of rational judgement and decision" (Feinberg 1983, p. 3).

Responses to Objections

Both these objections have adherents. However, contemporary paternalists may argue that these objections are based on misconceptions. When it comes to the promotion of welfare, contemporary paternalists have stressed the empirical evidence that people often choose poor means to their ends. Thus, Mill's claim that individuals will know best what will promote their own welfare is not always correct. Individuals may possibly know best what ends they have, but it does not follow from this that they are best at choosing the means to those ends. As Daniel Kahneman has argued, we have different systems of thinking, one more rational than another, and have a tendency to use the automatic, less rational system most of the time (Kahneman 2011). Sometimes those who are not confronted with a decision concerning themselves, and who don't need to make an immediate decision and who may not be subject to temptation, can make better decisions than do those who will be most affected by the decision. So, Mill's claim that an individual's happiness can be best promoted by his own decisions is refuted by contemporary empirical evidence.

The argument that paternalism does not respect autonomy does not rest on an empirical basis, so empirical evidence does not show that it is mistaken. However, contemporary paternalists again may avoid most of the thrust of the criticism. Since contemporary paternalists embrace a subjective view of welfare, they do not try to substitute their own ends for that of the individual. In fact, their paternalist influence is intended to enable the subject to reach his ends better than he otherwise could. There is a sense, then, in which contemporary paternalism respects the autonomy of the individual when it comes to that person's selection of ends. When it comes to respect for autonomy as regards the choice of means, contemporary paternalists vary. Libertarian paternalists do not want to foreclose options. Sunstein and Thaler are "libertarian" in that they leave the "choice architecture," the options open to the individual, open. All they do is try to give a "nudge" in the right direction, by making the choice that will best promote the person's welfare more attractive or the choice that will detract from the subject's welfare less attractive. The individual may still choose the act that does not promote his welfare. Other contemporary paternalists may indeed try to foreclose options, interfering with the individual's liberty to choose things that are likely to impede him reaching his ends (Conly 2013). However, a paternalist who endorses such coercion may argue that she is respecting the subject's ends more than would a laisser-faire policy that allows the subject to choose contrary to his own interests, so that there is a sense in which she respects one sort of autonomy even as she restricts freedom of action.

The related argument that paternalists fail to respect equality might similarly by rebutted by

contemporary paternalists. Those who use the existence of cognitive bias to justify paternalist intervention are at pains to point out that there are not two classes of people, those who suffer from cognitive bias and those who do not. We are all subject to cognitive bias. And, we are all better able to make instrumentally rational decisions in some situations than in others. Thus, paternalist strategies are designed to reflect the thinking we would do if we were acting as Planners rather than simply Doers, in Thaler and Sunstein's language. Thus, contemporary paternalists do not argue that there are two classes of people, but rather one class of people, all of whom sometimes need help.

Lastly, the charge that paternalism infantilizes its subjects is answered at least in part by the considerations just given. If the charge of infantilization rests on the idea that children make poor decisions but adults don't, the paternalist can reply that, as empirical evidence shows, adults are prone to error. They presumably do not make as many errors as do children, but the difference in rational decision-making is one of quantity rather than quality. Adults may make fewer ineffective decisions as to how to achieve their ends, but it is not that they are categorically immune to poor instrumental thinking. As to whether the failure to make decisions will result in the atrophy of their rational faculties, most paternalists do not expect paternalist measures to govern most or even many decisions. For a paternalist to recommend a policy, the benefits of that policy must outweigh the costs to the individual. Interference in every aspect of personal life would be prohibitively costly, both in terms of straightforward finances and in terms of psychological burdensomeness. For this reason, paternalists typically allow the interference of either nudges or coercive measures only in some significant areas of decision-making.

Conclusion

The debate about the acceptability of paternalism is ongoing, and is unlikely to be settled in the near future.

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Patriotism: Constitutional

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Introduction

Constitutional patriotism is a political theory that seeks to provide an explanation for the sense of

ownership that most individuals have toward their national constitutional system. Specifically, constitutional patriotism assumes that free-thinking individuals involved in a discussion over the common good will reach an agreement that is perceived, at least by those involved in the debate, as having normative value. The awareness that such a deliberative process has historically been a part of the constitutional system also induces a sense of ownership of past historical accommodations of constitutional principles. The shared perception of being part of historically grounded institutions within a deliberative democracy is sometimes called the "normative surplus effect" or "normative spill-over effect" of the deliberative process. The theory, in its current form, was proposed by Jürgen Habermas and Jan-Werner Müller.

Debates over the common good might take place informally or within the state's institutions. Pell-mell informal debates, with few exceptions, have a limited effect on amending constitutional norms. Yet, the prerogative to openly discuss laws and policies legitimized by constitutional norms is normally sufficient to develop an inner sense of belonging to a constitutional system. Deliberative debates within public institutions (e.g., parliaments and courts) are more likely to change the functioning of a constitutional system, but they are, by way of comparison to informal political discussions, normally constrained by the system of rules that regulate representative democracy and the administration of justice. Thus, the theory of constitutional patriotism provides an explanatory model for the historical development of a democratic constitutional system.

As one of the most persuasive explanatory theories of modern pluralist democracy, constitutional patriotism has attracted a series of well-articulated critiques. It has been suggested, for instance, that constitutional patriotism might not provide a plausible model of social integration for international organizations such as the European Union (EU). In this essay, I will provide an overview of the theory and a selection of its critiques.

Theoretical Assumptions and Normative Claims

Constitutional patriotism assumes that a deliberative activity, between free members of the political community who intervene in public debates in good faith and who accept the persuasiveness of the best argument, will form a consensus over policies, the legitimacy of statutes, and perhaps the normative values manifested in their constitutional text.

Drawing much of its epistemological strength from Kantian deontological thinking, constitutional patriotism proposes a theoretical justification for a democratic constitutional system without assuming the existence of a comprehensive theory of justice. It is a theoretical alternative to the concept of the nation-state, and it is widely accepted as one of the most articulated theoretical explanations for the functioning of modern state institutions in modern diversified societies (Habermas 2004; Müller 2008; Sołtan 2008; Enns 2010; Khoo 2014; Hułas and Fel 2015). One of the key features of constitutional patriotism is, for instance, the assumption that individuals are free to express their opinions – or to silently agree about the opinions of others – in a political debate. Discussions over the common good might take place anywhere within a political community. An informal discussion, for instance, among white-collar workers on the Clapham omnibus contributes to the layering of shared political opinions that might trickle into institutional debates. Institutional debates, while limited by the system of rules that allows for the functioning of modern mass democracy, might foster communal agreements over new policies and statutes. The general persuasiveness of decisions taken within institutions, due to the inherent imperfections of any deliberative activity (e.g., limited information), is transient. Past agreements will be reviewed by new political discussions, and the process will start again.

Consequently, constitutional patriotism describes the dynamic connection between the daily deliberative activity that distinguishes large liberal democracies and public institutions. The

daily plebiscite that generates a patriotic attachment between individuals and their legal system occurs within institutions in which a farrago of political opinions generates endless discussions (Habermas 1998, 3). Yet, constitutional patriotism does not explain the reasons (e.g., self-interest, religious beliefs, etc.) that motivate individuals to engage in political debates; it assumes it as a social fact.

This process of the constant tuning of previous political agreements has two pragmatic effects. Firstly, over a period of time, unchallenged agreements over the "common good" will become part of the shared cultural assets. For instance, the due process clause in the English Magna Carta ("No man shall be arrested or imprisoned . . . except by the lawful judgement of his peers or by the law of the land") and the Scottish assertion of individual freedom as a self-evident prerogative ("It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom alone, which no honest man gives up but with life itself") are currently part of the UK's constitutional culture (Breda 2014).

Secondly, the process of discussing past and present political issues generates a sense of ownership of past and present current agreements. The "winners" in a debate might recognize an overlap between their perception of what the common good entails and the procedural soundness of the debate that made their perception part of the legal system. The "losers," who might strongly disagree with the outcome of a political debate, accept instead that the deliberative process has been open and objective. Müller describes constitutional patriotism as a "collective learning process" where winners and losers accept that it is their daily political involvement (and not the outcome of individual discussions) that supports and legitimizes the gamut of values, assumptions, and prescriptions set in their constitutional system (2008, 85).

Thus, constitutional patriotism does not suggest a comprehensive theory akin to Rawls's theory of political liberalism (Rawls 1972). Constitutional patriotism acknowledges, instead, the normative foundations of the modern liberal democracy that we inherited from the Enlightenment (e.g., individual freedom and a commitment to pursue truth and justice) and the dynamic nature of the interpretations of those principles in a highly diversified society (Habermas 1994, 11–12). Each individual, within a liberal constitutional polity, tacitly (or explicitly if he/she acquired citizenship as a result of prolonged migration) subscribes to the values supporting the constitution.

While simple in its formulation, constitutional patriotism has the benefit of clarifying the often-muddled relationship between constitutional law and the role of the idea of national identity. For example, in *Roper v Simmons*, Justice Anthony Kennedy describes how citizens and the US Supreme Court honor the American Constitution as an expression of a communal endeavor. Kennedy explains this process as follows:

> The document sets forth, and rests upon, innovative principles original to the American experience [. . .] These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it *to be our own*. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within *our own heritage* of freedom [My emphasis]. (*Roper v Simmons* 2005, 578)

This is, as worded by Justice Kennedy, a manifestation of a patriotic attachment made by the members of an institution, the Justices of the US Supreme Court, to the universal values manifested in the American constitutional system. While carefully worded, the passage does not cover the tension between the universal values protected by the US Constitution and the reference to the Constitution as a distinctive asset of the American nation (whatever that might be). At a conceptual level, individual freedoms and human dignity are influential aspects in the development of modern democracy but, as such, are considered "universal" (Tully 2002). From Kennedy's narrative, it is reasonable to subsume that, firstly, the US Supreme Court perceived those universal values

as belonging to a national heritage and, secondly, that their interpretation is an exclusive element of American institutional history. This effect is the so-called normative spill-over (or normative surplus) of deliberative democracy (Müller 2007a, 49, 125, 147, 2008, 76–77).

To sum up, constitutional positivism proposes an elegantly simple solution to the dilemma of creating a community of strangers who are actively (or passively) involved in a daily deliberative activity. This endeavor is composed of minute public engagements with neighboring individuals and of debates within democratic institutions. The side effect of these activities is the formation of communities that value the rules they inherited from previous generations (as eloquently defined by Justice Kennedy in *Roper v. Simmons*) and that have the possibility of amending these rules in a way that seeks to enhance the commonwealth.

Constitutional Patriotism: Recent Critiques and Developments

The previous section proposed a general overview of the theory of constitutional patriotism. Most probably, it is an explicative theory of the effects of deliberative democracy in modern constitutional polities. Constitutional patriotism assumes that freedom, deliberation, and a commitment to rational and objective decisions will help in steering a community of citizens toward the common good. As one of the most persuasive contemporary political theories, constitutional patriotism has also attracted a fair amount of criticism (Canovan 2000; Michelman 2001; Laborde 2002; Breda 2004; Kumm 2005). Given that the overarching aim of this Encyclopedia is to seek to elucidate complex theoretical proposals and provide the reader with a springboard for further studies, this section will focus on a selection of critical engagements with the intention of clarifying the theoretical contribution that constitutional patriotism has made to the current understanding of the functioning of modern constitutional democracy. In particular, it will discuss the limits of constitutional patriotism in indirect democracies and in states that have not reached a level of political development that is essential in order to establish deliberative democracies.

A series of critiques will not be fully reviewed because they might misconstrue the theory of constitutional patriotism. Firstly, this short review of the critiques on constitutional patriotism will not consider those critiques that consider constitutional patriotism as a theory of justice. This is not one of the aims of constitutional patriotism (Müller 2009, 22). Freedom and equality are procedural requirements of deliberative democracy, as discussed elsewhere in the Encyclopedia, and they overlap with liberal assumptions of modern liberal democracy, yet constitutional patriotism does not seek to be a normative justification for liberal democracy.

Secondly, constitutional patriotism does not justify the sense of ethnic ownership of the constitutional values manifested in the constitution (Kumm 2005; Müller 2006). Constitutional patriotism, at least the version considered in this essay, is not one of the manifestations of liberal nationalism. The supporters of this "thick" constitutional patriotism assume, for instance, that there is a causal link between the historical development of the nation-state and the establishment of large, indirect, deliberative democracies (Miller 1995). Again, nationalism is discussed elsewhere in this Encyclopedia. It is sufficient to say that while the nation state developed during the Industrial Era and that period coincides with the establishment of constitutional democracies, claims that a national community might help the development of a parliamentary democracy in England or that national communities might endanger the development of modern democracies are equally misshaped (Smith 1971; Fukuyama 2012). However, constitutional patriotism elucidates how in open and culturally diversified deliberative democracies individuals might perceive themselves as active parts of normative endeavors.

Thirdly, this introductory review will not consider the details of the critique which depicts constitutional patriotism as a form of civil religion (Breda 2004; Müller 2007b, 202). Müller argues, for instance, that constitutional patriotism might generate an uncritical acquiescence of inherited

constitutional culture (2007b, 202). Inserting an a priori protection of identity-based communities, such as the freedom to manifest religious beliefs, which is already part of the constitutional assets of most liberal democracies, might be a sufficient safeguard against the potential homogenizing effects of constitutional patriotism as civil religion. This is the solution adopted in consociational political systems such as those found in Belgium, Northern Ireland, and Myanmar (Wolff 2004).

This summary of the critique review will focus instead on those critiques which question the procedural assumption of constitutional patriotism, since they question the theoretical soundness of a proposal. For instance, by making reference to the EU, Kumm explains that constitutional patriotism cannot provide a template for the development of the European Union, where institutions such as the European Council (hereafter the Council) and the Council of Ministers are bound by a series of multiple commitments to the national cabinets, their parliaments, and to the members of their respective constituencies (Müller 2007a, 94; Kumm 2008). In other words, the role of the member states' representatives as speakers within the Council is severely limited by the political mandate, and thus agreements formed within those institutions are often the result of behind-closed-doors diplomatic discussions.

It could be argued that open, unbiased discussions are only an ideal epistemic requirement and thus that an individual speaker cannot ever be free in a way that meets with Kantian epistemic requirements. Constitutional patriotism assumes that free-thinking individuals who, in good faith, are involved in a discussion over the common good will form an agreement over some aspects of good communal life. An agreement over the effect of luck on the redistribution of individual gifts in modern capitalist societies, for instance, must be accompanied by some level of redistributive justice. Kumm argues that the setting of macro-policy decisions within the EU is so far removed from the actual requirements of an open discussion that the result of the institutional debates cannot be associated with a level of objectivity and rationality that is necessary to trigger a patriotic commitment (Kumm 2008; Breda 2015). The problematic issue of EU representation is discussed elsewhere in this Encyclopedia, but it is sufficient to say that the Council's policies are the result of carefully orchestrated diplomatic negotiations between sovereign states and that an agreement might be difficult to justify in universal terms. For instance, the policy of subsidizing EU farmers might reduce the level of competition and impoverish communities outside EU borders such as those in Northern Africa.

Indeed, it might be idealistic to expect that diplomatic negotiations are as open as informal chats between fellow commuters are, but Kumm's critique shows a general limitation of the epistemic assumptions of constitutional patriotism. Modern democracy is an indirect democracy. If the institutional mandate is too narrow, it is illogical to assume that institutional agreements will generate a perception of objectivity and a shared sense of ownership of the decisions taken within that deliberative arena.

For analogous reasons, where there is a lack of freedom for those who intervene in institutional debates, constitutional patriotism might not provide an explanatory model for patrimonial political systems (Fukuyama 2012, 129). The practice of patrimonialism, which originated in rural societies, included an informal vertical power relation between the power holder (e.g., the patron/landowner) and a number of inferiors such as temporary workers (Fukuyama 2014, 14, 86–104). For instance, a few European political systems show signs of the isomorphic mimicry of neo-patrimonial systems (Caciagli 2006). In this political system, patrimonialism is horizontal and might include a nationwide network of individuals that exchange tangible favors such as jobs, public contracts, and political votes at the national level (Caciagli 2006, 159; Fukuyama 2012, 124). In a patrimonial system (and neo-patrimonial political systems), indirect representatives might refer to a general principle of good government such as the endorsement of the freedom of enterprise, and public institutions might claim the cost-effective delivery of key services, yet the majority of the population expects that politicians and civil servants will use their prerogative for their

personal benefit and for the benefit of their clientele (Faure 2013, 5, 198).

It is important to remember that debates over the common good within a democratic society are, according to the theory of constitutional patriotism, a manifestation of a daily plebiscite between all members of the polity and their institutions (Habermas 1994, 3). More precisely, the theory of constitutional patriotism explains that discussions give individuals a sense of ownership of the general principles manifested in the constitution, as well as the rules that might trickle down based on those principles (Cohen and Sabel 1997).

The possibility of making sense of the communal ownership of past and current political decisions requires, however, a series of functioning modern institutions (Fukuyama 2012, 14). Thus, there is an overlap between the conditions necessary for the development of truly meaningful deliberative activities within an institutional setting and the inner workings of the state's institutions. There is also a correlation between how public representatives form an agreement within an institution and the possibility that the process that forms such an agreement is perceived as objective and rational (Breda 2016). From Fukuyama's analysis, it appears that many formally modern constitutional systems are de facto patrimonial political communities and, for these types of polities, constitutional patriotism might not provide an explicative working template. As was mentioned in the review of Kumm's critique, it is idealistic to expect that debates will be set in optimal deliberative conditions, and so it is unreasonable to expect that those participating in a debate are completely unbiased. However, the deliberative institutions' main operating function in both patrimonial and neo-patrimonial political systems is to provide for their clientele. Representatives are expected to harvest the state's resources (e.g., public contracts and jobs) and distribute them among the members of their fiefdoms. The ability to provide for the clientele *is* the rational criterion that is used to assess the representatives' suitability for their post. It is reasonable to suggest that constitutional patriotism cannot provide a normative model for constitutional systems that have not reached the level of development that is necessary for a fully functioning deliberative democracy.

Conclusion

This encyclopedic entry provided a concise overview of the theory of constitutional patriotism and of the selection of its critiques. The first section focused on the general structure of the theory by looking at Müller and Habermas's interpretation of constitutional patriotism. From the analyses of these two authors, it is reasonably clear that constitutional patriotism is a political theory which seeks to explain the epistemic structure of modern mass democracies. It assumes that in a free, open, and socially diversified political system, individuals will interact with others in a way that seeks to find objective and rational agreements over the common good.

Constitutional patriotism has the benefit of explaining how informal and institutional debates among strangers are funneled into local and national institutional discussions. Most of these debates are impromptu informal public discussions among family members, friends, and strangers. A smaller number of these political discussions take place within the state's institutions. Cohen and Sabel's analysis shows that individuals are involved in multiple, local deliberative activities and the debates generate a perception of ownership (or the desire distancing oneself from ownership) over commonly agreed policies. Thus, constitutional patriotism provides a theory that bridges the informal and formal debates over the common good. It also explains how current institutional debates, such as the one reported by Justice Kennedy in *Roper v Simmons*, consider the inherited constitutional principle as an essential normative asset of a constitutional system.

The second part of the essay reviewed some of the critiques against constitutional patriotism. It is possible to conceive that some of the preconditions for a patriotic constitutional system might be ill suited in explaining the workings of deliberative institutions within large international organizations such as the EU. It is also improbable that a sense of ownership of constitutional values would

be perceived as a side effect of a deliberative activity within the patrimonial political system which has only formally embraced the supporting ideals (e.g., freedom, equality, objectivity, and rationality) that we inherited from the Enlightenment.

Cross-References

- ▶ Constitutionalism: Cosmopolitanism
- ▶ Constitutionalism: Sociology of
- ▶ National Identity

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Peace

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Introduction

The concept of peace is notoriously hard to define. More often than not, it is characterized by exclusion, viz., as absence of actual war or violence, although some definitions of peace encompass additional set of positive conditions which need to be fulfilled in order to prevent actual violence. There are two general conceptions of peace: the negative and the positive. The *negative peace* is a state of the *absence of actual violence* but *presence of the potential violence*. The *positive peace* is a wider ideal: it encompasses both *absence of the actual violence* and *absence of the potential violence.* There are various possible exemplifications of the two general conceptions of peace differing in important aspects. Some of the differences stem from the context in which the two kinds of peace could occur, viz., *intrastate* or *interstate*. Certain principles of peace could be considered as universal (applying both to intrastate and interstate relations), while others could be successfully applied only in one of the two spheres. Thus, particular conception of the *negative interstate peace* could differ from the particular conception of the *negative intrastate peace* (section "Negative Peace"), as well as the *positive interstate peace* could differ from *positive intrastate peace* (section "Positive Peace"). Ordering the complex debate concerning peace by providing positive/negative, interstate/intrastate distinction will allow formulating certain conclusions as to the mutual relationships between law and peace (section "Peace and the Law").

Negative Peace

On the negative conception, peace is defined as the absence of actual *direct violence*. Direct violence could take many forms, e.g., intentional physical force, psychological aggression, threats, or manipulation used against a person or a group. In the sphere of interstate relations, peace thus understood (*interstate negative peace*) can be described as a "more or less lasting suspension of violent modes of rivalry between political units" (Aron 2003: 151). According to Raymond Aron, such a suspension depends on the capacity each political unit has to engage in the affairs of other political actors. Therefore, a principle underlying negative peace thus understood is *power* or *impotence. Peace by power* can result from the power relations based on *equilibrium*, when there is an approximate balance of power between political entities; *hegemony*, when one political unit dominates the other; or *empire*, when one political unit is overwhelmed by the power of another, so that it fails to exists as an autonomous political entity (Aron 2003: 151). The negative peace achieved by means of balancing powers has a disadvantage of fragility. Since power relations are ephemeral and variable, they cannot be considered as an ultimate and durable protection against violence. It is also unclear which of the mentioned power relations would provide the best protection against violence, e.g., peace by hegemony could be in certain cases more durable than peace by equilibrium. Moreover, although balance of powers of some sort can dismiss the immediate outburst of violence, it does not resolve the problem of its underlying causes. The same objection can be made to the second kind of negative peace – *peace by impotence* (*peace by terror*), viz., a suspension of violence motivated by the threat of mutual destruction (Aron 2003: 159). The fear of annihilation in a nuclear war could be a strong motivation for refraining from violent modes of rivalry, yet the state achieved by the constant threat can hardly be labeled as peaceful *in a deeper (axiologically unambiguously) positive sense*. If one agreed that peace by impotence is peace in this deeper sense, then there would be no reason for coining the term "Cold War" for the rivalry between the Soviet Union and the United States. The *intrastate negative peace* is exposed to similar objections as the negative interstate peace. Since it is understood as absence of direct

violence, nonoccurrence of violent conflict, such as civil war or revolution, can be labeled as a time of peace. However, a state peaceful in negative terms could be characterized by high level of crime, extremely coercive laws, domination, political exclusion, or social injustice. In such cases, a threat of violent conflict is always around the corner. Thus, the common feature of the negative peace – regardless of the form it takes, viz., whether it is more or less durable, interstate or intrastate – is that although it breaks the cycle of violence, it does not address its underlying causes; thus, the potential of conflict it still not suppressed.

Positive Peace

The first preliminary article from the Kantian *Perpetual Peace* expresses what could be called a credo for positive peace: "No treaty of peace that tacitly reserves issues for the future war should be held valid" (Kant 2003: 2). Following this line of thought, adherents of the positive peace theory seek to determine the fundamental conditions necessary for ending violent conflicts as well as counteracting them. If peace thus understood is to be fulfilled, certain demands must be met. While some of these basic conditions for positive peace apply to both interstate and intrastate conflicts, others apply to only one of them. For instance, the principle underlying *interstate positive peace* could be *satisfaction* and *global justice*.

The term *peace by satisfaction*, coined by Aron, refers to the state when political units cease to compete for territory or resources, renounce a struggle for ideological victory or pride, and respect a shared principle of legitimacy (Aron 2003: 160). In order to serve as a common principle of peace, satisfaction would require shared consent and recognition (i.e., all of the "satisfied" states agree to renounce expansion and recognize that others do the same). Aron treated the possibility of such common consent with skepticism, as it would require either a revolution in human souls or institutions (giving up power politics, relying on international tribunals). Theoretically, it would be possible if there existed a federation of free states agreeing to obey the universally valid right of nations, like the Kantian league of peace (Kant 2003: 14), Kelsen's World Federal State (Kelsen 2000), or what Aron called a universal empire (Aron 2003: 161). While Kelsen manifested cautious optimism as to the possibility of arriving at such a world federal state after a long-lasting transitional period (Kelsen 2000: 15), Aron was more pessimistic – he noticed that federations of free states occurred in history only on the local level (Aron 2003: 162). Another variant of the conception of positive peace by satisfaction is John Rawls's theory of peace between reasonably just constitutional democratic governments. He argued for his conception relying on historical data according to which liberal societies do not wage wars with each other (Rawls 2002: 51–53). Liberal societies are satisfied and stable for right reasons (as opposed to being stable by power): their stability results *i.a.* from fair equality of opportunity (mainly in education and training), availability of basic health care, or decent distribution of income (Rawls 2002: 50). They have a reasonably just constitutional government remaining under their political and electoral control and serving their fundamental interests. Therefore, liberal societies have no reason for waging wars. They do not feel the need for territorial expansion and struggle for resources, and the liberal principle of toleration prevents them from engaging in ideological wars. Such peace by satisfaction can be achieved between liberal peoples (viz., accepting the principles of political liberalism) and "decent peoples" (viz., ones not accepting principles of political liberalism but honoring other basic principles, like human rights, binding force of treaties, duty of nonintervention). In other words, the Rawlsian underlying principle for interstate positive peace by satisfaction proves to be political liberalism. However, societies enjoying this kind of positive peace could still have a valid basis for war, viz., self-defense against domination from the "outlaw states" (the ones which fail to honor human rights or attempt to expand their territory or resources).

Another principle of *positive peace* could be *social justice* understood in terms of equal distribution of power and resources. This approach has been famously developed by Johan Galtung, who

defined positive peace as absence of what he labeled as *structural violence* (Galtung 1969: 173). According to his extended definition, "violence is present when human beings are being influenced so that their actual somatic and mental realizations are below their potential realizations" (Galtung 1969: 168). Such a general formulation incorporates direct (personal) violence, but it also leaves space for indirect (structural) violence. Now, not every impediment to the realization of human somatic or mental potential would be considered as an outcome of structural violence. Only these cases when such impediment stems from *social injustice* understood in terms of *inegalitarian distribution of power and resources* can be referred to as structural violence (Galtung 1969: 175). This kind of violence results from oppressive governments and laws and grossly unfair distribution of resources or power (such as limited access to education or governance) or of basic socioeconomic resources (e.g., health care). Using the term "positive peace" is in this case justified by the fact that the absence of structural (indirect) violence requires positively defined conditions, viz., social justice understood as egalitarian distribution of power and resources. Structural violence is an autonomous kind of violence, different from direct (personal) violence. It is easy to imagine societies where direct violence is absent and structural violence is present. However, the two kinds of violence are interrelated, that is, the presence of its structural variant could increase the risk of outburst of its direct variant (and the other way around). Thus, there exists no disparity between Galtung's definition of positive peace as an absence of structural violence and the general definition of positive peace as absence of both potential and actual violence outlined in section "Introduction." If interstate positive peace were to be understood as absence of structural violence defined as unequal distribution of power and resources, then attempts to secure the mentioned kind of peace would require adhering to some version of the theory of global justice, e.g., *cosmopolitan* or *Rawlsian*. According to the *cosmopolitan* approach nationality, being a contingent factor should not determine subjects' socioeconomic situation. Adherents of the cosmopolitan approach could, for instance, apply the Rawlsian two principles of justice (fair equality of opportunity and "difference principle") to the global context and claim that states should be obliged to support poorer countries so to maximize the well-being of their citizens (cf. Beitz 1979). It must be noted, however, that Rawls himself insisted that his "difference principle" could not be applied to the international context, as states are economically autonomous because their wealth depends from the just arrangement of their institutions. In *The Law of Peoples*, he developed a limited conception of global justice according to which the "well-ordered societies" (by which he meant liberal societies and non-liberal "decent societies") should provide assistance for the so-called burdened states in their struggle for building their own just institutions. In other words, the limited Rawlsian conception of global justice is focused on turning "burdened states" into "well-ordered societies" in which treaties are observed and human rights honored (Rawls 2002). Both conceptions, viz., a proper Rawlsian theory developed in *The Law of Peoples* and cosmopolitan (e.g., Beitz's conception influenced by Rawlsian *Theory of Justice*), could be used as principles of global justice helping to promote the interstate positive peace. The two options outlined above do not exhaust the wide spectrum of possibilities for promoting just distribution of power and resources and thus have been presented as examples of how theory of global justice could be applied in the context of structural violence at the interstate level. Thus, it should be noted that contemporary debates concerning the positive peace and global justice (at interstate level) or social justice (at intrastate level) overlap to a significant degree, which proves that positive peace is an unspecific concept (section "Conclusions").

The concept of structural violence introduced by Johan Galtung can also be used in the analysis of *intrastate positive peace*, which, on this account, would be provided by just distribution of power and resources at the state level. This general formulation, as it was the case with interstate peace, opens many possible interpretations as to how "just distribution" could be understood.

For instance, in the context of just distribution of resources, Rawlsian two principles of justice as fairness could be applied (the fair equality of opportunity and the difference principle). However, distributive justice alone would not resolve the problem of structural violence, as besides socioeconomic, it has also a political aspect. As Galtung claimed, the specific trait of structural violence is that its various aspects are interrelated, namely, that the citizens who are low on income tend to be often low on power, education, and health (Galtung 1969: 171). This does not imply however that overcoming inequality in one sphere must automatically translate into overbearing inequalities in the other. A comprehensive approach to structural violence would require actions not only in socioeconomic but also in political sphere. As far as political aspect of structural violence is concerned, actions could be taken in two directions: *protection* (securing citizens against consequences of their weak position in a society) and *empowerment* (strengthening their position in a society). Being a victim of political structural violence translates into susceptibility to what Philip Pettit labeled as *domination*, viz., the state when citizens are exposed to arbitrary interference from the state, certain social groups, or individuals occurring at their will and with impunity (Pettit 1997: 22). Domination thus understood could be overcome by the system of well-designed legal and political institutions which would preclude the possibility of accumulating power by minority interest groups or individuals and exercising it without impediment and with impunity. The comprehensive system of such institutions would have to guard citizens from domination in the sphere of *imperium* (citizens-state relationship) and *dominium* (relations between the citizens) and thus would encompass a variety of solutions such as separation of powers, counter-majoritarian conditions, the rule of law, or protective laws (Pettit 1997). While institutions could have the advantage of securing against domination, their existence and proper functioning are strongly related to respect for values such as political liberty (right to participate in governance, universal suffrage), negative freedoms (e.g., right of free speech, freedom of press and assembly which allow citizens to manifest their consent or dissent toward political authorities), or political equality. Therefore, the belief in providing a comprehensive solution to structural political violence may seem utopian, especially within strongly hierarchical societies which at the same time show lesser respect for political values. However, certain means of *empowering* the citizens could be undertaken, e.g., by assisting in creating nongovernment and nonprofit organizations, in which citizens could acquire some range of self-determination; certain scope of citizens' power thus achieved would be one of the means of reducing political structural violence. The idea behind empowerment can be found in Hannah Arendt's *On Violence*, where she famously opposed violence to power; she understood the latter as the capacity to act in concert in the public sphere in order to influence the political reality (Arendt 1970). Power, unlike violence, rests not on coercion but on mutual consent. Thus, a legitimate rule springs from entitlement provided by community to those who agree to exercise authority in their name (Arendt 1970: 44). Political violence is thus associated with political exclusion. Accordingly, a remedy for political violence could be increasing the scope of civic participation in governance, since by undertaking "common action," the citizens could express their attitudes toward government policies and thereby take active part in formulating them. Of course, a critical remark could be raised that these institutional safeguards against structural political violence, e.g., empowerment based on common participation, are Western ideals not suitable for other cultures. This remark draws attention to the fact that the precise understanding of positive peace is culture-dependent, and thus it would border on the impossibility to provide for it universally valid and precise principles.

Peace and the Law

The distinction between the positive and the negative peace outlined above entails certain conclusions as to the mutual relationships between law and peace; these conclusions will differ

depending on whether one chooses the negative or the positive peace as the value worth pursuing by means of the law. In the interstate context, the distinction between the two kinds of peace would result in two differing conceptions of peace treaties, which could be labeled as "war termination treaties" and "peace treaties properly so-called." Adherents of the positive peace conceptions would claim that any peace treaty worthy of the name must not only legitimize cessation of actual direct violence but also avert the threat of future conflict by addressing its potential causes and counteracting them. Thus, armistices and peace treaties that do not address the problems underlying future potential conflicts should be called war termination treaties rather than peace treaties properly so-called.

Adhering to one of the abovementioned conceptions of peace results in radically different views of the law in a domestic context. Should one assume that the negative peace is the *only* legal value, then one could justifiably adopt extremely coercive laws if they effectively served the purpose of restraining direct violence. Thus, the conception of the negative peace does not impose upon the legislator any obligations to enact laws, which would be respectful of the basic citizens' rights (e.g., the legislator could justifiably enact the law limiting the scope of individual freedoms, like the freedom of assembly, provided that this limitation would contribute to avert the threat of direct violence). Of course relation between the negative peace and the coerciveness of law is not of empirical necessity but of normative possibility. On the other hand, accepting positive peace as an important legal value would impose a broad set of obligations on the legislator, e.g., a duty to respect basic citizens' rights and their individual as well as political liberties. Thus, legal politics complying with the conception of the positive peace would provide broader directives for the legislator since it would require not only counteracting actual violence but also preparing a long-term policy including the methods of conflict prevention through minimizing structural violence. Such a policy would have to secure other values constitutive for the positive peace: certain scope of political and individual freedoms, sociopolitical equality, or stability. Moreover, the conception of positive peace imposes obligation of impartiality upon the law-applying or law-enforcing officials, treating equality under the law (irrespective of political views, gender, religion, etc.) as one of the chief principles.

The law complying with the aforementioned principles could significantly contribute to creating and sustaining the positive peace. Peace is however a legal value in yet another respect: in peaceful societies, maintaining the chief principle of the rule of law is more likely to be realized than in societies where violence contributes to the state of commonly accepted unlawfulness. Thus, the relation between peace and the law is characterized by mutuality: law enables the emergence and stability of peace, while peace is one of the fundamental conditions for the rule of law.

Conclusions

Both conceptions of peace outlined above involve certain controversies. The negative conception is limited; hence, it can hardly be considered an ideal which peace and legal scholars would ultimately pursue. As it was mentioned above, any comprehensive attempt of peacebuilding should address both resolving actual conflicts and diagnosing its causes and aiming at providing at least partial cures. Thus, the *negative peace*, due to its narrowness, is not an attractive value; its theoretical *specificity* entails inadequate (too narrow) conception of peace. On the other hand, on the theoretical level, the conception of the *positive peace* is *unspecific*, which means that it requires to be clarified relying on such concepts as social justice or satisfaction. Thus, the concept "positive peace" can have various meanings depending on the criteria by which it is specified. It is partly due to its openness to diverse positive axiological associations that the concept of positive peace is a much more attractive ideal than the negative peace and better captures

the common intuition that peace is one of the chief legal and social *values*.

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▶ Humanitarian Intervention
▶ Legal System and Legal Order
▶ Pettit, Philip
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Peach, Lucinda

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Introduction

The academic career of Lucinda Joy Peach (1956–2008) focused upon areas of publically relevant scholarship that have become ever more important since her death in 2008. Reflecting an overarching interest in the intersection between gender, religion, law, and ethics, she produced texts of enduring significance in key areas. These include the impact of religion on legal frameworks for women's rights (1993, 2001a, 2002, 2005a), the ethics of war and of women's participation in military combat (1994a, b, 1997, 2004), and women's rights and sex trafficking (2000, 2005b, 2006a). She was a Professor in the Department of Philosophy and Religion, at the American University, Washington, DC (the first woman to receive tenure in that department), and held a law degree from New York University and a doctorate in ethics from Indiana University. She was also a practicing Buddhist, the influence of which we can see reflected in her writing about the impact of law and religion upon the lives of Buddhist women in Thailand (2000, 2006a, b).

The Significance of Lucinda Joy Peach's Scholarship

Peach's work is significant in that it takes religion seriously: this is not in terms of some quasi-theological and normative promotion of religion as a positive force, but instead she views religious dynamics as intrinsic to understanding the reasons for inequality and discrimination as well as playing an important role in mitigating them. This lies in contrast to many other scholars working in the subject areas of gender studies, law, and ethics for whom religious dynamics are at the very least irrelevant to their analysis and more often than not only portrayed as an inherent problem for individuals and societies. My reading of Peach's approach to thinking about the relevance of religion is not that she necessarily disagrees with the fact that religion poses problems for women's pursuit of human rights and wellbeing. However, she challenges law makers and human rights activists to pay closer attention to the ways in which in the USA, for instance, "religious symbols of women and the feminine have functioned to shape legal views of women" and have become "a 'naturalized' part of our secular cultural symbolism" despite its religious

origins not always being evident (1993: 73). A commitment to educate scholars, students, and a wider public about the central role that religious and cultural dynamics play in shaping women's roles and opportunities is reflected in the publication of two edited volumes focusing on these themes (1998, 2001b).

Building on this, she also presents a sensitive challenge to approaches to human rights that fail to account for the role that religious traditions might play in limiting women's realization of human rights in the Global South, without collapsing her argument into a dangerous cultural relativism. In her 2000 article *Human Rights, Religion and (Sexual) Slavery*, she argues that human rights advocates need to take seriously the ways in which Buddhism in Thailand influences negative attitudes toward women that allow sex trafficking to flourish and make it difficult for women to view themselves as holders of human rights (2000: 70–72). She argues that it is crucial that – alongside any human rights campaigns to protect trafficked women in Thailand – it is important to develop and support approaches that seek to reinterpret understandings of Buddhism that devalue women: "such an 'indigenous' approach can more effectively address the 'self formation process' that the women's human rights approach neglects. Since this strategy works within "established religious paradigms," it minimizes the potential for opposition and backlash from conservative and anti-feminist elements" (2000: 74).

Conclusion

In an era where religious identities in many parts of the globe are strengthening, where competing claims to the right to religious freedom are being voiced more vociferously, and where religious fundamentalisms are presenting an increasing threat to the human rights of women and other minorities, scholars of gender, religion, law, and ethics can learn much from Peach's pragmatic and intersectional approach to dealing with manifestations of inequality and discrimination that have a basis in religious dynamics.

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Perelman, Chaïm

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Introduction

Chaïm Perelman (1912–1984) is a major figure of legal and moral philosophy of the second part of the twentieth century. As the leader of the Brussels School, he is best known as the founder of the "New Rhetoric" for having initiated the contemporary argumentative turn in philosophy, law, and social sciences.

He emphasized the argumentative nature, the epistemological value, and the various techniques of the practical reasoning in general and the judicial reasoning in particular.

Perelman was born in 1912 in Warsaw Poland within a Jewish family of merchants. In 1925, his family moved to Antwerp, Belgium. He received a secular education at Antwerp's high school, where he met his lifelong friends and future colleagues Henri Buch and René Dekkers. The three of them studied law at the Université Libre de Bruxelles (ULB). Perelman graduated *Juris Doctor* in 1934. At the same time, he also studied philosophy under the supervision of notable Eugène Dupréel, "the leader of the Brussels School and the most eminent of Belgian thinkers," according to the *Biographical Dictionary of Twentieth-Century Philosophers* (Routledge, 1996). Perelman's masters noticed the outstanding intelligence and talents of this extraordinary student and determined that he should become one of their own. In 1936, Perelman became a Belgian citizen. He also obtained a grant to study formal logic at the School of Logic of the University of Warsaw. Two years later, he was awarded a PhD at ULB with a dissertation on Gottlob Frege. He was appointed lecturer in philosophy at ULB but not for long. In 1940, he was forbidden, as a Jew, to teach, and he resigned his position. The Nazis regarded the ULB faculty as a bunch of free masons, Jews, and communists and had decided to transform it as a model of Third Reich University in Europe. However, the board of ULB derailed the project by closing the doors of the University from 1941 to the end of the German occupation. In the meantime, Perelman joined the Résistance and participates to the founding of the Comité de Défense des Juifs (CDJ). His wife Fela, a historian, played an important role in the saving of about 4,000 Jewish children placed in educational facilities and ordinary families.

The Logic of Justice

In 1945, Perelman was appointed ordinary professor and succeeded Dupréel when he retired in 1947. Perelman and his colleagues were profoundly shocked by the crimes and atrocities committed by the Nazis. They rejected the positivistic view that any order given by the political authority in accordance with the procedure was legally binding and should be obeyed. As soon as 1945, Perelman published an essay *On Justice*, where he tried to find the logical structure of justice. Starting from the ancient Roman definition of justice as *suum cui tribuere*, Perelman distinguished the multiplicity of criteria promoted by competing communities of values in order to materialize the formula. Does it mean to attribute the same thing to everybody or should one consider the needs, the merits, or the status of the various members of the community? Or, last but not least in a positivistic era, was the formula to be understood as giving to each one whatever portion determined by the applicable rules? However Perelman soon realized that this path was a dead end. There was no way to decide in principle which criterion was the best. Similarly, it appeared impossible to agree, within a pluralistic community, as a matter of principle, on a certain order of preferences that should apply on each and every case. Nevertheless, Perelman noticed that, when considering in a particular case at hand, what justice would require, the competing values would provide different and contradictory solutions. Some of them would be considered more convincing or more reasonable than others. The

way in which the abstract criteria or values were to be applied in the case at hand in order to provide the best answer, i.e., a fairer solution, was not the result of a formal deduction but rather formulated as an argument.

The Rehabilitation of Rhetoric and the Treatise on Argumentation

From then on, Perelman deserted the arid fields of formal logic that he regarded as almost useless in practical matters such as morals and law. Turning his back to formal logic, he immerged himself in the luxuriant jungle of rhetoric, following the steps of his master Dupréel.

After World War I, Dupréel had undertaken the difficult task of rehabilitating the Sophists, who had been most severely condemned and despised by philosophers during more than 2,300 years. Dupréel's primary interest was in pluralistic societies, meaning societies made of competing groups owning their own sets of values and interests such as Western contemporary democracies. He wanted to understand how collective values that could serve as grounds for collective action and democratic deliberations could be constructed in such a context and evolve over time. From the Sophists, he borrowed some useful notions like the value of artificial conventions and the usefulness of fuzzy concepts. With them, he shared a pluralistic view of moral and epistemology, from which he developed a constructive theory of values, which looks quite similar to the one of his American counterpart, the pragmatist philosopher John Dewey.

From 1949, Perelman engaged in the next steps with Lucie Olbrechts-Tyteca, another Dupréel's disciple. They collected a very extensive corpus of political, literary, philosophical works, discourses, as well as press articles and scrutinized them meticulously in order to exhume a contemporary topic of arguments that they presented in a systematic classification in their *The New Rhetoric: A Treatise on Argumentation* (1958). The treatise was an immediate success. It was translated in many languages and started Perelman's international career.

This book is generally seen as having contributed to launch the "argumentative turn" in philosophy and in law, along with Viehweg's *Topik und Jurisprudenz* (1953) and Toulmin's *The Uses of Argument* (1958).

The Seminar on Legal Logic: Facts and Rules

Simultaneously, Perelman founded in 1953, along with his lawyer friends Henri Buch and René Dekkers, the legal section of the Belgian National Center for Research in Logic (CNRL), which Perelman chaired during 30 years, until his death.

The regular contributors were both professors at the ULB and justices as well as prosecutors from the two supreme courts coexisting in Belgium at this time: the Cour de Cassation and the Conseil d'Etat. This group was commonly referred to as "The School of Brussels" in the fields of jurisprudence and philosophy of law. They were joined by dozens of foreign law professors and legal philosophers. Together they studied a range of tools mobilized by judges in the motives of their rulings. The case law material included both Belgian, foreign, European, and international court decisions. As a result, Perelman published, partially with Paul Foriers, eight books of collective works on *Facts and Law* (1961), *Antinomies* (1965), *Loopholes* (1968), *Legal Rules* (1971), *Presumptions and Fictions* (1974), *Motives of Court Rulings* (1978), *Proof* (1981), and *Fuzzy Concepts* (1984) in law. In addition, Perelman published a monograph summarizing his views on the subject: *Legal Logic. The New Rhetoric* (1976).

According to Perelman, the figure of syllogism, traditionally used on the continent to formalize the correct reasoning of the judge, where the major premise states the law, the minor states the facts, and the conclusion is logically deduced from them both, is unacceptable. It conceals the difficulties that should be explained: (1) how are the premises construed and (2) where and how the facts and the rules are brought together by the legal characterization of facts.

Moreover, the Brussels School does not abide by Hume's law and denies the possibility of a complete separation between *Sein und Sollen*. Norms and values on the one hand and facts or reality on the other cannot and should not be severed from one another, no more than theory and practice. Rules as well as facts are constructions made of mixed materials. The rule discovered by the judge is partially derived from the facts, which themselves are characterized by the rules.

Antinomies and loopholes are no defects of a legal system, exposing its inconsistency or incompleteness that needs to be eradicated by abstract metarules. Rather, when judges acknowledge the existence of an antinomy or a loophole, they create for themselves a possibility to add an element to the ongoing collective construction of the law in order to solve the case at hand. The tools and resources they use to build the law and to apply it to a case do not derive from logic. They are arguments that would be contradicted by other arguments and provide more or less convincing grounds for a correct and reasonable ruling. The audiences to be persuaded are plural and vary in their scope. The litigants need to convince the judge. The judge himself argues in his motives in order to persuade the parties, especially the one who loses the case, the courts that would potentially review his ruling, and in some cases the scientific community of lawyers who discuss its merits or even the general public in major or sensitive cases and sometimes at last the "universal audience" which is, according to Perelman, the final audience of philosophers.

Rebuttal of the "No Right Answer" Theory and Enforcement of the Rule of Law

Perelman absolutely rejects the positivist epistemology which separate, on the one hand, issues of facts and reality judgments who are the realm of science from, on the other hand, issues of morals and value judgments, which cannot be dealt with scientifically and are subject to arbitrariness and subjective preferences. Such conception produces terrible consequences by denying any possibility to reason in practical matters, which are most important for the sake of the humankind and the world, such as moral, political, legal, as well as social issues, decisions, and choices. Perelman refuses the impossible dilemma between logical reason and complete irrationality. Argumentation is the way of reasoning appropriate to discuss and to make decisions in practical matters. "It is the logic of action."

Discussing H.L.A. Hart's very famous hard case example "*no vehicle in the park*," Perelman rebuts the idea that hard cases are borderline cases to which our conventions provide no answer and that should be left to the discretion of the judge. Giving the example of an ambulance or a cab entering the park in order to collect a person who feels ill, Perelman shows that hard cases are indeed central cases when the real issue is a choice between competing values that contribute to reveal and to complete the meaning of the rules to be applied.

The various kinds of argument used by judges in the justification of their rulings make part of a toolbox that is needed to construct the law and to make it effective. In this task, judges mobilize not only what Perelman calls "rules in uniform" but also "guerilla norms," i.e., unofficial norms, which are not enacted according to primary rules but nevertheless play an important role in the fight for law and justice. Among these, general principles, norms, and fundamental rights are of capital importance, although they are only effective insofar that they find their way to infiltrate the layers of the legal orders.

Rejecting the frontal confrontation between positivism and jusnaturalism (another replication of the misleading separation between reality and ideals, facts, and values), the Brussels School invented the oxymoron "natural positivist law" (*droit naturel positif*) to capture the dynamics of these norms progressively integrating (or, at the contrary, being excluded from) the law and leading its further evolution.

More practically, professors and judges from the Brussels School committed themselves very hardly to this task, by promoting and sometimes enacting themselves some bold court rulings and

judicial reversals, contributing to improve significantly the rule of law in Belgium and sometimes in Europe.

Posterity

The field of argumentation reopened by Perelman and some others has been growing ever since.

Legal argumentation has become a specific branch of jurisprudence. Argumentation plays an important role in contemporary linguistics and pragmatics. The analysis of discourses is a method largely practiced and recognized in social sciences.

More specifically, Hans Georg Gadamer referred to Perelman's judicial model of reasoning in his major work *Truth and Method* (1960), which mutated the argumentative turn into an interpretative turn. The famous debate between Gadamer and Jürgen Habermas, stressing the importance of both tradition and critique in deciding practical issues, whose results were integrated by Ronald Dworkin and his famous "chain novel" in *Law's Empire*, had a significant influence in political and legal philosophy in the end of the twentieth century.

Finally, at a time when democracy and the rule of law are one more time clearly under attack, Perelman's conception of the law as a battle to fight case after case so that principles of justice and the rule of law would prevail remains a strong inspiration for the current and hopefully future generations.

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Introduction

Leon Petrażycki was born in 1867 at the time of the Russian Empire near the now Belarusian city of Vitebsk to a family of Polish heritage (Licki 1985, p. xxv) and died in Warsaw by suicide in 1931 (Merezhko 2012). He graduated in Law at the Kiev University (Licki ibid.) and attended the Russisches Seminar für römisches Recht in Berlin (Kolbinger 2004). Then, he lectured at the University of Saint Petersburg and – after the Bolshevik revolution – at the University of Warsaw. He also participated in the Russian political life. He was elected member in the first Duma in the ranks of the Constitutional Democratic Party. He signed the Wyborg manifesto and was sentenced to a brief term in prison for illegal propaganda (Walicki 1992, p. 222). Among other things, he actively supported women's and Jews's rights (cf. 1907, 1913).

As a scholar, his contributions range from general philosophy (e.g., 1939a), logic (e.g., 1939b), epistemology (e.g., 1908, Part 1), economics, (e.g., 1911), psychology (e.g., 1908, Part 2), sociology (e.g., 1936) to legal dogmatics and applied legal policy (e.g., 1892), general legal policy (e.g., 2010[1896–97]), and general theory of law (1909–1910). He is also considered a forerunner of Economic Analysis of Law (cf. Gadzhiev 2017) and one of the founding fathers of Sociology of Law (Podgórecki 1980–81; Motyka 1993). It is an open question whether his ideas are closer to legal realism or phenomenology (see, respectively, Fittipaldi 2018; Timoshina 2018).

In this entry I will focus on Petrażycki's theory of law and on his conceptions of legal dogmatics and legal policy.

Not without some simplification (see 1939b), we can say that, basically, Petrażycki distinguished three different approaches whereby legal phenomena can be studied:

1. An objective-cognitive one, aimed at investigating how legal phenomena actually are, *independently of the jurist's subjective attitudes* (theory of law).
2. Two subjective-relational ones, namely:
   2.1 One that, based on the subjective experience of the bindingness of certain *positive* legal sources and/or of certain non-positive, or *intuitive* legal principles, is made up of judgments (in a philosophical sense) concerning how people and officials should behave in order to be consistent with those sources or principles (legal dogmatics).
   2.2 One that, based on the subjective selection of certain political goals and on the available causal knowledge, is made up of judgments concerning what and how pieces of legislation should be enacted to achieve those goals (legal policy).

I will deal with these three approaches in this order.

Theory of Law

The starting point of Petrażycki's theory of law is the idea that the *sole source of scientific legitimacy of a conceptualization* is its ability to select causal (or logical) antecedents in class judgments. For example, the conceptualization of *particles* is scientifically legitimate only as far as they can enter as causal antecedents into at least one causal law (e.g., the law of gravitation).

Consistently, Petrażycki conceptualizes legal phenomena (or law) as *combinations of representations or perceptions of behaviors with emotions that make us experience those behaviors as owed*

to someone (imperative-attributive phenomena), thus distinguishing them from moral phenomena (or morality), where a behavior is experienced as obligatory *without* anybody being experienced as entitled thereto (purely imperative phenomena). Possible examples of legal and moral phenomena are, respectively, the experience of the obligation to pay the check at the restaurant and to give alms to beggars. However, in order to avoid misunderstandings, it should be stressed that, if a restaurant customer experiences their duty to pay without experiencing the restaurant owner's right to be paid, or, if a beggar experiences themselves as entitled to receiving alms, we are dealing with a moral and a legal phenomenon, respectively; the former one being located within the restaurant customer's mind, and the latter one within the beggar's one.

The difference between this conceptualization and von Jhering's conception of feeling of right (*Rechtsgefühl*) is twofold:

1. If von Jhering held that "[i]t is not the feeling of right that has produced law, but it is law that has produced the feeling of right" (1877, p. xiii; 1913[1877], p. lix, translation modified), the opposite is true in the case of Petrażycki. This latter stipulatively conceptualized law in terms of feelings of right and regarded von Jhering's law (i.e., state-enforced norms) as a complex *by-product* of law as he (Petrażycki) conceptualized it.
2. If Jhering allowed for social factors conditioning whether and how feelings of right are experienced (e.g., 1997[1872], p. 87 ff.; 1915 [1872], p. 42 ff.), as far as I know, he did not conceptualize *pathological experiences of entitlement* – including those of criminals – , while this is the case of Petrażycki, who expressly addressed the topic of pathological legal convictions.

According to Petrażycki, *legal phenomena, or law, are the main cause of conflicts among human beings*. This is so because where two people merely happen to have incompatible *interests* there is a much higher chance that they reach a compromise than where there is a clash of incompatible *feelings of right*, or *imperative-attributive emotions*. In this latter case there is a high chance that people will turn to violent self-help or ask some agency to provide violence, or coercion. This explains why many scholars conceptualize law in terms of coercion, state, and/or adjudication. As can be seen, many jurists conceptualize as law what, according to Petrażycki, is an *effect* of law's polemogenous nature. This also shows that Petrażycki's conceptualization of law is consistent with his ideas on the scientific legitimacy of conceptualizations.

Among the many effects produced by legal phenomena listed by Petrażycki, he mentions the following tendencies, which somewhat counteract law's polemogenous nature:

1. *Positivization*: When two persons argue over some right or legal obligation there is a tendency to invoke some prestigious fact (e.g., a sacred text, a judicial or nonjudicial precedent, a custom, a king's law, a prophet's dictum, etc.) to justify one's own claim. Notably, Petrażycki distinguishes between *positive* and *intuitive* (or nonpositive) legal *convictions* (i.e., stabilized dispositions to experience imperative-attributive emotions) depending on (α) whether the experiencer of an imperative-attributive emotion *believes* that some fact (in Petrażycki's terminology: "normative fact") justifies it and (β) whether that belief – regardless of its truth – actually causes that conviction. (In order to avoid misunderstandings, it should be stressed that in no way does Petrażycki hold that intuitive legal convictions are similar across different individuals. Intuitive legal convictions are simply conceptualized as legal convictions that are neither caused nor justified by beliefs in normative facts. Therefore, they are quite variable. Petrażycki's focus on *beliefs* is due to his conviction that theory of law should study human motivation, independently of its rational soundness.)
2. *Intensional formalization* (my terminology): The polemogenous nature of law causes the rigid conceptualization of the events that give rise to legal experiences, and of what and how much is owed. Compare the precise

determination of when and how much one should pay at the restaurant with the imprecise determination of the moral obligation to reciprocate a dinner invitation.

3. *Extensional formalization* (my terminology): The polemogenous nature of law also causes the tendency to make rights and legal obligations dependent of the intersubjective ascertainability of certain facts, for example, the existence of a certain instrument.
4. *Adjudication*: The polemogenous nature of law may cause people to ask third persons, usually prestigious ones, to solve their conflicts. Those persons may be a caregiver in a quarrel between children, an authoritative elder in a stateless society, a king, a trained jurist, etc., in a state society.

So far so good as to the effects produced by law which – at least to some extent – counteract its polemogenous nature.

Among the other effects produced by legal phenomena, Petrażycki mentions market economies and states.

Market economies come into being due to the imperative-attributive experience of ownership, which Petrażycki conceptualized as a compound legal phenomenon made up of the *experience* of some person as entitled (1) to do what she pleases – with or without limitations – in regard to something, and (2) to other people's abstention from dealing with that thing without that person's consent. If such convictions are relatively consistent within a group, exchanges within it may emerge, and this, in turn, brings about a market economy. This is so because people must convince others to part with what they own by offering something else in exchange for that rather than by using tricks or violence.

As for states, they come into being due to another compound legal relationship: "authority [*vlast'*]" (to be compared to Weber's *Herrschaft*). Authority amounts to a given person (authority-holder) being experienced as entitled to: (1) do what she pleases in regard to certain other individuals ("her subjects") and to have them (2) act, or (3) abstain from acting in certain ways, in accordance with that person's commands or prohibitions. A state is a group of people unified by an authority-holder who is experienced as entitled to rule that group for the benefit of its members or of the group as whole, provided that that authority-holder is not subject to any other individual (or group) experienced as an authority-holder in regard to her. (Incidentally, it should be recalled that Petrażycki characterizes authority-holders who are experienced as entitled to rule over certain subjects *to the benefit of the latter* as "public" and in this way distinguishes *public* authority-holders from *private* ones – for example, slave-owners or employers.)

Petrażycki's concept of state makes it possible to distinguish two other types of law besides intuitive and positive law, namely, state (or official) and nonstate (or unofficial) law. Official law is defined as the law applied and supported by state representatives in the line of their duty to serve their group. Thus, we have four kinds of law: intuitive-unofficial (e.g., chess-players' convictions concerning what each player is entitled to do during a game), intuitive-official (e.g., state judges' conviction to have the right to impose sentences based on how serious they perceive a certain crime to be), positive-unofficial (e.g., a custom-based conviction to be entitled to avenge certain offences), and positive-official (e.g., legal convictions based on laws enacted by some parliament).

Legal Dogmatics

We can now turn to legal dogmatics, and its difference from legal theory.

To highlight this difference, I will confine myself to two examples.

First example: A *legal theorist* is interested in whether some person is really experienced as entitled to walk on a path on somebody else's field because it is *believed* that since time immemorial people used to walk on that path (a legal-customary phenomenon), and so *regardless of the truth of that belief* (this is so because people are motivated by beliefs, not by truths), whereas a *legal dogmatician* –

provided that she subjectively adopts custom as a legal source – is interested in whether it is actually the case that since time immemorial people used to walk on that path, *regardless of whether anybody really experiences an imperative-attributive emotion, and that emotion – if any – is actually caused by the belief that since time immemorial people used to walk on that path*.

Second example: A *legal theorist* regards repealing laws as probabilistic causes of the removal of convictions concerning certain rights and legal obligations from the minds of certain people or officials. For a legal theorist, the question of when and to what extent a repealing law successfully removes those convictions is an empirical one. A *legal dogmatician*, instead, based on the enactment of a repealing law, will state that certain rights or legal obligations no longer exist dogmatically from the exact moment stated in that law. From a Petrażyckian perspective, this latter is not a statement about reality-as-it-actually-is, but about reality-as-it-ought-to-be, and is based on the adoption of the principle that parliaments have the right to enact laws to the goal of removing legal convictions whether or not brought about by other laws.

To put the distinction between legal theory and legal dogmatics in a Searlian language, we could say that legal theory and legal dogmatics have opposite directions of fit: the former has a world-to-mind direction of fit, the latter a mind-to-world one.

Legal Policy

As for legal policy, it also has a mind-to-world direction of fit but, unlike legal dogmatics, legal policy is not based on (α_1) the adoption of certain dogmata and (β_1) the ascertainment of spatio-temporally individuated events (e.g., the existence of a custom or the enactment of a repealing law) but on (α_2) the adoption of certain goals and (β_2) causal laws to be used to achieve them.

Legal policy concerns the choice of the optimal legislation to pursue certain subjectively chosen goals. Put in this way, it is apparent that Petrażycki's legal policy can be used to promote the most diverse goals. However, the fact that Petrażycki was a relativist (Lande 1952[1932], p. 613) does not mean that he did *not* have his own subjective preference as to goal to be pursued by legal policy. That goal was love, or benevolence. In his mature writings (see 2010[1913]), Petrażycki regarded benevolence as an ideal beyond law and morality, and, since – as we already know – he regarded law as the main cause of conflicts between human beings, he held that legal policy should aim at the replacement of law (and morality) with benevolence. In a society freed of law and morality people would follow plans for the sake of contributing to their neighbors' wellbeing rather than because pressured by moral or legal emotions. Think of stopping at red traffic lights simply because we care not only for our own but also for others' safety.

More in general, Petrażycki believed that the history of humanity showed a tendency towards the demise of violence and an increase of benevolence, and so that the achievement of his goal for legal policy was feasible. Modern research has confirmed this conjecture (see Pinker 2011).

Conclusion

As pointed out by Podgórecki (1980–1981), Petrażycki is to be regarded as one of the fathers of sociology of law – or, more precisely, of the empirical study of law.

In this entry, I showed that the contemporary legal-philosophical conversation should also take into account his contributions to (the epistemology of) legal dogmatics and policy of law.

Three are the main reasons why Petrażycki's contributions to all these fields are still neglected. The first one is that in order to make his ideas palatable to the Anglo readership the abridged English translation of Petrażycki's main works (2011[1955]) oversimplifies many of his most important ideas, that which makes it difficult for

unbiased readers to realize the potential of his theory. Among the few exceptions, I confine myself to mentioning Cotterrell (2015) and Treviño (2011); along with the many references to his ideas to be found throughout Carol Weisbrod's works, which, due to space limitations, I cannot list here. The second one is the anti-psychological attitude that still characterizes much legal theory, probably due to the influence of logical positivism and the subsequent "linguistic turn". The third and final one is that many scholars, including scholars who have direct access to Petrażycki's Russian or Polish originals/translations have taken his legal-theoretical ideas for legal-dogmatic ones, while Leon Petrażycki regarded legal theory and legal dogmatics as two distinct sciences, and the same goes for legal policy.

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Introduction

Philip N. Pettit (b. 1945–) is Laurence S. Rockefeller university professor of Politics and Human Values at Princeton University and distinguished professor of Philosophy at the Australian National University. He is also a fellow of the American Academy of Arts and Sciences, honorary member of the Royal Irish Academy, fellow of the Academy of Social Sciences in Australia and of the Australian Academy of the Humanities, and corresponding fellow of the British Academy. Pettit's early work explores questions related to phenomenology (Pettit 1969) and structuralism (Pettit 1975), but he is now primarily associated with his analytic approach to political, social, and legal philosophy, as well as to the philosophy of mind, moral philosophy, and metaphysics. Though these domains are systematically connected and would benefit from a joint reading, this entry will, for lack of space, deal only with his political, legal, and social philosophy.

Pettit was born to a Catholic family in Ballygar, Ireland. He went to the National University of Ireland intending to study either mathematics or classics, but eventually decided to pursue a philosophy track. This came after reading Sartre, whose writings also provided the topic for his graduate senior thesis, titled "Bad Faith in the Thought of Jean-Paul Sartre." Pettit then defended his master's thesis on "The Early Philosophy of G.E. Moore" and his doctoral dissertation on "The Philosophy of Paul Ricoeur."

Political Philosophy

Pettit sees political philosophy as an evaluative discipline: its task is to assess alternative institutional arrangements against the backdrop of one or more political ideals (Pettit 1996a, 1997a). Political philosophy is also construed as a reflective discipline, in that its data consists in general or particular normative judgments, not in empirically testable laws (Pettit 1980: 31). For Pettit, the objective of political philosophy is fourfold. It should (1) formulate an ideal for evaluating our institutions, (2) clarify and add to the existing political language in a way that gives voice to different individual and group complaints, (3) work toward a reflective equilibrium between general principles and particular judgments and intuitions about political matters, and (4) serve as a heuristic for concrete institutional design (Pettit 1997a, 2012).

Pettit is widely known for his conception of freedom as non-domination (Pettit 1997a) or, following an alternative formulation, of freedom as anti-power (Pettit 1996b). Drawing on a republican tradition of political thought ranging from Cicero to *Cato's Letters* and the *Federalist Papers*, Pettit argues that we should understand freedom as the absence of arbitrary interference with a person's affairs. This definiens of freedom needs some unpacking. Interfering with a person's affairs means affecting her choices in some relevant way – say, by making some of them entirely unavailable or by coercing that person into making a particular choice when alternatives would otherwise have remained available. Interference is arbitrary insofar as it does not track the interests that the interferee can be said to have in common with other members of her community. More specifically, a person's interest counts as common if it can be construed as a good whose collective provision is based on considerations that are admissible to all the members of a particular society (Pettit 2001: 174).

One way of making the idea of common interests more palpable (and politically operational) is to think of them in terms of basic liberties. Basic liberties are means of securing "certain fundamental choices" any person has an interest in. This is achieved by setting up a system of public resources and protections (Pettit 2012: 78). Though they can vary both culturally and historically, an indicative list of basic liberties would, according to Pettit, include the freedom to think what you like, the freedom to express what you think, the freedom to practice the religion of your choice, the freedom to associate with those willing to associate with you, the freedom to own certain goods and to trade in their exchange, the freedom to change occupation and employment, and the freedom to travel within the society and settle where you will (Pettit 2012: 103). Enjoying such liberties on a secure basis comes close to enjoying freedom as non-domination.

The idea of freedom as non-domination becomes clearer when one looks at some of the contemporary cases in which it does not obtain. These are paradigmatic cases of domination: the situation of a wife who can be beaten at will by her husband without the possibility of redress, that of an employee vulnerable to the good will of her employer, that of the debtor who has to "depend on the grace of the moneylender," or that of the welfare dependent subject to the caprice of the state bureaucrat (Pettit 1997a: 5). The modal *can* is important here: domination does not ensue only when interference actually happens – say, when the husband hits his wife or when the employer sacks the employee on a whim. Adequately understood, domination consists in the capacity a natural or legal person has to interfere arbitrarily with another person's commonly avowable interests. Even if the husband is nice to his wife, he dominates her as long as he has the capacity to treat her as he pleases. Conversely, non-domination refers to the absence of such a capacity and, correspondingly, to the immunity any free person enjoys in relation to others.

As indicated, Pettit connects the idea of freedom as non-domination to a republican tradition of political thought, in which *libertas* (freedom) is synonymous with *civitas* (citizenship). Thus construed, freedom functions as a politically acquired status; it is not a natural feature individuals hold in isolation from their communities. Pettit contrasts his (neo)-republican conception with what he considers to be the liberal conception of freedom. He criticizes the latter for being too thin. Pettit argues that, since Hobbes, liberals have been thinking about freedom as actual non-interference, not as the absence of the capacity for arbitrary interference. This liberal understanding of freedom has at least two implications. First, it entails that a person remains free as long as she is not actually interfered with, even if others have the capacity of interfering with her choices and interests. Thus, as long as the master is gentle to his slave, the latter can be considered to be free. Second, it means that any intervention – for example, a law that taxes people – that somehow interferes with a person's choices violates that person's freedom. Pettit considers that both of these implications are deeply counterintuitive and that, as a consequence, they point to the flawed nature of the liberal conception of freedom.

Another distinctive feature of Pettit's conception of freedom lies in its consequentialist commitment (Pettit 1997b; Pettit et al. 1997). For Pettit, freedom is not something that is honored by simply refraining from interfering with people's choices. Rather, it is a neutral value that should be promoted – and, if possible, maximized – by putting an effective set of institutions in place. More generally, Pettit's consequentialist stance explains his focus on feasible mechanisms for acquiring freedom in concrete public policy terms (Pettit and Marti 2010; Pettit 2012, 2014).

Based on his conception of freedom, Pettit articulates a distinct set of views about social justice, legitimacy, and international justice (Pettit 2010, 2012, 2014). His republican principle of social justice states that people should equally enjoy a certain number of basic liberties in relation to each other. His conception of legitimacy asks how the state should treat its citizens and formulates a principle of democratic control (Pettit 2008). This principle insists on the importance of supplementing the electoral and constitutional dimensions of democracy with institutions that allow for the contestation of specific public policies and with

independent monitoring agencies meant to oversee governmental activities. More generally, Pettit holds that democratic legitimacy requires a mixed constitution. Finally, Pettit advances a view of international justice that occupies a middle ground between statist and cosmopolitan approaches (Pettit 2010). His argument, at this level, is that international domination could be countered through a two-tier system: first, by fostering a regime of international agencies that enable the existence of free relations among states and, second, by encouraging the formation of a plurality of networks of moderately strong and weak states whose alliances could counterbalance the power potentially exerted by stronger ones.

Legal Philosophy

Pettit's legal philosophy is closely connected to his political one (Pettit 1996b: 317). This section will mention only three of his contributions to legal scholarship. The first one concerns Pettit's interpretation of law. Pace some liberal or libertarian views, Pettit argues that law is not simply an instrument for protecting freedom. Rather, it is a constitutive dimension of freedom understood as non-domination. This implies that, rightly understood, freedom cannot exist in the absence of law. Following Pettit's analogy, the relationship between freedom and law – and, more generally, legal institutions – is like the relationship between immunity and antibodies: the latter do not cause the former; rather, they constitute it (Pettit 1997a: 107–108). Being immune entails having certain antibodies; similarly, being free supposes the presence of a legal framework (Pettit 2009). To put in a slogan, the claim is that there is no freedom without law.

Second, Pettit holds a distinct view of legal punishment. After having developed a republican theory of punishment with John Braithwaite (Pettit and Braithwaite 1990), Pettit independently argued that criminal justice should track a principle of rectification (Pettit et al. 1997). The principle is derived from the more general ideal of non-domination, and it holds that justified punishment must meet three requirements: it should be applied in a manner that recognizes the wrong suffered by the victim, that provides a recompense for the material harm of the offense, and that reassures the general public that domination through crime will not be tolerated.

Third, Pettit has contributed substantially to contemporary theories of corporate responsibility. Pettit argues that corporations should be seen as autonomous persons and that, as such, they have distinctive rights and obligations (Pettit and List 2011; Pettit 2015). However, Pettit warns that corporation rights are not on a par with those of natural persons. This is mainly because though corporations enjoy "epistemological autonomy" – i.e., their judgments are not reducible to individual ones – they are not ontologically autonomous entities. This implies that, though in a sense they do function independently from individuals, corporations matter less from a normative standpoint. It further implies that corporation rights should be structured in a way that defers to the rights of natural persons, who are taken to be ontologically, not only epistemologically, autonomous. This is a position that Pettit calls moral individualism (Pettit 2007: 296).

Social Philosophy

Pettit's positions in political and legal matters are both distinct from and connected to his social philosophy. They are distinct because he considers that political and legal philosophy, on the one hand, and social philosophy, on the other, are different kinds of projects. The task of the first two is primarily evaluative or justificatory, whereas the task of social philosophy is explanatory: it should provide an account of how the social world is and how it functions. The two projects are however linked insofar as Pettit considers that any sound normative theory should be compatible with our best explanation of the social world.

Though Pettit holds that the individual is the ultimate unit of normative concern, he also argues that, as a matter of social ontology, an individual's functioning as a human being depends on her social interaction with others. Pettit thus rejects

atomism, which refers to the set of views holding that individuals can develop as human beings in isolation from society. Instead, Pettit holds a position that he calls social holism, a theory that is roughly based on two theses (Pettit 1996a, 2002). The first thesis is that what distinguishes human beings from other kinds of entities is the human capacity to think. The second thesis is that "thinking is a social activity" (Pettit 2002: 24) and that, as a consequence, one becomes a human being only through interacting with other people. Metaphysically speaking, "individuals are not free-standing" (Pettit 2002: 117).

Though conceptually distinct, Pettit's social philosophy remains central to understanding his political and legal philosophy. It accounts in part for Pettit's rejection of liberalism, which he takes to be generally anchored in a flawed metaphysical theory – namely, atomism – whereby individuals can acquire full human status independently from their social lives. Pettit's commitment to social holism also goes hand in hand with his civic republicanism, which is ultimately based on the idea that freedom is not a natural individual feature, but a status that can only be acquired socially.

Conclusion

It is difficult to provide a general characterization of Pettit's philosophical work. Nonetheless, two of its features seem to be particularly salient. First, Pettit is one of the rare contemporary philosophers to formulate both a distinctive normative theory (civic republicanism) and a systematic social philosophy (social holism) and to think about the ways in which the two can be articulated into one single coherent theoretical framework. Second, Pettit's work is distinctive in its interest in pointing to the concrete policy implications of his normative views. Following his formulation, it is not enough for an ideal to be normatively desirable. In order to be fully appealing, an ideal also has to be institutionally feasible (Pettit 1996: 284–286, 2002: 275).

Cross-References

- ▶ Citizenship
- ▶ Legal System and Legal Order
- ▶ Rawls, John
- ▶ Rights: General

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Phenomenology of Law

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Introduction

The term "phenomenology" refers to a school of philosophical thought founded by Edmund Husserl (1859–1936) that analyzes the state of being aware of a phenomenon. It mainly addresses the following three questions: Which characteristics of an object are essential and which are merely epiphenomenal? What does awareness contribute to the appearance of an object? Which intersubjective preconditions must be given so that an object can appear to a subject?

Phenomenology of law undertakes to answer these three questions for law as an object. In doing so, it relies on the philosophical foundations developed by E. Husserl: the methods of eidetic seeing and of transcendental reduction as well as the concept of "lifeworld." Hence, phenomenology of law can be roughly divided into three branches: eidetic, transcendental, and mundane. Each of the following three sections of this entry will present one branch of the phenomenology of law by first summarizing E. Husserl's philosophical impetus, followed by its application to law by different legal theorists. The fourth section will give an overview of the influence of phenomenology on other branches of legal philosophy. Finally, the fifth section will sum up widespread strands of criticism of legal phenomenology.

The Method of Eidetic Seeing and Eidetic Phenomenology of Law

Phenomenology's initial assumption is that being aware always means being aware *of something*. This is to say that phenomenologists do not only analyze the structures of consciousness itself but also the essential, unchanging features of its object. E. Husserl terms these features the "material *apriori*" of a phenomenon. Husserl leaves open the question as to whether there exists a real object behind the phenomenon (a thing-in-itself), since it is only through its appearance that human beings can have cognition of the existence of an object. The "material *apriori*" of a phenomenon can be identified by "eidetic seeing" (also translated as "essential seeing" or "vision of essence"). This means that the observer imagines to change features of the phenomenon or to see it from different perspectives. The characteristics of the phenomenon that prove immune to changes in this mental process will be its "material *apriori*" (Husserl 1973a, 340–348). A coat, to give a simple example, can be factory- or tailor-made. Hence, a particular production method is not part of the "material *apriori*" of a coat. If one imagined leaving out the sleeves, the garment would not, however, be a coat anymore. Having sleeves is, thus, a part of the "material *apriori*" of a coat. This method leads to a deep difference between a single, time-dependent phenomenon and its universal, time-transcendent essence.

While Husserl applied his method mainly to empirical objects and to the sentences of logic, it was transferred to the field of law by Adolf Reinach (1883–1917). He demonstrated that the law is not sufficiently described by limiting oneself to empirical terms only. Such descriptions could only lead to empirical hypotheses such as: "If a person causes grievous bodily harm to another, he or she will usually face imprisonment for up to 10 years." A description such as this states that a certain misbehavior *will* usually lead to punishment. It fails to show, however, that the wrongdoer *ought to* be punished. According to phenomenology, law is, therefore, a nonempirical object, meaning that its existence depends neither on its concrete physical manifestation nor on the convictions of its addressees (Reinach 2012, 9).

The sharp distinction between the perception of a single phenomenon and the intuition of its essential characteristics also applies to the phenomenologist legal theory: The sentences of "positive law," on the one hand, correspond to single phenomena. They are "enactments" of the form: "A ought to be b" (unfortunately, Reinach himself

does not give any example for what can be inserted for "A" and "b"). Enactments are issued by an authority. An enactment will only be efficacious to other persons, if those persons have conferred to the authority beforehand the power to give rise to legal effects (Reinach 2012, 105–108).

The "legal concepts" or "legal entities," on the other hand, are the essential features of law. They are neither authoritatively issued, nor do they have to be socially efficacious. Yet, the legal entities do not boast of moral nature, because it is the law itself which makes use of them (Reinach 2012, 51). A famous example for a "legal entity" given by Reinach is the case of promising. According to Reinach, promises imply the intent to perform the promised behavior. This is not, however, what makes the promise binding. Declarations of intent do usually not create obligations. This is not supposed to be different, if they are directed to him who will profit from the intended action. Instead, it lies in the essence of promises to give rise to claims and obligations (Reinach 2012, 26). Without making use of the terms "claim" and "obligation," it would be impossible to explain what a promise is.

By virtue of this distinction, eidetic legal phenomenology tries to strike a balance between legal positivism and natural law theories. Law does not raise a claim to moral correctness in general (Reinach 2012, 51). But "the positive law *finds* the legal concepts which enter into it; *in absolutely no way does it produce them*" (Reinach 2012, 4). The drafters of positive law may develop and rearrange these concepts for practical reasons, but they remain dependent on them. Moreover, gaps in the positive law can be filled with apriori essential laws (Reinach 2012, 135).

Reinach was not the only legal theorist who adopted the method of eidetic seeing: Edith Stein (1891–1942) utilized it for an analysis of the state (Stein 2006). Felix Kaufmann (1895–1949) and Fritz Schreier (1897–1981), Hans Kelsen's students, combined the phenomenological separation of token and essence with the Kelsenian separation of "is" and "ought" (Kaufmann 1966a, b; Schreier 1924). Jean-Louis Gardies (1925–2004) combined eidetic seeing with deontic logic (Gardies 1972). Based on the two-layered phenomenological concept of law, Tomoo Otaka (1904–1954) enquired into the "legal concepts" as social backgrounds of law (Otaka 1932). Gerhart Husserl (1893–1973) scrutinized the subjective conditions of assessing legal claims (Husserl 1964). From other phenomenologists, he differed in emphasizing the importance of justice for the positive law, which comes close to legal nonpositivism (Husserl 1937). A clearly nonpositivist position was taken by Herbert Spiegelberg (1904–1990): He claimed the existence of a legal order that can only be supplemented by positive law (Spiegelberg 1938, 348; 1989, 230).

The Method of Reduction and Transcendental Phenomenology of Law

The main insight of the second period of E. Husserl's oeuvre was that the appearance of a phenomenon depends on the subject to whom it appears. The subject is not the origin of the phenomenon, but it makes some contribution to its appearance. Husserl terms this contribution the "constitution" of a phenomenon by the subject. In order to make the role of constitution in the appearance of phenomena visible, it is necessary to put the existence of the objective world between brackets. This is not to say that the phenomenologist must deny the existence of a "real world" in the common sense. It is only an invitation to dispense with the naïve realistic presumption that each characteristic of a phenomenon originates in the phenomenon and not in the subject. Husserl calls this cautious attitude "epoché." It will allow for a critical analysis of the subject's contributions to the appearance of a phenomenon. Husserl terms this analysis "transcendental reduction" (Husserl 1983, 57–67).

Applying this method to law, Paul Amselek (∗1937) and Simone Goyard-Fabre (∗1927) try to show that both legal positivism and natural law theories presuppose inconsiderate metaphysical assumptions. On the one hand, natural law theories blur the distinction between law and morality; on the other hand, legal positivism ignores that the law itself is perceptible in

phenomena that can be perfectly described as facts, e.g., in legislative texts and judgments. It is only the way we think of the law that lends normativity to it (Amselek 1964, 80). Their criticism is also directed against the inclusion of the sanction into the concept of law: It is the law that defines whether the infliction of harm is a legal sanction or not. Hence, it cannot be the sanction that defines what the law is.

However, transcendental legal phenomenology has not worked out a common concept of law. The proposals range from law as a means for judgment (Amselek 1964) to law as the reality that serves the human need for order (Goyard-Fabre 1972).

The Concept of Lifeworld and Mundane Phenomenology of Law

In his last years, E. Husserl developed the concept of lifeworld as a counterpart of the scientific concept of the physical universe. "Lifeworld" means the concrete realm of our experience that we trust in our everyday life. For Husserl, this is the original sphere of experience, whereas the scientific worldview is an abstraction (Husserl 1970, 104–111). Mundane phenomenology of law is not mainly concerned with the rational justification of norms. Rather, it looks for everyday experiences to which normativity is always inherent.

From the point of view of Emmanuel Levinas (1906–1995), for example, it is part of the meaning of the experience of seeing another person's face that this person shall not be killed (Levinas 1994, 86). According to such an approach, human rights do not need to be justified, but testified. The question whether law can and does in fact transform such ethically charged experiences into norms is still discussed controversially. William S. Hamrick gives a positive answer: He perceives of the law as a part of a larger body of social rules, a "social Gestalt." The separation from other parts of that body would destroy the identity of law. He argues that law "appears as a particular mode of expressing values" (Hamrick 1987, 118). Petra Gehring, on the other hand, who emphasizes the character of law as a mechanism of power, gives a negative answer (Gehring 2006, 491).

Phenomenology of Law and Its Influence on Other Branches of Legal Philosophy

Eidetic legal phenomenology has anticipated some major insights of the later speech act theory. Reinach claimed that "there are also 'acts of the mind' which do not have in words and the like their accidental, additional expression, but which are performed in the very act of speaking." He calls these "social acts" (Reinach 2012, 36). Furthermore, Reinach and Searle's enquiries into the act of promising have much in common (Hoffmann 1987, 91–106).

Recent publications elucidate the phenomenologist influence on Hannah Arendt. She was a student of Martin Heidegger's, who was himself deeply influenced by E. Husserl. The research strives toward new interpretations of human rights based on the experience of "natality" (Birmingham 2006) and on Arendt's criticism of modern spirit for being limited to work and consumption (Parekh 2008).

Finally, the Husserlian concept of lifeworld has been embraced by Jürgen Habermas (Habermas 2001, 23–26). In his discourse theory of law, the ethically charged phenomena of the lifeworld may be used as reasons in legal and moral discourse.

Criticism of the Phenomenology of Law

One of the most well-known critiques of phenomenology is that it takes a solipsist point of view as point of departure. Thus, it misses out the linguistic turn in philosophy which showed that intersubjectivity and communication are necessary preconditions of every insight (Apel 1976, 60). That makes phenomenology seem to be unfit for approaching an intersubjective matter such as the law. However, this critique can be rebutted. Indeed, phenomenology commenced with enquiries into the subject's intentionality toward a phenomenon and its contributions in constituting that phenomenon. But this only reveals how

little an individual can accomplish on his or her own. Therefore, Husserl devoted his last years mainly to questions of intersubjectivity (Husserl 1973b, 1977). The fruits of this labor are used by mundane phenomenology of law, especially when it refers to ethically charged experiences, such as viewing another person's face.

Another point of criticism is that the phenomenology of law has not yet met its own demand for a method to safely distinguish the essence of law from mere epiphenomena: What was initially deemed to be an essential characteristic of the law has often been shown to be merely accidental in the course of history (DuBois 2002, 343–344). There is indeed evidence for this criticism in all three branches of legal phenomenology. Eidetic seeing shares the problem of induction: One can only imagine a finite sequence of alterations of the phenomenon, but only an infinite sequence could prove a characteristic of the object to be part of its essence. The method of reduction reveals the contributions of the subject to the emergence of a concrete legal order but not to the law in general under any circumstances. And mundane phenomenology can indeed rely on the ethical side effects of certain quotidian experiences, but it misses to identify a necessary connection between the two. As a consequence of this lack of distinctive criteria, phenomenology of law has never been able to develop a uniform concept of law: From Schreier and Kaufmann, who share the positivist concept of law to Spiegelberg's natural law theory, a wide spectrum of concepts of law has been proposed in the name of phenomenology. This makes it also difficult to draw a sharp line between phenomenology and other schools of legal thought.

Conclusion

Phenomenology of law is not a coherent school of legal thought. Rather, it is an umbrella term encompassing different attempts to transfer E. Husserl's philosophical thinking to the field of law. Although these suggestions were mainly methodological, it is their substantial outcome that most enriched the legal philosophy: the criticism both toward natural law theories and legal positivism, the analysis of social acts, and the concept of lifeworld. Whether these results may also be useful in legal doctrine remains to be seen.

For further introductory reading about phenomenology of law, see Cantegreil 2005, Loidolt 2010, Schiff 1982.

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▶ Arendt, Hannah
▶ Habermas, Jürgen: Faith and Reason

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Philosophy of Civil Procedure

► Civil Procedure: Philosophy of

Philosophy of Crime

► Crime: Philosophy of

Philosophy of Evidence

► Evidence: Philosophy of

Philosophy of Law: The Naturalistic Approach

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Introduction

Scientific naturalism (or simply "naturalism") is a broad philosophical outlook centrally characterized by a favorable attitude toward the methods and ethos of natural science, combined with a dimmer view of other modes of inquiry or purported sources of knowledge. While the precise philosophical commitments naturalism entails are notoriously uncertain and shifting (Rea 2002, 21–22), clear elements of naturalism are discernible in philosophers as temporally and geographically diverse as Thomas Hobbes, David Hume, Friedrich Nietzsche, and John Dewey (Beam 1996, 299, 318; Kail 2009, 5; Keil 2008, 255–256; Kim 2003, 86, 97). In twentieth-century analytic philosophy, naturalism is particularly associated with W. V. O. Quine, but self-described naturalists are numerous in all areas of philosophy today (Keil 2008, 261; Kim 2003, 84).

It is useful to distinguish between two basic kinds of naturalism: (1) methodological naturalism and (2) substantive naturalism (the latter of which is sometimes also referred to as "ontological" or "metaphysical" naturalism). Methodological naturalism is best understood as the view that philosophical inquiry – really, theoretical inquiry in general – should be continuous with the successful

sciences (Kim 2003, 86–87; Leiter 2007, 34). Within a broadly naturalistic outlook, one can advance different views about what kind of "continuity" is to be sought and which disciplines qualify as "successful sciences." But the basic idea is that philosophy should, so far as possible, emulate the methods and style of explanation employed in the hard or physical sciences, and possibly other natural or social sciences (Leiter 2007, 34). Of course, this methodological commitment is generally grounded in the belief that the methods of the successful sciences, and especially natural science, represent the best-going way to make progress in the pursuit of knowledge (Keil 2008, 265–266). Methodological naturalism per se need not entail any particular substantive conclusions; nonetheless, many naturalists are also drawn to a form of *substantive* naturalism according to which the only things (or, if one prefers, facts) that exist are those recognized by natural science (Keil 2008, 264; Price 2011, 4).

The goal of this entry is to explore the potential application and impact of naturalism, and especially methodological naturalism, in jurisprudence or philosophy of law. "Jurisprudence" and "philosophy of law" are here used synonymously, and are understood simply to mean "the study of philosophical problems about law" (Leiter 2007, 84), including "the metaphysics, epistemology, semantics, psychology, and sociology implicated by our legal thoughts and practices" (Toh 2013, 457). This entry specifically focuses on the pertinence of naturalism to two centrally important jurisprudential topics: (1) theories of law and (2) theories of adjudication. The entry first addresses the implications of naturalism for the development and assessment of *theories of law* (roughly speaking, accounts of the nature or concept of law). Then, in the final substantive section, the entry turns to the distinct topic of how naturalism bears on the *theory of adjudication*, i.e., descriptive and normative theories of judicial decision-making.

Naturalism and Theories of Law

One of the most prominent projects in contemporary analytic jurisprudence is the development (and assessment) of theories of law, where "theories of law" are commonly understood as accounts of law's *nature* (Raz 2005, 324). Of course, in a pre-theoretic sense, investigating the "nature" of something simply involves trying to find out what that thing is like (Schauer 2012, 458–462). An inquiry into the "nature" of law in this relatively deflationary sense would be subject to few constraints either as to explanatory ambitions or methodological commitments (Schauer 2015, 3–5). But in contemporary jurisprudence the word "nature" is widely used in a more technical sense, according to which the nature of law is taken to be the *essence* of law, that which makes law *law*, or the like (Dickson 2001, 17–18; Greenberg 2016, 1934n3, 1944–1945; Murphy 2013, 10–11; Raz 2005, 324, 328; Schauer 2015, 35–36; Shapiro 2011, 8–9). It is generally understood that determining law's nature in this more robust sense, whatever else it may involve, entails locating *necessary* truths about law: law's essence consists of its essential properties, and all essential properties, it seems, must be necessary properties (Fine 1994, 4; Greenberg 2016, 1937n6). Contemporary analytic jurisprudence generally purports to locate such necessary truths through certain characteristic "armchair" methods, prominently including thought experiments, consideration of hypothetical scenarios, and appeals to intuitions and purported "truisms" about law (Langlinais and Leiter 2016, 677–678; Shapiro 2011, 13–22).

Naturalism can have implications for inquiry into law's nature in at least two ways. First, to the extent one is drawn to substantive naturalism, this is likely to influence how one evaluates the merits of competing theories of law. Notably, those with naturalistic inclinations may be attracted to legal positivism – roughly, the view that "the existence and content of the law [is] a matter of social fact whose connection with moral or any other values is contingent" (Raz 1994, 194) – on grounds that positivist theories cohere with naturalistic ontological scruples (Leiter 2018, 19–20). Indeed, this may have been among the factors that attracted H. L. A. Hart to legal positivism (Finlay and Plunkett 2018, 71–72; Raz 1998, 251–253; Toh 2005, 83–85).

Second and more profoundly, naturalism can influence one's views about the appropriate methodology for developing theories of law (and, indeed, about how one should conceptualize the project of developing a "theory of law" in the first place). Recall the current prevailing approach to developing theories of law canvassed above: the goal is to develop an account of law's nature or essence – a subset of law's *necessary* properties – by using armchair methods heavily reliant on appeals to more or less a priori intuition. From a naturalistic perspective, such a project raises significant concerns. To be sure, naturalists need not have any particular skepticism toward the ambition to discover necessary truths per se: after all, natural science deals readily enough in various kinds of necessity claims (Papineau 2014, 189–190), e.g., the physical necessity that Earth is affected by the Sun's gravity and the biological necessity of adequate protein intake for human growth. (In this connection, it is important to keep in mind that there are many kinds of necessity – "metaphysical, physical, practical, for-all-practical-purposes, etc." (Murphy 2013, 11n17) – some of which fit more comfortably into a naturalistic worldview than others.) The question arises, however, whether the characteristic methods of analytic jurisprudence are up to the task of reliably pinpointing necessary truths about law. A comparison to the natural sciences is illuminating: while the history of science gives us no reason for skepticism toward the goal of discovering necessary truths (for appropriate senses of "necessary") about how solar systems or human bodies work, it does provide considerable reason for skepticism about doing so through armchair methods relatively disconnected from rigorous empirical research. Why should such methods prove more reliable when the object of inquiry is law? The basic concern, as Brian Leiter rather starkly puts it, is that jurisprudence "relies on. . .argumentative devices—analyses of concepts and appeals to intuition—that are epistemologically bankrupt" (2007, 175). And while not all methodological naturalists would go quite that far in condemning these traditional philosophical methods, it is hardly surprising that many harbor serious doubts about the epistemic bona fides of such methods, at least as they are deployed in current philosophical practice (Weinberg 2007, 340–341).

Defenders of standard jurisprudential methods are not without responses. For one thing, although physical necessities (e.g., about solar systems) and biological necessities (e.g., about human growth) are not particularly amenable to investigation through armchair methods alone, the same may not be true of all necessary truths. For example, it is at least minimally plausible that armchair appeals to intuition might help locate *analytic* truths about law – that is, truths that hold simply in virtue of the meaning of words (Fine 1994, 10; Harman 1999, 140), and which are therefore necessary in quite a strong sense. After all, as competent users of our own language, we plausibly have a good grasp of the meaning of "law" and cognate terms. Thus, if the ambition to develop a theory of law's nature were cast as an inquiry into analytic truths about law, it would at least not be facially incredible to suppose that progress could be made through the standard methods of contemporary analytic jurisprudence, i.e., appeals to intuition and thought experiments about possible cases.

Unfortunately, even if the armchair search for necessary truths about law were understood as an effort to locate analytic truths, there would still be significant grounds for doubt about the project's viability. Such doubts need not rest on radical critiques of the notion of analyticity; even Quine, the most famous critic of the traditional analytic–synthetic distinction, acknowledged that analyticity "undeniably has a place at a commonsense level" (1991, 270). The principal difficulty lies, instead, in the viability of locating *nontrivial* analytic truths about law. Even if we were to assume, for example, that "the number three is not a law" and (more doubtfully) "all laws are legally valid norms" are analytic truths, the question would remain whether genuinely *informative* analytic truths about law can be uncovered through armchair appeals to intuition, thought experiments about possible cases, and the like. (For example, if it were found to be analytic that "any law is a command of a sovereign" or "no norm is legally binding if governing officials consistently reject it," that would certainly be informative and nontrivial.)

Here, the historical track record is discouraging. Efforts to develop counterexample-resistant definitions of philosophically interesting concepts have consistently failed (Laurence and Margolis 1999, 14–16), and even prima facie clear analytic truths (e.g., that all bachelors are unmarried or that all unmarried men are bachelors) may appear open to doubt upon further reflection (Harman 1999, 140). "A sceptical induction over past failure is not a conclusive refutation" (Leiter 2011a, 670), nor should the implications of past failures be uncritically overstated. But the unencouraging history of efforts to develop analytic definitions of philosophically important terms or concepts is at least a cause for significant skepticism about attempting to locate nontrivial analytic truths about law. A slightly different, albeit related, concern arises as a result of empirical work in the field of "experimental philosophy," which has cast at least some doubt on the stability and consistency of philosophical "intuitions" across different social groups (Weinberg et al. 2001). While the implications of this research for philosophical methodology are the subject of considerable controversy and ongoing debate (for illuminating discussion, see Machery and O'Neill (2014)), the results to date nonetheless raise a real concern that the intuitions to which analytic jurisprudence traditionally appeals may be unrepresentative and idiosyncratic (Leiter 2007, 177–179; 2011b, 514–516). Thus, even if legal philosophers reached rough consensus on the analyticity of nontrivial propositions about law, this might simply reflect the atypical features of a localized dialect.

Philosophers of law might attempt to avoid these concerns by rejecting the idea that they are attempting to locate analytic truths. Indeed, many contemporary philosophers of law are adamant that elucidating the meaning of terms like "law" and "legal system" is not their main goal (Raz 1983, 204–207; 1998, 254–255; Shapiro 2011, 7–8). The question arises, however, what kind of necessary truths are then being sought and why we should believe that standard analytic jurisprudential methodology – generally speaking, eliciting "intuitions" about what law must be like and subjecting those intuitions to rigorous (but, importantly, more or less a priori) scrutiny – is a viable path to identifying the properties of law that are necessary in the relevant sense. Perhaps the answer is that we are seeking to discover conceptual necessities where conceptual necessities amount to something other than truths that hold in virtue of meaning (Raz 2005, 329–330), or metaphysical (as distinct from physical or logical) necessities (Shapiro 2011, 2, 215), or truths about law that are necessary in some fundamental but otherwise unspecified sense (Raz 1996, 2). But these are neither familiar nor pellucid notions, and (perhaps most tellingly, from a naturalistic perspective) do not feature in natural or even social science. A characteristic naturalist reaction, then, would be to wonder whether recourse to such notions does more to obscure than ameliorate concerns about the fruitfulness of standard jurisprudential methods.

Methodological Naturalism and Theories of Law: Paths Forward

We have seen that naturalism is not only capable of affecting the substantive criteria by which one evaluates candidate theories of law (notably, by motivating a preference for theories that cohere with naturalistic ontological scruples, such as appropriate forms of legal positivism), but that it can also motivate serious concerns about the currently prevailing methodology for developing theories of law. The discussion of methodology in the preceding section, however, naturally raises the following question: if naturalistic worries about the current standard methods of analytic jurisprudence are well-founded, what is the path forward for naturalistic philosophers interested in developing theories of law? Methodological naturalists will, of course, wish to employ methods that are in some sense continuous with the successful sciences – that, after all, is the basic constitutive premise of methodological naturalism. But even granting that high-level premise (which it is beyond the scope of this entry to defend), there is not necessarily a single clear answer regarding the best path forward – not least because naturalists may wish not only to change the methods we deploy in developing theories of law, but to reconceptualize (whether incrementally or

radically) what it means to develop a philosophical "theory of law" in the first place. Be that as it may, this section will discuss three potential avenues that methodological naturalists might explore.

A relatively conservative option, articulated by Ian Farrell, would involve only marginal adjustments to our philosophical ambitions and methods. Farrell, drawing inspiration from Frank Jackson (1998), defends a form of "modest conceptual analysis" in jurisprudence that would deploy intuitions about hypothetical cases solely in order "to clarify and to systematize. . .the way we employ certain important terms" (Farrell 2006, 1001), e.g., the term "law." This would not involve any naturalistically dubious metaphysical ambitions: we would only be seeking to draw "conclusions about the way humans use words (or, if you like, conclusions about how humans use concepts) from the way we use words" (Farrell 2006, 1000). Indeed, there is no reason to suppose that the modest conceptual analyst must even set out to locate exceptionless analytic truths, or any kind of necessary truths at all: he or she need only seek "to increase our *understanding* of how we use words" (e.g., "law") through careful, reflective, and systematic inquiry (Farrell 2006, 1001). Finally, in order to address the possibility that our own armchair intuitions about meaning/usage may be unrepresentative or idiosyncratic, we could deploy the survey-based methods of experimental philosophy to test the stability and cross-cultural robustness of such intuitions and update our theories accordingly (Farrell 2006, 1008–1010). So understood, the project of analytic jurisprudence would begin to resemble a form of "sophisticated conceptual ethnography" (Leiter 2007, 6) – certainly less ambitious than a search for the essence of law in any metaphysically robust sense, but still potentially illuminating.

An alternative possibility, initially suggested by Brian Leiter, would be for legal philosophy to "operate as the abstract branch of successful scientific theory," and more particularly to "ask what. . .law [must] be if current social-scientific theory of adjudication. . .is to be true and explanatory" – in effect, for jurisprudence to serve as "the abstract and reflective part" of social-scientific theory of adjudication (Leiter 2007, 180, 188). Here, "social-scientific theory of adjudication" is taken to mean predictive-explanatory theories of how judges decide cases; Leiter's usual example has been the work of political scientists Jeffrey Segal and Harold Spaeth (Leiter 2007, 187–188; Dickson 2011, 480). Under this proposal, the basic question for legal philosophers would remain, at least in a certain metaphysically deflated sense, "What is law?" But candidate answers would be evaluated largely on the basis of their coherence with current social-scientific theory of adjudication, rather than armchair intuition (Leiter 2011b, 510–511) – much as a naturalist might evaluate philosophical accounts of space and time by reference to contemporary physics instead of everyday experience (Leiter 2007, 179–180). In Leiter's view, this form of naturalized jurisprudence would most likely lead to a version of legal positivism, because a positivist concept of law is implicit in current social-scientific theory of adjudication (2007, 188–189; 2011b, 511; 2018, 18–19).

Although it has certain theoretical attractions, Leiter's proposal – which we can call, as a shorthand, the abstract social-science conception of jurisprudence – faces significant practical problems due to the "epistemically feeble condition of the predictive-explanatory social sciences of law" (Leiter 2007, 192). Leiter initially developed the abstract social-science conception of jurisprudence by analogy to Robert Cummins' suggestion that certain subfields of metaphysics might in effect be reconstituted as an abstract branch of physics (Cummins 1998, 117–118; Leiter 2007, 179–180). But as Leiter notes (2007, 192), there is a critical disanalogy between contemporary physics and current social-scientific models of adjudication: the former is a spectacular instance of successful science; the latter, at least to date, are not. And there is little sense investing effort in the project of figuring out what law must be if current social-scientific theory of adjudication is to be true and explanatory if, as it happens, current social-scientific theory of adjudication (1) is not particularly robust and (2) seems likely to evolve considerably before it qualifies as a genuinely

successful science capable of "meaningfully cut[ting] the joints of the socio-legal world" (Leiter 2011b, 511).

More successful social-scientific models of adjudication may be in the making, so it is perhaps overly pessimistic to suppose that the current absence of a "robust, hence epistemically credible, social science of adjudication" is "ultimately fatal" to the abstract social-science conception of jurisprudence (Leiter 2007, 192). But since it remains a matter of speculation what future social-scientific models of adjudication might look like, the correct approach may be to wait and see: if a sufficiently successful predictive-explanatory theory of adjudication emerges (and assuming that the notion of law plays a major role in that theory), then the style of naturalized jurisprudence Leiter has suggested might become viable (Dickson 2011, 484n25; Leiter 2011b, 511).

A third possible avenue for "naturalizing" jurisprudence may also be latent in the emerging literature on *expressivist* accounts of legal discourse patterned after the well-known expressivist program in metaethics (Etchemendy 2016; Toh 2011). Expressivists seek to achieve a better understanding of some area of human discourse by characterizing statements within that discourse as expressions of distinctive mental states or attitudes. A widely familiar example is A. J. Ayer's ethical emotivism, according to which the statement that some act is morally wrong expresses disapproval of that act (Ayer 1946, 107–109). Although expressivism is most prominent in metaethics, expressivist or proto-expressivist accounts of legal language go back at least to the Scandinavian Legal Realists (Olivecrona 1971, 183–184, 252–254; Ross 1959, 6–9, 46–49; Spaak 2014, 148–149, 272), and numerous legal scholars interpret H. L. A. Hart as having understood certain classes of legal statements in expressivist terms (Etchemendy 2016, 1n1; Toh 2005, 78–105).

Historically, metaethical expressivism – i.e., expressivism about moral discourse – has been associated with the view that moral statements express conative mental states (such as emotions) rather than beliefs in a proper sense, and that moral statements are, like nonassertoric expressions of feeling (such as "ouch!"), neither true nor false. The close association between expressivism and claims along these lines – which could be dubbed, in a very rough sense, "noncognitivist" in orientation – may make the idea of *legal* expressivism seem quite dubious, since whatever plausibility such ideas may have with respect to moral discourse, they seem decisively inapt in the legal context (Finlay and Plunkett 2018, 50). But not all contemporary metaethical expressivists think moral statements express "noncognitive" attitudes (Horgan and Timmons 2006, 256–257), and many accept that moral statements can be true or false (Blackburn 1998, 75–83; Gibbard 2003, 18, 183). Indeed, metaethical expressivists can, at least arguably, qualify as moral realists (Gibbard 2003, 18–19, 183, 185–186).

Some critics have wondered what remains of expressivism as a distinctive philosophical position once it is uncoupled from traditional noncognitivism (Dworkin 1996, 108–112). A plausible answer is that expressivists take a distinctive *approach* to understanding the area of discourse under investigation – and one that, crucially for present purposes, has strong affinities with methodological naturalism. Expressivism, unlike conceptual analysis as traditionally understood, does not seek to translate statements or phrases from the discourse under investigation (e.g., moral or legal discourse) into more ontologically basic terms, or to uncover analytic truths. Rather, it seeks to provide explanations – most commonly, naturalistic explanations drawing on psychology and/or anthropology – about the distinctive social function of that discourse: in effect, a naturalistic story about how and why we came to employ the discourse (Blackburn 2013, 74–79; Gibbard 1990, 8, 61, 64; Price 2011, 29–30, 271–274). To be sure, no adequately worked-out version of legal expressivism along these lines has yet been developed. But there is increasing philosophical interest in the intersection between metaethics and jurisprudence (Plunkett, Shapiro, and Toh 2019), and expressivist accounts of legal discourse may represent a fruitful avenue for future exploration by naturalistically inclined legal philosophers.

Naturalism and Theories of Adjudication

The preceding sections discussed how naturalism might affect the way we develop and assess *theories of law*, i.e., accounts of the nature or concept of law. Despite their enduring philosophical importance, however, questions about the nature or concept of law are relatively disconnected from the everyday work of legal professionals. From a legal practitioner's perspective, the more immediately pressing jurisprudential questions are likely to concern legal reasoning, and in particular the processes by which judges (as well as quasi-judicial decision-makers, such as administrative officials) decide legal disputes. While issues related to adjudication are largely distinct from questions about the nature of law per se, they have also been the subject of longstanding interest in the philosophy of law, and have received significant attention in the contemporary literature on naturalism in legal philosophy. This section therefore concludes the entry by exploring some ways in which methodological naturalism could influence one's approach to the *theory of adjudication*.

First, some terminological preliminaries are in order. Theoretical inquiry into judicial decision-making can be approached from at least two basic perspectives: descriptive and normative. That is, we can aim to describe how judges in fact decide cases or we can aim to develop an account of how judges *ought* to decide cases. Following Leiter (1996, 255; 2010a, 111), we can broadly refer to theories seeking to discharge one or both of these functions as theories of adjudication. We can further refer to theoretical accounts of how judges ought to decide cases as "normative theories of adjudication" and theoretical accounts of how judges in fact decide cases as "descriptive theories of adjudication" (Leiter 2010b, 257, 263).

What would a naturalistic approach to the theory of adjudication look like? Again, there is not necessarily a univocal answer. But Leiter has argued that the American Legal Realists of the 1920s and 1930s can be understood as having proposed (at least inchoately) a form of "replacement naturalism," according to which normative theories of adjudication should be replaced by descriptive theories grounded in empirical scientific methods – a program analogous, in Leiter's view, to Quine's (1969) influential proposal to "naturalize epistemology" by replacing Cartesian/Carnapian "foundationalism" with descriptive, empirical psychology (Leiter 2007, 36–40). Although the parallel to Quine has limits (Leiter 2007, 40), the replacement-naturalist proposal Leiter articulates in his philosophical reconstruction of American Legal Realism clearly represents at least one plausible form that a naturalistic approach to the theory of adjudication could take, and its prospects are worth exploring.

The American Legal Realists offered a critique of a certain traditional picture of law, legal science, and adjudication commonly referred to as "formalism" (Leiter 2010a, 111–112), but which might better be called a kind of pre-Realist "orthodoxy" (Grey 1983, 2n6). Regardless of how it is labeled, the traditional approach the Realists critiqued – which was advanced by influential pre-Realist figures like Christopher Columbus Langdell and Joseph Henry Beale (Leiter 2010b, 263; Sebok 1995, 2077–2078) – presumes that there is a body of "distinctively *legal* rules," principles, or doctrines that dictate "a unique result in most cases (perhaps *every* case)" (Leiter 2005, 50), and posits that "mastery of these" distinctively legal rules, principles, or doctrines is the goal of legal science and the mark of a "true lawyer" (Langdell 1879, viii).

On this traditional pre-Realist picture, a theory of adjudication falls into place, readily enough, as one aspect of a fundamentally normative science of law. In the first instance, the legal scientist's task is to master a body of prescriptive legal rules that justify, dictate, or demand a unique outcome in most or all cases – in short, a unique *legally correct* outcome. To be sure, only a restricted type of "correctness" or justification is in play thus far: the legally correct decision is not necessarily the morally or all-things-considered best decision (Baker 2018, 568–569, 578; Enoch 2019, 69–73). But if it is assumed that judges should (all things considered) generally render legally correct decisions – certainly a plausible thought, though of course debatable in principle – then mastery of the legal rules would still provide a normative theory of adjudication for most

circumstances: judges should decide cases by following the legal rules and rendering the unique legally correct decision. And given the further premise that judges usually *do* apply the legal rules honestly and competently (and thus usually render legally correct decisions), mastery of the legal rules would also yield a relatively serviceable descriptive theory of adjudication: judges generally decide cases by following those legal rules and rendering the unique legally correct outcome.

The American Realists famously rejected this "formalist" or "orthodox" picture. Their critique started with the observation that, at least in a substantial range of cases, one can evidently reach conflicting outcomes by applying different – but generally accepted and apparently "legitimate" – interpretive methods to the recognized sources of legal authority (e.g., constitutional provisions, statutes, and judicial precedents) relevant to the legal issues in the case (Leiter 2007, 20, 74–75). In other words, insofar as there is a body of "distinctively *legal* rules" available for application to concrete disputes, those rules do *not* dictate a unique legally correct outcome in "most cases" (Leiter 2005, 50). If true, this Realist thesis – commonly glossed as a claim about the prevalence of *legal indeterminacy* (Schauer 2013, 749n2, 756) – straightforwardly implies that judges neither can nor do decide cases just by correctly applying and following legal rules, at least in a substantial range of cases. As a result, Langdellian "formalism" or "orthodoxy" can at best yield a systematically incomplete (and thus inadequate) theory of adjudication on both descriptive and normative fronts.

If the Realists' indeterminacy-based critique is correct, what is the way forward for those seeking to develop better theories of adjudication? On the descriptive front, the Realists themselves believed "that careful empirical consideration of how courts *really* decide cases reveals that they decide not primarily because of law, but based (roughly speaking) on their sense of what would be 'fair' on the facts of the case" (Leiter 2005, 50). And, as a normative matter, many Realists affirmatively embraced the role of policy-based reasoning in adjudication (Leiter 2010b, 265).

The Realists' naturalistic "replacement" proposal comes into focus when we go beyond such hazy generalizations and examine how the Realists proposed to develop a more systematic science of adjudication. The Realists, of course, believed it was a forlorn enterprise to pursue a prescriptive science of law aimed at identifying legal rules that would dictate a unique legally correct outcome in most or all cases. Instead, the Realists proposed a descriptive, empirical science of adjudication, drawing on the resources of fields like economics, psychology, anthropology, and statistics, that would lead to better predictive-explanatory models of judicial decision-making (Fisher et al. 1993, 234–236; Leiter 2007, 40; Purcell 1973, 86–87). The methodological naturalism immanent in this proposal is evident. And while the occasional stereotype of American Legal Realism as "nihilistic behavioral science gone berserk" is a decidedly exaggerated caricature (Fried 1998, 14), it is true that the Realists – Felix Cohen (1933) excepted – generally eschewed robust, systematic normative theorizing (Leiter 2010b, 263–265). Hence Leiter's apt characterization of the American Realists as advocates of a "replacement naturalist" platform.

Much more could be said about the Realists from an intellectual-historical perspective. But for present purposes the important question is the *contemporary* merit of Realist-style replacement naturalism. As a proposal to replace one kind of theoretical project with another, the replacement-naturalist platform Leiter describes can be divided into two parts: (1) a positive proposal to develop better predictive-explanatory theories of adjudication by means of empirical, naturalistic methods, and (2) a negative proposal to eschew (or at least devote much less time and attention to) normative theories of adjudication. Although both aspects are open to criticism, the positive proposal is less controversial. There is little doubt about the basic usefulness of developing better predictive models of judicial decision-making. And, perhaps reflecting the pervasive influence of scientific naturalism on modern intellectual culture (Leiter 2018, 19), it is widely taken for granted that *if* better predictive models of adjudication

are to be developed, the most promising way to do so is through empirical scientific methods.

The negative aspect of the replacement-naturalist program is more open to doubt. Even assuming the Realists were correct about the need to replace the vision of legal science advanced by the likes of Langdell and Beale – and about the fatal inadequacy of any normative theory of adjudication that fails to seriously grapple with the problem of legal indeterminacy – it hardly follows that *no* systematic normative theory of adjudication could be viable. (Indeed, Quine's replacement-naturalist proposal in epistemology has been criticized on analogous grounds (Kim 1988, 381–391; Sober 1978, 166).) For example, perhaps as "[l]ater writers, like Ronald Dworkin, have argued," much of the legal indeterminacy the Realists purported to identify "disappears once we expand our notion of what constitute legitimate sources of law to include not only statutes and precedents, but also broader moral and political principles" (Leiter 2005, 52). And even without venturing beyond a strictly positivist theory of law, perhaps we can substantially blunt the force of the Realists' indeterminacy-based critique through more careful study of "what canons of interpretation are actually established" and what "priority" various established legal-interpretive rules have over one another (Baude and Sachs 2017, 1147). Finally, even if we made no effort to rebut the Realists' claims about the prevalence of legal indeterminacy, we might still be able to develop a plausible, systematic normative theory about how judges should decide cases where there is no unique legally correct outcome. The range of possible options is practically limitless, so a fully satisfactory defense of Realist-style replacement naturalism would likely require some broader reason to doubt the "*fruitfulness* of theoretical investigation" into normative theory of adjudication *in general* (Leiter 2007, 38). To be sure, one certainly could make a case for general skepticism about normative theory of adjudication, just as one can make a case for general skepticism about normative ethics (Leiter 2002, 1150–1151). But this would represent a very substantial philosophical undertaking.

Given the significant doubts about the merit of Realist-style replacement naturalism, it bears emphasis that replacement naturalism is only *one* way to "naturalize" the theory of adjudication, and a particularly radical one. Just as there are less radical forms of epistemological naturalism that reject the replacement proposal commonly attributed to Quine (Stich 1993, 2), there are less radical – but still substantial – ways to bring naturalistic methods to bear on the theory of adjudication, and even normative theory of adjudication. For example, to adapt one of Stephen Stich's proposals for naturalizing epistemology (which in turn bears notable affinities to the naturalistic epistemological program of Alvin Goldman (1986, 1–4; 1994, 306)), one might seek to develop better normative theories of adjudication by pursuing an empirical study of the cognitive processes by which *good* judges decide cases (Stich 1993, 5–10). While causal-explanatory science would not resolve the initial question of which judges qualify as "good," this would still represent a significant – and significantly naturalistic – departure from the way normative theorizing about judicial decision-making is typically conducted today, and one that could potentially yield useful insights.

Conclusion

This entry has explored a range of ways in which naturalism can have an impact, both critical and constructive, on two major topics within jurisprudence: theories of law and theories of adjudication. But there is much more to legal philosophy than this, and there are other areas of legal thought – for example, problems in the law of evidence (Allen and Leiter 2001) – where naturalism, and particularly methodological naturalism, could be influential. Given naturalism's considerable appeal and the comparative sparseness of the existing literature on naturalism in legal philosophy, the subject represents an especially promising area for future development.

Cross-References

► Hart, Herbert Lionel Adolphus: Influential Ideas
► Legal Positivism: Exclusive

▶ Legal Positivism: Inclusive
▶ Legal Realism, American: Development and Critique
▶ Legal Realism, American: Theoretical Aspects
▶ Legal Realism, Scandanavian
▶ Olivecrona, Karl Knut Hans: Philosophy of
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Philosophy of Private Law

► Private Law: Philosophy of

Philosophy of Property

► Property: Philosophy of

Pizan, Christine of

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Introduction

Christine of Pizan (c.1365–c.1430) is the first feminine author who managed to earn a living from her pen at the end of the Middle Ages; she wrote many "autobiographical" passages that inform our knowledge of her life.

The range of her works is immense and some enjoyed a great popularity. Some scholars consider her as a "proto-feminist," but she is also a political thinker, although the controversies about what she really thought are numerous, all the more so as the scholarship on her has grown exponentially these last four decades.

Christine's father was Thomas of Pizzano, a physician and astrologer who studied and lectured at the University of Bologna before going to Venice in 1356, where she was born. In the middle of the 1360s, he was invited by the French king Charles V the Wise (m. 1380) to come in Paris. He became one of his physicians and counselors. His family joined him at the end of 1368 or at the beginning of 1369, but Christine of Pizan never forgot her Italian origins. Nevertheless, she was nurtured in the intellectual circle surrounding the king. In 1379 or 1380, she married Etienne de Castel who became secretary of the king in 1381; this allowed her to stay close to the royal circles. She gave him three children and their marriage was a happy one. But the misfortunes fell several years later: her father died in 1387 and her husband in 1390. At the age of 25, Christine of Pizan was a young widow in charge of her children but also of her mother and a niece. She decided not to marry again, which was unusual. It took her more than 10 years to solve financial difficulties and find a suitable position in society, even if old friends of her father helped her. It is during this difficult period that she began to write love poetry, which established her reputation as a courtly writer. Her first "published" work, the *Hundred Ballads*, dates from 1399. In the next decades, she enjoyed a thorough patronage of the greats, men and women, until her retirement at the abbey of Poissy at the end of the 1410s.

An Autodidact

If Christine of Pizan has written much love poetry at the beginning of her career to alleviate, she tells us, the sorrow she felt after her husband's death, she had far more ambitions and constructed her own intellectual instruction at a time when women were excluded from university and other centers of learning. Nevertheless, it seems likely that she had access to the great library of the king constituted for its main part by Charles V – one of the greatest of Europe. She read ancient history, encyclopedias, scientific and philosophical writings, didactic and political treatises, and, of course, poetry. The major part of her readings was certainly in French – many translations of "classics" she used, from Aristotle to Augustine and Boethius, from Valerius Maximus to Cicero, and so on, had been commanded by Charles V and the Valois family. She also knew the major Italian authors – Dante, Boccaccio, and Petrarch – who had a major influence on her. And of course, she knew the Scriptures well. Besides French and Italian (her maternal language), there is a recent consensus on the fact that she also knew Latin well enough. Even if, in the same way as most of her contemporaries, she used compilations and florilegia, it is evident that Christine of Pizan acquired a vast culture and she applied her many readings to the comprehension of the troubled times in which she lived.

Politics: A Practical Philosophy

The first work of Christine of Pizan not on love was a didactic text named the *Epistle of Othea*, released in 1400 or 1401. The goddess of Prudence, Othea, an invention, writes advice to Prince Hector of Troy, aged 15. Some recurrent preoccupations already appear: the necessity of advice and education, the articulation between ancient history and Christian wisdom to address the contemporary problems of her time, the philosophical importance of the Aristotelian concept of Prudence, and the defense of women. This work was instantly very popular. Between 1400 and 1414, Christine wrote a considerable amount of works – didactical, political, allegorical, etc. – first in verse and then in prose. In all her writings, she addresses the contemporary society and its troubles, mainly the consequences of the madness of the king Charles VI (m. 1422) and the French civil war between Armagnac and Burgundian (1407–1435). Most of her texts are dedicated to princes and princess, actors of the conflict: the dukes of Orléans and Burgundy, the queen

Isabeau of Bavaria, the Dauphin Louis of Guyenne and his wife, and so on. If it was once said that she sided with the Burgundian party, it is recognized now that she did not choose a faction but tried to mend the French divisions.

Her first main works are in verse: *The Road of the Long Study* (1402–1403), *The Book of the Mutation of Fortune* (1403), and *The Advision Christine* (1405) are initiatory dream poems in which we find the most important "autobiographical" passages. Christine travels and meets several allegories – Reason, Philosophy, Noblesse, Chivalry, but also France who presses her to warn her compatriots on the dangers of division. These works also insist on the importance of philosophy, mainly Aristotelian in inspiration. In 1403, Philip the Bold asked her to write a biography of Charles V, *The Book of the Deeds and Good Mores of Charles V*, original in the way that it is divided in three parts, Noblesse, Chivalry, and Wisdom. These notions structure the presentation of the life of the beloved king, which is constantly presented as an example compared to ancient worthy figures. The concept of Prudence – practical wisdom or wisdom in action according to Aristotle and Thomas Aquinas – is central to this panegyric, also a mirror for princes. Among other major works in prose are *The Book of the Body Politic*, in which she deploys the metaphor of the organic body invented by John of Salisbury, insisting on the functional dimension of this well-known image and providing a vivid portrait of French society. There is also *The Book of Peace* (1413–1414), which meditates notably on the problems of tyranny and popular revolts, or *The Book of Deeds of Arms and Chivalry* (1410), a theoretical and practical treatise on war.

In all these works, Christine tries to present some major principles of government grounded on virtues, such as love, justice, prudence, and wisdom, but always in regard to contemporary problems of her country. Nevertheless, she defends, as her predecessors like Giles of Rome, a hierarchical society and a strong monarchy.

Her originality resides mainly in her implementation of a practical philosophy that could help to establish harmony, in her usage of ancient history, and in her shrewd perception of the troubles of the times.

An Advocate of Women

This is another originality of Christine of Pizan. In 1401–1402, she was caught in the famous "Quarrel of the Rose."

Through a series of epistles and treatises, she fought against some celebrated French humanists, Gontier and Pierre Col, and Jean of Montreuil, about the misogyny of the French best seller *Romance of the Rose*. She had already condemned the mischief of the men in an early poem, the *Epistle of the God of Love* (1399), but the quarrel probably led her to a more profound reflection on the place and status of women in two of her most popular works, *The City of Ladies* (1404–1407) and *The Treasure of the City of Ladies* (1405). *The City* is an allegorical work in which Reason, Rectitude, and Justice guide Christine for the building of a city meant to shelter all the worthy ladies, under the queenship of the Virgin. Inspired especially by Boccaccio and Augustine, the allegory is the occasion to discuss the contribution of women through human history and to show that they are as capable as men in intellect, reason, and moral. *The Treasure* is more pragmatic, very close in its structure to the *Book of the Body Politic* with its three parts, respectively, devoted to princess (with an accent put on their search for peace and intercessory role) and women of middle and of laborious class, again with a sense of vividness and realism.

Christine of Pizan is not a feminist in the modern sense of the term: she constantly defends women and recognizes for them a place in the public sphere, but she does not equate them with men. Nevertheless, her confidence in the capacities of women appears with a strong emotionally stance in her last work, on Joan of Arc (1429).

Conclusion

Christine of Pizan was an extraordinary woman, but a woman of her times. She was effectively the first feminine author, and she was very conscious of it, for she created a complex persona and means of authorizing her works. She also published it, by copying numerous manuscripts, and this contributed to her huge popularity in France, but also in

England and other European countries. More than 200 manuscripts, numerous translations, and printed editions subsist. Christine was a political thinker in the full sense of the term even if she was not a revolutionary and a modern feminist, as some scholars have argued. She made a huge contribution to the political and social culture of her time. The breadth of her work (also in matters of instruction, love, and devotion) is exceptional and appeals to all readers interested in late medieval society and culture.

Cross-References

- ▶ Aquinas, Thomas
- ▶ Aristotle: On Justice
- ▶ Augustine of Hippo
- ▶ John of Salisbury

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Plato

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Introduction

Plato's (c. 427 BCE–c. 327 BCE) efforts to articulate what laws (*nomoi*) should be probably stem from his experience of the inability of the historical Socrates to differentiate analytically just from unjust laws.

After his conviction and imprisonment for impiety and corrupting the young by a 3/5 majority of 501 Athenian jurors, Socrates refused an opportunity to escape jail. Plato reconstructs Socrates' rationale in his dialogue *Crito* by way of a hypothetical exchange between "Socrates" and "the Laws" (of Athens), in which Socrates vows not to injure those laws despite the fact that Socrates' jurors invoked these laws to convict and, ultimately, execute him. Plato's Socrates (if not the historical Socrates) not only refuses to disobey those Athenian laws but avers loyalty to them – blaming his condition on the particular (wrongful) judgment of his jurors rather than the laws themselves. Yet there was no analytical basis for differentiating just from unjust laws since only "the men of Athens" were in a position to determine the meaning of "the laws of Athens." If Plato was to exonerate Socrates in thought – since he could not in action – he needed to generate a theory of justice and law that clearly differed from what Athenian thought and practice had to offer. In the *Republic*, Plato composes an alternative theory of justice (inter alia). In the *Statesman* and *Laws*, he composes (inter alia) alternative epistemes of law that are correlated to his theory of justice as a distant horizon. The result is a Platonic philosophy of law that is political but nonpartisan – unlike contemporary conceptions of legality that attempt to frame politics and political life. How it does so comprises the core of this article.

At the outset of this account of Plato's philosophy of law, we must note that he never endorses anything resembling the moral authority of modern conceptions of "the rule of law." As the liberal political theorist Jeremy Waldron states, in modernity the rule of law is "one of the ideals of our political morality and. . .refers to the ascendancy of law as such and of the institutions of the legal system in a system of governance."[1] When Plato writes about laws in his dialogue *Laws* (*Nomoi*), his referents are much different than what typically come to mind when we think about "laws," "the law," or "the rule of law" – in four major respects. First, *nomoi* may be written or unwritten – whereas, for all but a few of us who believe in unwritten or religious laws (e.g., "natural law"), law and laws are written, such that the liberal (i.e., Waldronian) ideal of "the rule of law" blends ideals and practices of law. Second, Plato's *nomoi* are inherently inflected by ethical considerations about what we ought to do, not merely about what we should obey (i.e., laws as regulative, putatively fair, and impartial constraints on social practices). Third, Plato regards laws as practical iterations of his theory of justice in non-ideal circumstances. Such laws are extensions of Plato's political theory (whatever that is). For us, law and justice are contingently related and joined only by the political perspective of the citizen, public official, or political theorist. Finally, our best evidence for Plato's view of good, substantive laws appears in an account of foundational laws of a new, theoretically practical society called Magnesia – a Greek colony planted where no one else lives. It is not found in the *Republic* because the perfect city of that dialogue (*kallipolis*) is so perfect that it does not require any laws to cultivate the characters of its inhabitants; they perfectly fit together. Legislation exemplifies the need to correct imperfections, and Plato's Socrates avers that such corrections only make matters worse – much like "cutting off a Hydra's head." They attend to symptoms not causes, and the cause of perfection lies in the discursive model of *kallipolis* along with its citizens' proper interpretations of the gods (*Republic*, IV 426e; cf. 425d–427c).

Plato's philosophy of law nonetheless comports with his theory of justice in the *Republic*. Given the different tasks performed by each dialogue, there is nothing that suggests that the *Laws* reflects a different political philosophy than that put forth in the *Republic*.[2] That is to say, Plato's conception of the nature and function of law in the *Laws* differs from Aristotle's conception of law in his *Politics*, in which law is said to manifest

[1] See Waldron (2016).

[2] The argument for which I say there is no incontrovertible support appears in the learned, sophisticated argument of Bobonich (2002).

reason, without passion, as well as the mean, but is not necessarily correlated with justice (*Politics*, III. xv–xvi). For Plato, laws are pragmatic constructions designed to regulate politics and social relations in second-best societies. Plato's placement of law or laws in his philosophical firmament is a regulative practice of judgments made under imperfect conditions that are designed to sustain and promote virtue (*arete*) throughout society via education from birth (and before), institutions, and punishment.[3] We should understand the silent interlocutor for the Eleatic Stranger (in the *Statesman*) and the Athenian Stranger (in the *Laws*) as "the laws of Athens," democratically constituted ideas and practices that, for Plato, needed critical guidance in order to become instruments of justice.[4]

The close of this brief essay addresses how his formulation engages contemporary thinking about law – whether from a Hobbesian, Lockean, or Kantian perspective – particularly with respect to its ethical character, functions as a practical force, and relates to modern conceptions of natural law, positive law, and privacy. However, the principal features of Plato's philosophy of law take pride of place here – especially because it is radically constituted by its point of reference, namely, a second-best ideal, imaginary *polis*, a society in which neither capitalism nor monotheism existed and where there were no firm conceptual or legal boundaries between and among political life, religion, personal life, and civil and economic associations. The laws of the *politeia* for Magnesia, consequently, could cover all of social life, whereas modern constitutions in non-totalitarian societies are designed to regulate mostly public and political life – protecting most activity in the economic, religious, and personal arenas from direct control by the state.[5]

Our evidence for the most direct and clear Platonic thought about law stems primarily from two dialogues, the *Statesman* and the *Laws*, each of which has different textual contexts. The *Statesman* (*POLITIKOS*) addresses the idea of the statesman in analytic terms, mostly via the discourse of a stranger from Elea who dialectically constructs the prudential skills of a statesman. Socrates only is present as one of the Eleatic Stranger's interlocutors, and his main partner in dialogue is named Younger Socrates. Composed at the beginning of Plato's "later" period, the *Statesman's* dramatic setting is 399 B.C – obviously and ironically before Socrates' trial. A statesman is one who interprets and applies laws for the benefit of the society/*polis* he (in this case – in the *Republic* it could be he or she) leads. The analysis, however, is inimitably Platonic and preceded by a long preamble about *how* to analyze such an idea (ultimately understood as weaving together conflicting forces in society). In the *Laws*, Plato's last and longest dialogue, there also is a lengthy prologue prior to his explanation of the laws for a hypothetical *polis* (city-state/citizen-state) named Magnesia.[6] It involves an Athenian Stranger, a Cretan (Cleinias), and a Spartan (Megillus). They design Magnesia but not out of ideal materials; they sculpt it with available, extant locations and imperfect, albeit not corrupted, human beings capable of social virtue. At times, the Athenian Stranger refers to this *polis* as a "second-best" city. There is no necessary identity or conflict in his discussions of law in the dialogues in which it is discussed. Because of the different textual contexts for the statements about law in these dialogues, each provides different sorts of "evidence" for Plato's philosophy of law – which is discussed below under different analytical categories.

[3] For an account of Plato's view of law in terms of a non-liberal "rule of law," see Morrow (1993).

[4] The democratic constitutions of law and laws in Athenian democracy, via anger (*orge*) manifested by citizens, is a continuing theme in Allen (2000), especially Chap. 8.

[5] For a useful overview, see Stalley (1983).

[6] Note that a *polis* is a small community of citizens (materially supported by slaves and apolitical citizen-women) that includes both a city-center and countryside – very different from Renaissance city-states.

Law and Justice

Plato employs unhampered epistemic criteria to define the statesman (*politikos*) in the *Statesman*. He perfectly knows the political art (*he politike*) and would apply it without restriction if he could. His features could reflect the skill-set of the philosopher-guardians in the *kallipolis*, or ideal city in Plato's *Republic*. But in this dialogue, Plato iterates them differently. Human beings and citizens in the *kallipolis* act in ways that instantiate justice (*dikaiosune*) – the most comprehensive virtue and social practice. In the *Statesman*, law-ordered societies are good societies, but they are not the best society for two reasons that stem from the imperfection of law itself as a social phenomenon. Whereas each human being and all social relations are unique, law only applies to general conditions – which never precisely exist in the particular cases of real life. It is guided by the rationality of a *techne*, not the more indeterminate rationality of dialectic. To be sure, the *techne* of a doctor and of laws may be changed – although not according to a progressively more refined trajectory. Thus, a doctor may know the art of medicine, a *techne* that has determinate features, but if relevant scientific discoveries suggest the need to reform past practices, the good doctor will throw out the old in favor of the new. This is easier to do with particular arts like medicine or navigation than with the general art of statesmanship that only rarely is known by actual persons. In any event, law in society always falls short of the expression of perfect justice – even as it ought to manifest the best approximation of justice (*Statesman*, 294a–295a).

The Athenian Stranger also knows that. Thus, a successful founding of a second-best society stands or falls on the basis of its laws – even as they are not templates for policies, no more practical *models* for political reform than the norms of *kallipolis*. That is, laws do not directly instantiate reason or justice, but they do reflect them "in word" (702e). They more nearly constitute an art of political navigation for an actual statesman, and more so than do the celestial bearings in *kallipolis*. There are no unjust laws. At the same time, the Athenian Stranger in the *Laws* regrets the need for punitive laws since they presuppose the need to correct the inadequacies of human nature (as understood by him). As such, they lack the affirmative character of justice as the promotion of virtue without punishment.

Elements of Law

For a statesman dealing with a moderately recalcitrant citizenry, his primary concern (in the *Statesman*) is weaving together "courage" (*andreia*) and "self-discipline" (*sophrosune*), which are unevenly distributed in the population and must complement each other so as to produce civic harmony. This objective remains paramount for the art of a lawgiver in the *Laws* (*nomothetike*), but his raw materials are pleasure and pain – sculpted so as to yield proportionate goods for the person (self or individual), work, and property. These emotions are not tools for a utilitarian calculation; rather they are bases of human motivation – which the lawgiver needs to direct towards virtue. Therefore, no aspect of human life escapes the reach of the lawgiver. Moreover, only a *virtuous* lawgiver generates laws, as they must stem from knowledge, not ignorance (and certainly not faith or privilege). While Plato does not assume that any part of the population is necessarily wise or stupid, he is unwilling to allow the definition of laws as agents of virtue to be left to untutored citizens. It is easier for him to imagine a perfect lawgiver than a perfect citizenry, since he assumes that perfect knowledge is the province of the few, not the many. That said, for laws to be virtuous they are to be: promoted by persuasion; accepted by "willing subjects" (*hekonton*, 690c; cf. *Statesman* 296c); guided by "due measure" (*to metrion*, 691d); and, intended to draw on elements of both monarchy and democratic freedom to produce "political virtue" (707d). The result will be law "according to nature" (*kata phusin*) that does not exhibit "force" (*bia*, 690c), even though force may have to be used to deal with incorrigible citizens. The sociological contrast at work when laws are in play is perfection versus imperfection – not freedom versus force.

In this way, Plato transforms the political practices of democratic Athens according to imagined standards of knowledge and virtue. His law and laws are not deep roots for the contrasts between freedom and force articulated in the Christian, "liberal" political orders envisioned by Hobbes, Locke, and Rousseau. Finally, Platonic law is substantive, not just regulative or procedural. The rub is how to achieve genuine political virtue instead of having it veil the loathsome, corrupt, use of power – thus the importance of good and extensive laws.

Laws of the Person, Work, and Property

One of the reasons why Plato on law is fascinating in the twenty-first century is that liberal restrictions on state and economic power have become so porous with the exponentially extended reach of capitalism (via globalization, technology, and communications), the fecklessness of governments, and the receding or reactive role of monotheistic religions to social change that the affirmation of liberal rights as part of a political posture seems anachronistic. Today, almost no aspect of the person is off-limits; few laws hamper the greed of capitalists or the power of capital; minimal scruples restrain the hectoring and self-dealing of too many politicians. Although Karl Popper used a passage from Plato's *Laws* to validate his interpretation of Plato as a proto-totalitarian, these days we are more nearly in the grips of Sheldon Wolin's ideal type of "inverted totalitarianism" that diagnoses the perversity of energy-rich nations acting like political ostrichs in the face of climate change while, simultaneously, countries that constitutionally approximate one person one vote regularly elect official majorities in government that harm the actual majority's interests.[7] With the limits of individual rights on state power having become as much a rhetorical guise as a social fact, lawful guides to a healthy person and polity are now understood as thoroughly political problems. Plato's intuitive attention to these phenomena as political no longer seems beyond the pale. When rubbed up against our preconceptions, *ressentiment*, and postmodern doubts about connections among reason, law and virtue, Plato's philosophy of law sparks critical thought.

Plato's guide for laws in Magnesia followed the benchmark of virtue (*arete*). Magnesia cannot be a prototype for contemporary political reflection, insofar as its features cannot be understood without understanding its addressee as a pre-Christian, small-scale, precapitalist *polis* that only allowed 5,040 full citizens (women, children, slaves, and metics did not "count" – although Magnesian laws were much more egalitarian with respect to economics or gender relations than were accepted by, say, Aristotle or any Attic state of his time). But that may provide even more reason for us to ask, how did he understand virtue as a guidepost for proper laws governing the person and polity? Insofar as virtue was his only guide, and it applied to the practices of both the person and the polity, it must be distinguished from the "modern" binary of mind/body or soul/body that reflect Christian dualisms, Kantian divisions between autonomy and heteronomy, as well as conventional boundaries between private and public realms. This is not because Plato failed to differentiate mind and body – indeed, some of his thoughts on their relationship were taken as precursors of Christian dualisms (e.g., by Augustine) – rather, he did not identify a sharp line between them, noting how the education of each could affect the other. Thus, Socrates in the *Republic* and the Athenian Stranger in the *Laws* cultivate virtue for the individual from before birth, by regulating marriage and conception, and immediately after birth, by imagining proper forms for shaping the soul and body via *technai* for the body (*gymnastike*) and rhythms for the soul (*mousike*). To be sure, Plato, Pericles, and ordinary Athenians understood the differences not only between soul (*psyche*) and body (*soma*) but also the private and public realms (*idioten, demosian*), but Plato held that holding back from cultivating virtue in the private practices of a lawful state was foolish because of their central role in fostering mature virtue (*Laws*, 790b).

[7] See Wolin (2008).

Thus, Magnesia penalized failure to marry and adultery (for both men and women) during and after child-bearing age.

Plato does not regard these restrictions, however, as tools of domination. Magnesian laws provided for extensive vetting and scrutiny of office-holders and respect for privacy (albeit not to the level officially countenanced in increasingly surveilled modern liberal states), the criteria for which could not be subordinated to the mere exercise of ruling agencies. In addition, despite their imperfection, every sanctioned law for the citizens of Magnesia was preceded by a publicly stated rationale or preamble designed to demonstrate the alliance of social reasons with public reason (obviously not of the Rawlsian sort). Moreover, Plato perpetually imagined standards for perfectly virtuous city-founders and authorized statesmen – a vision that, in the hands of dictatorial charlatans, becomes nightmarish (and of which Plato had no experience – having been raised in and disappointed by democratic Athens).

All of Magnesia reflected the hand of Platonic laws, and a prominent feature of this imaginary *polis* was its economic structure. While Plato's construction of *kallipolis* in the *Republic* hardly mentioned the lives of farmers and craftsmen, the *Laws* institutes real property-holding for every full citizen. In addition, craftsmen (*demiourgoi*) are positioned in every district of the *polis*, under the supervision of law-guardians and deities, in order to facilitate the work of farmers. In this virtuous *polis*, no citizen's wealth was to exceed a poor citizen's by more than a factor of four – anticipating Rousseau's stipulation that, in a legitimate social contract society, it "is advantageous to men only when all have something and none too much."[8] The laws of Magnesia were designed to assure a steady-state condition – radically opposed to the steady-growth requirements of capitalist societies. The number of property-holders was supposed to stay at 5,040, and no economic growth was promoted.

Law, Punishment, and Intentionality

Law in Magnesia had both constructive and punitive features, even as the principal end of both was constituting virtue (*arete*), rather than providing safety and security (707d – contra Hobbes and Locke). The former were manifested in its educational and officiating institutions. The latter were to be invoked when slaves, foreigners, or citizens violated such norms. There is no Greek equivalent for our "crime" or "punishment." Plato understands crime in the generic, root sense of an "offense" against an individual, ethos, or institution – often associated with a proper, honored, status (*time*). The punishment was through a just sanction (*dike*) and injured the subject's freedom or body (*kolazein*). The Athenian Stranger simply refers to punishment as "suffering that follows a wrongdoing" (728c). Thus, the legal and penal code of Magnesia does not differentiate "civil" and "criminal" laws or their corollary punishments.[9] Most provocatively, the Athenian Stranger calibrates laws as instrumentalities of justice – not merely in a retributive, politically punitive, or individually reformative sense (*pace* modernity) but as instantiations of an ideal notion of justice interpreted and enforced by rulers assumed to be agents of genuine justice (945e). Plato never offered criteria for judging whether this ethical and political ideal *could* be met by actual political leaders – except negatively, insofar as he disdained the laws of democratic Athens and became horrified by the politics of Dionysius II.

The most unusual instance of this outlook was Plato's view articulated in the *L*aws, in accord with statements in previous dialogues, that (just) punishment benefited its recipient, so that for an unjust act not to be corrected was the most harmful experience for the perpetrator of injustice (a notion that is ethically inspiring but politically dangerous). This view of punishment correlated with Plato's Socrates statements from the *Crito* to the *Gorgias* that no one does wrong (*adikein*) voluntarily or willingly, for it is worse to do than

[8] Jean-Jacques Rousseau, *The Social Contract*, I.9, note (rev. tr. G. D. H. Cole).

[9] For a comprehensive account of the penal code of Magnesia, see Saunders (1991).

to suffer wrong. The latter claim is the lodestone of Platonic ethics (and thus law) which, unlike modern social ethics that inform notions of crime and punishment, does not presuppose (*pace* Augustine) the primacy of "the will." In the *Laws*, the Athenian Stranger articulates this point when he critiques the difference between "voluntary" and "involuntary" crimes (or the presence or absence of "responsibility," 860d–863e). For him the latter are subdivisions – not first principles – for distinguishing categories of criminality. The Stranger principally divides crimes among those committed (1) openly and violently (the deliberate infliction of harm and injury to person or property); (2) secretly and fraudulently, in tune with desire and pleasure; and (3) from hopes and opinions (e.g., impiety). (863e–864c) For Plato, kinds of criminality stem from an interpretation of how specific acts spring from different parts of the soul (*psyche*) – an obviously more complex set of criteria than the modern notion of *mens rea* (psychological competence, or the mental capacity to demarcate "right" and "wrong"). Plato awards value to the Greek equivalent of modern notions of intentionality in defining criminality, but he does not do this through a strict division between internal and external, or thought and action. And every determination of just punishment is designed, in the mind of the Athenian Stranger, to encourage the criminal to become better – not, as is the effect if not the aim of modern forms of punishment, to become more regimented or incapacitated as citizens.

Plato's philosophy of law, therefore, exhibits two assumptions that do not inform contemporary conceptions of law: (1) justice is identifiable through practical reason that accords with ethics or social morality; and (2) religious beliefs are only committed to a political sense of justice imbued in social life. In modernity, an equivalent of Platonic justice is deemed impractical for law-making or interpreting, and religious beliefs as such are anchored by transcendent monotheisms. In both regards, Plato's premodern and unmodern views make sense in terms of long-standing Greek ethical traditions. In Homer, "reason" lacked a public status that would justify its place as an anchor for justice. In turn, much of social life was understood and accepted in terms of inherited privilege and divine intervention. Privilege and putatively divine judgment were sometimes but not always connected, leaving much of what was "bad" that happened to people understood in terms of neither reason nor human nature. The result induced conformity to social norms, except when broken – as by Agamemnon when he took (*pace The Iliad*) Achilles' war prize and concubine, Briseis. Religious belief functioned as a feature of social solidarity as much as psychological order. Between Homeric times and Plato's, the scope and sanctioned power of public reason grew and religious stewardship declined, with both trends fueled by social and political democratization. But as Plato extended the critical scope of reason, he still maintained devotion to an unconventional (but still very Greek) idea of religion, insofar as not "man" (Protagoras) but "God" (*ho theos*) in the *Laws* was identified as "the measure (*metron*) of all [used and usable] things (*chrematon*)" (716c). Religious belief capped Platonic punishment as an extension of law, making impiety punishable by the death penalty – as it was in democratic Athens for Socrates and in medieval Christendom. Religious toleration in fourth-century Attica was not a legal option.

A Transportation of Plato's Philosophy of Law

Given the nonliberal features of Plato's philosophy of law, we should ask whether its effective meaning is oppressive or unrealistic – in his time and ours. Since we cannot know how it might have practically worked in his time, let alone ours, and the meaning of oppression requires a disquisition of its own, the question is hard to answer. It is important to address the question, however, in order to think about law as a force of social virtue – something that is implicitly considered in matters of social policy and penal systems. It is not enough to see every social regulation as oppressive, say, a force that opposes freedom, without considering how society might be ordered, and it is both intellectually valuable and politically provocative to think of Platonic

law as virtue in relation to liberal, positivist, moralistic and individualistic, notions of legal rights that are to protect citizens against the modern state. But then, how might it be interpreted as a tool of justice rather than oppression?

In Plato's philosophy of law, virtue (*arete*) is a critical ideal (*logos*) of excellence in the performance of a social practice. As understood by Plato, it is *not* an instrument of social or political enforcement, as is most often the case when it is deployed by Western conservatives or Islamic ideologues. How Platonic virtue is interpreted and practiced in a legal-social order makes all the difference in assessing its political value. Even Plato in the *Laws*, for all the attention he gives to laws and norms (*nomoi*) for guiding the social order, reserves ultimate political and legal power and authority to a Nocturnal Council. Its work is remedial, not radical (unlike the work of statist Communist parties). Nonetheless, their work is untrammeled by law because of the subordination of law to judgments of political virtue. As a collective, it does not signify an ancient justification for the modern executive's right to vitiate the rule of law because of its unique vantage point on political problems (*pace* Hobbes, Hamilton, Schmitt, or the U. S. Supreme Court). Virtue can only be politically excellent when the capacity for political judgment is highly developed. When virtue dictates social behavior without regard for how it might engender justice (assuming that one properly intuits or knows what justice is), it does not comport with Platonic usage.

Despite Plato's philosophical antipathy to the virtue of law as such, the virtuous society of Magnesia is often readily dismissed as an oppressive, closed society, with no appreciation of how its context constituted its meaning. Of course, Plato's philosophy of law was not designed for capitalist economies and quasi-liberal states in which virtue ethics is either a knock-off of various religious institutional communities or educated, secular cohorts. But his philosophy of law as a pragmatics of virtue at least corresponded to relatively small collectivities in which farming, craft-activity, trade, and military prowess produced the surplus value that enabled coherent political life.

We cannot know whether his notion of law as a constituent of virtue would have worked better in practice than the Athenians'. Certainly, it would have hampered Athenian freedom, which meant it had costs (since Plato did not dislike everything about Athenian freedom). Nor was he so silly as to expect that the matter of existing *poleis* could be fit into the mold of Magnesia. There would have be to a transformation of culture through education, of the sort, perhaps, imagined by Rousseau's Lawgiver in *The Social Contract*. So, the question is whether an intellectual and political norm of virtue, in conjunction with amenable social conditions, could yield not just a more regulated life but a better life. Again, here it is hard to know the answer. What about the Magnesian fines for failing to marry or the strict regulation of economic life? Today, we would think of such rules as egregious constraints on individual freedom and judgment. Plato thought that there *could* be a society that "knew better" than individuals making their own marital arrangements or fulfilling their desire for "more." That society would not be contemporary Athenian society whose desire for "more" led to the loss of the War of the Peloponnesians and the Athenians and unless Plato (unmarried throughout his life) thought he ought to be fined. It works, however, in Magnesia, an imaginary but practicable society. Is the thought-experiment of Magnesia a better counterpart to the injustices of Athenian society than, say, doubling down on preserving the rights of individual citizens? Would the latter have provided better protection for Socrates than, say – what Plato must have wished for – a politically educated jury? To answer these question, we should acknowledge that the very existence of rights in a legal order are themselves second-best practices (that require third-best interpretations). They are to protect individuals from corrupt or unjust practices of empowered institutions in family life, economics, and the political order. But also, rights-based societies presume the imperfect coordination of social life, insofar as everyone's exercise of rights without limits cannot produce an orderly society, and imperfect courts to adjudicate them.

What about the relationship between Platonic legal reforms and punitive incarcerations, utilitarian reformations, or Foucauldian discipline, the *surveillir* that generates *punir*? How does the critical ideal of Platonic law interact in these conditions – oppressive conditions of modern life that affect families, economies, and states? In answering this question, we must again confront the way Platonic virtue orders law through political judgment. Notably, both virtue and political judgment were regarded by both Athenian democrats and Plato as the ultimate ideals for social practice – much as they disagreed as to what could improve them. So, the question becomes, from whence comes good political judgment? For Plato, all of society was responsible; all of society was imperfect, and so all of society needed a revised code of laws to make possible good political judgment: thus, the *Laws*. But what about cultivating a notion of Platonically understood good political judgment that could be radically adapted to life in the twenty-first century? Much care would be needed, for the forces of power are amassed against it. The management and navigation of capital, technology, and political orders depends on obedience (more or less) to formal rules of behavior and calculation that, by virtue of promoting technological innovation and economic growth as fundamental principles, hamper the cultivation of good political judgment. Despite rising "standards of living" (particularly for the 1% and 0.1%), the result has not been heartening, what with growing economic inequality and socioeconomic and political courses of action that destroy the human habitat.

The contemporary significance of a Platonic philosophy of law, it would seem, would require the breakdown of the power generated by global entities – whether they be states or corporations – in order to make possible more cooperative practices of democratic power, which in turn would make more likely the cultivation of political judgment. This is an unlikely adaptation of Platonic law, insofar as it does not sanction the status quo of democratic practice (as Plato did not). Plato generated its particulars out of distress with the democratic law of Athens and its reliance on the *orge* of citizens for filing lawsuits and rendering legal judgments. Plato radically criticized Athens as a democratic and dominant power. But now – Plato's paramount concern for bettering the prospects of political judgment and virtue – is not smothered by democracy but by monarchies of economic and political power that damage the prospects of beneficial political judgment and virtue. For Plato, both monarchy and democracy had imperfections, and his Magnesia was a counterweight to both. Relatively undemocratic then, the political effect of Magnesian law now might well be antimonarchical and democratic. Whereas the emergence of rights discourse in early modern Europe operated as a counterweight to aristocratic privilege, finding ways to cultivate political virtue in the economy and polity, our time might be said to call for Platonic counterweights to today's global and social commodification and control of individuals. Given Plato's abhorrence to sophists and political imposters, adaptive fidelity to his core values (mutatis mutandis) would promote more political equality while fostering individuality and community. There was no cogent articulation of democratic virtue in ancient Greek political thought, but it may be that today, inspired by Plato's political critiques and philosophy of law, it might be just what we need. In this regard, a transportation of Plato's philosophy via cultivated political judgment may be neither oppressive nor unrealistic – although it would pose a daunting task.

Cross-References

- ▶ Capability
- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Constitutionalism: Political
- ▶ Constitutionalism: Sociology of
- ▶ Virtue Theory and Law

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Introduction

Thomas Winfried Menko Pogge (1953–) received his sociology diploma from the University of Hamburg (Germany) in 1977 with a thesis titled "Charles Sanders Peirce und sein Pragmatismus in der neueren deutschen Soziologie" – on the influence of American mathematician, logician, and philosopher Charles Sanders Peirce (1839–1914) on German sociology and Jürgen Habermas (1929–). Pogge then moved to the United States and enrolled at Harvard University to pursue graduate studies in philosophy. There, he was supervised by John Rawls (1921–2002) and received his PhD in 1983 with a dissertation titled "Kant, Rawls, and Global Justice." The philosophy of Rawls and Immanuel Kant (1724–1804) and the challenge of global justice elaborated in this doctoral dissertation would set the agenda for Pogge's subsequent production.

At Columbia University, Pogge worked as an assistant and associate professor in the Department of Philosophy from 1983 to 2006, and as full professor in the Department of Political Science from 2006 to 2008. Since 2008, Pogge is Leitner Professor of Philosophy and International Affairs and Director of the Global Justice Program at Yale University.

Rawls was initially the greatest influence on Pogge. At least in part, Pogge built his views on poverty and global justice on Rawls' twofold focus on the "basic structure" of a society (as defining the primary focus of justice), and on the worst-off positions in society and their access to basic goods (as a criterion for the comparative assessment of alternative basic structure designs). Pogge also defended Rawls' identification of social positions in terms of "primary goods" against proponents of the alternative "capability approach" (Sen 1995; Nussbaum 2000; Brighouse and Robeyns 2010; Pogge 2002b, 2010b).

Pogge aimed to push Rawls' views to their practical implications by advancing proposals for the reform, design, and creation of supranational institutions. These reform proposals primarily aim to overcome the international resource privilege – or, "the privilege of any person or group exercising effective power within a country to confer internationally valid legal ownership rights in its natural resources" (Pogge 1994, 2001, 2008b) – pharmaceutical monopolies (Pogge 2005b, 2008b), and the democratic deficit of already existing institutions (Pogge 2010a, ch. 9). Pogge has thus made a significant contribution to an increased practical orientation within liberal political philosophy which Rawls' predominantly ideal theoretical work seemed to lack.

Although deeply inspired by Rawls, Pogge also criticized some core tenets of his former mentor's work. On the one hand, he criticized Rawls' interpretation of Kant's thought, eventually offering a coherent understanding of Kant's categorical imperative (Pogge 1981, 1989a) while also arguing that Rawls mistakenly interpreted Kant's liberalism as "comprehensive" – or, as fully derivative of Kant's own metaphysics (Pogge 1997). On the other hand, although succeeding in shaping Rawls' late philosophical agenda (cfr. Rawls 1993, 1999), Pogge eventually distanced himself from Rawls' international liberalism to become a pioneer of what is sometimes referred to as "strong cosmopolitanism."

The Basic Structure: Institutional Versus Interactional Normativity

For Pogge (1989b), one of the most important contributions of Rawls' conception of justice

consists in its focus on the basic structure of society, conceived as the way in which major social institutions distribute rights and duties, burdens and rewards, positions and offices, and the products of social cooperation (Rawls 1971). Building on this understanding, discussions about justice differ from discussions about the goodness/badness of a society's members: the latter kind of discussions is about individual behavior within a given institutional order, while the former is about the very nature of that order.

Responding to criticisms made by Gerald A. Cohen (1941–2009) – where Cohen lamented that the focus on the basic structure neglects the relevance of social habits and individual behavior for the realization of an egalitarian conception of justice (Cohen 1997, 2000) – Pogge (2000, 2008a) emphasized that Rawls wanted to avoid endorsing the view that all human action must serve a single value, and that the distinction between institutional and interactional normativity aims to protect pluralism in people's conceptions of the good life. The problem of reconciling the requirements of a democratic, egalitarian ideal with the fact of pluralism is also discussed among American pragmatists: it is worth noting that the views of Peirce (the author with whom Pogge started his intellectual journey) have been recently recognized as partially inspiring this distinction in Rawls (Botti 2019) and possibly better equipped to overcome difficulties entailed by the substantive conception of democracy advocated by John Dewey (Talisse 2007).

The distinction between institutional and interactional normativity is relevant, according to Pogge, in at least three respects: *intentionality*, *assessment*, and *explanation*. First, in complex societies, the consequences of individual actions are often unintentional. This fact makes it seem intuitively prior for an individual to act ethically when the effects of an action can be fully predicted and controlled. However, most actions (e.g., paying taxes, buying certain products, electing officials, etc.) are connected to grievous consequences (e.g., killing of innocents, sweatshops, child labor, and environmental destruction) that cannot be accounted for as merely products of a sum of wrongdoings from the part of a sum of (individual or collective) agents. For Pogge, lamentable unintended consequences in complex societies are more efficaciously prevented through institutional reform, for behavioral correction alone does not remove the institutional incentives for individual and collective agents to behave in certain ways (Pogge 2000). It might be objected that, from this very institutionalist point of view, the bombing of civilians is to be regarded as an action of organized collective agents (e.g., governments) the assessment of which would exemplify interactional and not institutional moral analysis (Pogge 1995, 241). However, while a single act of bombing might be regarded as a collective agent's action, it is the series of domestic and international institutional arrangements, shared practices, and beliefs that make this action conceivable and possible: first, the fact that citizens of constitutional regimes believe that it is their duty to pay taxes to the elected government; second, the fact that it is accepted that an elected government can dispose, as a collective agent, of tax money to purchase weapons (provided certain procedural conditions are met); third, the fact that it is accepted that an elected government (with a sufficient number of votes in Congress) can use weapons in acts of war; fourth, the fact that it is considered possible, although not desirable, that civilians die due to acts of war; fifth, the fact that the use of force is commonly seen as justifiable in certain circumstances. These beliefs are not generated in a vacuum by individual or collective agents but result from a history of pre-existing institutions and shared practices. In some cases, certain rules are agreed upon by a portion of the population after public assessment; however, in *all* cases, the overall (global and domestic) institutional scheme is forced upon everyone at birth and is never agreed upon in its totality in a joint act.

This leads to the second aspect of the distinction: the question of *assessment*. We assess the way in which the overall institutional scheme distributes rights and duties, burdens and rewards, positions and offices, and the products of social cooperation, not the way in which people behave within this institutional scheme. As an example, consider two societies characterized by slavery. The first society is pre-abolition America – in which rape and other abuses, including murder,

are perpetrated on a regular basis. Call this society S1. The second society is a fictional one: call it S2. Imagine that in S2 slaves never experience rape, torture, and murder. Add that in S2 it is customary for slaveholders to inquire about the reasons behind a slave's escape and offer improvements in living conditions to persuade the slave to remain in their property. If unsuccessful in their attempts at persuasion, S2's slaveholders would typically let the fugitive choose to live in another slaveholder's property with preferred facilities (e.g., libraries, gyms, and swimming pools). In S2, slaves do not receive any form of monetary compensation for their work, they cannot own nor purchase property of any sort, and are automatically recognized as slaves by portable scanners that detect the presence of a harmless chemical injected at birth. In S2, therefore, successful escape does not guarantee freedom: the only way out of slavery for them is to exit S2 and find a society in which these scanners are not available, or one in which slavery is publicly condemned and legally prohibited. Pogge (and Rawls as well) would both say that the justice of a basic structure depends on the results it would have in the concrete context in which it exists (natural environment, stage of economic and technological development, culture, and habits of its members, etc.). Thus, the same basic structure that works well in fulfilling principles of justice in one context could work poorly in another. From the point of view of Pogge's (and Rawls') institutionalist notion of justice, S2's slaveholders' apparent humaneness (at least compared to S1's slaveholders) is only partially relevant to the moral assessment of the basic structure of S2. It seems intuitive that one would most likely opt to be a slave in S2 than S1 – if these were the only two options available, and if one could choose from a position of ignorance about their prospective situation – but this fact does not entirely conclude the assessment: the question of whether an alternative, slavery-free basic structure is available in a certain time and place remains open *in that time and place*.

The example of slavery is useful to clarify discontinuities between Pogge's and Rawls' views on justice. Rawls hypothesized, for instance, that a slaveholder might defend his position against a slave by saying that, given the circumstances of that society, slavery produces the "greatest average happiness" compared to alternative institutional arrangements, and that with knowledge of such circumstances slavery would be even *chosen* by hypothetical "parties" in a position of ignorance about their actual situation, at the risk of being "justifiably held a slave" after the choice is made. Rawls then announced that the slaveholder's argument is correct in its "general form," and added that, to reject it, one had to show that the principle of "average utility" (or other principles that might be used in defense of slavery, such as the "principle of perfection") would *not* be chosen in *that* very position of ignorance (Rawls 1971, 167–168, 248). Pogge responded to this by saying that the slave might still claim that *that slaveholder* is not entitled to his advantaged position, regardless of the acceptability of the average utility principle from a point of view of ignorance; or, that the selection mechanism as to how *this* person becomes a slaveholder and *this* other person becomes a slave requires a justification which is separate from the justification of the principle of average utility (Pogge 1989b, 260 footnote 23). Rawls would perhaps respond by using the example of ancient city-states that agree to stop killing prisoners of war and start holding them as slaves instead (Rawls 1971, 248). This, from Rawls' point of view, would be less unjust than current custom (i.e., killing), because parties in a position of ignorance would choose slavery over death. To the objection that it is very possible that real persons in certain historical circumstances would choose death over slavery, Rawls would perhaps respond that, given the circumstances, the substitution of captives' killing with their enslavement would leave open that possibility for those who prefer death over slavery, while the previous arrangement would deny choice of any sort. Yet, for Pogge, Rawls here stumbles in one of those problems of utilitarianism that Rawls' theory aimed to overcome: namely, conceiving of individuals as prospective recipients of an overall distribution of goods, and not as imposers of rules and practices in the concrete context of life. This, for Pogge, reveals that Rawls is still reasoning in a consequentialist manner by aggregating preferences of

prospective recipients of basic goods within a conception of justice that understands "the space of possible options [as] a function of existing social institutions" (Pogge 1989b, 51). For Pogge, however, the task before us is not that of choosing the least unjust scheme of distribution among realistic alternatives, but showing how real and present institutional arrangements violate justice (regardless of whether present conditions are less unjust than previous ones) and implementing institutional creation and reforms to unlock the way to justice globally and permanently (see section "Moving Away from Rawls' Model: The Problem of Consequentialism" for more details on the problem of consequentialism).

This leads us to the third aspect of the distinction: *explanation*. The explanation of social phenomena (e.g., slavery, monogamy, poverty, and addiction) by appeal to individual actions and interpersonal relations differs from the explanation of these phenomena by appeal to rules and institutional arrangements. We might explain why and how a person became addicted, enslaved, married, or poor by considering this person's life, and this would be an illustration that might reveal aspects about addiction, slavery, marriage, and poverty that might be lost through institutional analysis alone. But this illustration does not explain how these social phenomena came about, their territorial concentration and distribution, the probability of future occurrence, and the infrastructure of norms, practices, and beliefs that sustain and perpetuate them. This explanatory distinction was widely accepted in continental Europe, but it was not so in the United States until Rawls construed it in a language more congenial to the American academic audience (Pogge 1995, 241). However, Pogge lamented, Rawls failed to apply his own explanatory institutionalism to the case of *global* poverty (see section "Moving Away from Rawls' Model: The Problem of Nationalism").

Moving Away from Rawls' Model: The Problem of Consequentialism

Pogge identified two problems, each related to Rawls' focus on the basic structure of a society and on its worst-off members. The first problem is related to the remnants of consequentialism in Rawls' (self-styled Kantian) mode of assessment. The second problem is related to what Pogge identifies as "explanatory nationalism" in Rawls' way of accounting for the causes of global poverty. This section deals with the first problem. Section "Moving Away from Rawls' Model: The Problem of Nationalism" deals with the second.

By viewing our world through the lenses of its basic structure of major institutions, Pogge lamented, we tend to assess its degree of justice in a consequentialist way by privileging the perspective of prospective *recipients* of the goods distributed by it. This consequentialism also characterized approaches that presented themselves as alternative to Rawls' model: versions of utilitarianism and welfarism, the capability approach of Sen and Nussbaum, as well as Habermas' theory of communicative action, all tended to deem an institutional scheme as just if it appears to be better, overall, for prospective recipients living under it than its alternatives would be (Pogge 1995, 2004).

The problem with this widely shared consequentialist approach, Pogge points out, is that it might lead us to favor institutional schemes that overcompensate for minor inequalities, while also failing to maintain fair equality of opportunity when doing so would be expensive. Here, Pogge criticizes Rawls in a way that echoes Rawls' critics to utilitarianism. While Rawls famously claimed that "utilitarianism fails to take seriously the distinction between persons" for it ignores some of the most fundamental interests of prospective participants in a scheme of cooperation (Rawls 1971, 187), Pogge observes that Rawls' theory fails to take seriously the "distinctions among the ways in which relevant goods and ills are causally related to" such a scheme (Pogge 2005, 281). These "causal pathways" are ignored by Rawls, according to Pogge, for the perspective of prospective recipients of basic goods is privileged over the perspective of citizens as *imposers* of a social order. As agents, Pogge insists, we become contributors to the institutional order which was forced upon us at birth (by voting, paying taxes, purchasing products, communicating, etc.). But the institutional order

we are now imposing on others, ourselves, the newborn, and the powerless, is causing both unjustified harms and failures to rescue. The purely recipient-oriented perspective ignores the dimension that, once actively contributing to this institutional scheme, we as agents become partially responsible for that high number of harms to others (and failures to rescue) and cannot account for the important fact that we do distinguish between harming and failing to rescue in our assessment of justice.

The fact that we intuitively deem absurd executing drunk drivers, even when doing so would greatly diminish traffic fatalities, cannot be accounted for on purely recipient-oriented grounds: however, through our criminal code, we do prefer failing to rescue thousands of innocent victims of drunk driving instead of executing a few dozen drunk drivers yearly. This preference is unexplainable in purely recipient-oriented terms. From the point of view of ignorance of our prospective situation, and as concerned with our own prospective longevity, we have no apparent reason to *not* choose capital punishment for drunk drivers. So, an argument against this draconian rule cannot be grounded on this view. For it misses a crucial aspect of social life – that we are not only recipients of burdens and rewards, but also institutional (not just interactional) perpetrators of harms – this purely recipient-oriented perspective must be overcome by a perspective that considers the "causal pathways" of injustice (Pogge 2005, 274–275).

Moving Away from Rawls' Model: The Problem of Nationalism

Pogge (1989b) claimed that the existence of a global institutional order (a global basic structure) calls for the recognition of principles of justice to regulate it. Whether Rawls admitted of the existence of a "global basic structure," and whether this admission would entail an account similar (or equivalent) to Rawls' domestic basic structure, is subject to interpretation: Samuel Freeman (2006) denies it, for example, and David Reidy (2007) builds on a notion of it, but both aim to defend Rawls' approach against Pogge's strong cosmopolitanism.

What Pogge found incomprehensible is the reason behind Rawls' decision to limit the scope of institutionally understood principles of justice to the nation-state. Rawls (1993) initially developed an ideal theoretical conception of a just international world order, which would consist of just relationships between liberal and non-liberal, but "decent," well-ordered societies. Among the seven principles of international justice presented by Rawls, all well-ordered societies, which Rawls refers to as "peoples" and not as States, must respect basic human rights and must not wage wars of aggression. But none of the two parts of Rawls' second principle of domestic justice (fair equality of opportunity and "difference principle") are applied at the global level. Pogge (1994) criticized this view and claimed that issues of global distribution should be part of the ideal theoretical part of the investigation. He, therefore, proposed a global resource dividend as an international redistribution mechanism which all States would have to contribute to for global poverty reduction as well as the Health Impact Fund (Hollis and Pogge 2008), claiming that (1) such mechanisms would be accepted by hypothetical "parties" in a position of ignorance about their prospective situation in the world, and (2) they would progressively change the kind of relationship that citizens of rich constitutional regimes have with the global poor by alleviating effects of the institutional harm imposed by the former to the latter.

Rawls (1999) then presented his elaborated conception of international justice, where he explicitly referred to Pogge's criticism and his proposal for a global resource dividend. Rawls now adds an eight principle of justice (1999, 37) known as "duty of assistance," and adds in a footnote that this principle is "especially controversial," for the issue at stake between his own "duty of assistance" and a more egalitarian principle of global justice is that of establishing "a target and a cutoff point." Pogge (2002, 2004, 2008b), in turn, responded to Rawls' argument by questioning the consistency of Rawls' national and global conception of justice. While Rawls

regards justice as a property of institutional orders at the national level, he would relate the concept of justice to the interactions among peoples at the global level. Rawls' explanation of the causes of poverty, Pogge lamented, while institutional and connected to the notion of a basic structure at the domestic level, becomes interactional and connected to actions that governments might take at the global level. This, for Pogge, remains unexplainable from Rawls' very own definition of "basic structure."

Moreover, Pogge criticizes the notion that Rawls' "duty of assistance" mistakenly assumes that global poverty results from failure to rescue the poor at the global level, while Pogge identifies causal pathways that from the global basic structure actively and directly *harm* the global poor. Priority, then, must be given to the negative duty to stop the harm that the global basic structure is causing, not simply establishing that wealthy nations have a positive duty to assist nations that happen to the poor, as if poverty is disconnected from the rules imposed at the global level. The language of positive duties, Pogge insists, is not only weak at the motivational level, but it might subsume a false and dangerous narrative about the causes of poverty.

Conclusion: Reception

Several authors have defended Rawls against Pogge's critics by pointing out that Rawls was not only speaking of the law of peoples as a conception of global justice, but also of the basic global structure, consisting of the conditions of well-ordered people and the international institutions established by these peoples on their subject (Reidy 2007; Nili 2010; Williams 2011). Other authors have more recently tested empirically the motivational strength of positive and negative duty arguments (Buckland et al. 2021). Finally, the collection of essays edited by Alison Jaggar (2010) – which includes contributions from Joshua Cohen, Kok-Chor Tan, Neera Chandhoke, Jiwei Ci, Erin Kelly, Lionel McPherson, Leif Wenar, and Charles W. Mills – constitutes an array of perspectives on Pogge's argument as well as Pogge's responses.

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Police

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Introduction

The word police originates from the Greek term *polites*, from which the words "politics" and "politeness" are also derived, all being related to *Polis*, the ancient Greek city-state. The Greeks called *polidos* the citizen who participated in the political and military tasks of politics. However, despite the long-term use of the concept, the history of police is, however, relatively recent, not going back beyond the seventeenth century, when the figure of the lieutenant general of police was instituted by the French King Louis XIV in Paris. However, according to many scholars, the model for the modern police was only conceived in the first half of the nineteenth century in England. At that time, the British government conceived the idea of creating an internal force to prevent the use of the army in repressing social revolts. Thereafter, the police have become part of almost all modern states, consisting of a body of persons empowered to enforce the law, establish internal order, prevent crime, and protect individual rights. Its power includes the legitimized use of force and the power to arrest. Although being often separate from military forces involved in the defense of the state against foreign aggressors, there are many militarized policies around the world. The French *Gendarmerie*, the Italian *Carabinieri*, and the Brazilian *Policia Militar* are some examples of military units charged with civil policing.

Possible Criteria for Classification

The primary function of the police is to promote public safety and law enforcement in the State. For that to happen, however, its structure, organization, and practices around the world are very distinct. Perhaps the most striking difference in policing in the various nations is the structure and organization of the police system. For didactic purposes, we can categorize them as centralized and decentralized organizations. Those concepts refer to the number and authority of a country's police organizations and to the specific role they play.

A comparative analysis will show the United States and Sweden occupying opposite ends of the spectrum. The former has a radically decentralized system, in which there are multiple and different levels of law enforcement, policing, and investigative services, each of which acts

independently. Such a phenomenon, which finds support in the US centrifugal federalism, leads to the different political divisions of the state having different police forces, all operating within their own chains of command.

Radically opposed to the US model, Sweden stands out as possibly the most centralized model, employing a police force in which a single agency, Rikspolis, is responsible for providing police and investigative services throughout the country. Evidently, between these two examples, there are several levels of centralization in the world. Brazil, for example, adopts a more decentralized structure, where we find three types of police at the federal level, namely, the Federal Police, the Federal Highway Police, and the Federal Railway Police, and in the member states of the federation, there are the Civil Police and the Military Police. In addition, the municipalities can organize their own police, denominated Municipal Guard.

It is also customary to divide the police into two distinct types, according to the way they perform their activities: the former is the ostensive, *preventive police*, whose function is to prevent crime. Their members work in uniform, and they are always openly present on the streets, in order to inhibit criminal practice.

The second type is the *repressive police*, which generally have an investigative and judicial role, dealing with criminal offenses already committed and their authorship. In Brazil, preventive policing is the primary function of the military police, which is organized by the states, while the civilian police are responsible for carrying out investigative and judicial police activities, assisting the judiciary in its decisions.

As a rule, the police, mainly the repressive and investigative kind, act before the criminal proceedings, in other words, in the pre-processing phase. However, the fundamental rights of the citizens must be safeguarded whenever police action is necessary.

Challenges and Critique

In democratic states of law, police forces play a key role in ensuring public safety and, as a consequence, safeguarding, guaranteeing, and promoting the fundamental rights of individuals, thus contributing to justice.

According to Michel Foucault, in the fifteenth and sixteenth centuries, up to about the beginning of the seventeenth century, the term "police" was used to designate a community ruled by a public authority that exercised political power, as well as the ruling acts emanating from that society. In such a context, the "police" would be associated with the actual way of governing.

Foucault (2008, p. 421) goes on to say that, from the seventeenth century on, the word "police" gains a completely different connotation. "Police" is then understood as one of the means for the growth of the State's power, aiming at maintaining order. For the French author (2008, p. 422), the objective of the police would be the good use of the State's forces. From Foucault's perspective, that would be the modern idea of police, developed in the seventeenth and eighteenth centuries from the Liberal State, that is, the creation of public utility coming from men, so that its "fundamental object are all forms of coexistence of men in relation to one another" (Foucault 2008, p. 437).

Foucault will then argue that the problems the police deal with are very similar to those existing in cities, namely, problems concerning the market, buying and selling or exchange. As he states, "The police are essentially urban and mercantile, or, to put it more brutally, it is a market institution in the very broad sense" (2008, p. 451).

In that critical view, the police, as conceived in the seventeenth and eighteenth centuries, would have been thought of in terms of urbanization of the territory, aiming at the growth of State forces, and not as an instrument of the judiciary, with a view to promoting justice (Foucault 2008, p. 456).

Thus, according to Michel Foucault's biopolitical theory, the police would have the function of controlling the population according to the interests of the State, having a fundamentally mercantilist orientation, not that of an institution focused on the promotion of justice.

However, if Foucault's shrewd analysis has the potential to point out important risks and aporias, it is necessary to be able to deal more

objectively, precisely, and pragmatically with police institutions, which, after all, are present all over the planet. Thus, in the democratic rule of law, it is imperative that normative elements be built and made effective in order to recognize the role of the police in guaranteeing and promoting the fundamental rights of all citizens.

To that end, the institutionalization of external control and legal accountability seems to be indispensable and necessary paths. The studied example of police reforms in the United States can also lead to important reflections.

In that country, to face the numerous cases of police misconduct in the 1960s, different solutions were proposed by both policing professionals and their external critics. Police leaders argued that the problem was partisan control, and the solution could be found in a careful selection, training, and discipline. On the other hand, critical activists contended that the problem was, in fact, widespread police harassment and the abuse of racial minorities and of the poor and thus could only be solved by sweeping institutional reforms. A third group, composed of law scholars with extensive experience inside policing, proposed an alternative model. For them, the activists were right in their demands, but a complete reform was unnecessary. There were already unapplied administrative tools up to the task of bringing about those reforms. But only some reform-oriented police chiefs accepted the proposal, while the bulk of the profession rejected the idea. Legalized accountability then appeared as a reaction to those events and grew from both activist demands and the ideas of professionals, although activist demands were the driving force.

According to Charles Epp (2009), the role of the activist attorneys was to build an infrastructure of support for widespread litigation against the police, cultivating constitutional torts as a key tool for change. As a consequence of the activist movement, the mass media started to cover the all kinds of litigation against the police: not only high-profile litigation alleging police harassment of radicals but also litigation over police shootings of ordinary citizens, especially over shootings of unarmed young African Americans fleeing sites of burglaries. The positive reaction came from a practical administrative idea model developed by reform-oriented police experts J. Fyfe and Patrick Murphy. The model consisted of effective and empirically tested ideas to reduce the use of force and also police shootings. Additionally, the expansion of litigation forced the leading departments not only to adopt the administrative innovations but to do more. From that moment on, even some police insiders agreed to serve as witnesses in lawsuits, spurring, and spreading the innovations to almost all departments.

Epp demonstrates that the police reform not only preceded but provided the pragmatic foundation for the Supreme Court's key intervention in the area, with its decision in *Tennessee v. Garner* of 1985, striking down the fleeing felon shooting rule as unconstitutional. Years later, in *Canton v. Harris*, the Court endorsed the idea that police departments may be financially liable for injuries caused by their inadequately trained officers.

Conclusion

In conclusion, the police must act as an instrument to guarantee the public order constitutionally instituted and, consequently, ensure the citizens' fundamental rights can be enjoyed and respected. The police should exist to protect not only property but also life, integrity, freedom, honor, and all the other rights, recognized and necessary for human life in a state governed by the rule of law.

In that sense, it is the duty of the public security organs, especially the police, to guarantee and enforce those rights, using their armaments, human equipment, and intelligence to preserve all the premises on which democracy and the rule of law are founded.

Cross-References

► Rule of Law: Theoretical Perspectives

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Policing

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Introduction: Who Are the Police?

This entry offers an overview and analysis of policing, the area of criminal justice associated primarily with law enforcement. The study of policing spans a variety of disciplines, including criminology, law, philosophy, politics, and psychology, among other fields. Although research on policing is broad in scope, it has become an especially notable area of study in contemporary legal and social philosophy given recent police controversies.

The advent of modern policing is often traced to the formation of the London Metropolitan Police in 1829. John Kleinig characterizes the Metropolitan Police as a "legislatively mandated organization designed to provide round-the-clock service to a community confronted by diverse needs and fears" and to *prevent crime* (1996: 11). This suggests a focus on *proactive* law enforcement tactics, rather than earlier styles of policing that embraced a more *reactive* model of law enforcement. However, as Kleinig notes, law enforcement is but one of many police roles. Police also act as emergency operators (responding to emergencies such as vehicle accidents or natural disasters), social enforcers (using force in situations such as crowd control), and social peacekeepers (a combination of both law enforcement and social service roles) (1996: 25–29).

Within police culture itself, the police have embraced a range of archetypal identities (Hunt 2021a). The police institution is historically associated with a heroic ethos steeped in valor. In many countries (not least the United States), the heroic ethos has evolved into a distinct warrior identity, which is marked by militaristic equipment (military-style rifles and armored vehicles), methods (the widespread use of specialized weapons and tactics, or "SWAT," teams), and training (quick, reflexive use of force and "righteous violence") (Stoughton 2016). Fallout from the warrior ethos has led to calls for a somewhat milder "guardian" identity, which is said to be based more evenly on principles of protection (Yankah 2019). However, researchers have argued that these shifting, individuated archetypes (a sort of "identity crisis") can miss the central point that policing should be conceived as a *collective* (for example, "community policing") pursuit of justice (Hunt 2021a).

Naturally, concerns about policing are more pronounced in some countries than others. Comparing policing in, say, Denmark and the United States may not be fruitful given the vastly different populations, economies, crime rates, and other social problems – including gun ownership cultures. For a variety of reasons unrelated to policing itself, police in many countries do not have to contend with the same amount of poverty, homelessness, crime, gun violence, mental illness, and racial tension as police in the United States (Shelby 2007). On the other hand, countries such as Nigeria have a much more pronounced problem of police bribery and corruption (though the police in the United States and other countries of course have their share of corruption) (Guttschuss 2010). The point is that it is important to note that there is a complex array of contemporary police roles that vary internationally, as well as domestically within a single country.

The diversity of police roles and responsibilities is often organized according to both subject matter and bureaucratic jurisdiction. For instance, in the United States, most states have a "state police" (or "highway patrol") force that has jurisdiction across the entire *state* – such as the Alabama Highway Patrol. And there is often a police force within each state *county* ("county police" or "Sheriff's Office"), such as the Tuscaloosa

County Sheriff's Office in Tuscaloosa County, Alabama. Moreover, the city of Tuscaloosa (within Tuscaloosa County) has its own Tuscaloosa Police Department, which has jurisdiction within the *city* of Tuscaloosa. One can also add police departments on college campuses, such as the University of Alabama Police. To make things even more complicated, there are *federal* law enforcement officers such as FBI special agents, who have jurisdiction in matters of federal law across the entire United States.

Within each bureaucratic jurisdiction, officers may be generalists or specialists. There are uniformed officers who are generalists, responding to a range of issues they encounter on their shifts – from traffic accidents and violations to burglaries and domestic disputes. There are also "plainclothes" detectives and other investigators who become part of specialized squads that focus on a narrow range of crimes over the course of long-term investigations, such as a drug crime, white-collar crime, and violent crime (Hunt 2019). Although each polity and police institution is unique, these sorts of jurisdictional and subject matter boundaries can be found in police forces around the world.

Law Enforcement: Strategies and Tactics

There are countless police strategies and tactics that – as noted above – vary greatly from country to country and department to department. However, there are several prominent strategies and tactics that are familiar in one form or another in a wide range of police institutions.

Community Policing and Policing by Consent

Roughly, *community policing* is a philosophy and organizational strategy that promotes community empowerment and collective efficacy: policing that seeks community development through community partnership (Sampson 2011). An example would be coordination between the police and a neighborhood watch group, which might increase citizen empowerment and reduce citizen fear – thereby facilitating conditions that will help solve crime problems. There are three central aspects of community policing:

1. Citizen involvement in identifying and addressing public safety concerns
2. The decentralization of decision-making to develop responses to locally defined problems
3. Problem solving (National Academies of Sciences, Engineering, and Medicine 2020)

These aspects of community policing become manifest through a variety of activities that emphasize relationships and partnerships with the community. Accordingly, community policing can be associated with the related idea of "policing by consent" (Torrible 2022), which is consistent with social contractarian political philosophy inasmuch as community policing promotes communication with community partners (rather than simply relying on force and power). Community policing is thus often associated with particular styles of political philosophy – including those steeped in democratic liberalism (Hunt 2021a).

Criticism of these strategies has come from two directions. First, some researchers have examined various community policing tactics and concluded they do not yield evidence of significant crime reduction (Sherman and Eck 2002). A second objection to community policing is that – somewhat paradoxically – it might lead to increased bad behavior by the police. For instance, perhaps community policing increases police discretion and community engagement in a way that leads to increased illegal encounters with community members – such as expansion of police discretion to use unjustified stop and frisk tactics (Gould and Mastrofski 2004). In other words, poorly executed community policing may exacerbate both police legal noncompliance and police legitimacy. Jake Monaghan's conception of "legitimacy-risk profiles" provides insight on these points (2021).

In response to the second critique, researchers have suggested that community policing should be supplemented with "procedural justice policing," a distinct strategy that more narrowly focuses on "giving citizens police decision processes that manifest demonstrations of police

fairness and regard for a person's dignity" (National Academies of Sciences, Engineering, and Medicine 2018). The basic idea, then, is that procedural justice policing promotes police legitimacy both directly (the people with whom the police interact) and indirectly (the community generally). Still, it is important to note that some scholars worry that the psychological underpinnings of procedural justice policing (which might encourage trust and compliance) will discourage citizens from asserting their constitutional rights to contest bad policing practices (Miller 2016).

Regarding the criticism that community policing may not reduce crime adequately, some researchers have responded by rejecting consequentialist ethics (Hunt 2021a). In other words, there are a great many policing strategies that might have the consequence of a reducing crime significantly. However, it might also be the case that states should embrace community policing because it is the right thing to do given the state's assumptions about political morality. A consensus study report put the point this way: "procedural justice reflects the behavior of police that is appropriate in a democratic society. . .. [it] may not change citizen attitudes, but it encourages democratic policing" (National Academies of Sciences, Engineering, and Medicine 2018: 312). The idea, then, is that such strategies are needed (perhaps in conjunction with other crime reduction strategies) because they promote justice by bolstering legitimacy, autonomy, and respect for human dignity.

Algorithmic Policing

A second major policing strategy is policing by algorithm. Such strategies may be used in conjunction with community policing, procedural justice policing, and policing by consent, though there can also be tension between the various approaches.

Predictive policing is often categorized as person-based (targeting specific individuals based upon algorithmically generated predictions) and place-based (predicting when and where a crime will occur based upon an algorithm). Sarah Brayne describes the informal use of the term "algorithm" as the process by which computers make predictive, automated decisions based on a dataset (Brayne 2021).

One placed-based technique has been referred to as "prediction box" (Hunt 2021a, 2022), which is the technique of "forecast[ing] individual crimes in the immediate future in order to direct patrol officers into 500-by-500 foot areas (i.e., boxes) that are at a higher risk of a crime occurring during a particular 8, 10, or 12 hour shift" (Santos 2019: 372). The idea is simply for an officer to report to a specific geographic box and prevent a crime from occurring in that box (Ibid.). The location of the box is based upon data regarding time, date, and location of reported crimes, but there is often no human analysis (or qualitative analysis) of the box (Santos 2017).

Criticism of algorithmic policing has come from a number of directions. One of the central objections is based simply on the quality of the data used in the algorithm. If a state (and its police departments) has pervasive problems with racism (Shelby 2007), sexism, and other forms of discrimination, then there is a worry that any algorithm on which the police rely will necessarily be based on such discrimination – assuming that such discrimination is present in the accumulation of the data used in the algorithm (Mayson 2019).

More generally, researchers have argued that the use of algorithmic policing in isolation (without being augmented by community policing, for example) is dehumanizing to both the community being policed and the police themselves (Hunt 2022). Regarding the former, the worry is that individual members of the community are treated as part of an indistinguishable mass rather than in accordance with the respect each person deserves given norms of political morality. Regarding the latter, there is a risk that undue reliance on algorithms may amount to "agency laundering," or stripping the police of their moral agency and responsibility (Rubel et al. 2019, 2020).

Deception as an Investigative Tactic

Moving from broad policing models and strategies to specific investigative tactics, there are several common practices that raise important legal, political, and moral questions. To what extent are

the police justified in the use of deception and dishonesty as part of their law enforcement practices? Three common police tactics involving investigative deception are (1) the use of informants, (2) the use of operations giving rise to entrapment, and (3) the use of surveillance.

Police are trained to use informants to obtain useful information through a variety of authorized law enforcement collection activities. The informant's identity, information, and relationship with the police is confidential, allowing the informant to work their way into the confidence of unwitting suspects. Informants act as agents of the police for a great many reasons, but one the most common reasons they do so is because the police have leverage over them. An arrangement between a leveraged informant and the police is in many ways like a contract in that both sides voluntarily enter into an agreement with the intent that each side will assume certain obligations under the agreement (Hunt 2019).

The police might indicate that they have evidence that a person committed a crime that exposes the person to potential punishment. The police make the person an offer: If she acquires evidence or information for the police (including through conduct that would otherwise be illegal), then the police will consider advising the prosecutor (responsible for prosecuting the person's alleged crime) of the person's assistance so the prosecutor can consider recommending that the person receive a downward department from the punishment for which she is eligible. The person accepts the offer and performs according to the terms of the bargain.

This sort of bargaining process raises normative principles underpinning contractual relations and gives those principles weight with respect to questions about the justification of the agreement between the police and the informant. For instance, did the informant have a "real choice" given the police's leverage? Was the substance of the agreement – what the police asked the informant to do – justified from a moral perspective? (see Miller and Blackler 2005; Harfield 2012; Hunt 2019).

Sting and undercover operations are another common form of investigative deception. These tactics often involve the use of informants, as when the police, say, use an informant to induce businesspersons to engage in a conspiracy to bribe government officials. In addition to general moral questions about the use of false scenarios to induce people to commit crimes, the use of sting and undercover operations often raises legal questions regarding entrapment.

Entrapment is a legal defense in the United States, and there are various legal tests used to determine when a person has been entrapped. Under the subjective test – the predominant test based upon federal precedent – a person is entrapped when the government induces the person to commit a crime that the person is not predisposed to commit (Jacobson v. United States 1992). In other words, the government must show that the defendant would have committed the crime even if (in some possible world) the defendant had not been induced by the government (Hunt 2019: chapter 5). Under the objective test – embraced by the Model Penal Code and adopted in a minority of jurisdictions – a person is entrapped when the police use unreasonable tactics: "Methods of persuasion or inducement. . .[that] create a substantial risk that. . .an offense will be committed by persons other than those who are ready to commit it" (American Law Institute 1985 § 2.13). Accordingly, the subjective test is about what is in the mind of the defendant (a question of criminal law), and the objective test is about the reasonableness of the police's conduct (a question of criminal procedure).

On the other hand, entrapment is no defense in the U.K. and Australia. Although entrapment is no defense in English law, a series of court opinions confirm that there is a commitment in English law to the principle that the state should not lure citizens into committing legally forbidden acts and then seek to prosecute them for doing so (see R. v. Loosley 2001; Ashworth 2002). One of the underlying issues with the use of sting and undercover operations is thus preventing coercive police tactics through rule of law principles that shield citizens from oppressive executive agents.

Finally, surveillance is a deceptive investigative tactic that is common among police

departments around the world – a tactic that is often conducted in conjunction with the police's use of informants and operations that may give rise to entrapment. At the most basic level, Gary Marx defines surveillance "as regard or attendance to others," which often involves "gathering some form of data connectable to individuals" that is "tied to the goal of control" (Marx 2015: 734–735). Marx also describes how surveillance occurs in the private, corporate sector, not just in the context of state actions (Marx 2016). This is an important point because the domains often converge, as when the state relies on data from the private sector to surveil and investigate its citizens.

Of course, this does not mean that surveillance is always unjustified. In the context of policing, surveillance can obviously help promote security – often in a relatively unobtrusive way. This might include instances in which only a specific suspect is targeted for surveillance (rather than vast numbers of people through mass surveillance), as well as surveillance that does not stem from investigations that deviate from rule of law principles (Hunt 2019). These different perspectives are just another way of describing how surveillance – as with all police tactics – involves competing values, with security being but one value among many that must be considered.

Constraints: General and Special Moral Requirements

The complexities noted in the first two sections raise a basic philosophical question about policing: How should the relevant legal, political, and moral questions be framed given the diversity of police strategies and tactics, as well as the diversity among police departments themselves? One way to approach this question is by focusing on special and general moral requirements (see Hart 1961; Rawls 1971) of the police.

General moral requirements are construed as nonvoluntary requirements that bind the police simply by virtue of background norms regarding commitments to personhood and moral equality, irrespective of any special roles or relationships entered. These requirements might be grounded in human dignity (such as one's high-ranking, equal, social status) or natural rights (such as rights that are not conventional and would exist in state of nature) (Simmons 2015). For instance, John Locke's political philosophy is known for a commitment to a natural right not to be coerced without consent, giving rise to one theory of legitimacy.

In the domain of policing, an officer may be justified in treating a person in a particular way based upon the person's unlawful resistance, but any force used by the officer must be done in a manner that does not denigrate the rights comprised by the person's high-ranking, equal, socio-legal status (given the assumption that there is a general moral requirement against affronts to one's human dignity). In a similar way, the police's use of informants is perhaps an indispensable investigative tool, but there are moral limits to the police's power to use persons (informants) as a means to a law enforcement end given one's status and value emanating from one's human dignity (Hunt 2019, 2021b).

Special (or positional) moral requirements are grounded in those special relationships that we have (or freely make) with other groups (see Hart 1961; Rawls 1971). This might include (voluntary) promissory or contractual obligations, or perhaps nonvoluntary associative obligations owed to friends, family, and others. Accordingly, if a police officer fails to do her duty as police officer, then she is morally blameworthy because she voluntarily entered her position and undertook the duties of that position. Unlike most people, then, one of the explicit special obligations of the police is to obey the law.

Given recent attention to policing in the United States, consider how the police are constrained by legal obligations derived from the Constitution. The Fourth Amendment to the US Constitution protects the "right of the people to be secure in their persons . . . against unreasonable. . .seizures." A police officer's use of force (deadly, or otherwise) constitutes a seizure and must be reasonable. Courts have construed the "reasonableness" of force based upon "the perspective of a reasonable officer on the scene, rather than with the 20/20

vision of hindsight" Graham v. Connor, 490 US 386 (1989).

George Floyd was killed by a police officer in Minneapolis, Minnesota, on May 25, 2020. The officer knelt on Floyd's neck for over eight minutes while Floyd – who was handcuffed – exclaimed that he could not breathe. When Floyd became unresponsive, the officer continued to use his knee to pin Floyd's neck to the asphalt street. By any standard, the officer who killed George Floyd breached his special, positional obligation to follow law and policy. There was no threat of harm (Floyd was lying flat on the ground, handcuffed), and his actions (kneeling on Floyd's neck for over eight minutes) were clearly unreasonable and unnecessary.

Moreover, given basic assumptions of political morality, the officer failed to fulfill his general moral obligations regarding respect for one's human dignity. The upshot is a natural overlap between certain human rights and certain political and civil rights – as when the police have a general moral requirement not to brutalize persons, which is also prohibited by their special, positional duties as police (Hunt 2021b).

Conclusion: Police Abolition, Reform, and Nonideal Theory

The issues that have been raised in the preceding sections are at the heart of one of the more pressing contemporary debates about policing: Should states with police forces that engage in systemic injustices "defund" or "abolish" the police (Wertheimer 1975; Vitale 2017; McDowell and Fernandez 2018)?

"Defunding the police" can be described as reallocating funding away from the police to other government institutions funded by the state (Ray 2020). For example, a city might shift funding from the police to social services so communities can respond to mental-health crises, addiction, and homelessness more effectively. Some of these initiatives are politically possible (some cities have reallocated resources) and supported by research suggesting their efficacy (e.g., research suggesting that increased socioeconomic opportunity – not police – reduces crime) (Uggen and Shannon 2014). Researchers have thus argued that piecemeal reallocation is consistent with the background assumptions regarding the demands of justice: Core state functions (e.g., socioeconomic services) are handled by state agents with the relevant expertise, while other agents of the state (the police) retain core functions relating primarily to security (Hunt 2022).

On the other hand, arguments in favor of the actual *abolition* of the police raise several problems connected to the points discussed in the preceding sections. First is the *definitional problem*: Who counts as the police? Given the diversity of police roles and responsibilities – as well as the diverse administrative and bureaucratic manifestations of the police – there can be equivocation about which state entities count as "police" and which ones should be abolished. It is plausible to think that law enforcement – some sort of policing – is indispensable in any actual, existing (nonideal, nonutopian) society. Arguments regarding police abolition, then, can often be more like debates about what is meant by the term "police."

Second, police abolition raises a *socio-scientific problem*. As noted in the first section, it would be unusual to compare policing in the United States and Demark given the vast differences between the two countries. For example, the United States must contend with the reality that there are more civilian-owned firearms (393 million) than people (326 million) in the United States. This and other important social-scientific issues raise difficult questions regarding police abolition in some countries but not others (Hunt 2022).

Finally, police abolition raises a *philosophical problem*: Would a reallocative model abolishing (or drastically limiting) the police be politically possible, effective, and morally justified given a polity's assumptions about justice? Policing scholars have embraced a variety of nonideal theory methodologies to evaluate philosophical problems in policing (see Hunt 2019, 2021b). For example, even if it were possible to privatize policing, reliance on private

security forces would raise serious questions about the equal distribution of security to which most states are committed. Would efforts leading to the abolition of the police – rather than piecemeal reallocation and other reform efforts – improve the lives of those who are most in need of security (given that affluent citizens could simply hire private security without the police)?

The upshot is that any nonideal, nonutopian account of justice must have something to say about cases of unjust actions, such as those that create emergencies of security that might require just policing. From both a practical and moral perspective, many have thus argued that it is reasonable to take steps toward procedural and substantive police reforms that are politically possible, effective, and morally permissible given the assumption that states have a duty to promote the security of its members (Hunt 2022; Monaghan 2021).

Cross-References

- ▶ Claim Rights (Subjective Rights)
- ▶ Criminal Justice
- ▶ Justice
- ▶ Police
- ▶ Rights: General
- ▶ Rights: Legal and Moral

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Political Economy and Law

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Introduction

"Law and political economy" is treated here as an approach to the study of phenomena at the intersection of law, politics, and the economy rather than as a discrete school of thought. It views developments in law and political economy through an historical, conceptual, and interdisciplinary lens rather than taking law, politics, or economics as autonomous, to be studied through pure methods.

Law and political economy can be distinguished from classical (or neo-classical) law and economics because of a focus on issues of power and inequality, between persons, groups, states, and regions. More specifically, it focuses on how relations of power are legally and politically configured and reconfigured over time and in distinct periods, and how in turn this conditions the development of the economy. While "law and political economy" does not therefore refer to one discrete body or system of thought, its treatment here shares an affinity with (and owes a debt to) various and related critical traditions, including Marxism, Keynesianism, the German Historical School of Economics, the Frankfurt School, (historical) institutionalism, legal realism, critical legal studies, law and development, and critical political economy.

The aim here will be to sketch in broad outline the themes that have recently come to prominence through renewed interest in the political economy and politico-legal institutions of capitalist society. This coincides with the return to the academy – as well as the public sphere – of a discourse of crisis, and specifically structural crises of capitalism, which now demands theoretical and practical attention across various disciplines and within mainstream scholarship itself (particularly since the global financial crisis and the Euro-crisis beginning in 2007–2008, although long prominent in the work of theorists in the Marxist tradition (e.g., Jessop 2016). This renewal of mainstream interest in the relationship between the institutional make-up of capitalist society and its socioeconomic development is due in large part to the influence of French economist Thomas Piketty and German sociologist Wolfgang Streeck. As a preliminary step, we first explore a theme arising from their attempts to outline the logic of capitalism in terms of a dynamic of socioeconomic inequality. From a law and political economy perspective, this dynamic is seen as conditioned by politically and legally constituted relations of power, rather than an "iron law" of the capitalist economic system. To explore this further, we then survey three levels of analysis: law and political economy of the market (the micro-level), law and political economy of the state (the meso-level) and international and global law and political economy (the macro-level). This separation, however, is merely heuristic; micro-, meso-, and macro-levels are of course intertwined and interdependent, not least increasingly mixed

through forms of transnational integration, most obviously in the European Union, which is at the same time an internal market, a proto-state (with a single bank and single currency) and an inter-state trade regime.

Capitalism and Inequality

Piketty's *Capital in the Twenty-First Century* (2014), an historical approach to institutional change and the dynamics of inequality from a *longue durée* perspective, has begun to shape inquiries into the relationship between law and political economy and will likely do so for the foreseeable future.

A central question emerging from Piketty's work is whether the inequality stemming from $r > g$ is to be understood as resembling a "natural law" or as the contingent result of political and legal choices. Piketty is ambiguous about this, treating inequality as "a historical fact, not a logical necessity" (ibid.: 353) but also suggesting "that a market economy based on private property, if left to itself... contains powerful forces of divergence" (ibid.: 571).

Institutionalists and critical legal scholars have claimed that capitalism should be understood fundamentally as a legal ordering (Grewal 2014: 652). Samuel Moyn argues that in order to understand economic inequality, one must abandon the idea of a "capitalist system" with certain identifiable general laws and tendencies; there are "only legal and more broadly political arrangements in which inequality improves or . . . worsens" (Moyn 2014: 54). He concludes that "there is no such thing as capitalism" (ibid.: 55). The economists Daron Acemoglu and James A. Robinson similarly criticize Piketty's "quest for general laws of capitalism" (2015: 3) for failing to allow for "a systematic role of institutions and political factors in the formation of inequality" (ibid.: 4). This failure "implies that [Piketty's] general laws have little explanatory power" (ibid.).

Wolfgang Streeck offers the kind of institutionalist perspective on capitalism that is demanded by this line of critique. For Streeck, the "fundamental insight of political economy" is that "the natural laws of the economy, which appear to exist by virtue of their own efficiency, are in reality nothing but projections of social-power relations which present themselves ideologically as technical necessities" (Streeck 2015a: 10). Streeck takes a broader view of capitalism than Piketty, presenting a material dynamic of the whole social order as based on distinct but inter-related logics of competition and accumulation on the one hand, and solidarity and redistribution on the other. These two logics work in dynamic disequilibrium (Streeck 2011). Capitalism is thus parasitical on those very foundations that it tends to erode; but as an institutional, historical, and moral form of economy it cannot be understood in abstraction from democratic political and social forces, and from the regulatory and deregulatory pressures they exert on the governance of the state and the state system. Streeck thus highlights a fundamental societal tension between capitalism and democracy rather than merely a tendency within the economic system as such towards inequality. The dynamic of inequality is not an abstract logic of the economic system but is reflective of a dialectical relation in a capitalist democracy.

Streeck's analysis has rejuvenated inquiry not only into the relation between democracy and capitalism in the abstract but into its changes through periods of state transformation, in particular through the project of European integration and the single currency. In these conditions, and as the dominant means for the state to raise resources has shifted from reliance on its citizens through direct taxation (the "tax state") to reliance on financial investors in the global marketplace (the "debt state"), the pressures of supranational economic integration and financial markets combine to constitute a new type of "consolidation state" based on perpetual austerity and internal devaluation (Streeck 2014; see also Scharpf 2016). This process is conditioned in contradictory ways by identifiable constituencies, which Streeck labels the *Statsvolk* and the *Marktvolk,* exerting pressure through the voting mechanism and international financial markets, respectively (Streeck 2014).

Streeck's work draws on and updates earlier insights of Karl Polanyi (2001). In Polanyi's account, the modern nation-state exists and

evolves in a dynamic relation with the modern market economy. Polanyi traces a double movement of liberal marketization followed by social reaction to the dis-embedding of social relations as it evolved in the nineteenth and early twentieth century. The double movement represents a dynamic of legally induced and enforced commodification of the "fictitious commodities" of land, money, and labor, which produces a contrary reaction, as society tries to protect itself from the harsh consequences. Reversing the classical liberal idea, this leads Polanyi (2001: 147) to the conclusion that "laissez-faire was planned; planning was not." Social re-embedding, in other words, is more likely to be spontaneous than the carefully planned and state-executed processes of commodification that preceded it. The existence of two distinct logics in perpetual tension, one operating according to notions of equality and solidarity, the other on the basis of inequality and competition, is captured by the figure of the "market society."

Law, Political Economy, and the Market

One of the major limitations of the neoclassical approach to law and economics is captured in the notion of "markets left to themselves." This reflects the common but misleading perception that markets function according to natural forces that public power can choose to withdraw from or act upon. As the discussion of Piketty above attests to, even perspectives that stress the necessity of state interventions in the economy to correct its excesses often subscribe to this account. But markets do not perform a structuring function in society without a legal and political ordering already in place. At a minimum, public powers provide the legal and material framework conditions within which the economy operates. And this minimal-state perspective needs to be complemented to take into account the detailed ways in which law and political authority condition and affect market transactions and outcomes.

The free-market paradigm is difficult to align with the legal nature of even textbook examples of "perfectly competitive" markets. As Bernard Harcourt (2011: 15) has demonstrated with reference to the wheat market in Chicago, the supposedly most perfectly competitive "free market" is shot through with disciplinary rules and regulations. There is, one might conclude, no such thing as a "self-regulating market" in which resources are allocated to their most efficient use through the free workings of the price mechanism. "De-regulation" and "self-regulation" are simply names for particular kinds of regulatory and disciplinary regimes (see also Vogel 2018). The most salient question is therefore not whether, but *how* law and politics shape market activities.

The link between the governing apparatus of the state and supposedly "free" private economic interactions has long been a central concern for critical legal scholars. In order to highlight the constitutive dimension of law for economic life, Duncan Kennedy (1991), for example, analyzed the way in which society's background rules affect and condition bargaining over supposedly free contracts. When there is a conflict between labor and capital, distributive bargaining does not take place in a legal vacuum, even though the resulting contract is presented as the product of voluntary exchanges. As Kennedy puts it, "legislators and judges are responsible for the framework of ground rules within which labor conflict is conducted, including such basic rules as that corporations can 'own' factories" (1991: 329). Echoing this, the *régulation* theorist Robert Boyer (2001: 57) has argued that "[t]here is no invisible hand in the implementation and selection of basic capitalist institutions" such as property rights.

The importance of such fundamental background rules as those which constitute property rights is not only that they configure the basic conditions in which the parties engage with each other, but that they affect their relative bargaining strength. The legal framework of the state not only makes certain economic activities possible or impossible, but also makes certain "free" outcomes more or less likely. In this respect, Kennedy (1991: 330) outlines two general categories: "the rules governing the conduct of parties during bargaining" and "the set of rules that structure the alternatives to remaining in the bargaining situation." The legal framework that the state guarantees, in other words, not only acts directly on the

particular bargaining situation but it also configures the range of possible and likely alternatives.

The background culture more generally shapes economic interactions in fundamental if often hidden ways by conditioning interpersonal relations of social reproduction, including workplace and household relations, gender and race relations, intergenerational relations, etc. The politico-legal "background rules" of a regime structure social relations in the "public sphere", the "in between" sphere of civil society and in the "private sphere" of the home. Laws regarding parental leave, for instance, influence the pay gap between men and women, which in turn leads to a given distribution of bargaining power within the family, concerning issues ranging from household duties to career opportunities. With feminist theory and activism propelled into public consciousness, "the personal becomes political and the political becomes personal." In order to understand how a formally free and equal market economy (re-)produces inequalities, one must thus recognize that "the mundane matters" (Enloe 2011).

The relation between the politico-legal order and the social power relations in the household or firm is central to the law and political economy perspective at the micro-level. It requires the analyst to adopt a relational perspective on power that sees it as something that is "exercised from innumerable points, in the interplay of non-egalitarian and mobile forces" (Foucault 1990: 94). Economic activity takes place in and through relations of power, which produce and reproduce structures of domination. Struggles against dominant interests and ideas in turn take their point of departure from everyday experiences of distributive injustice, misrecognition and lack of representation, and can translate into calls for reform of the politico-legal structuring of the economy (e.g., Fraser 2013; Brown 2015).

Law, Political Economy, and the State

The state and the state-system continue to be key focal points for law and political economy. The state, as the specific and dominant historical form of actually existing political community, remains the primary locus of political allegiance and continues to provide the main stage for ideological, distributive, and identity conflicts. In the development of the welfare state, for example, legally secured alternatives to the "free market position" are central to understanding political-economic realities. Revolving in a large part around the "commodification/de-commodification"-nexus, Gøsta Esping-Andersen (1990) has argued that the relative bargaining positions of workers and employers is fundamentally altered if workers have a meaningful, non-stigmatizing, and opportunity of opting out of the labor market for an extended period of time. The process of fictitious commodification – described by Polanyi (2001) as driven by a politically created legal condition that makes a "free" labor market possible – can thus to a certain extent be tempered through the introduction or extension of social rights based on citizenship (Marshall 1950), which in turn are introduced against the backdrop of social and political pressures. Social rights, in this sense, can constitute a power resource that alters the relationship between worker and employer in favor of the worker. In addition to its general macroeconomic effects in terms of post-redistributive income equality, the welfare state fundamentally alters the pre-redistributive income distribution by providing the worker with an alternative to accepting the wage offered by employers.

A very different understanding of the relationship between the state and the market is offered in the earlier tradition of German ordoliberalism, originating in the interwar period but reaching fruition in postwar Continental Europe. Ordoliberalism rejects both the notion of laissez-faire of classical liberalism and the central planning associated with socialism and the welfare state. To the ordoliberals, Keynesianism was essentially a variant of socialism, and in this, they shared Hayek's conception that the "road to serfdom" was paved by economic planning. The ordoliberals sought a "third way," which privileged the role of the state and the constitution in the ordering of the economy (for a collection of key ordoliberal texts, see Peacock and Willgerodt 1989). Rather than necessarily distorting the functioning of the market economy, as classical liberalism complained, or tempering

capitalist inequality, as welfarism demanded, the ordoliberals considered state intervention in the economy to be necessary in order to preserve the free market itself. The state, as it were, needed to adopt the position of a neutral but proactive umpire: free of the influence of interest groups, parties, and mass democracy (Manow 2001), but strong enough to able to intervene to prevent any socio-economic group from becoming dominant and distorting the political-economic structure of liberalism. The state's role, in other words, was to ensure that there remained indeed something resembling the theoretical "free market position."

Ordoliberal rejection of a self-regulating market is encapsulated in the doctrine of the "strong state in a free economy" (Bonefeld 2017), where the state provides the basic "order" of the economy and remains an active force. It intervenes only in accordance with the principles of the market, functioning as "guardian of the competitive order" (Eucken 2004) and shielding the apparatus of economic governance from political forces hostile to it. Political power should, thus, be strictly circumscribed through an "economic constitution" policed by strong independent institutions, such as a constitutional court, anti-trust commission, and the creation of a legally independent central bank, which developed in the post-war period as the most viable model for removing the government of money from political influence. In this sense, ordoliberal ideas provided the economic dimension of what Jan-Werner Müller (2011) has called "constrained democracy." In tandem with the protection of certain basic elements of the "political" constitutional order against potential non-liberal democratic majorities, West Germany developed an apparatus of economic government that isolated aspects of economic policy from electoral politics.

While ordoliberalism shares a number of convictions with the American neoliberalism associated with "the Chicago School" – particularly a conception of freedom that privileges the market, the *homo economicus*, as well as a dedication to the stability of money – they also differ on crucial issues. One such issue is the question of monopoly power. Ordoliberalism sees private monopolies as an evil justifying state intervention. To neoliberals such as Milton Friedman (1962: 28), however, "if tolerable, private monopoly may be the least of the evils," compared with the other "evils" of public monopoly and public regulation. What makes private monopolies "tolerable" is the belief, following Schumpeter's famous notion of "creative destruction," that, absent government interventions, the market will, in the long run, erode monopoly power. In a free-market economy, monopoly is therefore perceived only as a temporary competitive advantage bound to be eroded over time by new entrants and technologies or kept in check by the threat of such.

The legal-political institutions of the state play a crucial role in neoliberalism, just as in the ordoliberal or welfarist visions. Their function and form, however, change. Rather than ordering and correcting economic relations through maintaining competitive markets or protecting labor unions and welfare policies, the state emerges as a key actor in pursuing market liberal economics, weakening the position of labor relative to capital, and, particularly after the 1970s, directing the turn to financialization of the economy through the international political and legal system (Fine and Saad-Filho 2017).

Law and Political Economy: International and Global Dimensions

One of the most significant developments in law and political economy over the last decades has been the internationalization of product markets and production as well as the liberalization of financial markets. This has been defended from an economically liberal perspective as facilitating an increase in consumer choice and exposing previously monopolistic firms in the domestic economy to foreign competition. Neoliberal economic globalization also has the effect of curbing the power of organized labor. When the legal structure allows production to be offshored or outsourced more easily, the ability of workers to demand higher share of profit declines. Even without taking policies directly targeting the power of trade unions into account, globalization thereby has the effect of strengthening the

alternatives for capital. In that sense, the neoliberal revolution of Thatcher, Reagan, and others starting in the late 1970s can be interpreted as a restoration of the class power of capital, which had been gradually curbed during postwar period of Keynesian demand management and full employment policies (Duménil and Lévy 2004; Harvey 2005; Streeck 2014). Whether this would have been successful without the entry of China, with its vast "reserve army" of labor, into the world economy is another matter (Harvey 2005).

The neoliberal revolution ushered in a political-economic paradigm, particularly in the Western bloc, which remained virtually unchallenged until the Great Recession of the late 2000s. The pattern of rising inequality that Piketty describes, appears to have started around the same time that neoliberal policies were first adopted on a grand scale. This, moreover, seems to be more or less a global trend, cutting across a variety of national and regional political, legal and economic systems. While some scholars have made compelling arguments about the need to disaggregate the macro-figures of inequality and look at differing national-level explanations for economic developments (see Acemoglu and Robinson 2015), it remains notable that inequality has increased across all but a few OECD countries and there are even indications that it is increasing in a number of developing economies.

Discourses of internationalization and globalization also reflect the obvious fact that the consequences and externalities of economic activity increasingly cross borders. Climate change is perhaps the most obvious example, but the effects of currency movements, finance, trade, production, and the movement of labor and capital have led to the realization that "in an ever more integrated world economy . . . national capacities to provide such collective goods as market regulation or crisis management have been dramatically weakened" (Underhill and Zhang 2008: 536).

An ever more complex web of legal and political institutions beyond the state has accompanied these changes. International and regional organizations such as the IMF, the World Bank, WTO, EU, Mercosur, and NAFTA have emerged both in order to structure trade and economic integration and to address the problems that flow from it. Such organizations have fundamentally altered global political-economic relations by facilitating and routinizing cooperation and dispute resolution between states. But more than simply being agents for states to overcome collective actions problems, international organizations have become actors in their own right, as policy regimes "around which actor expectations converge in a given area of international relations" (Ruggie 1982: 380) or bureaucratic experts (Barnett and Finnemore 2004). Domestic politics and law-making, therefore, are often conditioned by international rules and norms that are beyond the individual state's capacity to alter unilaterally.

The erosion of the individual state's capacity for exercising effective sovereignty, however, is not merely linked to the emergence of powerful supra- and international bureaucratic regimes, but also, and perhaps more fundamentally by the increasing power of capital in the form of transnational corporations (TNCs), which increasingly structure and constrain legal-political action within state jurisdictions. As such, the direct as well as the more indirect structural power of TNCs has become a rich subfield of the international/global political economy literature. The premise in such studies is often that the state, for better or worse, is losing control over economic processes, even if states – unilaterally or collectively – set this dynamic in motion in the first place (Helleiner 1994).

The process of internationalization and globalization reconfigure structures of power in ways that are concealed in normal circumstances because they are rarely contested in the mainstream political agenda. But they can spring into full view at certain critical moments, as in the case of the Euro-crisis, when the fundamental legal-political autonomy of the individual state appeared increasingly sidelined. Democracy and even legality may be sacrificed at the altar of market imperatives, as government takes place in an authoritarianism manner, determined by powerful states in the regional formation, informal groupings such as the Eurogroup, and supranational institutions, the so-called "Troika" (ECB,

European Commission and IMF) (see Streeck 2014, 2015b; Wilkinson 2015).

The study of law and political economy must therefore consider the politico-legal implications of democratic states losing policy autonomy through their involvement in economic integration. Integration does not have the same effects within each of the constituent jurisdictions, which is not merely to reprise the varieties of capitalism literature (Hall and Soskice 2001), but to emphasize the conflicts between a supranational legal order and the existing institutionalized mediations of the relationship between society and the capitalist economy. With the introduction of the euro, national institutions are subsumed under a legal-technical monetary regime associated with a particular kind of capital accumulation. The monetary order, in other words, is far from neutral; it is linked to a more comprehensive institutional ordering of the economy.

Conflicts around the euro more generally illustrate what the economist Dani Rodrik (2011: xviii) has called the "fundamental political trilemma of the world economy: we cannot simultaneously pursue democracy, national determination, and economic globalization," but can only enjoy two of the three at any given time due to the triangular tensions among them. As the post-war Bretton Woods system of embedded liberalism, which combined state sovereignty and democratic self-government with minimal economic integration, gave way to neoliberal globalization and the intensification of economic integration, democracy was increasingly sidelined. In crisis periods, however, when the fruits of economic integration and the burdens of readjustment appear manifestly unjustly distributed, this may become unsustainable, leading to political backlash and anti-systemic movements. Frequently labeled "populist," these demand control of borders (over capital and/or people) and economic management, and require a comprehensive reform of the basic organization of the state and state-system (Müller 2017). For some, national democratic retrenchment may offer the most feasible future alternative, reclaiming state sovereignty for progressive social change in a post-neoliberal era (Fazi and Mitchell 2017).

Conclusion

Political decision-making and law-making don't take place in an economic vacuum. The question of whether to maintain or abandon a capitalist market economy, for instance, is only rarely a salient political question in contemporary liberal democracies. More commonly, the question would take the form: what kind of capitalist-market economy do we want to have? What institutions should govern it? How much or how little trade would we like to encourage? How should we regulate the environment? How should we tackle gender or racial inequalities and discrimination? In such instances, law and politics affect economic activity within certain structural conditions. Most of the time it is thus forgotten that the economy is a capitalist economy, which can be presumed neither neutral nor natural. In interstitial periods, when it is again remembered that the economy is a juridico-political construction, as well as a product of power struggles between different social classes and different social relations (core – periphery, creditor – debtor, land owners – city dwellers, capital – labor, workers – non-workers), the deeper questions of structure and agency return. Only through analyses that capture the dynamics of such political and social relations is it possible to attain proper understanding of law and political economy, and to arrive at propositions aiming at change.

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Political Question Doctrine

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Introduction

Conceived in the jurisprudence of the US Supreme Court (the Court), the political question doctrine seeks to limit the range of cases federal courts can consider either for separation of power concerns or prudential reasons (*Baker v. Carr*, 369 US 186, 1962, 217). The doctrine underpins the relations among the different branches of the federal government, not federalism.

Article III of the US Constitution reduces the federal court's jurisdiction to "cases" and "controversies." The limitation means that federal courts can address only questions "historically viewed as capable of resolution through the judicial process" (*Rucho v. Common Cause*, 139 S. Ct. 2484, 2019, 2494). For the purpose of Article III, no justiciable "controversy" exists when the parties seek

adjudication of a political question (*Massachusetts v. Environmental Protection Agency*, 549 US 497, 2007, 516). Consequently, even when other justiciability requirements – standing, ripeness, and mootness – are fulfilled, the political question doctrine bans the federal courts from resolving constitutional issues (Cohn 2011, 677). In a handful of the Court's cases, a political question has been controlling: The issues concerning some areas of foreign policy, impeachment trials, and partisan gerrymandering are beyond judicial reach.

The political question doctrine comprises a "classical" component, which forbids courts from considering matters constitutionally committed to political branches, and a "prudential" one, a sort of "judge-made overlay" (Barkow 2002, 253), developed to protect the legitimacy of the judicial power and prevent conflicts with political institutions. The "prudential" component made the political question doctrine more discussed, disputed, and questioned than any other public law doctrine. Just when some predicted that the doctrine's time had passed (Tushnet 2002), in 2019, the Supreme Court delivered in *Rucho* a blockbuster decision on political question grounds and showed that the doctrine was there to stay.

Grants and Vetoes in Marbury Versus Madison

Chief Justice Marshall established in *Marbury* the legitimacy of judicial review by famously stating that "it is emphatically the province and duty of the judicial department to say what the law is" and that "the judicial power of the United States is extended to all cases arising under the Constitution" (*Marbury v. Madison*, 5 US 137, 1803, 177). Even before legitimizing judicial review, Justice Marshall acknowledged the constitutionally allocated power to the political branches of government to resolve certain categories of issues, the point Alexander Hamilton made in the *Federalist Papers* (Barkow 2002, 246–247). As a result, *Marbury* did not only establish judicial review, but it also delineated the boundaries of the judicial power by making clear that it had constraints:

> The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court. (*Marbury* 170)

Marbury, thus, arranged the foundation for the doctrinalization of the political question doctrine. At the same time, it opened the room for an everlasting discussion on whether a court must always provide a right answer to a substantive constitutional issue, under which circumstances it should simply answer the question of who gets to decide an issue at stake, and whether courts should have the power to allocate the interpretation of the constitutional issues to a particular constitutional institution, in the first place.

Early Developments

Although *Marbury* laid seeds for the doctrinalization of the political question doctrine, it happened only in 1962. However, some nineteenth- and early twentieth-century cases provide outstanding examples of the judicial restraint and deference to the political institutions under political question grounds. Following the *Marbury* route, the Supreme Court declined to rule on the issues involving, for example, possession of land (*Garcia v. Lee*, 37 US 511, 1838), border disputes (*Foster & Elam v. Neilson*, 27 US 253, 1829), territorial sovereignty, (*Williams v. Suffolk Insurance Company*, 38 US 415, 1839), recognition of a new state (*Kennett v. Chambers* 55 US 38, 1852), and the status of a group as a tribe (*United States v. Holliday*, 70 US 407, 1865).

Especially determinative were considerations in *Luther*, generally seen as the first and, until *Baker*, the leading political question case (Henkin 1976, p. 607). While considering the issue of which government controlled Rode Island, the Court adhered firmly to the constitutional text of the Guarantee Clause in Article IV

and held that the US Constitution "has treated the subject as political in its nature and placed the power in the hands of that department" (*Luther v. Borden*, 48 US 7 How. 1 1, 1849). But the Court also allowed the possibility that some practical reasons requested the Court to abstain from reviewing whether a particular state government was "republican" (*Luther* 62).

The implication of practical reasons influenced some authors to treat this case as an early manifestation of the modern political question doctrine (Issacharoff 2001, 639). The suggestion is that *Luther* was the first case in which prudential reasons colored the Court's application of the doctrine (Barkow 2002, 257). *Luther* is also used to illustrate the nonjusticiability of the Guarantee Clause on the political question ground (Vaughan 2011).

Not everybody, however, subscribes to these arguments. Tara Grove, for example, generally opposes the idea that political questions were constitutional questions in the nineteenth century (Grove 2015, 1908). Rather, they were factual determinations made by political institutions that courts treated conclusively in exercising judicial review, she asserts. Consequently, she denies any connection between what she termed "traditional" political question doctrine and its current version (Grove 2015, 1908, 1915). In many respects, Grove argues *Luther* was "a traditional" political question case: The Court examined the constitutionality of the actions taken by the Congress and President but treated as conclusive their finding that the charter government controlled Rhode Island (Grove 2015, 1927). For Louis Henkin, *Luther* did not establish the political question doctrine as it did not require abstention from judicial review due to political questions. He maintained that the Court did not decline to rule but had scrutinized the constitutionality of what political branches had done while obeying their substantive decisions as they were the law of the state (Henkin 1976, p. 608).

There is a further wrinkle here. A debatable issue is whether *Luther* signaled anything about Article III. To remind, Article III of the US Constitution allocates all cases and controversies arising under the Constitution to the judicial power. The Court in *Luther* ruled on the constitutionality of the actions taken by the political institutions, but it resolved the case by combining the separation of powers with political-in-nature concerns borrowed from *Marbury*: "Again, the Constitution of the United States enumerates especially the cases over which its judiciary is to have cognizance, but nowhere includes controversies between the people of a State as to the formation or change of their constitutions. *See* Article 3, sec. 2." (*Luther* 55). However, the Court noted that it was bound by the decisions of the political institutions as long as they acted within the scope of their jurisdiction: "Unquestionably a military government, [. . .] would not be a republican government, and it would be the duty of Congress to overthrow it" (*Luther* 45). In a subsequent number of cases, the Court adjudicated the Guarantee Clause claims on the merits (Dodson 2021, 693; Grove 2015, 1932–1935).

However, at the beginning of the twentieth century, the Court substantially amended its position regarding the claims arising from the Guarantee Clause – it declared an explicit lack of jurisdiction under Article III. Confirming *Luther's* stance that republican-in-form cases involved political questions, in *the Pacific States*, the Court determined that they were "not within reach of the judicial power" (*Pacific States Tel. & Tel. Co. v. Oregon*, 223 US 118, 1912, 151). In *Coleman,* the Court declared nonjusticiable claims regarding the validity of an amendment and in *Colegrove* the apportionment of congressional districts under political question grounds (*Coleman v. Miller*, 307 US 433, 1939; *Colegrove v. Green*, 328 US 549, 1946).

The Modern Political Question Doctrine

After many decades of application and uncertainty as to why some claims presented nonjusticiable political questions, the Court decided to define the contours of the political question doctrine in *Baker*. It first clarified that "the nonjusticiability of a political question is primarily a function of the separation of powers" (*Baker* 210).

Clearly, the Court rebuffed the suggestions that, in some instances, the doctrine takes federalism into account (Barkow 2002, 264). Furthermore, although Article III was the place to begin an inquiry, in the *Baker* decision, the Court did not explicitly source the political question doctrine in Article III as it recently did in the *Rucho* decision.

Turning to the separation of powers concerns, the Court fortified its monopoly to examine them in interpreting the Constitution: "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution" (*Baker* 211).

Finally, the Court explained that nonjusticiability was at the heart of the political question doctrine and set out six reasons for an issue to be nonjusticiable:

- "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department;
- or a lack of judicially discoverable and manageable standards for resolving it;
- or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
- or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
- or an unusual need for unquestioning adherence to a political decision already made;
- or the potentiality of embarrassment from multifarious pronouncements by various departments on one question" (*Baker* 217).

To dismiss the case on the political question ground, at least one of these reasons should be discernable in the case a court considers (*Baker* 217).

Of course, these conclusions left many questions open, as *Baker* is, to borrow from Cass Sunstein, "an ambitious, nonminimalist decision." The doctrinalization of the political question doctrine has not provided any blanket formula or rule but requires a case-by-case analysis. Looking more closely at the six-pronged formula, it is clear that the first reason represents the *Marbury* rule (Cohn 2011, 686), while the second resembles *Coleman*'s finding that a question would fall within a political category if there were a lack of satisfactory criteria for a judicial determination (*Coleman* 454). Usually, the other four have been mostly theorized as "prudential." However, disagreement on whether all four are prudential is present among scholars and Justices (Parsons 2020, 1302, *Zivotofsky v. Clinton*, 566 US 189, 2012).

Post-Baker Developments

The law in *Baker* has taken a rocky and confusing path. The lower courts applied *Baker's* reasons for nonjusticiability in a strikingly different way than the Court's. Perplexities emerged because they were ambiguously drafted without guidance on how to apply them in future cases. It was on the courts to fill the gaps.

The lower courts vigorously embraced the political question doctrine to abstain in various cases involving foreign relations and national security issues (Cohen 2017, 4), even when it looked like the Court was to abandon the doctrine completely (Bradley and Posner 2022, 19). They broadly read the first *Baker* reason and understood *Baker* in more prudential terms than the Court, which, until recently, tended to discourage such conceptualization (Cohen 2017, 14–15; Bradley and Posner 2022, 38–39). To dismiss a case for nonjusticiability reasons, the lower courts relied heavily on the need for policy judgment, the obligation for the United States to speak with one voice, the finality of decisions made by political institutions, and concerns of embarrassing the other branches of government (Cohen 2017, 14–15). *Baker* was mainly invoked in nonconstitutional cases, including criminal

and civil law cases, tax law cases, employment disputes, and arbitration, denying thus an allegation that the political question doctrine was exclusively about constitutional issues (Bradley and Posner 2022, 23, 38). Contrary to what the Court and many scholars assumed, the lower courts kept the doctrine alive and insisted on its "prudential" scope.

The Court took a different route. First, in some cases that might have seemed ripe for dismissal under political question grounds, the Court confirmed the justiciability of the issues involved and ruled on merits. The cases involving "war on terrorism" (*Hamdi v. Rumsfeld*, 542 US 507, 2004), Florida's recount of votes in a presidential election (*Bush v. Gore*, 531 US 98, 2000), and a State Department policy that prohibited recording "Israel" as the place of birth for those born in Jerusalem (*Zivotofsky*) illustrate well this point.

Second, examining whether, in a particular case, political question doctrine was a bar to judicial review, the Court almost exclusively relied on the first two *Baker's* reasons, narrowing thus the doctrine's application to its "classical" components (Dodson 2021, 696). Deciding in *Zivotofsky* in 2012, the Court confirmed a general presumption that courts exist to decide and not to evade constitutional issues and then acknowledged the political question doctrine "as a narrow exception to that rule." It reaffirmed that in cases where "a controversy 'involves a political question [. . .], where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it, a court lacks the authority to decide the dispute before it" (*Zivotofsky* 194 ff). However, several years later, considering partisan gerrymandering in *Rucho*, the Court implied that prudential application of the doctrine is not a dead letter (Fallon 2020, 1508).

Third, the Court has rather infrequently invoked the political question doctrine: It dismissed only three cases relying on *Baker*.

The first case *Gilligan v. Morgan* was decided in 1973 (*Gilligan v. Morgan*, 413 US 1, 1973). It involved the activities of the National Guard in Ohio and related alleged violations of the Due Process Clause of the XIV Amendment. The respondents asked from the "judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard," including establishing standards for training and rules on weapons the National Guard could use in future cases (*Gilligan* 5 ff). Relying primarily on the first *Baker* reason, the Court gave weight to the separation of powers. It ruled that the political nature of the claims rendered the issues nonjusticiable, emphasizing that "professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches" (*Gilligan* 10 ff).

Twenty years later, in *Nixon v. United States* the Court considered a Senate impeachment trial of a federal judge that included taking evidence (*Nixon v. United States*, 506 US 224, 1993). The Court declared the claims nonjusticiable under the first two *Baker* criteria, finding them to be intertwisted: "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch" (*Nixon* 228 ff). These arguments highlight the Court's conclusions that the Senate had exclusive power to try all impeachments and that the word "try" "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions" (*Nixon* 229 ff).

Finally, in the *Rucho v. Common Cause* case, decided in 2019, the Court found partisan gerrymandering claims nonjusticiable as they represented a political question beyond the reach of federal courts (*Rucho* 2506). Unlike in other post-Baker cases, the Court tied its decision to Article III, explaining that Article III allowed federal courts to address only questions "historically viewed as capable of resolution through the judicial process"(*Rucho* 2493 ff). Notably, for the first time in its history, the Court declared

the claims nonjusticiable entirely on the second *Baker* criterium: reminding that judicial action "must be governed by *standard*, by *rule*, and must be principled, rational, and based upon reasoned distinctions," it concluded that "judicial review of partisan gerrymandering does not meet those basic requirements" (*Rucho* 2507). Unlike in *Galligan* and *Nixon*, it found no separation of powers concerns that might preclude judicial interference. Considering that judicial reasoning in *Rucho* heavily depends on Baker's third criterium related to "policy determinations," some scholars read the *Rucho* decision as a revival of the prudential application of the political question doctrine after being abolished in *Zivotofsky* (Fallon 2020, 1508).

In light of these developments, the question that begs an answer is why lower courts are prone to classify sensitive issues as worthy of avoiding on the political question grounds, while the Court infrequently silences itself with the same justification. Among possible reasons, two deserve special attention. One may be that the Court can deny certiorari if it believes a claim is ill-suited for a judicial decision. At the same time, lower courts do not have the discretion to deny certiorari (Fallon 2020, 1487, n. 22). The other springs from different roles assigned to lower courts and the Court: In a technical sense, the Court does not only interpret and apply the law, but if the law is not clear it develops it, which is the responsibility that lower courts do not have (Bradley and Posner 2022, 50–51). If an issue appears judicially unspoken, the Court will deny certiorari while the lower courts will limit its task under the political question doctrine. Additionally, the reasons pointing to the Court's quest for strengthening its political authority and legitimacy probably capture the ordinary picture of the Court's tendency to skirt the political question doctrine (Fallon 2020, 1488; Bradley and Posner 2022, 51).

Theoretical Considerations

This hopelessly brief entry discusses the most theorized complexities in the political question doctrine.

General points that tend to denigrate or deny the necessity of the judicial strategic self-censorship under the political question doctrine come first. Thus, defending the doctrine, Peter Mulhern noticed that common to all critics is the assertion that judicial review allows no exceptions on no occasions (Mulhern 1988, 117). Thus, the doctrine's existence was famously denied by Henkin, who argued that, historically, no case allegedly involving "political questions" required "extraordinary abstention from judicial review" but only "the ordinary respect by the courts for political domain" (Henkin 1976, 601). Martin Redish considered the doctrine at odds with a legitimate role of judicial review in a constitutional democracy, and therefore he urged for its abandonment (Redish 1984–1985, 1059–160). Grove questions the doctrine's longevity distinguishing its traditional from the modern form (Grove: 2015, 1973). After *Bush v. Gore*, some predicted the doctrine's soon demise (Tushnet 2002; Choper 2005).

On more specific points, many authors maintain that *Marbury* is the fountainhead of both – judicial review and the political question doctrine (Barkow 2002; Huq 2013; Cohen 2017), but some reject the view that the *Marbury* rule underpins the political question doctrine (Grove 2015, 1939).

The issue of whether Article III is a source of the doctrine has also divided scholars. Rachel Barkow tied the doctrine with Article III even before *Rucho* confirmed this connection (Barkow 2002, 241). Others disagreed on different grounds, some regarding the traditional manifestation of the doctrine (Grove 2015, 1973) and some in general (Harrison 2017). Finally, notwithstanding *Rucho*, Scott Dodson insists that the doctrine originates from the substantive law, not from Article III (Dodson 2021, 681).

However, the most vivid divide revolves around classical and prudential formulations of the doctrine's rationale. Although this division originated in the pre-Baker time, it is mainly associated with the debate Herbert Wechsler and Alexander Bickel conducted immediately before and after *Baker*. While Wechsler firmly advocated the doctrine's classical rationale,

Bickel defended its prudential version enthusiastically.

Wechsler argued that the political question doctrine was firmly rooted in the constitutional text: All it requested from the courts was to decide who had the authority to interpret the constitution; consequently, it represented judicial obligation (Wechsler 1959, 6–8). Slippery as it may be for courts to silence themselves on selected issues, Weschler emphasized that "the only proper judgment that may lead to an abstention from the decision is that the Constitution has committed the issue to another agency of government" (Wechsler 1959, 9).

For Bickel, reducing the doctrine to simple constitutional interpretation was unacceptable: The political question doctrine was not about the principle or construction but something more flexible, "more of prudence" (Bickel 1961, 46). Bickel gave weight to the Court's discretion in abstaining from answering constitutional questions. His argumentation reduced the political question doctrine to a consideration of policy: "the Court's sense of lack of capacity," which [. . .] "unbalances judgment and prevents one from subsuming the normal calculations of probabilities: the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be, but won't [. . .] and the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from" (Bickel 1961, 75). It is a usual understanding that Bickel interpreted the doctrine's rationale in prudential turns – for him, it rested on "passive virtues" – the prudential techniques for withholding the Court's judgments in constitutional cases (Scharpf 1966, 519; Bradley and Posner 2022, 11).

There are, of course, other perceptions about the doctrine's logic within the scholarly community. The functional thesis, for example, highlights several factors that call for judicial restraint, including lack of information, skills, or judicially manageable standards, the need for uniformity of the decisions, and the deference to the responsibility of the political institutions (Scharpf 1966). The view has been partially endorsed. Some scholars recognize all three explanations for the issues raised by the political question doctrine (Cole 1985). In contrast, others find the functional thesis "merely a subset" of the prudential argumentation (Redish 1984–1985, 1043).

The Reach

The doctrine is usually considered the US constitutional law product, but it has a broader reach. In the UK and Israel, under the same or different name, it alone has been treated as a justiciability tool for noninterference due to political sensitivity (Cohn 2011, 677). In different forms, it has been applied in several African countries, including Nigeria, Uganda, and Ghana (Mtendeweka: 2019, 219).

In a strict sense, a comparable doctrine is missing in other jurisdictions. In Germany, for example, all questions arising from a constitution "are amenable to judicial resolution" (Kommers and Miller 2012, 196). But there is ample evidence that, in politically sensitive cases touching upon foreign relations or European integrations, the German judiciary has developed evidentiary rules that favor political institutions (Franck 1992, 116 ff). Moreover, when in the case of foreign policy legally controlling criteria were lacking, a constitutional review was denied (*The Cruise Missile Case*, 66 BVerfGE 39, 1983).

The legal borrowing method has inspired scholars to search for doctrine in the jurisprudence of international courts (Sajó and Hunter 2014; Odermatt 2018; Beširević 2021), in EU Law (Butler 2018), or to urge its transplantation in the adjudication of specific issues, including unilateral secession, even in jurisdictions outside its usual reach (Beširević 2021).

Conclusion

The political question doctrine is probably among the most discussed and criticized doctrines in public law (Cohn 2011, 678). On the one hand, in a functional constitutional democracy, judicial review secures the supremacy of the constitution, human rights consciousness, and alleviation of parliamentary tyranny. On the other hand, when politically sensitive issues are at stake, judicial responses may be blurred, wrong, or

counterproductive, even if they are right. For this reason, the political question doctrine tends to equip courts to decide whether to embrace silence or rule on merits. However, intense disagreements remain on why some issues are political questions and what is enclosed in the judicial self-censorship toolkit.

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Political Reconciliation

► Reconciliation: Political

Political Representation

► Representation: Political

Polybius

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Introduction

Polybius (c. 200 BCE–c. 118 BCE) is not, strictly speaking, a philosopher, but a Greek statesman and historian of the second century BC. Nevertheless, his historical work – which

has come down to us very incomplete while retaining its coherence – is our main source for understanding the process of Rome's rise to universal dominion after the collapse of the Macedonian kingdom in 168 BC. What is more, it retraces the global history of a transforming world between 264 and 146 BC, where Rome is not a model but an object of study put in perspective. After gaining supreme power, how did Rome exercise it? According to Polybius, the greatest utility of his work in the future lies in this examination (3.4.7–13). Indeed, through the example of Rome and the great Hellenistic kingdoms ousted, the historian raises the question of the fragility of empires and the immanent degeneration of human power (national or hegemonic) as well as the possible palliatives. In this respect, the *Histories* are, in their own way, a work of political science and philosophy, constructed to instruct statesmen and any reader "who likes to learn." They have thus attracted the interest of later political thinkers, from Cicero to the Enlightenment (such as Montesquieu).

Statesman and Historian

Born into a prominent family in Megalopolis, Polybius was the second in command of the Achaean League which had remained neutral in the war. He himself was neutral by choice and fundamentally attached to the freedom of expression of states, independently of their power. As a result of Pydna and after the partisans of Rome have been brought everywhere to power, 1000 notables, deemed hostile to Rome, were deported to Italy as hostages – this was an ordinary and ancient way to prevent political turmoil – and detained there for 17 years. Entrusted by Aemilius Paullus, the victorious consul, with the education of his sons, Polybius remained at Rome. Cutoff from political activity, not only was he still an actor and a witness of events, but also he was close to circles of power and had access to information (Roman archives and oral informants), which is why he began his universal history.

Political and Philosophical Learning Through the Practice of History

In order for his recipients, Scipio Aemilianus as well as his future readers, to acquire some form of experience of command and state, Polybius conducts a double investigation: The first one (in books 3 to 29) focuses on the institutional and civic assets that gave Rome authority over almost the entire Hellenistic world between 220 and 168 BC. The second one (books 30 to 39) examines, up to 146 BC, victors' behavior and their exercise of this authority as well as the adhesion or rejection it arouses among the dominated, both for "our contemporaries to see whether the Roman rule is something to be welcomed or avoided and for future generations to judge whether they should praise and admire or condemn it" (3.4.6). ***The mistake for the readers/disciples would be, however, to give a clear-cut answer without considering all the elements and without being able to adapt their own action***.

He thus proceeds in two ways: He comments on the management of situations, often by contrast, according to essential criteria – the importance of the long term, the respect for principles, and the prevalence of the collective interest or essential values (moderation, courage, disinterestedness, and clemency). He also establishes explanatory pauses, such as Book VI on Roman institutions, an epistemological tool of political science and philosophy of history. First, Polybius returns to the genesis of society to show the place of individual experience and interest, as well as their relationship with the collective interest and the progressive establishment of morality and law.

The Genesis of Society and the Political Pact

Like Plato in the *Laws*, but with significant differences, Polybius imagines the rebirth of society after some catastrophes: According to a natural process, men gather around the strongest. But unlike Plato, Aristotle, or Panaetius, the formation of the social group is not natural, but gradual, and according to the interest of each one to compose

with the others. Since they are capable of projecting other people's misfortunes into their own future by analogy, humans thus acquire over time the notion of duty by reproving in themselves the ingratitude of children toward their parents, the ingratitude of others toward their benefactors, and by showing their gratitude toward the defender of his fellows. The choice of a king, who puts his strength at the service of the weak by considering what each person deserves, marks the passage from normative customs, acquired through experience, to the perception of what is right, when reason overrides strength. The king is then recognized for his merits and defended even if he is quite enfeebled by age. The establishment of law is defined by the passage from a brutal relationship of forces (fear of the strength of the other) to the free recognition of authority. However, it is a political pact, with the king devoting himself to the collective and showing himself to be the guarantor of everyone's rights.

A Tool to Understand and Amend: The Anacyclosis (Return of the Cycle ALMOST to the Starting Point)

In a second step, Polybius creates a structural scheme of the degeneration of the different types of regimes (*politeiai*, institutions, and civic mores at the same time) to be able to identify a physical law of development (birth, acme, and decline) and curb the process by defining the practical and historical conditions of a relative stability. While remaining in the line of Herodotus, the Platonic analyses of the *Republic* Book 8 or *Statesman* (291d sq.), and Aristotle (*Politics* Books 3–4), he renews them.

The desire to have more and more, the *pleonexia*, which is a constitutive element of human nature, is the only degenerative factor of political regimes, and it arises in the later generation, with the habit of power and the forgetfulness of principles. Polybius emphasizes the breakdown of the political pact by constantly detailing every kind of excess as causing the rebellion against degenerate rulers. The king's children thus become tyrants; likewise, the aristocracy that chases them away with the help of the people falls into the hands of a few (an oligarchy); and democracy – which now relies only on itself – turns into a mass power (ochlocracy) manipulated by demagogues. The ensuing anarchy leads to a return to the original law of the strongest, the monarch, before a new cycle (6.8–9). But this whole anarchic periof of . violent return to the natural rule of the stronger over the weaker is also the outcome of the worst regime and the savage rule of violence (*cheirocracy*), when men have degenerated into wild beasts (VI 10, 5). This point seems to be a deliberate and purposeful change when compared to the cycles of Plato's *Statesman* (274 b): in the natural world of the *Statesman*, men are, on the contrary, all the weaker as the other species have become wilder. This very coherent cycle, unlike the one in Plato's *Republic* – according to Aristotle (*Politics*, 1316a25) – is an explanatory scheme, not an eternal return as some Machiavelli's commentators have understood it. Through its experience, Rome creates a tripartite constitution, the result of many resolved struggles (6.10.14), which is precisely what, for Machiavelli, allows progress.

However, the palliative is not only the "mixed" constitution by regrouping the three positive powers: consuls-royalty; senate-aristocracy; and people-democracy in Rome, as in Carthage or in Sparta. Everything depends on the quality of the relationship between the three bodies, and above all on the balance produced by the resultant of these three sometimes contrary forces, and therefore by a game of counterbalances between them as well as the fear that prevents each one from encroaching on the responsibilities of the others. This balance, which is subject to a variable play of forces, including external ones, requires constant recomposing – hence the importance of the historian/statesman's expertise in making the degenerative process slow down (6.57.2–4). This is a physical principle that Polybius applies also to the international situation, whether there is hegemony or interplay between the various powers.

In 168 BC, Rome, as the holder of the supreme power, has to play the role of the just arbiter like

the king, but "the Romans could believe they were the masters of the whole world," with the degenerative risk that this new status and the resulting impression create. This risk is always present in various forms. However, the final risk exists in the medium or long term. For Polybius, it sometimes only takes one man to slow down the decline – for Machiavelli too. He writes to train him politically and morally.

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Populism

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Introduction

In recent decades, populism has become a prominent political phenomenon in many countries around the globe. Populist movements, parties, and leaders attempt to mobilize voters on the basis of an anti-establishment rhetoric that pits "the people" against "the elite." This rhetoric caters to the dissatisfaction of parts of the citizenry with traditional politics and mainstream politicians and promises to restore "power to people."

Since populism generally stands for a rather rough kind of politics that is not always too concerned about democratic or legal subtleties, many observers consider populism a potential threat to democracy and to constitutionalism. Others, in contrast, emphasize the democratic promise populism potentially holds as an attempt to make politics more inclusive and to increase the sovereign power of the people.

In recent years, the academic debate on populism has grown substantially. Several accessible introductions to this debate have been published (Müller 2016; Mudde and Rovira Kaltwasser 2017; Moffitt 2020) as well as a number of more advanced handbooks with contributions by experts surveying the field (Rovira Kaltwasser et al. 2017; de la Torre 2019; Oswald 2021).

This contribution begins with a brief history of populism. Next, it turns to the ongoing debate about populism's proper conceptualization. After some remarks on the probable causes of populism's success, it concludes by looking at its relation to both democracy and constitutionalism.

History

Partly due to the work of Margaret Canovan (1981), the historical origins of populism are

generally situated in the second half of the nineteenth century, with the *narodniki* in Russia and the *People's Party* in the USA as the two prime examples. Recently, however, it has been questioned whether these two examples represent the best benchmark for conceptualizing contemporary populism (Müller 2016; Rosanvallon 2021). Both movements lacked the centralized leadership often considered a central feature of populism. In addition, the *narodniki*, as a top-down movement of intellectuals unsuccessfully trying to mobilize the Russian peasantry, lacked a genuine plebiscitarian connection with the people.

Populism gained real prominence only after the Second World War and the thorough delegitimization of fascism (Finchelstein 2017). It has its most pronounced tradition in Latin America. Here, a first wave of populist leaders in the 1940s and 1950s (with roots in the 1930s) includes Getúlio Vargas in Brazil, José María Velasco Ibarra in Ecuador, and, most notably, Juan Perón in Argentina. After the demise of the military dictatorships that succeeded this first wave of populism, a second wave of populist leaders embracing neoliberal economic policies emerged in the 1990s with people like Carlos Menem (Argentina) and Alberto Fujimori (Peru). A third, recent wave of populism is much more left wing in its economic policies and featured prominent politicians like Hugo Chávez in Venezuela, Evo Morales in Bolivia, and Rafael Correa in Ecuador.

In Europe, the label of populism was used from the 1980s onward to describe rising radical right parties in Western Europe like the *Front National* in France, the *Vlaams Blok* in Belgium, the *FPÖ* in Austria, or Silvio Berlusconi's somewhat more moderate *Forza Italia* in Italy. After the turn of the century, the list of radical right populist parties continued to grow and now includes, for instance, Nigel Farage's *UKIP* in the UK, Geert Wilders' *PVV* (*Freedom Party*) in the Netherlands, the *Alternative für Deutschland* in Germany, and the *Lega* in Italy. In addition, the label of populism is now also applied to certain right-wing conservative parties in Eastern Europa such as Viktor Orbán's *Fidesz* in Hungary or the Polish *PiS* (*Law and Justice*). As in Latin America, however, European populism is not necessarily right wing. In view of their anti-establishment discourse and their attempt to radically transform the political and socioeconomic order, some more left-wing parties in Southern Europe, like *Podemos* in Spain, the *Movimento 5 Stelle* in Italy, or *Syriza* in Greece, are also often qualified as populist.

In the USA, after the first experience with the *People's Party* in the 1890s, several twentieth-century politicians, like senator Joseph McCarthy, governor George C. Wallace, President Richard Nixon, and presidential candidate Ross Perot, have been called populist in view of their anti-elitism or their attempt to speak on behalf of the "silent majority" (Kazin 1998). A more explicit form of populism has more recently reemerged in bottom-up movements like *Occupy Wall Street* and the *Tea Party*, and has, later on, taken center stage, most notoriously, in the person of President Donald Trump.

Although populism has been most prominent in America and Europe, the phenomenon is not limited to those regions as testified by well-known populist figures like Recep Tayyip Erdoğan in Turkey, Narendra Modi in India, Thaksin Shinawatra in Thailand, or Rodrigo Duterte in the Philippines. In the academic literature, the presence of populism throughout the world is increasingly acknowledged and studied (de la Torre 2015, 2019).

Conceptualization

The proper conceptualization of populism remains a contested issue. One of the problems complicating the debate is that there is also no agreement about the proper extension of the concept. This means that academics disagree to a certain extent about what counts as a case of populism and what not.

Researchers working within the ideological approach (see below) are often much concerned with the authoritarian tendencies they believe to be inherent in populism and therefore present the more authoritarian forms of radical right-wing populism as paradigm cases. At the same time, they are sometimes inclined to suggest that more benign cases, such as the American *People's Party*

or contemporary left-wing populism in Europe, are not the most genuine examples of populism or even fail to qualify at all (Müller 2016).

In contrast, researchers working within the discourse theoretical approach (see below) tend to appreciate the emancipatory or egalitarian potential of populism and are, therefore, inclined to highlight examples from the first and third wave of populism in Latin America or from the current wave of left-wing populism in Southern Europe (Katsambekis and Kioupkiolis 2019). At the same time, they tend to downplay the populist features of radical right-wing populism and other more obviously authoritarian cases. They argue that the unpleasant features of these forms of populism derive from their nationalism or their xenophobic nativism rather than from their commitment to populism (De Cleen 2017).

Although there is ongoing disagreement about what populism is, the situation is not desperate. As already intimated, two dominant approaches have now emerged: the ideological and the discourse theoretical approach, which will be discussed in the next two sections. Additionally, almost all approaches seem to agree on two features that all instances of populism share. The first basic feature is that populists operate on the basis of an antagonistic opposition between "the people" and "the elite" and that they consider themselves to be the only true representatives of "the people." The second basic feature is that this antagonism is used and promoted for the purpose of politically mobilizing citizens and forming a populist movement.

Whereas many researchers suggest that this kind of populist mobilization requires the presence of a charismatic leader, others suggest that it can also be more bottom up (e.g., the *People's Party* or *Occupy*) or centered on a party organization that is strong enough to outlive a change in leadership (e.g., *Front National* in France or *Vlaams Belang* in Belgium) (Mudde and Rovira Kaltwasser 2017).

Although the presence of a populist movement is essential for any successful populist project, Andrew Arato and Jean Cohen (2022) rightly emphasize that populism can appear in different shapes and that a fine-grained conceptual analysis should heed these differences. Populism can operate merely at the level of a movement (e.g., *Occupy* or the *Tea Party*), it can become a party (e.g., *Vlaams Belang* or *Alternative für Deutschland*), it can become part of government (e.g., *FPÖ*, *Lega*, *M5S*, or Donald Trump), or it can become so powerful that it succeeds in controlling and changing the political structures of a country and, ultimately, establish a populist regime (e.g., Hugo Chávez, Viktor Orbán, or Recep Tayyip Erdoğan).

Before proceeding to discuss the ideological and discourse theoretical approaches to populism, two other approaches that remain influential should be mentioned. The first of these conceives of *populism as a strategy* for gaining access to power (Weyland 2017; Jansen 2015; Barr 2019). This strategy is employed by a populist leader who appeals directly to the people in order to mobilize support without organized intermediary structures. Researchers using this approach have mainly been working on Latin American cases where this kind of leadership is rather typical. As a result, however, the strategic approach is much less applicable to, for instance, European cases where intermediary party structures play a much more significant role.

The second approach conceives of *populism as a style* of politics (Moffitt 2016). Style is, thereby, broadly understood in terms of a kind of political performance. It can include a certain type of rhetoric but also the performative cultivation of a sense of crisis or a form of course behavior by the populist leader. This "flaunting of the low" (Ostiguy 2017) is meant to promote identification on the side of voters who resent the high culture of the elite. This approach emphasizes the mediatization of politics and the individualization of society as the main drivers of the rise of populism. One of the problems of this approach is that it turns populism into a very wide concept that applies to many if not all contemporary politicians at least to a certain extent.

Populism as Ideology

The ideological approach to populism has been developed by people like Nadia Urbinati (1998), Margaret Canovan (2002), Cas Mudde (2004),

Koen Abts and Stefan Rummens (2007), Ben Stanley (2008), and Jan-Werner Müller (2016). The most well-known definition of populism as an ideology is due to Mudde (2004: 543), who defines populism as "an ideology that considers society ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite,' and which argues that politics should be an expression of the *volonté générale* of the people."

Here, the notion of an ideology is not understood in the Marxian sense as some kind of false consciousness. It refers, rather, in a normatively neutral way, to a set of beliefs that gives a precise meaning to a set of essentially contested political concepts (Freeden 1996). In this context, populism is an ideology about the legitimacy of political power. In line with democracy, populism believes that legitimate power should be based on the will of the people. In contrast with liberal understandings of democracy, populism assumes, however, that the people constitute a homogeneous collective with a singular will. This collective is embodied by the populist leader who is, therefore, singularly capable of giving voice to the will of the people.

Populism is seen as a *thin* or *thin-centered* ideology. This means that populism needs a complementary ideology to give more specific content to the identity of the people as a homogeneous collective. Right-wing populists generally rely on some form of (ethno-) nationalism; left-wing populists usually turn to some form of socialism.

With its reliance on the idea of the singular will of the people – the *volonté générale* – populism has a philosophical pedigree that goes back to the work of Jean-Jacques Rousseau (1762), who emphasized the singular nature of the will of the people, and Carl Schmitt (1926), who added that this singular will should be based on a homogeneous collective identity (Urbinati 1998; Abts and Rummens 2007).

As many authors working in this approach have emphasized, however, the *anti-pluralism* inherent in populism makes populism suspect from a democratic point of view. The conceptualization of the people as a homogeneous collective marks a stark contrast with the democratic ontology as understood, for instance, by Claude Lefort (1988). Lefort emphasizes that a democratic community should remain a pluralistic community of autonomous individuals. This implies that the will of the people never exists in the singular and that the people always speak with several voices at the same time. According to Lefort's famous metaphor, in a democratic regime, the place of power should remain an *empty place*, in the specific sense that no single actor is allowed to claim to embody the people as a whole or to be the only legitimate voice of the people. According to the ideological approach, populism's assumption that the populist leader can embody the people and give voice to its singular will amounts, therefore, to an attempt to *close* the empty place of power. This attempt helps to explain several of the characteristic features of populism.

Populists generally see no real need for genuine public deliberation about political issues or genuine discursive participation by citizens since it is assumed that the leader already knows – on the basis of his of her common sense – what it is that the people want. The link between citizens and populist leaders remains unmediated, plebiscitarian, and based on acclamation.

Populists are generally highly impatient with all forms of criticism, which they tend to delegitimize as either fake news or as disingenuous attacks on the true will of the people, which only they represent. This type of delegitimization can be directed at political opponents, at judiciary institutions, at the media or at civil society actors.

In order to give substance to the collective identity of the people, populists generally rely on a whole series of antagonisms that define the enemies of the people. These can include political, cultural, and economic elites, but also "alien" elements in society such as immigrants, asylum seekers, or LGBTQ minorities.

When populists come to power, constitutional checks and balances and constitutionally guaranteed individual liberty rights usually come under pressure. In view of the supremacy of the sovereign power of the people, populists believe that the will of the people, as always embodied in the person of the leader, should, in case of conflict, trump constitutional constraints.

Populism as Discourse

Ernesto Laclau and Chantal Mouffe are the most prominent theorists within the discourse theoretical approach to populism. In earlier work, they jointly defended a poststructuralist and post-marxist model of radical democracy (Laclau and Mouffe 1985). On this basis, Ernesto Laclau (2005) later wrote what is probably the most sophisticated theoretical analysis of populism. Chantal Mouffe (2018), in turn, used this theoretical framework to advocate a left populist project to overthrow the hegemony of neoliberal capitalism, a proposal which has very directly influenced the political strategy of, for instance, *Podemos* in Spain and Jean-Luc Mélenchon in France.

Although this approach focuses on populist discourse, it is also very much about power since discourse always refers to the discursive structuring (and attempted restructuring) of political power in society. Inspired by the work of Antonio Gramsci (2011) and Carl Schmitt (1932), populism is analyzed, more particularly, as an attempt to build a counterhegemonic force that can overthrow the existing hegemonic power constellation.

According to Laclau (2005), three things are needed for such a populist mobilization. First, a *chain of equivalence* must be established between different grievances and demands that people have toward the elite in power. These demands become "equivalent," secondly, in the sense that they all share in the *antagonistic opposition* that marks the frontier between us, "the people," and them, "the elite." In order to maintain the cohesion and homogeneity of "the people," it is important that it is represented by an *empty signifier* (a leader, a party, or a label) that can signify the chain of equivalence in its entirety. The favorite example of Laclau is the rise of the Polish *Solidarność* movement in the 1980s under the leadership of Lech Wałęsa. Although originally representing the grievances of the workers in the port of Gdansk, it soon became a symbol for the many grievances the Polish people had with their communist leaders and, ultimately, succeeded in toppling the communist regime.

Like the ideological approach, the discourse theoretical approach emphasizes the antagonism between the people and the elite and the delegitimization of the opponent this involves. For Laclau, populism is characterized by a *pars pro toto* logic in the sense that the popular identity constructed through the chain of equivalence and represented by the empty signifier refers to the *plebs* (a part of the people) that claims to speak on behalf of the *populus* (the people as a whole). In the example of *Solidarność*, the communist leaders represent an illegitimate regime and need to be removed from the political stage.

There are, of course, significant differences with the ideological approach. Discourse theorists emphasize that the "people" or the "plebs" are always the outcome of an actual political and discursive construction in the sense that the chain of equivalence needs to be established through political action. They emphasize that this process is not a one-sided process of homogenization because the diversity of demands and groups within the chain of equivalence remains intact. They are also much more positive about the democratic potential of populism as a project of radical reform potentially empowering hitherto excluded groups and voices in society.

There are two main problems with Laclau's approach. It seems, first, to provide an account of political mobilization that is so general that populism becomes synonymous with politics in general, as Laclau at one point concedes. At the same time, it reduces politics to revolutionary politics in which all political struggle concerns attempts to replace one hegemonic power constellation with another hegemonic power constellation.

In order to solve these issues, Chantal Mouffe (2018) makes use of the important distinction between antagonism and agonism she developed in her work on agonistic democracy. Agonism thereby refers to political oppositions *within* the liberal democratic framework that oppose adversaries (rather than enemies), who recognize each other as legitimate contestants for power. In that context, the left populism she envisages "merely" aims for a *radical reform* of liberal and representative democracy rather than for a revolutionary

break with the current regime. Whether this solution can be squared with the delegitimizing *pars pro toto* logic inherent in the populist discourse remains, however, contested (Cohen 2019).

Causes

Populism has been on the rise in many countries for several decades and its success only seems to grow. The debate about the causes of this development is complex and, again, no general consensus has arisen. The analysis most often put forward is that populism is a symptom of the failure of our representative system. Voters are dissatisfied and resent traditional parties (both majority and opposition) for not taking their concerns seriously. Because their voices are no longer heard within the traditional political system, these voters increasingly turn to populist outsiders who challenge the political establishment as a whole and promise to restore power to the people.

This analysis seems plausible but, at the same time, rather uninformative. The question remains where the dissatisfaction comes from – this is the demand side of the problem – and why traditional parties fail to adequately deal with it – the supply side of the issue.

On the demand side both economic and cultural causes have been invoked. In economic terms, the finger is sometimes pointed at capitalism in generally or at (globalized) neoliberalism more specifically (Mouffe 2018; Eatwell and Goodwin 2018; Mounk 2018). Neoliberal policies have not only increased inequality and precarity. They have also lead to a greater sense of insecurity among people who might still have a decent income, but who are afraid of loosing their socio-economic position. More generally, neoliberalism has been accused of promoting the individualization and atomization of society. People are, therefore, in search of new forms of collective identification that can restore a sense of security.

In cultural terms, it is sometimes argued that immigration and the increasing multicultural nature of contemporary societies have been experienced by many voters as a threat to their own identity (Eatwell and Goodwin 2018; Mounk 2018). Pippa Norris and Ronald Inglehart (2019) have argued, more generally, that cognitive mobilization and the rise of postmaterial values after the Second World War have now triggered a conservative backlash among voters who feel threatened by these more liberal values and who turn to authoritarian populist leaders in the hope of restoring the old cultural order.

On the supply side several more political causes have been invoked to explain the failure of the political system to adequately channel the concerns of resentful citizens. Some authors consider the mediatization of politics an important contributor (Moffitt 2016; Mounk 2018). Others point more generally to the depoliticization of politics, i.e., the fact that no genuine political alternatives are available anymore since all traditional parties advocate more or less similar policies (Crouch 2004). Here, the cartelization of parties (Mair 2013) or the rise of (neoliberal) "third-way politics" (Mouffe 2018; Arato and Cohen 2022) are often mentioned as the main culprits. Other authors point to a more fundamental transformation of our political infrastructure related to the increasing technocratic and, thus, depoliticized nature of contemporary governance networks (Müller 2016; Rummens 2017; Esmark 2020; Bickerton and Invernizzi Accetti 2021).

Populism and Democracy

In view of its central reference to the sovereign power of the people, populism operates within the normative framework of democracy. At the same time, populism constitutes a rather radical project that tries to transform democracy from the inside out (Urbinati 2019).

As already indicated, most people working with the discourse theoretical approach herald populism as a potential improvement of democracy. Populism can unsettle hegemonic elitist power constellations and can make democracy more inclusive by giving voice to hitherto silenced minorities (Laclau 2005; Mouffe 2018). In contrast, most people working within the ideological approach warn about the authoritarian logic inherent in the populist belief system and

its political practices (Müller 2016; Rummens 2017; Arato and Cohen 2022).

Although this division holds generally, there are people from both sides who defend more nuanced views. Yannis Stavrakakis (2017) and Benjamin Moffitt (2016), both associated with the discourse theoretical approach, claim that populism can be both inclusive and exclusionary. Similarly, Cas Mudde and Cristobal Rovira Kaltwasser (2012), working within the ideological approach, conclude that populism can be both a threat and a corrective to democracy.

In this debate, many authors hold what is sometimes called a "two-pillar view" of liberal democracy. This view holds that liberal democracy is a balanced mixture of both liberal (or constitutional) elements and democratic elements and that populism should be associated with the democratic elements of liberal democracy (Mouffe 2000; Mounk 2018). Populism can then be a corrective in contexts where liberal elements have unduly taken the upper hand, and become a threat in contexts where populism – identified with the democratic elements – becomes itself too dominant (Mény and Surel 2002; Mudde and Rovira Kaltwasser 2012).

This two-pillar model has, however, been criticized by authors working within the ideological tradition. They argue that liberalism and democracy cannot be separated. By qualifying populism as a form of "illiberal democracy" – a qualification implied by the two-pillar model – populism is already bestowed with democratic credentials that it does not deserve. In reality, populism poses a threat to both the liberal and the democratic elements of the liberal democratic regime (Müller 2016; Rummens 2017; Arato and Cohen 2022).

Populism and Constitutionalism

Almost all scholars agree that there exists a serious tension between populism and constitutionalism since populists generally experience constitutional procedures and limitations as unduly constraining the sovereign people they claim to represent. At the same time, perhaps somewhat surprisingly, populists actually engage in a lot of constitutional politics. Rather than confront the constitution head on, they are keen to make the necessary constitutional changes to ensure the constitutional legitimacy of their own populist regime. These changes include the attempt to pack the constitutional court (the *PiS* party in Poland), the use of constitutional amendments (Erdoğan in Turkey), or the actual replacement of the entire constitution (Chávez in Venezuela, Morales in Ecuador, or Orban in Hungary). Populists not only seem to operate within the horizon of democracy, they also seem to operate within the horizon of constitutionalism.

The importance of constitutional politics in populism has lead to a growing debate on populist constitutionalism (Corrias 2016; Müller 2016; Blokker 2019; Arato and Cohen 2022). In this context, Luigi Corrias (2016) argues that the populist discourse on constitutionalism essentially revolves around three constitutional ideas: the primacy of the constituent power of the people, the idea of an unlimited popular sovereignty, and the constitutional identity of the people understood as a collective selfhood. Corrias thereby emphasizes that populists understand these ideas in ways that are hard to square with mainstream constitutional theory. As Paul Blokker (2019) argues, the commitment of populism to constitutionalism is, therefore, instrumental at best. The constitution is not an external constraint on the political power of the populist regime but merely a means for its own purposes.

Andrew Arato and Jean Cohen (2022) conclude, on the basis of a similar analysis, that populism is, in fact, committed to a form of *abusive constitutionalism*. This means that populism operates within the horizon of constitutionalism but aims to subvert the main constitutional principles from the inside out through formally constitutional means. The only true "constitutional" principle present in populism is a commitment to the unconstrained constituent power of the people that is embodied in the figure of the leader and that is understood to be both prior and superior to all actual constituted frameworks. Here again, populism has clear affinities with the constitutional theory of Carl Schmitt (1928),

who argues that the constitution should be an expression of the will of the people as a collective identity.

Conclusion

Populism remains a contested concept. It is analyzed as a strategy, a style, and, more prominently, an ideology or a discourse. Populism also remains a contested practice. Some herald its potential for democratic renewal, others warn about its authoritarian implications. The causes of populism's success are many and still not fully understood. Both as a prominent political phenomenon and as a prominent topic of academic debate, populism is here to stay.

Cross-References

- ▶ Gramsci, Antonio
- ▶ Representation
- ▶ Rousseau, Jean-Jacques: Theory of Law
- ▶ Schmitt, Carl

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Positive Law and Natural Law

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Introduction: Is Natural Law Necessary for Identifying Positive Law?

No one doubts the existence of positive law (hereafter PL), but we wonder about its rightness. No one doubts the rightness of natural law (hereafter NL), but many wonder if it actually exists. PL exists even when unjust, but for NL to exist, it is not enough to be just. One way of comparing them is to articulate the notion of the existence of law or its being in force. Being in force of the intrinsic value per se, i.e., in virtue of its moral merits, has been distinguished from being in force as formal validity and from being in force as factual existence. But this is not very convincing, because a norm that was valid only axiologically and was not part of a normative system in some way effective would be pure and simple morality and nothing else. Law, unlike morality, requires some degree of factual existence. One of the few cases of "existence" of NL that we know of is the Nuremberg Tribunal, which condemned Nazi leaders for having obeyed unjust positive laws, i.e., for having violated NL though obeying PL, according to *Radbruch's Formula* which states that where statutory law is intolerably incompatible with the requirements of justice, statutory law must be disregarded in favor of justice (Radbruch 1956[5], p. 345).

The essential requisites of NL do not include factual existence and so it is not "law" in the narrow sense (Verdross 1958, p. 252). However, we may wonder whether effectiveness and formal validity are all that it is required for there to be "a legal system" and whether perhaps it is not also necessary a certain correspondence to criteria of justice, at least as regards the legal system as a whole (Alexy 1992). If it is felt that PL as a whole, in addition to being effective, must at least satisfy minimum needs for justice, then the problem of the relation between PL and NL really arises, but within PL itself. Hence the question needs to be formulated as follows: what role is played by values or principles of justice that are not dependent on human will in the concept of positive law?

PL is constructed by man and is hence an artifact. But this in itself does not mean that all its constitutive elements are controlled by human will. We know that this is certainly not the case for a series of logical and factual conditions the violation of which would imply the impracticability of PL, i.e., its nonexistence (e.g., prescribing the necessary or the impossible). Besides these constraints, are there legal norms from which no derogation is permitted?

Before answering this question, we need to take a look at the history of the main conceptions of the relations between PL and NL. The great legal cultures were built up around some general idea of what law should be like. For the Romans, PL did not consist primarily in an arbitrary act of imposition of rules of conduct but in a set of rules deriving from the very nature of social relations. For this reason, the jurist Gaius (second century AD) could say that the first source of law is not statute but nature. Legal science itself is not knowledge of laws but of things, i.e., of right things (*iusti atque iniusti scientia*), that is to say of the *normality* of social relations. Cicero in *De Officiis* explains the fundamental legal categories (such as labor, property, self-defense and family) by making reference to basic inclinations of human nature like self-preservation and procreation. Reason itself is an inclination that induces human being to associate with his fellows, giving rise to the political community and its fundamental institutions. In the Middle Ages, NL operated within canon law, to which we owe – as has been demonstrated by Harold Berman (1983) and Brian Tierney (1997) – the importance of intention, consensus, and individual will in contract law, marriage law, and penal law, the first affirmation of natural rights. Moreover, the influence exerted by the rationalism of the Enlightenment on the codification process deserves mentioning. Lastly, how can we not recognize the enormous influence of the natural rights on the Universal Declaration of Human Rights (1948) and, through it, on the constitutional law of contemporary states and on general international law?

These are only a few of the many examples of how "in fact" an idea of NL has influenced a general understanding of PL and its contents. However, the fact that a conception of NL has inspired a PL culture does not mean that NL itself is relevant for a PL system. Indeed, we may think that this is the role and the task that the metalegal has always had in the formation of legal rules. And so we have to go back to the main question: is reference to moral and political values an essential element for identifying positive law?

Three Faces of the Relationship Between Positive and Natural Law

We can only answer a question like the one just raised by appealing to a theory of PL and at the same time to a conception of NL (Bix 2002). In the normative sphere the problem of the relationship between PL and NL becomes inseparably mixed up with the problem of the relationship between a conception of one and a conception of the other (e.g., Covell 1992). Since the ways of conceiving the positivity and naturalness of law are multiple, we will have different conceptions of the relations between them. Here the issue must be looked at from the point of view of the positivity of law.

The relevance of NL might be detected within the three main profiles of legal theory: the foundation of the obligation to obey legal rules, the content of legal rules, and the form of legal rules themselves. For each of these three points, we can ask ourselves whether we need to have recourse to NL.

Why Do We Have to Obey the Law?

Legal positivism rejects the idea that the legal bindingness can be essentially or necessarily based on moral values or on principles of justice, one reason being that, since value judgments are controvertible, the certainty and autonomy of law would be lost. In order to ascertain the existence of law, it is necessary to describe it in terms that are purely factual, empirical, based on the observation and interpretation of social facts. This rules out the possibility of it being ultimately legitimate to have recourse to natural morality. Consequently, we have to separate the concept of validity seen as existence of law from the moral duty to obey its rules (Ross 1961). But if the identification of law does not serve to create a foundation for a true bindingness, then legal theory loses part of its importance, and moral theory (or NL doctrine) becomes more attractive for law (Cotta 1983). Precisely in order to avoid this outcome, Kelsen identified the existence and validity of a norm with its binding force, its strong obligatoriness, i.e., with the obligation to behave as it prescribes (Kelsen 1945, p. 30). In this way, the legal system

takes on a moral quality, one that is not empirical even though not one linked to NL. Kelsen's intention is to confer on legal theory itself the normative advantages of the NL doctrine, stripping it of its metaphysical and axiological contents. This appears to be necessary since no normativity can be deduced from empirical facts. The result is a concept of legal duty which is of the same genus of the moral one. In this we can still see a certain presence of NL within PL, i.e., the idea of bindingness that is proper to NL doctrine is preserved without its recourse to substantial moral values. For this reason, together with the need not to move away from empiricism, contemporary theory of legal positivism has gone the way of conventionalism (Green 1999).

A settled doctrine, which started from the ideas of Hart, maintains that "there are conventional rules of recognition, namely, conventions which determine certain facts or events that are taken to yield established ways for the creation, modification, and annulment of legal standards" (Marmor 2002, p. 104). Hence positivity indicates reference to certain facts that in turn are determined by conventional rules regulating the identification and exercise of authority. Therefore the central point in this concept of positivity lies in the nature of these conventional rules of recognition. How are they related to NL?

These conventions constitute the practice at issue. This means that there exists no law prior to the legal practice made up of the recognition's conventions (*practice theory of norms*). This rules out any law existing prior to PL and hence also any "NL," but it does not yet rule out the possibility of NL being present *within* legal practice itself.

For this to be ruled out, it must be felt that the normativity of law is only grounded in the fact that all participants in the practice consider the rule a reason for acting. As it is well known, this was contested by Ronald Dworkin (1977), when he maintained that judicial decisions also have recourse to principles of critical morality connected in some way to institutional traditions. The argument (Marmor 2002, p. 108) whereby legal conventions cannot provide reasons for acting that are different from the ones internal to legal practice itself does not rule out the possibility of law also being identified on the basis of moral and political considerations, since it is always possible that these are reasons internal to PL, as Dworkin and inclusive legal positivists maintain, though in a different sense (Himma 2002).

Another conventionalist argument against NL is the following: if one were to obey the authority for other reasons than those that depend on the authority itself, then this would be superfluous (Raz 1994). This rules out the idea of reference to moral values being an essential (and contingent too) element for identification of law. However, this argument depends on the role that is assigned to the legal authority, which can have a creative or productive task and/or an interpretative task. The latter binds the authority to showing that its interpretation of the fundamental values is correct even if it is not the best. This justification implies that the reasons why a norm is issued become part of the essential characteristics of the PL together with the element of formal validity. Here too one can recognize a certain presence of NL.

In conclusion, one can doubt whether the conventionalist perspective, with recourse to the use and beliefs of all participants in the practice, succeeds in grounding the bindingness of the legal rule better than the normative theory, which sees independent reasons for acting in the legal undertaking itself. Contemporary legal theory is marked by a debate on the understanding of the social practice that law consists in (e.g., Coleman 1989). While the conventionalist nature of legal rules is not denied, the fundamental issue concerns the way of seeing the forms of good inside a social practice, i.e., establishing whether these are essential goals or fundamental values that must in some way be guaranteed for human beings (Finnis 1980, p. 3) or whether they are merely contingent and conventional themselves. Only in the first case could conventionalism be reconciled to some extent with NL, i.e., satisfy the demand for a "natural" function in law.

The Content of the Legal Rule and Natural Law

The second question is whether it is a necessary condition for being PL that a norm is consistent with NL. Obviously it is not an issue of fact but a normative one, i.e., one needs to know whether a

valid PL can in principle have any content – this was the opinion of Kelsen, who in the formal good of peace saw the only general aim of law (Kelsen 1945, pp. 13–14) – or whether there are ethical limits to contents. Jurists in the past admitted that law requires an "ethical minimum," seen by some rather as a positive morality (e.g., Jellinek 1878, 42 ff., pp. 56–57) and by others as a natural morality (Cathrein 1909[2], p. 61). More recently it has been stated that law necessarily makes a "claim to correctness" (Alexy 1989). However, the doctrine that legal norms can have any content, even the most unjust and the most seriously offensive for human dignity, is also unacceptable for many legal positivists. Hart's doctrine of "the minimum content of natural law" is also one famous indication of this orientation. "Reflection on some very obvious generalizations – indeed truisms – concerning human nature and the world in which men live, shows that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control" (Hart 1994[2], pp. 192–193). Here we are clearly not talking about positive morality but natural morality. It is not a simple observation of what actually happens in legal systems, but is a description of what must be expected, given certain conditions. According to Hart, these bound normative conditions are functional to the attainment of the general aim of survival, which is seen as the *reason* why certain prohibitions and obligations and certain legal institutions are present in some way in all legal systems. The difference between survival and peace, both Hobbesian and Humean aims, consists in the fact that the former appeals to a conception of human nature as it is in the present conditions of existence, while the latter does without this, deeming that the only evil that law wants to avoid is the illegitimate use of force. The NL doctrine of "commonsense" accepted by Hart is very restricted compared to the traditional one, both because like the modern one it regards only the means (Haakonssen 1996) and because it deems that the common aim is only survival. Precisely on the latter point, there is a debate going on in contemporary political and legal philosophy between a "thick" conception of fundamental values, like, for example, that of Finnis, and a "thin" conception of *primary goods*, like, for example, that of Rawls.

Moreover, if we consider law as a social practice of an interpretative type and not just a set of rules, then NL can be present in the judicial process insofar as the judge – as Dworkin believes – has the legal and moral obligation to include in the interpretation and argumentation principles and norms that are applicable not because they are legally valid but because they are morally right or fair.

Another interesting locus is that of international law, in which the notion of *jus cogens* has developed (Kolb 2001). At the 1969 Vienna Convention on the Law of Treaties (art. 53), reference was made for the first time to imperative and peremptory norms (Verdross 1966), the violation of which is a specific cause making treaties void. These norms, which cannot be derogated, protect some values that are essential for peaceful coexistence in the international community. The International Law Commission identified them in the norms forbidding aggression, colonialism, slavery, genocide, apartheid, and massive pollution of the atmosphere and the seas (Parker 1988–1989). This can be considered as a specific form of *jus gentium* in our time, i.e., a legalization of NL principles.

Conclusion: The Form of the Legal Rule and Natural Law

The third and last issue is whether the fact that legal rules must have a given form and not another and the fact that the legal system as a whole must have a given structure and not another are not a sign of NL constraints. Is not the form of legality itself a moral value (Maccormick 1992)? The theory of the *rule of law* is traditionally linked to the essential characteristics that a legal norm must have publicity, generality, non-retroactivity, clarity, consistency, constancy through time, practicability and congruity in application, and so on (Fuller 1964). All these conditions are formal in

a broad sense, but they must be these and no others for the law to perform tasks referring to substantial objectives or values like respect for liberty, equality, and people's expectations. While all agree in principle on the way to describe the elements of *rule of law*, there is major disagreement on the identification of these objectives or these values (Craig 1997; Marmor 2004). Even a "formal" conception has to justify itself in some way, and this should be a "substantial" way. As confirmation of this, Kelsen consequently expunges the theory of *rule of law* from the pure theory of law, i.e., from the object of legal science, considering it as a prejudice linked to NL. Hart deems it a necessary but not a sufficient condition for justice, in that it is "compatible with very great iniquity" (Hart 1994[2], p. 207). Nonetheless, there are marked analogies between Hart's "principles of natural justice" and Fuller's "internal morality of law." The procedural dimension of law presupposes a liberal view of human being, in that it is based on the presupposition that the human being is capable of self-determination and of understanding and following norms and making up for their defects (Fuller 1964, p. 162). For this reason, law is a purposive human undertaking. Hence – according to Fuller – there is a "morality" of procedures dictated by their internal reason for existing and the general aims for which they are made. That a public body must not perform acts ultra vires, i.e., beyond its own competences, is undoubtedly a moral procedural principle, and that the freedom of citizens must not be threatened by arbitrary acts by public powers is a substantial moral principle. These internal and external constraints of procedures have appropriately been configured as "a natural law of institutions and procedures" (Fuller 1981, p. 32). This means that the content of PL, at least in its procedural part, is neither arbitrary nor ethically irrelevant. Lastly, if we consider the nature of the obligation of functionaries in relation to these secondary rules, we have to recognize that they are closer to the moral ones than to the strictly legal ones, since they are founded on the principle of fidelity to law seen as a cooperative undertaking whose internal good is that of attaining justice in the best possible way with the legal materials available.

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Introduction

The most prominent figure in the field of law and economics and the most cited legal scholar of the twentieth century, Richard Posner (1939–) has gained fame for a wide array of contributions to jurisprudence and the law. He gained fame around the turn of the century as the appointed mediator in the Microsoft antitrust lawsuit and is a leading expert in the fields of tort, technology, and antitrust law, in addition to being a major legal philosopher. President Reagan appointed him to the US Court of Appeals for the Seventh Circuit (Chicago) where he spent 36 years as a Federal Judge and issued over 3000 opinions. Posner's prestige in antitrust is such that when he criticized a US Supreme Court ruling overriding one of his decisions, the Court unanimously reversed itself, quoting him extensively in the opinion. And although apparently self-taught in economics, he has delivered the prestigious Richard T. Ely Lecture to the American Economic Association and published in top rank economics journals.

When Posner published *Economic Analysis of Law* in 1973, H.L.A. Hart's legal positivism and Ronald Dworkin's legal naturalism were the two contending paradigms in jurisprudence, but before long economic analysis of law became the dominant theory of private law and arguably remains the most influential theory. With over 60 books and over 400 journal articles to his credit, in addition to his 3000 legal opinions, his sheer output combined with the depth of his scholarship has led many to view him as the embodiment of law and economics in general and of economic analysis of law in particular, but in fact economic analysis of law as currently constituted is "not a single, unitary practice but a set of projects that share a methodological approach," and law and economics is broader still and includes more than economic analysis of law (Kornhauser 2017).

This entry situates Posner's economic analysis of law within his jurisprudence of legal pragmatism and situates that within his perspective on moral and political theory. Section "The First 30 Years and Career Details" provides some general information and background on his education and career, section "Distinctive Traits of His Intellectual Personality" outlines some distinctive traits of his intellectual personality, section "From Holmes's Legal Realism to the Economic Analysis of Law" takes up his economic analysis of law, section "The Problems of Jurisprudence"

moves on to explicate his legal pragmatism, and section "From Judicial Pragmatism to the Problematics of Moral and Political Theory" concludes by noting some recent but significant work.

The First 30 Years and Career Details

Richard Posner's parents grew up in poverty on the lower east side of Manhattan and were political leftists – he himself does not know whether his parents were members of the Communist Party when he was growing up. His father had been a Communist Party student radical at the City College of New York and was dismissed from the school for refusing to participate in ROTC, and his mother was active in her teachers' union and participated in the Women Strike for Peace organization. In 1962 she was called in front of the House Un-American Activities Committee that was investigating the Communist Party's supposed infiltration of peace organizations, where she defiantly refused to answer questions and became something of a hero in her union. Richard attended a Communist summer camp when he was 12 years old and happily gave his model train set to the children of Ethel and Julius Rosenberg following their conviction as Communist spies in a controversial 1951 trial.

Although Richard's mother continued to argue about politics with Richard into the late 1970s, his parents focused more on his education than on his ideology. His father went to the NYU Law School's night program and went on to a successful career as a career in law and real estate and so enabled the Posners to move from New York City to Scarsdale on Long Island. His mother introduced him to literature when he was very young, and he was recognized as a prodigy early on, first at the Edgemont School in Scarsdale, NY (where he once served as a substitute teacher in his geometry class). He left high school before graduating when Yale accepted him after his junior year at the age of 16; although he preferred Harvard, only Yale was willing to accept him without a high school diploma and thus won him over. The decision worked out well for him as Yale placed greater emphasis on undergraduate education than Harvard, and equally fortuitous was his choice of Harvard for law school, since "they didn't baby the students, as Yale Law School did and does."[1]

Posner graduated first in his class from Harvard Law and was President of the Law Review. Graduating in 1962, he spent the next 6 years clerking at the Supreme Court for Justice William Brennan, then as assistant to Commissioner Philip Elman at the Federal Trade Commission and on to assist then-Solicitor General of the United States Thurgood Marshall, and as general counsel to President Johnson's Task Force on Communications Policy. Posner has described his work on the Task Force as "very economics intensive, so by the time I started teaching, I did think I was going to do law and economics. I don't think it was even called that then, but I did want to apply economics to the law." Although he was a "standard liberal type" when he left Harvard to become a clerk to Justice Brennan on the Supreme Court, these 6 years gave him extensive knowledge of workings of the law as an instrument of administration and of justice while also likely contributing to his critical views about the futility of government solutions to social problems.

After spending 1968 as Associate Professor of Law at Stanford University, Posner moved to the University of Chicago Law School in 1969 where he was Lee and Brena Freeman Professor of Law until his appointment to the US Court of Appeals for the Seventh Circuit in 1981. During this time, he was also President of Lexecon, Inc., a company he co-founded with University of Chicago economist William M. Landes ("to apply the law and economics scholarship then being developed in academia to real world commercial disputes"). He also was a Research Associate at the National Bureau of Economic Research, and since his retirement from the bench in 2017 has returned to the University of Chicago as a part-time Senior Lecturer and also returned as Senior Advisor to Lexecon.

Because the economic analysis of law strongly recommends free market solutions over government decrees and regulation, and because his

[1] Autobiographical comments in this section from Posner, R. *Reflections on Judging*

colleagues in the economics department of the University of Chicago were tremendously influential with the conservative Republicans who made the Reagan Revolution in American politics leading up to 1980, Posner was a natural choice for the Federal bench. He relates that he had "voted enthusiastically for Reagan and I felt. . .I shouldn't refuse," but his libertarian perspective has often clashed with social conservativism not only on such questions as reproductive rights and science vs. religion but also with originalist readings of the law and Constitution such as those of Robert Bork, William Rehnquist, and Antonin Scalia.

Distinctive Traits of His Intellectual Personality

Richard Posner is first of all an independent thinker, and any assessment of his work overall must begin from that premise. As noted above, his advocacy of market solutions over government programs and his reaction to the disorder of American society in the 1960s made him conservative in the 1970s and led President Reagan to appoint him as a Federal Judge, but his career trajectory belies any view of Posner as a mainstream libertarian or conservative doctrinaire. Certainly he is a libertarian of sorts, but what sort? His comments on libertarian icons Robert Nozick and Friedrich Hayek are consistently critical, and his economics is rooted not in the Austrian school but in a broad institutionalism. Indeed, Posner's favored Austrian economist is not one of the scions of that so-called school but rather Joseph Schumpeter. And he concludes the introduction to the most recent edition of *Economic Analysis of Law* with the reminder that "economic analysts of law have supported many liberal positions" and notes also that "[e]vidently there is more to justice than economics, and this is a point the reader should keep in mind in evaluating normative statements in this book."

This is not quite the Richard Posner of the 1981 *The Economics of Justice* or the 1990 *The Problems of Jurisprudence*, and while the core of his research program remains a legal pragmatism rooted in the economic analysis of law, the financial crisis of 2008 led him finally to read Keynes's *General Theory of Employment, Interest, and Money*, which he found "at once unfamiliar and convincing" and which led to his addressing what he saw as *The Crisis of Capitalist Democracy* in 2010. His 2011 "Keynes and Coase" essay that reveals an evolving view and a willingness to follow Keynes and change his view when the facts contradict his view.

Always controversial, Posner's sharp criticism of nearly everyone around him has made him a lightning rod, a role he evidently relishes. Although he is the consummate academic, he has charged that "the academic enterprise causes the values of variety and heterogeneity too often to be overlooked. The oversight is particularly serious in the domain of morality. . .A society of goody-goodies, the sort of society implicitly envisioned by academic moralist, would not only be boring; it would lack resilience, adaptability, and innovation." Himself a moral skeptic and at one time a self-proclaimed ethical relativist, he characterizes moral philosophers as picking "from á la carte menu the moral principles that coincide with the preferences of their social set," resulting in "an inconsistent heap of policies" that are "compatible with their personal happiness and professional enhancement."

His assessment of his law school colleagues is hardly more complimentary. He comments that law schools used to be more engaged with the legal community than with academia, but no more. "Academic lawyers write for each other rather than for judges and lawyers. They do not try to be useful or even intelligible to the practical profession. . . From the perspective of the judicial profession the change in the character of academic law (a change particularly pronounced at the most prestigious law schools) is an ominous trend."

Turning to the courts, Posner reports that he "found the Supreme Court an unimpressive institution" and that he "was stunned to discover the Supreme Court Justices didn't write all their own judicial opinions." And while acknowledging the "impressive academic and professional backgrounds" of many of the current justices, he also notes that "quality is never the sole, and often not

the primary consideration in the appointment of a Supreme Court Justice, any more than it is in other high-profile presidential appointments." And while his advocacy of free market solutions to social problems gained him popularity with conservatives, his advocacy of marijuana legalization, extensive reproductive rights, LGBTQ rights, and respect for science (including the theory of evolution), along with his disdain for literal interpretation of the law, has put him at odds with many conservatives and may have prevented his securing a Supreme Court nomination.

What critics may miss in these barbed exchanges, however, is that while Posner does not yield easily to critics, his response to 2008 and to his subsequent reading of Keynes reveals a thinker who is no less self-critical than he is critical of others. Moreover, notwithstanding his sharp criticism of moral philosophers and law professors, in his 2007 tribute to Ronald Dworkin, he emphasizes his respect for his greatest philosophical opponent's work and his agreement with Dworkin's critique of legal positivism. Posner concedes that Dworkin's criticism of his views about wealth maximization, "though it overstated his case, was convincing and caused me to alter those views, albeit grudgingly of course and with a lag," and avers that in fact differences between his and Dworkin's views "may not run very deep…[and] may be largely a matter of our using different vocabularies to express our views of sound public policy and the judicial duty to implement them." Finally, Posner concludes the Preface to the most recent edition of his famous textbook/treatise *Economic Analysis of Law* by noting his attempt "to make it more eclectic, less doctrinaire, less 'Chicago School,' more hospitable to criticisms of the 'rational choice' approach to law."

From Holmes's Legal Realism to the Economic Analysis of Law

Posner's legal philosophy is deeply influenced by Oliver Wendell Holmes, Jr., and he has always seen himself as the successor to the great American legal realist judge from the late nineteenth and early twentieth century. Although he disagrees with Holmes's apparent positivism, Posner's economic analysis of law is an attempt to give flesh to the Holmes thesis that judges seek to promote the best social outcomes; although statutes and precedents constrict judicial decision-making, judges are not bound by them. "The core of a defensible legal realism," Posner declares, "is the idea that in many cases, and those [that are] the most important, the judge will have to settle for a reasonable, a sensible, result, rather than being able to come up with a result that is demonstrably, irrefutably, 'logically' correct. Law is not logic, but experience, as Holmes famously put it."

Law, in other words, is not an autonomous discipline that can live comfortably within its own world of statutes and precedents, but must rely on insights from other fields as well, thus leading naturally to the law and economics perspective where judges consider economic efficiency in deciding the outcomes of cases. This was and is controversial. Law is typically understood as autonomous, with judges duty bound to "follow the law" rather than being empowered to make new law. Posner embraces and embodies a more activist approach whereby judges, in fact and of necessity, do make new law and that judges' moral judgments play an admissible role in their decisions. Indeed, as noted above this is Posner's main criticism of Holmes's positivist acceptance of the essential separation of law and morals, even while Holmes does not, Posner argues, adhere to that separation in his rulings.

The quality and quantity of Posner's writing have made his name seem to some virtually synonymous with law and economics and economic analysis of law. In fact it is synonymous with neither. Law and economics was a pristine field when Richard Posner graduated law school in 1962, having emerged only a year earlier with the publication of papers by Ronald Coase in economics and Guido Calabresi in law. Coase's paper introduced the controversial "theorem" – or, as Joseph Stiglitz has called it, "conjecture" – that bears his name and that is central to both Calabresi's and Posner's theories. Coase argued that absent transaction costs, any assignment of property rights in a competitive market will lead

rational maximizing agents to transact until they reach the same efficient outcome, so the initial assignment of property rights does not affect how the property will be used. Consider, for example, a case of a farmer with the legal right to grow his crops undamaged by passing locomotives that may emit sparks where the crops are worth $100, and suppose the value to the railroad of the unimpeded passage of its trains is $120, but it can install spark inhibitors for $110. Now if the railroad buys the land in question from the farmer for a price above $100 but below $110, there is a clear gain for both and thus an increase in the wealth of the community. Moreover, and of particular importance to law and economics, whether the initial property right attaches to the farmer or to the railroad makes no difference to the outcome, so although the question seems to be one of determining who holds a right, it turns out that rights are irrelevant, and this point is crucial.

Whether we view the case as one where the railroad is seen as intruding on the farmer's right to grow her crops, or her farming as intruding on the right of the railroad to transport its cargo to market, turns out to be irrelevant; rather than focusing on the question of who is the holder of a right, an impartial court will resolve the case so as to produce the best outcome going forward. And indeed, Posner argues, "many of the doctrines and institutions of the legal system are best understood and explained as efforts to promote the efficient allocation of resources."

Coase was an economist and was not primarily interested in how his theorem applied to the law (although he used several examples from the common law as illustrations), but Calabresi's work on tort law and Coase's economics led to the same anti-formalist perspective whereby economic efficiency is recognized as an important consideration in judicial reasoning. Thus, while not addressing directly the question of formalism versus realism, they supported the realist claim that the autonomy of the law is in fact a kind of myth. What followed the publication of Coase's and Calabresi's papers was, as Calabresi puts it, "a 10-year period of quite remarkable flourishing of Law and Economics [that has] unfortunately, been somewhat overlooked" primarily because of Posner's entry in 1973 with his seminal *Economic Analysis of Law* and the barrage of papers and books that followed it. For law and economics, Calabresi is at pains to argue, includes more than economic analysis of law. It shares with Posner's economic analysis of law the thesis that economic theory "enables the law to be seen, grasped, and studied as a system. . .that economic analysis can illuminate, reveal as coherent, and improve," but Calabresi argues that for Posner "economics dominates [law]. . .in Law and Economics the relationship is bilateral" with economics guiding law in some cases and law guiding economic theory in others. Indeed, Calabresi's law and economics is overall closer to Ronald Dworkin's jurisprudence than to Posner's for just this reason.

Indeed, the 31 chapters of the ninth edition of *Economic Analysis of Law* apply economic theory to a remarkably wide range of criminal, civil, and constitutional questions, and Posner's general stance remains more on the side of economics than of the law with regard to the determining factor in legal decisions. As with any theory that describes itself as "realist," the empirical argument is foremost, and Posner's voluminous output produced in the minds of many what Calabresi has called a "transformation of Law and Economics into Economic Analysis of Law." As noted at the outset, however, Posner's economic analysis of law is distinct not only from the broader field of law and economics but also from other economic analyses of law.

Several distinct features of Posner's economic analysis of law deserve mention here. Economic efficiency is an ambiguous concept, and each of its interpretations has its strengths and weaknesses. Posner rejects the familiar Pareto principle, where the gain to one party comes at no cost to others. This concept is robust, and one can readily understand the irrationality of refusing a Pareto improvement regardless of precedent. The problem Posner sees is that it is too rarely realized to be of much relevance in the law, and so he favors the alternative Kaldor-Hicks criterion that allows for outcomes that are not Pareto-efficient so long as the party who gains adequately compensates the losing party (thus sometimes called potential Pareto superiority). But the benefit of the wider applicability of the Kaldor-Hicks criterion

is offset by its intransitivity, which can produce inconsistent outcomes where the same outcome turns out to be both more and less efficient than its alternative.

Posner also locates the source of value in what people are willing to pay, or what he dubs "wealth maximization." Preferences are backed up by money register in the market, but many transactions still take the form of barter, and these nonmarket transactions are central to Posner's analysis. Their ethical roots are found not in the happiness that results from their transactions but in the consent implicit in them. These controversies within law and economics and within economic analysis of law are ongoing, and as noted above, Posner has modified and softened his stance on the extent to which economics dominates the law in the latest edition of the book as well as conceding the force of Dworkin's criticism of his reliance on wealth maximization.

The Problems of Jurisprudence

Inasmuch as one's views are always to a degree defined by one's philosophical opponents, Posner's jurisprudence is best seen through his arguments with Ronald Dworkin. When Posner graduated from law school in 1962, H.L.A. Hart's *The Concept of Law* had been in print for only a year, and the debate in the philosophy of law was between his positivism and the Harvard law professor Lon Fuller concerning the role of morality in the law, an exchange published in the 1958 *Harvard Law Review*. Posner, of course, found little to agree with in either view and although he favored Holmes's legal realism did not take an interest in the debate and was pulled into discussion of jurisprudence only when his economic analysis of law pulled him into the debate. Always the empiricist, Posner bases his argument on his claim to have explicated how the law actually works, as Holmes had done before him. Nevertheless, he found himself pulled into the fray and in so doing reinvigorated the legal realist tradition in the philosophy of law.

Posner did not respond directly to Hart or the legal positivists. He saw positivism as a formalist theory that had been falsified. His Holmesian pragmatism led his to take for granted that judges did make law, had to make law, and should make law, so he had no interest in a doctrine that viewed judicial decisions as deduced from a standing body of law. On this matter, his position accorded with that of Ronald Dworkin, Hart's student and successor at Oxford who was Hart's most prominent critic at the time and who also saw judges as, of necessity, making law. But while both Dworkin and Posner viewed judges as making laws, their accounts of how judges do that are sharply different. Dworkin held that judges must use principles that are not explicitly part of the law but are implicitly included in it, such as that criminals may not profit from their crimes. These principles are the moral component of the law, and as components of the law, they are consistent with the view of law as autonomous, while Posner excludes moral principles from the law.

With his focus on the development of his economic analysis of law, Posner was largely a bystander in the Hart-Dworkin debate in the 1970s. Posner dates his interest in jurisprudence from his work on Bentham and Blackstone in the 1970s, which he publishes as the opening chapters in his 1980 *The Economics of Justice*, a book that inserts him into mainstream jurisprudence. It does so, however, without directly engaging the debates of the day in jurisprudence. Hart is mentioned only twice and gets less attention than even John Rawls, and although Posner's debate with Dworkin can be dated from here, the main argument of the book is empirical. Rather than discussing the nature of the law, Posner begins from the assumption that people are rational maximizers of their satisfactions and explicates the use of economics in discussing nonmarket behavior. He shows how the principle of wealth maximization can be applied to the laws of primitive (including ancient) societies and goes on to explain the role of economics in clarifying such questions as the meaning of justice, the origin of the state, primitive law, retribution, the right of privacy, defamation, racial discrimination, and affirmative action.

In 1980, Posner, Dworkin, and Guido Calabresi participated in an exchange in the

Hofstra Law Review, and throughout the 1980s, Posner wrote more articles with normative themes in their titles, leading up to the publication of *The Problems of Jurisprudence* in 1990. The book takes up such philosophical themes as metaphysics (ontology), epistemology, and legal interpretation leading up to his account of substantive justice (including the economic analysis of law). Posner concludes the work with an account of jurisprudence without foundations, thus updating Holmes's view of the same. The book moves from a brief history of jurisprudence to using analytic philosophy to critically appraise modern American law. Although evidently self-taught in philosophy, Posner displays remarkable knowledge of analytic philosophy, using it to buttress his skeptical claims. Although Posner's view is pragmatist, it is not rooted in the pragmatism of Pierce, Dewey, or Rorty, but is rather what he calls "everyday pragmatism" and is based on a Humean skepticism that Posner takes to show that the law is not objectively knowable. He combines an epistemological argument for skepticism with an ontological skepticism about mental and other metaphysical entities in the law, leading to a behaviorist account that does away with such entities. Armed with this skepticism, Posner turns to the question of whether there are right answers on legal questions, rebutting Ronald Dworkin's affirmative answer.

Indeed, the differences between Posner and Dworkin resemble those between Hume and Kant, with Posner the subjectivist and behaviorist who sees people as rational maximizers of their satisfactions and Dworkin who sees the need for objectivity and who sees people as having interests beyond personal rational maximization. Posner thus sees judges as observing the various dimensions of a case and trying to take all relevant factors into account to produce the best overall consequences, rather than concerning themselves with justifying a decision textually, noting that we would think of a decision by the Supreme Court overruling *Brown* [vs. *Board of Education*] wrong, even if we agreed that it was an plausible interpretation of the meaning of the Fourteenth Amendment to the Constitution. The debate, however, which continued until Dworkin's death and which is ongoing in jurisprudence, concerns the objectivity of the law. Hart and Dworkin had agreed that law was objective and argued over the nature of that objectivity, but Posner calls objectivity into question. His "Pragmatist Manifesto" that concludes *The Problems of Jurisprudence* calls us to recognize that law is in fact a "social practice vaguely bounded by ethical and political convictions. The soundness of legal interpretation and other legal propositions is best gauged, therefore, by an examination of their consequences in the world of fact." Although the legal tradition has made great contributions to social development, "there is a tendency in the law to look backward rather than forward," and it is this tendency that Posner aims to correct.

Recently, however, Posner has been increasingly cognizant of the problem of complexity in the law and sees this as further buttressing his claim that judges and lawyers must look to knowledge outside of the law in order to properly discharge their duties. Complexity, he explains, involves more than claiming that a case is difficult; it also involves complicated interactions within a system with a variety of interactions of various kinds. Such complexity points to the defects in a formalist view of the legal system as autonomous, and Dworkin's account of the law is, like Hart's, "too abstract to decide cases. What judges *mainly* need is a better understanding of the practical consequences of their decisions."

From Judicial Pragmatism to the Problematics of Moral and Political Theory

Posner's 1997 Oliver Wendell Holmes Lecture at Harvard addressed "The Problematics of Moral and Legal Theory," and the book of the same title was published in 1999. Posner has confessed to a "visceral dislike" of academic moral philosophy, which he finds of no use in general and particularly useless in legal argument. But although he rather defended a version of ethical relativism here as well as in *Problems*, his 2003

Law, Pragmatism, and Democracy revises that view in favor of fallibilism, which indeed does better describe him. Indeed, notwithstanding his expressed agreement with some of Nietzsche's critiques of mainstream philosophical ethics, Posner's philosophical orientation is closer to that of Karl Popper, whose fallibilism he cites regularly and generally favorably.

As of this writing, Posner has published 28 books in the twenty-first century. He continues to be an engaged public figure, and his recent work has focused on reforming the federal judiciary as well as the economic crisis of 2008 and what he perceives as the crisis of capitalist democracy.

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Posthumanism: Critical

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Introduction: Imagine Tomorrows World

To quote by way of introduction the title of a painting created by Hundertwasser in 1998 (*Imagine Tomorrows World*) some people, indeed, think a lot about the future of the human species and the planet. Some are more concerned with how to preserve the present (such as nature, ecosystems, and biodiversity) and protect future generations from climate change and pandemics. Without question, very different assessments exist within these ranks about what a secure future for humans looks like and what the greatest challenges are that we must overcome to realize this utopia. One suggestion is made by *longtermism* with representatives such as Nick Beckstead in his study *On the overwhelming importance of shaping the far future* (2013).

Others are just looking for ways to justify the course taken by an increasingly excessive capitalist marketing drive – and in doing so they do not even stop at racist and fascist ideas. This attitude is exemplified by *futurism*, which goes back to Filippo Tommaso Marinetti's *Futurist Manifesto* published in 1909.

Finally, still others take the path of a primarily Marxist and poststructuralist critique of capitalism – such as *accelerationism*, which can be traced back to Nick Srnicek and Alex Williams' 2013 *#Accelerate Manifesto for an Accelerationist Politics*.

And then there are those currents oriented toward the future, which primarily deal with the subject of technology. *Either* technology is seen as the most suitable means to transform people into so-called posthuman beings. The posthumans are characterized by radically increased abilities and skills on the one hand and by new properties on the other hand. This current is called *transhumanism* and is represented by Max More, Nick Bostrom, Stefan Lorenz Sorgner, and others. *Or* technology itself is understood as a new stage of evolution: *technological posthumanism* – with proponents such as Ray Kurzweil, Marvin Minsky, and Hans Moravec – sees in the development of an artificial superintelligence the posthuman that will usher in the Singularity (cf. Loh 2018).

Critical Posthumanism in a Nutshell

Critical posthumanism (cPH) also imagines the future. However, cPH is no longer primarily concerned with "the" human being, but questions the traditional, mostly humanistic dichotomies such as woman/man, nature/culture, the natural/artificial, or subject/object, which have contributed significantly to the formation of our current view of the human and the world. CPH aims to overcome "the" human by breaking with conventional categories and the thinking that goes along with them. Thus, critical posthumanism arrives at a philosophical location behind or beyond ("post") a specific understanding of the human that is essential to the present.

Five core elements characterize, to my understanding (cf. Loh 2018), critical posthumanist thinking in general: (1) a struggling with humanism, (2) an overcoming of anthropocentrism, (3) a questioning of anthropological essentialism, (4) a critique of the knowledge spaces (i.e., the institutions, rooms, and dimensions where knowledge is produced), and (5) a clear appeal character and socio-political implications.

Genealogy, Pioneers, and First Representatives

Critical posthumanists such as Rosi Braidotti, Karen Barad, Cary Wolfe, Pramod K. Nayar, Neil Badmington, and others preferably start their reflection with Michel Foucault's treatise on the history of science, *The Order of Things* (1971), which they read primarily as a critique of humanism, classical philosophical anthropology, as well as anthropocentrism (Braidotti 2013: 23; Nayar 2014: 12–15; Wolfe 2010: xii). Other direct references are Jacques Derrida's essay on *The Ends of Man* (1968), Jean-François Lyotard's study on *The Postmodern Condition* (1979), the works of Jacques Lacan and Jean Baudrillard, and Louis Althusser's anti-humanism (Badmington 2003). Against this background, it becomes apparent to what extent these representatives of cPH in particular continue the discourses of poststructuralism, postmodernism, and also feminism via the method of deconstruction on the one hand, but also critically reflect on them on the other.

Thus, poststructuralism, on the one hand, has provided the means for questioning traditional epistemological categories, but in doing so, it remains, *first*, attached to a pure critique of language or a purely linguistically structured reality, which Karen Barad puts pointedly in *Meeting the Universe Halfway* (2007): "Language has been granted too much power" (2007: 132; Braidotti 2013: 188; Wolfe 2010: 97). *Second*, Foucault, Judith Butler, and other pioneers of critical posthumanist thought were ultimately only interested in human beings, and thus in consequence still implicitly anthropocentric in orientation (Barad 2007: 145–146; Braidotti 2013: 38; Wolfe 2010: 125), and therefore *third*, nevertheless unable to overcome the fundamental dichotomy of nature and culture (Barad 2007: 146–147). *Fourth*, feminism, although fundamentally anchored in cPH, had not been able to break with humanism completely (Braidotti 2013: 20). In general, *fifth*, all labels such as poststructuralism and feminism

are themselves highly questionable, since they do not question their own disciplinary boundaries (Wolfe 2010: 103).

In contrast, (*ad first*) cPH still seeks reality, possibilities of critique and performance beyond linguistic boundaries. Furthermore (*ad second*), it is also a post-anthropocentrism that recognizes alternative visions of the human being, of subjectivity, and forms of the self, and that can look beyond the human being to numerous nonhuman alterities. Finally (*ad third*), only the radicality of cPH manages to deliver on the promise of a break with conventional categories at the root of the nature/culture dichotomy. This happens, quite in the deconstructivist manner, not in the form of a pure (ultimately impossible) new beginning, but as a questioning reiteration and thereby breaking open of hitherto untouched hypostases, enabling their reformulation (Badmington 2003: 15–16). Just as postmodernism remains necessarily tied to modernity and poststructuralism to structuralism, cPH, even in its transcendence of humanism, always contains at least the memory of it (*ad fourth*), or, to speak with Neil Badmington, "The 'post-' is forever tied up with what it is 'posting'" (2003: 20). The multiplicity of disciplinary perspectives from which the deconstruction of the (humanist) human is undertaken in critical posthumanist reflection, and which may in themselves in part give the impression of contradictoriness, allow no enclosure in, and certainly no taming by, any disciplinary corset (*ad fifth*).

It can be said that one of the first "official" critical posthumanists was N. Katherine Hayles. In *How We Became Posthuman* (1999) she uses the example of Alan Turing and Hans Moravec to point out the questionable self-conception of liberal humanism. Liberal humanism aims to overcome the biological body and to define the human being as reducible to pure information (cf. 1999: 5). By contrasting this dystopia of the posthuman with an embodied yet technophobic utopia (1999: 5), Hayles was the first to formulate the difference between technological and critical posthumanism on the first pages of *How We Became Posthuman* (which cannot be further elaborated here). She identifies technological posthumanism with traditional humanistic attributes: "Indeed, one could argue that the erasure of embodiment is a feature common to both the liberal humanist subject and the cybernetic posthuman. Identified with the rational mind, the liberal subject possessed a body but was not usually represented as being a body" (1999: 4).

Five Core Elements of Critical Posthumanist Thinking

Struggling with Humanism

The critical posthumanist discussion of humanism is not consistently characterized by rejection; by no means is a pure anti-humanism generally proclaimed. Basically, three models of dealing with humanism can be distinguished in critical posthumanism: (1) the moderate critique of a basic humanist value or principle, which is the rarest way of a critical posthumanist dealing with humanism; (2) the more comprehensive questioning of several humanist core concepts, probably the most common form of questioning humanism by cPH; and (3) the general rejection of humanism, anti-humanism. However, I do not want to give the impression that representatives of a "moderate" approach cannot position themselves just as clearly against humanism as anti-humanists would. Rather, this rough division into three critical ways of struggling with humanism should make it possible to see that a critical discussion of humanism can start at different points.

Ad (1): Cary Wolfe remarks that he is not concerned with rejecting or transcending humanism per se, but that, on the contrary, some humanist values are quite "admirable" (2010: xvi). The problem, according to him, is rather that humanism as a theoretical edifice cannot do justice to the values it itself proclaims. This immanent contradiction arises mainly from the fact that it includes at its core an anthropocentrism (2010: 62, 124) that does not allow it to treat a non-human counterpart according to appropriate standards. Within the humanist setting, for example, the normative demand not to torture animals can only be justified anthropocentrically, according to

Wolfe: Although animals are different from humans, they should not be tortured according to the humanistic viewpoint. Wolfe seems to oppose the argument of Immanuel Kant, who in § 17 of the second part of his *Metaphysics of Morals* (1797) speaks out against cruelty to animals, because this leads to a brutalization of the human being, but not because animals have an intrinsic value. Against this background, Wolfe primarily criticizes anthropocentrism as a core element of humanism.

Ad (2): Hayles, on the other hand, in *How We Became Posthuman* (1999), unequivocally opposes the "liberal humanist subject" (1999: 2–7), which, according to her, combines several humanist values: "a coherent, rational self, the right of that self to autonomy and freedom, and a sense of agency linked with a belief in enlightened self-interest" (1999: 85 f.). In addition, there is a humanistic devaluation of the organic body in favor of the mind (1999: 2–4; Nayar 2014: 6). With this label, Hayles gathers all the common attributes of a critical posthumanist rejection of humanism, which is expressed in a very similar way in many critical posthumanist approaches. Barad formulates her critique of humanism in *Meeting the Universe Halfway* (2007) via her engagement with Niels Bohr's approach, finding fault with the humanistic vestiges of human essence and knowledge in Bohr's theoretical foundation (2007: 27; Pepperell 2003: 67). However, she sees not only in humanism an anthropocentrism and an unquestioned appeal to traditional dichotomies, but equally in anti-humanism. For just like humanism, according to Barad, anti-humanism does not position itself with sufficient expressiveness against the humanist stance that human bodies and conceptions of the (human) agent are exclusively "effects of human-based discursive practices" (2007: 171). Anti-humanism also ultimately invokes the same conception of the subject as humanism and should be rejected on these grounds (2007: 149, 171). Moreover, poststructuralist anti-humanist thinkers did not seriously question the nature/culture dichotomy any more than humanists do (2007: 428, footnote 6).

Ad (3): A fundamental rejection of the humanistic paradigm could object to an approach like Wolfe's described in (1) that even a normative judgment like the one that animals should not be tortured is already wrongly formulated under humanistic auspices. For the authority that in this case distinguishes between humans and animals, in order to then make a judgment about sentience and to define how sentience is to be dealt with in each case, is and remains humanism. Humanism, according to the provocation of anti-humanism, formulates questionable values out of itself. Rosi Braidotti explains her anti-humanism in *The Posthumanism* (2013) from the clear imperial and racist tendencies that necessarily accompanied humanist reflection (2013: 16–25; MacCormack 2012: 3–4; Nayar 2014: 4). In the same breath, however, she holds that although critical posthumanism feeds quite substantially on anti-humanist thought, anti-humanism "is by no means the only [source], nor is the connection between anti-humanism and the posthuman logically necessary or historically inevitable" (2013: 25). Braidotti thus belatedly provides an explanation of the distinction made here between three models of struggling with humanism, since Wolfe, Hayles, and others do not in fact argue anti-humanistic in the strict sense.

Overcoming Anthropocentrism

As shown above, in the eyes of critical posthumanists, the label "humanism" bundles all the questionable elements, which are to be overcome in the critical posthumanist paradigm. In particular, anthropocentrism is targeted by critical posthumanist thinkers. Anthropocentrism is defined by two aspects: on the one hand, by the idea that humans have a moral advantage and thus a special status compared to all other beings; on the other hand, by a descriptive, epistemological position according to which only humans have the capacity for cognition and can develop a capacity for judgment. Moral anthropocentrism is consistent with speciesism, i.e., discrimination against a being purely on the basis of its membership in a specific species (Ryder 2010). There are

alternatives to anthropocentrism, such as pathocentrism, which morally ascribes an intrinsic value to sentient beings and epistemically takes the position that values come into the world through sentient beings. However, critical posthumanists reject all centrist ethical positions because of their structurally discriminatory tendencies (see last section below).

Even if every humanist approach is anthropocentric in moral as well as epistemic respect, anthropocentrism and humanism are not synonymous. For one thing, the humanistic value setting is not exhausted in a pure anthropocentrism, insofar as humanism in particular also includes educational and cultivation aspects, that a non-humanistic anthropocentrism does not necessarily have to subscribe to. On the other hand, not every anthropocentric position is automatically also a humanistic one, because the attitude that only humans have an intrinsic value is not necessarily a component exclusively of a humanistic position. Barad points out that even anti-humanists do not necessarily break completely with all basic humanist concepts (Barad 2007: 171).

CPH formulates various approaches to overcome anthropocentrism. Braidotti accomplishes her "post-anthropocentric turn" (2013: 57) by means of a concept she calls "zoé" (2013: 60), which is supposed to enable new forms of "subjectivity and subject-formation" (2013: 58). From the zoé new and non-human subjects emerge. On the basis of the zoé, according to Braidotti, it is possible to recognize even a non-human counterpart as an agent. However, at this point she leaves open not only *which* non-human subjects are constituted as subjects by the post-anthropocentric turn – in the future, for example, will we also have to ascribe a subject status to bacteria? What are the criteria for a clear differentiation between subjects and non-subjects? Nor does it become apparent *what* concretely accompanies recognition as a subject, as an agent – for example, what rights and duties?

Wolfe, on the other hand, who like Braidotti interprets humanism primarily as anthropocentrism, is particularly interested in the recognition of animals as non-human counterparts (2003, 2010). His post-anthropocentrism takes the path of a large-scale reform of the cultures of knowledge and the self-understanding of the disciplines, in order to imagine and make possible new conceptions of the agent and, in particular, an understanding of the animal as a subject. For just as a uniform talk of "the" human being cannot do justice to the complexity of facets and varieties of the human being, there is no such thing as "the" animal in general, which is always spoken of as a matter of course in the disciplines in question.

Barad, with her agentive realism, again strikes a different path of overcoming anthropocentrism by "recogniz[ing] matter's dynamism" (2007: 151). Neither is matter, according to Barad, simply passive but discursive, nor is discourse alone active but also material (2007: 151 f.). This view, Barad argues, ultimately makes it possible not only to recognize new nonhuman subjects as such, but also to radically question the dichotomy of humans and nonhuman beings (2007: 145 f.).

Questioning Anthropological Essentialism

In *Posthuman Life* (2015: 10 f.), David Roden interprets humanism as an approach to philosophical anthropology. The anthropological disciplines such as biology, cultural studies, ethnology, and not least philosophical anthropology each take their own paths to define humans and to differentiate them from all other beings with the greatest possible unambiguity. In doing so, they usually proceed in an essentialist manner, i.e., they seek to describe the human species by means of a single attribute or a series of characteristics.

This anthropological essentialism gives rise to certain challenges such as moral status attributions that suggest a specific treatment of animals, machines, and other alterities. Radically exclusionary positions, such as speciesism, racism, and sexism, often argue in essentialist terms by depriving excluded beings of certain properties. Further, anthropological essentialism is accompanied by an epistemic uncertainty about whether the other actually possesses the ascribed properties. Our attribution of certain competencies, such as free will, often rests on a metaphysical foundation. Actually, we not only do not know what it is like to be a machine or an animal, e.g., a bat – to

paraphrase the title of a famous text by *Thomas Nagel* (1974). But we also already do not really know what it is like to be our human counterpart. For it cannot be determined with unambiguity whether humans are actually endowed with freedom of will and similar abilities. We cannot empirically prove them unequivocally. The only difference is that, in the case of humans, we are prepared to make an additional assumption, namely that, after all, the beings we call humans have the competences in question (Churchland 1999; Coeckelbergh and Gunkel 2014).

For these and other reasons, critical posthumanists are exceptionally skeptical of unreflective anthropological essentialism as well as of classical philosophical anthropology's project of categorically distinguishing the essence of humans from the essence of other beings (Badmington 2004: 41; Barad 2007: 27; Braidotti 1992, 1994: 16; MacCormack 2012: 106; Nayar 2014: 157, footnote 1.1; Roden 2015: 6; Wolfe 2010: xiv–xvi). Indeed, the whole enterprise of cPH can be read as overcoming philosophical anthropology as a discipline. I think that the path from an essentialist philosophical anthropology via different variants of critical posthumanist anthropology ultimately leads to a radical "alteritology," since in the critical posthumanist reflection in the proper sense only alterities exist – or phenomena in Barad's formulation.

As a reaction to anthropological essentialism, critical posthumanists formulate relational approaches that focus less on the relata, the subjects and objects, and more on the relation, that is, what lies between them (Coeckelbergh and Gunkel 2014: 722; Loh 2022). Thus, Barad outlines a "relational ontology" (2007: 93) in which singular, self-sufficient agents do not exist, but are recognized only within their mutual entanglements. With her relational ontology, Barad provides the critical posthumanist foundation of an anthropology and ethics to be based on it. Comparably, David Roden in *Posthuman Life* (2015: 114–120) proposes an anti-essentialist "flat ontology" oriented toward Nicolas Agar. With this, he seeks to avoid idioms such as that of the "radical stranger" or "radical other," since in order to assume that something or someone is radically different from human beings, we would have to acknowledge the premise that the inability to understand the other is part of human cognitive essence (2015: 120).

Critique of the Knowledge Spaces

Already the first "unofficial" critical posthumanist text – Donna Haraway's *Cyborg Manifesto* (1985) – sets out to question the given knowledge spaces and the academic-disciplinary landscape. With Haraway, two forms of a critique of the knowledge spaces become discernible in cPH: *first*, the disciplinary boundaries of the sciences themselves are softened and become transparent through her own work. In this way, Haraway stands for the practically implemented and actively lived inter- and transdisciplinarity, from which a colorful diversity of theories and methods in critical posthumanist circles results. Haraway conceives of herself in scientific terms as a hybrid creature. In her writings, she, who holds a doctorate in biology and history of science, interweaves philosophy, feminist theory and epistemology, literary studies, science fiction, technology, and natural sciences with personal experience. In this way, on the one hand, common disciplinary boundaries are dissolved and different discourses of knowledge are merged. On the other hand, however, the dense collage of subjects, schools, and methodologies makes an intuitive entry into her work difficult. Barad, who teaches particle physics, quantum field theory, feminist theory, ontology, philosophy, and epistemology, is also a remarkable example of the questioning of scientific boundaries in her own work.

The *second* way of a critical posthumanist critique of the given knowledge spaces becomes apparent in a clear skepticism of critical posthumanists toward the ways of creating facts and knowledge within a respective traditional disciplinary horizon. In numerous passages of her work, Haraway elaborates her understanding of the methods of creating knowledge in the (natural) sciences, which she interprets "as a specific form of narration, as a cultural practice of creating meaning" (Hammer and Stieß 1995: 17, my translation). She outlines the concept of situated knowledges, which illustrates the extent to

which knowledge is never context-independent, without history, or in any way "truly objective" (Haraway 1988). However, this stance by no means implies a radical constructivism, which, according to Haraway, would be cynically relativistic and, above all, incapable of political action (Penley and Ross 1991: 4).

In his book *What Is Posthumanism?* (2010), Cary Wolfe undertakes a historical genealogy and critique of American literary and cultural studies. However, his reflections, which rest on a general questioning of scientific disciplines, can also be applied to other subjects and schools. In an engagement with Foucault, Luhmann, and others, Wolfe elaborates on the extent to which disciplines are never independent, but always dependent on an external authority of judgment, which in turn requires external evaluation, and so on ad infinitum (2010: 108–126). Against this background, Wolfe formulates a critical posthumanist understanding of what disciplines are and what they must be able to do, characterized by multi- and transdisciplinarity (2010: 116 f.): "[P]osthumanism can be defined quite specifically as the necessity for any discourse or critical procedure to take account of the constitutive [...] nature of its own distinctions, forms, and procedures [...]. The 'post-' of posthumanism thus marks the space in which the one using those distinctions and forms is not the one who can reflect on their latencies and blind spots while at the same time deploying them" (2010: 122).

Critical posthumanists are aware of the necessary incompleteness of their own methods and theories. In their use of them, they repeatedly distance themselves from them and question them in their own work. Unlike other scientists, they enter into the cracks and seams that open up in their own research due to the "post" of their subject and use them productively for constant self-criticism.

Appeal Character and Socio-Political Implications

All approaches in cPH are appellative, in that they not only point out argumentative weaknesses in the approaches of humanists in theoretical terms, but also call for changes in science, in educational institutions, in upbringing, in the public space of society. And they sometimes to that in very practical terms. According to Barad, questions of (natural) science are questions of justice (2015: 205), since "racist, colonialist, sexist, heterosexist histories" (2015: 175, my translation) are woven into the fabric of (natural) scientific work. Conversely, questions of the economy, the social, and the political are also always at the same time those of the (natural) sciences (2015: 177). This shows not only Barad's critique of traditional knowledge spaces and academic disciplines, but also the at least implicit normativity of these supposedly purely descriptive and observational (natural) sciences. In doing so, she makes clear to what extent even the assignment of labels and the categorization or cataloging of thinkers in schools is already a political act (2015: 195).

Justice and empiricism are inextricably intertwined, being itself, "ontology, is political" (2015: 207, my translation), one cannot define being itself, cannot do ontology, without also doing politics so to speak. Since we cannot keep ethics and politics out of the sciences, according to Barad critique per se is also a creative task, it is not exhausted in the blanket negation (2015: 199–202). Responsibility, she argues, is the responsibility of the acting individual by virtue of their structure of being, which is always already one shared with a counterpart or one of being bound to a counterpart. Individuals do not consciously and actively decide to assume responsibility, but cannot help but be responsible (2015: 183; cf. Loh 2022).

Haraway, too, considers the assumption of responsibility important when she remarks that the blurring of traditional boundaries is a thoroughly pleasurable affair that one should actively enjoy. It should be noted, however, that the questioning of old boundaries is necessarily accompanied by the establishment of new distinctions, for which one also has to answer again. Haraway is aware of the challenge of oscillating between the poles of a radical constructivism on the one hand and the mere acceptance and objectification of given structures on the other (Penley and Ross 1991: 4).

Braidotti concludes her essay on posthumanism (2013) by promoting a "global 'multi'-versity" (2013: 173), which in her eyes is the sociopolitical consequence of a radical plowing up of knowledge cultures. The conventional disciplines, and with them the standard of knowledge established there, are losing power and influence as "disciplinary boundaries" (2013: 177) are dissolved. In the future, universities will be "virtual and hence global by definition" (2013: 179). In the last instance, the posthuman knowledge spaces result in a transformed society, with new and partly non-human subjects (2013: 179 f.).

Critical Posthumanist Ethics and What Remains to Be Done

This section is a small excerpt from my text *Posthumanism and Ethics* (2022) and it also summarizes my current work. For while it is possible to describe what critical posthumanist ethics is and how it differs from other ethical schools, so far, individual critical posthumanist writings have merely sketched the outlines of a corresponding ethics. There exists no fully formulated critical posthumanist ethics yet.

Critical posthumanist ethics differs fundamentally from other ethical traditions and schools. It is a form of inclusive or inclusionary ethics. Inclusive ethics is fundamentally different from the usual way of thinking and judging ethically in 'western' societies. Critical posthumanist and thus inclusive ethics radically shift the classic focus on moral agents, moral subjects, and (moral) objects (in a structural model one would say "relata"), toward relations (as already mentioned above). In doing so they therefore undertake a downright reversal of perspective. Exclusive ethical thinking, on the other hand, prefers moral agents to relations, consistently adopts first a definition of the moral subject, who then, as a basically self-sufficient, monadic, autonomous individual performs actions and enters into relations to be ethically evaluated. Critical posthumanist and thus inclusive ethicists, on the other hand, focus on the actual relations which are seen to create relata (the moral agents) in the first place.

Exclusive ethics carries its name because the focus on the moral agent leads to a displacement to the periphery of and exclusion from the moral universe. The definition of an elite circle of moral agents with an intrinsic or absolute value generally leads to the demarcation of such beings and entities to which, if at all, only an instrumental value is conceded. The moral agents with an intrinsic value have a superior status to those who have only an instrumental value. Those who have only instrumental value, if they are given any moral value at all, have a morally inferior status and are thus subject to structural discrimination and oppression.

Inclusive ethics, of which critical posthumanist ethics is exemplary, deserves its name because, by concentrating on relations instead of relata, there is an automatic inclusiveness at work. It is not even about a specific being in question having to prove its moral status in order to be a member of the moral community. Rather, inclusive ethics is about evaluating relations – entirely independent of who or what is conducting them. Some critical posthumanists are primarily interested in the relational model that underlies their thinking, such as Haraway with her ethics of kinship. Others are more interested in an ethics of specific relations for specific fields or domains, such as Barad with her ethics of knowing. What they have in common, however differently they may express themselves in detail, is an interest in relations, structures, practices, the in-between, and less in defining those who are in these respective relations.

Conclusion

Critical posthumanism is utopian by nature, that is, it creates visions of a better world. These are utopian visions in the sense that they are theoretically realizable, if we all work together to achieve a non-humanistic future. Critical posthumanist ethics are therefore also utopian and will inevitably seem radical to many. They are indeed radical in that they shake the foundations of one's everyday thinking. A society designed according to critical posthumanist inclusive ethical principles

would without any doubt look very different from contemporary "western" societies.

Seriously trying to act differently, to stop discriminating, to stop exploiting, to stop oppressing, subjugating, and reifying is the drive of inclusive and thus also critical posthumanist ethics. In order to achieve this, one must, according to the critical posthumanist inclusive alternative, fundamentally shift the interest from the question of "Who must act?" to the questions of "What happens, what is a good in-between, what are good practices, and what are successful relations?"

A complete critical posthumanist ethics still needs to be formulated. So at least at this point there is still work to be done.

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Postmodern Theory of Law

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Introduction

Postmodern theory of law is an umbrella term. It comprises various theoretical and empirical schools of thought that are defined by (1) an attempt to see the law in its social context, namely, not merely as positivist norms that come through the usual annals of legal decision-making (whether national, regional, international, supranational, etc.) but also as norms and behaviors that are produced in social interaction; (2) a tendency seriously to engage with interdisciplinarity, and work with the theoretical heritage of continental philosophy, such as post-Marxism, deconstruction, phenomenology, psychoanalysis, literary theory, theories of embodiment and spatiality, art theory and aesthetics, and more explicitly political legal strands, such as feminist legal theory, ecology and law, law and economics, postcolonialism, law and race, third world approaches to international law (TWAIL), queer legal theory, law and popular culture, and so on; and (3) a strong critique against current neoliberal political and legal regimes and also strands of legal theory that are

either supportive or silently complicit with the above regimes.

Postmodern theory of law is arguably a demanding branch of legal theory because of a paradox: on the one hand, it is highly political and embedded in the daily struggles of social groups; on the other hand, it is often expressed in theoretically complex terms. These terms are not habitually encountered in other legal theory strands and may require a concerted effort on behalf of the reader. The main reason for this is the desire of the theory to unveil legal injustices especially among the more disadvantaged social groups. In order to do this, the theory needs to revisit, criticize, indeed often attack, and finally rebuild the social structures that perpetuate such injustices. Such rebuilding typically requires a new language, indeed a new vocabulary that would have the potential to emancipate and empower the socially disadvantaged without patronizing them. A discussion in case is the one taking place in postmodern legal theory on human rights and their potential for critical emancipation. New vocabulary has been forged in order to work with the legal tools of human rights in a critical yet hopeful way (Douzinas 2000).

Origins

The term *postmodern* emerged in legal thought in the late 1980s to early 1990s, as a direct outcome of the emancipatory struggles of earlier decades that revolved around race, gender, sexuality, and socioeconomic struggles. At the time, critical legal studies (CLS) was already an established movement in North America, whereas what has come to be known as the "Brit Crits," namely, the British strand of critical legal thought, was still assembling itself. The main difference between the two consisted in the fact that the North American movement was much more hands-on politically (and in that sense, much more of an actual *movement*), whereas the British counterpart's politics were more embedded in philosophical thought, especially of the European/Continental tradition. This difference, however, was only a matter of emphasis: they were both political and philosophically aware. While the CLS movement was slowly coming to its peak, the Brit Crits moved headlong into postmodernity – if anything, at least on matters of terminology. Its presence was solidified with the 1991 publication of *Postmodern Jurisprudence: the Law of Text in the Texts of law* (Douzinas et al. 1991). The book's main point was an urge for the law to move from abstract and universal values, to a focus on the particular, the local and the plural. The tool for this move was a new understanding of the way the law can be read, written, and spoken: not just as a dry command but as an open story, filled with context, history, and humanity. Postmodern legal thought was urging us to read the whole world as a text, with imposed grammatical structures that forced us into thinking and being in a particular way. This was the moment of Jacques Derrida's *deconstruction*, where every text was peeled and each word revealed infinite layers of signification, hitherto invisible (Derrida 1976). This showed how the law was not only what it was said in the letter of the law but perhaps most significantly its omissions, absences, and dissimulations. It is not a coincidence that postmodern jurisprudence has been much more successful in common law traditions, where both the narrative of court decisions and the law's general reliance on case law prepared a fecund ground for a more narrative legal genre – as opposed to the Roman law traditions where court decisions are expressed in a way that is readily given to abstraction and generalization.

In the 2000s, the North American legal theorists of the old CLS tradition reemerged as *law and humanities*, a name now also used in Australasia to characterize a similar tradition. Law and humanities is characterized by strong postcolonial analysis and can be considered to be part of the broad umbrella of postmodern legal theory.

Text and Context

The emphatically textual emphasis in law was complemented by the emergence of *law and literature studies* (or law *of* literature, or law *in*

literature, depending on the emphasis of the works: White 1973; see subsequently Aristodemou 2000), which relied on parallel readings between law and literature, often influenced by deconstruction but also other strands of thinking such as Maurice Blanchot's (1982) literary theory, and Frederic Jameson's (1991) distinctly postmodern, fragmented readings of literature.

Another textual strand is *law and psychoanalysis*, namely, the psychoanalytic reading of law (Goodrich 1995). This tended to be Freudian or Lacanian psychoanalysis, and often assumed that the law was the analyzant, lying on the couch of the legal psychoanalyst and bringing to her the dreams, desires, and fears that characterized his works. The law is often understood psychoanalytically as the father, whose socially inscribed Law (often also theologically understood as Divine law) demands blind obedience (Goodrich and Carlson 1998). Such narratives, however, whether literary or psychoanalytical, are never just text in the standard understanding of positive law as text. They were (and still are) often *performed*, whether as actual performances, thus revisiting the theatricality of law but from a critical perspective, or performed by the texts themselves: a legal text that was also a work of fiction, for example, or a legal theory text that psychoanalyzed itself.

According to Derridean deconstruction, the whole world is a text. This means that legal symbols and images can also be read as part of the textual turn of legal theory. The statue of *Iustitia*, for example, is a well-debated symbol of the law, and its signification has ranged from issues of violence of the law and justice in the form of the sword, to readings of emancipated justice and to finally those of a woman typically oppressed by male-centered law (Resnik 2002). By undertaking forays into art theory, architecture, history of art, and so on, these analyses push the interdisciplinary nature of postmodern legal theory even further (Ben-Dor 2011). Such theoretical imports render even more obvious how the law is not just the text of a statute or a court decision but a whole system of symbols whose hierarchy of aesthetic values can perpetuate the predominance of white, middle-class, male-centered, Northern-hemisphere life choices and, therefore, legal choices as well.

These issues have given rise to another strong current in postmodern legal thought: the ethical. Ethics, at least at the first manifestations of the term, referred to the thought of Emmanuel Levinas and his idea that the Other (the guest, the stranger, the refugee, the minority) is always prior to us (Stone 2016). This required not only a full acceptance of the intimate connection between law and morality but also a radical understanding of the role of justice.

What Matters

The term *postmodern* proposes a specific timeline: that we are already *past* modernity. Bruno Latour, however, the French influential philosopher, has famously proclaimed in his homonymous book (1993) that *We Have Never Been Modern*. To be modern for Latour is to know when to keep things pure and separate from each other (such as, say, law from morality) and when to allow things to merge and become hybrids. This mode of rational, rather than emotional or even irrational, separation is the cudgel of modernity.

If modernity is all about rational distinctions, postmodernity is all about the chaos that comes when we realize that what we thought of as rational distinctions were in fact empty conventions, noncausal connections, or even thinly veiled prejudices. The judge's moral preferences can never really be kept away from the law (and postmodern legal thought teaches us that there are always plural moralities, rather than one, neutral and overarching). So, even if we cannot quite achieve this, we should at least pretend that we've achieved it. The law cannot afford to show its emotional, irrational, non-neutral side.

Niklas Luhmann, the German sociologist who has been influential in strands of postmodern legal thought, has offered a version of legal modernity which, however, is distinctly postmodern. What *appears* to be a rationally determined legal system whose decisions are taken in strict causal order is actually a system beyond individual or even collective human control, whose decisions are made

according to the strict internal logic of systemic survival (Luhmann 2004). The law, just as any other system, wants to carry on existing "autopoiesis." This is the only thing that guides the law, according to this sobering view.

Such conceptualizations propelled the law well beyond the textual and even the contextual and toward yet unchartered territories that have to do with technology, biology, geography, physics (and often quantum at that), and so on. Postmodern legal thought, in this most recent iteration, has moved from the textual (without abandoning it but trying to reimagine it) into the material, which is largely understood as spatial and embodied. The engagement with the works of Michel Foucault has given rise to the biopolitical strand of the postmodern legal thought that shows how our bodies are disciplined by the law through its institutions of prisons, courts, administration, and so on (Fitzpatrick and Golder 2009). Legal geography has proclaimed that law and geographical space are indivisible and cannot be considered in isolation. Our spaces and our bodies are no longer areas of free will and freedom of choice but tools in the society of surveillance and control (Philippopoulos-Mihalopoulos 2014).

It is not all apocalyptic. Thinkers like Latour, along authors like Rosi Braidotti (2013) and Jane Bennett (2010), have encouraged legal scholars to invent new and exciting ways of reimaging the subject of law. Thus, humans are no longer what were thought to be following the European Enlightenment, namely, the rational, indeed, modern Man, but a *posthuman* hybrid that is mediated by technology, affects, other animate and inanimate bodies, and the planet as a whole. Following the work of Spinoza, Nietzsche, and Gilles Deleuze, ethics are now understood as *always of a particular encounter and never universal*. This opens up new juridical spaces of research, such as AI and the law, animality and the law, atmospherics of control and biometrics, and new interdisciplinary collaborations with anthropology, ethnography, science and technology studies, and so on.

Out of an array of legal schools of thought, only postmodern legal theory has so far entered the epoch of the Anthropocene, namely, the geological epoch that acknowledges that human presence has altered the geological strata of the planet. These new bedfellows demand of the law a repositioning of human, collective and individual, responsibility toward the planet. This is a time of global financial, geopolitical, religious, and ecological crises, and it has largely fallen on the shoulders of postmodern legal theory to think about the legal repercussions of such crises.

The umbrella of postmodern legal thought is, however, getting a little tattered. The term *postmodern* is not used as widely anymore. Faithful to its credo of the particular, plural, and fragmented, the postmodern legal thought is more comfortable positioning itself outside strict time linearity and calling itself variously critical legal thinking (appropriately represented by the blog with the same name and the UK journal *Law and Critique*), law and humanities (represented by the US journal *Law, Culture and the Humanities*), critical sociolegal research, new materialist legal research, or, even quite simply, law and theory.

Conclusion

The term 'postmodern' has allowed for a host of other terms, variously representing currents of thought, positions and even ideologies, to emerge and indeed to even supersede the original term. Initially thought of as temporal and historical passage from modernity to the stage after ('post') modernity, the term 'postmodern' in terms of legal thought has now blossomed into critical legal thought, critical legal studies, law and humanities, critical sociolegal studies, and other denominations, and vigorously embracing such turns of the law, as the linguistic turn, the corporeal turn, the spatial turn, the material turn, and so on. We are standing before a precipice: we know that modernity, if it ever existed (as Latour questions), with its supposed symmetry, structure, grand narratives and dialectics of rationality and utilitarianism, has collapsed. Modernity has left in its trail, not a solid movement, a new era or a new collective way of thinking, but merely a gesture towards the future, a possibility for a 'post-' that

has sadly never quite materialized. But in its stead, we witness the proliferation of a myriad of rich, variegated, politically-aware and theoretically-adventurous other movements that attempt to grapple with an equally variegated contemporary reality of vast inequalities across geographies and bodies, posthuman considerations that demand the input of other disciplines, a proliferation of fake news and a demotion of the value of truth, and a word that is at ease with its own self-destruction through human-induced climate change, nuclear weapons and entrenched financial crises.

Cross-References

- ▶ Anthropology of Law
- ▶ Authority of Law
- ▶ Bioethics: Experimental Approaches
- ▶ Cosmopolitanism
- ▶ Critical Theory and International Law
- ▶ Deconstructionism
- ▶ Governmentality and Law
- ▶ Legisprudence
- ▶ Multiculturalism
- ▶ Neo-systems Theory and Jurisprudence
- ▶ Neuroscience and Law
- ▶ Ontology of Law
- ▶ Phenomenology of Law
- ▶ Refugee
- ▶ Rule of Recognition and Constitution

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Postpositivist Legal Theory

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P

Introduction

The positivist tradition of the twentieth century, the tradition that begins with Hans Kelsen, has carried out an immense body of analytical work on law; analytical work that has placed legal theory in a very different situation from the one it was in before Kelsen. Fundamental concepts concerning the structure and dynamics of legal systems have received so much clarification from that tradition that ignoring its contribution is simply equivalent to ignoring the most basic aspects of contemporary legal theory.

But it also seems that, in order to be fruitful, such conceptual clarifications must be inserted in the framework of a conception of law, which is different from that of the positivist tradition: that is, in a conception of law that, unlike what

happens with the positivist conception, allows jurists to operate in a meaningful way within the framework of the legal systems of the current constitutional states (Ruiz-Manero 2014).

It is now usual to distinguish between three varieties of legal positivism, each of which supports a distinctive way of understanding the thesis, common to all positivist currents, of the conceptual separation between law and morality. According to exclusionary legal positivism, the criteria of legal validity can never include moral considerations; the inclusive variety affirms contrariwise that criteria of validity do not necessarily include moral considerations; the normative variety, finally, emphasizes that criteria of validity should never include considerations of that kind (Waluchow 1994; Campbell 1996; Bayón 2002; Ródenas 2003).

In what follows, first, I will try to show how the legal theories belonging to the positivist tradition, in its strong or exclusive variety, present insurmountable deficits when it comes to accounting for capital features of today's legal systems; secondly, I will try to outline the elements that a new ("postpositivist") conception of law should integrate to overcome such deficits.

(a) The tradition of strong or exclusive positivism has good arguments in favor of a legal system that is composed centrally by rules endowed with semantic autonomy, that is, by rules that correlate generic cases, configured by sets of descriptive properties, with normative solutions, understood as the deontic qualification of actions, which are also configured descriptively (e.g., "Passengers having luggage ought not to leave any piece of it unattended at any time"). When applicable, such rules involve that the costs of the deliberation that would otherwise be necessary to build the basis of the decisions regarding individual cases can be avoided; such a foundation being predisposed by the rules selves to the benefit of the decision-maker. And the fact that the basis of the decision preexists to the decision of the individual case and that such a foundation is provided by the legislator and is not the output of a lawmaking by the judge is something like the perfect realization of the ideal we (usually) share about the proper distribution of the law-making power. There are, then, very strong reasons – which this line of the positivist tradition makes very clear – in favor of the predominant role of rules with semantic autonomy in legal regulation. And, what is implied in the above, there are also very strong reasons for legal norms to avoid referring to moral guidelines when characterizing both the cases to which they apply and the model of conduct they prescribe. What happens, however, is that the reasons given by strong positivism are certainly powerful, but not absolute. They are powerful reasons, but also prima facie reasons (or, for those who prefer it, pro tanto reasons). This means that there are reasons to be weighed with other reasons, which also exist, that push in the opposite direction: that is, in favor of the presence in law not only of rules endowed with semantic autonomy (and to be interpreted literally), but also of explicitly formulated principles that directly express the underlying reasons for the rules (Schauer 1991), values, and purposes that they seek to preserve or promote – values and purposes many of which, although not all, have a moral nature and, in any case, have to be morally justified. One of the main reasons for the presence of provisions that express such principles is constituted, to put it in Hart's (1997) own words, by the relative ignorance about future events, of the properties and combinations of properties that may show up, a relative ignorance that affects the legislator, as it does to any human being or to any set of human beings. This relative ignorance about future events causes the impossibility, for the legislator, to anticipate all possible combinations of properties that future cases may present and be relevant to the law. And this translates, inevitably, into the well-known problems of the possible under-inclusion and supra- or over-inclusion that the rules may present in relation to their underlying reasons: that is to say, in relation to the values and purposes that justify their enactment and the maintaining of their validity. It may happen that the rules do *not* include cases that, in the light of their justifying values and purposes, they should include and, at the same time, that they do include cases that, by the same token, they should *not* include.

In fact, all developed legal systems contain mechanisms, such as analogy, distinguishing or

atypical forms of illicit behaviors (abuse of a right, fraus legis, or misuse of powers), for dealing with these mismatches between rules and their underlying reasons, which make it possible avoiding the application of rules when such application would bring about effects that are considered intolerable from the standpoint of the relevant values (Atienza and Ruiz-Manero 1996).

A legal system composed exclusively of rules endowed with semantic autonomy, which does not contain or take into account the principles that specify the values and purposes pursued by the rules, would appear, then, as a set of disconnected mandates, which would not display any coherence from the perspective of values or purposes. Furthermore, in such a legal system, judges and jurists would lack instruments by means of which justifying the resolution of those cases in relation to which the rules of the system turn out to present antinomies, gaps, or problems of indeterminacy. As any system inevitably has to deal with the emergence of cases in relation to which the rules of the system present logical or semantic deficiencies of these sorts, a system composed exclusively of rules with semantic autonomy would lead us, faced with such cases, either to paralysis or to its unmotivated, that is, arbitrary, resolution (Ruiz-Manero 2014).

It must be noticed, however, that neither would it be acceptable in any way a legal system that would be composed exclusively of principles – and indeed there does not seem to be any competent jurist who advocates it. A system made only of principles would not offer the reduction of the complexity in decision-making processes that constitutes one of the main advantages of having legal systems as we know them. An exclusively principial system would make the decisions more difficult to predict and multiply the costs of these decisions. In fact, it could not avoid the need to undertake a deliberative process, in relation to every case and in relation to each of its elements: that is to say, it would imply the renunciation of what we understand to be one of the basic functions of the legislative bodies, namely, providing the applying bodies with predisposed solutions for generic cases in which such bodies can subsume the individual cases they have to adjudicate.

Therefore, we find that all legal systems that have reached a minimum level of development are mixed systems, made of rules and principles, although the relative importance of the one or the other ingredient varies from one system to another. To give an obvious example, the legal systems of the current constitutional states are, of course, much more principial than the French legal system was in the phase following the promulgation of the *Code Napoléon*.

The explanation for that is that reasons in favor of principles are increased in the case of the normative, rigid constitutional texts claiming supremacy that preside over legal systems like ours today. Indeed, a Constitution that is *normative* (i.e., one that does not limit itself to instituting and establishing the competences of the superior organs of the state, but also contains several regulative norms that impose limits on the inferior normative production, and, in general, on the action of public powers), that is *rigid* (that is, that requires burdensome conditions for its reform), and that *guarantees its supremacy* (through a jurisdictional control mechanism of constitutionality), would be directly amenable to the countermajoritarian objection if it basically articulated its normative-regulatory dimension through rules. For rules are mechanisms designed to exclude deliberation, which here would mean excluding all the generations following to the constituent generation from any deliberation regarding the most important normative contents of the system; the results of the deliberations of the constituent assembly would constitute for the following generations, to quote the usual way of saying, a kind of "tyranny of the dead over the living." Principles, on the contrary, cannot, nor do they claim to, exclude deliberation, for the following two reasons. First, because they do not specify, when there is more than one concurrent principle, which of them should prevail; second, because they tend to characterize the course of action they order through strong value-laden concepts – such as freedom, equality, honor, personal privacy, nondiscrimination – without specifying which descriptive properties constitute conditions

for the application of such value-laden concepts. Specifying such descriptive properties, as well as specifying in which combination of circumstances one or the other of two apparently concurring principles prevails, can only be carried out through deliberation.

Two elements contribute to this keeping open the deliberative process. The first one is the above-mentioned presence of principles (in a strict sense) in constitutional texts; the second one is the presence in those same texts of those standards we call policies, which establish the obligation to pursue certain ends (such as full employment, economic stability, protection of the environment or historical-artistic heritage, making decent and adequate housing available to all) without specifying how such ends are connected to each other and what courses of action can lead more effectively to achieve them. Specifying such connection and such courses of action, in changing circumstances over the time, is something that can also only be carried out by deliberation. Principles and policies are, therefore, standards intended, not to exclude deliberation, but to operate as ingredients in the deliberation process. In this way, the fact that the constitutional text builds its regulatory dimension basically through principles and policies is the best possible compromise between two demands, in undoubted tension with each other, to which we understand a constitution must respond: first, that the constitution places above ordinary political decisions those shared values and goals that integrate the basic consensus of the political community; second, that the constitution does not take away from democratic politics the possibility of giving the answer that at every moment appears as deliberately better to all those issues that we think are inevitably controversial (Ruiz-Manero 2014).

Now, norms that are not mechanisms designed to exclude deliberation, but, rather, shared grounds and ingredients for it, are difficult to fit in the strong positivist tradition of the last century. It does not mean that recognizing these norms as such is strictly incompatible with the positivist thesis, but only that, on the one hand, the theory (ies) of norms elaborated by the positivist tradition from Kelsen (1941) to Bulygin (2006), Raz (2009), or Ferrajoli (Ferrajoli and Ruiz-Manero 2011) (starting from the one who initiates the contemporaneity in that tradition and ending with three of the most qualified current representatives of the same) tends to see norms exclusively as sentences that correlate descriptively characterized generic cases, or conditions of application, with the deontic modalization of an action that is also characterized descriptively. And, on the other hand, these same positivist theories of norms tend to advocate that the law be integrally composed, in its regulatory dimension, by norms that respond to that model, that is, to the model of the rules with semantic autonomy – or, if we prefer to see it from the perspective of the working of norms in the practical reasoning of its addressees, to the model of "protected reasons" or "executive instructions" (to quote Joseph Raz's terminology). In this way, the positivist tradition tends to offer an impoverished view, reduced and to advocate, at the same time, the said impoverishment as a model for the development of law. The richness of types of regulatory legal norms present in the systems of today's constitutional states (among which can be distinguished rules with semantic autonomy, rules without semantic autonomy, principles, policies, as well as mixed norms or norms located in a penumbra area between some of these types) is, then, difficult to accommodate, both from a conceptual and a prescriptive standpoint, within the positivist tradition.

(b) Another feature of the constitutions of current constitutional states gives raise to even greater difficulties of accommodation within the strong positivism tradition. These constitutions present some of their most important principles not just as a result of an act of enactment (or prescribing) by the constituent, but as normative contents whose validity preexists to the constituent body; as normative contents that the constituent body has legitimately no choice but to "recognize," as, for example, the formula in the Spanish constitution repeatedly used in relation to very diverse fundamental rights. For if there is a view that characterizes the strong positivist tradition, this is the idea that all regulative legal norms are no more than directives of conduct that result

from acts of prescribing. The fact that the constituent body uses the language of the "recognition" of normative contents whose validity preexists to it, and that the constituent body itself cannot legitimately modify them by means of acts of authority, cannot be seen, from the point of view of a conception of norms framed in that positivist tradition, but as a rhetorical extravagance of that same constituent body, which should not be taken too seriously. At this point, paradoxically, strong positivism should dismiss as irrelevant certain manifestations of the normative authority – the constituent body – to unravel the meaning and scope of the provisions issued by that same normative authority. And to take such statements seriously, since they imply that the validity of certain rules, which are basically constitutional, does not depend on whether they have been issued by any normative authority, but, prior to coming into existence of any authority, on the correctness of its content, is incompatible with central theses of the positivist tradition. According to such theses, the existence of legal rules depends only on whether they have been issued by a competent normative authority, in accordance with the rules of a system that is as a whole effective. In this way, if it is accepted – following the constituent body – that the legal existence of some legal norms does not derive from their source, but from the correctness of their content, the two central theses of the strong positivist conception should be discarded: namely, the thesis of social sources and the thesis of the conceptual separation between law and morality. That is to say, what the law says about itself is incompatible with the central theses of the positivist conception regarding it.

Conclusions

If we were to summarize in a few points (e.g., four) the features that a theory of law should have to be able to operate meaningfully within the framework of the legal systems corresponding to the current constitutional states, we would observe that these traits imply *rectifications of elements which are common to the theories of law connected to strong or exclusive positivism.*

The first rectification, as already mentioned, which runs contrary to the reductionism which is characteristic of the positivist tradition, requires to be aware of the diversity of types of regulatory legal norms, as regards, both to their diverse structure and to their different role in practical reasoning (Atienza and Ruiz-Manero 1996).

The second rectification, also mentioned before, which runs contrary to the exclusively authoritative view of the law which is characteristic of positivism, requires drawing the distinction between norms resulting from acts of authority and norms resulting from the recognition of normative contents whose validity is understood prior to acts of authority.

The third rectification, which runs contrary to the vision of law exclusively in terms of behavioral guidance, typical of the positivist tradition, requires drawing the distinction between the function of guidance of conduct and the justificatory aspect of legal norms and granting a certain priority to the latter.

The fourth rectification, which runs to the contrary sharp distinction, which we find in the positivist tradition, between acts of application of norms and acts resulting from an exercise of discretion of the applicator requires considering that legal reasoning is not oriented to *discovering* solutions (and exercise free discretion whenever such a discovery turns out to be impossible), but, rather, to *justifying* solutions. The justification of solutions, in turn, does not always derive from subsuming the case into a predisposed rule, but, in certain cases, may require that, for reasons derived from the law itself, the predisposed rules be left out, and the solution be based on rules not previously predisposed.

Cross-References

- ▶ Constitutionalism
- ▶ Hart, Herbert Lionel Adolphus
- ▶ Kelsen, Hans
- ▶ Legal Positivism: Exclusive
- ▶ Legal Positivism: Inclusive

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Pound, Roscoe

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Introduction

Roscoe Pound (1870–1964) was the most distinguished and influential American legal scholar of the first half of the twentieth century. He served as Dean of the Harvard Law School for 20 years, from 1916 to 1936. During his tenure as Dean, he built a world-class faculty and programs, transforming Harvard into the best law school in the country. Pound was one of the intellectual leaders of the legal realism school of thought and generally advocated for a more progressive approach to jurisprudence. Yet he also was a staunch critic of Franklin Delano Roosevelt's New Deal, in particular its reliance on administrative bureaucracies to implement sweeping political reforms. As he increasingly criticized the program of modern American progressivism, Pound increasingly found himself under attack by the same community of legal scholarship he earlier influenced so greatly.

Early Life and Work

Born in Nebraska, Pound received degrees in botany from the University of Nebraska, where he studied under Professor Charles Bessey, an early Darwinian. Pound earned the University's first PhD in botany in 1898 and co-authored a significant book on botany in Nebraska the same year. He was perhaps the best of many great botanists to come from the University of Nebraska during this period. (A rare lichen he discovered is still named Roscopoundia.)

Pound then studied law at Harvard Law School for 1 year but never received a degree from the institution where he would eventually serve as Dean. Instead of completing his legal studies at Harvard, Pound returned to Nebraska because of his father's declining health. He taught law at the University of Nebraska from 1890 to 1903, where he utilized his background in science and botany to advance the philosophy of law. He helped form the Nebraska Bar Association in 1900 and served in several government positions in Nebraska during his tenure there, including Justice of the Supreme Court of Nebraska. He was appointed Dean of the Nebraska Law School in 1903 but eventually moved to Northwestern Law School where he taught from 1907 to 1909. From there he went to the University of Chicago to teach for a

year, before moving to Harvard Law School in 1910.

Pound's years in Nebraska were critical to his development as a legal scholar. It was at this time that Pound sought to integrate the principles of botany and natural science into the American philosophy of law.

Advocacy for Sociological Jurisprudence

Pound is best known today as one of the founders of legal realism – or what Pound called "sociological jurisprudence." In a series of canonical articles published between 1907 and 1912, including a three-part article on "The Scope and Purpose of Sociological Jurisprudence" in the *Harvard Law Review*, Pound criticized the traditional American natural-law and common-law approaches to jurisprudence. They were, he claimed, overly rigid, deriving conclusions as deductions from first principles based on natural law and individual rights.

This "mechanical jurisprudence," Pound claimed in a *Columbia Law Review* article bearing the title, should be abandoned for an approach that allows circumstances to shape the principles needed to reach good results for society as a whole. Pound called for a new system of law that would place "the human factor in the central place and relegate logic to its true position as an instrument" for social justice (Pound 1908, 609).

Pound's "sociological jurisprudence," as opposed to mechanical jurisprudence, would decide particular cases on the basis of their effects on society as a whole. "With the rise and growth of political, economic, and sociological science," he argued in 1907, "the time is now ripe for a new tendency, and that tendency, which I have ventured heretofore to style the sociological tendency, is already well-marked in Continental Europe" (Pound 1907a, 609).

Therefore, Pound insisted upon a more progressive understanding of law than most American jurists held at the turn of the twentieth century. Instead of using the law to uphold individual rights and enforce limitations on government, Pound thought that law should advance social purposes, relying more on sociology and aiming at producing positive results for society as a whole as opposed to deducing conclusions logically from first principles. Pound's chief legacy as a legal scholar was his successful call for lawyers and judges to discard a rigid, deductive framework for adjudicating legal issues in favor of a more flexible, sociological jurisprudence. This contribution was the primary reason for Pound's notoriety as a legal scholar and his appointment as Dean of Harvard Law School.

Pound's early work was therefore dedicated to revising American conceptions of the rule of law. He saw this project as the chief means, and perhaps the only means, of preserving the integrity of the judicial branch. Pound worried that as judges increasingly applied outmoded legal principles, they would see their powers for resolving disputes transferred to executive tribunals.

Beginning as early as 1907, Pound worried that American law too inflexibly restrained governmental power and that a day of reckoning was coming for the judiciary. As he explained, "the paralysis of administration produced by our American exaggeration of the common law doctrine of supremacy of law has brought about a reaction" (Pound 1907b, 139). "We have actually traveled a long way from the notions of a generation ago as to the relation of courts and administration," and "powers which fifty years ago would have been held purely judicial and jealously guarded from executive exercise are now decided to be administrative only and are cheerfully conceded to boards and commissions" (Pound 1907b, 139).

It was against this tendency of increasing administrative power that Pound focused much of his work between 1907 and 1940, including his tenure as Dean of Harvard Law School. During this time, Pound became the chief critic of the emergence of the American administrative state.

Critic of "Administrative Absolutism"

At an early point in his career, Pound became obsessed with the problem of what he called executive justice and administrative absolutism. Because of his sympathy with the progressive

objectives being sought by modern administrative agencies, Pound admitted that the rise of executive justice was a response to a legitimate concern. That concern was the American obsession with the rule of law, an obsession that tied the hands of executive and administrative actors too tightly. Pound explained that "nothing is so characteristic of American public law of the nineteenth century as the completeness with which executive action is tied down by legal liability and judicial review" (Pound 1907b, 139). Consequently "judicial interference with administration. . .was an every-day spectacle. Almost every important measure of police or administration encountered an injunction" (Pound 1913, 2).

It was only natural that this overly legalistic approach to administration would produce frustration and calls for reform. The hamstringing of administration by lawyers and judges prompted reformers to advocate wholesale transfer of power from courts to administrative agencies. This was the rise of executive justice, which Pound defined as the "attempt to adjust the relations of individuals with each other and with the State summarily, according to notions of an executive officer for the time being as to what the public interest and a square deal demand, unencumbered by many rules" (Pound 1907b, 145). This was "the most conspicuous feature of our American law," Pound believed (Pound 1924, 325).

While Pound acknowledged the legitimate concerns that gave rise to executive justice, he argued that this approach and its administrative absolutism was a cure worse than the disease of inefficient administration. Many lawyers and judges agreed with Pound, and during the 1930s the American Bar Association (ABA) mounted a full-scale assault on the powers of administrative agencies. Pound was one of the leaders of this assault, and he was the author of the famous ABA "Report of the Special Committee on Administrative Law" in 1938. Pound's report shocked many legal scholars, two of whom singled out this report and Pound's influence as a major factor in legal resistance to Franklin Roosevelt's New Deal (Davis 1942; Jaffe 1942).

As Pound summarized in that report, "the pressure for administrative absolutism goes on and the [legal] profession must be vigilant to resist it" (Pound 1938, 346). He called the modern administrative process "administrative absolutism" many times in the report and likened it to "the proposition recently maintained by the jurists of Soviet Russia that in the socialist state there is no law but only one rule of law, that there are no laws – only administrative ordinances and orders" (Pound 1938, 343).

To solve the problem, Pound advocated a series of sweeping reforms to the administrative process, including greater judicial review of administrative orders, greater procedural constraints on agencies, and a return of many decisions to judicial rather than administrative tribunals. Many of Pound's proposals were incorporated into a bill conventionally known as the Walter-Logan Act, which the US Congress passed in 1939 but could not enact over Roosevelt's veto.

Eventually some of these reforms were included in the more moderate Administrative Procedure Act, which was passed in 1946. The Administrative Procedure Act remains one of the most significant pieces of legislation enacted in the twentieth century and still shapes the way administrative agencies make policy in America today. Thus Pound's chief public policy legacy was his contribution to the American debate over the legitimacy of administrative agencies during the 1930s and 1940s. Although Pound did not win adoption of all of his proposals during that debate, he was a powerful advocate for the views of lawyers and judges who sought to preserve a place for the rule of law in the face of administration's expansion.

Rejection of the "Service State"

Pound was roundly criticized by his contemporaries and continues to be criticized by scholars today for his attack on executive justice and administrative absolutism. Many scholars conclude that Pound was an opponent of the New Deal because he had abandoned his early

progressivism for a staunch conservatism (Wigdor 1974). Others suggest that Pound's concern with executive justice arose early in his career, alongside his call for a progressive, sociological jurisprudence, and so his rejection of the New Deal cannot be attributed to a conversion to conservatism (Postell 2012).

While scholars disagree as to whether Pound's objection to the New Deal was rooted in a conversion to conservatism, there is little doubt that Pound became increasingly conservative later in his life, particularly during the late 1940s and 1950s. At that time, Pound came to reject not only the growth of administrative power but also the growth of government as such. He wrote articles and books condemning the rise of the "service state" which seeks to solve citizens' problems for them rather than protecting them from injury and allowing them to pursue happiness privately (Pound 1958). In a series of lectures delivered at the University of Calcutta in 1948, Pound objected to what he called the "omnicompetent state." Such a state, he claimed, "indicates a path in the development of society wholly divergent from that which had been followed in the West," which he called "the authoritarian path. The service state in its development seems to threaten to take this path" (Pound 1958, 351). A government which tried to solve every social ill would necessitate, Pound argued, a large bureaucracy "of supermen administrators" not bound by the rule of law or any limits on power. This would establish an authoritarian society rather than a free society.

Conclusion

Although he was perhaps the most influential and most cited legal theorist of the first half of the twentieth century, Roscoe Pound has not achieved the fame that has accompanied many of his contemporaries, such as Oliver Wendell Holmes and Louis Brandeis. Some of this is certainly due to the fact that Pound never served on the US Supreme Court but rather influenced and led the legal academy. But Pound's relative obscurity is also a result of his incredible body of work and the apparent contradictions in his thought.

Although Pound sought to reconcile his progressive tendencies, displayed most prominently in his advocacy for sociological jurisprudence, with his skepticism about the New Deal and administrative justice, both his contemporaries and today's scholars often conclude that Pound became more conservative as he aged. Nevertheless, a close reading of his many books and articles reveals a consistent theme: Pound's belief that the law can be updated to meet the demands of a new age, without turning to a pervasive administrative state.

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Pound, Roscoe: Sociological Jurisprudence

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Pound, Roscoe (1870–1964), American jurist and dean of Harvard Law School (1916–1936).

Sociological Jurisprudence

From the 1890s to the 1910s, Pound – in his formative years as a legal thinker – saw American judges repeatedly invalidate reformist labor legislation. The opinions stated that the Constitution's guarantees of "property" and "liberty of contract" were so fundamental to both parties of employment that legislative curtailment of those freedoms, however benevolent the purpose might be, was beyond the legitimate authority of the state. As one of the leading progressives of the time, Pound strenuously opposed these rulings. His learned criticism of the conservative judicial method developed into "sociological jurisprudence," his most well-known juristic idea.

Pound believed that adhering to outmoded concepts was nothing but a symptom of nineteenth century intellectual formalism, under which abstract notions tended to be regarded as philosophical absolutes. This approach, he felt, was theoretically unfit for a rational study of law in a country as rapidly industrializing and densely populated as the United States. His aversion to abstraction led him to endorse the emerging theory of "pragmatism" as the foundation of down-to-earth legal thinking.

Pound asserted the administration of justice should be judged by its practical effect on people's lives, not by doctrinal consistency with old precedent. He recommended jurisprudence become more "sociological," taking accurate account of the social reality to which law was applied. He wrote,

> [t]he sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than assumed first principles; for putting the human factor in the central place and relegating logic its true position as an instrument. (Pound 1908: 609–610)

The legacy of sociological jurisprudence can be seen in the "Brandeis brief," which cited socio-economic studies and data in addition to legal principles. It is named after one of Pound's friends, Louis D. Brandeis (1856–1941), an appellate advocate who later became a justice of the Supreme Court of the United States.

"Social Engineering": The Task of Law

The width and depth of Pound's knowledge of Western legal thoughts, as demonstrated in his *Jurisprudence* (Pound 1959) and the other works, was at the highest level of his generation. Through insightful analysis of laws and legal institutions, he masterfully distilled his concept of law, incorporating his pragmatist worldview.

According to Pound, law in the modern era was a "means" to be used in "social engineering". Legal precepts were put into concrete use by "social engineers" – lawyers and especially judges – to realize various social objectives. Full achievement of all the policy goals, however, was thought to be practically impossible, mainly due to opposing values and a scarcity of resources. The fundamental task of law was seen as maximizing the satisfaction of conflicting human wants and interests with minimal sacrifice.

Having lived amid the growing national economy as well as the social turmoil of two World Wars, Pound saw the essence of law as a secular instrument to facilitate "an adjustment of relations and ordering of conduct as will make the goods of existence, the means of satisfying human claims to have things and do things, go round as far as possible with least friction and waste" (Pound 1942: 65). As this remark shows, his view of the character of law was collectivist and utilitarian. He drew inspiration from two forerunners: Jeremy Bentham's positivist concept of legislation and

Rudolf von Jhering's instrumental conception of law.

While Pound's insight into the nature of law was mostly instrumentalist, he never fully subscribed to the thesis that a law belongs solely to the material dimension of "fact" or "is". Rather, he believed it could not be completely separated from an aspirational element of "value" or "ought". His position on this "fact-value" debate was thought to isolate him from the American "legal realism" movement in the 1930s. Nevertheless, Pound subscribed to much of the realist's functionalist jurisprudence, notably that of Karl Llewellyn. Later in his career, though, Pound put more emphasis upon a normative concept of justice, which he called "the ideal element in law."

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Poverty

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Introduction

Poverty is by far the greatest menace of humankind. It prevents billions from reaching their potential by depriving them of adequate nutrition, housing, education, leisure, and electricity; and it exposes its victims to other scourges, such as violence and disease, from which affluent people can far better protect themselves.

Scholarly work on poverty involves five components, which will structure this entry: the *definition* of poverty; its *description* in both quantitative and qualitative terms; the *causal explanation* of its incidence, depth, distribution, and trends; the *moral assessment* of poverty with ascriptions of normative responsibility; and the *eradication* of poverty.

Discussing such work, we should be aware that poverty is an eminently practical subject. By affecting how people think about poverty, one can influence their conduct and hence legislation, policies, and social practices. Accordingly, much about poverty is contested, as people – consciously or otherwise – adapt their understandings of poverty in the service of gaining political support for, or discrediting, some political goal, group, or ideology. Such biases and controversies are wide-ranging, involving all five of the mentioned components.

It may be tempting to seek an unbiased, neutral, and objective analysis of poverty. But such an analysis is a mirage. While there may be scientifically justifiable definitions of gold and energy, for example, the same does not hold for poverty. How we define it depends on the specific purpose for which we intend to use this definition and on the context in which it is to be deployed; and even when purpose and context are given, there are still various plausible options. The alternative to ideology and manipulation here is not some immaculate objectivity, but transparency with open discussion.

The five components are interdependent. Definition is linked to assessment: if poverty is morally regrettable, then it should be defined to exclude people who could easily raise their low level of expenditure but prefer a frugal lifestyle. Description presupposes at least a rough working definition to identify what is to be described; their detailed description – including interviews and consultations with poor people – can then lead to a sharper, richer definition or *criterion*. Explanation presupposes good descriptions of the phenomena to be explained (*explananda*) as well as of the phenomena invoked to explain them (*explanantes*). Assessment is linked to explanation insofar as causal involvement is presupposed in attributions of moral responsibility. Eradication strategies are linked to explanations insofar as they must be causally effective in modifying factors that produce or perpetuate poverty. Insofar as they rely on moral arguments, such strategies are

also linked to moral assessment, as when they make special demands on those who are contributing to, or benefiting from, poverty-producing wrongs or injustices.

Defining Poverty

Poverty may be defined as a *trait of persons and groups who are poor insofar as they lack secure access to essentials for a worthwhile life*, to nutrition, shelter, clean air and water, education, health care, leisure, and freedom from violence. This definition suggests that freedom from poverty is *satiable* (fully attainable), *scalar* (a matter of degree), and *multidimensional* (dependent on several essentials). At least the first two suggestions accord with common sense: some people are poorer than others, and some are not poor at all.

Whether persons or groups are poor and, if so, how poor they are depend on what goods are at their disposal and on their needs and circumstances. In the former respect, what matters are the *quality* and *acceptability* of goods in each dimension, their *quantity*, and the *ease* and *security* of access to them. In addition, a *holistic assessment across the various dimensions* is necessary to reveal to what extent access in any one dimension comes at the cost of access in others and to reveal overlaps among those disadvantaged in the various dimensions.

In the latter respect, the poverty status of persons may depend on their *natural constitution and endowments*, including size, gender, and metabolism, on their *necessary work*, which co-determines what food and clothing they need to make their living, on their *natural environment*, which may generate special needs for shelter and clothing, and on their *social environment*, which may impose certain prerequisites for social acceptance (Smith 1976, 399; Sen 1981, 18–20).

This last idea, that persons can be poor through lack of access to certain prerequisites for social acceptance, goes beyond the more common notion of *relative poverty* – being poorer than most others in one's society or community – by adding the further element of stigmatization or social exclusion. Without this added element, relative poverty isn't poverty at all by our basic definition. This makes sense when we conceive "poverty" as morally regrettable: relative poverty – or inequality – need not be morally regrettable, as when even a society's least affluent can lead highly worthwhile lives.

There are various respects in which genuine poverty is morally regrettable, providing moral reasons for its reduction and for preferring a more poverty-avoiding design of national societies and the international order. By definition, poverty impedes persons' ability to lead a worthwhile life. Inadequacy of nutrition, shelter, clothing, hygiene, or medical care degrades and endangers the health and functioning of poor people, as do social exclusion and stigmatization – reducing their ability to fend for themselves and to contribute to society. Such poverty may be claimed to be deserved in some cases, on account of improvidence or lack of effort. But even with such cases, there is reason to reduce their frequency, to avoid excessive penalization of the party at fault, and to avoid adverse effects on innocents – especially children, whose entire lives may be blighted by deprivations suffered during their early years. These reasons are strengthened insofar as poverty reduces poor persons' economic, social, cultural, and political contributions to society and humankind.

These thoughts suggest that relative poverty, although not morally regrettable as such, can nonetheless be relevant to the moral assessment of genuine poverty: as an aggravating factor. If two-thirds of some population are getting ever more affluent while the absolute poverty of the poorest third remains unchanged, then the increasing relative poverty of the poor does not make them any poorer but does make their persistent poverty morally ever more objectionable because ever more easily avoidable. Great socioeconomic inequality makes it highly likely that some agents – especially those in government – are not making the efforts they could and should make, at low cost, toward reducing poverty.

Promoted and administered by the World Bank, the most prominent definition classifies as poor all persons living in households whose per capita consumption expenditure, converted via

consumer price indexes and purchasing power parities, falls below some stipulated threshold, currently fixed as the purchasing power that USD 2.15 had in the USA in 2017 (2.15 international dollars). This definition incorporates six problematic elements.

- It disregards the quantity and intensity of labor required to afford the household's expenditures.
- It ignores how consumption and labor burdens are distributed within households, thereby assuming away what is widely true: that women and girls get less food and education (and often also contribute more labor) than men and boys within the same household.
- It weights the prices of goods and services in proportion to their share in aggregate household consumption expenditure, thereby ignoring the highly atypical consumption of the poor: a currency's purchasing power may remain constant when food prices rise 50% and air travel prices fall 50%; but this change greatly harms the poor who often spend over 80% of their incomes on food.
- It disregards poverty-relevant goods and ills that are not commodified, including public infrastructure, pollution, and crime.
- It disregards differential needs due to physical and mental constitution, profession, and natural and social environment.
- It sets an implausibly low poverty threshold – classifying as nonpoor persons living on USD 65 a month in the USA in 2017 – thereby massively understating the existing poverty problem.

Dissatisfaction with the World Bank's monetary definition of poverty contributed to the development of multidimensional metrics that incorporate outcome data, especially about persons' health and education status. In 1990, the UNDP began publishing poverty statistics based on the Human Development Index developed by Pakistani economist Mahbub ul Haq and Indian economist Amartya Sen. A crucial shortcoming of the HDI is that it assesses poverty in a society separately in each dimension, thereby discarding information about the extent to which the groups suffering poverty in each dimension overlap. This flaw is corrected by the Multidimensional Poverty Index, developed by Sabina Alkire and James Foster, which the UNDP introduced in 2010. The MPI fixes a threshold in each dimension of deprivation and then classifies as poor all those who fail to reach the threshold in some fixed minimum percentage of (weighted) dimensions. This approach produces only a binary result, classifying each person as either poor or nonpoor, thus discarding information about how far someone falls above or below a dimensional threshold or the minimum percentage of dimensions. This leads to paradoxical results as when those who are slightly deprived in one-third of the dimensions are classified as poor while those severely deprived in fewer dimensions are classified as nonpoor. The Individual Deprivation Measure seeks to overcome the flaws of HDI and MPI by producing a more fine-grained scale of individual poverty, based on distinguishing five levels within each of 15 indicators (Pogge and Wisor 2016).

All exercises in aggregation are at least somewhat arbitrary in the formulas and weights they employ to construct their unified scale. This has led some scholars to prefer a dashboard approach that eschews aggregation across dimensions into one measure of overall poverty. The reasons to shun aggregation are not, however, reasons to discard information about correlations: any serious study of poverty must pay attention to the extent to which various relevant shortfalls – in food, water, shelter, health care, education, and security – are concentrated in the same groups, as, of course, they typically are.

Describing Poverty

Thanks in part to the Millennium Development Goals (https://www.un.org/millenniumgoals) and especially the Sustainable Development Goals (https://sdgs.un.org/goals), we have a wealth of data about poverty: its incidence, depth, distribution, and evolution over time. Because many such data are gathered and processed by governmental organizations, they are typically biased toward

reporting less poverty and more favorable trends. Nonetheless, such data provide a rough picture of existing poverty.

Of the 8 billion people alive today:

- Well over 3 billion cannot afford a healthy diet (FAO 2022, 51).
- 2 billion lack access to essential medicines.
- 2.2 billion lack safe drinking water.
- 1.6 billion lack adequate shelter.
- 2 billion lack adequate sanitation.
- 940 million lack electricity.
- Over 750 million adults are illiterate.
- 160 million children (aged 5–17) do wage work outside their household – often under slavery-like and hazardous conditions: as soldiers, prostitutes, or domestic servants or in agriculture, construction, and textile or carpet production.

There is considerable overlap among the groups suffering these different deprivations; and most of the multidimensionally poor reside in Africa and South Asia, which also have the highest concentrations of deaths from poverty-related causes.

While the long-term trend in the number of people suffering severe poverty is clearly up – the entire world population numbered only 2.4 billion in 1945 – the percentage of people in severe poverty has generally declined since WW2. This favorable trend was however broken in recent years, as indicated by the prevalence of food insecurity which has been rising consistently from 21.2% in 2014 to 25.4% in 2019 (before COVID-19 and Ukraine) to 29.3% in 2021 (FAO 2022, 25). The prevalence of modern slavery is also on the rise, with 28 million subjected to forced labor and 22 million to forced marriage – a 25% increase over five years.

While numbers help us appreciate that over half the human population still suffer one or more severe deprivations, with progress stalling, the most authentic descriptions of poverty come from poor people, verbally or in other ways. Through such communications, we learn about common features of poverty and its myriad diverse manifestations. Only through such communications and encounters – and, more indirectly, through stories and novels – can we catch a glimpse of what it is like to be a scavenger in India, a child laborer in the Congo, a domestic servant in Brazil, an enslaved fisherman in Thailand, or a slum dweller in Nigeria. Through the vivid encounter with such lives, poverty becomes salient and commands reflective attention.

Explaining Poverty

Relying on household surveys from most countries, distinguished inequality researcher Branko Milanovic concludes "that 80% of your income can be explained by the two factors of your country of birth (60%) and your parents' income position (20%). The remaining 20% can be attributed to effort, luck or whatever else is the residual (gender, race)" (Milanovic 2019). Since people have no choice over their country of birth, their gender and race, their parents' income, and the good or bad luck they encounter, we can conclude from the data that only a small fraction, perhaps around 10%, of the global variability of income is explained by what individuals can actually control: their own effort. This conclusion may seem to be the end of the matter: by analyzing the relative importance of six relevant causal factors we have explained 100% of observed income variability.

But, really, this is where the interesting explanatory questions begin: why and how do those five unchosen personal characteristics exert such a heavy causal influence? It is a contingent fact that in our world the main cause of living in poverty is having been born into poverty. This is so because the poor live so very far below the average and lack the means to social mobility: adequate nutrition and health care, decent schools and study opportunities, and access to advanced social networks. Also highly relevant are tight legal restrictions on international migration by the poor as well as pervasive racism among more affluent populations. In turning to these facts, we move from micro-explanations of why particular people are mired in poverty to macro-explanations of the extent and distribution of poverty and its evolution over time.

The stubborn persistence of severe poverty is closely tied to inequality. While the global average income today is about 55 international dollars per person per day, 42% of humanity – over 3 billion people – are unable to afford a healthy diet whose national cost varies around 3.50 international dollars per day (FAO 2022, 51). This huge disparity between the poor and the average has been steadily rising. The global average income has roughly quintupled in real terms since 1941 – the year Roosevelt gave his famous Four Freedoms speech, envisioning a post-war order in which human beings everywhere would enjoy freedom from want. It is incredible, if not biologically impossible, that the incomes of the poorest 42% in 1941 were only one-fifth of what they are today.

Global inequality accumulated mostly in the colonial period, as tracked by the income ratio of the fifth of the world's people living in the richest countries and the fifth in the poorest countries. This ratio increased from 3 in 1820 to 7 in 1870, to 11 in 1913, to 30 in 1960, to 60 in 1990, to 74 in 1997 (UNDP 1999, 3). Since then, inequality has globalized with some formerly poor countries – including China and India – catching up but also becoming much more unequal internally. The poorest are still falling farther behind, but many of them now live in countries with broad and rapidly rising upper classes (https://wid.world/).

Extreme global inequality is crucial for understanding present poverty and its persistence. There is a mathematical link: if the poor get a small and ever-shrinking fraction of global income, they participate only marginally in increasing global prosperity. There is a socioeconomic link: when the poor have grossly inferior nutrition, health care, education, and social connections, they cannot effectively compete for higher social positions. And there is a political link: when the poor lack time, knowledge, and resources to fend for their interests in the political domain, their needs are disregarded in decisions about structural designs and policies. Money can buy influence in politics, and today any one of a few thousand billionaires and major corporations can outspend millions of poor people. Moreover, superrich individuals and major corporations have the incentives and opportunities to acquire the expertise and connections needed for effective political deployment of resources, while poor people must invest great efforts to even get started through coordination on a joint plan of political action. As a result of these disparities, political decisions, on the national and supranational levels, tend to reflect the interests of the affluent, thereby further increasing economic, social, and political inequality.

Examples abound. By polluting the planet with their emissions, affluent populations impose great harms especially on vulnerable people in the tropical regions: unbearable heat, heavy air pollution, expanding tropical disease areas, more frequent and severe extreme weather events, sea level rise with groundwater salination, and increasing scarcity of food and water. International rules impose no obligation to pay for such damage. On the contrary, when poor countries pass laws to better protect their domestic environment, they are often required to compensate multinational corporations for disappointed profit expectations (Tienhaara et al. 2022).

The superrich bear an unfairly small share of tax burdens. This happens partly through their influence on the tax code – as when taxes on capital gains can be deferred indefinitely and then forgiven in full when the assets pass to heirs or when multinational corporations can shift profits to their lowest-taxed national subsidiaries. It also happens through concealment – as when fortunes are hidden away into that vast global network of tax havens, secrecy jurisdictions, letterbox companies, fake trusts, and anonymous accounts with its ever-ready army of shady lawyers, accountants, lobbyists, and financial advisors. This sophisticated network facilitates not only massive tax abuse but also crimes of many other kinds such as illegal trade in persons, drugs and weapons, international terrorism, democracy subversion, bribery, embezzlement, and the money laundering associated with all such activities.

International law entitles any person or group in effective control of a country – regardless of how it acquired and exercises its power – to confer internationally valid ownership rights in this

country's natural resources, to borrow in its name, and to import weapons. These international privileges make it easy to rob poor populations of their natural resources and greatly strengthen the incentives and opportunities for oppressive rule.

By requiring states to reward innovations with extensive and well-policed monopolies, the WTO's founding treaty ensures that innovators neglect the specific needs of the poor and price new technologies out of their reach.

Assessing Poverty

Extreme inequality in standards of living around the world suggests that most severe poverty today is avoidable with humanity's available economic, technological, and administrative capabilities. As severe poverty is also morally regrettable, this leads to the question of responsibility: are there agents at fault for existing severe poverty, agents who ought to change their conduct?

Consequentialists believe that agents should act for the best and hence impose losses on themselves when doing so brings greater gains to others. They envision a uniform metric (of utility or happiness, for instance) on which gains and losses can be compared and then rank one conduct option above another if its relative gains exceed its relative losses. From a consequentialist standpoint, it is morally grotesque that billionaires could without a noticeable decline in their standard of living – and yet fail to – save millions from severe poverty and premature deaths from poverty-related causes.

A consequentialist approach needs significant emendations to address decision-making under conditions of risk or uncertainty. This is especially important insofar as a decision's effects reverberate far into the future. Nonetheless, this additional complexity cannot really upset the consequentialist presumption that assets going from rich to poor generally bring net gains in social benefit.

Most non-consequentialist accounts of moral responsibility also accept that one ought to avert great harms if one can do so at little cost to oneself. But they depart from consequentialist accounts in various respects. One departure permits the agent to privilege her own interests in certain ways – perhaps by capping the "sacrifice" one is morally required to make at some maximum loss to the agent and/or some maximum loss/gain ratio. Caps of both kinds are suggested by Peter Singer (1972) and the effective altruism movement forming in his wake. Singer himself apparently regards such caps as merely strategic, believing that the correct morality is consequentialist but that affluent people typically act better in consequentialist terms if the sacrifice demanded of them is capped at, say, 10% of their disposable income.

Caps are naturally understood to use as baseline the option that best serves the agent's own interests. But this can seem inappropriate when this baseline option is morally problematic – a risk-free theft, for example. It seems inappropriate to count the agent's loss from passing up this theft as a "sacrifice."

Related paradoxes arise for uncapped consequentialism too. Is one really morally required to steal from poor people in ways that reduce poverty overall – by channeling the loot to someone (perhaps the thief) who needs it even more? To avoid such conclusions, another departure from consequentialism makes morally significant the distinction between what an agent actively brings about and what she merely allows to happen. If substantially more moral weight is attached to the former, then one can avoid some paradoxical conclusions: by committing the theft, one would actively aggravate the victim's poverty, whereas, by passing up the opportunity, one would merely leave unalleviated the poverty of the even poorer person whom the theft would have benefitted.

Another, more fundamental modification is to apply consequentialist morality not to conduct but to the structuring of human society. Under the heading of "social justice," such an approach was developed by political philosopher John Rawls (1971), who applies consequentialist reasoning to the basic structure of a national society, by which he means its most important and pervasive institutional arrangements. Poverty and other deprivations are to be avoided through a just design of society; and individuals' main

responsibility regarding poverty is then to promote and support such just design.

This Rawlsian approach is especially suited to the modern world where poverty results indirectly from the conduct of many agents who cannot possibly foresee how their conduct will impact poverty and other morally significant phenomena. It is far more promising for individuals collaboratively to structure their society so that it limits poverty as much as reasonably possible.

Rawls's approach might be broadened by recognizing that a society's incidence, distribution, depth, and trend of poverty is influenced not merely by its institutional arrangements, notably the structure of its economy and tax system, but also by its social and cultural customs (possibly including discrimination by race, sex, caste, religion), by its material infrastructure, and by its material environment as shaped and changed by how humans interact with it. While Rawls focuses on institutional arrangements, structural features of all four kinds are subject to political design, inviting the question how poverty would be different if some such feature were modified in certain specific and feasible ways. Such assessments are easiest and most reliable when focused on a single clearly specified parameter, such as the minimum wage or the reach of the electricity grid. Often, however, one must analyze several modifications together because their effects would interact.

Such broader, holistic reflection is further encouraged by the fact that poverty is not the only justice-relevant consideration. The ultimate goal must be to shape the entire ensemble of a society's structural features to realize as well as possible the aims of social justice, including poverty avoidance. Government and citizens share a moral responsibility to promote this end.

While Rawls's assessment of a society's institutional order is broadly consequentialist, he instructs citizens to comply with just institutional arrangements already established and to promote their improvement – rather than directly to promote the aims that guide the structuring of their society. For example, citizens are to maintain a just, poverty-avoiding design of their society's economy and to abide by its rules – rather than to steal from the rich to reduce poverty even farther. Moreover, Rawls assigns citizens an especially weighty responsibility for the justice of their own society whose structural features they are involved in designing, upholding, and imposing. This special weight can be seen as arising from the moral significance of the distinction between what agents actively bring about and what they merely allow to happen: as citizens, we are not bystanders but co-designers and co-imposers of our society's structural features and thus potentially active contributors to (and perhaps also beneficiaries from) their injustice.

Rawls's social-justice approach can be extended to the structural features of the world at large: insofar as we can influence how our governments design and impose supranational structural features, we may be active contributors to (and perhaps also beneficiaries from) their injustice. This extension retains its plausibility even if, as Rawls (1999, §16) believed, supranational institutional arrangements should be assessed by a much less demanding criterion of justice than national ones. We might then complement Rawls's strong domestic difference principle – which requires the domestic institutional order to be arranged to optimize the lowest socioeconomic position – with a weaker international criterion requiring the supranational institutional order to be arranged to minimize foreseeable human rights deficits.

This weaker criterion reflects Article 28 of the *Universal Declaration of Human Rights*: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" – suggesting that states have a collective responsibility to ensure that supranational structures are human-rights-compliant. The more powerful states, especially, are falling far short of meeting this responsibility as billions of people are avoidably excluded from a standard of living adequate for the health and well-being of themselves and their families, including food, clothing, housing, and medical care (Article 25). This failure of states is a failure also of their citizens who share responsibility not merely for how their state structures itself but also for how it, in negotiations with

others, structures the world. Especially the more privileged citizens of the more powerful states are the principal contributors to, and typically also the main beneficiaries of, global injustice (Pogge 2008).

Eradicating Poverty

Poverty eradication is closely tied to explanation because it must suitably modify, and therefore comprehend, the causal factors that produce and perpetuate poverty. To be effective, eradication strategies must advance to a deeper causal analysis of whether and how these causal factors themselves can be modified. Such work poses challenges of science and engineering, which may result in new gadgets or pharmaceuticals, new houses or bridges, changes in crops or farming techniques, and connection to electricity or the Internet. Such work poses challenges of social reorganization, which may involve modification of property or taxation rules, reforms in social practices or taboos, and safeguards against violence and corruption. Most fundamentally, such work also poses broadly political challenges of persuasion: of getting actors to agree on a strategy and then to promote it effectively. This last set of challenges connects eradication to assessment insofar as one can build the needed political support through moral argument with appeal to the responsibilities of those to be convinced.

Efforts toward poverty eradication vary widely in how profoundly they seek to change the world. At one end of the spectrum are individual gifts to poor people. The primary example is remittances sent, typically by poor and often undocumented guest workers in more affluent countries, to relatives and friends in their home country. Remittances bring hugely important poverty relief, amounting to USD 630–774 billion in 2022, about four times the grand total of all official development assistance, which moreover is often given as loans or paid to consultants and businesses of the donor state. Remittances are, unfortunately, substantially diminished by the exorbitant fees charged for transfers by providers like Western Union; and they also, of course, exclude those without relatives and friends in richer countries. There is considerable evidence – including from randomized control trials, some of which monitoring the work of the NGO GiveDirectly – that, using modern transfer and payment technologies, cash transfers providing direct and predictable income supports are a highly cost-effective means of poverty reduction, tools that could be instituted nationally or even globally in the form of an unconditional but perhaps means-tested basic income.

While transfers clearly make a difference to poor people, they have not fully offset the headwinds of adverse structural design. This may suggest that transfers and assistance should be scaled up – or that we should pursue structural reforms to reduce those headwinds. The latter path may seem quite difficult as the affluent are willing and able to defend the national and international rules and structures that secure them a lion's share of the global product. But if one thinks more broadly, beyond taxes and social support, there may be structural reforms that, by also reducing waste and inefficiency, could facilitate gains for the poor that do not come at the expense of the affluent.

A promising example is the current global practice of rewarding innovations with patent monopolies, which offend against both justice and efficiency. The problems are most evident in the pharmaceutical sector where monopoly rewards guide innovators to neglect diseases concentrated among the poor, to price patented medicines out of reach of the poor, and to shun strategic disease suppression efforts that would slash future sales of their product. As a result of these three dispositions, poor populations become breeding grounds for infectious diseases, for new disease strains, as well as for drug resistance, which often emerges when poor people cannot afford to take an expensive drug at full dosage for the full course of treatment.

To get innovators to address these gaps, we could institute a supplementary reward system: an international Health Impact Fund that would enable innovators to trade their monopoly rents on a new pharmaceutical for rewards based on the health gains produced with it, fully including

positive externalities, such as the infection risk reduction enjoyed by – even untreated – third parties.

This Health Impact Fund would induce the development of those high-value innovations that the current regime fails to reward. It would also give innovators strong incentives to promote the fast, wide, impactful diffusion of their participating new pharmaceuticals – through information, training, technical assistance, discounts, etc. It would thereby reduce the risk of pandemics by guiding innovators to fully include the world's poor in an efficient global population-level strategy of infectious disease eradication. And it would largely avoid the wasteful expenditures now typical of the pharmaceutical sector: expenses for multiple staggered patenting in many jurisdictions with associated gaming efforts (e.g., evergreening), costs of preventing monopoly infringements, costs of mutually offsetting competitive promotion efforts, economic deadweight losses, and costs due to corrupt marketing practices and counterfeiting (Pogge 2022).

Many structural features of national societies and of our wider society of nations might be similarly reformable in ways that preserves their essential function and bring gains to the poor without losses to the affluent. Exploring and instituting such reforms would greatly reduce the work that tax and social support systems must do to keep extreme poverty and inequality at bay. And it might better address the structural causes of poverty with an eye to the special challenges poor people face in the various dimensions of deprivation.

Conclusion

We take pride in our moral progress against slavery, colonialism, violence, and the suppression of women. Yet few understand that severe poverty is still weighing down half of humankind. Few among the affluent have a vivid sense of the real travails and indignities of poverty. And few realize how small the problem is in economic terms, as a mere quarter of the income of just the global top 1% would suffice to double all incomes in the bottom half.

Severe poverty persists because the affluent structure the human world to preserve and expand the unjustly accumulated enormous economic inequalities. They mean no harm to the poor – they merely want for themselves the largest possible share of the Earth's resources and the global social product, thus fiercely resisting any restructuring that would diminish their predominance. This upholding of severe poverty may constitute history's largest crime against humanity.

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Poverty in Ethics and Political Philosophy

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Introduction

The philosophical literature on issues of poverty has greatly increased in quantity and quality since the 1970s. The focus of this research is mostly on questions of ethics and political philosophy (Wolff 2019). The importance of the question of poverty is certainly due to its global extent and the often devastating consequences for the people living in poverty. Poverty is and remains a political issue of urgency, not only in the Global South, but also in the developed welfare states of the Global North. This article will distinguish three important questions that can help structure the philosophical debate: What is poverty? Why is poverty a moral problem? What should be done about poverty and for people living in poverty?

What Is Poverty?

Poverty is a multifaceted and complex phenomenon, and no authoritative definition has been established in poverty research (Wisor 2012). Rather, poverty continues to be a contested concept that is defined differently depending on the research discipline, the context of its application and the envisaged research objective. Three important points can be made here. A prominent distinction is, first, that of relative and absolute poverty. In the literature, the concept of relative poverty is understood to be applied primarily in welfare states and to determine poverty in relation to (national) welfare levels. An example would be the poverty concept employed in the EU (Besharov and Couch 2012). There, a person is considered to be at risk of poverty if he or she lives in a household whose income is less than 60% of the national median income. Here, therefore, there are national poverty lines that vary according to national income levels, which can rise or fall in time. In addition, the EU uses the concept of material deprivation, which is based on which consumption goods and services a household cannot afford. This list of consumption goods (e.g., a car, washing machine, or vacation) is selected for the entire EU on the basis of expert opinions and surveys, what constitutes a "normal" life in the EU. In contrast to such relative poverty, the concept of absolute poverty refers to basic goods that all people need for survival or for a minimum standard of living. Probably the best-known poverty line in this context is the one of $1.9 per day per person set by the World Bank as the minimum consumption level. Thus, according to this threshold, any person in this world who consumes goods for less than $1.9 per day is considered to be absolutely poor.

Second, normative judgments are inherent in all definitions of poverty. Relative poverty aims to capture how much a person needs to reach the social minimum in a particular society. What that consists of, however, cannot be said without reference to normative judgments about what constitutes a "normal" life in that very society. Therefore, the indicators used to measure such poverty are always controversial and to some extent arbitrary. This also applies to concepts of absolute poverty. What are considered basic goods or basic needs that people universally need is equally controversial. Of course, there is a core that can be described in medical terms, such as food and water. But how much clothing a person minimally needs, or whether privacy and education are also basic needs that should be used to determine poverty, is debatable.

Third, there are many candidates of types of goods that are used to conceptualize poverty. The most prominent, which is used in both relative and absolute poverty measurement, is money. Poverty

is then considered to be monetary poverty, most often income poverty, because income is easier to measure than wealth and because wealth plays basically no role in the lives of the worlds' poor. Alternatives to this are the definition of poverty as a lack of capabilities, as suggested by Amartya Sen (1983), or the definition of poverty as a lack of basic goods. Here it is also important whether poverty is understood as one-dimensional or multidimensional. Poverty as a lack of income uses only one dimension and indicator to measure poverty, while poverty as a lack of capabilities has to clarify which capabilities are relevant for the determination of poverty (Alkire 2008), for example, the lack of agency, the lack to command certain material goods, the lack of mobility, the lack of education, and so on. This finally opens the debate about which deprivations constitute poverty and which deprivations are the (direct or indirect) consequences of poverty. That disadvantages cluster around poverty makes the distinction difficult here as well. If poverty is conceptualized as income poverty, then hunger or homelessness are possible consequences of that poverty, but neither constitutes the core of poverty. Multidimensional conceptions of poverty, on the other hand, would emphasize that hunger or homelessness are constitutive of poverty, even if individuals have incomes above a monetary poverty line. All debates about the concept of poverty are also linked to the question of the relevant indicators and the method of measurement. Thus, it is not only a matter of deciding whether poverty should be defined as income poverty, but also how little income counts as poverty. In multidimensional concepts, the questions arise for all dimensions. In addition, there are difficulties of direct and indirect poverty measurement, which are mainly found in the capabilities approach (Alkire 2008). After all, the capabilities approach wants to identify freedoms, that is, to know whether a person could act if he or she wanted to. However, measuring freedom is more difficult than measuring material deprivation. The question of the appropriate thresholds above which poverty is present is also a normative one, as is the question of the relevant goods that are poverty-constituting. Here, many connections can be found to concepts of the good life, to the determination of well-being or to justice (Brighouse and Robeyns 2010).

Fourth, poverty is not only defined, but it is also empirically researched in different ways. Philosophy, with its debates about poverty and justice, is situated on the non-empirical, theoretical level – but often linked to the goal of having an impact on practice. In empirical poverty research, on the other hand, many philosophically interesting questions arise. A few of them may be mentioned here. First, there is a whole set of research ethics issues (Morrow 2013; Cloke et al. 2000). Poverty research is research with a particularly vulnerable group, with people who are powerless and marginalized. In contrast, the poverty researcher is (almost) always in a much more privileged position. Poverty research is always embedded in these hierarchies and power imbalances. Research ethics challenges vary depending on the research method: in an ethnographic setting, where there is close contact and the establishment of a relationship of trust, there are different challenges than in the setting of large quantitative studies, where work is done using standardized survey instruments.

However, because poverty research is always embedded in political contexts, there are also broader implications to consider (O'Connor 2001). Statistics on poverty are, after all, often produced in order to guide policies and sometimes enter public debate. Depending on how poverty is conceptualized and measured, not only can the problem be made to appear larger or smaller, but political successes or failures can be proclaimed – changes in the World Bank poverty line bring millions of people into or out of poverty, even though nothing has changed in their lives (Pogge 2009). The agency of people living in poverty research as well as poverty politics is usually marginal. They are expected to report about their living and the deprivations they have to endure, but they usually have no say in what counts as poverty – or how their poverty should be alleviated. There are attempts to change this by means of feminist, decolonial, and participatory methods and to recognize people living in poverty as experts and to include them as co-researchers in the process (Bennett and Roberts 2004). This is,

of course, also a morally and politically motivated program, which is thus closely tied to ethical reflection.

Is Poverty a Moral Problem?

There seems to be consensus in the philosophical literature that poverty is a moral problem. At least global poverty understood as the poverty that exists in developing countries and is surveyed by such methods and concepts as the World Bank's $1.9 per day. Less obvious is the ethical status of relative poverty in welfare states. It is clear that poverty can be analyzed and criticized from different normative perspectives and some important ones will be presented here.

Poverty can be interpreted as a violation of the (moral) human rights of those in poverty, a position championed by Thomas Pogge (2007). Such a human rights-based approach can also refer directly to the Human Rights Convention, for instance by identifying poverty as incompatible with the right to dignity, the right to life, the right to health or other social human rights. However, poverty can also be understood without reference to human rights as a violation of other moral claims. For example, claims arising from global or social justice. Global justice is most often understood as the question of the relationship of rich countries and their populations to poor countries and their populations (Mack et al. 2009). An approach that starts from the phenomenon of injustice can claim that poverty is globally widespread, that it is produced and sustained by the economic world order, and that its eradication requires the coordination of several states or global institutions. Social justice approaches, in contrast to those that focus on the global level, are more concerned with clarifying what justice claims exist within particular societies and which are threatened or violated by (relative) poverty. The normative reference points of global and social justice, as well as human rights-based approaches, can be similar: they can be based on basic needs, basic goods, dignity (Neuhäuser and Müller 2011; Schaber 2011), recognition (Schweiger 2020), or capabilities (Nussbaum 2011) to which people are entitled and which are violated by poverty. Poverty is then viewed as morally wrong or unjust because living in poverty means having too few of these goods or capabilities or recognition, not being able to meet one's basic needs, or having one's rights violated or denied. Depending on the normative theory, the bar is set differently. Theories of equality demand equal distribution of certain goods, abilities or rights, and poverty is unjust if it stands in the way of this equal distribution (Gilabert 2012), i.e., if the people affected by poverty have less of it than others. Theories of sufficiency, on the other hand, are not oriented toward strict equality but toward everyone having enough of certain goods, capabilities, or rights, and poverty is unjust or morally wrong when living in poverty means having too little of them. Inequality is not necessarily morally problematic for theories of sufficiency, only falling below levels that everyone should be able to achieve. Of course, poverty can also be criticized for being associated with a poor life and lack of well-being, and for making people unhappy. The critique of child poverty can be founded on normative views of healthy development and how growing-up poor impacts future life chances (Schweiger and Graf 2015). It is important to see here that philosophical critiques of poverty are closely related to how poverty itself is conceived and measured.

Most of the philosophical critique of poverty relates to global poverty, which is particularly dire and unjust. The numbers that poverty research produces, despite some progress in recent years, are staggering: hundreds of millions of people still live without access to clean drinking water and sanitation, millions die annually from poverty-related diseases and deficiencies. It is numbers like these that are taken in philosophy as a starting point for questions of global justice and ethics, most of the time implicitly assuming that they in themselves, indicate a moral problem. The moral evil of poverty, however, does not lie solely in the fact that so many people suffer from it, or in the fact that this suffering is so deep and severe, but in the fact that poverty is a social product, that is, it is

produced and maintained by social processes – which include economic as well as political and cultural ones. Poverty is essentially a distribution problem; globally and locally. Poverty is not, neither in the Global South nor in the Global North, a disease that hits people like a tragic accident and for which there is no cure, but poverty is human-made and it could also be quite different. For the diseases that kill poverty-stricken people by the millions, there are cures or preventive measures; for the starving people, there would be enough food, and for those without electricity and water and sanitation, there would be the resources and the techniques to provide those things (Shue 1996).

However, there are also two things to criticize about a sole focus on the large numbers of global poverty. It is certainly the case that rapid and effective action is urgently needed here, in part because the climate crisis and population growth in the world's poorest areas may make the situation dramatically worse (Moellendorf 2014). Firstly, people living in poverty often appear in philosophical theories only as numbers and as passive objects (Schweiger 2016). While there are a few participatory methods in empirical research that understand people experiencing poverty as active subjects, experts, or even co-researchers, such approaches are almost non-existent in philosophy. It may also be asked here what voices and theories and concepts are heard in the philosophical discussion of poverty. Here, too, there is a clear dominance of Western philosophy. Secondly, there is far less philosophical work on what is unjust about poverty in welfare states (Wolff 2019; Neuhäuser 2016). Yet here, too, the facts and figures, as well as the personal fates, are quite dramatic. The neoliberal transformation of welfare states from welfare to workfare – and in the USA to prisonfare – produces poverty and especially also "deep" poverty, which could also be called absolute poverty. There are hundreds of thousands of homeless, beggars, and people who depend on social markets, food banks, or soup kitchens even in the midst of rich states. Finally, poverty in the Global North is often linked to other injustices, such as deep racism in the United States (Shelby 2016).

Who Should Do Something for the Poor?

If poverty is a moral evil, then the question is, on the one hand, who is responsible for it and, on the other hand, who should do something about it. It has already been noted that poverty is a structural problem, and therefore many philosophical theories also assume that there is a need for structural reforms that should take effect at the state or even global level. To put it briefly, a number of key actors can be distinguished to whom responsibility is attributed. First, there is the individual, which usually means the average citizen of the Global North, who has far more resources at her disposal than people in the global South who are affected by poverty. This citizen of the Global North can be attributed responsibility in different roles: as a person with resources that can be donated, as a consumer who should rely on fair trade in her consumption decisions, or as a political citizen with the right to vote, who through her election should bring those politicians to power who will then ensure fairer political structures and laws. There are different arguments as to why this citizen of the Global North should act in this way and not in a different way, i.e., why she has a moral responsibility to do something against poverty and for the people affected by poverty. Its responsibility may stem from a humanitarian duty to help. Simply because a person has the opportunity to help others in great need, it has a moral obligation to do so, in which case the distance between it and those it is supposed to help should not matter (Singer 1972). Alternatively, it is assumed that the citizen of the Global North benefits indirectly or directly from poverty (in the global South), for example because it enables her to produce cheap goods that are then consumed in the Global North, or because poverty is based on exploitation of resources in the Global South that benefit the citizen in the Global North (Young 2006; McKeown 2017). In a sophisticated variant, however, as advocated by effective altruism, the citizen of the Global North not only has such duties that affect her everyday actions, but she should actually also base much more profound decisions, such as career choices, on

doing something good for poverty-stricken people in the Global South (Gabriel 2017).

The power of most individuals to act to improve the situation of people experiencing poverty is small. Individual consumption decisions or donations have little influence, which is why we often talk about collective agents here. It takes the coordinated action of a large mass of people in the Global North to change things substantially and sustainably. Collective responsibility, however, faces particular difficulties, as it needs to show why individuals have a responsibility here, even for things they cannot influence themselves, and how collective action and agency can be established (Miller 2012; Schwenkenbecher 2013). This requires communication and coordination.

The people living in poverty themselves usually appear only marginally in these discussions about individual or collective responsibility. They are thus mostly seen only as passive recipients of aid and profiteers of the desired changes, but not as a driving force or as actors who should take responsibility themselves. One objection to this view is that, especially in the Global South, there are also large and networked projects and political movements of people affected by poverty that can certainly bring about improvements and also achieve a certain political clout (Deveaux 2015).

In addition to the responsibility of individuals and collectives, two other agents in particular are mentioned in the philosophical discussion: the state and international or global institutions (O'Neill 2001; Pogge 2008). Especially the states of the Global North have considerable resources and political influence. On the one hand, the Global North engages in classic development aid and supports the Global South with projects and in building infrastructure (Clark 2002). On the other hand, however, the states of the Global North are able to dominate their relations with the countries of the Global South in almost all economic and political matters (Vestergaard and Wade 2013). Thus, the power of states is also very unequally distributed, and it is ultimately a few powerful states that are able to impose their interests to the detriment of many others and dominate global relations and structures. This view of things is not at odds with the recognition that states in the Global South are also weakened by "home-grown" problems such as corruption and inequality, and that the elite there live at the expense of the rest of the population, and especially poverty-stricken people. At the supranational level, other interesting questions arise, such as the legitimacy of supranational institutions vis-à-vis states that bind them and the respective populations. In this context, global institutions such as the World Bank are of great importance, especially for development policy and global poverty reduction or poverty maintenance.

Conclusions

Finally, it should also be pointed out that in addition to the question of who should do something for people affected by poverty, of equal relevance is the question of what should be done for them and how (Gaisbauer et al. 2016; Wolff 2018). Poverty reduction, for example, in the form of development policy or social policy, can be implemented in different ways. Questions of efficiency and effectiveness arise here, as do questions of the ethical permissibility of certain interventions and the assessment of intended and unintended consequences. Poverty reduction can be paternalistic or it can focus on the autonomy of people experiencing poverty and involve them in the development and implementation of interventions; it can be punitive and demanding or enabling and supportive – In any case, normative assumptions about what constitutes a good life or justice are also inherent in the means and goals to be achieved in poverty reduction.

Cross-References

- ▶ Basic Needs
- ▶ Capability
- ▶ Justice
- ▶ Responsibility: Global
- ▶ Rights: Social Rights and Welfare

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Pragma-Dialectical Approach of Legal Argumentation as Specific Form of Rational Discussion

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Introduction

In the past four decades, the most influential approach of the study of legal argumentation in the European tradition of analytical legal philosophy and legal argumentation theory is the approach that conceives legal argumentation as a specific form of *rational discussion*. In this approach, the rationality of the argumentation depends on the question whether the justification of judicial decisions is in accordance with certain procedures and rules of practical rationality. The patterns of legal argumentation in adjudication that have a function in the justification are the object of study. Influential works in which the basic ideas of this approach are formulated are Aarnio (1977, 1987), Alexy (1989), MacCormick (1978, 2005), and Peczenik (1983, 1989). For an overview of the contributions to this approach in legal theory and argumentation theory, see Feteris (2017).

From the perspective of legal methodology, the central questions are the following: What are the general and context-specific characteristics of legal argumentation as specific form of rational discussion?[1] How can the procedures and rules of legal discussion be characterized in terms of general procedures and rules of rational discussion? How can the patterns of legal argumentation that are prototypical for legal justification be characterized in terms of legal implementations of general structures and schemes of rational practical argumentation?

This entry aims at providing a discussion of these questions from the perspective of the pragma-dialectical theory of legal argumentation.[2] This theory offers a good theoretical framework to explain the relation between general and specific legal aspects of rational discussion. To this end, the central concepts in the study of legal argumentation are taken as a starting point. These concepts are: legal justification as argumentative activity, the standards and rules of practical rationality for legal discourse, and models for the reconstruction of legal argumentation and argumentative patterns that are associated with the tasks of legal adjudication.

Legal Justification as Argumentative Activity

The basic idea of the pragma-dialectical approach of legal argumentation is that the justification of a legal decision can be considered as a communicative and argumentative activity. The communicative aspect implies that the justification is a form

[1] For a discussion of legal argumentation as special form of general practical argumentation, see Alexy (1989), Günther (1993), and Habermas (1996/1992).

[2] For a discussion of the pragma-dialectical theory and the key concepts of this theory, see van Eemeren (2010, 2017, 2018) and van Eemeren and Grootendorst (1992). For a more detailed overview and discussion of the application of the pragma-dialectical theory to the legal domain, see Feteris (2017, Chaps. 10 and 11)

of verbal interaction. The argumentative aspect implies that the justification is aimed at making a decision acceptable to an audience. Legal justification is an activity that takes place in the context of a critical discussion in which arguments are exchanged for and against a particular legal claim. In this conception, legal argumentation is not solely considered as a logical inference, but also as a form of verbal interaction in accordance with certain rules of practical rationality and certain legal rules. The rationale of legal justification as argumentative activity is that the decision can be verified and submitted to rational critique by the audience it is directed to.

As communicative and argumentative activity, the institutional goal of legal adjudication is the administration of justice in the application of the law in accordance with the *Rule of Law*. The Rule of Law requires that there be properly published and prospective laws, equality of citizens before these laws, and a limitation of the official powers between those who apply existing norms and those who create new norms. For courts, this implies that they must act in accordance with the relevant rules of procedural and substantive law, concerning procedural and material starting points in a particular legal system. To account for this discretionary power in interpreting and applying the law, courts have an obligation to justify their decision by specifying the legal and factual grounds on which their decision is based (For a discussion of the way in which legal procedures are institutionalized to promote the Rule of Law, see MacCormick (2005: 2–3) and Peczenik (1983). For a discussion of the Rule of Law in relation to the requirements of legal argumentation, see Canale and Tuzet (2016) and Klatt (2016).

In light of the function of legal justification to account for the discretionary power of courts, it can be said that the institution of legal adjudication creates the communicative need for courts to account for the way in which they have applied the law. Legal justification can be considered as a communicative activity that is predominantly argumentative because courts have the obligation to specify the arguments that support their decision. It is aimed at convincing a multiple audience, consisting of the parties in dispute, higher courts, and the legal community, about the way in which the law should be applied in the concrete case. In this view, legal justification is part of a dialogue, a *critical discussion*, aimed at making the decision acceptable to this multiple audience.

In the law, the argumentative activity is conventionalized in various respects in order to realize the institutional goal, the administration of justice in accordance with the requirements of the Rule of Law. The conventions for legal discussions form the institutional constraints that define the possibilities for the parties and the courts with respect to their argumentative behavior. The way in which the procedure of discussion is institutionalized involves different types of conventions that are related to the different stages of a critical discussion.[3]

These conventions first concern the rules for the presentation of differences of opinion in the *confrontation stage*. The way in which differences of opinion are to be presented is related to the jurisdiction of different types of courts. Second, they concern the procedural and material starting points in the *opening stage*. These starting points are the relevant rules of formal and material law in precedents, codes, and treaties. Third, they concern the choice of argumentative means and criticisms in the *argumentation stage*. The possibilities for choosing argumentative means and criticisms are related to the rules regarding proof for factual statements, rules regarding interpretation methods and forms of legal argumentation. Fourth, the conventions concern the outcome of the discussion in the form of a judicial decision in the *concluding stage*. These concern rules for the presentation of the final decision in different legal cultures, also depending on the role of juries and courts and the possibility of dissenting opinions.

The conventions form the institutional constraints that define the argumentative possibilities

[3] In a critical discussion, the various stages represent the phases of argumentative discourse that leads to deciding in a reasonable way whether or not a standpoint at issue is acceptable. For a discussion of the stages and their function in a critical discussion, see van Eemeren (2018: 36–38) and van Eemeren and Grootendorst (1992: 34–37)

for the participants to the discourse. They define what contributions have a function in a rational legal discussion. They also define the space the participants have in choosing the content and presentation of their contributions to the discussion in making their position acceptable to the audience.

Standards and Rules of Practical Rationality for Legal Discourse as Form of Rational Practical Discussion

By institutionalizing discussion procedures and discussion rules, the legal order offers a means for resolving differences of opinion in accordance with general criteria of practical rationality and specific legal requirements. In the pragma-dialectical theory of legal argumentation, it is investigated how legal discussions, as specific forms of practical discussions, must be conducted to meet the general requirements of practical rationality and specific legal requirements that are related to the institutionalized nature of the law. Authors in legal theory such as Aarnio (1977, 1987), Alexy (1989), MacCormick (1978, 2005), and Peczenik (1983, 1989) develop rules for legal discussions. The rules formulated by these authors are based on the general rules for rational communication and rational practical discussions that are developed in language philosophy, logic, rhetoric, argumentation theory, and ethics and are adapted and specified for legal discussions. General principles of practical rationality such as universalizability, coherence, consistency, relevance, efficiency, testability, generalizability, and sincerity are formulated as requirements for rational legal justification.

The standards and rules of practical rationality concern, in the pragma-dialectical theory, different aspects of the stages of a critical discussion as described in the previous section, such as the procedural rights and duties, the common starting points, and forms of argumentation.

The rules that concern the *procedural rights and duties* lay down the rights and duties of the participants in the different discussion stages. First, they specify the rights to put forward standpoints and to criticize standpoints that have been put forward by others, with the aim of externalizing differences of opinion and to enable participants to resolve the difference. Second, they specify the duty of the participants to commit themselves to common discussion rules and starting points and to behave themselves in accordance with these commitments. Third, they concern the obligation to defend standpoints and arguments that have been put forward against relevant criticism in accordance with these rules and starting points. Fourth, they concern the right to criticize arguments that have been put forward in the discussion and the right to put forward arguments that have been criticized in accordance with certain criteria of relevant critique. Finally, they concern the duty to accept a standpoint that has been defended in accordance with the rules and the duty to retract a standpoint that has been attacked successfully in accordance with the rules.

The rules that concern the *common starting points* are the rules of substantive law and general legal principles in a particular legal system and field of law. The methods for the identification and interpretation of those rules and principles are a specific form of common starting points. Common starting points concerning the identification of legal rules are related to what is called the "rule of recognition" to identify a rule as valid law. The rules of law and general legal principles are to be found in legal sources that are recognized as valid law in a particular legal system. Apart from these sources, also certain moral principles that can be considered as generally accepted in a particular legal culture can play a role as common starting points. Common starting points concerning the interpretation of legal rules are related to the canons of legal interpretation and the hierarchy of interpretation methods.

The rules that concern the *forms of argumentation* are related to the *argumentative patterns* and *argument schemes* that can be used in legal discussions. Argumentative patterns in legal justification represent constellations of arguments that are prototypical for the resolution of certain decision problems in various contexts of

adjudication.[4] Specific argumentative patterns can be distinguished in hard cases in which certain decisional problems must be resolved and in which different levels of justification must be represented. Legal argument schemes are distinguished on the basis of the content of the arguments that are put forward and the type of relation between the arguments and the decision. Argument schemes that have a function in legal justification are, for example, analogy argumentation, *a fortiori* argumentation, *a contrario* argumentation, etcetera. The rules for the use of argumentative patterns and argument schemes are related to the canons of legal interpretation and the hierarchy of interpretation methods. The canons and the hierarchy form the constraints of the interpretation space of courts and define the way in which certain interpretative arguments should or can be used to resolve a particular decision problem.

In legal procedure, a large part of these discussion rules is institutionalized for reasons of legal certainty and equality. The rules of formal law for conducting the procedure and the rules for the identification of legal sources and the rules of substantive law, which lay down rights and duties in specific fields such as civil law, criminal law, administrative law, etcetera, are institutionalized and in certain legal systems also codified.

The rules that concern the interpretation methods, the hierarchy of interpretation methods, the forms of argumentation, and argumentative patterns are not "codified" like the rules of formal and substantive law. They concern the conventions for the interpretation of the law and the justification of such interpretations in light of general standards of practical rationality implemented in a particular legal culture (For an overview of the conventions and norms for legal interpretation and argumentation, see MacCormick and Summers (1991, 1997)). Their normative status depends on the way in which these conventions are formalized and sometimes codified. For this reason, they are the subject of studies of legal interpretation in fields such as legal methodology, legal dogmatics, jurisprudence, and legal theory and legal philosophy. An important part of the research of legal argumentation concentrates on the way in which courts must account for their discretionary power to interpret the law in light of the hierarchy of interpretation methods and the weight of arguments that are based on these methods.

Models for the Reconstruction of Legal Argumentation and Argumentative Patterns

The standards and rules that have been discussed in the previous section are specified further in models for the reconstruction of legal argumentation. In the pragma-dialectical approach of legal argumentation, models have been developed to reconstruct the different levels in the justification to clarify which choices have been made in the application and interpretation of the law. For the different levels, it is specified how courts can account for the choices they have made and which forms of argumentation have a function in the justification, depending on the kind of difference of opinion that must be resolved. Various argumentative patterns, consisting of different argumentation schemes, are described that are characteristic for the way in which courts must justify their decision in the context of various types of legal problems and differences of opinion (such as problems and differences of opinion about the facts, the application of the legal rule, the interpretation of the legal rule, etc.).

The function of the models for the reconstruction is that they can be used as theoretical instrument to establish whether the argumentation is in accordance with certain standards of practical rationality, specified further in terms of certain legal standards of acceptability. General standards of practical rationality concern requirements such as logical validity, consistency, and coherence. These general standards are supplemented by specific legal requirements such as the Rule of Law and standards related to legal starting points of a particular legal order. The models make explicit the different steps in the reasoning process that

[4] For a discussion of research on argumentative patterns in legal justification, see Feteris (2017)

underlie the different levels of the justification. In the analysis of the argumentation, the models are used as a heuristic tool to identify the elements of the justification that have an argumentative function (as premises supporting or refuting a particular conclusion). In the analysis, they are also used to reconstruct implicit elements that belong to the argumentative commitments (implicit premises) and must be made explicit. In the evaluation of the argumentation, the models are used as a critical tool to determine whether the argumentation can withstand certain forms of rational critique (critical questions).

In the pragma-dialectical approach, the obligations of a court with regard to the way in which they must account for their decisions are characterized in terms of *prototypical argumentative patterns*. These prototypical argumentative patterns represent the way in which, from the perspective of a critical discussion, courts must take into account the relevant critique that may be put forward by the parties, higher courts, and the legal community in light of legal procedures and rules constituted by the procedural rights and duties and the common starting points.

The general prototypical argumentative pattern in the justification of a legal decision represents two levels of justification. These levels reflect the different types of argument that have a function in the justification.[5]

The *first-level* justification (the "internal justification" or "justification of the first order") consists of argumentation that specifies the legal rule and the facts that constitute the conditions for applying the rule. The first-level justification is an elaboration of what is also called the "legal syllogism." The justification can be reconstructed as a logically valid inference (according to a particular logical system) in which the decision follows logically from the legal rule and the facts. The reconstruction on the first level implies that the different premises of the legal syllogism are made explicit. The starting point for the reconstruction of the first-level argumentation is the requirement that the inference underlying the first-level justification must be logically valid, in light of the requirement of practical rationality demanding universalizability of legal judgments. A legal decision must be based on a universal rule that is also applicable in similar cases.

The *second level* justification (the "external justification" or "justification of the second order") consists of argumentation put forward to justify the arguments of the first level that are in need of further support. Such a support is necessary in "hard cases" in which there is a difference of opinion about the choice and/or formulation of the legal rule for the specific case. A support can also be necessary if the facts are disputed and are in need of further proof. In the literature on the justification of legal decisions, authors concentrate on the justification that is given in hard cases in which the choice and/or formulation of the legal rule must be justified. In the justification, courts can use interpretative argument schemes that are based on legal interpretation methods, forms of legal reasoning and argument schemes as discussed in the previous section.

This second-level justification consists of argumentation that may be relatively simple or complex, depending on the kind of problem that the court must resolve, the legal rules that must be applied, and the arguments of the parties that it must react to. On the basis of these considerations, a court must determine the kinds of arguments that are relevant to resolve the difference of opinion, the way in which these arguments are related to each other, and the way in which they can be presented. The arguments that are used in the justification may consist of arguments based on common legal starting points such as general legal principles, insights from legal dogmatics, as well as moral values that are commonly accepted in a particular legal community.

The way in which arguments are used in the second-level justification in hard cases depends on the choices courts make in anticipating or reacting to certain forms of critique. In pragma-dialectical terms, the implementations of argumentative patterns that are representative for this second level

[5] For the introduction of the terminology of internal and external justification, see Alexy (1989) and justification of the first order and second order MacCormick (1978). For a discussion of the distinction between clear cases and hard cases, see Dworkin (1986), Hart (1961), Feteris (2017: 3–5 and 226–232), and MacCormick (1978: 195–228)

justification are related to the way in which courts react to relevant critical questions associated with particular argument schemes. As indicated, there are various argument schemes which are used for defending the acceptability of the interpretation of a legal rule. Each type of argument scheme is associated with specific evaluative questions which are relevant for the evaluation and which must be answered satisfactorily for a successful defense. In each case, it must be checked whether the argumentation scheme is well chosen and whether it is applied correctly. Depending on the way in which courts react to these critical questions, different argumentative patterns may develop. Argumentative patterns that are characteristic for various methods of legal interpretation may result from answering these critical questions. Examples of forms of argumentation that have an important function in legal justification in hard cases are systematic argumentation, argumentation in which a court refers to the system of the law, and teleological-evaluative argumentation, argumentation in which a court refers to the consequences of applying a legal rule in light of the goal and values the rule is intended to realize.

In the context of *systematic argumentation,* various types of argumentation can be used. Analogy argumentation, *a contrario* argumentation, and *a fortiori* argumentation refer to (an aspect of) the legal system to justify the interpretation of a legal rule. The argumentative patterns in which these arguments are used are based on the reactions to different forms of critique that are relevant for this form of argumentation. For example, for analogy argumentation, a complex argumentation can be reconstructed that reflects the different forms of critique that a court must react to. The critical questions to be answered in the context of analogy argumentation concern the question whether the judge was allowed to use analogy argumentation and if so, whether he applied it correctly. In the reconstruction of the argument, the different elements must be spelled out: the constructed legal norm the judge is defending, the existing legal norm which is being applied analogically, the analogy relationship which is being assumed, and the arguments with which the analogical application is justified. Depending on the context of the specific case and the relevant critical questions that might be raised, the judge can put forward different arguments in which he or she reacts to these critical questions. If the judge, for example, expects doubt with respect to whether there are sufficient similarities between two cases to make them comparable (on the basis of the juristic facts in the existing legal standard), he or she may argue that there are more relevant similarities.

Teleological-evaluative argumentation can take on different forms, and depending on the form it takes, it is referred to as teleological argumentation, argumentation from consequences, *argumentum ad absurdum*, argumentation from reasonableness, etcetera. The rationale for using these forms of argumentation is that legal rules are considered as an instrument for realizing certain legal, social, and economic goals. In applying the law, judges should interpret the law in such a way that the consequences are conducive to realizing such goals. The critical questions to be answered in the context of teleological-evaluative argumentation concern the question whether the application of the rule (in a particular interpretation) would lead to a particular desirable or undesirable consequence and whether this consequence is desirable or undesirable from the perspective of certain (legal) goals and values. To anticipate critical questions regarding the (un)desirability of the consequences in light of certain goals and values, judges may refer to certain legal goals formulated by the historical legislator and/or to certain principles and values underlying the rule that constitute the ratio legis, the rationale, or purpose of the rule. Depending on the choices courts make and the way in which they present them, there are different types of relations between teleological-evaluative argumentation and other forms of argumentation. An example of a pattern in which different applications of a rule are proposed in light of consequences and values is a justification based on a weighing and balancing of different alternatives.[6]

[6] See Feteris (2017: 237–249) for a discussion of different patterns of argumentation that are based on an interaction between different forms of argumentation and weighing and balancing

Conclusion

The basic idea of modern studies of legal argumentation that have been dominant in analytical legal philosophy in the past four decades is that the justification of a legal decision can be considered as a specific form of rational practical discussion that takes place under certain constraints. In this entry, it has been explained how central concepts in the approach of legal argumentation as rational discussion are elaborated in the pragma-dialectical approach of legal argumentation. The pragma-dialectical theory starts from a conception of legal justification as an argumentative activity. This argumentative activity can be considered as a contribution to a rational practical discussion that is conducted in accordance with certain principles of practical rationality and certain legal principles that are to be observed in such an institutionalized discussion.

To clarify the way in which the constraints of the argumentative activity of legal justification influence the way in which arguments can be developed, models for rational reconstruction are developed. These models specify the different levels of the justification and the arguments that have a function on these levels. In light of the tasks of legal adjudication, various prototypical argumentative patterns are distinguished that are characteristic for the way in which courts must justify their decision in the context of various types of legal problems.

By using the conceptual distinctions of the pragma-dialectical theory, it can be explained what the relation is between general and specific legal aspects of rational discussion and argumentation. It offers an instrument to reconstruct argumentative practices in law and to establish how the specific legal characteristics of practical rationality are implemented in argumentative patterns in legal justification. For future research in the field of legal argumentation, the pragma-dialectical conceptual framework offers a good starting point to reconstruct argumentative practices in various legal domains and legal systems, to clarify the way in which those practices are governed by general and specific criteria of acceptability, and to investigate argumentative patterns that reflect adherence to general and specific legal criteria of rationality.

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Pragmatism

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Introduction

Legal pragmatism denotes a variety of approaches to law which share affinities with philosophical pragmatism. This contribution thus situates legal pragmatism within the tradition of philosophical pragmatism, explains how pragmatist ideas found their way from philosophy into law, and shows the relevance of pragmatism for contemporary jurisprudential debates. The first part identifies the paradigmatic features of philosophical pragmatism. The second part explains how pragmatist ideas traveled from philosophy to law and how legal scholars and practitioners interpreted, digested, and transformed these ideas. The third part explores the pragmatist understanding of the nature of law and adjudication.

Philosophical Pragmatism

Philosophical pragmatism is an important alternative to traditional metaphysics and epistemology. Traditional realist metaphysics understands reality as a mind-independent domain to be discovered by virtue of innate intuitions and a priori reasoning, while its corresponding epistemology demands that the content of knowledge be based on a firm foundation. This approach to metaphysics – which spans from Plato's ideal forms to Kant's things-in-themselves – is based on a picture of truth as a matter of correspondence of mind with reality and on epistemology which assumes that knowledge is an accurate mental representation of such reality from a vantage point independent of an agent's social and cultural framework. Pragmatism replaces this with a conception of truth as a construct that serves human purposes and the understanding of inquiry as an activity embedded in human practices.

In so doing, pragmatism does not start from a set of philosophical doctrines that command particular conclusions; rather, it aims to change the method of approaching philosophical questions. For example, William James – in his series of lectures introducing the notion of pragmatism and building on the work of Charles Sanders Peirce – is not concerned so much with *what* we should think but *how* we should think about philosophical problems. For James, pragmatism "stands for no particular results" and "has no dogmas, and no doctrines save its method" (James 1977: 380). As James describes it, pragmatism "turns away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins." Rather, it "turns towards concreteness and adequacy, towards facts, towards action, and towards power"; the pragmatist also adopts an "empiricist attitude" which enables sciences and metaphysics to "work absolutely hand in hand" (James 1977: 379).

In an attempt to overcome the abstract and detached picture of reality and cognition, pragmatists first turn to concrete empirical *consequences* as the ultimate measure of the value of metaphysical and epistemological notions. Peirce famously formulated the pragmatist maxim as follows: "Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object" (Peirce 1992: 132). Similarly, James understands pragmatism as a "method of settling metaphysical disputes that otherwise might be interminable" by looking at their practical

consequences: in his view, "if no practical difference whatever can be traced, then the alternatives mean practically the same thing, and all dispute is idle" (James 1977: 377). The focus on consequences aims to put aside stale philosophical disputes and redirect the discipline into – in pragmatists' view – a more fruitful direction that is able to generate practical solutions to the real-world problems.

Another staple of pragmatist philosophy is a rich understanding of *experience*. Instead of seeing experience merely as a repository of external sensory data, pragmatists understand it as inseparable from human needs, activities, and practices. For pragmatists, it is impossible to separate the "given" (data we passively receive from our surroundings) from actual socially embedded processes by which we conceptualize such data. Human interaction with the environment is more complex than suggested by the picture of experience as sensory reception and inevitably includes the process of experiencing and not merely cognizing the things we experience. As Dewey puts it, "There is, apparently, no conscious experience without inference; reflection is native and constant" (Dewey 2008: 6). In other words, the way we engage with the world is shaped by us as much as it is shaped by external reality. In the pragmatist view, the epistemology that assumes a perspective of a neutral spectator that stands outside of this process of engagement is inadequate.

Although pragmatism makes the concepts of truth and knowledge dependent on empirical consequences and contingent experiences, it does not reject the existence of mind-independent reality. When, for example, James says that the pragmatist is interested in "the truth's cash-value in experiential terms" and that "'the true'. . .is only the expedient in the way of our thinking," this is not a form of skepticism but a plea to abandon unproductive debates about truth and knowledge and understand these notions in terms of both their use and usefulness (James 1977: 430). The pragmatists simply deny the utility of the conceptions of truth and inquiry that neither arise from nor bear any consequences for the actual practice of the pursuit of knowledge.

However, apart from this general method, there is little agreement among philosophical pragmatists. For instance, Peirce's pragmatism is naturalistic, non-skeptical, and fallibilist. For him, a belief is a momentarily fixed habit of action which is open to revision based on any real doubt arising from experience, and knowledge is a temporarily settled belief that can be disproven or further refined until the truth is eventually represented in scientific consensus (Peirce 1992: 109–123). James' pragmatism is more prone to subjectivist interpretation. For him truth is what is "satisfactory in the way of belief" and is not to be judged by its worth for the scientific community but by its benefit for individuals: the test for beliefs is their fit with experience, and it may ultimately depend even on affective states and volition (James 1977: 429–472, 717–737). John Dewey stands between these positions: he follows Peirce in connecting truth to communal approbation but does not make it a function of ideal scientific inquiry. Instead, he follows James in linking it to concrete (social) experience that includes a much broader set of beliefs and values (Dewey 1958, 1960). Finally, Richard Rorty gives pragmatism a characteristically postmodern flavor: he defines it as "the doctrine that there are no constraints on inquiry save conversational ones" which leads to the conclusion that it is "useless to hope that objects will constrain us to believe the truth about them" (Rorty 1982: 165).

While the range of pragmatist positions is diverse, all pragmatists agree that to be able to say something interesting about truth and knowledge, philosophy needs to account for contingent *experiences* and practical *consequences*. On the one hand, an inquiry cannot start from a conceptually blank place affected merely by the sensory apparatuses or pure reason, but involves an agent embedded in the matrix of cultural meanings. On the other, the truth of any notion is to be evaluated in terms of the practical difference it makes. So defined, pragmatism is both backward and forward looking: it acknowledges that our inquiries are historically embedded as we can only understand the world through inherited conceptual apparatuses but is transformative and future

oriented in its plea to overcome our conceptions if they are no longer useful.

The Path from Philosophy to Law

Philosophical and legal pragmatism developed within the same intellectual environment and are related not only at the level of ideas but also as a matter of historical contingency. Philosophical pragmatism originated in discussions that took place in the early 1870s in a reading group called – in line with the spirit of the time but also somewhat ironically – "the Metaphysical Club." The notable members of the group included Charles Sanders Peirce, William James, and Oliver Wendell Holmes Jr. As the father of legal pragmatism, Holmes has thereby been directly exposed to the philosophical positions of Pierce and James and has himself contributed to the shaping of early pragmatist ideas (although Holmes admired Dewey and was critical of James; see Grey 1989).

As a consequence, philosophical and legal pragmatism share the same spirit, attitude, and method. While the early philosophical pragmatists wanted to overcome the abstract metaphysics and epistemology that neglected social practices, early legal pragmatists wished to counter the excesses of legal formalism and natural law that overlooked the social dimension of law. The former is the idea that law is an autonomous and rational system detached from social reality and that adjudication consists in a mechanical deduction of conclusions from the existing legal rules. The latter is the belief that legal rules are metaphysically grounded in universal moral principles and that the role of adjudication is to identify such principles. Legal pragmatism rejects these views because they disregard the actual social *experience* and *consequences* of law.

The first part of the pragmatist refutation of legal formalism and natural law situates law in the wider context of our social, political, and economic practices. Pragmatists argue that law does not consist in the application of formal rules or discovery of moral principles but that it is a matter of social contingency. As Holmes famously put it: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed" (Holmes 2009: 3). Similarly, John Dewey argues that law is social in "origin," "purpose," and "application," that its source is custom, and that we should give up the search of the source of law "outside of and independent of experience" (Dewey 1981: 117–119).

Legal pragmatists understand law as conceptually distinct from morality, but since they are both embedded in experience, law reflects the current moral mores of its community. For Dewey, the standpoint from which we evaluate law is also socially contingent, and while it may take universal and timeless form, its content is "historical and relative" (Dewey 1981: 122). Holmes argues that equating law with abstract ethical considerations creates an inadequate account of how the law works and generates a distorted picture of law as detached from its social basis (as he puts it, "the common law is not a brooding omnipresence in the sky" (Southern Pacific Co. v. Jensen 1917: 222)); at the same time, law and morality are intrinsically connected as "the law is the witness and external deposit of our moral life" (Holmes 1879: 459). Thus, legal pragmatists think of law and morality as socially embedded: while they are distinct at the conceptual level (because looking at moral principles cannot fully explain how the law actually functions), they are inherently connected in a sociological sense.

The second part of the pragmatist rebuttal of formalism and natural law makes practical consequences central to the understanding of law. Formalism explains the law in terms of rules and logical reasoning and natural law in terms of universal moral principles; in contrast, legal pragmatism understands it in terms of its consequences. Echoing the pragmatist maxim according to which any concept is explained by its practical effects, legal pragmatists argue that understanding of law must focus on its consequences which can

neither be deduced from abstract legal axioms nor from moral principles: to know what the law is, we must be able to predict how it will affect legal subjects. Dewey, for example, argues that "a given legal arrangement *is* what it *does*" (Dewey 1981: 118) and that the logic that explains the law "must be a logic *relative to consequences rather than to antecedents,* a logic of prediction of probabilities rather than one of deduction of certainties" (Dewey 1924: 26). Holmes explicates his prediction theory of law using the perspective of a "bad man," someone who is interested in practical consequences and not in law's formal system or moral value. The bad man, as Holmes imagines him, is only concerned with the outcome of legal processes for his own well-being, and the formal rules and perceived moral principles figure in his conception of law only indirectly as something that judges pay attention to when deciding cases. This conception of law includes – apart from formal legal and justice-related concerns – a plethora of other social, economic, and psychological variables. In line with pragmatist thinking, Holmes's message is naturalistic: to know the law, one cannot simply look at the black letter rules or moral values. Instead, one must engage in social science and economics (Holmes 1879: 469). But the pragmatist focus on consequences is neither morally skeptical nor antitheoretical: it arises from the need to better understand the social practice of law in order to improve it (Holmes 1879: 467; Dewey 1981) and from the ambition to put the theory of law in conversation with legal practice (Holmes 1879: 476).

These early legal pragmatist ideas have had an enormous impact on legal scholarship and practice. Most significantly, they gave impetus to the American legal realism of Karl Llewellyn, Jerome Frank, Felix Cohen, Roscoe Pound, and Benjamin Cardozo. Legal pragmatism and realism share the idea that legal rules are but one of the factors that determine the outcome of a legal case, and they both emphasize the importance of psychological, social scientific, and economic methods in understanding the consequences of law. Taken up by legal realists, the pragmatist conception of law continued to dominate legal academia and practice in the United States until the 1950s, and – by that time – the most important pragmatist lessons were well accepted. But as soon as the claim about the relative indeterminacy of law had become commonplace, legal academics began to develop normative theories of adjudication. For example, the so-called legal process school accepted the pragmatist/realist insight that judges make law; however, it did not see this process as embedded in a socioeconomic-cultural context but as guided by rational principles. However, by the 1970s, it became clear that there would be no agreement on any of the normative theories of adjudication. As legal academics became disillusioned about the rationality and universality of these theories, the stage was set for the return of legal pragmatism.

The revival of legal pragmatism coincided with important developments in philosophy. Around the same time, Richard Rorty began to develop a more radical interpretation of pragmatism which captured the imagination of legal academics and gave them the language to express their disenchantment with grand legal theories. In Rorty's version, pragmatism amounts to a complete rejection of the possibility of ahistorical, decontextualized, and mind-independent truth and knowledge, whereby the authority of any given vocabulary rooted in our contingent practices – even that of science – is to be established by reference to its usefulness for human purposes (Rorty 1979, 1991). Rorty's philosophy motivated the legal pragmatists to emphasize the connection between legal practices and their social roots, liberated them from belief in timeless truths, and inspired them to seek more radical legal and social reform. As a consequence, this legal neo-pragmatism champions a more pronounced contextual analysis and an even more instrumental understanding of the role of law. The result is an additional emphasis on experience and consequences, thereby engendering two strands of legal neo-pragmatism.

On the one hand, critical legal scholars depart from the pragmatist agenda to stress the role of social context in law. This strand of legal neo-pragmatism is committed "to finding knowledge in the particulars of experience" (Radin 1990: 1707), whereby the "demand to look at the context. . .means a demand to look at the

structures of power, gender, race, or class relationships" (Minow and Spelman 1990: 1651). Its main insight is that law embeds and masks social hierarchies and entrenches the experiences of the dominant class, gender, and race. However, the critical version of legal neo-pragmatism does not stop at the descriptive analysis of context and interprets pragmatism as a tool of social transformation. Matsuda puts it emblematically: "pragmatism as a method is valuable as a method to an end, and the end of all human striving is justice" (Matsuda 1990: 1769).

On the other hand, the law and economics movement also lays claim to the pragmatist heritage. While critical legal scholars start from experience and context, the law and economics scholars concentrate directly on economic consequences of law. Richard Posner defines the economic approach to law as "the idea that law should strive to support competitive markets and to simulate their results in situations in which market-transaction costs are prohibitive" (Posner 1990: 1667). While Posner concedes that there is no complete overlap between the economic approach to law and legal pragmatism – because the former can only offer a method of attaining societal purposes and not these purposes themselves (Posner 1990: 1668) – his economic approach to law does presuppose the indispensability of competitive markets to human autonomy and welfare and consequently invites judges to give priority to economic consequences when deciding cases.

Because it has been associated with completely different agendas for social reform, many have questioned the value of legal pragmatism. Tamanaha, for example, argues that legal pragmatism is "empty of substance" and "of scant benefit to normative legal theory" (Tamanaha 1996: 316, 318). This critique points to a tension between experience and consequences and frictions between backward- and forward-looking elements in legal pragmatist views. Two questions bring this tension to the fore. First, how does legal pragmatism understand the nature of law? While early legal pragmatists and realists saw indeterminacy of law as widespread but not pervasive, legal neo-pragmatists understand it as omnipresent and inescapable. For critical legal scholars, social domination is enforced by legal institutions through an unrestricted exercise of power by the privileged segments of the society. For law and economics scholars, the rules cannot be an obstacle to free markets and economic efficiency. Second is the question of how legal pragmatism understands adjudication. By focusing on both experience and consequences, pragmatism seems to suggest that adjudication is at the same time embedded in tradition and instrumental in the way that is not constrained by tradition. Let us look at these questions more closely.

Legal Pragmatism and Legal Theory

There are broadly two approaches to the nature of law from the pragmatist perspective. The first approach follows the main insights of Holmes' prediction theory of law. Recall that Holmes explains law from the perspective of a bad man, concerned only with his own interests, in order to predict the consequences of law. For Holmes, there is nothing more to law than these consequences: they simply *are* the law. This approach has famously been criticized by H.L.A. Hart. According to Hart, Holmes' theory misses an important dimension of law: its capacity to guide behavior by virtue of social rules. Holmes' picture of law cannot make sense of the way people who follow the law understand their own behavior. The vast majority of people do not follow the law because of possible negative consequences but because they genuinely accept legal rules as binding. This is why the point of view of the bad man is theoretically inadequate: to understand law we must adopt the perspective of someone who accepts legal rules as a reason for action (Hart 1994: 88–91). Furthermore, taking the perspective of the bad man leads to conundrum. If the law is coextensive with its consequences, then the question "what is the law?" does not make sense for a judge. If Holmes' account were correct, by posing this question, a judge would merely be asking about his own future behavior (i.e., "what is the law?" would be reduced to "what will I

do?"). But this is not meaningful: it fails to make sense of the internal perspective of a judge who treats the answer to this question as a genuine reason for action; moreover, such a judge would treat his future action as a reason for the very same future action (Hart 1994: 104–105).

Although Hart's critique is powerful and important, it may not be fatal for Holmes' view of legal pragmatism. The prediction theory of law can admit that most people accept legal rules as binding and make predictions based on this empirical fact. In fact, sophisticated legal realists accept that legal rules are a major variable in any causal account of legal judgment (Llewellyn 1960). The conceptual critique is more serious, but the question is whether Hart and the legal pragmatists are talking past each other. While Hart aims to offer a conceptual explanation of law, legal pragmatists want to offer a theory that takes the consequences of law seriously. The pragmatist task arguably needs to presuppose a conception of law, but it cannot stop there and must situate the law in the context of other variables in order to predict legal consequences. For example, legal pragmatists may accept Hart's concept of law to delineate one of the factors in their predictive theory (i.e., *legal* rules) and to identify the object of their inquiry (i.e., the prediction of how *legal* institutions will act). It is true that Holmes presented the prediction theory as an account of what the law *is*, and Hart is right to criticize him for this. However, on a more charitable reading, Holmes simply intended to move attention from legal rules to a wider array of variables that determine legal outcomes and did not aim to offer an account of the concept of law.

But there is also a reading that underlines the contrast between pragmatism and Hart's positivism. It is possible to argue that pragmatists want to move beyond philosophical disputes about the concept of law based on the correspondence of the linguistic use of the word "law" with certain features of social reality. A pragmatist could argue that what matters are the consequences of accepting any conception of law as true. But even if this were the case, legal pragmatists would still have to proceed from some conception of law, for otherwise they would arguably not be able to locate the object of their inquiry. Hence, it is perhaps best to understand the dispute between pragmatism and positivism as simply a matter of emphasis: while pragmatists do need to have a conception of law, they consider the debate about the concept of law uninteresting and immaterial and want to analyze legal consequences including the consequences of different conceptions of law; positivists remind them that there is some philosophical work to be done before they can tackle that task.

This kind of analysis is provided by the second strand of pragmatist thinking about the nature of law that focuses on legal experiences and not on consequences. For example, Jules Coleman argues that the way to understand the nature of law is to start from the practice of law and discern the more abstract principles that simultaneously explain and are embodied in such practice. The nature of law is not a matter of a priori truths but of revisable beliefs that are true of spatially and temporally situated legal practices (Coleman 2001: 3–12). Following this method, Coleman reaches conclusions about the conventional grounds of law similar to those of Hart and rejects the views that the concept of law is a function of moral evaluation (Coleman 2001: Chaps. 7–12). However – while the focus on social experience and epistemic inability to step outside of it to understand reality does have a pragmatist flavor – Coleman's disregard of consequences as relevant for a meaningful conceptual debate cannot be easily squared with the classic pragmatist method.

The tension between consequences and experience is also visible in pragmatist accounts of adjudication. For example, Richard Posner believes that the ultimate criterion of judging is "reasonableness," which in his understanding demands a careful consideration of legal effects (Posner 2003: 65–71, 2004: 151). The relevance of legal materials is secondary for this kind of judgment. In Posner's conception of adjudication, the sources of law – such as precedent, statute, or constitution – are treated as "sources of potentially valuable information about the likely best result in the present case" which cannot be disregarded

because "people may be relying upon them" (Posner 1996: 5). Similarly, past legal decisions are to be taken into account if the values they promote – such as "continuity, coherence, generality, impartiality, and predictability" – are pertinent and not because there is a legal duty to respect them (Posner 2003: 61). Legal reasoning is a form of "practical reasoning" which means that "there is no intrinsic or fundamental difference between how a judge approaches a legal problem and how a businessman approaches a problem of production or marketing" (Posner 2003: 73). Although economic consequences are not always determinative for legal judgment, the work of judges should eventually promote efficiency because "it's a useful thing that judges can do, whereas they lack effective tools for correcting maldistributions of wealth" (Posner 2003: 78; notice, however, that the fact that one is good at something does not mean that one should do it).

Posner's theory of adjudication almost completely disregards legal rules, except indirectly and instrumentally. On this account, legal rules are a repository of social wisdom, a habit that is useful when stability is important, or a game we are playing to get to the preferred outcomes, but they are not in any meaningful sense constitutive of legal consequences. Posner even goes as far as to assert that "the wholehearted pragmatist eliminates Hart's boundary between the closed and open areas [of law], 'the law' and 'legislating'" (Posner 2003: 81). But this claim does not sit well with Posner's view that judges sometimes ought to follow the existing law (this would be impossible given the collapse of the distinction between law-applying and law-making) and does not allow him to avoid the untenable rule skepticism discussed above.

In contrast, Daniel Farber develops a theory of adjudication that departs from experience in order to get to consequences. Farber rejects the possibility of a grand theory of adjudication – such as originalism – that would prioritize a single principle of adjudication against the richness of argumentative possibilities that exist in legal practice. For him, "the ultimate test is always experience" (Farber 1988: 1341), and – unlike Posner – Farber understands legal rules and methods of interpretation as part of tradition which is important "not just as an instrumental value but as a necessary ingredient in all human reasoning" (Farber 1988: 1344). Farber takes seriously the pragmatist lesson that it is impossible and unnecessary to step outside of our contingent experiences: for him, "the existing law is…a way of thought that a judge has internalized" (Farber 1988: 1346). The point is that we cannot simply overcome the social practice of law in order to get to the consequences; rather, even the conception of desirable consequences is internal to our social practices. Farber's understanding of experience – echoing James and Dewey – aspires to be broad enough to encompass the concerns about the social effects of law (Farber 1988: 1347–1348). While, for Posner, the experience of law is useful only from the perspective of its consequences, for Farber the consequences are secondary to and embedded in the experience.

Conclusion

Over the last decade, legal pragmatism has grown out of fashion. Partly this is due to the fact that its main lessons are beyond dispute. Most people agree that legal rules are not completely determinate and that doctrinal analysis cannot fully predict legal outcomes. But there are also internal strains within the pragmatist framework. The success of the legal pragmatist program thus depends on resolving the tensions between experience and consequences, in a way that would retain an attractive measure of (pragmatist) flexibility.

Cross-References

▶ Legal Realism, American: Theoretical Aspects
▶ Legal Realism: Contemporary
▶ Metaphysics of Law
▶ Postmodern Theory of Law

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Pragmatism and the Interdisciplinary Knowledge of Law

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Introduction

Turning to the theory of pragmatism to understand legal interdisciplinarity makes sense. Pragmatism promises a problem-oriented approach and attention to the experience of legal practice. Regarding legal problems in practice invites the observation that knowledge of economics, politics, morality, and society will be highly relevant for a viable solution. In this entry, the theoretical underpinnings of pragmatism will be brought to bear on the issue of interdisciplinarity and law.

To start, it is important to clarify that the focus is on the most theoretically sophisticated form of pragmatism: philosophical pragmatism. The scope of this entry is limited to the American pragmatism of Peirce, James, and Dewey and the way successors have applied this to law. The entry will not concern the influence of so-called everyday pragmatism on thinking about legal interdisciplinarity (Posner 2003: 49–50). The purpose of this entry is to show how the basic theoretical notions of philosophical pragmatism are related to possible viewpoints on the interdisciplinary knowledge of law. To that end, a large part of the discussion will be devoted to classical pragmatism, after which a limited number of more recent pragmatist positions will be discussed, with particular attention for views on socio-legal studies.

Classical Pragmatism's Views on Interdisciplinarity

Philosophical pragmatism is the theory first developed in the late nineteenth and early twentieth century by Charles Sanders Peirce, William James, and John Dewey. The core of their approach is their

theory of truth, inquiry, and knowledge. Peirce first formulated the pragmatic maxim as: "Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object" (1992: 132). James took up Peirce's ideas and presented them as the basis of the theory of pragmatism, famously summarizing the conception of truth in terms of practical differences as "the truth's cash-value in experiential terms" (1978:97). Dewey developed these ideas into an experimental theory of inquiry: applying an intelligent method to a scientific problem, and analyzing possible solutions in terms of their consequences (1988: 169–170).

Especially in the form given to it by Dewey, pragmatism has three main defining features as a philosophy of science. First, it is anti-foundational: there are no indubitable principles from which one can derive certain knowledge (Dewey 1984). Second, it rejects dualisms or dichotomies: the separations we tend to make, between mind and world (Dewey 1989: 24), fact and value (Putnam 2002: 30), and moral and natural goods (Dewey 1988: 178), do not mirror an ontological reality but are distinctions we make for our purposes. Third, it is contextualist: concepts need to be understood in the context in which they are at work and the historical context which had a need for them (Dewey 1960: 100).

As is evident in Dewey's writings on law (1987, 1998), all of these ideas also provide a specific view on law. Law needs to be regarded in its social context, being a social process itself (1987: 77). Legal propositions, meaning statements of legal rules and principles and the decisions made in application of these, must be based on a similar method of inquiry as all scientific problems: investigating the conditions that brought about the particular problem and the consequences of the proposed course of action (Dewey 1998: 356). Values of law cannot be regarded as eternal and unchangeable but must be subjected to scrutiny of their consequences as well (Taekema 2006: 30). The separation between means and ends is another pernicious dichotomy pragmatists reject: legal values and principles are also revisable as a result of critical inquiry. Pragmatism is suspicious of reasoning that takes ends or objectives as given without consideration of the way certain means affect those objectives. For example, the objective of generating electricity with water power may be laudable, but if the building of a dam that forms the means to do so involves the submergence of complete villages or natural heritage areas, this should be reason for reconsideration.

With regard to interdisciplinary knowledge, the conclusion is readily apparent: any self-respecting study of law needs to acknowledge that law ought not to be regarded in isolation. Moreover, the general applicability of the method of inquiry also implies that there are no barriers in principle to interdisciplinary research into law. Of course, which disciplinary perspectives need to be included depends on the research problem at hand. If the problem is the criminalization of euthanasia, ethical and medical knowledge need to be included. If the problem is regulation of mining, environmental and economic knowledge are necessary. A pragmatist view of interdisciplinary legal research is in principle open to any other disciplinary perspective, as long as the general method of inquiry can be applied to it. Since that method is open to both normative and natural problems, the only fields of knowledge excluded are those based on dogma. A pragmatist approach requires a fallibilistic attitude: a researcher can never be sure that the idea or solution proposed is (necessarily) true or right.

This principally open attitude towards interdisciplinary research may make it seem as if scientific disciplines do not matter in a pragmatist framework. Such a conclusion would be too quick. Given the contextualist character of pragmatist theory, disciplines have a crucial role in providing the background to the specific inquiry conducted. A distinction needs to be made between the contextual background to a problem that has shaped the experience of the researcher but is now taken for granted and the contextual aspects that are relevant to the research problem. As Dewey argues, it is impossible to question everything at the same time (Dewey 1960: 98–99). The discipline in which a researcher operates, and has been schooled in, provides a

large part of the implicit background to the problem studied. Moreover, the discipline is also an important influence on the selective interest of the researcher. In Dewey's account, it is mainly the subjective interest and attitude of the thinker that is highlighted, but there is an easy case to be made that, rather than subjectivity, disciplinary upbringing shapes the attitude of the individual researcher. Although contextualism means disciplinary influence should not be forgotten, the pragmatist attitude towards interdisciplinary research remains optimistic: as long as researchers pay close attention to the relevant conditions and consequences and keep an open and creative mind, they should be able to engage the other disciplines that are relevant (for a longer argument, see Van Klink and Taekema 2012: 18–21).

Varieties of Legal Pragmatism

The tenets of pragmatism have been adopted mainly in American legal scholarship. Pragmatism most deeply influenced the movement of American legal realism, also in its attitude towards interdisciplinary legal research. Oliver Wendell Holmes, sometimes typified as a pragmatist (Haack 2008: 454) or as a proto-realist (Duxbury 1995: 70), was part of the early pragmatist circles and was an important influence on the legal realists. Holmes was a defender of a broad view of the knowledge needed in the study of law, as shown in his famous quote: "For the rational study of law, the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics" (Holmes 1897: 469). Similarly to Holmes, the legal realists of the 1920s and 1930s also advocated the use of social science knowledge in the context of law. Both in legal practice, of which the well-known Brandeis brief is a good example,[1] and in legal scholarship, the legal realists sought to apply social science. An important aspect of legal realist interdisciplinary work is its functionalism: the idea that law has particular roles to fulfill in society and that legal rules can be criticized for not fulfilling such functions well (De Been 2008: 89). For Karl Llewellyn, one of the central figures in legal realism, this approach meant that certain law-jobs can be identified and that a researcher can use these to identify which social institutions fulfill them (Llewellyn 1940). For the legal realists, social science knowledge was the basis for evaluating and criticizing existing law and for improving the legal system (De Been 2008: 104–105).

More recent defenders of a pragmatist outlook on law can be found in various corners of the field of American legal scholarship. Here I will discuss the three most well-known ones that have a specific view on interdisciplinarity and law: Susan Haack, Richard Posner, and Brian Leiter.

Susan Haack may be regarded as one of the most wholehearted heirs to the pragmatist view of scientific inquiry. She defends the position that "The core standards of good evidence and well-conducted inquiry are not internal to the sciences, but common to empirical inquiry of every kind" (Haack 2003: 23). Like the classical pragmatists, she believes in the achievements of science without separating it from everyday forms of inquiry. This position has also led her to theorize the relationship between law and scientific evidence in the context of legal practice, particularly in the form of expert testimonies in court (Haack 2003, 233–264). Using science in the court context is problematic, because the long-term search for truth that drives science clashes with the legal need to deliver a judgment here and now, even without sufficient evidence (Haack 2003: 256). Within her general framework of empirical inquiry, Haack thus emphasizes the specialized disciplinary practices of science and law.

Richard Posner is a more ambiguous figure in the pragmatist field. As a legal theorist, a law-and-economics scholar, and a judge, his work sometimes aligns with classical pragmatism, but more often dismisses it (Posner 2003). Posner reduces pragmatism's relevance to law to the "everyday" common sense elements recognizable in (American) judicial practice. Here, his view of pragmatism seems informed as much by his practical work as a judge as by his philosophical inquiry. Interestingly, there is little overlap between his legal pragmatism and his position in the interdisciplinary area of law and economics. Posner claims that pragmatism supports

a particular, non-formalist, version of law and economics: "In the pragmatic version of economic analysis of law, economic analysis identifies the consequences of legal decisions but leaves it up to the judge or other policy maker to decide how much weight to give to those consequences in the decision-making process." (Posner 2004: 152). Posner thus advances pragmatism to support empirical social science as input for legal decision-making, without claiming that such social science should determine practical decisions.

Brian Leiter, using a different strand of pragmatic thought, comes to a comparable conclusion about the importance of empirical knowledge for law. Using legal realism's ideas and the insights of Quine, Leiter argues that pragmatism's idea of the usefulness of theory should be applied to epistemic criteria, and that this is consistent with a sharp distinction between fact and value (Leiter 1997: 308–309). Leiter argues that legal philosophy should build on empirical knowledge in science, and on empirical knowledge about law. He values legal realists because they conducted empirical research on courts.

The form of pragmatism espoused by Leiter and Posner can be described in Brian Tamanaha's terms as a theory of inquiry that is substantively empty and that promotes the fact-value distinction because facts and values are "functionally distinct aspects of our experience" (Tamanaha 1997: 51). According to Tamanaha, pragmatism is the basis for an anti-foundational but non-skeptical socio-legal theory. Tamanaha sees critical potential in empirical scientific work on law, but does not see pragmatism as leading to positive proposals on how to conduct interdisciplinary work. In the next section, such a positive proposal, building on the pragmatist continuity of fact and value, will be discussed.

Value-Oriented Pragmatism

For a more normatively charged view of pragmatism that sees the connections between fact and value as central, we may turn to Philip Selznick. A sociologist by training, Selznick advances a value-laden view of social science investigating institutions and social practices as sites of realization of moral and social values, in which law is an important domain (Selznick 2008). Selznick argues against "a radical separation of fact and value" with reference to Dewey (2008: 33) and builds a broad theory of social inquiry that centers on the ideals that inform social institutions. What sets Selznick apart from the authors discussed in section "Varieties of Legal Pragmatism" is that he does not focus on empirical inquiry only but also includes normative, moral inquiry. More strongly, Selznick sees ideals as a central element in the social world, which need to be included in social science to gain a full understanding of our practices (Krygier 2012: 277). His social theory thus claims that we need to understand social practices as oriented towards master ideals and that the realization of such ideals is variable and precarious (Selznick 1992: 244). In his socio-legal work, Selznick puts forward legality or the rule of law as the master ideal of law (1961: 94), which is realized in different forms and to different degrees in various times and places. Such a theory calls for both moral theorizing, about the meaning and proper place of values, and for empirical analysis, of the conditions for and variable achievement of values within social practices. In a pragmatist framework, these different aspects of inquiry influence each other and should do so: if the continued pursuit of a particular ideal is seen to have detrimental consequences for other valuable achievements, it needs to be reconsidered. A pragmatist view of values sees them as responding to the social context in which they are at work. Selznick's form of pragmatism supports the continuity between fact and value because he sees these as mutually influential: there may be empirical reasons to reject or amend certain conceptions of central values, but the pursuit of those values is what drives institutions and practices, so one cannot understand social life without understanding that orientation and its influence.

For an interdisciplinary project, Selznick's pragmatism encourages broader cooperation and the inclusion of more disciplines than just law and social science. Without ethics, history of ideas, and political theory, we will not gain a good

grasp of the ideals that are central to law. Sociological, anthropological, and psychological knowledge are complementary and intertwined with the normative disciplines. Such an interdisciplinary program is highly ambitious, but it is in line with the philosophy of the early pragmatists. Selznick's approach also has affinity with current legal theory that highlights the interdisciplinary connections between law and ethics, and law and the humanities more generally. Although such theorists do not use the label of pragmatism, the continuity of fact and value is an important theoretical starting point (e.g. Del Mar 2016, building on Putnam).

Conclusion

The philosophy of science of American pragmatism is very open to interdisciplinary research into law. Moreover, its problem-oriented approach of inquiry asks for a broad view of possibly relevant knowledge. Most modern continuations of pragmatist thought apply their ideas to the relationship between empirical knowledge and law: legal scholarship, and law in practice, needs to build on knowledge gained in natural and social sciences. However, if the rejection of the fact-value dichotomy is taken as central to pragmatist thought, there is a much wider space for interdisciplinary research linking socio-legal studies to normative disciplines such as ethics as well.

Cross-References

- ▶ Consequentialist Argument
- ▶ Fuller, Lon Luvois
- ▶ Llewellyn, Karl Nickerson
- ▶ Posner, Richard
- ▶ Rorty, Richard
- ▶ Tamanaha, Brian

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Precedent: In Legal Positivism

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The contrast between the classical common law and the positivist conceptions of legal precedent is a contrast between a conception of law based on reason and another one based on authority (Simpson 1981: 665).

There are traces of the positivist conception of legal precedent in the works of Thomas Hobbes, who raised some of the most powerful criticisms against the jurisprudence of classical common law. In his *Dialogue Between a Philosopher and a Student of the Common Laws*, Hobbes responded to Coke's argument of there being a distinctive type of reason in common law. The claim that law had some sort of "artificial reason" was, for Hobbes, both wrong and obscure. "It is not wisdom, but authority that makes a law" (Hobbes 1681: 4), and there is no such a thing as a specific "legal reason." What we got, rather, is only an unqualified form of "human reason." Instead of digging for reasons in the works of lawyers and judges, we should go straight to the only source of legal authority, which lies in the sovereignty of the rightful king.

Core among the ideas of Jeremy Bentham, at the dawn of analytic legal positivism, was a struggle to carry on with this argument and bring it to a more sophisticated theoretical level. Bentham intended to demystify the law, to free jurisprudence from the aristocratic vocabulary embedded in classical common law, "to draw aside that curtain of mystery which fiction and formality have spread so extensively over the Law" (Bentham 1977: 124). Like Hobbes, Bentham was skeptical of the idea of a different kind of rationality in the legal realm. His utilitarianism saw no room for a confused notion of "artificial" rationality. On his doctrine, "laws are at bottom nothing but commands, prohibitions or permissions, *artefacts of the human will*" (Hart 1982: 23). The idea of law is thus implicit in that of sovereign, which for its turn is implicit in that of State (Schofield 1991: 60). But Bentham was strongly skeptical about the common law. His extreme and characteristic opinion was that the existence of the common law was a "fiction from the beginning to the end" and that the belief in its existence would be no more than a "mischievous delusion" (Simpson 1973: 88).

A crucial point of Bentham's theory of law, therefore, was to depart from the "declaratory" theory of precedent contained in the works of Coke, Hale, and Blackstone. But Bentham's criticism of classical common law contributed, in spite of his despise for every form of case law, for an important change in the doctrine of precedent. As Evans argues in an interesting historical essay, the ascension of the jurisprudence of Bentham and Austin was an important *intellectual cause* of the nineteenth-century doctrine of binding precedents (Evans 1987: 64–72). In effect, Bentham's skepticism against binding legal precedents emerged only some years after he put forward the first critique against classical common law. As Gerald Postema explains, Bentham argued in an early essay (bearing the title "Law: Common Law vs. Statute") that a model of *stare decisis* could work as a remedy against the flexibility, uncertainty, and obscurity that he claimed were typical of the jurisprudence of common law. By adhering to a doctrine of binding precedents, legal practices would be in a better position to comply with the requirements of the principle of utility in adjudication. We can see, in this view,

"as in his account of utilitarian adjudication under a code of laws, an attempt to unite his deep commitment to the sovereignty of the principle of utility with his recognition of the need for a device which can focus public expectations in a way that . . . direct appeal to utility cannot" (Postema 2019: 164).

But it did not take too long for Bentham to realize that a model of *stare decisis* fails to provide an adequate antidote for the perils of judicial reasoning. After observing the practice of English lawyers in a legal system in which precedents were gradually becoming more important as a source of legal reasons, Bentham identified a paradox that Postema referred to as the "paradox of inflexibility" (Postema 1986: 279–286). The more a judge is constrained by a strict model of *stare decisis*, the more "legal fictions, abstract and largely empty notions like 'reasonableness', 'policy', 'natural law' and Latinized principles like '*contra bonos mores*' creep into law and the decision-making practices of common law judges" (Postema 2019: 167). The practice of binding precedent, therefore, in the mature and more developed version of Bentham's jurisprudence, is regarded as just as toxic and illegitimate as the classical common law jurisprudence, which explicitly adopted the mischievous and mysterious assumptions of the declaratory theory of law.

In spite of the differences between contemporary legal positivism and the early analytical jurisprudence found in the works of Bentham and Austin, the idea that law is a social artifact that emerges as the product of an authoritative pronouncement is still at the core of the contemporary notion of legal precedent. The positivist doctrine of legal precedent is based on a neat distinction between *creating* and *applying* the law, or between *settled* and *unsettled* legal cases (Raz 1979: 49). This distinction supposes a master rule for identifying a valid law of the sort that Hart postulated in his account of the "rule of recognition," which works as a second-order test "for conclusive identification of the primary rules of obligation" in a legal system (Hart 1994: 95). According to contemporary legal positivism, a law can be identified as such if it fulfills the conditions of validity conventionally stipulated in the rule of recognition. Exclusive legal positivists such as Joseph Raz refer to this method of identifying a legal rule as the strong version of the "sources thesis": A law has a source, for Raz, "if its contents and existence can be determined without using moral arguments," for the "sources" of law are those "facts by virtue of which it is valid and which identify its content" (Raz 1979: 47–48). When it comes to legal precedent, in particular, this allows us to make a sharp distinction between "regulated cases," which "fall under a common law rule which does not require judicial discretion for the determination of the dispute," and "unregulated cases," which arise when a legal question lacks a correct legal answer (Raz 1979: 181). On this view, either there is a precedent which works as an exclusionary reason, or we are facing an unregulated dispute which lacks a legal answer in any meaningful sense.

One of the consequences of Raz's conception of precedent is that judges must retain a power, within certain limits, to create new laws. When judges distinguish or overrule a precedent, they are neither applying the law nor uncovering a legal rule implicit in the diffuse set of reasons, principles, policies, and rules that emerge from the whole set of historical events that constitute the common law. Rather, they are modifying the law by a new authoritative pronouncement. One way to explain what they do in this sort of case is to distinguish between the *validity* and the *force* of law. A legal rule is valid when it satisfies the existence conditions authoritatively fixed in the rule of recognition and eventually in certain jurisdictional rules of the legal system. The force of this rule, however, does not come automatically. It remains to be determined after the rule is recognized. A theory of law is a theory about the identification of legal norms, whereas a theory of adjudication is a theory about the force of legally valid norms. Waluchow, for instance, distinguishes two senses of the force of law: the "moral" and the "institutional" forces. To say that a rule has *moral* force is to assert that it is capable to generate a "moral obligation to abide by the law's requirements," whereas to say that a rule has *institutional* force is to say that an official or a person lacks the legal power to change that

rule: institutional force, as Waluchow defines it, "is a function of a person's legal power (if any) to alter existing law so as to nullify its effect upon a decision" (Waluchow 1994: 39). The difference between being "strictly or moderately bound by precedent seems to reflect different degrees of this institutional force" (Waluchow 1994: 38). The easiest way to understand the institutional force of law is to analyze the effects of a precedent for a middle-level court. Consider the case of a legal system where lower judges are strictly bound by the precedents of the higher courts, whereas higher courts can overrule lower-instance precedents on the ground that they are based on a mistake. On Waluchow's positivism, it may well be the case that John, a first instance judge, is bound by a precedent of an appeal court while Mary, a Supreme Court justice, is permitted by the same doctrine to overrule such precedent and settle a new law. What should Judge John and Justice Mary do in such case? On Waluchow's account, the middle-court precedent has institutional force over John, but not over Mary. While the former is strictly bound by the doctrine of binding precedents, and henceforth lacks any alternative but to follow the precedent, the latter has a legal power to overrule the precedent and perhaps might even be required by the law to replace such precedent for a better rule.

Because of this strict institutional force, which does not allow a judge to alter the content of a legal precedent, Schauer has argued that it is the "status of a precedent that gives its authority – that provides the reason for a decision – rather than the content of the precedent or the persuasiveness of the reasoning it incorporates" (Schauer 2012: 124). If precedent matters, "a prior decision now believed erroneous still affects the current decision simply because it is prior, and thus an argument from precedent operates substantially like an argument from rule" (Schauer 1991: 182). The reasons given for this precedent are seen as not relevant, for precedents are binding even if "no reasons are given for the decision" at stake (Cross and Harris 1991: 47).

The doctrine of strictly binding legal precedents, therefore, has its origin in a positivist idea, which can become institutionalized in different degrees and in different ways, depending, on the one hand, on the institutional or constitutional framework developed in a state and, on the other hand, on the practice of the higher courts of that jurisdiction.

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Precedent: In the Common Law World

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Introduction

Even though sometimes the practice of precedent has been described as a distinctive aspect of common law jurisdictions, it is fair to assume that every legal system, to a certain extent, embodies some form of fidelity to previous judicial decisions. There are, however, two interrelated points of disagreement about precedent across different legal traditions and philosophical backgrounds. First, there is a disagreement about the force which must be attributed to an individual legal precedent; second, a deeper theoretical dispute about the appropriate method of interpretation of decisions with purported precedential effect. This second debate reflects not only a doctrinal dispute about the favored approach to case law but also an important jurisprudential question, which will be the main object of this entry. While legal positivism associates adherence to legal precedent to authoritative relations between courts and citizens or between higher and lower courts, the classical common law account of legal precedent, which will be analyzed in this entry, claims a distinctive type of rationality for the legal practice and does not fit well in a model of *stare decisis*.

Precedent in Classical Common Law

Classical common lawyers did not regard an individual precedent as a binding legal source. Past legal decisions mattered for determining the outcome of present and future cases, but their impact was assessed against a long history of customs, statutes, and cases that were regarded as part of a larger whole. "It was the general practice of the courts, not the specific decisions or reasoning in a given case, that established the propositions of law" (Postema 2002: 161). Common lawyers like St Germain, Hedley, Coke, Davies, Hale, and Selden, regardless of their differences and specific theoretical claims, agreed that common law was based on an interdependent mixture of *custom* and *reason*. They did not regard themselves as "making" the law, as legislatures do when they posit a particular norm which becomes strictly binding upon their subjects. Rules of law were not seen as the product of authoritative settlement; they were understood, instead, as a sort of social construction that emerged in the same way as the rules of grammar in a spoken language (Postema 1987: 21–22).

This interpretive attitude had an import not only in the practice of precedent but also in statutory interpretation, which was also understood against the background of a "public morality" embedded in historical practices. According to Allan, "a common law judge submits to a legislative command, just as he acknowledges a binding precedent, only insofar as he can view its requirements as an intelligible contribution to a larger common reason that he honors and respects" (Allan 2007: 186). Common lawyers thought that legal practice was, first and foremost, a historical enterprise. They believed that legal materials were constantly open to further refinement, adjustment, and interpretation. Legal changes never were, for these lawyers, a threat to the deeper integrity of the common law (Postema 2002: 173). Common law was understood as a social practice and should be read on the assumption of a historical continuity of this practice. To discover the common law was to engage in this argumentative practice, with a special responsibility to discover its the inner rationality.

The rationality of common law, however, was clearly distinguished from the "natural reason" of philosophers, theologians, and scholastic natural lawyers. Classical common lawyers were suspicious of metaphysical formulae and undertook an effort to avoid transcendental arguments about morality, justice or the nature of law. The reason behind classical common law was a form of "artificial reason" in the sense that it was a reasoning *in the law*, with little room for "external" principles imported from second-order philosophy. If the

historical series of decisions, customs, and institutional materials extracted from legal practice failed to give one an uncontroversial solution to a given argument, the job of the lawyer was not to consult "universal moral sources, as a natural lawyers might do, but rather to look longer, harder and deeper into the accumulated fund of experience and example provided by the common law" (Postema 2002: 179). The common law's rationality was called an "artificial" reason because the grounds for evaluating a legal claim were determined from the *internal point of view*, that is, from the point of view of the "member of the group who accepts and uses them as guides to conduct," and not from the standpoint of the observer who assesses them from outside of the social practice (Hart 1994: 89). Among other features, legal argumentation was pragmatic, contextual, and discursive (Postema 2003).

It was *pragmatic* not only in the sense that it aimed to solve practical problems of social life but in the more ambitious sense that it was committed to "settling grounds for decision for today's and future similar cases" (MacCormick 1978: 76). Common law reasoning was Janus-faced. It claimed continuity with the past, but it also looked to the future. Even though it was part of the responsibility of adjudication to discover the law which lied implicit in historical social practices, it was forward-looking in the sense that it was accountable for the juridical consequences that followed from the decision at stake (MacCormick 1983: 249–254).

Furthermore, it was *contextual*, for it required a special ability to interpret particular cases, which formed a long historical series and required a special form of analogical reasoning. To interpret the law was to engage with a mode of reasoning which was neither deductive nor inductive, but essentially *analogical*. Common lawyers carefully avoided the perils of philosophical particularism and of rule-rationalism. Unlike fashionable forms of contemporary particularism, analogical reasoning in classic common law was "discursive rather than intuitive; a matter of argument rather than perception or feeling; a form of reasoning, not just a mode of insight" (Postema 2007: 110). And unlike rule-rationalism, it was skeptical of the idea that there is always an abstract rule that can bridge the analogies between cases. According to rule-rationalists, "it is not possible to judge one case relevantly similar to another without the guidance of a rule that brings them under some category or description," of which the case is nothing but an instance (Postema 2007: 114). The problem with this thought, for Postema, is that it ends up in a vicious infinite regress, for if one asks about the foundation of the abstract rule postulated to allow an analogical inference, the need for a further rule emerges again (Postema 2007: 114). The kind of analogical reasoning of classic common law can be explained, therefore, according to contemporary forms of *philosophical inferentialism*: "Analogical reasoning is not a linear process but rather a dynamic one of locating a new case in a network of inferences; reasoning – tracing compatibilities and incompatibilities of reasons and inferences – occurs throughout the process. If we understand it in this way, we can resist the temptation to reduce it either to a form of intuition or of mere rule application" (Postema 2007: 121).

Finally, classic common law reasoning was essentially *discursive*. Perhaps the reason that led common lawyers like Coke and Hale to disagree with Hobbes is the same reason that motivated, more recently, Dworkin to disagree with Hart. The law was not conceived of as a plain historical fact. In Dworkinian language, "legal practice, unlike many other social phenomena, is *argumentative*", in the sense that "every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice" and that "the practice consists in large part in deploying and arguing about these propositions" (Dworkin 1986: 13). This Dworkinian description of the argumentative character of contemporary legal systems seems to fit well in the spirit of the classical common lawyer's notion of the law's "artificial reason," given that in the classic lawyer's view "only in the process of argument, regarding concrete cases, in open court subject to reasoned challenge, is the law to be found and forged" (Postema 2003: 8).

It comes as no surprise, therefore, that the classic common lawyers lacked a theory of authoritatively binding legal precedent. Cases and precedents were but brute facts whose impact should be assessed in light of the whole body of laws and the artificial reason that established its content. As Mansfield expressed in one of his famous *dicta*, "precedent, though it be evidence of law, is not law itself, much less the whole of the law" (*Jones v Randall* [1774] Lofft 383, 386, 98 ER 706, 707 [Lord Mansfield], quoted in Postema 2003: 11). As I argued elsewhere (Bustamante 2020), this thought replicates a Dworkinian interpretation of the doctrine of precedent, which claims that stare decisis "is the practice of engaging with history, not just by following precedents, but also by distinguishing them and, when appropriate, overruling them" (Hershovitz 2006: 104). In effect, for classical common lawyers "the authority and force of any component of the common law depends on its integration into the framework of the whole and its satisfaction of a shared sense of reasonableness rooted in this framework" (Postema 2003: 14).

The classical common law's interpretation of the practice of precedent, therefore, is committed to a historical and interpretive reading of precedent, which proceeds in the same way as Dworkin suggested with the "chain novel" metaphor: it claims that judges are in the same position as multiple authors of single romance, who share the mutual responsibility of engaging with the previous chapters and constructing an argument that fits and justifies the story as a whole, striving to make it the best it can be in their interpretive judgments. Precedents are binding to the extent that they make an impact in the content of law, that is, in the content of the moral and institutional obligations we have in virtue of them. But there is no brute impact to be found; what we got, instead, is a postinterpretive impact that we determine when we take up the political responsibility of judging the case at hand. To synthesize, there are three basic features in the conception of precedent shared by Dworkin and by classical common lawyers, as identified by Postema: first, we should respect and attach to past judicial decisions not by virtue of their being posited or laid down, but by virtue of "having found a place within the body of common experience"; second, "while individual cases are not regarded as establishing authoritative rules, they are taken to illustrate the operation of proper legal reasoning"; thirdly, past cases are not treated as exclusionary reasons. They "do not preclude deliberation and reasoning in subsequent cases, but rather they invite and focus that reasoning" (Postema 2003: 17).

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Presumption

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Introduction

Legal technique is a complex phenomenon, consisting of a set of various skills, methods, ways, and procedures, organized into a functioning unity. It is an instrumental phenomenon, established in order to make the law's functioning possible in a way it is considered socially desirable, by offering alternatives or selectivity, among paths in both the understanding and practical implementation of norms. It is the medium to filter – by transforming considerations outside the law into components as in-built elements inside the law – all impetuses, theoretical or practical, cognitive, and evaluational or volitional, which challenge it in varying times and situations (Varga and Szájer 1989). Accompanying the practical life of law from making to applying it, legal technique is an almost magical – transformative – means of the distinctively juristic genius (Varga 2006, 2008).

The Concept of Presumption

In its original meaning, it is "'assumption from the outset' on the truth of the facts of a case" (Heumanns 1907, 454), "probability consequence" (Unger 1868, 579) – "probabilis 'posita in communi omnium intellectu'" (Quint. *Inst. Or.* 5, 10, 18, cf. Andrioli 1968, 765) – as "presupposition without full evidence" (Bierling 1881, 301) that "substitutes to the constatation of a fact something deduced from elements only indirectly connected to this fact" (Russo 1942, 103), being, therefore, "anticipation of what is not proved" (Lalande 1947, 802). As to the structure of the presumption, two assertions are hidden in it: "Given the existence of A, the existence of B must be assumed. A is the basic fact, B is the assumed fact" (Morgan 1937, 257). In law, it is a technique of constructing the facts that constitute a case in a way that the proof of some normatively selected facts shall be sufficient for a qualification otherwise not justified.

In its normative definition, "Presumptions are consequences that the law or the court draws from a known fact to an unknown fact" (*Code civil* Art. 1349), "an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action" (*Uniform Rules of Evidence* 1953, Rule 13). A distinction between its cognitive and normative usage – i.e., presumptions "preferred by humans" and "ordered by the legal order" (Heumanns 1907, 454) – was already made by the Digest.

In the Judicial Process of Establishing the Facts: *praesumptio homini vel facti*

It is termed mostly without, or with disqualifying, determiner: "general" (Unger 1868, 580) or "simple" (Lalande 1947, 802) or "simply judicial or factual presumption" (Bierling 1881, 301), "[r]easoning by which an uncertain but probable conclusion on issue of facts is reached" (Lalande 1947, 802). It has a cognitive character inasmuch as it substitutes a definite degree of circumstantial evidence for positive proof. "Presuming [. . .] is accepting the truth of what can generally be true but in the case is only probable or simply possible" (Dabin 1935, 235).

As the *Code civil* provides, "[p]resumptions not established by statute are left to the learning and wisdom of the judge, who shall only admit serious, precise, and consistent presumptions"

(Art. 1353). As emphasized, it is "intimate conviction" that substitutes here for proof; "being indirect and acquired by induction, it is sufficient that it be of a nature to reassure the judge's conscience and to dictate his decision" (*Cass.*, April 23, 1914, 192/1; cf. Foriers 1974, 10).

In the Normative Definition of Facts to Be Established that, in the Absence of Proof to the Contrary, a Case Is Constituted: *praesumptio juris tantum*

"Inconclusive or rebuttable to be drawn from given facts, and which are conclusive until disproved by evidence to the contrary" (Jowitt 1959, 1398): "A legal presumption dispenses him in whose favor it exists from any proof" (*Code civil* Art. 1352). A necessary complementation holds that "statutory" (Unger 1868, 580) or "legal presumption" (Bierling 1881, 304) "is a legal norm" itself (Donatuti 1976, 421).

In the Normative Definition of Facts to Be Established that, by the Force of the Law, a Case Is Constituted: *praesumptio juris et de jure*

Rarely also termed as "violent" (Blackstone 1774, 372), such "irrebuttable or conclusive presumptions are absolute inferences established by law" (Jowitt 1959, 1398). As a rather artificial legal construction, it "specifies the conditions under which certain legal consequences must be recognized. It corresponds to the basic form of the legal norm" (Wróblewski 1974, 69).

Therefore even the name is misleading. "It is a part of the very definition of a presumption that it is rebuttable. An irrebuttable or conclusive presumption would be a contradiction in terms. The conclusive presumption [...] is therefore in no true sense a presumption at all" (Chamberlayn 1915, 1161) "but a rule of the substantive law of the legal field within which it operates" (Brosman 1930–1931, 209). This is to say that term of description and logic of operation are running against one another here; these are "usually mere fictions, to disguise a rule of substantive law" (Wigmore 1935, §451(4)), for such a construction "concerns the law of proof to exactly the same extent as other changes in the substantive law" (Bohlen 1920, 311–312).

Theoretical Reconstructions

Approaches to and understandings of presumption in law divide presumptions into two main groups with further subdivisions:

(A) Presumptions directed by *epistemological considerations* and among them presumptions
  (a) Based on the probability of the presuming facts establishing a *logically necessary link* to the presumed facts. "In order for the presumption rationally justify, it is necessary that it be supported by plausibility. Only what is normal can be presumed by the law [...], otherwise it degenerates into fiction" (Dabin 1953, 227). For "the presumption establishes an inference that experience and common sense justify; it is based on the fact of social life" (Fuller 1967, 43).
  (b) Offering a specific technique of evidence *allotting the burden of proof*. As motives, mostly "difficult proofs" or simply regulatory wish is referred to, knowing that "the norm of presumption predefines the direction of the decision" (Wróblewski 1974, 56), intervening the litigants' chances of the procedure's outcome (Luo 2007).

(B) Presumptions treating it as purely technical an instrument, directed by *practical expediency* exclusively while building upon the sheer formalism of law. "From a logical side, presumptions promote easy and rapid applicability, with comprehensible and clear features replacing difficult-to-comprehend beings" (Trendelenburg 1868, 173). Properly speaking, the facts that constitute a case in law are doubled here with presumed "practical" ones standing for the "original" ones (Plósz 1913, 15).

Queries on Presumption

Function

Legal presumptions are generally approached as if it were ordinary presumptions applied to a special domain. As Blackstone (1774, 371) explained:

> Positive proof is always required, where from the nature of the case it appears it might possibly have been had. But, next to positive proof, circumstantial evidence of the doctrine of presumptions must take place: for when the fact itself cannot be demonstratively evidenced, that which comes nearest to the proof of the fact is the proof of such circumstances which either necessarily, or usually, attend such facts; and those are called presumptions, which are only to be relied upon till the contrary be actually proved. *Stabitur praesumptioni donec probetur in contrarium.*

Or, presumption is normative intervention into inductive reasoning; it "attaches a degree of certainty to any given possibility, to which it normally has no right. It knowingly gives an insufficient proof the value of a sufficient one" (de Tourtoulon 1922, 398). Thereby "presumptions anticipate a possible answer to a controversial question in order to bring about a decision" (Mendonca 1998, 399).

At the same time, they break down the complexity of reality to indices of elementary structures. "Through the use of presumptions the law confers upon facts a clarity of outline lacking in nature. The presumption introduces into an entangled mass of interrelated events a certain tractable simplicity" (Fuller 1967, 108), for it "makes proof easier by consciously deforming ungraspable pieces of reality while it brings them back to firm frames" (Dekkers 1935, 25).

Once presumption is provided by the law, presuming facts themselves are to constitute a case in the law, on equal footing with those facts that might have been judicially presumed should the facts of the case had not been ascertained but presumed by the judge of the instance.

Presumption and Fiction: The Basic Difference

In the field of normative regulation, the specific carrier sublates all cognitive components as mere antecedent. However, for the sake of a proper distinction, Fuller set three requirements for that presumption may "escape the charge of 'fiction'": "(1) be based on an inference justified by common experience, (2) be freely rebuttable, (3) be phrased in realistic terms" (1967, 45).

As to fiction, it rearranges the extension of concepts which would otherwise be of differing contents, by declaring them to be overlapping at least partially. As to presumption, there is no operation with concepts at all. It does only settle the proof of which facts shall be sufficient for the official realization of facts constituting a legal case being established.

Irrelevance of Epistemological Foundations in Respect of the Normative Field

Epistemological approach misses the point even if considerations of probability may have had their role in the formation of presumptive practice. But independently of incidental historical motives, what matters here is the normative qualification of those facts with reference to which the imputation of normatively defined consequences to normatively selected facts takes place. Moreover, normative imputation is majored by practical considerations and their justifiable formulation, with theoretical considerations only assertable through, as mediated by, them. Or, "as its basis, not logic or truth, but expediency" (Fisk 1921, 11) is to prevail.

Jurisprudence has always dichotomized presumption and fiction – "Praesumptio iuris et de iure est declaratoria rei dubiae, quia presumptio est verorum; fictio est falsorum" (Baldo; cf. Todescan 1979, 172) and "In the praesumptio a presumption is made until the opposite is established. By contrast, the fiction is the assumption of a statement of a fact, even though the opposite is certain" (Vaihinger 1911, 258) – while hardly suggesting anything more than probably common genetical roots.

Consequently, further classifications of presumption – e.g., "anti-, non- and para-empirical," "of fact and of law," or "formal and material" (Wróblewski 1974, 59, 46, 49–50, 52–55) – are hardly reasonable in a normative context. In law, facts can occur once they are relevant; they are relevant if leading to a legal consequence; this can be the case only provided a legal norm prescribes it.

The Technique of Presumption

Distinctions are made between "procedural" and "material" presumptions (Burckhard 1866, 166–193), ones taken in a "strict" and "large" sense (Gény 1921, 264–270 & 334–341) as "presumption-proof" and "presumption-concept" (Dabin 1935, 240–241). There are facts

presuming those facts constituting a case that could be established by other means as well (e.g., paternity) and presuming facts imputing the legal consequence themselves (e.g., the silence of administration for 4 months taken as "irrebuttable presumption of rejection" (cf. Rivero 1974, 102–103). They are common in defining facts the proof of which shall be considered sufficient. In practice, admission and exclusion of counterproof are two extremes only, varied by limitations ranging from restriction of evidence to the admission of counterproof as an exception (Plósz 1913, 15).

At the same time, a presumption as a means of legal technique can be substituted by other means as well. For instance, the legal definition of the statuses of filiation is manageable through a search of "fatherhood" to be proved positively, with a construction of "paternity" to be presumed, or by general provisions imputing rights/duties and/or exceptions to them.

Presumption and Fiction in the Perspective of Legal Technique

By fiction, given contents (features, etc.) are attributed to given concepts. Fictions and presumptions as bordering phenomena may even prove to be inseparable from one another in some cases. Having in mind the connection between facts actually proven and legal facts considered proven, epistemological approach may emphasize that a fiction is an "assumptio contra veritatem in re certa," while presumption is "assumptio pro veritate in re dubio" (Olivier 1975, 73). Accordingly, a legal fiction "equates the true and the false," while presumption "equates the true and the likely" (Todescan 1979, 8–9), with the former being logically "arbitrary" operation, while the latter uses "an inductively produced major proposition" (Meurer 1973, 26). The fiction's pure pragmatism is shown by its characterization as "an essentially operative instrument without much abstract speculation on it" (Todescan 1979, 22).

Conclusion

"In the final conclusion, it can be established that the specific function of legal technique is to ensure that the realisation of any legally relevant material target shall be effected through the instrumentality of law, that is that the reaching of basic goals shall be complemented by realising the plus-values and plus-effects that can be gained from their distinctively legal mediation." (Varga and Szájer 1989, 146) In this sense, presumption is a means of economizing while extending regulation in cases where deciding upon factual issues would otherwise be more questionable or harder to reach, or, in limiting situations, when a new legal policy goal, not involved in the original normative intent, can also be reached by a presumptive qualification.

Cross-References

▶ Gaps: Legal
▶ Law as an Artifact
▶ Legal Reasoning: Virtues

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Price, Richard

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Introduction

Richard Price (1723–1791) was a notable eighteenth-century philosopher, activist, and dissenting clergyman. He made significant contributions to moral, political, and religious philosophy, as well as to mathematics and finance. He was known for his resolute commitment to the ideal of liberty, and his subsequent support for a number of progressive causes, including the abolition of slavery, the easing of political and civil restrictions on non-Anglicans, the eradication of the national debt, and, especially, the American and French Revolutions. In light of this, Price has been described as "the first and original Left Wing intellectual" in British history (Pocock 1984). While he was very well known in his lifetime, not only in England but also in America and France, his influence waned rapidly after his death. Today, Price is best known for his 1789 sermon, *A Discourse on the Love of Our Country*, which prompted Edmund Burke to respond with his *Reflections on the Revolution in France* a year later. In recent years, however, there has been a renewed scholarly interest in Price's moral, legal, and political philosophy.

Background and Life

Price was born in Llangeinor in Glamorgan, Wales, the son of a non-conformist minister. At

the age of 16, following the death of both his parents in quick succession, he moved to London to study at the dissenting academy in Moorfields. In 1757, Price became the minister at the Presbyterian chapel at Newington Green, a post he retained for almost 30 years. Shortly after taking up this position, he published his most important philosophical book, *A Review of the Principal Questions and Difficulties in Morals* (1758, corrected and edited in its third edition in 1787 simply as *A Review of the Principal Questions in Morals*).

In 1765, Price became a Fellow of the Royal Society, most likely because of his substantial work in editing and posthumously publishing his friend Thomas Bayles's seminal essay, *An Essay towards solving a Problem in the Doctrine of Chance* (1761). Price was himself a first-rate mathematician. His book *Observations on Revisionary Payments* (1771) is considered to be the first major work on actuarial science in general (Ogborn 1956). This was followed by *Observations on the Proper Method of Keeping the Accounts* (1774), which is also regarded as a key document in the field. Price is held up within the profession as a pioneering consulting actuary, serving for 15 years as an advisor to the Society for the Equitable Assurances on Lives and Survivorships (which became Equitable Life until its demise in 2019) on calculations, the valuation of policies, and the treatment of the Society's surplus.

In *Revisionary Payments*, Price included a section on the history and dangers of government debt, a subject with which he was preoccupied for most of his life. The following year, he published *An Appeal to the Public, on the Subject of the National Debt* (1771) in which he argued for the creation of a sinking fund to be used to pay off the national debt. There was, according to Price, a direct relationship between the level of national debt and the happiness, security, and character of the people. As the public debt grew dramatically during the American Revolutionary War, Price's warnings and proposed solution came to the attention of the Prime Minister William Pitt the Younger, who established a sinking fund along similar lines in 1786, although without crediting Price. Although economists question the soundness of the scheme, the debt was reducing until the long Napoleonic Wars put too much pressure on the nation's finances.

Price was a central figure in several influential London philosophical dining clubs, including the Royal Society Club, the "Bowood Circle" that met at the house of the future Prime Minister Lord Shelburne, and the "Honest Whigs," whose membership included Benjamin Franklin (who had proposed Price's admission to the Royal Society), James Burgh, author of *Political Disquisitions* (1774), and Price's close personal and intellectual friend, Joseph Priestley. Though Price disagreed strongly with Priestley on several important theological, moral, and scientific views, they were united on more issues than they were divided and shared a commitment to many of the same civil and political causes centered on the ideal of liberty, so much so that their names are often closely linked in historical discussions. Between 1977 and 82, for example, there was an academic journal specializing in Enlightenment and Dissent in the eighteenth century entitled *The Price-Priestley Newsletter*. The Honest Whigs group's meetings were also attended variously by James Boswell, the notable radical historian Catharine Macaulay, and the American patriot Josiah Quincy, Jr.

In the build up to the American Revolution, Price published *Observations on the Nature of Civil Liberty* (1776). This was a huge success on both sides of the Atlantic and led to Price being awarded the freedom of the City of London. He followed up this tract with some *Additional Observations* (1777). Subsequently, Price was offered American Citizenship and asked by the Continental Congress of the United States to help establish the finances of the new nation. Price declined the invitation. Franklin also provided the Comte de Mirabeau – a future leader of the French Revolution – with an introduction to Price when he visited London in 1784. Following his address in 1789, Price became a widely popular figure in France, receiving letters and visits from numerous revolutionary leaders.

Theology

Although a Presbyterian minister, Price's contribution to religious thought in the eighteenth century is rather more as a philosopher than as a theologian. He is often described as a Unitarian, as one who does not accept the doctrine of the trinity, but within this broad label his position was Arian rather than Socinian. This meant that, while he did not accept that Christ was divine, neither did he believe that he was a mere human being but instead held that Christ was God's begotten son through whom the world had been created. Price's denial of the doctrine of the trinity and his inability to affirm the Thirty-Nine Articles meant that he was subject to severe legal and civil restrictions.

While rooted in scripture, taking the Bible to have been both divinely inspired and historically accurate, Price's religion was nevertheless highly rational. He published *Four Dissertations* on religious questions in 1767 in which he defended, first, the doctrine of providence – the principle that the universe was created by, and remains under the control of, a benevolent and omnipotent God. Price understood this doctrine to have been supported rather than undermined by Newton's discoveries, though this was a subject of considerable philosophical discussion in the eighteenth century. The other three dissertations concerned the coherence of prayer, the necessity of an afterlife, and a refutation of Hume's arguments against miracles that incorporated Bayesian probability theory and which remains significant today (Earman 2000).

Price's religious and metaphysical beliefs provided the foundation for his ethical and political work. The God that sustains the world is a rational being whose principles are knowable to the human mind and include the principles of morality and virtue. Price understood this within a Platonist framework, an approach in which he followed Samuel Clarke (1675–1729) and Ralph Cudworth (1617–1688). The universe, he argued, is a copy of archetypal ideas used by God in his creation. These ideas are immutable and eternal while remaining independent of God himself, who knows them because they are identical with his nature. This gives the universe a rational structure which is accessible to human beings, whose minds are also a reflection of the archetype (Zebrowski 1994). It follows, then, that the principles of science, represented in Newton's axioms, and of moral duty and virtue are reflections of the divine reason. This is morally significant because it fixes the ideas of right and wrong according to nonarbitrary rational principles rather than according solely to either God's will (voluntarism) or human sentiment or emotion (sentimentalism). It also provides the basis for Price's ideal of social and political freedom as rational individual self-government under a system of similarly rational laws.

A millenarian aspect to Price's theology can also be detected, according to which not only do human beings have a duty to obey the moral law, but that in so doing they hasten the prophesied time of earthly paradise when the whole earth will be governed by an empire of reason and virtue (Fruchtman 1983). As people, we must prepare for this coming reward by developing our intellectual and spiritual knowledge of the eternal truths and principles of virtue. Seen in this light, the struggle for religious and political liberty also represents a struggle between good and evil on a cosmic scale.

Moral Philosophy

Price was a rational intuitionist. Intuitionism was one of the dominant approaches to moral theory from the early eighteenth century until the middle of the twentieth century when it was largely abandoned, although interest in it has returned to some degree in our own century. Price's moral philosophy is set out in *A Review of the Principal Questions*, a book which was considered in its day as the most able defense of rational infusionism in the English language. The book was significant in its own time and Price's thought foreshadowed a number of the important developments in this field of the twentieth century by G. E. Moore (1873–1958), H. A. Pritchard (1871–1947), and, especially, W. D.

Ross (1877–1971). For this reason, *A Review* should be regarded as a "permanent contribution to philosophical thought and a classic of the science to which it belongs" (Thomas 1924, 33). Nevertheless, like much of Price's work, the book's direct influenced largely died with its author. *A Review* does, however, continue to be highly esteemed by those acquainted with it, with Robert Fogelin describing it as "a work that is rarely read without praise, but still rarely read" (Fogelin 1992, 132).

Moral intuitionists hold that moral truths are self-evident and refer to nonnatural properties. Because moral truths are self-evident, they can be known without the need either for argument or experience. Self-evident truths need not be obvious, but they can be discovered without the introduction of further principles. As to how moral truths are known, there are two broad approaches. One holds that human beings have a moral sense by which we make our judgments. This tradition is associated with the Earl of Shaftesbury (1671–1713), Frances Hutcheson (1694–1746), and David Hume (1711–78) and is sometimes referred to as moral sentimentalism. On the other approach, we are understood to grasp moral truths through the intellect. This is the tradition built upon by Cudworth, Clarke, and Joseph Butler (1692–52). Price belonged to the latter group, and *A Review* was written principally as a reply to the sentimentalism of Hutcheson and Hume. On the sentimentalist account, the criterion of right and wrong was often identified with some natural but nonethical feature, such as the tendency to produce pleasure, whereas rationalists argued that moral principles were themselves basic, not reducible to any other quality, and in that sense were nonnatural. In this respect, Price anticipates – possibly originally – Moore's famous "Open Question Argument," according to which any attempt to define what is good in terms of a natural property is always left facing the question "but is this good"?

Legal and Political Philosophy

Price's legal and political philosophy builds on his theological and moral commitments. In particular, his framework is constructed around the central idea of freedom, so much so that he was described in France by the National Assembly, which itself went into 6 days of mourning for him upon his death, as an "Apostle of Liberty" (Thomas 1924, 144–146). "Nothing," Price argues in his *Observations on the Nature of Civil Liberty*, "can be of as much consequence to us as liberty. It is the foundation of all honour, and the chief privilege of and glory of our natures" (Price 1991, 23). Human beings have a natural and inalienable right to be free, and it is the principal purpose of government to protect that liberty, which includes ensuring that people's property is secure. In addition to being a natural right, a free way of life is said to benefit society by allowing the individual and collective exercise of our minds, providing the necessary conditions in which the arts and sciences can flourish. These ideas stand within the Commonwealthman, or republican, tradition of political thought that animated the English Civil War as well as the American and French Revolutions, and of which Price was one of the most notable representatives at the end of the eighteenth century. In the twenty-first century, as interest in neo-republican political thought has increased, Price's work has experienced a corresponding renewal of interest.

According to Price, and in line with republican theory, government is only ever legitimate where it is in the name of those it governs: "the people (that is, the body of independent agents) are their own legislators. All civil authority is properly their authority. Civil governors are only public servants, and their power, being delegated is by its nature limited" (Price 1991, 15). Independence, in this context, is synonymous with freedom. A free person is independent in the sense of being self-governing, acting in his own right rather than being under the control of a master. Such a person is the equal of all others in the political community, subject only to a properly constituted law. Law does not inhibit individual freedom, rather government by law is itself liberty so long as "the body of people. . . participate in the making of [it]" (Price 1991, 17). Freedom of this kind must be thought of from two perspectives simultaneously, that of the free individual citizen and that of the free state. "A free state," Price

argues, "at the same time that it is free itself, makes all its members free" (Price 1991, 27). Just as a free person is self-governing, so too must be the state as a whole meaning that it must be independent from all foreign interference and control. Not only must the free state be independent of external power, it must also represent the will of all its members on pain of otherwise being a despotic government to those it subjugates. Freedom, then, is a complex ideal. It not only entails the twin perspectives of individual and collective freedom but comprises three distinct components. Alongside independence from external control and equality with all other citizens, freedom requires the exercise of civic virtue on the part of free individuals (Coffee 2013, 120). Virtue, here, refers to the capacity and willingness to regulate one's conduct in accordance with reason and the rational moral law.

Freedom, as Price understands it in its eighteenth century context, represents the antonym of slavery. To be under the control of another person's, or another country's, will was the definition of servitude, language that Price applies liberally throughout his political writings, including in the context of the America colonies' subjection to British rule. Strictly, the right to freedom applies to all moral agents capable of independence living in the state. Where Price seems to have reservations about the idea of universal suffrage, it is because the poor and uneducated would likely remain dependent on their employers and landlords unless there were accompanying policies of education and social reform. The most notable area where Price is silent about extending freedom is in the case of women. It would be left to his friend and protégée, Mary Wollstonecraft (1759–97) who attended his church at Newington Green in the 1780s, and whose own philosophy is heavily indebted to Price's, to make this case.

Conclusion

Price is a versatile philosopher who made notable contributions to several areas of the discipline. He developed a systematic overall religious, moral, legal, and political philosophy (for an excellent introduction to his thought, see Thomas 1977). If Price's subsequent influence has not been what his achievements in lifetime might have suggested, this has most likely resulted from the contingencies of history rather than from any lack of quality in his thought. Revolutionary politics, for example, fell out of favor at the start of the nineteenth century, and Price's moral philosophy was eclipsed by that of Kant with whom he shares a great deal. And whereas the reputation of Price's contemporary, Priestley, was maintained for his scientific work, such as for the discovery of oxygen, the field of actuarial finance has not attracted the same historical attention. That Price's work is once more being discussed is a benefit to the history of philosophy.

Cross-References

- ▶ Freedom
- ▶ Illiberalism
- ▶ Priestley, Joseph
- ▶ Wollstonecraft, Mary

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Priestley, Joseph

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Introduction

Joseph Priestley (1733–1804) was an influential and versatile British thinker who made a lasting contribution to several disciplines. He published important works in several areas of philosophy and politics, as well as in science and theology. Priestley was an influential but controversial figure, especially regarding his nonconformist theology, antiestablishment politics, and support for the French Revolution. For this reason, his political ideals were more readily accepted abroad, especially in the United States where his nonconformist and millenarian theology, republican politics, and support for laissez-faire economic policies found a sympathetic audience.

Background and Life

Priestley was born near Leeds in the north of England. Though raised in a strict Calvinist family, he had early doubts about this doctrine and went on to study at the dissenting college, Daventry Academy. There, Priestley became acquainted with the work of David Hartley (1705–57), whose psychological and epistemological philosophy was to be one of his greatest intellectual influences.

Between 1773 and 1780, Priestley worked as a librarian and advisor for the future British Prime Minister, the Earl of Shelburne, before moving to Birmingham to take up a post as dissenting minister. In 1791 he fled the city when his house was ransacked and destroyed by a violent religious and politically motivated mob during the "Church-and-King" riots.

Shortly afterward, Priestley moved to the United States. He was a close friend of presidents John Adams and Thomas Jefferson. Following the rift between Adams and Jefferson, Priestley sided with Jefferson. Jefferson acknowledged his intellectual debt to Priestley, referring to him as "one of the few lives precious to mankind" (Jefferson 1801).

Natural Science and Theology

Though without formal scientific training, Priestley made important contributions to several fields, including electricity and chemistry, where he is credited with the discovery of oxygen in 1774. Though science and theology are distinct disciplines today, Priestley considered them to be part of a single research program, within which theology was the more important. For this reason, writes Robert Schofield, "one cannot understand Priestley *as a scientist* without also investigating

his theology, and his metaphysics which links the two" (1983, 70).

Theologically, Priestley was a "Socinian," considering Christ to be merely human. This placed him at the center of the growing eighteenth century Unitarian movement. Priestley applied the same rational and empirically based approach to theology as in his science. He had a materialist and causally deterministic outlook, which led to controversial conclusions including the rejection of Christ's divinity, the doctrine of atonement, and human free will.

Priestley's theology was also millenarian, interpreting historical and current political events in light of the scriptural accounts concerning the Christ's second coming. Priestley interpreted the French Revolution, for example, as indicating that the millennium was imminent. Underpinning his millenarianism was a belief in human progress and perfectibility, such that as knowledge and understanding improve, so societies will be better governed and happier (Fruchtman 1983).

Legal and Political Philosophy

Priestley's theory of the law and government follows from his beliefs about human progress. Society and government, are the "great instrument" placed in the hands of individuals working collectively to bring about a state of perfection (1993, 9, 10).

The protection and mobilization of human thought are the fundamental basis of government. This is best achieved through free enquiry, public debate, and a principle of religious toleration (*An Essay on the First Principles of Government*, 1768). Priestley took the limits of toleration much further than others such as Locke. "Should free inquiry," he argued, "lead to the destruction of Christianity itself, it ought not, on that account, to be discontinued," since religion is valuable only if it is true and can stand the test of free scrutiny (*Importance and Extent of Free Inquiry in Matters of Religion: A Sermon*, 1775, xxiv).

Priestley's politics should be understood within the republican tradition, an approach that includes other radicals and Dissenters of his time, such as James Burgh, Catharine Macaulay, Thomas Paine, Richard Price, and Mary Wollstonecraft. Government is regarded as being legitimate insofar as it upholds an ideal of individual and collective freedom as independence from arbitrary controlling power. Laws that uphold freedom are those that reflect the common good of the people, where the common good is determined by the people themselves through public debate rather than being imposed according to some prejudice or factional interest. Such a community is committed to a principle of equality among the citizens as well as a willingness to support the common good rather than some private advantage.

In contrast to some other republicans – such as his great friend and fellow radical dissenter, Price – who held freedom to be of intrinsic worth, Priestley sees its value instrumentally, regarding it as the surest means to progress and truth. "By freedom of debate," he writes, "and writing, the minds of the bulk of any people would in time be enlightened, and their general voice alone would, in a well-regulated state, both command any real useful regulation, and enforce the observance of it when it was made. If the constitution was not a good one, this perfect freedom of debate would be the best method of making it to be so" (*Letters of Advice* in *Works*, vol. XXII, 455, and Miller 2008, 338).

With the principle of equality, Priestley gives a similarly instrumental account of its application. While the interests of all citizens should be equally represented, it is not necessary that everyone should have a vote. If a person's circumstances – such as poverty – prevent them from being independent, then their judgment cannot be trusted and they would not be allowed a voice in the election (*Present State of Liberty* in Priestley 1993, 134).

Conclusion

Priestley is a versatile and penetrating thinker with a vast range. He made lasting and meaningful contributions to several fields, though he considered these all to be part of a single overall project of enquiry. He was a significant cultural and political figure in his lifetime. Though he has been neglected in comparison to his intellectual peers, such as David Hume and Adam Smith, his work remains relevant and appreciated by those who study it.

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Primoratz, Igor: On Terrorism

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Introduction

In a series of papers published between 1990 and 2011, and culminating in a monograph (Primoratz 2012), Igor Primoratz has developed a distinctive philosophical account of terrorism and of the moral issues that arise in connection with terrorism. This entry discusses Primoratz's contributions to this area.

Terrorism, Primoratz argues, may be defined as "the deliberate use of violence, or the threat of its use, against innocent people, with the aim of intimidating some other people into a course of action they otherwise would not take" (Primoratz 2012, 24). The definition is deliberately formulated so as to be neutral with respect to certain important controversies, including the question of whether "state terrorism" can genuinely count as terrorism.

Primoratz's definition does not rule out state terrorism. Indeed, Primoratz explicitly argues that the fact that violence is committed by a "legitimate" or recognized state or political entity does not disqualify it from counting as terrorism. Moreover, Primoratz argues that state terrorism tends to be more destructive, and hence morally worse, than nonstate terrorism. As a contemporary example of a morally criticizable state program, Primoratz discusses the United States' "war on terror," which has led to the violent deaths of large numbers of noncombatants in Iraq, Afghanistan, and elsewhere. "[T]errorism may not be fought by terrorism . . . In this respect, so far the record of the 'war on terrorism' has been very poor indeed" (Primoratz 2012, 46).

The centrality to Primoratz's definition of the innocence of terrorism's victims situates his account within the tradition of just war ethics. Thus the question of whether terrorism can ever be morally justified, which for Primoratz constitutes the fundamental question regarding the morality of terrorism, hinges crucially on the question of whether it can be justified to deliberately use violence against innocent civilians. In Primoratz's view such violence can be justified, but only very rarely; terrorism, on this account, is morally impermissible in all but the most extraordinary circumstances.

Primoratz's account of the circumstances under which terrorism *is* morally justifiable falls under the umbrella of what are sometimes referred to as "moral disaster" views, views which hold that the ordinary rules of *jus in bello* may occasionally be suspended, but only in order to avert

some sort of radically intolerable outcome. The account is, as such, related to Michael Walzer's "supreme emergency" view. However, while Walzer believes that a community that faces an imminent threat of being enslaved may be justified in resorting to terrorism, Primoratz rejects this claim. On Primoratz's account, the sole kind of moral disaster that could justify violence against the innocent, and hence justify terrorism, is the impending extermination of a people – a fate from which, unlike enslavement, a community cannot recover. It is important to note, however, that a community's being "exterminated" need not involve the death of all of its members. According to Primoratz, sufficiently radical cases of ethnic cleansing would also constitute extermination: "Uprooting a people from its homeland puts an end to its 'ongoingness' almost as effectively as does extermination." Thus "ethnic cleansing . . . constitutes a moral disaster in its own right" (Primoratz 2012, 107).

That a people is threatened with extermination is not, in itself, sufficient to justify the resort to terrorist tactics. Primoratz also requires that it be the case that the resort to terrorism is the community's only hope of defending against the impending moral disaster, and that there be a reasonable likelihood of success. Like the condition regarding the seriousness of the threatened outcome, these conditions are familiar requirements for justifying the use of violence in the just war tradition.

While Primoratz thus rejects the view (defended by Bauhn 1989; Nathanson 2010) that terrorism is never justifiable under any conditions, he regards nearly all attempts to justify it as insufficiently stringent and hence overly permissive. Against the position that the so-called innocent victims of terrorism are in reality not innocent at all, but rather collectively responsible for the wrongs that the terrorism is a response to, he offers a number of strong objections. The position fails completely with respect to governments that are not democratic, in which citizens have little if any power over what happens. In democratic societies, on the other hand, while some citizens (those who knowingly support regimes that perpetrate immoral actions) may bear a degree of responsibility for those actions, many citizens will not (including those who vote and work against these regimes, and children, who do not participate in political processes and who thus bear no responsibility whatsoever for the actions of the political entities to which they belong). Moreover, even those democratic citizens who vote for regimes that commit immoral actions are not clearly directly responsible to a degree that would justify being killed or maimed by terrorist actions. (Primoratz's rejection of collective responsibility is criticized by authors including Sparrow (2005), though to my mind Sparrow's criticism is mostly unconvincing.)

Primoratz responds to the consequentialist view that terrorism may be justified when it has good consequences (Nielsen 1981, e.g.) by appealing to commonly held fundamental moral beliefs regarding respect for persons, the separateness of persons, and the moral relevance of innocence and guilt, which imply that the value of persons may not be aggregated in a consequentialist manner and that persons possess individual rights that prohibit their being made targets of violence in order to achieve overall good outcomes. Thus we must reject the idea that "a sufficiently good end can justify virtually any means, however atrocious" (Primoratz 2012, 77).

Primoratz's preference for stringent rather than permissive accounts of terrorism's justifiability is reflected in his treatment of real-world cases. In Primoratz (2012) he spends considerable time on two: the World War II firebombing of German cities by British and American air forces, and violence against noncombatants committed by both sides in the Israeli-Palestinian conflict. Primoratz examines a variety of justifications for these acts, including the idea that targeting civilians can ensure "a more equitable distribution of inevitable suffering and loss brought about by war, the idea that everything is morally permissible in war, the appeal to considerations of vengeance, the supreme emergency / moral disaster view" (Primoratz 2012, 147). In every case, in Primoratz's assessment, the argument fails, and some crucial condition of justifiability fails to be met. The failure to find a real-world example of justified terrorism, Primoratz writes, should not surprise us and does not constitute evidence

against his position: "terrorism is, after all, almost absolutely wrong" (Primoratz 2012, 175).

Conclusion

The distinctive features of Igor Primoratz's view of terrorism include the following. First, state terrorism is possible, and indeed seems to constitute one of the most significant and potentially damaging forms of terrorism in the world as we know it. Second, it is a significant element of the definition of terrorism that it is directed toward innocent victims. Third, although terrorism may in principle be morally justified, the conditions that would justify it almost never obtain. Although Primoratz does not endorse the absolutist view that terrorism may never be justified, he comes close to doing so.

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Principles

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Introduction

The concept of legal principles refers to proper *legal* norms. A legal principle is not a practical standard from a normative level beyond the ordinary practice of law, but a ground for concrete legal decisions instead. It is *embodied* in the social practice of law, although it is often implicit rather than enacted in canonical texts.

Jurisprudence scholars became especially interested in legal principles after Dworkin claimed, in *The Model of Rules*, that legal positivism is "a model of and for a system of rules" (Dworkin 1978: 22). Dworkin argued that legal positivists employ criteria of validity that are inconsistent with the fact that principles have a dimension of normative weight. This dimension of weight, which is absent in the rules, would imply a "logical" or "structural" difference between rules and principles.

Dworkin's argument was initially conceived as a critique to legal positivism. He thinks that positivism is in trouble because it cannot account for the fact that judges treat these norms as legally binding even though they fail to satisfy the conditions established in a legal system's rule of recognition. Dworkin's emphasis on the structure of rules and principles made it easy for legal positivists to respond to his criticism. Nonetheless, it provides helpful insights to understand the nature of legal norms and the role they play in adjudication.

The distinction between rules and principles is of interest not only to legal theorists, but also to practicing lawyers who turn their attention to balancing and conflicts of rights, especially in constitutional or international law. Yet this emphasis on balancing is at odds with Dworkin's later philosophy, which denies that principles are prone to collide. Although Dworkin lacks an

ontological argument to rule out the possibility of a conflict of principles, he claims that the right interpretive attitude toward controversial cases is not to conceptualize rights as weighable objects, but to accommodate them in a constructive interpretation oriented by the value of integrity.

Integrity requires judges to reach decisions that fit institutional history while finding a justification in political morality.

In this entry, I endeavor to explain the following aspects of legal principles: (i) Dworkin's original distinction between rules and principles; (ii) Raz's positivist reply; (iii) Alexy's model of balancing; (iv) its critics; (v) Dworkin's later philosophy; and (vi) some arguments for and against integrity in the interpretation of law.

The Structural Distinction Between Rules and Principles

Dworkin's early attack on legal positivism challenges the idea that legal systems can be described as systems of rules. Dworkin believed Hart's positivism fails because it presupposes that the set of valid rules "is exhaustive of 'the law'" (Dworkin 1978: 17). When no rule is directly applicable to a case, one is faced with discretion and judges are not under any specific obligation to decide the case in a predetermined way. Dworkin intends to defeat legal positivism by demonstrating that another class of norms is part of the practice of law, and that these norms leave no room for discretionary judgments in adjudication.

In this view, the difference between rules and principles is a structural distinction, which Dworkin somehow obscurely called a "logical distinction." While both types of norms point to a particular decision in certain circumstances, they differ in the "character of the direction they give." Rules are applicable in an "all-or-nothing" fashion: "if the facts a rule stipulate are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision" (Dworkin 1978: 24). While rules may have exceptions, any complete statement of the rule must take these exceptions into account. The distinguishing feature of principles, in turn, is that they have a dimension of weight. "A principle like 'No man may profit from his own wrong' does not even purport to set out conditions that make its application necessary." It stakes a claim in one direction but does not "necessitate a particular decision" (Dworkin 1978: 26). The existence of a principle applicable to a case is not a conclusive reason for a particular decision, since there might be other principles arguing in the opposite direction.

This structural distinction entails another, which has a crucial methodological import. When two principles intersect, one must resolve the conflict comparing the "relative weight" of the principles that stand in competition in the case at hand. While no two rules can survive a conflict in a single case, it is "an integral part of the concept of a principle" that it "it makes sense to ask how important or weighty it is" (Dworkin 1978: 26–27).

The assumption that the distinction between principles and rules is a structural difference obnubilates Dworkin's stronger argument against positivist jurisprudence, which is the idea that there is a subclass of norms, that he calls principles in a "more precise" sense.

According to Dworkin, two classes of standards can be accommodated in the general category of "principles": policies and principles in a more precise sense (Dworkin 1978: 22). While a policy can be described as a "collective goal of the community as a whole," a principle in a narrow sense always convenes a decision that "respects or secures some individual or group right" (Dworkin 1978: 82). Unlike the former, the latter possess a special moral status and provides a firewall against the interests and political choices of an occasional majority, inasmuch as it establishes a "right" that constitutes an "individuated political aim" (Dworkin 1978: 91). A principle must be observed "because it is a requirement of justice or fairness or some other dimension of morality" (Dworkin 1978: 22).

The distinction between "principles" and "policies" plays a central role in Dworkin's account of law and adjudication, for it determines the grounds for legitimate decision-making. While

courts lack legitimacy to make policy judgments about collective interests and general goals, arguments of principle are part and parcel of adjudication. As we can see, Dworkin's early jurisprudence is dependent on the distinction between principles and policies, even though some critics think that he did not provide a clear-cut criterion to discriminate them.

A Positivist Response

Although the claim that principles are "requirements of justice or fairness or some other dimension of morality" is a powerful candidate to undermine Hart's claim that every legal system contains a test for "conclusive identification of the primary rules of obligation" (Hart 1994: 95),[1] the alleged structural distinction received more attention in jurisprudential scholarship.

The dimension of weight provides an interesting account of the roles played by principles and rules in practical reasoning. But it begs an important question. It fails to show what turns them into different normative entities, i.e., the "principles of individuation" that allow us to identify each type of norm in any given case. As Raz explained, a structural classification of norms inevitably presupposes a set of principles which provide an answer to the question "What is to count as a complete law?" (Raz 1972: 825). The point of the principles of individuation in a legal system is to carve "small and manageable units" out of the vast array of legal materials, with a view to provide a standard for *understanding* laws and classifying legal provisions into these different normative types, as well as "showing how these laws interrelate and interact with one another" (Raz 1972: 831).

Raz is after an answer about how to determine whether something counts as a principle or a rule, but unfortunately there is little in Dworkin's description of the logical structure of norms that provides a sound answer to this important theme. In response to Dworkin, Raz suggests that rules can also come into conflict because they can often be qualified or defeated by other norms. When we consider qualifying clauses like the exemption of punishment for acts committed in self-defence, which apply to ordinary crimes like assault or homicide, we should adopt principles of individualization of law that provide a general framework of the multiple rules that enter in normative relationships. The vocabulary of weighing leads to misleading distinctions between types of norms because rules can also be described as prima facie oughts (Raz 1972: 831–836).

To counter this difficulty, Raz distinguishes principles and rules in terms of the "character of the norm-act prescribed." While rules prescribe "relatively specific acts," principles prescribe "highly unspecified actions" (Raz 1972: 838). Although it is sometimes clear whether a norm is a principle or a rule (a norm forbidding smoking is a rule, whereas a norm that no one must profit from the wrong is a principle), the distinction is re-casted as a matter of degree, instead of structure, since there will be borderline cases in which it is "impossible to say that we definitely have a rule or definitely have a principle" (Raz 1972: 838).

Raz adopts, therefore, a distinction based on the generality of norms, and adds an important assumption to this proposal. He claims that norms prescribing highly specified acts "must be justified by more general considerations bearing on a wider area of human activity." In other words, we can resort to principles to justify rules, but not vice versa (Raz 1972: 839).

Balancing, Proportionality, and Rights

Alexy offers an influential response to the sort of criticism presented by Raz. He insists on a structural distinction between principles and rules but specifies in more concrete terms the feature that explains why principles possess a dimension of weight. Principles are "norms that require that something be realized to the greater extent

[1] It should be noticed, however, that Hart thinks that rules are inevitably open-textured (Hart 1994: 124–136), which requires one to interpret this quote in a nuanced way.

possible given the legal and factual possibilities." In other words, they are *optimization requirements*, which can be "satisfied to varying degrees" (Alexy 2002: 47). Rules lack such dimension of weight because they provide *fixed points* and require one to do "exactly what it says, neither more nor less" (Alexy 2002: 48).

Like Dworkin, Alexy believes conflicts of rules are resolved in the dimension of validity. We must either introduce an exception in one of these rules or conclude that it is invalid. Principles, in turn, can be put aside without undermining their validity. Collisions of principles are resolved by fixing "priority conditions" between principles. Balancing is their proper mode of application, and it is through balancing that one determines the appropriate priority conditions.

Like Raz, Alexy believes principles provide reasons for rules, while the opposite conclusion does not hold. As a result of every balancing of principles, a *derivative norm* emerges as the solution to the conflict. This derivative norm can only be a rule (Alexy 2002: 54).

Principles are optimization requirements because they establish an ideal ought. The maxim of proportionality provides a test to determine when an interference on a principle can be justified by factual or legal reasons. There are three dimensions of the maxim of proportionality: (i) suitability, which prevents a government from intervening on a principle-based right when the measure adopted fails to contribute to its justifying goal; (ii) necessity, which prevents unnecessary restrictions on one principle when there are alternative means (with similar efficacy) to promote a goal; and (iii) proportionality in a strict sense (or balancing), which requires one to balance the degree of satisfaction of one principle and the degree of interference on another (Alexy 2002: 66–69). In recent years, Alexy has further developed this model. He now thinks that the following factors must be considered in a balancing test: (i) degrees of interference on one principle and satisfaction of another; (ii) abstract weight of competing principles; (iii) epistemic uncertainty about interference or satisfaction of a principle; and (iv) normative uncertainty about the appropriate weight to be assigned to each principle. He developed, in addition, an arithmetic formula to compare the weight of competing principles in controversial cases, which purports to provide a structure for principle-based reasoning. Alexy acknowledges, however, that any legal judgment is dependent on disputable valuations and that the internal justification provided by the weight formula plays just a partial role in the justification of legal decisions (Alexy 2002: 388–425).

Two Objections

Several aspects of Alexy's theory of norms have been criticized, but I only have space for considering two.

The first criticism is that there remains a "latent positivism" at the heart of Alexy's theory of norms (García Figueroa 1997: 330). Alexy adopts a "semantic concept of norm" that is not entirely different from that which Kelsen developed in his pure theory of law. A norm, for Alexy and Kelsen, is what is ordered, prohibited, or permitted by the legal order, whereas a normative sentence is the verbal expression of a norm. In other words, a norm is the *meaning* of a normative sentence (Alexy 2002: 22). Alexy's concept of norm retains not only Kelsen's vocabulary, but also his theory of meaning, which includes the thoughts that legal concepts are marked by indeterminacy and that vagueness and ambiguities are sources of *discretionary powers* for the "authentic" (or officially authorized) interpreter of law (Kelsen 1967: 354).

As Raz summarized, the legal positivist model admits three sources of discretion in judicial reasoning: *vagueness*, *weight*, and the *laws of discretion* (Raz 1972: 846). The first stems from the indeterminacy of linguistic concepts; the second from the possibility of inconclusive judgments about weight and priority relations among principles; and the third from the possibility that some structural principles (which Raz calls "principles of discretion") expressly assign to a legal authority some normative powers to decide the matters at stake. Principles of discretion, for Raz, "merely specify the type of considerations which may be

taken into account," leaving to an authority a choice, within certain limits, about which reasons can enter the balancing of reasons in a controversial case (Raz 1972: 847).

On Alexy's theory of rights, there is plenty of room for "ties" between principles and inconclusive judgments about priority relations (Alexy 2002: 394–425). Furthermore, he believes that there are "formal principles" that work like Raz's "principles of discretion." The theory leaves to courts and officials a significant range of discretionary powers in determining the content of derivative norms. A supporter of Alexy's theory will face difficulty, therefore, in distinguishing between a principle-based reasoning and a discretionary judgment of an authentic interpreter.

The second criticism, in turn, refers to a possible impairment of legal normativity that the conceptualization of principles as optimization requirements entails. Jürgen Habermas, for instance, claimed that to trump the preferences of a political majority, rights must retain their claim to correctness, which comprises a claim to universalizability and assumes an unconditioned priority of principles over collective goals. On Habermas's view, it is this unconditional validity that distinguishes norms of action, which have a deontological status, from values that are mere teleological claims: "Valid norms of action obligate their addressees equally and without exception to satisfy generalized behavioral expectations, whereas values are to be understood as intersubjectively shared preferences." Consequently, values are realized through "goal-directed action" that tells one that "certain goods are more attractive than others," instead of "binary validity claims that are either valid or invalid" (Habermas 1996: 255). The putative dimension of weight attributed to legal principles cannot be accepted because it would deprive them of their obligatory force and imply that the solution of controversial cases is attained by arbitrary means.

A variant of this objection is presented by Nigel Simmonds, who challenges the theories that presuppose a pluralism of values that leads to incommensurable options and turns political judgments into a "matter of ungrounded choice" (Simmonds 2007: 176). This "pluralism of defeat," as Simmonds calls it, arrives too easily at the conclusion that principles are prone to collide. The conclusion that conflicts of principles are ubiquitous comes from the anxiety to individualize each value in advance of a careful attempt to achieve reflective equilibrium among them. That anxiety emerges in parallel with a lack of resistance to accept the moral costs associated to the acceptance of normative trade-offs.

Alexy's definition of legal principles as optimization commands is often regarded as vulnerable to this type of critique. The method of proportionality analysis seems to be based on an instrumentalist conception of "moral understanding," according to which "our knowledge of the goal can clearly be separated from our grasp of the means." The content of the principles that bind us is treated as "intelligible in abstraction from the circumstances within which they might be realized" (Simmonds 2007: 182). The model of balancing lacks, if Simmonds is correct, the means to distinguish mere *technical knowledge* from *moral reasoning*. For moral knowledge, as Simmonds argues, is different from technical knowledge "precisely in the absence of any clear priority," since there is little in morality that we can know in advance of a reflective reasoning informed by historical experience (Simmonds 2007: 182).

Law as Integrity

Dworkin is aware of these objections against conceptualizing principles as objects of weighing and balancing. This kind of concern is part of the explanation of why his account of principles in *Law's Empire* is different from his early view.

Dworkin's first response to Raz, in *The Model of Rules II* (Dworkin 1978: 46–80), offered several replies to the positivist account of social rules. He anticipated, for instance, the argument from theoretical disagreements, which claims that legal positivism cannot explain the "arguments that go beyond a simple appeal to practice" (Dworkin 1978: 57). He held that participants in legal disputes can disagree about these arguments (which include *normative* arguments), especially when a

claim about the foundations of law has impact on the practice and demands a reflective judgment to determine the content of law.

Nevertheless, Dworkin's response to Raz was unsatisfactory when it comes to the structural distinction between rules and principles. He recognized that he neglected the problem of the individuation of law (Dworkin 1978: 74) and claimed that his main point was only that law lacks any "fixed set of standards of any sort." All that was needed in his critique to legal positivism, he argued, was to show that legal norms have at least sometimes "the form and force of principles" (Dworkin 1978: 76). A positivist test like Hart's rule of recognition would fail, therefore, because it cannot show how these principles are incorporated into the law.

Although the claim that the law lacks "fixed standards" may appear obscure, the best way to interpret it is as holding that no legal norm can be always read as a rule in the sense that Dworkin originally attributed to Hart in *The Model of Rules*.

One might expect, therefore, that Dworkin would abandon the structural distinction between rules and principles, but he did not do that in *The Model of Rules II*. He retained the assumptions that principles are prone to conflict and that the proper way to resolve this conflict is weighing their force as new factual circumstances come about.

Nonetheless, the account provided in *Law's Empire* (a few years later) is not vulnerable to this worry. It now has a principle of individuation of law, which scores better than Raz's principle as a response to Habermas's or Simmonds's criticisms. A reader familiar with Dworkin has probably realized that *integrity* is the principle I have in mind. To understand how Dworkin's exigency of integrity works as a principle of individuation it is helpful to revisit the impact of Gadamer's hermeneutics in his jurisprudence. The influence of Gadamer in Dworkin's legal theory is sometimes emphasized and criticized (Patterson 1993; Moore 2000) and sometimes ignored, especially by those who read Dworkin's jurisprudence as a second-order enquiry on the "facts" that count as metaphysical determinants of law (Greenberg 2014; Hershovitz 2015; Stavropoulos 2021). As I argued in earlier work (Bustamante 2020), the truth probably lies in an intermediate position. Regardless of some specific differences, Gadamer and Dworkin share the view that interpreters should discard the "conversational" model that supposes that the task of interpretation is to reconstruct a mental state of the author of a historical text. One should reconstruct, instead, the principles that this author *endorsed through the enactment* of this text (Dworkin 1996: 1815). An important assumption of Dworkinian interpretivism is the idea that understanding and applying conceptual contents cannot be described as separable processes.

The focus on application of concepts shows that Dworkin's later view differs from Raz and Alexy when they claim that principles count as reasons for rules but not vice versa. Dworkin's theory of *legal* knowledge (although possibly not his general theory of knowledge) is holistic in the sense that Quine claimed knowledge is reached through a web of belief (Hylton and Kemp 2020). To determine the content of a law, in *Law's Empire*, is to construct normative relations among the normative materials which are produced by the institutions in charge of developing the law. There is no way to understand a principle apart from its historical context and the concrete reality in which this principle is applied.

On law as integrity, principles are implicit norms entrenched in the practice of law, which provide a way to read and understand the authoritative materials that stem from the acts of political institutions. In other words, the task of interpreters is to explain how "rights and responsibilities flow from past decisions and so count as legal not just when they are explicit in these decisions, but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification" (Dworkin 1986: 96).

In *Law's Empire*, Dworkin no longer assumes either the structural distinction between rules and principles, or that the former type of norms possesses a dimension of weight. Properly construed, integrity is in sharp contrast with the method of balancing, since it seeks for two types of consistency that are expressed in the requirements of

"fit" and "justification." Fit, on the one hand, is a demand for consistency with institutional history, which entails a commitment to *fidelity* to past political practice. It stems from the historical dimension of interpretive legal reasoning. Justification, on the other hand, requires one to "judge which of [the] eligible readings makes the work in progress best, all things considered" (Dworkin 1986: 231). It demands that states "act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are" (Dworkin 1986: 166).

For Dworkinian interpretivism, integrity demands a personification of the legal community; it asks the interpreter to treat the community as a *rational agent,* who can assume a political responsibility to speak with a single voice. Without such interpretive principle, Dworkin believes that decision-makers cannot treat every member of the community with equal concern and respect (Dworkin 1986: 174).

Fit with Incorrect Principles?

Shortly after *Law's Empire*, Finnis attributed to "law as integrity" a fatal flaw. It should be rejected because it resorts to "two incommensurable criteria of judgment": fit requires one to judge according to past political decisions, whereas justification appeals to "inherent substantial moral soundness" (Finnis 2011a: 292). Although Finnis withdrew this objection a few years later, acknowledging that "moral soundness" provides a common measure for these requirements (Finnis 2011b: 252), the claim that fit and justification cannot be combined remains a usual criticism against Dworkin's interpretivism. For positivist critics like Marmor (2009: 162–171) and Gardner (2006: 217–222), a threshold of *fit* presupposes a positivist criterion of validity, similar to Hart's rule of recognition, to identify the pre-interpretive materials that constitute the object of constructive interpretation. The requirement of justification enters legal reasoning only after the job of determining which principles count as legal is done.

Perhaps part of Dworkin's reasoning in *Law's Empire* encouraged this reading. An interesting way to explain this problem is to consider the social and political conditions in which integrity becomes an interesting political value. Like the idea of justice – which requires limited altruism and moderate scarcity – integrity only becomes attractive under certain circumstances. In his account of integrity, Dworkin presupposes a context distinguished from a utopic society, in which integrity would be redundant, and a wicked community, in which integrity would be impracticable (Waldron 1999: 192). In *Law's Empire*, integrity is independent from justice and fairness because it can come into conflict with these values. "It can require us to support legislation we believe would be inappropriate in the perfectly just and fair society and to recognize rights we do not believe people would have there" (Dworkin 1986: 176–177).

Given the possibility of conflict between integrity and justice, critics claim that integrity may require one to abide by an "incorrect principle," which constitutes a bizarre metaphysical entity. Dworkin would rely on the "mistaken assumption" that there can be norms which are neither correct moral norms nor posited in the form of canonical legal rules, although they "arise out of [these] posited legal rules" (Alexander and Kress 1995: 293).

The ideal of integrity and the correlative notion of legal principles can be saved, however, if one reconsiders the assumption that integrity comes into conflict with justice and procedural fairness. According to Waldron, Dworkin's contention that justice, integrity, and fairness are "independent" from one another (Dworkin 1986: 177) is based on a category mistake. Each of these values is "functionally related" to the others (Waldron 1999: 196) and the best way to understand "integrity" is as a second-order reason that dictates how disagreements about justice should be resolved. Waldron describes justice as necessarily a *social* matter, i.e., as "something we must secure together" (Waldron 1999: 196). Integrity does not compete with justice because it is itself a standard to resolve disagreements about justice.

If this interpretation is adopted, integrity can successfully incorporate a dimension of *regret*, responding to commitments that come from unfortunate political decision but carry a moral force because of considerations of fidelity, fairness, and the rule of law. As Postema argues, "integrity requires that we view and take responsibility for our *whole* past, not just the agreeable parts" (Postema 2004: 297). It is this idea that justifies Dworkin's distinction between "pure" and "inclusive" integrity. "Inclusive" integrity "requires a judge to take account of all the component virtues" (not just substantive justice but also procedural fairness and fidelity) (Dworkin 1986: 405).

In his latest work, Dworkin deflects Waldron's criticism because he adopts an *integrative epistemology* that purports to avoid conflicts of values. He assigns to interpreters a special form of intellectual responsibility. "Interpretation knits values together" and our moral responsibility depends on our capacity to achieve an "overall integrity" for our various concrete interpretations, "so that each supports the others in a network of values that we embrace authentically" (Dworkin 2011: 101).

This final act seems to make sense of the central intuition that Dworkin held about the requirements of fit and justification. The requirement of fit is not a formal threshold that one must examine in advance of justification. It is described as a "rough threshold" (Dworkin 1986: 255) not because it is a gatekeeper that controls what counts as a legal reason, but because it requires us to treat institutional history acts as an *ingredient* of one's judgments about justice (Dworkin 1978: 87), or at least justice *in context*. A state lacks integrity, says Dworkin, when "it must endorse principles to justify part of what it has done that it must reject to justify the rest" (Dworkin 1986: 184). Hence, the value of integrity requires only that you take seriously your own commitments, that you act as a responsible agent including when you realize that you made a mistake, especially an "embedded mistake" that you cannot ignore because there are proper ways to deal with it or correct it (Dworkin 1978: 121). This is why fit and justification can be described as two inseparable components of the value of integrity which can only work well if they work together.

Cross-References

- ▶ Alexy, Robert: On Rules and Principles
- ▶ Dworkin, Ronald: Constructive Interpretation *aka* Interpretivism
- ▶ Dworkin, Ronald: Legal Philosophy
- ▶ Dworkin, Ronald: Theory of Rights

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Private Law

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Introduction

The wording "philosophy of private law" is problematic and can be understood in different ways. It has been chosen as motto by a rather recent current among English-spoken legal theorists (notably Lucy 2007; Weinrib 2012) who claim for the specificity and the formal autonomy of legal principles in the field of property, contract, torts, unjust enrichment, and restitution. It is noteworthy that these authors, teaching in the United Kingdom, the United States, and Canada, use the categories of common law classical courses to defend the idea of a universal and abstract philosophy of private law. One can also observe that this school of thought is using the same historical references to Aristotle, Aquinas, Kant, or Hegel, who are analyzed as advocates or forerunners of this so-called philosophy of private law. This situation creates a point of contact with historical works about the philosophical origins of some basic concepts of private law (e.g., Gordley 1993) and raises the question if it is possible to isolate, in the history of legal philosophy, special trends concerning private law.

In order to make the hypothesis that in the past there were latent ideas about a philosophy of private law, it is necessary to say what we understand through the wording "private law" in an historical perspective. Clearly, the concept of private law is linked to the categories of Roman law that were inherited from Justinian's compilation. First, it means that this category was ignored, for a long time, in other legal traditions, for example, in Chinese law, in Jewish law, or in Islamic Law. The case of imperial China is particularly striking: as it is well known, the Chinese codes focused, since the Antiquity, on penal law (with prohibitive rules associated with penalties deemed by imperial judges) and did not contain the equivalent of Western private rules about property, contract, or even family law. Among legal historians, who are specialized in Chinese law, there is a strong debate to admit or not the possibility, since the eighteenth century, of civil actions with a private plaintiff and a private defendant. The second difficulty comes from the fact that the wording "ius privatum" was only used in Justinian's compilation through two texts: an extract of Ulpians' *Institutiones* in the Digest (D. 1, 1, 1, §2) and a very similar sentence in the Justinian' *Institutiones* (Inst, 1, 1, 4). Both these texts oppose the "ius publicum," concerning the "state" (*status*) of the Roman "Republic" and the "ius privatum," related to the interests of particulars. The private law is presented as a part of the study of law (*studi duae positiones*) and divided in three elements (*tripertitum est*), the natural law, the law of nations (*jus gentium*), and the civil law. If these texts were inserted at the beginning of the Digest and of the Institutes, they were probably the products of evolutions of the teaching of Roman law since the third century of our era. This division of law was not mentioned by

Gaius, in his second century Institutes. In fact, the teaching of Roman law was concentrated on "civil law," which was defined as the proper law of Roman citizens. This civil law was of course the main subject of the Digest and of the Justinian's Code, but it was not clearly separated from the rules concerning penal law, ecclesiastical law, or public law (if it is possible to gather in this category the rules about imperial laws, imperial administration, and imperial justice) (Caroni 1998).

With the rediscovery of Justinian's compilation in Italy at the end of the eleventh century and the intellectual revolution diffused from Bologna, this division of private and public law was known once more, but these two texts were rarely commented. The works of the glossators and commentators dealt mainly with civil law (what we call today "private law"), but used also Roman law in developments concerning penal law or public law (for the Italian cities or for the emperor and the princes). The emergence of "public law" and the corresponding relevance of the category of civil law were linked with the construction of modern States since the sixteenth and seventeenth century. Then, it was conceived, especially in continental Europe (but not in the common law tradition), as the *summa divisio* of the science of law. For all these reasons, the question of "legal philosophy of private law" can be cautiously studied in two perspectives: a historical one about some philosophical arguments given to support the specificity of legal rules concerning the relationship between particulars (1) and a contemporary one about the features of this school of thought claiming the autonomy of private law (2).

The Asserted Philosophical Basis for the Autonomy of Private Law

All the advocates of a special philosophy of private law begin their historical developments with Aristotle and his Ethics (V, 1131) about justice. The argument is that Aristotle was dealing with laws and judges (he used these two words about particular justice as differentiated from the virtue of justice) and that the distinction between "distributive" and "corrective" justice corresponded to the opposition between what is attributed to every man by the city (in proportion of his virtue, honor, or wealth) and what is decided by judges in the cases opposing two persons, a plaintiff and a defendant. As Aristotle considered that corrective justice applies to agreed or non-agreed relationships between individuals, his categories seem to be identical with our ideas of contract and of tort law. In both cases, the judge has to decide to correct the effect of a situation (the non-execution of a contract, the violation of the body integrity or of the ownership of the plaintiff) that has created a damage for the plaintiff and a benefit for the defendant. This special relationship between two individuals and the use of adjudication to operate a transfer, a kind of compensation, between the two litigants would be the philosophical basis for a set of rules that we could call "private law."

Besides the ignorance of any concept of private law by Aristotle, the linkage with any rule of tort law is very problematic: at the time of Aristotle, Greek cities had probably some legal rules about crimes (which inspired Aristotle's examples about thief or adultery), successions, ownership, and perhaps contracts, but nothing as comprehensive as the Roman Law of Twelve Tables. Even, in the more sophisticated Roman law, tort law (as the possibility to claim compensation for a wrong or fault, independently from penal law) began later (probably in the third-century BC) with the *Lex Aquilia*.

Aquinas, as the Doctor Angelicus who commented Aristotle and referred to natural law as well as to human law (with a good knowledge of Roman law) in his *Summa theologiae*, is often analyzed as the second classical writer that would have given philosophical basis to private law. Whereas the natural law of binding contracts was justified by the promise-keeping, the private ownership appeared (contrary to the tradition based on the Scriptures that denounced the excess of cupidity and of wealth) as consistent with natural law and necessary for the public peace, the end of conflicts associated with common ownership and the incentive effect for making the soil productive. Again, one can observe that the word

or the idea of something as "private law" is not present in Aquinas' works and that he did not deal with tort law.

The philosophical roots of unifying principles for property, contract, and tort law can be more easily found in the Second Scholastic and in the works of the theologians-jurists of the School of Salamanca during the sixteenth century and the beginning of the seventeenth century. Through their conceptions of the *dominium* (considered now as a *jus*) given by God to the humanity (Renoux-Zagamé 1987) and of the free will modeled according to the divine will and empowered with creative effects, Vitoria, de Soto, Suarez, or the Jesuit de Molina and Lessius combined the philosophy of Aquinas with the rules of Roman law. Private ownership, respect of contract, obligation to compensate wrongful acts, all these legal rules were explained by these authors through the lens of Aristotle's corrective justice. Whereas the writers of the Modern School often criticized Aristotle's Ethics, they continued this interpretation of the rules of Roman law through three basic principles of natural law expressed by Grotius: fidelity to promises, respect of the ownership of others, and compensation of damages caused by wrongful actions. That is not to say that these authors have isolated a block of private law inside the "civil law" (the word they used to make a distinction with natural law). In the works of Grotius, Hobbes, Pufendorf, and Locke, the different conceptions of the "social contract" mixed the questions of relationships between individuals with the one of the State. At the end of the seventeenth century, the French jurist Domat annexed a volume of *Droit Public* to his treatise about civil laws in their natural order (*Les lois civiles dans leur ordre naturel*), devoted to the study of Roman law reorganized according to the concepts of engagements and successions.

The explicit reference to "private law" appears only at the turning point of the eighteenth and of the nineteenth century. In a philosophical perspective, Kant (Doctrine of Law, 1796) considered "private law" as the law of nature based on real and personal rights that permitted to conciliate everyone's liberty and free will with the rights of others. Hegel, in his 1820 *Grundlinien*, spoke about an "abstract law" (as universal as Kant's private law) consisting in private ownership, contracts, and criminal law (whereas family law was associated with the civil society and the State). In a strictly legal perspective, the specialized codes devoted in France (1804) and in Austria (1811) to civil law delimited a sphere of private relationships between individuals protected from too intrusive interventions of the State. Savigny's *System* (1840) also theorized the legal relationship (*Rechtsverhätnis*) as the central point of private law, opposed to what he called "political law" (the law of the State but also one important part of the family law). According to Kant's schemes, the will theory considered property as the power of the will toward external objects and obligations as the power of the creditor to obtain something for the debtor. Such a conception of private law characterized the triumph of individualism and subjectivism in legal philosophy.

Philosophy of Private Law Today as a Counterattack of Natural Law?

Though they were endorsed by German Pandectists and apparently confirmed by the German Civil Code (1896–1900 BGB), these conceptions of an autonomous private law were strongly attacked since the end of the nineteenth century through different angles: the claim for a "social law" based on other principles concerning ownership, contract, and tort (let alone the evolutions of ideas concerning family law), the critics of the "jurisprudence of concepts" in favor of Jhering's teleological conception of statutory laws, and the affirmation of the primacy of public law according to the political priority (Lenin's idea that all law is public law) or to the origins of all legal rules in the constitution and in the state legislation. In opposition to the neo-Kantian interpretations that supposed the existence of a priori concepts for private law (Stammler, Reinach), Kelsen constructed his normative theory of pure law through the denunciation of every kind of dualism: between State and law, between objective and subjective rights,

and between public and private law. According to Kelsen, the idea of a separated corpus of legal rules called "private law" was only the product of a capitalist ideology that wanted to preserve the empire of private property and free market. In the ways of producing legal norms, there was no reason to distinguish between public law and private law: general norms (through statutes or precedents) as individual norms (through administrative acts and contracts) are present in matters related to private relationships as in matters concerning public authorities. Combined with the facts that the *summa divisio* public law/private law was not an element of the common law tradition and that the American realists refused any abstract formalism, nobody claimed for a philosophy of private law during a few decades.

More recently, Lucy (2007) and Weinrib (2012) have reactivated this idea in reaction toward the economic analysis of law. They reproach to Law and Economics to subordinate the legal analysis of private relationships to external values, those of economic efficiency. Through a return to Aristotle's corrective justice and to Kant's approach of rights based on individual freedom, these contemporary authors claimed for an autonomous private law in which the rules of contract, tort, and ownership are based on formalist principles. Identifying private law with these core matters of common law, they interpret the rules of British or American laws in the light of the will theory or of the fault principle in tort law. Although they also refuse to subject law to morals (and want to be differentiated for this reason from the traditional advocates of natural law), they reject a positivist or historicist approach of law. On the basis of the common law tradition as a nucleus of worldwide values, and without long discussions concerning the positive rules of civil law countries (e.g., the ones that have extended tort law through strict liability or the distinction in countries like France between civil and administrative tort law), the advocates of this philosophy of private law propose a new kind of natural law for all the legal orders. Using a tradition linked with some visions of morals and equity, they defend a universal corpus of principles, prior to positive law and likely to be used in order to criticize positive rules deemed inconsistent with this point of view.

Conclusion

These opinions cannot be considered as a new legal theory, likely to make all the legal rules coherent and easily understood. They resuscitate, in a particular field of law (which curiously excludes the ever changing rules of family law), an old ideology of individualism. It is artificial to consider the philosophy of private law as a separated field of theories and enquiries in the history of legal ideas and controversial to study the variety of positive laws in the mirror of a "true" or "good" law based on subjectivist conceptions of justice. Kelsens's argument that it is impossible to define, in a determined context, what is just remains an obstacle toward a general understanding of the law, or even a partial approach of a branch of law as the relationships between individuals, that would be based only on the conception of corrective justice (Kelsen 1957).

Cross-References

► Kelsen, Hans
► Natural Law: Contemporary

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Private Law: Philosophy of

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Introduction

Philosophical reflection on private law has gained significant sophistication in recent years. This does not mean that its development has only occurred since the end of the twentieth century. However, from then on, the discussions surrounding private law have shaped what we know of it today. In other words, these discussions have consolidated the current image of the philosophy of private law. In the academic community, the labels "philosophy of private law," "private law theory," and that of "philosophical foundations of private law" are used interchangeably. The first two labels referred to above are the most frequently used in Anglo-American literature (Lucy 2007; Zipursky 2004), while the latter label has gained some space in the academic community (Cane 2005; Coleman 1994). The latter label and approach to private law has inspired various works (e.g., Gordley 2006) and alludes to one of the main concerns of this discipline, which is the foundation of private law. In the Spanish-speaking world, meanwhile, the expression "philosophy of private law" is used (Papayannis and Pereira-Fredes 2018; Pereira-Fredes 2017) as a direct translation of the first two labels described above. This latter criterion has prevailed since early times in continental legal tradition, as reflected in one of the first works that can be traced in this field (Cogliolo 1888). Accordingly, it is worth highlighting the influence of Italian legal thought in connection with this discipline (Solari 1940, 1959), as well as other studies of German origin that, from historical approaches, contributed to configure the intellectual reconstruction of modern private law (Reinach 1913; Wieacker 1952; Zimmermann 1996). French thought was also crucial in rethinking the boundaries between private law and public law (Duguit 1912).

The question of the distinction between private law and public law is a determining concern for the philosophy of private law, and therefore the borders between both areas have been frequently reviewed (Barker and Jensen 2013). The difficulty in drawing the margins is explained by the fact that this differentiation ultimately highlights a more fundamental distinction relating to the contrast between the private and public sphere of life. What is the private character of private law? Does private law have a public justification that shows its relevance in the constitution of contemporary societies? Does private law perform public functions and, if so, which institutions perform them? (Lucy 2009; Gardner 2018; Benson 1995; Renner 1949). These are crucial questions for research on the identity of private law. Addressing these questions helps refine the contours of both areas of the legal phenomenon.

Beyond the terminological aspect, the philosophy of private law that is of interest here – i.e., the one that has developed since the end of the twentieth century – has focused, mainly, on determining and critically analyzing (i) its identity, (ii) its foundations, and (iii) the purposes of private law. Its object of study includes the most central concerns related to this field of law, e.g., contracts, property, tort, or unjustified enrichment, also called law of restitution. Regarding this latter aspect, we necessarily must note two observations. On the one hand, philosophy of private law does not deal exclusively with identity issues, its foundations, and the purposes of private law; however, these matters regard the study areas that most identify this field of law. On the other hand, the study areas referred to above are by no means exhaustive, but rather show the nuclear part of private law and therefore address the issues that have caught the attention of private law theorists in a greater manner. Other issues, such as philosophy of family law and inheritance law, have gained less attention. Nonetheless, philosophy of family law has gradually gained a place among works that address this field of study (Brown 2019; Eekelaar 2008; Houlgate 2017).

Yet, the list of concerns addressed by philosophy of private law is a controversial issue and on which there is no consensus. This ultimately depends on what is meant by "private law." Painting with a very broad brush, private law purports to govern a distinct type of normative relationship

between persons. How is this relationship to be cashed out is a very controversial issue. A relatively noncommittal description of the contours of such relationship could be that this relationship has two basic features: (a) it is constituted by a bundle of correlative rights and duties between private parties, and (b) it is amenable to mediation by an enforceable judicial judgment as to whether the plaintiff is entitled to have her or his demand for some relief or repair granted. Parties to a private law relation are empowered to alter the legal status of wrongdoers through a civil process that includes the courts. The relevance of plaintiff's rights for understanding the structure of private law is highlighted in "civil recourse theory" (Zipursky 2020).

It is a further and much contested issue which of the traditionally constituent juridical relations of private law (i.e., contract, tort, property, unjust enrichment) serves as the most inclusive archetype of private law justice. For some theorists, this field of law is only made up of torts and contracts. Property law, for example, could be understood as an extension of tort law, which represents an established understanding in common law (Gardner 2018). On the continental level, to the contrary, from early on property law has occupied a preponderant place in terms of defining what private law is. In this regard, the German theoretical discussions during the twentieth century regarding the nature of possession and the foundations of its legal protection (Savigny 1803; Ihering 1852) and the impact of the concept of property for conforming a *new* private law (Grossi 1988) reveal this preponderant interest (Penner 1997; Underkuffler 2003). In the same way, other concerns, such as unjustified enrichment or the law of restitution, have been positioned as areas with a significant philosophical interest both in the Anglo-Saxon and continental traditions. Accordingly, this has allowed the recovery of normative criteria (of the scholastic tradition) in connection with restitution obligations (Birks 2003; Burrows 2011; Diez-Picazo 1988). Lastly, the strictly private nature of family law and inheritance law is also not a peaceful issue. With greater or lesser intensity, public or collective interests are managed in both spheres, the autonomy of the will of individuals is strongly weakened, and it is not always completely evident if the institutions surrounding those fields of law involve property issues.

One of the most distinctive characteristics of the philosophy of private law is the integration of conceptual tools, methodologies, and categories of analysis belonging to other disciplines, e.g., legal theory, moral and political philosophy, sociology of law, and law and economics. Such incorporation has made it possible to widen the depth of the studies and refine the reflections on the private legal phenomenon. This offers clues about the possible considerations that ultimately differentiate between those who dedicate their research interests to the philosophy of private law and those who, for their part, carry out theoretical studies on private law. In the first place, the conceptual apparatus that both employ is not exactly equivalent. The theoretical elements that private law philosophers have progressively added to their research were not present in most traditional studies. Although it is possible to detect some philosophical and intellectual history considerations in the treatment of private law institutions, this is not the central issue. Secondly, the emphasis on the problems that make up their research agenda is diverse. While the philosophy of private law addresses questions of linguistic and conceptual analysis, as well as questions of foundation, traditional legal thought concentrates its efforts on the identification, interpretation, and systematization of current private law (Papayannis and Pereira-Fredes 2018). However, this does not suggest that the purpose of study is different; their study addresses a number of rules, institutions, and practices that are part of private law, but that are approached from *a* particular approach. For this reason, the division of tasks between the philosophy of private law and legal thought regarding this field of law cannot be categorized so explicitly, as if they were watertight compartments. To the contrary, the dialogue between both fields of law is relevant since they are mutually supplementary and essential in terms of reinforcing the explanatory value of private law.

Despite the diversity of problems and proposals presented by contemporary studies in the field of philosophy of private law, there are some distinctive considerations that can be traced for the purpose of providing a brief review of each of

them. This selection is, of course, not exhaustive and leaves out a set of topics that could be dealt with further detail. These particular considerations illustrate the way in which the reflection on the three general issues mentioned above has been implemented in the philosophy of private law and relates to the following: (i) self-understanding of private law; (ii) internal and external aspects in private law; and, finally, (iii) foundations and purposes of private law. The general concern for identity issues, foundations, and purposes of private law can be shown from these three specific considerations.

Self-Understanding of Private Law

The philosophy of private law has positioned itself as a self-understanding task. This statement suggests that private law simultaneously constitutes *explanandum* and *explanans* (Weinrib 1995). This represents both the object of study that is intended to be explained and the reality that determines the way in which knowledge is sought and the explanations that are provided regarding such phenomenon. In this way, the discipline itself is placed as an object of analysis for the purpose of determining what counts as private law, its foundations, and what can be expected from this theoretical task. For this purpose, the concepts, legal thoughts, and institutions that are part of the basic framework of private law are used. From this examination, it is possible to determine the contours of private law and extract the foundation that underlies its central rules, figures, and practices, ultimately shaping what private law is.

It is worth asking if there is a relationship between the philosophy of private law and the analytical philosophy of law. There are works that have tried to investigate the link regarding the influence of Hohfeld's analytical philosophy to unravel the complexity of the relationship between private law and the modern administrative state (Barker 2018). The process of self-understanding of private law does not differ greatly from what has happened in analytical case-law since the end of the last century, in which its explanations, objectives, and the methodology were thematized for achieving a stronger comprehension (e.g., explanation of the concept of law or the nature of law; descriptive or evaluative methodology). Both constitute second-order reflection processes that seek to improve the understanding of the object of study based on conceptual frameworks. One of the tasks that most strongly demands the attention of legal philosophers is, as is known, the self-understanding of legal institutions: we understand ourselves through understanding them (Kimel 2018). Thus, private law is understood as a self-reflection effort. However, this does not imply that there is a necessary connection between the philosophy of private law and the analytical philosophy of law. Their relationship is contingent even though numerous studies in the field of philosophy of private law show a strong influence (in terms of research) in analytical philosophy of law and, furthermore, are carried out by representative authors of analytical case-law based on the conceptual analysis and the reconstruction of legal practices of private law (e.g., Coleman 1992; Gardner 2018).

Internal and External Aspects in Private Law

Traditionally, studies on the philosophy of private law have been grouped into economic approaches and within approaches that seek to understand private law based on one of its main objectives: the idea of justice. The latter can be understood as moral approaches, where the focus of their research is put on corrective justice (Weinrib 2012), roughly the moral-political precept that those who wrong others must do something about that wrong. This way of organizing a good part of contemporary philosophy of private law is justified by the fact that one of the reasons that prompted this philosophical reflection lies in the emergence of law and economics during the second part of the twentieth century. Works such as "The Problem of Social Cost" (1960) by Ronald Coase and a decade later The Costs of Accidents (1970) by Guido Calabresi called the attention of

private law theorists. Under said light, authors began implementing notions and classical economics methodologies to evaluate the performance of legal institutions (in terms of economic efficiency). Their point of view has a high pragmatic value and provides solutions to a variety of problems that afflicted scholars of private law. The influence of the market forced the introduction of a vocabulary characterized by notions such as efficiency, maximization, utility, incentive or disincentive, and the installation of a consequentialist rationality that is, strictly speaking, *external* to private law. This scenario explains the force with which the competing perspective was defended which, contrary to the economic approach, emphasized the relevance of the *internal* elements of private law. Its concepts, institutions, and the direct interaction method between its participants provide sufficient analysis dimensions for private law to be internally intelligible, without depending on external considerations such as those coming from economics, the demands of public law, or politics in general (Weinrib 1995). According to the economic vision, private law is understood as instrumental to the achievement of socially desired ends, relegating rationality, and internal coherence (as shown by private law) to a second place. For the internal approach, on the other hand, said approach blurs the traditional concepts of private law and subordinates it to parameters and demands that do not belong to its historical line of thought. Hence, the philosophy of private law should be formulated from its internal structure and strive to understand this area of law in light of corrective justice (which governs private law relationships). This will allow capturing the particularity of the relationships of private law, which are defined by those who participate in the different legal practice areas.

This opposition has been called into question on numerous occasions (e.g., Papayannis 2016) because it seems to radicalize the approaches and widen the gap between the two lines of thought. For this reason, various conciliation ways between the external approach and the internal one (of private law) have been explored. Moreover, it is difficult to accept the fact that economic analysis (in all its variants) questions private law. This is given that it assumes that it is something radically different from what it actually is and ignores the way in which its relationships are acknowledged. Similarly, there is no consensus as to whether corrective justice is the only purpose sought internally by private law or whether, to the contrary, there are other values that should be achieved without necessarily affecting its internal coherence. Deontological approaches to private law have excessively emphasized the unitary commitment of this field of law with corrective justice. Thus, the coherence of the system depends on understanding it only from *within* in light of *what* makes private law private. In the same way, it is convenient to question if economic efficiency necessarily constitutes an exogenous purpose sought by private law or if it can be linked with considerations of justice that are frequently interpreted in endogenous terms, thus avoiding the antagonism between these two ways of understanding private law. As seen above, this discussion has highlighted the normative value of efficiency (Kaplow and Shavell 2002).

Foundations and Purposes

The previous tension expands to one of the main issues at stake today in relation to the foundation of private law and the purpose it seeks. Does it involve a *single* foundation and a *single* purpose that crosscuts all private law? Or is there a *plurality* of foundations and purposes underlying its rules, institutions, and practices? At the heart of the current philosophy of law discussion lies the problem, i.e., whether or not it is appropriate to identify a common criterion or value for the different concerns of private law. In the same way that Hart in *The Concept of Law* (1961) warned about the aspiration of uniformity that exists in legal theory, the philosophy of private law has given in to this temptation, paradigmatically resorting to corrective justice as *the* distinctive parameter to explain and justify private law (Weinrib 1995). Homogeneity has been regarded as a virtuous feature of this area of the legal

phenomenon, where authors have advocated for outlining it and exalting it in research. This has not prevented other legal theorists in proposing the adoption of anti-foundationalism for understanding certain areas of private law, as is the case with contract law (Saprai 2019). However, it is necessary to make some observations about this temptation of uniqueness. Private law – understood as a social phenomenon – is fraught with difficulties when having to implement a monistic methodology of analysis, which in turn affirms its unity around a foundation and a purpose. Its structure, internal composition, and normative commitments may be better suited to a pluralistic approach that captures the complexity and lack of uniformity of private law. Precisely, one of the challenges of a pluralistic vision in the philosophical reflection on private law is to show how the unity and internal coherence of private law can reconcile with its diverse foundations and purposes. According to this point of view, it is crucial to show why its coherence is not affected despite having more than one normative foundation (e.g., individualism, altruism, solidarity) and more than one aspiration (e.g., corrective, distributive, and punitive justice). Lastly, the fact that it is possible to find more than one foundation and more than one purpose in private law does not entail affirming that the former must be considered and the latter should be pursued to the same extent or in the same sense (Keren-Paz 2007; Dagan 2012; Micklitz et al. 2021). The relevance of each foundation and aspiration may be different and be reflected differently in areas such as contract law, property law, tort law, and unjust enrichment. Accordingly, they will be more present in some areas of law than in others. Nevertheless, individualism and corrective justice seem to occupy a prominent place in the different areas of private law, but none of them can be explained and founded solely in light of such parameters. Private law, then, may not be exclusively a matter of individualism or corrective justice. Therefore, it represents a substantive part of the current research agenda of the philosophy of private law to find out and establish the scope of such consideration.

Conclusion

The maturity reached by the philosophy of private law strengthens a certain degree of optimism regarding one of the most decisive issues for private law to become a genuine self-understanding exercise: to recover and take advantage of its epistemic value. Faced with the neglect of traditional studies on private law, philosophical reflections about other theoretical areas proliferated (e.g., philosophy of criminal law and philosophy of constitutional law). However, in the current state of things, the philosophy of private law exhibits fully competitive conditions with respect to this type of philosophical research, and, likewise, the interest of theorists about its identity, foundations, and purposes has progressively increased. This explains why this discipline has managed to position itself both in the legal tradition of common law and in the continental one. Nowadays it is indispensable for the philosophy of law to critically examine and rethink the traditional categories of private law, as well as its most distinctive rules, institutions, and practices. Thanks to the shared effort between theoretical and philosophical studies located in different legal systems, we must deepen our understanding of the private legal phenomenon.

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Property: Philosophy of

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Introduction

Property designates subjective entitlements to use specific objects (resources). The legal particularity of *property entitlements* is their absolute validity towards any other member of the same legal community. Whereas contractual entitlements oblige the

contract partners only "relatively," property entitlements oblige anybody to respect the position of the respective property holder. The social effect of absolute subjective entitlements to use resources is *property relations,* which often result in social power relations (e.g., tenants to landlords or workers to factory owners). From this perspective of social structuring, property always mediates "sovereignty" (Cohen 1927). The whole formation (specific rights & duties) of entitlements to use objects within one legal system could be called a *property regime*. Specific property regimes are part of distinct political economic settings. Comprehensive and exclusive private property for instance is an institutional prerequisite for any free market economy. In general, property allows for private (nonpolitical) ordering of social cooperation by economic market interaction. In that sense, the constitutional right to private property manifests a liberal defense against public (state) interference (cf. Locke 1689).

Property theory is the theoretical reflection on concept, reasons, scope, and structure of the socio-legal institution of subjective property entitlements and different property regimes. In a nutshell, there are five core questions for property theory: (1) What is property? What meaning could the concept "property" have, and what is its fundamental legal content? (2) Why property? For what reasons is the attribution of property entitlements justified? (3) Which property? Which objects could (or should not) be target of property entitlements? (4) Whose property? Who could be the subjects of property entitlements, and how does this affect the institutional form of property? (5) How property? What are or could be the structural developments in the legal formation of property regimes? Although all these queries are interrelated, one could separate distinct theoretical discussions which are all heavily controversial. Most philosophical debates and accounts center around the justification of property and develop answers to the other questions from there on.

Concepts: What Is Property?

Property law is often discussed as the law or "rights of things" (Blackstone 1766). Yet, property does not establish any mystical link between a person and an object but expresses a socio-legal relation between persons over the use of resources (or more precisely: objects including "things"). The only "objective" dimension of property relations is the absolute validity of property entitlements towards anybody within the legal community.

But what is the conceptual origin of that relation? The *natural law tradition* (e.g., Locke 1689) assumes a pre-legal ("natural") institution of property. The nowadays "classic" conceptual core of a corresponding property entitlement is unlimited and exclusive use of the owned object, which was famously (although not by a natural law scholar) framed as "sole and despotic dominion" (Blackstone 1766) by the property owner. The natural law tradition is mirrored in the recognition of private property as a basic human right (cf. Art. II French Declaration of Human Rights 1789). Correspondingly, most modern state constitutions include a positive fundamental right to private property (cf. 5th Amendment US Constitution; Art. 5 Brazilian Constitution) although often together with specific regulations for public expropriation (cf. Art. 14 German Constitution).

Quite to the contrary, a *positivist perspective* regards property as a pure social invention and construction (e.g., Bentham 1802). Then, the conceptual framing of property completely depends on the legal assignment of rights (and duties). Prominent intellectual heirs of this tradition are "bundle of rights" approaches (Hohfeld 1913; Honoré 1961), which dominate at least in economic (Alchian and Demsetz 1973) and anthropological (Benda-Beckmann 1995) property theory. Property is considered as bundle of legal rights attributed to the user of an object. Ownership could be understood as the whole of particular rights over an object. Yet, the legislator could tie various bundles and institutionalize distinct forms of authorized users like, e.g., lease (even hereditary lease) or equitable lien (collateral property). The bundle of property rights encloses, e.g., the rights to possess, use, manage, receive income, transmit, duration, security, and protection (Honoré 1961).

In practice, the conceptual accounts of these opposed traditions are more compatible than it seems at first glance. Also, for a natural law account, it is clear that property manifests in specific property rights formed by property law. The only difference is the belief in some ("natural") idea of property before property law, which is mostly irrelevant on the level of specific property rights. In both traditions, *property rights* show four structural areas or components: (a) privilege to use, (b) claim to exclude others, (c) power to alienate, and (d) immunity to infringement (protection). If the subjective legal entitlement encompasses all four components, it could be defined as (full) *ownership,* which gives the owner a comprehensive private dominion over the object.

Taking up the Latin distinction between "dominium" and "proprietas," there is, however, no need to restrict the concept of "property" to a synonymous extensive and loaded concept as "ownership." Instead, the conceptual focus on "property rights" also supports partial properties (e.g., collateral property) and is open for various group attributions (state or communal property). This conceptual openness enables a differentiated property spectrum even within one (legal) property regime (cf. Ostrom 1999; Heller 2013) and keeps the concept relatively neutral towards different normative reasons or justifications.

Justifications: Why Property?

The "why-question" addresses the normative reasons for property and property law. Property rights always confer some form of sovereign power (Cohen 1927). As a social power relation, property entitlements need justification. Any judicial interpretation of property law depends on and varies with its assumed underlying reasons. The normative background reasons of property (law) at least codetermine its objective and subjective scope as well as its legal structure and limits. Most normative theories of property are monistic starting their justification from one fundamental ethical value. A prominent historical example is the labor theory of property (Locke 1689), which justifies property rights by the single value of individual effort. But throughout centuries very diverging values and interests were qualified as an ultimate nucleus of property. Today, even more, property theory splits up in a rich landscape of plural theories representing conflicting *property paradigms*.

Property as Social Security (Communitarian and Systemic Reasons)

The institution of property stabilizes interpersonal relations and the social system in general. The assignment of clear and enforceable property rights minimizes intersubjective and systemic conflicts. The absence of conflicts promotes social security. This security function of property (Bentham 1802) is the essential justification of classic occupation accounts of property. Even if mixed with some strategic motives, the straightforward assignment of property rights to the first occupier of a resource promises some form of *reliable peace* (Grotius 1625). Assuming a war of everybody against everybody, the state enhances personal and collective security by enforcing a system of private property (Hobbes 1651). From a more functional perspective, property guarantees *systemic stability* (Luhmann 1993). The distinction of private property allowed the (market) economy to stabilize its separation from politics as a genuine social system. The legal institution of property generates a dynamic stability that enables collective security.

Property as Individual Freedom (Liberal and Liberalist Reasons)

Most liberal reconstructions of property start with the highly influential labor theory of property, where ownership is justified with invested individual effort (Locke 1689). Libertarians praise the idea of private appropriation by labor as independence from political influence of the state (Nozick 1974). Yet, this reading of property as pure privacy is not a necessary corollary of any liberal foundation. Another liberal core of property is the subjective freedom to say "it is mine," which enables *free choices* of autonomous persons (Kant 1797). Owners realize the options of resources by engaging their free will. Within the

idealist tradition of subjectivity, property plays an even more extensive role. Property constitutes the subjective sphere of freedom in the outer world (Hegel 1991). Property relations help subjects to appropriate a social world and find their place within communities. Thus, property empowers the individual self-development of *personhood* (Radin 1982).

Property as Wealth Maximization (Utilitarian and Economic Reasons)

Already in the labor theory of property, the essential reason is not free choice but rather the individual effort (Locke 1689), i.e., the merit of processing resources. Any competitive market is based on the possibility of personal profit. Property enables individual wealth maximization, thereby incentivizing *profitable performance*. The further utilitarian nucleus of welfare economics is that individual profit seeking maximizes collective wealth. Resources will be traded in markets as long as they reach their highest economic potential. As prerequisite objects have to become tradable goods (commodities) through attributed property rights. In that respect, property promotes an *efficient allocation of resources* and thus wealth maximization as an "ethical concept" (Posner 1981). Economic justifications of private property often start with the "tragedy of the commons" (Hardin 1968) where everybody exploits collective cost bearing. As a solution private property internalizes social costs and advances an efficient use of resources (Alchian and Demsetz 1973). As long as transaction costs remain low and allow for market exchange, the initial distribution of property positions is not relevant from that pure economic perspective.

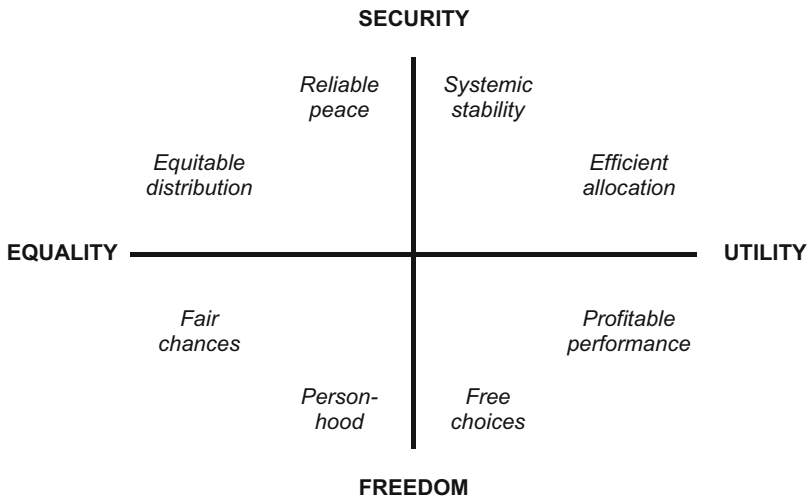
Property as Distributive Justice (Egalitarian Reasons)

Egalitarian theories shift the focus from efficient allocation to just distribution. Private property is considered to be a primordial reason for social inequality (Rousseau 1755). Property allows for the accumulation of assets which are not used for one's own living but invested in production, i.e., "capital." Critical economic theories demonstrate that capital rent reproduces much quicker than any labor income (Marx 1867; Piketty 2013). As a consequence, communist accounts condemn private property in any means of production (e.g., land, fabrics), whereas collective egalitarians demand social equality as a necessary precondition of any form of property (Proudhon 1866). The justification of property rights then depends on an *equitable distribution* of social wealth. Procedural accounts of social justice stress equal distribution of opportunities. Under this paradigm, structure and distribution of (private) property rights have to provide a *fair chance* for everybody regardless of their background or capabilities to share social wealth (Rawls 2001). A structure of property (law) is thus only justified if it benefits the least advantaged members of society.

Property as Democratic Deliberation (Plural Reasons)

From a (post-)modern perspective of value pluralism, any normative predominance of just one monistic reason of property is untenable. Instead, pluralism demands a *procedural approach* integrating plural reasons (Habermas 1992). No specific ethical value but only the argumentation process itself of giving and taking reasons could justify legal norms and institutions under the conditions of global multicultural diversity. Even if one rests skeptical about the ultimate possibility of consensus, legal discourse enables a deliberative balancing of reasons and translates plural communicative rationalities. For a "democratic model of property law" (Singer 2009), there is no single value that determines the understanding of property rights or obligations. Former foundational values become relative reasons that compete on guiding the legal interpretation of property law. A deliberative account of property law reconstructs judicial decisions as balancing procedures between conflicting legal principles (Alexy 2021), i.e., underlying reasons of property. Legislative and jurisprudential rules structure legal argumentation as an ongoing *democratic deliberation* on the scope and structure of concrete property rights.

A plurality of reasons and procedural balancing does not entail normative arbitrariness. Opposing justificatory reasons could be read as a



Property: Philosophy of, Fig. 1 Plural reasons of property

dialectic *discoursive grammar of property law* that structures the deliberative balancing procedure. Opposing collectivist (2.1) and individualist (2.2) property paradigms are represented by the competing reasons of systemic *security* and individual *freedom*. Concurrently, consequentialist wealth maximization (2.3) and its egalitarian opposition (2.4) frame another social conflict with the reasons of economic *utility* and *equality.* As monistic theories each claim an exclusive superior reconstruction under their normative stance, different justifications open a political battle between property paradigms. A pluralist account (2.5) offers a deliberative frame to integrate conflicting paradigms as competing reasons within one democratic legal procedure of balancing. The discussion on values and reasons is not congruent to the distinction between natural law and positivism. The value of individual freedom for instance is central for most natural law accounts but also for neo-Kantian positivists. Yet, some traditional clustering of natural law accounts around freedom/equality and positivist accounts around security/utility could be observed.

Objects: Which Property?

The textbook blueprint of property objects are tangible and *movable entities* (e.g., cars, vegetables). However, the most relevant social application of property relations was and probably still is land use. Ownership in such immovables is called *real estate*. Here, the property regime is "coding" a very basic structure of society (Pistor 2019) that decides over most economic starting positions and the form of social collaboration. Rights over *natural resources* (e.g., wood, coal, gold) are mostly treated like immovable or (when already extracted) movable property. Yet, the attribution of property rights to more fluid and volatile natural resources (e.g., water, air, gas) is not so obvious and rises serious problems of equal distribution and free access to truly vital essentials.

Other controversial tangible property objects are *human body parts*. Over centuries, courts in different nations established a "no property" rule for the human body, which was, however, undermined by newer Common Law jurisdiction (cf. Supreme Court of California, Moore v. University of California, 51 Cal. 3d 120 (1990)). A strong property approach would designate full ownership to separated body parts including the unlimited right to sell them (e.g., in a market for organ transplantation) based on reasons of free choice and efficient allocation of resources. Instead, a personality rights approach opposes all property rights in the human body (Munzer 1994) in line with personhood and

egalitarian paradigms of property. The topic of property rights in the human body is also traditionally highly delicate because of the cruel history of antique and colonial *slavery.* A slave is a human person who is legally treated as an object insofar as property rights attribute exclusive use to an owner. This extreme property relation historically manifests the dangerously extensive social power of property structures.

A partially independent, philosophically established area of property rights debate (cf. Drahos 1996) is *intellectual property in immaterial goods* (e.g., music, technical inventions, esthetic designs). Whereas material goods are rival and compete in their use, immaterial goods allow for parallel usage without restricting the access of other users. Thus, only intellectual property (IP) rights create really marketable immaterial goods. At the same time, IP rights may interfere heavily with genuine ideas of other people (e.g., parallel inventions or similar art creations) and create monopolies. To balance economic incentives to creation and innovation (utility) with free and equal access for users, most IP rights are initially limited in time (e.g., 20 years for patents) and substantial in scope (e.g., noncommercial "fair use" of academic writings or art work). Whether property rights should also be established for *non-personal but individualized data* (e.g., digital tracking of Internet search or buying histories) is a topical controversy pending.

Another difficult demarcation of a "new property" (Reich 1964) is intangible *financial assets* like corporate shares and economic securities. Here, the line between property and contractual obligation blurs. Most constitutional courts consider all money-worth assets under the realm of the fundamental right to property (US Supreme Court, Goldberg v. Kelly, 397 U.S. 254 (1970)). Indeed, although shares and securities only grant a relative obligation towards other shareholders or warrantors, additional rights (e.g., privileges in insolvency law) extend the realm of addressees and transform these relative positions into tradable goods (e.g., derivatives). This commodification of financial relations has the potential to rather increase social inequality and power hierarchies (cf. Piketty 2013; Pistor 2019).

Subjects: Whose Property?

The regular subject of property is an individual person. Subjective entitlements of one individual owner over an object are called "private property." Yet, property also allows for group ("common property") or public attribution ("state property"). The possible subjects of property relations are thus framed as diverse types of property: *private*, *public*, *and common property* (Page 2016). Correspondingly, some property regimes differentiate rules for "state ownership," "collective ownership," and "private ownership" (Chapter V Chinese Property Rights Law 2007). The role and importance of different subjects decide much upon the political orientation of property regimes. The political battle between capitalist and socialist economic systems in the last century could also be read as antagonistic prevalence of private or state property.

The transformation of state (or common) into private property is called *privatization*, e.g., of public infrastructure like streets or ports. Instead, *expropriation* designates a "taking" of private property by the state, which in most legal systems demands a legitimate public purpose and just compensation (e.g., 5th Amendment US Constitution; Art. 18 Saudi-Arabian Constitution). The essential purpose of international investment law is to protect foreign ventures against direct, indirect, or regulative expropriation. One controversy here is the standard of compensation between "prompt, adequate and effective" (the liberalist "Hull formula") and only "appropriate" to the circumstances (cf. Art. 2(c) UN Charter of Economic Rights and Duties 1975), which is supported by more egalitarian voices. The conversion of a whole economic branch (e.g., mining or housing) from private to state or common property is called *collectivization* (e.g., Art. 15 German Constitution). Although freedom and market utility are restrained, equality and security might justify such a transformation.

Beyond the dichotomy of private or state property, there is growing resonance for a third type of resource management: the *commons*. The concept was introduced in the modern debate with the economic (and ecological) narrative of the

"tragedy of the commons" (Hardin 1968). In this collective action dilemma, a piece of the commons (e.g., a river) that belongs to a community (e.g., a municipality) is overused by its members because usage costs are public and gains (caught fish or cheap sewage disposal) are private. Introducing private ownership offers an economic solution (cf. above 2.3) but also deprives unproblematic access and causes inequalities. Even more, private property rights may result in a "tragedy of the anti-commons" (Heller 2013) where exclusive monopolies result in socially detrimental under-use of resources (e.g., pharmaceutical patents, private railways). The recent concept of the "commons" stands for alternative self-organization of "common property rights" (Ostrom 1999) and sometimes even further for a different form of living together (Hardt and Negri 2009), i.e., "commoning."

Also, liberal private property regimes normally include forms of *shared property*, e.g., a couple co-owning their joint house. More important, the whole of *corporate law* could be understood to organize shared or even common property positions. The law creates a legal personality for a company that could own property objects as a legal subject. Share- or stockholders then own the respective company together. Yet, common property structures strongly differ. Whereas corporate stocks are mostly financial assets without much direct influence on management, cooperative membership requires participation in the joint purpose (e.g., working or housing). Moreover, the digital *sharing economy* experiments with the boundaries of shared property rights beyond ownership. Models like car-sharing grant use rights on a contractual basis which are only relative within the sharing community but to some extent absolute against everybody else.

Combining ecological motives (e.g., destruction of nature, climate change) and indigenous roots, there is a global movement to grant nature subjective legal rights (Stone 2010) like the legal personality of companies which include property rights in its own objects (e.g., trees, rivers). Some legal systems already assigned a (property) *right to nature* in their jurisdiction (Colombia Constitutional Court, T-622/16 (2016)), legislation (Art. 14 New Zealand Te Awa Tupa Act 2017), or even constitution (Art. 71–74 Ecuador Constitution). Notwithstanding nature's practical representation by humans or human associations, theoretical problems with the idea of self-ownership remain so far unsolved (e.g., self-alienation). A parallel problem rises with rights in and to artificial intelligent (AI) systems.

Formations: How Property?

Property entitlements could be read to include not only rights of the property holder (e.g., the right to exclude others by the owner) but also rights of third parties against the property holder (e.g., liability for harm through eroding land). From the perspective of the property holder, this extensive picture of property amends the bundle of property rights with a bundle of *property duties*. Thus, property obliges to use its object in accordance with public and social interest (cf. Art. 14(2) German Constitution). A gradual scheme of property rights (Ostrom 1999) as well as property duties allows for a highly differentiated structure of property positions. Of utmost importance for property formation is also the influence of public law. Public regulations do not superimpose private (law) property rights. Instead, independent of its core origin (natural law or positive setting), the concrete legal form of property rights is constituted by the public and private framework alike.

Land use is a good example for the *public-private property interplay*. If environmental law forbids some industrial exploitation but still allows for other usage, then private property in the land is only established in that specific form and not expropriated (cf. German Constitutional Court, BVerfGE 58, 300, 'Gravel Mining' (1981)). Of course, a political battle between freedom (to arbitrarily use owned land) and utility (to maximize economic gains) against security (ecological sustainable use) and equality (equal public restrictions for all) looms behind that decision. And yet, one could go even one step further to the bottom line of land property regimes. To reduce dynastic inequality and speculative rent-

seeking while still enabling economic production and security of investments, individual full ownership in land is amended (e.g., US ground lease) or even substituted (Chinese Urban Real Estate Administration Law 1994) with long-term use rights.

In general, there could be three dimensions of *bounded formations of property* with substantial, temporal, or subjective limitations. As an example for substantial bounds, corporate governance tries to oblige corporate property to more sustainable use (e.g., UK Stewardship Code 2020; B Corp Certification). Correspondingly, the idea of *stewardship or purpose ownership* restricts shareholders' rights (e.g., alienability, income) to promote the underlying public interest of the venture (cf. German Draft Bill for a Steward-owned Limited Liability Company 2020). A temporal bound provides property rights from the beginning on only within time limits like intellectual property (IP) rights (e.g., 20 years for patents). A similar root for tangible objects would be to question the general right to bequeath, which has only a loose and doubtful justificatory link to property anyway (Gosepath 2022). Finally, subjects of certain property objects (e.g., nature conversation areas) could be restricted to public or collective holders.

Conclusion

A democracy could decide on (and change) the basic structure of society's resource management with more, less, or even without private property (Rawls 2001). This formation of a property regime takes place continuously in public, private, and economic law legislation and jurisdiction defining concrete property rights and duties as well as the lawful property objects and subjects. The justificatory reasons for such property entitlements and obligations are not merely trivial accessories but a constitutive element of their formation. A genuine democratic perspective does not establish some fixed property positions but rather demands its ongoing transparent deliberation and justification in changing social situations.

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Proportionality: Measuring Impacts on Fundamental Rights

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Introduction

The principle of proportionality is perhaps the most successful principle in law. Such is the unanimity regarding its use that it has been argued to be an indispensable methodological tool in the argumentation of constitutional law (Klatt and Meister 2012a: 1). And, furthermore, this principle is expressly enshrined in several contemporary constitutions, as well as in regional and international human rights charters, and it is also used by the majority of courts around the world, such as constitutional and supreme courts, not only at state level but also at regional and international level. Perhaps this is why, more recently, some scholars have indicated proportionality as a universal principle of law (Beatty 2004: 159 ff; Klatt and Meister 2012b: 159 ff; Sieckmann 2017: 3 ff).

The unanimity mentioned, however, does not mean there is a lack of controversy. Quite the contrary, the very legitimacy of the principle has been widely attacked: Some argue that the expansive force of fundamental rights has gone too far, and therefore one should rely on another interpretative model in which proportionality and courts may lose some weight (Böckenförde 2003: 165 ff; Papier 2005: 81 ff; Hoffmann-Riem 2004: 53 ff). Differently, others have argued that proportionality has allowed for a real "assault on fundamental rights" (Tsakyrakis 2012: 468 ff). In any case, even the staunchest critics of proportionality do not wish to simply abandon it but rather reduce its impact by decrease its practical use (Ossenbühl 1996: 34).

Balancing, Proportionality, and Principles

Fundamental Rights *qua* Principles and Balancing

The relation between proportionality and fundamental rights is deeply connected to Alexy's fundamental rights *qua* principles theory. It is well known that Alexy's thesis of principles *qua* optimization requirements implies a conceptual connection between principles and proportionality (Alexy 2000: 297). Bearing in mind that proportionality is also linked to balancing, some argue the existence of a conceptual connection between principles, balancing, and proportionality.

According to Alexy, differently from rules, when principles collide, the solution must be obtained through balancing. In other words, legal operators must define a conditional relation of precedence between principles by weighing the different legal consequences under the circumstances of the case at hand (Alexy 2010: 50 ff). In a particularist fashion, it seems therefore that principles can take precedence over other principles in one case and be defeated in another.

Although it is debatable that all fundamental rights' norms are principles, or that there is a

conceptual relation between balancing and principles (Duarte 2010: 51 ff), assuming that the distinction between rules and principles lies in the norm structure (Lopes 2017: 471 ff; Duarte 2012), it does not seem particularly controversial to argue that the vast majority of fundamental rights are principles and that most conflicts of fundamental rights are conflicts that must be resolved through balancing (nevertheless, Zucca 2007: 41).

Balancing and Proportionality

An important assumption to bear in mind is that fundamental rights can indeed be interfered with (Alexy 2010: 178 ff; Borowski 2007: 197 ff), albeit on the basis of a constitutional justification *qua* another constitutional principle (Möller 2019: 1078 ff).

That said, balancing is the methodological operation to determine the application of principles, which is done by comparing two or more principles with incompatible legal consequences under some relevant factual properties. And its normative conditions are created whenever none of the legal system's conflict norms is able to resolve a particular normative conflict (Duarte 2009: 168–169). But how is the balancing operation carried out? It is at this point that proportionality seems to be important: Proportionality is a principle that governs the balancing operation (Martínez Zorrilla 2007: 236 ff; Duarte 2010: 59). Thus, one can argue that there is no equivalence or flat opposition between balancing and proportionality.

The determination of the principles to prevail is therefore governed by the normative framework constituted by the three subprinciples of proportionality: (i) suitability, (ii) necessity, and (iii) proportionality in its narrow sense (among others, Alexy 2010: 66 ff; Barak 2012: 243 ff; Klatt and Meister 2012a: 7 ff; Clérico 2009: 39 ff). The first and second subprinciples regard the factual possibilities of principles *qua* optimization requirements. In a different fashion, proportionality in its narrow sense concerns interferences at the level of legal possibilities. In other words, it defines the legal limits of interferences, which is done through the "Substantive Law of Balancing," according to which: "the more the interference in one principle, the more important the realization of the other principle" (Alexy 2000: 298, 2003: 436 ff). All the same, it also encompasses the so called "Epistemic Law of Balancing," according to which: "the more intensive an interference in a constitutional right is, the greater must be the certainty of its underlying premises" (Alexy 2002: 419).

This seems to show that proportionality in its narrow sense presupposes an operation of measurement of the intensity of interferences with fundamental rights, or in Kiel school's jargon, the measurement of satisfaction or nonsatisfaction of competing principles. Therefore, it looks like the main function of Alexy's Weight Formula (WF) is exactly to work as a measurement instrument (Sampaio 2018: 82 ff). For this purpose, the WF is carved on a scale created to express levels of interference – light, moderate, and serious – and is formalized through a geometric sequence of 2^0, 2^1, and 2^2 (1, 2, and 4) for each level. The briefly described WF apparatus aims at measuring *qua* evaluating the concrete weight of a principle in a specific case (Alexy 2003: 440 ff). Despite the elegance of the formula, it denotes two sorts of problems. From the conceptual perspective, is this kind of measurement instrument even possible if one considers that the objects being measured seem to be incommensurable? From the methodological perspective, can one use cardinal scales for the task at hand?

The Incommensurability Objection and Measuring Scales

Incommensurability and Comparability

Among the almost endless list of criticism directed at balancing and weighing (Bernal Pulido 2011: 228 ff; Jestaedt 2012: 159 ff; Barak 2012: 481 ff; Klatt and Meister 2012a: 45 ff), one of the most important regards the irrationality of balancing due to the incommensurability of the objects to be weighed, which leads to subjectivism and arbitrariness (Schlink 2012; Habermas 1996). Specifically concerning the WF, some argue its indeterminacy regarding the determination of scales of measurement (Jestaedt 2012: 164; Tsakyrakis 2009: 471 ff).

The main variant of the incommensurability argument contests the assumption of the existence

of a common metric as a basis for balancing. Incommensurability is caused, in the constitutional domain, by the fact that fundamental rights (as well as the values they express) have an ultimate nature, so there are no criteria allowing them to be compared and, thus, to rationally determine which one should prevail. In other words, the alternatives are incommensurable, as it is not possible to measure them in the light of a scale to establish a comparison and choose the courses of action that are considered more valuable or better. This objection is of course similar to the one being made in the moral realm due to pluralism of values.

Nonetheless, the objection almost disappears if one distinguishes, as Chang noticed, between incommensurability and incomparability (Chang 1998: 1 ff, 2015: 1 ff; Stocker 1998: 196 ff; Adler 1998: 1169 ff). Two elements are incommensurable iff they cannot be accurately measured on a value scale, whereas two elements are incomparable iff it is not possible to establish any affirmative relationship between them. Therefore, while incommensurability presupposes the impossibility of establishing a cardinal order (or at least a precise cardinal order) of the elements in question, although ordinal classification remains possible, incomparability makes both cardinal and ordinal classifications impossible. There are three comparative relationships: (i) "better than"; (ii) "worse than"; and (iii) "of the same value as" (trichotomy thesis). Finally, all comparisons require the determination of a covering value, that is, the element X is better, worse, or equal to the element Y in the light of the coverage value Z (Chang 1998: 1 ff, 2015: 3 ff) (e.g., although apples and oranges are different fruits, they can be compared in light of their flavor).

In constitutional cases, comparisons between fundamental rights require several values, such as intensity of interferences, abstract weight, or reliability, for which several considerations contribute. Nevertheless, they are still comparable as proved by the "insignificant-remarkable" relationship argument, according to which it is possible to compare between insignificant and remarkable tokens of different types (e.g., as a terrible painter named Talentlessli and Mozart, by reference to creativity). This shows it is possible to determine or at least to stipulate coverage values for "all things considered" assessments' situations (Chang 2015: 71 ff). The covering value used by Alexy, for example, seems to be the degree of satisfaction and nonsatisfaction of principles from the constitutional point of view, which appears problematic because constitutional principles have the same hierarchy (Urbina 2018: 58). In alternative, one can stipulate a broader covering value such as the *importance of compliance* with the conflicting principles, which varies according to the case properties.

One possible criticism is the "small improvement argument" (for example, in cases of balancing stalemates, a small or irrelevant improvement would suffice to overcome the stalemate, which does not happen in the cases of balancing fundamental rights), which is easily refutable either by stating that the three comparative relations – better, worse, or equal – are rough or approximate or by stating that there is a *sui generis* fourth value relation of parity (Chang 2015: 121 ff; Silva 2011: 294–295).

On this account, incommensurability does not exclude balancing, even if there are restrictions on the type of scale that can be used in the weighing process. To put it clearly: Only ordinal and not cardinal ranking is possible (Silva 2011: 282).

It is important to underline that there can still be cases of indeterminacy (although rare in the legal domain), namely cases (i) of non-comparability *tout court* between two elements, (ii) of incomparability between two elements in the light of a certain coverage value, and (iii) of nontrichotomous comparativity (e.g., situations in which there are no metacriteria or procedures to order the comparison criteria themselves) (Martínez Zorrilla 2007: 348 ff). Much more important are the (iv) cases of balancing stalemates (Silva 2011: 296), which may arise from symmetry (e.g., the Siamese twins' case) or parity (or rough equality) relations.

The Weight Formula's Methodological Main ProblemIts Cardinal Nature

As stated before, even if the incommensurability objection can be overcome, one cannot use a cardinal scale to measure the intensity of interferences with fundamental rights. The proponents of

the WF seem aware of the problem, as they stress that the formula is not an equation purported to give a mathematical response to conflicts of principles. Rather, it is a formal procedure for justifying the resolution of conflicts' decisions, and, as such, it is not a material ruling but simply a rationalization of an evaluative intellectual process (Bernal Pulido 2006: 109; Klatt 2012: 9; Alexy 2016: 67).

The problem is that despite their words, the WF constitutes not an ordinal but a true cardinal scale. The difference between ordinal and cardinal scales is that the former represent order but no further algebraic structure (e.g., the Mohs scale of mineral hardness), and the latter represent equally spaced units along the scale (such as interval scales [e.g., Celsius and Fahrenheit temperature measuring scales] and ratio scales [such as those representing mass in kilograms, length in meters, and duration in seconds]) (Tal 2017).

If we look carefully at the WF, a different story from the one told by Alexy emerges, to the extent that the three formula variables are rated equally and the numerical values obtained within each variable are multiplied. This seems enough to prove that the scale used is a cardinal and not an ordinal one, which would be a methodological contradiction (see Šušnjar 2010: 206; Sampaio 2017: 225 ff; Zuleta 2016). Nonetheless, as stated, nothing prevents the use of a simpler scale focusing only on the intensity of the impact *qua* interference with fundamental rights and still "compare" and "order" the obtained values by simply using the light, moderate, and serious values (Sampaio 2017: 225 ff).

Measuring Impacts on Norms: Which Criteria to Use?

Measurement is a ubiquitous phenomenon studied in philosophy of science and has an enormous importance in everyone's day-to-day life. This also happens in the legal domain, if one bears in mind that "courts often have to pull off such impossible feats" as happens in tort law when judges have to, for example, determine compensation for civil damages and set concrete penalties (Endicott 2014: 323 ff; disagreeing Urbina 2018: 73 ff).

In fact, on the one hand, as it is linear in the field of philosophy of science, no problem arises from qualitative measurement *qua* comparing through ordinal scales, as long as it is possible to rationally – i.e., in a consistent and nonrandom way – justify the assignment of values. On the other hand, from a neurological perspective, this seems to be confirmed by the existence of a human's "basic and largely inborn—though improvable by training and experience—intuitive capacity for non-symbolic quantitative reasoning." And this intuitive capacity "includes not only assessing and comparing magnitudes, but also performing on such magnitudes approximate mathematical operations" (Sartor 2013: 1432).

From this background, one last question arises: Even if it is conceptually possible to measure the intensity of impacts *qua* interferences with fundamental rights as well as to compare it, how can one rationally justify the assignment of the values' intensity? First of all, balancing seems to operate within the realm of practical reason, from which one can infer that the measurement presupposed by proportionality in its narrow sense is a process of weighing practical reasons. More specifically, the conflicting principles seem to constitute colliding reasons for action (e.g., freedom of expression allows prima facie shaming someone, while the right to honor seems to forbid it), which should be taken into account under the circumstances of the case in order to determine what should be done all things considered. In other words, since this kind of normative conflict is not resolved by the legal system itself, legal officials have no option other than to evaluate the reasons for action at stake under the properties that shape the legal case and, more specifically, to evaluate the combined weight of each of them in order to determine which is the strongest (in the moral domain, for example, Dancy 2004, 2018).

The question remains: Assuming that the facts of the legal case can modify *qua* increase or decrease the weight of the reasons to act constituted by each of the conflicting principles (on intensifiers and attenuators, Dancy 2004: 41 ff, 2018: 51–52; Lord and Maguire 2016: 10 ff; Bader 2016: 39 ff), are there any criteria that can help us determine the weight of reasons to

act in cases of interferences with fundamental rights? Putting it more simply: What kind of facts function as weight modifiers in cases of fundamental rights' interferences?

Let us recall that the weighing carried out within proportionality in its narrow sense is an operation used to measure the intensity of interference with a principle and the importance of applying the conflicting principle to that case. A comparison is needed in order to determine the prevailing principle, and for this purpose one needs to choose the quantity to be measured, such as the "weight" (which is of course a metaphor Mendonca 2003: 57 ff). The problem of proportionality in its narrow sense more specifically the problem of the WF is that usually no criterion is provided to measure the intensity of the interferences (Martínez Zorrilla 2007: 349 ff).

Bearing in mind we are dealing with conflicts between principles of fundamental rights, it is possible to specify some criteria to justify the assignment of values to the variables used by a formula such as the WF (Bernal Pulido 2007: 768 ff, 2006: 195 ff; Sampaio 2018: ff). To illustrate this, one could mention (i) objective epistemic criteria related (i_1) to the "area" of the principle's antecedent, i.e., the amount of action-types or tokens interfered with; (i_2) to time: namely the duration, speed, and frequency of the interference; and (i_3) to the general context of the interference: normality or abnormality of reality. There can also be (ii) subjective epistemic criteria, namely the specific consequences to the right- or freedom-holders (e.g., is the interference direct or indirect? Is it made through action or omission? Is it potential or present?). As one can see, these criteria are largely related to the temporal, spatial, personal, and material elements of the antecedent of constitutional principles.

Not everyone is so enthusiastic about these criteria, because assigning a certain magnitude to the intensity of the interference still is a "value judgment" (Martínez Zorrilla 2007: 349 ff). There is no room to disagree with the statement – it seems almost to be a platitude – that the process of assigning values involves subjectivity. However, one must not be naive: Value judgments are inevitable in most legal operations. In any case, no one is promising full objectivity in a practical reason domain such as the balancing one. Obviously, the assertion that an operation such as balancing is completely subjective or completely objective depends, to a large extent, on the assumed metaethical premises. For example, Guastini states that weighing is nothing more than the expression of the feelings and personal preferences of legal officials, because he assumes (even if implicitly) an expressivist-emotivist metaethical conception (Guastini 2014: 216 ff). In the domain of moral philosophy, in contrast, Dancy's particularism always seems to make it possible to determine what should be morally done in the light of the factual properties with an enormous degree of certainty, because he is a moral realist. Regardless of the specific metaethical conception, from a descriptive point of view, the fact is that officials such as judges seem to act as if it is possible, in most cases, to determine which reason to act should prevail or, in other words, what conflicting principle should prevail.

Conclusion

Taking stock of what has been said, there is no doubt about the existence of a deep connection between principles, balancing, and proportionality, even though it does not seem to be a conceptual one. Furthermore, assuming that most fundamental rights are principles, the idea that most conflicts of fundamental rights must be solved through balancing does not seem to pose any major problems. Thus, the question is to understand how is the balancing operation carried out. And proportionality fits perfectly into this regulative role. Within proportionality's normative framework, proportionality in its narrow sense appears to be the most interesting and also most problematic subprinciple.

Proportionality in its narrow sense presupposes an operation of measurement of the intensity of interferences with fundamental rights, which is precisely the main function of Alexy's WF. Despite its remarkable worldwide popularity, the formula is confronted by some conceptual and methodological problems. First, it faces the well-

known incommensurability objection, allegedly caused by the inexistence of a common metric as a basis for balancing fundamental rights. Nevertheless, the objection almost disappears if one distinguishes between incommensurability and incomparability. As long as an ordinal scale is used, it seems possible to avoid the objection. This leads to a second problem related to the fact that the WF actually uses a cardinal scale. But, as stated, there is nothing to prevent the use of a simpler scale focusing only on the intensity of the impact *qua* interference with fundamental rights. Since this kind of reasoning is conceptually possible, and even a trivial task for humans, the problem then becomes how can one rationally justify the assignment of intensity values to impact on fundamental rights. Assuming that weighing is a practical reason process for assessing the weight of reasons for action under the properties that shape cases, facts such as the amount of restricted action-types or tokens or the duration, speed, and frequency of interferences work as weight modifiers and therefore can help us to externally justify the assignment of values to the variables used by formulas such as the WF.

Cross-References

- ▶ Normative Conflicts
- ▶ Principles
- ▶ Rights: General

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A Militant Life

Proudhon (1809–1865) was born 1809 in Besançon, in the Jura region in Eastern France, from a working-class family (Haubtmann 1997). He started to work at an early age. But being a brilliant intelligence, he could by scholarships get a relatively good education, whereby he passionately started learning Latin and classics. Being 17 years old, however, he had to leave college and start to earn a living as a typesetter. Nonetheless, 1838 he wins a grant of the Besançon Academy of Science, thus being able to move to Paris and make studies that will then be published in his book *Qu'est-ce que la propriété?*, which made him immediately famous because of the radical theses there defended (Woodcock 1956). In this way he could later develop a career as a writer and journalist during a crisis time for the French society under the so-called July Monarchy. It was a time when liberals went to power and based their hegemony on the merits of a new capitalist economy that promised riches and wealth. "Enrichissez-vous," "get rich," was the liberal prime minister Guizot's slogan, that gave an

imprinting to those years. However, the bourgeoise success was not at all mirrored by an equivalent progress of working-class living conditions. This is the age well depicted by Victor Hugo's *Les Misérables*: great riches were accumulated, while pauperism was plaguing the underworld.

Constitutional monarchy collapsed February 1848, by a Republican mass movement, without however giving satisfaction to the working-class demands. Proudhon was an important actor during the end phase of the July Monarchy, at least as far as the intellectual debate was concerned, preparing the way to the 1848 revolution. In 1843, he published a further political philosophical book *De la Création de l'Ordre dans l'Humanité*, soon followed by a treatise on political economy, *Systéme des contradictions économiques*, where a systematic critique of capitalism is presented, a critique that had a strong impact on the following evolution of Karl Marx's communist doctrine. Proudhon and Marx met in Paris and discussed their respective views without, however, finding an agreement (Haubtmann 1947, 1981). Marx then wrote an acid critique of Proudhon's theory, *Misère de la philosophie*, contesting Proudhon's weak materialism and his strong propensity to an ideal interpretation of social phenomena. 1848 Proudhon was elected as a representative at the National Assembly of the Second republic and there strenuously defended the reason of a radical social reform (Woodcock 1956).

The French Second Republic after the June workers' insurrection and its implacable repression by the army and the bourgeois national guard was soon taking the shape of authoritarian liberalism, a stark class regime where bourgeois and capitalist privileges were to be protected at any cost. This could not but lead to first a cry for a "strong leader" and to the election of Louis Napoléon as President of the Republic December 1848 and then to the 1851 "coup" staged by the same Louis Napoléon, giving birth to a farcical Second Empire. Proudhon was a staunch opponent of this counter-revolutionary process, and an implacable critic of the new Emperor, defending the reasons of a social democratic republic.

He was taken under arrest from 1849 till 1852, the year when he went in exile to Belgium. He was permitted to come back to Paris 10 years after, in 1862, only to live 3 more years, and died 1865 (Haubtmann 1987). He was not given the chance to experience the Second Empire *debacle*, the Prussian invasion of France, and the following Paris Commune. This, however, was strongly influenced by his libertarian socialist program and his ideal of popular self-government as alternative both to liberal parliamentarism and paternalistic, communist dictatorship. After that, French workers' unions for decades were mostly referring to the Proudhonian intellectual legacy.

An Ontology of Freedom

Proudhon's political philosophy pays a special attention to the sphere of law (Chambost 2004). This is already patent from his first important work *Qu'est-ce que la propriété?*, where the central issue discussed is the right of property and its legitimacy. Property is challenged from various angles, normatively and conceptually, but mostly from a legal philosophical standpoint. In the legal doctrine property is seen as a fact of domination based on a historical title, in short, it is a fact, a "source" of human autonomy. Proudhon deconstructs such view. First, it is the very absoluteness of the right of property that is dismantled. Rights are in the doctrine seen either as "absolute," independent from any social relationship and the aid of a third subject; or they are "relative," founding on a third party's conduct and agreement. Property in this dichotomy is considered as the "absolute" right *par excellence, jus utendi ac abutendi*, right to use and abuse, a sovereignty that does not need a recognition and performance by any other subject to be fulfilled. Proudhon believes that such absolute sovereignty is a rest of a mythical, religious worldview. It is a residual fragment of a political theology first justifying political sovereignty, and then extended to the particular domain of a private subject. Property is a trickle down of such absolute idea of power that is fixed in the State and in the King. "If goods are property, why should not the proprietors be kings, and indeed

despotic kings, kings in proportion to their acquisitive faculties?" (Proudhon 1994, p. 211). A property owner is thus shaped as an absolute king in miniature. But this is phenomenologically untenable.

Moving from Thomas Reid's considerations, Proudhon equates property rather to the contingent occupation of a theatre seat. The spectator of a play sits on a place which is her own for a while, only for a well limited time; this somehow is possession, but this will last until it is allotted to a different person that will later enjoy a new performance of that play or of a different one. Possession reveals the phenomenology of what we have sacralized as property. On the other side, there is no fact whatsoever that could legitimize absolute private power over things, that is property, without assuming history or just facts as normative reasons. But facts cannot get this normative function without a traditionalist or positivist doctrine behind them, a doctrine, moreover, philosophically and socially unjustifiable. "This is the method of the ancients: the fact exists, therefore it is necessary, therefore it is just, therefore its antecedents are also just" (Proudhon 1994, p. 45). We could call this a legal positivist fallacy. Facts however do not have justificatory force, especially as far as rights are concerned. "Every right must be justifiable in itself, or by some right prior to it, and property in no exception" (Proudhon 1994, p. 55). A mere fact is just force, and this does not run the world of the just.

However, property is hardly to be justified through the alternative stance of natural law. If we conceive this as the rule in force in a natural state, we shall not find absolute property in such a state. No occupation of land will have a s a result an exclusive title of property. Land is a common good. "The land is indispensable to our existence, thus a common thing and insusceptible of appropriation" (Proudhon 1994, p. 73). In any case, "things," products also out of land, are the result of human labor. To concede for property would mean to accept giving up labor. But: "Men can no more give up labour than he can liberty" (Proudhon 1994, p. 74). Furthermore, human being would leave the natural state by a social contract and enter into the civil condition. This is done by an exercise of popular sovereignty. All power is vindicated by subjects thus building a political community, a common space for everyone, and consequently accessing the status of citizens.

Citizens are holders of a common space of exercised power, where no private entitlement could preempt the common sovereignty. Popular sovereignty is thus opposed to private property: "Popular sovereignty opposed to private property! Might not that be called a prophecy of equality, a republican oracle?" (Proudhon 1994, p. 73). But suppose that natural law could be based just on normative terms, and we could claim a natural right of property. This is however impracticable – claims Proudhon – because such a right could not meet the strict requirement of universality that natural rights are said to embody. Property cannot be universalized; therefore, it cannot be a natural right. Universality here means the chance of a mutual agreement and the promise of sociality. A universalizable right is a right that can be socialized, that is, that is not contrary to the social communication of subjects, a position that is able to maintain a common discourse and experience. This however is not the case with property. "Property, in its etymological sense and by the definition of law, is a right outside of society (. . .) If we were associated for the sake of liberty, equality, and security, we are not associated for the sake of property" (Proudhon 1994, p. 42). If a man was drowning, and to save himself, he landed into a land of some people's property, the proprietors of the land could not legitimately reject the drowning man into the sea. Room in the land should be granted to him. This will show that to make property compatible with sociality and the golden rule, the commonsensical basis of morality, the absolute power of property should be reneged. There is in society indeed an invisible hand, but it is normative, not merely functional. It is communication ruled by justice and equity, not a self-moving market driven by profit and accumulation and spontaneously destined to equilibrium.

In this perspective a property as an egocentric sphere of autonomy will not be a paradigmatic case for liberty, as is indeed for liberalism. Just

the opposite. Such absolute right, irresponsible property, is a condition that is hostile to true freedom, since this is a capacity that is accrued and increased, and not disparaged, by other freedoms. In the perspective taken by a liberal proprietor a fully-fledged freedom would mean complete isolation and solitude. But the doing of a subject as an isolated individual is not strengthened. It is as a matter of fact weakened. Acting in society is acting together with other people. Liberty thus cannot but be social and cooperative. "Au point de vue social, liberté et solidarité sont termes identiques : la liberté de chacun rencontrant dans la liberté d'autrui, non plus une limite [. . .] mais un auxiliaire, l'homme le plus libre est celui qui a le plus de relations avec ses semblables" (Proudhon 1929a, p. 249). Subjective rights are here reshaped from individual patrimonial titles into collective social powers (Gurvitch 1932).

Law as Mutual Recognition and Arbitration

By the criticism of property Proudhon develops a more general concept of society, political power and law. But he does not eschew the necessity of a more general philosophy. Actually, he even tries to develop his own ontology and philosophy of history. Proudhon's fundamental intuition is the idea that reality, whatever reality, is based on the fact of a relation. Accordingly, he believes that world entities, "things", are nor just "essences" plus "accidents". They are not absolute coherent entities. They are rather sort of a "series", an idea he derives from suggestions made by Charles Fourier, the French Utopian Socialist. Entities, both in nature and society, are a continuation of qualities, knots of properties, that cannot get full homogeneity. In the "series" all its points are of equal importance. There is no hierarchy between them. It is an alternative to the Aristotelian view of causes that start from a prime mover that is not moved and act through a second mover, a means, to obtain the movement of just moved, a subordinate reality in this triad. The Aristotelian scheme is revised by Louis de Bonald, one of the main philosophers of the French Counter-Revolution, who interprets society, and reality in general, as mirroring the hierarchical structure of a family where there is a prime mover, the father and husband, then a means, a "ministry", the wife and mother, and then just a "moved", the child. Society reflects this in its triple formation of a king, a government of ministers, and then simple and naked "subjects" that abide by the father's rules and the mother's instructions.

Proudhon strongly reacts against reactionary political metaphysics and reinterprets the triad as a "series", where any point follows, but also contradicts and reacts against the precedent or prior point of it (Proudhon 1929b). This is also why Proudhon's philosophy of history is starkly opposed to the Hegelian phenomenology of Spirit and its providential adventure (Proudhon 1946).

Proudhon believes in a history as an evolutionary trajectory, that is a "progress", but this is not made through a coherent, or better a serene movement. There are fights at any moment, there are "contradictions". And no final destination is to be envisaged. There is a thesis and an antithesis, but, and this is his anti-Hegelian sting, no synthesis whatsoever is provided for (Proudhon 1923-1924). The following moment in the historical process is at best the outcome of a compromise, of a balancing between the two previous opposing forces. This allows for maintain a strong identity and justification to each moment that is never "overcome" and absorbed, "aufgehoben" (in the Hegelian terminology) through their "synthesis". Progress is serial, but not linear or dialectical. Or, better, Proudhon's dialectics in the being and in the time is the product of contrasting elements, of struggles, and of only a partial reconciliation. No total or final reconciliation is here envisaged. Such political metaphysics and conflictual philosophy of history has heavy consequence for a view of society.

Proudhon does not deny the possibility and the activation of collective social forces. "Collective beings are as much realities as individual ones are" – we read in his *Justice in the Revolution and in the Church* (Proudhon 2011, p. 655). He is a no-methodological individualist. Individuals that are socially produced subjectivity from the start interact and are connected through

communicative acts, both linguistic and material. Communication is the existential mode of the social being, and it means not only discourse, but also commerce and exchange of goods. In this sense, a market is a piece of communication and its nature is similar to discourse. Labor is also communication, and power too. Political power is somehow conceived in Arendtian terms, it is acting in concert. "Power is immanent to society" (Proudhon 2011, p. 658). Whenever people act in concert, and by the way this is intrinsic in their social nature, they produce political power. Power in this perspective is not a voluntarist experience, a fact of will and monocratic self-affirmation. Just the opposite: it is a product of mutual aid and recognition, of a relation between plural actors. Pluralism is a fact of nature and society. And it will also be a definitional condition of law.

Proudhon's concept of law cannot thus be the one of a command issued by a political superior, a sovereign. Nor is law a product of the spirit of time progressing in a dialectical move. Command, history and tradition would betray the seriality of the social practice that is the source of law. Law is a relationship, something that is better expressed by the idea of a contract. This is why justice according to Proudhon is mostly commutative, not distributive. A distribution – it is assumed – needs a hierarchically superior actor that is capable of distributing. But superiority is illegal, or better contrary to the nature of law. The only legal justice is the commutative one, the one presiding a mutual recognition and agreement. This is also why the form of State should be reshaped and replaced by that of a federation, or better of a confederation, where the central authority is just offering a coordination service to the plural, horizontal political actors and entities. The principle of nationality is rejected both as a domestic constitutional rule and as a foundation of a just international order (Pritchard 2013).

In one of his latest and more mature works, *Du principe fédératif*, Proudhon (1959) explicitly deals with the issue of the concept of law. He lists three basic doctrines. There is first one basing on the idea of command, directly deriving from Christian theology; secondly a relationship theory, the one basically defended by Montesquieu, seeing the law as an intrinsic rule of societal phenomena, and a guiding standard for institutional arrangements. Finally, there is a third theory, one which bases on the idea of arbitration, of a rule setting a balancing criterion for human interests and deliberations. Only this third notion can render justice to a reflexive practice of citizenship, while the first is imbued with the Monarchical principle and an authoritarian morality, and the second cannot reflect the normativity of the claim for justice that presides human communication. Arbitration is in this perspective a relation concept of law made explicit and normative. In previous works the idea of relation is supported by the hope that shared interests could get a so overwhelming evidence that they would not need an imperative selection. The balancing and choosing of prevailing interests then transformed in legal statutes could be the outcome of just a cognitive practice. In conclusion, law according to Proudhon is to be considered as the result of relations made accessible to deliberation through a practice of agreements and arbitration that is moreover supported by the evidence of relevant needs. Law thus is both a normative and a cognitive practice in a way that allows for commands to be eschewed and for sanctions and coercion to be minimized. "The rule of reason will replace the despotism of will" (Proudhon 1994, p. 214).

The Birth of Political Anarchism

Political anarchism is the result of the same learning process that leads to the modern democratic State. It is in a sense the political final destination of a post-metaphysical age that begins once one understands the universe as justification to be replaced by subjectivity and its movement of self-recognition. What in Descartes's gnoseology still is an epistemological turn acquires already a political meaning in Spinoza's reaction and re-elaboration. Cartesian methodical doubt will be declined in terms of a right claim.

Rousseau too is a Cartesian philosopher. His romanticism is methodical doubt translated into

an existential attitude towards human life. His social contract might also be interpreted as a move towards subjectivity. Society is no longer conceived as something given, but it must fully be disposable by people's deliberations and self-understanding. Authorization is equated with autonomy. This move reshapes the idea of sovereignty by making of it a matter of reflexivity, power over power, "competence-competence."

Something similar happens with the private dimensions of sovereignty, family, and property. They both are invested by the requirement for subjective justification.

Liberalism challenges authority and power only in its political form, moreover without doubting about, and putting in question, its necessity or its ontology. The substance of power and authority, as submission and derogation to an alien will or reason, and its required company, force, and violence, are not contested by liberal theory. The question for such predicament is the way to justify such emergence of submission and violence. No possible alternative is envisaged. In any case, a justification is only required in the well-circumscribed precinct of political activity. The liberal art of separation, especially separating a public and private sphere, is instrumental not so much to the liberation of a private dimension conceived and practiced as distant from political prerogatives and governmental directive, as rather as a device to let the justificatory effort to be addressed only against the political domain. In this way family, economy, society at large can still be driven by power relations that are free of justification and control. In such perspective, freedom is mostly conceived as non-interference, and this is fully compatible with the practice and experience of dependence.

Anarchism intends to radicalize liberalism and its enterprise (La Torre 2017; Berti 1998). Justification is required for every form of authority, and power, from government to family and economic relationships. And the claim for justification is not just normative. It does not take as given social institutions as such. Justification claims to penetrate the very essence and practice of the institution considered. The question no longer is when specific coercion is justified, but whether coercion in general is legitimate. And this second query implies a search for possible alternatives. The utopian dimension is considered intrinsic to the justification claim. Freedom is no longer mere lack of interference, or a mere monocratic autonomy; it must be able to be accrued in a collective mood. One's freedom is not a limit to the other's liberty; they refer mutually the one to the other and in such mutual recognition it is to be found their true guarantee and certification. Freedom becomes a collective, generous practice of independence and participation. Independence bases on participation and vice-versa. In this sense anarchism is republicanism made secure and self-sufficient.

Now, a thinker that starts this movement certainly is Pierre-Joseph Proudhon (Ansart 1969), whose critical approach moves not so much from a consideration of the political dimension, but rather is concentrated on the territory of economic structures, especially property relationships. It is property the object of his radical claim of justification.

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Psychoanalysis and Law

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The inclusion of law and psychoanalysis in any list of "schools of legal thought" is ambitious, contentious, and optimistic. Freud may have contemplated studying law before he opted for medicine, and law in the anthropological sense of sovereignty, legitimacy and authority certainly played a foundational role in his concept of the social, but in practical terms the two disciplines were conceived as distinct and antithetical. In an early essay titled "Psychoanalysis and the Ascertainment of the Truth in Courts of Law" (1906), Freud makes amply clear that law and psychoanalysis exist in a parallel state of nonrelation.

As a matter of practice, the couch and the witness box, the analyst's chair, and the judge's bench were sites in different worlds. In this brief essay on the utility of psychoanalysis in the courtroom, Freud makes two points. The first is that the technique of free association is an excellent method for the extraction of hidden truths. If we want to understand motives for behavior, and so what happened, who committed the crime, their motives, free association will be much more likely to be successful on the couch than in court. The second point is thus that the analysand is not under time pressure, hostile examination, or threat of punishment. The obstacle for the analysand is the repression barrier, not resistance to the truth as such. The accused, however, is often seeking to hide what they did and that hostility, together with the inquisitorial method of the courtroom, and the strictly limited time for questioning, the necessity of judgment, precludes any chance of meaningful free association in the witness stand. The analysand, seeking a subjective truth, should be separated and screened from the court of law where trial procedures aim at an objective determination and conviction. Freud in effect ends his essay by saying that the "distinguished jurists" will go their own way, and the analysts in turn will pursue their distinct path.

Such divergence of directions seems to have been pretty much the case in the Anglophone world, and the major treatises on legal philosophy, Lloyd's exhaustive *Jurisprudence*, now in its ninth edition (2014), or even Leiboff and Thomas's *Legal Theories* (2014), in its second edition, exclude psychoanalysis from the list of disciplines that comprise what is loosely detailed as the canon of postmodern or critical legal thought. Fitzpatrick's *Dangerous Supplements* do not include Freud, nor is psychoanalysis one of the humanities that are listed lengthily in Sarat et al.'s *Law and Humanities* conspectus, and presumably because it is not political, the massive third edition of *The Politics of Law* is also silent on psychoanalysis. There are partial exceptions, a chapter in *Critical Jurisprudence* (2005), an essay in *Languages of Law* (1992), some pages on *Totem and Taboo* in Minkkinen's *Sovereignty, Knowledge, Law* (2009), the application of psychoanalysis to the interpretation of law in film in MacNeil's highly original *Lex Populi* (2007), the referencing of Freud in Kennedy's *Critique of*

Adjudication, and in a later essay (2014), but none of these propose a systematic application of psychoanalysis to the schemata, the conceptual grid, and doctrine of legal dogmatics.[1] The principal applications of psychoanalysis to the social bond, to the market, property, and the subject, if not to any very specific positive laws, come most expansively in the work of Jeanne Schroeder (1998, 2004, 2008), developing concepts of property, and latterly a theory of discourse, and in Aristodemou, *Law, Psychoanalysis, Society* (2014). Finally, although my list is simply indicative, there is the expansive work of the French jurist and analyst Pierre Legendre, on the *jouissance,* the pleasure and the pain of power, and on its incorporation, its vicarious subsistence in the monotheistic principle of the two Rome's of text and law, sovereign, and subject. His work, however, has yet to be extensively translated and has had minimal impact outside of certain Francophile stands of critical legal studies. In sum, the divide remains, the versus *unum* or *contropiano* of disjunction is indeed expressed in the fact that these works are in juristic and doctrinal terms marginal enterprises, admirable exceptions, denizens of a theoretical shadow domain, little read, and more celebrated than used.

The conflict between jurisprudence and psychoanalysis began early. First, of course, in Freud's brief disavowal, but somewhat later it was the Austrian jurist **Hans Kelsen**, a friend and correspondent of Freud's, who took up the cudgels and dug the disciplinary lines in the sand. In *Totem and Taboo* (1911) and later in *Group Psychology and the Analysis of the Ego* (1921), Freud had founded the social upon *eros*, which is to say upon desire and its repression. The Oedipus complex, love for the mother leading to patricide, and subsequently to a guilty reverence for the absent father, forms the basic template of the earlier work in which the fraternal bond of the social is generated by the murder of the tribal leader, the father figure who controls both sex and power in the primordial realm that Freud imagines. The key, as Freud later puts it, is that "love relationships (or, to use a more neutral expression, emotional ties) also constitute the essence of the group mind" (p. 91). Love binds, affect ties the community together around imaginary objects, the various images of paternity and of monotheistic identity, of God, monarch, sovereign, people that cohere the social in its iconic forms of collective being. The role of law is that of instituting and guarding the legitimate representation of a unified sociality and determining the singularity of the person, the rational subject devised by and for the order of legality.

For Kelsen, in a key confrontation from 1924, Freud's attempt at a psychic explanation of the social is doomed to failure because "all social phenomena stretch beyond the individual, indeed sociology seems to connote something wholly different from the individual, his very subjugation and negation" (1924, p. 6). The libidinal bond is entirely distinct from the legal tie or *vinculum iuris* of the classical division. This is so because for Freud there is only the individual mind and ego psychology. The social or group mind is simply the manifestation of the individual mind, a hypostasization which finds expression in identification with a common object, a father figure, the *eros* projected at the chief or leader of the political group. Against this, Kelsen points to the fact that the law, the state, the sovereign are wholly legal ideas "that can only be understood in [their] specific judicial conformity, but not psychologically, as may the processes of libidinal ties and associations, which are the matter of social psychology" (p. 22). Freud does important work in exposing the psychoanalytic roots of the hypostasizations of God and group in totemic figures and affective identifications, but these are founded in the individual mind, whereas the state and law are normative orders that depend upon the validity and coherence of their concretization within a system and whole that is independent of any subjective or psychological facets and expressions. Law, for Kelsen, is positive and pure, free of all subjective

[1] The list is partial, because there are evidently enough numerous other essays and indications of psychoanalytic techniques, references to dreams, to unconscious prejudices, in the main in the critical legal disciplines or their inheritors. Mention should be made of Peter Gabel's theories of legal subjectivity, and of the lacanian criminologist Renata Salecl but further referencing would be otiose.

dimensions, independent of psychological considerations, an idea, a theoretical construction or an "as if," a logical fiction that must never be confused with any real entity or any actual flesh and blood: "the highest competence cannot be traceable to a person or to a sociopsychological power complex but only to a sovereign order in the unity of the system of norms. For juristic consideration there are neither real nor fictitious persons, only points of ascription."

The long term work of psychoanalysis as a theory of law has been that of returning to the division of law from its human and subjective sources, the patient endeavor being that of reconstructing the broken unity of the symbols of legality and the mythic roots of the tokens of collective identity. Freud is at his best in debunking the illusion of religion and so in taking down the pretentions of sovereignty and the arrogance of law as represented in its liturgical rituals of trial and in the robes and rites of a hieratically cast personnel and a sacramental language of disposition. The Lutheran Reformers used to say "take off the paint of Rome and you undo her." Today we might paraphrase by saying that cameras in courts, the world allowed into the theatre of trial and the life of the judiciary, will over time produce a certain profanation, and a humanization of the heavily religious process of legal theater may slowly take place. The key to such a turning or movement towards use value lies in recognition of the desiring body, the *eros* and emotion that necessarily also inhabit the pure space of judgment and the elevated seats, the judicial thrones of legal rule. As Aristodemou puts it: "Psychoanalysis not only interrogates a host of distinctions that legal discourse religiously relies upon, but problematizes law's primary presupposition, that is, the distinction between the public and the private" (2014, p. 2). Principally it is the distinction between the subject and the persona or role, the division between body and mind, emotion, and reason that analysis undoes so as to clear the path to interpretation, to apprehension of the dreams and desires that subsist in even the most rational of expressions of law.

The ruse of the law is that of establishing a figure of social paternity, the *nom du père* or father figure that in speaking the law is itself spoken. The creation of the social mask of authority, be it the *grundnorm* of the *Pure Theory of Law* (1934) or the first constitution, or some other purportedly primary presupposition of systemic closure or virtual autonomy, allows for the removal of law from facticity and the isolation of the norm from its tellurian and fleshly progenitors. As Lacan puts it, "the true formula of atheism is not God is dead. The true formula of atheism is God is unconscious" (1979, p. 59). Legendre revises this to argue that the unconscious is a jurist, and the subject a product and expression of a law that literally "institutes life (*vitam instituere*)" (1999, p. 106), as a text, and the subject as a place in that text. It is language, and in juristic tradition, *ratio scripta*, the written code of law that defines the social and stipulates the places and roles, the order and manners of subjectivity. The institution is what we inhabit, the *oikonomia* of domesticity and the quotidian, the realm of administration, of the practice of what gets done, which depends upon the spectacular figures of sovereignty and legitimacy but proceeds in its own right and, as Agamben argues, largely independently of the toweringly spectacular, abstract figures of rule (2011).

Within the Christian tradition of a dual law and *imperium*, that of the jurists and that of the Church, and correspondingly of civil and ecclesiastical writ, it is for Legendre the concept of social text and of **hermeneutics**, of a mercurial passage between sacred words, holy scripture, and positive law, that dictates social existence as a dogmatic enterprise of emblems and dreams (2001, pp. 129–134). It is *ratio scripta* that determines hierarchy and dictates the imposition of offices, roles, norms, and rules, as also of lawyers as interpreters. Borrowing from Harold Berman's theory of law and revolution (1983), and indirectly from Rosenstock-Huessy (1938) the rediscovery of Roman law, and specifically of the *Corpus iuris civilis* alongside the compilation of the *Decretals*, the *Corpus iuris canonici*, presaged the development of textualist methods and theocratic norms of social governance that persist to this day – *nous les rentiers de la Scolastique latine* (1988, p. 105). The great order of being, the

Western inhabitation of our places in the text, our offices in scripture, is lengthily depicted by Legendre in terms of an "episcopalean power of the text," by which, he continues, "I mean that from the beginning the principle of episcopal power, the principle of the power of the text is based on the juridical concept of *competence*, meaning on a montage that in essence consists in rendering the text autonomous. On the one hand, it extracts the text from the general category of documents, and on the other hand endows it with the function of authority over all other texts within a hierarchical system that distributes the jurisdiction of texts over other texts." (1988, p. 113).

The reception and dissemination of textual hierarchies promoted an army of grammarians, hermeneuts, semionauts, scribes and servants of *ratio scripta*, glossators who parsed and collated, ordered, defined, and transmitted the authorized meanings and guilded places of the scriptures. Dogmatics produced two modes of the hierophant, the priest and the jurist, and two orders of judgment, penitence, and law. The second revolution of the interpreter, in this account, comes with Freud, who finally and directly addresses the murder of the father, the death of God. In a society of truth and text, in which scripture and parents are expressly to be reverenced – *venerandae romanae leges* as the *Decretals* put it – and in which the subject inherits vicariously, by way of imitation of *imperium* (*imitatio imperii*) the unity and the subjection of the sovereign, a delegated and distant majesty, what is the consequence of the demise of principal, the death of the Pontiff who has the power to found and interpret the laws – *potestas condendi leges et interpretandi*? (1988, p. 111) In deposing the figure of the sovereign, in undoing the externality of truth, Freud catapulted psychoanalysis into the vacuum: "Freud took the place not of the interpreter, but of the figure of the sovereign, of the Icon or Reference; his work, the Text that devalues all other Texts, now awaits its own devaluation . . ." (1992, p. 391).

The second revolution of the interpreter destroyed the dogmatic psychology of the Church and confession, of priest and penitent, and put in its place a different locus of truth in the unconscious, in a split subject and in the unwritten text whose interpretation depends upon the literal text, the body, the *corpus*, its signs and symptoms, its slips and free associations manifesting the subjective text, the dissonances that require interpretation. The judge and the analyst are the new duo, the double order of interpretation, each engaging with cases, casuistically directed within overlapping jurisdictions and both concerned with the life and the death, the intendments and the limits of the subject. While the two jurisdictions may seem, as Freud notes at the outset of his career, opposed to each other, it must also be recognized that there is a common bond of principle between the interpreters, the casuists, in their joint membership of the symbolic order. It is language that interpretation institutes, the text, written and unwritten – technically inscribed invisibly on the flesh – that manifests the subject and is articulated in the discourses of reason: "it is here that the analyst can most easily discover, in her own work, the play of distinct psychic instances; or again, one can observe that legal analysis of the distinction between what is certain and what is uncertain (the question of doubt, or of dividing: duo, double from which we derive *dubia*, things that are doubtful) turns into the problematic of the subjective relation to certitude" (1992, p. 407).

It might seem as though psychoanalysis repeats the religious function in a novel but nonetheless substitutionary form, and Legendre is prone to proselytizing the necessity of paternal authority and obedience to the categories and places of the symbolic order. The judge should judge, and the interpreter should interpret. As Freud said, the twain should not meet, but this position is open to substantive critique for its dependence upon continued belief in the unity and separation of roles and of interpretations. Legendre acknowledges the irony of Lacan as the new icon or Reference, reformer of the Freudian Text, "his retinue reiterating an ineradicable Bartolism" (1997, p. 191). Lacan, as Michel Tort expatiates most persuasively, presents a very catholic conception of paternal authority and his "Discourse of Rome" is very Roman Catholic, proposing the name of the father as the modern variant upon the theology of a unitary deity (2005, p. 79). Lacan saves the Holy Father and continues

to promulgate the discourse of patriarchy, while Legendre elaborates a nostalgic reconstitution of the mythic bases of the Western legal order in the model, as opposed to the historical and declining figure of paternal authority as a specific political position (2005, p. 51).

If the name of the father is a theological category, a phantasy of masculine authority, an immediate dubiety, a tension and fissure is inserted into the heart of law. The subject is not one, the system does not work. Phallologocentrism deserves division and deflation. As Kelsen pointed out, however, psychoanalysis is not really a political theory nor is it a social strategy of reform. The practice of analysis is simply a method of interpretation that subtends and potentially undermines, dependent upon one's point of view, the order, certainty, unicity, and monotone of law. Legality imposes limits, and juridical dogmatics "signifies (beyond what it enounces) a return to the order of discourse, it is the sign of a sacrifice, for the subject and for society, of the imaginary all powerfulness of thought," in whose place is instituted text and truth, competence, and jurisdiction as the order of writs (1998, p. 106). At the level of interpretation, psychoanalysis tracks and addresses the signs of the drives, the *eros* and the *thanatos* that underpin the text and split the subject that speaks, that lies and judges. The classical *iurisdictio merum et mixtum,* pure or mixed is now debased, mingled with and infused by the emotions and doubts, the flux and the change that make the subject human and the judge an historical, corporeal, and sensual being.

It is in the domain, the doctrine, and practice of interpretation that psychoanalysis has most to offer legal thought. The army of filing clerks, the smoky denizens of the archives, of plea rolls, writs, tables and fines, instruments and laws, find themselves joined by the Vienna brigade, another tribe of interpreters, equally concerned with the truth of the broken subject and the trauma of the case. These are the analysts and the psychoanalytic interpreters of law. Certainly they could ask who is the father, where is the phallus in the manner of the discourse of paternity, but the more significant advances in intrigue and doubt, in interpretative complexity and depth of apprehension occur rather when the emotive and often oneiric figures of diction, tropes and schemes are divined, deciphered, and disencrypted in the texts of law. If, as Legendre persuasively argues, the text is the territory of law, the words are worlds, the verbal manifestation of institutions and offices, the form of life for the subject. Certainty be damned, there is always, as the lawyer well knows, more, excess, *metalepsis*, as also *traditio*, the aura and audition of the word.

Lest it seem that the dreams of lawyers go unanalyzed, that their textual slips and incidental jokes pass unnoticed, it is perhaps worth ending by remarking that the second revolution of the interpreter is yet to come, that its intimations are evident, the prolepsis of its advent visible and a slow recognition, dating back to the American legal realists, of body and emotion, drive and symptom in the expression of law and the *arbitrium* of judgment is beginning to take shape and portend a subtle shift in attention and interpretation, an expansion of the scope of subjective intendments and uncertain illations. Recent developments in common law case method can provide an *exemplum* of sorts. The shift starts with Lord Hoffman expanding and subjectivizing the relevant scope of inquiry into the meaning of legal instruments. His view, building on early interpretative recourse to the "factual matrix" upon which decision as to meaning is made, he expresses the view that the judge, in assessing meaning, should take account of the sense that the document would convey to a reasonable person with "all the background knowledge . . . available to a person in that situation" (Investor's Compensation Scheme v West Bromwich Building Soc 1998). He goes on to stipulate, to the great anxiety of the London Bar, that such background of fact, "includes absolutely anything which would affect the way in which the language of the document could have been understood" (1997). More than that, "the meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of the words . . . the meaning of the document is what the parties using those words . . . would have understood [them] to mean" (1997). Texts have their reasons, of which reason knows not.

This shift in the conception of instrument, of record and deed, of what used to be termed a symbolæography implicitly acknowledges both the reason and the motive, the logic and the emotion that infuse the words with more than they can say, and specifically with an internal division, a *complexio oppositorum* in the language of the Church to which metaphysics we still no doubt belong. In *Investor's Compensation Scheme*, the issue concerned an assignment of claims that included an exclusion of "[a]ny claim (whether sounding in rescission for undue influence or otherwise) . . ." The trial Judge, the double barreled Evans-Lombe J. decided that this meant that the beneficiary of the exclusion had retained the right to bring a claim for rescission. The parenthetical was in effect to be shifted four words further forward so that any claim for rescission was what was retained, and the parenthesis helped define the species of rescission. In the Court of Appeals, Legatt LJ impugned the first instance determination as doing violence to the words of the instrument and claiming a meaning that was not available. Like Humpty Dumpty in *Alice Through the Looking Glass*, the earlier Court was making words mean what they wanted them to mean. The reference is to Humpty Dumpty pointing out that there are 364 days in the year when you might get unbirthday presents:

> "Certainly," said Alice.
>
> "And only one for birthday presents, you know. There's glory for you!"
>
> "I don't know what you mean by 'glory'," Alice said.
>
> Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!'""But 'glory' doesn't mean 'a nice knock-down argument'," Alice objected."When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

In the House of Lords, Hoffman sides with Humpty Dumpty and with the antique common law maxim that "words are messenger's of men's minds." Where the words do not reflect the intention, then the words must be emended. It is not, however, the instrument that is my primary concern, but rather the judicial exchanges which move then to a *topos* of domestic felines and a hypothetical lease that excludes "any pets (whether neutered Persian cats or otherwise)." This in turn is likened to Mrs. Malaprop saying that "[s]he is as obstinate as an allegory on the banks of the Nile." These, Lord Hoffman suggests, are all slips, symptoms of a split subject, signs of desire frustrated in expression.

Timpanaro some time back made the point that slips such as these were familiar to philologists and could be resolved through textual methodologies devised by that discipline and attention should be paid to the copyist's hand, to error's due to distraction, to banalization, failures of memory, as well as simple slips of the pen or errors of the tongue (1976, pp. 19–28). These can be resolved scientifically, according to Timpanaro, and the Judge might well agree. A later Court specifically and explicitly resorted to the methods of philological criticism to emend a text, but interestingly that emendation was so as to give effect to the judicial desire to recognize the rights of the plaintiff as a same sex spouse within the meaning of the relevant legislation. Lord Rogers of Earlsferry, himself a scholar of Roman law, remarks:

> When Housman addressed the meeting of the Classical Association in Cambridge in 1921, he reminded them that the key to the sound emendation of a corrupt text does not lie in altering the text by changing one letter rather than half a dozen words. The key is that the emendation must start from careful consideration of the writer's thought. (Ghaidan v Godin-Mendoza 2004)

Thus, if we return to the text and attend to its slips, the erasures of time, the enigmas of forgotten references, even the misremembered abbreviations, a world opens up, and the text begins to mean differently. The univocal sense of subject and expression fissures into plurality. Psychoanalysis expands, exposes, legitimates, and elaborates upon such covert subjective desires and builds precisely upon the philological efforts to restore the palimpsest that is the history of the text or the trajectory of the word. Here, to drive the point home, a Judge who is dealing with the claim of a gay couple to be spouses, makes recourse to the philological opinions of a celebrated gay poet and

literary critic on what back in the 1920s were termed corrupt practices and corrupted texts. There could be no more poetic justice, no better instance of relatively free association, the unconscious advent of a comparative equality between the subject of the case and the sexual orientation that the argument sought to foster. As Lacan puts it, the text is a half-said (*mi-dire*) implying everything else that went into its composition and expression (1997, pp. 37–38).

Psychoanalysis allows for a double reading, for subtle shifts and small openings. Tracing the affect in the text, the figures of diction, the force of expression attends to other surfaces, to altered scenes and different laws. In the case alluded to earlier of a release of claims, the Court had to decide whether to move the parenthesis, whether to correct the typographic limit and produce a meaning that made sense of the commercial relations between the parties. As one of the dissenting Judges put it, emotions running relatively high, the interpretation that required excising four word from the parentheses was effectively standing the text on its head and giving the words "the exact opposite effect" to their textual expression. Lord Hoffman recognizes this in picking up upon the reference to *Alice Through the Looking Glass*, and in effect applying the logic of sense, the potential reversal of the mirror and the displacement of meaning: the Judge accedes to Humpty Dumpty's semantic dictate and legislation of words, admits, that is, to the *eros* and generativity of words that the slightly later instance of the Persian cat not allowed by the landlord also implies. For Freud the cat is an oneiric sign of repressed desire "on account of the pubic hair" (p. 392) and implies a certain frustration or even anger that further analysis could usefully pursue in the biography and decisions of a Judge who clearly believes that Persian cats, that *eros* and desire, should be allowed in their lease. The cat is also a substitute perhaps for the Cheshire cat in *Alice* – symbolizing according to Deleuze's brilliant elaborations "the good object, the good penis, the idol or voice of the heights . . . In his essence, the cat is he who withdraws and diverts himself" (1990, p. 235). The cat is in any event, in this interpretation of reversals, of the mirror world of dream, Alice's friend, Lord Hoffman's brother or learned friend. Whatever the trigger, the cat is a symptom of excluded desires and the instrument, by free association, is part of a world stood on its head. Literature here plays the role of law, generating an opening, changing history, making meaning exactly as Humpty Dumpty dictated, through gifts and glory, birthdays, and their acclamations.

Cross-References

- ▶ Kelsen, Hans
- ▶ Legal System and Legal Order

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Psychology and Law

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Introduction

Psychology and law or, as in often known, legal psychology is today a fully fledged discipline in many countries. In addition to textbooks on legal psychology published internationally, there are academic programs devoted to it at undergraduate and postgraduate level, national and international conferences, as well as a number of journals internationally. Simply put, psycholegal teachers, students, and researchers focus on a broad range of topics at the interface of law and psychology. However, it took a century for the gap between psychology and law to be bridged to the satisfaction of most commentators and for the infant of the marriage between law and psychology to reach adolescence. Let us next consider the term "legal psychology" and why it has taken so long for the gap between law and psychology to be almost bridged before critically examining the relationship between the two disciplines and identifying remaining difficulties that would need to be overcome for the field of psychology and law to continue to grow.

Regarding the domain of the psychology and law, Blackburn (1996: 6) differentiated between (a) *psychology in law*, (b) *psychology and law*, and (c) *psychology of law*. *Psychology in law* refers to specific applications of psychology within law such as the reliability of eyewitness testimony, the mental state of the defendant, and a parent's suitability for child custody in a divorce case. Blackburn used *psychology and law*, to denote for example, psycholegal research into offenders, lawyers, magistrates, judges, jurors, and therapeutic jurisprudence. Finally, *psychology of law*, as Blackburn suggested, is used to refer to psychological research into such issues as to why people obey/disobey certain laws, moral development, public perceptions and attitudes toward various penal sanctions. Blackburn argued that *forensic psychology* should be used to refer to the "direct provision of psychological information to the courts, that is, to psychology in the courts." While there is no generally acceptable definition of *legal psychology*, the following one put forward by Ogloff (2000: 467) is sufficiently broad and parsimonious: "Legal psychology is the scientific study of the effects of law on people; and the effect people have on the law. Legal psychology also includes the application of the study and practice of psychology to legal institutions and people who come into contact with the law."

The Development of Psychology and Law

Research into, and the practice of, legal psychology has a long tradition (Ogloff 2000). An article in *Science* in 1895 by Cattell was concerned with how accurately one could recall information. The psycholegal field at the beginning of the twentieth century is exemplified by the work of such pioneers as Binet (1905), Gross (1898), Jung (1905), Münsterberg (1908), and Wertheimer (1906). In fact, Münsterberg has been called "the father of applied psychology." Also in 1906, Sigmund Freud in Vienna gave his lectures to judges on the merits of psychology for law in establishing facts; behaviorist psychologist Watson (1913) also maintained that judges could utilize psychological findings. In the United States, by 1917, the first modern polygraph had been developed by William Marston, and, the same year saw the use by Lewis Terman of psychological tests to screen law enforcement personnel, while the following year, the State of New Jersey employed the first full-time correctional psychologist. In the 1920s, the first American psychologist was testifying as an expert in a courtroom in 1921 (In the case of *State v. Driver*; 88 W.Va 479, 107 S.E 189 (1921)), and research into trademark and trade name infringements was presented in court by Paynter and Burt in 1920 and 1925, respectively. The late 1920s saw the publication of Hutchins and Slesinger's (1928) work on psychology and evidence law as well as, finally, the work by Russian psychologist Luria (1932) on the affect in newly arrested criminals, before being interrogated by police, in order to differentiate the guilty from the innocent.

Regarding significant publications in the development of psychology and law, in 1903, the first journal concerned with the psychology of testimony (*Beiträge zur Psychollogie der Aussage*) was established in Germany by Louis William Stern. In 1926 Brown published *Legal Psychology: Psychology Applied to the Trial of Cases, to Crime and its Treatment, and to Mental States and Processes.* One would have been justified in predicting the acceleration of legal psychology's development pace when Hutchins and Slesinger's (1929a) article on "legal psychology" in the *Psychological Review* and McCarty's (1929) *Psychology for the Lawyer* and Cairns' (1935) *Law and Social Sciences* were published. However, for reasons explained a little later, inactivity characterized the psycholegal field in the 1940s and 1950s, and it was not until the 1960s that the psycholegal field really began to expand.

The psycholegal field has been expanding internationally at an impressive rate: since the mid-1960s in North America, since the late 1970s in the United Kingdom, in Australia since the early 1980s, and since the 1990s in Japan and on continental Europe, especially in the Netherlands, Sweden, Germany, Iceland, and Spain. Psychology and law has evolved into a single applied discipline and an often-cited example of success in applied psychology and has had a significant impact on law in a number of Western countries.

Having tackled some very crucial questions in society, psycholegal researchers have, inter alia, been instrumental in improving the ways eyewitnesses are interviewed by law enforcement personnel, the adoption of a more critical approach to the issue of forensic hypnosis evidence in the courts, psychologists contributing to improving the legal status and rights of children, and, finally, generally making jury selection fairer. Furthermore, the impact of legal psychology has not only been one way.

Despite the early publications in legal psychology mentioned above, it was not until the 1960s and 1970s that lawyers in the United States came to acknowledge and appreciate psychology's contribution to their work. Since the 1970s, a significant number of psycholegal textbooks have appeared in the United States, in England, and on continental Europe. In addition, following Tapp's first review of psychology and law in the *Annual Review of Psychology* in 1976, relevant journals have been published, such as *Law and Human Behavior* which was first published in 1977 as the official publication of the American Psychology-Law Society (AP-LS) (founded in 1968) and is nowadays the journal of the American Psychological Association's Division of Psychology and Law. Other journals are *Behavioral Sciences and the Law*, *Expert Evidence*, *Law and*

Psychology Review, and *Criminal Behaviour and Mental Health*. New psycholegal journals have continued to be published. The first issue of *Psychology, Crime and Law* was published in 1994 and those of *Legal and Criminological Psychology* and *Psychology, Public Policy, and Law* in 1996 in the United Kingdom and the United States, respectively. A landmark decision for the development of psychology and law in the United Kingdom was the decision in 1999 to establish a Division of Criminological and Legal Psychology within the British Psychological Society.

With its emphasis on law in a social context, sociological jurisprudence created a climate within law, which has been conducive for the development of legal psychology. As psychological associations in various countries set up relevant psychology and law divisions (e.g., 1977 in the United Kingdom, 1981 in the United States, 1984 in Germany), a catalyst for the continuing development of psycholegal research internationally has been the organization of national (e.g., the annual conferences of the Forensic Psychology Division of the British Psychological Society, the American Psychology-Law Society (AP-LS) Division of the American Psychological Association, the Australian and New Zealand Association of Psychiatry, Psychology and Law (ANZAPPL)) and international conferences such as the annual conference of the European Association of Psychology and Law (EAPL) with its house journal *Psychology, Crime and Law*, founded in 1994. A significant development in the United States was the inclusion in 1994 of law and psychology in the *Annual Survey of American Law.* However, it was not until 2001 that the American Psychological Association recognized forensic psychology as a specialty. It should be noted in this context that the development of psychology and law appears to have been significantly different in Australia and New Zealand where ANZAPPL incorporates psychiatry as well as psychology and law and a higher proportion of both practitioners and lawyers attend their conferences.

Why, then, has it taken so long for the field of psychology and law to develop when, as has been argued, psychologists and lawyers do have a lot of common ground, when human behavior is the very purpose of both psychology and law and both disciplines focus on the individual? Bridging the gap between the two disciplines on both sides of the Atlantic; in Australia, New Zealand, and Canada; and, for example, in Germany, Spain, Italy, the Netherlands, and Sweden has not been easy. Admittedly, there is no consensus on what psychology should be about, and law, like poverty and happiness, is not the same thing to different people. The simple fact is that there are significant differences in approach between psychology and law. Psychology and law have a great deal in common, but they also differ in a number of significant ways. Furthermore, conflict is endemic in the relationship between the two disciplines.

Why It Has Taken So Long to Bridge the Gap Between Psychology and Law

The development of Holme's sociological jurisprudence at the end of the nineteenth century with its emphasis on studying the social contexts that give rise to and are influenced by law posed a challenge to the "black-letter" approach to studying law which was based on the English common law and had been the linchpin of the legal system in North America. Sociological jurisprudence provided conditions within law that were favorable to the development of legal psychology, as did subsequent movements in law such as "legal realism."

In his book, *On the Witness Stand*, Münsterberg (1908: 44–45) was critical of the legal profession in the United States for not appreciating the relevance of psychology to its work. However, Münsterberg was overselling psychology, and his claims were not taken seriously by the legal profession. In addition, there was opposition from within the discipline of psychology by such scholars as Professor Edward Titchener of Cornell University.

The rather unfortunate legacy left by Hermann Ebbinghaus (1885) and his black box approach to experimental memory research – best exemplified by his use of nonsense syllables – contributed to the state of knowledge in psychology at the time and was one significant factor that negated the

success of Münsterberg's attempt. Fortunately, the dominance of the black box paradigm in experimental psychology came to an end with the publication in 1967 of Neisser's futuristic *Cognitive Psychology* book. In the ensuing six decades, while behaviorism (on the one hand) and the experimental psychologists' practice (on the other) of treating as "separate and separable" perception, memory, thinking, problem-solving, and language permeated and limited psychological research greatly, the early interest in psycholegal research fizzled out.

By the late 1960s, as psychology matured as a discipline and, among other developments, social psychology blossomed in the United States, the experimental method came to be applied to problems not traditionally the concern of psychologists such as understanding deception and its detection, jury decision-making, the accuracy of eyewitness testimony, and sentencing decision-making as human processes. Most of the early psycholegal researchers with a strong interest in social psychology focused on juries in criminal cases, those with an affinity to clinical psychology concerned themselves with the insanity defense and psychopathy, while cognitive psychologists examined eyewitness testimony. These same areas continue to be of interest to psycholegal researchers today, but the questions being asked are more intricate, and the methods used to answer them are more sophisticated. However, the focus of psycholegal research has been broadened to include more areas of law, including negligence law, contract, administrative law, antitrust, civil procedure, corporate law, environmental law, patent law, and family law. Legal topics awaiting psycholegal researchers' attention are legislation, criteria relevant for determining legal tests, training manuals, and justice systems such as therapeutic jurisprudence.

One basic reason why it has taken so long to bridge the gap between psychology and law to the satisfaction of most commentators, is that there are important basic differences between the two disciplines, namely, the law lags behind contemporary social thinking, "while psychology tends to anticipate it," and while the law relies on assumptions about human behavior and psychologists concern themselves with understanding and predicting behavior, both psychology and law accept that human behavior is not random. More specifically, research in psychology relates to various aspects of law in practice. Compared to law, psychology is, chronologically speaking, entering its adulthood, and, given a number of important differences between the two disciplines, it comes as no surprise that there is tension and conflict between the two disciplines that persist.

Psychologists and lawyers are characterized by different objectives and the use of different reasonings. This point is well illustrated by eight issues which, according to Haney (1980), are a source of conflict between the two disciplines, namely:

- The law stresses conservatism; psychology stresses creativity.
- The law is authoritative; psychology is empirical.
- The law relies on adversarial process; psychology relies on experimentation.
- The law is prescriptive; psychology is descriptive.
- The law is idiographic; psychology is nomothetic.
- The law emphasizes certainty; psychology is probabilistic.
- The law is reactive; psychology is proactive.
- The law is operational; psychology is academic.

It can be seen that the two disciplines operate with different models of man. The law, whether civil or criminal, generally assumes free will and emphasizes individual responsibility in contrast to the tendency by a number of psychological theories to highlight "unconscious and uncontrollable forces operating to determine aspects of individuals' behavior." In addition, the psychologists' information is basically statistical, while the legal system's task is 'clinical and diagnostic'. As Clifford (1995) has put it: "the two disciplines appear to diverge at the level of value, basic premises, their models, their approaches, their criteria of explanation and their methods" (p. 13).

Whereas the image of human beings projected by American social psychologists is that of the "nice person," the law, and especially the criminal law, is characterized by a more cynical view of human nature, and this view tends to be adopted by those who work within and for the legal system. Some authors have argued, however, that the implications of the alleged methodological differences between law and psychology have been exaggerated.

Psycholegal researchers (e.g., in eyewitness testimony and jury decision-making) have utilized a variety of research methods, including incident studies, field studies, archival studies, and single-case studies. Many psychologists, however, rely a great deal on the experimental method, including field experiments, to test predictions and formulate theories that predict behavior and are skeptical of lawyers' reliance on commonsense generalizations about human behavior based on armchair speculation, however ratified by conceptual analysis. A feature that unifies a lot of psychological research is its preference for subjecting assertions to systematic empirical research and, where possible, testing them experimentally. This will often involve randomly allocating persons to different conditions who, at the time, are normally not told the aim of the experiment. The reader should note in this context that it is virtually impossible to duplicate exactly court proceedings in the laboratory. Long duration and boredom, examination, cross-examination, and reexamination of witnesses are not features of experimental simulations of eyewitness testimony, of course.

One significant difference between psychology and law is that lawyers focus on their individual client and emphasize how he/she differs from the stereotype and that one cannot generalize. On the other hand, psychologists talk about the probability of someone being different from the aggregate. For many a psychologist, a great deal of information processing is done without people being aware of it; the lawyer, on the other hand, operates a model of man as a free, conscious being who controls his/her actions and is responsible for them. What the law, based on a lot of judicial pronouncements, regards as "beyond reasonable doubt" is rather different from the psychologist's conclusion that an outcome is significant at a 5% level of statistical significance. One interesting aspect of this, for example, is the lawyer's reluctance to quantify how likely guilt must appear to be before one can say that such doubt exists is not reasonable. The lawyer in court is often only interested in a "yes" or "no" answer to a question asked of a psychologist who is appearing as an expert witness, while, at best, the psychologist may only feel comfortable with a "maybe" response. It should be noted, however, that the answers of interest to a practicing lawyer might vary according to whether it is examination in chief or cross-examination. In the former, the lawyer is interested in a story, whereas in the latter, the lawyer is interested in questions that require a "yes" or "no" answer. Also, lawyers look at the individual case they have to deal with and highlight how it differs from the stereotype; they try hard to show in court that one cannot generalize, whereas psychologists talk about the probability of someone being different from the aggregate; and, finally, as psychologists present themselves as experts in the courtroom, they find they have to deal with ethical dilemmas regarding, for example, the confidentiality of their clients.

Both psychologists and lawyers have cast doubt on the practical utility of findings from controlled laboratory experiments low on external validity that reduce jury decision-making, for example, to a few psychology undergraduates, reading a paragraph-long, sketchy description of a criminal case and making individual decisions on a rating scale about the appropriate sanction to be imposed on the defendant.

Back in 1986, pioneer British legal psychologist Michael King, too, criticized legal psychologists' strong reliance on the experimental method, arguing that there is a tendency to exaggerate its importance and that treating legal factors as "things" and applying to them experimental techniques and statistical methods gives rise to at least four problems, namely, inaccessibility, external validity, generalizability, and completeness (p. 31). King has also argued that exclusive reliance on experimental simulation also encourages legal psychologists to focus on interindividual

behaviors without taking into account the social context to which they belong (p. 7) and that Karl Popper's (1939) refutability has been shown by philosophers of science to be a questionable criterion for defining whether a theory is scientific. Furthermore, King contends that the real reasons for legal psychologists' continued use of the experimental method as the prime or sole method for studying legal issues are (a) a belief by psychologists that using the experimental method enables them to claim they are being "scientific" in carrying out their research, (b) a need felt by psychologists for recognition and acceptability, and (c) a belief by psychologists that they are more likely to be accepted and recognized as "experts" if they are seen to be "scientific" (see chapter ▶ "Feinberg, Joel"). King advocated a shift "away from the restrictive and self-aggrandising notions of what constitutes 'scientific' research which have tended to serve as a starting point for much of what passes for legal psychology" (p. 82).

For a number of years now, some psycholegal researchers have shown a preparedness to utilize a broad range of research methods, rendering their work more applied. To illustrate, in addition to experimental simulation, jury researchers have also used protocol analyses, in-depth interviews with jurors after they have rendered verdicts in real cases, elaborate simulations involving videotaped trials and juror respondents, and even randomized field experiments. Similarly, eyewitness testimony researchers have been making increasingly greater use of staged events and non-psychology students as subjects, as well as utilizing archival data.

Other reason why problems arise when psychology and law meet is that:

- For the psychologist, the plethora of theories and perspectives in the discipline is a matter of course. In law, however, the main goal is uniformity and the avoidance of disparity. Consequently, lawyers regard the numerous viewpoints in psychology as contradictory.
- Many psychologists attempting to investigate questions of legal relevance on their own often do not have an in-depth understanding of the relevant law.
- Most psychologists do not know how to do legal research.

For psychology and law to continue to grow and for psycholegal researchers to reach their potential, they need to overcome a number of remaining difficulties in the light of the experience, what Ogloff (2001) calls "evils," together with a similar list of problems first emphasized by pioneer German criminological and legal psychologist Friedrich Lösel, to which attention now turns.

Difficulties Remaining to Overcome

The importance of following problems in legal psychology, first highlighted by Lösel (1992), continues to apply today:

- Issues in civil law or custody law, taxation law, torts, contract, cross-cultural comparisons, or more multinational research continued still do not attract the attention of psycholegal researchers.
- Worldwide, only a small percentage of practicing psychologists are working in the field of legal psychology.
- New psychological findings normally take excessively long to be incorporated in legislation or to be taken into consideration by the judiciary because the wheels of law turn very slowly when it comes to change.

To ensure that legal psychology continues to develop and mature, a number of "evils" are listed by Ogloff (2001) that have plagued the development of legal psychology in the twentieth century and which need to be addressed in the light of the experience. These are (1) *jingoism* (i.e., focusing in a narrow way on one's own country), (2) *dogmatism*, (3) *chauvinism* (especially in terms of sexism and ethnocentrism), (4) naïveté (i.e., undue ignorance of procedural and substantive law that pertains to one's area of work), and (5) *myopia* (i.e., being only interested in a few,

narrow areas of psychology such as jury decision-making or eyewitness testimony).

Other problems that still remain are the fact that very rarely do psychologists and lawyers have an opportunity to socialize "after hours" and so increase their understanding of each other's issues, concerns and openness to interdisciplinary perspective (Carson 2005), and, also, the strong tendency by legal psychologists to be method- rather than phenomenon-orientated and to lack firsthand knowledge of the legal issue they investigate. Finally, the results of psycholegal research would be more likely to be accepted by members of the legal profession, academic lawyers, and policy-makers alike if psychologists showed greater familiarity with both common law and statutory provisions relevant to their research, as well as with different theoretical stances in contemporary legal theory instead of a myopic perception of a legal issue.

Conclusions

Despite differences between psychology and law, the two disciplines are inextricably bound together by virtue of their common role as far as regulation of human behavior and their responsibility for maintaining the social fabric in a civilized society as well as their use of common psycholegal concepts are concerned. The scope of psycholegal research has widened significantly to include, for example, the honesty of taxpayers and social cognition of tort law and wider acceptance of the view that the value of psycholegal research can be both theoretical and practical, of interest to both the practitioner and the academic psychologist and lawyer.

Raising questions about what psychology can contribute to law and the difficulties and ethical questions that occur does not mean that difficulties should be exaggerated. As evidenced by presentations at international psychology and law conferences and by the contents of relevant journals since the early 1990s, psycholegal research has continued to expand in both quantity and range and, to a significant degree, in quality, too.

As psychology and law advances into the twenty-first century, some feel that the full potential of the psycholegal field will be realized only with the development of a distinctly psycholegal jurisprudence. At the same time, psychologists are appalled when lawyers continue to ignore what the psychologists consider good empirical research results and, consequently, fail to resolve issues in law. For their part, the lawyers wish the psychologists would try harder to make their work more useful by ensuring that it is more relevant to actual legal contexts and "less convoluted." By going a considerable way in bridging the gap between psychology and law, psycholegal researchers have provided us with knowledge, the total of which is more than the sum of its parts. This realization provides, perhaps, the best basis for optimism about legal psychology's future.

The fact that psychology and law is a recognizable field means that psychology has a unique perspective – its concern with the individual in a social context – and a unique contribution to make to law. In this regard, psycholegal research differs from such related fields as sociology of law in the way it addresses issues as well as in the methodology it uses.

Cross-References

► Legal Reasoning: Virtues
► Neuroscience and Law

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Ptolemy of Lucca

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Introduction

Ptolemy of Lucca (1236–1327) was a Dominican friar and ultimately bishop of Torcello, Italy. He primarily wrote historical work, but is better known for his political philosophy. His greatest influence has been through his portion of the *De Regimine Principum*, which circulated under the name of his companion Thomas Aquinas, even though Ptolemy wrote almost three of its four books. Ptolemy's portion of this work contributed to philosophical accounts of limited monarchy in Britain through Sir John Fortescue (c. 1394–1479), and to Italian republicanism through Girolamo Savonarola (1452–1498) (Blythe 2009b: 227–241; Osborne 2000). Nineteenth-century scholars, such as Karl Krüger and Dietrich König, developed an interest in Ptolemy himself (Blythe 2009a: 26–27). As a result, two works that include political philosophy have since been published, namely the *De operibus sex dierum* (Ptolemy 1880), which is an account of creation, and the *Determinatio compendiosa de iurisdictione imperii* (Ptolemy 1909), which is about the lordship (*dominium*) of the emperor, especially in relation to that of the pope. The recent critical edition of his *Historia ecclesiastica nova* (Ptolemy 2009) also sheds light on some of the historical background to his political thought.

Political and Royal Lordship

Although Thomas's portion of the *De regimine* defended kingship, Ptolemy's portion favors the republican rule of some Greek cities described by Aristotle, ancient Rome, and some northern Italian cities, such as his native Lucca. In his own lifetime, Ptolemy experienced increasing self-rule and popular participation in Lucca, which sided with the Pope in frequent political disputes with the Emperor. Perhaps as a result of Ptolemy's own exposure to different kinds of rule and levels of political jurisdiction, Ptolemy distinguished between four sorts of lordship (*dominium*), namely (1) political, (2) royal alone, which includes imperial, (3) royal and sacerdotal, which belongs to the pope, and (4) household.

Ptolemy claims to take from Aristotle the distinction between political and royal lordship (Blythe 2009b:125–153). The primary distinction between them involves law. Political rulers cannot on their own make new laws and are strictly bound by them. Drawing on Roman law, Ptolemy states that by royal rulers, "not being bound by the laws, may judge by what is in their hearts" (Ptolemy 1997: 23). In various contexts, and perhaps reflecting contemporary practice, Ptolemy also mentions that in political lordship, the rulers are elected and can come from the people, whereas royal rule is hereditary. One advantage to royal lordship is that the ruler can adapt to exceptional circumstances that cannot be covered adequately by general laws. A disadvantage is its proximity to despotism. Ptolemy states that despotic rule, which is that of a master to a servant, can be reduced to royal rule. This reduction might not imply that all royal lordship is despotic, but it indicates that despotism in some way ultimately comes under royal lordship. Nevertheless, Ptolemy follows Thomas Aquinas by distinguishing between the king and the tyrant. Whereas the king intends the good of his subjects and cares for

them, the tyrant intends his own advantage. Ptolemy notes that Scripture describes as kings both those who are good and those who are tyrants (Ptolemy 1997: 177–182). All rulers should provide military security, mint coinage, regulate weights and measures, provide for the poor, and attend to divine worship (Ptolemy 1997: 129–145).

In general, Ptolemy thinks that political lordship is milder and more suited to virtuous people. It was the only kind of lordship necessary before original sin, subsequent vice, and the consequent need for punishment (Blythe 2009b: 17–34). It is suitable for cities, which are necessary for living well. In contrast, royal lordship is suitable for large provinces, and especially for wicked persons, who need correction. The difference in peoples is also due to the influence of the stars on geographical regions. Rome and northern Italy are influenced by stars that promote virtue, and consequently republics have flourished there. Many other geographical regions, such as Sicily and Corsica, produce vicious or even bestial peoples that need firmer control than can be exercised by merely political lordship. Ptolemy in no way appeals to later notions of race to explain such inferiority. He writes, "The nature of Gauls who move to Sicily becomes like that of Sicilians" (Ptolemy 1997: 238). Ptolemy himself comes from a city with a strong republican tradition, and he seems to belong to the *popolo*, which had gained political power through the thirteenth century (Blythe 2009a: 31–135). Despite his support for wide political participation among virtuous people, he thinks that the involuntarily poor should not hold political office (Ptolemy 1997: 256).

Unlike Thomas Aquinas and Aristotle, Ptolemy seems to defend tyranny over a wicked or bestial populace (Nederman 2019). Moreover, in some texts, he connects such tyranny with royal lordship, although he does not argue that all who rule by royal lordship are tyrants. He at least seems to think that royal lordship leads to and has a close connection with tyranny. Although Ptolemy may not be a republican, he defends the superiority of a republic for virtuous people. He describes the members of the Roman Republic as particularly virtuous, and deserving of their domination of other peoples due to their zeal for their fatherland (*patria*), their zeal for justice, and their benevolence to the conquered. He stresses the praise of the Roman Republic in 1 Macc 8: 15–16 (Ptolemy 1997: 153–162). He even uses historical examples from Augustine to argue for a point that Augustine would have rejected, namely that pagan romans were models of virtue and civic happiness (Carron-Faivre 2015). Some scholars think that his political philosophy owes more to Roman history and thought than to Aristotle (Nederman 2018; Nederman and Sullivan 2008). But Ptolemy's increasing defense of republican government in his later work corresponds to an increasing familiarity with the first books of Aristotle's *Politics* (Blythe 2002).

Although Ptolemy praises the Roman republic, he also is influenced by descriptions of Greek cities that he finds in Aristotle and in other writers. In particular, Ptolemy repeats Aristotle's praise of the Chalcedonian polity, because of the way that they elected virtuous rulers, although he also mentions Aristotle's remarks that they gave too much rule to one person (Ptolemy 1997: 264–268). Ptolemy not only praises limiting rulers with law but he also thinks that rulers should have authority only for a limited time.

Levels of Rule

Ptolemy also considers the way in which the rule of cities comes under the higher levels of imperial and papal lordship. The imperial lordship is found in the Holy Roman Empire. It resembles political lordship in that the emperor is elected from any background. It resembles royal lordship in that the emperor is acts like a king, is crowned, and is not bound by law. In comparison with the other kinds of lordship, the pope's royal and sacerdotal lordship is supreme. Ptolemy argues that Roman and then Greek emperors fell under and obeyed the Pope's authority, as did Charlemagne and his German successors. It has been recently argued that Ptolemy's suspicion of monarchy reflects his support of the papacy in its controversy with the King of France (Yun 2008). According to this view,

Ptolemy is more of a papalist than a republican. It is at the very least true that Ptolemy combines a strong support of the papacy with a preference for republicanism among virtuous peoples.

Modern readers may find strange the way in which subjects can come under different kinds of lordship. For instance, inhabitants of cities with political lordship might come under some form of royal and imperial rule, and all would come under the Pope's royal and sacerdotal rule. Ptolemy writes, "Cities live politically in all regions, whether in Germany, Scythia, or Gaul, although they may be circumscribed by the might of the king or emperor, to whom they are bound by established laws" (Ptolemy 1997: 217). Unlike later writers who assume that each political community is sovereign, Ptolemy thinks that there can be a hierarchy of political authorities. This hierarchy reflects the variety of his sources and the political institutions of his time. Aristotle primarily considered Greek cities, and the Roman writers were concerned with a Republic that ultimately dominated other political groups and then became an empire. Ptolemy lived in a self-governed city that sided with the Pope against cities that were self-governed and yet willing to be under the lordship of the Holy Roman Empire. The Pope himself became involved in a catastrophic struggle with the King of France. This complex historical situation allowed him to carefully consider the limits of and distinction between different political authorities.

Ptolemy ends his treatise with an unfulfilled resolution to write a work on household management, which would presumably include a discussion of household rule. James Blythe has drawn attention to the importance of Ptolemy's discussion of the role of woman in the family, and his discussion of whether women should be warriors (Blythe 2009b: 35–71). Ptolemy writes, "human beings are naturally civil and household-management animals, and in the governance of their own household the characteristic act is the woman's" (Ptolemy 1997:233). Although Ptolemy gives a fair consideration to arguments to the contrary, he argues against the participation of women in warfare in part by stating that such participation would undermine the household, which, like the city, is essential to human life and virtue.

Conclusion

Ptolemy's political thought is not entirely systematic, and it has exercised influence primarily through its diffusion under Thomas Aquinas's name. Nevertheless, Ptolemy addresses in an original way problems concerning the levels and kinds of rule. Since the nineteenth century, historians of political philosophy, such as James Blythe and Cary Nederman, have been concerned with Ptolemy's own thought, and especially with his defense of self-government and the rule of law, at least for a virtuous people.

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Puchta, Georg Friedrich

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Introduction

Georg Friedrich Puchta (1798–1846) was one of the most prominent exponents of legal doctrine and legal theory in Pandect law and was, along with Friedrich Carl von Savigny, one of the leading proponents of the German Historical School of Jurisprudence in the first half of the nineteenth century.

However, from the late nineteenth century onwards, Puchta was also considered a representative of a failed juristic methodology and so-called "jurisprudence of concepts" ("*Begriffsjurisprudenz*"), viewed by its critics as completely out of touch with everyday reality. It was not until the end of the twentieth century that the condemnation of the nineteenth century jurisprudence of concepts, which for more than a century had been overly broad and often lacking in objectivity, became the subject of a criticism that took an historical view of legal theory. This paved the way for a more differentiated evaluation of Puchta's work and recognition of his enduring achievements for present-day jurisprudence.

Life and Work

Life

Puchta was born on 31 August 1798 in Cadolzburg in Prussia, which is now part of southern Germany. His father, Wolfgang Heinrich Puchta, was a judge. Although Georg Friedrich became acquainted with the philosopher Georg Wilhelm Friedrich Hegel and his work when he attended the Nuremberg Ägidien-Gymnasium (1811–1816), where Hegel was headmaster at the time, it did not leave a lasting impression on him. Works like Barthold Georg Niebuhr's *Römische Geschichte* (*History of Rome*) (1811/1812) and Gustav Hugo's *Institutionen des heutigen römischen Rechts* (*Institutions of contemporary Roman Law*) (1789), as recommended by his father, and his father's private introduction into his judicial practice, had a much greater impact on Puchta as a young man.

From 1816 to 1820, Puchta studied jurisprudence at the University of Erlangen, where he became involved in the nationalist and anti-aristocratic student fraternity movement. In 1819, the Carlsbad Decrees, which sought to suppress nationalist and liberalist ideas, disbanded all student fraternities in Germany, heralding a time of political repression and surveillance during a period of restoration supported by the German dukes and princes. Puchta was lucky to escape political persecution and completed his studies with a doctoral thesis on a particular aspect of Roman civil law, "de itinere, actu et via," graduating on 30 October 1820.

Despite misgivings by the Bavarian State Ministry about Puchta's alleged political untrustworthiness and a police supervision order placed on him, he was nevertheless able to teach Roman civil law at Erlangen, beginning in late

1820. Adopted in Germany since the sixteenth century, Roman civil law was applied in many legal cases that came before the courts on the basis of its subsidiary legal effect and it dominated academic teaching at every German law school up to the end of the nineteenth century.

It was not until 1823 that Puchta was appointed extraordinary professor (professor without chair). In the intervening years, Puchta had met a number of people that would impact his entire personal and academic life, including the main founder of the Historical School of Jurisprudence, Friedrich Carl von Savigny (1821), the charismatic Christian Revivalist preacher Christian Gottlob Ludwig Krafft from Erlangen, his close friend, the poet Count August von Platen-Hallermünde (1822/1823), and the philosopher Friedrich Wilhelm Joseph Schelling (1823), who was already well known at the time. All four had a hand in shaping Puchta's way of thinking about religious *faith*, the *science* of law, and the *art* of poetry, which in his view were all essential aspects of life.

What influenced Puchta as a young man was that, as early proponents of a political Christian conservatism that had its heyday in the mid-nineteenth century in Germany, the four personalities shared the view that the preceding era of rationalist philosophy and enlightenment, the French Revolution and Napoleonic rule in Europe were dangerous crisis phenomena and thus sought to mitigate their political consequences for Germany.

Having published the first volume of his first major work on customary law (Puchta 1828), which quickly established him as a prominent representative of the Historical School of Jurisprudence, he was offered a chair as ordinary professor of Roman law at the new University of Munich in 1829, where he regularly attended Schelling's lectures on the philosophy of mythology and the philosophy of revelation. Puchta also became popular as a lecturer and his innovative teaching methods which involved using teaching cases that had to be decided by his students as an added task to supplement the then predominant historical systematic approach to Roman Law were a huge success with his students. After his death, some of these cases were incorporated in the famous collection of teaching cases published by Rudolf Jhering (first edition: *Civilrechtsfälle ohne Entscheidungen. Zu akademischen Zwecken herausgegeben von Rudolf Jhering. Erstes Heft, enthaltend 100 Rechtsfälle vom Verfasser und 36 vom verstorbenen G.F. Puchta* 1847), making an important contribution to the establishment of new teaching and examination methods involving legal cases.

As an active member of a conservative religious circle of Protestant professors, writers, and artists in Catholic Munich, Puchta nonetheless maintained relations with moderately liberal experts in constitutional law like Friedrich Christoph Dahlmann, Wilhelm Eduard Albrecht, and Robert von Mohl.

Even later, when he became a professor in Protestant Berlin, Puchta rejected political plans drawn up by people close to the Prussian King Friedrich Wilhelm IV to create a Protestant "Christian state" as he detested any metaphysical exaltation of state and authority based on the legal and political philosophical principles of figures as diverse as Hegel or Friedrich Julius Stahl, who, in contrast to Hegel, based his philosophical concepts on the Christian faith.

In 1835, when the absolutist clerical powers in Munich gained in strength under the Catholic Bavarian King Louis I, Puchta took up a post at the University of Marburg lecturing in Roman law and Protestant canon law. He then taught at the University of Leipzig from 1837 until the highpoint of his academic career in 1842, when he was offered Savigny's chair in Berlin, which had become vacant when the latter became Minister for Legislation in Prussia. In 1844, his professional career was yet further advanced when he was appointed a judge at the *Königlich Preußisches Obertribunal*, the Royal Prussian Supreme Court, and then again in early 1845, when he was made a member of the Prussian State Council and of the Legislative Commission, two of the highest state institutions in Prussia. On 8 January 1846, Puchta died unexpectedly.

Work

Besides many books, essays, and reviews, Puchta left behind three major works.

The first of these was entitled "Customary Law" and was published in two volumes, the first in 1828, and the second in 1837. Tying in with and continuing Savigny's doctrine laid down in his manifestos on the Historical School of Jurisprudence (Savigny FC (1814), *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*. Mohr und Zimmer, Heidelberg. English edition: Savigny FC (1831, Reprint 1975, 1986, 2002) *Of the Vocation of our age for legislation and jurisprudence* (trans: Hayward A). Littlewood, London; Savigny FC (1815) *Ueber den Zweck dieser Zeitschrift. Zeitschrift für geschichtliche Rechtswissenschaft* 1: 1–17), the work dealt with the school's teaching on the different sources of law.

Publication of the second volume (Puchta 1837) finally and definitively confirmed Puchta's position as the second leading figure, after Savigny, of the Historical School of Jurisprudence in Germany in the first half of the nineteenth century.

Puchta's second major work was a textbook on Pandect law; after the third edition, the last to be published by Puchta (1845), it continued to appear in various editions, even posthumously, until 1877. This work dealt with Roman civil law and its application in Germany at the time. It owed its success as a teaching tool to its innovative concept and layout as a concise single-volume textbook that used the terms with a precision previously unknown and its systematic presentation of Pandect law, which had been handed down in the rather unorganized form of the *Corpus Iuris Civilis* as issued by order of the Late Roman Emperor Justinian I.

Puchta's third major work, a three-volume *Course on the Institutions*, dealt with the history of law and legal reality in Roman Antiquity, and was first published in 1841/1842. The third volume was published posthumously in 1847 by the executor of his scientific estate, Adolf August Friedrich Rudorff. Rudorff also published two volumes of Puchta's *Lectures on contemporary Roman law* (Puchta 1847/1848) and a comprehensive collection of minor writings which included autobiographical notes (Puchta 1851: XX–XXII). Puchta's *Course on the Institutions*, the last edition of which was published in 1893, almost 50 years after his death, also included a "book within a book" in the form of an "Encyclopaedia of law" contained within the first 100 pages of volume one (Puchta 1841: 3–108). In it, Puchta outlined his conception of the philosophical foundations of law, the relationship between jurisprudence and philosophy, the evolution and formation, as well as the idea and system of law, some of which was inspired by Schelling's so-called "late philosophy" (Haferkamp 2004: 329–357).

Further references concerning Puchta's writings as well as his letters and unpublished papers from his estate can be found in Haferkamp 2004: 473–480 and Mecke 2009: 849–856. Puchta's letters to Gustav Hugo, the precursor of the Historical School of Jurisprudence, have also been published (Puchta 2009).

Legal Doctrine

Key terms in Puchta's legal doctrine, which he furnished with special normative meaning, included *the people/the spirit of the people ("Volksgeist"), customary law, law of science,* as well as *history/historical* and *system of subjective rights.* Knowledge of the specific meaning of each of these terms and of their historical context is essential to understanding Puchta's teaching on the *formation* of law, its *contents* and its *application* in each individual legal case.

The Doctrine of the Formation of Law

Puchta's doctrine of the formation of law directly tied in with Savigny's manifestos on the Historical School of Jurisprudence. According to this doctrine, the contents of law are produced neither by natural law theorists nor by the state, but by the *people,* understood historically and culturally not politically. Puchta introduced the term *spirit of the people*, which had previously been used in Hegelian philosophy, to the Historical School of Jurisprudence and viewed it – in a non-Hegelian way – as the main, invisible source of all cultural achievements of a people, including, in particular, its language and law. This was based on previously held ideas that had begun to turn against rationalistic philosophy as early as the second half

of the eighteenth century. It was claimed that law was unique to a nation (Mecke 2009: 145–197), it was influenced and made not just by reason but also by factors such as the local climate and the geographic conditions (Montesquieu), as well as the "national character," which as a concept was argued to be analogous to the differences in character between individual human beings (Johann Gottfried Herder).

Accordingly, each people or nation initially develops its own law solely in the form of traditional *customary law*. In legal systems of more advanced political communities, however, the *traditional* form of customary law was only granted a marginal role in the development of law, even by the Historical School of Jurisprudence. In those situations, they believed, it was the jurists who increasingly advanced law, both in terms of concepts and doctrines created by jurisprudence on the basis of applicable law and in terms of judicial practice governed by the science of jurisprudence. According to Puchta, after 1837, jurists had a *dual* function: on the one hand, they were there to advance the existing law by applying scientific methods (*law of science*); while on the other, they, as part of the people and beyond scientific restrictions of so-called logical deduction, were also expected to represent the people in advancing the rules of law in the special form of customary law (*customary law represented by a majority of jurists*), because in "advanced legal orders," these rules often went beyond the understanding of ordinary people with no specialist legal knowledge, particularly in terms of civil law.

In this way, Puchta was able to legitimize the role of jurists which, due to the absence of a nation state or legislative authority, was almost exclusive, not just with regard to the application but also to the determination and advancement of the Pandect law that was in force in Germany at the time (Mecke 2009: 279–313, 386–431). This was the logical continuation of the opinion, which was commonly held by German jurists even before the dissolution of the Holy Roman Empire in 1806, that Roman civil law, as was used in legal doctrine and practice, was applicable in Germany not as a statutory law but as a *customary* law, applied by jurists both in theory and in practice and enshrined in the Corpus Iuris Civilis. However, neither Savigny nor Puchta completely rejected all statutory laws or even a codification of entire areas of the law as long as this did not infringe upon Roman civil law. They both believed, rather, that it was of crucial importance for the state legislators within German-speaking states never to attempt to enforce any changes to the law that would run counter to the national character, and in particular to abolish the validity of the civil law of Roman provenance by introducing codifications of civil law in Germany. Revolutions and legislators with *unhistorical* notions, to use the terminology of the Historical School of Jurisprudence, and even occasional pathological disorders of the spirit of the people itself (Puchta 1841: 15) were seen as the greatest threats to the *historical* advancement of law. In Puchta's view, the state's main task was therefore limited to ensuring that the existing law was enforced by judicial authority.

According to the Historical School of Jurisprudence, the attainment of an *historical* view of law lay neither in the realization that both customary and statutory law were subject to historical change – a view that its critics did not dispute either – nor in a blanket ban on the law, having been handed down from the past, adapting to the constantly changing needs of the present. Puchta even went as far as explicitly rejecting this as a treatment of law that was "antiquated" and that ignored the notion of progress (Puchta 1841: 103). On the contrary, the *historical* view of law as called for by the Historical School of Jurisprudence was based on the conviction that no nation was able to create law "out of thin air" (Puchta 1844: 13), but that it was inevitably shaped by cultural traditions, and that it must therefore only be allowed to develop in an evolutionary manner. The Historical School of Jurisprudence, however, considered a *legislator* to be acting in an *unhistorical* manner if he was to believe – erroneously and ultimately in vain – that it was possible to detach himself from the spiritual imprint of his own national culture to make a clean slate and create a "new" law without ties to the law that had been handed down.

As a consequence of his faith in the evolutionary progress of the principles of law in the national and global history of law, Puchta believed that an *historical* examination of law must always deal with the prevailing law of the present (Puchta 1841: 103) "just as much" as the prevailing law of the present must deal with the law of the future. In contrast to Savigny, Puchta saw a history of the advancement of law both within each individual nation or people as well as on a global level, in that each people were "a link in a chain" that would lead to a more complete law (Puchta 1841: 22).

The Doctrine of the Contents of Law

Puchta's theory of the history of the advancement of law harked back to its origins in the Christian and biblical notion of the Creator. Puchta believed that the *normative premises* that preceded the "*notion of law* [that was] implanted in each individual people" (Puchta 1844: 44) in the history of humankind could be seen in the "oldest legal decision" found in the Bible (Puchta 1841: 59). According to Puchta's thinking, the "fundamental idea of law [is] liberty" (Puchta 1841: 4). If the individual does not enjoy liberty, there is an absence of law. Where liberty does not include all human beings, as in the Roman law of slavery, for instance, law remains incomplete.

Individual liberty finds its legal form in the granting of *subjective rights*. Any nation's legal system is therefore an embodiment of the subjective rights of the individual which, depending on the level of advancement, have evolved to a greater or lesser degree, and which substantiate individual liberty as a *system* of interrelated subjective rights, both in the area of civil law *and* in the area of public law. History *and* reason, liberty *and* necessity are the mutually dependent opposites in this system that ensure the evolution ("genealogy") of the system of subjective rights in any development of law that is grounded in the *spirit of the people* and that continues to run its *historical* course (Haferkamp 2004: 347–356; Mecke 2009: 627–637). In terms of its contents, this genealogy of all subjective rights, which according to Puchta requires systematic links between most of the rules of law in a legal order that has evolved historically, is partially *necessary* in the sense of universal reason because it contains the highest superordinate concepts of subjective rights with parameters for their subordinate concepts, as did all rationalistic eighteenth century systems based on the law of reason. However, the "genealogy" is also partially *historical* because, contrary to the notions of the law of reason, the number, differentiation, and actual form of all subjective rights depend on the peculiarities of national law, which hark back to the individual spirit of the people that shaped it, and on its particular level of development. Contrary to the overly simplistic criticism, Puchta did not believe that jurisprudential scholarship was entitled to deduce new terms concerning subjective rights from the concepts of the existing legal order and independent of the historical development of law.

Puchta used the example of Roman civil law to outline his genealogy of subjective rights, although he did this in a manner that would have run contrary to the thinking of jurists in ancient Rome. He extracted definitions for five universally valid "classes" of subjective rights from Roman civil law and used them to construct a universally valid framework for further historical differentiation of subjective rights, even with regard to systems of civil law of non-Roman provenance (Mecke 2009: 697–699). The influence of modern rationalism, which he actually vehemently rejected, is never as distinctly felt within Puchta's legal system as it is here.

The Doctrine of the Application of Law

In contrast to the formation and contents of legal systems, Puchta's legal doctrine did not put any particular emphasis on the application of law and he felt that the traditional rules of legal hermeneutics were "not particularly fruitful" (Puchta 1838: 22).

The fact that Savigny's legal hermeneutics, which were rooted in philological hermeneutics that were revived in the early nineteenth century, were of groundbreaking significance was not fully recognized by legal scholars until the mid-twentieth century and also escaped Puchta's notice (Mecke 2013: 38–40). However, he did

not share the earlier notions of a mechanical application of law ("automatic subsumption"). On the contrary, he pleaded for considerable judicial freedom in the interpretation and advancement of law, while always taking into account the concept of equity and fairness (Landau 1992: 14–25; Henkel 2004: 142–234). A judge, he felt, did not need statute books, but "a textbook on Pandect law would never fail to serve as a normative basis for his decisions" (Puchta 1847, 13).

The Legacy of Puchta's Works from Today's Perspective

Puchta's legal doctrine was not forgotten after his death. However, when in 1884 Jhering polemically denounced his former "great master" (Jhering R (1852) *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*. Erster Theil. Breitkopf und Härtel, Leipzig III) as the "master" of a misguided "jurisprudence of concepts" (Jhering R (1884) *Scherz und Ernst in der Jurisprudenz. Eine Weihnachtsgabe für das juristische Publikum*. Breitkopf und Härtel, Leipzig 1884: 330), Puchta's actual thoughts and writings were superimposed by images of him that were constructed by his critics and over time even began to contradict each other (Haferkamp 2004: 26–112). There are many reasons for this, but only some are actually rooted in his work. From an historical point of view, the idea of the textbook on Pandect law as a factual basis for judicial decision-making, which was characteristic of the nineteenth century German Pandectist school, was deemed outmoded at least since the foundation of the German Empire in 1871 and the legislative endeavor (1874–1896) to create a national code of civil law, which eventually came into force all over Germany on 1 January 1900. However, after 1850, younger Pandectists of the Historical School of Jurisprudence like Bernhard Windscheid or Rudolf von Jhering began to view as outdated the tendency among representatives of the older Historical School of Jurisprudence, and particularly in Puchta's legal doctrine, to attempt to reverse some important modern advancements to Roman civil law that had been made in Germany by means of a modern application of Pandect law in the seventeenth and eighteenth centuries ("usus modernus pandectarum"). One example of this tendency in Puchta's teaching was that he declared the direct representation or assignment of claim, which did not exist in ancient Roman civil law, as impossible from a jurisprudential point of view on the basis of an alleged conflicting universal "truth" of the "classes" in his genealogy of subjective rights, which in turn was based on Roman law. When the Industrial Revolution reached Germany and advancements in civil law became a necessity, this throwback to the ancient sources, as inspired by sixteenth century humanist thought, became anachronistic after Puchta's death. In this respect, it was by no means an exaggerated type of formalistic thought or logic making certain parts of Puchta's Pandectist doctrine seem somewhat detached from real life, as has long been claimed by Puchta's twentieth century critics, but rather an excessive tendency to be guided by certain *contents* of ancient Roman law (Landau 1992: 25–30).

In addition, the *doctrine of the spirit of the people* of the older Historical School of Jurisprudence also insisted on sublimating fractures in society, opposing worldviews and political strife between the interests of individuals or groups into one homogeneous *people*. This meant that under this doctrine there was no choice but to view conflicts of social interests as a threat to law and not, as did the twentieth century jurisprudence of interests inspired by Jhering, as a fundamental basis for the formation and evolution of law.

Following tentative beginnings in the 1980s (Mecke 2009: 26–32) and several monographic studies on Puchta's legal doctrine published since then (Hannes 1995, Haferkamp 2004, Henkel 2004, Mecke 2009), the current view among German legal scholars is that Puchta laid important foundations for modern-day jurisprudence. This includes the now central concept of subjective rights and their function of guaranteeing liberty, which Puchta himself explicitly viewed as pertaining to *all* law, including public law and the relationship between individuals and the state.

Another factor that has remained relevant, regardless of Puchta's excessive attempts to

draw clear boundaries between law and politics of any stripe, is his fundamentally critical stance on the state, which included a distinction between state *and* law and between politics *and* jurisprudence.

Finally, a lasting legacy, not just of Puchta's but of the Historical School of Jurisprudence overall, is the deeper insight that *history* in a broader sense and from the point of view of legal culture is *more* than just the past without any links to the present or future.

For the past few decades, Puchta's work has reemerged from the shadows of the uncharitable images painted by his nineteenth and twentieth century critics, who often used his teaching simply as a negative background against which to show their own opinions in a positive light. As a consequence, scholarship once again recognizes that Puchta was not only one of the most important proponents of nineteenth century Pandectist doctrine but that, regardless of certain era-specific biases and a number of outdated premises, he must be viewed as one of the founders of modern legal doctrine in Germany, whose legacy still endures.

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Samuel Pufendorf (1632–1694) was one of the greatest thinkers of the seventeenth century in Germany. He is known as a modern natural law thinker who tried to modify natural law and make a new version of it under the influence of Hugo Grotius and Thomas Hobbes. He was the first scholar who systematized natural jurisprudence thoroughly by the deductive method. The works of natural jurisprudence, that is, *De Jure Naturae et Gentium* (On the Law of Nature and Nations) and its compendium entitled *De Officio Hominis et Civis juxta Legem Naturalem* (On the Duty of Man and Citizen According to Natural Law), published in 1672 and 1673, respectively, were

the most famous and influential writings among European Enlightenment thinkers. John Locke recommended these two works as books which every student in his youth must read in his theory of education (1693). In particular, *De Officio Hominis et Civis* used to be designated as a textbook for jurisprudence and moral philosophy at many European universities until the second half of the eighteenth century. As a result, many famous commentators like Jean Barbeyrac, Gottlieb Gerhard Titius, and Gershom Carmichael came forward and added a number of significant notes and supplements to the textbook, enabling Pufendorf's natural law to be the standard among the general public and students. Pufendorf was not only a prominent theorist but also a historian, which related deeply to his official position as a royal historical editor in Sweden and Prussia in his later years.

Life and Main Works

Pufendorf was born in the village of Chemnitz in Saxony, the son of Lutheran pastor. He learned theology first at the University of Leipzig to succeed his father, but later young Samuel came to have an interest in natural science and jurisprudence, studying at the University of Jena under Gerhard Weigel, a Cartesian teacher of mathematics, who taught him the mathematical method of demonstration. During this period, Pufendorf was absorbed in reading books written by Hobbes and Grotius, and he soon decided to specialize in natural jurisprudence and moral philosophy. After publishing his first work, *Elementa Jurisprudentiae Universalis* (Elements of Universal Jurisprudence, 1660), he received an invitation to give a lecture on the Law of Nature and Nations at the University of Heidelberg. In this book he applied the mathematical method he learned from Weigel to jurisprudence.

In 1667 Pufendorf anonymously published a book entitled *De Statu Imperii Gerimanici* (On the Constitution of the German Empire) which became a best-seller at that time. He severely criticized the state of the Holy Roman Empire, which had been collapsing through internal breakup. He called it "*irregular aliquod corpus et monstro simile* (irregular polity and similar to a monster)" and presented reform plans to make the Empire better. He recognized that the Holy Roman Empire was coming close to *systemata civitatum* (systems of states) which almost had the functions and structures similar to a federation of states.

Thereafter, he moved to a new position at the University of Lund to study natural law and was devoted entirely to writing his two main works on natural law, by which he came to gain fame. In *De Naturae et Gentium* he tried to systematize natural jurisprudence and constructed universal natural jurisprudence from human sociability, using the deductive method, under the influence of Grotius and Hobbes. Then he used Roman law as material and tried to extract the elements of natural law from it, as he said in the preface to the second edition (1684) of *De Jure Naturae et Gentium*, "Everyone knows that most things necessary for the study of the Law of Nature and Nations exist in the books of Roman law."

In the first chapter of this thick book, Pufendorf dealt with moral science and focused on morality as the basis of moral philosophy. He called moral norms, that is, the moral world which only human beings different from brutes could construct, *entia moralia* (moral entities), and distinguished it accurately from *entia physica* (physical entities). He maintained that through intellectual activities human beings give a meaning to things, which is called *impositio*, and with this human imposition, the moral world would be built between men, and the order would be brought in human society. According to Pufendorf's principles, natural law as moral science will also have the same structure and function as *entia moralia*. For example, the right to things, that is, property is rooted in human imposition in its origin. Property is a moral quality which has no physical effect on things but produces only a moral effect on other men. Property owes its birth to human imposition as he claims. From this it can be seen that inadventitious institutions such as property, both rights and duties arise from human imposition. Pufendorf defined duty(officium)as human

action in conformity with the commands of law in proportion to obligation, so in the moral world which human beings could create, rights and duties would be in a relationship of the inside and outside.

Pufendorf divided natural law into two types and called one type hypothetical natural laws, which are decided by human convention according to human conditions. These rules contain languages, ownership, and value of things and human government. This idea suggested that most rules of natural law in civilized society were not commands from God any more, but created by human conventions and varied flexibly according to human conditions and situations. It was very important for the genesis of the secularization of natural law and the development of moral sciences.

In the year following the first publication of *De Jure Naturae et Gentium*, he published further the epitome of it, because the former was very thick and hard to understand. This epitome, entitled *De Officio Hominis et Civis,* was easier to understand for beginners studying this discipline. This book was so suitable for a textbook of jurisprudence and moral philosophy at institutions of higher education that teachers at many universities in Europe, especially Germany, Holland, and Scotland, used it as educational material along with Grotius's writings. *De Offici Hominis et Civis* consisted of two books, the first of which argued and explained human rights and obligations as those of an individual man before establishing a state. The second book dealt with civil rights and obligations in family society and after the establishment of a state. In comparison with *De Jure Naturae et Gentium*, the total system of natural jurisprudence in this work is constructed more clearly according to the scheme of the theory of social contract which begins by assuming the natural state of men.

However, there was a remarkable difference between the theory of social contract of Hobbes and Locke and that of Pufendorf, regarding their attitudes toward Roman law. The contents of natural law in the first book of *De Officio Hominis et Civis* virtually included parts of private law from Roman law, such as ownership and contracts, but the influence of Roman law is not so significant to the thinkers of the theory of social contract like Hobbes, Locke, and Rousseau. For instance, Hobbes paid little attention to Roman law, stating in *Leviathan*(1651) that civil law dealt with here was not Roman law itself. Locke and Rousseau explained that it was obvious that natural law existed. Nevertheless, they gave up making clear the concrete rules of natural law. They were not so much concerned with extracting the elements of natural law from Roman law like Pufendorf, but rather under the name of natural law, they were more interested in criticizing the real political institutions and presenting new ideas to change those institutions.

Acceptance and Criticism

In Germany, Christian Thomasius who is called the father of German Enlightenment, succeeded to natural jurisprudence of Pufendorf. As his father lectured on Grotius, Thomasius was interested in the study of natural law, and after reading Pufendorf's *De Jure Naturae et Gentium*, he decided to specialize in Jurisprudence. Like Pufendorf, He also denied scholasticism and authority in old academicism. His main works, *Institutiones Jurisprudentiae Divinae*(Institutes of Divine Jurisprudence,1688) and *Fundamenta Juris Naturae et Gentium*(Foundations of Law of Nature and Nations, 1705), these were written under the influence of Pufendrf's natural jurisprudence. However, he further separated Law and Morality more than Pufendorf and made improvements such as putting happiness on the purpose of natural law. As the successor to Thomasius, Christian Wolff highly appreciated Pufendorf, but under the influence of Gottfried Wilhelm Leibniz's teleological natural jurisprudence, he developed the theory on perfection of man and welfare state which served for enlightened absolutism.

After the eighteenth century, natural jurisprudence of Pufendorf, especially *De Officio Hominis et Civis,* was designated and accepted as a school textbook not only at German universities but also at other European universities. Since there

were no massive citations or footnotes, and the main points were generally described in a simple style, this book was so suitable for a textbook when teachers lectured at universities on the subject of jurisprudence and moral philosophy. However, many years had passed since 1673, the year of its first publication, and there were many controversial themes emerging and waiting to be solved. Thus, it was necessary for commentators and teachers to add footnotes and supplements to the textbook.

Here appeared distinguished and influential commentators, actively involved in the front lines of academic society. Barbeyrac, one of the most famous commentators and translators for Pufendorf, introduced him all over Europe, for instance, in France, Germany, Holland, and Scotland. French Enlightenment thinkers, such as Rousseau and Diderot, were said to have read *De Officio Hominis et Civis* through the French version translated and annotated by Barbeyrac. By introducing the writings of Pufendorf and publishing various versions annotated by himself, Barbeyrac contributed to bringing about controversies among academics, too. It is well known that he appended the letter of Leibniz to the fourth edition of the French translation (1718), in which Leibniz not only totally criticized the natural jurisprudence of Pufendorf, with special emphasis on the relationship between theology and natural law, but also set up a new stream of study on natural jurisprudence in other countries, in particular Scotland.

Carmichael was the first professor of moral philosophy at the University of Glasgow in Scotland. When he was still a regent at the beginning of the eighteenth century, he was stimulated and encouraged by the work of Barbeyrac. So he decided to publish the commentaries he made in his ethical lectures as a textbook for students in 1718. But he had to make clear that he already had the same opinion as Leibniz regarding the natural law of Pufendorf before reading the letter of Leibniz in the French translation by Barbeyrac. Accordingly, he published the second edition with the revised longer preface in 1724, in which he emphasized his original ideas about the connection of natural law with natural theology, that is to say, he denied the plagiarism and the imitation of Leibniz's ideas.

Francis Hutcheson, succeeding professor of moral philosophy at Glasgow University, admired Carmichael, his respected teacher, and said, "(Carmichael is) by far the best commentator on that book, has so supplied and corrected that the notes are of much more value than the text (of Pufendorf)." Hutcheson emphasized the difference from the principles of Pufendorf and in *A Short Introduction to Moral Philosophy* (1747), he added a new section entitled the Elements of Ethics and made it the first book in the three books. In the moral philosophy school of Glasgow University, the natural jurisprudence of Pufendorf was more or less accepted rather critically and transformed into social philosophy in a broad sense containing ethics, jurisprudence, politics, and economics.

Adam Smith separated jurisprudence from ethics completely when he was a professor of moral philosophy at Glasgow University and lectured on jurisprudence. Smith criticized the natural law of Hutcheson as a casuistry, which was similarly seen in that of Pufendorf and Barbeyrac according to him. He restricted the object of jurisprudence to perfect rights by which we could require the compulsory performance of the contract. He also excluded from jurisprudence imperfect rights which had been included in natural jurisprudence as moral necessities like humanitas (humanity), benevolentia (benevolence), and so on. The object of Smith's jurisprudence was to limit the wide-ranging themes of modern natural law and separate jurisprudence as a system of perfect rights from ethics.

In order to consider the significance of Pufendorf's natural jurisprudence in the history of legal philosophy, we should lay emphasis on not only the originality and the degree of perfection of his writings but also on the fact that his writings were read widely by a lot of people and students as a textbook. Moreover, various thoughts and criticism came into being from the ideas of Pufendorf by way of the influential commentators who devoted themselves to popularize them.

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Punishment of Children

► Corporal Punishment of Children

Punishment, Capital

► Capital Punishment

Purposivism

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Introduction

According to purposivism, legal texts (statutes, constitutions, wills, or contracts) should be interpreted according to their *purpose*. What does this mean in practice? How does purposivism relate to other methods of interpretation? How can purposive interpretation be justified or criticized? This entry is organized around these questions. Legal "texts" are here taken to refer primarily to statutes; so the focus is on statutory interpretation rather than on constitutional or contractual interpretation.

Purposivism and Its Relatives

As the name suggests, to use the purposive (or *teleological*)[1] method is to try to find out the purpose or *telos* of the text, i.e., "the values, goals, interests, policies, aims, and function" the legal text is designed to actualize (Barak 2005, 89). The purposive method is usually distinguished from the *textual* method, which means interpreting legal texts according to their plain, literal, or ordinary meanings. The idea in textual interpretation is to stick within the "four corners" of the text and not go outside it. The purposive method, in contrast, allows the interpreter to go outside the four corners

[1] Purposive and teleological methods are typically seen to be synonymous (see, e.g., Conway 2012, 20). The term "teleological interpretation" is more common in continental legal theoretical discussion, especially as regards the interpretation of EU law.

of the text and to take into account, for example, the circumstances at the time of the statute's enactment (e.g., what mischief the statute sought to avoid) or the policy consequences of different possible interpretations. The purposive method tries to find the meaning of a legal text that best realizes the goal behind the text or that does not lead to consequences that are contrary to that goal.

The purposive/teleological method thus has both a backward-looking and forward-looking dimension: on the one hand, the interpreter needs to investigate the actual historical circumstances at the time of the enactment of the statute; on the other hand, she needs to think about the consequences of different possible interpretations. Purposive interpretation can be viewed as seeking a balance between these dimensions – it tries to find a reading of a statute that respects the historical purposes of legislators yet adjusting and modifying those purposes so that absurd or clearly unjust consequences are avoided.

The purposive method's backward-looking aspect makes it a relative of *historical* and *originalist* methods of interpretation. The basic idea in historical interpretation is that in order to find the meaning of the legal text, it is necessary to know the historical conditions in which the text was written (von Savigny 1840, 214).[2] "Originalism" is a term used especially in the US constitutional interpretation, and one way of understanding it is to see it as seeking the original intentions of the drafters (or ratifiers) of the constitution (Greenberg 2021, Sect. 3).[3]

An even closer relative of the purposive method is *intentionalism*. In intentional interpretation, the aim is to find the intention of the legislator that enacted the legal text. "Intention" seems not that different from "purpose"; thus, purposivism can be understood as a strand of intentionalism (Greenberg 2021, Sec. 4.1.4). However, intentionalism and purposivism are usually distinguished so that the latter seeks not the real intentions – the actual psychological states – of legislators, but "objective purposes" (Barak 2005, 148) or "objectified intentions" (Greenberg 2021, Sect. 4.1.4). In other words, the intentional method is "subjective-teleological," while the purposive method is "objective-teleological" (Alexy and Dreier 1991, 88–89).[4] Intentionalism and its problems are discussed in a separate entry.

What Are Objective Purposes?

What does one look for, if one looks for objective purposes, instead of subjective intentions? A typical way of characterizing purposive interpretation is to say that it construes legislators as *reasonable*. As Henry Hart and Albert Sacks have put it, the assumption in purposive interpretation is that the legislature consisted of "reasonable persons pursuing reasonable purposes reasonably" (Hart and Sacks 1994, 1378). What it is to see the legislators as reasonable is another question. Supposedly the interpreter takes them to be rational and to have true beliefs about the world, in accordance with the "principle of charity" (Blackburn 2016). In the context of legal interpretation, reasonability typically also means that legislators are seen as *just*: they would not have wanted to enact statutes that lead to clearly unfair or absurd consequences. This of course leads to further debates about the nature of justice.

Another way of understanding the idea of "objectivity" in purposive interpretation is by distinguishing between different *sources* of interpretation. According to Barak, "[a]n interpreter learns the objective purpose from 'objective' data" (Barak 2005, 90). Objective data must be

[2] The historical canon, in its turn, resembles England's "mischief rule," which "directs you to look to the previous common law and the history of the Act (or other document) to see what was wrong with the law, what was the mischief, that the draftsman sought to remedy" (Holland and Webb 2019, 270).

[3] In another sense originalism means interpreting the constitution according to its original public *meaning*, in which case originalist interpretation sides with textual rather than purposivist interpretation.

[4] Barak's purposivism combines both aspects: he thinks that the purpose of a norm is "composed of both its subjective and objective purpose . . . The first reflects a historical-subjective intention; the second reflects a social-objective intention" (Barak 2005, 90).

publicly available and thus excludes, e.g., the private diaries of legislators or speculations and hearsays about their states of mind. The most obvious public source is of course the statute itself. But as was mentioned earlier, unlike strict textualism, the purposive method does not forbid the interpreter from looking outside the actual statutory text. Other publicly available sources include, for example, other legal texts (other statutes, the constitution, judicial opinions); texts produced during the legislative process (such as committee reports); texts that give more general information about the history and societal conditions surrounding the enactment of the statute; dictionaries; legal literature; or similar materials from other legal cultures.

Purposivism and Textualism: Do They Really Differ?

Which of these different texts is the most important one? Typically, the purposive method is understood as allowing the interpreter to ignore the text of the statute if the other sources point in a different direction. A famous case illustrating traditional purposivism is *The Church of the Holy Trinity* vs. *United States* (143 U.S. 457 (1892)) in which the text of the statute was quite bluntly dismissed. In this case the US Supreme Court ruled that The Church of the Holy Trinity in New York did not act unlawfully when it contracted with an Englishman to come over and serve as its rector, even though the relevant statute forbids the assisted importation into the United States of *any* alien to do labor or service of *any* kind (Feb 26, 1880, 23 Stat. 332, c. 164). The court used statute-external texts, such as committee reports and the petitions and testimony that were presented before the committees prior to the enactment of the statute. It concluded from them that the real purpose of the statute was to prevent the shipment of cheap unskilled labor into the United States, but not the importation of "brain toilers" (143 U.S. 464).

However, modern advocates of the purposive method give more weight to the text of the statute. Already the "legal process" purposivists Hart and Sacks claimed that "[t]he words of a statute, taken in their context, serve both as guides in the attribution of general purpose, and as factors limiting the particular meanings that can properly be attributed" (Hart and Sacks 1994, 1375). Barak highlights the constraints of the text so much that he sounds sometimes more an advocate of the textual than the purposivist method: "My position is that the limits of the text set the limits of interpretation in law, and the limits of language set the limits of the text" (Barak 2005, 18).

Modern textualists, in their turn, acknowledge that the words of a statute have meaning only in a wider *context*, and thus "meaning can never be found exclusively within the enacted text" (Manning 2006, 78). Furthermore, they also appeal to the construct of a reasonable reader and allow that the interpreter may look for the "objectified intent" of the statute – i.e., an "intent that a reasonable person would gather from the text of the law" (Manning 2006, 79). Thus, purposivism and textualism do not really differ as *methods*: the ground-level work in each consists in reading various texts, starting from statutes, and making assumptions about what is reasonable. The difference comes out at the stage where the interpreter has to choose which texts to prioritize (if they conflict). According to John Manning:

> [t]extualists give precedence to *semantic context* - evidence that goes to the way a reasonable person would use language under the circumstances. Purposivists give priority to *policy context* – evidence that suggests the way a reasonable person would address the mischief being remedied. (Manning 2006, 76)

In practice, this means that when textualists, e.g., clarify the meaning of some technical legal term, they may look to extra-statutory texts such as other statutes, dictionaries, or previous cases; but they eschew the use of legislative history. Purposivists, instead, include legislative history among the sources from which the purpose of the statute is constructed (Manning 2006, 81–91).

Purposive and Systemic Interpretation

The purposive method is sometimes hard to distinguish not only from the textual method but also

from the *systematic* rule of interpretation. The idea in systematic (or "systemic") interpretation is to find a reading of a statute that makes it consistent and coherent with other legal texts – with the legal "system." In other words, the interpreter should, at a minimum, avoid an interpretation that makes the statute contradict other legal materials and, if possible, find an interpretation that increases the unity and coherence of the legal system.

The purposivist interpreter's need to think of systemic arguments follows from the fact that the law may contain several purposes that need to be harmonized. Even a single act can have several objectives, and a single treaty may aim at various goals. For example, the European Convention on Human Rights (1950) lists several different values in its preamble, such as freedom, democracy, rule of law, and unity between members of the Council of Europe. Different areas of law may have their own purposes – e.g., to protect workers (labor law) or to protect freedom of contract (contract law). The ultimate purpose of all laws is, e.g., to promote justice, or to regulate behavior, or to provide security. Because of this multiplicity, it is not always obvious which purpose is the ultimate goal of the text that is interpreted and how the different purposes can be fitted together. According to Barak, "[t]hat is the uniqueness of purposive interpretation—it takes all the purposes into account and tries to synthesize them" (Barak 2005, 117). But one could argue that on the contrary, this takes away the uniqueness of the purposive method and makes it inseparable from systemic interpretation.

The need for systemic-teleological interpretation arises also from the fact that legally enacted purposes are typically (more or less) abstract, general, vague, or declaratory, and thus they need to be read together with texts that give more concrete content to the purposes. In the Nordic countries, the purposes of statutes are typically clarified in detail in *travaux préparatoires*, which are frequently employed in legal interpretation and decision-making despite not being legally binding (see Husa 2019). As regards the abstract purposes of human rights treaties, case law is indispensable in concretizing them. Thus, an interpreter who, e.g., needs to determine whether a national legal decision violates a specific article of a human rights treaty typically needs to consult earlier decisions of human rights courts in order to make any progress in purposive interpretation (Dahlberg and Paso 2020). This, again, makes the purposive method practically indistinguishable from the systemic method.

Why Should We Interpret Statutes According to Their Purposes?

Why *should* one interpret statutes according to their purposes rather than in some other way? One could avert this question and say that there is no other way: all interpretation is necessarily purposive. Lon Fuller comes close to this view in his famous debate with H. L. A. Hart about the rule "no vehicles in the park." Hart thought that because words like "vehicle" have "core meanings," there are easy cases where the judge simply applies the law as it is, without needing to think about the rule's purposes (Hart 1958). Fuller thinks instead that reference to purpose is always needed, whether the case is easy or hard:

> If the rule excluding vehicles from parks seems easy to apply in some cases, I submit this is because we can see clearly enough what the rule "is aiming at in general" . . . If in some cases we seem to be able to apply the rule without asking what its purpose is, this is not because we can treat a directive arrangement as if it had no purpose. (Fuller 1958, 663)

Fuller's suggestion that we cannot treat a rule "as if it had no purpose" comes dangerously close to the claim that legal texts do not have purpose-independent literal meanings. If this claim were true, then there could be no such thing as textual interpretation. Such an extreme view is discussed in the entry on intentionalism. Here we assume two things: (1) that language is needed to express law's purposes and (2) that linguistic meanings are conventional. This independence of language from legislators' purposes makes it possible that sometimes there can be genuine conflicts between a statute's literal meaning and its purpose, and thus the debate between textualists and purposivists need not be dismissed as a pseudo-debate. Of

course, this view presupposes that purpose can be found in some other texts than the statute, particularly in the travaux préparatoires.

One main argument for favoring the purpose-revealing texts over the letter of the statute is that it makes legal decision-makers the *faithful agents* of legislators. Here it is supposed that legislators (i.e., members of parliament, congress, or a similar institution) have been elected by the people to make laws that govern the society, whereas judges have been appointed to apply those laws as faithfully as possible, and not to make laws themselves. But all legal rules have some aim, such as to implement some policy or to remove some mischief; and "if a legislature enacts a statute in order to accomplish something, then presumably a judge who wishes to respect the constitutional supremacy of the legislature should read the legislation to achieve that purpose" (Manning 2011, 120–121).

However, advocates of textualism can claim that legislative supremacy is best protected by following the statutory text rather than surmising the purposes of legislators. Here the assumption is that purposes are typically found in unenacted documents of the legislative history. But the actual item that is subjected to voting is the statute, and the legislators agree only on the final *language* of the statute that they pass as law, not necessarily on its background purposes (Scalia and Garner 2012, 393). The statute is typically a compromise between many purposes and interests, and judges should respect this compromise (Manning 2010). As the most famous textualist Antonin Scalia put it, "men may intend what they will; but it is only the laws that they enact which bind us" (Scalia 1997, 17).

As we saw earlier, modern purposivists acknowledge the importance of the statutory text and admit that often there is no conflict between purposive and textual interpretation: the enacted text shows its purpose clearly, and there is no need to depart from it. But what if following the statutory text leads to *undesirable* consequences: to an absurd or clearly unjust or immoral result? Such cases reveal the real differences between strict textualists and purposivists. A devout textualist should follow the text, even if it leads to a result that rational and well-meaning legislators clearly would not have wanted. Of course, this does not mean that textualists would see no problems in this. But they might think that it is the lesser of two evils to follow the text literally than to ignore it or to rewrite it. The latter option would mean that the judiciary takes power that belongs to legislators. Thus, respect for division of powers might require tolerating occasional absurdities in legal decision-making. Furthermore, following even senseless orders literally can be seen as a message to legislators to make better laws – to allocate more resources to law-drafting so that enacted statutes are as clear as possible.

However, purposivists could reply that this is a strange way of viewing the relationship between legislators and judges. They should rather be seen as cooperating and mutually trusting one another. Barak calls judges *partners* rather than agents of legislators (Barak 2005, 249–252). This means that judges should not be seen as simply obeying the commands of legislators, but as continuing their work in implementing some policy or obviating some mischief. The purposivist could argue that true respect for democracy and rule of law requires that the legal interpreter pays attention not only to a single enacted statute (that is at the center in some legal dispute) but also to the broader underlying values of the whole democratic system, such as fundamental human rights. According to Barak, this broader perspective is more in accordance with the idea of rule of law rather than narrow-minded legalism: "Purposive interpretation thus balances legislative supremacy with 'proper law' that takes human rights and the system's fundamental values into account. No harm is thereby done to rule of law. Indeed, the balance fully realizes it" (Barak 2005, 246).

Andrei Marmor criticizes textualism on similar grounds. He thinks that textualists can be compared to uncooperative employees who require specific instructions for every task and who refuse to use their own judgment if the instructions leave something unclear or do not cover every situation (Marmor 2005, 2096). Marmor goes so far as to say that "the whole point of textualism is to undermine the ability of the legislature to pursue broad regulatory goals" (Marmor 2005, 2078). Implementing such goals requires cooperation, not strict adherence to the letter of authorities' directives.

Indeed, many directives are impossible to follow literally, if they are formulated at a very abstract level, or contain vague standards, such as "reasonable" or "proportionate." By issuing general and vague standards, rather than precise instructions, the legislating authorities can be seen to trust law-appliers to continue their work and to implement the directives into practice according to the appliers' own best judgment – simply by using their common sense.

Purposivism from the Viewpoint of Ordinary Citizens

How does purposivism look like from the viewpoint of ordinary citizens who need to organize their everyday lives in accordance with the law? From this perspective, it is important that laws are interpreted and applied predictably. Textual interpretation might then seem preferable: it seems to better advance legal certainty and the stability of law, if statutes are interpreted according to their literal meanings – no matter what the circumstances are. And if legislators know that judges will interpret statutes literally, they will also attempt to make statutes as clear as possible, which surely benefits ordinary citizens as well. The clearer the statutory language is, the less laypeople need the help of expensive legal professionals to find out their legal rights and duties.

However, even if law-drafters had unlimited resources and all the time in the world to make statutes as clear and detailed as possible,[5] there would still turn out to be cases where something happens that the legislators did not anticipate (unless we make the stipulation that they are omniscient) and where the literal application of statutes would lead to unjust or absurd results. From the point of view of a legal subject who would concretely suffer from such literal construal, purposivist interpretation surely seems preferable – at least if we assume that the ultimate purpose of the legal system that judges should advance is justice and the protection of human rights. This flexibility in the face of unexpected situations is one of the strongest arguments for purposivism. And it need not detract from the important values of legal certainty and stability; it is an important aspect of legal certainty that citizens can trust judges to be reasonable and to protect human rights even if the letter of some statute in rare cases would have to be sacrificed.

[5] Peter Tiersma (2011) discusses how far we could be governed by mere written statutes, without any interpretive discretion, if law-drafters had "unlimited time and brainpower."

Conclusion

Rather than choosing sides in this debate, as a conclusion it is suggested that the different methods of interpretation should be used as a *set*. The objectivity of legal interpretation is increased if even textually clear-looking cases are tested against sources that inform the interpreter about the purposes of the statute (which is to bring the systematic method into play as well, since then different texts have to be compared to one another). And likewise, purposive interpreters should never ignore the text of the statute. Different interpretive methods check and balance each other in a similar way as the different branches of government in democratic societies.

P

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► Intentionalism

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Q

Quesnay, François

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Introduction

François Quesnay (Méré 1694–Versailles 1774) was a French economist and physician. After studying medicine and surgery in Paris, he settled down to practice for about 20 years and became perpetual secretary of the academy of surgery. In 1752, Quesnay was appointed court physician to King Louis XV, thus reaching a professional position that allowed him to maintain a certain independence and to have the leisure to concentrate on his interest in economics: from the 1750s, he published the articles "Fermiers" (1756) and "Grains" (1757) in Diderot and d'Alembert's *Encyclopédie* and also his *Tableau économique* (1758–1759). In the history of thought, he is mainly known as the founder of physiocracy, the new science of political economy. However, his literary output includes also works on political and legal philosophy, such as natural law and legal despotism. In these pages, sometimes neglected in favor of his purely economic thought, Quesnay contributes to the transformation of the concept and the role of sovereignty, which was consolidated in the eighteenth century, and, at the same time, builds solid theoretical bases for his own economic doctrine.

Economic Thought

The inspiring principles of Quesnay's economic theories consist in a criticism of the mercantilism typical of the *ancien régime*, a rejection of Colbert's protectionism, and the belief that the overall wealth of France at that time depended on the strengthening of agriculture and the liberalization of trade. According to Quesnay, trade and industry are economic sectors that depend on agriculture and do not increase the wealth of workers; for this reason, they are typical activities of sterile classes. Agriculture, on the other hand, is a rough diamond, which must be processed using techniques that increase its productivity. The agricultural model that he deems most suitable to achieve this goal is not sharecropping, which produced a subsistence economy and impoverished most of the country. Instead, he suggests that agriculture is based on farmers, a strategic class for economy since it is able to increase the productivity of wheat and increase trade, also thanks to the intervention of the government in removing protectionist constraints. The agricultural production guaranteed by farmers, if adequately developed and traded, is the only economic activity capable of producing wealth beyond the threshold of need, resulting in

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the net profit that represents the true wealth of a nation: a brilliant idea, according to Marx.

The Tableau économique

These topics systematically converge in the *Tableau économique*, especially devoted to analyze the contrast between productive expenses and sterile expenses, the formation of the surplus value, and the ways in which wealth circulates. The work is divided into three parts. The first part consists of the actual *Tableau*, the circular flow diagram of the economy, which can be found at the beginning of each of the many existing versions and has the purpose of representing the circuit produced by the relationship between the three main factors of economy, mentioned above. In the second part (*Explication du Tableau économique*), Quesnay provides a kind of grammar of the language of the new political economy, explaining the meaning of the concepts that are expressed in a simple manner in the graph. The third part (*Extrait des Économies royales de M. de Sully*) includes the description of a long series of conditions (24) that are necessary for the validity of the diagram: without these conditions, the hypothesis of the *Tableau* would be fictitious. According to Quesnay, the science of the economic government of a kingdom is identified with the knowledge of the assumptions of economic activity (the true sources of wealth and the means required to multiply and perpetuate them), which is a prerogative of the sovereign. This belief is the welding point between economic theory and legal theory.

Legal Theory

The representation of the fundamental laws of economy offered by the *Tableau économique* can be easily attributed to historical contingency, because, by means of this work, Quesnay intended to restore the natural course of economy in an agricultural kingdom, putting forward an economic, social, and political development model alternative to Colbertism, as it is clear from Mirabeau's in-depth explanation of the *Tableau économique* (1760). It is certainly correct to observe that the *Tableau économique* describes a theoretical model that belongs to the spirit of the time, since trust in the existence of rational laws that preside over economic mechanisms, in their knowability, and in the possibility of their implementation using the tools of political government, is in accordance with Enlightenment culture. The theoretically most relevant aspect, however, consists in the fact that the *Tableau économique*, and with it the entire thought of its author, rests on the bond that exists between the work of the sovereign (not only in the economic field, but starting from there) and natural law. This relationship shapes (i) the scope of the economic laws determining the wealth of a country, (ii) the definition of the nature of the market (i.e., whether it is a natural and non-modifiable condition or an artificial space, a result of political action), and (iii) the quality of the features of sovereign's action (purely declaratory or constitutive, in an historically variable economic order).

Natural Law and Legal Despotism

In various parts of his work, Quesnay deals with the link between economic laws and political action, placing it in the perspective of natural law and constantly referring to the category of evidence, to which he also dedicated an entry in the *Encyclopédie* (which was not received positively), rather representative of his theoretical orientation. Evidence is, as defined by Quesnay, a certainty that is so clear and manifest in itself that the spirit cannot deny it, and it is the way in which natural laws (even economic laws) present themselves to men. However, the perception that they have of them is neither one of certainty nor one of ineluctability, because men interpret natural law in different ways and they do not always conform to it: for this reason, positive rules are essential, as they have the function of determining human behavior exactly. The evidence of natural laws is compromised also by the fact that natural law

indicates a physical social order to men, based on unchangeable and evident natural laws, constituting a perfect government. However, only the wise, the statesmen, the superior geniuses perceive them in an evident and rational way. Everyone else (ordinary men and the people) only perceive the feeling of their evidence. It may therefore be true that natural law dictates the laws of the country, regulating the rights and duties of the sovereign and of the subjects, but only the sovereign authority is responsible for translating them into positive laws, alternatively defined as *légitimes* and *positives*. This intervention is necessary also because the extent of natural law that each man actually benefits from is represented by the portion that he can obtain through his work: a condition that inevitably results in inequality between men. It is only in the political community, methodically governed by an *éclairé* sovereign, that the desire for the greatest possible share of property can be expressed. From this point of view, positive laws have a function that cannot be defined as fundamental, but they certainly help maintain natural law. Provided that they are illuminated by reason, which gives access to the evidence of natural law, positive laws guarantee the actual realization of the best government possible for men (i.e., for owners; only later, for citizens) gathered in society.

The cornerstone of this system of relationships between natural law and positive law, which coexist in the political State, can be found in the figure of the sovereign, who exercises a form of legal despotism. The concept of despot that Quesnay suggests can be found, among other things, in the pages concerning despotism in China: an interpolated work and for different profiles the result of plagiarism. It is however reasonable to attribute to the author of the *Tableau économique* the substance of the definition that appears in the *avant-propos*: the despot is not necessarily a tyrant, but rather a sovereign who has all of the supreme authority in his hands. This definition perfectly summarizes the theory of sovereignty that governs Quesnay and the physiocratic school's economic and legal-philosophical model, because it attributes exclusively to the apical figure of the political State the function of legislator, essential (and sole) translator of natural principles, both self-evident and inefficient, in positive law and economic policy actions. Quesnay leans towards the idea of a unique power superior to all of the parts that make up the society. In his theory, the unity of power and its ability to contain and balance all the parts of society distinguishes legal despotism from arbitrary despotism, which occurs when the real power joins forces with a part of the society. It is important to specify that legal despotism must be understood as based on natural laws. It is clear that the background of modern natural law constitutes, at most, a remote assumption of legitimation and reverence towards a culture that is certainly still very present, in the public discourse (i.e., *savant*) of the eighteenth century, but already clearly in deep transfiguration.

Conclusion

It is precisely this transfiguration that makes it difficult to find a clear solution to the problem of the relationship between the sovereign's work and natural law. Foundation and method of construction allow for this legal-economic system to be placed among the theories of modern natural law, but with two important conclusive warnings. On the one hand, interpreting Quesnay and the physiocratic school's theoretical performance as yet another revival of the natural law/positive law *vexata quaestio* may cause one to lose sight of the original contribution of a group of intellectuals with different backgrounds and sometimes engaged in public life, which also consisted in the attempt to build an autonomous and scientific statute (as is also clear from a linguistic, i.e., conceptual, point of view) for the emerging new science of political economy. On the other hand, their reliance on the natural law doctrine of social contract molds a complex of legal-philosophical concepts into a theory of political sovereignty clearly projected towards the "Legal State." It is an essential process for the development of contemporary legal culture, destined to culminate also in nineteenth-century codifications, which

are innervated by the same rhetorical figure of a sovereign legislator, who formally finds his source of legitimacy in the function of sole (in this sense despotic) interpreter of the natural law but is also, for that reason, the only legal source of political power. This ambivalence explains why the real extent of natural law in Quesnay's theories cannot be posed in a conclusive way.

In order to better understand Quesnay's legal philosophy, one should be alert to the inner plurality of natural law theories in the eighteenth century. Moreover, this plurality is evident in many interpretations of his thought. A common destiny joins Quesnay and the other representatives of the physiocratic school, whose legacy of thought continues to be considered in its duplicity, suspended between ancient and modern, not only in the history of economic thought, but also in the history of legal-philosophical thought. In the latter field, we may understand how different positions can coexist, namely, those of Catherine Larrère and Philippe Steiner. In the first case, the prevalence of economic law (natural) over political law (positive) leads us to situate the physiocratic theory in a substantial continuity with classical paradigms, thus limiting its innovative capacity. Instead, in the second case, the radical novelty of physiocracy and of Quesnay's thought is enhanced and, by turning economy into a tool of political governance, a dual and important effect is achieved. On the one hand, it completes the transformation from ancient European economy (according to the definition by Otto Brunner) to political economy; on the other hand, it contributes in a decisive way to the secularization of law, entrusting the authority to produce positive law to the sovereign's will (albeit legitimate and not exempt from controls).

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R

Racism

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Introduction

Under the impression of a devastating World War and the mass murder of Jews, Sinti, and Roma, homosexuals, people with disabilities, communists, social democrats, and others in concentration camps, Art. 2 of the United Nations' Universal Declaration of Human Rights from 1948, proclaim:

> "Everyone is entitled to all rights and freedoms set fourth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination picks up on this provision and stipulates:

> "[. . .] the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
>
> [. . .] States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, [. . .]"

Clearly, these two UN documents rule out racism. However, despite of the above-mentioned definition of "racial discrimination" it is far from obvious what is exactly meant by "racism" – both when it comes to human rights treaties and in everyday language. Racism refers to "race" but it is also linked to notions of "color," "ethnicity," and "nationality," all of which are highly complex constructs themselves. Furthermore, "racism" refers to discrimination, which, again, can be a highly complicated concept. Hence, it is not surprising that there is no clear-cut, uncontested definition of racism. However, scholarly investigations and day-to-day dealings with the concept of racism circle around a number of recurring themes, motifs, and conceptions. Hence, a reflection on these themes, motifs, and conceptions may also convey a better understanding of racism itself.

Concepts Around a Definition of Racism

"Race"

The human kind does not entirely look the same. The color of our skin, of our eyes, and our hair varies, just as some of us are taller than others, have a smaller nose, a sharper chin, etc. And,

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indeed, these phenotypic characteristics can be passed on from one generation to another, while still being subject to certain genetic variation. However, modern genetic sciences strongly oppose the deduction of human "races" from these characteristics. To the contrary, studies have found that the genetic variance within groups, which have historically been perceived as a single "race," can be just as big as between groups of people with, for example, different skin colors (Richard Lewontin 1972; for a critique, see Edwards 2003). No gene occurs exclusively in one of the "traditional" racial groups, nor does a specific gene occur in every single member of such a group (Cavalli-Sforza et al. 1994, p. 19). These insights from modern genetic sciences explain why "scientific racism" in the eighteenth, nineteenth, and early twentieth century was doomed to fail when trying to frame a coherent set of human races. To the contrary, "scientific" racial theories at the time inevitably contradicted one another even about the mere number of human "races." The influential Carl Linnaeus (1758, pp. 20–24), for example, suggested a set of four types of human beings by using geographical origin, skin color, posture, and temper as classificatory variables: he thought of Europeans as white, sanguine, and muscular; of Africans as black, phlegmatic, and lax; of Americans as red, choleric, and erect; and of Asians as yellow, melancholic, and rigid. Johann Friedrich Blumenbach added a fifth race ("Malay") and named the European race "Caucasian," for he took Georgian men from the southern slope of Mount Caucasus to be the most beautiful (Blumenbach 1795, also see Gould 1994; Hudson 1996, 255). Joseph Deniker, after all, detected no less than 29 races (Deniker 1926, pp. 360–361).

While the concept of "race" pretends to be founded in natural sciences, these alleged foundations have been widely contested for centuries and finally disproven by state-of-the-art genetic research. But even if human "races" arguably do not exist from a scientific point of view, racism is a social fact. In any case, thinking of "race" and racism as social constructs further complicates the endeavor of finding a clear-cut definition of these terms.

A Brief Look into the History of Racism

A first attempt to gain such a definition must include a study of how "races" have historically been constructed. But once again, even a quick glance into history reveals a highly varying and even contradictory reference to "race." Again, one might be inclined to think of a variety of racisms rather than of a single concise phenomenon.

Although the worldwide influences of racist ideology climaxed during the eighteenth and nineteenth century, its roots surely date back many centuries. The ancient Greeks labeled persons who were not able to speak proper Greek and who did not worship the Olympian Gods as "barbarians." Ancient Rome knew a sharp distinction between citizens and noncitizens; furthermore, Romans enslaved large parts of their prisoners of war. However, neither in the Greek, nor in the Roman case, social hierarchies were "essentialized" in a way that hereditability stood out as a key concept. In ancient Greece, the distinction between the own people and the "barbarians" was mainly about political citizenship. Slavery in Rome started out as debt slavery and the later war slaves were taken from all parts of the Empire regardless of the color of their skin or hair or their religion. Quite to the contrary, Roman citizens were highly diverse, including a presumably dark-skinned emperor who was born on the African continent (Septimius Severus, 145–211 AD, see Birley 2002, p. 36). Hence, these ancient forms of a yet unracialized "othering" have widely been referred to as "proto-racism." More pronounced varieties of racism can however be attributed to early South Asia, where the Indian caste system goes back at least two thousand years (see Aulette 2017, pp. 65–81).

The emergence of modern racism is often attributed to the late fifteenth and sixteenth century and the concept of "limpieza de sangre" ("cleansing the blood") in the Spanish Empire. Jews had been demonized and persecuted all over Europe during the Middle Ages. "Limpieza de sangre" however shifted anti-Semitism further towards biological racism: only "Old Christians" could access official positions. Jewish or Muslim converts were legally excluded even in following generations, for their "impure blood" was

believed to prevent a genuine conversion (Fredrickson 2002, p. 31).

Unlike the concept of "race," the term "racism" is an invention of the twentieth century. It has since been referred to in quite distinct contexts. Three of these contexts stand out and already give clear proof of the large variance of the concept's meaning in contemporary history: anti-Semitism in Germany, "white supremacy" in the USA, and apartheid in South Africa.

The term "racism" has first been used to describe the theories of German National Socialism, which ultimately culminated in the Holocaust – the systematic mass murder of over six million Jews from the late 1930s until 1945. The horrors of the Shoah unprecedentedly revealed what racism is capable of. On a conceptual level, National Socialist racism is highly contradictory. Although National Socialist racism surely did (and does) refer to certain presumed outward phenotypic traits of a "Jewish race," the outer appearance was not a centerpiece of NS racist lawmaking. The Nuremberg Laws of 1935, which banned marriages and sexual relationships between "German citizens" and "Jews," rather construed Jewishness as a combination of ancestry and religious affiliation: for racially "non-Arian" was every person with at least one Jewish grandparent in the religious sense.

American "white supremacy" racism, on the other hand, was (and is) obviously predominantly color-coded. Different from the German case, "white supremacy" is to be seen in a historical context of colonialism and slavery. Religion has certainly played a significant role in officially justifying both, and it has drastically been influencing the symbolism of the paramilitary racist Ku-Klux-Klan until today. All in all, religious motives have however become much less influential after the largest number of slaves had converted to Christianity. The post-Civil War doctrine of "separate but equal" embodied in the so-called "Jim Crow laws" hence did not primarily refer to religion but to ancestry and geography when construing the different American "races." This recourse to ancestry was executed by way of a particularly rigid biologism: according to the notorious "one-drop rule" in some Southern states' twentieth-century laws, every person with even one drop of blood from an African ancestor was considered legally "black."

South African apartheid ideology finally continued the sad tradition of marriage bans and the prohibition of sexual relations between "whites" and "coloreds" well into the second half of the twentieth century (see Act No. 55/1949; Act No. 23/1957). Against the background of the horrible crimes of Nazi Germany and in view of the Civil Rights movements in the USA as well as in other parts of the world, official language in South Africa however gradually shifted from an overtly biological towards a "cultural" essentialism (Fredrickson 2002, p. 855). Hence, apartheid was more and more justified by referring to alleged cultural differences between population groups, which directly resulted in a need for a "protected development" of each group. A notion of racist dominance and hierarchy could however not be avoided: neither in everyday life, nor in the law. "Coloreds" were violently resettled to questionable "homelands"; schools, universities, restaurants, parks, and beaches were segregated. Until 1994, "colored" citizens did not have an equal right to vote on a national level. At the same time – and notwithstanding the official line of argument concerning a need for protecting different cultures – the category of the "colored" underwent significant extensions and eventually included the "Cape Colored," "Cape Malay," "Griqua," "Indian," "Chinese," "other Asiatic," and "other Colored" (Rattansi 2007, p. 75) – categories to which people were assigned based on "appearance," "general acceptance," and line of descent (see Act No. 30/1950). Once again, the endeavor of grouping people along racial lines proved extremely difficult.

A Preliminary Definition: The "Racist Rule of Three"

Even a sideways glance at the history of racism reveals highly manifold concepts of race and racism. There are however certain roughly common elements in this history, which may suffice for a preliminary definition: In a first step, "racism" includes a grouping of people along allegedly hereditary and therefore supposedly immutable

specific properties (which is not confined to skin color) – i.e., a grouping of people in different "races." Secondly, these "races" are considered to exhibit a characteristic behavior, which, thirdly, is perceived as more or less socially valuable than the behavior of another group. This leads to a "racist rule of three," which solely by assigning a certain individual to a presumed "race" puts a positive or negative social value on his or her face.

This preliminary definition, including the "racist rule of three," is somehow challenged by modern manifestations of racism – "new racisms" (see Barker 1981) – which put a bigger emphasis on cultural differences than on biological hierarchies. Such a shift from an "old" to a "new racism" might make it even harder to distinguish the concept from xenophobia, ethnic or religious discrimination, sexism, nationalism, etc. in a given case. However, even here, it is certainly appropriate to speak of racism whenever alleged cultural differences are being "essentialized" by relating them – at least implicitly – to "inherent" human properties such as physique, phenotype, or descent. Such a process of "essentialization" is referred to as "racialization," when it is used to draw boundaries between groups of people by way of defining a Self and an Other (see Miles and Brown 2003, pp. 99–103).

Finally, some scholars have argued that the concept of racism calls for a power play between "racial" groups. Thereby, racism was not merely about a prejudiced "othering," but also by definition about an oppression of the other (see Fredrickson 2002, pp. 153–154). This debate however turns out to be a purely theoretical one because empirically the former implies the latter. All of the major historic "racisms" have comprised a notion of even crude oppression, whereas a truly nonhierarchical "racial" grouping of people has not yet occurred. Thus, it is not a coincidence that every historic attempt to enforce a "separate but equal" doctrine only succeeded in implementing apartheid, but never accomplished equality therein.

In any case, it is a great merit of these last-mentioned theories to point out that a comprehensive understanding of racism must reach well beyond a preoccupation with overtly racist hate crimes. Hence, comprehending racism as a highly contextual phenomenon has indeed been a main concern of academic research for the past decades.

Critical Race Theory

By understanding "race" as a social construct rather than a biological category, one might suggest to discard the concept of "race" altogether, especially when it comes to matters of politics and law. This is however heavily contested by so-called critical race theory (CRT). Drawing on early works of W.E.B. Du Bois and Frantz Fanon as well as the methods of critical theory (especially the so-called "Critical Legal Studies" movement), scholars like Derrick Bell or Richard Delgado emphasize that racism is a social reality. Hence, any "colorblindness" of the law – even of antidiscrimination law – would only make racism invisible on the surface, while inevitably stabilizing white privilege. Critical race theory therefore stresses the importance of race-consciously studying historic, economic, psychological, and sociological context. It is interested not just with intentional interpersonal racism but with the more subtle racist structures in society. Critical race theory is "critical" in the sense that – despite its analytical point of departure – it wants to make a contribution to social change; thus, critical race theory shows a certain distrust in political and economic liberalism, which is blamed for overlooking the self-reinforcing potentials of the deep-rooted power structures that – at least in effect – are perceived to constitute a form of racism. Critical race theory hence provides a theoretical framework for three concepts, which shall briefly be introduced hereinafter: intersectionality theory, "institutional racism," and affirmative action.

Intersectionality

Inspired by the works of Kimberlé Crenshaw and others, a more and more influential approach aims at acknowledging the overlap of different discriminatory "-isms" and at examining the effects of the said "intersectional" overlap on individual discriminatory experiences. This allows for a shift of focus from tedious terminological delineations towards a comprehensive account of systematic injustice and its individual effects. At the same

time, intersectionality theory stresses that "race" alone is not a sufficient criterion to fully analyze prejudiced disempowerment. Racism intersects with ethnic discrimination when distinct physical marks are combined with a notion of geographic origin and common descent. Racism intersects with nationalism when affiliation to a body politic is biologized and accompanied by a belief of superiority. Racism intersects with sexism when black women have much greater difficulties to find or even keep a job than white women or black men (see Crenshaw 1989, pp. 141–143). Race intersects with class when people of color are forced into outer-city urban ghettos. And obviously, there can be more than one intersection – taking, for example, the dark-eyed immigrant woman who is wearing a hijab for religious reasons. Particularly the threefold intersection of race, gender, and class is a common discriminatory pattern and a central concern of intersectionality analysis (see, for example, Collins and Andersen 2016).

Institutional Racism

Power structures are also at the heart of another concept, "institutional racism," which has shaped discussions on racism ever since the US Civil Rights Movement of the 1960s. The term goes back to Stokely Carmichael (later known as Kwame Ture) and Charles Hamilton. They pointed out that racism did not only include the deliberate and overt hate crime of one person to another. They claimed that certain disadvantageous structures in political and societal organizations did even more harm when disproportionally affecting black minorities (Carmichael and Hamilton 1967). The concept of "institutional racism" received wider attention through the so-called Macpherson report of 1999, which investigated into the UK police's handling of the murder of Stephen Lawrence, a black student in London. The report concluded that London police forces had failed to properly pursue the case in a variety of instances due to racial stereotypes toward the murdered victim. The report did not find unambiguous evidence for a blatantly and overtly discriminatory and hostile conduct by few specific individuals. However, it is concerned about "a more systematic tendency that could unconsciously influence police performance generally" (Macpherson 1999, at 6.6). The report continues by preliminarily defining such "institutional racism" as: *"The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people"*(Macpherson 1999, at 6.34).

This passage of the Macpherson report, which is regularly referred to when it comes to the concept of institutional racism, adds two aspects to the classic understanding of racism. One is the recognition that unconscious behavior can nevertheless constitute racist conduct. The other is an emphasis on organizational patterns that structurally disadvantage a certain minority group. Both of these aspects have been criticized for blurring and inflating the concept of racism (Miles and Brown 2003, pp. 70–72). The Macpherson report has however immediately made a considerable impact on legislation and organizational structure in the UK (Bourne 2001, p. 13). Both conceptual extensions are at the core of current political and legal debate. Examples include the problem of "racial profiling," when people of color are subject to police measures based on racial prejudice rather than individual suspicion (Tischbirek and Wihl 2013). In the case of Germany, they include misguided police investigations concerning the so-called National Socialist Underground (NSU), an extreme right wing terrorist group, which has been convicted of a series of ten murders of mostly immigrants between 1999 and 2007. They furthermore include questions like equal access to housing, employment, education, health care, and equal distribution of wealth.

Affirmative Action and "Positive Measures"

The shift of focus to structures and patterns that factually disadvantage racial minorities is also a key element of another conceptual problem in defining racism: the problem of affirmative action or so-called "positive measures." The question

whether affirmative action is a means to combat (institutional) racism or, to the contrary, if it is an expression of (reversed) racism in itself has been subject to a series of court rulings, famously including the US Supreme Court.

Affirmative action entails a specific preferential treatment of a member of a certain group in order to counteract structural disadvantages that members of that group are generally facing in society. While affirmative action is also widely discussed in equality politics for the benefit of women or handicapped persons today, it is once more a concept that has first gained broader public attention in the US Civil Liberties movement of the 1960s. The first documented use of the term by President John F. Kennedy in an executive order in 1961 concerning the Committee on Equal Employment Opportunity (sec. 301 of EO 10925) however arguably did not yet aim at giving specific situational advantages to applicants of color. Furthermore, the mentioning of affirmative action in sec. 706 (g) of the Civil Rights Act of 1964 still reads like an open authorization to order the abolishment of individual overt rather than overall structural discrimination. Yet, even according to this early understanding, affirmative action entails more than merely refraining from discrimination. It demands for positive action in order to stop discrimination.

The most politically and legally controversial measures of affirmative action include quotas – mostly in matters of employment or higher education. In its leading cases on race-conscious admission policies in American colleges, the US Supreme Court has upheld the possibility to consider "race" as a selection criteria in order to compile a "diverse student body" (see *Regents of the University of California v. Bakke*, 438 U.S. 265 [1978]; and most recently *Fisher v. University of Texas,* 579 U.S. __ [2016]). The Court has however assessed such admission policies as a suspect classification, triggering a strict scrutiny test. Hence, racial classifications must be "narrowly-tailored," placing the burden of proof on the universities, which have to demonstrate that such classifications are necessary to achieve diversity. "Race" moreover must not be the sole criterion in striving for diversity. The US Supreme Court has however upheld rigid quotas in employment law under the Civil Rights Act of 1964 (*United Steelworkers of America v. Weber*, 443 U.S. 193 [1979]).

Rigid quotas are an accepted means of affirmative action in a number of countries. Even years before the American affirmative action programs, India had long adopted affirmative action policies to fight structural inequalities due to the caste system. Influenced by the works of Bhim Rao Ambedkar, who was also one of the drafters of India's constitution, this even includes constitutional quotas: Articles 330 and 332 of the Indian constitution establish, for example, that India's lower parliamentary chamber, the House of the People, as well as the states' legislative assemblies must reserve a certain number of seats for members of the "scheduled castes." In Brazil, a federal law (Lei n° 12.711/2012) requires state universities to compose part of its student body according to the racial composition of the respective state's population. The Brazilian Supreme Federal Tribunal upheld such a rigid quota system by the Universidade de Brasília in a 2012 landmark decision (ADPF 186/DF). In South Africa, the Black Economic Empowerment Act (BEE; No. 53 of 2003) and its subsequent "Codes of Good Practice" have installed – inter alia – a score system including racial quotas concerning employment in the public sector as well as in private enterprises that seek to engage in economic activity with the public sector.

Conclusion: "Racism," "Racisms," and Class

The political and legal fight against racism faces a dilemma, which is a classic dilemma in antidiscrimination doctrine. While antidiscrimination efforts aim at unifying people by stressing their equal dignity as human beings, they are confronted with the need to specify what draws people apart. This is particularly difficult in the case of racial discrimination. For the underlying cause of racism, "race" is a highly volatile concept in itself, a social construct, which lacks any foundation in the natural sciences and whose meaning

has significantly changed over time. Hence, many authors have chosen to write about "racisms," rather than trying to define a single, clear-cut phenomenon. Dissolving this dilemma may go two ways: the first is to negate the concept of "race" altogether. Especially in present Germany, where the idea of "race" is inextricably linked to the horrendous crimes of the National Socialists, there is a very strong tendency to reject "race" as a valid conceptual category in any way (see, on the one hand, Liebscher et al. 2012 and, on the other hand, Barskanmaz 2011). The French Parliament has recently even decided to discard the term "race" from Article 1 of its Constitution, which proclaimed "the equality of all citizens before the law, without distinction of origin, race or religion" (Amendement No. CL847 of 22 June 2018). Critical Race theorists point another direction by stressing that doing away with "race" will not also make "racism" disappear. To the contrary, they value historical concepts of "race" as an analytical tool to uncover entrenched prejudiced societal structures. Hence, the need to define different racial groups is the price to be paid for a law against indirect discrimination, as Michael Banton (2001, p. 184) has noted.

Merely substituting "class" for "race" is only ostensibly a way out of this dilemma. In modern societies, "racism" and "classism" have often gone hand in hand (see Miles and Brown 2003, pp. 117–141). In Nazi Germany they did not. And even today, "classism" could not fully explain the formation of de facto segregated neighborhoods in the USA and in many other countries. It seems that we will have to deal with "races" and "racism" for still some time to come – both on a societal and on a conceptual level.

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- ▶ Claim Rights (Subjective Rights)
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Radbruch, Gustav

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Introduction

Gustav Radbruch (1878–1949) was a German legal philosopher, criminalist, and politician. In his short essay, "Statutory Lawlessness and Supra-Statutory Law" (1946), he denied the validity of National Socialist "law," which was influential in German legal practice, but has since been disputed. It is up for debate whether his argument in the essay is consistent with his works published before 1945. Further, it is questioned whether his non-positivistic claim is persuasive at all.

Gustav Radbruch was born on November 21, 1878, in Lübeck, Germany. In 1898, he began studying law in Munich and later pursued further studies in Leipzig and Berlin. He obtained his doctorate in 1902 in Berlin under the supervision of a reform criminologist, Franz von Liszt. In the following year, he acquired his habilitation qualification (a certificate to teach at a university) in 1903 in Heidelberg under the supervision of Karl von Lilienthal, who had been a student of Liszt's. From 1903, he taught at the University of Heidelberg as a lecturer, and from 1910, he continued as a professor without a civil servant status (*außerordentlicher Professor*). In March 1914, Radbruch moved to Königsberg after the University of Königsberg offered him a position as a professor without a civil servant status.

During the First World War, Radbruch voluntarily served as a paramedic for the Red Cross and was later called up as an infantryman. Immediately after the end of the war, he joined the Social Democratic Party. In May 1919, he received a call from the University of Kiel asking him to teach as a professor without a civil servant status. Subsequently, in October 1919, he became a full professor of criminal law there. Radbruch held a seat in the German *Reichstag* from 1920 to 1924. During this time, he was minister of justice twice in the cabinet of Josef Wirth and Gustav Stresemann. During his term as the minister, he drafted laws that permitted women to become jurors and judges. Furthermore, the Juvenile Court Act was promulgated by the German legislator based on his draft. He had also planned a new criminal code that was shaped by the idea of humanity (abolishment of the death penalty, introducing the concept of criminal from conviction, etc.) and the von Liszts' idea of purposeful punishment. Although this draft was not enacted, it had considerable influence on the reforms of German laws (Neumann 2020, 3).

In May 1926, he accepted an offer from the University of Heidelberg and later moved there. In 1932, he published *Legal Philosophy* (*Rechtsphilosophie*), which was later recognized as his primary work. Based on the Enabling Act (*Ermächtigungsgesetz*) of March 24, 1933, which permitted the cabinet, in effect, Adolf Hitler, to create laws, the Nazi government issued "The Law for the Restoration of the Professional Civil Service" (*Gesetz zur Wiederherstellung des Berufsbeamtentums*) on April 7, 1933. Radbruch was one of the first university professors to be dismissed under this law for political reasons. In 1945, he returned to the University of Heidelberg as the first dean of the Faculty of Law. Upon his death on November 23, 1949, in Heidelberg at the age of 71, he left many works. Among these, a short essay titled "Statutory Lawlessness and Supra-Statutory Law" (*Gesetzliches Unrecht und übergesetzliches Recht*) in 1946 became famous.

Radbruch gradually developed his theory of law. This development is roughly divided into two periods: before 1919 and in and after 1919. These periods are based on his construction of elements (or principles) of the idea and purposes of law. The theories that he developed during the first period surround two elements of the idea of law: purposefulness and legal certainty, as well as two possible purposes of law: individual and collective. During the second period after 1919, Radbruch elaborated a concept of law comprising three elements of the idea of law, of which two elements were used during the first period along with justice as equality. The three possible purposes also include the two purposes of the first period as well as the "trans-personal purpose" of law (Adachi 2006, 37). Regarding the second period, it is still debated whether Radbruch significantly changed his theory after the Nazi came into power in 1933.

Legal Philosophy (1932)

Following the fundamental doctrine of the South-West German Neo-Kantianism – especially those of Wilhelm Windelband, Heinrich Rickert, and Emil Lask – Radbruch starts *Legal Philosophy* by defining what he perceives as what is given (*Gegebenheit*). To the unreflecting mind, what is given seems to be a mixture of men, things (*Dinge*), and values. He indicates four types of attitudes with which we view what is given: value-blind, evaluating, value-relating, and value-conquering. The value-blind attitude, which is the attitude of natural science, views what is given without evaluation and distinguishes reality from value. The evaluating attitude, the attitude of the philosophy of values, attributes values to reality. The value-relating attitude, the attitude of cultural science, views reality that is related to values. The value-conquering attitude, the attitude of religion, affirms whatever exists. Radbruch relates legal philosophy to the evaluating attitude and legal science to the value-relating attitude (Radbruch 1950, 49–52).

According to Radbruch, legal philosophy is a science concerned with the value or idea of law. However, he does not distinguish value and idea from one another. In light of the South-Western Neo-Kantianism, he regards justice, the value attributed to relations between persons, as the normative idea of law. Referring to Aristotle, he considers equality as the essence of justice and distinguishes between two kinds of justice: commutative justice (*ausgleichende Gerechtigkeit*) and distributive justice (*austeilende Gerechtigkeit*). Commutative justice is valid between equal persons and demands absolute equality between goods or services. Distributive justice is valid between unequal persons and demands relative equality between persons. In essence, one should treat equal people equally and different people differently, according to their differences. Radbruch assumes that distributive justice is the prototype of justice because commutative justice presupposes an act of distributive justice. However, the idea of law cannot be fully explained by distributive justice. Distributive justice leaves two questions open. On the one hand, it does not say who is to be treated equally and unequally, and on the other hand, it only states the relation between different persons but not how to treat them (Radbruch 1950, 72–75). To answer these two questions, it is necessary to determine the purpose (*Zweck*) of law.

Radbruch indicates the traditional triad of ultimate values: ethical, logical, and aesthetical; the good, the true, and the beautiful. The ethical value can be attributed to individual and collective personalities and the logical and aesthetical values to human works. According to these "substrata," Radbruch distinguishes between three kinds of values: individual, collective, and work.

First, he argues that law can only serve the ethical value. That is, law can only serve individual and collective values directly by granting rights so that they can both comply with their moral duties (Radbruch 1950, 86). Second, law can serve the true and the beautiful indirectly if the true or the beautiful are the purpose of the actions of individual or collective personalities. Radbruch assumes that law cannot serve all these values equally, and therefore, it is necessary to decide which value should have priority over the other two values. In this way, he distinguishes between individualistic, transindividualistic, and wholly transpersonal views of law.

Based on his theory of value relativism, which was influenced by Max Weber (Radbruch 2003, 207), Radbruch argued that there would be no absolute answer to the question regarding which view we should take, but that every law should be at least purposeful. Therefore, "purposefulness" (*Zweckmäßigkeit,* suitability for a purpose) is the second element of the idea of law (Radbruch 1950, 90–97).

The third element of the idea of law is "legal certainty" (*Rechtssicherheit*). Because law is "the order of living together," it must be the order over disagreements between different views on law. Radbruch states that "if no one can determine what is just, somebody must lay down what is to be legal" (Radbruch 1950, 108, 117). It follows that legal certainty requires the law to be positive, which means that the enactment of law by an agent is necessary. It also follows that a judge is bound to consider all enacted laws valid. It is the professional duty of a judge to ask only what is legal, not if it is also just (Radbruch 1950, 119).

The value-relating attitude is derived from the historical method (*Geschichtswissenschaft*) developed by Heinrich Rickert. Radbruch interprets this method in a unique manner. According to his interpretation, culture encompasses all activities related to values: "[c]ulture is not the realization of value, but it is whatever has significance (*Bedeutung*) or meaning (*Sinn*) for the realization of values" (Radbruch 1950, 50). He considers law (*Recht*) as a cultural phenomenon and justice as the value or idea of law. He states that law is "the reality, the meaning of which is to serve justice" (Radbruch 1950, 75) or "an attempt at the realization of the idea of law" (Radbruch 1950, 147).

This concept of law leads Radbruch further into considering the science of law, which can be defined as the science concerned with positive legal order. To be more precise, in its interpretive practice, jurisprudence is less concerned with the will of the legislator (subjective theory of interpretation) and more with the objective meaning of laws and the legal order in light of a value-relating attitude (Radbruch 1950, 140–141). Furthermore, legal science is an "individualizing science." In a "teleological sense," law encompasses the totality of legal decisions. Its purpose is to decide particular cases. Legal scholars are interested in statute (*Gesetz*) not because it is a general statement but because it is "a summarization of many individual statements by way of an economy of thought" (Radbruch 1950, 150).

Radbruch's Formula (1946)

In his short essay published in 1946, which was based on the experience of the Nazi regime, Radbruch argued that the whole of National Socialist law was not a law in the sense of his concept. His argument was accepted in judgments over acts committed under the Nazi regime and was later called "Radbruch's Formula." This formula was also referred to in judgments on the Berlin Wall Snipers during the time of the German Democratic Republic until 1989.

This formula comprises two subformulas. The first one is often called the "intolerable formula" and the second one the "betraying (or disavowal) formula." According to the intolerable formula, an intolerably flawed law (*unrichtiges Recht*) is not valid. However, Radbruch argues that it is impossible to draw a distinct line between intolerably flawed laws and simply flawed laws. His emphasis lies in the second part of his formula – the betraying formula. It states the following:

> One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law," it lacks the very nature of law completely. For law, including positive law, cannot otherwise be defined as a system and an institution (*Satzung*) whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law. (Radbruch 2006, 7)

Radbruch gives three examples of National Socialist laws that lack the very nature of law, which are the kind of enactments through which the National Socialist Party claimed the whole of the state for itself, thereby flouting the principle that every political party represents only a part of the state, statutes treat human beings as subhuman and deny them human rights, and caveats

threaten with the same punishment, which is often death, thus disregarding the varying gravity of offenses (Radbruch 2006, 8). The first two cases are examples of laws that did not treat equals (human beings, political parties) equally, and the third case is an example of laws that did not treat different persons (i.e., offenses) according to their differences.

As Radbruch indicated in the betraying formula, this formula is based on the concept of law that Radbruch had proposed before 1945. However, it is unclear if there is room to interpret whether the aforementioned three examples of National Socialist laws are in place to serve justice in the sense of formal distributive justice. From the viewpoint of National Socialism, which is an extreme example of the transindividualistic view of law, the National Socialist Party would have been different from other parties, and "Aryan" would have been different from "non-Aryan"; therefore, different treatment of these groups was justified. All offenses against National Socialism would have been the same; therefore, equal treatment of these groups would be justified. It is at least fair to assume that there is a gap between Radbruch's concept of law and the betraying formula on the one side and its application to National Socialism laws on the other.

Discussion and Conclusion

Regarding Radbruch's formula, internal and external criticism can be distinguished from one another. The internal criticism is centered around the coherency between the formula and what Radbruch argued before 1945, while the external criticism is centered around the significance of the formula itself.

In *Legal Philosophy*, Radbruch claimed that judges are bound to consider all enacted law valid. However, in the essay "Statutory Lawlessness and Supra-Statutory Law," he claimed that a "whole portion of National Socialist law never attained the dignity of valid law." There seems to be a divergence between these claims, and this divergence gives reasons for some authors to theorize about Radbruch's "Damascus experience" (von Hippel 1951, 36) or "conversion" (Hart 1958, 616). However, it must be noted that in 1932, Radbruch argued that judges are bound by all enacted *laws*. This implies that judges are not bound by legislator's acts, which do not fall under Radbruch's concept of law. The latter view is concerned with the case that he discussed in the betraying formula of 1946, in which Radbruch claimed that the National Socialist law was "not merely 'flawed law,' it lacked the very nature of law completely." It follows from this that judges were not bound by those laws. Therefore, there is no divergence mentioned above.

The core of the question is whether the National Socialist law was a law that complied with Radbruch's concept of law in 1932. Here, if this law would not comply with Radbruch's conception, then it would never be legally valid. However, *Legal Philosophy* lacks an explicit argument for this question. One argument may be based on the principle of proportionality. Radbruch indicated three substrata: individual personalities, collective personalities, and human works, to which absolute values of the truth, the good, and the beautiful can be added. Even if the legislator and judges had a transindividualistic viewpoint and preferred a collective personality (e.g., the state or a particular party) to individual personalities and human works, the principle of proportionality could forbid them from burdening the latter two substrata unnecessarily or unreasonably. A reconstruction of Radbruch's ideas of law in the principle of proportionality framework – and therefore in the model of principle (Sieckmann 2009, 21) – is debatable.

Legal positivists can object to Radbruch's concept of law and his betraying formula on the claim that law and morality must be separate. Hart criticized Radbruch for considering the fact that a rule may be said to be valid as the answer to the final moral question: "Ought this rule of law to be obeyed?" (Hart 1958, 618). This question is concerned with the contemporary dispute between legal positivism in the sense of the claim for the necessary or contingent separation of law and morality on the one hand and non-positivism that affirms a necessary connection between law and morality on the other.

Radbruch's concept of law, that is, that law is "the reality, the meaning of which is to serve justice" or "an attempt at the realization of the idea of law" clearly supports non-positivism (Alexy 2021, 107; Dreier 2015, 228; Paulson 2015, 155). Robert Alexy, who furthers the theory that law necessarily claims to correctness and affirms non-positivism based on this thesis, also considers Radbruch as an early representative of this thesis (Alexy 2021, 109). Radbruch's theory is therefore still worthy of reference for the contemporary dispute between positivism and non-positivism.

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Radbruch, Gustav: His Formula and Concept of Law

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Introduction

Radbruch's formula is a radical critique of apologetic legal positivism and partially also of scientific legal positivism that closes its eyes to the true contents of law. Due to its positivist attitude, scientific legal positivism cannot be held responsible for the atrocities and abuses committed in the name of "law." The responsibility lies with those making decisions and carrying them out.[1] What may be objectionable regarding

[1] See Philipps 2007, 195 ff.: "Der Ausdruck 'Stoppbedingung', den man anstelle von 'Grundbedingung' verwenden kann, erinnert mich an etwas, das fast ein halbes Jahrhundert her ist. Ein Freund von mir und ich – wir waren Assistenten von Werner Maihofer – sind damals von Saarbrücken nach Mainz gefahren, um einen Vortrag von Hans Kelsen zu hören. An die Einzelheiten des Vortrags erinnere ich mich nicht mehr, wohl aber an eine Szene, die sich daran anschloss. Ein Student fragte Kelsen in deutlich kritischer Weise, ob der von ihm vertretene Positivismus nicht wieder zu einer Diktatur wie der vergangenen führen könne. Kelsen antwortete: 'Ob eine solche Diktatur wieder eintritt, das hängt von keiner Rechtstheorie ab, sei sie nun positivistisch oder nicht. Das hängt nur davon ab, ob Menschen, jetzt die Menschen Ihrer Generation, rechtzeitig 'Halt!' sagen.'"

scientific positivism is the fact that it does not explicitly tell how far its range extends. If it does say it – this is what Hart does and also Kelsen in his own way – then one has to focus on the quality of the positivist approach itself.

Radbruch and His Formula

From Value Relativism to the Idea of Law

Already at the beginning of his theoretical path, Gustav Radbruch (1878–1949) was aware "that it equally belongs to the concept of right law that it is positive as it is the duty of positive law to be right as to content" (Radbruch 1914: 163, 1999: 74). The basic characteristic of Radbruch's legal-philosophical thought was that, as a Neo-Kantian, he accepted value-theoretical relativism and advocated the standpoint that legal values cannot be "identified" (Germ. *erkennen*) but only "acknowledged" [(Germ. *bekennen*), Radbruch 1914: 22, 162, 1999: 15].[2]

An inevitable consequence of value relativism is that the sovereignty of the people and democracy are the central characteristics of the rule of law. The content of law has to be decided in a democratic, responsible, and tolerant way. In the paper *Der Relativismus in der Rechtsphilosophie* (*Relativism in Legal Philosophy*), special importance is assigned to tolerance: "Relativism is general tolerance – just not tolerance of intolerance" (Radbruch 1934: 21).

For Radbruch, law is a "reality whose meaning is to serve the legal value, the idea of law" (Radbruch 1999: 34).[3] The idea of law includes justice (in the meaning of the principle of equality), purposiveness (the idea of purpose), and legal certainty. The principle of equality (equal cases have to be treated equally and unequal cases have to be treated in an adequately different manner) has an absolute value but is only of a formal nature. Of a contentual nature is the idea of purpose, which is relative and extends over the three highest legal values, which, however, cannot be ranked. The starting point may be either man as individual, man as social being, or man as creator of cultural goods (Radbruch 1999: 54 ff.).[4] And finally, there is legal certainty, which in Radbruch's time before the Second World War had priority over justice (in the meaning of purposiveness). The circumstance that the highest legal value as regards content cannot be identified requires that this content be determined by the authorities with regard to legal certainty (Radbruch 1999: 73–75).

Radbruch's Formula

The experience with Nazism made Radbruch intensify his standpoints and, after the Second World War, also complement them concerning the relation between individual legal values. His well-known paper *Gesetzliches Unrecht und übergesetzliches Recht* (*Statutory Lawlessness and Supra-Statutory Law*, 1946) also contains this characteristic passage:

> The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. (Radbruch 1946: 107)[5]

Radbruch's formula has two derivations. The *formula of intolerability* (Germ. *Unerträglichkeitsformel*) states that when the conflict between statute and justice reaches an "intolerable degree," the statute as "flawed law" must yield to justice. The *formula of deniability* (Germ. *Verleugnungsformel*) applies when the statute

[2] See also Radbruch 1934: 17–22. Cf. Dreier 2015: 1–22.

[3] The English quotation is taken from Paulson 2006: 31 f.

[4] Cf. also Radbruch 1914: 101 ff.

[5] The English quotation is taken from Radbruch 2006: 7 f.

deliberately negates equality. In this case, the statute "is not merely 'flawed law,' it lacks completely the very nature of law" (Radbruch 1946: 107).[6] The formula of deniability is considerably less important because the intention of negation is very difficult to prove (see Kaufmann 1995: 81 ff.). If the negation is intolerable, we have the formula of intolerability again (Dreier 2011: 42 f.).[7]

Radbruch does not give into the temptation of revenge. Striving for decisions that are correct as to contents and for justice at the same time requires respect for legal certainty. "And we must rebuild a *Rechtsstaat*, a government of law," he states, "that serves as well as possible the ideas of both justice and legal certainty" (Radbruch 1946: 108).[8] Non-law must only be fought against legally (i.e., by legal means) and "with the smallest possible sacrifice of legal certainty" (Radbruch 1946: 107).[9]

Radbruch's Formula in the Practice of German Courts

Radbruch's formula of intolerability has often been invoked in the practice of German courts and the German Constitutional Court.[10] A very significant decision refers to the 11th Ordinance to the Citizenship Act (of 25 November 1941).[11] The Constitutional Court decided that the Ordinance was null and void from the very beginning. The Ordinance had fatal consequences for Jews and their assets. As an example, I cite just the first sentence of the first paragraph: "A Jew having a habitual residence abroad cannot be a German citizen." The second sentence of the same paragraph accepts the assumption that one already has a habitual residence when it can be established in view of the circumstances that he does not live there just temporarily. In the decision of the Constitutional Court, the first item of the pronouncement comprises just expressions from Radbruch:

> [L]egal provisions from the National Socialist period can be denied validity when they are so clearly in conflict with fundamental principles of justice that a judge who wished to apply them or to recognize their legal consequences would be handing down a judgment of non-law rather than of law.[12]

After the fall of the Berlin Wall, Radbruch's formula was also invoked in the decision of the Constitutional Court dealing with the shooting of fugitives trying to escape from GDR across the Berlin Wall (BVerfGE 95, 96 ff.). In the decision, it was repeatedly stated that Radbruch's formula was only applicable to cases of extreme non-law. It was a majority standpoint that the killings of fugitives at the Berlin Wall were serious non-law as well.[13] What has been contentious is the issue of justifying the reasons authorizing the use of firearms.[14] The dilemma is whether it can be said retroactively that the justifying reasons (Germ. *Rechtfertigungsgründe*) were non-law. The Constitutional Court of the GFR did not completely answer this question. The court allowed that the strict prohibition of the retroactivity of justifying reasons was not valid when the gravest criminal acts clearly showing contempt for

[6] The English quotation is taken from Radbruch 2006: 7.

[7] See also Saliger 1995: 5.

[8] The English quotation is taken from Radbruch 2006: 11.

[9] The English quotation is taken from Radbruch 2006: 8.

[10] See e.g. BVerfGE 3, 225 (232 ff.); 6, 132 (198 ff.); 6, 389 (414 ff.); 23, 98 (106) and 54, 53 (67 ff.).

[11] BVerfGE 23, 98 ff., especially 106 ff.

[12] The English quotation is taken from Paulson 2006: 27.

[13] See Kaufmann 1995: 82–83. See also Alexy 2003, 469–492, 486 f., who reasons in a very convincing manner: "Wenn aber alles zusammenkommt: ein ganzes und einziges Leben, das man führen soll, wie man nicht will, die Unmöglichkeit, sich mit Argumenten dagegen zu wehren, das Verbot, dem zu entfliehen, und der Todesschuss für den, der das nicht hinnimmt, dann kann an dem Urteil, dass extremes Unrecht geschah, als das Leben der zumeist jungen Menschen ausgelöscht wurde, die ihre Konzeption des guten und richtigen Lebens, ganz gleich wie immer diese aussah, selbst um den Preis ihres Todes realisieren wollten, kein Zweifel sein."

[14] Kaufmann 1995: 82: "The bone of contention is Art. 27 II 1 of the Border Act of GDR. The provision reads: 'The use of a firearm is justified when it may stop a directly imminent committance or continuance of a criminal act that, in view of the circumstances, is also considered a heavy criminal act.' This is the norm on the basis of which the killings at the Berlin Wall were considered justified and thereby non-punishable."

human rights that are generally accepted in the international community were concerned.[15]

Conclusion

Radbruch's formula of intolerability is a critique of self-sufficient statutory positivism. The content of the argument is not based on eternal and unchangeable natural law that positive law has to be in accordance with but on basic (human) rights as implemented in a particular historical period. In Radbruch's case, these are the basic (human) rights that were established together with the modern state. These rights are summarized in the "so-called declarations of human and civil rights" and are so firmly anchored that "only the dogmatic sceptic could still entertain doubts about some of them" (Radbruch 1945: 79).[16]

Radbruch's formula of intolerability primarily functions so as to falsify a statutory law which is claimed to be law. Thus, the argument of (non-) law does not claim that something is law but rather claims that something is *not* law. Kaufmann declares in a well-founded way that "our knowledge is much more reliable at falsifying than at verifying" (Kaufmann 1995: 83). But one has to be careful also in falsifying. Legal certainty requires that only that is falsified which really strikes the eye, which is "intolerable" (Radbruch), which is a "crude disturbance" because it is "a conspicuous, obvious, severe case of inhumanity" (Pitamic[17]) or which is "extreme non-law" (Alexy[18]).

[15] See pt. 3 of the operative part of BVerfGE 95, 96. See also the literature for and against the allowability of retroactivity (for justifying reasons) cited by Kaufmann 1995: 83, fn. 16.

[16] See also Radbruch 1948: 121–227, 147 f.: "Die völlige Leugnung der Menschenrechte entweder vom überindividualistischen Standpunkt ('Du bist nichts, Dein Volk ist alles') oder vom transpersonalen Standpunkt ('Eine Statue des Phidias wiegt alles Elend der Millionen antiker Sklaven auf') aber ist absolut unrichtiges Recht."

[17] See Pitamic 1960: 214 f., and Pitamic 1956: 199. Cf. Pavčnik 2013: 105–129.

[18] Alexy 2009: 159 f.: "Extremes Unrecht ist kein Recht."

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▶ Positive Law and Natural Law
▶ Rechtsstaat
▶ Rule of Law: Historical Perspectives

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Radin, Margaret Jane

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Introduction Margaret Jane Radin (b. 1941–) is a legal theorist and pragmatist whose scholarship focuses on investigating the limits of propertization and contractualization, which, in both cases, leads to considerations of market inalienability. Beyond her work in property law and contract law, Radin's oeuvre includes articles addressing punishment, feminism, e-commerce, pragmatism, and more. She has published prolifically, boasting more than 50 articles and book chapters, authoring three books, co-authoring a collection of case studies, and co-editing two collections of essays. She is best known for her groundbreaking work on commodification, with two of her first essays on the topic, "Market-Inalienability" (1987) and "Property and Personhood" (1982), serving as an introduction to the topic within legal scholarship. Her approach to the law has always been dynamic, nonideal, and philosophical.

Propertization In Radin's first book, *Reinterpreting Property* (1993), based on a collection of previously authored articles, she identifies herself as a pragmatist. She claims this moniker having always been focused on the nonideal nature of property practices and institutions, i.e., on the "situated," and finds it important to connect theory with specific legal practices. As a personality theorist of property, i.e., one who contends that ownership is bound up with self-constitution or personhood, and with her focus on pragmatism and nonideal theory, a primary theme in this work is the connection between property and personhood.

Her particular analysis focuses on why some property has special significance. In doing so, she introduces a distinction between the "personal," property people are attached to as persons, and the "fungible," property people are only attached to as a source of money (1993, p. 4). While she acknowledges that this dichotomy is not exhaustive of all types of property, she maintains its significance for determining the *relationship* between individuals and property. Furthermore, she maintains that some property has special significance (e.g., a wedding ring), even though it may be an object easily severable from the person.

In line with her introduction of personal and fungible property, she also acknowledges personal and fungible rights. She argues that "property is a contested concept, that its content depends upon culture, that it evolves, [and] that it is different for personal and fungible rights" (1993, p. 22). Some hold (e.g., Richard Posner) that all of an individual's rights are property rights, making consent the only morally salient factor for divesting of one's rights. Radin, however, maintains that personal rights are inalienable rights and, therefore, some objects and/or rights cannot be given away, even with one's consent.

Commodification

Many of the ideas Radin sets forth in *Reinterpreting Property* (1993), in particular the connection between property and personhood and the concept of (in)alienability, serve as a foundation for her subsequent work on commodification. In her second book, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (1996), Radin formalizes her legal and moral understandings of commodification and pays particular attention to the questions: "what can properly be bought and sold?" and "what is the appropriate *relationship* between things and the market?" The significance of the book's title is a reference to those commodities,

like babies or body parts (e.g., organs, semen), whose commodification, according to some, degrades or inhibits our understanding of those "objects" in terms of the personal, consequently forestalling human flourishing.

While many interpret Radin as being anti-commodification, she does not find all forms of commodification morally problematic. She advances an understanding of commodification that allows for "incomplete commodification," i.e., the position that one can understand something simultaneously as commodified and non-commodified. This approach sets forth a normative theory about the *appropriate* social role of the market. For example, one may possess a necklace from the late 1800s, passed down as a family heirloom. On Radin's account of incomplete commodification, one may simultaneously recognize that the necklace is "priceless" (i.e., not commodifiable) due to its personal significance, yet at the same time have it appraised for one's insurance policy, i.e., assigning it a price and turning it into a commodity. While Radin maintains this position, she also asserts that when it comes to contested commodities, i.e., commodities that make us question, morally, the process and result of commodification, there is no singular theory able to address all cases. As such, she is a pluralist. Furthermore, in those cases in which commodification is in fact immoral, therefore degrading the person and inhibiting their human flourishing, Radin recognizes this limit as a form of market inalienability. That is, whatever "object" it is that cannot be appropriately commodified ought not to be subjected to the market or treated as fungible.

Contractualization

Radin's third book, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2013), is an engaging analysis of the limits of contractualization and, furthermore, an argument in favor of regarding some rights as market inalienable and, therefore, non-commodifiable and properly safeguarded by the polity. The primary questions driving Radin's analyses are: (1) "should rights be considered property to be owned and disposed of?" and (2) "are boilerplate terms properly considered contracts?"

Boilerplate terms typically include arbitration clauses, which waive one's right to a jury trial; choice of forum clauses, which limit where one can bring suit (typically to the advantage of the contract drafter); and/or exculpatory clauses, which relieve the company of liability even in cases of neglect. These types of clauses, according to Radin, essentially amount to companies constructing their own legal world where consumers have a restricted set of rights that would otherwise be guaranteed to them. As such, boilerplate bastardizes the traditional basis of contracts, i.e., voluntary agreement, by forcing individuals to give up their rights in order to receive a product or service. This causes normative degradation of consent as one does not freely or, in some cases, knowingly consent to the terms set forth in the contract (e.g., the terms for a product become available only after its purchase). It also causes democratic degradation because, in such a world, the system of contracts deletes those rights that are guaranteed through the democratic process at the will of the company or firm.

The common justification for the "mass-market rights deletion" (2013) caused by boilerplate is that it allows consumers to purchase commodities at a lower cost (because the company saves on legal fees and settlements). Consequently, as Radin contends, boilerplate commodifies those basic rights that one is traditionally granted by the polity when in fact such rights should be market inalienable. If these rights are not protected and are subject to commodification, it will lead to "the privatization of the legal infrastructure of contracts," and it will "undermin[e] the infrastructure, [i.e., background assumptions,] that makes private law function" (2017, 372). Viewed in this way, it is not the lack of consent that is problematic, but rather the prior concern that in allowing all rights to be waived it will lead us to become a society that does not observe the rule of law. Consequently, Radin concludes, basic rights should remain market inalienable, i.e., they should never be waived or commodified.

Conclusion

When considering Radin's oeuvre as a whole, the outline of a sustained argument becomes apparent. Radin's work is concentrated within two areas of private law, contract and property, and seeks to delineate their limits through philosophical and legal analyses. In her own words, she is "concerned primarily with property and contract, their limits as between individuals and firms, and ultimately their relationship to the background state and the preservation of civil society and the rule of law" (2017, 342). Her analysis of boilerplate culminates here; however, her earlier work on property and commodification provides the foundation for her to make such a claim. Here earlier analyses of commodification and the market alienability of property and basic rights are similarly structured and engage similar legal and moral issues. The brilliance of Radin's work is that she constructs a framework for analyzing issues within private law while also establishing the requisite and groundbreaking theoretical resources to do so.

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Rawls, John

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Introduction

From the time John Rawls (1921–2002) became an adult to his retirement from his university chair (in 1991), an ongoing and demanding challenge – physical as well as intellectual – threatened Western political institutions. The theoretical side of this challenge was advanced by Fascism/Nazism, on the one hand, and by Marxism, on the other. Although these theoretical challenges were significantly different from one another, they had certain points of agreement: They concurred in a deep contempt of parliamentary government and an intolerance for political controversy (disdaining the idea of a "loyal opposition" or any acceptable difference of opinion from the official line); and they had no commitment to or respect for the idea of the rights, human or constitutional, of individuals.

These challenges are the wellspring of Rawls's political thinking. He believed that they were not being effectively met by utilitarianism, the dominant political and moral theory in the Anglo-American world at the time he began his reflections. In the preface to the 1999 revised edition of his *Theory of Justice* (originally published in 1971), Rawls says that he "wanted to work out a conception of justice that provides a reasonably systematic alternative to utilitarianism." He continues:

> The primary reason for wanting to find such an alternative is the weakness . . . of utilitarian doctrine as a basis for the institutions of constitutional democracy. In particular, I do not believe that utilitarianism can provide a satisfactory account of the basic rights and liberties of citizens as free and equal persons, a requirement of absolutely first importance for an account of democratic institutions. (Theory of Justice 1971 (rev. edn.), xi–xii)

These few remarks serve to locate Rawls within the tradition of modern political thought. What is not so clear, however, is the importance of his theory in the 50 or so years since the original publication of *Theory of Justice*. Quite simply put, John Rawls was the dominant philosophical theorist of justice in the last 30 years of the twentieth century (as regarding both political justice and economic justice), certainly in the English-speaking world and in much of western Europe.

The present entry will first take up the main arguments for Rawls's ideas about justice (as embodied in two main principles); then it will discuss the "original position," as Rawls called it. This is a device for structuring these arguments and for determining a preference for Rawls's candidate principles of justice over utilitarian alternatives. After that, I will lay out the lines of Rawls's "new theory" of justice – the one associated with his second book, *Political Liberalism* (Political Liberalism 1993, 1996) – and to indicate how Rawls thought this new theory solved the main problem he had seen in his own earlier theory of justice.

The First Principle: Equal Basic Rights and Liberties

Although Rawls intended his *Theory of Justice* to provide a "convincing account of basic rights and liberties, and of their priority," Rawls admits he did not successfully achieve this objective until 10 or so years later (Theory of Justice 1971 (rev. edn.), xii). Accordingly, I shall draw on Rawls's 1980 Dewey Lectures and his 1982 Tanner Lecture as providing the best account of, and arguments for, his first principle of justice, the principle of equal basic liberties.

Rawls claims (in these lectures) that for every individual citizen there are two fundamental capacities or powers and, correspondingly, two "higher-order interests" in the realization of those capacities. Thus each person has, over that person's entire life, (i) an interest in being able to formulate, revise, and live according to some particular conception of the good, and (ii) an interest in exercising his or her "sense of justice" and being motivated by it, providing others do so as well.

The notion of the two powers of the citizen is understood to include the idea that in a democratic society citizens are both equal and free. Here, each person is conceived as having the two powers at a sufficient level to be able to be a fully contributing member of society over that person's entire adult life (or, at least, the working years). In having these powers at some such level, all the citizens are on the same footing. This, then, is the grounding idea behind Rawls's notion that the citizens are equal: They are equal in having reached what might be called this same *minimum* threshold level (see Theory of Justice 1971 (rev. edn.), sect. 77, and Political Liberalism 1993, 19, 74, 79–80).

Rawls uses the idea of the two powers and the corresponding interests of the citizen to ground his elaboration of the concrete basic liberties that each citizen is to have equally. He identifies which liberties and rights – which protected ways of acting or of not being injured – should be among the basic constitutional rights, or among the most weighty rights, by considering what he calls "two fundamental cases." Thus, those liberties that are part of or a means of achieving the *first* interest (the conception of the good interest) constitute the first of these cases, and those that are a part of or a means of achieving the *second* (the sense of justice interest) constitute the second of the "two fundamental cases."

By way of illustration, Rawls offers liberty of conscience and freedom of personal association as examples of liberties justified under the *first* interest (the conception of the good interest). The argument here is simply that people would not be able to have or live according to their own particular determinate conception of the good, whatever it was, and in particular would not be able to *revise* any such conception, without liberty of conscience or freedom of personal association. He offers freedom of political speech and of assembly as examples under the *second* interest (the sense of justice interest). Rawls conceives this interest as being exercised in a democratic institutional context. The main argument, then, is that people could not live cooperatively with fellow citizens, on terms of equality and mutual

respect, under a unified and stable scheme of *democratic* political institutions without having a practice of free political speech in place there. And the same could be said about freedom of political assembly.

The basic liberties constitute, in effect, a determinate and well-defined set. Most of the liberties on this list would be justified in Rawls's schema as coming under either one or the other of the "two fundamental cases." Or they could be justified as falling under *both cases* (as all four of the liberties named in the previous paragraph presumably could be).

Finally, some liberties (or protections from injury) fall under neither case directly but are, nonetheless, necessary for the proper and adequate exercise of those that do so fall. For example, the due-process rights to such things as fair trial or the rights to bodily integrity (rights that specify not being assaulted and possibly maimed, not being tortured, and so on) are justified as necessary to the full flourishing of the liberties justified in the "two fundamental cases."

For Rawls, then, *all* the liberties (and noninjuries) specified so far should be counted among the basic constitutional rights. These basic liberties and rights, like the conception of the constitution of which they are a part, are not founded "on basic (or natural) rights." Rather, Rawls says, the "foundation is in the conceptions of the person and of social cooperation most likely to be congenial to the public political culture of a modern democratic society" (Political Liberalism 1993, 339).

Thus, we arrive at Rawls's first principle of justice: "Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties [e.g. the right to vote and to campaign], and only those liberties, are to be guaranteed their fair value" (Political Liberalism 1993, 5).

The Second Principle: Distributive Economic Justice

Unlike the case with his first principle, Rawls thought that the account and formulation of his *second* principle of justice, as found in *A Theory of Justice* (1971), was substantially sound. So I shall confine myself to what he said there about economic justice and to elaborations that he subsequently made.

Rawls's account begins with the fact that people have different natural endowments and are born into and grow up in different social circumstances. No one can be said to be responsible for these factors in their *own* case. Nonetheless, factors such as natural endowment and initial social circumstance are not negligible; they powerfully affect a person's life prospects, advantageously for some and disadvantageously for others. Indeed, they are among the main sources of inequality between people.

Rawls's argument sets out from this point. He first develops the idea of "democratic" equality of opportunity – conceived as (1) the taking of remedial steps, conscientiously, to reduce the *initial* differential in advantages that accrues to individuals, arbitrarily, from their starting points in life. State-supported primary and secondary education (of good quality and at no cost to the individual student) would be an example of such a step. The leading idea here is to try to make people somewhat less unequal at the point where they actually enter into adult life, as citizens and as workers, and to make sure that everyone there, so far as possible, has the basic capabilities required to be contributing members of society.

Rawls believes that an absolute equality of opportunity with respect to such *starting points* can never be achieved. And it is precisely where fundamental equality in starting points is not fully and strictly achieved, or cannot be, that concern for reducing the inequality of *resultant outcomes* is in order. Thus, Rawls introduces a further idea to complement equality of opportunity (point 1 above) and to complete the line of argument. Rawls calls this new idea the "difference principle," which adds two further remedial steps to the picture: It adds (2) the principle of everyone's continual benefit, which in turn is constrained by the idea that, where there are several mutually improving (that is, optimally efficient) options available, (3) we should choose that option (choose that optimally efficient point) which,

among all such points, most reduces the inequality in outcomes between the topmost and bottommost groups. The object of this three-step process is to reduce, ideally to *minimize*, the gap between persons by taking account of both starting points and end results.

The difference principle can be represented, practically speaking, as proceeding through a series of stages: first satisfy standards of mutual benefit (and of efficiency) and then pay special attention to raising the material prospects of those less well-off (as measured in terms of average income prospects over a 10-year period, say). This repeated pattern continues at each stage until we reach a point at which no further mutually improving moves is possible; at this point, ideally, those least well-off (the bottom 20%, say) have here their greatest benefit (without making any group worse off in the process).

We must first assume here, as does Rawls, that we start from a hypothetical point of strict equality between people. This "origin point" does not, of course, describe the way things actually are; rather, it is used merely to orient and clarify our thinking. And, second, we must assume that so long as the benefit of the least well-off group could *possibly* be higher, that of the other groups could also be higher, right on up to the optimum or goal point. The object of this second assumption is to identify a zone or context in which the procedure (the repeated pattern described earlier) can operate, with full effect, to achieve its intended end.

We have completed our sketch of Rawls's argument for his second principle of justice, the principle of distributive economic justice, and have given some idea of how it might be put into practice. It remains now only to state that principle succinctly: "Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society" (Political Liberalism 1993, 6; also Theory of Justice 1971 (rev. edn), 72, 266).

Rawls has identified two principles as central to political liberalism – the principle of equal basic rights and liberties, and a principle of economic justice, which stresses equality of opportunity, mutual benefit, and egalitarianism. What's distinctive about his main arguments for these two principles is that Rawls represents them as taking place ultimately in an ideal arena for decision-making, which he calls the "original position."

The Original Position

Rawls's contractarian method of justification is very complex. I shall be able to mention only a few of its main features here. One feature that is often emphasized – and that Rawls continued to include even in his later writings – is that the "parties" to the contract are placed (in what he calls the "original position") behind a thick veil of ignorance. Here, they are instructed in their subsequent reasoning to ignore their own *particular* traits (traits that distinguish them from most or, at least, many other people), to be unaware of (or to ignore) their actual place in society, to be unaware of their society's place in history or in institutional evolution, and so on. The point of the metaphor of the veil is to indicate that the parties should remove sources of bias or irrelevance from their deliberations.

In simplest terms, the original position is an arena for deliberation and decision about principles of justice; its various features are meant to frame and constrain the debate about such principles. "The idea of the original position is to set up a fair procedure so that any principles agreed to will be just" (Theory of Justice 1971 (rev. edn), 118).

Rawls envisions two main roles for the original position. In its first role, the original position is to serve as a screening device for the candidate principles, that is, principles taken from a short list of main, historically available theories of justice – such as Plato's republic, various versions of utilitarianism, and so on. Here, the features of the original position serve as a checklist against which the candidate principles are to be measured and to be assessed.

Let me illustrate the force of this first role (screening) with an example. An avowedly racist

principle would probably not pass through the filter afforded by the features of the original position. If people contemplated living in a multiracial society under that principle, it is clear that some of them would be seriously disadvantaged, indeed deeply harmed, by its operation. Everyone who took on, by hypothesis, the role of these injured parties would have to veto the racist principle; thus, it could not meet the requirement of unanimous agreement. Since anyone (given the veil of ignorance) could be in such a role, the racist principle would be decisively ruled out. For similar reasons, it is likely that caste system principles or slavery principles would not survive the initial screening either.

In short, some principles (for example, moral egoism or Plato's republic, with its endorsement of slavery) are going to be filtered out by the various features of the original position, and removed from any further consideration. But other principles, the various versions of utilitarianism, for example, might remain in contention after being examined under the conditions set by publicity, unanimity, the veil of ignorance, and so on. They have passed through the initial screening. This means simply that these principles can be formulated and argued for under the constraints of the original position. Unlike the discredited principles, these principles will have purchase there.

Where persons have an equal status (as parties to the deliberation) and each has equal claim to shares of primary goods (including such things as liberties, opportunities, income, and wealth), the parties – as representing such persons in the original position – would prefer a mutually beneficial outcome. And they would prefer one that *reduced* the difference in income between the top-most and bottom-most group over one that increased that inequality. To do otherwise would be to opt for a surplus of inequality, that is, an inequality without compensating benefits. Such a choice would unnecessarily perpetuate or increase inequality; any such choice would be unreasonable and unjustifiable. The idea is that, even after mutual benefit is assured, one should continue to use egalitarianism as a standing constraint on beneficial options, functioning often as a tiebreaker of sorts. Here, among available options, that efficient and mutually beneficial outcome which reduces inequality is to be preferred.

In sum, I think Rawls's straightforward arguments for each of his two principles would fare well in the original position construct. These arguments could be formulated and would hold up, under the constraints identified there. They would pass the screening test of the original position.

This brings us to the second main function of the original position: to *rank* the remaining eligible candidates, after the preliminary screening has been accomplished (See Theory of Justice 1971 (rev. edn.), 16 for the point about ranking). In performing this second role, of ranking, the parties rely on the balance of reasons (determined in light of assessments that could be reached in the original position) to decide which of the remaining eligible candidates is best. If they can do so unanimously, there should be no real doubt about *that* particular ranking.

Here, we encounter the most memorable argument from *A Theory of Justice*, the famous maximin argument (The Original Position). This argument actually presupposes and builds on the arguments allowed and the assessments reached, in the screening process, for the various candidate principles there.

We can put the line of reasoning in the maximin argument quickly and intuitively, as follows. Behind the veil of ignorance and given the high degree of uncertainty there, each individual thinks that, since they do not know how or where they might end up, things should be set up in the principles they select, each person having a veto, so that the worst controllable outcome for *any* one of them is the best of the available set of worst outcomes. This line of reasoning, which has its home in rational-choice theory, is sometimes called *maximin* reasoning, that is, reasoning literally on the principle of maximizing the minimum.

The outcomes, which the maximin argument ranges over, are in fact generated by the main competing principles under review – by justice as fairness (Rawls's own theory), on the one hand, and by its strongest competitor, the principle of maximizing average utility, on the other. It is these particular outcomes, sets of characteristic

outcomes as determined by these competing principles, which the maximin argument then chooses between.

Rawls's view is that utilitarians and others, especially in the setting afforded by the original position, would allow the sacrifice or the serious weakening of some of the demands of justice as fairness, or would do so for some people at least. Here, the argument focuses, in particular, on the loss of equal basic liberties of the sort enshrined in the *first* principle (see Theory of Justice 1971 (rev. edn), 135, 137; also, xiv and Sect. 49). And it is this fact that marks the primary ground, in Rawls's view, for *preferring* the principles of justice as fairness over their presumed closest competitor. Thus, the maximin test provides what, in the context of the original position, is a compelling reason for ranking the two principles, as a set, above the principle of average utility.

Rawls later came to see that the line he had taken here engendered no real argument for the second principle as such, certainly not for the difference principle. Thus, he later suggested that a two-stage original position argument, based on two distinct comparisons, was needed to supplement the initial original position argument of chapter 3 in *Theory of Justice* (see Theory of Justice 1971 (rev. edn), 1999 preface, at p. xiv).

Rawls developed this two-stage argument in *Justice as Fairness* (hereafter Justice as Fairness 2001), part III. The first stage (the "first fundamental comparison," as he called it) is like the one we have just been considering. But the second "fundamental comparison" is considerably different. Here, Rawls compares his two principles with what he calls a *mixed* conception of justice. This conception includes both the equal basic liberties and the notion of fair equality of opportunity, in each case exactly matching the language of Rawls's two principles. But in place of the difference principle, the mixed conception substitutes the principle of maximizing average utility with respect to such matters as economic and social positions, income, and wealth. Finally, Rawls constrains the operation of average utility here by requiring a baseline, in what he calls "a social minimum," below which no person is to be allowed to fall.

Clearly, this mixed theory is *not* a utilitarian theory, but it includes a utilitarian feature. The mixed conception allows for a comparison of average utility directly with the difference principle. Even more important, the mixed principle (with its standing commitment both to equal basic liberties and to fair equality of opportunity) is *impervious* to the maximin argument that had sunk the principle of maximizing average utility in the "first fundamental comparison." And the social minimum baseline makes it impossible for any person to fall (under average utility) to an *intolerable* economic level (Justice as Fairness 2001, 98).

The crucial line Rawls now takes is to argue that the difference principle is distinct from the idea of a social minimum and that it sets a *higher* standard of well-being for the least well-off group (say, the bottom 20% of wage earners) than does the social minimum. But how it sets that higher standard is the heart of the matter. The difference principle requires that as some working groups – some income groups – improve their prospects, others do so as well; certainly, none are to become worse off. Thus, in a relatively affluent society (of the sort we find in a typically complex contemporary economy), the least well-off groups (people who work but are relatively poor) can expect that they will rise above the floor set by the notion of a social minimum. This is so because the difference principle is driven, not by any idea of a minimum or floor, but by the idea of *reciprocity*, the ideal of continual mutual benefit as constrained by egalitarianism (see Political Liberalism 1993, 16–17).

Of course, there have been many criticisms of Rawls's book; it has been widely discussed, both favorably and unfavorably. Over the years, Rawls responded to many of the criticisms. Indeed, he appears to have become dissatisfied with the shape his theory had taken in 1971 and had retained for about a decade afterward. He began to rethink that theory. Beginning with his Dewey Lectures in 1980, he began to reconfigure his entire justificatory account. A number of important changes have occurred as he has moved further from positions he had occupied in *A Theory of Justice*.

Rawls's New Theory

In his more recent writings, Rawls assumes that there is and is going to be, in a continuing free and open society, an irreducible pluralism of reasonable comprehensive moral and religious and philosophical doctrines. In these writings, then, he seems especially concerned with the problem of assuring political stability in a pluralist or multicultural social environment. Rawls gives this current preoccupation – and his new theory of justice – its most complete elaboration in his second book, *Political Liberalism*.

Perhaps, the most significant feature of this book is that Rawls takes the public political culture of a contemporary democratic society to be the deep background of the entire theory. Rawls says that the leading ideas out of which the political conception of justice is to be constructed and by reference to which it is to be justified are implicit in that culture (Political Liberalism 1993, 13, 15, 175, 223).

In the new account, the principles of justice that emerge as preferred (from among a small set of historically available candidate principles) are the principles that are best supported by the background *democratic* ideas. The preferred principles are the principles most appropriate to the basic ideas there (ideas such as the two moral powers and the citizens' corresponding fundamental interests, and the importance of mutual benefit as constrained by egalitarian considerations). Rawls thinks that the best-supported principles will be his own two principles of justice, understood now as *political* principles. Or, to be precise, he thinks the preferred set will actually be a "family" of principles, among which are included the two he emphasized.

The members of this "family" have three main features in common. (1) Certain familiar rights, liberties, and opportunities are to be singled out and specified and maintained; (2) a certain priority is to be given to these rights, etc., over against "the claims of the general good [understood aggregatively] and of perfectionist values"; (3) measures to help citizens make effective use of these rights, etc., by having an adequate base of income and wealth, are to be set in place.

In Rawls's account, the justification of the political conception proceeds in two main stages (see Political Liberalism 1993, 64–65, 140–141, 385–388). The first stage is the one I have focused on up to now. This first line of justification (justification from democratic principles in a democratic context) is said by Rawls to be "freestanding," in the sense that it draws only on these background democratic ideas, presumably already shared to a large degree by fellow citizens.

What Rawls calls overlapping consensus is a second stage of political justification in which the already established "freestanding" justification is endorsed from the respective points of view of a variety of comprehensive ethical doctrines, such as Kant's moral theory or Mill's utilitarianism, and religious doctrines, such as contemporary Catholic Christianity. On this view, the political conception (as supported by freestanding justification) is a common focal point – a "module . . . that fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it" (Political Liberalism 1993, 12; see also pp. 145, 387).

Overlapping Consensus

Is overlapping consensus a utopian notion (as some have claimed)? Rawls attempts to deal with this issue by showing how it is possible to move from a mere political modus vivendi to a consensus over a detailed set of constitutional essentials, the features of which "all citizens may reasonably be expected to endorse'" (Political Liberalism 1993, 217).

The sort of political consensus Rawls had in view would come about as the agreed-upon area of rights and practices widens; it would come about as the ground under that area deepens, as convincing political reasons for having such arrangements, reasons that go beyond the mere utility of a modus vivendi, gain acceptance and are taken on board. And it would come about as a public political conception of justice, with these deeper reasons as justification and with greater focus and definition, which gained widespread support.

An overlapping consensus would arise where the great bulk of citizens could affirm, upon reflection and given experience, that the governing principles and institutional essentials of the existing public political conception were compatible (or could be made so) with the various comprehensive moral and religious and philosophical doctrines that they individually held, in each of their respective cases (see Political Liberalism 1993, 160; also pp. 187–8, 210). Such affirmation is not far-fetched, where we assume that the existing support for a given public political conception, or close-knit family of such conceptions, is already widespread and long-lived. The general run of citizens in that society do not think the perspectives they have individually are *in*compatible, in general or in principle, with the institutional essentials there.

Here, it is not so much that various comprehensive doctrines (understood as "isms") converge on a single public political conception of justice; rather, it is that lots of citizens, coming from diverse perspectives, do. In this latter case, we would, nonetheless, have an overlapping consensus, of a quite definite and interesting sort. Such an overlapping consensus would, of course, occur gradually; it would take time to gel (see Political Liberalism 1993, 160 n. 25). None of this shows that an overlapping consensus *will* occur: Nothing is guaranteed. It shows merely that such a consensus plausibly could occur, in the way Rawls envisioned (see Political Liberalism 1993, xlvii–xlviii). Its occurring in that way is not utopian.

The *shared* public political conception we are concerned with, given its starting point in democratic political culture, would focus on a "family" of liberal conceptions. Any family of liberal conceptions that had the Rawlsian two principles at its continuing center would exhibit a high degree of internal stability; such an order would be less likely to be overturned by divisive issues (see Political Liberalism 1993, 167–168). But if a democratic political conception is stable in the way indicated, one might well wonder what more an overlapping consensus of the various competing moral and religious doctrines alive at the same time could add to that rather high degree of stability.

What overlapping consensus provides is not political stability per se, but rather "stability for the right reasons" (see Political Liberalism 1993, xxxix, xliii, 388 n. 21, 390, 391, 394; and "The Idea of Public Reason Revisited" (1997), as reprinted in Collected Papers 1999, at p. 589). By this, Rawls meant stability for the right *moral* reasons. A public political conception, simply on its own, is always a consensus within and from public reasons; in the case at hand, the reasons are appropriate to a liberal democratic society. As such, it lacks a certain dimension: It lacks deep moral credentials of the sort afforded by a comprehensive critical moral theory. Thus, one goal, in Rawls's view, of critical moral justification would be to give freestanding political justification the particular kind of moral grounding that it otherwise lacks.

The only form a full justification could take in a morally and religiously pluralistic society and still have authority outside a narrow circle of partisan sentiment would be as an overlapping consensus – with the public political conception as focus – of these various ethical and religious doctrines. If it could be established as a matter of public fact (based on settled judgments of compatibility by the great bulk of citizens) that various of the main present-day comprehensive moral doctrines and religious faiths all endorsed, each for its own reasons, one and the same public political conception of justice, then that particular conception, a freestanding one, in Rawls's view, would be fully and publicly accredited by the standards of these various comprehensive doctrines. Thus, even in the face of a continuing and very likely ineradicable pluralism, we would have achieved stability, as provided by a public political conception, *and* for the right reasons (as provided by an overlapping consensus, and not a mere compromise, among the various relevant critical moral doctrines).

It was this problem, of moral justification under conditions of pluralism, which *A Theory of Justice* had conspicuously failed to solve. Rawls assumed in *A Theory of Justice* that, since his preferred principles of justice came out on top in the contest with utilitarianism and with perfectionist values, values such as Platonic aristocracy

or Nietzschean elitism, these principles would in effect be endorsed by everybody and for the *same* reasons. Thus, these principles would become the moral theory or part of the moral theory of any well-ordered society whose principles of justice were constructed in the original position behind the veil of ignorance, subject to the constraints of publicity and unanimity. Ultimately, then, it is this almost universal convergence upon a *single* justifying moral theory that underwrites Rawls's account of stability in *A Theory of Justice*.

Such uniform acceptance, Rawls now says, is inconsistent with the idea that a pluralism of reasonable comprehensive moral and religious doctrines, at least in any modern political society committed to free and open discussion, is here to stay (see Political Liberalism 1993, xvii–xx, xxvi, xlii, 4, 36–37, 129, 144). And overlapping consensus, one of Rawls's new ideas in *Political Liberalism*, was called upon to repair this self-professed defect.

The job of overlapping consensus is to provide an *independent,* critical, moral grounding for the public political conception itself and for the inherent stability afforded by that conception. Overlapping consensus (whatever marginal increase in stability it might afford) is directed by Rawls primarily at the issue, not of stability, but of critical moral justification.

Conclusion and Summing Up

Over time, Rawls became dissatisfied with the approach he had initially taken in *Theory of Justice,* and he began to reconfigure his theory in new and interesting ways. He moved the focus away from his own two principles and toward a "family" of liberal principles (which included his two principles as one possible option). And he developed a background theory for justifying this family of principles that did not require people to come to any sort of unanimous foundational agreement. Rather, the issue of justification could be approached from a number of different angles, and this would work out all right, he argued, if a sufficient overlapping consensus developed over time.

This new theory (as developed in *Political Liberalism)* solved the main problem Rawls had seen in his own earlier theory of justice. It did so by taking account of the "fact" that there is very probably going to be an irreducible and continuing pluralism of ultimate moral and religious beliefs.

In his *Law of Peoples* (Law of Peoples 1999), Rawls then took this new theory (which he calls political liberalism) and tried to outline a constructive place for it in the international order that emerged after the Second World War. One notable feature of this emerging order is its modification of the traditional international relations' view of states. A number of restrictions were imposed on the sovereignty previously granted to states. Among the most important of these constraints are the prohibition on waging war except in self-defense (or in collective defense or even sometimes in the international enforcement of human rights), the claim that certain standards (standards of *jus in bello*) are to prevail in the conduct of wars, the idea that human rights are to be respected internally, and finally the notion of a duty to aid deeply impoverished or "burdened" societies.

Cross-References

► Rawls, John
► Rights: General

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Rawls, John: Introduction to Rawls's Project

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John Rawls: Introduction to Rawls's Project

This entry introduces John Rawls and his theory of justice. The main components of Rawls's theory are discussed in fuller detail in the additional entries listed at the end of this introductory entry.

The Basic Question

"Justice is the first virtue of social institutions, as truth is of systems of thought." So begins John Rawls's highly influential *A Theory of Justice* (1971, revised 1999). Justice is not the only virtue of social institutions – efficiency and stability, for example, matter too. But as virtues, these depend on justice to a degree that justice does not in turn depend on them. For example, under anything like normal conditions, social stability achieved through deception or manipulation is no virtue at all.

While justice is the first virtue of social institutions, "the basic structure of society is the first subject of justice." The basic social structure is not the only subject of justice – interpersonal and international relations are subjects of justice too. But as subjects of justice, these presuppose some view of the basic social structure. For example, under anything like normal conditions, interpersonal relations unfold within one or another basic social structure and international relations unfold as the relations between determinate polities individuated by their basic social structures. Thus, no firm or final conclusions can be drawn about justice in either of these domains prior to or apart from conclusions first drawn regarding the justice of basic social structures.

The point here is not that either interpersonal justice or international justice is to be derived from or is a proper subset of justice as applicable to the basic social structure. It is rather that these subjects of justice logically cannot be raised prior to or apart from the existence of one or more determinate basic social structure. And if we do not know what justice requires of determinate basic social structures, we will find ourselves unable to arrive at any firm or final conclusions regarding the justice of interpersonal relations within them or international relations between them. For example, to arrive at a firm or final conclusion regarding the justice of an interpersonal act of "theft" we must first know something about the justice of the basic social structure within which it took place. A slave who appropriates a loaf of bread from the master's cupboard does not obviously commit an interpersonal injustice.

Once we know what justice requires of determinate basic social structures, we can then proceed to inquire after what justice requires of interpersonal and international relations. Though these inquiries depend on our knowing what justice requires of determinate basic social structures, their pursuit requires more than merely applying what we already know to new subjects. Of course, what we want in the end is a coherent account of what justice requires of determinate basic social structures and of interpersonal relations within and international relations between them. The pieces must fit together. But they need not fit together as if Russian dolls or a series generated by the iterated application of one and the same function to new facts.

As applied to the basic social structure, the concept of justice may be referred to as social or distributive justice. Social or distributive justice

demands most generally a system of institutions the structure of which assigns basic rights and duties and resolves competing claims to various goods, especially those socially produced, without distinguishing arbitrarily between persons. What distinguishes one conception of social or distributive justice from another is the way in which it gives determinate content to this general schema. Conceptions may differ in what they identify as arbitrary when it comes to distinguishing between persons, in their lists and manner of distributing basic rights and duties, and in their understanding of the goods to which persons make competing claims and the principles appropriately relied upon to resolve them.

John Rawls (1921–2002) devoted most of his professional life as a philosopher to the articulation and defense of what he argued was the most reasonable conception of justice for the basic social structure of a constitutional liberal democracy. He named this conception "justice as fairness." The name reflects the idea that as between those playing fairly a game the structure of which they accept as fair, there can be no complaints regarding the justice of its results. This idea appears in Rawls's "justice as fairness" in two ways. First, those living out their lives within a basic social structure may not complain of injustice if it is so organized that from a shared public point of view they may each and all understand and affirm its distribution of basic rights and duties and other goods as if the result of a fair (social production-distribution) game fairly played. Second, those asking themselves which of a number of candidate conceptions of social or distributive justice they ought to adopt for their society's basic structure may not complain of injustice against any conception they are able from a shared public point of view to understand and affirm as if the outcome of a fair (reasoning) game fairly played.

"Justice as fairness" constitutes the focus of Rawls's magnum opus, *A Theory of Justice* (1971, revised ed. 1999). He intended justice as fairness to answer, or at least to frame and focus reasonable deliberation over, the most basic political questions facing citizens in any modern democracy: In the most general sense, how ought we collectively, as free and equal persons, to organize ourselves into a polity? What sorts of institutions ought we to have, and how ought they to be systematically related one to another? These questions are, of course, much more basic and abstract than those typically addressed in ordinary political life. But Rawls surmised that without some shared public sense of how they might be answered most reasonably, or at least not unreasonably, there was little reason to think persons, even intelligent persons of manifest good will, would be capable of sustaining a free society over the long haul. Of course, if divided into factions more or less evenly matched, they might sustain as a kind of *modus vivendi* for some fixed period of time something that shared with a free society certain features, e.g., freedom from religious persecution. But a *modus vivendi* draws no genuine allegiance and lasts, unless it gives birth to a shared public sense of justice, only so long as the competing factions sustaining it remain more or less evenly matched. An enduring free society requires richer soil to take root and grow.

The most basic content of justice as fairness is given by two principles of justice for which Rawls is famous. The first, the so-called liberty principle, requires a constitutionally secured system of equal basic liberties. The second, often referred to as the difference principle, requires, first, fair equality of opportunity in competition for different offices and positions within the basic social structure (e.g., political offices and employment) and, second, that any inequalities or differences in the wealth and income standardly associated with these offices and positions be necessary to maximizing the wealth and income standardly associated with the least-advantaged office or position. It is known as the difference principle because it sets the constraints on permissible social and economic inequalities between persons already constitutionally secure in their equal basic liberties.

In many ways, these are familiar liberal principles of justice. However, there are a few novel aspects to them. With respect to the first principle, two novelties are notable. First, Rawls excludes from the liberties covered by the first principle the liberty to own property in the large-scale means of production familiar to modern economies

(factories, large tracts of land, etc.). While a just society might include a constitutional right to ownership of such property, it is not required to do so by Rawls's first principle of justice. Second, Rawls includes as a corollary to his first principle a special substantive "fair value" requirement applicable only to the basic political liberties. Without this corollary, the first principle would require that persons have merely formally equal rights to vote and participate in political life, rights that might under conditions of social and economic inequality have for many persons little or no substantive value. With this corollary, all persons are substantively ensured "fair value" for their equal basic political liberties, irrespective of any other permissible social and economic inequalities.

With respect to Rawls's second principle, again two novelties are notable. First, Rawls requires not only nondiscrimination in competition for different social and economic positions, but also social and economic policies designed to ensure that how persons fare in this competition is not determined mainly by the social or economic class or geographic region into which they were born. Rawls's second principle requires substantively fair equality of opportunity in the competition for different social and economic positions. Second, while many liberals have long maintained that inequalities between the wealth and income standardly associated with different offices and positions are acceptable only if they improve, relative to an egalitarian baseline, the wealth and income standardly associated with all offices and positions, Rawls goes further. He holds that such inequalities are unjust unless necessary to maximize the wealth and income standardly associated with the office or position least advantaged by them.

One final novelty in Rawls's principles bears mention. That is that they are serially or lexically ordered. This means that the second principle cannot provide any reason to violate the first principle. And the second half of the second principle (regarding the distribution of wealth and income) cannot provide any reason to violate its first half (fair equality of opportunity).

Rawls devoted most of his attention to articulating and defending justice as fairness as the most reasonable, or at least among the most reasonable, conceptions of justice for the determinate basic social structure of a free society. But he also devoted some attention to articulating and defending conceptions of justice for interpersonal and international relations. And he devoted his final monograph, *The Law of Peoples* (1999), to international relations as a subject of justice.

In all his work on justice, Rawls works first to articulate and defend a conception of justice as a social ideal that we might reasonably hope to fulfill under favorable but not impossible conditions. So, in working out justice as fairness, he assumes that all persons possess certain basic intellectual, physical, and moral capacities, that they are generally ready and able to do as justice requires provided others do the same, that material conditions are more or less favorable to their social cooperation (no plagues, no famines), that they collectively face no "supreme emergencies" (neither foreign aggression nor natural forces pose immediate threats to their survival as a people), and so on. Articulated and defended under these assumptions, justice as fairness provides citizens with a shared public answer to the question "what can we together reasonably hope for and so what ought we together reasonably work toward over the long haul?" It expresses a, perhaps the most, reasonable social ideal.

Of course, the foregoing assumptions, which Rawls characterizes as setting the parameters of ideal theory, do not always hold in our world. Indeed, they may never hold (though they always could). And so we must be prepared and equipped in our everyday politics to address many questions arising under very different conditions or assumptions. Everyday politics is often a matter of what Rawls dubs nonideal theory. From the social ideal of justice as fairness, worked out under the assumptions of ideal theory, there is no easy or direct path to the most reasonable answers to these nonideal theory questions that dominate everyday politics. Often these questions will turn on matters with respect to which justice as fairness provides no immediate guidance. But that does not mean that justice as fairness as a social ideal is irrelevant; far from it. It provides those called upon to make

these often very difficult judgments of ordinary politics a common map and compass by which to orient themselves, to assure themselves of their continued commitment to pursuing shared ends notwithstanding their disagreements over how best to respond to immediate challenges, and to chart and internalize pride in their progress over the long haul. And by reassuring them that their destination is in principle not beyond reach, it supports their rational immunity in everyday political life to the ever-present temptations of dogmatic fanaticism and apathetic resignation.

The Pattern of the Overall Argument

Rawls's overall argument for justice as fairness is complex and so setting out its general pattern before looking at details is useful. It may be divided into three steps. The first is Rawls's so-called original position argument. This argument, which draws from the social contract tradition spanning Locke, Rousseau, and Kant, involves setting out a thought experiment or reasoning game intended to model the task faced by free and equal persons tasked to co-author the basic institutional structure of their shared social world. Rawls argues that each time we run this experiment or play this game, we will find that the players unanimously prefer a social world faithful to and structured by his two principles of justice as fairness.

The second step in the overall argument for justice as fairness is Rawls's argument from reflective equilibrium. This argument rests on a distinctive standard of justification and objectivity. Rawls holds that for us, as the real persons in need of a shared conception of justice, a conception of justice is justified and objective just in case, first, it and its institutional implications fit and support the most reliable of our more particular and determinate judgments of justice made spontaneously and retained even after critical reflection and, second, it and its institutional implications fit without contradiction or incoherence into the overall web of our most confidently held beliefs and commitments more generally, including our most confidently held background theories in the sciences, in philosophy, and so on. Rawls conjectures that for those of us asking ourselves together what sort of society we ought to have, justice as fairness best satisfies this standard of justification and objectivity.

The third step in the argument is Rawls's stability argument. The argument here is that the normative force of justice as fairness as a social ideal depends in part on its ability, if institutionally realized, to be internalized by and to effectively and publicly regulate cooperation between persons without undue force, manipulation, coercion, or deception. Rawls argues that once institutionally realized, justice as fairness is well-suited to being reliably and naturally internalized by persons over the course of their moral development. He argues further that persons who have internalized justice as fairness will both understand and experience and publicly know that others similarly understand and experience this aspect of their moral psychology as part of or congruent with their rational good in the most general or abstract sense. Public political trust and cooperation will be robust between persons within a society the institutions of which are faithful to justice as fairness. Once institutionally embodied, then, justice as fairness is capable of sustaining itself as the basis of a shared institutional world without force, manipulation, coercion, or deception. It is, as Rawls puts it, the social ideal of a realistic utopia.

Key Background Motivations

Two motivationally important underlying concerns for Rawls ought to be mentioned. Rawls fought in World War II and witnessed post-War politics in both the United States and Britain. He was keenly aware of the various threats, both internal and external, faced by constitutional liberal democracy. He studied and was early in his career sympathetic to Millian utilitarianism. But by the later 1950s, he grew worried that utilitarianism was ill-suited to serve as the public political philosophy of a just and stable constitutional liberal democracy. Each of the alternative approaches to justice extant at the time – perfectionist theories, intuitionist theories, and atomistic Hobbesian social contract theories that rooted justice in self-interested bargaining – seemed also ill-suited to the task. In large measure, Rawls develops his theory of justice out of a practical concern to meet the political and philosophical

needs, and to help secure the future, of constitutional liberal democracy as the most promising form of an enduring free society known to us.

A theory of justice adequate to constitutional liberal democracy must coherently order and express liberal democratic commitments to the freedom and equality of citizens. Rawls argues that justice as fairness fares better on this front than any of its rival conceptions of justice. But he aims with justice as fairness to do more than coherently order and express liberal democratic commitments to the freedom and equality of citizens. He aims also to express, or at least leave plenty of space in political life for, a coherent conception of persons as moral beings made both in and for community with others. Throughout his life, Rawls held that there could be no persons without community and no community without persons. During his days as an undergraduate at Princeton University, this commitment figured into a distinctive theistic Christian world view to which he devoted his undergraduate thesis. Later, after his service in World War II, Rawls shed his commitment to theism and so to Christianity, but he never let go of this fundamentally relational and social conception of persons. A sense that liberal democracy is best served by a conception of justice that expresses, or at least does not conflict with, such a conception of persons undergirds much of Rawls's thinking.

A Snapshot of the Published Corpus

Rawls began work on justice as fairness in the 1950s. After publishing bits and pieces of the theory in articles, he finally published in 1971 a full statement and defense of it in *A Theory of Justice* (revised 1999). He divided *Theory* into three parts. Part I provided an initial argument for principles of justice. Part II described and defended the feasibility of their institutional embodiment. Part III argued for the stability of the sort of society described in Part II and publicly committed to the principles set out in Part I. Almost immediately *Theory* drew the attention, both critical and celebratory, of scholars across a wide range of disciplines. It was, as they say, an instant classic.

Sometime in the late 1970s, Rawls began to have doubts about a central argument given in Part III of *Theory*. Roughly, he thought it is inconsistent with the institutions and principles set out in Parts II and I. Setting out initially just to rework the stability argument of Part III, Rawls found himself throughout the 1980s compelled to recast in new terms a number of key elements (though not the basic principles of justice themselves) of justice as fairness as presented in *Theory*. In 1993, he published a full statement of the revisions in *Political Liberalism* (expanded 1996). It attracted a great deal of attention, and invited new lines of criticism. In 1997, he published an essay titled "The Idea of Public Reason Revisited"; it responds to numerous criticisms and constitutes his last best statement of many of the key ideas in *Political Liberalism*.

Focusing on the basic social structure of a single polity, Rawls did not say much about international relations as a subject of justice in either *Theory* or *Political Liberalism*. In 1993, he published the essay "The Law of Peoples." It takes up international relations as a subject of justice from the point of view of a polity committed, in the fashion of political liberalism, to justice as fairness. In 1999, he published as *The Law of Peoples* a revised and expanded version of this essay. As with *Theory* and *Political Liberalism*, it attracted a great deal of attention. But this time, the initial reception was largely critical.

In 1999, Rawls also published his *Collected Papers*. While not a complete collection, this volume contains key papers from the early 1950s until the mid-1990s. In 2001, he published *Justice as Fairness: A Restatement*. This volume contains edited versions of his lecture notes, mostly from the 1980s, from teaching both *A Theory of Justice* and the essays that eventually appeared as *Political Liberalism* to students at Harvard. Notwithstanding the fact that most of the material in the *Restatement* dates from the later 1980s, it is probably the best single source, especially for the beginner, for a reliable overview of Rawls's complete and mature view of justice as fairness.

In 2001, Rawls published his *Lectures on the History of Moral Philosophy*. His *Lectures on the History of Political Philosophy* were published posthumously in 2007. Both draw selectively from edited lecture notes from courses given at Harvard. These are invaluable sources for

understanding how Rawls understood his own theory of justice in relation to the political and moral philosophy of the modern period, and especially to the social contract and utilitarian traditions in political and moral thought.

In 2009, Rawls's undergraduate senior thesis from Princeton, "A Brief Inquiry into the Meaning of Sin and Faith: An interpretation based on the concept of community," was published. Included in the volume is a personal essay by Rawls dated 1997 titled "On My Religion." This volume, *A Brief Inquiry into the Meaning of Sin and Faith*, constitutes an important resource for those interested in exploring the relationship between Rawls's work in political and moral philosophy and various religious ideas and themes.

Additional Entries on Rawls's Theory of Justice

The entries that follow set out in further detail the essentials of Rawls's theory of justice. The next entry (2) covers his two principles of justice and their application to the basic social structure. Then following entry (3) reviews Rawls's main lines of argument for these principles, including his well-known original position argument. Rawls's arguments for the stability of a society publicly committed to and institutionally embodying his two principles of justice are surveyed in the next entry (4). Changes to that stability argument in the decades after publication of *Theory* carried in their wake a family of new ideas systematically developed in *Political Liberalism*. This family of new ideas – reasonable disagreement, a political conception of justice, overlapping consensus, public reason, and liberal legitimacy – are surveyed in the second to last entry (5). The last substantive entry (6) takes up Rawls's discussion in *The Law of* Peoples of international relations as a subject of justice. A select bibliography completes the effort.

John Rawls: His Two Principles of Justice and Their Application

This entry discusses Rawls's two principles of justice and their application to the basic social structure.

Rawls's Two Principles of Justice

The content of justice as fairness is given, most basically, but not completely, by Rawls's now famous two principles of justice. These highly abstract and general principles are meant to serve free and equal persons as final public criteria for the evaluation of their basic social structure as just or most reasonable.

Rawls's first principle concerns basic liberties. His second principle has two parts. The first concerns opportunities for offices and positions of authority. The second addresses wealth and income. Before saying more about the content of these principles, it is important to note that they are, on Rawls's view, serially (or as he often says, lexically) ordered. This means that the first principle may not be violated for the sake of the second. And the first part of the second principle may not be violated for the sake of its second half. Neither of the two principles may be violated for the sake of aggregate goods (such as increased Gross Domestic Product), corporate goods (such as national defense – though as a matter of non-ideal theory there is an exception in the case of a sufficiently severe constitutional crisis), or perfectionist goods (such as a more virtuous or righteous citizenry). In the order of reasons, the two principles of justice take priority over these goods. What this means, then, is that when publicly assessing their basic social structure to determine the extent to which it is just or reasonable, citizens should first have to see whether it secures basic liberties as required, then have to see whether it provides opportunities for offices and positions of authority as required, then have to see whether the production and distribution of wealth and income is as required. If these criteria are met, then their society's basic structure is just. Of course a just society may still be imperfect in various ways, and so citizens may then go on to evaluate it in terms of such aggregate goods as Gross Domestic Product, corporate goods as national security, or perfectionist goods such as a virtuous citizenry or a rich arts culture.

Though serially or lexically ordered as public criteria of justice, Rawls's two principles are meant to be pursued and satisfied together. Their ordering is not meant to suggest that a society

should take no steps toward providing opportunities or producing and distributing wealth and income as required until it has secured basic liberties as required. Their ordering is meant only to rule out certain trade-offs and to structure judgments regarding progress in the pursuit of realizing a basic social structure faithful to both principles.

The two principles are not meant to apply to impoverished or primitive societies not yet able even to fulfill the basic needs of all their members. They presuppose the satisfaction of a more fundamental principle requiring that society meet the basic needs of all its members. Accordingly, the two principles presuppose a society that has achieved at least a modest level of historical development and progress.

The first principle demands a constitutionally recognized system of equal basic liberties fully adequate to the development and exercise of the two basic moral capacities the possession of which qualifies persons for democratic citizenship. The first of these is the capacity to form, revise, and pursue a determinate conception of one's own good. Rawls calls this the capacity for rationality. The second is the capacity to propose and honor fair terms of social cooperation with others (provided they honor them in return). Rawls calls this the capacity for reasonableness. The basic liberties are those necessary and sufficient to the development and exercise of these capacities. They include the familiar canonical liberties (conscience, speech, association, possession of personal property, and so on) highlighted in many political documents and traditions (the French Declaration of the Rights of Man, the Constitution of the United States, the United Nations Declaration of Human Rights). They are to be constitutionally secured as equal rights under the rule of law.

The basic liberties do not include the right to own property in large-scale means of production (such as factories or large tracts of land). This right is not a fundamental requirement of justice. This does not mean that a society that constitutionally secures such a right is unjust. Such a society might be just if the right to own large-scale means of production it secures constitutionally is appropriately and constitutionally subordinated to the basic liberties covered by the first principle and is appropriately tailored in content so as to align with the demands of second principle of justice.

The second principle is known as "the difference principle" since it regulates differences in offices and positions and associated lifetime expected shares of wealth and income. It demands that institutions, laws, and policies giving rise to social and economic inequalities satisfy two conditions (corresponding to the two halves of the principle). First, if there are different offices and positions (including jobs) with different kinds and degrees of power, authority, responsibilities, and rewards, then those competing for them must do so against a background of fair equality of opportunity. Second, if there are to be inequalities in the reasonably expected lifetime share of wealth and income associated with securing and occupying these offices and positions (e.g., if there are to be skilled workers who typically do better in terms of wealth and income over their lives than unskilled workers, and if there are to be entrepreneurs who typically do better than skilled workers in terms of wealth and income over their lives), then these inequalities must satisfy two further conditions.

First, they must be necessary to raising the reasonably expected lifetime share of wealth and income associated with the occupation of any office or position above what it would be if the total product of social cooperation was shared out equally as wealth and income to all offices and positions. That is to say, any inequalities of wealth and income attached to offices and positions must be, relative to an egalitarian benchmark, mutually advantageous to representative occupants of all offices and positions.

To be fully just or most reasonable, inequalities of wealth and income that satisfy this first condition must satisfy also a second condition: they must be strictly necessary to maximizing the smallest gain, relative to the egalitarian benchmark, in the reasonable lifetime expected share of wealth and income. That is to say, they must be necessary to providing the representative occupant of the office or position least advantaged by the inequalities in wealth and income with an

advantage greater than that provided by any other mutually advantageous system of such inequalities. So, suppose a society finds it mutually advantageous relative to the egalitarian benchmark to make available to all (in terms of fair equality of opportunity) the different and differentially rewarded offices or positions of (in descending order of associated lifetime expected share of wealth and income) entrepreneur, skilled worker, and unskilled worker. In order to be fully just or most reasonable, it must take care to ensure that the differential rewards in terms of wealth and income it allows are necessary to ensure that its typical unskilled worker does better than would the representative occupant of the least advantaged office or position under any other mutually advantageous system of inequality.

That there exist social systems within which offices and positions attached to unequal expected lifetime shares of wealth and income satisfy the first condition, leaving all representative occupants of such offices and positions better off than they would be without the inequalities, is something Rawls takes for granted. This is because a system of equal regularly allotted expected lifetime shares of wealth and income is unlikely reliably to elicit from persons the cultivation and productive use of their most socially valuable talents. Given equal basic liberties and competition against background conditions of fair equality of opportunity for offices and positions that are attached to *equal* lifetime expected shares of wealth and income, persons are likely to pursue particular offices and positions for a wide variety of reasons. While some will perhaps aim at offices and positions that put their most socially valued talents to productive use, many others, desiring a life with more leisure, less stress, greater time for contemplation, and so on, will aim at offices and positions that put lesser socially valued talents to use. Thus, a system of offices and positions attached to *equal* lifetime expected shares of wealth and income is likely to leave a great deal of socially valuable talent uncultivated or unused. Accordingly, it is likely to be less productive overall than other alternatives also compatible with equal basic liberties and fair equality of opportunity. If a society committed to basic liberties and fair equality of opportunity is reliably to cultivate and put to productive use the talents of its members that are most socially valued, thereby improving total social production, then it must assure its members that if they focus on the development of and undertake to compete for positions where they might most productively use socially valued talents, they will be able to cover various costs they incur along the way. These include time and effort in training, forgone opportunities, less leisure, greater stress, the risk of failing in the context of competition for positions to secure a position making use of their cultivated talent, and much more. By attaching higher reasonable lifetime expected shares of wealth and income to offices and positions that require the targeted cultivation and use of especially socially useful talents, a society may reliably draw sufficient numbers of persons to invest in developing those talents and to compete for the offices and positions that involve their exercise. So long as this ensures a total social product large enough to both draw talent to socially productive use and to improve, relative to an egalitarian benchmark, the lifetime expected share of wealth and income for all offices and positions, including those least advantaged by the introduced inequalities in wealth and income, it would be collectively irrational not to do it.

There are no doubt many possibilities here, that is, many systems of mutually advantageous inequality in lifetime expected shares of wealth and income attached to offices and positions. Thus, on Rawls's view, the harder task is identifying a shared public criterion for selecting the most just or most reasonable of these. As noted, Rawls's proposal is that the most just or most reasonable is the system that permits only those inequalities necessary to maximizing the smallest lifetime expected share of wealth and income associated with a particular office or position (in many modern states, this is the unskilled worker).

Two further remarks are in order here. First, expected lifetime shares of wealth and income are determined by and relative to the constitutive rules governing the economy and the basic social

structure more generally. The "least advantaged" refers then not to persons least advantaged by nature (e.g., the disabled) and indeed not to any particular persons identifiable by proper names or rigid designators (e.g., the Smiths, Blacks, women, etc.) apart from their participation within the economy. It refers rather to the office or position, or a representative person occupying the office or position, least advantaged (relative to an egalitarian benchmark) by the inequalities in lifetime expected shares of wealth and income structurally ingredient in the society as a cooperative system of production and distribution.

Second, the difference principle does not require "redistribution" of wealth and income, as if wealth and income could be defined independent of and prior to the principles of justice. Rather, it serves as a criterion for the most just or most reasonable economic system understood as the cooperative system within and through which wealth and income are produced and distributed. So far as justice goes, then, at least as a matter of ideal theory, persons have no claim to any prior notion of wealth or income. Of course, in the real world, where wages are often left to be settled by market forces alone, a diverse range of laws and policies might be deployed to move the economic system toward the ideal set forth by the difference principle. Some of these, for example, progressive income taxation used in part to fund income subsidies, may appear "redistributive" to participants in the economy. But this appearance is misleading. These participants have no prior claim to what a market not regulated to ensure justice delivers. Such taxes and transfers merely accomplish outside market activity determining wages what it would be too cumbersome and inefficient to try to accomplish internal to it.

The two principles work together to ensure that no citizen may reasonably complain over the substantive value or worth of the formally equal liberties required by the first principle and guaranteed by any just or reasonable constitution. Of course, those who occupy offices or positions among the economically or materially less advantaged will find that the formally equal liberties are worth less to them than they are to those who occupy economically or materially more advantaged offices or positions. For example, the liberty to own personal property is worth more to persons who have more money to spend on personal property. But the second principle ensures that the economy is arranged, consistent with the basic liberties and fair equality of opportunity, so that for the least advantaged offices and positions, the value or worth of the formally equal basic liberties is as high as it can be. Taken together, Rawls maintains, the two principles meet the familiar Marxist complaint that the formally equal liberties central to liberal theories of justice serve merely to hide or legitimate unfair substantive inequality in the value or worth of those liberties to those whose liberties they are.

Even if working together the two principles enable Rawls to meet this familiar Marxist complaint about unfair substantive inequality in the value or worth of formally equal liberties, they do not obviously meet a familiar democratic complaint, namely that if the value of basic political liberties is unequal, the formalities of democracy – one person, one vote; majority rule – are likely merely to legitimate the wealthy ruling the poor for the sake of the wealthy. To meet this more sharply focused democratic worry, Rawls attached to his first principle governing basic liberties a corollary guaranteeing that all citizens enjoy "fair value" for their basic political liberties. Thus, while the substantive worth or value to citizens of all other basic liberties is determined or regulated by the second, or difference, principle, and thus cannot be improved at the expense of either formally equal basic liberties or fair equality of opportunity, the substantive worth or value to citizens of their political liberties is determined or regulated by the liberty principle itself. Accordingly, ensuring that all citizens enjoy fair substantive value or worth for their basic political liberties is part of ensuring them overall a system of basic liberties fully adequate to the development and exercise of their two moral powers. It is an element in the first of Rawls's serially or lexically applied criteria of justice or reasonableness.

Rawls identified two social systems or basic institutional arrangements faithful to his two principles: liberal democratic socialism and a liberal

democracy with a regulated market system with private ownership of the means of production that he dubbed "property-owning democracy." Of course, there may be others. He ruled out as inconsistent with his two principles laissez-faire capitalism, welfare state capitalism, and state socialism with a command economy.

The Basic Social Structure

The two principles of justice apply to a society's basic social structure. The basic social structure is the total set of key institutions (government offices, the legal system, markets, civil society, the family, and so on), taken as a dynamic and integrated whole and constitutive of the polity as a more or less self-contained and self-sufficient system within which persons may live out complete lives. The two principles apply diachronically to the basic social structure as a dynamic whole. They do not apply synchronically or directly to its parts. While in some form the socially and legally recognized family will be part of the basic social structure, the two principles do not apply directly to the family. Rather, they apply indirectly insofar as they apply to the total set of institutional relations within and through which the family is constituted and shaped as part of the basic social structure. So, the two principles of justice may be consistent with different sorts of socially and legally recognized families depending on the how educational institutions, religious, and other associations within civil society, labor markets, and other components of the economic system are constituted and governed and on how all these components of the basic social structure interact together. The same holds for churches, the market, business corporations, and so on, looked at individually and synchronically as components of the basic social structure. Components of the basic social structure must satisfy the two principles only when taken together as a unified, dynamic system, as a complete social institutional world. In this way, the two principles of justice specify a social ideal. Of course, as so applied to the basic social structure, they may nevertheless fix various features of its component institutions. For example, the family may never violate the physical and psychological security of its members and churches must permit their members to exit voluntarily.

Within the basic social structure, the legal-political structure (the constitution, government, system of law) occupies a special place. Through it a society makes explicit and binding decisions regarding the further and more determinate design and operation of its basic social structure. Within the legal-political institutions, Rawls distinguishes between, on the one hand, constitutional institutions, which are more or less fixed and beyond the reach of ordinary politics and, on the other hand, the institutions and laws produced through ordinary politics. Rawls suggests that constitutional institutions play a special role in securing the first principle and that ordinary, everyday legal-political institutions (legislatures, administrative agencies, etc.) play a special role in securing the second principle.

Because the two principles apply diachronically to the basic social structure as a whole, they do not determine directly the particular entitlements or obligations of particular persons at any given time. Rather, these persons largely determine by what they do within and subject to the rules of the institutions comprising the basic social structure. This is a matter of what Rawls calls "allocative justice": the allocation of determinate entitlements and obligations to particular persons at a particular time. The two principles are not principles of allocative justice. They are instead principles of distributive, or better social, justice. They govern society as the dynamic complex system in and through which persons cooperate to produce, distribute, and consume a variety of basic goods more or less essential to any complete life. Allocative justice is largely determined by what persons do within such a system, provided it is just. A just basic social structure may be seen then as an ongoing fair (cooperative) game which, if fairly played, yields for players results (allocative justice) the justice of which cannot be reasonably contested.

Rawls suggests a number of reasons why the two principles of justice apply in the first instance to the basic social structure taken as a unified, dynamic system. One, just hinted at, is that in the absence of some such principles of distributive

or social justice applicable to the basic social structure as a whole, distributive or social justice reduces to allocative justice which in turn proves to be an intractable problem. If we could not simply let allocative matters be determined at any given moment in time by the voluntary conduct of persons within the basic social structure understood as something like a fair game fairly played, how could we ever determine how justly to distribute particular entitlements and obligations to particular persons at particular times? Imagine trying justly to allocate wages (weekly? monthly? yearly?) to particular persons across a society: there are simply too many relevant considerations (need, desert, contribution, efficiency, etc.) and too many uncertainties (what will they do with the wages? what might we have done if we used the money for some other purpose?).

Another is that what it means for persons to be free and equal is to share in the first instance in the co-authorship of their common social (or institutional) world. But in this undertaking, there is no one institution uniquely reasonable as a starting point. While it is sometimes said that the family is basic, the family in anything like a desirable form will depend on the existence of and relations to an economic and a political legal system. Markets too are sometimes said to be basic. But again, they depend on the existence of and relations to other essential institutions, including the family. Given the inevitable necessary interactions between core institutions in any desirable social world, one cannot but beg questions by specifically fixing principles of justice for any one prior to and thus setting a constraint on fixing the principles of justice for others. A free and equal people must, then, settle first on a general social ideal applicable to the basic social structure as a system of institutions overall before turning to the principles constituting and regulating particular institutions.

A Four-Stage Sequence

Of course, they must move from this general social ideal to principles constituting and regulating particular institutions. Here, Rawls proposes that the two principles are to be applied to the basic social structure in stages. First, they are applied to the legal-political constitution. The legal-political constitution must first secure the basic liberties and fair value for the political liberties and second establish legislative, regulatory, adjudicative, and executive offices (a system of government) conducive to the realization of the second principle. Of all peoples acting together as free equals, then, the two principles require at least a constitutional, republican, liberal democracy faithful to the rule of law. Constitutional and governance details may vary with historical, technological, and demographic conditions. Second, the two principles are applied to the activities of law- and policy-making within the governance institutions established by and subject to the constitutional order. Here, Rawls's focus is on the second principle. The primary work of law-makers and policy-makers is to create and maintain, subject to the constitutional order, a system of law and policy and capable of reliably delivering to citizens a social and economic order faithful to the second principle of justice. Of course, details may vary again, not only in light of historical, technological, and demographic conditions, but also in terms of more transient and fluid and local economic and social conditions. Laws and policies will need to be adjusted far more often than the constitution. Of course, law-makers and policy-makers may also act with other ends in mind (e.g., increasing GDP, creating national parks, authorizing a space exploration program, etc.). But this work is secondary. Finally, through the adjudication and enforcement of law and policy the two principles are applied, indirectly, to individual persons and transactions. This is the work of those holding judicial and executive offices established by the constitution and fleshed out within the legal system. Judges and courts work consistent with the rule of law to apply to particular cases and persons the general laws and policies enacted by legislators and regulators. Executives work consistent with the rule of law and judicial rulings to ensure that the law is enforced in particular cases and against particular persons.

Taken all together, then, Rawls presents a four-stage sequence through which persons as the free and equal co-authors of their common social world are to execute their authorial task. The

four stages are analytic not temporal. First, they select the two principles of justice as the core of a general social ideal applicable to their basic social structure as a dynamic whole. Second, they select a legal-political constitution reasonably designed, in light of their historical, technological, and demographic condition, to entrench the basic liberties covered by the first principle and to establish legislative, regulatory, adjudicative, and executive offices of governance capable of producing and maintaining an economic and social order faithful to the second principle. Third, they regularly fill the legislative and regulatory offices and those officials regularly enact, monitor, and revise determinate laws and policies, subject to the constitution. Finally, fourth, they regularly fill adjudicatory and executive offices and those officials bring the enacted law, subject to the constitution, to bear on particular cases and persons. When thinking about issues of justice, citizens should be clear as to the analytic stage at which the issue arises. Facts about particular cases and particular persons relevant downstream to the adjudication or enforcement of the law are generally irrelevant upstream to questions concerning the justice of a general social ideal or a proposed constitution or constitutional amendment.

John Rawls: The Argument for the Two Principles

This entry discusses two of Rawls's three main lines of argument for his two principles of justice: the original position argument and the argument from reflective equilibrium. As noted above, Rawls argues also that considerations of social stability favor his two principles of justice. The next section (4) addresses the argument(s) from stability.

The Original Position Argument

How ought we to organize our polity? To begin to answer this question, Rawls recast it in the more basic and manageable terms of the original position argument. At the heart of this argument is a model of the deliberation free equals would have to undertake if they intended to agree unanimously on principles to constitute and regulate a shared social world. In his early work, culminating in *A Theory of Justice*, Rawls developed this model, the original position argument, by specifying the circumstances of justice, the role of principles of justice in governing the institutional production and distribution of social primary goods, various formal conditions to be satisfied by all principles of justice, a veil of ignorance designed to ensure that deliberation is not unreasonably tainted by prejudicial information, principles of rational choice, and so on. Later, in *Political Liberalism*, he characterized this model, the original position argument, as just one way we might draw together and work out the implications of three idea(l)s fundamental to our shared public political culture (within contemporary liberal democracies) and so plausibly constituting common ground between us as reasonable citizens within them. These three idea(l)s are society as a system of fair social cooperation, persons as free and equal citizens, and the well-ordered society. In his lectures throughout the 1980s, published in 2001 as *Justice as Fairness: A Restatement*, Rawls tended to combine the more formal and detailed argument presented in *Theory* with the less formal and schematic argument presented in *Political Liberalism.* What follows is an overview of this composite.

Fundamental Idea(l)s

Rawls does not consider the question of whether we ought to have a polity. He devotes his attention to the question of what kind of polity we ought to have. This question, when raised or posed by reasonable citizens, presupposes and expresses three fundamental idea(l)s. To see these, it is helpful first to sharpen the initial question. Whatever else a polity is, it is, Rawls insists, a system of social cooperation for mutual advantage sustained over successive generations. We want to know what kind of polity we ought to have because we take it for granted that polities can be mutually advantageous for their members over time. Of course, not all systems of mutual advantage are systems of social cooperation. When we ask what kind of polity we ought to have, we are not asking how some of us might forcefully order others or

how some external agent might forcefully order all of us for the sake of our mutual advantage. Instead, if we are reasonable, we are asking how, cooperating together under common public rules, we might mutually advantage ourselves, each and all.

Just as a polity, as a system of social cooperation for mutual advantage, is not a system of mere coordination (internally or externally imposed) for mutual advantage, so too it is not some sort of organic unity within which our relations to one another as separate persons are dissolved or transcended and mutual advantage is transformed into the advantage of some corporate whole. Rather, we cooperate for the sake of our mutual advantage as separate persons. And as separate persons, it is our mutual advantage over the course of a complete life that matters. A complete life will typically include participation, directly or indirectly, in the biological and social reproduction of successive generations sufficient to sustain the polity over time. So, then, what we each and all want to know is not simply what sort of polity we ought to have, but whether there is available to us any shared public understanding of how as enduring separate persons living out complete lives (which will typically involve the family in some form or other) we might organize ourselves into a mutually advantageous system of social cooperation sustained over successive generations.

Now, with the question thus sharpened, we can bring to the surface the three fundamental idea(l)s it presupposes on Rawls's view. These constitute common ground between persons taking up this question together. First, the question presupposes some shared or common point of view from which we as separate persons raise it and in terms of which our answer to it may be publicly defended and shared. Essential to this shared or common point of view is our idea(l) of ourselves as not only separate persons but as fully qualified, each and all, to co-author together the basic social structure of our polity as a system of mutually advantageous social cooperation. We are fully qualified, each and all, in that we each possess to the requisite minimum degree the two basic moral capacities separate persons must have to co-author together such a basic social structure. The first is the rational capacity to form, revise, and pursue a determinate conception of one's own good. The second is the reasonable capacity to propose and honor public, shared terms of social cooperation with others, and to pursue one's own conception of the good only as permitted by those terms (provided others do the same). By virtue of each having these capacities, we are fully qualified, for the purposes of the question at hand, as *free and equal* separate persons. Implicit in our question, then, is this (political moral) idea(l) of ourselves.

Insofar as we raise and seek to answer this question as free equals, we presuppose that in order to qualify as an answer to it, any proposed terms of social cooperation, the principles of our polity's basic social structure, must be acceptable to each and all. Such terms, or principles, would be not only mutually advantageous but also fair to each and all as a free equal with others. To put it another way, such terms, or principles, would be immune to complaints of unfairness as between free equals. So when we ask what sort of polity we ought to have we presuppose also an (political moral) idea(l) of *fair* social cooperation over successive generations.

With these first two idea(l)s identified, we can easily identify a third. In order for free equals to sustain fair social cooperation over successive generations, the content and fairness of their terms, or principles, of social cooperation must be publicly known and the institutions, or basic social structure, embodying them must be publicly evaluable in and publicly known to be compliant with those terms. As between free equals, then, fair social cooperation must be "well-ordered." This is Rawls's third fundamental (political moral) idea(l).

The basic question "what sort of polity ought we to have?" presupposes these three fundamental idea(l)s: society as a system of fair social cooperation over successive generations, persons as not only separate but free and equal, and society as well-ordered. Each is linked to the others. Taken together, they constitute common ground from which we might reasonably proceed on terms mutually intelligible and acceptable in trying to answer our basic question. What we want to know, then, is whether there is available to us a

polity that would, at the least, adequately embody and express this common ground.

To make further progress, these idea(l)s need to be fleshed out further. A first needed refinement concerns the idea(l) of persons as separate but free and equal co-authors of their society's basic social structure. Key here is that when we ask what sort of polity we ought to have we are not asking, indeed we cannot be asking, as the determinate persons that we already are: as properly named individuals with our unique dispositions, abilities, and character traits; or as members of socially constituted groups, such as Blacks and Whites, or workers and capitalists, or men and women; or as committed to one or another determinate conception of the good. There are several reasons that we are not, indeed cannot be, raising the question of what sort of polity we ought to have from any of these points of view. One is that in many ways what we are as properly named individuals with our own unique dispositions, abilities, and character traits, or as members of socially constituted groups, or as committed to this or that determinate conception of the good, is already shaped and determined by the basic social structure within which we live. So, unless we set aside these facts about ourselves, we will almost certainly be begging the question, tacitly assuming that our existing basic social structure is more or less just or given and so presupposing an answer to the very question we are trying to raise. Thus, we must approach the question of what sort of polity we ought to have as if we had no determinate identity. As free and equal co-authors of our society's basic social structure, we each have the same self-validating equal claims to the material and social conditions necessary and sufficient to the development and exercise of the moral capacities that qualify us as free and equal, the capacity to form, revise, and pursue a determinate conception of the good, and the capacity to propose and honor (provided others do the same) fair terms of social cooperation. It is from this point of view that we want most basically to know what sort of polity we ought to have.

Another needed refinement is a metric for assessing advantage within a system of social cooperation. Such a metric must include two things. First, it must include a common good or goods in terms of which the advantage of each and all may be assessed. Second, it must include a common baseline or benchmark for determining relative degrees of advantage. To address the first need, Rawls notes that we cooperate politically as citizens for the sake of various goods we could not otherwise secure adequately for ourselves. Rawls calls these social goods. Of these, however, only some may be reasonably thought to be of value to any and all citizens, irrespective of their particular identities, and so eligible to serve as a common public metric of advantage. These Rawls refers to as "primary" social goods. They include, at a minimum, basic rights and liberties, diverse opportunities for offices and positions of authority and responsibility, wealth and income, and the social or public bases of self-respect. These may reasonably be thought to have value for all citizens as free equals because they are essential means to advancing a very wide range of determinate conceptions of the good and for developing and exercising the core moral capacities that qualify citizens as free equals. So it is in terms of these primary social goods that advantage is to be assessed within any system of social cooperation.

But we need also a clear common baseline or benchmark for assessing relative advantage in terms of these primary social goods. However, from our point of view as the free and equal co-authors of our society's basic social structure, and therefore setting aside our determinate identities, the only plausible common baseline or benchmark is the egalitarian one of equal shares. After all, as free and equal co-authors of our basic social structure, we each have the same self-validating claim to the material and social conditions necessary and sufficient to the development and exercise of our moral capacities. Thus, relative advantage must be assessed in the first instance against the common baseline or benchmark set by the share of social primary goods each person would be able reasonably to expect within a system of social cooperation organized so that all engaged in it reasonably expected the largest possible equal share. Relative to this egalitarian baseline, a system of social cooperation is mutually advantageous and so collectively rational just

in case it improves for all the reasonably expected share of social primary goods, even if it requires or allows unequal shares.

But we need to refine this idea still further. There are likely many systems of social cooperation mutually advantageous and so collectively rational in this sense. One reason for this is that probably there are many systems of social cooperation with different offices and positions tied to different shares of social primary goods, at least shares of wealth and income, likely to draw talents distributed across separate persons to socially productive uses more effectively and efficiently than any society that attaches to all offices and positions equal shares of all primary social goods, including wealth and income. Thus, while the idea of social cooperation for mutual advantage relative to the egalitarian baseline or benchmark is sufficient to narrow the field of candidate answers to our inquiry into the sort of polity we ought to have, it is not sufficient by itself to determine *the* answer. Mutual advantage relative to an egalitarian baseline may be necessary to fair terms of social cooperation, but it is not by itself sufficient.

Clearly, then, if we are to arrive at a determinate public answer to our question, we must be able to assess advantage in terms more precise than mutual advantage or collective rationality. One possibility would be to appeal to the total size of the aggregate increase in the total social product and choose that social system that maximized aggregate or average per capita advantage. But Rawls immediately rules this out since such an appeal would take no account of how separate persons are advantaged as free equals in relation to one another. Free equals would reject it as unreasonable.

Assuming normal conditions, Rawls argues that free equals will never find it mutually advantageous to have inequality in basic liberties or opportunities for offices and positions. They will agree only to terms or principles of social cooperation that secure for each the largest equal share of such goods. But wealth and income is another matter. Certainly, free equals will not unanimously agree to terms or principles that fail to secure for each and all a share of wealth and income adequate to make meaningful use of their basic liberties and meaningfully pursue opportunities. But above this floor, they may reasonably agree to terms or principles that allow, even require, mutually advantageous inequalities. Here Rawls argues that it is from the point of view of the social position least advantaged by any mutually advantageous inequalities in lifetime expected shares of income and wealth that free equals would or ought to identify the fairest or most reasonable system of mutually advantageous cooperation between them.

The Fundamental Idea(l)s Modeled: The Original Position Argument

The foregoing should suffice to suggest how Rawls's original position argument models the assumptions and fundamental idea(l)s implicit in the basic question we raise when we ask of one another what sort of polity ought we to have. This argument imagines separate rational agents in an "original position" from which they are to determine the public principles of a basic social structure through which social primary goods are cooperatively produced and distributed. While each of these agents represents a real citizen (or family-line), they are behind a "veil of ignorance" with respect to both the determinate identities of the citizen (or family-line) they represent and the details of the existing institutional order. This veil ensures that agents face one another in the original position simply as free equals, and that if they are able to reach a unanimous agreement regarding the public principles for a basic social structure, the agreement will be one that the real citizens (or family-lines) they represent could acknowledge as not only collectively rational for, but also as most reasonable between, them as free equals, no matter their determinate identity or social position.

Of course, if we imagine agents in an original position starting from scratch in their effort to reach an agreement on principles to govern the basic social structure for those they represent, we may find ourselves unable to ever bring the thought experiment to a conclusion. There is no limit to the number and variety of possible principles that the agents might propose to one another and thus be forced to entertain. But when we ask

what sort of polity we ought to have, what we want to know is not mainly how to design a basic social structure from scratch but rather which of the historically significant and so familiar principles of social or distributive justice are the most reasonable. In effect, our question is multiple-choice. Accordingly, Rawls argues that it is enough to imagine agents in the original position making a number of pair-wise comparisons between the historically most significant conceptions of justice: utilitarian conceptions, perfectionist conceptions, intuitionist conceptions, and finally Rawls's own conception, justice as fairness. Rawls argues that original position agents would unanimously converge in this series of pair-wise comparisons on his two principles of justice as fairness as the most preferred. This constitutes Rawls's first main line of argument in favor of justice as fairness as the best answer to our basic question: what sort of polity ought we to have?

The Original Position Argument for the Two Principles of Justice

Rawls first compared his two principles to utilitarianism. He argued that agents in the original position would prefer his two principles for at least two reasons. First, his two principles firmly secure the basic liberties, whereas utilitarianism does not. Utilitarianism carries always some real possibility (of uncertain probability) of a morally catastrophic loss of liberty for citizens. The two principles guarantee a satisfactory social world, at least in terms of basic rights and liberties. Utilitarianism does not. Second, as a matter of moral psychology, citizens cannot reasonably be expected voluntarily and reliably to honor utilitarian principles if those principles leave their claims to the social primary goods subject to constant reassessment and revision. A polity organized on utilitarian principles will suffer, then, from an inherent instability to some nontrivial degree. It will be able to overcome this instability only through social indoctrination or other undesirable coercive measures. This, Rawls argues, a polity organized on the principles of justice as fairness will be able to avoid. Agents in an original position will therefore prefer justice as fairness to utilitarianism.

From this first comparison, Rawls concludes that fair terms of cooperation must include, and immunize from being overturned by utilitarian considerations, a liberty principle, and thus a constitutionally entrenched system of basic liberty rights, as well as some social minimum or safety net ranging over both opportunities for offices and positions and a lifetime expected share of wealth and income. Taking these as provisionally settled commitments, he goes on to compare his two principles to what he called "restricted utilitarianism." Restricted utilitarianism accepts the liberty principle, fair equality of opportunity, and a social minimum or safety-net in terms of wealth and income (of the sort familiar in developed liberal democracies). But, subject to these constraints, it then requires a basic structure (mainly the economy) to maximize average per capita wealth and income. This is a limited, humane, and not obviously unreasonable utilitarianism, one immune to morally catastrophic losses of liberty, opportunities or wealth and income. But Rawls argues that original position agents would still favor his two principles of justice as fairness, and in particular the difference principle, for several reasons.

One is that the difference principle is better suited to serve as a public principle of justice. Reliable society-wide assessments of average utility are difficult, if not impossible, to generate within reasonable costs. Another is that the difference principle is more likely to secure social stability. It will permit a smaller range of economic inequalities than restricted utilitarianism. And the inequalities it permits will themselves be publicly seen as more fully faithful to the ideals of reciprocity and fraternity implicit in the self-understanding of citizens as the free and equal co-authors of their polity's basic structure. Rawls concludes that original position agents will converge on the two principles of justice as fairness as more reasonable or fair than the alternative of restricted utilitarianism.

Rawls devotes most of his attention to explaining how original position agents would compare his two principles of justice as fairness to either general or restricted utilitarianism. He does not spend comparable time explaining how they would compare the two principles to intuitionist or to perfectionist principles or conceptions

of justice. But the reasoning is clear enough. Blind to the particular conceptions of the good affirmed and pursued by the citizens they represent, original position agents would reject perfectionist principles that picked out one or a small number of determinate conceptions of the good to be maximally promoted by the basic social structure. They would prefer to preserve for the citizens they represent a wide liberty to form, revise, and pursue a determinate conception of the good as they see fit. Accordingly, they would prefer justice as fairness. And concerned to identify public principles of justice capable of well-ordering society and sustaining mutual trust within political life, original position agents would reject intuitionist principles – which must always be balanced against one another case by case in light of ad hoc assessments of their weight and force – as incomplete and unable to well-order society. They would prefer principles that do not call for being balanced against one another case by case in light of ad hoc assessments of their weight and force and sufficient that are to well-order society. On this front, original position agents would prefer the two principles of justice as fairness to intuitionist principles.

One general current running beneath the surface of all Rawls's arguments is that original position agents must choose principles of justice with a good faith expectation that the real citizens they represent will be able and inclined voluntarily to comply with them and to support the institutions embodying them no matter how they fare under them. Original position agents are not to gamble, hoping that the citizens they represent are among those favored by the basic social structure and thus likely to give it their allegiance. They must take seriously every possible outcome allowed by the basic social structure and in good faith imagine the citizens they represent giving their allegiance to it irrespective of the outcome that obtains for them.

In *Theory*, Rawls aimed to set out the original position argument in a way that might, with further development and revision, operate as a kind of moral geometry. That is, he hoped to present it as a formally deductive argument, a kind of proof, moving clearly and directly from a complete set of general premises to a single determinate conclusion. As with any such argument, the main advantage is that with the inferential moves between premises beyond reproach, critical analysis can focus exclusively on the intelligibility, reasonableness, and truth of the premises.

Rawls acknowledged, even emphasized, of course, that whether such a proof could serve as a justification for any particular answer to our basic question – what sort of polity ought we to have? – would depend on whether the set of general premises (and the inferences marking the path from them to the single determinate conclusion) were common ground between us.

In his later work, Rawls seems to have abandoned any aspiration for an original position argument articulable as a kind of proof in moral geometry. Instead, he represented it as just one particularly vivid way of organizing the putative common ground expressed by the three fundamental idea(l)s and publicly showing how they generate a balance of reasons that favors as the most reasonable or fair the principles of justice as fairness over other candidate principles of justice. While he seems to have given up on the project of linking the fundamental idea(l)s through deductive inference to his two principles, he remained confident until his death that the fundamental idea(l)s well-expressed common ground between us and that they publicly underwrote a balance of reasons that favored the two principles of justice as fairness as more reasonable or fair than the historically available alternatives. He allowed, however, that others might reasonably think that the balance of reasons arising from the fundamental idea(l)s favored some other generically liberal conception of justice, for example, restricted utilitarianism. With respect to reasonable disagreements between generically liberal conceptions of justice each claiming best to reflect the balance of reasons arising from the fundamental idea(l)s, deductive arguments are not likely to prove of much value. Public deliberation here must be essentially interpretive in nature.

The Argument from Reflective Equilibrium

The two principles of justice as fairness constitute Rawls's answer to the basic question of what sort of polity we ought to have. The argument(s) from the original position and the fundamental idea(l)s

they model constitute a main line of argument for them. But they do not constitute the only main line of argument. Another essential main line of, indeed in a real sense the master, argument draws from Rawls's idea(l) of reflective equilibrium.

This idea(l) is often misunderstood. To get a handle on it, it is helpful to begin by noticing that in the absence of conflict or hesitancy in shared activity, we do not require of one another justification. We simply get on with the business of living. Absent conflict or hesitancy, shared activity mutually intelligible and acceptable to the persons engaging in it needs no further justification. Justification is called for only when we find ourselves in conflict or hesitant as to how to move forward with one another in our shared activity. And when justification is called for, it is always addressed to those with whom we are engaged in the shared activity that risks being derailed or idled by conflict or hesitancy. Justification aims to restore shared activity between persons on mutually intelligible and acceptable terms so that they can get on with the business of living. The business of living so restored requires no further justification.

Persons engaged in mutually intelligible and acceptable shared activity stand with respect to it and to one another in reflective equilibrium. They share the same spontaneous judgments, stable upon reflection, with respect to what they can expect of one another, what actions are forbidden, required, permissible, laudable, and so forth. And they share considerations, principles, values, argument patterns, and so on that they publicly understand these judgments – Rawls calls them "considered judgments" – to reflect and express. These considerations function for them as reliable public criteria of competence in their shared activity. As between persons in this condition of reflective equilibrium, there is no point to their seeking from one another further justification for their activity. Persons standing in this relationship are fully reconciled and attuned to one another as both rational and reasonable within the relevant domain of social life.

Rawls's most general argument for justice as fairness is that it is uniquely well-suited and well-positioned to sustain us, those of us asking what sort of polity we ought to have, in a common reflective equilibrium with respect to our shared activity as free equals organizing, maintaining, and perfecting a basic social structure. Of course, in its most complete form, ranging over all domains of a complete form of life, reflective equilibrium is something we will never fully achieve. But we may always more fully approximate it. In *Theory*, Rawls suggested that it was not unreasonable to think that we might achieve a single, focused, and rather substantial reflective equilibrium with respect to our shared activity organizing, maintaining, and perfecting a basic social structure. In *Political Liberalism*, he acknowledges that the sort of reflective equilibrium for which he hoped in *Theory* was probably beyond reach, but he then argues that a different and more complex sort of reflective equilibrium, one still sufficient to support justice as fairness, was not.

Rawls distinguishes various moments or stages belonging to the most complete form of reflective equilibrium. First, there is what he dubs narrow reflective equilibrium. This is a form of reflective equilibrium achieved whenever a person achieves relations of mutual fit between her considered judgments about and within an activity and a set of considerations bearing on them and it. So, a person who has achieved such relations of mutual fit between her considered judgments of justice about and within a basic social structure, on the one hand, and a set of considerations, or conception of justice, bearing on them, on the other hand, has achieved narrow reflective equilibrium. Achieving narrow reflective equilibrium may be impossible unless one revises some considered judgments about or within the activity in question or revises the considerations putatively bearing on those judgments. To achieve narrow reflective equilibrium, one must be ready to work back and forth between considered judgments and the considerations that support them, testing each against the other, and revising as necessary, until one arrives at a stable fit between both.

While the path to narrow reflective equilibrium may involve revising either one's considered judgments or the considerations bearing on them

so as to bring each in line with the other, it requires no attention to alternative sets of considerations capable of validating as competent more or less the same set of considered judgments (and so perhaps vindicating more or less the same activity, practice or institution). Whenever a person considers several candidate narrow reflective equilibria between considered judgments about and within an activity and various considerations bearing on them, holistically assessing and choosing between these narrow reflective equilibria, she achieves a wide reflective equilibrium. For example, if we take Kant and Mill to have each proposed a distinctive candidate narrow reflective equilibrium with respect to widely shared considered judgments of interpersonal morality, a person who holistically assesses and chooses between the Kantian and Millian alternatives realizes a reflective equilibrium wider than the person who simply settles on one or the other without considering alternatives. So, to achieve wide reflective equilibrium with respect to social or distributive justice, a person must consider a plurality of possible narrow reflective equilibria available to her and holistically assess and choose between them. For example, she must compare the considered judgments and social world expressing a restricted utilitarian conception of justice, taken as a whole, with the considered judgments and social world expressing justice as fairness, again taken as a whole, and then choose between them. The more exhaustive the range of candidate narrow reflective equilibria considered, the wider the wide reflective equilibrium achieved through deliberative reflective choice over that domain.

Narrow and wide reflective equilibrium are intrapersonal moments or stages of reflective equilibrium in its most complete form. They constitute only first steps on a person's path toward a coherent and integrated self-understanding. Neither makes any essential reference to a plurality of or to relations between persons. While we must move through narrow and wide reflective equilibrium in order to understand ourselves and to justify ourselves to one another, achieving either neither constitutes self-understanding or justification to others nor entails that we will be able to achieve self-understanding and justify ourselves to others.

It is tempting to think that self-understanding and justification to others are separate matters, and that the former is something we might and perhaps should achieve prior to pursuit of the latter. Yielding to this temptation, we might think of self-understanding as simply the coherent reflective integration of the widest possible wide reflective equilibrium for each of the various activities we engage in. But this would be a mistake. Self-understanding is not something we can achieve just by working on our own toward an integrated system of wide reflective equilibria.

For one thing, there are no hard boundaries between the various activities we undertake and the considerations that bear on them fixed prior to and independent of our achieving a coherent and integrated self-understanding. So, even if we set aside justifying ourselves to others, there is no one way to arrive at a coherent and integrated self-understanding by taking up serially the different activities we engage in and then patching together the various wide reflective equilibria achieved with respect to them in a consistent and coherent set. We might always have proceeded in a different order or with activities somewhat differently individuated and thus arrived at a different self-understanding.

Perhaps more importantly, however, much of our activity, including the reasoning we deploy in order to achieve a coherent and integrated self-understanding, is fundamentally shared or social activity. We engage in it not only as social creatures, but often also as persons or as social creatures constituting themselves in shared activity as persons, desiring to attune or align ourselves to one another within it as both rational and reasonable. To achieve a coherent and integrated self-understanding as persons, then, we must move beyond any comprehensive wide reflective equilibrium we might achieve in thinking things through only for ourselves and put that activity into dynamic interaction with the activity of justifying ourselves to one another and so achieving a shared public self-understanding of the common activities in and through which we are realized as separate persons.

General and full reflective equilibrium refer to the interpersonal moments or stages of reflective equilibrium, and so to our own self-understanding, in its most complete form. General reflective equilibrium is realized when persons publicly converge in shared activity on one and same wide reflective equilibrium with respect to it. So, for example, citizens who come publicly to share a common wide reflective equilibrium with respect to the justice of their basic social structure, say by converging publicly on Rawls's justice as fairness, stand in relations of general reflective equilibrium with respect to that activity. Full reflective equilibrium is realized as persons are able to bring their various general reflective equilibria for different activities into a coherent and integrated public understanding of their common form of life as a whole. So, for example, citizens move from general toward full reflective equilibrium if, already standing in relations of general reflective equilibrium with respect to their shared activity organizing, maintaining and perfecting their basic social structure, they are able coherently to integrate that general reflective equilibrium into a shared public understanding of their shared activity in other domains – e.g., the pursuit of scientific knowledge or of beauty and excellence in the arts or of the great good of personal intimacy in friendship and so forth. As they incorporate their various general reflective equilibria into a shared public understanding of larger and larger segments of their common form of life, they realize a fuller and fuller reflective equilibrium. At the limit they achieve complete reflective equilibrium – at which point they are together fully realized as both community and persons, each instantiated in and through activity publicly mutually intelligible and acceptable to each and all engaged in it.

Rawls is concerned with social or distributive justice, justice as the first virtue of the basic social structure. In this context, narrow and wide reflective equilibrium refer to the relation between a conception of justice and any particular individual's considered judgments of social or distributive justice (e.g., slavery and religious persecution are unjust). One might suppose that two persons with identical considered judgments of justice must necessarily converge as a matter of narrow or wide reflective equilibrium on the same conception of justice. But this is not so. At either stage, narrow or wide, there may be a plurality of possible equilibria and intelligent persons may make different choices. This is one reason why general and full reflective equilibrium are difficult to achieve. Intelligent persons often settle on different narrow or wide reflective equilibria. Reasonable intelligent persons must engage one another in a spirit of open and charitable dialogue if they are to move toward general and full reflective equilibrium.

When we ask what sort of polity we ought to have, we are asking how to go about the shared activity of organizing, maintaining, and perfecting our society's basic social structure. That we ask this question is evidence (as if we needed more!) of our conflicts and hesitancy over how to proceed together in this undertaking. Our progress in answering this question is measured in relation to general and eventually full reflective equilibrium. Of course, narrow and wide reflective equilibria mark stages of progress too, albeit for us as more or less isolated individuals rather than as reasonable social persons engaged in shared activity. One of Rawls's main lines, indeed the overall or master line, of argument for his two principles of justice as fairness is that they underwrite a wide reflective equilibrium for him and insofar as they do they merit open and charitable consideration by others as a possible basis for a general reflective equilibrium with respect to first principles of social or distributive justice. Should such a general reflective equilibrium emerge, Rawls's two principles and justice as fairness would be objectively justified within political life as a public conception of justice and would be a promising candidate for inclusion in an overall form of life with respect to which participants stand in full or complete reflective equilibrium.

It does not follow from the fact that a conception of justice belongs to a narrow, wide, general or full reflective equilibrium that it is true. And Rawls never characterizes his two principles or justice as fairness more generally as true or as aspiring to truth. Rather, they are justified as a reasonable, possibly the most reasonable, means

to the reasonable end of moving forward together as free equals in a publicly, mutually intelligible and acceptable way in our shared activity of organizing, maintaining and perfecting our basic social structure. This is not to say that they are not true; it is only to say that truth is not what is essential here. On the philosophical nature of truth, Rawls is silent. Certainly reflective equilibrium tells us nothing about it.

Instead, it expresses a regulative ideal for reasonable social persons facing conflict and hesitancy in their shared activity. As such, it neither presupposes nor denies that intelligent persons of good will facing such conflict and hesitancy will, given enough time, eventually converge on a single general or full reflective equilibrium. Within any existing polity, there may be a plurality of reasonable candidate general and full reflective equilibria available to its members. Open and charitable dialogue between them may lead them to converge publicly on one or it may lead them no further than a shared public understanding of the range of eligible equilibria.

Cut free from the idea of reflective equilibrium, the hypothetical consent of original position agents to the principles of justices as fairness does no justificatory work. The original position and the hypothetical consent of agents in it to justice as fairness are tools or heuristics used to shed light on the implications of some presumably shared fundamental idea(l)s and to help move us as persons facing conflict or hesitancy in shared activity toward a state of reflective equilibrium with one another. Whether the original position argument justifies anything, and if it does what specifically it justifies, depends entirely on the extent to which its premises, conclusions and inferences are incorporated into a general reflective equilibrium.

As may now be evident, Rawls rejects both foundationalist and what he calls naturalist modes of justification. Justice as fairness is not justified by deductive reasoning from some set of necessary or self-evidently true first principles. Nor is it justified by empirical reasoning or inductive scientific inference from some set of contingent descriptive truths (about human psychology, biology, etc.). It is justified as a (possibly the most) reasonable means to a (very important) reasonable end, namely engaging as free equals in the shared activity of organizing, maintaining, and perfecting a basic social structure on mutually intelligible and acceptable terms.

John Rawls: The Stability Argument(s)

This section surveys Rawls's argument(s) for the stability of a society well-ordered by his two principles and justice as fairness more generally.

The Stability Problem

Rawls recognizes that even if his two principles and justice as fairness more generally (including the argument from the original position) emerge as part of a, perhaps of the only possible, general reflective equilibrium between us with respect to our shared activity of organizing, maintaining, and perfecting a basic social structure, there remains still one further step to vindicating them as a (or the most) reasonable means to our reasonable end of sustaining that activity on mutually intelligible and acceptable terms. The general equilibrium with respect to the two principles and to justice as fairness must be demonstrably capable, at least under the favorable terms assumed by ideal theory, of sustaining itself on its own terms, without internal contradiction or the ad hoc introduction of external forces. That is, it must be, at least given favorable conditions, a self-stabilizing equilibrium. An equilibrium over justice as fairness that could not, even under favorable conditions, be sustained without the ad hoc introduction internally of deception, manipulation, indoctrination, coercion, false consciousness, or alienated agency, or externally of new resources, whether material, psychological or political, is, in Rawls's terms, unstable, or to put it another way, if it is stable it is not stable for the right reasons. And an unstable equilibrium, one not stable for the right reasons, is not a reasonable means to our reasonable end.

A stable general equilibrium, one stable for the right reasons, will over time reliably draw, and be publicly known reliably to draw, the full allegiance, in thought and deed, of those sharing in

it, without reservation or regret. If disturbed by the ad hoc introduction of new internal or external forces, natural, or "man-made," it will tend to restore itself on its own. Of course, the ad hoc introduction of new internal or external forces may necessitate various institutional reforms and this may generate political challenges and threaten social trust and unity. But, their allegiance fundamentally and reliably drawn to the two principles and to justice as fairness more generally, citizens will undertake and will successfully manage to make all reasonable necessary institutional reforms, to meet their political challenges and to restore and sustain social trust and unity.

In Part III of *Theory*, Rawls sets out his first argument for the stability of a society institutionally embodying and expressing a general reflective equilibrium over his two principles and justice as fairness more generally. The argument there has two main parts. The first part shows that it is reasonable to think that in such a society its members will, as a matter of their ordinary moral development, naturally and freely come to affirm and to internalize and then reliably to act on the two principles and on justice as fairness more generally. The second part shows that they will each understand and experience, and will know that others similarly understand and experience, their moral development in this way as congruent with their good in the most general sense, independent of whatever reasonable determinate conception of the good they affirm as the particular persons they are. That is, at the deepest level, they will experience, and know publicly that others experience, no fundamental conflict between being reasonable and being rational. Accordingly, they will each have adequate public assurance that for each and all it is rational to act reasonably. In *Political Liberalism*, Rawls revises this second part of the argument, the so-called "congruence" argument. The revision, which is introduced below, carries in its wake a number of new ideas that are discussed together in the next entry (5).

The Argument from Moral Development

The first part of Rawls's overall stability argument aims to show that it is reasonable to anticipate a reflectively endorsed, securely internalized, and effectively regulative commitment to the two principles and to justice as fairness more generally arising within persons raised in a society that institutionally embodied and expressed them and it. Rawls argues that persons so raised may reasonably be expected to undergo the following sort of moral development. This is a normative account of moral development. While it is presumably consistent with the empirical facts of our natural psychology, it is not a mere description or explanation of those facts.

We all begin life as infants totally dependent upon and in the care of parents (or persons functioning as parents). Ordinarily parents respond unconditionally to expressions of need or distress by an infant. Infants, ordinarily, respond by developing love for and trust in their parents. As an infant develops, this love for and trust in the parents leads the infant to take satisfaction in pleasing the parents. Accordingly, living up to parental expectations will become something the infant seeks both for the good of its parents and for its own good. And a failure to live up to parental expectations will generate primitive or proto-feelings of guilt and shame. As linguistic capacities emerge, explicit parental directions or commands will be received as (even if not reflectively understood as) genuinely normative. To be sure, insofar as this is a morality, it is a morality of (benevolent) authority fundamentally predicated on close ties of affection. Ordinarily, it yields in due course to a more familiar form of morality.

As infants develop into toddlers and then young children, many capacities, not just linguistic, come on-line. As they do, children will begin to participate in various cooperative activities within and beyond the family. In addition to sharing in the benefits of such activities, they benefit also through the development and exercise of their increasingly complex abilities, something human beings naturally find rewarding. Accordingly, as children cooperate with others in new ways, they will see that their own good, which they are coming to understand in more fine-grained and particular ways, is advanced whenever others fulfill role-specific responsibilities within the relevant activity and thereby further the common good of all engaged in it. This leads them to care for and

trust these others and to wish to advance their good. This they are able to do by fulfilling their own role-specific responsibilities and so reciprocally furthering the common good and thereby advancing the personal good of their fellow cooperators who are also developing and exercising their capacities. Through this process, iterated across many cooperative undertakings – in schools, on teams, in churches, and so forth – children come to understand and experience fidelity to their social roles within cooperation as essential to their own good and to the good of those with whom they cooperate. They acquire within cooperative undertakings some affection for those with whom they cooperate, of course, but they also come to understand their own good as congruent with the common good. When they fail to fulfill their roles and thereby let themselves and others down, they understand and experience themselves as acting contrary to not only their affections but also to a value, the common good, they share with others. They thus experience genuinely moral guilt and shame. To be sure, at this stage, their morality is a morality of association with no obvious extension to persons with whom they have no cooperative relations. But it is a morality the center of gravity of which is no longer immediate strongly felt affective ties but is rather a visible shared commitment to a common good shared and reciprocally realized with others. As children develop, they take on and internalize a complex array of role-specific responsibilities that present to them not simply as imperatively normative, but as genuinely and reflectively morally normative, both rational and reasonable.

As children develop into adults, participating in wider and more complex cooperative associations, they ordinarily come to understand and experience their cooperation with others as embodying and expressing not only a commitment to one or another determinate common good but also to certain general principles. This they find rewarding because it permits wider and more complex and institutionally mediated forms of cooperation involving the development and exercise of a capacity more complex than that involved in honoring the demands of their determinate social roles within relatively immediate cooperative undertakings. Their reflective allegiance is steadily drawn, irrespective of any affective ties or particular relationships, to these principles and to acting on them for their own sake. And toward those whose allegiance they can see is similarly drawn they begin to feel a kind of general or abstract love and trust, one cut free of any particular or immediate affection. Drawn by this general or abstract love for and trust in developed moral personality generally they will want to advance or at least not undermine the good of others who honor, even in the absence of particular affective ties, the principles to which their allegiance is drawn. Acting contrary to these principles, even in the absence of affective ties, will lead them to feel guilt and shame. This is a (fully developed) morality of principle, both rational and reasonable. It is, of course, consistent with strong and particular affective ties. And persons sharing a morality of principle will no doubt feel especially guilty or ashamed when they violate moral principles in relatively immediate cooperative relations with others for whom they have particular affection. But a morality of principle, once on-line, will generate genuine guilt and shame (and other moral feelings) even without such relations or affections. Persons who reach this stage of moral development have a fully internalized and effectively regulative commitment to honoring moral principles for their own sake.

Driving moral development through the three stages just sketched toward a fully internalized and effectively regulative commitment to moral principles for their own sake is a natural capacity for and disposition toward reciprocity that is more fully developed and exercised, generating greater self-satisfaction, at each stage. In the first stage, the morality of authority, the realized reciprocity is that of affection between the infant and parents, each desiring the good of the other. In the second stage, the morality of association, it is the reciprocity of advantage between those who cooperate through differential social roles for what they reciprocally recognize as their common good. In the final stage, it is the reciprocity of general reasons shared between persons capable of

publicly acknowledging and honoring them irrespective of particular contingent relations, expressing thereby a general and abstract love of moral persons constituted and united by shared principles in community.

Rawls argues that for a number of reasons, not least because they generally embody and express reciprocity of advantages and reasons, his two principles and justice as fairness more generally are especially well-suited to being taken up by persons whose moral development follows the pattern sketched above. In a society the institutions of which embody and express them, persons may reasonably be expected ordinarily to undergo a moral development that moves through the three stages and results in their having a fully internalized and effectively regulative commitment to the two principles and to justice as fairness. The moral development presupposed by a stable society organized by justice as fairness is not a matter of indoctrination, deception, manipulation, coercion, false consciousness, or alienated agency. It is something that may reasonably be expected reliably to happen naturally if the institutional and social world is properly arranged.

The Argument from Congruence

It does not follow, of course, that the persons whose moral development this is will understand and experience it as congruent with their overall good more generally. Conceivably they may understand and experience themselves as having acquired a moral character, good when seen on its own, that they would have preferred not to have if afforded an opportunity to survey all the goods available to them prior to starting down their developmental path to it. After all, even if it is a good for the person whose development it is, the moral development Rawls sketches surely precludes the development and exercise of other increasingly more complex capacities that she might also have found satisfying. Even if acquiring a moral character of the sort Rawls describes is good, it might be a good that persons, when thinking purely in terms of their rational self-interest in the most general sense, regret having acquired.

Were persons to so regret the acquisition of their moral character, they might more easily sacrifice it for the sake of other goods. And even if they remained faithful to their moral character, they will surely find themselves alienated to some degree from a central element of their determinate nature. Alienation of this sort almost always compromises reliable agency and trust. What needs to be demonstrated, then, Rawls concludes, is that persons will understand and experience the acquisition and their faithfulness to their moral character not simply as a good, but as fully congruent with their good overall. Showing this is not a matter of showing that their moral character is congruent with the particular determinate conception of the good they affirm as realized persons. Presumably, having acquired and being faithful to their moral character in a society faithful to justice as fairness, their particular determinate conception of the good will be a reasonable one. Demonstrating congruence here is, as Rawls say, trivial. What needs to be shown is that the acquisition of and their faithfulness to their moral character is something they will see as congruent with their good even if they set aside their reasonable particular determinate conception of the good and view their moral character from the point of view of rationality alone. In other words, what needs to be shown is that we can each see that in becoming and being reasonable we in no way forsake or compromise our rationality.

Two clarifying points are in order before moving ahead. First, Rawls is not claiming that we need to show that being reasonable is just a matter of being rational. He consistently denies that we can derive the reasonable (our moral character) from the rational (our intelligent pursuit of our own good). Rather, he is claiming that we need to show that being and becoming reasonable in no way diminishes or compromises our rationality. Second, Rawls is not claiming that we each need simply to see that this is true for ourselves. If we are to trust others, many of them strangers, within the complex system of social cooperation that is the basic social structure of a modern polity, we must be able, each and all, publicly to see that this is true for everyone. If we cannot all publicly see this, then each of us will have reason to doubt that

over time, and especially in tough times, others will be reliably moved by their acquired moral character to do as it demands.

What Rawls aims to show, then, in Part III of *Theory* is that the moral character acquired by persons living in a society the institutions of which embody and express justice as fairness will be publicly seen to be fully congruent with what he dubs "a thin theory of the good" – that is, the good as seen from the point of view of rationality alone. In *Theory*, Rawls argues that this will be so because the moral character acquired and the society that cultivates it that cultivates it make it possible for persons to participate in any of a wide and diverse range of voluntary cooperative associations oriented toward particular goods other than justice while also participating in the meta-cooperative association of a basic social structure oriented toward their free development, each and all, simply as moral persons. This sort of autonomy is a kind of self-realization that would be seen publicly by each and all as good prior to and apart from their determinate conceptions of the good.

In the decade following publication of *Theory*, Rawls began to worry about this argument. It seemed to presuppose a degree of public common ground unlikely to arise or persist in a free society organized by and expressing justice as fairness. At the very least, it presupposed as public common ground a shared general sense, from the point of view of rationality alone, of the good of a sort of autonomy and self-realization as a particular sort of being. But in a free society organized by and expressing justice as fairness, Rawls realized, there will always be disagreement over the sort of metaphysical, religious, and philosophical doctrines within and in terms of which persons frame their thinking about the good from the point of view of rationality alone. These doctrinal disagreements will manifest as pluralism with respect to comprehensive or nearly comprehensive moral, religious or philosophical doctrines or outlook. This sort of deep disagreement, a kind of disagreement in worldview, stands as a potential obstacle to any one argument serving publicly to assure citizens that their acquired moral character is congruent with their good as seen from the point of view of rationality alone.

Throughout the 1980s, Rawls undertook to rework the congruence argument from *Theory*. He found that so doing required the introduction of several new ideas (discussed below in entry 5). The results of his effort were published in 1993 as *Political Liberalism*. Roughly, Rawls argued there that so long as the (or most of the) deep doctrinal disagreements – the religious, moral, and philosophical doctrinal pluralism – characterizing a free society organized by justice as fairness were reasonable, which is to say best explained by certain burdens of judgment that often frustrate the best efforts of intelligent and informed persons of good will to reach agreement, it should still be possible for persons assure themselves and one another that their acquired moral character, at least if restricted to political morality, is congruent with their good as they understand it from their various doctrinal orientations toward the point of view of rationality alone. While they might not be able publicly to demonstrate that for each of them their acquired moral character is congruent in one and the same way with their good when seen from the point of view of rationality alone, they might still be able publicly to affirm that for each of them their acquired moral character is congruent with their good so understood. The public fact of such an "overlapping consensus" might then serve as a shared public basis of mutual assurance and trust in political life, for, at least with respect to reasonable persons and doctrines, everyone will know of everyone else, that there is no failure of congruence between their acquired moral character (in terms of political morality) and their good as they see it from their doctrinally distinctive way of understanding the point of view of rationality alone.

John Rawls: Political Liberalism, Stability Reconsidered

This entry discusses a family of ideas, systematically developed in *Political Liberalism*, introduced by Rawls as part of his effort to rework the "congruence argument" given in Part III of

Theory so that it was consistent with the deep doctrinal pluralism characteristic of a free society. These ideas include reasonable disagreement, a political conception of justice, overlapping consensus, public reason, and liberal legitimacy.

Reasonable Disagreement

Rawls uses the term "reasonable" to characterize persons, doctrines, disagreements, and much else. This can easily lead to confusion. At its root, "reasonable" refers to the mutually intelligible and acceptable adjusting or attuning of separate persons to one another in shared activity. Talk of the reasonable always presupposes a plurality of persons in a way that talk of the rational does not. Persons are reasonable only insofar as they are prepared to offer and honor mutually intelligible and acceptable terms of cooperation with others provided others are prepared to return the favor. When facing conflict or hesitancy in shared activity, reasonable persons resist the temptation to use force as a means to overcoming the impasse; instead, they engage one another in dialogue and seek creatively to find common ground from which they might reorient themselves in their shared activity.

Persons are reasonable also only insofar as they are ready and willing to recognize, and to accept the consequences of the fact, that in their reasonable efforts to avoid using force as a means to overcoming an impasse in shared activity they will sometimes find themselves, notwithstanding the manifest intelligence and good will of all parties, unable publicly and freely to reach a consensus. With respect to shared activity, this may happen at any level. Reasonable persons may freely and publicly agree on the principles bearing on a particular case but find themselves unable to reach agreement on what they require for it. Or, reasonable persons may freely and publicly agree on a number of principles regulative of a particular shared activity but find that they are unable to reach agreement on whether these together express a particular social ideal deserving their allegiance. The upshot is that reasonable people recognize that within and at any level within shared activity disagreements may arise notwithstanding the intelligence and good will of all parties. Full mutual intelligibility and acceptability in every shared activity or across all shared activities constituting a complete form of life is simply not something reasonable persons expect under conditions of freedom. General and full reflective equilibrium ranging across all the components of their shared form of life is not something they reasonably expect. Reasonable disagreements are unavoidable not just about particular cases but in overall (doctrinal religious, moral, philosophical) worldview. Reasonable persons accept this fact. Whether they accept it without regret depends on whether it stands as an insurmountable obstacle to a free and just society being stable for the right reasons.

If he had been pressed, Rawls would have acknowledged this fact of reasonable disagreement in *Theory*. He was always alive to reasonable disagreement, whether over determinate conceptions of the good persons might embrace or in particular judgments they might make given determinate facts. But he was not so pressed. And so in Part III of *Theory*, he drifted into writing as if it was reasonable to think that in a free society governed by justice as fairness reasonable persons, clearly reasonably divided over their determinate conceptions of the good and over many particular applications of shared principles to determinate facts, would somehow eventually reach a public consensus over, first, a most reasonable conception of justice, and, second, how from the point of view of rationality alone the moral character they acquire living under institutions faithful to that conception of justice is congruent with the good of each and all in the most general sense. In the decades after *Theory*, Rawls came to see that it was not reasonable to think either sort of consensus possible in any free society. There will always be reasonable disagreement over the most reasonable conception of justice. And there will always be reasonable disagreement over how to understand and evaluate the relationship between the moral character one acquires living under just institutions and one's good as seen from the point of view of rationality alone.

Rawls cites the history of Europe from the Reformation through modernity as compelling

evidence in favor of the point. The point, of course, is not simply that people will inevitably disagree, falling short of mutual intelligibility and acceptability, in one or another domain of shared activity. This has always been obvious and as supporting evidence any slice of human history will do. Whether under conditions of freedom or otherwise, simple disagreements can and do arise from many sources, not least stupidity and mean-spiritedness. Rawls's point, the point for which he cites the history of Europe from the Reformation through modernity as evidence, is rather that even under favorable conditions reasonable people – intelligent people of manifest good will, seeking with others relations of mutual intelligibility and acceptability – will inevitably sometimes disagree reasonably. What the history of Europe through modernity teaches, Rawls maintains, is that within any sufficiently complex shared activity there are limits to what reasonable persons can expect of one another in terms of mutual intelligibility and acceptability. It is certainly unreasonable to think that in a free society, mutual intelligibility and acceptability of shared activity between reasonable persons will take the form of a single comprehensive moral, religious and/or philosophical shared understanding, doctrine or tradition. Reasonable disagreement, including between comprehensive moral, religious, and philosophical doctrines and traditions, is a permanent fact in any free society.

One might conclude from this that within a free society, social stability will never rest on more than a *modus vivendi* between persons divided in various ways, including in their comprehensive doctrines, by reasonable disagreement. Certainly, the sort of social stability for which Rawls argued in *Theory*, arising out of the reliable natural inculcation in persons of an appropriate moral character which they in turn are each and all publicly able to recognize as congruent with their individual good as seen from the point of view of rationality alone, would seem to be beyond reach. But, Rawls argues, while reasonable disagreement, especially doctrinal disagreement, most certainly will give rise to conflict and hesitancy within the politics of a free society, it need not mean that persons aspiring to a free society can reasonably hope for no better than a *modus vivendi*. Were that the case, reasonable persons would have no alternative but to accept the fact of reasonable disagreement with regret. Faced with the conflicts and hesitancy arising out of reasonable disagreements, including doctrinal disagreements, reasonable persons committed to a free society the politics of which reflect their aspiration for mutual intelligibility and acceptability will settle for the stability of a *modus vivendi* only if they come up empty having looked long and hard for an alternative route to stability for the right reasons, a route other than that charted by Rawls in Part III of *Theory.*

In *Political Liberalism*, Rawls proposes and defends an alternative route. He concludes that while it is unreasonable to think that a free society will ever be free of substantial reasonable disagreement, doctrinal or otherwise, it is still reasonable to think that as shared activity between reasonable persons its politics might rest on and embody and express between them a mutually intelligible and acceptable shared public understanding of, first, how to organize, maintain and perfect a basic social structure and, second, how they might each find, and know that others similarly find, the moral character that they acquire as they develop within their shared institutional world to be congruent with their rational good, even though they have different doctrinal perspectives on their rational good. Eager to find a way to sustain as shared activity a free society, notwithstanding their reasonable disagreements, reasonable persons will be open to this possibility. They will not be driven too quickly or easily by the fact of reasonable pluralism to a politics stable at best through a mere *modus vivendi*. *Political Liberalism* is addressed to them. If its central line of argument succeeds, then reasonable persons can accept the fact of reasonable disagreement without regret, for it stands as no obstacle to a free society stable for the right reasons.

A Political Conception of Justice

The first key move Rawls makes in *Political Liberalism* is to recast justice as fairness as a free-standing public political conception of justice. As a political conception of justice, it applies only to

persons qua citizens in their political and legal relations one to another. It applies to the basic social structure and especially to constitutional essentials and issues of basic justice. It neither presupposes nor entails any particular conception of justice for interpersonal relations (whether between friends or strangers). And it neither presupposes nor entails any particular placement of political justice within a complete and acceptable order of all values, although it certainly commits to political justice as a weighty value. Further, it neither presupposes nor entails the sort of fuller and more complete understanding of moral personality familiar from Rawls's argument in Part III of *Theory* and common to comprehensive moral, religious, and philosophical doctrines. With respect to these and many other matters reaching beyond the boundary marking off a strictly political domain, Rawls aims publicly to recast justice as fairness as neutral or noncommittal. Justice as fairness is a political doctrine precisely tailored to the shared political activity of citizens organizing, maintaining, and perfecting a basic social structure, especially its constitutional essentials and matters of basic justice, in a modern free society marked by often deep reasonable disagreement.

In order for it, tailored as a political conception of justice, to serve as a reasonable means to the reasonable end of shared political activity on mutually intelligible and acceptable terms between citizens divided often by deep doctrinal disagreements, justice as fairness, including its stability argument, must be capable of public articulation and defense in terms of ideas and commitments common to citizens qua citizens, irrespective of their comprehensive doctrinal commitments, metaphysical conceptions of the person, complete understanding of the good from the point of view of rationality alone, and so on. It must be a public political conception of justice, from top to bottom and side to side.

Here Rawls makes every effort to articulate and initially defend justice as fairness in terms of idea(l)s and generally accepted facts drawn from the public political culture citizens share simply as citizens. As noted above (Section "John Rawls: The Argument for the Two Principles"), these include most basically the fundamental idea(l)s of fair social cooperation from one generation to the next, of persons as free and equal citizens possessed of certain basic capacities of political morality, and of the well-ordered society. Though often latent, these manifest themselves within our shared public political culture in the way they shape key events, artifacts, and narratives within it. The Declaration of Independence; the Constitution and its Amendments; canonical political speeches from Lincoln, Franklin Roosevelt, M.L. King Jr., and others; the national shame attached to slavery and Jim Crow; the post-Civil War introduction of public education; the post-Depression introduction of a social safety net: these all reflect underlying fundamental idea(l)s reasonably taken to be shared by citizens simply as citizens. Rawls then recasts his familiar original position argument as just one tool or heuristic citizens might use in order reasonably to work out from the common ground of their public political culture a conception (or family of conceptions) of justice capable of orienting them and underwriting social stability, notwithstanding their many reasonable, often deep and doctrinal, disagreements, in their shared political activity.

Represented as a public political conception of justice, justice as fairness might function for citizens, then, as a kind of freestanding conception of justice, a conception that they might each in their own way plug in, as it were, to their particular comprehensive moral, religious or philosophical doctrine or tradition. Justice as fairness is cast as a self-contained public political morality module capable of being integrated into each of the reasonable comprehensive doctrines (each of which expresses a possible general and nearly full reflective equilibrium) inevitable within any free society.

Rawls's next move in *Political Liberalism* is to show how this fact about justice as fairness provides a solution to the problem arising out of reasonable disagreement, doctrinal and otherwise, for the stability argument given in Part III of *Theory*.

An Overlapping Consensus

An overlapping consensus obtains when citizens are able to affirm publicly and to honor voluntarily

one and the same freestanding public political conception of justice, notwithstanding and without compromising their diverse doctrinal commitments in matters moral, religious, and philosophical. In an overlapping consensus, citizens draw on their own distinctive doctrines or traditions to give whatever further support they think needed to their shared political conception of justice and its freestanding public justification. Rawls argues that in a free society the comprehensive doctrines likely to flourish will each provide their own distinctive grounds for affirming justice as fairness, or at least a close relative from the family of generically liberal reasonable conceptions of justice publicly articulable and defensible in terms of the shared fundamental idea(l)s, as the most reasonable public political conception of justice. Whether the moral character cultivated by institutions faithful to justice as fairness or any other generically liberal reasonable conception of justice is congruent with the good as seen from the point of view of rationality alone is something to be determined by persons from within the perspectives given by their respective comprehensive doctrines. But Rawls argues that there are good reasons to be optimistic here.

For one thing, as a freestanding public political conception of justice, justice as fairness (or another member of the family of generically liberal political conceptions of justice) requires few commitments beyond those already latent within the public political culture. For another, it underwrites goods possessed of substantial gravitational force and so capable of drawing the allegiance of persons and of bending their comprehensive doctrines toward making doctrinal space for them. Sketching a few possible ways in which adherents to one or another comprehensive doctrine (e.g., Kantianism, Millian Utilitarianism, liberal Catholic Thomism) might not only affirm the content of justice as fairness (or any generically liberal political conception of justice) but also find their political moral character as cultivated by institutions faithful to it congruent with their good as seen from their doctrine's understanding of the point of view of rationality alone, Rawls concludes that it is reasonable to hope both for an overlapping consensus over the reasonableness of justice as fairness (or at least the family of generically liberal political conceptions of justice) and for this consensus to support stability for the right reasons.

Stability for the right reasons requires, of course, that citizens have adequate public assurance that they each and all understand and experience their acquired political moral character, their sense of political justice, to be congruent with their good as seen from the point of view of rationality alone. In *Theory*, Rawls made an argument that would provide such public assurance only if all persons were oriented by and understood the point of view of rationality alone in terms of a comprehensive doctrine broadly Kantian in nature. In *Political Liberalism*, he argues that insofar as the fact of an overlapping consensus is a public fact, it provides adequate public assurance for citizens that they each and all understand and experience their acquired political moral character, their sense of justice, to be congruent with their good, albeit in terms of their own diverse doctrinal understandings of the good as seen from the point of view of rationality alone. This public fact, however, is sufficient to sustain public trust and stable political cooperation for the right reasons.

This appeal to an overlapping consensus provides, then, a revised congruence argument capable of rescuing the general stability argument from Part III of *Theory* from the apparent problem of reasonable doctrinal disagreement. When conjoined with the argument from moral development (which Rawls does not revise), it specifies a sufficient basis of social stability in modern pluralist free society governed by justice as fairness. To make the case that it is not unrealistic to expect an overlapping consensus to arise in a free society, Rawls sketches a realistically possible path of historical development. Suppose a *modus vivendi* between warring factions. Over time the gravitational force of the great civic goods – peace, commodious living, etc. – it makes possible may draw previously hostile factions to a constitutional consensus over a freestanding public political conception of justice limited to an institutionally modest conception of constitutional essentials. Over time, as basic liberties,

including political liberties, are secured and as legislative, adjudicative and executive offices of government function reasonably well, additional great civic goods are produced – ties of civic friendship, a national sense of pride – and their gravitational force draws citizens to an overlapping consensus on a wider and deeper, even if still somewhat generic or underspecified, freestanding public political conception of justice, one that includes in addition to constitutionally secured basic liberties a commitment to meaningful equality of opportunity and a social safety net sufficient to ensure that liberties and opportunities are not simply formalities. Of course, there are many variations on such a conception of justice and so the political life of citizens sharing only such a generically liberal freestanding public political conception of justice will often focus on comparing and ranking candidate variations in terms of their reasonableness. Here Rawls speculates that it is not unreasonable to expect that over time the gravitational force of various civic goods will draw them toward an overlapping consensus of greater breadth, depth, and focal specificity, perhaps eventually centering on his two principles of justice as fairness.

It is not altogether clear where to locate the United States of America today along this imagined path of political development. There would appear to be a constitutional consensus. And there certainly does not appear to be an overlapping consensus over Rawls's two principles of justice let alone justice as fairness more generally. USA would seem to be somewhere along the path from a constitutional consensus to an overlapping consensus on a generically liberal freestanding public political conception of justice, but where precisely it is along that path is hard to say. Nevertheless, the history of Europe through modernity – from the *modus vivendi* arising in various states out of the wars of religion to a constitutional consensus in those states to a modest overlapping consensus over a generic liberalism – and the history of the United States both provide, Rawls maintains, evidence in favor of hope. France, the United Kingdom, other European states, and the United States have all moved some distance toward an overlapping consensus over at least generically liberal freestanding public political conceptions of justice. Over time, the citizens of each, reasonably engaging one another politically, may be drawn into an overlapping consensus yet still wider, deeper and focally more specific. Given favorable conditions, a free, pluralist and just society stable in the right way is, Rawls concludes, a real possibility.

Public Reason

The possibility of a free, pluralist, and just society oriented politically by an overlapping consensus over justice as fairness (or a closely related liberal conception of justice) and stable in the right way presupposes of citizens an ability and commitment to sustain over time their shared activity with respect to organizing, maintaining, and perfecting their basic social structure on mutually intelligible and acceptable terms. They must share and commit themselves to working within a public political reason sufficient to their reasonably deliberating over and deciding together key political issues, at the very least those regarding constitutional essentials and issues of basic justice. By reasonably addressing one another and deciding together (at least fundamental) political issues from within such a shared public political reason, citizens express and advance their commitment to a mutually intelligible and acceptable basic social structure.

Within states that have moved some distance beyond a mere constitutional consensus and toward a modest overlapping consensus over a kind of indeterminate generic liberalism, states such as the United States, the United Kingdom, and France, the content of this shared public political reason is given by the family of generically liberal political conceptions of justice as well as the noncontroversial and readily understood truths of science, history, common sense, and so on. As long as citizens undertake to deliberate and decide basic political issues within and through reasons drawn from this common ground, they ensure that their collective exercises of coercive force through state action remain always mutually intelligible and acceptable as at least reasonable or not unreasonable. Of course, deliberating over and deciding political issues in this way does not

guarantee that all citizens will accept all decisions as maximally or most reasonable. On many issues, reasonable disagreement over which of the reasonable options under consideration, each articulable and defensible in terms of public reasons, is most reasonable will persist notwithstanding responsible, intelligent, charitable public deliberation. But it should be possible for citizens to limit their voting to options they all publicly recognize as reasonable and so to ensure that their coercive force through state action can always be publicly justified as reasonable or not unreasonable. By doing so, citizens manifest their shared public commitment to a social world that is mutually intelligible and acceptable and to the view that might does not make right. This in turn supports public political trust.

The content of public reason within a free society is not fixed. For one thing, the noncontroversial truths given by the sciences and common sense develop over time. For another, a free society's public political culture will develop over time, altering the common ground from which citizens and officials may publicly reason together over political matters. Finally, as they publicly reason together from this common ground over political matters, citizens and officials will develop and refine shared criteria of reasonableness in both interpretation and inference.

The idea(l) of public reason is essential to the public political morality and culture of a free society that aspires to justice and stability. It is constitutively integral to the authority of all public offices, including that of citizenship. But because justice requires constitutionally secure basic liberties, including liberties of speech and thought, the idea(l) of public reason may not be legally enacted or enforced as either constitutional or ordinary law. Citizens must remain legally free to deliberate over and decide basic political issues in terms of nonpublic reasons (whether drawn from their various comprehensive doctrines or from controversial scientific or historical claims not part of any widespread public consensus). And though bound as a matter of public political morality to have and provide public reasons sincerely affirmed as sufficient for their positions on at least the most fundamental political issues – constitutional essentials and basic justice – citizens remain morally free to have and provide also nonpublic reasons. Indeed, there may sometimes be compelling reasons to introduce such nonpublic reasons, for these often enable citizens to assure one another that their assessment of an issue in terms of public political reasons is not in conflict with their assessment of it in terms of their nonpublic reasons as an adherent to one or another comprehensive doctrine or tradition.

Legitimacy

Even under favorable conditions, citizens in a free society should expect reasonable disagreement over many political issues. They should expect this even if they share an overlapping consensus over justice as fairness. There will always be reasonable disagreements over political issues at the adjudicative and legislative stages. And there may be reasonable disagreements at the constitutional stage with respect to nonessential items (e.g., whether constitutionally to authorize a federal income tax, or how to allocate representation or set particular limits on the number of terms to be served by persons elected to various offices). There will always be some reasonable citizens who not unreasonably judge one or another aspect of the basic social structure less than fully just. The pervasive permanent fact of reasonable disagreement in political life, even under the favorable conditions of an overlapping consensus, may seem to undermine the stability of such a society.

But Rawls argues that it need and ought not, provided citizens recognize and accept the distinction between justice and legitimacy. Justice and legitimacy are distinct, though related, moral properties. Coercive state action is just when it satisfies, either in itself or by virtue of its results, the demands of justice as given by the most reasonable principles of justice. It is legitimate when its exercise is permissible or falls within the state's (or citizens acting together through their state) authority.

The distinction is familiar and applies in many domains. A parent may act unjustly in punishing her child for a modest violation of a familial rule but also at the same time act within the scope of

her parental authority. Outsiders may have grounds for criticizing her act, but no authority to or grounds for coercively interfering with it. Or consider a parent who illegitimately but perhaps not unjustly undertakes to "parent" her child's friends whenever they are over for a playdate, instructing them without permission on religious matters or taking steps to inculcate values beyond those essential to children sharing the activity of a playdate. The parents of these friends have the authority to insist that this stops, even if the instruction is substantively just. Of course, ideally parental action is always both just and legitimate.

In similar fashion, coercive state action may be unjust but legitimate. A state may (through its officials) bring about results that are not just but that nevertheless fall uniquely within the scope of its authority to bring about. For example, laws preventing competent adults from recreationally smoking marijuana may be unjust but nevertheless legitimate. Conversely, coercive state action may be just but illegitimate. Arguably, antebellum U.S. judges that refused to enforce the Fugitive Slave Act acted justly but illegitimately. Again, of course, ideally state action is always both just and legitimate.

Though justice and legitimacy are distinct virtues, they are related. Legitimate or genuine authority is always bounded or limited authority. The legitimate or genuine authority of parents is constrained by the interests or good of their children. There is, accordingly, no legitimate or genuine authority to torture one's child as punishment or to prevent her from learning how to read in order to ensure her future status as a desirable subservient wife. Similarly, the legitimate authority of citizens and officials acting together via coercive state action is constrained by their common good as at least full, if not free and equal, members of a common body politic. There is, accordingly, no legitimate or genuine political authority to enslave or to deny freedom of thought, personal property rights or due process of law to any segment of the population.

With this distinction in mind, Rawls formulates in *Political Liberalism* a liberal principle of legitimacy. It holds that citizens who understand themselves as free and equal legitimately exercise their political power through coercive state action only when their action is in accord with a constitution the essentials of which they may all reasonably be expected to endorse in light of mutually intelligible and acceptable principles and ideals. Legitimate political action presupposes, then, and is bound or constrained by a genuine constitutional consensus between free equals. It does not presuppose and is not bound by a more robust overlapping consensus over any particular conception of justice. Given a genuine constitutional consensus, then, citizens and officials may act together legitimately to pursue justice (provided they honor the idea(l) of public reason), even as they reasonably disagree with one another over what justice demands and so reasonably disagree over the justice of the status quo at any particular point in time.

Rawls argues that in order for it to be reasonable to hope for a society stable in the right way through an overlapping consensus over justice as fairness, it must be reasonable to think that a society initially oriented only by a constitutional consensus could get to the point of being oriented by a more robust overlapping consensus without citizens or officials engaging in any illegitimate exercise of force through coercive state action. If citizens and officials engage only in legitimate exercises of force through coercive state action, then their actions are not only politically morally permissible they are also possessed of at least *prima facie* moral force as a responsible attempt to fulfill their natural duty to secure justice. Those subject to such coercive state action, manifesting typically as law or policy, will have, then, a *prima facie* moral reason, arising out of their natural duty to secure justice, to obey or comply. So long as citizens share and publicly know that they share in a constitutional consensus and honor and publicly know that they honor the idea(l) of public reason, they can rest assured and publicly assure one another that they each and all have at least a *prima facie* reason to obey the law and adhere to official policy, even if they think it less than fully just. So assured and assuring one another, they may reasonably hope peacefully to pursue justice together through only legitimate coercive state action. This raises the question, of course, as to why the legitimacy of coercive state action, and so laws and official

policies, entails a *prima facie* moral obligation to obey or comply.

Obeying the Law and Civil Disobedience

Rawls claims that ordinarily citizens have a natural duty of justice to comply with legitimate laws and to work with fellow citizens to perfect justice within the legitimate state to which they belong. This duty is natural in that it applies to citizens regardless of any voluntary undertaking on their part. They need only find themselves within a legitimate state and subject to legitimate authority and law.

The *prima facie* moral duty to obey legitimate law and acquiesce to legitimate authority is predicated, of course, on legitimacy. There is no *prima facie* moral duty to obey laws authorizing slavery or acquiesce to coercive state authority deployed systematically to deny freedom of conscience or due process of law or rights to personal property to any segment of the population. But there may often be a *prima facie* moral duty to obey an unjust but nevertheless legitimate law or to acquiesce to unjust but nevertheless legitimate authority. In such cases, reasonable citizens will have to determine for themselves whether the injustice is so substantial that all things considered their *prima facie* moral duty to obey or acquiesce is outweighed by other duties, either the duty to take effective action for the sake of justice or to stand with other very weighty values. Rawls holds that reasonable citizens will sometimes conclude that civil disobedience (violating a legitimate law for the sake of justice) and conscientious refusal (violating a legitimate law for the sake of other very weighty values) is sometimes morally permissible, perhaps even morally required.

All unjust laws call for revision. The revision of unjust laws always figures in the ongoing work of citizens and officials within a democracy. Ordinarily, this work is to be undertaken through legitimate political action without violating legitimate law. But laws sometimes prove both unjust and resistant to revision within ordinary legitimate political processes. If the injustice and the resistance to revision through legitimate political processes are substantial, then citizens and officials may reasonably turn to extraordinary remedial measures. Civil disobedience involves the public disobedience of an unjust law, and the willing acceptance of its associated legal penalty, as a way of calling the attention of fellow citizens to the seriousness of the injustice and the need for immediate remedial action. The civilly disobedient citizen acts in the name of and fulfills her natural duty of justice. The ability to judge when civil disobedience is permissible or necessary, and the disposition wisely to engage in it when it is either, is a virtue of good citizenship. The public political culture of a free society that aspires to justice will affirm this.

Sometimes a legitimate law or policy will conflict with a very weighty value other than justice to which a person is not unreasonably committed. For example, a religious citizen may be committed to pacifism as a condition of the salvation of her soul. Accordingly, she may find a call to serve in the military to conflict with this very weighty and not unreasonable value. She may refuse to comply, then, with a legitimate order from a state official simply because compliance would involve abrogating a fundamental tenet of her own not unreasonable personal morality. The ability to judge when conscientious refusal is permissible or necessary, and the disposition to engage in it when it is, are more than virtues of good citizenship. They are virtues of moral personhood more generally. A free, pluralist polity that aspires to justice will seek to accommodate conscientious refusal, provided it can be done without compromising the pursuit of justice through a legitimate politics.

John Rawls: The Law of Peoples

This entry discusses John Rawls's extension of political liberalism to international relations. It describes his approach to and understanding of the political morality of international relations and moral foundations of international law, or, as he puts it, the law of peoples.

The Issue and Rawls's Approach

In *Theory* and *Political Liberalism*, Rawls described and argued for a liberal conception of justice adequate to a just and stable (in the right way) pluralist society of free equals. Such a

society was, he argued, a realistic possibility and so something toward which we ought to aim in political life. But in making the case for this realistic utopia, Rawls set to the side a fundamental issue of both justice and stability. The issue concerns the external relations between a society of the sort described and argued for in *Theory* and *Political Liberalism* and other societies existing with it in the world. These relations raise issues of both justice and stability. With respect to justice, a society of the sort described and argued for in *Theory* and *Political Liberalism* must have principles of justice to guide it in its relations with other societies and these principles must not be in conflict with and ideally ought to express the moral core of the liberal principles of justice it draws on to orient its own internal affairs. With respect to stability, its internal stability must not be threatened by its just interactions and reasonable disagreements with, and political independence from, other polities on the world stage. To complete the case for the sort of society described and argued for in *Theory* and *Political Liberalism*, then, Rawls undertakes in his final monograph, *The Law of Peoples*, to address these issues of justice and stability in its foreign relations.

He takes these issues up from the point of view of a just and stable pluralist polity of free equals committed to a liberal conception of justice in its internal affairs and keen to interact with other polities on just terms and to assure itself that so doing poses no threat to its internal stability. As in *Theory* and *Political Liberalism*, then, Rawls addresses issues of justice and stability separately, without denying their interplay, taking up issues of justice first. His approach to the issues of justice follows the pattern established in *Theory*. He first describes and offers an initial argument for a determinate conception and specific principles of justice. He then describes the institutions and other determinate political judgments it entails. Finally, he points toward the reasonable possibility of various general reflective equilibria ranging over all the foregoing.

After making the case for a determinate conception and principles of justice governing the foreign relations of a polity of the sort he described in *Theory* and *Political Liberalism*, Rawls then makes the case for their stability. He argues that if polities of the sort described and argued for in *Theory* and *Political Liberalism* approached their relations with one another in a manner consistent with the conception and principles of justice set out in *The Law of Peoples* they would find those relations stable in the right way. They would naturally reliably acquire a sense of justice governing their relations to one another expressing, first, a morality of association (within which the sense of justice is a matter of fulfilling role specified responsibilities to others within a determinate cooperative scheme advancing the common good) and, eventually, a morality of principle (within which justice is understood and delivered as fidelity to moral principles with universal reach, principles underwriting the free reciprocal realization of persons in and as community on mutually intelligible and acceptable terms). And they would find themselves able, each and all, to appeal to the public fact of a kind of international overlapping consensus to assure themselves individually and publicly together that the sense of justice acquired through and governing their international relations was congruent or at least not in conflict with their good simply as independent rational polities.

The *Law of Peoples* also follows the pattern of *Theory* and *Political Liberalism* by making the case for a conception and principles of justice and their stability first under the favorable conditions of ideal theory, and only then after having made this case turning, second, to the unfavorable conditions of non-ideal theory (conditions often encountered in the real world) and the special issues (of non-compliance or historical or material conditions to some substantial degree inhospitable to justice) that often arise there.

The (First) International Original Position: Liberal Democratic Peoples

Under conditions of ideal theory, the issues of international justice and stability taken up in *The Law of Peoples* presuppose a plurality of independent, well-ordered, stable, liberal pluralist societies of free equals concerned to secure external relations with one another both just and stable. Rawls dubs these societies liberal peoples or

liberal democratic peoples. Liberal or liberal democratic peoples are themselves each a kind of artificial corporate person. Each has a body (territory, institutional structure) and particular identity (history, traditions). Each has a capacity rationally to form, revise and pursue (through its officials deliberatively exercising their public reason and adopting laws and policies within appropriate institutions) a conception of its own good (the common good of its members and corporate good of the whole). And each has a capacity for reasonableness in its relations to other polities. None are aggressive and all are prepared and able (through their officials deliberating and acting through institutions) to propose and honor mutually intelligible and acceptable terms of international cooperation provided the favor is returned.

What moral principles ought such peoples to honor in their interactions with one another? Here Rawls again makes use of a modified original position device as a heuristic. Suppose rational agents in an international original position behind a veil of ignorance. Each represents a separate liberal democratic people. But each knows nothing about the particular identity (size of territory, history, traditions, level of wealth and development, and so on) of the people it represents. Each seeks through agreement on principles to govern interaction with others only to advance the fundamental interests of the people it represents. These include the interests of liberal democratic peoples in securing their territorial integrity, their political independence, their reasonably just institutions (through which their citizens fairly or reciprocally secure for one another their fundamental interests as free and equal natural persons), their free civic culture and diverse civil society, and their self-respect as a people. They do not include any interests in indefinite economic growth or wealth accumulation or in expanding their territory or ruling other polities. Each seeking only to advance the fundamental interests of the people it represents, these rational agents must all freely reach a unanimous agreement over the principles governing their interaction.

They would, Rawls argues, freely and unanimously agree to at least eight principles. These express roughly the now nearly fully realized post-World War II settlement within international law. They recognize each well-ordered people as free, independent and equal. They affirm the principle that treaties and other voluntary undertakings are to be kept. They commit well-ordered peoples to basic human rights, to non-intervention, and to war only in self-defense (and then only subject to the traditional requirements of *jus in bellum*, including the guarantee of civilian immunity except in cases of "supreme emergency"). And, finally, they require well-ordered peoples to assist societies unable to achieve well-orderedness (through no fault of their own) to constitute themselves as well-ordered.

These principles do not exhaust the law of peoples. They simply constitute its core. The law of peoples also includes principles to govern the forming and regulating of various international associations, setting out standards of free and fair trade, and so on. But these Rawls only gestures toward and does not work out in detail.

Rawls accepts that there is a global basic structure and that it is to be governed by the law of peoples. He identifies three existing and morally necessary institutional elements of the global basic structure. The first, analogous to the World Trade Organization, will insure free and fair trade between peoples. The second, analogous to the World Bank and International Monetary Fund, will provide an international banking system from which peoples might borrow and ensure the stability of currencies within international markets. The third, analogous to the United Nations, will provide a regular loosely federative forum for diplomacy and the coordination of assistance to burdened societies unable to secure well-orderedness on their own. Of course, additional international organizations consistent with the law of peoples are permitted and can be expected as well-ordered peoples voluntarily cooperate over time. Taken together and in dynamic relationship one to another, well-ordered peoples and the various institutions and associations framing and expressing their interaction constitute the global basic structure. The global basic structure neither presupposes nor expresses nor

entails a commitment to a unitary world state or government. Rawls rejects such a world state or government. He affirms, however, the rule of law, not merely in a procedural but also in a substantive sense sufficient to underwrite *prima facie* moral obligations to obey the law, as an ideal to be realized in international relations between free and independent peoples.

Rawls develops the foregoing under the assumption that given the favorable conditions of ideal theory the only sort of well-ordered bodies politic possessed as artificial corporate agents of the moral capacities of personhood are liberal democratic peoples. But this assumption he recognizes might not be warranted. When it comes to international relations there may be, even under the favorable conditions of ideal theory (the global social and material conditions are conducive to all bodies politic being well-ordered and possessing as artificial corporate moral agents the capacities of personhood and all such well-ordered bodies politic are able and inclined to honor the demands of justice in their relations to one another), other sorts of well-ordered bodies politic possessed of the moral capacities of personhood. If there are, then liberal democratic peoples must check to see whether the conception and principles of justice tentatively selected (say, through the original position argument sketched above) to orient and govern their international relations to one another are suitable also to govern their relations with, or the relations between, other sorts of (nonliberal and/or nondemocratic) well-ordered peoples possessed as artificial corporate agents with the two moral powers.

This liberal democratic peoples may do by imagining a second original position within which rational agents behind the veil of ignorance represent only other sorts of (nonliberal and/or nondemocratic) well-ordered peoples. If the same principles would be selected in this second original position as in the first (in which rational agents represent only liberal democratic peoples), then liberal democratic peoples may rest assured that all well-ordered peoples possessed as corporate agents of the two moral powers could reasonably accept one and the same conception and principles of justice, the law of peoples.

The Second International Original Position: Decent Peoples

To be well-ordered, a body politic need not be liberal or democratic. It must institutionally embody a publicly known conception of justice aimed minimally at the common good of all its members, its officials must publicly and sincerely exercise their authority in accord with that conception of justice, and its citizens must largely voluntarily comply with the laws of their polity as more than a *modus vivendi* and without undue coercion, excessive policing, secrecy, indoctrination, mass manipulation, and so on. A well-ordered but nonliberal or nondemocratic polity may not be stable in the long run. Internal forces may draw it inevitably toward liberalization and democratization. But such long-term instability is consistent with well-orderedness for extended periods of time.

A well-ordered polity will respect and honor at least basic human rights (these Rawls identifies as the rights covered in or clearly implied by Articles 3-18 of the Universal Declaration of Human Rights as well the Conventions on Apartheid and Genocide). And it will satisfy the moral core of the rule of law. Institutionally, it will take the form of a constitutional republic.

Like a well-ordered liberal democracy, it will as a corporate agent possess the essentials of moral personality. It will possess a body (territory, institutional infrastructure), identity (culture, history and so forth), and the moral powers of rationality (to identify and advance through officials and institutions the common good of its members and its good as a corporate whole) and reasonableness (to propose and honor mutually intelligible and acceptable terms of interaction with other polities provided they return the favor). And as within a liberal democracy, its members will be bound to one another and to their polity as a whole by legal obligations invested, by virtue of their natural duty of justice, with at least *prima facie* moral force. While neither liberal nor democratic and thus not just in its internal organization, a well-

ordered constitutional republic may nevertheless still qualify as a "decent" artificial corporate moral person.

Rawls argues that decent peoples could reasonably affirm the same eight principles of international justice, the core of the law of peoples, as liberal democratic peoples. He invokes a second international original position within which rational agents represent only well-ordered decent peoples. These agents would agree to the same principles agreed to by agents representing only liberal democratic peoples. It follows, Rawls concludes, that liberal democratic peoples may properly regard them as objectively justified between them and any other well-ordered decent peoples and thus as a reasonable public basis for organizing and orienting their relations one to another on the world stage.

International Stability and Toleration

Rawls argues that between liberal democratic peoples, it will be publicly known that each possesses an institutionally embodied sense of (domestic and international) justice congruent with the good of its members and their shared form of life. Accordingly, liberal democratic peoples may reasonably be expected reliably to maintain peaceful and just relations with one another. Rawls suggests that the so-called democratic peace thesis constitutes empirical evidence in favor of this claim.

However, it does not follow that liberal democratic peoples may reasonably be expected reliably to maintain peaceful and just relations with other well-ordered decent peoples or that other well-ordered decent peoples may reasonably be expected reliably to maintain such relations between themselves. Rawls does not say much about the latter. And the matter of what may be reasonably expected of well-ordered decent peoples is complicated by the fact that there is no obvious reason to think that such polities will prove internally stable over the long run.

But Rawls does argue that to the extent that liberal democratic peoples tolerate well-ordered decent peoples, with recognition and respect, as full participants in a just international order, well-ordered decent peoples may reasonably be expected to tend to maintain peaceful and just relations with liberal democratic peoples. Liberal democratic peoples ought not expect well-ordered decent peoples to tend to maintain peaceful and just relations with them if they (liberal democratic peoples) undertake to liberalize or democratic well-ordered decent peoples through coercive measures, whether obvious (trade sanctions, interventions) or subtle (as with financial inducements). Liberal democratic peoples ought to allow well-ordered decent peoples to liberalize and democratize in their own way on their own time and restrict their efforts to bring about that result to the power of their own example within a respectful and reasonable politics of persuasion.

The stability of an international order embodying and expressing the law of peoples requires, then, a degree of toleration between liberal democratic and other well-ordered decent peoples. Rawls does not claim this toleration is sufficient, only necessary, to an international order stable in the right way. As between liberal democratic peoples an international order stable in the right way would seem to be a realistic possibility. As between liberal democratic peoples and other well-ordered decent peoples, or between other well-ordered decent peoples alone, matters are less clear. But this may not be a large problem if, given the favorable conditions of ideal theory, all other well-ordered decent peoples may reasonably be expected eventually to liberalize and democratize in due course as a matter of their own internal development, at least in a world within which there are some liberal democratic peoples and they engage well-ordered decent peoples with recognition and respect on terms all can reasonably affirm. Unfortunately, *The Law of Peoples* is not particularly clear on this point, leaving readers to wonder whether Rawls's view is that under the favorable conditions of ideal theory it is reasonable, or unreasonable, to hope for the eventual liberalization and democratization of all peoples in due course as a matter of their own internal development.

No Global Difference Principle

One striking feature of Rawls's law of peoples is that it includes no commitment to anything like a

global difference principle as regulative of a just global economy. Instead, Rawls includes in his law of peoples only a commitment to free and fair trade between well-ordered peoples and a duty binding already well-ordered peoples to assist other societies to become and maintain themselves as well-ordered. The law of peoples imposes no further limits on economic inequalities between peoples.

There are several reasons for this. One is that unless every state is organized itself around the same system of basic liberties and the same system of opportunity for social and economic offices and positions, there is no basis for appealing to distributive shares of the total global output of wealth and income as a uniform measure of relative advantage and no viable fixed referent for the least advantaged. Another is that neither the self-respect of peoples nor the self-respect of their members seems to be put at risk in the absence of a global difference principle. A third is that a global difference principle presupposes something like a global state capable of establishing and regulating a global currency, legislating across the totality of the global economy, enforcing a global tax on all polities, and so on. If there are good reasons to reject the idea of such a state, then there are good reasons to reject a global difference principle.

Of course, none of this constitutes a defense of the status quo. There is no excuse or justification for the failure of presently well-ordered peoples to take more effective steps toward eliminating the great poverty and suffering that plagues so many failed states. And there is no excuse or justification for their failure to secure genuinely free and fair trade.

Nonideal Theory: Political Regimes That Are Not Well-Ordered

Rawls identifies three sorts of political regimes that fail to achieve well-orderedness. These are to be denied the respect and recognition afforded members in good standing within a just international order. Extending the law of peoples to govern them is a matter of nonideal theory.

Outlaw states are not well-ordered because they either violate the basic human rights of their members, are unreasonably aggressive toward other peoples, or both. Under nonideal conditions, then, a just system of international law must include principles to govern just war, humanitarian interventions, and other forms of coercive international sanction.

Burdened societies are not well-ordered because they are, due to material or historical conditions, unable without assistance to overcome one or another obstacle – institutional, cultural, etc. – on their path to well-orderedness. Under nonideal conditions, then, a just system of international law must include principles to govern mandatory humanitarian assistance and the political and economic development of so-called failed or failing states.

Benevolent absolutisms are not well-ordered because they are ruled by self-appointed rulers acting without any public deliberation or decision on their own private judgments regarding the interests of their subjects. Regardless of their benevolence, these rulers do not rule a constitutional rule of law republic subject to a public conception of justice framing an exchange of reasons with, and guiding their exercise of public reason on behalf of, members of a single body politic. Rather they rule as an external, even if benevolent, force coordinating the behavior of a subject population. Those subject to a benevolent absolutism may be loyal to their ruler, but they are not bound one to another or to their ruler by legal obligations invested with *prima facie* moral force. And neither they nor their ruler is capable of acting through political and legal institutions as the official representative of a people as a corporate artificial agent. To be sure, the members of a benevolent absolutism have a right to defend themselves against coercive interventions, much as the members of a family have a right to defend their family against intervention, provided their parents are benevolent and secure their most fundamental interests as members of the family. But benevolent absolutisms are not entitled to recognition and respect as full members in good standing in the international order. Instead, from the well-ordered peoples that do give one another such recognition and respect within the international order, benevolent absolutisms may reasonably expect only the limited toleration of nonintervention. Under nonideal conditions,

then, a just system of international law must distinguish between the legal standing and powers of well-ordered peoples (say to enter into binding treaties across generations) and benevolent absolutisms.

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Rawls, John: Political Liberalism, Stability Reconsidered

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This entry discusses a family of ideas, systematically developed in *Political Liberalism*, introduced by Rawls as part of his effort to rework the "congruence argument" given in Part III of *Theory* so that it was consistent with the deep

doctrinal pluralism characteristic of a free society. These ideas include reasonable disagreement, a political conception of justice, overlapping consensus, public reason, and liberal legitimacy.

Reasonable Disagreement

Rawls uses the term "reasonable" to characterize persons, doctrines, disagreements, and much else. This can easily lead to confusion. At its root, "reasonable" refers to the mutually intelligible and acceptable adjusting or attuning of separate persons to one another in shared activity. Talk of the reasonable always presupposes a plurality of persons in a way that talk of the rational does not. Persons are reasonable only insofar as they are prepared to offer and honor mutually intelligible and acceptable terms of cooperation with others provided others are prepared to return the favor. When facing conflict or hesitancy in shared activity, reasonable persons resist the temptation to use force as a means to overcoming the impasse; instead, they engage one another in dialogue and seek creatively to find common ground from which they might reorient themselves in their shared activity.

Persons are reasonable also only insofar as they are ready and willing to recognize, and to accept the consequences of the fact, that in their reasonable efforts to avoid using force as a means to overcoming an impasse in shared activity they will sometimes find themselves, notwithstanding the manifest intelligence and good will of all parties, unable publicly and freely to reach a consensus. With respect to shared activity, this may happen at any level. Reasonable persons may freely and publicly agree on the principles bearing on a particular case but find themselves unable to reach agreement on what they require for it. Or, reasonable persons may freely and publicly agree on a number of principles regulative of a particular shared activity but find that they are unable to reach agreement on whether these together express a particular social ideal deserving their allegiance. The upshot is that reasonable people recognize that at any level within shared activity disagreements may arise notwithstanding the intelligence and good will of all parties. Full mutual intelligibility and acceptability in every shared activity or across all shared activities constituting a complete form of life is simply not something reasonable persons expect under conditions of freedom. General and full reflective equilibrium ranging across all the components of their shared form of life is not something they reasonably expect. Reasonable disagreements are unavoidable not just about particular cases but in overall (doctrinal religious, moral, and philosophical) worldview. Reasonable persons accept this fact. Whether they accept it without regret depends on whether it stands as an insurmountable obstacle to a free and just society being stable for the right reasons.

If he had been pressed, Rawls would have acknowledged this fact of reasonable disagreement in *Theory*. He was always alive to reasonable disagreement, whether over determinate conceptions of the good persons might embrace or in particular judgments they might make given determinate facts. But he was not so pressed. And so in Part III of *Theory,* he drifted into writing as if it was reasonable to think that in a free society governed by justice and fairness reasonable persons, clearly reasonably divided over their determinate conceptions of the good and over many particular applications of shared principles to determinate facts, would somehow eventually reach a public consensus over, first, a most reasonable conception of justice, and, second, how from the point of view of rationality alone the moral character they acquire living under institutions faithful to that conception of justice is congruent with the good of each and all in the most general sense. In the decades after *Theory,* Rawls came to see that it was not reasonable to think either sort of consensus possible in any free society. There will always be reasonable disagreement over the most reasonable conception of justice. And there will always be reasonable disagreement over how to understand and evaluate the relationship between the moral character one acquires living under just institutions and one's good as seen from the point of view of rationality alone.

Rawls cites the history of Europe from the Reformation through modernity as compelling

evidence in favor of the point. The point, of course, is not simply that people will inevitably disagree, falling short of mutual intelligibility and acceptability, in one or another domain of shared activity. This has always been obvious, and as supporting evidence any slice of human history will do. Whether under conditions of freedom or otherwise, simple disagreements can and do arise from many sources, not least stupidity and mean-spiritedness. Rawls' point, the point for which he cites the history of Europe from the Reformation through modernity as evidence, is rather that even under favorable conditions reasonable people – intelligent people of manifest good will, seeking with others relations of mutual intelligibility and acceptability – will inevitably sometimes disagree reasonably. What the history of Europe through modernity teaches, Rawls maintains, is that within any sufficiently complex shared activity there are limits to what reasonable persons can expect of one another in terms of mutual intelligibility and acceptability. It is certainly unreasonable to think that in a free society, mutual intelligibility and acceptability of shared activity between reasonable persons will take the form of a single comprehensive moral, religious, and/or philosophical shared understanding, doctrine, or tradition. Reasonable disagreement, including between comprehensive moral, religious, and philosophical doctrines and traditions, is a permanent fact in any free society.

One might conclude from this that within a free society social stability will never rest on more than a *modus vivendi* between persons divided in various ways, including in their comprehensive doctrines, by reasonable disagreement. Certainly, the sort of social stability for which Rawls argued in *Theory*, arising out of the reliable natural inculcation in persons of an appropriate moral character which they in turn are each and all publicly able to recognize as congruent with their individual good as seen from the point of view of rationality alone, would seem to be beyond reach. But, Rawls argues, while reasonable disagreement, especially doctrinal disagreement, most certainly will give rise to conflict and hesitancy within the politics of a free society, it need not mean that persons aspiring to a free society can reasonably hope for no better than a *modus vivendi*. Were that the case, reasonable persons would have no alternative but to accept the fact of reasonable disagreement with regret. Faced with the conflicts and hesitancy arising out of reasonable disagreements, including doctrinal disagreements, reasonable persons committed to a free society the politics of which reflect their aspiration for mutual intelligibility and acceptability will settle for the stability of a modus vivendi only if they come up empty having looked long and hard for an alternative route to stability for the right reasons, a route other than that charted by Rawls in Part III of *Theory.*

In *Political Liberalism,* Rawls proposes and defends an alternative route. He concludes that while it is unreasonable to think that a free society will ever be free of substantial reasonable disagreement, doctrinal or otherwise, it is still reasonable to think that as shared activity between reasonable persons its politics might rest on and embody and express between them a mutually intelligible and acceptable shared public understanding of, first, how to organize, maintain, and perfect a basic social structure and, second, how they might each find, and know that others similarly find, the moral character that they acquire as they develop within their shared institutional world to be congruent with their rational good, even though they have different doctrinal perspectives on their rational good. Eager to find a way to sustain as shared activity a free society, notwithstanding their reasonable disagreements, reasonable persons will be open to this possibility. They will not be driven too quickly or easily by the fact of reasonable pluralism to a politics stable at best through a mere *modus vivendi*. *Political Liberalism* is addressed to them. If its central line of argument succeeds, then reasonable persons can accept the fact of reasonable disagreement without regret, for it stands as no obstacle to a free society stable for the right reasons.

A Political Conception of Justice

The first key move Rawls makes in *Political Liberalism* is to recast justice as fairness as a free-standing public political conception of justice. As

a political conception of justice, it applies only to persons qua citizens in their political and legal relations one to another. It applies to the basic social structure and especially to constitutional essentials and issues of basic justice. It neither presupposes nor entails any particular conception of justice for interpersonal relations (whether between friends or strangers). And it neither presupposes nor entails any particular placement of political justice within a complete and acceptable order of all values, although it certainly commits to political justice as a weighty value. Further, it neither presupposes nor entails the sort of fuller and more complete understanding of moral personality familiar from Rawls' argument in Part III of *Theory* and common to comprehensive moral, religious, and philosophical doctrines. With respect to these and many other matters reaching beyond the boundary marking off a strictly political domain, Rawls aims publicly to recast justice as fairness as neutral or noncommittal. Justice as fairness is a political doctrine precisely tailored to the shared political activity of citizens organizing, maintaining, and perfecting a basic social structure, especially its constitutional essentials and matters of basic justice, in a modern free society marked by often deep reasonable disagreement.

In order for it, tailored as a political conception of justice, to serve as a reasonable means to the reasonable end of shared political activity on mutually intelligible and acceptable terms between citizens divided often by deep doctrinal disagreements, justice as fairness, including its stability argument, must be capable of public articulation and defense in terms of ideas and commitments common to citizens qua citizens, irrespective of their comprehensive doctrinal commitments, metaphysical conceptions of the person, complete understanding of the good from the point of view of rationality alone, and so on. It must be a public political conception of justice, from top to bottom and side to side.

Here Rawls makes every effort to articulate and initially defend justice as fairness in terms of idea(l)s and generally accepted facts drawn from the public political culture citizens share simply as citizens. As noted in the chapter Rawls, John: The Argument for the Two Principles of Justice, these include most basically the fundamental idea(l)s of fair social cooperation from one generation to the next, of persons as free and equal citizens possessed of certain basic capacities of political morality, and of the well-ordered society. Though often latent, these manifest themselves within our shared public political culture in the way they shape key events, artifacts, and narratives within it. The Declaration of Independence; the Constitution and its Amendments; canonical political speeches from Lincoln, Franklin Roosevelt, M.L. King Jr., and others; the national shame attached to slavery and Jim Crow; the post-Civil War introduction of public education; and the post-Depression introduction of a social safety net: These all reflect underlying fundamental idea(l)s reasonably taken to be shared by citizens simply as citizens. Rawls then recasts his familiar original position argument as just one tool or heuristic citizens might use in order reasonably to work out from the common ground of their public political culture a conception (or family of conceptions) of justice capable of orienting them and underwriting social stability, notwithstanding their many reasonable, often deep and doctrinal, disagreements, in their shared political activity.

Represented as a public political conception of justice, justice as fairness might function for citizens, then, as a kind of freestanding conception of justice, a conception that they might each in their own way plug in, as it were, to their particular comprehensive moral, religious, or philosophical doctrine or tradition. Justice as fairness is cast as a self-contained public political morality module capable of being integrated into each of the reasonable comprehensive doctrines (each of which expresses a possible general and nearly full reflective equilibrium) inevitable within any free society.

Rawls' next move in *Political Liberalism* is to show how this fact about justice as fairness provides a solution to the problem arising out of reasonable disagreement, doctrinal and otherwise, for the stability argument given in Part III of *Theory*.

An Overlapping Consensus

An overlapping consensus obtains when citizens are able to affirm publicly and to honor voluntarily one and the same freestanding public political conception of justice, notwithstanding and without compromising their diverse doctrinal commitments in matters moral, religious, and philosophical. In an overlapping consensus, citizens draw on their own distinctive doctrines or traditions to give whatever further support they think needed to their shared political conception of justice and its freestanding public justification. Rawls argues that in a free society the comprehensive doctrines likely to flourish will each provide their own distinctive grounds for affirming justice as fairness, or at least a close relative from the family of generically liberal reasonable conceptions of justice publicly articulable and defensible in terms of the shared fundamental idea(l)s, as the most reasonable public political conception of justice. Whether the moral character cultivated by institutions faithful to justice as fairness or any other generically liberal reasonable conception of justice is congruent with the good as seen from the point of view of rationality alone is something to be determined by persons from within the perspectives given by their respective comprehensive doctrines. But Rawls argues that there are good reasons to be optimistic here.

For one thing, as a freestanding public political conception of justice, justice as fairness (or another member of the family of generically liberal political conceptions of justice) requires few commitments beyond those already latent within the public political culture. For another, it underwrites goods possessed of substantial gravitational force and so capable of drawing the allegiance of persons and of bending their comprehensive doctrines toward making doctrinal space for them. Sketching a few possible ways in which adherents to one or another comprehensive doctrine (e.g., Kantianism, Millian Utilitarianism, and liberal Catholic Thomism) might not only affirm the content of justice as fairness (or any generically liberal political conception of justice) but also find their political moral character as cultivated by institutions faithful to it congruent with their good as seen from their doctrine's understanding of the point of view of rationality alone, Rawls concludes that it is reasonable to hope both for an overlapping consensus over the reasonableness of justice as fairness (or at least the family of generically liberal political conceptions of justice) and for this consensus to support stability for the right reasons.

Stability for the right reasons requires, of course, that citizens have adequate public assurance that they each and all understand and experience their acquired political moral character, their sense of political justice, to be congruent with their good as seen from the point of view of rationality alone. In *Theory,* Rawls made an argument that would provide such public assurance only if all persons were oriented by and understood the point of view of rationality alone in terms of a comprehensive doctrine broadly Kantian in nature. In *Political Liberalism,* he argues that insofar as the fact of an overlapping consensus is a public fact, it provides adequate public assurance for citizens that they each and all understand and experience their acquired political moral character, their sense of justice, to be congruent with their good, albeit in terms of their own diverse doctrinal understandings of the good as seen from the point of view of rationality alone. This public fact, however, is sufficient to sustain public trust and stable political cooperation for the right reasons.

This appeal to an overlapping consensus provides, then, a revised congruence argument capable of rescuing the general stability argument from Part III of *Theory* from the apparent problem of reasonable doctrinal disagreement. When conjoined with the argument from moral development (which Rawls does not revise), it specifies a sufficient basis of social stability in modern pluralist free society governed by justice as fairness. To make the case that it is not unrealistic to expect an overlapping consensus to arise in a free society, Rawls sketches a realistically possible path of historical development. Suppose a modus vivendi between warring factions. Over time, the gravitational force of the great civic

goods – peace, commodious living, etc. – it makes possible may draw previously hostile factions to a constitutional consensus over a freestanding public political conception of justice limited to an institutionally modest conception of constitutional essentials. Over time, as basic liberties, including political liberties, are secured and as legislative, adjudicative, and executive offices of government function reasonably well, additional great civic goods are produced – ties of civic friendship, a national sense of pride – and their gravitational force draws citizens to an overlapping consensus on a wider and deeper, even if still somewhat generic or underspecified, freestanding public political conception of justice, one that includes in addition to constitutionally secured basic liberties a commitment to meaningful equality of opportunity and a social safety net sufficient to ensure that liberties and opportunities are not simply formalities. Of course, there are many variations on such a conception of justice, and so the political life of citizens sharing only such a generically liberal freestanding public political conception of justice will often focus on comparing and ranking candidate variations in terms of their reasonableness. Here Rawls speculates that it is not unreasonable to expect that over time the gravitational force of various civic goods will draw them toward an overlapping consensus of greater breadth, depth, and focal specificity, perhaps eventually centering on his two principles of justice as fairness.

It is not altogether clear where to locate the USA today along this imagined path of political development. There would appear to be a constitutional consensus. And there certainly does not appear to be an overlapping consensus over Rawls' two principles of justice let alone justice as fairness more generally. The USA would seem to be somewhere along the path from a constitutional consensus to an overlapping consensus on a generically liberal freestanding public political conception of justice, but where precisely it is along that path is hard to say. Nevertheless, the history of Europe through modernity – from the modus vivendi arising in various states out of the wars of religion to a constitutional consensus in those states to a modest overlapping consensus over a generic liberalism – and the history of the USA both provide, Rawls maintains, evidence in favor of hope. France, the United Kingdom, other European states, and the USA have all moved some distance toward an overlapping consensus over at least generically liberal freestanding public political conceptions of justice. Over time, the citizens of each, reasonably engaging one another politically, may be drawn into an overlapping consensus yet still wider, deeper, and focally more specific. Given favorable conditions, a free, pluralist, and just society stable in the right way is, Rawls concludes, a real possibility.

Public Reason

The possibility of a free, pluralist, and just society oriented politically by an overlapping consensus over justice as fairness (or a closely related liberal conception of justice) and stable in the right way presupposes of citizens an ability and commitment to sustain over time their shared activity with respect to organizing, maintaining, and perfecting their basic social structure on mutually intelligible and acceptable terms. They must share a commitment to working within a shared public political reason when deliberating over and deciding together key political issues, at the very least those regarding constitutional essentials and issues of basic justice. By reasonably addressing one another and deciding together (at least fundamental) political issues from within such a shared public political reason, citizens express and advance their commitment to a mutually intelligible and acceptable basic social structure.

Within states that have moved some distance beyond a mere constitutional consensus and toward a modest overlapping consensus over a kind of indeterminate generic liberalism, states such as the USA, the United Kingdom, and France, the content of this shared public political reason is given by the family of generically liberal political conceptions of justice as well as the noncontroversial and readily understood truths of science, history, common sense, and so on. As long as citizens undertake to deliberate and decide basic political issues within and through reasons

drawn from this common ground, they ensure that their collective exercises of coercive force through state action remain always mutually intelligible and acceptable as at least reasonable or not unreasonable. Of course, deliberating over and deciding political issues in this way does not guarantee that all citizens will accept all decisions as maximally or most reasonable. On many issues, reasonable disagreement over which of the reasonable options under consideration, each articulable and defensible in terms of public reasons, is most reasonable will persist, notwithstanding responsible, intelligent, charitable public deliberation. But it should be possible for citizens to limit their voting to options they all publicly recognize from within public reason as reasonable and so to ensure that their coercive force through state action can always be publicly justified as reasonable or at least not unreasonable. By so doing, citizens manifest their shared public commitment to a social world that is mutually intelligible and acceptable and to the view that might not make right. This in turn supports public political trust.

The content of public reason within a free society is not fixed. For one thing, the noncontroversial truths given by the sciences and common sense develop over time. For another, a free society's public political culture will develop over time, altering the common ground from which citizens and officials may publicly reason together over political matters. Finally, as they publicly reason together from this common ground over political matters, citizens and officials will develop and refine shared criteria of reasonableness in both interpretation and inference.

The idea(l) of public reason is essential to the public political morality and culture of a free society that aspires to justice and stability. It is constitutively integral to the authority of all public offices, including that of citizenship. But because justice requires constitutionally secure basic liberties, including liberties of speech and thought, the idea(l) of public reason may not be legally enacted or enforced as either constitutional or ordinary law. Citizens must remain legally free to deliberate over and decide basic political issues in terms of nonpublic reasons (whether drawn from their various comprehensive doctrines or from controversial scientific or historical claims not part of any widespread public consensus). And though bound as a matter of public political morality to have and provide public reasons sincerely affirmed as sufficient for their positions on at least the most fundamental political issues – constitutional essentials and basic justice – citizens remain morally free to have and provide also nonpublic reasons. Indeed, there may sometimes be compelling reasons to introduce such nonpublic reasons, for these often enable citizens to assure one another that their assessment of an issue in terms of public political reasons is not in conflict with their assessment of it in terms of their nonpublic reasons as an adherent to one or another comprehensive doctrine or tradition.

Legitimacy

Even under favorable conditions, citizens in a free society should expect reasonable disagreement over many political issues. They should expect this even if they share an overlapping consensus over justice as fairness. There will always be reasonable disagreements over political issues at the adjudicative and legislative stages. And there may be reasonable disagreements at the constitutional stage with respect to nonessential items (e.g., whether constitutionally to authorize a federal income tax, or how to allocate representation or set particular limits on the number of terms to be served by persons elected to various offices). There will always be some reasonable citizens who not unreasonably judge one or another aspect of the basic social structure less than fully just. The pervasive permanent fact of reasonable disagreement in political life, even under the favorable conditions of an overlapping consensus, may seem to undermine the stability of such a society.

But Rawls argues that it need and ought not, provided citizens recognize and accept the distinction between justice and legitimacy. Justice and legitimacy are distinct, though related, moral properties. Coercive state action is just when it satisfies, either in itself or by virtue of its results,

the demands of justice as given by the most reasonable principles of justice. It is legitimate when its exercise is permissible or falls within the state's (or citizens acting together through their state) authority.

The distinction is familiar and applies in many domains. A parent may act unjustly in punishing her child for a modest violation of a familial rule but at the same time act within the scope of her parental authority. Her child or outsiders may have grounds for criticizing her act, but no authority coercively to interfere with it. Or a parent may illegitimately undertake to discipline her child's friends whenever they are over for a playdate. Even if the discipline is substantively just, the friends and their parents have grounds to complain that it is illegitimate.

In similar fashion, coercive state action may be unjust but legitimate. A state may (through its officials) bring about results that are not just but that nevertheless fall uniquely within the scope of its authority to bring about. For example, laws preventing competent adults from recreationally smoking marijuana may be unjust but nevertheless legitimate. Conversely, coercive state action may be just but illegitimate. Political elites may conspire illegitimately to bring about results that are substantively just.

Though justice and legitimacy are distinct virtues, they are related. Legitimate or genuine authority is always bounded or limited authority. The legitimate or genuine authority of parents is constrained by the interests or good of their children. There is, accordingly, no legitimate or genuine authority to torture one's child as punishment or to prevent her from learning how to read in order to ensure her future status as a desirable subservient wife. Similarly, within any polity the legitimate authority of citizens and officials acting together via coercive state action is constrained by their common good. There is, accordingly, no legitimate or genuine political authority to enslave or to deny freedom of thought, personal property rights, or due process of law to any segment of the population.

With this distinction in mind, Rawls formulates in *Political Liberalism* a liberal principle of legitimacy. It holds that citizens who understand themselves as free and equal legitimately exercise their political power through coercive state action only when their action is in accord with a constitution the essentials of which they may all reasonably be expected to endorse in light of mutually intelligible and acceptable principles and ideals. Legitimate political action presupposes, then, and is bound or constrained by a genuine constitutional consensus between free equals. It does not presuppose and is not bound by a more robust overlapping consensus over any particular conception of justice. Given a genuine constitutional consensus, then, citizens and officials may act together legitimately to pursue justice (provided they honor the idea(l) of public reason), even as they reasonably disagree with one another over what justice demands and so reasonably disagree over the justice of the status quo at any particular point in time.

Rawls argues that in order for it to be reasonable to hope for a society stable in the right way through an overlapping consensus over justice as fairness, it must be reasonable to think that a society initially oriented only by a constitutional consensus could get to the point of being oriented by a more robust overlapping consensus without citizens or officials engaging in any illegitimate exercise of force through coercive state action. If citizens and officials engage only in legitimate exercises of force through coercive state action, then their actions are not only politically morally permissible, but they are also possessed of at least prima facie moral force as a responsible attempt to fulfill their natural duty to secure justice. Those subject to such coercive state action, manifesting typically as law or policy, will have, then, a prima facie moral reason, arising out of their natural duty to secure justice, to obey, or comply. So long as citizens share and publicly know that they share in a constitutional consensus and honor and publicly know that they honor the idea(l) of public reason, they can rest assured and publicly assure one another that they each and all have at least a prima facie reason to obey the law and adhere to official policy, even if they think it less than fully just. So assured and assuring one another, they may reasonably hope peacefully to pursue justice together through only legitimate coercive state action. This raises the question, of course, as to why the legitimacy of coercive state action, and so

laws and official policies, entails a prima facie moral obligation to obey or comply.

Obeying the Law and Civil Disobedience

Rawls claims that ordinarily citizens have a natural duty of justice to comply with legitimate laws and to work with fellow citizens to perfect justice within the legitimate state to which they belong. This duty is natural in that it applies to citizens regardless of any voluntary undertaking on their part. They need only find themselves within a legitimate state and subject to legitimate authority and law.

The prima facie moral duty to obey legitimate law and acquiesce to legitimate authority is predicated, of course, on legitimacy. There is no prima facie moral duty to obey laws authorizing slavery or acquiesce to coercive state authority deployed systematically to deny freedom of conscience or due process of law or rights to personal property to any segment of the population. But there may often be a prima facie moral duty to obey an unjust but nevertheless legitimate law or to acquiesce to unjust but nevertheless legitimate authority. In such cases, reasonable citizens will have to determine for themselves whether the injustice is so substantial that all things considered their prima facie moral duty to obey or acquiesce are outweighed by other duties, either the duty to take effective action for the sake of justice or to stand with other very weighty values. Rawls holds that reasonable citizens will sometimes conclude that civil disobedience (violating a legitimate law for the sake of justice) and conscientious refusal (violating a legitimate law for the sake of other very weighty values) are sometimes morally permissible, perhaps even morally required.

All unjust laws call for revision. The revision of unjust laws always figures in the ongoing work of citizens and officials within a democracy. Ordinarily, this work is to be undertaken through legitimate political action without violating legitimate law. But laws sometimes prove both unjust and resistant to revision within ordinary legitimate political processes. If the injustice and the resistance to revision through legitimate political processes are substantial, then citizens and officials may reasonably turn to extraordinary remedial measures. Civil disobedience involves the public disobedience of an unjust law, and the willing acceptance of its associated legal penalty, as a way of calling the attention of fellow citizens to the seriousness of the injustice and the need for immediate remedial action. The civilly disobedient citizen acts in the name of and fulfills her natural duty of justice. The ability to judge when civil disobedience is permissible or necessary, and the disposition wisely to engage in it when it is either, is a virtue of good citizenship. The public political culture of a free society that aspires to justice will affirm this.

Sometimes, a legitimate law or policy will conflict with a very weighty value other than justice to which a person is not unreasonably committed. For example, a religious citizen may be committed to pacifism as a condition of the salvation of her soul. Accordingly, she may find a call to serve in the military to conflict with this very weighty and not unreasonable value. She may refuse to comply, then, with a legitimate order from a state official simply because compliance would involve abrogating a fundamental tenet of her own not unreasonable personal morality. The ability to judge when conscientious refusal is permissible or necessary and the disposition to engage in it when it is are more than virtues of good citizenship. They are virtues of moral personhood more generally. A free, pluralist polity that aspires to justice will seek to accommodate conscientious refusal, provided it can be done without compromising the pursuit of justice through a legitimate politics.

Rawls, John: The Argument for the Two Principles of Justice

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This entry discusses two of Rawls's three main lines of argument for his two principles of justice: the original position argument and the argument

from reflective equilibrium. As noted above, Rawls argues also that considerations of social stability favor his two principles of justice. The next section (4) ("The Stability Argument(s)") addresses the argument(s) from stability.

The Original Position Argument

How ought we to organize our polity? To begin to answer this question, Rawls recast it in the more basic and manageable terms of the original position argument. At the heart of this argument is a model of the deliberation free equals would have to undertake if they intended to agree unanimously on principles to constitute and regulate a shared social world. In his early work, culminating in *A Theory of Justice*, Rawls developed this model, the original position argument, by specifying the circumstances of justice, the role of principles of justice in governing the institutional production and distribution of social primary goods, various formal conditions to be satisfied by all principles of justice, a veil of ignorance designed to ensure that deliberation is not unreasonably tainted by prejudicial information, principles of rational choice, and so on. Later, in *Political Liberalism*, he characterized this model, the original position argument, as just one way we might draw together and work out the implications of three idea(l)s fundamental to our shared public political culture (within contemporary liberal democracies) and so plausibly constituting common ground between us as reasonable citizens within them. These three idea(l)s are society as a system of fair social cooperation, persons as free and equal citizens, and the well-ordered society. In his lectures throughout the 1980s, published in 2001 as *Justice as Fairness: A Restatement*, Rawls tended to combine the more formal and detailed argument presented in *Theory* with the less formal and schematic argument presented in *Political Liberalism.* What follows is an overview of this composite.

Fundamental Idea(l)s

Rawls does not consider the question of whether we ought to have a polity. He devotes his attention to the question of what kind of polity we ought to have. This question, when raised or posed by reasonable citizens, presupposes and expresses three fundamental idea(l)s. To see these, it is helpful first to sharpen the initial question. Whatever else a polity is, it is, Rawls insists, a system of social cooperation for mutual advantage sustained over successive generations. We want to know what kind of polity we ought to have because we take it for granted that polities can be mutually advantageous for their members over time. Of course, not all systems of mutual advantage are systems of social cooperation. When we ask what kind of polity we ought to have we are not asking how some of us might forcefully order others or how some external agent might forcefully order all of us for the sake of our mutual advantage. Instead, if we are reasonable, we are asking how, cooperating together under common public rules, we might mutually advantage ourselves, each and all.

Just as a polity, as a system of social cooperation for mutual advantage, is not a system of mere coordination (internally or externally imposed) for mutual advantage, so too it is not some sort of organic unity within which our relations to one another as separate persons are dissolved or transcended and mutual advantage is transformed into the advantage of some corporate whole. Rather, we cooperate for the sake of our mutual advantage as separate persons. And as separate persons it is our mutual advantage over the course of a complete life that matters. A complete life will typically include participation, directly or indirectly, in the biological and social reproduction of successive generations sufficient to sustain the polity over time. So, then, what we each and all want to know is not simply what sort of polity we ought to have, but whether there is available to us any shared public understanding of how as enduring separate persons living out complete lives (which will typically involve the family in some form or other) we might organize ourselves into a mutually advantageous system of social cooperation sustained over successive generations.

Now, with the question thus sharpened, we can bring to the surface the three fundamental idea(l)s it presupposes on Rawls's view. These constitute

common ground between persons taking up this question together. First, the question presupposes some shared or common point of view from which we as separate persons raise it and in terms of which our answer to it may be publicly defended and shared. Essential to this shared or common point of view is our idea(l) of ourselves as not just separate persons but as fully qualified, each and all, to co-author together the basic social structure of our polity as a system of mutually advantageous social cooperation. We are fully qualified, each and all, in that we each possess to the requisite minimum degree the two basic moral capacities separate persons must have to co-author together such a basic social structure. The first is the rational capacity to form, revise, and pursue a determinate conception of one's own good. The second is the reasonable capacity to propose and honor public, shared terms of social cooperation with others and to pursue one's own conception of the good only as permitted by those terms (provided others do the same). By virtue of each having these capacities, we are fully qualified, for the purposes of the question at hand, as *free and equal* separate persons. Implicit in our question, then, is this (political moral) idea(l) of ourselves.

Insofar as we raise and seek to answer this question as free equals, we presuppose that in order to qualify as an answer to it any proposed terms of social cooperation, the principles of our polity's basic social structure, must be acceptable to each and all. Such terms, or principles, would be not only mutually advantageous but also fair to all as a free equal with others. To put it another way, such terms, or principles, would be immune to complaints of unfairness as between free equals. So when we ask what sort of polity we ought to have we presuppose also an (political moral) idea(l) of *fair* social cooperation over successive generations.

With these first two idea(l)s identified, we can easily identify a third. In order for free equals to sustain fair social cooperation over successive generations, the content and fairness of their terms, or principles, of social cooperation must be publicly known and the institutions, or basic social structure, embodying them must be publicly evaluable in and publicly known to be compliant with those terms. As between free equals, then, fair social cooperation must be "well-ordered." This is Rawls's third fundamental (political moral) idea(l).

The basic question "what sort of polity ought we to have?" presupposes these three fundamental idea(l)s: society as a system of fair social cooperation over successive generations, persons as not only separate but free and equal, and society as well-ordered. Each is linked to the others. Taken together they constitute common ground from which we might reasonably proceed on terms mutually intelligible and acceptable in trying to answer our basic question. What we want to know, then, is whether there is available to us a polity that would, at the least, adequately embody and express this common ground.

To make further progress, these idea(l)s need to be fleshed out further. A first needed refinement concerns the idea(l) of persons as separate but free and equal co-authors of their society's basic social structure. Key here is that when we ask what sort of polity we ought to have we are not asking, indeed we cannot be asking, as the determinate persons that we already are: as properly named individuals with our unique dispositions, abilities, and character traits; or as members of socially constituted groups, such as Blacks and Whites, or workers and capitalists, or men and women; or as committed to one or another determinate conception of the good. There are several reasons that we are not, indeed cannot be, raising the question of what sort of polity we ought to have from any of these points of view. One is that in many ways what we are as properly named individuals with our own unique dispositions, abilities, and character traits, or as members of socially constituted groups, or as committed to this or that determinate conception of the good, is already shaped and determined by the basic social structure within which we live. So, unless we set aside these facts about ourselves we will almost certainly be begging the question, tacitly assuming that our existing basic social structure is more or less just and so presupposing an answer to the very question we are trying to raise. Thus, we must approach the question of what sort of polity we ought to have as if we had no determinate

identity. As free and equal co-authors of our society's basic social structure we each have the same self-validating equal claims to the material and social conditions necessary and sufficient to the development and exercise of the moral capacities that qualify us as free and equal, the capacity to form, revise, and pursue a determinate conception of the good and the capacity to propose and honor (provided others do the same) fair terms of social cooperation. It is from this point of view that we want most basically to know what sort of polity we ought to have.

Another needed refinement is a metric for assessing advantage within a system of social cooperation. Such a metric must include two things. First, it must include a common good or goods in terms of which the advantage of each and all may be assessed. Second, it must include a common baseline or benchmark for determining relative degrees of advantage. To address the first need, Rawls notes that we cooperate politically as citizens for the sake of various goods we could not otherwise secure adequately for ourselves. Rawls calls these social goods. Of these, however, only some may be reasonably thought to be of value to any and all citizens, irrespective of their particular identities, and so eligible to serve as a common public metric of advantage. These Rawls refers to as "primary" social goods. They include, at a minimum, basic rights and liberties, diverse opportunities for offices and positions of authority and responsibility, wealth and income, and the social or public bases of self-respect. These may reasonably be thought to have value for all citizens as free equals because they are essential means to advancing a very wide range of determinate conceptions of the good and for developing and exercising the core moral capacities that qualify citizens as free equals. So it is in terms of these primary social goods that advantage is to be assessed within any system of social cooperation.

But we need also a clear common baseline or benchmark for assessing relative advantage in terms of these primary social goods. However, from our point of view as the free and equal co-authors of our society's basic social structure, and therefore setting aside our determinate identities, the only plausible common baseline or benchmark is the egalitarian one of equal shares. After all, as free and equal co-authors of our basic social structure we each have the same self-validating claim to the material and social conditions necessary and sufficient to the development and exercise of our moral capacities. Thus, relative advantage must be assessed in the first instance against the common baseline or benchmark set by the share of social primary goods each person would be able reasonably to expect within a system of social cooperation organized so that all engaged in it reasonably expected the largest possible equal share. Relative to this egalitarian baseline, a system of social cooperation is mutually advantageous and so collectively rational just in case it improves for all the reasonably expected share of social primary goods, even if it requires or allows unequal shares.

But we need to refine this idea still further. There are likely many systems of social cooperation mutually advantageous and so collectively rational in this sense. One reason for this is that probably there are many systems of social cooperation with different offices and positions tied to different shares of social primary goods, at least shares of wealth and income, likely to draw talents distributed across separate persons to socially productive uses more effectively and efficiently than any society that attaches to all offices and positions equal shares of all primary social goods, including wealth and income. Thus, while the idea of social cooperation for mutual advantage relative to the egalitarian baseline or benchmark is sufficient to narrow the field of candidate answers to our inquiry into the sort of polity we ought to have, it is not sufficient by itself to determine *the* answer. Mutual advantage relative to an egalitarian baseline may be necessary to fair terms of social cooperation, but it is not by itself sufficient.

Clearly, then, if we are to arrive at a determinate public answer to our question we must be able to assess advantage in terms more precise than mutual advantage or collective rationality. One possibility would be to appeal to the total size of the aggregate increase in the total social product and choose that social system that maximized aggregate or average per capita advantage. But Rawls immediately rules this out since such

an appeal would take no account of how separate persons are advantaged as free equals in relation to one another. Free equals would reject it as unreasonable.

Assuming normal conditions, Rawls argues that free equals will never find it mutually advantageous to have inequality in basic liberties or opportunities for offices and positions. They will agree only to terms or principles of social cooperation that secure for each the largest equal share of such goods. But wealth and income is another matter. Certainly, free equals will not unanimously agree to terms or principles that fail to secure for each and all a share of wealth and income adequate to make meaningful use of their basic liberties and meaningfully pursue opportunities. But above this floor, they may reasonably agree to terms or principles that allow, even require, mutually advantageous inequalities. Here Rawls argues that it is from the point of view of the social position least advantaged by any mutually advantageous inequalities in lifetime expected shares of income and wealth that free equals would or ought to identify the fairest or most reasonable system of mutually advantageous cooperation between them.

The Fundamental Idea(l)s Modeled: The Original Position Argument

The foregoing should suffice to suggest how Rawls's original position argument models the assumptions and fundamental idea(l)s implicit in the basic question we raise when we ask of one another what sort of polity ought we to have. This argument imagines separate rational agents in an "original position" from which they are to determine the public principles of a basic social structure through which social primary goods are cooperatively produced and distributed. While each of these agents represents a real citizen (or family-line), they are behind a "veil of ignorance" with respect to both the determinate identities of the citizen (or family-line) they represent and the details of the existing institutional order. This veil ensures that agents face one another in the original position simply as free equals and that if they are able to reach a unanimous agreement regarding the public principles for a basic social structure the agreement will be one that the real citizens (or family-lines) they represent could acknowledge as not only collectively rational for, but also as most reasonable between, them as free equals, no matter their determinate identity or social position.

Of course, if we imagine agents in an original position starting from scratch in their effort to reach an agreement on principles to govern the basic social structure for those they represent, we may find ourselves unable to ever bring the thought experiment to a conclusion. There is no limit to the number and variety of possible principles that the agents might propose to one another and thus be forced to entertain. But when we ask what sort of polity we ought to have, what we want to know is not mainly how to design a basic social structure from scratch but rather which of the historically significant and so familiar principles of social or distributive justice are the most reasonable. In effect, our question is multiple-choice. Accordingly, Rawls argues that it is enough to imagine agents in the original position making a number of pair-wise comparisons between the historically most significant conceptions of justice: utilitarian conceptions, perfectionist conceptions, intuitionist conceptions, and finally Rawls's own conception, justice as fairness. Rawls argues that original position agents would unanimously converge in this series of pair-wise comparisons on his two principles of justice as fairness as the most preferred. This constitutes Rawls's first main line of argument in favor of justice as fairness as the best answer to our basic question: what sort of polity ought we to have?

The Original Position Argument for the Two Principles of Justice

Rawls first compared his two principles to utilitarianism. He argued that agents in the original position would prefer his two principles for at least two reasons. First, his two principles firmly secure the basic liberties, whereas utilitarianism does not. Utilitarianism carries always some real possibility (of uncertain probability) of a morally catastrophic loss of liberty for citizens. The two principles guarantee a satisfactory social world, at

least in terms of basic rights and liberties. Utilitarianism does not. Second, as a matter of moral psychology, citizens cannot reasonably be expected voluntarily and reliably to honor utilitarian principles if those principles leave their claims to the social primary goods subject to constant reassessment and revision. A polity organized on utilitarian principles will suffer, then, from an inherent instability to some nontrivial degree. It will be able to overcome this instability only through social indoctrination or other undesirable coercive measures. This, Rawls argues, is a polity organized on the principles of justice as fairness will be able to avoid. Agents in an original position will therefore prefer justice as fairness to utilitarianism.

From this first comparison, Rawls concludes that fair terms of cooperation must include, and immunize from being overturned by utilitarian considerations, a liberty principle, and thus a constitutionally entrenched system of basic liberty rights, as well as some social minimum or safety net ranging over both opportunities for offices and positions and a lifetime expected share of wealth and income. Taking these as provisionally settled commitments, he went on to compare his two principles to what he called "restricted utilitarianism." Restricted utilitarianism accepts the liberty principle, fair equality of opportunity, and a social minimum or safety-net in terms of wealth and income (of the sort familiar in developed liberal democracies). But, subject to these constraints, it then requires a basic structure (mainly the economy) to maximize average per capita wealth and income. This is a limited, humane, and not obviously unreasonable utilitarianism, one immune to morally catastrophic losses of liberty, opportunities, or wealth and income. But Rawls argues that original position agents would still favor his two principles of justice as fairness, and in particular the difference principle, for several reasons.

One is that the difference principle is better suited to serve as a public principle of justice. Reliable society-wide assessments of average utility are difficult, if not impossible, to generate within reasonable costs. Another is that the difference principle is more likely to secure social stability. It will permit a smaller range of economic inequalities than restricted utilitarianism. And the inequalities it permits will themselves be publicly seen as more fully faithful to the ideals of reciprocity and fraternity implicit in the self-understanding of citizens as the free and equal co-authors of their polity's basic structure. Rawls concludes that original position agents will converge on the two principles of justice as fairness as more reasonable or fair than the alternative of restricted utilitarianism.

Rawls devotes most of his attention to explaining how original position agents would compare his two principles of justice as fairness to either general or restricted utilitarianism. He does not spend comparable time explaining how they would compare the two principles to intuitionist or to perfectionist principles or conceptions of justice. But the reasoning is clear enough. Blind to the particular conceptions of the good affirmed and pursued by the citizens they represent, original position agents would reject perfectionist principles that picked out one or a small number of determinate conceptions of the good to be maximally promoted by the basic social structure. They would prefer to preserve for the citizens they represent a wide liberty to form, revise and pursue a determinate conception of the good as they see fit. Accordingly, they would prefer justice as fairness. And concerned to identify public principles of justice capable of well-ordering society and sustaining mutual trust within political life, original position agents would reject intuitionist principles – which must always be balanced against one another case by case in light of ad hoc assessments of their weight and force – as incomplete and unable to well-order society. They would prefer principles that do not call for being balanced against one another case by case in light of ad hoc assessments of their weight and force and sufficient to well-order society. On this front, original position agents would prefer the two principles of justice as fairness to intuitionist principles.

One general current running beneath the surface of all Rawls's arguments is that original position agents must choose principles of justice with a good faith expectation that the real citizens they represent will be able and inclined voluntarily to

comply with them and to support the institutions embodying them no matter how they fare under them. Original position agents are not to gamble, hoping that the citizens they represent are among those favored by the basic social structure and thus likely to give it their allegiance. They must take seriously every possible outcome allowed by the basic social structure and in good faith and ask whether they could freely give their allegiance to it irrespective of the outcome that obtains for them.

In *Theory* Rawls aimed to set out the original position argument in a way that might, with further development and revision, operate as a kind of moral geometry. That is, he hoped to present it as a formally deductive argument, a kind of proof, moving clearly and directly from a complete set of general premises to a single determinate conclusion. As with any such argument, the main advantage is that with the inferential moves between premises beyond reproach, critical analysis can focus exclusively on the intelligibility, reasonableness, and truth of the premises.

Rawls acknowledged, even emphasized, of course, that whether such a proof could serve as a justification for any particular answer to our basic question – what sort of polity ought we to have? – would depend on whether the set of general premises (and the inferences marking the path from them to the single determinate conclusion) were common ground between us.

In his later work, Rawls seems to have abandoned any aspiration for an original position argument articulable as a kind of proof in moral geometry. Instead, he represented it as just one particularly vivid way of organizing the putative common ground expressed by the three fundamental idea(l)s and publicly showing how they generate a balance of reasons that favors as the most reasonable or fair the principles of justice as fairness over other candidate principles of justice. While he seems to have given up on the project of linking the fundamental idea(l)s through deductive inference to his two principles, he remained confident until his death that the fundamental idea(l)s expressed common ground between us and publicly underwrote a balance of reasons that favored the two principles of justice as fairness as more reasonable or fair than the historically available alternatives. He allowed, however, that others might reasonably think that the balance of reasons arising from the fundamental idea(l)s favored some other generically liberal conception of justice, for example, restricted utilitarianism. With respect to reasonable disagreements between generically liberal conceptions of justice each claiming best to reflect the balance of reasons arising from the fundamental idea(l)s, deductive arguments are not likely to prove of much value. Public deliberation here must be essentially interpretive in nature.

The Argument from Reflective Equilibrium

The two principles of justice as fairness constitute Rawls's answer to the basic question of what sort of polity we ought to have. The argument(s) from the original position and the fundamental idea(l)s they model constitute a main line of argument for them. But they do not constitute the only main line of argument. Another essential main line of, indeed in a real sense the master, argument draws from Rawls's idea(l) of reflective equilibrium.

This idea(l) is often misunderstood. To get a handle on it, it is helpful to begin by noticing that in the absence of conflict or hesitancy in shared activity we do not require of one another justification. We simply get on with the business of living. Absent conflict or hesitancy, shared activity mutually intelligible and acceptable to the persons engaging in it needs no further justification. Justification is called for only when we find ourselves in conflict or hesitant as to how to move forward with one another in our shared activity. And when justification is called for it is always addressed to those with whom we are engaged in the shared activity that risks being derailed or idled by conflict or hesitancy. Justification aims to restore shared activity between persons on mutually intelligible and acceptable terms so that they can get on with the business of living. The business of living so restored requires no further justification.

Persons engaged in mutually intelligible and acceptable shared activity stand with respect to it and to one another in reflective equilibrium. They share the same spontaneous judgments, stable upon reflection, with respect to what they can expect of one another, what actions are forbidden, required, permissible, laudable, and so forth. And they share considerations, principles, values, argument patterns, and so on that they publicly understand these judgments – Rawls calls them "considered judgments" – to reflect and express. These considerations function for them as reliable public criteria of competence in their shared activity. As between persons in this condition of reflective equilibrium there is no point to their seeking from one another further justification for their activity. Persons standing in this relationship are fully reconciled and attuned to one another as both rational and reasonable within the relevant domain of social life.

Rawls's most general argument for justice as fairness is that it is uniquely well-suited and well-positioned to sustain us, those of us asking what sort of polity we ought to have, in a common reflective equilibrium with respect to our shared activity as free equals organizing, maintaining, and perfecting a basic social structure. Of course, in its most complete form, ranging over all domains of a complete form of life, reflective equilibrium is something we will never fully achieve. But we may always more fully approximate it. In *Theory* Rawls suggested that it was not unreasonable to think that we might achieve a single, focused, and rather substantial reflective equilibrium with respect to our shared activity organizing, maintaining, and perfecting a basic social structure. In *Political Liberalism* he acknowledges that the sort of reflective equilibrium for which he hoped in *Theory* was probably beyond reach, but he then argues that a different and more complex sort of reflective equilibrium, one still sufficient to support justice as fairness, was not.

Rawls distinguishes various moments or stages belonging to the most complete form of reflective equilibrium. First, there is what he dubs narrow reflective equilibrium. This is a form of reflective equilibrium achieved whenever a person achieves relations of mutual fit between their considered judgments about and within an activity and a set of considerations bearing on them and it. So, a person who has achieved such relations of mutual fit between her considered judgments of justice about and within a basic social structure, on the one hand, and a set of considerations, or conception of justice, bearing on them, on the other, has achieved narrow reflective equilibrium. Achieving narrow reflective equilibrium may be impossible unless one revises some considered judgments about or within the activity in question or revises the considerations putatively bearing on those judgments. To achieve narrow reflective equilibrium, one must be ready to work back and forth between considered judgments and the considerations that support them, testing each against the other, and revising as necessary, until one arrives at a stable fit between both.

While the path to narrow reflective equilibrium may involve revising either one's considered judgments or the considerations bearing on them so as to bring each in line with the other, it requires no attention to alternative sets of considerations capable of validating as competent more or less the same set of considered judgments (and so perhaps vindicating more or less the same activity, practice, or institution). Whenever a person considers several candidate narrow reflective equilibria between considered judgments about and within an activity and various considerations bearing on them, holistically assessing and choosing between these narrow reflective equilibria, she works toward a wider reflective equilibrium. For example, if we take Kant and Mill to have each proposed a distinctive candidate narrow reflective equilibrium with respect to widely shared considered judgments of interpersonal morality, a person who holistically assesses and chooses between the Kantian and Millian alternatives realizes a reflective equilibrium wider than the person who simply settles on one or the other without considering alternatives. So, to achieve wide reflective equilibrium with respect to social or distributive justice a person must consider a plurality of possible narrow reflective equilibria available to him/her and holistically assess and choose between them. For example, he/she must compare the considered

judgments and social world expressing a restricted utilitarian conception of justice, taken as a whole, with the considered judgments and social world expressing justice as fairness, again taken as a whole, and then choose between them. The more exhaustive the range of candidate narrow reflective equilibria considered, the wider the wide reflective equilibrium achieved through deliberative reflective choice over that domain.

Narrow and wide reflective equilibrium are intrapersonal moments or stages of reflective equilibrium in its most complete form. They constitute only first steps on a person's path toward a coherent and integrated self-understanding. Neither makes any essential reference to a plurality of or to relations between persons. While we must move through narrow and wide reflective equilibrium in order to understand ourselves and to justify ourselves to one another, achieving either neither constitutes self-understanding or justification to others nor entails that we will be able to achieve self-understanding and justify ourselves to others.

It is tempting to think that self-understanding and justification to others are separate matters, and that the former is something we might and perhaps should achieve prior to pursuit of the latter. Yielding to this temptation, we might think of self-understanding as simply the coherent reflective integration of the widest possible wide reflective equilibrium for each of the various activities we engage in. But this would be a mistake. Self-understanding is not something we can achieve just by working on our own toward an integrated system of commitments in wide reflective equilibria.

For one thing, there are no hard boundaries between the various activities we undertake and the considerations that bear on them fixed prior to and independent of our achieving a coherent and integrated self-understanding. So, even if we set aside justifying ourselves to others, there is no one way to arrive at a coherent and integrated self-understanding by taking up serially the different activities we engage in and then patching together the various wide reflective equilibria achieved with respect to them in a consistent and coherent set. We might always have proceeded in a different order or with activities somewhat differently individuated and thus arrived at a different self-understanding.

Perhaps more importantly, however, much of our activity, including the reasoning we deploy in order to achieve a coherent and integrated self-understanding, is fundamentally shared or social activity. We engage in it not only as social creatures, but often also as persons or as social creatures constituting themselves in shared activity as persons, desiring to attune or align ourselves to one another within it as both rational and reasonable. To achieve a coherent and integrated self-understanding as persons, then, we must move beyond any comprehensive wide reflective equilibrium we might achieve in thinking things through only for ourselves and put that activity into dynamic interaction with the activity of justifying ourselves to one another and so achieving a shared public self-understanding of the common activities in and through which we are realized as separate persons.

General and full reflective equilibrium refer to the interpersonal moments or stages of reflective equilibrium, and so to our own self-understanding, in its most complete form. General reflective equilibrium is realized when persons publicly converge in shared activity on one and same wide reflective equilibrium with respect to it. So, for example, citizens who come publicly to share a common wide reflective equilibrium with respect to the justice of their basic social structure, say by converging publicly on Rawls's justice as fairness, stand in relations of general reflective equilibrium with respect to that activity. Full reflective equilibrium is realized as persons are able to bring their various general reflective equilibria for different activities into a coherent and integrated public understanding of their common form of life as a whole. So, for example, citizens move from general toward full reflective equilibrium if, already standing in relations of general reflective equilibrium with respect to their shared activity in organizing, maintaining, and perfecting their basic social structure, they are able coherently to integrate that general reflective equilibrium into a shared public understanding of their shared activity in other domains – e.g., the pursuit

of scientific knowledge or of beauty and excellence in the arts or of the great good of personal intimacy in friendship and so forth. As they incorporate their various general reflective equilibria into a shared public understanding of larger and larger segments of their common form of life, they realize a fuller and fuller reflective equilibrium. At the limit they achieve complete reflective equilibrium – at which point they are together fully realized as both community and persons, each instantiated in and through activity publicly mutually intelligible and acceptable to each and all engaged in it.

Rawls is concerned with social or distributive justice, justice as the first virtue of the basic social structure. In this context, narrow and wide reflective equilibrium refer to the relation between a conception of justice and any particular individual's considered judgments of social or distributive justice (e.g., slavery and religious persecution are unjust). One might suppose that two persons with identical considered judgments of justice must necessarily converge as a matter of narrow or wide reflective equilibrium on the same conception of justice. But this is not so. At either stage, narrow or wide, there may be a plurality of possible equilibria and intelligent persons may make different choices. This is one reason why general and full reflective equilibrium are difficult to achieve. Intelligent persons often settle on different narrow or wide reflective equilibria. Reasonable intelligent persons must engage one another in a spirit of open and charitable dialogue if they are to move toward general and full reflective equilibrium.

When we ask what sort of polity we ought to have, we are asking how to go about the shared activity of organizing, maintaining, and perfecting our society's basic social structure. That we ask this question is evidence (as if we needed more!) of our conflicts and hesitancy over how to proceed together in this undertaking. Our progress in answering this question is measured in relation to general and eventually full reflective equilibrium. Of course, narrow and wide reflective equilibria mark stages of progress too, albeit for us as more or less isolated individuals rather than as reasonable social persons engaged in shared activity. One of Rawls's main lines, indeed the overall or master line, of argument for his two principles of justice as fairness is that they underwrite a wide reflective equilibrium for him and insofar as they do they merit open and charitable consideration by others as a possible basis for a general reflective equilibrium with respect to first principles of social or distributive justice. Should such a general reflective equilibrium emerge, Rawls's two principles and justice as fairness would be objectively justified within political life as a public conception of justice and would be a promising candidate for inclusion in an overall form of life with respect to which participants stand in full or complete reflective equilibrium.

It does not follow from the fact that a conception of justice belongs to a narrow, wide, general, or full reflective equilibrium that it is true. And Rawls never characterizes his two principles or justice as fairness more generally as true or as aspiring to truth. Rather, they are justified as a reasonable, possibly the most reasonable, means to the reasonable end of moving forward together as free equals in a publicly, mutually intelligible, and acceptable way in our shared activity of organizing, maintaining, and perfecting our basic social structure. This is not to say that they are not true; it is only to say that truth is not what is essential here. On the philosophical nature of truth Rawls is silent. Certainly reflective equilibrium tells us nothing about it.

Instead, it expresses a regulative ideal for reasonable social persons facing conflict and hesitancy in their shared activity. As such it neither presupposes nor denies that intelligent persons of good will facing such conflict and hesitancy will, given enough time, eventually converge on a single general or full reflective equilibrium. Within any existing polity, there may be a plurality of reasonable candidate general and full reflective equilibria available to its members. Open and charitable dialogue between them may lead them to converge publicly on one or it may lead them no further than a shared public understanding of the range of eligible equilibria.

Cut free from the idea of reflective equilibrium, the hypothetical consent of original position agents to the principles of justices as fairness does no justificatory work. The original position, and the hypothetical consent of agents in it to

justice as fairness, are tools or heuristics used to shed light on the implications of some presumably shared fundamental idea(l)s and to help move us as persons facing conflict or hesitancy in shared activity toward a state of reflective equilibrium with one another. Whether the original position argument justifies anything, and if it does what specifically it justifies, depends entirely on the extent to which its premises, conclusions, and inferences are incorporated into a general reflective equilibrium.

As may now be evident, Rawls rejects both foundationalist and what he calls naturalist modes of justification. Justice as fairness is not justified by deductive reasoning from some set of necessary or self-evidently true first principles. Nor is it justified by empirical reasoning or inductive scientific inference from some set of contingent descriptive truths (about human psychology, biology, etc.). It is justified as a (possibly the most) reasonable means to a (very important) reasonable end, namely, engaging as free equals in the shared activity of organizing, maintaining, and perfecting a basic social structure on mutually intelligible and acceptable terms.

Rawls, John: The Law of Peoples

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This entry discusses John Rawls's extension of political liberalism to international relations. It describes his approach to and understanding of the political morality of international relations and moral foundations of international law, or, as he puts it, the law of peoples.

The Issue and Rawls's Approach

In *Theory* and *Political Liberalism*, Rawls described and argued for a liberal conception of justice adequate to a just and stable (in the right way) pluralist society of free equals. Such a society was, he argued, a realistic possibility and so something toward which we ought to aim in political life. But in making the case for this realistic utopia, Rawls set to the side a fundamental issue of both justice and stability. The issue concerns the external relations between a society of the sort described and argued for in *Theory* and *Political Liberalism* and other societies existing with it in the world. These relations raise issues of both justice and stability. With respect to justice, a society of the sort described and argued for in *Theory* and *Political Liberalism* must have principles of justice to guide it in its relations with other societies, and these principles must not be in conflict with and ideally ought to express the moral core of the liberal principles of justice it draws on to orient its own internal affairs. With respect to stability, its internal stability must not be threatened by its just interactions and reasonable disagreements with, and political independence from, other polities on the world stage. To complete the case for the sort of society described and argued for in *Theory* and *Political Liberalism*, then, Rawls undertakes in his final monograph, *The Law of Peoples*, to address these issues of justice and stability in its foreign relations.

He takes these issues up from the point of view of a just and stable pluralist polity of free equals committed to a liberal conception of justice in its internal affairs and keen to interact with other polities on just terms and to assure itself that so doing poses no threat to its internal stability. As in *Theory* and *Political Liberalism*, then, Rawls addresses issues of justice and stability separately, without denying their interplay, taking up issues of justice first. His approach to the issues of justice follows the pattern established in *Theory*. He first describes and offers an initial argument for a determinate conception and specific principles of justice. He then describes the institutions and other determinate political judgments it entails. Finally, he points toward the reasonable possibility of various general reflective equilibria ranging over all the foregoing.

After making the case for a determinate conception and principles of justice governing the foreign relations of a polity of the sort he described in *Theory* and *Political Liberalism*,

Rawls then makes the case for their stability. He argues that if polities of the sort described and argued for in *Theory* and *Political Liberalism* approached their relations with one another in a manner consistent with the conception and principles of justice set out in *The Law of Peoples*, they would find those relations stable in the right way. They would naturally reliably acquire a sense of justice governing their relations to one another expressing, first, a morality of association (within which the sense of justice is a matter of fulfilling role specified responsibilities to others within a determinate cooperative scheme advancing the common good) and, eventually, a morality of principle (within which justice is understood and delivered as fidelity to moral principles with universal reach, principles underwriting the free reciprocal realization of persons in and as community on mutually intelligible and acceptable terms). And they would find themselves able, each and all, to appeal to the public fact of a kind of international overlapping consensus to assure themselves individually and publicly together that the sense of justice acquired through and governing their international relations was congruent or at least not in conflict with their good simply as independent rational polities.

The *Law of Peoples* also follows the pattern of *Theory* and *Political Liberalism* by making the case for a conception and principles of justice and their stability first under the favorable conditions of ideal theory, and only then after having made this case turning, second, to the unfavorable conditions of nonideal theory (conditions often encountered in the real world) and the special issues (of noncompliance or historical or material conditions to some substantial degree inhospitable to justice) that often arise there.

The (First) International Original Position: Liberal Democratic Peoples

Under conditions of ideal theory, the issues of international justice and stability taken up in *The Law of Peoples* presuppose a plurality of independent, well-ordered, stable, liberal pluralist societies of free equals concerned to secure external relations with one another both just and stable. Rawls dubs these societies liberal peoples or liberal democratic peoples. Liberal or liberal democratic peoples are themselves each a kind of artificial corporate person. Each has a body (territory, institutional structure) and particular identity (history, traditions). Each has a capacity rationally to form, revise, and pursue (through its officials deliberatively exercising their public reason and adopting laws and policies within appropriate institutions) a conception of its own good (the common good of its members and corporate good of the whole). And each has a capacity for reasonableness in its relations to other polities. None are aggressive and all are prepared and able (through their officials deliberating and acting through institutions) to propose and honor mutually intelligible and acceptable terms of international cooperation provided the favor is returned.

What moral principles ought such peoples to honor in their interactions with one another? Here Rawls again makes use of a modified original position device as a heuristic. Suppose rational agents in an international original position behind a veil of ignorance. Each represents a separate liberal democratic people. But each knows nothing about the particular identity (size of territory, history, traditions, level of wealth and development, and so on) of the people it represents. Each seeks through agreement on principles to govern interaction with others only to advance the fundamental interests of the people it represents. These include the interests of liberal democratic peoples in securing their territorial integrity, their political independence, their reasonably just institutions (through which their citizens fairly or reciprocally secure for one another their fundamental interests as free and equal natural persons), their free civic culture and diverse civil society, and their self-respect as a people. They do not include any interests in indefinite economic growth or wealth accumulation or in expanding their territory or ruling other polities. Each seeking only to advance the fundamental interests of the people it represents, these rational agents must all freely reach a unanimous agreement over the principles governing their interaction.

They would, Rawls argues, freely and unanimously agree to at least eight principles. These express roughly the now nearly fully realized post-World War II settlement within international law. They recognize each well-ordered people as free, independent, and equal. They affirm the principle that treaties and other voluntary undertakings are to be kept. They commit well-ordered peoples to basic human rights, to nonintervention, and to war only in self-defense (and then only subject to the traditional requirements of jus in bellum, including the guarantee of civilian immunity except in cases of "supreme emergency"). And, finally, they require well-ordered peoples to assist societies unable to achieve well-orderedness (through no fault of their own) to constitute themselves as well-ordered.

These principles do not exhaust the law of peoples. They simply constitute its core. The law of peoples also includes principles to govern the forming and regulating of various international associations, setting out standards of free and fair trade, and so on. But these Rawls only gestures toward and does not work out in detail.

Rawls accepts that there is a global basic structure and that it is to be governed by the law of peoples. He identifies three existing and morally necessary institutional elements of the global basic structure. The first, analogous to the World Trade Organization, will insure free and fair trade between peoples. The second, analogous to the World Bank and International Monetary Fund, will provide an international banking system from which peoples might borrow and ensure the stability of currencies within international markets. The third, analogous to the United Nations, will provide a regular loosely federative forum for diplomacy and the coordination of assistance to burdened societies unable to secure well-orderedness on their own. Of course, additional international organizations consistent with the law of peoples are permitted and can be expected as well-ordered peoples voluntarily cooperate over time. Taken together and in dynamic relationship one to another, well-ordered peoples and the various institutions and associations framing and expressing their interaction constitute the global basic structure. The global basic structure neither presupposes nor expresses nor entails a commitment to a unitary world state or government. Rawls rejects such a world state or government. He affirms, however, the rule of law, not merely in a procedural but also in a substantive sense sufficient to underwrite prima facie moral obligations to obey the law, as an ideal to be realized in international relations between free and independent peoples.

Rawls develops the foregoing under the assumption that given the favorable conditions of ideal theory, the only sort of well-ordered bodies politic possessed as artificial corporate agents of the moral capacities of personhood are liberal democratic peoples. But this assumption he recognizes might not be warranted. When it comes to international relations, there may be, even under the favorable conditions of ideal theory (the global social and material conditions are conducive to all bodies politic being well-ordered and possessing as artificial corporate moral agents the capacities of personhood and all such well-ordered bodies politic are able and inclined to honor the demands of justice in their relations to one another), other sorts of well-ordered bodies politic possessed of the moral capacities of personhood. If there are, then liberal democratic peoples must check to see whether the conception and principles of justice tentatively selected (say, through the original position argument sketched above) to orient and govern their international relations to one another are suitable also to govern their relations with, or the relations between, other sorts of (non-liberal and/or nondemocratic) well-ordered peoples possessed as artificial corporate agents with the two moral powers.

This liberal democratic peoples may do by imagining a second original position within which rational agents behind the veil of ignorance represent only other sorts of (non-liberal and/or nondemocratic) well-ordered peoples. If the same principles would be selected in this second original position as in the first (in which rational agents represent only liberal democratic peoples), then liberal democratic peoples may rest assured that all well-ordered peoples possessed as corporate agents of the two moral powers could reasonably

accept one and the same conception and principles of justice, the law of peoples.

The Second International Original Position: Decent Peoples

To be well-ordered, a body politic need not be liberal or democratic. It must institutionally embody a publicly known conception of justice aimed minimally at the common good of all its members, its officials must publicly and sincerely exercise their authority in accord with that conception of justice, and its citizens must largely voluntarily comply with the laws of their polity as more than a modus vivendi and without undue coercion, excessive policing, secrecy, indoctrination, mass manipulation, and so on. A well-ordered but non-liberal or nondemocratic polity may not be stable in the long run. Internal forces may draw it inevitably toward liberalization and democratization. But such long-term instability is consistent with well-orderedness for extended periods of time.

A well-ordered polity will respect and honor at least basic human rights (these Rawls identifies as the rights covered in or clearly implied by Articles 3–18 of the Universal Declaration of Human Rights as well the Conventions on Apartheid and Genocide). And it will satisfy the moral core of the rule of law. Institutionally it will take the form of a constitutional republic.

Like a well-ordered liberal democracy, it will as a corporate agent possess the essentials of moral personality. It will possess a body (territory, institutional infrastructure), identity (culture, history, and so forth), and the moral powers of rationality (to identify and advance through officials and institutions the common good of its members and its good as a corporate whole) and reasonableness (to propose and honor mutually intelligible and acceptable terms of interaction with other polities provided they return the favor). And as within a liberal democracy, its members will be bound to one another and to their polity as a whole by legal obligations invested, by virtue of their natural duty of justice, with at least prima facie moral force. While neither liberal nor democratic and thus not fully just in its internal organization, a well-ordered constitutional republic may nevertheless still qualify as "decent" artificial corporate moral person.

Rawls argues that decent peoples could reasonably affirm the same eight principles of international justice, the core of the law of peoples, as liberal democratic peoples. He invokes a second international original position within which rational agents represent only well-ordered decent peoples. These agents would agree to the same principles agreed to by agents representing only liberal democratic peoples. It follows, Rawls concludes, that liberal democratic peoples may properly regard them as objectively justified between them and any other well-ordered decent peoples and thus as a reasonable public basis for organizing and orienting their relations one to another on the world stage.

International Stability and Toleration

Rawls argues that between liberal democratic peoples it will be publicly known that each possesses an institutionally embodied sense of (domestic and international) justice congruent with the good of its members and their shared form of life. Accordingly, liberal democratic peoples may reasonably be expected reliably to maintain peaceful and just relations with one another. Rawls suggests that the so-called democratic peace thesis constitutes empirical evidence in favor of this claim.

However, it does not follow that liberal democratic peoples may reasonably be expected reliably to maintain peaceful and just relations with other well-ordered decent peoples or that other well-ordered decent peoples may reasonably be expected reliably to maintain such relations between themselves. Rawls does not say much about the latter. And the matter of what may be reasonably expected of well-ordered decent peoples is complicated by the fact that there is no obvious reason to think that such polities will prove internally stable over the long run.

But Rawls does argue that to the extent that liberal democratic peoples tolerate well-ordered

decent peoples, with recognition and respect, as full participants in a just international order, well-ordered decent peoples may reasonably be expected to tend to maintain peaceful and just relations with liberal democratic peoples. Liberal democratic peoples ought not to expect well-ordered decent peoples to tend to maintain peaceful and just relations with them if they (liberal democratic peoples) undertake to liberalize or democratic well-ordered decent peoples through coercive measures, whether obvious (trade sanctions, interventions) or subtle (as with financial inducements). Liberal democratic peoples ought to allow well-ordered decent peoples to liberalize and democratize in their own way on their own time and restrict their efforts to bring about that result to the power of their own example within a respectful and reasonable politics of persuasion.

The stability of an international order embodying and expressing the law of peoples requires, then, a degree of toleration between liberal democratic and other well-ordered decent peoples. Rawls does not claim this toleration is sufficient, only necessary, to an international order stable in the right way. As between liberal democratic peoples, an international order stable in the right way would seem to be a realistic possibility. As between liberal democratic peoples and other well-ordered decent peoples, or between other well-ordered decent peoples alone, matters are less clear. But this may not be a large problem if, given the favorable conditions of ideal theory, all other well-ordered decent peoples may reasonably be expected eventually to liberalize and democratize in due course as a matter of their own internal development, at least in a world within which there are some liberal democratic peoples and they engage well-ordered decent peoples with recognition and respect on terms all can reasonably affirm. Unfortunately, *The Law of Peoples* is not particularly clear on this point, leaving readers to wonder whether Rawls's view is that under the favorable conditions of ideal theory it is reasonable, or unreasonable, to expect the eventual liberalization and democratization of all peoples in due course as a matter of their own internal development.

No Global Difference Principle

One striking feature of Rawls's law of peoples is that it includes no commitment to anything like a global difference principle as regulative of a just global economy. Instead, Rawls includes in his law of peoples only a commitment to free and fair trade between well-ordered peoples and a duty binding already well-ordered peoples to assist other societies to become and maintain themselves as well-ordered. The law of peoples imposes no further limits on economic inequalities between peoples.

There are several reasons for this. One is that unless every state is organized itself around the same system of basic liberties and the same system of opportunity for social and economic offices and positions, there is no basis for appealing to distributive shares of the total global output of wealth and income as a uniform measure of relative advantage and no viable fixed referent for the least advantaged. Another is that neither the self-respect of peoples nor the self-respect of their members seems to be put at risk in the absence of a global difference principle. A third is that a global difference principle presupposes something like a global state capable of establishing and regulating a global currency, legislating across the totality of the global economy, enforcing a global tax on all polities, and so on. If there are good reasons to reject the idea of such a state, then there are good reasons to reject a global difference principle.

Of course, none of this constitutes a defense of the status quo. There is no excuse or justification for the failure of presently well-ordered peoples to take more effective steps toward eliminating the great poverty and suffering that plagues so many failed states. And there is no excuse or justification for their failure to secure genuinely free and fair trade.

Nonideal Theory: Political Regimes That Are Not Well-Ordered

Rawls identifies three sorts of political regimes that fail to achieve well-orderedness. These are

to be denied the respect and recognition afforded members in good standing within a just international order. Extending the law of peoples to govern them is a matter of nonideal theory.

Outlaw states are not well-ordered because they either violate the basic human rights of their members, are unreasonably aggressive toward other peoples, or both. Under nonideal conditions, then, a just system of international law must include principles to govern just war, humanitarian interventions, and other forms of coercive international sanction.

Burdened societies are not well-ordered because they are, due to material or historical conditions, unable without assistance to overcome one or another obstacle – institutional, cultural, etc. – on their path to well-orderedness. Under nonideal conditions, then, a just system of international law must include principles to govern mandatory humanitarian assistance and the political and economic development of so-called failed or failing states.

Benevolent absolutisms are not well-ordered because they are ruled by self-appointed rulers acting without any public deliberation or decision on their own private judgments regarding the interests of their subjects. Regardless of their benevolence, these rulers do not rule a constitutional rule of law republic subject to a public conception of justice framing an exchange of reasons with, and guiding their exercise of public reason on behalf of, members of a single body politic. Rather, they rule as an external, even if benevolent, force coordinating the behavior of a subject population. Those subject to a benevolent absolutism may be loyal to their ruler, but they are not bound one to another or to their ruler by legal obligations invested with prima facie moral force. And neither they nor their ruler is capable of acting through political and legal institutions as the official representative of a people as a corporate artificial agent. To be sure, the members of a benevolent absolutism have a right to defend themselves against coercive interventions, much as the members of a family have a right to defend their family against intervention, provided their parents are benevolent and secure their most fundamental interests as members of the family. But benevolent absolutisms are not entitled to recognition and respect as full members in good standing in the international order. Instead, from the well-ordered peoples that do give one another such recognition and respect within the international order, benevolent absolutisms may reasonably expect only the limited toleration of nonintervention. Under nonideal conditions, then, a just system of international law must distinguish between the legal standing and powers of well-ordered peoples (say to enter into binding treaties across generations) and benevolent absolutisms.

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Rawls, John: The Stability Argument(s)

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The section surveys Rawls' argument(s) for the stability of a society well-ordered by his two principles and justice as fairness more generally.

The Stability Problem

Rawls recognizes that even if his two principles and justice as fairness more generally (including the argument from the original position) emerge as part of a, perhaps of the only possible, general reflective equilibrium between us with respect to our shared activity of organizing, maintaining, and perfecting a basic social structure, there remains still one further step to vindicating them

as a (or the most) reasonable means to our reasonable end of sustaining that activity on mutually intelligible and acceptable terms. The general equilibrium with respect to the two principles and to justice as fairness must be demonstrably capable, at least under the favorable conditions assumed by ideal theory, of sustaining itself on its own terms, without internal contradiction or the ad hoc introduction of external forces. That is, it must be, at least given favorable conditions, a self-stabilizing equilibrium. An equilibrium over justice as fairness that could not, even under favorable conditions, be sustained without the ad hoc introduction internally of deception, manipulation, indoctrination, coercion, false consciousness, or alienated agency, or externally of new resources, whether material, psychological, or political, is, in Rawls' terms, unstable, or to put it another way, if it is stable it is not stable for the right reasons. And an unstable equilibrium, one not stable for the right reasons, is not a reasonable means to our reasonable end.

A stable general equilibrium, one stable for the right reasons, will over time reliably draw, and be publicly known reliably to draw, the full allegiance, in thought and deed, of those sharing in it, without reservation or regret. If disturbed by the ad hoc introduction of new internal or external forces, natural or "man-made," it will tend to restore itself on its own. Of course, the ad hoc introduction of new internal or external forces may necessitate various institutional reforms, and this may generate political challenges and threaten social trust and unity. But, their allegiance fundamentally and reliably drawn to the two principles and to justice as fairness more generally, citizens will undertake and will successfully manage to make all reasonable institutional reforms necessary to meet their political challenges and to restore and sustain social trust and unity.

In Part III of *Theory,* Rawls sets out his first argument for the stability of a society institutionally embodying and expressing a general reflective equilibrium over his two principles and justice as fairness more generally. The argument there has two main parts. The first part shows that it is reasonable to think that in such a society its members will, as a matter of their ordinary moral development, naturally and freely come to affirm and to internalize and then reliably to act on the two principles and on justice as fairness more generally. The second part shows that they will each understand and experience, and will know that others similarly understand and experience, their moral development in this way as congruent with their good in the most general sense, independent of whatever reasonable determinate conception of the good they affirm as the particular persons they are. That is, at the deepest level they will experience, and know publicly that others experience, no fundamental conflict between being reasonable and being rational. Accordingly, they will each have adequate public assurance that for each and all it is rational to act reasonably. In *Political Liberalism*, Rawls revises this second part of the argument, the so-called "congruence" argument. The revision, which is introduced below, carries in its wake a number of new ideas that are discussed together in the next entry (5).

The Argument from Moral Development

The first part of Rawls' overall stability argument aims to show that it is reasonable to anticipate a reflectively endorsed, securely internalized, and effectively regulative commitment to the two principles and to justice as fairness more generally arising within persons raised in a society that institutionally embodied and expressed them and it. Rawls argues that persons so raised may reasonably be expected to undergo the following sort of moral development. This is a normative account of moral development. While it is presumably consistent with the empirical facts of our natural psychology, it is not a mere description or explanation of those facts.

We all begin life as infants totally dependent upon and in the care of our parents (or persons functioning as parents). Ordinarily parents respond unconditionally to expressions of need or distress by an infant. Infants, ordinarily, respond by developing love for and trust in their parents. As an infant develops, this love for and trust in the parents leads the infant to take

satisfaction in pleasing the parents. Accordingly, living up to parental expectations will become something the infant seeks both for the good of its parents and for its own good. And a failure to live up to parental expectations will generate primitive or protofeelings of guilt and shame. As linguistic capacities emerge, explicit parental directions or commands will be received as (even if not reflectively understood as) genuinely normative. To be sure, insofar as this is a morality, it is a morality of (benevolent) authority fundamentally predicated on close ties of affection. Ordinarily, it yields in due course to a more familiar form of morality.

As infants develop into toddlers and then young children, many capacities, not just linguistic, come online. As they do, children will begin to participate in various cooperative activities within and beyond the family. In addition to sharing in the benefits of such activities, they benefit also through the development and exercise of their increasingly complex abilities, something human beings naturally find rewarding. Accordingly, as children cooperate with others in new ways they will see that their own good, which they are coming to understand in more fine-grained and particular ways, is advanced whenever others fulfill role-specific responsibilities within the relevant activity and thereby further the common good of all engaged in it. This leads them to care for and trust these others and to wish to advance their good. This they are able to do by fulfilling their own role-specific responsibilities and so reciprocally furthering the common good and thereby advancing the personal good of their fellow cooperators who also develop and exercise their capacities. Through this process, iterated across many cooperative undertakings – in schools, on teams, in churches, and so forth – children come to understand and experience fidelity to their social roles within cooperation as essential to their own good and to the good of those with whom they cooperate. They acquire within cooperative undertakings some affection for those with whom they cooperate, of course, but they also come to understand their own good as congruent with the common good. When they fail to fulfill their roles and thereby let themselves and others down, they understand and experience themselves as acting not only contrary to their affections but also to a value, the common good, they share with others. They thus experience genuinely moral guilt and shame. To be sure, at this stage their morality is a morality of association with no obvious extension to persons with whom they have no cooperative relations. But it is a morality the center of gravity of which is no longer immediate strongly felt affective ties but is rather a visible shared commitment to a common good shared and reciprocally realized with others. As children develop, they take on and internalize a complex array of role-specific responsibilities that present to them not simply as imperatively normative, but as genuinely and reflectively morally normative, both rational and reasonable.

As children develop into adults, participating in wider and more complex cooperative associations, they ordinarily come to understand and experience their cooperation with others as embodying and expressing a commitment not only to one or another determinate common good but also to certain general principles. This they find rewarding because it permits wider and more complex and institutionally mediated forms of cooperation involving the development and exercise of a capacity more complex than that involved in honoring the demands of their determinate social roles within relatively immediate cooperative undertakings. Their reflective allegiance is steadily drawn, irrespective of any affective ties or particular relationships, to these principles and to acting on them for their own sake. And toward those whose allegiance they can see is similarly drawn, they begin to feel a kind of general or abstract love and trust, one cut free of any particular or immediate affection. Drawn by this general or abstract love for and trust in developed moral personality, generally they will want to advance or at least not undermine the good of others who honor, even in the absence of particular affective ties, the principles to which their allegiance is drawn. Acting contrary to these principles, even in the absence of affective ties or immediate cooperative relations, will lead them to feel guilt and shame. This is a (fully developed) morality of principle, both

rational and reasonable. It is, of course, consistent with strong and particular affective ties. And persons sharing a morality of principle will no doubt feel especially guilty or ashamed when they violate moral principles in relatively mediate cooperative relations with others for whom they have particular affection. But a morality of principle, once online, will generate genuine guilt and shame (and other moral feelings) even without such relations or affections. Persons who reach this stage of moral development have a fully internalized and effectively regulative commitment to honoring moral principles for their own sake.

Driving moral development through the three stages just sketched toward a fully internalized and effectively regulative commitment to moral principles for their own sake is a natural capacity for and disposition toward reciprocity that is more fully developed and exercised, generating greater self-satisfaction, at each stage. In the first stage, the morality of authority, the realized reciprocity is that of affection between the infant and parents, each desiring the good of the other. In the second stage, the morality of association, it is the reciprocity of advantage between those who cooperate through differential social roles for what they reciprocally recognize as their common good. In the final stage, it is the reciprocity of general reasons between persons capable of publicly acknowledging and honoring them irrespective of particular contingent relations, expressing thereby a general and abstract love of moral persons constituted and united by shared principles in community.

Rawls argues that for a number of reasons, not least because they generally embody and express reciprocity of advantages and reasons, his two principles and justice as fairness more generally are especially well-suited to being taken up by persons whose moral development follows the pattern sketched above. In a society the institutions of which embody and express them, persons may reasonably be expected ordinarily to undergo a moral development that moves through the three stages and results in their having a fully internalized and effectively regulative commitment to the two principles and to justice as fairness. The moral development presupposed by a stable society organized by justice as fairness is not a matter of indoctrination, deception, manipulation, coercion, false consciousness, or alienated agency. It is something that may reasonably be expected reliably to happen naturally if the institutional and social world is properly arranged.

The Argument from Congruence

It does not follow, of course, that the persons whose moral development this is will understand and experience it as congruent with their overall good more generally. Conceivably, they may understand and experience themselves as having acquired a moral character, good when seen on its own, that they would have preferred not to have if afforded an opportunity to survey all the goods available to them prior to starting down their developmental path to it. After all, even if it is a good for the person whose development it is, the moral development Rawls sketches surely precludes the development and exercise of other increasingly more complex capacities that she might also have found satisfying. Even if acquiring a moral character of the sort Rawls describes is good, it might be a good that persons, when thinking purely in terms of their rational self-interest in the most general sense, regret having acquired.

Were persons to so regret the acquisition of their moral character, they might more easily sacrifice it for the sake of other goods. And even if they remained faithful to their moral character, they will surely find themselves alienated to some degree from a central element of their determinate nature. Alienation of this sort almost always compromises reliably effective agency. What needs to be demonstrated, then, Rawls concludes, is that persons will understand and experience the acquisition and their faithfulness to their moral character not simply as a good, but as fully congruent with their good overall, showing this is not a matter of showing that their moral character is congruent with the particular determinate conception of the good they affirm as realized persons. Presumably, having acquired and being faithful to their moral character in a society faithful to justice as fairness, their particular

determinate conception of the good will be a reasonable one. Demonstrating congruence here is, as Rawls says, trivial. What needs to be shown is that the acquisition and their faithfulness to their moral character is something they will see as congruent with their good even if they set aside their reasonable particular determinate conception of the good and view their moral character from the point of view of rationality alone. In other words, what needs to be shown is that we can each see that in becoming and being reasonable we in no way forsake or compromise our rationality.

Two clarifying points are in order before moving ahead. First, Rawls is not claiming that we need to show that being reasonable is just a matter of being rational. He consistently denies that we can derive the reasonable (our moral character) from the rational (our intelligent pursuit of our own good). Rather, he is claiming that we need to show that being and becoming reasonable in no way diminishes or compromises our rationality. Second, Rawls is not claiming that we each need simply to see that this is true for ourselves. If we are to trust others, many of them strangers, within the complex system of social cooperation that is the basic social structure of a modern polity, we must be able, each and all, publicly to see that this is true for everyone. If we cannot all publicly see this, then each of us will have reason to doubt that over time, and especially in tough times, others will be reliably moved by their acquired moral character to do as it demands.

What Rawls aims to show, then, in Part III of *Theory* is that the moral character acquired by persons living in a society the institutions of which embody and express justice as fairness will be publicly seen to be fully congruent with what he dubs "a thin theory of the good" – that is, the good as seen from the point of view of rationality alone. In *Theory,* Rawls argues that this will be so because the moral character and society that cultivates it make it possible for persons to participate in any of a wide and diverse range of voluntary cooperative associations oriented toward particular goods other than justice while also participating in the metacooperative association of a basic social structure oriented toward their free development, each and all, simply as moral persons. This sort of autonomy is a kind of self-realization that would be seen publicly by each and all as good prior to and apart from their determinate conceptions of the good.

In the decade following publication of *Theory,* Rawls began to worry about this argument. It seemed to presuppose a degree of public common ground unlikely to arise or persist in a free society organized by and expressing justice as fairness. At the very least, it presupposed as public common ground a shared general sense, from the point of view of rationality alone, of the good of a sort of autonomy and self-realization as a particular sort of being. But in a free society organized by and expressing justice as fairness, Rawls realized, there will always be disagreement over the sort of metaphysical, religious, and philosophical doctrines within and in terms of which persons frame their thinking about the good from the point of view of rationality alone. These doctrinal disagreements will manifest as pluralism with respect to comprehensive or nearly comprehensive moral, religious, or philosophical doctrines or outlook. This sort of deep disagreement, a kind of disagreement in worldview, stands as a potential obstacle to any one argument serving publicly to assure citizens that their acquired moral character is congruent with their good as seen from a shared understanding of rationality alone.

Throughout the 1980s, Rawls undertook to rework the congruence argument from *Theory.* He found that doing so required the introduction of several new ideas (discussed below in entry 5). The results of his effort were published in 1993 as *Political Liberalism*. Roughly, Rawls argued there that so long as the (or most of the) deep doctrinal disagreements – the religious, moral, and philosophical doctrinal pluralism – characterizing a free society organized by justice as fairness were reasonable, which is to say best explained by certain burdens of judgment that often frustrate the best efforts of intelligent and informed persons of good will to reach agreement, it should still be possible for persons to assure themselves and one another that their acquired moral character, at least if restricted to political morality, is congruent with their good as they understand it from their various

doctrinal orientations toward the point of view of rationality alone. While they might not be able publicly to demonstrate that for each of them their acquired moral character is congruent in one and the same way with their good when seen from a common point of view of rationality alone, they might still be able publicly to affirm that for each of them the political aspect of their acquired moral character is congruent with their rationality as each understands it. The public fact of such an "overlapping consensus" might then serve as a shared public basis of mutual assurance and trust in political life, for, at least with respect to politically reasonable persons and doctrines, everyone will know of everyone else that there is no failure of congruence between their acquired moral character (in terms of political morality) and their good as they see it from their doctrinally distinctive way of understanding the point of view of rationality alone.

Rawls, John: Two Principles of Justice and Their Application

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Rawls's Two Principles of Justice

The content of justice as fairness is given, most basically, but not completely, by Rawls's now famous two principles of justice. These highly abstract and general principles are meant to serve free and equal persons as final public criteria for the evaluation of their basic social structure as just or most reasonable.

Rawls's first principle concerns basic liberties. His second principle has two parts. The first concerns opportunities for offices and positions of authority. The second addresses wealth and income. Before saying more about the content of these principles, it is important to note that they are, on Rawls's view, serially (or as he often says, lexically) ordered. This means that the first principle may not be violated for the sake of the second. And the first part of the second principle may not be violated for the sake of its second half. Neither of the two principles may be violated for the sake of aggregate goods (such as increased Gross Domestic Product), corporate goods (such as national defense – though as a matter of non-ideal theory there is an exception in the case of a sufficiently severe constitutional crisis), or perfectionist goods (such as a more virtuous or righteous citizenry). In the order of reasons, the two principles of justice take priority over these goods. What this means, then, is that when publicly assessing their basic social structure to determine the extent to which it is just or reasonable, citizens should first look to see whether it secures basic liberties as required, then look to see whether it provides opportunities for offices and positions of authority as required, then look to see whether the production and distribution of wealth and income is as required. If these criteria are met, then their society's basic structure is just. Of course a just society may still be imperfect in various ways, and so citizens may then go on to evaluate it in terms of such aggregate goods as Gross Domestic Product, corporate goods as national security, or perfectionist goods such as a virtuous citizenry or a rich arts culture.

Though serially or lexically ordered as public criteria of justice, Rawls's two principles are meant to be pursued and satisfied together. Their ordering is not meant to suggest that a society should take no steps toward providing opportunities or producing and distributing wealth and income as required until it has secured basic liberties as required. Their ordering is meant only to rule out certain trade-offs and to structure judgments regarding progress in the pursuit of realizing a basic social structure faithful to both principles.

The two principles are not meant to apply to impoverished or primitive societies not yet able even to fulfill the basic needs of all their members. They presuppose the satisfaction of a more fundamental principle requiring that society meet the basic needs of all its members. Accordingly, the two principles presuppose a society that has achieved at least a modest level of historical development and progress.

The first principle demands a constitutionally recognized system of equal basic liberties fully adequate to the development and exercise of the two basic moral capacities the possession of which qualifies persons for democratic citizenship. The first of these is the capacity to form, revise, and pursue a determinate conception of one's own good. Rawls calls this the capacity for rationality. The second is the capacity to propose and honor fair terms of social cooperation with others (provided they honor them in return). Rawls calls this the capacity for reasonableness. The basic liberties are those necessary and sufficient to the development and exercise of these capacities. They include the familiar canonical liberties (conscience, speech, association, possession of personal property, political participation, and so on) highlighted in many political documents and traditions (the French Declaration of the Rights of Man, the Constitution of the United States, the United Nations Declaration of Human Rights). They are to be constitutionally secured as equal rights under the rule of law.

The basic liberties do not include the right to own property in large-scale means of production (such as factories or large tracts of land). This right is not a fundamental requirement of justice. This does not mean that a society that constitutionally secures such a right is unjust. Such a society might be just if the right to own large-scale means of production it secures constitutionally is appropriately and constitutionally subordinated to the basic liberties covered by the first principle and is appropriately tailored in content so as to align with the demands of second principle of justice.

The second principle is known as "the difference principle" since it regulates differences in offices and positions and associated lifetime expected shares of wealth and income. It demands that institutions, laws, and policies giving rise to social and economic inequalities satisfy two conditions (corresponding to the two halves of the principle). First, if there are different offices and positions (including jobs) with different kinds and degrees of power, authority, responsibilities, and rewards, then those competing for them must do so against a background of fair equality of opportunity. Second, if there are to be inequalities in the reasonably expected lifetime share of wealth and income associated with securing and occupying these offices and positions (e.g., if there are to be skilled workers who typically do better in terms of wealth and income over their lives than unskilled workers, and if there are to be entrepreneurs who typically do better than skilled workers in terms of wealth and income over their lives), then these inequalities must satisfy two further conditions.

First, they must be necessary to raising the reasonably expected lifetime share of wealth and income associated with the occupation of any office or position above what it would be if the total product of social cooperation was shared out equally as wealth and income to all offices and positions. That is to say, any inequalities of wealth and income attached to offices and positions must be, relative to an egalitarian benchmark, mutually advantageous to representative occupants of all offices and positions.

To be fully just or most reasonable, inequalities of wealth and income that satisfy this first condition must satisfy also a second condition: they must be strictly necessary to maximizing the smallest gain, relative to the egalitarian benchmark, in the reasonable lifetime expected share of wealth and income. That is to say, they must be necessary to providing the representative occupant of the office or position least advantaged by the inequalities in wealth and income with an advantage greater than that provided by any other mutually advantageous system of such inequalities. So, suppose a society finds it mutually advantageous relative to the egalitarian benchmark to make available to all (in terms of fair equality of opportunity) the different and differentially rewarded offices or positions of (in descending order of associated lifetime expected share of wealth and income) entrepreneur, skilled worker, and unskilled worker. In order to be fully just or most reasonable, it must take care to ensure that the differential rewards in terms of wealth and income it allows are necessary to ensure that its typical unskilled worker does better than would the representative occupant of the least advantaged office or position

under any other mutually advantageous system of inequality.

That there exist social systems within which offices and positions attached to unequal expected lifetime shares of wealth and income satisfy the first condition, leaving all representative occupants of such offices and positions better off than they would be without the inequalities, is something Rawls takes for granted. This is because a system of equal regularly allotted expected lifetime shares of wealth and income is unlikely reliably to elicit from persons the cultivation and productive use of their most socially valuable talents. Given equal basic liberties and competition against background conditions of fair equality of opportunity for offices and positions that are attached to *equal* lifetime expected shares of wealth and income, persons are likely to pursue particular offices and positions for a wide variety of reasons. While some will perhaps aim at offices and positions that put their most socially valued talents to productive use, many others, desiring a life with more leisure, less stress, greater time for contemplation, and so on, will aim at offices and positions that put lesser socially valued talents to use. Thus, a system of offices and positions attached to *equal* lifetime expected shares of wealth and income is likely to leave a great deal of socially valuable talent uncultivated or unused. Accordingly, it is likely to be less productive overall than other alternatives also compatible with equal basic liberties and fair equality of opportunity. If a society committed to basic liberties and fair equality of opportunity is reliably to cultivate and put to productive use the talents of its members that are most socially valued, thereby improving total social production, then it must assure its members that if they focus on the development of and undertake to compete for positions where they might most productively use socially valued talents, they will be able to cover various costs they incur along the way. These include time and effort in training, forgone opportunities, less leisure, greater stress, the risk of failing in the context of competition for positions to secure a position making use of their cultivated talent, and much more. By attaching higher reasonable lifetime expected shares of wealth and income to offices and positions that require the targeted cultivation and use of especially socially useful talents, a society may reliably draw sufficient numbers of persons to invest in developing those talents and to compete for the offices and positions that involve their exercise. So long as this ensures a total social product large enough to both draw talent to socially productive use and to improve, relative to an egalitarian benchmark, the lifetime expected share of wealth and income for all offices and positions, including those least advantaged by the introduced inequalities in wealth and income, it would be collectively irrational not to do it.

There are no doubt many possibilities here, that is, many systems of mutually advantageous inequality in lifetime expected shares of wealth and income attached to offices and positions. Thus, on Rawls's view, the harder task is identifying a shared public criterion for selecting the most just or most reasonable of these. As noted, Rawls's proposal is that the most just or most reasonable is the system that permits only those inequalities necessary to maximizing the smallest lifetime expected share of wealth and income associated with a particular office or position (in many modern states this is the unskilled worker).

Two further remarks are in order here. First, expected lifetime shares of wealth and income are determined by and relative to the constitutive rules governing the economy and the basic social structure more generally. The "least advantaged" refers then not to persons least advantaged by nature (e.g., the disabled) and indeed not to any particular persons identifiable by proper names or rigid designators (e.g., the Smiths, Blacks, women, etc.) apart from their participation within the economy. It refers rather to the office or position, or a representative person occupying the office or position, least advantaged (relative to an egalitarian benchmark) by the inequalities in lifetime expected shares of wealth and income structurally ingredient in the society as a cooperative system of production and distribution.

Second, the difference principle does not require "redistribution" of wealth and income, as if wealth and income could be defined

independent of and prior to the principles of justice. Rather, it serves as a criterion for the most just or most reasonable economic system understood as the cooperative system within and through which wealth and income are produced and distributed. So far as justice goes, then, at least as a matter of ideal theory, persons have no claim to any prior notion of wealth or income. Of course, in the real world, where wages are often left to be settled by market forces alone, a diverse range of laws and policies might be deployed to move the economic system toward the ideal set forth by the difference principle. Some of these, for example, progressive income taxation used in part to fund income subsidies, may appear "redistributive" to participants in the economy. But this appearance is misleading. These participants have no prior claim to what a market not regulated to ensure justice delivers. Such taxes and transfers merely accomplish outside market activity determining wages what it would be too cumbersome and inefficient to try to accomplish internal to it.

The two principles work together to ensure that no citizen may reasonably complain over the substantive value or worth of the formally equal liberties required by the first principle and guaranteed by any just or reasonable constitution. Of course, those who occupy offices or positions among the economically or materially less advantaged will find that the formally equal liberties are worth less to them than they are to those who occupy economically or materially more advantaged offices or positions. For example, the liberty to own personal property is worth more to persons who have more money to spend on personal property. But the second principle ensures that the economy is arranged, consistent with the basic liberties and fair equality of opportunity, so that for the least advantaged offices and positions the value or worth of the formally equal basic liberties is as high as it can be. Taken together, Rawls maintains, the two principles meet the familiar Marxist complaint that the formally equal liberties central to liberal theories of justice serve merely to hide or legitimate unfair substantive inequality in the value or worth of those liberties to those whose liberties they are.

Even if working together the two principles enable Rawls to meet this familiar Marxist complaint about unfair substantive inequality in the value or worth of formally equal liberties, they do not obviously meet a familiar democratic complaint, namely, that if the value of basic political liberties is unequal, the formalities of democracy – one person, one vote; majority rule – are likely merely to legitimate the wealthy ruling the poor for the sake of the wealthy. To meet this more sharply focused democratic worry, Rawls attached to his first principle governing basic liberties a corollary guaranteeing that all citizens enjoy "fair value" for their basic political liberties. Thus, while the substantive worth or value to citizens of other basic liberties is determined or regulated by the second, or difference, principle, and thus cannot be improved at the expense of either formally equal basic liberties or fair equality of opportunity, the substantive worth or value to citizens of their political liberties is secured the liberty principle itself. That all citizens enjoy fair substantive value or worth for their basic political liberties is part of ensuring them overall a system of basic liberties fully adequate to the development and exercise of their two moral powers. It is a democratic element in the first of Rawls's serially or lexically applied criteria of justice or reasonableness.

Rawls identified two social systems or basic institutional arrangements faithful to his two principles: liberal democratic socialism and a liberal democracy with a regulated market system with private ownership of the means of production that he dubbed "property-owning democracy." Of course, there may be others. He ruled out as inconsistent with his two principles laissez-faire capitalism, welfare state capitalism, and state socialism with a command economy.

The Basic Social Structure

The two principles of justice apply to a society's basic social structure. The basic social structure is the total set of key institutions (government offices, the legal system, markets, civil society, the family, and so on), taken as a dynamic and

integrated whole and constitutive of the polity as a more or less self-contained and self-sufficient system within which persons may live out complete lives. The two principles apply diachronically to the basic social structure as a dynamic whole. They do not apply synchronically or directly to its parts. While in some form the socially and legally recognized family will be part of the basic social structure, the two principles do not apply directly to the family. Rather, they apply indirectly insofar as they apply to the total set of institutional relations within and through which the family is constituted and shaped as part of the basic social structure. So, the two principles of justice may be consistent with different sorts of socially and legally recognized families depending on the how educational institutions, religious and other associations within civil society, labor markets, and other components of the economic system are constituted and governed and on how all these components of the basic social structure interact together. The same holds for churches, the market, business corporations, and so on, when looked at individually and synchronically as components of the basic social structure. Components of the basic social structure must satisfy the two principles only when taken together as a unified, dynamic system, as a complete social institutional world. In this way the two principles of justice specify a social ideal. Of course, as so applied to the basic social structure, they may nevertheless fix various features of its component institutions. For example, the family may never violate the physical and psychological security of its members, and churches must permit their members to exit voluntarily.

Within the basic social structure, the legal-political structure (the constitution, government, system of law) occupies a special place. Through it a society makes explicit and binding decisions regarding the further and more determinate design and operation of its basic social structure. Within the legal-political institutions, Rawls distinguishes between, on the one hand, constitutional institutions, which are more or less fixed and beyond the reach of ordinary, everyday legal-political institutions and, on the other hand, ordinary, everyday political and law-making activity. Rawls suggests that constitutional institutions play a special role in securing the first principle and that ordinary, everyday legal-political institutions (legislatures, administrative agencies, etc.) play a special role in securing the second principle.

Because the two principles apply diachronically to the basic social structure as a whole, they do not determine directly the particular entitlements or obligations of particular persons at any given time. Rather, persons largely determine these by what they do within and subject to the rules of the institutions comprising the basic social structure. This is a matter of what Rawls calls "allocative justice": the allocation of determinate entitlements and obligations to particular persons at a particular time. The two principles are not principles of allocative justice. They are instead principles of distributive, or better social, justice. They govern society as the dynamic complex system in and through which persons cooperate to produce, distribute, and consume a variety of basic goods more or less essential to any complete life. Allocative justice is largely determined by what persons do within such a system, provided it is just. A just basic social structure may be seen then as an ongoing fair (cooperative) game which, if fairly played, yields for players results (allocative justice) the justice of which cannot be reasonably contested.

Rawls suggests a number of reasons why the two principles of justice apply in the first instance to the basic social structure taken as a unified, dynamic system. One, just hinted at, is that in the absence of some such principles of distributive or social justice applicable to the basic social structure as a whole, distributive or social justice reduces to allocative justice which in turn proves to be an intractable problem. If we could not simply let allocative matters be determined at any given moment in time by the voluntary conduct of persons within the basic social structure understood as something like a fair game fairly played, how could we ever determine how justly to distribute particular entitlements and obligations to particular persons at particular times? Imagine trying justly to allocate wages (weekly? monthly? yearly?) to particular persons across a

society: there are simply too many relevant considerations (need, desert, contribution, efficiency, etc.) and too many uncertainties (what will they do with the wages? what might we have done if we used the money for some other purpose?).

Another is that what it means for persons to be free and equal is to share in the first instance in the co-authorship of their common social (or institutional) world. But in this undertaking there is no one institution uniquely reasonable as a starting point. While it is sometimes said that the family is basic, the family in anything like a desirable form will depend on the existence of and relations to an economic and a political legal system. Markets too are sometimes said to be basic. But again, they depend on the existence of and relations to other essential institutions, including the family. Given the inevitable necessary interactions between core institutions in any desirable social world, one cannot but beg questions by specifically fixing principles of justice for any one prior to and thus setting a constraint on fixing the principles of justice for others. A free and equal people must, then, settle first on a general social ideal applicable to the basic social structure as a system of institutions overall before turning to the principles constituting and regulating particular institutions.

A Four Stage Sequence

Of course, they must move from this general social ideal to principles constituting and regulating particular institutions. Here Rawls proposes that the two principles are to be applied to the basic social structure in stages. First, they are applied to the legal-political constitution. The legal-political constitution must first secure the basic liberties and fair value for the political liberties and second establish legislative, regulatory, adjudicative, and executive offices (a system of government) conducive to the realization of the second principle. The two principles require at least a constitutional, republican, liberal democracy faithful to the rule of law. Constitutional and governance details may vary with historical, technological and demographic conditions. Second, the two principles are applied to the activities of law- and policy-making within the governance institutions established by and subject to the constitutional order. Here Rawls's focus is on the second principle. The primary work of law-makers and policy-makers is to create and maintain, subject to the constitutional order, a system of law and policy capable of reliably delivering to citizens a social and economic order faithful to the second principle of justice. Of course, details may vary again, not only in light of historical, technological, and demographic conditions, but also in terms of more transient and fluid and local economic and social conditions. Laws and policies will need to be adjusted far more often than the constitution. Of course, law-makers and policy-makers may also act with other ends in mind (e.g., increasing GDP, creating national parks, authorizing a space exploration program, etc.). But this work is secondary. Finally, through the enforcement of law and policy and the adjudication of conflicts or controversies therein when they arise the two principles are applied, indirectly, to individual persons and transactions. This is the work of those holding executive and judicial offices established by the constitution and fleshed out within the legal system. Executives work consistent with the rule of law and judicial rulings to ensure that the law is enforced in particular cases and against particular persons. Judges adjudicate specific cases and controversies when conflicts arise within the enforcement of law.

Taken all together, then, Rawls presents a four-stage sequence through which persons as the free and equal co-authors of their common social world are to execute their authorial task. The four stages are analytic not temporal. First, they select the two principles of justice as the core of a general social ideal applicable to their basic social structure as a dynamic whole. Second, they select a legal-political constitution reasonably designed, in light of their historical, technological, and demographic condition, to entrench the basic liberties covered by the first principle and to establish legislative, regulatory, adjudicative, and executive offices of governance capable of producing and maintaining an economic and social

order faithful to the second principle. Third, they regularly fill the legislative and regulatory offices and those officials regularly enact, monitor, and revise determinate laws and policies, subject to the constitution. Finally, fourth, they regularly fill executive judicial offices and those officials bring the enacted law, subject to the constitution, to bear on particular cases and persons. When thinking about issues of justice, citizens should be clear as to the analytic stage at which the issue arises. Facts about particular cases and particular persons relevant downstream to the enforcement of the law or the adjudication of specific cases or controversies arising out of conflicts therein are generally irrelevant upstream to questions concerning the justice of a general social ideal or a proposed constitution or constitutional amendment.

Raz, Joseph

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Introduction

Joseph Raz (b. 1939–) emerged in the 1970s as one of the most influential contemporary writers in the philosophy of law. His work in analytical legal theory continues a rich tradition running from Thomas Hobbes to Jeremy Bentham, John Austin, Hans Kelsen, and H.L.A. Hart. While Raz's views certainly embody a theory of law, he does nothing so simple as saying "law is." Rather, he provides interdependent analyses of central characteristics of law, usefully approached through his analysis of legal norms – the building blocks of legal system – as special kinds of practical reasons for action. This central view is explained in section "Legal Norms as Second-Order Reasons," followed by explanation of his other distinctive contributions to legal philosophy. These include an account of the authoritative nature of law (section "Law's Authority"), a rejection of the legal positivist "separation thesis" which nonetheless preserves the positivist insight about the moral fallibility of law (section "The Sources Thesis"), an account of legal system and related problems of identity and continuity (section "The Identity and Continuity of Legal Systems"), and engagement with the methodology of legal theory (section "Methodology and Conceptual Analysis").

Legal Norms as Second-Order Reasons

In early work, Raz argues that legal philosophy is best understood as one branch of the philosophy of practical reason, philosophy engaged in the analysis of reasons for action (Raz 2009a, x). Raz distinguishes first-order from second-order reasons for action, calling first-order reasons those which apply to subjects in the absence of consideration of any social institutions or norms. These include, e.g., reasons of prudence, health, or well-being and some reasons of morality. Second-order reasons are reasons about how to relate to, act on, or balance first-order reasons and are characteristically found where there are social institutions and norms. Raz characterizes legal norms as general kinds of institutionally accepted second-order reasons, devoting the most attention to mandatory norms, first called "exclusionary" and later "preemptive" reasons not to act on first-order reasons. There is much technical language here, so a familiar nonlegal example may help to illustrate this view. I have a first-order (or "operative" or "dependent") reason of financial well-being to make sound investment decisions, but I am not always in the best physical or emotional or rational state to make such decisions. I might then accept and practice a second-order reason (i.e., a norm) that I should not make any investment decisions when I am tired, no matter how good or bad an investment option might look. My second-order reason not to make investment decisions when tired here functions to exclude or preempt appeal to the first-order reasons (i.e., the merits of an investment option and its potential effect on my financial well-being) (Raz 1999, 37).

Law makes use of second-order reasons in a special way. Where a person's choice in some

situation is ordinarily made by relying on one or more first-order reasons for conduct bearing on that situation, laws govern that situation by functioning as second-order reasons for conduct which exclude or preempt reliance on otherwise relevant first-order reasons. For example, we all have first-order reasons of safety to coordinate our conduct according to traffic rules. But once a rule has been made, or perhaps crystallized from long-standing practice, we no longer need to (nor should in situations where we are ignorant of the rules) appeal to first-order reasons of safety to determine, e.g., on which side of the road to drive. The legal rule, e.g., drive on the right, serves as a second-order or exclusionary reason on which we are to act and so excludes or preempts appeal to first-order reasons.

Law's Authority

Raz's account of the authoritative nature of law is intertwined with his account of legal norms. Law's authority is what gives legal norms their legal quality distinguishing them from other second-order norms. Raz's account of law's authority is perhaps his most distinctive contribution to legal philosophy, attracting distinguished advocates and equally distinguished critics.

The theory holds that where law exists, it necessarily claims authority to regulate comprehensively, supremely, and openly the lives of its subjects (Raz 2009a, 116–120). Law claims to be comprehensive in that all aspects of social life are regulated, whether by prohibition, requirement, or permission. Law claims to be supreme in that a legal system claims to sit at the top of a hierarchy of all normative systems and norms within a particular society. Finally, law claims to be open, offering support or authorization to various forms of voluntary associations and private agreements such as contracts.

Several aspects of this summary statement deserve further explanation. First, since laws only exist in legal systems, investigation of the nature of law is at the same time an investigation of legal systems and their authority. Raz notes that since there is nothing logically distinctive about legal norms as second-order reasons which marks them apart from other nonlegal second-order reasons, what makes them legal norms is their membership in a legal system. The membership is identified by observation of their systematic application by norm-applying institutions (Raz 2009a, Chap. 6).

A second aspect is the special significance Raz's account attaches to law's self-image. Not only do legal systems provide legal norms to guide the conduct of their subjects, they also claim a kind of legitimate authority over them. The exclusionary or preemptive reasons law provides claim to be justified reasons, since they are meant to reflect a settled and accurate view of the balance of first-order reasons which apply to subjects. This aspect of Raz's view is supported by intricately detailed argument, summarized in three distinct theses about laws as practical reasons: the dependence thesis, the preemption thesis, and the normal justification thesis (Raz 1995, 214). The dependence thesis maintains that "[a]ll authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives" (Raz 1995, 214). In other words, law could not claim authority unless it claimed to be based, at least in part, on these "dependent" reasons, which include moral reasons. The preemption thesis holds that law functions to reflect and replace first-order-dependent reasons, through provision of second-order, preemptive reasons in the form of legal norms. In other words, to claim authority is to claim to make a practical difference in the practical deliberation of subjects by preempting appeal to first-order reasons. The normal justification thesis states that the law claims that subjects are normally justified in following law's directives since to follow these will more likely lead subjects to act on the right balance of first-order dependent reasons than if subjects tried to act on direct appeal to first-order dependent reasons themselves.

The dependence, preemption, and normal justification theses which constitute Raz's theory of law's authority represent a sophisticated contribution in legal and political philosophy to understanding the relation between subjects and states, and they display Raz's answer to the anarchist's

challenge that authority and reason are incompatible. By explaining the nature of law's authority in terms of its role in practical reason, Raz can hold that there is nothing irrational or compromising to one's autonomy in following rules or living under the authority of a state. Yet in the philosophy of law, the three theses also go a long way toward resolution of at least one of the long-standing disputes between natural law theorists, who insist that law must be understood in terms of its moral purpose, and legal positivists such as Hart, who deny any such necessary connection between law and morality. On the one hand, Raz's theory of law's authority shows that law must be understood in terms of its moral purpose: in conceiving of law, one must understand that necessarily law claims *moral* authority to settle for subjects how they ought to conduct themselves (Raz 2009b, 180). But, on the other hand, by emphasizing the special significance of law's *claim* for itself to be a moral authority, rather than emphasizing the truth or falsity of such a claim in any or all circumstances, Raz's theory preserves the positivist insistence that particular laws and legal systems everywhere are morally fallible.

Raz does not, therefore, share Hart's view of the separation thesis which holds that "... it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so" (Hart,2012, 185–6). The difference is easy to miss but important. Hart thought that *in conceiving of law*, one need not suppose that it must reproduce or satisfy demands of morality: when law does reproduce or satisfy demands of morality, it is a matter of contingent, historical fact and nothing more. On Raz's view, *in conceiving of law*, one must understand that law claims to be morally authoritative, so law must be understood to claim to reproduce or satisfy demands of morality. This is of course different from the general, external view that it is morally desirable that laws reproduce or satisfy demands of morality. Rather, the connection is internal: when law does reproduce or satisfy demands of morality, we are *not* restricted to the conclusion that this is simply a matter of contingent, historical fact. We are also entitled to the observation or conclusion that this is part of law's nature and that its claim in a particular instance happens to be justified. Likewise, when law does not reproduce or satisfy demands of morality, we are able to draw the additional conclusion that law's claim, while sincere or genuine, is unjustified (Raz 2009b, 180; see also Green 2008).

The Sources Thesis

While law's authority is best understood in terms of a moral claim to best reflect and replace direct appeal to moral and other first-order reasons, Raz emphasizes that legal theorists must not suppose that the legal directives of states claiming authority are morally legitimate simply in virtue of being claimed to be so. Raz's "sources thesis" highlights the positivist insistence that the *existence* of particular laws and legal systems is everywhere and always a matter of social practices and never a matter of satisfaction of moral principles or values (Raz 2009a, 47–52). "Exclusive positivism," as Raz's view has been called, maintains that moral considerations are never among the existence or validity conditions of law (Giudice 2015, Chap. 5).

Here we have a second difference between Raz's and Hart's view of law. Hart supposed, but defended only briefly, the possibility that some legal systems might include or incorporate moral criteria among the ultimate tests of legal validity for the membership of legal norms (Hart 2012, 250). This view has come to be known as "inclusive positivism," "soft positivism," or "incorporationism," of which there are several variants (Waluchow 1994; Coleman 2001; Kramer 2004). Raz rejects inclusive positivism, arguing most forcefully that the possibility of moral criteria or considerations counting among the ultimate tests of legal validity is incompatible with the claim of authority necessarily made by all legal systems. The "argument from authority" is as follows (Raz 2009a, Chap. 3, 1995, Chap. 10). To claim authority, a legal directive must at least be capable of claiming authority. To be capable of claiming authority, a legal directive must purport to make a practical difference by excluding or preempting appeal to dependent reasons, which include first-order moral reasons. Inclusive

positivism, by maintaining that determination of the existence or validity of law might sometimes require moral consideration or argument, imagines a situation which cannot exist, since to appeal to moral considerations in the determination of legal validity renders law incapable of making a practical difference, and so renders it incapable of claiming authority to settle for subjects what they ought to do according to law.

The Identity and Continuity of Legal Systems

Raz's work on the nature of law's authority continues to develop and attract critical attention. But his work in the philosophy of law extends far beyond his influential contribution to the theory of law's authority. His work on the nature of legal system offers interesting insights and illumination on unresolved problems of identity and continuity (Raz 1980). Raz famously does not share the view that the identity of legal systems – the unified set of member norms – can be solved by appeal to a single basic norm or rule of recognition which sits at the foundation of a legal system. In his view, there could be multiple basic norms or rules of recognition in a single legal system. Part of the solution to the problem of identity requires observation that legal systems claim to be comprehensive, supreme, and open, a view which supposes that legal norms amount to a system when they are all operated by the same norm-applying institutions (Raz 2009a, Chaps. 5 and 6).

This account, however, is judged even by Raz's defenders to be underdeveloped, facing several problems. In particular, it is far from clear that all state legal systems can be accurately understood to be making supreme, comprehensive, and open claims to authority (Marmor 2001, 39–42). The idea of legal systems as supreme, comprehensive, and open normative systems also leaves intact the problem of the continuity of legal systems: what explains the persistence of a legal system and what distinguishes changes *within a legal system* which do not alter its identity or existence from changes *to a legal system* which do alter its identity or existence? Raz only offers a theory of momentary legal systems, a snapshot in time holding a legal system's identity and existence stable for the purpose of analysis, and suggests that others, including Hart, have either overlooked the problem of continuity entirely or simply found it unfashionable to solve (Raz 2009b, 58). As new forms of legal order emerge, in the form, for example, of the European Union, questions of the identity, existence, and continuity of legal systems must be taken up again, and Raz's work may be a particularly helpful point of departure (See Dickson 2008).

Methodology and Conceptual Analysis

Raz's work on the theory of law's authority and the nature of legal systems is systematic and profound. His remarks on the methodology of legal theory are less systematic, but no less insightful. His view about the goals and success conditions of analytical legal theory in particular, and social philosophy in general, is perhaps best stated in a passage on authority in *The Morality of Freedom*. He writes:

> Accounts of 'authority' attempt a double task. They are part of an attempt to make explicit elements of our common traditions: a highly prized activity in a culture which values self-awareness. At the same time such accounts take a position in the traditional debate about the precise connections between that and other concepts. They are partisan accounts furthering the cause of certain strands in the common tradition, by developing and producing new or newly recast arguments in their favour. (Raz 1986, 63)

A central aim of philosophy of law is to offer explanations of the general concepts of law (and the concept of law itself) which are responsive to both citizens' and theorists' interests in a way which illuminates their self-understanding. As he writes elsewhere, the theorist's goal is to "advance our understanding of society by helping us understand how people understand themselves" (Raz 1995, 237).

This is a nuanced view, and one far removed from any belief that philosophers of law are in the business of elucidating the meaning or definition of particular words. Raz's view is nonetheless vague in one respect: what counts as or what are,

exactly, the philosophical interests of citizens and theorists? But here the vagueness is deliberate and a decisive strength. As Raz notes in identifying the unsolved problems of identity and continuity, the interests of citizens and theorists shift, such that some problems might fall in or out of fashion. About explanations of the concept of law in general, he writes that there are no uniquely correct explanations but only better or worse explanations depending on the concerns addressed (Raz 2009b, 57). It might be, for example, that in some era and social situation, explanation of the nature of *authority* best responded to questions about the nature of law, as citizens and theorists alike were concerned to understand the nature of their relation to the state. In another era and social situation, explanation of the nature of *governance* might be more responsive to concerns about the nature of law, as citizens and theorists seek to understand new forms of private regulation and their relation to public forms of law in a globalizing world. Similarly, in one era, attention to the nature of state legal systems might have been prominent, but this may also be changing as new forms of non-state legal orders seem to be emerging. By highlighting the philosophy of law's responsiveness to contingent practices and shifting interests, Raz's views serve well to characterize its never-ending tasks.

Yet, responsiveness to contingent practices and shifting interests might suggest that Raz's view is incapable of offering what a theory of law should: an explanation of law's *universal* and *essential* properties (Raz 2009b, Chap. 2). But here appearances of having abandoned legal theory's goal are deceiving and show a further way in which Raz's view of the methodology of legal theory is nuanced. The fact that explanations of the concept of law are explanations in service of particular inquirers' interests does not preclude holding at the same time that law has universal or essential properties. In more recent work, Raz argues that beginning with an explanation of *our* concept of law, a concept developed largely in the Western world of sovereign states, need not inevitably result in a rigidly parochial concept of law. While our concept of law is a stable part of a common and shared understanding, it is still a "philosophical creation," designed to aid understanding of particular social phenomena by mediating between words or phrases and aspects of the world (Raz 2009b, 18). As a "philosophical creation," which is more than a reflection of linguistic usage, that creation is influenced by new experience, and as Raz notes, our concept of law has in fact been changing to make it "more inclusive and less parochial" (Raz 2009b, 33). In this way, concepts of law are not in competition with but instead responsive to shifting interests as, e.g., our interest in understanding law may be expanding from its familiar context of a singular sovereign state to comparison between dissimilar types of states to transnational, international, and global contexts.

Understanding this complex view nonetheless requires observing a distinction Raz draws between the nature of law and the concept of law (a distinction Raz argues that earlier theorists, including Hart, overlooked) (Raz 2009b, 32–33). The *nature of law* is to be a metaphysical object having universal and essential properties, while the *concept of law* is a parochial, typically prevailing understanding of law's nature. It is important to note that by this distinction, Raz does not aim to argue that law really does have universal and essential properties – only that those committed to supposing that there is such a thing as the nature of law are committed to viewing law as having universal and essential properties. Whether there is or is not a "nature" of law cannot be assessed from evaluation of "our" or "your" concept of law, since explanations of concepts of law are explanations of a particular perspective of law's nature, not explanations of the universal and essential properties themselves. In other words, no conclusion either way – whether law does or does not have universal or essential properties – can be drawn from observation that concepts of law differ and are subject to change. There is also, then, on Raz's view, nothing objectionable in applying our concept of law to other cultures which do not share our concept of law or do not themselves have a concept of law at all. What matters is whether other cultures have social institutions which have the nature of law: legal institutions which are subject to conceptual

explanation. An explanation of a concept of law is thus kind of descriptive-explanatory tool used by inquirers with interests and perspectives to explain the world to themselves and others as they see it.

There is one final observation which is important to note and rounds out Raz's view of the methodology of legal theory. The closer a concept of law comes to covering or designating successfully all instances of law, and so transcending its particular origin, the closer *explanation of that concept of law* comes to *explanation of the nature of law*. As Raz writes:

> Is it not our aim to study the nature of law, rather than our culture and its concept of law? Yes and no. We aim to improve our understanding of the nature of law. The law is a type of social institution, the type which is picked up – designated – by the concept of law. Hence in improving our understanding of the nature of law we assume an understanding of the concept of law, and improve it. (Raz 2009b, 31)

So while the life of a concept of law might have a parochial beginning, through its responsiveness to shifting practices and broadening interests and perspectives, it may, eventually, come to resemble the kind of philosophical concept of law a general jurisprudence or truly general legal theory seeks to accompany in explanation of the nature of law.

Conclusion

Raz's work in the philosophy of law ranges broadly, from an account of the nature of individual legal norms to a theory of legal system to an account of the very aims and methods of legal theory. This short introduction has been just that, a short introduction to some of his leading ideas, attempting to show the marked differences between his views and those of previous theorists in the analytical legal theory tradition, views which have already influenced a generation of later legal philosophers. Perhaps most importantly, Raz's views show in equal measure distinctive contributions to philosophical theorizing of law and motivation for pursuing old questions from new directions.

Cross-References

- ▶ Legal Positivism: Inclusive
- ▶ Legal Theory: Descriptive
- ▶ Legal Theory: Types of
- ▶ Radbruch, Gustav: His Formula and Concept of Law

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Reale, Miguel

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Introduction

Philosopher, jurist and poet, member of the Brazilian Academy of Letters and Brazilian Academy

of Legal Letters, president of the Brazilian Institute of Philosophy, founded by him in 1949, one of the founders and honorary president of the Brazilian Association of Philosophy of Law and Sociology of Law (Abrafi) and one of the honorary presidents of the *Internationale Vereinigung für Rechts- und Sozialphilosophie* (*IVR*), founder and twice president of the Inter-American Society of Philosophy, and doctor "*honoris causa*", from the universities of Genoa, Lisbon, Coimbra, and Valparaíso, the Brazilian philosopher Miguel Reale is one of the great thinkers of the Western world, probably the one with the greatest influence among Lusophone and Spanish-speaking peoples.

Born on November 6, 1910, he received his academic training at the University of São Paulo, where he became professor of Philosophy of Law and twice dean. He died in the city of São Paulo, on April 14, 2006, at the age of 95, having left a large body of work, with dozens of books on the great problems of legal, political, and social philosophy, as well as a relevant contribution to the tenets of Brazilian law.

The Brazilian Civil Code, which came into force on January 11, 2003, was drafted under his coordination.

The Three-Dimensional Theory of Law

Recognized as an heir of phenomenological culturalism, one of the most significant schools of thought in the history of philosophy, he was the creator of a truly original conception of law and legal knowledge, with repercussions in practically all domains of the social sciences, the *Three-Dimensional Theory of Law*.

Starting from the separation between two ontological spheres, the *being* and the *ought to be*, his core thesis seeks to demonstrate that the law consists of a form of social experience that occurs in history and is integrated into the set of objects created by rational activity, which are cultural objects. Law is one of these, and it is attestation of social life as a fact, but legality derives from its articulation with two other factors, norms and values. The impact of values through norms converts social facts into cultural objects, situated in the instance of what *ought to be*. However, these are not sealed objects, as they are only understood in their reciprocal implication. This is the specific three dimensionality of the legal phenomenon: an ontological unity of *fact*, *norm,* and *value*.

The values of law are integrated into collective values, and together they form precisely what we understand by culture. These values subsidize the cultural progress of humanity, led by some which are of special relevance and that tend to remain, such as freedom, equality, democracy, and justice, and which are axiological constants that have come to constitute the core of civilization. Such achievements tend to be improved, never reaching, however, a level of absolute.

Following of existential philosophy, Reale reaffirms the thesis of the exhaustion of the being in what is the essentially human, which is a notion that distances him from Hegel's absolute idealism, and in the context of culturalist axiology, he understands that values are the product of rationality. He disagrees, however, with the axiological idealism of Max Scheler and Nicolai Hartmann, as he believes that values do not belong to the same ontological category of logical and mathematical abstractions, since they *are* insofar as they *ought to be*, that is, they must be understood as an orientation for rational action, and their objectivity is a result of its realizability. This ontology requires an adequate methodological instrument to think about the juridical and to account for its phenomenal integrality, its immanent dialectic as a social fact receptive to valuations through different normative expressions. It is a dialectic of implication, not to be confused with the Hegelian dialectic of contradiction, since the three elements reciprocally demand each other as they integrate the same ontological unity. At the same time, it is a dialectic of polarity, as the values of the three-dimensional complex polarize positively or negatively. Reale refers to this *logos* as the *dialectic of implication-polarity* or *dialectic of complementarity*, expressions that emphasize the essential co-implication of the theoretical and practical dimensions of law. As knowledge, the implication concerns the indivisible unity between subject and object and, as experience, between freedom and valuation. This is the synthesis of an understanding of the

knowledge process, whose theorization Reale calls *ontognoseology.*

Realean three-dimensionalism, although initially rooted in essentialist phenomenology, emancipated itself from it by excluding in its conception of law the conditions emanating from supposedly objective ahistorical structures. Thus, the theory became able to respond to the criticism that was directed at substantialist apriorism: that law does not properly have an essence that can be detected through a *return to the things themselves*, much less that this essence can determine the historical aspects of juridicity. If Husserlian phenomenology was fundamentally essentialist, in response to the kantian challenge of the impossibility of metaphysics, in Reale it becomes existential, opening the prospect of a rescue of the living as an object of transcendental philosophy, the beginning of the liberation of legal philosophy from reductionist and sectorizing concerns that are characteristics of positivist empiricism. In Reale, the transcendental is open to the fullness of experience, as a *determining and determined* category on the dimensions of praxis and history.

The Theory of Legal Models

The natural unfolding of the ontognoseological synthesis is the construction of an epistemology that is built on the dialectic of complementarity and provides the foundations of a general theory able to preserve the coherence between the immanent dialectic of law and its gnoseological understanding. This effort led Reale to interpreting law in the immediate and non-reflective spontaneous state of a precategory experience that is objectified in the fundamental structures of legal knowledge. These are *legal models*, which synthesize the nexus between the reality of legal life and the corresponding scientific knowledge.

This dynamic already appears in the precategory embryonic phase, receiving the impact of the rationalization of the various and successive degrees in which it occurs and begins to be captured and enacted as law by the power of the State. This is the historical process of the formation of legal precepts, an anthropological mechanism that does not cease with positivity, but continues indefinitely through hermeneutics, albeit stratified in supposedly rigid legal formulas. Such is the dialectical understanding of legal nomogenesis, presented by Reale as the *theory of legal models*, an alternative to the theory of sources of law.

Such notions have repercussions on the conception of state power, and the way Reale defines it brings him closer to Foucault, for whom power is not a unitary phenomenon, centered on the hierarchical structure that culminates in political power, but a diffuse, articulated social phenomenon in a host of centers of power. Likewise, the recognition of the existence of pre-juridical realities brings him closer to the institutionalism of Maurice Hauriou, Georges Rénard, and Santi Romano, as he considers that normative schemes are institutionalized by virtue of acts of adherence to typical social structures, involving decisions emanating from a *power of negotiation* present in individuals and groups of greater or lesser scope, to the representative authorities of the State. Thus, power of negotiation involves the same factual possibility of decision, from the individual to the State.

Reale distinguishes between legal models properly said and dogmatic ones. The former are the result of a choice made by the legislator, the judge, or the individual, while the latter are constructed by the legal doctrine as theoretical-comprehensive structures of the meaning of legal models and their conditions of validity and effectiveness.

The comprehensive and integrative view of the law as a manifestation of social life reveals the influence of phenomenology and existential philosophy on Reale's thinking. For the master, the entire three-dimensional reality of law is ultimately reduced to the concrete action of the social being. Thus, legal models are created and recreated by virtue of an endless dynamic, which see participation not only on the part of the State's legislating power but also by the power of negotiation installed in private life and jurisdictional power, as well as all the manifestations of social power.

It is in this reality that the experiential authenticity of the law is sought. Its understanding

requires a specific dialectic of complementarity between the elements that make up the law, which is part of an open reality, society. These models are conceived as *a priori* material, normative structures not separated from concrete reality, but which emanate from it and can only be understood in terms of it. It is the permanent search for meaning that permeates the entire phenomenology of law.

On the other hand, the conception of concrete society as a reality that is not closed brings ontognoseological criticism closer to the existentialist notion of openness to being. The fundamental thesis of three-dimensional culturalism is that man is creative *par excellence*, and his ability to act is more important than his ability to be. Hence the importance of the factor *labor* for Reale in understanding existential phenomenology.

From the anthropological point of view, the human being is conceived of as essentially creative. This creativity is initially conditioned by bodily deficiencies, but it develops towards an unconditioned creativity, as a spiritual activity that manifests itself in culture. The scientific view of precategory experience places it precisely in a moment of prevalence of conditioned creativity, and *mutatis mutandis*, the same occurs with the unconditioned. Hence the notion of open adaptability, insofar as man frees himself from his physical, biological, psychological, ideological, and social conditioning, tending to a state of disalienation (a self-consciousness) that marks effective liberation. In this case, the idea of a material *a priori* conditioning the understanding of the being represents a delay in the process of affirmation of unconditioned creativity. Herbert Marcuse refers to one-dimensional man as the alienated man, who is the one whose ability to create has been replaced by the ability to adapt, but who closes into himself and becomes unable to recognize himself in his own work.

Truth and Conjecture

The culmination of legal three-dimensionalism is its understanding of the problem of truth, at which point Reale confronts the logical positivism of the philosophy of language, whose applicability to legal statements proves to be aporetic, both at the propositional and decisional levels. This is because such statements are not subject to empirical or analytical verification, as any attempt in this direction would not be able to rid legal reasoning of the doubt as to whether what is understood by legal, fair, or legitimate corresponds to what is imposed as law in the praxis of hermeneutics.

The traditional concept of truth, of a positivist nature, establishes a semantic relationship between discourse and events, the agreement between a fact that occurred in reality, and the idea that reproduces it. In legal discourse, this concept underlies the dogmatic separation between formal and substantial truth; the latter is linked to the reflected fact and the former to the discursive representation of the fact, considered to be true and able to support the judicial decision, provided that certain normatively established requirements are met.

This dichotomy, however, becomes outdated in the light of the concept of conjectural truth. Reale held that conjecture is a valid form of thought in common life and in science and that conjectural truth becomes the common denominator of the various attempts to equate a form of decision-making thinking that transcends the formalist normativism without being reduced to a kind of irrationalist decisionism. The conjecture is the judgment itself capable of being tested in the context of the other judgments that make up the judicial syllogism, present in the search for substantial truth as an approximation to it and in the motivation of the choice that leads to the decision of the *sub judice* conflict. In the dynamics of jurisprudential praxis is the passage from *logos* to *actio*.

At another point in Reale's work, another positivist assumption is questioned: the affirmation of the neutrality of science. In addition to demonstrating the inadequacy of traditional scientific methodology for the unitary understanding of law in its concrete manifestation of fact, norm, and value, it implicitly extends to ethical and legal experience the elaborations of contemporary critical epistemology regarding the impossibility

of scientific work being ideologically neutral, especially in the field of social sciences. By constituting its object of analysis, in an essentially integrative perspective of values that cannot be removed as ideal objects independent of the being to which they are added, the three-dimensional theory reaffirms the fundamental thesis of the critical theory of society, in the sense pointed out by the philosophers of the Frankfurt School, that ideology is one of the components of this objective reality. Thus, the tendency, firmly grounded in dogmatic thinking, to deal theoretically with the norm, the value, and the events to which they refer as if they were distinct realities is removed. Reale disapproves such attitude in the theories he presents as generic three-dimensionalisms, exemplified by Hans Nawiasky, Norberto Bobbio, Paul Roubier, Michel Virally, Luis Legaz y Lacambra, and Eduardo García Máynez, among others, and sees it as something implicit in the three-dimensionalism of Wilhelm Sauer, Jerome Hall, Luis Recaséns Siches, and Carlos Cossio.

Operativeness of Legal Values

Nevertheless, he does not reject the civilizing cultural heritage that converged with his own doctrinal convictions, despite going beyond sustantialism apriorism. Furthermore, the anthropological process of cultural elaboration is present, where the accumulation of axiological meanings from the historical past occurs, from which the updated meanings emerge. The three-dimensional theory envisages the operationality of values and understands that the tendency to maintain them in the structures of society is a very important factor for the formation of the cultural heritage of humanity, according to a requirement of order that, in Reale, more than a gnoseological presupposition or activity, is an ontological necessity; hence the emphasis on positive legal values, presented as the general rule in social life, while admitting that certain negative values can play a determining role in intersubjective relationships.

Concrete human action, however, the psychological-social factors that lead to the elaboration, implementation, and maintenance of values, is a task to be developed in the epistemological context of the social sciences, while Reale's axiology remains as an ontognoseological preliminary that emphasizes their potential to perpetuate themselves as acquisitions of cultural experience. Present since the precategory phase, the sense of permanence is an ontological characteristic of the values themselves, subject to an equally historic process of filtering in the passage to the categorical phase.

The evaluative filtering is permanent in historical dynamics, and when Reale asserts that the process of objectification, characteristic of the passage from precategory to categorical dynamics, represents some sense of improvement, a sort of evolution in the field of ideas, he is not eliding the social forces that act in this process, nor that they can act against the ideals that the values intend to identify. It is that filtering does not always occur in the sense of the full realization of positive values, as it often lends itself to manipulation by dominant social groups to preserve the *status quo* that favors them, a consequence of the axiological polarity implicit in the dialectic of complementarity.

Given that man is an imperfect animal from the biological point of view and endowed with creative adaptability in social terms, it is inferred that his existence is a continuum of creations and acquisitions. In other words, history is creation, and man is the product of history, the result of his own action in and on the world.

Existential philosophy transmutes this concept from the anthropological to the metaphysical dimension. *Dasein* is being insofar as it communicates with the other, and openness to being translates man's freedom as an immediate and primary datum of consciousness, whose demonstration is unnecessary because it is the foundation of the possibility of all truth. This existential openness founded on creativity removes all historicist determinism, as it means that all biological, physical, social, and ideological conditioning remains as such insofar as man renounces the

effort to change it. This being so, even if the limitations of a natural order are accepted as indemonstrable, historicist conditioning is removed, since it becomes self-conditioning, as man actively participates in his own biological, ecological, and social transformations.

The three-dimensional theory of law can be inserted into this anthropological-existential perspective, as it conceives law in its dialectical nature, and is inserted both into the dimension of conditioned creativity, which corresponds to the precategory experience, and into relatively unconditioned experience, which corresponds to the categorical one. However, the creation of law is not exhausted in its nomogenesis moment, as the social phenomenon manifests itself as *jus* to the extent that it is continually being created and recreated, essentially integrated into the vital impulsiveness of the human being. This perspective is present in the Realean theory of the *gradation of legal positivity*, in which positive law is the culminating moment of a normative process in which positive law is created, initiated with the precategory experience, and rationally improved through the categorical objectifications of legal models.

As such models constitute the expression of an open creativity, the existential prerogative of the human being, they also include the critical reach of rupture with the past, insofar as the philosophical conscience starts to bring to light the ideological sense of the manipulation of legal values by social strata, holders of the largest share of social power. Moreover, the awareness of these conditions of ideological alienation implies the projection of the legal being to a prospective dimension, always focused on new values and the real needs of a people. This is because the dialectical process must lead to a unified examination of being and knowledge of legal experience, to the point that Reale does not admit an enclosed legal gnoseology and ontology, but a unitary ontognoseology.

In ontognoseological criticism, the constructive dimension of science is also implicit in relation to its object, but the three-dimensional theory does not attribute this scope to it, in the sense that the jurist is a builder of the social order and not a mere observer of an immanent order. Such insufficiency is explained by the vigor with which Reale values cultural experience, considering it a civilizing heritage. However, the emphasis on the cultural-historical process presupposes a preestablished objective order, the past imposing itself on the present, suggesting a smooth evolution of cultural heritage, which is perfected until it becomes civilization. And, effectively, contemporary historiography gives us an account of a process of cultural evolution that prepares and builds the civilizations of the past, which culminated in Western civilization.

Axiological historicism does not take into account that the demand for order is the result of an ideology that reduces all rationality to the terms of logical-formal coherence. As social contradictions are opposed to this analytical notion of social order, ontognoseological criticism is not enough to account for neither the myths that hinder scientific thinking nor the qualitative transformations that can lead to the rejection of a scientific theory. Furthermore, axiological historicism is silent on the problem of revolution, although it implies the possibility of resistance to unjust laws, when it places the value of the person as a transcendental condition of the entire ethical-legal experience.

The importance of language in the ontognoseological process has not gone unnoticed. Quoting György Lukács, Reale reminds us that the basic forms of human life, "labor," and "language" have, essentially, in many ways, the character of objectifications. However, the greatest emphasis is placed on work, understanding that it can only be produced as a teleological act.

By opposing the Hegelian dialectic, the Realean notion of implication-polarity only denies its ontological dimension but does not remove it as a form of thought. However, it disagrees with the exclusivist character with which many understand it; on the contrary, it integrates it into the dimension of totality that it attributes to the ontognoseological dynamism. Contradiction is not only one of the possible ways of envisioning the total but also one of the aspects of social reality that cannot be ignored in the historical context. If the flow of history is shaped by thought, contradiction is also a gnosic category and not

something immanent. Such an understanding is perfectly coherent with Reale's thought, since the dialectic of complementarity is a multi-dimensional dialectic that unfolds in several perspectives. Is not contradiction one of these perspectives and, therefore, capable of being integrated into the dialectic of complementarity? Here, the words of José Ortega y Gasset can be recalled: *La perspectiva es uno de los componentes de la realidad.*

This is the core and, perhaps, the most significant of Reale's legal three-dimensionalism. The philosophy of language and the theory of ideology reveal the operational range of scientific language and demystify the illusion that social science statements can have defined semantic content. Furthermore, it clarifies the theoretical character of the language of the social sciences, including that of law and politics, revealing that semantic transformations of meaning, mentioned by Reale regarding the meaning of legal models, respond to pragmatic conditions of an ideological and social-historical character.

Such assumptions led, in the context of three-dimensionalism, to the search for a concept of legal truth that would satisfy the demands of practical reason, and it was the search for this concept that induced Reale to develop a new paradigm distinct from the methodology founded on analytical thinking. The dialectic of complementarity, to be found in conjectural thinking, makes the jurisdictional decision-making activity understandable, insofar as this is a search for solutions through conjectures.

Here is an aspect of three-dimensionalism not yet sufficiently developed, at least in terms of the logical scope of its notion of legal truth. It also advocates a new *logos* capable of overcoming the exclusivity of traditional legal logic models, since conjecture, by focusing on the procedures of intellection (intellectual intuition) and evaluation, constitutes a means of approaching legal truth, perfectly in accordance with the presuppositions of dialectical logic. Conjecture, in the way Reale presents it, is a concrete act of approximation to the truth which has itself a dialectical character. The whole complex that translates the passage from *logos* to *actio* is influenced by ideology, the image that society has of itself and the world that surrounds it.

With the three-dimensional theory of law, it becomes clear that ideology is one of the components of social reality, manifested in the axiological dimension of work, language, and conjectural thinking as factors in the construction of this reality.

The Critical Vocation of Realean Three-Dimensionalism

Finally, it is necessary to emphasize that Miguel Reale's work is not a ready-made theorization available to his followers. On the contrary, it foresees development possibilities worthy of the greatest attention. In the same way that it represents the convergence of the most significant expressions of philosophy since the Enlightenment, its conceptions point to a sense of renewal and enrichment of the legal and political culture built with a lot of struggle, work, and sacrifice. The full realization of the positive values that comprise it is a task that is left to new generations, always having as a horizon the value that Reale presents as the source of all values, the human person.

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Rechtsstaat

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Introduction

The German concept of *Rechtsstaat* has never been altogether clear. This is due to the tumultuous history of German law and German legal science in the past centuries, developments that have shaped different meanings of *Rechtsstaat* over time. Another part of the explanation for the lack of clarity in the concept is the fact that it serves, today, not only as a description of a particular kind of an (ideal) state, a concept belonging to the General Theory of Law and State (*Allgemeine Staatslehre*), but also as a normative concept of the constitution that enjoys status as a fundamental legal principle: the *Rechtsstaatsprinzip*. As the German Constitutional Court has clarified in one of its earliest decisions, "among the elementary constitutional principles are those of democracy, of federalism, and of the *Rechtsstaat*" (BVerfGE 1, 14, 18).

In the following, both *Rechtsstaat* and *Rechtsstaatsprinzip* shall be addressed: the former by means of a sketch of its conceptual history and the latter by reviewing the two paradigmatic concepts in contemporary German legal science – one rather positivistic and the other rather non-positivistic.

Rechtsstaat

It is claimed (Scheuner 1960, 229; Stern 1984, 764) and denied (Dreier 1985, 353; Schöbener and Knauff 2016, 217) that "*Rechtsstaat*" is a genuine German concept. There are, however, more or less similar concepts in other languages and legal cultures, e.g., *rule of law*, *reígne de la loi* or *estado de derecho*. Whether or to what extent these concepts can be regarded as genuine counterparts will not be considered here (see Kirste 2013, 2014, 30–35). Still, it may well be the case that the idea of *Rechtsstaat*, in the German legal tradition, has had a greater impact than its counterparts in other legal cultures (Scheuner 1960, 231). The most important reason for this difference, if it is in fact the case, would be the significance of the *Rechtsstaatsprinzip* as a fundamental constitutional principle which is conceptually linked with the *Rechtsstaat* as a regulative ideal or a political concept.

In the German tradition, *Rechtsstaat* is traceable back to ideas of Immanuel Kant. He defined the state as a "union of a number of human beings under law" ("*Vereinigung einer Menge von Menschen unter Rechtsgesetzen*"; Kant 1797, 313). He further characterizes this notion by appeal to the separation of powers, according to which the executive and the judicial powers are bound to legal norms that are issued by the sovereign (Kant 1797, 313). Statutory law (*Gesetz*) became the central element of the state, and the authorities had to commit themselves to obey the laws they have issued.

It was owing to Kantian liberalism, however, that the *Rechtsstaat* came to fruition (Scheuner 1960, 239; Huster 2008, 1092 f.). Among the first to have employed the concept was Carl Theodor Welcker. He described the *Rechtsstaat* as the "state of reason" (Welcker 1813, 25, 91). And it is Welcker who declared, as indispensably fundamental elements of *Rechtsstaat* (Welcker 1813, 95), freedom of expression, the right to petition, and the right to leave the state. These elements have been extended by others into a catalogue of fundamental rights or "*Volksfreiheiten*," accompanied by the claim for a constitutional warranty of these rights. The *Rechtsstaat* came into prominence in the German tradition no later than Robert Mohl's treatise on *Die Polizei nach den Grundsätzen des Rechtsstaates* (1832). According to Mohl's foundations, the state must issue precise laws and must

provide for an independent judiciary, so that the citizen's rights enjoy legal protection (Scheuner 1960, 240).

To be sure, the claims made by appeal to the *Rechtsstaat* did not remain a domain of liberalism. Constitutionalism had become a *fait accompli* in Germany, too, and the *Rechtsstaat* was depoliticized. It became a metaphor for effective judicial protection in public as well as civil matters. Friedrich Julius Stahl described this new understanding of *Rechtsstaat* in 1847 with the following words (Stahl 1847, 62): "By the character of *Rechtsstaat* I mean solely the steadfastness of the statutory legal order, not its content." The material concept of the liberal tradition (Welcker) was supplanted by Stahl with a formal concept. In its best known version, Stahl's text reads: "The concept of *Rechtsstaat* does not mean the ends or content of the state, whatever they be, but rather the nature and character of their realization" (Stahl 1878, 137 f.).

As a consequence of the now paradigmatic formal concept in its depoliticized and dematerialized formal reading, the constitutionality of a state ceased to be the political end (this shift is marked by the realization of constitutionality). For it, the idea of an administrative power bound by the statutory legal order was substituted. Thus, the legality of administrative action (*Gesetzmäßigkeit der Verwaltung*) and the independent judicial review of administrative acts (*unabhängige Verwaltungsgerichtsbarkeit*) became the major political ideal in the name of the *Rechtsstaat*. These ideas are to be found in the *Paulskirchenverfassung* from 28 March 1849 that, however, was never passed as law. In its section 181 we read: "Judicature and administration shall be separate and independent of one another." And in section 182, one reads: "Administrative jurisdiction shall cease, and every infringement is to be judged by the courts."

Despite the collapse of the *Paulskirchenverfassung*, the ideas of a formal *Rechtsstaat* as described above were debated further in German legal science (see Bähr 1864, 54). Otto Mayer, the most influential scholar in administrative law in his day, defined the *Rechtsstaat* in his epochal work on *German Administrative Law* (first published in 1895) as the state of a well-ordered administration (Mayer 1924, 58). Mayer understood judiciary review of administrative actions, however, as a task of administrative self-regulation (Mayer 1924, 56). Any material content of *Rechtsstaat* was clearly precluded (Mayer 1924, 62).

During the Weimar Republic (1919–1933), the term *Rechtsstaat* was rendered material once again. As Gerhard Anschütz puts it (1919), the *Rechtsstaat* is the state that was able, finally, to bring the relations between the state and its subjects ("*Untertanen*") into a legal order, according to which the administration was never to act contrary to law and was empowered to interfere with civil rights only when and in so far as the laws permitted (Meyer and Anschütz 1919, 29). Thus, *Rechtsstaat* was once again identified with the liberal idea of securing individual rights qua statutory law. The administration had to follow statutory law, and, generally speaking, could act only if and when statutory law had been enacted (*Gesetzesvorbehalt*). The idea of statutory law as providing the most effective protection of individual rights was paradigmatic. In a way, *Rechtsstaat* became *Gesetzesstaat* (Huster 2008, 1093) – but this was not merely a formal concept, as some would claim, for it employed the liberal notion of *Gesetz* (Herzog 1980, Rn. 6).

The notion of *Rechtsstaat* as *Gesetzesstaat* remained, however, paradigmatic in the Weimar Republic (Böckenförde 1992, 335). Its central material claims were institutionalized in the Weimar Constitution. According to Art. 68, statutory laws of the *Reich* were to be enacted by the elected national parliament (*Reichstag*) and by it alone. In Art. 107, independent courts for the judicial review of administrative acts were proclaimed. The ideal *Rechtsstaat* had been constitutionalized almost entirely. In the last years of the Republic, however, it once again became questioned. Fascism became more and more popular, and, already in 1932, Carl Schmitt described the *Rechtsstaat* as an outmoded notion of the liberal tradition (Schmitt 1932, 7).

In addition, Schmitt deprived the *Rechtsstaat* of any conceptual content. According to him, this concept could mean anything and thus meant nothing: "The term 'Rechtsstaat' can mean as many different things as the word 'law' itself

and, moreover, just as many different things as the organizations connoted by the term 'state'" (Schmitt 1934, 715). Thus, according to Schmitt, the term "Rechtsstaat" in effect functions, so to speak, as a variable expression, to which this or that adjective is added. The various possible adjectives refer to political movements. On these grounds, the National Socialist state that followed the first German democracy could very well have been described as *nationalsozialistischer Rechtsstaat*.

Following Hitler's accession to power in 1933, however, the German *Rechtsstaat* in its former liberal form collapsed. *Gesetze* were no longer a matter of the parliament, but of the *Führer* (according to the *Ermächtigungsgesetz* of March 1933). Individual rights were effectively restricted for the sake of collective goods, ostensibly in order to protect the people and the state (*Notverordnung zum Schutze von Volk und Staat* of February 1933). These instruments sufficed to destroy the foundations of the *Rechtsstaat*. The new regime, however, continued to refer to its state as a *Rechtsstaat*, supposedly with an eye to the legitimative power for domestic and foreign policy. This would have been utterly lost, had the regime explicitly described itself as a *Non-Rechtsstaat* or, more to the point, as an *Unrechtsstaat*. Thus, even the leading figures in the National Socialist Party, including Hitler himself, continued to describe their regime as a *Rechtsstaat* (see Schmitt 1934, 713).

A number of ambitious legal scholars hastened to substantiate this bold move. Among the most ambitious of them was Schmitt. He defended, following his path described above, the notion of a *nationalsozialistischer Rechtsstaat* (see Bäcker 2015, 151–160). Although the regime, once established, openly declared that it had overcome the outdated liberal ideas, it continued to describe itself as a *Rechtsstaat* – but now in its "true meaning." Roland Freisler, in 1937, proclaimed: "The Nationalsocialist state of Adolf Hitler, the German Reich, is no *Rechtsstaat* in this [liberal] sense. But a *Rechtsstaat* it is – indeed, we are convinced, with a very different, higher, more internal, more natural and, thus, real meaning" (Freisler 1937, 572).

Although there were various notions of *Rechtsstaat* in those days, a common feature was a non-positivist idea of law. The *Rechtsstaat* became materialized and, thus, depositivized in the National Socialist regime (see Hilger 2003, 197). Still, the positivistic *Rechtsstaat* as *Gesetzesstaat* of Weimar was seen, and is still seen, as a precursor of the National Socialist regime. After 1945, however, *Rechtsstaat* was once again rendered material – in order to protect this fundamental concept from mere formality ("*Inhaltsleere*"; Böckenförde 1969, 73). What is more, *Rechtsstaat* ceased to be a merely political concept. It became, effectively through the adjudication of the German Constitutional Court (*Bundesverfassungsgericht*), a constitutional notion, a legal principle of the highest rank: the *Rechtsstaatsprinzip*.

Rechtsstaatsprinzip

The *Rechtsstaat* found in the German constitution (*Grundgesetz*) is, beyond doubt, a normative reaction to the injustices and atrocities of the National Socialist regime. The *Grundgesetz* contains a number of explicit regulations in line with the liberal tradition of *Rechtsstaat*; among those, first and foremost, are the legal guarantees of basic or fundamental rights (Art. 1-19 GG) and the binding of the executive to the statutory law of the parliament and the law itself (Art. 20 III GG: "[. . .] die vollziehende Gewalt und die Rechtsprechung ist an Gesetz und Recht gebunden"). On the prevailing reading, "*Recht*" here means justice (although this is not convincing; see Bäcker 2015, 122–128). Thus, the *Rechtsstaat* under the *Grundgesetz* became more than a *Gesetzesstaat*; it became a *Gerechtigkeitsstaat*.

It may well be doubted, however, that this doctrine of *Gerechtigkeitsstaat* is the right conclusion to be drawn from German (constitutional) history as sketched above. Referring to justice as standing above statutory law as a means to overcoming the validity of the latter (in line with Radbruch's influential formula, see Radbruch 1946, 107) contains the risk that the law may be

changed without changing the laws. Even more so if the criterion for written laws is not, as Radbruch suggested, a matter of objective morality or, at least, of international legal customs (human rights, Radbruch 1945, 14 f.), but of constitutional law (Art. 20 III GG) that – somehow – transcends the written constitution.

Thus, the idea of *Gerechtigkeitsstaat* has been harshly criticized (see Böckenförde 1969, 73: "new totality"). At the end of the day, the critique turns on the question of whether there is any law that transcends positive law. However, an absolute claim for justice as part of a fundamental legal principle opens a legal backdoor to morality (Merten 1975, 19: "trojan horse"). Thus, the common understanding of the *Rechtsstaatsprizip* is at odds with any concept of law in the positivistic tradition. Surprisingly, this evident connection between the *Rechtsstaatsprinzip* and the jurisprudential debate on the concept and the validity of law has not been given the attention it deserves in German legal science (see Bäcker 2015, 312 f.).

Still, there are two conceptions of *Rechtsstaatsprinzip* in the German *Staatsrechtslehre* that – implicitly – reflect the debate over legal positivism. On the one hand, there is the idea that the *Rechtsstaatsprinzip* is a comprehensive term (*Sammelbegriff*) for various constitutional norms, all of them a matter of positive law. The most important of these elements is, according to Klaus Stern: "the ties of the legislation to the constitution in Art. 20 III GG, especially to the fundamental rights in Art. 1 III GG, the formal protection of these rights in Art. 19 I GG and their inviolability in their essence in Art. 19 II GG, finally the 'eternal guarantee' in Art. 79 III GG and the strengthening of jurisdiction, in particular by means of the control of the legislation through the constitutional court, and not least the conjunction of 'laws and law' in Art. 20 III GG" (Stern 1984, 777). A further element, although closely related to some of the elements listed above, would be the Principle of Proportionality (Klatt 2017, 392). As a consequence of this first conception, the *Rechtsstaatsprinzip* has no content apart from the content of these constitutional norms. This conception, however, is adopted only from a minority, albeit a growing one, in the German *Staatsrechtslehre* (see Merten 1975, 12; Kunig 1986, 457 ff.; Gärditz 2011, mn. 40; Hain 2012, mn. 88 ff.).

The majority, on the other hand, understands the *Rechtsstaatsprinzip* to be a comprehensive term that not only summarizes the various positive constitutional norms mentioned above (and possibly a vast number of further elements; see Sobota 1997, 254–257, who lists no less than 142 elements) but also comprehends those normative ideas as elements of the ideal or political concept of *Rechtsstaat* that transcend the (written) constitution (see Stern 1984, 778–780; Buchwald 1996, 173 ff.; Sobota 1997, 399 ff.; Frankenberg 2002, Rn. 21, 33; Schmidt-Aßmann 2004, Rn. 7 ff.; Schulze-Fielitz 2006, Rn. 38; Grzeszick 2006, Rn. 45; Wilms 2007, 58; Robbers 2009, Rn. 1724–1729; Maurer 2010, 207; Ipsen 2013, 209; Sachs 2014, Rn. 76). One of these elements would be justice.

More important with an eye to legal reality, this overly comprehensive ("*übersummativ*") reading has been adopted not only in the literature but also by the German courts, above all the German Constitutional Court (*Bundesverfassungsgericht*). The *Bundesverfassungsgericht* explicitly implements "material correctness or justice" as a main element of the *Rechtsstaatsprinzip*, accompanied by legal certainty (BVerfGE 7, 89, 92). Thus, the two major antipodes in the debate on the concept of law (legal certainty and justice) that have led Radbruch and others to struggle (for a defense of Radbruch's formula, see Alexy 1999, 2010) are simply combined in one legal (!) principle – that transcends positive law.

Conclusion

From the perspective of legal philosophy, it is beyond doubt that any reasons for one of these two competing paradigmatic concepts of the *Rechtsstaatsprinzip* must transcend the mere interpretation of the German *Grundgesetz*. It is a matter of the concept of law – and, thus, of the debate on the connection of law and morality. Interestingly enough, it may be assumed that some of those authors in favor of a broader concept of *Rechtsstaatsprinzip* will not be ready to be

designated as legal non-positivists – and vice versa. This may count, at the very least, as a demonstration of the oft-doubted usefulness of legal philosophy.

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Reconciliation: Political

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Introduction

In ordinary language, reconciliation has at least four interrelated meanings. First, reconciliation in the sense of pacification means that individuals or groups find back to peaceful coexistence after a time of disagreement. Second, reconciliation in the sense of rapprochement points to a process that builds, strengthens, or fixes cooperative relationships. Reconciliation in the sense of concord means, third, that apparently opposite views prove, on closer consideration, consistent with each other. And fourth, according to its theological etymology, reconciliation promises salvation through atonement. This theological overtone subsists in the psychoanalytical meaning of healing, of becoming reunified with a larger whole (the community, the cosmos, or god). All four of these aspects – pacification, rapprochement, concord, and healing – play a significant role in the theory of political reconciliation.

The current understanding of *political* reconciliation is based on the precedence of South Africa's transition from apartheid to democracy and, in particular, by the work of the Truth and Reconciliation Commission (TRC) in the 1990s. In similar cases of transitional justice in Rwanda, Yugoslavia, or, more recently, Tunisia, political philosophers address three key questions: What defines a legitimate peace process in the aftermath of civil war or regime change? How can parties of differing religious beliefs or worldviews be brought to agree upon the terms for a joint political life? What processes are needed to restore civic unity among hostile ethnic or religious groups?

Obviously, these questions are interconnected and theories of political reconciliation provide frameworks to answer them to differently ambitious degrees (Crocker 1999): pragmatic accounts focus on peaceful coexistence; political accounts aim either at deliberative rapprochement or at an overlapping consensus; and reformist accounts seek to overcome civic alienation through forgiveness and processes of public absolution. Given the growing literature on this topic, this entry mainly gives a tentative classification of current accounts (2–4; for an excellent overview, cf. Murphy and Radzik 2015). It starts with a provisional definition of political reconciliation (1) and concludes with a clarification of the connection between the idea of political reconciliation and the demands of justice (5).

A Provisional Definition

There is no conclusive definition of political reconciliation; however, a couple of key features and distinctions will help us to provide a provisional framework. First of all, political reconciliation points to both a process and an end-state (Murphy and Radzik 2015; Philpott 2009, 2012). As a process, it involves transitional justice mechanisms for settling deep societal differences.

However, institutions like truth commissions already operate towards a desirable end state. Therefore, either explicitly or implicitly, theories of political reconciliation assume an ideal of the reconciled society.

Second, and consequently, political reconciliation is primarily forward-looking even though (or precisely because) it deals with historic injustices (Philpott 2012). Conciliatory processes cope with the past, hold perpetrators accountable, or commemorate crimes in ways that foster peaceful cooperation and mutual understanding for a better future (Barkan and Karn 2006; Bashir and Kymlicka 2010).

Third, processes of political reconciliation do not only promote institutional change but they often require a deep transformation of interpersonal behavior, beliefs, and sentiments (Hirsch 2011; Lu 2008; Murphy and Radzik 2015). Political reconciliation is educational in that it seeks to reform the way in which citizens see and approach each other.

Fourth, political reconciliation is a matter of nonideal theory. Instead of constructing the ideal of a perfectly just society or categorical principles of what (retributive) justice ideally requires, theories of political reconciliation analyze the feasibility of peaceful progress under exceptionally unfavorable conditions.

Together with the conceptual distinctions from above, these features add up to a provisional definition: Political reconciliation is a forward-looking, institutional, and educational way to cope with the past in view of the realistic utopia of a reconciled society which aims at (a) the pacification of deep societal conflicts, (b) the political mediation between hostile groups, (c) the presentation of an overlapping political consensus, and/or (d) the healing of civic alienation by means of feasible transitional and restorative justice mechanisms.

Pragmatic Accounts

Within the theoretical spectrum, pragmatic accounts are minimalist. They equate reconciliation with pacification and emphasize that the rationale of political reconciliation applies primarily in the aftermath of deep societal conflicts or severe historic injustices (Lu 2008). Its primary goal is to make peace and to preserve political unity. A reconciled society is one with a stable political order. This is the precondition for any more ambitious ideas of political justice or civic unity. Further, more substantive ideals of the reconciled society tend to cover up irreconcilable conflicts or to ignore the lesson of history (Hughes 2001; Bhargava 2012). Pragmatist accounts therefore avoid thick notions of togetherness, trust, or reciprocity. Instead, they emphasize the necessity of mutual toleration and of living with dissent. They do so either because political reconciliation in the sense of agreement proves infeasible or because the required processes of forgiveness, amnesties, or public truth telling cannot do justice to the victims (Dwyer 1999; Murphy 2010). The institutional process of peaceful settlement then starts with the enforcement of the rule of law, mainly by way of fair trials and punishment (Teitel 2002; Verdeja 2009).

Political Accounts

According to Daniel Philpott, "the central meaning of political reconciliation is the restoration [of relationships in] the political realm" (2012, p. 5). Likewise, Andrew Schaap argues that the "ideal of reconciliation is to open up a space for politics between former enemies" (Schaap 2004, p. 20). Taking the "political" in "political reconciliation" seriously, political accounts fall into two groups: Deliberative theories define political reconciliation in terms of democratization, whereas liberal accounts aim to reconcile a people with a political conception of justice.

According to Bashir (2012), deliberativists are mainly concerned with the inclusiveness of the political demos. This requires . . .

a) a public mediation process in which "victims of violence and other disparaged groups must be included in debates over historical memory and collective identity as a way of reaffirming basic rights and reintegrating survivors as

moral and political equals" (Murphy and Radzik 2015)

b) educational measures to cultivate political attitudes and virtues (Gutmann and Thompson 2000)

c) and a democratic discourse about the particular meaning, aim and processes of political reconciliation for that society (Dryzek 2005; Schaap 2004)

Here, the reconciled society is one in which previously hostile groups or individuals recognize each other as political equals and fellow citizens (Moellendorf 2007).

On the other hand, liberal accounts of political reconciliation construct a political consensus for pluralist societies. This is at least how John Rawls applied the Hegelian notion of reconciliation in his later work. For him, the aim of political philosophy is itself reconciliatory (Rawls 2001). It provides a public narration that aligns societal demands of justice with the self-understandings of conflicting groups. In showing that a "self-sustaining and reasonably just political and social order both at home and abroad is possible," political philosophy "can itself reconcile us to the social world" (Rawls 1999, 128).

Reformist Accounts

Reformist accounts of political reconciliation hold the view that the possibility of peaceful cooperation and political inclusion depends on a deeper societal healing. This theological tone is still present in the secular idea that political reconciliation entails a deep transformation of attitudes and self-images (Braithwaite 2000). Experiences of historic injustices should not be suppressed but are in need of some kind of social catharsis.

The according ideal of a reconciled society is the healed nation which is built on a restored sense of membership in an ethical community (Howse and Llewellyn 1999). A paradigmatic case for the reformist account is again the work of the South African Truth and Reconciliation Commission (Allais 2012; Tutu 1999; du Toit 2000; Dyzenhaus 2000; Rotberg and Thompson 2000; Wilson 2001). Its work was inspired by the idea that societal healing cannot be achieved by lawful amnesties and reparations alone (McGary 2010; Walker 2010); rather, it needs a public process of truth telling and forgiveness to restore civic trust, unity, and friendship (Hayner 2010; Kiss 2000; May 2011).

Conclusion

Much speaks in favor of the practice-dependent assumption that the best account of political reconciliation depends on specific historical injustices, political feasibilities, and the political culture of a nation. The actual circumstances of political reconciliation may indicate a mixture among pragmatic, deliberative, liberal, and reformist ends and processes.

A final answer to the notorious question whether political reconciliation is in tension with justice hinges first and foremost on the underlying idea of justice (du Toit 2000; Rotberg and Thompson 2000). For some, political reconciliation clashes with the principle of just punishment, especially with the claim of retributive justice that wrongs in the past have to be equally repaid or corrected (against this: Allais 2012). However, reformative, expiatory, and restorative theories of just punishment are perfectly in line with the demand for political reconciliation.

The idea of political reconciliation does not sacrifice justice but requires us to think about justice differently, namely, in the forward-looking way of restoration and transitional justice (Dwyer 1999). As Desmond Tutu has famously put it: "I contend that there is another kind of justice – restorative justice which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment, but – in the spirit of ubumu – the healing of breaches" (1999, 51).

The remaining dispute concerns the question whether transitional justice is merely an exceptional case or all that can be said about justice. At first glance, the idea of political reconciliation is constrained to the transition from injustice to democracy. It is a second best theory. As Susan

Dwyer notes: "The rhetoric of reconciliation is particularly common in situations where traditional judicial responses to wrongdoing are unavailable [. . .]." (1990, 82). For others, however, the scope of political reconciliation deals with the improvement of societal relations and is hence coextensive with the scope of justice, when properly understood (Howse and Llewellyn 1999; Philpott 2012). The theory of political reconciliation already provides a framework to rethink questions of domestic and international justice in a way that takes the effects of feasible transitional justice mechanisms seriously (Murphy and Radzik 2013). Most remarkably, perhaps, the normative framework of political reconciliation has opened a new perspective on global justice (Lu 2017).

Cross-References

► Justice
► Justice: Transitional Justice

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Refugee

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Introduction

"Refugee" in the ordinary sense of the word is a natural person who is fleeing. Flight is, according to ordinary language use, the intentional temporary or permanent change of one's residence because of a threat at the place of original residence (Wittmann 1995). Those whose change of residence takes place within the borders of a state are referred to as *internally displaced persons* or *national refugees* (United Nations 2004). Those whose change of residence takes place in a state other than their country of origin are referred to as *international refugees*. The threat situation can result from a situation of persecution or from a situation of war or civil war or from a natural disaster.

According to the international law, the term refugee was defined by the Geneva Refugee Convention of 28 July 1951 (Zimmermann 2011). In Article 1. A. 2. of that convention, a refugee is defined as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." A person who satisfies these conditions is nevertheless not recognized as a refugee if there are good reasons to believe that the person has committed a crime against peace, a war crime, a crime against humanity, or a serious nonpolitical crime outside the country of refuge prior to his admission to that country as a refugee, or if the person concerned has been guilty of acts contrary to the purposes and principles of the United Nations (Article 1. F.).

This political conception excludes persons fleeing threats of persecution based on reasons other than those mentioned. Furthermore, it excludes civilians fleeing threats to life and limb in an area of war or civil war (war refugees). Finally, it also excludes persons fleeing from serious risks to life and limb because of a natural disaster (e.g., climate refugees).

Nonetheless, many states grant protection to those fleeing for humanitarian reasons. This is particularly true for signatories to the UN Convention against Torture as this treaty contains a refoulement ban in favor of those who are threatened by torture in the country seeking extradition or forced return (Nowak 2008). The signatories to the European Convention on Human Rights are likewise subject to a refoulement ban in cases where the person concerned is threatened by treatment that is contrary to the human rights of the Convention in the country seeking extradition or return (Hamdan 2016). According to the law of the European Union, persons who are threatened with capital punishment, torture, inhuman, or degrading treatment are granted a so-called subsidiary protection status. This applies also to civilians who are fleeing from the threats of life and limb in an armed conflict (Tiedemann 2019).

Similarly, pursuant to Article 22(8) of the American Convention on Human Rights, signatories to the convention are subject to a refoulement ban in cases where the right to life or personal freedom of the person concerned is in danger of being violated in the country seeking extradition or return because of the person's race, nationality, religion, social status, or political opinions (De Paula 2006). The relevant case law indicates

that there is also a refoulement ban in the event of imminent serious human rights violations, even if the abovementioned reasons for persecution are not met (IACtHR 2013).

The Convention of the Organization of African Unity (now: African Union) Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969 – Kampala Convention) embraces as refugees not only those who meet the conditions of the refugee concept of the Geneva Refugee Convention but also persons "who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, [are] compelled to leave [their] place of habitual residence in order to seek refuge in another place outside [their] country of origin or nationality" (Maru 2014).

Philosophical Problems

From a philosophical point of view, there are several questions regarding the phenomenon of flight and the concept of "refugee."

Territorial Sovereignty

First, "refugee" as a legal concept depends upon (1) the existence of national borders that are considered legitimate; (2) that each state is, as a matter of morality, considered to be free to determine whether and under what conditions persons who are not citizens of the state in question (aliens) may enter the territory of the state and reside inside the country; and (3) that the state in question, by making use of this freedom, hinders the ability of aliens in general or particular groups of aliens from entering the country. Until recently, the legitimacy of these propositions was presumed (Wolfrum 2001; ECtHR 1985; Walzer 1983). More recently, however, the legitimacy of the use of state borders to prevent people from entering and staying has been contested (Carens 1987; Cassee 2016).

If borders are illegitimate, or if the state is morally obliged to allow anyone to enter and stay, then anyone is morally entitled to enter and reside in any state for whatever reason. If true, there would not be any morally significant difference between persons fleeing from a threat situation and aliens who want to enter a state and stay there for any reason. One implication would be that a meaningful legal concept of refugee could not exist, which would also imply that there are few, if any, practically interesting philosophical problems.

As a practical matter, this is also true if the moral legitimacy of the national borders as well as the freedom to regulate the entry and residence of aliens should be affirmed, but also that the state in question does not make use of this freedom. Under such circumstances, foreigners can enter freely and stay in the target state. The distinction between refugees and other aliens is therefore practically irrelevant. This was the case, for example, for Great Britain before January 1, 1906, because the entry and residence of aliens had not yet been regulated (Bashford and McAdam 2014). A philosophy of refugees therefore presupposes that state borders are in principle legitimate and that states have, in principle, the right or the freedom to determine whether and under what conditions aliens are allowed to enter and remain in the territory. It is only under these conditions that the question can arise as to whether and to what extent principles exist that require a different relationship between a sovereign state and a refugee.

A Philosophy of Refugees

This question often takes the form of an inquiry into whether there is a (moral) human right to asylum (Keil 2019). In order to clarify and answer this question, it is necessary to begin with a clearer understanding of the relevant threat situation, which the refugee has escaped or fled. Additionally, in order to clarify the moral relationship between the refugee and the potential host state, two situations need to be distinguished:

Situation A The refugee is located within the sovereign territory or the sphere of power of the state offering possible protection. Under such

circumstances, a question arises as to whether the state has a moral obligation to refrain from compelling the refugee to return to his or her country of origin when he/she will be exposed to the threats from which he/she had fled. If such an obligation exists, an additional question arises over whether the refugee has a (moral) right held against the state not to be expelled or deported to their country of origin.

Situation B The refugee is located outside the sovereign territory or the sphere of power of the state offering possible protection. The state, therefore, has no direct power over him/her and cannot, therefore, damage him/her by exercising power. The question is, however, whether the state is morally obliged to provide assistance to the refugee by helping him/her to leave his/her home country and to reach either its own territory or the territory of another state, which is ready and willing to protect. The answer to this question may depend on the nature and causes of the threat situation the refugee seeks to escape.

If the state is morally obliged to tolerate or make possible the stay of the refugee in its territory, a further question must be answered: What kind of moral and political status should be granted to the refugee? (Citizenship).

Relevant Threat Situation

Though current international law offers many definitions of the threat situations that must be present for persons to be recognized as refugees, the only shared element is that the threat to prosperity by the loss of economic resources alone is not a threat relevant to refugee law. Frequently, it is argued that those on the run only want to immigrate in order to improve their economic well-being. They are economic refugees (UNHCR 1979, § 62). Moreover, there is no agreement regarding the conditions that must be met by the threat situation for it to trigger the refugee law. For example, there is a dispute over whether the threat must include a severe violation of basic human rights or whether discrimination is sufficient as long as the discrimination is based on reasons of race, religion, nationality, political opinion, or "membership in a particular social group" (UNHCR 1979, § 54). On the other hand, according to international law, the severe violation of basic human rights is in-and-of-itself insufficient for recognition as a refugee; in addition, the persecution must be based on race, religion, nationality, etc. (UNHCR 1979, § 51).

As a consequence, legal philosophy is faced with the task of clarifying the reason why the threat situation faced by a refugee should be considered morally relevant. There are two sources of moral obligation that may help to offer such clarification: (1) obligations based on a relationship of solidarity (Solidarity) and (2) obligations based on human rights (Human Rights).

As to those moral obligations generated by solidarity, one might argue that a state is morally obliged to grant protection if the refugees are being persecuted because of their ethnicity which is also shared by the peoples of the state in question (Example: The State of Israel grants protection for every Jewish refugee).

A philosophical approach that relies on solidarity to determine what counts as a relevant threat situation cannot, as a categorical matter, imply universal norms of protection. A relationship of solidarity embraces only particular groups of individuals in which the individuals that make up the group share some characteristic and never every "member of the human family." Mankind is no family.

In contrast, human rights implies a universal standard for understanding the moral relationship between refugees and states. A standard based on human rights, however, cannot justify an obligation to protect in cases where the threat situation is constituted only by discrimination. Only a threatened violation of human rights can be considered as relevant. Furthermore, under a human rights standard, the reasons or motives for persecution are irrelevant. Such reasons are not only superfluous but also they are contrary to a commitment to human rights.

Another question that must be answered is whether serious violations of any human right should be considered relevant or whether only

the violation of particular human rights, i.e., the so-called *basic* human rights, should be considered relevant (Article 9 QD 2011). Apart from which human rights' violations are relevant, it is also necessary to determine how severe the violation must be in order to be sufficient.

Finally, the question arises over whether a threat situation is relevant only when a violation of human rights threatens the enjoyment of the goods protected by the human rights in question or whether living under conditions in which one cannot enjoy the goods that are protected by human rights is sufficient. In the first case, the duty of protection depends on an act of persecution or maltreatment threatened by human agents. In the second case, persecution and maltreatment is not necessary. All that is required is that the person concerned had to live under inhumane living conditions for which nobody is responsible. Such a situation exists, for example, in the case of natural catastrophes or a lack of a health system in the case of seriously ill refugees. Thus, giving rise to the question of whether only targeted violations of human rights are relevant or whether threats to human rights are also relevant that are unintentionally committed.

Refoulement Ban (Situation A)

If the moral relationship between refugees and states is to be determined by a human rights standard, what corresponding protective obligations arise depends on which of the situations described above (A and B) applies (Tiedemann 2021).

In situation A, it is necessary to clarify whether the compulsory transfer of a person to another country where she is exposed to the threat of (relevant) human rights violations is to be regarded as a violation of her human rights by the deporting state itself. The European Court of Human Rights answers in the affirmative (Hamdan 2016). According to this view, a state that deports a foreigner to another state in which the deported person is threatened with death, torture, or any other violation of human rights violates the right in question. The relevant case law is based on the idea that the obligations that correspond to the human rights in question imply a refoulement ban. It is up to legal philosophy to justify this approach through an appropriate theory of action (Wilson and Shpall 2012).

Assuming that a refoulement ban is generally required by human rights, the question of an independent human right to asylum is answered at least for situation A because the refoulement ban's scope of protection as well as its legal consequence coincides with the protective scope and legal consequence of the relevant human rights. There is thus no need for a specific human right to asylum.

If, instead, the state should be responsible only for human rights violations inside its territory but not for those committed outside of its territory, even if it takes place as a consequence of deportation, then the moral evaluation is different. In this case, only moral duties to render aid can be considered and not the moral duty to refrain from harming. In this case, the difference between situation A and situation B would disappear.

The Duty to Support (Situation B)

Situation B differs from situation A in that the state in question has no direct power and no control over the refugees. They are located outside its political and legal jurisdiction. As such, the question of a human rights violation by the state in question does not arise. Thus, in situation B, the question is whether and to what extent there is a duty of the state to rescue the refugees.

However, there are conceivable situations in which the relevant difference between situation A and situation B seems to disappear. This is the case, for example, when the refugee is at the border, but still in the territory of a neighboring state, that is either not willing or unable to grant protection. The cost of assistance is minimal because the state can simply open the border, so the refugee can enter the state. The question is whether there is a substantial moral difference between keeping the border closed in this case and a violation of the refoulement ban in the case the refugee has already entered the state. Is the establishment of bulwarks, which prevent refugees from continuing their voyage and entering

the country in question, not already a kind of sovereign power of the state over the refugee who is still abroad, which is hardly distinguishable from the sovereign power the state would exercise over the refugee in the territory itself?

There is, however, much to be said if we take the distinction seriously. A state that prevents the immigration of refugees by means of barriers does not actively expose them to the threat situation that they are trying to escape. On the contrary, one might argue, such barriers are merely defensive mechanisms which, as such, do not constitute an active exercise of power, but are purely passive. There are indeed situations in which the intuitive moral distinction between doing (committing a human rights violation) and omitting (failing to prevent) becomes blurred or disappears altogether. For systematic reasons, however, it may still be sensible to maintain this distinction analytically, even if this can lead to the so-called asylum paradox (Endres de Oliveira 2016). This is the seeming paradox that being protected or not depends only on whether one has crossed a line.

Starting from a consequentialist approach to morality, there is no crucial difference in the reasoning between acting and omitting (Birnbacher 1995). The consequentialist standard of morality is solely concerned with improving aggregate well-being (Singer 1979). Improving the well-being of the refugees improves aggregate well-being better than leaving refugees to face risks of serious harm. Therefore, from a consequentialist point of view, morality requires not only that we refrain from violating the human rights of refugees, but also it requires that we rescue refugees without any limitation or reservation except for one and that the well-being produced continues to outweigh the costs incurred. Some consequentialists, however, further limit the scope of the obligation to rescue by employing a standard of reasonableness. However, reasonableness as a limitation is controversial, because it can hardly be philosophically justified on the basis of consequentialism alone. Rather, it seems to represent an ad hoc argument.

In accordance with the deontological approach to morality and in contrast with consequentialism, the morally right behavior is not a function of the premoral good (the best possible state of the world) but a normative quality of the action or omission itself (Frankena 1973). Deontological ethics recognizes a moral difference between doing and omitting. Moral agents are morally responsible for intentionally causing particular good or bad states but not for the mere occurrence of events. It follows that persons are not responsible for unintended action consequences.

From this it follows that, according to the deontological approach, the distinction between doing and omitting is much more important. Strict moral duties in a deontological sense refer only to the omitting of bad actions. Positive duties to act by supporting or rescuing someone – thereby improving the state of the world – are not considered as strict but rather supererogatory. Kant therefore designates the duties to help or to rescue as imperfect duties (Kant 1797). Only under particular conditions are duties to support considered as strict (perfect) duties. The general respect that must be shown towards human beings is insufficient to establish strict moral duties to support. Further arguments are needed to establish the duty in particular circumstances.

Justification for the existence of a duty to support or rescue can be grounded in a duty of *reparation* (Pogge 2008). The justification for the duty to help pursuant to a duty of reparation raises some serious concerns. The duty depends on a causal link between the injurious action and the threat situation. In many cases, it is difficult to satisfactorily prove such a link. In addition, one must account for the fact that, for moral reasons, the criterion of equivalent causality is not appropriate in the refugee context but rather the criterion of adequate causality (Causality and Imputation). According to this, states cannot be held responsible for damages that in the past had not been expected to occur because of a lack of knowledge. In particular, climate damage caused by industrialization in the nineteenth century is therefore unlikely to lead to restitution claims based on a duty of reparation. Thus, the problem of attributability will not be solved in many cases.

In this context, there is also a discussion focused on the principle of territorial justice (Risse 2012). The starting point for this discussion

is the assumption that the earth's surface and of all its resources were originally owned in common by all of mankind. Taking territory and resources by states is only justified, or at least morally permitted, if what remains are sufficient territory and resources for all people on earth to satisfy their own needs. If this is not the case, for example, because territories are uninhabitable because of climate changes or because the exclusion from the use of resources leads to economic impoverishment, this may justify a claim to asylum as compensation to those affected. This requires a justification of the idea of property independent from a positive legal order.

Finally, the state's obligation to help refugees outside its own territory may be derived from a general moral principle, according to which it is at least morally preferable to help people who are (innocently) in need. Under certain circumstances, this moral principle can imply a moral duty.

As mentioned above, deontological ethics requires the omission of bad actions but does not require that one brings about better states of affairs. However, the duty of respect includes not being indifferent to the suffering of other human beings. Indifference is not compatible with respect. Therefore, respect for human rights implies certain duties in favor of those in need. However, this moral duty to help is not as absolute as the duty to refrain from an attack on the human rights of other human beings. The duty to respect is unconditional and therefore cannot be restricted or ignored in the interests of one's own life goals. Support duties, on the other hand, are subject to the condition of reasonableness.

Reasonableness means that the moral agent is not obliged to sacrifice essential parts of the good life they have chosen to pursue. An abstract and universal determination of the extent to which moral agents are obligated to provide help to people in need is not possible. It depends on numerous variables and, therefore, cannot be determined in an abstract and general way. However, a manifest lack of proportionality between the available resources and the actual expenditure of help can be a reason for moral criticism to the policies towards refugees adopted by a state.

Even the duty of states to rescue refugees and grant them asylum is subject to a requirement of reasonableness that depends not only on the available economic and financial resources but also on the stability of the social model of the state in question (Collier 2013). In the current debates on the extent of the state's duties of rescue it owes to refugees, critics are particularly concerned with three types of alleged unreasonableness: (1) the threat of overburdening economic resources, in particular, the domestic social welfare systems; (2) the threat of the destruction of cultural identity (Perry 1995); and (3) the threat of the destruction of political identity (Walzer 1983). However, the threat of an overloading of economic resources cannot be confirmed empirically (Collier 2013; Entzinger 2007). The concern for cultural identity is arguably based on a mistaken assumption that culture is a static structure, when in fact it is subject to constant transformations (Miller 1995). The concerns over the threat to political identity are more serious (Collier 2013). However, recently, empirical data are available that seem to indicate that such dangers may not be as significant as was thought previously (Brücker et al. 2016).

When weighing the potential risks to the host society, it must always be borne in mind that these risks are to be contrasted with the existential threats faced by the refugees themselves. This greatly reduces the relative weight of the risks to the host society. In the interest of refugee protection, the host society can be reasonably expected to minimize any potential risks, certainly more so than in the context of a general immigration policy.

In any case, the scope of the moral support to refugees is the result of complicated and complex considerations. These considerations must be principled and free from ideological prejudices. The arguments must be carefully and appropriately weighted. Yet, there is still a margin of discretion left to those who are called on to help. Thus, there can be no *right to asylum* in this respect. The only right which seems possible is the *right to a proper exercise of discretion*.

Refugee Status

Finally, the philosophical question arises about the status that refugees should enjoy in a host

country. There are two aspects that play a decisive role here. On the one hand, the reception of refugees serves the sole purpose of protecting them from the dangers that threaten them in their home country. This justifies ending their stay once the dangers in their country of origin no longer exist. The stay in the host country is then to be regarded as a provisional one, so that it would be permissible to grant the refugee status only to the extent that this is compatible with a temporary stay as a guest. If it is to be assumed that the stay will be more than temporary, then the human right to protection of the family can demand that the immigration of the refugee's family be made possible.

On the other hand, most of the risks refugees would face in their countries of origin are durable and long-lasting. It is usually unpredictable whether and when the danger will be eliminated. After a certain period of stay in a host country, however, a person can be so deeply rooted in society that the compulsory termination of the stay would violate the *human right to private life* (ECtHR 2011), which should be better called as a *human right to affiliation*. A permanently established guest status would also violate the *human right to citizenship*, which can be claimed by any person who is permanently involved in a politically constituted comprehensive cooperation relationship (Leydet 2014). This raises the question of when it is mandatory for a refugee to be granted citizenship.

Conclusion

This entry has shown that the problems faced by a philosophy of refugee law are extremely complicated and complex. A comprehensive and sufficiently deep philosophical discussion of the problem is still needed. Thus, calling on those in the field of the philosophy of law and social philosophy take up the task.

Cross-References

- ▶ Citizenship
- ▶ Human Rights and Justice
- ▶ Immigration
- ▶ Kelsen, Hans: Causality and Imputation
- ▶ Solidarity

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Reinach, Adolf

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Introduction

Adolf Reinach (1883–1917), philosopher and jurist and brilliant and meticulous thinker, was one of the great exponents of realistic phenomenology.

Adolf Reinach's life, like that of so many intellectuals of his generation, was cut short by his eager enlistment in the German army during World War I. Reinach died on the front, in November 1917, 1 month before his 34th birthday. Shortly after his death, Husserl said of him that he "was one of the first to fully understand the nature of the new phenomenological method and was able to behold its philosophical reach" (Husserl 1919, 147).

In fact, this young university professor became the soul of a whole generation of phenomenologists who considered him their true teacher: Dietrich von Hildebrand, Edith Stein, Roman Ingarden, Jean Hering, Hedwig Conrad-Martius, Wilhelm Schapp, etc.

The Munich Period

To understand the reasons behind his intellectual sway, we must go back a few years. Specifically, to 1901, when Reinach, aged just 17 years old, enrolled at the University of Munich.

Born on December 23, 1883, into a wealthy family of Jewish entrepreneurs, he soon felt a genuine calling toward philosophy. As early as high school, he developed a strong fascination with Plato's dialogues.

Once at University, guided by Theodor Lipps as his teacher, he came into contact with the Academic Circle of Psychology (*Akademischer Verein für Psychologie*) and began to frequent Lipps' seminars, where he encountered eminent

intellectuals such as Theodor Conrad, Theodor Geiger, and Hermann Kantorowicz, as well as Johannes Daubert, who had the most decisive influence on Reinach's subsequent philosophical projection.

During these years, he completed his studies and obtained his doctorate in philosophy under Lipps with his work *On the concept of cause in penal law* (1905).

He formally joined the Circle with a dissertation on *Basic concepts in ethics.* Husserl's *Logical Investigations* had a strong influence on the members of the Circle, drawing them away Lipps' psychologism and even (in the case of Reinach) prompting them to travel to Göttingen to hear Husserl's lectures.

After a brief digression from this path during which, in order to satisfy his family's wishes, he completed his legal studies, qualifying to practice law, he contacted Max Scheler and Wilhelm Schapp and wrote his first philosophical essay, entitled *Nature and Theory of Judgement* (1908), which he presented as his thesis for admission to the University of Tübingen. After his initial rejection from this University, he was accepted at Göttingen, with the support of Husserl, and in 1909, he began working there as Husserl's assistant.

The University of Göttingen. Last Works from the Front

Following his arrival in Göttingen, he embarked on a period of intense intellectual activity. In June, he gave his lecture for formal admission as *Privatdozent*, on the topic *Problems and Methods in Ethics*. He became a mentor to the Göttingen Philosophical Society, attended by Hildebrand, Stein, Conrad-Martius, etc., and above all, he became the true academic, intellectual, and even personal role model for all these young teachers.

Reinach was a great *master*, in the pedagogical sense of the word. He put a great deal of effort into preparing his seminars each semester. His clarity of exposition, the thoroughness of his examples, etc. were all due to a tremendous intellectual endeavor on his part. When he presented his ideas, they appeared to flow naturally to him, but in reality, this fluidity was the product of hours and hours of hard work, as Reinach pushed himself to his very limit (Stein 1965, 195).

His influence on other members of the so-called Göttingen Circle was tremendous. Particularly on Edith Stein, who always considered Reinach her true teacher, professing boundless admiration for him. But not just her. Hildebrand had also found in Reinach the philosopher who made the most vivid impression on him, on the account of his unconditional love of truth, his intellectual power and rigor, and his unique clarity (Hildebrand 2000, 68). Schapp, Koyré, Hering, Conrad-Martius, etc. all regarded Reinach (even though he was merely Husserl's assistant) as their true master and teacher of phenomenology. Conrad-Martius referred to him as the "phenomenologist par excellence" (Spielberg 1960, 191).

However, Reinach felt lonely in Göttingen. He missed life in Munich and the company of his friends, the members of the Circle, whom he visited without fail during the summer holidays.

During these years, he taught seminars on various topics. Most of them were later turned into publications. Thus, "Kant's criticism of reason" (winter semester 1910–1911) became *Kant's interpretation of Hume's problem* (1911) and *The supreme rules of inferences in Kant's reasoning* (1911); "Freedom, imputation, criminal responsibility" (1911–1912) became *Deliberation: Its Ethical and Legal Significance* (1912–1913).

His great work, devoted to *The Apriori Foundations of the Civil Law*, which Reinach had prepared in the summer semester of 1912, when he gave a seminar entitled "The philosophy of civil law" (which he presented simultaneously with another on "Hume and English Empiricism"), was published in 1913.

During the winter semester of 1912–1913, he gave a seminar entitled "On the *Prolegomena* of Kant," but he was actually absorbed in the publication of the first volume of *Jahrbuch*, which appeared in 1913. That summer, he prepared a seminar on the experience of luminous objects and another on an "Introduction to Philosophy," which gave him an opportunity to comment on the recent appearance of *Ideas II*. This did not, as

Husserl himself thought, lead Reinach and his students to break ties with the new turns taken by Husserl's philosophical approaches. But it is true that younger people especially were distinctly confused by the new path taken by their teacher, which caused them to feel even closer to Reinach.

During the winter semester of 1913–1914, Reinach taught a course on modern philosophy and a seminar on the "Theory of Categories." In January 1914, he travelled to Marburg, where he gave his lecture "Concerning Phenomenology." That same year, his last publication came out, a review of Natorp's *Allgemeine Psychologie*, dated 1912.

Reinach volunteered and fought at the front under the orders of his younger brother, Heinrich. From the winter of 1914 until his death, on November 16, 1917, he continued to work, mainly on matters related to the philosophy of religion, occasionally announcing his seminars at the University, knowing that he would never give them. At the front, he experienced a profound religious conversion, which led him to embrace Christianity, together with his wife, in early 1916.

The Discover of Social Acts as Performative Utterances

Besides his work on general ontology, philosophy of language, or philosophy of criminal law, Reinach's monography on *The Apriori Foundations of the Civil Law* (1913) (and the brief essay *Nicht soziale und soziale Akte*) comprises his main and most original contribution to contemporary legal philosophy.

Reinach's analysis of the act of promising anticipates several crucial aspects of the speech act theories of John Langshaw Austin and John Searle (Dubois and Smith 2018).

Social acts, as promising, are intentional and spontaneous acts. They are also non-self-directable: Such as forgiving or praying, promising demands an alien subject, who must perceive the act performed. A peculiarity of certain external and non-self-directable acts is that the relevant utterance must of necessity be not only directed toward a certain subject but also registered or grasped by this subject in a further act, thus, for instance, in promising, commanding, or apologizing (and not, e.g., in forgiving).

Whenever a social act is performed, "something new enters the world," for example, when a promise is made, obligation and claim arise. Promising involves a kind of activity of the human spirit that is not expressed in words but is itself "performed in language."

In the structure of the act of promising, a set of truths can be discovered which are both "a priori" (they contain knowledge independent of experience and of sensible impressions and at the same time valid and universal) and "synthetic" (they are informative): through promising one incurs an obligation; by receiving a promise, one has a claim to what was promised; such claims are extinguished when the promise is fulfilled; such claims may also be extinguished if the claimholder waives the claim, and so forth (Dubois and Smith 2018). According to Reinach, there is a network of material necessities that links the performance of certain social acts with the emergence of new legal objects (thus obligation and claim arise out of promising). This a priori legality does not bind the legislator at all, but "the positive law finds the legal concepts which enter into it; in absolutely no way does it produce them."

Reinach's theory of social acts is in this respect opposed to that of Searle (1969), who maintained that promising is a social institution that can be explained in terms of constitutive rules analogous to the rules of chess (Zaibert and Smith 2007).

Intellectual Legacy

As noted above, Reinach had arrived in Göttingen as Husserl's assistant in 1909. In 1914, he joined the army and never returned to academic life. During that period, he served as *Privatdozent*, always in the formidable shadow cast by Husserl.

After his death, however, his disciples took it upon themselves, in these convulsive times, to publish his works. His "Collected Writings" appeared for the first time in 1921, *published by his students*, with a preface by Hedwig Conrad-

Martius, testifying to the mark that the young Reinach had made on all those students who attended his seminars during his 5 years of teaching in Göttingen.

When he left for the front, he asked his wife Anna to destroy all of his manuscripts in case he did not return. Anna authorized the publication of some essays (currently published in the second part of *Sämtliche Werke*), but when in 1942 she had to leave Germany because of Nazi persecution of the Jews, she destroyed the rest of the manuscripts. The Library of the State of Bavaria in Munich, under the symbol BSB Ana 379, still has some letters and other documents (Schumann and Smith 1987, p. 25).

There is a careful edition of his works, in two volumes, by Karl Schumann and Barry Smith, published in 1989 in Philosophia Verlag.

Reinach's fundamental work, *The Apriori Foundations of the Civil Law*, has been translated into the major academic languages, and the international dissemination of his work continues to grow.

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Relational Autonomy: A Feminist Perspective on the Concept of Autonomy

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Introduction

Personal autonomy emerges as a concept frequently used in political, social, and legal debates. It is constantly evolving in scope since its definition is the subject of an ongoing discussion. Feminist scholars have also contributed to this discussion with their reinterpretation of the meaning of autonomy and its importance in individuals' lives.

The concept of autonomy itself is crucial for the feminist movement. It relates to the core issues of feminism that are emancipation and oppression. As emancipation means living according to one's own will, autonomy is one of the significant values in feminist philosophy (Veltman and Piper 2014, 1). Therefore rather than a total rejection of the concept, feminists have suggested redefining it. Their reformulation is based on the critiques of the liberal understanding of the concept.

Feminist scholars have claimed that liberal understanding of autonomy was rooted in values such as self-sufficiency, self-reliance, independence, and the assumption that all humans constantly act as rational beings. However, they have argued that these values were part of a masculine ideal, which did not acknowledge women's lives in reality. Feminist theorists have suggested considering the reality of women whose relationships were of great importance in their lives, influenced their identity, and contributed to their autonomy. Thus, instead of defining autonomy in terms of independence from relations, relational autonomy accounts came up which have emphasized relations that played a central role in one's autonomy.

Relational Autonomy and Feminist Scholars' Contributions

An umbrella term as "relational autonomy" is used to indicate that "persons are socially embedded and that agents' identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity" (Mackenzie and Stoljar 2000, 4). It is stated that Jennifer Nedelsky was the first scholar who articulated the term "relational autonomy" (Mackenzie and Stoljar 2000, 26, Note 1). Nedelsky has criticized the liberal concept of individualism, which has also been accepted as the core of the autonomy concept (Nedelsky 1989, 7–8). Opposite to liberal understanding, social relations should also be

considered since what enables people to be autonomous is not isolation but relationships (Nedelsky 1989, 12). Thus, instead of rejecting the term itself, she has suggested to reconceptualize it, for autonomy was an important value in feminist movement (Nedelsky 2011, 123). She has highlighted the significance of relations that undermine or enhance autonomy and proposed to distinguish between those supportive or damaging relationships (Nedelsky 2011, 119–123).

Catriona Mackenzie and Natalie Stoljar have also found the liberal concept of autonomy as "inherently masculinist, with its assumptions about selfhood and agency that are metaphysically, epistemologically, and ethically problematic from a feminist perspective, and with political traditions that historically have been hostile to women's interests and freedom" (Mackenzie and Stoljar 2000, 3). While they have formulated this criticism, they have also stressed that the notion of autonomy has great importance for feminists in terms of understanding the concepts of "oppression, subjection and agency" (Mackenzie and Stoljar 2000, 3). And like Nedelsky, they have suggested the rethinking of autonomy by considering the intersubjective and social dimensions of selfhood and identity (Mackenzie and Stoljar 2000, 4). This rethinking has led to novel interpretations of conceptions of individual autonomy within moral, legal, and political theories.

Another feminist scholar Marilyn Friedman has similarly advocated an understanding of autonomy in the context of social relations. For her, "autonomous behavior is based on the deeper wants and commitments of the behaving person, is partly caused by her reflection on and reaffirmations of them, and mirrors those wants and commitments in the sense of helping her to achieve, promote, or protect them" (Friedman 2003, 8). Friedman has suggested that individual autonomy was the product of social conditions in various forms, and that autonomy was a matter of degree (Friedman 2003, 15–16, 7). Friedman has also criticized the definition of traditional autonomy based on the reason-emotion dilemma. She has rejected the argument that only intelligence could be autonomous and highlighted that emotions can influence preferences and actions, and in this sense, feelings may be included in the definition of autonomy (Friedman 2003, 9–10).

Marina Oshana has also considered the importance of social relationships on an individual's autonomy. She has brought a "social-relational" approach to autonomy, arguing that the notion of autonomy is shaped within social relations. She has stated that "personal autonomy is a social-relational phenomenon. Autonomy is a condition of persons constituted in large part by the social relations people find themselves in and by the absence of other social relations" (Oshana 2006, 49). In this sense, autonomy is shaped by how an individual interacts with other people (Oshana 2006, 52). Oshana has asked a number of important questions about autonomy. For example, she has questioned whether we could talk about the autonomy of someone who preferred to be a slave by her own free will. According to Oshana, the answer was negative. The freedom of one who prefers to be a slave hands over the control of her own life, and therefore she has lost her autonomy totally (Oshana 2006, 53–57). Another example she has been concerned with was the "angel in the house," described by Virginia Woolf as a woman who devoted herself to housework and other members of the house. Oshana has found this woman, whose own preferences and wishes were shaped by the needs of others, not autonomous. However, according to Oshana, dedicating yourself to others is consistent with autonomy. It is being put into a position in which one is dependent on others without an otherwise option, which she defines as "subservience" that conflicted with autonomy (Oshana 2006, 60). She has stated that the conditions affecting individual's choices should of course be accounted for if we were to judge whether the choice is autonomous or not (Oshana 2006, 64). This approach reflects a theoretical categorization of autonomy as "substantive" as opposed to "content neutral" or "procedural."

Substantive or Procedural Accounts of Relational Autonomy

One of the main discussions in the context of relational autonomy is the difference between substantive and procedural (mostly referred to as "content neutral") accounts. The former relates to

the contents of one's true desires or the authenticity of its motives while the latter focuses on the conditions for reflecting one's true desires.

Substantive views require that "particular values or commitments must be part of the autonomous agent's value or belief corpus" (Christman 2004, 148). In other words, these approaches stipulate certain values for autonomy. If an action contradicts with these values, then it will not be considered as an autonomous action. For example, Oshana states that an autonomous person should substantively be independent (Benson 2014, 91), and those who choose slavery become essentially dependent on others, contradicting the core elements of autonomy. In this case, the state of independence is required to decide whether an act or agent is autonomous or not.

In opposition to substantive theories there are content-neutral or procedural accounts. These accounts are based on the procedural of choices and adopt a neutral approach to the content of choices made by an individual (Friedman 2003, 19). Thus, according to the neutral approach, the individual who chooses to be dependent on others may have made this decision autonomously as the decision itself includes even a minimum of self-determination. Friedman's account of autonomy may be given as an example of content-neutral or procedural relational autonomy theories (Benson 2014, 88). Friedman claims that someone can renounce her autonomy by a decision which requires unconditional obedience (to a religious authority). Even though she will become non-autonomous in her acts afterwards, the initial decision itself will be considered as an autonomous one (Friedman 2003, 19).

Notwithstanding the different categories, the relational accounts of autonomy underline the importance of the relational and social influences on one's self-governance. This approach echoed back to a feminist ethics theory that has also emphasized relationships or contextual analysis of specific cases.

Ethics of Care and Relational Autonomy

One of the main ethical theories that relational autonomy was nourished with is ethics of care. Ethics of care is a feminist approach to moral reasoning that has a contextual perspective with an assumption of human connectedness and taking relationships as a priority (Clement 1996, 11). Since relational autonomy theorists emphasized relations playing a role on autonomy, ethics of care has been one approach they resorted to justify their argument.

The liberal approaches to traditional autonomy fall into the fallacy of designing individuals as social atoms without considering the social nature and the importance of social relations (Friedman 2003, 82). One of the reasons for this mistake is that while popular culture defines autonomy as a male ideal, women are bound to relationships and this creates the duality of autonomy versus relationships. However, this understanding has been challenged by the ethics of care approach that contributed to the development of the relational autonomy theory.

Carol Gilligan, among a number of psychologists, has questioned this duality of autonomy versus relationships. She has studied the difference between the moral development of boys and girls and their ability to reason in her famous book, *In a Different Voice* (Gilligan 1982). She has observed that while men consider ethical problems within the scope of rights and rules, women value the same problems with care and responsibility (Gilligan 1982, 73). According to Gilligan, women's identities were defined in the context of relationships based on the values of responsibility and care (Gilligan 1982, 160). In this sense, the ethics of care approach took into consideration the relationships and their influences on individual's identity. This aspect was lacking in the liberal understanding of autonomy, which defined autonomy based on values such as independence or self-governance. Hence, advocates of ethics of care brought a criticism that values such as trust, care, and responsibility were diminished in the traditional liberal understanding of individual. They have emphasized caring and responsibility that were devalued as being "feminine" values, and they have highlighted the significance of these values in social, legal, and economical contexts (Wallbank et al. 2010, 19–21). In her later arguments consisting of reply to critics, Gilligan has emphasized this by saying, "in a different voice" she did

not mean "in a woman's voice," and she wanted to identify this voice not by sex but by theme, so her work does not represent a generalization about either sex (Gilligan 1993, 209). Along the same line, academics that have developed this approach later argued that both men and women can assume the essential role of care, and rejected that it was merely a characteristic of women (Wallbank et al. 2010, 25).

By valuing care and responsibility and human relationships within their context, ethics of care has developed as an alternative to ethics of justice that prioritizes abstract rights and principles. Virginia Held has explained this difference as follows (Held 2006, 15):

> An ethic of justice focuses on questions of fairness, equality, individual rights, abstract principles, and the consistent application of them. An ethic of care focuses on attentiveness, trust, responsiveness to need, narrative nuance, and cultivating caring relations. Whereas an ethic of justice seeks a fair solution between competing individual interests and rights, an ethic of care sees the interests of carers and cared-for as importantly intertwined rather than as simply competing. Whereas justice protects equality and freedom, care fosters social bonds and cooperation.

We should also add that the ethics of care has given priority to caring relationships, but it has also underlined that these relationships should be healthy. And one of the criteria for a healthy relationship has been its contribution to one's autonomy (Clement 1996, 42). In this regard, by emphasizing the values of care and relationships, the ethics of care approach has supported and enriched relational autonomy.

Conclusion

Relational autonomy roots in the ethics of care and is an alternative approach to the liberal theories that are based on abstract rights and rational human beings. This theory assumes that individuals develop and enjoy their autonomy within the context of their relationships with other individuals. Thus, instead of defining autonomy independent from relationships, this theory considers the influence of relationships on one's autonomy. Considering these relationships also requires seeing the contextual characteristics of each case. In this regard, the understanding of liberal accounts that pictures autonomous individuals as separated atomistic beings has been challenged by the relational approach that defines individual's autonomy within the context of her relational environment. This contextual analysis is also crucial for the establishment of justice as it brings out the details of the concrete case. As such, relational autonomy also carries a dimension of relational justice theories that assume that misconduct was a breakdown in relationships and bring a relational perspective to the issues raised by the criminal justice system (Schluter 2004, 24–25). In this regard, the relational autonomy theory has contributed to both justice theories in jurisprudence and the agency theories in political philosophy.

Cross-References

► Justice: Retributive

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Relational Equality

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Introduction

Relational equality is a view that regards equality as a matter of (equal) relations between individuals. A group of egalitarian theories called relational egalitarianism claims that equality is ultimately a matter of individuals relating as equals. The most representative version of relational egalitarianism is, as will be discussed in the next section, Elizabeth Anderson's "democratic equality," according to which the negative aim of egalitarianism is to eliminate oppressive relations between persons and the positive aim is to construct a democratic society in which all citizens relate to each other as equals (Anderson 1999: 313).

Relational egalitarianism is contrasted with distributive egalitarianism, which had been the dominant position when theorizing equality in social and political philosophy until the late 1990s. The latter is a group of egalitarian theories that claim that equality is ultimately a matter of distributive patterns in which everyone has equal amounts of something (e.g., welfare, resources, or capabilities). The most representative versions of distributive egalitarianism are a group of egalitarian theories called "luck egalitarianism," according to which it is bad or unjust if and only if some are worse off than others in terms of their holdings or well-being due to uncontrollable causes. For relational egalitarianism, concern about a particular distributive pattern is subordinate to that for equal relations, e.g., an unequal distribution is unjust if and only if it causes, is caused by, or represents unequal relations between people. For distributive egalitarianism, by contrast, concern about a particular way of relating to each other is subordinate to that of equal distribution, e.g., an unequal relation is problematic only when it diminishes the well-being of the parties in this relation in a way that increases the disparity between them.

Sometimes, the terms "relational equality" and "relational egalitarianism" are used to denote distributive egalitarianism as explained previously. In his essay "Equality or Priority?" Derek Parfit characterizes what he calls "the priority view" or "prioritarianism" as *non-relational* egalitarianism, which focuses on the *absolute* level of the well-being of individuals when evaluating the moral value or goodness of different states of affairs (Parfit 2002: 106). By contrast, distributive egalitarianism, which focuses on the *comparison* of the level of different individuals' well-being, has been called *relational* egalitarianism by those familiar with Parfit's terminology. The relational equality mentioned in the beginning pertains to relations in the sense of *mutual interactions* between individuals and not to the comparison of different individuals' levels of well-being (cf. Scheffler 2015: 23). In what follows, this entry focuses exclusively on the former usage.

Background

In her influential essay "What Is the Point of Equality?," Elizabeth Anderson characterizes the mainstream egalitarian theories (those of Ronald Dworkin (1981), Richard Arneson (1989), Gerald Cohen (1989), and so on) as "luck egalitarianism," which condemns unequal distributions when and only when they are traceable to unchosen causes, and severely criticizes them. First, she argues that according to luck egalitarian, it would be justified to abandon those who have fallen into disadvantaged circumstances

due to their own choices (e.g., severely injured motorcyclists who have chosen not to wear helmets; Anderson 1999: 295–298). This is widely called "the harshness objection." Second, she argues that the state would have to send stigmatizing messages to those who have fallen into disadvantaged circumstances due to unchosen causes if it offers to help them based on luck egalitarian grounds. This is because, she claims, according to luck egalitarianism, the reason why the state should help these people has to rely on the judgment that they are innately inferior to other citizens in their capacity (Anderson 1999: 302–307). This is widely called "the stigma objection." From these reasons, she concludes that the aim of equality should not be the neuralization of the effects of unchosen luck on distribution. Instead, she argues for her own egalitarian theory called "democratic equality," according to which the negative aim of equality is to eliminate oppression and the positive aim is to construct a democratic society in which all citizens relate to each other as equals (Anderson 1999: 313).

Although her main targets are luck egalitarians, her critiques can be applied to distributive egalitarianism in general. This can be seen from her own text in her aforementioned essay:

> [D]emocratic equality is what I shall call a relational theory of equality: it views equality as a social relationship. [Luck egalitarianism] is a distributive theory of equality: it conceives of equality as a pattern of distribution. Thus, [luck egalitarianism] regards two people as equal so long as they enjoy equal amounts of some distributable good. . . . By contrast, democratic equality regards two people as equal when each accepts the obligation to justify their actions by principles acceptable to the other, and in which they take mutual consultation, reciprocation, and recognition for granted (Anderson 1999: 313).

There are two background arguments that can be seen as sources of Anderson's criticism against distributive egalitarianism and her choice in favor of relational egalitarianism. The first is Iris Marion Young's critique of the "distributive paradigm" in mainstream theories of justice. In her book *Justice and Politics of Difference*, Young characterizes these mainstream theories of justice (including that of John Rawls (1999)) as focusing only on the end-state pattern of distribution, paying little attention to the injustice of the background structures that have generated these unfair distributive patterns (Young 1990: 18–20). She also points out that unlike wealth and resources, it is inappropriate to regard rights, opportunities, and powers as something to be (re)distributed equally, as theorists in the "distributive paradigm" do. These are, she claims, to be regarded as social relations rather than objects of distribution (Young 1990: 25). In her contribution to *The Oxford Handbook of Political Philosophy* ("Equality"), Anderson herself makes a similar argument, contending that unlike resources, welfare, and capabilities, in the distribution of which the amount that one person has is "logically independent" of the amount that others do, "authority, status, and standing essentially refer to . . . interpersonal relations" (Anderson 2012: 41).

The second argument is Nancy Fraser's "justice of redistribution and recognition." Fraser famously argues that since the existing theories of distributive justice (those of Rawls, Dworkin, and so on) cannot cope with injustice of misrecognition and those of recognition (e.g., that of Axel Honneth) cannot cope with maldistribution (Fraser and Honneth 2003: 34), it is necessary to construct a more comprehensive theory that can integrate the justice of both redistribution and recognition within a single normative framework (which is, in her proposal, "parity of participation"). When considering the strategies to realize this normative ideal in the real world, Fraser refers to a potential tension between policies aiming to rectify maldistribution and those aiming to rectify misrecognition, giving an example of "affirmative" or "selectivist" redistributive social welfare programs targeting the poor and unintentionally representing these beneficiaries as "greedy" or "lazy" (Fraser and Honneth 2003: 76–77). This example reminds us of the stigma objection Anderson makes, although Anderson's worry is more about the expressed *meaning* of the state's act itself (Anderson 1999: 306, n. 61), whereas Fraser's focus is on the *consequences* of the policy, that is, more and more citizens in society come to see the poor in a stigmatizing way *as a*

result. Moreover, Fraser's parity of participation, according to which "justice requires social arrangements that permit all (adult) members of society to interact with one another as peers" (Fraser and Honneth 2003: 36), is almost functionally equivalent to the positive aim of Anderson's democratic equality. Anderson herself contends that "[t]he relational conception of equality . . . can explain the logic of those cultural agendas [focusing on issues of culture, representation, discourse, and the organization of civil society] better than the distributive conception can" (Anderson 2012: 52), explicitly sharing the theoretical motivation behind Fraser's justice of redistribution and recognition.

Following Anderson's criticism against distributive egalitarianism, more and more theorists have identified themselves as relational egalitarians (the most famous being Samuel Scheffler), and relational egalitarianism has become one of the two prominent positions when theorizing equality (the other being distributive egalitarianism) in the fields of contemporary social and political philosophy.

On What It Is to "Relate as Equals"

Although the idea of relational equality is applicable to purely personal relationships (e.g., love and friendship; cf. Scheffler 2015: 24–31), many relational egalitarians tend to seek its implications for social and political domains. This is why relational equality is also called "social equality." For relational egalitarians, what egalitarians should oppose in the first place is *social* hierarchies, so they try to identify what it is to relate as equals in the absence of these hierarchies.

In "What Is the Point of Equality?," Anderson relies on Young's five faces of oppression (i.e., exploitation, marginalization, powerlessness, cultural imperialism, and violence) and domination to characterize the social hierarchies her democratic equality should oppose (Anderson 1999: 312). In her later work, she constructs her own typology of unequal social hierarchies: hierarchies of domination, esteem, and standing.

In hierarchies of domination, "those occupying inferior positions are subject to the arbitrary, unaccountable authority of social superiors and thereby made powerless" (Anderson 2012: 42–43). Anderson borrows this notion of domination from republican theorist Philip Pettit (1997). Admittedly, it is impossible to abolish all hierarchical relationships, especially in the age of complex societies (e.g., officeholder-citizen, employer-worker, or teacher-student relationships). However, it is possible, she argues, to ensure that these relationships are not converted into a manner in which those in command exercise arbitrary or unaccountable power over the commanded by conditioning the power of commanders and the legitimacy of commands upon the need to fulfill the functions of their positions, the authorization of the commanded (notably, periodic elections under universal suffrage), and so on (Anderson 2012: 46–47).

In hierarchies of esteem, "those occupying inferior positions are stigmatized" (Anderson 2012: 43), while those occupying superior ones earn honor and high esteem. Anderson claims that these hierarchies correspond to what Fraser calls "injustice of misrecognition" (Anderson 2012: 44). Here again, it is surely impossible to eradicate all inequalities of esteem; few would deny the importance of earned esteem based on scientific, artistic, and athletic excellence. For these inequalities of achievement not to be converted into hierarchies based on membership in social groups, she argues, attempts should be made to ensure access to means of developing merit for all and "multiply and divide the arenas for competition" for diverse individuals to find some domain in which they can compete for earned esteem (Anderson 2012: 48–49).

In hierarchies of standing, "the interests of those occupying superior social positions are given special weight in the deliberations of others and in the normal . . . operation of social institutions, [thereby] those of higher rank enjoy[ing] greater rights, privileges, opportunities, or benefits than their social inferiors." "The interests of those occupying inferior positions," on the other hand, "are neglected or carry little weight in the deliberations of others and in the normal operation

of social institutions, [thereby] social inferiors [being] marginalized" (Anderson 2012: 43). Anderson claims that these hierarches roughly correspond to what Fraser calls "injustice of maldistribution" (Anderson 2012: 44). Unlike hierarches in command relationships and inequality of (earned) esteem, she argues that relational egalitarians would not permit hierarchies of any kind of standing because they are incompatible with the dignity and rights of human beings (Anderson 2008: 145).

Of course, there could be other ways to categorize unequal social hierarchies and conceptualize what it is to relate as equals. Indeed, Kasper Lippert-Rasmussen argues that there are (at least) five different dimensions on which different relational egalitarians have claimed that people should relate as equals: moral, epistemic, social, aesthetic, and empirical standing (Lippert-Rasmussen 2018: 63–70). Additionally, Rekha Nath proposed a dichotomy of main types of hierarchies: those of social standing and power (Nath 2020: 2–5). The former subsumes Anderson's esteem and standing hierarchies, and the latter corresponds to her domination hierarchies. Furthermore, since the idea of relational equality per se is applicable to purely personal relationships as well, it could be argued that exclusive focus on "social" hierarches is arbitrary from the standpoint of relational egalitarians (for instance, it seems bizarre to say that relational egalitarians have something to say in a case in which a tyrannical husband subordinates his housewife to his will in the family sphere but do not in a case in which a tyrannical wife subordinates her househusband to her will just because only the former is an instance of systematic patriarchy). In any case, it has not been long since social and political philosophers started to work on the analytical theorization of what it is to relate as (un)equals, and this grand endeavor is still a work in progress.

Criticism

Although relational egalitarians have different substantial conceptions of what it is to relate as equals, they all share the common identity of being distinct from distributive egalitarians, who claim that equality is ultimately a matter of distributive patterns in which everyone has equal amounts of something. Hence, their distinct identity as relational egalitarians will be fundamentally challenged if what they call equal relations is wholly reducible to some kind of distributive pattern. As already explained, relational egalitarians such as Anderson contend that interpersonal relations, such as authority, status, and standing, are not to be seen as the objects of distribution. However, friends of distributive egalitarianism would argue that even these (un)equal relations can be described in a way in which different (groups of) individuals have (un)equal amounts of something, e.g., if X stigmatizes Y and Y does not stigmatize X, X is stigmatized by fewer people than Y is stigmatized by, or if X stigmatizes Y in a major way and Y stigmatizes X in a minor way, then X has more of the good of stigmatization standing than Y has. If, on the other hand, neither X nor Y stigmatizes each other, X and Y are stigmatized by the same number of people, or if X and Y stigmatize each other to the same degree, then they would say that X and Y have equal amounts of the good of stigmatization standing, thereby relating as equals (cf. Lippert-Rasmussen 2018: 197–198).

Against this criticism, relational egalitarians can reply that the point of relating as equals is not to ensure that the parties in a relationship treat and regard each other disrespectfully so that the *overall* level of standing that each has is the same across individuals in a mutually counterbalancing way. The point is, they can argue, to demand that everyone treat and regard others respectfully in *every single* instance of interpersonal relations; if X humiliates Y in one situation in a social setting and Y does the same to X in another, then, according to relational equality, X relates to Y as an unequal in an impermissible way and vice versa, whether or not the two acts are counterbalanced overall. This way of understanding the demands of relational equality is in line with what Samuel Scheffler calls "the egalitarian deliberative constraint," according to which "each person accepts that the other person's equally

important interests . . . should play an equally significant role in influencing decisions made within the context of the relationship" and "each person has a normally effective disposition to treat the other's interests accordingly" (Scheffler 2015: 25). For a relationship to have an egalitarian character by satisfying this constraint, it is not enough for the parties in the relationship to show these attitudes and dispositions to an equal but low degree. "[T]he egalitarian aim is," Scheffler contends, "to ensure that both parties exhibit [these relevant attitudes and dispositions] to the fullest" (Scheffler 2015: 31).

Admittedly, this reply rests on a deontological view, and deontological/non-deontological distinctions are conceptually independent of relation/distribution distinctions. However, since the requirement of relational equality is most intelligible when understood in deontological terms (most relational egalitarians would still regard as morally wrong a particular act of hate speech against racial minorities, even if this act is highly likely to provoke anti-discrimination movements nationwide, resulting in a state of affairs in which more and more citizens relate as equals in racial terms), it seems that this reply has meaningfully captured what is distinctive about relational egalitarianism vis-à-vis distributive egalitarianism in a substantial (albeit not strictly conceptual) way.

Moreover, although many relational egalitarians are exclusively concerned with inequality of overall social standing, in which members of one social group are treated and regarded as unequals more harshly and pervasively than members of another such that there is a social hierarchy between the groups, it is doubtful that this exclusivist attention is faithful to the underlying motivation behind their endorsement of a society in which people live as equals. Imagine a hypothetical American society in which whites and blacks, out of racial hatred, frequently engage in discrimination and stigmatization (e.g., hate crimes or hate speech) against each other to the same degree that overall, there is no social hierarchy between these racial groups. Would relational egalitarians call this divisive society equal in light of their own idealized conceptions? Probably not. This shows that they have reason to be concerned with individual instances of relating as unequals, as well as overall social hierarchies, and as argued previously, the former consideration cannot be fully articulated in terms of whether the (groups of) parties in a relationship have equal amounts of the good of standing.

Application: On the Scope of Relational Equality

As is the case with distributive egalitarians, relational egalitarians need to answer the question of their *scope* when applying their principles, that is, to whom their principles apply. There are two major issues of scope: spatial and temporal (cf. Lippert-Rasmussen 2018: Chap. 5).

Regarding spatial scope, egalitarians have long discussed whether their principles should apply only among compatriots of the same political community (call this *statism*) or more broadly to human beings across state borders (call this *cosmopolitanism*). While distributive egalitarians, whose concern lies only with the comparison of different individuals' holdings or well-being, are said to have an affinity for cosmopolitanism (if it is bad or unjust that some are worse off than others, for instance, it would be irrelevant among whom the disparity occurs, whether between members of the same country, foreigners from different countries, or even Earth-dwellers and Martians), relational egalitarianism is said to have statist and conservative implications for global justice. For example, Anderson's democratic equality, whose positive aim is to construct a democratic society in which *citizens* relate to each other as equal, seems applicable only to the interactions between citizens of the same state whose political settings ought to be democratized; in the system of sovereign states without the world republic, the same does not seem to be the case with interactions between foreigners.

However, this contrast is overly simplified because what matters ultimately from the standpoint of relational egalitarianism is to make relations equal, and whenever there exists an instance

of individuals relating as unequals, relational egalitarians, if faithful to their own rationale, have reason to rectify it whether it occurs within national borders or not. Indeed, in the real world, there are many instances of unequal social relations between individuals living in different countries (Nath 2015). In the case of sex tourism, tourists from developed countries *directly* (in a physical sense) interact with prostitutes living in developing ones. Even setting aside this obvious example, workers in the garment industry in some developing countries and consumers in developed countries *indirectly* (in the sense that their interactions are mediated by large apparel companies) interact with each other, the former being exploited by the latter. One can also point out the existence of international organizations such as the World Trade Organization and the International Monetary Fund, which are to some extent comparable to the basic structure of domestic society in terms of the profoundness of their effects on the actors within a global society and whose decision-making is generally to the interest of developed countries at the expense of developing ones (because the former have more of a voice within these institutions). Therefore, relational egalitarians can argue, for instance, that for the relationships between people from different nations to be equal, the rules made by these international organizations should be reformed, and their decision-making process should be more democratized by strengthening the voices of developing countries. Although there can be some differences in what is demanded for members to relate as equals between domestic and global society, in principle, relational egalitarians qua being relational egalitarians have no reason to restrict their scope within a national boundary.

On the issue of temporal scope, there are two specific questions: that of justice between different generations of individuals whose lives do not overlap in time and that of justice between individuals belonging to different birth cohorts but whose lives overlap, e.g., justice between coexisting young and old people (Lippert-Rasmussen 2018: 123). Unlike the latter, in which individuals of different birth cohorts are collaborating in social cooperation, the former question, often called the question of intergenerational justice, poses a serious challenge to any theory of relational egalitarianism since, ex hypothesi, there is no way for those whose lives do not overlap in time to mutually interact with each other (Lippert-Rasmussen 2018: 123–129; Nath 2020: 10, n. 18). At this point, relational egalitarians might bite the bullet and respond that there is no requirement of justice between those whose lives do not overlap. This is undoubtedly a consistent position, but considering the widely held view in the fields of social and political philosophy that there is a genuine question of intergenerational justice (especially in this age of global warming), they still have to say something about how to object to the unlimited emission of greenhouse gases, whose harmful effects will become more significant when the present generation has died out. One path they may take is to rely on moral considerations other than egalitarian justice (e.g., humanitarianism or virtue ethics).

Conclusion

As argued above, relational egalitarianism has both pros and cons when dealing with a variety of problems in the real world. Being a relatively novel position as a group of egalitarian theories, it needs further elaboration on what it is to relate as (un)equals. At the same time, a substantial number of theorists have already participated in this debate and constructed their own conceptions of relational equality. Whether or not these attempts are successful all things being considered, what is clear is that the debate over how to theorize equality has become by far more interesting than before since Anderson's epoch-making essay in 1999.

Cross-References

- ▶ Equality
- ▶ Equality and Global Justice
- ▶ Justice: Structural Injustice
- ▶ Young, Iris Marion: Political Philosophy

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Renan, Ernest

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Introduction

Born in Tréguier (Brittany, France) on the 28 February 1823, orphaned at the age of 5, Ernest Renan entered the seminary (in fact, in three successive institutions, Saint-Nicolas-du-Chardonnet, Issy, and Saint-Sulpice) in Paris in 1838, but left it just before becoming a sub-deacon, in 1845. To assure himself a profession, he obtained his Baccalaureat and the Licence *ès lettres* in 1846–1847. Both in 1847 and 1848, Renan won the Prix Volney, respectively with an essay on Semitic languages and with an history of the study of Greek language in Europe in fifth to sixteenth century. In 1848, he obtained the aggrégation. Having long studied Hebrew, he projects writing a history of human spirit by way of comparing Semitic languages, on the example of the (indologist) Eugène Burnouf.

The year of the revolution and of the second Republic, 1848, urges him to reflect on the future of science. This book, *Avenir de la science*, will be published only 40 years later. In 1852, working as keeper of Eastern manuscripts at the Bibliothèque Nationale in Paris, he defended his doctoral thesis on the Arab-Andalusian philosopher Ibn Rushd, *Averroes and Averroism*.

He was appointed professor of Hebrew at the Collège de France in 1862 but this position was at first suspended, after defining Jesus an "incomparable man" in his inaugural lecture. His appointment would eventually be revoked because of the polemics raised by the Catholics against his newly published *Life of Jesus* (Paris: Michel Lévy Frères, 1863). The figure of Jesus was actually outlined in this book through traits of radical humanity, becoming a classic reading of the (first) Quest for the historical Jesus. However, the polemics also contributed to the quick success of this book, as it went through thirteen editions in only 4 years.

Newly appointed in 1870, he will devote himself to a *History of the Origins of Christianity*, to which will follow a *History of Israel* as an attempt to "put Christianity in perspective".

He died in Paris on October 2, 1892.

What Is a Nation? (1882)

With this lecture Renan established himself as one of the leading nineteenth-century theorists of nationality. Through his knowledge of ancient history and his observations of contemporary politics, the orientalist outlined his own conception of

nation. What makes a people is not the common language, not the often arbitrary geographical limits, not a shared economic interest. Also religion plays a secondary role, in that: "One can be French, English, German, Catholic, Protestant, Jewish, and not practise any religion" (*Qu'est-ce qu'une nation?*, 1882, p. 23).

Renan was especially opposing most (especially German) thinkers in rejecting any racial explication: "No French citizen knows if he is Burgundian, Alan, Taifal, Visigoth. [. . .] There are not ten families in France that can provide proof of a Frankish origin" (p. 9). Much more, he identified the nation with a "soul," a "spiritual principle". This is composed firstly of a political and cultural heritage of common memories (and corresponding oblivion) of a historical past, and secondly of a desire and a willingness to live together and "make use" of that heritage: "having done great things together, wanting to do more, that is the condition". Ernest Renan can be connected in this sense to the Enlightenment, to the civil religion of Jean-Jacques Rousseau (see Barberis 1993).

Also the famous expression "an everyday plebiscite" should be interpreted in the French (Second Empire) context — where the plebiscite was the way to the state of exception — as directed *against* nationalism. Like any other thing, however, the nation had a beginning and will have an end: "Nations are not something eternal. They began, they will end. The European Confederation will probably replace them" (p. 28).

Legacy

In *What Is a Nation?* Renan is aware that "The way to be right in the future is, at certain times, to resign oneself to being out of fashion" (p. 30). Renan's legacy is indeed very important, even more if one considers the permanence of the great questions he raised. We already mentioned Renan's role in the First quest of the historical Jesus; in his *Quest of the Historical Jesus* published in 1906, Albert Schweitzer will devote a chapter to the French orientalist.

Regarding Renan's "orientalism," the influent monograph by Edward W. Said presents Renan as one of its first great ideologues. The philosopher from Tréguier is treated by Said, more precisely, for being the "continuity" of an orientalist discourse inaugurated by Silvestre de Sacy: "it was his task to solidify the official discourse of Orientalism, to systematize its insights" (Said 2003, p. 130). Ernest Renan is depicted by Said substantially as a "notorious" racist: "a harsch divider of men into superior and inferior races" (p. 133).

Especially the definition of nation as a spiritual principle and the connection of nationality with free choice could be profitably compared to Jürgen Habermas's discursive conceptions leading to a constitutional patriotism (cf. *Between Facts and Norms*, p. 494 s.).

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- ▶ Habermas, Jürgen: Faith and Reason
- ▶ Patriotism: Constitutional
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Introduction

Karl Renner (1870–1950) is at once an imaginative scholar of multinationality and federalism, a pragmatic Austro–Marxist politician, a German nationalist nostalgic of the dual–monarchy, a legal relativist, and a proponent of economic democracy.

Socialist, monarchist, and nationalist: it is difficult indeed to find a common denominator that would do justice to his long and complex career. Editor of the famous journal *Der Kampf* (the Austrian Social–Democrat twin of Kautsky's *Die Neue Zeit*), negotiator at the Treaty of Saint–Germain (1918), he served in several capacities. First chancellor of the First Republic after WW2 (1918–1920), he managed to play Stalin when he became first president of the Second Republic after WW2 (1945–1950) and save Austria from becoming a satellite of the Soviet Union. He campaigned against Engelbert Dollfuss' Austro-Fascism in the 1930s but, convinced by Austria's cultural unity with Germany, voted for the *Anschluß* in 1938.

He wrote dozens of books and articles, and is still a debated personality in contemporary Austria, not least for his alleged Anti-Semitism. In the following, I will look at the two most striking dimensions of Renners' career as a scholar and as a politician: his thoughts on multinationalism (I) and his political endorsement of German nationalism (II).

A Failed but Inspiring Project: A Multinational Federation

As early as 1899, Renner and the Social–Democrats were committed to pacify the emerging nationalist movements in the Austrian–Hungarian Empire by transforming the Empire into a federal and democratic union of nationalities [*Nationalitätenbundesstaat*]. Following the lead of Jozsef Eötvös, a liberal minister of the first Hungarian constitutional government in 1848, and artisan of the *Doppelmonarchie*, Renner believed that the "national question" should be treated in much the same way as religion: a matter of individual choice.

Simply put, he proposes to disconnect the claim to nationhood from the related claim to territory (the "territorial principle" in contemporary terms). Autonomous citizens would freely choose their national–cultural belonging, and the national communities resulting from these individual aggregate allegiances would then gain collective and representative rights in significant areas of government (most prominently education).

Unlike the Millet system, where individuals were assigned to their religious community and a selection of faith-based communities were internally self-governing, the nations thus formed are collections of freely chosen independent entities, equal among themselves.

In Renner's view, the national right to self-government is an internal organizational principle of the state, a new social contract so to speak in which the limitation of state power [*Mitbestimmungsrecht im Ganzen*] goes hand in hand with constitutional provisions for the individual nations [*Selbstbestimmungsrecht in Innern*]. Multinationalism is hence achieved from *within* the federal state and grounded in an individual right to opt for one's nation. This is a refined version of the "personality principle." The state is the overarching territorial sovereign and oversees common interests (taxation, defense); the nations manage cultural interests. This "federalism from below" comes with a large share of subsidiarity.

Unlike the Wilsonian principle of cultural self-determination, the nations are not bound to claim their independence but would instead act as intermediary bodies between the citizens and the state, much like unions or even parties, representing and promoting the (cultural) interests of their constituency vis-à-vis the state. National communities act as associations or public law corporations (*Personenkörperschaften*); they are neither potential candidates for secession nor legitimate in claiming an independent political roof.

This mode of multicultural management reconciles two traditionally exclusive modes of membership in the literature on nationalism: ethnic and civic. For Renner, nations are in fact neither: nationhood is a personal experience of belonging, and the legitimacy of self-government is derived from the freedom to choose the entity one wishes to be associated with.

> [. . .] the personality rather than the territorial principle should form the basis of regulation; the nations should be constituted not as territorial entities but as personal associations, not as states but as peoples, not according to age-old constitutional laws, but according to living national laws. (Renner [1899], 2005, p. 29)

Original as it was, his model did neither pass muster in his own party nor did it survive where it was briefly and partially implemented: in an electoral compromise between the Czechs and the Germans in Moravia (1905–1906); in Bukovina between the Germans, the Poles, the Ruthenes, the Romanians and the Jews in 1910; in Galicia between the Poles and the Ruthenians in 1914. Estonia is the first and only example in the interwar period of a comprehensive status of personal autonomy in cultural matters; but the 1925 bill was actually revived in the law on the "Cultural Autonomy of National Minorities" in 1993 (except for Russian minorities).

So, what went wrong? On an international level, although ill adapted to the intricate Mitteleuropean situation, the territorial nation–state grammar had won the battle, and in the newly independent Austrian republic, the Austro–Marxists, divided among themselves, were unable to implement their agenda.

From Multiculturalism to Great German Nationalism

Renner is representative of the conservatives among the Social–Democrats driven by a strong nostalgia for the dual Monarchy. Profoundly legalist, he would have been satisfied with a reform of the monarchy. His comrade, Otto Bauer (1881–1938), equally convinced of the right of nations to self-determination, was rather a proponent of orthodoxy within the party. Both, however, shared a common belief in the superiority of the German "community of destiny" among the multiple Austro–Hungarian nations: to them, the Germans were culturally, socially, and economically the most powerful nation and deserved special treatment: as light of the nations for Renner, as forerunner of national awakening among the proletarians for Bauer. For different reasons, they thus both contributed to the political failure of Renner's multinational model. Bauer because he did not share the Marxist belief that a classless society would also play down the differences among nations: he was convinced that the cultural consciousness of the workers would pave the way for an "increased differentiation of the spiritual culture of nations"; and Renner, despite his real and sustained interest in a social welfare state (he wrote extensively on the nationalization of the economy), because was unhappy with *Deutschösterreich*, the "leftover" as he would say, of the greater German nation imposed by the allies in 1918.

Renner voted the Anschluß in the hope to restore the cultural unity of the German-speaking community. Renner was not a Nazi, he disapproved of the *means* of the 1938 takeover, but welcomed the union with Germany was a "godsend" after the humiliations of 1918 and 1919: "I would have to renounce my past as a theoretical activist for the self-determination of nations and as a German-Austrian statesman if I did not celebrate wholeheartedly the reunion of the German nation" (Renner 1951, p. 202). The key word is "statesman."

His interwar writings, somewhat different from his earlier work, indeed pertain mostly to the role of the state. Oddly enough, he invited Hans Kelsen to draft the postimperial constitution (1920) although Renner had a very functional understanding of the law: norms must adapt to social facts, and laws must change according to political imperatives. Although Renner is still committed to multinational federations, and stresses the importance of supranational communities of nations, the challenge is not the transformation of the Danubian Empire anymore, but the interests of states at war. He pragmatically believed that the increase of state power in the service of Social–Democracy would be beneficial

to "proletarian policy," even if this meant an alliance with the German Reich. Austria is German, and the cultural and economic interests of the working class would only be respected if the unity with the Reich were restored.

Conclusion: An Opportunistic Independent Austria

After WW2 Renner opportunistically abandoned this idea, endorsed neutrality and pacifism, and pleaded for an independent Austrian Republic, "a second Switzerland in the heart of Europe" (Renner 1951, p. 74).

The community of destiny now refers to the Austrian destiny alone, and the fact that Austria and Germany share the same language cannot be an obstacle to a deserved independence according to the head of the provisional government, then first president of the Second Republic (1945–1950). Renner played a last but important card after WW2: without his relentless intercessions Austria would have faced the same fate as the German Democratic Republic.

Called to office by Stalin at age 74, missioned to guard and to guarantee Soviet interests in the occupied zone, he organized free elections, reverted to the 1929 democratic constitution (the Soviets preferred the 1934 Dollfuss constitution), and negotiated with the allies to modify the Second control treaty (1946) that allowed for a simple majority to pass Austrian parliamentary decisions.

Whether Trotsky was right to judge that Renner was "so far removed from the revolutionary dialectic and more conservative than Egyptian pharaohs" remains an open question. It is for certain, however, that the man, precursor of an original brand of multiculturalism, had been guiltily blinded by his belief in the uniqueness of greater German culture, and his legacy is still debated in contemporary Austria.

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Representation

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Introduction

Representation is a complex and, at the same time, highly contested concept that large parts of political science literature treat as a "puzzle" (Eulau and Karps 1978). Take, for instance, Pitkin's well-known proposition to regard the basic meaning of

representation as "making present again" of something that is literally absent (Pitkin 1967: 8). Pitkin's formula, of course, invites the question of how representation is able to square this phenomenon of simultaneous presence and absence – something that has been dubbed the "paradox of representation" (Runciman 2007). From the perspective of conceptual history (Hofmann 2003), there are three dimensions of political representation (Vieira and Runciman 2008): (i) a visual-aesthetic dimension that relates to the unity between the representer (representative) and the representee (represented); (ii) a personal-ethical dimension referring to the enabling agency of the representees via the representer's actions; (iii) a dimension concerning juridical questions and accountability that bears on the transference of rights by the representees and, accordingly, the representer's competences and the consequences of these actions. The medieval struggles for interpretation of the essential elements of institutional organization prelude already the modern conflicts about political legitimacy for which the concept of representation is increasingly drawn on. At the end of the early modern era, the linkage between representation and legitimation (as much as the political importance of this interrelationship) has become evident: issues of representation inhibit a transformative power, because they structure political rules of the game and are therefore themselves subject to political change.

History of Ideas

In *Leviathan* (1651), Thomas Hobbes radically leverages the political significance of representation. His argument is based on the insight that in modern times political order is, first and foremost, constituted by representation. Thus, representation is not merely an organizational principle – as, for instance, the concept of "representative democracy" suggests. Rather, it is a constituting principle that connects the power of the people with the power of the state. In addition, Hobbes identifies key dimensions of representation and combines them with another: the state's capacity to act (personhood) becomes vivid by the sovereign representing the "mortal God." The linkage between statehood and personhood is embedded in a normative framework with a twofold structure of representation: The first structure displays the representation of the unity of the people (and not of the diversity of the multitude) in one "body politic." The second structure refers to the authorization of the sovereign power by the individuals (hereafter, citizens) with the effect of rationalizing the state's power by legitimizing its competences and, at the same time, limiting them about their ends – among them most importantly: peace inside the political order. Hobbes' critical concepts of representation are of primary importance until the present day, because they still inform our political and legal understanding of the political order as a representative order.

Constitution of the Political

To think of statehood as a representative order is Hobbes' theoretical innovation. Few have grasped so fully and criticized so sharply the radical twist of this conception like Jean-Jacques Rousseau. In *Contrat Social* (1762), he condemns the (what he thinks to be an ill-fated) belief in the authorization of will, since freedom understood as self-determination cannot be delegated without giving up the personal will, for which no right could compensate. Contrary to what Hobbes claimed, the consequence of such a delegation would not result in a political contract. Instead, it would pave the way for an asymmetrical relationship of domination in the spirit of feudalism. Rousseau's opposition to Hobbes marks the paradigmatic antithesis between identity and interest as the main object of representation, which divides the various approaches to representation: According to Rousseau, only the self-perception (identity) of a community allows an understanding of the common good (general interest). For Hobbes, however, it is an illusion to claim something like a pre-political identity that is preceding the representative order created by the state. A unified social whole and its collective interest (in the sense of the common good) are only formed by integrated top-down representation that is accepted by the community members. Ideally,

the members' identification with the community is gradually forged through representation.

Interest Versus Identity

A key question in the discourse about representation is whether authorization to represent interests is possible or whether this presupposes an idée directrice (acting for vs. standing for). The principal-agent model illustrates the paradigm of representation of interests. Here, the focus is on the relationship between the representee (principal) and the representer (agent) who is assigned to act for the representee. This approach is essential in politics for two reasons: Groups of representees only can act through an agent, but these collective forms of action need to be organized and coordinated (Pettit 2009).

Eric Voegelin's *New Science of Politics* (1952) is an instructive example for the paradigm of symbolized unity. In his study, Voegelin discusses different forms of representation and seeks to explain the underlying grounds of political representation, e.g., by democratic elections. His analysis focuses mainly on the formation processes of societies that reveal in his eyes the need of "articulation" through which a society comes into existence transforming the social plurality into political unity. Society becomes visible and vivid through the leading representatives and institutions whose political performance maintains and renews the capacity to act collectively as a society. These claims of representation are, however, sustained by a concept of identity, which is mediated symbolically and, at the same time, has the power to form the political order by means of symbolic expressions. Voegelin's concept of representation is in many ways a typical example for a German idealist tradition that has influenced many thinkers of representation, among them Carl Schmitt and Gerhard Leibholz.

Mandate-Independence Controversy

Whereas the German tradition was mainly concerned with the notion of unity within the discourse of representation, Anglo-Saxon contributions were more interested in the democratic dimensions of the representer's autonomy and accountability vis-à-vis the representee. The debate about this topic has been dubbed the so-called mandate-independence controversy. Four positions can be identified:

1. A landmark of this debate is Edmund Burke's discourse in Bristol (1774) on the occasion of his election in which he discussed the duties of parliament. Burke argued that a member of parliament is not the delegate of the district in which he or she was elected but a representer of the whole people. Burke's theory of "virtual representation" – a theory that would become effective only a few years later during the French Revolution – conceives of parliament as a deliberative assembly, rather than as an arena of interest politics. In his view, parliament should provide a forum in which debates are held, and decisions are made with regard to the benefits of the whole people. Therefore, the power of judgment of the members is what counts, each of them free of the confinements of his or her electorate that would otherwise impose its power on the representatives and would prevent them from forming an impartial opinion for the greater good of all. In this sense, Burke sees the representative as a trustee who devotes his knowledge and judgment to the service of a common cause.
2. In contrast to Burke, James Madison has rejected the notion of interest-free representation. He deemed it to be artificial and unrealistic due to the plurality of interests in modern societies. According to Madison, political representation cannot (and should not) be disconnected from the interests of the electorate; the citizens' interests, however, can (and should) be "refined" by political "wisdom" that has the power to filter those kinds of interests that are potentially harmful for the community (Federalist Papers No. 10). Thus, Madison argues, like Burke does, in favor of the independence and autonomy of each member of parliament, as far as the individual power of judgment is concerned. Unlike Burke, however, he believes that the responsiveness towards the interests of the constituency is a virtue and not a vice for each representative.

3. Burke and Madison share the idea that already Plato elaborated upon: politics has an important governing function for society; and therefore politicians should know better than ordinary citizens how to reach decisions that serve the public well. Rousseau, however, strongly disagrees with this view. In the course of the history of political ideas, there are maybe no more significant skeptics than him for representation in general and to authorization in particular. As mentioned, the transfer of will from the representees to representers – an important element of Hobbes' concept of representation – is for Rousseau more or less the same as giving up on the idea of autonomy. For this reason, delegates who are appointed to implement the will that has generally been identified as true (volonté générale) should only be "servants" at the service of the community. By no means, they are "free" to impose their will in place of the people's. Instead, they should obey and attend to the will of the people as – literally – "civil servants"; and only under these conditions can political freedom be preserved.
4. However, Rousseau's idea of the volonté générale on which the political freedom of the community is built has lost much of its appeal due to arguments by modern approaches of democratic theory. In particular, (neo-) pluralist and (neo-) corporatist approaches have questioned the notion of society as a community based on a shared notion of the common good. Instead, they have pointed to the importance of organized groups and their power to articulate, to aggregate, and to push for their group's interests at the cost of any national interest or common benefit. Thus, according to these approaches, representers are simply "delegates" or "messengers" bound by the mandate of the interest group they are obliged to serve.

Representative Democracy

Against the background of these four positions, the difficulties to balance the interests of "the people" on the one hand and of the elected representatives on the other hand have raised doubts about the concept of "representative democracy" (Urbinati 2006; Manin 1997). Are democratic self-determination and representative government compatible? These doubts find some more grounds with respect to the "founding fathers" of this synthesis between democracy and representation during the revolutionary times at the end of the eighteenth century: Emmanuel Sièyes in France or the Federalists in the USA were likewise concerned about the power of the masses for which Alexis de Tocqueville coined the phrase about the "tyranny of the majority" in his studies on *Democracy in America* (1835/1840). With the advent of party democracy, the tenor of criticism has somewhat changed. Ever since then, doubts about the democratic quality of representation have grown steadily: Does representation ultimately benefit the interests of an oligarchic elite? Does it abet the government in decoupling from the electorate? In normative democratic theory, particularly, radical democratic approaches fundamentally challenge the compatibility of representation and democracy, whereas the liberal mainstream continues to adhere to it. According to liberal approaches, it is the duty of political parties to reconcile representation and democracy qua responsiveness.

Quality of Representation

The democratic quality of political representation is one of the main issues of contemporary theories of democracy. Hanna F. Pitkin proposed to think of democratic quality as a balanced relation between representees and representers. In her study, *The Concept of Representation* (1967), she developed a typology of relationships of representation that has become a benchmark in the political science literature. According to Pitkin, we can distinguish four types of representation.

Formal Representation

The basic structure of formal representation corresponds to the principal-agent model in which the agent is acting for the principal. What seems at first asymmetrical in the principal's favor turns out more often than not to be a relationship which can

be exploited by the agent. This is one of Pitkin's main insights; and many empirical studies have supported her argument. The de facto asymmetry that benefits the agent is due to the lack of any substantial control, which is why "misrepresentation" turns out to be a missing link in the formal model (Pitkin 1967: 28ff.). According to Pitkin, strengthening political accountability due to democratic elections cannot compensate for the structural imbalance. It may well be that elections create incentives for candidates to be responsive to the electorate's preferences. However, potentially diverging interests can only be reconciled by "anticipated reaction" (Friedrich 1963) that depends exclusively on the representer's decision to take the voter's expectations into account.

Descriptive Representation

Representation in the sense of standing for something or someone gives priority to the characteristics, attitudes, or identity of the representees. Descriptive (or statistical) representation refers to the notion of membership based on the accordance between the representers and representees regarding a certain (often objective) quality (e.g., age, sex, race, etc.). Thus, a higher congruity of a characteristic deemed relevant for a group's identity makes representation more representative. An important example in the course of the history of ideas is the image of parliament as a reflection of the nation "en miniature" which was important during the revolutionary period at the end of the eighteenth century in which it was often claimed that representative institutions shall "mirror," "depict," or "display" the composition of the population or of individual groups.

Symbolic Representation

In a second version, standing for refers to the symbolic forms of representation. Identity is likewise given expression through representation – not by corresponding to an actual composition (aggregation) but symbolically by representing an "ideational" unity (association). Mediating representation symbolically allows for affective identification of the addressees. To feel pride when listening to the national anthem is a common example for this. According to Pitkin, these forms of representation are, however, prone to authoritarian exploitation of the guiding principle for abuse. This is why legitimation is a central dimension for any similar theoretical approaches that, accordingly, need to take the genesis and mediation of symbolic contents into account. Democratic theory should include such considerations in institutional propositions that aim at enhancing and safeguarding transparency, clarification, and control.

Substantial Representation

The issue at stake for Pitkin is, in particular, the representers' performance. The quality of representation is proven by the amount of responsiveness towards the representees' interests. Thus, individual or group interests are per se not harmful for the common good, but the basis for finding solutions for those challenges that have to be dealt with in political processes. This presupposes an active understanding of representation and (following Burke) demands the representers to employ their power of judgment for the whole community. In this sense, politics is not only about power play with the aim of satisficing (group) interests (bargaining). It is also the realm of deliberation with the purpose of finding reasonable policy solutions and creating common meaningful policy objectives beneficial for the general public.

Representation as Responsiveness

A large part of empirical studies on representation is informed by the so-called linkage model (Thomassen 2014). This model conceives representation as concordance between political leadership and the interests and demands of the public. Miller and Stokes (e.g., 1963) pioneered by establishing the *delegate model*, an empirical approach for explaining the voting behavior of members of the US Congress. Their core idea was to connect the attitudes of the electorate with the representer's perception of the electorate's expectations. Whereas this approach was directed mainly to political institutions and the roles of their members, the *political party model*

focuses on criteria related to party politics: Ideologically coherent parties (party discipline) contend proposing different political programs (ideology) for the approval of the electorate (competition) that decides according to the distribution of preferences (rational vote). Both models share the same idea, which defines representation essentially as responsiveness, either of the political institutions or parties. Responsiveness aims at the congruence of interests between government and people as a democratic and theoretical ideal (Dahl 1971). It is the (implicit) pretension of empirical works on responsiveness to contribute to the (self-) information of democratic societies by measuring the gap between the aspirations and the reality of this form of representation.

New Approaches

Substantial Representation Revisited

Jane Mansbridge propounds a new typology of representation based on action-theoretical premises in her article *Rethinking Representation* (2003). Her aim is to extend the perspective on the institutional foundations of different representational logics beyond voting and to evaluate their democratic quality. Mansbridge identifies four of these representational logics:

1. For Mansbridge, the conventional form of representation is *promissory* representation. Representers promise voters to act on their behalf – an asymmetrical conception that sustains the "myth of constituency control" and whose democratic quality is challenged by empirical research on responsiveness.
2. More pertinently, and in line with *anticipatory* representation, the representers' conduct is not conditioned by their commitment to election promises but by their anticipation of the evaluation of the preceding term by voters on Election Day. Voter preferences may change – also under the representers' influence.
3. As for *gyroscopic* representation, everything "revolves" around the representer's personality. The individual personality is decisive in that the representative stands out because of, e.g., character, competence, or charisma. The personality factor is the core reason for the representees' trust. Consequently, the representees' influence is restricted to the act of voting. Beyond this point of time, the influence on the gyroscopic representer is next to nothing.
4. In case a person or a (minority) group lack adequate representation in matters that are vital for them (e.g., sexual orientation), they might opt for a form of *surrogate* representation. A surrogate representer is committed to the interests of representees outside of his/her constituency and hence gets their support for (re-) election.

Representation as Participation

In *Representation Is Democracy* (1997), David Plotke emphasizes the constructivist dimension of representation that is of often missed by political theory, but is normatively speaking of relevance, because it strengthens the democratic character of representation. According to Plotke, the constructivist dimension of representation finds expression in three elements:

(a) The relationship between representers and representees is based on *nonidentity*: both parts have interests and abilities which come into effect in the process of representation.
(b) It follows from this a *relational* element: representation in this sense does not (only) presuppose an allocation of roles (e.g., principal-agent model) but a communicative space in which the relationship is established.
(c) In political contexts, the creation of such a space is the main challenge. Due to the social interactions and mutual coordination requirements, which are in the realm of politics rather un(der)determined, the "agent" is mostly unrestrained by the "principal." Instead, *reciprocal claims* between representers and representees shape their representational relationship. And, as Plotke points out, both sides can contest the others' claims, since not only the agent but also the principal has to make an effort to persuade the representer to promote the interests at stake.

Representative Claim

Michael Saward has radicalized Plotke's constructivist foundation of representation. In his studies on the *Representative Claim* (2006, 2010), Saward brings to light the preconditions of successful representation which are, in essence, twofold: a representer claiming to represent someone and a representee's approval of this claim. The potential representer needs to assert that the potential representees have a common feature X that (s)he can to represent (in a satisfactory way) because of her/his characteristic Y. According to Saward, representers are therefore not only agents but performers. Political representation is characterized by competing representative claims and the power of interpretation that is crucial for a specific claim to prevail over another. There are two corollaries to this conception of representation based on claims:

1. In addition to the electoral dimension, aesthetic and cultural factors need to be considered to describe performativity more comprehensively.
2. Next to the representer, Saward's approach points also to the "maker" as the spiritus rector. It is the maker who invents the representer's self-image that may differ from the opponent's image but, in any case, has to be brought before the audience that decides whether the various performances are appropriate and whether to accept each of the representative claims.

Legitimate and Non-legitimate Representation

The acceptance of a claim to represent is pivotal for Andrew Rehfeld and his *General Theory of Political Representation* (2006), which aims at also including forms of nondemocratic representation. As the classical authors, notably Thomas Hobbes, Rehfeld does not deem representation to be an annex of democracy but an independent political concept next (and even prior) to democracy. The representation of interests by NGOs is a case in point, because their advocacy work is generally held to be legitimate; however, it is not authorized democratically. Why are some claims to represent accepted and others are not? Fundamentally, the audience's de facto recognition is decisive which, analogous to the selection of representers, does not have to live up to any normative standards. Three criteria (rules of recognition) crystallize to gain acknowledgment for the selection process: First, the representer is chosen from a qualified set of candidates; second, there is a valid decision rule for the selection of representers; and this choice is made, third, by an appropriate selection agent. Because Rehfeld has stripped the terms qualified, valid, and appropriate of any external normative standard, these criteria apply in the same fashion to democratic and nondemocratic regimes and their representatives alike.

New Challenges

Large parts of the ongoing discourse on the future of democracy and its legitimacy are concerned with the concept of representation. Pitkin's study may be used as a compass to navigate through the various fields of political debate and academic research.

1. Research on the concept of *formal* representation has developed elaborate instruments to analyze the existing and in many cases widening asymmetries between principal and agent. A case in point are the numerous studies on the European Union that illustrate the agents' growing power: Despite the selection and control exerted by the principals (Member States, Council of Ministers), the European Court of Justice and the Commission act with ample degrees of freedom (Conceição 2010). Another example is the broad field of research on the lack of responsiveness of political parties (Clements et al. 2018).
2. In terms of political praxis, varieties of *descriptive* representation are closely linked to critique and reform of those procedures for selection and appointment that do not reflect the principle of representativeness sufficiently. Manin (1997) called to mind that elections are intrinsically "aristocratic" and therefore in opposition to democratic equality – a critical twist to Joseph Schumpeter's elitist view of

democracy. At the center of theoretical attention, however, is the discourse about political exclusion, especially regarding gender and minorities (Ruedin 2013), and the antidote of group representation (Young 1996). Advocates of such a group approach to representation take issue with the relationship between interest and identity and challenge the liberal version of representation based on individualism and pluralism which, in their view, all too often leads to the subordination of minority interests and identities alike. They argue that the logic of aggregation underlying the liberal concept of representation endangers different cultural ways of life outside the mainstream of society and politics. Against this background, group representation should allow for resistance to the liberal logic of aggregation by privileging collective identity over individual interests.

3. Such an approach may lead to the essentialization of political identities which is just as well a problem for forms of *symbolic* representation, in case these forms are understood as an "existential" emanation of a community. The discourse was advanced by highlighting the cardinal importance of the symbolic dimension for democratic systems (Diehl and Steilen 2016).
4. The political transformations on the national level and on the international and transnational level have stimulated the discourse about representation profoundly. The perceived "crisis" (Alonso et al. 2011) of representation intensifies Pitkin's concern about *substantial* representation and makes it a more prominent issue in research on representation. The transformation *from government to governance* puts the following topics on the agenda of the discourse about representation:
   - *Democratic legitimacy*: How can a democratically well-founded quality of representation be ensured (Disch 2011)? In addition, there is the question about the prospects of successfully implementing deliberative models of democracy.
   - *Transnational extension*: How is political representation in transnational spaces (Marschall 2005) and international arenas possible – including unelected political actors (Rehfeld 2006)?
   - *Fair inclusion* is about the visibility and presence of those previously excluded and the preservation of diverse and plural structures (Williams 1998).
   - *Post-democratic simulation*: The advances in representativeness that are discussed as progress regarding inclusion and integration in the public are at risk of being undermined by processes of deinstitutionalization and informal governance in networks which are used for maintaining established power structures (Crouch 2004).
   - *Effective participation*: Discussions about public participation are given a new impetus based on a conceptual distinction between immediate decision processes and direct forms of involvement (Urbinati 2006).
   - *Systemic innovation*: New protest movements (e.g., Occupy) aim not only at participation but also at representation. These twofold demands are given expression in new models of democracy such as *collaborative*, *liquid*, or *monitory democracy* which are representative in character (Lembcke 2016).

Conclusion

It is quite challenging to have an overview of the research field on representation and its ramifications. The history of ideas explicates why the concept of representation has become an essential concept of the political and the four example areas illustrate the close relation between a political order's foundations of legitimacy and its representation. Against this background, it becomes evident that representation is an integral category for analyzing democratic systems. Pitkin's study is the benchmark that maps the different relationships of representation – *acting for* (formal, substantial) vs. *standing for* (descriptive, symbolic) – and enables to evaluate the democratic quality of representation. Pitkin's skepticism is confirmed by the results of empirical studies of

responsiveness to the electorate. Nonetheless, the results also disclose the conceptual differences internal to the discourse about representation which reflects the divide of empirical and normative theories of democracy. To bridge this divide, Mansbridge proposes a new typology of democratic relationships of representation, and Rehfeld expands the analytical angle to nondemocratic forms of representation by decoupling political representation from democratic legitimacy. Plotke and Saward recall the aesthetic dimension of representation grounded on constructivist terms and, thus, links to action-theoretical considerations.

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Representation: Political

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Introduction

Political representation has a long history in political and social theory. It refers to the notion that elected officials speak for citizens in parliaments and across other political spaces. Liberal democracies around the world are facing number of challenges that make it important to revisit the concept of political representation. These challenges include declining voter turnout, the

underrepresentation of oppressed social groups among members of parliaments (including women, ethnocultural/racial minorities, disabled and LGBTQ people), and the lack of congruence between the percentage of the popular vote and the number of seats, at the expense of small political parties. These phenomena have produced a so-called crisis of political representation: citizens no longer believe that political elites are able to, or desire to, represent their views and interests in political spaces, and as a result, there has emerged a general climate of distrust and a corresponding dissatisfaction with democratic institutions. The remedies for this crisis aim at improving citizen participation and political inclusion, often through electoral reforms, and are explained in terms of improving the quality of political representation. It is thus important to understand what political representation is.

This encyclopedia entry begins by providing an account of the evolution of the meaning of political representation and its relationship to democracy in the history of political thought. Second, it highlights key contemporary debates about political representation. Finally, it illustrates emerging theoretical challenges to be considered in the reform of democratic institutions.

What Is Political Representation?

Etymologically, representation originates from the Latin *repræsentare* which means "to make present or manifest or to present again". From its initial usage in aesthetic and ecclesiasticism, the concept of representation finds its political meaning in the thirteenth century (Pitkin 1989). At first unrelated to democracy, the meaning of political representation evolved to be strongly associated with it until present-day theoretical efforts to understand it independently of democratic institutions.

It is in the seventeenth century, through the writings of Thomas Hobbes that a modern theory of political representation emerged. In Hobbes' account, political representation, the process by which an entity represents the people, emerges through a mechanism of authorization. He describes the operation by which a multitude of men voluntarily yield their individual sovereignties to a monarch or an assembly. The mechanism involved is illustrated in *Leviathan* as follows:

> This is more than Consent, or Concord; it is a reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man, in such manner, as if every man should say to every man, *I Autorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.* (Hobbes and Tuck 1991 [1651]: 120)

Political representation so construed has little to do with democracy, but is rather presented as instrumental in bringing about political stability. In *Leviathan*, Hobbes suggests that human nature is not inclined toward cooperation and that, as rational beings, men seek to have their private desires and interests prevail. The only way to guarantee the "safety of the people" from the greatest evil of "war of all against all" is to entrust their multiple wills into the hands of one sovereign, the *Leviathan*, who is like the god on earth. According to Hobbes, the ceding of the individual sovereignties to One who embodies the state and the Will of the people, if voluntary, it leads to the advent of the Republic; if coerced, it leads to tyranny.

The alliance between political representation and democracy is formed in the eighteenth century (Pitkin 2004). Political philosophers of the Enlightenment challenged the long-held ideal of Athenian direct democracy in which every citizen of the city-state participated directly in decision making. In this regard, two traditions of thought offer distinct arguments in favor of representative democracy and thus, distinct understandings of the function of political representation. The republican tradition views direct democracy as inevitably leading to political instability given the heterogeneity of citizens' interests. For republican thinkers, as Benjamin Constant (1874), the masses are either only seeking to fulfill their own parochial interests or lack the skills to engage in public matters. Therefore, political governance is best left to an assembly made up of public-spirited men who possess superior judgment to deliberate

and look after the common good. In contrast, the liberal tradition views that each person is best placed to know his or her own good and should participate directly in law-making to prevent his or her autonomy from being sacrificed to a so-called collective interest. For liberal thinkers such as John Stuart Mill (1862), representative democracy is an adequate alternative to direct democracy only for practical reasons: Given the size of today's political jurisdictions, it is virtually impossible to devise viable institutions that would gather all citizens in one place for every single decision. A representative government thus ensures that every class of interests is given a voice, so that individual freedom and that of the nation are safeguarded.

At the beginning of the twentieth century, Joseph Schumpeter and Stiglitz ([1942] 2010) offered a new meaning to democracy as a method of selecting political elites who will govern. Although largely idealized with respect to the diffusion of values of equality and liberty, the legacy of the revolutions of the late nineteenth century was certainly the development and entrenchment of contemporary institutions of representative democracies. By the turn of the twentieth century, political representation had, to some scholars, supplanted political participation as the central feature of democracy. This shift has been called the "representative turn" of democracy (Plotke 1997).

Against this backdrop, a contemporary understanding of political representation is provided by Hanna Pitkin in her book *The Concept of Representation* (1967). Pitkin suggests that representation means "acting in the interest of the represented, in a manner responsive to them." (Pitkin 1967: 209). According to Pitkin, political representation emerges from two mechanisms: authorization and accountability. To be authorized is to be mandated as the legitimate person to speak and act on behalf of a constituency. To be accountable is to be responsive; accountable representatives are not required to satisfy all the desires of their constituents, rather they must act in ways that are at least minimally consonant with their interests. According to Pitkin, specific institutional arrangements are required to produce these two mechanisms and, elections – free and fair – do precisely that. On the one hand, they provide the formal mechanism by which a person who wins the popular vote receives consent from a constituency to represent their wills. On the other hand, they create the conditions for responsiveness whereby the constituents express their preferences, and the recurrence of elections at regular frequencies binds representatives to take these preferences into account as they compete to be re-elected for another mandate. Thus, Pitkin enshrines the function of elections in bringing about political representation.

More recently, Michael Saward introduces a constructivist understanding of political representation. Saward defines political representation as a performative activity that proceeds from a discursive mechanism he calls "representative claim" which is, when someone declares themselves to be the representative of a group or to be the custodian of the best way to promote their interests. If the claim is accepted by a specific group, then political representation happens. In this way, political representation is *constructed* via discourses by and between representatives and represented, with or without the structure of democratic institutions. According to Saward, the process is as follows:

> A *maker* of representations (M) puts forward a *subject* (S) which stands for an *object* (O) which is related to a *referent* (R) and is offered to an *audience* (A). (Saward 2006: 302)

The constructivist approach rethinks the concept of political representation in way that is somewhat disconnected from democratic institutions. Political representation is construed as a dynamic process that can emerge independently and well beyond elections. One value of this understanding of representation for democracies is that it better caters to the feelings, voiced by citizens, of not being represented by an although elected official or assembly. It has also been of great value in articulating contemporary theoretical debates about the roles of representatives and in opening new directions for the study of accountability.

Contemporary Debates on Political Representation

A key debate in contemporary political theory is the relationship between representatives and constituents. This contemporary debate has historical origins in Edmund Burke's (1975) position during debates over the form of government in England that is expressed in his 1774 *Speech to the Electors of Bristol,* and which Hanna Pitkin has also considered. In her language, the debate is best understood as the *mandate-independence* controversy. On one view of representation, the representative acts as a "trustee" insofar as he or she acts according to his or her own judgment of what they believe to be the collective interest. On another view of representation, the representative acts as a "delegate," with a mandate to faithfully express the opinions, preferences, and particular interests of his or her constituents. In so doing the representative must suspend his or her own judgment. In her discussion of this so-called debate around the best way to conceive of the representative's job, Pitkin describes it as a false dilemma because, in practice, the role of the representative is not so fragmented. In her estimation, the representative acts to some extent on his own judgement while also taking into account the opinions and judgment of the represented. However, the debate continues to occupy contemporary political theorists. Following in the steps of Pitkin, the focus is now on the extent to which to conceptualize the role of representatives in a way that transcends the trustee/delegate dichotomy and accurately translates the complexity of the phenomenon of political representation (Mansbridge 2009; Rehfeld 2011). One shift is to rethink the representative-represented relationship as a transactional relationship rather than presuming that there is a given set of political interests which then find a representative. For Bernard Manin (1995), the relationship is better grasp through the metaphor of a performance, with politicians as actors who create policy options and deliver them to the judgment of the public who are the voters they try to satisfy or convince. Political campaigns provide a good illustration of this dynamic: candidates make election promises and voters wield influence over the political agenda as election promises are articulated to garner maximum votes to win the election. Considering this perspective of the representative-represented relationship, more than two roles of representatives are revealed (Mansbridge 2011; Rehfeld 2009).

Another important debate is on accountability. When she argued that accountability was key to political representation, Pitkin suggested that political representation is not reducible to the fixed time of elections when after vote count the winner of the popular vote is given authorization to act on behalf of a constituency. Rather once elected, there is political representation as long as the elected official acts in a manner that is consistent with the interest of the constituents. It does not mean blindly following their preferences, for example, but if he or she acts in way that goes against them, there must be an explanation provided. If he or she persistently acts against their interests or refuses to dialogue with the represented, the relation cannot be called representation (Pitkin 1967: 210). Second, Pitkin's notion of accountability also emphasizes that those represented are not passive recipients of the representative decisions but can express opinions, can be satisfied or dissatisfied with policy choices, and are able to act collectively by associating in interest groups or social movements, or influence the political agenda and the public policy process through various means. Drawing on her work, scholars of accountability have emphasized the importance of sanctions: at the moment of elections, those who have not fulfilled their representative role will not be re-elected or will be given fewer votes (Przeworski et al. 1999). Current focus on accountability considers the function of elections in creating the conditions for responsiveness. On the one hand, campaign promises can be broken and after elections, there is nothing to prevent the elected person from acting without regard for constituents' interests. If nothing else, the prospect of re-election is the incentive that compels representatives to keep their campaign promises during their time in office. On the other hand, poor representation comes at high cost to voters, who will bear the consequences of the representative's policy

choices. As rational agents, voters are therefore more likely to use elections to select a good representative rather than to sanction a bad representative. In so doing, they judge potential representatives based on their past actions, character, or set of values and beliefs (Mansbridge 2009). Using the constructivist approach which, as described above, views political representation as a discursive co-construction, other scholars attempt to understand accountability in non-electoral settings as well (Rehfeld 2011). Voters are considered as among one of many types of audience toward which a claim of representation is expressed. Accountability is thus theorized as a set of rules that is used to recognize the legitimate representative across multiple settings.

Emerging Challenges

A major current challenge faced by theories of political representation is how best to represent minority citizens. The challenge is on two fronts: mechanisms for representing minority political beliefs and the role of minority representatives. Common strategies that have been implemented since the 1990s in order to represent minority political beliefs and to include women and other marginalized groups are electoral reforms such as electoral boundaries redistricting and forms of quotas. Other strategies more recently being experimented with are *citizen assemblies,* which are consultative or deliberative assemblies that involve a number of citizens to act as representatives of the people. These strategies bring about new types of representatives: descriptive representatives and *citizen representatives* (Urbinati and Warren 2008). Both are sometimes non-elected self-declared representatives or selected through alternatives processes as sortition. New theoretical questions arise: By which mechanism are unelected persons legitimate representatives? What binds unelected representatives to promote the interests of the groups they claim to represent? These questions resonate with theoretical developments that seek to understand political representation dissociated from democracy and specifically interrogate how legitimacy and responsiveness of a representative are possible in absence of elections.

A critical focus is on the political inclusion of marginalized groups, and how representation serves to secure that inclusion. In this regard, contemporary political theorists such as Anne Phillips, Jane Mansbridge, and Iris Marion Young consider the role of descriptive representatives more deeply. Descriptive representatives are those who have similar demographic characteristics to those whom they represent, i.e., who "look like" them in some key way. However, this type of representative has long been dismissed in the literature, in favor of the idea that political interests are and should be detached from bodily and lived experience. This normative bias can be found in Pitkin's definition that situates descriptive representation as a form of representation which is *standing for* meaning they stand as symbol, in opposition to *acting for* meaning doing activities on behalf of the interests of their constituents. As such, descriptive representation has been viewed as undesirable for democratic institutions for it does not involve activities that can be evaluated as to whether they are consistent with constituents' interests. Considering the historical marginalization of social groups as women, racial minorities, disabled, and LGBTQ people, contemporary political theorists has shown that some characteristics have political significance. Therefore, they demonstrate that characteristics of the representatives in regard to "what his or her look like" are relevant as they determine shared lived experiences (Phillips 1995), shared perspectives (Young 2002), and trust between representative and represented (Mansbridge 1999) that translate into a substantive representation of interests. Recently, descriptive representation has been subject to further theoretical reflections which explore its possible conciliation with accountability (Dovi 2002).

Conclusion

As this entry has shown, political representation is itself a complex notion. Theoretical debates about political representation are contingent to the

practical challenges facing democracy. Thus, it is important to understand political representation in order to advance adequate reforms of democratic institutions that ensure political inclusion and trust in liberal democracies.

Cross-References

▶ Representation
▶ Trust

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Resistance

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Resistance can be contrasted with "ordinary political action," which refers to actions directed at political change that are permissible, either legally or socially, within the basic structure of a given society (Lovett 2010). Resistance by comparison is 'extraordinary political action'; it describes actions that either violate the law or the normative sensibilities of the society in which such action takes place in an attempt to create some form of political change (Caney 2015; Finlay 2015; Blunt 2019). However, what counts as "politically motivated" can be contested as will be seen in the following section.

It should be noted that the content of resistance is dependent on the context in which political action occurs as this determines the laws or values that are violated. What ordinary political action looks like in the context of a liberal democracy in which there is effective rule of law will be very different from an authoritarian regime in which law enforcement rests on the arbitrary will of a ruling clique. That which may pass as "ordinary political action" in the former, such as organizing an independent labor union or going to an anti-government demonstration, may potentially be resistance in the latter (Raz 2009).

Moreover, there is a question as to whether law-breaking is even a necessary condition of resistance (Delmas 2018). If we were to look at the suffrage movement, we would often find instances of women organizing to demand the vote in ways that were legally permissible, but scandalized the values of the day. The simple exercise of political agency by women fell outside ordinary political action in a society where it was thought that the woman's place was in the home.

Modes of Resistance

The modes of resistance refer to how groups or individuals engage in political resistance. Four general types of resistance often appear in the literature: conscientious objection, civil disobedience, uncivil disobedience, and revolutionary action (Rawls 1999; Raz 2009; Delmas 2018).

Conscientious objection refers to actions whereby a person refuses to comply with institutions or obligations that they deem unjust. Henry David Thoreau, for example, argued that there is an obligation to withdraw one's support for an unjust state on the grounds that to do otherwise would show approval for injustice (Thoreau 1996). A prominent contemporary example would be young men refusing to be drafted to serve as soldiers in the Vietnam War; they had a legal obligation to serve but refused compliance on the ground that it was an unjust war.

We might question whether this is a form of resistance, as conscientious objection can lack the publicity that one often associates with resistance. Thoreau conscientiously objected to the institution of slavery and the Mexican-American War and consequently stopped paying his taxes. This was not overtly done and took a while to discover. His attempt to transform this act of conscientious objection into civil disobedience failed when his aunt settled his tax-bill without his consent. Likewise, the "draft-dodger" might have packed his bags and fled to Canada without publicity. Yet, when this sort of conscientious objection to government policies or to the state itself becomes widespread, it becomes difficult for the state to ignore and over time can produce change.

The next mode of resistance is civil disobedience. This has broad similarities with conscientious objection. The standard definition of civil disobedience is organized political action that is principled and nonviolent and breaks the law (Rawls 1999; Brownlee 2012). Civil disobedience is distinct from conscientious objection insofar as it is organized and public; it is fundamentally communicative between the person committing the act and their fellow citizens; it is an appeal for reconsideration and support (Singer 1973; Rawls 1999). It is an expression of severe disapproval of the policies of the government or the state itself, which maintains civility through the absence of violence.

Liberal theorists such as John Rawls also maintain a "fidelity to the law" condition, which requires that those engaged in civil disobedience are prepared to accept legal sanctions for their actions. They may find a particular policy to be unjust, but they believe that the fundamental institutions of their society are worth supporting (Rawls 1999). The act of accepting sanctions can also be grounded in the dissident's duty of fair play; they recognize that everyone has an obligation to accept sanction; it demonstrates that they are not hypocrites by accepting the cost of their actions and demonstrates the depth of their conviction (Greenawalt 1987).

The "fidelity to the law" condition is not universally accepted in the philosophy of civil disobedience. Kimberly Brownlee argues that it is sufficient that one risks sanctions for their actions and that there is no obligation to endure penalty for law breaking (Brownlee 2012). Joseph Raz argued that fidelity to the law is not essential to satisfying civil disobedience's twin aims of effecting change or communicating dissent. It is sufficient that the act occurs and that its motivation is known (Raz 2009). Robin Celikates also disputes that an unjust state could hold sanction as a duty and that the claim tends to conflate justification with strategy (Celikates 2016). However, as Robert Jubb notes, Rawls was writing about very specific circumstances of civil disobedience: fidelity to the law applies in "nearly just"

societies, it is clear that Rawls did not expect this condition to apply in systemically unjust societies (Jubb 2018). So we might bear in mind that as resistance is context dependent, so too is civil disobedience.

We might also add that the assumption about "fidelity to the law" may build in a degree of unacceptable privilege into the account of civil disobedience. Accepting sanction for principled law breaking implicitly makes civil disobedience available to privileged members of society who are able to bear the burden (Blunt 2019). The standard definition fails to recognize what James C. Scott calls the 'infrapolitical' (see further below) and how oppressed people often anonymously and covertly engage in civil disobedience (Scott 2009). This may hold even in reasonably just societies in which some people find themselves victims of injustice.

The third mode is "uncivil" disobedience, as recently championed by Candice Delmas. Its nature is suggested in the rejection of "civility"; it can be covert, evasive, violent, and offensive (Delmas 2018, See also Havercroft 2021). It can, therefore, encompass a great deal of action from the covert whistle-blower to violent riots and DDoS (distributed denial-of-service) actions by hackers. Uncivil disobedience can also carry something of "impure dissent" identified by Tommie Shelby insofar as it can be offensive and perhaps have mixed motivation. He provides the example of N.W.A's song "Fuck tha Police" as an example of something that protests the extreme anti-black racism in America's police but does so in a way that some may find offensive or vulgar (Shelby 2016). However, uncivil disobedience is not without critics. William Scheuerman has argued that uncivil disobedience is over-capacious as a concept and its advocates have not engaged with its ambiguous historical track record (Scheuerman 2019).

Uncivil disobedience may be a strong reaction to a profound injustice in a society, but it does not necessarily entail a constitutional reorganization. The action may still treat the basic structure of society as worth preserving. The same cannot be said for the final mode of resistance: revolutionary resistance. This is principled public dissent that is aimed at overturning the basic constitutional order of a society that it deems irretrievably unjust. This mode of resistance is found, for example, in revolutionary Marxists who view capitalism and society that springs from it as intrinsically exploitative, impossible to reform, and doomed by a superiority of socialism. The demands of justice, if we can read such a concept into Marxism, require the abolition of private ownership of the means of production and the development of socialism (Cohen 2000; Marx and Engels 2014).

There is, further, a question around "hidden" resistance. Scott coined the term "infrapolitics" to describe actions which do not appear in the spectrum of ordinary or extraordinary political action, like infrared light it is not visible (Scott 2009). This would cover forms of resistance that appear apolitical as they do not have the intentionality that animates protest. We might think of fugitive slaves as acting in this category of resistance. A person might want to escape slavery because they despise the condition of servitude; this is not necessarily a political protest. However, if such acts are replicated over many cases, they can make unjust social institutions unsustainable. The "self-emancipation thesis" argues that the large number of slaves who absconded during the early stages of the American Civil War made slavery impossible to sustain and Lincoln simply recognized what had already a happened (Harding 1981). Likewise the day-to-day resistance against slavery, such as theft, slow-working, illegal religious practices, put slave-owners on notice that they did not inhabit a bucolic patrician society in which all were content (Bauer and Bauer 1942; Blunt 2019). Given that there is a strong historical precedent for infrapolitical resistance, it seems that this must be taken into account.

Resistance as a Right

Prior to the Early Modern period, there was a strong presumption that obedience to the state ought to be absolute, such as Socrates' argument that he was duty-bound to drink his cup of poisonous hemlock out of filial obligation to Athens (Plato 1972). Similarly, there is also a

longstanding fear that justified disobedience to the law would undermine the integrity of the state and lead to anarchy (Bentham 1843; Fortas 1968; Hobbes 1996). However, there is now a widespread consensus that resistance is sometimes justifiable (Finlay 2015). The debate has shifted primarily to considering how one justifies disobedience to the law in the face of its presumption of obedience.

The leading approach in the liberal and republican tradition is to argue for a right of resistance. The state, per John Locke, is established as a neutral arbitrator to manage social cooperation and protect preexisting natural rights. If the state becomes an intransigent and continuous source of rights violations then it loses its authority to command obedience. The people may then exercise their right to resistance, even so far as to overthrow the state and reconstitute it (Locke 1988). Certainly, there is an element of risk with the right of resistance, as noted by the likes of Bentham and Hobbes, but without it one is permanently exposed to the concomitant risk of tyranny. Tony Honoré's defense of the right to resistance was grounded in the claim that without it we cannot intelligibly speak of a system of rights at all. Rights require recourse when they are violated. If there is no recourse when the state, which ought to protect rights, is the source of intransigent and ongoing violations, then we cannot say these rights existed to begin with. What was referred to as "rights" was at best "privileges" granted at the discretion of the state and only upheld with its permission. This would leave us in the unenviable position of being reconciled to enduring the worst atrocities offered by the state (Honoré 1988; Blunt 2019).

Recently there have been challenges to this tradition of thinking about the right to resistance. Raz, for example, has critiqued the idea that there can be a "right" to civil disobedience, at least in the legal sense, because any legal form of civil disobedience would necessarily fall within permitted freedoms of expression. It could not, therefore, be "disobedient" (Raz 2009).

Additionally, there is a widespread skepticism over the presumption of obedience to the state in much of the current literature on resistance: why should one be bound to that which is manifestly unjust? (Brownlee 2012; Celikates 2016). The notion that a dissident must provide reasons and accept sanction is no longer an accepted premise of the debate.

A long-standing matter is the conditions under which the right of resistance can be acted upon. It seems uncontroversial to argue that individuals have the right violently to resist severe injustices such as genocide or crimes against humanity. Yet, what the threshold is for resistance to lesser injustices is less evident. The example of the civil rights movement helps to illustrate the problem. That institutionalized racial discrimination in the United States warranted extraordinary political action in the vein of civil resistance by the likes of Martin Luther King Jr. seems unproblematic, but more militant forms of resistance by groups like the Black Panthers are more controversial. Yet, not being able to pinpoint the exact moment when ordinary political action can be set aside for civil resistance or when civil resistance moves to armed struggle, it is not a flaw in the right of resistance, but merely indicates the importance of judgment and context in practical ethics.

Resistance as a Duty and Duties of Resistance

The implication of conceptualizing resistance as a right is that it has a degree of discretion in its exercise: One may have a right and chose not to use it. This position has been challenged by those who seek to argue that resistance to injustice is a duty that is binding but potentially defeasible in certain circumstances. This duty can be grounded in multiple reasons: a duty of natural justice, a duty of fairness, Samaritanism, and dignitary political membership. These duties can run together and potentially offset the duty to obey the law or at least seriously question why it has primacy in debates over the ethics of resistance (Delmas 2018).

Further, we might ask what duties are owed by third-parties to those engaged in resistance. If there is no duty to resist or if this duty can be excused, it is still plausible that there are negative

duties to either not interfere with those exercising their right or duty to resistance and not to collaborate with institutions that interfere with the exercise of these rights or duties (Blunt 2019).

Resistance as a Legal Right

Although resistance is often framed as a right, it is infrequently found in codified law. At present roughly 42 countries recognize or partially recognize the right to resistance (Murphy 2011). Moreover, the right to resistance is often conceptualized within the domestic political arrangement as part of the liberal democratic tradition and its application to human rights theory has been disputed (Ignatieff 2004). However, it is evident that international human rights instruments either tacitly or explicitly rely on the right to resistance. The argument made by Honoré and Gwilym David Blunt applies equally in the case of human rights; if human rights are to be more than rhetoric, they must include the right to resistance. Moreover, the preamble to the Universal Declaration of Human Rights makes clear that states that do not respect human rights will be overthrown by their own people. The United Nations General Assembly and the Security Council have passed resolutions supporting anticolonial and antiapartheid movements on the grounds of protecting human rights. In more recent years, there has been a more explicit mention of the right to resistance in international agreements (Blunt 2019). For example, the African Charter of Human and Peoples' Rights includes the right of oppressed peoples to liberate themselves from domination (Murphy 2011). So there is at least an argument to be made that the right to resistance is an emerging part of human rights practice.

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Responsibility: Collective

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Introduction

When a person commits a crime, that person is or should be held responsible for it. This is a matter of personal responsibility. We may call it "individual responsibility" to emphasize that the offender is an individual rather than multiple people. In contrast to individual responsibility, we can define collective responsibility as that shared by more than one person or group of people. Two or more people, even many people or a group, are held responsible in cases of collective responsibility.

Collective responsibility is a controversial topic (Arendt 1987). Typical issues include whether German people who were not personally committed to the Nazi worldview that led to atrocities are also responsible for them and whether modern White Americans are responsible for the lingering effects of slavery. These examples puzzle us because they seem incompatible with our basic moral idea that no one is responsible for what he or she did not do.

Other issues concern whether moral blame can be assigned to companies and whether collective responsibility can be ascribed to mobs. These cases are also morally perplexing because they recognize the moral status of a group independent of its constitutive members. Collective moral responsibility clashes with an individualistic idea of morality, whereby only an individual human being has moral status.

Collective responsibility has attracted intense practical interest, mostly because the majority of events and accidents causing massive casualties, including several historical atrocities, were brought about not by individuals but by groups of people. Collective responsibility has also stimulated genuine theoretical interest, partly because it concerns several difficult questions in law and morality including the nature of responsibility and the character of groups (Bazargan-Forward & Tollefsen 2020; Bovens 1997; May & Hoffman 1991; Smiley 2017; Tollefsen 2015).

The Concept of Collective Responsibility

H. D. Lewis regards the notion of collective or group responsibility as "barbarous" (Lewis 1948). According to Lewis, one of our fundamental moral principles is that no one is responsible for the conduct of another, so "responsibility belongs essentially to the individual." Certainly, it does not seem morally acceptable to hold someone responsible for what they have not done. No one should be legally punished for another's criminal conduct. No one should be held liable simply for holding membership in a group that committed a crime when the individual has done nothing in relation to it. Collective responsibility is a dubious notion. However, before we simply conclude that this view is correct, we must investigate the idea of collective responsibility in more detail.

The concept of collective responsibility is extremely elusive. In his *Collective Responsibility*, one of the best-known articles on the subject, Joel Feinberg characterizes collective responsibility as one kind of "liability without contributory fault" (Feinberg 1970, 222). In standard cases of responsibility for harm, a person is responsible for a consequence only when he or she has made a substantial causal and culpable contribution to it. Feinberg notes some exceptions to standard cases, among which collective liability is listed with strict liability and vicarious liability. He defines collective liability as "the vicarious liability of an organized group (either a loosely organized, impermanent collection or a corporate institution) for the actions of its constituent members." In cases of collective responsibility, even those group members who made no contribution to the offense are also held to be at fault because other members did contribute to it.

To understand the concept of collective responsibility clearly, it is important to examine two concepts carefully: collectivity and responsibility (French 2020). In collective responsibility, the two concepts are closely interconnected, but they can and should be analyzed separately.

First, the concept of collectivity in collective responsibility should be clarified by referring to the dichotomy between an individual person and a group of people. When we hold an individual responsible, we call it "individual responsibility." When we hold a group of people responsible, we may call it "group responsibility." The debate over group responsibility concerns what types of groups of people can/should be held responsible and why. The controversies include the question of whether a mob can be morally responsible or whether a corporation can be a moral agent. This debate is usually conducted in terms of "agency," "status," or "personhood," although these notions are used in various ways. When we do not hold an entity responsible, we do not regard it as a member of a normative community. When we do not hold an animal morally responsible, we do not give it moral agency. This implies that collective moral responsibility is related to the question of whether a certain group of people can hold moral personhood.

Second, the concept of "responsibility" in collective responsibility should be clarified by distinguishing between many different meanings of responsibility. An important distinction is between action responsibility and attributive responsibility. When we hold a person responsible for a wrong action, it is action responsibility. Action responsibility is a very normal type of responsibility in our modern world, although other types of responsibility were widespread in the premodern ages. When we hold a person responsible based on attributes such as character, a trait, a relationship with a certain person, or membership of a certain group, it is attributive responsibility. Whereas action responsibility focuses on what a person did, attributive responsibility concerns how the person was. Another important distinction about responsibility is about types of norms. It is generally important to keep in mind the difference between moral responsibility and legal responsibility when we discuss collective responsibility. We should add other types of responsibility relating to norms such as political, religious, civil, criminal, and metaphysical responsibility.

Because the concept of collective responsibility includes the two dimensions of collectivity and responsibility, it is important to distinguish between group responsibility and attributive responsibility. Whereas group responsibility is contrasted with individual responsibility, attributive responsibility is the converse of action responsibility. The former concept, group responsibility, concerns the question of whether only an individual person is held responsible, in other words, whether a collective entity can be held responsible independent of its constitutive members' responsibility. The latter concept, attributive responsibility, concerns the question of the conditions under which a person is held responsible, in other words, whether the person can be held responsible for wrongdoing just because the person belongs to a group whose other members are causally responsible for it even when that person is not. Let us see collective responsibility as group responsibility and collective responsibility as attributive responsibility.

Collective Responsibility as Group Responsibility

Defenders of group responsibility have put forth the view that a group of individuals can be responsible for their own actions independent of its constituents (Cooper 1968, Pettit 2007). This implies that in addition to a governor's and/or citizen's responsibility, even the state is morally responsible for its actions. It is widely accepted that legal responsibility, at least, can be ascribed to groups: Companies are held legally liable for actions performed in their names. It is controversial whether moral responsibility, like legal responsibility, can be attributed in this way (Orts & Smith 2017, Pfeiffer 1995). Relatedly, it is also sometimes debated whether all legal – including criminal – responsibility can be ascribed to groups.

Critics of group responsibility deny that a group is an appropriate agent of responsibility (Hasnas 2017). They claim that responsibility can be ascribed only to an individual person and not to groups. This claim implies that group responsibility is really nothing more than bundles of individual responsibility. Group responsibility is just shorthand for the various responsibilities of its members. According to this denial argument, group responsibility is not a correct notion but only a metaphorical expression.

The logical structure of their argument can be analyzed as follows:

CR1 An entity acts against a normative rule only if it has a normative status as an agent
CR2 An entity acts against a normative rule only if it has its own intention, independent of that of its members
CR3 An entity itself can be held responsible only if it acts against a normative rule with the capacities of understanding and control
CR4 A collective is not an agent
CR5 A collective lacks an intention of its own independent of that of its members
CR6 A collective lacks the capacities for understanding and control
CR7 Therefore, a collective itself cannot be held responsible

"An entity" here may be an individual or a collective, whether a conglomerate or a group; "a normative rule" can be a social, moral, religious, legal, or political rule. CR1–CR3 are presuppositions on necessary conditions for collective responsibility as a group responsibility. According to CR1, a flower does not act against moral rules because it is not a moral agent. CR2 relies on a convincing thesis that an entity's actions begin with its own intention. An entity that lacks intention cannot act even though it can be a link in a causal chain. CR3 is based on a widely accepted claim that people can be held legally responsible only if they act against a legal rule and have the capacities of understanding and control required for legal responsibility. The capacities of understanding and control are often elaborated on in relation to the idea of "moderate reason–responsiveness" (Fischer and Ravizza 1998). Responsible agents must be responsive to reasons in a relevant way. CR4–CR6 are claims concerning the characteristics of a collective. Defenders of group responsibility must show that some of its premises CR1–CR6 are false to deny conclusion CR7.

All agree that for some collections of individuals, CR5 holds true. For example, a collection of individuals born on the same date does not have intentions of its own; nor does a mob in an area. Those collections are called "aggregates" (French 1984; Corlett 2001) or "coalitions" (Collins 2019). The question is whether a "conglomerate" (French 1984) or a "collective" (Collins 2019) has intentions of its own and under what conditions.

Peter A. French argues for group moral responsibility. To be ascribed responsibility, the group must have intentionality. A group of people has intentionality when it has a decision-making procedure or what French calls a "Corporation's Internal Decision Structure" (a CID structure). According to French, the CID structure has two elements: (1) an organizational or responsibility flow chart that delineates stations and levels within the corporate power structure and (2) corporate decision recognition rules. The CID structure integrates the intentions and actions of its members into a group decision. Because we can identify the intentionality of a group of people through the CID structure, we may ascribe moral responsibility to it (French 1979, 1984).

Christian List and Philip Pettit also support the notion of group moral responsibility by elucidating the reasoning structure of group agents (List and Pettit 2011). They argue that a "group agent" is a group that exhibits the three features of agency – representation, motivation, and action – and that a group agent is fit to be held responsible if it faces a normatively significant choice, understands the evidence necessary to make normative judgments, and has the control required to choose among the options.

Supporters of collective responsibility sometimes cite Michael Bratman's planning theory of intentionality (Bratman 1987). Opposing the Humean tradition of explaining an action based on desires and beliefs, Bratman stresses the role of

a plan guiding and controlling an action (Bratman 1983). Based on his planning theory of shared intentionality (Bratman 2014), Bratman argues for collective intentionality and explains it by saying that "the functioning of procedure-based group intentions can draw substantially from a web of dispersed beliefs and plans of individuals or sub-groups" (Bratman 2017, 47). In this form, a collective can have an intention of its own.

It is important to note that there is a gap between proposition CR7 and a similar but different proposition that a collective itself may (or must) not be held responsible. Even when supporters of collective responsibility successfully show, by rebutting CR2, that a collective has an intention of its own and argue that a collective itself can be held responsible, it does not necessarily follow that the collective may or must be held responsible. We can distinguish between moral agency and moral responsibility. The moral agency of a collective refers to the question of whether a collective has an intention of its own and can then be a moral agent. The moral responsibility of a collective is related to a different question concerning whether a collective is an appropriate agent to be held responsible. Even when we recognize that a firm has an intention that is independent of its members and acts on its own intention, we still need to examine carefully whether we should hold a firm morally responsible for its activity. We may well have good reasons not to hold a firm morally responsible, putting aside legal liability.

David Miller distinguishes between state and national responsibility and only endorses the latter (Miller 2007). However, if we follow French's argument, no responsibility can be attributed to a nation because it lacks a proper internal decision-making procedure. Only a state that has an organized governmental structure can be held responsible because it has an internal decision structure.

Karl Jaspers made an influential distinction between political and moral guilt, claiming that political guilt can be collective but moral guilt cannot (Jaspers 1946). Political guilt implies that the nation should bear the consequences of its own political decisions and actions, whereas moral guilt means that a person as an individual is held responsible for actions even when simply following military orders. It follows from Jaspers's characterization that the Germans as a nation were not morally guilty of the Nazi atrocities because moral guilt can be attributed only to an individual person, not a group of people. Only the individual Germans who contributed to the Nazi crimes were morally guilty. French would agree with Jaspers because the Germans as a nation do not have any decision-making procedure. Although a state as a political organization has a decision-making procedure, a nation as a group of people lacks it.

Larry May has attempted to expand the notion of group responsibility (May 1987; May 1992; May 1996). May maintains that "collective moral responsibility is, in a sense, the appropriate category to apply to mobs" (May 1987, 83). This is partly because members of mobs should not be held individually responsible for the harm caused by the mobs. French does not agree with May because mobs lack a decision-making structure. The debate between them deals with the decision-making procedures necessary for the ascription of moral responsibility.

Collective Responsibility as Attributive Responsibility

The defenders of attributive responsibility claim that an individual can be responsible not only for his or her actions but also for his attributions: A person can be responsible for things that other members of his or her group have done even when that person never contributed to it. Attributive responsibility is the responsibility that a person has because of what he/she is and not what he/she did. Thus, people should be responsible for their community's wrongdoing because they belong to the community cf. Stilz 2011, Lawfird-Smith 2017. Attributive responsibility stands in contrast to action responsibility. Action responsibility is the responsibility that a person should bear because of what he/she did. The defenders of the concept of action responsibility deny attributive responsibility because it contradicts the principle

of personal autonomy. Responsibility without action deprives people of their liberty.

H. L. A. Hart famously made a distinction among different senses of responsibility: role responsibility, causal responsibility, liability responsibility, and capacity responsibility (Hart 2008, 212). In light of this distinction, the defenders of action responsibility claim that a person has liability responsibility for something only if he/she has causal responsibility for it. However, defenders of attributive responsibility deny this. They hold that a person has liability responsibility for something if he/she has role responsibility for it: Parents are liable for their children's actions because they are their parents.

Despite the influence of Hart's distinction, a basic distinction lies between retrospective and prospective responsibility. Retrospective responsibility is at issue when we discuss blame, punishment, praise, and reward after bad or good events. We investigate who should be ascribed causal and moral responsibility for the events. Prospective responsibility is at issue when we discuss who should be in charge of a certain matter before adverse events. We consider whose duty or obligation it was when such events had not yet occurred. Both collective retrospective responsibility and collective prospective responsibility have been debated. The question of whether even developing countries have an obligation to tackle global warming concerns the latter. More discussions have taken place on the former.

Jaspers's distinction between political and moral guilt is relevant here. Political guilt includes the consequences of political decisions and actions that affect people who had nothing to do with them, such as immigrants and young people. However, they do not incur any moral guilt for the decisions and actions. This distinction echoes in the dichotomy between guilt (*Schuld*) and responsibility (*Haftung*) in former German President Richard von Weizsäcker's well-known speech. He holds that guilt is not collective but individual and that all Germans, whether guilty or not, take responsibility for the past (von Weizsäcker 1985).

To understand this distinction, it is useful to introduce the distinction between direct and indirect responsibility. Direct responsibility makes sense only in a direct relationship between offenders and victims. It is pointless for a third party to apologize to the victims because an apology is a type of direct responsibility. Indirect responsibility makes sense even outside the direct relationship. Financial support provided to victims by a charity group assists in relieving financial damage even when the group had no responsibility for the damage at all. This shows that compensation is a kind of indirect responsibility. It remains to be resolved what kinds of responsibility (such as blame, apology, punishment, or compensation) are direct or indirect.

This debate is related to the controversy between individualism and collectivism, or more recently, between liberalism and communitarianism. In other words, it concerns the fundamental question of how we should exercise personal autonomy.

Conclusion

Major actions are often taken not by an individual but by a group of people, so we must face the problem of collective responsibility. However, collective responsibility is an elusive notion, and it may contradict other moral notions. We must investigate the notion of collective responsibility with deliberation and harmonize it with other moral ideas.

Cross-References

► Claim Rights (Subjective Rights)
► National Identity
► Responsibility: Global

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Responsibility: Global

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Introduction

Global responsibility concerns multiple intersecting social challenges that transgress state boundaries, such as climate change and environmental destruction, severe poverty, threats to global health, sweatshop labor, and extreme economic inequalities. In order to address such problems, governments, firms, NGOs, individual citizens, and consumers must cooperate across political boundaries. That these agents bear a morally grounded responsibility to do so is not yet unanimously acknowledged. Even more controversial is the exact content and weight of global responsibility, compared to moral relations between members of smaller social units such as the family or nation state.

This article gives an overview of debates on global responsibility within the field of practical philosophy. It starts with a conceptual outline of what it means to say that agents bear global

responsibility (see section "Conceptual Clarifications: What Is Global Responsibility?"). It then turns to the central notion of a responsibility to reform institutions and social structures, which complements interpersonal responsibility within these structures (section "Interpersonal and Political Responsibility"). The entry then outlines different positions in the global justice debate concerning the grounds and weight of global responsibility (see section "Grounds of Global Responsibility"). After that, a range of views on the principles (section "Principles of Global Responsibility") and the objects (section "Objects of Global Responsibility") of global responsibility are discussed. In the final step, the entry discusses the relation of individual, collective, and shared responsibility (section "Subjects of Global Responsibility").

Conceptual Clarifications: What Is Global Responsibility?

In the following, the term "global responsibility" will be understood in a spatial sense. That is, it will refer to morally grounded responsibility that is not restricted to geographical or social contexts smaller than the globe. Global responsibility in this sense is principally different from responsibility in a personally inclusive sense (i.e., *every* individual has a responsibility for x), although the two can intersect depending on which moral grounds are asserted for them (see section "Grounds of Global Responsibility") Global responsibility in the spatial sense is also principally different from, but interrelated with, responsibility to future generations.

The assertion that individual and collective agents have global responsibility is in tension with *ordinary moral thought*, which is a set of socially predominant abstract rules that inform or influence many ordinary moral judgments. Contemporary ordinary moral thought features two core normative assumptions which together yield a "restrictive" view on the scope of morality (see Scheffler 2001, p. 37). The first assumption concerns the weight of *general obligations* (what is owed to all human beings) and postulates that actively harming others (a violation of a "negative obligation") is more serious than failing to help others (a violation of "positive obligations") (ibid., p. 36). The second assumption emphasizes the importance of *special obligations* "toward members of one's family and others to whom one stands in certain significant sorts of relationships" (ibid.). Taken together, these assumptions limit what people owe to others with whom they have no special relationships.

It might be argued that global responsibility toward disadvantaged individuals who are neither family members nor fellow citizens is weak, because it rests on weak general positive obligations, as opposed to strong negative obligations and special responsibilities. However, such reasoning is vulnerable to two different kinds of criticism. First even if the normative principles of ordinary moral thought were valid, our world is currently shaped by dense transnational relations in the economic, ecological, and political spheres which arguably generate special obligations of transnational scope (see section "Grounds of Global Responsibility"). Second, the validity of the underlying principles of ordinary moral thought has been questioned at least since Singer's early argument in favor of strong positive general obligations toward the global poor (Singer 1972; see also the contributions in Chatterjee 2004). Both criticisms point to the need for more fine-grained arguments in order to determine the objects, content, grounds, and relative weight of global responsibility (see sections "Interpersonal and Political Responsibility", "Grounds of Global Responsibility", and "Principles of Global Responsibility").

Interpersonal and Political Responsibility

Globalization necessitates conceptualizing responsibility beyond the interpersonal dimension that remains the paradigm of contemporary ordinary moral thought. Ignoring the role of social structures is an expression of an influential, yet problematic ideology that explains social problems such as

homelessness and poverty (see Young 2011, Chapter 2), or even global warming in personal terms. Reducing such problems to the level of individual contributions ignores the fact that individuals are engrained in and causally constrained by a web of powerful social structures. Even in the academic philosophical debate, responsibility to address poverty has long been discussed in terms of *interpersonal responsibility*. The paradigmatic example is the discussion of moral obligations to the global poor as analogous to those of a passer-by who ought to rescue a drowning child in a pond (see Singer 1972). However, moral and political philosophers now increasingly acknowledge the need to focus on a shared and genuinely *political responsibility* to reform social institutions and structures as a complement to personal and interpersonal responsibility (see Young 2011; Beck 2016, Chapter 4).

Three reasons speak in favor of such a shift. Each was emphasized by John Rawls (1971, 1993, 2001), although his theory rests largely on a counterfactual characterization of a "well-ordered" and "self-sufficient" society (for criticism see Beitz 1979), and is therefore of limited value when it comes to justifying justice demands in a highly interdependent world. The first reason is that social institutions have a considerable and often overlooked influence on the formation of social identities and on the welfare chances of individuals (see also Scheffler 2010, p. 132; Beck 2016, p. 100f.). Second, social institutions and informal structures shape interpersonal conduct such that evaluations of institutional and structural arrangements and of personal and interpersonal behavior are both irreducible and interdependent (see also ibid., pp. 101–104; Young 2011, p. 26). Third, social institutions can help coordinate the behavior of agents and may therefore be helpful for achieving a fair division of labor in an ideal scenario; in a nonideal scenario, the creation and reform of institutions can help us address social failings that involve coordination problems, including global poverty, trade injustice, global health threats such as pandemics, climate change, and other environmental injustices (Beck 2016, pp. 105f.).

Grounds of Global Responsibility

If global responsibility is mostly a responsibility to reform social institutions and structures within and across national boundaries, what are its *normative grounds*? The grounds used to justify global responsibility will determine its content. The debate on global justice has focused on two broad categories of grounds: *humanitarian demands*, which are rooted solely in the common humanity of subjects and beneficiaries of responsibility, and *justice demands*. There is an array of positions that differ in the way they conceptualize, substantiate, and interrelate these two categories. *Nonrelational positions* hold that responsibility for justice has an entirely general core in the form of the principle of universal respect. Accordingly, all humans have a responsibility of global scope to maintain or reform all social institutions so that they conform to the demands of justice (see Gosepath 2001; Buchanan 2004; Caney 2007; Nussbaum 2006). From this angle, existing practices and institutions play an essential role in the application of justice demands but not in their justification.

In contrast, *relational positions* hold that only special relationships *generate* demands of justice. The views in this group differ, however, in their evaluation of the economic, ecological, and political practices in smaller and larger political units. Most relational positions conclude that the global realm is a context of justice, although they vary in how they draw on different normative criteria, such as collective ownership of the earth's natural resources (Beitz 1979) common ownership of the atmosphere (Moellendorf 2011b), social cooperation (Beitz 1979), existence of a global institutional order (Pogge 2008), membership in an economic association (Moellendorf 2009), nondomination (Pettit 2016), and systemic coercion (Valentini 2011). In contrast, *statist* views constrain demands of distributive justice to single nation states. Thomas Nagel (2005), for example, argues that justice demands do not apply to the current network of institutions and relationships in the global context, because its members are not subjected to a coercive power which enforces positive law in their name. However, even Nagel

assumes that there are absolute demands of humanitarian morality owed to all humans, which are complementary to the demands of justice. On this view, the responsibility to fight global poverty is not a concern of justice, but of humanity. This way of complementing the two kinds of demands is typical for relational approaches, be they statist or relational cosmopolitan. The latter typically hold that (some) relational justice demands are global in scope, as are nonrelational humanitarian demands (see the contributions in Brock 2013 for different versions of cosmopolitanism and noncosmopolitanism). *Pluralist internationalist views* combine justifications found in nonrelational and relational views by proposing that there are plural grounds of justice, of relational and nonrelational kinds. This gives rise to contextually different principles of justice, some of which solely apply to states whilst others apply across political boundaries (e.g., Risse 2012).

There is thus a broad theoretical consensus on the global scope of responsibility, although theorists disagree on whether it is rooted in the demands of humanity, justice, or both. The differences between these approaches still matter, of course. While nonrelational views risk blurring the line between grounds of justice and humanitarianism, statist positions are standardly accused of unduly limiting the scope of economic justice. If global economic and ecological interdependencies are such that measures designed to lift the globally least well-off are required by justice, then a purely humanitarian framing is conceptually inadequate. Furthermore, if global responsibility is required by justice, not merely by humanitarian concerns, then its demands are more stringent.

Principles of Global Responsibility

Different grounds yield different *principles*. There is a spectrum of proposed principles that could be used to concretize global responsibility, which differ in their metric and function (Beck 2019b). The *metric* of a principle determines which material or immaterial goods are to be counted and how human wellbeing is to be measured in a given context. Social and political rights, liberties and primary goods (e.g., Rawls 2001), sets of capabilities (Nussbaum 2006), resources, opportunities for welfare, and emission rights (e.g., Caney 2012; Moellendorf 2011b) are among the proposed elements that may constitute the metric. The *function*, on the other hand, determines how a given unit of measurement is to be distributed via institutional arrangements. Here, threshold (or "sufficientarian") standards, comparative standards, and combinations thereof have been defended and applied to social relations within states and globally (e.g., Beitz 1979). *Threshold standards* require that every member of a social context enjoys access to some minimum level of goods or wellbeing (e.g., Frankfurt 1997). In contrast, *comparative standards* limit the extent to which social and economic inequalities between the members of a social context are compatible with justice. Rawls's two principles of justice fit in this category (e.g., Rawls 2001), as do desert-based views or positions that advocate equal per capita emission shares (Vanderheiden 2009).

A number of thinkers have pointed to a problematic fixation on distribution in the debate on justice and equality. Examples are Iris Young's early critique of a "distributive paradigm" (Young 1990) and Rainer Forst's critique of a wrong "picture" of justice (Forst 2013, pp. 17–37), as well as defenses of the idea of "social equality" (or "relational equality") in the works of Elizabeth Anderson (1999), Samuel Scheffler (2010), and Jonathan Wolff, among others (see the contributions in Fourie et al. 2015). According to this group of thinkers, the demand for equal treatment does not merely require equal distributions, but the realization of egalitarian social relationships.

This overview shows that there is a spectrum of positions that differ on the grounds, scope, and content of demands of justice and humanity. Furthermore, philosophical theorizing on global justice has recently increased its focus on specific issues such as climate justice (e.g., Vanderheiden 2009; Caney 2012; Moellendorf 2011a, b), tax justice (Dietsch 2015), justice in financial markets (Herzog 2017) and trade justice (e.g., Risse and Wollner 2019). A comprehensive view of responsibility relations in the global context must take account of these issue areas.

However, despite profound philosophical disagreement, there is ample potential for pragmatic agreement. A standard of basic human rights, understood as comprising basic social rights, liberty rights, and political rights, is an apt choice for a justificatory pluralist account of global responsibility (see Beck 2016, Chapter VI). First, proponents of comparative egalitarian and of threshold standards of global justice can both subscribe to a set of basic human rights as minimal standards of global responsibility, but for different reasons. Second, although social egalitarians hold that questions of distribution are neither absolute nor fundamental when thinking about how to reduce injustice, they can agree that improving institutions in the global context with a standard of human rights provision would be an important step in the right direction. Third, even statists can agree on human rights standards as principles of global responsibility, although they would categorize them as humanitarian demands (e.g., Nagel 2005). Fourth, many normative theorists endorse the concept of human rights, although they disagree on what grounds them. There is a range of philosophical justifications of human rights, such as appeals to natural rights, anthropological features of human beings (Nussbaum 2006), utilitarian (Buchanan 2004, pp. 139–141), and constructivist justifications (see Forst 2013). Human rights are also culturally sensitive in that adherents of different comprehensive world views, including cultural and religious views, can agree on their validity in cross-cultural dialogue, although this requires the interpretive actualization of the views in question (see An'Naim 1992). Because of this plural justifiability, basic human rights are suitable consensual standards for the evaluation of social institutions in contexts characterized by irreducible value plurality, which is particularly true for the global context (Beck 2016, Chapter VI).

Objects of Global Responsibility

What does it mean that social institutions are the *objects* of global responsibility to implement human rights across state boundaries? Three social contexts are relevant: first and least controversially, the objects of responsibility are the domestic institutions of countries that display significant human rights deficits. Examining only the institutions of poor nations, however, would be "explanatory nationalism" (Pogge 2008, pp. 145ff.): neglecting external causes for failures in institutional human rights protection. The present system of international institutions constitutes the second context. Among these institutions are the World Trade Organization (WTO), the International Monetary Fund (IMF), and the United Nations (UN) system, including the World Health Organization (WHO), the World Bank, and the United Nations Framework Convention on Climate Change (UNFCCC). Rejecting explanatory nationalism should not lead to the opposite and equally one-sided view, "explanatory cosmopolitanism" (Patten 2005, p. 23). While international institutions undoubtedly represent important objects of global responsibility, focusing exclusively on them is insufficient. On a third level, the domestic institutions of wealthier countries must come into view because of the powerful economic and ecological *externalities* they create, for example in agricultural, financial and trade policy, and other areas (e.g., Barry and Øverland 2016, Part III).

Global heating poses a particularly grave challenge for the inhabitants of poorer and institutionally weaker countries, although they have historically contributed the least to greenhouse gas emissions. These countries face greater burdens in adapting to adverse conditions such as temperature increases, droughts, water shortages, wildfires, hazardous air quality, floods, and rising sea levels. Enabling sustainable development and fighting climate change are therefore closely related tasks (Moellendorf 2011a). Increased affordability of renewable energy means that eradicating poverty through the reform of social, political, and educational institutions is not only compatible with climate mitigation goals, but also crucially helps in efforts to adapt to and protect against climate change. Sustainable development also predictably leads to decreases in birth rates, as development economists have long pointed out (see Sen 1994). In any case, accepting global responsibility cannot be reduced to reforming social institutions in weaker states. Instead, an

integrated account of the objects of global responsibility is necessary, which holistically considers all three institutional contexts (see Beck 2016, Chapter VII).

Subjects of Global Responsibility

Seriously considering social institutions and structures as objects of global responsibility has substantial implications for the analysis of its *subjects*, that is, those who are responsible. While global responsibility is regularly treated in terms of what solitary agents owe the distant poor (paradigmatically in Singer 1972), ascribing structural responsibility requires a thorough examination of those subjects who are capable of contributing to institutional and structural change. Since such change presupposes effective collective action, group agents must be considered alongside individuals. *Group agents* (or "collectives") are different from mere collections of individuals (or "aggregates") in that they possess internal decision-making procedures that coordinate individual decisions and actions and translate them into collective ones (see French 1998). They thereby form genuinely collective attitudes that are representational (beliefs) and motivational (desires, preferences, and goals), and they can act on these (see List and Pettit 2011). Among the group agents that bear global responsibility are *governments*, but also *firms*, *nongovernmental organizations* (NGOs), and other associations. NGOs have become relevant under conditions of weak statehood, which is characteristic in the age of globalization. It is within nonideal theory (for this term, see already Rawls 1971) that firms, too, are treated as "moral agents," insofar as one can demand that they comply with moral norms specific to their sphere of agency. Under conditions of strong state agency, which includes effective regulations of economic agents, it would be problematic to demand that companies provide goods or services that are best provided or at least coordinated by the state in accordance with norms of democratic legitimacy. Under the present, highly nonideal circumstances, however, both firms and NGOs are subjects of global responsibility, which requires them to subordinate self-interested goals and contribute to the fulfillment of human rights and the protection of the environment in their spheres of action. Their responsible agency should contribute to the establishment of fairer background conditions and must not lead to the solidification of illegitimate political structures (see Beck 2016, Chapter VIII).

Including group agents does not exclude individuals as subjects of global responsibility. Individuals bear global responsibility as members of different groups (as citizens of a state, as employees or employers, and as members of organizations, etc.) and due to their capacity to externally influence the behavior of relevant group agents together with others. Individuals can denounce wrongful corporate actions and take part in consumer boycotts (see Beck 2019). They share responsibility to participate in demonstrations, sign and circulate petitions, hold politicians accountable, and vote for or against them in elections. They can also pool financial resources and support relevant NGOs (for example, those that effectively fight for climate justice or contribute to the eradication of poverty or fairer trade). Individuals must not content themselves with the existing range of group agents, as they can join forces and contribute to the constitutions of new collectives. The same is true for group agents, of course. The term "collectivization duty" has been coined for circumstances in which subjects can be said to have an obligation to found a new organization or transform an existing one (see Collins 2019, pp. 108–109; Beck 2016, Chapter VIII). Even those globally least well-off individuals who are victims of injustice in the domestic and global context are subjects of global responsibility (Young 2011). It is imperative not to neglect this function when assessing their interests, needs, and autonomous agency, although their debt with respect to fighting injustices is the smallest.

The content of political responsibility depends on a subject's exact social position and therefore cannot be determined with simple parameters, nor be reduced to financial contributions. In order to concretize the global responsibility of individuals, Iris Young's "parameters of reasoning" – power, privilege, interests, and collective capabilities – are helpful (Young 2011). However, these criteria must be further specified and complemented in a framework that places an emphasis on group agents as

genuine subjects of responsibility (Beck 2020). The responsibility of group agents also depends on their social position and sphere of influence, as outlined above. Responsibility that is directed at institutions and structures places higher cognitive demands on its subjects, compared to interpersonal moral principles or simple monetary guidelines that seek to quantify what individuals owe to the least-well off. That is because in order to assume global responsibility, its subjects must understand how they are entangled in structures that produce the injustices in question, and what they can do from their position. Therefore, contributing to better scientific knowledge about global injustices is a precondition for responsible agency, next to advocacy work promoting measures to improve the situation of the globally least well-off and protect the environment.

Conclusion

This overview explores debates in practical philosophy that are relevant for determining the content of global responsibility, including the controversies concerning its grounds, principles, issues, institutional objects, and subjects. Although many of these controversies will likely remain unresolved due to their normative nature, there is ample potential for an ecumenical consensus on a minimal conception of global responsibility for institutional human rights protection and for the protection of the environment. It is therefore unnecessary to defend a radical version of cosmopolitanism in order to yield a robust conception of global responsibility. Adherents of the latter must not deny the importance of smaller political boundaries. To the contrary, institutions and practices on the local, regional, national, and international level, each figure as interrelated objects of global responsibility. Global responsibility's subjects – individuals and groups agents such as governments, firms, and NGOs – must take responsibility by engaging in collective and joint action to reform these institutions in order to deal with challenges such as climate change, poverty, and economic inequalities. It may be regarded as a worrisome sign that many state governments have started to turn away from international cooperation and multilateralism, for dealing with said challenges requires more and better cooperation across state boundaries, not less. It is to be hoped that this trend will turn out to be a brief aberration, and that these governments' constituents will express more solidarity with the least well-off, hold their political representatives to account, and press them to take the urgently needed steps to address issues that are already shaping humanity's destiny.

Cross-References

- ▶ Capability
- ▶ Cosmopolitanism
- ▶ Equality and Global Justice
- ▶ Natural Resources
- ▶ Nussbaum, Martha
- ▶ Pettit, Philip
- ▶ Rawls, John
- ▶ Rights: Social Rights and Welfare
- ▶ Sen, Amartya
- ▶ Taxation
- ▶ Young, Iris Marion: Political Philosophy

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Retributive Justice

► Justice: Retributive

Rights in Recent Anglo-American Philosophy

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Introduction

Although the concept of rights is rather complex, there is considerable agreement about what

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might be included in a preliminary characterization. For example, there is widespread consensus that rights (understood as the normative capacity of persons to enter into certain ways of acting or of being treated) are things that (i) can be distributed, more or less equally, on an individual basis to each and all of those who are relevantly said to be rightholders. (ii) Most people think that rights are, in some sense, *justified*. But there is considerable controversy as to what, precisely, is the proper *focus* of justification. (iii) For a final example, the idea that rights always involve some sort of significant normative direction of the behavior of others (though it gives rise to important interpretive issues) would, as stated, appear to be almost universally agreed upon.

Concepts and Conceptions

The characterization of rights I offered above identifies three of the most important features of rights. This characterization, if spelled out more fully, would constitute the *concept* of rights. It is the organizing focal point common to competing conceptions of rights; this concept consists of elements that all of these conceptions (in the limiting case, everybody) would agree on. Our concern in this entry is with conceptions of rights within one the most important classes of rights: universal rights, in particular, human rights as moral rights, and constitutional rights insofar as these have normative foundations.

Interest in rights has undergone something of a revival since World War Two, especially in the years beginning in the late 1960s. In the time since then, there have been several crux disputes between conceptions of rights. Three of these stand out: (1) whether rights are best viewed as claims or as practices, (2) differing conceptions of the justification of rights, and (3) competing accounts of the main functions of rights (and of the closely related question of who – or what – can be rightholders). In this entry we will briefly look at each of these ways in which conceptions of rights have been organized and deployed.

Claims and Practices

Some say that rights are practices (certain ways of acting or of being treated) that are established, typically socially established. Thus, the issue for them is whether the *fact* of social recognition and enforcement is justified (or could be). Others say that rights themselves are justified principles or claims of some sort (whether the practice identified in any such principle or claim exists or not).

The problem we are examining arises, in part, because the procedure for deciding whether something is a right is not wholly settled. We find that the vocabulary of rights, in particular, of human rights, may actually be used at any of several steps: that of mere claim, that of entitlement (where the claim-to element is pretty well settled), that of fully validated claim (where we have the idea both of a justified claim *to* something and of a justified claim *against* someone for it), and, finally, that of satisfied or enforced claim (where the appropriate measures required to support or to fulfill the claim have been given effective embodiment as well). The presence of these possible stages has introduced a degree of ambiguity into assertions that a right exists. Accordingly, contemporary opinion varies significantly as to the point at which such assertions can most plausibly be thought to take hold.

For simplicity, the views here can be divided into two main camps: the view advanced most notably by Joel Feinberg (and most recently by Jesse Tomalty) that rights are justified or valid claims and the view (developed by Wayne Sumner, Gerald Gaus, and Derrick Darby among others) that rights, even human rights, are basically justified conventions for acting or being treated. The main case for each of these contrasting views will be laid out briefly.

The starting point to the view that rights are (valid) claims is the common opinion that to have a right is to have a justification for acting in a certain way or a justification for being treated in a certain way. Now, suppose that a candidate for rights status had all the rights-making features but one. Though accredited (in the sense of justified), it was not socially established; it lacked the *social* acceptance or the official recognition which it ought to have.

Why should the lack of such recognition deprive it of rights status? Clearly, if the rights-making features were modeled on what was justified (what was accredited in *that* sense), the thing was already a right even before it was recognized, even before it became a practice. And when it was recognized, it would be recognized *as a right* (as something that was fully justified) and would not simply *become* a right in being recognized. Many people, then, do regard justified claims as rights.

The opposing view is that rights are socially recognized practices or conventions suitably justified. This view rests on three main contentions.

The first contention is that the notions of authoritative recognition (if not explicit, then at least implicit, as evidenced by conduct) and of governmental promotion and maintenance (usually on a wide variety of occasions) are themselves part of the standard notion of a *legal* right, that is, when we are concerned with rights that are more than merely nominal ones. Arguably, then, legal rights cannot be satisfactorily accounted for under the heading of *mere* justified or valid claims. The next point put forward by the social recognition view is that where one alleged that moral rights or human rights are radically different from legal rights on the exact point at issue (that features of social recognition and maintenance are seemingly expected of active legal rights but not of moral rights), then it would prove difficult to hold onto the ideal that rights to identifiable ways of acting or of being treated should (a) provide significant normative direction to the conduct of people and should (b) provide some kind of guarantee to, some kind of protected enjoyment of, the benefits that can reasonably be expected to accrue to rightholders from these very ways of acting or of being treated. In sum, rights, as understood by the valid claims theorists, would not do some of the basic things that rights are ordinarily expected to do.

If the argument sketched so far is credited, then the view of rights as justified or valid claims (understood as a generic account of rights) does not provide an adequate *generalized* notion of rights, one that can comfortably include both legal rights and human or other moral rights. Thus, we must consider the contention that the notions of social recognition (of some appropriate sort) and of promotion and maintenance (usually on a wide variety of occasions) are themselves internal to the notion of any active right.

This raises the third main point urged by the social recognition view. Here the argument is that *all* moral rights, as accredited moral rights, can themselves be construed as involving established practices of (social) recognition and maintenance. Since human rights (as a special case of moral rights) are thought to be addressed to governments *in particular*, we must regard practices of governmental recognition and promotion as being one of the appropriate forms for such recognition and maintenance to take for these rights.

If one subscribes to the social recognition view, the conclusion one comes to can be put (least contentiously) as follows: a fully functioning or fully constituted human or constitutional right satisfies all of three crucial points – sound justification (including appropriate validation, if a constitutional right), effective recognition, maintenance by conforming conduct, and, where need be, enforcement by government.

There are, as we have seen, strong arguments for both of the main conceptions we have canvassed here. But the important point is that discussions about individual candidates for rights status, or about how best to shape specific rights, will feel the gravitational pull of each of these conceptions and will have to sustain themselves in the face of telling arguments from the perspective each conception provides.

The Justification of Rights

The question of how best to justify specific kinds of rights, in particular human rights and basic constitutional rights, has more and more come to be a focal point of dispute. Is there a substantive theory of critical morality that can do the job and do it well? I will confine the account here to a discussion of utilitarianism and its current critics.

One main concern that has surfaced is whether utilitarianism (one of the dominant ethical theories in the West today) is up to the task of

justification. Many people in the 1970s and 1980s (including John Rawls, Ronald Dworkin, and even thinkers broadly sympathetic to utilitarianism, like H.L.A. Hart or David Lyons) had concluded that utilitarianism was somehow incompatible with basic rights (human or constitutional) or at least with the priority habitually given to such rights.

The problem they saw was that no one can think that acting in accordance with any given right will on every occasion yield up a result that is compatible with the general happiness principle. Sometimes deviating from that policy will have the greater welfare value. And, given the general happiness principle itself – the principle that the greater or more general benefit should be preferred to the lesser and that, where it is feasible to adjust normative requirements on action to achieve a greater benefit, one should so act – it follows that such a deviation *should* be taken. Sometimes a right ought to yield to these considerations: it should do so when so doing holds the prospect of increased general well-being.

In an effort to deal with the problem these critics have identified, significant attempts have been made within utilitarianism (under the name of "rule" utilitarianism) to address and perhaps resolve it. This new version of utilitarianism shifts the focus of attention from Jeremy Bentham to J.S. Mill. Roughly, the theorists of rule utilitarianism assert that direct appeals to general welfare are self-defeating, all things considered, and that putting standing constraints on the principle – such as a system of moral rules (typically relatively simple and easily followable rules) or a coherent set of civil or constitutional rights justifiable by the standard of general happiness – in fact produces the greater well-being.

Rule utilitarians do not, however, assert that moral rules should never be overridden nor individual rights ever broached. Rather, on their view, where rules conflict or rights do (as they inevitably will, many have argued), some sort of appeal to the general happiness is in order.

Here is where the notion of *indirect* utilitarianism (a species of rule utilitarianism developed by David Lyons, John Gray, and others) comes crucially into play. Its advocates argue that the principle of general happiness should not *directly* determine what is to be done even here. Rather, the principle operates only indirectly in all such cases; it bears down, not on individual actions per se or even on individual rules *on the particular occasion in question* (an occasion of conflict of rules or of rights). Instead, the general welfare principle is used here merely to help contribute, in a continuing way, to an *ongoing* cumulative ranking of "the opposing obligations" so as to achieve a refined and resultant clear ranking of those obligations, for use on particular occasions of conflict (see Lyons 1994, p. 61). In indirect utilitarianism there is never a *direct* and determining appeal to the general happiness principle as to what to do, what act to perform, or what rule to follow, *on a particular and given occasion*.

On the indirect utilitarian account, then, it is possible to have policies for action (to have both moral rules and rights) that are justifiable by the standard of general welfare and at the same time to shield these policies from direct confrontation with (and possible overthrow by) the welfare principle on individual occasions. And it is possible to do so while still allowing these policies to remain sensitive to what produces the greater or more general benefit on given, individual occasions – a sensitivity that is registered in the differential weights assigned the various rights and policies, an assignment that occurs gradually (over time and with experience) and cumulatively. Thus, indirect utilitarianism (if all its arguments and presumptions are allowed) seemingly establishes that utilitarianism is compatible with human rights or basic constitutional rights and with the priority of such rights – at least in the case of those rights that are themselves justifiable in accordance with the general happiness principle. Certainly, it preserves the priority of such rights over against considerations of corporate good or of aggregate welfare that mark but a marginal increase in general welfare.

Let us turn now to some criticism. It will continue to be the case, even after granting everything said in favor of indirect utilitarianism, that considerations of greater welfare (including those that amount to nothing more than the increased well-being of some individuals at the expense of

others) can possibly and do in fact override basic civil rights on *given* occasions. Indirect utilitarians cannot really deny this. If they do, then the very jumping-off point of indirect utilitarianism would disappear along with the problem it was designed to solve. There would simply be no point to a strategy of shielding moral rules and human or constitutional rights from being overridden by corporate or aggregate political policies unless there were (or could be) occasions when such overriding policies would arguably be supported as preferable by *direct* reference to the standard of general happiness. Thus, indirect utilitarians are in effect forced to admit that social policies conducing to greater welfare could come to outrank and override such rights, within the utilitarian frame they have devised.

The heart of the problem here is that utilitarianism, like any other comprehensive and general theory, casts a wide net. Its determinations range not only over the tendencies of types of actions – the perspective for assessment probably preferred by most of the classic nineteenth-century utilitarians – or over the consequences of moral rules for conduct and, as well, of civil rights (conceived as politically universal ways of acting/being treated), the perspective favored by contemporary rule utilitarians. But utilitarian determinations do not stop with just these things; they also range over the consequences of states of character, of motives for acting, of other social institutions, and of non-rights political and social policies. And, last but not least, utilitarian determinations range over individual pieces of conduct (over *acts* on given occasions) – the perspective for assessment favored by contemporary act utilitarians and a perspective that came into prominence in the twentieth century, primarily under the influence of G. E. Moore (and of his teacher Henry Sidgwick).

None of the perspectives just named identifies *the* correct or criterial standpoint from which utilitarian assessment is to be made. There is no reason *within* utilitarianism, as a comprehensive and general critical moral theory based on a single foundational principle, to restrict its scope to individual *acts* or to *moral rules* and *basic rights* (even constitutional or human rights) or to give any of the perspectives just named an absolute or privileged status. Only one thing has that status in this theory: the master principle of general happiness itself (and, of course, whatever follows from that principle). That master principle, utilitarianism (if you will), does not reduce to any one of these perspectives of assessment; it embraces them all. But the possibility of these multiple perspectives for assessment within utilitarianism, all of them legitimate by the lights of that theory, introduces an irresolvable instability into utilitarianism. On a given occasion, any one of them *could* prevail as the platform for assessment.

It is this fact that caused concern among the critics of utilitarianism. It is this concern that led them to conclude that the general happiness principle, an aggregative principle, could not support the sort of radically distributive program associated with rights – could not support the assignment of constitutionally guaranteed benefits and protections – to each and every individual person in advance, so to speak, and across the board. It could not do so if, in effect, such rights tied the utilitarian politician's hands against allowing corporate or aggregate interests to override or supersede human or constitutional rights when, cumulatively and all things considered, those aggregate interests could be seen to conduce to greater benefit. Utilitarians of any stripe (regardless of whether they are act or rule utilitarians or something else) cannot allow for politically fundamental rights that have a built-in, standing, and overriding priority over considerations of corporate good or aggregate welfare. To this degree, then, philosophical utilitarianism, as commonly understood, is incompatible with the notion of basic rights (human or constitutional rights).

Thus, we find John Rawls saying, in the preface to the 1999 revised edition of his *Theory of Justice* (a book originally published in 1971), that he "wanted to work out a conception of justice that provides a reasonably systematic alternative to utilitarianism. He continues, by saying, "The primary reason for wanting to find such an alternative is the weakness. .. of utilitarian doctrine as a basis for the institutions of constitutional democracy. In particular, I do not believe that

utilitarianism can provide a satisfactory account of the basic rights and liberties of citizens as free and equal persons, a requirement of absolutely first importance for an account of democratic institutions."

Although Rawls intended his *Theory of Justice* to provide a "convincing account of basic rights and liberties, and of their priority," he admits he did not successfully achieve this objective until 10 or so years later. Accordingly, one would need to look at Rawls's 1982 Tanner Lectures as providing the best account of, and arguments for, his first principle of justice, the principle of equal basic liberties and rights. But I will not, for reasons of space, pursue this matter further.

Suffice it to say that differing views about the proper justification of basic rights have organized and regimented the debate about rights in the last 50 years or so. Some theorists have turned to classical natural law as a ground for justification (as have Randy Barnett and Robert Nozick and, before them, Hobbes or Locke). Yet others have turned for a justification of basic rights to notions of moral agency, typically either libertarian or Kantian in their formation (e.g., Charles Beitz or James Griffin). This is why I have included a section on the justification of rights in the present entry and have focused (as one of the most salient, significant, and controversial examples) on contemporary utilitarianism and its leading theorists.

The Function of Rights

Rights in the seventeenth and eighteenth centuries were largely discussed as if they were simply liberties and, hence, ways of acting on the part of the rightholder. Indeed, this tendency is deeply rooted in the tradition of rights discourse. It constitutes, nonetheless, a drastic oversimplification – even if the rights referred to are, as they often are, the classic rights of the eighteenth-century declarations. For these rights include important rights to ways of being treated, and such rights are *not* things the rightholder does or can do. Even so, the oversimplification continues to prevail in philosophical literature (as, e.g., in Hart 1973 and in the earlier writings of Rawls).

Rights have many functions. Two in particular have been emphasized in the contemporary literature: the conferring of choice or autonomy (on rightholders) and the protection of their interests, especially their basic interests. Now, it is clearly possible to have both important functions (the conferring of protected choice on rightholders and the protection of their interests) as functions of rights, often of a single right. Thus it seems arbitrary, where both functions are normally served by a great many rights, to single out just one of these functions (typically the function of conferring autonomy) and to give it *definitional* weight (as Sumner has done). Many discussions have, nonetheless, treated the choice/interest issue as if it were a crux issue, indeed, a deep dichotomy, within rights. Accordingly, I have included it in an entry devoted to competing conceptions of rights.

But this idea of a single duality, a fundamental bifurcation is, I think, another oversimplification. In line with the contemporary understanding of rights (as expressed, e.g., in the UN's Universal Declaration of Human Rights of 1948), it might be best to stress three main functions of rights. Thus, the central content of some rights will be a way of acting (e.g., a liberty of conduct of some sort). But at the core of other rights will be a way of being treated: a noninjury of some sort or, alternatively, the provision of a service.

Corresponding to each main heading or class of rights (as determined by these central cores), there is an appropriate or characteristic normative response enjoined for the conduct of others. But the essential character of this normative direction of the conduct of second parties shifts from main case to main case. Allowing or even encouraging a piece of conduct is what these parties are normatively directed to do in the case of a liberty; prohibiting their doing of an injury to the rightholder or requiring of them to provide a service, again to the rightholder, is the incumbent directive in the other two cases.

It is important to see too that choice, though a feature of many of these rights, is not a feature of all of them. For there is sometimes no choice available to the rightholder in the latter two cases mentioned above; the right not to be tortured

(a right to a noninjury) cannot be waived by the rightholder, and the service right to an education at public expense (or in some other suitable venue) is a right that the rightholders – so long as they are not above school leaving age – are *required* to exercise (required to avail themselves of). Similar points could be made about the interests of the rightholder. Thus, we have good reasons to accept the "Several Functions Theory" of rights, a view laid out by Leif Wenar, and to avoid what he calls "single-function theories."

Conclusion

For every right there are at least two parties: the rightholder and the person(s) whose conduct is normatively directed by that right. Rights will normally be located in any of three areas: rights can involve liberties of action (things the rightholder does or can do) or they can involve not being injured by the behavior of others or, alternatively, involve some form of aid or service from them. And corresponding to each main heading or class of rights (as determined by these central cores), there is an appropriate or characteristic normative response enjoined for the conduct of others. These normatively directed responses identify what is due the right (on the part of the second party) and what is owed to the rightholder.

Any given right, once we have located its core or main point, can be given a fairly determinate description, as to the right's object (what the right is to). Hohfeldian positions and associated elements can then be used to characterize the right, making its normative dimensions clearer and more precise.

Universal rights – including human rights (and civil and constitutional rights, insofar as these are normatively well based) – are distinctive elements within the domain of morality. However rights are construed, whether as protected choices or as protected interests or both, rightholders can reasonably perceive such universal rights to be part of the "good" of each person or instrumental to it. Such rights can be justified by a variety of accredited moral theories. These rights are high-priority norms, setting standards that should prevail, in the normal case, over nonrights considerations, such as aggregate or corporate interests, and over rights of lesser weight. The rights emphasized in this entry have proven historically to be significant in social practice and as grounds for the criticism and reform of such practices. Rights are valuable things.

Cross-References

- ▶ Claim Rights (Subjective Rights)
- ▶ Hohfeld, Wesley Newcomb: Fundamental Legal Conceptions
- ▶ Rights: And Collective Goods
- ▶ Rights: General
- ▶ Rights: Legal and Moral
- ▶ Rights: Social Rights

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Rights: And Collective Goods

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Introduction

Rights are often related to individual goods. Dworkin's famous metaphor of rights as "trumps" serves to explain that a genuine right is featured as a right that "trumps over some background justification for political decisions that states a goal for the community as a whole" (Dworkin 1984: 153). However, in every society rights can be also related in some ways to collective or public goods, thereby creating special relations of coexistence and conflict. This kind of relation creates normative problems, for every relation between rights and collective goods concerns decisions on how the structure of the state and of markets should be defined. As a result, collective goods,

also called public goods, are considered a key issue for welfare economics, social policy, political philosophy, developmental ethics, and legal philosophy, to the extent that different normative conceptions of justice would lead to different points of view concerning this class of goods, as well as different relations between rights and collective goods. For this reason, a concept of collective goods will be presented in the first section, while in the second section, a brief sketch on the relation between this type of goods and rights in legal philosophy will be introduced. Finally, in the third section, I will give a proposal to strike a proper balance between rights and collective goods by means of proportionality.

The Concept of Collective Goods

In order to better understand the relation between rights and collective goods, we must consider first the concept of collective goods. "Collective goods" is a concept that belonged in its origins to political economy. Hence, the proper place to start is with the economist's idea of collective goods. This concept was used for the first time by Paul Samuelson in 1954 (Samuelson 1954) to refer to those classes of goods that markets will never deliver, namely, so-called public goods. These goods exhibit two characteristics: they are non-excludable and non-rivalrous in consumption. These characteristics need to be explained.

The "non-excludability" characteristic of a good means that it is impossible to exclude any individuals from consuming the good, while the "non-rivalrous factor of consumption" means that the marginal cost of an additional person consuming this good, once it has been produced, is zero. There are typical examples of public goods, such as national defense, clean air and water, streetlights, and public safety. In the case of these examples, you cannot exclude any individual from the benefits of using this good, and the cost of providing another individual with this good is zero. Not every public good, however, can fully conform to these properties, but only to some extent. The definition of public goods is "highly restrictive, and it is not surprising that the modern theory of public goods has been criticized on this basis" (Buchanan 1999: 48). For this reason, this class of goods can be considered pure and impure. Impure goods have some of the characteristics of a pure public good but are not entirely non-rivalrous or non-excludable; in other words, these goods conform to the two characteristics of public goods to some extent, but not fully.

The characteristics of public goods are not unproblematic. The first problem is related to the free rider problem, while the second problem is related to externalities. Regarding the free rider problem, there will always be a temptation on the part of the consumer to avoid paying the cost of the provision of goods while enjoying its benefits. In accordance with externalities, many public goods will create benefits and losses to others who were not taken into account by those who produced the goods. Therefore, it can be concluded that "the indivisibility and publicness of certain essential goods, and the externalities and temptations to which they give rise, necessitate collective agreements organized and enforced by the state" (Rawls 2005: 268).

Based on this consideration, collective or public goods can be defined as those goods that every individual can enjoy without diminishing the consumption of other individual, while it is also impossible to exclude any other individual from consuming them. Once this definition has been established, problems arise if we consider that the provision of this kind of goods implies state intervention, insofar as a state is an organization that necessarily provides public or collective goods to its members, the citizens (Olson 1971: 15). Such problems of political authority affect the relation between public goods and individual rights. This issue will be addressed in the next section.

The Relation between Collective Goods and Rights

In contemporary legal and political philosophy, the priority of the right over the good has implications on the hierarchy of rights and collective

goals or goods due to the fact that these goods might well threaten to undermine individual rights or even override them. Balancing rights with collective goods has proved to be difficult, for, as Dworkin argues, rights ought to trump over ordinary considerations of policy that state a goal for the community. The actual liberal and legal conception of a justified state is based on specific considerations concerning the priority of the individual, and, therefore, it seeks to provide the individual with strong legal safeguards. Both legal academics and philosophers of a liberal persuasion, as well as some conservative writers in economics, subscribe to the view that individuals ought to be protected from those who determine public policies or, in fact, illegitimate state-sanctioned violence.

The normative priority of individual rights and thus a neutral realm that does not presuppose any conception of the good life has not escaped criticism. Academic communitarians like Charles Taylor and Michael J. Sandel have criticized the foundations of methodological individualism that underlie this priority. According to them, there is indeed a core of shared norms, values, and irreducibly social goods that impose normative constraints on individual rights and particular conceptions of the good life (Taylor 1995). For communitarians, collective goals are not always a threat to individual rights. This criticism of individual rights, however, could fall into some form of moral or cultural relativism, for neither gives sufficient weight to individual rights nor provides criteria as to how a balance between collective goals and rights ought to be worked out within an institutional framework.

Mattias Kumm has stressed that for political liberalism it is believed that rights enjoy priority in relation to perfectionist ideals, collective goods, and consequentialist reasoning. In other words, the liberal tradition of human rights must embrace anti-perfectionist, anti-collectivist, and anti-consequentialist ideas in order to protect individual rights from these threats (Kumm 2007). Here the anti-collectivist approach is of special importance, for it holds that rights have priority over collective goods. One might be tempted to think that respect accorded to rights implies that policy goals or collective goods cannot compete with them in any case. Whether or not one agrees on the importance given by political liberalism to individual rights, it is a fact that collective goods cannot override rights of whatever kind for merely utilitarian or consequentialist reasons. If this is indeed correct, then collective goods cannot defeat the validity of individual rights in any case, for they are found at different levels, that is, individual rights are not reducible to collective goods. If, however, collective goods are important within an institutional framework, then it ought to be possible to arrive at a manner of balancing of this relation, without departing from the basic commitment to rights. Addressing this possibility is the next step.

On Balancing Rights and Collective Goods

Robert Alexy claims that the account of the conceptual relation between rights and collective goods can be described in four main theses. The first thesis, the means-ends relation I, states that all individual rights are exclusively means for collective goods; the second thesis, the means-ends relation II, states that all collective goods are exclusively means for individual rights; the third thesis, the identity relation, states that all collective goods are identical with situations in which individual rights exist and are realized; and finally, the fourth thesis, the independence relation, states that between individual rights and collective goods, there is neither means-ends relation nor identity relations (Alexy 1995: 243).

It is easy to see that while some public goods can reasonably be considered genuine objects of individual rights, it is not possible to reduce, in the first place, all individual rights to collective goods or to reduce, in the second place, all collective goods to human rights or simply to declare, in the third place, a mere identity between them. Some individual rights and also some collective goods are irreducible. For that very reason, there must be a way to strike a balance between these kinds of goods and these kinds of juridico-normative

positions. Proportionality analysis is best suited for this task.

Establishing an adequate relation between rights and collective goods is possible only if rights are understood as non-definitive norms that lend themselves to balancing. Proportionality, the key concept in Alexy's principles theory (Alexy 2002), requires a distinction between two types of norm: absolute or definitive rules and relative or non-definitive principles. Unlike rules that are invalidated when an exemption clause is introduced, principles require that a certain goal be optimized, and they therefore lend to the consideration of the dimension of weight, based on both legal and factual issues.

It is not necessary to develop the entire principles theory here. It suffices to say that balancing, while it does not presuppose any collectivist idea, is in its ideal dimension a method for the application of rights understood as non-definitive principles. Balancing presupposes that not every right will have the same weight in every situation. Furthermore, this method provides a normative resolution to the problem in striking a proper balance between rights and collective goods – and this is due to its prima facie claim to take individuals seriously (Alexy 1995: 260), rather than to pursue a purely individualist approach to rights. While it has been argued that individuals' claims as a matter of right to certain public goods can be valid under special circumstances, as Denise Réaume has pointed out (Réaume 1988), principles theory offers a prima facie precedence in favor of individual rights and against collective goods or policies. This can be expressed by a rule that states: the greater the degree of the non-satisfaction of an individual's right, the greater must be the importance of giving special reasons for according priority to collective goods. This means that in balancing individual rights and collective goods, the basic commitment to political liberalism must be taken seriously by insisting on reasons of "special strength" (Kumm 2007) whenever rights are weighed against goods of this kind.

If these arguments are correct, then rights as a whole and collective goods can coexist within legal orders, and they can even serve as a complement to promote basic liberties and improve the lives of individuals by expanding a far more complex set of legal norms. This is not to say that they will be able to coexist peacefully in every situation. In some situations, rights and collective goods may protect the same shared interests, values, or social goals, but there are others in which balancing proves to be necessary, for it is unavoidable that "[l]egal material touches on collective goals and goods in a way that allows questions bearing on the concrete form of life to arise, if not questions of shared identity as well" (Habermas 1998: 154). As a result, the claim to take rights seriously alongside the consideration of the importance of fulfilling collective goods is a rational undertaking, and it also poses a genuine question as to what really matters for any given theory of rights and justice.

Conclusion

The priority of rights over collective goods must mean, on the one hand, that authorities ought not to override them without adducing special reasons. On the other hand, however, it would be a mistake to think that collective goods are not an essential part of the law. In fact, rights and goods can coexist, and when conflicts between them arise, they can be balanced in any legal system. Collective goods can yield to rights in some situations, but this requires proper analysis, taking into account the normative status of rights.

Still other issues concerning the relation between rights and collective goods will arise within the global context. In the last decades, economics has introduced the concept of "global public goods," namely, public goods that possess the same characteristics of other public goods but tend toward universality, which is to say that their benefits extend to all countries, people, and generations (Kaul et al. 1999). These goods can be listed as "global natural commons," "global human-made commons," and "global policy outcomes or conditions." With respect to global public goods, balancing should also be considered, for some of their implications may have legal and moral import for international law and global justice owing to the nature of these global goods. This is another reason for considering the importance of collective goods without compromising,

let alone renouncing, the basic commitments of political liberalism.

Cross-References

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- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Law and Economics: Methods of
- ▶ Proportionality: Measuring Impacts on Fundamental Rights

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Rights: Animal

▶ Animal Rights

Rights: Claim Rights

▶ Claim Rights (Subjective Rights)

Rights: Cultural

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Introduction

Cultural rights continuously attract much interest in political, anthropological, and legal theory, particularly within the ongoing debates on the protection of cultural peculiarities of groups, communities, minorities, and indigenous peoples vis-à-vis existing human rights legal frameworks (Vrdoljak 2013). However, since there are no commonly accepted notions of "culture" and "cultural rights," the legal conceptualization of these terms is characterized by a number of theoretical indeterminacies and difficulties of rhetoric. Although current political and social studies accept the modern anthropological notion of "culture" as "a process, developing and changing through actions and struggles over meaning, rather than as a static shared system of beliefs and values" (Merry 2001: 39), the law usually refers to certain, specific, and narrowly identified aspects of culture or its specific manifestations and practices (e.g., creativity, linguistic diversity, etc.). On the other hand, the theory and practice of human rights law increasingly tends to offer a wider, "holistic" vision of cultural rights as the "right to culture," enjoyed by individuals, groups, and communities, and encompassing the diversity of ways of life and visions of the world, and matters of identity (see Wiesand et al. 2016). Yet, such a broad understanding of cultural rights

is burdened with a number of theoretical and practical challenges.

Cultural Rights, Cultural Identity, and Cultural Pluralism

The first dimension in which cultural rights are usually framed is one rooted in the traditional, European vision of human rights as those vested to individuals, opposed to state power, and creating one person's sphere of freedom secured by the law. In such a guise, cultural rights belong to individuals capable of exercising agency within a given legal environment. Cultural rights may consider a variety of rights with an explicit reference to culture (in particular, the right of everyone to take part in cultural life, access to cultural heritage), and rights directly linked to culture (such as the freedom of expression), and other human rights in their cultural dimension, protected under constitutional frameworks around the world, and enshrined in the vast international human rights law instrumentarium. Cultural rights of individuals are operated vis-à-vis other legitimate and protected interests and rights. Their realization might be thus limited by necessary measures undertaken to achieve an objective of general interest, such as the preservation of the natural environment, for the sake of public order, safety, morality, or to protect the rights and freedoms of others. For instance, the European Court of Human Rights (ECtHR), in cases involving creativity and freedom of expression, has often underlined that artists and those who promoted their work are not immune from certain justified limitations, including the protection of national cultural heritage.

The identarian dimension lies in the core of cultural rights since cultural identity shapes a "self" of every human being (cfr Donders 2002: 33–36). Indeed, cultural rights are often seen as predicated on the identarian distinctiveness or diversity – features inherent to all people. Hence the recognition and realization of cultural rights in their diversity can be perceived as a way of managing differences between various members of society in respect of their human dignity. In this regard, equality and nondiscrimination may also mean different treatment in a given cultural context.

Such conceptualization is deeply rooted in the theories of multiculturalism and cultural pluralism primarily developing in North American political philosophy and anthropology since the 1980s. Accordingly to them, multiculturalism in a liberal, democratic society "requires a political society to recognize the equal standing of all the stable and viable cultural communities existing in that society" (Raz 1994: 174). In other words, a high degree of pluralistic voices and distinct cultural claims should be not only tolerated but also to some extent accommodated and reconciled. Seen through such a lens, the protection of culture has been translated into special representation rights for "national minorities" and indigenous peoples within already-functioning legislative institutions (Kymlicka 1995). Hence, the use of the term "cultural rights" denotes various policies aimed at accommodating ethno-cultural pluralism (Levy 1997). This may include the concept of cultural defense, understood as the use of cultural evidence and argument in judicial proceedings in order to assess to what extent cultural identity might have affected one person's action or behavior (see Renteln 2004). The accommodation of cultural pluralism is also associated with settling and reconciling ethno-cultural conflicts by empowering formerly marginalized groups. In addition, the ideas of multiculturalism have also affected the theory of international human law in relation to the nature of a multicultural global society in which various groups can claim and enjoy their rights, on equal footing (Xanthaki 2010).

The existence of cultural, group-differentiated rights can however be challenged from the premises of their corrective or oppressive effect on other rights, comprising fundamental rights and freedoms. This criticism stems inter alia from the position of feminist theories indicating that legal protection of culture and cultural rights might have negative effects on gender equality (Shachar 1999) or contribute to other forms of discrimination within a given group (Eisenberg and Spinner-Haley 2005). Indeed, the antagonism

between some forms of culture and the protection of fundamental rights, including cultural rights, is inevitable. For instance, certain cultural practices, e.g., self-mutilation, female genital mutilation, or other forms of physical violence, cannot be seen as reconcilable with fundamental, nonderogable human rights. Hence, several culture-oriented international treaties, while recognizing the value of cultural diversity, also acknowledge that consideration shall be given only to those practices which are compatible with international human rights instruments and with the requirements of mutual respect among people.

Another area of tension, as to the operation of various cultural practices and identities on equal footing, relates, as already alluded, to the changes in the ethno-cultural structure of many societies due to migration processes. The recognition of cultural rights of "new minorities" has always constituted a difficult fit for liberal theories on cultural rights (McGoldrick 2005: 36–53). In fact, one of the most debated elements of Kymlicka's liberal theory of minority rights has been his scepticism regarding the equal recognition and treatment of rights belonging to "old" and "new" migrant minorities who voluntarily left their original cultures. It has been observed that while migration processes are indeed not always driven by independent decisions, some degree of "prioritizing of the claims of national minorities over those of immigrants is reasonable and permissible" (Patten 2014: 295–296). In comparative constitutional law scholarship, these issues have sometimes been shaped in terms of majority-minority discourses driving certain legislative frameworks designed to protect majority cultural rights, and justified by personal autonomy and the right to identity (Orgad 2015). Importantly, such dilemmas have also recently been approached by the ECtHR and Human Rights Committee (HRCttee) in relation to the French ban on covering faces in public affecting the religious tradition of wearing *niqabs.* While the former body held that such a ban could be justified by the respect for the minimum requirements of life in society, the latter one found that the French law discriminated against Muslim women who wear such veils. Moreover, the HRCttee underlined that although the ban was intended to protect women, the law could have the opposite effect on the realization of their human rights. Thus instead of referring on broader social policy goals, it emphasized the intersectional discrimination based on gender and religion (see Bretscher 2019).

Cultural Rights and Collective Rights Holders

Another major problem with legal conceptualization regards to their subjectivity, i.e., whether cultural rights are individual or collective. Although it is true that the wordings of the "cultural provisions" of the core UN international human rights treaties recognize societal and collective aspects of enjoying human rights attached to culture, they do not explicitly acknowledge collective rights holders. In this regard, there are two major reasons for which collective aspects of cultural rights have been seen as problematic.

The first, essentially political, explanation relates to the legal regulation of culture which has long accommodated more general interests of states, representing collective rights of their citizens, such as the protection of national cultural heritage, on the one hand, and cultural rights and freedoms of individual rights holders, on the other. Moreover, the recognition and legal protection of cultural rights of human collectives, as distinct from a state's overall population (such as national, ethnic, linguistic, or religious minorities), has been seen as potentially leading to "balkanization," i.e., the rupture or division of a state along ethnic and/or religious lines, and thus undermining its territorial unity and damaging common citizenship (Barth 2008: 89–90). In turn, the second reason stems from individualistic, liberal foundations of human rights. Accordingly, for some liberal political theorists, the idea that collectives can hold rights is virtually a difficult one to accept (see Jovanović 2012: 5). The second argument consists in the rejection of collective rights as human rights and a group's capacity of exercising agency. It is also claimed that individual rights offer already sufficient justice to collective entities and their interests. From the practical

angle, it is to be noted that collectives rarely have standing before courts and tribunals in cases involving the infringements of their collective rights.

Notwithstanding these arguments, it seems that today the collective dimension of cultural rights is widely recognized by both national and international legislation, and legal scholarship (in particular, see Committee on Economic, Social and Cultural Rights, General Comment No. 21. Right of Everyone to Take Part in Cultural Life (Art 15, para 1(a) of the Covenant), 21 December 2009, para 9). It is also to be noted that the recognition of collective holders of cultural rights owes much to the rise of indigenous peoples' rights. The specificities of these communities and their particular ways of life have led to the indigenization of the concepts of culture, cultural heritage, and overall human rights toward the idea of "cultural integrity." In this regard, the UN Declaration on the Rights of Indigenous Peoples explicitly recognizes that "indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples" (Preamble, 22nd recital). In addition, the recognition of the collective dimension of cultural rights has also been widely addressed in international cultural heritage law in relation to communities' involvement in the protection and safeguarding of cultural heritage, albeit hindered by a number of structural, procedural, and political challenges (Lixinski 2019).

Conclusion

There is no doubt that the term "cultural rights" refers today to the rights of individuals, communities, and groups attached to a very broad notion of culture that "can be understood as a product, as a process and as a way of life," including "references beyond ethnicity, language and religion" (report of the Independent Expert in the Field of Cultural Rights, 22 March 2010, para 5). It is also to be noted that the legal basis of the protection of cultural rights has greatly expended in recent years. On the other hand, formal, explicit guarantees of such rights and effective mechanisms for their justiciability and enforcement are still limited. This is well manifested in the failure of various attempts to adopt an additional protocol to the ECHR covering cultural rights, driven by the alleged difficulties in defining such rights as substantive rights, whose protection would impose specific positive obligations on states. However, the practice of adjudicating and monitoring human rights tribunals and bodies demonstrates that cultural rights are truly enforceable and can be enjoyed by individuals and collectives and that states have obligations to respect and implement these rights.

In this regard, various methods for the implementation of cultural rights have been observed and systemized (Francioni 2016). Accordingly, the first area regards direct mechanisms of enforcement of cultural rights through the existing and ad hoc mandates of human rights institutions on national, regional, and international levels. The second way of implementing cultural rights concerns the expanding interpretation of human rights guarantees from a cultural perspective. Finally, the implementation of cultural rights often occurs through other human rights areas of law and policy, on national, regional, and international levels, particularly through cultural heritage instruments and institutions. These other methods of implementing cultural rights also regard criminal adjudication, investment arbitration, environmental protection, and more recently various regulatory and policy frameworks designed to combat terrorism, global poverty, and environmental challenges.

Considering this multifacet nature of cultural rights, and the diversity of scopes they serve, it can be concluded that their core function is to protect the very essence of human dignity with mutual respect for cultural differences, thus touching upon the concept of intercultural dialogue and cultural citizenship. However, it is to be seen whether such a vision of cultural rights is to be maintained in the world affected by global economic, social, and health challenges.

Cross-References

► Claim Rights (Subjective Rights)
► Dignity, Human

▶ Freedom of Expression
▶ Freedom of Religion
▶ Human Rights and Justice

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Rights: General

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Introduction

Legal rights are generally agreed to be legal advantages although the precise sense in which they are advantageous remains controversial. In this respect, they differ from legal duties that seem to be legal burdens because they require the duty bearer to act or refrain from acting in some manner whether or not she wishes to do so.

The Nature of Rights

One of the subjects of traditional jurisprudence is the analysis of the most general legal concepts, for example, rights and duties. Like Jeremy Bentham and Rudolf von Ihering, John Salmond defined a right as an interest recognized and protected by a rule. A legal right is an interest protected by a rule that imposes a duty upon some second party. A moral right is an interest protected by a principle of natural justice (Salmond 1920, pp. 181–182).

Wesley Newcomb Hohfeld examined the writings of lawyers and judges and found that they used "a right" indiscriminately to express four very different legal concepts, that of a privilege (or liberty), claim, power, or immunity (Hohfeld 1919 p. 36). Because Hohfeld believed that each fundamental legal conception refers to a legal relation between two persons (like two parties before a court?), he proposed four pairs of logical

correlatives. A has a legal liberty against B to do something if and only if A has no legal duty to B not to so act. A has a legal claim against B that B do something if and only if B has a legal duty to A to do so. A has a legal power over B to change some legal relation of B if and only if B has a legal liability of having that relation changed by some voluntary action of A. A has a legal immunity against B's changing some legal relation of A if and only if B has no legal power to change that legal relation of A by any voluntary action. This reveals the immediate logical implications of a right in each sense of "a right" (Hohfeld 1919 p. 36). Legal philosophers such as Lars Lindahl develop complex formal systems of logic to facilitate the use of Hohfeld's analysis in the legal reasoning of lawyers and judges (Lindahl 1977).

Joel Feinberg agreed with Hohfeld that only claims are rights in the strict sense, but rejected the logical correlativity of rights and duties. One can imagine a legal system, an expanded version of the Ten Commandments, that imposes duties upon its subjects but confers no rights. It might require debtors to repay loans and impose penalties upon those who fail to do so, but no creditor would have any right to repayment because she would have no legal power to claim repayment as her due. Thus a legal right is a claim valid under the rules of a legal system (Feinberg 1980 p. 154).

H. L. A. Hart did not agree with Hohfeld that the language of legal rights is ambiguous simply because legal liberties, claims, powers, and immunities are distinct legal relations. He proposed a general theory of legal rights to explain what liberty rights, claim rights, power rights, and immunity rights have in common that makes them all rights. All consist of a core of one or more bilateral liberties with a protective perimeter of duties of noninterference. For example, one's liberty right to look over one's garden fence at one's neighbor consists of one's liberty of so looking or not looking as one chooses together with duties such as the duties of others not to force one to look against one's will or prevent one from looking by forcible means. In the case of a power right, one has a bilateral liberty of exercising or not exercising some legal power; and a creditor's claim right includes the bilateral liberties to cancel or not cancel the debt and to sue for repayment or refrain from enforcing one's claim. Thus, every legal right is a legally respected choice. Hart argued that the interest theories of Bentham and Ihering are deficient because they make rights redundant by reducing a right to a beneficial duty. But rights have a special function in law and morality; they mark out the justified distribution of freedom (Hart 1982 pp. 175–179 and 188–189). Feinberg's claim theory and Hart's choice theory are two versions of a will theory of rights, theories holding that what is distinctive and important about rights is that they confer some advantageous status upon the will of the right-holder.

Neil MacCormick replied that, properly interpreted, an interest theory need not make rights redundant. A right can exist before the protective duty it justifies is created, and the law can protect or advance some interest of the right-holder by any or all of the Hohfeldian fundamental legal relations (MacCormick 1977, p. 205).

Like Neil MacCormick, Joseph Raz defends an interest theory of rights insisting that essentially rights give a special status to the right-holder's interests rather than her will.

However, MacCormick held that the essential function of rights is to protect or advance interests, but Raz interpreted rights in terms of their role in normative reasoning. He explains that to say that someone has a right is to assert that, other things being equal, some interest of that person is a sufficient reason for holding some other person or persons to be under a duty (Raz 1986 p. 166). Although he conceives of rights as interest-based reasons for duties, he rejects the logical correlativity of rights and duties. A right is logically prior to any duty it may imply, and a right may imply more than one duty or different duties under different circumstances (Raz 1986, pp. 170–171).

Carl Wellman argues that any right must consist of a complex of Hohfeldian positions. Were the creditor's right to be repaid simply a Hohfeldian claim, it would not hold firm against a recalcitrant debtor. To be a real right, it must include at least the creditor's legal power to sue for repayment, her legal liberty to exercise this power, and her immunity against the debtor's

canceling the debt by pleading inconvenience (Wellman 1985 pp. 59–60). Similarly, liberty rights, power rights, and immunity rights are complexes of Hohfeldian legal relations. Accordingly, he conceives of a right as a system of legal positions that, if respected, confers dominion, freedom, and control, upon the right-holder in face of one or more second parties (Wellman 1995 p. 8).

George Rainbolt rejects both Wellman's insistence that any real right must be complex and his view that what all species of rights share is that they confer dominion. He argues that the essential feature of any right is that it imposes normative constraint upon some second party. Because among the four Hohfeldian incidents, only claims and immunities impose normative constrain, to have a right is to possess a claim or an immunity. Even a single claim or immunity is sufficient to constitute a real right. However, he does not deny that there are also liberty rights and power rights. These are complexes of Hohfeldian incidents that, because they include at least one claim or immunity, impose normative constraint upon one or more second parties (Rainbolt 2006, pp. 27–28 and 30–32).

Leif Wenar views the recent history of theories of rights as a debate between will theories and interest theories. He argues that neither a will theory nor an interest theory can explain the entire range of rights because each is a single-function theory. He proposes a several-functions theory of rights as a more adequate alternative. A right consists of one or more Hohfeldian incidents, but only if it or they perform at least one of the following functions: exemption, discretion, authorization, protection, provision, or performance. Why are these six functions and no others definitive of rights? This is because of the way the concept of a right has been shaped and reshaped by social forces throughout history (Wenar 2005, pp. 238–242 and 246–252).

Possible Right-Holders

Because Hart conceived of a right as a respected choice, he suggested that it is idle and misleading to say that young children and animals have rights. It is idle because all one needs to say is that we have duties not to mistreat and perhaps to care for them. It is misleading because it suggests that law or morality respects the free choices of beings incapable of choice (Hart 1955, p. 181).

Neil MacCormick rejects Hart's will theory of rights precisely because it implies that young children have no right to be cared for. He asserts that the function of rights is to protect some interest of the right-holder. Since children do have interests, such as the interest in being nurtured, they can and do have rights (MacCormick 1976, pp. 308–311; MacCormick 1982, pp. 158–161).

Because Feinberg defined a right as a valid claim and defined claims in terms of the activity of claiming something as one's due, he recognized that his theory seems to imply that babies, who are incapable of claiming, could not possibly have rights. He avoided this conclusion by arguing that their rights can be claimed on their behalf by their parents or guardians. He suggested that this could also be true of animals because animals have interests that can be represented (Feinberg 1980 pp. 162–163).

Mary Anne Warren assumes that only persons in the morally relevant sense are possible right-holders. The traits most central to our concept of a person are consciousness, reasoning, self-motivated activity, the capacity to communicate, and the presence of self-concepts and self-awareness. Because fetuses and young children develop these traits at most to a very small degree, they cannot have any robust right to life. Because nonhuman animals never develop these traits, they cannot possess any moral rights at all (Warren 1973, pp. 55–61).

Jeffrie G. Murphy argues that the language of rights performs two different functions. One function is to mark out the special kind of treatment, called "respect" by Kant, which is particularly fitting to autonomous rational persons. The other function, noted by John Stuart Mill and John Rawls, is to mark out which of all the moral claims ought to be recognized by the state. Although very young children, seriously retarded persons, and animals cannot possess any autonomy rights, they can and do have some social contract rights (Murphy 1977, pp. 230–233 and 237–239).

Tom Regan maintains that even nonhuman animals are possible right-holders. He asserts that all those who are subjects of a life have inherent value. By virtue of this inherent value, they can and do have moral rights. This is as true of moral patients as of moral agents. Since animals are subjects of a life, they also have inherent value and thus have moral rights (Regan 1983, pp. 276–280).

No one doubts that future persons will have moral rights at least by the time they have been born and have developed their moral agency, but it would seem impossible for them to have any rights now. How could a right exist before its right-holder exists? Annette Baier argues that future persons can and do have rights now. We recognize the duty of an executor of a will to respect the rights of the deceased, a person who no longer exists. Hence, there is no conceptual incongruity in recognizing the rights of persons who do not yet exist. One possesses a right by virtue of some role one plays in relation to other persons. Since past and future generations form a continuing society with interdependent roles, past and future persons have rights imposing obligations upon others (Baier 1981, pp. 171–175).

Unlike social utility, that is essentially aggregative, rights are essentially distributive. For example, there is not one right to life that applies to many individuals, each individual has his or her own right to life. This suggests that groups as such cannot possess any rights distinct from the rights or their members. Denise Réaume explains how groups can be possible right-holders. She adopts an interest theory of rights similar to that of Joseph Raz. Thus a right exists when some interest of a right-holder is sufficient to impose one or more duties. A public good is something of value that cannot be provided to or enjoyed by one individual without being available to others. The conditions that enable one to communicate with others in one's native language, for example, French, are very valuable to many French Canadians. Since they are a public good, they ground a right of French-Canadians as a group, not as individual persons (Reaume 1988, pp. 7–12).

Anna-Karin Margareta Andersson explains how human fetuses and very young children, but not nonhuman animals, can have moral rights. The paradigmatic examples of right-holders are adults capable of exercising agency. Andersson suggests that they possess rights by virtue of possessing the physical constitution necessary to exercise agency. Presumably they do not lose their rights when they fall asleep or into a temporary coma. This is because this physical constitution persists so that they will regain their capacity to exercise agency unless some obstacle intervenes. Human fetuses will develop, and young children are developing the physical constitution necessary to exercise agency. Hence, in every morally relevant way, they are similar to sleeping adults and can be right-holders. But because animals will never develop the necessary physical constitution, they cannot ever possess any moral rights (Andersson 2013, pp. 180–184 and 190).

The Grounds of Rights

Legal positivists agree that legal rights are grounded on authoritative legal sources such as constitutional principles, statutes, or, in a common-law jurisdiction, decisions of the courts. Thus, Feinberg identified a legal right with a legally valid claim, and its validity consists in the fact that it is justified by the rules of the legal system (Feinberg 1980 pp. 153–154). But Feinberg failed to explain precisely how legal rules ground rights. Hohfeld accepted the logical correlativity of rights and duties. Presumably he would infer that any duty-imposing legal rule is also a right-conferring rule. For example, the legal rule that imposes a duty not to commit criminal assault also confers upon a potential victim the right not to be assaulted (Hohfeld 1919, p. 38).

Hart denied that the criminal law grounds any legal rights because it does nothing to respect the choice of any potential victim. She cannot make a criminal assault upon her person permissible by consent or choose whether or not the criminal shall be indicted and prosecuted by the state (Hart 1982 pp. 182–186). But Hart did not go on to explain what kinds of legal rules do confer rights. However, he would insist that these are all valid because posited in conformity with the

rule of recognition of the legal system (Hart 1961, pp. 100–110).

Ronald Dworkin rejects this legal positivism. He maintains that the point of legal rights, at least fundamental civil rights, is to protect the individual from mistreatment by the state. They cannot be grounded on utility because it would often be useful to violate a right of one or a few citizens in order to achieve a greater sum of public welfare. He distinguishes between social goals and the moral principles that ground civil rights. Hence, any legal system that takes rights seriously must include moral principles as well as posited legal rules (Dworkin 1977 pp. 90–91 and 190–192).

John Finnis also rejects legal positivism. The authority of law depends on its justice or at least its ability to secure justice. Rights impose the requirements of practical reasonableness. They reflect the requirements of a relationship of justice from the point of view of the person or persons who benefit from that relationship. The demands of justice reflect the mutual restraint required in the pursuit of the common good by a community of persons (Finnis 1980, pp. 205–210 and 261).

What, then, are the grounds of moral rights? Hart argued that because rights are not merely logical correlatives of duties, they require some special justification. Thus if there are any moral rights, they must be grounded on the natural right to freedom (Hart 1955 pp. 188–191).

Robert Nozick argues that because moral rights are side constraints on the pursuit of goals, they cannot be grounded upon good or bad consequences in any way. Instead, they must be grounded on the inherent value of human beings that makes each individual person an end in himself (Nozick 1974, pp. 28–33).

John Rawls seems to have grounded basic liberties upon a hypothetical social contract that would be unanimously accepted by the members of any society choosing under ideal circumstances (Rawls 1971, pp. 11–17).

Most philosophers believe that one cannot ground moral rights directly upon utility because under some circumstances, it would be useful to violate an important right of one individual in order to produce a slight benefit to many others. However, David Lyons suggests that one might ground moral rights indirectly upon utility in something like the way explained by John Stuart Mill. To have a right is to have something, a liberty or a benefit, society ought to protect one in the possession of. Rules protecting rights take precedence over merely useful rules because they concern the essentials of human well-being. Thus, moral rights can be grounded upon the general welfare (Lyons 1977, pp. 123–127).

Loren Lomasky grounds moral rights on personal projects. By establishing boundaries that others may not transgress, rights accord to each right-holder a measure of sovereignty over his or her own life. They recognize the importance of long-term projects in the life of a human being. A being who has projects is one for whom there is a higher level of desire that confers positive or negative value on lower-level choices. It is this that gives inherent value to persons and enhances the instrumental value of their choices (Lomasky 1983, pp. 45–47).

Jan Narveson grounds moral rights on a reasonable social contract. We have moral rights when it is mutually advantageous for all persons to assume enforceable duties to all others to refrain from interfering or even to assist in the performance of what we have a right to and when there is recognition of this status. Thus, rights are relative to reasonable agreement (Narveson 1984, pp. 172–174).

Richard B. Brandt grounds moral rights on an ideal moral code. X has a moral right against Z to do, have, or enjoy Y if and only if Z has a moral obligation not overridable by marginal or even substantial welfare to refrain from interfering with X's doing or having or enjoying Y and to enable X to do, have, or enjoy Y. And moral obligations are imposed not by the actual moral code of a society but by the moral code that would maximize the welfare of all members of that society (Brandt 1992, 196–200).

David Wiggins grounds moral rights on needs. He assumes that moral rights are conferred by a social morality. He suggests that there is a claim right or entitlement to x under conditions C where x is something the denial or removal of which under conditions C gives (and can be seen as giving) the person denied or deprived a reason

that is avowable and publicly sustainable within a society S to reconsider his adherence to the norms of reciprocity and cooperation sustained by S. This is because any social morality must engage with the passions of those who are to live by it (Wiggins 1998, pp. 31–33).

F. M. Kamm grounds moral rights on the moral status of the right-holder. She conceives of a right as a claim to the performance of a directed duty, a duty owed to the right-holder by the duty bearer. An entity has moral status when, in its own right and for its own sake, it can give us reason to do things such as not to destroy it or to help it. Such a moral status confers inviolable rights upon a person. The worth of the person that gives rise to this status is distinct from any of the person's interests, although it gives others reason not to damage those interests (Kamm 2007, pp. 228–230 and 253–255).

The Value of Rights

Although legal rights are generally believed to be legal advantages, the way in which legal or moral rights might be advantageous remains controversial. Philosophers ask what, if anything, makes rights valuable. Hart's respected choice theory of rights locates the special value of rights in the way that they protect the freedom of individual choice and action. The interest theories of MacCormick and Raz suggest that rights are valuable primarily because they protect the interests of the right-holder. Feinberg argued that the special value of rights as valid claims is the way in which they sustain self-respect by enabling their possessors to stand up and claim something rather than merely begging or petitioning for what is due to them (Feinberg 1980 pp. 151 and 155).

Not everyone is convinced of the value of rights. Elizabeth H. Wolgast argues that rights promote the selfish pursuit of individual interests at the expense of caring relationships and social responsibilities. Their adversarial nature is detrimental to personal relationships and leads to a litigious society in which conflicts are exacerbated rather than resolved amicably. They all too often serve as instruments by which those with power in any society dominate and even oppress the disadvantaged (Wolgast 1987 pp. 29–49).

Mark Tushnet, a critical legal theorist, rejects the value of legal rights for four reasons. Because what counts as a right depends upon the social setting, rights are unstable and make no significant difference in practice. Because rights talk is indeterminate, rights can provide only momentary advantages in political struggles. Rights reify our experiences of solidarity and individuality that it would be better to apply directly to political issues. And rights are harmful because they often protect the privileged and obstruct progressive legislative efforts (Tushnet 1984, pp. 1363–1364, 1370–1371, 1384, 1387).

A lawyer needs to recognize both the values and disvalues of rights in order to advise her client how best to further his interests. And a legislator will wish to understand the potential social benefits and harms of rights in order to decide how best to formulate the laws of her society.

More detailed information about these and related issues can be found in the more specific entries on rights.

Conclusion

Philosophers of law have recently proposed general theories of rights, theories intended to explain all of the various kinds of rights. Any complete theory of rights should explain the nature of rights, the kinds of beings capable of possessing rights, the rational grounds of rights and the value or disvalue of rights.

Cross-References

► Claim Rights (Subjective Rights)
► Rights in Recent Anglo-American Philosophy
► Rights: Interest and Will Theories
► Rights: Legal and Moral

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Rights: Interest and Will Theories

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Introduction

Human rights, animal rights, gun rights, gay rights, civil rights, states' rights, property rights, the right to abortion, the right to life, the right to freedom of speech, the right to remain silent, the right to go to first base, and the right to castle – rights are a key part of the normative landscape. People assert rights in a wide variety of contexts. Women in Saudi Arabia have a right to drive. Cats have a right not to be tortured. You have a right that Krista not enter your home. A chess player has a right to castle. These are assertions that some being has a right. What is it to have a right? Interest and will theories are attempts to provide an answer to this question; an answer to that applies to all the many different kinds of rights.

Function, Protection, and Justification

Some (e.g., Wenar 2015) hold that the interest and will theories of rights are theories of the function of

rights. Some interest theories and some will theories are theories of the function of rights. In particular, some versions of the interest theory and some versions of the will theory hold that the function of rights is to protect interests or wills. For example, Kramer holds that a "necessary but insufficient for the actual holding of a right by X is that the right, when actual, *protects* one or more of X's interests" (2001, 28, emphasis added). The view that rights protect interests has also been defended by Lyons (1994) and MacCormick (1977). Many rights protect interests. Emma's right that you not wipe her hard drive protects her interest in having a working computer. Hart holds that rights protect wills, that they protect a person's ability to choose. "[A] man has a right to look over his garden fence at his neighbor; he is under no obligation not to look at him and under no obligation to look at him. [The neighbor] has certain legal obligations or duties . . . which preclude some, though not all forms of interference" (1982, 166). By precluding some forms of interference with a person's choice, some rights protect a person's ability to make and implement decisions. Ethan's right that you not steal his truck protects his ability to decide what to do with his truck.

However, some interest theories and some will theories are not theories of the function of rights. For example, Raz does not defend a functional link between rights and interests. According to Raz, the link between rights and interests is that interests justify rights. "X has a right if and only if. . ., other things being equal, an aspect of X's well-being (his interest) *is a sufficient reason* for holding some other person(s) to be under a duty" (1986, 166, emphasis added, quotation marks omitted). Many rights seem to be justified by the interests of the right-holder. What is the justification for your duty not to wipe Emma's hard drive? It seems that a key part of the justification for your duty and her right is her interest in having a working computer. Interestingly, in spite of its plausibility, this author is not aware of a theorist who holds the justification version of the will theory. Following Raz's pattern, one version of such a theory might hold that X has a right if and only if the ability of X to make choices within a given domain is a sufficient reason for holding some other person(s) to be under a duty. Some rights seem to be justified by the importance of allowing the right-holder to make choices. Why do you have an obligation not to interfere with Charlotte's decisions regarding her 12-year-old son's baseball practice schedule? It seems that a key part of your duty not to interfere and her right to make these decisions is the importance of her making decisions about her son. Both interest theories and will theories come in two flavors: protection and justification. Only the first flavor asserts a view about the function of rights. Justification versions of interest or will theories do not assert that rights have a particular function. Instead, they assert that rights have a particular pattern of justification.

Wellman (1985), Sumner (1987), and Montague (2001) have defended dominion theories of rights. Dominion theories are one instance of functional will theories. For example, according to Wellman, "A . . . right . . . is a complex . . . advantage to which the right-holder can appeal in the event of some possible confrontation with one or more second parties. It is [an] advantage, not necessarily because its possession is beneficial to the rightholder, but in the sense that it favors the right-holder's will vis-'a-vis the opposing will of any second party" (1985, 91–92). One advantage of dominion theories is that, although they are will theories, they recognize that there is a sense in which rights advantage right-holders. In this way, they seem to incorporate part of the insight of interest theories.

Virtues of Interest and Will Theories

Both interest theories and will theories continued to be defended because, as illustrated with the examples above, both families of theories make sense of a broad range of rights. Both theories have another virtue. Both of them offer plausible accounts of the directionality rights, aka the relational nature of rights. Isla is wealthy, wealthy enough that she has a duty to give to charity. She has also promised you that she will give you $10, and as a result of this promise, she has a duty to give you $10. There seems to be an important

difference between these two duties. Only the latter is *to* you. If Isla does not give you $10, she wrongs you. If she fails to give to charity, no one is wronged. Moreover, you have a right to $10 from Isla, but it does not seem that anyone has a right to her charitable contributions. Many theorists hold that when someone has a right, someone else has a duty *to* the right-holder. (For the sake of simplicity, this entry focuses on claim rights. However, directionality seems to be a feature of all rights. See Hohfeld (1919).

Both the protection and the justification versions of both interest theories and will theories provide plausible explications of the directionality of rights. They seem to provide plausible answers to the question: Why is Isla's obligation to give you $10 *to* you while her obligation to give to charity is not to anyone? The protection version of the interest theory asserts that her obligation is to you because your interest in having the $10 is protected by her obligation. The justification version of the interest theory holds Isla's obligation is to you because your interest in having the $10 justifies her obligation. The protection version of the will theory asserts that her obligation is to you because it protects your ability to decide what to do with the $10, and the justification version holds that her obligation is to you because the importance of your deciding what to do with this $10 justifies her obligation.

Rainbolt (2006) has argued that the justification versions of the interest and will theories are better able to explain the rights of the dead and future generations than the protection versions. Justification seems to be transtemporal in a way that protection is not. That something happened in the past or will happen in the future is often a good reason, a good justification, to do something in the present. That Mikhail is planning to have children in the future is a good reason for him to save money now. If the link between interests/wills and rights is a sort of justification, then it seems that there may be no problem accounting for the rights of the dead or future generations.

Alexy (2002, 115–118) has suggested that the debate between the interest and will theories can be resolved if one distinguishes between (a) the justification of a right, (b) the formal structure of the relations that make up a right, and (c) the enforcement of rights. Alexy holds that the interest/will debate is a debate about the justification of rights. Furthermore, he argues that the debate about the justification of rights need not be resolved in order to develop a theory of the formal structure of rights or a theory of the enforcement of rights. Indeed, he holds that a theory of the formal structure of rights is a precondition for progress on the interest/will debate on the grounds that we need to understand the structure of rights before we examine their justification. (There is an extensive German literature on the interest/will debate. Alexy (2002, 115, fn 20) provides a useful review.)

Objections to Interest and Will Theories

Both interest theories and will theories seem to be unable to provide an adequate account of many cases in which many people think that there are rights. Will theories struggle to account for those cases which there seems to be little or no link between rights and the will of the right-holder. For example, there are many cases in which someone has a right to take some action but no right not to take that action. Police officers who see murders have the right to arrest them. Simple citizens lack this right. However, police officers also have a duty to arrest the murders. They have a right but lack choice. It seems that their will cannot be protected, and it cannot justify the duties of others because they have no choice in the matter. Another example of this pattern can be found in countries (such as Australia) where citizens have the right to vote and it is illegal for citizens not to vote.

Will theories have difficulty accounting for inalienable and unwaivable rights. MacCormick (1977, 197) holds that people have an inalienable and unwaivable right not to be enslaved. It seems that you have a right not to be enslaved and that your will is irrelevant in this matter. You have this right even if you want to be enslaved.

Passive rights seem to have little or no link between rights and the will of the right-holder. A passive right is a right that someone else do or

not do something. For example, if Michael promises Emily that he will put flowers on her mother's grave, then it seems that Emily has a passive right that Michael put flowers on her mother's grave. (By contrast, active rights are rights to do something oneself. Michael has an active right to put flowers on his mother's grave.) In most cases, a person with a passive right (such Emily) has some control over the right. For example, she can waive Michael's duty. However, suppose that Michael's promise to Emily is in an unusual contract that removes Emily's power to waive Michael's duty. It nevertheless seems to be a right.

Will theories also struggle to account for the rights of beings who do not make choices. Will theories seem to imply that human infants, humans with extremely serious brain injuries, and animals cannot have rights.

Interest theories are also unable to provide an adequate account of many cases in which many people think that there are rights. Many rights do not seem to be in the interest of the right-holder. Jasmine has a deadly allergy to strawberries. Yet, it seems that Jasmine has a right to eat strawberries. In response to cases such as these, some interest theorists (e.g., Kramer et al. 1998, 93) argue that rights are merely normally in the interest of the right-holder. Unless the notion of normality is fleshed out, the interest theorist runs the risk of appearing to make "normal" mean "whenever there is a right," and that would seem ad hoc. Other interest theorists (e.g., Raz 1986, 168) have distinguished between core and derivative rights and held that only core rights are in the interest of the right-holder. For example, the right to eat strawberries might be held to be derivative of a core right to choose what one eats, and this core right does seem to be in Jasmine's interest. However, it is not clear that the core/derivative distinction will line up correctly in all legal systems. Consider a legal system that specifies a short list of things that one may eat. A series of 100 laws is passed authorizing the eating of 100 things. Eating anything else is forbidden. One of these 100 laws grants Jasmine the right to eat strawberries. It seems that this legal right is not derivative of any core legal right.

Another problem for those (such as Raz) who defend a justification version of the interest theory is that it seems that many rights are justified by interests but not by interests of the right-holder. Police officers have the right to give speeding tickets. In most cases, police departments have policies that make it in the interest of police officers to give speeding tickets. (An officer who gave no tickets would be fired.) However, it does not seem that the interests of the police officers justify the right to give speeding tickets. The interests of drivers that people obey traffic laws does the justificatory work.

Many countries, businesses, universities, and other organizations have rules that give people rights. These rules have grown (in some cases over centuries) and grown in odd ways. Rules have been layered on top of rules and created many rights. Some sets of rules (such as the tax codes of many countries) are so complicated that no one knows all the rights they create, and they create rights unanticipated by those who wrote the rules. Some sets of rules are written by evil people who seek only to increase their own wealth and power. Perhaps the most serious objection to interest theories is that, given the way that all the world's sets of rules have developed, it seems unlikely that all the rights created by all these sets are all in the interest of right-holders. As Wenar (2015) notes, many philosophers who do not work on rights theory adopt an interest theory of rights (and in particular Raz's version of the interest theory) in spite of the fact that these objections to interest theories are now well documented.

Conclusion

While this entry focuses on interest and will theories of rights, these two families of theories are far from exhausting the space of answers to the question: What is it to have a right? Scanlon (2003), Darwall (2006), Skorupksi (2010), Sreenivasan (2005, 2010), and Rainbolt (2006) are among those who have offered answers that do not fall neatly into either the interest or the will

camp. Recently, it has been somewhat common to see claims that the interest-will debate has gone on for a long time and is stuck. However, the interest-will debate has only been a sustained focus of philosophical discussion since the 1960s. From the perspective of the long history of debates on difficult philosophical questions, this is not long. It may be that the interest or will theory awaits only a thinker with more perspicacious views on this complex issue.

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Rights: Legal and Moral

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Introduction

Rights are claimed in both legal and moral contexts. In a court of law, for example, one might seek financial compensation from another person for his carelessly damaging one's automobile. One would then be asserting a legal right to the compensation. If the court finds that existing law does not recognize the right, one might nevertheless insist, outside the court of law, that one has a genuine, though nonlegal, right to compensation. One would then be claiming a moral right, by invoking moral standards that one believes soundly apply.

Our understanding of moral as well as legal rights has been greatly influenced by Hohfeld's (1919) work, which distinguished four conditions in which legal rights are ascribed. Despite significant differences between legal and moral rights, they appear to have analogous properties, which are revealed by applying Hohfeld's analysis to moral relations. Legal and moral rights would seem, for example, to be related in corresponding

ways to legal and moral obligations. Although one may doubt that each of Hohfeld's four categories adequately represents a basic right, as he believed, his analysis provides a useful starting point for theorizing about rights.

This chapter will consider similarities and differences between legal and moral rights, beginning with a critical exposition of Hohfeld's theory.

Hohfeld on Legal Rights

Hohfeld focused on the competing claims of opposing parties in civil adjudication (where one party sues another) and observed that, no matter which side prevails, each of the four possible outcomes of such legal disputes may be characterized as the vindication of a right. Hohfeld accordingly identified four legal conditions as fundamental rights.

Imagine a legal disagreement concerning the possible existence of a public right of way across someone's land. The issue comes into court as a dispute about whether one person (the defendant, who is accused of trespassing) is free to cross another person's land without the latter's permission, which the landowner (the plaintiff, who initiated the suit) denies. Hohfeld's point is that, *whichever* party's legal position is confirmed by the court, that person may be said to have a right:

1. Suppose the court holds that there is a right of way across the land and thus vindicates the defendant's position. The defendant is found to have crossed the land *lawfully*; in other words, he has been found *to lack a legal obligation to refrain* and to have a corresponding *legal right*. Hohfeld suggested that we verbally distinguish this species of right from other species by saying that, in such a case, one has a *privilege* to so behave. We shall follow current theoretical usage and instead call this condition a *liberty*. (In using the term "obligation" instead of Hohfeld's "duty," we are likewise following current usage.)
2. Now let us suppose instead that the court holds that there is no public right of way across the land in question, which vindicates the legal position of the plaintiff. The defendant is found to have violated a legal obligation to refrain from crossing the land without the owner's permission and thus to have acted unlawfully. In that case, the plaintiff may be said to have a legal right that others not cross her land without her permission. This is the sort of case in which rights and obligations are said to be "correlative," that is, to imply one another because they are two aspects of a single normative relation. Hohfeld regarded the ascription of a right in such a case as employing the term "right" "in the strictest sense." We shall follow current theoretical usage and call this a *claim right.*

   The issue in the imagined case is whether someone is under a given legal obligation. If he is, then the other person has a corresponding claim right, and he *must* behave in a certain way. But if he is not under that obligation, then he has a liberty and *may* behave differently.

   Imagine now a different sort of legal dispute, about whether one can be legally required to testify in a court of law. One can normally be required to testify, but not always. In the USA, for example, one cannot be required to testify if one is a defendant in a criminal case or if one is the defendant's spouse. But let us suppose that the issue arises in a civil case, in a jurisdiction where the law regulating same-sex marriage is in flux, and it is unclear whether one partner in such a relationship may be required to testify as a witness to an alleged altercation between her partner and a third party, who is suing her partner for damages.
3. Suppose that the court agrees with the plaintiff and holds that she can require the defendant's partner to testify. In such a case, the plaintiff may be said to have a right because *she is legally empowered to effect some specifiable change in someone's legal condition* (e.g., to impose on the defendant's partner a legal obligation to testify). Hohfeld would distinguish this species of right from other species by saying that in such a case one has the corresponding legal *power.* (In some contexts another term, such as *capacity* or *authority*, seems more apt than *power.*)

4. Now suppose instead that the court agrees with the defendant's partner and holds that she cannot be required to testify. In such a case, *she* may be said to have a right because *her legal condition cannot be changed in a certain way.* The plaintiff *lacks the legal power* to impose an obligation to testify on the defendant's partner. Hohfeld would distinguish this species of right from other species by saying that the defendant's partner has the corresponding legal *immunity.*

Notice that, whereas a liberty concerns what one *may* permissibly do, according to law, and a claim right concerns what another person *must* do in order to behave as the law requires, a power concerns what one *can* do – what one is able to do with legal effect; and an immunity concerns what some person *cannot* do, what someone is unable to do with legal effect.

Hohfeld's analysis suggests an important point about the law. We may sometimes think of the law as if it were a set of restrictions (requirements and prohibitions) that have been imposed on our behavior, which would otherwise be unregulated and free. Once we recognize the role of legal powers, however, we can see that such a view of the law excludes and indeed obscures a great deal. As legal obligations and other legal conditions can be created, modified, and extinguished only by the exercise of legal powers, legal systems would seem *necessarily* to contain legal powers as well as legal obligations (Hart 1961).

Notice, further, that some legal powers (such as the power to enter into a contract and thereby acquire a legal obligation) can belong to individuals who act in a private (or nonofficial) capacity, whereas other legal powers (such as a judge's authority to decide a case within her jurisdiction) belong only to persons acting in an official capacity.

The four legal conditions that are distinguished by Hohfeld can be combined, and combinations are commonplace. Consider two examples. One's *freedom of action* normally includes (1) complementary liberties (to behave in certain ways and to refrain from doing so) and (2) claim rights against others' interference with one's choosing between and exercising those liberties. Second, a *property right* normally involves all four Hohfeldian elements: my ownership of an automobile, for example, involves (1) the liberty to use the item as I choose (subject, of course, to a variety of legal restrictions); (2) claim rights against others' interference with my lawful use of the car as well as against others' use of it without my permission; (3) the power to dispose of the car or transfer it to another party, e.g., by gift or sale; and (4) the immunity from others' modifying or extinguishing elements of this compound right.

Another kind of combination that merits special notice involves law at, so to speak, different levels. Consider, for example, the following difference between freedom of speech under the laws of two countries. In the UK, speech is legally free insofar as it has not been legally restricted, e.g., by Parliament. In the USA, another legal factor is present: some speech is constitutionally *immune* to legal restriction. The practical significance of the constitutional right should not, however, be exaggerated. It might seem as if the existence of the constitutional right renders speech less likely to be restricted in the USA than in the UK; but that appearance would be misleading. How legally free our speech is depends on how broadly the US constitutional right is interpreted as well as on American legal traditions and governmental practices. How free our speech is in practice also depends on governmental tendencies to respect the rule of law or, alternatively, to ignore legal limitations on their own lawful authority. We shall return to the last point later.

Limitations of the Hohfeldian Analysis of Legal Rights

Hohfeld did not apply his analysis to criminal adjudication, but it can be done. Criminal prosecution involves all four Hohfeldian species of right directly or indirectly. It presupposes a line between lawful and unlawful behavior, which is the realm of liberties and claim rights; and, as our examples have already shown, that line involves the exercise of legal powers and their legal limitations.

Suppose the question arises, whether a specified course of action is contrary to law. If a court's answer is No, it has confirmed the defendant's legal (liberty) right so to behave and his corresponding lack of legal obligation to refrain from doing so. If the court's answer is Yes, it has confirmed the prosecution's assumption that the law imposes an obligation to refrain. But the further question arises, whether some party has a corresponding legal claim right.

We have good reason to believe that someone has a corresponding right when we can identify some person who can be legally *wronged* by the legally prohibited behavior. It is unclear, however, that unlawful conduct always results in a person wronged, so it is unclear that all legal obligations "correlate" with legal rights.

Suppose that the government has ordered that all books by Islamic authors be destroyed and that someone has been charged with retaining a copy of the Koran, refusing to consign it to the flames. Can we rightly assume that there is some person, or some entity, that has been wronged by such unlawful conduct? It is unclear that we can assume that some real human being has been wronged and has had her legal right violated. The only plausible candidate for the position of right-holder in such a case would seem to be the government. We seem never to think of the government as being wronged in such a case. Furthermore, the government's position is no different in this case than in other cases in which it has imposed a legal restriction. To assume that the government is the right-holder in such a case is to suppose it to be a right-holder in *all* cases in which it has imposed a legal restriction. On that supposition, *both* the government and ordinary human beings (or institutions, such as corporations, on which the law confers rights) will be counted as right-holders in cases where it seems most plausible to suppose that some human persons (or institutions) are right-holders but for different reasons. That way of thinking about rights and obligations, however, seems to multiply right-holders beyond necessity. And that seems a good philosophical reason to reject the suggestion that the government automatically has a legal right whenever it imposes an obligation on one of its subjects. Theorists have sometimes distinguished such cases by saying they involve "absolute" rather than "relative" obligations, which is to distinguish between obligations with correlative claim rights and obligations that lack them. That is one reason for thinking that Hohfeld's analysis does not fully fit the criminal law.

Let us now consider some other possible limitations of Hohfeld's analysis. One concerns whether each of the four conditions that Hohfeld distinguished constitutes a right. Consider the following: when one *violates* another person's legal claim right, one normally creates a new legal right for that person – a right to have the wrong rectified by the wrongdoer (e.g., by compensating the victim) and a corresponding obligation for oneself to rectify the wrong. More generally, in violating the law, one changes one's own legal condition, by making oneself vulnerable to legal penalties or punishment. One may also change other persons' legal conditions, e.g., creating rights to compensation. Now, Hohfeld appears to have understood a legal power as the capacity to effect a change in some person's legal condition. On that definition, legal wrongdoing would constitute the exercise of a legal power. But our notion of a right seems to exclude the idea that legal *wrongdoing* automatically constitutes a legal *right.* It would seem, rather, that the capacity to change some person's legal condition constitutes a legal right *only when* it is paired with a legal liberty (which makes its exercise legally permissible). If that reasoning is sound, then powers by themselves are not full-fledged rights.

A different sort of case in which Hohfeld's categories do not seem to correspond with rights involves the Hohfeldian concept of an immunity, which is understood most broadly as a legal condition that is immune to change. Now consider the legal doctrine of primogeniture, under which most children are legally prevented from inheriting any part of their parents' estates. Under that doctrine, such children cannot be made eligible to inherit, and their legal condition would seem to fit the Hohfeldian concept of an *immunity.* But such an immunity would hardly be considered a legal *right*.

This sort of case is quite different from the prior one, in which the divergence of Hohfeld's categories from legal rights could be rectified by combining two Hohfeldian elements (a power with a liberty). What prevents some immunities from constituting *rights* is not the absence of a legal liberty or some other Hohfeldian element; however, it seems rather to involve the fact that such an immunity is *disadvantageous*. To rectify that divergence would require importing non-Hohfeldian elements into the system. Such an undertaking falls outside the scope of the present chapter.

Hohfeld's Theory and Moral Rights

Hohfeld's analysis has frequently been extended to moral rights (see, e.g., Wellman 1985). Promises, for example, seem analogous to contracts. A morally competent person has the moral capacity (or power) to make morally binding commitments and thus to acquire moral obligations to do what she freely promises to do. A person to whom a morally binding promise is made is said to have a right (a claim right) to the performance of the promise and is capable of releasing the promisemaker from the acquired obligation (another moral power). Thus, we have moral powers or capacities that enable us to create and modify moral rights and obligations. One cannot normally make a morally binding commitment for another person nor can anyone but the person to whom a promise is made release the promisemaker from the obligation she has freely incurred. We normally lack the corresponding moral powers, which in Hohfeldian terms correlates with some persons' moral immunities. Unless one is released from a morally binding promise, he is morally obligated to do what he has promised, which correlates with the promisee's moral claim right. If released from the obligation, he is once again morally at liberty to refrain from doing what he has promised.

It is noteworthy that these observations do not assume that there is such a thing as authoritative moral adjudication that is analogous to the legal adjudication that Hohfeld studied. The applicability of Hohfeld's categories to morality suggests that Hohfeld's insights have to do with legal concepts independently of adjudication.

The application of Hohfeld's categories to morality has exposed aspects of the moral realm that theorists had not previously appreciated. It reveals that morality, like law, consists of much more than restrictions and permissions and includes powers and immunities.

What about the limitations we have noted of the Hohfeldian analysis as it applies to law? Do we find the same limitations within the moral realm?

It would seem so. One has the Hohfeldian power, for example, to change moral conditions and relations by acting wrongly – making oneself the deserving object of negative appraisals, incurring an obligation to make amends (and, perhaps, to reform), and conferring on any victims of one's wrongdoing a right to reparations. But none of that could plausibly be seen as the exercise of a moral right. Similarly, one has Hohfeldian immunities that would not normally be called rights. Thus, for example, although anyone with a right to reparations might release one from the correlative obligation, no one can release one from deserved negative appraisals of one's wrongful behavior or from an obligation to reform.

So much for the more or less obvious parallels between legal and moral rights; we turn now to contrasts between them.

Differences Between Moral and Legal Rights

Legal rights are determined by law. One legal system's laws differ from another's because they depend on the authoritative decisions that have been made within a given system's institutions, such as its legislature and courts, all of which differ from one society to another and also vary over time. As the laws are changeable, legal rights are changeable too.

Any moral rights that we have would seem to be determined by moral principles that are not comparably rooted in social institutions and that are not analogously changeable. To be sure, when

someone ascribes a moral right to herself or to another person, she expresses her own moral convictions – just as someone who offers a scientific or historical assertion expresses her own scientific or historical judgment. Moral judgments, like judgments in every other realm of human interest and opinion, can be mistaken. More to the point, to sincerely assert that someone (oneself or another person) has a certain moral right is to imply that the moral judgment ascribing the right is *true*; to deny the ascription is to imply that it is *false*. One who ascribes a moral right claims that the right *exists*. One who ascribes a moral right is committed to regarding the relevant principles as *sound*, because it does not make sense to claim that one or another person *has* a moral right while also holding that the principles they presuppose are inherently arbitrary or unsound. The idea that one has a moral right is incompatible with that kind of full-blown moral skepticism.

Although legal and moral rights are determined by different factors, legal rights can also depend on moral principles, as when a right-conferring law explicitly refers to a moral standard (e.g., when the US Constitution says that private property taken for public use is to be *justly* compensated). Of course, once such a legal provision is interpreted by a competent court of law within a system that respects judicial precedents; the law determining what constitutes just compensation will depend not only on principles of justice but also on authoritative precedent. But the provision will retain its initially defining reference to moral principles.

It is also possible for moral rights to depend on legal rights. When right-conferring laws are morally justifiable, one presumably has a moral right to their enforcement. This is arguably true, for example, of a legal right to security of the person (though moral principles can also limit the justifiable enforcement of legal rights).

But legal rights do not necessarily support moral rights, because they can be, and sometimes are, morally indefensible. To take an extreme example: one who lives under laws that confer on him the *legal* right to hold another person as a slave arguably lacks any *moral* right to treat that other person as a slave.

As the foregoing implies, the independence of legal and moral rights reflects the fact that law is subject to moral appraisal and does not necessarily satisfy sound moral standards.

A legal system may confer some rights on all persons, such as a right to a fair hearing when one is charged with wrongdoing; or it may fail to do so. It may confer some rights on all persons who reside within the system's political boundaries, such as a right to be represented by elected legislators, or it may fail to do so. It may confer such a right on some persons but not others, or it may confer such a right on no persons at all. It may confer some rights subject to further conditions, as when the right to vote is conditioned on being an adult male who owns property of no less than a certain specified value. A legal system may deny rights entirely to some persons, such as those who the laws allows others to own as chattel slaves. As the foregoing suggests, a legal system may also confer assorted legal powers and immunities (and the rights that can be constructed out of them) on some persons but not others, in a great variety of ways.

Moral rights likewise vary but seemingly to a lesser extent. Moral principles are thought to confer some rights on all persons, such as the right to equal consideration and respect by governments. But moral principles presumably take into account different persons' interests and needs and the history of our interactions with others, all of which may result in different persons possessing different sets of moral rights. Morality also confers powers on individuals to create and modify various rights, and the exercise of such powers results in individuals possessing different sets of rights.

The foregoing enables us to consider a further contrast between moral and legal rights – or, rather, between theorists' ideas about them. Few, if any, theorists doubt that there are legal rights. (If there are exceptions, they would be theorists who believe that law is radically indeterminate.) But some theorists appear to deny the existence of moral rights (as opposed to beliefs about moral rights). Skepticism about moral rights would seem to stem from either of two philosophical positions. One may reject the possibility of an objective

morality, or one may embrace a moral theory like utilitarianism. We have already addressed moral skepticism. We have not, however, considered the implications for moral rights of theories like utilitarianism.

Utilitarianism is usually understood to require conduct that promotes (or that promises to promote) some value, such as human welfare, to the maximum degree possible. This renders such a theory incompatible with moral claim rights because the latter set limits on the pursuit of such values (Dworkin 1977; Lyons 1994).

If one does not embrace one of those philosophical theories, skepticism about moral rights is difficult to fathom. On the one hand, a moral claim right would seem to be implicated whenever it is possible for one person *to wrong another*, for it is unclear how one could be wronged unless one's right had been violated. On the other hand, moral obligations are understood to correlate with moral claim rights, in that they are two aspects of certain moral relations. Thus, one's moral claim right to another person's keeping her morally binding promise correlates with the other person's obligation to perform as promised. One cannot reasonably deny the existence of the right without rejecting the corresponding obligation. Skepticism about moral claim rights seems to entail skepticism about important classes of moral obligations.

Sometimes skepticism is directed not at moral rights in general but at the more specific idea of human rights – rights that belong to each and every person unconditionally. Skepticism about human rights, so understood, may reflect their historical association with the idea that such rights are "self-evident" (as is asserted, e.g., by the American colonial rebels' Declaration of Independence from Great Britain), knowable by a special kind of cognition. But we need not think of human rights in such terms.

Many persons believe that some moral requirements apply to all human beings unconditionally, e.g., that we owe other persons some minimal level of respect and consideration. On this view, anyone who is treated otherwise is wronged, which seems to mean that her human right to a minimal level of respect and consideration is violated. We should accordingly expect anyone who rejects human rights to likewise reject various moral requirements that are thought to be possessed unconditionally by all human beings.

Disagreement or uncertainty about moral rights is not a plausible basis for a contrast between legal and moral rights. Competent lawyers frequently disagree about legal rights. Those who disagree or are uncertain about legal rights do not act as if the relevant law is indeterminate. On the contrary, lawyers and judges reason about the existence and contours of legal rights, and they regard those with whom they disagree as endorsing mistaken legal judgments. Much the same applies to moral deliberation.

Rights and Enforcement

It is often assumed that legal rights are enforceable, presumably because we normally focus on claim rights, which we assume have correlative obligations that are imposed or regulated by laws that provide criminal penalties or civil remedies for noncompliance.

Other species of legal rights lack such obvious connections to enforcement. How, for example, might the law be said to enforce a legal liberty, which is the mere absence of an obligation? The law may supplement legal liberties by providing claim rights against interference with their exercise. As for a bare liberty itself (assuming that the lack of a legal prohibition constitutes a right), we might think instead of it being *respected* as when lawful conduct is not treated by a government as if it were unlawful (which governments too often do when they are lawfully criticized by dissidents). But that is a matter of governmental policy rather than law.

Similar considerations apply to legal powers and immunities. They cannot be enforced directly, but they can be respected, or not. The law might impose obligations on us as well as on officials not to interfere with the lawful exercise of legal powers. The law might also impose obligations to refrain from trying to change the legal condition of someone with a legal immunity.

It seems a mistake to assume that the enforcement of legal claim rights and obligations is always provided by law. Public officials have various duties attached to their positions as well as a special obligation (sometimes solemnized by an oath of office) to respect the law. And legal systems may provide punishments for officials' failure to discharge their duties (nonfeasance) as well as for other violations of law (malfeasance). But legal systems do not generally treat each official failure to respect and enforce the law as punishable. They do not provide for the rigorous enforcement of officials' obligations.

The failure of a legal system to enforce its own officials' obligations means in practice that governments may fail to respect the legal rights of their subjects. This failure is commonplace and can reach extremes in societies that incorporate oppressive forms of social stratification, such as Jim Crow and *apartheid* (see, e.g., Lyons 2013). In such societies, the legal rights of many persons may be violated systematically over a long period of time.

Moral rights would seem related to enforcement differently than legal rights. We might assume that in the normal case of imposing a legal obligation, lawmakers provide for penalties or remedies and thus for the enforcement of any correlative legal rights. Nothing analogous can be assumed about moral obligations. Moral rights and obligations lack the institutional base that is characteristic, if not definitive, of law and that appears presupposed by their enforcement. Nor do we, strictly speaking, enforce moral obligations as such. A given legal system may be thought of as enforcing some moral rights, but if it does so, that would be the enforcement of *legal* rights, not attributable to morality. We may morally judge conduct negatively and may as a consequence exert interpersonal pressure against threatened wrongdoing and may act hostilely toward one whose conduct seems to us to merit such treatment; but those tendencies seem a far cry from enforcement. We are morally obligated to respect moral rights and obligations, but no one is authorized to enforce moral judgments.

It is widely assumed that legal enforcement is appropriate for some especially important moral rights, including some human rights. But many moral rights are not thought of in such terms. The modest consequences of everyday moral interactions, such as routine promises, for example, would not seem to generate grounds for legal enforcement. The endorsement of a moral right does not seem to commit one to a presumption that it should be legally enforced.

Conclusion

Legal and moral rights have a number of analogous properties as well as significant differences. Hohfeld's theory of legal rights facilitates the analysis of law and enables us to advance our understanding of morality. It helps us to recognize ways in which both law and morality enable us to change our moral and legal conditions and relations. It also helps us to analyze rights that have complex structures. Although Hohfeld's four categories may not each correspond to a full-fledged right, they provide benchmarks for better understanding rights in morality as well as law and those two realms more generally. They presumably facilitate deliberate reform of the law.

Cross-References

► Dworkin, Ronald: Theory of Rights
► Rights: General
► Rights: Interest and Will Theories

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Rights: Ronald Dworkin's Perspective

▶ Dworkin, Ronald: Theory of Rights

Rights: Social Rights

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Introduction

Social rights have had a long and variegated history. As the product of revolutions and political struggles, they have been recognized for groups and collectivities such as the working class, in the form of labor rights and social security, or for needy individuals in the form of a right to subsistence. In the twentieth century, some people have even identified them with "socialist rights" (Schmitt 1934), which are alien to the bourgeois constitutional order. This polyfacetic history calls for an analysis of the concept and its history, structure, foundation, and enforceability.

The Concept

Social rights are claim rights, the content of which is a real positive factual benefit provided generally by the state. Claim rights are normative positions for which it is possible to offer valid and sufficient reasons, the unjustified nonrecognition of which causes imminent harm to the person (Arango 2005). Due to the fact that we accept the language and relational practice of rights, it is possible for us to make mutual demands of each other and to provide institutional support in order to secure their fulfillment. We have arrived at this concept of claim rights after progressively abandoning natural law concepts according to which individuals have rights or liberties that predate the state and exist through the will of God or through the mere fact of their own existence, as if an *ought* could somehow be derived from an *is*.

Holding a normative position means being in relation to others, in an institutionally supported relationship. Affirming that one holds a certain normative position in relation to others presupposes the possibility of justifying the bonding of other subjects to that position. A normative background that is the fruit of human interaction and experiences is an undeniable reality, even if that reality has been socially constructed. The reasons given to justify a certain normative position must fulfill some criteria of validity within the normative system. Furthermore, the given reasons must be sufficient to outweigh the opposing reasons or arguments that deny that relationship. The ideal nature of this construction requires its institutional recognition in order to coordinate the different levels of co-responsibility that exist between individual persons and social groups. The effectiveness of the recognition of normative positions or relations between subjects of rights depends on an adequate and effective interweaving of the diverse levels of protection of such positions or relations. The discourse and the practice of rights require a balance between individual and group responsibility and subsidiarity, between personal effort and the support of third parties, as well as effective intervention of different levels of protection in accordance with the level of risk and harm involved in each case. The imminence of harm and the urgency of the situation require the inversion of the order of enforceability of normative positions (see section "Enforceability").

In the legalist tradition of the eighteenth and nineteenth centuries, claim rights were mainly ensured through legislation. Legalism, however, would be unable to respond to the acceleration of time in the context of advanced capitalism (Luhmann 1983). It thus became necessary in the face of constantly changing realities for judges to interpret the constitution and the law in a broad and sensitive manner in order to fill legal voids. The process of constitutionalization of law, with the adoption of extensive, substantial, and directly applicable bills of rights, as well as the creation of specialized courts, characterizes the current

evolution in the practice of rights. The growing recognition of social rights as genuine human and fundamental rights is a clear expression of said process, and the Latin American experience has become a noteworthy example of it (Abramovich and Courtis 2002).

The History

In the eighteenth century, aid or support for the poor, for defenseless children, or for elderly people was a matter left to the family or to the public of private charity in the form of legal or moral duties. In the nineteenth century, social rights were identified with claims that were eventually able to achieve the status of legal rights for particular groups through political and social struggles, as in the case of salaried workers. In the twentieth century, social rights were granted the status of social ends or objectives, the materialization of which requires legal norms that impose positive obligations on public authorities, but excluded the individual possibility of claiming them directly before the judges. Nowadays, there is a broad doctrinal school of thought that considers social rights to be true human and fundamental rights, as seen both at the international level and in the constitutions of many different nations. This conception and its philosophical foundations are relatively new.

The revolutionary tradition initiated by Robespierre was opposed to any understanding of the positive benefits provided by the state as mere moral or legal duties. He was the first thinker to declare fraternity – together with liberty and equality – to be a universal principle, from which all individual rights within the political community emerge. The first committee against begging was established in Paris in 1790, which formulated the first social right to public assistance in case of want: "every man has the right to subsistence."

Poor laws were issued in the time of Otto von Bismarck in order to restrain the spread of communism and "deprive the revolution of its fuel." Through aid to the poor and social assistance, needy people received legally established benefits provided by the Prussian state. The law established state obligations to provide benefits that were aimed at maintaining law and order. The social question was a matter of law enforcement by the police. The same thing happened in Italy with the laws of conservative governments.

With the turn of the century, things took a different turn thanks to the advancement of the socialist legal consciousness and the positivization of social demands. The Mexican (1917) and the Weimar (1919) constitutions included a multiplicity of social rights in their catalogues of rights. Nevertheless, the broadening of the language of rights in order to cover a new generation of rights that would complement liberal rights of an individualistic type was not sufficient to accomplish the recognition of rights at the constitutional level.

In the constitutionalism of the postwar period, social rights assumed the form of objective norms, directives, or measures directed at the legislature for the purpose of securing social ends or objectives. However, this development did not seem to be sufficient at the level of international law, although the Universal Declaration of Human Rights did include within its articulation social rights to health, education, shelter, work, and social security.

In the light of their historical evolution, social rights have become trapped in a double meaning: for some, they are true universal rights – for example, the right to a bare social minimum (vital, existential) – with the same importance as fundamental defense rights; for others, the right-bearers may be nationals, who, given their objective situation of need, are protected by their particular political community generally through legal measures. The recognized divergent meaning and scope of social rights demand an in-depth study of their structure, foundation, and enforceability.

The Structure

Social rights, like other claim rights, have a triadic or threefold structure: the right-bearer, obliged subjects, and an object or benefit of that right.

Even when the bearer of a right can be individual or collective, in the case of social, human, and fundamental rights, the right-bearer is a natural person or individual. This is because the direct beneficiary of food, healthcare, education, shelter,

work, or social security is in every case a human being. It is the individual who suffers hunger, illness, unemployment, lack of shelter, or social protection in old age. Although collective cultural rights may well be recognized with the content or provisions that are typical of social rights – for example, healthcare or shelter in accordance with the worldview of a particular ethnic community – in such cases it is technically more appropriate to speak of cultural rights rather than collective social rights.

Social rights may have several different duty-bearers. It is up to the legislators to determine who they are in the case of legal social rights; to the constitutional assembly in the case of fundamental social rights; and to states and constitutional or international judges in the case of human social rights. Those obliged to satisfy these rights – i.e., the duty-bearers – in the last two of these cases may be determined according to a chain or order of precedence.

In contemporary states of law that guarantee social rights at the legal level, duty-bearers may be private individuals – such as an employer in the case of healthcare or social security – or the state itself. A minor who needs food; the youth who seeks a place to enroll in school; a worker who demands the payment of his salary or his social benefits; and a family that expects the recognition of their right to shelter or healthcare have either relatives, employers, or the state as their counterparts. When democratic legislators develop these guarantees in the law, it is possible to enforce the fulfillment of the respective benefits through administrative procedures or through ordinary judicial proceedings.

According to the principle of subsidiarity, those who are first called on to satisfy social rights are the right-bearers themselves or their next of kin; in the case of a legal void or an actual impossibility, it is the duty of the state or the international community to satisfy them. On the other hand, the principle of solidarity guarantees that, in the face of the legal or material impossibility of fulfillment on the part of those who are primarily obliged, and in accordance with the order of precedence in the multilevel system of protection of human rights, the national government is obliged to guarantee the full enjoyment of social rights.

A definitive criterion for the assignment of the respective responsibilities is the urgency of the situation (Scanlon 1975). It is not reasonable – in a constitutional state based on human dignity and respect for human and fundamental rights – to not recognize a sufficiently justified demand on the part of poor or helpless people, the lack of recognition of which would cause them imminent harm, with the simple argument that the legislator has not yet established who the possible duty-bearers are. In the case of an emergency, a situation in which the content of the benefits can be counterfactually determined (see section "Enforceability"), the order of precedence of those obliged to satisfy social rights becomes inverted.

As mentioned above, in reference to the concept of social rights, the object of law consists – primarily – of positive factual benefits. Even though part of the doctrine includes obligations not to do or to abstain regarding the content of social rights, the emphasis on positive obligations is justified because determining them requires more complex methods than those traditionally used by judges.

The Foundation

The debate regarding the foundation of social rights is broad and extensive. Four options have been explored in the philosophical and legal literature in recent years: dignity, liberty, equality, and solidarity.

Human dignity has been repeatedly invoked in doctrine and jurisprudence as the basis of social rights. Human dignity is used to express the intrinsic value of human beings and to avoid instrumentalizing them, the limit of moral action expressed in the second formulation of Kant's categorical imperative, namely, the duty to always treat a person as an end and never merely as a means to an end. The intangible nucleus of human beings would not only include the prohibition against degrading their intrinsic value but also the duty to provide the necessary material benefits to live with dignity. Such benefits would include physiological guarantees as well as sociocultural guarantees for the person's insertion as a social being, among other things.

The demo-liberal analytic tradition has tried to ground fundamental social rights on the idea of a factual freedom, in contrast to libertarian conceptions that deny such a possibility (Nozick 1974). For Alexy, basic rights to food, to basic healthcare, to education, to decent shelter, to work, and to social security must be ensured to guarantee the effective personal freedom (Alexy 2010). It does not suffice to defend an abstract idea of freedom associated with the possibility of making choices. This is how the need to ensure the individual's condition as a citizen who can effectively take part in the democratic process leads John Rawls to include the minimum social necessary for being a full-fledged citizen (Rawls 1993), in the first principle of justice and in the essential constitutional contents that ensure equal basic liberties for all.

The egalitarian democratic tradition grounds social rights on the principle of equality. The securement of these rights seems indispensable in the process of democratic and social inclusion of individuals and groups who for personal conditions are not capable of self-determination without the state's guarantee of positive measures. Those who ground social rights on equality start by distinguishing between "formal" and "material" equality. The first of these only ensures equality in the eyes of and under the law: it prohibits legislative discrimination against those who must be treated equally. Material equality, on the other hand, assumes the equalization of minimal material conditions – through the recognition of social rights – in such a way that individuals, attending to their own real capacities and concrete roles in society, can participate fully in the social, political, and cultural life of their community.

Solidarity is a fourth argument that has been put forward as the basis of social rights. Solidarity has its origin in Roman law. It refers to the responsibility that each one of the members of a group assumes for the obligations of all, as well as to the group's responsibility regarding the obligations of its members considered individually. The legal nature of the concept of solidarity makes it possible to clearly differentiate the responsibility for obligations from their moral content, which highlights the crucial role of law in the coordination of individual and collective action.

Economic reasons are added to reasons of a legal and political nature to justify social rights on the grounds of solidarity. In an increasingly interdependent and interconnected world, where doing or refraining from doing something in one corner of the world inevitably has repercussions on persons and populations in faraway places, some people's positive rights tend to increase and multiply. Liberalism's point of departure, the autonomous and rational individual who is irreducible in his or her preferences, is corrected by the emphasis on our relational and interdependent being, which, without denying individual liberties, integrates freedom rights and social rights within a universal, comprehensive, and indivisible whole.

Enforceability

With respect to social rights – i.e., food, healthcare, education, shelter, social security, and work – it is necessary to distinguish between two types of enforceability: political and legal.

Although social rights were initially identified with sectoral or group vindications, especially those of the working class in the early twentieth century, social rights currently form part not only of the constitutions of socialist countries but also of many constitutions, declarations, and conventions or international pacts on human rights. This is the product of collective demands or claims, as well as popular mobilization in defense of the full recognition of human rights in their integrity.

The experience of coordinated actions of theoreticians, human rights activists, judges and tribunals sensitive to the developments of constitutionalism and international human rights law, has led to the conviction that without the active mobilization of social organizations and civic associations, the political advances for the guarantee and effective enjoyment of social rights would not have been possible. Political enforceability therefore requires a constant labor of appreciation of comparative experiences, political lobbying, doctrinal development, macroeconomic decisions, international agreements, and international litigation in the quest for full enforcement of

social rights as true human and fundamental rights.

The legal enforceability (justiciability) of social rights is perhaps the hardest challenge posed by social human and fundamental rights in our time. The complexity of the conceptual, interpretative, and institutional problems has not been completely solved, either in theory or in practice. This situation, rather than discouraging their defenders, raises a challenge that is both greatly attractive and highly important: the possibility of effectively achieving a minimum of justice to ensure the stability of societies that seek to ensure peace through the rule of law, particularly through the model of the social, constitutional, and democratic state of law, and the national, regional, and universal systems for the protection of human rights.

The specialized literature presents two clearly discernible strategies for advancing in the justiciability of social rights. The first one takes international human rights law as its cornerstone, particularly the guarantees entailed in principles such as progressiveness and the prohibition of going backward or regressing. The second strategy is based on social constitutionalism and interpretative advances in the legal systems of the so-called Global South (Gauri and Brinks 2008). Both strategies converge in practice and potentiate the possibilities of responding satisfactorily to the objections raised against social rights as true human and fundamental rights.

Conclusion

Luigi Ferrajoli asserted years ago that the social state of law lacked a theory of the social state, in contrast to the integrated and deeply rooted theory of the liberal state of law (Ferrajoli 2003). The level of institutionalization that social rights have attained at present, especially in "peripheral" societies of the Global South, has made it possible to advance toward the full recognition of those rights. New research on the jurisprudential development of this type of rights, as well as the internationalization of their discourse, allow us to dismantle the biases against them and to secure the minimal social rights for all, without failing to recognize individual freedom or democracy or substituting political struggle with an exaggerated and irrational judicial activism. On the contrary, the broad recognition of social rights ensures the inclusion of everyone in the democratic process as free, capable, and full-fledged citizens.

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Rights: Social Rights and Welfare

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Introduction

In his influential 1950 essay, the British sociologist, T.H. Marshall explained the development of social rights in terms of the historical process of modernization and the completion of

citizenship rights (Marshall 1950). Taken together, civil, political, and social rights were to ameliorate class conflicts generated by industrial capitalism by extending the equal status of citizenship, along with its rights and duties, to all citizens across social classes. Following Marshall, social rights within the social policy literature have been understood as people's entitlements to the extra-market provision of socioeconomic resources by the institutions of the capitalist welfare state and are often discussed in terms of the degree of social expenditures for the social security system, healthcare, education, housing, income maintenance, and care services (Stephens 2010). Normative arguments on social rights in legal and political theory center on the moral reasons for why welfare ought to be provided as a right of citizenship, and how to justify the collective provision of socioeconomic resources in relation to other rights.

Meanwhile, the often-cited 1948 UN Declaration of Human Rights is noted for its inclusion of socioeconomic claims, along with the so-called first generation civil and political liberties, as human rights (United Nations 1948). The recognition and inclusion of social rights in the UNDHR reflects the development of the welfare state and expectations about the state's responsibility towards its citizens in the twentieth century (Jones 1994). At the same time, much of the ensuing theoretical controversy surrounding social rights has focused on whether we should understand social rights as universal human rights or as citizenship rights based on people's membership in a particular political community.

This chapter proceeds by considering arguments on the normative reasons for and against providing welfare as a right of citizenship, the idea of social rights as universal human rights rather than citizenship rights, and recent debates on the idea of social rights in relation to contemporary social changes.

Normative Arguments for Social Rights

Despite various criticisms regarding the historical accuracy of Marshall's account of the development of citizenship rights, his idea of social citizenship has also been interpreted as a normative argument on how welfare ought to be provided in society. While there are various ways to provide welfare – through the market, family, community, charity, and cooperative self-help – the idea of social citizenship stipulates that welfare provision ought to be a right of citizenship, provided universally, free from stigma and the discretion of others.

King and Waldron (1988) argue that social rights are instrumental to citizens' public participation as well as constitutive of the very idea of citizenship. First, a secure standard of living is a condition for people to exercise their civil and political rights as responsible citizens. Classical and republican theorists of citizenship have consistently argued that meeting people's basic needs, as well as preventing excessive social inequality, promotes social stability and solidarity, which are crucial to public life. If people were constantly in need, their immediate interests would take precedence over long-term reflection on the justice of social institutions. Moreover, excessive inequality would incline people to promote their own interests over the public good, deepening social cleavages and mistrust that work against social cooperation.

Second, a certain level of socioeconomic resources and equality are conditions for people's independence to form and express their opinions on public affairs (King and Waldron 1988). In other words, these conditions must be fulfilled to ensure that no one is economically vulnerable to the extent that their opinions can be "purchased" by another (King and Waldron 1988: 427). This relates to Robert Goodin's (1988) argument that the purpose of the welfare state, which institutionalizes extra-market provision as people's rights, is to prevent the exploitation of dependencies by separating welfare provision from the discretion of others. According to Goodin, "those who depend upon particular others for satisfying their basic needs are rendered, by that dependency, susceptible to exploitation by those upon whom they depend. It is the risks of exploitation of such dependencies that justifies public provision – and public provision of a distinctively welfare state form – for those basic needs" (1988: 121). Thus, an important achievement of the welfare state

in relation to previous welfare systems is the emancipation of individuals from exploitative dependence. Not only is such independence a necessary condition for responsible political participation but a substantive demand of liberal egalitarian justice since unequal power relationships that may lead to exploitation violates the idea of individuals' equal moral worth, and their equal civil rights freely to pursue their conceptions of the good.

Third, instead of simply having instrumental value for public life, welfare entitlements can be defended as being constitutive of the very idea of citizenship (King and Waldron 1988). Taking a Rawlsian framework, King and Waldron argue that being an equal member of society, as opposed to being a subject, is to have a part in justifying the basic institutions under which one lives: "A person is a member of a society if and only if the design of its basic institutions fairly reflects a concern for his or her interests along with those of everyone else" (1988: 440). For Rawls (1971), a society's basic institutions such as the constitution, the system of property rights, the economic structure and the family make up the basic structure of society which assigns rights and duties to citizens. Since basic institutions that everyone could agree to would be those that guarantee at least a basic minimum of socioeconomic resources to its members, the entitlement to a basic minimum of welfare ought to be considered as constitutive of equal citizenship.

Normative Argument Against Social Rights

Despite these normative arguments in favor of social rights, there have also been normative criticisms against it. While civil, political, and social rights all call for collective protection and provision, social rights, in particular, requires the transfer of wealth through redistributive taxation to provide for them. The libertarian view advanced by Robert Nozick (1974) holds that imposing redistributive transfers is impermissible because it violates people's property rights. Based on the premise that people are morally entitled to their wealth and income through legitimate acquisition and voluntary transfers, Nozick famously argues that involuntary transfers in the form of compulsory redistributive taxation amounts to "forced labor", thus denying any claims to welfare as people's rights (1974: 169). Nozick holds that rights should be understood as "side-constraints" on action, which place only negative limits on people's morally permissible actions (Nozick 1974; Lomasky 2000).

One approach against Nozick starts from the view that rights ought to be viewed as protections of human agency or the capacity autonomously to choose and pursue one's conception of the good. Although Nozick maintains that interference in people's property unjustifiably infringes their liberty, Griffin (2000, 2008) argues that not all interferences conflict with people's rights since the political significance of liberty lies in enabling people to pursue what they see as a valuable life. Since contributing part of one's income for redistribution does not necessarily hinder our capacity to live autonomously, we need not think of it as violation of our rights.

Another approach questions Nozick's assumption regarding the extent of people's moral entitlements to ownership. While Nozick himself recognizes that actual distributions of wealth in the world can be unjust due to the historical accumulations of illegitimate transfers of property, as Adam Swift (2006: 34) points out, "what is significant about his position is that, on his view, vast and structural inequalities *could* be just," so long as transfers were made freely and voluntarily by the rightful owners. By contrast, John Rawls' (1971) theory of justice starts from the idea that people are not entirely entitled to their income and wealth because such things depend on their luck in the social and natural lotteries, which are arbitrary from a moral point of view. Although Rawls agrees that people have self-ownership over their bodily integrity, talents, and personal freedom, his idea of self-ownership does not extend to ownership over the market value of their productive activities. Thus, redistributive taxation is a matter of treating all members of society as free and equal citizens by removing more fortunate individuals' morally arbitrary benefits and transferring them to less fortunate individuals who shoulder morally arbitrary disadvantages.

Social Rights as Human Rights

These normative reasons for and against social rights involve questions of justice among citizens in a common political community, whether in terms of the conditions that make equal political participation possible, their freedom from unequal power relationships or considerations of distributive justice that affect their status as free and equal citizens. Moreover, as the historical recognition and institutionalization of social rights evolved together with the development of the capitalist welfare state, social rights have been understood as the result of citizens' political determination to counter the effects of the capitalist economy on their wellbeing through collective provision (Marshall 1950; Esping-Andersen 1990; Pierson 2006; Stephens 2010; Dean 2015).

Nevertheless, there have also been calls for a "post-Marshallian" conception of social rights that seek to unchain social rights from citizenship in the modern welfare state (Dean 2013, 2015; Johansson and Hvinden 2013). Hartley Dean argues that social rights arise wherever there is recognition of people's sociality, by which he means their social interdependence, and negotiation which publicizes people's needs claims as their rights (Dean 2013, 2015). The impetus behind disentangling social rights from social citizenship stems from a concern that tying social rights to existing institutions leads to an overly legalistic and conservative view of social rights, as well as to growing inconsistencies between the idea of social rights and changing social circumstances.

Based on the moral intuition that socioeconomic needs apply to people everywhere, some theorists maintain that social rights should be understood as universal human rights, grounded in people's common humanity rather than in the entitlements of citizenship. This idea assumes that there are certain objective moral requirements that apply to human beings as such, regardless of their social, cultural, or religious context. These moral requirements are prepolitical and derive from a certain notion of human nature or of what it means to be a human being. One position holds that living in a characteristically human way is to live as autonomously choosing agents. From this perspective, because all human beings need an adequate minimum of socioeconomic resources to live autonomously, access to such resources should be considered a universal human right (Gewirth 1982; Griffin 2000, 2008; Fabre 2000).

Common objections against the idea of social rights as human rights center on the problem of feasibility and the possibility of identifying a duty-bearer in relation to people's positive claims to resources. It is claimed that under the circumstances of scarcity, it is unfeasible to perform, and thus incoherent to demand, positive duties to provide socioeconomic resources to every needy person (Cranston 1967; Wellman 1982). Moreover, without an identifiable duty-bearer, no one can demand the fulfillment of positive duties on the part of others as their right. These objections assume that, in contrast to social rights, civil and political rights only impose negative duties of forbearance and can simultaneously be demanded of people in general (Cranston 1967; Wellman 1982). For this reason, some argue that only civil and political rights should be understood as universal human rights, while social rights should be regarded as "manifesto rights," which people and governments should, at best, aspire to, rather than guarantee by law (Wellman 1982).

Today, however, it is widely established that there is no meaningful division between negative and positive rights. Jeremy Waldron argues that a right gives rise to "waves of duties" to support that right, and is "unlikely to stand in a simple one-to-one relation with duties" (Waldron 1989: 510). Referring to the right not to be tortured, Waldron (1989) shows how a supposedly negative right gives rise to waves of both negative and positive duties, such as the duty to educate people that torture is wrong and remedial duties like rescuing people from torture and preventing recurrences (Waldron 1989). Moreover, the protection of the right not to be tortured requires judicial institutions that judge and punish violations, a system that oversees the protection of people's rights

against torture, etc., and scarce resources must be rationed for these institutions against others.

In this sense, civil, political, and social rights all require political determination to institutionalize their protection as a public duty. Throughout most of the twentieth century, the modern welfare state has been recognized as the primary duty-bearer in relation to people's social rights. The state, as the agent of its citizens, is politically authorized to employ its coercive power to fulfil this duty through enforcing compulsory taxation and citizens' participation in public social security schemes. While citizens cannot make any enforceable claims against any particular individual for the provision of their welfare, they can make legally enforceable claims against the state for the fulfilment of their social rights (Plant 1988).

Social Rights and Social Change

Nevertheless, increasing global interdependence, on the one hand, and growing political pressures against the welfare state, on the other, are challenging the idea of the welfare state as the dominant duty-bearer in relation to people's social rights. Charles Beitz (1999/1979) argues that the current level of global economic interdependence means that the entire world should be seen as a single scheme of social cooperation to which principles of global distributive justice apply. Conversely, there have also been pressures to devolve responsibility for welfare from the state to individuals or to local self-help and community initiatives.

The latter argument comes from political debates on welfare state retrenchment and recalibration which began in the 1980s in face of postindustrial changes such as rising unemployment and demographic ageing (Pierson 2006). One response has been the shift towards "welfare contractualism," which emphasizes individual responsibility for welfare by attaching work-related conditions to cash transfers. Stuart White (2003) has argued that welfare contractualism may be defensible based on his idea of "justice as fair reciprocity," which holds that those who share in the fruits of social cooperation have a duty to make a corresponding productive contribution to society in accordance with their abilities. Each citizen must "do one's bit" in upholding social institutions as an attitude of paying equal respect to fellow citizens. Nevertheless, as White himself is careful to emphasize, the reciprocity principle only applies where fairly stringent structures of background justice regarding opportunities and rewards are already in place. In addition, there may be practical difficulties in accounting for non-work-related contributions such as informal care work.

Another response to postindustrial change has been to devolve welfare provision to communities. While some see these developments as a neoliberal agenda to roll back the state and privatize responsibility for welfare, others see it as a way to challenge standardized and uniform state services. Paul Hirst (1994), for example, argues for associational democracy in which the governance of welfare services are devolved to local communities and associations to counter the monopoly of the centralized state that crowds out citizens' democratic participation.

These perspectives point to growing recognition of multiple forms of social interdependence and social cooperation both above and below the state. Thus, Dean argues that "as the significance of all kinds of territorial boundaries dissolve, it is possible to envision a multiplication of diverse sites of social citizenship, ranging from local to global," based on the idea that "Social rights should be understood not only in institutional terms, but also in relational terms" (2013: 41).

Despite the development of multiple non-state forms of interdependence, however, social rights require a public that not only demands but shoulders collective duties and legitimately enforce them. At the global level, transnational governance networks and regulatory frameworks generate new normative requirements across state boundaries (Beitz 2005), whereas reciprocal social relations for providing collective goods and services at the local level may give rise to norms regarding participants' entitlements and

obligations (Endo and Lim 2017). Yet, even as new demands and norms for collective social provision emerge, there must also be ways to enforce these new publics to fulfil rights-corresponding duties in order to entitle beneficiaries to welfare provision as their social rights.

Conclusion

Normative controversies surrounding social rights have centered on (1) how to justify coercive obligations for the collective provision of socioeconomic resources and (2) whether social rights ought to be understood as prepolitical human rights or as rights of social citizenship in the welfare state. Recent arguments on social rights seek to unchain social rights from citizenship in the welfare state that potentially sanctions the status quo. One response turns towards a moral basis for social rights in terms of universal human rights that apply to people everywhere, regardless of citizenship. Another approach looks to emerging forms of social interdependence at both global and local levels. Nevertheless, the idea of social rights cannot be separated from the question of how practically to provide for them, and this requires some form of political recognition and determination for the collective protection of social rights. Moreover, an important achievement of the welfare state is to emancipate individuals from arbitrary dependence based on personal or communal relationships. Thus, while new interdependencies may lead to the recognition of reciprocal moral obligations and entitlements across and within state boundaries, there is still the challenge of institutionalizing such reciprocal provision as an enforceable public duty, while respecting individuals' freedom from arbitrary dependence.

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Robespierre, Maximilien

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Introduction

Maximilien Robespierre (1758–1794) was one of the leaders of the French Revolution, a committed radical democrat and a proponent of Jacobinism. He became a member of the Committee of Public Safety in the summer of 1793 where, during the ensuing tumultuous year of war and terror, he played a prominent part in the republican government. After his fall and execution he was posthumously scapegoated for having purportedly been the mastermind behind a concerted "reign of terror."

Early Life and Political Influences

Robespierre was born in Arras in northern France on 6 May 1758. His mother died young, and the father abandoned his family, leaving the boy and his younger siblings to be raised by relatives. He became a scholarship boy at the college of Louis-le-Grand in Paris, before returning to Arras where he established himself as a provincial lawyer. A hard-working, mild-mannered, and studious man, Robespierre took his responsibilities seriously, and shouldered the burden of caring for his younger brother and sister. He was not overtly particularly political before the Revolution – the Old Regime operated censorship of political views – but he had marked sympathies for the poor and downtrodden. He was known as a poor man's lawyer, rather than one who chose his clientele on the basis of their ability to pay. In common with many of his fellow revolutionaries, Robespierre was much influenced by Enlightenment thinkers and political theorists. Two thinkers who helped to shape his political thought were: Montesquieu, particularly for the idea – which itself owed much to classical republican traditions – that the highest form of government was that of a republic founded on the virtue of its citizens; and Rousseau, particularly for his formulations regarding popular sovereignty and natural virtue.

Robespierre and the French Revolution

The outbreak of Revolution in 1789 opened up the prospect of political transformation for Robespierre, as it did so many others. He was elected as a Third Estate (commoner) deputy to the Estates-General, which then transformed itself into the National Assembly alongside a constitutional monarchy. Robespierre worked hard to gain a political voice, though this was no easy matter in an assembly of over 1200 men. He established himself as one of a group of radical deputies, arguing that the principles espoused in the Declaration of the Rights of Man should apply to all, even to the poor and to religious minorities. He opposed slavery in the French colonies. In May 1791 he attempted unsuccessfully to get the death penalty abolished. He became a notable figure in the Jacobin Club, where he was known as "the Incorruptible," a man who could not be bought or corrupted. For much of his revolutionary career he exercised sound political judgment and cautioned against violent extremism that could make the Revolution hated. He was almost a lone voice in opposing the declaration of war with Austria in April 1792, a war that brought about the overthrow of the monarchy the following August, destabilized the country, and sent the Revolution hurtling toward terror.

In September 1792 a new body met, the National Convention, and promptly declared France a republic. The ensuing months saw the intensification of military and political crisis: France was threatened on all its borders, generals turned traitor, and a full-scale civil war began in Western France, centered on the Vendée. Against this backdrop the deputies of the Convention collectively began to pass a series of measures enabling crisis government. As a prominent Montagnard (a Jacobin Club deputy) Robespierre played his part in crisis government. On 27 July 1793 Robespierre was voted onto the Committee

of Public Safety, a body made up of 12 deputies that assumed an increasing number of executive powers, while remaining under the authority of the Convention.

Robespierre's transformation into a supporter of terror does not lie in some individual flaw in his personality, but in the headlong and increasingly traumatic politics of the Revolution itself. The Montagnards wrote the most democratic, egalitarian, and libertarian constitution that the world had yet seen. Then they shelved it "until the peace." Robespierre did not cease to be a democrat. But he thought other things were more important – chief of which was the survival of the Republic. Everything must be subordinated to that. Revolutionaries must be prepared to adopt the ruthless tactics that their enemies would deploy were the positions to be reversed. In these circumstances, Robespierre considered the recourse to terror to be acceptable provided it was guided by virtue (political integrity). Thus the humanitarian and libertarian politician became a defender of terror, and ironically it is for that that he is principally remembered.

With no historical precedent to guide them, the revolutionaries had to devise a new theory of the nature of revolution. In December 1793 Robespierre said: "The theory of revolutionary government is as new as the revolution that has led to it. We should not search for it in the books of political theorists . . . who did not foresee this revolution . . ." ["Report on the principles of revolutionary government," 5 Nivôse (25 December 1793), Robespierre, *Oeuvres*, vol. X, p. 274.] He went on to compare normal constitutional government with the exceptional circumstances of revolutionary government: "The goal of constitutional government is to maintain the Republic; that of revolutionary government is to found it." [Ibid.]

Terror – in the form of laws and the emotion of fear – also weighed upon the deputies themselves, who in April 1793 had voted to remove their own parliamentary immunity, and henceforward could be subject to arrest, indictment, and execution. Factional in-fighting broke out among the deputies themselves. Robespierre played a prominent part in the factional struggles, and was party to the downfall of the Girondin and later the Dantonist factions. Tensions escalated in the Convention, even as the military victory at Fleurus on 26 June 1794 began a process that obviated the need for terror. This time the factional conflict involved a split within the Montagnards and other prominent deputies, a split that reached the Committee of Public Safety, where relations broke down between Robespierre and several other committee members.

On 27 July 1794 the threatened storm broke in the Convention, partly due to Robespierre's own actions in precipitating the conflict. A group of Montagnards, fearful of Robespierre, joined forces to denounced him as a "conspirator" against the Revolution in the National Convention, and voted his arrest, along with his brother, and three other deputies. The following day, 10 Thermidor Year II in the new revolutionary calendar (28 July 1794), Robespierre was sent to the guillotine, along with 107 of his supporters, dispatched with him and on the 2 succeeding days.

The men who overthrew Robespierre did so to save their own lives in the factional conflict, rather than with a view to ending the terror in which they too had been implicated. Yet the convulsions around the fall of Robespierre started a process whereby the policy of terror began to fall apart. The men who survived Thermidor exculpated themselves from involvement in terror by elaborating the myth that shifted sole responsibility onto Robespierre, claiming that he had been a dictator, motivated by ambition, greed, and the lust for power.

Robespierre's Legacy

Few people in French history have been accorded such a polarized reputation as that of Robespierre. Attitudes toward Robespierre have changed over time, reflecting the profound political and social shifts that have taken place since the late eighteenth century. He has always had his advocates to whom he remains a hero and martyr of the Revolution, defender of a republic based on equality of rights, and a committed democrat. For much of the nineteenth and twentieth centuries, however, it

took considerable courage to defend any aspect of Robespierre's reputation, so tainted was he by the legacy of the "black legend" according to which he had been a dictator who almost single-handedly imposed a "reign of terror" on France. More recently, there are signs that a more objective view is starting to emerge, one which situates our understanding of Robespierre – along with his fellow revolutionaries – in the context of war, civil war, destabilized politics, and crisis government.

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Romano, Santi

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Introduction

Santi Romano (1875–1947) was born in Palermo, Sicily on January 31, 1875. His origins had a notable impact on his legal training, as Palermo was the cradle of a host of renewed legal studies that changed once and for all the way of approaching public law in Italy. His teacher, Vittorio Emanuele Orlando, was both a leading statesman and an innovator of the notion and practice of public and administrative law. The young Romano contributed to a seminal collection of volumes, edited by Orlando, devoted to Italian administrative law, *Primo trattato completo di diritto amministrativo italiano* (First Complete Treatise on Italian Administrative Law), published between 1900 and 1915. The importance Orlando and his many collaborators attached to such a monumental scholarly enterprise should not go unnoticed: in his preface to the first volume, Orlando emphasized his and the other contributors' conscious, and eventually successful, attempt at constructing an *Italian* school of public law. This collection of writings, he claimed, was the necessary counterpoint to the growing expansion of the state's competences in the public realm. While in the past, Italian scholars had been heavily influenced by the French lawyers who had been working and mulling over the *Code Napoléon* and, subsequently, by the German pandectists, Orlando insisted that the specialization and evolution of the Italian state called for a full-fledged "home-grown" scholarly apparatus. After obtaining his degree at the University of Palermo, Romano wholeheartedly adhered to this ambitious project.

Overview

Romano would soon part ways with his mentor (though they remained good friends, with the inevitable ebb and flow of pre- and post-war times) and developed a new, seminal approach to the legal phenomenon. Unlike Orlando, Romano had no penchant for the limelight of politics. He entirely devoted himself to legal studies and legal teaching. He taught in Camerino (1897–1902), Modena (1902–1907), Pisa (1908–1923), and Milan (1924–1928). His unconditional scholarly commitment, however, suffered a serious setback from the 1st of January 1929, when he had to quit his professorship as he was appointed by Benito Mussolini as the President of the Council of State, the

court of last resort in administrative matters. Although his judicial activity took most of his time, Romano did not give up his passion for teaching and gave lectures as an Adjunct Professor at the University of Rome "La Sapienza." He first taught Administrative Law, and then moved on to Constitutional Law, as Orlando, who had till then held the chair of Constitutional Law at La Sapienza, nominated him as his successor. Romano resigned from the Presidency of the Council of State in 1944, a few months after the Allied Powers liberated Rome from Nazi occupation. Romano died in Rome on November 3, 1947.

However, Romano's quite unexciting life tells us little about the striking path he broke in the history of legal thinking. A unique blend of legal institutionalism and legal pluralism makes his theory one of the most original and certainly topical legal paradigms. It is worth commencing with his notion of institution. In his most famous book, *The Legal Order*, first published in 1918, he argued that public law theory should get rid of the barren normativism that shored up state-based legal theory. The law can hardly be reduced to a set of norms backed by sanction. The law is neither a norm nor a set of norms. Nor is it reducible to judicial bodies, legal practices and legal procedures. The law comprises all these elements and much more. The law is the theatre in which these elements unfold: it is a *process* more than a *substance*. This is why he criticized the pioneer of legal institutionalism, French jurist Maurice Hauriou, as the latter claimed the institution to precede (and produce) the law. There is no diachronic or genetic relation between law and institution. They amount to the same phenomenon. The terms "law," "organization," "institution," and "order" are synonymous with each other. None of them precedes any other. Romano's distinctive argument was that, when it comes to legal theorizing, the term "institution" is a more accurate qualification for the process of organization – one that scholars of other disciplines had taken up more seriously than jurists.

More precisely, an institution is the process whereby a group of people stabilize their interactional life with recourse to various techniques: norms, principles, procedures, and others. However, the latter are nothing other than *substantive characteristics* which can vary, and actually vary, while the phenomenon of organization is the kernel of every institution. If this is the case, then, regardless of the substantive characteristics of this or that order, all interactional contexts that undergo a process of organization are *legal orders*. Here is the inner link between institutionalism and pluralism. While institutionalization concerns all organized groups, the identity of institution and law qualifies all organized groups as institutions or legal orders. The state is but a contingent form of law with context-specific substantive characteristics determining its shape and structure.

In substance, Romano's refined notion portrays the law as a complex practice by which a group organizes itself as a group. He consistently stuck to this view throughout his intellectual life. In the last text he licensed in 1947, *Frammenti di un dizionario giuridico* (Fragments of a Legal dictionary), he tackled the question of the function of law. The word "function" conjures a type of "thin functionalism": a social practice meant to order the relations between subjects at various levels of relations and of ordering. Romano's thin functionalism claims the law to be designed to stabilize social practices by establishing a set of powers and authorities – and conversely, all the practices that carry out such a stabilizing function are legal practices. However, he recommended, it is imperative not to separate either conceptually or pragmatically this ordering activity from the entity that is ordered. He dismissed as naïve and untenable the idea that an entity emerges as a factual entity and then gives itself an order by developing a set of legal rules. The law is the embodied organizational form of a sedimented group. At the same time, as Romano unswervingly maintained, it would be a mistake to conclude that in this view legal theory becomes a kind of sociology. The law is not a set of concrete practices, but the particular knowledge that institutions develop to give themselves an organized form. Accordingly, studying the law does not require (at least only) investigating empirical phenomena. It requires eliciting the special knowledge that those phenomena count on to get off the ground and thrive.

From his initial works – in particular, his notable inaugural lecture at the University of Pisa in 1909, devoted to the crisis of the modern state – up to

Frammenti, Romano was constantly on the lookout for a theory of law that could reconcile pluralism with the need for political order. The literature is split between those who think he eventually was a state-centric theorist and those who think he was averse to the existence itself of a common political structure. However, we can see that Romano easily gets away with this facile interpretive bifurcation with his instructive idea of what states are called upon to do. As noted above, the law is an organizational activity that pertains to all groups that need stabilization. While competition and antagonism between legal orders is inevitable, the solution cannon be found in a state-based hierarchy between these orders. Rather, Romano believed that the solution lies is the common legal nature of all orders. This is the reason why he suggested that the custodians of peace and social order are the jurists. Their legal expertise and the knowledge they master provide a negotiation platform for orders to settle their conflicts and govern their coexistence. Certainly, this conception entails a far-reaching revision of the state and its functions. Yet it does not entail its disappearance. The state is a creation of the law, he thought, that makes room for other legal orders that intend to negotiate their peaceful coexistence. Then, it is necessary to (legally) negotiate the effects that orders exert on one another, while any idea of a claimed hierarchy between them is both useless and scientifically unfounded.

Conclusion

Romano's thinking makes an invaluable contribution to understanding our present. He elaborated on a solid conception of law that makes sense of social transformations at various levels. This conception offers precious insights into the revision of state constitutional orders in a time when legal plurality becomes a main trait of social organization. As the toolkit of modern political theory loses its grip, Romano's legacy on what the law does and how it develops serves as invitation to rethink it as a technique whereby social actors construct semi-autonomous regulations that are to be integrated into the broader body of national and international orders.

Cross-References

- ▶ Constitutionalism
- ▶ Gierke, Otto von
- ▶ Institutional Facts
- ▶ Institutionalism: Italian
- ▶ Institutionalism: Legal

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Rorty, Richard

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Richard Rorty (1931–2007) was at the time of his death in 2007 at once the best known and most widely criticized philosopher in the world. In addition to his extensive writings in Anglo-American

and Continental philosophy, he contributed to discussions in political theory and literary criticism and in jurisprudence. This range of interests is reflected in his academic positions. After 21 years as Stuart Professor of Philosophy at Princeton University, in 1982 Rorty became Kenan Professor of Humanities at the University of Virginia. After his retirement in 1997, he became Emeritus Professor of Comparative Literature (and by courtesy Philosophy) at Stanford University.

Rorty's writings on politics, society, and the law are best understood by placing them in the context of his view of pragmatism. In his widely contested understanding, pragmatism takes an image of inquiry as confrontation with the non-human world and redescribes it as conversation between the members of social practices. This understanding of pragmatism permits a reconstruction of Rorty's views on some of the central questions in jurisprudence, including the philosophy of human rights law, and the debate between H. L. A. Hart and Ronald Dworkin.

Political Liberalism and Human Rights

In his first essay on political theory, Rorty lays out a position he names in its title, "Postmodernist Bourgeois Liberalism" (Rorty 1983). Postmodernism on his understanding rejects the idea that beliefs and practices rest upon immutable epistemic foundations. In politics, liberal societies and institutions are seen as historically contingent, neither possessing nor needing the kind of philosophical justification philosophers such as Locke and Kant attempted to provide them. Rather, the institutions of liberal societies are products of contingent circumstances, and our loyalty to them rests on nothing firmer than those contingencies. Rorty later summarized this position by writing that a "perfected society will not live up to a pre-existent standard, but will be an artistic achievement, produced by the same long and difficult process of trial and error as is required by any other creative effort" (Rorty 1999, 270).

Rorty came to regret identifying himself with postmodernism almost immediately after the publication of "Postmodernist Bourgeois Liberalism," preferring instead the word pragmatism. In a subsequent essay titled "The Priority of Democracy to Philosophy" (Rorty 1988), Rorty enlists John Rawls as a fellow pragmatist, and the position set out in that paper is developed through a close engagement with Rawls' work. Rawls is taken to be addressing specific circumstances, namely, the legacy of the wars of religion following the Protestant Reformation. In a society that has come to accept, as Rawls puts it, that justice is its first virtue, no philosophical justification of the kind sought by the classical liberals will be needed. Rorty writes, "Such a society will become accustomed to the thought that social policy needs no more authority than successful accommodation among individuals, individuals who find themselves heir to the same historical traditions and faced with the same problems" (Rorty 1991, 184).

Rorty regards *A Theory of Justice*, with its emphasis on the importance of "reflective equilibrium," as marking a major break away from the epistemological concerns of twentieth-century philosophy: "Rawls's willingness to adopt 'reflective equilibrium' rather than 'conceptual analysis' as a methodological watchword sets him apart from the epistemologically orientated moral philosophy that was dominant prior to the appearance of *A Theory of Justice*" (Rorty 1991, 186, n. 29). Reflective equilibrium is holist. It does not presume the existence of a "natural order or reasons" for inquiry to follow, necessary truths to be identified, or an intrinsic nature of the self or human nature to be taken into account in decision-making. Rorty writes in summary that:

> The idea that moral and political controversies should always be "brought back to first principles" is reasonable if it means merely that we should seek common ground in the hope of attaining agreement. But it is misleading if it is taken as the claim that there is a natural order of premises from which moral and political conclusions are to be inferred. (Rorty 1991, 190)

Much attention has been paid to the shift in Rawls' writings from the earlier work culminating in *A Theory of Justice*, through to his subsequent acceptance of the historical contingency of liberalism and what this entails for political theory in

Political Liberalism. Rorty minimizes any difference there might be between the early and later Rawls. "The Priority of Democracy to Philosophy" provides a historicist reading of Rawls, in which his focus on the particular circumstances in which we live is central, and in which the Kantian language is treated as something which can be set aside without loss to what is important in his position. Rorty writes: "On my view, the frequent remark that Rawls's rational choosers look remarkably like twentieth-century American liberals is perfectly just, but not a criticism of Rawls. It is merely a frank ethnocentrism which is essential to serious, nonfantastical, thought" (Rorty 1991, 30, n. 12).

Building on the essays "Postmodernist Bourgeois Liberalism" and "The Priority of Democracy to Philosophy," Rorty's most sustained thoughts on political theory are presented in *Contingency, Irony, and Solidarity* (Rorty 1989). That book sketches what he calls "the ideally liberal society." The ideally liberal society provides a framework within which individuals are treated equally in certain respects, but leaves them be to pursue their different ends. As Rorty puts it, "J.S. Mill's suggestion that governments devote themselves to optimizing the balance between leaving people's private lives alone and preventing suffering seems to me pretty much the last word" (Rorty 1989, 63).

Self-creation is one of the aims of the ideal liberal society and is outside of the scope of this entry. The second aim concerns one's social responsibilities to one's fellow citizens. Rorty captures this relation of responsibility with reference to a suggestion made by Judith Shklar, who defines liberals as people for whom "cruelty is the worst thing we do" (Rorty 1989, xv). Rorty takes up the distinction Shklar makes between cruelty and sin, describing liberals as those who take their duties to be owed exclusively to their fellow human beings. In itself, the injunction to avoid cruelty tells us nothing about what cruelty might be or how it is to be avoided, but Rorty is careful to insist that any attempt to define cruelty is problematic in assuming that we have identified its essence, something that will likely blind us to forms of cruelty which are yet to be identified. In saying this, Rorty recalls John Dewey's concern that rights can come to enshrine injustice, a point to which we return below. In a comment about the injustice inflicted on sexual minorities, Rorty writes:

> discussion of which rights exist and which do not, seems to me a philosophical blind alley, a pointless importation of legal discourse into politics, and a distraction from what is really needed in this case: an attempt by the straights to put themselves in the shoes of the gays. (Rorty 1996, 15–16)

Rorty's view of rights as tied to his anti-foundationalism animated a criticism of the language of human rights in his essay "Human Rights, Rationality, and Sentimentality" (Rorty 1998c). Contrary to the prevailing tendencies in the philosophy of human rights, Rorty argues that "the question of whether human beings *really* have the rights enumerated in the Helsinki Declaration is not worth raising" (Rorty, 1998c, 170). Rorty denies that there are "transcultural facts" which could provide a philosophical foundation for human rights, but argues that the absence of this foundation does nothing to reduce the appeal of what he calls "our Human Rights culture." In his view, human rights foundationalism is not only futile but also obscures the important practical task of cultivating and spreading this culture. Rorty believes that this culture is socially and politically desirable, especially when measured against alternatives, but also that it can be defended without reference to foundations of the kind that philosophers have traditionally sought. Rather, human rights should be defended by means of sentimental education and manipulation, by getting people to see in "such a way that they imagine themselves in the shoes of the despised and oppressed" (Rorty 1998c, 179).

For a foundationalist like Kant, the pressing question for moral philosophy to address is: "Yes, but am I under a moral obligation to her" (Rorty, 1998c, 185)? For Rorty, following Hume in this regard, "it is a mark of intellectual immaturity to raise that question." But in turn, this raises the question of what is left for philosophers to do once foundationalist projects are abandoned? And how effective is Rorty's sentimental

strategy for minimizing cruelty and cultivating our human rights culture?

By setting aside nonhuman authorities, Rorty hopes that we will come to see that there are only two responsibilities that we ought to acknowledge: those to ourselves and those to each other. However, he is less attentive to the ways in which *human* authorities can limit freedom and the capacity for self-creation and redescription. Pragmatism as Rorty describes it locates normative authority within particular communities and their social practices, but it seems to many critics that he fails to see that even in democratic societies, conversations between citizens are marked by unjust power relations.

In work composed after the publication of *Contingency, Irony, and Solidarity*, Rorty sought to address this omission. In "Feminism and Pragmatism" (Rorty 1998b), he proposes that pragmatism might play a role in realizing the conditions in which women can participate fully in the conversation of democratic society by challenging any belief that current ideas and social practices are natural and permanently fixed. In that paper, Rorty also changes his view of the agents of moral progress. His insistence on the importance of redescription and linguistic innovation remains, but this comes to be viewed socially and politically, with movements such as feminism seen as struggling to create themselves against dominant vocabularies. And, in so doing, Rorty argues that their descriptions should be viewed not as separate to political life, but as crucial for it. By offering new descriptions of their situation, writers such as Marilyn Frye, Catherine MacKinnon, and Adrienne Rich also offered redescriptions of the world. He proposes that:

> [. . .] if you find yourself a slave, do not accept your masters' descriptions of the real; do not work within the boundaries of their moral universe. Instead, try to invent a reality of your own by selecting aspects of the world that lend themselves to the support of *your* judgement of the worthwhile life. (Rorty 1998c, 216, emphasis in original)

Rorty is clear about the need sometimes to ignore traditions when there is no hope of using them to foster the sort of change that is desired. Feminists should, he hopes, refuse to work within the boundaries of a patriarchal moral world and seek instead to create their own.

Further, progressive social movements such as feminism should be seen not as *reflecting* changes in attitudes but rather as seeking to *cause* them. Rorty takes this to be born out in the practice of such movements. He writes:

> think of Martin Luther King, Betty Friedan, and the leaders of the gay rights movement as helping to create, rather than as detecting, a changed environment. They changed it by telling us, single-mindedly and passionately, how human lives were being needlessly damaged by cruel institutions. They incited social hope by proposing programs of action, and by prophesying a better future. (Rorty 2007, 924)

In saying this, Rorty criticizes what he takes to be a further problem with Kantianism: its conservatism. He takes Kant to be hostile to diversity and self-creation: "[u]niversalist philosophers assume, with Kant, that all the logical space necessary for moral deliberation is now available – that all important truths about right and wrong can not only be stated but be made plausible, in language already to hand" (Rorty, 1998b, 203). However, as feminists have demonstrated, often that language does not exist. And, accordingly, that the purpose of philosophy should be to help create it. Such creation will not be achieved by appeal to philosophical foundations; it is of no use, "to say, with Kant: notice that what you have in common, your humanity, is more important than these trivial differences. For the people we are trying to convince will rejoin that they notice nothing of the sort" (Rorty 1998c, 178). A culture of human rights and a culture which seeks to minimize cruelty will not be achieved either through philosophical argument or through judicial rulings, but rather through the practical cultivation of solidarity and human-made hope.

Pragmatism and the Law

Rorty does not offer a sustained analysis of the law or jurisprudence, but in pieces in which he comments on the law, it is clear that he takes it, blamelessly, to be a reflection of society's moral

and political beliefs rather than standing independent of them. This means that the law is not an autonomous discipline, separate from politics, and that attempts made by natural law theorists and legal positivists to base law on neutral principles that allegedly transcend historically contingent practices are fruitless. He joins in with Richard Posner's rejection of legal formalism, "the idea that legal questions can be answered by inquiry into the relation between concepts" (cited in Rorty 1999, 94). Formalism is not a possibility, because concepts, and their relation to other concepts, are themselves informed by social and political circumstance.

Rorty identifies the position just outlined with pragmatism, but it is also what has been called legal realism. In epistemology and metaphysics, pragmatism, as Rorty sees it, is avowedly opposed to realism. But outside of philosophy, he is happy to concur with Thomas Grey that pragmatism agrees with legal realism that "Law is more a matter of experience than logic, and experience is tradition interpreted with one eye on coherence and another on policy" (Rorty 1999, 93). (Relatedly, in epistemology Rorty joins with Sellars and Brandom in eschewing the very idea of experience. Outside of that precinct, however, he has no objection to nonphilosophical everyday uses of the word.) But Rorty also takes it that when applied to the law, pragmatism is "banal," for the simple reason that virtually all legal theorists accept it; they accept that normative authority is located within the social practice of the law and which determines what it is to be a member of that practice. This is the case even for a writer such as Ronald Dworkin, who presents himself as being opposed to pragmatism and seeks to stand apart from pragmatists in his insistence that there is "one right answer" to legal questions. However, this needs to be weighed against Dworkin's advocacy of what he calls a "charity principle" to interpretation, in which the language of the law is interpreted to secure congruence with the values of a community, and also his accepting that competent judges will disagree about which decision is the most reasonable. As Rorty sees it, "Dworkin's polemics against legal realism appear as no more than an attempt to sound a note of Kantian moral rigorism as he continues to do exactly the sort of thing the legal realists wanted done" (Rorty 1999, 93).

Although Rorty did not comment on the Hart-Dworkin debate which has preoccupied legal philosophers for half a century, a Rortyan position on this debate can nevertheless be discerned and reconstructed. The exact subject of the Hart-Dworkin debate is contested, and its contours are notoriously knotty. We follow Scott J. Shapiro in identifying "the relation between legality and morality" as the debate's unifying concern (Shapiro 2007, 5). Dworkin contends that the law is determined and underpinned by moral law, while Hart denies that the law requires such foundations and that it is instead determined and underpinned by social facts alone. Given Rorty's anti-foundationalism, it is tempting to assume that he would side uncomplicatedly with Hart in rejecting Dworkin's foundationalist realism. However, aspects of Rorty's social philosophy also count against classifying him neatly as a legal positivist such as Hart. First, Rorty was concerned not just with practices and the institutions which house them, but also with how those practices and institutions change and respond to social developments. Where the law, in Hart's view, reflects a conventionalist codification of social norms, Rorty would take a more radical view in seeing the law as a potential means of enforcing social conformity and legitimizing existing forms of cruelty. Rorty's endorsement of Dewey's view that rights can be used to enshrine injustice is thus, in a second step, an endorsement of the view that the law can be used to institutionalize injustice. What matters is not the question of whether the law is grounded in morality or in putative social facts, but instead the question of whether it serves human needs. Just as democracy takes priority over philosophy, so too does democracy take priority over the law. The authority of the law is binding only insofar as it continues to be made by and serve the people who are subject to its practices. The normative task, then, is not to marry social to legal norms, but instead to alter both sets of norms in accordance with the "utopia sketched by the Enlightenment" (Rorty 1998a, 172).

As we have seen, in Rorty's view there is no basis for ethical and moral judgments outside of the standards of some particular human community or vocabulary. There is no way to check that one's beliefs are more accurate than those held by another, for the reason that the only test for accuracy is the one provided by our own, contingent, language. He writes:

> To accept the contingency of starting-points is to accept our inheritance from, and our conversation with, our fellow-humans as our only source of guidance. To attempt to evade this contingency is to hope to become a properly-programmed machine. . . . In the end, the pragmatists tell us, what matters is our loyalty to other human beings clinging together against the dark, not our hope of getting things right. James, in arguing against realists and idealists that "the trail of the human serpent is over all," was reminding us that our glory is in our participation in fallible and transitory human projects, not in our obedience to permanent nonhuman constraints. (Rorty 1982, 166)

Rorty's pragmatism is often derided as relativism, but he contends that anti-realism and anti-foundationalism do not amount to relativism, to thinking that there is nothing to choose between alternative beliefs. The issue as he sees it concerns rather the ground upon which it is possible to stand in order to decide between alternatives. In casting doubt on the availability of *neutral* ground, Rorty has been attacked for denying the very possibility of making that choice. He responds that to draw that conclusion is to be guilty of what he calls "silly relativism," "the bad inference from 'no epistemological difference' to 'no objective criterion of choice'" (Rorty 1991, 89). This inference stems from what he takes to be the mistaken belief that criticism must be launched from outside of our practices. This he denies. Objectivity is usually taken to be a normative standard existing *outside* of social practices and which provides an independent standard by which moves within them might be judged. In contrast, Rorty takes constraints to be *internal* to social practices, with members of practices giving and exchanging reasons with each other. The standards of normative authority, and the constraints on inquiry, are those of such practices, and claims made by their members are judged by each other in their capacity as, among others, philosophers, political theorists, and lawyers.

It is only if it is thought that a tradition or social practice admits just one interpretation that one would think otherwise. Thus, Rorty would not regard the following question, posed by Michel Rosenfeld, as being to the point. Rosenfeld asks: "Assuming that different interpretations of the same law would lead to different practical consequences, can recourse to pragmatism determine which of the available alternatives ought to be pursued?" (Rosenfeld 2002, 278). Rorty's response would be to insist that it cannot. Pragmatism does not "determine" anything; the pursuit of an algorithm that can be used to resolve such disputes by evading contingency is precisely what it rejects. In the law, these things are left to judges, who necessarily interpret cases in the light of statute law and precedent.

As we have seen, Rorty agrees with Posner's realism which holds that the actual practice of the law shows that it is a reflection of circumstances. With reference to homosexual rights, Rorty claimed in an article from 1996 that, should the Supreme Court come to reverse the decision of *Bowers* v. *Hardwick* in which the justices found there was no constitutional protection for homosexual sex, "it will not be because a hitherto invisible right to sodomy has become manifest to the justices but because of the greater willingness of the heterosexual majority to stop tormenting homosexuals" (Rorty 1996, 16). In 2003, the Supreme Court did overrule this decision in *Lawrence v. Texas*. Rorty did not comment on this decision, but he would have welcomed it, while describing it in very different terms to those employed by a theorist such as Dworkin. For Dworkin, to extend rights to previously marginalized groups like homosexuals is a matter of "taking rights seriously," of applying them correctly given their meaning in order to yield the "right answer" (Dworkin 1977). For Rorty, this is a time-honored means to disguise the fact that sometimes courts, and not legislatures, make significant and desirable changes. He writes that "to suddenly notice previously existing but hitherto invisible constitutional rights is just the quaint way in

which our courts are required to express a conviction that the political waters badly need roiling" (Rorty 1999, 98–99).

Conclusion

Rorty held that if there is a future for humanity, it will come through contingent progressive social, political, and legal developments, not reason, human nature, or by identifying natural rights. His embrace of contingency might explain his relatively limited influence on more programmatic or systematic legal philosophy, despite the dividends that a Rortyan approach to law might pay. His own hopes were for "historical progress that will gradually encompass all of the human race" (Rorty 1991, 219). He became less optimistic in the last decade of his life as to whether this hope will ever be realized, prompting a political move further to the left. He maintained that pragmatism was consistent with any political position, but we have argued elsewhere that the liberal hopes Rorty held throughout his life are only likely to be achieved with a shift toward Marx (Bacon and Rutherford 2021).

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Rosmini, Antonio-Serbati

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Introduction

The encyclopedic work of Antonio Rosmini-Serbati (1797–1855) embraces amongst philosophical and theological, educational and spiritual, and ethical and historiographic topics also a wide section of political and juridical writings, first of all his *Philosophy of Politics* (1838), a monumental *Philosophy of right* (1841–1843), and the *Constitution under Social Justice* (1848). Of his minor works, the *Natural constitution of civil society* (1827) and the *Essay on Socialism and Communism* (1849) attract major interest.

In his law and social philosophy, Rosmini tries to give to modern civil society a stable fundament beyond classical natural law (Thomas Aquinas) and alternatively to modern State's law (Hegel):

the substance of right is the human person. Therefore, the principal dimension of right is Constitutional Right which has to conciliate the utility dynamics of civil society with the value of justice that is the essence of social relationship (*SJ* p. 6). Indeed, Rosmini is amongst the thinkers who coined the concepts "civil society" (together with Hegel) and "social justice" (together with Taparelli). In his Philosophy of Politics, Rosmini defines the social bond as a synthesis of presocial relationships based on reciprocal recognition and the social institutionalization through civil arrangements. Any political society must be measured on the presocial ethic criterion of equal concern and respect, which becomes the moral sense of right and law. In the consequence, on the one hand the essence of right is for Rosmini the person herself: "the human person is subsistent human right" (*PR* II n° 49). The absolute guarantee and defense of the system of personal rights is for Rosmini the only possibility to conciliate the dimension of "social justice" with the interests of economics and politics to realize the greatest social utility. On the other hand, the duty of the civil society's government is *not the creation* but the "regulation of the *modality of rights*": this consists in: (1) "to defend one's rights," (2) "settle disputes," (3) "modify the exercise of the rights of individuals either to prevent the harm threatened," (4) "or to obtain a benefit which would be impossible if everyone exercised their rights without regard for the rights of others" (*PR* VI n° 2130). For Rosmini, only this principle with its four aspects guarantees the realization of social competition and determines the sense of any civil government which is to "remove any obstacles and help each individual" (*PP* II n° 225) by eliminating "everything that impedes free concurrence for all goods that can be objects of right" (*PR* VI n° 2142). The preoccupation about the creation of despotism in any form (not any more of classical feudalism, but of economic monopolies, social or political positions of power etc.) is the principal motive why Rosmini sees in the right the realization of the moral dimensions of society capable to give the just order to the economic and social dynamics of modern societies. Indeed, the production of social richness in a competition based liberal market economy, as well as the modernization of political administration and the liberalization of civil society are the major motors for social progress in modernity.

For this motive, Rosmini provides strong institutional arrangements for the defense of rights: the "Political Tribunal" as political institution constituted by the equal suffrage of all citizens in order to "judge about the political rights and their violations either by government or by citizens" (*NC* p. 30). The specific position of this institution in Rosmini's law and social philosophy, which could be defined as a sort of anticipation of the twentieth century's *constitutional courts*, emerges by considering the fact that civil government is determined for the regulation of the economic interests of the contributors on social wealth, and therefore, it is constituted by census suffrage. Civil society is hence ruled in a duplex manner: juridical and economic, i.e., by Political Tribunal and Government, which are elected by universal and census suffrage. Rosmini commits social inclusion to a complex relationship between right and economy. Society is constituted by both aspects: justice and utility, recognition and competition. Only in this complex structure, for Rosmini liberty can be realized both efficiently and morally.

If civil society is characterized by right and law, the five elements of Rosmini's concept of "rational law" not only explain the basis of every political society but also clarify the theoretical synthesis which Rosmini elaborates between the tradition of natural law and the modern subjective rights: (1) "existence of subjective activity," (2) "existence of personal activity," i.e., rational and free will, (3) "exercise of this activity" with the intention for the author to realize a subjective good, (4) "lawful exercise of the same activity," i.e., not opposed to moral law (moral duty), (5) "other rational beings' duty of respecting this activity" (juridical duty) (*PR* I n° 238). In this way, right is based in subjective activity of realization of human person (1–3) with respect to moral duty and social recognition (4–5). At the same time, this personal-based right is structured according to Rosmini in an individual and in a

social dimension. This double-sided character of right is also the structural principle of the *Philosophy of right*: individual and social right. The principle for the "derivation" of individual rights from the principle of person is individual property, which is not only material possession but also cognitive awareness of the object as a good, and moral interest that this good contributes to perfection. The social relationship knows a presocial, thus natural, and a social face. In civil society, individual rights of person are guaranteed through the political instauration of the constitution, the Political Tribunal, and the principle of regulation of the modality of rights. In the natural social dimension, the reality of family ("domestic society") is not only the basis of "ethical life," i.e., the realization of moral principles in modern individual-rights-based social institutions, but also a natural determination of stable social-moral relationships which in its fundamental structures is detracted from political authority. Rosmini does not provide the State of "intermediate corps" as Montesquieu or Tocqueville but conceives civil society and its institutions as subsidiary to the natural and presocial human relationships, which get expressed in family ("domestic society") and Church ("theocratic society"). Indeed the second reality which is normatively prevenient to civil society and State is the super-natural ontological relationship of every human being to God, which is for Rosmini not a religious affirmation but the expression of the supreme dignity of person's moral liberty: "because the dignity of the light of reason is infinite, nothing can be superior to the personal principle which [. . .] is naturally *supreme*; no one has the right to command that which depends upon the commands of the infinite" (*PR* II n° 52). This relationship, which for those who religiously profess it becomes visible reality in the "theocratic society" of the Church (Rosmini does not use this term in a political sense), introduces into all human relationships the "sense of his own individuality [of every man], which goes hand in hand with the development of his new power of liberty": it "founds and embellishes in mankind the *subject of rights*" (*PR* IV, n° 496). In a secular sense, the super-natural fundament of person is for Rosmini the strongest affirmation of the existence of a "natural, human society" which is a "common good" of mankind and emerges as "barely present in the natural order if we compare it with what God and human beings could have in common" (*PR* IV, n° 681–687), i.e., if we consider every human person as "image" of God in her absolute dignity. For this reason, Rosmini individuates in the religious dimension the strongest foundation of the fundamental rights of mankind. The last guarantee for *justice* cannot be political but it has to be moral and religious. For Rosmini, only in the reciprocal tension between political and moral-religious institutions, individual liberty can be assured. Therefore, it is consequent if he entrusts the supreme of the hierarchical organized Political Tribunals to the college of cardinals.

Conclusion

The sense of this reciprocal constitutive tension between political and religious sphere for the foundation of rights lies in Rosmini's aim to propose an alternative strategy to the political concepts of Kant and Hegel which translate the classical strategy of natural law in the political sphere. In these doctrines, he does not find a real alternative to the thread of early socialism in the thirties and forties of the nineteenth century. Against this complete politicization of rights, Rosmini affirms that it is no "wonder that the individual does not count anything where government is all" (*CS* p. 99). With the concept of the tension between political and religious sphere, he searches a new way of rethinking natural law in the liberal-catholic tradition of Tocqueville. Rosmini is aware that Political Tribunal determined by universal suffrage of all citizens presupposes "a very advanced and enlightened society and a very developed ethical life of humanity" (*NC*, p. 316), and therefore *justice* cannot be something realizable only by political mechanisms but concerns the moral and religious presuppositions of politics. Or in other words, the "liberal secularised State lives by prerequisites which it cannot guarantee itself" (Böckenförde).

In his opposition to any risk of a complete politicization of right, justice, and society, emerges the most relevant aspect of Rosmini's law and social philosophy which is the identification of *right* and *person*, and therefore the real pre-political foundation of law.

Cross-References

- ▶ Anthropology of Law
- ▶ Aquinas, Thomas
- ▶ Constitutionalism: Political
- ▶ Hegel, Georg Wilhelm Friedrich
- ▶ Human Rights and Justice
- ▶ Kant, Immanuel
- ▶ Ontology of Law
- ▶ Tocqueville, Alexis de

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Ross, Alf: Biographical Perspectives

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Ross, Alf Niels Christian (1899–1979) was a Danish jurist and philosopher and professor of law at the University of Copenhagen where he taught international law, constitutional law, and jurisprudence. The fundamental theme in Ross's jurisprudential writings concerns the philosophical approach to the question of legal knowledge, and his answer can be divided into four phases: (1) from 1923 to 1930 is influenced by Hans Kelsen, (2) from 1930 to 1940 is influenced by Axel Hägerström, (3) from 1940 to 1960 is influenced by logical positivism, and (4) from 1960 to 1970 is influenced by the Oxford philosophy of linguistic philosophy.

1. Ross graduated in law in 1922 and received a scholarship to study abroad and stayed in Vienna (1924–1926) where he attended Hans Kelsen's seminars and also wrote his manuscript *Theorie der Rechtsquellen.* Ross subscribes to the neo-Kantian view that philosophy is a transcendental inquiry grounded in reason concerned with the conditions of cognition in terms of categories that that must be applied in order to arrive at knowledge within the various sciences. Ross turns jurisprudence into a theory of legal cognition claiming that the traditional inquiries into the sources of law have neglected to ask the jurisprudential question: what is the source of knowledge that a rule is a valid legal rule? Ross's answer is influenced by Kelsen's approach based upon the distinction between the category of is (Sein) that is the foundation for knowledge within the natural and social sciences and the category of ought (Sollen) that is the foundation for knowledge within legal science. In the first part, Ross presents a historical overview of the doctrines of the sources of law in France, England, and Germany and find them wanting since they fail to ask the jurisprudential question. John Austin is the only exception since he uses an a priori method to determine the concept of law in terms of commands expressing the will of the sovereign that makes it possible to account for the existence and cognition of the positive law. But Austin commits the error to conceive the will of the sovereign in empirical terms. Another error is that Austin makes room for the moral evaluation of the positive law based upon the theory of utility which Ross finds superficial and without any interest for modern lawyers. In the second part, Ross presents a systematic account of the theories of legal sources and rejects sociological theories of law that determine the

positive law in terms of empirical facts and natural law theories that determine the positive law in terms of moral facts. Finally, Ross considers Kelsen's theory that determines the law in terms of a specific legal ought manifested in the validity of legal norms that in the end can be traced to the Grundnorm. In this way, the positive law is located within the category of ought as a formal category and the merit of the Grundnorm is that it functions as the scheme of understanding norms as valid legal norms. But Ross objects that the Grundnorm is a needless reduplication since the validity of legal norms is grounded in the legal system itself. Ross also questions whether the category of ought is a fundamental category for cognition of the law but this does not imply that he rejects normative cognition but it is grounded in the category of totality. Ross's jurisprudential answer is important since it provides the conceptual framework that puts the theoretical study of law on the secure path of a science as legal science (Rechtsdogmatik) that is confined to present an account of the positive law as opposed to present an interpretation and application of legal norms. Legal science is a normative science that must be kept apart from knowledge about the law in terms of sociology of law (Rechtssoziologie) and from the moral evaluation of the law that is not scientific cognition but politics (Rechtspolitik).

Ross submitted his manuscript as a doctoral dissertation at the University of Copenhagen where it was rejected by the leading professors of law in Denmark. This was a blow for Ross who got in touch with Hägerström in order to submit the manuscript as a doctoral dissertation in Uppsala. This required Ross to pass the degree of philosophy in Uppsala, and he was then awarded a doctoral degree, and the manuscript was finally published in 1929. Hägerström has a favorable view of Ross's approach but also a critical stance to Ross's adherence to Kelsen's theory of law which Hägerström dismisses as a version of primitive positivism. Hägerström also rejects the category of ought as metaphysical nonsense and finds that Ross's replacement with the category of totality is untenable since the only foundation for cognition is the category of reality.

2. Ross is an ambitious author, dedicated to promote a better understanding of the task and method of jurisprudence to be executed through the publication of four volumes. The first volume is *Kritik der sogenannten praktischen Erkenntnis* (1933), showing Hägerström's influence. The title is, of course, an allusion to Kant's *Critique of Practical Reason*, but Kant's reliance on the will as practical reason is meaningless, and the idea of moral validity is an unthinkable phantom. This view is already put forward in *Theorie der Rechtsquellen* but is now supported by Hägerström's philosophy. Thus Ross shifts his allegiance from Kelsen to Hägerström and sets out to demonstrate that ethical theories, whether based upon the idea of the good or the idea of duty, are rooted in metaphysical speculations that have no foundation in reality. It follows that natural law theories and natural rights theories are devoid of conceptual meaning and must be discarded as scientific theories. Hägerström's moral philosophy is a version of noncognitivism in terms of an emotive theory that moral sentences do not express propositional attitudes of beliefs that can be true or false but are used to express emotional and conative attitudes of feelings and emotions that have a suggestive effect upon human behavior. Hägerström's emotive theory is endorsed by Ross, claiming that moral consciousness is not a genuine consciousness of the objectivity of facts but a composite consciousness consisting of subjective experiences of feelings in relation to situations and actions. This is the area for a new study of moral phenomena which Ross calls "ethology" concerned with the description and explanation of human behavior motivated by different kinds of feelings. Ross endorses Hägerström's view that legal concepts such as right and duty are rooted in magic that leads to the conclusion that these concepts do not refer to anything that can be seen or touched. It follows that the legal concepts of right and duty are not genuine concepts but

only meaningless words that can be used to direct and regulate human behavior.

The next book in the series is *Virkelighed og Gyldighed i Retslæren* (Reality and Validity in Jurisprudence) (1934) that deals with the assumptions of legal cognition and the analysis of fundamental legal concepts and earned Ross the doctoral degree of law in the University of Copenhagen he had longed for. It forms the basis for his later book *Towards a Realistic Jurisprudence* (1946) concerned with the dualism of reality and validity which implies that law is conceived as an observable phenomenon of human behavior in the world of facts and at the same time also as a binding norm in the world of values. Based upon Hägerström's criticism, Ross abandons his category of totality as the epistemological foundation for legal knowledge and claims that scientific knowledge of reality is based upon experience and expressed in propositions that can be true or false. In contrast to his former view, Ross now holds that legal knowledge does not present an epistemological problem since it is expressed in propositions. The jurisprudential problem is rather a problem within the knowledge of the law concerning the cognitive meaning of the legal vocabulary used in legal norms. This is the question whether legal norms express propositions which Ross denies to arrive at the view that legal norms are devoid of any conceptual content and the concept of the validity of legal norms is a meaningless word for various attitudes. This is a version of legal nihilism which implies that there can be no legal knowledge in terms of normative knowledge. This leads Ross to advance his realistic conception of the law in terms of psychophysical phenomena based upon the view that legal norms have a suggestive meaning and are used to express ideas of right and duties to produce similar ideas as manifested in human behavior. In this way, the law is located in reality as the area for legal science to study as a branch of sociology and psychology.

3. In articles in 1941 and 1945, Ross rejects Hägerström's theory of knowledge as meaningless and turns his allegiance from Hägerström to logical positivism, endorsing Rudolf Carnap's view that empirical knowledge of the world is based upon basic statements expressing elementary sensations. In another article *Tu-Tu* (1951) Ross takes issue with A. V. Lundstedt's view that the concept of right cannot be used in legal science since it is a meaningless word invoking magical forces. Ross accepts that it is a meaningless word but it can be used as a technical tool to present the relations between legal facts and legal consequences. Ross's allegiance to logical positivism is also manifested in his book Om *Ret og Retfærdighed* (1953) translated into English as *On Law and Justice* (1958) which is his most influential book. The subtitle in the Danish version is *An Introduction to Analytical Jurisprudence*, and the book is intended as a textbook to Ross's courses in jurisprudence. For Ross, philosophy is the logic of science and its subject the meaning of scientific language. It follows that jurisprudence is the logic of legal science concerned with the language used in the scientific study of the law as opposed to the language used within the law. With respect to the law, Ross follows Karl Olivecrona that legal norms must be conceptualized as independent imperatives, but Ross introduces the technical concept of directives which he defines as sentences devoid of any cognitive meaning but having an emotive meaning that can be used to produce a normative ideology. This is related to his view that statutory laws are not addressed to private individuals but solely to legal officials. He mentions the distinction between norms of competence and norms of conduct, but the former can be reduced to norms of conduct for the legal officials, particularly the judges, about the use of force. Norms of competence that are not about the use of force, for example, constitutional norms, cannot be regarded as valid legal norms. What matters is the emotive meaning of the legal vocabulary which accounts for the validity of the legal norms since the directives are operative in the minds of judges because they are felt to be socially binding and therefore obeyed. This is a social-psychological fact that is

manifested in the regularity in the behavior of judges deciding cases according to the law and constitutes the area for the scientific study. The scientific study is not expressed in directives but in propositions, and what concerns Ross is not the law but the verification of propositions about the law. In this respect, Ross endorses the verification principle advanced within logical positivism to arrive at the view that scientific propositions about legal norms are predictions about what the judges will do when they decide cases. In this respect, there is an affinity between Ross and the so-called American realists. Ross also calls his approach "jurisprudential realism," adding that this is only a slogan without any informative content, but it can be used to demolish "jurisprudential idealism" that holds that in addition to empirical knowledge there is also normative knowledge of the law as manifested in Kelsen's approach which Ross rejects, claiming that Kelsen has precluded himself from dealing with the problem of the validity of the law, that is to say the relation between the validity and the efficiency of the law. This leads to Kelsen's rejoinder that Ross commits the error of confusing the validity and the efficiency of the law. Ross's jurisprudential realism keeps within the bounds of reality to claim that legal norms are directives devoid of cognitive meaning and this implies the rejection of legal science as normative knowledge in favor of empirical knowledge of the impact of legal norms upon human behavior. It follows that the validity of the law cannot be conceptualized in terms of normative relations between legal norms but must be conceptualized in terms of causal relations between directives and human behavior as manifested in the social effectiveness of legal norms. Thus legal science is reduced to be branch of sociology and psychology. Ross continues to subscribe to an emotive theory, but it is now supported by reference to the theory put forward by Charles Stevenson. This is important for Ross's understanding of legal politics having the task to offer guidance to legal officials based upon a scientific basis which means that it cannot be expressed in normative propositions since they are devoid of conceptual meaning, and this implies the rejection not only of justice but also of utility as the proper standard for the making and application of legal norms. The guidance can only be expressed in empirical propositions based upon the social sciences where Ross makes a call for a scientific legal sociology. For Ross, the role of the lawyer as a legal politician is to function as a rational technologist that offers his knowledge at the disposal of the politicians in power. Ross's understanding of legal norms as directives is also put forward in his *Directives and Norms* (1968) concerned with the question whether directives are subject to logic in the same way as propositions are. He also takes issue with H. L. A. Hart concerning the understanding of the concept of validity. Ross also deals with the rise of natural law theories after World War II only to reject them as metaphysical nonsense based upon his adherence to logical positivism.

4. In the 1960s, Ross turns to consider questions within the criminal law presented in articles that are collected in *On Guilt, Responsibility and Punishment* (1975). Considering the concepts of responsibility and guilt, Ross uses the method of linguistic philosophy used within what is called Oxford philosophy. This is a departure from his earlier view, but Ross does not apply it with respect to jurisprudential questions concerning the understanding of the concepts of legal norms and their validity.
5. Besides his jurisprudential writings, Ross produced textbooks on international law and constitutional law. Also noticeable is his book on democracy, *Why Democracy* (1952).
6. Ross has been influential, but his approach has also been criticized for presenting a narrow view of jurisprudence due to his adherence to logical positivism which also informs his understanding of legal norms as directives devoid of conceptual meaning resulting in legal nihilism. His conceptual analysis of legal concepts presents a distorted view of the use of the legal vocabulary. Ross also contradicts himself since he does not follow his own recommended method when writing his textbooks which in effect turns legal science into legal politics.

His adherence to the emotive theory has also met with critique since it implies that there can be no argumentation within morality and law but only the use of meaningless words to cause the appropriate behavior.

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- ▶ Kelsen, Hans
- ▶ Legal Positivism: Inclusive
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Ross, Alf: Influential Ideas

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Introduction

The jurist and philosopher Alf Ross (Alf Niels Christian Ross) was born in Copenhagen on 10 June 1899 and died in Virum, near Copenhagen, on 16 August 1979 (officially, Ross died a day later, according to Evald (2014: 5), biographer of Ross).

As a philosopher, Ross made contributions to various branches of philosophy: to political philosophy, to moral philosophy, to the philosophy of mind, and even to the study of logic. As an example of his contribution to logic, one should look to his article "Imperatives and Logic" (Ross 1941). It was there that Ross coined the term "Jørgensen's Dilemma" to refer to the thesis, formulated in 1938 by the Danish philosopher Jørgen Jørgensen, according to which the traditional notion of logical consequence implies the impossibility of a logic of norms (this thesis can be expressed in the form of a dilemma: either the traditional notion of logical consequence is abandoned or the logic of norms is impossible). This problem is still the subject of debate today. In that same article, Ross exposed what has come to be known as the "Ross paradox": the inference from the imperative "slip the letter into the letter-box!" to the imperative "slip the letter into the letter-box or burn it!", an inference that Ross considered invalid, but demanded by a logic of imperatives based on the notion of satisfaction.

As a lawyer, Ross dealt with issues belonging to various branches of law. In particular, he wrote about international law, constitutional law, and criminal law. However, Alf Ross is known primarily as a philosopher of law. His contributions include the following: a classification of various types of antinomies between legal norms, his analysis of problems of interpretation of law caused by phenomena of ambiguity, his thesis regarding the term "right of ownership" as a meaningless expression but serving as a point of connection between different legal norms, and what Ross himself called "a puzzle of constitutional law" caused by the self-reference of the legal norms governing constitutional reform.

However, these scholarly contributions were, arguably, the product of concerns of the moment. On the other hand, the notion of legal norm and the subject of the science of law were the object of Ross' almost permanent interest. Ross' position around these issues varied substantially over the years. But there is an almost constant idea, observable with greater or lesser intensity in most of his main legal-philosophical works: the idea that authentic science is science, natural or social, capable of providing explanations and making predictions of the relevant phenomena. In addition to this idea, he claimed that legal science had to be an authentic science.

Neo-Kantian Stage

Science explains and predicts phenomena from generalizations or laws. For this reason, already found in his first book, *Theorie der Rechtsquellen. Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen*, published in 1929, there are passages that suggest universal applicability, in all sectors of human knowledge, of what Ross called, with neo-Kantian terminology, "generalizing method." However, and perhaps because of a confusion between language levels, in this work, Ross attributes a theoretical character, not only to legal science but also to its object of knowledge, to the legal norm. For Ross interprets or analyzes the norm, the *Sollen,* "A ought to be" as follows: "If it is not *A* then it is the penalty and if it is *A* then it is not the penalty." Thus interpreted, the *Sollen* "A ought to be" is not essentially different from the sentence "A is," since both sentences are assertive, that is, true or false.

There is little evidence of Hans Kelsen's influence on Ross, but quite the opposite, and this despite the fact that Ross wrote *Theorie der Rechtsquellen* after having studied with Kelsen

in Vienna from 1924 to 1925 and although Ross dedicated the book to Kelsen. On the one hand, the universal applicability of the generalizing method, as Ross called it, clashed with the neo-Kantian and Kelsenian idea of the specificity of normative knowledge, although Ross intended this work to save that specificity. And, on the other hand, Ross attributed to the *Sollen* a kind of assertive discourse that clashed with the prescriptive character that Kelsen has always attributed to the *Sollen.* However, the Ross's work in legal philosophy does show some Kelsenian influence, sometimes directly, but also, even simultaneously, by direct criticism of the Austrian jurist.

The estrangement with Kelsen was greater over the next two decades. For the original Danish text of *Theorie der Rechtsquellen* was rejected in the academic field when it was presented by its author at the University of Copenhagen for a doctorate of law. This incident led to Ross's meeting with Axel Hägerström in Uppsala, where Ross earned a doctorate in philosophy thanks to the German translation of that thesis. During these years (approximately, from 1930 to shortly before 1950), Ross became a prominent member of the Uppsala school, which was the origin of Scandinavian legal realism.

Realistic Stage

In this period, Ross wrote two of his most important works. The first is a 1933 book, *Kritik der sogenannten praktischen Erkenntnis. Zugleich Prolegomena zu einer Kritik der Rechtswissenschaft*. This work, which is inspired by the noncognitive moral theory of Hägerström, to whom the book is dedicated, was regarded by Ross himself as his main contribution to philosophy. The second work is *Virkelighed og gyldighed i retslæren. En kritik af den teoretiske retsvidenskabs grundbegreber* [Reality and validity in the theory of law. A critique of the fundamental concepts of the theoretical science of law], with which Ross obtained in 1934 the doctorate of doctor of law at the University of Copenhagen, though not without some difficulties (see Evald 2014: 114 and following). This Danish work, with some omission and also with some important additions, in particular, with the addition of ideas put forward by Ross in a recension, also in Danish, of the first edition of the *Reine Rechtslehre* of Kelsen (Ross 1936), was translated into English with the title of *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law,* published in 1946.

At this time, Ross no longer attributes assertive meaning to the *Sollen.* Ross now adopts the same conceptual position as Kelsen, as he includes within the concept of *Sollen* two distinct notions, without distinguishing between them, even though they are mutually independent: the semantic notion of prescription and the ontological notion of ideal entity. On the other side, Ross accepts the postulates of Hägerström about reality, namely, that the only world that exists is the real world, the world of facts happening in space and time. Legal norms must belong to this world, according to Ross. And since he does not distinguish, as Kelsen does, the notions of practical prescription and ideal entity, Ross concludes, on the basis of the proposition that legal norms cannot be ideal entities, that legal rules cannot have prescriptive sense. Ross goes even further by stating more broadly, perhaps by the influence of logical positivism, that propositions that are neither true nor false are meaningless.

The only perspective that can be adopted, according to Ross, against the expressions he calls of "practical modality," such as "value," "duty," "obligation," etc., and the judgments or sentences in which these expressions appear is that of considering them as facts related to other facts. Such expressions are, according to Ross, manifestations or effects of irrational psychic phenomena; specifically, manifestations of behavioral attitudes, consisting of experiences of a psychic impulse associated with the representation of a thing or a behavior. As a result, legal science is a branch of the disciplines that study human behavior, a branch of psychology and sociology. And legal dogmatics must be conceived, as Ross argues in this period, as a science that studies legal norms, not as ideal entities that speak of rights and obligations, but as facts psycholinguistics.

Neopositivistic Stage

Ross's thinking takes a radical turn during the 1950s. During this decade, Ross published numerous works revealing that the Danish jurist had moved away from Hägerström and his views were moving closer to Kelsen again. At the same time, Ross was influenced by one of the most vigorous philosophical movements of the time, neopositivism or logical positivism. These are the sources from which Ross's most important work published in this period is nourished, which is also his most famous and influential work, *Om ret og retfærdighed. En indførelse i den analytiske retsfilosofi* [On law and justice. An introduction to analytical legal philosophy]. This book was published in 1953, and the English translation, *On Law and Justice*, in 1958, although there are some differences between the original and the translation.

The differences between the two versions are most apparent in the second chapter of the book. The title of this chapter in the Danish work is *Begrebet* "*gældende(dansk) ret*" [The concept "(Danish) law in force"]. In translation, the same chapter is titled *The Concept* "*Valid Law.*" And, throughout the chapter, the English translator always translates "valid" as the Danish *gaeldende,* corresponding to the German *geltend(es)* (in Danish, there is also the expression *i kraft,* which means, like *gældende,* "in force"). As a result of Hart's critical remarks (1959), Ross has repeatedly lamented this unfortunate translation.

In this work, Ross endorses the conception of philosophy and the conception of science defended by neopositivism, and tries to apply them to the philosophy of law and the science of law. Applying to the legal field the thesis held by neopositivists with regard to philosophy, Ross argues that the philosophy of law does not have a specific object coordinated with, and different from, the object of the science of law in its various branches. The object of the philosophy of law, Ross says, is not the law, nor any part of it, but the science of law and its logical apparatus, especially its conceptual apparatus. The philosophy of law, Ross argues, is the logical analysis of the language of the science of law. (Although it should be noted that some of Ross' contributions cited at the outset, and contained in the work now discussed, such as the classification of various types of antinomies of the legal norms, their analysis of certain problems of interpretation of law and its analysis of the term "right of ownership" are analyses of the language of the law itself, not of the language of the science of law.)

Ross' conception of the science of law in *Om ret og retfærdighed* is also different from that advocated by Ross in the previous period. In this work, Ross divides the science of law into two major groups of science: (a) legal sociology, which studies legal phenomena or law in action and (b) legal dogmatics, or science of law strictly speaking, which studies legal norms as content of abstract ideas or as conceptual content (as propositions, you could say). Legal dogmatics are in turn subdivided by Ross into several branches: science of comparative law, history of law and legal dogmatics in the strict sense, which deals with the law currently in force in a given society, for example, Danish law currently in force.

In principle, it would be possible for the philosophy of law to deal with any of these sciences. But, with different arguments, Ross justifies the reduction of the task of the philosophy of law to logical analysis of the language of legal dogmatics in the strict sense, in particular, the logical analysis of the language of Danish legal dogmatics in the strict sense. And the objective of this analysis must, Ross argues, turn that discipline into a science according to the neopositivist model of the factual sciences, who use the method of observation and verification to control the truth of their statements.

Among the various concepts or terms of Danish legal dogmatics in the strict sense there is one that, according to Ross, appears in all the statements of that science: the concept or term "Danish law currently in force," which appears in the sentences of the following form: "Norm *N* is Danish law currently in force." This sentence is the object of Ross's logical analysis.

With regard to the notion of norm, Ross' analysis in *Om ret og retfærdighed* is contradictory. On the one hand, Ross asserts, as has been pointed out, that it is the task of legal dogmatics in the strict sense to study legal norms as conceptual content (such as propositions). On the other

hand, in classifying the different types of expressions, Ross includes the norms between expressions he calls "directives" and states of these that they do not have a semantic meaning, because they are not true or false. Ross would save this contradiction years later, by publishing his book *Directives and Norms* in 1968. In this play, Ross captures the essentials of the linguistic analysis of R.M. Hare, who distinguishes two parts in the sentences: the phrastic/neustic. This allows Ross to argue that the norms or prescriptive sentences do have semantic sense. Well, his thesis seems to be that the significant part of the sentences is the phrastic, a part that is common to assertive sentences and prescriptive sentences. For this reason, prescriptive sentences are significant, similar to assertive sentences, even if they have different meaning.

The notion that Ross discusses below is that of "Danish law." According to Ross, all the norms that make up Danish law belong to two classes: norms of conduct, addressed to private individuals, and competence norms. With regard to competence norms, Ross offers, like Kelsen, different interpretations, not equivalent to each other, of those norms. Based on these interpretations, Ross resolutely states: "The norms of competence are reducible to norms of conduct." Plus, the norms of conduct, Ross claims, are not actually aimed at private individuals. Because, according to Ross, "the real content of a norm of conduct is a directive to the judge, while the instruction to the private individual is a derived and figurative legal norm deduced from it."

These arguments enable Ross to conclude that all Danish legal norms are in fact directives whose addressees are the Danish judges. These norms order Danish judges to exercise physical force, if certain facts determined in the norm itself take place. This thesis, which can be called "prescriptivist, in a strong sense," is the same as that held by Kelsen and is inspired by it, as Ross himself acknowledges. However, the arguments put forward by Ross in defense of this thesis are different from those offered by Kelsen.

Another notion, according to Ross, found in Danish legal dogmatics is the notion of to be in force. According to Ross, a Danish legal norm is in force if, and only if, the norm is felt as binding and is therefore followed by the persons to which it is addressed. Since these people are the Danish judges, Ross's thesis is that a Danish legal norm is in force if, and only if, Danish judges follow it because they feel bound by it. That (Danish) judges follow a (Danish) legal norm because they feel bound by it means, according to Ross, that the (Danish) judges apply that rule. Ross therefore asserts that the application of the law by the judiciary is the effectiveness that a legal norm has to have to be in force.

In accordance with the ideas set out above, it would be possible for *N* to be a Danish legal norm, but not in force. However, in *Directives and Norms*, Ross introduces a modification to his theory that eliminates this possibility. Ross defines a norm as a impersonal directive in force; in this way, the property of to be in force becomes an essential element of the concept of the norm. On the other hand, Ross obscures his theory; since the classification of norms as impersonal directives, that is, as directives lacking a clearly defined sender and receiver, seems to contradict their thesis that (Danish) legal norms are addressed to (Danish) judges.

The last notion to be analyzed is that of "currently," which is included in the expression "currently in force." As Ross argues in *Om ret og retfærdighed* (and said in the terminology of this work, where Ross does not consider the property of to be in force to be an essential property of the legal norms), a sentence saying that a norm is in force must be understood as referring to hypothetical future judicial decisions. Ross's thinking can be expressed as saying that "being in force at the time t" means "being applied at a time t_1 after t." Consequently, the statements of the science of law by antonomasia, that is, of legal dogmatics in the strict sense, become predictions about the future behavior of judges, thus being verifiable statements and, therefore, scientific, according to the postulates of the neopositivist concept of science.

Alf Ross and the Pure Theory of Law

Along with the idea of the unity of science, the other axis around which Ross's thought revolved over the years was the work of Hans Kelsen.

After a first stage under the influence of Kelsen and a second stage away from him, in the third and last stage of his life, Ross elaborated a legal theory (which is the best known of his theories) very close to that of Kelsen. Up to the point that almost all the main theses of the pure theory of law appear in it.

The core of the pure theory of law is the notion of a legal norm. According to various theses held by Kelsen, a legal norm is characterized by four properties: it is an "ought to be," addressed to judges and related to the exercise of coercion, effective and authorized by a legal norm. On the other hand, Kelsen defines an "ought to be" as the meaning of an act of will directed at the behavior of another. In this way, an "ought to be," in addition to being a prescription, has two essential characteristics according to Kelsen: it has an ideal nature, because it is the meaning of an act, and it has a positive character, since its existence depends on a human act. And, since every legal norm is an "ought to be," legal norms and law have, according to Kelsen, an ideal, but at the same time positive, nature.

This conception, insofar as it considers law as something ideal, but which owes its existence to man, is similar to that held by Karl R. Popper concerning what Popper himself called the "third world." The assertion that law is both positive and ideal is precisely what characterizes the so-called iuspositivist doctrines as opposed to the iusnaturalist ones, on the one hand, and as opposed to the realist conceptions of law, on the other hand, which conceive law as a fact, as the title of one of Karl Olivecrona's books says. Such a conception may be erroneous, but it is not inconsistent, as some of Kelsen's critics, including Olivecrona himself, believed. And it is precisely this conception of law, as something that is both positive and ideal, which underlies after the qualifier of "pure" that Kelsen applies to his own theory of law and after the disqualification of "meta-legal," of strange to the law, which Kelsen applies to any theory about nonpositive norms or about historical, sociological, etc., facts. This notion of purity (Reinheit) had been anticipated by Rudolf von Ihering in 1854.

In addition to purity, the other distinctive feature of Kelsen's theory, which is also characteristic of the entire Vienna School, is the dynamic conception of law. This conception is embodied in the fourth property that Kelsen attributes to the legal norm, the property of being authorized by another legal norm or, in Kelsen's own words and put forward in 1882 by Adolf Lasson, the requirement that law must be established in accordance with the law.

With the exception of this fourth property that Kelsen attributes to the legal norm, the notion of the legal norm offered by Ross in the last stage of his thought presents the same elements that characterize Kelsen's legal norm, although sometimes for different reasons.

For instance, according to Kelsen, a legal norm is an ideal entity since it is the meaning of an act of will. Ross, on the other hand, conceives a legal norm as an ideal entity in a more direct way, by qualifying it as a conceptual or spiritual content.

Kelsen and Ross consider authentic legal norms to be prescriptions addressed to judges and related to the exercise of coercion. But they hold different views on the relationship between these legal norms and other legal norms. Kelsen claims that all other legal norms are not autonomous or are parts or fragments of the norms addressed to judges. Ross, on the other hand, distinguishes in the rest of the legal norms between norms of competence and norms of conduct addressed to private individuals. Regarding the norms of competence, Ross claims that they are reducible to norms of conduct addressed to private individuals. And, with respect to these norms, Ross argues that they are deductible from the norms of conduct addressed to judges. However, neither Kelsen nor Ross justifies any of these theses.

Finally, for both Kelsen and Ross (in Directives and Norms), effectiveness is an essential feature of legal norms. But, according to Kelsen, a legal norm (a genuine legal norm, addressed to the judges) can be effective in two ways: either because the judges comply with it by imposing a sanction on those who carry out the behavior contemplated in its factual assumption, or because the opposite behavior takes place, namely behavior that avoids the sanction. For Ross, on the other hand, a legal norm is effective, or is in force, only when the judges fulfill it because they feel bound by it.

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Rousseau, Jean-Jacques: Theory of Law

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Introduction

In addition to being famous as a political theorist, Jean-Jacques Rousseau (1712–1778) was a very successful composer and novelist. His posthumous autobiographical writings also gave impetus to autobiographical, confessional literature. Among his most important political works are the *Discourse on the Sciences and the Arts* (1751), the *Discourse on the Origin of Inequality* (1755), *Emile, or on Education* (1762), and *On the Social Contract* (1762). The latter two of these works generated much controversy over Rousseau's religious and political positons, and he spent much of the last period of his life with an active warrant for his arrest in France. Rousseau's political thought responds directly to his predecessors Hobbes, Grotius, and Locke as well as to earlier thinkers such as Plato and Aristotle. Recent scholarship has stressed his influence on Kant (Shell 1996: 81–87), and John Rawls explicitly acknowledges his debt to him (Rawls 1999: 233). His influence on legal thought can be traced through both the French Revolution and the Kantian tradition.

The Place of the Law in Rousseau's Thought

In an autobiographical passage that discusses the plans he had made for books when he was at the height of his career, Rousseau indicated the significance of law for his political thought and, indeed, for his thought in general. He says that he had begun meditating seriously about politics while serving as secretary to the French ambassador to Venice when he was in his thirties. After some years of thought and study, he reached the basic conclusions that serve as the foundation of his political writings. He says, "I had seen that everything depends radically on politics, and that, from whatever aspect one considers it, no people ever would be anything other than what it was made into by the nature of its Government; thus this great question of the best possible Government appeared to me to be reduced to this one. What is the nature of government suited to forming a people that was the most virtuous, most enlightened, most wise, in sum, the best, taking this word in its most extended sense. I had believed I had seen that this question depended very closely on this other one, if it even differs from it. What is the Government which by its nature keeps itself closest to the

law? From that, what is law? And a chain of questions of that importance" (Rousseau 1995: 339). In sum, he had arrived at a view of the radical importance of politics for all human matters, and, moreover, he had concluded that sound politics depended on government being subordinated to law. These conclusions were dependent on a chain of questions the foremost of which was, "What is law?" These are subjects to which he returned again and again over the course of his political writings.

Clarifying Rousseau's understanding of law, then, requires several things. As this passage indicates, it is necessary to begin by achieving some clarity about exactly what he understands law to be. In *Emile* he indicates that his own position on this subject departs radically from that of all his predecessors. He says, "This subject is entirely new: the definition of law remains to be made" (Rousseau 2010: 653). Second, it is necessary to understand why rule by law will make people virtuous, enlightened, and wise as opposed to merely law-abiding. To these can be added the question of the feasibility of the rule of law in the strict sense.

While the law is discussed throughout Rousseau's works, there are three places where his precise doctrine is presented particularly systematically. The most significant of these is in the *Social Contract*. The other two are shorter versions of the same argument. One of these occurs in *Emile, or on Education* which was published almost simultaneously with the *Social Contract*. The other is in the *Letters Written from the Mountain* (1764) and Rousseau explicitly describes this brief account as an analytic summary of the *Social Contract*. The three accounts are not identical, but the differences mainly concern either emphasis or the rhetorical context. The fact that they were published so closely to each other suggests that the different formulations given in the different works can be used to clarify each other.

What Is Law?

That Rousseau understood his position on the law to be radically new is clear. His most straightforward statement of what law is occurs in the analytic summary of his doctrine in the *Letters Written from the Mountain*. He says, "And what is a Law? It is a public and solemn declaration of the general will, on an object of common interest (Rousseau 2005: 232). The precise meaning of the general will is a complex topic, but for the purpose of understanding Rousseau's definition of law, it suffices to grasp that this generality has two aspects: first, it is expressed by all of the members of the community rather than by their representatives, and second, it applies equally to all members of the community. In the *Letters* Rousseau immediately deduces from its definition the consequence that "Law cannot have a particular and individual object." In the *Social Contract*, he makes a complementary statement about the characteristic of laws, saying, "Laws are properly speaking only the conditions of the civil association. The People that is subject to the laws ought to be their author. Only those who are forming an association have the right to regulate the conditions of the society" (Rousseau 1994: 154). Laws, then, are not particular decrees meant to apply only to a single situation or individual. They are, instead, the general rules stating the conditions without which the community itself cannot exist. They can be understood roughly as constitutional provisions as distinct from measures concerning things such as an annual budget.

Rousseau's account clearly implies popular sovereignty, but it also requires a new understanding of the separation of powers. He locates the legislative authority only in a general council of all citizens which is concerned only with general laws that apply to all. By its nature this assembly cannot apply the laws it has made to particular circumstances. This means that there must be an executive power which makes this application. Rousseau calls this executive power the government or the administration which must be distinguished from and kept subordinate to the sovereign. As he says, "The Legislative power that is the Sovereign thus needs another power that executes, that is to say, that reduces the Law into particular actions. This second power ought to be established in a manner so that it always

executes the Law and it never executes anything but the Law. Here comes the institution of the Government" (Rousseau 2001: 232).

That the people as a whole are the source of the laws is clear. An important question posed by the doctrine of the general will involves what determines the content of laws. Generality of application imposes some formal constraints, but whether there are substantive constraints as well is a subject over which scholars disagree (Cohen 2010: 73–82; Williams 2014: 250–255). Some have also argued that Rousseau's envisions a procedure for arriving at the common good, comparable to the Condorcet Jury Theorem (Grofman and Feld 1988: 567–576). Rousseau addresses some of the relevant issues in his discussion of law in Book II, Chapter 6 of the *Social Contract*, "On Law." This discussion follows Rousseau's refutation of alternatives to consent as a foundation of civil society and his account of the social compact that establishes sovereignty. His discussion of the nature of sovereign power leads to the discussion of law. Rousseau begins the chapter by saying, "Through the social compact we have given the body politic existence and life; the issue now is to give it movement and will through legislation" (Rousseau 1994: 152).

Before turning his attention to the making of laws, however, he first confronts a claim that it is not necessary for humans to make laws because there is "a universal justice emanating from reason alone." Rousseau does not deny the existence of such a standard here. In *Letters Written from the Mountain* he appears to be even more positive about its existence, saying, "[I]t is no more permitted to infringe natural Laws by the Social Contract than it is permitted to infringe positive Laws by the Contracts of private individuals, and it is only by these Laws themselves that the liberty that gives force to the engagement exists" (Rousseau 2001: 231). This claim has led some commentators to place Rousseau in the natural law tradition and to argue that natural law places substantive limitations on human law. In the *Social Contract*, Rousseau insists, however, the laws of justice based on this standard are ineffectual "for want of a natural sanction" and in his *Discourse on the Origin of Inequality* he indicates his reservations about any of the traditional natural law doctrines (Grace 2013). His claim is that, if such a sanction existed, neither government nor laws would be necessary at all. This might seem to leave the possibility that human positive law could be based on the standard provided by universal rational justice, but Rousseau does not even consider this possibility in this context. Instead he argues that prior understandings are needlessly metaphysical, that they fail to achieve a shared understanding. In short, even the most fully developed understanding of natural law does not lead to a clear understanding of human, positive law, or – as he calls it here – "the law of the State." The restrictions on the members of society are not here said to come from anything outside of their own will other than the fact that their deliberations are about the general conditions of their association rather than some particular matter. Subjects can appeal to the sovereign against the government's application of the law, but individuals who are members of the community cannot appeal to a standard outside of the general conditions of the society to question those conditions.

If one considered only the formal characteristics of law, one might conclude that there would be a single set of institutions valid for all communities. To some extent this is true. Rousseau argues that slavery can never be justified even in a case like Sparta in which slavery was a precondition for the free activity of citizens (Rousseau 1994: 193). On the other hand, he stresses more than most political thinkers that different communities require different laws. In fact, the same communities can require opposite laws at different times. Rousseau gives an example of this when he discusses Roman voting laws. Certainly, voting laws are among "the conditions of the civil association" and might seem not to be subject to variation. Rousseau observes that, in the early days of the republic, votes were given aloud by individuals and recorded by a registrar. In other words the giving of one's vote was a public act. Rousseau says, "This practice was good as long as honesty prevailed among the Citizens and each was ashamed to vote publicly for an unjust opinion or an unworthy subject" (Rousseau 1994: 210).

As the republic became corrupted, however, the secret ballot was instituted "in order to restrain buyers by distrust and provide scoundrels with the means not to be traitors." Rousseau observes that Cicero was opposed to this change and argued that it contributed to the ruin of the Rome. Rousseau disagrees, insisting "that the downfall of the State was hastened because more changes of this sort were not made." On issues of this sort, ordinary citizens are more likely to understand immediately the condition of their own community than are intellectuals equipped with a doctrine about a healthy republic or nostalgia about the past. Knowing what a good law is for one's own community depends on understanding its present condition more than it does on being a great philosopher.

Law and Virtue

It remains to be shown how rule of law is connected with making people virtuous. It is easy to see that deliberating about the law requires virtue of some sort: citizens must vote for what they understand the general will to be rather than for what suits them personally. It might even seem that rule of law, once it is established, is a way to mediate relations among people who are largely selfish. Indeed, human selfishness might seem to be precisely what makes rule of law, rather than rule of men, desirable. In this view, rule of law is a substitution for virtue rather than its cause. The issue here is to understand why Rousseau considers every alternative to rule of law as productive of vices and not merely as allowing influence to vices that already exist. The key to this is his view that personal dependency is the cause of both misery and vice. In *Emile* Rousseau opens his discussion of the dangers of dependency by saying, "There are two sorts of dependence: dependence on things, which is from nature; dependence on men, which is from society. Dependence on things, since it has no morality, is in no way detrimental to freedom and engenders no vices. Dependence on men, since it is without order, engenders all the vices, and by it, master and slave are mutually corrupted" (Rousseau 2010: 216–217). Dependence on the will of other people engenders vices by requiring that individuals attempt either to dominate or servilely manipulate each other. Masters take the former path and slaves the latter. In the course of pursuing their own good, both develop vices, although of somewhat different sorts.

Rule of law accomplishes a great deal by removing the personal dependence that engenders "all the vices." The passage from *Emile* continues, "If there is any means of remedying this ill in society, it is to substitute law for man and to arm the general wills with a real strength superior to the action of every particular will. If the laws of nations could, like those of nature, have an inflexibility that no human force could ever conquer, dependence on men would then become dependence on things again; in the Republic all of the advantages of the natural state would be united with those of the civil state, and freedom which keeps man exempt from vices would be joined to morality which raises him to virtue." An inflexible rule of law would remove the personal dependence that engenders vice. In fact it would do more in that because, by subjecting humans to laws of their own making, it would open the way to virtue understood as devotion to these very laws.

The Limits of Rule of Law

It should now be clear that Rousseau regarded rule of law to be the solution to all political problems. It is also necessary to consider, however, how practical he thought this solution to be. In the passage for *Emile* cited above, Rousseau indicates only the results that would follow if perfect rule of law were established; he does not say whether this is possible. Repeatedly in a variety of contexts, he indicated the difficulties involved by using a mathematical analogy. For example, in his *On the Government of Poland*, he states that it would be a mistake to regard the problem as a simple one even in principle. He says, "It may be easy, if you wish, to make better laws. It is impossible to make any that men's passions do

not abuse, as they have abused the first ones. To foresee and to weigh all these abuses to come is perhaps an impossible thing for the most consummate Statesman. To put law over man is a problem in politics which I compare to that of squaring the circle in geometry. Solve this problem well, and the government based on this solution will be good and without abuses. But until then, be sure that where you believe you are making the laws rule, it will be the men who are ruling" (Rousseau 2005: 170–171). To compare the problem of putting the law over man to the problem of squaring the circle is to say that the problem faces more than grave practical difficulties: even in principle it is impossible to solve.

There are two main reasons why the rule of law cannot be established even in principle. The problem of subjecting citizens to the general will has two dimensions. The first of these concerns the individuals who make up the community, and the second concerns the existence of factions within the community. Each citizen has a private will as well as a general will as member of the community. Rousseau calls the process of subordinating the private will to the general will "denaturing," a term which indicates the difficulty of achieving complete success (Rousseau 210: 165). However devoted individuals may be to their community, they remain separate individuals in some respects. In crucial, if unusual situations, their own good can put them at odds with the community. It is not obvious that the effort to make people oblivious to their own good can be completely successful or that its success would be entirely desirable.

The problem posed by factions is of a different sort (Kelly 2018: 23–26). Each faction in a community has its own general will that is different from and potentially opposed to the general will of the community as a whole. Factions will resist the general will of the community and attempt to turn the law to their own advantage. It would seem to be possible to solve the problem of factions by taking the path rejected by James Madison in the tenth of the *Federalist Papers*. Instead of rendering factions relatively harmless by multiplying them as Madison recommends, one could suppress them altogether. Rousseau stresses the importance of as compete a homogeneity as possible for a sound community. Nevertheless there will always be one faction that cannot be suppressed – that made of the members of the government. As indicated above, the idea that law must be an expression of the general will means that there must be a body separate from the sovereign that executes the law. In order to be effective at executing the law, the government must develop an *esprit de corps* that allows it to function effectively. Eventually the members of the government will see themselves as belonging more to this small community than to the broader community. In the long term, every government will tend to become a state within the state in which the interests of the government or administration predominate over the interests of the community. The more devoted public servants are to their mission as members of the government, the more dangerous they can become as citizens of the larger community. An education to civic virtue and frequent assemblies in which the government can be renewed can only delay this process; they cannot prevent it altogether. Rousseau calls this "the inherent and inevitable vice" that will eventually destroy any body politic (Rousseau 1994: 186). Even regular assemblies of the sovereign will slowly but steadily lose ground to the government.

Even though perfect rule of law is impossible and the best approximation of perfect rule of law is doomed in the long run, Rousseau does insist that his account of law remains relevant for existing societies. Even in communities in which the government has begun to usurp sovereign power and the citizens have become corrupt the general will is "always constant, unalterable, and pure" (Rousseau 1994: 199). The point is not that the general will stands in some sort of abstract isolation in relation to actual conditions. In fact, beyond its normative dimension, Rousseau's account is meant as a description of how all communities work. To the extent that even the most corrupt community continues to exist, it does so only to the extent that its members conceive of themselves as belonging to a community. The general will, and with it the law, will disappear totally only when the community becomes

nothing but an aggregation of individuals held together by force, or not held together at all.

Conclusion

Rousseau begins Book I of the *Social Contract* by indicating his task for the work as a whole. He says, "I want to inquire whether there can be a legitimate and reliable rule of administration in the civil order, taking men as they are and laws as they can be" (Rousseau 1994: 131). This statement provides a fine statement of the nature of his account of law and of politics in general. Rousseau aspires to combine a realistic account of what human beings are like with a description of the degree of legitimacy that is achievable for human societies. Significantly, he presents himself as making an inquiry of whether this combination is possible rather than dogmatically asserting that it is.

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Rule of Law: Historical Perspectives

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Introduction

There are numerous theories addressing the question of what is meant by the rule of law. The formal theory argues that the notion of the rule of law requires law to be general, consistent, prospective, accessible, intelligible, and stable. On the other hand, the substantive view of the rule of law imposes constraints, such as basic human rights, on the content of laws. As Gerald Postema argues, however, the core tenet of the rule of law is "to provide protection and recourse against the arbitrary exercise of power through the instrumentality of distinctive features of law" (Postema 2014, 16–17). This is a compelling perspective to take, as the ideal of the rule of law has often been contrasted with the rule of men.

I will focus on the Anglo-American history of the rule of law, emphasizing that, in England, the aim of the rule of law was primarily to constrain the King's absolute and arbitrary power. I will also show that the King's absolute power was later successfully contained through the concept of the "King in Parliament," which provided that the King cannot make or abolish laws without the consent of the House of Lords and House of Commons. On the other hand, in America, the judiciary played a leading role in sustaining and developing the rule of law. Until the end of nineteenth century, it was widely accepted that judges,

rather than legislators, were best suited to identifying the basic and objective values of American society. Indeed, it would be no exaggeration to say that the rule of law in America was the rule of these values.

In England, Edward Coke's (1552–1634) attempt to restrain the arbitrary rule, or the rule of men, has been significant. Coke summarized his view of the rule of law when he quoted the famous medieval jurist Henry Bracton: "the king was under no man, but he was under God and the law." The term "law" in this sentence meant the common law which had already become pervasive throughout England by that time. Coke and the other common law lawyers, for example, argued that impositions of additional taxes without the consent of Parliament were contradictory to the maxims or principles of the common law and succeeded in placing the throne under the rule of law.

On the other hand, Coke did not succeed in his attempt to place the statutes of Parliament under the control of the common law. In Dr. Bonham's case, Coke argued that unreasonable statutes can be struck down by common law courts, suggesting that he held a substantive view of the rule of law. However, particularly after the Glorious Revolution and the Bill of Rights (1689), the sovereignty of Parliament was established, and William Blackstone (1723–1780) explicitly rejected Coke's ruling in Dr. Bonham's case. Albert Dicey (1835–1922), whose formulation of the rule of law in England remains very influential, also presupposed the sovereignty of Parliament and argued that any statutes, including bad laws, have validity once they are enacted properly in the Parliaments. Dicey certainly wrote that a large part of the constitutional principles of England had been made by judges. He also argued that the judges in his own time had a significant role in preserving the rule of law. Dicey, however, did not have a substantive theory of the rule of law and admitted that even fundamental constitutional principles could be abolished by Parliament.

It is possible to contrast the formal tradition of the rule of law in England with the American tradition, which can largely be characterized as substantive. It is well known that the rule of law at the federal level in the USA took a definite form when John Marshall (1755–1835) established the system of judicial review in *Marbury v. Madison* (1803). Marshall's idea was that when legislatures enact unreasonable laws, judges can, on behalf of the people, find them unconstitutional. It has been argued that Marshall's conception of the rule of law is based on republicanism. The judgment in *Lochner v. New Yor*k (1905) is also said to be based on the political philosophy of a kind of republicanism which sought to protect the property rights of an industrious entrepreneur.

Most judges in *Lochner* believed that their philosophies reflected the values of American society. However, Oliver Wendell Holmes (1841–1935), who saw the influence of social Darwinism, famously criticized and wrote the dissent in the *Lochner* judgment, arguing that the US Constitution does not enact Herbert Spencer's theory. As Brian Tamanaha argues, the idea that law reflects social good was overturned in the early twentieth century by relativism, such as logical positivism and Marxism (Tamanaha 2006, 75). According to Tamanaha, the controversial judgments of the Warren Court, Burger Court, and Rehnquist Court reinforced the idea that the courts are "imposing their personal views on the populace in the name of interpreting the Constitution" (89). Tamanaha's point also holds true with regard to the present circumstances in America. As Robin Charlow notes, "the United States Constitution is singularly vague and contains relatively few enumerated rights"; for this reason, the Constitution "depends for its delineation and enforcement on the interpretation of judges" (Charlow 2014, 260).

Edward Coke and the Rule of Law

Edward Coke has been and remains the symbol of the rule of law. His aim was first and foremost to restrain the prerogatives of the Stuart kings. In England, kings from the ancient times enjoyed prerogatives such as declaring war. The scope of these prerogatives – in other words, the extent to which kings and queens could wield their powers arbitrarily – was very ambiguous. During the

reign of Queen Elizabeth I, the Queen and Parliament compromised with each other, and the balance of power was maintained to some extent. When James I acceded to the throne in 1603, however, the situation changed dramatically. This is because James I and the subsequent Stuart kings firmly espoused the theory of the divine right of kings and argued that the king's powers could be restrained only by the law of God and the law of nature.

The Stuart kings argued, for example, that the king could imprison people without showing cause when the policy of the state demands it by way of his special mandate. Thus, Charles I arrested Thomas Darnel and four other knights for refusing to contribute to forced loans. In Darnel's case (1627), John Selden (1584–1654), a counsel for one of the defendants, argued that the King's arrest was against chapter 29 of Magna Carta which stated that "No free-man shall be . . . imprisoned . . . nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land." Selden was arguing that the King's special mandates were not "the laws of the land," and his argument was based on the theory of the "ancient constitution," the champion of which was Edward Coke.

Coke and fellow common law lawyers argued that the excellence of Magna Carta and of the common law had been established by the test of time, because the fundamental principles those laws espoused were confirmed by each king successively. Coke claimed that, given that they represented fundamental principles and had been in force since ancient times, the fundamental freedoms articulated in Magna Carta and the common law should be followed by all, including kings. On the other hand, Coke also argued that the common law had supreme authority "because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection" (Coke and Sheppard 2003, vol. 2, 701). He also argued that "the common Law it selfe is nothing else but reason, which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every mans naturall reason"(ibid). Thus, the common law was characterized by an excellence and authority refined by an infinite number of judges, and so even kings should be subservient to it. More importantly, the content of the common law can be known only by lawyers who have acquired the artificial reason of law. On this occasion, the maxims of law played an important role. The maxims, such as "the king cannot change the property rights of subjects without their consents," or "free trade," were a summation of the common law, and the lawyers used these maxims effectively to curtail the arbitrary powers of Stuart kings.

In 1628, Charles I was forced to accept these maxims and to assent to the Petition of Right which restricted prerogatives such as non-parliamentary taxation and imprisonment without cause. It is well known that these rights of subjects were later confirmed by the Bill of Rights in 1689. Thus, Coke's attempt to restrain kings' prerogatives by the rule of common law was immensely successful. Coke's attempt to curtail Parliamentary sovereignty, however, was not.

Parliamentary Sovereignty and the Rule of Law in England

While there are many interpretations of Coke's ruling in Dr. Bonham's case (1610), Coke is sometimes depicted as one of the founders of the judicial review of statutes. However, while Coke's idea of judicial review was well received in the revolutionary period of the USA, it had very limited influence in England. Blackstone, in the eighteenth century, explicitly rejected Coke's ruling in Dr. Bonham's case.

The point in dispute was the College of Physicians Act (1553) with its relevant act and charter, which authorized the College of Physicians to regulate the physicians in London and to punish the practitioners not licensed by it. These statutes also gave the college half of the fines imposed on nonlicensed practitioners such as Dr. Bonham. So, according to Coke, these statutes made the College of Physicians judges of their own cause. With regard to this point, Coke famously argued that "when an Act of Parliament is against Common

right and reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void" (Coke and Sheppard 2003, vol. 1, 275). As noted above, there are many explanations for Coke's ruling, but Ian Williams recently provided a particularly persuasive explanation. According to Williams, Coke was embodying an old tradition wherein statutes were not given special treatment. As such, Coke nullified the statute just as judges would nullify any other legal document, such as a contract. However, Coke was criticized by his contemporaries such as Lord Ellesmere, who argued that statutes do hold special status and must be interpreted according to the intention of Parliament (Williams 2006, 126). This style of interpretation, rather than Coke's, became predominant and was reinforced by Blackstone in the eighteenth century.

After the Glorious Revolution, the Bill of Rights confirmed the Petition of Right and curtailed the prerogatives of the King even further. The King's power to dispense of statutes was abolished and the Parliamentary sovereignty was firmly established. In this context, Blackstone argued that Parliament is "the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms" (Blackstone 1979, 156). Blackstone also argued that "if parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it" (91). So, with regard to Coke's ruling, Blackstone was able to argue that "if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature"(ibid). Originally, the object of Parliamentary sovereignty was to constrain the King's absolute power. Blackstone praised the advances in this area since the reign of James I (323). He did not, however, propose any devices that would effectively prevent legislators from enacting bad laws.

In late nineteenth century, Dicey argued that the following three points characterize the English rule of law tradition. According to Dicey, the first is "that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land" (Dicey 1915, 110). The second point is that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals" (114). The third is that "the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts" (115). Paul Craig provides an influential interpretation of these points. On the first point, Craig notes that it did not speak to the content of the laws in any way (Craig 1997, 470). He also argues that the second point is concerned with formal access to the courts (472). On the third point, according to Craig, Dicey's argument was not that the rule of law demanded adherence to substantive rights (473).

On the whole, Craig argues that Dicey held a formal theory of the rule of law. Dicey seems to have followed Blackstone. According to Dicey, "the plain truth is that our tribunals uniformly act on the principles that a law alleged to be a bad law is *ex hypothesi* a law, and therefore entitled to obedience by the Courts" (Dicey 1915, 20). Dicey, however, also emphasized that common law courts abide by the tradition of a strict or literal interpretation of statutes. According to Dicey, a statute that, for example, attempts to give wide discretion to officials must grant such power to them explicitly, which in turn makes the enactment difficult as Parliament or public opinion would oppose such statutes on the grounds that they violate human rights. Dicey also observed that "our constitution, in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law" (116). As noted above, Dicey's third point on the English tradition of the rule of law also emphasizes this. It can thus be said that Dicey's formulation of the rule of law combines the tradition of the common law with that of parliamentary sovereignty. However, as Parliament can repeal any common law rule, including the most fundamental elements of constitutional law, the

interpretation that Dicey holds a formal theory of the rule of law stands. However, Dicey proposed more effective measures for preventing bad legislation than John Austin, one of the leading legal positivists in nineteenth century, who mostly relied on public opinion as a means of controlling the legislature.

The Substantive Concept of the Rule of Law in the United States

There are many theories on the rule of law in the USA, including natural law theory, the common law constitutionalism, and republicanism. This section focuses on republican (therefore substantive) theories of the rule of law in the USA in contrast to the formal theories observed in England. While controversial, the *Lochner* judgment has also sometimes been interpreted from the republican point of view.

While some states have their own system of judicial review, it is well known that at the federal level, the judicial review system was established by John Marshall, who was influenced both by natural law theory and republicanism. And the theory of republicanism had a particularly weighty influence on his view on the role of judges. On the eve of the Constitutional Convention, Marshall observed the crisis or the failures of democracies across the states, as laws by state legislatures often reflected the selfish interest of the majority. Laws such as those that authorized the government to issue paper money and make it legal tender were enacted, and executions for debts were postponed (Hobson 1996, 21). As Charles Hobson suggested, the distinction emerged between legislative will and justice and "this distinction became the foundation of a conception of judicial independence and discretion that was consistent with the republican belief in the sovereignty of the people" (39). After the Constitution of the United States made the sovereignty of the people the source of all political power, Marshall tried to interpret the US Constitution on behalf of the people and established judicial review in *Marbury v. Madison* (1803). For this reason, Marshall is depicted as a legal savant who interpreted the Constitution on behalf of the people. The influence of republicanism can be seen clearly in *Fletcher v. Peck* (1810), wherein Marshall protected a contract against an intervention of the state legislature of Georgia. To protect property rights is an important aspect of republicanism as it enables persons to pursue the public interest.

The most prominent theories of the rule of law that emerged in the mid-nineteenth century were developed by James Kent (1763–1847) and Joseph Story (1779–1845). In *Swift v. Tyson*, Story (1842) held that in a diversity case (a case between citizens of different states), the federal court can develop its own federal common law if there are no existing statutes that can be applied. Kent and Story tried to protect property rights against the Jacksonian democracy, and in this sense, Kent and Story were following Marshall. They were also influenced by the Scottish enlightenment and tried to introduce and protect the order of economy throughout the USA against the Jacksonian democracy and the individual states which tended to focus on their internal situations. They tried to control laws such as the law of negotiable instruments by federal common law and facilitate transactions between states. They referred to the Scottish enlightenment of Hume and Kames which sought after wealthy commercial society.

Lochner v. New York (1905) is a well-known case wherein it was held, at the beginning of the twentieth century, that liberty of contract was implicit in the due process clause of the Fourteenth Amendment. It has usually been interpreted as a judgment protecting the interests of the rich. However, there is research suggesting that *Lochner* is an attempt to protect the virtuous and industrious workers against individuals who unfairly try to use the power of the government to protect their own interests. In other words, *Lochner* was simply trying to eliminate special interest legislation from society (Tamanaha 2006, 49), which suggests an influence of nonpartisan republicanism. As Holmes noted that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics" (Holmes 1905, 75), Herbert Spencer's Social Darwinism also relates to *Lochner*. While Holmes also argued

that "this case is decided upon an economic theory which a large part of the country does not entertain"(ibid), the other judges in the *Lochner* case believed that their philosophy reflected the values of American society.

As the Holmes' dissent shows, however, basing law on theories which are intended to reflect the values of society became extremely difficult from the beginning of the twentieth century. Tamanaha argues that general skepticism of that period about objective moral values, such as that found in logical positivism and Marxism, determined the subsequent direction of American law (Tamanaha 2006, 75). According to Tamanaha, the concept of law as an empty vessel became prevalent in twentieth-century America. As a result of this change, law became a tool which could be used for any purpose. He criticized *Roe v. Wade* (1973), for example, stating that it "reigns as the unmatched example of judicial arrogation of legislative power, of justices imposing their personal views on the populace in the name of interpreting the Constitution" (89).

Conclusion

While the description of the history of the rule of law in England and the USA in the previous sections may be considered oversimplified, they are highly relevant to both modern and philosophical discussions.

As discussed in section "Parliamentary Sovereignty and the Rule of Law in England", Dicey's third point on the rule of law is that "the general principles of the constitution . . . are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts" (Dicey 1915, 115). Referring to Dicey's statement, T. R. S. Allan, a leading constitutional scholar in Britain, argues that the English concept of the rule of law has been based on substantive values developed by judicial decisions. He also argues that the rule of law in England is the rule of good law (Allan 1993, 2–16). Craig, however, argues that Dicey's point was only that it would be difficult to overcome the rights of the English people in the short term as the rights of private individuals in England are the results of manifold judicial decisions (Craig 1997, 474). Craig also poses a philosophical question. He suggests that those who rely on the substantive theory of the rule of law must show that the political philosophy which forms the foundation of the rule of law is acceptable even to their critics (468).

The question Craig raises is more relevant to the rule of law in the U.S., where the question of "what is the rule of law" is, I suppose, still closely linked to the question of "what political theory best reflects American values." Tamanaha, who emphasizes the relativism of values in American society from the beginning of the twentieth century, proposes a modest solution of balanced realism. According to Tamanaha, if all judges in the USA share a common orientation towards balanced realism in that they apply the law, are fair, strive to determine the best possible legal answer when the law is in doubt, and consider arbitrary judgments as inappropriate, then "this is [now] the most a rule-of-law system of judging can hope for" (Tamanaha 2010, 199). Tamanaha is in fact arguing that any substantive theory of the rule of law will lead to the rule of men (i.e., the rule of judges). Indeed, he is quite right to say that in order to sustain the rule of law in those legal systems which are based on substantive conception of rule of law, we should find some means of constraining judicial power.

Cross-References

► Ethics: Legal
► Waldron, Jeremy: Rule of Law

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Rule of Law: Theoretical Perspectives

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Introduction: Some Conceptual Issues

The term "rule of law" refers to a situation in which rulers and citizens are equally subject to the law and entitled to its protection. Many writers regard the rule of law as an ideal, and formulas such as "government subject to law" and "government bound by law" are sometimes used to describe a particularly valuable feature of that ideal. Joseph Raz observes that such formulas would be tautological, and so empty expressions of a political ideal, if we were to stipulate that no governmental action, as a matter of definition, can be against the law. Appeals to the rule of law as a genuine ideal make sense only if the definition of "governmental action" does not exclude the possibility of unlawful governmental actions (Raz 2009: 212–213). Raz argues that "[g]overnment by law and not by men is not a tautology if 'law' means general, open, and relatively stable law." (Raz 2009: 213) Governmental actions would then conform to the rule of law just in case general, open, and stable legal rules authorize or require those actions.

On A. V. Dicey's classical account, the rule of law comprises three ideals: (a) law prevails over arbitrariness and discretionary power, (b) "every man . . . is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals," and (c) "the general principles of the constitution (as, for example, the right to liberty, or the right of public meeting) are . . . the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts," rather than the result of legislation. Dicey's discussion of these three ideals purports to show that they guarantee that everyone is subject to rules rather than persons (Dicey 1915: 183–191).

So understood, the rule of law is the same thing as the law conceived as a system of rules. Lon L. Fuller offers an influential characterization of the value inherent in such understanding of the law. He argues that law, being a system of rules, displays an "inner morality" conveyed by the requirements of generality, publicity, non-retroactivity, clarity, consistency, possibility of compliance, stability, and "congruence between official action and declared rule." (Fuller 1969: 33–94). Retroactive laws, for example, cannot possibly guide behavior, and so they subvert the ideal of persons being governed by law, as opposed to being at the mercy of others. Similarly, John Rawls argues that the predictability of legal coercion, which is made possible by (meta)rules such as "there is no offense without a law," makes the rule of law a rational choice in a constitutional convention where impartial individuals try to secure for themselves the greatest equal liberty (Rawls 1999: 206–213). Thomas Christiano thinks, though, that Rawls's stability-of-expectation point does not fully explain the

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value of the rule of law; he argues that the rule of law also implements a "principle of public equality" that forbids treating citizens as "public inferiors" by subjecting them to case-by-case judgments instead of rules (Christiano 2008: 172–176). Legal predictability has also been praised for its contribution to the business-friendly environment needed to attract large investments, and so promote general prosperity (Bingham 2010: 38).

Some legal rules that apparently violate the rule of law actually conform to it. Fuller illustrates this point with the case of strict liability – i.e., the legal obligation to compensate victims of harm regardless of culpability. It would seem that in cases of harm caused by specified dangerous activities, strict liability commands the impossible, to wit, "never to cause any damage, however innocently" (Fuller 1969: 75), and so fails to provide the guidance that, as we saw, is central to the rule of law. However, as Fuller points out, strict liability for the harms caused by blasting operations (say, in order to build a highway on a hillside) does not aim at guiding behavior away from blasting operations, any more than a sales tax aims at guiding persons away from selling goods (Fuller 1969: 74–75). In those cases, strict liability purports to give firms the right incentives, as something different from guiding their behavior: it induces firms to work out the expected social costs and benefits of blasting operations, with an eye to making those costs and benefits coincide with the firms' expected benefits and costs. When it comes to harms caused by dangerous activities, it is often difficult to determine what the appropriate standard of care is and when it has been violated, what counts as a breach of contract, and when the requisite causation obtains. For these reasons, intention- or negligence-based liability would be less efficient than strict liability. As economists would put it, strict liability provides incentives to "internalize externalities," thereby producing a more efficient allocation of resources. Moreover, usual regimes of strict liability do not retroactively penalize certain activities – something that would be inimical to the rule of law – but rather announce ex ante that certain kinds of activities will carry legal responsibility for results that were neither intended nor caused by negligence. As long as the law "define(s) as clearly as possible the kind of activity that carries a special surcharge of legal responsibility," the requirements of what Fuller calls "the inner morality of law" and others would call "the rule of law" are met (Fuller 1969: 75).

Legal rules that appear to conform to the inner morality of law – which, as we saw, consists of formal, content-independent requirements – may fail to meet reasonable substantive moral requirements. Such rules are arguably arbitrary, and to that extent symptomatic of persons being subject to the will of other persons, rather than to genuine rules. The threat that substantive inadequacies pose to the rule of law is particularly pressing in connection with the generality requirement. It is tempting to believe that legal generality can be analyzed by means of purely formal notions, such as the absence of proper names in the laws. However, as Fuller points out (1969: 47), legal rules that are general under that analysis may not be suitably general. For example, a statute providing that it shall apply "to all cities in the state which according to the last census had a population of more than 165,000 and less than 166,000 inhabitants" is unduly particular (and not merely because of the proper name "the state"). Fuller is surely right in claiming that fairness, which is a value "external to the law," i.e., a substantive value, is compromised here. The upshot is that the rule of law, taken as a political ideal, cannot be a purely formal notion.

Fuller observes that infringements of the inner morality of law may occasionally be justified. For example, a legislature may justifiably keep secret the appropriations to fund research on a new military weapon, and so justifiably infringe the publicity requirement (Fuller 1969: 92). This case suggests an interesting distinction between the inner morality of law and the rule of law: we may want to say that violations of the inner morality of law (here, publicity) conform to the rule of law as long as those violations do not stem from anyone's arbitrary will but are rather rule-governed decisions. For example, legislators may secretly pass such appropriations under conditions clearly defined by the constitution, and

those decisions may be subject to review by independent courts.

The significance of independent courts for the rule of law can hardly be overstated. Recall that Dicey's feature (c) entrusts the courts with the interpretation of constitutional principles "in particular cases." Judicial review is arguably necessary for universal subjection to rules, because there would otherwise be no clear sense in which legislators are constrained by constitutional rules (Spector 2003). The rule of law seems to necessitate, then, judicial review by an independent judiciary. This point illustrates the intimate connection between the rule of law and classical liberal constitutionalism, a connection that underlies many of the arguments offered in *The Federalist Papers* in support of the ratification of the US Constitution, as well as the debates that preceded the constitutional processes that took place in many European and Latin American countries in the nineteenth century.

Rights and the Rule of Law

Classical liberals hoped that a well-designed constitution would protect individual rights, construed along the lines developed by John Locke towards the end of the seventeenth century (Locke 1689). On this view, individuals have strong moral rights to private property, and respect for these rights is essential to the rule of law. F. A. Hayek reaches a similar conclusion by insisting that the same set of rules should apply to government and citizens. Like Fuller (see the previous section), he maintains that general laws are essential to being subject to laws rather than to persons. Since Hayek's notion of generality excludes special-interest legislation, he rejects the redistributive policies of the regulatory state and advocates a regime of strong private property rights, including contractual freedom – in short, a free market (Hayek 1976: 11–12, 15–17, 27–29, 1979: 13–19, 93–97, 143–145). In contrast, other writers hold that the rule of law is neutral among economic policies or systems. Thus, Raz maintains that "the rule of law . . . can hardly be used to oppose in principle governmental management of the economy." He claims that (i) such management may "increase freedom" understood as "power of action," and (ii) power of action necessitates general, open, and stable rules (Raz 2009: 210–232, at 220). Raz implies, then, that restrictions on private property rights are consistent with, and perhaps necessitated by, the rule of law. Similarly, Jeremy Waldron writes that "arguing in Rule-of-Law terms for property, markets, and economic freedom is simply too distracting." For him, clarity would be best served by separating the ideal of economic freedom from the formal and procedural ideals that have been traditionally associated with the rule of law (Waldron 2012: 42–75, at 75).

Whether the rule of law allows for restrictions on private property rights turns on how much the government can manipulate the interpretation of the legal basis for such restrictions, and so impose its will. Some writers argue that key political concepts, such as the concepts of liberty and equality, are "essentially contestable," meaning that they allow for various "conceptions," and that there is no warrant for the claim that any of those conceptions is the best (Swanton 1985: 811–827). Essentially contestable provisions for constitutional rights increase the political power of those who produce authoritative interpretations of those rights and those who appoint them: their (changing) endorsements of conceptions of those rights cannot by hypothesis be challenged on the grounds that no reasonable interpreter would advocate a different conception. This being so, the rule of persons, rather than the rule of law, prevails. This line of thought suggests that constitutional guarantees of welfare rights – i.e., rights to aid – may be intractable under the rule of law, since the policies mandated or authorized by those rights turn on endless disputes about constitutional interpretation. For example, an abstract right to have one's basic needs met is open to endless disputes over what counts as a basic need, as well as over what specific legal provisions are conducive to meeting basic needs. Moreover, even those who share a political ideal expressed by an essentially contestable concept (say, those who think that equality, or liberty, has paramount importance), and even a conception of that concept (say, equality of resources, rather

than equality of welfare), are likely to disagree over which policies will best bring about the outcomes mandated or authorized by the rights recognized by such conception. For example, even if a constitution were specific enough to guarantee a right to affordable housing (thus adopting one of the contestable conceptions of an abstract right to have one's basic needs met), and statutes in turn laid down specific characterizations of what counts as affordable housing, much causal controversy would still surround the determination of the policies required by that right (Pincione 2011: 266).

In contrast, the strong private property rights generated by a consensual and purely procedural constitution, such as the one theorized by James M. Buchanan and Gordon Tullock and other "public choice" scholars (Buchanan and Tullock 1966: chapter 6; Gwartney and Wagner 1988: 43–49), are much less open to such interpretive disputes. Buchanan and Tullock's central point is that private property rights would emerge from a stateless condition in which rational individuals unanimously choose constitutional rules. Since those rules would be procedural in nature – e.g., rules defining the majorities required to pass bills in the federal and state legislatures, or the distribution of legislative authority among geographical jurisdictions – substantive disagreements, and so the threat of interpretive manipulation, are avoided. The paradoxical upshot suggested by this line of thought is that the rule of law is more attainable under well-designed procedural constitutions than under constitutions that contain bills of rights and other essentially contestable provisions (Pincione 2011: 264–275).

The view that the rule of law necessitates private property rights seems also supported by Hillel Steiner's thesis that only a system of private property rights is "compossible," i.e., the performances of the duties correlated to those rights are jointly possible (Steiner 1994: 55–85), since conflicts of rights open the door to interpretive manipulation when it comes to determining which right prevails. Those property rights need not be explicitly guaranteed by a constitution; indeed, the previous paragraph suggests that a purely procedural constitution holds out the best hope of generating those rights consistently with the rule of law.

Some accounts of moral rights seem friendlier to the rule of law than others. Thus, viewing rights as protecting choices, rather than interests, makes it easier to devise a system of non-conflicting rights, since the legally permitted choices of any two individuals can in principle be mutually consistent, whereas an individual's interests often conflict with the interests of other individuals (Waldron 1993: 204–206). Moreover, the law should protect at least those choices that pertain, to use Erick Mack's words, to each individual's "body, faculties, and capacities," for otherwise individuals would be vulnerable to other individuals', including the government's, harmful or paternalistic actions, to the detriment of the "moral jurisdiction over [themselves]" (Mack 2000: 98). Such vulnerability seems inimical to the rule of law, especially if we conceptualize it as antithetical to the rule of persons.

The Rule of Law as a Recipe Against Domination

We saw in section "Some Conceptual Issues" that Dicey's idea that the rule of law excludes arbitrariness and discretionary power suggests a contrast between the rule of law and the rule of persons. We also saw that the constitutions advocated by classical liberals aimed at preventing the rule of persons. They thought that rulers unbound by law would be a threat to Lockean rights, and held that a state would be legitimate only if it protected those rights. A different, though interestingly related, political tradition, known as republicanism, maintains that the rule of persons is inherently objectionable, i.e., regardless of whether those persons actually violate rights. Republicans advocate political arrangements in which no one is at the mercy of another, whether or not this latter person uses his power. Freedom, conceived as non-domination, and not merely as the absence of interference with one's actions (something that a benevolent despot may grant), is here the cornerstone of a legitimate state. Republicans embrace the "inner morality of law" (see section

"Some Conceptual Issues"), along with the checks and balances of classical liberal constitutionalism, including democratic procedures for selecting rulers and legislators, as means to prevent the state from dominating its citizens (Pettit 1997: chapters 6 and 7). To that extent, republicanism is committed to the rule of law.

However, as Philip Pettit observes, the rule of law does not exclude domination, since the exercise of the rights recognized by rules that pass the generality, non-retroactivity, and the other tests for the rule of law may put some individuals at the mercy of other individuals. Pettit illustrates this point by reference to the idea of wage slavery, proposed by Karl Marx in the mid-nineteenth century to describe the plight of workers who lack any significant bargaining power because their only alternative to accepting a wage offer is destitution. Pettit's point is that wage slavery involves domination even if workers made employment contracts that were formally free (Pettit 1997: 141; Marx 1867: chapter 19). He concludes that formally free employment contracts, which arguably conform to the rule of law, may well involve, and reinforce, forms of domination enabled by severe wealth inequality. (Pettit 1997: 141–142).

The thesis that the rule of law, as classical liberals understand it, is insufficient to avoid domination, as well as to promote related values, such as equality, has led many writers to advocate the regulatory state. In the United States, it is a matter of dispute whether the passage from laissez faire to the regulatory state required constitutional amendments, resulted from an improved interpretation of the Constitution, or flatly ignored it to the detriment of the rule of law. The Supreme Court upheld the regulatory state through revisionary interpretations of the taking clause of the Constitution and other provisions that classical liberals had read as protections of property rights, including contractual freedom, and so as bulwarks against the regulatory state (Wenar 1997). In defense of such interpretations, Cass Sunstein argues that the interests or values underlying the bill of rights may not be protected by current distributions of wealth and so may require various types of state intervention in the market (Sunstein 1993). More generally, Ronald Dworkin argues that legal interpretation requires, by its very nature, reading the "legal materials," including the Constitution, in their best lights, furnished by the best moral theory. For him, the best moral theory supports an abstract right to moral concern and respect that requires egalitarian tax transfers (Dworkin 1986). Such tax transfers have no room in classical liberal readings of the Constitution, which typically appeal to its "textual" (Scalia 1997: 12–39) or "original" (Barnett 2004: 89–117) meaning.

The economic analysis of political decision making, known as "public choice theory," suggests that the regulatory state is inimical to the rule of law, not primarily because it tramples on Lockean property rights (although many public choice scholars also raise this complaint) but rather because it rewards those who have competitive advantages in "rent seeking," i.e., attempts to obtain benefits through the political process as opposed to exchanges in the free market. More specifically, public choice theory contends that the regulatory state tends to benefit small, well-organized, and economically powerful groups, to the detriment of consumers and taxpayers. This is so because the former groups have competitive advantages in rent seeking (Olson 1965). The special-interest legislation that results from rent seeking arguably involves legal privileges that are hardly compatible with the rule of law. Typical examples of special-interest legislation are subsidies and protection from actual or potential competitors either by flat bans or by raising the cost of entry into markets.

If these worries about the regulatory state are well founded, then constitutional designers committed to eliminating forms of domination that compromise the rule of law must weigh the uneven bargaining power of the parties to market interactions against the uneven rent-seeking power of citizens and organizations in redistributive politics. Relevant to that weighing is the fact that, unlike public policies, which by their very nature affect all citizens within a state's jurisdiction, free markets tend to disperse economic power by allowing exit options, such as buying or working elsewhere. Such exit options are

typically less expensive than emigration – the only way of eluding a public policy. So, when other things, including the propensity to abuse power, are equal, private markets seem less hospitable to domination than politics is. Of course, this leaves open many questions about the nature of the constitutional regime capable of maintaining market freedoms over time. The fact that classical liberal constitutionalism was not able to prevent the emergence of the regulatory/redistributive state, and the rent-seeking that trades on it, seems to support procedural constitutional strategies (see section "Rights and the Rule of Law") for protecting the rule of law (Pincione 2011).

The regulatory state's tendency towards increasingly specific rules might suggest, however, a move towards the rule of law, since specificity seems to rule out arbitrariness. The ever-expanding administrative law, in particular, may seem to be an effective tool against arbitrariness, since the specificity of many of its rules reduces the interpretive leeway of regulatory agencies. A closer look at those rules, however, reveals important tensions with any attractive conception of the rule of law. For example, American antitrust legislation, which officially aimed at fighting monopoly, conferred in effect wide discretionary powers to the regulatory agency that decided whether a firm is the only producer of a certain good. The discretionary, if not arbitrary, nature of those powers stems from the fact that the claim that a good is a token of a type that is relevant to determining how many firms produce *that* good depends on debatable classification criteria. A firm may be monopolistic under some descriptions of the goods it produces (e.g., "electric car"), but not on less fine-grained descriptions (e.g., "car," "mode of transport") (Sowell 1996: 203–204).

The ideal of rule-governed political decision making is in tension with the leeway needed by regulatory agencies to react rapidly to changing circumstances. This tension can be seen as an instance of the principal-agent problem: the convenience of delegating certain decisions must be weighed against the agent's incentives to misuse the powers conferred by the principal. For example, a regulatory agency may divert appropriations away from its official goals in order to raise the salaries or improve the working conditions of its staff, especially if such diversion is within the agency's discretionary powers. Whether such powers are needed to respond to changing circumstances is a tricky question, though specific tradeoffs have been proposed for some governmental organizations (Cooter 2000: chapters 4 and 7).

The Rule of Law as a Prerequisite for Deliberative Democracy

As we saw in section "Rights and the Rule of Law," classical liberal constitutionalism sought to protect Lockean rights. We also saw (section "The Rule of Law as a Recipe against Domination") that classical liberal constitutions can be naturally seen as bulwarks against arbitrary power, and therefore as attempts to establish the rule of law. It should therefore be no surprise that theorists of republican freedom embraced many key provisions of those constitutions. Popular election of the executive and legislatures, separation of powers, and various individual rights (to free speech, against arbitrary arrest, etc.) are institutional devices that both advocates of classical liberal rights and advocates of republican freedom support. In contrast, theories of *deliberative democracy* view those institutional devices not merely as guarantors of Lockean rights or republican freedom, but rather as components of a framework that, along with referenda and other institutions aimed at promoting political participation, enables a robust public political deliberation.

Like republicans, theorists of deliberative democracy want to prevent domination, yet their emphasis is not so much on the separation of powers, individual rights, and other institutional devices advocated by classical liberals but rather on free, equal, and rational participation in public political deliberation. Deliberativists view the rule of law as a prerequisite for that kind of

deliberation. Thus, Jürgen Habermas's "discourse theory" holds that the rule of law is presupposed by an ideal political deliberation. For him, as long as public political deliberation is impartial and meets other requirements traditionally associated with the rule of law, it determines, as something different from discovering, (a) the rights that citizens have (other than the rights presupposed by free, equal, and rational participation in an ideal political deliberation, such as a right against arbitrary arrest), and (b) the morally justifiable public policies (Habermas 1996: 449–450, 454–455). The rule of law is also central to Carlos Nino's defense of deliberative democracy. For him, the rule of law, which he takes to be enshrined in a classical liberal constitution supplemented by various welfare rights, is a prerequisite for an epistemically valuable deliberative process. Rather than determining (as in Habermas' ideal discourse) persons' rights, democratic deliberation is here a reliable source of knowledge about those rights (Nino 1996: 43–66).

If, as Nino suggests, the value of the rule of law derives from the epistemic value of democratic deliberation, then those who call into question the epistemic value of democratic deliberation are committed to saying that any value possessed by the rule of law must have an independent source. A brief discussion of the grounds for such epistemic skepticism may help us see where those independent sources can be found. Fernando R. Tesón and I argue that any realistic instance of public political deliberation is bound to generate "discourse failure," that is, a rhetorical equilibrium that stems from truth-insensitive processes. Such processes involve a mutually reinforcing interaction between (a) the lack of incentives to acquire political information, given that each individual vote has a vanishingly small probability of deciding the electoral outcome and (b) the incentives of politicians, rent seekers, and others who stand to benefit from siding with popular views irrespective of their truth or falsity (Pincione and Tesón 2006: 8–64). Similarly, Bryan Caplan adduces that cognitive biases, which would be personally costly in private markets, are costless when it comes to voting, and so citizens tend to vote on the basis of irrational beliefs (Caplan 2007: 114–141). Since Tesón and I argue that the redistributive power of the state provides incentives to engage in discourse failure, we propose to decentralize that power through an overarching system of private property rights and full contractual freedom that allows individuals to freely join, and exit from, autonomous political communities, including ones that reject private property rights or adopt redistributive policies. On this view, well-defined property rights and full contractual freedom, rather than democratic deliberation within a redistributive/regulatory state, have epistemic value in that they induce citizens to take into consideration the personal benefits and costs of joining those voluntary political communities (Pincione and Tesón 2006: chapter 9). In a similar vein, Ilya Somin argues that exit rights that can be exercised at low personal cost, like those recognized in a federal state and in a free market, have epistemic and welfare advantages (Somin 2016). Common to all of these proposals is the idea that the substitution of a well-defined and exhaustive allocation of private property rights for arbitrary powers renders both rent-seeking and political misinformation no longer in each individual's perceived interests. This line of thought suggests, then, that the rule of law has both epistemic and welfare advantages.

Conclusion

It is tempting to view the rule of law, and its opposite the rule of persons, as formal ideals, in that they can be achieved by content-independent features of a legal system, such as the generality and non-retroactivity of its rules, or the absence of arbitrary power. On this approach, a commitment to the rule of law is neutral on widely divergent substantive issues, such as the existence and content of individual rights, the permissible roles of free markets and the regulatory state, and the value of political deliberation under alternative institutions. The preceding sections cast doubts on any such neutrality.

Cross-References

- ▶ Constitutionalism
- ▶ Constitutionalism: Political
- ▶ Freedom
- ▶ Fuller, Lon Luvois: Influential Ideas
- ▶ Locke, John
- ▶ Pettit, Philip
- ▶ Rights in Recent Anglo-American Philosophy
- ▶ Rights: General
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- ▶ Waldron, Jeremy: Rule of Law

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Rule of Recognition and Constitution

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A law, to have any authority, must be derived from a legislature, which has right. And whence do all legislatures derive their right but from long custom and established practice?

(David Hume 1983, 184, *The History of England*).

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Introduction

As it is well known, one of the key insights of Hart's jurisprudence is the idea that legal systems are not only comprised of rules but grounded on them, as well (Shapiro 2009, 235). In contrast to Bentham and Austin's idea of an unlimited sovereign who makes all legal rules, Hart reaffirmed the old idea that it is the rules that actually make the sovereign. In accordance with this theoretical position, he also put forward the concept of the so-called rule of recognition (RR). This "recognitional" rule is a special sort of social rule, which determines the status of every rule as part of a certain legal system. Consequently, the RR is the master rule that exists by virtue of the fact of social acceptance, and it establishes criteria of validity for all other legal rules. In a system with a written Constitution, the RR as a criterion of law's validity commonly and at least in part provides that norms, which are duly enacted according to the constitutional procedure, are valid laws. Therefore, it is clear at first sight that the two concepts are closely related but they are also different and separate.

This entry offers a summary analysis of possible and necessary relations between the two concepts. Some provisional theses are discussed concerning the problem of the validity of laws, the importance and contribution of a written Constitution to the fulfillment of the function of the RR, and the legitimacy and authority of a Constitution. However, before all that, in the first part of the entry, some of the essential properties of concepts of the RR and written constitution are listed, specifically those most relevant to the topic.

What is the Rule of Recognition?

Definition of the RR

The rule of recognition may be described most simply as a *social rule,* which is used to identify rules that are valid as law in a legal system. The RR is on the apex of a legal system's rules: all other rules ultimately owe their validity, i.e., their *legal* status to the RR. On the other side, being the ultimate rule of the system, the RR is not valid at all, for its existence is a matter of social facts. Namely, its existence has two necessary conditions: legal officials must *accept* and *follow* this rule. But what does "accepting and following" the RR actually mean? First, officials *follow* the RR when there exists a common practice of identifying certain rules as valid legal rules. Second, officials *accept* the RR when they demonstrate a normative attitude towards that common practice or, as Hart says, the "internal point of view" with regard to what they are practicing, when applying the RR as the ultimate criterion of validity, and criticize deviations from it by using normative terminology. The internal point of view with regard to a certain constant pattern of behavior makes this pattern not only regular but regulated as well (by the accepted rule). The internal point of view makes a difference between two kinds of widespread social practice: social habits and normative social practices (Hart 1994, 55–57, 83–91, 102–103).

What "Sort" of Social Behavior is the Object of RR?

A further step in the attempt to determine the nature of the RR is to describe the behavior of legal officials, which is regulated by the RR. For every group of officials to exist, its members must *coordinate* their actions to achieve one or more common goals. Such groups achieve coordination through reciprocal action between members, by *interaction*. Coordination through interaction is the normal way of operation of any group. Interaction between A and B exists when an act of A prompts an act of B, and an act of B prompts an act of A (Honoré 1987, 59). Simple examples include Hume's two rowers having a common goal, to propel the boat or Margaret Gilbert's two walkers going for a walk together (Coleman 2001, 91). Although the practice of legal officials which is regulated by the RR has significant idiosyncrasy, it is beyond doubt one common activity which demands cooperation and interaction of its members. In such activities, group members watch each others' actions, interpret them, and adjust their own actions in response to the actions of others. It is clear, for instance, why one judge is likely to follow a RR, which is being followed by

his peers: he has no motive or incentive to abandon this RR because it would be obtuse to follow some "rule of recognition" which none of his fellow judges follows. Notwithstanding the other possible reasons for acceptance of the RR, there is always one which is always the same: the RR is accepted and followed by other members of the group. If they do not accept it, then the rule cannot exist nor can establish certain practice.

Although it is clear what kind of behavior the RR regulates and how the RR operates to influence officials' practice, it is a mistake to think of a RR only as some sort of coordination convention (Lewis 1969; Postema 1982, 165). It is generally accepted that every coordination convention is characterized by the so-called arbitrariness and conventional rule is arbitrary when the reasons for having such a convention are more important to the members of the group than the reasons for preferring an alternative course of action (Marmor 2001, 204). However, several authors (Coleman 2001, 94–95; Adler 2006, 750) argue strongly in favor of the view that the RR, as a conventional rule, is not arbitrary in Lewis's sense of the word. For instance, Shapiro argues that "[M]ost Americans would [not] view the United States Constitution as an arbitrary solution to a recurring collective action problem....many would believe that they had a moral obligation to heed a text that had been ratified by the representatives of the people of the United States, regardless of what everyone else did" (Shapiro 2002, 387,426).

Usually, the rule is not arbitrary if a preference for a particular form of the RR (one which also always solves coordination problems) is stronger than the preference for uniform conformity to any other possible RR. In addition, it means that such a RR can be accepted by officials both because of some substantive personal convictions and out of their desire and need to act in coordination with other officials. So, here we approach one of the key questions about the RR: is it a so-called duty-imposing rule?

Is RR Duty-Imposing Rule?

It is self-evident that if the *ultimate* RR is not duty-imposing, it cannot fulfill its function, to bring certainty to a legal order. If every official has only an inclination, or a preference for one criterion of validity, if they are not bound by the rule, which establishes such a criterion, then in that society there is no reliable "landmark" to determine what is and what will be and what will not be law. Consequently, one of the purposes of RR – that it provides a specific legal system with a measure of certainty – vanishes.

However, the real issue is this: how is it possible that the existences of a particular practice (no matter how widespread), gives rise to the duty to abide by that practice? Hart has given a simple answer: the internal, personal commitment to certain practices transform those practices into rules. Subsequent commentators have shown, however, that actually the internal point of view cannot do the job. As Jules Coleman explains: "If each of 1.000 individuals separately apply criteria of validity comprised in RR, those separate acts do not impose any duty. For, it is not just that different judges decide individually and separately to apply some RR and thereby creating reason for their own actions that they can unilaterally extinguish. They are rather engaged in a practice that has a certain specific, so to say, normative structure, where, among other things, the fact that some judges apply criteria of legality is a reason for others do so" (Coleman 2001, 91–92).

In short, such a practice is capable of creating not *just any kind* of reason for actions, but duties (as a *special kind* of reason for action). While it is a question for ethics as much as for jurisprudence to elucidate the nature of this conventional duty, it is important to emphasize again the *non-arbitrariness* of the RR. This suggests that the RR has in itself some qualities, which in the mind of most officials prevail over the qualities of another possible RR. The RR is generally justified because it solves coordination problems among officials. But the answer to the question as to why *that specific RR* is binding, is not coming from this direction. At least for some, if not for most of the officials, the duty-imposing character of the RR can be based upon more substantive reasons than the need to coordinate mutual actions. It can ultimately be grounded on some

normative theory. This also means that *the moral duty* to follow a *specific* RR ultimately must come, so to say, from outside the practice itself. The question of the normativity of the RR is, of course, much more complicated than it is sketched here, and the conclusion, which is presented, is only provisional. But even in such an undeveloped form, it can serve as a useful "device" for some further conclusions about the topics.

Hart and Kelsen – Rule of Recognition and Grundnorm (Short Comparison)

As it is widely recognized, Hart's views about RR are similar with Hans Kelsen's idea of basic norm. They both claim that there is some kind of a master norm that determines what counts as law in any given legal order. The disagreement is about the nature of this master norm. Kelsen says that always when we are "confronted" with valid legal norms "we presuppose a norm according to which (a) the act whose meaning is to be interpreted as 'constitution' is to be regarded as establishing objectively valid norms, and (b) the individuals who establish this act as the constitutional authorities" (Kelsen 1967, 46.) This norm – the basic norm (*Grundnorm*) of legal system is not and cannot be *posited*, i.e., created by authority entitled to enact the laws by some other, higher norm, because such an authority does not exist. This norm must be *presupposed* (Kelsen 1967, 200). Kelsen stresses that basic norm is not arbitrarily chosen by anyone (Kelsen 1967, 201). It gives authority only to those constitutional rules which are *effectively* accepted and applied. Simply expressed, when we ask the question "why the specific basic norm is supposed?," the answer is "because there is standing effectiveness of a legal system, which is grounded by this specific basic norm." So, the content of the basic norm crucially depends of that state of affair which engendered legal system which is by and large effective (Kelsen 1967, 200–201) Even according to Kelsen's own account of the basic norm, one can see that there must be more to it than a presupposition, because the content of any such a norm is mainly determined by actual practice.

What kind of lesson we can learn from this short digression about Kelsen's concept of basic norm and its reference to official legal practice? First of all, though a basic norm is in certain respect determined as a presupposition, its content always depends on practice. Although these claims threaten the purity of his theory, Kelsen could not escape from the practice of legal system, eventually from facts, notwithstanding how they are included in his picture of legal system. But, this leads us to the second point: once we see that *this practice* is rule-governed, namely, that in applying the criteria for determining validity of the laws in their legal systems, the officials follow certain rules, it becomes clear that there are rules of recognition along the lines suggested by Hart and not only some fictional presupposition about normativity and validity of specific legal system.

What is a Written Constitution?

Joseph Raz pointed out that central features of a written constitution "give rise to theoretical questions that do not apply, at least not to the same degree, to other law" (Raz 2001, 153) and we would add, to unwritten constitutions either. Respectively, the reason for referring in the entry only to written constitutions is that usually there is a strong connection and interdependence between the RR and this form of constitution, which does not exist between the RR and unwritten constitutions. Moreover, the distinction between the RR and the customary, unwritten form of constitution is unclear. These two types of rules sometimes go on parallel lines, as is shown by the example of the English constitutional conventions (Wade 1960, 74). This is exactly the insight that motivates the analysis of the conceptual connection between the written form of a constitution and the RR.

A written constitution is a document (or several documents) that contains canonical or codified formulation of what is usually named as a *thin* constitution (Raz 2001, 153) or *materiae constitutionis* (Marmor 2007, 69). Usually, *materiae constitutionis* encompasses rules that determine who enacts laws and how, what is the structure and general principles of government,

and today in particular, general principles which establish human rights and restrain overall government power. A written constitution possesses some characteristics which an unwritten constitution does not have, so the fact and nature of these characteristics must be taken into account by those who want to understand the relationship between the RR and the constitution.

The first and probably the most important characteristic of a written constitution is its *normative supremacy*. It means that constitutional provisions prevail over ordinary legislation, i.e., the ordinary laws, which conflict with these provisions, are invalid. However, we are going to explain in the next section, this does not mean that all laws derive their legal validity from the constitution.

Second, this supremacy must be *institutionally strengthened*. Usually, this is done by entrusting the interpretation of a written constitution to the judiciary, either to specialized constitutional courts or to the regular court system. The essential point here is that there is a court that determines what the constitution means and which laws are invalid due to their unconstitutionality.

Further, at least in aspiration, a written constitution is meant to be of *long duration*. Since every constitution sets the basic structure of the legal and political system of a polity, it must be stable and intended to preserve the continuity of the political structure. Therefore, it is meant to apply well beyond the generation that created it. Owing to this aspiration, amending a constitution is a more demanding task than enacting and changing ordinary legislation. The more difficult it is to change the constitution, the more rigid the constitution is. *Rigidity* is closely tied to durability. If the constitution should be a long lasting document, then it must be relatively difficult to amend it. Also, *judicial review* and the extent of its authority regarding constitutional interpretation depend considerably on the constitution's rigidity. The more rigid the constitution, the more lasting the power of judges to determine its content.

As we can see, all these features of a written constitution are in some way interconnected. Taken together, they make the concept of a written constitution important for legal practice. But they also make the study of its conceptual connections with the concept of RR interesting and fruitful.

Conceptual Relations between the Two Concepts

Constitution and the RR: Identical or Just Overlapping?

It is sometimes ignored or forgotten that the RR and the written constitution cannot be identical. Conceptually, the RR is a social rule which may provide that one of the criteria of legal validity is conformity with the provisions of the constitution and that constitutional provisions are in some way superior legal norms. But the rule which sets some constitutional rules as superior legal rules cannot be itself a constitutional rule. Moreover, constitutional rules, unlike the RR, are always *valid* rules, and always valid immediately under the RR itself. As a matter of linguistic convention, we have got used to say that a constitution is valid (or it was valid once). As all other valid laws, constitutional provisions are amended, changed, or repealed by the procedure of constitutional revision and not by anyone's practice as is the case with social rules like the RR. Yet, the provisions of the written constitution more often than not, report and describe part of the content of the RR. For instance, we can clearly see this in the US Constitution. Article VII (the so-called ratification clause) is part of the Constitution that it validates. Therefore, it looks as if Article VII validated itself. However, although the Article's text is in the written constitution, its status as the (original) rule of recognition is external to the document and "rests on its acceptance as the validating rule, not on its validation by having been ratified in accord with its terms" (Alexander and Schauer 2008, 8). So the ratification clause itself *is not* the rule of recognition, rather it *records* or describes the rule of recognition.

Furthermore, it is not the case that every valid legal rule is valid on the basis of the provisions of constitutions. This is clearly the case in the USA (but also elsewhere) where the authority of the decisions of the Supreme Court, which it enjoys among other legal officials, is not immediately

based on any constitutional provision, but is directly based on the conventional rule of recognition. Accordingly, the provisions of a written constitution which are part of the RR neither validate all the rules of the legal system nor are all valid rules in compliance with these constitutional provisions.

The RR is a Remedy for the Indeterminacy of the Prelegal Order

The RR reduces uncertainty about the legal rules of conduct, by providing criteria for recognizing these rules and by setting the conditions of their validity (Hart 1994, 250). A written constitution strengthens this important advantage of the RR, i.e., that it brings certainty in social order and human relations. When a legal system gets a written constitution which usually is, at least partly, an effective social rule (like a RR), then this "strengthens" the function of the RR – at least that part of the constitution which "records" the content of the RR. The mere fact that through the articles of the constitution we can find some elements of RR in written form, surely improves the RR's capacity to diminish uncertainty and indeterminacy of the legal order.

A written constitution also has another important function: to set limits to all branches of government. Historically, under the flag of constitutionalism, it gave rise to the movement for limiting the absolute power of rulers. Even courts which, as we argued, play a distinct role in the interpretation and "protection" of constitutionality, are limited in their decision-making. Namely, their discretion is usually to some extent constrained by the written constitution itself. We can see this if we look at one version of the RR in the US, as formulated by Himma: "Supreme Court Justices are legally obligated to decide the validity of duly enacted norms according to what is, as an objective matter, the morally best interpretation [of the substantive norms] of the Constitution" (Himma 2009, 119). This means that although the Supreme Court has some discretionary powers to decide what is and what is not a valid law, its discretion is substantially constrained by the constitutional provisions. Note that this does not mean that the Court must reach the objectively correct decision that reflects the morally best interpretation in a given case, or even in any case. The Court must merely ground its decisions in an attempt to determine the morally best interpretation. The Court's discretion is constrained, "by what the other officials are prepared to accept from the Court in the way of validity decisions" (Carey 2009, 1182).

Himma's formulation of the RR is very telling. It shows that there is a sort of "synergy" between the RR and the constitution. They do the same job and they do it well in mutual combination. So, the constitution will accomplish its task if and only if the RR generally works and fulfils its function of bringing certainty to the legal order. Without the RR, the constitution alone can do nothing about limiting the discretionary power of officials. As Himma himself concludes, the officials might not view the written constitution as binding at all. That is why in order to understand the role, which a written constitution plays in ascertaining what counts as law, we have to regard all the relevant practices of officials (Himma 2009, 108).

Alexander and Schauer draw a similar conclusion. After a scrupulous analysis of constitutional controversies in the USA and the dependence of law on acceptance, they assert that "once we appreciate the unavoidable and dizzying fragility of a legal system's non-legal foundations, we discover that the security and stability that constitutionalism is alleged to bring depends less on constitutionalism itself than on the pre-constitutional understandings that make constitutionalism possible. Some such understandings will make constitutionalism more stable than others. . . It will be a useful reminder that constitutionalism of any sort resides not in a constitution, but in the pre-constitutional commitments that make any form of constitutionalism possible" (Alexander and Schauer 2008, 25).

Authority of the Constitution and the Rule of Recognition

In some sense, the RR helps the constitution in performing its function. Just as the RR can be seen as a duty-imposing and in some sense normative practice, so is the case with the constitution. The written constitution has a possibility to be

normative (to be the reason for action of officials) thanks to the normativity of the RR itself and this normativity of the RR is explained in one of the previous sections. Yet, a very important and frequently posed political and jurisprudential question asks if the constitution can have *legitimate authority* over officials and broadly over the citizenry? Can the concept of the RR give, at least a hint to the answer to that question?

First of all, it should be emphasized that the RR cannot transmit anything to the written constitution that it does not possess itself: a *moral justification* for the legal system of which the RR is the existence condition. The moral reasons for obeying the constitution cannot be derived from the rules that determine what the law is. If there is a moral "ought" to play the game by the specific RR, so to speak, then this "ought" cannot be expected to come from the function which the RR serves, because every imaginable RR can do it. The moral obligation to play by a specific RR, or in other words, to follow the valid law must come from other sort of considerations.

However, we need some qualification here. It is important to remember what has been said about the nature of the RR. Conventions like these are not arbitrary conventions and they have their own value, at least for those whose practice reflects the RR. Such conventions not only give the answer, as Marmor says (Marmor 2001, 215–216) as to "how" such a practice must proceed. They also go some way towards explaining "why" this practice is more valuable than any other. In an activity in which participants accept the specific RR for the values it offers them, specifically for some kind of substantive normative reason (not simply because others accept and follow it), the RR can be located in the moral and political arena. In other words, it may be cited to support, justify and perhaps even legitimize aspects of the constitution itself. Even so, this does not mean that each and every RR can be used in this way. In fact, this process of justification is always done with reference to some normative theory which stands in the background of both the RR and the constitution.

Conclusion

The analysis of the connections between the concepts of RR and written constitution has revealed some interesting conceptual insights, which can further elucidate some already known properties of written constitutional rules. First, although normative supremacy is a characteristic of the written constitution, the constitution as a whole is not the supreme rule of a legal system. It is not even necessarily a *supreme valid* rule. Second, one of the crucial and original functions of a written constitution and the function of the rule of recognition are in a sense complementary. However, the latter has a sort of primacy. Finally, the perennial problem of the legitimacy of a constitution cannot be solved by merely referring to the rule of recognition. Rather, the authority of the constitution, even for officials, lies in the normative field where also can lie, at least partly, the reason why the RR is accepted. Here again, the "destiny" of the RR and the written constitution overlap. This reminds us that they are closely related not only as concepts but as phenomena too.

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Rules and Principles: Robert Alexy's Perspective

► Alexy, Robert: On Rules and Principles

Russell, Bertrand Arthur William

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Introduction

Bertrand Arthur William Russell (1872–1970) was a British philosopher, logician, mathematician, political activist, and essayist. He was an authoritative exponent of the pacifist movement on a planetary scale.

Russell's contribution to the history of the philosophy of law and social philosophy concerns in particular the erosion of personal freedom and creativity, the over-exploitation of our natural resources, the bureaucratic state administration, and the continued domination of the capital over labor.

Human Beings and Their Creative Potentialities

Russell's philosophy can be described as a coherent whole. In his thought, concepts such as freedom, peace, and socialism arise out of his *passionate* concern for the human individual regarded as a being endowed with specific faculties which are not necessarily related to his class, status, or position.

Russell had an abiding faith in humankind and their enormous creative potentialities, and he is anguished to see that these powers are denied a chance to flower under contemporary institutions, social order, and cultural values. The pressure of these visible and non-visible sociocultural forces makes individuals forget their own real needs, and they therefore became tireless crusaders for things which are not really necessary, a pursuit which leads in the end, to catastrophic wars.

It is this painful awareness which underlies his theory of impulses in his *Principles of Social Reconstruction*. He says, "All human activity springs from two sources: impulse and desire." But impulse is, in his view, little more basic than mere desire, for what makes desire gain in power and insistence is its link to impulse.

There are places in Russell's writings which may lead the superficial reader to complain of incongruence. Thus, in the work just referred to, at one place Russell regards impulse and desire as the only springs of human activity; and at another, suggests that "the activities of men may be roughly derived from three sources: instinct, mind and spirit." How is this consistent, first only two, and then three clear bases of human action? This incongruence, however, can easily be explained with a little more careful study of the text.

Instinct and Mind

According to Russell, instincts are the basic equipment of the mind. Each of them is a natural tendency to attend to a particular class of objects,

and to feel and behave with regard to them in a more or less determined way. For example, the instinct of curiosity not only makes us wonder – or experience the feeling of uncertainty – with regard to unfamiliar objects, but also makes us actively *do* something to remove this uncertainty and to come to *know* the thing in question. In adult life, however, the actual operation of an instinct does not involve the three elements of knowing, feeling, and conation in equal measure. It is, for instance, quite possible for people to make their instinct of curiosity work in a quite impersonal way, that is, not really for the sake of removing the discomfort of their own uncertainty, but because the unknown object fascinates them by virtue of its potential relevance to a theory or to the larger interests of human knowledge taken generally. Such a working of curiosity, Russell says, gives rise to the life of the mind. In other words, though the two are surely not identical, instinct can come to be assimilated to what is known as mental life, to lose its initial otherness, and enable us to temper the sharp binary of instinct and mind. Similarly, if people can manage to exercise their instinct of protective love in such a way that they come to feel as intensely for others' children as for their own, the result will be the dawning of the life of the spirit. One may, therefore, say with reason that in Russell's thought instinct, mind, and spirit are not three exclusive entities, but only varying modes of the working of instincts.

Their working, however, does not need any *alien* force. Every instinct has its own built-in source of energy: that is, its inherent conative aspect or impulse. Yet the objects that this energy may aim at, and the way it tries to secure them have to be picked and regulated by conscious and self-critical thought.

Creative Impulses and Reason

The awareness of an end of some value or charm produces desire. Desire itself is related to need. We desire only that which we need or do not already have. These needs themselves are linked in other ways. They may relate to the life of the spirit, but quite as easily to the life of instinct (or mind). In any case, that which makes human life dynamic is the fact that we have needs and also the energy to try to meet them. So impulse and desire-relating may be, to the merely instinctive, or to the life of mind or spirit-be, said to be the basic sources of all human activity. The multiplicity of the determinants of our behavior is thus duly tempered.

Russell, however, does not stop at this point. He sees it clearly that though the gratification of an impulse always makes us immediately happy, the later and explicit consequences of such indulgence can often be bad. Thus, he divides impulses into two kinds: the creative and the merely possessive.

The exercise of a possessive impulse can lead to conflict with others quite easily, for the attitude of possessiveness to relate a man to a thing that the others are at once denied free access to it. Every possession, indeed, tends to be exclusive and encourages divisiveness. On the other hand, a creative impulse is not at all subject to such vitiation. True, an artist's creative impulse is not at all subject to such corruption. True, what artists create is *their* doing; but the artistic creations are necessarily meant for contemplation by and enjoyment of *others.* Even an object of craft is useful to others. Thus, a creative impulse may truly be said to draw people out of themselves and to put them, so to say, at the service of others. Russell is, therefore, convinced that an important aim of any social reconstruction should be to liberate our creative impulses.

He does not, however, exaggerate the value of impulse in opposition to reason; and in no way does he underestimate the value of reason in politics. Russell openly says: "It is common to speak of an opposition between instinct and reason. . .. But in fact the opposition of instinct and reason is mainly illusory. Instinct, intuition or insight is what first leads to the beliefs which subsequent reason confirms or confutes. . .. Reason is a harmonizing, controlling force rather than a creative one."

In other words, reason is, in Russell's view, necessary for regulating the non-rational forces of human nature. Nor does he think that it is too

much to expect an average person to let reason and social considerations regulate the working of his or her instincts. It is indeed a fact, says Russell, that "A man's needs and plans and desires are not confined to his own life. If his mind is comprehensive and his imagination vivid, the failures of the community to which he belongs are his failures, and its successes are his successes: accordingly, as his community succeeds or fails his own growth is nourished or impeded."

The creative impulses may be said to make for the awareness of the truth of the interdependence of the individual and society.

Socialism and Capitalism

But how can these impulses be allowed freer play unless we remove what bars their way? It is in this context that Russell affirms his faith in socialism and criticizes the present capitalist system. Capitalism, he protests, provides no outlet to people's creative impulses and only creates a gulf between what they *would like to* do – in response to their creative needs, urges, and desires – and the activity they *have to* undertake to keep their body and soul together by working for a capitalist. Under a capitalist system, the purpose of workers is not to create at the bidding of their inner nature but simply to produce whatever they may be asked to do for the sake of earning wages. In Russell's words: "The work becomes merely an external means to a certain results, the earning of wages. . .. And so the process of production, which should be one instinctive cycle, becomes divided into separate purposes which can no longer provide any satisfaction."

Moreover, capitalism may be said to breed a wrong kind of philosophy, that is, the belief that the way to happiness lies only in the acquisition of ever-greater wealth. This is why people keep struggling breathlessly to amass wealth and power by giving free play to their possessive impulses and predatory tendencies. Russell is indeed right when he says:

"The emphasis is on material goods, not on freedom, self-direction and outlet for creativeness. The private capitalist has become an unduly anarchic survival, preserving for himself alone a form of liberty which the rest of the community has unavoidably lost."

Russell adds that capitalism is also wasteful of human resources because it expropriates those material resources with a reckless prodigality which entails almost a certainty of hardship for future generations.

Russell challenges the very basis of capitalism, that is, the right to private property. What is, however, distinctive of his way of thinking is his studied opposition to the belief that acquisition of ever greater wealth is the pre-eminent urge of human nature. This belief, he protests, makes for indifference to the need for individual growth in accordance with one's inherent talent and aptitude. Here, Russell is in the company of thinkers such as Karl Marx, Antonio Gramsci, Herbert Marcuse, and Steven Lukes. He insists on the need to provide due channels of release to men and women's creative energies by humanizing the whole industrial process and by making it accordant with the basic needs of men and women for fellowship in creativity. This is why Russell inclines to socialism. But he sees it clearly that a truly advantageous transition to socialism cannot be a matter of just replacing one system with another, and that the advent of socialism has to be prefaced with, or accompanied by the creation of conditions that offer ample room for the creative growth of individuals. It is this cautionary thought which determines Russell's choice of the *kind* of socialism he comes to prefer. State socialism does not find favor with him for the simple reason that a mere transfer of property claims from the individual to the state can produce a perpetuation of the wages system, and also a kind of bureaucratic state capitalism. Russell is convinced that equalization of wealth without equalization of power would be an achievement of little value. The greatest evil which can arise under state socialism, however, is that the entire realm of human consciousness may become subject to *dictates of the state.* However irrational these may be, honest and right-thinking individuals would find it impossible to oppose them. At the same time, Russell sees no sense in anarchism either. He refuses to believe that human freedom

demands a total abolition of authority. Nor can he accept the idea of using violence or any kind of terrorist campaign for achieving ends, for such ways are bound to disturb peace and upset conditions required for the exercise of man's creative powers.

Russell also objects to syndicalist methods, for he believes that an excess of violence, strike, and sabotage is detrimental to the establishment of a true socialist society. However, he is sympathetic to such objectives of the syndicalist as safeguarding the interest of the producers, substituting industrial action for political action, and provision for freedom in work as opposed to excessive emphasis on mere material welfare.

Marx and Marxism

Russell is both a thoughtful critic and admirer of Marx. He appreciates the following emphasis of Marx: economic motivation in politics; the ideal of social change through the conquest of power by those who are not possessed of capital; and the idea of social acquisition of the means of production on a national or universal scale. On the other hand, Russell protests against Marx that it is neither necessary nor probable that the course of history will always move on a dialectical path, and that it is equally unlikely that dialectical change will assuredly lead to a happy ending. Nor is Russell willing to believe that history is determined merely by the objective forces of production, or that all human institutions and beliefs are, in the final analysis, products of economic conditions. He argues that history is also determined by quite a few non-economic factors, such as the influence of exalted personalities. The concept of class war is also unacceptable to Russell, for if it is pursued as an ideal, it is bound to breed hatred. Thus even Marxist ideology fails to satisfy Russell's passion for a just and creative social order. Consequently, he is led to propose a few devices of his own. One of these is industrial federal democracy. Russell regards this as a promising way to do away with autocracy or tyranny and to provide labor with a degree of direct interest in economic processes. In his own words: "If we are to retain any capacity for new ideas . . . the monarchial organization of industry must be swept away. All large business must become democratic and federal in their government."

Russell expresses surprise at the fact that while men and women have struggled so much to achieve political democracy, so little has been done to introduce democracy in *industry.* He hopes that "by this system many men might come to feel again a pride in their work, and to find which is now denied to all but a fortunate few . . . it is only by some such method . . . that the free growth of the individual can be reconciled with the huge technical organizations which have been rendered necessary by industrialism."

Russell is, therefore, naturally led to argue in favor of trade unions and to sympathize with their goals and objectives, namely, an increase of leisure and diminution of hectic work, as against mere increase in the quantity of production. Leisure is clearly necessary for the exercise of one's creative impulses. This is a recurrent emphasis of Russell. He lists the four essential requirements of an adequate industrial system, that is, *productivity*, *economic security*, *distributive justice,* and the ultimate *furtherance of creativity rather than possessiveness*. He does not forget to emphasize that "the fourth is the most important object to be aimed at." This is also why Russell regards guild socialism as the best of all workable systems, for it alone tries to secure maximum freedom and stimulus for workers through functional representation in Parliament and self-government in industry. Some of Russell's own words may here be cited with advantage: "National Guildsmen have always remembered the importance of freedom for more than their collectivist predecessors. Their systems of balance between the rival powers of the Parliament and Guild congress is designed to secure political freedom. Their system of self-government in industry, as opposed to bureaucratic management by state socialists, is designed to protect the interest of the workers in any industry both nationally, in the general problems of the industry, and locally in all matters that can be decided locally."

Rights and Education

It would, however, be wrong to believe that this is enough to meet the requirements of an ideal political system of Russell's conception. He sees it clearly that, as is borne out by the case of the Third World countries, the mere production of certain institutional devices such as communal ownership and industrial federal democracy cannot promote creativity unless the individual's own ability to respond to these changes is developed. A mere introduction of constitutional rights has not changed the hierarchical nature of society in these countries. People, here, have not just learnt to avail themselves of these rights; what they lack is education. To Russell, the aim of education should be an all-round fostering of the "critical faculties" and the "capacity to judge" independently unaided by the crutches of ideas and notions which are apparently friendly, yet in reality deceitful.

Our present education systems, Russell adds, are not so oriented. They do not quicken our mental powers; they are only vehicles of indoctrination. Russell says: "Certain mental habits are commonly instilled by those who are engaged in educating; obedience and discipline, ruthlessness in the struggle for worldly success, contempt towards opposing groups, and unquestioning credulity, a passive acceptance of the teacher's wisdom. All these habits are against life. Instead of obedience and discipline, we ought to aim at preserving independence and impulse. Instead of ruthlessness, education should try to develop justice in thought. Instead of contempt, it ought to instill reverence. . .. The worst evil which arises out of present educational system is the fact that education is treated as a means of acquiring power over the pupil, *not as a means of nourishing his own growth.*"

Russell, therefore, seeks to devise a new system of mental training, more suited to the needs of the new society. He insists on promotion of the scientific spirit so that people may be enabled to follow the direction of their own creative impulses. He goes to the extent of saying that no road to social reconstruction can be securely paved, and no political theory adequate unless equal attention is paid to children as to men and women.

It is interesting to see how Russell's attitude to our present educational system and capitalism relates to his analysis of war. Our teachers hold on to their way of looking at things and abhor disagreement; the capitalist, it is obvious, cannot think of parting with his wealth. It is this possessiveness and this indifference to sharing and accommodation that lie at the root of our tendency to wage war against other countries. Russell declares: "Capitalism does very much to promote wars . . . wars would probably be less frequent and less destructive if private property was abolished. . .. For my part I feel convinced that any vital progress in the world depends upon the victory of international socialism."

Again, in his work on China, *Problems of China*, he declares: "The concentration of world's capital in a few nations, which by means of it are able to drain all other nations of their wealth, is obviously not a system by which permanent peace can be secured. . .. Under the existing economic system, a nation's interest is seldom the same as that of the world at large, and then only by accident . . . the essential evil of the present system. . .. is production for profit instead of for use . . . Hence, arise competition and exploitation and in international relations . . . peace alone can never be secure until international Socialism is established throughout the world."

The Opposition to War and the Russell Tribunal

Bertrand Russell was a pacifist. According to him, the best government is a world federation of free states. He opposed the participation of the United Kingdom in the First World War. Because of his position, he was first dismissed and then he lost his professorship at the Trinity College of the University of Cambridge. Finally, in 1918, he was incarcerated for 6 months in Brixton Prison, since he protested against the intervention of the United Kingdom in the conflict.

In the years immediately preceding the Second World War, Russell was an advocate of a policy of pacification. He aimed at a dialogue with the Nazis to prevent a new conflict, but in 1940 he recognized the impossibility of dealing with

Hitler. Russell called his position "relative pacifism": he believed that war was an evil, but also that, in extreme circumstances (e.g., since Hitler threatened to occupy the whole of Europe), war itself could be the lesser evil.

Russell spent the 1950s and 1960s engaged in political causes primarily related to nuclear disarmament and opposing to the Vietnam War. The 1955 Russell-Einstein Manifesto was a document calling for nuclear disarmament and was signed by 11 of the most prominent nuclear physicists and intellectuals of the time.

In 1961, Russell was tried and sentenced to prison for 2 months, after his arrest at a demonstration in London against the proliferation of nuclear weapons. Considered his advanced age (he was 89), the judge offered him to be released in turn for his promise of "good behavior," but Russell refused. He also relinquished his privilege, as a Peer of England, of being exempted from arrest without the authorization from the House of Lords.

In 1966–1967, Russell worked with Jean-Paul Sartre and many other intellectual figures to form the "Russell Vietnam War Crimes Tribunal" to investigate on the conduct of the United States in Vietnam. He wrote a great many letters to world leaders during this period.

Conclusion

Russell's thought cannot be put under any rigid category of political or legal thought, be it utilitarianism, individualism, liberalism, or socialism. His views often touch the border regions of different ideologies and schools. But his main emphasis is clear and consistent. Whatever political system we may choose to devise, human individuals must be educated and enabled to cultivate their creative powers. The volume or power of an aggregate is not an alternative to individual excellence.

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Saint-Simon (Claude Henri de Rouvroy, comte de Saint-Simon)

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Introduction

The name Saint-Simon is more famous than his work, particularly because the Duke of Saint-Simon, famous memorialist of Louis XIV, and Claude-Henri de Rouvroy, count of Saint-Simon (1760–1825) the philosopher of the early nineteenth century discussed in this article, are often mistaken. The distorting reading of his work by the Saint-Simonian School added up to this confusion: it glorified the author, transformed him into a new Messiah, while at the same time caused his writings to be forgotten. His work, child of the French Revolution, played a mediating role between the end of the Enlightenment and the beginning of the following century, when the ideologies of the industrial world were born. Four lines of thought come directly from Saint-Simon: first, the positivism of Auguste Comte, his disciple and secretary for 7 years; then the socialisms, the anarchist thought of Proudhon, and especially the ideas of Marx who was the proponent of a return to Saint-Simon; then, the French sociology ushered in by Emile Durkheim; and, finally, the Saint-Simonian School itself. Although Saint-Simon's thought dominated the nineteenth century, it was often misused, starting with Auguste Comte who wanted to set himself apart from Saint-Simon; then it was mocked and ridiculed by the religious cult of his followers and caricatured as a "utopian socialism."

A constant preoccupation runs through all of Saint-Simon's thinking, that is, "to create a combination, which purpose is the making of a transition from the old to the new social system" (*Industrial System*, III, 2582).[1] As a post-revolutionary, Saint-Simon is a reformer; he wants to change the order of things but without the intention to put forward a new revolution. One cannot separate the work of Saint-Simon from his life, because his reflection on social change comes from his multifaceted experience as an engineering officer, a revolutionary aristocrat, an entrepreneur, and speculator. He himself said of his many experiences that they are the condition of a new thought: "to make important discoveries in philosophy, one must (. . .) travel across all classes of society; one must place oneself

[1] Our references refer to the critical edition of *Henri Saint-Simon's Œuvres complètes*, published in four volumes under the supervision of Juliette Grange, Pierre Musso, Philippe Régnier, and Franck Yonnet. Paris. Presses Universitaires de France, coll. "Quadrige." 2013. Each reference is composed of the title or an abbreviation of the title of the work of Saint-Simon, followed by the volume and page numbers in the aforementioned edition of the *Œuvres complètes*.

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personally in the greatest possible number of social positions, and even create, for others and for oneself, relations that have not existed before" (*History of my life*, I, 455).

Saint-Simon begun his professional career as an officer and left for North America to fight for the independence. Before the French Revolution, he multiplied projects for the construction of canals. After the Revolution, he made a fortune out of financial and land speculations and the creation of firms, in association with the Prussian count, Jean Sigismond de Redern (1761–1841). In 1798, Saint-Simon abandoned business to devote himself to philosophy, choosing, as he said, the "scientific career," which immediately meant settling himself down in misery. To further the writing of his work, Saint-Simon appealed to sponsors and had solicited many collaborators among whom, in 1814, are the young student of the École Normale, Augustin Thierry (1795–1856); then 3 years later, the young student of the École Polytechnic, Auguste Comte (1798–1857); and in 1823, Olinde Rodrigues (1795–1851), a renowned mathematician. The work of Saint-Simon, often co-written with these various collaborators, can be divided into three periods: first, the philosophical and epistemological period – from 1802 to 1813; second, the politico-economic phase – from 1814 to 1823; and, third, the ethico-religious period – filling the last years of his life.

The Epistemology of Saint-Simon (1802–1813)

It was in Geneva where Saint-Simon wrote his first text, *Lettres d'un Habitant de Genève à ses Contemporains (Letters from an Inhabitant of Geneva to his Contemporaries)*, published anonymously in 1802–1803. As soon as he entered into the "scientific career," Saint-Simon criticized the academies, as symbols of the scholars being subservient to the political power. This criticism presents the government as a useless intermediary between the governed and the scientists, here called "men of genius," such as Newton. The government organizes the embezzlement of knowledge to its own profit, via the academies, in order to subdue the governed who are fascinated by an "Enlightenment" that shines the light on the government. We must suppress the misappropriation of this "Enlightenment," Saint-Simon said, and we must establish a direct relationship between the scientists and the governed. If the French Revolution remained uncompleted, it was because science was diverted and misused by the government. Saint-Simon would lead a radical critique of the government – regarded as "a necessary evil" according to the formula introduced by Thomas Paine in *The Common Sense* (1776)[2] or even as a useless third party. He opposed straightaway two models of social bond: first is a direct one connecting the "genius" or scientist and mankind – whereby rulers and subjects are drawn together – and the second is an indirect one, between, on the one hand, the rulers and the academies serving them and, on the other, the governed. Saint-Simon seeks the exclusion of an interposed ruler or official who prevents the flows to circulate within the society – be it knowledge, money, or the "consideration" or otherwise the consent of the governed. Everything must become fluid in society, according to the image of a living body. Ever since his first book, Saint-Simon brings together physiology and sociology: "We are organised bodies; it is by considering our social relations as physiological phenomena that I have conceived the project that I am now going to present" (*Letters from an Inhabitant of Geneva,* I, 118).

In the *Introduction to the Scientific Studies of the Nineteenth Century* (1807–1808), Saint-Simon establishes a "general law" to serve as a foundation for his approach: any phenomenon is reduced to the struggle of its constituent elements, namely, fluids and solids. If solids dominate, they are inert or "raw" bodies; if fluids dominate, they are living or "organized" bodies. Like Jean-Baptiste Lamarck (1744–1829) who recently has published his *Zoological Philosophy* in 1809, Saint-Simon in his *Mémoire sur la Science de*

[2] The formula of Thomas Paine – "Government, even in its best state, is but a necessary evil" – was repeated and radicalized by William Godwin and then by Saint-Simon who proposed the suppression of permanent armies (*Le Politique*, III, 1850).

l'Homme (*Memory on the Science of Man)* of 1813 defines the phenomenon of life by the combination of contents, or "capabilities," in tubular form, and by the continuous flow of fluids. The *Memory* offers a logic and a method applicable to the study of objects other than living objects, such as the society being the subject matter of the "social physiology" (the word "sociology" was created in 1839 by Comte, his disciple). There it is not simply a shift by analogy from the physical body to the social body but rather the treatment of two objects according to the same method. Indeed, "physiological phenomena are the most complicated of all" (*Mémoire*, II, 1172). By transposing analogically the "logic of the organism" from one "organized body" to another, Saint-Simon is then able to treat social phenomena rationally or even scientifically. The organic and the rational relate to each other. The pair "capacity-circulation" also allows Saint-Simon to characterize the desirable social system, namely, "the industrial system," by assimilating it to a living organism, and, in opposition to the dying social system of the *Ancien Régime*, the "feudal-military system."

The Politics of Saint-Simon (1814–1823)

In 1814, after the fall of the Empire, Saint-Simon is in possession of a method and a logic: he then changes his subject and becomes directly interested in politics. The Restoration leads him to consider politics straight to the point, since it appears, as he has said time and again since 1802, that the French Revolution is not complete for the reason that it has not given birth to a new social system. From then on, Saint-Simon seeks to conceive and organize "the passage," being nonviolent, if ever oblivious, from the existing "feudal-military system" to the new "industrial system" that is to come.

Augustin Thierry joins him as his secretary and contributes to the drafting of *De la réorganisation de la société européenne – Necessity and ways to bring together the peoples of Europe into a single body politic, preserving each other's national independence* – cosigned by "Count de Saint-Simon and A. Thierry, his pupil," and published in October 1814 at the eve of the Congress of Vienna. What is their vast project? It is about creating a European Confederation with specific institutions, modelled on the English parliamentary system. Beyond the European question, Saint-Simon and "his pupil" draw up their proposals in a prospective vision of society: "The golden age of the human race is not behind us, it is ahead, it lies in the perfection of the social order; our fathers have not seen it, our children will arrive at it one day; it is up to us to clear the way for them" (*Réorganisation* II, 1297). This future will be industrial rather than political: it aims to transform nature by science and industry rather than to dominate men by force and trickery.

L'Industrie, or *Political*, *Moral and Philosophical Discussions, for the benefit of all men devoted to useful and independent works*, published in 1817–1818, carries the famous epigraph "Everything by industry, everything for it." To the distinction between the ruler and governed, based on the political representation, the whole forming the humanity, Saint-Simon substitutes the split between "producers" and "nonproducers," based on an economic approach. He has developed a method to make the great transition between two opposing social systems, by relying on political economy and, among others, Jean-Baptiste Say's *A Treatise on Political Economy.* He sums up his method in these two statements: "political economy is the true and only foundation of politics" (*L'Industrie*, II, 1497), and "Politics is (...) the science of production" (II, 1498). He often states that he has found a simple solution, namely, the modification of the composition of the parliamentary chamber which votes on the budget, by appointing only "industrialists" (a word he introduces) who know how to administer and manage. The truth of politics is the political economy, and the truth of power is the right to vote on the budget. A simple modification of the mode of representation in parliament can produce a change of the system, because "the law of finance is the general law, it is that law from which all the others derive or must derive" (*L'Industrie*, II, 1605). Real social change consists in entrusting the industrialists with the "supreme political power" (*L'Industrie*, II, 1605), namely, the right to vote on the budget, since "the government can do nothing

without money" (*L'Organisateur*, III, 2136n). Saint-Simon establishes the major symbolic image of his political theory, that is, the necessary circulation of money within the state and society, by analogy to the circulation of blood in a living body: "The most important law of all is undoubtedly the one that regulates the budget, for money is to the political body what blood is to the human body. Any part of the body in which blood ceases to circulate languishes and dies soon. In the same way, any administrative function which ceases to be paid ceases promptly to exist" (*L'Industrie*, II, 1605).

In 1819, in *Politics by a society of men of letters or essays on the policy that suits men of the nineteenth century*, he depicts his discovery in a famous article entitled "On the Quarrel of bees and hornets," subtitled "On the respective situation of producers and non-producing consumers," meaning that bees produce honey that hornets consume without producing anything. Honey represents money, the bees are the scientists and the industrialists, and the hornets are the nobles, the clergy, and the officials. If the "money-blood" is diverted to the advantage of the rulers, the "feudal-military" regime persists because the "hornets" are in control; on the other hand, if the "silver-blood" circulates and returns to the production, then this happens in the industrial system where the "bees" are the managers. It is ultimately labor which delineates the dividing line between bees and hornets, between politics and economics.

L'Organisateur, published in 1819, extends this political use of images in the famous "Parable of Saint-Simon" – the title owed to Olinde Rodrigues on the occasion of a new publication of the text in 1832. The purpose of this argumentation is to show "at a simple glance" that society is upside down, by comparing the effects of two assumptions: on the one hand, the disappearance of 3000 "men of genius," the "first scientists, artists and artisans of France" who "are really the flower of society," that without them, "the nation would become a body without a soul" (*Organisateur*, III, 2120) and, on the other hand, the disappearance of 30,000 leaders of the state and clergy that would cause "no political harm to the state" (III, 2121). To put society back in place, we must not start a new revolution that would ultimately replace men by other men, who would hold places in an identical social structure: "a system is needed to replace a system" (III, 2116). Changing the social system is reduced to only reversing the intrastate relationship between the commanding government and the managing administration. The government is there almost useless and must become a mere warden of the body politic or a "chargé d'affaires" of the industrialists.

Religion According to Saint-Simon (1824–1825)

In his latest texts, i.e., *The Catechism of the Industrialists*; *Literary, Philosophical and Industrial Opinions*; and *The New Christianity*, Saint-Simon deals with the moral foundations of politics and economics. While the search for a "purified" religion (against the Church) goes through all his work, he wants to steer the "industrial system" to a philanthropic moral end. This project consists of "moving the earthly paradise and transporting it from the past into the future. This intellectual operation is the most important of all that can be done; it is the one that will most directly improve the lot of society by perfecting its morality" (*Opinions*, IV, 3055). This morality of universal fraternity must impel to the peaceful and productive association of the industrialists. "Industrialism" (a term he created in 1824) is rooted in the Christian morality of the love of one's neighbor; as defined by St. Paul, "the conduct of these early Christians must serve as a model to us" (*The Industrial System*, III, 2509). The new religion is the equality of all the brothers associated as partners in the production, and not the domination of men over men. The Saint-Simonian religion promises the earthly paradise to come, whereas the Christian religion regretted the lost earthly paradise and promised a heavenly future. For Saint-Simon, there is no utopia in this plight for social change but only the fulfilment of the "march of civilization." Primitive Christianity, "which was essentially democratic" (*Opinions*, IV, 3051), has been perverted by the Church when it took part in the

exercise of temporal power. In the future industrial system, it will be necessary to return to the purified sources of Christian morality.

Conclusion

His last text of 1825, which remained unfinished, *Nouveau Christianisme* (*New Christianity*), subtitled *Dialogues Between a Conservative and an Innovator*, contains, according to its author, "the whole doctrine." Human history as a whole reveals a great loop between the origin and the end, between the lost paradise of the Christian religion and the earthly paradise to come. The industrialist fraternity of producers merges with the original Christian symbolism. This "earthly morality" is intended to avoid the triumph of selfishness, because if there were solely the logic of economic interests, this would lead to social disintegration. The new industrialist religion will improve "as quickly as possible the existence of the poorest class," by creating "a large amount of work to be performed" (*New Christianity*, IV, 152). This inner-worldly religion sanctifies "industrial society" as the true accomplishment of the French Revolution.

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► Durkheim, Emile

Saleilles, Raymond

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Biography

Saleilles was born in Beaune (Burgundy) in 1855. He studied law both in the Catholic Faculty and in the State Faculty of Paris. Saleilles succeeded in the national competition (aggregation) to become professor in 1884. He was then nominated as professor of legal history in Dijon, before been elected in the Faculty of Paris (1895), in which taught his father-in-law, Bufnoir. In Paris, Saleilles became a well-known professor of civil law and of comparative civil law, one of the founders in 1902 of the Society of Legislative studies (a group of jurists that discussed about the reform of French law), one of the editors of a new law journal about civil law (the *Revue trimestrielle de droit civil*), and the main organizer of the symposium for the 100 years of the Napoleonic Code in 1904. As a Catholic militant, interested in theological controversies and defending the congregations, he appeared first as a conservative professor distrusted by the Republican authorities. But his social Catholicism, mixing some ideas from Marc Sangnier and from the abbey Lemire, did not prevent him to dialog with Republican colleagues, like Esmein and Duguit. In the 1900s, he appeared as a moderate and consensual jurist: he participated in a commission for the reform of the Civil code and he supported the 1905 law about the Separation between Churches and State as a measure in favor of the independence of Catholic institutions. He died in 1912, at the age of 57 years, as a leader of the French legal thought of the beginning of the twentieth century.

Although centered on private law, the works of Raymond Saleilles focused on different subjects of legal history, constitutional law, commercial law, and criminal law, as well as civil law. As a great connoisseur of the German legal literature, he introduced French readers to the knowledge of Jhering or Gierke and to the draft of the German civil Code (through an 1890 study of the general theory of obligations in this draft). In 1895, he published in English, for the Annals of the American Academy of Political and Social Science, an article about "the development of the present constitution in France." If this text was critical towards the republican practice of Parliamentarian government, it shew the interest of Saleilles for the English-spoken literature (Dicey and Bryce) and his clear understanding of the distinction between constitutional and ordinary laws (Saleilles 1895; Sacriste and Foulquier 2010). Saleilles' book about the individualization of penalties (Saleilles 1898, English translation 1911) is also a nuanced appreciation of the

arguments of the Italian positivist School. The main contributions of Saleilles to the theory of law were his pleas for a kind of sociohistorical methodology and his last book about legal personality (Saleilles 1910).

Towards a Kind of Sociohistorical Methodology

In a series of articles devoted to the issues of law teaching, comparative law, and social reforms (notably about labor accidents, social housing, or women rights), Saleilles developed his conception of the historical method (Saleilles 1890) applied to the interpretation of modern law. Taking some distance from Savigny's historicism, that he accused to be fatalist and denied by the evolution towards codification even in Germany, Saleilles linked the historical method with the study of social facts in an evolutionary perspective. He borrowed to Jhering the idea of an "organic life" of the law and supported the conception of the French historian Fustel de Coulanges who confused history with sociology. The renewed study of Roman law was, according to Saleilles, the model for this association of law and social sciences. Saleilles was influenced by the sociological studies of Le Play, that were consistent with his social Catholicism, and did not give interest to the sociology of Durkheim that was developed from the 1890s onwards. He was not at all an advocate of the academic emancipation of the sociology or of the introduction of empirical surveys in the French law Faculties. However, he was one of the most involved jurists of his time in social issues: he defended the case law about the strict liability of employers for labor accidents of their employees, he supported the ideas of abuse of rights and of adhesion contracts against the individualist and liberal conceptions, and he favored the projects giving more rights to married women.

The use of this method, combining historical perspectives with social concerns, led Saleilles to militate for a relaxing or flexible method of interpreting the Napoleonic Code (Grossi 1993). About labor accidents, he supported the case law that relied on a vague wording of the article 1384 of the Napoleonic Code that spoke about the liability for damages caused by "the things that somebody has in one's custody." Even if the drafters of the 1804 Civil code did not have in mind the application of these words to labor accidents, Saleilles considered that the owner of a factory was liable for accidents linked with the machines he had in custody, because the benefits of his business cannot be separated from the acceptation of the risks that were linked with mechanization. Contrary to his friend François Gény (whose Method he prefaced, Gény 1899), he supported an objective or evolving interpretation of the statutory law that could "torture" the texts in order to give them an adequate meaning for the new social realities. Against a servile exegesis of the statutory laws, Saleilles promoted in France a kind of free interpretation of legal statements, that was near from the one of Bulow, Kohler, and the movement of Free Law (*Freirechtsbewegung)*. If one must not exaggerate the originality of this method, it provided an illuminating explanation of the strong case law of the French Court of cassation and could be read today as a first step towards a sociohistorical jurisprudence.

Towards an Institutional Theory of Legal Realities

The last book of Saleilles (1910) was a set of lessons he gave to doctorate students (through a new fashion to teach theoretical problems inside a seminar) about the legal personality. This book happened just after the 1901 law that has freed the creation of associations in France and it take place in the controversies concerning the status of private foundations and ecclesiastical congregations. Saleilles was clearly motivated by the will to defend the Catholic institutions after the Separation from Churches and State. For this political reason, he wanted to criticize the theories about the fictive character of legal persons (like the one of Savigny) and to promote the arguments in favor of the reality of moral persons (like the ones of Gierke). Saleilles had also to take distance from Jhering's conception of "protected interests" (that risked to let subjective rights in the dependence of

the State) and to fight against Duguit's crusade against the metaphysics of subjective rights.

For Saleilles, there were subjective rights existing before any social recognition or State concession. But this point of departure, clearly based on natural law conceptions (Saleilles was interested by Stammler's theory of natural law with a variable content through history), was immediately corrected by two important conditions. To be efficient, the power associated with any subjective right has to be recognized by public opinion and to be limited by the State according to a social destination. If the rights were individual, they had to be used in the general interest of the society and Saleilles continued to condemn the abuse of rights. Whereas Saleilles refused the denial of subjective rights by Duguit (what Saleilles called the "positivist school" that risked to become a "socialist school"), he was prone to admit the necessity of a social recognition of subjective rights, perhaps through the influence of Bierling whom he quoted in one footnote. For explaining that subjective rights and moral persons (especially associations and foundations) were intrinsically linked, Saleilles supported the idea of "institutions" that his colleague Maurice Hauriou began to develop at the same time. The relative originality of Saleillles in the French doctrine of the beginning of the nineteenth century was to make a clear distinction between the laws of natural order, that ruled physical realities, and the laws of the legal order concerning "legal realities," as abstract relationships "attributed" to social organisms like the moral and the physical persons. One year before Kelsens's *Hauptprobleme*, and with a completely different background in private law and in the social-catholic tradition, Salailles made the same distinction as the normavitist one between "causal laws of nature" and legal relationships of imputation.

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Same Sex Marriage

► Gay Marriage

Sandel, Michael

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Introduction

Michael Sandel (b. 1953–) has contributed to philosophy on many topics.[1] He has criticized

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mainstream liberalism, commented on political discourse, considered the moral limits of markets and bioethics, and engaged in public philosophy. However, despite the plurality of topics, there are a few central ideas that permeate most of his writings. One of these is perfectionism: the belief that the value of a person's choice depends, at least in part, on the content of that choice (while the anti-perfectionist values only the capacity for choice). This is something that is illustrated not only in his critique of mainstream liberalism but also in his work on bioethics and the moral limits of markets. The second idea, which relates to the first, is anti-neutrality. Being a perfectionist, Sandel does not think that the state should necessarily remain neutral on moral issues. On the contrary, he thinks that state neutrality has been the cause of many social ills.

Critique of Liberalism

Sandel's writings in the 1980s are critical of the mainstream liberalism which arises from John Rawls' *A Theory of Justice* (1971). These writings are often grouped under the label communitarianism.[2] Because one part of his critique includes the claim that contemporary liberalism fails to provide an adequate account of community, the label is somewhat justified. However, Sandel (1998: xi) quite directly rejects the label "communitarianism" in favor of "perfectionism." Given that his main aim is to argue that the right is not prior to the good by showing that "principles of justice depend for their justification on the moral worth or intrinsic good of the ends" (Sandel 1998: xi), this adoption of the label seems reasonable.

On Sandel's interpretation, the central claim of mainstream liberalism is that the right is prior to the good. This claim can be read in two ways: one is that the good of the many cannot outweigh the rights of the few; the other is that the principles of justice do not depend for their justification on any one specific conception of the good. It is the second reading that Sandel has his sights on (Sandel 1984b: 82, 1998: x). In other words, the core problem for Sandel is the neutrality foregrounded by mainstream liberalism.

This neutrality derives from the Kantian foundations of Rawls' liberalism, what Sandel calls "deontological liberalism," which is the idea that, given that persons are autonomous beings, what is of utmost importance is that they have the possibility to exercise that autonomy by freely choosing to pursue their own ends in life. Given that people are different, they will inevitably choose different ends. Thus, a society of such autonomous choosers is best organized when it does not presuppose any one particular conception of the good in its regulative principles (Sandel 1984b: 84, 1998: 1).

Kantian arguments for the existence of such a subject rely heavily on a transcendental metaphysics which Rawls wants to replace with his original position.[3] However, Sandel thinks this attempt fails (Sandel 1984b: 85, 1998: 14). The problem, according to Sandel, is that the original position presupposes a certain view of the person. It presupposes that persons are *unencumbered selves* who view themselves as pure choosers, completely divorced from the content of any choice they may have made or will make. Sandel rejects this presupposition; as he (1984b: 86) puts the point: "there is always a distinction between the values I *have* and the person I *am*." This is problematic because if we strip away all the characteristics I have (none of which define who I am), then there would not be a recognizable subject left. Such so-called persons would not resemble human beings (Sandel 1998: 20). Furthermore, such a self could not have any constitutive aims (i.e., ends that would define them as a person), nor could they belong to a community which helps to define their identity (Sandel 1984b: 86–87).

[2] According to Sandel (1994: fn 13) the best overview of the "liberal-communitarian debate" can be found in Mulhall and Swift (1992). See also Sandel (1984a).

[3] The original position is a hypothetical point of view from which one can make fair and impartial decisions about principles of justice because parties to the original position are behind the veil of ignorance, which deprives them of all knowledge regarding their personal characteristics and social circumstances.

A further problem with this view of persons is that there does not seem to be any basis for desert: the talents any person has are only accidentally theirs, and it is not in any way essential to their self to have them, so they cannot be said to deserve their talents. This leads Rawls to base all entitlement claims on legitimate expectations created by institutions. But Sandel replies that if we are all unencumbered selves with no defining community attachments, then there seems little reason to share in these common assets, as Rawls would require (Sandel 1984b: 90, 1998: Chapter 2).

Sandel's critique of liberalism has garnered quite a lot of responses. I will mention here only a few of them. In his review of Sandel's book, Charles Larmore (1984: 337–338) points out that Sandel fails to consider other versions of liberalism, ones in which the prevailing concept of justice does not express our deepest shared commitments but rather where the political order serves as a modus vivendi for people in deep disagreements about conceptions of the good and wherein their allegiance is based on prudence.

Will Kymlicka (1988: 190) has argued that Sandel's critique of the unencumbered self misses the mark because "we understand ourselves to be prior to our ends, *in the sense that no end or goal is exempt from possible re-examination*." Thus, our self is prior to our ends because we are able to imagine our self without the current ends and we need not be completely unencumbered to do that; the comparison is between two different versions of encumbered selves. Amy Gutman (1985: 313–314) argued that Sandel's critique of the priority of the right over the good attributes to Rawls, a view which is much stronger than Rawls actually has. To the best of my knowledge, Sandel has not directly replied in print to either of these points.

But Sandel (1994) has written an indirect reply to Larmore's critique, insofar as it represented a nascent version of political liberalism – namely, in his review of Rawls' *Political Liberalism* (1993). Sandel's initial critique of Rawlsian liberalism centered on the Kantian conception of the self and priority of the right over the good. Rawls consequently modified his liberalism by giving up the Kantian conception of the person and introducing the political, so that persons were unencumbered only in a limited sense and our conceptions of the good were bracketed when thinking about justice. So Sandel's new line of criticism focused on the practical problems this creates for public life and discourse. I will consider this in more detail in the next section.

An Update to the Critique of Liberalism

The argument from the aforementioned review, from a series of other essays from the late 1980s and early 1990s, and from the 1996 book (Sandel 1996a) boils down to this: the requirement of liberal neutrality is ultimately more harmful than helpful.[4] For one, any discussion on justice will unavoidably depend on some conception of the good, so what could be the rationale for excluding them? (See Sandel (2005: 27–28).) Secondly, the worry, that allowing conceptions of the good to serve as the basis for public debate opens the door to intolerance, gets things backward. Sandel (2005: 154–155) says that it is exactly the language of neutrality which strips us of our traditions and roots and opens the door to intolerance.

Let us look at one such argument more closely. Sandel (2005: 122–123) observes that in the abortion and homosexuality debates, there are two kinds of argument: first, abortion/homosexuality is deemed morally worthy/worthless and thus should be allowed/banned; second, in a democracy it is the majority/individual who should have the right to decide what is allowed/banned. The second kind of argument aims to be morally neutral. There are two versions of this kind of argument (Sandel 2005: 123): the minimalist version, which states that given the wide disagreement that there is on these matters, for pragmatic reasons, it makes sense to bracket the moral debate, and the voluntarist version, which states that neutrality is required to respect the autonomy of individuals and their ability to make independent choices.

[4] Many essays in the aforementioned series were published as a collection under the title *Public Philosophy: Essays on Morality in Politics* (Sandel 2005). See also Sandel (1996b) and Sandel (1997).

Sandel argues that both versions of the second kind of argument fail. Concerning abortion, Sandel (2005: 132–133) concludes that the Supreme Court justices fail to bracket the issues they claim to bracket, and the very idea of bracketing depends on accepting an implicit answer to the issue that is being bracketed. Furthermore, there seems to be more than one way to bracket the moral issues, but there is no neutral way to decide between them (Sandel 2005: 135–136). Thus, the minimalist view will fail in its minimalism.

Concerning homosexual relations, Sandel (2005: 136–137) shows that the Supreme Court justices, by the voluntarist version, have denied themselves a set of possible arguments. Relying only on the value of autonomous choices of persons without any regard to the value of the content of these choices, the court was unable to make use of arguments concerning the valuable contributions intimate relationships make to human life when rejecting antisodomy laws. Thus, the court's position was much weaker than it could have been. Furthermore, if the court wished for toleration toward homosexuals, then leaving the moral worthiness of it undecided will not be helpful (Sandel 2005: 139–140). Given these arguments, Sandel (2005: 141) concludes that the justice or injustice of laws against abortion and homosexual conduct must at least partly depend on our judgments about the moral worthiness of these things.

A version of this argument is also present in his most recent publications (Sandel 2018: 358) where he writes: "this strategy of avoidance, this insistence on liberal neutrality, is a mistake. It ill-equips us to address the moral and cultural issues that animate the populist revolt." Thus, according to Sandel, because the liberals required that public discourse be free of substantial values, they have made themselves defenseless against the rise of right-wing populism of recent years.

Moral Limits of Markets

Sandel (2012: 10) writes: "we drifted from *having* a market economy to *being* a market society"; in other words the values of markets (e.g., everything has a price, profits are to be maximized, incentives are the way to motivate people, etc.) have seeped into every aspect of our lives. According to Sandel, this change is due to the idea of state neutrality (Sandel 2012: 13–14). If the state is to be neutral between different understandings of what constitutes a good life and if the state should not pass moral judgment over its citizens' private lives, then market-based problem-solving will seem very attractive since there are no value judgments involved – the market purports to be morally neutral. Sandel has two arguments that are aimed at showing how this change is problematic.[5]

The fairness argument states that these changes allow for inequalities of some spheres to be transferred into other spheres (Sandel 2012: 8–9, 110–113). If the right to disregard the one-child policy is being effectively sold in China (Sandel 2012: 69) or when university places are given to the children of generous donors (Sandel 2012: 4), then those who have much more income at their disposal get much better access to those goods. The problem is that the market logic of "who is willing to pay the highest price wants the thing most and thus should get it" makes the faulty assumption that willingness to pay reflects the ability to pay (Sandel 2012: 30–31). The situation does not get much better if we used a different currency – time – which everybody has equally. Sandel (2012: 21) talks about companies that employ people to stand in line for the lobbyist who wants a seat at an important government meeting; thus, inequalities in wealth are once again allowed to transfer to other realms.

Another version of the fairness argument is that people who are not economically well-off might end up being effectively coerced into certain transactions (Sandel 2012: 45). In some sense drug addicts who allow themselves to be sterilized for money (Sandel 2012: 43) or people who would sell their organs (if it were legal) enter into those transactions voluntarily; nobody is literally

[5] Sandel explicitly presents only two arguments, but there are other implicit arguments present in the text. I have commented on them in more detail previously in Volberg (2015).

forcing them. In another sense, however, given their very dire economic circumstances, their choice is not really free: their choice to sell something of theirs would in effect be coerced by their circumstances (Sandel 2012: 111).

The corruption argument concludes that putting certain things on sale corrupts their nature; it degrades them; that is, we value them less than is appropriate given their nature (Sandel 2012: 34, 110–113). So, for example, if we allow the hiring of line standers by lobbyists, then access to government for the general public becomes a thing to be bought and sold, rather than an opportunity we should have as a matter of principle; or if people are able to buy their way into top universities, then being a student of one of those universities will no longer be an honor, signaling a person's high academic abilities, but rather an indicator of their parents' wealth. Sandel (2012: 9) claims that buying and selling a thing bring with it an implicit assumption that the thing is a commodity, but surely, a baby or the best man's speech at a wedding should not be that. Sandel has a similar argument against genetic enhancements, which will be explored in the next section.

Bioethics

From 2002 to 2005, Sandel served on the President's Council on Bioethics. This led him to consider topics and issues within bioethics. The culmination of these pursuits was his 2007 book *The Case against Perfection: Ethics in the Age of Genetic Engineering*. The first central question for Sandel (2007: 47–48) was: is there a difference between modifying a sick person's genes so as to make them healthy and modifying a healthy person's genes so as to make them a better athlete? And if there is a difference, what is it? The second question that Sandel (2007: 6) wanted to tackle was: there seems something morally wrong about parents picking and choosing their babies' genes, but what exactly explains this morally troubling nature of designer babies?

Sandel considers many arguments presented by others (based on autonomy, fairness, and problems of collective action) but eventually concludes that within the field of sports, the problem with genetic enhancements is corruption. According to Sandel (2007: 28–29), in sports we should care about effort, talent, and the cultivation of excellence. Permitting genetic enhancements would erode the importance of talent but would also corrupt the nature of the sport, since genetic enhancements can "[obscure] the talents and skills that distinguish the best players" (Sandel 2007: 37).

Outside sports, Sandel (2007: 86–87; 89) argues against genetic enhancements (especially in the case of designer babies) by appealing to three moral principles:

1. Humility – if we had total mastery over our gifts, then we would end up with a lack of humility.
2. Responsibility – being able to manipulate genes to our children's advantage would be a very great power and with it would come great responsibility, perhaps even too great responsibility.
3. Solidarity – given that our genes determine to a large extent the kind of people we are, then being able to manipulate genes would corrode the sense of community with those with "lesser" genes.

Public Philosophy

In addition to philosophizing on publicly relevant issues, Sandel has done quite a lot of public philosophy in the sense of engaging with the public. The highly interactive lectures of his course "Justice" have been freely available for years, and tens of thousands of students have passed the online course.[6] The videos were turned into an educational TV series, and the accompanying book, *Justice: What's the Right Thing to Do?* (2009), is an international bestseller. He has

[6] Harvard Justice: http://justiceharvard.org/

also worked with BBC Radio 4 on a similar series entitled *The Public Philosopher*.[7]

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Sartre, Jean-Paul

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Introduction

Jean-Paul Sartre (1905–1980) was one of the most important French philosophers, writers, and intellectuals of the twentieth century (Cohen-Solal 1987). His contributions, like those of his partner, Simone de Beauvoir, stand out in the fields of social philosophy, ontology, and ethics. As a writer, his work is composed of literary, dramaturgical, biographical, and autobiographical texts, as well as political, philosophical, literary, and art criticism essays. In 1964, he rejected the Nobel Prize in Literature as he considered it an institutional recognition. As a leftist thinker, he defended the intellectual's political commitment to social struggles (Sartre 1988). Founder of several magazines and periodicals, among which *Libération* (1973–) and *Les Temps Modernes* (1945–2018), which stand out as reference points of French culture. Critical of racism and colonialism, a defender of the USSR until 1956 and close to French Maoist circles, his thought and action contributed to the development of May 1968.

In the over five decades of his writing, Sartre's existential philosophy underwent significant changes. Essays published between 1926 and 1940 were framed in the Cartesian tradition and Husserl's phenomenology. These works deal with the central understanding of consciousness as an impersonal, creative, and absolute transcendental field (Badiou 2009). Later, until 1945, under the

influence of Heidegger, Sartre dove deep into the ontological aspects of human reality suggesting a new method: existential psychoanalysis. Due to the Second World War, Sartre moved toward the realm of political philosophy and, inspired by Hegel and Marx, set out to reconcile Existentialism with Marxism. In this sense, without reducing human subjectivity to abstract social determinations, Sartre employed the "progressive-regressive method" to offer an explanation of history understood as group struggle. Despite the different stages of Sartrean thought, there are methodological continuities in that transition from phenomenological existentialism to Marxist existentialism (Seel 1971; Castro 2016).

Social Philosophy: Ontology and History

Sartre never wrote a text in which he condensed his political, legal, ethical, and social thought. Sartrean contributions in these subjects are dispersed in different works, and revolve around two central issues: the ontology of freedom and man's role in history.

In his early texts, Sartre empties human consciousness of egological and reifying residues. On the one hand, imagination allows man, in the exercise of his freedom, to surpass the real world of given things (Sartre 2002, 2012). On the other hand, the expulsion of the *me* of consciousness situates human reality outside, as contingent content of the world, ending the supremacy of the subject. So, this is what is needed "to enable us to establish philosophically an absolutely positive ethics and politics" (Sartre 2004a: 30).

In "Being and Nothingness," Sartre considers that consciousness, the "being-for-itself" of human reality, is constituted ontologically by freedom. Human reality is free in so far as it has to be its own nothingness, since man is the only being that, as a project, transcends, in temporality and through intentionality, the "being-in-itself" (Sartre 1992a). Man is what he is not, and is not what he is, thus "Man is nothing other than what he makes of himself" (Sartre 2007: 22). This idea of freedom, inherited from the Stoic and Cartesian traditions, is not an abstract understanding, although it is absolute and phenomenologically anchored to consciousness. Freedom is exercised in situation, that is, in the circuit that individual action has traced by facticity and alterity (Sartre 1992a). The facticity of the "being-in-itself" motivates and conditions the freedom of the "being-for-itself," but it does not annul it. Man, in the exercise of his freedom, is capable of transcending his facticity. But, alterity, which is experimented in the "being-for-others," always implies a violent relationship. Consciousness ("being-for-itself) reifies the other-subject into an other-object (Sartre 1992a). Thus, Sartre understands that all intersubjective relationships are the result of alienation and respond to the Hegelian master/slave relation model: "Hell is other people" (Sartre 1989: 45).

Contrary to conventional wisdom, Sartrean phenomenological ontology ends up being optimistic, opening the doors to an ethics grounded in authenticity, that is based on freedom and responsibility. Given that "Man is condemned to be free" (Sartre 2007: 29), he is responsible for himself, for others, for everything, of everything and before everyone.

The unfinished project of a Sartrean ethics was recorded in the posthumous publication "Notebooks for an Ethics," which reveals the tensions experienced by the author between 1947 and 1948 in his transition toward Marxism. Phenomenological ontology, centered on the conception of individual freedom and on a vision exclusively conflictive of intersubjective relations, kept Sartre from founding a political philosophy proposal that was consistent with Marxism.

In "Critique of Dialectical Reason" Sartre links, on the one hand, the exercise of human freedom with the concept of *praxis*. Freedom is historically placed in human individual and collective activity more than in consciousness (Sartre 2004b). Praxis is man's permanent enterprise to transcend the material conditions of his existence. This is a consequence of the fundamental dialectic relationship between need and scarcity. On the other hand, the concept of facticity is renewed under the "*pratico-inerte*" (practico-inert) category. With this, Sartre emphasizes the situational character of praxis and, especially, the active role

played by history in human action. Sartre references everything that is produced by human praxis, and that which is fixed in the inertia of given matter (Tomès 2005). In this way, the practico-inert, while produced by people, once it has materialized, exerts a return action into praxis in such a way that human practice is taken as reactive passivity in the face of the active action of "practico-inert" matter. In this way, from a Sartrean perspective, men and women, individually and collectively, are alienated by "practico-inert" structures, which they themselves produce and, which also produce them. But, unlike orthodox Marxism, Sartre tries to integrate subjectivity into history (Sartre 1968).

For Marxist humanism, men and women, as singular-universals (Sartre 2008), are the products and producers of their own history. In this sense, although it is true that Sartre abandons the idea of an absolute freedom anchored in consciousness, this fact does not make him assume that that which is "practico-inert" annuls praxis. Sartre argues: "you can always make something out of what you've been made into" (Sartre 1972: 101). Freedom is thus limited to the "little movement" through which a person, totally determined by facticity, does not give back to the world only what they have received from that social determination (Sartre 1972). In order to understand these little freedom movements, we can use the "progressive-regressive method," which includes existential psychoanalysis (Sartre 1981).

At the social level, history is understood as the result of group struggle. Groups struggle and alienate themselves from others as a consequence of scarcity. As concrete realities, Sartre makes a difference between those serial collectives who alienate their members and the non-alienating group praxis (Sartre 1991). Thus, under the materialist dialectic paradigm, not all intersubjective relations are measured by violence. In group praxis, it is possible to assume alterity as a *we*, not just as *us*. On this point, Sartre adds the concept of "mediating third parties," which is useful not just to explain the organic structures of groups, but also allows us to transcend violence toward group solidarity based on mutual and reciprocal recognition. The reason for this is that social relations are not exclusively I-you relations. On this point, Sartre advocates for a sort of "libertarian socialist" position oriented toward enabling overcoming scarcity and alienation in the kingdom of abundance. Finally, freedom is thus understood as the praxis of liberation fundamentally associated with the collective actions that allow the transformation of history.

Philosophy of Law: Domination and Emancipation

Sartre's contribution to the philosophy of law has been the object of only a few studies (Kail 2013; Arrieta-Burgos 2016; Almeida 2016).

First, in an article published in 1927, Sartre reflected on the challenges that the First World War and the natural rights of individuals represented for the sovereign State, warning about the paradoxical duality of the law. Sartre recognized that the law is dialectically contested between the longing for the sentiment of the "just law" and the description of its statute as a social institutional "fact" determined as such by the circumstances that condition its formation process (Sartre 1974). In another earlier text "The Childhood of a Leader," Sartre shows the ways in which the geometric idealism of abstract forms of the law aims at legitimizing ways of conceiving reality as truth (Sartre 1969).

Second, in "Notebooks for an Ethics," Sartre sees in the law a strategy to deny reality in the name of an abstract ideality. Denying reality in the name of what should be can be a violent tool in favor of the powerful, which is why Sartre argued that: "To live without a right. To lose all hope of justifying oneself. To live unjustifiably" (Sartre 1992b: 15). Thus, for Sartre, the subject of the law entails a denial of the factual subject. At this point, his critique is aimed at the Kantian concept of dignity tied to formal freedom (Sartre 1992b). On the contrary, for Sartre rights should not stem from a sort of human nature, but from the need to recognize active participation in individual and collective projects in society (Sartre 1995). In the cases where this is not possible, Sartre

defended the use of revolutionary violence as a concrete exercise of freedom, as a form of resistance to domination.

Third, "Critique of Dialectical Reason" systematically explains the historical process of formation of the law as an institution of the group. The law is an institution that defines behaviors and establishes sanctions (Sartre 2005, 2015). As in every normative structure, the essence of the law is not found in the sanction itself, but in the unconditional imperatives that constitute the common places of a society (Sartre 2005, 2015). In this sense, the law is structured from individual and collective praxis, while, at the same time, it conditions and makes possible these praxes (Sartre 2004b). The law, as a form of domination institutionalized in the State, consecrates the right of the members of the group to fulfill their duty (Sartre 2005). The duo duty-right is presented as a process of free alienation of freedom before the authority of the State. Understood like this, the law, constituted and institutionalized in groups with a specific sovereignty (State), maintains the *status quo* and oppression.

A fourth moment is characterized by the figure of the People's Tribunals. Sartre understood that the law is a superstructural result of the development of history and exerts a feedback effect on that development (Sartre 2006). Under this premise, it is possible and desirable to judge the dominant system "in terms of the criteria which it has itself established" (Sartre 2006: 97). Sartre acknowledges that this is an example of *petit bourgeois* legalism. Despite this, he recognizes in the law a small emancipatory potential. On the one hand, the People's Tribunals allow us to awaken and shake the *petit bourgeois* by showing it, in its own words, the contradictions of the capitalist system. On the other hand, it is a way of empowering the oppressed classes, reminding them that "every historical action has an ethico-juridical structure" (Sartre 2006: 106). The People's Tribunals want the dominant class to regret the formal concessions granted on the oppressed. It is thus about fighting against the law through the law itself to reveal what is hidden in it: the *bourgeois* partiality of the judges, the objectification of the trial, the impossibility to judge, and the falsification of the law (Sartre 1977). Finally, in agreement with the People's Tribunals' view, Sartre understands that "the source of all justice is the people" (Sartre 1977: 173), not the State.

For these reasons, Sartre became very active in the Russell Tribunal (1966–1967) becoming its Executive President. This tribunal was a private People's Tribunal created by Bertrand Russell, and it aimed at judging, in strict legal terms, the behavior of the American armed forces and its allies in Vietnam, which, according to international law, committed war crimes (Dedijer et al. 1967).

Conclusion

Sartre's existential philosophy contributes a view enriched by the leading theoretical paradigms of the twentieth century: phenomenology and materialism. The originality of his contributions help develop an ontological understanding of social reality and of the law, deal with central questions of human liberty, and highlight the individual and collective role of man in history. In addition, Sartrean reflections contribute to the critical understanding of the law as an instrument for social domination and reproduction while, at the same time, it can be used as an instrument for social emancipation and transformation.

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Introduction

When raising the question of what is "law" and where it comes from, one encounters two basic ideas of thought, which have, to this day, remained at odds with each other. According to the first school of thought, an ubiquitous authority standing above society disseminates from the top down a set of norms with the aim of regulating social life. In contrast to this stands the idea that law is independent from any commanding will and emerges spontaneously from the bottom-up and society itself. Both points of view are rooted in differing notions of the emergence of which either sees it as dictated by the authorities or as a "spontaneous order" evolving "on its own." Friedrich Carl von Savigny (1779–1861), the founder and leading thinker of the German Historical School of Jurisprudence, believed that law was rather created by societal forces than by the order of a state legislator. The famous Pandectist and authority on the School, Bernhard Windscheid (1817–1892), shared this belief and described the epochal change that had been introduced by Savigny to the field of jurisprudence as following:

Originating from the rationalism of the law of reason, jurisprudence "has become rigid." It has failed to recognize that all formation of law must

be regarded as a product of the prevailing "needs and interests" within society. Savigny has retrieved "the law from the cold sea of fog over which it sat on its lonely throne" and has given it back to the "warm and nourishing earth," from where "it is drawing its life." Taking a historical view of law is not "what makes [the Historical School of Jurisprudence] special." It is rather its "core" which views law not as a "statute of arbitrary origin or an inflexible dogma," but as "the gown," which is "woven by real conditions." Thus law is "in infinite flux" and its "historical treatment" is just "one single consequence" of this perception (Windscheid 1879). These statements are full of insights in two respects. They clearly show that the fight against the voluntarist view of the law of reason gave the actual impetus for the founding of the School and that Savigny's goals were not only historical but also philosophical.

Savigny's Life and Work

Friedrich Carl von Savigny was born on February 21, 1779, in Frankfurt am Main. Given his background, it was by no means an obvious choice for him to become a teacher of jurisprudence. In fact, his family advised him against embarking on an academic career. Savigny, however, who was said to have already as a 20-year-old "predicted and planned his whole life in advance," had since his youth the wish to become a great scholar of jurisprudence. Having earned a doctoral degree in 1800, he began his career as a lecturer in Marburg. In 1802/1803 he gave a lecture on "Juristic Methodology," which has been handed down, thanks to his student and friend Jacob Grimm (1785–1863), the well-known literary scholar. In 1803, Savigny published a work entitled *Das Recht des Besitzes* (Treatise on the Law of Possession) followed by *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Of the Vocation of Our Age for Legislation and Jurisprudence) in 1814. These two books and the rediscovery of the *Institutes* of Gaius in 1816 instantly established the name Savigny even outside of Germany. Additionally, he planned to write a large-scale scientific history of jurisprudence based on a long-running research trip. As a result, his six-volume work entitled *Geschichte des römischen Rechts im Mittelalter* (The History of the Roman Law During the Middle Ages) was published between 1815 and 1831. In addition, his main juristic work, the eight-volume-long *System des heutigen römischen Rechts* (1840–1849) (System of the Modern Roman Law) is published, whose first volume contains the foundations for a modern system of juristic hermeneutics. A two-volume body on the *Obligationenrecht* (1851–1853) (Law of Obligations) and five volumes of *Vermischte Schriften* (Miscellaneous Writings) from the early stages of his research, published in 1850, complete the canon of works from his extraordinarily successful scholarly career.

Savigny's influence as a scholar was not limited to Germany but radiated throughout the continent towards Western and Eastern Europe, as well as the other side of the English Channel, the Far East, and the USA. The legal philosopher and pioneer in legal sociology Roscoe Pound (1870–1964), for instance, spoke of the School's "exclusive reign in American juristic thought in the past fifty years" (Pound 1921). This extraordinary history of reception was not just rooted in era-specific factors such as the high prestige of German scholarship in nineteenth century. Rather, the deeper reasons lie in the Historical School of Jurisprudence's ability to successfully connect the old approaches with the new approaches to law at a time when it developed a novel understanding of the science of jurisprudence based on the so-called Pandect Law.

Savigny's Critique of Law as a Critique of Codification

When Savigny formulated his critique of codification, a wide range of civil codes were in use in Germany: French, Prussian, Saxon, and Bavarian laws, to name but a few, all in addition to a *ius commune*, a code of law, which had evolved from Roman and canon law. This fragmentation of law not only hindered economic development but also contradicted the sense of national identity which

had begun to rise in the aftermath of the victory over Napoleon in the Battle of the Nations at Leipzig (1813). The Heidelberg jurist Anton Friedrich Justus Thibaut (1772–1840), for instance, published an essay in 1814 entitled *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (On the Necessity of a General Civil Law for Germany). In it, he expressed his conviction "that our civil law" now required "a code of law that is binding for all of Germany." Thibaut's call had not long been in print when Savigny raised his objection in his famous work on the "Vocation."

In terms of the question of codification, Savigny firmly believed that the civil law of a people was not like a shirt that could simply be changed. Quite contrary to the "general belief" that "in the usual state of affairs" all law "is founded upon the regulations of the highest state authority", and that "Jurisprudence has only the contents of the enactments for its object", Savigny believed that "law has no self-dependent existence" but that "its essence is the life of man itself, viewed on one particular side." He believed that the formation of law was best compared to language. Like language, he assumed, law was also created "by internal silently-operating powers, not by the arbitrary will of a law-giver" and that "For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency" (Hayward 1831). He viewed the legislative process as an attempt to take possession of law and, by order of the supreme state authority, to shield it from the dynamics of social powers. Of course, Savigny's objections were not directed at the legislative process per se but first and foremost at the existing perception of law in the era of Enlightenment and natural law. He was opposed to the notion that each era could freely and arbitrarily produce its own existence, its own law. Instead, he was a strong believer in the "indissoluble unity," which linked the present with both the past and the future. Savigny's critique of law as formulated in "Vocation" was met with such acclaim that the efforts of codification were temporarily halted in the wake of its publication.

Opposition to the Voluntarist Nature of the Rationalist Approach to the Law of Reason

The fact that the "Historical School" differs from the "school of natural law" has often been highlighted. It should therefore suffice here to call to mind certain differences between the two schools of thought. The basics of many natural law doctrines included the narrative of the "original position" and "social contract," which scholars as diverse as Hobbes, Pufendorf, Thomasius, Rousseau, and Kant used as a foundation for their legal and political philosophies (Meder 2018). Hobbes famously described the original position, or state of nature, as akin to a state of war, which did not end until the transition into a state of law. He believed that because man, by nature, is wolf to man, a social contract was required so that undivided power could by mutual consent be bestowed upon *a sole* sovereign with the aim of securing peace and protecting private property (Meder 2015).

According to this narrative, neither the state nor the commonwealth nor the legal order existed from the outset but had to be artificially created by a common declaration of will in the form of a social contract or contract of submission. This resulted in the liquidation of any formation of norms that could survive outside of the state, for instance, on the basis of customary law, science, or associations. Savigny was opposed to the voluntarist nature of a statist theory of the sources of law. He rejected the notions of a state of nature and a social contract and declared them to be pure fiction, especially because he was not willing to believe that there had been "in the life of peoples" a time "before the discovery of the state" (Holloway 1867).

Savigny's critique of law directly opposed the type of state-philosophical positivism that was determined to regard even the most unjust law as law and wished to silence the mechanisms of control which were traditionally subsumed under the term of equity (*aequitas*).

Bodin had already removed the principle of equity in favor of the order of the sovereign: "A legal ban is stronger than even the most obvious

demands of equity" (Mayer-Tasch 1981). Hobbes, Pufendorf, and Kant also excluded the concept of equity because "a judge cannot rule on the basis of indeterminate conditions" (Gregor 2017).

Savigny Versus Kant

It has been claimed that Savigny was a pioneer of "jurisprudential formalism," a kind of juristic positivism that insists on applying strict law and is characterized by remoteness from real-life and mechanical application of law. This juristic positivism "emerged from Kant's epistemological formalism"; hence, it would "be much more appropriate to call it legal-scientific *formalism*" (Weir 1995; Larenz 1991; Jhering 1861; Pound 1921). Is it thus correct to accuse Savigny of formalism and a dependence on Kant's philosophy? In order to find an answer to this question, the concept of equity (*aequitas*) appears to be promising. After all, the more latitude is given to equity by legal philosophy, the less formalistic it will be.

Under the premises of Kant's philosophy, a conflict between a legal provision and the peculiarities arising from the specific circumstances of an individual case cannot exist. This is due to the fact that Kant's concept of freedom is a pure rational concept, which, along with empiricism, also excludes equity: if a person acts within the law, it is applying a rule of reason, "since the object is not encountered at all outside the concept" (Guyer, Wood 1998). Kant thus idealizes formal law and accepts that the "strictest right can lead to the greatest wrong." In the paroemia *summum ius summa est iniuria* that experience has become proverbial, which inevitably has to be disregarded in his formal understanding of rules (Gregor 2017).

Savigny, in contrast, is placing the interplay between equity (*aequitas*) and strict law (*ius strictum*) at the heart of his legal thinking. In his doctrine of the sources of law he draws up the notion of a difference, dichotomy, or incommensurability between material (*aequitas*) and formal law (*ius strictum*). He differentiates between a principle of "pure" law, which creates formal competences, and a principle of "mixed" law, by virtue of which material aspects could also be asserted. Referencing an advanced Roman jurisprudence, he claims that law without structural formalism (*ius strictum*) was not possible but that formalism required correctives, which could be subsumed under the term *aequitas* (Holloway 1867; Savigny 1848). These "two elements of law" "not seldom enter into a definite opposition to one another, in turn oppose and limit one another, haply afterwards to be dissolved into a higher unity" (Holloway 1867; Manigk 1914; Behrends 1990). Savigny thus sees a basic condition for all law in the antagonism between formal and material law as well as between individual freedom and the requirement of social consideration. However, an all-encompassing answer to whether and how this conflict could be dissolved into a "higher unity" could not be given. According to him each era must seek its own answer to this question – a feat not every era finds easy to accomplish (Landau 1992).

Savigny's famous concept of law as a "boundary" must not be interpreted from a Kantian perspective either (Holloway 1867, § 52, p. 269, overlooked by Wieacker 1967). Savigny distinguishes, like Kant and many other philosophers, between law and morality: because pure law applies to property rights, "the rich man can allow the poor one to perish through the denial of assistance..." (Holloway 1867). However, on the basis of equity, the law is in a position to limit the freedom that is granted by strict law, for instance, by tempering the harshness that can come from the indiscriminate application of a formal legal position (Holloway 1867). Under the premise that the sources of law operate within a twofold system, i.e., an interplay between *aequitas* and *ius strictum*, Savigny's legal doctrine was, therefore, open to empiricism and completely independent of Kant's a priori concept of freedom.

Savigny's Hermeneutics

Savigny's model of juristic hermeneutics has also been accused of being formalistic (Holloway 1867). Some scholars have claimed that Savigny's hermeneutics could not fulfill modern

requirements because the role of the judge was reduced to an "enforcer of the law" and his ruling to a "mechanical copy of the life stage that is to be ruled upon" (Forsthoff 1940). This criticism is inaccurate for two reasons:

For one, it fails to see that Savigny's interpretation had overcome limiting aspects of "grammar" and, in identifying the legislative "thought," had downgraded the wording to one of several elements. In his famous doctrine of four *canones*, the grammatical, the logical, the historical, and the systematic interpretation, the word as such had lost its permanent place in the field of legal interpretation. All four elements are of equal importance and merely mean to "freely" ascertain the "thought" of the lawmaker (Meder 2004).

Moreover, as the second reason, Savigny did not neglect to highlight the productive character of legal interpretation. After all, when interpreting a law, the "thought" must be reconstructed "if it is to enter into life" (Holloway 1867, § 32, p. 167, and § 50, pp. 318–236). It is thus not just the individual passage but the entire legal construct that must be explained and interpreted. Due to his rejection of the "hermeneutics of passages," which was all-prevailing in the age of Enlightenment and the law of reason, Savigny may be regarded as the first critic of the (in Anglo-Saxon and French legal circles still held) notion that an interpretation of clearly and unequivocally worded legal texts (*sensclair-*, *acteclair-doctrine*, *plain meaning rule*, *literal rule*) is prohibited. Incidentally, his recourse to "life" shows that juristic hermeneutics should also be open to empiricism. Ultimately, this results not only in the object of interpretation being substantially broadened but also in a shifting emphasis from the intention of the lawmaker to the individual thought processes of the interpreter. Therefore, it is not surprising to see that Savigny's hermeneutics often included the terms art, tact, emotion, and power of judgement (Meder 2012).

Savigny as a Pioneer in Political Pluralism

Along with the social-contract doctrine, Savigny also rejected the understanding of the state as an "external coercive entity" or even as "self-defence." In his opinion, the state had to grant not only a negative form of freedom but also a positive one. An example of this was his two-sided approach to the doctrine of the sources of law, which also accommodated aspects of equity. From here it was but a small step to Savigny's critique of the "strictly applied centralisation" model, which, according to him, had, for example, come into power in France. He believed that a system of this kind could "in no way be reconciled" with concepts such as self-administration or self-organization of intermediary bodies (*corps intermédiaires*) (Meder 2015).

Savigny's critique of *legal centralism* was rooted in the doctrine of the double body, a corporation theory that distinguished between an "ideal" whole and the sum of its parts (principle of division) (Rattigan 1884). In making this distinction, he was mainly objecting to Rousseau, who was of the opinion that the political body (*corps moral et collectif*) "consists of as many members as there are votes in the assembly." Following the work of Jacob L. Talmon (1916–1980), recent research on totalitarianism has pointed out the problems associated with Rousseau's "identity-related" concept of democracy, which was also taken up by Carl Schmitt in developing his constitutional law doctrine. Savigny's "politics" are coinciding with the findings of research on totalitarianism and may be seen as an early testimony of a line of tradition in Germany, which declared war on any form of a concentration of power or "despotism." It is worth noting, however, that Savigny's differentiation between an "ideal whole" and the sum of its individual parts was not, as is often claimed, rooted in the philosophy of German idealism but rather in Roman law. The formation of a line of political thought which tends to be called "pluralism' today, is simultaneously an important element of the history of reception and of Savigny's doctrine of the sources of law. As alluded to earlier, he already emphasized in "Vocation" (1814) that law can also emerge "outside" the state. In regard to new transnational phenomena, the multiplication of legal actors, and the increasing emergence of "decentralized bodies" in a normative pluriverse, this statement is of particular interest today.

Regarding the idea of a multitude of sources, Savigny mainly referred to customary and scientific law in "Vocation" (1814). However, he further developed his approach later on with his corporation theory of 1840 being an important example of this. His doctrine of juristic persons opposes the "legal centralism" of enlightened absolutism as well as the omnipotence of rulers who either strive to completely eliminate any associations, societies, or cooperatives or to at least declare them to be creatures of the state. Savigny's corporation theory is based on the assumption that intermediary powers can also legislate and, much like the state, are authorized to give themselves a "constitution." Savigny thus adopted the term "constitution" from constitutional law, which could be seen as an early form of a "constitutionalization" of private law. Essential components of Savigny's corporation theory found their way into the doctrine of English pluralists thanks to scholars like Otto von Gierke (1841–1921), Frederic William Maitland (1850–1906), Ernest Barker (1874–1950), and Harold J. Laski (1893–1950). In current discussions concerning legal pluralism, these components still form a boundary to the centralized idea of constitutional monism. After all, legal pluralism can easily acknowledge structural similarities between the state and other associations of people, while legal centralism must refute the existence of any such similarities because it relies on the notion that there is a fundamental difference between the two.

Conclusion

The accusation of formalism is still to this day an obstacle on the path towards gaining an understanding of Savigny's jurisprudence. It is worth noting that this accusation was particularly prevalent in the 1930s. During the time of National Socialism, legal scholars were keen to discredit the achievements of Pandectists in order to help establish the ideology of a "new" world view under the flag of "anti-formalism." Savigny's jurisprudence cannot be adequately grasped on the basis of categories like "formal" or "material." It is neither formal, because it leaves enough space for the material elements of law, nor is it anti-formal, because, following Roman law, it insists on the primacy of strict law and clearly rejects any type of "free" administration of justice or "unrestricted" interpretation of law. Thus, Savigny's thinking was based on the notion of discrepancy that allows the formal and material components of law to interact with each other in a constant flux of interaction.

Once again the debate about our perception of Savigny has been set in motion, and, as a consequence, it becomes evident that many of his ideas lead us to the present – first and foremost, his critique of political voluntarism and the notion of law as a product of societal circumstances. It is certainly not a coincidence that it was Romanists like Eugen Ehrlich (1862–1922), Max Weber (1864–1920), Axel Hägerström (1868–1939), and Leon Petrazycki (1867–1931), who laid the foundations for the modern field of sociology of law. Having overcome the accusation of formalism, Savigny can also be added to this ancestral line. Other examples that show how pioneering his jurisprudence really was are keywords such as anti-totalitarianism, pluralism, and constitutionalism.

Even during his lifetime, Savigny had to defend himself against being labelled as a follower of some philosophy or other. He never grew tired of stressing that his doctrine was neither "Kantian" nor "anti-Kantian," and that it was neither based on natural law nor on idealism. From today's point of view it would, of course, be naïve to think that critics could be stopped by such explanations. Many authors still insist on pigeonholing Savigny's jurisprudence as part of German idealism. Those who have succumbed to the temptation of contributing their own collectanea when tracing the "influences" in his work and have thus been set on the wrong track are generally not Romanists themselves. The innovativeness of Savigny's legal critique of law was drawn from Roman law. The fact that this led to overlaps with certain philosophical systems is by no means a contradiction. Savigny followed contemporary discussions in the most diverse scientific disciplines, which went far beyond the boundaries of his own field. What he had in common with other

independent minds was a general unease in regard to certain types of standardized and categorized thinking.

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Introduction

Among T. M. Scanlon's (b. 1940) contributions to the philosophy of law is his influential work on freedom of expression. In fact he presented two different theories of the freedom of expression, the first in his article, "A Theory of Freedom of Expression," (Scanlon 1972, 2003) and the second, intended as a replacement for the first, mainly in his article, "Freedom of Expression and Categories of Expression" (Scanlon 1979, 2003; see also Scanlon 1990, 2011a, b). The main difference between the two theories concerns whether a general, unified account can be given as the answer to the question, what constitutes an illegitimate infringement of freedom of expression by the state? More specifically, the two theories differ on whether certain reasons are categorically ruled out as justifications for restriction of expressions by the state.

A theory of freedom of expression often aims at giving an account of a class of acts of expression protected from government restriction. Recognizing the difficulties in identifying and characterizing such a class, this aim is modified by Scanlon to mean an account of the *necessary* limits of the state's legitimate authority in regulating and restricting expressions that apply to all acts of expression. His first theory argues for some such limits and accounts for them on the basis of one particular value, namely, the autonomy of the audience, i.e., those who would be exposed to the act of expression at issue. His subsequent writings abandon this idea of *necessary* limitations for all categories of expression in favor of a non-systematic approach that allows for the balancing of a variety of considerations and interests of a number of parties as possible justifications for restricting and regulating expression that may vary depending on the category of expression under consideration. According to the later theory, even the same interests and concerns may carry different weights in different categories of expression. It is important to note, however, the two theories are not as drastically different as they might appear because, as will be made clear later, the first theory does allow for the kind of balancing of interests the later theory advocates as long as it is not incompatible with the autonomy of the audience.

Scanlon explicitly rejects the autonomy-based first theory. Nevertheless, the first theory remains influential and widely discussed and taught, perhaps because of the appeal of the idea of autonomy and the systematic approach that appeals to this idea in the first theory. "A Theory of Freedom of Expression" remains a classic. Furthermore, one can better understand and appreciate the appeal and the complexity of the second theory only in contrast with the first theory.

The First Theory

A public expression or speech typically involves and affects different groups of people. Scanlon divides them into three groups: participants (parties making the expression), audiences (parties exposed to the expression), and bystanders (parties affected by the expression in some other ways). The state may have an interest in an expression or speech as a party in one of these groups, but more importantly as the protector of the legitimate interests of other parties in these groups. A theory of freedom of expression concerns most fundamentally the extent to which the state may restrict speech based on the consideration of the relevant interests involved.

In his first theory, Scanlon appeals only to one particular value for one particular group, namely, the autonomy of the audiences, in articulating a basic principle for freedom of expression. His main reason for approaching freedom of expression in this way concerns the legitimacy of the political authority of the state. Such authority, in Scanlon's view, in order to be legitimate, has to be compatible with the citizens seeing themselves as equal, autonomous, rational agents. It follows from this view that the state's exercise of its authority to restrict expressions has to be defensible on grounds not incompatible with the citizens seeing themselves as autonomous.

The harm that an act will bring to others is generally considered to be a possible justification for the state's interference with the performance of that act. Arguably, as an act, expression should not be different. In the first theory, Scanlon does allow for the protection against the harm caused by an act of expression to serve as grounds for its restriction, *except* for two particular kinds of harms. According to the Millian Principle he proposes, two kinds of harms are specifically ruled out even if such harms would not have occurred if not for the acts of expression at issue. One such kind of harms is the harms of false beliefs in cases where individuals adopt false beliefs as a result of exposure to certain acts of expression. Another kind of harms ruled out are the harmful consequences of actions taken by individuals believing that such actions are worth taking as a result of exposure to certain acts of expression. In each of these cases, one can perhaps say that neither the relevant act of expression nor the person performing it is responsible for the harm because it involves an intervening autonomous judgment by an individual to

adopt a belief or a reason for action. More important for Scanlon, however, is the fact that if the acts of expression involved in these cases are prohibited for reasons of preventing the specific harms excepted by the Millian Principle, then the individuals who would be the audience are prevented from exercising their rational capacity to make up their minds regarding whether to believe what is expressed. As autonomous agents, it is our responsibility to exercise our rationality to judge what is to be believed, be it a matter of politics, science, art, commerce, or religion. The same autonomy-based account applies to all of them.

As a result of the view that requires the exercise of authority by the state be compatible with the autonomy of citizens, when the law requires or prohibits a certain act, it may provide a reason, even a strong, general, but not conclusive reason for citizens to follow it. A citizen would need to judge for herself whether a speech against obeying a law is to be believed instead of having it banned as a routine exercise of the state's authority. The state, therefore, may not prohibit speech for the reason that it advocates the violation of the law.

The Millian Principle does not apply in situations where the audience cannot be presumed to be autonomous, either because they lack rational capacity or because they are unable to exercise their rational capacity under the circumstances. The latter would explain, for example, why falsely shouting "fire" in a crowded theater may be legitimately prohibited by law.

It is important to note that the Millian Principle, while stringent, does not afford any given act of expression full protection from restriction. (It does not give rise to *rights* of free expression.) Nor should the systematic nature of Scanlon's first theory of freedom of expression be exaggerated. The side-constraints erected by the Millian Principle only disallow the state to prohibit or restrict expressions for *certain reasons*, namely, those incompatible with the autonomy of the audience, but not for *other reasons*. For a given act of expression, whether it gets protection from restriction depends also on what other reasons, apart from the autonomy of the audience, there are for and against restriction. Within the side-constraints posed by the Millian Principle, Scanlon's first theory allows for the *balancing* of interests and considerations of many kinds, including the interests of the participants and bystanders, as well as the general value of free expression in a given category. The protection from restriction a given act of expression gets in this regard would rely heavily on the high value of free expression we assign to the category of expression it belongs.

In this first theory, considerations such as distributive justice in the access to means of expression and special rights are also relevant to the determination of freedom of expression. To be sure, this theory of freedom of expression is not rights-based. But Scanlon does make allowance, though not as part of the basic principle, for the freedom of expression or the freedom to be informed as a political right for citizens in a political system such as democracy, in which citizens are expected to participate in decision-making.

The Later Theory

In his later writings on the subject, Scanlon gives up the idea of a systematic account of the necessary limits for defensible restriction of expression by the state and the central role autonomy plays in setting such limits. In doing so, Scanlon has also repudiated his earlier view on the more fundamental issue of the legitimacy of the state's exercise of authority – the view that it must be defensible on grounds that are compatible with citizens' autonomy – at least insofar as freedom of expression is concerned. Using the autonomy of the audience as the limiting condition, as in Scanlon's first theory, would require the state not to interfere with expressions even in cases where we think state interference is unproblematic. For example, in the case of commercial speech, contrary to the Millian Principle, we do not think it problematic for the state to regulate speech and prohibit false or deceptive advertising or to prohibit advertising altogether (as in case of cigarettes), in order to protect people from adopting false beliefs or bad reasons for action. In order to account for these cases, we need to claim that it is not always

important for people to make up their own minds regarding what to believe.

In fact, Scanlon now also thinks that even in the case of audience interests, their autonomy might not be central. The central interest a person has in the formation of her beliefs and the acquisition of reasons for action may not be to exercise her own rational capacity to make judgments, but rather to have the right kind of environment for the formation of her beliefs and desires so that she would not acquire them for the wrong reasons. To have a person shielded from certain influences by restricting others' expressions, in some cases, such as in the case of advertising cigarettes, may actually serve to advance her audience interests. In other cases, however, such as in political beliefs and religious beliefs, we do want to reserve the prerogative to make judgment for ourselves simply because we cannot trust the state (or other parties) to act disinterestedly or competently in making judgments for us.

This leads Scanlon in the later theory of freedom of expression to remove the side-constraints erected by the Millian Principle and expand on what remains of the first theory once the Millian Principle is removed – namely, the unsystematic balancing of a plurality of interests within each category of expression, along with considerations of special rights and distributive justice. The particular interests involved and the weight they carry for each of the three groups of concerned parties (participants, audiences and bystanders) may be quite specific to the category of expression in question. The main point is that not all expressions are of the same kind and their justifiable restriction need not be subject to the same basic consideration as in Scanlon's earlier, more monolithic approach. Commercial speech, for example, may be subject to greater restriction and regulation based on the truthfulness of its content than political speech. This is because our interest in exercising our judgment, i.e., our autonomy, with regard to what to believe factually about a consumer product is not as great as our interest in making up our own mind on which political view to subscribe to, including whether to obey a law. Furthermore, whether it is important for us to exercise our own judgment in a category of expression may also depend on whether the state can be trusted to protect us from false beliefs without bias. In the case of political views, the state is not disinterested and therefore cannot be relied on to regulate expressions in this area without bias. In contrast, we may reasonably trust the government to enforce laws prohibiting false or deceitful advertising without bias, except in cases where there is a direct conflict or competition between a government policy and a commercial product being advertised.

In Scanlon's later theory of freedom of expression, even in cases where the autonomy of the audience – indeed, the autonomy of any party – is at stake, it is only an interest to be considered alongside and balanced against other considerations and interests, be they interests of participants, bystanders, or the audience. In the later theory, not only may the autonomy of the audience fail to be the limiting condition of the state's exercise of authority to prohibit speech, but it may actually fail to be much of a concern, if at all, in some cases.

Freedom of expression does not have the same value across categories, according to this later view. How to categorize a particular expression, therefore, will have implications for how much and what kind of restriction to which it may be subject. Much, then, hinges on how the categories of expression are defined. Scanlon draws the distinction between two ways of defining the categories: categories of interests and categories of acts. On the first approach, a category is defined more generally by the interests the category serves. On the second approach, a category is defined by either the intention of the participants in specific acts of expression or the content of the expression. For example, a certain expression is a threat in accordance with the intention of the person making the expression, but an expression can be counted as a political speech if it serves the interests of a political speech even if it is not intended by the speaker to be so. While the use of categories of acts is necessary in some cases, as in the case of a threat, Scanlon thinks that it should be kept to a minimum. This is because categories of acts are harder to apply and would require more reliance on government to make fine distinctions

and correctly identify the intention or the content of an act of expression. By comparison, protecting expressions by the interests they serve might include some acts of expressions that are not intended to serve those interests. In Scanlon's view, because of the difficulty of drawing fine lines between categories, to promote the interests served by a category of expressions, we might need to protect a broader category of expressions to include some acts that are in the neighboring area so that acts of expressions that should be protected are not inadvertently excluded from protection. This is how Scanlon views the Skokie affair in which the deeply offensive display of swastikas in a neo-Nazi rally is treated as political speech, regardless of the intention of participants in that expression. The Village of Skokie had a significant population of Jews and survivors of the Holocaust.

Like his first theory, Scanlon's later theory of freedom of expression is not fundamentally based on rights. It is the values and interests of the parties concerned that play the fundamental role in the determination of correct policies in each category of expression. However, there is an instrumental basis for certain rights of freedom of expression if unfettered decisions by certain parties, especially the state, in making policies regarding freedom of expression would lead to unacceptable results. Rights in such cases would function as constraints on decision-making and be partly justified by empirical claims about the likelihood that unfettered decisions in certain areas would often lead to failure to consider or weigh properly certain fundamental values and interests, resulting in unacceptable decisions to regulate or prohibit expression. In this regard, rights of freedom of expression act as constraints on the weighing or balancing of values and interests and not as one of the factors to be weighed or balanced in a decision-making.

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► Mill, John Stuart

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Scandinavian Realism

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Schelling, Friedrich Wilhelm Joseph von

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Introduction

Friedrich Wilhelm Joseph von Schelling was born on January 27, 1775, in Leonberg. At the age of 15, he entered the Protestant Seminary in Tübingen, where he became close friends with Georg W.F. Hegel and Friedrich Hölderlin. The result of this philosophical friendship was *The Earliest System-Program of German Idealism* (1796–1797), the founding act of German idealism. In 1795 he was awarded Master of Theology with a thesis entitled *On Marcion as emendator of the Pauline letters*. Schelling moved to Leipzig in

1797 and the following year to Jena, where he took up his first professorship between 1798 and 1803. There he founded – along with August and Caroline Schlegel, Friedrich Schlegel, Dorothea Veit, Novalis, and Ludwig Tieck – the Jena Circle (1798–1802), home of early romanticism. In 1800, he founded the *Journal of Speculative Physics*, and 2 years later, with Hegel, the *Critical Journal of Philosophy*, one of the most important in the history of German idealism.

From September 1803 until April 1806 Schelling was professor at the University of Würzburg. During these years he began to take his distance from Hegel, with whom he broke up for good after the publication of the *Phenomenology of the Mind* (1807). In 1806, Schelling moved to Munich where he would stay until 1841. During this period, he also gave private lectures in Stuttgart in 1810, and at the University of Erlangen between 1820 and 1827. The latter stage of his career – 1841–1846 – was spent in Berlin, where he was called by Wilhelm to take up Hegel's former professorship and to defend the religious spirit from critical secularism. On 15 November 1841, he delivered his first lecture in front of 500 people, including Mikhail Bakunin, Friedrich Engels, Jacob Burkhardt, Alexander von Humboldt, Friedrich Adolf Trendelenburg, Arnold Ruge, and Søren Kierkegaard.

Schelling died on 20 August 1854 in Bad Ragaz, Switzerland. From his first work *On the Possibility of an Absolute Form of Philosophy* (1794) to his latest writings on *Philosophical Introduction to the Philosophy of Mythology* (1847–1852), he was one of the most authoritative voices in the history of philosophy.

He is usually regarded as the objective thinker of German idealism, a midpoint between Johann Gottlieb Fichte's subjective idealism and Hegel's absolute idealism.

Philosophy of Nature

Schelling's idealism arises with the aim of thinking the unconditioned – the true object of philosophy – overcoming the deadlock in which his predecessors were enmeshed, namely, the fatalist consequences of Spinoza's Monism, the deterministic results of Kantian formalism, and the abstract subjectivism of the Fichtean "I." The natural world reveals to him the concrete, objective, and unconditioned actuality of the One, whose immanent vitality would overcome both fatalism and empty formalism. To grasp nature as the proper name of the unconditioned, Schelling turned the transcendental conditions of thinking into the ontological conditions of physical production, so that nature turned into a free and self-determining subject, self-transparent in human consciousness. As the unconditioned subject, nature becomes the speculative object of philosophy, unlike the conditioned object of particular sciences.

Schelling's writings devoted to *Naturphilosophie* (*Ideas for a Philosophy of Nature*, 1797; *On the World Soul*, 1798; *First Outline of a System of Philosophy*, 1799; *System of Transcendental Idealism*, 1800; *Bruno*, 1802) show the effort to sustain the subjective unity of nature alongside the multiplicity of its objective expressions. Nature is both *natura naturans* and *natura naturata*, process and product. It splits itself to produce itself. In its productivity, nature follows the evolution of a succession of potencies increasingly actualized. The concept of potentiation – *Potenzierung* – enables Schelling to integrate in a dynamic process the One with the multiple, the unconditioned with its own becoming. Nature becomes then "a whole, which is at once the cause and the effect of itself, and is in its duplicity (which runs through all phenomena) again identical" (Schelling 2004, p. 202).

Identity Philosophy

In its attempt to dynamically integrate any duplicity – subject and object, being and thinking, ideal and real – in an overcoming unity, Schelling conceptualizes identity as Indifference: the proper name of the absolute, the absolute identity. Indifference expresses the unconditional and universal Ground prior to all separation and difference, and beyond all reflection and consciousness. Schelling's identity philosophy is usually dated

from the *Presentation of My System of Philosophy* (1801) until *On the Essence of Human Freedom* (1809), and includes works as the *System of the Whole of Philosophy and of Naturphilosophie in Particular* (1804).

Since the Indifference of the absolute precedes all being and thought, it remains as a non-reflective and untouched instance, never accessible to reflective judgment or understanding. The assertion of an unreflective and indifferent remainder beyond the finite world and the human understanding leads Schelling to break off with Fichtean subjective "I" as well as to withdraw from the reflective structure of the Hegelian absolute. In a sense, Schellingian Indifference reedits the Kantian thing in itself, a further darkness Hegel said it resembles "the night where all cows are black."

The main question concerning the absolute Indifference is how to explain the emergence of the finite world, conditioned by a chain of finite causes, from such inaccessible Identity. On this point, Schelling draws from the theory of potencies an intermediate and transitive instance that enables the appearing of non-essential entities out of the essential One. The Absolute discloses/reveals itself in a nonessential other that can neither subtract nor add anything to the One. It remains in itself always unchanged, and as such, it becomes the living link of itself and another.

Philosophy of Freedom

Schelling's final answer to the possibility of an absolute Identity that discloses itself in the world is its own freedom. The free will of the Absolute set as the ground of the finite being challenges the commonplace that associates the philosophical system of the unconditioned with necessity. Freedom also reformulates the very idea of foundation insofar as "in the final and highest judgment, there is no other Being than will. Will is primal Being [*Ursein*] to which alone all predicates of Being applies: groundlessness, eternality, independence from time, self-affirmation" (Schelling 2006, p. 21). The essence of freedom is the necessity of its self-determination as the possibility to be, and hence the radical contingency of becoming.

Freedom is the central theme of the period usually dated between 1809 and 1827, and covered by *Philosophical Investigations into the Essence of Human Freedom* (1809) and the *Ages of the World* (an unfinished work whose first version dates from 1813). The treatise on *Human Freedom* takes a step further than the philosophy of Identity and divides the structure of the original One into the Unground – absolute Indifference, the non-reflective limit of any reflection, irreducible, and indivisible instance – and the Ground – free and infinite possibility of existence, itself groundless, obscure, and inaccessible to reason. Schelling thus establishes a certain reduplication in the Absolute itself that distinguishes between the pure and impenetrable divine essence, and the obscure and unconscious Ground of existence. The latter justifies the possibility of finite being as well as the ontological condition of evil.

The *Ages of the World* imagines creation as a leap from the Absolute taken by an original negation that enables it to put itself outside itself as an Other. Here again, Schelling resorts to a theory of potencies dialectically arranged – by negation, affirmation, and unity – to explain the becoming of the finite. The world and history unfold by a conflict of forces.

Philosophy of Mythology and Revelation

Schelling's last writings (1827–1854) return to the earliest idealist program: to produce a mythology in the service of reason. This period was the distinction between two kinds of philosophies, negative and positive, the core theme of the Berlin lectures.

By negative philosophy, Schelling means the logical system of reason, aprioristic, and unconditioned. This formal science allows reason to know itself as pure and infinite potency, the true content of reason, and the *prius* of all beings. Negative philosophy corresponds to what is able to be: essence, *Wesen*, *quid sit*, or whatness as the infinite possibility to be. Schelling again resorts to the concept of potency in order to escape the threat

of rationalist necessity. This way, he establishes the primacy of infinite potency over the perfect act, turning around the philosophical tradition.

By positive philosophy, Schelling means the historical and experiential science of the understanding, empirical, and conditioned by the contingency. This is the science of existence, *Wirklichkeit*, *quod sit*, or actuality as concrete becoming from the possible into the real. The empirical content of positive philosophy comprises the history of being moved by divine freedom to manifest itself in mythology and revelation. Mythology and revelation rise through theogonic forces – potencies – from the un-pre-thinkable into the spirit, from the darkest ground into the transparency of philosophical consciousness. At the end of the positive philosophy, Schelling achieved its original proposal: to produce the highest act of reason as an aesthetic and religious one.

Schelling's Reception and Influence

Although Schelling's Berlin Lectures disappointed most of their attendees, the distinction between negative and positive philosophy played a crucial role in the material, anthropological, and existential outcome of idealism, the move toward the free human action both collective and singular. The dialectical and historical materialism represented by Karl Marx shares with Schelling the tenet of an un-pre-thinkable self-active state and matter, external and irreducible to reason. Kierkegaard grasped from Schelling the foundational idea of existentialism, namely, the infinite possibility of individual freedom. Arthur Schopenhauer's and Friedrich Nietzsche's conception of will draws from the groundless and non-reflexive ground of existence. The same applies to Freudian psychoanalysis, based on unconscious and uncanny drives always returning. On his part, Martin Heidegger's study on Schelling's treatise *On Human Freedom* influenced his conception of being in terms of freedom, history, and event – *Ereignis*. Schellingian vitalism impacted upon Henry Bergson's philosophy of becoming, and reached Gilles Deleuze and Félix Guattari through this.

Over the last four decades, there has been a resurgent interest in Schelling's philosophy. He is increasingly brought into contemporary debates about naturalism, freedom, aesthetics, epistemology, and ontology. Schelling's concept of nature as a subject penetrates the current approaches of eco-philosophy, ecofeminism, and post-humanism in authors like Iain Hamilton Grant, Barbara Holland-Cunz, or Timothy Morton.

His thinking also pervades the speculative turn of the twenty-first century in both material and realist trends. Neo-materialist authors like Slavoj Žižek or Adrian Johnston recognize Schelling as the pioneer of dialectical materialism, while neo-realist philosophers like Markus Gabriel consider him the thinker of a contingent and always open existence. Even feminist authors like Alisson Stone return to Schelling to shed light on the concept of sexual difference, also highlighted by Žižek.

In the history of philosophy, Schelling represents the speculative shift from the perfect Act to the infinite Potency, from the first luminous Cause to the dark immanent Unground. The finite being was then restored to freedom to be able, and the becoming de-founded in its radical contingency. This is why this philosophy keeps looking at the future, to the ever possible becoming, to the hope of what is still able to come.

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Schmitt, Carl

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Carl Schmitt (1888–1985). German jurist. He always qualified himself as a jurist, but the radicality and the innovative character of his scientific performance have made him a reference point for the twentieth century debates not only on public, constitutional and international law, but also for political science, and for the history of political thought and of institutions.

The Main Features of Schmitt's Thought

Schmitt's work can be described as an answer to three challenges: the political crisis of the State, the theoretical crisis of rationalist Positivism, and the affirmation of Hans Kelsen's juridical science, based on the objectivity and comprehensiveness of norms' inner logic.

Schmitt maintained a distinction between Law and reality, laws and politics. The real does not contain any order or norm in itself; and the Law has not in itself the strength to become real. But he brought these distinct fields in relation to one another through the "decision" (*Entscheidung*), made by different subjects: the judge, the sovereign, the people. The "decision" makes the law effective in the "concrete facts," that can take place as "cases of exception" (*Ausnahmezustand*). The decision is an act that can realize an always transitory mediation between the above-mentioned opposite fields. Therefore decision is part of the Law, not exterior to it.

Schmitt's position is based on the anthropologic pessimism inspired by French and Spanish counter-revolutionary thinkers, preventing him from thinking of reality as a self-realization of the Spirit, and adhering to a positivist thought based on contingency. His Catholic orientation (Schmitt 1923b) provided a scientific point of view that allowed him to articulate an innovative conception of Law. Schmitt opposed Idealism, Immanentism, and Liberalism because he did not believe that the law can simply emerge from history or from parliamentary debate; he opposed Marxism, because he did not conceive of Law just as the mirroring of power; he opposed Scientism, Positivism, and Functionalism because he regarded Law as neither a function of society, nor as a simple facilitation of social needs, nor as a simply rational command of the State; he opposed Normativism and Formalism, because Law is always incomplete and does not coincide with its inner logics; lastly he opposed the discourse of Natural Law and Moralism. Consequently, Schmitt criticized both Kelsen and Hermann Heller, both the legal Positivists and the Neo-Kantians. He conceived Law in a historical,

determined, concrete, genealogic, and dynamic way, and was therefore far from both rationalism and irrationalism. This is why Schmitt requires a constant distinction between Law (*jus; Recht*), the law (*lex; Gesetz*), and decrees (*Massnahme, Verordnung*): the first is the Idea that becomes a concrete legal reality only through decision; the second is a legal norm produced by an established power; the third is a technical administrative measure.

Early Juridical Writings

Schmitt's early writings are focused on the penal law. He rejected the idea that one could deduce the universality of a formal concept ("guilt") from empirical facticity (intention or negligence as "types of guilt") (Schmitt 1910). He therefore argued that it is necessary to presume the duality between factual reality and juridical form. This position was only seemingly a Neo-Kantian one, since Schmitt was preoccupied with detecting a "bridge," a concrete and effective mediation between the ideal and the real, the interior and the exterior dimension of action. The link is provided by the concept of "end" (*Zweck*): the individual's exterior action is the "position of an end," the concrete realization of an act of willing. When this act is in conflict with the objective will of society, that is, with the penal law, then it turns into "guilt."

Schmitt next dealt with the problem of decision in legal practice, when a judge faces a "concrete case" (Schmitt 1912). Through the concept of *Als ob*, due to Hans Vaihinger, and through a criticism of Gustav Radbruch's "static" Neo-Kantian conception of the norm, he concluded that judgment cannot mechanically derive from the logical development of the norm and from the interpretation of the law as an act of the will, presumed to be subjectively or objectively rational. Rather, the judgment is a "fiction," an ad hoc construction whose aim is to realize concrete ends: in this case, the judge must make a decision liable to be shared by "the other judge." So doing, Schmitt made a distinction between the interpretation and the judicial decision, the logics of the norm and the practical moment, the *Rechtslehre* and the *Rechtspraxis*. His aim was to assign a central place to the implementation of the Law (*Rechtsverwirklichung*) and the principle of legal determinacy (*Rechtsbestimmtheit*), that is, the concreteness of legal life, which differs from the abstract "legal security" (*Rechtssicherheit*), the mere conformity to the norm.

Schmitt further developed this topic through a philosophical discussion of the relationship between *Recht* and *Macht*, Law and Power (Schmitt 1914). Law coincides with neither the fact nor with power; the Law must be implemented, starting from the assumption that between *Recht* and *Macht* it is necessary to build a mediation that depends upon the State's "sovereign decision." The Idea of Law, therefore, precedes the State and is not identifiable either with the State or with the law; at the same time, the Idea of Law cannot be implemented without the State. Schmitt, therefore, sided neither with mediation nor with immediacy, neither with Formalism nor with power politics. Rather, politics is the junction between the Idea of Law and contingency and has therefore a metaphysical importance: the modern age and its political outcome, the State, cannot work either without transcendence, that is, the Idea, or without its realization through decision.

Decision, Secularization, Constitution

These issues became crucial during the Weimar period, when Schmitt established a strong connection between sovereignty, decision, and the constitutional order. In *Dictatorship* (Schmitt 1921) he makes a distinction between the system of norms and the concrete implementation of Law through its suspension ("commissarial dictatorship") or its *ex novo* establishment through the "sovereign dictatorship." By now, politics gains a fundamental role in Schmitt's discourse, even if this role is not characterized in an anti-legal fashion: the political decision is the only way through which Law is implemented. It is the origin of political-juridical orders.

These arguments are systematized in *Political Theology* (Schmitt 1922), where the controversy

with Kelsen is stronger. Schmitt's fundamental suggestion is that the Idea of Law must be implemented in a particular situation. This takes place through the intervention of sovereignty, which is defined as "the decision on the case of exception," namely, with regard to the concrete "extreme case." The extreme case falls outside the norm; however, it must be brought into the legal system: this end is pursued through decision, rather than through formal reasoning. The decision establishes a division that produces concrete unity. The decision does not derive from specific contents. What is essential is rather the presence of a personal subject, the sovereign, who takes the responsibility for the decision. Just like exception and decision, the sovereign is outside the legal system, while being part of Law; both the "case of exception" and decision precede and explain normality.

Neither Positivism nor Kelsen understood that the decision on the exception is part of Law, and not simply its "external precondition." Kelsen in particular carried to the extremes the modern conception of law as impersonal, rationalistic, technical, and self-sufficient. In Schmitt's view, Kelsen ignored that Law is not a closed system of security; rather it is open both to the extreme case and to transcendency, to the Idea of Law and to its concrete implementation by the sovereign decision.

As a consequence, according to Schmitt, the modern age cannot be regarded as a complete secularization of transcendence, that is, as the triumph of rationalism and of positive science. Rather, it is necessary to understand the metaphysical structure of the modern age. For realizing the Idea of Law, a decision is needed: that means that transcendence cannot be secularized through reason and technique. Modern history and progress are nothing but subsequent shifts from one metaphysics – and its corresponding political form – to the other, from Theism to Deism to Pantheism to Atheism, that is, from the monarchy legitimized by the Divine Law to the Liberal State, from the Democratic State to the world of technique. The modern age is "the epoch of neutralizations and de-politicizations" (Schmitt 1929), but does not succeed in its goal: the final outcome, the end of metaphysics, is not a neutral, rational order, but a disordered reality inhabited by conflict, a reality that can be temporarily reduced to order only through decision.

Decisionism holds together the general theory of Law, the critique of the modern age and the critique of progress. Here again, Schmitt was on a collision course with Kelsen, who had denied the scientific relevance of metaphysics, i.e., of the concept of God and the State. As to the link between secularization and exception, Schmitt distanced himself also from Hegel, whose Protestant progressivism he had always criticized, and from Weber who was bound to individualistic rationalization, much more than Schmitt himself.

In contrast to Weber, Schmitt criticized modern rationalism and its main political outcome, namely, Liberalism. He contested the bourgeois belief that the law can be created through rational discourse, within the parliament (Schmitt 1923a). Legal Formalism and political individualism – that he already criticized as unable to act politically (Schmitt 1919) – share the same incapacity of understanding the origin of concrete orders. In this regard, Kelsen replied to Schmitt that the justification of parliament rests on the functional necessity of a representative order in which the law could be produced through relativizing compromises.

In *Constitutional Theory* (Schmitt 1928) Schmitt distinguished between the Constitution and constitutional laws: only the latter can be suspended by the constituted powers in case of emergency, as the article 48 of the Weimar constitution stated. On the contrary, the fundamental decision that established and oriented the whole legal system is an act made by the subject of the constituent power, that is – in democracy – by the people. The Constitution is the decision of the people concerning the modality and the form of their own political existence. Consequently, it is the "material" origin of the State's political unity. Only secondarily the Constitution is the organization of public powers according to a political idea: the bourgeois liberal Constitutions, for instance, are based on the security of individual rights and on the division of the State powers. Thus, the Constitution concerns the political

status of the people rather than a legal principle. To say that a State has a constitution is incorrect: rather, the State is the constitution of the people in their concrete existence, and in their concrete rights.

The political essence of the constitution is organized in two different principles: identity, that is, the presence of the people in itself, and representation, that is, the production of an artificial unitary political form; in other words, on national democratic homogeneity and on the parliament. The liberal-democratic State, like the Weimar Republic, is a mixed form where different and even opposite legal principles coexist: first, the democratic factor of homogeneity and equality, which is recognized through the establishment of the *referendum* (Schmitt 1927) and of the social rights of the citizens; second, the liberal, juridical-formal rights and securities.

In this way, Schmitt separated, in principle, the constitution and the State, democracy and liberalism. Similarly, he distinguished between legitimacy and legality: the former is not located in the State – which, in the age of legal positivism has become the place of formal legality – but rather in the constituent decision of the people. Legitimacy is not simply a pre-legal value but is a decision for a concrete political-legal form (Schmitt 1932a).

The State, the "Political" and the Crisis of the Weimar Republic

Through the notions of decision and constitution, Schmitt relativized the State. The State is for him a historical and contingent order. It assumes different configurations according to the forms taken by the decisive political will whence it originates: jurisdictional State, governmental State, administrative State, legislative-parliamentary State. The latter defines itself as "rule of law," while in truth any State is such. Besides, the State is neither "stable" nor legally "close." Its very goal is to be unitary, inclusive, and to neutralize internal political conflicts; but it can succeed by means of a decision. Thus, the political unity is grounded in and crossed by division and exclusion, which are implicit in the decision.

This anti-formalistic and anti-individualistic drive and this tragic vision of reality had a backlash on political theory in *The Concept of the Political* (Schmitt 1932[3]b). Here Schmitt stated that the essence of politics does not lie in the power and in the institutions of the State, but rather in the "friend-foe" relationship. This is a radical conflict that precedes the State and the institutions, and transcends any possibility of a rational dialogue among the contenders. The "political" is not a field, as the ethical, the economical, the esthetical; on the contrary, political oppositions, that is public and not merely personal conflicts, may form in any field. The "political" is the conflicting, concrete and nonrational structure of reality. In Schmitt's legal thought, this structure is defined as and represented by exception; as a legal system originates from the decision on the exception, likewise the political order originates from the decision on the opposition. In Schmitt' view, Liberalism does not understand that the "political" is the origin of State politics, and tries to escape it by transforming it into competition and discussion.

Later on (Schmitt 1938a), Schmitt credited Hobbes – that he later reads in theological-political, rather than decisionistic terms (Schmitt 1944) – for having laid the foundations of the modern State with the aim of finding a way out of the civil wars of religion, and for having based the state not only on the contract, but also on myth and decision. Nonetheless he criticized Hobbes for the rationalism, individualism, and positivism prevailing in his thought. Through the Enlightenment and Liberalism, these features depoliticized the State, turning it either into an impersonal machine, unable to defend itself from its enemies, or into a pure technical power, deprived of any juridical dimension.

Every order, the State included, which arises from the "political," namely, is oriented against an opponent. And every order must be able to recognize, in order to eliminate it, that hostility can always emerge again. The source of legitimacy is precisely the management of the "political" through the constituent decision and through the exercise of sovereignty. The "political" is potentially an ever-present challenge within the State

and in international relations: both the internal peace and the universal peace are an ideological construction. Once again, Schmitt lined up against Kelsen's formalism and universalism and, more broadly, against supranational organizations (Schmitt 1940).

Through sovereignty the modern State has exercised, for some centuries, the monopoly of the "political," but when the State is depoliticized then subjects different from the State can become the bearer of the "political," in a more and more "pluralistic," conflict-ridden, scenario. Thus, the "political" entails a further relativization of the State because other subjects can be its bearers, like, for instance, the Partisan, charged with an extremely intense and concrete, that is, "telluric," polemic character, which differs from the absolute and rootless conflictual character of the revolutionary by profession (Schmitt 1963).

With these concepts, Schmitt read the final crisis of Weimar as the suicide of a State. Expanding its activity to the whole society, the Weimar system transformed itself into a "total State out of weakness" (Schmitt 1931) succumbing in the face of the pluralism of party politics, economical and bureaucratic powers, and in the face of the resulting "polycracy." Schmitt made an appeal to the original legitimacy of the republic, that is, to the popular decision for a liberal and democratic State, to defend it from internal enemies, namely, extremist parties. He suggested that the legislative power not be entrusted to the Parliament, which was paralyzed by the "negative majorities," but to the President of the *Reich*, elected by the people, based on article 48 of the Constitution (Schmitt 1932a). The State cannot simply be grounded in the principle of legality because, in this case, legitimacy would be undermined by legality and the enemies of the Constitution would have equal chances to legally take the power. But only the subject of sovereignty, that is, the State and not the *Länder*, have this power of exclusion, as Schmitt stated in the Lipsian *Staatsgerichtshof* in 1932, where he represented the *Reich* against Prussia, defended by Heller (Schmitt 1940).

As a consequence, Schmitt depicted a "total State out of energy" (Schmitt 1958), namely, an authoritarian post-liberal State. In his conception, however, this State would still be democratic because it is plebiscitary in character, and would still remain within the framework of the Weimar constitution. This would be a less extended State than the one which is "total out of weakness," and able to keep together the legal form and the political force of deciding on the enemy, of creating internal unity by excluding the anti-systemic forces and of depoliticizing the economy. Schmitt's proposal was opposed by Kelsen, that wanted to entrust the defense of the constitution not to the "neutral" power of the President, namely, to the executive power, but rather to the jurisdictional power of the Constitutional Court, in order to avoid the politicization of the Constitution.

The Nazi Era

Schmitt's endorsement of the Nazi regime was opposed also by some components of the regime itself, and this induced him to stop writing about internal politics after 1936. It also provoked his imprisonment by the Allies from 1945 to 1947, the expulsion from teaching, and a long-lasting *damnatio memoriae*. Schmitt justified his turning point with the necessity to recognize the new regime born out of the election of 5 March 1933, which in his view was a plebiscitary exercise of the constituent power that gave birth to a new provisional constitution, the "Enabling Act" of 24 March 1933 (Schmitt 1933).

Schmitt's Nazi production is marked both by continuity and discontinuity. The hostility to formalism, liberalism, and parliamentarism persists; whereas what's new is the effort to exit decisionism and to develop a "thinking of the concrete orders," or of the legal systems, partially borrowed from Maurice Hauriou and Santi Romano (Schmitt 1934). Therefore, in this phase, the legal concreteness is not based on decision, but rather on concepts such as the "popular identity based on race," the "people," the *Führung* (that takes the place of sovereignty), in opposition to the formal equality and the "impersonality" of modern laws. Thus, the idea of legal concreteness

shifts toward an organicism coupled with anti-Semitism. In turn, the role of the people changes: they become passive, while the "political" is managed by the Party and its Leader, which are not organs of the State. Having by now lost the monopoly of the "political," the State remains as an administrative system, whereas the nation expands, beyond the State, in the dimension of the Empire (*Reich*), that exercises hegemony in a "Great space" (*Grossraum*) closed to foreign political and economic interventions (Schmitt 1939). Schmitt's goal was to contribute to the redefinition of Nazi international law. However, these concepts are different from that of a *Lebensraum* grounded in race.

Toward the end of the Nazi era (Schmitt 1944), Schmitt saw legal science, which was still concrete and vital in Hegel and Savigny, turning itself into pure technique, as a consequence of the prevailing bourgeois and liberal "State of laws" and of positivism; legality and legitimacy become antithetical and no longer complementary concepts, and under pressure from the growing administrative needs to which the State is subdued in the twentieth century, legality turns into the domain of decrees. The critique of liberalism and positivism becomes a critique of the entire Modern age and of its dynamics, looking for something able to withhold them: namely, as Schmitt says quoting Saint Paul, a *Katechon*.

The "Nomos"

In the last phase of his work, Schmitt went back to international law, which he had engaged with years before, with an anti-universalistic approach (Schmitt 1926). In *The Nomos of the Earth* (Schmitt 1950) he gave a reinterpretation of the relationship between Law and politics in the Modern age that combines the historical and the spatial dimensions, further developing some older theses (Schmitt 1942). Particularly, Schmitt suggested that maritime political powers look at the world as a smooth space, to be covered on the basis of the principle of liberty and commerce, whereas the continental powers are the bearer of a sense of the border, of limit, of order.

The *nomos* is a "Measure" (it cannot be translated with "the law") that is "right" not as a natural right but just turning the original appropriation and the division of the land into a juridical principle of order (*Ordnung*), that is also an orientation and a localization (*Ortung*). The *nomos* is not legality, but rather legitimacy; it is not a set of international treatises, but rather the political-juridical origin of the concrete orders of the globe. Therefore, the *nomos* derives only marginally from geopolitics: its meaning is a juridical-political rather than a natural-geographical one.

Every time is characterized by a *nomos* of the Earth; the modern age is grounded in the crisis of the Medieval spatial order, the *respublica christiana*, not only due to the civil wars of religion but also to a "spatial revolution." In fact, the discovery of America ushers in a void of order in the historical scenario: the void space of the Oceans, and the void space of the new continent, appropriated and divided by the European powers. From the initial imbalance follows a reorganization of the world space that improves through different stages, from the tracing of *amity lines* in sixteenth century up to the Treaty of Utrecht (1713) and that continues up to the beginning of the twentieth century. This *nomos* of the Earth, the *jus publicum europaeum*, is based on the balance between Land and Sea (between continental States and England) and on the difference between Europe and the rest of the world: that is between the State and the non-State. In the European spaces the "just war" of the Christian Middle Ages turns itself in the "limited war," a military clash between States that recognize themselves reciprocally as *justi hostes*. In the non-European spaces, on the contrary, there are unlimited hostilities because the State does not exist there.

The *nomos* is therefore the last conceptualization of the "concrete Law," which is paradoxical in this case as well. Schmitt had demonstrated that the exception explains the norm, and that the unity of the State is based on the division produced by decision; now he demonstrated that the modern State system exists because outside Europe there is the non-State. Colonies are central to the modern configuration of power rather than peripheral.

In Schmitt's view, the crisis of the *jus publicum europaeum* and of the related *nomos* of the Earth is determined by the victory of the universalist ideology of the Anglo-Saxon maritime powers over the concrete pluralism of sovereignties, that is, by the triumph of economics and techniques over State-based politics. As a consequence of universalism, the war as a right of sovereignty is criminalized and the "just war" reemerges in the moralistic and discriminatory form of the "international police" against the "rogue States" (Schmitt 1938b). But the Eurocentric *nomos* has not been substituted by a new order: Schmitt took the world dualism between the East and the West during the Cold War as a clash between two universalisms (capitalist liberalism and communism), none of which is able to produce a concrete order (Schmitt 1951).

Conclusions

Schmitt's interpretation of Law is realistic but not positivistic, metaphysical, and, at the same time, historical; the genetic role of the exception and the drive toward form and order make Schmitt's thought both authoritarian and potentially revolutionary. Schmitt's scientific contribution lies specifically in his deep, genealogical gaze over the legal systems; the risk it entails, highlighted by all its critics, is occasionalism, that is the proposal of a "situated Law," which is contingent because is radically permeated by history and politics.

Since the 1980s Schmitt is one of the most studied, quoted, and translated authors all over the world as a constitutional jurist and theoretician of politics and international relations. Moreover, many philosophers have dedicated attention to his theory of Law, of Politics, and of History: among others, Walter Benjamin, Leo Strauss, Hans Blumenberg, Ernst Jünger, Erik Peterson, Jacob Taubes, Alexandre Kojève, Reinhart Koselleck, Jacques Derrida, Mario Tronti, Chantal Mouffe.

Schmitt was a brilliant and controversial thinker; some scholars maintain that he should be banned because of his support for Nazism, as if this was the manifestation of the intrinsic irrationality of his thought. The majority rejects his anti-liberalism and anti-rationalism but acknowledge that his thought needs to be studied for its heuristic efficacy in detecting the inner aporias of modern age. Yet others accept his teaching and place him among the great thinkers of realism, both in internal politics – where Schmitt is taken to be able to grasp the fact that executives prevailed over Parliaments, and to highlight the turn toward securitarian policies – and in international relations, where he is able to interpret the crisis of universalism, and the pluralistic and conflictual structuring of the world political stage.

Cross-References

- ▶ Critical Theory and International Law
- ▶ Hauriou, Maurice
- ▶ Kelsen, Hans
- ▶ Rechtsstaat
- ▶ Strauss, Leo

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Schopenhauer, Arthur

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Arthur Schopenhauer (1788–1860) was a German philosopher best known for his pessimistic views of life, his enmity to the philosophers of German Idealism, his misogyny, and his view of art as temporary redemption from the suffering of the world. Less well known is that Schopenhauer applied his philosophy at certain occasions to the political, social, and legal discussions of the day. This contribution serves to outline some of Schopenhauer's views on these issues.

Schopenhauer never drew up a political philosophy of the magnitude of Immanuel Kant or G.W.F. Hegel. His most sustained treatment of the subject comes in §62 of *The World as Will and Representation* (1818/19; abbreviated as WWV1), chapter 9 in the second volume of *Parerga and Paralipomena* (1851; abbreviated as PP2) and his lecture notes when at the University of Berlin (1820; abbreviated as VMS). He seems to have little praise for Kant in this area, even calling Kant's doctrine of right in the *Metaphysics of Morals* "a very bad book" (VMS 297). In all of his reflections on the topic, Schopenhauer takes his point of entry from Hobbes and argues that every single individual has a natural tendency towards egoism. This means that any individual will prioritize his own happiness over that of any (number of) other(s): "Every single individual makes himself into the center of the world: he takes his own existence and wellbeing as taking precedence over all others" (VMS 285). Because of such being our natural condition, Schopenhauer takes injustice to be the more original condition, which is when the structure of an individual's action is such that "he extends the affirmation of the will appearing in his body to the point where it becomes a negation of the will appearing in another individual's body" (WWV1 400; see also VMS 286). In consequence, Schopenhauer holds justice to be nothing more than the negation of injustice, but Schopenhauer equally recognizes that even in the state of nature, there is some natural affinity towards justice: "All savages know justice and injustice; they may have little to say about it abstractly but justice and injustice distinguish very well in feeling, even at times very finely and accurately" (VMS 293). In *The World as Will and Representation*, Schopenhauer explains this in terms of an innate, though weak, recognition that "the perpetrator and the victim are certainly distinct in appearances,

they are identical in themselves" (WWV1 402) – Schopenhauer's metaphysics argues that all individuals are manifestations of amorphous will and therefore, ultimately, indistinct.

The transition from a state of nature towards a public legislation occurs because of a communal desire to stave off injustice. For Kant, Schopenhauer's most immediate conversation partner on this topic, the transition from the state of nature occurs because of an ethical duty. In *Metaphysics of Morals* (1797), Kant argues that only a civil constitution can guarantee an empirical and rational title to the acquisition of property (6:264). Earlier, in *Idea for a Universal History with a Cosmopolitan Purpose* (1784), Kant emphasizes that human beings cannot develop their predispositions (*Anlagen*) properly, especially on the moral level, when they live in isolation. He would emphasize that the development of the predispositions of human nature can only take place "in the species [. . .] but not in the individual," which restricts morally any tendency human beings might have to self-isolate (8:18). Schopenhauer criticizes Kant's arguments here by claiming that there are only two types of duties: moral duties and legal duties. In Kant's philosophy, it is unclear whether the duty to unite in a society is coercive (legal) or autonomous (moral), which makes it so that "with Kant, the concept of right hovers between heaven and earth" (VMS 298). Matters are fairly straightforward for Schopenhauer: the move into public legislation takes place so as to minimize the injustice inflicted upon the self: "The doctrine of state, the doctrine of lawgiving, concerns only the suffering of injustice" (VMS 294). Any duties one might have in the state of nature are always moral; a state adds to this legal obligations.

When people leave the state of nature through such a social contract, they erect a form of state. Following his usual pessimism, Schopenhauer recognizes that a perfect state requires a perfect humanity, one wherein everyone is quite happy to sacrifice their well-being for the state: "To found a perfect state, you must start by creating beings whose nature allows them all to sacrifice their own well-being for the public good" (WWV1 406). This seems not an option, at least for now, and therefore the state must be so constituted in such a way that it navigates and channels the egoism of the people into the best possible direction and not naively assumes that human beings will act morally and legally well. The best form of state is not a republic or a democracy, according to Schopenhauer, because this naturally leads to anarchy, and he equally hesitates with regard to a monarchy because this concentrates all power into one person (WWV1 406). In his view, the best situation arises by "having *one* family whose well-being is inseparable from that of the country; so that they cannot promote the one without the other" (WWV1 406). The egoism of one royal family then extends over and benefits the entirety of the state.

Schopenhauer's reflections continue on this track in *Parerga and Paralipomena*. Anticipating Nietzsche's political philosophy, he would say that to erect a utopia, one needs "the despotism of wise men and noblemen of a genuine aristocracy, achieved by *means of procreation* through the marrying of the most noble-minded men with the smartest and most brilliant women" (PP2 273). He clearly believes in the merits of a strong hierarchical society (which is supported by selective eugenics), but he does assault the slave trade and speaks out against the sufferings of the proletarians – in fact, he sees no fundamental difference between these groups (PP2 262). His attitude is ambiguous, however: on the one hand, Schopenhauer argues that all the misery of slaves and workers is caused by the desire of the few to live in luxury (and clearly condemns such); on the other hand, "idle hands make for active minds" (PP2 262), and the leisure and luxury of the few is what drives society forwards. The progress of the few works, in the end, to the benefit of the many as their luxury trickles down: "Fifty years ago the ladies wore the same kind of cotton dresses worn today by maids" (PP2 263), and therefore the lot of the workers improves with the advances of the few. Despite some of his quasi-communist intonations, the misanthropic safe of Frankfurt admits that "the great herd of the human race always and everywhere requires leaders, guides and counsellors" (PP2 263). Schopenhauer lived and behaved in accordance with this anti-democratic

conviction, especially evident from his support for the government troops that violently put down the socialist revolution of 1848 in Frankfurt (he would even leave money to these troops in his will). Lastly, it bears mentioning that Schopenhauer adamantly believes that men, not women, ought to govern: "Women never entirely come of age, but should always be under real male supervision" because "all women, with rare exceptions, are inclined to be wasteful" (PP2 277).

Schopenhauer's reflections on the state conclude with a pessimistic note. The perfect state would "unite all the strength of humanity in itself" and succeed in "ultimately removing all kinds of evil to bring about something approaching a utopia," but "not only is the state still very far from this goal, there would still exist countless evils that are absolutely essential to life" (WWV1 413). What is more, the lack of evil and suffering would make way for "boredom, which would keep us suffering just as much ever," the state "will never abolish quarrels between individuals" and the very nature of national states naturally lead towards wars "between nations" (WWV1 413–414). And even if, "through millennia of accumulated lessons in prudence," the state would nevertheless find a way to resolve all these difficulties, then "the true over-population of the whole planet" would arise as "a terrible evil that only a bold imagination can bring before the imagination" (WWV1 414). In sum, the state of nature is a state of injustice; public legislation seeks to temper injustice; ideally, the state works to overcome injustice and suffering; the state is highly unlikely to succeed at this; if the state succeeds, overpopulation would create a terrible evil. There is no winning with Schopenhauer.

There is one element which may give cause for hope (though scant), namely Schopenhauer's view of eternal justice (mainly in §63 of WWV1). Schopenhauer's metaphysics holds that all individuals are the manifestation of undivided will. Moral beings recognize such and intuitively take up the suffering of others as if it was their own (which happens, most fluently, when one recognizes oneself in the other or the other in oneself, e.g., family members, close friends, etc.). This is his view of compassion, but it also has a repercussion for what concerns moral or eternal justice. In Kant's view, as he developed it in the Dialectic-chapter of *Critique of Practical Reason*, rational beings are to postulate the existence of God as a "mighty moral lawgiver" that aligns merit with happiness: "The highest good in the world is possible only insofar as a supreme cause of nature having a causality in keeping with the moral disposition is assumed" (5:125). For Kant, there is no intrinsic connection between virtue and happiness or vice and suffering, and so an external being has to align these concepts (which is a requirement of reason). Schopenhauer seemingly recognizes the cogency of balancing suffering/happiness with vice/virtue, but he does not require an external agent to do so. Referencing Schiller's *Resignation* (1786), Schopenhauer argues that because all individuals are expressions of the same will, the world balances itself: "The world itself is the world tribunal, the Last Judgment. If we could put all the misery of the world on *one* side of a scale, and all the guilt of the world on the other, the pointer would certainly vouch for this" (WWV1 416). Obviously, this has no bearing upon the individual who does not pierce through the illusion of individuation – who is stuck behind 'the veil of Maya' – but for those who are attuned to this more ultimate truth, it can be a release to know that ultimately the world is in balance. For more on Schopenhauer's ethics, I refer the reader to the works (full reference below) of Sandra Shapshay, Neil Jordan, and Gerard Mannion.

Note: References are to the pagination of the Sämtliche Werke *(Schopenhauer) or* Akademie Ausgabe *(Kant). Unless a translation is mentioned below, translations are my own.*

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Schultz, Vicki

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Vicki Schultz, currently the Ford Foundation Professor of Law and Social Sciences at Yale Law School, is a feminist theorist and scholar of American employment law. She is particularly well known for her writing on sex-based workplace harassment; she has advocated for reading the sex-discrimination provisions of the Civil Rights Act of 1964 in light of broader sociological understandings of Americans' relationship to work, while also employing modernized empirical methods historically associated with the social sciences.

Schultz received her Juris Doctor degree from Harvard Law School, and worked in the Civil Rights Division of the United States Department of Justice prior to her scholarly career; this career path was unusual at the time (although this sort of practical work has since become more common for American legal scholars), and deeply influenced Schultz' early work, particularly her interest in empiricism and larger-scale quantitative analysis. Schultz' earliest writing on workplace sex discrimination (particularly Schultz 1990 and Schultz and Petterson 1992) used empirical studies of the "lack of interest" defense to challenge received wisdom about workforce disparities in the wake of the Civil Rights Act, while also showing how poorly women were understood as a part of the industrial workplace. This work marries feminist theory (an area in which Schultz has been active since early in her career; see Schultz 1989), workplace sociology, and quantitative analysis; these methodologies recur throughout Schultz' career and are a defining feature of her scholarship.

The next major phase of Schultz' academic writing centered around sexual harassment. By the mid-1990s, sexual harassment was understood as sex discrimination and as forbidden under the Civil Rights Act (see Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); MacKinnon 1979; Abrams 1998); however, the dominant strand of caselaw understood sexual harassment primarily in terms of male sexual desire. Schultz challenged that view, showing (Schultz 1998) that much workplace harassment of women was either nonsexual in nature (in a fashion more closely analogous to race-based workplace harassment) or deployed sexual language and imagery specifically to denigrate female employees, rather than to provide sexual pleasure for the harasser. As Schultz argued, courts that understand sexual harassment in terms of erotics rather than power permit behavior that marginalizes working women and perpetuates gender hierarchies. A striking feature of Schultz' writing on sexual harassment is that Schultz differentiates sexuality or romance in the workplace (phenomena she views as largely positive, given how much of people's social lives occurs at work; see Schultz 2000, 2003) from harassment, which she identifies more closely with hierarchy and power differentiation. In *The Sanitized Workplace* (Schultz 2003; see also Schultz 2018) Schultz argued that corporations have hijacked sexual harassment law, originally a tool to remove burdens on women's participation in the workforce, in order to implement a Taylorist (see Kanigel 2005) model of workforce management and discourage employee fraternization. Schultz called, instead,

for freedom in workplace sexual expression, mixed with close scrutiny of women's presence in a given workplace to determine how empowered they might be to set the tone for that expression. This work connected Schultz more firmly to occupational sociology and places her in opposition to feminists (particularly MacKinnon) who are more skeptical of individual choice and who view erotics as a site of potential oppression.

Schultz' more recent scholarship has gone past the ambit of the Civil Rights Acts of 1964 and 1991, considering how a host of other statutes affect women's and other marginalized people's engagement with the workforce. In particular, Schultz has advocated for greater workplace flexibility as a feminist project, using the Family Medical Leave Act, the Pregnancy Discrimination Act, and the Americans with Disabilities Act as models for how American labor law should accommodate care work and other domestic obligations that predominantly impact women (Schultz 2010, 2013). This interest in broader interactions between women, work, and culture can be understood in light of contemporaneous work in vulnerability theory and feminism (see, e.g., Fineman 2013), but Schultz's approach is distinctive within that subfield for its empirical grounding and its interest in epilegal actors such as human resources departments.

Vicki Schultz has also impacted American legal feminism as a professor at Yale Law School. A number of sociologically minded law scholars have been trained by Schultz and deeply influenced by her work; these scholars work in a variety of fields (e.g., Dara Purvis in family law, Jessica Clarke in constitutional law, or Joshua Katz in labor law) but show the importance of Schultz' methodological and theoretic advances.

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Schwarzenbach, Sibyl

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Over a long career in legal, social, and political philosophy, Sibyl Schwarzenbach has made significant contributions to feminist theory, the theory of (civic) friendship, the philosophical study of the US constitution (especially from a feminist perspective), and the history of political thought. The central themes of her work relate to the extent to which women's work and women's lives have been adequately noticed and theorized by those seeking to understand the state, the law, the economy, and the society. Her most important work, *On Civic Friendship: Including Women in the State*, takes up the question, "what holds a good and just society together" (Schwarzenbach 2009: 1). Many philosophers have addressed this

question. Schwarzenbach's answer takes inspiration from Aristotle's claim, "when men are friends they have no need of justice, while when they are just they need friendship as well, and the truest form of justice is thought to be a friendly quality" (in Schwarzenbach 2004: 19). Similarly, she notes that the John Rawls of *A Theory of Justice* understood stable justice to depend upon a sense of "fraternity" among citizens (Rawls 1974). But Schwarzenbach is dissatisfied by the exclusion of women's perspectives from both the highest (political) form of friendship envisaged by Aristotle and by the concept of fraternity, with its connotations of brotherhood and relations between men. She invites readers to consider an answer to her key question that proceeds not just from the perspective of men, but one that fully and radically includes women. Only by doing so, she argues, can we develop a form of civic friendship that can support a just state.

Canonical legal, political, and social philosophers have led us down the wrong path in their answers to her key question because when they have considered the production and reproduction of society, they have not noticed the work done by women. From Locke's mixing theory of labor to Marx's belief that the proletariat could realize true freedom only through communal ownership of the means of production, male theorists have failed to notice a fundamental and essential form of labor and the role that it plays in maintaining a society. This is the work of caring for others, not only providing practical, material care to the young, the old, the sick, but also nurturing, teaching, and providing *friendship* and support to all. Without this work, none of us would grow and flourish. This work, done properly, is what Schwarzenbach calls *ethical reproductive praxis* (Schwarzenbach 2009, 2015).

Schwarzenbach distinguishes *praxis* from *ethical reproductive labor*, i.e., work done as drudgery or for pay, rather than work freely undertaken and to promote the good of the other (not one's own good or for financial reward) (Schwarzenbach 2009, 2015). Like some other fine-grained distinctions in Schwarzenbach's philosophy, one might wonder whether this line is clear: for example, a tired mother may deeply love her son and want to promote his welfare while still feeling the drudgery of caring for him.

The overwhelming majority of *ethical reproductive praxis* has been done by women. Yet, women have been absent from theories of the state, from theorizing about the state, and from even being mentioned in such fundamental pillars of the state as the US constitution. For Schwarzenbach (2004), this invites the question as to why women should accept the authority of the constitution at all. But the absence of women's voices from the process of drafting the constitution, and continuing into much of the history and theory of interpreting the constitution, matters not merely for reasons of representation (important though they are). Repeatedly, Schwarzenbach explains (a) the significance of *ethical reproduction* as a category of production, both for the bare fact of maintaining a citizen body and for its rich potential as model for civic friendship in a more just state; (b) the neglect of this by male theorists (Locke, Marx, Kant, Rawls), by political figures (Jefferson, Madison), as well as by lawyers and judges engaged in constitutional interpretation; and (c) the fact that the overwhelming majority of this work has historically been done by women and that it remains the case today that the majority is still done by women (see, inter alia, Schwarzenbach 2004, 2005, 2009, 2015). These circumstances have resulted in the process of developing the most fundamental building blocks of the state excluding from its remit the business of *ethical reproductive praxis*, to the very great detriment of the state and its citizens.

In situating women's role in *ethical reproductive praxis* as being authoritative for an understanding of civic friendship, Schwarzenbach might be taken to mean that women have an essential nature. But this is emphatically not Schwarzenbach's view, and she goes to some lengths to make clear her claim, namely, that women's socially allocated role as purveyors of *ethical reproductive praxis* must be the foundation from which a praxis of civic friendship is developed in order to foster and sustain a more just state. This follows not from women's biology nor any essence that they might be presumed to

have. It arises purely and contingently from the fact that social and political arrangements have over centuries steeped women in the work of caring for others *for the sake of the other's flourishing*. Women's experience of this is crucial to understanding *ethical reproductive praxis*, but it is not natural or inevitable; hence, Schwarzenbach distances her approach from a feminist theory of care (Schwarzenbach 2009). Moreover, Schwarzenbach is keenly aware that differently situated women – in terms of class, race, (dis)ability, e.g. – would have different experiences of this work, and she does take care to disavow the notion of a "universal" woman.

She also contrasts her vision of "positive" civic friendship to solidarity, which she rejects as a "negative friendship" (Schwarzenbach 2015). What defines the relation underpinning *ethical reproductive praxis* is not a shared enemy (as in traditional solidarity) nor even a goal or political struggle (*pace* Scholz 2009), but rather the friendly desire to promote the good of the other for their own sake. Yet, to dismiss the value of solidarity in the face of oppression as a "negative" form of friendship, because it is rooted in shared opposition to an other, rather than in a desire to promote one another's flourishing (Schwarzenbach 2015), fails to apprehend the heuristic and psychological value in being able to identify and support one another in the face of an oppressor (cf. Shelby 2002).

For Schwarzenbach, what *ethical reproductive praxis* ultimately produces is *philia*, friendship, but not the now most familiar Aristotelian form of friendship, i.e., the narrow and exclusively male friendship of political equals, which, like contemporary ideals of friendship, is rooted in sameness – sameness of experience, social position. Rather, it is another form of Aristotelian friendship, the friendship of difference, which exists between parents and their children, teachers and students, and in nurturing relations that promote the flourishing of the different parties for their own sake. If justice requires friendship in order to survive, then across large and diverse societies, what is needed is this *difference* friendship (Schwarzenbach 2015).

So, in a large, diverse society, *ethical reproductive praxis* promotes and sustains the kind of civic friendship, or *philia*, that is essential, Schwarzenbach argues, to underpin commitment to justice. Translating *ethical reproductive praxis* from the practices and attitudes associated with a caring difference-based friendship with a specific other to a civic friendship between millions of citizens is achieved by designing policies that promote the welfare of the unknown fellow citizen for her own sake. Such policies include an interpretation of Rawls' difference principle that goes far beyond Rawls' own vision in endorsing worker control of firms, community organized care for children and the elderly as other feminists have argued, and proportional representation as a way of better promoting friendship among citizens. Schwarzenbach also endorses national service for young people and tentatively proposes international volunteering by young people as part of globalizing civic friendship (Schwarzenbach 2009). Undoubtedly, some of her policy proposals are better thought out than others (Engster 2011). Nevertheless, her analysis of the implications of "including women in the state" raises profound questions about what binds a just society together.

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Secession

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Secession as a Contested Concept

The word "secession" in English – as well as cognates in many other Indo-European languages – originate in the Latin word "secessio" meaning "to go away" or "to depart". It is in this sense that the word was first used to describe the withdrawal in 494 BCE of the Roman people – *populus* – from the Senate and the city of Rome to a hill outside city which was later named, in honor of their *secessio,* the Sacred Mount. (Hillard 2008, pp. 165–166). In the present context, "secession" is taken to mean a withdrawal (detachment) of territory and people living on it, from an existing state.

Secession is, at least among legal scholars, a much contested concept. Legal – and other scholars – differ in their views on:

1. The means which are used to affect the withdrawal or detachment: is force or threat of force necessary to effect secession?
2. The effect of the withdrawal on the territorial integrity of the original or "host" state from which the withdrawal is made. Does secession, necessarily, breach the territorial integrity of the original state?
3. The effect on the legal and political identity of the original state: does the original state, necessarily, retain its legal and political identity following secession or not?

Restrictive Definitions of Secession

James Crawford defines secession ". . . as the creation of a State by the use or threat of force without the consent of the former sovereign . . . (Crawford 2006, p. 375). If a state, without a threat of force, consents to a withdrawal of a part of its territory and recognizes the new state formed on that territory, other states can and do follow suit (and the new state gains membership in the UN); if this consent is lacking, international recognition becomes problematic. Moreover, as Haverland (2000) suggests, consenting to a withdrawal of territory looks like a *cession* of territory and hence does not require a separate category, that of *se*cession.

Further, Crawford's definition assumes that for a secession to take place, it is necessary that the original state oppose it; if so, it is necessary that the original state continues to exist after the secessionists have declared their withdrawal from it. If the original state ceases to exist, the new state is created not through secession from the original state but through its dissolution. The requirement of the continuity of the original state greatly reduces the number of secessions: in many cases, the end result of the withdrawal of one or more territorial units from a state is its dissolution; and in all these cases, according to Crawford, there is no secession. Thus the withdrawal of two federal units, Croatia and Slovenia, from the Socialist Federative Republic of Yugoslavia (SFRY) in 1991, resulted in the dissolution of that state; likewise, the withdrawal of Norway (without the use or threat of force) from the United Kingdoms of Sweden and Norway in 1905 resulted in the dissolution of the latter. These were all dissolutions of states and, therefore, not secessions.

These two requirements – the use or threat of force in effecting secession and the continued existence of the original state – make secession a very rare phenomenon. There is only one detachment of territory by military force, the one that led to the creation of Bangladesh in 1971, in which the original state, Pakistan, retained its previous legal and political identity (Pavković and Radan 2007, pp. 102–109). The detachment of Kosova from Serbia in 1999 by military force (of NATO) is very similar, but, unlike Bangladesh, Kosova is not (as yet) a member of the UN and its independence has not been recognized by its original state (Kubo 2011). Other cases of violent detachments which left the original states intact – such of the

Irish Free State from the UK in 1922 (Kissane 2003) or East Timor from Indonesia in 1999/2002 – were officially deemed to be cases of decolonization and not secession.

Permissive Definitions of Secession

The first requirement of secession – the threat of or the use of force – has been questioned by Pavković and Radan (2007 p. 7) using the analogy of divorce: since we do not deny the title of "divorce" to a legal termination of a marriage to which both partners consented, there is no reason to deny the title of "secession" to a withdrawal of a territory to which both parties, both secessionists and original state, consented. When asking whether a state has been created by secession from another state, we are not asking by which means – consensual or nonconsensual – the state has gained independence; thus if we say that those states which were created without any threat or the use of force – such as Montenegro, Iceland, and Norway – were created by secession, we are not committing a conceptual/categorical error.

While rejecting both the first and the second requirement (the necessary continuity of the original state) Radan (followed by Anderson 2013) proposes a more permissive definition:

> Secession is the creation of a new state upon territory forming part of, or being a colonial entity of, an existing state (Radan 2008 p. 18)

According to this definition, any withdrawal of territory resulting in the creation of a state would count as secession, regardless of the *means* by which it was carried out or its impact on the continuity or the territorial integrity of the original state; since *any* creation of a new state (except, possibly, the unification of two or more states) counts as secession, in the post-1945 period, there were well over hundred secessions. In all of those cases, Radan notes, there has been a transfer of sovereignty from the original (or colonial) state to the new state; it is this transfer of sovereignty from an existing state to a new one that underpins secession a separate category of state creation.

This inclusive definition appears to group together two types of creation of new states: state creation which breaches the territorial integrity and political unity of UN member states and state creation through decolonization which does not do so; the first is prohibited by the UN Charter and UN declarations, whereas the second, decolonization, is deemed, in UN declarations and conventions, to be a permissible (and necessary) exercise of the right of peoples to self-determination. In this way Radan's (and Anderson's) definition miss an important aspect of secession, the aspect which makes secession so contentious: unlike the creation of states by decolonization and by unification secession *breaks up* the territorial, political, and juridical unity of states (see Pavković 2015).

Christine Haverland's permissive definition also misses this aspect of secession; according to her, secession is:

> . . ..the separation of part of the territory of a State carried out by the resident population with the aim of creating a new, independent State or acceding to another existing state. (Haverland 2000, p. 254)

This implies that there is no difference between secession as the creation of a new state (as Radan and Crawford defined it) and the transfer of territory and its population to another state, commonly called "irredenta" (in the sense of a "redemption" of territory). Yet as Radan (2008, p. 28) notes the creation of a new state involves only two parties ("the resident population" of the secessionists and the original state) whereas irredenta involves three: the irredentist "population," the original state, and the receiving state. The creation of a new state introduces a new sovereign actor in the international system and a new apparatus and new symbols of government. Irredenta, apart from the change of jurisdiction from one state to another, requires only a change of borders between the existing states. Interestingly, according to this definition, the separation of Bangladesh and of Kosova – which were "carried out" by outside military force and not by their "resident population" – would not count as secession.

Each of the above three legal definitions singles out one feature or aspect as the distinguishing

mark of secession: the use or threat of force, the transfer of sovereignty, and the agency of the "resident population" in effecting the separation. The first definition excludes most withdrawals of territory resulting in the creation of new states while the second and third group together withdrawals of territory which have highly disparate outcomes.

Secession in Social Science: A Few Definitions

According to Michael Hechter (1992, p. 277), "[*P*]*ure* secession occurs when a highly effective state permits a secessionist territory to withdraw from its embrace. . ." Only two secessions in the past were "pure": that of Norway in 1905 and of the Irish Free State in 1922. Contrary to Crawford, Hechter does not consider the detachment of Bangladesh a "pure" secession because Pakistan in 1971 was not a "highly effective" state. Hechter wants "pure" secession to be an outcome of rational choice of both the secessionists and the government of the original state; in the above two "pure" secessions, the original states rationally "chose" to let go of their territory. If a state is not "highly effective," it has no means to counter, effectively, secessionist demands and thus the detachment is a result of its weakness, not its choice. In many cases, for example, SFRY and the USSR, these weak states dissolved. Hechter's account of the above three cases of secession is, however, questionable. In 1971 Pakistan was forced to "give up" Bangladesh because its army in Bangladesh was defeated by a superior military force, the Indian army. There was no foreign military, let alone a militarily superior, force confronting the UK government in Ireland in 1920/22 and hence there is no point in comparing these two secessions in terms of "effectiveness" of the original state. Contrary to Hechter, the United Kingdoms of Sweden and Norway was in 1905, as a state, much less effective than Pakistan was in 1971: it had no unified army nor administration and thus no effective means to counter the secessionist demands of the Norwegian government (and that state, like the SFRY, dissolved as a result of the secession). Contrary to Hechter, one can argue that in all three cases, the governments of the original state had, for various reasons, no choice but to acquiesce or agree to the separation of the new states; to say that some of them rationally chose to agree to the separation, but others did not, is, at least, misleading.

Alexis Heraclides, while not endorsing a rational choice theory of secession, restricts secession *stricto sensu* to territorial separatism characterized by "unilateral and abrupt move to independence. . ." (Heraclides 1991, p. 1). Like Crawford's, his definition excludes mutually agreed or consensual separations such as those of Norway, Montenegro, Iceland, and South Sudan as well as Hechter's "pure" secession of the Irish Free State. But his requirement of "abruptness" may in effect exclude not only the separation of Bangladesh (which Crawford classifies as a secession) but almost all other unilateral separations: prior to the declaration of and the achievement of independence, secessionists need to mobilize their target population as well as outside support and this makes their declaration a likely outcome of their preceding campaign. Although the parliamentary declarations of independence of Bangladesh in 1971 and of Kosova in 1990 were responses to specific coercive actions of central governments, they were preceded by a period of secessionist mobilization and political conflict which made such a declaration a likely response to any attempt of the central government to assert its authority on the secessionist territory. However dramatic these declarations of independence are made to appear, the secessionists leaders, their followers, as well as their opponents are not taken by surprise.

Unlike those who assess separations on the basis of the effectiveness of original states or their abruptness, John R. Wood contrasts secession to integration and argues that secession is

> . . .an instance of political *dis*integration, wherein political actors in one or more subsystems withdraw their loyalties, expectations, and political activities, from a jurisdictional center and focus them on a center of their own. . .secession is disintegrative in the fundamental sense that it involves the dismemberment of a territorial state, and not just attacks on, or the overthrow or

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> replacement of, its existing institutions. (Wood 1981, pp. 111–112)

And the end result of this process, he writes a few sentences later, is "the birth of a new nation-state" (Wood 1981, p. 112).

Wood's definition thus incorporates several elements found in Radan's and Haverland's legal definitions: secession results in the creation of a new state on the territory of a previous state (Radan), and the process of secession involves the actions of "resident population" (Haverland). Wood, however, offers a fine-grained account of these actions (the withdrawal of "loyalties, expectations, and political activities") and points out that secession involves "dismemberment" of a territorial state, that is, the fragmentation of the territory of the original state.

The process of secession, as outlined by Wood, may or may not involve the threat or the use of force and it may or may not involve unilateral secessionist action. And, like Crawford, Wood recognizes the importance of international recognition of the new state: *no* ". . .. 'successful' secession is complete until it has become institutionalized in a new government, legitimate at home and recognized abroad" (Wood 1981, p. 133). International recognition of the new state is thus necessary for a *successful completion* of a secession but is not a necessary element in the process of seceding from the original state.

Wood's definition effectively distinguishes secession from decolonization (which does not involve a dismemberment of a territorial state) and from irredenta (which does not result in the "birth" of a new state). More importantly, perhaps, his definition allows for the same process of secession – as a dismemberment of a state – to be also regarded, in some of its aspects, as a case of decolonization. Thus the creation of the Irish Free State in 1922 involved a partial dismemberment of the United Kingdom of Great Britain and Ireland but the British government and the Irish secessionists agreed to carry out the legal process of separation within the existing framework of decolonization: at first the Irish Free State gained, like Australia and Canada before it, a dominion status under the British sovereign.

Secession: Normative Assessments

Restrictive definitions of secession which allow for only a few past secessions suggest that, because of their minuscule number, there is no need for special normative evaluation of secessions. Permissive definitions, like Radan's, suggest that the core feature of secession – the transfer of sovereignty from the original state to the new one – stands in no need of normative evaluation. Transfer of sovereignty, by itself, is neither good nor bad, neither right nor wrong; it is the consequences of such a transfer or the way it is carried out that are subject to possible normative evaluation. Likewise, the resident population's "carrying out" the separation, that is, separating from its original state, is neither right nor wrong by itself – it is the way that the separation is carried out or its effects that may be evaluated in these or other normative terms. These permissive definitions suggest that acts of secession, by themselves, are not subject to normative evaluation; it is the way these secessions are carried out and their consequences that may be harmful/beneficial or wrong/right. For example, it is not an act of separation but of using violence to effect or to prevent it that may be wrong in some (and harmful in almost any) circumstances.

In contrast, Wood's definition specifies the actions which are involved in every secession: the withdrawal of loyalties, expectations, and political activities and dismembering the state. Each of these is a potential subject to normative evaluation. Of any one of those, one can ask: is it right or wrong or is it harmful or is it justifiable? Even so, one could argue that these acts, in at least some cases, cause little if any harm and breach no significant political norms and that are, therefore, normatively neutral. One can perhaps argue that any one of those acts, including the dismemberment of the original state, performed by the Icelandic or Norwegian or Montenegrin secessionists caused no harm to any group of people and did not breach any political or ethical norms. In contrast, one can argue that the dismembering the state of FR Yugoslavia (including Serbia) in 1999 by armed force harmed in various ways both the inhabitants of Yugoslavia and of Kosova and

that these harmful act(s) require a normative justification.

Academic philosophers construct normative theories of secession in order to provide a systematic and coherent justification of unilateral or non-consensual secessions; consensual secessions are often not considered to be in need of special normative justification. Unilateral secessions are, for normative theorists, not normatively neutral: they are either justified or not.

The first normative theory of secession, formulated by Harry Beran in 1984, appealed the norm of democratic majoritarian decision-making: any group, with a common habitat on a territory, had a right to secede provided the decision is reached by democratic means, the secession does not cause undue harm to others and similar (recursive) secessions are allowed to smaller groups within the initial secessionist group (Beran 1984). Beran defines secession as

> . . ..the withdrawal, from an existing state and its central government, of part of this state, the withdrawing part consisting of citizens and the territory they occupy. (Beran 1984, p. 21)

For Beran, decolonization is only a peripheral problem and his discussion is restricted to secessions from "unified" states; further, by comparing secession to a divorce between two persons, Beran effectively excludes irredenta whose result – the transfer of a territory from one state to another – is not comparable to divorce. In its scope, his definition is roughly equivalent to that of Wood: it includes both violent and nonviolent and unilateral and mutually agreed secession. Buchanan (1991) offers a remedial theory of secession, according to which a secession is justified as a remedy of grievous harm/wrong, such as a threat of genocide or systematic abuse of human rights, perpetrated by the state in which the group is residing; in contrast to Beran, for a secession to be justified, there is no need for a democratic decision nor is it necessary for secession to avoid (nongrievous) harm to other, non-secessionist groups. According to this theory, smaller groups within the principal secessionist group have no right to recursive secession, in part because they are not exposed to the grievous harm/injustice which can alone justify secession. In spite of rejecting Beran's democratic theory, Buchanan appears to assume an inclusive definition of secession similar to Beran's (see also Dietrich 2011).

All normative theorists search for *universal* moral/political norms that would justify any creation of new states by secession. Hence they prefer inclusive and permissive definitions of secessions; were they to restrict secession only to a few selected cases (as Crawford and Heraclides do), it would be difficult to justify their search for universal norms.

Conclusion: Why Define Secession?

Legal scholars appear to differ in their views regarding the possibility and/or desirability of legal *regulation* of secession. Crawford holds that international law cannot and should not regulate the creation of new states by secession, which are in any case very rare. Radan and Anderson – as well as many others – believe that there is an emergent legal prescription in international law and practice which may in time come to regulate all or at least most secessions; according to them, at present international law regulates only colonial secession, that is, decolonization, which in any case has been mostly completed. Theirs as well as Crawford's definition of secession reflect, at least to some extent, their respective views on the legal regulation of secession.

In contrast, social scientists aim to explain why and how secessions happen; in short, they search for explanatory theories of secession. Their choice of explanatory theory may also be reflected in their definition of secession. Hechter's preference for a rational choice explanation leads him to advocate a highly restrictive definition of secession. Wood's preference for a dynamic explanatory theory, in which explanatory variables interact in a variety of ways, is reflected in his highly permissive definition of secession. As Wood has emphasized, secessionist movements' professed aims often oscillate between separatism – the striving for an increased autonomy from the political center – and secessionism.

Hence secessionism cannot, in practice, be sharply or categorically differentiated from various forms of political separatism. Those who, like Wood, espouse dynamic explanatory theories that allow for multi-path interactions of variables, assume a permissive definition similar to his (see, for example, Horowitz 2000; Siroky 2011). The advocates of dynamic explanatory theories obviously do not think that secession needs to be defined in terms of a single set of characteristics or variables, which would categorically differentiate it from any other political process.

The common ground between legal, normative, and social science definitions of secession is likely to be found in a permissive or inclusive approach, perhaps best exemplified in the definition proposed, more than three decades ago, by John Wood.

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Selden, John

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Early Works: Demystifying British Identity and Church Law

John Selden (1584–1654) was one of the most influential legal scholars, parliamentarians, historians, and Orientalists in early modern Europe. Born in Salvington, Sussex, Selden enrolled at Oxford in 1600 but left in 1602 without graduating. He was called to the bar in 1612. Robert Bruce Cotton, antiquarian and Member of Parliament, was one of his earliest patrons. Cotton gave Selden access to his rich law library and encouraged him to research the parliamentary records held at the Tower of London. In his first publications, such as *Analecta Anglobritannica* (written 1608, first published in 1615), *The Duello or Single Combat* (1610a), *Janus Anglorum facies altera* (1610b), *England's Epinomis* (1610c), and *Titles of Honor* (1614), Selden brought his historical knowledge to bear on topics of contemporary relevance and urgency, including the vexing issue whether the Norman Conquest disrupted the continuity of the common law.

In these early and later works, including *Mare clausum*, Selden developed an influential

formulation of British identity. In his time, "Britain" was used to describe both the island and an ancient kingdom supposedly founded by the Trojan prince, Brutus. Some of Selden's contemporaries revelled in this mythical genealogy; others rejected it. Both groups held that the Norman Conquest shattered constitutional continuity. But Selden embraced every conquest and invasion – Danes, Gauls, Romans, Normans – and argued that since the victors married the conquered, and their children blended languages, customs, and laws, the discontinuities are signs of growth, not of disjunction.[1] The British people are a union of peoples, he proclaimed, even if some of them, such as the Welsh, retain some markers of a distinct identity. The British legal system is a living blend with new and very old parts. In stark contrast with national purists and ancient constitutionalists, including John Dee and Hugo Grotius, Selden viewed radical change as part of identity, not its destruction. Selden's commentary on Michael Drayton's 1612 *Poly-Olbion* added to this vision of Britain a historical claim to dominion over all seas, which received Britain's rivers and the essence of sovereignty that coursed through them.

De diis Syris (1617, 2nd ed. 1629) was Selden's first major publication in comparative mythography. Showcasing Selden's wealth of erudition, it demystified ancient gods by tracing their origins to elements of nature – such as stars, rivers, animals – or to fictional or idealized historical heroes, founders, and kings. Selden also traced the transmission and adaptation of such gods, especially those that appear in the Bible. Yet his *Historie of Tithes*, published the next year, caused greater controversy. Here Selden denied any divine or biblical grounds for the clergy's right to tax. In the vicious polemic that followed, King James VI/I forbade Selden to answer his critics.

[1] Toomer (2009) John Selden: A Life in Scholarship. Oxford-Warburg. 99, 121, 138, 180–181.

Prison and Parliament

This incident may have been the reason for Selden's research and perhaps drafting role in the Protestation of 1621, a reaffirmation by the House of Commons of their freedom of speech. In response, King James dissolved Parliament. Selden, together with Edward Coke and other scholars and parliamentarians, was imprisoned in the Tower. After his release, Selden was elected to Parliament in 1623 and again in 1626.

While he was an MP, Selden served as counsel in *Darnell's Case*, a.k.a. the *Five Knights' Case*. The knights petitioned for a writ of habeas corpus after they were imprisoned for objecting to Charles I's forced loans. Selden argued that their imprisonment violated Magna Carta. Though he lost the case, his emerging view of the common law's protection of enumerated individual rights prompted Selden to help draft the 1628 Petition of Right. This Petition, invoked during the English Civil War (1642–1651) as well as by the American Founders in the 1760s–1770s, has been as influential as Magna Carta or the 1689 Bill of Rights throughout the subsequent history of the English-speaking world. Back to the Tower Selden went.[2]

While in captivity, Selden performed two extraordinary feats. The first was to learn more about Judaism than any of his English contemporaries.[3] It is still not clear how he did this with limited access to books and visitors. Selden was eventually allowed to borrow the Westminster Cathedral Library's copy of the Babylonian Talmud, but in works he wrote in prison, he cited even contemporaries such as Menasseh ben Israel and prepublication manuscripts including Leo of Modena's *Riti Hebraici*. Eventually Selden built up England's largest collection of Hebraica and donated it to the Bodleian Library.[4]

[2] Berkowitz (1988) John Selden's Formative Years: Politics and Society in Early Seventeenth-Century England. Associated University Press. Christianson (1996) Discourse on History, Law, and Governance in the Public Career of John Selden, 1610–1635. Toronto.

[3] Rosenblatt (2006) Renaissance England's Chief Rabbi: John Selden. Oxford.

[4] Toomer 445, 460–461, 505.

The second feat was to design a writing project that occupied him from 1629 until his death in 1654. Over this quarter-century, Selden published *De successionibus in bona defuncti secundum leges Ebraeorum* (1631) on the Jewish law of inheritance; *De successione in pontificatum Ebraeorum* (1636) on the succession of high priests; *Mare clausum*; a book on the law of nature and nations according to the Jews (*De jure naturali & gentium, iuxta disciplinam Ebraeorum*, 1640); a work on Jewish calendars (*Dissertatio de anno civili et calendario reipublicae Judaicae*, 1644); a book on Jewish marriage laws (*Uxor Ebraica*, 1646); an edition of *Fleta*, a thirteenth-century common law treatise to which Selden appended a dissertation on legal evolution; and three volumes on the Great Sanhedrin (*De Synedriis et praefecturis juridicis veterum Ebraeorum*, written 1629–1638, published 1650–1655).[5] These works are connected in numerous and various ways. Throughout this corpus, Selden refers not only to books he already published but also to texts he was planning or already working on. *Mare clausum* and *De jure naturali* illustrate the deeper connections.

International Law for the British Empire

In the Tower from 1629, and later in Marshalsea prison, Selden rewrote his early draft of *Mare clausum* in response to Grotius's *Mare liberum* (1609) and *De iure belli ac pacis* (1625). Grotius argued that each state had a natural right to navigate the high seas and trade globally, and the very nature of the high seas made it impossible to claim exclusive use over them. By contrast, Selden developed a history of customary international law in which at any given time one chosen state – Minos, Rhodes, Carthage, Rome, and others – always had effective dominion over the seas. Britain is the latest in this line and, given Selden's own codification of this dominion as the law of nations, may be the last and ever-lasting sovereign over the seas.

Against Grotius, Selden further argued that mathematics, astronomy, geophysics, and other sciences have made everything measurable; therefore nothing by its nature necessarily remains common property. Positive law therefore potentially covers the whole world, whether known or yet to be discovered. European empires need international law to regulate or at least frame disputes over resources which, despite Grotius's claims to the contrary, are neither unlimited nor infinitely renewable. At the same time, Selden's template for imperial exceptionalism was based partly on Grotius's free trade argument which, especially in its *De iure belli ac pacis* reiteration, posited new individual and corporate rights that were subservient to the sovereign state, which could use municipal law to abrogate divine, natural, and international law with great autonomy.

Selden's *Mare clausum* first appeared in 1635. Charles I ordered a copy to be deposited at the Royal Council, another at the Court of Admiralty, and a third at the Court of Exchequer, and instructed lawyers and statesmen to judge cases and formulate policy with reference to Selden's justification of Britain's global dominion. Selden's template of legal exceptionalism proved widely attractive. At one point or another, French, Swedish, American, and even Belgian arguments for world dominion explicitly followed Selden's template.

International Law and Hebraism

By contrast, Selden's other major work on international law, *De iure naturali*, has been described as the "dead end" that caused "much of the neglect of Selden that followed."[6] Yet in a sense, *De iure naturali* extends the advocacy for British world dominion in *Mare clausum* into a system of international law grounded in the seven Noahide precepts. These precepts stipulate functioning courts of justice and forbid idolatry, blasphemy, murder,

[5] Haivry (2017), John Selden and the Western Political Tradition. Cambridge.

[6] Malcolm (2018) The Talmudist in the Tower. Standpoint.

illicit sexual relations, theft, and eating part of a living animal. Selden set out to show that these precepts were not given to the Jewish nation as a special favor but were revealed to all mankind twice: first through Adam and then Noah. They should serve as the cornerstones of *ius gentium*.

Selden was accused of "Judaizing" Christian law in this book.[7] His most avid followers, including Richard Cumberland and Samuel Pufendorf, regarded his elevation of Jewish laws to the status of international law as an eccentricity. Selden's most authoritative biographer, Gerald Toomer, suggested that Selden appreciated self-contained legal systems, and after studying English, Roman, and canon law, he extended his inquiries to Jewish law.[8] The primary sources raise another five possible reasons why Selden turned Jewish law into the foundation of international law.

First, it fits his secularizing agenda.[9] Selden focused on the Talmud, Maimonides, and other sources absent from Christian international law in order to sidestep irresolvable debates based on Christian exegetical traditions, but without losing relevance to Christian discussions. Only Jewish sources could accomplish this. An added benefit was Selden's argument that Talmudists are both theologians and lawyers. With the expansion of the Jewish legal system, risks of a rift between priests and lawyers that landed Selden in trouble, and fueled his fears for Britain during the Civil War, would disappear.[10]

Second, by Selden's standards Jewish legal systems embodied the highest quality of law. Roman and English laws also contain vestiges of divine law, but the Jewish tradition is the most continuously active.[11] It is a living tradition, not mere history. In Selden's time it was still common to argue that ideas that could be traced back further were better than later innovations, because good ideas withstand the test of time. The Renaissance revival of ancient texts invoked this principle. By contrast, Selden thought it was possible to adhere faithfully, over centuries, to something worthless and false, such as cannibalism or superstition. Moreover, comparative and historical analysis and other methods to distil a natural common core of all laws are necessarily limited. Divine and natural law merely permit ranges of behavior. Natural laws in particular can be limited and transformed, like Theseus's ship, by "the conuenience of ciuill societie."[12] A nation's lived historical experience, customs, and culture will narrow the permissible range further and define a nation's legal system, until the laws of historically diverging nations barely resemble each other. As Selden explained in his notes to Fortescue's *Laudibus*:

> Divers nations, as divers men, have their divers collections and inferences; and so make their divers laws to grow to what they are, out of one and the same root.

Many nations are corrupted by sin or ignorance, for instance, when they misunderstand nature's message about God's existence and character and end up worshipping stars, rivers, and other anthropomorphized natural phenomena.[13] When the natural history of religious corruption that Selden described in *De diis Syris* is added to his account of the inevitable historical diversification of nations, it becomes clear why he thought that even a systematic comparison of past and present legal systems cannot reveal their shared core. The closest one can get to that true core, according to Selden, is Judaism.

Third, Selden argued that while Jewish law came closest to the original divine formulation, it did not create enforceable obligations. Selden did not propose Judaizing Britain. Instead, he cited Maimonides that gentiles were encouraged to pray and sacrifice to the true God even if they did not convert to Judaism, in which case they still had a reasonable hope of salvation. Thus the Judaism Selden discerned created space for

[7] Rosenblatt 139–141, 148–151.

[8] Toomer 44.

[9] Rosenblatt chapters 6 and 8. Somos (2012) Selden's Mare clausum: The Secularisation of International Law and the Rise of Soft Imperialism. Journal of the History of International Law 14:287–330.

[10] Toomer 505.

[11] Haivry 271, 281, 349.

[12] Selden "Notes to Fortescue," 19.

[13] Toomer 217–220.

toleration. Even radical seventeenth-century English toleration, such as John Locke's, excluded Catholics. In Parliament, Selden wished to open education and political office to Catholics, as well as to women. Expanding the scope of his reconstruction of Jewish law was his strongest argument. Judaism framed as the best approximation of divine and natural law thus helped Selden cut the Gordian knot at the heart of the Civil War, namely, the tension between authority and individual reason or conscience.[14]

Fourth, Selden thought that Jewish law resembled English common law. He found organic growth in both systems. In particular, he equated judicial common law with the oral Torah, and parliamentary statutes with the Sanhedrin's decisions.[15] Selden argued that legal systems must remain open-ended and a lawyer who lives in a particular historical moment cannot find universal principles, only the customary laws of the day. That is because we do not know the future. Not Grotius, nor other natural and civil lawyers, but only the English common law and Jewish law endogenize organic growth. Constitutional cataclysms, such as the Roman destruction of the Temple or the Norman Conquest, are absorbed by the constitutional identity of the nation.

The final reason is faith. *Fides sunt servanda*, though an old idea, is the best known principle from both Selden and Grotius. Selden chose Jewish law as the basis of international law because despite their tribulations and constitutional disruptions, the Jewish people have kept their faith. That is the key to their unique role.[16]

Legacies

That Selden's reputation waned due to *De iure naturali* is overstated. Rosenblatt shows that Isaac Newton; the Cambridge vice-chancellor John Lightfoot; the physician Henry Stubbe; Jeremy Taylor (King Charles' chaplain); the theologians Henry Burton, Henry Hammond, and Edward Stillingfleet; the satirist freethinker John Toland; Chief Justice John Vaughan; and others cited Selden's view of Noahide precepts "reverentially."[17] John Milton, Thomas Hobbes, James Harrington, Samuel Pufendorf and others were also heavily influenced by *De iure naturali*.

Alongside the considerable influence of works such as *Historie of Tithes*, *Mare clausum*, and *De iure naturali*, Selden's posthumous *Table Talk* (1689) remains one of his most widely read books and the easiest way to enjoy the striking depth and breadth of his learning and originality of thought.

Cross-References

- ▶ Fortescue, John
- ▶ Freedom of Conscience
- ▶ Grotius, Hugo
- ▶ Harrington, James
- ▶ Milton, John
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Sellers, Mortimer

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Introduction

Mortimer N. S. Sellers was born in 1959 in Philadelphia, PA. He is a lawyer, philosopher, historian, professor, administrator, and leader of intellectual inquiry and discussion, often convening colleagues from around the world to explore the enduring questions of law and philosophy. His contributions to and impacts on the philosophy of law and social philosophy are as deep and varied as his education and experience. He has left a significant impression on the field through his own research, his role as an educator, his abilities as a facilitator and promoter of others, and his unyielding commitment to the larger philosophic and scholarly project to which he has committed his professional life.

Biographical Sketch

After studying history as an undergraduate student at Harvard University, Sellers was awarded a Rhodes Scholarship and studied history and philosophy at Oxford University (UK) where he earned his D.Phil. After his time as a Rhodes Scholar, he earned his *Juris Doctor* at Harvard University and then returned to Oxford as a Frank Knox Fellow earning his B.C.L. in civil law. Sellers then served as a Judicial Clerk for the Hon. James Hunter III of the United States Court of Appeals for the Third Circuit. He went on to practice law in Philadelphia, PA, and Washington, DC.

In 1989, Sellers joined the faculty of law at the University of Baltimore School of Law (Baltimore, MD). During his more than three decades at the University of Baltimore, Sellers has occupied several different roles. As an administrator, he served as the co-director of the Hoffberger Center for Professional Ethics and, in 1994, became the founding director of the Center for International Comparative Law. As a professor, he has instructed and mentored countless students in international law and legal theory, frequently taught US constitutional law, and regularly instructed courses and held seminars on the philosophy of law and global justice. In addition to being a Rhodes Scholar and a Frank Knox Fellow, Sellers has been a Regents Professor of the University System of Maryland since 2003 and, in 2021, was awarded the Elkins Professorship which he used to support his scholarly and collegial commitment to republican legal and political theory. Both awards are marks of the highest distinction within the University System of Maryland.

Lastly, though it would be impractical to list every role Sellers has occupied in the life of the

profession, there are several that warrant mention. Sellers has served as a visiting scholar at several prestigious institutions, including Oxford University, Cambridge University, Georgetown University, Erasmus University Rotterdam, and the Academy of International Law at the Hague. He is also a past President of the International Association for the Philosophy of Law and Social Philosophy (IVR) and a past President of the American branch of IVR, AMINTAPHIL. In addition to these roles, Sellers has served as an intellectual incubator for the profession through his significant work as an editor of several different journals and book series, including the following: *AMINTAPHIL: The Philosophical Foundations of Law and Justice* (with Ann Cudd); *Ius Gentium: Comparative Perspectives on Law and Justice* (with James Maxeiner); *IVR Encyclopedia of the Philosophy of Law and Social Philosophy* (with Stephan Kirste); *American Journal of Comparative Law* (Editor); and *Archiv fur Rechts-und Sozialphilosophie* (Editorial Board). Through this work, Sellers has been highly effective as a promoter of academic inquiry and facilitator of intellectual discourse and debate, advancing the philosophy of law and social philosophy.

Historical and Philosophical Perspectives on Republicanism

As noted, Sellers' contributions to legal and social philosophy are deep and varied. Unsurprisingly, his work is interdisciplinary, connecting his expertise in the history and philosophy of republicanism to legal theory, international and comparative law, global justice, and political philosophy. Despite such disciplinary variety, his commitment to republicanism can be found throughout his scholarly work, binding it together into a coherent research agenda. More to the point, the thread that runs through his work in history, political philosophy and the philosophy of international law, is the proposition that republicanism is central to our normative understanding of law and politics – republicanism explains what has historically been taken to justify and what, from a moral perspective, is required to justify our legal and political institutions.

Thus, a useful way to frame Sellers' intellectual contributions and projects is to recognize that his work revolves around this commitment to classical republican legal and political thought. His contributions in this endeavor have been significant in both number and quality. Further, though here these are being discussed as separate projects, one historical and the other philosophical, this fails to capture the fact that Sellers weaves the two projects together in a compelling and largely seamless way. His books and articles taken together trace the history of republican thought in a way that provides conceptual illumination and normative insights. Framing these as a historical project and a philosophical project ensures that the independent significance of either project is not lost, but so framing Sellers' work fails to fully capture the extent to which he has woven the two together.

As to Sellers' pursuit of republicanism as a historical matter, it is explored in several works. In *American Republicanism* (1994), Sellers seeks to understand how the drafters of the US Constitution understood republicanism as a political and legal doctrine and how the drafters of the Constitution incorporated their understanding of republicanism into the Constitution. Sellers argued that when one compared the interpretations that the drafters had of canonical republican texts, the understandings that the drafters sought to institutionalize were consistent with classical republicanism and not reliant upon modern European interpretations of republican legal and political theory. In *The Sacred Fire of Liberty* (1998), Sellers offers a historical assessment of the development of republican thought during the post-enlightenment period in Europe, arguing that republican thought was the intellectual seed which gave rise to contemporary liberalism. Then finally, in *Republican Legal Theory* (2003), Sellers provides a comprehensive assessment of the development of republican legal theory over 2000 years, from Roman republicanism to its contemporary manifestations in Europe and America, tracing a continuous line of thought from ancient to modern times.

As noted, Sellers' interest in republicanism is not limited to tracing the historical development of republican legal and political thought. Throughout his academic career Sellers has sought to understand republicanism from the point of view of a legal and political philosopher as well as a historian. And, in assessing Sellers' scholarly work from the perspective of a legal and political philosopher, one finds a larger project focused on identifying the constitutive elements of republicanism, providing us with the ability to differentiate republicanism from other political and legal theories and setting the stage for Sellers' arguments regarding the normative significance of republicanism for international law and a just global order. Through his collected work, Sellers argues that republicanism requires respect for the rule of law, an independent judiciary, recognition of the demand for equal concern and respect for all members of a political community, respect for human rights, and pursuit of the common good.

Republicanism and the Normative Foundations of International Law

In addition to his work on republicanism as an object of historical and philosophical assessment, Sellers has leveraged his unique understanding of the historical and philosophical underpinnings of republicanism with his expert knowledge of international law to provide insightful assessments of the relationship between republicanism, international law, and a just global order. This has been a common theme that can be found throughout his scholarly work but is perhaps most explicitly stated in *Republican Principles in International Law* (2006).

As a general proposition, Sellers argues that the foundations of international law are best understood from a republican point of view. He contends that this is true both as a matter of historical fact and normative political and legal philosophy. As to the former, Sellers traces the history of international law through the lens of republicanism, arguing that the history of international law is best understood as an effort to establish international legal and political institutions that are grounded in republican commitments to the rule of law, equal respect, and the common good among other important republican values. This historical argument is grounded in Sellers' understanding of the works of Hugo Grotius from the seventeenth century, Emmerich Vattel from the eighteenth century, and Henry Wheaton from the nineteenth century. Sellers contends that the ideas and prescriptions found in the works of Grotius, Vattel, and Wheaton provide the intellectual foundations for what, in the twentieth century, emerged as international law.

Sellers also offers an alternative free-standing argument about the normative foundations of international law that does not depend on the truth of the proposition that the historical foundations of international law are best understood as republican. In short, Sellers argues that a commitment to republicanism is necessary for the international legal order to be just. Thus, even if a commitment to republicanism is not to be found in the historical foundations of international law, the creation and reform of international legal and political institutions ought to be guided by the core commitments of republicanism because to fail to do so would render international law unjust. To be specific, international law should show equal concern and respect for all which requires the establishment of the rule of law, an independent judiciary, a commitment to human rights, and other institutional measure intended to serve the common good.

There is, however, no unified sovereign in the international arena; consequently, instead of a republican system of global governance, the international arena is a collection of independent states. Considering these facts about the international legal and political order, Sellers contends that the institutionalization of republican principles within international law and politics is nascent and incomplete. Recognizing this limitation, Sellers argues that we ought to be working to address the structural weaknesses of international legal and political institutions, making manifest the underlying commitments to republican ideals. In the meantime, Sellers contends that we ought to differentiate between states and that the degree to which a state deserves respect within the

international arena should depend on the extent to which states are serving the interests of their citizens and serving the common good. Further, he contends that the respect owed to international law depends on the legitimacy of its claim to justice – the degree to which it fulfills republican ideals.

Conclusion

Mortimer N. S. Sellers has contributed to contemporary legal and social philosophy in several ways. This is not a surprise given his background and experience as well as his facility for bringing others together and fostering intellectual community. Much about Sellers' contributions have had to be left aside. Nonetheless it is worth noting that there is a certain collegial thread that runs through his work as a scholar, a teacher, an administrator, and a practitioner. He has always been committed to the view that projects – whether academic or practical – are best pursued in the company of others, especially perhaps with those with whom he disagrees. In addition, as a scholar, he has made immeasurable contributions to our understanding of republicanism, its history, underlying philosophical and ethical foundations, and connection to international legal and political institutions.

Cross-References

- ▶ Civil Law: Roman
- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Liberty and Equality as the Morality of Rule of Law
- ▶ Liberty and Justice
- ▶ Positive Law and Natural Law
- ▶ Rule of Law: Historical Perspectives
- ▶ Rule of Law: Theoretical Perspectives

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"Semantic Sting" Controversy

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Introduction

In the opening chapter of *Law's Empire*, Ronald Dworkin argues against the semantic sting, a "philosophical prejudice" (Stavropoulos 2001, 61) which he attributes to what he calls "semantic theories of law." Among those theories, he counts his primary foil in the book, the legal positivism of HLA Hart, John Austin, and others. Dworkin's critique of the semantic sting sets the stage for his positive account of law, elaborated in the rest of *Law's Empire*. That critique has engendered a long-standing jurisprudential controversy. Theorists disagree what is its thrust and whether it succeeds. In what follows, the critique will be analyzed and some of the key responses to it as well as Dworkin's rejoinders will be examined.

Semantic Theories and Grounds of Law

In *Law's Empire*, Dworkin famously defends a moralized approach to the theory of law, which he calls interpretive. According to the interpretive theory of law, the nature of law is determined by the moral principles that best explain and justify legal practice. Dworkin juxtaposes his approach to analytical legal positivism, which contends that jurisprudential method is descriptive in the sense that it does not rest on substantive commitments about what is morally right and wrong. Dworkin's critique of the semantic sting is meant to expose a fundamental flaw in the descriptive approach. With the descriptive approach thus set aside,

Dworkin then goes on in the rest of the book to shift his focus to interpretivism.

On the face of it, though, the target of the semantic sting argument is not legal positivism or a method for exploring the nature law at all, but a group of theories about the proper use of the word "law," so-called "semantic theories of law." Some legal philosophers have protested that as a result the argument misses its mark because legal positivism does not seek to explicate the meaning of the word "law" (Coleman and Simchen 2003, 8; Raz 1998, 2). This issue will not detain us. Dworkin is interested in semantic theories of law insofar as they can contribute to our understanding of the concept of law, and there is little reason to suppose that they do not. Indeed, for Dworkin they contribute to it in a special way, and it is important for understanding the semantic sting argument to explain how they are meant to do so.

Dworkin maintains that there is a close relationship between theories about the nature of law, on the one hand, and propositions of law, "the various statements and claims people make about what the law allows or prohibits or entitles them to have" (Dworkin 1986, 4), on the other. More specifically, he contends that theories of law elucidate the concept of law by specifying the grounds of true propositions of law. By grounds Dworkin means determinants of true propositions of law. For example, it may be that a proposition of law is true by virtue of the fact that a statute is enacted by Parliament, which (statute) has the effect of adding that proposition to the law. Enactment of a statute by Parliament is on this view a ground of law.[1]

Semantic theories of law, for Dworkin, also provide an answer to the question: What makes propositions of law true or false? They hold that "lawyers all follow certain linguistic criteria for judging propositions of law, perhaps unawares" (Dworkin 1986, 32), and that these shared criteria supply the grounds of propositions of law. Semantic theories locate the standard of correctness for the application of the concept of law in "criteria in framing, accepting, and rejecting statements about what the law is" (Dworkin 1986, 33) that are embedded in actual usage of the concept. Importantly, that standard does not transcend actual usage (Stavropoulos 2001, 71ff). In other words, whilst each of us individually may be mistaken about the concept, the linguistic community as a whole cannot be wrong, because there is nothing to the meaning of concepts other than its conventional meaning as this is determined by actual usage.

Some philosophers dispute that there is such a connection between theories of law and the grounds of propositions of law. (e.g., Coleman 2001, 180ff; Himma 2002, 160ff; Toh 2013) They contend that sharing the same criteria for the concept of law does not entail sharing the same criteria for determining the truth of propositions of law. For example, persons from different jurisdictions share the former but not the latter. This seems to open up the space for the existence of a class of (privileged) conceptual truths, which are shared even by those who disagree about the truth of propositions of law.

It is not clear how we are supposed to draw this distinction. In any event, however we draw it, it is doubtful that it can be kept watertight. It could be argued that, for almost any criterion these philosophers offer at the level of the concept of law, it is possible to imagine a dispute over that criterion leading to a disagreement about the grounds of propositions of law. Consider a positivist who maintains that one of the criteria for the existence of law is that there is a social practice among officials containing the ultimate criteria of legal validity and an anti-positivist who denies this because she thinks that a standard may be part of the law even though it is not treated as such by the community of officials. There are likely cases where the positivist and the anti-positivist disagree about the truth of a proposition of law by virtue of that upstream disagreement about the concept of law.

Dworkin attributes a criterial semantics to Hart's positivist theory of law. The attribution

[1] To be more precise, Dworkin maintains that the grounds of propositions of law are themselves propositions such as the proposition that "a majority of MPs voted in favour of this bill." The difference is not relevant for present purposes.

has been defended by Stavropoulos (2001), who offers close textual evidence from *The Concept of Law* and other work to support it. Although legal positivism is not the only theory of law that Dworkin associates with criterial semantics, there seems to be a special affinity between the two. Famously, Hart took himself to be pursuing a descriptive rather than normative inquiry (Hart 1994, 239–241). Criterial semantics, as Dworkin understands it, lends support to this pursuit. If the concept of law is individuated by the criteria employed collectively by members of the relevant linguistic community when they use the concept, the aim of the legal philosopher becomes one of reporting or unearthing those. Importantly, this exercise must involve very limited revision of members' use, because there is no standard independent of use by which we can correct it (Stavropoulos 2001, 76–77). Of course, we can evaluate and amend our linguistic practices, say, because the concept of law we currently employ has morally negative consequences, but that is an analytically separate task.

Theoretical Disagreement and the Sting

Dworkin faults semantic theories for their explanation of disagreement in law. He distinguishes two kinds of disagreement that people may have about the content of the law governing a particular issue: empirical and theoretical. Empirical disagreement is disagreement over whether a crucial law-creating or law-changing fact has occurred or not. Clearly, if you believe that the ayes had it when a bill was put to a vote in Parliament, and I believe that they did not, then we are likely to disagree about what the law is on a particular issue. But in this example, we agree that a bill securing a majority of affirmative votes in Parliament is a fact whose occurrence affects the content of the law by changing our legal rights and duties. In Dworkin's terminology, we agree what are the grounds of law. By contrast, two people have a theoretical disagreement when they disagree about whether a fact affects the content of the law in that way. For example, you and I disagree about whether the fact that it is morally wrong to benefit from your own wrongdoing affects the law of inheritance. That is, we disagree whether this fact is a ground of law.

Dworkin contends that theoretical disagreement is a common feature of legal practice, but that semantic theories cannot adequately explicate it, because they are afflicted by the semantic sting. The semantic sting is the belief that, in order for two people to be using the same concept, they must share the same criteria for its application. As explained above, for semantic theories these criteria are the grounds of propositions of law. But ex hypothesi cases of theoretical disagreement involve a dispute about such grounds. So, according to semantic theories, we must treat theoretical disagreements as "illusory" or "a pretense" (31): Disputants may frame their views in terms of what the law is, but what they are really doing is disagree about how the law should be developed in cases where, since agreement has broken down, the law has run out. In fact, for some semanticists, this will be a common occurrence, the result of the open texture of language throwing up "borderline cases." These are cases that our shared criteria for applying a concept do not fully anticipate, as when we contemplate whether to count a palace as a house. Palaces satisfy some of the criteria for a house but not others, so a fresh decision needs to be made whether to include them in the concept.

Dworkin finds this explanation unsatisfactory. Genuine cases of theoretical disagreement are not about drawing a linguistic boundary. In Dworkin's terminology, they arise in pivotal cases: Each side has its own understanding of the correct test guiding the application of the concept in such cases, and reporting to them that thus and so is how the term is used by the other side or even the rest of the community would not sway them.

If one takes this view of theoretical disagreement in law, one has reason to be attracted to the interpretive theory of law that Dworkin advances. In this theory, the grounds of law are (or are supplied by) the principles that best fit and justify legal practice, not what the community takes them to be. Accordingly, the interpretive theory ascribes to participants in legal practice a

"Protestant attitude" (Dworkin 1986, 252, 413). Each of them must work out for herself the best interpretation of legal practice. Theoretical disagreement is very likely to occur among people adopting this attitude.

Thus understood, the semantic-sting critique of legal positivism is ancillary to the broader argument from theoretical disagreement but independent of it (Smith 2010, 644ff). It offers a diagnosis for why some theorists downplay the importance of theoretical disagreement in law. However, the argument from disagreement does not stand or fall on the soundness of that diagnosis. If theoretical disagreement in law exists and a theory of law fails to account for it, then it is for this reason explanatorily deficient.

Disagreement Without Shared Criteria

One common strategy for deflecting the semantic sting is to deny the putative link between legal positivism and criterial semantics altogether. This is the line Hart himself took (Hart 1994, 246). However, he did not elaborate which semantic view *does* underpin his theory. In later work, Dworkin argues that there is no viable alternative that does not collapse Hart's theory to a fully normative project (Dworkin 2006, 140ff).

This strategy is also pursued by Endicott (1998, 285). Endicott maintains that Hart's semantic commitments are modest, consisting solely in a set of indisputable paradigms shared by all competent language users. When we apply a concept to a particular case, we do so on the basis of similarities between the case at hand and those paradigms. Such judgments of analogy serve a range of purposes in everyday communication. They are sometimes tenuous, but this does not mean that they are unwarranted, or that two people who draw different analogies are talking at cross-purposes; they can still make sense of each other if they bear in mind the context within which they are expressed. The same applies to law. The task of the legal philosopher is not to spell out the criteria for the application of the word "law." Such criteria are not available because we use the word "law" for different purposes.

Given that, as already mentioned, the semantic sting critique is a component of the argument from theoretical disagreement, it is not clear that Endicott's proposal undercuts it. Dworkin's semantic sting critique was not meant to question the very possibility of any kind of communication in the absence of shared criteria. Endicott may well be right that two people can engage in some genuine forms of communication although they employ different criteria when they use the word "law," but it does not follow without further argument that cases allegedly involving theoretical disagreement are best explicated in this way.

In a similar vein, Plunkett and Sundell (2014) challenge the argument from theoretical disagreement on the grounds that disagreement is not necessarily pointless in cases where people mean something different by a term like "law." They propose that in some of these cases, participants are best understood as conducting a *metalinguistic negotiation* (Plunkett and Sundell, 2014, 248). Metalinguistic negotiations do not revolve around the semantic content of the speakers' utterances but around propositions they convey by pragmatic means. Moreover, they cannot be settled by the correct meaning of any concept, since ex hypothesi the two parties refer to a different concept with the same term. Rather, they are about how that term should best be employed, which of the two (or more) concepts it should refer to. This is a normative question of "conceptual ethics." Plunkett and Sundell do not give an account of the considerations that settle that question, in law or in any other domain, but they allow that these may be moral. However, Marques (2017) argues that, if it turns out that such metalinguistic negotiations in law systematically draw on moral considerations, they could be said to support the antipositivist view, whereby such considerations are constitutive of law. Thus, they offer a merely "notational variant of Dworkin's *conceptual interpretation*" (Marques, 2017, 225).

Disagreement About Shared Criteria

Some theorists dispute that semantic theories are committed to the view that all competent

language users must possess the criteria for the correct use of concepts (Raz 1998, 15–16). They accept that the meaning of concepts like law is determined by the criteria a linguistic community employs when it uses those concepts in the sense that competent language users take their use to be governed by those criteria. However, they insist that the criteria need not be fully accessible to everyone. This anti-individualistic understanding of criterial concepts allows for the possibility that two language users sometimes disagree about shared criteria of which they only have partial knowledge. Furthermore, Raz cites two additional characteristics of criterial concepts that give rise to theoretical disagreements: the non-exhaustive character of criterial explanations and the interdependence of criterial concepts. By virtue of the first characteristic two persons might have different criteria in mind but only because these criteria refer to different aspects of the concept. By virtue of the second characteristic, two persons might share the same criteria for one concept but still disagree about their application because these criteria make reference to further concepts about which they do not have shared criteria.

Raz's strategy rests on a sophisticated understanding of criterial concepts, but it does not offer a complete rebuttal of the semantic sting critique. For, it is not tailored to account for the types of disagreement that Dworkin discusses (Smith 2009, 305ff). In particular, it is far from clear that it allows criterialists to explain cases where legal practitioners do not take their disagreements to be settled by appeal to shared criteria at all (Smith 2009, 312ff).

Disagreement About the Application of Criteria

A final strategy questions that a criterial explanation of the grounds of law allows only for empirical disagreement about propositions of law (Coleman 2001; Dare 2010). As Coleman puts it, "judges accept the same truth conditions for propositions of law.... They disagree about which propositions satisfy those conditions" (Coleman 1982, 156). Put differently, they disagree about how to apply those conditions. Himma (2002, 153) uses the example of the Equal Protection Clause of the US Constitution. Two legal practitioners can agree that equal protection of the laws is a standard of legal validity while disagreeing whether racial segregation fails or satisfies the standard.

Dworkin had anticipated this strategy in his early critique of Hart's account of social rules (Dworkin 1978, 83ff) and reiterated his objections to it in subsequent work (Dworkin 2006, 187ff). He argues that it rests on an abstraction strategy, which "[converts] any disagreement that any group might have over the standards that should govern its conduct into a supposed disagreement over the application of some more abstract moral convention they share" (Dworkin 2006, 192). However, this strategy trivializes the positivist thesis that the law is ultimately based on a social practice among officials. In addition, it has difficulty accounting for deep-rooted theoretical disagreements such as the disagreement between originalists and non-originalists whether the Equal Protection Clause makes the law depend on morality at all.

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Semiotics of Law: Structuralist

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> The structure preface – Text becomes open at both ends. The text has no stable identity, stable origin . . . each act of reading 'the text' is a preface to the next. The reading of a self-professed preface is no exception to this rule (Derrida 1977: xii).

Introduction

The language of law forms a special environment of signs, symbols, meanings, and rhetorical forms. Contrary to some ideas, it is an exceedingly well- and wisely organized product, which evolves according to circumstances of time and space, and historical, political, sociocultural, and purely legal event(s). Structuralism is oblivious to history in its search for what law means. Semiotics is the method that emphasizes the contextual and dynamic nature of meaning and knowledge in a triadic structure, where a "sign stands for an object, not in all respects, but in reference to a sort of idea . . . the ground," including all relevant epistemological implications (Peirce 1931: 34).

Cultural Impacts on Legal Language and Legal Semiotics

Legal language is based on cultures being composed of signs – written, imaginative, or imaginary. As a consequence, images, gestures, music sounds, objects, and all associations of them are perhaps not yet language per se but certainly *a system of signification* that forms the basis of *semiology* (Barthes 1977). Besides working as a sign system, the construction of meaning in law is affected by other sign systems, other societal discourses (see ▶ "Law as Discourse," ▶ "Language and Law," and ▶ "Cinema and Law"). This understanding of the construction of meaning rules out the possibility of a fixed foundation of knowledge. Any knowledge is mediated by a sign, which can only be interpreted by reference to another sign (its ground): "language is a system of interdependent terms in which the value of each term results solely from the simultaneous presence of the others" (de Saussure 1913: 114).

In the same way, legal semiotics has emphasized the dynamic character of legal concepts and stressed the importance of interpretation and the construction of meaning. In response to new problems, changing power structures, and changing societal norms, established doctrines are reconsidered, reformulated, and partly replaced by competing doctrines and hypotheses (Kevelson 1988).

Reconstructing the Semiotic Logic of the Narratives

The semiotic square of Greimas is a "toolbox" focusing on the construction of meaning in language, including all various semantic topics. His semiotic square illustrates the full complexity of any given semantic term (*seme*) in a closed system of signification. The axes of the square define its structure and the formal relationships they express. However, *semes* composing the axes are not static; they interact in a flux of multitude, and these interactions can bring to the forefront new meanings.

The Greimasian square could also be linked to the *Trialectics of Spaces* of Soja who relates the *Firstspace* perspective to the real and material world, the *Secondspace* to the interpretation of reality, whereas *Thirdspace* is a creative recombination of both the Firstspace and Secondspace perspectives (Soja 1996). Therefore, the notion of *Firstspace* is a definable logical structure, whereas the second one (*Secondspace*) transforms *semes* into discourse forms. In the triadic dimension given by Rastier and Greimas (Greimas and Rastier 1968), *deep structures* are construed by means of the semiotic square, having also two other interconnected structures (*Structure of manifestation* and *Superficial Structure*: See ▶ "Cassirer, Ernst").

These notions lead to an entire mechanism capable of generating *n*-logical meanings and *n*-possibilities of relations. This could also be easily linked to a statistical means – *the box-and-whisker plot* – being transposed as a visualization method to enhance and understand *law*, and draw comparisons across a series of legal signifiers. This method shows the shape of the distribution in meaning, its central value, and its variability, which is equivalent to the multi-leveled maze of Eco U. (Eco 1976) that is inherent to social dynamics being the core research of legal semiotic. Our field will need to focus on expressivity and meaning in communication, which is what Saussure (de Saussure 1913) called the "transmission channel" (See ▶ "Fish, Stanley").

The Logic in the Circulation of Legal Rules

The open and conjectural nature of legal knowledge raises some foundational questions regarding the nature and function of law. How is the openness of legal rules to be reconciled with the quest of final authority? Who has the power to define words and concepts in a concrete case? How is the construction of meaning in law affected by societal discourses? (See ▶ "Ross, Alf: Biographical Perspectives").

Such questions are closely related to the central topic of legal interpretation and the construction of meaning *within* and *through* law. The interpreter is then confronted with a "web closely woven around production" (Schauer 1992: 500–501). Consciousness, motivation, and social perception play an important role in interpreting the truth of statements, in construing concepts, notions, and language (See ▶ "Legal Realism, American: Theoretical Aspects" for further reading). Therefore, law is socially constituted and language is colored according to these principles. Law is instrumentalized with some compensatory redistributions using stabilizing controls and transforming somehow its *deep structure* to fully understand its hidden, silent, or even silenced dimension:

> The textual culture of law brings with it an explicit linguistics, a linguistics of fidelity to sources, to originals, to supposed first usages and all that those usages implied (Goodrich 1990: 115).

> We must try to determine the different ways of not saying such things, how those who can and those who cannot speak of them are distributed, which type of discourse is authorized, or which form of discretion is required in either case (Foucault 1969: 121).

Habermas (See for further reading ▶ "Habermas, Jürgen: Faith and Reason") stresses the importance of intersubjectivity and acceptability, echoing the Piercian reading of the relation between construction of meaning, intersubjectivity, and rationality (Habermas 1991). Accordingly, every theory leads to another, with some paths diverting in search of new destinies (Wagner

and Broekman 2010) in an endless discussion about the nature of the law (Further readings: "French Legal Realism" and "Philosophy of Language and Law"). Jackson B. (1995) argues that in a courtroom, legal language and behavior is addressed to different audiences for diverse purposes.

Third Space: A Space In-Between

In her essay "Law at the Border," Kevelson (1996: 167–180) noted that laws and legal systems which present themselves to the public as authoritative and coherent, as instantiations of "truth, justice, and the American way" are not riddled with holes, but that the holes are the essence of the system. These holes or "spaces," far from being empty or meaningless gaps (Further reading with "Legal Gaps") which need to be filled in or explained away, are in fact the fertile points of contact where different notions of law, where legal inconsistencies and paradoxes, meet in what Kevelson metaphorically termed "border wars" that are the sources of new law, creativity, and human freedom (See ▶ "Evolutionary Theories of Law," and ▶ "Gény, François").

The *Entre*: Fertile Points of Contact

Derrida (1977) considers language as having closures – some are open spaces and others are closed spaces with a space *in-between, "*the *entre* that carries the burden of the meaning of culture" (Bhabha 1995). The *Entre*, these *holes*, this "open texture" (Hart 1961) are "either unintended 'bugs' or necessary 'features'" (Baier et al. 1995: 199), which Wittgenstein (1958) refers to as the level of interpretative flexibility in law (Further readings with See ▶ "Ontology of Law," "Rule of Law: Philosophical Perspectives," and "Hart H.L. A."). For Hero J. (Hero 1989: 87), it is a "spatio-temporal hole, knowing how to orientate oneself in space and time, knowing how to construe presentations or appearance in terms of spatial and temporal reality."

So, legal interpretation and meanings of law would then constitute the "Third Space," a space in-between (Wagner 2016), "which enables other positions to emerge and where all forms of cultures are continually in a process of hybridity" (Rutherford 1990), of evolution. Indeed, the cycle of interpretation is infinite. Legal actors are in the capacity of having alternative options to maximize their decisions. They can prioritize the relevant patterns, general plausible solutions, assess their impacts, and so implement the most relevant decision in the context under consideration (Wagner and Gémar 2014). Images accompanying the "narratives" put forth by various actors do as much to shape the way communities interpret them as the language of the law and the narratives themselves do (Wagner and Sherwin 2013). Adjustment is vital as law is always evolving with ongoing transformations of concepts and notions within space and time (See ▶ "Deconstructionism" and ▶ "Gény, François"):

> Any instance of interpretation always involves a choice and a motive, an element of the "plays of meanings" which denies that there can ever be a single "correct" or valid interpretation (Goodrich 1986: 138).

> In law, although all cases of law application refer to some facts, which are brute facts in that sense and at that level, the legal process is one characterized by transformations of these facts into institutional facts, by interpreting them in the light of relevant rules and conventions (MacCormick 1992: 220).

Territorialization Versus Deterritorialization

The *Entre* has a coordinate function between primary meanings (*territorialization, domestication* in legal translation theory) and intercultural efforts of creations and shifts in meanings (*deterritorialization, foreignization* in legal translation theory: further reading with "Legal Translation"). This coordinate function, the space in-between, can lead to mitigating solutions, to a map in action with multiple entryways, passage ways, strata in meanings (Wagner 2016: 189).

Deleuze and Guattari refer to the *Thousand-Plateaus* principle (Deleuze and Guattari 1988) where a "rhizome may be broken, shattered at a given spot, but it will start up again on one of its old lines, or on new lines... Every rhizome contains lines of segmentarity according to which it is stratified, territorialized, signified, attributed, etc., as well as lines of deterritorialisation down which it constantly flees" (Deleuze and Guattari 1988: 9). Indeed, they operate in an "empty dimension supplementary to that of the system considered" (Deleuze and Guattari 1988: 48). And so, they emphasize on the core pivotal role of legal language, which could assume different meanings from the original matrix or even use ancient meanings to reflect new constructions, new images of law (Wagner 2016: 174–175). Furthermore, Pommer Sieglinde (2012: 283) introduces the assemblage phase to expand connections while Iser W. (Iser 1994: 6) emphasizes on "making inroads into one another, trying to get out of a different culture or the different intra-cultural levels that seem attractive, useful, or is combated and suppressed for whatever reasons" (Further reading with "Pragmatism and the Interdisciplinary Knowledge of Law").

Conclusion

The redistribution of legal language through the use of semiotics opens fertile avenues of interpretation. Structures cannot be distinguished from meaning and as suggested by Merleau-Ponty (1964: 90) language can only be conceived of as "a surpassing of the signifying by the signified which it is the very virtue of the signifying to make possible." Indeed law presents a stunning textual diversity, since there is not one "language of law" but an imposing array of legal languages and forms, depending on who or what is authoring, and on the subject and matter at stake. This reflects modern societies' heterogeneity and its trail of activities engaging law.

Cross-References

- ▶ Cassirer, Ernst
- ▶ Cinema and Law
- ▶ Deconstructionism
- ▶ Evolutionary Theories of Law
- ▶ Fish, Stanley
- ▶ Gaps: Legal
- ▶ Habermas, Jürgen: Faith and Reason
- ▶ Hart, Herbert Lionel Adolphus: Influential Ideas
- ▶ Language and Law
- ▶ Law as Discourse
- ▶ Legal Realism, French
- ▶ Ontology of Law
- ▶ Pragmatism and the Interdisciplinary Knowledge of Law
- ▶ Ross, Alf: Biographical Perspectives
- ▶ Rule of Law: Historical Perspectives

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Sen, Amartya

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Amartya Sen (b. 1933–) is one of the most prolific thinkers of our time. His many books and articles on a wide variety of topics have inspired many scientists and practitioners, especially in the fields of economics and philosophy. His work has a lasting impact on the Human Development Index and other areas of development theory and ethics. Moreover, Sen plays an active role as a public intellectual, particularly in India. His work includes some provocative ideas regarding the role of rights and especially human rights. Despite all of this, Sen is not a philosopher of law and never attempted to develop a theory of law.

The work of Amartya Sen is exceptionally diverse. It spans from mathematical economics to cultural theory and includes work on social choice theory, development economics and ethics, human rights theory, moral theory, multiculturalism, theory of justice, and political philosophy in general (Sen 1999/2002, 2005b, 2006a, 2009; Basu and Kanbur 2009; Morris 2010). Although this is a wide range of very different topics, it is possible to identify one underlying theme that runs through most of his work. This theme is a certain understanding of freedom (Sen 1990; Pettit 2010). In many of his books, Sen (1999, 2006a, 2009) tells the story of Kader Mia, a story from his childhood, which illustrates why he is so concerned with freedom. Kader Mia was a Muslim in Dhaka, who had no choice, but to work in a Hindu area to earn enough money to ensure survival for himself and his family. He was knifed to death by radicals in front of Sen's home, who as a child gave him some water shortly before he died in the hospital. Kader Mia's death, Sen (1999, p. 8) says, was the consequence of his economic unfreedom.

Sen's concern with freedom informed all his work, even his rather technical work on social choice theory. His famous theorem regarding the impossibility of a Paretian libertarian states that it is impossible to have a Paretian welfare policy and respect basic liberties at the same time (Sen 1970a, b, 1971, 1977a; Dhongde and Pattanaik 2010). Policy therefore cannot rest on a Paretian principle of maximizing preference satisfaction alone, but needs a broader information basis. This insight leads Sen (1977b, 1984, 2002) to criticize some basic assumptions of welfare economics regarding the preferences of agents. These are the assumptions of self-centered welfare, self-welfare goal, and self-goal choice. Sen argues that people possess a concept of welfare which is not centered only on themselves, but also includes others. Moreover, it is often not welfare they are concerned about, but other states of affairs that sometimes have nothing to do with themselves or the people they care about. His most controversial claim is that the assumption of self-goal choice is also wrong. Sometimes we do not choose our own goals, but the goals of others. This happens when we are committed to so, on grounds of a normative

principle we follow. Think of a larger family, where the majority votes for going on vacation in Italy. Although some family members would have preferred a trip to China, they are now committed to making a good vacation happen in Italy, although that is not their own original goal.

Its narrow understanding of welfarism is one reason why Sen (Sen and Williams 1982) rejects utilitarianism as the normative theory underlying economic thinking. He also accepts Rawls' point that sum-ranking of utility across persons is a very undesirable feature of utilitarianism. Sen (1982, 1983, 2010) therefore looks for another broadly consequentialist theory which includes rights and agent-relative reasons and therefore is better suited to inform economic thinking and especially development economics. This leads him to his version of the capability approach. He developed his capability approach together and in discussion with Martha Nussbaum (Nussbaum and Sen 1993; Nussbaum 2012; Robeyns 2005, 2006). Since there are quite important differences between the two approaches, I will focus on Sen's own version of the capability approach.

The basic distinction of the capability approach differentiates functionings from capabilities. Functionings describe all doings and beings a person actually realizes. Capabilities on the other hand describe the doings and beings a person can realize. Capability sets or spaces are the sets of doings and beings a person can realize simultaneously. The capability space of a person then is much bigger than his or her actual functionings. Sen (1985, 1987a, b, 1999; Crocker 2008) argues that it is the capabilities of a person that matter. He illustrates this point with the distinction of a person that is fasting and a person that hungers. In terms of nourishment, both realize the same deficient of functioning. However, the person that is fasting has the capability to take in more nutrition if he/she decides to do so, while the hungry person does not have this capability. For the second person, that difference freedom and unfreedom makes all the difference in the world.

Sen also explains why capabilities and not goods are his primary category of evaluation. Capabilities take important conversion factors into account, which enable people to converse goods into functionings. According to Sen (1992; Robeyns 2005) there are three central conversion factors. First, there are personal conversion factors which include health, education, gender, and much more. Second, there are social conversion factors. They include power structures, institutions, social relations, and importantly also the law. Third, there are environmental conversion factors, including natural, but also the human-made environmental features. The crucial point is that all those conversion factors have different impacts on different people regarding their ability to converse goods into functionings. For instance, in a very complicated law system, that stresses rhetorical abilities in court, a certain type of university trained persons will be much better equipped than others to have their legal rights secured.

One special feature of Sen's capability approach is that he stresses agency freedom and agency achievement, which he distinguishes from capabilities and functionings (Sen 1985, 1999). The basic difference is that capabilities and functioning concern the well-being of persons, while agency freedom and agency achievement concern the whole agency space of a person beyond his welfare. This distinction rests on Sen's criticism of welfare economics and its focus on self-centered welfare. Sen apparently wanted to make clear in his approach that people care about forms of agency freedom that have nothing do with their own welfare. The last point has consequences for how Sen approaches questions of justice. The first specific and most often noted feature of his theory of justice is that its metric is capabilities and not goods. It would be more accurate, however, to say that it rests on agency freedom. Sen (1990, 2002) stresses repeatedly that freedom consists of an opportunity aspect of reaching substantive goals and a process aspect, which concerns the way to get there.

Sen's lifelong concern with development also explains why he does not engage in ideal theorizing and indeed criticizes John Rawls and his followers strongly for doing so. Sen (2006b, 2009) understands thinking about justice as a tool for identifying real possible advancements here and now. He claims that an ideal theory of justice does

not help with identifying the best available advancements. The philosophical debate about the relation and relative merits of ideal theory and what often is called nonideal theory, but what Sen simply calls realization-focused theorizing about justice, is still ongoing (Valentini 2012).

Another, and in philosophical discourse less often noted offspring, of Sen's capability approach focusing on agency freedom is a certain conception of identity, which he brings forward in his work on multiculturalism. Sen (2005b, 2006a; Appiah 2009; Glover 2009) claims that every human being has a wide variety of very different identities. The agency freedom of a person allows her to change some of her identities and continuously rearrange her personal set of identities. This approach allows for recognizing the importance of identities, without falling into the trap of any kind of essentialism. Moreover, Sen (2006a) argues that most of what is called multiculturalism is something else, which he calls plural monoculturalism. Inherited identity sets are treated as given and public policy aims at protecting those traditional concepts of identities. This is bad policy, because it strengthens closed and often hostile traditions and leads to segregation. Instead public policy should aim at true multiculturalism, which means strengthening the trend of interlacing cultures and providing opportunities for the freedom to develop new personal identity sets that incorporate identities from different cultures.

On the ground of his idea of freedom, Sen develops a moral theory of rights and especially of human rights, which does not translate directly into legal rights but is informative for law making. Sen (1982, 1985, 2000) defends a rights-sensitive version of consequentialism against two alternatives. The first alternative is a deontological theory that sees rights as strict constraints for actions. Sen argues that sometimes it can be justified to violate relatively unimportant rights in order to secure other much more important rights. The second alternative is a right-insensitive form of welfarism. Here Sen argues that rights indeed trump other welfare concerns and cannot simply be reduced to certain forms of utility like happiness. He gives the example of beating up one person, which certainly cannot be justified by the net pleasure it might generate.

This general idea of the place of rights in moral consideration informs Sen's theory of human rights (2004, 2005b, 2012; Fukuda-Parr 2009). He follows Herbert Hart in claiming that human rights are ethical demands that are not legal per se, but can inspire legislation. At the same time, Sen argues, they are not only about legislation. Some human rights are best implemented in other ways, for instance through social solidarity, public discourse, and advocacy. Human rights are about the most important freedoms and can respect both, the process and the opportunity aspect of freedom. They include economic and social freedoms, since those freedoms are of utmost importance. The exact content of human rights has to be determined and redetermined in reasonable public discourse.

Sen believes that his theory of human rights can defeat most critical points brought forward against any idea of human rights (Sen 2004, 2005a, 2012). If human rights are understood as ethical demands the idea is not nonsense, as Jeremy Bentham famously argued, because there is nothing strange about prelegal ethical demands. It also does not speak against such an idea of human rights that not all of them are immediately realizable. The rightness of ethical demands does not depend on their immediate realization. Human rights can generate perfect and imperfect duties. It therefore does not constitute an argument against human rights, especially economic and social human rights, to state that sometimes it is not clear what exactly is to be done to fulfill them. Sen also argues against the charge that human rights are a Western concept. He claims that they have roots in many cultures and that all peoples are able to take part in reasonable public discourse. Since their content is determined in public discourse, human rights can be robust across cultures.

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Sen, Amartya: On Justice

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Introduction

The connected themes of freedom, poverty, justice, and social choice run through Amartya Sen's works over many years. The originality and importance of these contributions – and the fields of inquiry and research opened up by them – were recognized in the award of the Nobel Prize in Economic Science in 1998. For the purposes of this entry, I use John Rawls' works on justice – with which Sen has engaged throughout his career – as a central point of reference with a view to locating his views on justice.

Social Choice, Justice, and Capability

In his classic work *Social Choice and Individual Values,* Kenneth Arrow (1951) showed that there was no way of ordering social states which reflected society's preferences or values on the basis of individual orderings which does not violate one of a set of apparently plausible axioms. This result posed a serious challenge for the idea of rational social choice. Arrow took the orthodox view in economics which followed Lionel Robbins (1938) in treating interpersonal comparisons of "utility" as "unscientific" on the grounds that they involve value judgments. In *Collective Choice and Social Welfare* (1970), Sen explored the conditions in which rational social choice is possible. A recurring theme in his work is about the paucity of "information" for making rational social judgments in Arrow's framework, including its exclusion of interpersonal comparisons. As Sen (1971) notes in his lectures *On Economic Inequality*, the ruling out of interpersonal comparisons also severely restricts the capacity of welfare economics to engage with questions about inequality. Sen argues that for rational social choice to be possible, one needs to broaden its informational basis.

Rawls was clearly interested in these developments in economics and social choice theory. He jointly taught a seminar with Arrow and Sen at Harvard in 1968–1969. In *A Theory of Justice*, he advances a version of the social contract view. He asks himself which principles of justice rational and self-interested parties, who behind a "veil of ignorance" do not know their identity, preferences, and talents inter alia, might agree. Rawls (1972: 60) argues that, from a menu of alternative principles, parties would choose two. The first of these requires that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others" and has "lexical priority" over, and so bars trade-offs with, the second, which itself has two parts. The topic of interpersonal comparisons of advantage arises in the context of one part of his second principle of justice – the "difference principle." Rawls suggests that parties behind the "veil" would favor a principle according to which social and economic inequalities would be justified if they are to the greatest benefit of the least advantaged group. This is an application of the "maximin principle" in decision theory which involves maximizing the minimum value. To judge which group is "least well-off," Rawls needs a currency of advantage to make interpersonal comparisons. He (Rawls 1972: 90–91) argues that for the purposes of a theory of justice of the sort he advances, which is concerned with the distribution of benefits of social cooperation between citizens, advantage should consist in having those objects that are at the disposition of society and which any rational person would *want*. As a result, in Rawls' theory, the currency of egalitarian justice is an index of "primary social goods" which are all-purpose means. In his later work, Rawls (1993: 178–190) modifies this account and characterizes "primary social goods" as the *needs* of citizens.

Sen is critical of central elements of Rawls' theory. He finds the lexical priority of Rawls' first principle of justice too extreme. He asks: "[w]hy should we regard hunger, starvation and medical neglect as invariably less important than the violation of any kind of personal liberty?" (Sen 2009: 65). Similarly, he argues that it is not obvious that rational parties behind the "veil" would accept the maximin principle and give overwhelming importance to the least advantaged group. In his subsequent writings, starting from his celebrated Tanner Lecture on "Equality of What?," Sen (1980; see also 1992) argues that egalitarians should be concerned not purely with means but with the ends those means serve. In particular, he argues that what matters for egalitarians is at least in part what people are *able* to do and be with those means – whether these are understood in terms of income, resources, or primary social goods. He notes that, given human diversity, various people need different amounts of the relevant means to be able to do and be various things.

This line of argument led Sen to advance the "capability approach" (CA, for short) in a variety of contexts. Its basic concepts are *functionings* which are states of a person ("beings" and "doings") and the combinations of functionings

which constitute lives from which she can choose one – which is her *capability*. A person's capability is, in this sense, her *opportunity* or *freedom* to do and be certain things. This approach is deployed in Sen's writings on development understood as an expansion of capability, poverty understood as a failure to be able to do and be certain basic things, and disability and gender inter alia. Sen also used these ideas in his collaborative work for the United Nations Development Programme (1990–1997) in the 1990s to develop measures of human development – notably the well-known "human development index" – as well as related indices of gender inequality and poverty. The CA also features in his analysis of gender bias and intra-household inequality (see Sen 1990). Sen (2009: 248–252) also extends the application of the CA to the context of intergenerational justice and environmental concerns. In this way, his work on capability has been applied to a range of topics and reached a very wide audience including policy-makers. In works co-authored with Jean Drèze, Sen has also used the approach to contribute to debates about the economic development of India (e.g., Drèze and Sen 2013). The CA has subsequently generated an enormous literature (see Chiappero-Martinetti et al. 2021, inter alia) covering very diverse topics.

Utilitarianism and Consequential Evaluation

While Rawls and Sen take distinct views of the currency of egalitarian justice, they have both been leading critics of utilitarianism. Both argue that classical utilitarianism is indifferent to the distribution of "utility," since it ranks social states in terms of their sum total of utility. Sen is also critical of some utilitarian accounts of welfare. His version of this critique focuses on the possibility that people who suffer from certain forms of disadvantage might adapt to their circumstances or to an unjust status quo. They might adjust their beliefs and desires so that their desires are more easily satisfied or so that they learn to be happy with, or find pleasure in, small mercies. If they do so, their levels of measured happiness, satisfaction, or pleasure might not accurately reflect how well their lives are going. Another line of criticism of utilitarianism focuses on its exclusive focus on "utility" or well-being as the ultimate source of value. Sen's rejection of this exclusive focus leads him to argue in favor of plural values and the intrinsic value of freedom understood in terms of both opportunity and "process," where the latter includes freedom from interference. In this context, Sen also argues that capability and equality are not the only values which are relevant in the context of justice.

In spite of his criticisms of "utilitarianism," Sen does not challenge "consequentialism" – the view that the right action (motive or rule) is one which leads to a social state or outcome which is at least as good as or no worse than any other on offer. Furthermore, while Sen is associated with attempts to advance alternatives to utilitarianism in moral theory, and to Rawls' theory of justice, his defense of "the discipline of consequential evaluation" in his later writings is not a defense of any fully specified moral or political theory. It is "general" inasmuch as it allows for specific ways of filling out and developing a fuller "consequentialist" theory. A central element of this defense is that he understands the "outcomes" of actions (rules or motives) so that their description can include information on the action or process that leads to the outcome and information on who is responsible for it. By incorporating a wide range of values within his account of "outcomes," Sen allows for a variety of concerns that have motivated criticisms of consequentialism in moral and political theory. In the case of rights, his approach differs from those utilitarian views which give rights only instrumental importance. It also differs from those views which treat rights as "side-constraints" and understand justice in terms of rules and procedures in a "consequence-independent" way (see Nozick 1974). His view places the fulfillment of, or a failure to fulfill, rights within the description of social states and characterizes rights in terms of goals to be fulfilled (or a "goal rights system"). These rights can include the rights to be able to do and be certain things, but, on his view, the CA primarily covers that aspect of freedom which relates to opportunity – it cannot necessarily account for rights which relate to process.

The Idea of Justice, Public Reasoning, and Identity

The view of justice which emerges in Sen's later writings is presented in *The Idea of Justice.* It is *comparative* in that it is concerned with whether one state of affairs is more or less just than another. Sen is particularly concerned with making the world less unjust, and in particular with the eradication of *manifest* injustices – on which everyone might agree. In this respect, again, Sen distinguishes his view from Rawls' social contract view, to the degree that Rawls is concerned with the principles of justice in a *perfectly just society* and, to the degree that we do not live in such a society, with "nonideal" theory. Sen characterizes Rawls' search for a perfectly just society in terms of "transcendental" theory, and because the main subject of the theory is the "basic structure of society" – that is, its main institutions including "the political constitution and the principal economic and social arrangements" (Rawls 1972: 7) – it is *institutionalist*. Putting these two elements together, Sen characterizes Rawls' social contract approach as a form of "transcendental institutionalism." He argues that this approach is not a good starting point for thinking about justice. Instead, he favors an approach with some of the virtues of the paradigm of social choice theory which was the starting point of his engagement with Rawls' works. Even if social choice theory as it has been practiced – with its origins in the works of the eighteenth-century French mathematicians (notably, the Marquis de Condorcet and Jean-Charles de Borda) – is highly formal, he argues that its framework has virtues which make a "social choice approach" a good starting point for thinking about justice (see Sen 2009: 106–111).

Another theme in Sen's later writings is the importance of reasoning, and of public reasoning in particular. His work can here again be contrasted with Rawls' writings on the "idea of public reason." Rawls' idea of public reason is about how a political society "formulates its plans," puts "its ends in order of priority," and makes "its decisions accordingly" (Rawls 1993: 212). Yet Rawls' idea of public reason is part of his theory and presupposes other concepts within it, which Sen does not necessarily endorse. In part for this reason, Sen's use of "public reasoning" is distinct and encompasses engagement in public debate and imperfect democratic processes rather than merely the "idealized" deliberation which is the focus in some of the related literature on "democratic deliberation." And while some of that literature "cleanses" preferences which are included in democratic deliberation – for example, in an "ideal deliberative procedure" in Joshua Cohen's (1989: 25) formulation – Sen argues that public reasoning and debate can itself remove "distortions" by exposing people to arguments and ideas which are not available in their local communities. Public reasoning can thus encourage more "objective" beliefs and preferences which survive the test of discussion and debate.

Sen also argues that because public reasoning can operate through discussion, debate, and the dissemination of information across national borders, it makes sense to talk of global democracy even in the absence of a global state. In part for this reason, he views global movements which criticize "globalization" and argue for a more just world as participating in global democracy. And in evaluating the merits of "globalization," his concern is with achieving a more just distribution of its fruits. The role of global democracy is in advancing that more just distribution. Here again Sen's position differs from those of Rawls' later views which advance principles of distributive justice for liberal democratic societies (see Rawls 1993) and then extend the social contract approach to identify principles at the international level across nations or "peoples" (Rawls 1998; see also Sen 1998) – but do not include a principle of equal rights or a distributive principle (such as a "global difference principle") at the global level. Indeed, in Rawls' framework, participation in public reason is restricted to citizens within nations. By contrast, in Sen's work – which invokes Adam Smith's notion of the "impartial spectator" – public reasoning must include "distant voices," including voices from other nations which might introduce a more objective and impartial viewpoint on the subject matter of local or national debates. To this degree, the notion of impartiality operating in Sen's work is

"open" allowing debate across nations to counteract the influences of local interests and parochial beliefs.

Another context in which Sen stresses the importance of reason is identity. In a series of works (e.g., Sen 2006), he argues that there are two illusions associated with identity. One is that we have only *one* identity. The other "illusion of destiny" is the illusion that identity is not chosen. In one version, it is the illusion that identity is "discovered." As an example of someone who falls prey to this version, Sen cites Michael Sandel (1982: 150–151) who suggests that "[c]ommunity describes not just what they have as fellow citizens but what they are, not a relationship they choose . . . but an attachment they discover, not merely an attribute but a constituent of their identity." Sen argues, by contrast, that people have plural identities which are not simply discovered but are objects of reasoned choice. While he recognizes constraints on reasoned identity choice, Sen believes that we can freely choose between and give distinct weights to our different affiliations in various contexts. His views about identity are consistent with his views on capability. In particular, he argues that "there is a strong case for including cultural freedom among the human capabilities people have reason to value" (Sen 2006: 113), and this can include the freedom of some immigrants to retain aspects of their cultures when they settle in Western nations. To this degree, his views about identity and culture form part of his broader views about justice, freedom, and public reasoning. Nonetheless, the relationship between Sen's views and those of political philosophers who stress the importance of community ("communitarians") has not been much explored (see Qizilbash 2009).

Conclusion

Amartya Sen has argued forcefully in favor of alternatives to dominant ways of thinking about advantage, morality, and justice which are associated with utilitarianism and John Rawls' account of justice inter alia. His works have initiated a large literature further exploring these alternatives. He has brought these views to bear on public discussion and policy debates about some of the central questions of our times. His ideas will continue to inform how we think about questions of justice.

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Seneca, Lucius Annaeus

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Introduction

Seneca (4 BCE–65 CE) is more often remembered as the man who was tutor to the young Nero and who then tried to guide him during the early years of his reign. The association inevitably tarnished his later image as he remained a fixture at the court even when Nero's true character revealed itself. In his day, however, Seneca was esteemed as a philosopher whose writings addressed not abstruse metaphysical theories but the moral issues confronting individuals.

An acute observer of human failings and weaknesses he sought to show how the wise man could rise above the fickleness of fortune and find calm in the pursuit of virtue.

While identifying himself as a Stoic he was not wedded to one narrow approach and found wisdom in many philosophies; and as a gifted and persuasive writer his works appealed to many and had an influence well beyond his own time.

Life of Seneca

Seneca was a provincial, born around 4 or 3 BC at Corduba (Cordova) in Roman Spain, the most Romanized center in the peninsula. He came to Rome as an infant when his father, the older M. Annaeus Seneca, moved the family to Rome to pursue success as a rhetorician.

The family belonged to the equestrian order, the second in the Roman social hierarchy, and comprised Seneca, his mother Helvia, his brothers M. Annaeus Novatus and L. Annaeus Mela, and Mela's son the poet Lucan. (Novatus was adopted by a friend of his father and became the Gallio St. Paul encountered at Corinth, *Acts* 18:12–17.) Seneca's mother's brother-in-law C, Galerius was governor of Egypt and after a childhood at Rome the young Seneca visited them there, suffering shipwreck on the return journey when Galerius was drowned (AD 32).

Back in Rome Seneca took up his father's profession of rhetorician. In the absence of paid attorneys Romans relied on oratory and eloquent friends to sway juries, and Seneca's success gained him public acclaim and the quaestorship with entrance to the Senate. Many educated Romans dabbled in philosophy but despite his father's disapproval Seneca became an enthusiast, (*Ep.*108.22), eventually settling on Stoicism as the most congenial approach. In his writings he draws from a range of schools and there is an eclectic element throughout. Meanwhile he married Pompeia Paulina (perhaps his second wife) who fussed over his erratic health, and they had at least one son who died young.

In the Principate prominence brought risk. Seneca's fame brought on Caligula's jealousy, and the orator escaped execution only because Caligula was told the sickly Seneca would soon die anyway (Suet. *Calig.* 53.2; Cass. Dio 59.19.7). Caligula's assassination brought only a brief respite. The new emperor Claudius was persuaded that Seneca had an affair with Caligula's sister Julia Livilla and Seneca was banished to Corsica (AD 41). Despite describing Corsica as a barbarous crag in the sea he wrote a *consolatio* to his mother disclaiming any suffering and asserting the Stoic principle that a wise man can be happy under any circumstances (*Helv.* 4–5, 12). He was in fact bitter and less happily for his reputation wrote another wheedling *consolatio* to Claudius' influential secretary Polybius who had lost his brother; ashamed of the flattery he later tried to suppress it.

In AD 49 after eight years in exile he was rescued by Claudius' new empress Agrippina and made tutor to her 13-year-old son Nero and given the praetorship. Claudius had adopted Nero to the detriment of his own son the nine-year-old Britannicus, and since the adoption now placed Nero ahead of Britannicus Seneca can hardly have been unaware that his charge had a prospect of one day being emperor. Oratory not philosophy

was what Agrippina had in mind for Nero's education, but Seneca would have shared the view that a good orator should be a good man (Quint. *Inst.*12.1.1–3). That he supposedly dreamt he was teaching Caligula was hardly encouraging (Suet. *Ner.*7.1).

For the next 12 years Seneca was tied to the court. To this period belong some of the tragedies and other writings. Through the latter runs the theme of the good man, the wise man, and the man for whom Nature and Virtue should be one. The realities of court life ran on a different track, with scandal, intrigue, and bloodshed. Even Seneca's most ardent admirers confess the dichotomy between his avowed ideals and the role he found himself playing, one of tacit compliance and at times even active accomplice. That he found some way of justifying these roles to himself can be assumed.

In AD 59 Claudius was poisoned by Agrippina. Two things followed. Aided by Seneca and his ally the Praetorian Prefect Burrus Agrippina engineered the succession of Nero rather than Britannicus; Seneca writing the 17-year-old Nero's official panegyric on Claudius which was praised for its composition and derided for its remarks about Claudius' "wisdom" (Tac. *Ann.* 13.3). Soon after Seneca wrote the *Apocolocyntosis*, a derisive mockery of the dead Claudius that reflected Seneca's enduring bitterness over his exile. Seneca continued to write speeches for Nero as he and Burrus joined Agrippina in running the empire while Nero was siphoned off into pursuing his pleasures (Cass. Dio 61.4.2–5). Seneca became immensely wealthy, loaning out money at exorbitant rates of interest and inevitably attracting criticism. In AD 58 Publius Suillius was banished for publicly asserting Seneca's influence was malign and denouncing his usury, asking what philosophy justified this (Tac. *Ann.* 13.42–43). Nero meanwhile was showing his true colors, beginning with poisoning Britannicus. He grew tired of his mother's attempted domination and in AD 59 tried to drown her in a sailing accident; when that failed and with the complicity of Seneca and Burrus he had her executed, Seneca writing his official justification (Tac. *Ann.* 14.7, 11).

As Nero turned to advisors more to his taste the position of Seneca and Burrus became increasingly precarious. Burrus' death (perhaps by poison) in AD 62 ended Seneca's ministerial career. Professing gratitude for past favors in response to Nero's effusion of esteem, Seneca offered his vast wealth to the emperor and retired into private life; devoting his time to those writings on which his fame chiefly rests (Tac. *Ann.* 14.53–56). Three years later in AD 65 Seneca's nephew Lucan was involved in a failed plot to replace Nero by C. Calpurnius Piso, and in the ensuing bloodbath Seneca, his bothers, and his nephew all perished. Seneca's obligatory suicide copied that of Socrates; his wife's effort to die with him was prevented (Tac. *Ann.* 15.60–65).

His Writings

Not all of Seneca's works have survived, and there is some confusion about how to categorize what has. That his philosophy underlies much if not all that he wrote seems apparent, but is more obvious in the overtly philosophical essays. These comprise 124 *Epistulae Morales*, short essays supposedly addressed to his friend Lucilius, reflecting the Stoic virtue of detachment from the world and its mistaken values (34, 37, 74), claiming true happiness lies in the study of wisdom (16, 92), urging ostentation and excess to be avoided in any form (5,19), noting time is fleeting and death is unavoidable and not to be feared (24, 54, 102), arguing that philosophy is both theoretical and practical (95), accepting that fortune is ever fickle and not to be relied on (8, 98, 107), urging the benefits of retirement but rejecting self-absorption (10, 36), and asserting that the wise man will not choose troubles but will endure them (28, 67). There is a certain contempt for the mob (7, 18, 23, 29) and he asserts the need to choose friends wisely (3, 9, 32, 62). He claims to like the simple life, that no possessions are essential, and that while men are naturally gregarious the Stoic is self-sufficient (9, 17, 25, 87). In the famous letter on masters and slaves (47) he argues for recognizing their common humanity (and that through fickle fortune masters could become slaves and

slaves masters) and parades inviting the educated and interesting ones to join him at table; though unlike Cicero and the Younger Pliny he mentions none by name.

Seneca's longer treatises include three *consolationes*: to his mother, to Polybius, and an earlier one to Cremutius Cordus on the death of his son. The other treatises are mostly addressed to friends, two to his brother Gallio, and one to Nero. The *De Providentia* argues that the universe is governed benignly and the good man accepts what fate delivers as evils are only apparent, and he can rise above misfortune and learn from it; that it is best to be called to activity and true glory lies in overcoming dangers. The *De Constantia Sapientis* claims that Stoics only truly understand how things are, that evil lies in intent not outcome and the wise man's godlike mind is immune to adversity and cannot be injured in itself; and that to wisdom the real evil is baseness. The longer *De Ira* makes anger the worst of passions in wanting to punish not improve; that it is useless and ignoble and beneath the dignity of the good man. He agrees that seeming angry can be employed for good ends but the wise man will never be happy if he is really angry over vices all men share. He says it is easier to banish anger than control it and that Stoics believe anger requires a prior mental disposition and that anger is controlled by elements in the body; that the gods are incapable of doing wrong to us as they are by nature benign.

The *De Brevitate Vitae* argues that life is long enough but we waste it, that postponement is the great evil and that the past is gone, the present fleeting, and the future uncertain. Philosophers use the time wisely, others fritter it away over things best ignored; and true leisure lies in philosophy, with rest for the soul after death. The *De Vita Beata* argues that lack of self-control and seeking pleasure and luxury underlie much unhappiness; that the happy life consists of true discernment without empty hopes and fears. He admits no great philosopher ever lived up to his own ideals; and responding to criticism asserts rich philosophers can still teach good to others and that the wise man will accept the gifts of fortune, that even luxury is acceptable if not overvalued. The *De Otio*, of which we have only a part, affirms that man's first duty is to be useful to others, that in this Seneca follows the Stoic masters. He makes this call to usefulness to rise above mere nationality, to be a universal obligation and appeals to the heavens as overlooking all. Nature, he says, gives us curiosity and philosophers are not idle but seek truth and virtue, unlike the mob which follows the opinions of others.

The *De Tranquilitate Animi* confesses that public life is inimical to a peaceful mind but can involve doing good to the state; though bad times make it preferable to retire yet still help others with guidance and advice. He loves thrift but concedes losing property is harder than not gaining it, and there is no escape from self. Nothing should befall the wise man that he could not expect, that we can learn to bear adversity, that in all things we should maintain even temper and calmness in the face of public morals, and that we cannot live well if we do not know how to die well.

In addressing the *De Clementia* to Nero, probably after the murder of Britannicus, Seneca strove to persuade the emperor that his best security lay in the love and admiration of his people, and that nothing becomes a ruler more than clemency. Cruelty, he says, is unworthy and progressive, and a ruler has no need of vengeance. He concedes discipline is necessary, and distinguishes between mercy (deliberate) and pity (emotional); but argues that leading produces better results than punishing. He advises rulers should be careful in what they say, and act as they would have the gods act towards them as a good ruler establishes standards for all. Pouring flattery on Nero's character and praising his supposed virtues, Seneca compares him favorably even with the divine Augustus and avows that despite popular misconceptions Stoicism is the best guide for princes and that the state's good health starts at the top.

Seneca's longest essay the *De Beneficiis* asserts that ingratitude is the worst vice and the most common. He discusses the giving and receiving of benefits, distinguishing between the deed and the intention which alone constitutes the real *beneficium*. Benefits should be about what is necessary or useful, should be given with discretion

and not scattered, should be given graciously and not delayed, and should be given in proportion to the donor's and receiver's capacity. Equally they should be accepted cheerfully for the donor's sake, and he asserts that even slaves and sons *in potestate* can confer benefits, since they are a matter of intent. Gratitude lies in the spirit not in demeanor, and the main cause of ingratitude is too much self-esteem compounded by greed and ambition. He admits that even philosophers can be ungrateful, but doubts if a law on ingratitude could work and thinks the ungrateful are already punished by being ungrateful. He sees benefits and gratitude as ends in themselves and affirms we should be grateful to the gods for what they bestow on all men (suggesting bad men receive such benefits through the virtues of their parents or descendants), and we live under an obligation to the gods which we should accept calmly.

Seneca the Philosopher

Although Seneca identifies himself as a Stoic and mentions Stoic masters with respect he denies being a mere follower, and can cite Epicurus while decrying popular Epicureanism. Equally, while exalting the life of contemplation and self-examination in pursuit of virtue he believes this should show itself in doing good in the world. The inherent tension between these two is resolved by making the benefit lie in the intention rather than the deed; the Stoic is self-sufficient. Virtue alone is sufficient for happiness and philosophy will provide all he needs but it can be expressed to others in wise counsel, and there is a duty to be useful. Human beings should relate as friends, and living well comes from philosophy. Fortune is fickle and misfortunes are to be endured calmly; the wise man's godlike mind rises above them, and external possessions have no real value. In the Stoic tradition he mistrusts emotions and especially passions like anger, which he claims can be suppressed.

Seneca sees a benign providence behind all things visible and invisible, though his terminology oscillates between God and the gods, and he has a Wordsworth-like appreciation for finding God in nature (*Ep.*41.5). At times God is equated with a universal Nature, and the happy life comes from living in harmony with it. Life is the life of the soul which is the counterpart of God in man and is corporeal since only bodies can act. He rejects the idea of a personal daemon but believes some form or part of the universal spirit dwells within us and we can only be good with its help. Death is not to be feared (how or when is unimportant), though he says both that death is nonexistence and elsewhere that it is the birthplace of eternity.

He believes the role of the philosopher in the world is to persuade others to virtue, which is an end in itself. While recognizing that some things belong to the law courts (and unless his praetorship was purely nominal he must have had some experience of them) he has no faith in punishment to change people; people need to be persuaded, provided they have the right mindset. In Seneca's mind the law deals with the excesses arising from passions which the wise man rejects, as something to regulate the mob he despises; here he says that a law should be short and command not discuss, and Rome needs discipline (*Ep.*94.38; *Clem.* 1.1). Although ingratitude looms largest of the vices he condemns he sees no point in a law about it as it would be unworkable, and cites divorce as an example of laws making things more common. Law he says makes the unusual usual, and encourages imitation (*Ben.* 3:16).

Although historians remember Seneca primarily in connection with Nero, his fame at the time was as a Stoic philosopher. In this he differs from Cicero and Marcus Aurelius, whose Stoicism was secondary to their contemporary fame as great political figures. In the Piso Conspiracy some hoped to make him emperor, and it was not because he had been Nero's tutor. Both the clear, practical content of his moral philosophy and the vivid arresting flare of his writings, along with his admission that he did not find it easy to live up to his own ideals, won him many admirers in his own day and in succeeding centuries.

The *Quaestiones Naturales*

Although these address a range of natural phenomena, meteors, air, water, wind, earthquakes,

and comets, and borrow heavily from Aristotle and other Greek thinkers, they are not just idle observations. Running through them is a view of Nature as a unified divine power ruling the heavens and everything around us and which has preordained all things, including our unavoidable death; hence Seneca believed in divination. All of this operates through the law of Nature and Seneca identifies Nature with God, known by a wide variety of names but still is One. Through Nature this infinitely good God's existence is evident and proven. Our task is to recognize the handiwork of God in the world around us, the heavens, and the range of natural phenomena. Seeking this and bringing ourselves in line with this is the road to happiness, and the delight of the soul in all this proves its divine origin.

There is no evidence that Seneca himself ever conducted much personal exploration of the phenomena he describes; his sources are all secondary, but his curious mention that the Egyptians believed in male and female kinds of water (3.14) may go back to his time in Egypt. He disagrees with some sources, occasionally balancing probabilities, and the *Quastiones Naturales* may be a Stoic counter to Lucretius' Epicurean *De Rerum Natura*. In writing them Seneca was moved not by simple curiosity but the desire to elevate human life as part of some great divine plan.

The Tragedies and Satire

Roman tragedies stumbled as the stepchild of Greek originals and home-grown pastiches, and were primarily exercises in oratory and poetry performed probably in recital form. Seneca is credited with nine tragedies: *Hercules Furens, Troades, Medea, Hippolytus* [*Phaedra*]*, Oedipus, Agamemenon, Thyestes, Hercules Oetaeus,* and *Phoenissae*; the *Octavia* being by another hand. Although his tragedies echo Greek drama they drew from the wide corpus of Greek mythology, while leaning heavily on the sensational and gruesome. They depict brutally the violence of passions which Seneca abhorred, and some scholars have seen a didactic purpose behind them as holding up the consequences of surrendering to such passions as they contain a number of Stoic exhortations. That they represent another side of Seneca, with a vicarious interest in violence, cannot however be excluded.

Seneca's least creditable work is the *Apocololyntosis* written after Claudius' death in AD 54 and mocking his formal deification. Its ridicule of Claudius is unsparing, and his hostility towards him goes back to Seneca's Corsican exile. Yet while acting at Agrippina's behest it was Claudius who revoked the exile, granted him a praetorship, and made him tutor to the young Nero. The work sits badly for a man who condemned vengeance and exalted gratitude.

Seneca's Reputation

Seneca was greatly admired by his contemporaries for his writings though his wealth and political role had its detractors.

Quintillian (AD 35–c.100) however denounces his style and says he was admired only by the young, while conceding his wide knowledge and fertile intelligence (*Inst. Or.*10.1.125–131). Suetonius (c. AD 70–130) claims he forbade Nero to read other writers and that the poet Persius knew Seneca and was not impressed (*Ner.* 52; *Vita Persi*). Tacitus (c. AD 56–120) is sympathetic (he also served under a tyrant) and devotes space to Seneca's death (*Ann.*15.60–65). In the second century Marcus Aurelius' mentor Fronto (c. AD 95–126) thought Seneca's style abominable (*Amb.,*362); while Aulus Gellius (c. AD 126–180) cites for and against Seneca the writer but concludes by describing him as foolish and tasteless (*NA* 12.2.1–14). Gellius' younger cotemporary Cassius Dio (c. AD 164–c.230) is scathing on Seneca the politician and a man. He accuses Seneca of affairs with Caligula's sister and Agrippina, blames him for Nero's upbringing and developing follies, denounces his role in the death of Agrippina, sees his usury as provoking Boudicca's revolt in Britain, and sums him up as a consummate hypocrite (Cass. Dio61.10.1–6).

However, the early Church Fathers saw him differently. In his writings they found parallels with their own ethical standpoints, so much that

some even claimed him as Christian in sympathy (Tert. *De Anim.*20; Jer. *Adv. Jovinian.*1.49; *De Vir. Ill.* 12; Aug. *De civ. D.* 6.10–11; cf. Lact. *Div. Inst.* 1.5).

From the same period come the spurious *Letters of Paul and Seneca* which were accepted as genuine down to the Renaissance. This favorable view of Seneca contributed to preserving his writings through the Middle Ages, though theologians like Aquinas were uneasy with him. Dante and Petrarch admired him; Charles V of France (1364–1380) had Seneca in his library; the curriculum for the princely Gonzaga children at Mantua around 1430 included Seneca; in 1450 the future Pius II's *De Liberorum Educatione* recommended Seneca's philosophy to the emperor Frederick III; in 1484 the Dutch Rudophus Agricola used Seneca in his *De Formando Studio*; and around 1490 Gerhard Leeu the first Flemish printer had Seneca as one of the only two classics he printed.

The rediscovery of antiquity in the Renaissance had by then brought Seneca new admirers, and the humanists borrowed his style for invective and exhortation while approving a moral framework divorced from ecclesiastical censures.

Erasmus produced new editions and demonstrated the correspondence with Paul was spurious. Montaigne's essays (1580–1592) borrowed heavily from Seneca, but in the seventeenth and eighteenth centuries interest in Seneca waned; though Corneille based his *Cinna* (1640) on the *De Clementia* and later Diderot wrote in Seneca's defense (1782).

Seneca as a philosopher came to be increasingly disparaged, while appreciation of his influence on Elizabethan and Jacobean tragedies grew steadily. The passions, violence, death, and gore of Elizabethan tragedies in the works of Kydd, Webster, and even Shakespeare owed much to Seneca; and in France Racine's *Phaedre* (1677) was based on Seneca's *Hippolytus*.

As a philosopher Seneca elaborated no new system; he did not find a school. His Stoicism was made richer by eclectic borrowings and he presents it not as an abstract model but as personal advice addressing particular moral problems. His appeal stems in part from the conversational style and the flare of his presentation; and he has been called the second father of Latin prose. Whatever his failings as a man, his love for virtue remains unquestioned; and his writings hold up ideals that the Church Fathers found compatible with their own and later generations have found much to admire and imitate. He was not an original philosopher and certainly not a great one, but he applied his philosophy to the betterment of people rather than abstruse speculation, and today he is remembered as an ethical guide whose writings have withstood the ups and downs of acclaim or neglect, and are still found to have lasting value.

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Introduction

Juan Ginés de Sepúlveda (1490–1573), Hellenist, theologist priest, and royal chronicler, was born in Pozoblanco in 1490. He was awarded a Bachelor of Arts by the University of Alcalá de Henares in 1511. In 1513, he studied theology in the College of Sigüenza. He finished his learning as a grant holder at the St. Clemente School in Bologna (1515–1522). At this school, Sepúlveda was trained by Pomponazzi, who introduced him to Aristotelian philosophy.

In 1517, Sepulveda published his first essay (*Descriptio Colegii*). In 1519, Ginés met Julius Medici (Clement VII), who ordered some translations of Aristotelian texts and put him to work in the circles of Italian Humanism. In 1521, Sepúlveda completed his biography of Cardinal Gil de Albornoz, and before long, in 1523, his first philosophical work *Gonsalus o Dialogus de appetenda gloria* was published. From 1523 to 1525, he was employed by Albertus Pio, Prince of Carpi. In 1526, Sepúlveda was a member of the Clement VII's Papal Court and published the work against Luther titled *De fato et libero arbitrio* (1526).

During the Sack of Rome, he was expelled from Saint Angelo but remained in Italy because he was called by the Cardinal Cajetan to help in the commentaries on the New Testament. However, Sepúlveda had joined Cardinal Quiñones yet to collaborate with him in reforming the Roman Breviary. The return to the Papal Court and the introduction of Sepúlveda in the Imperial Court of Carlos V are owed to Quiñones. At this time, he completed the *Appeal to Carlos V for the War against the Turks* (1529) and *De ritu nuptiarum et dispensatione* (1531) in defense of Catalina de Aragon's marriage. In 1532, Sepúlveda conducted his defense of Albertus Pio against Erasmus, and in 1535 his first great work, *Democrates primus*, appeared.

In 1536, he returned to Spain as a royal chronicler and chaplain to Carlos V. In 1538, he published *Teophilus*, a work about canon law. In 1542, while still in the imperial court, Sepúlveda was appointed preceptor to Prince Felipe. In 1545, Sepúlveda finished his polemical work *Democrates alter*, although it was not published until 1890, thanks to Menéndez Pelayo. In 1548, the Sepulvedian translation of Aristotle's *Politics* was published in Paris.

In 1552, Sepúlveda wrote a scathing account of Las Casas with the booklet *Reckless, Scandalous and Heretical Proposals in the Book about the Conquest of The Indies.* Carlos V died in 1558, but Sepulveda's history of his reign did not come to light until 1563. It was in this year that he completed a new work, *De rebus hispanorum gestis ad novum orbe Mexicumque.* During this period, he began the chronicle about the reign of Felipe II, but this was only published in 1780. In 1566, Sepúlveda completed his translation of Aristotle's *Ethics*, but its publication was banned because it was considered heresy.

In his old age, Sepúlveda completed his great treatise, *De regno* (1571), which he had been working on since 1548. Sepúlveda died in Pozoblanco on November 17, 1573.

Main Ideas

Sepúlveda's thought can be summarized under four main headings: Italian humanism, the defense of the monarchy, the arguments about natural slavery, and the justification of a civilizing war.

The topic of the defense of Italian humanism appears in Sepúlveda's early works, specially in *Gonsalus* and *Democrates primus*. Sepúlveda positioned himself in the line of Italian humanism under the influence of some previous scholars, such as Cicero, Bruni, and, maybe, Machiavelli. Sepúlveda defended the notion that the appetite for glory and honor is not contrary to the notion of

the righteous man. He asserted that true glory can only be reached through the path of virtue and that the inclination for honor is not a feature of vanity, nor does it violate any sacred law. In contrast, assisted with power and public charges, wise men could reach the greatest good and achieve noble deeds.

In the course of Sepúlveda's life, his predisposition to the monarchy was evident. His translations of Aristotle reveal the influence of Pomponazzi, but Sepúlveda changed some expressions and words to bend the Greek philosopher's thinking toward the royalist doctrine.

In *Democrates primus*, Sepúlveda supported the primacy of the monarchy as a form of government, and he condemned tyranny. In *Democrates alter* and *Apología*, he defended the paternalist conception of the monarchy. In his final work, *De Regno*, he reasserted his position and advocated the public utility of dynastic succession; furthermore, he rejected elective monarchy and tyrannicide. The scheme used in this work was analogous to Juan de Mariana's *Regibus* and there has been speculation that Mariana wanted to refute Sepúlveda's work.

Sepúlveda takes the legacy of Aristotle's servitude according to the Castilian lectures about the subject, previously dealt by Cartagena and Roa. Natural slavery is developed in *Democrates alter* and *Apología*, but the concept is better explained in *De Regno*. In this work, he claims that the *homo probus* (virtuous man), instructed in virtue and reason, naturally rules the *homo hebetior* (duteous man), unable to govern himself because of his limited intellect and his primitive traditions. This position is paternalist and bespeaks a misconception about Indigenous people and a heroic patriotism that champions the Spanish model of civilization.

In Sepúlveda's thinking, the first theory about just war can be found in *Democrates primus*, in which he defends war as a political tool, but he confines its legitimacy to defensive war or to war in response to injuries and grievances. Also, Sepúlveda concludes that military and Christian duties are compatible whenever war is just, that is, when it could contribute to the defense of the faith.

In 1545, with *Democrates alter*, Sepúlveda returns to this question and validates war against Indigenous people because they need to be civilized due to the natural conditions of slaves or to their savage crimes and human sacrifices, or simply because war is being waged to encourage preaching and development.

This civilizing mission was treated in the same way in *Apología* and *De Regno*. The question is not superfluous, because the consequence of a legitimate war is based on natural law and *ius gentium* legitimates *ius in bello*, that is to say, slavery and the conquest of lands and properties.

Sepúlveda's Rivalries

Sepúlveda is also known for his academic disputes, in particular his conflict with Erasmus and his rivalry with Las Casas, which will briefly be explained below.

Erasmus names Sepúlveda in *Ciceronianus* as an erudite Bolognese with a deep mastery of Latin and as a proponent of the Ciceronian style. This brief description was not received with pleasure by Sepúlveda, who refuted that assertion argumenting that his ciceronian works were enough to more explanations. Also, Erasmus estimated that the critical reviews of Albertus Pio were not original and that the works of the Prince of Carpi must be attributed to his erudites, between which Sepúlveda was founded. Sepulveda, loyal to his concept of friendship, sided with Alberto Pius and defended this one posture and prompted him to defend Albertus's original concept and wisdom against the charges levelled by Erasmus. These features are the reasons for his *Antiapologia pro Albertus Pio in Erasmun* (1532), in which Sepúlveda argues that the works of Erasmus promote Luther's thesis.

The most notorious controversy in Sepúlveda's life was the dispute over the conquest of The Indies. The causes of Sepúlveda's intervention in the New World dispute are still debated today, but his doctrine on natural slavery and civilizing war certainly clashed with the position espoused by distinguished theologians such as Melchor Cano

and Bartolomé de Las Casas. The latter blocked the publication of the *Democrates alter* (1545) because this work challenged the New Laws of the Indies (1542). This situation should have ended in 1547 with the judgment of Cano by petition of the Royal Castile Council and as a representative of the University of Salamanca. Cano forbid the publication of *Democrates alter* judging that it was a rhetorical trivialization of a theological question. However, thanks to Sepulveda's contacts from Saint Clement he was able to write an *Apology in Favour of the Book about Fair Causes of War* (Rome, 1550), in which the theses of the unpublished *Democrates alter* are summarized. The scale of the scandal was such that in 1550 it led to the celebration of the Valladolid Junta and remained in place until 1557.

The proceedings of the struggle were collected by Domingo de Soto, who expressed the conflicts between Sepúlveda and Las Casas. In 1552, Sepúlveda, resentful because of this Congregation, published the book against Las Casas entitled *Reckless, Scandalous*, *and Heretical Proposals s in the Book about the Conquest of The Indies*. Sepúlveda was never forgiven for this polemic, and he strenuously defended himself in his *Epistolary* (1557). Even in his final work, he continued to support the arguments for the Indigenous people's condition of slavery and the legitimacy of civilizing war. This rivalry and the stubborn reaffirmation of his theses are still at the root of this Andalusian erudite's intellectual disgrace.

Sepúlveda's Legacy

It has been argued that Sepúlveda had a decisive influence in Felipe II's decision to maintain the *encomienda* system, in spite of Las Casas's opposite. Nevertheless, Sepúlveda's theological dissertations were unsuccessful in the academic field, and in the Indian Question the honors were awarded to Vitoria and Las Casas. Paradoxically, Sepúlveda's arguments supported English intervention in The West indies, while Las Casas's arguments were used to condemn the Spanish colonization. This situation was influenced by Richard Eden's translations of Peter Martyr's writings and, in particular, by his brief commentary in the introduction to the *Orbe Novo* (London, 1555). Here, Eden supports the same theses as Sepúlveda regarding natural slavery and the benefits of Spanish civilization. Soon after, Richard Eden's writing greatly influenced the colonialist convictions held by Hakluyt, Peckham, and Purchas. All had a bearing on the development of English imperialism. On the other hand, in Spain, the works of Sepúlveda were forgotten until the end of the nineteenth century (1892), when Menéndez Pelayo revived Sepúlveda's legacy.

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Shaftesbury (Anthony Ashley Cooper)

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Introduction

Anthony Ashley Cooper, the third Earl of Shaftesbury, was a British philosopher of the Enlightenment (1671–1713). As the grandson of the first Earl, who founded the Whig party, Anthony alternated between intense public service and periods of philosophical retreats, till his health forced him to leave London. Harmonizing politics with philosophy was not only the aim of his private life, but also his philosophic agenda. His greatest social enterprise was his attempt to educate the new class of citizens on which the Whig political party depended. He redefined religion, morality, and philosophy to meet this practical goal: He made morality the core of religion and the goal of the good life, and philosophy the means of acquiring a moral character.

Criticizing both John Locke's view of philosophy and Thomas Hobbes's view of human nature, his practical philosophy aimed less at discursive reasoning than at reforming the morals, manners, and taste of his day. Sociability informed the entirety of Shaftesbury's thought: In particular, as the founder of the "moral sense" school in ethics, Shaftesbury maintained that our innate sociability or affection to virtue predisposes us to act virtuously. As this predisposition should be cultivated, the furthering of rationality in view of refinement both moral and intellectual is what philosophy should do. Philosophy as the art of happiness and the key to wisdom became an instrument of good-breeding, while rationality as the means of *Buildung* redefined education. One becomes rational by practicing one's reason in the free exchange of ideas and the criticism which the social interactive devices of humor and wit facilitate. Thus, Shaftesbury refused to legislate against humor, as truth will withstand ridicule, and ridicule will in turn take care of religious fanatism, a form of enthusiasm whose milder expressions he praised.

His tolerance toward religious dissent, his views of enthusiasm as tamed by humor, of truth tried in ridicule and of the good life as artful living through moral and aesthetic self-fashioning had enormous influence in England and the Continent alike.

Life and Writings

The first Earl of Shaftesbury was the famous chancellor of England under King Charles II and later leader of the opposition to the future King James II. The third Earl was raised in his grandfather's household and educated by the latter's physician and political counselor, John Locke, along principles described in *Thoughts on Education*. Equipped with a thorough knowledge of Greek and Latin, familiar with Ancient philosophy and particularly with Roman Stoicism, Shaftesbury began his adult life upon Locke's advice by extensive traveling in the continent. He lived twice in Holland where he befriended French Protestants and skeptics and most probably became acquainted with Benedict Spinoza's philosophy. In 1694, he was elected to the House of Commons, serving the Whig party of King William III for one term. He generally supported the party yet he refused to always follow its line. He alternated between public service and philosophical retreats, till he was forced by poor health to leave London. In 1709, Shaftesbury married Jane Ewer, whom he hardly knew. They had one son, the fourth Earl of Shaftesbury.

Through a practical form of philosophy, Shaftesbury aimed at educating both the new class of citizens on which the Whig party

depended, and himself. His collected writings *Characteristics of Men, Manners, Opinions, Times* (1711) exemplify the former, while the latter can be gathered from his *Notebooks* or *Askêmata*, first compiled by Benjamin Rand as *The Life, Unpublished Letters, and Philosophical Regimen of Anthony, Earl of Shaftesbury* (1900). Apart from the Preface he penned for Benjamin Whichcote's *Sermons* in 1698 and an early work, *An Inquiry concerning Virtue or Merit*, published in 1699 without his consent, all of Shaftesbury's works assume that education and self-education are best served by dialogical means and facilitated by wit and humor. Notably, as one's interiority is social, pitting the philosophic and social selves against each other in the internal dialogue that structures self-education presupposes conversation and previous commerce with the world. The goal of this soliloquy is the integrity that follows from the unification of one's personality around one's philosophic ideal as expressed not solely in the privacy of the personal life, but also in the pressure of the social life. In 1711, the hope to recuperate led Shaftesbury to France and Italy, where he wrote an essay on aesthetics (*Hercules*). He prepared a revised second edition of the *Characteristics*, adding an allegorical headpiece for each treatise. And while working on a sequel to the *Characteristics* to be titled *Second Characters*, he died in Naples at the premature age of 42.

Philosophical Method

Shaftesbury delineates his own project by diverse references to ancient philosophy, but it is Socrates whom he embraces as a preeminent philosophical model. The challenge for the philosopher, who seeks to teach and edify, is to encourage instead of undermine the autonomy of the subject. The magisterial approach is to be rejected on two counts.

First, the passivity which it induces before authority is contrary to the philosophic aim of creating moral agents. The form of Shaftesbury's collected writings is meant to meet this challenge as it aims at making philosophers, or morally intelligent agents, out of readers.

Second, the magisterial approach violates the limits of human knowledge, promising more than philosophy can, ought or need to provide. Endorsing the skeptical methodology of ancient schools and such moderns as Pierre Bayle, Shaftesbury's discursive practice aspires to an open-ended quest for truth and to a free exchange of ideas.

With the exception of one precocious systematic work published without his consent, *An Inquiry concerning Virtue or Merit* (1699), and the Preface which he penned for a collection of Cambridge Platonist Benjamin Whichcote's *Sermons* (1698), he writes letters, dialogues, and miscellanies to reach his readership.

The members of the English upper orders, literate men who were educated but not necessarily learned, required a more "polite" approach. Politeness referred to matters of refined conversation and pointed to the conventions of good manners, which required to make concessions to the knowledge, interests, and attention spans of an audience. To replace the authoritarian or magisterial with the polite manner implied writing in ways that were more informal, miscellaneous, conversational, open-ended and skeptical, and also playful and humorous.

No coherent or comprehensive system can be found in Shaftesbury's works, yet his argument is clear: He redefines religion, philosophy, and education by maintaining that the purpose of philosophy is to create moral agents and that religion's value lies in human morality. This edifying view of philosophy is infused by the Xenophontic and Ciceronian examples of the active philosophic life and revives the Cynic ideal of free speech and the Cynic and Stoic use of humor in the service of moral truth. Although inspired by Ancient thought, Shaftesbury's philosophy seeks to answer contemporary problems. Philosophy should make people effective participants in the world. A practical enterprise and, given the disabilities from which humans generally suffered, often a therapeutic one, philosophy is neither an intellectual discipline for specialists nor a profession, but the study of happiness in view of wisdom that had to touch each thoughtful individual. Philosophy as good breeding – the new or renewed philosophy he devised – was to offer a cultural

program for a postcourtly European culture. His work aimed at returning philosophy to the world, especially to disengage the Cambridge Platonists' views from the dusted folios in which they were trapped, an aspiration that explains both his work's themes and its design. Any philosophy that did not fulfill this role he disparaged as impractical and he criticized the court and ridiculed the church, for failing, as philosophy did, to advance liberty.

Philosophy as practical activity aims at self-knowledge, which is necessary for the process of moral self-transformation, or fashioning of self, which is the content of the good life. Appropriate views of the human being's place in the world and of the true nature of both are required for such a life. In attempting to account for such views, Shaftesbury emphasizes the moral implications of the orderly cosmos that his philosophy advances. In such a universe, there must be a last or ultimate end for the human being. As we have instinctive dispositions of mind which refer to a species and to society, and as we naturally enjoy conversation, alliance, and friendship, Shaftesbury believes society to be such an end. The role of the virtues is to enable us to fulfill our end, which is to live with others in society. Because they allow us to live "according to nature," that is, to be fully human, the virtues are part of any human being *qua* human.

Our natural affection toward the common good assumes some representation of such a good, which the *sensus communis* allows. "Common sense" is a sense of the common good, the *koinonoemosune* which Shaftesbury finds in a Roman Stoic predecessor (*Sensus Communis* III.1, 48n19). The real good or virtue of one's individual is the end, in which one's private good harmonizes with the common good of one's species as a whole, toward which the natural affections point when they are not ill.

If Shaftesbury is responding to Hobbes's reduction of morality to self-interest, he is also rejecting the moral skepticism that followed from Locke's empiricism and voluntaristic divine command theory. He holds the latter responsible for convincing many of the British moralists to give up the idea of goodness as natural rather than as socially constructed. Indeed, Shaftesbury's philosophy opposes both Locke's and Hobbes's empiricism and also the latter's mechanism, voluntarism, and egoism. Shaftesbury endorses innate ideas of morality, which empiricism rejects. Classical moral philosophy saw moral principles as deriving from the human being's objective teleology, which modern mechanistic physics rejects. If there was to be a set of universal moral principles, then, it could not be grounded on universal human nature, but it must be, as voluntarism asserts, grounded on a sovereign will, either God's will or the human government's will as expressed in positive law.

This view Shaftesbury rejects, committing instead to his predecessor Ralph Cudworth's "eternal and immutable" principles of morality. As morality is "in the nature of things," this kind of moral realism is conceived as opposed to relativism, to subjectivism, but also to voluntarism: For Shaftesbury, morality is not constituted by custom, by an individual's fancy, or by the will of a sovereign, whether Locke's God or Hobbes's Leviathan.

Evil, Religion, and Morality

Shaftesbury's thought reflects the change in attitude toward Nature and evil that occurred in the transition from the seventeenth to the eighteenth century. He parts company with theologians who postulate a personal Devil, as well as with philosophers like Bayle who propose a Manichean approach to evil. His optimistic philosophy was to play a major role in transforming Nature from a fallen world into a revelation of divine goodness and beauty. Nature was God's good creation to be utilized and enjoyed by the human being as best as he could.

There are no real flaws in this perfect universe. The goodness or evilness of each system of things has to be judged in terms of the functioning of that system as a totality. Pleasure and pain, beauty and deformity, good and ill are now the many contrasting colors of a tapestry, which produces a harmonious over-all effect. What we consider "evil" is comparable to the shading in a picture or the dissonances in a sym phony. Just as artists make harmony out of contrasting or

opposing elements, so does Nature, the sovereign Artist.

Nothing in the universe is "ill," relatively to the whole, and everything is as it must be. It is justifiable for one species to prey upon another; physical evils, such as earthquakes or floods, which harm individual creatures or destroy whole species, are justified on grounds that all lesser systems of beings must submit to the necessary order of Nature as a Whole.

The world is providentially ruled by a Mind, which may be alternatively conceived as the Soul of the universe and as a personality external to the universe, and that rule is absolutely beneficent. Accordingly, benevolence is the proper frame of mind for the human being, who is so constituted as to find happiness in his benevolent affections and beneficent action, and misery in the contrary.

Genuine religion should be based on nature rather than on revelation. Religion is the enemy of virtue insofar as it depreciates good nature and recommends reliance on future rewards and punishments. Orthodoxy is also the enemy of true or natural religion, because it invites us to base our faith on miracles, that is, on infractions of the beautiful and harmonious order of things. Thus, the true content of religion lies in morality rather than on external authority and what is at stake is now the educational project of developing one's moral self on philosophic rather than religious ground.

Thus, Shaftesbury advances two principal theses in relation to morality. The first is that morality may exist independently from religion, and the second is that the human being is naturally virtuous. Like "nature," he is essentially "good," and "naturally" social, the contrary view held by Hobbes being simply ridiculous. Shaftesbury rejects the social contract theory, first, because society is humankind's natural condition: Out of society and community, we never did nor ever can subsist; second, because it is contradictory: If the state of nature is amoral, there is no duty to obey the laws of society; morality cannot raise out of amorality.

Virtue is in every way natural to the human being, and perfect virtue is perfected taste in morals. Ill-educated people err in ethics as in aesthetics. To be good-humored and truly cultivated is to be right in religion and in conduct, and consequently happy. To be malevolent or maleficent, in the same way, is to be miserable.

Thus, human virtue consists in "following Nature," in reproducing, within the individual microcosm, the harmony and proportion so manifest in the greater world. The "moral sense," the natural faculty whereby we are able to distinguish and prefer what is right, is closely akin to the aesthetic sense, by which we recognize and approve of that which is harmonious and proportionate. The moral sense is but good taste in the art of living, and, like other forms of taste, may be improved by training. The person of virtue, then, like the one of *virtu*, is the person who recognizes what is good by its beauty. The virtue of a rational creature consists in a rational affection towards the right, that is, a just sentiment or proper disposition. The highest good is a constant, fixed, and regular joy, which carries tranquility along with it and which has no rejolt.

Enthusiasm

To know with certainty that all things work for the best would require that a finite mind would comprehend the universe as a whole. Shaftesbury admits that this is impossible and introduces enthusiasm in view of amending the situation: The human being is able to surmount the limitation of his finitude because at moments he can intuit the harmony of the Whole; these are the ecstatic moments of faith, or enthusiasm, in which the mind is caught up in vision.

Enthusiasm should be educated, for it can be vulgar and conducive to vice. In his *Letter Concerning Enthusiasm* (1708), stimulated by the appearance in London of a group of prophetically inspired Christians, Shaftesbury reduces the "prophets" to peripherality and proceeds to attack the church in terms of enthusiasm. Since enthusiasm was the common currency of human life, enthusiastic prophets were all too likely to induce enthusiasm in the reigning clerics and magistrates. Zealots were to be found inside the established Church as well as at its borders. Shaftesbury took a stock element of Anglican polemic and turned it against Anglican Church, or at least its High

Church elements. The "high-flyers" were for Shaftesbury enthusiasts, zealots, and fanatics.

In keeping with the protestant tradition that he inherited, Shaftesbury defined religious enthusiasm as uncontrolled passion. He made clear that enthusiasm was a condition in which basically sound affections grew to extremity, liberating themselves from any control by the mind. It was a classic instance of the self's loss of autonomy, as described in *An Inquiry concerning Virtue or Merit*, since reason no longer shaped affection. Moreover, as the *Inquiry* would lead one to predict, enthusiasm was highly conducive to vice. Aside from inherently vicious affections, affections were liable to become vicious only when they were not harmoniously balanced or rationally moderated. This was the case with enthusiasm in its guise of superstition and bigotry.

While moral character entails a rational and cognitive element, Shaftesbury is unwilling to ground it solely on intellectual or logical functions of the mind. Moral "affection" is required – those outgoing energies within the individual that stimulate action and direct one toward the good. But moral affection must mature in cognition and must be controlled by reason. Virtue itself is described by Shaftesbury as no other than a noble enthusiasm justly directed and regulated. Enthusiasm is the inner movement of the human spirit which carries it beyond itself in the vision of the Good. Only the mind so taken up in vision is capable of that affection or energy which is the substance of the moral life – the life in harmony with Nature and with God.

Enthusiasm is not only the culmination of Shaftesbury's philosophy, but is the dynamic element that gives it its life and sets his thought apart from that of the Deists and rationalists of the Augustan age.

The Good Life

The natural joy that the mind enjoys in the contemplation of harmony and proportion is not limited by Shaftesbury to the fine arts; he finds it evident through the whole range of human activities and pleasures, whether it be in toys or sports, in dress or gardens.

For Shaftesbury, harmony is not merely mechanical symmetry of parts in a whole, but it is organization which manifests an inner formative force. He is saved from conceiving of harmony as a merely static balance of forces by thinking of it dialectically as the product of a complex interplay of tensions. This is clearly seen in his conception of the inner harmony of the affections as well as in his concept of the ultimate harmony of Nature. Though he praises symmetry, it is not understood as a simple balance of uniform elements; his description of the beauties of the natural world reveals a genuine appreciation for irregular or asymmetrical design.

It is for this reason that for Shaftesbury the science of virtuosi and that of virtue itself are one and the same. The virtuoso is one who appreciates or creates aesthetic form. Since in Shaftesbury's theory aesthetic and moral forms are continuous, virtuoso-ship is one of the best modes of preparation for the moral life, better, he remarks, than mere pedantry or empty scholarship. The true virtuoso understands the principles of harmony that underlie both good art and true character. Knavery is mere dissonance and disproportion. However, Shaftesbury explains that this does not apply to the artist who merely copies external forms, but to the one who represents the graces and perfections of minds, that is, who knows the laws of inward form. In the contemplation of the beautiful, the mind advances its own true worth and interest.

Influence

Shaftesbury's philosophy was very popular in England and the continent in the first half of the eighteenth century. Gottfried Wilhelm Leibniz praised him, Francis Hutcheson was his professed champion while his notion of moral sense influenced David Hume and Adam Smith; Bernard Mandeville, George Berkeley, and Joseph Butler testified to his importance by criticizing him.

In his *Pensées diverses*, Montesquieu referred to Shaftesbury as one of "the four great poets," along with Plato, Nicolas Malebranche, and Michel de Montaigne. His eulogy of the author of the *Characteristics* would be echoed by a multitude of instructed men in France, Germany, and England.

Shaftesbury's Deism and tolerance in matters religious influenced Georges-Louis Leclerc, Voltaire, and especially Denis Diderot; through the efforts of Robert Molesworth, Shaftesbury's writings impacted the Dublin scene; numerous writers of the Scottish enlightenment and many German thinkers, such as Gotthold Ephraim Lessing, Moses Mendelssohn, Johann Wolfgang Goethe, Friedrich Schiller, and Johann Gottfried von Herder, inherited his view of enthusiasm, which differentiated between intuitive reason and discursive reasoning and influenced the Romantic notion of the creative imagination.

At the end of the eighteenth century, Herder could write of Shaftesbury that this "beloved Plato of Europe," "this virtuoso of humanity. . . has had a marked influence on the best minds of our century, on those who have striven with determination and sincerity for the true, the beautiful, and the good" (quoted in Grean 1967, ix–x).

Finally, the controversy over Shaftesbury's view of ridicule as the test of humor, however misconstrued, engaged many thinkers for over two centuries and is echoed, along with his views of wit and humor, in the work of Immanuel Kant, Johann Georg Hamann, and Søren Aabye Kierkegaard, among others.

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- ▶ Hobbes, Thomas
- ▶ Kant, Immanuel
- ▶ Kierkegaard, Søren Aaybe
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Sidney, Algernon

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S

Introduction

An English politician and political writer, Algernon Sidney (1623–1683) was a descendant of two ancient noble families: his mother was the daughter of the ninth earl of Northumberland, and his father the second earl of Leicester. He is mainly known for his longstanding reputation as a "republican martyr," since he has been executed for his purported involvement in the Rye House Plot against the King Charles II and the Duke of York.

In the context of the post-Second World War impressive renewed interest in republican thinking (Fink 1945; Robbins 1961; Pocock 1975), Sidney's main work, the *Discourses concerning government* (1681–3, publ. Posth. 1698) has gradually been taken more and more seriously in intellectual history (Robbins 1947; Worden 1985; Scott 1988, 1991; Houston 1991; Skinner 1998, Sullivan 2004; Hamel 2011). As Sidney acquired the status of one of the key early-modern republican theorist, some of his theses and arguments have even been used to substantiate the neo-republican research program in political theory initiated by Philip Pettit (Pettit 1997, 2014; Lovett and Pettit 2009).

One should therefore probably not be surprised that by entering the "canon," at least of early-modern republican thinkers, Sidney has given rise to the most contrasting interpretations. As decisive as it has been for the republican revival in intellectual history, the overemphasis of the *Machiavellian Moment* on the figure of James Harrington and his heritage led J.G.A. Pocock's to unconvincingly play down the importance of Sidney in the reconstruction of the "Atlantic Republican Tradition" (see Pocock 1975, 1994). At the same time J. Scott published the second volume of his unequalled intellectual biography of Sidney (Scott 1991, following the first vol.: Scott 1988) in which he by contrast situated Sidney's life and work at the heart of English republican experiment and thinking, A.C. Houston even claimed in an important book, combining a careful study of Sidney's thinking and reception in eighteenth-century England and America, that "Sidney represents the essence of republicanism in England and America" (Houston 1991, 4). Owing to a willingness to underline the crucial role of the circulation and reception of seventeenth-century English republican ideas in the francophone context of the Huguenot refuge, several studies have also shown the importance of Sidney's presence in eighteenth-century enlightened and revolutionary France (Hammersley 2004, 2010; Quastana 2013; Hamel 2019). More modestly, Q. Skinner (1998) influentially argued that Sidney can be considered as a "neo-Roman" theorist of freedom before the rise of liberalism, whereas V. Sullivan (2004 part. II and ch.6) put forward a Straussian interpretation of Sidney's thought, hypothesizing that Sidney is one step toward the "formation" of a "liberal republicanism": a liberal as an "anticipator of Locke," Sidney was also a republican as a "secret admirer" of the nefarious Machiavelli.

Why Reading Sidney Today?

It is impossible to assess or even introduce duly these interpretations in the context of this entry. The privileged standpoint adopted here will be to highlight reasons for contemporary readers of this encyclopedia to consider Sidney's thinking: whereas the defense of individual rights is so frequently accused to undermine the foundations of the collective life, and while invoking the common good and civic virtue is no less often immediately assimilated to a paternalism hostile to personal liberty, Sidney's work provides one the opportunity to appreciate how avoidable are these oppositions.

Written between 1681 and 1683, the *Discourses* are posthumously published in 1698 in London, most probably under the responsibility of John Toland, the great architect of the "republican canon": Toland published the same year John Milton's *Works* (Milton 1698) and would soon edit the works of James Harrington (1700), another great English seventeenth-century republican.

Sidney introduces his reflections as a modest account of the claims and arguments laid out by Robert Filmer in *Patriarcha*, timely published posthumously in 1680 by royalists championing the "indefeasible hereditary government" against theorists of popular sovereignty and resistance (Cuttica 2012, 190). Filmer's two main theses are (i) that political authority has been divinely ordained and more specifically given to Adam who has then himself transmitted it to his descendants according to the right of primogeniture, and (ii) that paternal and political power are by essence indistinguishable, and must be conceived as absolute, indivisible, and unaccountable (except to God). From the first claim, Filmer draws a radical critique of all contractarian views of the origins of political authority; from the

second, he derives the illegitimacy of any limitation or contestation of political power. Now, Sidney does not only oppose these contentions: the hundred or so sections that compose the *Discourses* embody an ambitious and original political and moral thought.

His starting point is the affirmation of the "principle of liberty in which God has created us." This principle is taken as an "axiom" of "common sense," equivalent in the political realm to the most elementary mathematical truths (D.1.2.8); it means that human being are said to be born free and endowed with physical, moral, and cognitive faculties that allow each and every one to act and get one's bearings in life according to what one deems his or her "own good" (D.1.6.20–3). Although no one can be immune from misusing one's judgment, the progress is nothing but the result of the continuous adjustments of the individual to the circumstances (Hamel 2011, p. 406–19). This is no less true from a collective standpoint: The course of history has progressively made the peoples conscious of the defects inherent to the forms of government that were unable to fulfill their assigned ends. Strikingly, monarchies are thus assimilated to archaic and vitiated forms of government, fit only for immature and unexperimented peoples still ignoring that one cannot hope to protect one's freedom by giving up an unchecked power (D.3.7.358; D.2.8.122–3). To the expansive corruption of monarchies, Sidney opposes the greater efficiency, rationality, and legitimacy of systems of government in which laws derive from the people's choices or their representatives and make governors accountable to the people for the entrusted power they momentary hold. As a result, while electing virtuous representatives is in the people's interest, good institutions incite the governed to be watchful, and the people can always legitimately dismiss their governors, using force if necessary.

This ultimate power is indeed the hallmark of a free people, as Sidney claims emphatically:

> the choice of that society, and the liberty of framing it according to our own wills, for our own good, is all we seek. This remains to us whilst we form governments, that we ourselves are judges how far 'tis good for us to recede from our natural liberty; which is of so great importance, that from thence only we can know whether we are freemen or slaves (D.1.10.31)

But this power is even more than that. Sidney sees it, more generally, as the mainstay of the whole social fabric:

> all laws must fall, human societies that subsist by them be dissolved, and all innocent persons be exposed to the violence of the most wicked, if men might not justly defend themselves against injustice by their own natural right, when the ways prescribed by publick authority cannot be taken (D.3.4.340)

Freedom is assimilated to "the right that is common to all" to be "exempt[ed] from dominion D.2.31.304;D.3.33.510"; thus, it is conceived as the end men pursue not only when they choose to live in political societies (Sidney 1665 9.139–40) but also when they seek to reform, or even to overthrow, systems of government they deem undermining their freedom (D.1.2.8; D.3.41.551). Such a concern for protection against forms of power that are not controlled by laws leads Sidney to put forward an individual-centered version of the *salus populi*:

> if the safety of the people be the supreme law, and this safety extend to, and consist in the preservation of their liberties, goods, lands and lives, that law must necessarily be the root and beginning, as well as the end and limit of all magistratical power, and all laws must be subservient and subordinate to it. (D.3.16.403)

However, the concern "any private man" (ibid.) has for his life, freedom and goods do not prevent him from identifying and choosing who, among his brethren, seem the most virtuous to hold political charges. While seeking their own good – namely the assured enjoyment of their "most important temporal interests" (Sidney 1665 9.144) – individuals realize that this will not be possible, in many situations, without entrusting an individual or assembly a power to enforce justice and protect freedom. Now, who will be the most able to take care of these interests if not those in whom will be perceived the best dispositions to pursue the common good over their own personal interest? For individuals willing to enjoy their own rights, civic virtue appears as the rational criterion to be used in the choice of governors:

> whensoever men act according to the law of their own nature, which is reason, they can have no other rule to direct them in advancing one above another, than the opinion of a man's virtue and ability, best to perform the duty incumbent upon him; that is, by all means to procure the good of the people committed to his charge (D.1.16.51; see D.3.7.357)

It does not follow, however, that the most virtuous have a natural right to govern, because the right to govern cannot be but "created" (D.3.18.420) by the consent of the governed that makes it legitimate (D.1.10.30–1). The function of laws, according to Sidney, will thus be to curb the political power that has initially been granted without limits or checks (D.2.30.288, 301; D.3.21.442; D.3.31.504). Sidney adds that the political experience of any people, provided they have not been maintained in the ignorance of their rights and kept out of political life, will teach them that it is always dangerous to grant any unchecked prerogative to a ruler, virtuous though he be.

But establishing the empire of law over the power of men, and thus assuring the basic "equality" among citizens (D.2.18.179), is not enough to maintain freedom. Quoting and approving Machiavelli, Sidney explicitly follows his tracks on this:

> Machiavelli discoursing of these matters, finds virtue to be so essentially necessary to the establishment and preservation of liberty, that he thinks it impossible for a corrupted people to set up a good government, or for a tyranny to be introduced if they be virtuous; and makes this conclusion, That where the matter (that is, the body of the people) is not corrupted, tumults and disorders do no hurt; and where it is corrupted, good laws do no good: Which being confirmed by reason and experience, I think no wise man has ever contradicted him (D.2.11.135; see Machiavelli 1960, 1.17).

The most interesting claim in Sidney's conception of civic virtue is the following twofold argument: He argues that civic virtue is at the same time fundamentally rooted into, and nevertheless irreducible to, individual interests. It follows that the main precept of the good "method" to form citizens is not to teach them that they should sacrifice themselves on the altar of the homeland: it is to make sure that everyone sees his or her own benefit in the common good (D.2.28.274). To succeed, a society must be concerned about the "integrity of manners" which is particularly threatened by excessive inequalities of wealth and power. Those mighty sources of corruption destabilize the social structure and undermine free institutions (D.3.6.350):

> the good magistrate… knows there is no safety where there is no strength, no strength without union, no union with[out] justice; no justice where faith and truth, in accomplishing publick and private contracts, is wanting. (D.3.19.432)

Though civic virtue has a crucial role in maintaining the institutions protecting freedom, it is also a key resource in the critical situations where the people, by "judicial or extrajudicial ways" (D.2.24.220), embark upon the resistance to the tyranny they suffer:

> nothing can better shew the wisdom and virtue, or the vices and folly of nations, than the use they make of this right [i.e., to choose one's government]: they have been glorious or infamous, powerful or despicable, happy or miserable, as they have well or ill executed it. (D.3.25.463)

This is the moral Sidney wants to draw from the conflict opposing the Romans and the Privernates in 330–329 BC. Though defeated, the Privernates so to speak stated their conditions, warning the Romans that the terms of peace would be respected only if they, Privernates, were to be treated as a free people. This way of "resisting oppression and vindicating their own liberty," Sidney notes, has rightly been interpreted by the Romans themselves as "the highest testimony of such a virtue as rendered them worthy to be admitted into a society and equality with themselves, who were the most brave and virtuous people of the world" (D.3.36.520).

While Sidney should obviously be of interest to anyone looking for the intellectual sources of the eighteenth-century Revolutions, he also offers a salutary resource to reconsider the intellectual validity of the antagonisms we are accustomed to think with.

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► Freedom
► Machiavelli, Niccolò

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Sieyès, Emmanuel-Joseph

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Introduction

Emmanuel-Joseph Sieyès (1748–1836), central figure of the first period of the French Revolution, remains for many the author of a single book: *What is the Third Estate?* (1789), punctuated by three famous questions: "What is the Third Estate? EVERYTHING. What has it been in the existing political order, until now? NOTHING. What does it want to be? SOMETHING."

This reductive vision leads to the neglect of his other texts. He has also long been the object of a rather general hostility: the conservatives reproach him for his role in the end of the *Ancien régime* and for having voted the death of the king, the progressives reproach him for allowing Napoleon to come to power, and for not trusting popular sovereignty. Therefore, it is necessary to break with the partial vision of his intellectual work and to

measure better the historical and conceptual importance of his legal and political ideas.

Privileges

An Essay on Privileges (1788) tackles the question of the *common*. When he fights against privileges, he also fights for the invention of a common statute and common rights. The problem with the existence of privileges is that they are not just about the privileged. Sieyès thus distinguishes privileges from rewards, showing that the latter benefit those who receive them without harming those who do not deserve them. In privilege, when one gains another loses because one cannot grow without diminishing the other, except by choosing invisible promotions. Privilege is always a visible, sensitive phenomenon: it is an honor, humiliating to those who are not honored.

From the second edition, Sieyès devoted a long note to the problem of distinction: it contrasts the *distinction of* with the *distinction by*. The first is an ontological evidence: each being is distinct from the other; the second is a pure social creation, which entails a degradation of the image of those who are not distinguished, since in reality they become a kind of background from which stand out those who are distinguished. Against these illegitimate and unfounded privileges, it is necessary to construct a social and political order which, if it is to admit distinctions, manages to justify them rationally.

Active and Passive Citizens

This is the case with the distinction between civil and political rights. It appears in *What is the Third Estate?* but it is in the *Preliminary of the French Constitution* (1789) that it is most clearly stated. Sieyès speaks of passive rights/active rights, natural and civil rights/political rights. He also speaks of passive and active citizens, and it is this distinction that has left its contemporaries with a misunderstanding. Civil or passive rights are truly rights and are not reduced to a distorted version of the "real" full rights of "political rights."

Civil and political rights are of different nature and destination; Sieyès refers to the former as rights "for the maintenance and development of which society is formed" and the latter as rights "through which society is formed and maintained." Civil rights are therefore the purpose, the objective of the legal system and political rights are just means: therefore, the passive citizen does not have fewer rights than the active citizen, since he has as many freedoms, respect for his property, his security, than the active citizen, and that that is what the legal system boils down to for Sieyès.

On the other hand, passive citizens have political rights, even if they do not have elective rights. They have passive political rights: freedom of expression, freedom of the press, and the possibility of spreading ideas, through private letters as well as public writings. Passive citizens who all benefit fully from these rights can act in the political field and change the opinion of active citizens. It is an intervention that depends on the willingness of active citizens to be persuaded but it refutes the idea of an absolute lack of political rights for passive citizens.

Sovereignty and the Constitution

Sieyès then kept away from the great political boiling that crossed France after 1791. He tried again to play a role in the Year III (1795) by proposing a new Constitution. Sieyès' weak talents as a speaker, and a certain political clumsiness, reduced his hopes to nothing until 1799 when he succeeded in including many of his ideas in the constitution of the Year VIII. He then retired from his political life and, with the return of the monarchy, he went into exile in Brussels then returned to Paris, where he finished his life (1830–1836).

In two long speeches (*Opinions*) in 1795 (2 and 18 Thermidor An III), Sieyès devoted himself to the criticism of the notion of sovereignty. In 1789, in *What is the Third Estate?* Sieyès had already discussed the question of

sovereignty: he then presented the political will as dividing itself into *pouvoir constituant* (constituting power) and *pouvoirs constitués*. Only the Nation has the constituting power – the constituting power can therefore be seen as a specific difference in sovereignty (as opposed to other political powers). But when it is no longer a question of overthrowing an illegitimate government, the notion of sovereignty may become dangerous. According to him, the notion of sovereignty leads to the risk of a "*ré-totale*": a government that regulates all aspects of the lives of citizens, thereby reducing to nothing, under the pretext of general interest, individual freedoms. In these *Opinions*, Sieyès breaks with what could appear as a form of legislative passion at work in the texts of 1788 and 1789 when it came to promoting common rights. Six years later, Sieyès' concern was rather to control this "common will," to limit its excesses.

But it is above all the idea of a "*jury constitutionnaire*" that explains the importance of these two texts. A recurring question is whether or not this jury foreshadows the constitutional review. This complex debate presupposes, as Pasquale Pasquino rightly recalls, that we agree beforehand on the method: should we define constitutional review as "what constitutional courts do today" (genus) and from there compare the institution of Sieyès (species) to this activity? Or should we adopt a flexible design geographically and historically, and seek if there is a common structure among the set of devices, where there is an independent review of the conformity of the acts of the legislative power to the Constitution?

In the first perspective, it is difficult to relate Sieyès directly to the notion of constitutional review, since the concept that the *Opinions* of Sieyès implies of the notion of Constitution cannot be purely normative. It is also not purely political since if Sieyès refers to "legislative acts," which may seem to refer to practices and not to texts, it nevertheless refers to the compliance of "laws" with "articles" of the Constitution, specifying that these articles must be in small numbers and that the constitution must not be too detailed.

According to the second approach, this type of difficulty vanishes since it is accepted that to check the constitutionality can mean to check compliance with a normative hierarchy as well as to examine the regularity of the procedures for enacting the law by the legislator (voting conditions, duration and nature of terms of office).

In total, the reading of these two *Opinions* shows that Sieyès does not always clearly separate what is a political vision from what is a normative vision of the Constitution and this leads him to not always clearly dissociate the internal control from the external constitutional review. Nevertheless, the triple function of the "*jury constitutionnaire*" – cassation, improvement, natural fairness – shows that Sieyès sees in the Constitution something other than the mode of organization of the political system. Sieyès sees in the constitution the affirmation of a series of fundamental rights, which are imposed on legislators and which limit, from the top, its action, and on the other hand, the fixed form of this constituent power, whose extraordinary power he saw in 1789 and in 1793 its dreadful violence – this power also limits, but from below, the work of the legislator.

Conclusion

Sieyès lived a long time but had a rather short period of political activity, between 1789 and 1799. In his first texts, he denounces the absence of any common rule of law; this revolutionary position necessarily calls, as soon as the conditions of a new social order seem to be met, a phase of "recognition" of rights that will be common to all men and citizens – hence its role in the summer of 1789 when the *Déclaration des droits de l'homme et du citoyen* was drafted. Later, in 1795, he sought to set out the norms of public law that could perpetuate and guarantee the political community and fundamental freedoms. It is to the "*jury constitutionnaire*," an original creation, misunderstood by his contemporaries, that he entrusts this mission, paving the way for the various types of constitutional review that exist today.

Cross-References

▶ Constitution
▶ Sovereignty and Human Rights

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Silvers, Anita

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Introduction

Philosopher Anita Silvers (1940–2019) is a leading scholar and advocate for disability equality. She is Professor and Chair of the Philosophy Department at San Francisco State University. The purpose of this entry is to discuss themes from Silvers work on the nature of disability and how reflecting on the nature of disability matters for our thinking about justice and equality. There are two important themes in Silvers work. First, she defends a social model of disability. Second, she argues justice requires providing participatory rights for people with disabilities.

The Nature of Disability

The concept of "disability," as invoked in our contemporary social, political, and legal discussions, connects disability with physical or mental differences that limits a person's ability to achieve typical levels of success in different areas of social life, such as learning, communicating, or being able to contribute to productive economic activity (Silvers 2010: 23). The key idea is that people with disabilities are understood as being *limited* in some way.

One of the foundational philosophical questions about disability is the source of this limitation. The medical model of disability assumes that the disadvantages associated with disabilities are caused by some kind of natural defect. Since the medical model of disability equates the disadvantages associated with disability to functional impairment, it has historically been associated with policies of "normalizing" atypical bodies and minds (Silvers 1998a). According to this model, the proper normative response is to cure or rehabilitate.

Throughout her work, Silvers criticizes the medical model of disability (Silvers 1994, 1995, 1998a, b, 2010). She argues that the medical model falsely assumes functional impairments cause harmful limitations because it mistakenly conflates the *mode of function* with the *level of functioning* (Silvers 1998b: 101). The mode of functioning is the way some functional tasks are accomplished. For example, the mode of reading a document usually relies on seeing text. However, people can read by multiple means, such as tactilely with Braille text or aurally through voiced software. The medical model assumes the priority of "normal" modes of functioning over the absolute level of functioning itself. This means a person who is proficient at reading Braille will be assumed to be functionally impaired compared to a similarly proficient person who reads visually.

Importantly, the medical model of disability fails to account for the critical role the social environment plays in a person's ability to function (Silvers 1994, 1998a, b, 2010). It is often assumed, for example, that being unable to ambulate with legs and feet causes social limitations. This is false. The social limitation may be mitigated or removed entirely in a world full of ramps, elevators, and accessible transportation. Thus, it is a mistake to assume that the harm associated with disability is due to natural rather than social factors.

Silvers defends the social model of disability. She argues that the social model of disability transforms the notion of a "handicapping" condition from a state of a minority of people who are

internally disadvantaged to the state of society that disadvantages a minority of people with atypical bodies and minds. The source of the minority's disadvantage is an inaccessible social environment (Silvers 1998a: 75, 2010: 28). The primary disadvantages for disabled people are socially constructed barriers, such as discriminatory employment practices and inaccessible architectural design. For a person who relies on a wheelchair for mobility, her "limitation" associated with disability is not some internal defect that limits ambulation, but the fact she has limited or no access to bathrooms, workspaces, medical services, and educational programs, which "normal" citizens have access.

Disability, Political Morality, and Public Policy: A Right to Social and Political Inclusion

Silvers work has also critically examined what is owed to people with disabilities as a matter of political morality. Speaking broadly, we can try to think about what is owed to people with disabilities as either a compensatory right or a participatory right (Silvers 1998a, 2003). Silvers argues that we ought to think of disability rights as a kind of participatory right instead of a kind of compensatory right. For Silvers, a participatory right allows disabled people meaningful access to the social world on equal terms for people of all functional abilities.

Thinkers who assume that disability is a natural deficiency often assumed that the proper normative response to disability requires compensation. Thus, disability is a type of disadvantage that deserves special benefits, such as entitlements or compensation, to normalize "defective individuals" (Silvers 1998a: 138; See also 1998b). Distributive programs historically have focused on either repairing individuals through medical intervention or through welfare transfers to compensate for some sort of internal defect that limits opportunities for welfare or effective freedom. Silvers criticizes such normative responses to disability on several grounds. First, compensatory rights often presuppose false assumptions about the nature of disability, and as such, do not solve the central problem for people with disabilities: their exclusion from social and political life. Second, policies that allocate special benefits are justified by conceptualizing people with disabilities as exceptionally needy, and thus as being deficient compared with "normal" people (Silvers 1998a: 34). This has a pernicious effect on the identity of people with disabilities. By being seen as internally deficient, it undermines the ability of disabled people to initiate mutual and reciprocal relationships.

Silvers argues disability equality requires participatory rights (Silvers 1998a: 127). A failure to provide instrumentally effective accommodations interferes with the freedom of people with atypical modes of functioning. Disability rights ought to equalize opportunity so that disabled people have similar access to the social, legal, and physical environment as nondisabled individuals. Modeling disability rights in this way presumes that people with physical and mental impairments are capable of flourishing without special care or needs, as long as they have equal access to social opportunities (Silvers 1998a: 134).[1]

Silvers provides a thought experiment to critically evaluate specific exclusionary social and political practices that ought to be remedied. Her "historical counterfactualizing test" asks if a specific social and political practice would be the same if the excluded disabled individuals were the majority and not the minority. This test helps free our imagination from familiar social and political practices that are typically justified via economic necessity or mere convenience (Silvers 1994, 1995, 1998a, b, 2000, 2010). By broadening our imagination, historical counterfactualizing helps show how atypical individuals can achieve functioning through redesigning social practices. For example, visual media is privileged over aural and tactile media for storing data because that is what works best for most sighted individuals. However, visual data storage excludes blind

[1] For critical engagement with Silvers' arguments, see Arneson (2000) and Pogge (2000).

individuals. If blind individuals were the majority instead of the minority, then the practice would be different (Silvers 2000).

Conclusion

This short summary of several themes found in Silvers work cannot do justice to her contributions to the philosophy of disability. I will finish this entry with a quote from Silvers about disability and political morality, which nicely summarizes the main themes discussed in this entry. She states, "Political morality should recognize that the democratic value secured thereby lies not in relieving disabled people's neediness but instead in liberating their talent and thereby eliciting their contributions through full and meaningful citizenship" (Silvers 1998a: 143).

Cross-References

▶ Bioethics: Experimental Approaches
▶ Claim Rights (Subjective Rights)
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Smend, Rudolf

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Introduction

Rudolf Smend, born on January 15, 1882 in Basel, died on July 5, 1975 in Göttingen, was a German jurist. He received his doctorate in Göttingen in 1904 and habilitated in Kiel in 1908. Smend was named professor at Greifswald (1909), followed by chairs in Tübingen (1911), Bonn (1915), and Berlin (1922). In 1935, he was transferred to Göttingen for political reasons because of his rejection of National Socialism. For this reason, he later became the first rector of the university there after World War II (Hesse 1975, p. 338).

The seminars he held until 1969 brought together and produced numerous legal and political scientists. The main themes of Smend's work were law of the state, theory of state and constitutional history as well as church law and the law of church and state.

In his main work on constitutional theory, *Verfassung und Verfassungsrecht*, he developed his theory of integration, which had a lasting influence on the theory of state and the interpretation of the German constitution, the Basic Law. Equally influential were his reflections on the content and significance of freedom of opinion and academic freedom.

Community and State

In contrast to legal positivism, which emphasizes the separation of being and should, Smend was a representative of the methods of the humanities (*geisteswissenschaftliche Methode*) in law of the state and in constitutional theory. His working method was both normative and empirical, but above all historically grounded, value-bound, and open to consideration. It was epistemologically based on an overview of different patterns of interpretation, was mainly dialectical and not conceptually deductive. In the methodological dispute over the jurisprudential understanding of the state, in particular of the Weimar Republic, and the interpretation of the Weimar Reichsverfassung, he stood with Carl Schmitt, Erich Kaufmann, and Hermann Heller as anti-positivists against the legal positivists Gerhard Anschütz, Richard Thoma, Adolf Merkl, and Hans Kelsen (Stolleis 1999, pp. 153 ff.).

Smend was convinced that the content of a constitutional norm cannot be determined in isolation from history and current political and social conditions. The basis for his conviction was his understanding of the state, which in turn was significantly influenced by Theodor Litt's thoughts on the relationship between a person and the outside world. Also collective structures are naturally only the sensual experiences of individuals. The elements of a community cannot be viewed and grasped in isolation, but only through mutual interaction (Smend 1928b, 2010, p. 126). Since the constitution is one of these elements, the unity of the constitution is an essential maxim for understanding.

The rejection of thinking in spatial categories brought Smend into contrast with the three-element theory (*Drei-Elemente-Lehre*) developed by Georg Jellinek, according to which the territory, the people, and the power of the state constitute a state. In the same way, the theory of integration contradicts the notion of the state as an institutionally organized legal entity antagonistic to the individual and to society, which is in the tradition of Carl-Friedrich von Gerber, Paul Laband, Georg Meyer, and Otto Mayer. Rather, for Smend, the state is "not a static whole that issues individual manifestations of life, laws, judgements, diplomatic and administrative acts. Instead, it only exists in these various manifestations of life to the extent they are activations of an overall spiritual context (. . .). It exists and is present only in this process of constant renewal, continuously being-experienced-anew; it exists, to borrow [Ernst]Renan's famous characterization of the nation, because of a plebiscite repeated daily. It is this central process of state life, or if one prefers, its central substance, which I have elsewhere suggested be called integration" (Smend 1928b, 2010, p. 136).

The Theory of Integration

The theory of integration does not take the state for granted, but rather sees it as abandoned to the individual. The state becomes reality only in the thinking and acting of the individual in cooperation with other individuals, thus becoming a community in which life and experience take place (Hesse 1975, pp. 338 f.). Smend thinks the state from the individual and at the same time the individual from the state. The process of integration neither runs by itself nor is it unconditional or ever completed. Three factors in particular influence this process: personal integration, functional integration, and substantive integration (Smend 1928b, 2010, pp. 142 ff.). One factor of personal integration is leaderism (*Führertum*), which is not limited to politics, but is a general category of human life, i.e., it also applies to science, business, and culture. Leaderism therefore also includes elite status (Schmoll 2008, pp. 146 ff.). Functional integration means functions or procedures with a collectivizing character. These can be physical or mental processes. The decisive factor is that the individual experiences his or her integration into the community through them and that the sense of community is strengthened. Examples are military service, sporting events, elections, votes, or parliamentary debates.

Functional integration is interrelated with substantive integration. Substantive integration means establishing community through shared values. In accordance with the real-world

relevance of the theory of integration, values must not remain ideational in meaning, but must be experienced and lived out. They can be brought into consciousness through political symbols (flags, hymns, and monarchs), political ceremonies (public swearing-in ceremonies, coronations), national holidays, and celebrations. Other factors of substantive integration are language, national history, and the national territory as a cultural and emotional home (fatherland, homeland). Values "both demand and support the validity of a certain state legal system" (Smend 1928b, 2010, p. 166).

The constitution has a special position as a substantive integration factor. As the legal system of the state, it is also the legal standardization of its reality, which manifests itself in the integration process. Catalogs of basic rights are at the same time value systems that lend legitimacy to the constitution as the order of the integration process. Thus, the constitution and constitutional law are not identical. In Smend's work, reality and norm are not isolated from each other, but rather in relation to one another.

The Concept of the State and the Science of the Law of the State

The theory of integration has considerable consequences for the concept of the state and for the science of the law of the state. It dynamizes the state and emphasizes not the individual's freedom from the state, but his freedom to the state, which is why individuals are at the same time jointly responsible for the life in the state and the condition of the state. It is not only a legal theory of the state, but also a political theory of the state, which is directed against abstention from the state and worship of power (Smend 1928b, 2010, p. 123).

The background of this theory of the state is the political situation and social tensions in the Weimar Republic. It had no further impact on state practice before its fall in 1933. Even before the Nazis seized power and after 1949, it was sharply criticized in part. Kelsen dissected its methodological foundations and accused Smend that the theory of integration was a totalitarian theory of the state (Kelsen 1930, pp. 58 f., 77). Nazis and Fascists did not use them, however. Ethnicity can be misused as a factor for integration but thinking from and tracing back to the individual is unattractive for dictatorships. After the formation of the Federal Republic of Germany in 1949, the theory of integration did not continue without changes (Hennis 1999, pp. 488; Dreier 2008, pp. 76 ff.), but underwent a normative transformation that had a lasting and strong influence on science and practice (Hesse 1959; id. 1999, paragraph 4; see to his work as a judge of the Federal Constitutional Court Voßkuhle and Schemmel 2019, pp. 425 ff.). There were several reasons for this.

Firstly, legal positivism was blamed for the possibility of undermining the content of the Weimar Reichsverfassung through the Reichstag Fire Ordinance (*Reichstagsbrandverordnung*) and the authorization law (*Ermächtigungsgesetz*) (Günther 2004, p. 197).

Secondly, the emphasis on values and the dynamic momentum of the theory of integration were quite practically suitable as a foundation for a new West German state and social order to be established after the war, fleeing, and forced displacement of millions of Germans from the former eastern territories and the division of Germany.

Thirdly, the Federal Constitutional Court was established in 1951 as an institution that could provide both functional integration through the right of state organization and substantive integration through fundamental rights with normative power and actual enforcement. The Basic Law thus became both a factor of integration and an attempt to integrate, because the concepts of state and people were interpreted collectivistically and used inflationarily at the expense of the individual in the Third Reich (Stolleis 1999, pp. 323 ff.).

Constant Actuality

Smend's work stimulates reflection on the concept of constitution and constitutional law beyond state orders. Whether the theory of integration will

experience a European turn after its constitutional law turn is uncertain. The obvious thing to do is to transfer the processes of creating and producing political communities to the European Union, where primary legislation takes over the function of constitutional law. However, Smend did not only have the daily plebiscite as a state-forming ideal in mind, but also the noncontroversial cultural foundations of a community and a basic political consensus were prerequisites for successful integration (Smend 1928b, 2010, p. 155; Dreier 2008, pp. 74 f.). It remains to be seen whether the states of the European Union have a common basis of values that is sufficient as a basis for substantive integration and whether their societies are sufficiently open for functional integration. In any case, identitarian thinking and action in the categories of internal and external, above and below, is unsuitable for making an overall intellectual context with a liberal democratic character a reality – neither nationally nor supranationally.

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Smith, Adam

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Introduction

Adam Smith (1723–1790) was a Scottish moral philosopher and political economist. He is best known today for his later influence on the field of economics although in his own time it was his moral theory that received most attention. He published two books in his lifetime, both of which were highly acclaimed on publication, leading Smith to become a prominent part of the Scottish Enlightenment and one of the foremost figures in European intellectual life. Smith's first book was *The Theory of Moral Sentiments* (first published in 1759, but continually revised until

his death and ran to six editions). It remains a significant text in the history of moral philosophy although it has been eclipsed in the popular consciousness by his subsequent work, *An Inquiry into the Nature and Causes of the Wealth of Nations*, or more commonly, *The Wealth of Nations* (1776). Shortly after his death his reflections on the history of astronomy were published as *Essays on Philosophical Subjects* (1795) and, much later, student notes from 1762–1763 were collected and published as *Lectures on Jurisprudence* (1978) helping shed light on and clarify aspects of his philosophy, particularly on issues of justice and government.

Smith was born in Kirkcaldy, a small Scottish fishing village near Edinburgh. Aged only 13, he went to study at the University of Glasgow under Frances Hutcheson, who himself remains a significant figure in moral intellectual history. Smith then won a scholarship to study at Balliol College, Oxford, returning 6 years later to his home in Kirkcaldy. Smith worked as a freelance lecturer for a while during which time he met David Hume, another Scottish philosopher of great influence, who became a lifelong personal and intellectual friend. Smith was appointed Professor of Logic at Glasgow at the age of 27, and Professor of Moral Philosophy a year later. In 1764 Smith left Glasgow to become tutor to the Duke of Buccleuch in France, and during his time in Europe met a number of leading French thinkers including Voltarie, Turgot, and François Quesnay. After returning to Scotland 2 years later, Smith completed the *Wealth of Nations*.

The Theory of Moral Sentiments

In the *Theory of Moral Sentiments*, Smith sets out the view of human nature that underpins his moral as well as social, political, and economic ideas. Smith's position is built around an idea of the natural feelings of sympathy that people have for others who are suffering or in distress. What makes this an ethical rather than descriptive theory is that moral judgements are made not from an individual or personal perspective by adopting that of an imagined third party observer known as the impartial spectator. The perspective we take in forming moral judgements, then, is not one swayed by our interests and feelings but that of a disinterested person.

Smith's moral theory draws heavily on the ideas of his predecessor Hutcheson and overlaps somewhat with his contemporary Hume. While there are similarities with both, Smith's approach is distinct. Hutcheson (1725) forms part of what is known as the sentimentalist, or moral sense, tradition which seeks to understand why it is that we ascribe praise or blame to the actions of others. This approach pioneered by the Earl of Shaftesbury (1659–1729) but extensively developed by Hutcheson, stands in opposition to the rationalist and intuitionist ideas of writers such as Ralph Cudworth (1617–1688) and Samuel Clarke (1675–1745) and the moral egoism of Thomas Hobbes (1588–1679) and Bernard Mandeville (1670–1733). We cannot, it is argued, appeal to reason to understand what people approve or disapprove of morally, or why. This is because reason tells us only how best to achieve or satisfy some end. It cannot explain why it motivates, or "excites," us. Neither can we find an answer in self-interest. While human beings clearly do regulate their behavior in a prudential manner, Hutcheson maintains that this alone cannot explain our attitudes towards others. We often both approve of actions that do not benefit us and disapprove of what does (such as treachery that ultimately benefits the nation). So, instead of reason, we should look to our emotions, or "affections" to understand how we apportion approval. These affections are not driven by self-love but by feelings of benevolence. We do not draw on reason in coming to approve or disapprove of certain behaviors but instead rely on our "moral sense" which is a distinct cognitive human faculty in its own right.

Smith belongs within the broad moral sense tradition in ethics albeit even if the extent to which he himself makes use of a specific moral sense, if he does at all, is debatable. There is no basic moral faculty through which we might perceive or apprehend moral qualities. Rather, Smith, like Hume (1978), starts with the foundational

notion of "sympathy," the basic human tendency to empathize with the feelings of others. Smith's account is both different from Hume's and worked out in far greater psychological detail. Where Hume argues that we actually feel what others are feeling when we are sympathetic, Smith recognizes that this is implausible. Our feelings can never match precisely those of the other person, either in exact quality or in intensity. Instead we do our best to put ourselves in the shoes of the other, trying to imagine how they themselves feel. If we are able to imagine something close to what we observe in others then we sympathize with them, otherwise do not. Significantly, it matters very much to us all that others sympathize with our reactions to things and events, and that we sympathize with theirs (rather as when we have finished reading a book we want others to read it too and are either delighted if they share our enjoyment of it or disappointed if they do not). In the end, our natural desire to harmonize our feelings and attitudes with others leads to a social convergence and the establishment of cultural norms.

People do not just wish to share in the attitudes of others but also crave their approval. Morally, we approve of others where we approve of the feelings we discern in or attribute to them. Of course, each of us is limited in our ability to fully or properly sympathize with others. To different degrees we all lack the requisite knowledge, insight, and experience, and we all have personal biases particularly as we may be implicated in the situation under consideration. For this reason, Smith argues that moral approval should not be based on sympathy from our own perspective but from that of a dispassionate and disinterested observer, which Smith calls the impartial spectator. This is the central notion in Smith's moral theory. It allows him to move from a basic psychological observation about human feelings of sympathy to a comprehensive moral framework. The introduction of the impartial spectator allows us not only to imagine what others are feeling but to make judgments about those feelings according to a testable and shared standard. Nevertheless, although the device of the impartial spectator is meant to help people step outside of themselves as they make moral judgments, it remains an imaginative exercise. There is no "view from nowhere" or God's-eye perspective to take as individuals remain limited and culture bound even as they try to extract themselves.

It is not only other people that we judge but also ourselves. The impartial spectator serves as reference point for our own personal consciences through which we can also regulate our behavior. We do this not only because we want the approval of others for doing what the impartial spectator would applaud but we want to deserve that approval. The difference here is between acting with propriety (doing the right thing) and acting virtuously (doing the right thing for the right reason). Smith's notion of virtue here "corresponds," as he notes in book VII, "pretty exactly" to Aristotle's view in the *Nicomachean Ethics*. Ideally, we would adopt the perspective of the impartial spectator as our own, not merely conforming to its judgments but internalizing its sympathies as our own. To act with virtue in this way is, of course, a very demanding standard that few can live up to, although recognizing this standard does at least give people something to strive for. In the meantime, given that we are not always virtuous a system of moral and legal rules is needed for people to follow. These rules provide a shared framework that all the members of society can recognize and maintain.

It is possible to see in Smith's approach the foundations for an intended account of justice, something which Smith sets above all the other virtues (I.II). However, although Smith wanted to follow up his two published books with a universally-applicable theory of justice that built on the principles developed in the *Theory of Moral Sentiments*, it never came to fruition. One reason sometimes suggested for this is that the concept of sympathy and the impartial spectator is too deeply embedded within particular social and cultural contexts to serve as a universal concept (Fleischacker 2004). Nevertheless, what Smith does achieve is to show the twin motivations of self-interest and benevolence combine through the natural feeling of sympathy to develop into social systems of norms and morality, harnessing both people's desire for both

approval and self-improvement. While Smith's approach was not able to transcend the processes of socialization that lie at the heart of his theory, it does have the advantage of showing us how pervasively influenced by our social, cultural, and historical context our moral attitudes are. Nevertheless, Smith's theological commitments and the deist, and often also Stoic, framework that he applies give him a consistent and robust basis to develop his normative claims out of his psychological analysis. Appealing to natural sentiments as part of the benevolent designer's overall plan allows Smith to refute egoists like Mandeville (1989) who claim that virtue has no social value, as well as providing some grounding for his famed image of the invisible hand bringing order to unconnected individual decisions made for unrelated and often self-interested reasons. This metaphor briefly appears in the *Theory of Moral Sentiments* (IV.I) but takes on greater significance an image of central importance in the *Wealth of Nations*.

The Wealth of Nations

A long-standing controversy in the study of Smith has concerned how to reconcile the sympathy-based ethics of the *Theory of Moral Sentiments* with the account of self-interested economic action for which the *Wealth of Nations* has become known. Historically, this has been centered on what was known as the "Adam Smith problem" following a debate between German scholars in the nineteenth century. The modern consensus is that there is no fundamental tension between the two books and that they should be read and understood together as complementary parts of the same overarching project. Smith develops a single social ontology across both *The Theory of Moral Sentiments* and *The Wealth of Nations*, within which the activities of commerce and deliberation are intertwined and rooted in natural human sentiments such as the desire for acclaim that forms the basis of Smith's moral psychology. Indeed, the *Wealth of Nations* is itself a wide-ranging text that takes in issues of moral philosophy, history, and education as well as of political economy.

Although the *Wealth of Nations* is often heralded as a radical departure from previous work in economic theory, Smith discusses a number of existing accounts in favorable terms. The most significant of these is the agricultural system advanced by the Physiocrats, led by Quesnay (1694–1774), who argued that agriculture constituted the only source of wealth in a nation. Though he ultimately rejects physiocratic approaches, Smith nonetheless praises them as the best of the existing economic theories. In the context of a still heavily agrarian Scotland, Smith argued that the cultivation of land is the most efficient use of labor, adding that the interests of landowners are entirely aligned with the interests of society. As well as the Physiocrats, Smith's account in the *Wealth of Nations* is influenced by the work of Hume, Sir James Steuart (1707–1780), and Mandeville, although he departs substantially from each.

Smith's main polemical target in the *Wealth of Nations* is the mercantilist economic policy that was dominant in Smith's era. Mercantilist theories conceive of trade as an extension of a wider power struggle among nations and argue that states should seek to establish as high a trade surplus as possible and to preserve large reserves of bullion. Smith presents mercantilist policies such as high import tariffs not only as mistaken but as a racket advanced by merchants whose interests differ from those of society as a whole and who have co-opted the state to promote these private interests. Instead, the wealth of a nation can be determined as the overall produce of both the land and, in contrast to the Physiocrats, the labor in a country. This wealth can be divided into three parts; the rent of land, the wage of labor, and the profits of stock.

The books begins with Smith's famous exposition of one of the most significant factors in the improvement of productivity and prosperity at the time of writing; the division of labor. The productive significance of the division of labor is illustrated using the example of the manufacture of pins. The division of labor speeds up the productive process by enabling specialization of

laborers, who become skilled at performing a highly specific function, reducing the time spent between these separate tasks being performed and enabling the production of machines that can reduce the time each specialized task takes. As a result, far more pins can be produced by the same number of laborers working on discrete tasks within the process. Though Smith places the division of labor at the heart of his argument for a free system of commerce, he does not view it in exclusively positive terms, noting that the constant repetition of a single task can have alienating and intellectually stultifying effects that can have adverse social consequences.

Smith identifies the origins of the division of labor in people's "natural tendency to truck, barter, and exchange one thing for another." His support for market-based economics is founded on this, and two other natural tendencies, one of individuals and one of society. The first is our individual "desire of bettering our condition." People acting in their own self-interest are more motivated to do so than those acting benevolently; Smith famously observes that "it is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own self-interest." This is not to say that self-interest is the only guiding value in commercial activity. Smith views market behavior as being enmeshed in moral considerations and sentiments. The second tendency is that the actions of individuals motivated by self-interest will align with the interests of society as a whole. Someone acting in the pursuit of their own self-interest may be "led by an invisible hand to promote an end which was no part of his intention." This is in part a product of the ability of markets to coordinate diffuse action effectively and in part a natural coincidence of public and private interest that depends on the proper governance and structure of markets by the state.

The successful operation of this market co-ordination relies upon individuals acting in their own self-interest. Despite his sensitivity to humans' cognitive limits and biases, Smith views individuals as being generally more capable of identifying their economic interests than the state can be. Nevertheless, Smith's skepticism about the ability of the state to direct the investment of capital is not indicative of a minimalist approach to the state more generally. Indeed, he argues that the state must fulfil three principal duties – to defend the nation, to administer justice, and to provide basic public goods such as education and infrastructure – to a standard that often exceeds that provided by present day governments. The state is required not only to protect its citizens against external aggressors but must additionally protect citizens from "the injustice or oppression of every other member." The government also has a duty to establish and maintain any public institutions that are of social value which cannot be created or run profitably by private enterprise, including schools and any systems or services that are necessary for carrying out commerce, such as regulatory bodies and transport networks. He argues that these institutions should be funded through a system of progressive taxation. Nor is Smith complacent about, or indifferent to, economic inequality. His defense of free markets is, rather, premised on the claim that they erode the inequalities of feudal society, providing each member of a society the opportunity to better their own condition.

Commerce and the state, together in their right place, combine to create the conditions for individual freedom in a society – and these effects are interconnected. Smith views this as a historically necessary development. The expansion of commerce has both improved the quality of domestic government and reduced the threat of war by diminishing the level of dependence tenants or tradespeople had on any particular landowner. Trade correspondingly relies on good government to protect property rights and maintain the institutions of commerce. The institutions of trade and of government therefore act in concert to maintain and promote individual freedom, which is conceived not in terms of pure absence of constraint but rather as a condition of independence that requires the establishment of a variety of social and economic conditions and institutions, such as the rule of law.

Conclusion

Smith has long been described as the "father of economics." This is inevitable given the enormous influence *The Wealth of Nations* has had on the discipline as a whole and particularly in the doctrine of laissez-faire. However, while Smith's ideas are most commonly associated with free market economics, this is misleading if taken outside of the overall context of his social and moral system. There are clear limits to the role and function of the market and Smith has a strong emphasis on equality that he expected to result from market processes. With the benefit of two centuries' worth of hindsight on the actual operation of the market, it is likely that Smith would give even greater emphasis to the role of government in maintaining justice and would rethink the design of markets, for example, with regard to negative externalities. Nevertheless, Smith's influence on subsequent economic thought remains profound and includes the development of general equilibrium theory which focusses on explicating the ideal conditions for the functioning of the invisible hand, and Hayek's (1960) focus on the incomplete knowledge of economic agents and the use of markets as co-ordination mechanisms. But Smith's influence extends across many schools; the theory of value, conceptualization of labor and theory of history developed in the *Wealth of Nations* were of central importance to Marx's economic thought, while his comparative account of wellbeing was an insight central to the development of Amartya Sen's capabilities approach.

Smith has also left an important legacy in moral philosophy. In part his influence comes to us through his engagement with David Hume, a central figure in the field of ethics, with whom Smith's ideas are frequently compared. Smith's approach remains distinct and, while it is set out with less analytical precision than Hume's, it compensates for this for its rich psychological plausibility and appeal to everyday life. Smith's work has been the subject of renewed focus in this century with several key studies being published (e.g., Fleischacker 2004; Haakonssen 2006; Herzog 2013; Otteson 2002; Raphael 2007; Rothschild 2001; Schliesser 2017; Weinstein 2013) which build on existing scholarship (e.g. Griswold 1999; Raphael 1985). The recent interest in the role played by emotion in people's moral judgments has contributed to something of a revival of sentimentalism in ethics, with Smith's ideas being proving salient (Haidt 2012). More generally, Smith's figure of the impartial spectator has been of enduring interest to moral philosophers. Though the concept does not originate with Smith, his articulation represents a substantial advance on Hume's understanding of sentiments and a significant contribution to the wide development of impartialism in ethical theory, such as in Rawls's image of the Original Position. While this departs from Smith's impartial spectator in a variety of ways, it shares an emphasis on dispassionate rational scrutiny into the practical business of ethical deliberation. Smith also developed a detailed and viable form of Aristotelian ethics rooted in the concept of virtue.

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Smith, Patricia

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Introduction

Patricia Smith (b. 1956–) is a US philosopher of law whose work has helped to define American feminist legal theory and to clarify certain issues in legal thought and in liberalism more broadly. The majority of her published work can be grouped into three main categories: feminist legal theory, concerns regarding the distinction between acts and omissions, and the intersections between liberalism and both feminism and philosophy of law.

Feminist Legal Theory

In *Feminist Jurisprudence* (1993b), Smith outlines a picture of feminist thought broadly as a rejection of patriarchy, or pervasive and systematic male/masculinist domination, reflecting the vocabulary and perspectives of 1980s and 1990s liberal feminist understandings. She argues that this rejection of patriarchy is what all versions of feminism and feminist thought share, along with a commitment "to foster open dialogue that allows the expression of diverse views and gives particular attention to eliciting views not usually heard," as feminism works to "represent the commonality of fundamental values without misrepresenting the plurality of experience" (1993b, p. 8). Rather than accepting traditional legal categories, analyses, and projects, feminist jurisprudence challenges and rejects them when they imply or require the subordination of women. This makes feminist jurisprudence, like feminism generally, a normative project.

In "Four Themes in Feminist Legal Theory: Difference, Dominance, Domesticity, and Denial" (2005), Smith argues that feminist jurisprudence has three particular projects in its examination of law: "first, to identify sources of bias and injustice within it; second, to find ways to use it as a means to promote justice for women in other institutions and social practices, and third, to identify and overcome devices of denial, subversion, and containment that pose barriers to reform" (2005, p. 90). Contributors work on these projects by engaging with the issues identified by the four themes she notes in the title.

The theme of difference raises questions regarding whether it is more advantageous for women that the law treat them as equal to men

or as different. This is often a matter of workplace debates, such as whether pregnancy leave for women should be considered a matter of equal treatment or of so-called special treatment, implicating the more general question of whether equal treatment means same or identical treatment. For example, pregnancy benefits are only "special" if it is assumed that the standard for treatment in the workplace is male. As Smith puts it, "the very construction of the debate as a question of either equal or special rights is a false dichotomy that is slanted against women" (2005, p. 92).

The theme of dominance reflects the ongoing commitment to preconceptions about the supposed "naturalness" of social hierarchies which privilege men and subordinate women. Smith's treatment of this issue focuses on violence against women and the difficulties of finding legal remedies for it when the law is still grounded in beliefs that women should be subordinate to men, and men's access to women is what law should protect rather than women themselves. Women continue to be inadequately protected by the laws and court procedures in place; review and reform of those laws and procedures is an uphill battle, and there is "clear documentation of the extreme bias that currently presumes male domination as normal life, and the complicity of law in failing to address it" (2005, p. 95). Smith points out that this bias and law's complicity lead to a tendency on the part of traditional legal scholars and the public to engage in widespread practices of denial regarding the occurrence of and responsibility for violence against women. The task for feminist legal scholarship is to acknowledge and reveal the culture of dominance and intimidation that exists in the legal environment as well as in the society at large, thus making it possible to understand and address its workings in law.

The theme of domesticity reveals a further source of subordination for women which is grounded in economic disadvantage. Smith's argument here is that the culture's organizational structure is gendered along traditional lines that present women as nurturing caregivers and homemakers, passive and uninterested in competition, and men as aggressive, competitive, and interested primarily in the impersonal relations of the public sphere, the market, and politics. Thus working/economic life caters to men, who fit the paradigm of the "perfect worker" because they tend to be less encumbered by the demands of relational and home-making work, which is usually provided for them by the women homemakers in their lives (whether those women are also wage-workers or not).

Ultimately, Smith's conclusion is that feminist jurisprudence is a necessary piece of the overall project of feminism working to show that "the culture of dominance and the culture of domesticity combine to produce the multidimensional subordination of women to men that is accepted as normal life, and the rationalization of difference is used to justify it" (2005, p. 104). Her conclusion is perhaps more radical than one might expect, given her presentation of herself as a moderate liberal (e.g., 1998, p. 10); as she says, "our society is fundamentally unjust. Indeed, it is organized on the basis of injustice" (2005, p. 104).

Distinguishing Acts and Omissions

The most basic issue in legal theory with regard to acts and omissions is how to understand the difference between them. The tendency in both law and ethics is to ascribe responsibility to persons on the basis of what they do and to refrain from such ascriptions when nothing has been done (omission). Smith's position in general is to argue that although there is a distinction to be made between acts and omissions, that distinction does not do the work that it is often believed to do in legal theory or ethics. In "Omission and Responsibility in Legal Theory" (2003a), Smith explains that acts function in the literature as paradigmatic for ascribing responsibility because they are seen as causes of the states of affairs that someone must be responsible for. But because omissions (not acting) also have consequences, they should be understood as causing those consequences in the same way that (positive) actions do. This puts actions and omissions as such on similar standing with regard to ascriptions of responsibility. If one is reasonably held responsible for the acts one positively undertakes on the

basis of what those acts cause (consequences), then one should also be held responsible for the omissions one allows and the consequences that follow from those omissions. Omissions thus can function as causes for which agents can be held responsible in the same way that actions can.

Smith's analysis is highly attuned to the ways that the law, and legal concepts such as omission, are embedded in the concrete social world rather than simply being abstractions. This makes it possible for her analysis to include, for example, the fact that omissions are not merely "failures to act" but rather are a subcategory of actions; that is, "an omission is always the violation of some norm, standard or rule" (2003a, p. 232). Recognizing how omission functions requires noticing that it is always related to or in regard to some norm or standard of the social world. This recognition of the importance of the social is a strength of Smith's work that allows her to argue that what is important about omissions is *not* that "they reflect our separateness or even our autonomy but that they demonstrate our connections – connections that extend our responsibility beyond interventions to the failure to act" (Smith 2003a, p. 240).

Smith shows that the conception of omission as failure to act is misleading because it exaggerates the tendency to associate cause with act and obscures the fact that consequences follow from failures, or encourages disavowal of responsibility for those consequences because they were not "positively caused." Rather, when the social and normative context of omission is understood, it can be seen that an omission is "a state of affairs brought about by an agent who deviates from a pattern of activity in a way that violates what a reasonable person would expect to be done, specifically by failing to do what is necessary to meet a standard of normal behavior within a context that specifies normal behavior" (Smith 2005, p. 250). Responsibility must therefore be ascribed in cases of omission as well as for acts.

A thornier problem arises with regard to unconscious or unintentional omission. Smith points out here that the language of "refraining" generally used to talk about omission can itself cause difficulties. This is misleading when there is an unconscious omission because to refrain implies something done deliberately, whereas unconscious omission (negligence) is not deliberate: "A legal charge of negligence typically involves a claim that the defendant was not aware of (or attending to) what any reasonable person would have been aware of under the circumstances" (1990, p. 159). This makes the determination of negligence in law a matter of evaluation of context, because what is reasonable is a matter of consensus standards and the expectations of communities. This does not make the determination of unconscious omission simple or obvious, but rather points again to the importance of the social in legal issues. The point is, on Smith's account, that such determinations cannot be made abstractly but must include the social context the events arise and occur within.

Issues in Liberalism

Smith argues in various publications that the issues explained above are connected to the fact that the liberalism that provides certain grounding values for Western, and especially American, society supports a version of individualism that is drawn too narrowly and atomistically. The values of freedom and autonomy are understood negatively, as enjoining a sphere of non-interference, but not positively, as entitling persons to any aid they might need in order to enjoy those values. Thus she explains that in a country (the USA) that says it reveres motherhood and values and protects children, mothers and children are not considered worthy of or entitled to a standard of living higher than poverty unless they can provide it for themselves or get it from charity (2003b). This is because Americans believe that others are not entitled to anything economically; at least, not if we all have to pay for it. Although the official rhetoric of the United States is that we are all fundamentally equal, the "wind tunnel effect" that works to maintain white and male privilege means that reform, both social and legal, has been and continues to be miniscule on issues that significantly

challenge the status quo, such as substantive racial equality (2000).

Smith believes that many issues along these lines can be understood in terms of the problem of affirmative obligation, the idea that our duties are not limited to the universal negative proscriptions associated with noninterference rights. Rather, she argues in depth in *Liberalism and Affirmative Obligation* (1998) that an adequate conception of (liberal) individualism must be cooperative rather than the traditional atomistic one. Such a conception would recognize that while each individual's rights must be protected, no individual is self-sufficient, but depends on a wide network of others, and is mutually obligated to contribute to that network in return. Smith elaborates the conception of special positive duties to support her position, showing that such duties are not limited to those that are "natural" (family obligations) or contractual but include large-scale social and political duties as well. Thus a morally and politically adequate liberalism must recognize not only negative rights but also a much larger scope of positive duties than has tended to be assumed. Whereas the violation of duties associated with negative rights has always been seen as wrongful action, a cooperative liberalism must also see the failure to meet positive duties as wrongful omission, for which persons can and should be held equally culpable. In this way, a cooperative model of liberalism can require a greater level of responsibility and positive contribution from (all) its citizens rather than relying only on those whose charitable impulses are strongest, marshalling greater resources for positive action and enabling positive progress on problems such as poverty and inequality.

Conclusion

Smith's work has helped define the field of feminist philosophy of law. She has illuminated issues of importance to jurisprudence generally as well as to feminists in areas such as the theory of rights, problems of liberalism and law, the distinction between acts and omissions, and equality in the law.

Cross-References

▶ Family
▶ Racism
▶ Responsibility: Collective

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Social Contract and Justice

► Justice: And Social Contract

Social Epistemology

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Introduction

Social epistemology is the study of the effects of social interactions, structures, and context on knowledge claims. One way to get a reasonably comprehensive if not exhaustive sense of social epistemology today is to recognize how many aspects of knowledge-making can be meaningfully socialized. This includes not only *who* knows, but also *how* they know and *what* they know.

Epistemic Agency Socialized

Different sorts of social epistemology challenge the Cartesian conception of an individual epistemic agent in different ways. One approach argues that knowledge is primarily generated by groups rather than individuals (Nelson 1990). Each person might have beliefs, but knowledge is a collective achievement. The focus on epistemic communities is particularly common in (though not limited to) science studies. Longino (1990, 2002), for example, argues for the epistemic value of social and intellectual diversity in science, not because differently positioned persons each generate significantly different knowledge, but because the diverse community itself generates knowledge. Individual scientists' knowledge derives from community knowledge. Miller (2015) argues that at least some knowledge is held communally even as no individual community member knows it because the justifying elements of this knowledge are distributed among its different members. Bird (2010, 2014) and Tollefsen (2004) likewise offer accounts of groups as collective epistemic agents.

Those who do not aim to position groups more than individuals as primary knowers are also interested in how group belief, knowledge, and assertion work. Deflationist or summative accounts of group epistemic agency include Gilbert (2004), according to whom group belief is about a joint commitment made by individual members; List and Pettit (2011), for whom what a group believes is a function of the individual members' beliefs; and Goldman (2014), who explains group justification in terms of process reliabilism. For her part, Lackey (2021) proposes a hybrid account on which groups can be epistemic agents depending on the bases of sufficiently many members' beliefs and the potential for deliberation.

Epistemic goods other than knowledge also can be achieved collectively as well as analyzed socially. Feminist standpoint theories (Harding 1991; Wylie 2003) distinguish individual epistemic perspectives and standpoints: both involve how we see the world around us, but it is only the latter that are theorized as epistemically privileged. Standpoints are neither automatic nor individual but achieved collectively through consciousness-raising and social struggle. For Longino, objectivity is a virtue of (sufficiently diverse and critically reflective) scientific communities, rather than an ideal for individual scientists. Kerr and Gelfert (2014) find that scientific evidence is gathered not only by individuals but also

groups, and indeed even by hybrids of groups and artifacts as extended epistemic agents.

Social epistemology is not limited to group agency. Even those who focus on individuals as epistemic agents can do so without assuming what Grasswick (2004) calls the "atomistic view of knowers," where individual agents are generic and interchangeable. One way to complicate matters is by attending to our relationships of epistemic similarity and difference, how individual knowers learn from and work with those to whom they are relevantly alike or relevantly different (Narayan 1988). Are we epistemic peers (Elgin 2010)? Are you an expert (Watson 2020) in a field that I am not? How do our social locations (Daukas 2006; Code 2006) affect the experiences that different individuals will likely have, and how does this make a difference to what each of us can know?

Finally, there are productive debates in social epistemology where an individual knower is socialized in deliberately generic terms: for example, so-called pure cases of testimony where all that matters is that one person hears another utter a proposition (Lackey 2008; Hopkins 2011), or whether there are some truths each of us individually should know "for ourselves" regardless of who we are in particular (Huenemann 2004).

Epistemic Sources Socialized

Radical skepticism aside, epistemologists generally agree that sensory perception, memory, and reason are all epistemic sources. Individually and together they are a basis for justified belief and knowledge, whether theorized in terms of internally accessible reasons, reliable belief-forming processes, or otherwise. Should we recognize other people's words as a comparably basic epistemic source? Those with Locke (1961) would insist not, that the "floating of other men's opinions in our brains, makes us not one jot the more knowing, though they happen to be true." On this general critique, we should listen to others but not *believe* them (Anscombe 1979).

Contemporary epistemologists are less concerned about skepticism toward testimony in general than whether or not testimony is epistemologically basic. Reductionists argue that beliefs based on testimony are at root based on sensory perception, reason, and memory. Testimony reduces to these basic sources. To oversimplify what is happening, we see and hear (and we remember seeing and hearing) people making utterances (signs, symbols, etc.), then from this we draw inferences about what is reasonable to believe (Hume 1978; Fricker 1994). Anti-reductionists see this sort of story as inadequate. It fails to capture how testimony works in our lives, how we give and are entitled to receive it (Coady 1992; Burge 1993).

One thing that makes the testimonial reductionism debate challenging is that it turns frequently on pure cases of testimonial belief: that is, where an agent's belief in a proposition is based wholly on someone testifying to that proposition. Kenyon (2013) finds, however, that even common examples of testimony are rich with context-specific information relevant to an overall epistemic evaluation, casting doubt on pure cases as a useful hermeneutical device. This is illustrative of a divergence in social epistemology between those who prioritize the analytical clarity of idealized scenarios and the intuitions they evoke vs. those interested in testimony in scientific, legal, and other applied contexts where epistemic sources are co-operational and not easily disentangled.

Related social-epistemological questions include whether testimony is capable of generating (Lackey 2008) or only transmitting knowledge (Hardwig 1991) and whether testimony should be understood in evidential or interpersonal terms (Moran 2005). Is trusting someone's testimony synonymous with relying on it, or does epistemic trust involve something more than simple reliance (Faulkner 2007): a matter of assurance (Hinchman 2014) perhaps, or a sharing of epistemic responsibility (Origgi 2008; McMyler 2011)?

Even if testimony is generally accepted as a source of knowledge, one might think that there are certain subjects for which it is inappropriate: for example, ethics (Hopkins 2007), aesthetics (Hopkins 2011), or philosophy generally

(Huenemann 2004). Likewise, in addition to those who are suspicious about experts in full (Sassower 1993; Feyerabend 1999) are those who contend that there are specifically no experts in domains of inquiry like ethics (Williams 1995; Cowley 2005). One argument is that experts demand deference and deferring to others on moral matters is an abdication of our individual autonomy (Driver 2006 for articulation but not endorsement of this position). Others are more optimistic about the potential for ethical expertise (Davis 2015) and about testimony as a legitimate basis for moral knowledge (Jones 1999).

Finally, we might consider the social dimensions of other epistemic sources. How do the function and reliability of our senses, memory, or reasoning also depend on corroboration or influence from others? See for example Hanson (1969) on theory-laden observation, Wilson (2005) on collective memory, Kornblith on reason in social environment (2005), and Ludwig (2014) on extended cognition.

Epistemic Standards Socialized

One way that social factors can affect what we know and how we know it is when the standards for what counts as knowledge vary relative to social context. Strong forms of epistemic relativism (e.g., that an agent knows something just in case a group or community of which they are part takes them to know it) are not especially popular in contemporary epistemology, but weaker versions can be found. If for example knowledge requires truth, and the truth of moral statements is culturally relative, then moral knowledge would be relative as well. If knowledge requires justification, and what counts as adequate justification varies across different social contexts, the standards for reaching knowledge vary as well. Contextualists (Lewis 1996) seek to make sense of otherwise discordant knowledge attribution claims by arguing that the standards for knowledge rise or fall according to contextual expectations. Stanley (2005) defends a similar view, such that whether an agent knows a particular proposition depends on their practical interests: those with more at stake must meet a higher standard to achieve knowledge. Context and practical interests may include (though need not be limited to) social factors such as conversational norms, audience expectations, and group needs.

One influential approach to contemporary epistemology puts a defeasibility condition on knowledge: that is, a person knows some proposition *p* when they have a justified true belief in *p* and there exists nothing to defeat this knowledge (Lehrer and Paxson 1969). Social facts can be potential defeaters. Let us consider a puzzle central to the epistemology of disagreement: someone who believes *p* learns that someone else with comparable cognitive capacities and equal access to the evidence thinks otherwise. What is the upshot of this disagreement? Should one defer to the other (if so, which one)? Should they both stand pat? Should they meet in the middle and withhold judgment? One solution to this puzzle is that the fact of disagreement defeats knowledge for whoever believes correctly on *p* (Christensen 2007; Elga 2007).

Numerous cases from the history and philosophy of science illustrate how epistemic standards vary across different epistemic communities and how communities revise their standards over time. Here the emphasis is not only on how much evidence is required to confirm or refute a scientific hypothesis, but also how to read experimental results and what sorts of results count as evidence (Kuhn 1962; Hull 1988; Knorr Cetina 1999). There is of course persistent debate within science studies on the ontological and epistemological implications of the social-historical contingency of science: see for example the different readings of the social dynamics of experimental physics from Collins (1992) and Franklin (1990).

As with perception, memory, and reason, we might ask about when testimony is more and less reliable and standards to evaluate as much. To hallucination and cognitive deterioration let us add cults, social media algorithms, conspiracy theories, and echo chambers that feed back to us what fits with we already believe (Nguyen 2020). When is a consensus trustworthy and when is it stultifying (Miller 2013)? When does dissent merit a hearing and when is it normatively

inappropriate (de Melo-Martin and Intemann 2018)? When – and why – do financial conflicts of interest undermine the credibility of scientific work (Elliott 2014)? Perhaps most difficult of all, as nonexpert recipients of (at least putatively) expert testimony, is how are we to answer these sorts of questions short of becoming experts ourselves? Much of the contemporary literature on epistemic trust in expertise takes up these sorts of challenges (Whyte and Crease 2010; Anderson 2011; John 2011; Coady 2012; Origgi 2015).

The social dimensions of credibility as an epistemic standard merit special attention. Fricker (1998) use-fully distinguishes between *rational authority* as being both competent and trustworthy on a subject and *credibility* as one's reputation of authority. The former speaks to an agent's epistemic strengths; the latter is an irregularly reliable social manifestation. Ideally how others evaluate an agent's credibility should be a reliable guide to their rational authority; an ideal good informant is competent, trustworthy, and has properties that indicate these virtues to the recipients of their testimony. In practice, of course, this is often not the case, for reasons innocuous and worrying. The mismatch between rational authority and credibility is part of what allows for *epistemic injustice* – the variety of ways in which people are wronged in our capacity as knowers (Fricker 2007). For example, testimonial injustice occurs when a listener gives a speaker's testimony less credibility than it otherwise deserves owing to racist, sexist, or otherwise social-identity prejudicial stereotypes. In this case, the corrective measure of virtuous listening asks hearers to adjust their epistemic standards for testimony to counteract the prejudicial effects of social stereotypes.

Epistemic Goods Socialized

As previous sections have suggested, not only how but what we know is highly contingent upon others. In part this is a simple matter of specialization: no one of us fallible, finite epistemic agents could achieve expertise in every domain of knowledge. Indeed, as Hardwig (1985, 1991) reminds us, experts too must rely on – and even trust (Frost-Arnold 2013) – other experts. This is not just because there are domains in which they too are novices, but because there are many scientific and other investigations that are too complex, long, and wide-ranging to be undertaken individually. Divisions of cognitive labor (Kitcher 1990; Goldman 1999) are needed to pursue them.

Experts arguably serve important social-epistemic roles; is expertise itself a socially constructed epistemic good? On one interpretation, to be an expert is to have intellectual authority in some social context: you are an expert when people treat you like one (Fuller 2006). Others insist that expertise while not just a matter of perception is nonetheless (at least in part) constituted socially. Collins and Evans (2008) see socialization into an extant scientific community as crucial to develop scientific expertise. Goldman (2001) is explicitly veritistic about expertise but also sets a social threshold for it: experts are experts because they know *more than most* about some domain of inquiry.

Another way that epistemic goods are socialized is when the *content* of knowledge is social in nature. This includes our understanding of our and others' social experiences, including experiences of being oppressed, silenced (Dotson 2011), misinterpreted (Herbert 2019) as well as being seen and heard. In her recent work on epistemic reparations, Lackey (2022) argues for the right to *be known*, that part of the injustice of wrongful conviction is how it systematically undercuts this right. Indeed, part of what is wrong with epistemic injustices generally is that they rob and deprive their victims (and sometimes also perpetrators or other community members) of valuable epistemic goods, including but not limited to knowledge and justification. Epistemic agency includes not only the ability to achieve knowledge but also transmit it to others, trust in others, engage in critique, and participate in collective knowledge production. Epistemic injustices undercut our capacity to do these things in numerous ways (Hookway 2010; Carel and Kidd 2014; Grasswick 2018; Medina 2021).

Agnotology is the branch of epistemology concerned with ignorance: what we do not know,

mistakenly take ourselves to know, and (in the grand tradition of Socratic wisdom) realize that we do not actually know. Interestingly, some feminist epistemologists have argued that ignorance can be a positive thing: as a commitment of trust, perhaps (Townley 2006), or a tactic of social-epistemic resistance (Bailey 2007). But a notably negative variety is what Proctor (2008) calls *active ignorance*: a not-knowing that is a constructed element of our social-epistemic environment. Examples of actively constructed ignorance include doubts manufactured by tobacco and fossil fuel industries (Michaels 2008; Oreskes and Conway 2011). It also includes what Mills (2007) calls *white ignorance*, which is not only things white people mistakenly believe or otherwise do not know, but ignorance constructed for individual and collective epistemic agents across race that serves the interest of white supremacy.

Lastly, social epistemology encourages and enables a revaluation of other goods in terms of epistemic value. This tradition is at least as old as Mill's defenses of freedom of thought and expression and sexual equality on epistemic grounds (1859; 1869). More recent contributions to this literature include assessments of the epistemic case for democracy (Anderson 2006; Peter 2016), voting schemas (Dietrich 2008), social diversity (Intemann 2009), disclosure statements (Tresker 2022), expert witnesses (Brewer 1997), and legal trials generally (Robson and Hoskins 2021).

Conclusion

Philosophical examination of the social world in all its complexity must include (though needn't reduce to) epistemic questions, and epistemology as traditionally pursued is usefully challenged by social analyses of the substance, standards, sources, and agents of knowledge. Social epistemology as it has developed over recent decades has taken these philosophical projects in many promising directions. What coming decades will have in store for social epistemology exceeds any one presently situated observer's ability to reliably predict.

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Social Rights

► Rights: Social Rights

Social Rights and Welfare

► Rights: Social Rights and Welfare

Society

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Introduction

The theory of society is prior to sociology itself and as old as philosophy. In the naturalistic tradition of the origin of society, Hobbes, Locke, Kant, and Rousseau explained society by reference to the social contract and the priority of natural rights. Nevertheless, by the end of the eighteenth century, the naturalist theses of the social contract had already lost their persuasiveness given the profound social changes that brought about a greater awareness of the historical character of social life. Founded in the mid-nineteenth century, sociology was born from the ashes of natural law theory and took the task upon itself to explain scientifically the social order, thereby renouncing the postulates of natural law that underpinned the contractualist explanation. In an initial phase, the naturalistic and moralistic assumptions of natural law theory influenced sociology. After, it gradually freed itself from these moorings to seek, as Durkheim said, to know the social bases, not a natural anymore, of the social contract. In this way, sociology reveals a strong vocation to think society as a whole.

The "Theory of Society" of the Classics

The classics of sociology were not only important on the discipline formation but also produced the bases of the theory of society which, even today, informs sociological thinking. For Durkheim (1858–1917), society is not the sum of individuals but the result of social facts, being these ways of acting, thinking, or feeling. By their very nature social facts, as *things*, tend to form outside the consciousness of individuals, since they dominate them (Durkheim 1982). Although social facts are invisible and cannot be observed directly, they are

objective, and it is up to sociology to know social things as they are and to build concepts capable of describing the true nature of them. Karl Marx (1818–1883) concentrated on explaining the profound changes that the society of his time experienced, relating them to the development of capitalism. Capitalism, says Marx from a materialist conception of history, is a commodity-producing system endowed with a permanent impulse for expansion which is nothing more than the movement of its internal logic of competition and accumulation of capital. The whole theory of Marx is to reveal that behind false ideological consciousness and the appearance of relations between things (commodities and money) are social relations of exploitation between a class that owns the means of production and an employed class. The young Marx proclaims in his *Theses on Feuerbach* (1845) that it is not enough to interpret the world but also to transform it. This would be through the inevitable revolution which would overthrow the capitalist system making possible a classless society. Max Weber (1864–1920) interprets society in terms of social action and the intentional sense individuals attach to it. According to Weber, the task of sociology is to understand the meaning of these actions. Weber's comprehensive sociology has used ideal types, which are conceptual and analytical models, to understand the transformations of modern society, through the development of science, technology, bureaucracy, and the capitalism, as a result of a process of secularization and rationalization.

After the classics, sociology seemed to have given up on a social theory capable of describing society as a whole, turning to theoretical and empirical research of a different kind: sometimes as a kind of "sociology of sociology" capable of reflecting on itself sociological knowledge (which can be testified through the profusion of sociology dictionaries), sometimes empirically specializing in fields of study (such as sociology of roles, professions, religion, education, etc.). The lack of interest in the macro theories capable of encompassing society as a whole can be explained by two factors: (1) the diffuse expectation in the 1950s and onwards that sociological research, especially of an empirical matrix, could be applied to society in order to plan social changes and (2) the assumption that the broader and ambitious is a theory, the more difficult is to test it empirically (Giddens 2001). Between the 1940s and 1950s, the social theory gains a foothold with Talcott Parsons (1902–1979) and his theory on social action systems (Parsons, 1966), which, however, has been harshly criticized for its conservative character as regards the preservation of social structures.

Sociology in different social theories takes society, whether formed by men, social facts, or social actions (Weber, 1979), as an object to be observed from the outside. In this way, the theory affirms its status of scientificity, assuming the distance in relation to its own object and consequently the postulate of axiological neutrality. The social theory has so far avoided the issue of self-implication of the theory of society in the own society, whereas assuming a compromise between theory and social practice. In this last respect, only Karl Marx was an exception.

Theory of Society or Critical Theory?

The debate about the fundaments of social theory from the 1970s onwards was marked by the opposition between "traditional theories" and critical theory. In 1937, Max Horkheimer (1895–1973) had pointed out that while traditional bourgeois theory sees social reality as something external, critical thinking is motivated by overcoming the tension between theory and social practice in unity with the dominated class (Horkheimer 1968). In the early 1970s, this polarization was represented in the debate between Niklas Luhmann (1927–1998) and Jürgen Habermas (∗1929) (Habermas & Luhmann, 1971). At the heart of the conflict lies precisely the problem of the self-implication of the theory. The point here is not so much the difference between theory and practice, because given the self-implication, one assumes that theory is per se a form of social practice. The divergence behind the false distinction between theory and practice is in relation to the concept and the different claims of rationality.

Critical theory, as it is presented by the first and also by the second generation of the Frankfurt School, takes on the notion of typically modern rationality, now heralded as "discursive reason," as well as claims that man, through its rational action, is able of guiding social evolution. Niklas Luhmann's theory of society excludes the idea of universality of reason and considers that in society, there is a plurality of communicatively constructed "systemic rationalities." In this stage, the task of sociology is to observe and describe society and not that of promoting social change, since every "rational" attempt of social intervention is confronted with the rationality of the different social systems. While critical theorists have interpreted this stance as "conservative," or at least "conformist," the theory of society assumes with all risks the problem of self-implication, including that critical theory, succeeds in its attempts to intervene.

Challenges

Over the last three decades, the social theory seemed to have been replaced by a single concept: globalization. The notion of globalization, as consequence of modernity (Giddens, 1990) operated as a "*passe-partout* formula" (Marramao 2003) or a "kind of key capable of opening the mysteries of the present and the future" (Bauman 2000). The inflation of the notion of globalization in sociological thought has finally depicted a scarce explanatory capacity of this concept which, in an already global society, can hardly have an additional meaning. In this context, it became necessary again to use a social theory capable of understanding society as a whole and, at the same time, to account for the complexity of a society that recognizes itself as global.

Sociology, as a science of modern society, has since considered the global character of society. Saint Simon (1760–1825) saw a close relationship between sociology as a new form of science and "globalism," thinking that a science of society was impossible without unification of humanity or vice versa. Auguste Comte (1798–1857), when coined the term "sociology," made it a "religion of humanity". In the pages of the Communist Manifesto, Marx and Engels (1999) described more than a hundred years earlier what would only be known under the label "globalization" in the 1980s. Weber also referred to the emergence of so-called "world religion."

In the twentieth century, the rapid technological transformations of the 1960s and onwards, as well as the intensification of the transnational flow of capital and commodities, sharpened the perception of the global character of society. In sociology, many authors have sought to treat the theme of globalization as an ongoing process, relating it very often to the "compression of space and time" (Harvey 1989; Bauman 2000) and, in this way, once again looking at society from the outside. They avoided explaining globalization from a theory of global society. It becomes necessary to construct a theory of society in society (Luhmann & De Giorgi 1993), instead of observing society as if sociology per se were not part of it.

The reality of a society that recognizes itself as global brings new questions to the social theory and social criticism. The first challenge is, with the overcome of the epistemological obstacles and the vanity of the researchers, to gather from both traditions, one of the theories of society and the other of critical thinking, the best tools to acknowledge and defend society. One of the most relevant current aspects of globalization is the law and political changes in their democratic articulation. These transformations certainly cannot be known without taking into account the fact that law and politics are global social systems (Luhmann 2012). In this sense, a possible way is to withdrawn from the theory of society a critical achievement in which the debate among the classics of the second generation of sociology did not allow to observe. In this way, the refined conceptual tools of social theory can be placed at the service of critical thinking and its most recent developments in matters of gender, race, and post-colonialism.

Cross-References

► Critical Theory and International Law

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Sociology of Constitutionalism

► Constitutionalism: Sociology of

Socrates: On Justice

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Any assessment of Socrates' attitude to the law and to justice must take account of the following points. First, Socrates wrote nothing and we must rely on various later writers for our picture of Socrates' philosophy. Those later writers were for the most part supporters of Socrates and also, most obviously in the case of Plato, were themselves often philosophers of considerable skill and invention. It is therefore implausible to take something that the character of Socrates says about justice in, for example, Plato's *Republic* to be directly representative of what Socrates himself thought about the subject. Second, the earliest of our sources about Socrates' views about justice were composed in the aftermath of Socrates' execution after a successful prosecution for charges of impiety and corrupting the youth. Socrates' death at the hands of a democratic Athenian jury not only raised important questions about his stance with respect to what was lawful or just but also presented an opportunity for dramatic portrayals of Socrates in conversation about precisely those matters in a way that foreshadowed his eventual death and allowed the retrospective construction of Socrates as a person whose execution demonstrates the excellence of his character in contrast with his confused or malicious fellow citizens.

In what follows I shall concentrate on two texts in which Socrates' attitude to law and justice is highlighted: Plato's *Crito* and Xenophon *Memorabilia* 4.4. In the *Crito*, Plato presents a discussion between Socrates and Crito; Crito has come to visit Socrates who is in prison waiting for his death sentence to be carried out. Crito has heard that the execution will take place soon and has come to persuade Socrates to escape from prison and to flee from Athens. This can be arranged with appropriate bribes and, what is more, Crito is concerned that if Socrates does not leave then his friends will appear in a bad light for not having arranged the escape. Socrates calmly explains to Crito that he will not run away because he has been told in a dream that he will die in two days' time and then rehearses with Crito what he says are some familiar arguments that show that it is never appropriate to act unjustly (*adikein*) nor is it appropriate to act unjustly in return for suffering an injustice (*antadiken*, 49a–d). Further, he argues, popular notions of what is to be considered just or unjust should not be taken to be

authoritative any more than popular notions of diet or exercise should be thought to be more authoritative than the views of an expert doctor or trainer. Socrates presses this analogy further when he claims that just as we should not want to live with a body that is ill or damaged, so too we would not want to live with "that part of us that justice benefits and injustice harms" ill or damaged (47e–48a). By this, Socrates means that if he were to act unjustly then he would harm some important part of himself and when he acts justly, then he benefits that same part. In fact, Socrates holds that the health of this part of us is far more important than the health of the body. It seems to follow that it would be worth suffering physical damage to maintain the health of this part and that if the alternative to acting in a way that damages this part is to die then death is the preferred option. Socrates remains frustratingly unclear, however, about two important aspects of this general picture, even as he insists that he and Crito have been through such arguments a number of times before and only now that Socrates is faced with precisely the choice they previously have considered in general terms has Crito lost confidence in them. First, Socrates says nothing more about what this thing is that justice benefits and injustice harms. We might assume that he must mean something like the soul since its health must stand in some appropriate analogical relationship to the health of the body in his illustration. Such an analogy plays a central role in Plato's *Gorgias* where there is a defense of the argument that it is better to suffer than to commit an injustice and also that it is better to be punished for having committed an injustice than to remain unpunished. The benefits of justice are also defended by the elaborate account of justice as the internal harmony of parts of the soul that is developed in Plato's *Republic*. But in the *Crito*, Socrates does not appear to be much interested in explaining what he has in mind by this part that injustice harms nor about what the harm consists in. Perhaps this is a prudent choice: The *Crito* says nothing much about questions of the possibility of a continued existence after death and in Plato's version of Socrates' defense-speech at his trial – the *Apology* – Socrates famously expressed a somewhat open mind about the nature of death. More worrying, perhaps, is that Socrates gives no substantial account of exactly what he thinks it is to act justly or unjustly. He cannot mean that a just act is whatever is conventionally thought to be just since he clearly expresses concerns about the competence of popular beliefs on such matters. We might expect some alternative view but at this point of the dialogue, at least, there is no general statement on the matter nor do we have any examples of what Socrates himself considers just or unjust actions except, presumably, the implicit thought that doing what Crito recommends and escaping from the prison would not be just and would not be acceptable even if it were in return for an earlier injustice such as an unjust legal verdict. Precisely why it would not be just to escape is not certain and interpretations of the *Crito* differ significantly on this point.

It seems that Socrates imagines there is some divine imperative for him to die at the appointed time since he confidently cites a dream in which that outcome is expressed. Perhaps to act otherwise would be some kind of injustice to the gods. We shall see that the notion of divine law and divine justice plays an important role in Socrates' discussion in *Memorabilia* 4.4. Alternatively, he thinks that to escape will constitute an unjust act and therefore a harm to himself because in some way it is an injustice to Athens. This possibility is supported by the end of the *Crito*, in which Socrates constructs a speech which he puts in the mouths of the personified "Laws of Athens." These Laws offer a battery of arguments why Socrates would be doing wrong were he to escape, many of which anticipate other famous arguments in support of a requirement of obedience to the state. They say that Socrates has implicitly agreed to obey the Laws and their injunctions because he has voluntarily continued to live in Athens in full knowledge of the laws (52b–c). He also owes them obedience on account of the various benefits that the Laws have provided for him and he should look on them as authorities just as a child looks to a parent or a slave to a master (50e–51c). It was possible for him to persuade the Laws to change if he thought them unjust but he did not do so. And were he to escape, then his reputation would suffer, his children would suffer, and he would have to live in exile somewhere much worse than

Athens (53a–54b). Overall, in running away, he would undermine as far as he is able the laws of Athens and therefore Athens itself, perhaps because he would set a precedent for disobedience or call into question the rules by which the city is governed and sustained (50a–b).

There are good and familiar concerns about each of these arguments and there is also good reason to be worried about the coherence of a view that attempts to combine them: Is it possible to say both that Socrates could have left Athens if he thought its laws unjust or persuaded the laws to change and also that he owes them obedience just as a child owes obedience to a parent? These two arguments conceive of the relationship between the individual and the laws in very different and perhaps incompatible ways. There is therefore some reason to be wary of ascribing to Socrates himself the arguments that he has the Laws address to him and Crito; their points seem particularly aimed at addressing the concerns that were raised by an agitated Crito at the beginning of the dialogue as reasons for Socrates to escape but which were dismissed by Socrates. Nevertheless, if Socrates does not endorse the arguments the Laws propose then the dialogue does indeed seem to lack any reasoned account of what just and unjust actions consist in of the kind that must underlie Socrates' surprising decision not to escape his harsh sentence.

The *Crito* presents a Socrates who is committed to the overwhelming importance to the individual agent's well-being of just behavior but leaves tantalizingly unclear the relationship between an individual acting justly and the laws or legal judgments of the particular state in which they live. Xenophon raises similar questions in *Memorabilia* 4.4. The larger part of that text is taken up with a discussion between Socrates and the sophist Hippias of Elis, but it begins with a long account by Xenophon stressing how Socrates made his views on justice perfectly clear "in his actions" (*ergōi*), behaving lawfully (*nomimōs*, from the standard Greek word for law, *nomos*) and obediently in all public matters, including when called upon like any other citizen to serve the city as a soldier. Xenophon then cites three occasions on which this just behavior was most evident: (1) when serving in 406/5 BC on the "council" (*boulē*) as the democratic lottery required, Socrates resisted a popular demand for a joint trial of all the Athenian generals held responsible for the losses at Arginusae on the grounds that it would be "contrary to the laws" (*para tous nomous*), showing a commitment to the law even in the face of democratic pressure; (2) when Athens was under the rule of the "Thirty Tyrants" (404–403 BC), Socrates refused to obey their command to arrest Leon of Salamis, again because it was "contrary to the law"; (3) at his trial in 399 BC, Socrates refused to engage in familiar rhetorical tricks to sway the jury but "preferred to die holding fast to the laws (*emmenōn tois nomois*) than to live contrary to them (*paranomōn zēn*)." Xenophon's Socrates is thoroughly obedient to the laws of Athens, even when everyone else thought they should be ignored, even when those in direct political power commanded otherwise, and even when doing so cost him his very life.

Once the substantial discussion begins, Socrates immediately declares that "what is lawful is just" (4.12) and then defines acting lawfully as acting in accordance with the laws of a state; acting contrary to the laws of a state is acting unlawfully and hence acting unjustly (4.14). "Laws" here are understood to be what the citizens of a state have collectively set down as what ought and ought not to be done. Hippias raises a problem for this account: Laws are often changed or rescinded. This is an objection only if we also assume that it would be peculiar for what is just to be similarly mutable. Alternatively, we might add the thought that the laws of two different states may require or ban actions in such a way that what is just in one place is unjust in another (perhaps an easy thought since *nomos* can mean not only "law" but also "convention" or "custom"). Either way, tying what is just too closely with what is lawful by making the law the arbiter of what is just raises problems for any notion of universal justice. Of course, by itself Socrates' identification of the just with the lawful might instead mean that something is lawful if and only if it is just, that is to say: Any requirement set down by a state can be considered a law only if it does indeed fit with what is

just. Interpreters have been exercised with determining the correct "direction of fit" for Socrates' identity claim. Socrates does emphasize the importance of the citizens' agreement in setting down what is a law and goes on to explain how important agreement and collective obedience to those laws are for the prosperity of cities and the citizens within them (4.15–18). The agreement of the citizens and the stability of the laws are important factors in the laws' providing benefit and therefore for the value of lawful and just behavior. People who behave lawfully are trusted by others and cities who exhibit internal stability and lawfulness are able to make reliable alliances with other cities to the benefit of the parties concerned. Socrates' own behavior as explained by Xenophon at the beginning of the dialogue appears to be in line with this thought: He acted as he did, sometimes contrary to the passing whim of the people or a given regime, because it was in accordance with laws that were freely agreed to and obedience to which will prevent the city falling into factionalism and internal strife.

It seems not to matter for Socrates' position what the precise content of the laws might be provided that the citizens agree to them and then behave accordingly. The argument for the value of lawfulness and justice rests on the beneficial consequences of stability as such. From 4.4.19, however, the discussion turns in a new direction. Socrates introduces the notion of "unwritten laws" that are observed universally. Since these cannot have been made by voluntary agreement between all parties – the people concerned do not speak any common language – Socrates and Hippias infer that they were made by the gods for all humans. Examples include the duty to honor one's parents and the prohibition of sex between parents and their children (both laws violated, albeit unwittingly, by Oedipus). A mark that these are divine in origin is that the penalty for transgression follows directly from the act: The penalty for not requiting a benefit received is the loss of trust, the loss of friends, and the consequent misery that follows from the act itself. No penalty has to be determined and exacted independently. That is why these laws are universal and do not need to be explicitly codified. The dialogue ends with Hippias agreeing with Socrates that the gods too think that what is just is what is lawful and a reminder from Xenophon of Socrates' impeccably just behavior.

The dialogue is frustrating because it does not pursue a number of questions that arise from the contrast and comparison between the two kinds of laws it introduces. In the case of human laws, Socrates merely emphasized the benefit of collective agreement and obedience with no reference to the content of any particular law. Does Socrates think this holds also for the unwritten laws? Does he think that, if they had wished, the gods could have made incest not have these bad consequences or made some other behavior have them instead? We would therefore universally obey some alternative behavior because of its direct negative results. If so, then the important point is again not the content of any particular "unwritten law" but instead the fact that disobedience brings harm, this time as a direct consequence of the unlawful action. But Socrates makes a good case for why it is that failing to return a benefit has the bad consequences it does; the nature of the action causes the harm and this is why it is universally avoided.

Neither text gives a clear and developed Socratic philosophy of law and justice. However, Plato's *Crito* and Xenophon *Memorabilia* 4.4 raise, in just a few pages, the central questions and problems that lie at the heart of the philosophy of law: the possibility of divine or natural law, the relationship between what is lawful and what is just, the conditions of political obligation and civil disobedience, and the relationship between law and punishment or benefit. Those questions were further explored by Plato, as he worked through Socrates' personal and philosophical legacy, and were then inherited by Aristotle and the subsequent philosophical tradition. So here, as in many other areas, Socrates was more an inspiration and provocation to further thought than a source of answers.

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Solidarity

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Introduction

Solidarity has a descriptive and a normative meaning. Descriptively it refers to the mutual connection between the members of a group that gives stability to the continuity of the group (cement of the society). Normatively it refers to the expectation of mutual support and the willingness of the group members to support the others or to contribute to a common good. The willingness to help can be motivated altruistically or by the well-intentioned self-interest. In the latter case, the solidarity obligations are not based directly on morality but on prudence. However, in this case, solidarity also requires action on moral grounds, because otherwise the problem of free-riding cannot be overcome (Baurmann 1998; Bayertz 1995).

According to a widely shared view, the solidarian willingness to work for common goals or the goals of others is based on a sense of belonging (Bayertz 1998). However, this criterion is not undisputed (Löschke 2015, 82). As a result of this dispute, it is also controversial whether there is universal solidarity or whether solidarity can always only exist towards an exclusive group (Derpmann 2013, 82; Kersting 1998, 424). The idea of solidarity is often expressed by the phrase "One for all, all for one."

The noun *solidarity* stems from the French *solidarité*, developed from the Latin adjective *solidus* = *firm, stable, massive, solid*. The word referred originally to the *obligatio in solidum* of the Roman law (Inst. 3.16.1), according to which each of several obligors is liable up to the full amount of the relevant obligation so that the creditor can claim the full amount from each of the obligors.

The modern expression "solidarity" exists only since the French Revolution of 1789. Danton speaks in a speech in front of the Convent of April 1, 1791, about a "community based on the identity of our conduct" and calls it "solidaire" (Brand 2005, 42). In a speech of 1798 Mirabeau uses the expression "solidarité" (Brand 2005, 43). Solidarity refers in this context to the idea of the identity of state and society in the volonté générale (Brand 2005). In this meaning the expression is synonymous with "fraternity" that appears in a decree of December 22, 1789: "Tous les Français sont frères et composent qu'une famille" (Brand 2005, 43).

In the nineteenth century, the notion of solidarity, understood as a legal concept, increasingly displaces the metaphor of fraternity: "...que fraternité devienne juridique" (Fouillé 1885, 348).

Pierre Leroux uses *solidarité humane* for the first time in a nonjudicial sense, namely as counter-concept of the Christian concept of charity. Solidarity as a basic value of the political self-understanding of the state is now the expression of the idea that the liberty rights of the citizens must be accompanied by respective social rights in order to establish real equality (Leroux 1840). This idea has theoretically confirmed the development of the French welfare state and strongly

influenced further development in France (Metz 1998).

The French sociologist Auguste Comte contributed to the further dissemination of the concept. He identified solidarity with socioeconomic interdependencies (Fiegle 2002). The concept is given a decidedly political meaning by Louis Blanc, Pierre-Joseph Proudhon, and in the propaganda of the revolution of 1848 (Fiegle 2002; Wildt 1995).

In Germany, the concept of solidarity in the nineteenth century becomes the central concept of the workers' movement. However, it functions only as a concept of struggle and not as a theoretical basis for legitimacy of state self-understanding. It is only after the Second World War that the concept of solidarity under the influence of the Catholic Social Doctrine is increasingly becoming a political concept of values which serves the legitimation of the German *social state* (Tenfelde 1998).

In England and in the English-speaking world, the concept of solidarity played a comparatively minor role. England since 1601 had already had the world's first law concerning the poor, which gave every poor a right to support from the local community. However, care for the poor was not legitimized from the point of view of equality and solidarity, but was regarded as a matter of public order and police (Metz 1998).

Since the Second World War, the expression "solidarity" in Europe has increasingly become a widely used, but also extremely vague buzzword. In academic texts, it often functions as a generic term for various forms of social attachment, such as trust, loyalty, friendship, charity, fraternity, etc. (Göbel and Pankoke 1998, 477). Pope John Paul II. defined solidarity in his encyclical *Sollicitudo rei socialis* as the "firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all" (Paul II 1987, § 38).

In the Charter of Fundamental Rights of the European Union, there is a section entitled "Solidarity" (Title IV) with a total of 12 fundamental rights and programs, including the right to strike, employment protection, the ban on child labor, the right to health care, as well as provisions for the protection of the environment and of consumers (Charter 2000).

Solidarity in the Humanities and in Philosophy

In Emile Durkheim, solidarity becomes a basic concept of sociology (Durkheim 1893). It describes the binding forces that hold a society together. Durkheim distinguishes between "mechanical" and "organic" solidarity. "Mechanical" is the social cohesion, which is based on personal ties, on perceived similarities, on the consistency in thought, and on the shared way of life. This kind of solidarity is typical of small, manageable, or premodern societies. Solidarity in modern societies, on the other hand, is based on the dependence created by a differentiated division of labor ("organic" solidarity).

While the notion of solidarity in Durkheim primarily serves as a descriptive term, it is used normatively by the representatives of so-called Solidarism (Hayward 1959, 1961). For Léon Bourgeois, the *solidarité sociale*, i.e., the fact of the unavoidable mutual dependence of human beings, implies a social guilt of all toward all, especially of the privileged toward the underprivileged (Bourgeois 1902).

Following the theory of French Solidarism, German Jesuits developed the Catholic Social Doctrine, which in 1931 has strongly influenced the papal social encyclical Quadragesimo Anno by Pope Pius XI. Important authors are Heinrich Pesch (1854–1926), his disciple Gustav Gundlach (1892–1963), and Oswald von Nell-Breuning (1890–1991). The Catholic Social Doctrine is based on the natural law theorem that human beings neither can be thought of as isolated and independent individuals, nor as mere elements of a collective. Rather, one must start from the essential connectivity of the individual to the society and from the essential connectivity of the society to the individuals. From this dual connectivity follows the moral demand for solidarity. Solidarity is effective on three levels: on the level of mankind, which, according to the Christian view,

is a single "family of God"; on the level of the state which secures public welfare on a subsidiary basis; and on the level of the national economy which has to ensure the fair allocation of natural resources (Rauscher 1995). Catholic Solidarism has become effective in the Polish Solidarnošc trade union (Goodwin 1991).

Universalist concepts of solidarity appear in the Moral Philosophy of the twentieth century also outside of and independent from the Catholic Social Doctrine.

Max Scheler, like the Catholic Social Doctrine, proceeds from the idea of a solidarian community that embraces all human beings, because all individuals are essentially related to communion with all other human beings (Scheler 1916, 488).

Philippa Foot (Foot 2002) and – even more clearly – David Wiggins (Wiggins 2009) consider solidarity as respect for persons as moral subjects. In contrast to Kant, this respect is not the result of rational beliefs but a pre-reflexive attitude. In this sense, solidarity is the root of morality. Foot and Wiggins connect with solidarity as the notion of certain negative universal obligations from moral respect towards everyone and not just towards comrades or allies. This approach contradicts the history of the concept according to which solidarity always refers to positive obligations and not to negative ones.

Jürgen Habermas uses the concept of solidarity in various ways. While he conceives it in his book *Faktizität und Geltung* rather in the sense of orientation at the common good, which emerges from the communication process of the members of a society (Habermas 1993, 327), he uses the concept in his Kohlberg essay in a decidedly normative sense. According to his discourse theory, the content of morality corresponds to what the members of a universal communication community would agree in a free discourse. The result of the discourse is fair because it is based on the consent of all interested parties and all concerned. The discourse theory, however, does not answer the question of the mechanisms by which membership in the universal discourse community is ensured. This is supposed to be the function of solidarity. It is according to Habermas rooted in the experience that "one must stand for the other, because all as comrades must be interested in the integrity of their common life in the same way. Deontological justice demands solidarity as its other." (Habermas 1991, 70).

The approach of Arnsperger and Varoufakis belongs also to the Universalist concepts of solidarity. According to that, there is a difference between altruism or affection on the one hand and solidarity on the other. The latter is a form of empathy towards strangers simply based on the fact that the strangers suffer (Arnsperger and Varoufakis 2003).

Other thinkers consider solidarity as counter-concept of Universalist ethics and refer it exclusively to particular communities or groups. These include the approaches of Richard Rorty and Axel Honneth.

For Rorty, the function of solidarity is keeping people from humiliation (Rorty 1989, 89). Humiliation, according to Rorty, prevents people from telling a coherent self-narrative about which they can identify with themselves. Torture is not cruel because it causes physical pain, but because it forces individuals into behaviors that they cannot later integrate into a coherent self-image and which are incompatible with their self-description. Solidarian communities provide their members with the conceptuality and the basic conviction patterns (the vocabulary), which only make a meaningful self-narrative possible. Solidarian communities in the sense of Rorty are always particular value-communities. At the same time, they are always the only possible authorities toward which it is possible to justify one's own convictions and values. Because only in the framework of the relevant solidarian community there is a sufficient degree of consistency concerning values and fundamental convictions. Solidarity conveys a sense of belonging. It is the basis on which alone it is possible to determine what has to be considered as humiliation.

For Axel Honneth, solidarity is an element of his recognition theory. Recognition is a necessary prerequisite for successful identity formation. Honneth distinguishes three forms of recognition: love, justice, and solidarity. In love, a person is recognized in their needs. In law, a person is

recognized as a legal entity. Solidarity is the recognition of a person's abilities and qualities, that is, their peculiarities and their resulting social status. Thus, solidarity refers to the experience of social appreciation (Honneth 1994, 207).

Philosophical Problems

The concept of solidarity was comparatively rarely reflected in moral and legal philosophy (Bayertz 1998). The desiderata of a theory of solidarity can be expressed in the following questions.

Is Solidarity a Suitable Basic Concept of Universalist Ethics?

There are two reasons why the concept of solidarity was so rarely reflected in moral philosophy. On the one hand, modern ethics is almost exclusively interested in establishing universal norms. It knows only the individual on the one hand and the humanity on the other. Smaller human units are considered morally irrelevant. There is no moral special status of those who "belong to us." On the other hand, modern ethics is based on the idea of individuality. The central function of morality is therefore seen as the defense and protection of the legitimate interests of the individual. The demands emanating from groups, on the other hand, appear to be heteronomous and a threat to individual self-determination. Moral duties are therefore primarily thought of as negative duties, while positive duties require special justification and, in principle, can only be based on voluntariness. The concept of solidarity might therefore be of interest to universalist ethics, if it opens the opportunity to develop a more precise universalistic ethics of positive duties.

The counter-argument to this follows from the history of the concept and its meaning in our ordinary language. According to this, solidarity is always connected with the aspect of inclusion and exclusion. The criterion that determines whether or not someone belongs to a particular solidarian community is in dispute. But there is a widespread consent that such a criterion exists and that it is relevant in terms of solidarity. According to this opinion solidarity is always based on a certain feeling of belonging together and the more or less reflexive identification with a group (Derpmann 2013). A specific feeling of belonging together with the whole of humankind, however, seems to be difficult to prove empirically. Some authors, therefore, do not refer to the feeling of belonging together but to an alleged mutual dependence of all individuals (Bourgeois 1902). Apart from the fact that one can dispute the empirical truth of this thesis (Steinvorth 1998, 59), the question remains open how the validity of solidarian duties can be concluded from the fact of the alleged mutual dependence without committing a naturalistic fallacy. If, on the other hand, the French tradition does not refer to an emotional feeling of belonging together, but to the equal rights of the citizens of a state, this does not lead to a universal concept of solidarity, but rather to inclusion and exclusion on a national level.

Finally, the idea of a universalist concept of solidarity ignores a fundamental characteristic of universal morality, namely the fact that it is just reason and not emotions, feelings, and interdependences that justify universalistic morality. This is just what makes the difference to all particularistic ethics.

Is Solidarity as a Concept of a Particularistic Morality Compatible with Ethical Universalism?

If one assumes that the concept of solidarity has no place within the framework of universalist ethics, the ethical relevance of solidarity depends on the fact that beside of the universalist morality also a particularistic one can be asserted, so that universalism and particularism do not exclude but complement each other. The question arises, therefore, whether at least some universalistic moral demands may be rejected, as long as they oppose the fulfillment of particular solidarity obligations. The partial compatibility of universal and particular moral obligations seems to be conceivable by virtue of the fact that universalistic ethics mainly provides justifications for the validity of negative obligations (prohibitions of injuries) and only in rare cases the foundation of strict positive duties (aid-duties): negative universalistic

obligations always displaces solidarity obligations, while positive solidarity obligations can be prior to positive universalist obligations (Derpmann 2013; Kersting 1998). According to this, it would be forbidden, for example, to kill an unknown child in order to use its organs to save one's own child. It would, however, be permissible to make a partisan decision in favor of one's own child in the question of which of two children is to be rescued from a burning house.

Can Solidarity Be Distinguished from Other Universal or Particular Duties?

There is a linguistic usage which identifies solidarity with moral aid-duties in general (Thome 1998, 212). However, it is possible that this equalization conceals morally relevant differences between different moral aid-duties. In this case a narrower meaning of solidarity would lead to a better gain in understanding (Löschke 2015, 67). A narrow concept of solidarity allows the distinction between universal aid-duties and particular solidarity duties (Kersting 1998). It may also be useful to distinguish between different particular aid-duties depending on the different ways in which they can be justified. So it can be questioned whether duties from solidarity should be distinguished from duties from family affiliation or duties from friendship, etc. (Derpmann 2013, 29). A narrow concept of solidarity could also make it easier to work out the morally relevant special features that lie behind the notion of international solidarity (Brieskorn 1997; Derpmann 2009; Preuß 1998) or the concept of the social (welfare) state (Bayertz 1998).

Are There Solidarity Duties That Are Not Based on Consent?

The least clarified problems in the context of solidarity include the question of whether and for what reasons there may be solidarity obligations which are not based on the voluntary accession to or identification with a solidarity community, but simply on the fact that the committed person is actually member of the solidarity group. The existence of such involuntary solidarity duties seems to be confirmed by a moral intuition, which shows the following thought experiment: A person who needs help is offered the needed aid by someone she abhors. In this situation, the person in need of aid will feel the strong impulse to reject the offer because, by virtue of the factual acceptance of the aid, she sees herself in turn morally obliged to offer a benefit to the helping person. This is what she wants to avoid under all circumstances. If she accepts the help (because the need is so urgent), she lives in the unpleasant feeling of being obliged towards the hated helper, although she did not voluntarily commit to it (Thome 1998, 256). From this consideration seems to follow that there can be solidarity obligations which are not based on consent, but simply on reciprocity (Khushf 1998, 126; Thome 1998, 252).

This conclusion is contradicted, however, by the fact that it is obviously based on a naturalistic fallacy. This can be shown also by a thought experiment: Persons who have been injured in a voluntary manner also feel a certain urge to reciprocity, namely to revenge. But we do not conclude from this fact that they are obliged to commit revenge. The problem of involuntary solidarity obligations is relevant in practice, for example, when it comes to the question whether it is justified to raise moral accusations when a worker does not want to participate in a strike, although he inevitably also benefits from the better working conditions which are the goal of the strike. In order to solve this problem, it has been proposed to accept involuntary solidarity obligations only if the relevant solidarity community is justified to consider itself as identity-constitutive for the individual member in question. In this case the community can trust in the solidarity of the member because he or she can deny the solidarity duties only at the price of his or her self-alienation (Derpmann 2013, 33). However, this involuntary bindingness can be terminated by a sufficient declaration of the member to the community (Derpmann 2013, 62, Löschke 2015, 67).

Is Solidarity Based Only on Mutuality or (Sometimes) on Altruism?

The open problems of a theory of solidarity also include the question whether the solidarity relationship must be determined solely by the well-informed interests of each member, or whether altruistic solidarity obligations are also conceivable. Many authors think the latter is possible. For example, the willingness to sacrifice one's life for one's own community is considered as an act of solidarity (Voland 1998). However, such a use of the concept of solidarity entails the risk that the differences between solidarity obligations, universal aid-duties, and supererogatory services become blurred (Bayertz 1998, 49).

Conclusion

The concept of solidarity has not yet been sufficiently clarified in legal and moral philosophy. According to the recent researches by Jörg Löschke the term solidarity should only be used if at least the following four elements are given:

1. Solidarity refers to aid, support, assistance. It is still unclear whether solidarity refers necessarily to positive duties or whether supererogatory aid is sufficient.
2. Solidarity refers to particularity, which excludes something like universal or cosmopolitan solidarity.
3. Solidarity is always constituted by a certain kind of identification of the members of a group with the group. The identification can be based either on voluntary membership or on the self-understanding of the person as belonging to the group.
4. Solidarity as a moral concept presupposes compatibility with the requirements of universal morality and cannot be considered as an alternative to universal morality. In this context, future research will also have to deal with the question of the extent to which the denial of access of third parties to a solidarity community questions the morality of the community or can be compatible with the requirements of universal morality (Löschke 2015).

Löschke's results seem to show in which direction a clarification of the concept is to be expected.

Cross-References

- ▶ Citizenship
- ▶ Common Law and Civil Law Systems: A Comparison
- ▶ Cosmopolitanism
- ▶ Integration: Civic and Social
- ▶ Responsibility: Collective
- ▶ Rights: Social Rights

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Sorbière, Samuel

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Samuel Sorbière (1615–1670) was a French physician, savant, and philosopher associated with the *Libertins érudits* (Learned Freethinkers) of seventeenth-century France (Pintard 1943). He is best known for his promotion of the physical sciences, his writings in support of absolute monarchy as a political form, and his French translations of Thomas Hobbes. Although not of marked originality, Sorbière's work in the second half of the seventeenth century helped to develop an ideology of absolute monarchy, arguing that strong, undivided sovereign authority was necessary to regulate European societies in the aftermath of the Wars of Religion (Adkins 2005, 2013). In general, Sorbière was a moderate philosophical skeptic who considered the crises of the sixteenth and seventeenth centuries to be a result both of dogmatism and of the insufficient regulation of human affairs at all levels (Bianchi 2009). He therefore promoted an anti-dogmatic, empirical,

and skeptical approach to truth claims and greater regulatory efforts in the social, political, and intellectual spheres (Bianchi 2003).

Born to an Occitan Protestant family in Saint-Ambroix, but orphaned at a young age, Sorbière was raised by his uncle, the classicist Samuel Petit, whose sister was Sorbière's mother. Sorbière later studied medicine at the University of Paris, taking his degree in 1639. He then moved to Leiden in 1642, where he practiced for the next 9 years until returning to France in 1650 to become director of the collège d'Orange in Provence. In the intervening years between finishing his medical degree and leaving for the Netherlands, Sorbière continued to reside in Paris, having befriended the Mimin monk and polymath, Marin Mersenne, and the priest and philosopher, Pierre Gassendi, who was known for his attempts to reconcile Epicureanism with Christianity. Mersenne also introduced Sorbière to René Descartes and to Thomas Hobbes, who was then living in exile in Paris for the second time, having fled England when the Long Parliament convened in November of 1640. Sorbière remained in contact with Gassendi and Hobbes for many years and assisted in the publishing of their work (Sarasohn 2004).

Although Sorbière's first mature intellectual contributions, mainly in the form of French translations of important philosophical works, occurred during his sojourn in the Netherlands, there is a letter from Sorbière to Charles du Bosc in 1656 containing a partial French translation of Sextus Empiricus' *Outlines of Pyrrhonism* (*Pyrrhōneioi hypotypōseis*) that Sorbière claims to have accomplished "more than 25 years ago" – which would have made him 15 or 16 at the time. If true (and we have no reason to doubt him), then Sorbière's interest in skeptical philosophy, which influenced his attitudes toward human nature, the natural sciences, law, and government, emerged early in his thinking life and remained fairly constant throughout. It also appears that his skepticism included a pessimistic attitude about human nature in general and a dissatisfaction approaching despair with the state of European society as a whole.

Certainly Sorbière early on displayed an interest in ideas about reforming or redesigning European society, which he believed to be wrong or broken in a fundamental way. Within a year of his arrival in Leiden, he published a French translation of Thomas More's *Utopia* (More 1643). When Hobbes' *De Cive* appeared in 1647, Sorbière commenced a French translation which he published in 1649. In the dedication to the translation, Sorbière suggested that Hobbes, Descartes, and Gassendi were worth more than all the philosophers of the ancient world and that translating *De Cive* diverted him from unhappiness and from the memories of indignities and misfortunes that he had suffered. "I have seen what is natural to men in a state of liberty," he added, "how they tear themselves apart in an eternal war and lead a life more unhappy than that of wild beasts" (Hobbes 1649). Even civil society, he argued, cannot deprive some men of their ferocity.

Thus by the end of the 1640s, with the Thirty Years' War winding down, but with the Fronde just beginning in France, Sorbière's pessimism led him, like Hobbes – and also, one must add, like the famous Leiden philosopher, Justus Lipsius – toward an embrace of absolute monarchy as the only means of maintaining peace and security in a chaotic world plagued with violence, war, fanaticism, and unrestrained passions. Following through on this realization, Sorbière soon returned to France and sought the patronage of Cardinal Mazarin. In 1652 he published a translation of Hobbes' 1640 *Corpus Politicum*, and then in November he converted to Catholicism (Hobbes 1652). Although some interpreted his conversion cynically as merely a ploy for political and financial benefit (and that may be true), in an essay he published a year later entitled *Discours du Sieur de Sorbière sur sa conversion à l'Eglise Catholique*, Sorbière condemned the Protestant notion of Scripture alone as the source of religious truth because it led to free interpretations and thus to disagreement, dissension, and disorder (Sorbière 1654). In other words, authority was necessary; men could not rule themselves. Two years later, in 1656, Sorbière published two "*discours sceptiques*" both of which criticized French society and insisted that people would be

happier under a despotic government than under one with less absolute authority, for then the people are "all immediately under the protection of their Sovereign." (Sorbière 1755) Strong, unassailable regulation of human behavior was the only way to maintain a just, peaceable society. Ultimately, Sorbière bound his various essays into one volume and presented them to his patron, Mazarin (Sorbière 1660a). In 1659 he expressed to Mazarin the idea that one cannot induce ethical propositions from the particular behaviors of humans in a state of nature because for such people justice and injustice have no meaning. Instead of observing human behavior, he argued, one must consult one's reason to deduce the manner in which people *ought* to behave and then make laws to regulate that behavior through fear of punishment (Sorbière 1660b).

Sorbière adhered to his philosophy in other areas of life, too. Soon after returning to France, he helped Henri Louis Habert de Montmor to form the Montmor Academy, a group of savants and natural philosophers that was the immediate precursor to and even model for the Royal Academy of the Sciences. In 1657, Sorbière and a colleague drafted the Montmor Academy's rules and regulations. When vanity, passion, and ambition led some members openly to flaunt the rules, Sorbière harangued them in 1663, arguing that even an academy of learned men required authority, regulation, and discipline to function properly.

Later in 1663, Sorbière traveled to England where he attended meetings of the Royal Society and visited Thomas Hobbes. The English poorly received his *Relation* of his voyage, however, and struck his name from the list of Royal Society members (Sorbière 1666). An indiscreet remark about the Lord Chancellor in the account also resulted in an official complaint to the French government which replied by suppressing the book and banishing Sorbière from Paris. As a result, Sorbière had nothing to do with the formation of the Royal Academy of the Sciences in 1666.

Falling ill early in 1670, Sorbière committed suicide in April of that year by overdosing on laudanum.

Cross-References

▶ Authority of Law
▶ Rule of Law: Historical Perspectives

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Soto, Domingo de

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Introduction

Domingo de Soto (1494–1560) was a Spanish theologian, a disciple of Francisco de Vitoria and a prominent member of the School of Salamanca. He studied in Alcalá and in Paris, entered into the Order of Preachers and was a full professor of Theology at the University of Salamanca. He participated in the Council of Trent and in the meetings in Valladolid held to settle the controversies between Bartolomé de Las Casas and Juan Ginés de Sepúlveda concerning the titles legitimizing the conquest of America. He was regularly called upon by the Inquisition to report on the censorship of religious writings. Aside from his theological reflections, in the same manner as Vitoria, Soto tackled philosophical, legal, moral, and political matters, at the same time as making interesting contributions to economic and social thought.

Main Contributions

Soto's main ideas on several problems, not strictly theological, are included in an extensive treatise entitled *De iustitia et iure* (1556), published definitively in Salamanca after some corrections. This work is a good example of classical natural law theory owing to its Aristotelian-Thomistic attributes.

Following the scholastic method, the exhibition focuses on the study of Justice, conceived as a virtue, and on Law, defined as its object. Soto distinguishes four types of laws: eternal, natural, human, and divine positive. He defends the concept of Law as representing what is just, and emphasizes that nature, or the covenants, are those things that concretize the idea of Justice, which he defines as giving what corresponds to each one following a pattern of equality. Based on these ideas, he differentiates Natural Law from Human or Positive Law. Following the Thomistic postulates, he considers that Natural Law is a Moral Law, which can be discovered by right reasoning and which contains universally valid principles. He participates in an intellectualist conception of law, stating that "it is a universal proposition and a ruling of practical reason" (Soto 1967: 9), and affirms that the Human Law that does not derive from Natural Law will not be just and "if it is not just, it is not Law" (Soto 1967: 4). Therefore, for Soto, the validity of laws comes directly from the content.

Domingo de Soto embarked upon the titles that could justify the conquest of America in his work *De Dominio*, presented in the year 1534–1535, although there "he loyally confesses that he had not yet fully developed the matter" (Brufau 1964: XXVII). Years later, he coincided with the doctrine defended by Vitoria, who, in a more orderly and precise way than our theologian, affirmed, in *De Indis prior* (1539), that the Indians were true owners of their property, rejecting as legitimate titles, among others, that the Emperor was lord of the whole world and that the Pope had temporary power over the Indians. He criticized the abuses committed against the native population and accepted legitimate titles for the conquest, mainly, the *ius communicationis*, interpreting as a right the ability to travel and trade with territories and the right to preach, not to impose, the Gospel. He concluded that if the Indians prevented the Spaniards from exercising these rights using violence, they could legitimately respond by using "force as something exceptional" (Pérez Luño 1992: 89).

His concern for commutative justice also led Soto to denounce the numerous abuses that, in his opinion, disrupted the equality between the contracting parties, a subject to which he dedicated book VI of his *De iustitia et iure*. He focused on valuing trade, the fair fixing of prices, and the legality of interest-bearing loans and currency

exchanges. He maintained a restrictive and cautious attitude towards the new proposals that advocated speeding up mercantile exchanges, admitting, with a great deal of prudence, the use of the so-called extrinsic titles, the *damnum emergens* and the *lucrum cessans*, to justify the lender's perception of some form of interest.

Other social problems on which he spoke included growing pauperism. Faced with new regulations promulgated in different European cities, inspired, among others, by the humanist thought of Juan Luis Vives, Domingo de Soto showed his distrust of reformist measures dictated by the political power. According to him, they provoked an excessive control over the lives of the poor. He defended the continuity of alms as an instrument to alleviate the needs of others and considered it unviable to create a tax to alleviate poverty in Castile.

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Sovereignty and Human Rights

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Introduction

The relationship between sovereignty and human rights is one of the most contested questions in legal theory and practice. It has been mostly conceived as antagonistic in contemporary discussions. Sovereignty is often deemed as a threat to human rights of individuals, especially when a state violating human rights invokes sovereignty as defense against criticism or scrutiny. It has been argued that the universal protection of human rights entails the rejection of state sovereignty. Full protection of human rights, therefore, necessarily requires a force that encroaches, compromises, or even breaks down the sovereignty of the state. Sovereignty seems as an anachronism that must be discarded or disregarded in the era of human rights. This has become a global ethos at the turn of the century.

Against this backdrop, this essay will first provide a short history of the concept of sovereignty and then introduce the development of international human rights movement as well as its challenges to sovereignty. After that, it will address the contemporary debate on the relationship between sovereignty and human rights. A short conclusion follows.

The Transformation of Sovereignty

In modern political, social, and legal vocabularies, sovereignty is an important, yet protean, concept. To put it simply, it basically means the supreme authority within a given territory. In modern history, sovereignty as the supreme authority has been relocated from God to the state. In theory, starting from the sixteenth century, amidst the enduring religious wars, European thinkers like

Jean Bodin and Thomas Hobbes invented such a concept to justify the independence of monarchs' rule over his realm against churches and feudal estates and establish the autonomy of the political state. In practice, the Peace of Westphalia in 1648, which ended the Thirty Years War, established the principle of sovereignty in the European, absolute states, in which the monarch had sacral, sovereign rights. In the era of the Enlightenment and the French and American Revolutions, internal sovereignty was democratized and the idea of popular sovereignty arose. Yet the meaning of external sovereignty remained. Afterwards, the concept of sovereignty and the institution of the modern state has spread all over the world.

In modern jurisprudence, sovereignty is a concept of both international law and domestic law. In international law, sovereignty means the independence of a state from other political forces, especially in terms of regulating its internal affairs. It protects a state from foreign invasion or international intervention. In domestic law, sovereignty connotes the supreme political authority that can make and change the fundamental law of a state. In the modern era, the principle of popular sovereignty reigns: the supreme power resides in the people. In this essay, we are mostly concerned with the question of sovereignty in international law.

The principle of sovereignty has been the bedrock of international politics and law in modern times. Analytically, sovereignty can have several dimensions. First of all, it means independence of a state against conquest and invasion. Second, it means exclusive control over its territories and persons, especially the inviolability of territorial boundaries. Third, the immunity of state leaders and high-ranking government officials from the trials of foreign or international tribunals (Vyver 2013).

In its origins, at the heart of the idea of state sovereignty lies the principle of nonintervention. Reflecting upon the religious wars experience, Europeans who invented state sovereignty felt that intervention based upon supra-state reasons engendered international chaos. Religious wars devastated Europe; Europeans strove to find way out. The Westphalian concept of sovereignty marked a total denial of external intervention, especially for religious reasons. The order of 1648 ended the Thirty Years War by establishing the state as a container bracketing unlimited, religious wars. Internally, the state can determine its own policy on religion; it reinforced the principle of "*Cuius regio, eius religio*" ("Whose realm, his religion") established at the Peace of Augsburg (1555). Externally, the state cannot invade another state out of whatever reasons. The notion of territoriality triumphed.

For 300 years, these points have been intact in the international society of states. Things began to change in the mid-twentieth century, chiefly because of the international human rights movement. In a sense, the contemporary universal human rights movement resembles the ecumenical vision of Christianity, while the system of sovereign states impedes a universal Christendom. The German jurist Carl Schmitt argues that all political and legal concepts, like sovereignty, are secularized theological concepts (Schmitt 1985). This is true of sovereignty and human rights.

International Human Rights Movement

The idea of human rights presupposes that every human has rights just because s/he is human. The Universal Declaration of Human Rights (1948) states: "all human beings are born free and equal without regard to race, sex, language, religion, political affiliation, or the status of the territory on which they were born." Three points are in order. First, rights are inherent: rights come from humanity, not a membership of a political community that is a sovereign state; they are inalienable. Second, rights are equal: any human enjoys human rights; she/he does not have to belong to any community or class or race or gender in order to enjoy human rights. Third, rights are universal: they transcend national, territorial boundaries; foreigners or stateless people should be treated humanely by the local people or authority.

In the chronological sense, compared with sovereignty, the idea of human rights is a late comer

in international politics and law. Despite the discourse of universal human rights in the Enlightenment, the idea has only been taken seriously by the international politicians and lawyers after the Second World War, especially the Nazi experience. The Holocaust, which resulted from absolute, national sovereignty, made the world reflect upon sovereignty and bred the worldwide awareness of human rights protection. On the other hand, the historical process of European integration abridged absolute sovereignty, too.

Post-WWII, human rights have been codified in multiple international legal instruments, including the Universal Declaration of Human Rights (1948), the Genocide Convention (1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966). The traditional idea of sovereignty received substantial challenges from international legal documents.

The deep transformation of international law also occurred with the founding of the United Nations. The order of 1948 challenged that of 1648 by institutionalizing the limits on sovereignty in a legal way. Both the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948) sought to circumscribe absolute sovereignty and exalt human rights. The former cut the link between war and sovereignty: the sovereign state can only conduct war for self-defense. The latter put universal human rights as the foundation of the new international order: states violating human rights are deemed as illegitimate.

The subjects in classical international law are sovereign states. Nonstate actors, including individuals, were unrecognizable under international law. International law, therefore, protects sovereigns, rather than individuals. Individuals, as victims of the sovereign, cannot appeal to international law for remedy. Sovereign immunity, therefore, was absolute. Before 1945, talking about other states' human rights condition constituted violation of sovereignty. States were left free to do whatever within their own territorial domains while treating their nationals.

The post-WWII world order, typically represented by the United Nations, featured the denial of absolute sovereignty and the emphasis on individual rights. Individuals became the subjects of international law. International law became a law of human rights, not only a law of states. The relationship between governments and individuals falls under the regulation of international law. The aim of international law is to guarantee the rights of individuals, rather than those of the state. No longer thought as the protector of human rights, the state appeared to be the chief violator of human dignity. Sovereignty can be employed by perpetrators as a pretext for human rights violations. Sovereignty can serve as a shield under which potentates do injustice against their people without external check.

Despite these codifications in international instruments, human rights remained law in books for decades: all signatories made reservations in these documents to avoid their sovereignty to be abridged or circumscribed. The more serious institutions came decades later. From the 1980s to the 1990s, the collapse of socialist regimes in Central and Eastern Europe, as well as the end of dictatorship in many developing states earlier, marked the triumph of liberal-democratic order in the world. On the one hand, sovereignty seems to be eroded by economic globalization, financial internationalization, immigration (permeability of borders). On the other hand, the effective enforcement mechanism of human rights through military means only formed after the end of the Cold War by challenging the most fundamental principle of traditional international order – nonintervention. Military operations were employed to redress human rights violations in a foreign state with neither state consent nor U.S. Security Council approval. *The Responsibility to Protect* by the International Commission on Intervention and State Sovereignty urged a rethinking about the meaning of sovereignty: sovereignty includes a legal obligation to protect citizens' human rights, the massive violation of which warrants international scrutiny (International Commission on Intervention and State Sovereignty 1999).

The 1990s also bred an international, triumphant enthusiasm for international human rights

regime. For human rights advocates, the state became the instruments of individuals to achieve their rights, not vice versa. Sovereignty has been thought as a chief impediment in the progress of universal human rights. People begin to rethink the concept of sovereignty as the tools of the people. As the former UN Secretary-General Kofi Annan said: "States are now widely understood to be instruments at the service of their peoples, and not vice versa." (Annan 1999) Not denying the concept of sovereignty itself, the new ethos relocates the site of the sovereign from the state to the individual. Sovereignty no longer refers to unlimited, extra-legal power, but rather is transposed as a legally regulated public power for the well-being of individuals organized as the people.

Institutional mechanism other than state implementation has been invented to enforce human rights. On the one hand, there is humanitarian intervention: when gross human rights violations exist in a state, another state or international actor can employ military force to interfere in that state in order to stop them. On the other hand, there is international criminal court – state leaders committing gross human rights violation can no longer be exempted from criminal responsibility by the cover of sovereign immunity. Justice seemed to take precedence over peace as the chief aim of international politics and law.

The Contemporary Debate

Ever since the end of the Cold War, the attack on state sovereignty has been fermenting in political and legal theories, which made the relationship between sovereignty and human rights complicated. Sovereignty and human rights appear opposed especially in the international polemics around events of humanitarian intervention. While sovereignty requires nonintervention, protection of human rights calls for perforating territorial boundaries. On the one hand, under the contemporary human rights enforcement mechanism, especially humanitarian intervention, how a government treats its own citizens in its own territory becomes an international concern and needs international review. Regarding human rights issues, there is no such thing as pure "internal affairs." On the other hand, enforcing human rights law requires the actions from states. The international society remains that of states. Sovereignty has been challenged by the international human rights movement, but it does not die out. Rather, it has robustly responded to the challenge of human rights in the theoretical domain.

From the 1990s on, many human rights advocates argued against the use of sovereignty in the globalized world of human rights. Sovereignty was thought as "a mistake built upon mistakes" (Louis Henkin 1994), or "organized hypocrisy" (Krasner 1999), or "anachronism" (Reisman 1990). As the world reached a new century, sovereignty appeared to be an anachronism. For human rights advocates, sovereignty has become a dirty word that needs to be erased from the dictionary of political and legal language.

Human rights advocates oppose sovereignty as idolatry, for it locates the ultimate meaning in the state and individual citizens are usually sacrificed for the sovereign nation-state. The notion of human rights, by contrast, takes the individual body to be the locus of the sacred. For human rights advocates, the legitimacy of international order has shifted from the sovereignty of the state to that of the individual, just as modernity relocates the site of the sovereign from God to the state.

To human rights advocates, sovereignty speaks a totally different language from that of human rights. Universal human rights hold that all men are similar facing pain and death: a man/woman is similar to another. Sovereignty presupposes pluralism in the world: a nation is different from another nation. Human rights appeal to the internal moral sentiments – sympathy or empathy – of individuals afar, regardless of their external attributes conferred upon by culture, civilization, social life, and political ideas, among others. Sovereignty, by contrast, exalts collective interest and national identity that demand the sacrifice from individuals. Sovereignty, for human rights advocates, is something that must be erased in the age of human rights.

On the other side, there are other theorists holding firmly onto the principle of state sovereignty (Eric Posner 2009, 2014, Eric Posner and Jack Goldsmith 2005; Jeremy Rabkin 2005). They generally argue that (1) sovereignty is hardly gone in contemporary world and (2) it is unwise to deny the importance of state sovereignty in the course of human rights protection and (3) the rampancy of human rights discourse actually undermines sovereignty.

For the sovereigntists, many states still follow the logic of state sovereignty.

Some non-Western countries, authoritarian or theocratic, view human rights universalism as Western value imperialism and insist upon the principle of state sovereignty. State sovereignty, thus, serves as a shield against Western political encroachment or moral invasion; political-cultural relativism goes hand in hand with state sovereignty against claims of moral universalism or "imperialism." Among the members of the UN Security Council, China and Russia are typical examples. For them, sovereignty ensures the protection of their particular culture that buttresses political systems, while human rights appear as the weapon of Western powers to permeate their borders. For states in the Middle East, the Western notion of human rights – equality and freedom – seems a scourge to their religious communities. Take gender equality for example. What appears to Westerners as gender discrimination are taken by Muslims as natural arrangement. In this sense, sovereignty protects self-determination.

Even in the West, sovereignty still finds its supporters for it protects national democracy. The United States, the long-standing leader of international human rights movement, claims American exceptionalism while facing international norms that restricts its power (Kahn 2011). After 9/11, it even employed torture, the prohibition of which lies at the heart of human rights movement, as a means to fight against terrorism, and it is a way that connects violence to sovereignty. Even in Europe, where human rights discourse most flourishes and the notion of sovereignty is denied, recent events show the tenacity of sovereignty. In the resistance against European constitutional integration, for example, several European constitutional courts invoke the principle of sovereignty to argue against the supremacy of European constitutional law over national ones. Post-9/11, it seems that sovereignty has staged a comeback. The post-Cold War fervor of legal globalism and human rights universalism has arguably been cooled by new developments in both the West and the rest.

For sovereigntists, human rights enforcement relies mainly on efforts at the national level. The universal definition of human rights does not resolve the problem of interpretation and enforcement. Yet this simple definition cannot avoid ambiguities and uncertainties in concrete application of human rights, especially in contentious or conflictual situations like humanitarian intervention. International law is too weak to make the utopia of human rights realistic: it lacks effective executive and judiciary to enforce human rights (Goldsmith and Posner 2005).

In spite of the popularity of human rights discourse, states are still cautious in intervening in the internal affairs of other states. Ironically, believing in human rights, people enjoying full protection of human rights in their home countries tend to extend little support for intervention; they do not want their sons or friends to die in countries of severe human rights condition. Humanitarian intervention or supervision does happen, as in the cases of Kosovo, Haiti, or Rwanda, but the occasions are rare. When it does happen, it brings about international controversies and theoretical conundrums. In the Rwanda genocide crisis, the United States withdrew its diplomats and the United Nation's intervention received little support from states. State practices show the entrenchment of sovereignty in international politics. While recognizing human rights, no state abandons sovereignty by itself.

Moreover, in the eyes of sovereigntists, the overemphasis on universal human rights weakens the basis of democracy. The international human rights regime, lacking global democratic ground, is imposed upon national states, creating democratic deficit – the EU is a typical example. It actually undercuts the principle of popular sovereignty that grounds democratic self-government. Sovereignty, in this sense, serves as a protector of national, democratic life (Grimm 2015).

Conclusion

The relationship between state sovereignty and human rights needs to be reconceived. In the world where anarchical signs surge – as shown in the humanitarian crisis in Syria, it is altogether fitting and proper to re-appreciate the value of state sovereignty in protecting human rights. State sovereignty and human rights do not constitute an absolute opposition. Indeed, sovereignty and human rights are intertwined: human rights are mostly implemented by sovereign states; sovereign states reinforce their legitimacy by protecting human rights. Sovereign states remain the main implementing mechanism in contemporary international society. To abandon it without an alternative would be both reckless and ruthless. The threat of the failed state to human rights is as much as the despotic government. The sovereign state persists as the dominant form of political organization in the earth; the force of international law, including human rights law, still hinges upon state conformity and implementation. While "internal affairs" have become legitimate international concern, the enforcement mechanism of international human rights has not been globalized enough. After all, despite the existence of the UN, there is still no world state.

To some extent, sovereignty is merely reshaped to some extent, rather than totally denied by international human rights. It is no longer absolute in the Hobbesian sense, but it is still supreme. Supremacy does not necessarily mean absoluteness. It just means not subject to a more superior authority. The point is not an either-or choice between sovereignty or human rights. Rather, it is how to tweak state sovereignty to accommodate the requirements of human rights protection. Sovereignty now has constraint, but its life continues. In this sense, sovereignty remains the norm, while being tweaked by international human rights. Sovereignty, tinged with the concern with individual human rights, remains the foundation of contemporary international society and international law. Well-tuned sovereign states still serve for the common good of humanity.

Cross-References

- ▶ Constitutionalism: Cosmopolitanism
- ▶ Humanitarian Intervention
- ▶ International Law: Legitimacy of
- ▶ Rights: Legal and Moral
- ▶ Transnational Legal Normativity

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Soviet Legal Theory

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Introduction

The Soviet Revolution in Russia marked the first attempt internationally (apart from the short-lived and localized 1871 Paris Commune) to

fundamentally reorganize economic, social, and legal life along anti-capitalist, participatory, and egalitarian lines. The subsequent degeneration of the Soviet Union at the hands of Stalin's bureaucrats after 1923 has been taken by many as proof that these aspirations were utopian. In order to assess these claims, it is necessary to examine both the achievements and problems of the early years of the Russian Revolution.

In relation to legal theory and practice, the October 1917 Revolution launched the boldest and most sweeping experiment of the twentieth century. The Soviet government led by Vladimir Lenin dispensed with the previous courts, legal system, and legal profession and sought to fashion a radically new approach to the state, law, and legal theory, with some striking results in many fields, including criminal and family law. Moreover, it attempted to create the conditions for the fading away ("withering away") of law and the state.

Never before had a mass revolution placed in power an administration whose avowed intent was to dissolve itself into a classless, stateless society. This program of state disappearance was enshrined as a constitutional principle. In the words of the first Constitution of the Russian Republic (see Berman 1963: 30–1) adopted in 1918:

> The basic task of the Constitution . . . at the present transitional moment is the establishment of the dictatorship of the city and village proletariat and the poorest peasantry in the form of a powerful All-Russian state authority for the purpose of complete suppression of the bourgeois, the destruction of exploitation of man by man, and the installation of socialism, under which there will be neither division into classes nor state authority.

The early years of the Soviet Revolution and its social and legal reforms presented a fundamental challenge to Western capitalism and law:

- Where Western law asserted the sanctity of private property, freedom of contract, and the "rule of law" itself, as supposed guarantors of liberty and formal equality, the Bolsheviks argued that these doctrines inherently produced economic and social inequality.
- While Western law enforced the stability of the nuclear family as an economic unit, the Soviet government called for genuine freedom of choice in undertaking and leaving marriage and gender equality in family and social relations.
- Whereas Western law declared miscreants punishable because of their alleged personality defects, Soviet law treated "crime" primarily as a product of social inequity and, accordingly, sought to replace "punishment" with social improvement, education, and other remedial measures.
- Western jurists insisted that law was an organic and indispensable method of governing society, essential to combat or curb the alleged deficiencies and aggressive tendencies of human nature. Soviet jurisprudence regarded humanity as capable of rising to a higher social and moral level, given the right conditions. It viewed the state and law as legacies of exploitative, class society and sought to create the social conditions for them to be supplanted by more participatory and democratic forms of administration.

Informed by this approach, Soviet law struck out in new directions, often setting benchmarks that Western governments later felt compelled to emulate. This was especially so concerning gender equality, domestic relations, labor protection, and social welfare (Quigley 1988).

Soviet law was the first in the world to give women equal rights in marriage, divorce, and economic status. The 1918 Russian Socialist Federated Soviet Republic (RSFSR) family code instituted divorce on demand, without a separation period, and gave wives equal legal authority with husbands in decisions affecting their children. In Britain, by contrast, divorce was only available on the ground of adultery, and while a husband need only prove adultery, a wife had to prove cruelty or desertion in addition to adultery. According to the French Civil Code, a wife owed "obedience to her husband" and was obliged "to live with her husband and to follow him wherever he chooses to reside" (ibid.: 135–9).

In 1919, Lenin could boast with some justification that:

> In the course of two years of Soviet power in one of the most backward countries of Europe, more has been done to emancipate women, to make her the equal of the 'strong' sex, than has been done during the past 130 years by all the advanced, enlightened, 'democratic' republics of the world taken together. (ibid.: 140)

There were similar groundbreaking achievements in labor protection (e.g., the eight-hour day), social welfare (e.g., social insurance), and housing (e.g., rent controls and rent-free public housing) (ibid.: 141–51). Overall, the Soviet government sought to make a fundamental shift from private property and individual rights to social ownership and collective rights and responsibilities, underpinned by the nationalization of land and key enterprises.

The first Criminal Code of 1919 made criminal law hinge on "social danger" and "measures of social defense," replacing the notions of "crime" and "punishment" (Berman 1963: 35). Soviet leaders drew the conclusion that the latter terms, together with "guilt," functioned to obscure the social causes of crime (Bauer 1959: 38). The Communist Party program of the same year looked ahead to when "the entire working population will participate in administering justice and punishment will be replaced once and for all by educational measures" (Juviler 1976: 25). Despite the primitive and difficult social and economic conditions that the Soviet government confronted, its programmatic and legal instruments looked forward to more humane possibilities.

Many of these early initiatives were reversed or abandoned under the Stalinist regime that took hold after the end of the 1923. However, there were lively and wide-ranging debates on the future of the Soviet state and law throughout the early years of the Russian Revolution, in which the best-known protagonists were the Soviet jurists Peter Stuchka and Evgeny Pashukanis.

Broad-Ranging Legal Debates

There were passionate conflicts over the role of the law in the early days of the Russian Revolution. Few Western scholars have examined the full scope and richness of these debates (see Jaworskyj 1967; Zile 1970). There were exceptions, including several well-known scholars, notably Kelsen (1955), Hazard (1951), Berman (1950), Schlesinger (1951), and Fuller (1949).

After 1956, Khrushchev's attempts to distance the Kremlin bureaucracy from the most grotesque features of Stalinism led to renewed interest in the writings of Pashukanis (see Kamenka and Tay 1970; Arthur 1977; Balbus 1977; Redhead 1978; Cotterrell 1979; Beirne and Sharlet 1980; Sumner 1981; Warrington 1981; Norrie 1982) and, to a lesser extent, Stuchka (see Stuchka et al. 1988). These studies, however, often paid insufficient attention to the wider jurisprudential discussion that flourished between 1917 and 1927, until they were extinguished by the Stalinist regime. Considering the austere and tense circumstances of the Soviet state, which had barely managed to survive the so-called civil war of 1918–1921, these debates were remarkably open and spirited.

The pre-Stalinist period between 1917 and 1923 saw free-ranging and scholarly discussion on legal theory. It began to emerge in the earliest days following the October Revolution and continued during the difficult days of the civil war but was largely provoked by the complex issues raised by the 1921 New Economic Policy (NEP). The debates were not extinguished until after the final defeat of the Joint Opposition, led by Trotsky, Zinoviev, and Kamenev, in 1927 (see Head 2008: 11–151).

Jaworskyj and other commentators assert that Russian legal theorists found themselves confronting uncharted waters for which Marxist theory had no answers (Jaworskyj 1967: 50). It is certainly true that unprecedented challenges were posed in the years after 1917 that earlier Marxists could not have fully anticipated. None of the leading Marxists – Marx, Engels, Plekhanov, Lenin, and Trotsky – attempted to set out a comprehensive model of society under socialism. They regarded such ventures as overly prescriptive, as well as premature and utopian. For them, socialism consisted of human self-emancipation and would be shaped by the actions and ideas of millions of working people, tempered by the concrete historical and international circumstances

that prevailed. The classical Marxists were even less inclined to provide a detailed blueprint for the role of law and the state machinery in the transition from the overthrow of capitalism to socialism and then communism. They regarded law's role as being fundamentally bound up with and, in the final analysis, dependent upon the development of humanity's economic capacities and social well-being.

Karl Marx and his close collaborator Frederick Engels wrote considerably on the role of law in contemporary society, albeit usually tangentially to their broader examinations of class structure and dynamics. Only in several short letters did they address the issue of law as a subject in itself (see Marx and Engels 1975: 328). They wrote less on the postrevolutionary withering away of the state and law in the transition to genuine communism but enough to provide a policy orientation. What they did not attempt, flowing from their analysis of law as ultimately deriving from economic interests and the conquest of state power, was a general theory of law. Marx twice wrote of his intention to develop a theory of state and law (Marx and Engels 1942: 119; Marx 1857–58/1973: 108), but this project was set aside to concentrate on his study of political economy, presented in the three volumes of *Capital*.

Nevertheless, a Marxist heritage provided guiding principles. While Marx and Engels did not write systematic expositions on legal theory, many of their works examined the role of law in society (see Marx 1859/1971; Engels 1942; Engels 1886/1978: part IV; Phillips 1980; Cain and Hunt 1979). They provided a definite framework of analysis and orientation, as well as basic principles, which initially guided the early Soviet leadership but were later betrayed under the regime headed by Joseph Stalin.

Fundamental Marxist Conceptions

The two fundamental, underlying Marxist conceptions were (1) that, in general, all forms of law and the state were in the end derived from the development of the productive and hence cultural level of human society and (2) that law and the state would wither away in the process of arriving at a genuinely communist society. That is, the need for formal, bureaucratic, and repressive instruments of rule would disappear with the creation of a bountiful, egalitarian, and democratic world.

For the major Marxist theoreticians named above, law and the state were derivative and secondary, not primary, institutions in the economic, social, and political structure. Nonetheless, Marxists have not ignored the fact that law can play a critical part in shaping social development and consciousness under certain circumstances.

The starting point for understanding this historical materialist view is Marx's 1859 Preface to *A Contribution to the Critique of Political Economy* (see Marx 1859/1971), where he tentatively described the following propositions, derived from years of research and experience, as "a guiding thread for my studies":

> In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political and intellectual life process in general. It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their social consciousness.
>
> At a certain stage of their development, the material productive forces of society come in conflict with the existing relations of production, or – what is but a legal expression for the same thing – with the property relations within which they have been at work hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an epoch of social revolution. With the change of the economic foundation, the entire immense superstructure is more or less rapidly transformed.
>
> In considering such transformations, a distinction should always be made between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, aesthetic or philosophical – in short, ideological forms in which men become conscious of this conflict and fight it out. (ibid.: 20–21)

Three themes can be discerned in this seminal passage. The first is that law, like other aspects of the political superstructure, arises from definite relations of production and the forms of social consciousness forged by those relations. The second is that those relations are not static but are inevitably shattered by the further development of technology and production itself, ultimately leading to social revolution. The third is that law is one of the ideological forms in which humanity becomes conscious of the underlying conflicts and "fight them out."

As a young man, Marx studied law but soon rejected the "metaphysics of law," which he saw as divorced from social reality. He turned initially to a study of the philosophy of law and then to the class and economic driving forces of social development. In his 1843 *Critique of Hegel's Philosophy of Law*, he criticized the "speculative philosophy of law" for its "disregard of real man" (see Cain and Hunt 1979: 19). This notion was further developed in his 1859 *A Contribution to the Critique of Political Economy* (Marx 1859/1971):

> Neither legal relations nor political forms can be comprehended whether by themselves or on the basis of a so-called general development of the human mind, but that on the contrary they originate in the material conditions of life, the totality of which Hegel, following the example of English and French thinkers of the eighteenth century, embraces within the term 'civil society'; that the anatomy of this civil society, however, has to be sought in political economy. (ibid.: 20)

Properly understood, the Marxist view of law includes a number of pivotal propositions:

1. First, that socialism means democracy and the withering away of the state, not the bureaucratic "command economy" that subsequently emerged under Stalin.
2. Second, that socialism cannot be achieved by seeking to reform the state machine of the old order. It requires a thoroughgoing popular revolution to establish a new kind of state, a genuinely democratic state (the dictatorship of the proletariat), as a transitional regime to create the ultimate conditions for a classless, stateless communist society.
3. Third, that law is not inherent or organic to society; rather, it arises out of conflicting interests in society and primarily reflects the interests of the ruling layers. Therefore, in a classless society, the legal form of social regulation will become redundant. This withering away of the state and law can and must begin as soon as the socialist revolution has successfully wrested power from the old ruling class.
4. Fourth, that the relationship between law and socioeconomic power is dialectical. Against crude materialism and class reductionism, Marxists explain that legal definitions and measures can, in some circumstances, exert a sharp influence on economic and social developments. In part, this arises from the mystified, ideological form in which law and legal theory present themselves.
5. Finally, the Marxist view of law rejects the notion that capitalism, based on private ownership of the means of production, is somehow natural, while socialism is alien to human nature. Under capitalism, law also plays an ideological role in disguising social inequality, dulling consciousness of class divisions, and reinforcing "commodity fetishism."

The Marxist literature, cited above, established some clear principles to be applied by the young Soviet state: democratic (soviet) forms of governance, mass participation in all aspects of administration, the achievement of social equality as quickly as possible, the delegalization and decriminalization of social life, and the creation of an entirely new kind of state, one that began to wither away from birth. These principles were summarized in the Russian Communist Party program of 1919 (see Carr 1971):

> Conducting the most resolute struggle against bureaucratism, the Russian Communist Party advocates for the complete overcoming of this evil the following measures:
> 1. an obligatory call on every member of the Soviet for the fulfilment of a definite task in the administration of the state;
> 2. a systematic variation in these tasks in order that they may gradually cover all branches of the administration;

3. a gradual drawing of the whole working population into work in the administration of the state.

The full and universal application of all these measures, which represents a further step on the road trodden by the Paris commune, and the simplification of the functions of administration accompanied by a rise in the cultural level of the workers will lead to the abolition of state power. (ibid.: 248).

Within that definite framework, there remained considerable scope for theoretical and practical debate, which enhanced the policies applied by the Soviet government (see Head 2008: 91–109).

Immense difficulties emerged for the Russian Revolution that were not fully anticipated. While Lenin proposed critical measures in *The State and Revolution* (Lenin 1917/1992) to ward off the dangers of inequality and bureaucratism, he did not foresee the even greater pressures that would arise from a protracted political and economic isolation of Soviet Russia and delay in the world revolution. The central contradiction of the Russian Revolution – that the world's first socialist revolution erupted in one of the least developed countries of Europe – could not be overcome within the boundaries of Russia. Yet, the early hopes of successful revolutions in Western Europe in the wake of World War I were soon dashed.

Instead, the brief "honeymoon" period of Soviet social and legal policy was ended by the so-called civil war of mid-1918 to 1921, in which the major capitalist powers, including the United States and Britain, financed and sent contingents to join the military forces attempting to overturn the revolution. The consequent economic and social devastation largely forced the Soviet leadership to adopt the NEP in 1921, making key concessions to capitalist market relations and necessitating a return to traditional legal forms in order to protect private property rights. This had a profound impact on Soviet legal theory, particularly reflected in the writings of Stuchka and Pashukanis.

The economic, political, and legal pressures generated by the NEP were compounded by the defeats suffered by the Western European revolutions, culminating in the October 1923 crushing of the German revolution. It became apparent that the isolation of the Soviet state would continue for far longer than anticipated. These setbacks coincided with the illness and death of Lenin, removing the most respected and authoritative Marxist from the scene. Stalin, whose social base consisted of NEPmen and apparatchiks, was able to prevail over the Left Opposition and unveil a new nationalist course of "socialism in one country," which had a further deepgoing impact on Soviet legal policy. Following the 1926–1927 defeats of the British General Strike and the Chinese Revolution, Stalin's group was able to cement its grip over the Soviet state, defeating the Joint Opposition. This signaled a new shift in legal discourse, expressed in Pashukanis' first "correction" – his acceptance of "socialist legality" (see Head 2008: 153–68).

This degeneration was not inevitable. There was an alternative advanced by the Left Opposition, whose platforms and manifestos, from late 1923 onward, included critical calls for a return to the classical Marxist conceptions of the withering away of the state. The powerful Marxist legacy of the October Revolution was not finally extinguished until the great purges of 1936–1937. Nonetheless, the defeat of the Opposition by the end of 1927 set the scene for the shutting down of the free-ranging legal debates of the first 10 years of Soviet Russia.

As already noted, the early years of the Soviet Revolution produced groundbreaking achievements in legal policy. In several spheres, Soviet approaches were the most progressive in the world. They included the transformation of family and sexual relations – the recognition of the rights to divorce, de facto marriage, and abortion – and the decriminalization of the official response to antisocial behavior. Underpinning these initiatives were the broader abolition of private ownership of basic production and finance and efforts to deformalize and provide for popular participation in social administration. As Hazard observed, the Bolshevik vision was one of a new social order in which people would be able to settle their disputes "with simplicity, without elaborately organized tribunals, without legal representation, without complicated laws, and without a labyrinth of

rules of procedure and evidence" (Hazard 1960: vi).

These experiments, cut short by the severe difficulties of the civil war and NEP, followed by the Stalinist degeneration, provided a glimpse of what may be possible in a future socialist society.

The early legal debates between 1917 and 1924 were substantially democratic, uninhibited, and rigorous. It was a period of wide-ranging discussion and intellectual output. In the words of Jaworskyj, the literature was "diverse, original, and full of cognitive content" and "the range of both theoretical and practical problems discussed is indeed impressive" (Jaworskyj 1967: 4). Early Soviet thinkers were neither dictated by official policy nor affected by obsequiousness. Differences and criticisms were freely raised, regardless of the prestige or official posts held by the protagonists. This was the case for the debates that occurred on various levels, political and legal, theoretical and practical. While the needs of official policy were made clear, for example, with the adoption of the NEP, no attempts were made to shut down discussion or suppress divergent opinions.

There was a distinct shift in content and tone from 1924, signaled by Stalin's usurpation of power and the adoption of the "socialism in one country" perspective. In the same year, Pashukanis' *General Theory of Law and Marxism* (Pashukanis 1924/2001) was published and rapidly became the central legal text. It was followed by Pashukanis' 1925 denunciation of "Trotskyism" and his subsequent elevation as the doyen of the Soviet legal establishment. A further shift occurred in 1927, amid the defeat of the Joint Opposition. The passionate, intelligent debates of the early years degenerated into stifled, turgid, repetitious, and vacuous diatribes. Although cloaked in formal references to Marxism, contributions no longer made bore any resemblance to genuine Marxist theory or to the actual history and internationalist program of the Russian Revolution.

While the early Soviet scholars can be classified in relation to various traditional schools of jurisprudence, the differences between them revolved around several key issues. Whether the participants regarded themselves as belonging to sociological, psychological, normativist, or social function schools, the primary axes of the legal debates (see Head 2008: 111–51) concerned whether:

1. Legal forms of regulation should disappear in the transition to communism.
2. Such "law" was "bourgeois" or "proletarian".
3. Law and the state should immediately begin to wither away.

Stuchka and, later, Pashukanis progressively repudiated their early adherence to the classical Marxist conception that "law" was a residue of class society that would give way to genuinely collective forms of social interaction as the state withered away.

Although Stuchka and Pashukanis made important contributions to the legal debates and, at least in Pashukanis' case, developed aspects of Marxist legal theory, they played a role in the Stalinist degeneration (ibid: 169–203). Pashukanis shed light on the nature of the legal form, the distinction between law and regulation, the withering away of law, and the idea of morality. But both Pashukanis and Stuchka lined up against the Left Opposition, depriving the debates of the analysis and program that could have helped overcome the political and theoretical degeneration that occurred. In the end, a series of "corrections" did not save Pashukanis from Stalin's purges because by 1936 Pashukanis' continued view that the state would wither away under communism became incompatible with Stalin's insistence that socialism had already triumphed in the Soviet Union (ibid.: 160–66).

Stalinist "Legality"

After 1924, from enlightened legislation and vibrant legal debates, the climate shifted dramatically to repressive laws and mindless diatribes (ibid.: 147–51). One of the central features of that reversal was the adoption of what the regime called "socialist legality." Ironically, as the regime became increasingly lawless in practice – seen, for

example, in the show trials of 1934–1937 – it proclaimed the erection of a new permanent legal system, overturning the previous emphasis on moving toward the disappearance of the state and law.

By 1936, the Stalinist regime had not only trampled over but formally repudiated the basic Marxist conception of the withering away of the state. While claiming to have created socialism and dissolved antagonistic social classes, the regime denied that the legal institutions and state apparatus would disappear, even in the final stage of communism. This abandonment of Marxist precepts flowed organically from the doctrine of "socialism in one country" adopted by Stalin in 1924. The formal reason given for the new policy of "socialist legality" was the existence of socialism in one country, encircled by capitalist powers, making it essential to strengthen the state power.

In the midst of the Great Purges of 1936–1937, directed against all socialist opposition, Stalin emphasized the need for stability, orthodoxy, and legality to consolidate power. "We need stability of laws now more than ever," he said in his Report on the Draft Constitution in 1936 (see Berman 1963: 53). Over the following 2 years, every surviving feature of Bolshevik jurisprudence was overturned. "Crime" and "punishment" were restored, as were the sanctity of marriage and contracts, individual fault as chief criterion of personal injury liability, and "judicial authority" (ibid.: 57). Correspondingly, Soviet legal theory became reduced to self-serving and platitudinous gibberish. In a series of articles and a book on Soviet public law published in 1938, Procurator-General Vyshinsky denounced Pashukanis and Stuchka and their insistence that genuine socialism would mean the end of law.

> History demonstrates that under socialism, on the contrary, law is raised to the highest level of development. . . Our laws are the expression of the will of our people as it directs and creates history under the leadership of the working class. The will of the people with us is fused with the will of the whole people. (ibid.: 55)

As Western legal observers have readily concluded, these banalities cannot compare to the theoretical work of Pashukanis, let alone provide a coherent conception of law. "Such generalities hardly constitute a theory of law," comments Berman (ibid.: 55). Berman also points to the relationship between the lawless despotism of the Stalinist regime, its annihilation of the Bolshevik party, and its increasing need for the political prop of "socialist legality":

> Stalin deintellectualised the Party; he purged it of the men who were in love with revolutionary ideas. . . Without a legal system and a legal order – without Law with a capital L – the Stalinist regime could neither control the social relations of the people nor keep the economy going nor command the political forces in the country as a whole. (ibid.: 64)

While Marxism was chanted, however, the Stalinist doctrine was the antithesis of Marxism. As Leon Trotsky observed in *The Revolution Betrayed* (Trotsky 1991), the evolution of the Soviet state into an ever more totalitarian regime under Stalin could not be reconciled with the classical Marxist conception of the withering away of the state. Referring to the 1918 program adopted by the Bolshevik party, he wrote:

> The state as a bureaucratic apparatus begins to die away the first day of the proletarian dictatorship. Such is the voice of the party program – not voided to this day. Strange: it sounds like a spectral voice from the mausoleum. However you may interpret the nature of the present Soviet state, one thing is indubitable: at the end of its second decade of existence, it has not only not died away, but not begun to 'wither away'. Worse than that, it has grown into a hitherto unheard of apparatus of compulsion. (ibid.: 44)

"Stalinist legality" was a terrible demonstration of the truth of the Marxist analysis of law as a defender and facilitator of privilege, inequality, and private property interests.

The crowning glory of the Stalinist regime's repudiation of Marxism came at the seventh Congress of the Communist International in August 1935. It declared that with the nationalization of industry, the collectivization of agriculture, and the liquidation of the kulaks as a class, "the final and irrevocable triumph of socialism and the all-sided reinforcement of the state of the proletarian dictatorship, is achieved in the Soviet Union"

(ibid: 53). As Trotsky pointed out, this resolution was entirely self-contradictory:

> If socialism has 'finally and irrevocably' triumphed, not as a principle but as a living social regime, then a renewed 'reinforcement' of the dictatorship is obvious nonsense. And on the contrary, if the reinforcement of the dictatorship is evoked by the real needs of the regime, that means that the triumph of socialism is still remote. Not only a Marxist, but any realistic political thinker, ought to understand that the very necessity of 'reinforcing' the dictatorship – that is, governmental repression – testifies not to the triumph of a class less harmony, but to the growth of new social antagonisms. (ibid: 53)

Conclusion

In summary, there was a marked contrast between the post-1917 discussion and the post-1923 degeneration. The period after the revolution was characterized by genuine legal debates and efforts to minimize legal formality, replacing state coercion with mass involvement.

The adoption of the NEP in 1921 caused a shift back to legalism, particularly with regard to the protection of private property rights. After late 1923, with the ascendancy of Stalin and the doctrine of "socialism in one country," a new atmosphere of "corrections" and diatribes set in, accompanied by a strengthening of the repressive state apparatus. The classical Marxist perspective of the withering away of the state and law was ditched in favor of the entrenchment of a legal edifice, erected in the name of "socialist legality." In this sphere, as in others, Stalinism was a repudiation of Marxism, not a continuation of it.

The early Soviet regime advanced several worthwhile features:

1. It sought mass participation in political and legal life, not legal formality.
2. It was open and democratic in academic discussion.
3. It sought to create social equality as the only true guarantee of human rights.
4. In relation to misconduct, it sought to ameliorate the underlying social causes, instead of criminalizing and punishing.

Ultimately, the Soviet Union and its people suffered a cruel fate – decades of bureaucratic decay and repression, followed by the disastrous "shock therapy" of capitalism in the 1990s following the dissolution of the Soviet Union. Nevertheless, the debates and achievements of early Soviet Russia can provide valuable pointers for the future, demonstrating the possibility of a democratic, egalitarian, and participatory society. Under conditions in which all the fundamental problems that gave rise to the Russian Revolution – war, social polarization, and national and economic oppression – continue to blight humanity, it would be myopic to ignore the lessons offered by the Soviet experiment. The October Revolution proclaimed the principles of a new society, even if it was unable to realize them. The future is likely to thrust forward new opportunities to do better.

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Spence, Thomas

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Thomas Spence (1750–1814) was a British radical thinker whose name remains attached to his ambitious plans for social and political reform. He took part in several political clubs and ceaselessly broadcast his and other thinkers' ideas in print. They came to inspire revolutionary groups that became active in the capital city between 1816 and 1820 as well as other radical movements like Chartism in the 1840s.

Thomas was born in Newcastle upon Tyne to Margaret and Jeremiah, a net-maker and shoemaker who had migrated from Aberdeen. His father belonged to a small dissenting group mainly composed of poor tradesmen – the Glassites – who preached the community of goods. As was frequent at the time in laboring families, he did not attend school and learnt how to read in the Bible. He became a clerk and then taught himself into a schoolmaster. He began to read a vast range of books, including *Utopia* (1516) by Thomas More, *The Commonwealth of Oceana* (1656) by James Harrington, and *Robinson Crusoe* (1719) by Daniel Defoe, all of which presented fictionalized reflections on human organizations and institutions. In his youth, he became a follower of Reverend James Murray, a radical Presbyterian who preached natural rights and the equality of all creatures before God. In the 1760s and 1770s Murray supported John Wilkes' campaign and the American revolutionaries. In 1771, Spence experienced the social tensions engendered by the completion of the enclosure movement. In the Newcastle Town Moor case, he took side for the town's freemen opposing the town's corporation seeking to appropriate the town's common moor. The corporation lost their trial and the revenue of the land went to charity purposes.

In 1775 he exposed his ideas about land tenure before the Newcastle Philosophical Society: in his lecture entitled "The New Rights of Man", he

maintained "that property in land and liberty among men in a state of nature ought to be equal" (Dickinson 1982). He then accounted for the birth of private property which he equated to spoliation, concluding: "thus were the first landholders usurpers and tyrants" (Dickinson 1982). He therefore advocated a vast reform of land ownership whereby the parishioners would form a corporation which would own the land. The people would pay a rent to it, so that the money would be redistributed in the form of public facilities or local charity. Because he had the text printed and sold as a broadsheet, he was expelled from the society. However, this marked the beginning of his career as a book dealer. The same year, he published *The Grand Repository of the English Language* in which he presented his project of a new phonetic alphabet to help the uneducated poor and foreigners learn English (Spence 1775). To him its implementation in schools would eradicate the social discriminations engendered by linguistic disparities and would complete his Land Plan. After Murray's death in 1782, he moved to London where he set up a book stall in Holborn.

By the time of the French Revolution, Spence had become a prominent figure of radical activism in the capital. He temporarily hosted meetings of the London Corresponding Society (1792–1799) and of the paramilitary Lambeth Loyal Association. But most of all, he contributed to the publication of political writings and songs. He funded his trade by producing and selling copper coins and medallions (Parssinen 1979). With civil liberties restricted, he was arrested on several occasions for publishing seditious books and even spent some time in prison without trial (1794). His works include *Marine Republic, or a Description of Spensonia* (1794), *The Constitution of a Perfect Commonwealth* (1798), *The Constitution of Spensonia* based on the 1793 draft "Jacobin" constitution, *The Giant Killer, or Anti-Landlord* (1814), and a self-defense *The Important Trial of Thomas Spence* (1803). He also published others' texts, such as Thomas Paine's *Rights of Man* (1791) and a weekly periodical *One Penny Worth of Pig's Meat, or Lessons for the Swinish Multitude* containing a selection of past and present authors among whom Philip Sydney, James Harrington, John Locke, Richard Price, Joseph Priestley, and William Godwin. He died in relative obscurity but his ideas survived him, in particular thanks to his disciples, including Thomas Evans and Allen Davenport (Evans 1821; Davenport 1836). The so-called Spencean Philantropists were involved in the Spa Fields riots of 1816 and in the proto republican plot known as the Cato Street Conspiracy (1820), resulting in the execution of five and the transportation of many.

His prose is characterized by a blend of rationalism and Biblical language (while he had discarded religion as a fallacy) whenever he evoked the advent of a new society (Parssinen 1979; Dickinson 2004). To him, this would happen not through the parliamentary reform advocated by the whigs, but through profound transformations and the implementation of measures such as annual elections and the secret ballot which were in line with the Leveler proposals of the 1640s and paved the way for the Chartist program. He was also one of the few radicals who defended the civil rights of infants and women (*The Rights of Infants*, 1797). In *The End of Oppression* (1795), he even envisaged the necessity to resort to revolutionary means to achieve his utopian projection.

By criticizing Thomas Paine's conception of "agrarian justice" (Paine justified the necessity of private property but proposed to redistribute land income via an inheritance tax), Spence took part in a century-old debate about the relation between land possession and social inequalities. In many ways, the Paine-Spence controversy was reminiscent of the discussions and experiments which had taken place during the First English Revolution (1642–1660) and which fueled the subsequent radical discourse in Britain. Spence's vision of a system of communal land ownership was more akin to that of the "True Leveler or Digger" Gerard Winstanley but he also took the cue from the Levelers' and Harrington's suggestions to enhance democracy (Chase 2010; Rogers and Sippel 2016). On the other hand, Spence departed from Harrington (Dickinson 2004; Lee 2016) whose "agrarian" – a succession law meant to

redistribute lands evenly between the members of a family – was but a corrective to the concentration of property within the hands of a few. However, the common thread between these thinkers of the seventeenth and eighteenth centuries was the way they connected social reform and the overhaul of existing property structures, a goal for which they rightfully deserve the name of "radicals."

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Spencer, Herbert

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Introduction

Herbert Spencer (1820–1903) contributed significantly to nineteenth century thought. He enlarged theory through innovative conceptual enquiry, gaining recognition, in his native England and across the world, as influencing psychology, sociology, political thought, and ethics while in the process illustrating his theory of the mechanisms and processes of (largely progressive) evolution as universal phenomena. Much of his work predated Darwin's *On the Origins of Species* in 1859; what he published subsequently owed little of substance to Darwin. The supposition that there were ideas and related movements needing unification as "social Darwinism" in the late nineteenth and early twentieth centuries is now questioned. Locating Spencer therein was always, given his work's distinctive intellectual content, a severe injustice.

Spencer was born in Derby on April 27, 1820 and died in Brighton on December 8, 1903. His father, George, actively promoted science in the Derby Literary and Philosophical Society. His father and his uncle William, who taught Spencer first, were committed teachers. Home life in Derby was stimulating; religious dissent, scientific debate, books and ideas, were the hallmarks of domestic life. In 1833 Spencer was moved to Hinton Charterhouse, near Bath, to be educated by George's younger brother Thomas, Cambridge graduate, prodigious writer of tracts and pamphlets and the village's evangelical Perpetual Curate. By Spencer's account, these 3 years were marked by achievements in mathematics. He was also yearning to see his own writing in print: his article supporting poor law reform limiting relief appeared in the *Bath and West of England Magazine* in 1836.

University studies were not contemplated. Home in Derby, he undertook teaching, but in

1837 he readily seized the opportunity presented by a civil engineering post on the London and Birmingham Railway, then under construction. A decade-long succession of engagements ensued. He was thrown into the planning and administration of projects, and, in the "Railway Mania" stock market bubble, left to navigate paths through legal requirements for securing Parliamentary approval. He developed interests in geology and also phrenological psychology (contributing articles on aspects of it), was active in the Complete Suffrage Movement, and honed his views on politics, policy, and society. A letter from Thomas to the editor of *The Nonconformist*, Edward Miall, secured the publication of 12 letters in 1842, republished the following year as a pamphlet, *The Proper Sphere of Government*.

Towards Spencer's Idea of Evolution

For Spencer, everything in nature has its laws: "Society as certainly has its governing principles as man has," with the concept of "the social organism" making an early appearance. The preeminent task of the state is "the administration of justice," protecting person and property, and preventing aggressions of the powerful upon the weak. There are grave sins of omission: the state fails to provide courts which are easy of assess, speedy in their decisions and free of cost. With this publication, and another letter from Thomas, Spencer secured a subeditorship on the *Economist* in 1848. He mingled with the radical intellectuals associated with the publisher John Chapman, who in 1851 published Spencer's *Social Statics.* The core argument is that happiness in social life followed from a clear and absolute moral principle from which the right role of the state can be derived, the law of equal freedom: "*Every man has freedom to do all that he wills; provided he infringes not the equal freedom of any other man*" (1851: 103). On the one hand, it is voluntary action that should aid the poor, not the state, on the other, it is a role of state to apply the equal freedom principle to both sexes. Derived from the phrenological focus on the brain's "faculties" as needing exercise for their health, and derived from his normative belief that "nature" was beneficent, this equal freedom principle became characteristic of his social and political thought.

With *Social Statics* issued, his friendships in the capital were expanding to include G H Lewes (his *Biographical History of Philosophy* was an introduction to the subject for Spencer), Marian Evans (later George Eliot), T H Huxley, John Tyndall, Sara Hennell, David Masson, and Cara and Charles Bray. By 1857 he was acquainted with John Stuart Mill. Mill had not thought him a utilitarian in his *Utilitarianism* but conceded when Spencer demurred; Spencer meanwhile considered that if he was not a utilitarian in the direct sense he was in the "transcendental sense." The death of Thomas in 1853 left Spencer with a legacy. He resigned from the *Economist* to devote himself to writing the *Principles of Psychology*. In 1840, he had read an account (in Lyell's *Principles of Geology*) of Lamarck's views on the origin of species as arising through progressive adaptations and modifications, physically caused and inherited. This theory he had adopted and used in *The Proper Sphere* and *Social Statics.* In Spencer's *Psychology*, the mechanism of inheritance of acquired characteristics following adaptation to surroundings treated mind as part of nature and as developing or "evolving," individually, collectively, and historically. Physical (outer) adaptations linked with psychical (inner) adaptations in the body, a psycho-physical parallelism account of mind. Elements of existing associationist and innate ideas theories of the nature of mind were reconfigured in an evolutionary perspective. Among others, Douglas Spalding, Hughlings Jackson, and Wilhelm Dilthey were influenced by his conceptual development of psychology.

The 1850s saw the augmentation of Spencer's stock of ideas and their application, manifested in a range of essays and culminating in his book, *First Principles* of 1862. Many essays remain relevant, including "Over-Legislation," "Manners and Fashion," "The Ultimate Laws of Physiology (later retitled as "Transcendental Physiology"), "State Tamperings with Money and Banks," "The Social Organism," "Prison Ethics" (arguing against revengeful penalties), and "The Morals of Trade." In the last Spencer makes clear that in

addition to the self-consciousness possessed by individuals there is also "a social self-consciousness" which they possess.

Spencer dated the inception of his general doctrine of evolution to January, 1855. *First Principles* became the founding volume of the "System of Synthetic Philosophy" which housed this theory of evolution and applications of it. The sister volumes were a recast version of the *Principles of Psychology* (2 Vols.), the *Principles of Biology* (2 Vols.), the *Principles of Sociology* (3 Vols.), and the *Principles of Ethics* (2 Vols.). The final volume was third volume of the *Sociology*, published in 1896. Among the new ideas appealing to Spencer were the "physiological division of labour" regarding morphological change which he found in Henri Milne-Edwards's book on general zoology of 1851 and the description, by the Estonian embryologist, K. E. Von Baer, of individual development as a change from the homogeneous to the heterogeneous, an idea that Spencer rather impetuously applied to *change in general* and elevated as the law of all progress. These elements, with the mechanism of organic change, the inheritance of acquired characteristics, were instrumental in framing his concept of "evolution," a word used by Spencer since "Manners and Fashion" of 1854. "Evolution" was defined as "an integration of matter and concomitant dissipation of motion; during which the matter passes from a relatively indefinite, incoherent homogeneity to a relatively definite, coherent heterogeneity; and during which the retained motion undergoes a parallel transformation."

First Principles attempted a theory of the "knowable," as opposed to what he called the "unknowable," with a synthesis of knowledge about the "persistence of force," that is, of its *shared* patterns and trajectories revealed by the results of processes of change in the world, including social life (his agnostic view about the unknowable paradoxically attracted unexpected providential speculation and controversy). Spencer assumed that main *mechanism* of organic change was the Lamarckian one. However, Darwin's *On the Origin of Species* of 1859 introduced "natural selection." While noted in *First Principles*, discussion awaited the first volume of the *Principles of Biology* of 1864. Natural selection argued that, given that a struggle for existence was present in nature, a "variation" in a member of a species that was favorable to circumstances would have a better chance of surviving and reproducing, hence being naturally selected. In the *Biology*, it was Spencer who coined the expression "the survival of the fittest" to refer to natural selection (later sometimes adopted by Darwin), and he "accommodated" the theory into the "physics" of his "System" as "indirect equilibration," complementing the inheritance of acquired characteristics as "direct equilibration." However, close inspection shows the accommodation was *not* of the pure form of natural selection, although widely been assumed to be. Spencer also remained notably steadfast in the belief that the inheritance of acquired characteristics was the chief mechanism of change for human beings.

Studying Society: Cooperation and Social Life

From 1864, membership of the X Club presented Spencer with a seat in what has been described as the "cynosure of scientific radicalism." Election to the Athenaeum Club enhanced his ability to make contacts. Translations were apace and the popular science writer in America, Edward Livingston Youmans, was there advancing Spencer's reputation (in 1882 Spencer visited America). In the 1870s, sociology and social life as topics occupied Spencer's attention. In 1871 Huxley, a friend nevertheless, wrote an article critical of Spencer, "Administrative nihilism," which prompted a reply from him, "Specialized administration," the same year. Contrary to Huxley's representation, Spencer argues that the state has a key role in the provision of justice, as described in earlier publications. Echoing those, Spencer again cites Richard Whately (his *Introductory Lectures of Political-Economy* of 1832): people have sympathetic interests, they can act, individually and cooperatively, to achieve unplanned but impressive outcomes, such as supplying a city with its manifold requirements. Feelings both egoistic and

"altruistic" (he acknowledges August Comte's word) will maintain a "healthy national life" provided that the state acts in a purely negatively regulative manner: he was no friend of any "unjust" aspect of laissez-faire.

The aim of *The Study of Sociology* (1873) was to justify the subject ahead of the *Principles of Sociology* (i: 1876, ii: 1886, iii: 1896). In 1879 *The Data of Ethics* appeared, later included in the two volumes of the *Principles of Ethics* (1892 and 1893), primarily sociological in tenor. These outputs, and his review of 1880s politics, applying aspects of the "System" as a whole, *The Man* versus *The State* (1884), can be considered together.

His concept of the "social organism" is a common theme. However complex, a society is part of nature. It can be considered as an organism, but an organism *sui generis*: "not comparable to any particular type of individual organism, animal or vegetal." Spencer sometimes emphasizes the special qualities of society, such as language, by naming them "super-organic" in the *Principles of Sociology* (an expression first used in 1864). The "social organism" idea was legitimately framed to show that, while individuals had consciousness, there was no social sensorium. Critical comment often juxtaposes "individualism" with "organicism." Should there be an opposite to individualism it is collectivism, *not organicism* per se, despite comments to the contrary of idealist thinkers among his late-century critics, such as Henry Jones and Bernard Bosanquet, who also argued for a positive role for the state and that a *society* was a moral agent (Gray 1996: 233). Moreover, Spencer underlined that individuals were *not* "atomic" individuals but *social* individuals, who cooperated with each other and displayed social self-consciousnesses. The possession of social self-consciousness meant awareness that the well-being of each person was bound up with the well-being of all. The well-known criticisms of Spencer by Durkheim are seriously flawed by not taking these aspects into account.

For Spencer, the "units" (individuals) in society become subject to "actions and reaction between the community and each member of it, such that either affects the other in nature." Individuals adapt to each other and to the society over time, and to external conditions, and the changes made in turn lead to further adaptations, best described as helical. The characteristics acquired are inherited, according to his theory of evolution, and the heart of the process of "social evolution." "Character" is modified as it adjusts to surrounding conditions. Spencer refers to "functions" and "structures" in analyzing a society, but he states that these elements are mutable, they are malleable according to the changing and varied contents of the spontaneous cooperations of individuals. Compared with an individual organism, the structures and functions in a society are "obviously far less specific, far more modifiable, far more dependent on conditions that are variable and never twice alike."

Justice, Beneficence and Agile Adaptation

Central to the Political Institutions section of the *Principles of Sociology* was the categorization of social relations into two differing types, "militant" and "industrial". In essence militant, or coercive, centralized and status-based relations, pertained in times of aggression, industrial, or voluntary, loosley coupled and contract-based relations, in times of peace. During social evolution there are transformations "of the militant into the industrial and the industrial into the militant." Spencer favored the voluntary cooperation of the industrial type. He perceived threats to this by the 1880s, warning that the industrial type would retrograde toward the militant type if international conflicts recur. The was the *raison d'être* of *The Man* versus *The State*. Late Victorian Britain was semi-militant, semi-industrial; the balancing and rebalancing reflected the current stage of social evolution.

Although there is commonality between *Social Statics* and the *Principles of Ethics*, the *Ethics* was able to build on the psychological and sociological foundations of the "System." A fuller account of equity and justice, in particular of the duty of the state to administer justice without cost, in civil as well as in criminal cases, complements a more

developed treatment of beneficence, strikingly sociological in observation. Justice and beneficence are the two divisions of altruism, justice is needed for "social equilibrium" and is thus a public matter, beneficence is not so needed, though desirable, and thus a private matter. For Spencer, voluntary restraints on competition, honoring of payments due, and spontaneously-offered mutual support in times of illness had become hallmarks among "highly evolved persons." They pursued knowledge and culture, engaged in public affairs, and augmented their own and other's fulfilment. They were wise parents, attentive offspring, and "natural centres of happiness."

By the 1890s, science preferred Darwin's natural selection theory buttressed by August Weismann work on the germ plasm and heredity to Spencer, though not without fight from Spencer who published criticisms of Weismann. The rejection was seen as sinking Spencer's theory of evolution. Spencer's theory was also criticized for being so abstract as to be true whatever actually happens, thus in principle unfalsifiable. His friend Huxley had registered this when saying: "Spencer's idea of a tragedy is a deduction killed by a fact."

The criticism has substance. But the sections of the "System" in which Spencer's focus is fixed on "the individual" and "the social," locked as it were in an endless and intimate dance with each other, are capable of depicting striking connections with our contemporary interests. These are shown, for example, in the sections of his *Principles of Ethics* dealing with altruism and in the *Principles of Sociology* in the sections dealing with professional life. Looking beyond the "System," many of Spencer's essays ask enduring questions about the nature of justice in familiar political structures and business transactions, while *The Study of Sociology* and *The Man* versus *The State* are commonly cited as soon as those areas of concern come to the fore.

Spencer was disturbed by signs of a resurgence of militancy and more generally by new legislation on social matters, and by the criticisms of aspects of the "System." But he was also able to greet the new century with optimism for the social life of the future. If the grand evolutionary sweep of the Spencerian "System" has mostly lost its attraction, Spencer's particular treatment of individuals in social life instead deserves protection from that fate: its focus on spontaneous cooperation and the creativity, diversity and agile adaptability of social individuals as agents merits retrieval now.

After 1844 Richard Potter and his wife were close friends of Spencer and he was a frequent visitor. One of their daughters, Beatrice, read Spencer's books appreciatively, and he encouraged her interest in social research to grow in the 1880s, which led to her own book *The Co-Operative Movement in Great Britain* of 1891. In 1892 she married Sidney Webb. They became prominent Fabian socialists, committed to social reform and politics and instrumental in founding the London School of Economics and Political Science (in their books on local government Beatrice and Sidney Webb made lasting contributions to the study of constitutional and administrative law). Beatrice came to shun Spencer's doubts about socialism and a positive role for the state, but visited him until his death. She recorded numerous and thoughtful glimpses into his life and work in her autobiographical *My Apprenticeship*.

Spencer was cremated at Golders Green on Monday, December 14th, and the remains placed in Highgate Cemetery in London.

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A Stellar Moment

In the history of philosophy, there are specific contingencies, or moments, where we could see a debate of ideas powerfully concentrated and expressed. They are somehow exceptional times in which we experience the emergencies of fundamental approaches to the understanding of the world and its human predicament. We see exceptional figures taking the floor and giving systematic shape to questions that were somehow subjacently dealt with but yet not with the necessary clarity and a sufficient analytical power. These special philosophical moments are not common in the history of ideas and are connected to particular historical constellations, though endowed of a general significance. One of these "stellar" moments is the great debate we can now from far away observe around the crisis of ancient Athenian democracy. Two philosophical giants emerge from this scene and will mark philosophy for the rest of her days, Plato and Aristotle, to respond to Sophistic incredulity. We have something similar at the dawn of modernity, where Medieval culture begins to be challenged and eventually fully declines. Here we face again a further "stellar" episode of philosophy, whose main protagonist is René Descartes preceded by Michel de Montaigne as recommending a skeptic attitude and followed by Benedict (Baruch in Hebrew, Bento in Portuguese) Spinoza (1632–1677) as trying to restore absolute rationality. We shall have later a similar exceptional contingency with David Hume opening a new game that was to be then played by Immanuel Kant and somehow ended by Georg Wilhelm Friedrich Hegel, once again respectively in the roles of a skeptic, of a searcher for rational determinacy and as the prophet of absolute reason. Among these thinkers it is Spinoza the one that is more difficult

to classify and even to understand. His indeed is a special position, taking place between different and even opposing culture worlds.

Spinoza was educated as an Orthodox Jew but then has already in his youth been developing a secular worldview. He has been studying both the Talmud and Aristotle. He is enthusiastic about Descartes without nonetheless repudiating Ancient and Medieval metaphysics. Indeed, his work can be considered as a compromise or a bridge between Modern and pre-Modern philosophy. On the other hand, his theses could be considered as a response to several of Descartes' weaknesses when asserting a Modern view of the world. Moreover, Spinoza explores and develops ideas in a field that is prudently left aside, on purpose neglected, by Descartes, that is, moral and political philosophy. He is familiar both with Calvinist republicanism and with Catholic monarchism, both with Grotius' legal pluralism and with Hobbes' political absolutism, both with Quevedo and Machiavelli.

Spinoza's life is exemplary for a Baroque philosopher (see de Vries 2011, Nadler 2018). Born in Amsterdam 1632 from a family of Portuguese Jews, emigrated into the Low Countries at the end of sixteenth century, and brought up in the Jewish religion, in his 20s, he starts being critical toward Jewish orthodoxy, is consequently expelled from the Jewish community through a dramatic act of excommunication, and then approaches the Protestant and Republican milieu that was so lively in the Netherlands of early seventeenth century. He later becomes sort of intellectual reference of the Republican party and a friend of the de Witt brothers, who are opposed to the monarchical, Orangist political front. His life and production are thus marked by two main predicaments, one given by the fight against religious orthodoxy both in the camp of Jewish and Christian religion. On the other side, Spinoza is somehow a protagonist of the political crisis that takes place in the Netherlands of seventeenth century as a struggle between a Republican-Democratic party and a Monarchist, illiberal camp that will in the end get the upper hand. Spinoza's confinement, his living somewhat hidden from the public eye, is a necessity arising from the dangers of being involved in the political and religious controversies of his time. He was likely sent to a mission for talks with the enemy army leadership at the start of the Franco-Dutch war 1672. Spinoza was a protégé of the Republican group, and especially of the de Witt brothers, Johan and Cornelis, whose assassination and cannibalization by a Monarchist mob in 1672 was a terrible blow for him. He died in February 1677 in a condition that one might label as internal exile.

A Post-Cartesian Monist Ontology

Spinoza's thought is to be found in his three main and more mature works, *Tractatus Theologico-Politicus*, *Ethica: Ordine Geometrico Demonstrata*, and the unfinished *Tractatus Politicus* (Spinoza 1924, 1986/2016). Though such work has a strong and wide ontological foundation (as a matter of fact his *Ethica* is more of a treatise on ontology than a proper essay of moral theory), this list immediately reveals the political philosophical ambition of such enterprise. His *Tractatus Theologico-Politicus* proposes a reinterpretation of both Jewish and Christian tradition. This is done by means of philological critique of the canonical texts, especially of the Bible, and through a reconceptualization of God's idea in pure philosophical terms. The objective of this critique is making religion either equivalent with a specific ontology, deprived of political claims, or to let it collapse to a generic principled theory having as its main concern the question of social convivence, the question of the *civitas*. Citizenship thus is the core of Spinoza's work, and in this sense one could claim that all his efforts are directed to offer a political theory, within which the issue of the concept of law cannot be eschewed (see Balibar 2008). Thus, though there is very little said about the Dutch philosopher as a theorist of law, and in spite of his not being a lawyer, or a student of law, it might not be an exaggeration to think of him as a proper philosopher of law (see Campos 2015).

Spinoza's ontology is heavy and somehow obscure. Its main point and its starting move is that there is only one substance in the world. Such strong ontological monism cannot be really

understood without considering the philosophy which actually is the permanent reference and the background against which the Dutch philosopher develops his theorizing: Descartes' revolution in metaphysics (Hampshire 1951). It is a kind of Copernican revolution that is operated by this thinker, as is well known. Against skepticism, well represented by Michel de Montaigne's *Essays* and Catholic possibilism, this itself a reaction to Protestant quest for certainty and absolute rules, Descartes' strategy is to reinterpret basic ontological questions as queries about knowledge competences, and these are tested against self-interrogation and self-assessment. In a way along this path, philosophy is reshaped a sort of autobiography, and the world is first compressed into the self and its existential and cognitive projections. The experience of self, its presence, is the starting point of the whole of Descartes' research. The first certainty we are looking for is rooted in ourselves not planted in the external world. This as a matter of fact to be proven as real needs the assumption of a much stronger entity, God, as the guarantee that what we perceive as real is not just the trick of a malevolent divinity.

This strategy, a somewhat theological turn, is an enterprise that intends first of all to be epistemological or a theory of knowledge men have that to have a very limited knowledge of even a small portion of the world, we need to reach the knowledge of the first cause of this world. We do not need God to be sure about our self, but we do need Him to be able to claim that our perception of external things be not just a delusion. This however does not imply that in the Cartesian ontology the self be given a special or an independent status. It is just the opposite. A self, our selves included, is just a res cogitans, a case of this. The world consists of both res cogitans and res extensa, of mind and body, the two expressions of God's power and will. Descartes' ontology thus is tripartite, though in the end res cogitans and res extensa are modes of God's presence. This means in any case that according to the French philosopher the world is somehow plural and that between its three main entities there might be tensions or gaps and therefore bridges. Descartes' strong divisionist doctrine of a body disconnected from the mind is the cause of more than one problem in such doctrine. And in such system God is still a creator that can be strongly distinguished from creation. This allows Descartes to accept both God as a legislator endowed it a will and individuals, human beings, minds, that are too driven through free will. If we had had a theory of law offered by the French philosopher, this would have taken an imperative tone, and a body politic for him would have been one ruled by a king, and independent sovereign.

Descartes' individualism, be as it may, was nonetheless introducing a conception of the world that because of its individualism and voluntarism might be considered congruent with the development of a State-centered idea of politics. There is no question of citizenship in Descartes' work, but this figure would not have been a necessary complement of a possible political doctrine of his. We know that Descartes' radicalism stops at the door of moral theory. He is not brave enough then to knock at the door of political and legal philosophy. His individualism sticks to gnoseology; it never steps forward to invest practical philosophy.

Now, we could say that it is Spinoza's great merit attempting to extend the radical gnoseological question to the entire territory of philosophy and in particular to the very sensitive domains of religion, politics, and indeed law too (see Scruton 1986). But this is first prepared through a reform of Descartes' program and especially of its ontology. We know that Descartes' map of the being consists of registering three items, but it is produced in four steps. We have first a strong self, so strong to exist all possible skeptic doubt. Cogito is the self's self-expression and the basis of the entire cognitive and philosophical enterprise. By reinterpreting the certainty of the self in terms of an experience of clear and distinct ideas, we reach the dimension of res cogitans, of an objective entity that transcends the single self. A self is just part of the res cogitans, and this is such insofar can be considered as a separate dimension from res extensa. The latter however we reach by proving the existence of a benevolent God that would defeat any invocation of a *génie malin*, of a demon, or devil,

permanently occupied in cheating our perception and rationality. We thus get three fundamental ontological positions, res cogitans, res extensa, and God; but such plurality is difficult to connect in a system that is still ruled from the point of view of an intellectual self. Res extensa and res cogitans to be connected is an arduous philosophical work, and to prove external reality, which is a matter of course and of common sense, we are obliged to make a complicated detour through the evidence offered to the existence of God, we might say. Descartes' pluralist ontology and individualist gnoseology would have radical implications, should they be applied in building a theory of politics or law, a path which not attempted by Descartes, possibly not only because of his prudence and cautious perspective but also because of the impervious road that those philosophical assumptions would imply. How could we get a community from a mere individualistic perspective? And why will an independent self accept to obey and abide by the law? These would be difficult questions for Descartes to answer, should he decide to develop a moral and political philosophy out of his methodological reform of epistemology and ontology. In any case, the French philosopher's starting point is a radical doubt that is then solved through an existential experience, that I cannot doubt without thinking, and that I cannot think without actually being existing.

Spinoza believes that we can eschew this existential and burdensome experience. Doubt is not an option to him from the beginning. By thinking logically, we cannot doubt. Thus, his reinterpretation of the *ergo sum* revelation for the self is very suggestive. This we find in proposition 4 of his *Principia Philosophiae Cartesianae* (actually the only book published with his name during his life): *I am*, *ego sum*, can be the first known truth, only insofar as *we* think, *nos cogitamus*. The radical subjectivity of the doubt here is downplayed in the collective practice of thinking. The *I*, *Ego*, is absorbed by a *We*, *Nos*, and indeed from the start there is no room for an independent self in Spinoza's system. The analytical or existentialist pace of Descartes' probing of an undisputable truth is replaced by a synthetic and geometrical presentation where we move not from a radical existential experience of the self but from the objective evidence of a clear and distinct first principle, which is God. While in Descartes' argument God is met after the self, in Spinoza's system we first meet God and then we forever forget the self. The dissolution of doubt is operated by intuition, through an intellectual not an existential perception. Once we have clear and distinct ideas, this is enough to dissolve any possible doubt. This is strongly claimed in the note 6 of his *Tractatus Theologico-Politicus*: "De Dei existentia, et consequenter de omnibus dubitamus, quamdiu ipsius Dei non claram et distintam, sed confusam habemus ideam."

Spinoza's ontology is thought to offer a solution to the gaps still left open in Descartes' construction. We do not need to find a link between body and mind according to Spinoza, since the mind in his system is the idea of the body. This is also reflected in his notion of causality where a material cause is conceived as a logical condition. So that one might possibly claim that Spinoza's hidden assumption is that reality, or matter, and conception, or thought, coincide. From the vantage point of such coincidence, there would be no need to exclude a *génie malin*, a cheating devil, making our perception and rationality a depository of mistakes and delusions, since minds are ideas of bodies, and in particular individual human minds are *modi*, modes, expressions of the divine mind, covering and reflecting all that is, and this cannot by definition be mistaken. God is the only possible substance in the world, if we assume that a substance is that entity that does not need any other substance to be. And God cannot be malevolent, that is, imperfect, again by definition, by the very force of the evidence of His existence.

God is that entity that has all positive properties, among which we cannot exclude the one of existence. Such entity can be considered by means of infinite perspectives and points of views and dimensions or qualities, *attributi*. However, human minds are able to see only two of such attributes of the divine substance, cogitation and extension. This means that minds, res cogitans, and bodies, res extensa, are not really two distinct *res*, two diverse entities, but only two alternative

ways of considering the substance. This then deploys its power along infinite modes, *modi*, which however in themselves are finite entities.

Once we assume there is only one substance, that is, a strong ontological monism, there will not be much room for a God that distinct from creation. Creator and creation here are consubstantial, which is not the case in Descartes' ontology, where God is still the absolute creator, and to be such He's given full free will. On the contrary, in Spinoza's system where creator and creation are strongly united, and collapse the one into the other, there is then no need of a free will. Everything that happens had to happen in precisely that way, since it was already contained in the substance itself and its power. This scheme of course has a strong impact on the concept of freedom and that of laws and rights. According to Spinoza, freedom is but a *causa sui*, as a condition experienced by an entity whose actions are intrinsic to its nature. Freedom according to a formula that will later be employed among others by Hegel is the recognition of necessity; it is necessity itself reflected and acknowledged. Will and intellect are considered one and the same thing (see *Ethics*, Part 2, corollarium to proposition 49). This is especially true, insofar God is concerned. In the same vein, a law is not an imperative, but simply the manifestation of the power intrinsic in the substance. A law is the deployment of the only one substance power.

Jurisprudence Naturalized: A Determinist but Anti-Authoritarian Concept of Law

In the Appendix to the first book of Spinoza's *Ethics*, that is devoted to explain the nature of God, we find the following statement: "All the prejudices I here undertake to expose depend on this one: that men commonly suppose that all natural things act, as men do, on account of an end, indeed they maintains certain that God himself directs all things to some certain end." But this is, as is stressed, just a prejudice. Nature, that is, God, since for Spinoza the two entities fully coincide, "natura seu Deus" (Preface to the Fourth Part of *Ethics*), is not moved by any end, by any final cause, but only from determinative conditions. To claim that God could have designs, or ends, would imply that He has needs or desires. But a need or a desire is striving to something one does not yet have. However, God, that is, the highest possible reality, which means as well the highest possible perfection, by definition has everything He needs. Therefore, He cannot have any design.

Nor does God has a will. Since a will once more marks a wanting for something one does not yet possess. But God has already all that is. This implies that the world there is the only possible one. God could not have been making a different one, for all He does is by necessity implicated in His nature. There is no contingence in God's affairs and therefore in the nature. "There is nothing contingent" (*Ethics*, Part 1, proposition 26). Within nature, that is, God, we can distinguish a *natura naturans* and a *natura naturata*. The former is "what is in itself and is conceived through itself," that is, "God, insofar as he is considered as a free cause" (*Ethics*, Part 1, scholium to proposition 29). By *natura naturans* we should understand "whatever follows from the necessity of God's nature" (ibid.). *Natura naturans* is God's essence considered as such, while *natura naturata* is God seen as the sum of all modes, that is, individual things, that are covered by that essence.

To better understand such fundamental distinction, we should refer to Spinoza's theory of knowledge. This consists of a hierarchical structure of sources of knowledge. We have first perception and opinion, whereby we get blurred and confused ideas about the world; we then have *notiones communes*, universal concepts, operated by the intellect, whereby we get clear and distinct ideas of individual entities in the world. Finally, we have intuitive knowledge, reason, whereby we attain a cognition, a clear and distinct idea of God and its essence. *Natura naturata* is then God understood through the intellect and the ideas of *modi*, of individuals, while *natura naturans* is the highest form of cognition offered by the intuitive apprehension of God as causa sui. The difference is more an epistemological than an ontological

one. There is but one nature or God (See Jaspers 1978). In such world there is no possible contingency; facts are the logical development of the essence of God, and laws are the logical notation of its attributes. There is no power distinguishable from act. "God's power is nothing except God's active essence" (*Ethics*, Part 1, scholium to proposition 3). Now, this picture excludes the possibility of a God meant as a legislator, issuing laws that are discrete imperatives backed by sanctions. God is not a king. We should "take great care not to confuse God's power with the human power or right of kings" (ibid.).

The place where we find distilled Spinoza's concept of law is Chap. 4 of his *Tractatus Theologico-Politicus*, dealing with God's law, *De lege divina*. This chapter begins with a clear distinction between on the one side human and on the other divine and natural law. Human law is not assimilated into the natural law, and this is considered equivalent with divine law. However, there is a common meaning of law, and that is a principle whereby individuals, be human or not, behave following a common and certain standard: "id secundum quod unumquodque individuum, vel omnia, vel aliquot ejusdem speciei una, eademque certa ac determinata ratione agunt." This could happen by the necessity that is rooted in nature ("a necessitate naturae"), and we have a natural (or divine) law, or by human convention, or decision ("ab hominum placito"), a human construct, and thus we'll get a human law. In the case of natural law, the law is a necessary conceptual derivation from the definition or essence of that particular thing ("ex ipsa rei natura sive definitione necessario sequitur"). The human law that Spinoza says it should better be called *jus* is a precept that human beings lay down for their good life ("ad tutius, et commodius vivendum"), or for other reasons ("ob alias causas"), and they address to others and themselves equally. In both cases, laws are not imperatives, or commands, but rather rules and are not necessarily sanctioned by an appended penalty or reward, though this might occasionally or often happen. Natural or divine law cannot be broken or violated, while human law can easily be disregarded. Human law's main features seem then to be first that its production is a question of human will, and then, second, that its following is a once more referred to the will of human beings. But how could human beings, that are part of nature, which is necessarily ruled by natural law, establish rules that are contingent and conventional? How could we have conventions, if everything in the world is driven by nature? Spinoza immediately sees the problem.

How could we on the one side defend a strong determinist concept of what happens in the world (where humans are not a special jurisdiction, "imperio in imperio," but are indeed subject as every other entity to necessary determination) and on the other side conceive of human affairs as ruled by law that base on consent and will of their producers and users? Spinoza does not try to evade this question and to deal with it proposes two arguments. First, human law can be seen as a decision of human beings insofar as these are driven by their internal power, that is, internal faculties. Whatever they do is their powers' making. These mean that their laws, as common deliberations, are properly said as human and conventional. The second argument is that human laws are seen as such, as conventional, from the limited epistemological point that is given to human beings. These cannot follow and know causality in all its steps and relations. Human beings properly define causality in terms of close causality, of vicinity, "quia res per proximas suas causas definire, et explicare debemus."

Now, there is no doubt that such laws are laid down through a deliberation of human beings, and therefore this can be considered (from our limited gnoseological point of view) their source. The fact of decision and deliberation and the corresponding conventional conduct are then sufficient to explain such laws. Human laws considered in this way do not refer to sanctions. The fundamental of such rules is their rationale, what they intend to achieve. However, human beings are not all and always rational. They are moved ("obnoxiati") by passions and affects, causes that originate from their natural environment or from external impulses and that they cannot often be the masters of. They are not always able to perceive the force of the rules' rationale and are recalcitrant to follow them. This is why these rules need

sometimes to be reinforced through sanctions, punishment, and rewards. Consequently, it happens that one can consider individuals as "subjects" to the law, sort of "slaves" of the law: "Et consequenter ut ii, qui legibus obtemperant, sub lege vivere dicantur, et servire videantur." But this can only be metaphorically meant, since the law is nothing but a way of living human beings' collective decide to give themselves: "Cum itaque Lex nihil aliud sit, quam ratio vivendi, quam homines ob aliquem finem sibi, vel aliis praescribunt." The positive law is far from being a decisionist imperative with whatever possible content as it's preached in the legal positivist *vulgata* (by Hans Kelsen, for instance). Law is its rationale, and this is a sense and a reason for acting together. Moreover, positive law is not conceptually a result of coercion or force. It might be so contingently and occasionally. But it can never be so fully. Human beings – adds Spinoza – are not brutes and animals that can be directed through violence. They need to think of themselves of behaving as self-directed agents.

Spinoza's metaphysics is thus justifying a revision of the modern doctrine of natural law (Campos 2012). This, as is known, is the result of an individualistic and voluntarist turn in this foundational concept now against the Thomist objectivist tradition reshaped in terms of individual, subjective rights that are then rooted in a specific counterfactual but "natural" condition, that of the "state of nature." The great founding father of such doctrine is the Dutch lawyer and philosopher Hugo Grotius, but its most powerful thinker is Thomas Hobbes that by his natural theory tries a new justification for a stable and absolutely legitimate political order. Now, it is by reading and discussing Hobbes' contract theory that Spinoza develops his views. The first question he has here to face is how to combine the notion of a right, that is, a liberty, with a strong negation of free will and a radical determinist worldview (see Deleuze 2003). The fundamental place where this problem is handled is Chap. 2 of his *Tractatus Politicus*.

As we have seen from his concept of law, normativity is reinterpreted by Spinoza in terms of natural necessity, the "ought" is reabsorbed into the "is," but this, "is," however is shaped in terms of power, that is, an expression of what makes more generally the essence of things, their drive to self-conservation. This theoretical constellation leads to the equation of power and right, *potentia* and *jus*, where *potentia* is to be understood in the way of a material power, of "can," not of "may," or "be entitled," or "empowered." Accordingly, natural law is the same as natural right; however, the latter is a specification and individual determination of the latter, signifying the portion of God or natural necessity/power allotted to each and every individual thing and in particular to human beings. "Per Jus itaque naturae intelligo ipsas naturae leges, seu regulas, secundum quas omnia fiunt, hoc est, ipsam naturae potentiam" (*Tractatus politicus*, 2, 4). This has a consequence that a natural right covers all that is covered by its holder's power. Whatever one can, one has the right to. There is no other limitation to natural rights than the power they materially consist of and are able to let exercise. "Et consequenter uniuscuiusque individui naturale Jus eo usque se extendit, quo ejus potentia" (ibid.). In the state of nature therefore natural rights are doomed to clash the one's against the other's; human beings will be mutually enemies: "sunt enim homines [...] natura hostes" (*Tractatus politicus*, 8, 12). This means that human designs and actions are permanently endangered by others' designs and actions. The natural right in such state is belittled, reduced to a very small force and faculty. To make it be stronger, to potentiate an individual natural right, we need the cooperation and the sum of others' natural rights. In fact, "when each man most seeks his own advantage for himself, then men are most useful to one another" (*Ethics*, Part 4, corollary 2 to proposition 35), not "homo homini lupus" – as it is claimed by Hobbes' pessimist anthropology. It is just the contrary: "Man is a God to man" (*Ethics*, Part 4, scholium to proposition 35). This offers the justification of a political order whereby individual natural rights are pooled and instituted as a collective capacity. However, to obtain this result, Spinoza believes that individuals should fully give up their rights on behalf of a supreme collective authority that will in this way grant an absolute power. This point however is an

additional source of friction or contradiction in the grandiose building of his system.

As a matter of fact, we are on the one side told that to have a body politic, we need and can request from individuals to give up their rights and grant them to a sovereign, be this an individuality or a collectivity, then endowed with a power that could not, and should not, be resisted. On the other side, when asked where lays the difference between his theory and Hobbes's one, he explicitly says (see Letter 50) that while in Hobbes' system by the social contract human beings definitely lose their rights by forever transferring them to the sovereign, in his own view, the social contract's result is that human beings will still keep, and even potentiate, their rights and powers. Here Spinoza develops an argument that is somewhat oblique, according to a style – I would say – that is common to him, especially whenever he deals with thorny, highly politically sensitive issues. This is a style that Leo Strauss has – I believe – misinterpreted as a form of esoterism while rightly perceiving that it's a form of writing, an "art" of it, on the background of an impending, possible persecution (Strauss 1952). First, here, an argument is presented, but then in the following its force is attenuated by a different, indeed opposite, argument, to finally take from the first argument all its sting. By not seeing this obliquity of his argumentation, more than one commentator has been laid stray. For instance, there is a widespread interpretation of Spinoza as a defender of an absolute State. This is held by, among others, two Italian scholars, and distinguished legal philosophers, Guido Fassò (see Fassò 1968) and Giovanni Tarello (see Tarello 1978), in their respective reconstructions of Spinoza's thought. But, in spite of what they say, Spinoza is not ever theorizing an absolute sovereignty and a full subjection of citizens to the sovereign. A proper reading of *Tractatus Theologico-Politicus* would suffice to justify my claim.

We have seen that for Spinoza we can have a political order and positive law only and only if individual natural rights are fully transferred to the sovereign. However, in Chap. 20 of *Tractatus Theologico-Politicus*, we find a dissonant thesis: the natural right of freely thinking and judging can never be transferred to anyone ("nemo jus suum naturale, sive facultatem suam libere ratiocinandi, et de rebus quibusque iudicandi in alium transferre, neque ad id cogi potest") (20, 1). Now, this thesis is used to reshape the doctrine of absolute power of sovereignty. Since the natural right of freely thinking and judging can never be given up, the absolute power of sovereigns should stop before the freedom of opinion and the free speech of subjects. But Spinoza makes a step beyond the vindication of free speech. Free speech means that citizens can judge and say that the sovereign's laws are unjust and unreasonable, and since the ontological fundament of their obedience is that they could be agreeing with them, a sovereign decree that is unreasonable will only be enforced by extreme violence and with the opposition of citizens, which will render public security and harmony fragile. The conclusion to draw is then the following: the supreme power of the sovereign cannot trespass the limit of reasonableness and collective freedom of judgment. "Negare etiam possumus easdem absolutam potestam ad haec, et similia habere, et consequenter neque etiam absolutum jus" (ibid., 20, 1). There is in the end no absolute power of sovereigns (see ibid., 17, 1), and positive law cannot have whatever content is decided by public authorities. This is also why Spinoza explicitly states that the true end of a body politic, of a *res publica*, is not public security, but indeed freedom. Freedom as power and a capacity of self-preservation and self-affirmation is an internal ontological quality of human beings. Sovereignty cannot but at its own peril be built upon a denial of subjects as human beings, that is, as free agents. "Nam nemo unquam suam potentiam et consequenter neque suum jus in alium transferre poterit, ut homo esse desinat" (ibid.).

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Staël, Madame de (Staël Holstein, Anne-Louise-Germaine Necker)

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Introduction

Madame de Staël's work is closely linked to the historical context in which she lived. Born in 1766 in Paris, she was the only daughter of Jacques Necker, the great finance minister who served under Louis XVI. She was brought up with a firsthand knowledge of politics, which was fostered by her great love for her father. In 1789, she witnessed the splendor of the opening of the Estates General at Versailles, the last act of what would soon be called the *Ancien Régime* and the first of the nascent Revolution.

Married in 1786 to Baron de Staël, the Swedish ambassador to the French court, her social status allowed her to retain her leading role in political life despite the removal of her father in 1790. The first French Constitution was forged in her salon, which was frequented by the abée Sieyès, among others. Her articles in the press provoked much debate, while she used her influence to place her friends in government, the only political activism available to a lady at that time. Being a moderate at heart, she supported the French Revolution, albeit without entirely distancing herself from the so-called *Feuillants*, or monarchists.

The radicalization of the revolution, which led to the execution of King Louis XVI and Queen Marie Antoinette, forced Madame de Staël to leave France and take refuge in Switzerland, in the Chateau de Coppet, her father's estate and residence. Here she wrote a work of moral philosophy, *De l'influence des passions sur le bonheur des individus et des nations*, along with some political reflections on the Queen's trial. The fall of Robespierre and the end of The Terror allowed her to return to Paris in 1795.

Faced with the impossibility of a constitutional monarchy, Madame de Staël and her friend Benjamin Constant voiced their preference for a moderate republic in their writings under the Directory regime, and it was during those years that she wrote her main political work: *Les Circonstances actuelles qui peuvent terminer la Révolution et des principes qui doivent fonder la République en France.* The instability of the Directory led her to support Napoleon Bonaparte's coup of 18 Brumaire and the establishment of the Consulate (1799). However, Constant's and Necker's criticism of the First Consul, and Germaine de Staël's eagerness to rise to political prominence, led Bonaparte to sentence her to exile in 1803.

After this development, she abandoned her political reflections to focus on literary issues. During her exile, she lived in Switzerland, Germany, England, Russia, and Sweden. In 1810, she published *De l'Allemagne*, an influential literary criticism of the arrival of the Romantic movement in France. She returned to Paris in 1816 and died a year later, in July 1817.

The Influence of the Enlightenment

From an early age, Germaine de Staël found in Rousseau a guide to educate her sensitivity. It was to him that she dedicated her *Lettres sur les*

ouvrages et le caractère de J.-J. Rousseau, and she became convinced of the importance of feelings and passions, in both individual and collective life.

It was in 1796 that – influenced by Adam Smith and *The Theory of Moral Sentiments*, as well as by Hume and his analysis of the passions – she wrote *De l'influence des passions.* In this work, she bases happiness on personal autonomy and the forceful control of passions, even at the expense of enthusiasm and fervent, albeit fleeting, amorous impulses. And yet, completing this late contribution to Enlightenment moralism, with the transformation brought about by the outbreak of the Revolution, was a discussion devoted to the political passions and how they were changed by the outbreak of the Revolution. Glory, a virtue of the old monarchies, now became ambition for power, and social peace is continually disturbed by quarrelling political factions that seriously disrupt the social fabric. Madame de Staël agreed with Hume that human passions remain constant over time, but their particular development varies according to specific historical circumstances. Only the hope for freedom, and the improvements it will undoubtedly bring to the new society, can make up for the excesses indulged in under the Revolution.

This faith in the future also appears in her work *De la littérature considérée dans ses rapports avec les institutions sociales*, published in 1800, which revolves around the concept of perfectibility, in line with the "philosophical history" of the Enlightenment. It takes a departure, however, with de Staël's break with the notion of cycles, and she goes beyond the idea of decadence to affirm her faith in a continuous, linear progression of the human spirit. Literature is both the reflection and the engine of History – it is the ultimate act of civilization, provided it can be deployed in freedom, in a renewed political space, and in harmony with public opinion as it comes into shape.

A Liberal Republic

This new political world that emerged after the Revolution also needed new social and political structures. Germain de Staël's greatest contribution to political theory appears in her work *Les circonstances actuelles*, written in 1798 but never published, due to continuous political upheavals.

In this manuscript, she puts forward an alternative to the Directory regime, outlining the bases of a moderate Republic that meets the needs of the time. The first requirement would be to recognize individual rights and freedoms, something which Germaine de Staël called *the freedom of the moderns* – an expression that Benjamin Constant would later make famous. Crucial among these freedoms in defining the new society is the protection of private property, in opposition both to the Jacobin left and to hereditary privileges.

It is therefore essential for political power to rest in the hands of property owners, the class most willing to carry forward the achievements of the Revolution without repeating its excesses.

Influenced by Jacques Necker, she proposed a strong but plural executive body, composed of three, five, or seven members so as to prevent a single man from dominating the government and falling into the temptation to install himself as king. This executive body would have the right to veto the legislature's decisions, in such a way that the executive would not be forced to execute laws it disapproves of, and the legislature could even be dissolved in order to call new elections.

The legislative power would consist of two chambers: the *Conseil des Cinq Cents*, elected by the people, and an upper house, the *Conseil des Anciens*, whose members would enjoy a lifetime mandate. Together, they would compose an inherently conservative body that would uphold the achievements of the Revolution, republican values, and the excellence and talent of the best citizens. It would also act as a Constitutional Court and would put forward candidates for the executive body.

Following Sieyès, she called for harmony and balance between the powers of the state, rather than for Montesquieu's separation of powers. Only the judiciary would maintain full independence.

This constitutional edifice would be strengthened by careful oversight by the press and fixed laws to prevent its excesses; it would be supported

by a national religion, which would provide the civic virtue and spiritual and political values needed in a republic – a natural religion guided by reason, without priestly castes. This national religion, capable of upholding republican morality, might be described as theophilanthropy. Moderate Enlightenment thus remained a part of Madame de Staël's liberal revolutionary project.

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Introduction

Fr. J. Stahl, professor of public law, philosophy of law and canon law, political philosopher, and conservative politician, built a system of legal philosophy based on Lutheran theology. He thus laid the theoretical foundations for the monarchical and authoritarian Prussian state.

Biographical Elements

Son of the merchant Valentin Jolson and of Babette Uhlfelder, grandson of the president of the Munich Jewish community, Abraham Uhlfelder, Friedrich Julius Stahl was born in the Würzburg region on January 16, 1802, and died August 10, 1861 in Bad Brückenau. The family soon settled in Munich with their maternal grandparents. At the age of 17, he converted to Protestantism and changed his name to Friedrich Julius Stahl. He then studied law in Würzburg, Heidelberg, and Erlangen. He defended his thesis in 1826 and then in 1827 his habilitation on *Ancient Roman Law of Actions* at the University of

Munich. He later taught Roman law at the University of Erlangen. In 1837 he became a representative of the Protestant professors' body at the University of Erlangen in the Lower House of Bavaria. His academic career progressed rapidly: in 1832 he was elected assistant professor (*ausserordentlicher Professor*), in Erlangen, and then Professor of Law at the University of Würzburg; in 1834 he returned to Erlangen as an Ordinary Professor of Public and Canon Law. He reached the culmination of his career in 1840, when he was appointed Professor of Philosophy of Law, Public Law, and Canon Law at the prestigious University of Berlin, where he succeeded the Hegelian Eduard Gans; his candidacy was particularly supported by the new King Frederick William IV. His appointment was intended to counterbalance the influence of the Hegelian school in this prestigious university.

Stahl's political position in Berlin was particularly conservative, even reactionary; he was close to the Gerlach brothers and the Grimm brothers. In 1849, he was elected a member of the Prussian Upper House, representing the conservative party; then, in 1854, he was named a member of the *Herrenhaus*, the institution which succeeded the Upper House. In 1850, he became a member of the House of States (*Staatenhaus*) of the Erfurt Union Parliament (*Erfurter Unionsparlament*), which was tasked with preparing the constitution (Erfurt) of the union of German states at the time. Between 1852 and 1858, he was member of the Supreme Council of the Protestant Church of Berlin.

Philosophical and Political Position

Stahl belonged to the conservative branch of Prussia, as did K.L. von Haller, Fr. Gentz, Fr. Ancillon, and C.E. Jarcke, although while being quite different to them. The main work in which he set out his political philosophy, *The Philosophy of Law from a historical point of view* (two volumes), whose publication began in 1830, was edited several times and bestowed upon him an exceptional reputation within conservative circles. This text in which he exposed his political theory, based on the Lutheran teachings, became the intellectual nucleus of his career, even if he published a large number of books thereafter.

Historicity

Stahl's thinking was inspired by Schelling's philosophy but also by the method of the Savigny Historical School of Law. The first volume of his *Philosophy of Law*, entitled *History of the Philosophy of Law*, bears witness to this. However, Stahl considered that the Savigny system lacked internal coherence and that it risked overemphasizing what would be of historical value only, without an internal and ethical link between the concepts. Stahl's historical approach was based on Protestant theology, as opposed to medieval theology. While medieval theology considered that historical evolution was governed by God, according to Protestant theology as Stahl interpreted it, only the ethical law (*ethische Regel*) and the command of authority or the duty (*Gebot*) are important. In this sense, the course of history is under human responsibility; it is not a pure result of the divine will (*PhR, 1, 1856, 78s*). Instead of using "concepts of an outdated philosophy," Stahl suggested a harmonious overview of philosophy (*PhR, 1, Introduction of the 1st edition, 1830*) and intended to reach, taking into account the historical dimension, new philosophical results.

Personality

Personality, a cardinal concept of Stahlian philosophy, already introduced by Jacobi (*Grosser, 11*) and developed by Schelling, is expressed in a theological manner. Man possesses a *personality* (*Persönlichkeit*) created by God, who is the *supreme personality*, in his image. As an image of God, man is free and endowed with will. Freedom and will are the two main characteristics of *personality*. In this sense, man is capable of concrete action, just like his Creator, although within certain limits: only God has absolute and unlimited power of creation.

In his conception of the law, Stahl included original human rights which were rightfully deserved due to *personality*. Rights are not primarily a shield against state arbitrariness but rather a guarantee for man in an ethical state (*PhR, II/2, 1856, 526*). Thus, his conception of human rights was incompatible with the jusnaturalist problematic. According to Lutheran doctrine, human rights are linked to obligations to society. The Stahlian conception of human rights evolved, however, after 1848; he then admitted that rights constrained the government and the legislature. However, in the Stahlian system, there was no possibility for citizens to claim or demand anything. Stahl warned against the prospect of a devaluation of the state due to the people. Human rights are indeed not the sole criterion of state legality: institutions such as the church or state authority (*Obrigkeit*) are just as important, if not more.

Starting from this concept of *personality* residing in each individual separately, Stahl did not admit the principle of popular or national sovereignty. The concept of popular sovereignty assumed that the people are outside of the ethical state instead of being submitted to it (*PhR, II/2,* 535). Thus, Stahl opposed the principle of popular sovereignty to that of the *legitimacy* and *continuity* of the state. According to the first of these two concepts, people are not above the state but are subjected to the legitimate and sacred authority; the *continuity* of the state means in turn that it is beyond the control of individuals.

The State

Stahl rejected the jusnaturalist and contractualist theories. The state may in no case be the product of an agreement between equal members; it is an institution of divine origin superior to man. The theological concept of Stahl led him to consider that the state is the union of people under a dominant authority (*Herrschaft*); it is thus an "ethical kingdom" (*sittliches Reich*), terrestrial, but inserted in "the kingdom of God" (*PhR II/2, 1856, 131*). The state is an outdoor community (*äussere Gemeinschaft*), but it is no less a divine order kingdom to be used to worship God as much as the protection and welfare of man (*PhR, II/2, 1837,* 2). The state is thus always thought in the context of a relationship to transcendence. Its earthly goal is the flourishing of national existence and the implementation of a specific organization of life. A set of moral and political institutions derive from it: law, justice, "punishment of criminals," "moral form of the family," and "prestige of religion." Thus, the foundation of the state is the morality of the whole nation, in which the individual is based. In the perspective of Stahl, the individual obeys the sovereign and is inspired by piety, loyalty to the prince, and devotion to the community.

Stahl rejects Hegel's philosophy and especially its fundamental speculative positions. He follows a different path, especially toward the distinction between society and state. According to Stahl, Hegel understands everything which benefits individuals as part of the society. In this prospective the administration or the legal constitution would also be part of the "civil society" (*PhR II/2, 51s. Hegel, Grundlinien der Philosophie des Rechts, §157*). Therefore the state would only deal with the organization of power. By contrast, Stahl defines society only as the distribution of activities and professions, while the state is an institution based on legitimate domination; as a result society is part of the state.

Rule of Law (State of Law, Rechtsstaat)

Stahl is one of the first publicists to have developed the concept of the *rule of law* (*Rechtsstaat*), which would later become especially important in German political philosophy. He suggested a definition which is now well-known: "The state should be a state of law. . . It should clearly define the ways and limits of its action, such as the sphere of freedom of its citizens in accordance with law. . ." The state according to Stahl is the union of people under an authority. It is thus not only a guardian of the material and immaterial goods of its people but also a guardian of the sacred order (*heiliger Ordnungen*). The state therefore has a dual nature: it is firstly a kingdom of law and

secondly an ethical empire; morality and law are inevitably linked in the Stahlian theory. In his definition of the state of law, Stahl refutes the patriarchal or patrimonial state (theorized by Haller), which is sometimes arbitrary, as well as that the "popular" state of Rousseau or Robespierre, which grants political virtue to each individual without limiting its exercise by law (*PhR, II/2, 1856, 137s*). Insofar as the state is mainly an ethical kingdom, the rule of law does not offer the real individual guarantees for defending a sphere of protected activity. Stahl's rule of law is quite far from the concept later developed by German liberals.

The Monarchical Principle

It is obvious that the political regime of the ethical kingdom can only be monarchical. Stahl is the ultimate theorist of the *Monarchical Principle*, mentioned in the French Constitutional Charter of 1814 and in the final act of Vienna (*Wiener Schlussakte, May 15th, 1820, art. 57*), which means that all power within the state emanates from the king. Stahl therefore opposed popular sovereignty and the separation of powers (*Das monarchische Prinzip, 1845,* 1). The proclamation of the monarchical principle offered Stahl the opportunity to take a stand on the other political systems of the time, notably on British parliamentarianism, on the French constitutional monarchy, and on the traditional German system of the representation of estates (*Stände*). Stahl first rejected parliamentarism, in which parliament was co-sovereign, equal to the Monarch. Under the Stahlian system, the monarch must enjoy complete freedom of movement and decision and must not share power with a representative body of the nation. Stahl criticized the parliamentary system for being, in a way, based on the fiction that parliament represented the spirit and will of the nation. According to him, the spirit and the will cannot govern because they do not have the *personality*; they have only a moral value; they can therefore support government action, but not exercise power.

Stahl also opposed the system of the July Monarchy in France, in which the king was forced to deal with the Chambers. For him, the king must always have a decisive role within the state; he must be the sovereign. On the other hand, he showed a certain respect for the British political system, based on a long tradition, unlike that of France. In the system which, according to Stahl, would have been ideal for Prussia, the Chambers should only have a consultative role and not a decision-making role in the activity of the state (Indeed, in the traditional system approved by Stahl, the German princes are the core of the state constitution, while estates are not involved in the sovereignty). The Ministers must also be independent of the Chambers. Furthermore Stahl rejects the parliamentary system's conception of ministerial responsibility. Prussian officials, who guarantee the stability and proper application of royal policy, are also a decisive cog in the system.

The Revolution

At first sight, Stahl refused any legitimacy to a right of popular insurrection. The Head of State (*Obrigkeit* in Stahl's terms) – people relationship is not an equal relationship, so that the link would be dissolved as soon as the former was not respecting his obligations. Above the sovereign and the people, there is indeed a higher authority that was not to be questioned (*PhR II/2, 541s.*). The Head of State having native power cannot be judged on how he exercises power. Stahl based his opposition to any form of revolt, insurrection, or revolution on the Pauline principle of obedience to public authority. However, in agreement with Edmund Burke, he explained that passive resistance is exceptionally permissible (*PhR II/2, 548*), in the event of the public authority opposing divine commands or destroying the physical or moral order of a nation.

State and Church

Stahl opposed the attempted union of the Protestant churches which began under the reign of Frederick William III and was continued by his successor Frederick William IV. Regarding the question of relations between church and state,

he advocated the coexistence of two institutions in mutual respect. However, the state must have sovereignty over the church (*Hochheitsrecht des Staats über die Kirche*). Stahl's political theory opposes the principle of majority defended by Rousseau and Sieyès. "Authority not majority" is one of his well-known expressions. He defends the autonomy of the Lutheran church against those who think that the majority of the members support the union. Stahl considers that the right of the institution of the church is superior to that of the majority of its members (*Die lutherische Kirche und die Union, 1860, 558–559*).

In the field of religious affairs, Stahl exposed his conception of tolerance. Civil rights must be granted to every citizen regardless of their confession. On the other hand, political rights must go exclusively to Christians, which exclude the deists (those who do not recognize the revelation) and the Jews. To the *indifferentist* conception of tolerance that the Enlightenment had, Stahl opposes an idea of tolerance based on the *personality*, which is the basis of the Christian state as ethical kingdom; the kingdom's main obligation is to protect and promote the divine word (*Der christliche Staat, 1847, 26s*). These are the limits of religious tolerance according to Stahl, who had a violent controversy with Baron Chr. K.J. von Bunsen on this topic (*Wider Bunsen, 1856*).

Conclusion: Judgement of Posterity on Stahl's Works

Stahl's theory did not leave publicists and philosophers indifferent. However, his contribution to legal philosophy and theory of state has been appreciated in different ways depending on the era and the disciplinary affiliations. Under the empire, since 1871, legal science became positivist, and references to Stahl's theological system became very rare. The liberal jurists such as R. von Gneist, J.C. Bluntschli, or O. Bähr did not share his theory of state as an ethical kingdom. The founding father of legal positivism in the field of public law, P. Laband, did not attach any importance to the Stahlian theory and neither did G. Jellinek. On the other hand, historians H. von Treitschke and Fr. Meinecke appreciated his contribution to the national unification project. Under the Weimar Republic, his future despiser Carl Schmitt approved the decisive role that Stahl granted to the Sovereign; but later, under National Socialism, Schmitt violently attacked the converted Jew and accused him of having deliberately weakened the Wilhelminian monarchy with his constitutional theory (*C. Schmitt, Neutralität und Neutralisierungen [1939], Positionen und Begriffe, Berlin 1988, 275, 293*). Like Rudolf Smend, Hermann Heller appreciated some non-positivist aspects of Stahl's theory while rejecting its authoritarian and highly conservative nature. Under National Socialism, the regime's spokespeople focused on the Jewish origins of "Stahl-Jolson" (as Carl Schmitt called him) and strove to erase the influence he'd had on German legal science.

After the Second World War, Stahl's concepts were discussed and criticized from all sides, both because of his very conservative positions concerning public law and political theory and his religious policy. He was accused of having slowed the development of parliamentarianism in Germany with the concept of "monarchical principle," both under the Bismarckian empire and later into the twentieth century (*Wiegand, H-J*). Among the Marxists, H. Marcuse particularly blamed his theory for having given certain ideological tools to National Socialism (*Marcuse, Reason and Revolution, 1941, 374*).

Stahl had a particularly important role in the political evolution of Germany: he is the jurist who consolidated the authoritarian Prussian monarchy in the middle of the nineteenth century by providing a philosophical and ideological basis for confronting the political and social crises that shook German territories.

Abbreviation: PhR: Friedrich Julius Stahl, Die Philosophie des Rechts, Heidelberg, vol. I, II, 1854–56

Cross-References

► Natural Law: Protestant
► Rechtsstaat
► Rule of Law: Historical Perspectives

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Introduction

The works of Rudolf Stammler (1856–1938), a professor of private law and philosophy of law in Berlin, are numerous, dense, and difficult to read.

He produced a great deal in both fields; even when considering only his philosophical works, the task of understanding them accurately appears quite arduous.

We cannot deal here with the whole of this scholarly production, which indisputably made Stammler the most influential legal philosopher of the early twentieth century. Stammler's fame was then universal, his work being celebrated by many famous jurists, such as François Gény and Georges Saleilles in France and Roscoe Pound in the United States (Gény 1915: 127; Saleilles 1902: 92; Pound 1911: 153).

Moreover, the emerging social sciences passionately discussed his conception of the relationship between law and economics: while the filiation with Stammler was openly claimed by some institutionalist economists, first and foremost by Karl Diehl and the German School of Social Law, his work remains highly controversial, being refuted by both Hans Kelsen, Hermann U. Kantorowicz, and Hugo Sinzheimer among jurists, and by Max Weber (1907) and Georg Simmel (1896) among sociologists (Coutu et al. 2001: 20ff).

Stammler's Basic Assumptions

Following here H. Sinzheimer, who was initially quite influenced by Stammler, three distinct points must be studied in order to understand this author (Sinzheimer 1976: 219ff.). They are all connected to the central idea of *Gesetzmässigkeit* (see below): (a) what Stammler calls the "monism of social life," meaning the inevitable reduction of all knowledge of social life to a single regularity of the order of a "law"; (b) the "social ideal" which posits a unity of the goals of social life, which Stammler describes as a "community of free-willing men" (*Gemeinschaft frei wollenden Menschen*); (c) the theory of the just law where the social ideal is transposed to the level of positive law, and Stammler's critical theory also raises the issue of the justice of the existing law. Stammler is unsatisfied with the sole principle of legality as the criterion for evaluating the validity of juridical norms (Coutu 2013, 2018: 15ff.).

(a) The question of the "nomological regularity" or "legality" (*Gesetzmässigkeit*) of social life underlies all of Stammler's work. It is the task of science to discover this legality. In other words, Stammler wants to bring to light the fundamental law that regulates social life. To understand this idea, it is necessary to grasp the sources of social philosophy which Stammler defends.

These include historical materialism, even though Stammler is not at all Marxist: but historical materialism illustrates in an exemplary fashion this search for a fundamental unity of social life. The determination in the final instance by economy is incorrect for Stammler, however, it is the approach, this search for *Gesetzmässigkeit*, which one must pursue and achieve.

The second source is the neo-Kantianism of the Marburg School that of Hermann Cohen and Paul Natorp to whom Stammler, a close associate of the School (Binder 1937; Müller 1994:8ff.) would dedicate his first major work, *Wirtschaft und Recht* (first edition: 1896). Stammler would take up in the social sciences (in which Cohen and

Natorp had little interest, contrary to the neo-Kantians of Baden) the effort of the masters of Marburg to arrive at an objective and universally valid knowledge of thought and action on the basis of "legality."

The third source is the doctrine of law which Stammler had before him, of the German Historical School and of formalist legal positivism (later to be characterized as *Begriffsjurisprudenz*), two conceptions against which he reacts vigorously (Stammler 1906: 306ff.). Stammler does not accept one of their central postulates: the complete discrediting of natural law.

Based on those three theoretical sources, Stammler asks what social life is, refusing to follow the path of empiricism. As did Kant for "nature," this means starting from the presupposition or concept of social life (Vorländer 1904). Life in society, continues Stammler, involves a plurality of individuals who live together. However, this "living together" is based on a presupposition of social cohesion: the fact that the activity of this multitude is oriented reciprocally, without which one could not speak of "society." And social cohesion, Stammler assures us, is above all a regulated condition, meaning that it comes from regulation external to agents. Such an external rule can be conventional, although the conventional rule still depends on a consensus between the participants and remains unstable and fragile (Stammler 1906: 121ff.). Or it may be of a juridical nature. In fact, only law appears able to truly underpin social cohesion, given its coercive dimension. Its representation remains inseparable from the idea of social life itself; law has no existence beyond it. For Stammler, like the economy in the Marxist perspective, law cannot be considered a sphere of social life because it constitutes its form. Conversely, historical materialism errs when it grants an autonomous presence to the economy without any consideration for law: rather, the economy represents the content of social life and appears unthinkable without legal regulation (Ibid., 131–158).

Social monism thus signifies that law cannot be opposed to society: the relationships between law and economy must be thought of as a unit, as both form and substance. Social monism also means that no primarily economic social phenomenon can be conceived of without presupposing the existence of a legal order: law is thus the element which conditions and frames social life.

(b) Stammler proceeds to update this ideal based on a distinction between causality and teleology. Using that terminology, the material reproduction of society can be analyzed according to causal rules. However, causal rules are insufficient for understanding the dynamics of society, because social life depends on the meeting of a plurality of wills and is oriented toward purposes, toward a *telos*. The fundamental law governing social life can only be a voluntary rule, a teleological rule. From Stammler's point of view, the law understood in this sense is not in any way external to the subject: it is in fact a formal way of ordering the content of consciousness, thus a form of thought.

Once the idea of *telos* is put forward, the justice of social life and its ultimate goals is also raised. The critical formalism which describes Stammler's epistemological posture here becomes ethical, although just as formal, encapsulated by the notion of the "community of men of free will" (Ibid., 600ff.). This, for Stammler, does not describe an ideal society or a vision in some hypothetical future: it represents only a method aimed at differentiating between the just and the unjust.

(c) We are thus confronted with the decisive problem that of the "just law." In *Die Lehre vom dem richtigen Rechte* (1902: 9ff.), Stammler contrasts two elementary ways of looking at the law: one, purely technical, which considers the law as an end in itself, the other, more encompassing, which apprehends it as a means at the service of an end that of justice. For those who take this second path, the concept of law must first be unraveled. According to Stammler, law is the expression of a uniting, self-dominating, and inviolable will (*das unverletzbar, selbtsherrlich verbindende Wollen* – Stammler 1923: 89, 1902: 1245

ff.). The law must therefore, in view of its inviolability, which is also imposed on the rulers, be carefully distinguished from the arbitrary will. For Stammler, the inviolability of law is based on some aspiration to universal validity. Stammler thus replaces at the center of legal thought the issue of rightness, which historicism and positivism, in their struggle against the idea of natural law, pushed out of the domain of legal science. However, Stammler challenges the two essential postulates of natural law, which he judges untenable: that of the primacy of natural law over positive law and that of the absolute validity of the axioms and basic principles of natural law. The just law constitutes in this sense only a *natural law with variable content*, which has no predetermined substance (Stammler 1906: 181). It is only a norm that, despite the contingencies resulting from given socio-historical conditions, and without being isolated from positive law, leans toward the idea of just law, the reflection of the social ideal. Two essential principles can be deduced from the concept of a just right, one of consideration (freedom and self-determination of the individual) and another of cooperation (participation of all, without exclusion, in the common effort – see Stammler 1902: 208ff.).

However, Stammler leaves the terrain of formalist philosophy uneasily: he carefully avoids raising the question *de lege ferenda* and directly addressing the legislator. His argument is directed at the judge who must occasionally fill the gaps of existing law. This must be done, Stammler argues, in compliance with the principles of just law (*supra*), formulae that, for numerous authors, remain vague and unclear.

Critiques of Stammler

The positions defended by Stammler have been the source of passionate, sometimes virulent debates.

We can highlight three main elements toward which criticism of his philosophy of law converges: (a) the epistemology of the social sciences and law; (b) the distinction between causality and teleology; and (c) a purely formal conception of just law.

(a) The sharpest criticism of Stammler's theory of science came from Max Weber (1907). We may say that Weber considers that the distinction between form and substance is a precondition of knowledge when dealing with human interactions, like Stammler does. Contrary to Stammler, however, he refuses to base this distinction on what constitutes the external regulation of social life (conventional or legal rules) versus what is regulated thereby (the common purpose of satisfying human needs, i.e., "economy" in a very large sense: Sabine 1937: 327). Weber's own methodological distinction between form and substance is much more abstract: it is the opposition between concept and reality. Weber rejects all theories that naively assume that the concepts they use directly reflect the reality being studied, underlining instead the *hiatus irrationalis* between the empirical world and the concepts elaborated to understand it. In this, he is strongly influenced by Heinrich Rickert. Weber admits the idea of the formal unavoidability of a unilateral perspective on social life defended by Stammler but only to a limited extent. While for Stammler such unilaterality presupposes social monism and the search for nomological regularities, for Weber it implies the opposite. Unilateral viewpoints are the products of a value relationship (*Wertbeziehung)* depending upon specific scientific interests and directed mainly at "historical individuals," such as modern capitalism, Roman law, the medieval city, etc. In other words, the unilaterality of scientific research in the social sciences is not set down once and for all (as was the case with Stammler's social monism) but is relative to the cultural context, the disciplinary field, and the value relationship underlying the historical, sociological, and anthropological research based on specific interests.

(b) The sharp distinction between causality and teleology that Stammler makes, opposing past and future human action, is only possible insofar as causality is to be understood as akin to necessity, therefore in a univocal and determinist way, as in mechanical physics for example. Weber strongly refutes such a view in his methodological writings. At the time, most social sciences including economics, psychology, and even history were establishing equivalence between causality and necessity based on the deterministic model of the natural sciences. But for Weber, to require a univocal relationship between two successive events before speaking of a "cause" is a gross misunderstanding of the nature of social sciences.

These are interpretive (*verstehende*) sciences oriented toward the understanding of the subjective meaning of human action, which of course is absent from natural processes. Such interpretation opens the way for causal imputation in a probabilistic manner: it would be impossible to consider social sciences as being empirical sciences, if unable to successfully establish causal links. Furthermore, according to Kelsen, any determination of a goal implies at the same time the representation of causal links (Kelsen 1923: 60).

(c) Philosophers and legal theorists have frequently emphatically praised Stammler's sustained effort to achieve a renewal of natural law thinking. In particular, Stammler sought to overcome the aporias of the deductive approach of the modern School of Natural Law, while challenging at the same time the axiological neutrality claims of the Historical School (Stammler 1922: 28ff).

Among some defenders of jusnaturalism such as F. Gény, Stammler's concepts, particularly the idea of a natural law with variable content, made a strong impression. However, the formalism defended by Stammler made it difficult to apply his theories, as long as practical questions of interpretation of the law were raised. For Gény indeed, "if we attempt to adapt [the abstract formulas] of Stammler to the tangible circumstances of life they refuse to be of service . . .They demand a realization of the facts which is impossible to attain" (Gény 1915: 186; See also Husik 1924: 383; Ginsberg 1932: 569).

H. U. Kantorowicz, one of the leading proponents of the Free Law school, delivered one of the most acerb critique of Stammler's views on the theory of justice (Kantorowicz 1909). Despite having praised at first Stammler as a precursor of the free law movement, Kantorowicz went on to deconstruct as being devoid of any meaningful content all of Stammler's basic concepts, such as the social ideal, the community of free-willing men, or the concept of "law" itself. Influenced at the time by Max Weber, Kantorowicz was then strongly defending value relativism, as was the case for Gustav Radbruch. But the latter, also an important figure of the Free Law movement, was to substantially change his mind after World War 2, as a result of the terrible evils of totalitarianism (Radbruch 1946).

Overall Appraisal

Stammler, as we have pointed out, is to be credited with giving new life to critical legal thinking in the face of historicism and formalistic positivism then dominating German legal thought. We can see there, notably from the horizon of a "community of men of free will," a first formulation of a procedural theory of law and justice, anticipating by certain aspects the one defended today by Jürgen Habermas (1994).

Moreover, beyond its conceptual imprecision when considered empirically, Stammler's conception did a service to the nascent sociology, if only by obliging some of its most eminent representatives, such as M. Weber and G. Simmel, to clarify their thinking in order to mark the specificity of this new science. Certainly, from the point of view of an empirical sociology, especially as regards the relationship between law and the economy, the radical opposition between causality and teleology defended by Stammler cannot be retained,

just as its lack of distinction between law as a norm and law as a social fact.

That said, if we remain within the realm of legal philosophy, the idea of a natural law with variable content and the horizon of a human community of free wills certainly provide valid points of reference when considering the indispensable role of fundamental values in contemporary law. We may only refer here to the eminent development, in an ever-evolving form, of human rights and freedoms at the international, regional, and national levels. From this point of view, the contribution of Rudolf Stammler always deserves to be highlighted, particularly in that he expresses, *nolens volens*, the unbridgeable tension between formal and substantive approaches to fundamental human rights and freedoms, when understood as being supralegislative norms.

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Stanton, Elizabeth Cady

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Introduction

Elizabeth Cady Stanton (1815–1902) is widely considered to be the founder of the early women's rights movement in America. She convened the first convention dedicated specifically to women's rights, in Seneca Falls, New York (1848), and is credited with authoring the "Declaration of Sentiments," arguably the founding document of the American women's rights movement. *The History of Woman Suffrage* (1881–1922), which Stanton initiated and coedited, is considered the definitive account of the early movement. Stanton fundamentally challenged American ideals and began one of the most powerful social movements in history.

A key element of Stanton's efforts is the creation of a new legal identity for women. Indeed, Stanton transformed American law first by establishing the concept of woman as a rights-bearing individual (Clark 1989), and then by collectivizing women as a new "gender class" (Thomas 2011). Subordinated by the legal system and kept in ignorance of their common experiences, women would together claim equal protection under the law. Stanton provided a scathing critique of the structural inequalities facing women that were shaped and supported by a legal system dominated by men. She sought to extend formal equality to women by expanding the rights of citizenship, including suffrage and property rights, and by reforming marriage laws. Yet, legal reform alone was insufficient. Stanton called for a "social revolution" that would expose male domination, uproot patriarchy, and fundamentally transform American institutions.

Early Influences

Stanton's keen interest in the law was not surprising, considering that she was born and raised among practicing attorneys. Her father, Daniel Cady (1773–1859), was a lawyer who also served as a New York state legislator and New York state judge, and he was a one-term Congressman. Cady provided his daughter with an expansive, informal education in law. She enjoyed free access to Cady's library and observed his consultations with clients, especially women, which led to sparring over the legal inequities facing women. After graduating from the Troy Female Seminary in Troy, New York, Stanton continued her informal legal education with her brother-in-law, Edward Bayard (1806–1889), who had also studied with Cady. She met her husband, Henry B. Stanton (1805–1877), while he too trained with her father. An ardent abolitionist and politician, Henry Stanton would enjoy mixed success in his own legal career. Perhaps channeling her frustration upon being barred from the legal profession, Stanton saw to it that four of her sons would go on to receive training in law.

Stanton's understanding of women and law was influenced by other sources as well, especially Sarah Grimké's (1792–1873) account of the "legal disabilities" of women in America in the *Letters on the Equality of the Sexes* (1838). Whereas Sarah Grimké and her sister Angelina retreated to private life in the face of relentless controversy surrounding their public speeches and writings on women's rights, Stanton dedicated her adult life to documenting the ways in which American women were subordinated. In so doing, she provided the major arguments used by other reformers to advocate for change.

Suffrage and Property Rights for Women

Stanton is perhaps best known for her tireless efforts to guarantee women's suffrage (Gordon 2007). Indeed, Stanton repeatedly condemned the fact that women had no say in the legal system

that governed their lives. Laws were created and enforced by men, for their own benefit, at the expense of women. She described how young men were trained in the very patriarchal laws they would soon uphold. Women were denied a fair trial by their true peers, according to Stanton, because they would be represented and ultimately judged by men with no understanding of their unique life experiences. Stanton's bold proposal for including a resolution for woman's suffrage at the Women's Rights Convention at Seneca Falls was by far the most controversial, narrowly approved only after abolitionist Frederick Douglass (1818–1895) persuasively argued in favor of the measure. A closer look at Stanton's writings and speeches, however, reveals an expansive agenda for reform that included, but was not limited to, enfranchising women (Davis 2008).

In the "Declaration of Sentiments," Stanton offered a blistering attack on American patriarchy and the oppression of women. Declaring women to be "civilly dead" in the eyes of the law, Stanton condemned the lingering effects of English Common Law on American society. As articulated by William Blackstone (1723–1780) in his *Commentaries on the Laws of England* (1765–1770), the principle of coverture required that in marriage, the legal identity of women would effectively be subsumed by her husband's as the couple became "one person in law." Under coverture, a married woman no longer held the right to her own property or wages. She could not draft her own will, enter a contract in her own name, testify in court on her own behalf, sue, or be sued. Although marriage in nineteenth-century America was being gradually transformed from an indissoluble bond into a contractual relation that could be dissolved, divorce was rarely pursued and, if granted, often left women economically disadvantaged and socially stigmatized. And although women maintained limited property rights through pre-marital trusts, the trusts were controlled by male relatives and rarely protected when challenged in court. The common-law practice of dower granted a widow with children one-third of her husband's real property if he died intestate (and in some states included a portion of his personal property as well as basic household goods), but she could not sell or pass on her inherited property. Nor did she automatically inherit her marital home, leaving open the possibility that as a "tenant" she, along with her children, could be evicted (Thomas 2016).

Stanton was instrumental in the passage of various property reform acts in New York state (DuBois 2007). Her support of petitioning efforts and behind-the-scenes lobbying contributed to the 1848 New York State Married Women's Property Act, which allowed women to maintain property owned before marriage. Although the Act was a significant step toward women's legal equality, the law was designed primarily to shield women's property from creditors, and it did not extend similar protections to women's earnings, leaving working-class women and those without inherited property behind. New York would later extend protections to women's wages in the 1860 Earnings Act, but significant parts of the law were partially repealed 2 years afterward.

Divorce and Marriage Reform

One of the most controversial aspects of Stanton's plan for reform is her support for no-fault divorce and redefinition of marriage as a mutual contract between equal parties. Deploring the concept of "Man Marriage," Stanton offered vivid descriptions of women who were subjected to domestic violence and sexual abuse, often by intoxicated husbands, resulting in unplanned pregnancies and compulsory motherhood. (Although Stanton remained married and bore seven children, she too struggled with the burdens of motherhood and wrote extensively about her experiences.) Stanton advocated the establishment of civil marriage that would entail, among other things, a minimum age requirement for both parties, a civil ceremony in the presence of state-recognized officials and witnesses, and a signed license that represented an official legal contract with the state. Fearing that individual states would create

an uneven patchwork of legal protections for women, Stanton supported uniform standards for marriage at the federal level (Thomas 2016). Seeing that male lawmakers, left to their own devices, would most likely restrict rather than expand women's rights and protections, Stanton insisted that women play an important role in developing marriage laws and regulations (Thomas 2006).

Stanton's condemnation of common-law marriage was deeply rooted in her rejection of the patriarchal religious principles that were used to legitimize the institution. Her radical stance on marriage and divorce drew many critics from various circles. Stanton was associated with the "free love" movement, which called for the abolition of traditional and state-recognized marriage. Although Stanton supported sexual and reproductive freedom for women, she did not favor promiscuity. And while Stanton condemned unwanted pregnancy and compulsory motherhood, she did not necessarily support abortion or any form of infanticide. Rather, Stanton promoted the concept of "Enlightened Motherhood," according to which women, in full control over their own bodies, would voluntarily bear children who would be raised in healthy households free of violence and oppression. Until "Enlightened Motherhood" became a reality, Stanton believed that women should not be punished for resorting to desperate measures, including infanticide, by the very same men who benefitted from their subordination (Thomas 2012). Along similar lines, Stanton did not approve of prostitution, but she did object to the arrests and prosecutions by men whose promiscuity remained essentially unchecked.

Controversies Surrounding Stanton's Reform Efforts

The comprehensiveness of Stanton's transformative worldview was limited by inconsistencies in her thought, arguing for universal suffrage while often relying on racist and elitist rhetoric (Caraway 1991; Mitchell 2007; Stansell 2007). Throughout her career, Stanton had mocked the hypocrisy of the white-male-American ruling elite who opposed the enfranchisement of educated white women like herself while allowing uneducated white and immigrant men to vote. In her condemnation of domestic abuse and involuntary motherhood, Stanton would often deploy eugenic arguments to prove that unfit parents—whether drunken, unfaithful husbands or miserable, abused wives—would produce defective or intellectually inferior offspring, to the detriment of society. Questions linger about the extent to which Stanton was a strong advocate for all women, regardless of race or class.

Stanton's racist rhetoric intensified after the American Civil War when the proposed Fifteenth Amendment to the Constitution would grant freed Black men the vote without extending enfranchisement to women. Stanton and Susan B. Anthony (1820–1906) spoke out vociferously against the proposed amendment and offered an alternative version that favored universal suffrage (Dudden 2011). Other reformers, such as Lucy Stone (1818–1893) and Julia Ward Howe (1819–1910), supported the amendment and proposed a more incremental state-level approach to enfranchising women. In 1869, Stanton and Anthony formed the National Woman Suffrage Association (NWSA) and, several months later, Stone and Howe created their own organization, the American Women Suffrage Association (AWSA). Although Stanton's comments were likely intended to persuade her largely white, privileged audience to accept universal suffrage by expressing shared values, she effectively aligned herself with the very people she had opposed. The polarized environment was ill-suited for the more complex position of African American women's rights advocates such as Sojourner Truth, Frances Ellen Watkins Harper, and even Frederick Douglass, who did not necessarily see the Fifteenth Amendment as the Faustian bargain deplored by Stanton and Anthony, nor did they automatically assume that their white colleagues had their best interests at heart.

By arguing that women should enjoy the same rights as white men, critics argue that Stanton left largely untouched the divisive hierarchies of her time. Her focus on formal equality might well have allowed material inequalities to remain unchecked. Stanton's concern over women's suffrage did prove prescient, however, as the

Nineteenth (Suffrage) Amendment to the Constitution would ultimately be ratified in 1920, 18 years after her death.

Further controversy surrounds Stanton's efforts to literally rewrite history in her formal account of the early women's rights movement, which sidelined those who did not fit comfortably into her narrative (Hewitt 2010). For critics, it is not surprising that the ever-confident Stanton portrays herself as the leader of the early women's rights movement in the *History of Woman Suffrage*. By excluding or mischaracterizing the important contributions of other women, Stanton made many of the same mistakes for which she criticized men (Tetrault 2014).

Conclusion

Described as "brilliant, self-righteous, charismatic, self-indulgent, mischievous, intimidating, and charming," Stanton was a complex and polarizing figure. She was not alone in her pursuit of women's rights. Yet, she "was the first person to devote her considerable intellect solely to developing the philosophy and promoting the cause of woman's rights . . . devoting her life to challenging the ways that ideas about gender shaped women's place in society, politics, law, and marriage" (Ginzberg 2013: 11). By creating a new legal identity for women, first by establishing the concept of woman as a rights-bearing individual, and then by collectivizing women as a new "gender class," Stanton fundamentally transformed American legal thought.

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State of Exception

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Introduction

The expression "state of exception" refers to the temporary suspension of the law or, more technically speaking, of the Constitution in its entirety or in important parts, such as the fundamental rights and guarantees (freedom of movement, freedom of speech, freedom of trade and commerce, property rights, suffrage, etc.). Usually, the state of exception is established when abnormal, serious, and unpredictable circumstances occur (natural disasters, civil wars, generalized terrorism, foreign invasions, etc.) and threaten the structure of the Rule of Law, demanding the concentration of power, typically (but not exclusively) by the Executive, with the purpose of returning the exceptional situation to normal. François Sainte-Bonnet proposes that the phenomenon might be defined by the three elements that constitute it (Sainte-Bonnet 2001: 27–28):

(a) The infraction or derogation of law, since the state of exception only has meaning when related to a certain existing or future legal order. For this very reason, it is not possible to occur a state of exception in the context of despotism or the absolutism. In such State forms, there is not exactly a law to be eclipsed, since in them the norms simply derive from the will of the holder of power. This does not relate to an earlier legal instance, which could be suspended, or to a later one, which could be created by the exception. The state of exception only arises through a necessary dialectic with the Rule of Law in the form of its suspension.

(b) The reference to an abnormal situation that may not be foreseen, despite the efforts of the doctrine (especially the French) to do so. What is important in this regard is the central issue of the sovereign, that is, the authority capable of declaring the exception, turning the merely subjective into an objective experience. The entity that decides on the exception might be the Executive, the Legislative, or the Judiciary. Once the sovereign authority is established (or self-established), the exception instituted by it leads to a concentration of power that ignores both the horizontal limitation, subverting the logic of the distribution of legal competences among State entities, and the vertical limitation, disregarding the restrictions imposed on the State concerning the protection of the fundamental rights of individuals.

(c) The foresight of a higher purpose to be achieved, perceived as a goal to which the exception aspires, a situation that, at least conceptually, is a means and not an end. This does not mean, however, that the exception is indifferent to the ends. It is the pursuit of certain ends that justifies it, given that the means defined by the established law may prove to be, at times, excessively limiting (Schmitt 2009: 42). The sovereign authority defines the objective of the state of exception, realizing the indeterminate concepts of Public Law (public order, social interest, etc.), and declares its beginning and end. Furthermore,

> the exception's purpose may have to do not only with the protection of the State, but also with the maintenance of a given political regime or even of certain social classes and specific individuals. In this hypothesis, the subjective nature of the state of exception reaches its maximum indeterminacy. Some authors, like Geneviève Camus, argue that, in addition to the public good and the social order, the specific political beliefs of a people and the institutions that maintain them are assets to be preserved by the establishment of the exception. This clearly gives dangerously wide margins to measures usually adopted in emergency situations, which might imply, for example, the elimination of communist parties in a capitalist order and vice versa (Sainte-Bonnet 2001: 17).

By modifying the relationship between the sovereign and the political power, the state of exception establishes the indistinction between the creation and the application of law (Schmitt 2007: 76). The extraordinary powers of exception are based on: (i) the discretionary use of power; (ii) the presumption of legality (understood in a broad sense) of the acts performed; and (iii) their immediate enforceability (Schmitt 2007: 37).

Theoretical Status of the Exception: Between Fact and Law

There are many different theories on the status of the state of exception. The first and most obvious of the questions is whether the state of exception represents a legal or a merely factual structure. The two legal traditions that most dedicated to the study of this theme were the French (Hauriou, Mathiot, Nizard, etc.) and the German one (Friedrich, Jellinek, Schmitt, etc.). The former understands the state of exception as a triumph of the facts over law, and the latter explains the exception as a kind of adaptation of the law to facts. Nevertheless, all the definitions of these currents of thought reveal the fluid character of the state of exception. That is why those who claim to reconduct the exception to an extreme pole (the legal or the factual one) are wrong. More than a hybrid between law and fact, the exception is an unstable reality that stands as a threshold between the legal and the factual. According to Sainte-Bonnet, the exception is at the center of the relationship between factual pressure and legal stability, mediating (and questioning) the dimensions of Public Law and political fact. Therefore, the state of exception is less than a revolution, but more than a simple political struggle (Sainte-Bonnet 2001: 14). As Giorgio Agamben indicated, the exception appears as a limit structure between the factual and the legal, which guarantees the transit (and the indetermination) between these dimensions (Agamben 2010: 25).

According to Robert Hoerni, the state of exception represents a kind of natural right of the State to self-defense. If the State is threatened by serious circumstances that might put an end to it, it would be authorized to resort to measures like the self-defense of the Criminal Law (Hoerni 1917: 202). Maurice Hauriou suggests that this idea may be better understood if the State is regarded as both a person (and, therefore, must be able to defend itself) and an organization in which the oldest function is that of government, which would override the legislative function in moments of crisis (Hauriou 1929: 425). For his turn, Frede Castberg argues that the state of exception constitutes a type of customary law capable of integrating the inevitable gaps in Constitutional Law, which become evident in emergency situations. Even if *contra legem*, such a custom would be based on the community's awareness of what law is (Castberg 1961: 116–117). André Mathiot states that there is no true textual gap in law, but rather a crisis textual gap. It might only be resolved by appealing to the idea of the state of exception as an integrating source of law (Mathiot 1956: 416–424). This view clashes with the thesis of Gerhard Anschütz, for whom the exception is not a textual gap, but a legal gap, indicating a *terminus* for the Rule of Law, that is, a border zone immune to technical-scientific knowledge (*apud* Schmitt 2005, pp. 14–15). All these theoretical approaches refer to the state of exception to an obscure and perhaps pre-legal situation, even

though Hauriou refers to it as a second-level law, like a revolutionary law.

Carré de Malberg's approach is far more radical than that of the other French authors. In an open disagreement with those jurists who claim to comprehend the state of exception as an expression of the state of necessity of Civil Law or of the self-defense of Criminal Law, he argues that such structures are not foreseen in Public Law. There is no *opinio juris* (a fundamental constitutive element of a legal custom, additionally to the *inveterata consuetudo*) that enshrines the State's right to self-maintenance. On the contrary, the State would even be able to commit suicide since it is sovereign. According to Carré de Malberg, the state of exception is a political and not a legal reality. Every suspension of the Constitution, even if provisional, involves a strictly political act of revision that belongs only to the constituent power, never to the constituted one (Carré de Malberg 1962: 610–623).

In fact, the attempt to solve the problem of the exception through the state of necessity theory creates more aporias than it solves (Agamben 2004: 46–47). Unlike what a superficial reading might sustain, the state of necessity (as well as its penal derivation, the self-defense) is in no circumstance defined as an objective situation. On the contrary, it is highly subjective. The emergence of the state of necessity depends on the declaration by the sovereign authority. Indeed, the authority is sovereign because it can decide, that is, it can constitute a state of necessity. In this way, the exception cannot be reduced to a factual necessity.

In a perspective similar to Carré de Malberg's, Olivier Beaud understands the state of exception as a "constitution reservation" activated by the "sovereign outside the Constitution," that is, by the authority that, in times of emergency, determines what is constitutional or not, without the possibility of other entities to veto or control it (Beaud 1993: 44). It is, in accordance with Schmitt's proposal, a phenomenon that places the exception and normality as sides of the same coin. It composes a double concurrent Constitution whose ordering is established by a kind of rule of jurisdiction. Therefore, the state of exception would only be a reinterpretation of the normal rule in the context of specific conditions set by the emergency (Beaud 1993: 37). Lucien Nizard introduces a similar reflection. He states that, since it depends on material circumstances, the principle of legality, on which liberal legal orders are based, is not intangible. Legality coexists – or rather, competes – with the exception, given that it is based on the principle of the relativity of powers, which is put in check when public order is threatened. The vulnerability of fundamental rights in times of crisis derives from this. Nevertheless, without the exception, the "normal" legal order would destruct itself in times of emergency (Nizard 1962: 258–279).

Constitutional Review of the Exception

Carl Friedrich states that it is important to prevent the exception from becoming the rule. He observes that an excess of control would lead to the ineffectiveness of emergency measures and the absence of control would generate a permanent exception.

To avoid it, Friedrich presents three rules that must be followed: (a) the sovereign who decides on the state of exception must be designated by a third party; (b) the beginning and the end of the exceptional powers must also be defined by a third party; and (c) the purpose of the exception should be to maintain (never to replace) the established constitutional order. Friedrich concludes that the exceptional powers should be broad, but the conditions for their use should be restricted (Friedrich 1958, pp. 399–400).

In a similar approach, Léon Duguit affirms that emergency regulations are not illegal only if governmental decrees, which override the Legislative in situations of exception, are issued in the following and exclusive situations: war against foreign powers, armed insurrections, general strikes in the public service, and the material impossibility of convening the Parliament or of respecting the necessary procedures and deadlines to do so. Even in these situations, Duguit adds that the exceptional measures taken by the Executive must be expressly ratified a posteriori by the Legislative (Duguit 1923: 162).

From Schmitt's perspective, the "calculating" concerns of Friedrich and Duguit are innocuous and completely misrepresent the state of exception. It corresponds to a liberal attempt to prevent the ordering of the juridical by means of the political. Due to its very nature, the exception is immune to prior normalization, being rather an anomalous situation that is placed between the raw fact and the legal norm. A simple reading of Friedrich's three rules demonstrates the inability of law to regulate the exception. If there is a third party that decides who the sovereign is (rule a), what is the temporal limit of his powers (rule b), and what purpose they serve (rule c), this third party is the true sovereign. Then, if the third party is the true sovereign – the liberal jurist used to the mechanical recurrence of abstract concepts would reason – Friedrich's three rules must be applied to it again, which would generate (or rather, reveal) a new third sovereign, and so on, indefinitely.

The History of the State of Exception

Despite the controversies, the theory of the state of exception has evolved in legal-constitutional thought and practice since the Romans, who had similar constitutional figures, reaching the present day, when emergency legal measures are provided for in practically all democratic Constitutions.

Contrary to what many authors assert, the Roman dictatorship is not similar to the state of exception. Although the dictatorship was based on an especially powerful *imperium*, which could not be hindered by the power of the consuls, the voting of the *collegia*, the right of veto of the tribunes, or the appeal to the people (Schmitt 2009: 33), it should be highlighted that the dictatorship did not suspend the republican law but integrated it as an extraordinary magistracy, and was perfectly regulated in the customary Constitution of the Republic. The relationship between the Roman dictatorship and the ordinary law is not characterized by a suspension, but by an integration. Furthermore, the Roman dictatorship had a fixed term (6 months). Last but not least, the Romans did not establish any fundamental rights that could be opposed by the State and that could be suspended by the exception. In the same sense that the notion of fundamental rights and liberties was unknown to the Romans because they lived under an organic-State concept, the idea of the suspension of such rights is also unknown to them. Notwithstanding, there were similar institutes to the state of exception in Rome, such as the *senatus consultus ultimus*, which in practice allowed the consuls to act in emergency situations, the declaration of *hostis publicus*, the *crimen maiestatis*, the *tumultus* (general mobilization), and the *iustitium* (suspension of justice) (Sainte-Bonnet 2001: 43–77).

The conceptual and practical history of the state of exception only begins when the West conceives a legal sphere independent from – and in certain circumstances opposed to – the State. This process begins with the natural law of the Middle Ages, passes through Modernity, and reaches our days (Sainte-Bonnet 2001: 41). If law and State are identified, there is no place for exception, because any State order, even the most exceptional, will also be a legal order.

In Modernity, the state of exception is assimilated to the *coup d'état* theory. In his investigations on the reason of State, Michel Foucault has demonstrated that the expression *coup d'état* did not have any negative connotation in the political-legal treaties of the late sixteenth and early seventeenth centuries, when what he calls "governmentality" began to form (Foucault 2009: 349–351). At that time, the expression indicated the measures that the sovereign should take to safeguard the State, being justifiable based on necessity rather than regular law, eclipsed by the reason of State. The safeguard measures exceed regular law, affirms Gabriel Naudé, Mazarin's librarian. More than a residue of illegality, the *coup d'état* expressed an expansion of the State's right of self-preservation, always excessive/exceptive in relation to regular law. It is, according to Naudé, an "excess of the regular law in favor of the public good" (*apud* Foucault 2009: 375, n. 20). The *coup d'état* integrates the reason of State. Indeed, it is its most characteristic moment, never its negation, since this "reason" is not determined by laws, but on the contrary, it determines them. According to Philipp von

Chemnitz, historiographer of Christina of Sweden: "The reason of State, enclosed within the limits of which we have just spoken [religion, fidelity, natural honesty, and justice], does not recognize others: public, private, fundamental, or any other kind of laws do not disturb it; and when it is a question of saving the State, it can boldly infringe them" (*apud* Foucault 2009: 375, n. 22.). There are important similarities between the modern *coup d'état* and the contemporary state of exception, whether in its purpose, structure, or justification.

The State of Exception Nowadays

Given this brief overview of the ancient and modern thought, it might be observed that the state of exception was integrated into the political-legal framework as an exceptional measure that belongs to the set of mechanisms – legal or not, depending on the doctrine chosen – necessary for the defense of the State. Nevertheless, contemporary world has provided a new aspect to the state of exception. The end of the twentieth century and the beginning of the twenty-first century are periods characterized by the normalization of the emergency, when the exceptional becomes usual and the state of exception becomes the rule, even if the competent authority does not always formally declare it. Two authors have best observed this transformation: Carl Schmitt and Giorgio Agamben.

In his classic *Political Theology*, Schmitt states that the sovereign is the one who decides on the state of exception (Schmitt 2005: 5). Thus, the real characterization of sovereign power is in the emergency (Schmitt 2009: 49). This means that sovereignty, a constitutive attribute of the State, ultimately depends on who is capable of denying and surpassing the Rule of Law by acting as an outlaw. Schmitt does not recognize the state of exception as one of the institutes of Constitutional Law. He considers it rather as a situation, as indicated by its name in German, *Ausnahmezustand*. Schmitt argues that the state of exception cannot be foreseen and regulated by law. The state of siege and similar mechanisms are then only feeble attempts by the Rule of Law to circumvent the unavoidable: the original and founding exception. It is important to notice the controversial element contained in Schmitt's definition: the sovereign is the one who decides on the situation in which sovereignty as a purely juridical institute is senseless.

Based on Schmitt's thesis and combining Arendtian and Benjaminian ideas, Agamben concludes that the paradigm of modernity is the permanent or "desired" exception, finding its representation no longer in the *polis* or in the modern State, but in the concentration camp (Agamben 2010: 44–45). The camp is not a realm of the unlawful, but of that which is placed as an absolute indistinction between violence and its normative regulation that can be indefinitely suspended. This occurs because the exception would be inherent to law, which inserts the facts in legal order creating exceptional areas of deregulation (Agamben 2010: 27). According to Agamben, law includes by excluding ("the law is outside itself"), a paradox like that of the sovereign described by Schmitt, who states: "I, the sovereign, who am outside the law, declare that there is nothing outside the law" (Agamben 2010: 22). Agamben regards the norms of normality as mere empty forms that would express only the meaningless validity characteristic of the contemporary legal orders (Agamben 2010: 55–67).

For Agamben, the inclusive exclusion logic characteristic of the exception corresponds to the archetype of all law. It makes participate in law something that originally should be outside its domain (Agamben 2010: 33). The Italian philosopher reinterprets in this light the legal positivism tradition that considers the sanction as the typical structure of law, understanding legal sanction (in the strict sense of a synonymous of punishment) as an inclusion of violence – precisely the reality that law would intend to deny – in the specific composition of law. Therefore, to exclude violence from social life, it needs to be included as a sovereign exception in the very core of law. Law

is, then, qualified violence, that is, organized and monopolized violence, given that the establishment of law is an establishment of power (*Gewalt*) and, as such, an act of immediate manifestation of violence (Benjamin 1991). This relationship is evident if it is considered, through a philosophical archeology, the historical forms in which law has revealed itself throughout history. The talion law, for example, is nothing but a repetition of violence, a reinsertion of that violence originally perpetrated against the victim into the "normal" social structure. In this regard, violence is reconfigured in law as a sanction, that is, a punishment of violence using violence.

Agamben concludes that the state of exception is a constitutive element of the Rule of Law. Its origin would be in the French Revolutionary Constitution of 1792, assuming in the contemporary world the form of a permanent state of exception. Thus, it ceases to be a mere situation or stage to become almost an autonomous form of State. Agamben tests his hypothesis by analyzing the recent constitutional and legal history of France, Switzerland, Germany, Italy, the United Kingdom, and the United States of America (Agamben 2004: 10–49), privileging liberal States with consolidated constitutional traditions. Nevertheless, it is exactly in these "developed" States that the emergency is transformed into rule and the popular instances of law creation are emptied out in the name of maximizing the power of entities that manage the exception, usually located in the Executive.

Conclusion: The Economic State of Exception

The authority that decides on the exception today is no longer the representative State of the sovereign people, but the private economic power, with which a new situation is established: the economic state of exception. This term was delineated in the 1920s and 1930s to indicate the drastic changes imposed on the economy and on the production/distribution of goods by the war effort. Nevertheless, nowadays the expression refers to something different. It is no longer about the temporary transformations that war as an international political event imposes on national economies, but rather indicating the changes that global capitalist economic power demands from the State and society, even in the absence of a context of declared war (Scheuerman 2000). According to several authors, there would be today a kind of permanent state of exception in Western democracies, which could be proven by the following everyday facts: warfare that is low in intensity, but continuous; war against terrorism; resurgence of ethnic, tribal, religious, and national violence; neo-fascist movements and governments; emergence of a new plutocracy; and domination of political decision making by speculative markets. In these situations, the normality of the legal orders might be indefinitely suspended by the economic power, since the main political decisions, including those concerning wars and global violence, involve today the necessary mediation of the capital (Galli 2002; Messina 2013).

Cross-References

- ▶ Agamben, Giorgio
- ▶ Destituent Power
- ▶ Rechtsstaat
- ▶ Rule of Law: Theoretical Perspectives
- ▶ Schmitt, Carl
- ▶ Sovereignty and Human Rights

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Statutory Interpretation

► Legal Methods: Statutory Interpretation – The Argument from Intention

Stein, Edith

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Introduction

Edith Stein (12 October 1891–9 August 1942) was a philosopher and women's rights activist. Born Jewish, she completed her doctorate in 1916 with Edmund Husserl on the "Problem of Empathy." In 1922, she converted to Catholicism and became a nun. She was a victim of the Holocaust in the Auschwitz-Birkenau concentration camp in 1942. In the Catholic Church she is regarded (since 1998) as a saint and martyr, in the Protestant Church as a witness of faith. In her philosophical work, she focused on anthropology, ontology, and theology.

On Stein's Life and Impact

Edith Stein was born as German Jew in Breslau (today Wroclaw, Poland) as youngest of 11 siblings. From the summer of 1911, she began to study psychology, philosophy, German studies, literary studies, and history in Breslau and Göttingen. In Göttingen, through an acquaintance, she was introduced directly to Husserl, whom she considered "the philosopher of our time" (*Life in a Jewish Family*, 118). During the First World War she was called in 1915 to an epidemic hospital in Austria where she worked as paramedic. Afterwards she passed the state examination for teachers in philosophical propaedeutics, history, and German. In 1916 she completed her doctorate with Edmund Husserl at the University of Freiburg. Parts of it were published in *On the Problem of Empathy* (*Zum Problem der Einfühlung*, 1917).

From October 1916 to February 1918 she worked as Husserl's research assistant. Although she invested a lot of work, she neither received adequate appreciation for it nor was able to establish a dialogue with Husserl. For this reason, she resigned from the position. Afterwards, she struggled to take the final qualification step required in the German-speaking system for a professorship, the *Habilitation*. The *habilitation* thesis she wrote, *Beiträge zur philosophischen Begründung der Psychologie und der Geisteswissenschaften*, was published in Husserl's *Jahrbuch* in 1922. However, since she could not find a (necessary) mentor, her *habilitation* was rejected by Göttingen University. In 1925 she presented *An Investigation Concerning the State* (*Eine Untersuchung über den Staat*). In the following years she translated Thomas Aquinas' *De Veritate* and produced a new *habilitation* thesis entitled *Potency and Act* (1931). In 1930–1931 she undertook three more (unsuccessful) attempts at *habilitation* in Breslau, Kiel, and Freiburg. The autobiography of St. Theresa of Avila changed her life: in 1922 she became a member of the Roman Catholic Church. In April 1933 she wrote to Pope Pius XI urging a statement on the situation of Jews in Germany. She also began the autobiographical notes *Aus dem Leben einer jüdischen Familie* (*Life in a Jewish Family*), which remained unfinished and was published posthumously. She joined the Order of Carmelite nuns in October 1933 and took the religious name Teresia Benedicta of the Cross. In 1935–1936 she worked on her main philosophical work, *Finite and Eternal Being* (*Endliches und Ewiges Sein*). On 31 December 1938, she fled to her sister in a Carmelite convent in Echt (Niederlade), 2 months after the Jewish progroms of 9–10 November 1938. There she wrote her two most important theological works, *The Science of the Cross* and *Ways to Know God*, but also her will. After her arrest on 2 August as part of a political operation by the Gestapo, she was deported – together with her sister Rosa – to Auschwitz-Birkenau on 7 August 1942 and killed in the gas chambers on 9 August 1942. According to eyewitness accounts, she helped many other prisoners in Auschwitz.

Edith Stein was beatified on 1 May 1987 and canonized by Pope John Paul II on 11 October 1998. She was also declared one of Europe's three patron saints in 1999. Her beatification and canonization were controversial because she was persecuted and killed by the Nazis not as a Christian but as a Jew. Apart from the canonized women in the Bible, she is the first Jewish-born person to be canonized.

Following her canonization, research interest in the philosopher Edith Stein increased: From 2000 to 2014, her completed works *Edith Stein-Gesamtausgabe* (ESGA) were published, and in 2009 the *International Association for the Study of the Philosophy of Edith Stein* (IASPES) was founded.

Edith Stein was interested in human being in their relation to society and to God. In philosophy, she worked primarily on phenomenology, ontology, and anthropology. At the beginning, her writings were influenced above all by the phenomenology of Edmund Husserl, who supervised her doctorate *Zum Problem der Einfühlung* (On the Problem for Empathy). For Edith Stein, phenomenology is a method for describing reality, not a theory.

This phenomenological perspective is later complemented in her theological-metaphysical writings by her increasingly strong focus on theology. In the process, an independent, creative approach crystallizes. Her main theological works are *The Paths to the Knowledge of God* and *The Science of the Cross*. Stein advocates a rational theology, i.e., the principles of reason and faith are equally recognized in her work.

The writings on the state system and women, which are interesting from the perspective of legal philosophy, stand out at first glance, but are ultimately motivated by the same interest and worked on with the same methods as the other writings: Stein's question about men and women and their position in society and in relation to God, whereby men and women in the collective can ultimately transcend their finite being. Accordingly, Stein also contains many contributions of interest to the philosophy of law on the question of the person, the state and women's rights.

The Suffragette

As natural as Stein's political commitment to the equality of women was, her academic interest in it was initially low. Already in her autobiography, she repeatedly mentions how important the issue of the status of women had been to her. After completing her university entrance qualification, the verse written about her in the school magazine read:

> Equality of woman with man/so shouts the suffragette,
> Surely one day we will see her/in the ministry. (Life in a Jewish Family, 95))

In college she joined the Prussian Association for Women's Suffrage, which sought full political equality. In 1921 she gave several lectures in Salzburg on the subject of women's education. From 1923 onwards, Edith Stein published writings on the subject, strongly influenced by her affiliation with the Catholic Church and the phenomenological perspective. This means that she always asked about the nature of women in the Christian community. These contributions were only ever made in response to direct requests or because the "really philosophical" topics had already been given to men at a conference.

From today's perspective, her analyses can be described as progressive, even if they often get stuck in the description of the social roles of the time. Of her contributions to today's debates, the strict separation of the sexes, which she derives from the Bible, is relevant:

> God created man as male and female and both in his image. Only the purely developed male and female characteristics result in the highest attainable likeness to God and the strongest penetration of the entire earthly life with divine life. (*Das Ethos der Frauenberufe*, 29)

Stein concludes that it cannot be determined scientifically whether gender is only a "variable type or a fixed species" (ESGW 13, 119).

The decisive factor in determining the nature of gender is ontology. The essence of "woman" – according to the very typical phenomenological choice of words – lies above all in a striving for wholeness and in the ability to "form whole people" through the activities of supporting, advising, and helping and to do justice to them. The male being, on the other hand, is characterized by an "abstract objectivity" and a "suppression of the striving for wholeness" (ESGA 13, 14). In criticizing the strictly binary view of men and women, one should not go so far as to deny a peculiarity and the resulting intrinsic value of women.

Even though Stein opposes the idea that there are purely masculine or purely feminine professions, she recommends as particularly suitable professions for women those in which the characteristics of the woman are brought to the greatest possible development. Theologically, too, she concludes that being a wife and mother *cannot* be a woman's only destiny.

> If for the sex as a whole marriage and motherhood are the first profession, they are not so for each individual. (ESGW 13, 130)

Professions particularly suited to women, she says, are those of mother, educator, doctor, or even member of parliament. Here, too, Stein shows her religious imprint in her analysis – for example, the purest female profession lies in the fact that a woman "brings the Saviour with her wherever she goes and kindles the love of the Saviour" (ESGA 13, 15).

Stein never sees the relationship between the sexes negatively; in order for the whole to develop, each member (and thus not only woman and man, but each individual) must perfect himself or herself in terms of their nature, so that humanity as such can perfect itself. In doing so, she rejects the idea that there is no difference between the sexes. The peculiarity of women would also be their strength. For her, both sexes are like poles between which all forms occur and are natural.

Legal Philosophy

Stein summarizes her political views in her autobiography:

> As much as I was repelled by chauvinist nationalism, I was always firmly convinced of the sense and the natural and historical necessity of individual states and different peoples and nations. . . . More and more I also freed myself from the liberal ideas

> in which I had grown up, and came to a positive conception of the state, close to the conservative one, even if I always kept myself free from the special imprint of Prussian conservatism. (*Life in a Jewish Family,* 101)

In such a state, and here Stein's guiding question emerges again, Stein is interested in the specific way in which subjects live together. This coexistence of subjects, she argues, is crucial if the state is not to be hollow and ephemeral. In her eyes, the state constitutes itself and is not solely based on "community," "people," or "society." In this way, she argues against models of an organic community of the people, from which law emerges, as well as against contractualist models. The constitution of a state is neither a mere act of arbitrariness nor a mere organic development. Stein is concerned with the equivalence of statehood and sovereignty. For her, law and state come into being at the same moment – where there is a state, there is law. But the reverse is also true for Stein: where there is no law, there can be no state. Only the state has the right to establish rights for the people on its territory.

Following Adolf Reinach, Stein distinguishes between "positive" and "pure" law. She considers both to be equally justified.

> Pure law is the same at all times and among all peoples, for it is eternal and does not come into existence at any time or anywhere. (ESGA 7, 33)

This pure law corresponds to justice; therefore, where pure law prevails, justice prevails. In order for pure law to be valid, however, it must be cast as positive law. Of course, this leaves open the question of how far natural law is law for Edith Stein, if it has no validity at all. Positive law is dependent on time and place – for Stein it is not bound to pure law.

To Stein, the state is a collective legal subject, a legal person. As with the latter, they have no capacity to act; this is always derived only from natural persons. Any institution that is legitimized to do so by the state may act on behalf of the state.

In contrast to the community on which it is based, the state has no independent ethical value. Since it cannot feel – and according to Stein this is a prerequisite for being a moral subject – it cannot be morally obligated. This connection between emotion and morality shows Stein's creativity and the connection to her earlier work on emotions. The consequence of this connection, however, is that the state cannot be bound by moral norms in its actions. According to Stein, it is solely obliged to promote this sensitivity in its citizens, which for them is the condition for the possibility of being a moral subject. This realization of values is the actual "meaning of history" (*Life in a Jewish Family*, 126).

Conclusion

Her writings on legal theory are often accused of being contradictory and not going far beyond a description of the status quo at the time. However, the basic lines outlined here already show that Stein's view of the state as a philosopher leads her to independent and creative approaches that prove these accusations to be unjustified.

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► Husserl, Edmund
► Reinach, Adolf

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Stein, Lorenz von

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Life and Works

Lorenz von Stein (St.) is born in Borby near Eckernförde on November 15, 1815, as the natural child of Baron of Wasmer and the commoner Anna Julianna Stein. Several scholarships by King Frederick VI of Denmark (1768–1839) allow for his *rise by education*. After studying law and philosophy in Kiel and Jena, in 1839 St. works for the Chancellery of Schleswig-Holstein-Lauenburg in Copenhagen. With his dissertation *Die Geschichte des dänischen Civilprocesses und das heutige Verfahren* (1841), he obtaines his doctorate in 1840, the jurist, historian, and politician Nikolaus Falck (1784–1850) being his supervisor. St. receives a travel grant to Paris by Danish King Christian VIII (1786–1848). In 1842 he publishes the book *Der Socialismus und Communismus des heutigen Frankreich. Ein Beitrag zur Zeitgeschichte*, which at once builds his fame. After his habilitation in 1845, the University of Kiel appoints him Professor of Political Science in 1846. During the rebellion against Denmark (1848–1851), St. becomes a member of the *Schleswig-Holsteinsche Landesversammlung* (national assembly) and an envoy of the *provisional government* to Paris. After having been offered professorships at the Universities of Erlangen, Königsberg, and Würzburg, his decision for Würzburg and later appointments at German universities are thwarted by Prussia. In 1854 the University of Vienna appoints St. Professor of National Economy and Statistics, which marks the start of 30 years of scientific work in the fields of social science and political science as well as economics, finance, and public administration. In 1868 Emperor Franz Joseph I (1830–1916) makes him a hereditary nobleman, in recognition for completing his eight volumes on public administration. Activities as an entrepreneur (purchase of a thermal spring, founding a joint stock company in 1863, running a peat bog and a glass factory as well as other investments) end up with bankruptcy in 1879. From then on, St. lives with his son, Ernst Ludwig v. Stein (1858–1929), in Weidlingau near Vienna. Since 1882 he is a counselor for the Imperial House and government of Japan. As a consequence, he contributes to the Meiji restauration and its constitution in 1889. St. dies on September 23, 1890.

From Hegel via Young Hegelianism to the Theory of the State

During his studies, St. joins the Young Hegelians around Arnold Ruge (1802–1880) and Ludwig

Feuerbach (1804–1872). St., Karl Marx (1818–1883) (M.), and Friedrich Engels (1820–1895) (E.) are the first to recognize that principles of Georg W. F. Hegel's (1770–1831) (H.) philosophy of history will determine the development of the industrial age.

H.'s objection to Fichte had been that the latter's philosophy of absolute subjectivity, as H. stated, was self-destructive because its ideals "[. . .] become fiction and any reference to them appears as an unsubstantial game or as dependence on objects and superstition" (H., 1969 ff., Vol. 2, p. 391). M., E., and St. adopt H.'s insight that the subjective intention and the objective effect of acting are drifting apart: "[. . .] – Only this [. . .] must be stated, that immediate action may hide something more than intended by the actor's will and awareness [. . .], it becomes a recoil against him, which will shatter him" (H., 1969 ff., Vol. 12, p. 43). H.'s observation is transferred onto reality. M. and E. inherit his *objective idealism* insofar as, although materialistically "turning him inside out" (MEW, 1977, Vol. 23, p. 27) and deriving the antagonisms of modern society "[. . .] from the natural laws of capitalist production" (MEW, 1977, Vol. 23, p. 12), still they adopt H.'s three-levelled scheme. H.'s *double negation* is transferred onto the production process of mankind: the division of labor, they say, destroys the natural unity of primitive societies, leads to the separation of ruling class and dominated class, and results in humans being alienated from and dependent on their own products, which again must be negated (MEW, 1990, Vol. 3, p. 29 ff.). "From this there concludes that all struggles within the state, the struggle between democracy, aristocracy and monarchy, the fight for suffrage etc. etc. are nothing than illusionary ways of fighting the real fights among the different classes [. . .]" (ibid. p. 33). M. and E. idealize the proletariat, by understanding it as a (non-)class thrown out of any historical-societal ties which, by way of the proletarian world revolution, will bring salvation for all mankind (ibid. p. 60 f.). St., on the other hand, recognizes a mistake with interpreting H.'s philosophy in the sense of materialism, a mistake which is already due to H. himself. However, St. adopts H.'s concept of ownership (see H., 1969 ff., vol. 12, § 45, pp. 107), thus criticizing M.'s interpretation of the Hegelian philosophy of right: it is wrong, he states, to attack the antagonism of the classes "[. . .] by using weapons of blind fanaticism." "Among [the] weapons [against social dependence], however, there does not count pure negation [too]; this will only create negation and thus lead to fighting. That kind of truth, however, is not far away [. . .]. Here as well as when it comes to the development of the nature of the general goods anyway, the concept of the general dissolves into that of the individual, and this side of it is indeed nothing else than personal ownership [. . .]" (Stein 1842, p. 26). A kind of ownership must be found, he states, "[. . .] which will maintain personal possession yet not make it an absolute obstacle for the complete development of personality" (ibid. p. 26 f.). The work building on these premises connects the concept of the state to the foundations of an egalitarian society of work. In terms of history, it pursues the development of rational state administration as well as the emancipation of the state from feudal-hierarchical ties, as a result recognizing universal suffrage and general tax liability as the foundation of a solid funding of the state and systematic finance as well as individual liberty. Thus, St. paves the way toward social reform and the modern social state.

Theory of Society and Theory of the State and Economics

The background of the *royalty of social reform* explained in *Geschichte der sozialen Bewegung* (1850) is formed by the reception of Aristotelian, Kantian, and Hegelian philosophy of the state applied to the industrial age: St. combines insights from Aristotle's Politics with the awareness of liberty of German Idealism as well as with ideas by Saint-Simon and the French "Utopians." Royalty, he says, has to defend the welfare of the workers against the interests of the capital. In a constitutional monarchy, indeed the King is the ruler, but he does not govern. Being the representative of the conception of the state, he protects the common welfare against societal interests (see Stein 1869: I, 1 p. 71 f., 139 f., 149 ff.). The theory of mutual interest, which is connected to the

royalty of social reform, demonstrates that a free social order based on the legal equality of all individuals is possible: "labor and capital, which by their innermost nature are mutually creating and conditioning, thus pursue a *common interest*" (Stein 1959, Vol. III, p. 203). At the same time, it provides evidence that even a free society requires a "free, working state" enforcing the common good against the combined lobbying of gain and protecting the liberty of the individual (see Stein: 1850, Vol. 3., p. 204 f.).

In 1852 and 1856 the first two volumes of his system of political science are published: *System der Statistik, der Populationistik und der Volkswirtschaftslehre* and the first part a doctrine of society, conceived as a two-parter. Instead of the second part of the doctrine of society announced in the first one, the *Lehrbuch der Volkswirtschaft* is published in 1858 (third edition *Lehrbuch der Nationalökonomie* 1887), the *Lehrbuch der Finanzwissenschaft* in 1860 (fifth edition 1885/1886 in four volumes), two editions of his eight-volume *Verwaltungslehre* are published between 1865 and 1884 (second edition, 10 volumes) and three editions of his *Handbuch der Verwaltungslehre* follow between 1870 and 1888. If the *System der Staatswissenschaft* still understands itself as *positive philosophy*, by providing empirical evidence for philosophical statements, the *Lehrbuch der Nationalökonomie* marks a different starting point: philosophical deduction and empirical induction become mutually completing and legitimate methods of political science. The *Finanzwissenschaft*, following in 1860, combines the concept of the state and doctrine of systems of government from *Geschichte der sozialen Bewegung* with the foundations of the egalitarian society of work. The textbooks on national and political economy mark the completion of the theory of society; finance and administration of economy (economic policy), on the other hand, investigate the limits of the power of the state. Thus, the *Lehrbuch der Finanzwissenschaft* marks the beginning of public administration which marks the completion of political science whose ideals are philosophy-based but which is actually based on the social sciences. St.'s concept of the state demonstrates that the state "[. . .] is the ruler according to its concept, [. . .] in reality [it is] the one who *obeys*" (Stein 1850 (1959): Vol. I, p. 51). It combines the liberal principle "[. . .] that the valid order of the state's life, and thus also that of administration, can only be determined according to the law which is made by the organized will of the state" (Stein 1866: Theil 2, p. 21) with the social task that "[. . .] the individual climbs by its own, [. . .] from the lower class to the higher one [. . .]" (Stein 1876, p. 140). In a complex world, he states, the ideal of the *social state* can be normed only as a general principle or task, according to which not only the constitution but predominantly the administration has to take care for individual liberty, social climbing, and social balance.

Liberal Principle, Social Task, and Education

St.'s *social state* is the heir to the liberal state under the rule of law, to socialist solidarity, and to Christian charity. As it is accountable to the democratic principle appearing in society and state as right to participation and as negative liberty of the individual, the social state has to cope with social inequality resulting from the economic cycle. Apart from its social tasks, St. says, the social administration also covers the educational and the health system in the wider sense "[. . .] where the development of the individual capability as the basis for climbing from the lower class to the higher one is the task of administration" (Stein 1866, p. 59), which is why "[. . .] the administration of the interior [. . .] [is] completely unlimited when it comes to its social tasks" (Stein 1885: Pt. I, p. 156). This, St. states, is also its danger: if finance does not determine the limits of the state's social spending and if administration costs more "[. . .] than it is worth, [. . .] individual production, due to paying for a state whose administration is non-productive, will lose its capital-generating power and then decline itself" (ibid. p. 26). Thus, an actually social state is based on the subsidiarity of *administration of community services* (see Stein 1866, p. 59). By the textbooks on

national economy and finance as well as by his doctrine of administration and his educational system, St. intends to support the accumulation of capital by the individual in the widest sense, i.e., also his/her human capital. St. demands appropriate accommodation, education, and climbing possibilities for the working class. By his *Verwaltungslehre* and the *Handbuch der Verwaltungslehre*, he furthermore consigns concepts for social-medical and building regulations which today look surprisingly up to date: against the hygienic dangers connected to poverty, he develops suggestions in both works "[. . .] which are most of all based on the principle that the demands for gain and production come second to the health interests of the working class" (see Stein 1888: Pt. 2, p. 95 ff).

As a result of dealing with Saint-Simon and his school, Lorenz von Stein had developed the opinions his concept of education and his educational system are based on, that is, that education toward liberty must support the individual's independence, that this requires legal equality, and that the latter is only possible in the context of a public educational system which provides each individual with educational opportunities and thus inevitably becomes a social educational system (see Koslowski 2017):

1. The entire educational system must be legally organized, thus providing for both democratic legitimation and professionalism.
2. Popular education and elementary schooling must be guaranteed as tasks of the administration of community services. In an egalitarian society of work, anybody must be granted opportunities. "But how crucial these things are as such is something which does not need any further explanation for a thinking person" (Stein 1884, p. 12).
3. Free choice of employment guaranteed by the state requires employment offers which are accessible for everybody. An appropriate educational system requires each individual's self-education, is based on personal initiative, and is in the service of general human education, independently of status or class.
4. By emancipating the state citizenry politically and socially from its ties to the authoritarian state, general or *liberal education* comes to the aid of the system of private and state educational institutions. It is based on the "[. . .] idea of the equal and common purpose of all people, and only where it has been accepted it will complete its own development" (Stein 1888: Theil II, p. 202).
5. Thus, a free press is the precondition for individual liberty and general education as well as for art and science (see ibid. p. 207).

Reception and Impact

St.'s at first sight idealistic method anticipates many elements of *Christian social ethics*, of *ordoliberalism*, and of the *social market economy*. Indirectly, it influences both the *historical* and the *Austrian School of National Economy*: if the former follows St.'s historical approach, representatives of the latter refer to his systematic works. Nevertheless, in Germany, in the twentieth century, he has at first little impact, and for Austria there is only indirect evidence, from students such as Eugen von Philippovich von Philippsberg (1858–1917) and Karl Theodor Inama von Sternegg (1843–1908). With the appearance of the legal and economic problems of today's social states, St. becomes widely known as a theoretician and critic of the structural deficits of the *productive state*.

In East Asia St.'s work has lasting impact since the Meiji Constitution (1889) and Hirobimo Ito (Japanese Prime Minister 1889–1909), at first in Japan, and then, thanks to Itos's translator, Nagao Ariga (1860–1921), also in China, Taiwan, and Bhutan. After the Japanese occupation of Korea (1910–1945), Taiwan (1895–1945), and Manchuria (1931–1945), with the Chinese Civil War and the Communist takeover, St.'s reception comes to an end there. In 1987–1997 the transition from Kuomintang rule to presidential democracy in Taiwan happens while referring to St.'s theory of revolution and theory of society (see Jang/Hsu/Koslowski 2014). The Constitution of Bhutan, passed in 2008, is also inspired by St.'s concept of culture and constitution (Kakutani 2009, p. 490 ff).

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Stirner, Max

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> People are at pains to distinguish *law* from arbitrary *orders* [*Befehl*], from an ordinance: the former comes from a duly entitled authority. But a law over human action (ethical law, state law, etc.) is always a *declaration of will*, and so an order. (Stirner 1995: 174)

So said Max Stirner (1806–1856), one of the most radical philosophers of the nineteenth century. Born Johann Kaspar Schmidt in Bayreuth in 1806, Stirner (a pseudonym that meant "high-brow") became one of the most notorious members of the Young Hegelian circle of intellectuals. His contemporaries included Karl Marx, Bruno Bauer, and Ludwig Feuerbach. While he lived and died in relative obscurity, his savage critique of humanism, liberalism, idealism, Christianity, and, indeed, the entire Western philosophical tradition had a significant impact on intellectual debates in his own time and, after his death, influenced philosophical and political and cultural traditions and movements as diverse as individualist anarchism, existentialism, avant-garde art, and even twentieth-century postmodernism (see Newman 2001, 2002, 2003). Stirner's main work, *The Ego and Its Own* (*Der Einzige un sein Eigentum*), published in 1845, has been described as the "most revolutionary book ever written" (Hunecker 1909: 350) and with good reason. His assault on our social and political institutions and their moral foundations makes him an unrelenting opponent of the very principle of legal and political authority and its claims on our obedience. "We too, the state and I, are enemies," declares the proponent of egoism (Stirner 1995: 161).

Stirner's philosophy of egoism refuses any sense of obligation, whether moral or political, to external institutions, including to the law. Like the philosophical anarchist, the egoist might do as the law directs him for prudential reasons, or because it suits his or her interests, but never simply because it is the law (see Newman 2012). As is clear from the passage quoted at the start, the law is essentially indistinguishable from command or arbitrary order and therefore carries no more moral weight or binding obligation than force. In particular, Stirner is critical of the assumption made by liberals and republicans, like his contemporary, Bauer, that the distinction between law and command is the condition of freedom – in other words, that what makes one free is living under the rule of law. If the law is nothing but a disguised form of will – after all, the law is made and enforced by individuals – then, from Stirner's perspective, it is as much a

violation of another individual's freedom as an arbitrary command.

Stirner strips away the moral bases upon which our legal and political obligation has hitherto been invoked. He rejects both natural law and positive law accounts of obligation. Moreover, the very notion of morality itself is, for Stirner, an illusion, a "spook," a kind of hangover from Christianity. Indeed, in his critique of humanism and secularism, Stirner shows that Feuerbach's project of replacing God with Man, and divine qualities with human qualities, simply reinvents God in the guise of Man and reproduces religion in the form of an idealization of humanity. The same structure of religious authority persists, but it is now the universal specter of Man we obey, not God: "'Man' is the God of today, and fear of man has taken the place of the old fear of God." (Stirner: 165). The modern individual, the one who is supposedly liberated from religious superstition and obscurantism and who can supposedly make free and rational decisions about his own life, is, on the contrary, surrounded by new kinds of moral ideals, ideological specters that alienate and oppress the individual as much as religion did: "Man, your head is haunted... You imagine great things, and depict to yourself a whole world of gods that has an existence for you, a spirit-realm to which you suppose yourself to be called, an ideal that beckons to you." (Stirner: 43).

Political institutions, particularly the modern liberal state, are one such ideal which calls to us; we are enjoined, indeed compelled, to become part of this community and to offer it our unconditional obedience and devotion. The liberal state is, according to Stirner, the new altar upon which the individual is sacrificed. While the liberal state is based on the rule of law, and rights that supposedly guarantee our freedom, thus distinguishing itself from the absolutist regimes it replaced, this only entails a more complete subordination of the individual within this political framework. The freedom of the individual under the modern liberal state becomes a mark of a more profound political subjection – now the individual is required to obey in the name of his or her own freedom. Thus, for Stirner: "Political liberty means that the polis, the state is free... It does not mean my liberty, but the liberty of a power that rules and subjugates me." (96) The state and its laws become the new God that we must obey. Moreover, liberal notions of rights and equality only subject the individual to abstractions rather than enhancing his or her freedom. Equality of rights means only that "the state has no regard for my person, that to it I, like every other, am only a man..." (93). Rights are granted, through the state, to man, to a general abstraction, rather than to the individual. There is nothing wrong with equality as such, according to Stirner; it is just that in its embodiment in the liberal state, the individual is reduced to a fictional commonality that takes an institutionalized form.

A similar critique of obligation applies equally, in Stirner's account, to socialism, which removes property as the basis of the individual's autonomy, and what he calls "humane liberalism" – something like the republicanism espoused by Bauer – in which the individual is fully incorporated into the idea of a universal human community in which his or her uniqueness and difference are denied. The problem lies in the very idea of community. This thing we call "society" is an imaginary body, a specter that has no real substance, but which nevertheless demands our ongoing sacrifice: "Accordingly the united society may indeed have bodies at its service, but no one body of its own. Like the "nation" of the politicians, it will turn out to be nothing but a 'spirit', its body only semblance" (Stirner: 105).

The real problem here is a kind of voluntary servitude (see also Newman 2011: 189–208) in which the law does not so much coerce us into submission, but rather becomes internalized within us, so that we obey freely and unquestioningly because we think it is the right thing to do. Just as we believed in divine law in the time of religion, today we believe in the laws of society and the state. This is an aspect of a kind of legal and political Protestantism in which, through secularization and the discourse of humanism, we internalize what was once external. As Stirner says: "Here at last the domination of the law is for the first time complete. 'Not I live, but the law lives in me.' Thus I have really come so far to be only the 'vessel of its glory" (50).

If nature, religion, morality, and community can no longer serve as a convincing basis for legal and political obligation, is there anything to which the individual egoist might want to commit him or herself? The only way out of the problem of voluntary servitude, our self-abandonment to the "fixed idea" – which is an ethical problem for Stirner – is to affirm the self as the only thing to which one might have any reasonable obligation. However the affirmation of the self in opposition to the law has to involve something more than disobedience, or even criminality, something that Stirner occasionally seems to advocate. Rather, the genuine egoist considers the law unworthy of even disobeying or breaking (see Stirner: 180–181). In other words, transgressing something often affirms the authority of that which one transgresses, the sacredness of the line one chooses to cross. Rather we should adopt an attitude of *indifference* to the law – neither obeying it nor deliberately disobeying it but, rather, investing ourselves with value instead.

Stirner's notion of "ownness" is the ethical basis for this radical mode of self-affirmation (see Newman 2017). Unlike freedom, which is a limited concept determined by law and institutional constraints, ownness implies a radical form of self-ownership or autonomy in which the self, and its capacity, becomes the only basis for human action. Unlike freedom, a universal moral idea – so often an illusion concealing particular forms of domination (see Stirner: 145) – ownness is defined by the individual for him or herself and does not confirm to any specific ideal of freedom: "Ownness, on the contrary, is my whole being and existence, it is I myself. I am free from what I am *rid* of, owner of what I have in my *power* or what I *control*. My *own* I am at all times and under all circumstances, if I know how to have myself and do not throw myself away on others" (Stirner: 143).

"Knowing how to have myself" is key to understanding Stirner's project of egoism as an alternative to our usual obligation to external norms and institutions like law. The self is our only ontological reality, the only thing to which we might owe any kind of ethical obligation, and is thus the basis upon which we enter into social relations. However, while this might sound like a crude form of selfish individualism, or worse, a kind of self-enclosed solipsism, we should understand the ego (*der einzige* – better translated as "the unique") as a kind of void or "nothingness," out of which we are always creating and recreating ourselves, rather than being defined by a fixed identity or set of properties. When Stirner declares "I set my affair on nothing," he means not only a refusal of all external obligations – aside from those freely entered into by the individual "owner" – but, more radically, the possibility of an entirely new kind of relationship with the world.

This might involve, Stirner suggests, different kinds of autonomous associations with others, no longer defined by the state, community, or society and no longer determined by legal obedience. One such example is the notion of the "union of egoists" (*Verein von Egoisten*), a kind of fluid, voluntary association of "owners" which one is free to join or leave as one chooses and which imposes no binding obligation upon its members. Unlike the state, which demands the absolute obedience and sacrifice of the individual, and unlike society, which is a "fixed idea," a dead concept over which one has no power, the union is "my own creation, my creature, not sacred, not a spiritual power above my spirit, as little as any association of whatever sort" (Stirner: 273). The union might therefore be seen as an alternative form of commonality and an alternative set of relations to the state and its laws.

Stirner's thinking has always been controversial, in his own time and after his death. He has been dismissed outright by many, or regarded as a nihilist, (see Paterson 1971), a psychological egoist (Jenkins 2009), or as a propagator of a crude form of possessive individualism. Marx and Engels devoted the majority of their critique of German idealist philosophy in *The German Ideology* to an attack on "Saint Max," who, they claim, turned the ego into the ultimate ideal or "spook" and who believed that the state could be wished away through a mere act of will (see Marx and Engels 1932). None of these characterizations are correct or fair. Stirner is a thinker who eludes easy classification; perhaps some form of individualist anarchism comes closest, but even this is not

entirely adequate. But what I have attempted to show in this entry is his relevance and importance to questions of legal authority and obligation. In demolishing the accepted foundations for legal and political authority, and in pointing toward alternative ways of seeing ourselves and our relations with others, Stirner might come to be seen as making an important contribution to critical legal studies.[1] At the very least, he throws down a challenge to legal philosophers and theorists to come up with better reasons for obeying the law than they have thus far done.

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[1] More recent scholarship in this area has recognized the importance of anarchism to a critical legal approach (e.g., Chartier 2012; Loizidou 2019; see also Newman 2012).

Strauss, Leo

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Introduction

Leo Strauss was a German Jewish political philosopher born in Kirchain, Rhineland, in 1899. He graduated in 1921 in Marburg with a dissertation under the tutorship of Ernst Cassirer, and the following year he attended, like many other young people of his generation, the Husserl and Heidegger lectures in Freiburg. After immigrating to the United States in 1937, he taught at the New School for Social Research and, from 1949 until 1967, at the University of Chicago. After his retirement, he lectured for a year at Claremont's College in California, and from 1969 until his death in 1973 he was a Research Fellow at St John's College in Annapolis.

Strauss's work is mainly organized in the form of commentaries of classical, medieval, and modern thinkers, ranging from Plato, Xenophon, and Lucretius to Nietzsche and Heidegger, and passing through Al-Farabi, Maimonide and Averroes, Machiavelli, Spinoza, Hobbes, Locke, or Rousseau. We may apply to his own work what he said about Farabi, that is, that he takes shelter in the "immunity of the commentator" (Strauss 1945) to convey his highly original thinking on the history of political philosophy, and on the philosophical-political problems of his time, which is still very much ours.

The Quarrel of the Ancients and the Moderns

To say that Strauss was a political philosopher is not just a statement of fact. The question "What is political philosophy?" not only gives its name to one of his best known writings but is a red thread running through all his work. Through it, it is possible to retrace one of the central nuclei of his

thought, which is the call for the reopening of the "Quarrel of the Ancients and the Moderns," a call sustained by the assertion that modernity, or the modern political-philosophical thought on which it builds its certainties, far from refuting classical thought, has simply dismissed it derisively and has dogmatically decreed its own victory.

The modern rejection of the postulation of an ultimate goal of human life inscribed in a finality that transcends it – be it of a theological or teleological order – has led to the assertion that the differences between individuals, and of collective forms of life, cannot be the object of well-founded judgment, and can only be judged on the basis of arbitrary preferences. Our choices have no other support than these preferences – individual, cultural, epochal – and their only possible hierarchization lies in the intensity of the action of deciding. That is, modern thought, which had rejected from the outset any hierarchization of forms of life based on a relation with a dimension beyond the community – be it theological or teleological – and had made faith in universal reason the sole basis for its affirmation of the progress of the human race, which would lead to the realization of a perfectly just community of free and equal individuals by nature, has led, with the crisis of such faith in reason, to the relativism and historicism of the twentieth century, and its horrendous expression in the death camps.

However, according to Strauss, the fact that the question of the standard of our own society is not alien to us, the fact that we understand what we mean by the distinction between the legal and the just, indicates that, despite the careless affirmation of relativism, the question of the just is not foreign to us. And the mere fact of raising the question of what is just refers us to the question of the standard by which we measure justice or injustice.

This is wherein lies, for Strauss, the great misunderstanding of modern thought: as stated above, far from refuting classical thought, it has not only dogmatically affirmed the absence of standards, and thus its own superiority, but has also misunderstood the classical thought whose defeat it has proclaimed. The reopening of the quarrel between Ancients and Moderns will consist, for our author, to a large extent in the restitution of what he considers the true classical thought, in particular, the Socratic-Platonic tradition and its continuation in medieval philosophy, and in the demonstration of the erroneous reading that the moderns have made of classical philosophy – which they understand as a dogmatic affirmation of an undemonstrated and non-demonstrable teleology, in which a no less dogmatic affirmation of natural right is grounded.

In Strauss' view, the classical postulation of natural right – that is, of what is just by nature – does not bear the status of an uncontroversial philosophical affirmation, but of a truth necessary for the existence of the city. Philosophy is not the possession of, but rather the quest for, truth, and in this, it challenges theology for its certainty about the right order of things, and about the ultimate purpose of human life. However, every city, in order to exist in a firm and stable way, needs to believe in its values, and it is the duty of the philosopher to provide the foundations of these values. And insofar as philosophy is not the possession of the ultimate foundations of truth, and with it, of the good and the just, but the quest for truth, it is its task to proceed in two registers, one exoteric, destined to provide the city with the moral certainties it needs to sustain itself in a stable way in its existence, and the other esoteric, directed to those who are in a position to transcend the values of the city, in search of the truth about the Whole. Thus, moral virtue, proper to the good citizen, can be distinguished from the highest virtue, which is also the highest pleasure and which transcends the moral virtues of the city, of those who devote their lives to the search for knowledge. Philosophy must be political, in a twofold sense: by its object, that is, its interest in the matters of the city, and by its function, that is, providing the city with firm and incontrovertible values, even if the philosopher knows that it is not in his power to prove them conclusively.

What Is Political Philosophy?

The assertion that political philosophy is political by its object and by its function brings us to the heart of the Straussian view of the esoteric

character of classical thought, and with it, of the gulf between classical and modern thought.

Political philosophy is political by its object because it is interested in the affairs of the city: it is only from the opinions of the city, from what is said, that the philosopher will be able to rise to a higher understanding of what is right and good. As reflected in the Socratic dialogues, the knowledge of what the best city should be is a dialectical ascent from opinion. But it is, at the same time, political in its function, for the philosopher, who in this ascent knows that he is questioning the moral values on which the city is based, must at the same time justify his existence before it, and avoid appearing as a bad citizen, who challenges and subverts its values among the young people he gathers around him. If the object of philosophy, as political philosophy, is to be concerned with the moral values of the city – the assertion of the good and the just on which the city is sustained – and to transcend them by a (in?) quest for the knowledge of what is good and just by nature (which the philosopher knows he could only attain if he could finally access the knowledge of the heterogeneous Wholeness of nature), the political function of philosophy is, instead, to uphold before the city the moral virtues as incontrovertible virtues – as if the philosopher possessed, indeed, the knowledge of what is good and just by nature. And this, for the sake of the city, to which the philosopher owes the material and social conditions of his existence, but also, for the sake of his own security – to avoid being persecuted by it.

Conclusion

Thus, in the eyes of Strauss, in stating that the justice of the city rests on no supralegal foundations, or that the Ancients went about founding imaginary cities, Machiavelli said nothing that the classics did not already know. Indeed, for classical thought, as our author reads it, natural right cannot be demonstrated by the philosopher, and, inasmuch as perfect knowledge is not in his reach, the perfect city – the perfectly just – is unattainable. But by expressing aloud what the classical philosophers understood should be hidden from the city, Machiavelli introduced an abysmal break in the understanding of human affairs, which would be radicalized by his successors: if the modern philosopher conceals his thought in the folds of esoteric writing, it will no longer be out of responsibility toward the city, which cannot exist properly without certainties, but only to avoid persecution.

For modern philosophy, there is no natural hierarchy or ineradicable inequality between men: the modern dream is that there will be a time when the advancement of science will lead to the satisfaction of needs, and the progress of education will make it possible for the truths carefully hidden by classical thought regarding the indemonstrable character of the values of the city to be assumed collectively. Strauss rejected this possibility, and, in accordance with this, he adopted himself an esoteric writing style that gave rise to markedly contrasting interpretations of his work: Jewish thinker for some, cultivator of classical natural law for others, prudent Nietzschean or ideologist of the new American right for yet others. In any event, however we understand him, it seems incontrovertible that for Strauss that modern dream, if it had not died before, has definitely died in the concentration camps: the catastrophe of Nazism is, in his eyes, the outcome of relativism and historicism, the offspring of the illusion, and the subsequent crisis, of faith in universal reason, to which modernity has succumbed.

Cross-References

► Machiavelli, Niccolò
► Plato

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Structural Injustice

► Justice: Structural Injustice

Structuralist Semiotics of Law

► Semiotics of Law: Structuralist

Stuchka, Pyotr Ivanovich

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Pyotr Ivanovich Stuchka (Pēteris Stučka) was born on 26 July 1865 in a peasant family in a village near to Riga. In 1888 he graduated from the law faculty of Saint Petersburg University and began working as an assistant attorney in Riga, specializing in criminal law. In 1903, Stuchka joins the Bolshevik party and actively engages into the revolutionary activities. After the 1917 Revolution, he is one of the leading Soviet lawyers. Stuchka becomes law professor at the Moscow University, and he is the first minister of justice of the Bolshevik government. From 1923 until his death, he is the chairman of the Supreme Court of the Russian Soviet Federal Socialist Republic (the RSFSR). Stuchka dies on 25 January 1932.

Stuchka's ideas did not remain on a purely theoretical level but triggered a series of controversial reforms. Among these reforms one can mention the abolishment of the laws of the Imperial Russia to the extent they do not fit the revolutionary legal consciousness and the elimination of the ancient court system (Decree No.1 on the Court, 30 January 1918). These reforms were founded on the sociological conception which implied that law passively reflects social relations and only fixes the factually grown social order. In Stuchka's view, there are two sets of legal rules: those setting out these factual relations and those that build ideological justifications to change these relations. The former are proper to the Soviet law, while the latter are a hallmark of bourgeois law that endorses legalism and "legal fetishism." In Stuchka's views, soviet judges shall decide cases basing on their revolutionary legal consciousness and do not need to take care of the laws outpaced by the social development and lagging behind it. He wrote: "the law establishes the landmarks that define the limits of the legal order. . ., and theoretically the law provides the basic principle of the system, and all the rest is to be done by the proletarian court" (Stuchka P.I., *Revolutsionnaia rol' prava i gosudarstva*, 109).

In the first decade of the Soviet rule, Pashukanis and other supporters of the Marx's idea of "withering away the law" argued that the socialism leaves no room for genuine law after the proletarian revolution, so that in the Soviet Russia only vestiges of the old bourgeois law can remain. Stuchka took the issue with this argumentation and contended that the Soviet law defends the class interest of toilers and therefore has absolutely different nature than bourgeois law. On this theoretical basis, Stuchka develops the conception of "revolutionary legality" which refers to "the legal order deemed to be expedient by the supreme organs of the proletarian dictatorship" (Ibid., 323). It is incommensurable with the bourgeois legality understood as a self-limitation of the state authorities. The "revolutionary legality" requires that administration of justice is centralized and remains under the strong ideological control of the party and the state. This legality, in Stuchka's opinion, is not about legal norms and their observance. He was persuaded that toilers do not conceive their interest in terms of legal norms, especially under the condition of class struggle. In the spirit of sociological jurisprudence, he argued that revolutionary changes undermine the established social order and make the law obsolete. In his critical appraisal of Stuchka's legal theory, Kelsen aptly characterized it as one of the versions of sociological jurisprudence variegated with class ideology and economical expediency (see Hans Kelsen, *The Communist Theory of Law*, London, 1955, 64–66).

Stuchka advocated the idea that main component of law is class interest protected by the state coercion. According to his definition: "law is a system or an order of legal relations that corresponds to interests of the governing class and that is protected by the organized force of this class" (Stuchka P.I., *Revolutsionnaia rol' prava i gosudarstva*, Moscow, 1921, 13). For Stuchka, the legal coincides with the class interest. In order to become legally binding, a social relation must correspond to the class interest, and thereby it obtains the protection from the organized power of the state becoming a legal norm (Stuchka P.I., *Izbrannye proizvedeniia po marksistsko-leninskoi teorii prava*, Riga, 1964, 280–281). That is why "the revolutionary class struggle focuses on the struggle around law, for law and in the name of our class law" (Stuchka P.I., Marksistskoe ponimanie prava, 13–14 *Kommunisticheskaia revolutsiia* (1922), 135).

Under the pression of the new formalist legal ideologies developed in the late 1920s, Stuchka had to partly reconsider his anti-legalist views and acknowledged the importance of posited legal norms for regulation. In the 1931 paper under the telling title "My Journey and My Mistakes" (Stuchka P.I. "Moi put' i moi oshibki", 5–6 *Sovetskoe gosudarstvo i revoliutsiia prava* (1931), 67–97), Stuchka admitted that he failed to elaborate a "more balanced concept of law that would underscore the intellectual participation of people in establishing legal order." In this last paper, he was likely to abandon the idea of legal normativity as stemming immediately from

human consciousness and social practice. But this reconceptualization remained unaccomplished because of Stuchka's death in January 1932. After Stuchka's death, his legacy underwent a critical reappraisal, and his anti-legalist views were condemned by Vyshinsky as a part of the Trotskyist counterrevolutionary propaganda. However, Stuchka's theory gained the upper hand at such crucial points as the conception of law (state coercion and class interest) and the justification of Soviet law in its integrity and in this sense prefigured the development of Soviet theory of state and law for years to come.

The main books of Stuchka are *Revolyutsionnaya rol' prava i gosudarstva* [*The Revolutionary Role of Law and State*], Moscow, 1924; *Uchenie o gosudarstve proletariata i krestianstva i ego Konstitutsii SSSR i RSFSR* [*The Teaching about the State of Proletariat and Peasantry, and About Their Constitutions of the USSR and the RSFSR*], Moscow, 1926; and *Kurs sovetskogo grazhdanskogo prava* [*Textbook of the Soviet Civil Law*], Moscow, 1928–1931, in three volumes. Stuchka's principal articles and presentations, along with his book *The Revolutionary Role of the Law and State*, are collected in *Izbrannye proizvedeniia po marksistsko-leninskoi teorii prava* [*Selected Writings on Marxist-Leninist Theory of Law*], ed. by G.I. Kliawa, Riga, 1964. A part of this collection has been translated in English and published by Robert Sharlet, Peter B. Maggs, and Piers Beirne in 1988: P.I. Stuchka, *Selected Writings on Soviet Law and Marxism*. Armonk, N.Y.: M.E. Sharpe, 1988.

Suárez, Francisco

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Introduction

Francisco Suárez (1548–1617) was born in Granada, the son of a wealthy Granadian family and a nephew of Francisco de Toledo, the future Jesuit cardinal. He was the second of eight brothers and sisters, from which six devoted themselves to religion. He went to Salamanca to study Canon Law in 1561, entered the Jesuit Order in 1564, and at that year and until 1570 studied at the same university Philosophy for 2 years and Theology for other 4 years. In Salamanca, he was pupil of some members of the second generation of the so-called "School of Salamanca" founded by Francisco de Vitoria, among them the Dominican Mancio del Corpus Christi, a direct disciple of Vitoria, and the Augustinian Francisco de Guevara. The members of the school, Vitoria included, although declared followers of Aquinas, were strongly influenced either by nonorthodox Thomist interpreters (such as Cajetan) or by Scotistic or even nominalist tendencies (Prieto López 2013).

Suárez devoted his whole life to his teaching activity: from 1571 to 1580 in different colleges of the order in Segovia, Ávila, and Valladolid, at the Collegio Romano in Rome from 1580 to 1585, being colleague of Bellarmine and Cristobal Clavius, at the University of Alcalá from 1585 to 1593, and from 1597 to 1615 at the University of Coimbra. He died 2 years later in Lisbon, as an all over Europe famous catholic thinker.

Suárez wrote on metaphysics his huge treatise *Metaphysical Disputations* (*Disputationes Metaphysicae*), commentaries to Aristotle, the most important of them the *De Anima,* systematic theological works commenting most parts of the *Summa Theologiae* of Saint Thomas, and legal and political treatises, a total of 22 works (Schwartz 2012b). The most complete edition of his works is the one edited by L. Vivés in Paris, 1856–1878 in 26 volumes, plus 2 of indexes. For his analytical precision and systematic approaches to philosophical questions, Heidegger considered him as a philosopher even superior to Saint Thomas (Heidegger 1983: 78).

As a thinker, Suárez is above all a conscious catholic theologian that makes use of philosophy as a tool to help demonstrate the truths of faith, an attitude that in no way hinders the originality, strength, and acuteness of his thought. As a member of the Jesuit order, he declares himself in many places of his works a sincere follower of Saint

Thomas. Notwithstanding this declarations, Suárez was considered by fellow members of his order (quite properly indeed), as departing from him in many respects, inaugurating an original way of approaching philosophical and theological questions that already in 1597 was known as *Suarismo* (Scorraille 2005, vol. 1: 310).

Suarezian legal and political thought is mainly incorporated in his *A Treatise on Laws and God the Lawgiver* (*De legibus ac Deo legislatore, DL,* 1612, Vivés, vols. 5 and 6), and *A Defence of the Catholic and Apostolic Faith in refutation of the errors of the Anglican sect* (*Defensio fidei catholicae et apostolicae adversus anglicanae sectae errorse*, *DFC,* 1613, Vivés, 24). The last, written at the request of Pope Paul the Fifth, triggered a hot debate among political thinkers and politicians of his time.

Human Agency

Suarezian moral philosophy presupposes a Christian concept of the human being, according to which human beings are truly free moral agents. Suárez holds on this point a genuine "libertarian" account of freedom in which the will is the last determinant of the free action, as far as the intellect is not free in judging about reality (Penner 2013: 31).

Law and Natural Law

In his moral acting, human beings are subdued to the natural moral law or law of nature, which for its part is a participation of the eternal divine law and a declaration of the Will of God, knowable by the light of right reason, as far as it is written on men's hearts (*DL*, 2, 5, 10).

God is the true legislator of the law of nature as far as otherwise it could not be a real law, according to the suarezian definition of it as a "just and stable precept sufficiently promulgated" (*DL*, 1, 12, 5). Suárez holds this opinion against a tradition beginning at least with Gregorius Ariminensis in the fourteenth century, and upheld at his time by his order friar Gabriel Vázquez, according to which the formal constitutive of the moral law was the mere rational nature of man showing which actions are convenient or inconvenient with it. Such mere convenience lacks, according to Suárez, the necessary compulsory dimension of the law, without which it cannot really impose any obligation (*DL*, 2, 5, 5). In this sense, Suárez defends a "Force model" of moral obligation instead of a mere "Recommendation model" (Pink 2012: 180–188). Because of this, Suárez has been accused of being a voluntarist many times, quite unjustly, as far as God commands or prohibits actions that are by themselves convenient or inconvenient with human nature (and in this sense not in an arbitrary way), but He truly *commands*, not just recommends (Bach et al. 2017: 8–10).

Origin and Legitimation of Political Power

Political philosophy of Suárez relies on the presupposition that human being is a social being that naturally lives inside social groups. Family is the first and basic of these groups, an "imperfect community" consisting in the unity between husband and wife, parents and their children, and, if it were the case, among lords and servants (*DL,* 3, 1, 3). As imperfect community, the family cannot afford to all the needs of its members. Because of this, men living without supra-familiar mutual bonds unite themselves through a "common consent" in a moral community, a "political body" or political community, in order to search the common good of all the so united (*DL,* 3, 1, 3, and 3, 2, 4).

The government of the thus freely constituted political community demands the existence of a "supreme magistrate" charged with the obligation of pursuing the common good, for which purpose he is endowed with a "legislative power" that springs from the political community once it is constituted (*DL* 3, 1, 5). This power, as far as it includes even the possibility of ruling death penalties upon the members of the community (a power privative of God as Lord of life), derives immediately from men constituting the political community (*immediate ab hominibus*), but from God mediately (*mediate a Deo*) as the author of

human nature, men merely "disposing the matter" or subject of the power (*DL*, 3, 3, 2 and 3, 3, 3).

The concrete political system and persons actually endowed with the legislative power depends on the election of the political community, which delegates its own power through a contract or "almost a contract" *(contractu vel quasi contractu*), on the ruler (*DFC,* 3, 2, 17 and 3, 2, 19).

Faithful to Aristotelian tradition, Suárez admits the possibility of different legitimate forms of government: monarchy, aristocracy, democracy, or a mixed form of them (*DL*, 3, 4, 1, *DFC* 3, 2, 4), although he considers (in times of a pervasive absolutism), that democracy is the "almost natural" (*quasi naturalis*) form of government, as far as political or legislative power resides naturally on the whole political community before any positive disposition of it by the same community (*DFC*, 3, 2, 8).

Theory of Rights and Private Property

Relying specially on Joannes Driedo and Joannes Gerson, Suárez has a concept of what later will be referred to as subjective right as a "certain moral faculty" that anyone has on things that are his or on things that are owed to him (*DL*, 1, 2, 5 and 2, 17 2). Its ontological statute is one of a "moral relation" (*moralis habitudo*) to any good (*A work on the virtue of religion and religious life*, *Opus de virtute et statu religionis, DVSR,* -Vivés, 13-15-, 8, 5, 3). The subjective right is also a moral or an "almost moral property" of the person (*DL*, 3, 3, 7), which in contradistinction with mere physical properties, can be modified by a human decision, even if it originally derives from human nature (as for example liberty, from which a person can be deprived for different justified reasons).

Considering its practical utility and against tradition, Suárez allows the right to private property even before the fall of Adam (*A Treatise on the work of the six days*, *Tractatus De opere sex dierum*, *DOSD* -Vivés, 3-, 5, 7, 17-18, *DL*, 2, 14, 13). Being all material goods allocated by God for all humans beings, the moral rationale for the appropriation of the common stock is the transfer of the property on one's own actions to any good obtained through them, as far as on the thing appropriated "morally remains the action through which it has been obtained" (*DVSR*, 8, 5, 38).

Theory of Just War and Tyrannicide

Suárez addresses the question of just war in the thirteenth disputation *On war (De bello)* of his posthumous treatise *A work on the three theological virtues faith, hope and charity* (*Opus de triplici virtute theologica, fide, spe et charitate*, 1621, Vivés, 12). Delivered as a lesson in the *Collegio Romano* in 1584 (Pereña Vicente 1954: vol. 1: 10), Suárez expounds in *De bello* a systematic theory departing from the q. 40 of the II-II of Saint Thomas, and relying strongly on the commentaries on it of Cajetan and the *De iure belli* of Vitoria.

With tradition, Suárez distinguishes between *defensive* and *offensive* (or "aggressive") war. The former is held against an actual wrongdoer and is not only licit, but in occasions even compulsory, not only for the magistrates of the community, but also for private persons in virtue of the right to self-defense (*De bello*, 1, 4). Offensive war against a former unjust wrongdoer to redress the injustice is licit when it fits some conditions, among them the "airing of the grievance" (Reichberg 2012, 195), to give the wrongdoer the opportunity of amending the injustice, as well as the principle of proportionality and of reasonable hope of success. What attains the authority to wage war, Suárez considers that the faculty of waging war is a faculty of jurisdiction, and in so far it belongs only to the supreme magistrate of the community endowed with the legislative power. As far as Suárez allows different legitimate political regimes, not only a monarch but any legitimate government can wage war. The unjustly offended sovereign is considered the "superior" authority of the two parts and in so far the legitimate judge in the conflict, as far as the unjust offending part, as an effect of its wrongdoings, has lost its legislative power becoming subject to the other (Reichberg 2012: 197).

Tyrannicide is addressed by Suárez especially in chapter four of book VI of the *Defensio fidei* and in section 8 of the *De bello* ("Is sedition intrinsically evil?"). Suárez interprets tyrannicide as a defensive war against an unjust aggressor. With tradition, he distinguishes between an illegitimate ruler (*tyrannus int titulo*, an usurper), and a legitimate ruler that rules tyrannically (*tyrannus in regimine*). The first may be resisted by the whole political community, any magistrate of it, or by any private person; the second either by any one, but only after a condemnatory sentence issued by the representatives of the political community or the pope in the case of Christian princes in virtue of his indirect power over them (*DFC*, 6, 4 14-15, 17), or by any person without previous condemnatory sentence in case of an actual offence against him. In the case of the *tyrannus in regimine,* it is understood that due to his tyrannical government, he lost the political power transferred on him.

Distributive Justice

Suárez holds in his *On God's Justice* (*De iustitia Dei,* sixth of his *Six little theological works*, *Opuscula sex theologica*, 1599, Vivés, 10), an original and very subtle theory about the nature of distributive justice, which in his view is dependent on a previous pact or promise between the sovereign and his subjects. In this sense, one can speak of a distributive justice of God towards his creatures (Schwartz 2012c).

Conclusion

Suárez is doubtlessly the leading figure of the Spanish second scholastic. His immense influence in metaphysics and theology during the seventeenth century and until the twentieth century has been many times underscored.

What attains his political philosophy he may have been determinant for the evolution of the social contract theory of the English seventeenth century.

From the beginning of that century, the *De legibus* was an authoritative source on legal subjects. Surprisingly enough, in the British Parliament of 1628 devoted to discuss the possibility of the king levying taxes without parliamentary consent, both absolutist and parliamentary members of the Commons quoted Suárez's work in Latin to uphold their respective positions (Sommerville 1999, 76–77).

Throughout that century, Jesuit thinkers, especially Bellarmine, Suárez, and Mariana, were charged of being the true inspirers of *whig* doctrines on social contract and tyrannicide (Goldie 1983: 71–73). It is therefore not surprising that Robert Filmer consecrated half of the second chapter of his *Patriarca* (written ca. 1630), to refute Suárez's rejection of patriarcalism (Filmer 1991: 15–18, *DL* 3, 2, 3). Locke knew this passage, as far as he devoted the first of his *Two treatises of government* to criticize Filmer's works at length, very specially *Patriarca*. He began to write his *Two treatises*, beginning with the second, precisely in the winter of 1679–1680 (Laslett 1988: 51, 65), when he could have at his disposal the only complete edition of the *De legibus* in an English-speaking country until today, an *infolio* issued in London, 1679.

Cross-References

- ▶ Aquinas, Thomas: On Natural Law
- ▶ Authority of Law
- ▶ Natural Law: Contemporary
- ▶ Ontology of Law
- ▶ Rights: General

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Subsidiarity

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Introduction

Subsidiarity can be provisionally understood as the principle under which final decision-making authority over a subject (roadways, healthcare, immigration, etc.) or issue (a specific road or hospital placement or migration criterion) should presumptively belong to the entity (federal government, provincial government, etc.) "closest to" the subject or issue or representing those "most affected by" the exercise of that decision-making authority and capable of addressing the problems underlying the decision. Any question about which entity should be able to decide something should, in other words, presumptively resolve in favor of the "local" one such that a province has priority over a federal government absent evidence defeating that presumption.

Subsidiarity has a long history in philosophy and law. The following provides basic background information on the concept and briefly discusses some pressing problems facing any philosophical account of subsidiarity and prominent positions on thereon. It thereby further introduces key philosophical controversies, providing a basis for further research.

Background: Is Subsidiarity a *Single* Principle?

Subsidiarity appears in several otherwise distinct intellectual traditions. Andreas Føllesdal (1998)'s excellent survey notes use in Johannes Althusius's early "federalist" thought in the fifteenth–sixteenth centuries, Catholic social thought of the late nineteenth and early twentieth centuries, and the development of the European Union [E.U.] in the mid-twentieth century, among other venues. John Finnis (2016) suggests it has origins in (and yet distorts) still earlier Aristotelian political theory (but see Aroney 2007's alternative reading of Aristotelean and Catholic thought). Each conception of subsidiarity has distinct commitments that produce different understandings of its purpose, application, and implications. For instance, Althusius and many Catholics recognize zones of "sphere sovereignty" (Cahill 2017) in which particular associations (guilds, unions, religious groups, etc.) should be free to organize their affairs absent state interferences, but EU law does not directly recognize this claimed non-state authority. Moreover, followers of the Calvinist Althusius and Catholic social thought each "justify" sphere sovereignty on divergent bases and disagree on which subjects or issues non-state entities should possess

authority and when subsidiarity's presumption can be overcome.

"Subsidiarity" is also used differently across modern domains. It is invoked as a principle of political morality to guide the allocation of authority and as a legal principle not only in EU law (in, e.g., the Treaty of Lisbon with Barber 2005; Føllesdal 2006; Føllesdal and Muñiz-Fraticelli 2015; Barber and Ekins 2016 providing some representative discussions thereof) but also in international law (e.g., Carozza 2003, 2016; Føllesdal 2013; Besson 2016) and domestic constitutional regimes (again see Føllesdal and Muñiz-Fraticelli 2015; Barber and Ekins 2016; and Barber 2018 (highlighting it uses) as well as, e.g., Kong 2015; Aroney 2016 (applying it)).

This raises questions about whether "subsidiarity" refers to one principle common to all domains and how to understand the relationship(s) between uses across domains. Subsidiarity gained renewed prominence in debates about the EU (Føllesdal 1998; Levi and Valverde 2006). Yet one may understandably query whether a distinctly modern conception can be divorced from earlier conceptions (compare, e.g., Barber 2005 with Finnis 2016; Cahill 2017), especially given signs of historical influence. Can one develop a plausible conception of subsidiarity without appeals to commitments in Althusius, Catholic thought, etc.? If there is a modern conception, one must determine whether it is distinctly "legal" (given its role in EU and international law) and, if so, whether one conception can/should apply in international, EU, and domestic law and how legal conceptions relate to moral ones. Note, for instance, how contemporary legal uses do not always mirror historical philosophical conceptions despite explicitly or implicitly drawing on premises therein (e.g., Føllesdal 1998; Vischer 2001; Cahill 2017). If, in turn, there is no distinct modern conception, questions remain about whether, e.g., Althusius, Catholic social theorists, EU Parliamentarians, and contemporary international lawyers and judges consistently refer to the same concept. Answers to each question here partly depend on responses to other questions.

What Problem(s) Does Subsidiarity Aim to Solve?

Some debates about subsidiarity concern the problem that it should solve. Subsidiarity is a principle for allocating decision-making authority. Many view it as a principle for allocating authority among levels of government. Subsidiarity is, for instance, invoked as a means of determining which powers countries should have vis-à-vis the international community or EU and which powers provincial governments should have vis-à-vis federal governments in federal countries. Even this admits multiple interpretations. Føllesdal (1998) discusses this problem in terms of a distinction between competence allocation (Who should have what powers?) and competence exercise (When is this power validly used?). That helpful distinction can be further subdivided. Subsidiarity can be understood as a mechanism for deciding how powers should be allocated within a constitution or when powers should be subconstitutionally devolved from one level of government to another or a principle that review bodies (e.g., courts) should use to analyze the scope of executive/legislative powers and validity of acts taken pursuant to each.

Subsidiarity could, then, solve problems of how to constitutionally divide powers, when to legitimately provide powers to others, or how to interpret other powers. And each problem can be understood as one of international, regional, or domestic governance. So, subsidiarity can respond to moral or legal problems at global, transnational, regional, or domestic levels.

Subsidiarity may not even be best understood as a principle for allocating authority among governmental entities. Even those who view allocating such authority as its primary or most natural role (e.g., Føllesdal 1998; Barber and Ekins 2016; Barber 2018; Da Silva 2022) grant that it could serve other ends. Subsidiarity could, for instance, be a principle for delineating the proper boundaries between state and non-state authority (e.g., Cahill 2017). Those committed to a deep form of political pluralism in which multiple entities can possess legitimate authority within a sphere require a principle for determining whether and

when associations (be they religious groups, guilds, unions, or even boxing clubs) should be able to make decisions free from state interference. If non-state entities have unique domains of sphere sovereignty, subsidiarity can help identify the domains and protect the entities from undue state interference. Finnis (2016), Maria Cahill (2017), and others suggest plausible views of subsidiarity aim to protect those entities. It could also structure discourse on either issue (Allard-Tremblay 2017; Cahill 2021).

Who Are the Subjects of Subsidiarity?

This raises questions concerning the entities to which subsidiarity applies. Those who view subsidiarity as primarily concerning relationships between levels of government should explain to *which* levels of governments it applies. A further question concerns whether subsidiarity necessarily must identify groups with claims to authority and the powers that they can possess or if it can simply serve as a principle allocating authority among recognized categories. One tradition views the identification of subjects of authority as one of subsidiarity's primary functions (e.g., Barber 2018: 187). Another views subsidiarity as primarily allocative (e.g., Da Silva 2022). Those primarily concerned with allocation among state entities can view subsidiarity as a means of identifying potential authorities (as Føllesdal 1998: 212 may suggest): e.g., subsidiarity can set conditions whereby any candidate must be in principle capable of addressing problems underlying a decision. Yet subsidiarity could solve conflicts between, e.g., provincial and federal governments without explaining or justifying why they should even be candidate authorities. And some suggest subsidiarity merely reflects and instantiates analytically prior views on who can possess authority (as one may read Cahill 2017 as suggesting, though Cahill 2021 appears much more open to, and plausibly advocates for, contestation on this point).

If one cannot take subsidiarity's subjects for granted, challenging questions remain. Several scholars suggest subsidiarity should require much more governance at the municipal level than exists in most states (cf., e.g., Levi and Valverde 2006; Weinstock 2014; King 2014). Even if it does not require greater constitutional powers for cities, for example, it may require much more devolution of authority to them (*id.*). Accounts of subsidiarity should explain whether, when, and why cities and even neighborhoods should possess authority (Da Silva 2022). Further questions concern whether groups currently lacking powers should possess them. For instance, should subsidiarity entail greater powers for "national" groups with a better understanding of their members' self-identified interests and an observed mandate to advocate for same (*id.*)? This raises questions about whether and when other associations ought to possess powers even if one denies that such associations have "natural" domains of sphere sovereignty (cf. Cahill 2017). Recognition that cities or sub-state nations might have valid claims to authority on grounds justifying provincial authority, like local knowledge, at least demand accounts of why other entities with local knowledge, etc., like unions, should not possess it (Da Silva 2022).

Whether the allocation problem or candidate authorities are analytically primary is also important. Must one have a set of authorities before applying the principle? If, e.g., one starts with a view whereby particular non-state entities have distinct claims to act without governmental interference (e.g., Finnis 2016; Cahill 2017), it will be hard to view subsidiarity as only concerning state action and allocating powers between extant levels of state governance. Yet that begs questions about *who* can possess authority others believe subsidiarity must solve.

What Could Justify Subsidiarity?

The next questions concern the justification for "local" control. Numerous values are invoked to justify subsidiarity. These include concerns with individual liberty (viz., local groups best protect individual goods), protecting group identities or other communitarian interests (local groups provide valuable communal goods), unique interests/values or challenges and related epistemic goods of local control (viz., local groups know how

decisions impact communities and their distinct concerns), and democratic concerns (viz., local communities provide the highest vote shares to those most affected) (as summarized by, e.g., Føllesdal 1998). These considerations are often invoked to justify state sovereignty and provincial control over particular policy areas in federal states. Whether they can or should also justify authority for other entities remains debatable. Recall, e.g., aforementioned discussions of municipal authority and appeals to sphere sovereignty as a form of natural non-state authority that subsidiarity should theoretically protect.

Other debates concern whether these goods actually justify subsidiarity or instead distort it or make it redundant. Subsidiarity often leads to centralization in practice and so may not "work" as intended (Føllesdal and Muñiz-Fraticelli 2015). If, moreover, e.g., democratic concerns do justify provincial control over many policy areas, they still may not establish any *presumption* of control for any level of government (Latimer 2018a, b). Broad interpretations could even justify frequent powers for neighborhood associations. This raises concerns that splitting authority among too many bodies could undermine state stability (Levy 2007; King 2014). If, moreover, the presumption is valuable, appealing to "subsidiarity" is still not clearly helpful. If, e.g., democratic principles justify a presumption of provincial control, one can likely establish that by directly appealing to democratic concerns (Da Silva 2022). Subsidiarity then adds little to the analysis. However, subsidiarity alone also cannot pick up justificatory slack where its own justifying principles fail to establish its purported presumption. Its value is thus unclear. It may, of course, still be morally valuable if, e.g., it leads to better engagement with operative moral reasons in a domain, enhancing moral discourse (e.g., Allard-Tremblay 2017). However, subsidiarity's value is then contingent. I again prefer direct engagement with actually operative reasons.

What Does "Closeness"/"Most Affected"/"Local Control" Mean?

Whether these concerns are valid is, in part, a function of how one understands subsidiarity's constituent parts. One question concerns what it means to provide authority to those "closest" to the decision or to the most "local" entity. These categories are clear for choices between regional and domestic or federal and provincial governments. However, these are, again, not the only categories to which subsidiarity may apply. Moreover, normative concerns motivating subsidiarity above do not obviously track geographical boundaries in any case. Some accordingly discuss subsidiarity in terms of those "most affected" by a decision. Yet it is often difficult to identify those "most affected" by a decision (see also Boundary Problem debates mentioned below). Consider (Da Silva 2022): "Should commuters have more say on [transit] policy because they use roads (supporting provincial control) or less because they do not pay property taxes?" Subsidiarity alone does not appear to provide a clear answer on any combination of features here.

Concerns about subsidiarity devolving into ad hoc geographical stipulations led Cahill (2017) to suggest eschewing discussion of "local" control in favor of discussions of primary and secondary authorities. This, of course, raises questions about how to identify which groups are "primary." Concerns above provide some plausible guidance for that difficult task even if one denies that some groups have natural spheres of sovereignty. Yet whether those groups should always have presumptive authority within or across states is unclear. Intuitions vary.

What Presumption Does Subsidiary Establish? How Can It Be Overcome?

Further questions concern how to understand subsidiarity's defining feature (in competing conceptions like Føllesdal 1998, 2013; Weinstock 2014; King 2014; Cahill 2017; Allard-Tremblay 2017; Burbidge 2017; Barber 2005, 2018; Latimer 2018a, b; Da Silva 2022), namely its "presumption" of local (or primary) control. Difficulties answering some such questions may support Cahill (2021)'s suggestion that subsidiarity marks a "preference for proximity," rather than creating a presumption of local control. At minimum, those who seek to maintain subsidiarity as a

presumption-raising principle must attend to these further questions.

One set of remaining questions about subsidiarity concerns the nature of the presumption that it (purportedly) establishes. Is it best understood as a presumption that powers should be allocated to local groups in the first instance, that groups should devolve their powers more often, that local laws will be valid and more central ones invalid, or some combination? Relatedly, is it a presumption of political morality, legal interpretation, or both? Responses raise different argumentative burdens at different stages. If, for example, subsidiarity is a moral presumption for constitutional debates but is overcome at a constitutional assembly such that a power is provided to the federal government, subsidiarity establishes no legal presumption that related provincial laws will be valid. Likewise, if it is a mere moral presumption of devolution, nothing beyond public condemnation is appropriate when devolution does not occur. Yet if it is a legal presumption, courts should show deference to the validity of provincial laws where it remains undefeated.

Additional questions concern how the presumption can be defeated. On Føllesdal (1998)'s standard reading, subsidiarity entails effectiveness and necessity conditions whereby the presumption standards unless the local government is ineffective and action by the higher-level government is necessary to address the underlying issues. Both admit multiple interpretations. Scholars continue to debate whether provinces, for example, must be literally unable to address a problem for a federal government to justifiably act or if provincial unwillingness to act or inability to act will suffice (e.g., Føllesdal and Muñiz-Fraticelli 2015; Da Silva 2022). Current and historical legal interpretations of related concepts take different approaches.

What Is the Role of "Higher"-Level Governments?

Still other questions concern how one should understand action by less "local" bodies in this sphere. Føllesdal discusses a distinction between subsidiarity proscribing or requiring federal action: Is subsidiarity a burden federal governments must meet before they can act or a trigger for when federal governments must act (or both (as Allard-Tremblay 2017 seems to suggest))? How, in turn, should one understand the "higher"-level governments' actions in this sphere?

Some accounts of subsidiarity (e.g., Barber and Ekins 2016: 8, Allard-Tremblay 2017: 697) suggest it triggers duties of assistance: "Lower"-level governments remain central and higher-level ones must help them fulfilling their ends. After all, the Latin term from which subsidiarity, "subsidium," is derived can be translated as "support." Yet others (including me) believe that subsidiarity permits higher-level governments to pursue their agendas where subsidiarity's presumption is defeated. Federal governments, for example, must fill gaps in provincial governance but need not simply assist provinces whose actions prove unsuccessful and can go beyond provincial aims.

How Does Subsidiarity Relate to Adjacent Concepts?

Where one can resolve preceding questions about the nature and purpose of subsidiarity, further questions remain regarding its relationship to adjacent concepts. One concerns whether subsidiarity is best understood as a principle of or rival to federalism. Althusius is widely recognized as an early proponent of federalism (e.g., Føllesdal 2018); subsidiarity played key roles in the development of Althusius and others' "confederal" thought (e.g., Føllesdal 1998; Vischer 2001) and appeals to subsidiarity appear in the statute and case law of many purportedly federal entities (as seen in many legal analyses, including Evans and Zimmermann 2014 and Føllesdal and Muñiz-Fraticelli 2015). Yet historical connections between the concepts need not entail conceptual connections between them. N.W. Barber (2018: 209) suggests subsidiarity is better understood as a principle favoring devolution, rather than formal constitutional federal

divisions of powers, and that "subsidiarity may require more and, sometimes, less than federalism." If this is so, subsidiarity may not be the best principle for allocating authority at constitutional moments and should not be a necessary interpretive tool in federal states: subsidiarity speaks to different issues than and is analytically distinct from federalism.

Similar debates concerning subsidiarity and sovereignty are also prominent in relevant literatures. Scholars debate whether subsidiarity is consistent with legitimate state sovereignty or requires justified limitations on sovereignty. Competing views on sovereignty appear in different conceptions in Føllesdal (1998). Latimer (2018a) suggests the EU project aims to limit state sovereignty and subsidiarity might be viewed an intended tool for that role. Or subsidiarity may even require forms of non-state sovereignty (e.g., Cahill 2017). Another, less prominent, debate concerns whether and how subsidiarity relates to Indigenous concepts, like treaty federalism. Some nascent scholarship suggests that appeals to subsidiarity could be useful for securing recognition of Indigenous groups as sovereign entities who should possess formal authority in federal compacts (e.g., Hueglin 1994, 2000, 2003). Yet whether subsidiarity applies to these cases or can best secure recognition of legitimate Indigenous sovereignty remains unclear.

Conclusion

Subsidiarity has a long intellectual history and admits multiple interpretations. Whether it refers to a single concept is debatable. Yet nearly all forms appear connected by a commitment to the presumptive primary authority of the most "local" entities capable of addressing problems underlying a decision. Attending to similarities and differences between conceptions of subsidiarity should highlight not only why it appears plausible but also the philosophical challenges facing those who seek to formalize and invoke it in real-world political debates.

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Sunstein, Cass

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Introduction

Cass Sunstein (b. 1954–) is an American legal scholar and theorist who, in addition to his academic work, served as the Administrator of the Office of Information and Regulatory Affairs under President Barack Obama. He is considered the most famous and widely-published left-leaning legal scholar of this generation. His work in constitutional and administrative law, as well as his scholarship in behavioral law and economics, is widely read and cited by American legal scholars. A 2015 study of law school faculty found that Sunstein was the most widely-cited legal scholar in public law by a nearly 2-1 margin.

Sunstein's primary scholarly contributions have connected political and constitutional theory to contemporary questions about the scope of government regulation, the purpose of regulation, and the institutional approaches that best promote good regulation. His work also addresses the theory and practice of democratic government, particularly in the age of mass media.

Constitutional and Legal Theory

The core of Sunstein's constitutional theory is a rejection of strict constructionist, originalist approaches to the U.S. Constitution. Strict constructionist and originalist approaches claim that the Constitution ought to be interpreted according to how it was understood by those who wrote and ratified it, and that the government's powers are to be construed narrowly.

Sunstein holds that the strict constructionist and originalist approaches, along with the limited government it produces, should be rejected because of its practical consequences. As he argues in one book: "No approach to constitutional interpretation is mandatory. Any approach must be defended by reference to its consequences. . ..[T]he choice among theories of interpretations depends in significant part on consequences, and the consequences of originalism would be bad" (Sunstein 2009, 19, 21).

Sunstein's rejection of originalism and embrace of a constitutional theory that allows for more government intervention is premised, therefore, on two arguments. First, there is no intrinsically-correct approach to constitutional interpretation. The task of interpretation is not to be judged by how well it carries out a theoretically-correct approach, but must be evaluated based on its practical consequences.

Second, any system of law that avoids intervening in the distribution of wealth and economic power produces harmful consequences. Proponents of limited government assert that government intervention disrupts the natural distribution of economic goods and is therefore illegitimate. Sunstein responds by arguing that the existing distribution of economic goods is not natural, but is itself a product of law. He claims, "governmental rules are implicated in, indeed constitute, the distribution of wealth and entitlements in the first instance" (Sunstein 1993a, 39).

These rules and laws, not natural talent, create the existing distribution of wealth.

Therefore, since the existing distribution of wealth is created by government, it can be modified by government. "A system that required unanimous consent for redistribution," he argues, "would be understandable only if the existing distribution seemed prepolitical." Since the existing distribution is not prepolitical but is the product of government, there can be no constitutional objections to modifying it. (Sunstein 1993a, 39) "The very notion of redistribution (if it is used as a pejorative)," he concludes, "depends on a belief that the existing distribution of property and entitlements should be taken as neutral and prelegal – in any case just. This position cannot be defended in light of the numerous ways in which existing distributions are a product of law." (Sunstein 1993a, 70) Elsewhere he states even more forcefully: "the distribution of wealth is not simply a product of hard work; it depends on a coercive network of legal rights and obligations." "If homeless people lack a place to live," therefore, "it is not because of God's will or nature. It is because the rules of property are invoked and enforced to evict them" (Sunstein 2006, 21).

Sunstein therefore is one of the chief exponents of a progressive approach to constitutional interpretation. He rejects the premises of originalism on both principled and pragmatic grounds. Originalism is bad in principle because it wrongly contends that existing distributions of economic goods are the product of nature, rather than government. It is bad in practice, Sunstein maintains, because it refuses to afford government assistance to many people whose lives would be improved by government intervention to modify existing governmentally created distributions of economic goods.

In place of the originalist method of constitutional interpretation, which seeks to construe the Constitution according to the understanding or intentions of those who framed and ratified it, Sunstein adopts a more flexible approach which allows for the meaning of the Constitution to evolve with the progress of society. "At its best," he argues, "the American tradition has refused to engage in ancestor worship, and for one simple reason: Our ancestors knew much less than we do" (Sunstein 2009, 210–211). When a new approach to constitutional interpretation gains the support and assent of many people, we should allow the Constitution's meaning to change in light of that new approach.

Sunstein grounds this theory of constitutional interpretation on a "many minds argument" called the Condorcet Jury Principle. This principle maintains that "the probability that each person will answer [a true/false question] correctly exceeds 50 percent," and therefore that "the probability of a correct answer, by a majority of the group, increases toward 100 percent as the group gets bigger" (Sunstein 2009, 8–9). A good example is the "Ask the Audience" feature of the game show *Who Wants to be a Millionaire?* Assuming that each audience member's likelihood of answering correctly is higher than his or her likelihood of answering incorrectly, the more people that are polled, the better the odds of getting a clear indication of the correct answer. The same principle holds, Sunstein concludes, for Constitutional interpretation. If a new way of understanding the Constitution emerges, it is likely better, and originalism should not stand in the way of its being enforced as a matter of constitutional law.

Cost-Benefit Analysis, Libertarian Paternalism, and Behavioral Economics

Sunstein's constitutional and legal theory places him firmly on the left, but his approach to regulation borrows from both progressive and classical liberal thought. Sunstein's faith in regulation is not unlimited. Rather, he proposes to distinguish regulations that are efficient from those that are too costly. Only regulations that are efficient should be defended, he claims. He accepts prevalent criticisms of regulation, acknowledging that in many cases regulations can be "self-defeating in the sense that they bring about precisely the opposite of their intended purposes" (Sunstein 1993a, 106). This can happen because the regulations are poorly written, pursue impossible goals, or have unanticipated consequences. Because he

is not an uncritical defender of regulation, Sunstein proposes to adjust regulatory policies in light of two principles.

The first principle is cost-benefit analysis. In dozens of articles over several decades, Sunstein has explained and defended the notion that regulations should be evaluated based on quantifying both the costs and the benefits of their consequences. Those regulations which produce more benefits than costs should be adopted, while those which fail this calculus should be scrapped. As the head of OIRA and President Obama's "Regulatory Czar," Sunstein followed this long-standing approach which dates back to the 1980s.

The second principle is what Sunstein and his co-author Richard Thaler call "libertarian paternalism." In their most famous book, *Nudge*, Sunstein and Thaler define libertarian paternalism as an approach which leaves people free to do as they like, but attempts to influence their choices in a way that makes them better off. Libertarian paternalism therefore seeks to "nudge" people into correct choices rather than force them.

It nudges by constructing the environment in which choices are made so that the "choice architecture" incentivizes people to make the correct choice. Choice architects are those who have "the responsibility for organizing the context in which people make decisions." In an elementary school cafeteria, choice architects might nudge children to eat healthy fruits and vegetables by placing them at the beginning of the line and in the most reachable positions, putting the desserts and bad foods slightly out of the way. A government rule might allow people to opt out of saving for retirement, but set the default option so that they contribute to a retirement account, nudging them toward the best long-term option for their happiness. These kinds of policies leave people free to do what they please but subtly influence them to choose in a certain way.

Sunstein's turn to cost-benefit analysis and libertarian paternalism is motivated by insights borrowed from psychology and economics. These insights have led Sunstein and others to develop an approach commonly referred to as "behavioral law and economics." This approach challenges the older, neoclassical approach to economics which posits that human beings operate as rational actors who always choose to maximize their interests. Neoclassical economics therefore assumes that a person's choice reflects his or her true preferences, and that government should avoid influencing a person's choices except in the most extreme circumstances.

Behavior economics, and the legal scholars who incorporate it into behavioral law and economics, rely upon recent work in psychology which shows that human beings do not always act rationally. Human beings are loss-averse, meaning that they will demand more to give up an item like a lottery ticket than they would be willing to pay for it in the first place. They are more likely to give to charity if presented with a green versus a red checkbox. In short, the environment in which they act is the greatest influence on their choice, not the rational calculation of their self-interest.

Based on this insight, followers of behavioral law and economics conclude that government has an important role to play in shaping citizens' preferences rather than leaving them to try to maximize their happiness on their own. But the danger of this approach, Sunstein argues, is that government becomes too intrusive and takes control of every aspect of its citizens' lives. To avoid this extreme, tools such as cost-benefit analysis and nudges can allow government to accomplish its work while avoiding the pitfalls of earlier, command-and-control approaches to regulation.

Sunstein is therefore a proponent of a more modest, simpler role for government than many of his progressive colleagues, but not because of any principled objection to government intervention on originalist grounds. Rather, Sunstein believes that there are pragmatic reasons to be skeptical of government overreach and seeks to develop alternative models of governance to enable government to achieve its goals without succumbing to the problems of earlier approaches.

Democratic Theory and Practice

Sunstein's remaining work focuses primarily on the theory and the practice of democracy.

Sunstein is a committed advocate of deliberative democracy, a theory fashionable among political theorists. Deliberative democracy holds that democracy should be understood not merely as a form of government predicated on pure majority rule, but as a system which fosters genuine and authentic deliberation in the decision-making process. Therefore, deliberative democracy requires conditions that promote reason-giving in the political sphere, such as checks and balances. Sunstein has gone so far as to link a positive welfare state and government interference with television and radio broadcasting to promote reasonable public policy debates (Sunstein 1993a; Sunstein 2002b). Sunstein's endorsement of deliberative democracy, and his use of that theory to support a modern regulatory state, meshes neatly with his rejection of originalism and limited government.

In practice, Sunstein has emphasized how insights drawn from behavioral psychology can help lawmakers accomplish a more deliberative democracy. Sunstein is well known for his concern about information cascades – situations in which people who lack information about a particular matter follow the apparent beliefs of others. As a result of information cascades, people who lack strong opinions on a question can appear to be committed to a position simply because they have gone along with someone else who does. Sunstein writes, "The result of these set of influences can be social cascades, as hundreds, thousands, or millions of people come to accept a certain belief simply because of what they think other people believe" Sunstein 2002b, 86).

Sunstein believes that this phenomenon leads to many of the ills plaguing American politics in the twenty-first century, such as extreme polarization, the spread of false information through social media networks, and political gridlock. In his published work, Sunstein has considered, but ultimately rejects, the use of government regulation to control citizens' sources of information, in order to eliminate these difficulties.

Cass Sunstein is a widely-published legal theorist who has influenced the direction of legal thought in many areas, but his primary contributions have linked developments in political philosophy and behavioral psychology to the practice of law and the design of legal institutions. By incorporating insights from these fields into legal theory, Sunstein has both deepened the progressive philosophy of law, and moderated progressive approaches to law in important respects.

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Supreme Courts

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Introduction

The "Supreme Court" is the highest body of the Judiciary and may have both appeal (acting as the final decision-making authority) and original jurisdiction to judge certain matters or persons, as provided for in the Constitution. In States that adopt the federative model, it plays an important role in resolving conflicts between those entities, seeking to provide stability and legal certainty to a

multilevel normative system, characterized by the existence of federal, state, and municipal legislation. In addition, it may exercise control over the constitutionality of laws acts of public authorities, aiming to guarantee the legal-constitutional order and fundamental rights. This model has its origins in the United States and tends to be associated with a notion of diffuse control of constitutionality, in which this function is shared with other judges and lower courts.

Alternatively, following the influence of the European model, the role of "guardian of the Constitution" can be entrusted to a single, autonomous body that does not form part of the structure of the Judiciary, the Constitutional Court, which concentrates the competence to consider all matters related to the Constitution, such as the constitutionality of laws and normative acts.

The composition and number of members vary from one country to another, depending on what is established by the Constitution. Likewise, its structure and internal organization can assume different features, either forming a single Full body (Plenary) or adopting fragmentary figures like "chambers," "senates," or "groups," each one with specific competences or with competences shared among themselves.

The same goes for the forms of nomination (in some countries, this nomination is made by Parliament, in others by the President, in others by a composition of nominations), as well as the requirements that must be fulfilled by whoever is nominated (age, education, nationality).

Finally, the mandate can be for a fixed period (with a variable duration, as provided in the Constitution) or for life (until the magistrates retire or die).

Origins

The figure of the "Supreme Court" was created in the United States of America, taking place in the new constitutional order established after the Independence (1776). It was while debating the separation of powers between the legislative and executive departments that delegates to the Constitutional Convention (1787) established the parameters for a national judiciary, so that the first United States Congress provided its detailed organization through the Judiciary Act of 1789, which institutes the Judiciary, having the Supreme Court as its top organ. Creating a "third branch" of government was a novel idea, once in the English tradition judicial matters had been treated as an aspect of royal (executive) authority.

Discussions about the Judiciary and the Supreme Court, its functions, nature, composition, and relation with other Branches were also widely discussed in the Federalist Papers, especially in its Chapter LXXVIII, written by Alexander Hamilton in May 1788 (Hamilton et al. 2005, p. 415).

It has ultimate appellate jurisdiction over all US federal court cases and over state court cases that involve a point of federal law. It also has original jurisdiction over a narrow range of cases, most of them involving consuls and ambassadors.

However, it gained significant notoriety in the exercise of "judicial review," related to the role of "guardian of the Constitution." This function is not expressly included in the body of the US Constitution, having been developed by Chief Justice John Marshall, on the occasion of the famous judgment of Marbury v. Madison, in 1803, when he established, based on a concrete case, the thesis that the Constitution is the basis of all rights and the supreme law of the legal order, so that its content is unchangeable through ordinary means, that is, other laws must be in accordance with its principles, thus justifying a "judicial review" of legislative acts that are in contradiction with it. According to Marshall, once the supremacy of the Constitution is recognized, it is also imperative to recognize that laws contrary to it cannot be considered laws, so that they are null and void, and compliance with them is unenforceable. This resulted in "diffuse" judicial review system, in which this function is shared by all judges and courts.

This model was incorporated by different countries, and its structure and competences may vary according to the provisions of the constitutional text itself.

Supreme Court X Constitutional Court

It was only in the following century, in the 1920s, that the discussion about the task of guarding the Constitution took place in Europe, becoming notable for the famous debate between Carl Schmitt and Hans Kelsen about who should be the "guardian of the Constitution."

For Schmitt, the *Führer* of the German Reich should perform this function (Schmitt 1934), since courts formed by magistrates would not present the necessary conditions for the maintenance of the unity of the political and legal system. The chief executive, on the other hand, once elected by representation, would express the will of the majority and, therefore, would be more qualified, in terms of legitimacy, to be the defender of the Constitution.

The author thus argued that the *Führer* was responsible for maintaining order and institutions, with the President of the Reich being the guardian of the Constitution (Schmitt 1996a, b, p. 159), once he had a central and neutral position in relation to the political party system. In this context, he considered that it was impossible for the (apolitical) Judiciary to play this role, since, according to him, judicial review always and undeniably displays a political aspect. Furthermore, he considered that the task of the Judiciary consisted, exclusively, in the subsumption of certain facts to the normative rules previously established by the legislator. The analysis and appreciation of the constitutionality of laws would not fit, therefore, within the limits of this restricted conception (Schmitt 1996a, b, p. 12).

In Schmitt's perspective, only those that are the result of subsumption should be considered as jurisdictional (rational) decisions. As decisions involving judicial review do not have this character, they cannot be conceived as jurisdictional but as political acts. Consequently, it is preferable not to entrust such an important task to judges lacking direct popular legitimacy (aspect that remains, even nowadays, as one of the main criticisms directed to Supreme Courts and Constitutional Courts).

Kelsen (2019) responded arguing that if politics is understood as a "decision," then an element of exercise of power is present in every sentence. Thus, the difference between the political nature of application of any law and the control of constitutionality is only quantitative, and not properly qualitative, so that there is no reason to reject the existence of a specific body in charge of performing such a task (Kelsen 1929, p. 81). This model based on the figure of a Constitutional Court was instituted, for the first time in History, in the Austrian Constitution of 1920.

Such a system, by adopting a concentrated logic of control, differs from diffuse nature of American judicial review in many decisive aspects, as it confides to a single body (Constitutional Court) the task of "guardian of the Constitution," centralizing the competence to appreciate all questions relating to constitutional matters.

This variation hides, however, a profound significance behind its apparently single practical appearance: if distrust in judges led, in France, to a certain refrain in incorporating the idea of judicial review – being this task ruled by a political body, the *Conseil Constitutionnel* – this same distrust led, on another level, to the exclusion of ordinary judges in most European countries, through the establishment of Constitutional Courts that are located outside the structure of the Judiciary.

Thus, in European tradition, the choice between the concentrated system and the diffuse system was not even raised, being the choice of the former due more to political issues than to technical aspects (such as the absence of *stare decisis* and vinculation to precedents, for example, which would not allow such decisions to extend an *erga omnes* effect).

In face of this distrust in relation to the Judiciary, Kelsen idealized the control of constitutionality not properly as a judicial activity, but of "negative legislation," in which it is up to the Constitutional Court to analyze only the (purely abstract) problem of compatibility between ordinary law and Constitution. It is, therefore, an activity that gets close to that of the legislator, as it does not imply a singular and concrete decision characteristic of judicial sentences (Kelsen 1929, p. 57). In this system, the law established by the legislator is considered valid until its

unconstitutionality is declared, so that it consists in an annullability – with *erga omnes* effects for the future – more than in a retroactive nullity vice (as it happens to be in the American diffuse system).

So, the Constitutional Court, from rival of Parliament, ended up being placed as its logical complement, not making an assessment in relation to the content of the law, but only analyzing its validity, acting as a "negative legislator." According to Enterría, complementing Kelsen's perspective, only an organ "exempt" from political dispute, composed by independent members, could exercise this function, maintaining the balance between the Powers (Enterría 1985, p. 59).

The figure of the "Constitutional Court" was so consolidated and resembles the figure of the "Supreme Court" in the task of guarding and interpreting the Constitution, but based on a different logics, the first being an autonomous body, which centralizes the appreciation of all constitutional matters, while the latter integrates the structure of the Judiciary, functioning as its top organ – being, as such, in charge of the "last word" in terms of constitutional interpretation.

However, throughout this process – especially after World War II – European constitutional courts advanced in the model proposed by Kelsen, which began to incorporate and acquire new dimensions (Sánchez 1998, p. 67). Germany, for example, taking into account the atrocities committed by the Nazi regime, adopted, in its Fundamental Law (1949), the figure of the Constitutional Court, reinforcing its competence and entrusting it with the task of guaranteeing fundamental rights and human dignity, which was followed by many other European countries, like Spain, Italy, and Portugal, among others (Krüger 1985, p. 103) and also in Latin America, in countries like Ecuador, Colombia, Guatemala, and Bolivia (Arroyo 2007, p. 73).

Judicial Activism and "Counter-majoritarian Difficulty"

One of the most controversial issues related to the performance of Supreme Courts and Constitutional Courts is that of "judicial activism," which has gained significant notoriety and popularity in various legal-constitutional contexts.

Although the expressions "judicial activism" and "self-restrained" are attributed to Arthur Schlesinger (1947, p. 201), who, in a 1947 *Fortune Magazine* article, outlined the profile of US Supreme Court justices, classifying them into "activists" and "champions of judicial self-restraint," the discussion about the performance of the Supreme Court and its relationship with the other Branches of government that is in its roots appeared much earlier, going back to the debates of the Independence process, still in the eighteenth century.

Alexander Hamilton, in "The Federalist – Chapter LXXVIII," had already addressed the issue, seeking to calm apprehensions regarding the Judiciary, placing it as bound to the limits of the Constitution and classifying it as "the least dangerous branch" (Hamilton et al. 2005, p. 437).

Although the initial criticisms of the Judiciary did not specifically use the term "judicial activism," they clearly invoked it, implicitly. Although the Supreme Court has been heavily criticized throughout its history, it is important to point out that it has not always been attacked for the same reasons or by the same groups (Lindquist 2009, p. 2).

The origins of this debate, from a theoretical perspective, are commonly associated with James Bradley Thayer, who, still in the end of the nineteenth century, warned about the risks of judicial review and invalidation of federal laws by the Judiciary.

According to the author, the language of the Constitution is indeterminate and subject to different interpretations, and in face of this uncertainty, the Court should defer to the legislator's interpretation, as long as it is reasonable (Thayer 1893). The central argument for this position focuses on the so-called counter-majoritarian difficulty," which reflects the challenge posed to democracy when, through judicial review, unelected judges supplant the powers and prerogatives of elected representatives.

Analyzing the issue, however, Kutler (1968, p. 125) observes that there has always been

intense disagreement regarding the performance of the Supreme Court, but not about the existence of judicial review itself.

Some authors also differentiate between criticisms of "judicial activism" and attacks on "judicial supremacy," although they recognize that they share common elements, such as the fact that in both judges mischaracterize their function, invoking excessive powers for themselves: "there are plainly overlaps between the two concepts; both pivot on the claim that judges misunderstand their role and arrogate excessive power to themselves. But the critique of judicial supremacy focuses primarily on finality (i.e., that judges wrongly claim final authority to bind other actors, especially other branches of government), while the critique of judicial activism focuses on how courts interpret the law (i.e., that judges inject their substantive preferences and decide questions that ought to be left to political determination)" (Schacter 2018, p. 214).

The argument about the "counter-majoritarian difficulty" became a central element of the constitutional debate, remaining an object of analysis and theoretical controversy until the present days: "the counter-majoritarian difficulty is the central theme in constitutional scholarship, such that reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today" (Sherry 2001, p. 921).

In such a perspective, perhaps one of the greatest advocates of self-restraint on the part of the Supreme Court is Alexander Bickel, for whom the problem lies in the relativization of the will of the majority, resulting in a deviation/distortion of democracy. His most famous book, "The least dangerous Branch," was written in the late 1950s and published in the early 1960s, a time when the US Supreme Court was at the center of academic debate and when its decisions provoked a return to fundamental questions of constitutionalism, such as the justification and *raison d'être* of judicial review (Wellington 1962, p. IX).

For the author, the Court's action in invalidating unconstitutional laws is not on behalf of the majority, but against it: "The root difficulty is that judicial review is a counter-majoritarian force in our system. [...] when the Supreme Court declares the legislative act unconstitutional or the action of an elected executive, it thwarts the will of representatives of the current people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it" (Bickel 1962, p. 16–17).

In some countries, this "counter-majoritarian difficulty" tries to be counterbalanced by mechanisms that seek to attenuate this tension between the Supreme Court and the other Branches. This is the case, for example, of the *Notwithstanding Clause* (Article 33 of the Canadian Charter of Rights and Freedoms) adopted in Canada, in which to the Parliament, when legislating on certain matters relating to fundamental rights, is reserved the possibility of "paralyzing," for a period of 5 years, the possibility of questioning the constitutionality of the law before the Supreme Court. There are also figures such as the "essentiality theory" (*Wesentlichkeitstheorie*), developed by the German Federal Constitutional Court, that establish that the regulation of issues related to restriction of fundamental rights corresponds to Parliament (BVerfGE 33, 1).

In spite of all those controversies, inherent to constitutionalism itself and to democracy, fact is that Supreme Courts and Constitutional Courts have acquired a significant role in the context of the current Democratic State of Law.

In this sense, a phenomenon of "judicialization" can be observed, being resultant of a historical process based on multiple factors (Leal 2007, p. 39), such as the centrality of the Constitution and the concern with its normative force (HESSE 1954), associated with aspects such as its principle character, and the supremacy and objective dimension of fundamental rights (Schlink 1989), which, together, lead to an expansion and transformation of the nature and performance of Supreme Courts and Constitutional Courts (Schwabe 1971). This reinforces their status as "guardians of the Constitution" and enhances, thus, the issue of the "counter-majoritarian difficulty" (Lindquist 2009, p. 34).

In the context of populist governments and Post-Democratic States, understood as those that operate on the basis of democratic systems (with

periodic elections and guarantee of freedom of expression), but whose guarantee is progressively limited, with a small elite claiming relevant decisions and co-opting democratic institutions (Crouch 2004), Supreme Courts and Constitutional Courts tend to be targeted by frequent attacks, often being placed as the great "enemy" to be fought. This gives rise to movements such as attempts at constitutional reforms, directed to limiting their competences and procedures, as well as the so-called court packing, that consist of the subterfuge of seeking to obtain the majority of votes in Court by increasing the number of judges, aligned to the interests of those responsible for the nomination.

Conclusion

The "Supreme Court" is the highest body of the Judiciary and may have both appeal (acting as the final decision-making authority) and original jurisdiction to judge certain matters or persons, as provided for in the Constitution. In States that adopt the federative model, it plays an important role in resolving conflicts between those entities, seeking to provide stability and legal certainty to a multilevel normative system. In addition, it may exercise control over the constitutionality of laws acts of public authorities, aiming to guarantee the legal-constitutional order and fundamental rights. This model has its origins in the United States and tends to be associated with a notion of diffuse control of constitutionality, in which this function is shared with other judges and lower courts.

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One of the most controversial issues related to the performance of Supreme Courts and Constitutional Courts is that of "judicial activism," which has gained significant notoriety and popularity.

One central argument of critics focuses on the so-called counter-majoritarian difficulty, which reflects the challenge posed to democracy when, through judicial review, unelected judges supplant the powers and prerogatives of elected representatives.

In spite of all those controversies, inherent to constitutionalism itself and to democracy, fact is that Supreme Courts and Constitutional Courts have acquired a significant role in the context of the current Democratic State of Law. In this sense, a phenomenon of "judicialization" can be observed, being resultant of a historical process based on multiple factors that lead to an expansion and transformation of the nature and performance of Supreme Courts and Constitutional Courts, reinforcing their status as "guardians of the Constitution" and enhancing, thus, the issue of the "counter-majoritarian difficulty."

Cross-References

- ▶ Claim Rights (Subjective Rights)
- ▶ Constitutionalism
- ▶ Constitutionalism: Political
- ▶ Constitutionalism: Popular
- ▶ Constitutionalism: Sociology of
- ▶ Constitutionalism: World
- ▶ Corporal Punishment: Judicial
- ▶ Dignity, Human
- ▶ Garantism
- ▶ Kelsen, Hans
- ▶ Montesquieu, Charles Louis de Secondat, Baron de La Brède et de
- ▶ Neoconstitutionalism
- ▶ Schmitt, Carl
- ▶ Transconstitutionalism

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Surveillance Society

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Introduction

Along with rapid development of information technology, mechanisms to view, record, and analyze our daily lives have become increasingly popular, cheap, and widespread. Our life events are filmed through video recording like closed-circuit television (CCTV/surveillance camera) or "dashcams" (video event data recorders) to record the outside view from a car's dashboard. Additionally, every economic transaction, for instance, using a credit card on the Web or riding a bus with an integrated circuit card (ICC) is now processed on line and frequently aggregated as consumption records for statistical marketing data, or else individualized through digital IDs to analyze one's identity through profiling measures (e.g., customer number or national identity such as a Social Security Number in the United States or a "my number," the 12-digit Social Security and Tax Number in Japan). For instance, Amazon.com can estimate your tastes or preferences based on your record of purchase, while the government may predict your movement from the pile of CCTV images taken on the road. We are under continuous and universal surveillance, which David Lyon called the "surveillance society" (Lyon 2001).

Origin of Surveillance Society

According to Lyon, sociologist Gary T. Marx first coined the term "surveillance society" in 1985, to warn about the potential emergence of Orwellian dystopia through rapidly growing computer technology. The origin of the surveillance society, thus, was assumed to be in governments' desire to monitor and control their citizens, with improved efficacy through information

technology, as depicted in George Orwell's famous novel *Nineteen Eighty-Four* (Orwell 1949). Surveillance here mainly indicates one-directional enforcement from government to citizen, which is usually disliked and avoided, if possible.

Surveillance in Reality

Lyon, however, observes that in reality surveillance has been pervasive in our society, being so multidirectional as to reconfigure our time-space environment. "The concept of surveillance *society* denotes a situation in which disembodied surveillance has become societally pervasive… the notion of surveillance society indicates that surveillance activities have long since spilled over the edges of government bureaucracy to flood every conceivable social conduit" (Lyon 2001: 33, original emphasis).

From this viewpoint, Lyon emphasized the three following elements of surveillance society.

1. Surveillance of others has become very widespread and universal, as shown in the quantitative increase of CCTVs. In Japan, for instance, nearly five million CCTVs were installed by 2018, *The Nikkei Business* estimated (November 13, 2018). This amounted to a camera per approximately 24 people.
2. Users of surveillance technology, however, have also become widespread not only among governments and similar public organizations, but many private entities as companies, associations, or even individual persons. In Japan, for instance, most "dashcams" are sold for use in average citizens' private cars, while the vast majority of CCTVs are installed in stores, shopping malls, or railway stations, by owners who usually are private companies or associations. Contrary to the Orwellian nightmare in earlier twentieth century, or the reality of spying and watching in many totalitarian regimes as depicted in the film *Das Leben der Anderen* (von Donnersmarck 2006), surveillance is not just a tool for governments to control their citizens arbitrarily, but a widespread and common measure for private persons and organizations to secure their safety or property and to enhance the efficiency of their businesses. At the same time, since the improvement of business efficacy increases not only the companies' benefits but also serves customers by enabling price discounts or service refinements, private surveillance could be welcomed from its very target. In many cases, we find such services as Amazon's recommendations or Google's search suggestions to be useful and customer-friendly. Therefore, surveillance is frequently introduced by private entities seeking appropriate ways to establish mutually beneficial relationships with their customers or clients. We see each other, for our own good, in this surveillance society.
3. However, Lyon notes that in surveillance society we experience our "body" disappeared, since each of us is captured in records that are reduced to a certain dataset, and not considered as an individual: "[F]or the vast majority of relationships, especially those dependent on computer-based communication of data, embodied persons have vanished" (Lyon 2001: 15). The monitoring target has shifted from our visible bodies to "personal traces" (Lyon 2001: 15), because of the increasing difficulty of catching the former. We are now seen as a combination of visible and countable elements, not as a person with integrity. This concern could be seen as resonant with the problem of identity in liquid modernity, as discussed by Zygmund Bauman (2000, 2004).

Through this disembodiment, the time and space structure that surrounds us has been reconfigured. For instance, through wiretapping, the police can obtain my opinion on certain issues without physically intruding into my personal space. In the United States, for instance, wiretapping was not considered privacy infringement, as judged in *Olmstead v. United States*, 277 U.S. 438 (1928). This judgment, however, was reversed in *Katz v. United States*, 389 U.S. 347 (1967), which opined that electronic communication is included in the "reasonable expectation of

privacy" protected under the 14th amendment of the US constitution. Without meeting directly to shake hands, "a token of trust, such as a personal identification number, became a proxy for the kind of trust that arise from an ongoing relationship of co-present persons" (Lyon 2001: 16). The public-private dichotomy of space, typically, blurred to open the possibility of introducing universal surveillance.

Problems in Surveillance Society

Thus, the problem of surveillance society consists of three elements: (1) Overall usage of surveillance technology has increased both in quantity and quality, (2) different types of surveillance agents have enhanced surveillance to improve the efficiency and utility of their businesses, and (3) for that reason, targets of their services, typically the general public, welcome such surveillance immersion, whereas minorities or those who have sensitive conditions are concerned about it. The dialogue between Bauman and Lyon (2013), for instance, recognizes the last point as the danger that the majority can adopt certain problematic policy according to their will.

When Lawrence Lessig observed, although not explicitly, in his *CODE* (Lessig 2006) that digital surveillance transfers the burden of proof from the agent of surveillance to its target, he also attempted to indict surveillance society. "The burden is on you, the monitored, first to establish your innocence, and second to assure who might see these ambiguous facts that you are innocent" (Lessig 2006: 218). For Lessig, "digital" surveillance is special due to its exemption from "the imperfection of monitoring technology" (Lessig 2006: 209).

However, this concern over endangering human rights, typically privacy, is reflected not only in academic debate but in the introduction of personal data protection law in many jurisdictions. An example is the Personal Data Protection Act of Japan (act no. 57 of 2003), which could be augmented with the right to erasure. Another example is the right to deny automatic profiling (Article 22, automated individual decision-making, including profiling) in the current enactment of the new European Union rule on data protection (General Data Protection Regulation; Regulation (EU) 2016/679, 27 April 2016).

Future of Surveillance

The development of surveillance in society, however, has and will be escalated faster year by year. Government surveillance has intensified globally, mainly for security reasons, in the struggle with terrorism threats after the September 11 attacks in the United States (Lyon 2003). The immigration flows both because of economic globalization and state instability in the Middle East (including the internal warfare in Syria, IS-related problems, and distressed recovery of governmental function in Iraq and Afghanistan) may have enhanced this tendency, which also encompasses successive terrorisms in Norway (July 2011) and Paris (January and November 2015).

Private surveillance has shared this trend with an increasing need for emerging AI (artificial intelligence) and robot technology. For the automatic driving of a car to work, for instance, it must be necessary to gather information on the surrounding environment, including movements of other cars and passers-by, and to record them to solve legal conflicts involving possible car accidents. In this case, surveillance is a necessary condition for us to establish a fair and just allocation system of liability under the ever-developing engineering.

Conclusion

The rapid development of information technology, and thus, growth of monitoring, seems to be impossible to suppress or stop. At the same time, the general public is likely to condemn inhibition of technology and monitoring because of the utility they provide. Allowing their unchecked autonomous evolution, however, will cause much privacy concern, especially for minorities; indeed, such problems may not be visible to mainstream

society. Since private entities conduct most surveillance, compliance with the appropriate privacy or human rights laws might not occur. Moreover, citizens have few effective measures to control such activities.

The central field of discussion is moving, or at least shall move, from ethical evaluation of surveillance generally as to whether certain technology is good or bad, to possible and effective measures to control information gathered from surveillance.

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Systemic Interpretation

► Interpretation: Systemic

T

Tamanaha, Brian

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Introduction

Brian Tamanaha's work divides into two main projects. The first project involves a repudiation of much of contemporary legal theory, which Tamanaha sees as dominated by the school of analytic jurisprudence (and in particular by legal positivism). As an alternative to analytical jurisprudence, Tamanaha seeks to develop a more interdisciplinary approach which will "infuse legal theory with insights from social scientific approaches to law, and vice versa" (Tamanaha 2001, xviii). Tamanaha's second project is more narrowly focused on defending the rule of law against legal instrumentalism. However, he does not use the traditional method of external constraints on legal actors to achieve this.

Tamanaha's First Project: Realistic Socio-legal Theory at Work

Tamanaha's "thoroughly social, non-essentialist, behaviour-based view of the law" (Tamanaha 1997, 245) leads him to critique two common jurisprudential questions: (1) "what is law?" and (2) "what is the source of law?" His critique is not simply that the answers hitherto given to these questions are inadequate. He will go on to claim that even asking these questions is a mistake.

What Is Law?

Tamanaha says there are two types of answers traditionally given to the "what is law?" question. One type says that law is what *creates social order*, and the other type says that law is what *responds to disruptions of social order*.

Answers of the first type accept that all human societies will have law, since all human societies exhibit order. The familiar critique of this position is that it is over-inclusive. If something that performs the function of creating social order is law, then law cannot be distinguished from morality, religion, etiquette, and habit. Anything that socializes people into shared patterns of behavior, such as the family, the church, and the mass media, turn out to be sources of law.

Answers of the second type to the "what is law?" question typically assume the existence of a Western nation-state. On this account, the state deals with any violations of the rules establishing social order through specialized institutions such as courts, police forces, and prisons. It is the presence of these specialized institutions that are the markers of law. One critique of this answer is that the requirement for state-created institutions makes it too narrow and under-inclusive. It leads

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to the conclusion that non-Western "primitive" societies that have not developed such specialized institutions do not have law.

Tamanaha agrees that neither of the traditional kinds of answers to the "what is law?" question is satisfactory, but he does not stop there. He moves on to challenge the shared assumption of both of these answers that law is crucial to social order (Tamanaha 2001, 2–3). He argues that an examination of the empirical reality of law and its history shows this assumption to be false, and that maintaining social order is not an essential mark of law. Law may be one factor in achieving social order, according to Tamanaha, but it is not the main factor (Tamanaha 1997, 109, 123–4, 128; Tamanaha 2001, 140, 213–224). Moreover, the two traditional categories of answers to the "what is law?" question ignore the fact that much of law is devoted to goals other than social order (Tamanaha 2017, Chap. 6).

No Universal and Necessary Truths About Law

Applying realistic socio-legal theory by looking at law historically and empirically does more than disprove the traditional assumption that law's function is to create and/or maintain social order, Tamanaha argues. It also undermines the analytical jurisprudential project of seeking to find universal and necessary truths about law. In *A Realistic Theory of Law,* he argues that law "involves multiple social-historical phenomena that have taken different forms and functions in different times and places and therefore cannot be captured by a single definition of law" (Tamanaha 2017, 38). Tamanaha comes to the conclusion that we cannot say that law is X (e.g., a union of primary and secondary rules) or that law does Y (e.g., maintains social order). That is, it is impossible to identify a defining *feature* that is common to all instances of law, and it is similarly impossible to identify a defining *function* that is performed by all instances of law. This is why asking the "what is law?" question is a mistake, because the question assumes that such a feature or function can be identified.

Conventionalism

The correct approach, according to Tamanaha, is to accept that law is *whatever a particular community calls "law."* "To identify law using a conventionalist method, one should look at what people in a given community consider 'law' in their own language, which a theorist can find using common translations" (Tamanaha 2017, 75). In doing this, we must abandon the conventional assumption that there *must* be something common to all of these instances, otherwise they would not all be called "law." What historians, anthropologists, ethnologists, and sociologists tell us is that very diverse things have been called law by different communities of people; there is nothing universal and necessary about any of these phenomena. In *A General Jurisprudence of Law and Society* Tamanaha offers a partial list of such phenomena: State law, customary law, religious law, international law, transnational law (lex mercatoria), indigenous law, and natural law (Tamanaha 2001, 224ff.).

What Is the Source of Law?

Just as Tamanaha identified two types of traditional answers to the "what is law?" question, so he identifies three types of traditional answers to the "what is the source of law?" question. And once again, he finds each of these answers to be unsatisfactory because they fail to acknowledge the immense variety of what groups of humans have called "law" through history. There is no one source for these diverse phenomena. But he also challenges one of these answers for a more particular reason: it makes another assumption that has a long jurisprudential history, but which Tamanaha believes to be false. This is the "mirror thesis."

The three traditional answers to the "what is the source of law?" question are that (1) law comes from the customs or traditions of a people, or (2) law comes from the commands of the king/sovereign, or (3) law comes from Nature/Reason/God. The first answer is associated with historical jurisprudence, the second with legal positivism,

and the third with natural law. Even though Tamanaha's realistic socio-legal theory endorses the findings of historical jurisprudence that legal systems are too various to reveal any universal features, he criticizes the assumption of historical jurisprudence that each particular legal system *mirrors* its society. By "mirroring" Tamanaha means that law reflects the intellectual, social, economic, and political climate of its time, as well as the customs and traditions and values of the group it applies to.

One reason why Tamanaha rejects the mirror thesis is that "the history of legal development around the world substantially consists of the transplantation of norms and institutions from one society to another, either through natural diffusion, colonial imposition, or voluntary borrowing" (Tamanaha 1997, 117). Because this foreign legal material was not organically produced by the borrowing society, it is not likely to mirror that society in any strong way.

A second reason why law did not mirror the society it governed, according to Tamanaha, was because "the legal culture itself determines and controls legal development, mediating the influence of surrounding social, economic, and political factors" (Tamanaha 2001, 108). As lawyers developed into a specialized caste, they increasingly shaped law to reflect their own financial interests, professional goals, and values. Also, "legal knowledge has its own internal logic and demands that constantly push it to develop in directions that differ from common sense notions" (Tamanaha 2001, 73).

Tamanaha's Second Project: Defending the Rule of Law from Instrumentalism

The threat to the rule of law that Tamanaha judges to be most significant is the rise of what he calls "legal instrumentalism." Legal instrumentalism rejects the more orthodox position that law has a determinate content that is found, rather than made, by rule-appliers, and that this content constrains what the rule-appliers can do, regardless of their personal desires. On the legal instrumentalist approach, law is more flexible and adaptable. It does not have a fixed, predetermined content, and so can be deliberately shaped to advance goals such as the common good or justice.

In *Law as a Means to an End* (Tamanaha 2006), he describes how legal instrumentalist arguments gained ground in the late nineteenth and twentieth centuries, but Tamanaha argues that legal instrumentalism is wrong: legislators and law-appliers *are* subject to constraints. They cannot do whatever they want with the law and utilize whatever flexibility it contains to achieve the partisan outcomes they desire. However, he rejects the orthodox accounts of these constraints. They do not come from external sources like Divine law, or neutral principles discovered by reason, or the objective meanings of legal texts. Nor are the constraints found in liberal institutional structures involving checks and balances or the procedural requirements of "formal legality" that Fuller described. Rather the constraints are found within the law-appliers themselves.

On Tamanaha's account, the shared background beliefs, values, goals, organizing categories, paradigms, dichotomies, narratives, etc., of the legal community necessarily structure (i.e., constrain) the way that the members of that community perceive and think about law and its application. This is similar to the approach of Stanley Fish (Robertson 2014). It is this shared background which works in an unnoticed manner to shape the literal meanings which members of the legal interpretive community apprehend in legal texts. It is this this shared background which therefore provides the determinate legal content that is found, rather than made, by law-appliers. Ultimately, it is only a shared background belief in the existence of the rule of law and the propriety of self-constraint that produces the rule of law, on Tamanaha's analysis, not the external constraints stressed by orthodox legal thinkers (Tamanaha 2004, 58–9, 89–90; Tamanaha 2006, 6, 20, 239–40, 244).

Tamanaha believes that the legal instrumentalist position does not deserve the degree of influence that it has had on the legal culture, because its claims are not backed up by facts or by legal theory. Tamanaha first points out that empirical studies of American judicial decisions seeking to

discover the influence of the judges' personal political beliefs find that below the Supreme Court level, these political beliefs have hardly any influence. Unanimous cases are found 85–95% of the time in state supreme courts and federal appellate courts (Tamanaha 1997, Chap. 7). Tamanaha concludes that this degree of consensus among judges must be due to specifically legal constraints.

Next, Tamanaha argues that legal realism has been systematically misrepresented in legal culture as supporting legal instrumentalism. According to a commonly accepted understanding of legal history, law in the late nineteenth and early twentieth centuries featured contests between formalists, who believed that law was pervasively determinate and allowed for no judicial choice, and instrumentalists, such as the legal realists, who believed that law was pervasively indeterminate and allowed for massive amounts of judicial choice. But Tamanaha examines the actual decisions and legal writings from that time and finds no support for this claim. Instead, virtually all of those categorized in this accepted narrative as formalists and also those categorized as legal realists adopted a "balanced realism" which acknowledged *both* choice and constraint in the law (Tamanaha 2010).

So, a false belief about (i.e., a serious misreading of) law's past has allowed legal instrumentalism to become more acceptable and thus facilitated the intrusion of politics into law. Tamanaha wants to reverse this destructive dynamic by clearing away errors that prevent belief in the rule of law from remaining a key value for lawyers.

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Tan, Kok-Chor

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Introduction

Most of Kok-Chor Tan's (b. 1964–) work addresses topics in global justice, including international toleration, nationalism, patriotism, global distributive justice, and human rights. While some of Tan's work is not explicitly about global justice – for example, his defense of institutional luck egalitarianism – these other projects often play a role in Tan's arguments about global justice. Like the early work of Charles Beitz and Thomas Pogge, Tan's early work often promotes a "globalized" version of John Rawls's account of social justice, based on supposed analogies between domestic and global society. However, Tan's later work relies less on the Rawlsian architecture, but instead develops Tan's own ideas about the grounding principles of (global) justice.

Liberal Toleration and Global Justice

In his first book (2000) – and in other articles (1998, 2006b) – Tan argues that the theory of international toleration that Rawls developed in "Law of Peoples" (Rawls 1993a) (and in *Law of Peoples* (Rawls 1999)) is inconsistent with the account of liberal toleration that Rawls developed in *Political Liberalism* (Rawls 1993b). In *Political Liberalism*, Rawls argued that a liberal society should tolerate some illiberal ways of life (or illiberal "comprehensive doctrines"), when those ways of life are consistent with the broader liberal political

culture. So, for example, orthodox Roman Catholicism (which prohibits women from senior leadership) should be tolerated because orthodox Roman Catholics can affirm the liberal rights of citizens, including the political freedom to commit apostasy. Rawls extends this account of toleration to the international sphere, where he argues that liberal societies should tolerate illiberal societies, if they engage in respectful international relationships and protect human rights.

Tan objects that the toleration of illiberal societies in international affairs cannot be justified in the same way that toleration of illiberal ways of life can be justified within a liberal society. This is for three main reasons. First, Rawls's account of domestic toleration protects a full slate of liberal rights, while his account of international toleration protects only a smaller set of urgent interests. Second, in the domestic case, individual people have a real right of exit from illiberal ways of life, while in the international case, the right to exit is more precarious, because few societies recognize a right to immigrate. Third, in the domestic case, Rawls focuses on the rights of individuals, while in the international case, he focuses on the rights of societies. In place of what Tan calls Rawls's "international" (and illiberal) account of toleration, Tan endorses a "cosmopolitan" account of toleration that protects the liberal rights of individual persons (2005c, 2011b).

Nationalism, Patriotism, and Global Distributive Justice

In his second book (2004b) – and in a set of articles (2002, 2003, 2005a, b, 2006a) – Tan defends a form of cosmopolitan egalitarianism that takes priority over (but nonetheless protects room for) nationalistic and patriotic projects. Tan argues that global justice requires cosmopolitan egalitarian concern, according to which international inequalities (e.g., of wealth and income) are a concern of justice. However, Tan endorses a broadly Rawlsian account of distributive justice, such that the demands of cosmopolitan egalitarianism can be met when the background institutions of global society are regulated by principles of egalitarian distributive justice. This means that individuals and societies need not be committed to an ethos of global egalitarianism, but only that they need to create and support global institutions that are regulated by egalitarian principles.

Institutional (Global) Luck Egalitarianism

Tan argues that principles of egalitarian justice apply to institutions and not to the everyday activity of individuals (2004a, 2008a). In this way, Tan defends Rawlsian institutionalism against the famous criticisms of G.A. Cohen, according to which individual activity is included in the *site* of distributive justice (Cohen 2008). Against Cohen, Tan argues that an institutional account of egalitarianism will not allow significant inequalities and that institutional egalitarianism is necessary to protect personal pursuits. More fundamentally, Tan argues that justice is essentially a virtue of institutions, rather than of individual activity, such that institutional forms of egalitarianism are not mere pragmatic compromises, but they capture all that egalitarian justice requires.

One of the most innovative aspects of Tan's institutional egalitarianism is his claim that inequalities become a concern of justice only when institutions convert bad luck into disadvantages (2008a). In this way, Tan affirms a novel version of the egalitarian theory that Elizabeth Anderson termed "luck egalitarianism" (Anderson 1999) and that Anderson attributed people like Ronald Dworkin (1981). But Tan's account of luck egalitarianism aims to avoid some of the objections Anderson directed at it. First, the institutional nature of Tan's egalitarianism may protect him against the charge that luck egalitarians are concerned about absurd or irrelevant inequalities. Second, Tan argues that people should not be held responsible for disadvantages that would leave them below a basic needs threshold. Tan's endorsement of a social minimum – grounded in humanitarian considerations – may protect him against the charge that luck egalitarians treat the victims of bad "option luck" too harshly. Finally, Tan thinks that luck egalitarianism is a grounding

principle for egalitarian concern, not a distributive principle. So, for example, Tan thinks luck egalitarianism may be consistent with Rawls's Difference Principle and does not require eliminating the influence of luck on people's holdings.

Tan builds on his work on luck egalitarianism to develop arguments for global egalitarian distributive justice (2011a, 2012). He argues that the institutions of global political and economic life transform instances of (bad) luck into international inequalities. Accordingly, it follows from Tan's institutional account of luck egalitarianism that international inequalities (e.g., of wealth and income) may be unjust. Importantly, Tan is able to access this global egalitarian conclusion without claiming that global cooperation and domestic cooperation are analogous in other ways, e.g., that similar "basic structures" make both forms of cooperation possible. This sort of argument by analogy is common among global justice Rawlsians (see, e.g., Buchanan 2000; Beitz 1999; Pogge 1994), though more orthodox Rawlsians, e.g., Freeman (2006), have argued that disanalogies between domestic and international politics undermine the case for "globalizing" Rawls's account of distributive justice. In his later work, Tan has been able to sidestep this debate, since he no longer makes his arguments *within* the Rawlsian system, but bases his account of global egalitarianism on freestanding luck egalitarian commitments.

Conclusion

This short entry has focused on some of the main themes of Kok-Chor Tan's work. In closing, it is worth mentioning some other notable aspects of Tan's corpus, which include his work on reparations (2007, 2008b), humanitarian interventions (1995, 2010), and climate change justice (2015).

Cross-References

- ▶ Cosmopolitanism
- ▶ Humanitarian Intervention
- ▶ Rawls, John
- ▶ Sovereignty and Human Rights

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Tasioulas, John

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John Tasioulas (b. 1964 – Wollongong, Australia) is a moral, political, and legal philosopher, working in the Anglo-American tradition. His main scholarly contributions are in the areas of human rights, the philosophy of international law, and the philosophy of punishment.

Tasioulas is a leading proponent of what has been called the "orthodox" approach to human rights. This is a traditional view (hence its "orthodoxy"), rooted in the natural law tradition, according to which human rights are moral rights that all human beings possess simply in virtue of their humanity. In recent philosophical debates, this view has been opposed to the so-called "political" approach (originally attributed to John Rawls), which understands human rights as moral rights that perform a distinctive role in international political affairs, e.g., as triggers for intervention, standards of legitimacy, or aid targets. Tasioulas has also offered an account of the grounding of human rights in considerations of both human dignity and universal human interests. Alongside his philosophical work on the nature and grounding of human rights, Tasioulas has also written on related questions about the human right to health, the relationship between human rights and the common good, and how human rights morality relates to human rights law.

As a scholar of international law, Tasioulas has advanced a natural law interpretation of customary international law and *jus cogens* norms that incorporates an element of moral judgment in the process of their derivation. He has also written on the legitimacy of international law and is the author of two reports for the World Bank on minimum core obligations of human rights and their bearing on the human right to health. He is co-editor of *The Philosophy of International Law*, a volume that has helped make international law a more familiar and established topic among philosophers. And he is co-author of the forthcoming entry on the philosophy of international law for the *Stanford Encyclopedia of Philosophy*.

In the area of the philosophy of punishment, Tasioulas has developed a novel version of the communicative theory of law, according to which the communication of justified censure is the formal point of the institution of punishment. This approach enables a plurality of values – most centrally, retributive desert but also mercy – to operate as part of the internal logic of punishment. Tasioulas' theory therefore differs from the communicative theory of R.A. Duff, which regards mercy, especially based on repentance, as external to the logic of punishment.

Tasioulas has also written on a wide range of other topics, including the value of play, issues in bioethics, and the ethics of robots and AI.

Tasioulas studied law and philosophy at the University of Melbourne (1983–1988) and completed a DPhil as a Rhodes Scholar at the University of Oxford under the supervision of Joseph Raz (1989–1996). After holding positions at the University of Glasgow (1992–1998), the University of Oxford, Corpus Christi College (1998–2010), and University College London (Quain Chair of Jurisprudence, 2011–2014), Tasioulas is currently the inaugural Yeoh Professor of politics, philosophy, and law at the Dickson Poon School of Law, King's College London, as well as Director of the Yeoh Tiong Lay Centre for politics, philosophy, and law.

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Taxation

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Introduction

Taxation is the imposition, administration, and collection of taxes. In a very broad sense, taxes can be defined as economic resources that private persons must compulsorily give to governmental authorities to finance the provision of public goods and services.

As so defined, taxation is as old as the exercise of political power and one can find different kinds of taxes in Ancient Greece, the Roman Empire, or in the Middle Ages. However, the legal meaning and economic importance that taxation has today is completely different from the social role it used to play in preindustrial societies. The current legal theory and social practice of taxation have their roots in the emergence of the so-called Fiscal or Tax State in the eighteenth century. Previously, taxes were in most cases a contingent duty that servants, slaves, or conquered peoples were supposed to pay.

This entry regards taxation as a legal institution and an economic mechanism that evolves in the course of history in a conflictive way (Seligman 1905, 1–22).

Taxation in Classical Antiquity

In order to show how current taxes considerably differ from taxes levied in these old times, it suffices to point out one key characteristic of taxation in Ancient Greece and Rome: the moral and legal incompatibility between the full citizenship prerogatives and the duty to pay taxes, especially personal taxes (Weber and Wildavsky 1986, 107–119).

In general, according to the liturgies system, the wealthiest Greek citizens were supposed to voluntarily contribute to finance the construction of public buildings, vessels, and other equipment and goods. Indirect taxes were preferably levied upon foreigners and conquered peoples. Only during war times, the extraordinary military expenses could be financed by personal taxes levied upon Greek citizens.

In Ancient Rome, there was also a clear connection between social dishonor and the duty to pay taxes. At first, the wealthiest citizens donated liturgies, and extraordinary war expenses were financed by a compulsory loan calculated upon the citizens' properties. As the Empire's military power continually grew, these Roman citizens contributions were replaced with war loots and taxes were levied on conquered peoples on a regular basis. Hence, in Ancient Rome, taxes were not a relation between free citizens and their government, but between vanquished and conquerors (Sáinz de Bujanda 1975, 165–174).

Taxation in Feudalism

Today taxes are naturally related to the presence of National States, which derive public revenue from the private economy. But during the long period of feudalism (between the sixth and the fifteenth

centuries), the situation was quite opposite. Taxes (in a very broad sense) were not due to an exclusive and public authority like the Modern State, but to feudal lords and the Church. Furthermore, taxes were economically derived (in a non-monetary form) not from taxpayers' (peasant serfs) properties and businesses, but from the land properties of the same persons (feudal lords) who collected the duties. The previous unified and centralized political power of the Roman Empire was fragmented into a mosaic of realms with their correspondent lords, with no clear distinction between private and public economy, or between public and private proceeds of the sovereign (Torres 1991).

The Emergence of the Fiscal or Tax State

During the Late Middle Ages, there was an expanding range of services which the king had to provide to maintain the loyalty of barons and overlords, especially in terms of military support (the rise of mercenary armies, the colonization of America). Traditional duties that feudal lords received from their serfs (patrimonial proceeds) were not enough to finance the increasing costs of war and colonization of far lands, and it became more and more common that the king levied taxes on, first, the clergy and, second, the nobility – estates, who traditionally used to benefit from fiscal immunities. The famous 1215 British Magna Carta was a political reaction from clergies and barons against the rising taxing powers of the king (Adams 2001, 159–166).

The precise current meaning of taxes (monetary resources that in principle all persons must regularly pay from their personal economy to the State's authorities according to legislation approved by its representative parliaments) was historically reached only with the growth of the Fiscal or Tax State (Schumpeter 1918), where (a) the political power is centralized and unified in the Modern State, which finances its expenditures deriving proceeds from private economy and not from its own properties; and (b) market economy and individual freedom to enterprise replaced the medieval institutions that subordinated the economic system to a rigid morality (doctrine of usury condemnation, for example).

Illuminist and liberal philosophers worked hard to change the legal and moral character of taxes, from a dishonored duty that subjugated people were forced to pay to their lords or conquerors to a rational duty that every citizen had to regularly honor to grant their political and economic freedom, a fraction of their property that each individual had to pay to assure the protection and security of the rest (Voltaire1738; Montesquieu 1749), "like the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate" (Smith 1994, 887).

Taxation in the Three Historical Stages of the Fiscal State

The Fiscal or Tax State came to sight approximately four centuries ago (Yun-Casalilla et al. 2012) and today, with some few exceptions (communist countries or countries with huge natural oil resources which finance public services with patrimonial proceeds rather than taxes), it still rules the interaction between private economy and public finance. Nevertheless, since eighteenth century taxation has assumed quite a few different features and forms, depending on evolving basic assumptions about freedom, equality, and social justice (Martin et al. 2009).

Rule of Law, Liberal State, and Neutral Taxation (Eighteenth and Nineteenth Centuries)

Political and economic revolutions of the eighteenth and the nineteenth centuries rebelled against the old patrimonial logic of absolutist States and put the taxation of citizens – and its limits – in the center of politics. It was a big challenge to transform a traditionally damned institution that was reserved for slaves and serfs into a regular duty that citizens are supposed to

honor as a condition to be free and to protect their property.

The paramount objectives of this first stage were to assure that parliaments decided about what and whom to tax ("no taxation without representation" was first an aristocratic political motto used by barons to limit king powers in medieval times, and then emerged again in the context of the liberal revolutions), and to assure that the criteria regarding this decision about what and whom to tax was governed not by aristocratic immunities and privileges but by equality before the law. Tax equality in this first historical stage meant that the tax burden was to be imposed "among all citizens in proportion to their means," as put by the 1789 French Declaration of the Rights of Man and Citizen (Article 13).

Legality meant that taxation was to be freely accepted by the majority of the citizens and could not be imposed by the sovereign. This political formula of consent was considered to fully respect individual property (Locke 2012, Second Treatise, Section 140) and to render legitimacy and social acceptance to taxation. Besides, legality was supposed to bring taxpayers a greater level of certainty – according to Adam Smith's liberalism, the experience of all nations showed that a small degree of tax uncertainty was worse than a great degree of tax inequity (Smith 1994, 888).

The ability to pay principle, affirmed in several eighteenth century liberal revolutionary declarations and later constitutionalized in several countries, firmly outlawed old tax formulas based in nobility's privileges. Yet the ability to pay principle was quite vague and did not indicate clearly which specific economic bases the democratic legislator was supposed to tax (Palao Taboada 1976). The eighteenth and nineteenth centuries' parliaments, which were basically formed by rich bourgeois, set the central economic tax base (consumption) and defined the preferential tax species (ad rem excise taxes and custom duties with low rate levels) that better served the purpose of an accelerated capital accumulation (Piketty 2014).

Public services and state activities in eighteenth and nineteenth centuries were limited to a minimum (national defense, internal security apparatus, and very incipient and limited expenditures on people's education), so the tax burden could be very low. Moreover, in this period of time, neither taxation nor public budgets had redistributive functions.

This fiscal landscape, together with the firm theoretical and political conviction that workers' wages and salaries were supposed to be roughly around the mere subsistence level in order not to harm a good pace of capital accumulation, produced in the last decades of the nineteenth century and in the very beginning of the twentieth century a situation of extreme poverty and economic inequality, leading to rising political pressures that would cause a radical change – but not the collapse – of the Tax State.

Welfare State and the Fair Value of Liberties: The Rise of Progressive Taxation

During the last decades of the nineteenth century, the most developed European countries and the United States strongly depended on custom duties and excise taxes to finance their budgets. This indirect taxation was harder on to the poor and working class. At this time, when the total tax burden was less than 10% GDP in Europe and in the United States, the idea of a personal income tax with progressive rates emerged and developed very fast in Germany and England (Seligman 1911). The lowest income (around the average household subsistence level) should be exempted from tax because their beneficiary did not have sufficient ability to pay, and above this threshold tax rates should rise according to the rising ranges of income from taxpayers (Seligman 1908).

The idea soon reached the United States and in a period of 50 years completely transformed its tax system. In 1890, 90% of federal tax revenues were formed by customs duties and alcohol and tobacco excise taxes (indirect taxation), with no relevant direct taxes. After the New Deal decade (1930s), customs duties and excise taxes represented only 25% of federal receipts, and income tax revenue rose to 60% in federal government receipts (Mehrotra 2013). Another major

source of growing fiscal capacities in Western countries was the generalization after 1925 of many income tax withholding techniques (Besley and Persson 2013).

In European countries like Germany, England, and France, especially with the impact of the Great Depression of 1929 and two World Wars, the affirmation of progressive income taxation was also a reality. During the glorious 30 years from 1945 to 1975, Welfare State flourished. Taxation was no longer considered as a simple means of raising public revenue but as a strong instrument that had to be actively used to fight social inequality and to induce economic development (Baleeiro 2010, 65–86).

In 1910, when the total tax burden was less than 10% of GDP in European countries and the United States, the top 10% of the richest families in the United States held 80% of the total wealth, whereas the top 10% of the richest families in Europe held 90% of the total wealth. The Welfare State came and somewhat changed this landscape of huge capital concentration. In 1970, with a total tax burden of 25% of GDP in the United States and 35% of GDP on average in Europe, the top 10% of the richest families in the United States held 65% of total wealth, whereas the top 10% of the richest families in Europe held 60% of total wealth (Piketty 2014).

It was not a matter of seeing equality as a worthier social value than liberty; it was a matter of reassessing the fair value of political liberties (Rawls 1971). As put by the US Supreme Court Justice Louis Brandeis (in office from 1916 to 1939), "we may have democracy or we may have wealth concentrated in the hands of a few, but we cannot have both" (Mason 2016).

Taxation and the Crisis of Welfare State (1970s)

In 1918, when the top progressive income tax rates reached 70% in the United States and 60% in the UK, Joseph Schumpeter predicted that the Tax State would collapse in a short period of time, because the private economy's taxable capacity was not being respected and that "tax must not demand from the people so much that they lose financial interest in production" (Schumpeter 1918, 112). Schumpeter's prognosis of the imminent decline of capitalism and the final crisis of Tax State was wrong. Throughout the twentieth century, the Tax State showed enough resilience and ability to sustain expanding budgets (Musgrave 1992), and from post-war reconstruction until the 1970s the global economy grew fast, with full employment.

From the 1970s on, economy in most countries strongly diminished their pace of growth. Neoliberal and libertarian ideas (Nozick 1974) gained momentum and inspired conservative governments to deregulate economy, cut taxes, and firmly control public budgets (Block 2009).

The Welfare State did not collapse after the 1970s: the majority of European countries continued to slowly increase the total tax burden through the following decades, and taxes on income and profits are still the main heading (32.8%) of OECD countries' total tax revenue, followed closely by consumption/value-added taxes and social security contributions and payroll taxes (OECD 2018a, 49). However, since 1975 developed countries considerably restricted the redistributive role of taxation and public expenditure. After the 1970s, top marginal income tax rates and top inheritance tax rates were drastically reduced in the United States and most European countries. Additionally, progressive personal income tax revenue's share in the total tax revenue of most developed countries slightly diminished, from 30% in 1975 to 23.8% in 2016 (OECD 2018a, 49). Accordingly, the pre-tax income share of the top 1% richest households substantially increased in most developed countries in the same period (Alvaredo et al. 2018, 259).

Since the final decades of the twentieth century, economic globalization and financial markets deregulation have led to an international environment of growing tax competition among national jurisdictions, which exacerbated the practice of tax evasion and tax avoidance among multinational enterprises and the wealthiest individuals. This phenomenon of unrestrained tax competition usually is not in the best interest of developing countries and threatens the social

insurance safety net in developed countries (Avi-Yonah 2000).

The tax crisis pervasively perceived in the last decades, notably in developed countries, is not a typical tax revenue crisis since national tax burdens (measured as a percentage of gross domestic products) did not stop to increase at a slow pace. It is rather a kind of legitimation crisis in which taxpayers find no rational grounds for the recognition of their obligations (Menéndez 2001, 111), because of the growing divorce between the rhetoric of constitutionalized tax law principles (no taxation without representation, equality before the law, ability to pay, or faculty principle) and the crude reality of their implementation (opaque legislative process dominated by powerful lobbies; excess of competing tasks assigned to the tax system leading to innumerable exceptions and exemptions with no clear rationale) (Saldanha Sanches 2010).

Differences Between Taxation in Developed and in Underdeveloped Countries

In 1963, the economist Nicholas Kaldor noticed that the tax revenue (in proportion to the gross national product) was much smaller in underdeveloped countries than in advanced countries. Besides, he showed that the tax burden in underdeveloped countries was far more regressive than in developed countries, which aggravated the extreme inequality of wealth and income distribution among classes. Kaldor proposed that a higher and progressive tax revenue should be used by underdeveloped countries to finance public services, to discourage the richest people's unessential or luxury consumption, and to increase savings for capital formation (Kaldor 1963).

Fifty years after the classic Kaldor paper, underdeveloped countries have learned how to raise tax revenues, especially with the general diffusion of the value-added tax. However, due to enduring political obstacles, they have not introduced the progressive income or wealth taxation that all developed countries adopted throughout the twentieth century and which they have preserved, though with less strength, in the first two decades of the twenty-first century (Genschel and Seelkopf 2016).

Kaldor's observation that in most underdeveloped countries progressive income taxes exist on paper but are not effective in practice remains valid. In Brazil, for example, the 1988 Constitution provides for a general and progressive income tax, but the 1995 statutory personal income tax full exemption of dividends created a situation where the effective income tax rate decreases among the top 0.5% richest taxpayers.

Tax Evasion, Tax Avoidance, and Its Global Countermeasures After the Global Financial Crisis (2007–2008): The Base Erosion and Profit Shifting (BEPS) G-20/OECD Project

In all countries, by tax evasion one means the behavior that avoids taxes by breaking the law, by concealing facts (like in the shadow economy), by cheating or lying to fiscal authorities. The typical legal reaction against tax evasion entails tough pecuniary penalties and criminal prosecution.

On the other hand, it is universally accepted that individuals and enterprises have legitimate freedom to organize matters in such a way to avoid paying more tax than required and expected under the law. If they do that without concealing anything from tax authorities, if they do that simply by exploiting the possibilities of the law, that is called tax planning.

In a certain way, tax avoidance is a conduct between tax evasion and tax planning. In tax avoidance, there are no fraud or concealment, but the tax minimization intended by the taxpayer is not considered (by legislation or by case law) valid or effective. Artificiality, contrivance is the key to establish the difference between tax avoidance and tax planning (Cooper 1997). In tax avoidance, people try to minimize taxes resorting to arrangements that are artificial and do not have sufficient economic substance.

Domestic legislations all over the world have developed tools and techniques to fight tax

avoidance since the beginning of the twentieth century. In some jurisdictions, legislation has adopted a general anti-avoidance rule, which uses traditional legal criteria as the abuse of law or *fraus legis* doctrines to identify and fight situations of tax avoidance (Lang et al. 2016). A common characteristic of all anti-avoidance techniques is that they see tax avoidance as a strategy that respects the letter but not the spirit of the law, and that's why tax avoidance can be challenged (not without many difficulties and controversies) by tax authorities. As legal criteria such as abuse of law or *fraus legis* inevitably entail a certain degree of legal uncertainty, some jurisdictions prefer to provide for specific anti-avoidance rules rather than general anti-avoidance rules.

Multinational enterprises have plenty of economic and technical resources to create dozens of legal entities and complex instruments and also to combine them in order to exploit all the tax loopholes and tax incentives located in some jurisdictions, whereas domestic companies and ordinary citizens do not have the same possibility. Harmful tax competition is an old phenomenon by which some privileged tax regimes are created to attract investments to some countries with no requirements of economic substantial activities therein. A harmful tax regime is especially tailored to attract financial companies or holding companies that provoke the erosion of other countries' tax base, leading to a kind of "race to the bottom."

International tax avoidance heavily depends on the availability of a harmful tax competition regime, so that profits which are diverted from a high tax environment are not taxed by the country that offers the privileged tax regime. Governments were aware of the problem (OECD 1998), but no effective and coordinated countermeasures were taken. During the 1980s, corporate income tax rates were about 40%, whereas today the average corporate income tax rate in European countries is 19.48% (KPMG 2019).

Since 2012, tax privileged regimes and aggressive tax planning schemes of the most famous multinationals came to public scrutiny and popular condemnation. "Aggressive tax planning" is an expression that became very popular after the 2008 global financial crisis and since then entered the glossary of OECD and UN tax documents (Dourado 2017). An aggressive tax planning is not necessarily abusive or illegal, but it causes a huge revenue impact, much bigger than a normal tax planning. Moreover, an aggressive tax planning usually exploits the inconsistencies and mismatches between two or more domestic legislations and is not in line with the real intents of the signing parties of a double tax treaty.

In a context of unpopular fiscal austerity policies, people realized that large multinationals, in proportion to their earnings, pay much less income tax than domestic companies and ordinary citizens (Christians 2014). Close to 40% of all multinational's profits were shifted to tax havens and privileged tax regimes in 2015, and the United States multinationals shift comparatively more profits (50%) than multinationals of other countries (Torslov et al. 2018). The reaction against this crude reality, especially in European countries, was the political impelling force that led to 2013 launch of G20/OECD BEPS Project (OECD 2013), in a context of a growing social perception that current international tax law needs to change in order to ensure that multinationals pay their "fair share of taxes".

The BEPS Project's basic diagnosis is that industrialized and developing countries lose substantial tax revenue because of multinational enterprises aggressive tax planning that counts on harmful tax competition among jurisdictions and artificially shifts profits to locations where they are subject to no-taxation or reduced taxation.

The fundamental objective of the BEPS Project and its 15 Actions is to ensure that profits are taxed where substantive economic activities generating the profits are carried out and where value is created. The basic output of the BEPS Action Plan are changes in domestic legislation, double tax treaties, and UN/OECD tax model conventions that can properly address these issues (OECD 2015).

In order to give an effective and swift response to the problem, G20 and OECD decided to impose four minimum standards that all of the 127 countries which are currently engaged (2018) must

implement in a timely manner. According to these minimum standards, countries must counter tax treaty abuse; refrain from harmful tax competition practices; collect and exchange detailed information on the global economic and tax performance of multinational enterprises; and improve mechanisms for a more effective and timely tax treaty disputes resolution.

Big Tax Challenges: Digital Era, Gig Economy, and the Survival of the Welfare State

In a global digitalized economy, multinational enterprises derive a great amount of their income from movable intangible assets and do not need to be physically present in a country to make billionaire profits from the sale of goods and services to its market, relying very often on the user data or participation (marketplaces, sharing economy platforms). That is why BEPS Project Inclusive Framework countries have promised to propose in 2020 a new set of nexus rules on the allocation of taxing rights among countries.

But there is another big challenge beyond international tax rules: the current changing nature of work (from employee to self-employed or incorporated) threatens the effectiveness of most national tax systems heavily based on income taxes and social security contributions, flowing from a classical employment relation. As nonstandard labor contracts (independent workers and short-term engagements) tend to attract much lower tax burdens, the survival of the Welfare State depends on finding and exploiting new and less elastic tax bases (OECD 2018b).

Conclusion

As long as our legal systems remain affirming people's rights, taxation will be the natural consequence of the fact that these rights have costs (Holmes and Sunstein 1999).

On the one hand, as taxation is not only a method for financing public services but it is also "the most important instrument by which the political system puts in practice a conception of economic and distributive justice" (Murphy and Nagel 2002), the nature and shape of taxation will keep changing according to variations and transformations in deep social values such as equality, liberty, and security.

On the other hand, in order to remain faithful and functional to the social values they serve and preserve, tax systems must change decisively from time to time, in response to crucial economic and technological changes in the material world that tax law must fit and rule.

Cross-References

► Taxation: International

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Taxation: International

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Introduction

In the context of economic globalization, capital responsible for the production of wealth has been spread all over the world. If once only countries that had developed technology were responsible for the production of goods and services with high value added (turning into developed countries), with the globalization, part of these productions were transferred to underdevelopment countries. Thus, in order to maintain the gains derived from this movement, capital export countries tax the income earned from its residents, even when the income is produced abroad.

By the other side, capital import countries, most of them underdevelopment, maintain taxation of the income produced inboard, even when the producer of the income is a nonresident person.

International Taxation

So, international taxation refers to the taxation of an income or a capital by more than one jurisdiction and is related to the adoption of (i) taxation based on the residence of the tax payer (the USA is one of the few countries in the world to adopt nationality as criteria for international taxation) or (ii) taxation based on the territorial source where the income is produced.

Thus, residence-based taxation, also known as worldwide income taxation, is related to taxation of income or capital of a resident person that occurred outside the territory of the taxing state; and source-based taxation is related to taxation of income or capital of a nonresident that occurred inside the territory of the state. The adoption of worldwide income taxation does not exclude taxation on a territorial basis, as described by Heleno Torres (2001):

	Resident	**Non-resident**
In the country	Internal taxation	International taxation
Abroad	International taxation	No taxation

Nevertheless, this scenario may lead to double or multiple taxation of the same income or capital of the same person.

Potential double taxation always exists with the adoption of worldwide income taxation, once the income may be subject to tax by the source country and by the residence country of the tax payer. But, it may also occur by other two causes: when the same person is considered resident in more than one state and when income or capital is considered to have source in more than one state.

There are two main ways to avoid the effects of double taxation: unilateral measures and adoption of tax conventions.

As potential double taxation is a natural effect of the residence-based taxation, states of residence always implement unilateral measure to avoid double taxation, as the value of the tax payed to the source state may be used as *tax credit* to be deducted at the residence state.

Also, countries may celebrate bilateral conventions to avoid double taxation of income and capital, by which are defined the persons subject to tax, the different kinds of income, and the mechanism to avoid double taxation on each case: credit, exemption, or both. According to Vogel (2015), "Credit method recognizes the tax payed to the source country as credit in the residence country. The exemption method attributes the power to tax to one of the contracting States, with the exemption in the other. And the mixed method imitates taxation in the source country, with recognition of credit in the residence country."

There are three main models of tax conventions: OECD Model, UN Model, and USA Model. Without a doubt, OECD Model is the most used model for negotiation and celebration of tax conventions and is accompanied by its commentaries produced by the OECD Committee of Fiscal Affairs (2017), largely used to the interpretation of tax conventions all over the world.

Discussions on international taxation take into account two main aspects: (i) tax neutrality principle and (ii) ability to pay principle.

According to Stathis (2004), "The concept of neutrality is based on the assumption that productivity will be highest when income-producing factors are distributed by market mechanism without public interference." So, to reach tax neutrality, it is necessary to implement consistent mechanisms to avoid double taxation. But, in doing so, which country should be privileged with the power to tax (and its revenue): the capital export country (mostly developed) or the capital import country (mostly underdevelopment)? The decision about which country should maintain the power to tax takes into account the different positions of the countries involved and may increase the gap on economic development between them.

That's why capital export neutrality is defended by developed countries, as capital import neutrality is defended by underdevelopment countries.

The clash between these two positions is also the main difference between the OECD Model, whose members are, mostly, capital export countries, and the UN Model that adopts the arguments of the capital import countries.

If double taxation convention privileges capital export neutrality, source countries may have their power to tax reduced, as taxation will be granted to the residence country, increasing the economical difference between developed and underdeveloped countries. This impacts the position of developing and developed countries in relation to their revenue, as appointed by Thomas Piketty (2017).

Regarding the ability to pay principle, international taxation has gained importance in the last few years in order to achieve the avoidance of aggressive tax planning implemented by multinational enterprises (MNEs).

That's because most of the biggest companies of the world may use tax planning structures that leads to zero or insignificant taxation. From structures located in different countries, gaps in the double taxation conventions, tax havens, etc., these companies may avoid regular taxation on a global basis.

The problem has been increased in the last few years, with the growth of the digital economy, once traditional concepts have been challenged, as residence and source. For instance, where is the residence of a crypto asset? Where is the source of income of a service when the client is at country A, the provider of the service is located on country B, and the company is registered on country C?

To face these issues, OECD coordinated the Base Erosion and Profit Shifting – BEPS Plan, with 15 measures to face aggressive tax planning.

Finally, international community has developed important measures of exchange of information between tax administrations, thankfully for two instruments: FATCA and the Multilateral Convention.

FATCA is a mechanism created by the USA that binds foreign financial institution – FFI – to inform the Internal Revenue Service, IRS, about all financial transactions of residents or American citizens. According to the treaties (IGA 1) that carry the FATCA prevision, in return, IRS shall provide financial information of the other country residents that maintain financial accounts in the US institutions.

The Convention on Mutual Administrative Assistance in Tax Matters has been signed and is in effect among more than 140 countries and makes possible not only the exchange of information for tax purposes but also coordinated tax inspections and collection of tax through the members. It has been called "Tax Administration's Globalization."

Conclusion

The importance of International Taxation has increased in the last few years with the growth of economic globalization, and the challenges have been discussed and faced with multilateral measures, mostly coordinated by the OECD.

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Taxation: Legitimation of

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Introduction

Taxation is the state's main source of revenue, it is a tool for redistribution, and it is used to provide behavioral incentives. But what is the moral legitimation of taxation, given that it is a

straightforwardly coercive practice? The answer to this question largely depends on the moral standing of property entitlements. If citizens have property entitlements that are prior to and independent from legal conventions, then one will have to either find a tax base that is morally innocent, or find a moral principle that explains why some infringements of property entitlements are morally permissible. If, on the other hand, there are no pretax property entitlements, then the justification of taxation will not have to overcome a presumption against infringing them, and taxation can be legitimized by direct appeal to values like welfare, efficiency, and distributive justice (For overviews on the political philosophy of taxation, see also von Brederode 2022 and Halliday 2013).

Taxation and Pretax Property Entitlements

The classic justification of "natural" (preconventional) property rights is found in John Locke's *Second Treatise of Government* (Locke 1689). Locke argues that persons can acquire property rights in the state of nature before the creation of the state by "mixing their labor" with natural resources. This is so because, although God gave the earth to all in common, he wants us to enjoy the conveniences of the earth. There are certain limits to this right of initial acquisition, too: One may not put resources to waste, and one can only acquire things by way of labor mixing as long as there is "enough and as good left in common for others."

One need not follow Locke in the details of his theory to agree with him that property entitlements have moral weight independently from the legal conventions they are embedded in. In particular, one need not share his theistic background picture, and one may disagree with him about the proper methods and the limits of legitimate property acquisition. Dan Moller claims to merely follow common sense morality when he points out that there are several factors that may ground moral property entitlements: Investing labor and adding value to a resource, discovering a resource, creating it, having prior control over it, or having it transferred from someone, for example, in the form of a salary from an employer or a payment from a customer (Moller 2019; see also Mack 2010; Huemer 2017).

If property rights have their moral standing independently from legal conventions, then taxation looks highly problematic, since it straightforwardly infringes upon property rights, and accordingly, taxation has been equated to robbery, theft, or forced labor (Spooner 1867; Rothbard 1982; Nozick 1974), and anarchists like Spooner and Rothbard deny the legitimacy of the state and of taxation for that reason.

Some, though, have argued that taxation is *not* an infringement of property entitlements once the tax base is properly chosen. Thomas Paine, Henry George, and contemporary left-libertarians like Hillel Steiner argue that a tax on land or (more generally) raw natural resources is legitimate. This is so either because they remain common property and can only be rented by individuals, or because individuals merely have a right to an equal share of natural resources (Paine 1797; George 1879; Steiner 1994). Steiner also regards germ-line genetic information as a natural resource, and he argues in favor of a 100% inheritance tax (because dead persons have no rights and thus release their ownings back into the commons). Such arguments leave open, though, why the state should have the authority to collect these payments, and they will not convince those who believe that people can acquire a broader set of property entitlements.

Others argue that (some) taxation is legitimate even though it does infringe upon pretax property entitlements. According to Locke, legitimate taxation needs everyone's consent: "The supreme power cannot take from any man any part of his property without his own consent. [. . .] For I have truly no property in that, which another can by right take from me, when he pleases, against my consent." (Locke 1689: §138). But he qualifies this significantly when he explains that the required consent to taxation is "the consent of the majority, giving it either by themselves, or their representatives chosen by them" (Locke 1689: §140). Obtaining the consent of the

majority of representatives is politically much more feasible than obtaining the consent of each individual tax payer, of course. But the downside is that it can hardly count as the consent of the tax payer. Now, Locke thinks that property owners consent to submit to majority rule when they first give their consent to enter or remain in society, but it is questionable whether such consent is really ever given by a significant number of people (Simmons 1995): In other words, if actual consent is needed to legitimize taxation, then taxation will hardly ever be legitimate.

Many authors in the classical liberal tradition instead appeal to something like a *hypothetical* social contract or constitutional convention in their legitimation of taxation (Brennan/Buchanan 1980, 1985; Epstein 1985). The general idea is that state coercion is justified if and to the extent that it makes everyone better off. If it does, it can be assumed to obtain the (hypothetical consent) from everyone. Taxation for the support of public goods like national defense and to correct other "market failures" are prime examples (for discussion, see Schmidtz 1991; Morris 1998; Anomaly 2015).

Since the social contract justification of taxation relies on a specific picture of the proper purpose of the state, it also sets limits on legitimate taxation. Taxation for the sake of redistribution will only be justifiable if and to the extent that it is desired by the constituency of the hypothetical contract. If some kind of safety net can be conceptualized as desirable from that perspective at all – it is a nontrivial question how the constituency of the social contract is to be modeled in the first place – then a universal basic income or negative income tax may look preferable to in-kind transfers because it is less prone to pressure by rent-seeking special interest groups (Buchanan 1997). Second, it is doubtful whether "sin taxes" – which are designed to paternalistically incentivize consumers to make better choices – could obtain the hypothetical consent of a constituency that is aware of their dynamic and evolving preferences (Sugden 2018; Delmotte and Dold 2022).

The social contract justification of taxation naturally goes hand in hand with the "benefit principle" from public finance (e.g., Viti de Marco 1936): Taxation is considered the equivalent to prices consumers pay in private transactions – it is a "forced exchange" – and so taxation is to reflect the benefits payers receive from the state's services. Where possible, only those who receive a service should be taxed for it, for example, in the form of tolls for the use of highways. For services like national defense, the implications of the benefits principle are less straightforward, though. If those who are wealthier can be supposed to benefit more from the state's services, then proportionate taxation (a flat tax) may look more appropriate than regressive "head taxes" (everyone paying the same amount), on the one hand, and progressive taxation (tax rates increasing with income), on the other hand (Buchanan 1997; Epstein 2002; Delmotte 2020, but see also Fried 1999).

A fundamental worry about this approach to taxation is that hypothetical consent is very different from actual consent: That I *could* hypothetically agree to pay you $50 for mowing my lawn does not mean that you may force that service upon me and take $50 from me, even if this would make us both better off. You only have a right to my $50 if I *actually* agree to the exchange. Proponents of hypothetical consent have to explain why this is supposed to be different in the context of taxation.

There are several other attempts to legitimize taxation that I can only briefly mention here (see also Wendt 2018). One is to appeal to a "principle of fair play" that obligates everyone to contribute to indispensable public goods that cannot adequately be provided without the state, and that on the flip side allows the state to coercively collect the contributions (Klosko 1992; Moller 2019). Another alternative is a "Samaritan principle" that allows the state to do things that would otherwise be impermissible if this is necessary to save everyone from the perils of a Hobbesian state of nature (Wellman 2001). Others suggest an "anti-paralysis postulate" according to which property rights are permissibly infringed by way of taxation if this is necessary to preserve the point of having such rights in the first place (Mack 2011, building on Nozick 1974). All these

theories explicitly or implicitly work against the background assumption that people have sound property entitlements.

Taxation without Pre-Tax Property Entitlements

The legitimation of taxation takes a very different form once one outrightly rejects the idea that property rights have any prelegal and pretax moral weight. Liam Murphy and Thomas Nagel have challenged what they call "everyday libertarianism," i.e., the view that one has some sort of natural entitlement to one's pretax income (Murphy and Nagel 2002, see also Holmes and Sunstein 1999; Murphy 2020). Classic conventionalist takes on private property include not only Thomas Hobbes and David Hume, but also Immanuel Kant, according to whom only "provisional" property – which is not generating duties for others – is possible in a state of nature (Hobbes 1651; Hume 1740; Kant 1797). On this view, property rights are nothing but the creation of legal conventions, just like taxation is, and so taxation cannot be said to infringe upon pretax property entitlements. This does not mean that "anything goes" with regard to taxation, of course. Rather, it means that a society's system of property as a whole – including taxation – has to be assessed in light of relevant values like the general welfare, distributive justice, or efficiency (but it could also be that the rationale for having a conventional practice of private property in the first place sets constraints on legitimate taxation; see Wendt 2022).

Utilitarians and traditional welfare economists regard taxes as justified if and when they help to promote welfare, understood as the happiness of the greatest number, preference satisfaction, or in some other way. From this perspective, redistribution by way of progressive taxation may be justified due to the diminishing marginal utility of income and wealth, negative externalities are to be taxed, public goods supported and funded through taxation, and paternalist taxation (sin taxes) may be recommended if successfully leading people to make better choices (on the traditional welfare economist perspective on taxation see e.g. Edgeworth 1897 and Pigou 1920).

Others invoke a theory of distributive justice to evaluate different forms of taxation. When it comes to income taxation, most egalitarian theories of distributive justice will favor progressive rates and endorse an "ability to pay" rather than "benefit" principle (Seligman 1908). The most influential egalitarian theory of justice is, of course, John Rawls's theory of "justice as fairness" (Rawls 2001). To Rawls, the basic structure of society is just if it secures the fair value of equal basic liberties for everyone, realizes fair equality opportunity, and allows inequalities in income and wealth only if necessary to improve the prospects of the worst off. In his latest book, Rawls favors a "property-owning democracy" (and, as an alternative, "liberal socialism") over "welfare state capitalism." Property-owning democracy emphasizes the importance to avoid large concentrations of wealth and thus tries to "predistribute" what people have in the first place, rather than merely "redistribute." In that process of predistribution, high inheritance taxes are regarded as crucial (for discussion of property-owning democracy see the contributions in O'Neill and Williamson 2012, on Rawls and socialism Edmundson 2017).

Conclusion

How taxation is to be legitimized depends largely on one's take on the moral standing of property. If there are pre-tax property entitlements, one will either have to find a tax base that does not infringe upon them, or find a moral principle that explains why property rights are permissibly infringed under specific circumstances and conditions. If there are no pre-tax property entitlements, on the other hand, then the legitimation of taxation may directly appeal to values such as welfare, efficiency, and distributive justice.

Cross-References

► Taxation

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T

Taylor, Charles: Ethics

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Charles Taylor (b. 1931–), Professor Emeritus of Philosophy at McGill University, is a key figure in several intellectual debates. He is the author of numerous books, including *The Explanation of*

Behaviour (Routledge & Kegan Paul 1964), *Philosophical Papers* (2 vols. Cambridge University Press 1985), *Sources of the Self* (Harvard University Press 1989), *Philosophical Arguments* (Harvard University Press 1995), *A Secular Age* (Belknap Press 2007), and *Dilemmas and Connections* (Belknap Press 2011). His work attracts a wide range of readers from both public and academic circles, ranging as it does from reflections on human agency and moral experience to analyses of the nature of language and the meaning of religion in a secular age. Taylor's publications cross the areas of ethics, philosophical anthropology, ontology, epistemology, hermeneutics, social and political theory, religious studies, and the philosophy of language. His ideas are widely discussed in a variety of disciplines and his books continue to be translated into many different languages. He has been awarded the 2007 Templeton Prize, the 2008 Kyoto Prize in Arts and Philosophy, the 2015 John W. Kluge Prize for Achievement in the Study of Humanity, and the 2016 Berggruen Prize for Philosophy and Culture.

Introduction

Ethics is without doubt a central theme of the extensive and ever-increasing writings of Charles Taylor, as the ethical resounds through a number of the dimensions of his thought, not just on philosophical anthropology, hermeneutics, and ontology, but also on issues of moral realism and language theory. Taylor's explorational style has allowed for multiple interpretations of his ethical views, both by his critics and by his interpreters. In these interpretations, Taylor's philosophical background has been traced back to Plato (Olafson 1994, 193–194), Aristotle (Abbey 2000, 12; Laitinen 2008, 33), Kant (Saurette 2005, 197–233; Shapiro 1986, 311–324), Hegel (Berlin 1994, 1), Merleau-Ponty (Smith 2002, 1), Murdoch (Kerr 2004, 84–85), and Christianity (Williams 1990, 45–48; Lane 1992, 46–48; Skinner 1991, 133), whereas Taylor himself consistently emphasizes his indebtedness foremost to Heidegger (Taylor 1985, 1989, 1995b, 2015, 2016).

Taylor's ethical thought starts from a rejection of what he calls "naturalism," that is, "the view that arises among thinkers for whom seeing humans as part of nature means seeing their behavior and life form as ultimately explicable in terms that are consonant with modern natural science" (2003, 306). Refuting this approach, Taylor's main concern is that crucial features of human life just disappear by adopting a scientific stance. In line with this, the leading notion of his central doctrine of "strong evaluation" (cf. Abbey 2000; Laitinen 2008; Meijer 2017) is that moral agency essentially resists incorporation into the empirical sciences. Yet he sees a broader "naturalist temper" not just in the outlooks of "many students of the sciences of human behavior" but in Western culture as such, "stopping short frequently of explicit espousal of full-blooded naturalism but tending to be suspicious of the things that naturalism cannot accommodate" (1964, 3; 1995a, 137). This observation – that most people are reluctant to embrace naturalism fully and yet remain highly skeptical of all things that do not fit the naturalist model – is *the* underlying theme of Taylor's moral philosophy.

Taylor's Doctrine of "Strong Evaluation"

Methodologically, Taylor's arguments not only combine ethics with philosophical anthropology, but also have a way of entwining hermeneutic and metaphysical reflections with ethical inquiries. In a major effort to link these issues together, Taylor draws attention to the connection between ethics, philosophical anthropology, and ontology in general and the intertwinement of human identity and value in particular. His views are inspired, first, by an epistemological concern for the nature of human agency in dealing with the problem of knowledge; second, by an ethical concern for the central place of value in human life; and, third, by an ontological concern for the background conditions within which human thought and action take place.

As a philosophical anthropologist, Taylor argues that the implicit agent in naturalist theory is a "monster" (1989, 32). As a moral philosopher, he criticizes much modern and contemporary

moral philosophy (mostly forms of utilitarianism and Kantianism) for annihilating our sense of morality, that is, the sense that moral values are "in some way special, higher, or incommensurable with our other goals and desires" (2003, 308). As an ontological thinker, he seeks to convince us that moral reactions are best understood as "responses to some reality," as it lies in their nature to claim "truth, reality, or objective rightness" (2011, 297–298).

However, since Taylor's thinking is organized around an interpretation of the human subject that steers a course between Aristotelian and Murdochean ethics, Kantian epistemology, Merleau-Pontyan phenomenology, and Heideggerian ontology, his hermeneutical vocabulary is somewhat of a mismatch with the analytical discourse in which these issues are generally debated (for example, in terms of moral facts and properties). This may have contributed to some neglect of Taylor's moral philosophy, at least within Anglo-American ethics. Yet it is precisely his unusual terminology that makes his views stand out from that of the others.

In this regard, Taylor's key concept of strong evaluation is worth mentioning. In his most basic definition, "strong evaluation" depicts an ethical kind of reflection that involves "distinctions of worth" (1985, 3). With this key notion, Taylor seeks to capture the sense that human beings understand themselves not by simply having certain desires but by *evaluating* their desires in terms of their worth. He describes this type of evaluation as "strong" because it recognizes not just plain desires but reaches beyond these to judge their value. In this way, he introduces the concept of strong evaluation to highlight that human beings experience some of their desires and goals as inherently more worthy than others.

At one stroke, Taylor employs this notion to refute naturalism, to defend his philosophical-anthropological thesis about the self, to develop his phenomenological approach to ethics, and to raise ontological questions. One way of mapping the terrain of strong evaluation is to see it as an inclusive doctrine that is divided between three large domains: philosophical anthropology, ethics, and ontology. First, Taylor argues that strong evaluation is to be understood as a universal feature of human agency. In this respect, the thesis of strong evaluation is part of his larger philosophical anthropology, which aims to describe those features of human action and experience that in his view are distinctively and universally human. Second, Taylor uses strong evaluation to endorse his moral phenomenology, which centers on the point that some goods, values, or goals strike us as being higher, more worthy, or more demanding than others. Third, this point only sets the stage for his "non-anthropocentric" perspective on the good (Kerr 2004; Taylor 1989), that is, to make room for the rather contentious metaphysical question of what it is that implicitly informs our experience of strong values.

Taylor's Interwoven Mode of Argumentation

One example of Taylor's interwoven mode of thinking is that his anthropological and ethical views are intertwined in such a fundamental way that the two can hardly be separated. He believes that identity and value or, as he puts it, "selfhood" and "morality" are deeply interwoven because "our notion of the self is inextricably connected with our understanding of our moral predicament and moral agency" (1988, 298; 1989, 3). In elaborating on this, Taylor makes it clear that his concept of the self is linked to moral issues in a broad sense, having to do with how one ought to be and what is a good or worthwhile life (1989, 32). In this way, he strategically discusses human agency in connection with broad moral issues in developing his philosophical anthropology.

This focus on moral identity prepares the ground for Taylor's more applied "ad hominem" and "transcendental" arguments in criticizing naturalism in ethics. In developing these arguments, he has constant recourse to the close relation between facts of human nature and ethical beliefs in order to expose and refute the imagined *agent* behind naturalistic moral theories. The "ad hominem" moment (Latin for "to the person") in Taylor's reasoning, then, is that his philosophical

anthropology appeals to basic considerations of personal identity by invoking commonsense moral beliefs that no sane human person would be willing to give up. In this way, he defends what he calls an "*ad hominem* mode of practical reasoning" (1995b, 37), which states that we cannot make full sense of ordinary moral self-understanding without recognizing strongly valued goods that we all share, such as respect and benevolence.

The main thrust of Taylor's ad hominem argument is to show the inadequacy of reductive naturalistic approaches to ethics that leave no room for strong evaluation. However, this critique is only the basis of a transcendental argument that seeks to convince us that strong evaluation is both a structural and inescapable feature of human agency. Put simply, Taylor's transcendental argument seeks to make clear that no other condition than strong evaluation makes our actions intelligible and that, therefore, any coherent understanding of human agency will include strong evaluation. Although he explicitly presents this argument as an exercise in "moral phenomenology" (1989, 68, 74, 81), he stresses that his view is "not only a phenomenological account" as it aims to establish something stronger, namely, an account of the "transcendental conditions" of human life (1989, 32).

These points show that Taylor's ad hominem and transcendental perspectives include anthropological, ethical, and phenomenological points all in one. He then continues and extends his interwoven mode of argumentation by adding an ontological perspective, that is, by asking "what ontology can underpin our moral commitments," and by arguing – tentatively, yet boldly – that there is a tension between "the phenomenology of the incommensurably higher," on the one hand, and "a naturalist ontology which has difficulty finding a place for this," on the other (2003, 316; 2007, 607). In reply to this tension, Taylor defends his non-anthropocentric perspective as a middle position between "a 'Platonist' mode of moral realism" and "mere subjectivism" (1994, 211). Compared with his philosophical anthropology and moral phenomenology, what is striking about Taylor's ontological perspective is that it challenges his opponents, as it were, from the opposite direction. That is, rather than argue (both anthropologically and phenomenologically) that naturalist theories paint a false picture of human *subjectivity* and moral experience, he now criticizes them for neglecting the *objectivity* of the good. In this respect, Taylor warns us that moral thinking can easily slide into "a celebration of our creative powers," whereas "at its best, in full integrity, the enterprise is an attempt to surmount subjectivism" (1989, 510).

Taylor's Hermeneutic Moral Realism

Taylor's anti-subjectivist claims raise an important issue: What is the relation between Taylor's hermeneutic approach to ethics and his defense of what he calls "a kind of moral realism" (1991, 246)? In this respect, Taylor's thought has been strongly criticized. Whereas some commentators see Taylor as a Platonist, others dismiss the charge of Platonism as flawed. However, a large number of them do so only to make the claim that Taylor is best understood as an advocate of theism. Numerous reviews of *Sources of the Self* raise the worry that Taylor is, if not a Platonic metaphysician in disguise, more like a hidden Christian theologian. In this spirit, Quentin Skinner notes that "Taylor's final message, like that of the Churches, is that we cannot hope to realize our fullest human potentialities in the absence of God" (1991, 133). Melissa Lane concurs when she says, first, that Taylor advances "a normative argument that only theism is an adequate moral source" and, second, that he "fashions a theory requiring God, or something very like God, to be complete" (1992, 46, 48). Accordingly, Bernard Williams characterizes *Sources of the Self* as a "Catholic tale" (1990, 45). Others simply insist that we should be wary of "the theism that lurks ever more prominently" in Taylor's writing (Flanagan 1996, 154). For yet others, the real problem is that "Taylor's argument about the indispensability of theism" boldly states that "atheist moral sources are inadequate" (Skinner 1991, 149; Johnston 1999, 111). Paul Johnston seems to express the most radical interpretation, for his reading goes so far as to

conclude that Taylor's attempt is "to show that everyone should believe in God" (1999, 112).

One of the phrases that have triggered such frantic responses is Taylor's expression of the "incomparably higher." In Skinner's reading, Taylor strategically employs this term to render incontestable his theism. He argues that if, as Taylor insists, we really stand in need of "something awe-inspiring and completely incomparable in order to give meaning to our lives, then it is certainly hard to see how we can hope to attain that meaning in the absence of God. For who else is completely incomparable?" (Skinner 1991, 147) For Williams, however, the problem lies not so much in Taylor's account of the incomparably higher, but more in his "rapid move uphill," metaphysically speaking, that is, a move from phenomenology to ontology (1990, 48).

At least three problems emerge from the above readings. First, what does Taylor's conception of the "incomparably higher" mean to express? Second, how does he evaluate the difference between theistic and non-theistic moral sources? Third, how should we understand Taylor's move "uphill," that is, the move from moral phenomenology to moral ontology? Although this is not the place to explore such major questions, I discuss these topics in detail in Meijer (2017). Instead, I would like to draw attention to an often-neglected dimension of Taylor's hermeneutic moral realism: its deep connections with two other, closely related topics: philosophical anthropology and philosophy of language.

As noted, Taylor's central claim is that selfhood and morality cannot be separated. In so arguing, his anthropological perspective takes its cue from a central hermeneutical idea: What human being *is* (what we are as agents) depends on how we interpret and evaluate ourselves, on self-interpretations. However, as a *realist*, Taylor loses no time in stressing that the understanding behind such fundamental interpretations is that they track "some reality," that underlying them "there is supposed to be a truth of the matter," and that it "lies in their nature as strong evaluations to claim truth, reality, or objective rightness" (2011, 297–298). So, how does Taylor's hermeneutics relate to his realism?

While Taylor's moral philosophy is based on the link between value and agency, it also connects with another crucial aspect of his thought: his understanding of the nature of human language. For Taylor, moral judgments as strong evaluations are not merely descriptions of some independent reality as they are expressive of our nature as "language animals" (2016). To clarify this point, he marks a distinction between immediate feelings such as physical pain and what he calls "import emotions," which differ from brute feeling because they involve "a sense of our situation" (1985, 48). His examples of import emotions are fear, shame, indignation, and admiration, emotions through which we experience our situation as bearing a certain "import" – it being frightening, shameful, insulting, or admirable. Whereas a situation is painful "just because we feel pain in it," the feeling of fear (etc.) is a *response* to what has happened, which makes explicit some *judgment* about the situation that gives the emotion its character (1985, 48–49). That is, while we only speak of an animal's fear or anger to speak about a quality of the animal in question, namely, its behavior or response, we can think of human feeling as making a further claim, one about the "object" of our awareness and response (1985, 158). In this sense, import emotions are expressive of our nature as uniquely linguistic animals.

Against the background of these claims, the concept of strong evaluation comes in as a further sophistication of what is involved in this characteristically human type of feeling and articulation. What distinguishes strong evaluations from mere import emotions is that they are what Taylor calls "inherently reflexive." They involve not just explicating the imports concerned, but also referring to "the life of the subject" (1985, 67). Fear, shame, indignation, and admiration are strongly evaluative emotions because they need crucial reference to one's self-understanding. For example, I might be proud of my success as a banker in selling usurious insurance policies, while you are really ashamed of me. Shame and pride refer to activities and ends, which are worthy or unworthy. As import emotions, they involve a response to and make explicit some judgment about the

situation. But as strong evaluations, they further reflect how this response/judgment relates to one's moral identity. In this respect, his further claim has been that strong evaluations involve judgments that are "not rendered valid by our own desires, inclinations, or choices, but rather stand independent of these and offer standards by which they can be judged" (1989, 4). How to make sense of this claim?

Surely, the meanings that our strong evaluations seek to define depend on us in the sense that they require language to exist. But precisely this feature of our experience – that the meanings to which our judgments respond can only exist for us through articulation – gives our moral statements a distinctive metaphysical character. How so? Because, unlike the expression of immediate feelings, strong evaluations are such that articulating something with the term "shameful" inflects our sense of meaning in a *new* direction. The "metaphysics" involved here is that new expressions "open up new ways of being in the world" (2016, 189). We are concerned here with a particular constitutive force of strong evaluations, which puts us squarely in the metaphysical domain because it creates new *realities*, and, beyond that – a new sense of self as part of that reality. Strong evaluations not only make explicit some judgment about the world (actions, persons, policies) but further reflect the significance of one's own desires, actions, and identity as part of that world.

What Taylor calls the "constitutive power" of language (2016), then, is that it reflects on *us* as language animals seeking moral orientation through articulation. When I come to understand my agitated state as envy or jealousy, I am already living it differently. I have taken the first step out of confusion; my situation already has a shape for me. In this way, new articulations allow the world to move us in new ways. That is why Taylor calls them "constitutive." The crucial point is that this kind of articulation requires *words*. An initially vague "unpleasant" feeling emerges as a recognizably distinct experience of envy, jealousy, vanity, indignation, remorse, or whatever, when we find the right words. The strongly evaluative descriptions carry the constitutive force. This type of articulation – which *changes* its object – thus by no means offers a merely dispassionate explanation: as strongly evaluative descriptions, they constitute and color the meanings in a way that gives them a profoundly normative character. Consequently, any change of description effects a change in the reality, that is, "the pattern of meanings we live by, the 'landscape' as we live it and feel it" (2016, 197).

The point of Taylor's realism, then, is that when it comes to our strongly evaluative judgments, we could always be deceiving *ourselves* – for instance, when I pride myself for acting out of generosity while I am really acting out of greed. For example, as a banker, I may see myself as helping people, but we can ask whether selling shady financial products is really consistent with that self-image. For Taylor as a *realist*, then, there is a *getting it right and getting it wrong in this domain*. Moral judgments are interpretations of meaning in that they are attempts to make clearer the worth things have for us. But such clarity cannot be achieved at will by simply articulating our experience. Rather, moral insight must be *earned*; it is meant to be faithful to what it is that moves us.

Conclusion

To conclude, while it makes no sense to accuse someone of being inconsistently in pain, we can point to inconsistencies in self-understanding. Strong evaluation thus involves goods, which stand "independent" of our own desires, in that our experience of these goods can be faulty, and that we always risk falling prey to self-deception, reminding us never to take our existing experience for granted. In *this* sense, then, our moral judgments authentically claim "truth, reality or objective rightness" (2011, 298). This is now the shape of Taylor's hermeneutic moral realism.

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Taylor, Charles: Secularity

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Introduction

Though Charles Taylor's (b. 1931–) writings span a wide range of topics in political philosophy, social theory, and ethics, the theme of secularity has remained an enduring focus of his work. This emphasis is made explicit in his landmark 2007 volume *The Secular Age*, which offers a philosophically nuanced and richly detailed analysis of the rise of secularism in the modern West. But the concern to demystify and disentangle the various dimensions of secularity in western society also permeates his earlier writings on behavior, modernity, and subjectivity, and it is likewise interwoven into his analyses of key modern philosophical voices and his continuing work on meaning and language. Currently Professor Emeritus of Philosophy at McGill University, Taylor's work on the impact of secularism has earned widespread recognition. He received a Templeton Prize in 2007 for his research into ongoing forms of spirituality in contemporary society. In 2015, together with Jürgen Habermas, he was also awarded the John W. Kluge Prize for Achievement in the Study of Humanity.

Over the course of his writings, Taylor's analysis of secularism has continued to evolve and deepen. However, his treatments have also maintained a consistent perspective throughout. Arguing against manifold reductionist narratives that regard modern or scientific rationality as inevitably undermining the possibility of religious belief, Taylor depicts western secularity as a far-reaching cultural shift in what it means to believe,

an underlying transformation in the "conditions of experience of and search for the spiritual" (Taylor 2007, 3). Amid this secular age, democratic societies find themselves in a new predicament of a significantly altered conception of the place and role of religion in the public sphere (Taylor 1999, 2002; Smith 2014).

The Theme of Secularity in Taylor's Early Work

Taylor's early writings centered on a critique of psychological behaviorism (Taylor 1964), investigations into competing modern theories of meaning (Taylor 1985), and an exploration of G.W.F. Hegel's pioneering work in phenomenology (Taylor 1975, 1979; Sibley 2008; Meynell 2011). These works treat a wide variety of topics, yet they also converge in a developing criticism of prominent naturalistic and reductive approaches in modern thought. Taylor objects to the widespread tendencies to structure the study of the humanities – in history, social sciences, linguistics, and philosophy – after the purportedly objective model of the natural sciences (Taylor 1985, 1–2). He finds the motivation and appeal of such attempts to rest on increasingly accepted notions of the atomistic individual, who exists independently from society, and of disengaged reason, which might neutrally and dispassionately survey the external world (Taylor 1995). Such a view of individualized rationality obscures fuller accounts of how and why human beings search for meaning and fails to recognize crucial features of human agency and persons, such as consciousness, intentionality, and the common meanings that are embedded in social institutions and cultural practices.

Taylor's 1989 text *Sources of the Self: The Making of Modern Identity* pulls together the various strands of these early works to present a portrait of developing modern understandings of identity and selfhood. This complex and nuanced work charts the historical development of conceptions of the self, along with related questions of fundamental moral frameworks, through the emergence of modern notions of inwardness, the growing affirmation of ordinary life, and increasing trends toward expressivism in philosophy, literature, and art. From these overlapping cultural transformations, Taylor notes, emerge the conflicting ideals and moral frameworks that distinguish modern western thought: the prevalence of naturalist and rationalist theories of knowledge, a strong valuation of instrumental reason and its achievements in science and technology, and a robust individualism that cherishes self-realization, authenticity, and "expressive fulfillment" (Taylor 1989, 508; Taylor 1992; Braman 2008).

The rise of western secularism, with its far-reaching implications for human agency and morality, is inextricably bound to these shifting understandings of modern selfhood (Smith 2002; O'Shea 2012). In the breakdown of former theistic conceptions of the good and order in society, ideals such as freedom, justice and beneficence, and equality are still forcefully maintained but have grown increasingly distant from any moral sources or conceptions of value that can command meaningful assent. In consequence, explanations of the shared goods and meanings of society, as well as the social responsibilities of individuals, have become partial and one sided (Taylor 1992). In this respect, the emergence of secularity in western society, despite its claims to cultural and political progress, is accompanied by a fragmentation and loss of meaning in modern conceptions of personhood and by truncated and inarticulate moral perspectives (Taylor 1989, 498–499). Thus, the significant social gains of modern secularism are matched by narrowed and cramped perspectives of human goods and human meaning (Taylor 1994; Redhead 2002).

Recent Treatments of Secularity

Taylor's subsequent writings have continued to expand upon these insights. His 1998–1999 Gifford lectures, on the question, "What does it mean to call our age secular?," trace the cultural revolutions underpinning the expressions of spirituality in twentieth-century western society and serve to outline his developing inquiry into the

role of secularity in modern culture (Taylor 2002). In place of traditional views which saw the spiritual as intrinsically related to the goods of society, present forms of spirituality play out amidst a new individualized consumer culture which prizes the "vigorous pursuit of personal prosperity" and champions the depth and strength of individually held feeling over the actual content of belief (Taylor 2002, 103). Religious belief and practices, then, have not disappeared from contemporary society but are recomposed and reoriented toward a new humanistic pluralism centered on personal choice (Taylor 1999).

Taylor's *A Secular Age* takes up this line of inquiry to present his fullest account of secularity, furthering the critique begun in his *Sources of the Self*. Like this earlier volume, *A Secular Age* presents a detailed and multifaceted study, which aims to tell the story of Western secularization through a comparative description of key secular and religious voices. At the outset, Taylor clarifies his own understanding of secularity against more commonly held meanings of the term. Secularity is not simply the emptying of religion from public spaces and the political sphere, nor is it a mere falling off or withering of religious belief or practice. Instead, it signals a deeper change in the sense of what it means to believe, setting up "a new context in which all search and questioning about the moral and spiritual must proceed" (Taylor 2007, 20). Once more, then, Taylor departs from the simplistic narrative that modern science obviates or crowds out religious belief in the way that knowledge replaces superstition or history replaces archaic myth. Such "gross error theories" (Taylor 2007, 12) obscure the new predicament of religion in society – that what it means to believe has now become problematized as one option among others, the truth of which can no longer be held naively but which instead involves an ongoing search of reflective inquiry and tenuous hope. To recognize secularity is not to see religion as overcome, but to acknowledge that now religion continues in a "disenchanted" world, in which the sense of connection to spiritual forces or sources of meaning has been lost. As Taylor writes, "belief in God isn't quite the same thing in 1500 and 2000" (Taylor 2007, 13).

Taylor indicates several interrelated factors underlying this cultural transformation. The first of these is the turn to reflexive and inward understandings of individual identity. In contrast with earlier frameworks that regarded personhood as inescapably "porous" – related to moral and spiritual forces, embedded in social rituals, and susceptible to the powers of nature – modern identity has become "buffered" against outside influences and disengaged from natural and social surroundings (Taylor 2007, 42). Individuals are viewed as independent rational minds, standing over against a neutral and objectified natural world. This disengaged stance ushers in conceptual changes ranging from an altered understanding of time and the physical universe to a re-imagined place of the individual in society. It enables both a mechanistic understanding of nature and an instrumental view of reason that proceeds coolly and stands apart from context.

Yet this modern buffered self has also faced a strong backlash with the emergence of expressive individualism, a trend whose beginnings lie in late eighteenth-century Romanticism but which has grown especially prevalent in the wake of the cultural revolutions of the 1960s. Contemporary western democratic societies, Taylor suggests, now inhabit a culture of authenticity, which insists "that each one of us has his/her own way of realizing our humanity, and that it is important to find and live out one's own" (Taylor 2007, 475). Within this interiorized and pluralistic scheme, religious belief and practice find legitimacy only as a privatized path toward authentic self-expression.

A second and more subtle factor in the transition to a secular age lies in the growing separation of nature and the supernatural, or of immanence and transcendence. In the West, the move to secularity rested upon a crucial theoretical distinction between the immanent order of nature, whose workings could systematically and independently be explained, and the realm of transcendent reality existing beyond nature. This differentiation of the natural from the supernatural was originally intended to disentangle the order of nature from the divine workings of grace. Yet it slowly gave way to a conviction of the self-sufficiency of

immanent mundane reality, which in turn served to "close the transcendent window" and to restrict any human aspirations that would go beyond ordinary human flourishing (Taylor 2007, 638). In this way, it became possible "to identify the locus of our highest moral capacity and inspiration, without reference to God, but within the range of purely intra-human powers" (Taylor 2007, 244–245).

Taylor locates a third aspect of the story of secularization in "the drive to Reform," which has both animated repeated Christian attempts at reformation and given decisive shape to secular humanism (Taylor 2007, 61). This reforming impulse proves a strong and enduring motivation within Christianity, as it seeks to make over society in the vision of the gospels and to gradually abolish the gap between spiritual elites and the mass of ordinary believers. Following centuries of internal pressure, it comes to the fore in the Protestant Reformation and the Catholic counter-reforms in the sixteenth and seventeenth centuries, and it continues on in eighteenth-century Deism and in the proliferation of new mobilizing religious forms throughout the nineteenth and early twentieth centuries. Yet the desire to remake society in the name of good social order also lies at the heart of nineteenth-century humanism, which develops as "an exclusive alternative to Christian faith" (Taylor 2007, 299). This exclusive humanism offers a substitute for Christian attitudes toward transcendence and the love of God in the unceasing push for social progress and a sense of benevolence toward one's fellow human beings. Likewise, it presents a competing vision for reordering society, seeking to organize the lives of citizens in rational ways, through proper education, the rule of law, and the cultivation of sober and productive economic lives.

Taken together, Taylor's analysis suggests a need to move beyond well-worn simplistic accounts of secularism in the west. "Modern culture," he writes, "is not just the scene of a struggle between belief and unbelief" (Taylor 2007, 636). A more adequate understanding of secularism demands fresh, more nuanced frameworks that capture the intimate and enduring connections of modern humanism with religious belief.

Conclusion

Throughout his writings, Taylor's developing analysis of the rise of secularity in the modern west is distinguished by its thoroughgoing attentiveness to nuance and his aversion to polemic arguments that distort the place of religion in contemporary society. He presents the growth of modern secularism not as a single, uniform development but as an evolving series of complex and often conflicting cultural transformations, intellectual revolutions, and attempts at social and political reform. In place of a mere decline in religious conviction and practice, Taylor makes clear that the "path of modern religious life under 'secularization' is one of destabilization and recomposition," a process which continues today (Taylor 2007, 461).

Taylor's treatment also entails important implications for the ongoing inquiry into the place of religion in contemporary western society. Over against the various "subtraction stories" that would attribute the perseverance of modern religious belief to simple error (Taylor 2007, 22), his work presents an incisive critique of reductive accounts of religious thought and practice which deny crucial important aspects of the ongoing search for meaning and fullness in human living. On this view, the modern triumph of humanistic attitudes consists not in a heroic rejection of Judeo-Christian values but in a gradual and subtle process of translating of these stances into another sphere. Secular humanism, in this sense, continues to be nourished by religion even where it rejects it.

Furthermore, Taylor's analysis runs contrary to the view that the passage from religious belief to secularism in the modern West presents a paradigmatic case, a logical inevitability in the face of scientific reasoning. In contrast to the presumption that secularity will supplant religious belief in modern democratic society as a matter of natural course, Taylor depicts the growth of Western secularism as the fruit of a particular social, moral, and intellectual context and one whose peculiar shape is owed to factors specific to the challenges and tensions that shaped the western European intellectual tradition. In this respect, Taylor suggests we live in a world of "multiple modernities"

(Taylor 2007, 21; Taylor 2004). If secularization were to arise in other cultural contexts, this process of destabilization and recomposition could travel a significantly different path.

Yet beyond these challenges to lingering simplistic notions of secularism, Taylor's inquiry also carries important ramifications for "our present predicament" in western democratic societies (Taylor 2007, 259). Pressing challenges such as political violence, violations of human dignity, and systemic social injustice, Taylor argues, can only be adequately met through an understanding of both their secular and spiritual dimensions. By contrast, depending solely on secularized viewpoints leads to truncated and fragmented reasoning, which obscures central insights into ongoing clashes of culture, morality, nationality, and religion in the west.

Taylor's contributions on secularity, then, enable a more comprehensive perspective. The rise of secularism is not a development that can be isolated from other areas of contemporary culture. Rather, it marks a fundamental shift that implicates all current directions in social criticism, moral philosophy, and political theory.

Cross-References

- ▶ Deconstructionism
- ▶ Habermas, Jürgen: Faith and Reason
- ▶ Hermeneutical Legal Theory
- ▶ MacIntyre, Alasdair
- ▶ Neo-Kantianism

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Technology: Feminist Philosophy of

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Introduction – Early Feminist Thoughts on Technology

A feminist interest in dealing with technology and science has been evident since the so-called second wave of the feminist movement and thus since about the middle of the twentieth century.

However, the early analysis of these topics in feminist circles was characterized by a schematic view. Either technologies were seen as promising new possibilities, especially with regard to a conceivable emancipation from patriarchy. Shulamith Firestone, an influential feminist of the 1970s, for instance, advocates in *The Dialectic of Sex* (1970) the thesis of an elimination of all gender differences and the "freeing of women from the tyranny of reproduction and childbearing" (1970: 225). Firestone therefore welcomed the (technique and technology of the) breeding of embryos in artificial wombs (ectogenesis).

However, much more common was the negative assessment of the opportunities afforded by technology to those who were not understood as male. Technology has been criticized as perpetuating structures of dominance, generally marginalizing people who are not understood as male, and perpetuating patriarchal patterns of oppression that inscribe themselves into social structures through it. Quoting Audre Lorde that "the master's tools will never dismantle the master's house" (1979/1984: 110), currently existing technology is never able to liberate people from the patriarchal norm. Technology, according to the prevailing opinion of feminist critique of the second wave of the women's movement, only provides patriarchal tools and therefore does not represent a possibility to free oneself from the patriarchal system.

Judy Wajcman pointedly summarizes this period of an initial feminist engagement with technology in *TechnoFeminism* (2004: 103): "Feminist theories of the woman-machine relationship have long oscillated between pessimistic fatalism and utopian optimism. The same technological innovations have been categorically rejected as oppressive to women and uncritically embraced as inherently liberating."

Feminism + Technology = Feminist Technology?

Perhaps the most important insight in retrospect of the early and mostly one-sided debates about the relationship between humans and technology is that technologies cannot be considered in isolation and on their own. Depending on the respective feminist perspective, a technology can be understood as liberating from patriarchy or, on the contrary, as a patriarchal tool. This is what Linda L. Layne, Sharra L. Vostral, and Kate Boyer then state again many years later in the anthology they edited, *Feminist Technology* (2010). Across numerous examples of potential feminist technologies, they conclude that a "technology may appear feminist in light of one type of feminism and antifeminist through a different feminist lens" (Layne 2010: 18). The birth control pill, for example, can be rejected by radical feminism because it adapts childbearing people to patriarchal labor and social structures. At the same time, liberal feminists can see it as a feminist technology, as it opens up possibilities and greater control for people understood as women with regard to their own bodies.

So, if we want to talk about feminism and its relationship to technology, we have to define what we mean by feminism and what we mean by technology. Feminist are all those approaches that are directed against patriarchal and heteronormative structures. But apart from this fundamental and essential feminist idea, however, the individual feminist currents differ so much in their visions and the ways of realizing them that it seems to make more sense to always speak in the plural, that is, of *feminisms*, rather than in the singular, of feminism. Indeed, there exist a variety of feminist approaches such as essentialist, cultural, liberal, radical, socialist, existentialist, psychoanalytical, Marxist, postmodern, deconstructivist, gynocentric, spiritual, postcolonial, cybernetic, anarchist, ethnic, difference, eco, equality, and egalitarian feminisms. All of these feminist positions (and others not mentioned here) each have their own perspective on technology and science and often differ significantly from each other (cf. Loh 2019: 2).

As far as technology is concerned, we need a broad understanding that includes not only individual technologies (artifacts, objects, material technology), but also, for example, techniques as standardized, well-rehearsed, methods, processes, practices (process technology), signs (intellectual

technologies), procedures (social technologies), materials (real technologies), and attributes (e.g., affine in technics) (Hubig 2013, 1995; Kranz et al. 1971–2007).

Only such a broad understanding of technology does not narrow the feminist analysis to single objects, thus promoting a one-sided and schematic view. Technologies must always be studied together with the social structures in which they are embedded and on which they have an impact. Layne therefore argues in her introduction to the anthology *Feminist Technology* that potential feminist technologies, "would be those tools plus knowledge that enhance women's ability to develop, expand, and express their capacities" (Layne 2010: 3). Against this background, it seems reasonable to classify feminist technologies gradually on a scale ranging from "minimally feminist technology" ("for those that improve things for women some degree from the status quo") to "moderately feminist technology" ("for innovations that provide a substantial improvement for women over the status quo") to the actual, genuine "radically or truly feminist technology". These are "innovations that adopt a holistic approach to women's lives and make changes that radically restructure arrangements in ways that will benefit women and substantially shift the balance of power between women and men" (all quotes in Layne 2010: 14).

Donna Haraway's *Cyborg Manifesto* – The Birth of Cyborg Feminism

Over the years, there has been a realization that technologies can never be considered without context and independent of social, political, economic, and scientific structures. In the 1980s and at the latest with the dawn of the so-called third wave of the women's movement, which itself had a much more differentiated view of the diversity of the sexes (cf. Judith Butler and queer feminism), a more differentiated examination of technology and science also took off. Donna Haraway made the famous beginning with her *Cyborg Manifesto* (1985). With *cyborg feminism*, she defined a first feminist approach that was decidedly concerned with the challenges, functions, and potential of technology.

As with all later technofeminist approaches, this is a constructivist approach. Haraway explicitly and with the help of the figuration of the cyborg questions traditional dichotomies and dualisms such as those of nature and culture, subject and object, woman and man. Through the lens of technology, she criticizes society as a whole, which Haraway (in the mid-1980s) clairvoyantly sees as being on the cusp of an information society. Her main interest, therefore, is in a critical analysis of information and communication technologies (ICTs). On the one hand, these promise greater transparency and plasticity of identities and offer possibilities for the creation of new and experimental gender forms. At this point, the figuration of the cyborg represents a critical consciousness regarding the questioning and merging of categories. On the other hand, however, Haraway also sees the dangerous tendencies of an evolving informational and techno-capitalism. The philosophical element of her approach lies precisely in the social critique that at the same time outlines some thoughts with a perspective of a utopia of a society worth living in.

The *Philosophy* in Feminist Philosophy of Technology

At this point we have arrived at the third element of *feminist philosophy of technology*: that of philosophy. Philosophy is dedicated to a critical analysis of the basic assumptions of being and the self-evident aspects of everyday life (cf. Loh 2019: 2). Philosophers also question the axioms and first premises of the empirical sciences. This is Jay F. Rosenberg's understanding of the discipline of philosophy and the practice of the philosopher (1978: 5–6): "Philosophy as a discipline is perhaps thought of most fruitfully as being distinguished by its method rather than by a subject matter. [. . .] Indeed, one of the initially most striking features of philosophy is the multiplicity of diverse philosoph*ies* of various other disciplines—philosophy of science, philosophy of art, philosophy of religion, philosophy of

mathematics, of history, of psychology, of law, of language, and so on [. . .]. Philosophy thus takes on the character of a sort of 'second-order' discipline, one which has as its objects of study the 'first-order' activities of the scientist, the artist, the theologian, the mathematician, the historian, the psychologist, the jurist, the linguist, and their many colleagues."

In her *Cyborg Manifesto*, Donna Haraway engages in the "second-order disciplines" of social philosophy and ethics, philosophy and theory of science, philosophy of technology, and feminist ethics with regard to the "first-order objects of study" of society, technology, and the sciences. Accordingly, all approaches that want to be understood as philosophical technofeminist approaches against this background must be conceptualized as follows: If they want to be understood as *feminist* approaches, they are to be directed against patriarchal and heteronormative structures. As *techno*feminist approaches, their initial interest lies in the mobilizing of the emancipatory potential of technology and in becoming aware of specific categories and dichotomies and traditional boundaries between, for instance, the natural and the artificial. If an approach should be understood as a feminist techno*philosophical* approach, it does not exhaust itself in a descriptive analysis of the given (the "first-order objects of study"), but rather formulates the premises and first principles for an ethics for a better society (cf. Loh 2019: 15).

Cyb*org* Feminism Versus Cyb*er*feminism – Net Feminism and Glitch Feminism

Basically, then, Haraway's *cyborg feminism* is the origin of many, if not all later developing techno-philosophical feminist currents. All subsequent technofeminist approaches, which without exception contain at least implicitly critical and thus normative, i.e., philosophical, elements, usually even explicitly refer to Donna Haraway's *Cyborg Manifesto*. In some cases, however, the reference is misleading. There are some technofeminisms, which since Sadie Plant (in the mid-1990s) can be summarized under the term *cyberfeminism* (not to be confused with Haraway's *cyborg feminism*; cf. Gajjala and Oh 2012; Hawthorne and Klein 1999; Sollfrank n.d.), which do contain philosophical elements with regard to, for example, a critique of society. However, these technofeminist positions no longer critically assess the technologies they use as a means of critique themselves. This is particularly striking in the case of the feminism circulating in German-speaking countries under the name of *net feminism*, which Annekathrin Kohout (2019) concisely describes (although, however, she herself does not identify as a net feminist). This feminist current, which is also critically or pejoratively referred to as *hashtag feminism* (Flaßpöhler 2018) or *pop feminism* (Kauer 2009), does critically address net political issues. However, those who use the digital space for their feminist net activism represent a predominantly positive understanding of information and communication technologies, digital and net technologies, which Donna Haraway had still subjected to explicit criticism in her *Cyborg Manifesto*. *Net feminists* primarily see in these technologies the possibilities of a critique of the heteronormative and patriarchal majority society and, in doing so, have a comparatively low awareness of how the same heteronormative and patriarchal majority society uses the very same technologies for its own purposes.

Compared to *net feminism*, the cyberfeminist current of *glitch feminism*, which is also quite young, shows a significantly greater critical potential – also, at least by tendency, with regard to the digital technologies that constitute its main medium. Legacy Russell's *Glitch Feminism Manifesto* (2020), originally based on the essay "Digital Dualism and the Glitch Feminism Manifesto" (2012), is primarily concerned with a critique of the dualism between a 'real' offline and a 'not real' online world. However, in classic cyberfeminist fashion, it also focuses on the possibilities offered especially by information and communication technologies, digital and network technologies, for example, with regard to the creation of new identities beyond the two traditional gender identities. *Glitch feminism* focuses primarily on art and how it exists on the internet or in the digital realm, asking what distinguishes this art, who it makes visible, who it excludes, and so on. Unlike *net feminism*, whose representatives

have not yet published their own texts (e.g., a manifesto), Russell articulates a decided responsibility that we bear in shaping the digital realm. She thus manages to build a bridge between art and activism on the one hand and feminist theory on the other.

Technofeminism

The first decidedly technofeminist alternative to Haraway's *cyborg feminism*, however, was not a *cyberfeminist* approach at all, but the *technofeminism* outlined by Judy Wajcman in her book of the same title (2004). Although she sensitively reflects Haraway's *Cyborg Manifesto*, she misunderstands Haraway at the crucial point in a very similar way as the much younger *cyberfeminist* currents. After all, she fears in the final chapter of her book that "[a]t times, the cyborg solution comes dangerously close to endorsing cyberfeminism's embrace of all technological innovations per se" (Wajcman 2004: 108). Similar to Haraway, Wajcman also focuses on the entanglements of technology, society, and labor, reflecting on technology as generally dependent on context and usage. Her technofeminism represents a combination of what she sees as the positive aspects of *cyborg feminism* with those of a socialist and radical and, thus, constructivist feminism (2004: 103, 107) – although, as argued above, Haraway also formulates a constructivist approach. In the end, Haraway's *cyborg feminism* and Wajcman's *technofeminism* differ less in their intentions than in their working methods. While Wajcman represents a clear perspective of the science and technology studies that focuses on the entanglements and interactions of technology and society, Haraway uses a range of different disciplinary methods and is ultimately primarily interested in the emancipatory potential she sees in feminist science fiction and thus in the power of new narratives.

Xenofeminism

Finally, the last technofeminist current to be mentioned here is the *xenofeminism* of the Laboria Cuboniks collective (Hester 2018; Laboria Cuboniks 2015). *Xenofeminism* sees itself as the feminist continuation of a political accelerationism, that is, the idea that capitalism can be overcome by beating it with its own means, by accelerating current developments with technological methods. *Xenofeminism* also shows numerous overlaps with Haraway's *cyborg feminism*, but also parallels with *glitch feminism*. For instance, all three technofeminist approaches have in common that they in their title already contain a moment of irritation that is meant to disrupt the conformity of patriarchy and that has an emancipative potential. This moment is the figuration of the cyborg in Haraway's *Cyborg Manifesto*, the idea that "[w]e are all alienated" (Laboria Cuboniks 2015: 0x01) in *xenofeminism* (from Greek "xénos" for "alien"), and the glitch itself in *glitch feminism*: "A glitch is an error, a mistake, a faliure to function. Within technoculture, a glitch is part of machinic anxiety, an indicator of something having gone wrong" (Russell 2020: 15).

But there are also some differences between Haraway's *cyborg feminism* and Laboria Cuboniks' *xenofeminism*. One of the most striking is probably that *xenofeminism* holds on to the idea of a "universal" that need not be "absolute" and thus dogmatic and ideological (Laboria Cuboniks 2015: 0x05), whereas Haraway's *Cyborg Manifesto* rejects the "feminist dream of a common language" (2016: 52) precisely for these reasons that such an idea would necessarily be "totalizing and imperialist" (2016: 52).

Conclusion

All of the currents discussed here – *cyborg feminism*, *technofeminism*, *xenofeminism*, *net feminism*, and *glitch feminism* – can be understood as approaches to feminist philosophy of technology. There are clear similarities in their intentions; differences are due in particular to the working methods or the original disciplines and theoretical backgrounds of their first representatives. While the young cyberfeminist currents of *net feminism* and *glitch feminism* have the greatest activist and artistic potential, they are most likely to lack a

philosophical critique of the technologies they focus on. *Cyborg feminism* and *technofeminism*, on the other hand, tend to be on the other side of this spectrum. Both currents have a focus on a differentiated philosophical critique, which, however, because it is theoretical and abstract, does not offer an intuitive approach and even less a clear artistic or activist realization of its agenda.

In this comparison, *xenofeminism* can best be placed midway between *cyborg feminism* and *technofeminism* on the one hand and *net feminism* and *glitch feminism* on the other. Xenofeminism shares a philosophical and theoretical-critical claim with *cyborg feminism* and *technofeminism*. With *net feminism* and *glitch feminism*, on the other hand, it shares a practical disposition, which also becomes clear in the choice of texts. *Xenofeminism* also appears in the form of a manifesto, but it is not so much a manifesto as Haraway wrote with her *Cyborg Manifesto* (which is more of a complex scientific essay), but is comparable to the manifesto of *glitch feminism*. Short, trenchantly formulated paragraphs that contain concise messages give *xenofeminism* a practical impetus that brings it close to the more recent cyberfeminist movements of *net feminism* and *glitch feminism*.

This concluding comparison possibly shows a development of technofeminist currents toward more practice and clarity, which is to be welcomed in any case. It would be regrettable, however, if the critical consciousness, which is fundamentally at the heart of feminist thinking, were to diminish or even be lost on this way.

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The Legalist School

► Chinese Legal Thought: The Legalist School

Thibaut, Anton Friedrich Justus

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His Training: The Law Between History and Philosophy

Anton Friedrich Justus Thibaut was born in 1772 in Hameln in Sassonia, of French Huguenot descent, his maternal grandfather was the jurist Christian Ulrich Grupen. He entered the University of Göttingen as a student of Jurisprudence, then he went to Königsberg, where he studied under Immanuel Kant. He became research doctor in 1796, from 1801 he was University Professor first in Kiel, then in Jena, where he met Goethe and Schiller, finally in Heidelberg (from 1806), where he made friends with Hegel. Here he died in 1840. He was also finely interested in musicology with a particular predilection for ancient music, as we can see in his *Űber Reinheit der Tonkunst* (1825).

When he was in Kiel and in Jena, he wrote his major works, from an academic point of view: the collection of essays *Versuche über einzelne Teile der Theorie des Rechts* (1798–1801), the most important of which is *Űber den Einfluss der Philosophie auf die Auslegung der positiven Gesetze* (1798), thanks to which his doctrinal orientation was named (and it is partially wrong) "philosophical school"; *Theorie der logischen Auslegung des römischen Rechts* (1799), based on a logic-systematic view of legal interpretation, referring to the Roman law, and *System des Pandektenrecht* (1803), his chief work, also today considered the first complete compendium of the subject, in which he analyzed and ordered, with great skill, the Roman law as it then current in Germany.

In this period, he developed his idea about the role of the legal science according to the rational theory of Wolff and Leibniz, who thought that the law came up as a system of principles obtained with deductive method starting from general rules like the mathematic method model.

The most part of the material law came from the Roman law that Thibaut reorganized in a rational, systematic order and not in the same order of Justinian. The "philosophical school" didn't reject the historical method but asserted that the historical reality cannot be understood without referring to reason: Thibaut stated that there isn't real history without philosophy and that there isn't a clear application of philosophy without history (*Űber den Einfluss der Philosophie auf die Auslegung der positiven Gesetze,* p. 174). Later he used the notion of "historical-philosophical school" opposite to the "historical school" of Savigny.

When later he was in Heidelberg, he didn't write large-scale works anymore but he worked hard as essayist, taking part to the cultural and political debate of that period in particular affirming the need for a codification in Germany, opposite to Savigny.

Thibaut and the Codification in Germany

The key points of his intellectual biography are two: the legal science scholar and the reformer who is aware of the need for intellectual, civil, and politic renewal of his country. In particular Thibaut revealed a vivid awareness of the special historical moment of Germany which, after the victory in the German Wars of Liberation against Napoleon, could finally wake up from a long sleep, destroy ancient abuses with a new harmony of spirits, and base new civil institutions for its people happiness.

Thibaut's interest in codification began some years earlier during the debate concerning the reception of French law in the Renan Confederation and in the other German States (his important reviews about it were published on *Heidelbergische Jahrbücher der Literatur*, collected in R. Polley, pp. 281 e ss). He discussed the Brauer's project for the Grand Duchy of the

Baden region (promulgated in 1810), inspired by *Code Napoléon,* with some "additions" (*Zusätze*), which considered the feudal relations still existing there and he was also interested in the Almendingen project for the Duchy of the Nassau region, that aimed at transposing the French Code, in a new form, equal for all the States and without ancient feudal rights. About the French code, Thibaut analyzed strengths and weaknesses (in particular the poor systematic) and was for a long time opposed to a complete reception of it, especially if without the needed modifications, always recommending caution and gradualness. At the beginning, he was sure that the codification could not be carried out in the field of civil law, but only in that of the criminal law. He began to believe in unification of law in Germany only after the liberation war and the change of the political situation implying a new national solidarity.

In 1814, he expressed his new point of view in his review on Rehberg's "reactionary" work against the introduction of the Napoleon Code. This review was the starting point for his most mature essay, published in the same year, with the title *Űber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (NBRD). The clear and incisive proposal of this essay caused the Savigny reaction, who published *Von Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, to which Thibaut replied in the journal *Heidelbergische Jahrbücher der Literatur.*

Thibaut stated that there were two conditions to be respected in each legislation: it must be perfect both for the formal and material point of view and contain a clear and comprehensive exposition of its principles as well as a wise legal system, according to the subjects' needs (NBRD, p.67). In his opinion, at that time, no German State respected these conditions.

After the Napoleonic war of 1813, the situation was very diversified. In some German States, the "ancient codes" were still in force, that is, collections of local law setting in normative texts heterogeneous legal issues as well as the Roman law, working as *jus commune*; in other States, the Prussian Code of 1794 was in force, in others the Austrian one of 1811, in more others it was the Napoleon Code of 1804 to be in force, which had to be changed after the end of the Rhenish Confederation experience.

Both Thibaut and Savigny aimed at removing these differences. But their strategies were very different: Savigny thought that the Roman law had to be the basis of law, in force as a supplement to particular rights and to "modern" codes, where these were in force, so that the ordering and unifying element would have been the legal science, main source of law, making compatible all the heterogeneous different elements. On the contrary, Thibaut thought about a common codification for all the German States above their own political autonomy. Thanks to this codified law, the jurists should have to work only on a definite object with great, civil and scientific, advantages for citizens and legal practitioners.

The legal systems in force in that period were a confusion of disordered laws in contrast with each others, guilty of dividing the Germans and preventing judges and lawyers from finding and applying the law. Even if some jurists (at the prestigious School of Savigny) had been able to manage that disorder, a very incomplete legislation remained and often needed "foreign sources", like the Canon law and the Roman one. In particular the latter, which Thibaut had studied for a long time, seemed to him the result of the deformation effected over the centuries of the authentic Roman people spirit by imperial constitutions and jurisprudential collections. It was reduced to a picture of laws sometimes wise and sometimes unreasonable, with a lot of variations, at the mercy of the will of the laws interpreters. To be able to interpret the laws, they accumulated (and showed) an erudition that judges and lawyers and also people didn't need, just as all the sick would like to be treated by doctors with few universal medicines – said Thibaut with a questionable example (NBRD, p. 73).

Thanks to the codification great advantages would result also regarding the university teaching of law, not provided for "local" laws, but limited to Roman law less useful in the daily work of legal practitioners. A strong code would be able to draw out from the darkness the law of

the States and make possible to take advantages from studies and scientific reflection. Philosophy teaching and law teaching wouldn't fight each other anymore and they could be together and combine their efforts.

But for sure people would have the most important advantages because from a common legislation they would have a strong reason for solidarity and brotherhood, so that no foreign power could again put the German people against each other. Same laws generate same morals and costumes and this equality generates love and loyalty among peoples. For the Germanic people, they would be a valuable counterpart to the political division.

Thibaut considered also the (presumed) drawbacks coming from the code, learned in the long debates about the various codification proposals for each country and from the disputes with Rehberg and Savigny.

The honest objections (publicly declared) to the school of Montesquieu and Savigny were about the historical nature of the law, which has always to be appropriate to the spirit of the people and to their costumes, that's why a general civil law for all Germans would be unnatural. Certainly traditions and constant costumes for Thibaut were positive, but he thought it was wrong to think that the sole purpose of the law was to consolidate old habits, especially if they were irrational, exclusive consequence of arbitrariness and selfishness. Of course special conditions could require special laws (e.g., about police and economy), but the general part of civil law (property, succession, contracts) was "a kind of pure mathematics of law" (NBRD, p. 88) prevailing for its rationality.

But the "secret" objections, that nobody dared to argue, were the most insidious ones. The codification would limit the princes' power and would excite the subversive nature of the people overwhelming public order. Thibaut thought that German people were the most faithful to their princes and to the ancient laws and that the wisest and mildest princes, willingly accepted to decrease their power for the good of people. It was rather necessary to fear those state officials linked to their privileges who wanted to separate people from their prince and spread distrust and fear.

Conclusion

It is worth going back to the two essential requirements identified by Thibaut for the new code (formal and material perfection) to focus on his position from a philosophical-juridical and political point of view.

According to the great jurist, a clear (unequivocal) and complex (without external integrations) unitary system of rules was formally required. How could these requirements be guaranteed?

Thibaut understood that the completeness of the code could not be achieved through a very detailed text, because in that way it could not be the simple tool required. Rather he thought about the formulation of general principles, from which to drive consistent consequences in the particular cases through logical reasoning but without leaving room for integrative and arbitrary interpretative operations. In other words, the law is only what the code contains but it doesn't mean the unrealistic idea of a mechanical interpretation of laws. Clear laws would have been the basis for a rational interpretative activity.

This is for him the sense of the influence of philosophy on interpretation (as before mentioned): it is certainly not an attempt to revive rationalistic or naturalistic ideas so as to contrast an immutable law of the reason with the changeable one produced by men. More simply he wanted to underline the importance of a logical and systematic reasoning, the need to go beyond the historical intention of the legislator and to manage the *ratio legis* of the laws (*Theorie der logischen Auslegung des Römischen Rechts*, §16). In this sense, Thibaut adopted a more complex theory of interpretation than the strictly exegetic one in vogue among French jurists interpreters of *Code* (the so called "School of Exegesis").

On the other hand the renewal had to be also about the contents of the code.

The submission of all the subjects to the same law had necessary to involve the same submission to the law and a unification of the legal capacity of the subjects at least from the civil law point of view beyond the differences of class. A code that retained the subjective differences (like the Prussian one of 1794) could not aspire to simplicity. Even though Thibaut never explicitly stated that

the legal subject is unique, his indications lead to a clear liberal-bourgeois policy of law (cfr. Becchi 1999, p. 130).

There is some uncertainty about who should be the author of the code. He asked it had to be "the product of the whole nation," therefore neither the product of a single legislator nor only of jurists, but of a teamwork of statesmen and renewed scholars with the help of "public opinion." It's difficult to say how "the public opinion" could be clearly expressed. Maybe Thibaut thought of the presence of nonjurist representing the nation together with princes and legal experts, but it's not easy to understand what could be the weight of this presence. In a later writing in 1817 (a review on *Heidelbergische Jahrbücher der Literat*), he specified that he had never proposed the right to vote, but he reiterated that the presence of the nation's representatives was important.

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Authors remanding to other items in the section: Wolff, Leibniz, Montesquieu, Savigny

Thick Versus Thin Justice

► Justice: Thick Versus Thin

Thomasius, Christian

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Introduction

Thomasius, Christian (1655–1728), was a jurist, law professor, philosopher, and protagonist of the early Enlightenment in Germany. His work

includes nearly all positions later to be considered as the key elements of the enlightenment, e.g., the emphasis of self-thinking and the fight against prejudices, the purpose of all knowledge acquisition for practical use, the pathos of the sound reason, the arguing for the freedom of thought and religious tolerance, and the distinction between philosophy/jurisprudence and theology. Mostly well-known is his demonstration of the absurdity of witchcraft trials.

Main Aspects of Thomasius's Work

I. As a *philosopher of law*, Thomasius is one of the important representatives of modern natural law theory. But there has necessarily to be distinguished between his two main works. The *Institutiones Jurisprudentiae Divinae* (Thomasius 1688) was substantially drawn up as a textbook according to Samuel Pufendorf's natural law theory but especially as a refutation of any concepts of Christian natural law by the law of reason. Thomasius's main focus is the de-theologization of natural law in order to separate jurisprudence and theology. He seeks above all to close the gateway for clerical influence, for instance, the equating of natural law and the Decalogue.

In his later *Fundamenta Juris Naturae Et Gentium* (Thomasius 1705), the base for natural law seems less the common human reason than the individuality of all human beings, which is caused by a key change in Thomasius' anthropology: He believes the will reigns the intellect and the will itself is determined by a unique mix of passions (voluptuousness, ambition, greed). That means for his basic principle of natural law: The pursuit of happiness – a long and convenient life – is a very individual way (in oppression of passions), but governmental coercion is not only inappropriate to lead individuals to happiness but must be banned. There is no doubt that establishing a governmental power is necessary because of the conflicting will of the individuals who endanger each other. But Thomasius harshly restricts the concept of law to the maintenance of external peace ("iustum"). Reversely he excludes such precepts from the concept of law which merely refer to the polite and friendly sociability ("decorum") as well as the happiness of the individuals ("honestum"). Thus he developed the idea of the separation of the spheres of state (iustum) and civil society, which was later attributed to Immanuel Kant. The power of princes is limited to securing the external circumstances (peace of law) that are essential to the individuals to pursue their own happiness.

II. In some of Thomasius's most controversial writings (Thomasius 2007), he *advocates religious tolerance*, especially because of his insight that confessional controversies are a main reason for social unrest. He underlines that religious convictions are private matters: Neither can there be an absolute truth, because all people can err, nor can exist a certainty about God's will. Confessions of faith including the pressure on the individual conscience are actually the work of clergymen to strengthen their position of power in state and society. In fact "heresy" is only a question of the respective view. Besides, the individual faith only aims at the salvation of the soul, which never could be achieved or should be enforced by coercion.

Likewise, Thomasius defines the religion of the prince as a private matter sharply separated from his "official" functions. This leads to the concept of a supra-confessional sovereign: (1) This way, the prince is able to grant religious integrity to his subjects including dissident believers, because the best way to avoid dangerous conflicts is religious tolerance. (2) Without founding his power in religious arguments, the prince has an own legitimation (neutral peacekeeping), independent from the approval of theologians. This is synonymous to the emancipation of the secular government and the base for the loyalty by all subjects (independent from their own denominations). (3) Due to his religious neutrality, the prince is able to act as credible "mediator" between religious parties. Thomasius even concedes him a decision-making authority in religious disputes and clerical ceremonies, if they endanger social peace.

III. At the center of Thomasius's *philosophical thought*, there is the pathos of the usefulness of all thinking for everyday life against the, as he calls it, Aristotelian-scholastic thinking at traditional universities. He vehemently criticizes every

pointless accumulation of knowledge, sophistries, etc. According to Thomasius, true erudition is the ability to recognize right from wrong and good from evil, whereby he practically identifies the truly good with the benefit for the worldly happiness, namely, the preservation of a long and convenient life. That is the reason why he declares in general the truly good is simple and recognizable for every human.

Referring to *logic*, this means the consequent education for self-thinking. Firstly, it is the liberation from the prejudices of authority and precipitance. Secondly, Thomasius propagates eclecticism as a key method for acquiring useful knowledge, opposed to what he calls pedantry (Thomasius 1691a, 1691b). Touchstone of any kind of knowledge is the practical benefit. The objective of logic is no longer the art of right conclusions, but the cognition of what is useful. Also in *ethics*, (Thomasius 1692, 1696), he defines the good relating it to the goal of individual happiness, especially considered as peace of mind. Because of the greatest obstacles he sees, he designs ethic as a program of suppression of passions. Although Thomasius, due to his conviction that the will reigns the reason, is not able to solve the ethical problem of the lack of free will (finally, one needs God's grace), his theory of passions offers a very deep understanding of human individuality to him.

From early on, convinced that they are the necessary precondition for the peaceful coexistence of all members of society, Thomasius also focuses on the importance of social manners. On the one hand, he respects historic grown manners, even though they reflect inherent social inequality ("decorum politicum"); on the other hand, he wants to establish a normative corrective with a "natural decorum," based on the equality of all humans. His esteem of social manners that should not be in the prince's legislature is quite revolutionary because he heightens the decorum to the "soul of human societies," the traditional role of religion.

IV. Thomasius also had remarkable influence with his *reform ideas for criminal law*; especially he enjoyed great success with his writings about witchcraft and torture. Although he was neither the first fighter against the witch trials (predecessors were, for instance, Friedrich von Spee or Balthasar Bekker) nor the first who condemned the use of torture, he was the first one to provide plausible reasons for the absurdity of witch trials to his contemporaries, namely, the lack of an objective justification of the criminal charge. His argumentation was as simple as persuasive: Because of Thomasius's premise of the nonphysical existence of the devil (he has no body), there is no way for an alleged witch for a physical union; ergo a crime is not possible at all. He also excludes torture as a means of making somebody confess guilt, because everyone would admit everything while suffering from torture.

V. Thomasius's role as an *academic teacher and university reformer*: Because of the defined criterion of education – individual as well as social benefit – he considers logic to be so clear that all rational people are able to see the truth, regardless of their social status or sex. Therefore, the public use of German instead of Latin in lectures, in textbooks, and in his *Monatsgespräche* (1688–1690), the first review journal in German, is programmatic. Furthermore Thomasius defines critical judgment instead of unreflected memorizing of knowledge or subservience to intellectual authorities as the educational goal. In order to implement his own goals in academic teaching, he sketches in detail the knowledge that he appreciates for bringing practical benefits, e.g., social manners, history, or even economic issues. Finally, Thomasius's efforts culminate in designing a purposive curriculum for juridical studies that had not existed until then, a fundamental reorganizing of the studies. He offered to his students a temporally and clearly defined syllabus in several important writings claiming to teach all contents that are needed to know for practical life (of a jurist or counsellor).

Thomasius's influence must have been exceptionally large. Although the University of Halle was officially founded only in 1694, he had been its first teacher since 1690 (cf Thomasius 2017). About one and a half year, there was in fact a "one-man-university" of Thomasius, and only the attraction of his lectures to students may have led to the definite decision by the Brandenburgian elector for the establishment of the new university. Here Thomasius had the opportunity to spread his reform ideas and to influence a large number of future government

officials in Brandenburg-Prussia. He worked as an inspirational academic teacher for four decades and his influence can hardly be overestimated.

Discussion

Although Thomasius gave important contributions to the history of thought (cf Kühnel 2001), his name is little known outside the very special field of the research of the early German Enlightenment. On the one hand, the reasons are systematic because his numerous writings are spread over many genres, not to be captured at one glance, and often his new (and later popular) ideas are not in the frame of an elaborated theory or difficult to access in a convoluted "baroque style" German.

On the other hand, some positions of Thomasius in the discussion on early Enlightenment are quite controversial. For instance, some commentators argue that he is first of all a representative of absolutism and a servant of the princes, but not an early advocate for individual human rights (e.g., Hunter 2007, pp. 139–142). However, this view is very one-sided. Doubtless Thomasius wants to strengthen the territorial state of the princes, but he primarily stands up for an individual right for the freedom of religion. These two goals are in fact two sides of the same medal: The liberation of the state from the influence of the church concerning governmental power shall, at the same time, give the individuals security from religious pressure by the church instrumentalizing the secular law and executive.

Likewise, one can often find the objection that Thomasius does not propose an institutional limitation of state power, and indeed that's right. Though he is far away from a naive belief in the "kindness" of princes, he developed clear criteria to which a legitimate government must comply: the limitation of law to only external crimes (conversely the exclusion of thought, creed, conscience), the supra-confessional neutrality of the prince, and the absolute necessity of "wise" advisors as a prerequisite for good governance, including the statement that the prince's government without such advisors runs the risk of becoming a tyranny. All in all, his proposals aim at protecting the individuals against the misuse of power under the specific social-political circumstances of the post-Thirty Years' War era in the German territorial states and in view of the absence of an emerging economic bourgeoisie with its own political demands.

Cross-References

► Freedom
► Natural Law: Protestant

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Thon, August

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Introduction

August Christian Thon was a German professor of law whose research focused primarily on the

relation between law in a subjective and objective sense. He was born on the 18th of February 1839. He came from a long-established Protestant family of civil servants: his father Gustav Thon (1805–1882) was the Duke's Minister of State from 1871 until his death. His mother was the Eisenach merchant's daughter Auguste Caroline Thon (born Bohr). Thon married the daughter of the law professor Johann Heinrich Gottlieb Luden. The marriage remained childless. From Easter 1857 on, he studied three semesters law in Heidelberg and one semester in Jena. After the mobilization in November 1859, he joined the military contingent and received the status of "Second-Leutnant" on the 15th of October 1859.

Thon completed his legal studies in Göttingen, where he received his doctorate on the 18th of August 1861 with the dissertation "*Exponatur de successione in locum creditoris pignoratitii secundum ius romanum*." In fall 1863, he was qualified as a university lecturer in Heidelberg with the study "*Das ius offerendi des besseren Pfandgläubigers nach Römischem Recht*". From the first of October 1866, Thon worked at the district court in Eisenach: first as an assessor, from the 20th of May 1871 as a judge, and from October 1871 on as a public prosecutor.

From spring 1873 to October 1879, Thon held a chair for Roman law at the University of Rostock, and afterwards a chair for criminal law in Jena, where he also served as a judge until the 1st of July 1893. Thon participated in the organizational management of the University in Jena: he served as dean of the law faculty for several periods and as president of the university for three semesters. Thon died in 1912 in Jena.

Because of these university duties and because of his activities as a judge, Thon's literary output was rather small: in addition to a few articles on procedural law, his editorship of the seventh and eighth editions of the "Handlexikon zu den Quellen des römischen Rechts" (Jena 1891 and 1895), founded by Hermann Gottlieb Heumann, is particularly noteworthy. Thon's main work is undoubtedly the study "Rechtsnorm und subjektives Recht - Untersuchungen zur allgemeinen Rechtslehre" (Weimar 1878). Thon later supplemented it with the two essays entitled "Das Gesetz im formellen und materiellen Sinn" (Archiv für öffentliches Recht, Vol. 4 [1890] pages 149–168) – a replica to a contribution of the same name by Albert Hänel – and "Der Normenadressat: Eine Untersuchung zur allgemeinen Rechtslehre" (Jhering's Jahrbücher für die Dogmatik des bürgerlichen Rechts, Vol. 50 [1906] 1–54).

The main work: *Rechtsnorm und subjektives Recht - Untersuchungen zur allgemeinen Rechtslehre*

Thon dedicates his study to the "subjective law" and, above all, illuminates the moment in which objective law simultaneously becomes the entitlement of the individual. The works of Karl Binding (Die Norm und ihre Übertretung I 1872, II 1877), whose theses Thon attacks already in the preface, inspired the study. The same applies to the dogma of Jhering (Der Zweck im Recht 316 ff), according to which the essence of law is to be found in the coercive power exercised by the state over those subject to the law.

Thon follows Hegel's approach, according to which law in the objective sense should rather be regarded as the general will of the legal community. Under this premise, he analyses the structure of legal norms (1–70) and postulates: Each legal norm is to be regarded as an independent imperative, to the disregard of which legal consequences such as a penalty or the duty to compensate for the evil caused by the violation of the norm are frequently – but by no means necessarily – attached.

In the second part of the work (71–107), Thon expands on the fact that the legal consequence is not an essential feature of a legal norm by looking at the unblameable violations of norms by minors. He decisively opposes Binding's thesis that legal norms do not apply to minors and speaks of a partial elimination of the legal consequences linked to *dolus* and *culpa*.

In the third part of the work (108–144), one finds a meritorious, still stimulating examination of the demarcation between public and private legal norms: Thon first rejects the views that see the difference in a divergent origin of the norms (§ 1). A demarcation of public and private law cannot be made according to the norm addressees (§ 2); nor according to the interests whose protection the norms are intended to protect (§ 3). Rather, the

distinguishing characteristic lies in the consequence that triggers the violation of the norm. The nature of the claim distinguishes between public and private law. Building on this, Thon fixes the concept of private law on the basis of the private entitlement.

The core of the work (147–287) aims to determine precisely this concept of private entitlements. It is noteworthy that Thon distinguishes this from the concept of the Roman-legal *actio* (248 ff). Nevertheless, Thon's understanding of the entitlement is still strongly procedural. He sees the entitlement as a means granted by the legal system to obtain legal assistance from official bodies - especially the courts (244). Therefore the private legal system should grant the individual the power to obtain a judgement, which Thon describes with the Latin word *condemnatio* (244).

The weak point of this view – as Helmut Coing (1959) quite rightly criticizes – is that Thon has not arrived at the heart of the concept of entitlement. This is particularly evident in the fact that Thon does not use the word "entitlement" in situations, where the defendant can raise a counterclaim (266–270).

On the Significant and Continuous Impact of Thon's Contribution

Despite his procedural approach, Thon made an important contribution to the understanding of entitlements in private law that is common today.

His merit is, on the one hand, that Thon – like his colleague Bernhard Windscheid before him – separates the Roman-legal concept of the *actio* from the entitlement. On the other hand, he placed – more precisely than many before him – the entitlement of the individual in relation to the whole legal system. Awareness of this problem deserves all the more recognition, as such questions had previously been examined primarily by scholars of public law, who paid too little attention to the specifics of private law. In this respect, Thon helped to redefine the relationship between public and civil law.

At the same time, however, Thon also followed the path taken by Georg Friedrich Puchta of alienating jurisprudence from the social, political, and moral reality of law. Moreover, the work – similar to the early works of Rudolf von Jhering – is based on a rather technical and positivistic understanding, which becomes clear especially in the closer analysis of the individual private rights (147–222). Not least because of this, Jhering succeeded after his methodological reorientation in replacing the imperative theory established by Thon with his own interest theory. From then on, Thon's theory has lost approval.

Nevertheless, Thon's work has a lasting merit. They are rooted in the fact that Thon, as part of his investigation, critically examined the understanding of democracy at the time. His work certainly can be regarded as revolutionary in the sense of liberalism. Perhaps too little attention was paid to the aspect of the power of will conferred on each individual by the legal system, as pointed out by Bernhard Windscheid – on the basis of Kant's philosophy. It could probably have helped to see the entitlements in a more substantive sense. However, the fact that the theses about entitlements were regarded as outdated in the twentieth century is probably also due to Thon's understanding of law, which is in part strongly influenced by criminal law and which he sometimes transfers to private law theory. This is evident in the recurring statement: The entitlement always presupposes a violation of the norm, which cannot be true in contract law.

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Thoreau, Henry David

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Introduction

The US American writer and social critic Henry David Thoreau (1817–1862) never studied law nor held those he described as "babbling" lawyers in high esteem. Yet his ideas remain pertinent to legal philosophy.

A complicated political and intellectual figure, Thoreau is now widely viewed as an iconic representative of nineteenth-century US individualism. However, his most famous work, *Walden* (1992 [1854]), a vivid defense of economic independence in sync with the natural environment, rejected market capitalism's destructive environmental consequences and also its obsessions with economic growth and wealth accumulation. Although a harsh critic of the state and laws who pointedly advocated avoiding political activity whenever possible, Thoreau was involved in the US anti-slavery movement and publicly defended its most controversial figure. Thoreau's "Plea for Captain John Brown" (1996 [1860]), published shortly before the author's death from tuberculosis at age 44, is widely credited with popularizing the efforts of the radical pre-Civil War abolitionist hanged for his failed attempt to lead an armed insurrection of Virginian slaves. An inspiration to both Mahatma Gandhi and Dr. Martin Luther King, Thoreau is now also credited with helping to invent *civil disobedience* and many of its associated practices (Scheuerman 2018). However, he never used the term and surely would have been surprised by their – and countless other – subsequent appropriations of his ideas.

Political Resistance

"Resistance to Civil Government" (1996 [1849]), based on a lecture in which Thoreau described his arrest and jailing by local authorities for his failure to pay his taxes, was posthumously retitled, on the basis of an editorial decision he probably never approved, "Civil Disobedience." Recent archival research demonstrates that the edition Gandhi later read had been substantially altered by a disciple of Leo Tolstoy, the publisher A.C. Fifield, whose Christian pacifism encouraged him to tone down Thoreau's more militant views (Hanson 2017). The rest, as they say, is history: Thoreau's defense of (potentially violent) resistance, by means of *voluntary individual withdrawal* of support for unjust laws and political institutions that directly impede his or her pursuit of moral truth, became the basis for the idea of a *universal moral duty* to pursue *common political action* taking the form of *civil, conscientious, nonviolent, politically motivated* law breaking.

Yet Thoreau's "Resistance to Civil Government" never advocated civility, nonviolence, or publicity. Nor, in sharp contrast to Gandhi (and later, Dr. King), did Thoreau claim that he went to jail to demonstrate basic *respect for law*, another element of the modern idea of civil disobedience that was alien to him. Thoreau's views, in

contrast, were decidedly *antilegalist* and *antistatist*. Finally, the deeply individualistic Thoreau was always skeptical of politics and public affairs, even under democratic conditions. It seems unlikely that Thoreau would have embraced either Gandhi's or King's life-long penchant for political activism: "What is called politics is comparatively something so superficial and inhuman, that, practically I have never fairly recognized that it concerns me at all" (Thoreau 1996 [1854a]: 120). Only when injustice directly obstructs the pursuit of a self-reflective, yet simple (and relatively solitary) life free from unnecessary material dependence, should individuals take resolute action to "wash their hands" of it (1995 [1849]: 7).

In this vein, Thoreau refused to pay local poll taxes because of his home state of Massachusetts' complicity in slavery and the Mexican-American War (1846–48), both of which he opposed. He sought to delineate his acts from those of moralists and those engaging in more conventional types of political protest, many of which he did not deem useful. Thoreau was reluctantly prodded into action, he reported, only because "I had foolishly thought that I might manage to live. . .minding my own private affairs," an illusion punctured by Massachusetts officials' decisions to uphold repressive legislation allowing for southern slaveholders to reclaim their escaped human "property" (1996 [1860]: 134). Because injustice directly impacted him, Thoreau argued, moral conscience demanded militant "action from principle" alone capable of potentially allowing him to limit his complicity in evil (1996 [1849]: 8).

Antilegalism and Antistatism

Thoreau conceived of individual conscience as a basically secular moral lodestar capable of providing objective evaluative standards. Unlike others in the *transcendentalist* circles around Ralph Waldo Emerson (1803–82) he frequented, Christian themes tended to fade into the background of his thinking. Far less concerned than recent liberal theorists about the subjective and potentially anti-pluralistic contours of appeals to individual conscience, Thoreau highlighted modern law's tendency to squelch its voice and, in the process, rob human beings of what he viewed as a distinctive capacity for moral judgment and reflection. Individuals should not be expected to subject conscience to legislation, even under democratic conditions, because law tended to reduce human beings to robot-like machines: "A common and natural result of an undue respect for law is, that you may see a file of soldiers. . .marching in admirable order over hill and dale to the wars, against their wills, aye, against their common sense and conscience" (1996 [1849]: 3). The state represented nothing more than organized violence, a "wooden gun," whose heavy-handed general laws transformed individuals into machines from whom it demanded physical as well as mental uniformity along with unthinking obedience (1996 [1849]: 1). Even majority rule, crucial to democratic politics, simply entailed domination by the physically strongest part of the community. For Thoreau, lawyers were preoccupied with consistency or regularity and mere practical expediency, but not the moral truth conscientious individuals should pursue in order to live well (1996 [1849]: 19). Massachusetts' statutes, he commented in "Slavery in Massachusetts" (1854), made for unprofitable reading since "they do not always say what is true; and they do not always mean what they say" (1996 [1854b]: 125). Judicial rulings too often proved accidental and even arbitrary in relation to moral conscience's strict dictates. Judges who legitimized their rulings on the basis of appeals to the US Constitution conveniently and irresponsibly ignored its support for immoral practices – in particular, the system of chattel slavery Thoreau so abhorred (1996 [1854b]: 132–133].

Thoreau tended to conflate specific criticisms of US government and law with more general reservations about state and law per se. The pathologies of the US constitutional order should remind us, for example, that "law will never make men free; it is men who have got to make the law free" (1996 [1854b]: 128). If individuals pursued a simpler mode of independent economic existence, freed from modern commercial society's pathologies, they might successfully circumscribe the state and its role

in their everyday affairs. The modern state and law, Thoreau occasionally grasped, functioned in conjunction with modern capitalism. By restricting the latter's scope and real-life impact on individuals, the former might be productively limited as well.

Thoreau's political and legal ideas have been the object of myriad interpretations (Pepperman Taylor 2015; Turner 2009), In particular, they have inspired both left-wing antistatists (e.g., the anarchist Emma Goldman) and their right-wing cousins, some of whom have recently tried to find in them the makings of contemporary *philosophical anarchism* or *libertarianism* (Simmons 2010). However, Thoreau categorically rejected the possibility of a political community without state or law. Instead, he viewed both as necessary evils whose impact on individual affairs, given their threats to individual moral conscience, should be limited. In the concluding section of "Resistance to Civil Government," Thoreau speculated about the possibility of a better or improved democracy, capable of taking "a step further towards recognizing and organizing the rights of man," that would do so by recognizing "the individual as a higher and independent power" (1996 [1849]: 21).

Conclusion

Although he never provided a full-fledged political and legal theory of such a democracy, it would acknowledge the privileged status of individual moral conscience by "not meddling" with its dictates. Democracy, it seems, might still be made to cohere with a principled respect for individual moral conscience and its dictates. Such a "perfect and glorious State," however, Thoreau had "not yet anywhere seen" (1996 [1849]: 21). Nor arguably have we.

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Tocqueville, Alexis de

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Introduction

Alexis de Tocqueville (1805–1859) was a thinker pulled between several worlds. He was an aristocrat by both birth and temperament, but he never lived in an aristocratic society, and his crowning achievement was to compose the most celebrated study of democracy ever written. He was awestruck by the equality found in democratic societies, but he also prized freedom and was fearful that democracy would enable new forms of despotism. Tocqueville was also torn over the conflicting demands of intellectual and political life. Although he savored the tranquility of scholarship and writing, he also threw himself into

politics, serving as deputy under the July Monarchy, vice president of the *Assemblée Nationale* after the revolution of 1848, and even briefly as France's minister of foreign affairs. Finally, Tocqueville found himself divided between his detestation of violent tyranny and his support for French colonization as a project of national salvation. In his capacity as a Parliamentarian, he even travelled to Algeria to oversee French colonization efforts. And while he was repulsed by the brutality of French colonial tactics against the Berbers and Arabs, he ultimately condoned them as necessary for France to secure its place among Europe's imperial powers (Pitts 2005: 204–5).

Tocqueville's works reflect a diversity of style and interest. His *Ancien Regime and the Revolution* (1856) was mainly an historical work, situating the French Revolution within a gradual process of state centralization that began in the middle ages. His posthumously published *Recollections* (1893) was part political memoir, part analysis of the 1848 revolution and the events giving rise to Bonaparte's 1851 *coup d'état*. Tocqueville even dabbled in political economy in his short *Memoir on Pauperism*, delivered as an address to Royal Academy of Cherbourg in 1835.

Tocqueville's first work, however, was by far his most ambitious and influential. *Democracy in America* resists easy classification, being at once a work of political science, cultural criticism, philosophy, ethnography, travel writing, and historical sociology. It was made up of two large volumes, published 5 years apart (1835 and 1840), and was based on research conducted during a 9-month trip around the United States that Tocqueville began in 1831. The ostensive purpose of the trip was to study American prisons on behalf of the French government, but Tocqueville instead seized the opportunity to study American society as a whole and up close. Like many French thinkers of his day, Tocqueville was fascinated by America, not least because he believed that the American democratic present contained lessons for France's democratic future. It is telling that he titled the work *Democracy in America* and not "American Democracy." Democracy was what absorbed him; America happened to be where democracy was most deeply implanted. As he admitted in the introduction, "I saw in America more than America; it was the shape of democracy itself which I sought" (DA: I, Intro).

Readers approaching *Democracy in America* for the first time must keep in mind that democracy, for Tocqueville, was more than a political regime. He referred to it instead as a social state (*état social*), a term denoting the entire set of habits, customs, manners, and social relations characteristic of a given society. This expansive understanding of democracy reflected Tocqueville's belief that a society's laws and institutions were ultimately expressions of its underlying mores (*moeurs*). But it also pointed to something unique about the democratic social state. By introducing the principle of equality to every sphere of life, democracy transformed education, religion, social etiquette, relations between the sexes, business practices, philosophy, and even literature. Thus, true to the tradition of Montesquieu, Tocqueville saw that comprehending democracy required more than a knowledge of laws and political institutions; rather, it demanded a deep sociological appreciation of the gulf separating the aristocratic habits of the old world from the democratic habits of the new.

The Equality of Conditions

The quintessential characteristic of the democratic social state, Tocqueville claimed, was what he called the equality of conditions. This was a claim about motivation as much as social structure. Tocqueville's argument was not that democratic societies would eradicate inequalities of wealth or status, but rather that democratic citizens were *driven* by the passion for equality. No democratic citizen would ever recognize another person as a natural superior. Nor would they regard any actually existing inequalities as anything other than temporary and contingent. The frenetic atmosphere of democratic societies and the restless energy of their citizens were, for Tocqueville, largely attributable to this craving to be equal.

The equality of conditions, as Tocqueville understood it, brought many benefits to democratic societies. Citizens who refused to acknowledge superiors would enjoy healthy self-esteem, be impatient of authority, and assert their political rights. The passion for equality could also have its downside, however. So eager were democratic citizens to be on an equal footing with their peers that they would occasionally sacrifice freedom to obtain this goal. In one of his more somber moments, Tocqueville even alleged that a corrupted democratic people would prefer equality under a despot to freedom in a society with fixed distinctions or ranks. He also worried that the passion for equality could stoke a poisonous envy, leading the "weak to want to drag the strong down to their level" (DA: I, I, iii). Finally, the fixation on equality could bring about intellectual and cultural mediocrity. Tocqueville marveled at how America had delivered a basic education to the bulk of its citizens, a feat that France had not come close to matching. But he considered American brilliance rare and expected little from American writers, artists, and philosophers. The challenge for democratic societies, as he saw it, was to somehow preserve the good effects of equality while avoiding the bad.

Popular Sovereignty and Majority Tyranny

One of Tocqueville's most influential arguments in the first volume of *Democracy in America* was that the American polity, despite its complicated system of checks and balances, was founded on popular sovereignty. This might seem a surprising claim for students of American politics, many of whom consider the peculiar genius of the American political system to be the absence of a single locus of authority. Indeed, Tocqueville himself judged the federal constitution superior to the constitutions of the individual states precisely because it placed limits on democratic majoritarianism (Selinger 2019: 147). However, for Tocqueville, the surface complexity of American constitutional arrangements concealed the fact that ultimate authority was wielded by the people. He even went so far as to compare the people's rule over America to God's rule over the universe. Once at least a majority of the people, declared themselves on an issue then they would have their way. This made popular sovereignty the "law of laws" (DA: I, I, iv).[1]

Tocqueville was not opposed to popular sovereignty, but he nevertheless fretted that it could usher in a tyranny of the majority. In some ways, Tocqueville's apprehensions on this score repeated those of earlier critics of democracy from Plato to Burke. In theorizing how majority tyranny manifests itself, however, Tocqueville innovated by exploding several common assumptions about how tyranny operates. The first such assumption was that tyranny must be exercised by a single person. Aristotle had called tyranny a corrupt form of monarchy (rule by one), and this formed the basis of modern understandings of the term as well. Tocqueville instead insisted that tyranny could be exercised just as brutally by a collective as by an individual: "I refuse grant to several that power to do everything which I refuse to a single man" (DA: I, II, vii).

The second assumption that Tocqueville challenged was that tyranny was *lawless*. The tyrant, in classical and modern political thought, ruled according to personal whim rather than law. Tocqueville, by contrast, recognized that majorities in a democracy often deployed law as an instrument of tyrannical rule. In other words, the majority could exercise a kind of nonarbitrary tyranny, a tyranny that weaponized law rather than regarding it as an obstacle or restraint.

Third, Tocqueville undermined the notion that tyrants typically ruled by means of coercion or violence. Anticipating Michel Foucault, Tocqueville saw majority tyranny as imperceptibly molding the thoughts and habits of the minority rather than overtly punishing them. As a form of social control, it "leaves the body alone" and "goes

[1] All in-text references to Tocqueville's *Democracy in America* (DA) contain the volume, part, and chapter numbers. All in-text references to Tocqueville's *Ancien Régime and the Revolution* (AR) contain the book and chapter numbers. The editions cited are listed in the references at the end of this entry.

straight for the soul" (DA: I, II, vii). The illusion of free thought could be maintained under majority tyranny, but deviants were ostracized if they failed to conform. They might retain their legal rights, but their social standing would suffer. At its worst, Tocqueville argued, majority tyranny could shape the desires of democratic citizens to the point where they would lose any appetite for dissent at all.

Tocqueville saw such tyranny at work in the context of American race relations, a topic he is often accused (wrongly) of neglecting. Even in nonslave states such as Pennsylvania, he observed, black Americans dared not exercise their suffrage rights because they were intimidated by the white majority. In his chapter on "The Three Races that Inhabit the United States" (the longest chapter in either volume of *Democracy in America*), Tocqueville dispelled the notion that the absence of slavery in the north signaled an absence of racial prejudice. In fact, he argued, matters were quite the opposite. In the absence of slavery, the northern white majority invented new ways of tyrannizing over blacks, including ostracism, contempt, and social segregation.

Communal Freedom and the Power of Association

One feature of American democracy that struck Tocqueville with particular force was the practice of municipal government, especially in the New England townships. If America was to ward off majority tyranny, he insisted, preserving this mundane and unspectacular political activity was crucial. For Tocqueville, practices of collective self-management were natural to human beings and could be found in any small-scale and primitive community. Echoing Rousseau (an author he admired greatly), Tocqueville even suggested that as societies became more civilized they also became less tolerant of local freedom, preferring instead an enlightened centralized administration (DA: I.I, v). What Tocqueville believed Americans had accomplished (for now) was what Rousseau had deemed impossible; they had grown a commercial society on a large and lasting scale without sacrificing localism.

In Tocqueville's view, participation in local government educated democratic citizens in the art of self-rule, teaching them an orderly and effective method of advancing their interests in coordination with others. Crucially, this was a form of rule that Americans exercised *directly*, requiring little or no delegation. At least with respect to local government, Tocqueville shared Rousseau's suspicion of representation; to preserve the habits of political freedom, democratic citizens had to get their hands dirty with the business of local taxes, roads, and the maintenance of public amenities. Recruiting representatives to take on these tasks, or leaving them for the central government to decide, was a first step toward servitude.

Tocqueville also placed great faith in the American practice of association to mitigate some of democracy's defects. Associations could be either political or civil, and both forms were integral to American public life. By political association, Tocqueville simply meant the "public and formal support of specific doctrines by a certain number of individuals who have undertaken to cooperate in a stated way in order to make these doctrines prevail" (DA: I, II, iv). Even the tyranny of the majority, he noted, could be tempered by groups of citizens combining in this manner. Here again Tocqueville reinforced his argument by contrasting America to Europe. Whereas political associations in European countries resembled cabals of conspirators plotting sedition, their American counterparts served a role analogous to the intermediary institutions (such as the *parlements*) that Tocqueville considered essential to freedom in France but that had been gradually eroded there. Civil associations, whether commercial, cultural, or religious, were no less important. Besides teaching citizens that their freedom, independence, and prosperity relied on cooperation with others, civil associations broadened their intellectual and moral horizons, allowing civilization and public freedom to become mutually reinforcing. In a democracy, Tocqueville claimed, "knowledge of how to combine is the mother of all other forms of knowledge" (DA: II, II, v).

The Value of Lawyers and Juries

Another key source of resistance to majority tyranny that Tocqueville identified was the legal profession. More than any other social grouping, he noted, lawyers displayed the kind of orderly habits and "taste for formalities" that could calm the unruliness of democratic society (DA: I, II, viii).The fondness of lawyers for precedent, tradition, and established procedures gave them a temper that was "eminently conservative," and in this respect they resembled the aristocracy of Tocqueville's native France, with the crucial difference that American lawyers still played the kind of outsized role in public life that French aristocrats had long ago relinquished (DA: I, II, viii). This aristocratic disposition made lawyers an indispensable force of moderation, a kind of safeguard against democracy's lack of self-control.

Even more valuably, the aristocratic habits of the lawyers could be communicated to the citizens at large through the jury system. By sitting in judgment of their peers in a court room, Tocqueville proposed, Americans citizens learned to follow rules, deliberate, and weigh evidence. This made the jury the "free school" of democracy, teaching citizens their rights, while forcing them to pay attention to things beyond their immediate sphere of interest (DA: I, II, viii). As such, it was a *political* rather than just a legal institution, a precious addition to American civic education.

The Problem of Individualism

In the second volume of *Democracy in America,* Tocqueville offered a gloomier outlook on America's democratic future. Part of the difficulty he foresaw was that the habit of association so vital to public freedom could weaken as society became more homogenized, anonymous, and atomized. "Unhappily," he wrote, "the same social conditions that render associations so necessary to democratic nations also make their formation more difficult there than elsewhere" (DA: II, II, v). Only a handful of aristocrats needed to combine in order to form a formidable association, not least because their shared rank provided an immediate common link. In democracies, by contrast, large numbers of dispersed and individually weak strangers needed to come together for an association to have any effect. This practical difficulty aside, the desire to associate could also be sapped by the growth of what Tocqueville called "individualism" (DA: II, II, ii).

Individualism is among the most easily misunderstood concepts in Tocqueville's political thought. It is the feeling that encourages citizens to look exclusively to their own affairs and those of their immediate circle rather than to the public at large. On a societal scale, it resembles a kind of mass turning inward or self-isolation. As such, it has nothing to do with individuality. Indeed, individualism can take root in deeply conformist societies with little diversity of thought. Nor, however, does individualism denote a kind of selfishness. Citizens can fall under the sway of individualism and yet still work tirelessly to advance the welfare of their families and close friends. The narrowing of concern that individualism prompts, however, will eventually give rise to a kind of egoism as the citizen becomes "shut up in the solitude of his own heart" (DA: II, II, ii). Thus, although individualism is not reducible to selfishness, one can lead to the other.

Just as individualism is not reducible to selfishness, the remedy for individualism is not reducible to altruism or civic mindedness. Instead, Tocqueville proclaimed, counteracting individualism required that citizens in a democracy learn to see their self-interest as bound up with that of those around them. A citizen may wish to see the road nearby their house repaired for no other reason than that they are personally inconvenienced. But if that citizen is motivated by "self-interest properly understood" then they will quickly see that the quickest way to satisfy their interest is to work with neighbors to get the road fixed (DA: II, II, viii). This particular argument places Tocqueville outside the mainstream of political theorists (usually republicans) who consider an education in civic virtue as key to sustaining collective self-rule. For Tocqueville, noble self-sacrifice is too unreliable a foundation for public freedom, which can best be preserved

by opening the eyes of citizens to how their interests are best served through civic cooperation.

Centralization, Homogenization, and Democratic Despotism

The alternative to joining forces locally with one's peers was to petition the central government to take care of local business instead. Tocqueville's abiding fear was that democratic citizens would increasingly defer to central government for their needs, surrendering public freedom in the process. This was not a problem that was limited to democracies. In *Ancien Regime and the Revolution*, Tocqueville charted the growth of administrative centralization in Europe over a span of centuries, taking prerevolution France as his particular focus. From the middle ages onward, he argued, the French crown and its administrators incrementally seized control of taxation, conscription, poor relief, and a host of other public functions, undermining more local sites of authority. Under feudalism, Tocqueville notes, the different corporations and guilds that made up a municipality were obliged to work together to manage the common affairs of the city. As centralization gathered pace, however, these corporations became "withdrawn into themselves" and ceased to bother with the common good of the city as a whole (AR: II, ix). This "collective individualism" was only a prelude, however, to a further atomization of the French population into ever smaller circles of interest (AR: II, ix). This centralization went unnoticed because the "outward form" of local autonomy was allowed to remain, meaning that the French people hardly realized what they were losing (AR: II, iii). In theory, cities still enjoyed municipal autonomy and parishes still met to discuss local affairs. But in effect, this was only a façade. Municipal governments had long since developed first into a "petty oligarchy" of local elites only to be effectively taken over by the central government (AR: II, iii).

The centralization of French administration was all but completed when, in the decades immediately prior to the revolution of 1789, French appetite for reform was greater than the desire for political freedom. The revolutionaries, Tocqueville held, wanted to take over the machinery of central government rather than limit it, making it easier for them to enact their own modernization projects. For them, it was "not a question of destroying absolute power but of converting it" (AR: III, iii). And although the taste for public freedom was briefly revived during the revolution itself, it quickly died off again afterward, enabling the rise of Napoleon Bonaparte's regime.

For Tocqueville, administrative centralization was often accompanied by social and cultural homogenization. Having lost wealth and power, he claimed, the French aristocracy began to resemble the middle classes in every way. They no longer took part in state business or administered justice locally, but yet still clung to their exemptions from taxes. In time, such aristocratic privileges became "no longer understandable" to the French bourgeoisie who objected to differential treatment in a society where all were increasingly alike (AR: II, i). Homogenization was, thus, a key force driving revolutionary resentment.

What lay in the future for societies that were increasingly equal, homogenous, and beholden to a central government? Tocqueville refused to be fatalistic when considering this question and insisted that while the spread of democracy was inevitable, the death of public freedom was not. In both America and Europe, considerable scope remained for peoples to choose the kind of democratic society they wanted to live in. Unfortunately, many would unsuccessfully try to reconcile their desire to remain free with their demand for "guidance" from the state (DA: II, IV, vi). Tocqueville coined the term "democratic despotism" to describe the particular kind of power that would arise in such circumstances. Unlike in the case of majority tyranny, democratic despotisms treat all members of society with impartiality, mildness, and benevolence, regarding those in its care as helpless children who will never mature to adulthood. This species of despotism would, Tocqueville feared, reach further than any previous despotic power in history. The violence of the most tyrannical of the Roman Emperors, Tocqueville wryly noted, rarely fell on anyone beyond the senatorial classes. The

modern democratic state, by contrast, would penetrate all levels of society, softening the population and rendering them pliable to government demands. Rather than governing citizens, such a state would superintend a docile population happy to cede control of their lives in return for safety and material comforts.

Conclusion

After a long period of neglect in his native France, Tocqueville was reinvented in the twentieth century by Raymond Aron as a political sociologist and by François Furet as a historian of the French Revolution (Aron 2017; Furet 1981). This coincided with a recognition – on both sides of the Atlantic and at each end of the political spectrum – of Tocqueville as a political thinker uniquely placed to diagnose the contemporary malaise of Western democracies. Part of this wide appeal stemmed from the fact that Tocqueville seemed to have something to offer everyone. While Burke remained the darling of conservatives and Marx held appeal for few beyond the left, Tocqueville could be cited approvingly by liberals, libertarians, conservatives, and participatory democrats.

American and French liberals have perhaps been quickest to enlist Tocqueville to their cause. Harvey Mansfield, for instance, argues that Tocqueville's self-description as a "new kind of liberal" should be taken at face value (Mansfield 2010: 3). Annelien De Dijn, by contrast, positions Tocqueville as the heir to a French tradition of "aristocratic liberalism" inaugurated by Montesquieu (2008: 11). Libertarians too have invoked Tocqueville's specter of democratic despotism in their criticisms of the welfare state, praised his criticism of intellectual conformity, and elevated him into a "fixture on the American cultural right" (Welch 2001: 226). Conservatives and Straussians have also leaned on Tocqueville's suggestion that order, religion, and law are essential to preserving freedom in a democracy.

Liberals, libertarians, and conservatives have not been the only enthusiastic appropriators of Tocqueville, however. Theorists of social capital have seized on his theory of association and diagnosis of individualism as a founding moment in their tradition (Putnam 2000). Hannah Arendt saw in Tocqueville a theorist of republican freedom (Arendt 2006). Following Arendt's lead, Berkeley political theorists have celebrated his commitment to active political participation as essential to a free democracy (Wolin 2001; Villa 2008). More recently, Tocqueville has even emerged as a champion of Parliamentarism, a form of politics he deemed essential for France's future, if not for America's (Selinger 2019). The socialist left has by and large ignored Tocqueville (not least because Tocqueville made no secret of his disdain for the socialist of his own day), but even they might yet come to applaud Tocqueville's prediction that a new and despotic industrial aristocracy of capitalists would emerge in democratic societies.

Tocqueville's most important legacy, however, is irreducible to any particular tradition, argument, or doctrine. Rather, it is his style of social and political analysis that remains his most valuable contribution. Tocqueville thought about modern societies with a capacity and ambition that academic specialization has rendered all but impossible today. He saw better than any other thinker that political, cultural, and economic forces were intertwined and that the attempt to privilege any one of these as more fundamental than the others would prove futile. And more than anyone else before or since, he knew how to hold up a mirror to modern societies and force their inhabitants to confront some of the uncomfortable tensions and trade-offs inherent therein.

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Toland, John

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Introduction

John Toland, deist philosopher and religious reformer, was born in the Irish county of Donegal in 1670 and died near London in 1722.

Toland was raised as a Catholic but rejected his religious upbringing as a young man. He then received a Presbyterian education at the Redcastle School in Londonderry before attending the Scottish universities of Glasgow and Edinburgh. After graduating in 1690 he went to London where he met the prominent presbyterian minister Daniel Williams. Thanks to his protestant connexions he was sent to the universities of Leiden and Utrecht where he completed his knowledge of ancient languages and was taught the critical and historical method of biblical exegesis in line with Spinoza, Pierre Bayle, and Richard Simon.

While in Holland, he became acquainted with the protestant theologian Jean Le Clerc, whose texts he later translated, and other advocates of liberty of conscience, among whom two Englishmen: the learned Quaker merchant Benjamin Furly and the philosopher John Locke.

Back in England, he spent some time in Oxford where he worked at the Bodleian Library on various subjects: an Irish dictionary, a history of Ireland, and a manuscript on religion which won him a European reputation as a freethinker. His habit of voicing heterodox views in coffeehouses and taverns caused him to be expelled from the city by the vice-chancellor.

Heterodox Ideas: From *Christianity Not Mysterious* to *Pantheisticon*

The manuscript he had been preparing in Oxford first appeared anonymously in 1695 in London as *Christianity Not Mysterious*. In this book he developed a rational understanding of religion and professed Socinian opinions about the divinity of Christ which he reiterated ten years later in *Socinianism Truly Stated* (1705, with a translation of Le Clerc's commentary on Johann Fabritius). Unlike Locke, he argued that revealed truths were consistent with reason and could not be beyond the grasp of human understanding. Besides, he questioned the so-called "mysteries" of the Christian religion as instruments used by clergymen to control the mind of believers. In *Clito: A Poem on the Force of Eloquence* (1720), he declared "Religion safe, with Priestcraft is the war." His attacks on the Christian clergy went together with attempts to retrieve the characters of pagan religion (*A History of the Druids*, 1726) and of the primitive Church (*The Primitive Constitution of the Christian Church*, 1726).

Throughout his works, he developed the same kind of rationalist and materialist argument. In *Amyntor* (1699), he went on to unravel the Christian canon by sorting out authentic and apocryphal texts attributed to Christ, Mary, and the Apostles. In *Letters to Serena* (1704) addressed to Queen Sophie Charlotte of Prussia, he proclaimed to delve into the origins of superstition and prejudices. Moreover, he rejected Newton's articulation of physics with metaphysics: motion was a self-sufficient phenomenon and needed no divine intervention. He never ceased to promote the reading of Giordano Bruno and other heterodox thinkers: He owned a rare copy of the vehemently anticlerical *Expulsion of the Triumphant Beast* (1584) which he presented to the learned circles in Hanover, Berlin, and Vienna. In *Socinianism,* and then in *Pantheisticon* (1720 in Latin, 1751 in English), he upheld new forms of worship: not so much the esoteric liturgy of an alternative religion (Jacob 1981), but an "intellectual disposition" (Champion 1995) which consisted in welcoming a variety of theological opinions as "their opposition will augment your Knowledge" (*Socinianism*).

In his writings Toland defined God as "the *Mind* and Soul of the Universe" (*Pantheisticon*) and Christians as "those who live according to Reason" (*Primitive Constitution*). According to Justin Champion, Toland's historical and philological works are not to be read as the mere attacks by a freethinker on dogmas but as the sincere efforts by a political reformer to lay the foundations of a new public religion (Champion 1995, 2003).

Political Career: In Defence of Toleration

After publishing *Christianity*, Toland faced prosecutions in England and fled to Ireland. But he received a cool welcome there: He was denounced from the pulpit, was turned down from a position at Trinity College, and the Irish House of Commons ordered him to be arrested and the book to be burnt. In 1698, he went back to London where he was employed to serve the Whig cause, and later the country party led by Robert Harley. In this context he was commissioned by two Whig patrons, John Holles, first Duke of Newcastle, and Sir Robert Clayton, director of the Bank of England and mayor of London, to prepare editions of several mid-century great commonwealthmen. He thus published the collected works of John Milton (London, 1698), edited Algernon Sidney's plea for resisting tyrants and vindicating popular sovereignty *(Discourses concerning Government*, London, 1698), as well as James Harrington's exposition of various models of commonwealths in *Oceana and Other Works* (1700). He was also probably involved in the edition of the late regicide Edmund Ludlow's *Memoirs* (1698). The common thread between these political authors and actors was their commitment to liberty of conscience and civic virtue. However, as Toland made clear, this does not mean he endorsed "a pure Democracy, nor any particular Form of Government: but an independent community, where the Commonweal or Good of all indifferently is design'd and pursu'd" (*Anglia Libera*, London, 1701).

These volumes went through several editions in the course of the eighteenth century, were reviewed in periodicals, and sometimes immediately translated by Huguenots (the *Discourses* by Sidney were published in French in 1702), thus allowing for the transmission of republican ideas in the eighteenth-century Republic of Letters. Toland took up his pen to oppose William of Orange's invasion of England (*Militia Reformed* and *The Danger of Mercenary Parliaments* published in 1698), while defending the Protestant succession in *Anglia Libera*. Thanks to Robert Harley, he was appointed secretary to the embassy of Hanover where he presented the Act of Settlement ensuring a protestant succession on the throne of England to Electress Sophia. *The Memorial of the State of England* (1705) was an intervention in the heated debate about occasional conformity that raged in the last decade of the seventeenth and first decades of the eighteenth century, as religious minorities were still barred from public office after the Toleration Act (1689) was passed.

Toland himself had proclaimed he took Anglican communion as a public sign of his membership of the established church and recommended this practice for protestant dissenters as a measure

for civil peace. In the next few years of Queen Anne's reign, he fell out of favor with Harley who was now more concerned with maintaining peace with France than with defending Protestantism, but Toland did not cease to promote his ideal. In *Reasons for Naturalizing the Jews* (1714), *The State-Anatomy of Great Britain* (1717), and *Nazarenus* (1718) he relied on biblical criticism to promote a broad-based national church which would be the guardian of toleration. Such an institution would not only reform faith by transforming "mechanical and artificial religion" into "reasonable worship and unaffected piety" (*Nazarenus*), it would pave the way for the establishment of a true commonwealth. Toland was ruined in the South Sea Company crisis and died in poverty without seeing the reform he had called for.

Legacy

Toland's prolific works have been reviled or praised, the latter notably by materialist thinkers such as Diderot and baron d'Holbach.

He has been studied by modern commentators and considered to be one of the inspirers of the Freemason ritual.

We may ponder over the fact that very few of his texts have been published in modern critical editions, but at least this leaves room for the next generations of scholars.

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Toleration

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Introduction

The term "toleration" (and its cognates "tolerance" and "tolerant") tends to have a positive resonance today. For example, to be named "the most tolerant country" might be a source of great national pride. However, toleration was not always the desired trophy to be held up high. Published just a little before the English Toleration Act of 1689 (as it is commonly known) was a pamphlet entitled *Toleration tolerated* (Taylor 1687) attributed to the late Bishop Jeremy Taylor. As the title suggests, toleration itself was the very

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subject of what was or was not to be embraced. How exactly toleration became one of the prized values of modern liberal democracies is an important but long and complicated story (Zagorin 2003) – much beyond the scope of a short entry. Toleration is also an idea faced with challenges today, challenges about its value and possibility (Brown 2006; Newey 1999; Creppell 2003). Thus, an equally important task is that of thinking about why toleration should still matter today, and if it does, how the idea might be incarnated by society and law. To facilitate and to serve as a preliminary to such a discussion, the following series of questions are considered: what toleration is, how it might be justified, what its scope is, and how it might be measured in social, political, and legal contexts.

What Is Toleration?

Toleration is a much contested concept. The term derives from the Latin verb *tolerare*, which means "to put up with" or "to endure." While in stoic writings, the noun *tolerantia* concerned the endurance of fate, injustice, and pain, in the early Christian writings, the word acquired in addition to the sense of patience, a sense of indulgence toward others (Forst 2013: 36–9). In moral, social, and political discussions, toleration at its core has traditionally been understood as involving an acceptance of something which one finds objectionable. There is an agent (e.g., individual, group, and government) tolerating, and as a transitive, an object (e.g., beliefs, actions, and practices of others) being tolerated. It may be worth noting that the verb *tolerare* also has a less passive sense than to endure – "to sustain," "to support," or "to maintain" – which may help to account for its wider appeal and endorsement in the history of social and political thought (Dascal 2003: 457).

Toleration, however, is often used in looser senses than the traditional way, ranging from indifference to positive acceptance (Walzer 1997: 10–1). Nevertheless, toleration should be distinguished from both positive acceptance and indifference (Cohen 2004: 71–4). Toleration involves making a judgment that something is objectionable – this is known as the "objection component." One "puts up" with something one disapproves of, not with something one approves. Neither does one "bear" something one does not care about. What does not matter just does not matter – there is no pain in accepting it (for a discussion about the role of pain and its relation to toleration, see Tønder 2013).

Toleration should also be distinguished from acquiescence (King 1976: 22–4). The latter is indeed about putting up with something but with the further implication that one is unable to do anything about the offensive situation. One is powerless in face of the situation and, as a consequence, does not have a choice but to bear. As opposed to this, while toleration involves accepting by not interfering with what one objects to – the "acceptance component" – it also requires that one voluntarily chooses not to do so. As such, this seems to imply a degree of power to do something about the situation (Forst 2013: 25–6). Just how much power and whether this power is actual, believed, or supposed are moot points (Nicholson 1985: 161; Williams 1996: 18–9; Oderdiek 2001: 51–2; Cohen 2004: 93–4; McKinnon 2006: 15). To illustrate this point, consider resistance theorists in the history of social and political thought who often talked about tolerating "tolerable tyrants" (Numao 2013). In what sense can people be said to be "tolerating" the tyrants? On one account of toleration, (a) people can really be "tolerating" only if they have the power to overturn the government. On another, (b) they can tolerate given that they have enough power to inconvenience the tyrant. Yet on another, (c) they can tolerate as long as they *believe* that they have the power to overturn or inconvenience the government even if they do not have such power as a matter of fact. Finally, (d) they can be said to be tolerant as long as they adopt an attitude of not overturning the government supposing that they were to have such power. Supporters of account (a) will say that agents of (b), (c), and (d) are just barking, but this is a difficult call.

It may be relevant here to note that toleration can indicate both a practice and an attitude (Cohen 2004: 76–8; Sahin 2010: 5; Forst 2013: 26). As a political practice, toleration is about exercising,

effectuating, or incarnating the principle of toleration, whereas as an attitude, toleration is about the willingness to tolerate, or about having a disposition of being tolerant. Thus as an attitude, it can be exhibited even by a weaker, powerless party to the stronger as in case (d) above, whereas as a practice or action, one might suppose a stronger connection with a notion of power as in case (a), (b), or (c) above. To distinguish between the two senses of toleration, commentators commonly suggest that the term "toleration" should be used for the practice and "tolerance" for the attitude (Walzer 1997: xi; Oberdiek 2001: 24; Cohen 2004: 76–7). In practice, however, the two terms are often used without much distinction. The existence of these two senses and terms together with the use of the common adjective "tolerant" (as in "tolerant society") can give way to confusion in discussions of measuring toleration (see section "Measuring Toleration").

Moving on from the relationship between power and toleration, for toleration to be a genuine case of toleration distinguished from other ideas, it further requires a relevant reason for acceptance. There are many possible reasons for tolerating (see section "Why Tolerate?"), but for toleration to count as toleration, the reason for putting up with something cannot be due to powerlessness ("I can't do anything about it") or indifference ("I don't care") as discussed above, or sadism ("I know a more painful future awaits them if I do nothing"), just to add another example (Gardner 1993: 90; Cohen 2004: 81–2).

Finally, within the scope of toleration, there may be different kinds or levels ("conceptions") of toleration (Waldron 2012: 208; Forst 2013: 26–32). These might range from the traditional vertical toleration (e.g., a dominant party permitting a minority group) – a conception that struck Enlightenment writers (e.g., Tom Paine and Immanuel Kant. Paine 2000: 102; Kant 1991: 58) and strike multiculturalists today as condescending, oppressive, and outmoded – to a more horizontal toleration (e.g., citizens see each other as their equal and see others' beliefs as having a degree of value short of approval).

Why Tolerate?

Justifying toleration might seem paradoxical at first sight. Of liberalism, which embodies the idea, José Ortega y Gasset remarks that it is "incredible that the human species should have arrived at so noble an attitude, so paradoxical, so refined, so acrobatic, so anti-natural" (Ortega y Gasset, 1951: 55). For why would one want to tolerate what one finds objectionable? Even more, how can one see the tolerating of what one deems wrong to be something commendable? The answer seems to be connected to toleration being a dependent value, or in other words, that its value depends on something else (Forst 2013: 32–5. However, for the possibility of toleration being a value itself, see Cohen 2004: 84; Cohen 2014: 16). This other value helps make the reasons for tolerating stronger than for not, and thus makes toleration possible.

Many reasons for toleration have been canvassed. For these, one may first turn to history (see Forst 2013). On a practical level, exhaustion resulting from religious conflict and political expediency may be one obvious reason (Zagorin 2003: 20). Here, toleration might be seen as a temporary truce, or a *modus vivendi*. But thinkers have often sought for more principled and lasting reasons (Leiter 2013: 7–25). Two English thinkers that have traditionally received much attention in Anglo-American scholarship are John Locke and J.S. Mill.

In his *Epistola de Tolerantia* (1689) and later *Letters on Toleration*, Locke made a case for religious toleration based on the argument that while people have a duty to worship God, God had not required governments to concern themselves with religious affairs. That was for the church, which one joins on a voluntary basis. The government's role pertained to maintaining civil interests (Locke 2010; see also Locke 1988). And so, even if governments could use force to prompt conversion (which Locke believed was for the most part ineffective), they could not rightfully intervene as it lacked a Godly warrant (Locke 2010). The developing idea of the separation of church and state expressed here also resonated in its own unique ways in the writings and

documents of the American founding and the French Revolution (e.g., Forst 2013: 334–45).

Mill's defense of toleration can be found in *On Liberty* (1859). He defended the liberty of expression and action from societal and governmental interference, arguing that toleration of different opinions and beliefs was an important means to strengthening one's own opinions and beliefs and also, through vigorous exchange of these, arriving at superior knowledge. Moreover, toleration of opinions and practices was vital for individual and societal development (Mill 1989).

French and German thinkers on the continent should also command our attention. Montesquieu, the French Enlightenment thinker, offered a defense of religious toleration based on the benefits religion produced for society. In the *Spirit of the Laws* (1748), he held that religion in general had positive effects for the state, preferring false dogmas over atheism (Montesquieu 1989: 459–78 (Book 24)), and moreover, in the *Persian Letters* (1721), he argued that a plurality of religions would be good for society because tolerated believers would be better motivated to proving and distinguishing themselves as useful members of the society (Montesquieu 1973: 164–6 (Letter 85)). However, while calling for toleration of existing religions in the state, he did caution against establishing new ones (Montesquieu 1989: 488 (Book 25, Chap. 10).

Another French Enlightenment thinker, Voltaire, called for toleration on account of humanity's weakness and liability to error in his *Philosophical Dictionary* (1764). Given humanity as it is, we should forgive and tolerate each other's errors (Voltaire 1971: 387–94 ("Toleration")). Religious fanaticism and persecution, on the other hand, is condemned as a mental disease in need of reason's influence (Voltaire 2000: 25). It is unreasonable, Voltaire maintained, to suppose one could bring everyone to think alike on metaphysical issues; likewise, it is contrary to natural law to try to force people to believe what they reject (Voltaire 2000: 28, 87).

Of particular interest in the German tradition is Immanuel Kant. Kant seemingly rejects toleration when he refers to it as "presumptuous" in "What is Enlightenment?" (1784). The "tolerant" prince was patronizing for Kant indeed, but toleration nonetheless played a key role in his thought. Toleration was required on account of humankind's dignity as a free and rational being. Given that they observe the laws, people must be free to think for themselves and speak out publicly fully to liberate themselves (Kant 1991). Moreover, Kant spoke out against religious intolerance in the *Religion within the Boundaries of Mere Reason* (1793). He maintained that there was one universal moral, rational religion, while there were many particular, historically contingent faiths, including Judaism, Islam, and Catholic and Protestant Christianity. Thus, by giving faiths only a particular validity, he tried to foreclose attempts made by certain of these to elevate themselves to the true religion through religious persecution (Kant 1998: 116, 122).

There is no shortage of modern defenses of toleration either (e.g., McKinnon 2006). While modern, they are often inspired by and bear the impress of the historical arguments (the details of which will not be discussed here). One of the most influential of these in Anglo-American discussions is the defense of toleration from reasonableness, notably by John Rawls. Rawls holds that people are reasonable: They have a desire to search for reciprocally acceptable terms of how to live in society, and at the same time, they accept that they can disagree with each other. Because of reasonable disagreement, citizens will see it wrong to impose their beliefs about the good life without a reciprocal agreement. In a stable liberal society, citizens will be able to reach a consensus based on their reasonable perspectives to adopt a (moral) political conception of toleration (Rawls 1996).

The defense from reasonableness should be distinguished from other defenses such as skepticism or value pluralism. Brian Barry's defense (Barry 1995) involves presupposing that citizens cannot have beliefs about the good life to a degree of certainty that can justify imposing them on others. If they wish to arrive at a reciprocal agreement with others, accepting moderate skepticism of their beliefs, citizens need to practice toleration, not dogmatism. Value pluralists on the other hand see pluralism tied to incommensurability of

values – the idea that there lacks a common measure to rank different values. Because of incommensurability, it is unjustified to impose one's beliefs on others in respect for their liberty to make choices (Berlin 2002) or autonomy (Raz 1986).

The Anglo-American tradition does not exhaust the discussion on toleration. From the Frankfurt School, Rainer Forst offers an account of toleration that revises the Anglo-centered history of toleration and tries to navigate around what he sees as some of the conclusions and problems faced by the Anglo-American tradition (although his account is in many ways inspired by and compatible with this tradition, particularly reasonable tolerance). On his account, Pierre Bayle, rather than Locke or Mill, figures centrally. Forst's defense first depends on making a distinction between moral norms, which are nonrejectable and reciprocally binding, and ethical values, which are not generalizable in the way moral norms are but nevertheless can be justifiably held as guiding values for those who embrace them. He then invokes what he calls the "principle of justification" according to which the imposition of norms or laws on other people, where their moral equal standing is at stake, is justifiable only to the extent that they satisfy the reciprocity and generality requirement of moral norms; that is, they should be reciprocally nonrejectable and shareable to all those concerned. Accompanying this normative component is an epistemological component (a connection, according to Forst, Bayle made), in which citizens need to accept that while their beliefs may have value for them with respect to their particular ethical or religious identity, they may not for others given that the specific context that justifies these beliefs for them may not be generally shared. But insofar as these ethical beliefs do not violate people's "right to justification" – their right to be given adequate reasons for the imposition of norms that would affect their equal moral standing – they merit toleration. What gives toleration its force is the morally autonomous principle of justification rather than, as in Rawls, the overlapping content of people's specific ethical and political values, which cannot provide the independent normative force when ethical values clash (Forst 2003, 2013; Cf. Rawls 1996).

Where Toleration Ends

It is important to note that while toleration is about accepting what one objects to, it is not about accepting everything. As Forst puts it, one only tolerates what is "not intolerably wrong" (Forst 2017). Governments today regularly talk about "zero tolerance." Some things are simply out of bounds. So too the defenders of toleration believe. For example, Mill (1989) calls for toleration of various opinions and practices no matter how wrong or silly they may seem to others. However, one may not harm another person by what one says or does ("the harm principle").

In some cases, the reasons for toleration may help to explain and clarify what is to be excluded. For Locke (2010), religious toleration was defended in terms of what God did or did not entrust to governments. As God grounded toleration, those who denied the existence of a God – atheists – were denied toleration. Also as God was sovereign for Locke, those who postulated and practiced absolute and arbitrary power and thereby contradicted God's purposes (implicit here was Catholics) were not to be tolerated.

In some other cases, the principle by which one justified toleration could also be invoked to justify intolerance, thereby setting the limits to toleration. For example, while love of one's neighbors was a reason for tolerating others, for Augustine, the same also worked to justify the castigation of a perceived heretical group, the Donatists (Augustine 1995: 209 (Sermon 359A); Augustine 1953: 56–106 (Letter 93); also Forst 2013: 47–58).

Governments and societies today are regularly confronted with the challenge of determining where the appropriate line between the tolerable and intolerable should lie. Even within liberal democracies that equally respect values such as liberty and equality, decisions about what is or is not to be tolerated by law differ greatly such as in the case of hate speech, the use of marijuana, or the wearing of religious symbols. For example,

while in France "conspicuous" religious symbols such as headscarves have been banned in public schools and full-face veils (e.g., niqab, burka) in public spaces as a violation of secularism (and also as an affront to other values such as autonomy and solidarity. See Laborde 2008), in other countries such as Canada and the USA, the general policy toward religious attire has been that of reasonable accommodation (although political and legal challenges and disputes concerning them have and continue to exist, e.g., the now struck-down policy to ban the wearing of the niqab during the citizenship oath in Canada).

Measuring Toleration

While many kinds of toleration indicators and indices exist today, on the philosophical level it may be said that to measure and compare levels of toleration is a tough job, as the contested scope of toleration, for one, might indicate. One might try defending one specific conception of toleration over others, and then try verifying how individuals, societies, and political and legal systems do in relation to *that* conception. However, finding and agreeing upon such a conception is no easy task.

In addition to the difficulty of reaching a philosophical consensus about which conception of toleration to use, there may be a difficulty about what exactly to look for. For example, if one were wishing to measure the level of toleration of legal systems, one would need to understand what toleration implies, entails, or embodies (e.g., neutrality? impartiality?) because in the first instance the word "toleration" itself often does not appear in the laws themselves (the aforementioned English Toleration Act serves as a good example). But more crucially, toleration may plainly not be at work while legal systems of liberal democracies are commonly described as tolerant. Some would argue that in legal systems, the tolerating agent is absent (i.e., laws being inanimate lack the psychological capacity to find things objectionable). Some also say that liberal democracies no longer have the capacity to practice toleration because they are neutral and so cannot object to the views they accommodate (Newey 1999: 151–81). In response, one might argue that legal systems uphold and guarantee toleration rather than tolerate themselves, and on that account can be tolerant (Jones 2012).

When neutrality becomes respecting or endorsing (Gutmann 1994), it also poses difficulties. Multicultural societies declare that they are tolerant and are typically seen as such. But if toleration involves endorsing, it ceases to be toleration. This might also be "where toleration ends" in a different sense. While toleration might be compatible with respect for others (Galeotti 2002), it must retain an objection component. So some countries may not be accurately described as tolerant in the sense of practicing toleration; however, it may not be something necessarily to be ashamed of. The aim might be to go "beyond toleration" (Cf. Walzer 1997: 52; Walzer 2007: 176). Thus, for these countries, the work to be done by toleration is, as it were, finished.

The difficulties involved in measuring toleration are not confined to what conception of toleration ought to be the norm or what signs ought to be sought. There is also a difficulty about what aspect of society ought to be the focus and how these different aspects relate with others. This difficulty is neatly illustrated in discussions of hate speech. In his book on hate speech, Jeremy Waldron broaches the subject of what a tolerant society is or what a well-ordered society would "look like" (Waldron 2012: 65–104). Is a tolerant society one which allows a high degree of free expression, including hate speech, or is it one which people, despite their differences, treat each other with a degree of civility and respect? In the former case, (1) the political and legal system might be said to be tolerant in allowing different opinions to be voiced including intolerant ones. Among the citizenry, however, intolerant views may pervade. Dealing with such intolerance remains a moral and social problem and not a political or legal one. In the latter case, (2a) a civilly diverse culture might already exist in society and the society can be described as tolerant for that reason. The political and legal system may remain indeterminate about hate speech. Alternatively, (2b) a civilly diverse culture might

be politically and legally created and upheld, say by the introduction of antihate speech legislation. This society also can be said to be tolerant in that it keeps intolerant views at bay while fostering a diverse culture.

All three societies are tolerant in their own ways, but which is the more tolerant? Between (1) and (2a), there is a difficulty of deciding which dimension – the social or the legal – ought to carry more weight when measuring the level of tolerance. Between (1) and (2b), things get more complicated. There is first the difficulty of finding which conception of toleration ought to be the standard when assessing the political and legal system, but furthermore, there is a difficulty of deciding how to weigh the social culture and the effect law has on it (some argue that toleration is supererogatory and is therefore incompatible with the idea of being required by law, whereas others believe that it is compatible with such an idea. See Newey 1999: 54–80; Jones 2012: 269). While one possibility might be to isolate the social and legal dimensions and talk about them independently, seeing how in modern democracies the social, the political, and the legal relate with each other (i.e., citizens influence lawmakers and laws, and laws, in turn, affect citizens), one may question the merit of doing so.

Thus, although it is frequently talked about how one country or society is more tolerant than the other, translating this talk into a coherent philosophical explanation is much harder than it may appear at first sight.

Conclusion

Toleration leaves us with questions: about its nature and scope; about how to defend it; and about how to assess its level of diffusion or permeance in society. It even leaves us with questions about its very existence and value. Can toleration still exist today in its traditional form? If not, can it change and yet be "toleration"? Is toleration desirable today? Or is it something eventually to be overcome? The importance of asking and thinking about these questions, at least, seems to be unquestionable.

Cross-References

▶ Modus Vivendi
▶ Multiculturalism

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Tolstoy, Lev Nikolaevich

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Introduction

Count Lev Nikolaevich Tolstoy (1828–1910) is widely regarded as one of the greatest writers of all time and is increasingly valued as an important radical thinker, religious teacher, and social reformer.

Fundamental concepts of the philosophy of law and social philosophy are at the epicenter of Tolstoy's religious and philosophical teaching and his art. His quest for achieving universal justice outside of the "correctional" system of retributive justice administered by modern states rests on the conviction that we can achieve justice and general well-being without this system, through the commitment of every member of society and larger social groups alike to nonviolent cooperation – his ideal of governmentality.

Tolstoy dedicated more than six decades to daily observation, documentation, and commentary on and critique of legal ideas and their key exponents – from his time and from the past. He wrote on the regulatory codes underpinning civic, state, international, military, economic, religious, cultural, and ideological sectors of the law.

He felt drawn to the natural law school of thought espoused by Enlightenment thinkers such as Montesquieu and Rousseau. He admired Immanuel Kant, Adin Ballou, and William Lloyd Garrison; appreciated John-Stuart Mill, Schopenhauer, and Nikolaï Grot; and left trenchant appraisals of Catherine the Great (in particular, the *Nakaz* [1767]), Georg Wilhelm Friedrich Hegel, Gabriel Tarde, Cesare Lombroso, and Leon Petražycki.

Tolstoy's Views on Law in General

Tolstoy never experienced a Platonic fervor for perfect laws. For Tolstoy, we should ask how a perfect republic could have condemned Socrates to death in the first place. His distrust of *jus poenale*, both in its ancient and modern iterations, and his rather formidable hatred of the idea of establishing in Russia a semblance of the *Rechtsstaat* dates back to 1845–47 when Tolstoy was a student in the Faculty of Law at the University of Kazan (Tolstoy 2022).

He interrupted his studies without completing a degree following a dispute about whether commensurate punishments and the power and right of the monarch and the state to punish their subjects

were morally justified prerogatives. Tolstoy did pass the bar exam eventually, before he enlisted in the military (1852–56). Throughout his time in the military and after his retirement, he never lost focus on questions of law, moral autonomy, and freedom of the will. Tolstoy lived during the period of Russia's Great Reforms, of which the legal reform of 1864 was the greatest success story (Wortman 1976). During this time, spectacles of open courts replete with magnanimous pardons coexisted with arbitrary decisions and bureaucratic misuse. The questionable successes of the Great Reforms would reinforce the younger Tolstoy's skepticism about the human capacity to fairly judge one's own iniquities let alone the guilt of others.

Before 1870, Tolstoy had served in the capacity of a justice of the peace, twice as a juror, and in 1866 as a defense lawyer for a soldier named Shibunin who was court-martialed for hitting a superior officer. Tolstoy's defense was drawn up in perfect harmony with the minutiae of the law code and was couched in exactly the right jargon, but Shibunin was executed regardless.

Tolstoy's religious turn in the middle of his life is characterized by a steady tilt, from the end of the 1870s onward, toward his special brand of radical ethics. This approach is, in the main, an unorthodox inheritance of Kant's categorical imperative and a similarly radical reinterpretation of the Old Testament, The Talmud, and the gospels, which Tolstoy determines to be none other than the unwritten law of the kingdom, *la loi morale* of natural religion, and of Spinoza's *Ethics* that he also sees described in Matthew 5.17–18; Luke 16.16 and Romans 3.27; 7.16.

In his general predilection for a justice of clemency, Tolstoy rejects Kant's adherence to the tit-for-tat principle of retribution by first mollifying its pitilessness by an appeal to Schopenhauer's teaching on compassion. Yet Tolstoy quickly moves past Schopenhauer's pessimistic theory of the will, instead favoring the restoration of joyous innocence and readiness for martyrdom of primitive Christianity. He loved to repeat Christ's words about violence – "On me, lawlessness shall end" – while reiterating the power of the voice of conscience. At the same time, the principle of nonviolence itself is for him not the principle of coercion, but is "a free choice facing the people" (Tolstoy 1928–1958, vol. 36, p. 99).

Major Works and Activities

Some seventy-five nonfictional titles of Tolstoy's writings on law and social order remain. Among these, the most compact encapsulations of Tolstoy's views are the following: *The Harmony and Translation of the Four Gospels* (also published as *The Four Gospels* 1881); *In What Do I Believe?* (also published as *My Religion* [1884]); *The Kingdom of God Is Within You* (1893); *Christianity and Patriotism* (1894); *Christian Teaching* (1896); "The Law of Violence and the Law of Love" (1908); "I Cannot be Silent" (1908); "Death Penalty and Christianity" (1909); and "A Letter to a Student Regarding Law" (1909). There is an even lengthier list of Tolstoy's artistic works that tackle related problems.

Many of Tolstoy's works broach questions of guilt, compassion, crime, and the work of law courts: Some describe judges' vitas and the daily lives jurors; some canvas murderous plots and crimes followed by the portrayal of suffering in prison, others describe the hanging of revolutionaries; some tell us about the tsarist prisons and camps in Siberia; and still others of his works of fiction and drama extol human care and mutual forgiveness. Tolstoy is especially fond of writing about the rare display of extraordinary behavior in select government officials who overstep the bounds of their office to perform acts of mercy and kindness. Principal among these works are "God Sees the Truth but Waits" (1872); *The Death of Ivan Ilyich* (1886); *The Power of Darkness* (1886); *The Kreutzer Sonata* (1889); "Dream of a Young Tsar" (1895); *And Light Shineth in Darkness* (1902); "The Assyrian Tsar Assarkhadon" (1903); *The Forged Coupon* (1904); "After the Ball" (1904); and *God's Way and Man's* (1906).

Tolstoy's novel *Resurrection* (1899) is his most complete commentary on the human reception of law and injustice provides his fullest fictional depiction of the law system at work. The proceeds

of the novel were used to resettle the Doukhobors (persecuted religious dissidents) to Canada. In 1901, explaining their decision to excommunicate the author, the hierarchs of the Russian Orthodox Church blamed Tolstoy's depiction of liturgy in a prison chapel scene in *Resurrection*. The real reason, however, was Tolstoy's presentations of the inhuman conditions in Russia's detention centers.

The final thirty years of Tolstoy's life coincided with the rise of the revolutionary movement and religious dissent. With continued emphasis on clemency, Tolstoy visited prisons and wrote to government officials, even addressing the monarchs Alexander II, Alexander III, and Nicholas II directly. Human connection became his favored method for persuading the military and the police to abandon the dictates of their occupation in favor of their human obligation to mercy (Medzhibovskaya 2001, 2008b, 2014). During this time, it is noteworthy that Tolstoy contributed much to advocacy in print and by taking a public stand for hundreds upon hundreds of the persecuted, criminalized, imprisoned, exiled, and defeated in civil rights, speaking out on behalf of many people condemned to hard labor, sentenced to life imprisonment or even death.

To questions as to whether one should leave the profession of law as one would leave the den of sin, Tolstoy would usually respond that it was best to remain in the ranks and change the system from within. He corresponded or disputed law with many eminent jurists, legal thinkers, and historians in Russia, including Yury Samarin, Boris Chicherin, Anatoly Koni, Paul Miliukov, Maxim Kovalevsky, and Vasilii Maklakov, alongside many other servants of law.

Through his friendship with the philosopher Nikolaï Grot, starting in the mid-1880s, Tolstoy became involved in the work of The Moscow Psychological Society and contributed to its studies in the spheres of criminology and free will, which affected the thought of Petr Struve and Bogdan Kistiakiovsky.

By the end of his life, Tolstoy had become convinced that nobody is guilty in this world ("net v mire vinovatykh" [Tolstoy 1928–1958; vol. 38, pp. 181–204]) and that penal justice, having nothing to offer but the opposite of everything that is ethically edifying, should be purged from the social realm (ibid., 38: 57).

Impact and Criticism

Within the context of Russian legal scholarship, Andrzej Walicki frames Tolstoy as a legal nihilist: As an anarchist and pacifist, he did not hold the abolition of law to be a condemnable socialist-utopic idea but rather believed in the possibility of such an abolition (Walicki 1992, 79). Ivan Il'in, the most outspoken and most typical Russian critic of Tolstoy's nonviolence from the standpoint of statism, argued that by resisting evil with force, the state fulfills its divine goals (Il'in 1993, 5–132).

Tolstoy's model of nonviolent autonomy from the state and of forms of solidarity was, however, not Eurocentric in scope and influence. It was also based on creative appropriations from Judaism, the teachings of Lao Tzu, and the Vedas (specifically, on the ideas of nondoing for the prescient avoidance of evil and on justice always being on the side of the persecuted). Tolstoy's model would also go on to have much in common with both Gandhi's and Nehru's practices of *ahimsa*, both of whom were influenced by Tolstoy (in 1909, Tolstoy advised Mahatma Gandhi directly [Green 1990]). As a result, Tolstoy's teaching about the peaceful dismantling of old justice is enjoying a resurgence in the twenty-first century (Medzhibovskaya 2018). In addition to advising Gandhi, Tolstoy influenced the logical positivism of the early Ludwig Wittgenstein and the fundamental ontology of Martin Heidegger, as well as progressive lawyers and political justice activists in Progressive Era America, including George Kennan, Jane Addams, Ernest Crosby, and Clarence Darrow.

Many treatments of Tolstoy's views in English underscore their grim asceticism (Spence 1967), or they concentrate on finding ways to observe the Russian Orthodox law under the conditions of modern alienation (Gustafson 1986). In addition

to offering an account of Tolstoy's impact on Russian radicalism alongside an expected discussion of Gandhi and Martin Luther King, Jr., Marks (2003) assesses Tolstoy's role on many social movements in Europe, Asia, England, and the Americas, from César Chávez to Malcolm X. Medzhibovskaya (2008a) regards Tolstoy's interpretation of law as part of a more comprehensive search, his revaluation of the religious-philosophical heritage of Christianity and of centuries of world wisdom, for finding meaningful answers for a sustainable social realm. For Boot (2009), Tolstoy's artistic and intellectual anarchism is in dangerous violation of the Judeo-Christian principles on which Western civilization and its foundations stand. Christoyannopoulos (2019) takes a more global perspective on the literature written in English on Tolstoy's social and political thought, focusing on his Christian anarchism.

Conclusion

Despite – or perhaps thanks to – their controversial and debatable aspects, Tolstoy's views on law are rife with potential. He deserves to be heard, not least because he suffered for his ideas. Just like the vagabond Jesus that he embraced, after 1901 Tolstoy lived effectively outside of the sphere of worldly law.

The unbearable legalistic fuss around his last testament and will – the procedure for placing his literary estate in the public domain worldwide – was too much for him, and he died at eighty-two just 2 weeks after fleeing from his home.

Tolstoy's teachings on law and justice bear a strong resemblance to Kierkegaard's existentialism, specifically regarding the idea of the teleological suspension of ontic morality.

His ethics of mutual dependence outside of the political space of the state anticipates Giorgio Agamben's theory of bare life, with the caveat that Tolstoy's state of exception engenders a dialogue and responsible care for every encounter, in the form of what might be called a new ethics of the open.

Cross-References

- ▶ Gandhi, Mohandas Karamchand
- ▶ Kant, Immanuel
- ▶ Kierkegaard, Søren Aaybe
- ▶ Schopenhauer, Arthur

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Transconstitutionalism

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Transconstitutionalism (Neves 2009 [Engl. trans. 2013]) is not to be confused with panconstitutionalism (Neves 2017), that is, with the tendency to identify a new constitution whenever a legal order, institution, or organization emerges in contemporary society, in terms, for instance, of Gunther Teubner's constitutional pluralism: "not just ubi societas, ibi ius, as Grotius once said, but ubi societas, ibi constitution" (Teubner 2012, p. 63 [Engl. trans. 2012, p. 35]). It is neither to be equated with the notion of a political constitution for the world society (Habermas 2005 [Engl. trans. 2008]) nor a constitution of the international community (Fassbender 1998; Verdross 1926), of the United Nations (Ross 1950) or even of mankind (Tomuschat 1997).

The transconstitutional model starts from the solid notion that the meaning of "constitution" in the strictly modern sense is linked to the constitutionalism that resulted from the liberal revolutions of the eighteenth century in France and the United States, as well as from British political and legal history, albeit atypically so in the latter case. From this conceptual start-point, it sets out to identify the problems that presented themselves as a condition for the historical possibility of the emergence of the constitutional state. Having determined the problems, it is relevant to ask what functional and normative answers were intended to be embodied in the constitutions of modern states. It is precisely this relationship between problems and solutions that enables the concept of constitution arising from constitutionalism to be stablished.

Two problems were of vital importance to the appearance of constitutions in the modern sense. On one hand, the emergence of demands for fundamental or human rights in a society of increasing systemic complexity and social heterogeneity. On the other, and associated with this, the organizational question of the legal limitation and control of power; related hereto was the question of the growing specialization of functions, a condition for greater efficiency of state power. As world society (Luhmann 1971) has become more integrated, these problems have recently become untreatable by any single national legal order within its territory alone. Problems of human or fundamental rights and power limitation or control are increasingly becoming relevant to more than one legal order at the same time; many of these are non-state orders but they, too, are called upon to offer solutions to such problems. This entails permanent cross-cutting relationships among legal orders revolving around shared constitutional problems. Thus, constitutional law emancipates itself from the state, in which its foundations were originally located, not exactly because a multitude of new constitutions have appeared, but rather because other legal orders are directly involved in resolving basic constitutional problems, frequently prevailing over the orientation of the legal orders of the respective nation states. Furthermore, permanent direct relations are formed between states to deal with the constitutional problems they have in common. The exception has become the rule in both cases.

To address this state of affairs, I propose the concept of transconstitutionalism. On the one hand, transconstitutionalism should not be confused with mere transjuridicism, such as, for example, in relations between legal orders in medieval pluralism, especially between canon law (including Roman law), urban law, royal law, and feudal law (Berman 1983, fig. 2, pp. 522–526), since medieval experience did not involve constitutional problems in the modern sense. Thus, it was not a matter of fundamental rights, or of the legal limitation and control of power, much less of various claims for the self-foundation of law (ultimately the law had sacred foundations – Neves 2009, pp. 8–10 and 16, footnote 63 [Engl. trans. 2013, pp. 9–11 and 14, footnote 63]).

On the other hand, it is not about international, transnational, supranational, national, or local

constitutionalism. The concept of transconstitutionalism points precisely to the development of legal problems that cut across the various different types of legal order. A transconstitutional problem entails an issue that may involve national, international, supranational, and transnational courts or arbitration tribunals, as well as native local legal institutions, in the search for a solution. In constructing the transconstitutional theory, I invoked Wolfgang Welsch's concept of "transversal reason" (Welsch 1996, 2002, pp. 295–318), although I keep my distance somewhat from this ambitious concept, to analyze the limits and possibilities of the existence of *transversal rationalities* (or "bridges of transition"), both between the legal system and other social systems (transversal constitutions) and between legal orders within the law as a functional system of world society (Neves 2009, pp. 38 ff. [Engl trans. 2013, pp. 28 ff.]).

Moreover, the transconstitutional model does not merely refer to a functional requirement and normative claim for transversal rationality among legal orders, but also takes into consideration empirically the negative aspects of transconstitutional entanglements, such as cases where the problem involves situations of anticonstitutional orders or practices, that is, those which counteract the protection of human and fundamental rights, or which counteract the control and limitation of power. Similarly, the constitutional approach addresses the question of anticonstitutional practices found within the orders of typically constitutional states (Scheppele 2006; Roach 2006). Therefore, it is worth distinguishing transconstitutionalism (genus), which includes relations between constitutional and anticonstitutional orders, from interconstitutionalism (species), which comprises only relations between legal orders that fulfil constitutionalist requirements (Canotilho 2006, pp. 265 ff.; Pires 1997, pp. 101 ff.).

Transconstitutionalism does not take any single legal order or type of order as a starting point or ultima ratio. It rejects nation-statism, internationalism, supranationalism, transnationalism, and localism as privileged spaces for solving constitutional problems. Instead, it points to the need to build "bridges of transition," promote both "constitutional conversations" or "dialogue" and "constitutional collisions," as well as strengthen constitutional entanglements among the various legal orders, be they national, international, transnational, supranational, or local. It constitutes, on the one hand, dialogues and, on the other hand, agonic communications. Both of these forms are related to a process of permanent learning in conditions of "double contingency" (Luhmann 1984, pp. 148 ff. [Engl. trans. 1995, pp. 103 ff.]; Neves 2009, pp. 270 ff.; [Engl. trans. 2013, pp 169 ff.]). We should not presume, however, that these are communicative forms designed to secure a consensus. On the contrary, they are aimed at absorbing and dissipating structural dissent involving the constitutional problems of world society. The transconstitutional dialogues between legal orders indicate that there is a willingness to learn from each other, and a readiness to rebuild *identity based on alterity*. "Dialogue" in the sense implied here might have an analogous meaning to that formulated by Feyerabend (1991, pp. 164–165): "It can show the effect of arguments on outsiders or on experts from a different school," as well as "demonstrate the chimaerical nature of what we believe to be the most solid parts of our lives." But such a dialogue is not always possible. Transconstitutionalism can avail itself of agonizing postures that are minimally reflexive and therefore capable of promoting mutual learning *a posteriori*.

The transconstitutional model avoids the dilemma of "monism versus pluralism." From the standpoint of transconstitutionalism, a plurality of legal orders entails a complementary relationship between identity and alterity. The orders involved in solving a specific constitutional problem continuously reconstruct their identity at the level of their self-referential foundations by means of transconstitutional entanglement with another order or with other orders: identity is rearticulated on the basis of alterity. Thus rather than seeking a "Herculean Constitution," transconstitutionalism points to the need to tackle the many-headed Hydra of constitutional problems by articulating reciprocal observations among the various legal orders of world society.

From the epistemological background, transconstitutionalism admits the constructivist assumptions that every observer has a "blind spot" (Von

Foerster 1981, pp 288–289) and hence that "I see something you don't see" (Luhmann 1990 [Engl. trans. 2002]). However, it goes beyond to such a model based on an exclusionary identity in order to achieve an approach that dynamically links identity and alterity to each other, and thus affirms: *the other can see your blind spot* (Neves 2009, pp. 297–298 [Engl. trans. 2013, p. 184]).

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Transitional Justice

► Justice: Transitional Justice

Transnational Legal Normativity

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Introduction

In the last three decades, academics and practitioners have started raving about the emergence of

transnational norms or norms that transcend state and international law in different ways. These norms involve dynamic norm-use as evidenced in the following examples. Can we register a website with a domain name such as "Ihateburgerking.com?" Which international financial reporting standards ought a company to follow if it wishes to be listed in a European stock exchange? Should government experts on education take into account the PISA results on the quality of education provided by their national systems? And are indexes and rankings such as Doing Business or Worldwide Governance Indicators to be taken seriously by anyone planning regulatory reforms or providing legal advice to companies willing to internationalize their activities? Are decisions made by international arbitration bodies or online dispute settlement mechanism valid and can they be contested in domestic courts? Who makes the rules of product and food safety or financial instruments, such as derivatives?

Many of these rules are privately made and administered by businesses, lawyers and arbitrators, bankers, and consortia of producers and suppliers of services and goods that operate at the global level. This means that citizens' activities are now being regulated by transnational norms on which they did not vote for or consent to and that they can hardly review or change. Furthermore, because these transnational norms are hardly legal in the traditional sense and are not produced within the known logistics of law, we cannot know whether they fit the fundamental rights and values of our political communities and where to litigate them in case they do not. Finally, because these norms are often made or adjudicated by issue-specific groups, there is little guarantee that they consider potential externalities or systemic effects.

Altogether, it is perfectly understandable why transnational (legal) normativity wreaked havoc within the Western understanding of law posing to the latter a *descriptive* (What is transnational legal normativity? Is it new?), *analytical* (Is it proper law?), *conceptual* (Do we need a new concept of law?), and *normative* (What should we do?) challenge.

The remaining of the chapter will investigate these four levels of analysis which shall help to make sense of the manifold strands of literature that have emerged and which often conflate them (Michaels 2013). In addition, the reader should keep in mind that the battle over transnational legal normativity has triggered a flight into interdisciplinarity (Zumbansen 2016) with legal scholarship having a hard time defending its traditional terms of inquiry. Before, however, it needs to be clarified the way in which transnational legal normativity is a problem *because* of the Western historical legal experience. That shall be the focus of the next section.

The State Legacy in Western Legal Thought

Norms are everywhere, from states, companies, and churches to sexual practices, virtual and family life, as well as daily social intercourse. *But not all norms are legal*, or so the history of Western social and legal thought tells us. Law, properly called, grew to be intrinsically linked to the state.

Over centuries we learned to call law only those norms that are legislated, administered, judged, and enforced by state authorities according to the official list of sources of law. Thus, law became the product of a system of institutions which also greatly facilitated the knowledge of the law itself. *The logistics and objects* of law were made stable and the circulation of law was identified precisely, e.g., a circuit between courts, parliaments, public administrations, police forces, lawyers, laws, law decrees, regulations, ordinances, legal decisions and agents.

Throughout this process, and with the help of legal theory, law became autonomous because based on the idea of legal validity, i.e., valid laws, produced according to legal rules prescribing the rules for lawmaking, were now automatically binding and thus considered obligatory for everyone. Here, it is important to understand the difficult point of law's bindingness being metaphysical because it is largely independent from the effectiveness of legal rules (Kelsen 1978).

Bindingness in law's sense is internal to law itself and cannot be confused with social bindingness. It is this distinction that allows for a clear separation between legal and nonlegal norms and supports the conclusion that albeit socially effective norms exist and impact the behavior of agents, they are not law.

Throughout history, the West came to believe that in order to be properly called legal, normative orders needed to be based on the democratic principle and respect fundamental rights of individuals. This engendered a specific relationship between law, state, and a given political community within a limited territory. For in a *legal* order, norms have to be made or at least consented to by those subject to them (the *whole* political community) while simultaneously respecting a set of contingent fundamental legal values (a normative vision of the *good*).

Finally, we believe that there is something special about *legal* normativity, i.e., we hold that legal rules provide *stronger* reasons for action than other norms such as custom or etiquette. This entails, ultimately, that the state and its legal order trample, in case of conflict, our allegiances to families, religious, and ethnic communities as well as all sorts of normative engagements we may enter during our life.

It is therefore because of the historically received views on the idea of law that transnational (legal) normativity becomes a problem. Remember, however, that this is not an empty appeal to past and tradition. It is an appeal to values that law was meant to protect and which may be jeopardized when law enters the transnational moment. How so?

Descriptions

The emergence of transnational legal normativity is often explained as a by-product of globalization and a general trend toward liberalism (Teubner 2014 discusses and qualifies the argument). The compression of time and space together with an ideological acceptance of laissez-faire is said to have enabled the appearance of networks of experts, transnational associations managing activities such as sports or communications, as well as global providers of services and goods that operate beyond state-made law. The global reach of their actions and the normative vacuum in which they operated allowed these actors to start creating their own normative standards and consequently exercising de facto *public authority* over social affairs (Kingsbury et al. 2005).

Political integration, however, did not follow suit and thus we lack to a great extent politically produced global laws. Therefore, if it is true that the liberal mindset now favors the creed of deformalization of laws while as always protecting private initiative and self-regulation (Cutler 2003; Scheuerman 1999), the fact is that political actors such as states simply lack the regulatory power to address global issues and are too slow to set standards either on their own or through international bodies. How can individual states effectively regulate human rights violations in countries across different continents due to abusive supply chain practices, manage migration flows and refugees' crises, or impose strict banking and tax rules if, in the absence of global rules, domestic capital may simply fly away?

It should not be forgotten either that the globalization of markets also required a move toward harmonization of standards and processes (e.g., food safety and technology) without which trust in quality standards would not develop, condemning the emergence of such markets in the first place. And along these lines, it can be surmised that the growing complexity and functional differentiation of society leads to a natural imbalance between the regulatory capacities of states and those of private actors. After all, how can parliaments and governments – with the vocation of legislating for the whole society – compete with functional actors that specialize and accumulate technical and social capital in single issues only?

But as the descriptive argument goes, the effects of transnational normativity are much deeper than a mere addition of another layer of norms produced by new lawmakers as they go beyond the earlier postmodern anxieties with the fragmentation of international law scattered among hundreds of different institutions with overlapping powers and

jurisdiction (Koskenniemi and Leino 2002). The literature on transnational (private) regulation argues that the latter is irreversibly shifting the paradigm of regulatory governance (Cafaggi 2011; Fischer-Lescano and Teubner 2004). This is because of the following points highlighted in the work of Cafaggi and his coauthors (Cafaggi 2011; Scott et al. 2011).

First, transnational norms are produced by a wealth of actors that include corporate private lawmakers like groups of bankers, retailers, food suppliers, pharmaceutical companies, and sports associations. But these also include countervailing forces such as consumer associations and other monitoring bodies pursuing global justice such as Oxfam or Amnesty International. Secondly, most of the norms produced by transnational actors are voluntary albeit they may have to be adhered to in order to enter a specific association or simply for economic agents to survive in the market. Thirdly, these private norms very often add to existing domestic and international legislation composing a multilevel governance framework which combines hard and soft laws in a dynamic process.

These points are important because they evidence that transnational normativity disorganizes the logistics of law as traditionally understood. In fact, the multiplicity of private actors on both sides of the walls disaggregates the idea that a single actor controls all legal moments – legislation, administration, enforcement, and adjudication.

Instead, what we may have are arbitration tribunals adjudicating disputes according to, arguably, their own norms as well as rules created by groups of law professors. Only in exceptional cases does the review, enforcement, or recognition of such decisions require relying on domestic courts. Alternatively, we may imagine consumer groups creating standards to measure industry practices. As a result, businesses may respond by adopting industry-driven voluntary codes of conduct or technical standards. In order for trust in this self-regulation to develop, third-party monitoring bodies have arisen starting to issue certificates of "good practices" and labels (such as "fair trade") condensing information for helping consumers to make their choices according to non-price qualities of the product. Thus, the new style of governance is one less based on legally binding commands legislated by states and monitored by state institutions which if not complied with may give rise to fines and other penalties. Instead, it is based on *incentives* as the adoption of unethical and/or inhuman practices by companies and businesses (think of the scandals affecting Nike in recent decades) may cost them much money and their consumer base.

It is easy to see that dissolving the legal label by calling legal all norms that produce effects, or not worrying about the question, challenges the *dignity* of law and its self-professed higher role in ordering social affairs. In fact, in transnational arenas, nonlegal norms are perhaps more used than legal rules. Hence, this seems to replace social bindingness of rules for validity as the distinctive feature of transnational normativity. Norms are followed and deemed to be binding because they are empirically used and not because they are metaphysically binding. With such a move, the distinction between law and non-law collapses opening the door to the recognition, against the efforts of classical mainstream legal theory and common sense, that illegitimate norms like mafia rules can be deemed legal if they are empirically taken to be authoritative (as they are in some parts of the world).

The new model of governance also contrasts with law's normativity because it makes norms and rule-following openly *available* to the interests of the different actors. Thus, not only these norms do not benefit from law's special reasons for action (converting sanctions into prices; Cooter 1984) but their enforcement also becomes available, that is, dependent on consumers' or other groups of agents' choices. Thus, and because individuals cannot surveil all aspects of behavior and will not do so either out of psychological lack of constancy, there may well not be any judgment cast on existing undesirable rules. After all, relying, for instance, on consumers makes legal enforcement not only decentralized but also reliant on their capacity and willingness to pay.

Finally, transnational normativity is often produced by specific interest groups either according

to their sole goals and interests or, if they aim to be more inclusive, according to those affected by such rules. The general point remains though: these are norms made *by some for some* and not as in the Western traditional view of law, laws made *by everyone for everyone* (somehow evoking Lincoln's formula "government of the people, by the people, to the people"). Beyond the obvious externalities and systemic effects that such a style of legislation can arguably bring about, notice how it changes the paradigm of a political community managing collectively its course. Instead, transnational normativity gives birth to islands of communities regulating for themselves their own issue areas.

Summing up, against the neat and crisp model of state law, transnational normativity appears as a *hyper-accelerated* space in which functional systems, groups of consumers, networks of judges and lawyers, banking leaders, and so on create rules and standards (and sometimes even dispute resolution mechanisms) that add up to existing state-made laws but in many ways overcome, partially conflict or simply sidestep, them.

Because there is no longer a monopolistic actor controlling all aspects of law, absent global political institutions, and transnational well-formed publics, and due to the accelerated diffuse global production of normativity, we can no longer easily identify and follow the logistics of law, i.e., the channels according to which we can identify the rules we must abide by as well as how to challenge practices that breach our legally protected interests and rights. Instead, we have a "fluid, impermanent and fractured normative landscape" (Backer 2012). Altogether, this is seen to seriously damage law's social relevance and its capacity to guide behavior (D'Aspremont 2011).

A Word of Caution or How Accurate Was the Old Paradigm?

For someone who upholds the traditional Western legal experience, these changes are appalling at first sight. Basically, law dissolves and collapses into facticity, i.e., the fact that norms are legal because they work and are used, in opposition with the formative intuition of law's autonomous value.

But it could be argued that the traditional legal theoretical paradigm we lived with was never, or at least no longer is, sound. For instance, long ago, Niklas Luhmann reminded us that to structure a legal order on the basis of fundamental subjective rights meant making enforcement decentralized and dependent on individuals' motivations and capacities (Luhmann 2008). Furthermore, and against the central case of state law paradigm discussed earlier, legal pluralists have constantly argued for the wealth of normativity in social life and the importance of non-state norm-use. As they argue, the problem of "soft laws" or nonlegal normativity in the transnational world already existed within states and was simply camouflaged under a highly biased and reductionist theory of law. It could be retorted, nonetheless, that the existence of a complete legal system based on constitutional legal rules enforcing fundamental rights ensures that, in case of conflict, state legality can trample other normative orders making official state law the supreme normative authority. Or even that domestic and global legal pluralism may be much more different than one thinks (Twining 2010). Yet other arguments were conjured proposing that transnational private laws are nothing new because of lex mercatoria's medieval roots. A claim however, that, similarly to the previous one, overlooks the absence of a robust centralized state claiming the monopoly of political and legal force in medieval lex mercatoria (Michaels 2007).

From a different angle, it could still be argued that it is chimeric to argue that state law is made by everyone for everyone because public choice has demonstrated the endemic capture of the political process by lobbying forces and powerful interests. In fact, the "new governance" literature focuses exactly on revamping lawmaking and developing experimental and more pluralist forms of democracy in the absence of sovereignty (Sabel and Zeitlin 2007). More radical views could further contend that it is unclear why should lawmaking take into account the views of those that are not affected by the norms at stake (a bigger scale and modified version of what economists call the

enforcement of meddlesome preferences) or even question why on earth transnational normativity has to mimic the features of state legality, i.e., do the domestic and transnational worlds share the same nature?

The Interdisciplinarity Flight and the Changes in Theorizing Law

The purpose of the last section was to further illustrate how transnational normativity has set in motion a deep process of soul-searching, casting shadows over the fitness of the Western concept of law even when applied to domestic legal orders. It is in this sense that we should understand Peer Zumbansen's (2016) concept of transnational law as a methodological approach that should aim at uncovering the silences and injustices of our concepts of law juggling private and public actors, hard and soft laws, as well as liberal and critical ideologies in continuous processes of normative engagement and use.

This stance further embodies three important consequences for the task of theorizing law. First, it greatly expands what should be understood as law. Following the directives proposed above by Zumbansen amounts to study law from the standpoint of street protests, sophisticated dark-suits lobbying, and legislators' interests and preferences. It requires looking for the way in which informal norms intermesh with official laws both statically and dynamically in courts, again in the streets or in the press mobilized and operated domestically, regionally and transnationally, and, furthermore, open to all legal geographies challenging Western legal imperialism. All this over time, as law becomes the ever-changing point held together in each instant by the action of multiple forces. We could not indeed be further away from the Kelsenian and Hartian definitions, as precise as narrow, *of law as a set of norms* (very simplistically put).

Second, the expansion of what counts as law's ontology necessarily demands a plurality of *savoirs* in order to approach it. After all, political science, sociology, legisprudence, philosophy, anthropology, economics, political theory, geography, democracy, and media studies all in one way or another lie behind law seen from its inception to its deception (not to its expiration because it can no longer die once defined so broadly). Conceptualizing law ceases to be an eminently analytical enterprise to become one of law in context, i.e., *a task based on case studies* (Zumbansen 2016). Overall this triggers a move away from analytical aprioristic conclusions and toward a focus on empirics. It is important to assert this point because it warns against, for instance, falling all too easily – after emancipation from narrow studies of law – on the aprioristic trap of assuming that the normative pluralism unleashed is inherently progressive (Santos and Rodriguéz-Garavito 2005a).

Third, this general approach to transnational normativity also seems more congenial to the inherently normative and political assumptions held when articulating a conception of global law that is Western to the detriment of all other legal and political traditions. This line of inquiry is taken to its full consequences in Santos and Rodriguéz-Garavito-led (2005b) "subaltern cosmopolitan legality" research agenda that focuses on the role of forgotten actors, often from the Global South, such as sweatshop workers, squatters, or illegal migrants, in writing an alternative story of transnational law.

Description, Conceptual Analysis, and Normative Theses

While it may seem from the setup of the chapter that transnational normativity has operated a further flight from analyticity to descriptivism, this could not be further away from the truth. In fact, most of the attention placed in describing transnational normativity was possible by conceptual choices made according to specific research goals and research questions. Clearly, the seemingly Latourian inspired "Just describe" move was a call to arms from those studying law to make sure that legal analysis remained relevant and capable of contributing to understand, explain, and regulate what looked like new forms of normativity. It was also the continuation

of the legal pluralist battle against analytic jurisprudence's conceptual strategy. For, in the same way, concepts are always informed by normative goals, they also determine what we can see and how we go about to look. In the case of transnational normativity, let us just say that scholars did not want to remain blind to it.

The link between description, conceptual activity, and normative concerns is best seen through the prism of concrete guiding research questions. In what follows, we briefly examine this triadic constellation through a set of answers to the following question: are transnational legal actors and their normativity autonomous from state control and what should we do?

One part of the literature addresses this question by claiming that we need to "go global." The "global constitutionalism" and "global administrative law" movements contributed to discover and describe forms of authority and normativity that escaped traditional domestic and public international laws. They eschew an aprioristic concept of law to be able to see all normativity but then argue that we need to infuse this normativity with values if we want to call it law. For global constitutionalists, transnational normativity must conform to supposedly universal values, i.e., human rights, democracy, and rule of law (Dunoff and Trachtman 2009). For "global administrative law," instead, the fit operates at the level of administrative law principles such as good administration, legality, or effective review of decisions (Kingsbury 2009). Thus, faced with what they deem to be the task of legal thinking – to tame the unruly world of transnational normativity in the absence of a global legal and political system that can authoritatively (officially) solve the problem of the sources of transnational law – these movements postulate a sort of natural law 2.0 defining what law is, not according to its sources, but according to its values. Unsurprisingly, this therapy was promptly accused of imperialism for it takes Western legal values as universal as well as of being unfulfillable because there are, even within the West, huge differences in domestic understandings and applications of "shared" constitutional and administrative legal principles (Marks 2006).

At the other extreme, Teubner's (2014) societal constitutionalism proposes that we cannot do much to tame transnational normative orders. This position is based on a theory which claims that world society is functionally differentiated. In complex societies, different systems fulfill different social functions according to their own logics and codes. For instance, the World Trade Organization follows its trade imperative largely oblivious to environmental and inequality concerns which cannot be forced upon it as they will always be reworked according to its own rationality. Instead, the remaining possibility is to pressure these orders to self-regulate themselves (as the WTO Dispute Settlement Body is somehow doing by timidly and gradually recognizing non-economic concerns), making the global constitutional and administrative law therapies demagogic ideologies. So, while Teubner recognizes global law as a phenomenon to take seriously, this is primarily due to a strong thesis on the nature of world society which inescapably changes law and limits our powers of agency. And yet, Teubner's position establishes by *conceptual fiat* – as it does some legal theory of international arbitration wishing to preserve international commercial law free from state intervention – something that is at odds with positive law, i.e., that transnational functional systems are autonomous from state and international legal controls. This is empirically not true but that cannot be ascertained with the lenses provided by such conceptualization (Vilaça 2015; Halliday and Shaffer 2015). All in all, conceptual analysis remains essential to detect how biases toward *effectiveness* and *efficiency* are inbuilt in what appears to be a simple description of what is going on.

Interestingly, analytic jurisprudence is slowly responding to the "transnational challenge" by rejecting the conceptual plausibility of autonomous *legal* orders and the conceptual necessity of jumping from the state to the world level of analysis. Indeed, for legality to arise a "pattern of institutional relations" (Culver and Giudice 2010) or "linkage rules" (Daniels 2010) between legal orders are required. This means that legality cannot be ascribed to normative systems in isolation but instead depends upon historical interactions which deploy peremptory rules of

behavior and rely on the exercise of different normative powers. But it also means that legality does not depend, as in state-driven legal theory, on the belonging of rules to a hierarchical system of rules (Kelsen 1978) upheld by the relevant officials as legal (Hart 1994). Because of the need for examining the historical empirical relations between systems over time, this move within legal theory pushes it away from the analyticity of the past and toward the interdisciplinary challenge identified throughout the chapter. It remains to be seen, however, whether patterns of institutional relations between organizations and normative orders are enough to ensure an adequate level of legitimacy of transnational normativity or whether this goal necessitates transnational legal theory to provide an account of what counts as morally legitimate authority (Roughan 2013).

Conclusion

The chapter has tried to show the formidable challenges that transnational legal normativity poses to establish thinking on legal phenomena and to map the different literatures that have emerged as a consequence. Taking stock on what has been said so far, we could say that on the one hand, discussions on transnational legal normativity are about new (supposedly) legal phenomena; the novel normative challenges these pose to state and international legal systems and the need for an interdisciplinary approach to study them. On the other hand, however, transnational law is at least as much a reflection on deep seated disciplinary assumptions of state-based legal scholarship and domestic legal theory which are now claimed to be untenable. Therefore, talking about transnational legal normativity amounts to reopening the investigation of what should count as domestic law.

It is no wonder then that this movement is leading to a deep rethinking of legal education more open to interdisciplinarity, social sciences methods, and cultural diversity as well as to conflicts and interactions between normative legal orders that span multiple territories, legal cultures, and legal traditions.

Cross-References

- ▶ Authority of Law
- ▶ Law and Efficacy
- ▶ Legal Positivism: International
- ▶ Legal System and Legal Order
- ▶ Transconstitutionalism

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Transversality

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Introduction

Transversality, or transversal politics, is a framework for combatting injustice – one that offers a way of moving beyond the impasses of, on the one hand, identity politics and, on the other hand, universalistic politics that gloss over differential subject positions. Advocates for transversal politics (a) hold that lived experiences are more salient than social identities or location and (b) eschew homogenizing disadvantaged groups. Solidarity groups might employ transversal politics to achieve more inclusive, more democratic, and more self-critical deliberations and practices. For a transversal group, the emphasis is on collaboration rather than contracts, tactics rather than policies, and events rather than doctrines.

Transversal politics have been implemented, to varying degrees, by numerous activists around the world. For example, the autonomous leftist movement in Italy during the late 1970s culminated in a wave of political demonstrations in 1977 that were led by groups identifying as "transversalists." The Critical Art Ensemble, which formed in the mid-1980s, and Black Lives Matter more recently, have both been operative in the United States. In the United Kingdom, the Feminist Activist Forum has been active since 2007. Perhaps the most noteworthy transversal feminist group is Women in Black, which evolved out of the Network of Yugoslav Women, a coalition of various feminist groups that was formed by feminists in Ljubljana and Zagreb in 1987.

Feminist activists deploy transversality in order for links to be formed between various feminist projects within and across national borders. Transversal politics serves to remind feminist activists that one needs to be mindful not to perpetuate logics of domination, specifically within hierarchical structures that give voice to some while silencing others, and not to fall back into practices that might be, for instance, racist or patriarchal. It also can offer a way of correcting problems of representation within feminist projects.

Transversality at La Borde

Transversality was first developed by the psychoanalyst Félix Guattari, who collaborated with several Italian leftists (e.g., Antonio Negri and Franco

Beradi) beginning in the 1960s. In the previous decade, while working alongside Jean Oury at La Borde psychiatric clinic, situated in the Loire Valley in France, Guattari found the clinic in urgent need of fundamental change. The institutional structure was a hindrance rather than a help to the patients' well-being. He wanted to get beyond the psychical violence involved in transference as well as the shortcomings of institutional psychotherapy.

Guattari described transference as "a way of interiorizing bourgeois repression by the repetitive, archaic, and artificial re-emergence of the phenomena of caste, with all the spell-binding and reactionary group phantasies they bring in their train" (Guattari 1984: 17). In the clinic, the psychiatrist has epistemic authority *en tout* and *avant tout*. The patients, consequently, are trapped in a "rigid mechanism," a kind of psychical violence, in which the patient is expected to report what the analyst expects to hear. The psychiatrist checks the appropriate box on the chart and signals to the patient that one is making improvement. In other words, the scripts of pathology vis-à-vis social norms are already predetermined prior to any particular analysis.

At La Borde in the 1950s, psychiatrists wanted to move beyond the mechanisms of the couch, that is, the limited, hierarchical interaction between themselves and the patients. Guattari and Oury employed an institutional psychotherapy that allowed for all those involved in the clinic (doctor, patient, staff) to experience parity of participation. Guattari realized, however, that the clinic was experiencing what he describes as baroqueness. "Baroque" means that the clinic was "always in search of new themes and variations in order to confer its seal of singularity" (Guattari 2008: 181). While the clinic attempted to offer something authentically original, that is, it had gestures of change, the clinic lacked any internal critique that would help reduce the production of subjugated groups.

Guattari thought that transversality might produce radical collective subjectivities within subject groups (in contrast with subjugated groups, i.e., groups spoken on behalf of by non-representative authorities such as psychiatrists, managers, and the like). The radical collective subjectivities of the subject group ought to be identified in their becoming (dynamic) rather than the being (static) of bureaucratic norms. Guattari suggests that "new social practices of liberation will not establish hierarchical relations between themselves; their development will answer to a principle of transversality that will enable them to be established by traversing, as a rhizome, heterogeneous social groups and interests" (Guattari and Negri 2010: 123). In the traditional clinic, strict lines were drawn between who had expertise and authority and who did not. Such lines created a sort of architecture of relationality, a set of boundaries that kept individuals in their "proper" places. Transversality, however, opposes "(a) verticality, as described in the organogramme of a pyramidal structure (leaders, assistants, etc.) [and] (b), horizontality, [that is,] a state of affairs in which things and people fit in as best they can with the situation in which they find themselves" (Guattari 1984: 17).

By employing transversality through a technique called *la grille*, the operative assumptions involving the psychiatrists' "'noble' tasks [and] the thankless, material tasks of the service [staff]" would be called into question, thereby generating subject groups (Guattari 2008: 178). *La grille* involved the rescheduling and shifting of day-to-day practices within the institution in order to increase mutuality and reciprocity, avoid boredom and idleness, and so that patients would gain the potential of finding new, improvised, and experimental ways of conceptualizing and expressing their conditions. While performing different tasks, the constituents of the clinic were expected to remain in conversation with one another (through "informational meetings") in hopes of overcoming the impasses of verticality and horizontality and shifting the relations of power and discourse. This modification in the bureaucratic makeup of the clinic involved an ever-changing, rhizomatic approach for making decisions about the best interests of all stakeholders.

Feminist Transversal Politics

In the winter of 1999, Cynthia Cockburn's research project Women Building Bridges,

focused on anti-militarism and the reduction of asymmetrical power relations, led to two consecutive conferences at Gresham College in London. Representatives from various feminist groups that employed transversal politics, namely, the Women's Support Network in Northern Ireland, the Medica Women's Association in Bosnia-Herzegovina, and Bat Shalom in Israel, attended the conference. In the previous year, these groups visited one another to understand the experiences of one another. At the conference, these three groups met with the London-based Southall Black Sisters, which engages with Hindu, Muslim, and Sikh women. Members from these groups learned how to be more reflective and critical of their own internal dynamics while remaining committed to anti-violence. For Cockburn, transversal politics (whether at the clinic, on the streets, or in the conference room) changes how one thinks – about oneself and about others – and changes how one speaks and acts.

In 1993, Italian feminists from Bologna held a gathering with Palestinian and Israeli (both Palestinian and Jewish) women in attendance. Nira Yuval-Davis, who was there, writes, "Transversalism [for Guattari] was about the politics of the construction of a radical political group as a collective subject, in which there is a constant flow of communication both horizontally and vertically. [. . .] Bologna's tradition of transversal politics expanded it beyond the boundaries of the political group and developed it into a more general politics of dialogue and cooperation" (Yuval-Davis 2012: 50). The coefficient of transversality, as Guattari phrases it, refers to the extent to which a group is open to dialogue and cooperation that appreciates rather than undermines difference. The less one is open the more likely one is to experience trauma, reinforce asymmetrical relations of power, naturalize exclusion, and perpetuate injustice. The more one is open the more likely one is to experience liberation.

Feminist groups practicing transversality range across the globe. Examples include activist groups in Post-1997 Hong Kong including but not limited to the Advancement of Feminism, Hong Kong Women Workers Association, Hong Kong Federation of Women's Centers, and Women's Coalition on Equal Opportunity. Kosovo Women's Network with Women in Black created a collaborative effort in 2006 called Women's Feminist Antimilitarist Peace Organization, which led to the formation of the Women's Peace Coalition. Feminist Dialogues arranged a series of conferences beginning in Mumbai in 2004 and later in Porto Alegre in 2005, Nairobi in 2007, and Belém in 2009.

Key Themes

Moving beyond the verticality and horizontality of groups begins with an appreciation for the situated knowledge or standpoints of various group members and, if applicable, members of groups with whom one shares a coalition. Patricia Hill Collins explains that "each group speaks from its own standpoint and shares its own partial, situated knowledge. But because each group perceives its own truth as partial, its knowledge is unfinished. [. . .] Dialogue is critical to the success of this epistemological approach" (Collins 2000: 270). Collins presents transversality as a kind of solidarity – one in which group members rally around a shared value rather than an ideology (Collins 1998). That value, she claims, is one that requires flexible tactics in order to practice that value in ways that account for disparate effects experienced by those members. Members should routinely reflect on the ends and means of the group, the values upon which the group builds its movement, and the extent to which its successes and failures generate unforeseen problems. Such a task demands members be attuned to the ever-changing experiences of fellow members and needs arising therefrom.

Transversality entails critique, which makes individuals aware of injustices in the world as well as problems internal to their solidarity group. For Cockburn and Lynette Hunter, the internal critique involves "empathy without sameness, shifting without tearing up [one's] roots" (Cockburn and Hunter 1999: 88–89). One needs to be rooted – reflectively aware – in one's own subject position and identity while also attempting to understand – putting oneself in – the position of those with whom one is conversing. Both Yuval-Davis and Collins hold that one's subject position affects how one understands reality, that getting

closer to the truth involves a dialogical relationship between individuals, each of whom has partial or perspectival knowledge. This is not to say that relativism is correct and that all knowledge claims are of equal standing; rather it is to say that some individuals have more access to how institutional practices affect them than other individuals.

Within an epistemic community practicing transversality, one is expected to rethink what is speakable and be willing to hear it. Put differently, one is committed to listening to the needs of others and rearticulating one's own needs. "Rooting" and "shifting" also includes being willing to address the needs of others. Groups will have internal disagreements about priorities and sometimes this will be intractable. However, even if particular acts of political solidarity fail to correct injustice, the acts that individuals perform remain productive for subject formation. In other words, practicing transversality transforms one into a more empathic person and reaffirms one's commitment to solidarity.

Conclusion

Transversal politics strengthens feminist solidarity in productive ways that cross over established borders while, at the same time, resisting the sisterhood model of solidarity that treats all women as sisters, that assumes that all women live under the same oppressive conditions and, by doing so, ignores the role that other social identity categories (e.g., race, class, or ability) might affect particular women. Transversality also critiques universalistic politics, which Yuval-Davis argues "stumbles on the fact that the boundaries of difference [. . .] are determined by specific hegemonic discourses, perhaps using universalistic terminology, but definitely not universal. [Furthermore] the differential positionings of those they refer to often cover up racist (and one can add sexist, classist, ageist, disablist, etc.) constructions" (Yuval-Davis 2000: 180). As an alternative to both universalistic politics and the essentialism of identity politics, transversal politics is a means of allowing for more inclusive and democratic practices to flourish within solidarity groups. But, since there are always injustices to alleviate, since there is no fixed endpoint in politics, transversal politics is also its own goal. It is a way of doing politics that grants its own need to be critiqued and adjusted.

Cross-References

► Psychoanalysis and Law
► Solidarity

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Trauma-Informed Ethics

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Introduction

This entry considers what the relatively novel concept of "trauma informed ethics" means for

the study of ethics and the fields of social and political philosophy. Up to now the term "trauma informed ethics" has largely been used to modify other practices or concepts, such as "trauma informed ethics consultation" in a biomedical context (Lanphier and Anani 2022); "trauma informed ethical decision-making" in a counseling context (Stark et al. 2022); or "trauma informed ethics of care" in social science research (Markowitz 2021).

"Trauma informed ethics" as a stand-alone concept is not, to date, clearly defined in the existing literature. It could mean at least three things: (1) the application of principles and practices of "trauma informed care" to ethical theory and practice; (2) the development of a new normative theory arising out of attention to and awareness of trauma and commitments to trauma-informed response; or (3) the identification of trauma-informed ethics as a variety of relational ethics or care ethics that specifically attends to the ways in which trauma shapes and impacts relationships or care.

To unpack these three possible meanings of trauma-informed ethics, this entry first reviews current definitions of "trauma" as they relate to the concept of "trauma informed" care and practices, then outlines key assumptions and principles of "trauma informed care" as developed by the Substance Abuse and Mental Health Services Administration (SAMHSA), which is the foundation for "trauma informed" approaches in a variety of settings from healthcare services to education, research, social services, community programs, and even recreational activities (like trauma-informed yoga, as one of many possible examples).

The next section notes that trauma, its theorization, and response relate to other philosophical fields and projects before elaborating three potential meanings of "trauma informed ethics" that each point to various directions for future scholarship and teaching in social and political philosophy. Both "trauma" and the notion of being "trauma informed" defy simple characterization, making "trauma informed ethics" a somewhat elusive concept, but one ripe for further philosophical inquiry. In conclusion, this entry underscores future challenges and opportunities for the development of trauma-informed ethics and its applicability to teaching any philosophical topic, though particularly ethics.

Defining Trauma

It is important to note at the outset that definitions of "trauma" depend on context and application. For example, the Oxford English Dictionary (2022) offers a pathological definition ("a wound, or external bodily injury in general"), a psychoanalytic or psychiatric definition ("a psychic injury" especially "one caused by emotional shock" typified by "repressed" or "unhealed" memory), and indicates the term has general or "figurative" uses. One challenge for defining a "trauma informed ethics" is that the term "trauma" expresses a continuum of meanings and uses. For the purposes of "trauma informed care" from which "trauma informed" responses and theories derive, "trauma" retains certain broad and inclusive meanings but is not all-encompassing. Trauma in this context is neither figurative nor generic, and using the term in such ways risks diluting understandings of trauma and appropriate – and ethical – responses to it.

In a "trauma informed" context, trauma can be an event, experience, or environment, occurring singularly or repeatedly, and which fundamentally disrupts something for the individual or group experiencing it. Trauma scholar and psychiatrist Bessel Van Der Kolk says that "trauma, by definition, is unbearable and intolerable," and can impact "not only those who are directly exposed to it, but also those around them" as well as be "imperceptibly passed down through generations" (Van der Kolk 2014, 1). Van der Kolk identifies various examples of experiences that might be traumatic, including witnessing or experiencing violence, sexual assault, or substance abuse, which align with "adverse childhood experiences," or "ACEs," that the Centers for Disease Control and Prevention, and other research into childhood trauma and response, define as sources of trauma in both childhood and beyond. In addition to the potential trauma

sources already named, ACEs also include experiencing abuse or neglect, or growing up in an environment with caretakers or other close individuals experiencing mental illness, suicidality, incarceration, or parental separation (CDC 2016).

Such experiences do not exhaust all possible sources of trauma. Any experience or environment that "results in a fundamental reorganization of the way mind and brain manage perceptions" (Van der Kolk 2014, 21) or "overwhelm a person's coping mechanisms, or compromise their ability to develop coping mechanisms" (Lanphier and Anani 2022, 47) is a source of trauma. What Van der Kolk describes as a "fundamental reorganization" of one's thinking and experience due to the event or experience is a necessary condition to classify it as "trauma." This means that not all experiences – even if they subjectively or objectively appear to *others* as traumatic (such as instances of ACEs or events that other individuals experience or identify as traumatic) – are necessarily traumatic for a given individual. In this way, "trauma" is defined objectively yet experienced subjectively.

Especially crucial to conceptualizing trauma-informed ethics, another valence of trauma is its collective, intergenerational, and environmental experience, including "living through natural or manmade disasters… mass acts of violence" and "historical oppression such as racial, ethnic, or sex and gender based exclusion, discrimination, or violence" (Lanphier and Anani 2022, 47) that impact groups *as groups,* in addition to individuals comprising those groups. Particularly for social and political philosophy, attention to the ways social and political theory and practice are shaped by and shape experiences of past and present group-based oppression, or are formed by or lead to disaster or violence, contributes to a potential trauma-informed ethics.

Trauma-Informed Care

SAMHSA's principles and practice of "trauma informed care" are the origin of much "trauma informed" work that has followed since its initial development, and continues to be the foundation for subsequent iterations and evolutions of trauma-related programs, theories, and approaches including those that are "trauma responsive" or "trauma sensitive." At its core, trauma-informed care transforms how we relate to others by changing how we understand the world, and the experiences and behaviors of ourselves and others with whom we share it, as potentially shaped by trauma. Trauma-informed care is frequently understood as "an approach that shifts away from questions of what is wrong with someone" to asking, "what happened to them, what experiences inform their behavior and reactions" (Lanphier and Anani 2022, 47). As the field continues to take an even more healing approach to trauma, the fundamental question continues to shift to iterations such as "what is right with you?" (Schimmels and Cunningham 2021, 410).

SAMHSA's concept of trauma-informed care is rooted in four key commitments, often called the "four Rs": *realizing* that trauma is pervasive and widespread, *recognizing* of signs or symptoms of trauma, *responding* to trauma through trauma-informed practices, and *resisting* triggering past traumas or creating new traumatic experiences (SAMHSA 2014). The *realization* that trauma is pervasive reflects data suggesting that many adults experience at least one traumatic event in their lifetime, and that in addition to individually traumatic experiences, many groups experience collective and intergenerational trauma (CDC 2016; Frissa et al. 2016).

From these four commitments follow the six core principles of trauma-informed care to (1) create conditions for physical and emotional safety, (2) support trust through transparency, (3) foster peer support, (4) promote inclusivity and collaboration and levelling hierarchy, (5) empower the voices and choices of individuals and groups, and (6) enact these principles with awareness of history, identity, bias, culture, stereotype, and other sources of injustice, exclusion, or oppression (SAMHSA 2014; Lanphier and Anani 2022).

In a healthcare context, a universal precaution is one taken as a preventative measure to stop the spread of certain pathogens that may or may not

be present, yet for which steps are consistently and uniformly taken to mitigate. Because trauma is widespread, trauma-informed principles are generally applied as universal precautions for all situations and individuals, and across an entire organization or institution, and its systems and policies – not only those in which screening for trauma has already occurred. However, past or current trauma, once identified, may result in scaling up a trauma-informed response through additional layers of trauma-informed practice.

Trauma and Philosophy

Various modes of philosophical inquiry that take trauma as their source or topic are distinct from, but may contribute to, trauma-informed ethics. These include work within the philosophy of emotion, moral psychology, on personal identity, and scholarship from across the discipline at the intersection of memory, narrative, and self (e.g., Brison 2002). Additionally, philosophy can and should contribute to the continued theorization of "trauma," particularly as it relates not only to individual experience but to collective experience, as well as the relationship between trauma and other social and political practices (including but not limited to political representation, healthcare, juridical systems, social justice, and activism).

Work within feminist theory, disability theory, and critical race theory addresses how forms of oppression, bias, and inequities impact groups and individuals within groups to organize (or reorganize) thinking by and about certain identities, and disrupt or inhibit social and political mechanisms for flourishing, in ways that both do and do not parallel individual definitions of trauma. Thus, there is a need for ongoing philosophical inquiry into what it means for a collective, which does not operate as a single mind or brain, to experience "fundamental reorganization" as it relates to Van der Kolk's definition of trauma, for a group to experience disruption of or inability to form coping mechanisms, or to articulate more applicable concepts and definitions of trauma to appropriately capture collective trauma in trauma-informed theory and practice.

Applied Theory

One way to understand "trauma informed ethics" is as a framework to apply to ethical cases or to the evaluation of existing ethical theories. Running a traditional philosophical thought experiment, like the trolley problem, through a trauma-informed lens could offer new insight into the permissibility or impermissibility of certain actions. It may also provide new ways of viewing whether competing normative theories arrive at a proper conclusion to the case. Given how trauma-informed principles are designed to minimize further traumatization or triggering of prior trauma, the trolley problem, in which one or more people will die and an individual's action or inaction determines which and how many, may seem to defy trauma-informed principles. The scenario inevitability creates a traumatic event – and would likely trigger prior trauma – for some (or maybe all) involved.

Yet trauma-informed care is not designed to eradicate trauma, but instead to recognize the prevalence of trauma and take active steps through the application of trauma-informed principles to minimize it. A world in which trauma is less pervasive is ideal. But as cases like the trolley problem illustrate, there are circumstances – perhaps even more in the real world than in fantastical thought experiments – in which no pathway can be entirely trauma-free for all involved. Approaching such cases with trauma-informed principles like safety, trust, transparency, inclusion, collaboration, and attention to bias in mind could shift the intuitions pumped in a thought experiment and the ethical conclusions one draws. Engaging trauma-informed principles may also create new ways of applying or evaluating ethical theories, and conceptualizing or weighing the duties, rule, virtues, or consequences they identify and prioritize.

Normative Theory

Applying trauma-informed principles to an evaluation of existing normative theory could be one way of *doing* trauma-informed ethics. Another possibility is that trauma-informed ethics yields

its own normative ethical theory. Approaching existing normative theory through a trauma-informed ethics may conclude that no existing ethical theories are sufficiently trauma informed. Or other ethical theories may undermine trauma-informed principles and practices to such an extent that to be trauma-informed demands the development of a new normative ethics. This is, to be clear, the most currently abstract way to conceptualize trauma-informed ethics.

Trauma-informed principles (again, related to safety, collaboration, inclusion, trust, context, etc.) are also normative values requiring conceptualization, refinement, and weighing. There is no obvious program for a trauma-informed normative ethics that emerges directly from these principles, though there is a great deal of need for normative attention to them. Nonetheless it is possible to imagine a normative theory that takes trauma-informed principles as central values, gives them shape and definition, and from which a normative ethical theory *could* follow.

What is more likely, however, is that trauma-informed ethics complement other ethical theories as noted previously, as an applied or evaluative tool, rather than be a stand-alone normative theory. Or, as suggested below, that trauma-informed ethics is a variety of relational ethics recognizing relationships shaped by trauma and how trauma create obligations and entitlements among and between individuals and groups.

Relational Ethics

One of the most comprehensive ways to understand "trauma informed ethics," that may also best reflect and embody trauma-informed principles, is as an iteration of relational ethics. Again, trauma-informed theory and practice arises out of a fundamental understanding of the prevalence of trauma both in the sense that many individuals and groups experience trauma, and the profundity of the impact trauma has on those who experience it. Recasting questions of "what is wrong" with another, whether an individual or collective, to "what happened to them?" or "what is going on for them?" fundamentally acknowledges otherwise often unrecognized individual (and collective) experience.

Following from this, trauma-informed ethics, then, is an ethics recognizing individual and collective relationships to trauma and how trauma impacts individual and collective relationships with each other, and, in line with recognition theory more generally, has both moral and psychological components. Translating trauma-informed principles into practice raises questions about whose and what trauma is recognized. Enumerating principles of empowerment, inclusion, leveling hierarchy, attending to bias, and fostering trust is also an acknowledgement that such principles are not necessarily universally practiced, nor mutually respected. Thus, trauma-informed ethics as relational ethics contributes to but also requires further attunement from recognition theories that unpack who and what are subjects and objects of recognition, and by whom, both on individual and social and political registers. The move in trauma-informed practice to asking "what is right with you" also signals trauma-informed ethics as a potentially reparative ethics, acknowledging traumatic experiences as the results of past moral failing and building toward moral repair.

Similarly, trauma-informed ethics could be viewed as a form of care ethics. It is a mistake to understand trauma-informed practices as caring in the sense of promoting a simplistic or surface kindness or concern for others, such as feeling merely sympathy for another's trauma. But understood in care theoretical terms that focus on recognizing both universal and specific needs for, and obligations to, care for individuals, selves, others, and communities, a trauma-informed ethic builds on the work of *care* of trauma-informed care. It deepens attention to how care shapes and responds to trauma, but also how trauma shapes and relates to care. Both trauma-informed care and care ethics hold in tension the ways in which trauma and care are on some levels shared experiences, and in on other levels acutely particularly, a tension with which a relational trauma-informed ethics must contend.

Conclusion

Trauma-informed principles and practice are both a form of universal precaution, and a mode of paying very particular attention to individual or collective experience, story, history, and responding in tailored trauma-informed ways. While there are consistent and identifiable trauma-informed principles, given how differently trauma manifests and is triggered, no single set of trauma-informed practices can prescriptively apply to all people or all cases all the time. Objective universal awareness of trauma and attention to the very particular subjective experience and impact of trauma is both a challenge and opportunity for trauma-informed theory and praxis, including trauma-informed ethics.

One final way to think about and apply trauma-informed ethics that cuts across applied, normative, or relational approaches, is to adopt a trauma-informed ethics for teaching philosophy, including but not limited to the teaching of ethics. This dovetails with robust work already done in and on education settings to make classrooms (whether traditional university classrooms or non-traditional learning environments including engagement in public philosophy) trauma informed. Bringing a trauma-informed ethics to teaching philosophy would include applying trauma-informed principles in the design of the physical and psychic spaces of the classroom (i.e., fostering safety, transparency, inclusion, collaboration, leveling hierarchy, peer support, with attention to history, context, and bias), and to course requirements on the syllabus, modes of evaluation, and the content of assigned texts.

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Trotsky, Leon

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Bury me amid Trotskyists/a common grave of idealists/ where lie those/whom power has not corrupted.
Paulo Leminski (1944–1989).

Introduction: *Ouverture*

"Capitalism's irregular and planetary rhythm escapes our mental habits, imprisoned – as they are – in the narrowness of national contexts, in class myopia, in the routine of academic disciplines and, also, in the schematisms of dogmatic Marxism… Leon Trotsky attempted to do justice to the counterintuitive complexity of the real historical process. (…) Meanwhile, considered from the standpoint of the critique of common sense, of the certainties of linear evolution, and of stable loci of historical processes, it was also a vital program for the de-automatization of the spirit, pressed to free itself, from clichéd ideas." With such terrific words – from Roberto Schwarz (2022)[1] – we want to present our subject.

Trotsky's (Ukraine, 1879–México, 1940) life and work are both an epic subject of the chief tragedy of the "*brief 20th Century*": the "Revolution of the *Soviets*" – despite all public oblivion, "Soviet," an old Russian word for "Council," became a new global *lexicon* for a novel reality, i.e., direct-democracy of the rank-and-file people, in an original history from below in the making – and its *Stalinist* twilight: from workers' agencies and artistic vanguards to the brutality of *Gulags*, censorship, or autocracy. A still very young Liev D. Bronstein adopted the surname of one of his incarcerators, *Trotsky*, and the most popular literary French pen-name of his times in Russia, *Leon*, while escaping exile, from Siberian camps, to make world-history. Leon Trotsky (LT) is a crucial figure in the making of the great and terrible world of ours.

An anti-tsarist revolutionary since puberty, Trotsky went on to become the chairman of the St. Petersburg Soviet of Workers' Deputies, both at its inception in the revolution of 1905 and again in 1917, and the most decisive civil and military strategist of the Russian Revolution – as the People's Commissar for the Army and Naval Affairs –, during the Revolutionary Civil War (1918–1921) fought against 14 foreign armies that invaded the newly born Soviet Republic after the October revolution (1917). Nevertheless, such feats do not sum up his whole footprint as a notable reference in philosophy, history, or politics.

A decisive collective organizer and political leader, he was also a major intellectual in the dialectical tradition, expanding classical Marxist research program to fields of work and new key areas as broad as Literary Criticism & Everyday Life, the Theory of the State and International Relations, Women's Studies or even Psychoanalysis. He bestowed us a major – fresh – original inspiration to study *the role of the individual* in human history: one need only to compare G. Plekhanov's *homonymous opus*, and its crude imagery of the "parallelogram," with his intricate inquiry of ► V.I. Lenin *persona* in the eve of insurrection.

Life

Born *Liev Davidovich Bronstein*, in Ianovka (Ukraine) – on November 7, 1879 –, Trotsky was cruelly assassinated by Ramón Mercader, at the behest of Stalin in Coyoacán (Mexico), where he lived in exile, on August 21, 1940. A child of Jewish farmers, Trotsky soon distinguished himself as a brilliant student. In 1896, as a young pupil at Nikolaev, he discovered Marxism. Arrested in 1898 by the Tsarist regime for subversive activities, Trotsky was sentenced to exile in Siberia, where he lived with his then wife, Aleksandra Sokolovskaya, who won him over to historical materialism. He escaped in 1902, leaving behind him all references that might identify his past. In the same year, he joined Lenin and Martov, prominent leaders and socialist editors of legendary *Iskra,* in London. Very early, he was known as "*The Pen*" for his striking political prose, skill only exceeded by his gift regarding public speaking in direct contact with the masses in the eye of unfolding events.

Until 1917, Trotsky was in open controversy with the Bolsheviks, led by Lenin, over social theory and practice, mainly worker's organization and political strategy. However, after the February first 1917's revolution, the two men came together

[1] Schwarz, Roberto. Tese de Trótski transforma visão de países periféricos. Folha de S Paulo, 30.07.2022.

following Lenin's "April Theses," where the Bolshevik leader made the very case for *a socialist revolution in Russia* – "Peace, Bread, Land and Freedom!" / "All Power to the Soviets!". In the early days of the Soviet Union, Trotsky played a decisive role first as People's Commissar (or Minister) for the Foreign Affairs and later as Commander of the Red Army and founder and one of the key leaders of the Soviet Communist Party and the Communist International.

Trotsky took up the struggle against the growing bureaucratization of party and State after Lenin's notorious "*Last Testament*" and following death. However, he and his Left Opposition were eventually defeated as Stalin's political, bureaucratic, Bonapartist-like counterrevolution won the day. Trotsky was denigrated, persecuted, and exiled. He was eventually expelled from the Bolshevik party, and then banished from the USSR, in 1928.

Work

Trotsky's extensive *oeuvre* is a reflection of his extraordinary path. It stands for a constant struggle to develop anti-deterministic, non-dogmatic, and creative thinking based on classical historical materialism and diametrically opposed to the Stalinist vulgate and official State-creed. His own view of ▶ K. Marx's tradition was open and critical, but also uncompromising rather than something overly *fixed* and/or *dogmatic*: "Marxism is above all a method of analysis, not analysis of texts, but of social relations" (LT 1974, p. 69). The methodological orthodoxy of Trotsky's Marxism reflects fierce irreducibility of the Hegelian-Marxian category of the *perspective of totality* as a vital guiding principle for any serious inquiry (in this matter, he was influenced by Antonio Labriola's anti-positivist philosophical works). Following Classic German Philosophers, he argued that the "*formal logic*" – e.g., *non-dialectical* – was discreetly incapable of comprehending any process of transformation. Even though, as is typical of most Marxist revolutionaries, his writings are largely made up of appraisals relating to specific contexts, and formulating answers to particular, urgent issues. In his theoretical writings he draws general lessons from both living political experience and/or significant swathes of history. The dialectical bond of theory and practice – inherent in his Marxism – is ever intensely present in such historical works. Not by chance he was a Soviet-deputy at the core of the revolution more than once.

The potency of Trotsky's Marxism is fully rendered in his explorations of the highs and lows of the world revolution (Burawoy 2009, p. 175). His studies of the workers' revolution and his theory of uneven and combined development as well as his criticism of the Soviet bureaucracy and his analysis of Western fascism showcase the originality and strength of Trotsky's thought and vital contribution to the critical thinking of our age.

Stalinism was for Trotsky not some particular form of "Evil incarnate." It was rather a pragmatic platform emerging from social, economic, and political manifestations in the world class struggles affecting the URSS. Stalinism's theory of *socialism in one country*, its program of *revolution by stages*, and the *popular frontist* strategy, later culminating in the unfathomable notion of a "*peaceful coexistence*" – in fact, between the Muscovite *Bureaucracy* and the Western *Imperialism* –, were part of the *nomenklatura*'s preventive dyke to world revolution, as a threat to its consolidating grip over the USSR and satellites.

Stalinism was a *political regime* in the USSR expressing the agency-expropriation and stifling of the power of the workers' soviets by the bureaucracy as a consequence of the isolation of the Soviet state following the failure of workers' revolutions in the rest of Europe. The actual spirit of social and economic transformation, and cultural or political experimentation, inaugurated with the Soviet-based Revolution, was crushed. Stalinism zigzagged, between ultra-left and rightist-like policies, at home and abroad, eventually promoting a late, rash push for industrialization at the cost of brutal repression and the sacrifice of millions. The ghastly cult of personality, despotism and Stalin's persecution-obsession led to suppressing the best brains in the whole Soviet Union, often with terrible consequences. For instance, dreadful execution of the Red

Army's top-officers on phoney accusations of treason, on the eve of the Nazi invasion; or the quackery of Lysenkoism, made then an official dogma in the natural sciences, which delayed the development of agriculture for decades – and led to a permanent deficit in the supply of food. In practice, Stalinism fostered a conservative rather authoritarian model of late modernization, with severe autoimmune pathologies of its own that, sometimes, led to a paroxysm of violence and even terror. It led miles away from the fairer, more egalitarian, let alone freer society, unveiled by the 1917 unrest – the bizarre zombie-like corps outlived the all-mighty vision.

If one must capture systematically the *Zeitgeist* developed by the Stalinist apparatus, it could be whittled down to some instrumental blend of *top-down reformism*, *economic gradualism*, *anti-revolutionary political transformism* – or perhaps a "brutalist" *historical progressivism* in the sense criticized by Walter Benjamin (1940), based on an underlying linear, opaque, and/or one-dimensional "*concept of history*." "Actually existing Stalinism" adopted a merger of notions originating in many former non-revolutionary currents of the workers' movements, such as French social *Possibilisme*, German political *Revisionism* or even the Russian historical *Menshevik fraction*. It became markedly (and actively) anti-internationalist towards social and political movements both in Eastern and Western – Northern or Southern – countries over the world. In the mighty pen of Trotsky, it was no more and no less than a huge political device, the "great organizer of historical defeats."

Stalinism was thus the "automatic making" of a vast apparatus "without personality" shaped from the decline of the worker's revolution. Isolation and hardship in a backward, mostly peasant country, after 4 years of World War, and another three of Civil War, accounted for the genesis of the Soviet *nomenklatura*, which Stalin, as the *apparatchik* incarnate, rode and led as a new, horrible, and most *anti-Sovietic* Thermidorian Bonaparte.

Against economic determinism, Trotsky's concept of the "*permanent revolution*" – borrowed from an intellectual tradition, that reaches back to a pre-Marxian stage – first developed after the 1905 Revolution, in opposition to encroaching vulgar materialism, attempted to demonstrate how the social processes of worldwide "uneven and combined development" made the modern socialist revolutions possible – and inevitable – even in underdeveloped social formations, such as the Late Tsarist Russian Empire. Trotsky's political and historical writings constantly stress that the outcome of political crises is not predetermined by their underlying economic causes but depends on "subjective factors" – that is to say, historical agency in the form of the self-determination of the masses, the political parties expressing it, and even the very individual leaders per se – an audacious counterpoint to the encrypted *Diamat* then reigning as an authentic URSS' *raison d'État*.

Legacy

How can we make sense of Leon Trotsky's theoretical heritage nowadays? Trotsky clearly distances himself from the kind of work carried out by the exponents of so-called "Western Marxism" – who, like ▶ T.W. Adorno, kept an *equidistance* from both Stalinist thought and "Classical Marxism," tending to dismiss it, as reductively materialistic. He cannot either be regarded as any mere "endurance" of the intellectual tradition of the third Marxist cohort or another "link" in the evolutionary chain of an "archeology of knowledge."

The relevance of his achievements lies is in the high complexity of the "toolbox" of the challenges, issues, and questions that it leaves to us. It is also to be found in its ability to pose new problems and present previously unthought-of solutions for periods other than his own. A major thinker, such as Trotsky, might be recognized not only in what he or she says but also in what he or she continues to say. It is in his Classic theorization – a Classic and a revolutionary one, at once – and the development of his method of *analysis of social relations* that we can find the novelties of Trotsky's own historical realization of Marxism. In the new epoch of the *actuality of revolution*, the author provided us with a powerful

set of tools – for fine-tuning insurgent levers and revolving the whole of those *social relations*.

However, how can we grasp some unity in such a rich, diverse, or wide-ranging work? The Marxism of Trotsky has some *prisms* – the optical metaphor is useful – that manifest themselves in a contradictory way, with varied intensities and under dissimilar formulae, but also in diverse ways that are quite recurrent in his works. The *differentia specifica* of his Marxism, what distinguishes it from its contemporaries, is not a plain thought, as a uniform whole, virtually ruled by a unique immutable role-model. The multi-dimensional, plurilevelled, and *prismatic* nature of his lines of thought eludes any particular treatment. As anti-deterministic, non-dogmatic, critical, and autocritical as every Marxist should be.

Nonetheless, the intellectual endeavors – advanced by him –, which constituted the innovative nature of his social and political thought, are: the *epistemic internationalism* in modern contemporaneity, the *centrality of praxis* in political change, and the notion of a *permanentist dialectics* in revolutionary processes. The former is mainly determined by the concept of *uneven and combined development* on a world-scale (i); the second topic relates to his *most radically open* view of the political processes into social transformation (ii); and, the latter provides *vivid dialectical insight* into contemporary world-history (iii).

While the first trait is widely recognized, in contemporary studies of international relations, social sciences, and literary studies, and the second one is the notable verve of any critical Marxism which goes against the grain of the fatalist worldviews of the Second International (like in ► R. Luxemburg's and/or György Lukács' thoughts), the third one is feasibly what makes Trotsky's own reasoning a voice so unique among this resonant choir.

His theory of *permanent revolution* is not only about the actual reconversion of the political revolution – or the realization of democratic tasks, in backward countries – in a social revolution, with the entire socialist transformation of the peripheral societies; or even the outgrowth of the national revolution – with no solutions of continuity – into an inter-national revolution, surpassing frontiers of any size and shape; but the "seizure of power" as just the beginnings of a truthfully *longue durée* historical process, in which all social relations are radically changed in the course of an uninterrupted single confluence. The most varied events that unfold necessarily inside this development have a notorious political character, given that they take the historical form of dramatic clashes between divergent fundamental social groups in the whole of the changing society. The profound alterations, either in Political Economy, Technique or Science, and in family, habits and everyday life new courses, fertilizing each other, then form "uneven and combined" new correlations so complex that societies cannot reach any long-lasting "state of equilibrium."

The idea of *permanentist dialectics* in "all social relations" has, often, escaped the attention of critics, not only preventing the understanding of the theory's reach, but also its link to Trotsky's analysis of the social nature of the Soviet Union. ► A. Gramsci noted, however, that "the tendency represented by Lev Davidov [Trotsky] was closely connected to this series of problems, a fact which does not seem to me to have been fully brought out." The really complex interrelations between the economic structure and the cultural dynamics become apparent both in the interest shown by Trotsky in *Americanism and Fordism* and in his research, inquiries, and/or writings on the "*Byt*" ["mode of living"], culture, art, and literature. "These activities were less separated than they might appear, since the new methods of work are inseparable from a specific mode of living, thinking and feeling-life. One cannot have success in one field without any tangible results in the other." The paradigmatic example – given, here, by A. Gramsci – is the dialectical *nexus* between the rationalization of production and the prohibitionist *élan* in the United States. This new theory of imperialism, found in a leaflet made by Trotsky ("*Europe & America*") – which was the primary source for Gramsci's remarks, on "*Americanism & Fordism*" –, also contained new reasoning on the *psyche of the advanced modern industrial masses*. The first non-Trotskian, Gramscian, intellectual to openly

recognize this specific filiation – shared by these two notorious works – was the Italo-Brazilian historian Del Roio (2015). It would not be any exaggeration to regard Trotsky as one of the classical Marxists who foreshadowed, with great insight, the fresh debates on Everyday Life launched by the new Western Marxists generations, such as in Agnes Heller and Henri Lefebvre – as well as some of the cultural brio, of the later "*soixante-huitard*" cohorts –, in spite of its reception.

Present

One might then, in order to acknowledge the academic inheritance of what Gramsci called "the tendency represented by Lev Davidov," refer to the Western European "*World-System*" scholars, the Latin American exponents of the "*Theory of Dependence*" or even the more recent international trend of new enthusiasts of the so-called "*Cultures of Uneven and Combined Development*." Never before has Trotsky enjoyed so much respectability in academic circles. He had been ostracized from university *syllabi* and *corpora* all over the world, for many years now, in contrast with Gramsci, always championing the scholar bibliographies. Even though it may be very difficult to summarize all the fragmented and complicated narrative of minoritarian organizations or platforms referring to the *Fourth International* across the Planet, since the most ruthless assassination of its main leader, Trotsky considered the "*New International*" – rather than his own theoretical inputs – to be his key contribution to the future. After all, the *new imperialist era* impelled workers' collective action to the necessarily systematic effort to globally coordinate the movements of the subaltern groups' liberation and to alter the balance of forces not merely on national ground, but in world arena. As in the lyrics of E. Pottier (1871), based on Paris Commune, "*L'Internationale sera le genre humain*," i.e., the International will be the humanity itself.

After the tragic historic of bankruptcy of the Second, then the Third International, particularly when the latter's Stalinist policies condemned the West European working classes to a historical defeat – without any struggle – against fascism, Trotsky realized the tragic need for regrouping revolutionary forces across the world again, and devoted all his vital energies to the pivotal task of the collective organizing of human emancipation from "all forms of evil," during the last years of his life, with a tremendous political devotion. Finally, when evoking Trotsky's intellectual legacy, one might – honoring the intrinsic connection, between the Arts and Politics, often stressed by the author of "*Literature and Revolution*" (1924) – do more than entailing a late echo in the splendid, powerful narrative thriller that is Cuban writer Leonardo Padura's – "*The Man Who Loved Dogs*" (2014) – based on accurate historic inquiry into the knotty quandaries of twentieth century world history.

It wouldn't be fair, though, not to mention an unknown masterpiece of a great vanguardist literate from Southern Brazil, Paulo Leminski, who penned a startling poetic biography of LT and the Soviet Revolution to explain his daughter this rather intricate event. "*The Passion According to the Revolution*" ("*A Paixão Segundo a Revolução*") is a landmark on its own, first issued at Braziliense (1988) and, then, reprinted by Cia. das Letras (2013).

One might also be tempted to invoke reputations as solid as Ken Loach's (as a film maker), Perry Anderson's (as a historian) or Terry Eagleton's (as a literary critic), to name but a few living figures who championed Trotsky's politics and/or theory, or names like of Ernest Mandel, Isaac Deutscher, and/or Roman Rosdolsky; or even, paying tribute to Trotsky's internationalism, a lengthier list as in Mario Pedrosa, Patrícia Galvão ("Pagu"), C.L.R James, Raya Dunayevskaya, Andre Breton, Livio Maitan, Hugo Blanco, Victor Serge, Pierre Broué, or Jean von Heijenoort – just to mention a few comrades of this front.

However, we'd rather pay homage here to the work of the author that – in range and wisdom – most advanced those pivotal three tenets of the Trotskyan culture, in an actual scholarly breakthrough, i.e., Neil Davidson (1957–2020). In "*Modernity, Modernism & Revolution*"

(2017) the Scottish intellectual presents us a cutting-edge contribution to the inquiry into capitalist global modernity and the many challenges to those whose ultimate goal is to overcome it. Here we have the utmost illustration of the grits, and wits, of the "tendency of Lev Davidov" – Davidson also authored classics on the State and revolution, besides national question and other issues. Guarding the idea of Socialism or Communism from the Social-Democracy and Stalinists maybe have turned this line into an involuntary paradox of "revolutionary conservatism." And it is most conceivably true that some genre of triumphalism of the working class and catastrophism of the capitalist State can become some notable doctrinaire and sectarian tic, time to time, when isolated in historical defeat or surrounded by political betrayal. After all we are talking about *Lilliputian* groupings here.

Yet, is also true that:

> (. . .) the subsequent legacy of Trotsky's (. . .) tradition – persecuted, reviled, isolated and divided – will have to be studied in all diversity of its underground channels and streams. . . It may surprise future historians with its resources. (Anderson 1977, p. 98)

Anti-Trotskyism

The anti-Trotskyist video-pamphlet, made by Putin's television (and globally broadcasted, by the massive Netflix network) – "*Trotsky*", an eight-episode mini-series, directed by Alexander Kott and Konstantin Statsky –, reprises every Stalinist *cliché* against Trotsky, with not one bit of new documental insight, say, from the opening of the historical archives or even the aforementioned historical opus about the Marxist revolutionary: the worse of Hollywood melodrama in *post-KGB* settings.

This film is a showcase for the lingering persecution of Leon Trotsky and the *Internationalist* Communists (or *Bolshevik* Leninists, as the collective used to call themself) who first grouped into the Left Opposition tendency and then in the new *Fourth International*. The persecution went to great lengths. The Comintern forbade any relationship or contact with the adherents or fellow travelers of "Lev Davidov." L. Trotsky – and/or the Trotskyists – were not only systematically prosecuted and exterminated in the Soviet Union, but they were also stigmatized throughout all the twentieth century in all the capitalist world. To this day, this brutal history still crops up in parts of left-wing culture around the world. There is, nowadays, a late revival of Stalinism – with a renewal of anti-Trotskyism, as a consequence. Anti-Trotskyism appears alive not only in some political groups and their publications but also in virtual spaces and social networks. It is driven both by a ruthless lack of historical knowledge, and the advance of a new global far-right. Ignorance of history leads to mystification and denial, the rejection of evidence widely proven. Like with "*flat-earthers*," but in a supposedly left-wing guise, historians are all supposed to be in the service of the CIA, every document or text is a forgery, belief resists reality. An "audacious ignorance" allows the neo-Stalinists to be seen as some kind of an anti-fascist *gendarmerie*, appearing as the legitimate response to the worldwide advance of post-fascism in the twenty-first century. This inauspicious new loathing of Trotsky and new wave of anti-Trotskyism, unfortunately, can be seen and heard in parts of Latin America, the USA and Europe – let alone the former "actually existing" Second World.

Ironically enough, besides self-congratulatory viewpoints that conveniently ignore the agreements signed by Hitler and Stalin, as well as the catastrophic strategy of the "third period," that hindered the combat against the escalation of Nazi fascism, was precisely Trotsky who led the quarrels against the theory and practice of the ultra-leftist "revolutionary offensive," at the Third Congress of the Comintern, and who, finally, was the main architect of the United Front strategic wager. Trotsky was mainly accountable for the most classic manuscript that posited the United Front political formula, in the 20s, and for the axis of the debate on the Comintern's denial of an alliance of social-democrats and communists against historical fascism.

Treasure

The Lubitz' Leon Trotsky Bibliography (LLTB) – compiled by W. Lubitz, listing the entire bibliography published on the subjects *Trotsky* & *Trotskyism* from the beginning of the twentieth century to the present day all over the whole world –, the ***Trotskyana.net***, in its new 23rd version, contains 17,336 entries. Most pieces were published/released between the years 2001 and 2021, including there more than 20 biographies and a whole series of novels published in several languages, which aids to show the continuing relevance and incessant interest in the work of Leon Trotsky. The current edition amounts to approximately 17 Megabyte (roughly, 2700 printed A4-sheets) of bibliographic information. Besides main entries (title descriptions or title records), it includes several, thousands, cross-references, adding up to 21,531 running records (and/or identification figures). The records encompass 25 languages (English, French, German, Italian, Spanish, Portuguese, Russian, Dutch, Flemish, Danish, Swedish, Norwegian, Finnish, Belorussian, Bulgarian, Catalan, Czech, Magyar, Icelandic, Polish, Serbo-Croatian, Slovak, Slovene, Ukrainian, Welsh among others) and publications in 55 countries, between the years of 1905 and 2021 Summer. Historical and literary accounts of Trotsky's life and work include:

"Trotsky, révolutionnaire sans frontières", by Jean-Jacques Marie (2006), a rich profile that adds to the canonical works – by Deutscher and Broué –, in a wide record that recreates all Andre Breton's *globetrotting* in "*Planet without Passport.*" "*Trotsky in Norways' Exile – 1935-1937*" by the historian Oddvar Høiddal (2013) is a more specific recording of a very particular time as a political outcast in Norway while the first trial in Moscow reached completion. Gabriel García Higueras wrote "*Trotsky en el Espejo de la Historia*" (2006/2018), now in its Second Edition, a portrait in three historical key essays: i) an update of the bibliological appraisal of Trotsky's figure, ii) an ideopolitical biography of Trotsky's Marxism, and iii) a critical appraisal of the main Western and Eastern falsifications of his life and work.

In the footsteps of Padura's fiction work, "*Viva!*", by Patrick Deville (2017), not only narrates Trotsky's final years but also retraces the political and ideological ambiance of the pre-war Mexico. "*The Lacuna*" – by Barbara Kingsolver (2009) – moves between muralist art and surrealist literature in the 1930s in the aftermath of the Mexican revolution, and the McCarthyite witch-hunt of artists in the mid-50s. In "*Los Sueños de la Serpiente*", by Alberto Ruy Sánchez (2018), the assassination of the Soviet leader serves to build a literary artefact that assemblies literary genres, developing an *avant-garde* fabric of stories that are tied to one another into a very elusive mapping of twentieth century experimental affections and/or political contexts. Padura seems to have – somehow – triggered plenty creative imagination of many different writers and *structures of feelings* all over the world at a time not at all kind to a leftist nostalgia or the idea of revolution. Chief strategic challenges inherent in Trotsky's revolutionary endeavors have, apparently, been poetically condensed into some unvulgar type of "slow impatience" that seems to be the new order of the day.

Lev Davidov signified – for generations, especially radical artists or intellectuals – the utopian figure of an *embodied ideal*, which so wild-intensely fascinated the old-fashioned nineteenth-century romantic revolutionaries. Andre Breton, "Pagu", Padura and many others shared that atmosphere. Transcending the margins of mere "influence" it seems something that many authors could agree as being a "prefigurative" *milieu*. The allegory of the "*Prophet Outcast*" – masterfully created by a zealous craftsman – appealed to the most potent intellects or vital wills open to the great refusal of so-called "midnight of an era," typified either by western Fascism or eastern Stalinism. Not only a meaningful life, or even a significant work but, in a way, *something else*. Ironically, Trotsky own temper would be at odds with such a metaphysical appraisal.

At least that is the imprint made by Padura's last input to this rather intricate setting, in the *Preface* to a new edition of "*La fuga de Siberia en un trineo de renos*" ("*The escape from Siberia*

in a reindeer sleigh"), 2022, an exciting thriller penned after the actual startling escape, of Leon Trotsky, from the final Glacial Czarist exile:

> What claim of the present could have provoked that renewed interest in the figure of Trotsky almost a century after his death? [. . .] In a globally digitized world, polarized in the worst way, dominated by rampant and triumphant neoliberalism and, to top it off, hit by a pandemic of biblical proportions that put. . . the destiny of humanity in check, what such an expectation came to recover the fate of a Soviet revolutionary of the last century who, by the way, had been the loser in a political [. . .] dispute that was intended to end with his assassination? [. . .] defeated in the political arena, the exiled turned out to be the battered winner in the historical arena projected into the future; from the latter, unlike his assassins, he has come out as a symbol of resistance, coherence and even the incarnation of [. . .] utopia.

Conclusion: *Fermata*

Might all this vast artwork energies ever again be translated into any political stimulus? There is no proof, whatsoever, that could back up such a counterintuitive hypothesis. But – then again – we can summarize all this *left-wing melancholia* with Daniel Bensaïd's most uplifting words carved in his trilogy on history and memory:

> If there were only one chance out of a hundred thousand, just a petite probability, I would bet anyway [. . .] I have a passion for difficult, *quasi*-lost, *quasi*-desperate causes. It's all the difference between the Cliff, comfortably sitting, haughty with its place, somewhat arrogant, self-indulgent, and the Wave which ebbs, retreats, but never forgets to resurface. Who knows which one, between the Cliff and the Wave, will have – then – the last word? (translated from the original manuscript of Daniel Bensaïd, 1989, In: "*Moi, la Revolution*").

Cross-References

- ▶ Adorno, Theodor Wiesengrund
- ▶ Gramsci, Antonio
- ▶ Lenin, Vladimir Ilyich
- ▶ Luxemburg, Rosa
- ▶ Marx, Karl

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Trust

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Introduction

Trust is a key component of our lives. Without a certain amount of trust, in at least some people, it would be impossible to live a normal, human, life. Trust is an attitude, which motivates someone to place themselves in a position of vulnerability with respect to another's choices. That person, who is trusted, can live up to the trust

that has been placed in her or can betray it, and the truster signals – by trusting – that she expects, or at least hopes for, an attitude of good will on the part of the trusted, who will live up to the trust (Baier 1986). Trust supports cooperation to achieve shared objectives: when two people's relationship is trusting, they are more likely to cooperate to achieve shared objectives and they are more likely to prioritize the needs of the other, on the expectation that the other will do the same in the future (Gambetta 1988).

The term trust is also used to describe the climate that pervades a society or other large groups. It is hard to say with specificity what a trusting society is, but it means something like: members generally have a positive attitude towards others, and expect them to play by the rules, broadly understood. Just as is true between individuals, where trust exists in a society, cooperation among its members to achieve collective goals is more likely to emerge. For instance, a society in which residents lock the front doors of their homes against possible or suspected intrusion exhibits a less trusting attitude than a society in which residents leave doors unlocked; the willingness to leave doors open, believing that others will not enter without permission, is a sign of a society with a climate of trust.

Distinctions and Clarifications

Scholars have offered many distinctions to help keep track of, and analyze, trust. One major distinction focuses on the basis for trusting others. Some believe that we trust others on the basis of a rational risk assessment, where would-be trusters consider whether the trust is likely to be rewarded (Hardin 2006). This assessment can make use of a wide range of information, including the interests of the trusted, their motivations, and general social and institutional conditions, which may themselves operate to encourage (or discourage) trusting relations (Mcleod 2000). On the basis of such an assessment, a would-be truster may decide that trust is warranted, and therefore extend it. Others treat trust as more emotional or affective, suggesting that trust is typically extended more or less automatically and without thinking, usually to those we care about and have personal relations with, but also toward strangers about whom we make snap – that is noncognitive – judgments, on which we act on a near daily basis (Jones 1996; Becker 1996). On this view, trusting someone does not entail engaging in a probabilistic assessment of whether trust will be rewarded, but is rather carried out more or less intuitively.

In political thought in particular, a key distinction is made between horizontal or social trust and vertical or political trust (Newton 2007). Social trust refers to the trust we have in fellow citizens and residents as we go about our daily lives. Political trust refers to the trust we, citizens and residents, have in our political actors, ideally to make good choices on our collective behalf. A distinction is also made between interpersonal trust, i.e., the trust we have in those we know and interact with on a daily basis, and general trust, i.e., the trust we have in those around us, whom we do not know personally.

Trust is sometimes conflated with related concepts, including reliability and confidence. To trust someone is to believe that they are generally reliable – I trust my colleagues, for example, because they have been reliable in the past. For those who believe that trust is extended on the basis of a risk analysis, evidence of past reliability is one key factor in determining whether one should extend trust. To be reliable, we might even say, is to be able to be trusted – that is, to be trustworthy (this concept will be considered in more depth below). If I can rely on you, then I can depend on you to do what you have promised and to behave in ways that generally reflect good rather than ill will. The term confidence denotes the same sort of thing: if I am confident in you, I believe that you will do what you have promised, or that you can be relied upon to act with good will (or at least not ill will) towards me. Confidence denotes a kind of certainty that is not present in trust: if I state my confidence in you, I am stating that I am certain you will behave in the way I expect, but if I state my trust in you, I am stating that I believe you will behave in the way I expect,

but I recognize that you may not and I am willing to make myself vulnerable to you in this situation. Although for philosophers, these terms have technical distinctions that separate these concepts, in regular speech, these terms are often used interchangeably.

For some scholars, trust is a moral concept, and for others, it is not obviously so. For those who believe that trust has moral content, it is good to trust others, and a trusting society is overall better than one that is not. But some question the morality of trust, pointing to cases where high levels of trust produce bad outcomes – think of the expression "honour among thieves," where the outcome is better if there is no trust among thieves. Yet, there do seem to be moral questions connected to trust, in particular with respect to being trustworthy (Hardin 2002). To be worthy of trust – that is to be someone who others believe will respond to trust in the right way – is a virtue that deserves moral praise. But here too, one could be considered trustworthy by other thieves, and so although it might be a kind of virtue, it might also produce a bad outcome overall, and might be a virtue that all else equal we might wish someone did not possess (Mullin 2005). So, it seems, in most cases, whether trust and trustworthiness are good depends at least in part on the outcomes, i.e., what will be produced if trust is extended and rewarded or not. If the outcome is valued, the trust is good; if it is disvalued, the trust is bad.

Widespread Trust and Social Goods

Three major social goods are said to come with widespread social trust: compliance with law, robust democracy, and widespread support for social justice policies (Miller 1995). First, in trusting societies, citizens and residents are more likely to believe that the laws are fair and that they are equally applied to all, i.e., that the rule of law is operative. Citizens and residents in high trust societies see law enforcement, and the judicial system, as on their side; they believe the laws, and authorities that both enforce them and punish violators, are legitimate. Correspondingly, they are willing to comply with what is asked of them, in general (Bradford et al. 2018).

Second and related, this willing compliance with authority that is present in high trust societies is also essential to supporting democratic rule more generally. Democracy is a political system in which decisions are made via majority rule. The result is that for nearly all decisions, some people are "losers," i.e., their first preference is not met. How does trust relate to this situation? Democracies require the voluntary compliance of all (or at least most) citizens with decisions that are made democratically, and this voluntary compliance depends on the existence of relatively robust trust relations among citizens and residence of a political community. The willingness to accept democratically made decisions requires that losers believe – in fact, that they trust – that they will be in the majority at other times, i.e., that there is no persistent minority that never gets its way (Anderson et al. 2005), as may be the case in divided societies (Lenard 2012; Weinstock 1999). Of course, compliance with law is not entirely voluntary; rather, there are legal penalties associated with failing to do so. To say that it is voluntary is to recognize, instead, that democracies rely on citizens and residents' willingness to abide by the law, so that they can expend their collective resources on producing a range of goods that citizens and residents expect in democratic societies, including the delivery of quality health care and education, rather than in enforcing compliance. Citizens and residents' willingness to comply, more or less voluntarily, relies on their believing that they do sometimes see their preferences reflected in law and policy choices; in general, losers must be willing to comply with law and policy that they did not select, on the idea that others will do the same when the time comes.

The third major social good that comes from widespread trust is support for social justice policies, that is, policies that support the redistribution of goods from those who are more well off to those who are less well off, including publicly funded health care, education, and social assistance programs more generally. The underlying thought is that these programs operate to support those in need, and everyone who is able should be

willing to contribute to them and only those in need should take from them. The willingness to contribute to such programs relies on trusting that others will not abuse them, and also that they will be available if one needs them in the future. Of course, if a society adopts social justice policies, citizens and residents do not comply with their requirements voluntarily; they are legally obligated to contribute to them, by paying taxes. But the willingness to *vote* for representatives or parties that support the extension of such programs appears more widespread in high trust societies.

Some philosophers do note, however, that democracy requires a certain amount of *mistrust* in order to function well. On this view, political representatives have a great deal of power which they have the capacity to misuse in various ways: the result is that electors should persistently manifest an attitude of *mistrust* towards elected representatives. This skeptical, cautionary, attitude towards political representatives makes sense; representatives have substantial power and the temptations to misuse this power can be immense (Lenard 2008; Hart 1978). So, adopting a mistrustful attitude towards elected representatives has salutary benefits for democracy: political actors will be motivated to demonstrate that they are worthy of trust rather than mistrust and electors will keep an eye on their representatives to make sure they are working in the collective best interest.

Distrust and Mistrust

Trust is extended knowing that others may reward *or* betray our trust; it is the risk, or the willing acceptance of vulnerability, that defines the extension of trust. Each time someone's trust is rewarded, she becomes more likely to extend trust again, and more readily does so. Trusting others, when the trust is rewarded, generates a kind of virtuous circle in which trust begets more trust. The same is true of betrayed trust, however. When someone's trust is betrayed, she becomes less likely to extend trust again and will be more difficult to persuade to take the risk in doing so.

Just as with trust, individual relations can be pervaded by distrust, and a society can be characterized as having a climate of distrust. As a matter of personal relationship, someone might say "I just don't trust her." There might be many reasons offered for this statement: perhaps the relevant person has betrayed trust in the past, perhaps even repeatedly; perhaps the relevant person possesses certain features that the would-be truster believes are suggestive of untrustworthiness; or, perhaps the relevant person believes that the incentives that motivate others generally press them towards betraying rather than rewarding trust. The relation between trust and distrust, as well as mistrust, is complicated: one can trust another person to do some things, but actively distrust them in others. So, trust and distrust are not quite opposites, nor are trust and mistrust (Ullmann-Margalit 2017).

The reasons for extending or refusing to extend trust apply not only to personal relations but also to social and political relations in general. Social science suggests that multiple factors influence whether individuals are trusting, as well as whether societies are in general pervaded by a climate of trust (Inglehart 1999). To give just some examples, those who are more educated are more likely to extend trust than those who have less education; those who are wealthier are more trusting than those who are comparatively less wealthy; members of the majority community are more likely to be trusting than members of minority communities. What this evidence suggests in general is that those for whom the risk of extending trust is lower are more likely and willing to extend trust; that is, such individuals can in some sense "afford" betrayed trust, i.e., the costs of betrayed trust for such people are lower. These social science findings generalize to society as well: societies in which there is greater wealth (especially if it is evenly distributed), in which there is less diversity (ethnic, racial, religious), and in which more (or most) people are educated are also generally more trusting. These rules are general, so there are of course exceptions, where poorer or diverse societies exhibit high levels of trust. Yet, these factors, which track trust in general, suggest ways forward in social and political spaces in which trust is low.

If citizens and residents come to believe that others are in general untrustworthy, that society may be described as a low-trust society. As is the case with respect to personal relations, at the level of society, both trust and distrust can be warranted or unfounded. Before worrying that a society is low trust, it is important to assess not only what the source of low trust is but whether it is also warranted; this information is key to guiding effective trust-building efforts.

For example, in the United States, Black Americans display less generalized trust than do white Americans. Given the racist history of the United States, which has systematically operated to oppress Black Americans, and which continues to do so in myriad spaces and in spite of a formal commitment to equality of all citizens, the lower trust among Blacks is not only unsurprising but also warranted (Williams 1998). Moreover, Black Americans' active distrust in the motives of white citizens and white representatives is not only warranted on the basis of American history, it is salutary: it presses Black Americans, and their allies, to fight for the rights of Black Americans, and to hold others accountable for protecting them, in ways that support the advancement of Black Americans across a range of sectors in American society. The distrust of Black Americans, in white Americans, is both reasonable, based on past history, and productive, because it is propelling a movement towards better rights protection (Krishnamurthy 2015).

The same may not be true in cases where members of a majority community signal distrust towards minorities, however. Consider cases where majority societies register distrust of new immigrant minorities, who travel with unfamiliar cultural and religious practices, and who are racially or ethnically distinct from the majority. In these cases, which, for example, are reflected in many European countries which are receiving Middle Eastern origin migrants and refugees, the distrust appears driven by a fear of difference, often fuelled by media that focus on instances of violence or disloyalty among members of the migrant population. In these cases, the distrust is neither reasonable, since it is not based on past evidence of lack of trustworthiness, nor is it productive, since it does not direct movements in favor of better rights protection (rather, it appears to be fueling anti-immigrant populist movements).

In the latter case, the emergence and perpetuating of distrust between majority and minority communities is troubling. It can be tempting to simply deride immigrant-receiving communities as racist and hostile to difference, which they ought not to be. As a matter of morality, it is right to criticize those who adopt racist attitudes which underpin distrustful relationships among citizens and residents. As a matter of policy, however, choices can be made that over the longer term can serve to reduce distrust. For example, when distrust is fuelled by the perception that immigrants are insufficiently knowledgeable of host society norms, trust can be built by naturalization processes that impart these norms and aim to develop an inclusive national identity (Lenard 2020). When distrust is fuelled by the perception that immigrants are insufficiently loyal to their new homes (and correspondingly that they are loyal to the states from which they came), it is possible that their apparent lack of loyalty in fact stems from their sense that they are largely unwelcome; multicultural accommodations, which signal a willingness to welcome and incorporate new cultural and religious practices, can therefore enable newcomers to commit more fully to their new homes, undermining the perception that they are insufficiently loyal (Lenard 2010a). When there is evidence that inequality follows racial or ethnic lines, and in particular where ethnic and racial minorities are relatively less well off, robust redistributive policies can undermine the perception that poverty tracks minority status (Lenard 2010b). When distrust is the result of a history of oppression, more transparent institutions may help to foster the emergence of trust relations (Welch 2013; O'Neill 2002).

None of these policies is foolproof, and none works quickly, but they all highlight that there are society level measures that can be taken to create the conditions under which distrust is undermined and replaced with trust. No one can guarantee that someone will be willing to extend trust to others, either personally or more generally. But, as a

society, the conditions under which trust among diverse citizens is more likely can be created and fostered over time. What these institutional or policy level changes can do is, specifically, reduce the apparent risks of extending trust, by increasing the benefits of rewarded trust and decreasing the costs of betrayed trust.

Conclusion

Trust is fickle and hard to build. Distrust is often robust and hard to undermine. But, creating the former and undermining the latter is the job of good public policy in diverse political communities. This entry has attempted to outline what trust is, how it relates to distrust, what benefits come from trusting societies, and what costs are born by those who live in distrusting societies.

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Turgot, Anne-Robert-Jacques

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Introduction

Anne-Robert-Jacques Turgot (1727–1781) was the French kingdom's *Contrôleur Général* (a kind of Minister of Finance) in the first government of young King Louis XVI from 1774 to

1776. During this brief period, he attempted to implement wide-ranging economic and administrative reforms that he believed were an absolute necessity to stave off a revolution in France. However, opposed by the privileged classes and abandoned by the monarchy, his downfall was sealed before he had completed 2 years in his post. He never again returned to politics nor wrote about government or administrative affairs.

Turgot came from a noble family that had loyally served the French kings for centuries. Although his family had planned for him to join the Church, his lack of vocation made him decide to leave the ecclesiastical path and instead to serve the Crown, first as a magistrate of the Parliament in Paris and then as an intendant.

For 13 years (1761–1774), he was the intendant of one of the poorest regions in France: the *généralité* of Limoges. He advocated numerous reforms in this region, which earned him fame as an enlightened, honest, and well-intentioned official. As a result, Louis XVI, on the advice of Minister Maurepas, invited Turgot to form part of his government, much to the delight of the members of the Enlightenment, who considered Turgot (who had written several articles for the encyclopedia and was an assiduous salon frequenter) one of their own.

After his expectations for reform were dashed and his political career failed, he spent his time studying humanities and sciences, receiving distinguished guests and exchanging letters with some of the most outstanding figures of the age such as Benjamin Franklin. He died in Paris, the city of his birth, at the age of 54 (de la Nuez 2010).

Philosophical Ideas: History and Progress

Turgot's work as an administrator and minister serving the king cannot be fully appreciated without knowing the philosophical principles of his thinking, since they formed the basis of his political and economic maxims, which included optimistic faith in the progress of humankind.

In 1750, when he was studying theology at the Sorbonne, he wrote two of his most famous works, *Discours sur les avantages que l'établissement du christianisme a procurés au genre humain* and *Discours sur les progrès successifs de l'esprit humain*, the first time in France a solemn declaration was made on the idea of progress, later continued by his friend Condorcet (Turgot 1913 [1750]).

According to Turgot, universal history has one meaning, one direction, and one purpose: humanity's constant and inescapable progress (despite obstacles and setbacks, mainly due to ignorance, prejudices, bad laws, and bad institutions) as it passes through a series of development stages (hunter-gatherers, farmers) leading humans to perfection, as in the works by Montesquieu and Adam Smith.

This universal force – the progress made by the human spirit – consists of the emergence of reason, knowledge, and morality. It is a morality based on human nature and natural law (not incompatible with true Christianity), which the future commercial society will recognize and respect.

Turgot shared the widespread enlightened belief in the civilizing nature of commerce and the superiority of commercial societies above all others. This commercial society marked a superior phase of civilization and was also characterized by the progress and perfection of knowledge, arts, humanities, and sciences; tolerance, freedom of thought, and emancipation of women; and an enlightened government whose ultimate aim is freedom.

Economic and Political Ideas

The stages (savage, barbarian, and civilized) humans have passed through respond to certain socioeconomic factors that to a great extent explain their level of development. This is why Turgot attached importance to what he considered economic truths, many of which he had learned from his mentor, Jacques-Claude-Marie Vincent de Gournay, for whom he wrote a famous eulogy (*Éloge de Gournay*) on his death in 1759 (Turgot 1913 [1759]).

Gournay taught him above all the need for economic freedom (laissez-faire) in comparison to the arbitrary and pernicious interventions of governments and the idea that all individuals should pursue their own interests since no one is a better judge of their own interests than the individuals themselves. This included criticism of monopoly, privilege, and abuses and the theory, shared with François Quesnay and his physiocrat friends, that the grain trade would have to be liberalized to end famines, scarcity, and the bread shortage the French population repeatedly suffered. Yet Turgot was not a physiocrat as he never upheld legal or political despotism. He considered despotism the government of barbarian peoples. Freemen need neither masters nor tutors.

In 1766, while intendant of Limoges, he wrote another manuscript that was destined to become a classic of economic thought, *Les réflexions sur la formation et distribution des richesses*, an outline of his economic ideas based on freedom for all branches of national and international trade (Turgot 1913 [1770]). Since he firmly believed in the benefits of this economic freedom for France and the rest of the world, he tried to have liberalizing measures adopted while still intendant in Limousin; nevertheless, it was not until he became minister that he managed to liberalize the grain trade (although not completely), leading to the *guerre de farines* (flour war). Despite the opposition this measure garnered, Turgot was still convinced that liberalizing trade and work was the solution for the ills afflicting France. As a consequence, he promulgated six edicts against guilds, taxes, and arbitrary dues endured by the poorest citizens. However, alongside his objection to France intervening in the American colonists' fight against England, these contributed to precipitating his downfall.

Turgot supported the independence of the American colonies, which he also believed was inevitable, but he perceived that French participation in the conflict would have dramatic consequences for the Crown's revenue and make any reform impossible. The monarchy's tax problems had been looming for centuries, yet all attempts at reforming an irrational, ineffective, and extremely unfair tax system had been hampered by the privileged classes, many of whom were members of the Parlements (Courts) that would have had to register these reforms.

This is why Turgot wanted to implement not just far-reaching economic measures but political and administrative ones as well. France needed a constitution and a rational, effective government that would serve the common good and spread the public spirit France completely lacked. The participation of property owners in local and national government had to be encouraged, and education had to be taught outside the Church to create citizens imbued with love for the public good. These are the ideas he submitted to the king in his *Mémoire sur les Municipalités* (1775), drawn up by his friend Dupont de Nemours but not published during his lifetime (Turgot 1913 [1775]).

According to Alexis de Tocqueville's interpretation (Tocqueville 2012 [1856]), Turgot's reforms incorporated revolutionary principles, which is the reason why some of his proposals were debated and implemented during the French Revolution, for example, the suppression of the guilds, which he had always advocated in order to guarantee the "right to work." However, Turgot was not a revolutionary and he was always loyal to the Crown, even though he probably would have wanted it to evolve toward a constitutional monarchy and was hopeful about the outcome of the revolutionary events in America, as he made clear in his *Lettres au Docteur Price sur les constitutions américaines* in 1778 (Turgot 1913 [1778]). The Americans had a unique opportunity in history to create a state based on liberty which would serve as a refuge for the persecuted and a model for the rest of the world.

Conclusion

Concerning his social thinking, it is worth remembering that social theory has been linked to economics from the very beginning. Furthermore, as Ronald L. Meek points out, Turgot's philosophy of progress is one of his main contributions to the social sciences as he facilitated the formulation of a general social development theory (Meek 1971).

His belief that religion, philosophy, and science form three major systems succeeding each other in time has been considered a precursor to the "law of three stages" (theological, metaphysical, and positive) by Auguste Comte, one of the founders of sociology.

Regarding his economic ideas, Louis XVI's minister is considered one of the founders of economics alongside Adam Smith (who he met while the Scot was in Paris). Unsurprisingly, some of his ideas are extremely modern and foresaw some of the arguments wielded by the liberals in the twentieth century. These include the importance he places on entrepreneurs, his criticism of state's intervention in the economy as it is impossible to acquire and manage all the information needed to steer a country's economic activity, and his statement that freedom of trade promotes peace among nations while protectionism and the spirit of monopoly make them enemies (Rothbard 2006).

Nevertheless, as a member of the continental Enlightenment, his liberalism is even more rationalist, radical, and even utopian than that of the Scottish or British Enlightenment, among other reasons because Turgot thought a strong and centralized modern state was needed to provide the right conditions to exercise the economic freedom he considered essential to create wealth but, above all, to eradicate poverty.

Perhaps this is why there is now a revival of interest in his life and work since his faith in liberty, his concern for the public good, and his sensitivity toward the poorest members of society have enabled his thinking to contribute to the current renewal of liberalism.

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Tushnet, Mark

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Introduction

Mark Tushnet (b. 1945–) is one of the most influential contemporary legal scholars and American constitutional theorists. He is currently William Nelson Cromwell Professor of Law at Harvard Law School. Tushnet studied at Harvard College (1963–1967) from which he obtained his B.A. in Political Science and Government and then moved to Yale Law School (1967–1971) where obtained his M.A. in History and, later, his J.D.

After a brief experience as a law clerk to the Supreme Court Justice Thurgood Marshall (1972–1973), Tushnet began his academic career at the University of Wisconsin Madison in 1973, and he remained there until he moved to the Georgetown University Law Center in 1981, where he served as Carmack Waterhouse Professor of Constitutional Law. He finally moved to Harvard Law School, where Tushnet is still teaching Law courses. He has been visiting professor in many universities including the University of Toronto, the University of Texas, University of Southern California, University of Chicago, Columbia University in New York, the New York University, and many others.

From 1975 to 1985, Tushnet served as Secretary of the Conference on Critical Legal Studies.

Research and Publications

Tushnet focuses his studies on constitutional law and legal theory, addressing issues such as judicial review, the role of the courts in democratic regimes, and the theory of rights and popular sovereignty. His main works are entitled *Taking the Constitution Away from the Courts* (1999) and *Weak Courts, Strong Rights* (2008).

Taking the Constitution Away from the Courts presents the thesis of the so-called "populist constitutional law" as a defense of popular sovereignty over the Supreme Court's supremacy. Here, as Tushnet remarks, "what the constitution means is not necessarily what the Supreme Court says it means" (Tushnet 1999, p. 6).

Tushnet provides a deep and exhaustive analysis of the Supreme Court's activity by arguing against judicial supremacy and the allegedly undemocratic character of the judicial review as a constraint over popular sovereignty.

In *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008), Tushnet proposes to adopt a *weak-form* judicial review to replace the *strong-form*, typical of the contemporary US constitutional system. On this point one of the most articulated comment is addressed by prof. Walter Sinnott-Armstrong in his article entitled "Weak and Strong Judicial Review" (2003).

Along with these books, Tushnet published several articles and essays, including: "The Canon(s) of Constitutional Law: An Introduction" (2000) "Forms of Judicial Review as Expressions of Constitutional Patriotism" (2003a); "The Issue of State Action/Horizontal Effect in Comparative Constitutional Law" (2003b); "Popular Constitutionalism as Political Law" (2006); "Against Judicial Review" (2009); and "Authoritarian Constitutionalism" (2015).

Populist Constitutional Law

According to Tushnet, the populist constitutionalism is the most democratic way to decide about fundamental issues and to fully realize the principles of the Declaration of Independence and the

Preamble of the US Constitution. The populist constitutional law puts the Constitution in the hands of the people themselves, rather than of lawyers or judges. In Tushnet's words, "constitutional law creates the people of the United States *as a people* by providing a narrative that connects us to everyone who preceded us" (Tushnet 1999, p. 182). Thus, for populist constitutionalists, people should participate in the process of amending the Constitution directly, by openly expressing its voice in the realm of politics.

This thesis entails a distinction between *thick* and *thin* Constitution; the former provides details and provisions about how government and institutions should be organized, while the *thin* Constitution is only engaged in protecting fundamental values, such as the principle of equality, freedom of expression and liberty, without addressing institutional or procedural matters. The *thin* Constitution thus refuses to conceive the Constitution as "what the Supreme Court has said about those provisions" (Tushnet 1999, p. 11).

More generally, the *thin* Constitution is "the project the Constitution established for the People of the United States (. . .) the vindication of the Declaration's principles: the principle that all people were created equal, the principle that all had inalienable rights" (Tushnet 1999, p. 11). The populist constitutional law, by applying the thin Constitution, is thus supposed to prevent the Court from influencing democratic constitutional decision-making.

The populist constitutional law is characterized by two aspects; it identifies the Declaration of Independence as the unique source of constitutional legitimacy and emphasizes disagreement about fundamental values. This means that "no one can guarantee that democratic processes will always yield results I agree with. Reasonable people can disagree with the judgments I make about what the Declaration's principles require. Democracy is a way of resolving such disagreements without routinely risking severe social disorder" (Tushnet 1999, p. 31).

The populist constitutional law is possible only by respecting some preconditions:

> 1. Voting: People who are not allowed to vote will be unable to help construct populist constitutional law or even the less exalted policies that are the meat and potatoes of everyday political life; 2. Criticism of government: People who are not allowed to criticize the government will be unable to change the government and so will be unable to secure what they believe to be better policies or to construct what they believe to be better constitutional law; 3. A place to form independent views: People need some private space in which they can develop their own views about good policy and constitutional law; 4. Dealing with real crises: A determined political majority can enact laws that repudiate fundamental constitutional principles. (Tushnet 1999, pp. 157–158)

Mark Tushnet and His Critics

Tushnet's theories have provoked a wide debate among legal theorists. John Rogers has noted that Tushnet would fail in distinguishing between "the issue of whether a branch has the *power* to interpret the Constitution, and the issue of what *is* the proper interpretation" (Rogers 1991, p. 258). By contrast, as Rogers argues, this distinction seems evident if we look to the Supreme Court, since "if the Supreme Court has the final constitutional power to interpret certain constitutional issues, then it has the power to interpret them *wrong* under some independently applied standard" (Rogers 1991, p. 259).

Erwin Chemerinsky observes that Tushnet's argument is shaped on Professor Larry Kramer's project for a "popular constitutionalism," though Tushnet uses the term "populist" instead of "popular." Nevertheless, Chereminsky underlines that Kramer and Tushnet share a great part of their approach; although refusing the idea of abolishing judicial review in his conception of popular constitutionalism, Kramer – Chereminsky notes – shares many of Tushnet's thesis by quoting his statements frequently.

Chemerinsky bases his critique of Tushnet by suggesting that abolishing judicial review would imply many problems; firstly, "constitutional interpretation would be transferred from an institution largely insulated from political pressure to

one that is highly majoritarian. Checks and balances would be lost most tragically in instances where the legislature simply chooses to ignore the Constitution at the expense of unpopular groups" (Chemerinsky 2004, p. 1016). Secondly, eliminating judicial supremacy would mean that the government or parliament get the last word about constitutional essentials, by subduing the Constitution to the will of temporary and allegedly tyrannical majorities. Eventually, Chemerinsky rejects Tushnet's argument against judicial supremacy by stating that:

> It is desirable to have an institution, largely insulated from direct majoritarian control, decide the meaning of the Constitution. Subject to overruling only by constitutional amendments and its own later decisions, the federal judiciary should have the last word in interpreting and enforcing the Constitution. (Chemerinsky 2004, p. 1022)

Chemerinsky reiterates that Tushnet fails in underestimating the advantages of judicial supremacy for democracy. At the same time, he adds, Tushnet seems to devote too many faith in populist constitutionalism, by ignoring the risks of this approach for constitutional values. In his critique of Tushnet, Chereminsky emphasizes that he does not provide enough arguments to defend populist constitutionalism, by offering no evidence for refusing judicial supremacy.

According to Chereminsky, Tushnet does not sufficiently develop his thesis according to which judicial review prevents the populist constitutional law, and this is – Chereminsky insists – the greatest weakness of his argument. Accordingly, "the idea of a populist constitutional law has great rhetorical appeal. But what exactly this means, and how eliminating judicial review will bring it about, are left unclear" (Chereminsky 2000, p. 1431).

Neal Devins has pointed out that Tushnet has the merit to give us a distinctive and significant contribution in the great debate about the role of the courts and justices in constitutional matters. Down one path, Devins defends Tushnet's attempt to question judicial supremacy but, down another path, he remarks that the "call for populist constitutional discourse does not make sense in the real world" (Devins 2000, p. 361).

Devins presents arguments in favor of Tushnet' rejection of judicial supremacy, by underlying, for instance, that judicial review is effectively a problematic issue within the constitutional theory. Nonetheless, he remarks that the Court often decides about hard cases in the sense of following the national political majority or being influenced by popular opinion. As Devins suggests, for Tushnet the problem concerns "the fact that judicial review encourages policymakers to care less about the Constitution. Rather than struggle over the possible constitutionality of their handiwork, lawmakers can simply delegate that question to the courts" (Devins 2000, p. 362).

Devins finally concedes that no arguments can be raised in favor of judicial supremacy, since a just and stable constitutional democracy "must involve elected officials as well as the people" (Devins 2000, p. 364). Thus, he concludes, when judicial review makes lawmakers uninterested in taking the Constitution seriously into account, judicial review itself should be suspected to be harmful to democracy.

Eventually, Devins emphasizes that considering the Constitution as the supreme law implies accepting the separation of powers as the key element of the democratic system. In turn, separation of powers implies judicial review: "just as judicial supremacy is not the answer, neither is the elimination of judicial review. Whatever the limits of judicial review may be, the cost of taking the Constitution away from the Court is too great. Whatever its deficiencies and limitations, judicial review is critical to the maintenance of our constitutional order" (Devins 2000, p. 371).

Conclusion

The populist constitutional law is one of the most interesting but also controversial contributions to contemporary legal philosophy. In the same vein as Richard Bellamy's republican approach to constitutionalism, Jeremy Waldron's idea of the

"dignity of legislation" or Cass Sunstein's "judicial minimalism," Tushnet's populist constitutional law is one of the most stimulating varieties of "political constitutionalism" as opposed to the so-called "legal" version of constitutionalism.

Tushnet's proposal stems from a liberal conception of law to argue in favor of the populist constitutional law as the best method for making constitutional decisions through majority rule, or overturning allegedly counter-majoritarian Supreme Court decisions.

Eventually, Tushnet believes that judicial review, to be democratically legitimate, should be confined to securing these populist prerogatives, together with a radical rejection of any form of judicial activism in the political sphere on this point see (Tushnet 2008).

Cross-References

- ▶ Claim Rights (Subjective Rights)
- ▶ Constitutionalism
- ▶ Constitutionalism: Political
- ▶ Corporal Punishment: Judicial
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Types of Legal Theory

- ▶ Legal Theory: Types of

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Ubaldis, Baldus de

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Problem

Baldus de Ubaldis (1327–1400) was Bartolus' pupil and one of the major medieval jurists. He was born in Perugia from the rich and established family of the Ubaldi or Baldeschi. He studied at Perugia, where Bartolus of Sassoferrato taught him civil law, and Federico Petrucci was his master in canon law.

It has been long accepted that he took his doctorate *in utroque* in 1344 and that subsequently he obtained his first chair at the University of Bologna. Only in recent times, thanks to the researches of Domenico Maffei on the sixteenth-century forgeries in legal literature, we know that the biographical information contained in the *Practica iudiciaria* attributed to Baldus is a complete forgery (Maffei 1979; Cortese 2013). The only secure date is 1351 when he was lecturing in law at Perugia. "Baldus was a professional teacher of law for the rest of his life. It was a profession which encouraged mobility as cities and *signori*, emperors, and popes competed to attract the services of the best jurists; in this respect, Baldus' career proved no exception. He remained at Perugia probably until 1357, and then taught at Pisa, probably from 1357 to 1358. On 25 June 1358, the Signoria invited him to a chair at Florence; his appointment was confirmed in 1359 and he taught there until 1364. He then returned to Perugia and lectured there from 1365 until 1376. From 1376 to 1379 he was professor at Padua, whence he again returned to lecture at Perugia. In 1390 he took up the invitation of Giangaleazzo Visconti to lecture at Pavia where (apart from a stay in Piacenza for a few months in 1399) he worked until he died" (Canning 1987, 4). In Pavia he wrote some of his major works, as the commentaries to the *Liber de Pace Constantiae* and to the *Libri feudorum*, which Baldus dedicated to Giangaleazzo (Dolezalek 1984; Danusso 1991).

Baldus was for all his life both a civil and a canon lawyer, teaching and writing in both laws some of the most important commentaries of the two *corpora iuris*. He also wrote a great number of legal opinions (*consilia*), where the best of his intellectual production as a jurist interested in public law can be found (Colli 1995). "The sheer volume of Baldus' juristic writings is prodigious [. . .], and may well constitute the largest output of any medieval jurist. As regards the quality of Baldus' work only Bartolus bears comparison with him" (Canning 1987, 7–8). That's why after the death of Bartolus of Sassoferrato, in 1357, Baldus improved and developed his reputation, becoming the most famous jurist all over Europe. It was "a reputation which attracted pupils from the rest of Europe as well as Italy. Indeed, some of his students achieved eminence in their own right:

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they included Pierre Roger de Beaufort (who later became pope Gregory XI), and the jurists, Petrus de Ancarano and Paulus de Castro" (Canning 1987).

Discussion

These considerations aside, it has been argued that Baldus was not simply an academic teacher of the law. His conception of the law as a part of moral sciences made him a master of a brand of legal wisdom very close to moral philosophy and as "Baldus philosophus" he was often recalled by his contemporaries. This was due not only to his use of Aristotelian works, with which Baldus was more familiar than his great master Bartolus. It was his large practical experience of different political systems, gained in his academic peregrinations around Italy, that gave Baldus the sense of a cultural and political relativism which can be easily found in his works. "He did not set out to write political theory as such: his works are entirely juristic in nature. Unlike Bartolus he wrote no professedly political tracts. Ideas and arguments which the modern interpreter may consider to come under the heading of political theory have to be sought out in Baldus' treatment of public law" (Canning 1987, 7). Sometimes, as in his commentary to the law *Decernimus* (Cod., 1, 2, 16), he accused his master Bartolus of prolixity, reducing, for example, the very complex legal doctrine on tyranny that had been articulated by Bartolus to a single definition by which Baldus affirmed that tyranny was present wherever the common good could not be freely (*libera voce*) defended (see Quaglioni 1980).

"Baldus' political thought possesses a fundamental structure which underlies and informs his whole treatment of public law: the acceptance that universally sovereign authorities, in the form of the emperor and the pope, coexist with territorially sovereign entities, that is independent city-republics and kingdoms" (Canning 1987, 17). So, combining historical, theological, and legal arguments, he tried to save the universal sovereignty of the emperor, solving the problem of the jurisdictional relationship between the emperor and the pope and justifying the current forms of political autonomy of the local powers. Among the best and most famous contributions to medieval and modern legal though is Baldus's definition of sovereignty, drawn from the law *Omnis iurisdictio* of the emperor Frederick Barbarossa, which had not been included into the *Libri feudorum* and which Baldus was one of the last jurists of his time to quote in his writings (Colorni 1967; Quaglioni 2008). His formula, expressed in a negative form ("He who is sovereign cannot have any other above him"; *ille qui est supremus non potest habere alium supra se*) has been rightly considered as a turning point in public law conceptions about jurisdiction and political power (Costa 1969, 186). Another important contribution comes from Baldus' commentary to the law *Omnes populi*, in Justinian's Digest (Dig., 1, 1, 9), where the text attributes to each nation (*populus*) in general the ability to create its own body of laws and where Baldus's interpretation emphasizes this ability as a governmental power which represents the "spirit and soul" of the people (see Calasso 1970, 63; Fassò 2001, 228–229). So, according to Baldus, "peoples with jurisdiction whether by concession or by custom enjoy through the exercise of their consent an autonomous sphere of action in their law-making" (Canning 1987, 102). Baldus was deeply immersed in the political and legal reality of his times, but contrary to his master Bartolus, who was the strongest apologist of popular government and a fierce enemy of all forms of tyranny, Baldus was not a supporter for any one form of government. He rather sought to provide juristically acceptable explanations of the several forms of government, jurisdiction and political organization which existed in his own day, but also of some of the most controversial problems of his times, such as the relations between Christians and Jews (see Quaglioni 1983). In this sense, one could say that the first and main intention of his works was the accommodation of legal science to contemporary reality.

"Baldus dominated the second half of the fourteenth century," highly contributing to consolidate the position of *ius commune* "as part of a common Christian culture of Europe" (Stein 1999, 73–74).

His academic fame and cultural influence long outlived him, and his writings occupied a central position in European legal thought until at least the first half of the seventeenth century.

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Unconstitutionality

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Introduction

A judicial review of constitutionality is generally considered the most important instrument for ensuring constitutional efficacy. In polities based on the rule of law, the mere existence of such an instrument has an anticipatory value. Court decisions on the unconstitutionality of statutes are taken into account when making and applying the law (cf. Kokott and Kaspar 2012, 805–806). By adhering to them, the legislator, as well as the executive and judiciary, allows people to order their business with confidence in the stability of law (cf. Walker 2005, 769). For that reason, it is necessary to take a closer look at the effects of unconstitutionality of statutes and a whole array of issues, implied in the operation of this segment of judicial review of constitutionality.

Already in the late eighteenth century, Alexander Hamilton observed that a limited constitution required that courts of justice be empowered to "declare all acts contrary to the manifest tenor of the constitution void" (Hamilton 1982, 394). This argument was restated in 1803 in *Marbury v. Madison*, a landmark case by which the doctrine of judicial review of constitutionality was introduced in the United States of America. In the case, the United States Supreme Court held that the principle essential to all written constitutions was "that the law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." In the 1920s, the early days of judicial review of constitutionality in Europe, Hans Kelsen observed that among the technical instruments for securing lawfulness of state functions, the nullification of an unconstitutional act is the principal and most efficient guarantee (Kelsen 1928, 221).

Court decisions on the unconstitutionality of statutes raise a wide range of legal and political

questions. Some of them are technical in nature, such as their temporal effects and their addressees, as well as the concrete obligations of those addressees. Others, however, touch upon the very essence of constitutional ordering: whether those decisions are the source of law, and if so, of what rank and is it only their holding or also their opinion, as well as what does the legitimacy of the judicial review of constitutionality rest upon in a given polity? These questions become even more complex when they are put in the perspective of an ever more interrelated national, supranational, and international system of government (Pizzorusso 1995, 12).

In addition to this, the extent to which the statutes are declared unconstitutional and to which these decisions are respected can be telling of the functioning of the separation of powers and distribution of powers in a given polity. The decisions declaring the unconstitutionality of statutes are, in principle, much more politically sensitive than the decisions upholding their constitutionality and therefore likely to provoke resistance of other institutional players within the system. "You are legally wrong because you are in a political minority!," the French ruling socialists lashed out at the Constitutional Council members in 1982 after they invalidated some provisions of the Statute on the Nationalisations (Favoreu 1988, 24). *Brown v. Board of Education* (1954), condemning the school segregation in the United States, was characterized as one of the most significant decisions of the Supreme Court, "an elemental force in American constitutional law"; yet, it encountered "imaginative varieties of 'massive resistance' [. . .] by the southern states" (Wiecek 1990, 158–159).

To answer these questions, this contribution focuses on the res judicata nature of court decisions, the force of the decisions' holding and opinion, the temporal effects of decisions on the unconstitutionality of statutes, and the addressees of those decisions.

Each and every of these questions is sufficiently complex that it deserves to be studied thoroughly and across the legal and political institutions of each polity. However, this entry is a comparative overview of the main features of the two principal systems of the judicial review of constitutionality – centralized and decentralized – with respect to the effects of unconstitutionality of statutes. The analysis of the centralized (European) system is based on the relevant institutions of Austria, France, Germany, Italy, and Spain, while the decentralized (American) system is based on the corresponding institutions of the United States.

Absolute and Relative Force of Res Judicata

In the European system, it is the constitution which generally determines the status of the constitutional court's decisions. This indicates their importance for the ordering of the legal system. The hierarchical status of the court's decisions declaring the unconstitutionality of statutes is summed up in their having absolute force of res judicata. The Spanish Constitution is particularly eloquent in that respect: "The judgements of the Constitutional Court [. . .] have the force of *res judicata* [. . .], and no appeal may be brought against them. Those declaring the unconstitutionality of a statute [. . .] shall be fully binding on all persons" (Article 164(1)). The similar provisions can be found in the constitutions of Austria (Article 140(7)), Italy (Article 137(3)), and France (Article 62(3)). It follows that the constitutional court decisions have the force of res judicata both in the formal and material sense. In the formal sense, they are conclusive of the unconstitutionality of the statutes without the possibility of appeal to them (*Res judicata facit jus* inter partes). In the material sense, the constitutional court decisions establish the "legal truth" and therefore bind everyone (*Res judicata pro veritate accipitur*). This feature is also known as the *erga omnes* effect of constitutional court decisions.

The constitutional court decision on the unconstitutionality of statutes has *erga omnes* force independently of the type of proceedings from which it originates. The most obvious case is the abstract review of constitutionality, brought about by the public authorities and not by individuals; the embodiment of the objective character of the

constitutional adjudication. The same applies to the concrete review of constitutionality which stems from the division of work between ordinary courts and constitutional courts in the centralized system of constitutional adjudication. If an ordinary court concludes that the statute on whose validity its decision depends is unconstitutional, it stays the proceedings and refers the issue to the constitutional court, which authoritatively decides on its constitutionality (cf. Basic Law of Germany, Article 100(1)). Finally, the judicial review of constitutionality of statutes can originate in the individual constitutional complaint proceedings, in which it is possible to challenge the constitutionality of statutes (e.g., Germany and Austria). In these instances the decision on the unconstitutionality of statute also has an *erga omnes* force, thereby securing the coherence of the legal order (Favoreu et al. 2019, 267–268).

Creation of the supranational judiciaries for the protection of human rights, in the aftermath of World War II, such as the European Court of Human Rights, has had effects on the hierarchical superiority of the constitutional court decisions. The jurisdiction of the European Court to deal with the individual applications filed against the domestic remedies, including the constitutional court decisions, affects the sacrosanct res judicata status of these decisions both in the formal and material sense (cf. Marinkovic 2015). However, this would not be the case with the constitutional court decision on the unconstitutionality of statute (rendered, e.g., in the constitutional complaint proceedings), inasmuch with the constitutional court interpretative decision, which formally upholds the constitutionality of a statute while substantially amending (invalidating) it through its reserves of interpretation (see *infra* 3).

In the United States, due to the decentralized system of judicial review, the res judicata force of court decisions declaring the unconstitutionality of statutes is not absolute, but relative. The decisions of courts have first and foremost inter partes effect binding solely the parties to the decided case. However, they can also have an effect on all other litigations presenting identical or similar questions insofar as they create precedents for other courts. In accordance with the rule of precedent, decisions of the Supreme Court are not only binding to that court but also to all inferior courts. As a result, although formally Supreme Court decisions have only relative force of res judicata, in practice they have the effect equivalent to invalidation for the whole territory of the United States (Favoreu et al. 2019, 260).

Binding Force of the Holding (and of the Opinion)

The almost universally acknowledged absolute force of res judicata of the decisions on the constitutionality of statutes, in the centralized system of constitutional adjudication, does not answer the question of which part of the decision is binding. Is it only the holding of the decision, or is it also its opinion? In the original understanding of the nature of the judicial review of constitutionality, as portrayed by Hans Kelsen, this question seems to be of little importance. "Constitutional judges are 'negative legislators': their lawmaking authority is restricted to the annulment of legal norms that conflict with the constitutional law" (Stone Sweet 2012, 819). In the holdings of their decisions, they rule simply on the (un)constitutionality of statutes. As a result, there are two types of decisions: on the constitutionality and on the unconstitutionality of statutes.

However, by their power to interpret the law, constitutional judges are also positive legislators. To the extent to which their interpretation concerns the provisions of the constitution and not only of the disputed statute, they can be considered constitutional co-makers (Stone Sweet 2012, 827; Troper 1994). Constitutional judges provide their interpretation in the opinion of the decision. In principle, those decisions uphold the constitutionality of statutes, with the distinction that they contain also the reserves of interpretation, hence the intermediate type of constitutional court decisions – interpretative decisions. Depending on the nature of their interplay with the legal system, interpretative decisions can be constructive, when they introduce a new provision in a legal system; neutralizing, when they take away the

meaning of an existing provision in a legal system; and directive, when they specify the "right" meaning of an already existing provision in a legal system to be applied (Rousseau 2001, 156–157).

The expansion of the interpretative decisions in Austria, France, Germany, Italy, Spain, and other countries is explained by their flexibility. The constitutional judges are aware of the fact that the simple decisions on the unconstitutionality of statutes imply, at the end of the day, contempt of the parliament. In addition to possible institutional vanities and tensions, the simple decisions on the unconstitutionality of statutes can undermine the legal order, while nominally protecting it, by creating legal gaps (cf. Rasson-Roland 2012, 597). As a result, constitutional judges have come up with decisions in which their interpretation of the statute becomes a veritable condition of its constitutionality (Pizzorusso 1995, 13).

It is obvious that the authority of those decisions, insofar as they create a new norm – under the guise of interpretation – goes beyond their usual res judicata force (cf. Rasson-Roland 2012, 597). However, this is the case only if the binding force is attributed not only to the holding of the decision but also to its opinion. In Germany and France, the binding force of the opinion of the decision was recognized in a praetorian way by the constitutional judiciaries themselves (Passaglia 2012, 620). In Spain, the same goal was achieved through the Constitutional Tribunal's authority to interpret the Constitution and annul the Supreme Tribunal's decisions, in the *amparo* proceedings, when they do not follow its interpretative decisions (Passaglia 2012, 620, 634). In Italy, on the other hand, the absence of individual complaint proceedings has prevented the Constitutional Court from imposing its interpretations on the ordinary judiciary. The opinion of the interpretative decision has binding force only for the ordinary court which referred to the Constitutional Court in the concrete review of constitutionality (Passaglia 2012, 620, 633–634).

It follows that, contrary to the simple decision on the (un)constitutionality of statutes, the essence of an interpretative decision is not in its holding, but in its opinion. The force, which is habitually attributed to a reasoning contained in the opinion, is not that of a res judicata, but of a precedent (Rubio Llorente 1995, 23). This is another reason to take a look at the functioning of the judicial review of constitutionality in a common law country, where precedent is the source of law. In the decentralized system of the judicial review of constitutionality such as the United States, not only the holding but also the opinion of a decision has a biding force to the extent to which the courts adhere to the doctrine of stare decisis, or precedent. In accordance with this doctrine, the courts are bound by authoritative prior decisions of higher courts and in some instances of the same level courts. More specifically, they are bound by the result and a rule or rationale underlying the result of the prior decision. Consequently, the court bound by a prior decision has to distinguish between the reasoning necessary for that decision (ratio decidendi) and other statements "said in passing" (obiter dictum) in the opinion of the decision it has to follow (Bix 2004, 163, 205).

Temporal Effects

The temporal effects of a constitutional court decision declaring the unconstitutionality of a statutory provision revolve primarily around the question of whether it should have consequences only on future events or whether it should also impact past events, with respect to the moment of decision publication. The elimination of an unconstitutional legislative norm with a solely prospective effect is usually named abrogation, while the elimination with a retroactive effect is usually named nullification. The difference in terminology has no real significance (Venice Commission 2001, 13).

In the centralized judicial review system, the temporal effects of judicial decisions on unconstitutionality are particularly complex. The legal systems normally opt for one of two possibilities for elimination of an unconstitutional statutory provision – abrogation or nullification – providing simultaneously for various types of modulation of temporal effects of a constitutional court decision. This, ultimately, attenuates the differences

between the two models. The need for the modulation of the temporal effects of the constitutional court decision comes from the fact that the abrogation and nullification rely on important yet conflicting societal values: legal security and lawfulness.

Abrogation of unconstitutional statutory provision produces effects prospectively, *ex nunc*, normally from the moment of publication of the court's decision. The effects which the norm has produced, prior to the decision, are maintained, even though the constitutional court established its unlawfulness. The reason for such an approach is the high value placed on legal security – the importance of trust in the validity of legal norms and acts established thereunder. All the addressees of a norm need to be certain that the norm which entered into force will produce effects that cannot be challenged even if the competent body finds that the original norm is unlawful and decides to eliminate it from the legal system (Magnon 2012, 576).

The Austrian Constitution states, as a matter of principle, that the abrogation enters into force upon expiry of the day of the publication of the Constitutional Court's decision (Article 140 (5)), allowing for the application of the statute to the circumstances effected before the abrogation unless the Constitutional Court decides otherwise (Article 140 (7)). Following the Austrian model, most states have opted for the invalidation "which takes effect on the date the judgment is given or published (*ex nunc* effect) or soon afterwards" (Venice Commission, 13). For instance, the Italian Constitution stipulates that the when Constitutional Court "declares the constitutional illegitimacy of a statute [. . .], the statute ceases to have effect the day following the publication of the decision" (Article 136 (1)). Also, the French Constitution, amended in 2008 to introduce a posteriori concrete review of constitutionality, states that "a provision declared unconstitutional [. . .] shall be abrogated as of the publication of the decision of the Constitutional Council" (Article 62 (2)).

Nullification of unconstitutional statutory provision produces effects retroactively, *ex tunc*. If the norm is nullified, it is considered that it has never been part of a legal system. The judicial decision has the purpose of purifying the legal system from an unlawful norm and its effects. It provides a fiction that the effects such a norm may have produced have normatively not taken place. The respect of lawfulness takes precedence over legal security (Magnon 2012, 557).

Driven by this philosophy, German Basic Law stipulates that "if a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained [. . .] from the Federal Constitutional Court where the Basic Law is held to be violated" (Article 100(1)). Furthermore, "if the Federal Constitutional Court comes to the conclusion that federal law is incompatible with the Basic Law [. . .] it shall void the law" (Federal Constitutional Court Statute, Article 78). Accordingly, "a case based on a legal provision which [. . .] was voided pursuant to § 78, or which was based on the interpretation of the legal provision which the Federal Constitutional Court declared to be incompatible with the Basic Law may be reopened pursuant to the provisions of the Code of Criminal Procedure to challenge a final conviction" (Federal Constitutional Court Statute, Article 79(1)). It follows that the German legal order embodies a system in which the principle of lawfulness is expected to apply in an absolute way ("zero default") – judges are supposed to apply only lawful rules (Magnon 2012, 557).

Different types of modulation of temporal effects of decisions declaring the unconstitutionality of statutes are possible in both systems. As to the effects in the past, retroactivity can be of general or limited immediate effect. Retroactivity of a general immediate effect prevents the application of an invalidated statute on all the pending administrative and judicial proceedings (Magnon 2012, 561). Retroactivity with a limited immediate effect prevents the application of an invalidated statute only on the pending judicial proceedings; or it can be even further limited to only the non-application of an invalidated statute on the proceedings which was at the origin of the concrete review of constitutionality (Magnon 2012, 561–562). These types of modulation of temporal effects of decisions declaring the

unconstitutionality of statutes serve the purpose of correcting injustices that would incur if an abrogated statute continued to be applied to the proceedings pending at the moment of its invalidation.

Modulation of temporal effects of decisions declaring the unconstitutionality of statutes is also possible with regard to future events. The principal case is postponed invalidation. Since the invalidation of a statute may create legal gaps, some legal systems provide for the possibility to postpone the effects of the invalidation for a certain period of time in order to allow the legislature to adopt a new statute (Magnon 2012, 562). The postponed abrogation creates a provisional period within which the invalidated statute continues to be applied in a general manner to all possible situations or it continues to be applied in a limited manner only to situations that have taken place at the moment of its invalidation. And there is also a third possibility, that the constitutional court adopts a provisional regulation, which would be applied pending the adoption of a new statute by the legislator (Magnon 2012, 563).

In contrast to the European model of judicial review of constitutionality, in the United States, there is neither the abrogation nor the nullification of a statute. The Supreme Court's decision declaring the unconstitutionality of a statute results in the subsequent non-application of that statute by the executive and judiciary on the national and/or state level, but not in its abolition. Hence, if the Court overrules its previous decision on unconstitutionality of a statute after a number of years, which it did, for instance, in the New Deal era, or more recently with anti-abortion legislation, the invalidated statute can be applied anew without any need for a legislative reenactment. Accordingly, the judicial declaration of the unconstitutionality of a statute has the effect of its suspension in the legal system (Dorsen et al. 2003, 139).

Addressees

Court decisions declaring the unconstitutionality of statutes have direct normative effects, creating legal obligations for all public institutions, especially executive and judicial power, to refrain from further applying a statute which has been invalidated. In the centralized system of judicial review of constitutionality, this obligation is specified in the highest law of the country itself. For instance, in Austria, "if a law has been rescinded on the score of unconstitutionality [. . .] all courts and administrative authorities are bound by the Constitutional Court's decision" (Constitution, Article 140 (7)); or in France, "decisions of the Constitutional Council [. . .] shall be binding on public authorities and on all administrative authorities and all courts" (Constitution, Article 62 (3)).

Further, court decisions on the unconstitutionality of statutes do not stop short of the direct normative effects. They also have indirect effects on the legal and political system, creating not only negative or positive obligations upon different constitutional bodies but also other kind of their reactions, thereby engaging (constitutional) courts in a wider political process. This is sometimes even more the case with interpretative decisions that are formally decisions on the constitutionality, but substantively on the unconstitutionality of specific statutory provisions (see 3 *supra*).

To assess the narrower and wider impact of court decisions upholding the unconstitutionality of statutes on the legal and political system, the addresses of those decisions are presented in this section, more specifically the constituent power and the constituted powers: legislative, executive, and judicial.

Constituent Power

Judicial review of constitutionality very often has a direct impact on constituent power, as manifested in many constitutional revisions adopted in reaction to the decisions on the unconstitutionality of statutes. For instance, granting women political power in France and Italy at the turn of the twentieth century through legislative gender quotas did not take place without judicial battles, negative reactions of constitutional courts, and, ultimately, their constitutional entrenchment (Evola et al. 2023). Furthermore, of 27 amendments to the United States Constitution, as many

as one quarter can be interpreted as reversing Supreme Court decisions: for instance, the Fourteenth Amendment (1868) overturned the *Dred Scott v. Stanford* (1857) – the most infamous Court decision – by extending citizenship rights to all native-born and naturalized Americans (Vile 2005, 231).

Although the "last word" of constituent power may appear as a degradation of the judicial review of constitutionality, it is precisely this *rapport de force* which legitimizes the power of the courts to declare the statutes unconstitutional. According to Louis Favoreu's theory of switchman (*aiguilleur*), the judicial opposition to statute is not definitive since it can be overcome by the revision of the constitution. Accordingly, the courts appear as switchmen who direct reforms along adequate normative tracks, in this context constitution-amending ones (Favoreu et al. 2019, 398).

Legislative Power

The effects of unconstitutionality of statutes on legislative power are multifarious, depending on the specificities of the invalidated statutory provision. In the European system, the constitutional courts' decisions being binding for the constitutional organs, the legislator must refrain from adopting the same statutory provision declared unconstitutional. In France, this rule applies also to a statutory provision which, although formulated in different terms than the invalidated provision, reproduces, in fact, the substance of it (Favoreu et al. 2019, 388). In Germany, also, the work of Parliament is heavily influenced by the Federal Constitutional Court's case law. If there is a margin of appreciation of the legislator, constitutional law cannot predetermine the legislator's policies. However, if the constitutional judiciary has put limits on them, they narrow down the discussion of the possible legislative choices (Arnold 2012, 120).

Still, there are also inherent limits to the res judicata force of the courts' decisions on the unconstitutionality of statutes. In principle, those decisions are of the same rank as the statutes which they invalidate. For instance, the German Federal Constitutional Court Statute explicitly states that the Constitutional Court decisions rendered in the proceedings on the compatibility of statutes with the Basic Law "shall have the force of law" (Article 31(2)).

Consequently, some authors consider that there is an infringement of the res judicata force only when the statutory provision which is declared unconstitutional is validated, which is not the case with the adoption of the same statutory provision *pro futuro* (Passaglia 2012, 619). Furthermore, they warn of the risk of petrification of the constitution if the constitutional judiciary does not have the opportunity to revisit its case law. This would imply, for the decisions on the unconstitutionality of statutes, that the legislator should have the power to adopt a new statute in the same or similar terms as those which were declared unconstitutional, especially after certain laps of time (Rubio Llorente 1995, 23).

In this context it is important to remember that *res iudicata* typically applies to the cases that have the same cause, object, and litigants (Favoreu et al. 2019, 388). And there is another important distinction to make. The review of constitutionality basically consists of three operations: interpretation of the disputed statutory norm, the interpretation of the constitution as the reference norm, and the confrontation of the results of the first operation with the second (Rasson-Roland 2012, 594). Court decisions that focus on the interpretation of the statutory provisions can be overturned simply by enactment of a new statute. For instance, in the United States, bills are introduced in Congress to reverse or modify a significant number of the Supreme Court's "statutory" decisions (Baum 2005, 852).

The decision on the unconstitutionality of statutes may create not only negative but also positive obligations for the legislator. Elimination of a statutory provision from a legal system almost inevitably creates a legal gap: a legal obligation disappears and a legal freedom takes its place (Kelsen 1928, 243). In order to avoid the risk of horror vacui, the constitutional court and legislator may be called upon to act, in a number of different situations.

Already Kelsen discussed this problem. He suggested the possibility of making effective again the "old" statutory provision, which had

been in force before the adoption of the "new" statutory provision, subsequently invalidated by the constitutional court. According to him, this rule of replacement should not apply automatically, *ex constitutione*, but only if the constitutional court considers the reentry into force of the old statutory provision to be justified (Kelsen 1928, 243–244). This possibility was introduced in Kelsen's fatherland (cf. Constitution of Austria, Article 140(6)).

A more common reaction would be that the legislator remedies such a situation by adopting a new statutory provision. For instance, the German Constitutional Court reminds the legislator of its obligation to reform the legal system (*Nachbesserungspflicht*). The Court deduces this obligation from Article 20(3) of the Basic Law which stipulates that "the legislator shall be bound by the constitutional order, while the executive and judiciary by law and justice" (Passaglia 2012, 621). The practice of legislative reforms, induced by the constitutional court's decisions on unconstitutionality of statutes, can be found also in Italy and Spain (Passaglia 2012, 636). In the European system, the constitutional courts sometimes find necessary to adopt decisions which modulate the temporal effects of the invalidation so that the legislator is given needed time – up to 18 months in Austria (Constitution, Article 140(5)) – for the necessary legislative reform (see 4, *supra*).

Executive Power

In line with its multifunctional nature, the executive branch of government may be affected in various ways by a court decision on the unconstitutionality of a statute. In the centralized system of judicial review of constitutionality, the *erga omnes* force of the court decisions implies that they are binding for all administrative authorities. It follows that there is an obligation of the executive not to apply in individual cases statutory provisions which were declared unconstitutional (Passaglia 2012, 623). Furthermore, in the parliamentary system of government, the executive is expected not to initiate a statute which would contradict the tenet of the court's ruling.

However, the obligation of the executive may be not only negative but also positive in that respect. The executive is also expected to amend the implementing legislation which was initially adopted on the basis of a statute which was subsequently invalidated. It is in this context that the Organic Statute on the Spanish Constitutional Tribunal, mirroring the respective German Statute, stipulates: "The Tribunal [. . .] may specify [. . .] the body responsible for execution, [and] necessary enforcement measures" (Article 92(1)). Depending on the type of temporal effects the decision produces, the administrative authorities may be called to reopen the proceedings at the initiative of an interested party.

In the decentralized system, such as the United States, court decisions declaring the unconstitutionality of statutes are also binding on the law enforcement authorities. And to the extent to which those decisions have de facto *erga omnes* force, their effect is even more powerful. This is the case with controversial Supreme Court decisions too – they have not put into question the basic acceptance of the judicial review of constitutionality in the United States (Lasser 2005, 747). Nevertheless, due to the fact that the Supreme Court operates within a system of true separation of powers, it finds itself, from time to time, in open conflict with the political branches of government. The resistance to the Court's unpopular decisions sometimes leads to attempts to curb it, with potentially chilling effects on the Court's further work. The most publicized example of that kind was President Franklin D. Roosevelt's "court-packing plan." Unhappy with the Court's opposition to his New Deal legislation, Roosevelt came up with a plan in 1937 to pass a statute in Congress that would allow the President to appoint one justice for every Supreme Court justice over the age of 70, up to a total of 6. Ultimately, the President won the war even without the legislative changes, since one of the former majority justices shifted ("switch in time that saved nine"), while another retired allowing, after all, the President to have the necessary number of sympathetic votes in the Supreme Court (Solomon 2005, 233–234).

Judicial Power

Court decisions on the unconstitutionality of statutes produce effects on the work of the judicial power too. The ordinary general and specialized jurisdictions are under obligation not to apply the statute declared unconstitutional. In the European system of judicial review, the specific temporal effects of court decisions on unconstitutionality of statutes may have as a consequence further provisional application of an invalidated statute or reopening of court proceedings (see 4 *supra*). These aspects of the *erga omnes* force of the court decisions on unconstitutionality of statutes do not pose a problem in practice (Passaglia 2012, 633).

However, the same conclusion does not work for the interpretative decisions. The constitutional courts' reserves of interpretation, which are a condition of validity of the challenged statutory provisions, are not always welcome and followed by the ordinary courts. In some instances, there are true judicial battles between the constitutional courts and the courts of cassation over the repartition of the respective domains of interpretation. The courts of cassation do not dispute the constitutional courts' power to interpret the constitutional provisions, but they question their authority to interpret the statutory provisions considering it to be the prerogative of the ordinary judges (Passaglia 2012, 633).

The differences of experience of Italy and Spain are illustrative as to the outcomes of those battles. Constitutional justice in Italy is based on the cooperation of the ordinary and the constitutional judges, since the former provide the docket of the latter by referring statutes for the review of constitutionality. The conflict between two groups of judges ended after the Constitutional Court had accepted the primacy of the Court of Cassation whenever there is a consistent interpretation of a statutory provision. In Spain, on the other hand, the frictions between the two groups of judges still reverberate, due to the Constitutional Tribunal's power to annul the Supreme Tribunal's decisions in the proceedings for the protection of the constitutionally entrenched human rights (Passaglia 2012, 633–634).

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Unger, Roberto Mangabeira

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Introduction

Roberto Mangabeira Unger (b. 1947–) is a synoptic thinker whose work in legal and social philosophy rests on his distinctive conceptions of self, society, and history. He was a founding figure of the Critical Legal Studies movement (CLS), but his contributions to the study of law and society are not limited to his role in CLS. In light of the scope and ambition of his thought, Unger's work is more reasonably compared to that of Hegel, Marx, and Mill than to the work of other figures associated with CLS.

Unger's thought is unabashedly humanist in that it affirms and celebrates the power and potential of humanity. Accordingly, his work stands strikingly apart from the anti- and posthumanist movements of twentieth-century philosophy, especially those inspired by the late Heidegger, Foucault, and Derrida, which wholly rejected the optimistic understandings of human agency and cognition associated with the Enlightenment. By contrast with those movements, Unger hopes to see "common humanity [carried] to a higher level of power: not just practical capacity . . . but power to transcend the insights and products of established society and culture" (1987a/2004: cxvii).

Early Works

Unger's first book, *Knowledge and Politics* (1975), is an examination of the main ideas of modern liberal thought and an account of the contradictions to which those ideas give rise. The contradictions penetrate to the heart of the liberal legal order, which seeks to secure maximum equal freedom for all through the rule of law. Maximum equal freedom requires a system of law that is neutral among the contending values that people hold. The rule of law requires a system in which the authoritative rules are applied to decide particular cases in a way that preempts any appeal to values, so that a firewall exists between law (adjudication) and politics (legislation).

Unger argues that liberal thought is unable to provide an account of how maximum equal freedom could ever be established. Neutrality can only be secured at the price of vacuity: a neutral system of laws would be devoid of the concreteness needed to govern society. Vacuity might be averted by invoking the objectively valid character of concretely specified values, but, on Unger's account, liberalism treats values as subjective and so turns its back on a possible escape route from the conundrum. Additionally, Unger argues that liberalism's theory of meaning, which rejects the Aristotelian view that things have fixed essential natures, cannot make intelligible the requirement that legal cases be decided under rules that preempt an appeal to values. He concludes that "no coherent theory of

adjudication is possible within liberal political thought" (1975: 98).

Unger's criticism of liberalism in *Knowledge and Politics* found favor within CLS, whose proponents contended that politics and its conflicting values necessarily suffused legal reasoning and thereby undermined the rule of law. But while many of those proponents dismissed the very possibility of the rule of law, Unger's argument is limited to showing that its possibility is incompatible with certain liberal premises, including its ideas about values and meanings. He did not argue that the rule of law is impossible, full stop.

In his next book, *Law in Modern Society* (1976), Unger provides an historical account of the rise and – as he sees it – the demise of the liberal legal order. The demise is traced to the emergence of the welfare state and its pervasive reliance on administrative bureaucracies more concerned with the efficient achievement of their goals than with following general rules that restrict their discretion. Unger speculates that a postliberal order could emerge in which society is bound together by customs that "represent some sort of natural order instead of a set of arbitrary choices" (240).

Unger's Turn

Beginning with *The Critical Legal Studies Movement* (1983), Unger decisively rejects his earlier suggestion that there is a special social order that is natural for humans. This turn in his thinking is a consequence of the development of an idea that appears only in passing in his earlier work but becomes central to Unger's thought, viz., that persons are both context-transcendent and context-dependent beings. The idea means that persons have powers of insight, imagination, and thought that transcend any given framework of ideas, practices, and institutions, even while such frameworks are indispensable for a meaningful form of freedom through the measure of stability they lend to human life. In a later work, Unger explains, "[W]e are an infinite caught within the finite . . . [N]o one context can be our permanent home: the place where we can institute all of the varieties of practical or passionate connection that we have reason to want" (1987a/2004: 12).

In his three-volume *Politics* (1987a/2004, 1987b, c), Unger provides accounts of self, society, and history oriented around the twofold relation of persons to their contexts. His view takes "to the hilt" (1987b: 1) the modern idea that every society is an artifact, i.e., a contingent construction of thought and action. Unger argues that a corollary of this idea is that abstract social and political concepts, such as those of capitalism and democracy, have no single privileged institutional embodiment but rather can take on any of a wide range distinct realizations. To identify any particular institutional embodiment with the concept itself is "institutional fetishism" (1987b: 12) and a denigration of the society-making powers of humans. In a related vein, Unger argues that societies are not systems whose elements comprise indivisible bundles of institutions that stand or fall together. Rather, societies are loosely structured amalgams of institutions that can be put together in many different combinations.

In Unger's view, a stable social order is the contingent and temporary outcome of collective struggles, conflicts, and compromises. The order comprises a formative context that persons take for granted in their routine actions and thoughts, and their context defines the terms on which individuals have access to resources and opportunities for making their future. Every formative context has inertia, but none has necessity. A context is difficult to disturb, but some are more so than others. What Unger calls the illusion of "false necessity" (1987a/2004) presents the contingent and transitory products of social struggle and inertia as manifestations of inalterable and narrow constraints on human possibility.

Unger proposes a system of rights that aims to do justice to the context-transcending powers of the human self. The system includes "immunity rights," which protect the most vital interests of persons by guaranteeing certain resources and opportunities to all and placing those guarantees beyond the reach of ordinary politics, and "destabilization rights," which empower persons to disrupt institutional pockets of power that have locked in their control of some area of economic

or political life. Unger's system also incorporates nontraditional entitlements to divisible portions of capital; these entitlements are different from the traditional property right in that they disaggregate the elements of property and assign them to different parties. The traditional, consolidated property right would not be eliminated, but conditional and fragmented claims to productive resources would be a feature of the system, with the aim of allowing access to capital to be spread widely.

In Unger's view, critical to human progress is the construction of formative contexts much less resistant to change than has historically been the case. Such disentrenched contexts better respect human powers of transcendence, but, for Unger, they also provide improved prospects of realizing the two central goals of the progressive movements of modernity: widespread material abundance and individual emancipation from illegitimate hierarchies and rigid social roles. And disentrenchment would, he says, rescue humans from a persistent and undesirable feature of history: the dependence of major social reforms on crises such as war and economic collapse.

Unger favors institutions that would enable contexts to be revised through cumulative, piecemeal changes. There would be no revolutionary moment in which one context is replaced with a radically different one. Unger regards the idea of such a moment as mistaken and pernicious. Nor would the piecemeal changes amount to a kind of mild incrementalism that introduces minor modifications but leaves the basic structure of society intact. Instead, the changes would amount to "revolutionary reform" (1987b: 163–164) by moving society in a consistent direction that, over time, results in a new type of order.

Critical Legal Studies: Looking Back

In the heyday of CLS, during the 1980s, some proponents seemed to argue that the law was radically indeterminate in meaning, so that a skilled lawyer could provide equally plausible but opposing interpretations of any of the authoritative materials. Looking back on the movement several decades later, Unger holds that no one ever believed in such indeterminacy, though he admits that the rhetoric of indeterminacy "seduced its proponents into an intellectual and political desert and abandoned them there" (1983/2015: 27). The "desert" was the mistaken belief that "[i]t hardly mattered who won or lost in politics," because "once made by the winners, the laws could be made to mean something else," as long as judicial offices were occupied by those sympathetic to the political losers (28). This belief rests on a failure to realize that law is the part of a formative context in which conceptions of the right and the good take on concrete, practical, and stabilized form.

In Unger's estimation, the most important aspect of CLS was the idea that "legal thought can become a practice of institutional imagination" (1983/2015: 29). Such a practice seizes upon deviant elements within the law and imagines them as starting points for arrangements that do a better job than existing institutions of realizing the highly abstract ideals – such as democracy and freedom – said to be embodied in the law. However, Unger notes out that although CLS "helped disturb the consensus in the study of law" by rejecting the distinction between politics and law and challenging the existing formative context, "it largely failed . . . to turn legal thought . . . into a source of ideas about alternative social regimes" (1983/2015: 32).

Rationalizing Analysis and the Alternatives

Unger calls the reigning method of legal thought "rationalizing legal analysis." It regards law as "something more than ephemeral conflict and compromise among clashing interests and visions" and represents law as a system of norms that constitutes an "approximation to an intelligible and defensible plan of social life" (1983/2015: 9). Rationalizing analysis aims to provide an elucidation of the law that shows its norms in their best light and that enables jurists to identify and correct the anomalous "mistakes" found in the authoritative materials.

One form of rationalizing analysis is associated with Ronald Dworkin and seeks to represent the law as the embodiment of a morally attractive scheme of rights-protecting principles. Another form, exemplified by the work of Richard Posner, sees the law as the embodiment of a principle of economic efficiency. Both forms allow that existing law is not a perfect reflection of their favored principles, but their aim is to advance the process by which the law "works itself pure," to use Lord Mansfield's famous phrase.

Unger repudiates rationalizing legal analysis as a form of conservativism that endows existing law with a specious rationality, thereby entrenching the reigning forms of democracy and the market. But in doing so, rationalizing analysis turns judges and legal theorists into "judicial mystagogues" (1996: 110) and betrays its hostility to democratic politics. Rationalizing analysis ignores the origin of law in deep conflicts of ideals and interests, papering over the fact that law is a transitory interruption of those conflicts. For Unger, law represents a temporary resting place for society and consists in a ramshackle body of compromises and concessions, reflecting the relative power and determination of the contending parties.

Unger argues that rationalizing analysis should be replaced by two main kinds of legal thinking: "purposive analogical reasoning" (1996: 114), which would be the province of judges deciding hard cases and addressed to other legal professionals, and "institutional imagination" (130), which would be the province of legal thinkers and addressed to all citizens seeking for their society's future an alternative to the existing institutional framework.

The hard legal cases that arise when fact-patterns and authoritative materials do not dictate clear answers are not to be resolved by ascending to higher levels of abstraction in search of attractive principles of right or efficiency. Rather, the resolutions are to be sought in exploring the actual purposes behind the relevant provisions of the authoritative materials. The idea is not to look for the best purposes that could be plausibly read into those provisions but rather "to respect the capacity of parties and movements to win in politics, and to encode and enshrine their victories in law" (1996: 114). The purposes "count not because they are best or wisest, but because they won" (114). Purposive analogizing is thus compatible with the recognition of the law as a ramshackle product of conflict and compromise.

Nonetheless, Unger acknowledges that there are situations in which judges justifiably adopt a more ambitious form of legal reasoning, when the law entrenches arrangements that block popular self-government. Such situations call for "judicial statecraft" and "a bold remaking of the law" by judges in what amounts to a "gamble for [popular] support." Unger mentions "[t]he partnership of the American federal judiciary with the civil-rights movements" as an example in which the gamble was justified and paid off. It is unclear, though, how this kind of judicial statecraft differs from rationalizing analysis, aside from the fact that Unger appears to regard it as a form of legal thinking that judges should pursue only in the limited range of circumstances in which they must "cut through a Gordian knot in the law" in order to remove blockages choking democracy (1996: 118).

Legal thought as institutional imagination is a critically oriented complement to purposive analogizing and "explore[s] the interplay between the detailed institutional arrangements of society as represented in law, and the professed ideals or programs that these arrangements or ideals frustrate and make real" (1996: 130). This is the form of thought that Unger found so potentially valuable in CLS, even though he concluded that the movement failed to follow through on it.

Freedom, Equality, and Democracy

Unger finds the ideals that guide his thought in the democratic and other emancipatory movements of modernity, with their principles of individual and collective autonomy. In his view, these ideals "have aroused humanity in every corner of the globe" (2014: 291) and hold higher authority than competing ideals because of their success "across a broad range of societies over many generations" in "overthrow[ing] conceptions that

[had been] ascendant in the high cultures of all great civilizations" (2014: 300). But a key mistake of many who embrace the ideals of freedom and democracy is to think that the existing institutional realizations of those ideals are their true and unsurpassable embodiments. Unger thinks that the most influential political philosophies of the day are guilty of such institutional fetishism.

Unger embraces "the central promise of democracy," namely, "that ordinary men and women will have a chance to become freer and greater" (1996: 46). He calls the kind of freedom he has in mind "deep freedom," and the "greater" life to which he refers is one in which an individual "make[s] a self by struggling against a context" (47). Deep freedom does not mean incessant context-smashing, but it does mean a refusal to take any formative context as beyond challenge and change: "[w]e develop our faculties and powers by moving within [formative] structures, but also by resisting, overcoming, and revising them" (1998: 7). Deep freedom is achieved only when the contexts in which we participate make available to us opportunities for their own revision as we pursue our normal course of activities.

Unger folds into his conception of deep freedom two "sacrosanct" (2014: 296) forms of equality: equality of respect and of opportunity. He does not provide any abstract metric for conceptualizing these forms; rather, he explains them in terms of the sorts of institutions that would help realize them. Among Unger's main ideas here are that equality of respect demands institutions that treat all as equally capable of exercising context-transcending powers and that such institutions must, among other functions, secure the same political rights for all and replace inheritance of private wealth from one's family with inheritance of educational and economic opportunities and endowments from society.

Principles of equality that directly constrain the benefits that market transactions can bring to the most advantaged, or that condition those benefits on their raising the level of the least advantaged, are misguided in Unger's view. Once equal respect and opportunity are secured and everyone has effective access to productive resources and opportunities, it is a mistake to then demand, as does, for example, Rawls's famous difference principle, that the most advantaged gain only if their gain also redounds to the greatest benefit of the least advantaged. Unger thinks that any such demand would drag down economic innovation and thus interfere with the pursuit of widespread material abundance.

Rawls and like-minded liberal egalitarians argue that democracy must be protected from distortion and subversion arising from the accumulation of wealth in the hands of a few, and Unger agrees. But he thinks that those liberals have missed the mark by failing to develop an account of the kinds of institutions that would help protect democracy from that threat. He thinks that existing democracies have fallen prey to the threat in part because their political arrangements discourage mobilization by the citizenry and make it exceedingly difficult for any successful challenge to the reigning economic structure to be mounted. Unger formulates many proposals, such as his destabilization rights, whose aim is to reinvent democratic institutions so that they stimulate popular mobilization, overcome political gridlock, and realize deep freedom.

Self-assertion

In Unger's view, there are certain conflicting demands that afflict human life and can never be entirely resolved by any social or political order. The most basic of these conflicts involves "the enabling requirements of self-assertion" (2014: 85). On the one hand, a person must be free of dependence on, and domination by, others. On the other hand, it is only through connection with others that the self can develop its latent powers at all, and such connection is never entirely secure from the threat of dependence and domination. This conflict presents a situation analogous to our relation to formative contexts: we need stable frameworks in which to pursue life, but any given context – or finite series of them – fails to fully respect our context-transcending powers. Unger thinks that our best response to such conflicts is to

construct personal and institutional forms that moderate the conflicts.

Neutrality

For Unger, our normative commitments and the metaphysical notions tied to them are invariably contestable, outrunning the justifications that we can give them. It is not possible to resolve competing commitments by appeal to premises neutral among them. The best we can do to mitigate such cognitive overreach is to build intellectual orders open to challenge and revolutionary revision.

Similarly, a political order neutral among competing normative and metaphysical views is not an option, in Unger's view. Every such order tilts the scales in a particular direction and relies for its justification on views that are contestable and contested. A political order hospitable to a wide range of competing normative conceptions and open to challenge and revolutionary reform is the best we can do in response to our ineliminable moral and metaphysical disagreements.

Marxism

Unger is sometimes characterized as a neo-Marxist, but he bluntly states, "Marxism is dead as a doctrine" (2005: 42). He unambiguously rejects the key Marxist ideas that human history proceeds in a preset and predictable sequence of stages; that each stage is characterized by the dominance of a single type of social formation (feudalism, capitalism, etc.) whose main elements fit together in an indivisible package; that there is a sharp distinction between reform and revolution; and that there is a form of society – communism – in which all valuable human powers will be realized.

Unger criticizes wage-labor, holding that it bears "the taint of serfdom" (2014: 185), and, like Marx, he looks to technological innovation for the means to free workers from mind-numbing and repetitive activity and to enable them to develop and use their powers of imagination. But, unlike Marx, Unger does not call for the eradication of markets or for the establishment of social ownership of all capital. Unger argues that through various forms of worker control and cooperation and the mitigation of workplace hierarchies, labor can rid itself of its taint and draw on imaginative powers of the workers without abolishing the market. The diffusion of access to productive resources and the development of markets friendlier to experimentation and self-revision, rather than the elimination of private ownership, constitute the road to emancipation and material abundance for ordinary people.

Social Democracy

Among the important realizations of early twentieth century legal thought, in Unger's view, was that persons can have formal legal rights without being able to effectively exercise their rights due to the lack of resources and opportunities. Social democracies and welfare states have addressed the problem of ineffective rights, but Unger thinks that those political systems have fallen well short of making fundamental rights effective for all their citizens. He argues that the shortcomings derive from the failure of progressive political forces in those systems to challenge and change the existing institutional forms of the market and democracy. Progressives argue or assume that there is no feasible, superior alternative to those forms, with the result that social democracies depend on tax-and-transfer schemes to make rights more effective for more citizens. Unger argues that such schemes have severe limitations: redistributive taxation provokes a level of political resistance that, especially in ethnically mixed societies, prevents it from being pursued far enough.

Additionally, Unger argues that much of the original social-democratic project has been jettisoned, a result of increasing economic, financial, and political strains that stem from a failure to change the existing forms of democratic politics and free markets. Rescuing the moral impulse behind social democracy requires institutional

innovation that produces "a radical expansion of the terms on which people can have access to education, expertise, technology, and credit" (2007a: 202). It also requires a reinvention of democracy, encouraging popular mobilization and facilitating the resolution of impasse within government. The institutionally conservative defense of social democracy is, in Unger's eyes, a surrender to "the dictatorship of no alternatives" (2005: 1).

Free Trade

Unger is critical of the established system of global trade and the received understanding of free trade that has driven globalization. The doctrine rests on the Ricardian theory of comparative advantage, the idea that the most efficient assignment of productive specializations results when each country concentrates on producing what it can make at the lowest opportunity cost. But Unger argues that the theory is "radically incomplete" and that its completion requires full appreciation of the fact that "comparative advantage can be, and always has been, shaped by governmental initiative and collective action as well as by private enterprise" (2007b: 51 and 15).

Unger contends that the lowering of trade barriers should be regarded as a means, not as an end. The appropriate end is "to make more productive resources and opportunities available to more people in more ways" (2007b: 178), and the effective pursuit of this end requires, among other conditions, "the step-by-step extension of the right of labor to cross national frontiers" (2007b: 163).

Like the abstract concept of a market economy, "[t]he idea of a universal system of free trade is institutionally indeterminate" (2007b: 9). Global advances in production call for a system that does not straightjacket each country into a particular role in the world trading system but fosters diversity by allowing countries to experiment and innovate with their economic arrangements. In Unger's view, the identification of the established form of globalization with the very idea of free trade and the notion that the world-historical process is converging on a single form of market society as the most rational one are additional examples of the dictatorship of no alternatives and fetishistic forms of surrender to existing formative contexts.

Rawls

Unger takes Rawls's theory of justice to be illustrative of "a dominant style of political philosophy [that] disconnects the formulation of principles of justice from the problems of institutional design . . . and treats the social-democratic compromise of the postwar period as the insuperable horizon for the pursuit of ideals" (1996: 4; also see 2014: 316). And there are important disagreements between Rawls and Unger, for instance, with respect to the value of equality (see section above: "Freedom, Equality, and Democracy"). However, over the decades, Rawls revised his theory in ways that accommodated several of Unger's criticisms of it, revisions that Unger does not appear to note.

For example, Rawls revised his theory "to distinguish more sharply the idea of a property-owning democracy . . . from the idea of a welfare state." A welfare state relies on the redistribution of income so that no one "falls below a decent standard of living." Property-owning democracy dispenses with income redistribution and instead "tries to disburse the ownership of wealth and capital" and so "to put all citizens in a position to manage their own affairs . . . on a footing of mutual respect" (1999: xiv–xv). Rawls rejected the welfare state as incompatible with the demands of his theory, holding that only property-owning democracy or liberal democratic socialism could meet those demands. Rawls's thinking here is in line with Unger's criticisms of redistributive, tax-and-transfer schemes, and with his programs for radically expanding access to capital.

Unger also charges Rawls with ignoring the importance of institutions, but Rawls had revised his theory to include a discussion of "the institutions of a just basic structure." He came to emphasize that before his principles of justice could be

endorsed "even provisionally," it was important "to trace out... the institutional content" of the principles (2001: 135–136). This recognition of the importance of institutions to normative theory is another respect in which Rawls's revisions brought his theory closer to Unger's view.

Critics

The most common criticism of Unger's thought is that it mistakenly holds that a life in which nothing is settled or fixed would be good for humans. Thus, Galston focuses his criticism on Unger's "preference for the unsettled over the settled, the impulse to imagine and to act out context-smashing transgressions." Galston holds that "most human beings find satisfaction within settled contexts and experience the disruption of those contexts, not as empowerment, but rather as deprivation" (1990: 22). In a similar vein, Sunstein writes, "Unger's system underestimates the dangers of putting everything 'up for grabs'" (1990: 69).

Yet, Galston and Sunstein appear to exaggerate Unger's "preference" for the unsettled. Unger's point is that hitherto existing formative contexts have been unduly antagonistic to the transcendent side of the self, and his legal and political program is designed to enable ordinary persons to live in a way that does justice to their powers of transcendence. Moreover, the revolutionary reform that Unger proposes is not a matter of context-smashing but of transforming contexts "piece by piece and step by step" (1987a/2004: lxxxiii). And he argues that the kind of formative context that can do justice to both sides of the self is one that opens doors to its own revision by empowering ordinary people pursuing their routine activities to challenge elements of their context.

At the same time, Galston and Sunstein might be right to think that Unger does not adequately value the side of personality that finds a home in settled routines and stable institutions. Unger holds that this side has value only insofar as it can "form a setting in which the new becomes possible," i.e., its value lies wholly in its "service [to] the power of transcendence" (2014: 366–367). This view appears to omit the inherent value of "the solace most of us find in ordered existence" (Galston 1990: 21).

Conclusion

Few thinkers have provided such a comprehensive vision of humanity as has Unger or have found a place in their view for so many of the conflicting tendencies of human thought and desire. His affirmation of human powers resonates more with the optimism of earlier centuries than with the resignation and skepticism, not to say cynicism, of recent times. Unger is right to point out the transitory nature of the structures of thought and society that dominate the contemporary world. However, it remains to be seen whether humanity will realize Unger's hope that ordinary persons around the globe "become freer and greater" (1996: 46).

Cross-References

- ▶ Dworkin, Ronald: Legal Philosophy
- ▶ Law as an Artifact
- ▶ Rawls, John
- ▶ Rule of Law: Historical Perspectives

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Utilitarianism

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Introduction

Utilitarianism is one of the most influential theories of contemporary moral and political theory. It "arguably has the distinction of being the moral theory that, more than any other, shapes the discipline of moral theory and forms the background against which rival theories are imagined, refined, and articulated" (Eggleston and Miller 2014, 1).

Utilitarianism has long been subject to fierce criticism. It is possible to identify the following objections to utilitarianism: (1) utilitarianism has an inadequate theory of value; (2) utilitarianism permits abhorrent actions, or at least actions that are wrong; (3) utilitarianism is too demanding; (4) utilitarianism fails to respect the separation of persons; and (5) utilitarianism is committed to implausible claims about the psychology of persons (Woodard 2019, 211–16).

This entry will first discuss major figures in the history of utilitarian tradition, namely Jeremy Bentham (1748–1832), John Austin (1790–1859), John Stuart Mill (1806–1873), and Henry Sidgwick (1838–1900). In addition to some of their justifications of the principle of utility, the focus will be on the parts of their theories that are related to the central issues of legal philosophy, such as the role of rules, moral or legal rights, as well as their views on justice. After discussing the modern utilitarian theory of R. M. Hare (1919–2002) and Peter Singer (1946-), this entry examines how utilitarian theorists would respond to the criticisms mentioned above. Bentham might be the most vulnerable utilitarian to these criticisms, but more balanced interpretations are suggested in recent Bentham studies, which would weaken the cases of the critics. Finally, the most recent "law and happiness studies" of "legal hedonists," who "have published a number of articles arguing that new empirical data on happiness requires changes to, or a better explanation of, existing legal institutions" (Swedloff and Huang 2010, 554), will be discussed.

Classical Utilitarian Theories

In his *Introduction to the Principles of Morals and Legislation* (1789), Bentham explains that the principle of utility "approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question" (Bentham 1996, 12). In the same work, he adds that "sum up all the values of all the *pleasures* on the one side, and the *pains* on the other. . . . Take the *balance*, which, if on the side of *pleasure*, will give the general *good tendency* of the act, with respect to the total number or community of individuals concerned; if on the side of pain, the general *evil tendency*, with respect to the same community" (ibid, 40).

These statements have led to an interpretation that Bentham's theory of utility was based on a simple aggregation of pleasures of people in society, as suggested by a Rawlsian interpretation of utilitarianism. Outside of Bentham scholars, it has been widely argued that Bentham's theory is incompatible with liberal values as it can undermine minority rights through the direct

applications of the principle of utility. However, Bentham's theory should be seen not as a top-down theory but as a bottom-up theory in which the principles derived from the principle of utility are applied to practice (Rosen 1997). Bentham referred to his principle of utility as "the greatest happiness principle" or the principle requiring "the greatest happiness of the greatest number" (Postema 2019, 110). Yet the greatest happiness of the greatest number cannot be achieved, Bentham thought, if the principle of utility is invoked and peoples' expectations are upset.

According to Bentham, "[i]n order to form a clear idea of the whole extent which ought to be given to the principle of security, . . . it is not enough to guard him against an actual loss, but also to guarantee to him, as much as possible, his possessions against future losses" (Bentham 1962, i. 308). Bentham regarded security of expectations as a necessary condition for achieving any individual happiness (Postema 2019, 151). His secondary principle of "the security-providing principle" was to give everyone rights of person, property, condition, and reputation, which would be sanctioned by the provisions of the Pannomion – a complete code of laws – and would not usually be subject to a utility calculation. In Bentham's theory, the security-providing principle and those rights that are derived from that principle could do the same jobs as Rawls's social primary goods by making the pursuit of diverse goods possible (Kelly 1990, 87).

Bentham called the utilities derived from security of expectations as "expectation utilities" and distinguished them from "original utilities." From the preceding paragraph, Bentham argued that expectation utilities or utilities derived from security of expectations have special weight. Bentham criticized the Common Law, where judges could overthrow precedents that were contrary to "reason," for its uncertainty and obscurity by arguing that "if there be still a man who will stand up for the existence and certainty of a rule of customary law, give him everything he asks, he must still have recourse to fiction to produce any such rule" (Bentham 2010, 196). Bentham tried to replace it with his Pannomion comprised of determinate rules for the purpose of securing people's expectations. Bentham even identified justice with expectation utilities. According to Postema, Bentham associated justice with general rules that seek to protect expectations essential to social interaction. The demands of justice are to be taken seriously because they concern a species of utility that has overriding importance (Postema 2019, 150–1).

However, although expectation utilities have special weight in Bentham's theory, he did not endorse pure rule-utilitarianism. Expectation utility was just a species of utility, and the principle of utility was always the decision principle (ibid, 150). For instance, with respect to laws that required amendments, Bentham argues that "that which the people look to, at the hands of the Legislature and the Judiciary together is—the fulfillment of salutary ordinances, and no others: not the production of evil by admission or omission of this or that word in the law, through inadvertence or otherwise. What may, therefore, be reasonably looked for is—that, by giving execution and effect to the imperfectly expressed portion of the law in question, a severer shock would be given to the public confidence, than by forbearing so to do" (Bentham 1962, ix. 509).

It is well known that Austin inherited from Bentham such jurisprudential ideas as "command theory of law," "conception of sovereignty based on habitual obedience of the population," and "separation of law and morality." Like Bentham, Austin embraced the principle of utility as well. As Wilfred Rumble notes, in relation to Austin's main work, *The Province of Jurisprudence Determined*, 23% of the entire book is an explanation and defense of the principle of utility (Rumble 2013, 141).

However, Austin's version of the principle of utility was very different from that of Bentham. Austin was a theological utilitarian and argued that "God design the happiness of all his sentient creatures. Some human actions forward that benevolent purpose, or their tendencies are beneficent or useful. Other human actions are adverse to that purpose, or their tendencies are mischievous or pernicious. The former, as promoting his purpose, God has enjoined. The latter, as opposed to

his purpose, God has forbidden" (Austin 1995, 41).

It seems that the principle of utility did not have much work to do in Austin's political or legal theories due to the following reasons. Firstly, Austin was generally a rule-utilitarian. According to Austin, "human conduct, including the human conduct which is subject to the Divine commands, is inevitably guided by *rules*, or by *principles* or *maxims*. If our experience and observation of particulars were not *generalized*, our experience and observations of particulars would seldom avail us in practice" (Austin 1995, 41). For Austin, an individual should decide their course of action by deducing the decision from a rule that is grounded in the principle of utility (Rumble 2013, 141). Secondly, and relatedly, Austin tried to limit direct resorts to the principle of utility to cases of disobedience to a government. It was a general rule from the principle of utility that government is obeyed (Lobban 2010, 87). Austin was a conservative utilitarian, and his rule-utilitarianism served to justify existing moral or legal rules (ibid, 88). Unlike Bentham, Austin, in the wake of the establishment of state decisis doctrine in England, described the Common Law as a system of rules by arguing that "*judicial commands* are commonly occasional or particular, although the commands which they are calculated to enforce are common laws or rules" (Austin 1995, 27). Although Austin admitted that moral experts or judges could develop rules that were more consonant with the principle of utility (Lobban 2010, 88), he seems to have assumed that the substance of Common Law rules is also typically grounded in the principle of utility.

It is often argued that John Stuart Mill refined Bentham's utilitarianism. In *Utilitarianism* (1861), Mill articulates his definition of utilitarianism or the greatest happiness principle. He states that "[a]ccording to the Greatest Happiness Principle . . . the ultimate end, with reference to and for the sake of which all other things are desirable (whether we are considering our own good or that of other people), is an existence exempt as far as possible from pain, and as rich as possible in enjoyments, both in point of quantity and quality" (Mill 2021, 113). Here, Mill introduces the dimension of quality for pleasures that was absent in Bentham's theory. Mill's aim was to respond to the criticism of utilitarianism that it is a doctrine worthy of swine (West 2014, 71). According to Mill, "the test of quality, and the rule for measuring it against quantity of pleasure "is "the preference felt by those who, in their opportunities of experience, to which must be added their habits of self-consciousness and self-observation, are best furnished with the means of comparison" (Mill 2021, 113).

As Postema argues, Bentham's justification of the principle of utility fails to point beyond the appraiser's judgment itself (Postema 2019, 63). For instance, in his *Constitutional Code*, Bentham writes that "[w]hen I say the greatest happiness of the whole community, ought to be the end or object of pursuit, in every branch of the law,. . .I make a statement relative to a matter of fact, namely that which, at the time in question, is passing in the interior of my own mind;—how far this statement is correct, is a matter on which it belongs to the reader, if it be worth his while, to form his judgment" (Bentham 1962, ix. 4).

Mill also accepted that the ultimate principle – the principle of utility – cannot be proved. However, Mill tried to support the principle of utility by showing that the only thing we should consider the ultimate end is happiness. Mill tried to show that happiness is the ultimate end – what is desirable – by showing that happiness is what people actually desire (Lazari-Radek and Singer 2017, 21). For Mill, "[n]o reason can be given why the general happiness is desirable, except that each person, so far as he believes it to be attainable, desires his own happiness. . . .that happiness is a good: that each person's happiness is a good to that person, and the general happiness, therefore, a good to the aggregate of all persons. Happiness has made out its title as one of the ends of conduct, and consequently one of the criteria of morality" (Mill 2021, 133). As is well known, this argument of Mill is subject to the criticism that Mill confounded "capable of being desired" and "worthy of being desired." Henry West defends Mill that "[h]e is appealing to psychological evidence to move from facts of pleasure and pain and of

desires and aversions to judgements of good and bad as ends of actions" (West 2014, 76).

Like Austin and Bentham before him, Mill emphasized the importance of rules. For instance, Mill argues that "mankind must by this time have acquired positive beliefs as to the effects of some actions on their happiness; and the beliefs which have thus come down are the rules of morality for the multitude, and for the philosopher until he has succeeded in finding better" (Mill 2021, 123). Mill argues that there are secondary principles applied to social practice which are derived from the principle of utility. Mill wrote that "[i]t is a strange notion that the acknowledgment of a first principle is inconsistent with the admission of secondary ones. . . .The proposition that happiness is the end and aim of morality, does not mean that no road ought to be laid down to that goal, or that persons going thither should not be advised to take one direction rather than another" (ibid).

Mill explains justice and rights in terms of utility as well. Mill defined justice as the class of obligations having correlative rights (West 2014, 78), writing that "justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right" (Mill 2021, 145). Mill goes on to argue that "[w]hen we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion. If he has what we consider a sufficient claim, on whatever account, to have something guaranteed to him by society, we say that he has a right to it" (ibid, 148). Mill then introduces the principle of utility to explain justice and rights. According to Mill, "[t]o have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him no other reason than general utility" and "the extraordinarily important and impressive kind of utility which is concerned" is "security" (ibid, 148–9), as it was for Bentham. In Mill's theory, the conduct required by justice can be justified by utilitarianism.

Neither Bentham nor Mill sought to develop the justification of the principle of utility itself. With respect to this point, Sidgwick argued that "[t]he utilitarianism of Mill and Bentham seemed to me to want a basis: that basis: that basis could only be supplied by a fundamental intuition" (Sidgwick 1907, xxi). Sidgwick, on the other hand, argued that "the best examination I could make of the morality of Common Sense showed me no clear and self-evident principles except such as were perfectly consistent with Utilitarianism" (ibid).

In *The Method of Ethics*, seventh edition (1907), one of his aims was to show the relationship between common-sense morality and the principle of utility. For instance, Sidgwick discusses parents' special duty to their children as an example of common-sense morality. It seems that that duty has a solid foundation, but according to Sidgwick, some may argue that parents have a right to extinguish their children's life because they have had no life at all but for their parents (Sidgwick 1907, 347). Sidgwick also argued that some higher principle is required for the principle of justice as its "rules are differently formulated by different persons and . . . these differences admit of no Intuitional solution" (ibid, 422). As Roger Crisp writes, "[t]he essense of Sidgwick's view on commonsense morality . . . is similar to that of J. S. Mill: it consists in a set of 'secondary principles' the ultimate justification of which is their promotion of the greatest overall balance of pleasure over pain" '(Crisp 2014, 95). More practical use of the distinction between the commonsense morality and utilitarianism was by Hare.

Modern Utilitarian Theories

Modern utilitarian theories significantly refined the classical utilitarian theories. Hare, unlike Mill, tried squarely to justify the principle of utility by analyzing the nature of moral language. Firstly, Hare argues that moral judgments express prescriptions. Then, Hare states that moral judgments are universalizable in that those who prescribe an action for one situation should prescribe the same action for all situations with the same universal features (Bykvist 2014, 118). According

to Hare's theory, "I must put myself in the position of all those who would be affected... and this requires me to give the desires and preference of all those affected by the action as much weight as I give my own" (Lazari-Radek and Singer 2017, 21). For Hare, only utilitarianism – preference utilitarianism rather than a hedonistic version of Bentham and Mill – can provide moral judgments which would regard the desires and preferences of all those affected.

The utilitarianism of Bentham, Austin, and Mill had both aspects of act and rule-utilitarianism. Hare tried to explain the relationship between the act and rule-utilitarianism in terms of the distinction between the critical and intuitive levels of moral thinking. This is referred to as "two-level theory," and according to Hare, the critical level is the level of thinking to which the moral reasoning discussed in the preceding paragraph would be applied. Hare argues that "[O]nce the levels are distinguished, a form utilitarianism becomes available which combines the merits of both varieties. The conformity (for the most part) to the received opinion which rule-utilitarianism is designed to provide is provided by the prima facie principles used at the intuitive level; but critical moral thinking, which selects these principles and adjudicates between them in cases of conflict, is act utilitarian" (Hare 1981, 43).

Singer is particularly well known for his *Animal Liberation: A New Ethics for Our Treatment of Animals* (1975) and, more recently, for *The Most Good You Can Do: How Effective Altruism Is Changing Ideas about Living Ethically* (2015). We can find his elaborated discussion on utilitarianism in his *Practical Ethics*, third edition (2011).

Singer confirms that "[f]rom ancient times, philosopher and moralist have expressed the idea that ethical conduct is acceptable from a point of view that is somehow *universal*" (Singer 2011, 10). He also points out that "[e]thics goes beyond 'I' and 'you' to the universal law, the universalizable judgement, the standpoint of the impartial spectator or ideal observer, or whatever we choose to call it" (ibid, 11).

Then Singer argues that these "universal aspects of ethics ... provide a ground for at least starting with a broadly utilitarian position" (ibid). After articulating that his preference utilitarianism requires agents "to weigh all these [relevant] preferences and adopt the course of action most likely to maximize the preferences of those affected" (ibid, 12), he adds that "[t]he preference utilitarian position is a minimal one, a first base that we reach by universalizing self-interested decision making." Singer tries to make those who are opposed to utilitarianism bear the burden of proof by saying that "[t]o go beyond preference utilitarianism we need to produce something more" (ibid, 14).

Singer famously defended animal rights, and he recently advocated "effective altruism." Singer's bold proposals are based on his criticism of reciprocity, which has been thought to be closely associated with notions of justice. According to Singer, "whatever its origin, the ethics we have now does go beyond a tacit understanding between beings capable of reciprocity. The returning to such a basis is not appealing" (ibid, 63). It is difficult to judge whether Singer's claim that "[b]ecause no account of the origin of morality compels us to base our morality on reciprocity, and no other arguments in favour of this conclusion have been offered, we should reject this view of ethics" (ibid) is convincing or not. Singer's utilitarianism is based on this claim, which weighs all relevant preferences or interests – including those of animals – and adopts the course of action that would be most likely to maximize the interests of those affected, including animals, which are incapable of reciprocity.

Criticism on Utilitarianism

As discussed at the beginning of this entry, utilitarianism has been subject to fierce criticism. Typical criticisms are the following: (1) utilitarianism has an inadequate theory of value; (2) utilitarianism permits abhorrent actions, or at least actions that are wrong; (3) utilitarianism is too demanding; (4) utilitarianism fails to respect the

separation of persons; and (5) utilitarianism is committed to implausible claims about the psychology of persons.

However, when considering that Bentham, Austin, and Mill were all, to some extent, rule-utilitarian and that Hare had a "two-level theory" of utilitarianism, some of this criticism against utilitarianism would be weakened. For instance, criticism (2) suggests that utilitarianism permits acts such as torture, enslavement, organ snatching, wrong punishment, and the like (Woodard 2019, 212). However, Hare's two-level theory, for instance, can reply that the prima facie principles used at the intuitive level would typically forbid these acts. Although (4) is a widely accepted criticism, section "Classical Utilitarian Theories" showed that, in Bentham's theory, the secondary principle of the security-providing principle and those rights that are derived from that principle could do the same jobs as Rawls's social primary goods and enable the pursuit of diverse goods. On the other hand, criticism (5) holds that utilitarianism favor "pervasive calculation," which would require people to use calculation in every decision. However, as seen in section "Modern Utilitarian Theories", Mill urged people to follow the rules of morality. Hare, relying on his distinction of levels of thinking, argues that at the intuitive level, "such calculations are in practice usually impossible and... [w]e would do better to stick to well tried and general principles" (Hare 1981, 121).

Criticism (3) argues that utilitarianism is, by some, taken to require people to work tirelessly for others to maximize the well-being of a society (Woodard 2019, 213). This point is particularly true of Singer's utilitarianism, but as Postema claims, Bentham, for instance, tried to articulate a public philosophy primarily for legislators and constitution designers (Postema 2019, 56). Thus, Bentham's principle of utility would not force people to be altruistic.

The most troublesome criticism for utilitarians might be criticism (1) that relates to the difficulty of sum-ranking or measurement of pleasure and pain. For Bentham, pleasure and pain are basic units of value. Postema argues, however, "this thought raises a number of questions, ... [such as] how are these essentially subjective values to be measured, related, and weighed with respect to each individual and combined to yield a meaningful assessment for each proposed act, law, or institution" (Postema 2019, 73). In Postema's interpretation, however, Bentham did not rely on people's pleasure, which is varied, but on basic or universal interests which are standard within a particular society (ibid, 127). Bentham's universal interest was meant to incorporate each member's security of person, property condition in life, and reputation, which would be, as discussed in section "Classical Utilitarian Theories", introduced by the security providing principle and sanctioned by the provisions of his Pannomion. Hare, on the other hand, took a more straightforward approach. According to Hare, to provide moral judgments based on the desires and preferences of all those affected by the action, "[t]he most that human beings can ask for, when they are trying to do the best critical thinking they can, is some way of approximating, perhaps not at all fully, to the thoughtful process of an archangel" (Hare 1981, 122).

Law and Happiness Studies

The final part of this entry, "law and happiness studies," applies some of the findings of utilitarian studies to the legal system. The preceding entry discussed how utilitarians are facing the difficulty of sum-ranking or measurement of pleasure and pain. It was due to the standard argument that "subjective hedonic experience cannot be observed or measured" (Kahneman et al. 1997, 375). However, the development of hedonic psychology and the data it can provide, since around 2007, have helped "the legal hedonists" to publish a number of articles. These researchers argue that new empirical data on happiness requires changes to existing laws in such areas as taxation, corporate governance, criminal justice, and tort systems (Swedloff and Huang 2010, 554).

John Bronsteen, Christopher Buccafusco, and Jonathan Masur argue in their *Happiness and Law*

(2013) that it has become possible to estimate quite accurately how any given experience is going to make most people feel. They discuss many new methods to measure pleasures and pains or experienced utility. For instance, ESM (experience sampling method), by using computers and smartphones, survey people by asking randomly what they are doing and how they feel about it. DRM (day reconstruction method), on the other hand, analyzes daily diary entries to reconstruct subjects' emotions. In addition, PATS (Princeton Affects and Time Survey) asks subjects to evaluate their experience of the previous day, and life satisfaction surveys, which are the oldest method of measuring subjective well-being, ask subjects to answer on a scale ranging from "not very happy" to "very happy" (Bronsteen et al. 2013, 11–2).

However, unlike Bentham, the modern legal hedonists do not use these data of experienced utility to measure the overall effect of, for instance, a legal institution on a society. Instead, they rely on findings from the data and apply them to legal systems. The most important and basic finding is "human's ability to adapt rapidly to changes in their life" (ibid, 15). The finding that "[m]ost people . . . do a surprising poor job of predicting the intensity and duration of future feelings" (ibid, 20) is also important. Cass Sunstein, for instance, relies on a finding of "immune neglect," which is similar to "hedonic adaptation." According to Sunstein, people "do not see the power of their internal psychological immune system, which greatly diminishes the welfare effects of apparently significant changes." He also relies on a finding of "impact bias" that people tend to exaggerate the effect of future events on their own emotional states. He argues that as people tend to make similar mistakes in evaluating others' emotional states in the future, civil juries tend to award excessive damage awards (Sunstein 2008, 168–9). Sunstein points out a $1 million award for the loss of feeling and strength in hand, an award of $1.5 million for the amputation of a finger, and the like as examples of excessive damages and even proposes to introduce civil damages guidelines (ibid, 184–5).

Conclusion

In this entry, some of the major figures in the utilitarian tradition are discussed, focusing mainly on their views on the role of rules, moral or legal rights, as well as on justice. Their responses to some of the criticism may suggest that the most difficult problem for the utilitarians is that utilitarianism has an inadequate theory of value, meaning that their sum-ranking or measurement of pleasure and pain are indeterminate. However, Bentham once wrote, "[h]ow far short soever this degree of precision may be, of the conceivable point of perfection—of that which is actually attained in some branches of art and science, —how far short so ever of *absolute* perfection,—at any rate in every rational and candid eye unspeakable will be the advantage it will have over every form of argumentation in which every idea is afloat no degree of precision being ever attained because none is ever so much as aimed at" (Bentham 1998, 255). How far we should seek precision in moral and legal reasoning is, of course, open to argument. It is possible to say that the utilitarians, and the modern legal hedonists who are deploying utilitarian insights, still have resources to shed new light on legal studies.

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- ▶ Austin, John
- ▶ Bentham, Jeremy
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Utopia

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Introduction

The noun *utopia* refers to any image of an ideal society, but the corresponding adjective *utopian* often carries a pejorative connotation, suggesting the naïvete or impossibility of the plan or idea it modifies. Although a distinct scholarly field of "Utopian studies" has existed since the 1970s (Levitas 2013, 103), and the problem of definition was recognized at an early stage (Levitas 1990, 2), and many scholarly definitions have been proposed, the literature has not converged upon a single, precise definition (Claeys and Sargent 2017, 1–5). At the restrictive end of the spectrum, philosopher Leszek Kolakowski confines the term utopia to an ideal society, produced through human action, that is thought to be perfect – "where there is nothing to correct any more" (Kolakowski 1982, 230). By contrast, sociologist Ruth Levitas characterizes as "utopian" any "expression of desire for a better way of living and of being" (Levitas 2013, 4); thus, she finds utopian elements in every sort of normative social theory and program for political reform, as well as in many works of art and literature. Lyman Tower Sargent likewise takes an expansive view of the subject and has identified what he calls "three faces of utopianism": literary accounts of ideal societies and of nightmare societies (which have come to be called *dystopias*); experiments in creating new, ideal communities ("intentional societies"); and theorizing about ideal social orders (Sargent 1994). Ultimately, any definition is bound to be to some extent stipulative, as different scholars focus on different elements to serve the needs of their own intellectual projects. What all such definitions have in common, however, is that they take as their touchstone Thomas More's 1516 dialogue, *Utopia*, which invented both the word and the genre.

More's *Utopia*

Written in Latin early in the European age of discovery, *Utopia* is a complex and playful work that simultaneously affirms that the island of Utopia really exists somewhere in the south Pacific and hints plainly at its unreality. More claims to have been a participant in the conversation he relates in the work, which supposedly took place in Antwerp, when he was in truth in that city on a diplomatic mission. Nevertheless, the neologism More contrived as the name of his island tells a different story, as it derives from the ancient Greek expression for "no place" (*ou topos*) and puns on the phrase meaning "good place" (*eu topos*). Similarly, the fictional sea captain who relates what he saw in Utopia is named Hythloday, which in Greek means "purveyor of nonsense."

In Utopia, there is no private property, and people inhabit dwellings assigned them by the rulers; although there is no luxury, all live in comfort and enjoy plenty to eat. Everyone learns a useful trade, but because so few are idle, 6 h of work each day suffices to supply all their needs. Agricultural labor is done by turns: each year some urban tradespeople are assigned to begin a 2-year stint on one of the surrounding farms. Whatever anyone needs can be found in the common storehouses, which are open to all. Thus, the Utopians have no use for money, using gold and silver instead to make such items as chamber pots and chains for criminals. Utopian leisure is primarily devoted to learning and the cultivation of the mind. A few are selected on the basis of their talents to become scholars, and from among the scholars, their priests, ambassadors, and high officials are chosen. The Utopians elect their officials annually. They are highly religious but tolerant of philosophical and religious diversity. Monogamy is the rule in Utopia, however, and the families are patriarchal. Perhaps oddest to the contemporary reader, there is slavery in Utopia, though those enslaved are prisoners of war, condemned criminals, or the desperately poor of other lands who would prefer to be slaves in Utopia than destitute and wretched at home.

Other Tales of Imaginary Lands

Subsequent writers followed More in producing fictional accounts of journeys to ideal polities located in distant seas. Two of the most notable are Tommaso Campanella's *City of the Sun* (1602) and Francis Bacon's *New Atlantis* (1627). In Campanella's story, a sea captain from Genoa relates his visit to the titular city, a beautiful construction of seven concentric, circular walls, situated upon a hill. That city in some respects resembles Utopia: property is held in common and labor is common to all, in consequence of which the people live in plenty, security, and harmony and have sufficient leisure for liberal pursuits. Unlike the Utopians, the inhabitants of the City of the Sun do not form conventionally monogamous families but are paired by the magistrates in order to produce the best offspring, and the offspring are raised communally. Supreme rule in the city is exercised by an official whose title is said to mean "Metaphysics"; he is assisted by three chief ministers, Wisdom, Power, and Love, along with a whole assortment of subordinate officials, chosen for their knowledge and virtue.

Francis Bacon's unfinished utopian novel, *The New Atlantis,* by contrast, celebrates the power of modern science. The frame story is familiar: the narrator arrives at a mysterious island in distant seas and relates what he finds. The people of this island, having miraculously been converted to Christianity, are distinguished for generosity and virtue. Although it may seem paradoxical, the most notable establishment of this pious society of Christians is a sort of scientific research university, called Solomon's House. The scholars there seek "the knowledge of causes and the secret motions of things" both out of a reverence for the divine glory of creation and a secular interest in "the enlarging of the bounds of human empire, to the effecting of all things possible" (Claeys and Sargent, 135). Bacon describes in some detail the extraordinary campus of this "university," which includes underground caverns, airy towers, pools, parks, workshops, and laboratories, each dedicated to the pursuit or teaching of a specific branch of knowledge.

In later eras, when it became impossible to believe that sailors might discover on a remote island some previously unknown but ideal community, utopian novelists had recourse to alternative devices for bringing verisimilitude to their imagined ideal societies. In Edward Bellamy's influential novel, *Looking Backward* (1888), the protagonist falls into a deep sleep and awakens in the year 2000 to find the United States transformed into a socialist paradise. The same plot device appears in William Morris's reply to Bellamy, the novel *News from Nowhere* (1890). Both envision societies without private ownership, but whereas in Bellamy's utopian Boston a benevolent state manages a productive, industrial economy, Morris depicts an England where people have returned to the land to live simple lives in harmony with nature and dispensing entirely with organized government. In *A Modern Utopia* (1905), H.G. Wells employs a more complex technique that draws attention to the artifice involved in depicting an imaginary ideal society. His narrator and a companion find themselves without explanation transported to a utopian mirror earth, inhabited by duplicates of everyone then alive, including themselves. The utopian earth has benefited from ages of consistent progress, led by an order of "samurai" – the ruling elite of this world, who earn their places by professional achievement and by embracing a rigorous discipline. Wells's utopia aims to preserve freedom, diversity, innovation, and progress, while retaining other common "utopian" elements – chiefly, the abolition of poverty and war through the establishment of an enlightened and benevolent world state. Still more recently, utopian societies have been set on other planets, as, for example, in Ursula LeGuin's *The Dispossessed: An Ambiguous Utopia*. This novel explores with great acuity the psychological risks, costs, and benefits entailed by the attempt to live in a radically egalitarian and anarchistic society.

The Wider Utopian Tradition

Although More's *Utopia* created the generic term for an ideal society and popularized the literary device of using a traveler's report to describe its institutions in detail, visions of ideal societies appear in much more ancient writings, and scholars with more capacious definitions of utopia regard such literature as part of an extended utopian tradition. Thus, one might include such Biblical elements as the Garden of Eden, the prophet Isaiah's vision of a day when lions and wolves would live peacefully alongside calves and sheep, and the vision of the heavenly city that appears at the conclusion of the biblical Book of Revelation. One might similarly characterize as utopian the golden ages of peace, plenty, and happiness imagined by a variety of Greek and Latin poets, going back as far as Homer and Hesiod. Medieval tales of the land of Cockaigne, where abundant food and drink simply present themselves to be consumed, may likewise be regarded as elements in a wider utopian tradition.

Works of normative political theory that articulate as-yet unrealized political ideals or describe institutions thought to be decisively superior to those currently existing are also sometimes included in the utopian tradition, though such works typically lack the narrative structure and richly descriptive texture of the classic "traveler's tale" utopias. Plato and Marx are the two normative theorists most closely identified with the utopian tradition, although others, such as James Harrington and William Godwin, are sometimes also included. Whether or not one regards the *Republic* by Plato as a piece of utopian writing, it strongly influenced More's *Utopia* and many of the works the succeeded and echoed it. The *Republic* relates a fictional conversation about justice, during the course of which Socrates describes the institutions of an imaginary and ostensibly ideal city. Three of Socrates' proposals figure prominently in subsequent utopian writings: the abolition of private property; the equality of the sexes and replacement of the monogamous, patriarchal family by a controlled system of eugenic breeding; and the establishment of rule by an elite few, who have been trained specifically in, and selected to hold power on account of, wisdom and virtue. Although Karl Marx and his frequent collaborator Friedrich Engels insisted that their conception of socialism was not utopian,

because it was scientifically grounded and therefore certain to be achieved in practice, their vision of a global communist association nevertheless includes elements frequently found in classic utopias, such as the transformation of the family, the abolition of private property, and the absence of a government wielding political power to protect it. Unlike such writers as More and Bellamy, Marx and Engels provide few details of what their fully realized communist society would look like, but in their *Communist Manifesto* they indicate clearly the first step necessary to bring it about: a revolution that would empower a revolutionary dictatorship of enlightened communists to nationalize all of society's economically productive assets.

Is Utopian Thinking Dangerous?

A persistent line of critique holds that utopian thinking is dangerous and the attempt to construct Utopia in the real world inevitably leads to tyranny. Such critics typically adduce as evidence the murderous waves of terror unleashed by the French, Russian, and Chinese revolutions. Friends of utopianism typically reply to such charges by denying that the Jacobins and Marxists were truly utopians. Rather than dispute over definitions, however, it is more productive to consider how and why utopian thinking can prove dangerous. The belief that one knows how to construct a *better* society is obviously salutary: without ideas for improvement, social reform would not be possible. But the belief that one knows how to build a *perfect* society is different: the prospect of achieving universal happiness can easily seem to justify measures that would otherwise be rejected as violations of basic rights. What are a few thousand or even million deaths today, one might reason, if they are the price that must be paid to bring unending happiness to humanity's billions? As yet, however, no one moved by such reasoning has ever succeeded in constructing utopia, nor does any experience suggest that the road to utopia leads over a mountain of corpses.

Critics of utopian thinking would add that, in principle, there can be no detailed blueprint for a truly perfect society. One line of argument for this proposition, central to the work of the economist Friedrich Hayek, holds that human societies are so large and complex that they exceed the human capacity for understanding and design: any detailed blueprint for a supposedly ideal society would be a bed of Procrustes, which a living society could be made to fit only by destructive violence. Another critique holds that a perfect social order is impossible because individual human beings are not perfect and cannot be made so, at least not without sacrificing their humanity. This idea finds illustration in such dystopian novels as Aldous Huxley's *Brave New World*, where the "perfect" society requires the sacrifice of truth, beauty, and virtue, and Yvgeny Zamyatin's *We*, in which social perfection is achieved by turning human beings into machines by the eradication of imagination. Still other critics argue that because human goods are diverse and to some degree incompatible, and because individual persons have diverse talents, interests, and aims, no single blueprint for social order could be ideal for everyone. For such reasons, the philosopher Robert Nozick proposes instead, in his libertarian work *Anarchy, State, Utopia*, that the best form of society would be a framework to accommodate a diverse and potentially changing array of communities regarded as utopias by the people who choose to inhabit them.

Conclusion

Despite the limitations inherent to the genre, fictional utopias retain an enduring fascination, and they continue to be read and published in the present, even as dystopian speculations have also proliferated. Many readers enjoy exploring relatively concrete alternative societies in fiction, and imaginatively inhabiting such communities enables readers to assess the merits of new social forms without having to struggle through often-difficult philosophical treatises. And, as the example of Bellamy's *Looking Backwards* demonstrates, well-crafted utopian novels can attract wide followings and inspire advocates to

press for concrete reforms, without succumbing to the temptation to seek nothing less than perfection.

Cross-References

- ▶ Marx, Karl
- ▶ More, Thomas
- ▶ Plato
- ▶ Rights: Social Rights

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V

Validity

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Introduction

The absence of a clear conceptual core, shared by all those who have theorized on the notion of legal validity, is the first difficulty we encounter when we explore this notion. It is difficult to find a more elusive legal concept. First of all, the notion of legal validity does not only seem to differ depending on the author who is using it, but sometimes the same author can confuse us by suddenly using different notions of validity. This is clearly the case of Hans Kelsen, who in the course of the twentieth century developed one of the more influential theories of validity (Kelsen 1960/1967), using the term validity to indiscriminately refer to the concepts of *membership*, *bindingness*, and *applicability* (Bulygin 2005: 113, 2015: 113).

On the other hand, legal sociologists had quite a different perspective on the validity of law. For instance, Theodor Geiger developed a very influent sociological concept of validity in the first decades of the last century (Geiger 1970, p. 70). According to Geiger, validity is determined on the ground of empirical observations. Specifically, there are two different effects that a norm can have: (1) it can either be followed or (2) behavior in violation of the norm can be sanctioned. The validity of a norm depends precisely on these two effects. So according to Geiger's concept, we can measure validity in percentage, adding the number of cases of conforming behavior and the number of sanctions for deviant behavior and dividing this sum by the total number of cases. As it is easy to see, Geiger's concept of validity is very far from legal practices.

Finally, nowadays there is a broader debate in contemporary legal theory on the validity of law. This debate – which has nothing to do with the sociological notion of validity – focuses on the conceptual connection between moral validity and legal validity. The modern schism between *Postpositivism* (or Non-positivism), *Inclusive Positivism*, and *Exclusive Positivism* stems from the different ways of understanding this connection. In short:

I. According to *Postpositivism* this connection always takes place; thus moral validity is a necessary condition of the legal validity of a norm (Dworkin 1977, 1985, 1986).
II. On the other hand, for *Inclusive Positivism* moral validity does not always condition legal validity; it depends on what the legal systems establish in this regard (Coleman 1998; Waluchow 1994; Moreso 2002).
III. Finally, *Exclusive Positivism* denies the existence of any conceptual link between moral validity and legal validity and claims that understanding the legal validity of a norm as

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depending on its moral validity is tantamount to endorsing a distorted vision of law (Raz 1979, pp. 39–40).

To sum up, the frame regarding the concept of legal validity is complex multilayered. As a result, a useful starting point for the clarification of this concept may be to restrict the scope of our analysis and to examine it as an *internal legal concept*, i.e., to consider the way in which legal dogmatics generally uses it. In this sense, *validity* and its opposite *invalidity* are the two basic terms that legal dogmatics uses to describe the institutional outputs of the exercise of *power-conferring rules*. These institutional outputs can consist in rules – for example, legislative rules and administrative regulations – or other legal *acts*, for example, a will, the act of appointment of a Minister, or a divorce. When we violate the obligation (or prohibition) contained in a mandatory rule – for example, when we exceed the maximum speed limit on a road – we perform an unlawful act that requires a sanction, for example, a fine or the subtraction of driving license points. In contrast, we do not speak of illegality, but of invalidity, when we fail to comply with some of the conditions contained in power-conferring rules (for instance, when the contracting parties of a marriage are underage). Moreover, the consequence provided by the law is not a sanction, but the nullity of the institutional output (it is considered legally void).

There are two different meanings of validity of a legal outcome or a legal norm generally used by legal dogmatics: *validity in the strong sense* (or *legitimacy*) and *validity in the weak sense* (or *existence*). Let us analyze these two meanings of validity more closely.

Strong and Weak Validity

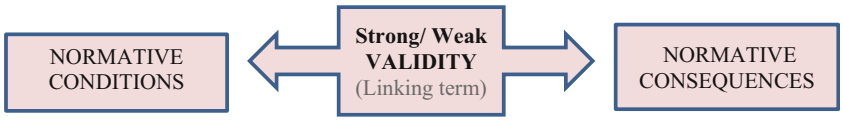
We speak of *strong validity* or *legitimacy of a norm (or legal outcome)* when it is in accordance with *all* the norms that, in several ways, discipline its production and limit its content (SV). In contrast, *validity in the weak sense* or *legal existence* (WV) implies that a norm or other legal products (*legal outcomes*) "is simply effective, in force, that is, susceptible of being applied and producing legal effects (such as the arise of an obligation, the extinction of a right, etc.)" (Guastini 1993, pp. 49–50), until (and unless) duly eliminated from the legal world.

Let us consider the following example: According to Spanish law, a will made by a legally incapacitated person takes effect as long as it is not nullified. Hence, if a legally incapacitated person made a will, we would say that this will is not valid in a strong sense (SV), because the person who has made the will does not have the required mental capacity and therefore the will must be declared void due to the testator lack of capacity. However, according to Spanish law, this will must take effect as long as it is not nullified. Therefore, the will is valid in the weak sense (WV), because it is simply effective, in force, that is, susceptible to being applied and producing legal effects (such as the emergence of an obligation, the extinction of a right, etc.). In other words, although the will is an irregular institutional output, it is not *valid in the strong sense* (SV) and, therefore, can be nullified – that is, it is invalid in the strong sense. But meanwhile it can generate a successful institutional outcome since, according to the law, it is applicable as long as it is not nullified.

To sum up, strong validity or legitimacy (SV) is attributed to regular institutional outcomes (rules or other *legal outcomes*) and informs us that these institutional outcomes fulfill all requirements in the power-conferring rule. Meanwhile *weak validity* (WV) or *legal existence* is attributed to successful institutional *outcomes* (whether legitimate or not).

However, there is a striking disparity between these two notions of validity. The notion of *strong* validity (SV) only alludes to a *conditioning factor*: that the rule (or legal outcome) fulfills all power-conferring rule requirements. In contrast, the notion of *weak validity* (WV) alludes to *normative consequences resulting from validity*: that the rule (or legal *outcome*) is applicable and can produce legal effects.

In order to facilitate the comparison of the two concepts, it is necessary to make the main defining features of these two concepts *visible*. To do this,



Validity, Fig. 1

we can approach both notions of validity as *tû-tû concepts* (Ross 1970). This implies analyzing validity both in the strong sense (SV) and in the weak sense (WV) as linking terms between certain normative conditions and a series of normative effects or consequences. With this we seek to clarify, as far as possible, which set of validity-conditioning requirements are related to each type of validity, as well as what effects result from them.

This idea is expressed graphically in Fig. 1.

Validity in the Strong Sense (SV) or Legitimacy

Normative Requirements Conditioning Validity in the Strong Sense: The Idea of Membership

Let us begin with the less problematic concept: *validity in the strong sense* or *legitimacy*. First, let us consider which set of factors constrain the legitimacy of the institutional outcome. In accordance with the above definition, such requirements are expressed in power-conferring rules. Specifying these requirements forces us to focus our attention on the rules that confer the power to legislate and, more precisely, on each of the elements that appear in their structure, as conditions for producing normative outcomes. We will use the structural analysis of the rules that confer the normative power to legislate (Atienza and Ruiz Manero 2003) in order to account for each of the requirements on which the legal order makes the validity of normative outcomes depend. In particular, the structural elements that appear in the antecedent of a rule that confers the power to pass an ordinary law in the Spanish legal order would be (1) a state of affairs that includes the matters (certain matters are left to the constitution; others, to a special kind of laws called "organic laws"; and others to the legislative bodies of the autonomous regions) and the territory, which is that of the Spanish state; (2) the subject or subjects to whom the initiative to legislate corresponds: this could be, for instance, the government or a certain number of parliamentarians; (3) the procedure (the draft bill is examined, amended, and voted on by the two chambers; and if they disagree, congress has the final word, and, in the case of organic laws, this must be manifested by "a final vote on the whole draft bill"); and (4) the content, or at least some limits of content (laws, e.g., must respect the "essential content" of the rights and freedoms proclaimed in the constitution).

These four structural elements – a state of affairs *X*, the subject *Z*, the procedure *Y*, and the content *C* – have a logical connection to the idea of strong validity (SV) or legitimacy: the complete formulation of a rule that confers the power to legislate includes the set of conditions that are necessary and sufficient for strong validity, while conversely, the absence of one or more of those conditions implies a defect of validity. The adequacy requirement between a normative outcome and the legal order is thus specified as full compliance with each of the characteristic requirements of the rules that confer the power to legislate, such as those of matter, addressee, territory, subject, procedure, and content.

It is worth noting that these structural elements conditioning validity in the strict sense are related to the idea of validity as membership. In accordance with this idea, a norm is considered valid when it meets the formal and material conditions necessary for its production. Remember that the idea of validity as membership is addressed by Kelsen in his pure theory of law. According to Kelsen, the question of the basis of validity is closely connected to another question: why does a certain norm belong to a certain order? And Kelsen's answer to this question is that the normative system is essentially dynamic in character.

A legal norm "is valid [. . .] because it is created in a certain way" (Kelsen 1960/1967, p. 198).

Normative Effects or Consequences of Validity in the Strong Sense: The Idea of Binding Force

After analyzing normative requirements conditioning validity in the strong sense, let us start with the associated normative effect of validity. As we already know, the notion of validity in the strong sense (SV) does not allude to *normative consequences resulting from* full compliance with each of the characteristic requirements of the rules that confer power. To respond to this demand, we have to follow the suggested tû-tû strategy and complete our analysis by pointing out the normative effect associated with the production of valid norms in the strong sense.

This enquiry leads us to a classic way of understanding validity: validity as binding force (BFV). This notion of validity, along with that of membership and applicability, is addressed by Kelsen in his pure theory of law. According to Kelsen, the fact that a norm which concerns a subject's conduct is valid means that it creates obligations; i.e., the subject must behave in the way that is determined by the norm (Kelsen 1960/1967, p. 193). In fact, questions of membership and questions of binding force are strongly connected in Kelsen's work, to the point where the question "Why does a norm belong to a certain order?" is closely related to the question "What is the basis of its validity (i.e., of its binding force)?" (Bulygin 2015, ch. 20, p. 313). In the Kelsenian doctrine, affirming that a norm is valid not only means that it belongs to the system but also that it must be obeyed. Or to put it in more Kelsenian terms, validity, in which the specific existence of a norm consists, "stands for the idea that the prescribed behaviour by the norm *ought to be*."

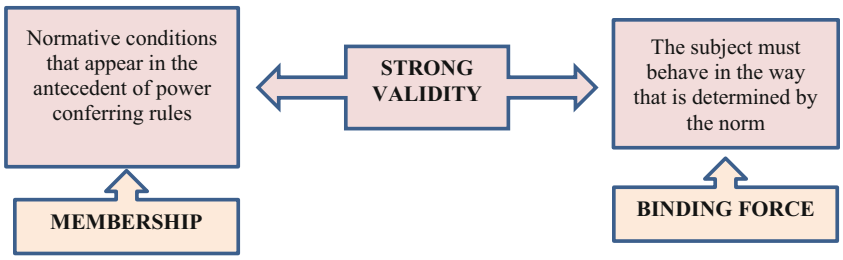
In short, validity in the strong sense (SV) can be understood as a linking term, between (i) a series of normative requirements conditioning validity and (ii) a series of normative effects or consequences. (i) The normative requirements conditioning validity depend on full compliance with all the structural elements that appear in the antecedent of power-conferring rules, and they are related to the Kelsenian idea of validity as membership. (ii) The associated normative effect of validity is that the addressee must behave in the way that is determined by the norm (and another associated effect of validity can be an obligation imposed on the organs which are empowered to annul the outcome, not to do so). These normative effects could be related to the Kelsenian idea of validity as a binding force.

The proposed reconstruction of strong validity as a linking term is expressed graphically in Fig. 2.

Validity in the Weak Sense (WV)

The Problem of *Irregular Normative Outcomes*

Now let's look at the notion of validity in the weak sense. As we know, the legitimacy of a legal outcome demands full compliance with these requirements, but what can we do when we encounter an *irregular normative outcome*?, for example, a law with an unconstitutional content, a will made by a legally incapacitated person, or a judgment by an incompetent judge. In none of these cases have all requirements established in the antecedent of power-conferring rules (relative to the content, the agent, the subject, etc.) been fulfilled, and, consequently, there is an obligation



Validity, Fig. 2

(and a power) on the part of the organs which are empowered to annul the outcome, to do so (or to enforce a rectification). The obligation to annul (or to enforce a rectification) is, therefore, the legal system's reaction to the failure to fulfill the set of institutional requirements in the power-conferring rules.

The difficulty raised by irregular institutional outcomes is that, despite the existence of the obligation to annul the outcome (or to enforce a rectification), such outcomes produce legal effects. Thus, an unconstitutional law, an irregular will, or an invalid judgment produce effects until they are annulled. But the situation is much more concerning when the irregular outcomes are final, that is, in the case of all those irregular outcomes against which appeal is no longer possible, because the legal effects of definitive irregular legal outcomes are exactly the same as if they had been issued in a regular way. It is precisely in relation to these irregular results that the second notion of validity comes into play: validity in the weak sense.

As we already know, validity as legal existence implies that a rule (or legal outcome) is merely effective or in force, in other words, that it is applicable and can produce legal effects. Thus, the next question should be: which normative requirements condition validity in the weak sense?

Requirements Conditioning Validity in the Weak Sense: The Idea of Efficacy

It is rather complex to answer whether or not it is possible to isolate the minimum requirements according to which an institutional result is considered to exist and is therefore applicable (Guastini 1993, p. 50). Thus, for example, it is not always reliable to attempt to differentiate between formal and material conditions of institutional outcomes,[1] linking formal requirements to validity as existence and material ones to the legality or legitimacy of the legal outcome. The breaching of the formal requirements expressed in the power-conferring rules does not always necessarily imply the inexistence of a legal outcome; in many cases the breaching of formal requirements leads to the nonexistence of the outcome, but in other cases the breaching of the same kind of formal requirements can lead to the outcome being irregular (Ródenas 2012, p. 64).

In short, legal systems usually do not offer a stable catalogue of minimum normative requirements on which to base the institutional success of an outcome (i.e., weak validity). On the contrary, the minimum requirements for institutional success are the result of incomplete and partially unstable legal practices whose content can vary depending on the decision of the law applying organs, in such a way that our predictions regarding the success of an institutional outcome are not always reliable. From these partially unstable legal practices, we cannot infer a reliable implicit rule about the minimum requirements. Our perception of what is and what is not a valid outcome is mediated by a factual component that cannot always be put in normative terms.

If the notion of strong validity highlights law's normative dimension, the notion of weak validity or legal existence focuses on its factual dimension. For this reason, in legal theory it is often argued that the efficacy of norms – the fact that they are followed by their addressees – is a necessary condition for their validity: an idea which appeals to this factual dimension of law.[2] The truth is that in our perception of "the legal," a factual dimension coexists with a normative dimension: we consider as legal those norms and outcomes whose existence is grounded in legal practices (conventional facts), but we also understand that we should not consider as legal those norms and legal outcomes that do not meet all the demands made by power-conferring rules. The fact that these two dimensions of law usually go hand in hand makes legal systems

[1] We can consider the first three elements of power-conferring rules – the state of affairs X, the agent or agents Z, and the action or procedure Y – as formal conditions of the institutional outcomes, while the fourth one – the content C – would be a material condition.

[2] An idea which can be found, for instance, in Kelsen (1960/1967) and Hart (1961/2012). However, this idea will not be explored here; see instead Navarro (2013) and Adams (2019).

stable enough to govern our lives, but this does not rule out the possibility that, from time to time, situations may occur in which these two dimensions are irreconcilable. The case of irregular law is one of them.[3]

Irregular norms and legal outcomes are those that are created by bodies with no competence to do so, either because they have not observed the procedure established by law or because they have transgressed either the limits of the organ's competence (matter, addressee, territory, etc.) or the limits of content. But the fact that an unconstitutional law, an invalid will, or an irregular judgment produces legal effects should not only be understood as a matter of a factual legal practice: it is also – and above all – the effect of following a normative requirement. Understanding this normative requirement means that we can no longer postpone our reflection on the normative effects of validity in the weak sense.

Normative Effects or Consequences of Validity in the Weak Sense: The Idea of Applicability

The notion of applicability allows us to account for the obligatory nature of irregular norms and legal outcomes, taking into account that a rule or a normative outcome that does not fulfill all the normative requirements of the power-conferring rules (for instance, because the established procedure has not been followed or because the limits of the organ's competence have been transgressed) would not belong to the system, but may nevertheless be applicable (on condition that there is another norm that provides for this), as long as it has not been declared unconstitutional by the corresponding body (Bulygin 2015, ch. 20, pp. 319–320).

Thus a rule that has not been issued by the competent organ cannot belong to the system but may nevertheless be applicable, as long as it has not been declared unconstitutional by the corresponding organ.

[3] The Kelsenian solution of the tacit alternative clause could be reinterpreted as taking sides in favor of the law's ultimately conventional nature.

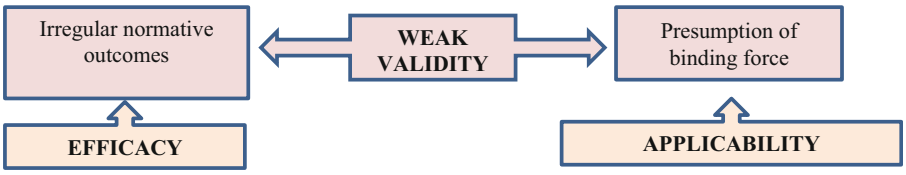
The General Presumption of the Validity of Legal Outcomes and Norms

Perhaps a way of explaining in legal terms the normative force of irregular norms would be to link the notion of normative force to the general presumption of the validity of rules and legal outcomes.[4] In virtue of this presumption, legal effects should be produced not only by those legal norms and outcomes that conform to the demands made by the power-conferring rules but also by those norms and outcomes that, despite their inadequacy, present at least *a minimal appearance* of adequacy; and this presumption could only be defeated when there is a specific statement of the legal organ that is competent to control the regularity of the norm.

The basis for this presumption could be found in institutional reasons centrally linked to the authoritative force of the law. The rules that confer public powers (the rules of competence) establish systems of authorities to which the functions of producing and applying the law itself are attributed.[5] That is, it is the same law that regulates the functions of exchange and adjudication. Thus the efficacy of all this institutional network of authorities depends to a large extent on granting a presumptive force to the decisions that such authorities reach, whether this decisions are laws, sentences, resolutions, or anything else.

[4] Thus, for example, J. J. Moreso (1993, p. 101) has argued that the presumption of constitutionality, in virtue of which judges are obliged to apply the norms of that legal system, even when they consider them to be invalid, would be an application norm.

[5] As for those rules that confer private powers (or capacities), let us observe that many of them have been centrally linked to the substantive value of autonomy. A good example of this is all those norms that confer the power to oblige oneself to do something or to carry out acts of patrimonial disposition. The efficacy of the principle of autonomy would be seriously in doubt if, by alleging the slightest appearance of deviation from the demands made by the rules that confer such powers, it were possible to prevent the results generated in virtue of them from being considered valid. Consider what would happen if producing the legal effects of all the wills drawn up in the territory of a certain state were subordinated to verifying their effective concurrence with each of the conditions that appear in the antecedent of the rules that confer the power to make a will (Ródenas 2006, p. 262).



Validity, Fig. 3

The efficacy or authoritative force of the law would falter if it sufficed for any agent to allege a deviation from the requirements established by the rules that confer such powers in order to prevent the application (or continuation) of a law, sentence, or resolution. In contrast, the presumption operates in the other direction: faced with the slightest appearance of meeting the requirements that appear in the norm of competence, all the legal effects foreseen for the regular regulative results must go ahead, and only when there is a specific statement of a body invested with the authority to do so will it be possible to defeat this presumption. In short, institutional reasons, linked to the authoritative force of the law, show that binding force not only concerns those norms that conform to all of the requirements established by the rules that confer the power to produce them but also those other norms which, despite not being fully adequate, present a minimal appearance of adequacy (Ródenas 2006, pp. 262–263).

It is in the light of this general presumption of validity that we perceive in all its breadth the significance of the notion of legal existence or validity in a weak sense: normative force (or applicability) is predicated not only of strong valid norms, but – more significantly – of those norms that, despite not fully meeting the demands made by the rules for normative production, present a minimal appearance of adequacy. According to our legal system, before the slightest appearance of a norm's conformity with the norms governing its normative production, it must produce the same effects as if its adequacy were full, as long as it has not been annulled.

The proposed reconstruction of weak validity as a linking term is expressed graphically in Fig. 3.

Conclusion

Institutional reasons linked to the effectiveness of law as a mechanism for the pursuit of certain – public or private – goals result in the need for two sorts of "validity." Validity is not only used to refer to those normative outcomes that fulfill each and every one of the requirements of the power-conferring rules (strong validity) but also of those others that merely present a minimal appearance of adequacy (weak validity). Normative consequence associated with strong validity is binding force, while in the case of weak validity, the associated consequence is applicability. In this way, the Kelsenian idea of applicability can be explaining resorting to the idea of a general presumption of validity of legal outcomes and norms.

Cross-References

► Competence Norms
► Institutional Facts

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Vattel, Emmerich

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Short Biography

Emer de Vattel was born on 25 April 1714 in Couvet, Neuchâtel (Switzerland), which at that time was still a part of Prussia under a personal union. He was one of nine children of a protestant priest elevated to nobility by Frederic I of Prussia and his wife, Marie de Montmollin. Vattel died on 28 December 1767 in Neuchâtel. Emer (or Emmerich) de Vattel studied philosophy in Basle and theology in Geneva. He there seems to have also visited legal classes with J. J. Burlamaqui. Vattel was soon attracted by Leibniz and his legal epigone Christian Wolff. In 1741, he published his study in defense of Leibniz: "Défense du système Leibnizien." After having in vain tried to enter into the Prussian public service and equally in vain to obtain the interest of Frederic II of Prussia for the project of an Academia in Neuchâtel, he was eventually appointed ambassador of Saxe in Bern (1746) and secret council of the Chancellor in Dresden (1756). However, these functions remained of secondary interest for him, while he mainly spent his time in Neuchâtel under unattractive financial conditions. Thus, he had time to work on his main opus, which would establish his international fame: "Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains" (1758). In 1962, Vattel published another piece, titled "Questions de droit naturel et observations sur le traité du droit de la nature de M. le Baron de Wolff," which is much less known. In 1764, Vattel married Marie-Anne de Chêne, and in 1765, a son would be born from that union. He finally died prematurely on 28 December 1767 from what the doctor noted as being a "hydropisie de la poitrine."

In the following years, *Le droit des gens* would be translated into many languages, including English and German. Vattel had a significant influence on practitioners (in the legal professions and in diplomacy), particularly in the United States where the book had initially been introduced to B. Franklin. His temperament and talent were more philosophical and political than strictly legal; in legal terms, his writings often lack ultimate polish and precision. But his language and system are highly suggestive and attractive, while being also much more readable than the old Latin-styled treatises, replete with precedents from Antiquity. It is thus fair to say that his *magnus opus* is the first modern treatise of public international law.

Work

What are the main contents and characteristics of the *Droit des gens* of 1758? Vattel is one of the

"fathers" of public international law. This branch of the law is designating progressively since the seventeenth century the legal rules which States adopt for their mutual intercourse. Traditionally, treaties, diplomacy, territorial rights, war, and the regime of common spaces (like the high seas) are part of it. With the consolidation of the modern State and the fading away of the universal powers of the Middle Ages (papacy and empire), true "international" (i.e., cross-border interstate relations) appeared, and the old system of international law had to be reshaped.

There had been roughly speaking three schools of thought on the remodeling of the edifice after the breakthrough of Grotius' writings, mainly his *De jure belli ac pacis* (1625). For some authors, international law was a part of positive law, i.e., it flowed from agreements and customary practice of States being the "legislators." This school is composed by authors such as R. Zouche, C. van Bynkershoek, or J. J. Moser. The second school considered that international law was merely natural law, i.e., a law based on right reason. It could not be positive law since there was no organized sanction of its rules between the equally sovereign States. Under this view, positive law is defined by the existence of a sanction for unlawful conduct as it is typically organized in municipal law systems. This current was led by S. Pufendorf and would still be echoed in the nineteenth century by authors such as J. Austin. The last school of thought is the intermediate current envisioning international law as a mixed system of natural and positive law. This thought is in a direct line of development with the system of Grotius. It is followed by authors such as S. Rachel, C. Wolff, and E. de Vattel. Roughly speaking, this system was based on the idea that there were rules of right reason indicated by secular tradition and applicable in the relations between the sovereigns; however, these rules were binding mainly in the conscience of the rulers – but no sanction was provided for them. On the other hand, there were a series of rules of positive international law, which the States had adopted in their mutual relations, by treaties or practice, and these were fully binding and gave rise of a type of sanction if breached, namely, reprisals and war. (On these schools of thought, see, e.g., A. Truyol y Serra, *Histoire du droit international public*, Economica, Paris, 1995, pp. 82ff).

The second main trait of Vattel's doctrines is the fact that they take fully account of the new political-territorial situation emerging progressively after the adoption of the Westphalian treaties ending the Thirty Years' war (1648). Whereas in the former treatises of international law, the old-fashioned medieval elements and traditional scholastics were still more or less present; Vattel evacuated all these elements from his system and exposes in almost exemplary purity a system of law placed in the crucible of relations between equal sovereigns not being subjected to a superior power. Vattel is thus the great commentator of the so-called classical system of international law as "interstate law" of a "horizontal" nature based on the "coexistence" of States, i.e., a contractual and natural law between equals, rooted in their sovereignty. An expression of that choice is the almost complete absence of any "community of States" and community interests in Vattel's treatise (some exceptions can however be found, see, e.g., Book I, Chap. XXIII, § 283, collective sanctions against a State violating the common right of free access to the oceans, or Book II, Chap. IV, § 53, collective right to punish a malfeasant nation; it will be noted that these positions concern mainly collective action conducted by aggrieved States). Vattel therefore unsurprisingly eliminated from his treatise the concept of *civitas maxima* still symbolically upheld by his mentor, C. Wolff. It stands to reason that the collection of rules for such relationships between States reflected largely the really existent organization of international society and the effective power situation in Europe and in the world. Thus, Vattel's treatise could exert a much greater influence than the partly outdated older treatises, modeled on a bygone world. However, in the twentieth century, some international lawyers would more or less harshly criticize Vattel for having initiated the dismantlement of international law by trying to base his whole system on the "anarchic sovereignty" of each power unit rather than on international community constraints enforced by law. The power of each

State to act quite freely on the basis of its sovereignty was here seen as corrosive; in this view, a legal system must be based on constraint and prevalence of some common interests over mere individual egoism. One of the main critics of this type was the eminent Dutch international lawyer by C. van Vollenhoven (*Du droit de paix, De iure pacis*, Martinus Nijhoff, The Hague, 1932, p. 98–99).

The third main trait of Vattel's work is that it is written in elegant French and is not too technical in its exposé. This paved the way to the great fame of the opus. It could be read by lawyers and diplomats, politicians, and enlightened citizens alike. This led to the first "popularization" of public international law (which was to be pursued at the times of the League of Nations, 1919). The style is attractive and simple, albeit sometimes slightly bombastic, which a language that does not lack studied attempts at charming the reader. It is therefore no surprise that the *Droit des gens* was translated in so many languages and read all over the world. At the same time, this very style attracted some more or less harsh criticisms by trained lawyers, who consider Vattel to be at once often imprecise and grandiloquent and to lack true originality, adapting the system of Wolff rather than creating really new ground (see, e.g., A. de Lapradelle, *Maîtres et doctrines du droit des gens*, 2nd edn., *Les Editions internationales*, Paris, 1950, p. 154–5).

Not all the chapters of Vattel's book are still in some use today. Thus, the distinction between perfect and imperfect rights, or the treatment of the duties of the State toward itself (self-perfection), has fallen into oblivion. Conversely, there are some chapters enjoying still an unbroken fame. A first example is provided by the extremely detailed and groundbreaking chapter on the interpretation of treaties (Book II, Chap. XVII, §§ 262ff). Vattel develops this crucial aspect of day-to-day practice more than his predecessors had done. He ventured into such questions as disallowing interpretations made in bad faith or fraudulently; the search for certain and precise rules of construing the treaty; the weight to be attached to the ordinary sense of the words ("you should not interpret what does not need interpretation"); the ascertainment of special meanings of words according to the intentions of the parties; the context furnished by other conventions relevant for the one being interpreted; etc. A second area where Vattel has remained essential is the emergence of the modern "law of war" (called today international humanitarian law), i.e., a set of rules regulating the rights and duties of States during warfare, mainly in terms of defining unlawful means and methods of conducting hostilities and granting protection to persons hors de combat. In the older treatises, under the influence of the just war doctrines of Antiquity and of the Middle Ages, this branch of international law was still in infancy. The current conception that there was one legitimate and one illegitimate belligerent (aggressor and aggressed) had made it impossible for it to develop and flourish. A law of war can practically operate only if abstraction is made as to the rights and wrongs in the initial recourse to force so as to apply to both belligerent parties the same legal restraints in warfare, e.g., against weapons with cruel effects. However, the older doctrine, and to a large extent still Grotius, had refused to apply *equal* constraints to the belligerent with a just cause and to the one with an unjust one – this was seen as an intolerable reward given to the aggressor. Vattel, on the basis of his *Grundnorm* of "equal sovereignty," liberated the laws of warfare from their umbilical cord linking them to the lawfulness of the resort to force. He thus allowed a full-fledged law on warfare to develop on the new basis of equal rights and duties of belligerents (see Book III, Chap. IV, § 68). This was to the humanitarian benefit of those involved in war. This conception dominates today: minimum humanitarian constraints (*jus in bello*) must be applied at all times and in any case; they cannot be unilaterally withheld on the basis of more or less subjective judgments on who is right or wrong, i.e., who had the right to use force and who do not have that right (*jus ad bellum*).

In the twentieth century, under the impulsion of many international organizations and the more vivid perception of common concerns of humanity (human rights, preservation of the natural environment, weapons reduction, international cooperation, etc.), international law has given a greater

share to such issues and developed the corresponding legal tools, rooted in the perception of some international community. But the old law of coexistence, as envisioned by Vattel, has not altogether disappeared, nor did many of its "anarchical" sovereignty-bent features. There is just an additional community-oriented layer in the law now, whose strength however greatly varies according to context and time. Consequently, Vattel still remains modern in many respects, while being outdated on others. In short, one may roughly venture to say that he is to some extent relevant for much of what his opus actually *does contain* but has been overtaken by events mainly on the *blind spots* of his writings.

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Vico, Giambattista

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Giambattista Vico was born in Naples in 1668; he died in his native town in 1744. He studied law and became a professor at the local university. It is now acknowledged that he was never a solitary genius, nor a romantic, tragic figure of unacknowledged talent; he had contacts with several intellectual figures of his time. It is safe to state, however, that the magnitude and depth of his insight, especially as formulated in his complex, sometimes puzzling masterpiece, *The New Science*, was not understood during his lifetime. The baroque language he used is at the same time magnificent and difficult, eloquent and redundant, and intriguing and convoluted.

Vico is first and foremost a philosopher of history, who believes that independent human civilizations, or nations, necessarily go through a number of stages that are also forms of government: aristocracy, then democracy, and eventually monarchy. The most important source for Vico's sequence is Roman history (and Roman law): the seven kings were not the leaders of true monarchies, and only with the Roman Empire the last form of government enters the stage of history.

The first stage, however, is a sort of state of nature that for Vico is, literally, a state of families: independent social units ruled by the iron fist of the fathers. Before that state of families, there is the brutish state, where the first human beings dwelt. These brutish ancestors cannot nevertheless be deemed as properly human, since even their bodies were different in shape and dimensions – they were "giants." History is therefore a taming process, by which Divine Providence leads men and women toward civilization, human feelings and emotions, refinement, and civil equality. Every element of human civilization goes therefore through three stages: the Age of Gods, i.e., the state of families, where religious rituals are most important and mark the dawn of

civilization; the Age of Heroes, i.e., aristocracies, where the fathers join forces to keep the serfs (who will become the Roman plebeians) subjugated; the Age of Man, i.e., democracies and then monarchies, where human beings are acknowledged as equals and the peak of civilization is reached. Religion, language, and of course law all go through these three stages.

This means that historical legal system is not the outcome of a deliberate project and agreement, as in social contract theories, but the result of historical factors, not planned by any human will. As a matter of fact, human wills often pursue selfish goals, but the resulting courses of action are bended by Divine Providence into beneficial tools, leading those struggling men and women toward humanity and civilization. Legal systems are therefore not legitimate because of any form of consent but because they are steps toward this higher goals.

Even the most primitive human condition, the brutish state, can find a sort of legitimacy from Vico's philosophy of history. When a civilization reaches its peak, civil equality under democracy, in the Age of Man, can run the risk of moral disintegration, when citizens are no longer able to share modesty and virtue, and turn into shameless atoms of individual selfishness. Under such circumstances, Divine Providence can administer three remedies. The first one is a change of form of government, when, thanks to a royal figure, an "Augustus," democracy morphs into a monarchy. If no such a figure is to be found, then that unfortunate nation can be conquered by a stronger and better one. If such a stronger and better neighbor is nowhere to be found, Providence can administer the third and most drastic remedy, letting those deluded human beings drift and sink in another brutish state, so that all their clever schemes and sophistries will be wiped out in thousand years of lack of civilization. The Middle Age is, according to Vico, the second brutish state, and the European civilization coming out from that Dark Age is just another cycle. There is an implicit warning in Vico's philosophy: it is still possible to fall into a brutish state again, if civil virtue is not respected and enforced. Such a returned Dark Age, however, will be legitimated by the role it plays in these spiraling cycles of history, supervised by Divine Providence for the benefit of human beings.

Law and political order are therefore instrumental to this philosophy of history; this has meaningful consequences from a legal-philosophical point of view. In a critical moment of human history, plebeians fight to conquer full citizenship status and rights: when they succeed, the shift from "heroic" aristocracy to democracy will have taken place. Plebeians do not fight for such a lofty goal; however, they fight for an agrarian law and for the right to marry. It is not that plebeians could not marry patrician women, or the other way around: they could not have solemn nuptials even among themselves. This impacts the law of wills, the hereditary transmission of the land, and the certainty of the family trees. All of this is basically *civil law*.

The heroic contentions between patrician and plebeians are but an example of *the positive role played by social conflict* in Vico (a notion already envisioned by Machiavelli). The shift from a form of government to another is always due to some form of social conflict, allowed by a Divine Providence that shapes it into the engine of political change. The only change that does not require social conflict is the most radical one, the dramatic exit from the brutish state and the primeval "forests." In Vico's most famous reconstruction, those most ancient beings, unable to speak and lacking any sexual modesty, were struck in their fervid imagination by the first lighting. They thought the thunder to be the angry voice of a powerful and watchful entity (God as an Eye, i.e., Providence, is also visible in the famous frontispiece, an illustration of the content of the book that Vico explains in full detail in the first section of his masterpiece). These (almost) human beings "raised their eyes and observed the heavens" (SN 377). There is therefore need of an external fiat to start the process, and this is Jupiter's lightning that deeply scares those beings and make them change their habits. Fear of God makes them start the first families, taking shelter in the caves and putting an end to the primeval wandering. It is the very

beginning of civilization: religion, nuptials, and the burying of the death. Again, the first human laws have to do with marriage and civil conventions. There is, therefore, *a primacy of civil law and institutions* in Vico (just like there is a primacy of penal law in Hobbes or of public law in Hegel).

The role played by civil law and institutions is not grounded in nature; quite the contrary, the latter is often the outcome of the former. Law and politics seem to be able to shape human nature itself.

For example, the first beings dwelling in the "forests" of the brutish state lack properly human shape and dimensions. According to Vico, properly human shape and dimensions, i.e., the very bodies of those ancient human beings, are due to the first hygienic rules – the two words politess (cleanness) and polity have a common root. A human institution, a set of rules, changes the nature (dimensions) of those human "giants," shrinking them down to truly human proportions.

Interestingly, Vico often mentions natural law. His notion of natural law, however, has little in common with natural law theories that take nature as a *prius* and human, positive law as a *posterius*: so that legal institutions should follow some eternal normative standard somehow grounded in nature in order to be legitimate. With Vico, nature can be the effect, rather than the cause. Equality among human beings, as well, is not simply a data that the famuli discover, a notion that prompt them to fight for their rights; it is as well the outcome of such a fight, a fight motivated by the "axiomatic" truth that "subject people naturally yearn to escape their servitude" (SN 583), so that, after a long oppression, "they must have grown weary of it," *se ne dovettero attediare* (SN 583) – the motivating factor seems therefore to be an emotion, weariness.

Another example of the relationship between politics and nature is about another emotion, namely, motherly love. As long as the women of the famuli, the roman serfs, were slave – says Vico in one of the most haunting passages of *The New Science* – they must have hated their children: it was but pain and discomfort to give birth to a creature that was probably going to be sold to other masters and to live in another household. Under the democratic form of government, however, when civil equality can thrive among citizens, the tenderness of the blood, *la tenerezza del sangue*, was bound to wake up. Motherly love is therefore slumbering, and almost absent, under the wrong legal and political circumstances: what could be deemed as an inherently natural emotion, the love of a mother for his child, flourishes into existence only because of the right legal and political institutions.

Vico acknowledges, indeed, the power of the emotion of fear and describes in detail the first awesome, terrifying religions, often involving human sacrifices. Nothing less could have started that taming process by which real humanity could have, in later days, flourish. The key emotion in his vision, however, is shame: while fear is an emotion that seems to revolve around individuals, for it is possible to be afraid by oneself, shame is basically a social emotion, and it implies someone else who is acknowledged as such. The first fear of the lightning and the thunder turns into the shame caused by open sexual intercourse under the eye of God. Laws cannot be obeyed just because of the fear of the consequences: laws radiate from and at the same time validate a feeling of shame for some specific acts, like disrespecting the dead by neglecting to give them a proper burial.

This means both a notion of human beings as social animals, fundamentally interactive, and the idea of interiorized "values" that are not to be fully understood as the deliberate creation of rational maximizers. In all human, legal and political, institutions dwell both the factor Vico calls "true," *vero*, and the element he refers to as "certain," *certo*. The former is the rational element by which an institution justifies itself, the argument inherent in that given legal provision that usually involves some form of equality. The latter is the necessary historical data, the contingent arbitrary shape that any given institution of a human civilization, in any stage of the cycle, must take.

There is something that is not fully transparent to human reason: and Vico, acknowledging the complexity of human condition, fights the modern

rationalism of Descartes. There is a relationship between what is true and what is made, *verum et factum convertuntur*. Only God can fully understand the world of nature, because He is the Maker of such world; human beings, however, collectively make the "world of nations," and we can therefore understand human institutions, legal provisions, forms of governments, and political orders. While Vico reminds us that no civilization was ever built on atheism, he also justifies the humanist study of the institutional world (a theme that he had already tackled, from a different point of view, in the fundamental oration *On the Study Methods of Our Time*).

There is controversy on the role actually played by Catholic religion in Vico's life and philosophy. There was a folder on Vico on file at the Holy Inquisition. Although he often protests himself as a devout man of religion, Benedetto Croce found his theory of cycles essentially pagan. It cannot escape that in Vico's philosophy of history, the crucial event for a Christian, the Incarnation of Jesus Christ, that happens only once and gives meaning to human history as a whole, is never truly stressed. Religion, however, is something critical in Vico's theory. The ancient pagan religions can be viewed from two different points of view: they are false, because only the Catholic faith is the true one, but they are also "true," because Providence, i.e., God himself, wanted them to exist and to be believed as true.

It is undeniable, however, that piety is a key value all through *The New Science* and that even those ancient cults honored and cherished their own *impia pietas*.

Vico is buried in Naples, in the Church of the Girolamini. His legacy and fortune have grown exponentially, and together with Machiavelli he is currently the most widely studied Italian author in the history of legal and political philosophy.

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Viehweg, Theodor

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Introduction

Theodor Viehweg (1907–1988) was a German legal philosopher. He worked as a professor at Johannes Gutenberg-Universität Mainz from 1959 to 1972 and then received professor emeritus status, which he maintained until his death. His only book, *Topik und Jurisprudenz*, was written in the post-Second World War context. It was first published in 1954, followed by new editions in Germany and translations into Italian, Spanish, Portuguese, Japanese, Serbo-Croatian, and English. The fifth edition (1979) included a new chapter in which the author provided a comprehensive view of the debate over law and rhetoric that had held sway since 1954. Aside from this book, he published many short contributions to the field of legal philosophy, which were collected and organized after his death and published in German (1995), Spanish (1991), and Portuguese (2021).

Alongside Chaim Perelman, he was one of those responsible for restoring rhetorical studies in legal theory.

Viehweg was also a co-editor of the *Archiv für Rechts- und Sozialphilosophie* (1949–1967), as well as a member of the International Association for Philosophy of Law and Social Philosophy (IVR).

Topik und Jurisprudenz's Main Ideas

The most well-known and controversial idea is directly related to the book's title: "Topics and Law." By avoiding the word *Rechtswissenschaft* (science of law) – which is more common in German – Viehweg was pointing to an important debate that continued to intensify after the publication of his work, i.e., the *status* of what jurists do. Jurisprudence, according to him, is related to *prudence* and to the tradition of ancient rhetoric. Legal reasoning is based on "problem-thinking" and not on "system-thinking," contrary to the modern self-image that jurists have developed about their own work as either "systematic" or "deductive." Viehweg attempted to show how the rhetorical background of law had stood almost untouched, even within German private law, the field that offered the most relevant example of an effort at legal systematization: the effort undertaken by the pandectics. To achieve his purpose, the author organized his discourse by first defining what "topic" means (according to the works of Aristotle and Cicero) and then exploring its historical traits in Western legal reasoning. Hence, the books chapters traverse the *ius civile*, the *mos italicus*, Leibniz's *ars combinatoria*, the axiomatic, and the German pandectics. Viehweg also argued that the main problem (or the aporia) in the field of law is, and always will be, justice.

Therefore, the main argument of Viehweg's book can be summarized as follows: "problem-thinking" is so closely related to topics because it is always linked to deliberation. To deliberate, humans need to discuss what they will do about their lives, in the fields of ethics, politics, and law. They must take a dialectical approach and be prepared to confront as many points of view as possible in order to find the best answer. Accordingly, whenever jurists need to find a solution to a given problem, they search the existing systems for useful points of view. In fact, to find out what may be considered the just, right, or fair solution here and now, jurists use these points of view as *topoi*, or rather as commonplaces that are part of a broad catalogue. A *topos* has its meaning linked to the particular situation in which it is used. That situation is intrinsically related to justice, and whenever it occurs that a given answer is not good enough, the jurists must abandon their previous deductive chain and start a new one. In this sense, there is a system serving as the background to legal reasoning, even if it is not deductive in its configuration.

Viehweg's Ideas After *Topik und Jurisprudenz*

The problem of legal reasoning and its relationship to a system was further developed in some of Viehweg's other contributions, in which he noted that there are several ways to conceive of a system, and a deductive conception is just one possibility.

The distinction between dogmatic and zetetic ways of thinking is another main idea in Viehweg's later work. Viehweg argues that jurists must fulfill tasks varying from the analysis of a given legal system to scientific or philosophical inquiry. Those tasks can be better comprehended as a scheme of questions and answers. Given a problem, answers are offered. According to the specified rules of evidence, those answers may then be accepted or rejected. In this scheme, it is possible to emphasize either the questions or the answers. When we emphasize the questions, the schema points toward investigation or zetetics; in contrast, when we focus on the answers, that indicates dogmatics. A complete legal knowledge needs both zetetics and dogmatics, precisely because of its wide range of tasks: providing guidance for human action requires an emphasis on answers, and executing both a scientific and a philosophical investigation necessitates a focus on questions. A philosophical investigation should be conceived of as a theory of argumentation, with the capacity for developing a rhetorical

perspective on how jurists do their work through various discourses.

The other main theme in Viehweg's later work is related to significant developments in the rhetorical theory of law and its connection to the justifications required when thinking in terms of the Rule of Law, even though the author neither discussed how this duty of rational argumentation can be fulfilled nor presented a fully developed theory of legal argumentation.

The Main Critics

Criticism of Viehweg's work came from several directions. Frequently, criticism pointed to the ambiguity of certain of his premises or the lack of a direct response to objections.

Some critics also attacked *Topik und Jurisprudenz* for what they called "fallible historical reconstructions" and for Viehweg's use of Giambattista Vico's work or of Nikolai Hartmann's distinction between "problem-thinking" and "system-thinking."

To summarize the main arguments against his primary thesis: when he discussed the aims of systematization in German legal theory, Viehweg described a reality that was long gone. It was neither right nor useful to pay so much attention to the problem, thereby losing sight of the coherent resolution of legal issues.

Last but not least, criticism focused on the difficulties of managing concepts like *topos*– full of semantic uncertainty since Aristotle's discussion of the matter – as part of the construction of a comprehensive theory of legal argumentation that is capable of providing a way of understanding the duty of justification and the Rule of Law, even if that duty is conceived of in a limited or skeptical manner.

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Virtue Theory and Law

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Introduction

In the last decades, there has been a blossoming of virtue approaches to a number of philosophical problems (Snow 2018), and, as a result, virtue theory now occupies a prominent place in both ethics and epistemology. Although virtue ethics has its origin in ancient Greek philosophy and was the dominant approach in Western moral philosophy until the Enlightenment, from the late

eighteenth century onward, with the rise of deontology and consequentialism, it gradually faded from the landscape. Virtue ethics reemerged in the late 1950s (Anscombe 1958) and has established itself as a major approach in contemporary moral philosophy. In contrast to deontology, which gives explanatory primacy to duties and rules, and consequentialism, which focuses on consequences, virtue theory places the notion of virtue at the center of moral theory. Both deontology and consequentialism aim to provide a principle-based account of right action; this sharply contrasts with virtue ethics, which seeks to explain the normative properties of actions in terms of the virtues of the agents. The revival of virtue theory has also been a main development in contemporary epistemology (Sosa 1980). Its central contention is that intellectual agents and communities, rather than beliefs, should be the primary focus of epistemic evaluation. This commitment entails a distinctive direction of analysis: virtue epistemology – in a way analogous to virtue ethics – explains the normative properties of beliefs in terms of the epistemic virtues of agents, rather than assessing the epistemic status of beliefs against agent-independent epistemic principles.

The last years have also witnessed an increasing interest in virtue theory in both legal and political theory (Axtell and Olson 2013). Virtue politics has embraced a range of issues in political philosophy, including constitutional design, civic virtues and education, democratic theory, matters of global justice, political oppression and disagreement, the role of deliberative virtues in politics, and the relation between virtue theory and political liberalism. In law, virtue-oriented work has been growing in the last years as a greater number of issues are being subjected to virtue analysis and new perspectives on virtue are being applied in legal scholarship (Solum 2003; Solum and Farrelly 2008; Amaya and Ho 2012; Amaya and Michelon 2018). In law, as much as in other domains, current work on virtue is the result of a recovery. Indeed, virtue was for most of the history of legal thought a critical concept, which was increasingly displaced by the dominance of principle-based approaches to morality as well as the hegemony of legal positivism. Nowadays, the field of "virtue jurisprudence" is a very active area of research, which keeps on expanding its scope and visibility. Virtue jurisprudence places the notion of virtue, rather than rules or consequences, at the center of legal analysis. The primacy of virtue sets virtue jurisprudence apart from rule-centered approaches to law and adjudication (e.g., legal positivism, formalism, or legalism) as well as from outcome-oriented views (e.g., legal realism, pragmatism, and law and economics).

Versions of Virtue Jurisprudence

Different versions of virtue jurisprudence may be distinguished. The following are some classifications that might be useful to chart the map of theories that fall within the realm of virtue jurisprudence:

(a) *Strong, moderate, and weak versions of virtue jurisprudence*. The claim that unites all versions of virtue jurisprudence is the primacy of virtue. However, this core claim may be interpreted in different ways, yielding more or less strong versions of virtue jurisprudence. On a strong interpretation, the thesis of the primacy of virtue is meant to replace or eliminate the role that deontic notions may play within a theory of law and adjudication. On a moderate interpretation, the thesis implies that deontic concepts are derivative from virtue concepts, but this is compatible with assigning value to deontic concepts. A weak version of virtue jurisprudence vindicates the relevance of virtue concepts alongside with irreducible notions of duty (Statman 1997, 8–9). The different interpretations of the thesis of the primacy of virtue have important implications for the issue of whether virtue jurisprudence is alternative or rather complementary to deontological theories of law and adjudication.

(b) *Constitutive and epistemic versions of virtue theory.* Virtue jurisprudence in all its varieties gives virtue a foundational or constitutive role. In the strong and moderate versions, virtue provides the only foundation for legal

theory. The weak version endorses a pluralist approach to legal theory in which virtue, together with deontic concepts, serves as the foundation. All these approaches give virtue a constitutive role in that a right legal decision is explained in terms of virtue (either exclusively or in conjunction with deontic concepts). However, it is important to keep in mind that virtue may be given a role in legal theory and legal reasoning without committing to the view that it is foundational. One may defend a broadly deontological or consequentialist theory of law and adjudication and hold that virtue plays an important epistemic role, i.e., virtue provides the best criterion for determining the correctness of a legal decision, which is a function of compliance with virtue-independent principles. It is also possible to adhere to a principle-based account of law and adjudication (either deontological or consequentialist) while recognizing the serviceability of certain character traits to the effective implementation of the theory, thereby assigning virtue an auxiliary role within the theory.

(c) *Conventional* vs. *radical versions of virtue jurisprudence*. Some legal scholars have used virtue theory to address the issues that have been the traditional concern of jurisprudence, such as the nature of law and the analysis of legal justification. Others, however, have deployed virtue theory to pursue a different set of problems, such as the role that emotions play in legal reasoning, the perceptual dimensions of legal argument, or the exemplary character of the law. In addition, virtue jurisprudence has led to an expansion of the methods and sources used in legal theorizing. Some legal scholars working in the field of virtue jurisprudence have relied heavily on literature and the arts to argue for their claims and have used methods other than the kind of conceptual analysis that is the landmark of analytic philosophy of law. Thus, virtue jurisprudence has not only provided new answers to traditional questions, but it has also questioned the conventional understanding of the discipline by drawing attention to new problems, sources, and methods (Baehr 2008).

(d) *Sources of virtue jurisprudence*. Most work in virtue jurisprudence draws on the Aristotelian (and neo-Aristotelian) theory of virtue. However, the resources of other traditions of virtue ethics have been recently exploited with a view to examining a number of legal problems. Most prominently, there have been applications of Plato's theory of virtue (Berges 2012; Annas 2018), Confucian perspectives on virtue (Wang and Solum 2012), as well as Humean and utilitarian versions of virtue theory (Slote 2012).

Features of Virtue Jurisprudence

The defining feature of virtue jurisprudence is the *thesis of the primacy of virtue*, which, as mentioned above, may be variously interpreted. Other characteristics that bring together the varieties of virtue-centered approaches to law and adjudication are the following:

(a) *Attention to particulars.* Virtue jurisprudence denies that there is any sort of decision procedure that may yield the right results irrespective of the agent who applies that procedure. In this view, there is no system of rules and principles that suffices to govern correct legal decision-making. Instead, sound legal reasoning critically involves the perception of the particular circumstances of the case (Michelon 2018; Van Domselaar 2018). This brings virtue jurisprudence closer to particularism – even if, insofar as virtue jurisprudence (in some, moderate, versions) does not reject the relevance of rules to legal decision-making, it is best understood as providing a middle way between generalist and particularist approaches to legal reasoning (Schauer 2012).

(b) *Human flourishing as an end.* Although the vindication of human flourishing as an end is particularly distinctive of Aristotelian approaches to virtue and reason in law, a concern with human flourishing lies at the

background of most writing in virtue and law. Important issues in connection with human flourishing are the role of law in bringing about this end, the relationship between obedience to law and living virtuously, the discussion of the ends of the legal professions and their contribution to human flourishing, and the connection between civic virtue and a virtuous life.

(c) *The relevance of the emotions.* Virtue is not only a matter of action but also of emotion. Virtue requires one not only to act in a way that is appropriate to the particulars of the case but also to have the right sort of emotional response. From the perspective of virtue jurisprudence, emotions are thus critical to virtuous legal deliberation.

(d) *Noncommensurable plural values.* Virtue theory rejects the assumptions that values are commensurable and that commensurability is a condition of rationality, which underwrite principle-based approaches to law and legal reasoning (Nussbaum 1986). The task of legal reasoning, which oftentimes involves dealing with value conflict, cannot be simplified by a balancing operation or by reducing the conflicting values to some common value which ought to be maximized. Instead, legal deliberation is, on a virtue approach, a complex task that requires the specification of the plural and heterogeneous values involved in the particular case.

Fields of Research

There is a wide range of legal problems that have been addressed by using the tools of virtue theory. In philosophy of law and legal theory, virtue jurisprudence has focused on three main problems. First, as mentioned above, it has sought to investigate the connection between virtue and the aims or ends of law. A proper aim of law, in some views, is to promote human flourishing, by inculcating virtue and preventing vice (George 1993). More plausibly, the law may be used to shape character indirectly, by creating the social conditions under which citizens may develop the virtues or by serving as an exemplar of virtue (Koller 2007; Brownlee 2015; Solum 2018; Cimino 2018). Second, virtue jurisprudence has contributed to the theory of adjudication by investigating the relevance of judicial character to sound legal reasoning. In this regard, special attention has been given to the role that practical wisdom plays in judicial reasoning (Solum 2003; Amaya 2011; Michelon 2012). Finally, besides legislation and adjudication, virtue jurisprudence has contributed to the theory of justice, by providing a virtue account of justice as well as examining the relations between law, justice, and law-abidance (Solum 2006).

Virtue theory has also been applied to many areas of substantive law, notably, criminal law, constitutional law, contract law, property law, torts, evidence law, international law, intellectual property law, corporate law, medical law, and legal ethics (Amaya and Ho 2012, 8–9). Thus, there are a growing number of exceptions to the dominant – rule-oriented and consequence-oriented – paradigms of legal analysis as an increasing set of problems in different branches of law are being analyzed by using virtue theory. These applications show the fecundity of the virtue paradigm and its potential to provide new perspectives on a diversity of fields of legal theorizing.

Conclusions

The virtue turn in legal scholarship has significantly contributed to the advancement of legal studies by providing new insights into traditional problems as well as broadening the horizons of legal theorizing. A major benefit of this turn has been the enablement of a productive dialogue between contemporary legal theory and ancient legal thought. Work on virtue and law has also interestingly intersected with current research on law and the emotions, legal education, legal epistemology, moral and cognitive psychology, and legal ethics. Several objections, however, have been raised against virtue-oriented work in law. It has been argued that virtue jurisprudence cannot give adequate action-guidance; that it is paternalistic; that it

intrudes in the private realm in a way that is incompatible with political liberalism; that it undermines the rule of law; that it is in tension with the legal practice of reasoned judgment; that it is inadequate in the circumstances of value pluralism that characterize contemporary societies; that it is at odds with the phenomenology of judging; that it is unduly elitist as it makes justification the province of a few and opaque to the non-virtuous; and that it has problematic relativist implications. Although advocates of virtue theory have responded to these objections by using a number of different strategies, there is still much work to be done before these worries may be put to rest. Proponents of virtue approaches to law face the challenge of showing that virtue jurisprudence can be conducted in a way that circumvents the foregoing criticisms. A thorough engagement with these problems promises to result in exciting work on the limits and potentialities of the virtue paradigm.

In addition, there are a number of areas in the field of virtue jurisprudence that await further development. First, it would be necessary to go beyond the traditional lists of judicial virtues and investigate in detail individual virtues and vices. Second, the exploration of connections and mutual relevance of Eastern and Western virtue perspectives on legal thought has barely begun. A third growth area for virtue jurisprudence is the development of a virtue-oriented approach to some problems in social epistemology, such as the issue of whether institutions, like the jury or collegiate courts, may be said to properly possess and exercise virtues or which individual virtues are conducive to sound collective legal deliberation. Fourth, it is critical to investigate connections between virtue theory and institutional design by examining the various ways in which virtue may be promoted in institutional legal settings. Last, the aretaic turn can be seen as "opting ultimately for a different kind of society and for different relationships among its members" (Statman 1997, 2). Law has a momentous role to play in shaping the kind of society in which we live. Hence, a major research goal in the field of virtue jurisprudence is the exploration of the political implications of virtue approaches to law.

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Vitoria, Francisco de

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Biographical Data

The study of Francisco de Vitoria's (1483–1546) biographical data has raised some doubts concerning his birthplace. For a long time, he was thought to have been born in the city corresponding to his known surname, that is, Vitoria. Nevertheless, the most recent research shows that he was actually born in the city of Burgos in 1483, his complete name being Francisco de Arcaya y Compludo. Since he wanted to preserve his father's Basque heritage, he presented himself as Francisco de Vitoria.

At a young age, he entered the novitiate of the Dominican Order in the Convent of San Pablo de Burgos, where he studied Theology, Philosophy, and Humanities. He was later sent to the University of Paris to complete his training as a resident of the Dominican General Study. Vitoria's sojourn in Paris as a student and a teacher allowed him to socialize with the most distinguished humanists, namely, Luis Vives and Erasmus of Rotterdam. In Paris, he was also exposed to the innovative Thomist trends focusing on rationalism.

In 1523, Vitoria came back to Spain to hold the Theology Chair at the College of San Gregorio in Valladolid, which he did until he obtained the Distinguished Chair ("cátedra de prima") of the Faculty of Theology in the University of Salamanca. He remained in that position until his demise in 1546. In that university, Vitoria joined the Dominican Convent of San Esteban, and he is considered one of the most prestigious members of the so-called School of Salamanca during the Renaissance. He renewed the pedagogy of Theology, conceiving it as a "*carrefour* discipline"; Vitoria's kaleidoscopic mind considered it a crossroads where the main religious, moral, legal, and political issues could be addressed.

Works

Among his Works, his commented edition of Thomas Aquinas' *Secunda Secundae* of his *Suma Teologica* is especially relevant. Francisco de Vitoria never published his own works because his intellectual perfectionism led him to seek perfection and endlessly polish his thoughts and thesis. After his death, the University of Salamanca planned on publishing his Chair Lectures based upon the notes taken by his disciples. However, in 1557 Jacob Boyer edited and published his *Relectiones Theologicae* in Lyon in 1557. Domingo de Soto and Melchor Cano directed the publication in Salamanca of 11 of his *Relectiones*. These so-called *relectiones* were special lectures given by sixteenth century university teachers on hot topics or addressing particular questions posed by students as a complement to their regular lectures. Vitoria's most important *relectiones* on legal and political philosophy are: *De Potestate Civili* (1528); *De Homicidio* (1530); *De Indis prior* (1539); *De Indis posterior* (1539).

Justice and Natural Law

In his *Commentary* on *Secunda Secundae* (*Suma Teologica*), he follows an Aristotelian-Thomist conception of justice. Also, he conceives natural law as a set of principles known by reason and concretized in human nature's tendencies. The main features of these natural law principles are universalism, necessity, and non-derogability, since they are postulates of right reason common to all humankind.

Political Philosophy

Vitoria's Political Philosophy is mainly developed in his *De Potesate Civili*. Drawing from Aristotelian-Thomism, he defends sociability as a natural human trait from which he deduces the basis of the political community.

The preservation of the political community and its direction towards the common good requires and justifies authority. Vitoria follows Aristotle's political typology considering the existence of three types of government: monarchy, aristocracy, and democracy. Among them, he prefers monarchy because he thinks it is more efficient in guaranteeing the unity and stability of the state, as well as the pursuit of the common good.

The Law of Peoples

In his *De Indis prior*, Vitoria conveyed his notion of Law of Peoples, rephrasing the Roman definition of *Ius Gentium* substituting the word "*homines*" with "*gentes"*: "Quod naturalis ratio inter omnes homines constituit." This means he conceives *the Law of Peoples* as that which natural reason determines for the relationship between peoples, that is today, nations. Therefore, the Law of Peoples is an *ius inter gentes*. Subjects concerned are not men, but political communities, nations, or states. Vitoria distinguished between a natural Law of Peoples, built upon reason, and a positive Law of Peoples, built upon treaties and the principle of "*pacta sunt servanda."*

The "*Ius communicationis"*

The main application of Vitoria's thesis on the Law of Peoples related to the legitimation issues of the conquest of America, a topic much debated in Spain and Europe at that time. He rejected the thesis adduced by some of his contemporaries, who justified the Spanish and Portuguese presence in America upon the alleged powers of the pope and the emperor to authorize the occupation of territories, the paganism of American natives, or their barbarous customs and law of true political institutions. The only valid justification he defended was what he called *Ius communicationis*, that is, the right that all peoples in the universe have to establish a free communication of ideas and cultural, political, and religious experiences, as well as to establish free commerce among all peoples. The use of force was only justified in cases when some people impeded the exercise of such right of free communication with violence.

Francisco de Vitoria's notoriety is associated with his pioneering contribution to the genesis of International Law. According to academic lore, it was the President of the Institute of International Law, the prestigious American jurist James Brown Scott (1886–1943), who first regarded Francisco de Vitoria as the founding father of contemporary international law. His consideration as a human rights precursor has also contributed to the contemporary relevance of Vitoria's ideas.

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Vitória, Francisco de: On Human Rights

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Introduction

Francisco de Vitória is the lead author of late Spanish scholastics. This school has fundamental importance for both German Idealism and the German School of Natural Law,[1] which have built several institutions of contemporary law. Therefore, investigating Vitória's influence is not seeking to reproduce concepts used in the past, in the distant sixteenth century, but rather dealing with the genesis of contemporary legal institutions.

Late Spanish scholastics was developed at the University of Salamanca, where Francisco de Vitoria owned the *cathedra prima*. The differential feature of this school is of unique importance: the break with medieval speculative thinking and its replacement by a methodology of reasoning aimed at the active life of the common people, with concrete impacts on that historical reality. Indeed, medieval thought was aimed at metaphysical issues and was based on a methodology of theoretical and ideal argumentation. Augustine's dichotomy, between the city of God and the city of men, illustrates the scope of this speculation, since the "world" was seen through the lens of a faith dissociated from reason, which distanced it from concrete problems. In this panorama, in medieval times, one of the central questions of knowledge was the *problem of universals*, which referred to the definition of mental connections to objects. Such an issue, the product of speculation, is totally dissociated from practical consequences. In opposition to speculative thinking, humanist thought was developed in France – where Vitória studied and achieved the doctoral degree – which was characterized by historicity and by rediscovering elements of late antiquity that were despised by the medieval culture, such as Epicureanism, skepticism, cynicism and, in some extent, stoicism. Such elements of philosophy, developed in Athens especially after the Peloponnesian War, were fundamental for the reconciliation between faith and reason, which was done in the Iberian Peninsula with a heavy load of historicity.

In the century of the great navigations (sixteenth century), concrete issues were not solved by the knowledge developed until then. The most important problem is also at the center of gravity of the human rights theory developed by Vitória and it was formulated from the encounter with the "different" human being.

The Meaning of Human Rights in Vitória's Theory

With the great navigations, the Europeans had to develop interactions with human beings who were in a lower civilizing standard and the question raised by this meeting was faced by Vitoria, namely: *are the Indians, who are in a lower stage of development compared to the Europeans, subject to rights*? Although Vitoria did not use the expression Human rights, its theoretical construction started from this question to consolidate a substantial concept of what is understood as such.

To answer this question, Vitória has developed a theory that deals with different people, either in the sense of faith, since the Indians were not baptized, or in the sense of social and human experience, since the Indians also lacked the technology and development that could oppose obstacles to those who would dominate them.

[1] Harald Maihold, Strafe für fremde Schuld? (Böhlau 2005) 2.

Problems of various orders gravitate around the question faced by Vitória, for example, from the point of view of the organization of the kingdom, was necessary to answer whether the Indians is also the subjects of the emperor; from the point of religiosity, was necessary to answer whether they can be baptized.

Vitória took the property right as the conceptual key that would be used to defy the Spanish law in the face of the different subject, who was in a lower civilizing stage. According to Vitória: *"Returning now to our main topic, that we may proceed in order, I ask first whether the aborigines in question were true owners in both private and public law before the arrival of the Spaniards; that is, whether they were true owners of private property and possessions and also whether there were among them any who were the true princes and overlords of others?"*[2]

Thus, the right to property in the theory proposed by Vitoria was a starting point to enable his theory of Human rights, because it was also the beginning of a profound reflection on the role of human dignity according to the legal order. The theological foundation of property rights ultimately lead to the foundation of the dignity of every human being, which is expressed in rational power. So, "*Dominion is founded on the image of God. Now man is the image of God by nature, that is, by the rational powers (potentiae rationales)".*[3]

In this scenario, the *relectio* the Indians answered a juridical problem: about 40 years, the inhabitants of the newly conquered territories, *"barbarians of the New World commonly called Indians*",[4] fell into the power of the Spaniards because of the great navigations and are they *subject* to rights? The issue of the Indians is directly linked to the limitation of power and, according to Vitoria, it covers three parts, namely, *"in the first, it will be discussed why the barbarians fell under the Spanish rule. In the second, what power, temporal or civil, the Spanish princes have over them. In the third, in which the proposed question will be answered, what power do they have over themselves, whether the Church, in spiritual or religious questions?*".[5]

These three questions are connected with property rights (dominium) and find an answer based on the use of rational power and rationality, seen in the face of philosophy and in the face of both *jus gentium* and natural law. Vitória points out that natural norm is also substantiated in reason.[6] Furthermore, he understood the norm as a mandate, and as such, it was determined by reason and ordered to a finality, which could only be devised from rational activity. Since it is imperative and ordered to a goal, the norm shall always be systematized to the preservation of the common good.[7]

The emperor's obvious intention was to take possession of the entire discovered New World, so he made use of the following argument: the barbarians had no natural or civil rights because they were not baptized. However, by recognizing in every human being the dignity that comes from rationality, Vitória put himself in opposition to the holders of political power, affirming that they effectively possessed property rights.[8]

Conclusion

In a humanistic perspective, Victoria inaugurated the relationship between human rights and legitimacy of power. Thus, by recognizing a nucleon of rights which emerge from belonging of mankind, regardless the social condition. Civilization standard or personal state, Vitoria opposed this question and created the roots of

[2] Francisco de Vitoria, Relectio de Indis (Funag 2016) 106.

[3] Francisco de Vitoria, Relectio de Indis (Funag 2016) 100.

[4] Francisco de Vitoria, Relectio de Indis (Funag 2016) 100.

[5] Francisco de Vitoria, Relectio de Indis (Funag 2016) 100.

[6] Anselm Spindler, "Vernunft, Gestz und Recht bei Francisco de Vitoria" in Kirstin Bunge (ed) Die Normativität des Rechts bei Francisco de Vitoria (Frommann 2011) 49.

[7] Francisco de Vitoria, De legibus (Acta Salmanticensia 2010) 92. Francisco de Vitoria, Relectio de Potestate Civili (Consejo Superior de Investigaciones Científicas 2008) 23.

[8] Francisco de Vitoria, Relectio de Indis (Funag 2016) 106 et seq.

humans right's concept. The rational potential (*potentiae rationales*) is the substance of that nucleon of rights and, in this panorama, the law also protects the Americans. So, the rational condition is not determined by the standards of culture or civilization, but in the *dignity of human nature*. About this last topic, Vitoria says that the Human being, in his nature, is the image of God, so always has dignity for the resemblance with the divinity.

Victoria rejected the ethics proposed by the emperor and appointed new grounds for limiting the political power. Starting from *dominium* and its connection with human dignity, he built a legal argument that serves as a functional equivalent to the substantial concept of human rights, characterized by promoting the inclusion of all. The ability to acquire property on the basis of rational power (potentiae rationales) affirmed the dignity of humanity and had the legal effect of limiting the emperor's power. In Vitória, the concept of both *jus gentium* and natural law gained a new scope and funded the concept of Human rights, according to the practical knowledge of humanism: its irradiation to all human beings, regardless of any condition, such as faith or the stage of development. In this view, the rational power that characterizes human beings causes everyone to be subjected to the sphere of protection of the law, seen as a system of guarantees that legitimizes political power.

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Voltaire (François-Marie Arouet)

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François-Marie Arouet (1694–1778), better known as Voltaire, a pen name which he coined for himself in 1718, was a key figure of the Enlightenment and clearly the most famous French writer of the eighteenth century. He occupies an unconventional place in the history of the Philosophy of Law and Social Philosophy. A champion of religious tolerance and freedom of speech, he was also an influential popularizer of legal reform. Modern critics have often underlined the weakness and the incoherence of Voltaire's philosophy. What kind of philosopher Voltaire was still remains a matter of controversy. Voltaire's legacy in the history of Western philosophy resides more in his social and political activism in favor of legal reform than in systematic philosophy, despite rare but interesting forays into the latter field.

The most convenient way to shed light on Voltaire's legal, political, and philosophical thought is first to follow, step by step, the development of his career as a "philosophe" before focussing, more specifically, on his contribution to Legal and Social philosophy.

Voltaire was born in Paris in 1694. He came from a middle-class Parisian legal family. His father was a notary before acquiring the venal office of "receveur des épices" at the Accounting Chambers. In his youth, from 1704 to 1711, he was educated by the Jesuits at the prestigious Collège Louis-le-Grand. In order to fulfill his father's wishes, he began to study law and became a lawyer's apprentice. He soon gave up this career to follow his dream of becoming a playwright and emulating the princes of French classical tragedy, Corneille and Racine, as well as the greatest authors of Roman poetry, Horace and Virgil.

It was probably in the years following the death of Louis XIV that Voltaire discovered natural

philosophy and English freethinkers thanks to his contacts with the famous English aristocrat Henry St. John Bolingbroke who lived in exile in France during the period of the Regency government (1715–1723). Nonetheless, it was during his own voluntary exile in England (1726–1729), brought about by his altercation with the Duc de Rohan, a young but powerful nobleman, that Voltaire's conversion to philosophy really began (Gay 1959).

Moving first in Bolingbroke's circle of Tory intellectuals, he also frequented Whig circles and especially that of Samuel Clarke who introduced him to Newtonian philosophy.

Originally entitled *Letters on England*, his famous *Lettres philosophiques*, published in 1734 after his return to France, were a product of this important period of Voltaire's life.

Written in the style of letters to a friend abroad, this work revealed Voltaire's admiration for religious tolerance and freedom of speech which he believed existed in England. His thought was shaped by authors such as Francis Bacon, whom Voltaire considered as "the father of experimental philosophy," John Locke, "who objected to innate ideas," and above all Newton, "the destroyer of Descartes' system." First edited without the approval of the royal censors, the book caused a great scandal and led the author to adopt the stance of the outlaw philosopher which was to become one of the key elements of his complex personal and public identity.

In 1734, under threat of arrest by "lettre de cachet," Voltaire fled to Lorraine and took refuge at the Château of Cirey with his companion and mistress, Émilie du Châtelet, until her death in 1749. With this brilliant woman, who had herself praised Newton and provided the first French translation of the *Principa Mathematica*, he fought against the cartesianism of the French classical age by leading a long public campaign to promote and popularize Newtonian philosophy in France. The masterpiece of this successful campaign on behalf of Newtonianism was his *Eléments sur la philosophie de Newton*, published in 1738, which constituted a clear and accessible account of Newton's principles.

This period of his life was also marked by the meeting between Voltaire and Frederick II of Prussia which had a lasting impact on the construction and development of Voltaire's political ideas, particularly that of an enlightened monarchy or Philosophical Kingship.

Their first encounter dates back to August 1736, when the young Prince Frederick, heir to the throne of Prussia, sent a letter to the French writer in order to defend the German philosopher Christian Wolff, who had been unfairly persecuted by his own father, the Prussian king Frederick William I. Under the pretext of defending Wolff, the Crown Prince invited Voltaire to become his royal tutor in literature and philosophy. There ensued a long correspondence which ended only on Voltaire's death.

During the four years until Frederic succeeded to the throne on May 31, 1740, he served as Mentor to "a Prince," whose ability to think "as a man," like the stoic Roman emperors Trajan and Marcus Aurelius before him, gave Voltaire hope that the rule of philosophy would soon begin in Europe.

Voltaire took part in the revival of the Platonic idea of the philosopher king revisited by political philosophers such as Bacon and Hobbes in the modern era and pursued by Leibniz and by his influential follower Christian Wolff (Beales 2005). Paradoxically, despite his opposition to the Leibnizian philosophy of optimism, Voltaire was one of the most important propagators, within the French Enlightenment, of the notion of a "philosophe king." However, the concept took on a different meaning which was based on a new definition of the French words "philosophe" and "philosophie." Rejecting metaphysical systems, Christian theology and Cartesianism, this new conception exalted the use of reason and the virtue of experience and observation.

In 1750, after the death of Emilie du Châtelet, Voltaire finally accepted the repeated invitation of the Prussian King to join his court in Potsdam. The experience was cut short by the scandal provoked by an anti-Leibzinian pamphlet written by Voltaire against his compatriot Maupertuis, the President of the Royal Academy of Science of Berlin. This ended in bitter disillusionment for

both parties. To Voltaire, who hastily left Prussia in 1753, Trajan had become Dion, the tyrant of the ancient Greek city-state of Syracuse.

Despite the deep and personal disillusionment caused by Frederick's accomplishments and actions as King, Voltaire remained convinced that, most of the time, only a strong monarchical power could allow progress in the State and accomplish public felicity.

He continued to look forward to the enthronement of philosopher sovereigns throughout Europe, thus explaining his fatal attraction for the so-called "enlightened Princes" such as Catherine II of Russia, Joseph II of Austria and Gustave III of Sweden, as well as his high hopes for strong philosophical rulers (Quastana 2003).

This deep-rooted belief was based on the study of History which he initiated with *An Essay Upon the civil Wars of France* (1727) and the writing of the *History of Charles XII, King of Sweden* despite its suggestive portrayal of his glorious rival Peter the Great, Tsar of Russia.

Yet it was only after his appointment as Royal historiographer of France, in 1745, that Voltaire was really able to further his talents as a historian. In his *Siècle de Louis XIV* (1751), he underlined the major role played by the famous French absolute monarch in the development of France in many areas, especially in the arts, letters, and sciences. He also vaunted the progress achieved in the field of modern and centralized State building, along with the fight against the survival of feudal traditions and the promotion of the uniformity of French legislation.

Voltaire's most influential book among his historical writings is probably his *Essai sur les mœurs et l'esprit des Nations*, a pioneering work of universal history in which he developed what he himself later called the "philosophy of History." Dismissing the Christian view of history proposed by Bossuet in his *Discours sur L'Histoire universelle*, Voltaire rejected any supernatural and providential influences on the development of history.

For him, the course of human events was cyclical; it was not governed by a theory of systematic progress. He divided the history of mankind into four great Ages: Periclean Athens, Augustan Rome, Renaissance Italy, and the France of Louis XIV which blossomed in stages to a high level of cultural achievement. These glorious ages, marked by the rule of reason, contrasted with long periods dominated by disorder, barbarity, bigotry, and superstition. In the middle of the eighteenth century, Voltaire, whose doubts about mankind continued to grow, made the observation that European countries seemed more enlightened than the rest of the world; this despite their shortcomings which still allowed his contemporaries to succumb to dangerous beliefs born from the twin hydras of fanaticism and superstition.

After his fall out with Frederick, Voltaire made the choice not to return to Paris and he settled in Geneva, then an independent republican city-state and the birthplace of Rousseau who was to become his great enemy. A few years later, he acquired an estate at Ferney, a large piece of land just over the French Swiss border where he settled permanently in early 1759 and lived for the last 20 years of his life, until his death in 1778, just before his final return to Paris. Having made his Château his permanent home, he became known as the "Patriach of Ferney" to the public, as well as to his intellectual allies and friends, Diderot and d'Alembert, the editors of the *Encyclopédie*.

This period constitutes the final stage of Voltaire's literary career but is also the most interesting one in the definitive shaping of his legal thought and social philosophy.

Skepticism was central to Voltaire's philosophy. It derived directly from the neo-Pyrrhonianism of Montaigne and also owed a particular debt to Pierre Bayle's philosophy. From Montaigne's *Essais* and Bayle's *Dictionnaire critique*, Voltaire emphasized the value of doubt and skepticism as a final and complete philosophical stance (Brandao 2015). This type of skepticism led him to reject the systematic philosophy of Malebranche and Leibniz. Voltaire's attack on Leibnizian optimism – the idea that "all is well" in the world as it is and that God had a "sufficient reason" for creating it – culminated in his philosophic novella *Candide* (1759), the one work by Voltaire which is still widely read. Through its claim that optimism

was a chimera produced by the detachment of dialectical reason from empirical facts, the book's conclusion is proof of his deep and continual debt to Newtonian empiricism (Riley 2009).

Nonetheless, Voltaire insisted that this kind of skepticism should not lead to inaction. Proclaiming himself as a member of "the party of humanity," Voltaire offered the Enlightenment a new trinity based on cardinal and complementary values: liberty, tolerance, and justice. These were, in his opinion, the only fundamental, intangible, and sacrosanct laws. These key notions were widely set out in his *Dictionnaire Philosophique* of 1764–1770 and later refined in works such as the *ABC* (1769) or the *Prix de la Justice et de l'humanité* (1777). In Voltaire's mind, a strong State was associated with the recognition of individual freedoms. Voltaire conceived freedom in a basically negative sense: as "being dependent only on the law." For him, the best government was that in which "all ranks of society are equally protected by law." Following Hobbes's argument, Voltaire saw the essence of liberty in the absence of physical constraint and agreed with Locke that liberty was the right to do what one ought to do in accordance with the law.

Despite a few positive opinions expressed about the high value of man's freedom in small commercial modern republics such as Holland and Geneva, it is impossible to associate him with what is known today as republicanism where civil and political liberties are closely intertwined with the ideal of freedom as non-domination. He found many faults with ancient participatory popular republics such as Rome. Contrary to Machiavelli, Sidney, or Rousseau, he often criticized its excessive militaristic spirit, inherent factionalism, and internal division. For Voltaire, Montesquieu and his followers were wrong about virtue being the dynamic principle of republics. History proved conclusively that it was only ambition that motived republican citizens, and that in a democracy, anarchy and ultimately tyranny are always to be feared.

As a pragmatic liberal, he still admired the English constitutional monarchy produced by the post-1688 settlement, regarding England as a "republic under a king." Despite this, he never envisaged the possibility of transferring this political model abroad. In France, the power of an absolute monarch remained one of the bases of his political system and he never advocated any extension of political liberty. More than once, he claimed that "The people are no fit to govern" and he frequently expressed disdain for the unthinking multitude which he called "la canaille." Insisting on the utility of luxury, he no longer believed that the reduction of social inequalities was at the core of a well-ordered state.

Thus, Voltaire thought a part of the people could have a role in government only when they were sufficiently educated and tolerant. But first and foremost, the State must protect basic civil liberties: freedom of opinion, freedom of the press, property, security, and individual liberty (William 1994). Voltaire considered freedom of conscience and religion as the foremost of these liberties. The main impediment to the exercise of this right was intolerance which was the result of fanaticism, prejudice, and ignorance. For Voltaire, the malignant presence of the Catholic Church in the core of the State constituted the major cause of civil intolerance, superstition, and civil disorders. He focused his criticism on the Roman Church but also criticized Protestantism, Islam, and Judaism. Voltaire's secret program against religion as an institution of the State and its influence on political power is encapsulated in his famous slogan "Crush infamy." It was only in the last decades of his life that his struggle for freedom and against intolerance was carried into the legal field by the famous Calas case (1762). Without any evidence, Jean Calas, the head of a protestant family had been falsely accused of murdering his son because he had been about to convert to Catholicism. Calas was unjustly condemned by the Parliament of Toulouse to a horrific punishment. French authorities tortured Calas and killed him while trying to get him to confess. From 1762 to 1765, Voltaire led a relentless campaign to change public opinion and rehabilite the Calas family. This episode gave him the opportunity to write the *Traité sur la Tolérance* (1763) in which he promoted the idea of universal tolerance of religious differences.

In the same decade, he played an active part in other cases of injustice such as the Sirven affair and the trial of the Chevalier de la Barre, a young man who was mutilated and executed in Abbeville in 1766 for his disrespectful behavior when a religious procession passed by.

These three tragic cases revealed the inequities of the judicial system and Criminal Law in France. Voltaire's interest in issues of penal law had been sharpened by reading a small treatise, in its original Italian version, written by the young Milanese jurist Cesare Beccaria, which was entitled *Dei Delliti e delle pene* (1764).

The aim of Beccaria's book was to rethink the foundations of the system of Criminal Law, underlining the urgent necessity to reform it. In 1766, Voltaire's commentary on *Crime and punishment* constituted an influential contribution to what has rightly been called the "Beccaria moment," a period of intense debates which set out the foundations of modern Penal Law and humanitarian justice in the Western world (Audegean and Delia 2018). It played a decisive part in reaching audiences interested in the principles of the Italian writer and particularly the principle of Legality and the idea that punishment should be commensurate with the offense. These ideas directly inspired the *Nakaz*, a statement of legal principles written a year later by Catherine II of Russia. Following Beccaria, Voltaire fought against the abuses of *Ancien Régime* Justice: the arbitrariness of the judicial system, the secrecy of trials, the confusion between crime and sin, the frequent use of torture, and extreme corporal punishment.

There is a hard-nosed pragmatism about Voltaire's thinking on Law. For him as well as Beccaria, severe penalties served to increase crime levels rather than reduce them. He strove for proportionality between crime and punishment. Such precepts represented a radical departure from the traditional conception of Criminal Law. Voltaire only considered laws in terms of their usefulness for society, their basis on reason, and their compliance with the law of nature, namely, the sense of justice that nature engraved in the human heart. Despite writing prolifically on the subject of Natural Law, as well as making repeated references to it in his works, Voltaire cannot be classified as a Natural Law philosopher. He attacked Grotius and Pufendorf as well as all the great authors of the Natural Law tradition. He never paid much attention to the theory of Natural State or original contract thinking. Such notions belonged to the realm of speculative metaphysics (Gay 1959). However, unlike Beccaria, Voltaire did not reject Roman law. While he was very critical of the interpreters of the Justinian Digest, such as the great Italian jurist Bartolo da Sassoferrato or the illustrious French humanist jurist Cujas, he often referred to the principles of Roman jurisprudence in his claim to reform French judicial procedures.

Many of the proposals he put forward to further the reform of Justice and promote freedom of the press and religious tolerance were implemented by the French Revolution which adopted Voltaire as one of its founding heroes. Voltaire ignited the spirit of many people and paved the way for the eventual abolition of capital punishment. This blend of philosophy with social criticism and reformist legal action remains his most lasting contribution to the history of Western philosophy.

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Waldron, Jeremy

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Introduction

Born in New Zealand in 1953, Jeremy Waldron is a US-based legal and political philosopher. Waldron is currently University Professor at the New York University School of Law, though he has also held positions at Columbia Law, the University of Oxford, Edinburgh, UC Berkeley, Princeton University, and the University of Otago. Before beginning his career, Waldron received his D. Phil at Oxford under the direction of Ronald Dworkin. His towering status has been recognized in the form of four honorary doctorates.

Waldron has published 16 monographs and over 200 article-length pieces on a wide array of topics, but his work is organized around one central ambition: to turn the focus of legal and political philosophers away from abstract theorizing about the nature of justice and toward theorizing institutions. The remainder of this entry offers a bird's-eye view of Waldron's argument for this shift and how it is embodied by his work over the course of many decades.

Equality

Waldron's work is helpfully understood in the light of a certain conception of equality, which he calls basic equality. It is thus worth beginning by specifying his understanding of this foundational ideal and how it differs from other conceptions in the literature.

For some theorists, the point of equality is to ensure fairness in the distribution of resources or welfare. Naturally, there are many conceptions of what this requires. For alleged luck egalitarians like Cohen, Arneson, and Dworkin (though see Dworkin (2003)), a just political order will tolerate only those inequalities in outcomes that result from agents' free choices. If Poor Philip and Rich Ricky share similarly low aspirations and make similarly poor choices, but Ricky lives lavishly due to a trust fund, this is, on the luck egalitarian view, unjust. Other conceptions of economic equality abound. Some argue that equality implies a special concern for the worst off. Libertarians opt for a kind of formal equality, which condemns formal legal barriers to economic participation but tolerates material inequalities. Marxists focus on eliminating class distinctions. And so on.

But not everyone agrees that these distributive conceptions of equality deserve the prominence they have enjoyed. Relational egalitarians, for example, argue that equality's point is not to

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govern the distribution of resources as if this mattered for its own sake, but rather to secure each person in the equal status she is owed at the bar of justice (Anderson 1999; Scheffler 2003). On these views, equality demands ensuring that no person is dependent on the will of any other or arbitrarily assigned to a subordinate status. Equal societies allow us to look one another confidently in the eye.

Waldron's understanding of basic equality is closer to relational equality than to economic equality. But he emphasizes that it is identical with neither conception (Waldron 2017, 10–11, 255). Rather, basic equality *grounds* these downstream, political conceptions, explaining why we are equal despite our differences (Waldron 2017, 4–5). Basic equality denies fundamental category differences between human beings and explains our aversion to theories that mark such distinctions in the service of subordinating some to others.

Disagreement, Methods, and Legal Authority

Having articulated Waldron's notion of basic equality, we are in a better position to understand his distinctive approach to political theorizing. Whereas political philosophers traditionally offer abstract theories of justice in the hopes that their visions will gain adherents and eventually political prominence, Waldron notes that we disagree (as equals) about such matters (Waldron 1999b, 2; Waldron 2013, 2016). Because these disagreements are so central to our political lives and so important for explaining our political institutions, theorists should take more interest in them. Specifically, theorists must ask: "What are we to think of democratic. . .procedures, given that such procedures have to accommodate a politics for those who differ fundamentally" about which theory of justice is correct (Waldron 1999b, 3)?

In taking this approach, Waldron aligns, in part, with realists in political theory, who argue that contemporary political philosophy does not reckon sufficiently with the depth of our disagreements. But whereas realists tend to focus on articulating a distinctive sense of political normativity grounded in values necessary to secure order (Williams 2008; Galston 2010; Rossi 2012; Geuss 2008; Sleat 2014, 2016, et al.), Waldron is interested in setting aside, for a time, the scholarly task of articulating the structure of the values to which we are committed (be they political or moral). We should, Waldron suggests, focus more squarely on analyzing the *institutions* that help us live with our various disagreements about value, and less about the nature of the values themselves (Waldron 2016, 5).

Given the need for collective action, designing procedures capable of legitimating such action among disagreeing equals is crucial. Taking this task to heart means recovering the insights of enlightenment theorists like Kant and Hobbes who structured their theories around the problems of conflict and disagreement. It also means recovering the dignity of democratic legislatures and understanding the ways in which they build respect for disagreement into their very procedures (Waldron 1999a; Waldron and Dan-Cohen 2012).

Waldron reminds us of the mundane truth that debates on the legislative floor traffic in arguments for various policy proposals, any of which might win out. A crucial presupposition is that the winning decision will be accepted as final. Indeed, it is democratically enacted law's unique capacity to select among a variety of controversial proposals that explains its special grip on us. It is not that we must agree with the substance of democratic decisions, but rather that we must agree to abide by them whether we agree on the substance or not. We so agree not because those procedures spit out a coherent theory to which we owe our allegiance, but because, if we do not agree, we are unable to live cooperatively alongside one another.

In Waldron's view, these features of majoritarian legislatures give them a kind of intrinsic worth. Not only do democracies reflect our basic equality (by assuring that no one's perspective is afforded any special status) but they also succeed in securing the legitimacy of controversial decisions. It is against this backdrop that Waldron

worries about anti-democratic aspects of our institutions like judicial review.

Skepticism About Judicial Review

Because democracies allow groups and individuals to self-govern consistent with their equal status, democratically enacted law is (perhaps uniquely) capable of binding us in contexts of disagreement. Of course, many Western governments are not *pure* democracies, but rather constitutional republics, which limit the wills of legislative majorities. When legislatures do things that overstep these boundaries, they are sometimes subject to a strong form of *judicial review.* Strong judicial review allows courts to declare void any legislation incompatible with the law of the land.

In regimes like the United States (where justices of the Supreme Court are not elected), Waldron argues that this kind of strong judicial review is unjustified. In such regimes, courts composed of a small number of unelected elites are able to decide the fate of legislation (sometimes highly popular legislation) by a single vote involving a simple majority.

What Waldron calls the "core of the case against judicial review" is a conditional argument. In circumstances where (1) democratic institutions are in "reasonably good working order," (2) functioning courts are empowered settle disputes between citizens, (3) individuals are committed to upholding the rights of minorities, and (4) persons persistently disagree about the content of rights, strong judicial review is not justified (Waldron 2016, 203). Under such circumstances, judicial review is not plausibly necessary (as its advocates claim) for avoiding the tyranny of the majority. After all, legislatures will be committed to respecting minority rights because their constituents are committed to the same. Moreover, because there is assumed to be disagreement about the scope of rights, privileging a minority's view on the matter has massive legitimacy costs, shackling democratic bodies at the say-so of an elite minority. Waldron's analysis of strong judicial review is one example the kind of institutional turn he hopes to see in political philosophy.

Property Theory and the History of Thought

Waldron has also taken a keen interest in another set of institutional questions, this one regarding private property. His first book (based on his dissertation), *The Right to Private Property,* subjected Locke's and Hegel's theories of property to contemporary normative analysis. Waldron concludes that neither theory justifies denying some persons subsistence in order to secure others in their property.

The Lockean theory does not do so because its "labor mixing" account of how to acquire property fails to justify rights to exclude others altogether. But then, given that the same theory includes a compelling account of subsistence rights, there is nothing to resist the conclusion that individuals must be secured in their basic needs.

In contrast, the Hegelian theory succeeds in grounding general rights to exclusive ownership. By the same token, however, it also gives us strong reason to think that everyone must have at least some property. After all, the Hegelian theory grounds the importance of property rights in each individual's interest in ethical self-development. But then, if (i) *everyone's* ethical development matters from a moral perspective and (ii) property is crucial for realizing *anyone's* ethical self-development, then (iii) it matters from a moral perspective that everyone has some property. How much? Enough, naturally, to ensure that every individual is capable of such ethical self-development.

Waldron takes this early argument to show that appeal to property rights fails to ground an objection to redistribution designed to secure everyone in their basic needs, especially when such redistribution is grounded in democratic procedures. More recently, in his Hamlyn lectures, Waldron takes up the central issue of the relationship between property rights and the rule of law. In these lectures, Waldron scrutinizes claims advanced by theorists like John Locke, Richard Epstein, and F.A. Hayek to the effect that the rule of law itself requires respect for property rights (Waldron 2012).

Waldron organizes this later discussion around the US Supreme Court case, *Lucas v. South Carolina Coastal Council.* Lucas bought some land on the coast of South Carolina, upon which he had hoped to build a home for later resale. At the time of the purchase, the lot was not affected by any regulatory restrictions, although two statutes aimed at protecting the coastline from erosion established a costal council for governing construction in the surrounding area. Unfortunately for Lucas, the legislature would later authorize the council to redraw the area of concern, dashing his developmental hopes and causing the value of his land to plummet.

In response, Lucas sued for violation of his fifth and fourteenth amendment rights, arguing that, without compensation, the council's action constituted a wrongful taking of his property. The Court agreed. Many theorists are sympathetic with the *Lucas* decision and think that South Carolina's behavior was incompatible with the rule of law. Waldron demures (Waldron 2012, 42–75; 2012, 76–111).

As far as the rule of law is concerned, Waldron claims that we do better, as far as the economy of our theorizing is concerned, to sharply separate rule of law values from other substantive economic values like respect for property rights. As far as the debate over property is concerned, Waldron aims to show that, however important property rights might be, such rights do not constrain the activity of legislatures and the administrative agencies authorized by them as much as is commonly supposed. In ruling against this activity, courts wrongfully rule against respectable democratic law.

Speech, Dignity, and Harm

Another area in which courts have, according to Waldron, thwarted US legislatures in their legitimate democratic aims concerns their consistent invalidation of laws prohibiting hate speech. To see the strength of Waldron's argument, notice that hate speech is a subclass of discriminatory speech. Specifically, hate speech denigrates persons on the basis of their perceived (and often protected) characteristics (e.g., their race, sex, gender, religion, or sexual orientation), often to consign individuals with those characteristics to subordinate status.

Whereas opponents of hate speech legislation object that there is no right to freedom from offensive of distasteful speech, Waldron argues that such a response misapprehends the purpose of the laws. As he sees it, such legislation is aimed to protect against genuine harm, not mere offense. Moreover, such harm plausibly rises to a level in which it can be permissibly regulated by law.

But can words really *harm* people in legally actionable ways? To motivate a positive answer, Waldron articulates a new conception of harm, which he calls *dignitary harm*. On Waldron's account, human dignity incapsulates not only our "status as anyone's equal in the community" but also each person's "entitlement to basic justice" and "the fundamentals of their reputation" (Waldron 2014, 106). When people speak hatefully and publicly about entire groups of people, Waldron argues, this can set back the dignitary interests of those targeted by such speech. This is not to say that hate speech takes anyone's dignity away. Understood as "the standing of human beings in the great scheme of things, their status as persons who command a high level of concern and respect," Waldron characterizes dignity is an inherent property of human beings (Waldron 2017, 3). Still, our ability to move freely in civil society and to be taken seriously by our peers depends on aspects of our social reality. Hate speech threatens these very aspects.

To better see the problem, consider Waldron's own example.

> A man out walking with his seven-year-old son and his ten-year- old daughter turns a corner on a city street in New Jersey and is confronted with a sign. It says: "Muslims and 9/11! Don't serve them, don't speak to them, and don't let them in." The daughter says, "What does it mean, papa?" Her father, who is a Muslim—the whole family is Muslim—doesn't know what to say. He hurries the children on, hoping they will not come across any more of the signs.

> Other days he has seen them on the streets: a large photograph of Muslim children with the slogan "They are all called Osama," and a poster on the outside wall of his mosque which reads "Jihad Central." (Waldron 2014, 1–2)

Waldron asks: What kind of message does such signage send? To those (Muslim) persons targeted, the signs are meant to communicate the message that they are not welcome. To non-Muslim readers, the message is somewhat different: if you feel this way about our neighbors, you are not alone.

These messages in-turn have a number of effects. First, those that the messages target have their interest in being treated as dignified equals set back. Though they might enjoy equal protection under the law, confronting such speech undermines their social standing and their credibility when making claims of justice. Without a firm reputation as an equal to rest on, those targeted might anticipate being racially profiled and excluded in important ways from civic life. These are genuine harms that legislatures may seek to prevent. When courts stop them when they attempt to do so, this too represents an affront to democratic values.

Conclusion

Having spent the bulk of his career arguing for these positions, Waldron is spending an increasing amount of his time thinking about more concrete, applied issues (e.g., targeted killing, terrorism, and torture). It is impossible to determine in advance how this work might alter the shape of a legacy still in the making. What is clear is that Waldron will continue to advance our understanding of legal and political reality for years to come.

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Waldron, Jeremy: Rule of Law

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Introduction

Jeremy Waldron's work spans a number of areas in legal, political, and moral philosophy. This entry will focus on his extensive work on the rule of law (henceforth, ROL). First, what is the ROL? It is, most basically, the idea that the law should rule, rather than individual people, and the related idea that the law should apply equally to all. This idea comes from Dicey (1915, 149–152), whose ideas provide a starting point for the ROL for Waldron and many others and generate the idea that laws should be universal and known to all (Waldron 1989, 81).

One way to think about the ROL is as a way of compensating for problems that arise from the law itself (Raz 2009, 224). But Waldron sees it rather as a way of solving dangers that can arise from the use of power more generally (Waldron 2008c, 11); he thinks it is better to say that we demand that power be constrained by requiring it to be exercised through *legal form* (Waldron 2008a, 78). Power exercised legally is to be contrasted with power exercised through decree, terror, or managerial control.

In fleshing out what the ROL requires, theorists tend to provide lists of specific demands that law must meet: it must have a certain character if it is to effectively rule and provide a clear guide for the individuals that rely on it. These demands include the idea that law must be general, clear, prospective, noncontradictory, capable of being obeyed, publicly promulgated, relatively constant over time, and applied by the officials as written (Fuller 1969, 39).

Waldron has paid particular attention to several of these principles. With respect to prospectivity, he notes the difference between retrospective law, which attaches a new consequence to past action, and retroactive law, which changes the status of a past action from permissible to forbidden (Waldron 2004b, 632). He delves into what is wrong with retroactivity. It is often understood as a matter of the guidance of conduct or of prior reliance. (Waldron 2004b, 640–642). But in the larger scheme of things, the problem has to do with the systematicity of law. Even minor violations indicate a willingness to undermine the system, which is built of complex webs of rules that frame the competition for and exercise of power. We should be concerned about retroactive actions that disregard this system (Waldron 2004b, 650–653).

Waldron also talks about clarity and its opposite, vagueness, in two articles (Waldron 1994a, 2011d). He argues that it is possible to understand even some vague provisions as capable of guiding action (Waldron 2011d, 60). Citizens are the first appliers of legal norms, and it is possible to respect people's dignity by presenting them with norms that require a degree of evaluative judgment (Waldron 2011d, 65–66). Vague standards might be said to have a chilling effect on conduct, but in some contexts, this is unobjectionable. Think of torture, where a vague statute's chilling effect on behavior is precisely what is desired (Waldron 2011d, 75–80). Waldron also addresses problems of vagueness that arise because of indeterminacy in language (Waldron 1994a). Sometimes we can identify core cases even if there is contestation at the edges (Waldron 1994a, 534–536). Sometimes, in fact, contestability might be part of what we want from law: it forces us to have a certain kind of debate (Waldron 1994a, 539–540).

The ROL is often said to aim at ensuring predictability: people need to know the consequences of their actions and be able to plan accordingly (Hayek 1960, 153). Waldron notes that the predictability account is widespread (Waldron 2008c, 9, 2011b, 2–3, 2015a, 66). But the ROL is also said to promote dignity and autonomy (Fuller

1969; Raz 2009), and one of Waldron's major contributions is to critique the predictability-focused account and deepen the dignity-based understanding of the ROL (Waldron 2011c, 317, 2012a, 2015a, 67).

Waldron's detailed account of the value of the ROL should be understood against the background of the contestability of the concept. He suggests that the ROL might be understood as an essentially contested concept, one marked by contestation at its very core, which we understand only by participating in the debate about it (Waldron 2002a, 149–151). There is contestation about its value or point and about what it demands of us (Waldron 2002a, 159).

The ROL is just one ideal among many. It does not represent all the things we value (Waldron 2012b, 12–13, citing Raz 2009, 211). We should keep it separate from other values such as human rights, democracy, and, as Waldron specifically emphasizes, economic freedom and property rights. While we may value these things, there is no good reason to build them into our definition of the ROL. Waldron's aim is to flesh out a distinctive value that the ROL represents, which is not a matter of what it "really" or "objectively" is, but of building a normative account that does justice to the general aim of taking the edge off of power (Waldron 2015a, 71–72).

Procedural ROL and Dignitarian Respect

One of Waldron's central contributions to the ROL literature is his insistence on emphasizing the procedural dimensions of the ROL. Much ROL discussion has been about principles that demand that law take a certain form, such as Fuller's principles. Waldron notes that Fuller and others have often termed these principles "procedural," but that they are better understood as "formal" (Waldron 2008a, 71, 2011a, 8), and the principles properly called procedural have been neglected (Waldron 2011a).

The procedural requirements that Waldron suggests we should add to our formal account of the ROL are the following: hearings by impartial tribunals (which must act according to evidence and argument), independent judges, the right to be legally represented, to be present at the trial, to present evidence and to make arguments about its bearing on the case, and to confront witnesses, restrictions on how the government can gather evidence, a right to reasons that properly attend to the evidence and argument, and a right of appeal to a higher body (Waldron 2011a, 6). These have substantial overlap with what often goes under the name of "due process."

An important dimension of Waldron's argument here is his emphasis on argument. In setting out these procedural ROL demands, he exposes a dimension of law that he considers vitally important: the way in which law provides a space for people to present arguments on their own behalf, to "have their day in court" (Waldron 2011a). This evinces a certain kind of respect for the individual at the center of a legal proceeding (Waldron 2011a, 15). These characteristics "capture a deep and important sense associated foundationally with the idea of a legal system, that law is a mode of governing people that treats them with respect, as though they had a view or perspective of their own to present on the application of the norm to their conduct and situation" (Waldron 2011a, 15–16).

This point is one Waldron frequently returns to, and he often puts it in dignitarian terms. Treating people as though they have a point of view and are capable of explaining it respects their dignity (Waldron 2011a, 16). In Waldron's view, law promotes dignity in a number of ways, and one of these is its guarantee of a space for argument: this guarantee shows that the law sees people as intelligent beings who can apply the law to themselves and hold a view about what law demands (Waldron 2011b, 7–8, 2012a, 210–212).

This dignity-promoting strand in the ROL might seem to be in tension with the certainty-providing strand (Waldron 2008c, 8, 2011a, 19, b, 8, 2012a, 211). Argument can unsettle previously accepted interpretations, and if law is contestable, it is therefore less certain. But we nevertheless cannot escape the fact that this argumentative dimension is a fundamental feature of the ROL (Waldron 2011a, 20–21, b, 8). Law's procedural protections and its sponsorship of argument do not amount to a

rival political ideal but a dimension of the ROL that we must recognize (Waldron 2011b, 11). We must face any tension in the ROL rather than sidelining procedure in favor of clarity, as other conceptions do. The dominant positivist approach tends to neglect procedural elements and envisions a command-and-control picture of law as a matter of rules, which misses the fact that these rules are used in a particular way, and argued about adversarially, within a system that provides space for such contestation (Waldron 2008c, 56, 2011a, 22, b, 8). If we ignore argumentation, we cannot do justice to what we value about the ROL: its insistence on "treating ordinary citizens with respect as active centers of intelligence" (Waldron 2011a, 22).

The ROL and the Concept of Law

Waldron's work on the ROL also has a bearing on the debate in general jurisprudence about the nature or concept of law. He argues that we should understand the ROL as an integral part of the concept of law itself. Against those who claim that understanding the ROL requires first understanding what law is (Raz 2009, 224), he says that we should understand these two terms "as a package" (Waldron 2008c, 10). It is question-begging to assume that there is a descriptive account of the concept of law that we can give before moving on to discuss the ROL. Rather, using the term law itself implies a certain positive evaluation of the particular use of power in question (Waldron 2008c, 12–13). "Law" should be understood as an evaluative or appraisive term (Waldron 2008c, 37). Waldron critiques what he calls "casual positivism": the assumption that whatever labels itself law must be considered law. We should be more discriminating in our application of the term, scrutinizing the system before deciding it deserves the appellation (Waldron 2008c, 13–14), as we do with democracy: we do not take at face value claims by governments that they are democracies (Waldron 2008c, 19).

Law's essential features, then, include courts and the procedures that go along with them (Waldron 2008c, 20–22; 2011a, 12), general public norms, positivity, orientation to the public good, and systematicity (Waldron 2008c, 24–36). Waldron emphasizes that these are part of what we think it is for something to be law and not just desirable features (Waldron 2008c, 26).

These are value-laden criteria. His account "defines a distinctive mode of governance that is worth having and worth distinguishing from other modes of governance" (Waldron 2008c, 36). The fact that these are evaluative features is important: while they could be stated descriptively, they are morally motivated. We focus on them because we value law, and these are the features that make the distinction between law and nonlaw an important one (Waldron 2008c, 40–41).

Thus, the connection between the ROL and the concept of law is for Waldron a very close one (Waldron 2008c, 44). We can think of the ROL as setting demands on law, which form a minimum threshold for law's existence and, beyond that, provide pressure for the system to continually improve. We may not always be able to identify the precise point at which we should say a legal system exists, but the question of whether it does is tied up with its score on ROL dimensions (Waldron 2008c, 45–47; Fuller 1969, Chap. 1). Waldron argues that the ROL as a value stems from what law itself is.

This puts Waldron on Fuller's side in the famous Hart-Fuller debate. Waldron argues that Hart gave insufficient attention to the ROL and took a generally defensive posture toward Fuller's insights (Waldron 2008a, b). Waldron argues that Fuller is right to think that his eight principles generate a special morality of law: "law is *the result of their successful application*" (Waldron 2008a, 79). We should accept Fuller's claim that when a system grossly violates the ROL, it loses its claim to be called a legal system (Waldron 2008a, 79).

Public Versus Private Accounts of the ROL: The Case of Property

Waldron defends an account of the ROL that is focused on public rather than private law. In public law, the chief concerns are the limiting of discretion, fair application of rules to which

public power is subject, and procedures enabling the challenging of official actions. (Waldron 2014, 1) His focus on the public dimension is a response to a move by others toward associating the ROL with private law (Waldron 2015a, 59) and, more specifically, with rights to private property, functioning markets, and "investor-friendliness" (Waldron 2007, 92, 2012b, 11). In general, in these sorts of accounts, public law concerns are absent. They focus on private law rights related to the enforcement of contracts and the security of property, ignoring the importance of compliance with regulations or enforcement of legislation (Waldron 2014, 2). Sometimes this move is an explicitly cynical one, aimed at using the appeal of the ROL to achieve the aim of protecting markets (Waldron 2015a, 61).

Waldron's argument against this association of the ROL with the protection of private property is in part an argument against including any substantive value in the ROL. People will disagree about what value is important, and all will fight to have their own favorite value recognized. "The result in my view is likely to be a general decline in political articulacy, as people struggle to use the same term to express disparate ideals" (Waldron 2012b, 48).

But the more specific problem is with the value in question. Waldron considers and rejects a number of ways to reach the conclusion that the protection of private property is linked in a deep way to the ROL, drawing on the formal values and seeing if they can point us toward more substantive claims (Waldron 2012b, 51–61). In short, he argues that the ROL does not prevent changes in the way property is regulated, though it may disfavor certain ways of making such changes, for example, frequent "managerial meddling" or change by decree (Waldron 2012b, 106). But we are not, as a society, estopped from using the law to address common problems (Waldron 2012b, 103–106). The idea that we should come together, in the name of the common good, to solve a collective problem, "is not an anomalous or socially destructive position; it is the ordinary wisdom of human affairs." (Waldron 2015a, 69) We should not adopt a view of the ROL which forbids such social actions (Waldron 2015a, 69; see also Waldron 2012b, 105, 2014, 14).

Legislation and the ROL

The previous discussion connects to a broader point about legislation. Those who want to privilege private property in their accounts of the ROL often do so at the expense of legislation. But Waldron argues against this, insisting that legislation has solid ROL credentials. The worry expressed by those who object to legislation is not that it fails on one or another of the formal or procedural dimensions mentioned above (Waldron 2007, 112). The thought is that even if it meets all the formal and procedural standards, there is just something wrong from a ROL point of view with legislation (Waldron 2007, 96, 2014, 11–12, 2015a, 61). This antipathy toward legislation is not limited to those who defend property-focused accounts of the ROL. There has been a general strand of anti-legislative thinking in legal philosophy (Waldron 1999, Chap. 2). The suggestion is that the ROL "involves keeping legislation and the propensity to legislate under very firm legal control" (Waldron 2007, 91).

The worry seems to be about *will*. The ROL is associated with taming or restricting the will of those in power, and legislation seems like nothing more than the will of the lawmakers (Waldron 2007, 102, 2012b, 86–88, 2015a, 65, 67). One way of thinking about this is by distinguishing rule *by* law from the rule *of* law. The thought is that ROL indicates a situation in which the law itself rules, in contrast with the rule of human beings, whereas rule by law is just a particular method that people use to achieve their aims (Waldron 2012b, 22–23). Rule by law makes law a mere tool for political purposes, whereas the ROL "is supposed to lift law above politics" (Waldron 2014, 12, 2015a, 69). We need to seek limits on legislation, so that law rules instead of humans. But this is a myth: there is no way to achieve law without the agency of humans who create and administer it (Waldron 2015a, 69). Even if we have to concede that sometimes it is rule by law and not the ROL we achieve, we should not denigrate this: being ruled by legal procedures is valuable in itself (Waldron 2015a, 70–71).

Lawmaking in legislatures involves certain procedures and safeguards, is representative of us all, and is a transparent mode of governing (Waldron 2012b, 95–96). Further, law is a method that essentially involves deliberate change (Waldron 2012b, 99, 2014, 13, 2015a, 68). Our account of the ROL should not exclude that possibility; it must be an account that takes seriously our ability to make collective decisions about any number of different issues (Waldron 2014, 13–14). We should recognize the legitimate place of a public agenda, according to which we decide together how to deal with problems (Waldron 2014, 15, 2015a, 68–69). This doesn't mean we change things on a whim; rather, we depend on legislative due process to ensure that change is carefully thought through and properly scrutinized (Waldron 2001, Chap. 4, 2007, 107, 2012b, 107, 2014, 19–20).

Substantive Dimensions of the ROL

As the above section "Public Versus Private Accounts of the ROL: The Case of Property" made clear, Waldron resists the inclusion of the substantive value of the protection of private property in the ROL. The ROL doesn't aim to assess the substance of a given law; it is about the *way* we are governed (Waldron 2015a, 65). So it may seem surprising that he argues for a substantive dimension of the ROL. But he does: he says the prohibition on torture is a substantive demand that the ROL places on us. He defends the view by linking it much more closely to the very idea of the ROL than property advocates have been able to do with their preferred substantive value.

In short, the argument is this. In law, there can be what Waldron calls "archetypes." An archetype is "a particular provision in a system of norms which has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law." (Waldron 2005, 1723) The rule against torture, Waldron says, operates as an archetype in our legal system. The larger commitment or purpose it is representative of is nonbrutality: when law rules us, it may do so coercively, but it does not do so through terror or the breaking of a person's will (Waldron 2005, 1726–1727). Law operates in ways that respect people's agency, not by smashing or short-circuiting that agency. Law evinces its commitment to this in many ways, but a prohibition on torture is the central instance of it, the archetype. The ROL is the idea that our governments are constrained in the ways they can act. Thus, the prohibition on torture is an archetype not just of law but of the ROL: it is a fundamental case of the idea that there are some ways we expect our leaders not to act. They simply may not torture people to achieve their aims. "If this protection is not assured, then the prospects for the rule of law generally look bleak indeed" (Waldron 2005, 1742).

The ROL and International Law

Waldron expands his thinking about the ROL into the realm of international law. He notes that some people think the ROL plays a less important role here than in the domestic context and argues against this view (Waldron 2006, 16). In the international sphere, there is a temptation to think that the government plays the role of an individual and gains the protections of the ROL (Waldron 2006, 20). But Waldron argues that this is a poor analogy; there is no reason to value sovereignty, which is a construct, in the way that we value individual freedom (Waldron 2011c, 341). The ROL's protection of freedom makes sense for citizens. The government has no comparable interest in freedom; in fact, the ROL demands that the government be constrained (Waldron 2006, 18).

Thus, lawyers who advise the government on international law have a duty to take the ROL seriously in that advising role: not as something to be maneuvered around but as the very thing that constitutes the government. They should strive to maintain the integrity of the international legal order and not advise governments to push their freedom as far as possible, as they might advise a citizen (Waldron 2006, 26).

Conclusion

Law and the ROL, for Waldron, are deeply interconnected. The ROL sets out the value inherent in using legal means for guiding behavior. When law functions well, it lives up to the value of the ROL, the promise of guiding and enabling human conduct in dignity-respecting, non-brutal ways. Law is distinct from terror or brute force, and it is in understanding that distinctiveness that we see the value of the ROL. We strive to bring the vast power of the state under control, and we do so by demanding that it be exercised through law, in ways that enable people to engage with it as thinking, autonomous beings, individuals with a distinctive viewpoint, and a life of their own to lead. It does this by being clear and prospective and publicly announced, but also by spurring us to think and argue and engage with it, through a complex process of thoughtful self-application.

Cross-References

- ▶ Dignity, Human
- ▶ Ethics: Legal
- ▶ International Law
- ▶ Property: Philosophy of
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Walzer, Michael

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Introduction

Michael Walzer (b. 1935–) is among the most prolific of contemporary political and social theorists, and his work is among the most wide-ranging. He has made contributions to fields such as the ethics of war (Walzer 2004, 2015a), distributive justice (Walzer 1983), social criticism and philosophical method (Walzer 1987, 1988, 1994), multiculturalism (Walzer 1992, 1997), religion in politics (Walzer 2012), liberation movements (Walzer 2015b), and global justice (Walzer 2018). Walzer studied at Brandeis University, graduating in 1956. At Brandeis, he met Irving Howe and Lewis Coser, who had recently founded the social democratic intellectual magazine *Dissent*, which Walzer joined in 1954, and which he edited from 1973 to 2013. Following graduate study at Cambridge and Harvard, he taught at Princeton and then Harvard, before becoming Foundation Professor for the Social Sciences at the Institute for Advanced Study in 1980. Walzer retired in 2007 but remains professor emeritus at the Institute.

Walzer has generally advanced a center-left or social-democratic perspective based on an interpretivist methodology in which the task of a theorist is to analyze the social meanings prevalent in a particular realm. Walzer argues that the practice, norms, and laws of war demonstrate the existence of a "moral reality of war" and a "War Convention," holding that just-war theory should proceed by critical interpretation of that convention (Walzer 2015a, parts I and III). In similar vein, he claims that theories of justice should focus on interpreting the "shared understandings" of particular societies (Walzer 1983: 6–10). As a result of this interpretive method, Walzer is often called a "communitarian" critic of liberalism (Mulhall and Swift 1996; Avineri and De-Shalit 1992). Walzer argues that this method can provide radical insight, as situated but marginalized social critics demonstrate the incompatibility of current practice with deeper meaning to which participants are jointly committed (Walzer 1987). The extent to which the method can make good on this radical promise is one of the major recurrent problems in consideration of Walzer's work. This entry starts by analyzing the major themes in Walzer's account of military ethics, proceeds to discuss his theory of distributive justice or "complex equality" (Walzer 1983), and then touches briefly on other contributions. It ends with discussion of the interpretive method that underlies most of his body of work.

Justice in War

Walzer is most famous for *Just and Unjust Wars* (Walzer 2015a), first published in 1977 and now on its fifth edition. *Wars* has sold as many copies as all of Walzer's other books combined. Walzer wrote *Wars* to systematize his reasons for opposing the American war in Vietnam, and also to "rediscover the just war for political and moral theory" (Walzer 2015a: xxvi). That is, while there is a long tradition of theorizing about justice in war that goes back at least to the medieval Christian thinkers Augustine and Aquinas, prior to the 1970s, there had been little secular work on the subject for decades. Many now view Walzer as being successful in his aim, as just-war theory has become, in part because of Walzer's influence, a vibrant intellectual tradition; however, much recent work departs from Walzer's use of the War Convention as the foundation of the theory (for example, McMahan 2009; Rodin and Shue 2008).

Walzer's central innovation is in founding his theory on human rights to life and liberty (Walzer 2015a: xxiii) rather than the rights of states. He follows both international law and Christian just-war theory in dividing the ethics of war into two parts: *jus ad bellum* (the justice of resorting to war) and *jus in bello* (justified conduct during war). With regard to the former, Walzer's contention is that, because aggressive war violates human rights and forces people to fight to vindicate their rights, the only just war is a defensive one. Almost all just-war theory now follows Walzer in holding that the only just cause for war is defense against aggression and that, because war cannot break out without an aggressor, any war can be just on at most one side (though see Coates 2016: 162–183).

However, Walzer's definition of aggression has become increasingly controversial. He takes it to be the use of force across national boundaries, arguing that human rights to life and liberty ground state rights to political sovereignty and territorial integrity (Walzer 2015a: 51–53) by virtue of a "domestic analogy" with crimes in civil society (58). States exist to protect individual rights, so without states we would have either perpetual war or tyranny. International society relies on a self-help system. As there are no international police, states cannot rely on anyone but themselves for protection against aggression and so have "police powers" of self- and other-defense (59). Critics argue that Walzer's theory would grant legitimacy to states that violate the rights of their own citizens and, so, that it is at odds with the foundation of his theory (Beitz 1979; Luban 1980). Recent just-war theorists have sought to model just wars on police action (especially McMahan 2009), rather than conflict between states. These critics redefine aggression as any violation of human rights and so deny entitlements to use force in self-protection to rights-violating states.

Walzer allows for a few exceptions to the principle that the use of force across international boundaries constitutes unjustified aggression. These include providing assistance to secessionist movements and counterintervention in civil wars (Walzer 2015a: 74–100; for the example of the Syrian civil war, see Walzer 2018: 71–73). In these cases, Walzer insists that the purpose of the intervention be to ensure that the conflict be decided by the balance of domestic forces. He also allows for preemptive strikes such as that which Israel launched against Egypt in the Six-Day War of 1967 (Walzer 2015a: 80–85). In cases of preemption, a state launches an invasion against a neighbor that is mobilizing on the border but has not yet attacked. Walzer insists that preemption is distinct from the preventive war that the USA launched against Iraq in 2003, because preventive war responds to a more distant threat and so is freely chosen by the side waging war. In cases of preemption, the state faces an imminent risk to its sovereignty.

Most importantly, Walzer does allow for cases of humanitarian intervention akin to those advocated by his critics (Walzer 2007: 219–236). So, for example, he holds that intervention in apartheid South Africa to liberate the subjugated blacks would have been legitimate, as later would intervention in the Rwandan genocide of 1994. However, Walzer is far less permissive than his critics, holding that intervention should be limited to cases that "shock the moral conscience" of humanity, and defining such cases as those of massacre or enslavement (Walzer 2015a: 107). The norm should be nonintervention (Walzer 2007: 220), with lower levels of rights-violations dealt with locally so as to preserve the pluralism of international society. Walzer thus rejects the attempts to model just wars on police work and to make the defense of basic rights the paradigmatic just cause for war. This is because he insists that membership in a community is a sufficiently important good to require that the sovereignty of states be respected in almost all cases.

With regard to *jus in bello*, Walzer argues that there is a "dualism" between it and *jus ad bellum* (Walzer 2015a: 34–41): The latter is the responsibility of political and military leaders; ordinary combatants are responsible morally only for their particular deployments not for the justice of the war as a whole. They are entitled to obey any call to arm. Thus, he claims, combatants are "moral equals" in that they are all entitled to use lethal force against each other and so all liable to being

killed. Again, recent just-war theorists have been sharply critical of Walzer on this front, arguing that combatants whose cause is just have done nothing to lose their immunity to harm and so are not liable to attack (McMahan 2009; Rodin 2002). McMahan, for example, argues that only those who are responsible for an unjust threat are liable to defensive violence (McMahan 2009: 14). Walzer insists that the basis for liability to harm in war be engagement in acts of harm, so that all combatants are liable to attack (except for prisoners of war).

The principles of Walzer's version of *jus in bello* are proportionality and noncombatant immunity. That is, he holds that because nobody can be forced to fight to protect their rights, and because civilians are not in fact fighting, they are immune from attack in almost all cases. Moreover, he makes just-war theory less permissive of harm to civilians than it had been hitherto by insisting that combatants accept risks in order to minimize the danger that they pose to civilians on either side of the conflict (Walzer 2015a: 152–159). For example, he argues that bombers should fly lower to the ground than would be ideal if they were to evade antiaircraft missiles, so as to increase their accuracy, and suggests that in the humanitarian interventions in Rwanda, Kosovo, and Sierra Leone justice required that civilians be protected by ground troops (Walzer 2004: 16–17).

Unlike pacifists, however, Walzer does not insist that civilians are entitled to complete protection from danger. Following the just-war tradition, he accepts that harm to civilians may be legitimate if it fit with the Doctrine of Double Effect reworked to require combatant risk-taking (Walzer 2015a: 152–153; for discussion, Orend 2013: 121–125). According to this Doctrine, civilian deaths are acceptable so long as the actors who cause them do not intend them and they are byproducts of legitimate military activity. For example, it can be legitimate to bomb a munitions factory located in a city even if some civilians will die, because otherwise the munitions factory cannot be destroyed. Walzer accepts that a ban on attacking the factory would be too restrictive because it might make the war unwinnable, but insists that without the principle of combatant due care that would require bombers to fly as low to the ground as possible to maximize their accuracy, the Doctrine of Double Effect would be too permissive.

Walzer's acceptance that it is important for just wars to be won leads him to accept suspension of principles of *jus in bello* in cases of "Supreme Emergency" (Walzer 2015a: 251–268, 2004: 33–50). In such cases, a political community faces the imminent threat of destruction at the hands of a particularly terrible opponent unless it fights indiscriminately. Walzer argues that such communities may do whatever is necessary to avoid defeat so long as such action would be effective. His sole historical example is the United Kingdom during the Battle of Britain – Walzer argues that the risks of Nazi conquest of Europe were so terrible that the firebombing of German cities was necessary even though it meant deliberately targeting civilians (Walzer 2015a: 255–263). Moreover, he holds that no political community can be required to accept its own destruction by such an enemy. Critics have argued that this position, too, weakens the putative foundation of Walzer's theory in human rights (Shue 2004). Yet Walzer insists that because human identity and meaning emerge in communal life, the destruction of a community is the coercive violation of a right to membership.

Complex Equality and the "Spheres of Justice"

Walzer's other major work (Walzer 1983) is an argument for social democracy. Walzer calls his theory "complex equality" (3–30). He argues that theories of distributive justice should interpret a society's social meanings so as to ensure that each good is distributed in accordance with its own meaning and not that of some other good. He holds that distribution of goods in this way will ensure a type of equality, and that inequality is the product of goods becoming dominant over others, with this enabling the possessors of the dominant goods to oppress others (10–13). In Walzer's account, inequality does not emerge because some people monopolize particular goods but

because the possessors of socially dominant goods are able to determine all sorts of distributive processes and other forms of social decision-making. He holds that the greatest threats to equality in contemporary society are that the possessors of either money or political power can use those goods to gain access to goods such as healthcare, education, recognition, and even love or kinship. As these goods have different social meanings, they should be distributed in different ways. For example, healthcare should be distributed on the basis of need – that is, to the sick (88–91). For Walzer, equality requires that different goods be "distributed to different people for different reasons" (Walzer 1980: 242). Thus, equality requires social pluralism and separation between the different "spheres" of justice. Social meanings are internal to distributive spheres.

Walzer's pluralism has both an external and an internal aspect. As well as arguing that justice in contemporary societies depends on the sustenance of a variety of distributive spheres, he insists on pluralism across societies or "radical particularism" (Walzer 1983: xiv). That is, his argument that theories of justice should interpret social meanings rest on the thesis that goods are cultural products, not universal or natural ones. As a result, distribution of goods in accordance with their meaning will produce different distributive principles in different societies. For example, what makes healthcare a need in contemporary society is a widespread social commitment to longevity that was not prevalent in past societies such as that of medieval Europe (Walzer 1994: 28–31). Even bread has different meanings in different societies: In religious ones, it can be "the body of Christ" or "the symbol of the Sabbath"; in food-insecure ones "the staff of life"; and in others "the means of hospitality" (Walzer 1983: 8). Walzer insists that goods cannot have universal meanings because most objects are themselves indeterminate (Walzer 2007: 38–52). Goods must be conceived of before they can be created (Walzer 1983: 7).

Unlike *Wars*, *Spheres* entered into a lively debate about distributive justice in political theory for which John Rawls' *A Theory of Justice* (1971) was the inspiration. Walzer's argument contributed to the debate in two major ways. First, his argument that allowing the meaning of a good to determine its distribution would produce a type of equality provides a distinctive conception of equality (Walzer developed this argument from Williams 1967) as a political relationship. Walzer argues that the plurality of social meanings in contemporary society means that inequalities will not mount up across social spheres, so that a rough or complex equality will ensue. Against this, he holds that "simple" equality – which seeks equality within each sphere – is unsustainable given people's particular relationships to particular goods (Walzer 1983: 13–17). Complex equality suggests that equality is not about possession of goods, but is rather about the absence of relationships of domination and oppression. This occurs when possessors of one social good subordinate "all the companies of men and women to the one company" that possesses the dominant good (284). People may indeed have legitimate claims to a preponderance of particular goods, but it is Walzer's contention that the only possibility of achieving a society of equals is wagering that these claims will differ across spheres as talents and interests differ (Walzer 2007: 92). However, because Walzer's theory does not include a metric by virtue of which people will be equal, some critics have denied its egalitarian credentials (Rosenblum 1984; Arneson 1995).

Second, Walzer's argument that meanings are social contributes a culturally variable turn to a debate that had generally presupposed the universality of distributive principles. In doing so, he brings political theory into conversation with cultural anthropology: Walzer's argument draws on Clifford Geertz's account of culture as an interpretive quest for meaning (Geertz 1973). That is, Walzer's is a theory of the social construction of meaning and value. He argues, for example, that the principle of equality of opportunity could not exist until capitalism created the notion of the career open to talents (Walzer 1994: 22–24, 2007: 43–44). Critics have argued that Walzer's account presupposes a greater degree of social unity than in fact exists (Dworkin 1983; Warnke 1993). This line of critique probably arises in part

from Walzer's tendency to call social meanings "shared understandings" (Walzer 1983: 312–314), yet Walzer does not in fact argue that societies agree about the meaning of goods. Rather, he holds that goods are created via a social process of contestation and debate, with meanings that are always indeterminate and that change over time. Walzer's argument for the variability in social goods raises a marked challenge for the traditional attempt to produce a universal theory of justice by suggesting that such a theory has no anchor in that it cannot provide a satisfactory account of the goods that are available for distribution.

Interpretive Method and Social Criticism

The foundations of Walzer's just-war theory are universal rights to life and liberty, whereas his theory of justice appeals to particularistic social meanings. This seemed to critics to lead to tension between the two, although in fact *Wars*, too, takes a set of social practices – the War Convention – as its base, albeit these are international ones because wars are fought across the globe. Moreover, as the previous two sections show, critics of both Walzer's major works argue that his interpretive method attaches too much importance to community and suggests that communities are more unified than the critics take them to be. In particular, critics suggest that interpretation is insufficiently critical of social practice and is especially incompatible with Walzer's social-democratic credentials (especially Dworkin 1983).

To rebut this critique, Walzer developed a theory of social criticism (Walzer 1987, 1988) and an account of the relationship between universal and particular values (Walzer 1994, 2007: 183–218). Walzer argues that interpreters can be social critics who engage in immanent critique that shows that social practice fails to live up to ideals to which all members of society are in fact committed. This form of critique will be more meaningful than the detached and disinterested moralism of universalist philosophy because it will make for greater connection between critic and audience. The existing social world already provides the resources needed for its own improvement. That is, philosophical interpretation is not "positivist" in its reading of social meaning or value (Walzer 1987: 29–30). Social practices invariably fail to live up to underlying principle because ways of life are always in flux. Moreover, social construction is always partly coercive (Walzer 2007: 40–41), and so societies have dominant groups. Yet because these groups cannot rule by force alone, they must claim that their interests are widely shared. This "gives hostage to future social critics" (Walzer 1987: 41) to point out the gap between practice and principle and hold up a mirror to society to show its failure to live by its ideals (Walzer 1988: 151). Walzer argues that this type of critique is far more powerful because social construction implicates our identities, and so to fail to live up to our own ideals is a much deeper form of failure than is failure to meet someone else's moral standards.

Walzer also provides an account of the major social critics of the twentieth century, including figures such as George Orwell, Albert Camus, and Ignazio Silone who are of long-term interest both to him and to fellow writers on *Dissent*. Walzer's accounts praise Orwell for developing a distinctively English type of socialism that is ambivalent to rather than simply critical of English values such as consumerism (Walzer 1988: 123) and Camus for his ambivalent attitude toward Algerian independence from France (Walzer 1988: 136–152). As a French Algerian, Camus not only recognized the moral importance of decolonization but also insisted on a negotiated settlement that respected the rights of the *pied-noirs* (French Algerians) in postindependent Algeria. These accounts of ambivalent attachment illustrate Walzer's general claim that social criticism works because critics are insiders who identify with a group but are also in some respect marginalized and so achieve a small amount of "critical distance" (Walzer 1987: 60–61). They also exemplify Walzer's own ambivalent attachment to Israel, as a Labor Zionist whose commitment to the state sits alongside discomfort about its continued occupation of Palestine.

The theory of social criticism does show that Walzer's particularism is not unambiguous,

because although the content of moral meanings and values is particular, the process of social construction is similar (Walzer 1987: 46). As Walzer puts it in *Spheres*, all people are "culture-producing creatures" who construct a world of meanings (Walzer 1983: 314). Walzer later calls this a "reiterative universalism" (Walzer 2007: 186), suggesting that each community creates its own version of a good life. Moreover, he holds that there *is* a universal morality, albeit it is "thin" and, because it is always embedded in a particular or "thick" moral system, susceptible of different interpretations (Walzer 1994: 2–3). The idea that grinding the faces of the poor is wrong is universal, but what counts as grinding their faces is culturally specific (4–5). Just-war theory can to some extent draw on the thin universal morality, because it deals with threats to the human body, which is not a cultural product. Moreover, even the theory of social construction itself, on Walzer's account, implies some sense of human agency (Walzer 2007: 47–48) and so sets limits on the variability of construction while also allowing space for human creativity and the capacity to criticize dominant norms from within.

Other Work

Walzer has made numerous other important contributions, including to the topics of multiculturalism and immigration, global justice, and the roles of religion and nationalism. In *Spheres*, he argues that membership is a crucial social good, because it affects debate about the distribution of every other good, and so holds that states must have the right to control admissions. However, he does modify that by insistence on moral responsibility for refugees and by arguing that those admitted must gain full citizenship rights and not be permanent resident aliens (Walzer 1983: 31–63). He has since developed that position into what he calls "meat and potatoes" in which immigrant and minority groups must be empowered to participate as equal citizens by state support that helps them to provide goods such as education, welfare, and religious worship (Walzer 1998). He has also held that patterns of cultural accommodation must be variable, depending on both the needs of the minority and the nature of the state in question (Walzer 1997).

Walzer's particularism means that he is a critic of the cosmopolitan aim to develop a theory of global distributive justice (Walzer 2018: 98–117; c.f. Beitz 1999) because he does not believe that the goods to be distributed are global. Nonetheless, Walzer supports a minimal version of global justice in which those in need receive relief and local institutions are repaired so that communities can become self-determining (Walzer 2018: 115). Walzer is similarly minimalist on human rights. Minimal global justice is necessary because threats to the human body are part of the thin universal morality and overcoming them is a necessary precondition of the maximal project of seeking to instantiate a set of social meanings and a common life. A full theory of global justice is impossible because of cultural diversity and because there is no global metric by virtue of which we could measure people as equals. Theories of global justice tend, on Walzer's account, to treat equality as about possession of goods and not about relations of people that overcome domination and oppression.

At both the start and the end of Walzer's career, much of his work has focused on the specifics of group politics, in the form of studies of Puritanism (Walzer 1965), of independence movements in Israel, India, and Algeria (Walzer 2015b; see also Walzer 1985), and of Jewish political thought (Walzer 2012). In these works, Walzer emphasizes the importance of situated criticism, working within a tradition of thought while recreating it, and appealing to particular peoples. In particular, he holds that there is a "paradox of liberation" (Walzer 2015b: 19) because secularist national-liberation movements have failed to create cultural symbols that can bind the community together and, as a result, have faced religious backlash that threatens to undermine the legitimacy of the nation. The secularism of the liberation movements left the nation-state unmoored from its traditions, and as the movements did not engage with the traditionalist religions and challenge them to develop in more inclusive ways, the upshot has been entrenchment of exclusive

conceptions of religion that do not respect religious minorities in any of the three nations (Walzer 2015b: 102). Walzer concludes that liberation must be an ongoing enterprise that succeeds at cultural reproduction that incorporates both religious groups and excluded minorities.

For further discussion of these works, see Reiner (2020: 101-141).

Conclusion: Walzer's Contribution

Walzer is most famous for having developed a secular just-war theory based on individual rights to life and liberty and that reconciles a millennia-old religious tradition with the techniques of modern philosophy, drawing also on international law and history. He is celebrated also for advancing a social-democratic theory of distributive justice that rivals the liberalism and libertarianism dominant in the field. This entry has suggested that his interpretive method, which seeks to base principles of justice on analysis and critique of social meanings, and which brings political theory into conversation with narrative fields such as cultural anthropology, is also a significant contribution.

One of the most distinctive features of Walzer's thought is simply his willingness to advance contentious arguments and stake a position in a wide range of fields. He has argued that this is what makes political and social philosophy distinctive as fields in the contemporary academy: that they have a license to intervene in public debates in this way (Walzer 2013). Seen in this light, one of Walzer's most important contributions is to combat the academic specialization of recent decades and to advance arguments drawing on work for engaged public-intellectual journals such as *Dissent*, thus making political theory accessible to a broad audience.

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Walzer, Michael: Just War

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Introduction

More than any figure in the past century, Michael Walzer is responsible for the resurgence of just war theory, the idea that war can and must be governed by morality in both its ends and means. With the publication of "Just and Unjust Wars" in 1977, Walzer reanimated a largely dormant discourse and marshaled the triumph of just war thinking over realpolitik. Through his singular influence, just war theory is now the dominant framework for discussion of war within military and public arenas, and it has become an area of specialization within the academy.

Background

As a theory, just war is born of a Western tradition that has Greco-Roman and Jewish roots and that germinated primarily through works in Christian moral theology. The tradition is often, if too neatly, traced from the writings of the Christian bishop Augustine of Hippo in the fourth and fifth centuries and developed through the medieval and early modern writings of Thomas Aquinas, Francisco de Vitoria, Hugo Grotius, and Samuel von Pufendorf, among others. An approach to the ethics of war, just war theory stands in opposition to and between pacifism (or anti-warism) on the one hand and political realism on the other. Against pacifism, just war thinkers have argued that war may be the necessary means for the achievement of justice in the face of unwarranted aggression. To reject war in principle, on this account, involves an abdication of responsibility and submission to tyranny. Against versions of political realism, reflected for example in the thought of Hobbes and Carl von Clausewitz, the just war tradition has claimed that war is an enterprise that must be constrained by moral norms. The realists, who assess war through the lens of prudence and power, likewise abdicate responsibility and make justice an absurdity. According to the just war tradition, war is neither an immoral nor amoral affair, but rather one that can, under delimited circumstances, be moral, given principles that determine when it is permissible to enter war (*jus ad bellum*) and the justifiable means by which to fight within war (*jus in bello*).

By the twentieth century, particularly with the advent of the Cold War, just war theory had been generally disavowed or ignored in favor of realism and the language of national interest and balance of power that typified the foreign policy of Henry Kissinger. With few exceptions, attention to the just war tradition was sequestered in theology programs and debates within Catholic social thought. As Walzer notes, "Vietnam changed all this." Public outrage about the American involvement in Vietnam and atrocities such as the My Lai massacre signaled a sea change in attitudes about war. "Almost against its will," Walzer explains, "the left fell into morality. All of us in the antiwar camp suddenly began talking the language of just war—though we did not know that that was what we were doing" (2002: 928).

It is in this context that Walzer wrote his landmark *Just and Unjust Wars* (hereafter *JUW*). As he notes in the Preface to the First Edition, "I did not begin by thinking about war in general, but about particular wars, above all the American intervention in Vietnam. Nor did I begin as a philosopher, but as a political activist and a partisan" (2015: xxiii). As we will see below, these are not incidental comments, as the origins of his

interest in the ethics of war guide both the method and substance of his arguments.

Within just a year of its publication, *JUW* became required reading for cadets at the United States Military Academy at West Point and subsequently all of the major military academies. Public officials now routinely invoke the language of the just war tradition and its principles such as just cause, last resort, proportionality, and noncombatant immunity. The majority of scholarship on the ethics of war, both secular and religious, continues to engage, if not focus on Walzer's work, not only *JUW* (now in its fifth edition) but also his countless essays and articles on the subject. It is, then, difficult to overstate the impact Walzer has had on the revitalization just war thinking.

It is impossible to capture the many nuances of Walzer's approach to the ethics of war. Since Walzer has, with a few notable exceptions to be treated later, defended the views he articulated in the first edition of *JUW*, this entry will focus on key points of his theory of just war as presented in that work.

Just and Unjust Wars: Method

A signature feature of *JUW* is its casuistical approach. In marked contrast to the preoccupation with fanciful "trolley cases" that characterizes much of the recent literature in moral philosophy, and the ethics of war specifically, Walzer's is a concrete casuistry. *JUW* is filled with historical vignettes and war literature. Figures like Augustine and Kant are absent, while George Orwell, Robert Graves, Wilfred Owen, and Tolstoy have a central place. In the "Postscript" to the 5th edition, Walzer explains that the greatest part of his research for *JUW* involved reading war history, memoir, poetry, and novels, "because I wanted the moral arguments of my book to ring true to their authors—and to the men and women about whom they were writing" (336). Toward those who would seek to begin with disembodied principles, Walzer worries that "the illumination and resolutions won't ring true to the people I have always tried to address, for whom war is a primary subject and a personal experience" (337). In this way, *JUW* begins with a suspicion of theory and abstraction.

The subtitle to *JUW*, "A Moral Argument with Historical Illustrations," is indicative, if somewhat misleading on this score. For Walzer, historical examples do not merely instantiate moral claims, but rather the substance of these claims must be *derived* from the lived moral commitments of those engaged in war. This is no small inversion; it means that the moral horizon for war is limited by the moral vision of those who have lived and will live war. Despite the fact that he frequently invokes foundational principles and rights language, Walzer advances what he describes as a "practical morality" that moves "from the ground up" (xxvii). This creates a tension in his work that is at once fruitful and frustrating, as he never reconciles the normative force of his principles with the limiting forces of practicability and lived testimony. Minimally, one might view the narrative and personalist elements as side-constraints on the sort of rules that are possible for war. Maximally, we might see Walzer as giving primacy to something akin to a virtue approach (though he rarely speaks explicitly in terms of virtue), where what is good simply is what we as a community find admirable in those who have warred. In favor of the latter view, Walzer argues that his method of practical casuistry is concerned not with the actual actions of individuals in war or with the conventions surrounding war but with the *judgments* we make about specific forms of conduct. He adds, "I don't mean to suggest that our judgments, even over time, have an unambiguous collective form. Nor, however, are they idiosyncratic and private in character. They are socially patterned, and the patterning is religious, cultural, and political, as well as legal. The task of the moral theorist is to study the pattern as a whole, reaching for its deepest reasons" (45).

Substance

While, as we have seen, Walzer was seminal in the rebirth (and in most secular circles, birth) of just

war theory, his treatment remains to a significant degree faithful to the tradition as it evolved within Christian and Catholic discourses. He defends the basic criteria of the jus ad bellum – a just war requires the presence of just cause, the aim of peace, declaration by a legitimate authority, the exhaustion of alternatives, and must balance the risks of action and inaction while possessing a reasonable hope for success. Likewise, he supports in outline the conditions of the jus in bello, which prohibits the direct targeting of noncombatants and any indirect harm to noncombatants that is disproportionate to the value of the military operation. Nevertheless, Walzer deviates from the received traditions, as they have appeared in Catholic social thought and particularly in international law, in at least six important ways.

Four of Walzer's amendments address the jus ad bellum and concern the criterion of just cause. Responding to what he sees as the established norms for casus belli – he refers to the legalist paradigm that operates in view of something like the U.N. Charter – Walzer argues for a more permissive and expansive set of justified causes. Where the legalist paradigm only permits aggression as a form of self-defense in response to an unjust attack, Walzer gives moral license to wars of anticipation and intervention.

Article 51 of the U.N. Charter states that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense *if an armed attack occurs* against a Member of the United Nations." Taken at face value, this clause prohibits the use of force prior to the initiation of unjust aggression. Against this view, Walzer posits his first amendment defending preemptive strikes. Using Israel's first strike against Egypt in the Six Day War as a model, Walzer claims that anticipatory wars can be justified so long as the threat faced is imminent, where imminence requires that one is confronted by "a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting. . .greatly magnifies the risk" (81). For Walzer, imminent threats indicate that war, de facto if not de jure, has already begun, and thus the condition of last resort has been met. This is to be distinguished from wars of prevention, understood to mean anticipatory responses to any threat that fails to be imminent. Prevention is illicit precisely because it does *not* meet the threshold of last resort and indulges vagaries that would give credence to threats merely imagined, perceived, or felt. Walzer's discussion of anticipatory strikes presages debates surrounding the 2003 invasion of Iraq as well as current deliberations regarding Iran and North Korea. While enlarging the scope of permissibility, Walzer's account would reject the arguments from the so-called Bush doctrine and from scholars such as David Luban for justified preventive war (Luban 2004).

The second, third, and fourth revisions focus on forms of third-party intervention and deal with secession, civil war, and humanitarian rescue, respectively. Here, Walzer moves to subordinate what he sees as the lesser goods of territorial integrity and political sovereignty to more fundamental goods of human rights and communal self-determination. The legitimacy of any nation, and hence the source of its claims to protection, depends on its respect for these more basic goods. Walzer maintains that individual nations may intervene in foreign conflicts when (a) the intervention is on behalf of a secessionist movement that clearly reflects the collective will of a people capable of self-rule; (b) the intervention serves to counterbalance the prior, illicit interventions of another third-party in the midst of civil war; and (c) the intervention responds to gross human rights violations that "shock the moral conscience of mankind" (Walzer 2015: 86–108). Though Walzer's analysis of these issues is relatively brief, taken together, they considerably broaden the scope of a just cause while still insisting on rigorous jus ad bellum limits. Much of Walzer's later work takes up in greater detail questions of intervention and will be discussed below in "Evolution and Additions."

The fifth and sixth revisions apply to the jus in bello and the relationship between combatants and noncombatants. The fifth articulates a demand that Walzer describes as "due care" and increases the responsibility of soldiers to avoid collateral damage. Drawing on what he takes to be implicit in the doctrine of double-effect, Walzer argues

that it is not sufficient for a combatant to simply not intend harm to noncombatants; rather, combatants must have the positive intention to actively seek to minimize harm even at increased risk to themselves. Walzer's oft-cited example is of soldiers in the First World War shouting into cellars before throwing grenades. By doing so, risk was transferred from the potential civilians occupying the cellars to the soldiers, and, according to Walzer, appropriately so. A combatant has, by virtue of becoming a fighter and a "dangerous man," forfeited protection against harm, whereas a civilian has made no such forfeiture and therefore claims rights of protection that become (for the soldier) duties to protect (145). Furthering this line of argument, aerial bombing campaigns that pose disproportionate risks to civilians, according to the principle of due care, would be prohibited and should be rejected in favor of ground forces. In the Preface to the Third Edition and elsewhere, Walzer applies this standard as a critique of the 1999 NATO campaign in Kosovo, for example, arguing that the strict reliance on aerial bombing violated the requirement of due care (2000: xvii–xxiv). The requirements of due care are to some extent situational, but Walzer draws the limit at the point where the military operation becomes unrepeatable or doomed to failure (2015: 158). It is noteworthy that due care has become central to US military operations, specifically in escalation of force protocols, as can be witnessed in the Army Field Manual 3–24 on Counterinsurgency.

The sixth revision involves Walzer's exception to the jus in bello, an exception that has generated enormous controversy and is worth examining in some detail. Within the received traditions, the rule of noncombatant immunity is – despite the historical record – meant to be absolute. Contrary to this, Walzer rejects, albeit with some trepidation, the claim that the right of immunity is indefeasible and argues that under certain extreme conditions, it may be acceptable (in some moral sense) to intentionally target innocents. These circumstances, under which immunity can be overridden, Walzer describes as the "supreme emergency." His heavily scrutinized example is the British terror bombing of German cities from 1939–1941. As portrayed by Walzer, with the increasing likelihood of Nazi victory and the hopelessness of conventional defenses (i.e., means in keeping with the jus in bello), Churchill and the British people faced the "ultimate threat to everything decent. . .an ideology and a practice of domination so murderous, so degrading. . .that the consequences of its final victory were literally beyond calculation, immeasurably awful" (252). On this account, when a community is confronted with annihilation by evil and faces the "ultimate crisis of collective survival," the jus in bello is suspended, such that direct, even devastating attacks on civilians are warranted by necessity (327). Walzer is careful to note that the continued bombing of German cities subsequent to 1941, as well as the US bombings of Hiroshima and Nagasaki, fail the test of necessity and therefore are unjustified – indeed, they constitute war crimes. But under sufficiently dire conditions, the rule of noncombatant immunity is abrogated.

How exactly the notion of supreme emergency comports with Walzer's broader treatment of killing and war remains indeterminate, in part because Walzer's defense of the concept is ambiguous. In *JUW*, he recurs to notions of collective goods and civilization, which might be interpreted as claiming that community rights trump individual rights. He writes that "communities, in emergencies, seem to have different and larger prerogatives," but he immediately adds, "I'm not sure that I can account for the difference, without ascribing to communal life a kind of transcendence that I don't believe it to have" (253). At times, he offers relatively straightforward utilitarian grounds, arguing that utilitarianism upends deontological approaches in war when "a defeat [is] likely to bring disaster to a political community" (267). In a later work, he describes this as "utilitarianism of extremity" as set against a "rights normality" (2004: 40). He also gestures towards notions of a role morality wedded specifically to political leaders, who "can hardly help but choose the utilitarian side of the dilemma. This is what they are there for" (326). The idea that leadership assumes unique responsibilities and consequently greater moral license is prominent in Walzer's early and influential work on dirty

hands (1973: 160–180). Lastly, there are moments in his writings when Walzer concedes that the supreme emergency constitutes a full-blown paradox. In *JUW*, he writes that necessity and the supreme emergency represent the "ultimate tyranny of war" and perhaps "the ultimate incoherence of the theory of war," where our judgments "say yes *and* no, right *and* wrong" because war is not "fully comprehensible" (326–327). In a recent talk, Walzer reiterated, while maintaining his belief in supreme emergencies, the possibility of its paradoxical nature (Walzer 2017). It remains unclear whether Walzer ultimately views the violations of immunity as *justified* or *excusable*, i.e., right, all things considered, or wrong, but in some moral or nonmoral sense necessary all the same. Whichever line of reasoning one takes as principal, the concept of supreme emergency has been the target of most vehement critique by those who otherwise embrace Walzer's arguments in *JUW*, especially given concerns that same logic would justify certain forms of terrorism.

Considered as a whole, Walzer's revisions in *JUW* both widen and narrow the moral permissibility for war and in warring. As such, his approach cannot be described as either "hawkish" or "dovish." This is consistent with his commitment to a practical moral realism and the type of concrete, historical casuistry that forms the center of gravity for Walzer's theory of war.

Evolutions and Additions

Walzer has remained remarkably consistent in his views on the ethics of war as articulated in the first edition of *JUW*, with no substantive changes to the work in the subsequent four editions. He has, however, revisited and modified his approach. The largest drifts in his thinking, both made consciously, involve interventions and post-war justice.

On the topic of interventions, Walzer's view has become significantly more permissive, expanding both the scope of acceptable third-party involvement and its duration. In *JUW*, Walzer defended a strong presumption against intervention in light of the prima facie duty to respect national sovereignty and self-determination and the dangers posed by imperialist ambitions masking as foreign aid. His initial view found interventions justified under only three conditions: (1) to assist in a secessionist movement that reflects the will of the people and abets self-determination; (2) to balance – and only up to the point of balancing – another nation's unwarranted intervention in a civil war; (3) and to provide humanitarian relief in the face of acts that "shock the moral conscience of mankind," most obviously genocide (2015: 86–108). While he continues to uphold the presumption against intervention, the conditions under which it can be overridden have expanded significantly. Confronting the widespread massacres and political instability throughout South America, Africa, East Asia, and the former Soviet Union, Walzer has been led to not only adopt a more accommodating stance on intervention but also to place more capacious demands on intervening nations. In brief, we might summarize this shift as deepening the obligations of neighboring states and the global society at large to protect the basic rights of communities to be free from pervasive persecution and free to pursue political autonomy. To fulfill these obligations, Walzer has recognized a need to replace what we might call a *modest* intervention strategy with *robust* intervention. In *JUW*, Walzer was more concerned with the legacy of colonialism and perverse paternalism. This led him to conclude that the signature of a benevolent and justified intervention was that "the intervening forces are quickly in and out" (1995: 56). As his thought has developed, he has given more attention to the realities of political struggle and strife, often profoundly systemic, which generate them. In this vein, Walzer has come to see a modest interventionist approach as inadequate. "It may well happen," he explains, "that the quick departure of the intervening forces is followed immediately by the reappearance of the conditions that led to intervention in the first place" (56). On these grounds, the aim of intervention is not a return to the status quo ante, but rather the creation of lasting, or at least sustainable, peace.

The license for robust interventions leads naturally to the second evolution in Walzer's ethics of

war, which regards the jus post bellum, or justice after war. Though jus post bellum questions, such as what the victors in war owe the vanquished and vice versa, are not new, these have typically been addressed as part of the jus ad bellum or treated independently of the framework of the just war tradition. An influential essay by Brian Orend helped to push the jus post bellum as an integral part of a holistic ethics of war, and on this point Walzer seems to agree (Orend: 2002). Though he discusses post war settlements in *JUW*, that treatment was, in his assessment, "much too brief and doesn't even begin to address many of the problems that have arisen in places like Kosovo and East Timor and, recently, Iraq" (Walzer 2004: xiii). Walzer has become more open to the need for protracted engagement, including protectorates and trusteeships, which involve "standing interventions" (Walzer 1995: 62). Here again, Walzer's primary worries seem to have moved away from the realists' aspirations for power and fixed instead on the pacifists abandonment of responsibilities to protect or provide assistance.

Applied, this expanded view of interventions has led Walzer to criticize the failure to intervene in Rwanda, the Sudan, and elsewhere and to call for a continued and more deliberate US presence in Haiti, Kosovo, and Iraq.

Responses

The vast and lasting impact of *JUW* and Walzer's ethics of war make it impossible to digest the responses, criticisms, and approbations. It is worthwhile to note one dominant thread of discussion related to Walzer, stemming from what has come to be called the "revisionist school" of just war thought and which has become something of a rival academic enterprise. Reflected most prominently by the works of Jeff McMahan and David Rodin, the distinctive features of this critique of Walzer's approach are twofold: revisionists have tended to reject the independence between the jus ad bellum and jus in bello and consequently the moral equality of soldiers. Traditionally, just war theory, as well as international law, has upheld that the moral status of individual combatants in a war is independent of the status of the war as such. Thus, a soldier might fight well, in keeping with the jus in bello, even in an unjust war as assessed through the jus ad bellum. Corollary to this independence thesis is what Walzer described as the moral equality of soldiers – under normal conditions, combatants on both sides of a conflict, irrespective of the justice of their cause, have legitimate rights to use lethal force and are legitimately targeted as having forfeited rights of protection.

According to revisionists, this account defies the basic moral logic of self-defense. Drawing on domestic analogies such as law enforcement, they have claimed that to grant combatants fighting in an unjust war moral permission to kill is akin to giving criminals rights of defense against police officers engaged community protection. If it is the case that, say, a homicidal attacker lacks rights of self-defense against law enforcers, having forfeited rights of defense by virtue of villainous activity, then it would seem to follow that soldiers fighting for a villainous cause in an unjust war likewise lose rights of self-defense. From this vantage, failure to comply with the jus ad bellum defeats any prospect of justice in bello. Subsequently, the possibility of fighting justly is *dependent* on the justice of one's war, and combatants are unequal or morally asymmetrical when divided between those defending a just cause and those engaged in wars of aggression.

Walzer's response in defense of his and the "orthodox" position has both methodological and theoretical elements. Methodologically, Walzer observes that most of the work coming out of the revisionist camp is ensconced in hypotheticals and thought experiments, thereby divorced from the concrete realities of warfare and warring. Citing his own immersion in war literature, Walzer argues that the ethics of war cannot be approached through domestic analogies, let alone the sort of imaginary and fanciful cases that sometimes typify academic philosophy. This leads to his more theoretical response, which might be summarized: war, as a category for moral analysis, is sui generis, and this in at least two ways. First, the environment of war, as well as the forces that compel combatants to fight, are

deeply coercive. Soldiers who fight typically lack anything like full moral autonomy and a transcendent, birds-eye perspective on the causes for which they fight. They are frequently pressured to fight by law, threat, or social norms; they are confronting the life and death dangers ingredient to combat, and even when eager to fight they do so for reasons that are sometimes independent of moral causes. Second, warfare is a collectivizing experience that is not readily mapped by highly individualized parameters of most philosophical thought experiments and domestic analogies. Soldiers fight for the well-being of their compatriots, their families at home, their sense of collective honor – these are, Walzer avers, not the sort of moral motivations that operate in the sanitized moral theater presented by the revisionists. The attempt to situate war within the same moral landscape as civil society, on Walzer's account, amounts to a category mistake. Walzer, and those that follow him, are left to explain how the moral norms that govern war are derived, if not from common morality, and whether something other than historical conventions and ad hoc intuitions ground them.

Conclusion

Michael Walzer's work continues to be the centerpiece and touchstone for discussions of the ethics of war, particularly within academies, military, and otherwise. He has been the seminal figure in what has become an academic discipline in its own right, and the reach and legacy of his thinking has been profound. *JUW*, as well as the innumerable articles, essays, and opinion pieces that Walzer has produced, are the point of refraction for revisionists and defenders of the just war orthodoxy alike.

Cross-References

- ▶ Human Rights and Justice
- ▶ Humanitarian Intervention
- ▶ International Law
- ▶ McMahon, Jefferson Allen

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Walzer, Michael: Political Theory

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Introduction

The American political theorist Michael Walzer has produced some of the most studied and celebrated works of the past half-century. His books *Obligations* (1970), *Just and Unjust Wars* (1977), *Radical Principles* (1980), *Interpretation and Social Criticism* (1987), *On Toleration* (1997) and most of all, *Spheres of Justice* (1983), have set the agenda on numerous levels of academic discourse, usually as a beacon of radical thought provoking theorists of all other stripes. At the same time, Walzer's views defy easy interpretation. His books challenge and confront theories

close to the mainstream, and if one wants to appreciate them fully, it is necessary to look past conventional labels and closely examine the arguments of his early works.

The Spheres of Justice

Walzer's most important contribution to political theory is *Spheres of Justice* (1984), a book of immense scope and ambition, written primarily as a challenge to liberal theories by Rawls (1971) and Dworkin (1977). Mainstream theories of egalitarian justice are fashioned from individualistic premises so that each gives prominence in its own manner to individual citizens. They reflect what Walzer calls a regime of "simple equality" (Walzer 1983: 13–16). By contrast, *Spheres* renounces distributive schemes like those of Rawls and Dworkin. In Walzer's eyes, "there is no single set of primary or basic goods conceivable across all moral and material worlds" (8).

Under this "pluralistic" theory of egalitarianism, modern societies are comprised of separate worlds of social activity, and a primary task of egalitarian justice is to guard their separation. Walzer outlines ten "spheres" of activity: communal membership, personal security, money and wealth, official office, employment, recreation, education, religious belief, recognition, and crucially political power. If pluralistic egalitarianism could be contained in a simple proposition, it would be this: at no time should power in one sphere run roughshod over activities in others.

"There is no way to rank and order these worlds with regard to their understanding of social goods" (314). No currency of justice is conceivable into which all other goods translate. The question of how to distribute goods within separate spheres "must itself be worked out politically, so its precise character will depend on understandings shared among the citizens about the value of cultural diversity, local autonomy, and so on" (29). Indeed, "social meanings are historical in character," and therefore "distributions . . . change over time" (9).

Walzer enters political theorizing on a footing essentially different from mainstream liberalism. A legendary passage in *Spheres* declares his commitment to "stand in the cave, in the city, on the ground. . . to interpret to one's fellow citizens the world of shared meanings that we share" (*xiv*). This and other passages herald a mode of argumentation that is "concrete rather than abstract, historical rather than timeless, personal rather than disembodied" (Galston 1989: 119).

For Walzer egalitarian justice is rooted in social structure in ways that mainstream theorists fail to understand. Pluralistic egalitarianism gives expression to the value of "complex equality" (Walzer 1983: 3–9), which is the "opposite of tyranny" (19), where "tyranny" is understood as a condition in which power held in one sphere dominates others. An optimal state of egalitarian justice is where each sphere is governed in accordance with shared understandings about how its "internal" goods should be delivered.[1]

Philosophically, *Spheres* is a statement of communitarianism. It resonates with the arguments of communitarian writers like Charles Taylor, Michael Sandel, and Alasdair MacIntyre, who hold that political communities are entitled to self-rule or that bonds of culture should receive ethical recognition. Communitarians argue that the well-being of collective groups is tied to the well-being of individuals. Therefore, societies and their traditions should receive protection (Sussmann 2014: 3).

In light of its communitarianism, the key question about Walzer's political theory is whether pluralistic egalitarianism defies essential principles of liberal egalitarianism. For even though some theorists find in Walzer a valued corrective to liberal theories of justice (Gavison 2014: 41), and others praise him for conceiving of individual citizens as participants in a common life (Sandel 2014: 175), most readers have discovered in *Spheres* communitarian arguments that threaten to undermine individual rights.

Critical discussion of the arguments contained in *Spheres of Justice* is a continuing enterprise, as is

[1] As Walzer puts it, "we do justice to actual men and women by respecting their particular creations. . . To override those understandings is (always) to act unjustly" (Walzer 1983, 314).

the effort to map their progression into Walzer's other writings. The liveliest discussion about those arguments, however, concerns whether pluralistic egalitarianism in the end satisfies or betrays values deemed essential to liberal egalitarianism.

State, Culture, and Community

One way to comprehend Walzer's political theory is as a project to bring bonds of culture into dialogue with institutions of the state. In nearly all his writings, Walzer attempts to weave together traditionally distinct notions of community; "one notion is the moral community in which individuals are conjoined by their shared understandings of social goods. The other is the legal community in which individuals come together through specific acts of consent that create and delimit sovereign authority" (Galston 1989: 120–121).

In a sense, the central insight of Walzer's theory is that it draws these levels of community together. Institutions of a state are rooted in its people's values and sense of justice: both are creations of a cultural tradition. Of course, the balance of law and culture can never be scripted in advance; every case must be "worked out politically," determined in accordance with built-in meanings and values. Nevertheless, pluralistic egalitarianism is unique for how it celebrates the interplay of culture and legal institutions and for making their interaction a distinguishing feature of state sovereignty (Miller 2014: 19).

But then radical disagreement *within* sovereign states becomes a critical concern. A small group of existing states (including Japan, Denmark, and Iceland) is mainly homogeneous, and this locates them well in Walzer's schema. But many others encompass intense cultural and ethnic divisions, and some (like Belgium, Canada, and Spain) are defined in their own constitutions as states comprised of historically separate ethnic nations. In many cases, historically distinct minorities are fully capable of political self-determination; they create understandings of their own. Yet they are presided over politically by what they view as a foreign government, which makes such minorities dangerously vulnerable to state power.

Other questions emerge around global issues such as international migration. States are right, Walzer argues in *Spheres*, to manage flows of immigration and to regulate citizenship. "The theory of justice must allow for the territorial state, specifying the rights of its inhabitants and recognizing the collective right of admission and refusal" (44). Then, however, as Walzer himself recognizes, liberal theorists will ask; should states enjoy legal power to deny entry to "destitute and hungry, persecuted and stateless men and women simply because they are foreigners?" (45).

Pluralistic egalitarianism answers differently in relation to the history and values of a given society. States with traditions of inclusion and civil rights will fittingly endorse significant levels of immigration, but others will surely differ according to their shared meanings. If their values tell against immigration, those values should take precedence as a matter of Walzerian justice.

But liberal egalitarians find that response entirely unsatisfactory. For them, judgments about migration should resist the impulse to discuss communal ties; no such ties justify infringements of basic rights. The adequate response makes human rights the sole or exclusive determinant of legitimate judgments about cross-border migration.[2]

On two levels, then, Walzer's vision of institutions rooted in cultural bonds corresponds to regressive, inward looking, even parochial ways of thinking. As with other elements of his theory, critical debate turns on whether Walzer exaggerates the value of communal belonging and grants too much power to the sovereign state.

Democracy

Anyone familiar with his contributions to the theory of democracy or leading journals of democratic socialism will attest that Walzer is a

[2]For a clear summary of the cosmopolitan challenge to Walzer on international migration, see Arash Abizadeh, "Citizenship, Immigration and Boundaries," *Ethics and World Politics* Duncan Bell (ed.) (Oxford: Oxford University Press) 362–369 and Levy 2014: 117–120.

supporter of democratic governance. But the character of his democratic views is not easy to pin down. The political philosopher William Galston detects three prodemocratic strands in Walzer's political writings (127–128).

At certain times, he defends democracy for "perfectionist" reasons. "Moral self-development toward freedom requires an appropriate arena for human activity, which only a democratic community can provide" (Walzer 1980: 13). The society envisioned in *Spheres* produces equal citizens who are equipped to decide the course of their lives.

At others, Walzer defends democracy on "Rousseauean" grounds. The people themselves, he claims, "are the subjects of the law, and if the law is to bind them as free men and women, they must also be its makers" (Walzer 1981: 383). Consequently, "the proper exercise of power is nothing more than the direction of the city in accordance with the civic consciousness or public spirit of the citizens" (Walzer 1983: 286–287).

Fundamental to the argument of *Spheres*, however, is the view that democratic institutions are "intrinsic to the political sphere itself." As Walzer explains, "Once we have located ownership, expertise, religious knowledge, and so on in their proper places and established their autonomy, there is no alternative to democracy in the political sphere. Democracy is the political way of allocating power" (Walzer 1983: 303–304).

Each of Galston's arguments alludes to a significant thread in the ancient tapestry of democratic reasoning, and each is deployed in its own connection. It is tempting to let them occupy different spaces. But while it is likely that Walzer's perfectionist argument is faithful to liberal principles, the others proceed in anti-liberal directions. After all, if the community itself authors its laws, presumably it will decide at times to dismiss legitimate claims of citizens and minorities. And if we admit that democracy is the fitting apparatus for Walzer's regime of complex equality, it seems all the more vital to adopt a vigilant attitude toward majoritarian repression.

Once again, questions about Walzer's communitarian arguments and allegedly illiberal sympathies persist. Pluralistic egalitarianism gives expression to a strong impulse for democratic governance, but close analysis reveals that both citizens and minorities may be vulnerable to the power of democratic authority.

Challenges

Spheres of Justice exerted a powerful influence in academic discourse, particularly in debates about citizenship, democratic governance, international migration, patriotism, and national self-determination. In relation to these and other key topics in post-Rawls political theory, Walzer's views have proven extraordinarily provocative. Several books and essays in the last two decades are devoted to analyzing complexities of his theory.[3]

Two critical challenges stand out. The first is a recurring challenge relating to ethical relativism, indications of which are everywhere in Walzer's political writings. Given his "concrete" style of argument, critics are right to cast doubt on pluralistic egalitarianism's credentials as a universal conception of justice.[4]

Those who defend pluralistic egalitarianism against the charge of relativism emphasize the "minimal code" of justice at the heart of Walzer's

[3] For the best examples, see Orend, *Michael Walzer on War and Justice* (Montreal: McGill-Queen's University Press, 2001), and O'callaghan, *Walzer, Just War and Iraq: Ethics as Response* (New York: Routledge, 2015). Certainly the most exhaustive discussion is the following collection: Benbaji and Sussmann (eds), *Reading Walzer* (New York: Routledge, 2014). For examples of essays dedicated to Walzer's political thought: Delmas, "On Michael Walzer's 'The Obligation to Disobey'" *Ethics* 125, 4 (2015), 1145–1147; Elshtain, "Terrorism, Regime Change, and Just War: Reflections on Michael Walzer" *Journal of Military Ethics* 6, 2 (2007), 131–137; and McMahan, "Liability and Collective Identity: A Response to Walzer" *Philosophia* 34, 1 (2006), 13–17.

[4] Making use of very similar arguments, cosmopolitan theorists contend that Walzer overstates the value of communal belonging and fails to fully appreciate the universality human rights. For an example of this critique, see Beitz 2014, 71–72. These challenges of course take a geopolitical form, but it derives from the same dilemma between universal values and attachments to a particular society or culture.

theory, a code that would transcend boundaries of culture and politics. To be sure, it appears faintly in *Spheres* and goes undeveloped until years later, but this bedrock of universalism begins to answer the perennial challenge of relativism. From a liberal egalitarian standpoint, however, this "thin" universalism is humble indeed; "slaves and masters," Walzer says, "do not inhabit a world of shared meanings. The two groups are simply at war" (Walzer 1983: 29).

Another set of challenges takes issue with Walzer's handling of sub-state minorities. A key purpose of any conception of justice for sub-state minorities is to protect vulnerable groups from powerful state governments. Academic discussion of minority justice has produced such concepts as "rights of self-determination," "Aboriginal rights," and "citizenship rights." But when Walzer grants moral standing to the state, he defines justice in a way that neglects these specific types of minority rights to underscore relations of justice in each sovereign state.

At a general level, Walzer voices genuine concern for "ethno-cultural groups that *already* share a single, common political framework [which should] be perceived as already constituting a single collective" (Sussmann 2014: 7). But the structure of his political theory allows "substantive differences" between states based on their histories and traditions. "Minority rights enjoyed in a given state are, and ought to be, determined by the shared understandings of the state's dominant cultural majority" (ibid).

Although Walzer may not freely acknowledge it, the configuration of pluralistic egalitarianism generates a logic of uniformity that dictates its management of minority issues. This differs from recent theorizing on the theory and practice of minority rights (Kymlicka 2014: 135; Levy 2014: 116–117), and it may help to explain why Walzer's influence in the worldwide multiculturalism debate has somewhat diminished over time. In short, "people reject his state-differentiated approach to categorization" (Kymlicka 2014: 137).

Proponents of universalism and advocates for minority justice bring forth considerable challenges to Walzer's political theory. The arguments that emerge from pluralistic egalitarianism provide exceptional depth of vision, but detailed inspection reveals tensions with liberal egalitarianism's basic commitments.

Recent Work

Walzer's latest contribution to political theory is *The Paradox of Liberation* (2015), a book that carries forward the commitment to pluralism introduced in earlier writings. Its purpose is to defend a series of claims about national liberation movements in Algeria, India, and Israel, three states which have succumbed in the past decade to uprisings of political fundamentalism. After analyzing the "internal relations" of each movement, Walzer describes how social elites at the vanguard planted seeds of conflict among the masses they set out to modernize. Simply put, the project of nation building brought into existence by each struggle triggered opposition in the beliefs, traditions, and practices of everyday citizens.

Like all his contributions, Walzer's arguments in *Paradox* offer multiple points for critical engagement. But the concerns raised there – regarding secularism, globalized states, consequences of colonization, and social realities of human rights – point to vital faultiness in modern political theory. Few readers will fail to engage with this work as an evolution of Walzer's political philosophy and as critical analysis of geopolitics.

Conclusion

Only a handful of political theorists enjoy the degree of influence and admiration owed to Michael Walzer. His gifts to contemporary political philosophy are almost without comparison. And this summary has set aside the question of how Walzer's political theory intersects with neighboring areas of his thought such as just war theory, Jewish political philosophy, foreign policy, social criticism, and meta-ethics. Pluralistic egalitarianism is the core of these diverse writings – the compass that brings into alignment an

extraordinary range of concerns and locates them in a single framework. It is the cornerstone of a truly original vision of our shared political universe.

Cross-References

► Human Right to Democracy
► Human Rights and Justice

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Weber, Max

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Introduction

Max Weber (1864–1920) is one of the undisputed classics of humanities, legal and social sciences. His works on religion and law, economy and politics, state and domination shaped the debates in various disciplines sustainably and left a clear mark on later discussion. A lawyer by profession and specialized in legal history, Weber was appointed professor of economics and finance, before, at the end of his life, being finally appointed professor of social science. Thus, the most diverse disciplines call him one of their own – among them jurisprudence, sociology, political economy, history, and political science. Some of his writings, such as *Economy and Society*, *The Protestant Ethic and the Spirit of Capitalism* or *Politics as a Profession*, became canonical texts of philosophy and social sciences.

Biography

Weber was born on April 21, 1864, in Erfurt, as the first of eight children of Max Weber sr. and Helene Weber. He grew up in an upper middle-class family, who moved to Berlin in 1869 (for biographical aspects see Radkau 2008). In his parental home, he came into close contact with prominent legal scholars and politicians; his father was a National Liberal member of the German Reichstag as well as of the Prussian Chamber of Deputies. Although the young Max Weber only partially shared his father's political preferences, his parental home was of decisive influence for his intellectual development. He studied law, history, economics, and philosophy in Heidelberg and Berlin, obtained his law doctoral degree in 1889, with a dissertation on medieval commercial law, before he started with the

preparation of his habilitation thesis. Among his academic teachers were the luminaries of contemporary jurisprudence, Rudolf von Gneist, Otto von Gierke, and Rudolph Sohm.

Already as a doctoral student, Max Weber joined a circle of younger economists and social politicians, who demanded an increased activity of the state in social policy. Weber was involved in the *Evangelisch-sozialer Kongreß* (Evangelical Social Congress), he joined the *Verein für Socialpolitik* (Association for Social Policy), and he was commissioned with the evaluation of the association's survey on the situation of rural workers in eastern Germany. After his habilitation with an economic and legal history study on the Roman agricultural history in its impact for public and private law (1892), he received his first reputation in 1893, quite unexpectedly, to a chair of economics and finance in Freiburg. In the very same year, he married Marianne Schnitger (1870–1954), who later became one of the important German suffragettes of her time. In 1895, Weber gave his Freiburg inaugural address *The National State and Economic Policy*, a much-noticed patriotic plea for a strong German "Weltpolitik" (Weber 1895).

In his inaugural speech, Weber self-confidently called himself a "member of the bourgeois classes" (Weber 1895, 23). Some years before, in the 1890 Reichstag elections, he had still voted for the Conservatives, and in 1893 he had joined the *Alldeutscher Verband* (Pan-German League), which he left a few years later. Now he approached the left-wing liberals, with whom he shared democratic ideals, while missing the national point of view. He shared the national ideals with the National Liberals, but he missed the socio-political stance. In 1897, Weber moved to Heidelberg, accepting a chair of economics and public finance. In the next year, the beginning of a nervous disease led to a complete collapse and, finally, forced him to resign from his professorship in 1903. The following years consisted of sanatorium stays and recreational trips, which were at the same time rehabs from the strong drugs on which he had become dependent.

In these years, however, Weber started with extensive studies in methodology, sociology, and cultural history, first and foremost his study on *The Protestant Ethic and the Spirit of Capitalism* (1904/05). Released from teaching, he unfolded a monumental scientific work. Furthermore, in 1909 he was assigned the editorship of the *Grundriß der Sozialökonomik*, one of the most ambitious scientific projects of that time, from which his latter opus magnum *Economy and Society* emerged. Although he was still in poor health, the scope of his own contributions to the *Grundriß der Sozialökonomik* continued to grow. Until the outbreak of World War I in 1914, they mounted up to thousands of manuscript pages, a compilation containing the foundations of his sociology of domination, his sociology of law, and his sociology of religion, which established Weber's latter worldwide fame.

After the outbreak of the World War, Weber's scientific work initially came to a standstill. He volunteered for war, but since he was not front-suitable, he was commissioned leading the Heidelberg Reserve Hospital Commission. Just like the overwhelming majority of the contemporary intellectuals, he was gripped by enthusiasm for war. Only after the first ones of his relatives died on the battlefield, the initially enthusiasm was replaced by more dark mood. Finally, since 1916, he turned to a sharp opponent of the Reich Government's warfare, particularly against the unrestricted submarine war. He became one of the most committed German political journalists, discussing current war policy topics and constitutional issues of the future German state, particularly in his series of articles in the *Frankfurter Zeitung*. In the first postwar years, he engaged himself in politics, not only participating in the deliberations on the draft Weimar Constitution, but also in the election campaign for the liberal German Democratic Party, in which he had joined in 1918.

Weber was a spirited political speaker, but as a party politician he remained without fortune. His candidacy for the Reichstag failed. In the meantime, in 1918, he had returned to University. After a long abstinence, he accepted a visiting professorship in Vienna, and the following year he took over a chair of social science in Munich, where he died unexpectedly on June 14, 1920, of pneumonia.

Values and Politics

Weber's early works are dominated by his studies in social policy and agricultural policy. However, his analysis on the survey of the *Verein für Socialpolitik* on the East Elbian rural workers (Weber 1892) already reveals the basic features of his political thought, which was directed to the nation and the reason of state. He emphasized that he considered the situation of the rural workers only from the point of view of the national interest. Even in his late political writings, he stressed that he valued political issues especially from the national point of view (Weber 1916, 161). Throughout his work, this national value system is inextricably linked to a liberal-democratic conviction. Weber was a committed advocate for the parliamentary constitutional state, and he counted democracy as one of his central political values, but if he engaged himself for democratic goals, there were always national motives involved (Anter 2014, 111ff).

The early studies on agrarian policy lead him from law to economics and raised particular questions that he dealt with in more detail in his Freiburg Inaugural Address in 1895, where he placed the results of his survey in the context of an analysis of the current German state. The inaugural lecture is "the most significant documentation" of the young Weber's political thought (Mommsen 1990, 36). Furthermore, it is Weber's first confrontation with the problem of value judgments, in this case, the "ultimate values" of the nation and the reason of state. The Freiburg Address has always been read as a patriotic document, which is not without reason, but at the same time, it was the reflection of his own thinking about the way in which particularly his political writing was bound up with values (Hennis 2000).

As a value-minded thinker, Weber interfered from the beginning in the contemporary debates. Hence, unlike often said, Weber does not represent a simple "theory of value freedom" which seeks to abolish value judgments from the legal and social sciences. However, he stated that every science is inevitably bound up with values and thus founded upon "standards of value" which necessarily influences any "scientific argument" (Weber 1904, 362). This conviction leads him to an ethico-scientific maxim that it is essential to reveal the standard of value "from which a value-judgment is derived" (Weber 1904, 366). Weber himself had to complain that his theory of value judgment was exposed to "endless misunderstanding" (Weber 1917, 311), and in fact, his theory was often grotesquely distorted and even turned into its opposite. Admittedly, the misunderstanding derives partly from Weber's unfortunate choice of essay titles, since the single words "objectivity" and "value freedom" in the titles of his essays on *The "Objectivity" of Knowledge in Social Science and Social Policy* (Weber 1904) and *The Meaning of "Value Freedom"* (Weber 1917) acted like stimulus words, involuntarily associated with "positivism." However, it would be untenable to divide Weber's "value-free scientific" positions strictly from his "evaluative political" ones, since both are indissoluble linked.

Ethics and Violence

Weber always followed the maxim of revealing his "standards of value," as in his lecture on *Politics as a Profession*, which he delivered to a student audience in Munich, on January 28, 1919. In this lecture, he dealt with basic questions of political theory and political ethics: How can one define politics? What is the task of political parties? Do states inevitably have to act violently? Are ethics and politics compatible at all? Weber gave his lecture in the revolutionary turmoil after the World War I, in a civil war situation where violence was ubiquitous. Against the pacifist longing of his student audience, he insisted that politics is primarily a "striving for a share of power or for influence on the distribution of power" (Weber 1919, 311). Anyone who wants to take responsibility in politics must, if necessary, be prepared to act violently. Weber did not believe that politics could ever be completely nonviolent. Since the state is characterized by the monopoly of legitimate physical force, which guarantees protection and security, the present state must be able to prevent any kind of nonstate violence. But that does not work without the effective threat or use of force. However, this creates a problem, at least for those who make ethical demands on

politics. For it is the use of force in the hands of human associations, "what gives all the ethical problems of politics their particular character" (Weber 1919, 364).

To resolve the tension between ethics and politics, Weber resorted to a skillful move, setting the distinction between "ethic of conviction" and "ethic of responsibility" (Weber 1919, 357ff.). The first one is an absolute and nonconcessional ethic, based only on abstract principles like nonviolence, the latter is a pragmatic ethic that focuses on the success of action. The conviction ethicist is only interested in the purity of his convictions, even if his actions benefit only the opponent. In formulating this pair of terms, however, Weber's own preference was only too obvious. For him, conviction ethicists were not suitable for responsible political leadership, since a radical rejection of violence would be ultimately a denial of the state.

State and Domination

This is also reflected in his definition of the state as a "political institution" that claims successfully on the "monopoly of legitimate physical force" (Weber 1921, 356). With this definition, Weber tried to solve a central problem of state theory, reducing the abstract institution "state" as well as the varieties of state experience to a single concept. He described the notion of the state as "the most complex and interesting case" of the problem of concept formation (Weber 1904, 394). Weber concluded from his historical studies that the monopoly of force is the decisive criterion that distinguishes the modern occidental state from other historical forms of domination. The monopoly is the only criterion common to all state formations. Since this monopoly was only enforced in modern times, the "state" for Weber was a precise historical concept. The history of the modern state was for him the history of a comprehensive monopolization, which occurs not only in the exercise of force but also in administration, jurisdiction, legislation and other spheres (Anter 2019). Weber saw this as the result of a long-term and violent process in which the local rulers were gradually expropriated by a central authority.

In Weber's sociology of domination as well as in other works, the state appears primarily as an institution of domination. Like the majority of the contemporary legal theorists, Weber thought rule to be an essential criterion of the state (Anter 2014, 46ff.; Breuer 2011). But unlike other theorists, he tied the existence of rule to the existence of legitimacy. The category of legitimacy is the Archimedean point of his sociology of domination, since domination cannot last if it is not considered legitimate.

The question of the origins and effects of domination is one of the fundamental questions of legal and social theory. This is also true to Weber, who occupied himself throughout his life with this question, most intensively in his sociology of domination, which he developed during the last decade of his life in several attempts (Weber 2005; Weber 2013, 453ff.). In the beginning, the aspect of the functioning of domination was in his focus, while later the question of its legitimacy became more and more clear, that is, the question of when, how, and why domination is recognized and obeyed by those who are ruled.

It was Weber who made legitimacy a key concept of legal and social science. The type of obedience as well as the character of rule differs according to the nature of legitimacy. In this regard, Weber distinguished his three famous types: the rational-legal rule, which is based on the belief in the legality of order; the traditional rule based on the belief in the validity of the tradition of order; and the charismatic rule based on the belief in the heroic power of a charismatic leader (Weber 2005, 717ff.; Weber 2012, 449ff.). Weber was not concerned with squeezing the heterogeneous forms of rule into a schema. Rather, he understood them as ideal types that never appear in pure form, but always in mixed forms. The charismatic rule was for him a product of extraordinary situations and arises from an "aggravation." However, when it flows back into the "pathways of everyday life," it is regularly "broken" and "transposed" (Weber 2005, 489). In this respect, it remains extremely unstable, as it is always exposed to the risk of traditionalization or legalization, through which it would fall back on one of the other two types

(Weber 2005, 416). Thus, the charismatic leader is replaced again by an impersonal-legal rule. But even this won't be the "end of history" for Weber, since legal rule is constantly exposed to crises that could lead to charismatic revolutions. This diagnosis has often been confirmed in the history of the twentieth century. Weber's theory of domination has occupied generations of social scientists and it laid the foundations for today's understanding of legitimacy. His typology remains one of the most important models for the analysis of the practice of rule in different eras and cultures.

Conclusion

Weber did not create a systematic political or social theory. He was no kind of systematic thinker anyway, and, moreover, he left behind a conceivably fragmentary work. Hence, it remains a challenge to discover a thread in his monumental work. After decades of focusing on the "occidental process of rationalization" (Roth 1987, Schluchter 1985), the focus shifted to Weber's anthropological question and his theme of the relationship between "personality" and "life orders" (Hennis 2000). In addition, it becomes increasingly clear how much the state was at the center of his political thought (Anter 2014). However, his social and political thought reveals a characteristic ambivalence. Weber argued for freedom and individualism, and at the same time, he argued for the viewpoint of the reason of state; he was committed to the welfare state and the parliamentary democracy, but only because he considered it the most effective form of government. His thinking was marked by a series of antinomic tensions – between freedom and authority, personality and life orders, individualism and reason of state. Since such antinomies shape the political sphere until now, Weber is all the more a representative thinker of modernity.

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Weil, Simone

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Life and Action

A French philosopher and activist, Simone Weil was born in Paris, 3 February 1909, and died in Ashford, England, 23 August 1943. In her brief and intense life, thought and action came together into a singular union in which the critique of the various dimensions of social oppression continuously opened new spaces for a renewed vision of individual and political life centered around a radical spiritual questioning. Displaying an energetic intellect and deep seriousness from an early age, Weil's intellectual journey was one of the most remarkable of the twentieth century, her tragic fate an extreme testament to the fact that "no one more heroically harmonized her actions with her ideas," as her friend and biographer Simone Pétrement wrote.

A student of philosopher Alain (Émile-Auguste Chartier), under whose guidance she honed her philosophical skills from 1925 to 1928, she later taught philosophy in high schools in Le Puy and Roanne. She became active in the revolutionary syndicalist movement, struggled alongside the unemployed and the miners, and often criticized the positions and decisions taken by the French Communist Party. Her analysis of the situation in Germany, carried out after a visit in the early 1930s, led her to criticize the revolutionary movement (both German and international), which she believed was incapable of effectively interpreting the necessity of simultaneously emancipating the proletariat and arresting Hitler's rise to power.

Increasingly disillusioned over the possibility of a revolution that could represent an opportunity for a "superior morality," and convinced ever more that a strong personal testimony was all that she could or wanted to offer, in 1934 she began to work in a factory, where she experienced the physical and moral oppression of the workers, as she recounted in her *Journal d'usine*. Experiencing the exhaustion and pain of the workers' condition, she felt like a slave who had lost the "awareness of having rights." The impossibility of remaining indifferent to the tragic events afflicting Europe in the interwar period drove her to enlist in the republican army during the Spanish Civil War; she was forced to withdraw quickly due to an accident that prevented her from remaining on the front lines.

In the meantime, she began to develop decidedly pacifist convictions, which led her to criticize radically the politics and political discourse of the moment, and to hope for an agreement with Germany that could avoid the tragedy of a new world war. As health problems forced her to leave teaching (she suffered continuous and acute headaches), she began to reflect more intensely on religious matters, which led her closer to Christianity, albeit always maintaining a critical position with regard to the Catholic Church.

With the ominous rise of Hitler, Weil became convinced that there was no longer any space for pacifism. Her analysis of the origins of Hitlerism and her interpretation of actual situation in which "there is no force other than force", together with her long-standing thoughts on action, led her to the Frontline Nurses' Project – women dedicated to sacrifice who were summoned to serve as defenders of a morality and a "greatness" very different from the militaristic values that seemed to be gaining the upper hand in Europe at that moment.

The need to contribute actively in the struggle against Hitlerism drove her to side with individuals organizing the Resistance in London. Before obtaining a visa for London, she and her parents

moved to Marseille, where she circulated among Catholic groups and where she composed the bulk of her *Cahiers*. Here she reconstructed the elements of a Mediterranean culture that united the Ancient Greeks and Medieval Cathars, and which stood as an alternative to the culture of "force" represented by the Hebrews of the Old Testament and the Ancient Romans, both considered the true antecedents to the degeneration she witnessed all around her. In this period she encountered the Domenican priest Jean-Marie Perrin, with whom she established a deep spiritual dialogue, and the philosopher Gustave Thibon, with whom she worked as agricultural laborer.

After arriving with her parents in New York, she made arrangements to move to London, where she arrived toward the end of 1942 and took up employment in the civil services. In London she fervently developed her thoughts on the reconstruction of France and Europe, views articulated in *L'enracinement* and *Écrits de Londres*, works that devote considerable space to constitutional and legal-philosophical themes. Her proposals did not receive widespread acceptance, nor did her request to return to France to participate in the liberation struggle. Weil died at 34, succumbing to tuberculosis and malnutrition from her refusal to eat, a choice she made to share in the suffering of the French people.

Law, Force and Justice: Toward a Critique of Political and Social Oppression

Although not central to Weil's thought, questions of law and justice return time and again and connect the various stages of her philosophical journey. In one of her early writings, she inquired into the nature of law and into what distinguishes law from power and force. Starting from Spinoza's famous identification of (natural) law with power, Weil underscored how law ought to be a "rule that judges the fact", rather than being coterminous with it (*L'antinomie du droit*). The particularity of law lies therefore in its capacity to provide a limit to individual powers, based on a criterion that tends to equalize these powers and give rise to a social equilibrium. This criterion is supplied by labor, a notion that Weil analyzed closely, with reference to Marx in particular, who she credited for having understood reality as a relationship between forces, and for having described the mechanism of capitalist oppression. She faulted him, however, for not having understood that workers' oppression did not stem from the regime of private property, but rather from the organization of work, specialization, and the technical developments in production. In any case, it is precisely the need to bring rules into the world of work that helps to clarify the distance that separates law from arbitrariness. For example, with regard to terminating workers, even "the most absurd rule, provided that it were stable, would constitute progress" (*La condition ouvriére*).

In Weil's early work, she criticized both collectivism in social organization and the state, the latter of which "tends more and more, and with extraordinary rapidity, to become the center of economic and social life" (*Réflexions sur les causes de la liberté et de l'oppression sociale*). She was inclined to see in the law a source of freedom, in line with the typical republican conception of freedom as the absence of arbitrary power, such as in the relationship between slave and master. Even if the master "can be very mild and the laws very harsh", for Weil there was nonetheless a great "distance between caprice and the rule" (*Cahiers*). In these writings, the concept of the "limit" emerged, a notion that would inform all of Weil's subsequent writings on justice.

In the wake of these reflections, in which law (seen as an alternative to force) provided the link between the idea of limits and a conception of justice, Weil developed a number of different observations in which the law is absorbed by force. In her reconstruction of the historical and ideological origins of Hitlerism – a discussion that contained significant differences with respect to Hannah Arendt's account, which emphasized totalitarianism's discontinuities with the past – Weil singled out the Romans and their legal tradition, which in her view was entirely subservient to the dominion of force. Law becomes a mask of force itself and the main instrument of centralization – a recurrent phenomenon in human history

that durably connects the ancient history of the Roman Empire to the modern state and subsequently to totalitarianism.

In these instances, we see a radical realism in which law and power are drawn together into a single point. For Weil, there was no escape from the dominion of force. Faced with this fact, however, one can take different stands, depending on whether one chooses the route of adoration or contemplation. Alongside civilizations like Israel and Rome that idolized force and recognized only collective values, there stood civilizations like Greece and Occitania that were capable of understanding dominion without idolizing it; only the latter were able to escape it. In fact, recognizing the centrality of force without hypocrisy is essential to the goal of rejecting the logic of force and, most importantly, of identifying the sphere in which it could be overcome.

This move is essential for understanding Weil's discussion of justice. The more Weil insisted on the fact that "there is no other force on this earth except force" (*L'enraicinement*), the wider the space became between law and justice. If force prevails everywhere, justice cannot come to pass except through the choice of *weakness*. This is the case not only because justice is realized by serving the weak, the poor, or the unfortunate, as the Greeks understood so well, having taught us that "the feeling of human misery is a condition of justice and love" (*La source grecque*), but also and above all, because justice becomes possible only thanks to the fact that an individual renounces one's own power, one's own "self", imitating the gesture of "decreation" (*décréation*) by which God created the world. If renouncing one's own power through decreation is the only way to achieve justice, Glaucon's provocation in Plato's *Republic* must be taken seriously: the perfectly just person is the one who, preferring to endure rather than inflict injustice, always behaves correctly, but who in the end is considered the most unjust of all. In fact, the just person must never be even minimally touched (and made impure) by prestige. This is the reason Weil maintained that the construction of an alternative to force must pass "through a kind of death" (*L'enracinement*). Justice thus comes to coincide with charity and the practice of supernatural love. It proceeds from a close reading of reality and of a careful concern for other people: Antigone and the Good Samaritan of the Gospel are the purest incarnations of this, in the same way as Christ who died upon the cross.

Weil's conception of justice offers iconographic connotations entirely different than traditional notions: justice appears without a blindfold, because it must be able to see misfortune; it holds no scale, because the task is not to measure the weights and the forces, but rather to tend to those who are invisible and voiceless; and it bears no sword, not only because it rejects identifying itself with the use of force, but also because it knows that the space within which justice is realized is not that of legal institutions possessing coercive power, but in the relationship with the Other on the basis of a capacity for care – a capacity that is impossible to insert into the mechanisms of a law.

Critique of Rights and the Priority of Obligations

If justice is coexistence, and coexistence requires tending directly to the experience of the Other rather than placing limits around the sphere of individuals, Weil's critical position with regard to rights is understandable. This is, perhaps, the most controversial aspect of Weil's thought: her critique of rights seems to conflict with her attention to misfortune and the least among us. After all, weren't rights "invented" to defend the defenseless?

Weil's position is clear. In one of her last writings, *La personne e le sacré*, she launched a frontal attack against subjective rights, considering them entirely contaminated by the logic of force. This was due not only to their origins with the Romans and their concept of the person, but above all because they were worthless without the backing of force to uphold them. Weil's vision seems to recall Hobbes' state of nature: rights are closed within a logic of "division and exchange", and thus necessarily evoke "legal claims and arguments". Even worse, rights "evoke a latent war and awaken the spirit of contention". Although they may prove useful on that plane of human association in which one attempts to discern

relationships of "quantity" between subjects, they are useless when it comes to "ensuring that individuals go unharmed". In these cases, when we are confronted with the unfortunate who cry "Why have I been visited with evil?," rights appear mistaken because the relationship between subjects is unbalanced; here only "the spirit of truth, justice, and love" are needed.

As with other critics of rights, such a radical rejection could only be accompanied by a decisive reevaluation of obligations, their language, and their specific logic. In the famous opening to *L'enracinement*, Weil wrote that "the notion of obligations comes before that of rights, which is subordinate and relative to the former". The priority of obligations over rights stems from the fact that, while rights require obligations to be effective, obligations carry weight regardless of their recognition by others. But Weil's point of view is not an expression of the simple legal notion of the correlation between rights and obligations; rather, it is concerned with the supernatural foundation of obligations, and its resulting difference in logic compared to the logic of rights. Criticizing the justifications that traditionally have been given for the sense of duty – tradition, law, relationships of force, and the direction of history – Weil located the origin in a place "above this world", the only condition that can guarantee its immutability and observance. More importantly, she insisted on the fact that obligations, not rights, are what are connected to the deepest needs of the human spirit, for the *movement of openness toward the Other* that they necessarily imply. Weil thus effected a kind of revolution, not only in bringing fundamental needs – which modern political and legal philosophy had expressed in terms of rights (freedom, equality, security, property, etc.) – into the domain of obligations, but also because the fundamental relationship is the one established between individuals, rather than between individuals and the state: "Obligations are only binding on human beings" (*L'enracinement*).

The centrality of the notion of obligation, however, satisfies not only the characteristics that she attributed to justice – chiefly, attention, and care – such that the two concepts are nearly coterminous; but it allows us to understand correctly the fundamental human need Weil located at the basis of all other needs, namely, *to be rooted.* Far from representing the locus where an organic and identitarian community is established, it constitutes the terrain upon which a community comprised of subjects is realized and which is expressed through reciprocal obligations toward each other – moving from a "personal" to an "impersonal" logic – without ever forming a collective *we*.

Recovery of the Law and Legitimacy of Power

A large part of Weil's writings from her period in London were devoted to reflections on political community and its institutional structure. In these works, her convictions pertaining to the priority of justice (over law) and obligation (over rights) broaden into a cogent, albeit unsystematic, consideration of the subject of legitimacy. Here she distanced herself again from views that see legitimacy in terms of power and force, and privileged instead the dimension of consent. Through a rich analysis, elaborated mainly in *L'enracinement* (one of the most important works of twentieth-century European political thought), Weil achieved her own particular "return to the law", in which law was called upon to actualize the fundamental principle that there must be a correspondence between power that is exercised and responsibility for what is carried out in society. This mechanism lies at the bottom of the legitimacy of institutions and forms the intersection between the actions undertaken by the rulers, on the one hand, and the expectations of the ruled, on the other.

Importantly, however, the consent Weil referred to can never be the fruit merely of the effectiveness of power. It is (and must be) tightly connected to justice and therefore must follow both from a series of constitutional limitations on power itself and from a system of rules aimed at guaranteeing "the same quantity of respect and regard" for every human being. For Weil, consent never rested on merely formal criteria, but rather on substantive

criteria, since "legitimacy is not a primary notion" but "derives from justice" (*Écrits de Londres*). This explains why Weil's writings from her period in London reevaluated significantly the role of the judiciary, whereby she understood it not merely as an executor of law, but as an institution called upon to express a "judgment according to equity" inspired by a new fundamental Declaration. This it would be able to do if (and only if) the judiciary received an adequate education based not only on technical knowledge but spiritual formation too.

It is in this context, in which only free consent centered on justice is the basis of legitimacy, that we may read Weil's radical and Rousseauian critique of political parties in one of her most well-known works (*Note sur la suppression Générale des partis politiques*). If the criteria of the good in politics can only be the spirit of truth and justice, together with the search for the public good, parties clearly come up short, given their nature as machines in pursuit of power and the collective passions they stir to this end; they distance individuals from reason and truth and therefore must be prohibited if we wish to remain faithful to the spirit of democracy.

Although she harbored no illusions concerning the feasibility of her ideas (and leaving to the side their specific content), these reflections at the end of Weil's journey suggest a restored faith in the possibility of devising a constitutional order that could incorporate a sense of justice inspired by fundamental human needs.

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- ► Marx, Karl
- ► Rousseau, Jean-Jacques: Theory of Law
- ► Spinoza, Baruch

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Wertheimer, Alan

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Alan Wertheimer (1942–2015) was John G. McCullough Professor of Political Science, University of Vermont and Senior Research Scholar, Department of Clinical Bioethics, National Institutes of Health. It has been said that he was not only "a philosopher's philosopher but a lawyer's philosopher" because his philosophical work had such an impact on legal theory (Cohen 2015). Wertheimer's claims about coercion, exploitation, and consent have value not only to legal theory but to a wide range of applied topics including political justice and bioethics.

Normative Legal Concepts

Wertheimer offered a series of works that explore what he considered the irreducible normative grounding of certain legal concepts. Some might argue that concepts like coercion or consent are purely descriptive. They pick a set of actions (or class of actions) that are wrongful only because of some agreed upon legal convention. Wertheimer argues, however, that concepts like coercion, exploitation, and consent are irreducibly normative. Wertheimer's scholarly method was to extract from actual legal cases the common core of what he called a "moralized" legal concept. For instance, when considering coercion as a legal concept, Wertheimer says, "The adjudication of coercion claims has, in effect, required the courts to develop a theory (or theories of coercion), even if that theory has not always been consciously held or explicitly articulated" (Wertheimer 1988).

Coercion

A purely descriptive understanding of coercion would say Ann coerced Betty if empirically Ann's actions fit the necessary and sufficient conditions of causing Betty to do something she otherwise would not do. Wertheimer calls this a "value-free" or empirical account of coercion.

According to Wertheimer, coercion is a thoroughly moralized concept, however. He argues there are two conditions or "prongs" of a moral analysis of coercion, a coercion prong and a proposal prong. The first indicates coercion has occurred but it is not sufficient to locate wrongful coercion. Rather we also need to know whether Ann's proposal to Betty (i.e., "do this or else") is one that would absolve Betty of her responsibility for doing some action under duress. The moralized concept of coercion hinges on whether or not someone can be held responsible for some act they otherwise would not do. For instance, Wertheimer applies his theory of coercion to sexual relations in *Consent to Sexual Relations.* Andy coerces Betty into sexual relations when he proposes to make Betty worse off (relative to the appropriate baseline) if she does not acquiesce, and it is reasonable for Betty to acquiesce rather than suffer the consequences (Wertheimer 2003).

Exploitation

Wertheimer makes the same sort of normative claim about the concept of exploitation as he does about coercion. In *Exploitation*, Wertheimer rejects the purely descriptive idea that Ann exploits Betty when Ann takes advantage of Betty's vulnerability in order to gain something for herself. Wertheimer, again, seeks a normative analysis from specific elements of case law (e.g., unconscionable contracts). He is most concerned with those instances where the exploitation is consensual and mutually beneficial and yet wrongful.

Wertheimer distinguishes between the *moral weight* of exploitation (how morally wrong it is) and the *moral force* of exploitation (what reasons are there for preventing the exploitation in society). Wertheimer argues that the moral weight of consensual and mutually beneficial transactions, though unfair, does not settle the issue of the moral force of the transactions. Thus a transaction could be mutually beneficial, consensual (in that no one is coerced), and unfair (one party has an advantage in the exchange). This does not entail that the moral force is sufficient to warrant state

intervention (see Zwolinski and Wertheimer 2016) or even prohibition by regulatory agencies such as institutional review boards who would prohibit paying research participants who otherwise would not enter into a research trial (Wertheimer 2011).

A mutually beneficial exchange (though unfair) cannot be prima facie wrong if neither party is under obligation to enter into the transaction. A mutually advantageous interaction cannot be morally worse than no interaction at all if no party is worse off by the transaction. In fact, depriving someone from entering into a mutually beneficial and consensual transaction could make them worse off (Zwolinski and Wertheimer 2016). Since most unfair transactions are the result of background conditions, merely preventing the transaction does nothing to alleviate those conditions.

Consent

Wertheimer also turns his normative method on the subject of consent. "The concept of consent provides a useful template to organize many of the moral issues. . .the question as to what behavior should be prohibited through criminal law will be settled by moral argument informed by empirical investigation" (Wertheimer 2003). Wertheimer argues that the core idea in consent is that consent is morally transformative. Just as with coercion, what counts as consent is what would absolve someone of moral responsibility that would otherwise have. For instance, Ann's consent to surgery transforms Betty's treatment from battery to a permissible medical procedure (Wertheimer 2011).

Conclusion

Alan Wertheimer's work represents a bridge between social philosophy and legal reasoning. Wertheimer's moralized legal concepts revolve around moral transactions. One party is coerced only when they have standing to argue they are not responsible for their part in the transaction. Someone is exploited when the transaction is unfair and they are made worse off. Consent transforms what would otherwise be coercion into a morally permissible and therefore legally acceptable action.

Cross-References

- ▶ Bioethics: Experimental Approaches
- ▶ Coercion and Law
- ▶ Legal Positivism: Inclusive

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West, Robin

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Introduction

Robin L. West (b. 1954–) is a legal academic who is best known for her scholarship on constitutional law and theory, jurisprudence, law and humanities, and feminist legal theory. West's legal writing is critical of dominant legal approaches, including

legal liberalism and critical legal theory. She understands justice as the ideal toward which law should be aimed. West argues that attending to the lived experiences of human beings through the phenomenological method is necessary for evaluating whether laws are morally good or bad.

West earned a J.D. from the University of Maryland Law School in 1979 and a J.S.M. from Stanford Law School in 1982. West is the Frederick Haas Professor of Law and Philosophy at the Georgetown University Law Center, where she has taught since 1986. She has also taught at the Cleveland-Marshall College of Law, the University of Maryland Law School, the University of Chicago Law School, and Stanford Law School. In 2009, West received the J. B. White Lifetime Achievement Award from the Association for the Study of Law, Culture, and Humanities. West was elected a member of the American Academy of Arts and Sciences in 2015.

American Constitutional Law and Theory

Constitutional arguments concern questions about the fundamental rights of citizens and the fundamental duties of the state. West defends a progressive understanding of constitutional interpretation that stands in stark contrast to liberal and conservative constitutional paradigms. To West, an orientation that is progressive focuses on the way laws affect human well-being and how laws can cause or alleviate unjust suffering. In her 1994 book *Progressive Constitutionalism*, West argues that the Fourteenth Amendment to the US Constitution should be interpreted to recognize that the government has an affirmative obligation to protect citizens from private violence and private economic exploitation. She also argues that legal reform movements should focus on legislatures and elected officials rather than the judiciary (West 2011). Activists should craft arguments that are informed by the US Constitution, but they should broaden their focus beyond the Supreme Court. West criticizes legal reform movements that draw on liberal principles such as formal equality and negative rights. She encourages scholars and practitioners to be attentive to desire, pleasure, and subjective well-being.

Jurisprudence

Basic questions of legal theory feature prominently in West's scholarship: what is law? Does the law have a specific purpose? What is the relationship of law to morality? West argues that normative inquiries into what the law should be are equally important as descriptive inquiries that clarify what the law currently is. In her book *Normative Jurisprudence: An Introduction*, West diagnoses a failure to ask normative questions about law's value in three prominent traditions in jurisprudence. According to West, justice is the goal of law, and legal scholars should spend more time developing accounts of how a law can achieve or fail to achieve justice (West 2012). Justice consists of moral principles, and scholars and students of law should not leave inquiries about morality to philosophers. In her book *Teaching Law: Justice, Politics, and the Demands of Professionalism*, West defends training students both to practice law and to evaluate morally whether existing laws are good or bad. She suggests that embracing the relevance of normativity to legal education and practice would help to solve what she calls the "existential crisis" of law schools as they decide what it means to have a "joint identity as part of both a university and profession" (West 2013).

Law and the Humanities

West is an important member of the law and humanities movement in legal scholarship and teaching. Christopher Langdell, Dean of Harvard Law School from 1870 to 1895, gave pride of place to case law in legal education, and many legal educators continue to believe that answers to legal questions are found by looking primarily to resources within the legal system. West rejects this view about the autonomy of law and instead

defends supplementing the Langdellian legal education with the interdisciplinary study of law. On her account, law should promote the human good, and humanistic disciplines offer guidance in interpreting the law, being attentive to the subjective human experience of the harms and benefits of a particular law, and theorizing about the nature of the legal good.

West's 1993 book *Narrative, Authority, and Law* collects her early scholarship on the relationship between law and literature. Although West has contributed insightful interpretations of classic works of literature that pertain to law by Melville, Kafka, and Twain and literary devices such as narrative and rhetoric within legal opinions and other legal writing, her distinctive contribution to the law and literature movement is that reading and listening to stories is the best way to apprehend the subjective suffering or well-being of another human being. Literature is a way to reveal the consequences of legal authority, especially in the lives of people who have been subordinated or silenced due to sex, gender, race, or class.

Feminist Legal Theory

West's articles "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory" (1987) and "Jurisprudence and Gender" (1988) are widely regarded as classic contributions to feminist legal theory. She argues that women experience gender-specific harms that are not recognized within the legal system. Historically, laws have been authored by men and serve the interests of men. She encourages scholars and practitioners to look at the law from the point of view of women and to identify and criticize "the patriarchy behind purportedly ungendered law and theory" (West 1988). West acknowledges the many varieties of feminism, and she identifies valuable aspects within liberal feminism and radical feminism while also offering criticisms of these approaches. She defends relational feminism, which places emphasis on the commonalities among women's experiences. Many feminist legal theorists interpret West as defending essentialism, the view that all women share similar characteristics because they are women. The debate between essentialism and anti-essentialism was central in the development of feminist legal theory in the 1990s, and West received much criticism for her views (Cornell 1991; Harris 1990; McClain 1999; Nussbaum 2008).

In her 1997 book *Caring for Justice*, West argues for a vision of jurisprudence that appreciates and balances justice and care. She argues that acknowledging the value of caregiving labor would benefit all human beings, not just women. Within feminist legal theory, West is viewed as defending an ethics of care. West has written extensively about substantive issues that concern sex and gender, including pornography, abortion, rape, sex discrimination, and motherhood. Ever suspicious of legal arguments that give pride of place to the value of autonomy, she argues in recent work that unwanted but nevertheless consensual sex is morally wrong and ought to be considered legally wrong. Janet Halley has offered trenchant criticism of West for understanding law and feminism through the framework of morality (Halley 2005; West 2006). Halley rejects West's claim that it is possible to identify objectively what counts as a harm to women.

Conclusion

A defining characteristic of West's legal scholarship is her insistence that laws and lawmakers ought to be attentive to the subjective experience of human pains and pleasures. In "Jurisprudence and Gender," West argues that feminist legal theorists and other likeminded scholars "need to show that community, nurturance, and the ethic of care are values at least as worthy of protection as autonomy, self-reliance, and individualism. We must do that, in part, by showing how these values have affected and enriched our own lives" (West 1988). In her view, we "need to retain a moral vision, centered on an empathetic understanding of the pain of others, that will move us toward an urgent and sympathetic response both in law and politics" (West 2006).

Cross-References

▶ Constitutionalism: Political
▶ Legisprudence
▶ Phenomenology of Law

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Williams, Bernard

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Introduction

Bernard Arthur Owen Williams (1929–2003) was an English philosopher born in Essex. Educated at Oxford, Williams went on to become a leading figure in twentieth-century philosophy, influencing the fields of moral philosophy, personal identity and the self, moral psychology, and political theories of equality.

Personal Life

Beloved by students and colleagues alike, Williams was a famously gregarious party guest who delighted in gossip and was known for his acerbic wit and unsurpassable debating ability. He was an ardent fan of opera and an expert music critic, serving on the board of the English National Opera for 18 years until 1986. He also loved driving fast cars, indulging a passion for speed that may have been kindled during the year he served as a RAF fighter pilot. Williams was knighted in 1999, around the time he was stricken by cancer that would eventually overtake him.

Williams was married to politician Shirley (Brittain) Williams from 1955 to 1974. The couple divorced and Williams married Patricia Law Skinner, commissioning editor for Cambridge University Press, from 1974 onward. He has one daughter from his first marriage and two sons from his second marriage.

Education and Career

Williams attended Chigwell School and Balliol College, Oxford, where he read Greats—an educational program steeped in Ancient Greek and Roman classics. There he graduated with the rare distinction of a congratulatory first. In 1951 he was elected to a Prize Fellowship at All Souls College, Oxford, a position he began in 1953 after serving 1 year in the RAF by flying Spitfires in Canada. After his marriage to Shirley Brittain in 1955, he left Oxford for University College London, and, in 1964, he went to Bedford College. Both academic moves served to accommodate and support his wife's political career. By 1967 Williams moved to Cambridge to assume the Knightbridge Chair of Philosophy.

During his time at Cambridge, Williams served on numerous British government committees, the most notable of which was the Committee on Obscenity and Censorship of 1979. The Committee's report, mostly written by Williams, recommended liberal reform on pornography (among other things) on the basis of J.S. Mill's harm principle. The main point underlying the Commission's report was that legalizing some forms of pornography did not harm the public. Williams also served on committees and commissions on gambling, drugs, and schools, pushing for liberal reforms in each of these areas.

From 1979 to 1987, Williams served as Provost of King's College, Cambridge. He left for UC-Berkeley in 1987 in protest to Margaret Thatcher's governmental policies affecting British universities, where he remained until 1990. He then returned to Oxford to assume the seat of his former tutor, Richard Hare, as the White's Professor of Moral Philosophy at Oxford until 1996. He returned to All Souls College, Oxford, and resumed his connection at UC-Berkeley until his passing in 2003.

Ethics

Williams' most notable contribution is his criticism of modern philosophical ethics and the epistemology and psychology that supports it. When Williams entered academia, both utilitarian and deontological moral theorizing dominated philosophical ethics. Williams influentially attacked the specific claims of each of these moral systems, as well as the very idea of moral systems. He argued that any accurate account of ethics must avoid the tendency to over-theorize and should instead attend to the untidy features of particular actions and the emotions of agents involved in them (Williams 1972, 1985, 1993). Williams most often conveyed his positive teaching on ethics through criticism of rival philosophical accounts of morality, most notably utilitarianism and deontology.

In many respects, utilitarianism and deontology are two very different moral systems. However, both were competing for theoretical supremacy in philosophy in the mid-twentieth century. On the one hand, utilitarianism determines morality solely by the outcome of an action. Utilitarianism argues that morality is always determined by what produces the greatest outcome for the greatest number of people, where the greatest outcome is determined by what produces the most pleasure. On the other hand, deontology determines what is moral according to whether an agent acts with a good will. Deontology holds that morality consists of inviolable rules that rational creatures both create and obey.

Despite these differences, Williams argued that both theories have the same fatal flaw because each seeks to provide comprehensive ethical norms through moral systemizing. Though they do so differently, both theories seek to provide a sort of intellectual rulebook for how to determine what is moral in any possible circumstance. Williams rejected this general attempt to create an exceptionless, impersonal, impartial moral system.

His arguments against ethical systems reveal his own positive contribution to moral theorizing and analysis of the epistemic limits that attend moral thinking. Williams doubted any attempt to explain the ethical without reference to a human being's embedded and embodied situation. An agent's particular circumstances and emotions have moral significance. By focusing on these things, Williams shifted the focus in moral philosophy away from an abstract theoretical approach which claims that there is an objective, single, and applicable principle for all morality. Instead, he argued in favor of a more Hellenic approach to the good life that recognizes the importance of creating a life well-lived by cultivating a sensitivity to one's context and circumstances.

In so doing, Williams held that circumstances and emotions were not merely occasions for agents to apply moral rules; they themselves have ethical bearing. Emotion and the pure luck of an agent's life circumstances play a heavy role in determining what is moral (Williams 1981). Williams coined the term "moral luck" to explain that whether an agent has acted well or badly sometimes depends on facets of an action or its

consequences that are not in an agent's control. For example, consider a man in charge of the financial well-being of his family who decides to quit his job to start his own business. The assessment of whether he has cared well for his family will, in part, depend on whether this career move is successful. It may be that he has a good business model and customer base before he transitions to the new business venture. However, if it turns out that the business sector into which he enters becomes obsolete, and that he had no reasonable way of foreseeing this decline, it may still turn out that his career change is ruinous for his family. This result, largely a factor of luck, will still impact our assessment of whether he has done right by his family.

Williams' description of moral luck largely influenced philosophical ethics, and it directly challenged the prevailing notions in both utilitarianism and deontology that the only relevant factors when assessing morality are those that are under an agent's control. Thomas Nagel eventually developed this concept into four different kinds of moral luck: circumstantial, constitutive, causal, and resultant (Nagel 1979).

Moral luck also made it possible for Williams to explain the existence of tragedy. Tragic situations are only possible when agents are faced with no good way of acting, through no obvious wrongdoing of their own. Compelled by a righteous sense of duty, Oedipus unknowingly killed his father and married his mother. Yet Oedipus' ignorance during the time of these actions does not change the heinousness of what he did, which is what compelled him to poke out his own eyes.

The existence of moral luck and tragedy led Williams to critique another prominent feature of moral theorizing, which claims that moral principles never conflict (Williams 1973). Many moral theories maintain that the conflict between ethical principles is only apparent and that the right ethical theory will explain which principle ought to govern in any particular circumstance. Against this, Williams maintains that ethical demands do genuinely conflict, sometimes offering agents no course of action that is devoid of suffering and regret.

Aside from these general criticisms of abstract moral theorizing, Williams reserved special criticism for utilitarianism (Smart and Williams 1973). In an influential critique, Williams argued that the theory could not make sense of the value of integrity or dimensions of an action that affect an agent's moral responsibility. To explain the points, Williams produced a vivid example of a man named Jim. A cruel dictator about to kill several innocent people gives bystander Jim the chance to shoot one of the innocent people. If Jim kills one, the dictator will let the rest go free. If Jim refuses, the dictator will shoot all of them. From the utilitarian point of view, Jim's moral obligation is clear: he should shoot one to spare the lives of the rest. However, this calculation assumes two things that Williams rejects.

First, it assumes that if Jim does not shoot, then *Jim* will be responsible for what the dictator does in response to Jim's nonaction. Since utilitarianism argues that moral goodness is determined solely by what produces the best outcome, agents become responsible not only for the outcomes they produce directly but also for the outcomes that others produce if the agent could influence them. Since Jim could have altered the dictator's behavior by shooting an innocent person, Jim becomes morally responsible for the dictator's murders if Jim does not commit murder himself. Williams argues that this is incorrect. By explaining Jim's responsibility through the utilitarian lens, Jim loses a meaningful sense of agency that any correct ethical account should acknowledge. In utilitarianism, Jim is no longer an agent responsible for his life and actions; he is nothing more than a cog in a large utility machine.

Second, Williams argues that utilitarianism wrongly assumes that the values that matter to Jim are morally insignificant. From the utilitarian perspective, it does not matter that Jim objects to killing innocents. He must unquestioningly violate his integrity in order to do what utilitarianism claims is moral, since the overriding concern must always be to promote the greatest good for the greatest number. In this moral system, Jim becomes merely an agent of maximizing pleasurable outcomes, stripped in any meaningful way of upholding his integrity by pursuing goods that

matter to him. Williams' point is not that Jim's principles ought to enter into the utility calculus but rather that Jim's principles hold value of a different kind than the values that enter into a utility calculus. Since utilitarianism never accounts for these aspects of morality, it is a flawed theory.

Utilitarianism's tendency to ignore these central features of intentional action and human psychology reveals further deficiencies of ethical theorizing in general. For Williams, any ethical system eventually tries to explain morality by offering an impersonal system of rules that ignores the complexity of the agent's psychology and culture, the role of luck in ethical praise and blame, and the myriad features of intentional action. The reality is that philosophical ethics must account for these features, and, according to Williams, it cannot do so by way of any comprehensive theory.

Epistemology

Williams supported his critique of modern moral systems with a theory of epistemic internalism. In a watershed paper titled "Internal and External Reasons" (Williams 1981), he claimed that all moral reasons are "internal." By this, Williams meant that there are no objective, universal moral truths available to every agent. Such "external" reasons do not exist. Rather, all moral truths exist within the purview of an agent's emotional and cultural value system. This position purported to explain why agents cannot be persuaded to act on reasons that do not appeal to them. Williams argued that if an agent does not value a certain good, she will not be motivated to pursue it and no reason will persuade her to change her mind. At bottom, an agent's evaluative outlook determines what she has reason to pursue. For example, if an agent highly values honesty, she will not cheat even if she could benefit from doing so. But this thesis also runs in the other direction. If an agent values good test scores at any cost, she will cheat if possible, and no amount of rational exhortations explaining to her why cheating is immoral will change her behavior (or her mind).

This position on the status of moral truths challenged many traditional views in ethics, including nature-based ethics and deontology. In their own way, these ethical systems argue that moral goods are objectively good, and there is some sense in which an agent has an external reason to pursue them.

First, Williams' thesis challenges Thomistic-Aristotelian ethical systems that are based on nature. The Thomistic-Aristotelian approach argues that moral truths arise from objective truths about the structure of human nature. In this view morality is determined by what actuates a person's nature. Since human nature is objectively knowable, moral goods are also universal and objective. For example, since human beings are by nature social, being friendly is a moral virtue. Friendliness helps agents actuate their natural potential to live in community. Given that all people inescapably have a human nature, Thomistic-Aristotelian ethical systems argue that there is some sense in which every agent has a reason to pursue the ethical goods that are connected with their nature, whether agents realize it or not. This is because the moral virtues are the true path to happiness. Happiness comes from the ability to live out one's humanity most fully, and the virtues enable people to live out their humanity. Since all agents inherently desire happiness, they always have some motivational reason to live virtuously. The point of this approach is not that every agent has an external reason to be ethical which exists entirely detached from an agent's motivational set. Rather, the point is that every agent, due to her nature, has some inherent motivation to be virtuous. Williams' thesis about internal reasons rejects this approach to ethics, arguing that agents with a subjective motivational set bent toward vice have no genuine reason to change their ways, since there is nothing within the virtuous outlook that appeals to them.

Second, Williams' internal reasons thesis challenges deontology. For Kant, the chief exponent of deontological ethics, human nature does not determine what agents have reason to pursue. Rather, a special sense of freedom *from* natural necessity, which Kant calls autonomy, determines what is moral for all rational agents. Kant argues that reason itself has an a priori structure which places demands on any rational agent. Rational

agents will conclude that they have a duty to create and follow exceptionless moral rules because when these rules are formulated correctly, they will reveal how agents can live perfectly rational practical lives. On Kant's view, an agent's motivational set has almost nothing to do with morality. Aside from a special respect for the moral law, an agent's desires or happiness have nothing to do with what is moral. For Kant, morality is about acting rationally, apart from any consideration of one's motivations. Only when one acts on pure reason can one act freely, for motivations are unchosen impediments to a rational being's autonomy.

Kant's anthropology would seemingly make him a prime representative of the "external reasons" position that Williams attacks. Yet Williams did not think so, arguing that even Kant was an internalist. According to Williams, given that Kant thought that any rational deliberator will ultimately determine that she has reason to act according to duty, Kant took the demands of morality "to be implicit in a conception of practical reason which he could show to apply to *any rational deliberator as such*. I think that it best preserves the point of the internalism/externalism distinction to see this as a limiting case of internalism" (Altham and Harrison 1995, p. 220, note 3). Even though Kant had little role for emotions in his moral system, there is a path in deontology from *any* agent's motivational set toward a moral outlook due to the indissoluble connection between practical rationality, morality, and the respect agents have for the structure of reason. Because this path exists for everyone, Williams counted Kant as an internalist.

Williams' point turns out to be that nobody is an externalist in the end. Because even the moral systems that Williams rejects think it is possible to show how any agent, no matter her value system, has reason to adopt the principles of the chosen moral system, these moral systems hold that all agents are or can be motivated by the principles of that moral system. If that is true, then no moral system falls into the externalist category.

What, then, distinguishes Williams from the internalists with whom he disagrees? Unlike other approaches to ethics, Williams holds that it is possible in principle for any rational agent to be unmotivated by any moral claim. Put positively, there exists no moral principle that universally applies to every agent. While Williams argues that all ethical theories are internalist in some way, he also argues that most of them wrongly assume that there is a universal good that motivates ethical action. Against this, Williams argues that there is no type of good, even in principle, that could motivate all agents without exception. In the end, there are irreducibly different worldviews and motivating standards of good, none of which is in principle better than its competitors.

There is no universal ethical standard, even in principle, for three reasons: (1) there are essential features of morality, such as moral luck, that do not depend on such standards; (2) there is no principled way to limit the scope of what reasons should motivate agents; (3) moral principles in general impoverish the description of what comprises the moral realm. Shorn of any absolute ethical standard, Williams argued that ethics was essentially a historical and cultural activity. The best kinds of ethical activity are those which authentically express the values an agent takes herself to have.

Given Williams' opposition to moral systems, it is a matter of debate as to whether and how Williams ever reconciled this perspectival view of morality with his claim that it is possible to understand the moral standards of alien ethical perspectives (cf. Williams 2002). While he is a masterful critic of many approaches to ethics, many have also wondered what Williams' positive description of ethics is. Additionally, Williams argued that objective, scientific truths exist outside of the ethical perspective (Williams 1978). It is an open question whether Williams adequately described and defended the boundaries of these differing domains of truth.

Equality and Applied Topics

Williams' approach to ethics also connects with a particular view on equality and applied ethics (Williams 1962, 1973). Similar to his critique of utilitarianism, he argues that agents have a desire

to be identified with the projects that matter to them, not the projects that others impose on them. As such, every agent desires not to be the instrument of another person's will. Egalitarian political ramifications follow from this. Williams argues that political structures ought to embrace pluralism on the basis that there is a fundamental equality of merit to different agents' life projects. No person's projects should, in principle, be subordinated to another person's projects as a result of power discrepancies.

The irreducible pluralism in morality demands that respect for each other's life projects and equal allowance for different life projects ground our political interactions. Williams argues that the idea of equality should extend to two categories of applied goods: need-based goods and merit-based goods. A society can uphold the principle of equality well only if it distributes goods based on the kind of good that they are, and not by some other standard that is arbitrary or imposed by the will of those in power.

Williams argues that it is irrational and violates equality to distribute need-based goods according to some standard other than need. Using health care as an example, he claims that access to care ought to depend on need, rather than an arbitrary standard such as who has the money to buy the needed service. Similarly, merit-based goods, such as access to education, should not be distributed on any basis other than aptitude, such as legacy. By looking at the nature of the goods that a political system distributes and the actual way in which these goods are dispersed, Williams argues that it is possible to determine whether any given political system is treating its citizens according to the most just conception of equality.

Conclusion

Bernard Williams scholarship is wide-ranging and influential. His criticisms of moral systems and ethical objectivity led to more nuanced discussions in ethics, epistemology, and political theory, making him one of the most influential philosophers of the twentieth century.

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Winstanley, Gerrard

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Introduction

Gerrard Winstanley (1609–1676) was "one of the most original radical religious writers and social thinkers of the English Revolution and indeed early modern England" (Loewenstein 2012:

327). Amidst the chaos of the British Civil Wars, he analyzed the source of social, economic, and political power in England and developed a radical alternative vision for a society in which there would be equality for all.

What makes Winstanley so remarkable is not just the sophistication of this analysis, or the clarity of his writing, but that he took direct radical action in support of his principles, as he founded, and later led, a group known as the Diggers who collectively lived and worked upon the common land together.

This entry will first set out Winstanley's life and the Digger experiment, before exploring his central argument that the earth should belong to all. The third section examines the means of resistance by which he thought the poor could reclaim the land, before his alternative vision of society is shown. The conclusion sets out the continuing influence of Gerrard Winstanley's life and work.

Life and Digging

Born in Wigan in 1609, Winstanley moved to London to begin an apprenticeship in 1630. He then started a business in the cloth industry, but by 1643 he was forced to declare bankruptcy as the political turmoil of the Civil Wars combined with repeated harvest failures triggered a national crisis that caused several of his customers to default on their payments. (The duplicity of those in business is a repeated theme throughout his works.)

He then moved to Surrey, and while living there, he had a vision, of a "voice in trance, and out of trance" which he thought came directly from God and told him that all should "work together; eat bread together" (Winstanley 2009ii: 14). One commentator describes this vision as part of "a mid-life crisis of epic proportions" (Kishlansky 1996: 196) but determined to follow what he believed was divine instruction; by April 1649 Winstanley and five others moved to the heath on St George's Hill and began to farm the land and live collectively together. By the end of the month, between 20 and 30 people had joined them, and Winstanley believed thousands more would soon follow. He began to publish pamphlets to spread the word and defend their actions, with 12 texts produced within a year (several were published in the name of all the Diggers).

Furthermore the "Digger writings often strike a remarkably inclusive note" (Apetrei 2014: 53) with regard to gender equality. But by digging and planting on the common land, the Diggers prevented the local community from using the heath, and their radical proposals angered the local landowners, leading to repeated attacks on the community, many of them violent. As a result, Winstanley and the Diggers moved to Little Heath in Cobham and again began to collectively live and work upon the land. Once again they were targeted by a systematic violent campaign, and by April 1650 they disbanded. That August Winstanley and several followers went to work for an eccentric aristocrat, Lady Eleanor Douglas, but they soon had to leave. Winstanley published *The Law of Freedom in a Platform*, in 1652, setting out his blueprint for an alternative society. Though this was his longest, and most accomplished work, it was to be his last. He returned to conventional society, where he undertook a "remarkable rise to the ranks of the gentry" (Corns et al. 2009: 18) before his death in 1676.

Earth as a Common Treasury

Winstanley's writing and political action was driven by a central belief: that private ownership of land was wrong because "surely then the earth was made. . . to be a common treasury for all, not a particular treasury for some" (Winstanley 2009i: 520). So, though God gave the earth to all mankind, the land of England had been stolen by a minority who had gained immense economic and political power as a result. Winstanley dates this seizure to the Norman Conquest of England in 1066, as in his description of private ownership of land, and the legal system that upholds it, as a "Norman Yoke" that was forced upon the English people.

This initial Conquest was expanded through the centuries via the system of enclosure, in which land previously held in common by the

local community was fenced off and made the exclusive property of one person. Such private ownership of resources was, Winstanley argued, a sin and so against God's will that all who enclosed the land "lives in the breach of the Seventh and Eighth Commandments, Thou shalt not steal, nor kill" (Winstanley 2009ii: 11) because by "locking up the earth" they stole it from all mankind, to whom it belonged, and prevented others from accessing these resources, even as they starved for lack of food. Thus they "suffer it to rust and moulder while others starve for want to whom it belongs" (Winstanley 2009ii: 223). But with the Parliamentarian victory in the Civil Wars, such ownership was null and void, for it had been justified through the power and might of the king, who was now overthrown. The time was therefore right for the Diggers to take back the earth.

Resistance

In the greed of the landowning class, Winstanley saw the means by which the poor could reclaim the resources that had been stolen from them. Since the aristocrats had enclosed more land than any one person could farm, they were dependent on paid laborers to work the land and create their profits. Therefore, Winstanley argued, if the poor withdrew their labor and refused to work for others, such extensive holdings would be untenable. Though the former laborers could support themselves by working on the remaining common lands together, as the Diggers did, the rich could not farm their vast estates themselves. So "by their labours they have lifted up tyrants and tyranny, and by denying to labour for hire they shall pull them down again" (Winstanley 2009ii: 15–16). Likened to a call for a strike (Hill 1972: 132), Winstanley here recognizes the agency of the very poorest, and their ability to change the economic structure of their society by working together, in accordance with God's will. But this led him to argue that those who continued to work for hire were complicit in their exploitation and just as culpable for the system of private land ownership as those who first stole it.

By withdrawing their labor and choosing instead to work the land together and to share the results, the Diggers not only attacked the central means by which unjust ownership of land was maintained but did so peacefully. Winstanley emphasized that he did not call for violence against the landowners or their property – "we do not thereby take away other men's rights" (Winstanley 2009ii: 88). He was committed to peaceful action for practical reasons, as the Diggers were outnumbered, but his primary motivation was a belief that violence was against God's will. By reclaiming land through force and violence, the cycle of injustice that Winstanley opposed would be perpetuated, for "victory that is gotten by the sword is a victory that slaves get over one another" (Winstanley 2009ii: 133). But his opponents did not share such scruples, and in the face of mounting harassment, the Diggers were forced to abandon their attempts to "work together; eat bread together."

Alternative Society

It was not until the Diggers had been defeated that Winstanley finally set out his vision of how society should be structured, the world he was trying to build through Digging on the land. As a result, his final text, *The Law of Freedom in a Platform*, is described as both utopian and reflecting "the bitterness-of-defeat" (Webb 2004: 206). In it Winstanley expands on his political vision while considering the means needed to preserve such a society in the face of the hostility.

In his alternative society, Winstanley outlined a fully functioning state, in which private ownership of land and other natural resources was prohibited, with any attempt to buy or sell the earth classed as treason and punishable by death. Instead the land was to be owned by all who would, by law, "come into the field... to plow, dig and plant and at harvest time to reap the fruits of the earth" (Winstanley 2009ii: 371). The produce that was grown would be taken to communal barns, managed by an overseer, from which anyone could take what they wanted. A second warehouse would be stocked with the goods made

from these shared raw materials, and again these would be freely available for anyone to take "for his pleasure and comfortable livelihood" (Ibid.: 361). Anything taken from the warehouses would belong to that person, for private ownership allowed for everything other than land. Such a system would therefore ensure that all could freely access the goods that they needed, preventing starvation and ensuring equality. But this system was to be enforced through extensive surveillance. Winstanley envisaged an army of monitors and overseers, who observed how much people took from the storehouses and made sure they fulfilled their responsibilities with regard to planting and harvesting and neither bought nor sold the earth.

All aspects of people's lives were to be observed, even down to how much they ate, with punishments for those who "suffer more meat to be dressed at a dinner or supper than will be spent" (Ibid.: 378). So extensive was this proposed surveillance that J.C. Davis argued that Winstanley's utopia reflected the "repressive functioning of the state" (1976: 92). Yet Winstanley did genuinely believe that all would consent to such surveillance, with yearly elections for many of the officers and overseers, who could only fulfill their role through the support of those they monitored: "the people say to their overseers and officers do you see our laws observed for our preservation and peace and we will assist and protect you" (Winstanley 2009ii: 316).

Webb (2004) also suggests that this surveillance is grounded in Winstanley's religious thought, as with sin entering the world and the expulsion of Adam and Eve from the Garden of Eden, the faithful need to be constantly on guard against temptation. A system of surveillance would help all to resist, especially as they became accustomed to the new rules. Winstanley therefore not only sets out a compelling case that the earth should belong to all but considered the political difficulties involved in implementing this.

Conclusion

Though in his lifetime Winstanley returned to anonymity, his work has been highly influential, particularly in the development of communism, to the extent that Lenin had his name carved onto an obelisk in Moscow which honored key thinkers, listing him alongside Marx and Engels. Indeed which Hudson asks if Winstanley was "a seventeenth-century Marxist," Holstun asks "was Marx a nineteenth-century Winstanleyan?" (Hudson 1946; Holstun 1999).

The 2011 Verso edition of his writings, with an introduction by Tony Benn, also emphasized his relationship to socialism. More recently Winstanley's work has provided inspiration for environmentalists. He is cited by George Monbiot and Derek Wall, as well as environmental protesters. Though his emphasis on the consumption of natural resources means that he "cannot easily be accommodated within emerging Green narratives" (Hessayon 2008: 17), his belief that all "have an equal right to the land" (Winstanley 2009ii: 32) demonstrates the continued relevance of his work to the political problems of the twenty-first century.

Cross-References

▶ Lenin, Vladimir Ilyich
▶ Marx, Karl

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Wittgenstein, Ludwig

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Introduction

Many professional philosophers believe Ludwig Wittgenstein (1889–1951) to be one of the most important philosophers of the twentieth century. Wittgenstein wrote mainly about language (e.g., issues involving linguistic meaning and the relationship of language to the world) but he also wrote about the philosophy of mathematics, certainty, rule-following, and psychology, just to name a few topics. The trajectory of Wittgenstein's thought and career is bounded by his *Tractatus Logico Philosophicus*, which he completed in an Italian prisoner of war camp at the end of World War I and his *Philosophical Investigations*, which was published after his death in 1951. Wittgenstein wrote almost nothing about the law (sources are collected in Langille 1992). Nevertheless, his ideas have played an important role in academic legal scholarship.

Wittgenstein and Legal Theory

Wittgenstein's thought has been put in the service of a number of diverse projects in legal theory (For a collection of papers see Patterson 2004). As we know, there is a skeptical reading of Wittgenstein's remarks on rule-following, made infamous by Saul Kripke (1982). Mark Tushnet used the skeptical reading of Wittgenstein to critique leading theories of constitutional law, all in an effort to advance the so-called indeterminacy thesis (Tushnet 1983). Gone are the heady days when Critical Legal Studies scholars declared the law to be fundamentally indeterminate, meaning that "a competent adjudicator can square a decision in favor of either side in any given lawsuit with the existing body of legal rules" (Solum 1987: 462). At present, Kripke's reading of Wittgenstein still attracts wide attention. The same cannot be said for the legal indeterminacy thesis.

The field of constitutional law provides an example of a scholar whose work shows distinct Wittgensteinian influence. Philip Bobbitt studied Wittgenstein with Richard Rorty while Bobbitt was an undergraduate at Princeton. Additionally, Bobbitt attended lectures by Elizabeth Anscombe at the University of Pennsylvania. These experiences seem to have shaped his approach to philosophy and constitutional theory. I shall briefly describe his seminal contributions to legal philosophy and constitutional law.

Bobbitt's first book on constitutional law was *Constitutional Fate* (Bobbitt 1982) In that book, Bobbitt advanced the argument that the debate over the legitimacy of judicial review was grounded in a false premise. All theories of judicial review judged its legitimacy from a vantage point outside the bounds of constitutional practice. Bobbitt argued that nothing legitimizes judicial review other than employment of the forms of argument (Bobbitt refers to them as "modalities") for constitutional law. These modalities (textual, structural, prudential, doctrinal, historical and ethical) are the forms of constitutional argument: they are the ways in which propositions of constitutional law are shown to be true or false. The modalities are neither true nor false: they are the ways in which propositions of law are true or false.

Bobbitt's approach to constitutional law was not well-understood when he first made his case in *Constitutional Fate*. An especially harsh review of the book appeared in the pages of the Harvard Law Review (Gudridge 1983). The reviewer

dismissed the book as a defense of tradition. His conclusion was that "*Constitutional Fate*" excludes precisely the aspects of contemporary constitutional law that explain its notably fragmentary and conflicting quality – its status not simply as an environment *for* controversy, but an environment *in* controversy (Gudridge 1983). Unhappily, the reviewer failed to notice any of the underlying philosophical motivations for Bobbitt's position. Of course, the central idea is the idea of a practice, so familiar to readers of Wittgenstein's *Philosophical Investigations*.

In his next book on constitutional law, Bobbitt was much more explicit about the philosophical inspiration for his position. In the Preface to *Constitutional Interpretation* (Bobbitt 1991), Bobbitt succinctly summarizes the argument of *Constitutional Fate*. With allusions to Cartesian geometry and gödel numbering, Bobbitt states explicitly that the forms of constitutional argument are "the way in which a proposition is true rather than the reason it is true . . ." (Bobbitt 1991: xiv). It is the operation of the forms of argument that maintains legitimacy. With citations to the literature on Realism and Anti-Realism, references to Rorty, Dummett, Wittgenstein, and others, Bobbitt sharpens his position and leaves no doubt about the philosophical inspiration for his work. This paragraph sums it up nicely:

> Law is something we do, not something we have as a consequence of something we do. Sometimes our activities in law – deciding, proposing, persuading – may link up with specific ideas we have at those moments; but often they do not, and it is never the case that this link must be made for the activities that are law to be law. Therefore the causal accounts of how these inner states come into being, accounts that lose their persuasiveness in contact with the abundance of the world, are really beside the point. If we want to understand the ideological and political commitments in law, we have to study the grammar of law, that system of logical constraints that the practices of legal activities have developed in our particular culture. (Bobbitt 1991: 24)

I once heard an American professor of constitutional law describe Bobbitt's position as "idiosyncratic." At the time (2002), that view was widely-shared. But time has shown that Bobbitt was on to something right from the start: eventually, his big idea caught on. The modalities identified by Bobbitt are now a staple of the leading casebooks on constitutional law. Every American law student learns them as the basic tools of constitutional discourse.

The second example of the influence of Wittgenstein's thought in legal theory is *Law and Truth* (Patterson 1996). That work took up a single question: "What does it mean to say that a proposition of law is true?" The book surveyed the answers on offer from the principal legal theories at the time and identified shortcomings in each. The book went on to make the claim that propositions of law are shown to be true by the argumentative standards of the practice of law. Integrating Wittgenstein's analysis of truth, practices, rule-following, and the nature of understanding, a fully practiced-based account of law was advanced.

Debates over the propositional character of law are often focused on the "truthmaker": what makes a proposition of law true (Dworkin 1986 uses the phrase "the grounds of law" for the truthmaker). Positivists ground the truth of legal propositions in social facts while philosophical realists (e.g., Dworkin) ground the truth of legal propositions in moral facts. Patterson argued that the truth of propositions of law is a matter of employing forms of legal argument for it is in virtue of these forms of argument (See Bobbitt 1991) that propositions of law are true and false.

Patterson bolstered his account of truth in law with an adaption of Stephen Toulmin's framework for argumentative assessment (Toulmin 1958). Patterson employed that framework to show both how the forms of argument are used to show the truth of legal propositions and to depict legal argument about the forms of argument themselves. One common form of dispute in law is debate over conflicting forms of argument. *Law and Truth* provides a solution to this problem, one grounded in Quinean holism (Ullian and Quine 1970).

Wittgenstein and Law: A Skeptical View

A different form of skepticism concerns the very idea that Wittgenstein's thought could illuminate

problems in legal theory. Scott Hershowitz and Brian Bix have both argued that Wittgenstein has little to offer legal philosophers. Hershowitz claims that "[n]othing much can be learned about legal rules or legal interpretation by attending to Wittgenstein's remarks, because they were aimed at wholly different phenomena" (Hershowitz 2002: 619). Similarly, Bix argues that Wittgenstein's focus in the rule-following discussion was explanation of "the phenomenon of general agreement in practices regarding the simplest terms and mathematical concepts" (Bix 2005: 220). Bix even goes so far as to say that "[t]he first thing worth noting is the strangeness of applying Wittgenstein's rule-following considerations to law at all" (Bix 1993: 51).

Hershowitz and Bix share the view that because Wittgenstein directed his attention to mathematics and "simple rules," nothing relevant to law could be gleaned from Wittgenstein's thoughts about rule-following. Of course, if such a claim were true, it would be true of many other areas of academic endeavor (I am not aware of any commentator on Wittgenstein's work who makes the claim made by Hershowitz and Bix, that is, that Wittgenstein's remarks on rule-following are or should be limited to the specific examples he gave). As we shall see, this is not the case. Not only are there clear examples of the relevance of Wittgenstein's comments on rule-following and interpretation to matters beyond those he addressed, his insights into the nature of normativity, rule-following, and interpretation are quite profound and in no way limited to the contexts in which he made his case.

Before turning to one example of the use of Wittgenstein's insights to an unrelated field of endeavor, let me remind the reader of the object of Wittgenstein's attention. Wittgenstein was keen to undermine the idea that understanding (of meaning) is a matter of (an act of) interpretation. That is, when we come to understand how to carry on a series of numbers, for example, we get to the correct answer through a process of interpretation. He stated it as a paradox:

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.
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> It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shews is that there is a way of grasping a rule which is *not* an *interpretation,* but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases.
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> Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term "interpretation" to the substitution of one expression of the rule for another. (Wittgenstein 2010 at Sec. 201)

Wittgenstein is puzzled by the fact that a rule doesn't seem to indicate what it would take to conform to its requirements. But if the rule does not tell us this, what does? One idea – a notion pervasive in many areas of thought – is that understanding is the product of interpretation. The idea is that in the move from signs (e.g., a rule, a number series, a law) to meaning (i.e., what it means to follow), interpretation does the work of understanding. That is, we come to understand when we interpret properly. But, Wittgenstein contends, interpretation is a non-starter. The answer must lie elsewhere.

"Suppose we are interested in the meaning of 'intentional' in the phrase 'an intentional act'." How do we go about discerning its meaning? Wittgenstein would recommend surveying the various ways in which the law uses the word "intentional" to see its meaning across a variety of contexts. What we would be surveying are – literally – the uses to which the word is put. Those who take the view that we need first to interpret the word in order to understand it would require a theory of intentionality, one that could be brought to bear on how the word is employed in legal contexts. Wittgenstein cautions against such an approach, arguing that understanding is grounded in use and not in theory. Wittgenstein's philosophical methodology is one that seeks a perspicuous survey of the uses (and, thus, meanings) of our words. A theory, he argues, will only serve to distort our understanding.

Wittgenstein develops his account of understanding in practices as a solution to the paradox of rule-following. Hershowitz and Bix deny that Wittgenstein's account of understanding in practices can be extrapolated beyond the narrow contexts he used to make his points. This is manifestly untrue.

In an important and provocative essay, James Tully (2003) demonstrated how Wittgenstein's remarks on rule-following undermined the rationality claims of Jurgen Habermas as well as Charles Taylor's hermeneutical argument that all understanding requires interpretation. In fact, Tully's essay was so persuasive, Taylor came to agree (Tully 2003: 228, n.70). More importantly, Tully made his case from the very texts that Hershowitz and Bix claim preclude such extrapolation.

Tully uses Wittgenstein's remarks on rule-following and practices to make the point that "understanding is prior to and distinct from interpretation" (Tully 2003:36). Through careful explication of Wittgenstein's texts, Tully shows how the idea of all understanding as interpretation is a non-starter. This idea – which is pervasive in the human sciences and is the basis of Taylor's hermeneutics – is unsustainable. He writes:

> The attempt to construe conventional understanding as implicit interpretation misses the revolutionary point Wittgenstein is concerned to make. An interpretation is a reflection on a sign; an opinion or belief about how it should be taken. To interpret a sign is to take it as one expression rather than another. In contrast, to understand a sign is not to possess a sedimented opinion about it or to take it as something, but to be able to grasp it; that is, to act with it, using it in agreement with customary ways (section 241). If conventional understandings were implicit interpretations or beliefs about practice, rather than the actual abilities manifested in practice, they would not be conventional understandings, for all the reasons given above: "It is our acting, which lies at the bottom of the language-game." Conventional understanding does not involve implicit interpretations (or representations) to bridge the gap between thought and action, language and reality, because no such gap exists." (Tully 2003:40)

Having shown how Wittgenstein's rule-following considerations undercut both Habermas' claims for the validity conditions of rational discourse and Taylor's hermeneutical claims for the centrality of interpretation in understanding, Tully then makes the point that "Wittgenstein's methods can be extended and deepened by adding historical applications to them, such as the work of Foucault and the historical approaches of Quentin Skinner and Charles Taylor . . ." (Tully 2003: 227, n. 68). Tully is not the only scholar who has successfully taken Wittgenstein's insights and utilized them beyond their original contexts (See Pitkin 1993). His work is a convincing demonstration – if one is needed – of the importance of Wittgenstein's thought beyond the four corners of a group of texts.

Conclusion

This short entry can mention only a few of the many examples of the influence of Wittgenstein's thought in legal scholarship. Topics as diverse as metaphilosophy, methodology, the nature of truth, and epistemology are all influenced by Wittgenstein's approach to philosophy. Ronald Dworkin once said that debate in legal philosophy is, "at bottom, a debate within the philosophy of language and metaphysics" (Dworkin 1977). He was right in this. Wittgenstein had much to say about language and metaphysics. It falls to legal philosophers to continue using his insights to address problems in legal theory.

Cross-References

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Wolff, Christian

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Christian Wolff (1679–1754) is a rationalist philosopher of the German Enlightenment known as an encyclopaedic "systematizer of all areas of knowledge" (Haakonssen 2012). He developed a comprehensive, and thoroughly rationalist, philosophical system.

Life

The eighteenth-century polymath was born in Breslau, Silesia, which was at the time a Protestant part of the Habsburg monarchy, in 1679 (Drechsler 1997). From 1699 on, he studied at the University of Jena, first divinity, then mathematics, and natural sciences. After he had finished his studies in Leipzig, Wolff, who was strongly supported by Gottfried Wilhelm Leibniz, soon became a professor of mathematics at the University of Halle in 1706. He succeeded both as a lecturer, later also covering the field of philosophy and finally physics, and as a scholar. He was elected as Fellow of the Royal Society in London, became a member of the Berlin, St. Petersburg, and Paris Academies, and later a Prussian *Hofrat* (court councillor).

Wolff's career was interrupted abruptly in 1723, when the Prussian King Frederick William I (known as the "soldier king") dismissed him from his position and ordered that he had to leave the city of Halle and all other Prussian lands within 48 hours or suffer punishment by the rope. Wolff had given a lecture in which he expressed his admiration for Chinese philosophy, the *Oratio de Sinarum philosophia practica* (Anonymous 1750; Wolff 1985). This obviously provoked his pietist colleagues in Halle, who charged him with heresy. Wolff was forced to flee and accepted a professorship in Marburg (Hesse) that had been offered to him earlier. Ultimately, the affair only contributed to his international reputation as a "martyr of science" (Nussbaum 1954). His renown spread throughout Europe and he received flattering invitations from Saxony, Sweden, and even Russia. In 1740, Frederick II ("The Great," the "philosopher king") extended to Wolff a very generous invitation. Wolff returned to Halle where he became a professor of public law and of mathematics, Prussian *Geheimer Rat* (privy councillor), and vice chancellor of the university. In 1745, he was ennobled and became a *Reichsfreiherr* (Imperial Baron of the Holy Roman Empire). Wolff remained in Halle until he died in 1754.

Writings

Wolff's writings include over 26 titles, spanning more than 42 quarto volumes, with contributions primarily in the areas of mathematics and

philosophy. After his return to Halle, his writing began to focus completely on practical philosophy and on natural and international law. His contributions to the philosophy of law include the multi-volume treatise *Jus naturae, methodo scientifica pertractatum* (1740–1748) (Wolff 1968–1972), his *Jus gentium methodo scientifica pertractatum* (Wolff 1934, 1972), and the *Institutiones juris naturae et gentium* (Wolff 1754, 1969), in German: *Grundsätze des Natur- und Völckerrechts* (Wolff 1980). The volume on *Jus gentium* brought Wolff's *Jus naturae* to a conclusion, and the whole work represents a *jus naturae et gentium*, the *Institutiones* offering a brief take of the whole subject.

Rationalism and Systematic Method

Systematization plays a special role in Wolff's reasoning. He was particularly interested in systematic terminology, the inner mathematical connection of all truths, and a higher level of scientific knowledge that he sought to attain through consistent proof in all fields of knowledge (Peterson 2005). A system, thus understood, is a combination of truths. In ethics, Wolff held that moral laws depend not on God's will but are part of the natural world and can therefore be known by natural reason. Consistently and circumstantially progressing, Wolff's political philosophy built the individual stages of the original state of nature of equal and free men, who soon gained contractually-acquired rights to their innate rights, entered into marriages, founded houses, and finally established the state through the social contract, the determination of the form of government, and submission to a ruler. In his *Vernünftige Gedanken von dem gesellschaftlichen Leben der Menschen und insonderheit dem gemeinen Wesen* ("Deutsche Politik," "Rational Thoughts on the Social Life of Man, and in Particular on Society", 1721) (Wolff 2004), Wolff adhered closely to the Thomistic tradition of Aristotle in terms of content, but combined this model with the reality of the enlightened absolutist welfare state of his time. Wolff taught moral truths which he deduced by the mathematical-demonstrative method from the principles of "perfection," "necessity," and "expediency." Optimal perfection will only be reached if all acts of all men and associations are optimally coordinated in an organized world association, the universal *civitas maxima* (Wolff 1998). Accordingly, states have the natural-law duty to preserve and perfect themselves by associating in the *civitas maxima* (Wolff 1934).

Impact and Aftermath

Arguably, none of Wolff's own works had the most direct impact on the history of western philosophy, but rather his influence on the German undergraduate university curriculum (Hettche 2014). In Wolff's days, natural law was recognized as a basic subject, which was taught partly in the philosophical faculties, partly and soon predominantly, in the law faculties. It assumed the propaedeutic function in law studies that had previously been assigned to Aristotelian politics. For obvious reasons, law students preferred the natural law textbooks of their law professors to Wolff's enormous *Jus naturae, methodo scientifica pertractatum* and his *Institutiones juris naturae et gentium* (Stolleis 1988).

Commentators stress the rather exceptional fact that Wolff – the champion of academic freedom – received the honor of an Imperial Baron of the Holy Roman Empire exclusively on the basis of his scholarly work (Drechsler 1997). Others take a more critical stance, pointing to Wolff's lack of familiarity with affairs of state or with the practice of law (Nussbaum 1954). Generally, later scholars across the disciplines tend to have strong views on Wolff: the philosopher Ernst Bloch severely criticized his philosophy as an apology of the mercantilist welfare and police state (Bloch 1986), while Ernst Cassirer praised him as a father of human rights (Cassirer 1961). Arthur Nussbaum admonished that Wolff's "pseudo-mathematical" syllogistic way of reasoning lead him to "frequent pretentious trivialities and tautologies" (Nussbaum 1947). In international law scholarship, Wolff's reception is largely influenced by his "translator" Emer de Vattel (2008).

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Wollstonecraft, Mary

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Introduction

Mary Wollstonecraft (1759–1797) was an English philosopher in the Enlightenment tradition, writer, novelist, and book reviewer. She was an advocate for women's rights and for equality of wealth and privilege and supported the French Revolution. She made her name in 1790 as the author of *A Vindication of the Rights of Men*, the first published commentary on Edmund Burke's critique of the French Revolution and defense of aristocratic privilege. Her book *A Vindication of the Rights of Woman*, published in 1792, counts as a pioneering work in the history of feminism.

Intellectual Life

Wollstonecraft was born in London into a middle-class family with seven children. Her grandfather had made good money in the weaving trade, which he left to Wollstonecraft's father, a man of seemingly few skills who managed to squander his inheritance. From Wollstonecraft's early

childhood and until she left the family home in her late teens, her father moved the family several times, trying various pursuits without success. Her education was patchy and frequently interrupted, but she received some informal training in philosophy and the classics. A formative experience in her teens was a warm and intensive friendship with a girl named Fanny Blood. Wollstonecraft's father was a violent and abusive man, while her mother was submissive toward him but strict with her children, particularly Mary who was the oldest of the daughters. Both parents favored the oldest son. These details from her early years are relevant since she reflected on and made use of her experiences of family life in her writings (Gordon 2005).

At 19 Wollstonecraft left her family home, determined to make her own living. Respectable occupational opportunities for young middle-class women were few. After a brief spell as a lady's companion and after the death of her mother, she moved back to London in 1783 and started a school for girls together with her two sisters and Fanny Blood. This was a fortunate circumstance – even though the school only lasted for a few years – since the area in London where she settled was to become the center of her intellectual world. In Newington Green she befriended the dissenting Unitarian minister, philosopher, agitator, and mathematician Richard Price. Indirectly, Price occasioned Wollstonecraft's fame in two ways. His sermon *A Discourse on the Love of Our Country* (delivered and published in 1789), in which he praises the French Revolution, was made the butt of Edmund Burke's vexation in *Reflections on the Revolution in France*, and this in turn gave Wollstonecraft cause to write her essay on the rights of men, in defense of the revolution and of her friend. Through Price she got to know Joseph Johnson, who was to become her publisher and employer. Johnson was a crucial figure as a publisher of radical and reformist books aimed for a growing middle-class and educated readership (Todd 2000). His circle included philosophers like Thomas Paine and Joseph Priestley, and he was known to be a promoter of women writers.

Wollstonecraft's school was forced to close in 1786, after her return from a disastrous trip to Portugal where Fanny Blood, who had moved there to marry, had died in childbirth. These events together with the intellectual home and support she had found in Johnson's and Price's circle sparked her new life as a public intellectual. After a brief spell as a governess to an aristocratic family in Ireland, she established herself as a professional writer. Her earliest publications were mainly on education: the educational guide and conduct book *Thoughts on the Education of Daughters* (1787) was her first book. It is inspired by the educational writings of John Locke and animated by a firm belief – characteristic of the time – in the transformative powers of education. The book contains progressive views on education and on the importance of facilitating the intellectual autonomy of children – boys and girls alike – and their capacity to reason. Her book of tales about the education and moral development of two young girls under the liberating tutelage of a wise female instructor (*Original Stories from Real Life*, 1788) is a counter-story to the education in submission and domestic duties that Rousseau advocated for women in his famous work *Émile*. Wollstonecraft also compiled a collection of classic texts in *The Female Reader* (1789). In addition to the educational writings, she did some work of translation for Joseph Johnson and wrote her first novel, *Mary: A Fiction* (1788). The novel contains some autobiographical themes but is of philosophical interest in its narration of how a young girl struggles in vain for intellectual and material independence.

Joseph Johnson employed Wollstonecraft as a book reviewer and editorial assistant to the *Analytical Review*, a radical journal that throughout the 1790s published reviews of English and translated works of philosophy, politics, science, religion, and literature. All reviews were published anonymously using only an initial, sometimes not the reviewer's own. Tracing her literary style, it has been concluded that Wollstonecraft's reviews were published under the initials M, W, and T (Todd 1989, vol. 7). If that is correct, she wrote more than two hundred reviews for the journal.

It was through her work for the *Analytical Review* that she read Burke's *Reflections on the Revolution in France*, which came from the presses on 1 November 1790. Her reply to it is in the form of an open letter to Burke. It was published anonymously as *A Vindication of the Rights of Men* on 30 November 1790, as the first reply of many. The essay sold well and was favorably reviewed, at least until a later edition that had Wollstonecraft's name on the cover. Political debate and theory were considered to be a male domain, unsuitable for women. The tone of the reviews changed considerably once it was known that the writer was a woman (Sapiro 1992; Hodson 2007). Still, the publication of *A Vindication of the Rights of Men* made Wollstonecraft famous; it changed the course of her life and made her career as a philosopher of politics and morality.

The years from 1790 to her death in 1797 was a period of intense writing. Wollstonecraft had hoped that the French Revolution would lead to equality and political emancipation for women. When this did not happen, she expressed her disappointment in *A Vindication of the Rights of Woman*, published in 1792. As a reminder of crushed promises of equality and freedom for women, she dedicated it to the French politician Talleyrand who had co-written the *Déclaration des droits de l'homme et du citoyen* in 1789 and promoted public education. He visited Wollstonecraft on one of his visits to England and was the kind of man of whom she had had high expectations.

Wollstonecraft did not consider women's rights to be a separate question but realized that it was regarded as such and therefore needed specific arguments, aimed at the conventional understanding of women as frivolous and emotional, closer to nature than to civilized culture, and unfit for politics. When the revolution in France turned violent, she turned her attention to the dynamics and difficulties of rapid political change.

She left for Paris in December of 1792 and stayed in France for over 2 years. There she met and had a relationship with Gilbert Imlay, an American writer and businessman. They did not marry, but for protective purposes, Imlay registered her as his wife at the American embassy (Gordon 2005). They had a daughter, Fanny Imlay, in the spring of 1794.

This was a tumultuous and violent period in France. The dethroned king, Louis XVI, was executed shortly after Wollstonecraft's arrival in Paris. From a letter to Johnson (Dec. 1792), it is known that she witnessed the procession taking him to his trial. As of February 1793, France and England were at war. While in France, Wollstonecraft wrote *An Historical and Moral View of the French Revolution*, published in 1794, in which she traced and analyzed the early stages of the revolution. It is a comparatively neglected work but contains significant elements of her political theory, both in terms of normative political principles and in terms of more anthropological observations of political behavior under oppressive circumstances.

Wollstonecraft returned to London with her daughter in the spring of 1795. Her relationship with Imlay was not going well. She suffered from depression and attempted to take her own life. In the summer of that same year, she undertook a journey to Sweden, Norway, and Denmark with her daughter and a maid as her only companions. She travelled for 4 months, with longer stays in Gothenburg and several towns along the southern coast of Norway. The purpose of the trip remained a mystery until the Swedish historian Per Nyström found archival evidence that Wollstonecraft acted as Imlay's agent in a venture to discover the whereabouts of a ship in which Imlay had business interests. The ship had a valuable cargo of silver and gold and had disappeared, presumably stolen, on its voyage from Copenhagen to Gothenburg (Nyström 1980). Whether she succeeded in locating the ship and its cargo is unclear.

Upon her return to London, the relationship with Imlay ended. She made a second suicide attempt by jumping into the River Thames but was rescued. In a letter to Imlay, she describes her suicide attempt as a calm act of reason (Oct. 1795).

Wollstonecraft chronicled her trip to Scandinavia in *Letters Written During a Short*

Residence in Sweden, Norway, and Denmark. It is written in the epistolary form. The letters are a combination of love letters, ruminations over nature, and social commentary and were published in January 1796. It was the last work to be published in her lifetime and became her most popular book.

In 1796, Wollstonecraft resumed a prior acquaintance with the anarchist and philosopher William Godwin. They became friends and then lovers and decided to marry when Wollstonecraft became pregnant. The marriage made it clear that Wollstonecraft had never been married to Imlay, contrary to what she had let people believe. Wollstonecraft was a defender of women's right to independence and Godwin an opponent of the institution of marriage, and they were both ridiculed for backing down from their principles.

Wollstonecraft's and Godwin's life together was unconventional in that they retained separate households. It can be perceived as an egalitarian experiment by two singular minds, which was tragically cut short when Wollstonecraft died in September 1797, aged 38, of sepsis following complications after childbirth. Her and Godwin's daughter, named Mary after her mother, is known for us today as Mary Shelley, the author of *Frankenstein*. Wollstonecraft left several unfinished manuscripts, the most significant being an unfinished version of her second novel *Maria: or, The Wrongs of Woman*.

Legacy

After Wollstonecraft's death, Godwin edited a collection of her unfinished manuscripts, including *The Wrongs of Woman*, and wrote an account of her life. Joseph Johnson published the posthumous works and the biography – *Memoirs of the Author of A Vindication of the Rights of Woman* – in 1798. Wollstonecraft was already regarded as a scandalous figure in conservative circles, and the frankness of Godwin's memoir – detailing her romantic relationships as well as her depressive episodes and suicide attempts – added to her reputation as an immoral and dangerous woman (Holmes 1987). Considering Wollstonecraft's fame in her own lifetime, it is noteworthy how effectively she was erased from the public discourse after her death. In the first book-length biography of Wollstonecraft after Godwin's, *Life of Mary Wollstonecraft*, Robins Pennell claims that the most long-lasting damaging effects to Wollstonecraft's legacy did not come from Godwin's memoir but from a hostile article about Wollstonecraft in Alexander Chalmer's *Biographical Dictionary*, which served as a standard work of reference and influenced other encyclopedic and literary accounts of her throughout the nineteenth century (Robins Pennell 1884).

Wollstonecraft's *Letters Written During a Short Residence in Sweden, Norway, and Denmark*, the last work that she published in her lifetime and the most popular, did secure her a literary legacy and a small fan base in the decades after her death. Her emotionally charged and melancholy narrative in the *Letters* of an individual depressed soul's encounter with the nature of the north was an inspiration for the Romantic writers and poets of the early nineteenth century (Holmes 1987; Butler 1989).

For the emerging women's rights movement in the nineteenth century, Wollstonecraft would have been an obvious inspiration, but it is uncertain to what extent she was read by women's rights advocates in her own country. She was read by early activists for women's rights in the United States of America at the turn of the century and at least indirectly influenced the principles behind the women's rights conventions that were held regularly in the United States from the famous first convention in Seneca Falls in 1848 to the last in 1870 (Murphy 2013; Kish Sklar 2015). In England, Harriet Taylor Mill's essay "The Enfranchisement of Women" (1851) and John Stuart Mill's *The Subjection of Women* (1869) are intellectually indebted to Wollstonecraft, and it seems unlikely that they would be unfamiliar with *A Vindication of the Rights of Woman*, even though they do not refer to her (Hunt Botting 2016).

Toward the end of the nineteenth century, attempts were made at re-establishing Wollstonecraft's standing as a public intellectual

and writer. Shortly before Robins Pennell's biography, which explicitly sets out to restore Wollstonecraft's good name, the publisher and writer Charles Kegan Paul published a collection of Wollstonecraft's letters to Gilbert Imlay with an almost overly sympathetic introduction (*Letters of Mary Wollstonecraft* 1879). Kegan Paul also gave a favorable account of Wollstonecraft in his biography of Godwin (*Life of William Godwin* 1876). This renewed interest in the second half of the nineteenth and early twentieth century coincides with the emerging women's movement and the struggle for women's suffrage (Todd 1976; Gunther-Canada in Falco 1996).

For most of the twentieth century, the interest in Wollstonecraft stayed centered round her person rather than her work. In 1935 Virginia Woolf wrote a short essay on Wollstonecraft's experiences of family life and marriage (Woolf "Mary Wollstonecraft" *The Common Reader 1935*), and in 1951 Ralph Martin Wardle published a biography (*Mary Wollstonecraft: a critical biography*) as well as all her known correspondence (*Collected Letters of Mary Wollstonecraft*). There was not much research on Wollstonecraft as a thinker. In the new wave of the women's movement in the 1970s, Wollstonecraft was a prominent but also divisive figure. She was regarded as a women's rights advocate and as a writer, rather than a philosopher. The continued interest in her person shows in the number of biographies written about her. Janet Todd (1976) presents and reviews no less than six biographies of Wollstonecraft published between 1970 and 1976, the most widely read being Claire Tomalin's *The Life and Death of Mary Wollstonecraft* (1974).

In much of the research in the 1980s, she is criticized for being insufficiently radical in her feminism. Commentators like Zillah Eisenstein, Mary Beard, and Diana Coole claimed that Wollstonecraft while refuting sexual division in public life reproduced it in the domestic sphere and that she argued for equality of opportunity while not attacking the patriarchal structure itself. Some of this research is marred by the fact that all of Wollstonecraft's works were not available in print.

In 1989 Wollstonecraft's collected works were made available for the first time, in a scholarly edition by Marilyn Butler and Janet Todd (*The Works of Mary Wollstonecraft*, 7 volumes, 1989). This initiated a new phase of Wollstonecraft research. The production of biographies continued, as seen in Janet Todd's *Mary Wollstonecraft: A Revolutionary Life* (2000), Diane Jacobs' *The Life of Mary Wollstonecraft* (2001), and Lyndall Gordon's *Mary Wollstonecraft: A New Genus* (2005), but parallel to this, there is a substantial and growing body of research into Wollstonecraft's moral, social, and political philosophy. Virginia Sapiro's *A Vindication of Political Virtue* (1992), the first book-length study of Wollstonecraft's political thought, can be said to usher in this new period of Wollstonecraft scholarship.

Political Thought

Liberal or Republican?

Mary Wollstonecraft's social and political philosophy has been interpreted both as a form of liberalism and as a form of republicanism. Liberalism as an explicit movement within political theory is a nineteenth-century phenomenon and is in that sense an anachronistic label for an eighteenth-century thinker, but Wollstonecraft's individualistic morality and the role of individual rights and liberties and individual autonomy in her thought account for the tendency to regard her as liberal in her orientation (e.g., Muller in Falco 1996, Ferguson in Falco 1996; Gerson 2002). In *A Vindication of Political Virtue* (1992), Virginia Sapiro notes that although Wollstonecraft had typically been described as a liberal, the historical circumstances of her intellectual context and her republican defense of the French Revolution together with her republican language of civic virtues count against identifying her as a liberal. After the revival of republicanism in political theory in the 1990s and early 2000s (represented by Philip Pettit, Quentin Skinner, and others), there has been a shift toward reading Wollstonecraft as republican not only in her political affiliations but also in her philosophical

commitments. There are two partly distinct reasons given in the literature for regarding Wollstonecraft as a republican theorist. One strand, exemplified by Lena Halldenius (2007, 2015) and Alan Coffee (2013), picks up on her conception of liberty and her identification of liberty with personal independence and freedom from submission under arbitrary masters. This is a typically republican conception of freedom. Another strand, exemplified by Sapiro, Judith Vega (2002), and Saba Bahar (2002), focuses on republican civic humanism and Wollstonecraft's discourse on virtue and the crucial role that she gives to the cultivation of virtue and civic equality for political progress. Other republican, largely civic humanist tropes in Wollstonecraft's thinking, are her critique of luxury and excess and a language of sensibility (Barker-Benfield 1989). This is not to say that Wollstonecraft was a typical republican thinker. Reasons to doubt that republican is an apt description of her philosophy are her feminism (Anne Phillips has written on the uncomfortable relation between republicanism and feminism) and her critique of property rights. For most republicans, property represented the economic independence that was required for citizenship status.

Equality Between Women and Men

Wollstonecraft's case for equality between men and women proceeds from the premise that there are no morally or politically relevant differences between the sexes. In *A Vindication of the Rights of Woman*, she expresses what she refers to as the "wild wish" that society should disregard the distinction of sex. As long as women are perceived as morally different, their political exclusion can be justified on the basis that women are made for domesticity and too physically and intellectually weak for public life (Gunther-Canada 2001). Morality is founded on reason and reason has no sex. Consequently, virtue has no sex. Claiming rights for men while denying women those same rights would require that one demonstrate a relevant and sufficient difference in the capacity for reason which cannot be accounted for by contingent circumstances like a difference in education (Bergès 2013). On the other hand, if such a difference could be proven – which she believed would not be possible – then women could not be obligated to perform moral duties either. Virtue, rights, and duties are a moral package predicated on reason. She maintained that the combined facts that women are treated as less capable, taught that their business in life is to please and obey men and that their worth is counted in good looks, chastity, and superficial accomplishment have the effect of shaping women's minds so as to accept that this is their lot in life. This idea of the habituation of the mind to embrace circumstances also when they are unfair is a significant feature of Wollstonecraft's analysis of the ills of inequality, between men and women but also between rich and poor.

Wollstonecraft's argument for political, legal, and moral equality in public and private life between men and women was for her compatible with women and men fulfilling different social functions in practice. She made a distinction between moral and social duties such that moral duties are the same for all creatures of reason, while social duties are a practical function of one's contingent situation. The situation of being a nurse carries different social duties compared to the situation of being a gardener. To the extent that men and women occupy different social functions, their social duties will be different, but this is a matter of difference in circumstance, not in inherent qualities. She expected that most women would dedicate a large part of their lives to the domestic duties of a wife and mother but thought it crucially important that more respectable occupations would be open to women, freeing them from economic dependence on men. Wollstonecraft regarded freedom as a matter of independence from the will of others (Halldenius 2007). Marriage was an obstacle to women's freedom as long as wives were economically dependent on their husbands and subordinate to them in the eyes of the law as well as social custom. Her contemporary advocates for reforms on behalf of women restricted their proposals to issues of education and family life (e.g., Hannah More and Patricia Wakefield), but Wollstonecraft argued that the situation of women is bound up with political and economic hierarchies in general.

She believed that the inequality between women and men, as the inequality between rich and poor, needs to be analyzed in the context of political and commercial life (Kelly 1996).

Political Justice and Political Change

Wollstonecraft's first foray into political theory is the open letter to Edmund Burke in *A Vindication of the Rights of Men* (1790). She defended the principles of the French Revolution – liberty, political equality, and popular representation – against Burke's critique of it and his defense of the monarchy and aristocratic privilege (O'Neill 2007). A deeper point is her defense of rights to liberty and equality as universal rights against Burke's arguments that whatever rights there can be will be conditioned and variable depending on historical and local circumstances. Two things of note is, first, that she rejects Burke's historical argument of legitimation and claims instead that historical arguments legitimize unmerited, arbitrary privileges and, second, that inequality of property breeds corruption and vanity. She seems to believe that the natural right to liberty does not include a right to property.

Wollstonecraft expresses herself in natural rights terminology. Liberty is a "birthright" of the human person who is characterized by her capacity for reason and improvement. Justice is a matter of reason and rightness, not custom or prescription, and there is no obligation to obey laws that are in violation of justice.

Any revolutionary or reformer needs to address the challenge of political change, and this was a crucial yet difficult question for Wollstonecraft. By her analysis, any substantial change in the situation and minds of women would likely not happen without a substantial change in education or in law and political culture. For instance, *A Vindication of the Rights of Woman* ends with a proposal for a program for national coeducation of boys and girls. It was her belief that if a purpose of education is to form citizens and teach young people to think independently, then schools have to be national establishments and children of both sexes and different classes educated together. Any reform of women's situation would in that sense have to be a consequence of general political change (Reuter 2014). Her analysis of revolution and of political injustice is therefore an integrated part of her analysis of inequalities between men and women.

When she wrote *A Vindication of the Rights of Woman* (1792), it had become clear to her that the revolution would not bring liberty and equality for women and that revolutionary change easily turned into violence and new hierarchies, only with other men at the top.

In *An Historical and Moral View of the French Revolution* (1794), she returns to the theme of political change. She asserts as her fundamental principle of politics that the purpose of the government is to destroy inequalities of strength by protecting the weak. Any organization of political society that does not support that principle cannot be legitimate. Wollstonecraft does not use voluntarist or consent-based arguments for political legitimation; the criterion for legitimacy is found in the principle of justice and so is bound up with her defense of representative government – republicanism – and her critique of inequalities of property and of hereditary privilege. She is however more wary of revolution now than in 1790 and seems to make some concessions to Burke.

Sudden rebellions – however justified – can backfire since people only change slowly and gradually. She refers to "science of politics and finance" in recommending that political change takes place in step with the gradual development of the human mind. This is a practical concession; she does not retract from her support in principle for the French Revolution or indeed any rebellion against oppressive rulers. The philosophical import of *An Historical and Moral View of the French Revolution* is that it binds together her republican theory of rights and freedom in *A Vindication of The Rights of Men* with the feminist analysis of *A Vindication of the Rights of Woman* in a discussion of the circumstances and difficulties of political change.

Letters Written During a Short Residence in Sweden, Norway, and Denmark forms part of the same project through her anthropological observations of human behavior and the formation of human character in different social settings. In

France she analyzed the trajectory of a revolution. In Scandinavia she made inferences about the conditions for political change from observations of human life in poor and constricted circumstances where there was no hint of revolution. She regarded these countries as less civilized than France but also less corrupted and that the conditions for gradual change might be more beneficial there for that reason. Wollstonecraft had a particularly positive view of Norway, where the royal seat was far away (the Norwegians were subjects to the Danish king), leaving room for what she regarded as an independence of spirit which she linked to a less unequal distribution of wealth, land, and privilege than in France and England. Wollstonecraft's assessment of the Scandinavian countries serves as an example of her conviction that intellectual and moral developments are dependent upon equality of circumstances.

Conclusion

Mary Wollstonecraft is now recognized as a significant political philosopher of the eighteenth century and a crucial thinker in the modern history of feminism. Wollstonecraft's analysis of women's situation and her arguments for women's equal moral rights and equal rights to political and legal standing represent something radically new in the history of political thought. Her case for equality between men and women is integrated in a political and moral theory focused on the injustice and damaging effects of hierarchies of wealth and privilege.

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Work

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What Is Work?

At first glance, work appears to be something we do out of necessity for merely instrumental reasons. It is a way of earning money to pay for other necessities – food, clothing, accommodation, and so on – and, if we are lucky, some discretionary spending beyond that in our free time. The concept of "work" also encompasses housework, homework, and voluntary work, which do not typically attract remuneration, but even these may be considered burdensome and primarily instrumental. This conception of work as burdensome has a long history. In the Old Testament, for instance, Adam's punishment for eating the forbidden fruit is the need to toil the cursed ground (Gen 3:17) in order to produce the necessities of life. This assessment of work remained largely constant in European thought, at least, throughout antiquity and the Middle Ages.

More recently, Bertrand Russell offered the following definition of work: "Work is of two kinds: first, altering the position of matter at or near the earth's surface relatively to other such matter; second, telling other people to do so" (2004, p.3). Russell claimed that the former is typically unpleasant and poorly paid, and the latter pleasant and well paid, yet today this seems naïve. Oral historian Studs Terkel's remark that his renowned book on work was "by its very nature, about violence – to the spirit as well as to the body" (1974, p.xi) draws our attention to the mental and spiritual hardship that even work which is not physically onerous can have, a fact of which many in today's white collar occupations are aware.

The conception of work as necessary but undesirable has been challenged by research focusing

on the disruptive potential of technological change, in particular, the prospect of widespread automation replacing human workers. This research has often accepted that work is undesirable but sought to challenge the claim that it is necessary. The anti-work view holds that we should aim to move towards a world without work and instead devote ourselves to other activities, including some of those we currently enjoy as part of our leisure time (Gorz 1985). Whether this is a realistic or, indeed, worthwhile aspiration is, though, open to dispute: on the contrary, argues Deranty (2022), despite its current flaws, work is both necessary and valuable.

Indeed, in contrast to the emphasis on subjective enjoyment implicit in celebrations of free time, there is an attractive seriousness that attaches to the concept of work. This is in part because there is a sense in which "free time" is "shackled to its opposite" (Adorno 2005, p.187): our hobbies allow us to recuperate, serve to replenish our ability to work, and can only be understood against a background of bad work (Reeves and Sinnicks 2021). This thought encourages us to consider rival understandings of work. One such understanding is suggested by Hannah Arendt (1958), who distinguished between labor, which applies to activities which support our basic survival, which merely immediately sustain us (the paradigm being farming); work, which creates something lasting, the sphere of artifice, but which is still undertaken for achieving some purpose, rather than for its own sake; and action, which connotes creative activity done for its own sake. These latter concepts, work and action, suggest the possibility of forms of employment that are rather removed from burdensome toil.

Indeed, while experiences of boredom and frustration are common in the workplace, there is an enormous variation in how people assess and relate to their work. This is captured by research into the distinction between jobs, careers, and callings (Wresniewski et al. 1997), which can perhaps be understood as mirroring Arendt's tripartite distinction, with jobs corresponding to labor, careers to work, and callings to action. While this way of putting it is inevitably secular, and misses the religious dimension of callings (see Wightman et al. (2022)), it nevertheless demonstrates that work can have considerably different meanings for different people, with action and calling representing the highest stage, which, far from burdensome toil, might be considered "life's prime want" (Marx 1978, p.531).

Good and Meaningful Work

Because avoiding poverty and providing for one's family are goods, even if the pessimistic understanding of work as a burdensome necessity is correct, work may still be, all things considered, a good. However, what other kinds of goods might work make available that would justify understanding one's work along the lines of Arendt's description of action, or approaching one's work as a calling? In this section, we look at good and meaningful work. There is significant overlap in the discussion of such concepts, largely because meaningfulness is an important good, and goodness tends to make work meaningful, although it is possible to distinguish between the two.

Sayer suggests that "a complex, interesting job that demands the use of skilled, practical judgement enhances the capacities and satisfaction of the worker, whereas a boring, unskilled job dulls the mind" (2009, p.2). Given the realities of work under present conditions, this is perhaps a high bar to set, and yet meaningful work in this sense is compatible with work that one would wish to avoid in the event of automation leading to the possibility of an age of leisure, or, more prosaically, in the event of some personal windfall (a lottery win, a large inheritance, discovery of buried treasure, etc.), as leisure activities may yet be more complex, interesting, demanding of skill, etc.

Tyssedal (2022) argues that work is meaningful insofar as there are good reasons to do it. This suggests that "work can be meaningful regardless of whether it is good in other respects, such as in inherent interest or opportunities for self-realization" (2022, p.1). This sense of meaning may provide grounds for critiquing particularly pointless forms of employment, or perhaps capturing

what makes "hard labor" a particularly unpleasant punishment, but nevertheless it also requires us to recognize work that is very unpleasant or painful for those who carry it out if, all things considered, there are reasons to carry it out. This links meaningful work to the significance of doing something that is good to be done, in that it contributes to the life of the community, even if it is not good to do for the individual. However, it thereby threatens to make meaningfulness hostage to the vagaries of the market mechanism that can create reasons for doing work by manufacturing or manipulating consumer wants and can create reasons for individuals to carry out unfulfilling work by, for example, marginalizing certain people from other more enriching kinds of work. Here meaning is collapsed into goodness for the community, but this seems to sideline the intuitively primary sense, according to which meaningful work is indexed to goodness for the worker.

In a move that brings meaningfulness and goodness closer together, Yeoman (2014), following Wolf (2010), identifies meaningful work as inhabiting the intersection between subjective attraction and objective attractiveness and suggests that meaningful work is inherently bound up with our "inescapable interests in freedom, autonomy and dignity" (Yeoman 2014, p.249). Such a conception is clearly at odds with Tyssedal's "reasons" account: while we might reluctantly concede that some dirty and dangerous job does, all things considered, need to be done (i.e., that there are reasons to do them), this hardly qualifies as objective attractiveness and falls far short of providing a justification for adopting the "calling orientation," or for meeting Arendt's conception of action, outlined in the previous section.

One influential account of good work is provided by MacIntyre's account of "practices" (2007, p.187), which are rich, rewarding activities that are conducive to the good life. MacIntyre's own examples include architecture, chess, football, and farming – with brick-laying, tic-tac-toe, throwing a ball, and turnip-planting being corresponding examples of non-practices which lack the requisite richness – but it has also been applied to a variety of forms of occupations (see Sinnicks (2021) for an overview). This account attempts to capture forms of work which allow for creativity and intrinsic appeal in the manner of Arendt's conception of action, but also highlights how such forms of activity can be morally educative – we need patience and self-honesty to devote ourselves to such activities and courage to open ourselves up to the criticisms of others.

This conception of good work allows for an emphasis on community in at least two senses. Firstly, there is the sense of enjoying the community of the workplace – the sense of fellowship, the emergence of friendship, and so on – and secondly there is the wider sense of contributing to the common good of the community. This sense of making a social contribution is bound up with the good of recognition, which work provides perhaps the best opportunity for in contemporary society (Gheaus and Herzog 2016) and yet which is often denied, sometimes unjustly, to workers.

Work and Justice

We might primarily think of work as being something we have a duty to perform (though see Cholbi (2018) for a critique of this intuition), rather than something we have a right to. However, Sison et al. (2016) note that these two positions are not incompatible and suggest that while the duty to work is primary, because of the goods work can provide – the ability to support a family, to property, to play a full role in human society – might be considered rights, then we can think of a "right to work" as being derivative of these rights.

Others have disputed the existence of such a right. Elster (1988), for instance, argues that we should not understand work as something to which we have a right. This is because it is almost unimaginable to suggest that an individual has a right for any particular employer to provide employment, and even a right against dismissal would seem to violate the rights of that employer to property and voluntary contracts. The other alternative is that we have a right for the state to ensure we are provided with employment, but this

is taken to be unattractive in light of both the economic inefficiency it would lead to, and because the kind of jobs it would generate would lack the kind of dignity and esteem workers need and typically want. Both positions arguably underestimate the extent to which private contractual right rests not simply on voluntary agreement but on substantive norms of fairness rooted in social recognition struggles over how social relationships should be organized (see Honneth (2014)).

Indeed, the question of justice at work is not entirely separate from the issue of good work. After all, the right to a zero-hours contract for a dirty and dangerous job would be a meagre right. Thus, whether we have a right to meaningful work has also been a topic of fruitful debate, with Hsieh (2008) casting meaningful work as an object of distributive justice and Breen (2016) suggesting that, despite the inevitably challenging questions relating to how it might be supported by the state, meaningful work should be an object of public policy. Veltman argues that even if we "cannot guarantee that opportunities for meaningful work will be available to all people," we ought to continue "working to transform institutions so that work that promotes psychological health and self-development becomes possible for more people" (2015, p.740).

Questions of justice have also been addressed in connection to a variety of more particular workplace practices, including justice in compensation (Moriarty 2012) and broader debates about equal pay (Örtenblad 2021). Bieber and Moggia (2021) address the issue of precarious work in the "gig" economy and suggest that greater regulation is called for, as is a move away from an understanding of work as a mere commodity. Anderson (2017) has drawn attention to the undue influence employers can exercise over the lives of employees and argues that employers are often akin to authoritarian private governments. Meanwhile, other scholars have explored concepts such as discrimination (Demuijnck 2009) and the systematic undervaluing of women's work (Grimshaw and Rubery 2007).

One potential route towards dealing with problems of injustice in the workplace, as well as making work more meaningful, is through the promotion of workplace democracy (see Frega et al. (2019) for a helpful overview). Such democracy can, when in good order, give workers a means with which to oppose workplace injustices, as well as to experience the autonomy and community that are characteristic of good and meaningful work.

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Work: The Future of

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Introduction

Inevitably, digitization and the increasing use of intelligent programs and machines have fundamentally changed the world of work. Moreover, it is to be expected that trends will continue in the near future and that other far-reaching changes will occur. Work is such an essential part in the lives of most members of society. It is not only the primary source of income but also crucial for one's self-fulfillment, identification, and the achievement of social recognition. Therefore, from a societal, legal, and political perspective, there is a need to understand the imminent changes, to critically reflect on them, and to draft alternative proposals to shape the future in order to provide normative guidance.

Without claiming comprehensiveness, this article highlights three major transformations of the labor market that have taken a central role in recent ethical, legal, and political debates. It aims to explain the changes currently occurring, to outline the ethical problems they may imply, and to discuss different social, political, and regulatory measures that have been proposed to confront the challenges for the future of work. In the next section, I discuss the fear of widespread technological unemployment. In section "Demise of the Traditional Employee Status", I address the phenomenon of "gig work." Finally, I examine the surveillance of workers with the help of digital technologies.

Obsolescence of Human Work

Based on the results of some influential economic studies on the substitutability of human labor by smart robotics and machine learning programs (Frey and Osborne 2013; Brynjolfsson and McAfee 2014), there has been a lively debate in recent years about whether work in the future will no longer be performed by humans. On the one hand, economists and social scientists have discussed the *nightmare scenario* that there will be widespread unemployment due to a rapid elimination of many jobs in a short period of time (Ford 2015). The World Bank (2019) has warned that in the next 10 years around 60 percent of all jobs are susceptible to replacement by artificial intelligence machines. McKinsey Global Institute (2017) estimated that for most jobs more than one third of all tasks currently performed by humans

could be taken over by robots or programs. On the other hand, however, the imminent developments have also been regarded as a historical opportunity to restructure our society. Thus, the predictions on future labor-market developments have spurred *utopian imaginaries* of a society whose members are not dependent on work anymore to make a decent living (Bastani 2019; Danaher 2019b).

Economic Expectations

There are sound theoretical reasons backed by empirical observations that technological progress (in the medium and long term) does not lead to unemployment. Economic development does *not only* consist in the amelioration of processes and the rationalization of production costs. Also new products are invented whose production requires labor (Vivarelli 2014). If, in a specific sector, a newly invented machine is being used that relieves the workers from performing a labor-intensive task, these workers can either find a new job in other emerging sectors or they are able to keep their job and perform a different set of tasks (Autor 2015; cf. Arntz et al. 2020).

However, behind the economists' argument against the prediction of widespread technological unemployment, there are numerous assumptions that rest on empirical observations of past events (Pratt 2015). For example, it is not certain that product innovation will be able to keep up with the pace of process innovation. It is possible that more jobs are replaced than created. The mere fact that technological progress has not yet led to a vast unemployment does *not guarantee* that, in the future, the demand for labor would remain stable (Mokyr et al. 2015). It is argued that the technological development of AI has a different impact on our economic system than earlier technological revolutions, such as the steam engine, electrification, or the Internet. Whereas earlier developments allowed for a steady adjustment of production processes to new technologies, the speed of development of AI technologies could outpace the adaption process.

Automation could progress so quickly that labor markets might not be able to accommodate the free workforce anymore. Therefore, there is an acute risk that the labor market will change significantly within a short period of time. As a result, different policy and legal measures have been discussed in the literature on automation to meet the challenge.

Universal Basic Income

In case of widespread technological unemployment, *traditional social security* institutions – subsidies, unemployment insurance, retirement funds – might not be a suitable answer anymore. These redistributive schemes are presumed to be only of limited use. They have adverse effects on productivity and product quality and to come at unreasonably high costs (Marchant et al. 2014). The prediction that, in the near future, a large part of the population is unable to generate income calls for a reflection of accounts of distributive policies and their applicability to the problem at hand. One broadly discussed option to face the challenge is the implementation of an *unconditional basic income* (Walker 2014; Santens 2017).

A universal basic income is equally provided to all members of a society, regardless of their specific circumstances and regardless of how much additional income they can generate on the labor market. In this way, it effectively protects each individual from the risk of becoming redundant due to automation (Bruun and Duka 2018). It eliminates the need for an individual to work in order to make a living. The underlying rationale is that technological progress always generates surplus value for the entire society. (Production becomes more efficient, and therefore more products can be brought to market with the same resources.) The basic income now ensures that this value is not just distributed unilaterally to capital owners and the remaining workforce, but also benefits those whose jobs are endangered by automation (Zwolinski 2019).

However, a transformation to a society that guarantees a minimum income admittedly requires a fundamental restructuring of politics and the economy and thus encounters opposition from different sides. On the one hand, it is questionable how strong the resulting *disincentives to work* would be. It is unclear how large the material welfare loss is caused by this disincentive. On the

other hand, it is questionable to what extent those who finance the redistribution mechanism are willing to show solidarity.

Along with the discourse on technological unemployment and the introduction of a guaranteed minimum income, there is also a philosophical discourse on the question of whether *work itself* has value (e.g., Danaher 2019a). Work is often seen as a constitutive element of the good life in that it provides an individual with meaning, enables to self-development, and the achievement of social recognition (Gheaus and Herzog 2016). A "post-work" future would challenge this value, and the question arises whether the supposed value of work is a contingent phenomenon that we can leave behind or whether it is desirable to preserve work.

Taxing Automation

A much-discussed proposal to prevent the possible mass unemployment caused by the use of robots and computer programs is that of a tax on automation or also called "robot tax." The idea behind this is that automation and the resulting reduction in the number of employment opportunities generate costs – not only for the individual who loses the job but also for society as a whole. In this sense, the robot tax is a means of "internalizing" this negative external effect. Companies are made to pay for the costs they impose on others. The intention, on the one hand, is to distribute the burdens fairly and, on the other hand, to create incentives to hire people instead of using machines (Mazur 2018). There are different tax instruments to *disincentivize automation*, e.g., the abolition of tax privileges for investments in automating technologies, the additional taxation for layoffs due to automation, a subsidization of human labor, or additional taxation of capital inputs in general (Abbott and Bogenschneider 2018).

What proponents of a robot tax are calling attention to is a fundamental inequality in the treatment of capital as an input factor compared to labor. The former is only marginally taxed, while the latter comes at increased costs for social insurances and taxes. Labor, they argue, is therefore unattractive from a tax perspective, and this leads to *inefficiently high* automation. From the perspective of political economy, the additional taxation of capital can be argued on this basis (Acemoğlu et al. 2020; Hemel 2020).

However, the justice claim behind the argument can be scrutinized. Human workers are not disadvantaged against robots in a way that presents a problem of justice. This is because robots are no subjects of justice and thus are not advantaged in an unfair way. Moreover, it is difficult to blame a company for an injustice if it invests in a labor-saving technology (Moser 2021). Such an accusation would presuppose that it is a company's duty to create or maintain jobs regardless of the specific economic circumstances of the market in which it operates.

Depending on which tax instrument is chosen, there are almost insurmountable legal hurdles that a robot tax would have to overcome. Without insight into the company structure, the legislator can hardly distinguish between investments in automation, which come at the expense of jobs, and investments in technologies in general. More generally, inherent in the argument for a robot tax is a belief that work has an *intrinsic value* (see above section "Universal Basic Income") that cannot be compensated. Thus, the loss of jobs, it is argued, cannot be compensated simply by redistributing income and social insurance. However, it is questionable whether work possesses such a value (Parr 2022a).

Reduction of Working Hours

If the number of tasks performed by humans diminishes (and hence the number of jobs), one solution might be to distribute the remaining tasks more equally among everyone in order to preserve jobs. Unemployment can thus be fought with a legally enforced cap on working hours. If we assume that the demand for labor remains unaffected by such a policy, the amount of labor needed would then simply be distributed among more individuals as people. Eventually, more people could be employed, while all would work less. This solution to the problem has been put forward as a reaction to increased technological unemployment in the near future (e.g., Rafi Khan 2018).

From an empirical perspective, the effectiveness of a strong upper limit for working hours can be challenged (Kapteyn et al. 2004). As various studies on previous legal impositions of working-hours caps have revealed, companies found ways to circumvent them. The restriction did not necessarily effectuate a reduction of individual working hours, nor did it increase the overall employment rate. But besides problems of efficiency, there is an ethical concern that speaks against work distribution by means of legally imposed upper limits. Subjective needs and preferences differ across individuals (cf. Parr 2022b). Some would like to earn more and be able to consume more, while others are ready to accept a reduction in income in exchange for more leisure. By the implementation of an upper limit on working hours, the former group of people are forced to earn less, even though they do not value leisure over consumption as much as the latter group. Hence, these people become involuntary underemployed.

One may defend the legal restriction against the will of these people by arguing for a substantive conception of wellbeing and the good life – i.e., that leisure is objectively more valuable than consumption. However, this claim is subject to justified scrutiny. It has illiberal implications that allow for paternalizing the individual (cf. Kirchgässner 2009).

Demise of the Traditional Employee Status

Advances in the algorithmic allocation of supply and demand of labor through the development of online platforms have had a disruptive effect on both the labor market and society at large (de Stefano 2016a). It has facilitated what is commonly referred to with the term "gig work." That is short-term and task-based labor on demand. Workers are hired for a specific occasion or assignment – a "gig" – by those who request the service.

The *rapid expansion* of this form of work in different labor markets has resulted in a large number of workers no longer enjoying the status of employees but acting as service providers. They have become "freelancers," "self-employed," or "non-traditional" workers. Highly skilled or specialized workers can get jobs on platforms such as Upwork or Labmate, while low-skilled workers can get orders from Amazon Mechanical Turk or Fiverr. The former are used by people who probably belong to the often much-envied class of "digital nomads." The latter enable people without specific education either to earn a part- or full-time income. The development of platform-mediated gig work brings advantages for both sides, the companies and the workforce. On the one side, it allows substantial cost reductions. On the other, the platform economy increases the flexibility of the individuals, who only have to do those tasks that they agree to (Wood et al. 2019).

However, for many people the recent developments rather led to disadvantages and perils. In the gig economy, a substantial part of the *entrepreneurial risk* is passed on to the worker (Tan et al. 2021). Whereas in traditional labor relations, it is the task of a company to balance out the fluctuations in demand and the number of orders. (In quiet times, the company maintains the employees regardless of the workload.) However, if the worker is an external contractor, the company may dispense with this function and may outsource it. The risk for low demand for work is no more carried by the firm but by the individual worker (Bieber and Moggia 2021).

But foremost, traditional employers are obliged to guarantee the historically hard-fought *social achievements*: employees earn a minimum income and a number of obligatory vacation days, they are protected against short-term dismissal, and they are insured against illness, incapacity for work, etc. These benefits of employment no longer accrue to the workers in the gig economy.

Legal Distinction Between Employees and Self-Employed

A variety of ethical problems arise from the fact that workers are *misclassified as contractors* and not employees. This misclassification occurs even though they de facto are employed, and they should enjoy the benefits of traditional employment relationships (Halliday 2021). In order to

avoid the high (non-wage) labor costs or to pass them on to the employees (Sprague 2015), platforms present themselves as mere middlemen between customers and service providers. Hence, the workers bear the full entrepreneurial risk and receive neither job guarantees nor any securities. In certain industries, such as graphic design, marketing, or programming, these conditions are even desired by the workers since they are sufficiently remunerated as to be able to pay for insurances, sick-leave pay, hollidays, etc. themselves while enjoying an increased flexibility with regard to working times and hours. In other sectors, however, such as cab drivers, cleaners, or translators, the outsourcing of risk leads to precarious, exploitative environments. Indeed, these working conditions are structurally similar to those faced by factory workers at the beginning of the last century.

Due to the rapid growth of self-declared "transport" companies, jurisdictions in different countries acknowledged the need to properly delineate the concept of employees from external contractors (Prassl and Risak 2016). In England, for example, the Appeals Court found that Uber drivers are employees, because they lack the opportunity to set the price per unit themselves (Court of Appeal 19-12-2018). Despite the legislative and judicial reaction to the challenge, there are still legal loopholes in many countries that enable platforms to circumvent regulations. Admittedly, this problem is not something new but applies also to the classical distinction between employment relationships and service providers and freelancers (Finkin 2015). However, it has entered a new dimension with the technological possibilities made available by online platforms (ILO 2015). Since the cost saving potential of outsourcing entrepreneurial risk to the workers is an integral part of the *business model of platform providers*, they can be assumed to always be one step ahead of either the legislator or the jurisdiction.

It has to be noted that taxi rides and other services, which are advertised via platforms, usually must be provided at the place where they are consumed, and therefore legislators have more options for handling them under domestic labor and tax law. However, there are different types of gig work, not all of which can be regulated easily. Gig work can be divided into two different classes (de Stefano 2016b; Stewart and Stanford 2017). The first can be labeled "on-demand work." It consists of traditional services whose supply and demand are moderated by a platform. Typical services include the above example of cab rides, food deliveries, or cleaning services. The second type is mediated by "crowdwork" platforms that assign tasks to a large number of globally distributed providers (Aloisi 2016). Classic examples of this are cleaning of datasets, tagging of images, transcriptions of audio-files, etc.

This latter sort of gig work poses more legal and societal problems because country-specific laws are of no help to alleviate the precarious conditions of people who are dependent on working for these platforms. The Online Labor Index (2020) (a time-series study that measures trends in the prevalence of remote freelancers) estimates that by 2020, one-third of the total gig economy was located in India and one-eighth each in Pakistan and Bangladesh (Stephany et al. 2021). These countries have a significant *wage gap* compared to those where the services are primarily requested and they have low workplace regulation.

Unionization and Platform Cooperatives

One reason for the problem of workers' precariousness in the gig economy is that so far workers have not been able to organize themselves into unions. A joint representation of the interests of the stakeholders would be desirable, since a negotiation between workers, managers, and shareholders would lead to a *decentralized*, company- or industry-specific result. In the absence of a domestic rule of law and international standards regulating on-demand work, potent unions could ensure a necessary balance. They could set minimum prices per job and ensure social security (Wood et al. 2018).

In theory, some conditions are in place for potential unions to successfully negotiate higher wages and better working conditions. Since the less competition there is on the product market, the greater the opportunities for a union to obtain

better conditions (Boeri and van Ours 2014, chap. 3). (If the product market is fully competitive, any increase in labor costs is fatal for a company. It has lay off part of its workforce because it would otherwise drop out of the market.) However, platforms often operate in what is called a "winner-take-all" market (Rifkin 2014). One company (the one offering the most used platform) absorbs a large portion of the market. Therefore, platforms are often quasi-monopolists. They charge a price that is significantly higher than a competitive market price, and this price gap between monopoly price and market price is the subject of negotiations between a potential union and the company.

Nevertheless, real-world circumstances prevent the successful establishment of unions. Platform work is characterized by the fact that the interaction between customers, employers, and employees is almost *completely anonymous* (Irani 2015). This circumstance renders communication and organization among employees almost impossible. Thus, employees cannot unite and stand together for their interests. On the one hand, the lack of possibilities for forming a unity hinders potential strikes or threats of work refusal, on the basis of which the united workers could enforce their interests. On the other hand, these obstacles also promote opportunistic behavior among workers. The less possible communication is between the workers, the less it can be assumed that individuals will show solidarity.

Nevertheless, it must be noted that solidarity and a joint advocacy of workers' interests may still be in the process of development (Tassinari and Maccarrone 2020). One proposal that refers to a concept of gig worker solidarity is to establish *platform cooperatives* (Scholz 2016). These are non-profit platform providers whose management is either democratically elected or the shares are owned by the employees. Cooperatives, as they exist today in the wholesale sector, for example, could be applied as a future business model in some segments of the gig economy. However, the potential applicability should not be overestimated, as firms that can cut labor costs (i.e., costs per tasks) enjoy a significant price advantage over cooperatives that guarantee fair working conditions, high wages, and adequate job security.

Labeling and Codes of Conduct

In order for workers in the gig economy to regain influence over their working conditions, *stakeholder initiatives* seek to hold companies liable for a bad treatment of their gig workers (e.g., for underpricing or for arbitrary judgment). For example, for workers on the micro-task platform Amazon Mechanical Turk, the assessment mechanism "Turkopticon" was developed. It allows workers to evaluate the buyers (Silberman and Irani 2015). Such *feedback mechanisms* could prevent poor contract conditions by providing workers with more information. They also create an incentive for contractors to behave fairly, since a good ranking allows them to attract a broader and possibly better qualified sample of workers for their tasks.

However, this can only be a partial solution to the problem. In conditions of unilateral dependence on income and *strong competition* among workers, principals are not dependent on good evaluation. Furthermore, there is still the fundamental problem that companies outsource work and the associated costs of insurance, as they only pay for each completed order. The risks of illness, low workload, and unemployment remain with the workers.

Another approach to improving the working conditions of a globalized "underclass" of crowdworkers (Gray and Suri 2019) does not refer to the evaluation of the workers themselves but to the consumers of the end-use product. Similar to fairtrade or organic products, *standardized labels* could be introduced into different markets that provide consumers with information about the conditions under which the product is produced. For example, a research initiative focusing on data in India and South Africa has been launched to explore the possibilities of ranking companies according to certain principles. The Fairwork Initiative attempts to establish guidelines for companies that are reliant on gig work for the provision of their goods (Graham et al. 2020). These guidelines or codes of conduct

could serve as a basis for the evaluation of companies by the consumers.

However, for these guidelines and the consumer evaluation based on labels to succeed in regulating the behavior of firms using platform-mediated crowdwork, there needs to be a sufficiently *informed public* that is sensitive to the working conditions in the gig economy. At the moment, however, the vast majority of processes that take place in the background of a successfully marketed digital product are hidden from the end customer. Not many people are aware of the amount of human labor actually required to provide the product. Gig workers who clean up data sets, optimize search processes, tag images, refine speech recognition, etc. are invisible to the general public. This phenomenon is often referred to with the term "ghost workers" whose existence remains unknown to many (Irani 2019). As long as this is the case, labels and consumer market power have no chance to improve the precarious working conditions of the globally dispersed gig workers.

Digital Surveillance and Control of Workers

The processing of information on quality, pace, and reliability of employee performance with the help of digital technologies is another fundamental change in the world of work that has taken place in the last two decades. The use of algorithms for monitoring and control of internal processes enables companies to achieve great cost savings and provides them with much more precise information about the effort and productivity of their employees. In addition, algorithmically processed information is expected to provide an unbiased and impartial judgment about the behavior and characteristics of the staff.

Ethical and regulatory issues arise from a variety of aspects of the new possibilities for managers to monitor their workforce. The use of algorithmic monitoring is almost exclusively to the advantage of the employer (or contractor) and not to that of the workers. The latter are exposed to a higher degree of competition and enjoy less liberties, as their actions can either be directly steered, incentivized, or nudged by algorithmic systems. Last but not least, ethical challenges emerge from the fact that the functioning of algorithms is not disclosed to the individual worker. As a result, workers are subjected to a controlling force whose mechanisms are largely unknown to them (Wood et al. 2019).

Algorithms, Control, and Domination

Some aspects of digitally processed information about employee productivity are a cause for concern. First, algorithms collect and process information about individual behavior – e.g., the pace of task completion, the number of errors, the level of output, or various quality characteristics. Typically, the extracted information is *not available* to the person whose actions have been observed (Shapiro 2018). Second, on the basis of this information, an evaluation of the individual performance of a worker is made, which is usually reduced to certain comparable variables. How and on the basis of which *parameters* the process of evaluation is carried out is also not disclosed to the person in question. The knowledge of the mechanism is reserved for supervisors, managers, or clients. (In certain cases, algorithms even operate without possible comprehensibility by human observers.) Third, this evaluation provides a basis for rewarding the worker's performance. He or she can receive bonuses, or be sanctioned, wages can be adjusted, or specific incentives can be set to influence the worker's future actions (van Doorn 2020). So, there is a high degree of *dependency* of the worker from a positive evaluation.

On the one hand, automated information collection systems are opaque (Tan et al. 2021). On the other hand, they enable decisions over which those affected have little to no influence. These two properties of algorithmic monitoring and control enable an ethically problematic form of curtailment of workers' freedoms, which can be criticized from a neo-republican perspective (Muldoon and Raekstad 2022). These theories see a concern with an individual being subject to *arbitrary power* (Pettit 1997). It is not necessarily the case that gig workers are curtailed in their free actions, rather it is the possibility that actions can

always be influenced by employers through the withholding of information, rewards, or punishments. In this sense, the individual is "dominated" and is thus, in a substantive sense, unfree to decide his or her own performance on the job. In the absence of information on the algorithmic mechanism behind the managerial decisions, the worker has no possibility to influence the decision.

Some of the solutions mentioned above for eliminating precarious employment in the gig economy could also be a potential remedy. In order to avoid worker domination, workers must be empowered to negotiate for themselves the freedom either not to be monitored by algorithmically controlled surveillance programs or to have insight into the mechanisms. Thus, the problem of surveillance through digital technologies, after all, is a problem of *power asymmetries* between employers and employees. The use of digital technologies to monitor workers must thus be negotiated bilaterally so that workers are not taken advantage of.

Exposure to Arbitrary Consumer Ratings

Another problem related to the algorithmic control of employees is that the appreciation or sanction of service providers is sometimes managed exclusively by *customer ratings* (Wood et al. 2019). This problem exists especially with regard to employees in the gig economy. Many online services can be rated by customers unilaterally, without imposing any cost (Diekmann et al. 2014). This rating is in turn processed automatically and can lead to wage or price cuts or a reduction in the number of orders. Companies are thus relieving themselves of a core task of human resource management – the assessment of their employees – and can thus save considerable expenses.

The direct exposure of workers to customer evaluation is ethically questionable for several reasons. On the one hand, it can lead to psychological stress and greatly reduce the quality of the workplace (Rosenblat and Stark 2016). On the other hand, determining the sanction of employees is often unfair. An employee's effort cannot fully influence the success of performance. For the provision of many services, certain circumstances beyond the worker's control have an influence on the quality. It may also be the case that the customers do not evaluate the employee him- or herself for the specific service but the company more generally.

In theory, profit-seeking entrepreneurs have an interest in evaluating employees or service providers not on the basis of output or quality but *on the basis of the effort* exerted by the worker. They want to create incentives for employees to be recognized for the work they do, since the other factors influencing the success of an assignment cannot be ameliorated by rewards and punishments. Thus, smart companies do not focus solely on output. However, there is an epistemic problem involved. Customer satisfaction can be measured very easily. Effort, on the other hand, cannot. Hence, additional safeguards are needed to protect workers and service providers from the arbitrary actions of consumers. In traditional companies, these take the form of protection against dismissal and minimum wages.

Conclusion

Digital technologies and artificial intelligence constitute a great opportunity but also an immense challenge for the world of work in the future. First, there is the risk of the extensive substitution of human work by robots and programs. Second, digital technologies have increasingly called into question the traditional role of employees. Third, digital surveillance has created new opportunities to control workers and to curtail their freedoms. Numerous proposals have been made and discussed over the past 5–10 years in response to these troubling developments. This article has attempted to overview and contextualize some of these discourses. The developments discussed, however, will by no means be the only ones spurred by the adoption and utilization of digital technologies and artificial intelligence. It remains to be seen how the economy and society will develop as a result of technological advances and how this development will be shaped and influenced by politics, legal measures, and society.

Cross-References

- ▶ Artificial Intelligence, Ethics of
- ▶ Equality and Global Justice
- ▶ Rights: Social Rights and Welfare
- ▶ Work

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Wundt, Wilhelm

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Wilhelm Wundt (1832–1920) was a leading figure in the German culture between the last quarter of the nineteenth century and the first quarter of the twentieth century. In 1855, he graduated in medicine and became a medical doctor at the University of Heidelberg. Between 1857 and 1874, he taught physiology and psychology at the same university. In 1874, he became professor of inductive philosophy at the University of Zurich, and

published his most famous work – *Grundzüge der physiologischen Psychologie.* In the following year, he was invited to occupy a prestigious chair of philosophy at Leipzig University. In Leipzig, he became worldwide known for founding in 1879 the first psychological laboratory in the world and promoting experimental psychology, which attracted many international students. However, although he is best known today for establishing scientific psychology – some psychologists call him "the founding father" of psychological science – his work pervades different fields of knowledge, such as physiology, linguistics, ethnology, sociology, and philosophy (Araujo 2016; Fahrenberg 2018).

Wundt's conception of law is developed within the framework of his psychological project, so it is important first to understand its basic idea. For him, human experience cannot be grasped in its totality, as it is necessarily split into two irreducible poles or perspectives: immediate experience (*unmittelbare Erfahrung*) and mediate experience (*mittelbare Erfahrung*). In the first case, one has a kind of direct, intuitive, or nonconceptual experience (e.g., hearing a pleasant song or drinking water). In the second, one abstracts from the contents of immediate experience and focuses on a conceptual elaboration of the experienced contents (e.g., writing the musical notation of a song heard or defining water in terms of atoms of hydrogen and oxygen). Accordingly, since one cannot have both points of view at the same time, Wundt conceived two groups of empirical sciences. On the one hand, psychology "has as its subject matter immediate experience" (Wundt 1911a, p. 133). On the other hand, the so-called natural sciences (physics, chemistry, biology, etc.) deal with mediate experience. Also, because the two poles of experience are irreducible, both groups of sciences cannot be reduced to each other, although they can complement each other. Thus, for example, psychology and neuroscience can work together, but they are epistemically autonomous.

In order to study immediate experience, Wundt divided the psychological work into two main branches: individual and collective psychology. In the first case, psychologists use the experimental method to investigate mental processes as they occur in individual minds (representing, feeling, willing). In the second, they analyze mental or cultural products (language, myth, custom) after these are generated in the historical development of mankind. Most importantly, there is a parallel between both series of mental processes: "language corresponds to the sphere of representation, myth to that of feeling, and custom to that of the will" (Wundt 1900, p. 27). For Wundt, in addition to the individual mind (*Seele*), there is also the collective mind (*Volksseele*) – both understood as the unity of all underlying mental processes. The general goal of psychology is to search for the universal laws or principles that explain mental life, be it in individuals or communities (Wundt 1888, 1908). For him, "the same laws of mental life, despite all the differences in particular conditions, govern the great cultural phenomena altogether" (Wundt 1918, p. xii). In other words, Wundt never gave up the idea that behind all individual, social, and cultural differences, there are some basic universal principles operating, such as the principle of psychic causality, according to which mental events are caused and to be explained by other mental events alone (Wundt 1911b). Not by accident, he says, "the fundamental method of solving problems in collective psychology is causal psychological analysis" (Wundt 1918, p. xi).

It is important to note that Wundt's collective psychology – or *Völkerpsychologie*, as he called it – differs from his individual psychology in one crucial respect: it does not investigate those collective mental processes directly, but only indirectly through the so-called cultural products (language, myth, custom), which are the result of interactions among individuals in groups or communities. Law (*das Recht*) enters Wundt's psychological project as one of those cultural products within the sphere of custom.

Between 1900 and 1920, Wundt published his 10-volume *Völkerpsychologie*, and the ninth is dedicated to law (Wundt 1918). According to him, "the fundamental problem of law [is] the question of its origin" (p. viii). It must be clear that origin here is understood in psychological terms, that is, Wundt's central theme in his

account of law is "the psychological history of the development of the legal order [*Rechtsordnung*]" (p. xiv). However, this does not mean that Wundt reduces law to psychology. His intention is rather to show that, apart from its juridical side, law has an important psychological dimension, to the extent that legal norms are the embodiment of collective mental processes.

Initially, Wundt associates the origin of law with the development of legal consciousness [*Rechtsbewusstsein*]. The problem, according to him, is that until the nineteenth century, the science of law (*Rechtswissenschaft*) had been using the concept of consciousness in the sense of popular psychology, which identifies consciousness (*Bewusstsein*) with self-consciousness (*Selbstbewusstsein*). In scientific psychology, though, consciousness is not a rigid entity, "but a connection of constantly changing mental processes" (p. 17). For Wundt, conscious processes have different degrees of clarity, going from obscure representations to clear knowledge. Thus, the existence of a legal order does not imply that every individual knows its legal norms and acts self-consciously: it is sufficient that a simpler form of consciousness arises, such as the feeling of obligation, which derives from emotional impulses. "Only the feeling of obligation towards legal norms can be assumed as universal, not the knowledge of the reason for this obligation" (p. 15). To sum up, individuals go through a kind of mental development that enables them to reach the highest point of legal consciousness and act self-consciously.

This relation between law and individual consciousness does not explain, however, how law emerges in the first place. To understand its historical development in psychological terms, it is necessary to trace the development of the will (*der Wille*). For Wundt, "every mental development [. . .] is a development of the will" (p. 297). For that reason, he called his psychological system "voluntaristic psychology" (Wundt 1895, p. 166).

Wundt has a peculiar conception of the will: It is a basic function of consciousness. In contrast to traditional assumptions, he did not understand it only in terms of choice behavior and voluntary movements, which are more complex and develop later in mental life; rather, the will exists from the beginning, as the process that gives direction to consciousness. As he claimed, "the will is not a property that emerges later in consciousness, but it is originarily connected to consciousness" (Wundt 1885, p. 294). Thus, Wundt included among the primitive activities of the will a series of impulsive actions (*Triebhandlungen*), in which a single motive determines and gives conscious life a particular direction (e.g., a visual perception caused by a single stimulus). At the same time, "we reserve the name *voluntary action* [*willkürliche Handlung*] for those movements in which a struggle between different motives takes place in our consciousness. Such a process we designate as a *choice* [*Wahl*]" (Wundt 1883, p. 354). Thus, Wundt postulates that individual consciousness goes through a long developmental process from impulsive actions to choice behavior.

Here, the question arises about how singular (individual) wills transform themselves into a collective will (*Gesamtwille*), and how the latter gives rise to law. For Wundt, a collective will is a natural result of the development of the will that requires a multiplicity of individuals living together in a community. It is the interaction of individual wills that generates a collective will. However, according to Wundt, one should not conflate the latter with a unanimous will, as "the characteristic of the collective will is precisely to be unity and plurality at the same time" (Wundt 1918, p. 327). In other words, the collective will of a society unifies at a higher level its constitutive individual wills without losing the divergent motives underlying them.

Finally, the collective will of a community or society gives rise to law, to the extent that a legal will (*Rechtswille*) emerges out of it, that is, a will to unify norms of conduct that are valid for all members of a community (from simple primitive groups to nation states), thus establishing a legal order. However, this is not the last stage in the development of the will. The legal will as such has from the beginning the tendency to go beyond the collective will out of which it emerged, in the sense of creating a universal legal order that encompasses different nations or cultures, thus breaking the boundaries of a nation state. For that reason, the legal will is not to be identified with the collective will. According to Wundt, "the ultimate and proper expression of the legal will is

not to be found in the beginnings of the legal formations, but in the end to which they aspire" (p. 343). The legal will is, then, the most universal stage in the development of the will, which eventually leads to the idea of universal human values.

Cross-References

▶ Language and Law
▶ National Identity
▶ Rights: Interest and Will Theories

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Wyclif, John

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John Wyclif (c. 1330–1384) was an English secular priest, a philosopher, and a theologian. The little that is known about his life shows him as a quintessential Oxonian; a respected philosopher, an expert on law, and an influential preacher. From 1366 he testified on donations to the church and some questions concerning the relationship of the Kingdom of England and the Pope at the King's Great Council and at Parliament. His tenets reverberated from the highest to the lowest levels of English society. Pope Gregory XI warned in his bull of 1377 that his teachings did not only subvert the vitality of the church but secular order, too. Though summoned to church court twice, the attempts to condemn him failed. However, after the English Peasant Revolt in 1381, when, in addition to some clergymen's claim that the "perpetrators" were Wyclif's disciples, his views on transubstantiation scandalized even his greatest patron, John of Gaunt, Duke of Lancaster, and his tenets were condemned as heretical at Oxford. He was expelled from the university and died in his parish church of Lutterworth in 1384. He started the translation of the Scriptures into English before his death: the Wycliffite Bible remained his most well-known legacy.

Wyclif's Tenets

In his testimony at Richard II's Great Council in 1377, he defined the English nation as a natural body, which has the right to detain its natural property. He based his argument on the law of nature, the law of scripture, and the law of grace, dismissing canon law as Roman law and, as such, irrelevant for the welfare of the English nation. In the same testimony, he also added that the conscience and virtue of the English people should be *roborated* before its goods detained from the endowed clergy are used to restore the commonwealth.[1] His political conclusions were based on his philosophical and theological innovations.

Wyclif thanked God for enlightening his mind on the nature of time, which liberated him from the linguistic constraints on the spirit, though in

Elemer Boreczky has retired.

[1] Responsio Magistri Johannis Wyccliff ad dubium infra scriptum, quaestium ab eo per dominium regem Angliae Ricardum secundum, et magnum suum consilium, **in** Shirley (1858), pp. 258–71.

his Latin works on logic, metaphysics, and theology, he, too, made use of analogies, equivocations, and syllogisms, and followed the conventions of *scholastica.* Apparently, he addressed an academic audience representing the chain of knowledge from Plato, Aristotle, Augustine, the church fathers to the most influential thinkers of his own time, including Grosseteste, Aquinas, Scotus, Ockham, Avicenna, Fitz Ralph, and Bradwardine. He aspired to restore the created order of the universe, so that his secular audience – confused by the contradictory opinions of theologians about God's omnipotence and Aristotle's justification for the quest for happiness – should not believe that "God wanted them to indulge in luxury, to procreate and kill."[2]

Already in the 1360s, he had an insight into the nature of time, being, and the realness of universals. They were the roots of all his later heresies. Each man and woman in their real being in time represent the human spirit, the image of God, that was, is, and will always *be*, ever since the human person was created in the first born of mankind. The spirit, which consists of an uncreated part – charity and justice – and a created part – the common memory of mankind, reason, and will – becomes part of the soul at copulation like the word, i.e., the human capacity for language.[3]

He elaborated this simple insight in logic, metaphysics, philosophy, and political theology. His real proposition in logic, and real universal in metaphysics, meaning that each singular human person predicated and represented the universal man simply by its being, corresponded with the "logic of Christ," who was the most common man, yet in whom the divine qualities that made man the image of God transcended the Jewish Jesus and the natural being.[4] This was his first heresy.

Wyclif claimed that God, the metaphor for creative potential, intelligence, and charity, was inside and outside every real person and eternally present in the community of being (*ens communissimum*). The real and universal nature of human beings is present in their common being with God, in the common memory of mankind and in the natural body of the nation – the community of people who speak the same language and live in the same territory. The universal ideas, Plato' s forms, had real existence in God also as part of things in the *productibility* of the creature.[5] As in the community of being the divine intellect is also present, the articles of faith can be defended by reason, and moral choices are made by every man and woman.

He concluded that there were not two worlds,[6] the spiritual and the real, therefore any claim by the Pope, and indeed, the whole church hierarchy to exclusive access to the spiritual world through their *regula* and the sacraments, cannot be justified. This was his second heresy. Religion is order though it is not the man-made order of the church but the structure of the will. All the sin in the world is caused by the lack of the ordered love of universals.[7] People should always want the greater good, which is the common one: everything must be common. Christ did not save us from the devil but "from tyrants who appropriated the goods of nature and treated them as their own property."[8] Christians should follow the example of Christ and his disciples who lived in poverty and shared everything. But as we all trespass against others we are always in debt; therefore, the rule of Christian religion is reciprocal service. Christians (*Christicoli*) should continuously exchange what they have as in a market place and say the *Lord's Prayer*.[9] There is only one order, the order of nature, which is instituted by Christ, the incarnation of the Word, and the answer to the question of how to live well as a human being.

Wyclif's views on divine and civil dominion were also inferred from his insight. He claimed that God is perfect nature. He is the Lord because he is served by all created nature but he does not

[2] Wycliffe (1890), p. 119.

[3] Wycliffe (1884), pp. 130–132.

[4] Wycliffe (1890), p. 198.

[5] Wyclif (1985), pp. 176–177.

[6] Wyclif (1869), p. 76. Translated into English by Lahey (2012), p. 70.

[7] Wyclif (1985), p. 22.

[8] Wycliffe (1900–1904), p. 284.

[9] Wycliffe (1922), p. 3.

require any service: his best service is living naturally. Dominion is not right or possession and it can only be had by grace.[10] God does not govern his dominion directly but only through three laws: that of nature, scripture, and grace. He does not give dominion to anybody and does not give priority to any person, but leases generative potential, intelligence, and charity to each man and woman to be used freely. Having free will, they can choose to live free of sin as human persons in justice, or cast away their natural freedom by sinning. Justice means that everyone should use and enjoy their property, which is what is leased to them by perfect nature: the first law of nature. Sin is taking from other people or from one's own body what belongs to it naturally. Donations to the church are not only useless, they take away from people what is theirs. All sins against men are sins against God.

Wyclif replaced the cure of the soul by the cultivation of the spiritual man. According to him, the church consisted of those in past, present, and future, in whom the Word was incarnated by grace – a *convocation*, not a congregation. He claimed that preaching was communion by which the universal human person, Christ, is incarnated in the community. His disciples refused to accept that the bread became Christ's real body at consecration by a priest. This was his third major heresy. In order to implement his vision of reforming the English secular clergy so that they could teach the gospel to the people and "cultivate the flower garden of the scriptures" in the soul of Englishmen instead of administering the business of selling the sacraments and manage church property as a member of a religious order living on tithes and donations, he translated at least some parts of the Bible into English.

Wyclif's Afterlife

Wyclif's fame and teaching lived on among Lollards. However, after Henry IV's law on the burning of heretics in 1401, Wyclif's works were burnt and many of his followers died at the stake. According to this law "[Lollards] made unlawful convecticles, and confederances, they held and exercised schools, they made and wrote books, they did wickedly instruct and inform people." In 1415, Wyclif, too, was condemned as an arch heretic by the Council of Constance, which also sent Jan Hus and Jerome of Prague to the stake. They both confessed to be his disciples.

Wyclif was canonized by Foxe in his Book of Martyrs in 1563 as "the morning star of reformation" and the enemy of the bishops and papacy. Foxe also mentioned that "with the metaphysical disquisitions of the age, he [Wyclif] mingled opinions in divinity apparently novel," but he no longer had access to Wyclif's works to clarify his point. The myth of his religious communism survived until the end of the nineteenth century.

The Wyclif Society started to publish his extant works in the 1880s. However, the large amount of his scholastic Latin tracts did not lead to a revelation, as it had been expected; on the contrary, he was disowned both by liberal English historians and communists. Yet the publication of his works revealed one of the greatest philosophers and theologians of the fourteenth century, possibly the last great scholastic philosopher, who tried to save the integrity of the beautiful edifice of speculative philosophy by the realness of universals and the integrity of man as the image of God and nature. His actual teaching and importance have only been explored cautiously by scholars in the twentieth century and are still a matter of debate.

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Y

Young, Iris Marion

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Introduction

Iris Marion Young (1949–2006) was an American social and political philosopher and feminist theorist. At the time of her death, she was Professor of Political Science at the University of Chicago, with affiliations with the UC Human Rights program and the Center for Gender Studies. Prior to Chicago, Young taught political theory at the Graduate School of Public and International Affairs at the University of Pittsburgh, and philosophy at Worcester Polytechnic Institute, Miami University, and several visiting positions around the world, including Goethe University in Frankfurt am Main, the Human Sciences Research Council of South Africa, the Institute for Human Sciences in Vienna, the Australian National University, the University of Canterbury in New Zealand, and the Institute for Advanced Study in Princeton, New Jersey.

Young completed an undergraduate degree in philosophy from Queens College. She earned her masters and doctorate in philosophy from Pennsylvania State University in 1974. She was married to David Alexander and the couple had one daughter. Young died in 2006 of esophageal cancer.

Young is perhaps best known for her work in political theory on oppression, but she also made substantial contributions in socialist feminism, democratic theory, and global social responsibility.

Oppression

In her seminal book *Justice and the Politics of Difference* (1990a), Young defended an account of social groups. In contrast to contemporary liberal political theory with its focus on individuals, Young argued that oppression is a characteristic of social groups existing in opposition to other groups. In that sense, she offers a relational theory of justice for groups, suggesting that political theory needs to include accounts of oppression and injustice. Her "five faces of oppression" have been used for decades by philosophers and political theorists to think about how structural injustice afflicts groups and inhibits individual participation and flourishing within political systems. Young drew on her background in phenomenology, feminist theory, and socialist theory to articulate the group-based theory of oppression; although not every from of oppression will exhibit all five faces, the five are distinct phenomena affecting groups.

Oppression, according to Young, refers to "systematic institutional processes which prevent some people from learning and using satisfying and expansive skills in socially recognized settings, or institutionalized social processes which

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inhibit people's ability to play and communicate with others or to express their feelings and perspective on social life in contexts where others can listen" (Young 1990a, 38). The five faces point to different institutional processes. They are exploitation, marginalization, powerlessness, cultural imperialism, and violence. Exploitation refers to the processes whereby the results of the labor of some is appropriated or benefits others; this form of oppression is especially evident in the relations of workers and management or in the unremunerated work of women. Marginalization means the exclusion of a social group or groups from participation in social life; it can include such social phenomena as poverty and genocide. Powerlessness denotes the lack of autonomy or creativity and judgment in the workplace understood broadly. Cultural imperialism points to the way a dominant group holds the power to define the norms of culture and experience. Violence refers to the systematic violence directed at certain social groups or members of certain social groups as well as the social and cultural acceptance of violence as legitimate.

Throughout her work, and especially in developing her work on oppression, Young drew on the tools of phenomenology developed by Maurice Merleau-Ponty and Simone de Beauvoir. Her accounts of female bodily experience offered a gendered and embodied account of oppression, illustrating how violence, marginalization, and cultural imperialism can be encoded on the body. For instance, Young's 1980 essay "Throwing like a Girl: A Phenomenology of Feminine Body Comportment Motility and Spatiality," compared the space and movement of men and women in such everyday activities as sitting and throwing a baseball (Young 1990b, 2005). Young illustrated how women are socialized not to take up much space and to perceive their bodies as sexualized objects for the gaze of men. Women's freedom is situated and constrained by the socialization of their bodies. Young continued her phenomenological approach to women's oppression in essays on pregnancy and the objectification of breasts (1997, 2005). Together with Alison Jaggar, she edited *A Companion to Feminist Philosophy* (Blackwell) in 1998.

Democracy and Violence

Young's commitment to the praxis of politics led her to reflect on democracy and its challenges. In *Inclusion and Democracy*, she draws on the experience of protests and signature gathering to identify different ways that people who lack official status in a political regime effect change (see also 2001). Young notes how people use different "discursive terrains" to counterbalance their status inequality in a political body. Democratic theory, she argues, ought to account for the variety of commitments and practical measures people use beyond the ballot box, thereby expanding the polity. Describing her belief that "democratic practice is a means promoting justice" (Young 2000, 5), Young argues for an inclusive democracy that does not rely on a single set of procedures or institutions, nor a single conception of the common good, but rather attends to the particularity of different social groups and addresses conflicts from "situated positions" (7). Young is here employing critical theory, understood as a method that takes seriously the social situations and unjust relations or institutions in theorizing for justice. Young sets out to expand the norms of democracy to better accommodate equality and inclusion against other models of democracy in political theory. She offers three modes of communication that help to address or overcome internal exclusion: greeting, rhetoric, and narrative. After a thorough defense of her inclusive democracy, Young addresses more practical issues like integration, identity politics, and global democracy. Her inclusive democracy with an expansive understanding of political discourse, as well as her theory of global social justice, have been the subject of much discussion in political theory (e.g., Vieten 2014; Bellon 2008; Ferguson and Nagel 2009).

Iris Young's account of deliberative democracy in *Inclusion and Democracy* often assumes civil, orderly discussions, but Young wants to make room for political communication that is messy, disruptive, and disorderly. Public protest or demonstrations are valuable expressions of opinions, but Young draws the line at violence. Her standard of reasonableness (to persuade and be willing to be

persuaded) means that violence is not an appropriate mode of expression (Young 2000, 48). Violence does, however, express even while it would not be appropriate expression in democratic deliberations. In thinking about global democracy, it is perhaps important to attend to the unwelcome messages of violence as well as the interruptions perpetrated through violence. The 2007 collection of essays, *Global Challenges: War, Self-Determination, and Responsibility for Justice*, brings together much of Young's thought on violence that is used to secure borders and aid the attacked.

Arguing against the presumed legitimacy of a right to use violence by states, Young argued that the authority to enforce law does not automatically grant authority to use violence. Both domestically and globally, the use of violence, she held, must be independently justified (Young 2007, 102–103). Her argument is premised both on the prima facie wrongness of killing and because routine uses of violence, especially when state sanctioned violence becomes widespread, imperils power, "the capacity for collective action" (Young 2007, 84). Young's concern is that the use of violence, either by rulers or by resistance actors, often leads to distrust and retreat rather than inspiring cooperation of others. Power as collective action is much more effective for ruling and resisting than the use of violence. State use of violence domestically creates a framework of domination rather than endorsing or exercising authority.

Young took a similarly strong stance against the use of violence for armed humanitarian intervention. Intervening militarily, she argued, creates positions of domination and subordination globally that feed resentment. This is not to say that Young embraced principled nonviolence; on the contrary, her point was both that political authority ought to be based on the power of the people rather than on the ability of the administration to wield violence, and that political authority does not grant a right to wield violence. This does not mean, however, that states do not have the responsibility to use their power to come to the assistance of a people under attack if necessary. Young's position is demonstrated in her opposition to the 1999 NATO actions in Kosovo. She argues for the defense of human rights norms in the form of forceful (as opposed to violent) humanitarian intervention in order to protect citizens from massive violence when their state is unable to offer such protection or when the state is the author of the human rights violations. The key to understanding her position is the Arendtian-inspired shift from "legitimation" to "justification" and the distinction between "violence" and "power." "Violence must be justified by arguing that it is the only means available to do good, that it does more good than harm, and that it is effective without having undesirable long-term consequences" (2007, 103; see Bar-On 2009; Scholz 2017).

Social Connection Model

Young's final projects addressed the questions of responsibility for global structural injustice. In particular, her social connection model of responsibility, meant to augment the standard liability model, conceived of responsibility for long-term and far-removed structural injustice, such as sweatshop labor practices. Young argued that while it is possible to attribute blame for the harm of some practices to particular people or corporations, the collective past actions and interactions of persons positioned at a distance from the injustice actually carry current and future effects that exceed the intentions of any particular actor. In other words, "structures are produced and reproduced by large numbers of people acting according to normally accepted rules and practices, and it is in the nature of such structural processes that their potentially harmful effects cannot be traced directly to any particular contributors to the process" (Young 2011, 100).

The social connection model of responsibility is a forward-looking approach; rather than seeking to lay blame, the social connection model looks at the disbursed relationship of many people to injustice and assigns widespread responsibility for ameliorating injustice and building justice. Young describes the social connection model as "a shared responsibility that all members of a society have to redress structural injustice by dint of the fact that they contribute by their actions to its production and reproduction. This model of responsibility

does not assign blame or fault, but rather enjoins a political responsibility to organize collective action for change" (Young 2011, 173). Using the example of sweatshops and the low price of consumer goods in wealthy Western nations, Young implicates consumers in the structural injustice of labor conditions across the globe. Participation in interdependent relations of exchange forms the basis of shared responsibility for injustice. Emphasizing its forward-looking feature, together with global interdependence, the social connection model of responsibility obviates the tendency of individuals and corporations to skirt liability. Young directs attention in political philosophy to structures, beyond the causal actions of any individual or corporation, and to mundane participation in them. This opens the way for thinking about justice outside of standard distributive models.

The social connection model of responsibility involves five features: "it does not isolate perpetrators; it judges background conditions of action; it is more forward-looking than backward-looking; its responsibility is essentially shared; and it can be discharged only through collective action" (Young 2006, 103). Some critics are reluctant to move accounts of justice away from distribution of public goods and others argue that social groups and social structures are nothing but the isolatable actions of individuals. Young's account, however, is not meant as a stand-alone account of responsibility for injustice; it is presented alongside of liability models of responsibility that isolate and identify blameworthy actors.

Conclusion

Young's commitment to combatting social injustice took many forms. She recognized the limitations of accounts of distributive justice, offering grounded, layered, relational accounts of social justice. By understanding the lived experience of oppression through engagement in political activism, political theorists might better craft the tools for analyzing and addressing it. As her writings evince, Young was herself committed to advocating for social justice locally and globally.

Whether through her phenomenological account of women's embodiment, her articulation of the five faces of oppression, her proposal for inclusive democracy, or her analysis of global justice and the social connection model of responsibility, Iris Marion Young had a huge impact on social and political philosophy. Her work is read around the world and serves as a source of inspiration for activists as well as political theorists.

Cross-References

► Humanitarian Intervention
► Justice: Structural Injustice
► Technology: Feminist Philosophy of

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Young, Iris Marion: Political Philosophy

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Introduction

This article focuses on how the work of Iris Marion Young (1949–2006) has contributed to legal and political theory. Her groundbreaking book *Justice and the Politics of Difference* and her later work *Inclusion and Democracy*, as well as numerous articles, have been very influential.

These texts involve the articulation of the numerous structural ways in which oppressed groups can be treated unjustly and the kind of legal, political, and social structures that need to be put in place to overcome these injustices. The axes of injustice include gender, race and ethnicity, disability, age, and sexual orientation. The article will consider her contribution to thought concerning achieving justice and overcoming oppression and domination, especially in relation to marriage, citizenship, democracy, and international relations. Let us begin with her best-known work on justice and oppression.

Oppression and Domination

Young's earliest publications were in phenomenology, before she turned to an exclusive focus on political theory. There is continuity between these two aspects of her work, which will be left aside here (La Caze 2014). *Justice and the Politics of Difference* set out a broad account of how justice would be better realized in a society that recognizes, respects, and celebrates difference through principles of group representation in government and institutions and policies that differentiate between groups. Young's account proceeds from critiques of ideals of impartiality and neutrality in approaches to justice, and of the distributive paradigm of justice as exclusive, to articulating her views of public policy that acknowledges difference between groups, defined relationally (1990, 172). Three examples of justice she provides are of workplace equality for women, language rights for non-English speakers, and Native American rights (1990, 173). These require recognition of special rights, she argues, and should be combined with "a general system of rights which are the same for all" (1990, 174). Political theorist Rainer Forst contends that Young's critique of the distributive paradigm of justice is "her deepest and most productive thought" (2007, 260). His reason is that the critique has two sides in addressing how the distributive paradigm misunderstands issues of power and rights as issues of distribution and how that paradigm neglects the vital issues of how the goods to be distributed came to be and how systems of distribution are decided.

Importantly, Young's conception of the groups who should be recognized is those which are oppressed. Thus, no discussion of her work in political philosophy would be complete without an examination of her account of oppression and domination developed in *Justice and the Politics of Difference* (1990). Young understands oppression as structural and institutional and distinguishes between it as hindering self-development and domination as hindering self-determination (2000, 37–38). Justice is the overcoming of both domination and oppression. Moreover, Young believes that analysis of and action against the oppression of women as a group must be connected with corresponding analyses of and action against the oppression of other groups. For her, oppression is a "cluster" concept with five "faces": exploitation, marginalization, powerlessness, cultural imperialism, and violence

(1990, 39–65). Groups who are oppressed may experience any one or all of these kinds of oppression. For instance, Young argues that women face exploitation of their labor, care, and sexuality. Unemployed people are generally marginalized, and single mothers are a marginalized group. Women and oppressed races experience powerlessness in that their capacities to develop are limited, their opportunities with regard to decision-making are restricted, and through the disrespect they suffer. Cultural imperialism involves treating women's distinctive qualities as nonconformity to masculine norms, and women experience the violence of rape, sexual harassment, and domestic violence (1990, 48–65). This concept of oppression allows for differences within and between groups and for the interaction of different forms and degrees of oppression.

Young argues that specific representation for oppressed groups is important because such groups are often disaffected and need to be brought into the political process, and their perspective is needed to relativize the dominant perspective (2000, 144). Since Young's initial elaboration of this concept of oppression, it has been applied to a range of oppressed groups and has been extended to consideration of oppression at transnational levels. An example is provided by Ronald Beiner who, although concerned that differentiated rights could sometimes be difficult to reconcile with full citizenship participation, acknowledges that there can be convincing reasons for accepting special exemptions for some cultural groups, such as allowing Sikhs in the Royal Canadian Mounted Police to wear distinctive head covering (2006, 31). In contrast, Monique Lanoix argues that Young's conception of citizenship in which difference must be recognized implies that members of different groups and everyone at different stages of their lives may be a kind of "passive" citizen, one where citizenship is grounded in cohabitation of a "shared social space" (2007, 126).

Social and feminist theorist Zuzana Uhde considers how structural injustice can be understood in the context of late modern capitalist developments. She argues that there have been positive changes for women in western societies in terms of emancipation and in relation to a lesser confinement to biologically designated roles of housework and care work. However, she also contends that "marginalized groups of women are paradoxically entrapped in bonds of unpaid and low-wage reproduction activity" (2010, 162). Young herself observes both positive and negative developments in the situation of women in different terms. She argues that women have experienced a greater presence in the public in many societies, in work, politics, and the arts. However, she also sees a persistence of more private oppressions in that "women still do most of the housework, childcare, care for elderly family members," and the incidence of sexual and domestic violence has not decreased in most countries and has even increased in some (Young 2008, 178).

Young's discussion of marriage shows the importance and prescience of her complex understanding of oppression, which includes issues of cultural representation. In *Justice and the Politics of Difference*, she focuses on the oppression of women within marriage (1990, 50). Then, in *Intersecting Voices*, Young expands her analysis to consider how the institution of marriage oppresses homosexual couples who are excluded from it, and female-headed households and unmarried couples, which exist outside of it (1997, 103–105). Her view prefigures the growing international acceptance of gay marriage and the possibility that marriage and family are understood in terms of rights and obligations rather than oppressive norms. Nevertheless, Young is critical of marriage as an institution and concludes that it is "irreparably unjust," and so conceptions of the family should be diversified and reformed (1997, 105–106). This could occur through the registration of domestic partnerships that would have the current rights and obligations of marriage without necessarily being based on a sexual relationship, she argues. Her analysis considers both the changes that would need to be made to legal thought concerning families and the kind of social policies that would be necessary for families with special needs, such as single-parent families and families with disabilities. In order to account philosophically for the kind of changes she envisages,

Young proposes a widening and deepening of our concept of democracy.

Democracy and Cosmopolitanism

Young's work goes beyond a national perspective to consider questions of global democracy and the impact of past colonization and current crises on international relations. *Inclusion and Democracy* distinguishes between cultural and structural social groups, arguing that concerns with inequality and injustice need to focus on the latter because they concern "power, resource allocation, and discursive hegemony" and are thus more like class (2000, 82–83). The book considers how both localized and global institutions of democracy can be made more inclusive of the structurally excluded and marginalized groups. Simone Chambers observes that in *Inclusion and Democracy* (2000), Young focused on a problem of democratic inclusion that other democratic theorists had not seen. While these thinkers were aware that members of oppressed groups are often excluded from participatory processes, what Chambers calls "external exclusion," Young spotlighted "internal exclusions" where "the unstated expectations of appropriate or proper speaking diminished the value and weight of what they said" (2007, 38). In contrast to a purported ideal of neutral speech, Young's advocacy for a range of rhetorics and forms of expression, such as narrative and greeting, had a great impact on accounts of deliberative democracy.

Furthermore, in *Inclusion and Democracy*, Young sets out a more international vision of justice and democracy. She criticized nationalism because it tends to exclude groups and to be based on essentialist conceptions of groups. Instead, she argues for a cosmopolitan vision of global obligations for justice or what she calls "a global rule of law." In an important paper written with Daniele Archibugi after the September 2001 attacks in New York and Washington, she argues for that position in itself and as a frame for responses to the attacks rather than treating such terrorism as if it were state terrorism. They outline ways to reinforce and coordinate international institutions such as the United Nations and to reduce global inequalities (2002, 32).

Addressing these questions in more detail in *Inclusion and Democracy* (2000), Young developed an account of global communicative democracy as a mode of self-determination that can resist domination. Her cosmopolitanism allows that membership of distinct peoples can be significant for identity and sense of self, but contends that nationalist interpretations should be eschewed. This self-determination should be understood in relational terms as non-domination rather than non-interference, a sense consistent with her established view of the nature of groups in general (2000, 237). Young's account of global justice points out the interdependencies that exist between nations, matters of justice that arise due to historical and current domination and exploitation of some peoples by others, and the implications of effects of climate, war, and other crises.

The idea of a people is meant to be a relatively loose one taking account of the degree to which a "group is internally constituted to the extent that people interact with one another to affirm their similarity and belonging together. It is also externally constituted to the extent that its members distinguish themselves from others and affirm a distinctness from them" (2000, 253). To explain what she means, Young considers the situation of indigenous peoples, which challenges traditional ideas of nations and states and the relevance of European law, because while indigenous peoples' claims to self-determination are compelling, it does not follow that each people should have "an independent territorially bounded jurisdiction" (2000, 257).

Rather, Young proposes that self-determination is interpreted as non-domination, so that peoples have distinct institutions of governance allowing them to make decisions concerning goals and ways of life. Nevertheless, self-determining peoples will have reciprocal claims and interests with outsiders on matters that affect them both. Her further argument is that these ideas could be applied globally to relations between states, in that a non-dominative approach to

cosmopolitan relations would include a presumption of non-interference combined with an inclusive, democratic means of regulating these relations (2006, 260). Nevertheless, she still holds that day-to-day governance should be primarily local, such as in metropolitan regions (2000, 268).

Feminist philosopher Ranjoo Seodu Herr argues that nationalism can be reworked in the light of Young's criticisms and that such a reworked nationalism is in fact needed to realize Young's vision of a just world. Her first point is that nations do not need to be tied to the principle of sovereignty, as Young argues; rather they are cultural communities based on affinity and not necessarily concerned with becoming a state (2008, 45). Herr contrasts what she calls ethnocentric nationalism of domination over other nations with a "'polycentric' nationalism of currently or formerly colonized peoples, both in the West and the Third World, struggling to (re)gain or maintain national independence in the face of hostile elements that threaten the survival or autonomy of their nation" (2008, 46). The reason given for thinking that such nationalism supports Young's cosmopolitanism is that this kind of nations' development of greater democracy and recognition as equals would bring the goal of global democracy closer. However, while this interpretation may be in the spirit of Young's concern with global democracy, Herr's redefinition of the concept of nation conflicts with Young's distinction between nations and groups or communities.

Taking issue with Young's account of self-determination and defending the concept of it as non-interference, political scientist Jacob T. Levy acknowledges that Young's approach does not foreclose the possibility of global improvement of democracy through shared, democratic decision-making (2008, 75–76). Extending Young's ideas, Máriam Martínez suggests that immigrant groups in Europe should be understood in Young's terms as structural groups who have limited opportunities to develop and determine their own lives. Furthermore, Young's focus on civil society and structural injustice can be used as a way to conceptualize how immigrants could surmount marginalization and segregation, Martínez argues (Martinez 2009, 213–227). Young's emphasis on the implications of actions within individual countries leads to consideration of our global responsibilities in her last writings.

Conclusion

Young's work is a rich source for considering questions of cultural and structural injustice, both within nation-states and between them. This article focuses on her concept of oppression, especially its implications for marriage, and her prescriptions for greater inclusion in political decision-making. Encompassing both analysis and a range of policy solutions for change to increase democracy and create a more just world, her texts lead us to consider how we are all implicated in the global struggle to defeat domination and oppression.

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Zetkin, Clara

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Introduction

Clara Josephine Zetkin (1857–1933) (neé Eißner) was born on July 5, 1857, in Wiederau, a small village in the Kingdom of Saxony, German Confederation. She was the eldest of three children of Gottfried Eißner, a local schoolteacher and a devout Protestant, and Josephine Vitale, a highly educated daughter of a middle-class family from Leipzig of French roots (Götze 1982, 5–6). Zetkin's family moved to Leipzig in 1872, where Clara Zetkin studied to be a teacher at the Leipzig Teacher's College for Women (Dornemann 1957, 23). Having graduated at the top of her class in 1878, the young Clara Zetkin would probably have continued her education at the university level were it not for the fact that women were not allowed to study at German universities at the time (Honeycutt 1976, 132). In 1878, at age of 21, Zetkin joined the German Socialist Workers' Party (Taber and Riddell 2017, 6). This was the year in which Otto von Bismarck's Anti-Socialist Laws were enacted in Germany. Following this, Zetkin became involved in the illegal activities of the party and was soon forced into exile for several years. She spent the first year and a half of her exile in Austria, where she was employed as a private tutor in the home of a wealthy factory owner (Götze 1982, 12). In the spring of 1882, she moved to Zürich, only to relocate to Paris in November of the same year. While in exile, she met her partner, the Russian revolutionary Ossip Zetkin (1850–1889). Although they never married, she took his name, and together they had two sons, Maxim Zetkin (1883–1965) and Kostja Zetkin (1885–1980). After Ossip's death, she married the painter and socialist Georg Friedrich Zundel, who she ultimately divorced in 1927.

Early Career and the Socialist Women's Movement

At the founding congress of the Second International, held in Paris in July 1889, Clara Zetkin delivered a speech in which she demanded the integration of women workers into the Labour Movement. From then onward, for a period of 25 years, she held the most prominent position in the German and international socialist women's movement. When the Anti-Socialist Law was finally lifted in 1890, Zetkin returned to Germany to live in Stuttgart. She joined the newly founded Social Democratic Party of Germany (SPD) and became one of its leading activists. In 1891, she became an editor of *Die Gleichheit: Zeitschrift für die Interessen der Arbeiterinnen* (*Equality: Journal for the Interests of Working Women*), a

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biweekly SPD newspaper for women, a post she held until 1917 (Dornemann 1957, 437).

Zetkin was the leading female German Marxist theorist, and she helped formulate the core ideas of socialist feminism. In 1889, the year of the Paris Congress, she published a brochure titled *The Working Women's Question and the Women's Question of the Present* (*Die Arbeiterinnen- und Frauenfrage der Gegenwart*), which is considered the central contribution to early socialist woman's emancipation to this day for having laid out the guidelines for the future policy of Social Democracy (Thönnessen 1976, 44). In it, Zetkin summarized all the positions on the women question that had hitherto been put forward by the German Social Democracy and additionally assessed the works of August Bebel and Friedrich Engels. She stressed that women's wage labor should be perceived not only as an economic necessity but as an indispensable step toward the emancipation of women, as it guaranteed the economic independence of women from men.

At the third congress of the Socialist International, held in Zürich in 1893, Zetkin presented a resolution, subsequently adopted by the congress, which proclaimed it a duty of the representatives of the workers of all countries to advocate strongly for the legal protection of female workers (Gaido and Frencia 2018, 281). In 1895, the SPD first introduced a motion in favor of women's suffrage in the German Reichstag, an initiative repeated in the following years much to the chagrin of the bourgeois parties. To provide the theoretical framework for propaganda and mobilization, in 1896, Zetkin drew up a socialist theory of women's liberation. The SPD Gotha Congress that year adopted her formulation of socialist feminism (Quataert 1979, 68). She believed that the working woman had to turn from being a cheap competitor of man in the labor market to being his partner in struggle, from being an inhibition to be a driving and active force in the class struggle. Thus, Zetkin was totally opposed to bourgeois feminism as a multi-class movement, counterposing to it the creation of a proletarian women's movement organized in the framework of the Labour Movement (trade unions, socialist parties, and the International). She argued that, unlike the bourgeois feminists, socialist women should not confine themselves to the demand for suffrage, but should fight for the right to work, equal pay, paid maternity leave, free child-care facilities, and education for women. In her mind, socialism was the only way truly to end the oppression of women. One of her primary goals was to get women out of the house into the workplace so that they could participate in trade unions and other worker's rights organizations in order to improve their material living conditions. During the revisionist controversy which broke out in 1898, Zetkin associated the women's movement of the SPD with the "orthodox" current, while the revisionist leader Eduard Bernstein sought an alliance with the bourgeois women's movement (Gaido and Frencia 2018, 285). Revisionism was officially rejected by the party in 1903, and this allowed Zetkin to defeat the supporters of cooperation with the bourgeois women's movement within the party.

In August 1907, at the meeting of the First International Conference of Socialist Women in Stuttgart, which was designed to coincide with the congress of the Socialist International held the same month in that city, Clara Zetkin was elected the chairwoman of the meeting. The Stuttgart Conference adopted a resolution in favor of universal female suffrage, which stated that women's suffrage is a correlate of the economic emancipation of women from the household and of their economic independence from the family, thanks to their paid work. At Stuttgart, Clara Zetkin received the enthusiastic support of Rosa Luxemburg. Alexandra Kollontai also supported Zetkin's motion on universal female suffrage and offered a description of the socialist women's movement in Russia after the revolution of 1905 (Gaido and Frencia 2018, 290).

The Second International Conference of Socialist Women was held at Copenhagen, Denmark, in August 1910 and saw the proclamation of the International Women's Day. At the Copenhagen Conference, the German representative Luise Zietz, following the example of the North American socialist women, proposed an "International Women's Day" (Frauentag) to be held annually, a

proposal that was seconded by Zetkin. On March 19 the following year, International Women's Day was celebrated for the first time by more than one million women worldwide.

Reception of Clara Zetkin in Contemporary Feminism

The major historical impact of Clara Zetkin is measured in her influence on future feminists. The bond between feminism and socialism that she cultivated paved the way for a number of other feminist socialists, who introduced many groundbreaking ideas, ranging from the women's right to work and equal pay to democratic demands for equal rights for women, critique of bourgeois feminism, problems of domestic labor, and the structure of marriage and family. In her critique of bourgeois feminism and its demand for a limited woman suffrage, Zetkin developed a materialist critique of the metaphysics of law, which forms the methodological basis of contemporary Marxist feminism. She emphasized that bourgeois feminists ("Women's Righters") proclaimed the suffrage a natural right, just as speculative philosophy did (Zetkin 1906). As opposed to that, Zetkin saw woman suffrage as a social right, which was not founded on any premises of natural rights, but on the altered social conditions.

The feminism of Clara Zetkin did not have an impact only on socialist feminists, such as Rosa Luxemburg or Alexandra Kollontai, but on more recent feminist thinkers as well. The famous organizational principle of the second-wave feminism from the 1970s, which insisted on creating separate safe spaces for women with the purpose of their empowerment and combating sexism and sex-based discrimination on the Left, actually originates from Clara Zetkin herself (Honeycutt 1976, 137). Aware of the fact that women still did not have the right to participate in public life and were in dire need of cultivating their own political maturity, Zetkin organized special groups for women outside the formal structure of the SPD, which operated separately from the men in the Party.

Today, the feminist theory of Clara Zetkin is most present within Marxist feminism, especially in the context of Social Reproduction Theory (SRT). Contemporary Marxist feminists insist on the fact that the birth of the socialist feminist movement cannot be understood without properly situating Zetkin's political and organizational efforts (Arruzza 2013, 35). Of equal importance are Zetkin's observations that enabled a specific use of social reproduction perspective in analyzing women's oppression in capitalist society (Vogel 2013, 139). However, within the framework of the unitary theory approach of SRT, Marxist feminists criticize what they see as Zetkin's dual system legacy, thereby referring to the fact that she examined the problem of domestic labor exclusively within the family household (Vogel 2013, 115). Even though Zetkin correctly pointed out that capitalist waged labor and unpaid domestic labor co-occurred historically, unitary theorists reproach her for not having theorized any systemic or necessary relation between them (Vogel 2013, 115; Ferguson 2020, 5) and for having allowed one to conclude that exploitation and oppression were ultimately two distinct struggles (Vogel 2013, 133–140; Čakardić 2020, 112; Ferguson 2020, 66).

Wartime and Left-Wing Opposition of the SPD

In 1914, when SPD betrayed its socialist principles by openly supporting Germany's war effort in World War I, Zetkin broke away from her party's declaration of Burgfrieden (a truce with the government, promising to refrain from any strikes during the war) and went into active opposition. She co-signed letters with Rosa Luxemburg, Karl Liebknecht, and Franz Mehring, which appeared in socialist newspapers in neutral countries that were condemning the war. Zetkin was one of the organizers of the International Women's Conference in Bern in 1915, which, despite not enjoying the approval of the Party, saw citizens of almost all the belligerent countries taking part (Thönnessen 1976, 79). Above all, Zetkin used her position as the editor-in-chief of *Die Gleichheit* and as the

Secretary of the Women's Secretariat of the Socialist International to propagate the positions of the anti-war movement (Jones and Lewis 2015, 34–35). Zetkin's fallout with the majority within the Party was the outcome of her theoretical and practical work. Her standing and influence no doubt contributed to the fact that many women were drawn into the camp that opposed the war (Thönnessen 1976, 76). Furthermore, by becoming part of the revolutionary underground organized in the Spartacus League (Spartakusbund), she was arrested several times for anti-war activities and was taken into "protective custody" in 1916, from which she was later released on account of illness.

In 1918, the Spartacus League helped found the Communist Party of Germany (KPD), of which Zetkin became a leader (Taber and Riddell 2017, 6). Following the murder of Luxemburg, Liebknecht, and others in early 1919, Zetkin came to play a central role within the Communist Party leadership and was admitted to the executive committee of Communist International, which meant that she spent long period in the Soviet Union. In June 1921, the Second International Conference of Communist Women, chaired by Clara Zetkin, was held in Moscow. It proclaimed that, in the future, International Women's Day would be celebrated around the world on March 8 (Gaido and Frencia 2018, 296). Ever since, International Women's Day celebrations have been held on March 8 in countries across the globe, serving as an annual reminder of the revolutionary potential of female workers.

During this period, Zetkin cultivated close contact with Vladimir Ilyich Lenin, with whom she often discussed politics, especially the women's question, discussions which were described in her 1925 *Memories of Lenin* (*Erinnerungen an Lenin*). In 1921, she joined Lenin and Leon Trotsky in their efforts to prompt the Comintern to unify working people and their organizations in a joint struggle against the evils of capitalism. This policy was termed the "united front" (Riddell 2011, 37).

The Struggle Against Fascism

As member of the German parliament between 1920 and 1933, Zetkin represented the KPD's radical left and became a leading Comintern advocate and the president of the Rote Hilfe (Götze 1982, 61). In August 1932, as the chairwoman of the Reichstag by seniority, she was charged with giving its solemn opening address. She took that opportunity to denounce the policies of Adolf Hitler and the National Socialist Party and to call for workers to unite in the struggle against fascism. While addressing the Reichstag, she expressed the essence of her 1923 report on fascism, which she initially presented at the Third Enlarged Plenum of the Communist International's Executive Committee (Riddell 2017, 90). The 1923 report by Zetkin pointed to several key features of fascism and described it as the ultimate product of capitalist rule. She maintained that the threat of fascism would end only when working class takes the power away from the hands of the capitalists. In August 1932, refusing to remain silent in the face of an increasingly hostile audience, the 74-year-old Zetkin once again seized the chance to speak publicly to a national audience about the need for united front antifascist action (Riddell 2017, 102). After Adolf Hitler and his Nazi Party took power in January 1933, the KPD was officially outlawed. Zetkin went into exile for the last time, this time to the Soviet Union. She died on June 20, 1933, in Arkhangelskoye near Moscow, aged nearly 76. Her ashes were deposited in the Kremlin Wall Necropolis, in the vicinity of the Red Square (Götze 1982, 93).

Cross-References

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- ▶ Kollontai, Alexandra
- ▶ Lenin, Vladimir Ilyich
- ▶ Luxemburg, Rosa
- ▶ Trotsky, Leon

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